

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:23-CV-897

IN RE:)
CAMP LEJEUNE WATER LITIGATION)
This Document Relates to:)
ALL CASES)

**PLAINTIFFS' OPPOSITION TO
UNITED STATES' MOTION TO
EXCLUDE THE OPINIONS OF
MR. PETER RYBOLT [D.E. 858]**

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INTRODUCTION

Plaintiffs' Leadership Group ("PLG" or "Plaintiffs") engaged Peter Rybolt, an expert with more than 20 years' experience in economic research and analysis, to review Defendant United States' ("Defendant's") economic expert reports with regard to their use of Veterans Benefits Administration ("VBA") benefits to reduce the recoveries available to Plaintiffs for their claims under the Camp Lejeune Justice Act ("CLJA"). Mr. Rybolt offers three general rebuttal opinions, each of which he is qualified to offer and each of which are based on his economic expertise, not interpretation of the law. First, Mr. Rybolt analyzed Plaintiffs' damages claims, and found that, as a matter of economics, Plaintiffs sought damages for lost *earnings*, but not lost earning *capacity*, while Defendant's experts calculated offsets for, as a matter of economics, lost earning capacity. Rybolt Report ("Rep.") ¶¶ 25-30 (JA. Ex. 766, D.E. 840-30). (Plaintiffs did not calculate compensation for lost earning capacity in recognition of the CLJA provision allowing for past VBA disability benefit offsets, yet Defendant seeks offsets for such amounts anyway.) Second, Mr. Rybolt opines that, as a matter of economics, lost wages and lost earning capacity have different meanings, such that Plaintiffs would be undercompensated for their full losses if one were used to offset the other. *Id.* ¶¶ 31-41. Third, Mr. Rybolt opines that, from an economics and standard damages calculation perspective, Defendant's calculation of future disability benefits is flawed because Defendant's experts Dr. Brod, Ms. Yount, and Dr. Tomic, assume multiple factors will stay constant in calculating such offsets despite the data available for these Plaintiffs showing those same factors have not been constant in the past. *Id.* ¶¶ 42-65.

In its memorandum of law in support of its motion to exclude Mr. Rybolt's opinions, [D.E. 859] ("Mot."), Defendant attempts to reframe Mr. Rybolt's expert opinions as legal conclusions, but that is wrong. Mr. Rybolt does not interpret statutes or opine on what the law

requires. Mr. Rybolt opines on the economic definition of “earning capacity,” a term used in the relevant VA statute, and references the law to show how his economic opinion is relevant to the circumstances of this case. It is up to the Court to determine how to apply the law, and Mr. Rybolt properly provides specialized knowledge on the meaning of relevant terminology in economic terms to aid the Court in that task. As a rebuttal expert, it is also proper for Mr. Rybolt, as an expert in damages and economic analysis, to identify flaws in Defendant’s economic experts’ calculation of future disability benefits without offering alternative calculations of offsets himself, which are Defendant’s burden to prove.

Defendant seeks to exclude Mr. Rybolt as an economic rebuttal expert because he does not possess what the Defendant contends is requisite expertise regarding veteran disability benefits. If that is a sufficient basis to exclude Mr. Rybolt, however, then it is also a sufficient basis to exclude the Defendant’s experts (Brod, Yount, and Totic) whose opinions he is rebutting, as it is undisputed that those experts also lack any specific expertise regarding veteran disability benefits. Further, Mr. Rybolt’s critique that Defendant’s economic experts’ calculations inappropriately assume several factors will hold constant for years into the future is based on Mr. Rybolt’s analysis of actual past data, and thus is not speculative. To the extent Defendant takes issue with Mr. Rybolt’s conclusions, those issues apply equally to the opinions of Defendant’s own economic experts and either call for their exclusion as well or are appropriately addressed through cross-examination, not exclusion.

BACKGROUND

Vice President at Cirque Analytics, Inc., Peter Rybolt has been an expert in economic research, damages analysis, valuation, and loss modeling since earning his MBA in 2006. *See* Rybolt Rep. ¶¶ 5-8; Rybolt Rep., App’x A at 1. He has more than twenty years of experience in economic research and analysis and has led or managed hundreds of dispute-related engagements

involving accounting, financial, statistical, and economic analyses across class action, securities, antitrust, intellectual property, tort, and contract matters. Rybolt Rep., App’x A at 2-6. Mr. Rybolt has been admitted as an economic expert in state and federal court litigation, and has also appeared as an expert before domestic and international arbitration panels. *Id.* His expert work has addressed the statistical likelihood of claims and potential losses in mass tort, as well as valuation, loss modeling, damage assessment, and the quantification of economic loss under varying legal and market conditions. Rybolt Rep. ¶¶ 5-8. Mr. Rybolt has written and presented extensively on damages analysis, loss causation, and valuation, including before the American Bar Association and the California Society of Certified Public Accountants. *Id.* ¶ 7.

In this case, Mr. Rybolt was engaged by Plaintiffs to provide expert testimony addressing the economic implications of Defendant’s proposed VBA offsets with respect to Plaintiffs’ claimed damages. He described his assignment as “review[ing], and where appropriate respond[ing] to, issues raised by experts for the United States” concerning “the use of Veterans Benefits Administration (VBA) offsets to reduce the recoveries available to Plaintiffs.” *Id.* ¶ 1. In preparing his expert report, he reviewed Plaintiffs’ damages materials, the reports of Plaintiffs’ economist Chad Staller, Defendant’s expert reports from Brod, Yount, and Totic, deposition testimony of VBA employees, and other materials relevant to the Defendant’s offset calculations. *Id.* ¶ 11.

Based on his review, Mr. Rybolt offered three overarching economic opinions concerning the types of damages claimed by the VBA Bellwether Plaintiffs and the VBA offsets calculated by Defendant’s experts, the definition of relevant terms according to economics, and flaws in the VBA offsets calculated by Defendant’s similarly qualified economic experts. First, he explained that lost wages and lost earning capacity are separate economic concepts. *Id.* ¶¶ 13, 30-34.

