

STATE OF NORTH CAROLINA

DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 738

BLUE CROSS AND BLUE)
SHIELD OF NORTH CAROLINA,)

Petitioner,)

v.)

NORTH CAROLINA STATE)
HEALTH PLAN FOR)
TEACHERS AND STATE)
EMPLOYEES,)

Respondent,)

and)

AETNA LIFE INSURANCE)
COMPANY.)

Respondent-Intervenor.)

**BLUE CROSS NC'S RESPONSE
IN OPPOSITION TO MOTION TO
EXCLUDE EXPERT WITNESSES**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
BACKGROUND	4
A. Mr. Russo’s qualifications	4
B. Mr. Russo’s opinions	6
GOVERNING STANDARDS.....	7
ARGUMENT.....	9
I. Mr. Russo is qualified to offer the opinions stated in his report	9
II. Mr. Russo’s testimony is relevant and will assist this Tribunal in assessing the merits	11
A. Mr. Russo’s analyses show that Segal and the Plan erred in evaluating and scoring the vendors’ pricing guarantees	11
B. Mr. Russo identifies errors in Segal’s evaluation of the vendors’ repricing results	14
C. Mr. Russo’s analysis shows that Blue Cross NC’s network offers the most providers and the least disruption	15
D. The Plan’s arguments on relevance fail.....	17
III. Mr. Russo’s opinions and methodology are reliable.....	20
IV. Rule 403 does not support the exclusion of Mr. Russo’s opinions	22
CONCLUSION.....	24
CERTIFICATE OF SERVICE.....	26

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bonner v. ISP Techs., Inc.</i> , 259 F.3d 924 (8th Cir. 2001)	20
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993)	<i>passim</i>
<i>Duke Univ. Health Sys. v. N.C. Dep’t of Health & Human Servs.</i> , 22 DHR 02685, 2022 WL 18665927 (N.C. Ofc. Admin. Hrgs. Dec. 9, 2022)	17
<i>Eichenbaum v. N.C. Dep’t of Env’t & Nat. Res.</i> , No. 99 EHR 0191, 2000 WL 33953027 (N.C. Ofc. Admin. Hrgs. Nov. 21, 2000)	17
<i>Hose v. Chicago Nw. Transp. Co.</i> , 70 F.3d 968 (8th Cir. 1996)	20
<i>Kinergy Corp. v. Conveyor Dynamics Corp.</i> , No. 4:01CV00211 ERW, 2003 WL 26110512 (E.D. Mo. Oct. 14, 2003).....	23
<i>Kopf v. Skyrms</i> , 993 F.2d 374 (4th Cir. 1993)	8
<i>Mannino v. Int’l Mfg. Co.</i> , 650 F.2d 846 (6th Cir. 1981)	8
<i>Potts v. KEL, LLC</i> , No. 16 CVS 2877, 2019 WL 4744646 (N.C. Super. Ct. Sept. 27, 2019).....	7
<i>RG Steel Sparrows Point, LLC v. Kinder Morgan Bulk Terminals, Inc.</i> , 609 F. App’x 731 (4th Cir. 2015)	8
<i>State v. Jennings</i> , 209 N.C. App. 329, 704 S.E.2d 556 (2011).....	11
<i>State v. McGrady</i> , 368 N.C. 880, 787 S.E.2d 1 (2016)	8
<i>State v. Pennington</i> , 327 N.C. 89, 393 S.E.2d 847 (1990)	20

<i>State v. Turner</i> , 273 N.C. App. 701, 849 S.E.2d 327 (2020).....	10, 21
<i>Thomas J. Kline, Inc. v. Lorillard, Inc.</i> , 878 F.2d 791 (4th Cir. 1989)	8
<i>United States v. Bolton</i> , 19 F.3d 1434 (6th Cir. 1994)	8
<i>United States v. Brown</i> , 415 F.3d 1257 (11th Cir. 2005)	8
<i>United States v. Fuertes</i> , 805 F.3d 485 (4th Cir. 2015)	8
<i>United States v. Perry</i> , 35 F.4th 293 (5th Cir. 2022).....	22
<i>United States v. Wood</i> , 741 F.3d 417 (4th Cir. 2013)	8
<i>Watts-Robinson v. Shelton</i> , 251 N.C. App. 507, 796 S.E.2d 51 (2016).....	22
<i>Yates v. Ford Motor Co.</i> , No. 5:12-CV-752-FL, 2015 WL 3448905 (E.D.N.C. May 29, 2015).....	23
Statutes	
Fed. R. Evid. 702.....	8
N.C. Gen. Stat. §8C-1, Rule 403.....	<i>passim</i>
N.C. Gen. Stat. § 8C-1, Rule 702.....	<i>passim</i>
N.C. Gen. Stat. § 8C-1, Rule 702(a)	<i>passim</i>
N.C. Gen. Stat. § 8C-1, Rule 702(a)(2)	20
N.C. Gen. Stat. § 8C-1, Rule 702(a)(3)	20
N.C. Gen Stat. § 150B-23(a)	18
Treatise	
29 Charles Alan Wright & Arthur R. Miller, <i>Federal Practice and Procedure</i> § 6267 (2d ed.)	20

INTRODUCTION

This case involves the health care of more than half a million North Carolinians.

