

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SECRETARY CLAIRE DEMATTEIS in	:	
her official capacity as Secretary of the	:	
Delaware Department of Human	:	
Resources and Co-Chair of the State	:	No. 57, 2023
Employee Benefits Committee,	:	
DIRECTOR DERRON CADE IN HIS	:	
OFFICIAL CAPACITY as Director of the	:	Court Below: Superior
Delaware Office of Management and	:	Court of the State of
Budget and Co-Chair of the State	:	Delaware
Employee Benefits Committee,	:	
DELAWARE DEPARTMENT OF	:	C.A. No. N22C-09-526 CLS
HUMAN RESOURCES, DELAWARE	:	
STATE EMPLOYEE BENEFITS	:	
COMMITTEE, and DELAWARE	:	
DIVISION OF STATEWIDE BENEFITS	:	
	:	
Defendants Below, Appellants	:	
	:	
v.	:	
	:	
RISEDELAWARE INC., KAREN	:	
PETERSON, AND THOMAS PENOZA	:	
	:	
Plaintiffs Below, Appellees.	:	

**APPELLEES’ RESPONSE TO APPELLANTS’ RESPONSE  
TO NOTICE TO SHOW CAUSE**

Appellees respond to Appellants’ Response to the Court’s Notice to Show Cause as follows:

**I. PROCEEDINGS BELOW**

1. On September 25, 2022, Appellees filed suit in Superior Court to prevent Appellants from implementing an unlawfully adopted Medicare Advantage

healthcare plan to replace the currently effective Medicare supplement plan that has been in place for Medicare-eligible State retirees for decades. Medicare Advantage is very different and far inferior to the Medicare supplement plan.

2. Appellees' Complaint alleged Appellants failed to comply with the Administrative Procedures Act ("APA") and Freedom of Information Act ("FOIA") of Title 29 in surreptitiously taking that action.

3. Appellees moved to stay implementation of Medicare Advantage under 29 *Del.C.* §10144. After expedited briefing and oral argument, the Superior Court granted the Motion to Stay on October 19, 2022 (the "Stay Decision"). The Stay Decision contained two provisions that functionally operated as preliminary injunctive relief. Specifically, the Stay Decision ordered:

Defendants' implementation of a Medicare Advantage Plan for State retirees and acceptance of enrollment into the Plan, including by way of automatic enrollment in the open enrollment period currently in effect for State retirees is stayed until further Order by this Court.

During the stay, Defendants shall take all necessary and proper steps to ensure that the healthcare insurance and benefits available to State retirees prior to October 3, 2022, or in which they were enrolled prior to that time, remain in full force and effect.

*Rise Delaware Inc. v. DeMatteis*, 2022 WL 11121549, at \*5 (Del. Super.).

4. All parties understood the Stay Decision was *not* a final order and that a final disposition was needed. But because the material facts underlying the stay were undisputed and given the determinations in the Stay Decision, the parties

agreed there was no need to proceed to a trial. They submitted a stipulation reflecting this agreement. (Trans. ID 68368180).

5. On November 14, Appellees filed their Petition for Attorneys' Fees (Trans. ID 68384972).

6. On December 6, the Court directed the parties to file a "stipulation reflective of the resolution of the case." (Trans. ID 68511555) (Exhibit A, p. 5, attached).

7. As instructed, on December 16 the parties filed a Stipulation and [Proposed] Order for Entry of Final Judgment (Trans. ID 68652107) (Exhibit B, attached). That Stipulation documented the parties' agreement that: (a) "[w]ith the exception of the Court's rulings" needed on fees, "the Action is ripe for entry of final judgment"; (b) after a fee ruling, the parties' form of Order and Final Judgment could be entered "fully disposing of all matters in the Action"; and (c) thereafter, "each party shall be permitted to appeal as authorized by law" (*Id.* at pp. 2-3). Importantly, the proposed Final Judgment provided that: "The [Stay] Decision constitutes the findings of fact and conclusions of law on Counts I and II and the remaining paragraph(s) of Count III of Plaintiffs' Complaint"; and "final judgment is entered against Defendants and in favor of Plaintiffs on [those Counts]." (*Id.* at p. 8).