Second and relatedly, he found that the proposed offsets did not correspond to the damages categories being claimed. *Id.* ¶¶ 13, 25-29. Applying a VBA offset against damages other than damages for lost earning capacity could thus reduce the value of a Plaintiff’s recovery below the amount of the losses calculated in the damages reports. *Id.* ¶¶ 13, 35-41. Third, he found that the government’s future VBA benefit analyses did not account for variables that could affect future benefit amounts, including rating changes, life expectancy variability, military retirement interactions, and other inherent uncertainties. *Id.* ¶¶ 13, 42-65. These are each economic opinions of fact, not law, and were offered in rebuttal to economic damages and offset opinions presented by the Defendant. Mr. Rybolt did not opine, for example, on what type of offsets the CLJA permits—whether the CLJA permits offsets for differing economic categories of damages is a legal issue for the Court to decide.

A more detailed look at Mr. Rybolt’s opinions demonstrates their appropriateness. First, Mr. Rybolt compared the categories of damages Plaintiffs claimed with the VBA offsets calculated by Defendant’s experts. *Id.* ¶¶ 14-23. He found that Plaintiffs’ expert reports tied each “claim for compensatory damages ... to a specific loss, such as a loss of earnings (wages and income) or an increase in expenses,” such as “compensation for medical expenses incurred, documented loss of earnings, and the cost of past and expected future care.” *Id.* ¶ 25. Mr. Rybolt found that Defendant’s experts likewise calculated offsets corresponding to these same categories: “lost wages, medical expenses incurred, and the cost of home care as separate categories of damages.” *Id.* ¶ 26. Yet Mr. Rybolt found that Defendant’s experts also separately calculated an asserted offset for “a new category of economic damages ... for which there is no specific corresponding claim from Plaintiffs”: VBA disability benefits, including both the present values of past benefits and estimated future VBA disability benefits. *Id.* ¶¶ 18-23, 26.

Based on his analysis, Mr. Rybolt concluded that the proposed VBA offsets did not match any of the specific economic losses Plaintiffs were claiming. *Id.* ¶ 24. In other words, Mr. Rybolt’s economic analysis of the types of damages claimed by Plaintiffs’ and Defendants’ experts showed that while some asserted offsets had an equivalent claim by Plaintiffs, VBA disability benefits did not. As explained by Mr. Rybolt, Plaintiffs had not claimed compensation for lost earning capacity, the type of economic harm compensated by VBA disability benefits.

Mr. Rybolt expanded on his opinion, explaining that from an economic standpoint, lost earnings and lost earning capacity are distinct. *Id.* ¶¶ 30-34. Mr. Rybolt opined that in economic terms, lost earnings means an actual interruption or reduction in earnings attributable to the injury or illness, typically documented through employment records, tax returns, contracts, and medical records. *Id.* ¶ 32. Meanwhile, in economic terms, earning capacity is a person’s ability to compete in the labor market, which may be affected even when the person has not suffered a corresponding actual wage loss. *Id.* ¶ 31. To support these opinions on the differing meaning of these two concepts in economics, Mr. Rybolt referenced “a large body of economic literature describing these concepts and the differences between them,” quoting three articles from the *Journal of Forensic Economics* and another from *Estimating Earning Capacity*. *Id.* ¶ 33 n.27. At his deposition, he further confirmed that “lost wages and a loss of earning capacity are separate economic concepts,” and his report used that distinction in analyzing the proposed VBA offsets. Rybolt Dep. Tr. at 242:20-24 (JA Ex. 792, D.E. 841-23). He also confirmed that he was not attempting to opine that the Court must apply the offsets in the way he delineated. *Id.* at 242:25-243:7.

In his report, Mr. Rybolt next explained that the offset and damages calculations proposed by Defendant would leave Plaintiffs less than fully compensated for their losses.

Rybolt Rep. ¶¶ 35-41. To illustrate why, Mr. Rybolt presented a table with the claimed damages and offsets for a hypothetical claimant, showing which align economically and which do not. *Id.* ¶ 36. As with the actual Track 1 Plaintiffs, Mr. Rybolt’s hypothetical claimant did not seek compensation for the value of lost earning capacity, recognizing that it would be offset by the value of the VBA disability benefit provided to that plaintiff. *Id.* ¶ 38. Applying that VBA disability benefit to offset *other* types of claimed damages in such a scenario would mean “the claimant is no longer compensated for the value of the lost earning capacity, and the government receives a substantial windfall.” *Id.* ¶ 39. He further stated that applying an offset on the basis of VBA disability benefits against other damages categories “would strip Plaintiffs of both their past VBA disability benefits and the present value of their future VBA disability benefits, leaving every such Plaintiff worse off.” *Id.* ¶ 41. At his deposition, Mr. Rybolt confirmed this opinion, agreeing with the example that if a plaintiff’s out-of-pocket medical costs were offset on the basis of VBA disability benefits, that plaintiff would not be fully compensated for their losses. Rybolt Dep. Tr. at 248:15-23.

Finally, Mr. Rybolt opines that Defendant’s experts’ estimates of future VBA disability benefits are speculative and contain material omissions. Rybolt Rep. ¶¶ 42-43; Rybolt Dep. Tr. at 243:14-23. Defendant’s experts, Brod, Yount, and Tomic, valued future offsets by projecting the disability benefit currently being received into the future, and Mr. Rybolt identified variables those experts failed to consider that could affect those future payments, including changes in disability ratings, differences between average life expectancy and individual life expectancy, the interaction between military retirement and disability benefits, and other uncertainties affecting future VBA benefits. Rybolt Rep. ¶¶ 44-65. Mr. Rybolt’s identification of these factors as variable was not speculative, but based on his review of the Plaintiffs’ actual past data, from

which he found that Plaintiffs would be under-compensated based on VBA offsets relative to their losses. *See id.* ¶¶ 46-49, 53-59. He further discussed how variability in life expectancy and changes in health would mean that certain Plaintiffs would be severely undercompensated relative to their losses, and that Defendant’s use of mean life expectancy was not sufficient for projecting an economic picture of these specific Plaintiffs’ remaining lives in the context of offsets. *Id.* ¶¶ 60-62. In his deposition, Mr. Rybolt reiterated that he was not retained to calculate an alternative offset number, and he testified that his opinions were limited to reviewing the offset calculations set forth by Defendant’s experts. Rybolt Dep. Tr. at 244:2-15. He also testified that his analysis did not ask the Court to adopt a legal rule governing offsets under the CLJA, and that he was “not offering any legal ... conclusions or opinions.” *Id.* at 97:3-98:12; 242:25-243:7.

