

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., *et al.*,)
)
 Plaintiffs,)
 v.)
)
 Secretary Claire DeMatteis, in her) C.A. No. N22C-09-526 CLS
 official capacity as Secretary of the)
 Delaware Department of Human)
 Resources and Co-Chair of the State)
 Employee Benefits Committee, *et al.*,)
)
 Defendants.)

DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

Defendants herein move, pursuant to Superior Court Rule 56, for an Order granting Summary Judgment in their favor. The grounds for the Motion are set forth in Defendants’ Opening Brief in Support of its Cross-Motion for Summary Judgment and Answering Brief in Opposition to Plaintiff’s Motion for Summary Judgment filed herewith.

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November 14, 2022

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., <i>et al.</i> ,)	
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Plaintiffs,)	
v.)	
)	
Secretary Claire DeMatteis, in her official capacity as Secretary of the Delaware Department of Human Resources and Co-Chair of the State Employee Benefits Committee, <i>et al.</i> ,)	C.A. No. N22C-09-526 CLS
)	
Defendants.)	

[PROPOSED] ORDER

This Court, having considered Defendants’ Motion for Summary Judgment in their favor on the Communications Claim under Superior Court Rule 56, and having found good cause therefore, Defendants Motion is hereby GRANTED.

IT IS SO ORDERED this _____ day of _____, 2022.

The Honorable Calvin L. Scott

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 Plaintiffs,)
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 Resources and Co-Chair of the State)
 Employee Benefits Committee, *et al.*,)
)
 Defendants.)

NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendants’ Motion for Summary Judgment on the Communications Claim in the above-captioned matter shall be presented to the Court on November 28, 2022 at 2:00 pm.

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Employee Benefits Committee, *et al.*,)
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Defendants.)
_____)

**DEFENDANTS’ OPENING BRIEF IN SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

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Dated: November 14, 2022

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INTRODUCTION

Count III of the Complaint is the only remaining pled claim for resolution via cross-motions¹ for summary judgment.² Count III is Plaintiffs' declaratory judgment claim regarding communications directed by the Secretary of the Department of Human Resources (the "Secretary") regarding a now rescinded change to a Medicare Advantage Plan that purportedly violated 29 *Del. C.* §9604(8) (the "Communications Claim"). The Communications Claim should be dismissed because: (1) Plaintiffs have no private right of action; (2) §9604 does not require communications to retirees; (3) it is moot; (4) it is barred by sovereign immunity; and (5) the communications satisfied all purported statutory requirements.

¹ Plaintiffs' Motion is cited herein as "PMSJ."

² *See* Stipulation, Trans. No. 68359922. Although seeking fees by separate Motion, Plaintiffs have not pled any claim for attorneys' fees.

NATURE AND STAGE OF PROCEEDINGS

This case is a challenge to the Department of Human Resources (“DHR”), and more specifically the Delaware State Employee Benefits Committee’s (“SEBC”), decision to change the health care plan provided by the State to retirees from the Medicare Supplemental Health Plan (“Medicare Supplemental”) to the Medicare Advantage Plan (“Medicare Advantage”), filed by Plaintiffs RiseDelaware Inc., Karen Peterson, and Thomas Penoza.

On October 19, 2022, this Court granted Plaintiffs’ Motion to stay, and stayed Defendants’ implementation of Medicare Advantage for state retirees (the “Decision”). Heeding the Decision, on October 24, 2022 the SEBC voted to extend the Medicare Supplemental through 2023. Exhibit A. While Defendants believe the Decision functionally ruled on all issues, Plaintiffs sought to press the Communications Claim found in paragraphs 102-104 of the Complaint.³ By stipulation, the parties agreed that there are no triable issues, and that the Communications Claim is ripe for decision through cross-motions for summary

³ See Stipulation, Trans. No. 68359922. Plaintiffs’ Motion includes a request that the Court “deem” their Complaint amended to include the Director of the Office of Management and Budget (the “Director,” and when referring to the Office “OMB”) as a named Defendant under the Communications Claim. Defendants oppose this improper request – which should be rejected outright because, *inter alia*, the request is too late and because §9604(8) imposes no duties on the Director.

judgment. This is Defendants' answering and opening brief on the Communications Claim.

