



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)

No. _____, 20____

On Appeal from the Superior Court of
the State of Delaware

C.A. No. N22C-09-526 CLS

Defendants Below,
Appellants,

v.

RISEDELAWARE INC., KAREN)
PETERSON, and THOMAS PENOZA)

Plaintiffs Below,
Appellee.

NOTICE OF APPEAL

TO: Fox Rothschild LLP
Sidney S. Liebesman, Esquire
Austen C. Endersby, Esquire
Nathaniel J. Klepser, Esquire
919 North Market Street, Suite 300
Wilmington, DE 19801
Attorneys for RiseDelaware Inc.

PLEASE TAKE NOTICE that Secretary Claire DeMatteis, Director Cerron Cade, Delaware Department of Human Resources, Delaware State Employee Benefits Committee, and Delaware Division of Statewide Benefits (“Appellants”), Defendants-Below, do hereby appeal to the Supreme Court of the State of Delaware the Order granting Plaintiff Below/Appellee’s Motion for Stay of the Requirement All State Retirees Holding Medicare Supplemental Health Plus to Use Medicare Advantage of the Superior Court of the State of Delaware, in and for New Castle County by the Honorable Judge Calvin L. Scott dated October 19, 2022 in case number N22C-09-526 CLS; the Order in the case dated February 8, 2023; and the final Order in the case dated May 22, 2023. A copy of the Superior Court’s October 19, 2022, February 8, 2023, and May 22, 2023 Orders sought to be reviewed are attached hereto as Exhibits A, B, and C.

The names and address of the attorneys of record for Appellee are as follows:

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Attorneys for Plaintiff Below/Appellee

The parties against whom the appeal is taken is RiseDelaware Inc., Karen Peterson and Thomas Penozza, Plaintiffs Below/Appellees.

The names and address for the attorneys of record for Appellants is as follows:

DELAWARE DEPARTMENT OF JUSTICE

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Attorneys for Defendants Below/Appellants

No transcript of proceedings in the Superior Court need be ordered because the proceedings concerning the matters that are the subject of this appeal have already been transcribed as reflected on the Superior Court docket (Trans. ID No. 68418618). No transcript need be ordered regarding the May 16, 2023 argument on “Defendants’ Motion for Entry of Final Judgment or in the Alternative, Partial Final Judgment Pursuant to Superior Court Rule 54(b)” (Trans. ID No. 69871182) because the Superior Court’s ruling on the motion is contained in the Superior

Court's May 22, 2023 Order titled "The Court's Order on Final Judgment."
Exhibit C; *see* Supr. Ct. R. 9 (e)(ii).

DELAWARE DEPARTMENT OF JUSTICE

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DATE: May 22, 2023

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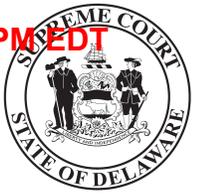


EXHIBIT A



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., KAREN)
PETERSON, and THOMAS PENOZA,)

Plaintiffs,)

v.)

C.A. No. N22C-09-526 CLS

SECRETARY CLAIRE DEMATTEIS)
in her official capacity as Secretary of)
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.)

Date Submitted: October 17, 2022

Date Decided: October 19, 2022

Upon Plaintiffs' Motion for Stay of the Requirement All State Retirees Holding Medicare Supplemental Health Plans to Use Medicare Advantage. GRANTED.

ORDER

David A. Felice, Esquire, Bailey & Glasser, LLP, Wilmington, Delaware, 19808, Attorney for Plaintiffs.

Steve Cohen, Esquire, and Sara Haviva Mark, Esquire, Bailey & Glasser, LLP, New York, New York, 10006, Attorneys for Plaintiffs.

Jacob S. Gardener, Esquire, Walden Macht & Haran LLP, New York, New York, 10281, Attorney for Plaintiffs

Patricia A. Davis, Esquire, Adria Martinelli, Esquire, and Jennifer Singh, Esquire, Delaware Department of Justice, Wilmington, Delaware, 19801, Attorney for Defendants.

SCOTT, J.

