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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE DEPARTMENT OF NATURAL RESOURCES AND CONTROL, Plaintiff/Appellant, v. MCGINNIS AUTO AND MOBILE HOME SALVAGE, LLC, Defendant/Appellee.	)	No. 139, 2019 Court Below – Superior Court of the State of Delaware K17A-09-001 JJC

APPELLEE'S ANSWERING BRIEF

John W. Paradee, Esquire (#2767)
Daniel F. McAllister, Esquire (#4887)
Stephen A. Spence, Esquire (#5392)
Brian V. DeMott, Esquire (#6025)
BAIRD MANDALAS BROCKSTEDT, LLC
6 S. State Street
Dover, Delaware 19901
(302) 677-0061
Attorneys for Defendant Below, Appellee McGinnis Auto & Mobile Home Salvage, LLC

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NATURE OF PROCEEDINGS

On August 8, 2017, the Environmental Appeal Board ("EAB") determined by a five to one majority that 7 *Del. C.* § 6018 does not authorize the Secretary of the State of Delaware Department of Natural Resources and Environment Control ("Appellant" or "DNREC") to mandate affirmative injunctive relief in a cease and desist order issued under that statute.[1] The EAB therefore ruled that five of the seven items in the Secretary's Order No. 2016-WH0032 (the "Cease and Desist Order" or the "Order"), issued on May 2, 2016 to Appellee McGinnis Auto & Mobile Home Salvage, LLC ("McGinnis") were not enforceable.

To allow the EAB to resolve the threshold legal question before it, the parties agreed that, *with respect to that legal issue*, there was no disagreement about the material facts.[2] The Order's contents are self-evident, and the document speaks for itself. Therefore, the EAB hearing was limited to presentation of legal arguments and paper submissions (analogous to cross motions for summary judgment) addressing the legal question of the Secretary's authority under § 6018.[3] McGinnis expressly denies, however, that it has committed any violation of

[1] EAB decision at p. 6, A-047.
[2] Superior Court Opinion at p. 4.
[3] *Id.*

Chapter 60, Title 7 of the Delaware Code, or DNREC's Regulations Governing Solid Waste, and has consistently reserved the right to litigate this question.[4]

The EAB let stand two of the seven paragraphs of the Order (one of which McGinnis complied with, and the other of which was moot). DNREC appealed the EAB decision. On February 21, 2019, the Superior Court upheld the EAB's decision and remanded the matter to the EAB.[5] The Superior Court agreed with the EAB that 7 *Del. C.* § 6018 allows the Secretary to order an alleged violator to "cease" and "desist," but does not permit the Secretary to order affirmative remedial action akin to a mandatory injunction.

On March 15, 2019, after conferring with the parties and having received a stipulated Motion for Entry of Final Judgment, the Superior Court entered final judgment. On March 28, 2019, DNREC appealed the final order to this Court.

This is McGinnis's Answering Brief in opposition to DNREC's appeal.

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[4] *See* B-001 (May 19, 2017 submission of McGinnis to the EAB at p. 1) ("The parties to this appeal agree that the **sole issue here presented** is whether the Secretary's Order was validly issued…." [emphasis added]); B-003 (*Id.* at p. 3) ("…[McGinnis] den[ies] that [it] ha[s] ever committed any violations of either Chapter 60, Title 7 of the Delaware Code or the Regulations (and [it] expressly reserve[s] the right to litigate that question in any further enforcement action which may be undertaken by DNREC in the future)…."). While DNREC did not include this document in its appendix, this document was part of the record sent up to the Superior Court on appeal by the EAB.

[5] *Dep't of Nat. Res. & Envtl. Control v. McGinnis Auto & Mobile Home Salvage, LLC*, No. K17A-09-001 JJC, 2019 WL 851935, (Del. Super. Feb. 21, 2019).

