

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.)

MOTION TO DISQUALIFY

NOW COMES Respondent the North Carolina State Health Plan for Teachers and State Employees (“Respondent” or “SHP”), by and through the undersigned counsel, and pursuant to Rules 1.7 and 1.9 of the North Carolina Revised Rules of Professional Conduct, hereby respectfully submits this Motion to Disqualify the firm of Robinson, Bradshaw & Hinson, P.A. (“RBH”)¹ as counsel for Petitioner Blue Cross and Blue Shield of North

¹ Notwithstanding any prior query or discussion related to counsel Matt Sawchak’s representation of BCBS in this contested case, Respondent does not move to disqualify him in his individual capacity separate and apart from RBH.

Carolina (“Petitioner” or “BCBS”). In support of this Motion, the SHP shows the following:

Petitioner’s Action

1. Petitioner, represented by RBH, has initiated this contested case challenging the decision to award Aetna Life Insurance Company (“Aetna”) the SHP’s 2025–2027 contract for third-party administrator (“TPA”) services. (Pet. introductory paragraph, p. 1).

2. Specifically, Petitioner alleges the SHP’s application of criteria, gathering and consideration of information, and scoring system was erroneous, arbitrary, and capricious. (Pet. introductory paragraph, p. 1).

3. Petitioner’s allegations are drafted as claims that erroneous actions were taken solely by the SHP as a legal entity distinct and separate from the North Carolina State Treasurer Dale R. Folwell, CPA (“Mr. Folwell” or “Treasurer”) and the North Carolina Department of State Treasurer (“Department”).

4. The SHP, however, is not a separate and distinct legal entity for purposes of determining whether a conflict of interest exists for RBH. Rather, the SHP is both under the supervision of the Treasurer and the Department while being part thereof. Petitioner’s allegations of erroneous, arbitrary, and capricious actions challenge the actions and decisions of the Treasurer and the Department.

5. RBH cannot avoid this conflict of interest simply because it omits reference to the Department and Treasurer in the Petition thereby suggesting that a distinction exists

between the Department it now challenges and the same Department it elsewhere represents.

6. As detailed below, in a series of letters (attached as Exhibits 1-4) and telephone calls between January 20, 2023, and March 10, 2023, representatives of the Department and RBH discussed whether RBH's representation of BCBS created a conflict under the North Carolina Rules of Professional Conduct. The representatives were unable to resolve the issue.

Standard of Decision

7. The decision to disqualify an attorney is within the Court's discretion. *Robinson & Lawing, L.L.P. v. Sams*, 161 N.C. App. 338, 339, 587 S.E.2d 923, 925 (2003).

8. "[T]he goal of maintaining public confidence in our system of justice demands that courts prevent even the appearance of impropriety and thus resolve any and all doubts in favor of disqualification." *Chemcraft Holdings Corp. v. Shayban*, No. 06 CVS 5227, 2006 WL 2839255, at *4 (N.C. Super. Oct. 5, 2006). "In preventing the appearance of impropriety, the client's perception of events is of paramount importance and overshadows the details of his attorney's conduct." *Id.*

9. "The conduct of the attorney need not constitute a violation of the Rules of Professional Conduct, and certainly need not rise to the level of professional negligence in order to warrant disqualification." *Id.*

10. "Where a reasonable client would be concerned by a potential conflict, a court must err on the side of disqualification." *Id.* (citations omitted).

The Department and SHP Are a United Entity

11. The SHP is created by N.C. Gen. Stat. § 135-48.2 and governed by article 3B of chapter 135 of the North Carolina General Statutes. (Pet. ¶ 2). It provides health benefits coverage to hundreds of thousands of North Carolina teachers, state employees, retirees, and their dependents. (Pet. ¶ 2).

12. The SHP was transferred in 2011 by S.L. 2011-85 § 2.2 to the Department from the North Carolina General Assembly via a Type II transfer. *See* § 143A-6.

13. As a result of the transfer of the SHP to the Department in 2011, the SHP is now a division of the Department. (Aff. ¶¶ 17-18; *Divisions, State Health Plan*, NORTH CAROLINA DEPARTMENT OF TREASURER, <https://www.nctreasurer.com/> (last visited April 17, 2023)).

14. In 2017, significant changes were made by S.L. 2017-57, particularly to § 35.22, which increased the Treasurer's administrative and managerial authority and had the effect of more closely integrating the SHP into the Department as one of its divisions. (Aff. ¶ 17).

15. The SHP is managed, operated, and administered by the Treasurer and Department. (Aff. ¶ 21; N.C. Gen. Stat. § 135-48.30(a)(1); *Quaicoe v. Moses H. Cone Mem'l Hosp. Operating Corp.*, 274 N.C. App. 306, 308-9, 852 S.E.2d 399, 401-2 (2020)).

16. The Treasurer may delegate his or her powers and duties to operate and administer the SHP “to the Executive Administrator, the Board of Trustees, and employees of the Plan. In delegating powers or duties, however, the State Treasurer **maintains the**

responsibility for the performance of those powers or duties.” N.C. Gen. Stat. § 135-48.30(b) (emphasis added).

17. The Treasurer appoints and has authority to remove the SHP’s Executive Administrator and Deputy Executive Administrator, employs the clerical and professional staff, and provides other assistance necessary to run the SHP. § 135-48.23(b), (c1).

18. The Treasurer is responsible for adopting rules to implement the SHP. § 135-48.25.

19. As a result, the Treasurer and Department are responsible for the SHP along with any actions or decisions related to the SHP. (Aff. ¶¶ 18, 21-22, 26).

20. The Treasurer serves as an ex officio member of the Board of Trustees of the State Health Plan for Teachers and State Employees (“Board”), serves as its Chair, and has tie-breaking voting power. § 135-48.20(c).

21. The Board is required to approve any contract exceeding \$3,000,000, including the SHP’s TPA contract at issue here. § 135-48.33.

22. The Treasurer and Board must carry out their duties and responsibilities as fiduciaries to the SHP. § 135-48.2(a); *see* §§ 147-69.2A(a), -69.3(a), (e), (i2), and -69.7

23. As a division of the Department, the SHP is integrated with and intertwined with the Department (Aff. ¶ 18), as shown by the overlapping officers and personnel as alleged herein.

24. The SHP is not a subsidiary of the Department. (Aff. ¶ 19). A single human resources team, a single legislative affairs team, a single communications team, and a single legal team supports the entire Department, including the SHP and all other

Department divisions. (Aff. ¶ 20). The Treasurer maintains leadership and responsibility for all divisions, including the appointment and removal of personnel. (Aff. ¶ 20). Since 2015, the SHP has shared the same facilities as the rest of the Department, and the same personnel policies apply. (Aff. ¶ 20).

25. Indeed, Fox Rothschild, LLP, has been engaged by the Department and by the Treasurer, in his capacity as fiduciary and manager of the SHP, to represent them, including the SHP, in this contested case. (Aff. ¶¶ 23-24).

