EFiled: Oct 03 2023 03:33PM EDT
Filing ID 71012573
Case Number 178,2023D

IN THE

Supreme Court of the State of Delaware

SECRETARY CLAIRE DEMATTEIS, in her official capacity as Secretary of the Delaware Department of Human Resources and Co-Chair of the State Employee Benefits Committee; DIRECTOR CERRON CADE, in his official capacity as Director of the Delaware Office of Management and Budget and Co-Chair of the State Employee Benefits Committee; DELAWARE DEPARTMENT OF HUMAN RESOURCES; DELAWARE STATE EMPLOYEE BENEFITS COMMITTEE; and DELAWARE DIVISION OF STATEWIDE BENEFITS,
Defendants-Below, Appellants,

v.

RISEDELAWARE INC., a Delaware corporation; KAREN PETERSON, an individual; and THOMAS PENOZA, an individual,
Plaintiffs-Below, Appellees.

NO. 178, 2023
On Appeal from the Superior Court for the State of Delaware,
C.A. No. N22C-09-526-CLS

APPELLANTS' REPLY BRIEF ON APPEAL AND CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS ON CROSS-APPEAL

As SEBC's opening brief demonstrates, this appeal centers on: (1) whether the Superior Court erred in holding that the SEBC's contract award for Medicare Advantage meets the definition of a "regulation" in the APA; (2) whether the Superior Court's Stay Order contravenes the holding of this Court in *Free-Flow;*[1] and (3) whether the Superior Court lacked jurisdiction to issue the Stay Order under the APA. Following submission of SEBC's opening brief, Plaintiffs filed a Notice of Cross-Appeal on June 21, 2023, appealing the Superior Court's May 22, 2023 Final Order, the February 8, 2023 Order denying attorneys' fees, and the December 19, 2022 Order denying Plaintiffs' Motion to Amend and Supplement Their Complaint.

This is Defendants' reply brief in support its appeal and answering brief in opposition to Plaintiffs' brief.[2]

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[1] *Free-Flow Packaging Int'l., Inc. v. Sec'y of Dept. of Nat. Res. & Evntl. Control*, 861 A.2d 1233, 1236 (Del. 2004) (hereafter "*Free-Flow*").

[2] Defendant/Appellants' Opening Brief will be referred to herein as "DOB" and Plaintiff/RiseDE's Answering/Opening Brief will be referred to herein as "PAB."

RESPONSE TO APPELLEES' CROSS-APPEAL SUMMARY OF ARGUMENT

1. **Denied**. The Superior Court did not abuse its discretion in denying Cross-Appellants'[3] attorneys' fees. The American Rule applies, and RiseDE must bear its own fees. Plaintiffs can point to no contract or statute that authorizes fee shifting here. None exist. And no equitable exception supports a fee award to Plaintiffs.

Plaintiffs' reference to the common benefit doctrine is misplaced. It may only be invoked (1) in a taxpayer suit (2) where plaintiff confers a quantifiable monetary benefit. But this was not a taxpayer suit, and there was no quantifiable monetary benefit; thus, the common benefit doctrine does not apply. Plaintiffs' reliance on the bad faith exception to the American Rule is likewise inapposite. That exception cannot apply because the Superior Court made no factual findings at all—let alone of bad faith—and Plaintiffs cannot establish as a matter of law vexatious or other litigation conduct that could justify invocation of the bad faith exception. Plaintiffs' attempt to invoke the private attorney general doctrine in all but name should be rejected. As the Superior Court correctly held, this is not a case where equitable fee shifting is permitted, and the Superior Court did not abuse its discretion in denying Plaintiffs' fee request.

[3] Hereinafter, collectively referred to as "Plaintiffs" or "RiseDE."

COUNTER-STATEMENT OF FACTS ON CROSS-APPEAL

Plaintiffs spend twenty-four pages of their submission alleging "facts." Appellant/Cross-Appellees[4] dispute Plaintiffs' version of events, much of which are disputed affidavits submitted by SEBC below. The Superior Court, however, never made factual determinations below, and certainly did not make findings, as RiseDE insinuates on appeal. Indeed, five orders issued by the Superior Court in this case confirm that the Superior Court made only two findings relevant to these cross appeals: (1) that the SEBC's contracting for Medicare Advantage is subject to the requirements of the APA; and (2) that attorneys' fees are unavailable to Plaintiffs.

- Order #1 – The Stay Order. A089-102.[5] After Plaintiffs filed the Complaint on September 25, 2022, the parties agreed to expedited briefing on Plaintiffs' requested stay order. The motion was argued on October 17, 2022, and the Order was issued on October 19, 2022. The Superior Court was unclear "how accurate information may be given to retirees about their new medical benefits without a contract in place," (A093) and stated that "the Medicare Advantage plan is substantially different from retirees [*sic*] current State-funded health insurance as the Medicare Advantage plan will require prior authorization for significantly more

[4] Hereinafter, collectively referred to as "Defendants" or "SEBC."

[5] References to A___ refer to the Appendix attached to DOB. References to B___ refer to Volume 1 and 2 of the Appendix attached to PAB. References to AR___ refer to the SEBC's Appendix filed herewith.

procedures and will require retirees to find in-network doctors to avoid paying out-of-pocket costs for care." A094. The Superior Court held that the "SEBC . . . enacted a policy requiring retirees to move from their State-subsidized Medicare Plan to Medicare Advantage plan or stay with traditional Medicare and give up their State-subsidized benefits" and "such policy change is a regulation under the APA." A096-97. The Court went on to hold that "Plaintiff will likely be successful in their action because the procedural safeguards of the APA were ignored in implementation of this regulation." A098. Thereafter, on November 15, 2022, the Court sent an e-mail to the parties, stating "[f]or all intents and purposes, the issues in this case seemed to have been resolved." B266.

- Order #2 – Stipulation Denial. B274-78. On November 18, 2022, the parties submitted a stipulation and order for resolution of remaining claims and issues. B270-73. The Superior Court denied that stipulation on December 6, 2022. The Court's explanatory note states "[p]lease file a stipulation reflective of the resolution of the case. It seems that the parties are at the point of over litigating this case." B278. The parties thereafter filed a second stipulation, which was not entered by the Superior Court. B279-282.

- Order #3 – Order on Attorneys' Fee Petition. B288-94. Plaintiffs filed the fee petition on November 14, 2022. B338-39. The SEBC filed its brief in opposition to the fee petition on November 22, 2022. AR004-27. The Superior

Court decided the fee petition on February 8, 2023. A344. In that decision, the Superior Court *rejected* Plaintiffs contention that "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.'" A348 at ¶7. The Superior Court stated plainly that it "did not make any findings of fact" and "therefore no final determination of facts occurred under these circumstances." *Id.* at ¶¶7-8. The Court denied the claim for attorneys' fees and stated "[n]o further order of this Court is needed to close this case." A350.