The North Carolina State Health Plan for Teachers and State Employees provides health coverage to our state's teachers, state employees, retirees, and family members. The Plan's third-party administrator, or TPA, serves the Plan and its members. It creates a network of health care providers, negotiates prices with those providers, and processes the providers' claims.

In 2022, the Plan issued a request for proposals for the role of TPA in 2025. In response to that RFP, Blue Cross and Blue Shield of North Carolina offered the lowest cost and the broadest provider network. Despite those facts, the Plan awarded the contract to Aetna Life Insurance Company.

Discovery has revealed that the Plan made multiple errors in the evaluation and scoring of the RFP. The Plan and its consultant, Segal, ignored facts like these:

- Blue Cross's pricing guarantees offer the plan almost \$600 million more in savings than Aetna's price guarantees offer.
- The prices that key providers will charge the Plan if Aetna becomes the TPA are almost \$30 million per year higher than Aetna stated in its bid.
- If the Plan changes its TPA to Aetna, thousands of Plan members—especially in rural areas—will face a choice between changing their doctors or paying more for their health care.

Developing this evidence required extensive quantitative analysis. For that work, Blue Cross engaged Gregory Russo, an expert with nearly 20 years of experience in health care financial analysis. Mr. Russo has prepared over seventy pages of expert reports that break down the financial issues in this case. His reports include tables and explanations that untangle the numbers and lay them out for the Tribunal's review.

Mr. Russo's main report and rebuttal report are Exhibits A and B to this response. When the Tribunal reviews those reports, it will see the care and rigor that Mr. Russo has brought to his work in this case.

Despite the detailed and careful nature of Mr. Russo's work, the Plan has moved to exclude his opinions.¹ The Plan's motion fails for multiple reasons.

First, Mr. Russo has expertise and experience that will help the Tribunal analyze this complex case. Mr. Russo has a master's degree in health finance and management. He has analyzed issues of health care finance for almost 20 years. The Plan argues that expert witnesses cannot testify unless they have worked on cases that exactly match the fact pattern here. That is not the law.

Second, Mr. Russo's opinions are directly relevant to the issues before this Tribunal. Mr. Russo has studied the massive cost proposals in this case, as well as

¹ The Plan's motion also addresses another expert for Blue Cross NC, Mary Karen Wills. Earlier today, Blue Cross NC served an amended expert disclosure, withdrawing Ms. Wills's designation as an expert. Blue Cross NC does not rely on Ms. Wills's opinions in its January 11 summary-judgment response, and it will not rely on her opinions in the ultimate hearing in this case. As a result, the Plan's motion to exclude Ms. Wills's opinions is moot.

Segal's work papers on those cost proposals. He has identified the errors in Segal's conclusions and has laid out those errors for the Tribunal's review. Mr. Russo's opinions will help the Tribunal apply the governing standards, including the "arbitrary and capricious" standard that the Plan emphasizes, to the complex financial issues in this case.

Third, Mr. Russo's work applies reliable methods, including quantitative analysis of the cost proposals and networks at issue here. Mr. Russo produced his underlying calculations and spreadsheets with his report. After receiving those materials, the Plan's and Aetna's experts identified no math errors in them. The Plan is free to disagree with Mr. Russo's conclusions, but it misses the mark when it attacks his analytical methods.

Fourth, Mr. Russo's opinions comport with Rule 403. This case will be tried before an experienced Administrative Law Judge. Mr. Russo's opinions will assist the Tribunal and streamline the hearing on the merits. The only risk of undue prejudice here is the risk posed by the one-sided hearing that the Plan is hoping to achieve.

In sum, the Plan offers no sound basis for precluding Mr. Russo's testimony. Blue Cross NC asks that the Tribunal deny the Plan's motion and hear Mr. Russo's opinions.

BACKGROUND

A. Mr. Russo's qualifications

Mr. Russo is a Managing Director at Berkeley Research Group. He specializes in advising health care organizations through complex data analyses and financial modeling. Rebuttal Rep. A2.² Mr. Russo earned a master's degree in Health Finance and Management from the Johns Hopkins Bloomberg School of Public Health in 2005. *Id.* at A5. He has nearly two decades of experience advising health insurers, health care provider organizations, life-sciences companies, and state and federal agencies on health care pricing issues. *Id.* at A2-A5.

Mr. Russo has been qualified as an expert witness in state and federal courts across the country to testify on health care pricing issues and health care market dynamics. *Id.* at A2-A3, A8-A10.

Mr. Russo's experience and expertise are directly related to the opinions and testimony he will offer in this case:

- One component of the cost proposal in this RFP is a claims-repricing exercise. Mr. Russo has deep experience with repricing claims for health care services. *See* Dep. 76:18-77:3 (identifying twenty-four matters in which Mr. Russo performed a repricing exercise).³

² This brief cites Mr. Russo's initial report as "Russo Rep." and cites his rebuttal report as "Rebuttal Rep." Mr. Russo's initial and rebuttal reports are attached as Exhibits A and B to this brief, respectively.