INTRODUCTION

Upon consideration of Plaintiffs RiseDelaware, Inc., Karen Peterson, and Thomas Penozza's ("Plaintiffs") Motion and Brief for Stay Pending Court decision upon Delaware State Employee Benefits Committee ("SEBC") decision to require all State retirees holding Medicare Supplemental Health Plans to switch to Medicare Advantage and Defendants'¹ Answering Brief in Opposition, Plaintiffs' Reply, the record in this case, and oral argument, the Motion for Stay is **GRANTED**.

¹ Secretary Claire DeMatteis, in her official capacity as Secretary of 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

BACKGROUND

Plaintiffs move to stay the policy decision of SEBC decision to require all State retirees holding Medicare Supplemental Health Plans to switch to Medicare Advantage. On February 28, 2022, SEBC held a public meeting. According to the agenda for this meeting, the fourth matter to be addressed was “2021 Health Third Party Administrative Services RFP Award Recommendations.”² According to the February 28, 2022 meeting minutes, it seems as if the members of SEBC were selecting a carrier for Medicare coverage for retirees to start on January 1, 2023. Page three of the minutes indicates Director Cade believed there would not be material changes to the plan, if the SEBC switched retirees to Medicare Advantage. A motion was adopted unanimously to move all State retirees to a Medicare Advantage plan administered by Highmark, effective January 1, 2023. At the time of the adoption to move all State retirees to Medicare Advantage, no contract was negotiated with Highmark. The terms of the Medicare Advantage plan were unknown as no contract yet existed.

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.

² Defendants’ Answering Brief curiously left out the reference to 2021. Def. Answ. Br., E-File 68238809, at 7.

SEBC met on April 25, 2022. The agenda for this meeting referred to “Medicare Advantage with and without Prescription Coverage Plan Options.” According to the April 25, 2022 minutes, Director Faith Rentz stated, “At the February 28th meeting, the Committee approved the rates for the Medicare pensioner plan options and those proposed options were voted on to replace the current plans in place today. At the March 14th meeting, the Committee approved the implementation of the Medicare Advantage plan for the January 1, 2023 plan year.” At the April meeting, a motion was adopted to approve Medicare Advantage plan with prescription as the only Medicare pensioner option. Additionally, Plaintiffs allege Director Cade on September 12, 2022 stated the Medicare Advantage plan “was not adopted in February but voted on in early June.” This Court has looked at the public minutes for SEBC’s meetings. Nothing contained in the minutes indicates the Medicare Advantage plan was voted on in early June, in fact there was no public meeting in early June.

On June 1, 2022, the Statewide Benefits Office and Office of Pensions sent out a standard letter to all Medicare-eligible retirees. According to the letter, “The State of Delaware will transition medical plan coverage from the current Special Medicfill Medicare Supplement Plan to Freedom Blue PPO, a Medicare Advantage Plan (also known as a Medicare Part C plan) administered by Highmark Blue Cross

Blue Shield Delaware, for coverage to begin January 1, 2023.” Additionally, Medicare-eligible retirees were reassured the switch was beneficial because

1. The monthly cost of the Medicare Advantage Plan is less than half of the current cost while providing the same level of medical plan benefits as the Special Medicfill plan it replaces.
2. The Medicare Advantage Plan offers exceptional service through an expanded concierge service team and additional benefits, such as Silver Sneakers and at home meals following discharge from a hospitalization.
3. The Medicare Advantage Plan offers a simplified process because you no longer need to carry your Medicare card in addition to your Highmark medical plan ID card.
4. There will be no change to your prescription coverage as SilverScript, the State of Delaware Medicare Part D prescription drug coverage administered by CVS Caremark, will continue as our pharmacy plan for all Medicare retirees.

The Court has concern with the promise of “providing the same level of medical plan benefits” as the policy retirees currently hold without an executed contract as to those medical plan benefits. Defendants have conceded the contract with Highmark was not executed until September 28, 2022. A copy of the contract to provide Medicare Advantage to retirees can be found on the State’s Website.³ It is unclear to this Court how accurate information may be given to retirees about their new medical benefits without a contract in place. In fact, no SEBC meeting minutes mentioned prior authorization or the use of in-network doctors in connection with

³ Delaware Department of Human Resources, *Health Plan-Highmark BCBS Medicare Advantage*, <https://dhr.delaware.gov/benefits/medicare/medicare-advantage.shtml> (last visited, Oct. 18, 2022).