LEGAL STANDARD

Federal Rule of Evidence 702 permits a qualified expert to testify if their knowledge will assist the trier of fact, the testimony is grounded in sufficient facts or data, that testimony is the product of reliable principles and methods, and those principles and methods have been reliably applied to the case. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993). In determining “whether proffered testimony is sufficiently reliable, the court has broad latitude to consider whatever factors bearing on validity that the court finds to be useful; the particular factors will depend upon the unique circumstances of the expert testimony involved.” *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). “[R]ejection of expert testimony is the exception rather than the rule.” *Gillis v. Murphy-Brown, LLC*, No. 7:14-CV-185-BR, 2018 WL 5284607, at *2 (E.D.N.C. Oct. 24, 2018).

Because this Court will serve as the fact finder in this case, the Court has increased latitude in how to perform its gatekeeping role. *City of Huntington v. AmerisourceBergen Drug*

Corp., No. 3:17-01362, 2021 WL 1596355, at *2-3 (S.D. W. Va. Apr. 22, 2021) (collecting cases and concluding: “Given that, in a bench trial, the gatekeeper is keeping the gate only for itself, courts will often conditionally admit expert testimony subject to later exclusion if the expert’s testimony does not satisfy Rule 702.”). Although the Rules of Evidence still apply, there is a relaxation of the gatekeeping function due to the significantly reduced risk of confusion or being swayed by dubious testimony in a bench trial. *Id.*; see also *United States v. Wood*, 741 F.3d 417, 425 (4th Cir. 2013) (“because the district court was also the trier of facts, the district court’s evidentiary gatekeeping function was relaxed”).

Federal Rule of Evidence 704 states that an “opinion is not objectionable just because it embraces an ultimate issue.” Rule 704 specifically allows expert testimony that is helpful to the trier of fact, even if it is closely related to the key issues in the case. Other rules assure “against the admission of opinions which would merely tell the jury what result to reach[.]” Fed. R. Evid. 704 Advisory Committee Notes (1972).

ARGUMENT

Mr. Rybolt is an economics expert who was designated as a rebuttal expert to “review, and where appropriate respond to, issues raised by experts for the United States” concerning “the use of Veterans Benefits Administration (VBA) offsets to reduce the recoveries available to Plaintiffs.” Rybolt Rep. ¶ 1. That is what he did: he reviewed Plaintiffs’ damages materials, the reports of Plaintiffs’ economist Chad Staller, Defendant’s economic expert reports from Brod, Yount, and Tosic, deposition testimony of VBA employees, and relevant research materials to evaluate whether the government’s proposed offsets corresponded economically to the damages being claimed, or were otherwise flawed from an economic standpoint. *Id.* ¶ 11. Defendant attempts to reframe his analysis as asserting “legal conclusions,” Mot. at 1, but the record shows

that Mr. Rybolt used his economic training to critique Defendant's economic experts' offset calculations in line with economic literature and principles.

The arguments in Defendant's Motion reveal a great deal of contradiction. Defendant argues that Mr. Rybolt's opinions are "the definition of *ipse dixit*," but elsewhere credits him with relying on scientific literature. *Compare* Mot. at 14 *with* Mot. at 15. Defendant complains that Mr. Rybolt "offers no methodology" because he critiques Defendant's experts without offering his own calculations of Defendant's offsets, despite elsewhere defending its own rebuttal experts on the basis that they can validly critique another expert's methodology without offering a competing methodology of their own. *Compare* Mot. at 2 *with* [D.E. 666] at 12. Defendant criticizes Mr. Rybolt (who does not opine on what VBA benefits any plaintiff will receive in the future) because he "has not determined whether there is a reasonable likelihood that any of the [VBA ratings] will actually change, nor has he made any attempt to determine what those ratings changes might be," Mot. at 6, but Defendant ignores the fact that Defendant's experts (who *do* opine on what VBA benefits plaintiffs will receive in the future) have also not conducted such analysis. Defendant claims that it is speculative for Mr. Rybolt to criticize Defendant's experts for ignoring variables that may or may not change in the future, Mot. at 17, despite Defendant's experts conceding that they were aware such variables had actually changed in the past, yet nonetheless assumed without explanation that each plaintiff's benefits today would persist unchanging. *See, e.g.*, Tasic Dep. Tr. at 235:16-238:24 (JA Ex. 787, D.E. 841-18). Moreover, while Defendant is correct that "the law does not require absolute certainty," Mot. at 17, Defendant has elsewhere critiqued Plaintiffs for what it sees as insufficient certainty, as Mr. Rybolt has critiqued Defendant's experts. *See, e.g.*, Tasic Rep. (Gleesing) at 8 (JA Ex. 707, D.E. 839-5) (arguing in favor of a "Probability of Unemployment Adjustment" because "all workers

are exposed to some probability that they would not be employed in any given year”).

Defendant’s Motion is inconsistent with itself, with Defendant’s other briefing, and Defendant’s own expert work. The Motion should be denied.

I. Mr. Rybolt Is a Qualified Economics Expert.

Mr. Rybolt is qualified to offer economic damages analysis, and did so here. *See* Rybolt Rep. ¶¶ 1-10, App’x A. He has more than twenty years of experience in economic research and analysis and has led or managed hundreds of dispute-related engagements involving accounting, financial, statistical, and economic analyses across class action, securities, antitrust, intellectual property, tort, and contract matters. Rybolt Rep., App’x A at 2-6. He specializes in “business valuation, loss modeling, and damage assessment in commercial litigation.” *Id.* at 1. Defendant claims Mr. Rybolt lacks “any experience in valuing damages” for personal injury, wrongful death, or veterans’ disability benefits, Mot. at 3, but Mr. Rybolt’s resume has plenty of experience evaluating damages for litigation. He lists professional experience as an expert for “class certification and damages,” and recently published “Proving Loss Causation” in *Lost Profits Damages: Principles, Methods, and Applications* (Valuation Products and Services, 2022). Rybolt Rep., App’x A, at 3, 7.

Rather than focus on Mr. Rybolt’s years of experience as an expert, Defendant points to his performing arts work from decades earlier. *See* Mot. at 1-2. But contrary to Defendant’s *ad hominem* attacks, a person is capable of having a decades-long career as an expert in damages and economic analysis even if they worked in the performing arts in the 1980s. Defendant’s emphasis on Mr. Rybolt’s earlier performing-arts career does not change the fact that, since earning his MBA from the University of Southern California in 2006, he has spent nearly two decades performing economic research, damages analysis, valuation, and loss modeling. Rybolt

Rep, App'x A at 1-6. He is qualified to testify on economic concepts like those involved in the measures of Plaintiffs' damages and Defendant's asserted offsets.

