

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. )

**PETITIONER BLUE CROSS AND  
BLUE SHIELD OF NORTH  
CAROLINA'S MOTION FOR ENTRY  
OF PROTECTIVE ORDER**

Pursuant to 26 N.C. Admin. Code 03.0101 and Rule 26(c) of the North Carolina Rules of Civil Procedure, Petitioner Blue Cross and Blue Shield of North Carolina moves this Tribunal for entry of the proposed protective order attached as Exhibit A. In support of this motion, Blue Cross NC states as follows:

1. The parties anticipate that during this contested case, they will disclose to each other and to this Tribunal certain information, documents, and things, the further disclosure of which would cause injury to the disclosing party or its customers, clients, or members. The parties therefore seek entry of a protective order to govern and limit the disclosure and use of those discovery materials.

2. The parties have attempted to agree on the terms of a protective order that could be submitted jointly to this Tribunal. Counsel for Blue Cross NC drafted a proposed stipulated protective order and circulated that draft to counsel for the North Carolina State Health Plan for Teachers and State Employees and counsel for Aetna Life Insurance Company on April 7, 2023.

3. Counsel for the Plan and Aetna proposed a number of changes to that draft. After telephone conferences and email exchanges between counsel for the parties, Blue Cross NC agreed to the vast majority of the proposed changes.

4. The parties were unable to reach agreement on two critical issues: (a) the treatment of materials designated as Attorneys' Eyes Only, and (b) whether documents relating to implementation of the 2025-2027 contract for Third Party Administrative services at issue in this litigation that are withheld on privilege grounds must be identified on privilege logs.

5. As described further below, the positions taken by the Plan and Aetna on these issues would unfairly and unnecessarily impede Blue Cross NC's ability to litigate this contested case.

#### **TREATMENT OF ATTORNEYS' EYES ONLY MATERIALS**

6. The Plan and Aetna seek to prohibit Blue Cross NC's in-house lawyers from reviewing any material designated as Attorneys' Eyes Only (AEO). Under their proposal, only Blue Cross NC's outside counsel would be permitted to access AEO materials.

7. Blue Cross NC's proposal would allow its in-house lawyers to review AEO materials. But that access would not be without restriction. Under the terms of Blue Cross NC's proposed protective order, Blue Cross NC's lawyers would be prohibited from sharing AEO information and materials with anyone else within the company and would be prohibited from using them for any purpose other than litigating this contested case.

8. The blanket prohibition proposed by the Plan and Aetna is unnecessary and would unfairly prejudice Blue Cross NC.

9. The litigation of this contested case will involve the disclosure and production of documents and information that are complex and nuanced. It is possible that Aetna will apply an AEO designation to a significant number of the documents and a significant part of the information it produces.

10. It is critical that Blue Cross NC's outside counsel have the ability to review and discuss this material with Blue Cross NC's in-house lawyers, so Blue Cross NC can knowledgeably evaluate the evidence in this case and make decisions about how to best present its case to this Tribunal. The Plan and Aetna's proposal to prohibit those discussions and interactions between Blue Cross NC's outside and in-house counsel will make it difficult or impossible for Blue Cross NC to make knowledgeable decisions in this complex case.

11. The treatment of deposition transcripts under the proposed protective order highlights the prejudice that Blue Cross NC will suffer under the Plan and Aetna's proposal. All deposition testimony will be treated as AEO for ten days after

the final transcript of each deposition is provided to the parties (an event that often does not occur for several days after the close of the deposition). This provision means that Blue Cross NC's outside counsel would be prohibited from providing any report to Blue Cross NC's in-house lawyers about the depositions of Plan or Aetna witnesses for multiple weeks after each deposition. Given the relatively short discovery schedule in this contested case, this blackout period is untenable.

12. The unfairness that would result to Blue Cross NC is compounded by the fact that, under the Plan's proposal, the Plan's in-house lawyers would have access to AEO materials, while Blue Cross NC's in-house counsel would have to operate in the dark.