Medicare Advantage until August 22, 2022, just one month before the contract was executed.

Two days after the execution of the contract, the State updated information on its website providing an 11-page document labeled “Frequently Asked Questions” (“FAQs”) under its information tab in Medicare Benefits explaining this shift in health care coverage to Medicare Advantage. The FAQs document explained the policy requires State retirees to enroll in a Medicare Advantage plan with prescription or lose their State-funded health insurance. It is undisputed that the Medicare Advantage plan is substantially different from retirees current State-funded health insurance as the Medicare Advantage plan will require prior authorization for significantly more procedures and will require retirees to find in-network doctors to avoid paying out-of-pocket costs for care. The FAQs is the first document made available to retirees to refer to prior authorization. Even though the contract was signed on September 28, 2022, and was to be effective as of January 1, 2023, the contract maintains a 30-page list of procedures or imaging which require prior authorization to be effective October 1, 2022. Then, on October 12, 2022, 13 days after this action was filed, retirees were made aware of the prior authorization overview as a document was available on the State’s website labeled, Highmark Blue Cross Blue Shield of Delaware Freedom Blue Medicare Advantage PPO Prior Authorization Overview. It appears to this Court the first time in which a reasonable

person would have notice of the prior authorization component and the use of only in-network providers of the Medicare Advantage plan was September 30, 2022.

Plaintiffs filed a Complaint asking for Declaratory Judgment, as well as this Motion to Stay on September 29, 2022. Plaintiffs and Defendants agreed to a briefing schedule and oral argument date. Briefs for Plaintiffs and Defendants, as well as Plaintiffs' reply on the Motion to Stay were received and reviewed by this Court.

STANDARD OF REVIEW

Enforcement of an agency's decision may be stayed by this Court “only if it finds, upon a preliminary hearing, that the issues and facts presented for review are substantial and the stay is required to prevent irreparable harm.”⁴ In analyzing this question, the Court balances all of the equities together; the Court balances the likelihood of the appellant being successful on appeal; whether the appellant will suffer irreparable harm; and whether any other interested party or the public will be harmed.⁵ “Moreover, ‘simply outlining the issue before the Court’ is not enough to

⁴ 29 Del. C. § 10144.

⁵ *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm'n*, 741 A.2d 356, 357–59 (Del. 1998).

establish a ‘substantial issue[.]’ ”⁶ In terms of demonstrating irreparable harm, Plaintiffs must present evidence that the alleged harms they claim they will suffer, will actually occur. Speculative harm does not serve as a basis for irreparable harm.⁷ Accordingly, this Court held a preliminary hearing on October 17, 2022.

ANALYSIS

This Court has Authority to Render Stay

Defendants argue this Court does not have the authority to render a stay in this case. The language of 29 Del. C. § 10144 makes clear this Court’s authority to render a stay if the decision of the SEBC is considered a regulation under the Delaware Administrative Procedures Act (“APA”). According to the APA, a regulation is, in relevant language, “any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority or court.” Here, SEBC, under its authority under 21 Del. C. § 9602 and 21 Del. C. § 5210, enacted a policy requiring retirees to move from their State-subsidized Medicare Plan to Medicare Advantage plan or stay with traditional

⁶ *Dept. of Transp. v. Keeley*, 2018 WL 4352855, at *3 (Del. Super. Sept. 11, 2018) (quoting *Dept. of Transp. v. Keeler*, 2010 WL 334920, at *1 (Del. Super. Jan. 28, 2010)).

⁷ *Keeler*, 2010 WL 334920, at *2 (citing *Liselyn Enter. v. Brady*, 1989 WL 100399, at *2 (Del. Super.)).