II. Mr. Rybolt Relies on his Expertise to Explain Why Defendant's Proposed Offsets Lack Economic Foundation; He Does Not Attempt to Offer Legal Opinions.

Mr. Rybolt draws on standard economic concepts in order to explain why Defendant's experts' offsets opinions "lack economic foundation." *See* Rybolt Rep. ¶¶ 25-34. Nevertheless, Defendant argues that Mr. Rybolt's opinions are legal conclusions. Plaintiffs do not dispute that under Federal Rule of Evidence 702, experts generally cannot offer legal conclusions. But Mr. Rybolt offers none. Mr. Rybolt opines about the economic categorization of damages Plaintiffs claims and offsets Defendant claims and compares them, to assess whether they are equivalent in economic terms. It is up to the Court to determine whether he is correct, and what legal impact equivalence or non-equivalence between claimed damages and claimed offsets has under the CLJA and other law. Mr. Rybolt is doing exactly what an expert should: providing expert opinion in a specialized non-legal area (economics) that informs the Court and trier of fact (here also the Court) in its determination of the facts and application of the law.

A. Mr. Rybolt's Explanation of the Distinction Between Lost Earning Capacity and Lost Wages Is an Economic Discussion.

Mr. Rybolt's explanation of the difference between "lost earnings" and "loss of earning capacity" is an explanation of how the field of economics distinguishes between these terms, not a legal instruction to the Court. *See* Rybolt Rep. ¶¶ 30-34. Mr. Rybolt explained that "lost wages and a loss of earning capacity are separate economic concepts," *see id.* ¶ 13, and his report used that distinction to evaluate whether the government's proposed VBA offsets corresponded economically to any of Plaintiffs' claimed damages. *See, e.g.,* Rybolt Rep. ¶¶ 25-29. Mr. Rybolt relies on "a large body of economic literature" to support his opinion that these terms are distinct

concepts. *See* Rybolt Rep. ¶ 33 n.27.¹ And as he explained in his deposition, Mr. Rybolt further considered that the government itself operates as though the two are distinct concepts.² Mr. Rybolt’s testimony on the *type* of economic harm caused by lost earning capacity, and that it is distinct from lost earnings, is a factual, economic opinion, not a legal one.

By contrast, an opinion may constitute an improper legal conclusion when the expert offers opinions on *legal* terms—terms that have “a separate, distinct and specialized meaning in the law different from that present in the vernacular.” *U.S. v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006) (quotation omitted).³ However, “terms bearing similarity to legal terms of art properly may be used by an expert, despite the similarity” when there is “limited vernacular” available. *See Buser v. Eckerd Corp.*, No. 5:12-CV-755-FL, 2015 WL 1438618, at *7 (E.D.N.C. Mar. 27, 2015).⁴ Economists and damages experts routinely offer opinions using terms like “lost earning capacity,” which are economic concepts. *See, e.g., Musick v. Dorel Juv. Grp., Inc.*, 818 F. Supp. 2d 970, 961 (W.D. Va. 2011) (admitting expert testimony about the value of plaintiff’s lost

¹ Plaintiff’s damages expert Mr. Staller’s testimony also supports a difference between lost earnings and lost earning capacity “in an economic sense.” Staller Dep. Tr. 232:4-233:6 (JA Ex. 786, D.E. 841-17).

² *See, e.g.,* Rybolt Dep. Tr. at 114:1-9 (explaining that an individual’s VBA disability benefit “isn’t affected by your actual earnings. You can be making 400,000 as a tenured professor at some private university, you still get the same VBA disability benefit. By the same token, it follows that they are not the same thing.”).

³ In *U.S. v. McIver*, the Fourth Circuit admitted expert testimony that a doctor’s treatment of patients was illegitimate and inappropriate, recognizing that “the line between a permissible opinion on an ultimate issue and an impermissible legal conclusion is not always easy to discern.” *Id.*

⁴ Defendant cites this case in support of its argument, but it does not support excluding Mr. Rybolt’s testimony. In *Buser*, an expert who had been a pharmacist for 20 years was qualified to give opinions about a pharmacist’s core responsibilities. 2015 WL 1438618, at *6. He was, however, barred from using technical legal terms like “essential function,” which had no specialized pharmacy meaning, and which might confuse the jury on an ultimate issue in the case. *See id.* at *7. By contrast, here, “earning capacity” *does* have a specialized economic meaning on which Mr. Rybolt is qualified to opine, and there is *no* risk of confusing a jury (about an ultimate issue or otherwise).

earning capacity); *Lawson v. United States*, 454 F. Supp. 2d 373, 424 (D. Md. 2006) (same). Mr. Rybolt's opinions about the meaning of "lost earning capacity" as an economic term (not a legal term) are likewise admissible here.

Defendant nonetheless claims that Mr. Rybolt's opinions must be legal because he references statutes and caselaw. Defendant is wrong. Mr. Rybolt does not opine on the legal import of the CLJA or other statutes. He references statutes to show that the text of relevant VBA statutes reference one economic concept ("earning capacity") over another. *See* Rybolt Rep. ¶ 30 n.21, ¶ 31 n.22. By doing so he is showing the context for and relevance of his opinions—and Defendant's experts' opinions—about these economic concepts. He is allowed to explain the context for his economic opinions. *See, e.g., HBC Ventures, LLC v. Holt MD Consulting, Inc.*, Nos. 5:06-CV-190-F, 5:07-CV-342-F, 2012 WL 4483625, at *9 (E.D.N.C. Sept. 27, 2012) (cited by Defendant, allowing expert to include a "discussion of relevant . . . cases in order to provide the background from which his opinions and analysis arise"). The court always "remains the final arbiter of what constitutes the governing law." *Id.* Mr. Rybolt's opinions do not offer the trier of fact instruction on how to interpret statutes. He provides an opinion only on the deficiencies in Defendant's experts' economic analyses, explaining their economic errors. Calculating damages and offsets are a key role of an economic expert. Mr. Rybolt can describe economic concepts and explain the limits of offsets by drawing on his expertise as an expert in damages and economic analysis; he needs no legal training to do so.