13. In an effort to reach a reasonable compromise on this issue, Blue Cross NC proposed that each Party designate two in-house lawyers who would be permitted to access AEO materials (with no disclosure permitted outside of these two designees). Aetna and the Plan rejected this proposal as well.

14. Aetna has said that it is concerned about the potential for misuse of AEO information disclosed to Blue Cross NC's in-house lawyers. But the protective order provides sufficient safeguards for the dissemination and use of AEO information. And any theoretical risk of misuse is outweighed by the prejudice that Blue Cross NC will suffer if its in-house lawyers are prohibited from meaningfully participating in the litigation of this contested case.

**IDENTIFYING IMPLEMENTATION-RELATED DOCUMENTS  
ON PRIVILEGE LOGS**

15. To avoid the burden of logging a large number of documents that are indisputably privileged or work product, the parties have agreed not to require a limited range of documents to be included on the parties' privilege logs. Section 12 of the proposed protective order states that, to the extent that communications (a) are withheld on privilege grounds, (b) occurred after litigation began, and (c) relate solely to the litigation (or to public-records requests that Blue Cross NC issued to the Plan), those communications need not be listed on the producing party's privilege log. The parties are in agreement on this provision.

16. The Plan and Aetna, however, propose to extend this privilege-log exception to all documents that relate to the implementation of the contract award at issue in this contested case and that are withheld on privilege grounds. In fact, Aetna has taken the position that implementation-related documents are not relevant to this dispute at all.

17. Documents related to Aetna's implementation efforts are relevant to this dispute. Blue Cross NC offered the lowest price and the broadest network of providers in response to the Request for Proposal at issue. It was not chosen as the winning bidder largely because it did not confirm its ability to comply with a small number of technical requirements in the RFP.

18. Blue Cross NC contends that those requirements were technically or operationally impossible to comply with, or not in the best interests of the Plan or its members. Under the terms of the RFP, Blue Cross NC was prohibited from

submitting any narrative that would explain its position on these technical requirements and was restricted to stating only whether or not it would comply with them.

19. Aetna confirmed compliance with each of these technical requirements. Under the RFP process used by the Plan here, the Plan made no efforts to test or verify that Aetna could actually comply with the requirements; instead, it accepted Aetna's responses at face value.

20. Whether Aetna can actually comply with the technical requirements that Blue Cross NC did not confirm is therefore a central issue in this dispute. If it cannot, that means that Aetna was chosen as the winning bidder even though it will charge the Plan more for its services and will offer fewer health-care providers than Blue Cross NC offered.

21. Documents related to the implementation of the contract award at issue are likely to shed light on whether Aetna can fully perform the technical requirements at issue.

22. Those documents are also likely to confirm that Blue Cross NC's network of providers is more extensive than Aetna's.

23. Aetna and the Plan should be required to produce implementation-related documents that are responsive to Blue Cross NC's discovery requests. If they withhold these documents on privilege grounds, they should be required to identify those documents on their privilege logs so that those privilege claims can be evaluated by Blue Cross NC and, if necessary, challenged.

24. Failure to require production and logging of these documents would deprive Blue Cross NC and this Tribunal of information relevant to whether the Plan's decision to award the third-party administrative services contract to Aetna was arbitrary, capricious, and erroneous.

\* \* \*

For the reasons stated above, Blue Cross NC respectfully requests that this Tribunal enter the attached Protective Order.

This 25th day of April, 2023.

ROBINSON, BRADSHAW & HINSON, P.A.

/s/ Nathan C. Chase, Jr.

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

101 N. Tryon Street, Suite 1900

Charlotte, North Carolina 28246

Telephone: (704) 377-2536

Facsimile: (704) 378-4000

Counsel for Blue Cross and Blue Shield of  
North Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served on the following through the OAH electronic filing system at the electronic mailing addresses shown below:

Aaron Vodicka  
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 25th day of April, 2023.

/s/ Nathan C. Chase, Jr. \_\_\_\_\_  
Nathan C. Chase, Jr.

