IN THE SUPERIOR COURT FOR 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.	:	

PLAINTIFFS' REPLY BRIEF
IN FURTHER SUPPORT OF THEIR MOTION TO STAY

Dated: October 13, 2022

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ARGUMENT

I. DEFENDANTS DO NOT DISPUTE THAT SEBC'S NEW HEALTHCARE POLICY SATISFIES THE DEFINITION OF "REGULATION"

Defendants do not dispute that an SEBC "regulation" is invalid unless compliant with the APA, and that the SEBC changed its retiree healthcare policy without such compliance. Defendants' sole defense on the merits is that the SEBC's new policy is not a "regulation." Yet, Defendants nowhere address the definition of "regulation" in 29 *Del. C.* §10102(7), much less rebut Plaintiffs' clear showing that the new policy satisfies the definition in multiple ways. O.B. 22-25. Under settled law, Defendants have conceded this dispositive issue.[1] *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch.).

The SEBC's policy decision to enroll retirees in Medicare Advantage is an exercise of its regulatory authority under Sections 9602(b)(4) and 5210(4), and it satisfies the APA's broad definition of "regulation." Just because the implementation of this policy may also involve the SEBC's other statutory powers, including contract execution, does not negate its status as a regulation.

[1] The SEBC's action is also reviewable under 29 *Del. C.* §9012D and the Court's statutory writ jurisdiction.

II. DEFENDANTS MISCHARACTERIZE THE SEBC'S UNPRECEDENTED PRIVATIZATION OF RETIREE HEALTHCARE AS IMPLEMENTATION OF A STATUTORY DIRECTIVE

Defendants' attempt to characterize the foundational shift in the healthcare paradigm from Medicare to Medicare Advantage as a mere selection of carrier is misguided. The change to a fundamentally different type of health insurance is simply not the same as choosing which carrier administers the plan. The SEBC's February minutes themselves treated these as separate decision points: "maintain Medicfill plan or move to Group MA product"; "select Aetna or Highmark Delaware as the plan administrator"; and "include or exclude Part D drug coverage." Indeed, the mischaracterization of this transformational decision as a choice in carrier is contradicted by Defendants themselves: "[t]he transition to the Medicare Advantage plan marks the first substantive change in the benefits afforded to State benefit eligible Medicare pensioners since 2013." A.B. 1.

Furthermore, Defendants erroneously rely on *Free-Flow*, which held that an agency's assessment of fees did not qualify as a "regulation" because it was merely "implement[ing] a specific and detailed statutory directive." 861 A.2d 1233, 1236. In *Free-Flow*, DNREC mechanically applied a detailed statute that "instructed DNREC to place each polluting source into one of four specified categories" based on "DNREC's estimation of the number of hours spent performing services." *Id*. Here, the powers granted the SEBC in Sections 9602 and 5210(3) are nothing like

the "specific and detailed statutory directive(s)" at issue in *Free-Flow*—they do not direct SEBC to place Medicare-eligible retirees into a Medicare Advantage plan, much less a plan with the specific features of HMAP.[2] There is no statute directing SEBC to implement a Medicare Advantage plan. That policy decision was made independently by SEBC and is, therefore, a regulation.[3]

III. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM

Defendants' irreparable harm rebuttal is littered with errors. To counter a few:

- The harms identified by Plaintiffs are non-speculative. Absent a stay, retirees will be:
    - forced to make consequential healthcare decisions without adequate information or time;
    - denied their APA procedural rights;

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[2] For another example of SEBC action subject to the APA—and not a "statutory directive"—see "amendments to rules for Employees Eligible to Participate in [GHIP] and [ ] Disability Insurance Program." The legislature recognized the applicability of the APA to SEBC and made a specified, limited exception. 83 Del. Laws, c.325, §25 (2022).

[3] See Department of Insurance's APA-compliant regulation for Medicare supplement policies– https://regulations.delaware.gov/AdminCode/title18/1500/1501.pdf.

