

STATE OF NORTH CAROLINA  
DURHAM COUNTY

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
23 INS 00738

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.	)

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**RESPONDENT’S MOTION TO EXCLUDE PETITIONER’S  
PURPORTED EXPERT WITNESSES**

Respondent North Carolina State Health Plan for Teachers and State Employees (“SHP” or the “Plan”) hereby moves to exclude the two witnesses Petitioner proffers as experts in this action—Gregory Russo (“Russo”) and Mary Karen Wills (“Wills”). Both Russo and Wills should be excluded pursuant to Rule 702 because their opinions are merely offered as an invitation for the Tribunal to substitute its judgment for that of the Plan. Both attempt to supplant the relevant “arbitrary and capricious” standard with an “industry standard” or “best practices” standard—neither of which are relevant to the issue before the Administrative Law Judge. Moreover, both experts propound speculative, unsupported opinions without any connection to an objective authority—particularly any authority that negates the substantial discretion that the Plan has in

designing its own RFP and evaluating proposals<sup>1</sup> for the TPA contract. Further amplifying the problems with their testimony, neither Russo nor Wills have any experience in the type of procurement at issue here and are thus not qualified to provide the opinions that they seek to admit. Finally, given the lack of relevance and the conflicting standards that Russo and Wills assert, their testimony is likely to only confuse the issue and is thus excludable under Rule 403 as well.

### **FACTUAL BACKGROUND REGARDING PETITIONER'S PURPORTED EXPERTS**

The Plan refers the Administrative Law Judge to the Statement of Undisputed Facts set forth in the Memorandum in Support of its Motion for Summary Judgment filed December 15, 2023, for a full recitation of the factual background of the Plan's decision at issue here. In this Motion, the Plan has limited its discussion only to the procedural history and a few facts particularly pertinent to the Motion and the opinions of these proposed witnesses.<sup>2</sup>

Both Russo and Wills are managing directors at the Berkeley Research Group. (*See* Appendix A to the Expert Report of Gregory Russo dated October 4, 2023 (hereinafter, "Russo Report"), attached hereto as Exhibit A; Attachment A to the Expert Report of Mary Karen Wills, CPA, dated October 4, 2023 (hereinafter, "Wills Report"), attached hereto as Exhibit B). Between the two of them, Russo and Wills (along with their respective "teams") have billed approximately *\$1.6 million* to Petitioners to serve as witnesses in this case who are willing to disagree with the Plan's decisions and the analysis conducted by the Plan and its own experts who assisted in designing and developing the RFP and evaluating and scoring the resulting bids. (Deposition of Mary Karen Wills, (hereinafter, "Wills Dep.," excerpts of which are attached hereto as Exhibit C,

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<sup>1</sup> The terms "proposal" and "bid" are used interchangeably herein.

<sup>2</sup> This memorandum adopts the same defined terms as used in the in the Memorandum in Support of its Motion for Summary Judgment filed December 15, 2023.

p. 21; Deposition of Gregory Russo (hereinafter, “Russo Dep.,” excerpts of which are attached hereto as Exhibit D, p. 84).

### ***Russo’s Opinions***

Russo is a “health care consultant.” He is not a CPA, actuary, or procurement-specific data analyst; but he apparently does some valuation of health care services in other contexts. (Appendix A to Russo Report at A-2 through A-3). The vast majority of his experience—more than 80%—involves serving as an expert witness in “litigation support,” in which he calculates “reasonable value of healthcare services” in contexts such as personal injury cases or reimbursement disputes. (*Id.*; Russo Dep. pp. 40-41). Russo has never given expert testimony regarding a procurement for third-party services for a state government health plan. (Russo Dep. p. 44). He has never had to analyze the propriety of scoring or ranking cost proposals related to a state governmental RFP. (Russo Dep. pp. 44-45). Nor has he ever advised a state government health plan in developing an RFP, drafted an RFP for a state government, or evaluated responses to a state government RFP. (Russo Dep. p. 45). He has no knowledge of the law, rules, process, or procedure related to state procurement. (Russo Dep. pp. 47-48).

Russo offers five (5) high-level opinions regarding the Plan’s methodology for the RFP:

1. The Plan’s evaluation of the Guarantees was subjective, non-quantitative and lacked sufficient basis; and Blue Cross’s Guarantees would provide lower costs to the Plan than Aetna’s (hereinafter, “Russo’s First Opinion”). (Russo Report p. 5) (*See* pages 16-17 of the Plan’s Mem. in Support of its Mot. for Summ. J. (referred to hereinafter as the “Summary Judgment Memo”) for factual background relevant to this opinion).
2. In the Claims Repricing exercise, Russo “found that the discounts Aetna assumed” for providers who were bound by a letter of intent was “higher than the discounts that will be realized under the signed agreements” and that the alleged difference will result in higher bottom-line costs to the Plan than Aetna presented in its bid (hereinafter, “Russo’s Second

Opinion”). (Russo Report p. 5 ) (*See* pages 27-29 of the Summary Judgment Memo for background relevant to this opinion).<sup>3</sup>

3. The Plan and Segal decreased Blue Cross’s discount “based on erroneous assumptions,” which resulted in both Blue Cross and Aetna earning 6 points each for the Claims Repricing, as opposed to Aetna earning 3 points (hereinafter, “Russo’s Third Opinion”). (Russo Report p. 5) (*See* pages 14-16 of the Summary Judgment Memo for factual background relevant to this opinion).
4. Segal did not consider external data that purportedly favored Blue Cross in its evaluation of the Claims Repricing results, further undermining Segal’s decision to adjust Blue Cross’s discount percentage (hereinafter, “Russo’s Fourth Opinion”). (Russo Report p. 5).
5. The Plan did not score the proposals based on the network disruption that will occur by comparing the vendors’ networks of providers, even though it had the data needed to do so (hereinafter, “Russo’s Fifth Opinion”). (Russo Report pp. 5-6) (*See* pages 25-27 of the Summary Judgment Memo for background relevant to this opinion).

Despite these criticisms based on his preferred methods, Russo concedes that the Plan, in its discretion, has “the ability to design the [RFP] and outline the criteria” that are important. (Russo Dep. p. 78).

### ***Wills’s Opinions***

Wills is a CPA and a managing director at the Berkeley Research Group, which provides contract advisory services to governmental entities. (Wills Report ¶ 4). Wills contends, generally, that she has experience working on “procurement-related and bid-protest matters.” (*Id.*). However, in her deposition, she admitted that she has no experience or background in procurement for state health plans. (Wills Dep. p. 16). Indeed, she concedes that she has little to no experience in state or local government procurement at all. (*Id.*). At most, she claims to have been involved in some Federal Tricare procurement, which apparently included some claims repricing and provider network issues. (*Id.* at 30-31).

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<sup>3</sup> As explained in the Summary Judgment Memo, Russo’s “finding” is not supported by the evidence. Regardless, his opinion fails for other reasons discussed below.

Wills provides three primary opinions:

1. The Plan's final scoring methodology for the RFP—in which the Plan used a combination of scoring and ranking—failed to follow *best practices* for procurements (hereinafter, "Wills's First Opinion"). (Wills Report p. 5) (*See* Summary Judgment Memo pp. 45-50 for background relevant to this opinion).
2. The Plan's scoring methodology for the cost component of the RFP did not follow *best practices* for procurements because the distribution of points among the three subparts (Claims Repricing, Fees, and Guarantees) was "unreasoned" and the methodology for awarding points for Fees and Guarantees was not explained in the RFP, was subjective, and was "unreasoned" (hereinafter, "Wills's Second Opinion") (Wills Report p. 6) (*See* Summary Judgment Memo pp. 32-34 for background relevant to this opinion).
3. The Plan's decision to bar narrative responses in the technical component without validating any part of the vendors' technical proposals did not follow *best practices* for procurements (hereinafter, "Wills's Third Opinion"). (Wills Report p. 11) (*See* Summary Judgment Memo pp. 45-46 for background relevant to this opinion).

