SO ORDERED.

SIGNED this 29th day of January, 2024.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In re Randolph Hospital, Inc. d/b/a Randolph Health, Debtor.	)	Case No. 20-10247
Louis E. Robichaux, IV, as Liquidation Trustee of Randolph Health Liquidation Trust, Plaintiff, v. The Moses H. Cone Memorial Hospital Operating Corporation d/b/a/ Cone Health, Moses Cone Physician Services, Inc. d/b/a Triad Hospitalists, and and American Healthcare Systems, LLC, Defendants.	)	Adv. Pro. No. 22-02002

ORDER
OVERRULING IN PART AND SUSTAINING IN PART OBJECTION TO EXPERT REPORTS

THIS ADVERSARY PROCEEDING is before the Court on the Objection to Admission and Consideration of Expert Reports (Docket No. 122, the "Objection") filed by Defendant The Moses H. Cone Memorial Hospital Operating Corporation d/b/a/ Cone Health ("Cone Health"). Cone Health asserts that the Report and

Rebuttal Report submitted by the Plaintiff's expert, Cheryl Waltko, (Pl.'s Exs. 13, 14, collectively the "Reports"), fail to satisfy the reliability and relevancy requirements of Federal Rules of Evidence 401 and 702 and should be excluded from consideration on summary judgment. As discussed in more detail below, the Court finds that Waltko qualifies as an expert, reliably applies her experience to the facts of the case, and remains mostly within the confines of acceptable expert testimony. The Court will thus sustain in part and overrule in part Cone Health's Objection to Waltko's proffered Reports and testimony.

JURISDICTION AND AUTHORITY

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334. Under 28 U.S.C. § 157(a) and Local Civil Rule 83.11, the United States District Court for the Middle District of North Carolina has referred this proceeding to this Court and venue of this proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The parties expressly consented to bankruptcy court adjudication of matters in this adversary proceeding (Docket No. 43) and this Court has constitutional authority to enter final judgment. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 674-82 (2015).

BACKGROUND

On February 8, 2022, Louis E. Robichaux, IV, in his capacity as the Liquidation Trustee for Randolph Health Liquidation Trust, initiated this adversary proceeding by filing a complaint against Cone Health, Moses Cone Physician Services, Inc. d/b/a Triad Hospitalists ("MCPS"), and American

Healthcare Systems, LLC ("AHS"), (Docket No. 1), asserting various claims. In accordance with the Court's scheduling order, the Plaintiff filed his Rule 26(a)(2) expert disclosures, listing Cheryl Waltko and Stephen Darr as expected expert witnesses; after several Court-approved modifications to the scheduling order, Cone Health and MCPS filed their own disclosures, listing Keith Pinkerton and Robert Burleigh as experts. (Docket Nos. 79, 88). After discovery closed, both the Plaintiff and Cone Health moved for partial summary judgment on the Plaintiff's claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) unfair and deceptive trade practices. (Docket Nos. 112, 113, 115).

Cone Health also filed the Objection arguing that Waltko's Reports are inherently inconsistent, provide no factual context by which to judge performance under the Management Services Agreement (Pl.'s Ex. 6, the "MSA"), impermissibly construe the legal effect of the MSA, offer legal opinions on whether the Defendant breached certain provisions, and are based upon unspecified and unrelated personal experiences. (Docket No. 122, pp. 2, 8-13). In his response, the Plaintiff maintains that Waltko has a reliable basis for the opinions expressed in the Reports and that the Reports are helpful to the trier of fact and relevant to claims that Cone Health did not adequately perform consistent with the industry standards as required under the MSA. (Docket No. 132, pp. 2-3).

The Court held a hearing on October 5, 2023, on the cross-motions for partial summary judgment and Cone Health's Objection at which Jody Bedenbaugh and Rebecca Redwine appeared on behalf of the Plaintiff and Kelly Cameron, Jennifer

Lyday, and John Van Swearingen appeared on behalf of Cone Health. At the conclusion of that hearing, the Court considered all pending matters to be fully submitted.