8. On February 8, 2023, the Superior Court handed down a decision denying Appellees' Petition for fees on procedural and jurisdictional grounds ("Fee

Decision”). (Trans. ID 69104306). That document states at the beginning and on the final page that Plaintiffs’ Petition is “DENIED.” Following the word “DENIED” on the last page (p. 7), the document goes on to state, “No further order of this Court is needed to close this case.” The Superior Court did not then, or ever, rule on the parties’ pending Stipulation regarding Final Judgment.

9. On February 15, given the concerns over subject matter jurisdiction expressed in the Fee Decision, Appellees filed in Superior Court a Notification of Their Election to Remove and Transfer the case to the Court of Chancery under 10 *Del.C.* §1902. (Trans. ID 69157466). On February 23, Appellees filed a Petition in the Court of Chancery asking for an award of fees and entry of final judgment. *RiseDelaware, Inc. v. DeMatteis*, C.A. No. 2023-0230-MTZ (Trans. ID 69197202).

10. On February 15, after Appellees’ election was filed, Appellants filed their Notice of Appeal.

## **II. THIS APPEAL SHOULD BE DISMISSED BECAUSE NO FINAL ORDER OR FINAL JUDGMENT HAS BEEN ENTERED**

11. Appellants do not claim they have complied with Supreme Court Rule 42 governing interlocutory appeals. Instead, they argue the Fee Decision was “final and appealable.” (Response ¶8). That position has no merit.

12. “A judgment is final for purposes of appeal when it disposes of all justiciable matters,” *Cunningham v. Federal National Mortgage Assoc.*, 154 A.3d

93, 2017 WL 455407, at \*1 (Del. 2016) (Table). The Fee Decision did *not* dispose of all justiciable matters and Appellants do not argue otherwise.

13. Rather, Appellants rely on what they characterize as the Superior Court's "intention that the [Fee Decision] be the court's final act." (Response ¶7). Such "intention," this Court is told, is evidenced by the enigmatic statement that "No further order of this Court is needed to close this case." (Response ¶8). As a matter of law, however, that statement cannot transmute what is clearly an interlocutory order (denial of fees) into a final judgment/order for the entire proceeding.

14. The terminology - "to close the case" - can be at most an administrative directive. It has no binding legal meaning or effect on the finality of judgments that Appellees could find in Court rules or decisional law. Therefore, no legally cognizable "intent" to dispose of all justiciable matters can properly be attributed to the Fee Decision, especially when the parties' proposed Order and Final Judgment remains pending.

15. In short, the current procedural posture is that two justiciable matters remain undisposed of: entry of Final Judgment and entry of a further order as expressly contemplated by the Stay Decision which, by its terms, keeps in place the stay "until further Order by [the Superior] Court." *Supra*, ¶3.

### III. TRANSFER TO THE COURT OF CHANCERY

16. In this Show Cause proceeding, only one issue is presented: is the Fee Decision a Final Order from which an appeal may be taken as of right? Appellants barely address this issue. Instead, they delve into a different and totally irrelevant issue—whether the Appellees’ 10 *Del.C.* §1902 transfer to the Court of Chancery was properly effectuated. That Appellants would ask this Court to consider this unrelated issue bespeaks eloquently of the infirmity of their claim that the Fee Decision was a final order. Even if no transfer had occurred, the finality of the Fee Decision would remain the sole issue.<sup>1</sup>

WHEREFORE, Appellees respectfully submit that Appellants’ appeal should be dismissed.

---

<sup>1</sup> If this Court were to consider the propriety of transfer, Appellees note: (a) the election notice was timely (within 60-days of the Fee Decision); (b) the Complaint in Count II pled Appellants’ violation of FOIA; and (c) the FOIA allegations were not time-barred because, as the Superior Court noted, the contract adopting important aspects of the Medicare Advantage plan was not signed until September 28, 2022 – three days after the Complaint was filed. *Rise Delaware*, 2022 WL 11121549, at \*4, n.10. In any event, the propriety of Appellees’ transfer election is an issue to be first adjudicated in the trial court, not this Court.