SUMMARY OF ARGUMENT

I. Denied. This Court should affirm the decisions of the Superior Court and EAB which both correctly ruled that 7 *Del. C.* § 6018 does not allow the Secretary to order affirmative corrective action—the equivalent of mandatory injunctive relief. The Superior Court and EAB's statutory interpretation analysis was correct. Section 6018 authorizes the Secretary to issue a "cease and desist" order, the scope of which is limited by the accepted understanding of that phrase. Other sections of Title 7, Chapter 60 allow the Secretary to seek from the Court of Chancery broader and affirmative injunctive relief; meaning the Secretary lacks that power by statute. The Delaware Constitution also prohibits the Secretary from issuing orders for mandatory injunctive relief because that is the sole jurisdiction of the Court of Chancery. This Court should reject DNREC's argument that implicit understandings, strained statutory interpretations, and regulatory efficiency justify its desire for power the General Assembly has not granted and which belongs exclusively to the Court of Chancery.

STATEMENT OF FACTS

A. The Parties

Appellant DNREC is an administrative agency of the State of Delaware created by 29 *Del. C.* § 8001.

Appellee McGinnis is a Delaware Limited Liability Company engaged in the business of automobile and mobile home salvage.[6] McGinnis owns and operates a facility at 4160 Downs Chapel Road, Kent County, Delaware.[7]

B. Facts

The facts necessary to decide this appeal are as limited as those stipulated to by the parties and relied on by the EAB and the Superior Court.[8] On August 2, 2016, the Secretary issued the Order, which ordered McGinnis to (1) "immediately cease and desist receiving and dismantling mobile homes and construction and demolition waste"; (2) "remove all solid wastes, including, but not limited to, discarded mobile homes and piles of construction and demolition waste on land and in containers" within 30 days; (3) use transportation companies, disposal facilities, and contractors holding valid permits; (4) "provide documentation…confirming the proper disposal or recycling of solid wastes" within 30 days; (5) "provide…a list of all mobile homes received since 2001, the

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[6] A-007.
[7] *Id.*
[8] A-044; B-001; Superior Court Opinion at p. 5.

vehicle identification number for each mobile home, and the date of manufacture for each mobile home" within 30 days; (6) "provide a detailed explanation of inspection, handling, storage disposal, and recycling procedures for all materials removed from, or contained within, mobile homes" within 30 days; and (7) apply for a Resource Recovery Facility Permit within 30 days if McGinnis wished to operate such a facility.[9]

McGinnis did not contest the Secretary's authority to order the relief sought in paragraphs 1 and 7 of the Order.

No other facts in DNREC's "Statement of Facts" have been stipulated to, nor has an authorized fact finder such as a court or administrative board issued any determination or ruling on those facts. Many of DNREC's factual assertions are entirely without record support. And other sections of DNREC's Opening Brief contain unsupported factual assertions too numerous to mention.[10] McGinnis contests the entirety of DNREC's Statement of Facts except where it is consistent with the facts set forth above.

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[9] A-028.

[10] For example, "McGinnis admittedly took no steps to identify or properly dispose of hazardous materials such as asbestos." Opening Brief at p. 15.

ARGUMENT

I. The EAB and Superior Court Both Correctly Found that the Secretary is Not Authorized to Order Affirmative Injunctive Relief.

A. Question Presented.

May the DNREC Secretary mandate affirmative action, analogous to an injunction, through a cease and desist order issued under 7 *Del. C.* § 6018?

B. Standard of Review.

On an appeal from the EAB, this Court's role is limited to a determination of whether the EAB's decision is supported by substantial evidence and is free from legal error.[11] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[12] Further, the reviewing court does not substitute its judgment for that of the EAB, even if it would have reached a different conclusion.[13]

Here, the EAB was presented with a narrow threshold legal question for which the EAB was not asked to weigh evidence. However, this is *not* because McGinnis has admitted to any violations or that the violations have been established. McGinnis has not stipulated to any of the violations, and they cannot

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[11] 29 *Del. C.* § 10142; *Stoltz Mgmt. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).
[12] *Oceanport Indus. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).
[13] *Tulou v. Raytheon Serv. Co.*, 659 A.2d 796, 802 (Del. Super. 1995)

be assumed in reviewing the appeal.[14] The parties stipulated to the facts necessary to decide the limited legal question before the EAB: first, the Order contained seven paragraphs, each ordering a distinct item of relief; and second, the Secretary had the authority to order the relief in paragraphs 1 and 7 of the Order. These were the only facts stipulated to, the only facts required for the EAB to decide the **legal** question before it, and the only facts relevant to deciding this appeal.