As shown in her primary opinions, and further emphasized throughout her deposition testimony and reasoning, Wills relies on her assessment of the "best practices for procurements" to form her opinions in this matter. However, she admits that "best practices are not binding" authority on the Plan or the RFP. (Wills Dep. p. 140). Each contracting entity or authority can appropriately decide their own best practices. (*Id.* at 142). She further confirmed that the Plan had the authority to design its RFP in the way that it did and was not required to follow any particular "best practice." (*Id.* at 146). She agreed that the Plan had "wide latitude in deciding what requirements and methodology they will use in the evaluation of proposals in response to RFPs." (*Id.* at 62-63). She agreed that the Plan was in the "best position to determine the relative significance of different components of its own RFP." (*Id.* at 70). Further, she admitted that best practices are dependent on the type of procurement, and the type of good or service at issue. (*Id.* at 144). She testified that there is no set of "best practices" that applies to all entities or organizations. (*Id.* at 144). She agreed that there are multiple acceptable methodologies for scoring technical and cost proposals. (*Id.* at 65).

## LEGAL STANDARD

A motion to exclude is examined under Rule 702 of the North Carolina Rules of Evidence and the applicable standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2017 NCBC 14, 2017 WL 806432, at \*14, 2017 NCBC LEXIS 14, at \*39 (N.C. Super. Ct. Feb. 24, 2017) (“Expert testimony is governed by North Carolina Rule of Evidence 702, which is now virtually identical to its federal counterpart and follows the *Daubert* standard for admitting expert testimony.” (citations and internal quotation marks omitted)).

“In other words, North Carolina trial courts now perform the same ‘gatekeeping role’ that federal district courts have long performed.” *Kerry Bodenhamer Farms, LLC v. Nature's Pearl Corp.*, 2018 NCBC 136, 2018 WL 6829168, at \*2, 2018 NCBC LEXIS 239, at \*4 (N.C. Super. Ct. Dec. 27, 2018) (citing *Daubert*, 509 U.S. at 597). In applying the *Daubert* standard, North Carolina courts may seek guidance from federal case law. *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1 (2016).

The purpose of this gatekeeping role “is to ensure the reliability and relevancy of expert testimony.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). The court must critically analyze proposed expert testimony to ensure that irrelevant or unreliable opinions are not afforded undue weight. See *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008) (“Experts famously possess an ‘aura of special reliability’ surrounding their testimony.”); *United States v. Jones*, 107 F.3d 1147, 1161 (6th Cir. 1997) (noting “the mystique attached to ‘experts’”). It is up to the court to ensure that expert testimony serves its legitimate purpose—to aid the factfinder with specialized knowledge—without compromising the factfinder’s ability to independently evaluate all the evidence. *McGrady*, 368 N.C. at 892, 787 S.E.2d at 10.

Under the Rule 702 and *Daubert* analysis, expert testimony must satisfy a three-part inquiry: (i) “the witness must be qualified by knowledge, skill experience, training or education,” (ii) “the testimony must be relevant,” and (iii) “the testimony must be reliable.” *Pope v. Bridge Broom*, 240 N.C. App. 365, 371, 770 S.E.2d 702, 708 (2015) (quotation marks omitted).

Even if otherwise admissible, expert testimony may still be excluded under Rule 403 if the risk of confusion outweighs the utility of the testimony, or if the testimony is a waste of time or unnecessarily cumulative. *See State v. King*, 366 N.C. 68, 75-76, 733 S.E.2d 535, 540 (2012).

Petitioner bears the burden of establishing the qualifications and competency of the alleged experts it intends to rely on. *State v. Ward*, 364 N.C. 133, 140, 694 S.E.2d 738, 742 (2010). Petitioner must carry this burden when challenged at summary judgment or a pretrial motion in limine. *See generally Barbee v. WHAP, P.A.*, 255 N.C. App. 214, 803 S.E.2d 701 (2017) (table).

This Tribunal is afforded wide latitude in making pretrial determinations of admissibility of evidence; such determinations will not be reversed absent an abuse of discretion. *See Stark v. N.C. Dep’t of Env’t & Nat. Res.*, 224 N.C. App. 491, 500–01, 736 S.E.2d 553, 559 (2012) (confirming abuse of discretion standard in context of administrative proceeding). This abuse of discretion standard applies to the determination of admissibility of expert witness testimony, generally, *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11, as well as any determination that particular evidence or testimony is helpful to the tribunal sitting as the finder of fact, *Stewart v. Steel Creek Prop. Owners Ass’n*, 260 N.C. App. 356, at \*6, 816 S.E.2d 268 (2018) (table) (where court acts as factfinder, the “decision to exclude evidence it feels is not helpful will not be overturned absent Plaintiffs showing an abuse of discretion”).

Moreover, the Tribunal’s exclusion of expert testimony is not an abuse of discretion unless the party proffering the expert can demonstrate that it “was prejudiced and that a different result

would have likely ensued had the error not occurred.” *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 731 (1981); *see also N.C. Dep’t of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 483 810 S.E.2d 217, 222 (2017) (observing that complaining party must show whether exclusion of expert testimony “was prejudicial or harmless”); *Ingram v. Henderson Cnty. Hosp. Corp.*, 259 N.C. App. 266, 285, 815 S.E.2d 719, 731 (2018) (finding no abuse of discretion when party could not “demonstrate prejudice” from exclusion of expert testimony).

Finally, while this Tribunal’s gatekeeping role is more relaxed when a jury will not serve as the factfinder, “Rule 702 still applies in a bench trial.” *See* 29 Charles Alan Wright & Arthur Miller, *Fed. Prac. & Proc. Evid.* § 6270 (2d ed. Oct. 2020 update). Thus, it must still exclude proffered expert testimony if it is irrelevant, unreliable, or unhelpful. *See, e.g., Atl. Specialty Ins. Co. v. Porter, Inc.*, 742 F. App’x 850, 852 n.4 (5th Cir. 2018) (affirming exclusion of unreliable and irrelevant expert testimony in bench trial); *Seaboard Lumber Co. v. U.S.*, 308 F.3d 1283, 1302 (Fed. Cir. 2002) (in bench trials “the *Daubert* standards of relevance and reliability must still be met”); *Goldberg v. Paris Hilton Ent., Inc.*, No. 08-22261CIV, 2009 WL 1393416, at \*4 (S.D. Fla. May 18, 2009) (excluding expert testimony that would not assist court as factfinder).

## **ARGUMENT**

### **I. NEITHER RUSSO NOR WILLS IS QUALIFIED TO PROVIDE EXPERT TESTIMONY ON STATE HEALTH PLAN PROCUREMENT.**

The substantive opinions of both Russo and Wills are inadmissible for a number of reasons, discussed in detail below. However, looming over each of these opinions is the fact that neither is an expert qualified to opine on the design or content of the RFP at issue here, or the evaluation or scoring of the resulting proposals.

Russo may be an expert in valuing healthcare services in some contexts—indeed, he spends the majority of his time developing opinions that favor his clients in the litigation context.

Similarly, Wills may be qualified for some opinions in governmental contracting based on her experience. However, “[a] witness’s qualifications alone do not make the witness an expert witness”—rather, the expertise must be related to the facts at issue. *See State v. Armstrong*, 203 N.C. App. 399, 414, 691 S.E.2d 433, 443 (2010).

In other words, to be qualified, an expert must have some specific experience in the area in which he proposes to testify. *See Ancho v. Penteck Corp.*, 157 F.3d 512, 516 (7th Cir. 1998) (affirming trial court's exclusion of expert who had no expertise in product design). Moreover, as discussed above, when an expert is relying on his experience, rather than proven scientific methodology, the proponent of the expert testimony must “explain how that experience led to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case.” *U.S. v. Frazier*, 387 F.3d 1244, 1265 (11th Cir. 2004).