Dated: March 3, 2023

*/s/ David A. Felice*

---

David A. Felice (#4090)

Bailey & Glasser, LLP

Red Clay Center at Little Falls

2961 Centerville Road, Suite 302

Wilmington, Delaware 19808

Telephone: (302) 504-6333

*Attorneys for Appellees/Plaintiffs  
Below*

**CERTIFICATE OF SERVICE**

I David A. Felice certify that on this 3rd day of March 2023 the foregoing *Appellees' Response to Appellants' Response to Notice to Show Cause* were served via File & Serve*Xpress* on the following:

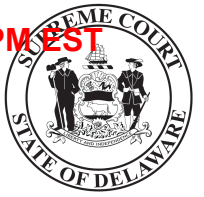
Patricia A. Davis, DAG  
Adria Martinelli, DAG  
Delaware Department of Justice  
820 N. French Street, 6<sup>th</sup> Floor  
Wilmington, Delaware 19801

Max B. Walton  
Shaun Michael Kelly  
Lisa R. Hatfield  
CONNOLLY GALLAGHER LLP  
1201 North Market Street, 20<sup>th</sup> Floor  
Wilmington, Delaware 19801

Dated: March 3, 2023

*/s/ David A. Felice*  
David A. Felice (#4090)  
Bailey & Glasser, LLP





# EXHIBIT A



**Denied**  
 /s/ Calvin Scott Dec 06, 2022

EFiled: Dec 06 2022 09:06AM EST  
 Transaction ID 68511555  
 Case No. N22C-09-526 CLS

**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

**[PROPOSED] STIPULATION AND ORDER FOR RESOLUTION OF  
REMAINING CLAIMS AND ISSUES**

WHEREAS, on October 19, 2022, by written Order, the Court granted Plaintiffs’ Motion to Stay and by written decision, stayed implementation of the Medicare Advantage Plan (hereafter the “Decision”);

WHEREAS, the Parties agree that the Decision effectively grants Plaintiffs the complete relief sought in Counts I, II and Paragraph 105 of Count III of the Complaint, and constitutes the Court’s findings of fact and conclusions of law on these claims, such that no trial is necessary for entry of judgment on these issues based upon the Court’s holdings in the Decision;

WHEREAS, by separate stipulation, the Plaintiffs have dismissed the remaining claim, as set forth in Paragraphs 102-104 of Count III (the “Communications Claim”), without prejudice;

WHEREAS, on November 14, 2022, Plaintiffs filed a petition for attorneys’ fees (“Fee Motion”);

WHEREAS, Defendants oppose the Fee Motion; and

WHEREAS, the Parties desire to set a schedule for resolution of the Fee Motion and a procedure for entering of final judgment.

NOW, THEREFORE, the parties stipulate and agree, subject to the approval of the Court, as follows:

1. Defendants shall file their brief or memorandum in opposition to Plaintiffs’ Fee Motion before November 22, 2022. Plaintiffs shall file their reply brief or memorandum on or before December 2, 2022. Defendants brief or memorandum in opposition to the Fee Motion shall be limited to 4000 words, and Plaintiffs’ reply brief or memorandum limited to 1500 words.

2. If the Court rules in Plaintiffs’ favor on the Fee Motion, Plaintiffs shall submit an affidavit(s) and redacted invoices regarding the amount of fees sought within five (5) business days of the Court’s Order deciding the motion. Defendants shall have five (5) business days thereafter to contest the fees Plaintiffs seek. Plaintiffs shall have three (3) business days to reply.

3. Upon final resolution of the Fee Motion (and, if necessary, any fee award), the Parties shall endeavor to jointly submit an order for final judgment within five (5) business days thereafter. If the parties are unable to reach agreement on a joint form of judgment, the parties shall submit separate forms of judgment and the Court will enter judgment.