# EXHIBIT A

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. )

**[PROPOSED]**  
**PROTECTIVE ORDER**

Because certain information, documents, and things to be produced in this Litigation may contain information appropriately deemed Confidential or Highly Confidential—Attorneys’ Eyes Only (as defined below), and to address the potential inadvertent production or disclosure of information protected by the attorney-client communication, work product, or other privilege, this Tribunal hereby enters the following Protective Order.

1. **DEFINITIONS**

1.1 **Confidential Information**: all Material designated as “Confidential” or “Highly Confidential—Attorneys’ Eyes Only” in accordance with Section 4.

A Producing Party may designate any Material as “Confidential” if it contains trade secrets, proprietary business information, competitively sensitive information, personally identifiable information, or other information, the disclosure of which, to persons or entities not identified in Section 6.2 would, in the good-faith judgment of the Producing Party, cause injury to the Producing Party or the Producing Party’s customers, clients, or members. A Producing Party may also designate any Material as “Confidential” if it contains proprietary business information or competitively sensitive information of a third party and the Producing Party has an obligation to keep the information confidential.

A Producing Party may designate any Material as “Highly Confidential—Attorneys’ Eyes Only” if, in the good-faith judgment of the Party making such designation, the information embodies or contains extremely sensitive trade secrets or non-public confidential and/or proprietary business, commercial, or financial information, the disclosure of which to persons or entities not identified in Section 6.3 would cause injury to the Producing Party or the Producing Party’s customers, clients, or members.

For avoidance of doubt, no Material that constitutes a public record subject to inspection and examination under Chapter 132 of the North Carolina General Statutes shall be designated as “Confidential” or “Highly Confidential—Attorneys’ Eyes Only.”

1.2 Material: all documents, deposition transcripts and recordings, deposition exhibits, responses to any discovery requests, including responses to

interrogatories, document requests, and requests for admission, inspections, and physical evidence, and any other information or items produced pursuant to discovery obligations in this Litigation or otherwise given, received, or exchanged by or among the Parties or filed with this Tribunal. “Material” includes all copies of such documents or other materials, in hard copy, electronic form, or any other form or format.

1.3 Party: any party to this Litigation, including any officer, director, manager, member, or employee of the party.

1.4 Receiving Party: a Party or non-party that receives Material from a Producing Party.

1.5 Producing Party: a Party or non-party that produces Material in this Litigation.

1.6 Designating Party: a Party or non-party that designates Material as “Confidential” or “Highly Confidential—Attorneys’ Eyes Only” in accordance with Section 4.

1.7 Outside Counsel: attorneys of record in this Litigation (as well as their support staff) who are not employees of a Party, but who are retained to represent or advise a Party, including any counsel retained by contract for the sole purpose of reviewing documents for discovery in the Litigation.

1.8 House Counsel: attorneys (as well as their support staff) who are employees of a Party and provide legal services to the Party.

1.9 Counsel (without qualifier): Outside Counsel and House Counsel.

1.10 Expert: a person who has been retained by a Party or its Counsel to serve as an expert witness or as a consultant in this Litigation (as well as their support staff).

1.11 Professional Vendors: court reporters and persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

1.12 Joinder: the “Acknowledgment and Agreement to Be Bound by Protective Order,” the form of which is attached as Exhibit A.

1.13 Litigation: as used herein, the term “Litigation” shall mean and refer solely to proceedings in the above-captioned Petition for Contested Case Hearing, including any judicial review or appeal.

## 2. SCOPE

The protections conferred by this Order cover not only Confidential Information, but also any information copied or extracted from Confidential Information, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by Parties or Counsel to or in this Tribunal, or in other settings that might reveal Confidential Information.

## 3. DURATION

After the termination of this Litigation, the confidentiality obligations imposed by this Order, including any Joinder signed pursuant to this Order, shall remain in effect until a Designating Party agrees otherwise in writing or this Tribunal or a court of competent jurisdiction otherwise directs.