26. In light of these overlapping relationships between the Department, the Treasurer, and the SHP, there is no separate legal counsel for the SHP in this matter. (Aff. ¶¶ 24-25).

27. Similarly, the Department has not moved to intervene in this matter to protect its interest because it is involved in this matter via the SHP. (Aff. ¶ 26). Because the SHP and the Department are an integrated whole as a North Carolina executive branch state agency, any defense in the name of the SHP is a defense of the Department, alleviating any need for the Department to intervene. (Aff. ¶ 26).

RBH's Client Relationship With the Treasurer and Department

28. The Department first became aware of RBH's representation of BCBS in connection with the TPA services contract award on January 12, 2023, upon receipt of BCBS's Request for Protest Meeting, which was subsequently denied by letter dated January 20, 2023. (Aff. ¶ 8).

29. On January 20, 2023, the Department sent a letter to RBH raising the issue of RBH's potential conflict as BCBS's counsel. (Ex. 1; Aff. ¶ 9).

30. On January 26, 2023, RBH provided a letter to the Department responding to the Department’s inquiry. (Ex. 2; Aff. ¶¶ 9-10).

31. In its January 26, 2023, letter, RBH admitted the following:

- a. “[RBH] has had recent and ongoing engagements with the North Carolina Department of State Treasurer...” (Ex. 2, p. 3);
- b. “Specifically, the firm has had recent engagements with the Department for investment transaction matters and, although [RBH] [has] no active matters in which [RBH] [is] serving as bond counsel on a State bond issue, the firm remains a member of the pool of pre-qualified public finance and bond counsel firms who may provide such services to the Department.” (Ex. 2, p. 3);
- c. “As these agreements confirm and you noted in your letter, our firm’s existing client relationship is with the Department, or with the State Treasurer through the Department.” (Ex. 2, p. 4).

32. RBH’s January 26, 2023, letter also describes the language found in its engagement letters with the Treasurer and Department, confirming its client relationship, as follows:

- a. “*Investment Transaction Engagements.* Our engagement agreements for investment transaction matters state that we are being engaged ‘[t]o represent you [the State Treasurer], through the North Carolina Department of State Treasurer (the ‘Department’), in connection with the investment to be made by you or at your direction on behalf of the North Carolina Retirement System and other plans and funds managed by you (collectively, for purposes of this engagement letter, ‘NCRS’) in [the specific investment at issue].’ **Our engagement agreements are countersigned by the State Treasurer.**” (Ex. 2, p. 3) (emphasis added).
- b. “*Public Finance Counsel and Bond Counsel Pool Agreement.* In our role as a member of a three-firm pool of pre-qualified public finance counsel and bond counsel for State bond issues, **our written agreement is with the Department.** That agreement contemplates that we will provide services to the Department and its State and Local Government Finance Division. The most recent extension of the agreement was countersigned by a representative of the North

Carolina Department of State Treasurer, State and Local Government Finance Division, **and approved by the State Treasurer.**” (Ex. 2, pp. 3-4) (emphases added).

33. On February 16, 2023, the Department responded via letter to RBH’s January 26, 2023, letter, disagreeing with RBH’s conclusion and analysis, informing RBH the Department believed there was a conflict, and requesting RBH to address it. (Ex. 3; Aff. ¶ 13).

34. On March 10, 2023, RBH responded to the Department’s February 16, 2023, letter further explaining its position that RBH does not have a concurrent client conflict of interest. (Ex. 4; Aff. ¶ 14).

35. RBH’s reliance on the fact that its engagement letters with the Department and the Treasurer do not refer to SHP fails to account for the actual interlocking structure of the Department and the SHP.

RBH is Representing BCBS in a Petition Against RBH’s Current Client

36. Pursuant to North Carolina Revised Rule of Professional Conduct 1.7 “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client...”

37. RBH is currently engaged by the Department to assist with reviewing and revising the transaction documents for an investment on behalf of the North Carolina Retirement Systems (“NCRS”). (Aff. ¶¶ 34, 38, 41; *see* § 147-69.2(b)(8)).

38. Here there is an unavoidable conflict under Rule 1.7 because RBH is representing its client BCBS against another current client, the Department/Treasurer.

39. “[A]bsent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, **even when the matters are wholly unrelated.**” N.C. Rev. R. Prof’l Conduct 1.7 comt. 6 (emphasis added); *see Turner on behalf of Sweetwater Constr., LLC v. Hunt Hill Apartments, LLC*, No. 19 CVS 2195, 2020 WL 698604, at *4 (N.C. Super. Feb. 11, 2020).

40. The Department has not provided consent to RBH to represent BCBS, nor has the Department waived any conflict of interest. (Aff. ¶¶ 42-43).

41. RBH argues that “[b]ecause the State Health Plan is an entity separate from the Department and because the firm has never represented the State Health Plan, [RBH’s] representation of Blue Cross Blue Shield NC in the TPA RFP bid protest is not adverse to any current firm client.” (Ex. 2, p. 4).

42. RBH’s purported distinction is inconsistent with reality. As detailed in this motion, as a North Carolina executive branch state agency the SHP, the Department, and the Treasurer are interlocking entities that are inextricably intertwined. No one can deal with the SHP without dealing with the Department, the Treasurer, or the officers and staff appointed by the Treasurer. Any action against the SHP is necessarily an action against the Department and Treasurer. (*See also* Aff. ¶¶ 17-31). As integrated and interlocking entities, the SHP, the Department, and the Treasurer should be considered the same client. *See* N.C. Rev. R. Prof’l Conduct 1.13 comt. 9.

43. Moreover, a “client may be specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which

the bureau is a part or the relevant branch of government may be the client” N.C. Rev. R. Prof’l Conduct 1.13 comt. 9.

44. RBH’s current client is a branch of the North Carolina Government, the Department, and head of the state agency that includes the SHP. (Aff. ¶¶ 26, 34, 38, 41; Ex. 2, pp. 3-4).

45. RBH cannot avoid a conflict by artificially stripping the SHP out of the branch of government that RBH is currently representing.

46. RBH’s prior engagement letters contradict their position.

47. RBH represented the Treasurer for investments made by him or at his direction on behalf of the NCRS. (Aff. ¶¶ 34-37). The NCRS are administered by two divisions of the Department. (Aff. ¶ 27). The SHP is another division of the Department. (Aff. ¶ 29). The Treasurer is a fiduciary of both the NCRS and the SHP and is required to manage each (directly or through appointees), and each has a board of trustees (in the case of NCRS, there are multiple boards of trustees). (See Aff. ¶¶ 27-31; N.C. Gen. Stat. §§ 135-48.2(a), 147-69.2A(a), -69.3(a), (e), (i2), and -69.7).

