

GALAXY TELEVISION, LLC,

Appellant,

v.

MARIJUANA APPEALS
COMMISSION, and JOSHUA
SANDERLIN, MARIJUANA
COMMISSIONER,

Appellee.

C.A. No. N26A-01-001 SSA

MEMORANDUM OPINION

At issue is the Delaware Marijuana Control Act (“DMCA”). The DMCA required the MAC to review the record as it existed in front of OMC. No record was developed at the MAC beyond arguments of counsel and a two-page denial letter.

¹ 4 *Del. C.* §1352(d).

OMC asserted that confidentiality obligations prevented dissemination of certain material. As a result, the MAC was placed in a difficult position. This Court is also asked to conduct its duty without a sufficient record. This matter is remanded to the MAC for proceedings as outlined below.

Factual and Procedural History

In September 2024, Galaxy applied to operate a retail marijuana store in Delaware.² After OMC “selected [Galaxy] to pursue an Open Retail Marijuana Establishment License[,]”³ it completed a supplemental application in February 2025.⁴ However, on September 29, 2025, the Commissioner notified Mr. Jeffrey Yatooma—Galaxy’s sole owner⁵—of the decision to deny the application and “not issue a conditional license.”⁶ In a two-page Denial Letter, OMC articulated three supporting grounds:

- On May 16, 2025, the applicant was convicted of Obstructing Judiciary or Congress or Legislature or Commission. Upon the conviction, neither the applicant or his attorney notified the Office of the Marijuana Commissioner of the change to Mr. Yatooma’s criminal history. 4 *Del. Admin.* § 5001-4.7.4.
- The above criminal conviction is a crime involving moral turpitude and which seriously impacts the applicant’s qualifications to hold a license for the sale of marijunana [sic] in Delaware. 4 *Del. C.* § 1354(b)(4); 4 *Del. Admin.* § 5001-4.7.1.

² D.I. 13, at A062–65.

³ *Id.* A069. *See also* A064.

⁴ *Id.* A069, A071–78.

⁵ *Id.* A063.

⁶ *Id.* A001.

- Further, the applicant failed to disclose that the State of Missouri has revoked two of the licenses he was awarded to to [sic] engaging in questionable practices during the application processs [sic]. 4 *Del. Admin.* § 5001-4.5.3.5; 4 *Del. Admin.* § 5001-4.7.4.⁷

In short, the denial concerned: (1) Yatooma’s failure to notify OMC of his conviction of a specific offense; (2) that conviction’s impact on Galaxy’s qualifications; and (3) the undisclosed revocation of two licenses in Missouri. No documentation accompanied the Letter.

Galaxy timely appealed to MAC.⁸ At a December 18 hearing, MAC expressed dissatisfaction with the record.⁹ Although Galaxy attached a Michigan court order sentencing Yatooma for Criminal Contempt (as distinct from Obstructing Judiciary or Congress or Legislature or Commission)¹⁰ and OMC included application materials,¹¹ there was no further record information on: Yatooma’s conviction, communications with regulators, or the Missouri license revocations.

⁷ D.I. 13, at A001. The referenced attorney does not presently represent Galaxy. Opening Br., D.I. 10, at 5. *See also* A084 n.5.

⁸ D.I. 13, at A003. *See* A010–17, A025–30 (parties’ briefings on appeal to MAC).

⁹ Galaxy Television, LLC Appeal Hr’g, D.I. 8, [hereinafter “MAC Hearing”] at 27:59 (“It would have been useful if the license denial letter was more fulsome.”). *See also id.* at 36:15 (“I’m not sure that ... as we sit here right now the record is crystal clear.”).

¹⁰ D.I. 13 at A022–24. That court convicted Yatooma on May 16, 2025, and sentenced him to forty days incarceration; it also ordered \$1.2 million in restitution, over \$190,000 in attorney’s fees, and \$7,500 in other fines. A023–24.

¹¹ D.I. 13 at A059–78.

Confidentiality requirements prevented certain records' dissemination, according to OMC,¹² so that the hearing focused instead on the parties' arguments and filings.

Supplementation of the factual record began in OMC's brief to the MAC which asserts "The Commissioner found that Mr. Yatooma was unavailable for his interview with DATE¹³ because he was incarcerated in Michigan on a criminal contempt charge for non-compliance with a court order; Mr. Yatooma and his attorney intentionally mislead investigators about the reason for his unavailability..."¹⁴ The brief also cited a recommendation made by DATE to deny the approval for Appellant. For statutory reasons which will be discussed below, the Commissioner did not provide Appellant, or the MAC, with a copy of the DATE investigation.

At the hearing, the parties referenced correspondence between DATE and Yatooma's then-attorney.¹⁵ These emails apparently revealed that when DATE sought to interview Yatooma, his then-attorney stated he would be unavailable but

¹² MAC Hearing, at 35:10–35:40.

¹³ Division of Alcohol & Tobacco Enforcement.

¹⁴ D.I. 13 at A027.

¹⁵ MAC Hearing, at 42:42–46:14 (representations by OMC); *id.* at 13:53–16:15 (discussion with Galaxy). OMC quoted an email from Yatooma's then-attorney to DATE; the email purportedly stated that "Jeff does not have access to email for the rest of July." *Id.* at 45:18. OMC contended that "they [Yatooma and his then-attorney] intentionally misled and chose not to ... inform the Office of what Mr. Yatooma's situation was." *Id.* at 46:05. Additionally, Galaxy explained that Yatooma's attorney later attempted to initiate communication. *Id.* at 14:57–15:20.

did not explain why.¹⁶ As for the license revocations, OMC represented that Missouri had revoked the licenses of Yatooma’s purported affiliate CannaZonedMLS (“CannaZoned”);¹⁷ this information was apparently “open-source.”¹⁸ OMC conceded, however, that the materials it submitted to MAC did not demonstrate such a revocation.¹⁹ The MAC provided Galaxy an opportunity to supplement the record.²⁰

On January 8, 2026, MAC affirmed.²¹ Describing the hearing—which “was ... limited to the record”²²—MAC noted that it “heard argument from both parties and received information that was largely not disputed.”²³ It also “provided the parties additional opportunity to explain their positions on the record on appeal.”²⁴ However, MAC observed “it would be helpful for OMC to fully articulate all factual bases ... and not to provide new information for the first time on appeal....”²⁵

¹⁶ D.I. 13, A082. MAC reflected that “[a]s part of its investigation of Galaxy’s application, DATE made efforts to contact Galaxy’s sole-owner....” *Id.*

¹⁷ MAC Hearing, at 32:37–33:00; 39:18–39:31.