³ This brief cites Mr. Russo's November 28, 2023 deposition as "Dep." Cited excerpts from Mr. Russo's deposition transcript are attached as Exhibit E to this brief.

- Mr. Russo has significant experience analyzing the medical costs that a health plan incurs in different scenarios. That experience is highly relevant to his analysis of the pricing-guarantee element of the RFP and the effect of vendors' proposed guarantees on the Plan's costs. *See id.* at 75:3-25 (identifying five engagements that involved analyzing the medical costs that a health plan would incur in different scenarios); *id.* at 216:9-18 (explaining that Mr. Russo's graduate coursework and nearly twenty years of experience analyzing medical expenses form the basis of his analysis of the effects of the vendors' pricing guarantees); *id.* at 211:17-25 (explaining that pricing guarantees affect the Plan's costs).
- Mr. Russo has experience analyzing reimbursement terms of TPA contracts. *Id.* at 61:1-23.
- Finally, Mr. Russo has experience analyzing provider networks, including assessments of whether those networks are adequate to meet the needs of health-plan members. *Id.* at 77:10-18, 379:11-382:6.

B. Mr. Russo's opinions

Mr. Russo's initial and rebuttal reports offer five main opinions.

First, Mr. Russo explains that the Plan's and Segal's⁴ evaluation of the vendors' pricing guarantees did not consider the actual value of Blue Cross NC's guarantees. The Plan's and Segal's evaluation, which reflected little quantitative analysis, overlooked the fact that Blue Cross NC's guarantees offer the Plan lower costs than Aetna's guarantees do. That evaluation also relied on a misreading of the amount of administrative fees that Blue Cross NC promised to repay if Blue Cross NC missed its guarantee targets. Russo Rep. 22-26, 17-19. Mr. Russo also identifies several other objective errors in Segal's evaluation of the pricing guarantees that caused Segal to err by awarding Blue Cross NC zero points for this element of the RFP. *See id.* at 10-22.

Second, Mr. Russo analyzes the difference between Aetna's repricing results and the actual prices that Aetna negotiated with providers **REDACTED** **REDACTED**. Those prices are reflected in letters of intent between Aetna and **REDACTED**. Mr. Russo shows that the prices in those letters of intent are higher than the prices stated in Aetna's repricing results. Segal's evaluation did not identify that discrepancy or take it into account. *See id.* at 27-31.

⁴ Segal is the Plan's actuarial consultant. It evaluated and scored the cost proposals in the RFP. *See Plan Summary Judgment Br. 9.*

Third, Mr. Russo describes how Segal erred in adjusting Blue Cross NC's reported discounts downward during its analysis of Blue Cross NC's repricing results. *See id.* at 32-44.

Fourth, Mr. Russo analyzes external pricing data (called UDS data) that confirms that Blue Cross NC has more favorable discounts than Aetna has. When Segal evaluated vendors' repricing results, it reviewed this UDS data, but then disregarded it. *See id.* at 45-47.

Finally, Mr. Russo performs a detailed comparison of the provider networks offered by Blue Cross NC and Aetna. That analysis shows that Blue Cross NC offers Plan members more in-network providers than Aetna does, especially in rural areas. The Plan did not perform this type of analysis when it evaluated the vendors' proposals here. *See id.* at 48-59.

GOVERNING STANDARDS

As a North Carolina court has aptly explained, expert testimony can be essential. *Potts v. KEL, LLC*, No. 16 CVS 2877, 2019 WL 4744646, at *2 ¶ 9 (N.C. Super. Ct. Sept. 27, 2019). That is the case because expert testimony often “assist[s] the trier of fact to understand the evidence or to determine a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 702(a).

An expert witness can be qualified to testify through knowledge, skill, experience, training, or education. *Id.* Expert testimony is admissible if (1) it is based on sufficient facts or data, (2) it is the product of reliable principles and

methods, and (3) the witness has applied those principles and methods reliably to the case. *Id.*

“[T]he rejection of expert testimony is the exception rather than the rule.” Fed. R. Evid. 702 advisory committee’s note to 2000 amendments. The qualification requirement is liberal, and “the test for exclusion is a strict one.” *RG Steel Sparrows Point, LLC v. Kinder Morgan Bulk Terminals, Inc.*, 609 F. App’x 731, 739 (4th Cir. 2015) (quoting *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799 (4th Cir. 1989));⁵ see also *United States v. Fuertes*, 805 F.3d 485, 496 (4th Cir. 2015) (a witness’s “qualifications to render an expert opinion are liberally judged by Rule 702”) (quoting *Kopf v. Skyrn*, 993 F.2d 374, 377 (4th Cir. 1993)). That is the case because “the only thing a court should be concerned with in determining the qualifications of an expert is whether the expert’s knowledge of the subject matter is such that his opinion will likely assist the trier of fact in arriving at the truth.” *United States v. Bolton*, 19 F.3d 1434 (6th Cir. 1994) (quoting *Mannino v. Int’l Mfg. Co.*, 650 F.2d 846, 851 (6th Cir. 1981)).

