



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

RISEDELAWARE INC., *et al.*, :  
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 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. :

**REPLY BRIEF IN SUPPORT OF  
PLAINTIFFS' PETITION FOR ATTORNEYS' FEES**

Dated: December 2, 2022

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
REPLY TO COUNTERSTATEMENT OF FACTS.....	1
ARGUMENT .....	2
I.    Defendants Are Estopped From Arguing Waiver .....	2
II.   FOIA Fee-Shifting Applies .....	3
III.  Common Benefit Warrants Fee.....	4
IV.  Defendants’ Vexatious Conduct Warrants Fees.....	5
V.    The Great Weight Of The Factors Favors An Award .....	6
CONCLUSION .....	7

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>DeAnn Totta v. CCSB Financial</i> , 2022 WL 16647972 (Del. Ch.).....	4
<i>In re Del Monte Foods Shareholders Litig.</i> , 2011 WL 2535256 (Del. Ch.).....	7
<i>Dover Historical v City of Dover</i> , 902 A.2d 1084 (Del. 2006).....	4, 5
<i>Freedman v. Restaurant Assocs.</i> , 1990 WL 135923 (Del. Ch.).....	6
<i>H&amp;H Brand Farms v. Simpler</i> , 1994 WL 374308 (Del. Ch.).....	5
<i>Helaba v. Fialkow</i> , 2008 WL 1128721 (Del. Ch.).....	4
<i>Loretto Literary v Blue Diamond</i> , 444 A.2d 256 (Del. Ch. 1982).....	5
<i>In re Riverbed Tech. Stockholder Litig.</i> , 2015 WL 5458041 (Del. Ch.).....	4
<i>In re Sauer-Danfoss Shareholders Litig.</i> , 65 A.3d 1116 (Del. Ch. 2011).....	4, 7
<i>Tandycrafts, Inc. v. Initio Partners</i> , 562 A.2d 1162 (Del. 1989).....	4
<b>Statutes</b>	
29 Del.C. §6342.....	2
29 Del.C. §10005(d).....	3

## REPLY TO COUNTERSTATEMENT OF FACTS

Defendants' Counterstatement of Facts is replete with reargument of the Court's findings, elaborate (and erroneous) irrelevancies, and new confounding affidavits.

Contrary to Defendants' argument (AB 12) contradicting the Court's finding (Decision at 3), the SEBC at its February 28 meeting did not vote on a Third-Party Administrator, as the Agenda made it appear. HMAP was a fully-insured plan as determined by the RFP, *not* an administrative services contract for Delaware's own funding of claims. Likewise, Defendants' assertions of a true public process in adopting HMAP (AB 2-4) are reargument and wrong (*Decision* at 3-7).

Defendants' assertion it is "unfounded" to say the delay in announcement of HMAP to June 1 was intentional (AB 4) is contradicted by their own affiant. The first Rentz Affidavit (10/11/22 ¶¶26-27) averred it *was* intentional, allegedly to avoid "confus[ing]" retirees (OB 3).

Defendants' implication that subsequent State communications were fully forthcoming (unlike the June 1 letter) is reargument (AB 6-7). The State did not disclose the substantial differences between HMAP and Medicfill (*Decision* at 5).

As to individuals spreading the false notion before suit that Delaware was contractually bound to HMAP (OB 6-7), Secretary DeMatteis's new Affidavit offers no defense and instead speaks as though she never thought Highmark had legal rights

until contract execution on September 28. Her expressed “view” now – that signing the Contract would bring “substantial damages” if the State rescinded (¶11) – makes its execution after the Complaint all the more unjustifiable.<sup>1</sup>

Attempting to explain away the misdirection of his Goldey Beacom statement (*see* OB 7), Director Cade avers that he meant HMAP “could not be implemented until the General Assembly approved the funds during the budget process and through passage of the bond bill” (Cade Aff ¶4-5). The bond bill,<sup>2</sup> however, is for capital projects (which HMAP is not), and he fails to identify any applicable budget item or bill portion. His explanation is not credible.

## **ARGUMENT**

### **I. Defendants Are Estopped From Arguing Waiver**

Defendants knew by October 27 that Plaintiffs were seeking fees. Understanding their right to seek fees was undisputed, Plaintiffs acceded to Defendants’ request for expedited briefing. The parties’ stipulation for the remaining proceedings, including briefing, served as a *de facto* pre-trial order. Defendants should not be heard to argue that Plaintiffs have no right to seek fees, particularly when Defendants identify no prejudice.