48. Despite the similarities of the Department’s divisional structure, RBH argues that it can represent the Treasurer and the Department in actions taken by one division while opposing the Treasurer and the Department in actions taken by another division, even when the Treasurer is a fiduciary of both. The Treasurer and Department contend that each division is an integrated part of the Department for the purposes of conflict interest analysis. (See Aff. ¶ 31).

49. In addition, RBH is part of a pool of law firms that have provided bond services to the Department's State and Local Government Finance Division ("SLGFD"), another Departmental division that is similar to the SHP and the divisions administering the NCRS. (Aff. ¶¶ 30-33). Yet, RBH argues that no distinctions exist between the Treasurer, the Department, and the Department's divisions, except for the SHP, where RBH contends that its appearance representing BCBS in opposition to the Treasurer does not constitute a conflict of interest.

50. RBH has crafted a unique distinction that it applies only for the Department's SHP division in order to allow them to take on this matter.

RBH's Representation is Adverse to their Current Client's Interests

51. Assuming the Department and SHP are separate and distinct entities, which is denied, RBH's representation of Petitioner is still impermissibly adverse to the Department's and Treasurer's interests.

52. RBH admits it has an "existing client relationship [] with the Department, or with the Treasurer through the Department." (Ex. 2, p. 4).

53. Despite RBH's existing client relationship with the Department, Petitioner's contested case is entirely based on allegations that the Department's and the Treasurer's actions were erroneous, arbitrary, and capricious.

54. Specifically, Petitioner makes the following relevant allegations:

a. "The Plan made that award by applying arbitrary criteria, by failing to gather and consider critical information, and by using a distorted scoring system. Because of those flaws, the process that led to this award was an improper procedure, and the Plan's award to Aetna was erroneous, arbitrary, and capricious." (Pet. introductory paragraph, p. 1,);

- b. “The Plan issued the RFP on August 30, 2022.” (Pet. ¶ 6);
- c. “[T]he Plan did not evaluate any vendor’s provider network...evaluate how many providers in the Plan’s current Blue Cross NC network would not be included in Aetna’s network. Nor did the plan evaluate how many members would be forced to change providers because of differences in the networks offered by Blue Cross NC and Aetna”. (Pet. ¶ 8);
- d. The RFP used a flawed scoring method (Pet. ¶ 26);
- e. The Plan refused to receive information on any vendor’s technical capabilities without context, clarification, or explanation which was a departure from other RFPs (Pet. ¶¶ 30-32);
- f. “On January 20, 2023, the Plan sent Blue Cross NC a letter denying the meeting request.” (Pet. ¶ 41);
- g. “[T]he RFP’s scoring system did not score the vendors’ provider networks.” (Pet. ¶ 46);
- h. “The Plan admits that it did not compare the provider networks offered by Blue Cross NC and Aetna during the RFP process.” (Pet. ¶ 48);
- i. “Issuing the award to Aetna without scoring the vendors’ networks of providers, and without accounting for the disruption that the award would cause, was erroneous, arbitrary, and capricious.” (Pet. ¶ 52);
- j. “Even when the RFP’s scoring process did assign scores, it assigned those scores in a flawed way.” (Pet. ¶ 53);
- k. “[T]he Plan did not test the accuracy of any vendor’s self-reported pricing or discounts.” (Pet. ¶ 56).
- l. “Because the Plan did not validate the accuracy of Aetna’s network-pricing proposal, the Plan made a significant scoring error...” (Pet. ¶ 58);
- m. “[T]he RFP’s weights and scoring methods for administrative fees and networking-pricing guarantees were an improper procedure. Those weights and scoring methods led to an arbitrary, capricious, and erroneous award.” (Pet. ¶ 73);
- n. “In sum, Blue Cross NC had good reasons for not confirming seven out of the 310 technical requirements in the RFP...The Plan’s decision to prohibit Blue Cross NC from providing this information prevented the plan from fully evaluating Blue Cross NC as a vendor and rendered the Plan’s decision erroneous, arbitrary, and capricious.” (Pet. ¶¶ 106-7);
- o. “Plan officials told Blue Cross NC that it did not win the award because of those seven responses [to the RFP].” (Pet. ¶ 83);
- p. “[T]he formula that the Plan used to calculate each vendor’s overall score and rank was unsound, arbitrary, and capricious.” (Pet. ¶ 108); and

q. “This scoring system has no rational basis, was an improper procedure, and was arbitrary and capricious.” (Pet. ¶ 112).

55. These allegations involve the application of criteria set out in the RFP, the gathering and considering of information, and the scoring system used for BCBS’s application, all of which were set out by SHP personnel under the direction and guidance of the Department and the Treasurer. (Aff. ¶ 44).

56. After being duly appointed by, and under the direction and supervision of, the Treasurer and Department, SHP personnel drafted the RFP, reviewed, considered, and evaluated the responses of the insurers that made submissions and information provided to the RFP, and scored the RFP based on those responses. (Aff. ¶ 45). The recommendation of those SHP personnel was to award the SHP TPA contract to Aetna. (Aff. ¶ 46). The SHP Board of Trustees, which the Treasurer chairs, then voted unanimously to approve the award to Aetna. (Aff. ¶ 47).

57. To prove its case, RBH, on behalf of Petitioner, must take factual and legal positions challenging these actions and decisions.

58. RBH admits that the SHP “is to be administered under the direction and supervision of the Department and certain ‘management functions’ (e.g., planning, organizing, staffing, directing, coordinating, reporting, and budgeting) are to be performed under the direction and supervision of the State Treasurer as head of the Department...” (Ex. 2, p. 4).

59. Yet, the Department's and Treasurer's involvement in the RFP process, as carried out by SHP personnel under their direction and supervision, for the SHP's TPA is what Petitioner now challenges.

60. These challenges, which are disputed, are against the Treasurer's and Department's interest as they allege error and abuse by the Department and criticize the Treasurer's performance and delegation of his fiduciary duties. (Aff. ¶ 48).

61. A firm is prohibited from prosecuting claims against a party with which they have no relationship if the claims will require them to take factual and legal positions adverse to their current or former client's interest. *See e.g. Kingsdown, Inc. v. Hinshaw*, No. 14 CVS 1701, 2015 WL 1880599, at *4 (N.C. Super. Apr. 22, 2015).

62. In *Kingsdown*, the firm of Tuggle Duggins P.A. was disqualified from representing their client Kingsdown, which brought suit alleging breach of fiduciary duty, constructive fraud, and conspiracy against a party with whom the firm had no relationship, defendant Ann Ray. *Id.* The reason for the disqualification was that Tuggle Duggins would have been required to take factual and legal positions that a former client, co-defendant Eric Hinshaw, disputed and were against his interest. *Id.*

63. If Tuggle Duggins was disqualified from pursuing claims against co-defendant Ray, a party with whom it had no relationship, because those claims would have involved facts and legal positions contrary to the interest of co-defendant Hinshaw, its former client, it necessarily follows that BCBS's allegations, which require proof that RBH's current client failed to perform its fiduciary duties, require disqualification.