Medicare and give up their State-subsidized benefits. Therefore, such policy change is a regulation under the APA. This Court rejects Defendants' argument against APA application using *Free-Flow*⁸ to bolster their argument. *Free-Flow* stands for where there is specific statutory directive, an agency may operate outside the requirements of the APA.⁹ Relying on *Free-Flow*, Defendants contend that the language giving SEBC the power to make this decision is not a regulation subject to the APA, but rather the implementation of a specific and detailed directive that is not subject to the same formal comment and review requirements. Specifically, Defendants argue 21 Del. C. § 9602 and 21 Del. C. § 5210 that authorized SEBC to change retirees' healthcare plans without following the formal APA requirements. The Court finds otherwise. Here, there is no specific statutory directive for SEBC to force all retirees from their State-subsidized benefits to a Medicare Advantage plan or lose benefits. Therefore, *Free-Flow* does not apply.

Plaintiffs Likelihood of Success on Merits and Imminent Harm

Because this Court has the authority to grant a stay over implementation of a regulation under the APA, the Court may now assess the merits of Plaintiffs' arguments for such stay. Plaintiffs have provided the Court with sufficient

⁸ *Free-Flow Packaging Int'l, Inc. v. Sec'y of Dep't of Nat. Res. & Env't Control of State*, 861 A.2d 1233 (Del. 2004)

⁹ *Id.* at 1236.

information to assess their likelihood of success on their claims that SEBC improperly implemented a policy change. Specifically, that Defendant's conduct violates the APA. Plaintiffs allege, with specification, that based on the substantial right, retirees' State benefits, and procedural deficiencies in adoption of the new policy, the Plaintiff will likely be successful in their action because the procedural safeguards of the APA were ignored in implementation of this regulation.

Additionally, Plaintiffs also make a clear showing that retirees were unaware of the terms of the Medicare Advantage policy until the time of the signing of the healthcare contract with Highmark on September 28, 2022, or at the earliest the August 22, 2022, SEBC meeting. The Court notes there was no indication coverage would change, in fact, retirees were assured just a few months ago that their coverage under Medicare Advantage would provide "the same level of medical plan benefits as the Special Medicfill plan it replaces." This Court cannot agree with the sentiment that the need for prior authorizations for over 1,000 procedures and the use of only in-network doctors is the same level of benefits retirees obtained with the current policy. Despite Defendants belief that SEBC knew about the prior authorization component to the Medicare Advantage plan, from the record and minute meetings of SEBC it does not appear SEBC knew prior authorizations were contained in the Medicare Advantage plan until the August 22, 2022, meeting, just a month before entering into agreement with Highmark. To this point, Director Faith Rentz reported

the Medicare Advantage Plan would require prior authorization for “some services.” While the Court is not in the shoes of Director Faith Rentz, it seems as if the contract between Highmark had not even entered its final stages of negotiation on August 22, 2022, as certainly a reasonable person could not confuse “some” services with over 1,000 services Highmark requires prior authorizations for. Notice to retirees seemingly occurred August 22, 2022, at the earliest, therefore, Plaintiffs have filed this action within the limitations prescribed by the Delaware Freedom of Information Act.¹⁰

Plaintiffs also contends that they, as well as other retirees, present and future, will suffer irreparable harm if a stay is not granted, because without a stay, the Plaintiffs will be forced to change their health insurance coverage. The Court agrees that if the stay is not granted, Plaintiffs will be substantially harmed by the denial of

¹⁰ Defendants have suggested the only remedy available to Plaintiffs was a Freedom of Information Act violation of the validity of SEBC’s action and Plaintiffs are time-barred as six months has elapsed since the February 28, 2022. 29 Del. C. § 10005 requires Plaintiffs to contest the alleged violations of Delaware Freedom of Information Act, in the Court of Chancery, within 60 days of learning of such action, but in no event later than six months after the date of the action. The date of action is when retirees knew or should have been expected to know about the terms of the contract because no reasonable person would be expected to contest action of a public body relating to terms of a contract of a contract in which was not discussed nor executed. Additionally, under 10 Del. C. § 1902, no civil action brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter and if the action is transferred to the appropriate court, Plaintiffs’ original filing date in this Court will be considered the date Plaintiffs brought the action in Court of Chancery.