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<sup>1</sup> Defendants point to formal process service on September 29. But the State had actual notice of the Complaint at least by mid-day September 27. Exhibit 1.

<sup>2</sup> Which he is responsible for preparing. 29 Del.C. §6342.

To avoid further distraction, Plaintiffs are moving to amend their Complaint to plead therein a request for fees.

## **II. FOIA Fee-Shifting Applies**

Defendants' arguments that the fee shifting of 29 *Del.C.* §10005(d) is inapplicable (AB 11-12) are wrong.<sup>3</sup>

Defendants admit Count II “alleges that the Defendants violated the APA *by virtue* of violating FOIA” when adopting the HMAP regulation (MTD ¶¶6 10/17/22). As the parties stipulated (11/18/22), the Decision constitutes the Court’s findings of fact and conclusions of law on Count II and effectively decides Count II in Plaintiffs’ favor. The Decision is clear that Count II was not time-barred under FOIA (p.11, n.10) and that Agenda notice was insufficient (p.3). Because the FOIA violation is one reason the regulation was unlawful under the APA, the fee-shifting provision applies.

It matters not that this Court, rather than the Court of Chancery, would declare a regulation unlawful based on a FOIA violation. This Court, acting in equity, is empowered to award fees to the same extent as the Court of Chancery (OB 10-11).

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<sup>3</sup> To moot the pleading issue, Plaintiffs’ motion to amend includes an explicit request for DJ relief on Count II.

### III. Common Benefit Warrants Fee

Contrary to Defendants’ argument (AB 1, 15-17), common benefits can be nonmonetary. Fees have been awarded for: corrective disclosures, as “benefit need not be measurable in economic terms,” *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989); a “rectified electoral process, *DeAnn Totta v. CCSB Financial*, 2022 WL 16647972, at \*2 (Del. Ch.); and “minimally beneficial” disclosures, *In re Sauer-Danfoss Shareholders Litig.*, 65 A.3d 1116, 1138 (Del. Ch. 2011).<sup>4</sup>

This case is not, as Defendants suggest (AB 16), “public interest litigation” achieving for the citizenry at-large the “mere social benefit that invariably results when a governmental agency is required to do its job.” *Cf. Korn*, at 413 (citing *Dover Historical v City of Dover*, 902 A.2d 1084, 1091 (Del. 2006)). This case achieved a critical and concrete benefit – health care coverage for State retirees through Medicfill.

Defendants assert (AB 17) the benefit is “speculative” because HMAP set lower premiums for some retirees. This assumes HMAP was comparable to Medicfill (*see cited Rentz Aff* ¶20, asserting HMAP “premium reduction came with

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<sup>4</sup> Similarly: *In re Riverbed Tech. Stockholder Litig.*, 2015 WL 5458041 (Del. Ch.) (fee award for “mustard seed” of nonmonetary benefit); *Helaba v. Fialkow*, 2008 WL 1128721 (Del. Ch.) (fee award “applying the same principles that guide the court where an actual common fund still exists.”).

the same benefits and coverage and no out-of-pocket costs for the same Medicare covered service” as Medicfill). But HMAP was not comparable, given its substantial differences in benefits and networks, as the Court found (*see* OB 5).<sup>5</sup>

#### **IV. Defendants’ Vexatious Conduct Warrants Fees**

Defendants misconceive Plaintiffs’ argument (AB 13-15).

First, “subjective bad faith” is not required.<sup>6</sup> “Even without a showing of the existence of bad faith,” a Court may assess fees in an unusual, appropriate matter “where the situation or the equities dictate that such a burden should not fall on the prevailing party.” *Loretto Literary v Blue Diamond*, 444 A.2d 256, 260 (Del.Ch. 1982). In this unusual matter, the burden of fees should not fall on Plaintiffs – State retirees on fixed incomes with significant medical needs.

Second, the misconduct need not occur within litigation confines. *See* OB 15; *Dover Historical*, at 1093 (“to require that the offensive conduct take place in the court proceeding itself[] is, in our view, overly narrow.”); *H&H Brand Farms v. Simpler*, 1994 WL 374308, at \*6 (Del. Ch.) (before litigation, defendant plowed easement).

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<sup>5</sup> *Cf.* Peterson Aff(10/4/22) ¶9,11 addressing costs. *See also* consequences to care: <https://www.cityofhope.org/city-hope-study-finds-medicare-advantage-may-put-complex-cancer-surgery-patients-disadvantage>

<sup>6</sup> Although the evidence, including Defendants’ affidavits, would support such a finding.