- forced to incur prohibitively expensive costs—not compensable through a damages award—if they opt out of HMAP and purchase other insurance, or if they stay in and continue treatment from out-of-network doctors;
- precluded from receiving treatments deemed medically unnecessary; and
- deterred from seeking medical attention from out-of-network doctors due to cost concerns.

- Defendants cite no case—from Delaware or elsewhere—rejecting the widely recognized principle that violation of one's APA procedural rights is irreparable harm.

- Defendants tout working on this change for "several years," but foist the decision-making burden on retirees in an "extremely tight timeframe." A.B 1, 10.

- Financial harm can be irreparable, especially where, as here, damages are unavailable. *See Gen. Holdings v. Renco Grp.*, 2012 WL 6681994, at *4 (Del. Ch.).

IV. DEFENDANTS ARE INCORRECT ON CRITICAL FACTS

Defendants rely heavily on the justification that the cost of the current retiree health plan is economically unsustainable. A.B. 1. That is legally irrelevant. Regardless, any significant long-term financial implications are even more reason to adhere to procedural requirements. HMAP may not be the best solution, as the RBSC—established to address unfunded liability—suggested an HRA option reducing that liability far more than HMAP. Compl. ¶54.

Defendants accuse Plaintiffs of delay in filing suit. A.B. 31. But the timing was a direct result of Defendants' failures. Plaintiffs acted quickly, filing *before* the

contract was even signed. Nor should Plaintiffs be faulted for exhausting political avenues, rather than immediately suing. Diller and Peterson (Second) Affidavits. Moreover, laches is unavailable in Superior Court. *Pike Creek v. New Castle County*, 238 A.3d 208, 212 (Del. Super. 2020).

Defendants cite the "numerous communications" to retirees. A.B. 8. No number of communications could supplant the procedural requirements of APA rulemaking; especially communications *after* a regulation. And, if communications were deemed an adequate substitute, it would not be Defendants' confusing, misleading and incomplete communications. Compl. ¶28-38. Notably, the HMAP contract and EOC were only signed on September 28 and made public on September 29.

To counter other misstatements:

- Prior authorization categories for active employees in Highmark PPO are far fewer than for HMAP. Peterson (Second) Affidavit.

- Senate Bill 250 only amends Medicare coverage for some pensioners' spouses—far from "codification" of the change to HMAP. A.B. 9-10.

- Defendants are not locked into a November 4 transfer date or January 1 start date. The CMS Medicare Manual allows for significant flexibility. CMS Publication#100-16, Ch. 2 § 30.1.

CONCLUSION

Plaintiffs respectfully request that this Court grant their motion.

Dated: October 13, 2022

/s/ David A. Felice

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022, I caused a true and correct copy of the foregoing *Plaintiffs' Reply Brief in Further Support of Their Motion to Stay* to be served by File & Serve*Xpress* upon the following counsel of record:

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

Dated: October 13, 2022

/s/ David A. Felice
David A. Felice (#4090)

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	:	
Defendants.	:	

AFFIDAVIT (SECOND) OF KAREN PETERSON

STATE OF DELAWARE)

COUNTY OF NEW CASTLE)

I, Karen Peterson, hereby depose and state as follows:

1. This is further to my Affidavit of October 4, 2022 and is offered to answer the question in the State's brief to the Court (p. 31): "If there was a true risk of irreparable harm, why did Plaintiffs wait until the eve of open enrollment to file their lawsuit?" I also offer some facts about prior authorizations and communications to respond to statements by the State.

MY EFFORTS TO GET PUBLIC OFFICIALS TO CHANGE

2. In August 2022, I began to understand how problematic Medicare Advantage plans are and the possible negative effect on my own healthcare. This is what I did.