the stay because the deadline for switching benefits through Open Enrollment is October 24, 2022. This means retirees will be forced to enroll in the new Medicare Advantage plan or stay with traditional Medicare and give up their State-subsidized benefits within the next few days for such decision to become effective on January 1, 2023. Accordingly, Plaintiffs will suffer irreparable harm without a stay as their government benefit, to which these individuals have a reasonable expectation of continuation, is at stake. Additionally, this Court recognizes irreparable harm in Plaintiffs and other retirees being denied a statutorily protected right to review or comment on proposed agency action before its implementation.¹¹

Finally, as required when balancing the harms in determining irreparable harm, the Court addresses the issue of whether Defendants or the public will be harmed by the order for stay being granted. Since retirees were the only target of this policy change, the policy roughly effects approximately 30,000 individuals. There is no evidence that the public would be harmed by a stay as it effects a small

¹¹ See, *Blue Cross & Blue Shield v. Elliott*, 1977 WL 23810, at *1 (Del. Ch. Apr. 13, 1977) (Where this Court stayed an order directing Blue Cross to “reduce proposed weighted average rate increased” based on irreparable harm from deficiencies in notice of hearings leading to the decision.”) See also, *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, 2022 WL 2960031, at *11 (W.D. La. July 26, 2022) (Using the same standards this Court adopts to evaluate irreparable harm, the court found “Being deprived of a procedural right to protect its concrete interests [by violation of the APA's notice and comment requirements] is irreparable injury.”)

percentage of Delawareans. It is not clear from Defendants' Answering Brief that Defendants will suffer any significant harm in granting the stay. Therefore, the harm to Plaintiffs far outweighs the harm to Defendants and the public.

CONCLUSION

The Court finds that Plaintiffs have shown that the issues before this Court are substantial and that they will suffer irreparable harm. Accordingly, after balancing the required factors, Plaintiffs' Motion for Stay of the Requirement All State Retirees Holding Medicare Supplemental Health Plans to Use Medicare Advantage is **GRANTED**.

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

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

A final trial on the merits, subject to the availability of the Court and the parties, will be scheduled as soon as possible, where the Court will make a final determination of facts.

IT IS SO ORDERED.

A handwritten signature in blue ink, reading "Calvin L. Scott, Jr." in a cursive style.

Judge Calvin L. Scott, Jr.

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., KAREN)
PETERSON, and THOMAS PENOZA,)

Plaintiffs,)

v.)

C.A. No. N22C-09-526 CLS

SECRETARY CLAIRE DEMATTEIS)
in her official capacity as Secretary of)
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.)

Date Submitted: December 2, 2022

Date Decided: February 8, 2023

Upon Plaintiffs' Petition for Attorneys' Fees. DENIED.

ORDER

David A. Felice, Esquire, Bailey & Glasser, LLP, Wilmington, Delaware, 19808, Attorney for Plaintiffs.

Steve Cohen, Esquire, and Sara Haviva Mark, Esquire, Bailey & Glasser, LLP, New York, New York, 10006, Attorneys for Plaintiffs.

Jacob S. Gardener, Esquire, Walden Macht & Haran LLP, New York, New York, 10281, Attorney for Plaintiffs

Patricia A. Davis, Esquire, Adria Martinelli, Esquire, and Jennifer Singh, Esquire, Delaware Department of Justice, Wilmington, Delaware, 19801, Attorney for Defendants.

SCOTT, J.

This 8th day of February 2023, upon consideration of Plaintiffs RiseDelaware, Inc., Karen Peterson, and Thomas Penozza’s (“Plaintiffs”) Petition for Attorneys’ Fees, Defendants’¹ Answering Brief in Opposition, Plaintiffs’ Reply, and the record in this case, it appears to the Court that:

1. Plaintiffs filed a Complaint asking for Declaratory Judgment, as well as this Motion to Stay on September 29, 2022 the policy decision of the State Employee Benefits Committee’s (“SEBC”) decision to require all State retirees holding Medicare Supplemental Health Plans to switch to Medicare Advantage. Plaintiffs and Defendants agreed to a briefing schedule and oral argument date.
2. On October 19, 2022, after hearing oral argument and reviewing the parties’ briefs, this Court issued an opinion on Plaintiffs’ Motion to Stay. The Court granted the stay and found Plaintiffs showed that the issues before the Court were substantial and that Plaintiffs would likely suffer irreparable harm if the stay was not granted. Accordingly, the Court found that after balancing the