Here, each of Russo’s five high-level opinions necessarily delve into the sufficiency or insufficiency of the design and structure of the RFP, the Plan’s assessment of the importance of various requirements, and the scoring of the submissions based on the defined criteria. However, Russo admits that he has no such experience for an RFP for a state health plan. (Russo Dep. pp. 44-45, 47-48). The lack of any relevant experience to the fundamental issue in the case is disqualifying. *See Uchytel v. Avanade*, No. C12-2091-JCC, 2018 WL 4091692, at \*2 (W.D. Wash. Aug. 21, 2018) (excluding expert who had no specialized knowledge of federal contracting law or practice). This is particularly true where Russo’s opinions are, in part, based on his subjective understanding of “the intent of the Plan,” (*Id.* at 267-69), which he certainly is not qualified to testify about. *See Yates v. Ford Motor Co.*, No. 5:12-CV-752-FL, 2015 WL 3448905, at \*4

(E.D.N.C. May 29, 2015) (“[T]he opinions of expert witnesses on the intent, motives, or states of mind of corporations ... ha[s] no basis in any relevant body of knowledge or expertise.”).

Moreover, the fact that the majority of his experience comes from providing expert testimony specifically for litigation in other contexts is further disqualifying. *See Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 800 (4th Cir. 1989) (“[I]t would be absurd to conclude that one can become an expert simply by accumulating experience in testifying.”); *Frushtick v. FeroExpress Inc.*, No. 1:18-CV-2891-MLB, 2022 WL 824239, at \*4 (N.D. Ga. Mar. 18, 2022) (“‘[E]xperience developed as a professional expert witness is not sufficient’ to qualify as an expert.”) (quoting 29 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Evid.* § 6264.1 (2d ed. Apr. 2021)).

Similarly, Wills is not an expert in state procurements, much less procurements related to a state health plan. She has never given expert testimony in a dispute concerning a procurement for third-party administrative services for a state government health plan. (Wills Dep. p. 36). She was not familiar enough with the state of North Carolina practices to draw a comparison with state and local procurement practices. (*Id.* at 58-59). Prior to this case, she had never been involved with any state procurements in the state of North Carolina. (*Id.* at 59-60).

The fact that Wills has had tangential experience in an unrelated federal Tricare procurement context is not sufficient to establish her as an “expert” in the nuances of procurement rules and procedure in North Carolina. This is particularly true where she admits that the “best practices” that she relies on may vary based on the type of procurement and locale. (Wills Dep. p. 144). In other words, she has no experience in North Carolina procurement—even though there may be substantial differences in what is required, what is common practice, and what may be “arbitrary and capricious” in this jurisdiction. There is no connection between her experience and

the issues in this case such that she has any relevant specialized knowledge. Therefore, Wills is not qualified, and should be excluded on this basis as well.

## **II. THE TRIBUNAL SHOULD EXCLUDE MR. RUSSO'S OPINIONS, REPORT, AND TESTIMONY.**

### **A. Russo's Mere Disagreement with The Plan's Decision-Making Is Not Relevant.**

#### *1. Russo's opinions are not relevant to an arbitrary and capricious standard.*

As a threshold matter, Russo's opinions should be excluded because they do not "fit" the case and are thus not relevant. The *only* relevant question for the factfinder here is whether the Plan's RFP and the evaluation of the bids were arbitrary and capricious.<sup>4</sup> See *Pamlico-Tar River Found. v. N.C. Dep't of Env't & Nat. Res.*, 2015 WL 3813960, 13 EHR 17938 (N.C. O.A.H. March 20, 2015) (citing N.C. Gen. Stat. § 150B-23(a)). In conducting that analysis, the Tribunal does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law. *Id.* (quoting *Lewis v. N.C. Dep't of Human Res.*, 92 N.C. App. 737 (1989)). Moreover, the Tribunal must give "due regard to the demonstrated knowledge and experience of the agency with respect to facts and inferences within the specialized knowledge of the agency." *Id.* (quoting N.C. Gen. Stat. § 150B-34(a)).

Despite this framework of deference to the Plan and its own experts, Russo's opinions attempt to evade the arbitrary and capricious standard by attacking the wisdom of the Plan's decisions (and its reliance on its own expertise); in effect, he proposes an alternative standard that asks the Tribunal to substitute its judgment.

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<sup>4</sup> The Petitioner does not argue that that the Plan violated any statutory requirements or rules such that there could be any violation of Section 150B-23(a)(1), (2), (3), or (5). Instead, Blue Cross's arguments herein amount to conclusory arguments that the Plan acted arbitrarily and capriciously. (Summary Judgment Memo pp. 24-25).

For example, Russo frequently relies on opaque “industry experience” or “industry standard” to criticize the design and scoring of the RFP. (*E.g.*, Russo Dep. pp. 122-123, 297-299). However, in the procurement context, expert testimony about “industry standards” is generally only admissible to interpret an ambiguous statutory or contractual provision governing the RFP. *See Hutton Contracting Co. v. City of Coffeyville*, No. 02-4130-JAR, 2004 WL 2203449, at \*12 (D. Kan. Sept. 24, 2004). But where the contract, statute, or governing standard is clear and complete, “it cannot be changed or supplemented by evidence of prevailing industry practice.” *Id.* “In addition, absent any need to clarify or define terms of art, science or trade, expert opinion testimony to interpret contract language is inadmissible.” *Id.* (alterations omitted). “Thus, in the absence of an ambiguous contract provision, evidence of industry custom is simply irrelevant and properly excluded pursuant to Rule 702 and *Daubert*.” *Id.*

Here, Russo’s “industry standard” testimony does not purport to clarify or define specialized or ambiguous terms in the RFP. Rather, he attempts to apply a non-binding “industry standard” as a baseline requirement—which is not relevant to the question of whether the Plan acted arbitrarily or capriciously. Thus, tribunals frequently exclude similar expert testimony that purports to substitute an industry standard for the actual governing requirements or the appropriate standard of review. For example, in *Second St. Holdings, LLC v. United States*, No. 19-473C, 144, Fed.Cl. 361, 2019 WL 3798237, at \*372 (Fed. Cl. July 11, 2019), in a pre-award bid protest, the Court of Federal Claims refused to allow the plaintiff to supplement the administrative record with a declaration purporting to provide testimony on the commercial real estate industry standards. The plaintiff sought to use this testimony to undermine the agency’s decision to include certain purchase options in the request for lease proposals (“RLP”). Recognizing that its duty was only to review whether the agency’s design of and requirements in its RLP had a “rational basis” or

“violate[d] federal procurement law,” the Court refused to consider the declaration purporting to utilize the non-applicable “industry standard.” *See id.*; *see also Hutton Contracting Co. v. City of Coffeyville*, No. 02-4130-JAR, 2004 WL 2203449, at \*12 (D. Kan. Sept. 24, 2004) (rejecting expert testimony about industry practice for certain terms in RFP that was converted to operative contract, because contract defined the relevant standard).

Moreover, within his “industry standard” testimony, Russo also relies on a “reasonableness” standard. (*E.g.*, Russo Dep. pp. 293-294, 297-299, 313). However, a “reasonableness” standard and an “arbitrary and capricious” standard “are not functionally equivalent.” *Nat'l Audubon Soc. v. U.S. Forest Serv.*, 46 F.3d 1437, 1445–46 (9th Cir. 1993). “The reasonableness standard involves less deference to the agency than does the arbitrary and capricious standard . . . [A] finding that the agency’s decision was not reasonable does not necessitate the conclusion that the decision was arbitrary and capricious.” *Id.*; *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 375 (1989) (recognizing distinction between the two standards). Regardless, nothing in Russo’s background or experience suggests that he is qualified to opine on “reasonableness” in the context of a state health plan RFP, and any attempt to do so would be an impermissible legal conclusion. *See United States v. McIver*, 470 F.3d 550, 561–62 (4th Cir.2006) (“[O]pinion testimony that states a legal standard or draws a legal conclusion by applying law to the facts is generally inadmissible.”).<sup>5</sup> Thus, once again, Russo’s reliance on a demonstrably inapplicable standard renders his opinions irrelevant and inadmissible.

Relatedly, under the applicable arbitrary and capricious standard, Russo’s mere disagreement with the Plan’s decisions and methodology is not relevant. *Town of Leland*, 2017

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<sup>5</sup> Similarly, Russo repeatedly opines that the Plan’s evaluation was “erroneous.” That is not an issue an expert can opine on but is the legal determination this tribunal must make. *See* N.C. Gen. Stat. § 150B-23(a)(2).