- Order #4 – Motion to Amend Rendered Moot. B449-50. On December 2, 2022, Rise DE filed a motion to amend the Complaint to add, *inter alia*, a claim for attorneys' fees. B444-48. On December 7, 2022, the SEBC filed its opposition. AR028-35. On December 19, 2022, the Superior Court ruled that RiseDE's motion to amend was moot. B449. That Order states "[s]eemingly, this case ended after the Court entered its October 19, 2022, order. After that date, it is unclear what additional action by the attorneys, or the Court was needed to end the case, other than an order closing the case. There was no trial, no facts for the Court to determine and no need to amend the Complaint." B450.

- Order #5 – Order on Final Judgment ("Final Order"). B330-37. After this Court held the SEBC's appeal of the February 8, 2023 Order to be interlocutory

(2023 WL 2761690, at *2), on April 21, 2023, Defendants filed a motion for a final judgment, or in the alterative, a final judgment pursuant to Rule 54(b). B306-12. Unsurprisingly, RiseDE opposed the motion. On May 22, 2023, the Superior Court entered an Order entitled "The Court's Order on Final Judgment." The Superior Court opined that "[t]he Parties did not find trial necessary, therefore no final determination of facts or conclusions of law occurred under these circumstances." B336. The Superior Court went on to hold that "[t]he 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." B337.

To summarize, the Stay Order contains the Superior Court's key legal finding: the contract award for Medicare Advantage constitutes a "policy" under the APA, which should have been adopted via a regulation. A096-97. As SEBC's opening brief demonstrates, this constitutes legal error. And because the SEBC's action was not subject to the APA, the Superior Court lacked jurisdiction to grant the Stay Order pursuant to 29 *Del. C.* §10144. The Superior Court also denied attorneys' fees requested by Plaintiffs because it found no legal basis to grant them. But the Superior Court did not—and repeatedly clarified that it did not—make any other legal or factual findings. Accordingly, RiseDE's statement of facts on appeal are

not facts found by the Superior Court, and this Court should disregard RiseDE's skewed and needlessly inflammatory version of events.[6]

A. Retirees' Healthcare Benefit

Without citation to authority, RiseDE impermissibly recites opinion or argument dressed up as "factual information." These include statements such as "seniors on Medicare Advantage receive worse care" (PAB 11) and "the only winners in the privatized managed care Medicare Advantage scheme have been the…insurance industry and employers who offload their retired employees to such plans." *Id*. However, many retirees are likely to disagree with this characterization as "some of the retirees have been harmed by the Plaintiff's conduct as a switch to Medicare Advantage would have reduced the monthly premium [for some]…". A132 at ¶19. Where RiseDE asserts opinion as fact, Defendants dispute the assertions.

B. SEBC Adoption of Medicare Advantage

The SEBC's complained-of actions were conducted in a public process with required public notice. Plaintiffs' allegations that Medicare Advantage was a "secretive adoption" and "without notice" are incorrect. PAB 12.

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[6] The SEBC disputes many factual assertions made by RiseDE in their submission. Due to word limitations, only the most glaring factual disputes are addressed below.

As required, at least seven days prior to the meeting, the SEBC posted its agenda including notice that, "2021 Health Third Party Administrative Services RFP Award Recommendations… (c.) Medicare Plan Effective January 1, 2021," would be discussed.[7] A192.[8] The agenda noted that this particular agenda item "may require action and approval by the Committee," (*id*.) further alerting potential attendees that action on the Medicare Plan was likely to occur. Further, with the posting was a document titled "FY23 Outstanding Decisions," which included charts comparing Medicfill to Medicare Advantage and a discussion of consideration when deciding between the two. A194-225. The SEBC concurs with the acknowledgement that the February 28, 2023 meeting was public (PAB 12; A091), and further maintains that notice was proper. A119-120; A129.

Contrary to RiseDE's assertions, the Superior Court's Stay Order does not state that the "meeting Agenda had given no notice of this major policy change." PAB 13. Indeed, the Court made no findings of fact and stated only that the "[n]otice to retirees seemingly occurred August 22, 2022…". A099. Nor did the Court state that FOIA's mandates were violated.[9] And although the Superior Court found the

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[7] The plan would be effective January 1, 2023, and references to "January 1, 2021" in the agenda were the result of a typographical error. A129 at ¶9.

[8] RiseDE contends that the Superior Court determined that "the SEBC violated FOIA's open meeting laws." PAB 14, n.7. A plain reading of note 10 of the Stay Order (A099) belies this contention. No violation of FOIA was found.

[9] *Id*.

actions of the SEBC were regulatory and required adherence to the APA, the Court did not make a factual finding that "[t]he procedural safeguards of the APA were ignored in implementation of this regulation[.]" PAB 14. In full, the Court stated, "**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." A098 (emphasis supplied). The Court was merely assessing Plaintiffs' likelihood of success (A097-98) and has made clear that it did not make any findings of fact. A102; A348; A357.

C. Open Enrollment

Plaintiffs contend that State Officials lied to retirees for three months after the SEBC's adoption of Medicare Advantage. PAB 15. This is sensationalism. Standard processes were followed.

Following any decision to award a contract to a successful bidder under an RFP, the State begins negotiations of the actual terms of the contract, a process that typically takes six to eight months, particularly for large, complex contracts such as that here. A130 at ¶12. The Highmark Commercial Contract awarded on December 13, 2021, was finalized on August 25, 2022, and the Medicare Advantage contract awarded on February 28, 2022, was finalized on September 28, 2022. *Id.*

Medicare Advantage was introduced on June 1, 2022. *Id*. at ¶15. Following the June 1, 2022, communication, the SBO distributed five additional letters to state pensioners —including several brochures, answers to frequently asked questions, and newsletters—and held thirty informational sessions where pensioners could ask questions and be prepared for the state's Medicare open enrollment in October 2022. A131 at ¶17.

In addition to eighteen Medicare Advantage educational sessions held across three counties in August, information about the change was also provided via town hall meetings. The SBO Office of Pensions and Highmark attended six town hall style meetings on 9/12, 9/15, 9/22, 9/27, 9/28 (all prior to open enrollment), and 10/10/22 (during open enrollment). A131 at ¶18. Each session included a PowerPoint presentation and an opportunity to ask questions. Each of the PowerPoint presentations informed pensioners that the new plan would be the Medicare Advantage plan and explained that some services would need prior authorization. *Id*.

D. Threat of Litigation and Execution of the Contract

Defendants never attempted to subvert this action (or any litigation) by executing the Highmark contract for pensioners. As explained more fully in the DeMatteis Declaration, several communications were provided regarding contract execution. A330 at ¶¶4-7. After the contract was executed on September 28, 2022,

it was publicly posted to SEBC's website the next business day. *Id*. at ¶8. The negotiation of this sizable contract (over 180 pages) and the timing of execution were conducted in the normal course of business and clearly communicated. A331 at ¶10. Any contention that Defendants lied about the contract and its finality is wrong: the contract was final when executed. *Id*. at ¶11.

E. The Purported "Benefit" Does Not Accrue to All State Retirees

Despite Plaintiffs' assertion that they achieved "monumental benefits" for 30,000 State retirees, this is *not* a class action, and no class claims have been alleged (nor could they be). Indeed, some retirees have been harmed by the Plaintiffs' conduct as a switch to Medicare Advantage would have reduced the monthly co-pay by over 50% for those retirees at the highest tier of monthly co-pays. A132 at ¶19 (demonstrating a co-pay of $459.38 under Medicare Supplement with prescription and a co-pay of $216.19 under Medicare Advantage with prescription).[10] This co-pay reduction would have come with the same benefits coverage including the same prescription coverage and same provider network. *Id*. at ¶20.