4. Upon entry of final judgment, each party shall be permitted to appeal as authorized by law. Nothing in this stipulation shall be deemed a waiver of any applicable right of appeal nor shall it be deemed to preclude any arguments on appeal that were raised in the underlying proceedings.

BAILEY & GLASSER, LLP

DELAWARE DEPARTMENT OF  
JUSTICE

/s/ David A. Felice

/s/ Patricia A. Davis

David A. Felice (#4090)  
Red Clay Center at Little Falls  
2961 Centerville Road, Suite 302  
Wilmington, Delaware 19808  
Telephone: (302) 504-6333

Patricia A. Davis, DAG (#3857)  
Adria Martinelli, DAG (#4056)  
820 N. French Street, 6<sup>th</sup> Floor  
Wilmington, Delaware 19801  
Telephone: (302) 577-8400

*Counsel for Plaintiffs*

*Counsel for Defendants*

Dated: November 18, 2022

Dated: November 18, 2022

CONNOLLY GALLAGHER LLP

*/s/ Max B. Walton*

---

Max B. Walton (#3876)

Shaun Michael Kelly (#5915)

1201 North Market Street, 20<sup>th</sup> Floor

Wilmington, Delaware 19801

Telephone: (302) 757-7300

*Counsel for Defendants*

Dated: November 18, 2022

IT IS SO ORDERED on this \_\_\_\_ day of November 2022.

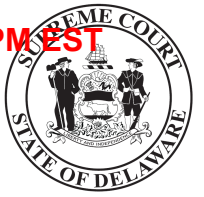
---

The Honorable Judge Calvin L. Scott Jr.

This document constitutes a ruling of the court and should be treated as such.

**Court Authorizer**  
**Comments:**

Please file a stipulation reflective of the resolution of the case. It seems that the parties are at the point of over litigating this case.



# EXHIBIT B



**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

RISEDELAWARE INC., *et al.*, )  
)  
Plaintiffs, )  
)  
v. )  
) C.A. No. N22C-09-526 CLS  
)  
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. )  
)

---

**STIPULATION AND [PROPOSED] ORDER FOR ENTRY OF FINAL JUDGMENT**

WHEREAS, Plaintiffs RiseDelaware Inc., Karen Peterson, and Thomas Penoza (collectively “Plaintiffs”) filed suit on September 25, 2022 (the “Complaint”) seeking, *inter alia*, a stay of implementation of the Delaware State Employee Benefits Committee’s (“SEBC”) decision to transition the State of Delaware retirees’ healthcare benefits plan to a Medicare Advantage Plan (the “Medicare Advantage Plan”);

WHEREAS, on October 19, 2022, by written Order, the Court granted Plaintiffs’ Motion to Stay and by written decision, stayed implementation of the Medicare Advantage Plan (hereafter the “Decision”);



WHEREAS, by separate stipulation, the Plaintiffs have dismissed without prejudice Paragraphs 102-104 of Count III (the “Communications Claim”);

WHEREAS, the Parties agree that the Decision effectively grants Plaintiffs the complete relief sought in Counts I, II and the remaining paragraphs of Count III of the Complaint, and constitutes the Court’s findings of fact and conclusions of law on these claims, such that no trial is necessary for entry of judgment on these issues based upon the Court’s holdings in the Decision;

WHEREAS, on November 14, 2022, Plaintiffs filed a petition for attorneys’ fees (“Fee Petition”); Defendants filed their opposition to the Fee Petition on November 22, 2022; and Plaintiffs filed their reply on December 2, 2022.

WHEREAS, on December 2, 2022, Plaintiffs filed a motion to amend their Complaint (the “Motion to Amend”), and Defendants filed their opposition to the Motion to Amend on December 7, 2022; and

WHEREAS, on December 6, 2022, the Court directed the Parties to file a stipulation reflective of the resolution of the above-captioned action (the “Action”);

NOW, THEREFORE, the parties stipulate and agree, subject to the approval of the Court, as follows:

1. With the exception of the Court’s rulings on the Motion to Amend and Fee Petition, the Action is ripe for entry of final judgment.