WL 7052568, at COL 4 (citing *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997)). Mere disagreement with the Plan's conclusions does not entitle a Petitioner to relief. See *Little v. Bd. of Exam'rs*, 64 N.C. App. 67, 69-70, 306 S.E.2d 534, 536-37 (1983) (holding that contradictory evidence or a difference of opinion with an agency does not lead to a conclusion that the agency's decision was arbitrary and capricious if the agency decision is supported by substantial evidence). Russo does not identify any legal requirement that the Plan violated or impermissible bias in the design and evaluation of the RFP—he simply disagrees with the methodology that the Plan and its consultants used and points to other methodologies that he would have used had it been up to him. (*E.g.*, Russo Dep. pp. 186-87; 306-07). That disagreement is not relevant to the issue before the Tribunal—it is only an improper attempt to persuade the Tribunal to substitute its own judgment for the reasoned decisions of the Plan. See *Asarco, Inc. v. U.S. Env't Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) (“Presumably, the primary function of the ‘expert’ declarations and reports here is to re-evaluate the agencies’ analyses and contradict their conclusions. Submission of the documents can be read only as an attempt to persuade the Court to form an opinion on the substantive merits and substitute it for that of the agency.”).

Under comparable circumstances, courts refuse to admit or consider proffered expert testimony that merely disagrees with an agency's decision or argues for application of a different standard. For example, in *Buckingham*, the court rejected expert declarations that disagreed with the internal expert analysis relied upon by the agency in making its decision. See *Buckingham Twp. v. Wykle*, 157 F. Supp. 2d 457, 467 n. 10 (E.D. Pa. 2001), *aff'd*, 27 F. App'x 87 (3d Cir. 2002). There, the court concluded that a “party may not undermine an agency decision even with an affidavit of unquestioned integrity from an expert expressing disagreement with the views of other qualified experts relied on by the agency, and a court may not weigh the contrary views of such

experts to assess which may be more persuasive.” *Id.* The court explained that disagreeing expert opinion is *not relevant* to such an analysis, because “[a]n agency is entitled to select any reasonable methodology and to resolve conflicts in expert opinion and studies in its best reasoned judgment based on the evidence before it.” *Id.* Notably, the court forecast the potential problem with allowing a disappointed party to challenge agency decisions with *post hoc* expert testimony— noting that “virtually every agency action involving expertise or technical analyses could be obstructed by a party who engaged an expert willing to disagree with the views or conclusions of the experts utilized by the agency.” *Id.*; *accord Asarco*, 616 F.2d at 1160 (“Plaintiffs’ experts are not in a position to explain the agency’s reasoning; rather, as discussed above, their declarations and reports substantively attack it. As such they are completely improper.”).

Here, Russo’s opinions amount only to *post hoc* disagreement with the manner that the Plan designed the RFP and evaluated the bids.

***Russo’s First Opinion.*** For instance, Russo’s First Opinion criticizes Segal’s comparison of the bidders’ Pricing Guarantees,<sup>6</sup> and its conclusion that Blue Cross’s guarantees provided the least comparative value. Russo acknowledges Segal’s analysis comparing and scoring the bidders’ pricing guarantees (Russo Dep. pp. 225-226), but he identifies twelve separate points on which he disagrees with how Segal conducted its analysis. (*Id.* at 306-307). Among other things, Russo agreed that Segal’s analysis recognized both bidders’ discount guarantee targets and the amounts

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<sup>6</sup> Despite the use of the term “guarantees,” Pricing Guarantees do not ensure or “guarantee” that the Plan will actually achieve any particular pricing or discount. Pricing guarantees are merely contract terms in the nature of a monetary penalty, in which bidders propose “guaranteed targets” (typically a certain overall discount percentage goal) and amounts “at risk” (typically a percentage of the bidder’s fee that will be repaid if the target percentage is not achieved). (Summary Judgment Memo p. 16, n.9).

put at risk,<sup>7</sup> but he does not believe the guaranteed targets were given any weight by Segal. He testified that, although the guaranteed targets were shown in Segal's analysis and discussed in its narrative reasoning, it is "challenging to assess whether [Segal was] giving the [guarantee targets] any weight because ultimately their review is not quantitative." He continued that the weight given is "unclear" and that "one cannot get in the minds of what Segal was doing." (*Id.* at 244-245). Russo identifies no statute or rule governing how pricing guarantees must be scored. Rather, his criticism of Segal's analysis is based on his reading of the language of the RFP and his belief that Segal did not follow the RFP's requirements. (*Id.* at 313). Further, Russo agreed that the quantitative analyses advanced by him merely illustrate ways the pricing guarantees *could* have been compared, not the way they had to be, and he agreed that his analysis is not the only way to compare the value of pricing guarantees. (*Id.* at 220-221).

***Russo's Second Opinion.*** Russo's Second Opinion contends that there were "discrepancies" in Aetna's Claims Repricing<sup>8</sup> as it pertains to providers with letters of intent, based on Russo's review of Aetna's letters of intent (provided in discovery) and his attempt to replicate Aetna's Claims Repricing. (Russo Report pp. 28-31). However, the RFP did not require bidders to provide documentation to validate their Claims Repricing, and Russo identifies no requirement that the Plan or Segal must validate bidders' Claims Repricing. Further, Russo does not know and did not try to find out if the Plan or Segal has *ever* asked for copies of vendor agreements with providers to validate their claims repricing in *any* prior RFP. (Russo Dep. p. 193).

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<sup>7</sup> Section 3.4(c)(3) of the RFP states that bidders' pricing guarantees will be ranked based on their value to the Plan, and that value will be "based on a combination of the competitiveness of the guaranteed targets and the amount placed at risk."

<sup>8</sup> The Claims Repricing exercise was the basis for the Plan's evaluation of bidders' network pricing. (*See* Summary Judgment Memo, p. 14).

***Russo's Third Opinion.*** Russo's Third Opinion disagrees with the Plan's methodology for the Claims Repricing, specifically its direction that bidders were not allowed to "trend" (assume future increases in) billed charges, which Russo contends is "industry standard." (Russo Dep. pp. 122-25, 149-151). However, he concedes that the Plan's purpose in disallowing trended billed charges was to compare the bidders "apples-to-apples," and that an apples-to-apples comparison was a valid, desirable goal. (Russo Dep. pp. 164, 200).

***Russo's Fourth Opinion.*** Russo's Fourth Opinion contends that the Plan's evaluation of the Claims Repricing was undermined by commercially available data (called "UDS data")<sup>9</sup> that Segal reviewed but did not rely on. (Russo Report p. 5). Russo acknowledged there is no requirement that the Plan or Segal use UDS data and that Segal had a reason for not using UDS data to score or compare bidders' Claims Repricing discounts; he simply believes it would have been reasonable to do so. (Russo Dep. pp. 369-370).

***Russo's Fifth Opinion.*** Russo's Fifth Opinion contends that the Plan should have compared the bidders' provider networks and the disruption to members in the event that Aetna became the Plan's TPA. (Russo Report p. 48). He agreed that Section 3.4 of the RFP does not include network access or disruption among the criteria for evaluating or scoring bids (Russo Dep. p. 373) and that no statute or rule required the Plan to compare or score network access or disruption. (*Id.* at 391-92). Russo contends that the Plan was required to do so based only on very general, aspirational language in the RFP. (*Id.* at 373-74, 391-92; RFP<sup>10</sup> p. 8, Section 1.1 (Vision), p. 81, Section 1.1 (Network Access)). Russo acknowledges that the Plan decided not to score

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<sup>9</sup> Uniform Discount Specification ("UDS") data is a collection of insurance carrier data by a consortium of insurance carriers and actuarial consulting firms that can be used to calculate discounts for certain employers or markets. (Russo Report p. 45).