BURDEN OF PROOF

Federal Rule of Evidence 702[1] governs the admissibility of expert evidence, providing that such evidence is admissible if it "rests on a reliable foundation and is relevant to the task at hand." *Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)). The rule specifically provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702 (2023).

Although the Supreme Court has provided a non-exhaustive list of guideposts to consider in determining reliability, *see Daubert*, 509 U.S. at 593-94, "this list 'neither necessarily nor exclusively applies to all experts or in every case,' as the relevance of some factors can depend 'on the nature of the issue, the expert's

[1] The Federal Rules of Evidence are made applicable to this case under Federal Rule of Bankruptcy Procedure 9017. Federal Rule of Civil Procedure 56 is made applicable to this case under Federal Rule of Bankruptcy Procedure 7056.

particular expertise, and the subject of his testimony.'" *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 150 (1999)); *see also White v. City of Greensboro*, 586 F. Supp. 3d 466, 478 (M.D.N.C. 2022). Trial courts, therefore, have "'broad latitude' to determine whether these factors are 'reasonable measures of reliability in a particular case.'" *Nease*, 848 F.3d at 229 (quoting *Kumho Tire*, 526 U.S. at 153)).

Courts routinely consider expert testimony and reports at the summary judgment stage and, upon proper motion or objection, must conduct the same reliability and helpfulness analysis mandated by Federal Rule of Evidence 702 for determining the admissibility of proffered expert evidence. *See Mod. Auto. Network, LLC v. E. All. Ins. Co.*, 416 F. Supp. 3d 529, 536-37 (M.D.N.C. 2019); *Blackjewel, L.L.C. v. United Bank*, 643 B.R. 128, 132-33 (Bankr. S.D.W. Va. 2022); 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.05(4) (2022). "The trial court's analysis under the standards listed in Rule 702 must focus on the admissibility of the proffered testimony, not its correctness." 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.05(2)(a). "[T]he proponent of expert testimony does not have the burden to 'prove' anything, but 'must come forward with evidence from which the court can determine that the proffered testimony is properly admissible.'" *Pugh v. Louisville Ladder, Inc.*, 361 Fed. Appx. 448, 452-53 (4th Cir. 2010) (quoting *Md. Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780, 783 (4th Cir. 1998).

Although the Court must perform its gatekeeping role under Rule 702, "ensur[ing] that the expert is qualified and that the expert's testimony is both

relevant and reliable," the Court "is not intended to serve as a replacement for the adversary system, and consequently, the rejection of expert testimony is the exception rather than the rule." *United States v. Smith*, 919 F.3d 825, 835 (4th Cir. 2019) (internal citation omitted). The concerns regarding expert evidence cited by *Daubert* and its progeny, particularly an expert's power to persuade and potentially mislead a jury, s*ee Sardis*, 10 F.4th at 283, are greatly diminished in a bench trial where the judge acts as both gatekeeper and factfinder. *See, e.g.*, *United States v. Wood*, 741 F.3d 417, 425 (4th Cir. 2013) (quoting *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005)) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."). In bench trials, where the Court itself is the trier of facts, there is no pressing need "to protect juries from being swayed by dubious scientific testimony," *United States v. McDaniel*, 925 F.3d 381, 385 (8th Cir. 2019) (quoting *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011)), and, therefore, the Court's gatekeeping function under *Daubert* and Rule 702 is "relaxed." *Wood*, 741 F.3d at 425.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Cone Health's multi-pronged argument for excluding the Reports can be distilled down to four points: (1) Waltko's opinions are not relevant or helpful to the claims at issue; (2) Waltko lacks the requisite experience to form a relevant opinion for this proceeding; (3) Waltko offers legal conclusions regarding Cone Health's non-performance of its obligations under the MSA; and (4) Waltko's opinions regarding

Cone Health's performance relative to industry standards have no basis and are not reasonably connected to her experience.[2] The Court considers each in turn.

A. Relevance and Helpfulness

Cone Health first challenges the relevance of Waltko's opinions to the claims at issue on summary judgment, arguing that the Reports "provide no factual context by which to judge Cone Health's performance under the MSA as written, instead musing frequently about unwritten or alternative obligations for which neither party contracted … based on nebulous industry standards, citing only to Ms. Waltko's personal experience and opinions." Cone Health requests that the Court exclude the Reports as they "do not relate to the issues before the Court and fail to explain or clarify facts material to Plaintiff's claims[.]" (Docket No. 122, pp. 8-9).