3. Having been a State Senator for many years, I contacted State officials. On August 16, I wrote to Gov. John Carney to ask him to intervene and give State retirees the option of remaining with traditional Medicare. I cited the findings of the Inspector General's Office of the U.S. Department of Health and Human Services that found "troubling evidence" that Medicare Advantage plans delay and prevent Medicare beneficiaries from getting medically necessary care. I sent a copy of my request to all members of the General Assembly and to administration officials. On August 18, I sent a follow-up e-mail.

4. On August 19, I received a reply e-mail from Claire DeMatteis, Secretary of Department of Human Resources. She took issue with the findings of the Inspector General's Office and assured me that Delaware's plan was different from all the others. She said, "It is not some off the shelf Medicare Advantage Plan. Highmark designed it specifically to match the coverage in the previous Medicare supplement plan."

5. On August 30, I wrote to Secretary DeMatteis asking her: (1) What medical procedures, tests, and treatments will require pre-authorization? (2) Which doctors, labs, surgical facilities, etc., are in-network? and (3) Are referrals necessary to see a specialist? The "informational" mailings I had received from the Highmark Freedom Blue PPO Medicare Advantage Plan did not answer these questions and I was concerned about my own medical treatments.

6. On August 30, Secretary DeMatteis replied: "By the end of this week I will have a detailed list of non-emergency procedures that may require prior authorization, which I plan to share with all state legislators and state pensioners. I will forward them to you when I receive them." I received no list. I finally saw a list when someone sent me a link one month later, September 29, 2022, to the Highmark contract and "Evidence of Coverage" documents posted on the State's Pension Office website. I did not receive them from the State.

7. On August 31, I asked Secretary DeMatteis how much money the State saved in the FY23 budget by its switch to Medicare Advantage. I asked because we have been repeatedly told that the State needs to save money for "long term sustainability" of the benefits fund. Secretary DeMatteis replied: "To the extent there are any differences between the aggregate premiums paid by the State to BCBS of Delaware for the Medicare Advantage Plan versus the aggregate claims and fees the State might have had to pay in prior years under the Medicfill plan, those savings (or costs) would be reflected in the State's annual budget. In addition, to the extent there may be savings, those savings will also help to assure the long-term sustainability of these very important benefits." (9/1/22 emphasis added) I was taken aback because the whole point of taking away our Medicfill supplement was supposedly to save money. My understanding of her reply was

that there may or may not be savings. Secretary DeMatteis repeated this statement in the September 30, 2022 "Frequently Asked Questions" (pg. 8, No. 27).

GOLDEY BEACOM AND DECISION TO BRING SUIT

8. On September 12, I attended a "Town Hall" meeting hosted by Representatives Mike Ramone and Mike Smith at Goldey Beacom College. The large events center was filled to capacity (and over-flowing) with concerned retirees. I had prepared remarks but when I saw how many hundreds of people were there and wanted to speak, I limited my comments to two:

(a) "Back on November 1, the Governor's Retirement Benefits Study Committee [RBSC] issued a report in which they recommended that the State develop and implement a plan to educate active and retired members on the issues, challenges, and opportunities highlighted in the report and gain feedback on options under consideration through meetings and a survey. Why was that never done? The only option we've been given is – take it or leave it."

(b) "This could have been handled in a different way – the same way the State treats employees when they downgrade pension plans: they grandfather in those who are already eligible for the more liberal benefits and impose the new plan on future retirees. That way, everybody knows what they're entitled to before they retire. That would have been the fair and decent thing to do."

Rick Geisenberger, Secretary of Department of Finance spoke for a long time to respond but did not answer either question.

9. On September 13, Lt. Gov. Bethany Hall-Long asked that I attend a Zoom meeting she was hosting the next day with Secretary DeMatteis, Director Cerron Cade, and other State officials, to try to "work this out." I reluctantly

attended. When I asked why the plan could not be delayed so everyone could digest it, Secretary DeMatteis said the State had already sent a letter of intent to Highmark and that the State would be sued if it reneged on that.