STATEMENT OF FACTS

Communications sent regarding the Medicare Advantage plan are set forth in

Plaintiffs' appendix. They include:

- June 1, 2022 letter Page 3
- Welcome Brochure Page 5
- Rate Sheet Page 20
- June 22 letter Page 21
- Details Brochure Page 25
- July 2022 Newsletter Page 41
- August 29 letter Page 45
- Spousal Coverage Insert Page 47
- Frequently Asked Questions Page 52
- Application Page 60
- September letter Page 61
- September Newsletter Page 68
- Benefits Chart Page 70
- Meet Your Plan Brochure Page 108
- October 10 letter Page 140
- October 12 letter Page 142
- September 26 letter Page 145
- September 30 letter Page 148
- Prior Authorization Overview Page 150 and Tab 2

In addition, there were over thirty information sessions held, including sessions in all three counties and virtually, to inform retirees of the changes to the Medicare Advantage Plan.⁴

⁴ PSMJ, Appx. Tab 1, p. 43, 68.

QUESTION PRESENTED

Should summary judgment be granted to Defendants when: (1) there is no private right of action; (2) the statute relied upon only references employees; (3) Plaintiffs claims are moot; (4) sovereign immunity bars the claims; and (5) applicable communications satisfy any purported statutory duty?

STANDARD OF REVIEW

“Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁵ The standard for summary judgment “is not altered because the parties have filed cross-motions for summary judgment.”⁶ “Where cross-motions for summary judgment are filed and neither party argues the existence of a genuine issue of material fact, ‘the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.’”⁷

⁵ *Wilm. Tr. Co. v. Aetna Cas. & Sur. Co.*, 690 A.2d 914, 916 (Del. 1996).

⁶ *Total Care Physicians, P.A. v. O’Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001).

⁷ *New Castle Cty. v. Pike Creek Recreational Servs., LLC*, 82 A.3d 731, 744 (Del. Ch. 2013), *aff’d*, 105 A.3d 990 (Del. 2014) (citing Ct. Ch. R. 56(h)).

ARGUMENT

I. There Is No Private Right Of Action Under §9604

The Communications Claim seeks a declaratory judgment under 29 *Del. C.* §9604, entitled “Duties of the Secretary of Human Resources.” There is no private right of action or remedy, express or implied, that allows Plaintiffs to assert a claim under §9604(8).

There is no statutory remedy – and no other express legislative intent – indicating that the General Assembly intended to create a private right of action for alleged violation of the duties of the Secretary as outlined in §9604(8). Thus, any private right of action or remedy, if any exists, must be implied.

“Courts are hesitant to find an implied private right of action unless there is strong evidence that the legislature intended to create it.”⁸ General noncompliance with the law is insufficient.⁹ To determine if there is an implied private right of action, Delaware has adopted a three-prong test: “(1) [i]s the Plaintiff a member of a class for whose special benefit the statute was enacted; (2) [i]s there any indication of legislative intent to create or to deny a private remedy for violation of the act; and,

⁸ *Rays Plumbing and Heating Service Inc. v. Stover Homes, L.L.C.*, 2011 WL 3329384, at *4 (Del. Super. July 26, 2011) (citation omitted).

⁹ *Korn v. Wagner*, 2012 WL 5355662, at *1 (Del. Super. Sept. 28, 2012).

(3) [i]f there is no such indication, would the recognition of an implied right of action advance the purposes of the act[.]”¹⁰ Plaintiffs cannot satisfy any prong of this test.

First, Plaintiffs are not members of the class for whose benefit the statute was created. Indeed, §9604(8), is for the benefit of *employees* of the State – the statute describing the duties of the Secretary does not mention any requirement to distribute communication to retirees.¹¹ **Second**, there is zero indication of legislative intent to create a private right of action under §9604, which is merely a description of the duties of the Secretary. **Third**, the recognition of a private right of action would not advance the purposes of the act. At most, the statute establishes broad duties of the Secretary, which is insufficient to establish a private right of action.¹² **Fourth**, there is no statutory remedy created by §9604, and therefore there is “far less reason to infer a private remedy in favor of individual persons.”¹³ Simply, Plaintiffs have no private right of action for a purported violation of §9604(8).