<sup>10</sup> A copy of the RFP was previously filed with the Tribunal as Exhibit 1 to the March 20, 2023, Notice of Filing containing the documents constituting the agency action.

geographic access or disruption because it determined that if there were any significant disruption and geographic access issues, they would be apparent in the Claims Repricing evaluation. (Russo Dep. pp. 377-78). He also acknowledges that Segal's calculation of in-network claims percentages for each bidder in the Claims Repricing exercise is a measure of disruption; he just disagrees that it is an appropriate or adequate measure. (*Id.* at 378-79, 383-84).

In short, Russo would have analyzed the bidders differently had it been his analysis to do, and he offers dozens of pages of opinions expressing his disagreement and suggesting other potential methodologies that are more favorable to his client. But he has not and cannot point to anything arbitrary and capricious in the methodology that the Plan and its experts relied upon. His opinions are not premised on any facts suggesting that the Plan did not make a considered decision; he simply disagrees with the Plan's judgment. That makes his opinion irrelevant and of no assistance to the fact finder. *See Buckingham Twp.*, 157 F. Supp. 2d at 467 n. 10. As the *Buckingham* court warned, Russo's opinion should be excluded as irrelevant, lest every disappointed bidder inhibit a state agency from procuring contract services by hiring experts willing to offer another methodology. *See id.*

2. *Russo's opinions are not helpful, and thus not relevant.*

Finally, Russo's opinions are not helpful to the factfinder here, which is the touchstone of the relevance analysis. Much of his report is a lengthy recitation of the background of the case and the RFP process, which is useless and unnecessary. *See Fisher v. Ciba Specialty Chem. Corp.*, 238 F.R.D. 273, 281 (S.D. Ala. 2006) (“[t]he Court's task in examining the . . . issues presented here is not assisted by [the expert's] one-sided recitation of record facts”).

Also, Russo's opinions are largely based on his reading and subjective interpretation of the RFP. For example, his opinions about how the Pricing Guarantees should have been scored

(Russo's First Opinion); whether the bidders could trend billed charges in the Claims Repricing (Russo's Third Opinion); and the way the Claims Repricing had to be done here (Russo's Second and Third Opinions) are all based on his reading of the RFP. (Russo Dep. pp. 219-21, 313; 196-199; 126, 128-29). His understanding of Blue Cross's Claims Repricing exercise is similarly premised entirely on his reading of the RFP instructions. (*Id.* at 183-84).

But Russo is no better situated than this Tribunal to analyze the language of the RFP and governing statutory authority to assess the evidence of what the Plan did under that framework—making his testimony irrelevant and unhelpful at best, and improper at worst. *See Corel Corp. v. United States*, 165 F. Supp.2d 12, 31-32 (D. D.C. 2001) (in assessing agency determination under arbitrary and capricious standard, striking proposed expert declarations which attacked the merits of agency's decision and proposed alternative cost-benefit analysis).

Indeed, the Tribunal has access to direct testimony from the parties involved to assess the knowledge and thought processes from both sides of the RFP. Allowing Russo, as a non-party, to inject his speculative narrative after-the-fact is simply not helpful. *See Corbrus, LLC v. 8th Bridge Cap., Inc.*, No. 219CV10182CASAMFX, 2022 WL 4239055, at \*19 (C.D. Cal. Sept. 13, 2022) (appeal filed) (“Allowing [the proposed expert], who was not a party to the agreement and had no knowledge of the partnership, to testify to the [factfinder] regarding his view that the agreement was unusual would not ‘give effect to the mutual intention of the parties,’ . . . and thus would not aid the [factfinder] in interpreting the contract.”); *San Francisco Bay Area Rapid Transit Dist. v. Spencer*, No. C 04-04632 SI, 2007 WL 397300, at \*2 (N.D. Cal. Feb. 1, 2007) (finding expert's opinions on the background and context of contractual relationships would “add nothing beyond that which [plaintiff] can provide through evidence from the individuals actually involved in the contracts at issue”). The Tribunal need not, and should not, permit Russo to second guess the

Plan's intent, analysis, and conclusions under the guise of "expert" testimony. See *Yates v. Ford Motor Co.*, No. 5:12-CV-752-FL, 2015 WL 3448905, at \*4 (E.D.N.C. May 29, 2015) ("[T]he opinions of expert witnesses on the intent, motives, or states of mind of corporations ... ha[s] no basis in any relevant body of knowledge or expertise").

### **B. Russo's Opinions Are Not Reliable.**

Russo has not overcome the threshold question of how his "experience" provides a reliable basis for his methodology and conclusions. An expert "relying solely or primarily on experience" for his opinion must "explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." See *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007). Russo admits that he has not worked on state health plan procurements, and thus he does not connect his experience in other "valuation" contexts to his opinions in this case. (Russo Dep. pp. 44-45, 47-48). Moreover, much of what Russo opines on consists of speculation or "questions" that he raises without any actual objective supporting analysis.

Nowhere is this more obvious than in Russo's Second Opinion (that Aetna's Claims Repricing was understated). For example, Russo lacks any meaningful experience that would render his opinions reliable. This engagement is the *only* time Russo has done a claims repricing or evaluated a claims repricing exercise in the context of an RFP. (Russo Dep. p. 103). While faulting the Plan for not following the methodology he used to "validate" Aetna's repricing exercise, he agreed, based on a white paper cited in his report, that there are five different acceptable methods of performing a claims repricing. (*Id.* at 182-83). He further acknowledged that these five repricing methods have different advantages and disadvantages and are "reasonable approximations of repricing." (*Id.* at 129-30). As the Segal employee who led the work on the RFP explained, any of those methods can therefore affect the outcome and there is no one correct

way to do to a claims repricing exercise. (*See* Aff. of Steve Kuhn, Plan’s Mot. For Summ. J., APPX V4.0907-.0908, ¶ 36).

Russo also asserts unfounded “questions” about whether Aetna “trended” charges to arrive at its discount number—even though the actual evidence does not support his hypothetical criticisms. (Russo Dep. pp. 170-72). Indeed, Russo acknowledged that he does not have evidence to support his speculation. (*Id.* at 186-87). He also speculates about what the Plan and its experts actually did in their analysis—but he cannot say “one way or another.” (*Id.* at 245). His mere speculation does not become reliable simply because it comes from an “expert.” *See Zuckerman v. Wal-Mart Stores E., L.P.*, 611 Fed. Appx. 138, 138 (4th Cir. 2015) (per curiam) (unpublished) (quoting *Daubert*, 509 U.S. at 590) (“Expert testimony rooted in ‘subjective belief or unsupported speculation’ does not suffice.”).

Further, Russo’s analysis is fundamentally unreliable because he failed to perform a comparative analysis to arrive at his conclusions. He admits that he did not analyze Blue Cross’s (or UMR’s) repricing exercise using the same methodology he applied to Aetna’s, to assess whether his own client’s proposal would have changed based on the same criticisms. (E.g., Russo Dep. 93-94; 107-109; 142). He did not even know the method by which Blue Cross repriced the claims in its submission. (Russo Dep. 184). It is not enough to say Aetna’s Claims Repricing should have yielded a higher amount than Aetna calculated; he would have to show that the difference would have changed the scoring. And he could only show that the difference would have changed the scoring if he applied the same methodology to each bid and determined the correct network pricing for each bidder under that consistent methodology. Instead, he just assumes that had the Plan done so, the scoring would have put Blue Cross ahead of Aetna.

That is precisely the type of unreliable speculation that courts reject. For instance, in *Bona Fide Conglomerate, Inc. v. SourceAmerica*, No. 314CV00751GPCAGS, 2019 WL 1369007, at \*6–7 (S.D. Cal. Mar. 26, 2019), the plaintiff’s expert similarly analyzed only one bidder’s submissions and concluded that plaintiff was “reasonably certain to have prevailed” on the bids. The court excluded this opinion, finding that the expert’s failure to conduct an actual comparative analysis that included the affirmative qualifications of the plaintiff and the other bidders made his conclusion pure speculation. *See id.*<sup>11</sup>

Russo’s failure to examine the other bids and assess the scoring and outcome is similarly fatal, as in *Bona Fide Conglomerate, Inc. See id.* His scrutiny of only one bidder’s submissions is the paradigmatic example of “fail[ing] to consider the relevant facts of the case” and “ignor[ing] inconvenient evidence,” making his opinion fundamentally unsupported and unreliable. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) (excluding expert who did not “incorporate all aspects of the economic reality of the [relevant] market”); *see also Cole v. Homier Distrib. Co., Inc.*, 599 F.3d 856, 865 (8th Cir. 2010) (expert’s report factually flawed where he was unaware of or disregarded facts).

