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Case Number 178,2023D

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 Employee Benefits Committee, DIRECTOR CERRON CADE in his official capacity as Director of the Delaware Office of Management and Budget and Co-Chair of the State Employee Benefits Committee, DELAWARE DEPARTMENT OF HUMAN RESOURCES, DELAWARE STATE EMPLOYEE BENEFITS COMMITTEE, and DELAWARE DIVISION OF STATEWIDE BENEFITS Defendants Below/ Appellants/Cross Appellees, v. RISEDELAWARE INC., KAREN PETERSON, and THOMAS PENOZA, Plaintiffs Below/ Appellees/Cross Appellants.	No. 178,2023D On Appeal from the Superior Court of the State of Delaware C.A. No. N22C-09-526 CLS

CROSS-APPELLANTS' REPLY BRIEF ON CROSS APPEAL

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INTRODUCTION

One year has elapsed since the Superior Court issued its Stay Order stopping the Defendant State Officials' furtive effort to deprive Retirees' of their long-standing Medicare Supplement healthcare benefit (Medicfill) and replace it with a Medicare Advantage plan to the extreme disadvantage of Retirees.

This Court should be aware that, during that intervening year, significant events have occurred outside the courtroom. As mentioned in Plaintiffs' Opening Brief (p. 4), the Delaware General Assembly established the RHBAS, an independent advisory committee free from the dominion and control of the executive branch, to recommend appropriate Retiree healthcare benefits. After some seven months of work and seventeen true public meetings with extensive input from Retirees and employees, the RHBAS recommended what amounted to an undoing of the SEBC's decision to switch Retirees to Medicare Advantage. On October 2, 2023, the SEBC followed that recommendation. The SEBC took Medicare Advantage off the table and voted to issue, for the upcoming healthcare benefits contract cycle, a Request for Proposals (RFP) limited to bids for administration of "one self-funded employer-sponsored Medicare Supplement plan that duplicates the current [Medicfill] plan design without deviation."

This epic vote was a stunning public rebuke to the Defendant State Officials who had led the effort to foist Medicare Advantage on Retirees. It was also a real-

world legislatively-born affirmation of the correctness of the Superior Court's stay of the Medicare Advantage plan. Without that stay, the legislative impetus through the RHBAS would not have occurred and Retirees would now either be on Medicare Advantage or paying on their own for a Medicare Supplement plan. In the meantime, the State and Highmark on September 7, 2023 terminated their Medicare Advantage contract.

Given these developments, the Defendants might have been expected to drop their appeal. They did not. Instead, one day after that critical SEBC action, the Defendants on October 3, 2023 filed early their Reply Brief on their appeal and Answering Brief in opposition to Plaintiffs' cross appeal for attorneys' fees.

In that brief, in an effort to avoid the consequences of their procedurally-defective appeal, Defendants now invoke the "interests of justice" as a basis for this Court nonetheless to consider their arguments. True justice, however, would require the State to pay the significant, still-unpaid fees owed to Plaintiffs' Superior Court counsel who worked so assiduously to achieve the victory and common benefit that Retirees are able now to enjoy. That outcome is all the more warranted because the victory was achieved despite the State Officials' multifront effort to thwart litigation through a campaign of disinformation and their extra-judicial execution of the Highmark Medicare Advantage contract during the litigation.

With this context, Plaintiffs respond to Defendants' Answering Brief.

ARGUMENT

I. DEFENDANTS' PROCEDURAL PRECLUSION ARGUMENTS TO FORECLOSE CONSIDERATION OF PLAINTIFFS' CROSS APPEAL SHOULD BE REJECTED

Defendants advance various procedural preclusion arguments in an attempt to foreclose or limit this Court's consideration of the merits of Plaintiffs' cross appeal. Defendants claim that: (1) the Superior Court lacked adjudicative jurisdiction (*see, e.g.*, DAB 1, 6–7, 19, 26–27, 32 n.63)[1]; (2) the Superior Court "never made factual determinations below, and certainly did not make findings" (DAB 3; *see also* DAB 41); (3) Plaintiffs should have pled a request for attorneys' fees in the Complaint (DAB 33–34); and (4) even if this Court entirely rejects the foregoing arguments, it should nonetheless overturn the Stay Order and decline to entertain Plaintiffs' cross appeal in the interests of justice. *See* Supr. Ct. R. 8, DAB 27, 32 n.63 ("The Court need not reach cross-appeal on fees if it overturns the Stay Order, as [Plaintiffs] will no longer be deemed a successful party entitled to seek any fee award"). Defendants' arguments are devoid of merit.