4. DESIGNATING CONFIDENTIAL INFORMATION

4.1 Manner and Timing of Designations. Material sought to be protected under this Order must be clearly designated at the time the Material is disclosed or produced. Designation in conformity with this Order requires:

(a) for information in documentary form (other than transcripts of depositions or other prehearing or hearing proceedings), that the Producing Party conspicuously affix the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” on each page of each document that contains Confidential Information.

(b) for testimony given in deposition or in other prehearing or hearing proceedings, that the Party or non-party identify on the record all protected testimony, or within ten business days after the transcript is received after the close of the deposition, hearing, or other proceeding, specify any portions of the testimony that qualify as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY.” Only those portions of the testimony that are designated for protection within the ten-business-day period shall be covered by the provisions of this Order. Until the expiration of the ten-business-day period, all deposition testimony shall be deemed “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” and treated as if so designated.

(c) for information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the object, container or containers, or electronic file in which the information or item is stored, as applicable, the legend “CONFIDENTIAL” or

“HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY.” With respect to any electronic document production, the confidentiality designation of each document shall be included as a metadata field supplied with the production.

4.2 Personally Identifiable Information. Materials containing personally identifiable information may be produced in redacted form, with any redactions strictly limited to such information.

4.3 Inadvertent Failure to Designate Confidential Information. Should a Producing Party discover or determine after production that Materials should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” the Producing Party shall promptly notify the other Parties of its failure to designate such Materials.

Should the other Parties not consent to the new designation of such Materials, the Producing Party may move this Tribunal for appropriate relief. The Parties shall treat such Materials consistently with the Producing Party’s proposed new designation under the terms of this Order until this Tribunal enters an order on the Producing Party’s motion. The inadvertent failure to designate Confidential Information shall not itself provide a basis to argue that the right to designate material as such has been waived as to that Document or any other Document unless the Producing Party has unambiguously stated its intention to waive such right.

## 5. CHALLENGING CONFIDENTIALITY DESIGNATIONS

5.1 Meet and Confer. A Party that elects to challenge a Designating Party’s confidentiality designation must do so in good faith and must begin the process by conferring directly (in videoconference, telephone conference, or face-to-face dialogue;

other forms of communication are not sufficient) with counsel for the Designating Party. In conferring, the challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated Material, or reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next stage of the challenge process only if it has first engaged in this meet-and-confer process.

5.2 Motions Challenging Designations. A Party that elects to pursue a challenge to a confidentiality designation after considering the justification offered by the Designating Party may file a sealed motion to that effect. Upon any such motion to this Tribunal, the burden shall be on the Designating Party to show why its classification is proper. Pending this Tribunal's determination of the motion, the designation of the Designating Party shall be maintained.

5.3 Non-Waiver. The failure to timely challenge a Designating Party's confidentiality designation and any delay in making such a challenge shall not (i) constitute a waiver, (ii) preclude a challenge to a Designating Party's confidentiality designation, or (iii) be used in any way to contest a challenge or in support of a Designating Party's claim of confidentiality.

## 6. ACCESS TO AND USE OF CONFIDENTIAL INFORMATION

6.1 Basic Principles. A Receiving Party may use Confidential Information that is disclosed or produced by another Party or by a non-party in connection with this Litigation only for prosecuting or defending this Litigation and for no other purposes. Such Confidential Information may be disclosed only to the categories of

persons and under the conditions described in this Order. When the Litigation has been concluded, a Receiving Party must comply with the provisions of Section 10 below.