Third, the conduct underlying Counts I and II was the SEBC's restructuring of retiree healthcare—disregarding FOIA and the APA. The vexatious conduct supporting fees is different—it is the responsible individuals' improper campaign to carry out HMAP with: (a) well-timed delay in announcement to retirees that painted a false picture that nothing material would change<sup>7</sup>; (b) further communications reinforcing that false picture; and (c) citizen, media and private pronouncements of misinformation with the imprimatur of their executive offices that predictably would erect formidable roadblocks to any legislative or judicial recourse (OB 3-9).

**V. The Great Weight Of The Factors Favors An Award**

This case is of great significance to State retirees. It stopped the State, for a year, from forcing them to a “substantially different” and materially worse healthcare plan, without their knowledge or input and leaving them no time for consideration of options. This was a clear violation of the APA and FOIA. Such a case could likely not be brought again without the incentive of a fee award, as the limits of crowdfunding are now clear.<sup>8</sup>

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<sup>7</sup> DHR and OMB at least by virtue of the June 1 letter took on a duty to be fully forthcoming with retirees. *See, e.g., Freedman v. Restaurant Assocs.*, 1990 WL 135923, at \*8 (Del. Ch.).

<sup>8</sup> Delaware law does not deny or reduce a fee award because a plaintiff is cash positive, including from gofundme. This is particularly true when only some 35% of the \$310,000 fees (to date) was raised.

Defendants do not dispute that *Sugarland* applies and points to a substantial award (*see* OB 16).<sup>9</sup> This important litigation was complex and “not cookie-cutter.” *See In re Del Monte Foods Shareholders Litig.*, 2011 WL 2535256, at \*13 (Del. Ch.). Counsel undertook real risk of not being paid. *See Id.* (“The assumption of *bona fide* contingency risk supports an award at the higher end of the range.”) This motion seeks to pay attorneys for their hard work. To call an award a “windfall” is an affront to RISE and its constituency. And an award would hardly be unfair to the State or taxpayers, given Delaware’s staggering \$1 billion surplus.

As to the efforts of a volunteer working with the attorneys of record (and who is in the State retiree healthcare plan), this is not about fees *to* a *pro bono* attorney; it is about an award to RISE *for* the efforts of a *pro bono* licensed, Delaware attorney. Defendants’ reliance on *In re Infinity* at 292 is misplaced. It actually supports recognizing those efforts, undertaken to assist counsel and most recently to limit increasing debt of RISE to its of-record attorneys.

### **CONCLUSION**

Plaintiffs respectfully request an award of fees.

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<sup>9</sup> *In re Sauer-Danfoss*, *supra*, analyzes fee awards.

Dated: December 2, 2022

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*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, David A. Felice, hereby certify that on December 2, 2022, I caused a true and correct copy of *Reply Brief in Support of Plaintiffs' Petition for Attorneys' Fees* to be served via File& ServeXpress upon the parties listed below:

Patricia Davis  
Adria Martinelli  
Jennifer Singh  
Department of Justice  
Carvel State Office Building  
820 N. French Street, 6th Floor  
Wilmington, Delaware 19801

Max B. Walton  
Shaun Michael Kelly  
CONNOLLY GALLAGHER LLP  
1201 North Market Street, 20th Floor  
Wilmington, DE 19801

Dated: December 2, 2022

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

EFiled: Dec 02 2022 05:30PM EST  
Transaction ID 68499475  
Case No. N22C-09-526 CLS



# EXHIBIT 1

**David A. Felice**

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**From:** David A. Felice  
**Sent:** Monday, September 26, 2022 3:37 PM  
**To:** Aaron.Goldstein@delaware.gov  
**Subject:** Rise Delaware Inc. v. DeMatteis (Del. Super.)  
**Attachments:** Letter.pdf; 1 - RiseDE - Complaint.pdf; 4 - RiseDE - Motion for Special Process Server.pdf; 5 - RiseDE - Motion Expedited Proceeding.pdf; 2 - RiseDE - Praeipce for Summons.pdf; 3 - RiseDE - Summons.pdf

Aaron:

Please see the attached. Thank you.