RiseDE's discussion of the purported results of the Stay Order, and their perceived "validation of the Stay order's recognition of the benefits of public input in rulemaking[,]" specifically RiseDE's conclusions about SEBC and legislative

[10] As RiseDE admits, "premiums are cheaper for Medicare Advantage plans." PAB 11.

actions following the decision below, PAB 24-25, are not part of the record below and therefore, not properly before this Court for consideration.[11]

[11] Supr. Ct. R. 9(a) "An appeal shall be heard on the original papers and exhibits which shall constitute the record on appeal."

REPLY BRIEF ARGUMENT

I. THE APA DOES NOT APPLY AND THE COURT THEREFORE LACKED JURISDICTION TO IMPOSE A STAY

The APA does not apply to an SEBC contract award for Medicare Advantage under the statutory definition of "regulation" and this Court's decision in *Free-Flow*. DOB 14-24. Because the APA does not apply to such contract awards, the Superior Court lacked jurisdiction to impose the Stay Order. DOB 24. This is the threshold and determinative issue on appeal.

RiseDE's entire submission grasps and claws to allege (unfound) facts and advance clearly erroneous procedural arguments aimed to obfuscate the threshold, determinative legal issue. RiseDE cannot refute SEBC's key arguments showing that the APA does not apply.

First, Plaintiffs cannot dispute this Court's unequivocal holding in *Free-Flow*. This Court "disagree[d] with the premise that all of what an agency does must culminate in a regulation or a case decision."[12] This Court held that "when an agency carries out other functions [beyond creating a regulation or case decision], as when it implements a specific and detailed statutory directive, it may operate outside the scope of the APA."[13]

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12 *Free-Flow*, 861 A.2d at 1236.

13 *Id.*

Second, RiseDE cannot dispute that the SEBC has a specific statutory directive. Unquestionably, the SEBC has the power and duty for the "(2) [s]election of all carriers or third-party administrators necessary to provide coverages to State employees"[14] and separately has the power and duty for the "[s]election of the carriers or third-party administrators deemed to offer the best plan to satisfy the interests of the State and its employees and pensioners in carrying out the intent of this chapter."[15] They also cannot dispute that the General Assembly authorized the SEBC to select Medicare Parts A, B, or C, and that Medicare Advantage is a Medicare Part C plan.[16]

Third, RiseDE cannot reasonably dispute that: (1) the award of a contract does not meet the statutory definition of a "regulation" because a contract award does not act as a rule, standard, or guide;[17] (2) the newly enacted statutes (specifically 29 *Del. C.* §9602(b)(2) and 29 *Del. C.* §5210(3)), which do not make specific reference to the APA, control over general older statutes, such as the APA (DOB 21);[18] (3) the statutory language of 29 *Del. C.* §9602(b) and 29 *Del. C.* §5210 treats selection of carriers separately from adoption of a regulation, meaning that it must be presumed that the selection and contract award to a carrier need not be done via

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14 29 *Del. C.* §9602(b)(2).
15 29 *Del. C.* §5210(3).
16 29 *Del. C.* §5203(b).
17 29 *Del. C.* §10102(7).
18 *Heath v. State*, 983 A.2d 77, 81 (Del. 2009).

the formality of a regulation;[19] and (4) requiring the formality of a regulation would impermissibly render the plain statutory authority of the SEBC to select carriers[20] (without the formality of a regulation) mere surplusage.[21]

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Without adequately refuting *any* of these truisms, RiseDE advances a strained construction of the statutory language. Ignoring the applicable statutory provisions in favor of Delaware's Drafting and Style Manual,[22] RiseDE contends that all directives "affecting individuals" should be adopted by regulation. PAB 37. RiseDE further contends that because selection of Medicare Advantage by the SEBC is a

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19 *In re Request of Trustees of Lawyers' Fund for Client Prot. for an Advisory Opinion,* 242 A.3d 555, 557-58 (Del. 2020).

20 29 *Del. C.* §9602(b)(2); 29 *Del. C.* §5210(3).

21 *Spintz v. Div. of Fam. Servs.*, 228 A.3d 691, 698 (Del. 2020) (quoting *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696 (Del. 2013) (citations omitted)).

22 *See* https://regulations.delaware.gov/agency/docs/draftingmanual.pdf (last accessed Sept. 29, 2023). The Delaware manual for drafting regulations is, by its own admission, "intended to provide editorial assistance in drafting documents" for publication in the Delaware Register of Regulations and the Delaware Administrative Code. Manual p. 1. RiseDE quotes the *conclusion* of a *summary* of the APA provided in the drafting manual when quoting Section 2.6. PAB 37; Manual p. 6. Ultimately, provisions in a drafting manual cannot alter the specific definition of a regulation provided by the General Assembly, and even if it could, the regulations cannot supersede the statutory provisions of the Delaware Code. *See De. Dep't of Nat. Res. and Envtl. Control v. Sussex Cty.*, 34 A.3d 1087, 1095-96 (Del. 2011); *Farm Family Ins. Co. v. Verizon Commc'ns Inc.*, 2011 WL 531941, at *3 (Del. Super. Jan. 31, 2011) ("when there is a conflict between an administrative regulation and a statute, the statute prevails . . .").

purported policy change, that it must be done by regulation. RiseDE's arguments are unavailing for several reasons.

First, even assuming *arguendo* that the selection of a carrier for Medicare Advantage constitutes a "policy" of some kind, *Free-Flow* teaches that the action of an agency is not subject to the APA's regulation adoption rules if the agency has a specific statutory directive, as here. The specific statutory directive for the SEBC to select carriers in 29 *Del. C.* §9602(b)(2), 29 *Del. C.* §5210(3) and 29 *Del. C.* §5203(b) (coverages) removes the selection of the carriers from the ambit of the APA.

RiseDE's reliance on language in a summary of the APA in the drafting manual is misplaced: the drafting manual cannot alter the General Assembly's definition of a regulation in 29 *Del. C.* §10102(7). The standard is not, as RiseDE contends, that any action affecting individuals requires promulgation of regulations. Indeed, "affecting individuals" language does not appear anywhere in the Delaware Code[23]—and any contract award affects *some* individuals. *Free-Flow* makes clear that not "all of what an agency does must culminate in a regulation or a case decision."[24] RiseDE's argument should be rejected.

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23 *See supra* n.22.

24 861 A.2d at 1236.

Additionally, a "regulation"—to be a "regulation"—must be "formulated and promulgated as an agency rule or standard, or as a guide for the decision of cases thereafter . . . "[25] Plaintiffs do not argue, nor could they argue, that the selection of a carrier for Medicare Advantage (a plan specifically permitted to be adopted by the General Assembly) formulates or promulgates an agency rule or standard.[26] Again, the agency action here is a contract award for Medicare Advantage provided pursuant to the specific statutory directives in 29 *Del. C.* §9602(b)(2) and 29 *Del. C.* §5210(3), for a plan specifically authorized by 29 *Del. C.* §5203(b). DOB 16, n.13.