¹ Secretary Claire DeMatteis, in her official capacity as Secretary of 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.

required factors, Plaintiffs' Motion for Stay of the Requirement All State Retirees Holding Medicare Supplemental Health Plans to Use Medicare Advantage was granted. Further, this Court concluded that Defendants' implementation of a Medicare Advantage Plan for State retirees and acceptance of enrollment into the Plan, including by way of automatic enrollment in the open enrollment period currently in effect for State retirees is stayed until further Order by this Court. Additionally, a final trial on the merits was scheduled for November 28, 2022 so the Court could make a final determination of facts.

3. On November 7, 2022, the State made the decision to extend the current Medicare Supplemental Health Plan for a year. The parties represented to this Court that the trial, scheduled for November 28, 2022, at 2:00 P.M. was not necessary. As a result, no trial was held on the assigned trial date.
4. Since representing to this Court no trial was necessary, Plaintiffs and Defendants have filed excessive motions², resulting in, asking the Court to make a factual determination, which should have been addressed at Trial.

² Plaintiffs' Motion to Amend and Supplement their Complaint, Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment on their Communications Claim, as well as a Stipulation for Entry of Final Judgment.

5. As a Trial Court, the expectation is that the Court will hear testimony from witnesses, judge their credibility, and examine exhibits to reach its Final Decision.
6. This Court is asked to decide Plaintiffs' Petition for Attorneys' Fees even though there has been no trial.
7. Plaintiffs argue they are entitled to Attorneys' Fees because the Court's October 19, 2022 Opinion "made important findings of fact about the SEBC's adoption and Defendants' communications of Medicare Advantage for State retirees that were adopted by stipulation for the Final Order." The Court did not make any findings of fact and importantly points Plaintiffs to the last conclusion of its order; it reads "A final trial on the merits, subject to the availability of the Court and the parties, will be scheduled as soon as possible, where the Court will make a final determination of facts."
8. The Parties did not find trial necessary, therefore no final determination of facts occurred under these circumstances.
9. Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs.³ However, Plaintiffs argue they are entitled to attorneys' fees for two reasons: (1) for Defendants

³ *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del.1966) ("a litigant must, himself, defray the cost of being represented by counsel.").

“violation of open meeting laws” allowing Plaintiffs to utilize the fee shifting statute in Title 29, Chapter 100 and (2) because equitable principles can be applied “because the Court granted relief equitable in nature” allowing the Court to award attorneys’ fees even if no contract or statute requires it. Both arguments fail.

10. First, this Court is not permitted to award attorneys’ fees under Title 29 because enforcement of violations of open meeting laws is given to the Court of Chancery,⁴ as such this Court may not award attorney fees and costs.

11. The Court agrees it does hear cases which occasionally require the Court to apply equitable principles and if such occasion is presented then the Court does have jurisdiction to award attorneys’ fees even if no contract or statute requires it.⁵ Examples of such instances include upholding award of attorneys’ fees in a Superior Court action involving a mortgage foreclosure, which is inherently equitable,⁶ and sought relief equivalent to an injunction, which is sufficiently equitable in nature.⁷ The Plaintiffs in this case originally sought a declaratory judgment, which is not inherently equitable. Therefore, this Court

⁴ See 29 *Del. C.* § 10005.

⁵ *Dover Hist. Soc., Inc. v. City of Dover Plan. Comm’n*, 902 A.2d 1084, 1090 (Del. 2006).

⁶ *Burge v. Fidelity Bond & Mortgage Co.*, 648 A.2d 414, 421–22 (Del.1994)

⁷ *Dover Hist. Soc., Inc.*, 902 A.2d at 1090.

does not exercise its jurisdiction to award attorneys' fees. Each party should bear their own costs and fees.

12. For the aforementioned reasons, the Plaintiffs' Petition for Attorneys' Fees is **DENIED.**

No further order of this Court is needed to close this case.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.

EXHIBIT C

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., KAREN)
PETERSON, and THOMAS PENOZA,)

Plaintiffs,)

v.)