[1] Consistent with Defendants' nomenclature, the parties' appellate briefs are cited as: DOB (Defendants' Opening Brief); PAB (Plaintiffs' Answering Brief on appeal and Opening Brief on cross appeal); and DAB (Defendants' Reply Brief on appeal and Answering Brief on cross appeal). Pages of the appendices are cited in the form: A001 (Defendants' opening appendix); B001 (Plaintiffs' answering/opening appendix); and AR001 (Defendants' reply/answering appendix).

A. The Superior Court Had Adjudicative Jurisdiction

Defendants repeatedly now claim, without citing authority, that the Superior Court lacked (subject matter) jurisdiction to adjudicate this case, including to make the findings on which Plaintiffs' cross appeal is predicated. *See, e.g.*, DAB 1, 6–7, 19, 26–27, 32 n.63). To put the presentation of Defendants' featured argument in context, Plaintiffs note that Defendants' first brief on appeal made a fly-by reference to jurisdiction. DOB 24 ("Stated simply, if the APA does not apply, the Superior Court lacked authority and jurisdiction to issue a stay upon a finding of irreparable harm."). But their Summary of Argument did not identify lack of jurisdiction as an argument they were advancing on this appeal. *See* DOB 4. And it is not facially apparent where, at Defendants' alleged cites (*see* DAB 19), they might have made their argument of lack of jurisdiction in the stay proceedings in the Superior Court. Nonetheless, as their argument sounds in subject matter jurisdiction which this Court may feel compelled to consider, Plaintiffs respectfully respond.

The Superior Court allegedly lacked jurisdiction because, according to Defendants, the SEBC's switch to Medicare Advantage was not subject to the APA. DAB 6. Defendants' form of jurisdictional argument has been aptly called "drive-by"—i.e. one where, without rigorous analysis of the actual adjudicative provisions of a statute, a legal rule (such as a statutory violation) is argued to be jurisdictional.

See "THE DEMISE OF 'DRIVE-BY JURISDICTIONAL RULINGS,'" Wasserman, Howard M, Vol. 105, No. 2 Nw. U. L. Rev., 947–48 (2011).

Defendants' drive-by argument, which borders on the frivolous, should be rejected out of hand. "However merits are defined, the question of who should win under substantive law remains distinct from the court's adjudicative authority. A court's adjudicative jurisdiction should not depend on the ultimate outcome of the case." *Id.* at 950. As stated by the U.S. Supreme Court in *Morrison v. National Australian Bank Ltd*. 561 U.S. 247, 254 (2010): "[T]o ask what conduct [the statute] reaches is to ask what conduct [the statute] prohibits, which is a merits question." Subject matter jurisdiction "presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Id.*

In this case, a statute expressly granted the Superior Court subject matter jurisdiction. Section 10141(a) of Title 29 provides: "Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief." The "Court" is defined in § 10102(4) as the Superior Court, and it was empowered by the Delaware General Assembly to exercise its jurisdiction to issue the Stay Order. 29 *Del. C*. § 10144. Defendants' drive-by jurisdiction argument is baseless.

B. The Superior Court Made Factual Findings That Control This Appeal

Based on the Superior Court's observation that the facts found in the Stay Order were not "final" because there had been no trial, Defendants ask this Court to conclude that the record contains no underlying facts enabling an adjudication of Plaintiffs' cross appeal. *See* DAB 3, 41. How Defendants can reconcile that position with their Opening Brief's reliance on "facts" (POB 5–11) is nowhere explained. Nor could it be. In the trial court, the parties agreed that the Stay Order "constitute[d] the Court's findings of fact and conclusions of law," and "effectively grant[ed] Plaintiffs the complete relief sought" in Counts I and II. B280, 286 ¶¶ 1–2. The parties further agreed that, because of their stipulation, "no trial is necessary…." B280, *see also* B258.

Defendants would now alter and obfuscate the parties' actual agreement and its legal effect by claiming that "both parties agreed that final judgment could be granted based upon the *findings of law* in the preliminary hearing." DAB 22 (italics added), citing B280. (Defendants similarly altered the wording of the parties' agreement when they presented to the Superior Court their unilateral and unagreed-upon form of order on April 21, 2023—omitting from their requested order "findings of fact" (B303 ¶ 1).) But this Court previously observed, in dismissing Defendants' defective appeal on April 3, 2023, that the trial Court's disavowal of factual findings

was made "despite the parties' agreement to the contrary as recited in the stipulation and proposed order for entry of final judgment [B286 ¶¶ 1–2]." B299.