Also, Plaintiffs erroneously contend that the policy change is not the selection of a carrier but the change in the benefit from Medicfil to Medicare Advantage. PAB 40-41. But RiseDE never acknowledges that the SEBC has a specific statutory directive in 29 *Del. C.* §5203(b) that allows it to select Medicare Advantage. Thus, the SEBC had both a specific statutory directive to select a carrier *and* specific statutory authority to provide Medicare A, B, or C. As SEBC's opening brief demonstrates (DOB 15-16), the General Assembly set the policy (allowing Medicare A, B, or C), and as such, there was no policy change enacted by the SEBC when selecting a statutorily authorized plan.

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[25] 29 *Del. C.* §10102(7).

[26] RiseDE's contention that Rule 8 bars this argument is without merit. The SEBC specifically made this argument below at A039-43.

It was in error that the Superior Court held that the contract award for Medicare Advantage is a "policy" because a contract award is not a policy as that term is used in the APA. It is further in error that the Superior Court held that the contract award required the formality of a regulation under the APA when, as a matter of law, no agency rule or standard was formulated or promulgated[27] when the SEBC implemented a specific statutory directive for carrier selection and for adoption of Medicare A, B, or C. If the decision of the Superior Court stands, virtually any action or contract award could be deemed a policy change mandating adoption of everything via regulation requirements.[28] This result contravenes the plain meaning of 29 *Del. C.* §10102(7), and it is directly contrary to this Court's pronouncements in *Free-Flow.*

Because the APA does not apply, the Superior Court could not impose a stay under the APA. The Superior Court otherwise lacked jurisdiction to grant the type of relief sought. Accordingly, the Stay Order should be reversed and vacated.

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[27] 29 *Del. C.* §10102(7).

[28] RiseDE contends that because the SEBC has the authority to promulgate regulations under Section 9602(b)(4) that the APA is applicable. PAB 42. This argument misses the point, specifically, that the General Assembly recognized that selection of carriers and the contract award for insurance coverage is not a regulation – it is separate and distinct because each are set forth distinctly. DOB 21-22.

II. THE SEBC DID NOT WAIVE ANY RIGHT TO CHALLEGE THE JURISDICTION OF THE SUPERIOR COURT ON APPEAL

Whether a court has subject matter jurisdiction is a question of law that this court reviews *de novo*.[29] Indeed, "a litigant may raise a court's lack of subject matter jurisdiction at any time in the same civil litigation, 'even initially at the highest appellate instance.'"[30] The Superior Court's lack of authority or jurisdiction to issue the Stay Order under the APA was raised below (A036-39; B231-239; B253; B257), and the issue is properly decided on appeal.

A. The Jurisdiction To Issue The Stay Order Is Appealable Upon Entry Of The Final Judgment

Appeal of the Superior Court's jurisdiction to issue the Stay Order is proper upon issuance of a final judgment. "A final judgment is generally defined as one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration."[31] Upon the Defendants' motion and request for a final order or partial final order following remand, the Superior Court entered the Final Order.

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[29] *Imbragulio v. Unemployment Ins. Appeals Bd.*, 223 A.3d 875, 878 (Del. 2019).

[30] *Id.* (quoting in part *Gunn v. McKenna*, 116 A.3d 419, 420-21 (Del. 2015)).

[31] *Ridgewood Mannor HOA v. Ridegwood Manor MHC, LLC*, 2023 WL 5538611, at *1 (Del. Aug. 29, 2023) (citing *Braddock v. Zimmerman*, 906 A.2d 776, 780 (Del. 2005)).

The test for whether an order is final, and therefore ripe for appeal, is whether the trial court has clearly declared its intention that the order be the court's "final act" in a case.[32] Here, there can be no question that the Superior Court intended the Final Order to be a final order because the Court titled its opinion "Order on Final Judgment," and issued it on the SEBC's motion for final judgment after remand from this Court due to uncertainty regarding finality.[33]

Now that a Final Order is entered, this Court can review "any or all interlocutory rulings . . . that preceded the entry of its final judgment on the issue of attorneys' fees . . .".[34] This right of appeal of interlocutory orders is statutorily confirmed. Under 10 *Del. C.* §144, all interlocutory orders of a trial court are appealable as of right to this Court upon appeal ***from*** the Final Order.[35] This Court has rejected—repeatedly—attempts similar to RiseDE's here, to preclude appeals of

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[32] *J.I. Kislak Mortgage Corp. v. William Matthews Builder, Inc*., 303 A.2d 648, 650 (Del. 1973).

[33] *DeMatteis v. RiseDelaware Inc.*, 295 A.3d 1098 (Table), 2023 WL 2761690, at *2 (Del. Apr. 3, 2023).

[34] *Lipson v. Lipson*, 799 A.2d 345, 349 (Del. 2001); *Robinson v. Meding,* 163 A.2d 272, 275 (Del. 1960).

[35] *See McCollum v. Blenheim Homes, L.P.*, 718 A.2d 528 (Table), 1998 WL 700180, at *1 (Del. Aug. 20, 1998) ("The McCollum's notice of appeal from final order in case No. 317, 1998 has preserved for this Court's review all intermediate rulings made by the Court of Chancery in the case below."); *Husband, de v. Wife, de*, 367 A.2d 636, 638 n.4 (Del. 1976) ("The interlocutory order is, of course, reviewable by this Court on appeal from a final order. 10 *Del. C.* §144.").

interlocutory orders, including those providing interlocutory relief.[36] RiseDE fails to cite 10 *Del. C.* §144 or *any* of these decisions in the answering brief, instead relying on inapplicable Federal or New York state precedent. PAB 33. Considering 10 *Del. C.* §144, there is no question that the viability of the Stay Order is properly on appeal.

Even if an appeal on the merits of a final order were required,[37] in its "Notice of Appeal" the SEBC confirmed that it was taking "Appeal from the Orders dated 10-19-22, 2-8-23 and 5-22-23 in the Superior Court" and that copies were attached as exhibits.[38] As discussed *infra*, the Court's February 5, 2023 Order and May 22, 2023 Final Order each incorporated the Superior Court's ruling on October 19, 2022, granting the Stay Order. As such, the rulings found in the Stay Order are properly

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[36] *See GM Sub Corp. v. Liggett Grp. Inc.*, 415 A.2d 473, 480 (Del. 1980) ("While we recognize that Liggett did not have an opportunity to develop its record, we nonetheless have the case on appeal from a final judgment. The full case, developed more thoroughly than at the time of the hearing on the temporary restraining order, is now before us . . ."); *Coaxial Commc'ns Inc. v. CNA Fin. Corp.*, 367 A.2d 994, 997 (Del. 1976) ("[u]nder §144, his ruling on the application for a stay is reviewable by this Court in its consideration of the case after final order by the Trial Court. In other words, the fact that there has been a trial on the merits does not preclude our inspection of the interlocutory order . . .").