As for caselaw, Defendant argues that "Mr. Rybolt misstates the holdings of three federal cases" when stating his opinion that lost earnings and a loss of earning capacity are distinct economic concepts. Mot. at 5. Mr. Rybolt is not professing to be a legal expert, and is not relying on his own legal interpretation or any legal interpretation to reach his opinions. Mr. Rybolt's

opinions are based on his own economic experience and expertise and “consistent with a large body of economic literature” that Mr. Rybolt quotes. Rybolt Rep. ¶ 33 n.27. Mr. Rybolt’s references to caselaw were simply an additional statement that he understands his opinion to be “consistent with applicable law,” but not that Mr. Rybolt himself is attempting to supply the law, or even rely on it—neither Mr. Rybolt or Defendant suggest that his opinions would change if the applicable law were not consistent. Rybolt Rep. ¶ 33 n.27. Nevertheless, Mr. Rybolt’s characterizations are accurate. Mr. Rybolt stated that “loss of earning capacity” was treated as its own category in *Warden v. United States*, 861 F. Supp. 400, 402 (E.D.N.C. 1993), which is consistent with his understanding of it as a different economic category than lost earnings. Defendant ignores the holding of *Moore v. Chesapeake & Ohio Ry.*, 649 F.2d 1004, 1011 (4th Cir. 1981), that the existence of actual post-injury earnings “does not bar recovery for loss of future earning capacity,” which Mr. Rybolt correctly stated.⁵ And Mr. Rybolt offered only a direct quotation from *Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 388 (4th Cir. 2010), which holds that an offset requires a defendant to show that the plaintiff would otherwise receive “double payment” of the same type of compensation. In short, Mr. Rybolt simply explains the difference between two economic concepts; the cited cases show that past courts have accepted the same distinction.

B. Mr. Rybolt’s Discussion of Defendant’s Proposed Offsets Is Also Based in His Economic Expertise.

Mr. Rybolt’s opinion that “[n]one of the VBA Bellwether Plaintiffs’ expert reports assert damages claims for lost earning capacity, thus the use of a benefit intended to compensate Plaintiffs for a loss of earning capacity as an offset is inapt,” Rybolt Rep. ¶ 13, is also a damages

⁵ Defendant may have been confused, as Mr. Rybolt’s pincite does not match the quoted language. This appears to be an inadvertent citation error.

opinion based on Mr. Rybolt's economic expertise, not a legal conclusion. It is an economic analysis and comparison of what type of economic damages each side's experts are claiming, Mr. Rybolt is critiquing Defendant's experts' methodology, pointing out that they are comparing apples to oranges when trying to claim offsets. *See* Rybolt Rep. ¶¶ 25-29, 35-41. He illustrates this with a table of each type of damages and offsets claimed for a hypothetical claimant that parallels the types of damages and offsets claimed in the Track 1 cases. *Id.* ¶ 36. If damages experts were not permitted to discuss *how* to calculate damages, all Defendant's experts would need to be excluded as well. Mr. Rybolt is simply offering the economic proposition that Defendant cannot justify an offset for a payment category Plaintiffs themselves do not claim. *See, id.* ¶¶ 25-26. Doing so would undercompensate Plaintiffs for the reasons Mr. Rybolt explains. *Id.* ¶ 41. This is an explanation of economic consequences, not the law, and it remains the Court's job to apply this information as it chooses according to the law.

At his deposition, Mr. Rybolt expressly disclaimed any opinion on whether offsets are legally permitted under the CLJA, explaining that he was "not offering any legal ... conclusions or opinions" and was instead offering his "understanding as a damages expert as to the consequences of calculations and assumptions made by [the Defendant's] experts." Rybolt Dep. Tr. at 97:7-13. He further stated, "To the extent you're defining a legal conclusion, that's not my role." *Id.* at 97:20-21. His role, as he explained, was to articulate the economic implications of applying VBA benefits to Plaintiffs' damages claims, and to assist the court in understanding how those damages categories apply economically. *Id.* at 242:25-243:13. That is what he did.

C. Mr. Rybolt Clearly Explains the Bases for his Opinions.

Mr. Rybolt provides a basis for each of his opinions. He explains why allowing Defendant to claim an offset for a category of damages that Plaintiffs do not claim would leave Plaintiffs less than fully compensated for their loss, walking through hypothetical examples. *See*

Rybolt Rep. ¶¶ 25-29, 35-41. He relies on Plaintiffs' Damage Assessment forms and the reports of other experts in the case. He also cites several economic papers. *See, e.g.*, Rybolt Rep. ¶ 26 n.17, ¶ 33 n.27, ¶ 35 n.29. This is a proper methodology for Mr. Rybolt's rebuttal report.

Defendant argues Mr. Rybolt relies on only *ipse dixit*—his say-so—before ultimately acknowledging that he cites a “large body of economic literature describing these concepts and the difference between’ lost earnings and earning capacity.” Mot. at 16 (quoting Rybolt Rep. ¶ 33 n.27). At that point, Defendant switches to attempting to dispute Mr. Rybolt's *conclusions* by quoting one of the several articles he quoted and claiming it contradicts Mr. Rybolt. *Id.* (quoting Stephen M. Horner & Frank Slesnick, “The Valuation of Earning Capacity Definition, Measurement and Evidence,” *J. Forensic Econ.*, 12, 15-16 (1999)). But contesting the merits of an expert's conclusions, and confronting them with supposedly contrary literature, is exactly the province of cross-examination, not grounds for exclusion under *Daubert*. Defendant disproves its own *ipse dixit* argument, and may present its challenges to Mr. Rybolt's conclusions at trial.

Moreover, on the merits, Horner and Slesnick's article does not undermine Mr. Rybolt's opinions. Defendant quotes the article's observation that earning capacity and expected earnings are often estimated using similar evidence, and that in some cases the earning capacity that can be proven may be identical to expected earnings. Mot. at 16. But that observation concerns measurement and proof; it does not collapse the two concepts into one. The authors address “how earning capacity may be distinguished from expected earnings,” and define actual earnings, expected earnings, and earning capacity as separate concepts. *See* Stephen M. Horner & Frank Slesnick, “The Valuation of Earning Capacity: Definition, Measurement and Evidence,” *J. Forensic Econ.* 12(1), 13-32 (1999).

The point is straightforward: earnings history may be evidence used to estimate earning capacity, but the evidence used to estimate a loss is not the same thing as the economic concept being measured. Thus, the fact that past or expected earnings may be used in some circumstances to estimate earning capacity is not inconsistent with Mr. Rybolt's opinion that lost earnings and lost earning capacity are distinct categories of economic harm. At most, Defendant identifies a disagreement over how those concepts should be applied here. That disagreement goes to weight, not admissibility.

