IN THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

GOLD COAST COMMODITIES, INC. **PLAINTIFF/APPELLANT**

vs. **CAUSE NO. 21-cv-717**

MISSISSIPPI ENVIRONMENTAL QUALITY PERMIT BOARD **DEFENDANT/APPELLEE**

REBUTTAL BRIEF OF APPELLANT GOLD COAST COMMODITIES, INC.

Appellant Gold Coast Commodities, Inc. ("Gold Coast") submits this rebuttal brief in support of its appeal of the adverse action of the Mississippi Environmental Quality Permit Board (the "Permit Board") revoking State Operating Permit No. MSU218003 (the "Permit").

As its members had discussed in illegal email communications between themselves, the Permit Board ordered the revocation of Gold Coast's Permit on November 10, 2020, then, unsurprisingly, affirmed its own decision on April 13, 2021.

The Permit Board's revocation of Gold Coast's Permit should be reversed because the Permit Board has been found to have violated the law, and because the Permit Board acted without any defined, objective standard for what constituted "cause" to revoke the Permit.

The recent, law-changing cases of *King vs. Miss. Military Dept,* 245 So. 3d 404 (Miss. 2018) and *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 319 So. 3d 1049 (Miss., June 10, 2021) provide all the guidance the Court needs in this matter. Understandably, the Permit Board's only mention of the cases is in a single footnote.

Between them, the Mississippi Supreme Court's opinions in *King* and *Methodist Hospital* state that the law in this state now is that this Court, as the interpreter of law in this case, is not to grant deference to the Permit Board in the latter's legal pronouncements, regulatory analyses and

conclusions of law. The only deference due the administrative agency in view of the new state of the law in Mississippi is as to fact-finding, an issue not before this Court today.

Here, the Permit Board both broke the law and wrongly construes the law, and this Court should reverse.

The Permit Board broke the law.

The Mississippi Ethics Commission found that the Permit Board broke the law in the handling of Gold Coast's Permit, and issued a preliminary order to that effect on which the Permit Board did not request a hearing. The Ethics Commission then entered a final order that was not appealed by the Permit Board. *See* Final Order of July 22, 2021, attached to Gold Coast's brief in chief. Now, the Permit Board asks this Court to grant it solace because the Permit Board only violated the law, and was not also fined on top of that. But surely, when a state agency is sitting in a quasi-judicial capacity exercising penal authority over a regulated entity as was the Permit Board in this case, the standard of conduct to which the government must hew is something higher than "well, at least we weren't fined."

A couple of observations seem in order here.

First, the Ethics Commission expressly found the Permit Board to have broken the Open Meetings Act when it communicated secretly by email. The reason the Permit Board members weren't fined under the law is because the Ethics Commission noted that this was the first violation found by the Ethics Commission, and did not see such violations to be a "customary practice" of the Permit Board. That is all well and good for any other permittee whose rights were not violated in instances when – at least as far as the Ethics Commission knows – the Permit Board did not have illegal communications among themselves before deciding another permittee's fate. But it is of no comfort whatever to Gold Coast, whose rights *were* violated

when the law *was* violated by the Permit Board. Gold Coast has no interest in fines being assessed against Permit Board members, but Gold Coast has a profound interest in the vindication of its legal rights.

Second, the Permit Board's attorneys, who were copied on the illegal email messages, are held to a higher standard of responsibility by virtue of having prosecutorial powers in this revocation action. At a minimum, that higher standard includes a duty to prevent the kind of miscarriage of justice as would be allowed if a client administrative agency is allowed to ignore the law when adjudicating whether to penalize a permittee. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice…" *Comment*, M.R. Pro. Cond. 3.7.

The Permit Board cites a number of irrelevant cases to try to support the point that its decision should not be set aside in view of its illegal acts. In those cases, governing bodies sitting in their legislative capacities were taking legislative action. The reviewing courts determined that the legislative actions are not nullified by open meetings violations.