¹⁸ *Id.* at 33:27. OMC also characterized other investigatory information as open-source. *Id.* at 29:35–29:50 (“[The Commissioner] relied on investigations that DATE undertook through the criminal background history, their law enforcement databases, and in fact most of the information is also available on open-source media....”).

¹⁹ *Id.*, at 37:03.

²⁰ *Id.* at 56:19–56:43 (“Would you like the opportunity on behalf of your client to supplement the factual record in a robust way...?”).

²¹ D.I. 13, A080.

²² *Id.* at A081 *citing* 4 *Del. C.* § 1322(b). The MAC also stated that the hearing was not evidentiary. *Id.*

²³ *Id.* at A081.

²⁴ *Id.* at A083.

²⁵ *Id.* at A081 n.3.

On the threshold issue of Galaxy’s status at the time of the denial, MAC stated “that it is immaterial ... whether Galaxy received a conditional license or was in the process of obtaining one.”²⁶ It then addressed each basis for the denial. Assessing the overall context, MAC concluded “that OMC did not abuse its broad discretion in denying Galaxy a retail license.”²⁷

The MAC recounted the newly submitted evidence by OMC regarding DATE’s “efforts to contact ... Yatooma[,]” noting “[t]hese efforts were unsuccessful, apparently” due to his incarceration for contempt.²⁸ The Denial Letter stated that Yatooma’s offense involved obstruction; however, “OMC explained ... that this characterization may be attributable to ... certain criminal history reports obtained by DATE.”²⁹ MAC did not cite (and OMC did not furnish) those reports, but it inferred “no debate that Mr. Yatooma was convicted of a crime that ... carried a prison sentence of 40 days and a [\$1.2 million] fine....”³⁰ With that in mind, MAC concluded OMC did not “abuse[] its discretion in determining that such a conviction

²⁶ D.I. 13, A080 n.1.

²⁷ *Id.* at A085.

²⁸ *Id.* at A082. *See also* A085. (“DATE was told ... that he was unavailable for an extended period ... and would not have access to either a phone or email to answer questions. No explanation was provided to DATE as to why [he] was ... unreachable.”). MAC perceived that: “[t]hough no evidence suggests affirmative deception on the part of Mr. Yatooma’s outside counsel, outside counsel’s failure to volunteer this information under the circumstances would rightfully concern any reasonable state regulator....” A084.

²⁹ *Id.* at A083.

³⁰ *Id.* at A083. Here MAC ostensibly was referencing the sentencing order. *See* A022–24.

... may impact his qualifications....”³¹ And as for whether criminal contempt involves moral turpitude, the MAC deferred to OMC’s discretion and the alternative basis “set forth in Section 1354(b)(4).”³²

“[T]he record was similarly not clear” on the Missouri licenses—the Denial Letter “fail[ed] to detail that” an affiliate held them.³³ The MAC observed “no dispute” over Missouri’s revocation of CannaZoned’s licenses.³⁴ The MAC perceived “no argument that [CannaZoned] fits cleanly within the definition of those entities whose license revocations would require disclosure[,]” it nevertheless treated “Galaxy’s [nondisclosure] ... as a sufficient basis for” denial, in part given that “it disclosed the existence of these licenses by an affiliate in its application....”³⁵

Galaxy appealed to this Court, and both parties again wielded information outside the record.³⁶ Galaxy seeks reversal of the Commissioner’s decision.

At oral argument, the Court focused on the meaning of “review the matter on the record” under the DMCA. The parties took differing positions on this phrase.

³¹ D.I. 13, A084.

³² *Id.* at A083 n.4. In the first place, “decid[ing] whether the conviction was of a crime involving moral turpitude.... [o]n this record is difficult given the lack of detail regarding the conviction and the conduct underlying it.” *Id.*

³³ *Id.* at A084.

³⁴ *Id.* at A084.

³⁵ *Id.* at A085. MAC reviewed Galaxy’s alleged nondisclosure “in the larger context of Galaxy’s application process.” *Id.* Under a section titled “All Business Entity Affiliates of Owner/Investor,” which prompted a “[d]escription of all businesses associated,” Galaxy’s application listed “CannaZonedMLS, from 2020 to current, expert consulting and real estate services in the cannabis industry.” A073. It did not disclose a corresponding license.

³⁶ See Appellee Sanderlin’s Answering Br., D.I. 14, at 7 (quoting from DATE correspondence); Reply Br., D.I. 17, at 10–11 (citing press releases).

Contentions

Galaxy seeks reversal for lack of substantial evidence and argues the MAC relied on material outside the record. It attacks both the procedure for denial and “material errors in [OMC’s] Denial Letter....”³⁷ Galaxy challenges MAC’s review, contending that it “affirmed [OMC’s] decision by relying on unsupported assertions that were ... outside the record.”³⁸ In part, Galaxy argues “since the Appeals Commission only reviews matters on the record, it was impermissible for OMC to raise additional grounds and claims outside the record. Here, since OMC held no hearing prior to denying Appellant’s application...the Denial Letter is the only record that exists for this case.”³⁹ Not surprisingly, OMC responds that the Denial Letter and process were both proper and the MAC decision is supported by substantial evidence.⁴⁰

Standard of Review

Under the DMCA, “[t]he Superior Court’s review of an appeal shall be on the record and in accordance with” Subchapter V of the Administrative Procedures Act

³⁷ D.I. 10, at 9, 10. It asserts that “[e]ach [of the three grounds in the Denial Letter] is either based on incorrect facts, unsupported by any evidence in the record, or improperly supplemented with unsupported assertions not found in the record.” *Id.* at 11.

³⁸ D.I. 10, at 10.

³⁹ D.I. 10, at 14.

⁴⁰ *See* D.I. 14, at 22.