Defendant also attempts to compare Mr. Rybolt's rebuttal methodology to Plaintiffs' expert Chad Staller's damages methodology, but this comparison is inapt: Mr. Staller is affirmatively conducting damages calculations; Mr. Rybolt is critiquing *Defendant's* economic experts' calculations, rather than affirmatively conducting any such calculations himself. Plus, the calculations Mr. Rybolt critiques are calculations of offsets rather than damages, and thus employ a different methodology than the damages methodology utilized by Mr. Staller. Mr. Rybolt is upfront in explaining that many of the experts in the case—including Mr. Staller—“loosely and inexactly use the phrase ‘earning capacity’ when what is claimed is an actual loss, not a loss of potential.” Rybolt Rep. ¶ 15 n.7. This is apparent from Mr. Staller's reports and testimony, which make clear that the section titled “Lost Earning Capacity” considers only *actual* past and future lost earnings, with no consideration of earning *capacity*. *See, e.g.*, Staller Rep. (Amsler) at 3-4 (JA. Ex. 737, D.E. 840-1); Staller Dep. Tr. at 233:7-23 (JA Ex. 786, D.E. 841-17) (agreeing he relies only on past or future earnings). In other words, Mr. Staller and Mr. Rybolt's reports are not contradictory.

Mr. Rybolt's methodology is sound.

III. Mr. Rybolt Uses His Economic Expertise to Explain Why Defendant’s Experts’ Estimates of Future VBA Offsets Are Speculative; Mr. Rybolt’s Opinion Is Not Speculative.

Defendant fundamentally mischaracterizes Mr. Rybolt’s opinion. Mr. Rybolt, an expert in conducting economic analysis, is critiquing Defendant’s economic experts’ methodology—not offering counter-estimates of offsets. His report is a rebuttal to the Defendant’s economic experts. Mr. Rybolt opines that Defendant’s economic experts are drawing economic conclusions when they should not, because there are too many unknown variables that could affect their economic forecasts. *See* Rybolt Rep. Section IV.B (describing Defense experts’ assumptions, unknown variables, and unconsidered factors). It is appropriate to opine, as an expert in damages and economic analysis (and rebuttal expert), that another expert cannot draw a conclusion based on unreasonable assumptions, and to explain that expert’s error. *See, e.g., Funderburk v. South Carolina Elec. & Gas Co.*, 395 F. Supp. 3d. 695, 720 (D.S.C. 2019) (rebuttal expert witness “may criticize other experts’ theories and calculations without offering alternatives”) (citation modified); *Huskey v. Ethicon, Inc.*, 29 F. Supp. 3d. 691, 711 (S.D.W. Va. 2014) (admitting report that “simply criticizes the methods [defendant’s] experts used to come to their conclusions”); *Pulse Medical Instruments, Inc. v. Drug Impairment Detection Servs., LLC*, 858 F. Supp. 2d 505, 511–12 (D. Md. 2012) (“[A qualified damages expert] is qualified to testify as to all issues relevant to damages in this case, which necessarily include rebuttal of [opposing party’s] damages expert.”).⁶ Using his knowledge of economic forecasting and his review of Plaintiffs’ actual past data, Mr. Rybolt explains that it was not reasonable for Defense experts Brod, Yount, and Tomic to reach the conclusions they present in their reports about future offsets. This opinion

⁶ Defendant has asserted this very principle elsewhere. *See, e.g.,* United States’ Opp. to PLG’s Mot. to Exclude Expert Dr. Michael McCabe, Jr. [D.E. 666] (“Rebuttal experts are permitted to criticize other experts.”).

is based on Mr. Rybolt's background, education, and training, as well as Plaintiffs' actual past VBA data.

As Defendant notes, "damages based on future consequences of an injury may be had only if such consequences are reasonably probable or reasonably certain." Mot. at 17 (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1160 (4th Cir. 1986)). Defendant argues that Mr. Rybolt's opinion is inadmissible because "Mr. Rybolt himself speculates that certain unknown events may occur in the future." Mot. at 17. Again, Defendant misses the point. Mr. Rybolt is not offering independent opinions about the likelihood of certain events to occur, but is opining on why Defendant's experts' opinions were based on faulty assumptions that render their conclusions speculative. Nor is Mr. Rybolt saying that future projections "would never be permitted." Mot. at 18. Rather, he explains why Defendant's experts' specific projections as to alleged future VBA offsets here fail to have a "reasonable basis." See *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559, 569 (D.S.C. 1986).

Using his expertise, Mr. Rybolt points to several specific facts that demonstrate why a reliable expert in damages and economic analysis would not make the assumptions Defendant's experts made in four separate categories. He opines that it was unreasonable for Defendant's experts to make assumptions ignoring the actual facts before them. Mr. Rybolt's opinion that Defendant's experts ignored the facts is not itself speculative, but rather based on extensive review and discussion of Plaintiffs' actual past data, which showed the very changes Defendant's experts assumed would never occur again. See Rybolt Rep. ¶¶ 45-59. Mr. Rybolt also relies on federal reports of trends in VA benefits programs. See *id.* ¶ 65. The weight the Court will assign to Mr. Rybolt's critique will be determined at trial, but it is a critique he is permitted to make, and indeed one the Fourth Circuit itself has recognized. See, e.g., *Trana Discovery, Inc. v.*

Southern Rsch. Inst., 915 F.3d 249, 255 (4th Cir. 2019) (“An expert must offer an opinion that fits the case at hand, not some other, hypothetical case, and a damages model that simply ignores key evidence veers into speculation.”).

A. Mr. Rybolt Appropriately Opines that Defendant’s Experts Made Unreasonable Assumptions About Plaintiffs’ Disability Ratings.

Mr. Rybolt opines that a reasonable expert in damages and economic analysis would not assume “that Plaintiffs’ disability ratings will never change.” Rybolt Rep. ¶ 43. As he explains, multiple Plaintiffs’ disability ratings *have* changed over time, both for Camp Lejeune-related disability ratings (*id.* ¶¶ 44-49) and for non-Camp Lejeune-related disability ratings (*id.* ¶¶ 50-59). He thus opines that Defendant’s experts’ blanket assumptions that Plaintiffs’ disability ratings and their medical conditions will never change are “unreasonable on their face and demonstrably incorrect.” *Id.* ¶ 43.