Moreover, while Defendants (DAB 22, 28–29) cite to the provision in the parties' stipulation that, "Nothing in this stipulation shall be deemed … to preclude any arguments on appeal that were raised in the underlying proceedings" (B281 ¶ 3), that provision cannot have preserved any right of Defendants to submit additional or different evidence relevant to Counts I or II or to challenge the Superior Court's findings of fact. Defendants did not appear for trial on November 28, 2022 or ask that the trial be rescheduled if the Court did not agree to cancel the trial as presented in the parties' first-filed Stipulation signed on November 7, 2022 ("[t]he trial, currently scheduled for November 28, 2022, is hereby canceled." B259).

Defendants' decision to waive a trial was a voluntary and unforced strategic choice—to avoid an interlocutory appeal and advance to an appeal from a final judgment without the risk or cost of further proceedings on the merits. *See* B250, 254, 259. Defendants thereby avoided, *inter alia*, having an unwelcome spotlight during cross examination of State Officials on the witness stand about their misconduct. Having made that strategic choice, Defendants should not be heard to argue that the absence of a trial precludes this Court from considering the factual underpinnings of the Stay Order for purposes of Plaintiffs' cross appeal (or of Defendants' cross appeal, if the Court decides to reach the merits of the Stay Order).

C. Plaintiffs Did Not Waive Their Right To Seek An Award Of Attorneys' Fees

Defendants' next claim is that Plaintiffs waived their right to seek fees because their initial Complaint did not plead a request for fees (DAB 33–34). That argument is all form and no substance. Early on, Defendants had actual notice that Plaintiffs were seeking fees. B250. Nor have Defendants suffered any prejudice given their agreement to, and the parties' observance of, a prompt schedule for briefing fees on a paper record. B260.

Not until the midst of fee briefing did Defendants raise a pleading issue, but even then based only on alleged improper notice without claim of prejudice. *See* B267, A116–17. In particular, Defendants filed their fee opposition brief with lengthy affidavits (A103–343) without complaint of prejudice. Notably, Defendants' opposition did not claim they would have proceeded with a trial so as to create a different record had the Complaint requested fees. The actual record, objectively and fairly viewed, leaves no room for any claim of waiver. *See Vaughn v. Rispoli*, 804 A.2d 1067 (TABLE), 2002 WL 1874909, *2 (Del. Aug. 12, 2002) (no error allowing defense identified in pretrial order). Defendants' cited cases at DAB 33, n.66, are not to the contrary. *See, e.g.*, *Kramer v. Am. Pac. Corp.*, 1998 WL 442766, at *1 (Del. Super. July 28, 1998) (request for attorneys' fees first made while final judgment was on appeal); *Abbott v. Gordon*, 2008 WL 821522 (Del. Super. Mar. 27, 2008), aff'd, 957 A.2d 1(Del. 2008) (no request made in any form).

Moreover, Defendants' pleading argument should be regarded as moot. Plaintiffs filed a timely Motion to Amend their Complaint to plead attorneys' fees at a stage when no scheduling order had set any deadline for pleading amendments solely to moot Defendants' pleading argument. B444–48 (citing cases on the liberal amendment standard).[2]

The Superior Court declined to consider the Motion to Amend on the merits, on the basis that, "Seemingly, this case ended after the Court entered its [Stay Order]" so "there was no need to amend the complaint." B450. If this Court concludes otherwise—i.e., that Plaintiffs' Complaint should have pleaded a request for attorneys' fees—then it should reverse the trial court's denial of Plaintiffs' Motion to Amend as a clear error of law. *See* PAB 8, 447-48.

D. Defendants' Invocation Of "Interests Of Justice" Lacks Legal And Equitable Merit

Lastly, Defendants seek refuge in the "interests of justice" to circumvent the consequences of their strategic litigation choices. Defendants begin by chastising Plaintiffs—wrongly claiming (DAB 28) that Plaintiffs "pivoted" when they did not agree that the Superior Court's February 8, 2023 order (which did not enter the

[2] Defendants did in opposition to the Motion to Amend express alleged surprise about the amount of incurred fees (AR033), although the amount should hardly surprise anyone familiar with litigation expenses and given how much work Defendants' conduct had created for the litigation. The public "open checkbook" suggests that Defendants have spent the same order of magnitude on outside fees.

parties' proposed form of final judgment) was a final order. It is Defendants, not Plaintiffs, who pivoted from the parties' agreement.