This Court’s decision in *Korn v. Wagner*¹⁴ is instructive. There, Plaintiffs challenged the Delaware State Auditor’s alleged failure to audit New Castle County

¹⁰ *O’Neill v. Town of Middletown*, 2006 WL 4804652, at *17 (Del. Ch. Jan. 18, 2006) (citation omitted). Legislative intent is generally the most determinative of these factors. *Id.* at *19; *Rays Plumbing*, 2011 WL 3329384, at *2.

¹¹ The statutory distinction between “employees” and “retirees” is discussed in Section II below.

¹² *O’Neill*, 2006 WL 4804652, at *22.

¹³ *Id.* at *23 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)).

¹⁴ 2012 WL 5355662, at *1.

school districts, as required by 29 *Del. C.* §2906(f). The Court dismissed Plaintiffs’ declaratory judgment claim, holding that even though “29 *Del. C.* §2906(f) defines the duties of a state office constitutionally created for the benefit of Delaware taxpayers, the statute is insufficient to give taxpayers a private cause of action or a private remedy against the auditor.”¹⁵ The same result prevails here.

II. Plaintiffs Are Not Employees And §9604(8) Is Inapplicable

A. The Statutory Language Does Not Mention Retirees Or Pensioners

The “goal of statutory construction is to determine and give effect to legislative intent.”¹⁶ Intent is determined by the plain language of the statute, and absent ambiguity, “there is no room for judicial interpretation and ‘the plain meaning of the statutory language controls.’”¹⁷

Plaintiffs, who are unquestionably pensioners, allege that the Secretary violated §9604(8) by not providing them sufficient notice of a healthcare plan change. That contention is belied by the plain language of the statute. §9604(8) is inapplicable to pensioners – §9604(8) is only applicable to employees. The statute provides, in pertinent part, “[c]ommunication to State *employees* of all State *employee* benefits coverages and any additions or changes of benefits affecting State

¹⁵ *Id.* at *3.

¹⁶ *Harris v. Div. of Family Servs.*, 251 A.3d 115 (Table), 2021 WL 1561433, at *2 (Del. Apr. 20, 2021); *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).

¹⁷ *PHL Variable Ins. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1070 (Del. 2011).

employees.” The Secretary’s statutory duty under §9604(8) is expressly limited to *State employees*, not retirees or pensioners. The plain, unambiguous language and statutory intent is that the listed duties of the Secretary do not include any requirement of communication to retirees or pensioners.

B. The Specific Inclusion of the Word “Pensioners” In Other Provisions Of The Statute Establishes Legislative Intent

It is well-settled that “when provisions are expressly included in one statute but omitted from another ... [the Court] must conclude that the General Assembly intended to make those omissions.”¹⁸ “The legislative body is presumed to have inserted every provision for some useful purpose and construction, and when different terms are used in various parts of a statute it is reasonable to assume that a distinction between the terms was intended.”¹⁹

Applying these well-settled interpretive rules establishes that the phrase “employee” is not synonymous with the terms “pensioner.” An employee is a person presently receiving compensation for services, as defined in many places in the Delaware Code.²⁰ A pensioner is defined separately.²¹ When the General Assembly desires to include persons beyond just employees within the reach of a statute, it

¹⁸ *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007).

¹⁹ *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) (citation omitted).

²⁰ *See* 29 Del. C. §5501(f)(1); *see also* 29 Del. C. §5804(12); 29 Del. C. §5201(8).

²¹ 29 Del. C. §5201(3).

expressly does so – as established by the use of additional terms, such as pensioners, in surrounding statutory provisions. Notably, three other subsections of this same code provision specifically delineate that the Secretary’s authority applies to “pensioners”: subsection (7) separately delineates “employees **and pensioners**,” as does subsections (9) and (10).²² The General Assembly’s conscious choice to include only the term *employee* in §9604(8) means that the legislature intended that pensioners were not included in the Secretary’s communication responsibilities.

Broadening the reach of the plain statutory language, as Plaintiffs request here, “amounts to judicial legislation.”²³ “It is a settled principle that courts will not engage in ‘judicial legislation’ where the statute in question is clear and unambiguous.”²⁴ If the General Assembly desires to include retirees or pensioners within the ambit of §9604(8), “then it, and not the Court, must change the statute.”²⁵ “It is beyond the province of courts to question the policy or wisdom of an otherwise valid law.”²⁶ Because under §9604(8), the Secretary is only required to communicate with *employees*, there is no statutory requirement for any specific communication to Plaintiffs. To expand the statute’s scope beyond its plain

²² 29 *Del. C.* §9604(7) (emphasis added); §9604(9); §9604(10).

