



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION TO AMEND THE COMPLAINT**

Patricia A. Davis, DAG (# 3857)
Adria Martinelli, DAG (# 4056)
Delaware Department of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 257-3233
PatriciaA.Davis@delaware.gov
Adria.Martinelli@delaware.gov

Max B. Walton (# 3876)
Shaun Michael Kelly (# 5915)
Connolly Gallagher LLP
1201 North Market Street, 20th Floor
Wilmington, DE 19801
(302) 757-7300
mw Walton@connollygallagher.com
skelly@connollygallagher.com
Attorneys for Defendants

Dated: December 7, 2022

Defendants hereby oppose Plaintiffs' Motion to Amend the Complaint to add post decision claims for attorneys' fees, purported FOIA violations, and seeking to invoke FOIA's fee shifting. The Motion should be denied.

1. **Standard of Review.** In the context of a Motion to Amend under Rule 15, leave to amend is generally granted freely, “[b]ut ‘freely’ doesn't mean without exception.”¹ This Court is not “openhanded” regarding amendment if there is “evidence of undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies, prejudice, futility, or the like.”² Indeed, where, as here, Plaintiffs have been “inexcusably careless” in failing to file a timely Motion to Amend, amendment should not be allowed.³

2. Plaintiffs' Motion to Amend the Complaint to assert a claim for attorneys' fees and to add FOIA claims should be denied for three reasons: (1) undue delay – the request for leave to amend is too late; (2) it is futile; and (3) it is unfairly prejudicial to Defendants to allow amendment at this late stage.

3. **Undue Delay.** This case has been decided on an expedited basis. The Complaint was filed on September 25, 2022 – and there is no indication in the

¹ *Lima USA Inc. v. Mahfouz*, 2012 WL 5774394, at *10 (Del. Super. Aug. 31, 2021).

² *Id.* (quoting *Parker v. State*, 2003 WL 24011961, at *3 (Del. Super. Oct. 14, 2003); *Fox v. Christina Square Assoc., L.P.*, 1995 WL 405744, at *2 (Del. Ch. June 19, 1995) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *Hess v. Carmine*, 396 A.2d 173, 177 (Del. Super. 1978).

³ *Id.*

Complaint that Plaintiffs seek a fee award.⁴ Following consideration of Plaintiffs' Motion to Stay, the Court issued its stay ruling on October 19, 2022, which ostensibly resolved Counts I and II of the Complaint.⁵ Thereafter, the Court set the matter for trial on November 28, 2022. Exhibit A. On November 9, 2022, the parties submitted a stipulation for the Court's consideration, in which the parties stipulated that Counts I and II of the Complaint would be considered decided, and setting a schedule for resolution of Plaintiffs' Communications Claim and their newly minted theory that they are somehow entitled to an award of attorneys' fees.⁶

4. Thereafter, the Court sent an e-mail inquiry regarding the Communications Claim and attorneys' fees. Exhibit B. In response to the Court's e-mail, Plaintiffs stipulated to the dismissal of the Communications Claim.⁷ Per the Court's directive, e-mail responses were provided on November 18, 2022.⁸ Following that submission, on November 21, 2022, Plaintiffs (for the first time)

⁴ As such, in the Complaint, there is no articulation of the basis for which Plaintiffs believe that fees may be shifted.

⁵ Dkt. 34; Trans Id. 68274838.

⁶ Dkt. 36; Trans Id. 68368180. Plaintiffs' contention that the stipulation is "a *de facto* pretrial order" (Motion to Amend at p.3) is nonsensical. The stipulation was never entered as an order of the Court – and, by its plain terms, it is not a pretrial order. That stipulation makes crystal clear the "Defendants oppose any award of attorneys' fees and do not believe that an award of attorneys' fees is legally permitted or otherwise warranted in this case. . . ." One of the many reasons that fees are not "legally permitted" is because *no fee claim was asserted in the Complaint*.

⁷ Dkt. 41; Trans Id. 68405138.