Russo’s selective analysis is not limited to just this example—he consistently failed to consider all relevant information. For example, Russo did not consider what the Plan’s goals were for the Claims Repricing exercise, which of course may affect the methodology. (Russo Dep. pp. 199-200).

Further, Russo’s interpretation of whether the Plan “complied” with the standards set forth in the RFP (*e.g.*, Russo Dep. p. 313) (and any governing statutory criteria) is an impermissible

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<sup>11</sup> Notably, Ms. Wills also served as an expert in this *Bona Fide* case, and the majority of her opinions were also excluded. *See id.* at \*12-18.

legal conclusion that is not reliable, from a qualified source, or relevant. *See Alabama Aircraft Indus., Inc. v. Boeing Co.*, No. 2:11-CV-03577-RDP, 2019 WL 13172372, at \*7 (N.D. Ala. July 1, 2019) (in federal procurement case, excluding expert testimony that interpreted contract, governing laws, and parties' compliance).

Each of his remaining opinions is unreliable for similar reasons.

***Russo's First Opinion.*** For example, as to Russo's First Opinion (relating to the Plan's evaluation of the Guarantees), Russo's testimony confirms that he lacks relevant experience. For example, he testified that he has never evaluated or analyzed pricing guarantees for purposes of an RFP response. (Russo Dep. pp. 211-12, 222). He similarly did not know whether *any* state health plan does the type of quantitative analysis of a pricing guarantee that he did in his report. (*Id.* at 315-17, 320). Moreover, while Russo offers one way to compare the Guarantees in Tables 5-7 of his report, he agreed that his analysis was not the only way to compare the Guarantees. (*Id.* at 220-21). Additionally, Russo has never done a similar analysis of pricing guarantees and his analysis here is based purely on his interpretation of the RFP instructions. He is unfamiliar with any similar analysis by anyone else or any other RFPs with similar "instructions." (*Id.* at 221-22). Nor is he aware of anyone having followed his particular analysis to analyze pricing guarantees in any context. (*Id.*). Finally, Russo concedes that the type of quantitative comparison he performed for purposes of his opinions has not been accepted or endorsed by any other experts or trade associations for purposes of a state health plan RFP. (*Id.* at 321-23).

***Russo's Third Opinion.*** With respect to Russo's Third Opinion (criticizing the adjustment of Blue Cross's Claims Repricing based on clarifications), Russo acknowledged that Segal decided to adjust Blue Cross's Claims Repricing to enable it to make an apples-to-apples comparison of the bidders' pricing at a specific point in time. He also conceded that was a reasonable and even

desirable goal. (Russo Dep. pp. 164, 200). Russo also acknowledged that the adjustment to Blue Cross's Claims Repricing was based on Blue Cross's confirmation that it had trended billed charges, which Segal determined was contrary to the RFP instructions. In contrast, as he conceded, Aetna confirmed that it had *not* done so. (*Id.* at 169-72). He further admits that Aetna's 30(b)(6) designee testified that its Claims Repricing did not trend bill charges. Yet he says he "questions" the accuracy of Aetna's representations and thinks the Plan should have scrutinized Aetna's repricing more carefully. (*Id.* at 171-72, 185-87, 200). But he had no analysis or evidence to substantiate those questions. (*Id.* at 185-87).

***Russo's Fourth Opinion.*** With respect to Russo's Fourth Opinion (contending that Segal's evaluation of the Claims Repricing is undermined by UDS data), neither Russo nor anyone on his team have worked with UDS data before, and they are not licensed to do so. (Russo Dep. p. 363). He acknowledged and did not disagree with Segal's opinion that UDS data is not current, especially when letters of intent are involved (as they were here). (*Id.* at 365-66). Moreover, the UDS data that Russo says Segal should have relied on showed only a 1.1% difference between Blue Cross's and Aetna's current discounts, which is less than the +/- 2% variance range in the UDS data. (*Id.* at 368-69).

***Russo's Fifth Opinion.*** In Russo's Fifth Opinion, he performs a series of calculations to compare the numbers of providers in Blue Cross's and Aetna's networks by county, resulting in a total for Blue Cross that is 1.1% higher than Aetna's total. (Russo Dep. pp. 393-96). Russo has never done a similar comparison of provider networks in the context of an RFP before. (*Id.* at 381). He agrees that no statute, rule, or specific provision of the RFP requires the comparison of network access or disruption and agrees that there are no network access standards that apply to the Plan. (*Id.* at 371-73, 391-92). Further, Russo does not disagree with testimony of the Plan's

expert that the amount of disruption (calculated by Segal as part of the Claims Repricing evaluation) was insignificant for a large health plan like the Plan. (*Id.* at 386-87). However, he has no independent opinion about what level of disruption is typical when a state health plan changes TPAs. (*Id.* at 382).

### **C. Admitting Russo's Proposed Testimony Would Be Unfairly Prejudicial.**

Russo's testimony should also be excluded under Rule 403 as both prejudicial, as well as to avoid confusion of the issues, waste of time, and needlessly cumulative evidence. As noted above, the vast majority of his time is spent providing expert opinion for litigation, including this case, in which Mr. Russo and his team have billed over \$1 million. (Russo Dep. pp. 40-41, 84). *See Kinergy Corp. v. Conveyor Dynamics Corp.*, No. 4:01CV00211 ERW, 2003 WL 26110512, at \*26 (E.D. Mo. Oct. 14, 2003) (excluding expert opinion in part because it was developed for litigation rather than application of objective methodology). This bias and the lack of any particular authority or objective methodology to support his disagreement with the Plan, makes any opinion more prejudicial than probative.

Even beyond the lack of impartiality, Russo's repeated injection of irrelevant "industry standards" and his own unsupported opinion are unhelpful and confusing at a minimum, and likely to confuse the appropriate analysis at worst. *See Yates v. Ford Motor Co.*, No. 5:12-CV-752-FL, 2015 WL 3448905, at \*8 (E.D.N.C. May 29, 2015) (excluding expert testimony on whether defendant acted reasonably, noting that "while the term 'reasonable' may have a common meaning distinct from its legal meaning, presenting testimony as to whether a particular design or selection of materials was 'reasonable' would 'frame[ ] the term in its traditional legal context'"); *id.* at \*10 ("Introduction of testimony regarding these other 'standards of care' would therefore pose a risk of confusing the issues, misleading the jury, and subjecting defendants to unfair prejudice which would substantially outweigh any probative value from such testimony.").

Moreover, because the testimony is premised on incorrect standards and is irrelevant, it is a waste of the Tribunal's and the parties' time to spend hours or days allowing this purported expert to provide testimony that does not address the issue before the Court. Further, because his opinions address the RFP and the parties' own bids, they are needlessly cumulative of the same testimony that will be given from Plan witnesses, Blue Cross witnesses, and Aetna witnesses. Rule 403 permits the Tribunal to exclude this testimony as a waste of time and unnecessarily cumulative. N.C. R. Evid. 403.

### **III. THE COURT SHOULD EXCLUDE MS. WILLS'S OPINIONS, REPORT, AND TESTIMONY.**

#### **A. Wills's Opinions Are Irrelevant to The Arbitrary and Capricious Analysis.**

Wills's opinions should be excluded, at a minimum, because she attempts to avoid the relevant arbitrary and capricious standard and invites the Tribunal to substitute its own judgment for that of the Plan and its consultants. Indeed, each of her opinions is premised on a non-binding "best practices" standard that has no applicability here. As discussed with Russo, an expert's testimony cannot be premised on a standard that does not have a demonstrable connection to the standard at issue in the case. *See Greenwald Caterers Inc. v. Lancaster Host, LLC*, No. CV 22-811, 2023 WL 7021239, at \*10 (E.D. Pa. Oct. 25, 2023) (excluding expert testimony asserting industry standard where there was no clear link between witness's proposed testimony and contract, which did not contain standard with which defendant was required to comply).