The standard for admissibility of expert testimony is “even more relaxed in a bench trial,” because “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for [herself].” *United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005); see also *United States v. Wood*, 741 F.3d 417, 425 (4th Cir. 2013) (in a bench trial, the “court’s evidentiary gatekeeping function [is]

⁵ Because North Carolina’s Rule 702 incorporates the federal *Daubert* standard, North Carolina tribunals may seek guidance from federal case law. *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016).

relaxed, and the . . . court [is] in the best position to decide the proper weight to give the expert opinions”).

ARGUMENT

I. Mr. Russo is qualified to offer the opinions stated in his report.

Mr. Russo has specialized knowledge and experience that will help the Tribunal analyze the errors that the Plan and Segal made in their evaluation of the vendors’ proposals. Mr. Russo’s opinions flow directly from his knowledge and experience.

Three of Mr. Russo’s opinions concern errors in the Plan’s and Segal’s evaluation of vendors’ repricing results. In his career, Mr. Russo has conducted many repricing exercises like the one at issue here. *See* Dep. 54:23-55:21, 76:18-77:3. His report explains in detail why Segal’s evaluation was flawed and how those flaws affected Segal’s scoring decisions. *See* Russo Rep. 27-47.

Another one of Mr. Russo’s opinions concerns Segal’s evaluation of vendors’ pricing guarantees. As the Plan agrees, the purpose of pricing guarantees is to ensure that the Plan and its members pay the lowest possible costs for health care. *See* Plan Summary Judgment Br. 35. Mr. Russo’s analysis shows how Segal strayed from this objective by not analyzing how the vendors’ proposed guarantees would affect the Plan’s bottom-line costs.

Mr. Russo conducted the quantitative analysis that Segal did not. His analysis shows that Blue Cross NC’s pricing guarantees are objectively better for the Plan’s bottom line than Aetna’s guarantees are. *See* Russo Rep. 10-26. In

developing these opinions, Mr. Russo drew on his significant professional experience with analyzing the claim costs of health plans. Dep. 75:3-25, 216:9-18.

Mr. Russo's final opinion concerns differences in provider networks. The RFP stated that the Plan would choose a TPA with a broad provider network that would result in the least disruption to Plan members. RFP Attach. A, § 1.1, at 81.⁶ Despite this mandate, the Plan did not conduct any meaningful comparison of the vendors' networks. Mr. Russo's testimony fills that gap. His detailed, quantitative analysis shows that Blue Cross NC's provider network is broader than Aetna's network, especially in rural areas. *See* Russo Rep. 48-59. In performing that analysis, Mr. Russo applied his prior experience with this same type of work. *See* Dep. 77:10-18, 379:11-382:6.

The Plan's motion overlooks these points. The Plan instead argues that Mr. Russo is not qualified because his experience does not involve the precise context of "an RFP for a state health plan." Plan Mot. 9. That argument fails for two reasons.

First, the Plan's argument is based on an inaccurate view of what qualifies as relevant experience. As the North Carolina Court of Appeals has held, Rule 702(a) does not demand that an expert witness "be experienced with the identical subject matter at issue." *State v. Turner*, 273 N.C. App. 701, 709, 849 S.E.2d 327, 333 (2020). Nothing in Rule 702(a) contains such a requirement. Instead, the rule

⁶ This brief cites the request for proposal at issue in this case as "RFP." The RFP was filed as Ex. 1 to Blue Cross NC's petition for a contested-case hearing.

states a flexible standard: it requires only that an expert have expertise that will assist the trier of fact. Mr. Russo easily meets that standard.

Second, the Plan does not identify anything about the context of a state-health-plan RFP that would make Mr. Russo's expertise inapplicable here. The Plan does not differ from other self-insured entities in any way that would affect Mr. Russo's opinions. As Mr. Russo explained at his deposition, the cost and network concerns of a state health plan are similar to the concerns of other self-insured entities. Dep. 408:8-409:4. In sum, Mr. Russo's expertise and knowledge are fully applicable here.

II. Mr. Russo's testimony is relevant and will assist this Tribunal in assessing the merits.

The purpose of expert testimony is to assist the Tribunal in evaluating evidence or deciding disputed facts. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a); *State v. Jennings*, 209 N.C. App. 329, 337, 704 S.E.2d 556, 561 (2011); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

Mr. Russo's testimony serves this purpose directly.

A. Mr. Russo's analyses show that Segal and the Plan erred in evaluating and scoring the vendors' pricing guarantees.

Mr. Russo's first opinion concerns the evaluation of two types of pricing guarantees that vendors were required to provide as part of the RFP.

The first type, called a discount guarantee, has two primary components: (1) the "target," or average discount off providers' full prices that the vendor promises

to achieve for a given year, and (2) the “amount at risk,” which is the amount of money that the vendor promises to pay the Plan if the vendor falls short of its target. *See* RFP, Attach. A, § 1.4, at 84.