⁸ As of the date of this filing, Plaintiffs' e-mail submission has been placed on the Docket. Dkt. 43; Trans Id. 68412466. Defendants' submission has not.

requested that Defendants agree to allow Plaintiffs to amend the Complaint to add a fee claim; the Defendants did not agree. Exhibit C. Defendants filed their opposition to the fee petition – raising the failure to plead fees – on November 22, 2002.⁹ Then Plaintiffs waited until December 2, 2022 – the day that its reply brief on the petition for fees was due per stipulation – to file a Motion to Amend to plead a claim for fees and for fee shifting under FOIA.¹⁰

5. Stated simply, it is far too late to bring a claim for attorneys’ fees or brand new FOIA claims because Plaintiffs unduly delayed seeking leave to amend under the circumstances. The law is well settled that if a party is seeking fees, that request must be pled.¹¹ Plaintiffs did not plead any claim for fees or assert a FOIA violation count, and now seek to amend their Complaint at the 11th hour after all other claims are resolved. At best, this is undue delay or inexcusable carelessness by Plaintiffs; at worst, it is dilatory motive to prevent Defendants from timely taking an appeal. Much the same as in *Anderson v. Artisans’ Savings Bank*,¹² the request to amend the pleadings is simply too late when judgment on all counts has already been established. The “better approach,” in such circumstance, is to deny the

⁹ Dkt. 45; Trans Id. 68423868.

¹⁰ Dkt. 47; Trans Id. 68499475.

¹¹ See *Kramer v. Am. Pac. Corp.*, 1998 WL 442766, at *1-2 (Del. Super. July 28, 1998) and cases cited in footnote 9 of Defendants’ brief in Opposition to Plaintiffs’ fee petition. Dkt. 45; Trans Id. 68423868.

¹² 1977 WL 9673, at *1 (Del. Ch. Feb. 2, 1977).

untimely motion to amend.¹³ Denial of the Motion works no prejudice on Plaintiffs’ – they simply will be required to follow the American Rule wherein each litigant pays their own fees.¹⁴

6. **Futility.** The Superior Court denies motions to amend a complaint where the amendment would be futile and cannot survive a motion to dismiss.¹⁵ As outlined in Defendants’ response to Plaintiffs’ fee petition,¹⁶ in addition to the fee claim being barred because Plaintiffs’ failed to seek fees in their Complaint, Plaintiffs’ requests for fees is also barred because: (1) statutory fee shifting does not apply; (2) Plaintiffs have not and cannot show bad faith litigation conduct; (3) the “common fund” doctrine is inapplicable because there is no monetary benefit to Plaintiffs; and (4) Plaintiffs’ counsel would receive a windfall if fees were awarded because Plaintiffs have amassed substantial anonymous litigation funding donations via GoFundMe that cannot be returned.¹⁷ Regarding the new FOIA claims, amendment is futile because: (1) this Court lacks jurisdiction to hear Plaintiffs’ FOIA claims; (2) no FOIA claim was litigated and such claim otherwise fails; and

¹³ *Id.*

¹⁴ *See id.*; *Balooshi v. Global Corp.*, 2022 WL 576819, at *15 (Del. Super. Feb. 25, 2022), *aff’d*, 2022 WL 5052721 (Del. Oct. 5, 2022).

¹⁵ *See Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 786 (Del. Super. 1995) (citing *DeNardo v. Rodriguez*, 1993 WL 81319, at *4 (Del. Super. Feb. 12, 1993) (Where a complaint as amended would not withstand a motion to dismiss, the motion to amend should be denied as futile.”)).

¹⁶ Dkt. 45; Trans Id. 68423868.

¹⁷ *Id.* at pp. 8-17.

(3) Plaintiffs never prevailed on any FOIA claim because it did not bring a FOIA claim.¹⁸ Because each of these defenses to the fee petition are meritorious and dispositive of the fee issue and the FOIA claims, the Motion to Amend should be denied as futile.