"Whether testimony 'assist[s] the trier of fact' is the 'touchstone' of Rule 702." *United States v. Campbell*, 963 F.3d 309, 314 (4th Cir. 2020) (quoting *Friendship Heights Assocs. v. Vlastimil Koubek, A.I.A.*, 785 F.2d 1154, 1159 (4th Cir. 1986)). In the Fourth Circuit, there is a presumption of helpfulness "unless it concerns matters within the everyday knowledge and experience of a lay juror" and, if "the proposed testimony will recount or employ 'scientific, technical, or other specialized knowledge,' it is a proper subject" for expert testimony. *Kopf v. Skyrm*, 993 F.2d 374, 377 (4th Cir. 1993).

The Plaintiff's breach of contract claim contains allegations that Cone Health failed to fulfill certain of its duties under the MSA or deficiently performed required

[2] In the interest of clarity, the Court will depart from the organizational scheme employed by Cone Health in its Objection and adopt its own.

services. At the center of the parties' dispute is Section 3, which describes the manner in which Cone Health was to perform its duties under the MSA:

> 3. Management Services. – Cone Health *shall perform its duties under this Agreement consistent with the standards of the healthcare industry for an independent management company contracting on an arm's length basis to provide comprehensive management services to a hospital and healthcare system of the size and capabilities of Randolph*. Cone Health shall manage Randolph in a manner that assists Randolph in fulfilling its policies relating to charitable care and community benefit. Cone Health shall provide a full range of day-to-day operational and administrative management services for Randolph, including the following:

(Pl.'s Ex. 6, § 3) (emphasis added). Section 3 then lists 16 services (enumerated as subsections (a) – (p)) that Cone Health was to provide under the MSA.

Section 3 contains a defined performance standard, agreed upon by the parties, governing how Cone Health was to provide the listed services. In considering the Plaintiff's claim for breach of contract, the Court must not only assess whether Cone Health completed the duties required of it under the MSA but also whether its performance in doing so met the defined standard. The Court finds, as more thoroughly discussed in the Memorandum Opinion on the parties' cross-motions for partial summary judgment (Docket No. 137), that the standard is ambiguous; other than the oblique reference to "an independent management company contracting on an arm's length basis," there are no cross-references, sub-definitions, or other means to discern what the specific healthcare standard is for each management service that Cone Health was to provide under the MSA. Therefore, the meaning of the performance standard is a question of fact and additional parol evidence may be introduced to show the intent of the parties.

Galloway v. Snell, 885 S.E.2d 834, 836 (N.C. 2023). Moreover, "if technical terms are used in a contract, expert testimony is admissible to explain the meaning of such terms as an aid in interpreting the instrument." *Smith v. Childs*, 437 S.E.2d 500, 506-507 (N.C. Ct. App. 1993) (citing *Stewart v. Raleigh & A. Air Line R. Co.*, 53 S.E. 877, 880 (N.C. 1906)).[3]

The Court finds Waltko's Reports and her proposed expert testimony at trial to be relevant under Rules 401 and 402 and helpful for purposes of Rule 702. Waltko describes, based on her experience, the healthcare industry standard for services listed in Section 3; she also examined emails, deposition transcripts, and other documentary evidence to evaluate whether Cone Health's performance would satisfy that performance standard. (Pl.'s Ex. 13). Because it incorporates broader industry practices within the complex, specialized world of hospital management