10. I did not know at that time that the RFP for the contract provided that the successful bidder would have no legal or equitable rights from a letter of intent so Highmark could not have sued. (RFP Section 4.0 p. 21: "Notice in writing to a vendor(s) of the acceptance of its proposal by the SEBC and the subsequent full execution of a written contract will constitute a contract and no vendor will acquire any legal or equitable rights or privileges until the occurrence of both such events.")[1] Secretary DeMatteis made clear that the State would not change course.

11. On about September 15, the Pension Office posted the "Medical Benefits Chart" listing medical services covered (and not covered) by the Medicare Advantage plan. After reading the Chart, I became even more alarmed that my medical treatments might not be covered by the new plan.

12. On September 19, I attended the SEBC meeting in Dover to appeal to the entire committee to delay implementation of the plan. I reminded committee members that the law governing the SEBC requires that they "select the best plan to satisfy the interests of the State and its pensioners. This plan satisfies <u>your</u> interests – but not <u>ours.</u>" I closed, "In a year when you had one of the largest surpluses in state history – $1 billion – you traded our health insurance for a dollar

[1]https://bidcondocs.delaware.gov/DHR/DHR_2201MedicalTPA_rfp.pdf

store version. You've given our Medicare benefits to Highmark to make medical decisions for us, instead of our doctors. It's not too late to fix this. The contract hasn't been signed yet. We know that something needs to be done to make the fund sustainable – and there are several options that we could bring to the table, if only you had asked us what our interests are. It's not too late."

13. After that September 19 meeting, it was clear to me that there was no chance the State would change course without intervention of the Courts. So I decided to participate in a lawsuit against the State. From working nonstop, our Complaint was filed on Sunday September 25. Only after that time did the State execute and publicize a contract with Highmark.

RESPONSE TO FACTUAL STATEMENTS

14. Secretary Rentz's Affidavit (pp. 8-12) says that we received many communications about the new plan starting in June 2022. Those communications, however, were long after the February 28, 2022 SEBC meeting. And I do not see why this monumental benefits change was not mentioned in the March 2022 benefits newsletter sent to State retirees like me from the State Benefits Office (SBO).[2] I regularly read those newsletters when they come out and did not see

[2] https://open.omb.delaware.gov/PDF/Newsroom/newsletters/2021/2021-Winter-Retiree-Newsletter.pdf.

anything in their newsletters about the change to Medicare Advantage until the July 2022 newsletter.[3]

15. The statement of facts in the State's brief (p. 5) says: "These pre-authorization requirements in the HMAP are identical to those that active state employees and pre-65 retirees have had as part of their insurance coverage through Highmark since 2010." But in all the months that I was asking about what the prior authorizations were, I was never told the list of prior authorizations was something already available from an active employee plan, such as mine before I retired. And I certainly never experienced such authorizations when I was an active State Senator or employee. Or while on Medicare. Looking at the published Summary of Benefits and Coverage document for the active employees' Highmark PPO plan, there appear to be some pre-authorizations,[4] but nothing like the 41 pages of prior authorizations in the September 29 contract.

16. The Affidavit of Faith Rentz (p. 5) states that there will be $0 costs to retirees for doctor's visits, medical services, skilled nursing facilities, lab and imaging, and coverage of pre-existing conditions. This seems to be contradicted by the "Medical Benefits Chart"[5] that adds 38 pages of hard-to-digest rules that determine whether a pensioner will actually be covered. And there are unexplained

[3] https://open.omb.delaware.gov/PDF/Newsroom/newsletters/2022/2022-Summer-Retiree-Newsletter.pdf
[4] https://dhr.delaware.gov/benefits/medical/documents/highmark/summary-ppo-fy23.pdf
[5] https://dhr.delaware.gov/benefits/medicare/documents/ma-benefits-chart.pdf

"cost-sharing" payments, co-insurance payments, deductibles, and out-of-pocket charges (up to $1000 per year).