7. **Prejudice**. Prejudice to Defendants is substantial if amendment of the Complaint is allowed. Defendants are prejudiced because they were not put on notice from the beginning that fees would be sought, which did not allow Defendants to engage in a financial analysis of the claims at the beginning of the case and in developing their litigation strategy. If a fee or FOIA claims had been pled, Defendants could have pressed to dismiss them from the beginning, and at least Defendants would have known the risk of such an award as it proceeded through the litigation. Plaintiffs' tactical choice to fail to plead such claims, and attempt a fee claim by ambush after the pled claims have been basically resolved, should not be permitted. This is especially so when Plaintiffs are unrealistically claiming *more than \$310,000* in attorneys' fees for their work in this litigation,¹⁹ which consists only of a Complaint, the stay briefing and a single hearing, briefing on the Communications Claim (which Plaintiffs dropped), and the fee petition.²⁰

¹⁸ *Id.* at 11-13.

¹⁹ *See* Dkt. 47; Trans Id. 68499475, at p. 6, n.8.

²⁰ Defendants reiterate that Plaintiffs have never pled or sought class certification.

8. Defendants are further prejudiced by the delay caused by the Motion to Amend. This Court has held that the contract award for Medicare Advantage should have followed the APA.²¹ Defendants seek to appeal this issue in a prompt fashion to clarify the potential implications for all State agencies making contract awards. Delaying this appeal potentially delays implementation of new or other benefit plans that the State seeks to impose for 2024 because the APA process requires a longer lead time. Prompt finality is therefore of keen interest to the State. Plaintiffs' 11th hour motion to add heretofore unpled claims for fees and FOIA violations, delays finality of this case for ultimate resolution before the Delaware Supreme Court and presents uncertainty for other State agencies awarding contracts. While Plaintiffs may desire to delay entry of judgment, appeals, and delay decisions on benefit plans for 2024, such delay tactics prejudice Defendants. Moreover, prejudice abounds because Plaintiffs are seeking more than \$310,000 in fees for this limited litigation – when no fee or FOIA claim was pled. This massive and belated fee demand alone establishes the prejudice of Defendants.

WHEREFORE, for the reasons stated above, Defendants respectfully request that Plaintiffs' Motion to Amend the Complaint be denied.

²¹ Dkt. 34; Trans Id. 68274838.

DELAWARE DEPARTMENT OF JUSTICE

/s/ Patricia A. Davis

Patricia A. Davis, DAG (# 3857)
Adria Martinelli, DAG (# 4056)
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 257-3233
PatriciaA.Davis@delaware.gov
Adria.Martinelli@delaware.gov

CONNOLLY GALLAGHER LLP

/s/ Max B. Walton

Max B. Walton (# 3876)
Shaun Michael Kelly (# 5915)
1201 North Market Street, 20th Floor
Wilmington, DE 19801
(302) 757-7300
mwalton@connollgallagher.com
skelly@connollygallagher.com
Attorneys for Defendants

Dated: December 7, 2022

EFiled: Dec 07 2022 02:05PM EST
Transaction ID 68529035
Case No. N22C-09-526 CLS



EXHIBIT A

Max B. Walton

Subject: FW: Rise DE 22C-09-526 CLS

From: Emerson, Lisa K (Courts) <Lisa.Emerson@delaware.gov>
Sent: Friday, October 28, 2022 10:07 AM
To: David A. Felice <DFelice@baileyglasser.com>; Davis, Patricia (DOJ) <PatriciaA.Davis@delaware.gov>
Subject: RE: Rise DE 22C-09-526 CLS

More time is fine, however, if a trial is needed, the proposed trial date is firm.

From: David A. Felice <DFelice@baileyglasser.com>
Sent: Thursday, October 27, 2022 7:34 PM
To: Emerson, Lisa K (Courts) <Lisa.Emerson@delaware.gov>; Davis, Patricia (DOJ) <PatriciaA.Davis@delaware.gov>
Subject: RE: Rise DE 22C-09-526 CLS

Ms. Emerson:

The parties are discussing options that may obviate the need for a trial. Can we please have additional time to respond to the Court's proposed trial date? Thank you.