2. Upon rendering its rulings on the Motion to Amend and Fee Petition, the Court may enter the form of Order, attached hereto as Exhibit 1, as its Order and Final Judgment, fully disposing of all matters in the Action.

3. Upon entry of the attached form of Order, each party shall be permitted to appeal as authorized by law. Nothing in this stipulation shall be deemed a waiver of any applicable right of appeal; nor shall it be deemed to preclude any arguments on appeal that were raised in the underlying proceedings.

BAILEY & GLASSER, LLP

/s/ David A. Felice  
David A. Felice (#4090)  
Red Clay Center at Little Falls  
2961 Centerville Road, Suite 302  
Wilmington, Delaware 19808  
Telephone: (302) 504-6333  
*Counsel for Plaintiffs*

Dated: December 16, 2022

DELAWARE DEPARTMENT OF JUSTICE

/s/ Patricia A. Davis  
Patricia A. Davis, DAG (#3857)  
Adria Martinelli, DAG (#4056)  
820 N. French Street, 6<sup>th</sup> Floor  
Wilmington, Delaware 19801  
Telephone: (302) 577-8400  
*Counsel for Defendants*

Dated: December 16, 2022

CONNOLLY GALLAGHER LLP

/s/ Shaun Michael Kelly  
Max B. Walton (#3876)  
Shaun Michael Kelly (#5915)  
1201 North Market Street, 20<sup>th</sup> Floor  
Wilmington, Delaware 19801  
Telephone: (302) 757-7300  
*Counsel for Defendants*

Dated: December 16, 2022

IT IS SO ORDERED on this \_\_\_\_ day of December 2022.

---

The Honorable Judge Calvin L. Scott Jr.



# EXHIBIT 1

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

RISEDELAWARE INC., *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 v. ) C.A. No. N22C-09-526 CLS  
 )  
 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. )  
 )  
 \_\_\_\_\_ )

**[PROPOSED] ORDER AND FINAL JUDGMENT**

WHEREAS, Plaintiffs RiseDelaware Inc., Karen Peterson, and Thomas Penoza (collectively “Plaintiffs”) filed suit on September 25, 2022 (the “Complaint”) seeking, *inter alia*, a stay of implementation of the Delaware State Employee Benefits Committee’s (“SEBC”) decision to transition the State of Delaware retirees’ healthcare benefits plan to a Medicare Advantage Plan (the “Medicare Advantage Plan”);

WHEREAS, on October 19, 2022, by written Order, the Court granted Plaintiffs’ Motion to Stay and by written decision, stayed implementation of the Medicare Advantage Plan (hereinafter the “Decision”);

WHEREAS, the Decision is attached hereto as Exhibit A and is incorporated herein by reference;

WHEREAS, the Decision holds that the SEBC “enacted a policy requiring retirees to move from their State-subsidized Medicare Plan to Medicare Advantage plan or stay with traditional Medicare and give up their State-subsidized benefits” and that “such policy change is a regulation under the APA”;

WHEREAS, the Decision further holds that (1) procedural requirements were not followed in adoption and implementation of the Regulation, and (2) Defendants’ conduct violated the APA;

WHEREAS, the Decision issued the stay requested by Plaintiffs pursuant to 29 Del. C. § 10144;

WHEREAS, the parties stipulated to dismissal without prejudice of paragraphs 102-104 of Count III, which was so ordered by the Court;

WHEREAS, on November 14, 2022, Plaintiffs filed a petition for attorneys’ fees (“Fee Petition”); Defendants filed their opposition to the Fee Petition November 22, 2022; and Plaintiffs filed their reply on December 2, 2022;

WHEREAS, on December 2, 2022, Plaintiffs filed a motion to amend their Complaint (the “Motion to Amend”), and Defendants filed their opposition to the Motion to Amend on December 7, 2022;

**NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND**

**DECREED** this \_\_\_\_\_ day of \_\_\_\_\_ 2022, as follows:

1. The Decision constitutes the findings of fact and conclusions of law on Counts I and II and the remaining paragraph(s) of Count III of Plaintiffs' Complaint.