(“APA”).⁴¹ The latter provides that “[i]f the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.”⁴² To be clear, the APA limits itself to specific agencies and its applicability to non-listed agencies is limited.⁴³ However, this Court has previously addressed this issue under a similar structure. Specifically, where the authorizing statute for the agency makes specific reference that a procedure shall be conducted “in accordance with the Administrative Procedures Act” then the APA rules governing that procedure apply.⁴⁴ The DMCA specifically indicates that this Court’s review of an appeal will be “in accordance with the Administrative Procedures Act.”⁴⁵ According to the DMCA, absent fraud, review “shall be limited to whether the Commissioner’s decision is supported by substantial evidence on the record and is free from legal error.”⁴⁶ In sum, this Court is to review the Commissioner’s decision and the record. If this Court finds the record insufficient, “it shall remand the case to the agency for further proceedings on the record.”⁴⁷

⁴¹ 4 Del. C. § 1352(d). The DMCA is OMC’s authorizing statute. 4 Del. C. ch. 13. Subchapter V of the APA governs judicial review of administrative agencies’ actions. *See generally* 29 Del. C. §§ 10141–45.

⁴² 29 Del. C. § 10142(c). *See also Pepsi Bottling Grp., Inc. v. Meadow*, 2009 WL 3532274, at *4 (Del. Super.) *quoting* 29 Del. C. § 10142(c).

⁴³ 29 Del. C. § 10161(b).

⁴⁴ *Maurer v. Council on Police Training*, 2007 WL 625903, at *6 (Del. Super.).

⁴⁵ 4 Del. C. § 1352(d).

⁴⁶ *Id.* Review for legal error is plenary. *Sewell v. Del. River & Bay Auth.*, 796 A.2d 655, 660 (Del. Super. Ct. 2000) *citing Brooks v. Johnson*, 560 A.2d 1001, 1002 (Del. 1989). Although the DMCA directs the Court to review OMC’s decision-making specifically, MAC’s derogation of the DMCA necessarily implicates the Court’s review.

⁴⁷ 29 Del. C. § 10142(c).

Substantial evidence review requires “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴⁸ “[T]he Court is required ‘to search the entire record to determine whether ... it could fairly and reasonably reach the [agency’s] conclusion....’”⁴⁹ That “record must ‘clearly show the basis [upon which the Commissioner relied]....’”⁵⁰ But the Court “does not weigh the evidence, determine questions of credibility, or make its own factual findings.”⁵¹ Instead, “[i]t merely determines if the evidence is legally adequate to support the agency’s factual findings[,]” and in so doing it “consider[s] the record in the light most favorable to the party prevailing below.”⁵²

Discussion

The Delaware Marijuana Control Act

“The powers of an administrative agency must be exercised in accordance with the statute conferring power upon it.”⁵³ Consequently, we look to the DMCA, which functions to “regulate[] [marijuana] in a manner similar to alcohol[,]”

⁴⁸ *Sewell*, 796 A.2d at 660 (citations omitted).

⁴⁹ *Hawkins v. United Parcel Serv.*, 2023 WL 3749355, at *2 (Del. Super.) *quoting* *Nat’l Cash Register v. Riner*, 424 A.2d 669, 674–75 (Del. Super. Ct. 1980).

⁵⁰ *Christian v. Del. Alcoholic Beverage Control Appeals Comm’n*, 2003 WL 21733139, at *2 (Del. Super.) (alteration in original) *quoting* *Applications of X-Chequer Inn, Inc.*, 229 A.2d 22, 26 (Del. Super. Ct. 1967).

⁵¹ *Sewell*, 796 A.2d at 660 *citing* *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁵² *Id.* at 660 (citations omitted).

⁵³ *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 654 (Del. Super. Ct. 1973).

meaning that “[l]egitimate, taxpaying businesspeople, not criminal actors, conduct sales of marijuana.”⁵⁴

OMC is empowered to “[g]rant, refuse, suspend, or cancel licenses....”⁵⁵ Obtaining an open retail license takes several steps,⁵⁶ including admission to a lottery⁵⁷ and a supplemental application.⁵⁸ Then, “[u]pon successful completion *and approval* of the application and payment of licensing fees, the applicant *will be granted a conditional license....*”⁵⁹ Thus, a conditional license does not issue until the supplemental application’s approval,⁶⁰ including a background check for both “[a]n applicant” and “[a] person who holds an ownership interest of 10% or more in ... a[n] [applicant] business entity....”⁶¹ Another condition mandates disclosure of certain license-related actions against the applicant or affiliates.⁶²

⁵⁴ 4 Del. C. § 1301(b), (b)(4). *See generally* 4 Del. C. §§ 1301–89.

⁵⁵ 4 Del. C. § 1322(a)(5).

⁵⁶ Galaxy applied for an open retail license. A062. *See generally* 4 Del. C. § 1302(22) (defining “open license”); 4 Del. Admin. § 5001-3.0 (types of licenses); 4 Del. Admin. § 5001-4.0 (application process).

⁵⁷ *See* 4 Del. Admin. § 5001-4.2.1, -4.4; 4 Del. C. § 1343. *See also* A034.

⁵⁸ *See* 4 Del. Admin. § 5001-4.5.1.

⁵⁹ *Id.* at § 5001-4.5.6 (emphasis added).

⁶⁰ *Id.* at § 5001-4.5.4 (discussing OMC’s authority to cancel application).

⁶¹ 4 Del. C. § 1347(a)(1), (4). *See generally id.* 4 Del. C. § 1347(b)–(d), (f). The State Bureau of Investigation (“SBI”) and DATE conduct the check. *See generally* 4 Del. Admin. § 5001-4.5.3.1.

⁶² *See* 4 Del. Admin. § 5001-4.5.3.5 (“A selected applicant is required to: [d]isclose whether [it] or any affiliate, intermediary, subsidiary or holding company ever had any license application, license, permit, or other authorization issued by a government agency in this state or any other jurisdiction denied, suspended, or revoked in the last 10 years.”).

OMC's refusal to grant a license is discretionary.⁶³ However, 4 *Del. C.* § 1354 articulates bases for denial,⁶⁴ and 4 *Del. C.* § 1352 governs procedure for applications and appeals. Specifically, the MAC "shall hear the appeal and ... *review the matter on the record*; act in accordance with the Administrative Procedures Act, Chapter 101 of Title 29; and affirm, reverse, or modify the decision of the Commissioner."⁶⁵

Defining "Review the Matter on the Record"

The DMCA does not define what it means to "review the matter on the record."⁶⁶ In Galaxy's view, the record is fully developed prior to the appeal to the MAC and thus consists of the Denial Letter only.⁶⁷ Conversely, under OMC's reading the MAC creates a record contemporaneously with the proceedings before

⁶³ 4 *Del. C.* § 1354(b) (emphasis added) ("The Commissioner *may* refuse to license an applicant if..."). The MAC "may only ... reverse[] [OMC] upon a finding of abuse of discretion." 4 *Del. C.* § 1352(c).