[3] Based on these conclusions, the Court may dispense with Cone Health's argument that "the Reports contain contradictory reasoning and circular conclusions." (Docket No. 122, pp. 12-13). While it remains true that "[c]ontradictory expert testimony may be excluded due to a lack of reliability[,]" *Mod. Auto. Network, LLC v. E. All. Ins. Co.*, 416 F. Supp. 3d 529, 539 (M.D.N.C. 2019) (internal citations omitted), the only basis cited by Cone Health for its position is Waltko's agreement that the MSA "speaks for itself," (Pl.'s Ex. 14, p. 2-3), which Cone Health asserts is in direct conflict with her position on the MSA's performance standard. The Court sees no logical inconsistency because, as explained above, the express language of Section 3 of the MSA requires that "Cone Health shall perform its duties under this Agreement consistent with the standards of the healthcare industry for an independent management company contracting on an arm's length basis to provide comprehensive management services to a hospital and healthcare system of the size and capabilities of Randolph." (Pl.'s Ex. 6, § 3). As Waltko explained, "the MSA itself establishes that Cone's responsibilities under the MSA should be in accordance with industry standards." (Pl.'s Ex. 14, p. 2). Waltko's valid position in her Reports – without an opportunity for further clarification through deposition or trial testimony – that the MSA, *including* its expressly included performance standard, "speaks for itself" stands in contrast to cases where experts' reports directly conflicted with their deposition or past trial testimony. *See, e.g.*, *Mod. Auto. Network*, 416 F. Supp. at 539 (finding expert's conclusions in report were inconsistent with his deposition testimony); *Tyree v. Bos. Sci. Corp.*, 54 F. Supp. 3d 501, 545-46 (S.D.W. Va. 2014) (finding expert's prior testimony "is at odds" with his expert report and deposition in the present case). Accordingly, the Court overrules this aspect of Cone Health's Objection.

service agreements, the Court finds Waltko's proffered evidence will be helpful in discerning the meaning and application of the MSA performance standard.[4]

B. Waltko's Qualifications

In performing its gatekeeping role, this Court must "decide whether the expert has 'sufficient specialized knowledge to assist the jurors in deciding particular issues in the case.'" *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 162 (4th Cir. 2012) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,156 (1999)). "A witness' qualifications to render an expert opinion are liberally judged by Rule 702," *United States v. Muro*, 784 F. App'x 160, 162 (4th Cir. 2019) (quoting *Kopf v. Skyrm*, 993 F.2d 374, 377 (4th Cir. 1993)), and a witness may qualify as an expert in a particular field through any one or more of the five bases enumerated in Rule 702—knowledge, skill, experience, training, or education. *Eskridge v. Pac. Cycle, Inc.*, 556 F. App'x 182, 190 (4th Cir. 2014) (citing *Garrett v. Desa Indus., Inc.*, 705 F.2d 721, 724 (4th Cir. 1983)).

Cone Health contends that Waltko "lacks relevant experience with the circumstances presented in this proceeding," arguing that her occupations and roles within the healthcare system "are unrelated to hospital system management."

[4] Although the Court finds the bulk of Waltko's Reports and proposed testimony to be relevant and helpful to understanding the MSA performance standard, certain of her opinions deviate from that purpose and are subject to exclusion under Rules 401 and 702. For instance, Waltko, at times, offers opinions on Cone Health's alleged efforts to recruit physicians, its so-called "go it alone" strategy, and its purported conflicts of interest without any nexus to the performance standard or the industry guidelines or practices contained therein. (Pl.'s Ex. 13, pp. 11-12). In these instances, the Reports do not satisfactorily connect these alleged actions to the performance standard or explain the extent to which it has any bearing on determining Cone Health's compliance with that standard. The Court will therefore exclude those statements in the Reports from consideration on summary judgment and reserve the issue of whether, and to what extent, Waltko may be permitted to testify at trial to issues regarding physician recruitment, the "go it alone" strategy, and conflicts of interest.

(Docket No. 122, pp. 10-11). Yet, Waltko has "over 40 years of experience in executive and senior management positions in the healthcare industry, with an extensive history of evaluating and improving operations, as well as managing single and multi-specialty groups." (Pl.'s Ex. 13, p. 2). Waltko also founded and served as CEO of a company that provided "turn-around services to distressed healthcare systems" and "interim management and practice management services through their management service agreements with rural hospitals through the United States." *Id.*