1. *The "best practice" standard is irrelevant to the arbitrary and capricious analysis.*

Each of Wills's opinions is premised on the theory that the Plan's actions do not meet "best practices" for procurement. (Wills Report, ¶ 8(a)-(c)). But that theory is completely unrelated to the arbitrary and capricious standard. Indeed, she testified that she was not familiar with the standard under General Statutes Section 150B-23(a). (Wills Dep. p. 33). Instead, by relying on

general “best practices,” she invites the Tribunal to substitute Wills’s or the Tribunal’s judgment for the Plan’s and to impermissibly change the appropriate standard in this case. Stated differently, “best practices” for procurement are *irrelevant* to whether the design of the RFP or evaluation of the proposals was arbitrary and capricious.

Proposed expert testimony is not relevant if the opinion does not “fit” the facts of the case. *Garlinger v. Hardee's Food Sys., Inc.*, 16 F. App'x 232, 235 (4th Cir. 2001) (“The consideration of relevance requires the district court to determine whether the testimony ‘fits’ the instant case; not all *reliable* expert testimony is *relevant* expert testimony.”). An opinion does not “fit” when it attempts to deviate from the relevant standard. For example, in *Olson*, the defendant college expelled the plaintiff after an internal investigation revealed that the plaintiff had committed domestic violence. *Olson v. Macalester Coll.*, No. 21-CV-1576 (ECT/DJF), 2023 WL 4353820, at \*24 (D. Minn. July 5, 2023). Plaintiff attempted to present an expert to testify about “best practices” in “interviewing techniques,” to attempt to undermine the reasonableness of the college’s investigation of plaintiff and other witnesses. *Id.* at \*23. However, the court excluded the proffered expert because “no legal authority holds or suggests that the (mostly law-enforcement related) interviewing best practices” applied to the case at bar—which was limited to whether the investigation conducted by the college was “‘so devoid of substantive content as to be unworthy of credence’ or is marked by ‘clear procedural irregularities.’” *Id.* at \*24. Thus, the proposed expert’s opinion regarding best practices was “not reasonably tethered to the legal standards by which [plaintiff’s] claim must be judged.” *Id.* Moreover, the court further confirmed that any probative value in such testimony would be outweighed by the potential confusion, thus warranting exclusion under Rule 403 as well. *Id.*

Here, Wills’s proposed opinions do not “fit” the facts of the case because she attempts to redefine the relevant standard of “arbitrary and capricious” to an amorphous “best practices” standard. As in *Olson*, Wills attempts to assert a higher standard that would require the Court to reweigh the evidence and substitute its own judgment for that of the Plan’s and its experts. *See id.* at \*24.<sup>12</sup> However, here, the Tribunal is not tasked with deciding whether the Plan made the *best* decision, or whether the Petitioner or even the Tribunal could have or would have decided differently. It is only tasked with determining whether the Plan’s decisions were “patently in bad faith” or so “whimsical” as to reflect “a lack of fair and careful consideration” or a failure to indicate “any course of reasoning and the exercise of judgment.” *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 16, 565 S.E.2d 9, 19 (2002). Thus, Wills’s opinions based on “best practices” are entirely untethered to the relevant standard and analysis, warranting exclusion.

2. *Wills’s best practices opinions are irrelevant aspirations.*

The irrelevance of Wills’s best practices opinions is further emphasized by the non-binding, aspirational nature of the standard that she proposes. Wills concedes that her preferred practices—what the Plan supposedly should have done—are not binding. (Wills Dep. p. 140). They are not minimums or requirements that are uniformly required or even observed by all governmental contracting entities. (*Id.* at 144). Indeed, she concedes that the Plan was not required to not utilize any particular practice and had the authority to design the RFP in its own discretion, with “wide latitude.” (*Id.* at 62-63, 146). In fact, she was not aware of *any* procurement decision *ever* being invalidated for failure to follow a “best practice.” (*Id.* at 147-148). Nevertheless, she

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<sup>12</sup> Indeed, Wills’s opinions stray even further from the relevant standard by creating an entirely new, unfounded standard as part of her analysis. She opined that her “best” or “standard practices” involves an amorphous element of what “taxpayers expect” with respect to government procurements. (Wills Dep. pp. 137-40). she could provide no authority or basis for this “taxpayer expectation” standard, other than representing that she is a taxpayer. (*Id.* at 139).

attempts to make history by having this Tribunal, for the first time, invalidate the design and structure of an RFP at an agency's discretion because it was not what she (with the benefit of hindsight) deemed the *best* way to do it.<sup>13</sup>

However, tribunals rightfully exclude testimony rooted in such aspirational standards as irrelevant and likely to cause confusion or prejudice. For example, in *Lopez*, the plaintiffs sought to challenge the constitutionality of the detention protocol for certain migrant juveniles. *See Doe by & Through Lopez v. Shenandoah Valley Juv. Ctr. Comm'n*, No. 5:17-CV-97, 2018 WL 6581220, at \*5 (W.D. Va. Dec. 13, 2018). The standard and requirements for defendants' detention program were comprehensively governed by an agreement with the Office of Refugee Resettlement—which defined specific standards applicable to the complained-of conduct. *Id.* However, Plaintiffs attempted to offer an expert to opine on the “best practices in the field of juvenile justice,” including “nationally accepted standards for the operation of juvenile detention facilities” based on recommendations of certain federal commissions and organizations. *Id.* The Court excluded the proposed expert, finding that her testimony attempted to assert an “aspirational” standard that was not binding on defendant and was therefore not relevant to the issue before the Court. *Id.* at \*6.

As in *Lopez*, Wills's testimony attempts to misdirect the Court from the relevant question—whether the Plan acted arbitrarily and capriciously—by asserting the “aspirational” and nonbinding “best practices” standard. *See id.* However, because the standard (and analysis) she relies upon is not binding on the Plan, her entire opinions are irrelevant and inadmissible.

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<sup>13</sup> For example, Wills contends that “best practices” include allowing narrative responses to technical requirements (Wills Report, pp. 11-14), despite the fact that the Plan previously made a thoughtful decision to exclude narrative responses based on its own experience that narrative responses were counterproductive. (See Summary Judgment Memo, pp. 45-46).

3. *Wills's opinions are not helpful to the factfinder.*

Further, Wills's opinions should be excluded as ultimately unhelpful and unnecessary, and thus irrelevant. The touchstone of relevance is whether the expert's opinion is at all helpful to the trier of fact—which does not include invitations to substitute judgment. *See McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (to assist the factfinder, expert testimony “must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case” for its own). Wills's attempt to substitute the standard and the weighing of the evidence invades the province of this Tribunal and is thus unhelpful and irrelevant.

For example, Wills's Second Opinion includes the opinion that the Plan's scoring of the cost proposal was “unreasoned.” However, an expert opinion about *why* the Plan did what it did is neither within her expertise nor is it helpful to the trier who will have as much (if not more) evidence and ability to make that determination as Wills. *See Yates v. Ford Motor Co.*, No. 5:12-CV-752-FL, 2015 WL 3448905, at \*4 (E.D.N.C. May 29, 2015) (“[T]he opinions of expert witnesses on the intent, motives, or states of mind of corporations ... ha[s] no basis in any relevant body of knowledge or expertise.”).