Next, with a misshapen version of what occurred, Defendants complain that Plaintiffs have "capitalized" on the procedural choices that Defendants made (DAB 28–29). But Defendants cannot credibly claim that Plaintiffs have done anything improper, or that Defendants are an unsophisticated party litigant of whom Plaintiffs took unfair advantage.

Defendants' cases which they cite as authority for applying the "interests of justice" standard as a basis for this Court to review the interlocutory Stay Order (DAB 29–30) are inapposite. In those cases, the adjudicated non-reviewability of the interlocutory orders at issue was the product of circumstances beyond the appellant's control. *See In re Appeal of Sun Life Assurance Co. of Canada*, 249 A.3d 131 (Table), 2021 WL 964894, at *1 (Del. Mar. 15, 2021); *Solar Reserve CSP Hldgs. LLC v. Tonopah Solar Energy, LLC*, 258 A.3d 806, 2021 WL 3478651 at *1 (Del. Aug. 9, 2021). Here, by contrast, Defendants' predicament was entirely self-inflicted.

To put the Defendants' "interests of justice" argument in its proper context: the Defendants did not contest the form of stay provisions that Plaintiffs proposed (B092), which the Court below then adopted (A101). Defendants chose not to seek a trial, as noted above, even when the Court did not sign the parties' first stipulation filed before the scheduled trial. And they chose not to move for entry of a "further

Order" (*see* A101) that would have lifted the stay. In a capstone of procedural complacency, the Defendants did not argue on their appeal that the Final Order, necessarily the sole basis for their appeal, was in and of itself erroneous. Indeed, only now in their reply brief on their appeal do they drop a limited footnote to address the Final Order to the extent they say that "there was never any settlement between the parties" (DAB 22 n.39).[3] But Defendants have options—the same ones Plaintiffs had, albeit ones the Defendants tried peremptorily to cut off—to seek legislative help or file an independent action.

Defendants' new request for justice from this Court is unjustified, both legally and equitably, and should be denied out of hand.

[3] In *Robinson v. Meding*, 163 A.2d 272, 275 (Del. 1960), newly cited by Defendants (DAB 20, n.34), this Court observed that, "Generally, … an appeal from a final judgment brings up for review all interlocutory or intermediate orders involving the merits and *necessarily affecting the Final Order* which were made prior to its entry" (italics added). "Generally" is not "always," and the Final Order here is not tethered in any way to the actual determinations made in the Stay Order. Therefore, the Final Order is not "necessarily affect[ed]" by the Stay Order within the purview of *Robinson v. Meding*, and Defendants do not contend otherwise. 10 *Del. C.* § 144, cited to but not quoted by Defendants, by its terms has no relevance to the *Robinson* holding or this case.

II. THE SUPERIOR COURT ERRED IN DENYING PLAINTIFFS' PETITION FOR ATTORNEYS' FEES

A. This Lawsuit More Than Qualifies For An Award Of Attorneys' Fees Because Of The Common Benefit It Achieved

Defendants begin their opposition to the merits of Plaintiffs' cross appeal from the Final Order's denial of fees by characterizing Plaintiffs' lawsuit as a "public interest suit" seeking a "social benefit" brought by a "private attorney general" DAB 35–39. As such, they assert, it cannot qualify for a fee award. *Id.*

As a threshold matter, this lawsuit is *not* public interest litigation—it was not brought on behalf of the Delaware citizenry at large. By contrast, in *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240, 241 (1975), relied on by Defendants (DAB 38–39), respondent Wilderness Society acted to vindicate important statutory rights of all citizens by filing suit "in an attempt to prevent the issuance of permits by the Secretary of the Interior which were required for the construction of the trans-Alaska oil pipeline." *Id.* at 245. The group on whose behalf the present action was brought, albeit large, is more narrowly focused.