Confidential Information must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

6.2 Disclosure of Confidential Information. Unless otherwise ordered by this Tribunal or permitted in writing by the Designating Party, any information or item designated “Confidential” may be disclosed only to:

(a) Counsel who represent the Parties, including attorneys, paralegals, legal secretaries, and administrative staff to whom disclosure is reasonably necessary for this Litigation;

(b) Representatives of the Parties who are assisting with or making decisions concerning the Litigation, to the extent deemed reasonably necessary by Outside Counsel, for the purpose of assisting in the prosecution or defense of the Litigation;

(c) Witnesses or deponents, and their counsel, whose testimony is reasonably related to the Confidential Information sought to be disclosed to them, and who have signed a Joinder, to the extent reasonably necessary to prepare for and provide testimony;

(d) Experts (as defined in this Order) to whom disclosure is reasonably necessary for this Litigation and who have signed a Joinder;

(e) this Tribunal and its personnel;

(f) Professional Vendors to whom disclosure is reasonably necessary for this Litigation;

(g) Authors, addressees, and recipients of the Confidential Information or the original source of the Confidential Information to the extent that they have previously had lawful access to the particular Confidential Information to be disclosed;

(h) Any other persons upon consent of the Parties or upon Order of the Tribunal.

6.3 Disclosure of Highly Confidential—Attorneys’ Eyes Only Information.

Unless otherwise ordered by this Tribunal or permitted in writing by the Designating Party, any information or item designated “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” may be disclosed only to:

(a) Outside Counsel, including attorneys, paralegals, legal secretaries, and administrative staff of the law firm(s) of Outside Counsel to whom disclosure is reasonably necessary for this Litigation;

(b) House Counsel of the Receiving Party;

(c) Experts (as defined in this Order) to whom disclosure is reasonably necessary for this Litigation and who have signed the Joinder;

(d) this Tribunal and its personnel;

(e) Professional Vendors to whom disclosure is reasonably necessary for this Litigation and who have signed a Joinder; and

(f) Authors, addressees, and recipients of the Confidential Information or the original source of the Confidential Information to the extent that they have previously had lawful access to the particular Confidential Information to be disclosed; and

(g) Any other persons upon consent of the Parties or upon Order of the Tribunal.

6.4 Outside Counsel for the Receiving Party shall maintain the original of each Joinder signed pursuant to this Order and shall promptly provide a copy thereof to Outside Counsel for the Producing Party and/or the Designating Party upon request.

6.5 Nothing herein shall restrict the manner in which the Producing Party may use or disclose its own Confidential Information.

6.6 The nondisclosure agreement reflected in Attachment I of Request for Proposal #270-20220830TPAS (the “RFP”) shall not prohibit any Party from disclosing the following to any Expert who has executed a Joinder:

- (a) any portion of the RFP,
- (b) its submission in response thereto, or
- (c) any materials used in the preparation of such submissions that are also produced in discovery in this case to the extent required under applicable rules of the Office of Administrative Hearings or North Carolina Rules of Civil Procedure.

## 7. FILING CONFIDENTIAL INFORMATION

A Party seeking to file with this Tribunal Material designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or

containing or referring to Confidential Information, including without limitation pleadings, motion papers, memoranda of law, briefs, affidavits, declarations, and stipulations, must seek to file the Material under seal in accordance with applicable procedures of this Tribunal.

Within three (3) business days of a sealed filing or as soon as reasonably possible, Outside Counsel for all Parties shall confer and agree upon redactions of Confidential Material. Thereafter, Counsel for the filing Party shall file a redacted public version of the sealed filing(s) within two (2) business days.

8. CONFIDENTIAL INFORMATION SUBPOENAED OR ORDERED TO BE PRODUCED IN OTHER LITIGATION

If any third party (including a governmental agency) subpoenas, requests, or moves to compel discovery of Confidential Information from a Receiving Party, or if a Receiving Party is otherwise asked or required (by oral questions, interrogatories, requests for information or documents, civil investigative demand, or similar process) to disclose any Confidential Information, the Receiving Party must so notify the Designating Party. The notification must be in writing by email to the Designating Party's counsel of record.

The notification must be made as soon as possible and must be sent no more than three business days after the Receiving Party receives the applicable subpoena, request, motion, or order. Such notification must include a copy of such subpoena, request, motion, or order. Notwithstanding the above, there shall be no obligation to provide notice of the subpoena, request, motion, or order where such notice is prohibited by statute, regulation, court order, or operation of law.