C. Merits of the Argument.

1. The Superior Court correctly ruled that 7 *Del. C.* § 6018 does not allow the Secretary to order affirmative corrective action.

a. 7 *Del. C.* § 6018 authorizes the Secretary to issue cease and desist orders.

By its plain terms, 7 *Del. C.* § 6018 permits the Secretary to issue an order "to any person violating any rule, regulation or order or permit condition of this chapter to cease and desist from such violation." The EAB did not rule, and McGinnis does not dispute, that the Secretary may issue cease and desist orders as a general matter. Even with the limitations that McGinnis argues (and the EAB and Superior Court agree) apply to cease and desist orders, the Secretary's authority is substantial and, along with the other powers Chapter 60 confers, reflects the General Assembly's intent as set forth in the legislative findings cited

[14] Superior Court Opinion at p. 7, n. 5 ("The limited stipulation by the parties did not establish a violation by McGinnis.").

in DNREC's Opening Brief. It is not true that "§ 6018 would cease to be an effective means to combat violations"[15] just because courts have limited the statute's application to its own terms: "cease and desist."

But the broad authority contained in § 6018 is not without limits. The narrow issue presented here is whether § 6018 may be read broadly enough to permit the Secretary to issue orders which go beyond ceasing and desisting, and actually *mandate affirmative action*, like that set forth in paragraphs 2 through 6 of the Order. The Superior Court correctly recognized that the plain language of the statute limits the scope of cease and desist orders—to wit, cease and desist orders may be employed solely for the purpose of bringing ongoing violations to a halt.

"The rules of statutory construction are well settled. First, [the Court] must determine whether the statute under consideration is ambiguous…. If it is unambiguous, then [the Court] give[s] the words in the statute their plain meaning."[16] As the Superior Court correctly noted,

> Under Delaware law, the goal of statutory construction is to determine and give effect to legislative intent. If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, a court's role is limited to an application of the literal meaning of the words. Accordingly, the starting point for the interpretation of a statute is its language.[17]

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[15] Opening Brief at p. 23.
[16] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).
[17] Superior Court Opinion at p. 9.

As a matter of plain English, orders issued under § 6018 are limited to those requiring that a person "cease" or "desist" from continuing activity constituting a violation. The Superior Court correctly noted that Title 7 does not define these terms. They are unambiguous and are interpreted according to their accepted meaning.[18] Nothing in the plain language of the statute gives the Secretary the authority to order affirmative action of the sort in paragraphs 2 through 6 of the Order, such as clearing a waste pile in a specific way using specific contractors, or to provide an accounting. Thus, DNREC is incorrect when it states, "[n]ote that the legislature did not place any limits on the scope of a cease and desist order."[19] The words "cease" and "desist" are themselves limiting and were the words chosen by the General Assembly to set the scope of the Secretary's authority. The EAB and the Superior Court therefore ruled correctly that the Secretary's authority under § 6018 does not include the right to issue affirmative injunctive relief beyond an order to cease and desist.

A correct statutory reading of § 6018 will in no way restrain the Secretary from advancing the legislative goals of Chapter 60. As explained in greater detail below, the Superior Court also correctly found that cease and desist orders exist

[18] *See also* 1 *Del. C.* § 303 ("Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.").