Here, a distinct and identifiable group of people were benefited by this lawsuit—approximately 30,000 current and an unknown number of future retirees of the State of Delaware with a cognizable legal and economic interest in their State-funded healthcare benefit during retirement. Although this lawsuit has successfully stopped the State from forcing Retirees to Medicare Advantage, it does nothing to

prevent Medicare Advantage from being foisted on unsuspecting retirees of other Delaware employers. As a legal matter, however, it is not necessary for this litigation to have been brought as a class action to qualify for a fee award, as Defendants suggest (DAB 11). This Court's jurisprudence makes that point indisputably clear. *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1163 (Del. 1989).

Nor is it mere "opinion," as Defendants baldly assert (DAB 7), that seniors on Medicare Advantage receive worse care. The evidentiary record on the Motion to Stay is replete with uncontested evidence establishing that reliable fact. *See* B106–12 including cites to B008–12 ¶¶ 22–25. For example, an AMA survey found that 93% of physicians reported that prior authorization requirements, which run rampant in Medicare Advantage plans (Highmark's plan having some 2,030 in contrast to Medicfill which has virtually none (B394; *see also* B108)) had caused delays in necessary treatment, with 34% reporting "serious adverse events" requiring medical intervention. B009 ¶ 23. So, too, Medicare Advantage plans limit access to doctors and hospitals, or make it more expensive. B010–12 ¶¶ 25–27. And lastly, the affidavits submitted by Plaintiffs detailed specific concerns with Retirees receiving worse care if the Court did not stop the Highmark Medicare Advantage plan. B136–84 and *see* PAB 24.

Nor is it mere "opinion" that the Medicare Advantage scheme benefits insurers and employers at the expense of seniors. *Cf.* DAB 7. Defendants do not and

cannot dispute that Medicare Advantage plans are funded from the Medicare Trust Fund in preset ("capitated") amounts per retiree (*see* PAB 10). And that on the expense side of their ledgers, the insurers determine what they will pay to which doctors and hospitals and whether they will pay at all based on prior authorizations of patients' procedures and treatments (*see id*). It is this very structure that incentivizes Medicare Advantage insurers to use their power to delay and deny care (and to limit access to doctors) to maintain and increase their profits. *See* OIG report (p. 2 of pdf) cited at B010 ¶ 24.

That employers, including the State of Delaware, benefit from off-loading retirees to Medicare Advantage is evidenced by the Highmark-Delaware contract ("Contract") itself.[4] The Contract called for Delaware to pay zero dollars in premiums on behalf of Retirees to Highmark for three years, and next to nothing during the two allowable one-year contract extensions ($5, then $10, per month per member). Contract p. 3. Incredibly, and in addition, the Delaware treasury actually stood to share in Highmark's profits from the Contract. *Id.* pp. 3–4 ("gain share").

[4] The Contract was of record on the Motion to Stay (B103 n.3) by its cited link: https://dhr.delaware.gov/benefits/medicare/documents/ma-delaware-contract.pdf?ver=1010.

That contract has now been terminated as of September 7, 2023: https://dhr.delaware.gov/benefits/medicare/documents/ma-contract-termination.pdf

These profits for Highmark's bottom line and income for the State's coffers would have come at the expense of Retirees who paid into the federal Medicare trust fund through all their working years. Retirees on Medicare Advantage unquestionably have diminished access to doctors and more burdensome red tape with prior authorizations that delay and deny care—right at the fragile stage of life when they need the most care but are least able to cope with red tape. B008–12.

The record below also establishes the true financial exposure to Retirees of significant additional hidden provider and out-of-pocket expenses. *See* B110–11 and cites therein. Such exposure resulting from the Highmark Medicare Advantage plan would have taken the form of co-pays, co-insurance, deductibles and cost-sharing, not present in Medicfill. B179 ¶ 179 (Peterson 1st Aff.). Those financial burdens were potentially devastating. *See* B111–12.

Defendants assert, without record support, including testimony from any actual Retiree, that "many retirees are likely to disagree" with Plaintiffs because the monthly premiums "for some" would have been reduced (DAB 7).[5] Yet Defendants omit to address how these same hypothetical "many" Retirees would react if they were told by Defendants (which has never happened) about the tradeoff—the hidden

[5] Defendants omit that only those Retirees who retired with fewer than 20 years of service would have seen a noticeable reduction in premium. By statute, all those who retired with 20 or more years of service: (a) before 2012 pay no premium for Medicfill; and (b) after 2012, only 5% of the premium. 29 *Del. C.* § 5202(b).

costs, significant delays and denials of care from prior authorizations, and the restrictions on access to doctors and hospitals accompanying Highmark's Medicare Advantage Plan. Indeed, and as the Superior Court found, even the SEBC had not been informed of such concerns when State Officials led that agency to jettison Medicfill and replace it with Medicare Advantage. *Decision* at *4, A098.