17. I am over the age of eighteen (18) years and am competent to testify.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed this 13th day of October, 2022.

Karen Peterson

SWORN TO AND ASCRIBED before me this 13 day of October, 2022.

JASON KITTINGER NOTARY PUBLIC STATE OF DELAWARE MY COMMISSION EXPIRES May 17, 2023

Notary Public

v. 10/13/22 930

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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.	:	

AFFIDAVIT OF ELISA DILLER

STATE OF DELAWARE)

COUNTY OF NEW CASTLE)

I, Elisa Diller, hereby depose and state as follows:

1. I am a State Retiree and a Director and President of RiseDelaware, Inc ("RISE"). I formed RISE along with Rep. John Kowalko to provide a means for State retirees to get together and to work to change the State's effort to switch State retirees' healthcare benefit from Original Medicare to Medicare Advantage.

2. I worked for the State of Delaware beginning in 1982 as a planner in what was then the Department of Community Services. After graduate school, I again worked for the State of Delaware in 1995-1997, as an administrator in the Department of Services for Children, Youth, and Their Families. In 1995, I was hired as an administrator in the Department of Services for Children, Youth, and Their

Families. In 2000, I was hired as an administrator in the Division of Community Services which was part of the Department of Health and Social Services.

3. I have served as a part-time pastor for a number of small Presbyterian churches in this area for years. I currently serve as part of the ministry team for the First Presbyterian Church of Chesapeake City, MD. I was elected to New Castle County Council in 2009 and I will end my service on November 8, 2022.

4. I qualified for State healthcare because of my start date and five years of continuous service from 2000-2005. My husband worked for the State for a total of 37 years and is covered by the State healthcare program as well. Our daughter, 19, is covered through my husband's healthcare benefits.

5. This affidavit is to answer the question the State has asked in its brief to the Court (p. 31): "If there was a true risk of irreparable harm, why did Plaintiffs wait until the eve of open enrollment to file their lawsuit?"

DEVELOPING CONCERNS

6. I received a letter from the State of Delaware in June 2022 saying that retirees would be entered into a Medicare Advantage (MA) plan beginning January 1, 2023. I went to the Medicare website and found out that Medicare Advantage was not Original Medicare. My Parts A and B (Original Medicare) would no longer be in effect and I would be enrolled in what I later learned was called a Part C plan (Medicare Advantage).

7. I was disconcerted and called Highmark Blue Cross Blue Shield, our current State retiree Medicare supplement provider. No one at Highmark was able to tell me anything about the new MA plan because they said they had no information. They were still waiting for details from Delaware and to call the State.

8. The next place I called was the State Pension Office. They assured me information about the proposed MA plan would be coming but I needed to talk to the HR department for more details. I called HR and they did not have any details either because the plan was not supposed to go into effect until January 1, 2023.

9. I did ask HR how people were supposed to know what the MA plan was if there was no information. I was told the State would be holding information sessions later in the summer for retirees. This concerned me because I know from my years in elected office that most people are not going to come to meetings like that. And summer is a bad time.

10. In the meantime, my daughter graduated from high school and we were consumed with graduation activities. Finally, after not hearing anything from anyone, I contacted my State legislator, Paul Baumbach, and said I am reading about these Medicare Advantage plans and I do not think they are good for State of Delaware retirees. How can you help me with this issue? At this point, Rep. Baumbach said something like, well, I was the only person who called to talk to him about this and he wanted to wait until he found out if more people were concerned.

11. After a few days, I called Rep. John Kowalko. I have known him for many years and I know he is always concerned about his constituents. So, even though I am not his constituent (I live in the 23rd and not his 25th district), I thought he would listen. I said, "John I don't think this is going to be good for State retirees. What do think we should do?" John said, "It's funny you called because I just heard from another constituent who is concerned about this."