[19] Opening Brief at p. 18.

alongside other powers of the Secretary, including the assessment of administrative penalties, civil penalty actions in Superior Court, and injunctive relief in the Court of Chancery.[20] The cease and desist order permitted by § 6018, as correctly interpreted by the EAB and Superior Court, remains an extraordinarily powerful remedy. That it is not without limits does not mean it is impotent or would "cease to be an effective means to combat violations."[21] Employed in concert with the other available remedies discussed by the Superior Court, a cease and desist order gives the Secretary unilateral power to order any person to cease an alleged environmental violation immediately. To the extent more relief is warranted, injunctions and other remedies are available if the prerequisites are met.

b. Other sections of Title 7, Chapter 60, allow the Secretary to seek injunctive relief to stop imminent and continuing violations.

DNREC suggests the Superior Court incorrectly "looked at the language of § 6018 in isolation, declining to find the implied authority to include remedial actions…."[22] But it is DNREC that seeks to isolate § 6018, reading that provision to include powers that are actually contained in other sections of Chapter 60. As the Superior Court correctly noted, "other Title 7 provisions demonstrate the language the General Assembly uses when it intends to permit the Secretary to

[20] Superior Court Opinion at p. 8.
[21] Opening Brief at p. 23.
[22] Opening Brief at p. 8.

mandate affirmative corrective action."[23] These other provisions become surplusage under DNREC's broad reading of § 6018.

"[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible."[24] As DNREC admits in its brief, 7 *Del. C.* § 6005(b)(2) expressly allows the Secretary to seek the full spectrum of injunctive relief to stop threatened or continuing violations.[25] If the Secretary already had the power to issue affirmative injunctive relief, without needing to petition the Court of Chancery, then this provision would be unnecessary.[26]

DNREC's position on the scope of § 6018 renders § 6005(b)(2) surplusage. If the Secretary already had equity powers as broad as the Court of Chancery, § 6005(b)(2) would not need to authorize him to seek injunctive relief on the very same basis (violations of Title 7, Chapter 60) as he may issue a cease and desist order. DNREC can offer no explanation on why § 6005(b)(2) would include such a provision if § 6018 provides the same power.

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[23] Superior Court Opinion at p. 11.
[24] *Chase Alexa LLC*, 991 A. 2d at 1152.
[25] Opening Brief at p. 11.
[26] *See FMC Corp. v. New Castle Cnty. Special Servs. Dep't*, 2018 WL 1110851, at *5 (Del. Super. Feb 27, 2018) ("If the [New Castle County] General Manager had authority to order injunctive relief, Subsection C of the Penalties Section [of the County Code, permitting him or her to bring a civil action in court] would be superfluous.").

c. DNREC fails to address the Superior Court's straightforward statutory analysis.

The Superior Court provided a well-reasoned statutory interpretation analysis of § 6018 that DNREC fails to address. DNREC instead focuses on a single case, *Formosa Plastics v. Wilson*,[27] which it incorrectly claims is the only precedent on the extent of the Secretary's authority.[28] Along with sidestepping the entire basis for the Superior Court's opinion, DNREC's arguments based on *Formosa* and its own unsupported methods of statutory interpretation are incorrect.

First, DNREC states that, "[i]f the extreme sanction of revocation can be implied as a concomitant power, the far lesser directives here to account for and remediate illegal waste products can surely be seen as well within the Secretary's concomitant power."[29] But this argument incorrectly assumes the analysis is about a continuum of severity: if a statute permits one remedy, anything less intrusive is also impliedly authorized. But there is no legal basis for this position and it completely ignores the statutory interpretation in which the Superior Court engaged. The issue here is not the severity of the remedy, it is the nature of the remedy. Section 6018 only authorizes cease and desist orders, not mandatory affirmative action, irrespective of how severe either may be.

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[27] 504 A. 2d 1083 (Del. 1986).
[28] As explained in § 2, below, *FMC Corp.* controls here.
[29] Opening Brief at p. 12.