⁶⁴ One basis arises where an applicant "or such ... person who holds an ownership interest of 10% or more in" the applicant entity "has been convicted of an offense that may impact the qualifications, functions, or duties of the business or profession for which the application is made...." 4 *Del. C.* § 1354(b)(4).

⁶⁵ 4 *Del. C.* § 1352(c) (emphasis added). *See also id.* § 1322(b).

⁶⁶ This phrase is significant. *Cf. Maddrey v. Just. of Peace Ct. 13*, 956 A.2d 1204, 1216–17 (Del. 2008) (discussing importance of defining the record) ("However, what is actually put 'in the box' does not make the record; the record is what legally should be in the box.").

⁶⁷ D.I. 17, at 7. In support, it points to § 1352(c), which provides that "[t]he Commissioner's decision on an application must be in writing and is final and conclusive unless a party ... files an appeal...." *Id.* at 7 n.16 *quoting* 4 *Del. C.* § 1352(c).

it, so that the record includes “the Commissioner’s denial letter, plus the parties’ written submissions and arguments offered at the hearing.”⁶⁸

Certain interpretive objectives, such as “‘determin[ing] and giv[ing] effect to legislative intent[,]’” guide the Court.⁶⁹ Naturally, “[t]he starting point is the language of the statute[,]”⁷⁰ whose plain meaning governs when “‘clear and unambiguous....’”⁷¹ But ambiguous language—meaning “it is reasonably susceptible to different conclusions or interpretations”—“should be ‘interpreted ... [to] promote its apparent purpose and harmonize it with the statutory scheme.’”⁷²

DMCA’s directive that MAC “review the matter on the record” is ambiguous. Some considerations, such as one meaning of “on the record,”⁷³ suggest OMC has the proper reading. Other points support Galaxy’s reading: for instance, appellate courts “review ... the record as it existed below.”⁷⁴ In sum, to “review the matter on

⁶⁸ D.I. 14, at 14. Specifically, “MAC holds its hearing on the appeal prior to its review of the matter on the record[,]” since its hearing “is the first statutorily required adjudicatory process....” *Id.* at 14 & n.3.

⁶⁹ *Jud. Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1003–04 (Del. 2021) *quoting Del. Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012).

⁷⁰ *Id.* at 1004 (citation omitted).

⁷¹ *Id.* at 1004 *quoting Ins. Comm’r of Del. v. Sun Life Assurance Co. of Can.*, 21 A.3d 15, 20 (Del. 2011).

⁷² *Id.* (citation omitted) *quoting Del. Bd. of Nursing*, 41 A.3d at 427.

⁷³ *See On the Record*, Black’s Law Dictionary (12th ed. 2024) (“(Of a statement, comment, or testimony) recorded as official evidence of a proceeding, such as a trial or deposition.”). In other words, ‘the hearing is on the record’ might simply mean the hearing is being recorded.

⁷⁴ *Wroten v. Mobil Oil Corp.*, 315 A.2d 728, 732 (Del. 1973) (“[W]e review the case on the record as it existed below.”); *Bodnari v. State*, 216 A.3d 868, at *2 (Del. 2019) *quoting Beard v. Elster*, 160 A.2d 731, 741 (Del. 1960) (““This court reviews decisions of trial courts on the basis of the records made in them.””); *Petsinger v. Doyle*, 2002 WL 31268286, at *2 (Del. Super.) (“In its appellate role, the court is not at liberty to perform its own fact-finding.”).

the record” could mean that either (a) MAC reviews the record that preceded the appeal or (b) MAC’s hearing becomes part of the record evidence for it to then evaluate. Thus, the language “is reasonably susceptible to different conclusions or interpretations.”⁷⁵

Several tools assist in resolving this ambiguity.⁷⁶ “[E]ach part or section [of a statute] should be read in light of every other part or section” so that a “‘harmonious whole’” results.⁷⁷ “[C]ourts must ascribe a purpose to the use of statutory language, if reasonably possible.”⁷⁸ Likewise, “words in a statute should not be construed as surplusage if there is a reasonable construction[,]”⁷⁹ and “[u]ndefined words ... must be given their ordinary, common meaning.”⁸⁰ Finally, “legislative language is interpreted on the assumption that the legislature was aware of existing judicial decisions.”⁸¹

⁷⁵ *Jud. Watch, Inc.*, 267 A.3d at 1004 (citation omitted).

⁷⁶ *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307–08 (Del. 2010).

⁷⁷ *Id.* at 307 (alterations in original) quoting *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994).

⁷⁸ *Id.* at 308 quoting *Oceanport Indus., Inc.*, 636 A.2d at 900.

⁷⁹ *Id.* See also *Parker v. State*, 201 A.3d 1181, 1186 (Del. 2019) (second alteration in original) quoting *Arbern-Wilmington, Inc. v. Dir. of Revenue*, 596 A.2d 1385, 1390 (Del. 1991) (second alteration in original) (“The State’s preferred understanding, by contrast, would render the final sentence ... superfluous, contrary to the canon that ‘[a] statute will not be construed in such a way that part of it becomes surplusage.’”).

⁸⁰ *Dewey Beach Enters., Inc.*, 1 A.3d at 307 quoting *Oceanport Indus., Inc.*, 636 A.2d at 900.

⁸¹ *Williams v. Twin City Fire Ins. Co.*, 1998 WL 281277, at *5 n.28 (Del. Super.) (citation omitted).

A. The Record

Our starting point is “the record.” Since 4 *Del. C.* § 1352(c) requires the MAC to “act in accordance with the Administrative Procedures Act, Chapter 101 of Title 29,” the Court employs the APA’s express definition. 29 *Del. C.* § 10127 defines “the record” to include “all notices, correspondence between the agency and the parties, all exhibits, documents and testimony admitted into evidence and all recommended orders, summaries of evidence and findings and all interlocutory and final orders of the agency....”