C.A. No. N22C-09-526 CLS

SECRETARY CLAIRE DEMATTEIS)
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DELAWARE DEPARTMENT OF)
HUMAN RESOURCES, DELAWARE)
STATE EMPLOYEE BENEFITS)
COMMITTEE, and DELAWARE)
DIVISION OF STATEWIDE)
BENEFITS,)

Defendants.)

Date Submitted: May 16, 2022

Date Decided: May 22, 2023

The Court's Order on Final Judgment.

ORDER

Sidney S. Liebesman, Esquire, Austen C. Enderby, Esquire, and Nathaniel J. Klepser, Esquire, Fox Rothchild LLC, Wilmington, Delaware, 19801, Attorneys for Plaintiffs RiseDelaware, Inc., Karen Peterson, and Thomas Peterson.

Patricia A. Davis, Esquire, Adria Martinelli, Esquire, and Jennifer Singh, Esquire, Delaware Department of Justice, Wilmington, Delaware, 19801, and Lisa R. Hatfield, Esquire, Max B. Walton, Esquire, and Shaun Michael Kelly, Esquire, Connolly Gallagher LLP, Wilmington, Delaware 19801, Attorneys for Defendants.

SCOTT, J.

This 22nd day of May 2023, upon consideration of Defendants’¹ Motion for Entry of Final Judgment or Partial Judgment, Plaintiffs RiseDelaware Inc.’s (“RiseDE”) Response, the record in this case, and oral argument, it appears to the Court that:

1. In Oral Argument, this Court’s jurisdiction was called into question due to Plaintiffs unilaterally transferring the issue of Attorneys’ Fees to the Court of Chancery.
2. The Court now examines its jurisdiction to render a decision on this matter.
3. According to 10 *Del. C.* 1902, a court, which by final order has declared it does not have jurisdiction over the matter, can transfer an action to another court by filing a written election of transfer. A motion to transfer should be filed within 60 days for this Court to grant or deny such motion.
4. In *West*, defendants moved this Court to transfer the case to the Court of Chancery to decide plaintiff’s equitable breach of fiduciary duty claim.² The Court granted the motion to allow Court of Chancery to exercise jurisdiction

¹ Secretary Claire DeMatteis, in her official capacity as Secretary of 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 Recourses, Delaware State Employee Benefits Committee, and Delaware Division of Statewide Benefits.

² *West v. Access Control Related Enterprises, LLC*, 2023 WL 2920675 (Del. Apr. 13, 2023).

over the legal and equitable claims.³ Instead of following the necessary steps to transfer the case, plaintiff then voluntarily dismissed its breach of fiduciary duty claim then moved to amend the complaint, which was granted by this Court, to drop the breach of fiduciary duty claim and to add new claims for breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and tortious interference with prospective business relations.⁴ The *West* court explained under 10 *Del. C.* § 1902, a court can transfer an action to another court for lack of jurisdiction and such transfer orders are not self-executing but require a party to file a written election of transfer within 60 days of the order.⁵ Plaintiff did not file an election to transfer the case to the Court of Chancery.⁶ Because the case was never transferred from the Delaware Superior Court to the Chancery Court, the Superior Court retained jurisdiction.⁷

5. To properly transfer a case, Plaintiffs should have E-file/serve the following to the Superior Court: Election of transfer to Chancery Court, Motion to Transfer, proposed order granting Motion to Transfer, certificate of service of motion and proposed order. Then, Plaintiffs should have filed a letter to the

³ *Id.* at *1.

⁴ *Id.* at *2.

⁵ *Id.* at *5.

⁶ *Id.*

⁷ *West*, 2023 WL 2920675 at *5.