Second, DNREC's reliance on *Formosa*, besides sidestepping the Superior Court's statutory analysis, overlooks two distinguishing factors in that case. In *Formosa*, the violator was afforded a pre-revocation hearing.[30] Here, by contrast, the Secretary invoked § 6018 to order McGinnis to undertake mandatory affirmative action without the benefit of any prior due process, including even the pre-revocation hearing afforded to Formosa Plastics. *Formosa* is inapplicable in yet another way: the revocation of a permit differs from a mandatory order because only the Secretary is authorized to issue and revoke permits. It is thus natural that if the law allows him to issue a permit, he is also permitted to revoke it. Unlike with mandatory injunctive relief, there is no mechanism for a court to revoke a permit issued by the Secretary.

The Superior Court's analysis is supported by legal authority and time-honored Delaware principles of statutory interpretation. DNREC by contrast offers its own statutory interpretation of § 6018 with no basis in case law and no supporting legal citation: "[T]he legislature did not place any limits on the scope of a cease and desist order; only on its duration"[31] and "[n]othing in the statutory language prevents a cease and desist order from containing affirmative, as well as prohibitory, mandates."[32] But this position ignores entirely the plain meaning of

[30] *Formosa Plastics*, 504 A. 2d at 1086.
[31] Opening Brief at p. 18.
[32] *Id.* at p. 19.

"cease" and "desist" discussed by the Superior Court. This is the extent of the statutory interpretation DNREC applies to § 6018. It sidesteps the Superior Court's analysis and is unsupported by caselaw. This Court should affirm the Superior Court's analysis.

DNREC engages in further incorrect statutory interpretation when it writes, "[t]he statute specifically anticipates that a cease and desist order may be suspended by injunction. The General Assembly thus expected the Secretary to exercise administrative powers equivalent to a court issuing an injunction."[33] But it does not logically follow that because a cease and desist order can be suspended by an injunction, it is thus equivalent to the power of an injunction. If anything, it confirms the opposite. Almost any action, such as an action undertaken by a corporate board of directors, can be suspended by an injunction. That does not make these actions equivalent to an injunction. By contrast, an injunction itself cannot be suspended by an injunction. It is clear that the General Assembly chose to make a cease and desist order of lesser force than an injunction. This allows the party against whom the order is issued to petition the courts for relief from the order. It also allows the Secretary, when necessary to obtain more extensive relief beyond the authority of § 6018, to petition the court under § 6005(b)(2) for an injunction which would then become the controlling order. DNREC's arguments

[33] *Id.*

to the contrary should be rejected and the Superior Court's decision should be upheld.

d. The EAB correctly ruled that paragraphs 2 through 6 of the Order mandated affirmative injunctive relief.

Because McGinnis did not contest the legality of paragraphs 1 and 7 of the Order, the only question is whether the EAB correctly characterized paragraphs 2 through 6, not whether it correctly distinguished paragraph 7 from paragraphs 2 through 6. The EAB correctly ruled that the relief ordered in paragraphs 2 through 6 of the Order mandated affirmative injunctive relief beyond the scope of the Secretary's authority. Even if the EAB erred in ruling that paragraph 7 was within the Secretary's authority, this would be harmless error because the question is moot.[34]

Paragraphs 2 through 6 very clearly mandate affirmative injunctive relief as opposed to merely ceasing and desisting from an activity. Paragraph 2 orders the removal of solid waste; paragraph 3 requires that the waste be removed only by contractors and disposal facilities with valid permits; paragraph 4 requires McGinnis to document the disposal; paragraph 5 requires McGinnis to provide a list of all mobile homes taken into the facility since 2001; and paragraph 6 requires an accounting of the inspection, handling, storage, disposal, and recycling of

[34] McGinnis conceded that it would cease and desist from receiving and dismantling mobile homes (¶ 1), and thus McGinnis need not apply for a Resource Recovery Permit (¶ 7).

mobile homes. To say that paragraphs 5 and 6 "look backward and not forward" is not correct and is the very sort of false distinction that DNREC tries to attribute to the EAB. Paragraphs 5 and 6 mandate, in DNRECs own words, that McGinnis affirmatively provide an "accounting" (even employing the nomenclature of equity). Just because the accounting itself looks backwards, it does not follow that affirmatively mandating its creation is not a form of affirmative injunctive relief.