[37] The Final Order denied RiseDE's request for fees – and the SEBC does not challenge that holding. As Judge Quillen stated succinctly in *Kirkwood Motors v. Bd. of Adj. of New Castle Cty.*, 2000 WL 710085, at *4, n.7 (Del. Super. May 16, 2000) - "[y]ou don't usually appeal a victory."

[38] Trans. Id. 70063496.

before this Court, as is the material question of whether the Superior Court has jurisdiction when the APA does not apply to the contract decision of the SEBC.

Finally, RiseDE's statement that the SEBC "waived any right to challenge its facts when they waived trial" (PAB 6) should be rejected. The Superior Court stated it did not make any findings of fact (A102; A348; A357), so there is nothing for the SEBC to have waived. The Superior Court did render conclusions of law (specifically that the APA applied to a contract award for Medicare Advantage). Those conclusions, the parties agreed, would not have changed at a full trial on the merits. *See* B280. In the interest of judicial economy, both parties agreed that final judgment could be granted based upon the findings of law in the preliminary hearing. *Id.* Further, the parties jointly submitted a proposed stipulation agreeing that "[u]pon entry of the attached form of Order, each party shall be permitted to appeal as authorized by law. Nothing in this stipulation shall be deemed a waiver of any applicable right of appeal; ***nor shall it be deemed to preclude any arguments on appeal that were raised in the underlying proceedings***." B280.[39]

Although the Superior Court did not sign this particular proposed order, choosing to use its own form of order, both parties agreed that the conclusions of law to date disposed of the issues, other than Plaintiffs request for attorneys' fees, at

[39] Although the Final Order states that the parties reached a settlement, there was never any settlement between the parties. The parties simply submitted a stipulation to streamline case management and facilitate this appeal.

the lower court level. The parties presented the stipulation to the Court with full knowledge that the other side would be appealing any adverse decision of the Superior Court.[40] B261; B272. The SEBC cannot be held to have waived its right to appeal the Stay Order under these circumstances.[41]

B. A Stay Order Under 29 *Del. C.* §10144 Is Not An Injunction And Does Not Exist in Perpetuity Even Absent Further Order Of The Court

It is undisputed that the Superior Court lacks jurisdiction to issue preliminary or permanent injunctive relief. An APA stay is not an injunction and RiseDE's attempt to convert a temporary stay into a permanent and unappealable injunction,[42] a remedy which was never requested from, or considered by, the Court below should be rejected.

An injunction requires a party to take action or cease action in accordance with a court order. It requires the movant seeking a preliminary injunction to show likelihood of success on the merits and later, if they wish for a permanent injunction,

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[40] *See also* B311, Defendants' Motion for Final Order at ¶¶15-16 (advising that the SEBC desires to appeal the October 19, 2022 Interim Order).

[41] Appeals should not be dismissed on technicalities where, as here, there is no prejudice. *See Di's, Inc. v. McKinney*, 673 A.2d 1189, 1202 (Del. 1996) ("More than 30 years ago this Court adopted the "modern view" that, where possible and where there is no prejudice, appeals should not be dismissed on technicalities.").

[42] PAB 43 ("In any event, given the Defendants' waiver below in not asking to have the injunction against implementation of Medicare Advantage lifted or modified, that injunction should not be lifted...").

to show actual success on the merits.[43] If granted by the Court,[44] the permanent injunction is just that–permanent.

Conversely, the stay order remedy under 29 *Del. C.* §10144 has no element of permanency. Titled "Stay pending review," it reads, "[w]hen an action is brought in the Court for review of an agency regulation or decision, enforcement of such regulation or decision by the agency may be stayed by the 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." By its own terms, the stay terminates following review of the Court when either, (i) the Court finds the regulation or decision unlawful, and it cannot be implemented, or (ii) the Court upholds the regulation or decision, and enforcement is permitted to proceed.

Here, where the Stay Order is still under review by the Court, the stay is still in effect. However, a stay cannot morph into a permanent injunction. Once review is complete, the stay must terminate. A holding otherwise would prevent future agency action indefinitely–even if such action were compliant with the decision of the Court.

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[43] *See Qwest Commc'ns Int'l Inc. v. Nat. Union Fire Ins. Co. of Pittsburgh*, 821 A.2d 323, 327-28 (Del. Ch. 2002).

[44] *See In re COVID-Related Restr.'s on Religious Services*, 285 A.3d 1205, 1228 (Del. Ch. 2022) ("…a court issues a permanent injunction at the end of the case, after a trial on the merits, as part of an award of final relief.").

C. The Stay Order Decision Is Not Moot

RiseDE's argument that the SEBC "waived their right to challenge the Final Order insofar as it left in place the Stay Order and effectively mooted that issue for purposes of this appeal" (PAB 34) should be rejected. Stated simply, the SEBC was not required to seek to vacate an order prior to entry of a final order to ripen the issue for appeal. As the Stay Order remains in place, the timely jurisdictional challenge to the authority to grant the order is proper. RiseDE's reliance on *Tyson Foods, Inc. v. Aetos Corp*.[45] for its contrary contentions is misplaced.

In *Tyson*, the court issued an interlocutory order (requiring Tyson to complete a business merger) and later issued a final order when the remaining issues had been resolved.[46] Tyson did not appeal the first order, ostensibly because the court specifically stated that it was not final and therefore, not appealable.[47] However, unlike the instant matter, Tyson also did not appeal the subsequent order which the court expressly stated was a final judgment.[48] When Tyson finally filed an appeal seven months later, following denial of a motion to vacate a post-trial decision, the appeal sought review of the interlocutory ruling as well as four prior rulings.[49] The court found that the appeal was untimely and that the issue was moot due to the

45 809 A.2d 575, 580 (Del. 2001); *see also* PAB 34.
46 *Tyson*, 809 A.2d at 578.
47 *Id*.
48 *Id*. at 578-79.
49 *Id*.

merger having been completed and no actual controversy remaining.[50] Neither of those two factors are present herein.

The Superior Court's Final Order was issued on May 22, 2023. A351. And as RiseDE agrees, "[t]here is no dispute that the Final Order is cognizable as a 'final order' and capable of appeal as such." PAB 34. The SEBC filed a timely appeal on May 22, 2023, citing appeal of the lower court's October 19, 2022, February 8, 2023, and May 22, 2023, decisions.[51] As such, the SEBC's appeal is not barred.

Nor is the appeal moot. As RiseDE confirms, the SEBC disputes the Stay Order (PAB 32) and has disputed the Stay Order throughout the proceedings, including by first attempting to appeal the February 8, 2023 Order, and again immediately following the Final Order. Nonetheless, RiseDE incorrectly avers that "the defendants did not dispute below, the SEBC's adoption of Medicare Advantage constituted a policy change that falls squarely the statutory definition of a 'regulation.'" PAB 6-7. But that is precisely what the SEBC disputed[52] – the Superior Court only had jurisdiction and authority to issue the Stay Order if (a) the SEBC's action was a "regulation," (b) thereby triggering application of the APA.

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50 *Id*. at 582.