2. For the reasons outlined in the Decision, final judgment is entered against Defendants and in favor of Plaintiffs on Counts I, II and the remaining paragraph(s) of Count III.

3. Judgment is granted declaring that:

a. The SEBC's policy change requiring retirees to move from their State-subsidized Medicare Plan to a Medicare Advantage plan or stay with traditional Medicare and give up their State-subsidized benefits is a regulation under the APA ("the Regulation").

b. The procedural requirements were not followed in adoption and implementation of the Regulation, and Defendants' conduct violated the APA.

c. The Regulation is unlawful and void.

d. Defendants violated 29 Del. C. §§10115-10118 by failing to follow the procedures of those provisions.

4. The stay entered by the Court's Decision pursuant to 29 Del. C. § 10144 of the APA, requiring "the defendants to ensure that healthcare insurance and

benefits available to State retirees prior to October 3, 2022, or in which they were enrolled prior to that time, remain in full force and effect,” shall remain in place for the 2023 policy year.

5. Upon consideration of the Parties’ submissions, and for good cause shown, the **Motion to Amend** is hereby [**GRANTED / DENIED**].

6. Upon consideration of the Parties’ submissions, and for the reasons set forth by the Court, the **Fee Petition** is hereby [**GRANTED / DENIED**].

a. [Each party shall bear its own fees and costs.] **OR**

b. [Plaintiffs’ counsel are awarded attorneys’ fees in the amount of \_\_\_\_\_.]

7. Upon entry of this Order, there is no just reason to delay the entry of this Judgment as a Final Judgment in the Action, and the Prothonotary is expressly directed to immediately enter this Final Judgment in the Action.

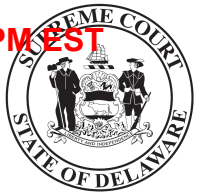
8. Each party shall be permitted to appeal as authorized by law.

**IT IS SO ORDERED** on this \_\_\_ day of December 2022.

---

The Honorable Judge Calvin L. Scott Jr.





IN THE SUPREME COURT OF THE STATE OF DELAWARE

SECRETARY CLAIRE DEMATTEIS in	:	
her official capacity as Secretary of the	:	
Delaware Department of Human	:	
Resources and Co-Chair of the State	:	No. 57, 2023
Employee Benefits Committee,	:	
DIRECTOR DERRON CADE IN HIS	:	
OFFICIAL CAPACITY as Director of the	:	Court Below: Superior
Delaware Office of Management and	:	Court of the State of
Budget and Co-Chair of the State	:	Delaware
Employee Benefits Committee,	:	
DELAWARE DEPARTMENT OF	:	C.A. No. N22C-09-526 CLS
HUMAN RESOURCES, DELAWARE	:	
STATE EMPLOYEE BENEFITS	:	
COMMITTEE, and DELAWARE	:	
DIVISION OF STATEWIDE BENEFITS	:	
	:	
Defendants Below, Appellants	:	
	:	
v.	:	
	:	
RISEDELAWARE INC., KAREN	:	
PETERSON, AND THOMAS PENOZA	:	
	:	
Plaintiffs Below, Appellees.	:	

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

1. The Appellees’ Response Appellants’ Response to Notice to Show Cause (“Response”) complies with the typeface requirement of Delaware Supreme Court Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word for Office 365.

2. The Response complies with the type-volume limitation of Delaware Supreme Court Rule 30(d) because it contains 1,196 words, which were counted by Microsoft Word for Office 365.

Dated: March 3, 2023

/s/ David A. Felice

David A. Felice (#4090)

Bailey & Glasser, LLP

Red Clay Center at Little Falls

2961 Centerville Road, Suite 302

Wilmington, Delaware 19808

Telephone: (302) 504-6333

*Attorneys for Appellees/Plaintiffs  
Below*