Paragraph 7, by contrast, only requires that McGinnis obtain a permit, an order it chose not to contest because it ceased dismantling and recycling mobile homes immediately upon receipt of the Secretary's Order. Requiring a permit for a regulated activity falls within the Secretary's authority, and McGinnis never argued otherwise. Therefore, the Board correctly distinguished the substance of paragraphs 2 through 6 from paragraph 7. And even if it had not, paragraph 7 was not contested below and the error would be harmless.

DNREC also incorrectly argues that the EAB looked solely at the "form of the Order" in determining whether it fell within the scope of the Secretary's Authority under § 6018.[35] The EAB's decision was based entirely on the substantive nature of the relief ordered in paragraphs 2 through 6, and not based on any formality. The distinction between "the power to order a violator to stop disobeying the law, and the related…power to mandate compliance with applicable

[35] Opening Brief at p. 23.

law, including remediation and documentation" is not an artificial one, as DNREC argues.[36] This distinction has been expressly recognized by this Court, which has ruled that mandatory injunctions requiring affirmative action (as opposed to those merely preserving the status quo) may not issue except either upon undisputed facts or following a trial on the merits.[37] The distinction between affirmative injunctive relief and a cease and desist order is also recognized by Chapter 60 of Title 7, which distinguishes between cease and desist orders issued by the Secretary and injunctions which the Secretary may seek in court. While DNREC is correct that in some cases, "DNREC would be forced to pursue litigation to force compliance," this is precisely what § 6005(b)(2) contemplates.

The cease and desist order permitted by § 6018, as correctly interpreted by the EAB, still remains an extraordinarily powerful remedy. That it is not without limits does not mean it is impotent or would "cease to be an effective means to combat violations."[38] Employed in concert with the other available remedies, including the pursuit of injunctive relief in the Court of Chancery, as contemplated by Chapter 60, a cease and desist order gives the Secretary unilateral power to

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[36] *Id.*

[37] *C & J Energy Servs., Inc. v. City of Miami Gen. Employees*, 107 A.3d 1049, 1071 (Del. 2014) ("**To issue a mandatory injunction requiring a party to take affirmative action**…the Court of Chancery must either hold a trial and make findings of fact, or base an injunction solely on undisputed facts.) (emphasis added).

[38] Opening Brief at p. 23.

order any person to cease an alleged environmental violation. To the extent more relief is warranted, an injunction is available if the prerequisites are met. The EAB correctly delineated the limits of the Secretary's authority under § 6018, which is supported by a logical reading of the plain meaning of the statute. Its decision is therefore free of legal error and should be affirmed.

2. The Delaware Constitution prohibits the Secretary from issuing orders requiring injunctive relief because that is the sole jurisdiction of the Court of Chancery.

The Superior Court correctly ruled that, as a matter of straightforward statutory interpretation, 7 *Del. C.* § 6018 does not authorize the Secretary to issue orders tantamount to an injunction issued by the Court of Chancery. However, even if the statute did permit such orders, they would violate the Delaware Constitution, because the power to issue injunctive relief is the sole provenance of the Delaware Court of Chancery.

"In Delaware, the Court of Chancery has exclusive jurisdiction to grant injunctive relief."[39] This exclusive jurisdiction prevents other government officials from mandating injunctive relief. In considering the scope of the New Castle County Special Services Department's General Manager's authority to address sewer users in violation of their permits or County Code, the Superior Court ruled,

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[39] *FMC Corp.*, 2018 WL 1110851, at *5 (citing 10 *Del. C.* § 341 and *Nat'l Indus. Grp. v. Carlyle Inv. Mgmt., LLC*, 67 A.3d 373, 382 (Del. 2013) (citing DEL. CONST. Art. IV, § 10)).