RBH Cannot Prosecute BCBS's Claims Without Violating Rule of Professional Conduct 1.7

64. A “conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit” N.C. Rev. R. Prof'l Conduct 1.7 comt. 6.

65. We anticipate that the Treasurer and Department representatives will be key witnesses in this contested case.

66. RBH must take their depositions and cross-examine them at the hearing to effectively represent BCBS.

67. These examinations by RBH will be undertaken to prove the SHP personnel under the Treasurer's and Department's guidance, supervision, and direction, and to whom the Treasurer delegated authority, not only erred in their evaluation and consideration of BCBS's RFP response but also acted arbitrarily and capriciously.

68. Such cross-examination qualifies as a directly adverse conflict and is impermissible. *See* N.C. Rev. R. Prof'l Conduct 1.7 comt. 6.

RBH's Representation Violates its Duties to its Former Client Under Rule of Professional Conduct 1.9

69. “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” N.C. Rev. R. Prof'l Conduct 1.9(a).

70. RBH has previously represented the Treasurer through the Department. (Aff. ¶¶ 32-33; Ex. 2., pp. 3-4).

71. Petitioner, through RBH, now challenges the Treasurer's actions as fiduciary of the SHP.

72. Specifically, RBH claims the process leading to the award of the SHP's 2025–2027 TPA services contract to Aetna, as guided, directed, and supervised by the Treasurer pursuant to his fiduciary duties, was arbitrary and capricious. (See Pet. introductory paragraphs, p. 1).

73. “A decision is arbitrary and capricious if it was ‘patently in bad faith,’ ‘whimsical,’ or if it lacked fair and careful consideration.” *Teague v. W. Carolina Univ.*, 108 N.C. App. 689, 692, 424 S.E.2d 684, 686 (1993) (citations omitted).

74. Fiduciaries, however, must act in good faith and with due regard. *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001).

75. The Treasurer could not have acted with good faith and due regard if the award of the TPA contract to Aetna was arbitrary and capricious.

76. As a result, RBH's prior representation of the Treasurer supporting the Treasurer's fiduciary duties is substantially related to the current challenge which alleges that the Treasurer failed in his fiduciary duties.

77. The Treasurer has not consented to RBH's representation, and RBH should be disqualified. See N.C. Rev. R. Prof'l Conduct 1.9(a).

WHEREFORE, Respondent the North Carolina State Health Plan for Teachers and State Employees respectfully requests that the firm of Robinson, Bradshaw & Hinson, P.A.

be disqualified as counsel for Petitioner Blue Cross and Blue Shield of North Carolina in this contested case.

This the 25th day of April, 2023.

NC State Health Plan

/s/ J. Benjamin Garner

J. Benjamin Garner

N.C. State Bar No. 41257

ben.garner@nctreasurer.com

Joel Heimbach

N.C. State Bar No. 47794

Joel.heimbach@nctreasurer.com

3200 Atlantic Avenue

Raleigh, NC 27607

Telephone:

919.814.4430

FOX ROTHSCHILD LLP

/s/ Robert H. Edmunds, Jr.

Robert H. Edmunds, Jr.

N.C. State Bar No. 6602

Marcus C. Hewitt

N.C. State Bar No. 23170

mhewitt@foxrothschild.com

Elizabeth Sims Hedrick

N.C. State Bar No. 38513

ehedrick@foxrothschild.com

434 Fayetteville Street, Suite

2800

Raleigh, NC 27601

Telephone:

919.755.8700

Facsimile:

919.755.8800

Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing document was uploaded electronically with the Office of Administrative Hearings, causing electronic service, as defined in 26 N.C.A.C. 03 .0501(4), to be made upon the following:

Matthew W. Sawchak
msawchak@robinsonbradshaw.com

434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601

Stephen D. Feldman
sfeldman@robinsonbradshaw.com

434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601

Nathan C. Chase, Jr.
nchase@robinsonbradshaw.com

101 N. Tryon Street, Suite 1900
Charlotte, North Carolina 28246

Counsel for Petitioner Blue Cross and Blue Shield of North Carolina, Inc.

Lee M. Whitman
lwhitman@wyrick.com

4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607

Benjamin N. Thompson
bthompson@wyrick.com

4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607

Sophia V. Blair
sblair@wyrick.com

4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607

Counsel for Proposed Respondent-Intervenor Aetna Life Insurance Company

This the 25th day of April, 2023.

/s/ Robert H. Edmunds, Jr.

Robert H. Edmunds, Jr.

STATE OF NORTH CAROLINA
DURHAM COUNTY

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AFFIDAVIT OF SAMUEL W. WATTS
IN SUPPORT OF MOTION TO
DISQUALIFY

The undersigned, being first duly sworn, declares as follows under penalty of perjury:

1. I, Samuel W. Watts, being duly sworn, deposes and says:
2. I am employed by North Carolina State Treasurer Dale R. Folwell, CPA (“Mr. Folwell” or “Treasurer”) and The North Carolina Department of State Treasurer (“Department”) in the position of Interim Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees (“Respondent” or “SHP”) and Legislative Liaison and Senior Public Policy Advisor for the Department.

3. As the Interim Executive Administrator of the SHP and the Legislative Liaison and Senior Public Policy Advisor, I represent the Treasurer and Department, including the SHP.

4. My duties and responsibilities as Interim Executive Administrator of the SHP, on behalf of the Treasurer and Department, include managing and administering the programs and personnel necessary to provide health care benefits to the almost 740,000 members and dependents pursuant to the applicable statutory mandates. My duties and responsibilities as Legislative Liaison and Senior Public Policy Advisor, on behalf of the Treasurer and Department, include representing the same before the North Carolina General Assembly to support and further the Treasurer's and Department's goals pursuant to their constitutional and statutory authority and responsibilities.

5. I am familiar with and knowledgeable of the above captioned contested case filed by Petitioner Blue Cross Blue Shield of North Carolina ("Petitioner" or "BCBS"), including the petition and its allegations, and the firm of Robinson, Bradshaw & Hinson, P.A.'s ("RBH") representation of Petitioner.

6. I am familiar with and knowledgeable of the duties, responsibilities, structure, and relationship of the Treasurer and Department with the SHP.

7. I am familiar with and knowledgeable of the actions and decisions of the SHP, at the direction, supervision, and guidance of the Treasurer and Department, related to this contested case, including the award of the SHP's 2025–2027 contract for third-party administrator ("TPA") services to Aetna Life Insurance Company ("Aetna") and BCBS's request for proposal ("RFP").

The Department's and RBH's Communications Regarding RBH's Conflict

8. The Department first became aware of RBH's representation of BCBS in connection with the TPA services contract award on January 12, 2023, upon receipt of BCBS's Request for Protest Meeting, which was subsequently denied by the Department by letter dated January 20, 2023.