OMC points out,⁸² 29 *Del. C.* § 10161(b) limits the APA’s applicability for certain agencies: “[a]ll agencies which are not listed in subsection (a) of this section shall only be subject to subchapters I and II of this chapter and §§ 10141, 10144 and 10145 of this title.” Subsection (a) lists neither OMC nor MAC, and § 10127 does not fall under Subchapters I or II. But as discussed above regarding the standard of review, when § 10161(a) does not list an agency, the agency’s authorizing statute may adopt the APA more broadly.⁸³

⁸² See D.I. 14, at 14 n.2 *quoting CFT Ambulance Serv. v. State Fire Prevention Comm’n*, 2016 WL 6157445, at *4 (Del. Super.). OMC raised this point on “whether [it] is bound by the APA to hold a pre-decision hearing or establish another formalized record-making process before reaching a final decision....” *Id.* Although it must act “in accordance with ... [APA] Chapter 101” in performing certain duties (*see* 4 *Del. C.* § 1322(a)), the DMCA limits when OMC must hold a pre-decision hearing. 4 *Del. C.* § 1352(b).

⁸³ See generally *Maurer v. Council on Police Training*, 2007 WL 625903, at *6 (Del. Super.); *McGee v. Council on Police Training*, 2014 WL 662327, at *17 (Del. Super.).

The DMCA uses language similar to one such statute,⁸⁴ so that here, too, “[i]t would render [the authorizing statute’s] express reference to the APA superfluous”⁸⁵ if the MAC did not adhere to the APA regarding appellate procedure. Section 10127 applies and defines this record.

B. “Review the Matter on the Record”

To “review the matter on the record” here entails reviewing the preexisting record—meaning the record as it existed in front of OMC.⁸⁶ In short, on-the-record review does not permit new evidence absent authorization. Canons and case law drive this conclusion.

Starting with the principle against surplusage: due to the DMCA’s incorporation of APA, the MAC has an obligation under § 10125(d) to create a record “from which a verbatim transcript can be prepared” for “all contested cases.”⁸⁷ Read against that duty, 4 *Del. C.* § 1352(c)’s directive to “review the matter on the record” is superfluous if it also addresses creating a new record.⁸⁸ Logically, § 1352(c)

⁸⁴ Cf. 4 *Del. C.* § 1352(c) (emphasis added) (“The Appeals Commission shall ... act *in accordance with the Administrative Procedures Act*, Chapter 101 of Title 29[.]”), with 11 *Del. C.* § 8404A(4) (emphasis added) (bracketed language in original) (“All hearings shall be conducted *in accordance with the Administrative Procedures Act* [Chapter 101 of Title 29].”).

⁸⁵ *McGee*, 2014 WL 662327, at *17.

⁸⁶ *Kirpat, Inc. v. Del. Alcoholic Beverage Control Comm’n*, 1998 WL 731577, at *2 (Del. Super.) (citations omitted) (discussing “limited appellate review of the factual findings of an administrative agency.”); *Lynch v. Ellis*, 2003 WL 22087629, at *8 (Del. Super.) (discussing “curtail[ing] the Court’s review in matters on the record....”).

⁸⁷ 29 *Del. C.* § 10125(d). This duty is distinct from MAC’s duty to review the matter on the record.

⁸⁸ *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307–08 (Del. 2010) quoting *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900

speaks to a different role: the MAC’s appellate function to consider the record as it existed in front of OMC.

However, OMC suggests that since MAC’s hearing “is the first statutorily required adjudicatory process, ... the record created at the MAC is ‘the record’ to be considered by this Court in its review.”⁸⁹ *Vanella ex rel. Delaware Call v. Duran* suggests otherwise. *Vanella* concerned an appeal from a decision without an underlying adversarial proceeding, still the Court’s “‘on the record’ review prohibit[ed] [it] from considering new facts or arguments ... not presented below.”⁹⁰ In other words, “[e]ven if a hearing is neither required nor held below, the reviewing Court is ... able to review the appeal on the record, and remand to the agency if the record is insufficient.”⁹¹

A substantially identical statutory scheme confirms this interpretation. The statute at issue in *Nischay, Inc. v. Alcoholic Beverage Control Appeals Commission* directed that appeals commission to “review the matter on the record” “in accordance with the Administrative Procedures Act, Title 29 of the Delaware

(Del. 1994). The opposite conclusion “would create redundancy....” *Fuller v. State*, 104 A.3d 817, 830 (Del. 2014) (citation omitted).

⁸⁹ D.I. 14, at 14 n.3.

⁹⁰ See *Vanella ex rel. Del. Call v. Duran*, 2024 WL 5201305, at *3 (Del. Super.) (citation omitted) *rev’d in part on other grounds*, 2026 WL 2473687 (Del. Supr.).

⁹¹ *Wilson v. Elliott*, 1985 WL 21123, at *2 (Del. Ch.) *citing* *Green v. Wilmington Sav. Fund Soc’y*, 310 A.2d 638 (Del. 1973).

Code....”⁹² As is the case here it was “not clear whether the Appeals Commission may or may not hear new evidence.”⁹³ The commission “consider[ed] the case ‘on the record[,]’”⁹⁴ yet the catchall APA reference also “entitled [it] to receive evidence.”⁹⁵ The Court treated this apparent conflict as a source of “confusion[,]”⁹⁶ thereby acknowledging that on-the-record review excludes new evidence.

The DMCA’s drafters are presumed to have been aware of these decisions.⁹⁷ One final example—the Court in *Rudenberg v. Chief Deputy Attorney General of Delaware Department of Justice* also held that absent statutory authorization it “cannot consider additional facts in this ... appeal ‘on the record.’”⁹⁸ For instance, “[t]he appeal under the APA is heard on the record and not *de novo* The parties to an appeal are bound by the record before the agency.”⁹⁹ Additionally, the Court

⁹² See *Nischay, Inc. v. Alcoholic Beverage Control Appeals Comm’n*, 2011 WL 1743976, at *4 (Del. Super.) citing 4 Del. C. § 304(b) (2001) (amended by 80 Del. Laws, c.325, § 1 (2016); 85 Del. Laws, c.269, § 2 (2026)). Cf. 4 Del. C. § 1352(c) (MAC “shall review the matter on the record; act in accordance with the Administrative Procedures Act, Chapter 101 of Title 29....”).

⁹³ *Id.* at *10.

⁹⁴ *Id.* quoting 4 Del. C. § 304(b) (2001).

⁹⁵ *Id.* citing 29 Del. C. § 10125(b).

⁹⁶ *Nischay, Inc.*, 2011 WL 1743976, at *10. See also *id.* at *10 n.64 (pointing out that “the Appeals Commission may not [receive additional evidence].”); *Patel v. Milfor, Inc.*, 2018 WL 1009168, at *2 (Del. Super.) (citations omitted) (“The Commissioner is to be the primary factfinder, as decisions of the Appeals Commission are to be based upon the record provided by the Commissioner.”).