David

David A. Felice

Attorney

Bailey & Glasser, LLP

2961 Centerville Road, Suite 302

Wilmington, DE 19808

T: 302.504.6333

F: 302.504.6334

DFelice@baileyglasser.com

www.baileyglasser.com

This message and any attached documents contain information from the law firm of Bailey & Glasser LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail then delete this message.

IRS Circular 230 Disclosure - To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any matters addressed herein.

From: David A. Felice

Sent: Thursday, October 20, 2022 4:31 PM

To: Emerson, Lisa K (Courts) <Lisa.Emerson@delaware.gov>; Davis, Patricia (DOJ) <PatriciaA.Davis@delaware.gov>

Subject: RE: Rise DE 22C-09-526 CLS

Ms. Emerson:

Thank you for your email. Ms. Davis and I spoke briefly this afternoon and intend to speak again on Monday. We look forward to getting back to you on Monday if that is acceptable to the Court. Thank you.

David

From: Emerson, Lisa K (Courts) <Lisa.Emerson@delaware.gov>

Sent: Thursday, October 20, 2022 2:22 PM

To: David A. Felice <DFelice@baileyglasser.com>; Davis, Patricia (DOJ) <PatriciaA.Davis@delaware.gov>

Subject: Rise DE 22C-09-526 CLS

CAUTION: External Email

Counsel----

The Court proposes a trial date of November 28, 2022. Please let me know if this is agreeable. Also, how many days should be allotted for the trial?

Lisa K. Emerson

Judicial Secretary to Judge Calvin L. Scott

Superior Court of the State of Delaware

500 North King Street, Suite 10400

Wilmington, DE 19801

(P) 302-255-0677

Judge Scott's Judicial Preferences

EXHIBIT B

Max B. Walton

From: Emerson, Lisa K (Courts) <Lisa.Emerson@delaware.gov>
Sent: Tuesday, November 15, 2022 11:05 AM
To: David A. Felice; Davis, Patricia (DOJ); Max B. Walton; Shaun Kelly
Cc: Watson, Shawan (Courts); White, Tamu (Courts)
Subject: RiseDE v DeMatteis, et al N22C-09-526 CLS

For all intents and purposes, the issues in this case seemed to have been resolved. It does not seem that oral argument would be necessary.

Even though there may have been a vote to accept Highmark's proposal, did the Committee have the important facts about the changes? For instance, when did Highmark disclose the relevant changes to the plan and to who? Does the Court really need to decide the issue of Communication? It does not seem relevant to the final outcome.

Are we really arguing over attorney fees when a 'Go Fund Me' page has been set up for those purposes? If so, is there case law out there?

Please respond by Thursday, November 17, 2022.

DOCKET

Lisa K. Emerson
Judicial Secretary to Judge Calvin L. Scott
Superior Court of the State of Delaware
500 North King Street, Suite 10400
Wilmington, DE 19801
(P) 302-255-0677
Judge Scott's Judicial Preferences

EXHIBIT C

Max B. Walton

Subject: FW: RiseDE v DeMatteis, et al N22C-09-526 CLS

From: Max B. Walton
Sent: Monday, November 21, 2022 5:18 PM
To: 'David A. Felice' <DFelice@baileyglasser.com>; Davis, Patricia (DOJ) <PatriciaA.Davis@delaware.gov>; Shaun Kelly <skelly@connollygallagher.com>; Martinelli, Adria (DOJ) <Adria.Martinelli@delaware.gov>
Cc: Sara Mark <sara@pollockcohen.com>
Subject: RE: RiseDE v DeMatteis, et al N22C-09-526 CLS

David:

Defendants oppose any attempt to amend the complaint to add a claim for attorneys' fees at this late stage. You will need to seek leave to amend if you seek to amend. We disagree on the prejudice contention and many other points below, but we will save those arguments for a later time.