9. On January 20, 2023, the Department sent RBH a letter regarding RBH's potential conflict as BCBS's counsel.

10. The letter questioned how the North Carolina Rules of Professional Conduct allowed RBH to represent BCBS in this matter that is directly adverse to a division of the Department, the SHP, which the Department directs and manages.

11. The Department noted its surprise to learn of RBH's representation in this matter and the serious concerns it had given RBH's prior and ongoing representation of the Treasurer and Department.

12. On January 26, 2023, RBH responded via letter to the Department's January 20, 2023, letter advising why RBH believed there was no conflict.

13. On February 16, 2023, the Department responded via letter to RBH's January 26, 2023, letter, disagreeing with RBH's conclusion and analysis, informing RBH the Department believed there was a conflict, and requesting RBH to address it.

14. On March 10, 2023, RBH responded to the Department's February 16, 2023, letter, further explaining its position that RBH does not have a concurrent client conflict of interest.

15. In addition to these letters, between January 20, 2023, and March 9, 2023, the Department and RBH engaged in telephone calls discussing the conflict.

16. As of this date, RBH has not addressed the conflict as requested by the Department's February 16, 2023, letter, and RBH's conflict issue remains unresolved.

Duties and Relationship of the Treasurer and Department with the SHP

17. The SHP was transferred in 2011 by S.L. 2011-85 to the Department from the North Carolina General Assembly via a Type II transfer. In 2017, significant changes were made by S.L. 2017-57 which increased the Treasurer's administrative and managerial authority of the SHP and had the effect of more closely integrating the SHP into the Department as one of its divisions.

18. The SHP has been a division of the Department, and integrated with and inextricably intertwined with the Department, during all times relevant to this contested case.

19. The SHP is not a subsidiary of the Department.

20. A single human resources team, a single legislative affairs team, a single communications team, and a single legal team supports the entire Department, including the SHP and all other Department divisions. The Treasurer maintains leadership and responsibility for all divisions, including the appointment and removal of personnel. Since 2015, the SHP has shared the same facilities as the rest of the Department, and the same personnel policies apply.

21. The SHP is managed, operated, and administered by the Treasurer and Department. SHP personnel are directed and guided by the Treasurer and Department.

22. It is the Treasurer's and Department's responsibility to direct, oversee and run the SHP.

23. Due to their duties to and relationship with the SHP, the Treasurer and Department are responsible for hiring counsel to defend this action even though they are not specifically named in it.

24. The Department and Treasurer, in his capacity as fiduciary and manager of the SHP, retained Fox Rothschild, LLP, to represent the Treasurer and Department, including the SHP, in relation to this matter due to the overlapping, integrated, and intertwined relationship of the Treasurer and Department with the SHP.

25. Due to that relationship, the Treasurer and Department do not believe there is a need or that it would be appropriate to retain separate counsel for the SHP to defend this contested case.

26. The Department has not moved to intervene in this matter to protect its interest because it is involved in this matter via the SHP. Because it is the position of the Treasurer and Department that the SHP and the Department are an integrated whole as a North Carolina executive branch state agency, any defense in the name of the SHP is a defense of the Department, alleviating any need for the Department to intervene.

Department Divisions

27. The North Carolina Retirement Systems ("NCRS") are composed of certain state pension plans that are administered by the Retirement Services Division ("RSD") and the investments of which are managed by the Investment Management Division ("IMD"). Both the RSD and the IMD are divisions of the Department.

28. The RSD also facilitates the certain boards of trustees that are responsible for specific state pension plans, each of which have their own statutory authority and responsibilities. For example, the North Carolina Teachers' and State Employees' Retirement System ("TSERS") Board of Trustees is supported by RSD, and RSD implements the decisions and directions of that Board in addition to the directions of the Treasurer. The TSERS Board of Trustees has the power to sue and be sued pursuant to N.C. Gen. Stat. § 135-6.

29. The SHP, as another division of the Department, functions similarly with respect to its own particular Board of Trustees and that Board's, and the SHP's, own statutory authority and responsibilities.

30. Like the SHP, IMD, and RSD, the State and Local Government Finance Division ("SLGFD") is a division of the Department. As with those other divisions, the SLGFD facilitates the activity of a public body, the Local Government Commission, which has its own statutory authority and responsibilities.

31. The Treasurer and Department are responsible for managing the RSD, IMD, and SLGFD, and other plans and funds under N.C. Gen. Stat. § 147-65 *et seq.*, just as they are required to manage the SHP. As a result, the SHP, RSD, IMD, and SLGFD are integrated parts of the Department.

RBH's Engagements with the Department

32. The Department has previously retained RBH to serve with two other firms as members of a pool of pre-qualified public finance counsel and bond counsel for State

bond issues. RBH was retained through a representative of the SLGFD that was approved by the Treasurer.

33. RBH provided bond services to the SLGFD through the Treasurer and Department.

34. RBH is currently engaged by the Department to assist with reviewing and revising the transaction documents for an investment on behalf of the NCRS.

35. This investment is with a long-time investment manager for the NCRS maintained through a series of separately managed accounts structured as a series LLC. RBH's engagement for the NCRS investment, as originally conceived, consisted of three parts: (1) work on a new commingled fund holding vehicle (Series 2), (2) work on the commingled main fund (in which Series 2 invested), and (3) work on a co-investment vehicle (Series 3).

36. RBH and the Department's engagement letter for this work is dated July 29, 2022.

37. RBH's work thus far involved a deep review and necessary revisions to the Master LLC, work on a new commingled main fund holding vehicle (Series 2), and work on the commingled main fund (in which Series 2 invested). The closing for the Series 2 new commingled main fund holding vehicle was March 7, 2023.

38. As of the date of this affidavit, it is anticipated RBH will perform work on the Series 3 co-investment vehicle pursuant to this continuing engagement, as detailed below.

39. The investment manager sent draft documents to the Department for the Series 3 co-investment vehicle work the week of April 3, 2023.

40. On April 7, 8, and 10, 2023, RBH and the Department's lead investment attorney exchanged emails regarding additional necessary work for the third part of RBH's engagement and the need to complete the Series 3 co-investment, including cost estimates for this legal work.

41. RBH's engagement with, and work for, the Department and Treasurer for the NCRS investment is ongoing.

The Department Does Not Consent to RBH's Representation of BCBS

42. In the Department's February 16, 2023, letter to RBH, and in additional phone calls, the Department informed RBH that it believed there is a conflict with RBH's concurrent representation of both the Department and BCBS.

43. The Department maintains this position. The Treasurer and Department, including the SHP, do not consent to and oppose RBH's representation of BCBS in this contested case. The Treasurer and Department have not otherwise provided their consent to, or a waiver of, RBH's conflict.