Although Waltko may not fit Cone Health's narrowly tailored definition of a qualified expert, "witnesses need not have complete knowledge about the relevant field of specialized information to be of help to the trier of fact and thus qualified to testify as experts under Rule 702." 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.04(5) (2023). "An imperfect fit between the expert's knowledge and experience and the issues before the court impacts the weight given to the expert's testimony, not its admissibility." *Blackjewel, L.L.C. v. United Bank*, 643 B.R. 128, 134 (Bankr. S.D.W. Va. 2022) (quoting *Benedict v. Hankook Tire Co.*, 290 F. Supp. 3d 488, 497 (E.D. Va. 2018)). Because a lack of detailed expertise affects the credibility of the expert witness's testimony and not its admissibility, *see* 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.04(5) (2023), "the proper method to challenge an expert's testimony surrounding areas sufficiently related to, but still outside, an expert's main area of expertise is through cross-examination [sic]." *In re Laurel Valley Oil Co.*, No. 05-64330, 2015 WL 4555579, at *5 (Bankr. N.D. Ohio July 28, 2015).

The Court finds that Waltko has the experience and knowledge necessary to testify as to the healthcare industry practices and norms that may be encompassed within the MSA's performance standard.

C. Legal Conclusions

Cone Health further asserts that Waltko impermissibly determines the legal effect of the MSA and whether Cone Health breached certain of its provisions. (Docket No. 122, p. 9). The Plaintiff, however, counters that Waltko's Reports do not offer opinions regarding the law or legal effect of the MSA, but instead use non-legal verbiage to assess whether Cone Health sufficiently met the healthcare industry standard for nine of the services listed in Section 3. (Docket No. 132, pp. 7-8).

The Defendant is correct that "[e]xperts may not opine on issues that are committed exclusively to the trier of fact." 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.03(3) (2023). This view is supported by the Fourth Circuit Court of Appeals, which has held that "it does not help the jury for an expert to give testimony that states a legal standard or draws a legal conclusion by applying law to the facts, because it supplies the jury with no information other than the witness's view of how the verdict should read." *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011) (internal citations omitted). This general view has been extended to the specific field of contract interpretation, which is "generally for the trier of fact to decide" and is "not an appropriate subject for expert testimony." 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.03(3) (2023). "[W]hether a party breached a contract, as well as the proper interpretation of a contract, are 'question[s] of law,' and an expert

cannot give an opinion as to the legal obligations of parties under a contract." *Donnert v. Feld Ent., Inc.*, No. 1:13CV40, 2013 WL 12097618, at *3 (E.D. Va. Nov. 8, 2013) (quoting *Forrest Creek Assocs., Ltd. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1242 (4th Cir. 1987)).

In some circumstances, particularly those involving specialized industries, "opinion testimony that arguably states a legal conclusion is helpful to the jury, and thus, admissible." *United States v. Barile*, 286 F.3d 749, 760 n.7 (4th Cir. 2002) (citing 4 WEINSTEIN'S FEDERAL EVIDENCE § 704.04(2) (2001)). Within the context of a breach of contract claim, courts "may allow an expert to testify regarding industry custom and usage when such explanation would be helpful to the jury." *Carlisle v. Allianz Life Ins. Co. of N. Am.*, No. 2:19CV565, 2021 WL 5104703, at *7 (E.D. Va. Sept. 13, 2021) (collecting cases); *see also Kona Tech Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 611 (5th Cir. 2000) (affirming district court's use of expert testimony to construe specific contractual term with technical meaning used in the industry).

The majority of Waltko's Reports and proposed testimony speak to the MSA performance standard and how Cone Health's actions aligned with or fell short of that benchmark, which is firmly within the realm of acceptable expert testimony.[5] In several instances, however, Waltko strays beyond the scope of her expertise on industry standards and too far afield of permissible expert opinion, instead

[5] By way of example, in discussing Section 3(b) of the MSA regarding corporate managerial resources, Waltko opines that, "I believe a minimum level of corporate managerial resources should have been provided without a separate, express request in order to provide management which is consistent with industry standard." (Pl.'s Ex. 13, p. 13).