The second type of pricing guarantee, called a trend guarantee, addresses the amount by which the Plan’s total claim costs increase over time. The RFP called for vendors to state “trend targets”—maximum percentages that the Plan’s costs would increase annually. *Id.*⁷

The RFP stated that these guarantees would be scored based on their relative value. *Id.* § 3.4(c)(3)(b)-(c), at 25. That value was to be “based on the combination of the competitiveness of the guaranteed targets and the amount placed at risk.” *Id.* § 3.4(c)(3)(a), at 25.

When Segal scored the vendors’ guarantees here, it gave Blue Cross NC zero points. That zero-point scoring made the difference between Blue Cross NC winning or not winning the cost proposal. *See* Blue Cross NC Summary Judgment Br. 34.

Mr. Russo’s testimony on pricing guarantees will show that Segal’s evaluation of pricing guarantees did not apply the standard in the text of the RFP. His testimony will also show that Blue Cross NC’s guarantees offered the greatest value to the Plan. *See* Russo Rep. 10-26; Rebuttal Rep. 4-14.

⁷ For a more extensive overview of the pricing-guarantee section of the RFP, please see Blue Cross NC’s Brief Opposing Motions for Summary Judgment at 21-34.

These opinions rest on quantitative models that show how the vendors' pricing guarantees affect the Plan's total costs. Mr. Russo analyzes the bottom-line effects of the guarantees offered by Blue Cross NC and Aetna under multiple scenarios:

- (i) In one scenario, he assumes that each vendor achieves its stated discount targets. *See* Russo Rep. 23 fig. 5.
- (ii) In another scenario, he assumes that each vendor misses its target discount by an amount that would require the vendor to pay the Plan the full amount the vendor put at risk. *See id.* at 25 fig. 6.
- (iii) Mr. Russo also calculates the bottom-line effects on the Plan if each vendor misses its discount target by 0.5%, 1%, and 1.5%. *See id.* at 26 fig. 7.

Mr. Russo's analysis shows that in all of these scenarios, Blue Cross NC offers the lowest bottom-line costs—and thus the most value—to the Plan.

Mr. Russo also identifies other errors in Segal's evaluation of the pricing guarantees, as well as the effects of those errors. Based on a detailed study of Segal's work papers, he shows that Segal erred by focusing its evaluation almost entirely on the vendors' amounts at risk. Segal slighted other factors, including the discount targets and trend targets themselves and whether those targets would improve over time. *See id.* at 16-17; Rebuttal Rep. 7 fig. 2, 13 fig. 4. Mr. Russo also shows that Segal misread and understated the amount Blue Cross NC put at risk. *See* Russo Rep. 17-19.

This testimony is highly relevant because it will help this Tribunal analyze whether Segal erred by awarding Blue Cross NC zero points on guarantees.

B. Mr. Russo identifies errors in Segal's evaluation of the vendors' repricing results.

Mr. Russo also identifies errors in Segal's evaluation of the vendors' repricing results, as well as Segal's decision to award Aetna the full six points available for this element of the cost proposal.

Mr. Russo's report compares (1) the prices in letters of intent between Aetna and certain providers **REDACTED** with (2) the prices reflected in Aetna's repricing results for those providers. That comparison, which includes a detailed quantitative analysis, shows that Aetna's repricing proposal materially overstated the actual discounts offered by these providers. *See* Russo Rep. 27-31.

Because of this error, Aetna was awarded more points than it should have been awarded. Aetna's actual prices for these providers are about \$30 million per year higher than Aetna's proposal stated. *Id.* at 29-31. When this error is corrected, Aetna's total claim costs are more than 0.5% higher than Blue Cross NC's. *See* Dep. 133:25-135:18. Under the terms of the RFP, Aetna should have been awarded no more than five points on the repricing element of the RFP. *See* RFP § 3.4(c)(1)(c), at 25.

Mr. Russo's quantitative analysis extends further. He shows that if the same error rate on the above providers affected the rest of Aetna's repricing results, the

Plan could incur almost \$640 million more in claim costs than Aetna stated in its proposal. *See* Rebuttal Rep. 16.

Mr. Russo found other flaws in the repricing evaluation as well. He found that Segal subjected Blue Cross NC's repricing proposal to more scrutiny than it applied to Aetna's proposal. *See* Russo Rep. 32-44. That selective scrutiny led Segal to lower Blue Cross NC's discount percentage from 54% (the discount reflected in Blue Cross NC's repricing results) to 52.7%. *See id.* at 32. That improper adjustment put Blue Cross NC's discount behind Aetna's discount, which Segal left unchanged. *See id.* Mr. Russo also found that Segal checked, but then disregarded, external data showing that Blue Cross NC has better discounts than Aetna's. *See id.* at 45-47.

Each of these errors was material. Because Blue Cross NC and Aetna received the same score on the cost proposal (six points), the correction of any one of the above errors would result in Blue Cross NC receiving the best cost-proposal score. Mr. Russo's testimony will aid the Tribunal's assessment of those issues.

C. Mr. Russo's analysis shows that Blue Cross NC's network offers the most providers and the least disruption.

The RFP states that the Plan will select a third-party administrator that offers "a broad provider network with the least disruption." RFP, Attach. A, § 1.1,

at 81.⁸ Mr. Russo's analysis shows that the Plan ignored that mandate. Neither Segal nor the Plan compared the vendors' provider networks in any detail. *See* Russo Rep. 49-52.