The Treasurer's and Department's Actions Regarding BCBS's RFP

44. Under the supervision, guidance, and direction of the Treasurer and Department, SHP personnel established the application of criteria set out in the RFP to which BCBS, Aetna, and UMR, Inc. responded, what information was to be gathered and considered in relation to the RFP, and the scoring system used for the RFP application.

45. Under the supervision, guidance, and direction of the Treasurer and Department, SHP personnel drafted the RFP, reviewed, considered, and evaluated BCBS's responses and information provided in response to the RFP, and scored the RFP based on BCBS's responses.

46. Under the supervision, guidance, and direction of the Treasurer and Department, the SHP's Evaluation Committee recommended to award the SHP TPA services contract to Aetna.

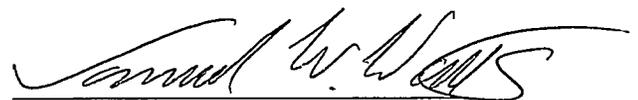
47. The SHP Board of Trustees, which the Treasurer chairs, then voted unanimously to approve the award to Aetna.

48. The Treasurer and Department dispute BCBS's challenges to the RFP process documented in its Petition. It is the Treasurer's and Department's position that BCBS's allegations allege error and abuse by the Department and criticize the Treasurer's performance and delegations of his fiduciary duties since they were responsible for supervising, guiding, and directing SHP personnel in the RFP process.

49. It is the position of the Treasurer and Department, including the SHP, that BCBS's responses to the RFP were fairly and appropriately reviewed and evaluated, and that the decision to award the TPA services contract to Aetna was proper.

50. The facts stated in this affidavit are within my personal knowledge and are true and correct to the best of my knowledge.

This the 25th day of April, 2023.



Samuel W. Watts

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Sworn to and subscribed before me this day by: **Samuel W. Watts**

Date: April 25, 2023

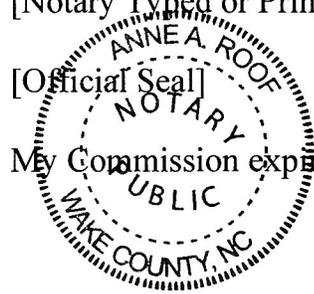
Anne A. Roof

Anne A. Roof Notary Public

[Notary Typed or Printed Name]

[Official Seal]

My Commission expires: 04-25-2026



This the 25th day of April, 2023.

EXHIBIT 1



January 20, 2023

Via Electronic Mail

Mr. Matthew Sawchak (msawchak@robinsonbradshaw.com)
Robinson Bradshaw
434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601

Re: Inquiry regarding your and Robinson, Bradshaw & Hinson's ("RBH") representation of Blue Cross Blue Shield of North Carolina

Dear Matt:

The purpose of this letter is to ask about RBH's representation of Blue Cross Blue Shield of North Carolina ("BCBS") in a matter that is directly adverse to a division of the North Carolina Department of State Treasurer (the "Department").

RBH's and your appearance on behalf of BCBS in response to the North Carolina State Health Plan's (the "Plan") recent request for proposals for third-party administrative services (the "RFP") has raised serious concerns – specifically, how is your and RBH's representation of BCBS permissible given (1) your former representation of the Plan and (2) RBH's ongoing representation of the Department?

While the Department is organized in multiple divisions, as a North Carolina state agency led by the State Treasurer, it is a unified whole. There is no parent–subsidiary relationship within the Department. There is a single human resources team that supports the entire Department, a single legislative affairs and communications team. And as General Counsel for the Department, which, again, is currently a client of RBH, I lead and support a legal team made up of all the Department's attorneys who work in regular collaboration with each other.

We understand the North Carolina Rules of Professional Conduct are fashioned to not unduly constrain attorneys from moving between public and private practice. But that understanding does not mitigate the surprise we experienced upon learning of your and RBH's representation of BCBS through your letter on its behalf.

We would like to better understand RBH's analysis:

- How do the Rules of Professional Conduct allow you to represent BCBS when you previously represented the Plan?
- How do the Rules of Professional Conduct permit RBH's attorneys to represent the Department as bond counsel and as investment transactions counsel while simultaneously representing a client in a matter adverse to the Department and the Plan?



As a final note, the responses sent today by Department and the Plan related to the RFP are in no way intended to waive any rights that the Department may have either from your prior representation or as a current client of RBH. The RFP process presented response deadlines that displaced, but did not eliminate, our concerns noted above.

I look forward to hearing back from you or the firm as soon as possible.

Sincerely,

/s/ Benjamin Garner

Benjamin Garner
General Counsel
The North Carolina Department of State Treasurer

EXHIBIT 2

January 26, 2023

KMaynard@robinsonbradshaw.com
704.377.8101 : Direct Phone
704.339.3401 : Direct Fax

VIA E-MAIL

J. Benjamin Garner, Esq.
General Counsel
Department of State Treasurer
3200 Atlantic Avenue
Raleigh, NC 27604

Re: Response to your January 20 letter to Matt Sawchak

Dear Ben:

Thank you for your time yesterday. As I explained when we spoke, I serve as Robinson Bradshaw's general counsel. I am writing to respond to the inquiries in your January 20 letter to Matt Sawchak regarding our firm's analysis of conflicts of interest under the North Carolina Rules of Professional Conduct (the "Rules") relating to our representation of Blue Cross and Blue Shield North Carolina ("Blue Cross NC").

To fulfill our ethical obligations, the firm evaluates each potential new matter for conflicts of interest before accepting an engagement. We performed that analysis when we were first approached by Blue Cross NC to assist them with regard to the recent RFP process for third-party administrative services (the "TPA RFP") conducted by the North Carolina State Health Plan for Teachers and State Employees (the "State Health Plan" or "Plan"). In light of your January 20 letter, we have revisited and reaffirmed our original analysis. As I lay out in greater detail below, our firm's representation of Blue Cross NC in a bid protest arising from the State Health Plan's TPA RFP does not give rise to any conflicts of interest under the Rules.

In your letter to Mr. Sawchak, you have asked two questions. I will address each in turn:

How do the Rules of Professional Conduct permit you [Matt Sawchak] to represent BCBS when you previously represented the Plan?

Rule 1.11 of the North Carolina Rules of Professional Conduct specifically defines the duties of former government lawyers and sets forth the conflicts of interest analysis applicable to Mr. Sawchak's service in the Attorney General's office as state solicitor general. In relevant part, that rule states:

Rule 1.11 *Special Conflicts of Interest for Current and Former Government Officers and Employees*

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

....

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

As the comments to Rule 1.11 reflect and your letter acknowledges, the Rule's scope is intentionally narrow. In relation to the State Health Plan, Rule 1.11 applies only to limit Mr. Sawchak from representing other clients in connection with matters in which he "personally and substantially" participated on behalf of the Plan. The only such matter from Mr. Sawchak's tenure as solicitor general is the *Lake v. State Health Plan for Teachers and State Employees* litigation, where he appeared on behalf of the State Health Plan between 2017 and 2020. Because Blue Cross NC's bid protest arising from the State Health Plan's TPA RFP is wholly unrelated to the *Lake* case, it is not the same matter for purposes of Rule 1.11(a)(2). As a result, no conflict of interest exists under Rule 1.11 that impedes Mr. Sawchak's ability to represent Blue Cross NC here.