Thanks,

Max



CONNOLLY
GALLAGHER

Max B. Walton

CONNOLLY GALLAGHER LLP • www.connollygallagher.com

• 267 East Main Street • Newark, DE 19711

☎ 302-888-6297 ☎ 302-757-7299 ✉ mwalton@connollygallagher.com

This message may contain confidential attorney-client communications or other protected information. If you believe you are not an intended recipient (even if this message was sent to your e-mail address), you may not use, copy, or retransmit it. If you believe you received this message by mistake, please notify us by return e-mail, and then delete this message. Thank you for your cooperation.

From: David A. Felice <DFelice@baileyglasser.com>
Sent: Monday, November 21, 2022 2:08 PM
To: Max B. Walton <mwalton@connollygallagher.com>; Davis, Patricia (DOJ) <PatriciaA.Davis@delaware.gov>; Shaun Kelly <skelly@connollygallagher.com>; Martinelli, Adria (DOJ) <Adria.Martinelli@delaware.gov>
Cc: Sara Mark <sara@pollockcohen.com>
Subject: RE: RiseDE v DeMatteis, et al N22C-09-526 CLS

Max:

Your email to the Court Friday for the first time asserts that Plaintiffs waived their request for attorneys' fees by not pleading it in their complaint. We believe the issue was fairly raised in the stipulation addressing the parties' cross motions for summary judgment. Nonetheless, the touchstone of whether to allow an amended complaint (if that is

even needed at this point) is prejudice to the Defendants. Here, there can be no prejudice to Defendants as defense counsel have been on notice since at least October 27 that we were seeking fees. Defendants never raised an issue in all that time of our needing to amend the complaint, and indeed, proceeded to negotiate with us for many rounds on a stipulation of how to bring the proceedings to closure at the trial court level, including with briefing on Plaintiffs' request for an award of attorneys' fees, so they could appeal.

Please let me know if you will insist that Plaintiffs move to amend even though the claim for fees and facts are laid out in our moving papers and you waited three weeks to assert the argument of waiver. And if so, whether Defendants will oppose the motion and on what grounds. Thank you.

David

David A. Felice

Attorney

Bailey & Glasser, LLP

2961 Centerville Road, Suite 302

Wilmington, DE 19808

T: 302.504.6333

F: 302.504.6334

DFelice@baileyglasser.com

www.baileyglasser.com

This message and any attached documents contain information from the law firm of Bailey & Glasser LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail then delete this message.

IRS Circular 230 Disclosure - To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any matters addressed herein.



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

NOTICE OF RESPONSE TO MOTION

PLEASE TAKE NOTICE that Defendants' will present its Response in Opposition to Plaintiffs' Motion to Amend the Complaint at the convenience of the Court.

DELAWARE DEPARTMENT OF JUSTICE

/s/ Patricia A. Davis
Patricia A. Davis, DAG (# 3857)
Adria Martinelli, DAG (# 4056)
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 257-3233
PatriciaA.Davis@delaware.gov
Adria.Martinelli@delaware.gov

CONNOLLY GALLAGHER LLP

/s/ Max B. Walton

Max B. Walton (# 3876)

Shaun Michael Kelly (# 5915)

1201 North Market Street, 20th Floor

Wilmington, DE 19801

(302) 757-7300

mwalton@connollgallagher.com

skelly@connollygallagher.com

Attorneys for Defendants

Dated: December 7, 2022



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

[PROPOSED] ORDER

IT IS SO ORDERED on this ____ day of December 2022, that Plaintiffs' Motion to Amend the Complaint is DENIED.

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

The Honorable Calvin L. Scott



CERTIFICATE OF SERVICE

I, Max B. Walton, hereby certify that, on this 7th day of December 2022, I caused a copy of the foregoing to be filed and served upon the following via File&ServeXpress:

David A. Felice
BAILEY & GLASSER LLP
2961 Centerville Road, Suite 302
Wilmington, DE 19808
dfelice@baileyglasser.com

/s/ Max B. Walton _____

Max B. Walton (#3876)