Mr. Russo has done that comparison. His detailed, quantitative analysis shows that Blue Cross NC's network offers Plan members more providers than Aetna's network offers, especially in rural areas of the state. *See id.* at 52-59.

His analysis shows the specific differences in these networks in rural counties (*id.* at 59 fig. 27), as well as urban and suburban counties (*id.* at 58 fig. 26). Both statewide and in the vast majority of counties, Mr. Russo's analysis shows that Blue Cross NC offers the best network. *Id.* at 57-59.

Mr. Russo also quantifies the disruption that Plan members will experience if the Plan replaces Blue Cross NC's network with Aetna's. *See id.* His analysis shows that over 115,000 in-network claims submitted by Plan members in 2021 would be out-of-network claims under Aetna. *See id.* at 57 fig. 25. That disruption would cause Plan members to pay about \$7.28 million more in out-of-pocket costs under Aetna. *Id.*

Mr. Russo's testimony on these points will help this Tribunal assess the effects of the Plan's failure to conduct a meaningful network analysis.

⁸ "Disruption" refers to the impact that switching networks has on members. Russo Rep. 55. A disruption analysis studies which members' providers go from in-network to out-of-network because of a change in TPA. *Id.*

D. The Plan’s arguments on relevance fail.

The Plan offers several arguments to suggest that Mr. Russo’s opinions are not relevant. Those arguments lack merit.

First, the Plan contends that the only issue in this case is whether the Plan’s actions were arbitrary and capricious. In the Plan’s view, expert testimony is not relevant to that question. Plan Mot. 11.

That argument clashes with Rule 702(a). That rule makes clear that a key purpose of expert testimony is assisting the trier of fact “to understand the evidence.” N.C. Gen. Stat. § 8C-1, Rule 702(a). Applying that principle, this Tribunal regularly considers expert testimony that is relevant on whether agency action satisfies a controlling legal standard.

In one recent case, for example, when the Tribunal considered whether the review process for a certificate of need was (among other things) arbitrary and capricious, the Tribunal admitted expert testimony on the reasonableness of the projections submitted with the CON applications. *Duke Univ. Health Sys. v. N.C. Dep’t of Health & Human Servs.*, 22 DHR 02685, 2022 WL 18665927, Findings of Fact ¶¶ 21-27, 91, 145, 149-51, 155, 164, Conclusions of Law ¶¶ 45-49, 115-16 (N.C. Ofc. Admin. Hrgs. Dec. 9, 2022).

In another illustrative case, when the Tribunal considered whether the issuance of a mining permit was, among other things, arbitrary and capricious, the Tribunal admitted evidence from seven experts who opined on how mining would affect the groundwater in the area at issue. *Eichenbaum v. N.C. Dep’t of Env’t &*

Nat. Res., No. 99 EHR 0191, 2000 WL 33953027, Findings of Fact ¶¶ 16-54, Conclusions of Law ¶¶ 3-4 (N.C. Ofc. Admin. Hrgs. Nov. 21, 2000).

Here, as in the above cases, Mr. Russo’s testimony will aid this Tribunal’s analysis of complex, technical evidence. That evidence relates directly to whether the contract award here violates the standards in section 150B-23(a).⁹

Second, the Plan argues that Mr. Russo’s opinions are irrelevant because this Tribunal must defer to the knowledge and experience of the Plan. Plan Mot. 11. The Plan makes that same argument in its summary-judgment motion. The argument is just as mistaken here as it is there. As Blue Cross NC discusses in detail in its summary-judgment response, the Plan is not immune from inquiry on the basis for its decisions. Blue Cross NC Summary Judgment Br. 17-18. Mr. Russo’s testimony will speak directly to whether the Plan’s decisions have a sound basis.

Third, the Plan argues that Mr. Russo’s opinions are irrelevant because, according to the Plan, they rely on “industry experience” or “industry standards.” Plan Mot. 12. That argument misconstrues Mr. Russo’s opinions and the applicable legal standard.

⁹ The Plan is mistaken when it states that the arbitrary-and-capricious standard is the only standard that applies here. Blue Cross NC has also forecast evidence that the Plan acted erroneously, failed to act as required by law or rule, and failed to follow its own procedures in evaluating the vendors’ proposals. Blue Cross NC Summary Judgment Br. 13-16.

Mr. Russo's opinions are not applying "industry standards" as a yardstick for the Plan's actions. That term does not appear in his reports. Mr. Russo's report refers to his industry experience only as one basis for an empirical fact: health care costs rarely decrease from year to year. That fact is relevant to Segal's lack of scrutiny of Aetna's reported discounts. *See* Russo Rep. 39-40.