Nor does Rule 1.9(c) limit Mr. Sawchak's ability to represent Blue Cross NC. Recently revised, Rule 1.9(c) instructs all lawyers on their continuing obligations with regard to certain information relating to the representation of a former client:

Rule 1.9 *Duties to Former Clients*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information is contained in the public record, was disclosed at a public hearing, or was otherwise publicly disseminated; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. A lawyer may disclose information otherwise covered by Rule 1.6 that is contained in the public record, was disclosed at a public hearing, or was otherwise publicly disseminated unless the information would likely be embarrassing or detrimental to the client if disclosed.

Mr. Sawchak is aware of his continuing obligations under Rule 1.9(c) to each of his former clients and is vigilant in complying with those obligations. The State Health Plan's TPA RFP process has no factual or legal overlap with the issues litigated in the *Lake* case, which involved a constitutional challenge to the terms of the Plan's coverage of retirees. Mr. Sawchak has not used or disclosed any information protected by Rule 1.9(c), and he will remain careful not to do so.

How do the Rules of Professional Conduct permit RBH's attorneys to represent the Department [of State Treasurer] as bond counsel and as investment transaction counsel while simultaneously representing a client in a matter adverse to the Department and the Plan?

Rule 1.7(a)(1) defines a concurrent client conflict as a situation where the firm is representing one current firm client in a matter directly adverse to another current firm client. An essential step in this conflicts analysis is to "clearly identify the client or clients" involved. Rule 1.7, Comment 2. When a client is an organization, a lawyer representing that organization "does not, by virtue of that representation, necessarily represent any constituent or affiliated organization." Rule 1.7, Comment 34. This is the case for private and governmental organization clients alike. See Rule 1.13, Comment 9.

A lawyer-client agreement that defines the identity of the governmental organization client controls whether the lawyer is representing any constituent or affiliate of the client, as well as the scope and purposes of the representation. Ethics opinions and judicial opinions in other jurisdictions caution that it is inaccurate and unwieldy to define a government client at too high a level of generality.

Your letter correctly notes that the firm has had recent and ongoing engagements with the North Carolina Department of State Treasurer (the "Department"). Specifically, the firm has had recent engagements with the Department for investment transaction matters and, although we have no active matters in which we are serving as bond counsel on a State bond issue, the firm remains a member of the pool of pre-qualified public finance and bond counsel firms who may provide such services to the Department. Those engagements are each governed by a written agreement:

- *Investment Transaction Engagements.* Our engagement agreements for investment transaction matters state that we are being engaged "[t]o represent you [the State Treasurer], through the North Carolina Department of State Treasurer (the 'Department'), in connection with the investment to be made by you or at your direction on behalf of the North Carolina Retirement System and other plans and funds managed by you (collectively, for purposes of this engagement letter, 'NCRS') in [the specific investment at issue]." Our engagement agreements are countersigned by the State Treasurer.
- *Public Finance Counsel and Bond Counsel Pool Agreement.* In our role as a member of a three-firm pool of pre-qualified public finance counsel and bond counsel for State bond issues, our written agreement is with the Department. That agreement contemplates that we will provide services to the Department and its State and Local Government Finance Division. The most recent extension of the agreement was countersigned by a

representative of the North Carolina Department of State Treasurer, State and Local Government Finance Division, and approved by the State Treasurer.

As these agreements confirm and you noted in your letter, our firm's existing client relationship is with the Department, or with the State Treasurer through the Department. Our firm has never represented the State Health Plan. Our engagement agreements with the Department for investment transaction and bond counsel matters do not contain any reference to the State Health Plan. Nor do the agreements recite that the firm is agreeing to represent the State Health Plan or describe any services the firm has been engaged to provide on behalf of or in relation to the State Health Plan.

Your inquiry as to how the firm can represent Blue Cross NC in a matter adverse to the State Health Plan while the firm represents the Department in unrelated matters, and your letter's description of the Department as a "unified whole," suggest that the Department and the State Health Plan are one and the same for purposes of analyzing conflicts of interest under the Rules. That suggestion overlooks the statutory structure and authority of the State Health Plan, as well as the Rules.

The State Health Plan is created by and exists under Article 3B of Chapter 135 of the North Carolina General Statutes, as amended. Those statutes define the State Health Plan as an entity that exists separate and apart from the Department. N.C.G.S. § 135-48.2 ("The Plan shall have all the powers and privileges of a corporation and shall be known as the State Health Plan for Teachers and State Employees."); N.C.G.S. § 135-48.1(14) ("Plan or State Health Plan" [means] "[t]he North Carolina State Health Plan for Teachers and State Employees. Depending on the context, the term may refer to the entity created in G.S. 135-48.2 or to the health benefit plans offered by the entity . . ."). With all of the powers and privileges of a corporation, the Plan has the power to sue and be sued in its own name, as has occurred over the years. The Plan has a Board of Trustees with substantive powers and responsibilities. See N.C.G.S. §§ 135-48.20, -48.22. Moreover, when the legislature transferred the Plan to the Department in 2012, it did so by a "Type II" transfer, as defined by N.C.G.S. § 143A-6. See Session Law 2011-85, Section 2.2. As a result of this Type II transfer, the State Health Plan and the Plan's Board of Trustees continue to "exercise all [their] prescribed statutory powers independently of the [State Treasurer as the head of the Department]." N.C.G.S. § 143A-6(b). Although the Plan is to be administered under the direction and supervision of the Department and certain "management functions" (e.g., planning, organizing, staffing, directing, coordinating, reporting and budgeting) are to be performed under the direction and supervision of the State Treasurer as head of the Department, see N.C.G.S. § 143A-6(b), this does not mean that the Plan has become indistinguishable from the Department as a result of the 2012 transfer.

The separate legal existence and statutory powers of the State Health Plan are important for purposes of the conflicts of interest analysis. See Rule 1.7, Comment 34, and Rule 1.13. Because the State Health Plan is an entity separate from the Department and because the firm has never represented the State Health Plan, our representation of Blue Cross NC in the TPA RFP bid protest is not adverse to any current firm client. Thus, that representation does not involve a conflict of interest under Rule 1.7(a)(1).

I hope our discussion and this letter answer the questions you posed in your January 20 letter. We regard our ethical obligations seriously and have considered the circumstances

involved here with much care and attention. We value our longstanding relationship with the Department, and we are proud to have the opportunity to represent the Department in its important work in the areas of investment transactions and public finance.

Best regards.

Sincerely,

ROBINSON, BRADSHAW & HINSON, P.A.