51 Trans. Id. 70063496.

52 *See* Defendants' Opening Brief in Opposition to Motion to Stay at 12 (A036), ("The SEBC selection of a new insurance carrier under Sections 5210(3) and 9602(B)(2) was not the passage of a regulation"); *see also id*. at 18 (A042); Defendants' Motion to Dismiss at 2-3. A058-59.

The SEBC maintains that the contract award for Medicare Advantage was not a regulation, hence, this issue is properly preserved for appeal. The question of whether the Superior Court had jurisdiction to issue the Stay Order under 29 *Del. C.* §10144 (which RiseDE contends remains in place, presumably forever) remains alive and ripe for review by this Court.[53]

D. Even If This Court Finds That The October 19, 2022 Stay Order Is Permanent, This Court Should Review The Lower Court's Ruling In The Interests Of Justice

This case has been unusual in myriad ways. Most notably, the Superior Court did not agree that it made findings of facts and conclusions of law[54] and, at least partially on that basis, rejected two proposed stipulations for final judgment which the parties had agreed upon and presented to the Court. B270; B274; B279. But, because the Defendants disputed the Court's subject matter jurisdiction to enter the Stay Order under 29 *Del. C.* §10144, the Court undoubtedly made conclusions of law. It could not issue the Stay Order without first concluding (at least implicitly) it had legal authority to do so.[55]

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53 *See Coaxial Commc'ns*, 367 A.2d at 997; *see also GM Sub Corp.*, 415 A.2d at 480 ("But to say that is not to say that interim injunctive relief should be continued.").

54 *See* February 8, 2023 Order (A348); *see also* Final Order (A357).

55 *See* Stay Order at 8-9 (A096-97) ("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 ... such policy change is a regulation under the APA.").

Had the Superior Court signed the parties' proposed stipulation, the intent of the parties would have been memorialized and both parties would have had the option to appeal following final judgment on the last remaining issue. Instead, the Court declined sign the stipulation, issued its own form of order denying Plaintiffs' request for attorney's fees, and stated "[n]o further order of this Court is needed to close this case."

When asked by this Court on appeal to opine on the finality of the February 8, 2023 Order, RiseDE pivoted and argued that the order—which did not include the exact language in the stipulation presented by the parties, but nonetheless decided the only remaining issue—was not final, and therefore could only be appealed as interlocutory. This Court agreed.

Thereafter, the SEBC petitioned the Superior Court for a final order resolving all issues. Again, the Superior Court rejected the proposed form of order and issued an order denying attorney's fees but this time titling the order "The Court's Order on Final Judgment." A351. As discussed *supra*, RiseDE does not dispute this is a final appealable judgment.

According to RiseDE, this cascade of unusual circumstances operates to bar the SEBC from appellate review of the Superior Court's erroneous conclusions of law. Even more, RiseDE has capitalized upon these peculiarities by: first, agreeing with the SEBC that by waiving trial on the merits, no party was waiving the right to

appeal any argument it made in the lower court; second, arguing against the SEBC's right to appeal the Superior Court's first final order; and third, agreeing the second final order is final, but arguing it is still unable to be appealed because the Court's factual findings (of which there were none), and conclusions of law made at the preliminary hearing did not merge into the Final Order. According to Plaintiffs, this parade of purportedly unappealable orders results in a permanent stay, forever precluding the SEBC from implementing Medicare Advantage or changing the retirees' current health plan, and precluding jurisdictional review by this Court. As discussed *supra*, the SEBC disagrees.[56] But if this Court finds otherwise, review of the lower Court decision is proper and necessary in the interests of justice.

This Court has repeatedly held that where an unappealable decision will have a precedential or preclusive effect, the Court will review the lower court decision in the interest of justice.[57] And this Court has entertained newly minted vacatur requests when the necessity to request vacatur became clear as result of arguments

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[56] *See* p. 23 *supra* ("Under 10 *Del. C.* §144, all interlocutory orders of a trial court are appealable as of right to this Court upon appeal ***from*** the final order.") (citations omitted; emphasis supplied).

[57] *See Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145, 148 (Del. 2003) ("This so-called 'interests of justice' standard is no doubt met where the party seeking appellate review is *thwarted* by some event beyond its control); *see also In re Appeal of Sun Life Assurance Co. of Canada*, 249 A.3d 131 (Table), 2021 WL 964894, at *1 (Del. March 15, 2021) ("As a general rule, when a case becomes moot at some point during the appellate process, this Court will vacate the judgment below where the interests of justice so require.").

asserted by an appellee's answering brief on appeal,[58] even where the issue appeared to be mooted prior to the appeal.[59]

Here, if deemed unappealable—and if found to be permanent—the Stay Order would bar the SEBC from ever implementing Medicare Advantage (or any other alternative), even assuming that the Court found the APA applied and the SEBC followed that procedure in the future.[60] Indeed, the Stay Order (as interpreted by RiseDE) theoretically bans the SEBC from *ever* changing the health care plan that is currently in place for State retirees until further order of the Court.[61] Granting such an order permanently is contrary to the legislative intent of 29 *Del. C.* §10144 and exceeds the authority of the Superior Court.

The powers, duties, and functions of the SEBC are set forth in 29 *Del. C.* §9602(b), which grants the SEBC the authority to select all carriers or third-party administrators necessary to provide coverage to State employees. Further, 29 *Del. C.* §5210(3) expressly establishes as a power, function, and duty of

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58 *See Solar Reserve CSP Hldg's LLC v. Tonopah Solar Energy, LLC*, 258 A.3d 806 (Table), 2021 WL 3478651, at *1 (Del. Aug. 9, 2021).

59 *Id*. at *2 ("Although [Appellee] correctly notes that [Appellant] relies primarily on cases that became moot during, rather than before, the appellate process, [Appellee] cites no authority to suggest that this means [Appellant] cannot obtain vacatur or that a stricter standard for vacatur applies.").

60 *See* Stay Order at 13 (A101) ("During the stay, Defendants ***shall*** take all necessary and proper steps to ensure the healthcare insurance and benefits available to State retirees…remain in full force and effect.") (emphasis supplied).

61 *Id*. ("Defendants' implementation of a Medicare Advantage Plan…is stayed until further Order by this Court.").

the SEBC, the "[s]election of the carriers or third-party administrators deemed to offer the best plan to satisfy the interests of the State and its employees and pensioners in carrying out the intent of this chapter." Although the Court has the authority under 29 *Del. C.* §10144 to stay APA-related actions, the Court lacks authority to select health insurance carriers or health insurance plans for State retirees.[62] As such, the Superior Court Order must be limited in scope and time and, if this Court finds the Stay Order moot and unappealable, the interests of justice require that this Court hear and decide this appeal.

[62] Senate Bill 250 of the 151st General Assembly, Section 25, makes clear that "[n]otwithstanding the provisions of the Administrative Procedures Act, 29 Del. C. c. 101 or any other laws to the contrary," the SEBC may amend the rules for employees eligible to participate in certain insurance programs by publication in the Register of Regulations only. Thus, any court order requiring an APA comment period to amend such rules would be contrary to legislative intent.