employing language and offering opinions on the "purpose" of the MSA, Cone Health's ultimate responsibilities under the agreement – without any reference to the performance standard – as well as its "blatant mismanagement."[6] Although the boundary between permissible ultimate-issue testimony and impermissible legal conclusions can be difficult to discern, Waltko, at times, "cross[es] the line … and invades the province of the court by instructing the jury as to the meaning of a contract." *E. Claiborne Robins Co. v. Teva Pharm. Indus., Ltd*, No. 3:18CV827 (DJN), 2022 WL 3710758, at *3 (E.D. Va. Feb. 23, 2022) (quoting *Elorac, Inc. v. Sanofi-Aventis Can., Inc.*, No. 14C1859, 2017 WL 3592775, at *24 (N.D. Ill. Aug. 21, 2017)).

Given these findings, the Court will overrule this aspect of Cone Health's Objection and consider Waltko's opinions and testimony regarding healthcare industry standards that may be encapsulated within the MSA performance standard of Section 3. But the Court will strike and disregard any expert testimony

[6] Although attempting to speak in generalities, Waltko's opinions and conclusions on Cone Health's duties under the MSA venture too close to legal conclusions in several instances. For example, in discussing Cone Health's obligations under Section 3(a), Waltko flatly states that, "Similar to any Cone employee, the Key Personnel were hired, salaried, and directed by Cone and were therefore a representation of Cone itself." (Pl.'s Ex. 13, p. 6). Waltko also offers blunt overall assessments of Cone Health's performance under the MSA, without any clear tie-in to the performance standard. For instance, Waltko remarks in her Rebuttal Report that "relying on its existing controller as an interim CFO and not hiring a competent CFO and strategic leader was one of many mistakes and marks of Cone's blatant mismanagement preceding Randolph's ultimate failure." (Pl.'s Ex. 14, p. 5). Waltko also opines on the broader purpose of the MSA, writing that "the crux and fundamental purpose of the MSA was for Cone Health to provide a thorough level of 'comprehensive management services' to Randolph …" (Pl.'s Ex. 14, p. 5).

or opinions as to Cone Health's legal responsibilities under the MSA or its alleged breaches of the agreement.[7]

D. Reliable Application of Principles and Methods

Cone Health further asserts that the Reports are unreliable under Rule 702, arguing that Waltko "makes no attempt to explain how her experiences across the healthcare industry … form a defensible reliable basis for her opinions." (Docket No. 122, p. 11). Cone Health also takes the position that "there are no actual 'industry standards' cited or relied on in the Reports." *Id.*

"Experience alone – or experience in conjunction with other knowledge, skill, training or education – may provide a sufficient foundation for expert testimony," *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007), and "[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." Fed. R. Evid. 702, advisory committee's note to 2000 amendment. "[E]xperiential expert testimony is noticeably less 'testable' than testimony based on pure science," *United States v. White*, 519 F. App'x 797, 808 (4th Cir. 2013) and there are "meaningful differences in how reliability must be examined with respect to expert testimony that is primarily experiential in nature as opposed to scientific."

[7] The Court would similarly apply this finding and approach to the report and proposed testimony of Cone Health's expert, Robert Burleigh. As to the opinions expressed in his report (Burleigh Dep., Ex. 3), Burleigh conceded that he was not offering any opinion on industry practices and merely expressing his view as to whether Cone Health fulfilled its duties under the MSA:

> Q: So are you not providing opinions – expert opinions on what industry standards are? Is that not what you have been retained to do?
> A: I offered opinions. I have not applied any standards because there are none to apply.
> Q: So are you simply interpreting this contract, reading the provisions and giving your opinion on whether those terms have been violated or not?
> A: That's – that was the essence of my engagement.

(Burleigh Dep., p. 84:3-13).

Wilson, 484 F.3d at 274. Purely scientific testimony "is objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication," but experiential expert testimony "does not rely on anything like a scientific method." *Id.* at 274 (quoting Fed. R. Evid. 702, advisory committee's note to 2000 amendment); *see also Mod. Auto. Network, LLC v. E. All. Ins. Co.*, 416 F. Supp.3d 529, 537 (M.D.N.C. 2019). Although a trial court's task in examining the reliability of experiential expert testimony is "somewhat more opaque," it must "require an experiential witness to 'explain how [his] experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts.'" *Wilson*, 484 F.3d at 274 (quoting Fed. R. Evid. 702 advisory committee's note).