A handwritten signature in black ink that reads "Kate G. Maynard". The signature is written in a cursive style with a large, stylized initial "K".

Kate Gordon Maynard

EXHIBIT 3



February 16, 2023

Via Electronic Mail

Kate Gordon Maynard (KMaynard@robinsonbradshaw.com)
Robinson Bradshaw & Hinson, P.A.
101 N. Tryon St., Ste 1900
Charlotte, North Carolina 28246

Re: Response to your January 26 letter

Dear Kate:

First, thank you for your phone call on January 25, 2023, and the letter you sent the next day.

We appreciate your thoughtful response and the effort taken to consider the relevant issues regarding both Mr. Sawchak's representation and also your firm's concurrent representation of Blue Cross Blue Shield of North Carolina ("Blue Cross NC") and the North Carolina Department of State Treasurer (the "Department"). We respectfully disagree, however, with your conclusions that distinguish the Department from the North Carolina State Health Plan for Teachers and State Employees (the "Plan") for purposes of the conflicts of interest analysis.

We certainly understand the statutes and the history you noted. But your letter unfortunately describes an artificial distinction that does not correspond with how the Department, including the Plan, is structured or functions. While you noted that a government client should not be defined at too high a level of generality, your analysis of this conflict situation suffers from going too far in the opposite direction. As I mentioned when we spoke, I would be glad to review the materials from other jurisdictions to which you referred.

In short, we believe that the conflict faced by your firm with respect to its concurrent representation of both the Department and Blue Cross NC continues to exist. We respectfully request that your firm address this, and we invite you to provide additional clarification that you think is appropriate.

Sincerely,

/s/ Benjamin Garner

Benjamin Garner
General Counsel
The North Carolina Department of State Treasurer

EXHIBIT 4

March 10, 2023

VIA-EMAIL

J. Benjamin Garner, Esq.
General Counsel
Department of State Treasurer
3200 Atlantic Avenue
Raleigh, NC 27604

Dear Ben:

I am writing in response to your February 16, 2023 letter and to follow up to our conversation yesterday. I appreciate our continued dialogue. I offer this letter to further describe the nature of our firm's representation of the North Carolina Department of State Treasurer (the "Department") and explain our conclusion that our firm does not have a concurrent-client conflict of interest.

As I shared in my January 26, 2023 letter, the firm treats our ethical obligations to our clients with great consideration. We have conducted a thorough analysis of the circumstances related to our representation of the Department and our representation of Blue Cross and Blue Shield of North Carolina ("Blue Cross NC"). Under the North Carolina Rules of Professional Conduct (the "Rules"), a lawyer or law firm has a concurrent-client conflict of interest when it represents one client in a matter *adverse to another current client* of the firm. That is not the case here.

Ethics opinions and other authorities instruct that written engagement agreements between a lawyer and a governmental client define the identity of a governmental client for purposes of the conflict-of-interest analysis, as is the case for other organizational clients. See N.C. R. Prof'l Conduct 1.7 [Comment 43]; ABA Formal Ethics Opinion 97-405; District of Columbia Bar Ethics Opinion 268; Restatement (Third) of the Law Governing Lawyers § 97(c). Authorities also instruct that each government entity should be treated as a distinct entity for conflicts purposes, and that representation of one government entity does not create a conflict that prevents a law firm from appearing adverse to another government entity. See, e.g., New York City Bar Ass'n Ethics Op. 2004-03; Mass. Bar Ass'n Op. No. 94-09. To conclude otherwise, absent express agreement between a lawyer and government client, would result in a lawyer having unmanageably broad obligations under the Rules, which in turn would make lawyers reluctant to represent any government client.

As you are aware, our firm has recently represented the Department in limited-scope engagements relating to (i) certain investments made by the Treasurer or Department on behalf of the North Carolina Retirement System ("Investment Transaction Matters") and (ii) bonds issued by the State of North Carolina ("Bond Counsel Matters"). The written engagement agreements we have with the Department for each of these categories of matters define our client as the

Department (or the Treasurer, through the Department) and describe the limited scope of our engagements.

Our firm's work on behalf of the Department is not related to the North Carolina State Health Plan for Teachers and State Employees (the "State Health Plan" or the "Plan") or the Plan's recent RFP for third-party administrative services (the "RFP"). In particular:

- The firm's work on the Department's Investment Transaction Matters and Bond Counsel Matters has not involved information related to the State Health Plan or the RFP;
- The firm lawyers who have represented the Department in Investment Transaction Matters and Bond Counsel Matters have never been engaged to perform legal services related to the State Health Plan or the RFP;
- The firm lawyers who have represented the Department in Investment Transaction Matters and Bond Counsel Matters have not had any contact with the Plan or the RFP; and
- The firm lawyers who have represented the Department in Investment Transaction Matters and Bond Counsel Matters have had no involvement in the firm's representation of Blue Cross NC in the RFP dispute.

The Department has been our firm's only client in the Investment Transaction Matters and Bond Counsel Matters. The Plan is not, and has never been, a client of our firm.

Your February 16th letter states that our analysis rests on an "artificial distinction" between the Department and the Plan. The statutory structure of the Plan and the designation of authority within the Plan, however, are far from artificial distinctions. By statute, the Plan is a body corporate that can sue and be sued. See N.C.G.S. § 135-48.2. In addition, even after the Type II transfer of the Plan to the Department in 2012, the Plan and its Board of Trustees are required to exercise their prescribed statutory powers independently. See Session Law 2011-85, Section 2.2; N.C.G.S. § 143A-6(b). The Plan's statutory structure and independent authority—and, indeed, the Plan's own statements in connection with the RFP—demonstrate that the Plan and Department are distinct entities for purposes of the conflict-of-interest analysis under the Rules.

In its petitions for judicial review, Blue Cross NC is adverse to the Plan, not the Department. The Plan is not a firm client. Thus, because our firm is not representing one firm client in a position adverse to another current client, the firm does not have a concurrent-client conflict under the Rules.

As I noted during our conversation yesterday, the firm lawyers who have represented the Department have no confidential information acquired from the Department related to the State Health Plan or the RFP, nor have those lawyers had any involvement in the firm's representation of Blue Cross NC in the RFP dispute. Nonetheless, out of an abundance of caution, the firm has implemented an ethical screen to confirm that no firm lawyer representing Blue Cross NC in the RFP dispute can access any confidential information of the Department that may be in the firm's possession.

March 10, 2023

Page 3

If you are aware of other facts or circumstances regarding our representation of the Department that you believe the firm should take into consideration or if you believe other screening measures would be helpful, please bring those to my attention. Thank you again for discussing these issues with me.

Sincerely,

ROBINSON, BRADSHAW & HINSON, P.A.

A handwritten signature in cursive script that reads "Kate G. Maynard".

Katherine Gordon Maynard

KGM/sef

Cc: Justice Bob Edmonds