That is not this case. Here, the Permit Board was acting in a quasi-judicial capacity, considering severe penal action. The standard of conduct and responsibility to which the Permit Board is held when sitting in that capacity is different than would be the case if the Permit Board were merely a legislative body passing a budget or amending a city zoning ordinance as in the cases cited by the Permit Board.

In the weeks leading up to the November 10, 2020 revocation action by the Permit Board, Permit Board members exchanged numerous email messages among themselves, demonstrating their determination to punish Gold Coast in some way, including even the prospect of forcing

Gold Coast out of business. They prejudged Gold Coast's fate, and both justice and equity would be offended if the Permit Board's action is affirmed on its argument that this is the first time we know that it broke the law.

The Permit Board's revocation of Gold Coast's Permit should be reversed, because the Permit Board acted contrary to law, a violation that is documented in a final order of the Mississippi Ethics Commission, never appealed by the Permit Board, and starkly prejudicial to Gold Coast's rights to a fair tribunal.

The Permit Board never tried to define "cause" until too late.

The Permit Board rolls out its litany of facts, then makes the not-so-compelling argument that if this is not "cause," nothing is.

But that's what the government always says when it tries to enforce an unpublished standard.

In fact, the Permit Board's argument is circular: since we had substantial evidence of violations, that must have been cause for revocation, so they say. If the Permit Board's argument in this respect is granted sway – if a regulatory agency can, after the fact, find violations and then, after the fact, deem those violations "cause" for permit revocation – there is no need for a body of administrative law, at all, and no administrative agency could ever be reversed in a penal action.

Remarkably, the Permit Board goes so far as to say that it didn't have to have an objective standard for cause at all. And, again, that's what the government always says when it does whatever it wants to do. In fact, it's essentially what the Permit Board's lawyer said, in the conversation quoted in Gold Coast's brief in chief: if the violations were "significant, enough" then MDEQ might possibly bring them before the Permit Board.

But who decides whether violations reach the level of "significant" or "enough"? Is that a decision for MDEQ's Executive Director, or the attorneys? And if "significant" or "enough" violations are found to bring to the Permit Board, against what standard is the Permit Board to measure in reaching its decision? Does it have its own "significant, enough" ruler? Does it use the Executive Director's or the attorneys' ruler? And regardless of whose ruler is used, how does a court – how can *this* Court – determine the lawfulness of the Permit Board's action?

The Permit Board is not permitted to define "cause" for itself during the midst of a revocation proceeding, as its staff testified it could. And it can't define "cause" by the musings of its lawyer during a prior meeting.

The Legislature could have, but did not define "cause" by statute. The Permit Board might have, but failed to define "cause" by regulation. And the Permit Board should have, but never explained "cause" in the Permit.

Now, here, the Permit Board asks this Court to cover for the Permit Board's refusal to promulgate the sort of standard the Mississippi Supreme Court specifically required in *Mississippi Air & Water Pollution Control Permit Bd. v. Pets & Such Foods, Inc.* 394 So. 2d 1353 (Miss. 1981). That ask should be declined, and the action of the Permit Board should be reversed.

CONCLUSION

This Court's review of the administrative action before it calls for reversal on two, separate grounds: the agency acted unlawfully, and the agency acted without an objective standard.

This Court does not have to find the actions of the Permit Board to be unlawful. That finding has already been made, and is a final order in the public record of the State of Mississippi.

This Court does not have to find the absence of a definition of "cause" for revocation of the Permit. That absence is apparent from the public record of the State.

All this Court need find is that the Permit Board, having acted illegally and without an objective standard, must be reversed.

Respectfully submitted, this the 4th day of November, 2021.

GOLD COAST COMMODITIES, INC.

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CERTIFICATE OF SERVICE

I, R. Andrew Taggart, Jr., hereby certify that on this day I electronically filed the foregoing pleading with the Clerk of the Court using the MEC system which sent notification of the filing to all counsel of record.

This the 4th day of November, 2021.

/s/R. Andrew Taggart, Jr.
R. ANDREW TAGGART, JR.