²³ *Balma v. Tidewater Oil Co.*, 214 A.2d 560, 562 (Del. 1965).

²⁴ *Ewing v. Beck*, 1986 WL 5143, at *2 (Del. Ch. May 1, 1986).

²⁵ *Flowers v. Office of the Governor*, 167 A.3d 530, 545 (Del. 2017).

²⁶ *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011).

language is impermissible judicial legislation. Plaintiffs' claims should be rejected and summary judgment should be granted in favor of Defendants.

III. The Communications Claim Is Moot

In the Communications Claim, Plaintiffs seek a declaratory judgment regarding the now rescinded switch to Medicare Advantage, which would have been effective January 1, 2023. Because this Court has stayed implementation of Medicare Advantage, and the SEBC has voted to leave the Medicare Supplemental in place for policy year 2023 (Exhibit A), any claims regarding the sufficiency of the communications for a switch to Medicare Advantage in 2023 is moot.

The mootness doctrine is in place because the Court must “decide actual, live controversies.”²⁷ “Mootness arises when controversy between the parties no longer exists such that a court can no longer grant relief in the matter.”²⁸ “Under the mootness doctrine, although there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist.”²⁹ “[A] Court will not decide a moot issue which raises nothing but an abstract question of law.”³⁰

²⁷ *State Farm Mut. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013) (citing Del. Const. Art. IV, §11).

²⁸ *Id.* (quoting *Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003)).

²⁹ *De. Assoc. of Alt. Energy Providers Inc. v. Chesapeake Utilities Corp.*, 274 A.3d 287 (Table), 2022 WL 710452, at *4 (Del. Mar. 10, 2022) (quotations omitted).

³⁰ *Bradshaw v. Trover*, 1999 WL 463847, at *2 (Del. Super. Ct. Apr. 30, 1999).

If the SEBC decided to proceed with a Medicare Advantage plan for the 2024 plan year, it would provide revised communications to plan participants for that plan year. The sufficiency of the communications about a switch to Medicare Advantage for 2023 is now moot because there will be no change to the plan in 2023. This is a quintessential case where the controversy ceased to exist due to changing circumstances during the pendency of the litigation. As such, Plaintiffs' declaratory judgment claim on the Communications Claim is moot and should be dismissed.

IV. Plaintiffs' Declaratory Judgment Claim Is Barred By Sovereign Immunity

The State may not be sued without its consent and the State may only waive its sovereign immunity by act of the General Assembly.³¹ "The General Assembly must express clear intent to waive sovereign immunity."³² Claims against public officials in their official capacity are also barred by sovereign immunity and the Eleventh Amendment.³³ Because the General Assembly has not expressly or impliedly waived sovereign immunity with regard to the duties of the Secretary in §9604(8), sovereign immunity precludes Plaintiffs' Communications Claim.³⁴

³¹ *Id.* at *4; Del. Const. Art. I, §9.

³² *Furman v. De. Dept. of Transportation*, 2015 WL 1406119, at *2 (Del. Super. Mar. 23, 2015) (citing *Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004)).

³³ *Eaton v. Coupe*, 2017 WL 626614, at *6 (Del. Super. Feb. 14, 2017).

³⁴ *Korn*, 2012 WL 5355662, at *4.

V. Adequate Notice Was Given And Can Be Found In The Record

A. The Communications Satisfy §9604(8)

Assuming *arguendo*, that the Plaintiffs are included in the term “employees” in §9604(8), and thus, were statutorily required to receive communications from the Secretary’s staff, that section does not provide a minimum threshold for such communications. §9604(8) states only that the duties include, “[c]ommunication to State employees of all State employee benefits coverages and any additions or changes of benefits affecting State employees.” Under the statute, a single communication that included information regarding benefit coverage and any changes or additions, would satisfy the legal requirement. However, Defendants exceeded any such requirement, sending numerous, informative communications to the retirees.³⁵

The DHR communicated with the retirees about the health care coverage change slated to take effect on January 1, 2023 in a multitude of ways throughout the second half of 2022. **First**, letters were sent to State eligible pensioners regarding the upcoming change on or about June 1, June 22, July 15, August 29,

³⁵ Although the Court previously held, on a truncated record, that certain communications regarding Medicare Advantage were insufficient (Decision p. 10-11), the question on the Communications Claim is different. If the claim is not moot and not dismissed on other grounds, the issue is whether any communication, at whatever time, including the communications outlined on pages 6-7 of the Decision, satisfy the requirements of §9604(8).