Contrary to Defendant’s argument, *see* Mot. at 19-21, Mr. Rybolt does not need to be an expert in disability ratings, or to determine whether any of the VBA Bellwether Plaintiffs’ disability ratings are likely to change, in order to explain why it was *unreasonable* for Defendant’s experts (who also are not experts in disability ratings) to make a blanket assumption that the ratings will never change. Mr. Rybolt identifies the basis for his opinion that Defendant’s experts made an unreasonable assumption, namely that VBA Data already demonstrates rating changes for the Plaintiffs in the past. *See, e.g., id.* ¶¶ 45-47, 53-58. It is *Defendant’s* burden to prove its offsets, and it is *Defendant’s* experts’ job to explain why it was reasonable to assume the ratings and the Plaintiffs’ medical conditions would not change again in making their offset calculations. Damages experts are routinely disqualified for improperly assuming circumstances will never change. *See, e.g., MyGallons LLC v. U.S. Bancorp*, 521 F. App’x 297, 306–07 (4th Cir. 2013) (holding it was error to admit expert whose damages projections “ignored business

realities and relied on sheer speculation,” including failing to account for “real circumstances”); *Perry v. Scruggs*, 17 Fed. App’x 81, 87 (4th Cir. 2001) (expert’s estimate of damages from lost business royalties was “impermissibly speculative” when assumptions included that business would continue for plaintiffs’ lifetime and that business would grow at a fixed rate).

It is important to note that Defendant’s own economic experts lack the same expertise that Defendant faults Mr. Rybolt for not possessing,⁷ and Defendant’s expert reports lack the same factual basis for which Defendant criticizes Mr. Rybolt. The critical difference is that Defendant has the burden to prove its asserted offsets, and Mr. Rybolt is merely a rebuttal expert to the opinions of Brod, Yount, and Totic. Thus, if Mr. Rybolt’s lack of familiarity with disability ratings determinations is a sufficient basis for excluding his rebuttal opinion, then the same would apply to Brod, Yount, and Totic. Similarly, if Mr. Rybolt’s failure to determine the likelihood of service-connected benefit changes and/or likelihood of medical developments is a sufficient basis for excluding his rebuttal opinion, then Brod, Yount, and Totic’s failure to make those same determinations would be fatal to their opinions on supposed future offsets.

Defendant also seeks to exclude Mr. Rybolt’s opinions on the basis that Mr. Rybolt offers his opinions “without any basis to conclude that such changes are reasonably likely to occur.” Mot. at 24. That is doubly wrong. First, Mr. Rybolt’s opinions that changes may occur in the future are not “without any basis,” they are based on his analysis of the facts in the present and the past. For example, Mr. Rybolt writes: “To test whether the disability ratings of Plaintiffs have changed over time, I reviewed data on Plaintiffs’ disability ratings and associated VBA disability

⁷ See [D.E. 865] at 12 (Plaintiffs’ motion to exclude certain testimony of Defendants’ experts Brod, Yount, and Totic, citing deposition testimony of each admitting they “lacked familiarity with the structure and operation of government payer programs, including how benefits were determined, how those programs function over time, and how projections would interact depending on which payer applied.”).

payments that have been produced in this litigation (the ‘VBA Data’). The VBA Data clearly indicate that a number of Plaintiffs have experienced changes in their Camp Lejeune-related disability ratings over time.” Rybolt Rep. ¶ 46. Mr. Rybolt then discusses several specific examples. *Id.* ¶¶ 46-48, 53-58. Mr. Rybolt also relies on government reports describing trends in benefit changes over time. *Id.* ¶¶ 52, 63-64.

Second, Mr. Rybolt is a rebuttal expert, and if he is found to have provided insufficient basis for his conclusion that changes are reasonably likely to occur, then the same holds true with respect to Brod, Yount, and Totic. As argued in Plaintiffs’ motion to exclude certain testimony of Defendants’ economic experts Brod, Yount, and Totic, none of them provided any basis for concluding that changes to the Plaintiffs’ disability benefits are likely *not* to occur, and Defendant is relying on Brod, Yount, and Totic’s opinions to prove offsets for which Defendant bears the burden of proof. *See generally* [D.E. 865] (memorandum of law supporting Plaintiffs’ motion to exclude certain opinions of Defendant’s economic experts). Neither Brod, Yount, nor Totic support their conclusion that no changes will occur—this is simply an assumption that is made without any of those experts having any expertise on the topic and without any citations to support the conclusion. Moreover, the assumptions made by Brod, Yount, and Totic that such changes are likely *not* to occur run contrary to the available evidence, whereas Mr. Rybolt’s opinions that changes are reasonably likely to occur rely directly upon the available evidence as the basis. Accordingly, the arguments the Defendant makes with respect to the bases for the exclusions of Mr. Rybolt actually support the opinion of Mr. Rybolt, which is that Brod, Yount,

and Tonic lack adequate foundation for the opinions they have rendered with respect to future VBA benefits.⁸

B. Mr. Rybolt Explains Why Defendant's Experts' Blanket Use of Life Expectancy Tables Was Unreasonable.

Mr. Rybolt also explains why Defendant's experts' assumptions about life expectancy are unreasonable for an expert in damages and economic analysis opining on future offsets: they did not follow the "common" practice in personal injury matters "to seek input from a medical expert rather than relying on general life expectancy tables." Rybolt Rep. ¶ 61; *cf. Boyle v. United States*, 948 F. Supp. 2d 577, 582 (D.S.C. 2012) (in court's findings of fact, relying on personal physician and expert witness, rather than life expectancy table, in determining plaintiff's life expectancy after kidney transplant); *Harris-Reese v. United States*, 615 F. Supp. 3d 336, 355 (D. Md. 2022) (in court's findings of fact, relying on expert assessment of life expectancy after plaintiff's brain injury). Instead, Defendant's experts used statistical life expectancy tables to calculate damages for *all* Plaintiffs, regardless of each Plaintiff's level of injury or disease. *Compare Mosley v. United States*, 538 F.2d 555, 557 (4th Cir. 1976) (affirming district court's determination of life expectancy based on "painstaking study" of health, physical