Defendants further argue that the common benefit doctrine "may only be invoked (1) in a taxpayer suit (2) where plaintiff confers a quantifiable monetary benefit." DAB 2. Defendants fail, however, to cite or address the authority cited in Plaintiff's Opening Brief (PAB 49–50), including *Tandycrafts*, 562 A.2d 1162, establishing that a quantifiable monetary benefit is not required for a fee award. And contrary to Defendants' misguided claim, that the common benefit doctrine requires a taxpayer suit, Delaware jurisprudence is replete with non-taxpayer cases where fees were awarded. *See, e.g.*, cases cited at B433.[6]

B. The State Officials' Egregious Misconduct Justifies A Significant Fee Award

As noted in their Opening Brief, the Plaintiffs rest their request for an attorneys' fee award based on the common benefit doctrine exception to the so-called

[6] Defendants reference the pending argument *In re Public Schools Litg.*, C.A. No, 138, 2023 (Del.), as involving issues regarding the common benefit doctrine similar to those in the present case. DAB 34 n.34. It appears from the parties' briefing that, while that case too involves common benefit and could support a ruling here, there are also certain factual differences. Plaintiffs are not in a position to opine or predict what impact, if any, that case might have.

"American Rule." PAB 50. That said, Plaintiffs also contend that, because of the egregiousness of the State Officials' misconduct, Plaintiffs' recovery in full of the fees they incurred (and are currently unable to pay counsel) is warranted. *Id.*

Absent from Defendants' Answering Brief is any recognition or acknowledgement of the highly unfair conduct that State Officials carried out against Retirees to whom they were tasked with serving (*see* PAB 50). Defendants attempt to portray what actually happened as a sterile, intellectual difference of view over whether the SEBC's attempted switch of the Retirees' benefit from Medicfill to Medicare Advantage required following the APA. DAB 41 ("The litigation centered on differing interpretations of whether the APA required certain actions under the circumstances.") Nothing could be more misleading or further from the factual truth established by the record.

Contrary to Defendants' suggestion (*see* DAB 40–41), the misconduct relied on as supporting fees here is not "merely" the Stay Order's ruling in favor of Plaintiffs on their causes of action that Defendants violated the APA. What the State Officials did went far beyond simply joining with Plaintiffs in an intellectual debate to be resolved in a courtroom. By withholding material information and affirmatively waging a campaign of misinformation, the State Officials attempted to poison and foreclose any avenues that Plaintiffs might pursue to obtain relief, whether from the Delaware General Assembly or the Superior Court.

Plaintiffs' Opening Brief on cross appeal (PAB 15–22) set forth the unassailable facts found in the Stay Order or presented by affidavit in the fee briefing,[7] including Defendants' own documents constituting admissions, that establish the reprehensible conduct by defendant State Officials. To avoid burdening this reply brief, Plaintiffs respectfully refer this Court to that portion of their Opening Brief.

The significance of what the State Officials did to block and thwart Retirees' efforts to seek judicial redress cannot be overstated. Tellingly, beyond claiming that "standard processes" were followed when State Officials failed to reach out to Retirees until their June 1, 2022 letter and beyond referencing subsequent incomplete and misleading voluminous communications (DAB 9–10), Defendants make no effort to defend the State Officials' inaccurate and misleading statements to Retirees, legislators and the public—or their extra-judicial execution of the Medicare Advantage contract despite their knowledge that the Complaint seeking to halt that execution had been filed (B441–43). *See* DAB 10–11. Even worse, the State Officials used their own extrajudicially executed contract as leverage to persuade

[7] As noted above in Argument I.C, by their stipulation and mutual proceeding forward with briefing (B260 ¶ 5), the parties agreed to and did present the fee motion for decision on the papers. Both parties submitted affidavits without objection from the other. *See* B383–426, A127–343.

legislators that the Contract was a *fait accompli* beyond any legislative or judicial power to redress. *See* B402–03.