September 15, September 26 and October 10, 2022.³⁶ *See* Exhibit B. Each of these letters included plan information and/or links to view plan information.³⁷ **Second**, DHR, OMB and Highmark hosted eighteen in-person information sessions throughout August – hosting two days each with three sessions in each county, in each month – and eleven in-person sessions (split between the counties), plus one virtual session in October, all of which were advertised in the July and September newsletters mailed to all State eligible pensioners.³⁸ This satisfies any purported duty of communication.

B. Plan Changes Were Timely Communicated

While the SEBC initially decided to change to Medicare Advantage in February 28, 2022, there is no statutory timeframe for the sending of plan change notices. Details of the plan had to be worked out and appropriate notices put together for direct communications to occur – all of which takes time.

Although Plaintiffs allege they were prejudiced by a three month gap between the decision and the first mailing to retirees sent on June 1, there is no statutory requirement for faster or different notice. The statute does not require the Secretary

³⁶ *See* PMSJ, Appx. Tab 1; *see also* Rentz Aff., p. 9-10.

³⁷ DHR repeatedly advised of the prior authorization requirements of Medicare Advantage. *See* PMSJ Appx. p. 27, June 2022 “Get The Details Brochure”; Appx. p. 56, Sept. FAQs, Question 22; Appx. p. 70, 73, 79, 81-82, 107, Medical Benefits Chart; Appx. p. 115, PPO Brochure; Appx. p. 150, Prior Authorization Overview.

³⁸ *Id.*, p. 42-44.

(or her staff) to communicate changes immediately. “[A]dditions or changes” only need to be communicated in a timely fashion so they can be exercised for the following plan year. Even if other federal statutes applicable to large private employers are used for guidance,³⁹ it is clear that Defendants’ initial notice letter – approximately 120 days prior to the open enrollment period and more than 180 days prior to the date the new policy would take effect – certainly provided sufficient “communication to State employees” regarding “additions or changes of benefits affecting State employees.”⁴⁰

C. Attacks On The Substance Of The Communications Are Not Actionable Under §9604(8)

Plaintiffs’ attack the content of the communications and claim that the early communications provided were misleading.⁴¹ Such claims, however, do not survive under §9604(8), which requires only that the communications include “benefits coverages and any additional or changes of benefits affecting State employees.”

Letters sent to State eligible Pensioners on June 1, and again on June 22, included multiple statements informing recipients of the change of benefit provider and coverage, enclosed a brochure from the health care provider outlining the current plan as compared to the future plan benefits, and included a document titled

³⁹ See 42 U.S.C. §300gg-12 (Affordable Care Act); see also 29 U.S.C. §1001, et seq. (ERISA).

⁴⁰ 29 Del. C. §9604(8).

⁴¹ PMSJ ¶19.

“Frequently Asked Questions.”⁴² The letters further confirmed additional information would be arriving shortly, but in the meantime provided a phone number for both Blue Cross Blue Shield Delaware and the Office of Pensions where pensioners could ask additional questions.⁴³ As details of Medicare Advantage were worked out, communication and methods to answer questions were provided. This satisfies any purported communication obligation under §9604(8).

Likewise, the communications were not misleading because the State said it was “excited” about these “positive changes.” The SEBC believed that the Medicare Advantage plan was a positive change – one which lowered the monthly costs for participants.⁴⁴ The stated opinion that Medicare Advantage was a positive change does not make it misleading – whether Plaintiffs agree with the statement or not. The State provided *communications* to the Plaintiffs of “***benefits coverages and any additional or changes of benefits*** affecting State employees.” If §9604(8) applied (and it does not), all statutorily required communications regarding benefits were provided.