> Here, the General Manager exceeded his authority under the County Code by ordering unilaterally Petitioner to submit and implement a preventive plan at Petitioner's cost. **Such an order is injunctive relief in violation of the County Code and the Court of Chancery's jurisdiction**.[40]

Like the General Manager in *FMC Corp.*, the Secretary here has ordered injunctive relief in paragraphs 2 through 6 of the Order. DNREC argues that this is permissible because "[t]he General Assembly expected the Secretary to exercise administrative powers equivalent to those of a court issuing an injunction."[41] But that stance is defeated by this Court's long-held position, applied by the Superior Court to a case just like this one, that injunctive relief is the sole jurisdiction of the Court of Chancery.

If the Secretary could grant relief that was injunctive in nature, it would be reviewable by the Superior Court rather than the Court of Chancery, which would violate the jurisdictional division of those two courts. Under 7 *Del. C.* § 6008(a), the Secretary's cease and desist orders may be appealed to the EAB. Under both 7 *Del. C.* § 6009 and the Administrative Procedures Act, decisions of the EAB are appealable to the Superior Court. Because equity jurisdiction is exclusive to the Court of Chancery, this Court should reject DNREC's position that equity jurisdiction lies also with the Secretary.

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[40] *Id*. (emphasis added).
[41] Opening Brief p. 19.

3. DNREC's reading of § 6018 runs counter to *Formosa Plastics*, which called for procedural safeguards to the exercise of the Secretary's powers.

The Superior Court correctly ruled that *Formosa Plastics* does not apply to § 6018 viewed in isolation. When *Formosa* ruled that the statute conferred "all necessary concomitant powers to give full force and effect to the clear legislative mandate of the Act," it was looking at the entirety of Chapter 60 as applicable to the revocation of a permit. There is thus no "concomitant authority" found in § 6018 related to cease and desist orders, as the Superior Court correctly noted.

Formosa, however, is relevant to this matter in a different way. *Formosa* ruled that,

> Although we recognize that broad and pervasive powers repose in the Secretary, it is not to be overlooked that procedural safeguards and fairness must accompany their exercise. This is essential in marking the difference between rule by law and rule by whim or caprice.[42]

Thus, DNREC's argument that this Court should look to the scope of a judicial injunction in determining the scope of the Secretary's power under § 6018 is misplaced for another reason: it would remove the procedural safeguards to the Secretary's powers found in Chapter 60 of Title 7 and required by *Formosa*.

Because § 6018 does not require any of the long-standing prerequisites to injunctive relief that apply in the Court of Chancery, none of the "procedural safeguards" required by *Formosa* would restrain the exercise of the Secretary's

[42] *Formosa Plastics*, 504 A. 2d. at 1089.

power. Reading § 6018 as giving the Secretary power equal to that of the Court of Chancery would epitomize the "rule by whim or caprice" of which *Formosa* warned. This is so for five reasons.

First, Section 6018 authorizes the Secretary to issue a cease and desist order "to any person violating any rule, regulation, or order or permit condition of [Title 7, Chapter 60]." The Secretary's power is unilateral, and does not require a hearing, or even notice.[43]

Second, the alleged occurrence of a violation is the only prerequisite to the exercise of the Secretary's power under § 6018, without a determination of a threat of ongoing irreparable harm or the balancing of equities, both required for judicial injunctions authorized by § 6005(b). Section 6018 does not require any such analysis. Therefore, if a mere rule or statutory violation is sufficient to vest in the Secretary equity powers as broad and discretionary as the Court of Chancery, the Secretary's aggregate power would actually far exceed that Court because he could issue injunctions absent the ordinary requisite showing of harm and other factors which the Chancery Court must consider in determining the scope of an injunction.

Third, even preliminary injunctions granting the type of mandatory affirmative action DNREC seeks are granted "sparingly,"[44] because doing so

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[43] 7 *Del. C.* § 2018.