In line with this guidance, the Court finds that Waltko's opinions are sufficiently reliable for purposes of Rule 702. "Where no recognized authoritative published industry standards or other authority apparently exist," experts' opinions based on experience in the industry are a "reliable methodology" for determining whether practices are consistent with industry standards. *United States v. Dish Network LLC*, No. 09-3073, 2016 WL 157387, at *4 (C.D. Ill. Jan. 1, 2016). Waltko bases her opinions on not only her 40-plus years of experience in executive and senior management positions in the healthcare industry, but also on widely known industry standards[8] that are "often relied upon in creating and implementing a

[8] Waltko specifically cites to standards promulgated by the Medicare Conditions of Participation and Standards for Hospitals, 42 CFR § 482, the Healthcare Standards Institute, the Healthcare Financial Management Association, the American Hospital Association, and The Joint Commission Standards. (Pl.'s Ex. 14, p. 2).

management services agreement, among other purposes." (Pl.'s Ex. 14, p. 2; Pl.'s Ex. 13, p. 2). Waltko's experience in healthcare management – particularly her work providing turn-around services to distressed healthcare systems – is a sufficiently reliable basis for forming opinions on the MSA's performance standard. Waltko's opinions, therefore, are not "'guesses pulled from thin air,' but are instead valid expert testimony." *In re Laurel Valley Oil Co.*, No. 05-64330, 2015 WL 4555579, at *4 (Bankr. N.D. Ohio July 28, 2015) (citing *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 390-92 (6th Cir. 2000)). Any disputes Cone Health may have as to the lack of textual support for Waltko's opinions on healthcare industry standards "go to the weight, not the admissibility, of [her] testimony." *Spearman Corp. Marysville Div. v. Boeing Co.*, No. C20-13RSM, 2022 WL 6751797, at *4 (W.D. Wash. Oct. 11, 2022); *see also Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, No. 11CV6201 DLC, 2015 WL 930276, at *4 (S.D.N.Y. Jan. 29, 2015) (finding defendants' arguments that no industry standards exist and that "no published work has ever contained" those standards "are properly considered at trial in assessing the weight that should be accorded [the expert's] testimony.").

Cone Health also asserts that Waltko "speculates about the existence of facts not in (or contradicted by) the record." (Docket No. 122, p. 12). Under Federal Rule of Evidence 703, "[a]n expert may base on opinion on facts or data in the case that the expert has been made aware of or personally observed." An expert witness "need not attend the trial or hearing to obtain information concerning the testimony of other witnesses[,]" but may also "review transcripts of the testimony, summaries of

the trial record, or deposition transcripts instead." 4 WEINSTEIN'S FEDERAL EVIDENCE § 703.02 (2023). As evidenced by the numerous footnotes and citations throughout the Reports, Waltko bases her opinions on the depositions, board minutes, and other documentary evidence found in the record. Although Waltko, like many experts, often employs assumptions in her analysis, "disagreement among experts as to the appropriateness of an assumption does not render an expert opinion inadmissible, but instead goes to the weight given the expert's testimony." *In re Laurel Valley Oil Co.*, 2015 WL 4555579, at *4 (internal citations omitted). The Court, therefore, finds that Waltko has sufficiently rooted her opinions in the record and Cone Health is free to challenge her assumptions on cross-examination at trial.

CONCLUSION

Based on the foregoing analysis and reasoning, IT IS HEREBY ORDERED that Cone Health's Objection to Admission and Consideration of Expert Reports (Docket No. 122) is OVERRULED IN PART AND SUSTAINED IN PART as follows:

1. Cheryl Waltko's opinions and testimony, both in the Reports and at trial, are excluded to the extent that they involve conclusions as to Cone Health's legal responsibilities under the MSA or its alleged breaches of the agreement;
2. Cone Health's Objection is overruled in all other respects; and
3. The Court reserves judgment to limit the scope of Cheryl Waltko and Robert Burleigh's testimony, if necessary, at trial.

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