What is especially disheartening is Plaintiffs’ attempt to cherry-pick limited statements from selected communications to allege that the communications made do not satisfy any purported statutory duty. In July and August, the newsletter sent

⁴² PSMJ, Appx. Tab 1, p. 3-40, 52-59.

⁴³ PSMJ, Appx. Tab 1, p. 3-4, 23-24.

⁴⁴ PSMJ, Appx. Tab 1, p. 3.

to all impacted pensioners provided additional statements alerting them of the change, providing phone numbers to call, and providing dates and times of information sessions available in all counties during the months of August and October.⁴⁵ On August 29, an additional letter went out that included an additional information brochure. Moreover, DHR's subsequent communications provided retirees information about the new plan, comparison with the old plan, answers to frequently asked questions, and informational sessions where additional information could be obtained and additional questions asked.⁴⁶ To emphasize, over thirty information sessions provided information about Medicare Advantage.⁴⁷ In light of the bevy of communications, Plaintiffs' assertion that communications of this volume are insufficient to provide notice of "any additions or changes of benefits affecting state employees" under §9604(8) falls flat.

Perhaps recognizing that even if §9604(8) were applicable, there were a mountain of communications and any purported §9604(8) obligation was satisfied, Plaintiffs cite to the June 1 letter and *Mentis v. De. Am. Life Ins. Co.*⁴⁸ for the unremarkable proposition that a duty to communicate can arise where a partial

⁴⁵ PSMJ, Appx. Tab 1, p. 43, 68

⁴⁶ See Decision p. 6.

⁴⁷ Plaintiffs notably do not and cannot assert that these sessions did not provide complete and accurate information.

⁴⁸ 1999 WL 744430 (Del. Super. Jul. 28, 1999).

disclosure of facts requires additional facts to prevent a misleading impression.⁴⁹ All information regarding the Medicare Advantage Plan was communicated as it became available, and was communicated to all retirees at the latest by September 30, 2022.⁵⁰

Every aspect of each and every perceived benefit or burden of the Medicare Advantage plan was not required to be communicated – nor could every single plan change or difference be communicated in the initial communications.⁵¹ For this reason, the State provided subsequent information – and disclosed that prior authorization would be required under Medicare Advantage. While Plaintiffs desire an earlier and a more robust disclosure, additional facts were provided with each communication, and Plaintiffs were most certainly made aware of the benefits and burdens of the Medicare Advantage plan prior to when open enrollment began. The statute relied upon by Plaintiffs, however, requires only communication of the existence of “benefits coverages and any additional or changes of benefits affecting State employees.” Seven letters, numerous brochures, countless reiterations of the phone numbers to call with questions, and the opportunity for pensioners to attend any of thirty presentations, provided any and all communication purportedly required by §9604(8).

⁴⁹ *Id.* at *7.

⁵⁰ Decision p. 6-7.

⁵¹ Plaintiffs can make challenges, as they did under Counts I and II. They simply cannot make a direct attack under the generalized duty of the Secretary in §9604(8).

What Plaintiffs seek in the Communications Claim is extraordinary and unprecedented. They seek to create a private right of action, based on a statute that is explicitly only applicable to state employees, which would allow judicial review and scrutiny of any governmental communication based on a statute outlining the generalized duties of a cabinet Secretary. The Court should reject Plaintiffs' attempt to expand available claims and causes of action against state actors providing information, and should not require the government to be subject to challenge simply because a would-be Plaintiff disputes certain contentions in communications. There is no generalized right to bring a challenge for "noncompliance with the law,"⁵² and the Court should not create a generalized right to directly challenge every governmental communication. Remedies for any purported harm lie with claims similar to Counts I and II of the Complaint, not a direct declaratory judgment challenge under §9604(8).

⁵² *O'Neill*, 2006 WL 4804652, at *8; *Korn*, 2012 WL 5355662, at *3.

CONCLUSION

Defendants respectfully request that judgment be entered in favor of the Defendants and against Plaintiffs on the Communications Claim.