CROSS-APPEAL ARGUMENTS

III. ATTORNEYS FEES WERE PROPERLY REJECTED BY THE SUPERIOR COURT[63]

A. Question Presented

Did the Superior Court properly decline to award attorneys' fees to RiseDE when: (1) a request for attorneys' fees was never pled and was first pursued after the Stay Order was granted; (2) the common benefit doctrine is only applied in taxpayer suits (not public interest suits), and only then if there is a quantifiable monetary benefit to all taxpayers (and there is no such benefit here); and (3) there is no finding of bad faith litigation by the Superior Court? Answer: Yes. This argument was raised below. AR017-25.

B. Standard of Review

The decision of the Superior Court to award fees is reviewed for an abuse of discretion.[64] "To the extent the award [of fees] requires the formulation of legal principles … that formulation is subject to *de novo* review."[65]

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63 The Court need not reach cross-appeal on fees if it overturns the Stay Order, as RiseDE will no longer be deemed a successful party entitled to seek any fee award.

64 *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 266 (Del. 2022).

65 *See Gannett Co., Inc. v. Bd. of Mgrs. of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1240 (Del. 2003); *Dover Historical Soc. Inc. v. Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006) (hereafter "*Dover*.") ("[W]e review the Superior Court's formulation of the appropriate legal standard *de novo*.").

C. Merits

1. The Fee Argument Was Waived Because No Claim For Fees Was Ever Pled

Plaintiffs waived their ability to seek fees by failing to request them in their Complaint. An award of attorneys' fees is appropriate only where a request for attorneys' fees is pled.[66] Plaintiffs' Complaint sought relief as follows:

> **WHEREFORE**, Plaintiffs respectfully request that judgment be entered as follows:
>
> (1) for declaratory relief pursuant to 10 *Del. C.* §6501 and 29 *Del. C.* §10141 as set forth herein;
>
> (2) for a stay of executing a contract with Highmark, or any further implementation of a Medicare Advantage Plan pending review pursuant to 29 *Del. C.* §10144; and
>
> (3) for such other relief as this Court deems just and appropriate.

AR003.

[66] *Kramer v. Am. Pac. Corp.*, 1998 WL 442766, at *1-2 (Del. Super. July 28, 1998); *Maidmore Realty Co., Inc. v. Maidmore Realty, Inc.*, 474 F.2d 840, 843 (3d Cir. 1973); *see also Abbott v. Gordon*, 2008 WL 821522, at *26 (Del. Super. Mar. 27, 2008), *aff'd*, 957 A.2d 1 (Del. 2008) (finding that, where no request for fee-shifting had been pled, "the Court will not impose any."); *but see Dreisbach v. Walton*, 2014 WL 5426868, at *9 (Del. Super. Oct. 27, 2014) (stating—in dicta—a contrary view).

Because RiseDE did not plead a request for attorneys' fees, the Court can dismiss the cross-appeal on this basis alone. RiseDE's catch-all request for "other relief as this Court deems just and appropriate" is insufficient.[67]

Here, the Complaint provided zero notice that RiseDE would be seeking an award of attorneys' fees prior to the issuance of the determinative Stay Order.[68] Unlike litigants who have been found to preserve their request for fees, RiseDE plainly failed to seek fees, expenses, or damages of any kind—they sought declaratory relief and a stay order in their complaint. Accordingly, RiseDE waived any right to request attorneys' fees.

2. The Common Benefit Doctrine Is Inapplicable[69]

RiseDE contends that, based "on the found facts in this case," they are entitled to an attorneys' fee award under the common benefit doctrine. PAB 45. Putting aside that the Superior Court did not make any factual findings (*see supra* pp. 6-15),

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[67] *Benson v. Am. Ultramar Ltd.*, 1997 WL 317343, at *10-11 n.29 (S.D.N.Y. Apr. 19, 1997) (finding that a request for "costs and disbursements" is insufficient).

[68] RiseDE sought to amend its Complaint to add a claim for fees after the Stay Order was granted. B444. The SEBC opposed the motion because amendment proposed was futile and due to prejudice to the SEBC. AR032-34. The Superior Court denied the Motion because it believed the case was functionally over at that stage. B449.

[69] In the case of *In re Public Schools Litg.*, C.A. No, 138, 2023 (Del.), similar issues regarding the scope of the common benefit doctrine are at bar. The Court has called that matter for argument *en banc* on November 15, 2023.

RiseDE's argument misunderstands the common benefit doctrine, which is not applicable.

Delaware adheres to the "American Rule," under which "a litigant must, himself, defray the cost of being represented by counsel."[70] "[U]nder the American Rule governing the award of attorney's fees, a court of law will not award attorney's fees unless a statute, contract or procedural rule makes the award explicit."[71] In the action at law below, no statute, rule, or contract authorizes fee shifting. The General Assembly has not allowed fee shifting for purported violations of the APA, and RiseDE cites no statute that authorizes any fee shifting on appeal.[72] Moreover, fees are not permitted for public interest suits (such as this) that seek to compel the government to "perform properly" and which have a "social benefit."[73] Because no statute or contract authorizes fee shifting, and because this is a case whereby RiseDE brought suit to purportedly compel the government to "perform properly," RiseDE is not entitled to attorneys' fees. The American Rule prevails.

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[70] *Dover*, 902 A.2d at 1089 (quotation omitted); *see also Johnston v. Arbitrium (Cayman I) Handels AG*, 720 A.2d 542, 545 (Del. 1998) ("Under the American Rule, absent express statutory language to the contrary, each party is normally obliged to pay only his or her own attorneys' fees, whatever the outcome of the litigation.") (citation omitted).

[71] *Petition of State*, 708 A.2d 983, 989 (Del. 1998).

[72] In the Superior Court, RiseDE contended that they were entitled to an award of fees under the provisions of the Freedom of Information Act ("FOIA") (B354-55), even though their Complaint contained no FOIA claim. That contention is not advanced on appeal, and it is therefore waived.

[73] *Dover*, 902 A.2d at 1091.

While equitable exceptions to the American Rule exist,[74] none is applicable here. "Historically, our courts have been cautious about creating and expanding judge-made exceptions to the American Rule absent express and clear legislative guidance."[75] The three recognized equitable exceptions in Delaware are bad faith, common fund, and corporate (or common) benefit.[76] "The common benefit doctrine," identified by RiseDE here, "does not operate as a generalized mechanism for achieving redistributive justice."[77]

The common benefit doctrine is inapplicable to a public interest suit such as this. As this Court held in *Dover*:

> In essence, this case is not unlike one where a citizen sues successfully on behalf of the public interest as a **private attorney general**, and then seeks reimbursement of his or her attorneys' fees for having successfully caused a government agency (here, the DPC) to do its job properly. **In the public interest litigation context, absent legislative authorization, fee-shifting applications are disfavored.** Historically, **our courts have been cautious about creating and expanding judge-made exceptions to the American Rule absent express and clear legislative guidance**. Here, to the extent this lawsuit caused the DPC to perform properly, it clearly created a social benefit. But, that benefit is not of the kind that

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74 *Id.*

75 *Id.*

76 *Id.* at 1090 & 1093.

77 *Judy v. Preferred Comm'n Sys., Inc.*, 2016 WL 4992687 at *15 (Del. Ch. Sept. 19, 2016).