The Receiving Party also must immediately inform in writing the party who caused the subpoena, request, motion or order to issue that some or all of the material covered by the subpoena or order is the subject of this Order and must provide such party a copy of this Order promptly. No Receiving Party shall disclose Confidential Information in response to a subpoena or other request before notifying the Disclosing Party and before the date required by the terms thereof or by applicable law.

The purpose of imposing these duties is to alert the interested parties to the existence of this Order and to afford the Designating Party in this Litigation an opportunity to protect its confidentiality interests in the tribunal from which the subpoena or order issued. The Designating Party shall bear the burdens and the expenses of seeking protection in that tribunal of its Confidential Information. If, failing entry of a protective order, a Receiving Party is compelled to disclose Confidential Information, that Receiving Party may, without liability hereunder, disclose the portion of the Confidential Information that it is compelled to disclose.

9. UNAUTHORIZED DISCLOSURE OF CONFIDENTIAL INFORMATION

If a Party learns that, by inadvertence or otherwise, it has disclosed Confidential Information designated by another Party or non-party to any person or in any circumstance not authorized under this Order, the Party must immediately (a) notify in writing the Producing or Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Confidential Information, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request that person or those persons to execute a Joinder.

10. FINAL DISPOSITION

This Order shall remain in force and effect until modified, superseded, or terminated by further order of this Tribunal, and shall survive the termination of this Litigation. Unless otherwise ordered or agreed in writing by the Producing Party, within thirty days after the final termination of this Litigation, including any judicial review, appeals, and/or rehearings, each Receiving Party must destroy or return all Confidential Information to the Producing Party; provided, however, that no Party shall be required to return or destroy any Confidential Information that it is required by statute, rule, regulation, or other governmental mandate to retain, including but not limited to the Public Records Act, N.C. General Statutes, Chapter 132. As used in this Section, “all Confidential Information” includes all copies, abstracts, compilations, summaries, or any other form of reproducing or capturing any of the Confidential Information. The Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the thirty-day deadline, affirming that all the Confidential Information was returned or destroyed and that the Receiving Party has not retained any copies, abstracts, compilations, summaries, or other forms of reproducing or capturing any of the Confidential Information. Notwithstanding this provision, Counsel are entitled to retain all pleadings, motion papers, transcripts, legal memoranda, correspondence, emails, notes, and attorney work product, even if such materials contain Confidential Information. Any such materials that contain or constitute Confidential Information remain subject to this Order as set forth in Section 3 above.

11. INADVERTENT PRODUCTION OF PRIVILEGED INFORMATION

A Producing Party's inadvertent disclosure of documents that such Producing Party believes constitute, contain, or reflect information otherwise protected by the attorney-client privilege, the work product doctrine, or any other privilege or immunity from discovery ("Privileged Material"), shall not constitute a waiver with respect to such Privileged Material or generally of such privilege or immunity in this Litigation. In such an instance, the Parties shall follow North Carolina Rule of Civil Procedure 26(b)(5) and the process set forth above in Section 5 to resolve the claim.

Counsel may not assert as a ground for compelling production the fact or circumstance that the alleged Privileged Material has already been produced. In the event of a motion to compel production of the alleged Privileged Material, it shall be the responsibility of the Producing Party to provide, in its opposition to the motion to compel, information regarding the content and context of the alleged Privileged Material sufficient to establish the applicability of any asserted privilege or immunity from discovery. If this Tribunal so requests, the Producing Party shall provide the alleged Privileged Material to the Tribunal for in camera review.

12. PRIVILEGE LOGS

To the extent that the following documents are withheld on the grounds that they constitute Privileged Material, they need not be included on a Party's privilege log:

(a) Communications exclusively between a Party or its House Counsel and that Party's Outside Counsel occurring on or after December 14, 2022;

(b) Communications exclusively between a Party and its House Counsel, or exclusively among its House Counsel, occurring on or after December 14, 2022 and relating solely to the prosecution or defense of the Litigation or Blue Cross NC's public-records requests; and

(c) Communications exclusively between (i) a Party, a Party's House Counsel, or a Party's Outside Counsel and (ii) any retained (testifying or nontestifying) expert witness that do not relate to any of the matters identified in Rule 26(b)(4)e.1, 2, or 3.