⁹⁷ See *Williams v. Twin City Fire Ins. Co.*, 1998 WL 281277, at *5 n.28 (Del. Super.) (citation omitted) (“[L]egislative language is interpreted on the assumption that the legislature was aware of existing judicial decisions.”).

⁹⁸ 2016 WL 7494900, at *6–7 (Del. Super.).

⁹⁹ *Rudenberg*, 2016 WL 7494900, at *7 (ellipses in original) quoting *Delaware Appellate Handbook*, § 19.13, at 19–xvi (2d ed. 1996).

connected its standard of review to the Delaware Supreme Court’s standard, which precludes “consider[ing] facts that were not established in the record below.”¹⁰⁰

Analysis

The MAC’s observation that OMC should not provide new information for the first time on appeal is correct. OMC did not supply the full record for review, and proceedings at the MAC added to the record. Thus, MAC did not “make its decision based upon the entire record of the case[,]” as is required.¹⁰¹ Further, the record did not “clearly show the basis for [OMC’s] act[,]” despite an “explicitly recognized [requirement] in Delaware.”¹⁰² The Court cannot properly assess the record informing OMC’s denial; this limitation warrants remand.¹⁰³ Without straying from the limitations of this Court’s review on appeal, the Court intends to address a few additional issues presented by this matter.

Confidentiality Provisions

¹⁰⁰ *Rudenberg*, 2016 WL 7494900, at *7 n.35 (citations omitted).

¹⁰¹ 29 *Del. C.* § 10128(a). The sentencing order and application materials which the parties attached to their briefs before MAC qualify as part of the record. *See Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976) discussing *Henry v. Dep’t of Lab.*, 293 A.2d 578 (Del. Super. Ct. 1972) (“The Court therefore considered the letters to be a part of the record, since they [s]hould have been included in the record as sent up by the Board.”).

¹⁰² *State Farm Mut. Auto. Ins. Co. v. Hale*, 297 A.2d 416, 419 (Del. Ch. 1972) (citations omitted). *See also* 29 *Del. C.* § 10128(a).

¹⁰³ 29 *Del. C.* § 10142(c). *See also McQuay v. Del. Alcoholic Beverage Control Comm’n*, 338 A.2d 129, 131 n.1 (Del. 1975) (citations omitted) (“The general rule is that remand is proper where an agency has made invalid, inadequate or incomplete findings.”); *Somerset Pharms., Inc. v. Shalala*, 973 F. Supp. 443, 445 (D. Del. 1997) quoting *Horizons Int’l, Inc. v. Baldrige*, 811 F.2d 154, 162 (3d Cir. 1987).

The record's sparsity apparently stemmed from OMC's asserted confidentiality duties.¹⁰⁴ Those protections are not unconditional, though; data and information "may be revealed ... in the *ordinary administration* of this chapter, [or] *upon the lawful order of a court of competent jurisdiction....*"¹⁰⁵ Overlooking the statutory limitations on confidentiality creates a situation where an applicant is given the right to litigate two layers of appeal without access to the information that forms the basis of the denial.

In *Pusey v. Delaware Alcoholic Beverage Control Commission*, the Supreme Court held "confidentiality must yield to the right of a party in a contested hearing to examine all the evidence upon which the Commission bases its decision."¹⁰⁶ There the commission invoked an advisory opinion precluding discovery of specific financial data via the Freedom of Information Act.¹⁰⁷ The Supreme Court clarified, however, that the advisory opinion concerned "access to confidential files by the public at-large, not by parties to a contested proceeding seeking information which the Commission is statutorily required to rely upon..."¹⁰⁸ At bottom, "[a]n

¹⁰⁴ OMC invokes title 11, stating that "the DATE report and recommendation for each applicant [are] confidential under 11 Del. C. Ch. 85." D.I. 14, at 7 n.1. It asserts that "the Commissioner and OMC ... are not authorized to disseminate any applicant's criminal history or DATE's investigatory materials." *Id.* The Court presumes 11 Del. C. § 8527 forms the basis of this position.

¹⁰⁵ 4 *Del. C.* § 1348(b) (emphasis added). A third carveout is not relevant.

¹⁰⁶ 596 A.2d 1367, 1371–72 (Del. 1991).

¹⁰⁷ *Pusey*, 596 A.2d at 1370 & n.2.

¹⁰⁸ *Id.*

administrative agency may not conduct a hearing in which it withholds information from the parties involved ... on the ground that it is confidential” but “simultaneously use that information as a basis for its decision.”¹⁰⁹

The same principle applies here.¹¹⁰ Confidentiality protections—which, in the first place, do not apply for the DMCA’s ordinary administration or lawful court order¹¹¹—must “yield to the due process rights of the parties.”¹¹² Those rights include “that a party have a full and fair opportunity to be heard in its own defense.”¹¹³ If a challenging party may examine the evidence, then on appeal the applicant should also have access. Procedures exist and should be explored by the parties to ensure either a Protective Order or filing under seal so that the record can be fairly reviewed.

Accepting New Information on Appeal

MAC accepted new details on the Missouri revocation¹¹⁴ and DATE correspondence, not based on testimony but based on attorney argument. OMC’s

¹⁰⁹ *Pusey*, 596 A.2d at 1370 (citation omitted).

¹¹⁰ For instance, as with *Pusey*, OMC must “examine [criminal record] data incident to its ... denial of a license.” *Pusey*, 596 A.2d at 1370. Further, OMC “‘must have a reasonable basis for ... [refusal which] appear[s] in the record if the rejection is to be sustained on appeal.’” *Id.* quoting *Lyons v. Del. Liquor Comm’n*, 58 A.2d 889, 892 (Del. Super. Ct. 1948).

¹¹¹ 4 Del. C. § 1348(b).

¹¹² *Pusey*, 596 A.2d at 1370.

¹¹³ *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at *2 (Del. Super.) (citation omitted). “The procedural requirements and formality of that opportunity vary depending on the circumstances.” *Id.* (citation omitted). For instance, Galaxy is not entitled to a pre-decision hearing.