[44] *David v. Shell Oil Co.*, 1985 WL 21122, at *2 (Del. Ch.) ("Mandatory preliminary injunctive relief is sparingly given and will only issue if the legal right

"would confer upon [the petitioner] all the relief it could expect after a successful trial on the merits."[45] As such, a petitioner must satisfy the standard applicable to a motion for summary judgment before being granted such relief.[46] This requires, among other things, an absence of dispute of material fact. Section 6018 contains no similar procedural safeguard.

Fourth, another key distinction between an injunction and a cease and desist order is that a party seeking an injunction must post bond in an amount sufficient to cover costs and damages if equitable relief is improvidently granted.[47] Section 6018 provides no such requirement.

Fifth, judicial injunctions are subject to appellate review on an abuse of discretion standard.[48] Yet DNREC's position is that the Secretary, an appointed member of the executive branch, has injunctive authority as broad as the Court of Chancery, and this authority may be exercised unilaterally, without notice or a right to be heard, without a weighing of the equities, and without the posting of bond. This Court should reject DNREC's position as violating the procedural

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to be protected is clearly established."); *Sherman v. Americasub*, 1983 WL 18025, at *3 (Del. Ch. June 27, 1983) ("[Mandatory preliminary injunctive relief] is granted sparingly indeed, and only when the right sought to be protected is free from doubt.") (quotations omitted).

[45] *Kingsbridge Capital v. Dunkin' Donuts Inc.*, 1989 WL 89449, at *4 (Del. Ch.).

[46] *Page v. Kopf*, 1992 WL 245968, at *3 (Del. Ch.).

[47] Chancery Court Rule 65(c).

[48] *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380 (Del. 2014), *as revised* (Nov. 10, 2014).

safeguards that *Formosa* ruled must constrain the Secretary's broad powers (found *throughout* Chapter 60, not just in § 6018).

In conflating cease and desist orders with judicial injunctions, and in an apparent attempt to make its position consistent with *Formosa*, DNREC argues that § 6018 contains procedural safeguards. But DNREC's examples are unpersuasive. That McGinnis was forced to seek bankruptcy protection[49] shows not that § 6018 contains procedural safeguards, but that the exercise of the Secretary's powers in the way DNREC claims § 6018 allows drives businesses into penury. DNREC's argument that setting aside due process is somehow a benefit to the alleged violators by allowing "a relatively simple, informal, and inexpensive way to deal with alleged violations" without the need for procedural safeguards[50] is illogical. Notably, every example of a "procedural safeguard" cited by DNREC—bankruptcy protection, appeals to the EAB, the Superior Court, and the Supreme Court—is merely an ex post facto review, not an affordance of due process *before* the issuance of the Order.[51] DNREC later describes the EAB's ruling, allegedly a procedural safeguard against the Secretary's excesses of which McGinnis availed itself, as a "usurpation" of the Secretary's authority.[52] It is hard to imagine how EAB review could be both a legitimate procedural safeguard and an improper

[49] Opening Brief at p. 17.
[50] *Id.* at p. 24.
[51] *Id.* at p. 17.
[52] *Id.* at p. 23.

usurpation of the Secretary's authority. The examples DNREC offers are not the procedural safeguards contemplated by *Formosa*.

CONCLUSION

For all these reasons, Appellee, Defendants-Below, McGinnis Auto & Mobile Home Salvage, LLC requests that this Court affirm the Superior Court and the EAB.

BAIRD MANDALAS BROCKSTEDT LLC

/s/ Daniel F. McAllister
John W. Paradee (No. 2767)
Daniel F. McAllister (No. 4887)
Stephen A. Spence (No. 5392)
Brian V. DeMott (No. 6025)
6 South State Street
Dover, DE 19901
Telephone: (302) 677-0061 / Fax: (302) 677-0065
john@bmbde.com
dan@bmbde.com
sas@bmbde.com
brian@bmbde.com
Attorneys for Defendant Below, Appellee McGinnis Auto & Mobile Home Salvage, LLC