For avoidance of doubt, the above categories do not include documents relating to implementation of the 2025-2027 contract for Third Party Administrative services at issue in the Litigation.

Each Party's privilege log shall, for each entry, describe the nature of the Documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable an assessment of the applicability of the privilege or protection (including date, author, recipients, individuals copied, privilege claimed, basis for privilege or protection claimed).

A single Document containing multiple Email messages (*i.e.*, an Email chain) may be logged as a single entry. If only part of a chain is privileged, the privileged content should be redacted and the remaining content in the chain should be produced. A Document Family (*e.g.*, an Email and its attachments) may be logged as

a single entry so long as the entire Family is privileged and the log entry accurately describes both the Parent and its attachment(s).

13. MISCELLANEOUS

13.1 Modification. Nothing in this Order abridges the right of any person to seek its modification by this Tribunal in the future.

13.2 Public Records. Notwithstanding anything herein to the contrary, to the extent that any obligations herein conflict or are inconsistent with the Respondent's or the North Carolina Department of State Treasurer's obligations as an administrative agency of the State of North Carolina under the public records statute, N.C. General Statutes Chapter 132, then the obligations thereunder shall control and supersede any such obligations herein.

13.3 Right to Assert Other Objections. This Order shall be without prejudice to the right of any Party to oppose production of any information on any ground allowed under applicable rules.

13.4 Right to Request or Agree Upon Additional Protection. Nothing in this Order abridges the right of any Party to seek additional protection of Material from this Tribunal or to agree upon additional protection of Material with any other person.

13.5 Rights of Non-Parties. If a non-party provides Material in connection with this Litigation, and if the non-party so elects by signing a Joinder, then the provisions of this Order shall apply to such Material. Under such circumstances, the non-party shall have the same rights and obligations under this Order as would a Party.

13.6 Additional Parties or Attorneys. In the event additional parties or attorneys join or are joined in this Litigation, they will be bound by this Order.

13.7 Notwithstanding any other provision of this Order to the contrary, the confidentiality obligations herein shall not apply, or shall cease to apply, to any information that:

(a) At the time of disclosure hereunder was already lawfully in the possession of the Receiving Party and was not acquired under any obligation of confidentiality; or

(b) At the time of disclosure hereunder was, or subsequently becomes, through no fault of the Receiving Party, a public document or publicly available.

13.8 This Tribunal retains jurisdiction even after termination of this Litigation to enforce this Order and to make such deletions from or amendments, modifications, and additions to the Order. Any Party for good cause may apply, before or after termination of this Litigation, to this Tribunal for a modification of this Order.

\* \* \*

For good cause show, the motion is **GRANTED** and the above Protective Order is hereby **ENTERED**.

**SO ORDERED**, this \_\_\_\_ day of \_\_\_\_\_, 2023.

---

Melissa Owens Lassiter  
Administrative Law Judge

**EXHIBIT A**

**ACKNOWLEDGMENT AND AGREEMENT  
TO BE BOUND BY PROTECTIVE ORDER**

I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_  
\_\_\_\_\_ [print or type party], declare under penalty of  
perjury that the undersigned has reviewed in its entirety and understand the  
Protective Order that was issued in the contested case of *Blue Cross and Blue Shield  
of North Carolina v. North Carolina State Health Plan for Teachers and State  
Employees et al.*, 23-INS-00738. The undersigned agrees to comply with and to be  
bound by all the terms of the Protective Order and understands and acknowledges  
that failure to so comply could result in sanctions and punishment in the nature of  
contempt. The undersigned covenants not to disclose in any manner any information  
or item that is subject to the Protective Order to any person or entity except in strict  
compliance with the provisions of the Protective Order.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Title: \_\_\_\_\_