¹¹⁴ The Denial Letter referenced licenses that “*he* was awarded” in Missouri. App. to Opening Br., D.I. 13, A001 (emphasis added). But as of MAC’s decision, that basis changed so that

position at the MAC changed; new facts were asserted that DATE reached out for an interview and Yatooma's attorney represented he was unavailable.¹¹⁵ The Court notes it may be inferred that these arguments by counsel were undisputed, due to exchanges at the hearing.¹¹⁶ But it is not clear the MAC had the communication before it. OMC seeks to include arguments at the MAC hearing as part of the record.¹¹⁷ However, this Court excludes from evidence "arguments [and] statements the respective parties' attorneys made during [a] hearing."¹¹⁸ Nor do "[s]tatements in an attorney's brief ... constitute evidence."¹¹⁹ Arguments at a hearing are not replacements for the actual record.

CannaZoned—an entity which we do not know Yatooma personally owned, as the Letter intimates—is the subject. The only record information came from CannaZoned's inclusion under an application section titled "All Business Entity Affiliates of Owner/Investor." A073. We do not know how "affiliate" is defined for these purposes, and it is not evident that CannaZoned ever had a Missouri license.

¹¹⁵ The Letter concerned Yatooma's failure to *notify* OMC of the conviction. But MAC concluded "that OMC attempted to contact Galaxy's principal to address concerns it had and that its owner was unable to address those concerns solely because he was incarcerated...." App. to Opening Br., D.I. 13, A083. Additionally, "when DATE made inquiries about Mr. Yatooma's conviction, outside counsel ... claimed that Mr. Yatooma would not be able to talk for a period of time and would also not have access to email." A084. *See also* A082.

¹¹⁶ D.I. 13, A081. For instance, when asked about the DATE correspondence, Galaxy's attorney did not refute that such communications existed. *See* MAC Hearing, at 14:18–16:12 (general discussion); 14:19 ("I am aware that there were attempts to speak to Mr. Yatooma through an attorney."); 1:03:58–1:04:09 (acknowledging review of emails).

¹¹⁷ D.I. 14, at 14.

¹¹⁸ *Moore v. Perdue, Inc.*, 1991 WL 18094, at *4 (Del. Super.) (footnote omitted) (citations omitted); *Balt. Tr. Co. v. Holland*, 85 A.2d 367, 369 (Del. Ch. 1952) ("I need hardly say that such statements of counsel are not evidence.").

¹¹⁹ *Dick v. Reves*, 206 A.2d 671, 676 (Del. 1965). *See also Cavalier Oil Corp. v. Harnett*, 1988 WL 15816, at *12 (Del. Ch.) ("The Companies' assertion is ... unsupported by any competent evidence of record.").

The record serves a crucial role: it provides support, collates information, and facilitates efficiency.¹²⁰ Attorneys' recollections and unsubstantiated assertions are not an adequate substitution. In interpreting its role under this new statute with assertions of confidentiality of records by the Commissioner and faced with a record that was limited to the 2-page denial letter, the MAC was in a difficult position. An expanded record on appeal of an agency decision has been addressed previously and consistently deemed inappropriate.¹²¹

The parties also reference external information on appeal to this Court. For instance, OMC alludes to "open-source media."¹²² Whether or not information is publicly available, "[t]his Court cannot consider anything outside the record."¹²³ Wielding what it represents is a press release on license revocations, Galaxy argues

¹²⁰ *Cf. United Water Del., Inc. v. Pub. Serv. Comm'n*, 723 A.2d 1172, 1176 (Del. 1999) ("[T]he Commission's ... findings must, in all events, be supported by competent evidence, not supposition.").

¹²¹ *See Patel v. Milfor, Inc.*, 2018 WL 1009168, at *2 (Del. Super.) ("[H]ere the Appeals Commission expanded upon the facts provided by the Commissioner.... [G]athering supplemental information appears ... to be impermissible overstepping...."). *Cf. Luke v. Chesapeake Utils. Corps.*, 2005 WL 272933, at *2 (Del. Super.) (emphasis added) ("This Court's role is limited to review of the record and *any consideration of new evidence* would be inappropriate...."); *Smith v. F.T.C.*, 403 F. Supp. 1000, 1009 (D. Del. 1975) (citation omitted) ("[C]ourts are not free to accept explanations of counsel for administrative decisions not employed by the agency and subsequent to ... the administrative action being reviewed.").

¹²² D.I. 14, at 7–8; *id.* at 8 ("DATE advised that open-source media revealed that CannaZonedMLS ... had two licenses revoked by Missouri's Division of Cannabis Regulation after an investigation relating to questionable practices during the application process.").

¹²³ *Keim v. Greenhurst Farms*, 2001 WL 1490060, at *1 n.2 (Del. Super.). Principally, "it is not the Court's responsibility to develop the record." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Stauffer Chem. Co.*, 1990 WL 161704, at *2 (Del. Super.). Further, it is inappropriate for the Court "to investigate matters independently." *A.L. v. D.L.*, 2011 WL 5345412, at *15 (Del. Fam. Ct.) *citing Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008).

that because “CannaZoned [and Galaxy] [are] not on the list” of revoked licenses, “the Commissioner abused his discretion....”¹²⁴ Perhaps Galaxy seeks judicial notice;¹²⁵ however, the release does not address an adjudicative fact, since it is “subject to interpretation and dispute.”¹²⁶

Conditional Licensee Status

MAC opined “that it is immaterial to its determination ... whether Galaxy received a conditional license or was in the process of obtaining one.”¹²⁷ But that issue is material, because OMC cited 4 *Del. Admin.* § 5001-4.7.1 and -4.7.4, which concern termination of conditional licenses.¹²⁸ It appears Galaxy may not have been issued a conditional license.¹²⁹ OMC now suggests that § 1354(b)(4) gives it

¹²⁴ D.I. 17, at 10–11 *citing* App. to Reply Br., D.I. 17, at B001–02. According to Galaxy, the press release “announced ... that [the Missouri Division of Cannabis Regulation] had revoked twenty-five microbusiness cannabis facility licenses and listed them.” *Id.* (citation omitted).

¹²⁵ *See generally* D.R.E. 201; *Walden v. Ga.-Pac. Corp.*, 1995 WL 790955, at *4–5 (Del. Super.) (citations omitted). Although “[j]udicial notice of an adjudicative fact may be taken at any stage of the proceeding[,]” *see Walden*, 1995 WL 790955, at *4 (citations omitted), “[a] judicially noticed fact must be one not subject to reasonable dispute....” *Id.* at *4 (citations omitted) *quoting* D.R.E. 201(b). *See also Tribbitt*, 963 A.2d at 1131 (citations omitted).