Superior Court Judge stating that the motion to transfer was unopposed (if true), enclosing courtesy copies of the documents of the election to transfer, Motion to Transfer, proposed order granting Motion to Transfer, and certificate of service of motion and proposed order, and E-file letter and hand-deliver letter with courtesy copies to the Superior Court Judge. Upon reception of an order transferring the case to Chancery Court, e-file/serve the Complaint filed in Superior Court, and Chancery case information sheet. Finally, Plaintiffs should have submitted a letter to the Chancellor stating the action originated in the Superior Court and the Superior Court granted a motion to transfer the case to Chancery Court, enclose courtesy copies of the Complaint and Chancery Court case information sheet, and state that the Complaint is substantially the same, with the exception of the name of the court and the civil action number.⁸

6. The concepts in *West and Transferring Cases From Chancery Court to Superior Court: A Step-by-Step Guide* apply to this case. Here, RiseDE did not file a Motion to Transfer in this Court, therefore the matter was never

⁸ Francis G.X. Pileggi and Chauna A. Abner, *Transferring Cases From Chancery Court to Superior Court: A Step-by-Step Guide*, LAW.COM (Mar. 10, 2021, 9:01 AM), <https://www.law.com/delbizcourt/2021/03/10/transferring-cases-from-chancery-court-to-superior-court-a-step-by-step-guide/>. (Noting the article's topic is about transferring from Chancery Court to Superior Court, however, the same procedure would be required in Superior Court).

properly transferred to the Chancery Court. As such, the Superior Court retains jurisdiction.

7. Plaintiffs filed a Complaint asking for Declaratory Judgment, as well as this Motion to Stay on September 29, 2022, the policy decision of the State Employee Benefits Committee's ("SEBC") decision to require all State retirees holding Medicare Supplemental Health Plans to switch to Medicare Advantage. Plaintiffs and Defendants agreed to a briefing schedule and oral argument date.
8. On October 19, 2022, after hearing oral argument and reviewing the parties' briefs, this Court issued an opinion on Plaintiffs' Motion to Stay. The Court granted the stay and found Plaintiffs showed that the issues before the Court were substantial and that Plaintiffs would likely suffer irreparable harm if the stay was not granted. Accordingly, the Court found that after balancing the required factors, Plaintiffs' Motion for Stay of the Requirement All State Retirees Holding Medicare Supplemental Health Plans to Use Medicare Advantage was granted. Further, this Court concluded that Defendants' implementation of a Medicare Advantage Plan for State retirees and acceptance of enrollment into the Plan, including by way of automatic enrollment in the open enrollment period currently in effect for State retirees is stayed until further Order by this Court. Additionally, a final trial on the

merits was scheduled for November 28, 2022, so the Court could make a final determination of facts.

9. On November 7, 2022, the State made the decision to extend the current Medicare Supplemental Health Plan for a year. The parties represented to this Court that the trial, scheduled for November 28, 2022, at 2:00 P.M. was not necessary. As a result, no trial was held on the assigned trial date.
10. Since representing to this Court no trial was necessary, Plaintiffs and Defendants filed excessive motions, resulting in, asking the Court to make a factual determination, which should have been addressed at Trial.
11. As a Trial Court, the expectation is that the Court will hear testimony from witnesses, judge their credibility, and examine exhibits to reach its Final Decision.
12. This Court was asked to decide Plaintiffs' Petition for Attorneys' Fees taking into account that there had been no trial.
13. The Parties did not find trial necessary, therefore no final determination of facts or conclusions of law occurred under these circumstances. Since this Court granted Plaintiffs' Motion to Stay, the parties have settled the matter without adjudication from this Court.
14. On February 8, 2023, the Court denied Plaintiffs' Petition for Attorneys' Fees because it did not believe Attorneys' Fees were warranted.

15. RiseDE appealed the February 8, 2023 Order. The Delaware Supreme Court **DISMISSED** the appeal because it was interlocutory.
16. Defendants' now move for entry of final judgment or in the alternative, partial final judgment on a record that is undeveloped due to the parties' mutual agreement.
17. The only issue remaining in this case is of Attorneys' Fees. Therefore, because Plaintiffs are not entitled to Attorneys' Fees by Statute or for any other reason, this Court enters judgment against Plaintiffs for Attorneys' Fees.

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.



CERTIFICATE OF SERVICE

I certify that on this 22nd day of May 2023 the foregoing *Appellants*
Secretary Claire DeMatteis, Director Cerron Cade, Delaware Department of
Human Resources, Delaware State Employee Benefits Committee, and Delaware
Division of Statewide Benefits' Notice of Appeal and Exhibits A, B, and C were
served via File & ServeXpress on the following:

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/s/ Max B. Walton
Max B. Walton (#3876)