Of similar disingenuity is Defendants' assertion that they followed a "public process" with required public notice when adopting Medicare Advantage (DAB 7–8). In fact, it is a found and indisputable fact that the agenda for the February 28, 2022 meeting gave no hint that something called Medicare Advantage would be voted on, let alone that it would have serious ramifications for Retirees. *See* PAB 12–13, *Decision* at *1. Defendants' bare assertion—that there is no judicial finding that the SEBC's agenda violated FOIA—is not made true by Defendants' repetition. Their agreement that the Stay Order's determinations constituted the findings of fact and conclusions of law with judgment required for Plaintiffs, expressly applied to Count II. B286 ¶¶ 1–2. The underlying basis for Count II is the claim that Defendants violated FOIA because the agenda for the February 28, 2022 meeting was defective. *See* Complaint ¶¶ 96, 98 B035–36. Defendants should not be heard to argue that no FOIA violation was alleged or found when all parties understood and agreed a violation had indeed been found, based on the findings of the Stay Order and the allegations of the Complaint.

Defendants' hailing of State Officials' communications—five additional letters following the June 1, 2022 letter, eighteen educational sessions in August 2022 "across three counties" and subsequent presentations at six town hall meetings

(DAB 10)—only underscores the extent of State Officials' misconduct. Nothing in those communications disclosed that the new and old plans were "substantially different" as found by the Stay Order (*Decision* at *2, A094) or otherwise corrected the misrepresentations in the June 1, 2022 letter. Nor do Defendants claim otherwise. To the contrary, Defendants' Answering Brief admits that their presentations only "explained that *some* services would need prior authorization." DAB 10 (italics added). But as the Superior Court trenchantly put it, "certainly a reasonable person could not confuse '*some*' services with over 1,000 services Highmark requires prior authorizations for." *Decision* at *4, A099 (italics added); *see also* PAB 17.

It is not grounds for ignoring State Officials' conduct that it occurred before litigation—for the very purpose of thwarting the commencement of litigation (misrepresentations to Retirees and legislators)—or outside the litigation (execution of the contract). *Cf.* DAB 40 (Defendants assert that, "bad faith must relate to those actions taken either in the 'commencement of' or 'during' litigation."). As noted in Plaintiffs' opening brief and ignored by Defendants, this Court is not limited to consideration of conduct in the litigation itself. It may consider, for example, the State Officials' impeding of the exercise of Plaintiffs' rights, *see Scion Breckenridge v. ASB Allegiance,* 68 A.3d 665, 687 (Del. 2013), as well as State Officials' execution of the Contract that the Complaint had asked to stop. *See Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084, 1093 (Del. 2006)

(defendant's destruction of historic homes during the litigation meant to protect the homes warranted fee-shifting award).

For the foregoing reasons, the Superior Court's Final Order of May 22, 2023 (B330–37), to the extent it denies Plaintiffs' application for an award of attorneys' fees, should be reversed.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' Opening Brief, this Court should reach the ruling of the Superior Court's Final Order of May 22, 2023 (B330–37) to the extent it denies Plaintiffs' application for an award of attorneys' fees, and should reverse that ruling and award Plaintiffs their reasonable attorneys' fees in recognition of the common benefit achieved and the role of Defendants in vexatiously increasing the fees that Plaintiffs had to incur.

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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 Employee Benefits Committee, DIRECTOR CERRON CADE In his official capacity as Director of the Delaware Office of Management and Budget and Co-Chair of the State Employee Benefits Committee, DELAWARE DEPARTMENT OF HUMAN RESOURCES, DELAWARE STATE EMPLOYEE BENEFITS COMMITTEE and DIVISION OF STATEWIDE BENEFITS Defendants Below, Appellants/Cross-Appellees, v. RISEDELAWARE INC., KAREN PETERSON, and THOMAS PENOZA Plaintiffs Below, Appellees/Cross-Appellants.	No. 178, 2023 On Appeal from the Superior Court of the State of Delaware C.A. No. N22C-09-526 CLS

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. Plaintiffs Below, Appellees/Cross-Appellants' Reply Brief ("Reply") complies with the typeface requirement of Supreme Court Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. The Reply complies with the type-volume limitation of Supreme Court Rule 14(d)(i) because it contains 4,969 words, which were counted by Microsoft Word 2016.

Date: October 19, 2023

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CERTIFICATE OF SERVICE

I, Sidney S. Liebesman, Esq., hereby certify that on this 19th day of October, 2023, the foregoing Plaintiffs Below, Appellees/Cross-Appellants' Reply Brief was served on the following via File & ServeXpress:

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