¹²⁶ *Walden*, 1995 WL 790955, at *4. In other words, the release does not foreclose the possibility that revocation occurred at some other point. *See generally id.* (collecting examples of facts which were suitable for judicial notice).

¹²⁷ D.I. 13, A080 n.1. The Regulations of the Office of the Marijuana Commissioner do not define “a crime of moral turpitude.”

¹²⁸ *Id.* at A001; 4 *Del. Admin.* § 5001-4.7 (emphasis added) (“The Commissioner *may terminate a conditional license if...*”).

¹²⁹ In its Opening Brief, Galaxy represented that OMC had already issued a conditional license. *See* D.I. 10, at 3. Galaxy later clarified that although the database which it used for applications reflected that it was a conditional licensee, no conditional license had issued. *See* Oral Argument, at 10:18:28–10:19:13.

independent grounds.¹³⁰ Whether or not that establishes a satisfactory legal basis, remand for production of the full record for the reasons stated above is required.

Galaxy's Additional Challenges

Galaxy levies several other challenges;¹³¹ these are either without merit or cannot be resolved on this record. Galaxy asserts that no rule requires updates for “changes to an applicant’s criminal history after the Supplemental Application is filed.”¹³² The DMCA inferably favors amendment, though, since it establishes generally that certain convictions justify refusal.¹³³ Similarly, Galaxy claims that OMC should have held a pre-denial hearing.¹³⁴ By statute such hearings are discretionary “in the absence of a protest” by certain persons,¹³⁵ and the Denial Letter

¹³⁰ See D.I. 14, at 18.

¹³¹ For instance, Galaxy seeks to distinguish Mr. Yatooma from “the applicant” identified in the Denial Letter. D.I. 10, at 10, 17. Mr. Yatooma is Galaxy’s sole owner, though, and the DMCA clearly sets out to investigate and regulate such individuals. See 4 Del. C. § 1347(a)(4), (f), (g). See also 4 Del. C. subch. VII (establishing Commissioner’s control over changes in ownership).

¹³² D.I. 10, at 12. See also *id.* at 10, 11–12.

¹³³ See 4 Del. C. §§ 1354(b)(4); 1347(b), (d), (f). Where OMC “has substantial evidence that would reasonably support a belief that” an applicant’s owner “has been convicted of an offense that *may* impact the qualifications, functions, or duties of the business or profession...,” then OMC “*may* refuse” licensure. *Id.* § 1354(b)(4) (emphasis added). The DMCA empowers OMC to consider the criminal record as an ongoing object of concern, as evidenced by the focus on whether an offense *may* impact qualifications. Galaxy’s assertion would undercut that framework. Additionally, SBI relays to DATE “[a]ny subsequent state criminal history record information of the person.” *Id.* § 1347(f)(1). Moreover, criminal background checks are a condition for periodic license renewal. 4 Del. Admin. § 5001-5.1.2.2.

¹³⁴ D.I. 10, at 10, 14.

¹³⁵ 4 Del. C. § 1352(b)(1), (2). Moreover, in the similar context of licensure by the Alcoholic Beverage Control Commission, “there is no general right to a hearing in license application cases under Title 4.” *Kelley v. Del. Alcoholic Beverage Control Comm’n*, 423 A.2d 507, 510 (Del. Super. Ct. 1980) citing *Demarie v. Del. Alcoholic Beverage Control Comm’n*, 143 A.2d 119 (Del. 1958).

complied with 4 *Del. C.* § 1352(a) by “timely notify[ing] the applicant stating the reason for denial.” Last, Galaxy raises the Letter’s enumerated charge (which differs from Yatooma’s Michigan conviction) as a material error that precluded notice.¹³⁶ Because it will remand, the Court refrains from addressing these issues.

Conclusion

“In reviewing the actions of the agency, the Court is *required* ‘to search the entire record to determine whether ... it could fairly and reasonably reach the conclusion that it did.’”¹³⁷ To that end, “‘every part of the record before an administrative agency which is necessary to a review of its decision must be made part of the record brought before this Court.’”¹³⁸ And where “the Court determines that the record is insufficient for its review, it *shall remand* the case to the agency for further proceedings on the record.”¹³⁹

¹³⁶ See D.I. 10, at 17–20.

¹³⁷ *Hawkins v. United Parcel Serv.*, 2023 WL 3749355, at *2 (Del. Super.) (emphasis added) quoting *Nat’l Cash Register v. Riner*, 424 A.2d 669, 674–75 (Del. Super. Ct. 1980).

¹³⁸ *Hawkins*, 2023 WL 3749355, at *2 (emphasis added) quoting *Perrine v. State*, 1994 WL 45341, at *1 (Del. Super.). See also *Somerset Pharms., Inc. v. Shalala*, 973 F. Supp. 443, 445 (D. Del. 1997) quoting *Horizons Int’l, Inc. v. Baldrige*, 811 F.2d 154, 162 (3d Cir. 1987) (“[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”).

¹³⁹ 29 *Del. C.* § 10142(c) (emphasis added). Although not always determinative standing alone, “‘it is generally presumed that the word ‘shall’ indicates a mandatory requirement.’” *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 296 n.54 (Del. 1999) quoting *Del. Citizens for Clean Air v. Water & Air Res. Comm’n*, 303 A.2d 666, 667 (Del. Super. Ct. 1973). See, e.g., *Hawkins*, 2023 WL 3749355, at *2; *Del. Audubon v. Del. Dep’t of Nat. Res. & Env’t Control*, 2018 WL 526594, at *5 & n.45 (Del. Super.).

On remand to the MAC, it shall direct OMC to produce all documents which form the record—as 29 *Del. C.* § 10127 defines the term—on which OMC made its decision.¹⁴⁰ OMC shall transmit a certified copy¹⁴¹ to MAC, which shall hold a renewed hearing on the matter.¹⁴² This matter is **REMANDED** for proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/Sonia Augusthy
Judge Sonia Augusthy

¹⁴⁰ See generally *Hill v. Diamond State Port Corp.*, 1999 WL 1611426, at *1 (Del. Super.) (citation omitted) (“This Court entered an order remanding the case back to the Board with instructions to remand it back to the appeals referee so that a record could be obtained.”).

¹⁴¹ With some records potentially sealed or subject to a Protective Order.

¹⁴² OMC need not hold a hearing in the absence of protest. 4 *Del. C.* § 1352(b)(2). Hence, the Court will not Order it to hold a hearing here, though it appears it may elect to do so under the DMCA to ensure a complete record.