In any event, the Plan's criticism of the relevance of "industry standards" is ironic, because the Plan's own expert invokes industry standards to defend Segal's work on the RFP. *See, e.g.*, Amended Vieira Rep. 28 (opining that Segal's analysis of pricing guarantees followed "standard industry practice").¹⁰ Aetna's expert, for his part, invokes "industry practice" over twenty times. *See, e.g.*, Coccia Rep. 21 ("the Plan's scoring of pricing guarantees is an acceptable industry practice"); *id.* at 31 ("Segal's analysis . . . followed an acceptable industry practice"); *id.* at 42 (Segal's use of UDS data "is a typical and acceptable industry practice").¹¹

The Plan also argues that Mr. Russo violates Rule 702 by relying on a reasonableness standard. Plan Mot. 13. Here again, the Plan is attacking its own arguments. The Plan's own motion to exclude argues that an agency "is entitled to select any *reasonable* methodology" to make a decision. *Id.* at 15 (emphasis added) (quoting federal decision). The Plan's summary-judgment brief invokes a

¹⁰ The amended expert report of Kenneth Vieira is attached as Exhibit C to this brief.

¹¹ The expert report of Andrew Coccia is attached as Exhibit D to this brief.

reasonableness standard nineteen separate times. Plan Summary Judgment Br. 17, 25, 27, 29, 31, 32, 34, 35, 39, 40, 41, 45, 46, 50.

Having raised reasonableness as a controlling standard for its actions, the Plan cannot credibly argue that evidence based on such a standard is irrelevant.

III. Mr. Russo's opinions and methodology are reliable.

Expert testimony is reliable if it stems from reliable principles and methods that are applied reliably to the facts of the case. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a)(2), (a)(3). Here again, the reliability analysis leans heavily against exclusion. As one court has explained, reliability is a basis for excluding expert testimony only “if the expert’s opinion is so fundamentally unsupported that it can offer no assistance to the [fact finder].” *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001) (quoting *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1996)).

Where, as here, expert testimony is not experimental, courts look to common-sense marks of reliability. *See* 29 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 6267 (2d ed.). Mr. Russo’s testimony bears those marks.

First, an expert’s professional background in the relevant field points to reliability. *E.g.*, *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 853 (1990). Here, Mr. Russo’s professional background in health care pricing and networks is considerable. *See supra* pp. 4-5 (summarizing Mr. Russo’s professional experience).

Second, testable expert testimony is reliable. *Daubert*, 509 U.S. at 593. Here, Mr. Russo gave the Plan and Aetna the data, formulas, and computer-

modeling scripts he used in his analysis, so the Plan's and Aetna's experts could verify and reproduce his results. *See* Vieira Dep. 222:2-19.¹² The Plan's motion does not challenge the accuracy of any of Mr. Russo's calculations.

Third, the existence of publications that support an expert's opinions and methodology is another mark of reliability. *Daubert*, 509 U.S. at 593. Here, Mr. Russo's opinions refer to publications that support his methodology. *See, e.g.*, Russo Rep. 37 (citing a Milliman white paper that supports Mr. Russo's methodology for calculating discounts); *id.* at 40, 42 (citing a PwC Health Research Institute report that supports Mr. Russo's opinion on the general upward trend of medical costs); *id.* at 45 (citing a Milliman white paper on UDS data).

The Plan's motion does not address these points. Instead, the Plan again relies on its mistaken argument that expert testimony requires pinpoint experience. *See* Plan Mot. 8-10. That argument misunderstands the law. *See Turner*, 273 N.C. App. at 709, 849 S.E.2d at 333. As shown above, moreover, Mr. Russo has substantial expertise and experience in the areas covered by each of his opinions. *See supra* pp. 4-5.

The Plan also argues that Mr. Russo's opinions are unpersuasive. *See* Plan Mot. 20-25. That argument is misplaced. Rule 702(a) calls only for inquiries on an expert's qualifications and the reliability of the expert's principles and methods. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a). It does not allow challenges to the merits of

¹² Cited excerpts from Mr. Vieira's November 30, 2023 deposition are attached as Exhibit F to this brief.

expert testimony. As one court put the point succinctly, a “*Daubert* inquiry should not supplant trial on the merits.” *United States v. Perry*, 35 F.4th 293, 330 (5th Cir. 2022).

The hearing on the merits of this case is a month away. At that time, the Plan and Aetna can cross-examine Mr. Russo on his opinions. They can also offer testimony of their own experts who seek to rebut Mr. Russo’s opinions. Those are the proper vehicles for the Plan’s merits-related arguments.

IV. Rule 403 does not support the exclusion of Mr. Russo’s opinions.

The Plan also asks this Tribunal to exclude Mr. Russo’s opinions under Rule 403. Plan Mot. 25-26. That request has no basis.

As his expert reports show, Mr. Russo offers testimony that will aid this Tribunal’s analysis on technical issues of health care pricing and network access. The Plan has not identified any prejudice—let alone unfair prejudice—that it would suffer from the admission of Mr. Russo’s testimony, nor any reason to believe that the testimony would cause confusion or delay. Nothing about Mr. Russo’s testimony triggers the concerns behind Rule 403, especially in the context of a bench proceeding. *See, e.g., Watts-Robinson v. Shelton*, 251 N.C. App. 507, 513, 796 S.E.2d 51, 56 (2016) (holding that “excluding evidence under Rule 403’s weighing of probative value against prejudice has no logical application to bench trials”).