> justifies creating a new judge-made exception to the American Rule.[78]

In public interest litigation, this Court has recognized a limited exception to the American Rule under a common benefit theory that allows for recovery of attorneys' fees in a taxpayer challenge to the expenditure of public funds that results in a quantifiable monetary benefit to all taxpayers. As this Court held in *Korn v. New Castle County*:[79]

> [W]e consider whether taxpayers may recover attorneys' fees if their litigation satisfies the requirements of the so-called "common benefit" exception to the standard rule, under which each party bears its own attorneys' fees. . . We hold that the rationale of the common benefit exception applies to **taxpayer suits** that result in a quantifiable monetary benefit for **all taxpayers**.[80]

Korn, which applied common fund principles, did not expand the application of the common benefit doctrine beyond taxpayer suits because, just one year before in *Dover*, the Court made clear that "[t]he corporate benefit exception to the American Rule is typically applied in business enterprise litigation . . . [and] [i]n the public interest litigation context, absent legislative authorization, fee-shifting

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78 *Id*. (citing *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)) (emphasis supplied).

79 922 A.2d 409 (Del. 2007).

80 *Id*. at 410 (emphasis supplied).

applications are disfavored."[81] *Korn*'s holding is expressly limited to taxpayer suits.[82]

Neither *Dover* nor *Korn*—nor any decision of this Court—has authorized an attorney fee award for obtaining a stay of administrative action under the APA. Because (1) there is no fee shifting for public interest suits such as this, (2) this is not a taxpayer suit, and (3) RiseDE obtained no quantifiable monetary benefit, any attempt to seek attorneys' fees under a common benefit theory fails.

Under the guise of a "common benefit" theory, RiseDE is, in essence, asking this Court to adopt what is known as the private attorney general doctrine. "[T]he fundamental objective of the private attorney general doctrine of attorney fees is 'to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees … to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens.'"[83] The U.S. Supreme Court rejected the private

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81 *Dover*, 902 A.2d at 1091.

82 Any belated attempt by RiseDE to argue that this is a taxpayer suit is unavailing. Indeed, taxpayer suits are "a narrow set of claims involving challenges either to expenditure of public funds or use of public lands." *Reeder v. Wagner*, 2009 WL 1525945, at *2 (Del. Jun. 2, 2009) (quotation omitted). Taxpayer suits are "focused on whether use of public funds or property itself is legal, not merely on the process by which decisions regarding such use are made." *Lechliter v. Del. Dept. of Nat. Res. & Envtl. Control*, 2015 WL 7720277, at *7 (Del. Ch. Nov. 30, 2015), *rearg. denied*, 2016 WL 878121 (Del. Ch. Mar. 8, 2016).

83 *In re Head*, 721 P.2d 65, 67 (Cal. 1986) (citation omitted).

attorney general exception in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*,[84] and this Court did likewise in *Dover*.[85]

The doctrine has been almost uniformly rejected[86] because, it has long been recognized that, "courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party … or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."[87] RiseDE's attempt to invoke the private attorney general doctrine without uttering the name should be rejected, and the Superior Court's denial of the fee request should be affirmed.

3. Plaintiffs' Reliance on the Bad Faith Exception Fails, and the Superior Court Did Not Err

"The bad faith exception [to the American Rule] is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process."[88] It is aimed at deterring "abusive litigation in the future, thereby

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84 421 U.S. 240 (1975).

85 902 A.2d at 1091.

86 *See Shelby Cty. Comm'n v. Smith*, 372 So.2d 1092, 1096-97 (Ala. 1979); *Doe v. Heintz*, 526 A.2d 1318, 1323 (Conn. 1987); *Jones v. Muir*, 515 A.2d 855, 861-62 (Pa. 1986); *N.M. Right to Choose/NARAL v. Johnson*, 986 P.2d 450, 460 (N.M. 1990); *Hamer v. Kirk*, 356 N.E.2d 524, 528 (Ill. 1976); *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657, 664 (Ind. 2001).

87 *Alyeska*, 421 U.S. at 269.

88 *Shawe v. Elting*, 157 A.3d 142, 149-50 (Del. 2016).

avoiding harassment and protecting the integrity of the judicial process."[89] So, Delaware courts may award attorneys' fees where a "'losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[90]

"The party seeking to invoke that exception must demonstrate [its applicability] by clear evidence . . .".[91] Specifically, a party must show by "clear evidence" that the opposing party "acted in subjective bad faith."[92] "This subjective bad faith must relate to those actions taken either in the 'commencement of' or 'during' litigation."[93] "Although there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records[,] or knowingly asserted frivolous claims," and where "a party misled the court, altered testimony, or changed his position on an issue."[94] The bad faith exception should not be invoked merely because "allegations were disproven at trial."[95] Thus, an award of fees for bad faith conduct must derive from

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89 *Dover*, 902 A.2d at 1093.

90 *Id.*

91 *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) (emphasis supplied) (internal quotation marks and citation omitted).

92 *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 877 (Del. 2015).

93 *Parexel Int'l (IRL) Limited v. Xynomic Pharm. Inc.,* 2021 WL 3074343, at *18 (Del. Super. July 21, 2021) (quoting, in part, *Jervis*, 129 A.3d at 877).

94 *Shawe*, 157 A.3d at 149 (citing and quoting *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d at 546).

95 *Parexel Intl.*, 2021 WL 3074343, at *18 (quoting, in part, *Gen. Video Corp. v. Kertesz*, 2009 WL 106509, at *1 (Del. Ch. Jan. 13, 2009)).

either the commencement of an action in bad faith or bad faith conduct taken during litigation, and not from conduct that gave rise to the underlying cause of action.[96]

RiseDE has not and cannot establish extraordinary circumstances here, nor can they establish by clear and convincing evidence that the SEBC acted in subjective bad faith. There was no finding of bad faith (let alone subjective bad faith) by the Superior Court, and this Court should not resolve questions of credibility on appeal. RiseDE's assertions of bad faith are based upon numerous self-serving affidavits that were (and are) disputed by the affidavits submitted by the SEBC.

RiseDE did not show bad faith by clear and convincing evidence. The Superior Court said repeatedly that it made no factual findings. At most, RiseDE established to the Superior Court's satisfaction, on a preliminary record, that the switch to Medicare Advantage was a policy change, purportedly requiring the formality of a regulation adoption under the APA (which is the primary issue on appeal to this Court). And virtually all RiseDE's contentions are based upon pre-litigation conduct, which is not a basis for invocation of the bad faith exception under Delaware law. The litigation centered on differing interpretations of whether the APA required certain actions under the circumstances. A disagreement on those

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[96] *Jervis*, 129 A.3d at 877 (citing *Versata Ent., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010)).

issues certainly does not rise to the level of vexatious conduct sufficient to invoke the bad faith exception to the American Rule.

CONCLUSION

For the reasons stated herein, the SEBC requests that the Superior Court's Stay Order be reversed and vacated, and that the Superior Court's denial of Plaintiff's attorneys' fee petition be affirmed.

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DATE: October 3, 2023

WORDS: 9,946