DELAWARE DEPARTMENT OF JUSTICE

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November 14, 2022

EXHIBIT A



FOR IMMEDIATE RELEASE:

October 24, 2022

MEDIA CONTACT:

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Department of Human Resources

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Karen.M.Smith@delaware.gov

State Employee Benefits Committee Votes on State Pensioner Healthcare Coverage
SEBC votes to extend current Medicfill coverage for 12 months

DOVER, Del.— The State Employee Benefits Committee (SEBC) held its monthly meeting today, and to comply with Judge Calvin Scott’s interim ruling, the SEBC voted to extend the Medicfill contract for state pensioners for 12 months pursuant to the Emergency Procedures and Critical Need for Professional Services provision of the procurement code, 29 *Del. C.* § 6907. Pending the resolution of the litigation, the SEBC will consider its options for Calendar Year 2024, which include renegotiation of the Highmark BCBS Delaware Medicare Advantage PPO plan contract and rebidding of the State Medicare health plan.

In the coming weeks, all State of Delaware Medicare eligible pensioners will receive additional information regarding Special Medicfill enrollment for the plan year that begins January 1, 2023. Enrollment in the Special Medicfill with prescription plan will automatically continue for individuals currently enrolled. Benefit eligible pensioners who are enrolled in the Special Medicfill without prescription plan or who have waived coverage for the current plan year, will be given the opportunity to make changes effective January 1, 2023.

As additional information becomes available, it will be posted on the [DHR - Division of Statewide Benefits \(delaware.gov\)](#) website and the [Office of Pensions website](#).

###

STATE OF DELAWARE STATEWIDE BENEFITS OFFICE

97 Commerce Way, Suite 201, Dover DE 19904 (D620E)

Phone: 1-800-489-8933 • Fax: (302) 739-8339 • Email: benefits@delaware.gov • Website: de.gov/statewidebenefits

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., *et al.*,)
)
 Plaintiffs,)
 v.)
)
 Secretary Claire DeMatteis, in her)
 official capacity as Secretary of the)
 Delaware Department of Human)
 Resources and Co-Chair of the State)
 Employee Benefits Committee, *et al.*,)
)
 Defendants.)

C.A. No. N22C-09-526 CLS

STATE OF DELAWARE)
 KENT COUNTY)

**AFFIDAVIT OF FAITH L. RENTZ IN SUPPORT OF DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

I, Faith L. Rentz, hereby depose and state as follows:

1. I am the Director of the State of Delaware Statewide Benefits Office (“SBO”), a division of the Department of Human Resources.
2. I am over the age of 18 years and am competent to testify.
3. In this capacity, I am familiar with the activities of the SBO regarding communicating information to pensioners and retirees regarding their benefits and eligibility for those benefits through the State Group Health Plan.
4. ”Pensioners” and “retirees” have different meanings as it pertains to their participation in the State Group Health Plan and related communications from

the State. State pensioners are individuals who are eligible for retirement and health benefits through the Delaware Public Employees' Retirement System (DPERS). Retirees are individuals who have retired from employment with an organization that offers their former employees health benefits through the State Group Health Plan.

5. The Office of Pensions communicates directly with State benefit eligible pensioners, while SBO requests that other employers who offer former employees health benefits through the State, communicate directly with their retirees.

6. In reference to the communications sent which are the subject of the Communications Claim currently before the court, the SBO and Office of Pensions sent communications regarding the upcoming changes to State pensioners. Communications to retirees not covered in the DPERS were sent by the University of Delaware, and other employers with retirees.

I declare under the penalty of perjury under the laws of Delaware that the foregoing is true and correct.

EXECUTED this the 14th day of November 2022.

Faith L. Rentz

Faith L. Rentz

SWORN AND ASCRIBED before me this 14 day of November, 2022.

Linda M. White

Notary Public

My Commission Expires: upon office

LINDA G. WHITE
Notary Public, State of Delaware
My Commission Expires Upon Office

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., *et al.*,)
)
Plaintiffs,)
v.)
)
Secretary Claire DeMatteis, in her) C.A. No. N22C-09-526 CLS
official capacity as Secretary of the)
Delaware Department of Human)
Resources and Co-Chair of the State)
Employee Benefits Committee, *et al.*,)
)
Defendants.)

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. This document complies with the typeface requirement of Superior Court Rule 107(b) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.
2. This document complies with the type-volume limitation of Superior Court Rule 107(h)(1) because it contains 3,951 words, which were counted by Microsoft Word 2016.

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November 14, 2022

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Max B. Walton, hereby certify that, on this 14th day of November 2022, I caused a copy of the foregoing to be filed and served upon the following via File&Serve*Xpress*:

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