Moreover, Wills's attempt to interpret the Plan's adherence to its own requirements is also unnecessary and unhelpful. (*E.g.*, Wills Report ¶ 56). The Tribunal is capable of analyzing the language of the RFP, any governing rules or statutes, and assessing the Plan's compliance. *Post hoc* expert testimony is simply not required for such an exercise. *See Lightfoot v. Georgia-Pac. Wood Prod., LLC*, 5 F.4th 484, 494 (4th Cir. 2021) (excluding expert opinion interpreting reports, concluding that expert inferences and interpretation years after the fact are not necessary in assessing the plain meaning of words of the report). Indeed, Wills's opinion of any “breach” of governing protocols or procedures would be an impermissible legal conclusion—a *fact she must*

know because her testimony has been excluded in other cases for similar reasons. See *Bona Fide Conglomerate, Inc.*, 2019 WL 1369007, at \*13 (excluding *Wills's* testimony regarding interpretation of contracts, compliance with regulations, or opining on the ultimate legal issue). Therefore, because Wills is not situated any better than the Tribunal for this analysis, her testimony is unhelpful and unnecessary, and thus it should be excluded.

**B. Wills's Subjective Opinions Are Not Reliable.**

In assessing reliability of expert testimony based on experience, the court must “require an experiential witness to explain how [her] experience leads to the conclusion reached, why [her] experience is a sufficient basis for the opinion, and how [her] experience is reliably applied to the facts.” *Wilson*, 484 F.3d at 274. Here, Wills does not explain why and how her experience leads to her conclusions. Rather, her report and testimony make clear that her opinions are not grounded in any objective authority but are actually based on her “say so.” *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (“[T]he court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” (quotations omitted)).

Wills could often not point to any authority at all. For example, she could not identify any North Carolina (or other) authority that made it improper to base bidders' final scores on their rankings in the cost proposal and technical proposals. (Wills Dep. pp. 53-54). She quibbled with that process only because she had not “seen it before.” (*Id.* at 54). As to Wills's First Opinion, she provided one example of a Texas county government procurement that scored proposals differently than the Plan did here, but she could provide no authority or reasoning as to why that local government's methodology must be followed this case. (*Id.* at 61-62). In another example, as to Wills's Third Opinion, Wills testified that the Plan had a “duty” to assess the different bidders' ability to perform the requirements of the RFP. (*Id.* at 263). Again, she could not point to authority that substantiated that opinion. (*Id.*) Similarly, she criticized the Plan for utilizing

“yes” or “no” questions but could not identify any authority that requires a narrative response format. (*Id.* at 99-100). Her inability to point to any authority or basis for such opinions is the paradigmatic example of an inadmissible expert opinion based on mere *ipse dixit*.

Even where she did resort to “authority,” Wills does not provide any reliable methodology to arrive at her conclusions. Her “authority” for best practices is non-binding and aspirational, as discussed above. She concedes that the Plan had the authority to design the RFP and its evaluation methodology differently from any particular “best practice.” (Wills Dep. pp. 62-63, 146). The fact that she recognizes that the Plan might conclude that a different method for its RFP was preferable, and was permitted to do so, fundamentally undermines any reliability. *See Ponder v. City of Asheville*, 589 F. Supp. 3d 500, 505 (W.D.N.C. 2022) (excluding opinion where expert “repeatedly acknowledged that other individuals with knowledge of fire department management may reach different conclusions”).

Other times, even the authority on which she relies does not support Wills’s strict opinions. For instance, in Wills’s Third Opinion, she opines that the Plan’s equal weighting of each technical requirement was somehow problematic, even though the written “handbook” that she frequently cites actually notes equal weighting as a viable methodology. (Wills Dep. pp. 103-05).

In other instances, Wills relies on unrelated or irrelevant procurement codes or manuals as “authority.” For example, she cites to language from the State Procurement Code for Alaska, but she did not know if the language was Alaska’s current policy and recognized it would have no bearing on North Carolina procurements—other than as a “best practice.” (Wills Dep. pp. 90-91). She also relied upon the North Carolina Department of Administration Procurement Manual, even though this particular RFP is exempt from these general procurement procedures by statute. (Wills

Dep. pp. 93-95); *see* NCGS 135-48.34.<sup>14</sup> Her inability to ground her opinions in an actual, relevant authority is disqualifying.

Moreover, Wills's lack of relevant authority only further confirms that the Plan had authority to design and evaluate the RFP as it did and to reach different conclusions based on the evidence/bids presented. She readily concedes that the Plan had the authority and discretion to design, draft, and evaluate the RFP as it did. (Wills Dep. p. 106). She even affirmatively states that the Plan "should decide for itself what is a best practice relative to procurements of this nature." (*Id.* at 142). She agrees that the evaluation criteria in the RFP and the scoring methodology were not biased. (*Id.* at 88). She agrees that the scoring and ranking of the submissions was not inaccurate. (*Id.* at 155). She agreed that the rankings did not skew in favor of any particular bidder. (*Id.* at 169-70). She even agrees that changing the scoring methodology to "scaling points" (as she contends it should have been done) as opposed to ranking would not, alone, have changed the outcome. (*Id.* at 172). She agrees that the proposals were scored consistently with the description in the RFP. (*Id.* at 155-56). She agrees that evaluation criteria can be at least partly subjective. (*Id.* at 231). She also concedes that the Plan had a reason for weighting the fee proposal and the guarantee equally. (*Id.* at 104-05). She understood the rationale (and benefits) to some of the Plan's decisions, such as utilizing non-narrative questions. (*Id.* at 102).

In other words, Wills's opinions do not reliably support her conclusions because she does not (and cannot) identify any errors or mistakes in the Plan's approach. At bottom, she acknowledges the Plan's authority, discretion, and even the validity of its methodology—she just

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<sup>14</sup> NCGS 135-48.34 states that "[t]he design, adoption, and implementation of the preferred provider contracts, networks, and optional alternative comprehensive health benefit plans, and programs available under the optional alternative plans, as authorized under G.S. 135-48.2, are not subject to the requirements of Article 3 of Chapter 143 of the General Statutes . . ."

disagrees with the Plan’s approach and would have done it differently. That is simply not enough to justify an “expert” opinion. *Town of Leland*, 2017 WL 7052568, at COL 4 (disagreement is not sufficient to satisfy arbitrary and capricious standard); *Buckingham Twp. v. Wykle*, 157 F. Supp. 2d at 467 n. 10 (A “party may not undermine an agency decision even with an affidavit of unquestioned integrity from an expert expressing disagreement with the views of other qualified experts relied on by the agency, and a court may not weigh the contrary views of such experts to assess which may be more persuasive.”).

Wills’s opinions that fault the Plan for the discretionary exercise of its authority are not grounded in specialized knowledge but are merely the *ipse dixit* of the expert. *See McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (“[T]he court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” (quotations omitted)). That is, her opinions and testimony are then not “supported by appropriate validation,” but are rather based on her “subjective belief or unsupported speculation,” which renders them unreliable and inadmissible. *See Daubert*, 509 U.S. at 589-90.<sup>15</sup>

### **C. Wills’s Opinions and Testimony Are Prejudicial.**

Like Russo, Wills’s testimony is much more likely to be prejudicial than probative. Her reliance on irrelevant, undefined “best practices” as authority are likely to confuse and mislead. This is particularly problematic where the bulk of her opinions attempt to define the “rightness” or “wrongness” of the Plan’s conduct—testimony that would not be admissible even in a more standard litigation, much less in the deferential “arbitrary and capricious” context. Further, because she is unfamiliar with North Carolina authority and has no experience in state health plan

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<sup>15</sup> Wills’s testimony has previously been excluded by an ALJ for providing similar conclusory opinions on the ultimate issue to be decided by the court. (Wills Dep. pp. 115-119; Deposition Exhibit 407, attached hereto as Exhibit E).

procurements, her opinions will be unhelpful and more likely to waste time and confuse the issues, rather than clarify. For any one of these reasons, but certainly in the aggregate, Wills's opinions are unnecessary and prejudicial and should be excluded under Rule 403 as well.

### **CONCLUSION**

For the foregoing reasons, the Court should exclude the opinions, reports, and any testimony by Petitioner's two proffered expert witnesses, Gregory Russo and Mary Karen Wills.

This the 21st day of December, 2023.

North Carolina State Health Plan for  
Teachers and State Employees

/s/ J. Benjamin Garner

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## CERTIFICATE OF SERVICE

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