⁸ Defendant's Motion underscores its ongoing failure to grapple with the complexities of these offset calculations. Defendant references Mr. Rybolt's citation to "a Congressional Budget Office report which shows the trend since 2000 has been a steady increase in veterans who receive benefits as well as an increase in the amounts of benefits," Mot. at 24, implying that such an increase would mean Defendant's experts' offset calculations would not result in undercompensation of the plaintiffs. But it is undisputed that offsets are appropriate based only on the amount of benefits that are received due to the plaintiff's Camp Lejeune-related conditions, subtracting the amount that would be received for plaintiffs' unrelated conditions. If eligibility for benefits continues to expand, additional unrelated conditions could become eligible for disability ratings, therefore increasing the share of unrelated conditions within a given plaintiff's total ratings, thus reducing the share of that plaintiff's total benefits attributable only to Camp Lejeune-related conditions. *See* Rybolt Rep. ¶¶ 50-52. Defendant's failure to reconcile uncertainties like this, reflected in Defendant's experts' failure to do the same, is exactly what Mr. Rybolt criticizes.

condition, and character of employment). *This* is what Mr. Rybolt opines is unreasonable. Defendant points out that Mr. Rybolt has used life expectancy tables in other work, *see* Mot. at 22 n.9, but Mr. Rybolt’s point is about cases like the Track 1 Plaintiffs. Mr. Rybolt opines it is unreasonable to use such tables in a case like this, where the Plaintiffs have been diagnosed with “debilitating diseases” likely to “shorten the life expectancy of those so affected.” Rybolt Rep. ¶ 61. Even so, when asked directly about whether he believes Defendant’s experts’ use of life expectancy tables was “unreasonable and speculative”, Mr. Rybolt specified that “it’s the cumulative effect of the life expectancy used as well as the other criticisms that I offer[.]” Rybolt Dep. Tr. 205:23-206:16. Whatever its weight, this testimony is not inadmissible.

Defendant tries to contrast Mr. Rybolt’s opinions with Plaintiff’s expert Mr. Staller’s, but oversimplifies Mr. Staller’s testimony. Mr. Staller acknowledges that statistical life expectancy tables are often used in economic analysis—which Mr. Rybolt does not contest—but Defendant ignores that Mr. Staller himself *did not use statistical life expectancy* for all Plaintiffs in this case. For some plaintiffs, Mr. Staller assumed a reduced life expectancy because of the Plaintiffs’ medical conditions. *See* Staller Dep. Tr. at 126:4-16. As a responsible economist would, Mr. Staller relied on “other medical or medically trained experts” to estimate the correct life expectancy for particular Plaintiffs when calculating damages. *Id.* at 126:17-23. Mr. Staller further tailored his life expectancy estimates based on the category of damages he was calculating. For example, he used healthy-life expectancy to calculate damages for future lost household services, *see id.* at 128:20-130:7, and work-life expectancy for lost earning capacity, *see id.* at 136:13-137:1. He sometimes used statistical estimates for these expectancies, but adjusted those numbers when there was Plaintiff-specific information. *See id.* at 139:13-142:14 (describing adjusting work-life expectancy for one Plaintiff, and general role of plaintiffs’

intentions in future damages calculations). Mr. Staller's testimony supports Mr. Rybolt's point: Defendant's experts were insufficiently precise in rendering their future damages calculations, rendering their opinions speculative and likely to undercompensate Plaintiffs. Regardless, arguments about whether Mr. Rybolt's critique is correct or in what circumstances go to the weight of Mr. Rybolt's opinion, not its admissibility.

C. **Mr. Rybolt Appropriately Opines it Was Error for Defendant's Experts to Ignore the Interplay of Veterans' Retirement and VBA Disability Benefits.**

Once again, Defendant ignores the purpose of Mr. Rybolt's report, which is to explain why Defendant's experts' opinions are unreliable because they fail to account for critical factors in building their estimates. Mr. Rybolt does not purport to be an expert on VBA benefit programs or to calculate any Plaintiff's benefits. Defendant's offset experts also are not VBA benefit experts yet they *do* purport to calculate VBA benefits. In two paragraphs, Mr. Rybolt points out that some veterans cannot receive disability benefits *and* retirement benefits, so offsetting for both would be inaccurate. Rybolt Rep. ¶¶ 63-64. Mr. Rybolt makes this point because Defendant's experts fail to acknowledge any outside variables, including retirement benefits. Defendant now argues (without factual citation or support) that the VBA Bellwether Plaintiffs *do* qualify for both types of benefits. *See* Mot. at 23. The point, however, is that it is Defendant's burden to support their calculation of offsets, and its experts must make clear what outside variables were considered and how it was determined they did not apply—none of which is addressed in the expert reports of Brod, Yount, or Tasic, who simply assume no variables apply. This is an appropriate basis for Mr. Rybolt's rebuttal opinion, and any counter argument is for cross-examination, not a basis to exclude Mr. Rybolt's opinions.

D. Mr. Rybolt Describes Additional Factors that Render Defendant's Experts' Testimony Uncertain.

Finally, Mr. Rybolt points out that there are a variety of “additional uncertainties” that could affect future VBA disability benefits, for which Defendant’s experts failed to account. Rep. ¶ 65. As support for these uncertainties in future VBA disability benefits, Mr. Rybolt cites reports of the Congressional Budget Office, the U.S. Senate Committee on Veterans’ Affairs, the Veterans Healthcare Policy Institute, and other sources. *Id.* Defendant makes much of this single paragraph. Mr. Rybolt is not opining on what is *likely* to occur with regard to government benefits programs, but explaining why a reasonable expert in damages and economic analysis would not make future projections based on uncertain benefits. After all, Defendant’s *own* experts do not dispute that the future of veterans’ benefits programs are uncertain. *See* Plaintiffs’ Motion for Partial Summary Judgment Regarding Future Offsets [D.E. 861] at 10-17 (summarizing testimony from Defendant’s government agency experts). While the law may not require experts to account for *all* hypothetical possibilities, they must account for uncertainty where it exists. *See, e.g., MyGallons LLC*, 521 F. App’x at 307 (must account for “real circumstances”); *Perry*, 17 Fed. App’x. at 87 (unrealistic assumptions render damages estimate “impermissibly speculative”). Mr. Rybolt opines that Defendant’s experts failed to do so based on his expertise in economics and his extensive experience analyzing economic damages. His rebuttal opinion is admissible without Mr. Rybolt providing his own calculation or projection of offsets. It is not Plaintiffs’ or Mr. Rybolt’s burden to prove Defendant’s offsets.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant’s motion to exclude the opinions of Mr. Peter Rybolt [D.E. 858].

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