The decisions that the Plan cites to support its Rule 403 argument do not help its case. *See* Plan Mot. 25. The expert testimony at issue in those cases contrasts sharply with the reliability and helpfulness of Mr. Russo’s testimony.

In *Kinergy Corp. v. Conveyor Dynamics Corp.*, for example, a district court excluded certain expert testimony under *Daubert*—not Rule 403—in a jury trial because the proposed testimony was “so fundamentally unsupported that . . . it can offer no assistance to the jury.” No. 4:01CV00211 ERW, 2003 WL 26110512, at *26 (E.D. Mo. Oct. 14, 2003). In that case, the court noted that the proposed expert had “used no equations or formulas in forming his opinions,” had “consulted no literature except [certain provided literature] upon which he admittedly did not rely,” and “reviewed no peer review literature.” *Id.* That proposed expert’s testimony was based entirely on “a thought process in his head” and “his subjective beliefs and unsupported speculation.” *Id.* The testimony was “not based on anything that can be measured or compared” or “sufficiently tied to the facts of [that] case.” *Id.* at *26-27.

Mr. Russo’s testimony has the opposite features. His opinions rely on extensive quantitative analysis. They are based on relevant documents and data. *See supra* pp. 11-16, 20-22.

The Plan fares no better by citing *Yates v. Ford Motor Co.* There, an expert was barred from testifying on the standard of care that applied in the industrial and medical fields. The relevant issue, however, was the standard of care in an entirely different field—manufacturing. No. 5:12-CV-752-FL, 2015 WL 3448905, at *10 (E.D.N.C. May 29, 2015). The court therefore held that the probative value of testimony on the standard of care in inapplicable contexts was outweighed by the risk of confusing a jury about the applicable standard. *Id.* No such risk exists here.

In contrast, what *would* cause undue prejudice here would be the one-sided hearing that would result from excluding Mr. Russo's opinions. Nothing in Rule 403 or this record offers any basis for such an extreme result.

CONCLUSION

As his detailed reports make clear, Mr. Russo is amply qualified to testify on issues of health care finance. His reports and testimony will help the Tribunal analyze the many technical issues in this case.

Blue Cross NC respectfully requests that the Tribunal deny the Plan's motion to exclude Mr. Russo's opinions and deny as moot the Plan's motion to exclude Ms. Wills's opinions. *See supra* note 1.

This 12th day of January, 2024.

ROBINSON, BRADSHAW & HINSON, P.A.

/s/ Matthew W. Sawchak

Matthew W. Sawchak

N.C. State Bar No. 17059

msawchak@robinsonbradshaw.com

Stephen D. Feldman

N.C. State Bar No. 34940

sfeldman@robinsonbradshaw.com

434 Fayetteville Street, Suite 1600

Raleigh, North Carolina 27601

Telephone: (919) 239-2600

Facsimile: (919) 328-8790

Nathan C. Chase, Jr.

N.C. State Bar No. 39314

nchase@robinsonbradshaw.com

Benjamin C. DeCelle
N.C. State Bar No. 52102
bdecelle@robinsonbradshaw.com

101 N. Tryon Street, Suite 1900
Charlotte, North Carolina 28246
Telephone: (704) 377-2536
Facsimile: (704) 378-4000

Erik R. Zimmerman
N.C. State Bar No. 50247
ezimmerman@robinsonbradshaw.com

Emily J. Schultz
N.C. State Bar No. 58747
eschultz@robinsonbradshaw.com

1450 Raleigh Road, Suite 100
Chapel Hill, North Carolina 27517
Telephone: (919) 328-8800
Facsimile: (919) 328-8791

MORNINGSTAR LAW GROUP

Shannon R. Joseph
N.C. State Bar No. 22144
sjoseph@morningstarlawgroup.com

421 Fayetteville Street, Suite 530
Raleigh, North Carolina 27601
Telephone: (919) 590-0360
Facsimile: (919) 882-8890

*Counsel for Blue Cross and Blue Shield of
North Carolina*

CERTIFICATE OF SERVICE

I certify that today, I caused this response to be filed through this Tribunal's electronic-filing system. Under Rule 03.0501(4), the system will electronically serve the response on the following counsel:

Aaron Vodicka, Esq.
North Carolina State Health Plan for
Teachers and State Employees
aaron.vodicka@nctreasurer.com

Robert H. Edmunds, Jr., Esq.
Fox Rothschild LLP
bedmunds@foxrothschild.com

Marcus C. Hewitt, Esq.
Fox Rothschild LLP
mhewitt@foxrothschild.com

Elizabeth Sims Hedrick, Esq.
Fox Rothschild LLP
ehedrick@foxrothschild.com

Attorneys for Respondent

Lee M. Whitman, Esq.
Wyrick Robbins Yates & Ponton LLP
lwhitman@wyrick.com

Benjamin N. Thompson, Esq.
Wyrick Robbins Yates & Ponton LLP
bthompson@wyrick.com

Sophia V. Blair, Esq.
Wyrick Robbins Yates & Ponton LLP
sblair@wyrick.com

Attorneys for Respondent-Intervenor

This 12th day of January, 2024.

/s/ Matthew W. Sawchak
Matthew W. Sawchak