David

## David A. Felice

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**From:** David A. Felice  
**Sent:** Monday, September 26, 2022 3:46 PM  
**To:** kathleen.jennings@delaware.gov  
**Subject:** FW: Rise Delaware Inc. v. DeMatteis (Del. Super.)  
**Attachments:** Letter.pdf; 1 - RiseDE - Complaint.pdf; 4 - RiseDE - Motion for Special Process Server.pdf; 5 - RiseDE - Motion Expedited Proceeding.pdf; 2 - RiseDE - Praecipe for Summons.pdf; 3 - RiseDE - Summons.pdf

Ms. Jennings:

Based on an out-of-office reply, I understand Mr. Goldstein is not in the office today. I am forwarding to you a copy of my letter. Thank you.

David

---

**From:** David A. Felice  
**Sent:** Monday, September 26, 2022 3:37 PM  
**To:** Aaron.Goldstein@delaware.gov  
**Subject:** Rise Delaware Inc. v. DeMatteis (Del. Super.)

Aaron:

Please see the attached. Thank you.

David

## David A. Felice

---

**From:** David A. Felice  
**Sent:** Tuesday, September 27, 2022 10:56 AM  
**To:** Davis, Patricia (DOJ)  
**Subject:** RE: Rise Delaware Inc. v. DeMatteis (Del. Super.)

Patty:

Yes, I will call you at 11:00. Thank you.

David

**From:** Davis, Patricia (DOJ) <PatriciaA.Davis@delaware.gov>  
**Sent:** Tuesday, September 27, 2022 10:45 AM  
**To:** David A. Felice <DFelice@baileyglasser.com>  
**Subject:** RE: Rise Delaware Inc. v. DeMatteis (Del. Super.)

### CAUTION: External Email

Mr. Felice: Please call me Patty. If you're available at 11, that would be good for me. If 11 doesn't work, I have some availability this afternoon as well. My direct number is below.

Thanks,  
Patty

*Patricia A. Davis*

Patricia A. Davis  
State Solicitor  
820 N French Street, 6th Floor  
Wilmington, DE 19801  
(302) 257-3233 Phone

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**From:** David A. Felice <[DFelice@baileyglasser.com](mailto:DFelice@baileyglasser.com)>  
**Sent:** Tuesday, September 27, 2022 10:16 AM  
**To:** Davis, Patricia (DOJ) <[PatriciaA.Davis@delaware.gov](mailto:PatriciaA.Davis@delaware.gov)>  
**Subject:** FW: Rise Delaware Inc. v. DeMatteis (Del. Super.)

Ms. Davis:

Is there a good time to call you this morning? Thank you.



David

**From:** Goldstein, Aaron R (DOJ) <[Aaron.Goldstein@delaware.gov](mailto:Aaron.Goldstein@delaware.gov)>  
**Sent:** Tuesday, September 27, 2022 9:45 AM  
**To:** David A. Felice <[DFelice@baileyglasser.com](mailto:DFelice@baileyglasser.com)>  
**Subject:** RE: Rise Delaware Inc. v. DeMatteis (Del. Super.)

**CAUTION: External Email**

Good morning David:

You may be aware that yesterday and today are a religious holiday. I was not working yesterday for that reason. Please contact State Solicitor Patty Davis with this.

Thanks very much,  
Aaron

**From:** David A. Felice <[DFelice@baileyglasser.com](mailto:DFelice@baileyglasser.com)>  
**Sent:** Tuesday, September 27, 2022 9:30 AM  
**To:** Goldstein, Aaron R (DOJ) <[Aaron.Goldstein@delaware.gov](mailto:Aaron.Goldstein@delaware.gov)>  
**Subject:** RE: Rise Delaware Inc. v. DeMatteis (Del. Super.)

Aaron:

I just left you a voicemail. Please let me know when you are available for a call. We need to get back to the Court on a date for it to consider our motion to expedite. Thank you.

David

---

**David A. Felice**

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**From:** David A. Felice

**Sent:** Monday, September 26, 2022 3:37 PM

**To:** [Aaron.Goldstein@delaware.gov](mailto:Aaron.Goldstein@delaware.gov)

**Subject:** Rise Delaware Inc. v. DeMatteis (Del. Super.)

Aaron:

Please see the attached. Thank you.

David



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

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 her official capacity as Secretary of the :  
 Delaware Department of Human :  
 Resources and Co-Chair of the State :  
 Employee Benefits Committee, *et al.*, :  
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 :  
 Defendants. :

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

1 Plaintiffs’ Opening Brief in Support of their Motion to Stay (the “Brief”) 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 365.

2 The Brief complies with the type-volume limitation of Superior Court Rule 107(h)(1), because it contains 1,495 words, which were counted by Microsoft Word 365.

Dated: December 2, 2022

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