12. John said he would do some investigating while I kept reading about Medicare Advantage plans. In early July, we received a large flyer about the plan. But the large flyer was still pretty general and, by this time, I knew that Medicare Advantage plans had lots of hidden fees and charges that people ended up paying that were not clearly explained before they enrolled. So I was suspicious about not only what was being written in the flyer, but also what was not written in the flyer.

13. At some point, we received postcards about State-sponsored information meetings. The meetings in New Castle County were set for the first week in August. John and I decided to attend together so we would hear the same information at the same time. We attended a session on August 4 at the Chase Center, Wilmington Riverfront. It only increased our concerns.

14. We met a few other people there who were concerned and gave them the new RISE gmail address. Thinking that people needed to know what was happening, John and I worked on an Opinion piece the News Journal published

August 14. Because of that piece describing our concerns, people started to join our effort.

15. We hoped this could be resolved by having people contact their legislators and we urged them to do so.

NO OPTION LEFT BUT TO FILE SUIT

16. People kept the pressure up and, eventually, legislators set up Town Hall meetings. The first was on September 12 at Goldey Beacom College with speakers from the State and Highmark. From our word-of-mouth efforts, several hundred people attended, vociferously. We were elated and thought with all these angry people showing up and protesting, the plan might get shelved by State officials and we could have input before any changes would later be adopted.

17. Unfortunately, the Goldey Beacom Town Hall, and other later ones, scheduled by legislators with speakers from Highmark and State officials, were just a version of the Riverfront session in August that had not been helpful. And there remained lots of confusion. John Kowalko had asked through many channels for the contract with Highmark so we could see what was really true as far as cost sharing, benefits, the new prior authorization requirement, and the new provision for a network of providers. We kept hearing conflicting information about whether a contract had been signed. The Goldey Beacom Town Hall did not clear up the confusion.

18. In the meantime, I had been in touch with Lt. Governor, Bethany Hall-Long, who has a healthcare background, and let her know that John Kowalko and I were concerned about the MA plan. She said she would try to get us a meeting with State officials.

19. The day after the Goldey Beacom Town Hall, the Lt. Governor said the meeting was scheduled for the next day. I was hopeful that the meeting would lead to a change by the State.

20. John Kowalko, Karen Peterson, and I attended the Zoom meeting with the Lt. Governor and State officials on September 14. I specifically asked that the new Medicare Advantage plan be shelved and that the State go back to the drawing board with retirees having input on the crafting of a new plan. They refused.

21. The group of us forming RISE as an advocacy group for State retirees held an organizing meeting in Newark on September 15. People asked what could be done and expressed there was now no choice but to try to file a lawsuit. At that point, we reluctantly felt we were out of administrative options. There was one further chance with the SEBC meeting on Monday September 19. But the SEBC did not withdraw the plan.

22. I had never wanted a lawsuit. I felt that our backs were pinned against the wall and we had to at least fight back. This Medicare Advantage plan was pushed through secretively and it was just wrong for it to go unchallenged. So after

September 15, we moved as quickly as possible to engage counsel and prepare the lawsuit. After working intensely, we filed the Complaint on Sunday night, September 25 at 11 pm. We had seen no contract with Highmark from the State.

23. I am over the age of eighteen (18) years and am competent to testify.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed this 13 day of October, 2022.

Elisa Diller

SWORN TO AND ASCRIBED before me this 13 day of October, 2022.

JASON KITTINGER NOTARY PUBLIC STATE OF DELAWARE MY COMMISSION EXPIRES May 17, 2023

Notary Public

My commission expires: 5-17-2023

v. 10/13/22 842

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	:	
Defendants.	:	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1 Plaintiffs' Reply Brief in Further 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 the type-volume limitation of Superior Court Rule 107(h)(1), because it contains 999 words, which were counted by Microsoft Word 365.

Dated: October 13, 2022

/s/ David A. Felice

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