**SO ORDERED.**

**SIGNED this 17th day of May, 2024.**

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

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**UNITED STATES BANKRUPTCY COURT**
**MIDDLE DISTRICT OF NORTH CAROLINA**
**GREENSBORO DIVISION**

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

**ORDER**
**GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION IN LIMINE**

THIS ADVERSARY PROCEEDING is before the Court on the Motion in Limine Regarding Damages and the Memorandum in Support (Docket Nos. 158, 159, collectively the "Motion") filed by the Defendants, The Moses H. Cone Memorial Hospital Operating Corporation d/b/a/ Cone Health ("Cone Health") and Moses Cone Physician Services, Inc. d/b/a Triad Hospitalists ("MSPS") (collectively,

the "Defendants"). The Court held a final pretrial conference on May 13, 2024, at which time the parties indicated that they did not require an evidentiary hearing on the Motion and would stand on the papers already submitted.

The Defendants seek to preclude the Plaintiff from presenting evidence and expert testimony of damages at trial that were allegedly undisclosed or deficiently supplemented in violation of Federal Rules of Civil Procedure 26(a) and (e). They also contend that the Plaintiff's expert testimony and evidence from Stephen B. Darr is founded upon a basis that does not adhere to the law of case and is therefore not relevant or helpful the trier of fact under Federal Rules of Evidence 401, 402, and 702.[1] The Defendants, therefore, request that the Court issue an order (1) finding Plaintiff's Exhibit Numbers 56 and 58 (Expert Report and Response of Stephen B. Darr) inadmissible at trial, (2) precluding Darr from testifying at trial, and (3) foreclosing the Plaintiff from arguing at trial—and presenting evidence in support—that the Plaintiff suffered damages related to loss of enterprise value, loss of physician referrals and procedures, and the amount of fees incurred by Ankura Consulting Group, LLC ("Ankura") for completing duties under the Management Services Agreement (the "MSA") that Cone Health failed to perform.

The Plaintiff, Louis E. Robichaux, IV, in his capacity as the Liquidation Trustee for Randolph Health Liquidation Trust, filed an objection to the Motion (Docket No. 160, the "Objection"), arguing that Darr's Reports are relevant and helpful to the trier of fact, the Defendants misinterpret and misapply the law of the

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[1] The Defendants do not contest the methodology Darr used in his expert testimony or the application of the methodology to the facts.

case, and the Plaintiff has otherwise complied with its disclosure requirements under Rule 26.

The Court assumes the reader's familiarity with the factual background and procedural history of this adversary proceeding and the underlying bankruptcy case.[2]

## 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).

## DISCUSSION

### 1. Motion to Exclude Reports and Testimony of Stephen B. Darr

The Defendants first assert that the reports and testimony of Stephen B. Darr are not relevant to the question of damages, would not assist the trier of fact, and should be excluded from the trial under Federal Rules of Evidence 401, 402, and 702. The "standard for relevance is a liberal one," *Daubert v. Merrell Dow*

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[2] The Court incorporates the comprehensive statement of facts included in the January 29, 2024 summary judgment memorandum (Docket No. 137) and will recite additional relevant facts as needed.

*Pharms., Inc.*, 509 U.S. 579, 587 (1993), and encompasses any evidence which "has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." Fed. R. Evid. 401(a)-(b). For its part, Rule 702 provides, in relevant part, that a witness qualified as an expert may testify in the form of an opinion or otherwise if "it is more likely than not that …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." Fed. R. Evid. 702(a).[3] "Whether testimony assists the trier of fact is the 'touchstone' of Rule 702[,]" *United States v. Campbell*, 963 F.3d 309, 314 (4th Cir. 2020) (internal quotation omitted), and in the Fourth Circuit, there is a presumption of helpfulness "unless it concerns matters within the everyday knowledge and experience of a lay juror[.]" *Kopf v. Skyrm*, 993 F.2d 374, 377 (4th Cir. 1993).

Darr's reports and testimony are, in large part, focused on Randolph Health's loss of enterprise value stemming from the Defendants' alleged breaches of the MSA. Specifically, Darr measures and considers Randolph Health's changing enterprise value over time, which is a subject not "within the everyday knowledge and experience of a lay juror" and which would be appropriate for expert testimony. *Kopf*, 993 F.2d at 377. The Defendants, however, contend that this prospective evidence is "founded upon a basis that is in direct conflict with the law of the case," and is therefore irrelevant and unhelpful. The Defendants assert that the Darr's

[3] The Court notes that Fed. R. Evid. 702 was amended on December 1, 2023 "to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

testimony and reports fail to tie the Plaintiff's alleged damages to any specific breach of the MSA, which the Defendants maintain is out of step with this Court's findings as to the scope of Cone Health's duties under the MSA. (Docket No. 159, p. 12).

It is true that, in its summary judgment memorandum, the Court found that the Cone Health's duties under the MSA "are those enumerated services listed in subsections (a) through (p) [of Section 3]." (Docket No. 137, p. 20). Still, the Plaintiff originally alleged breaches of twelve of the sixteen services, with ten now proceeding to trial after surviving Cone Health's motion for summary judgment. (Docket No. 138). Accordingly, there are numerous potential breaches remaining at issue, with potential damages flowing from each. There are also genuine issues of material fact that exist as to what the MSA's performance standard is for each of the services and there is a possibility of overlapping damages between several of the alleged breaches.

Given the procedural posture and the claims at issue, it is neither feasible nor necessary for Darr to tie the Plaintiff's alleged damages to specific breaches of the MSA. The Defendants point to no authority for such a requirement and at least one court has specifically rejected that argument. In *Audi of Am., Inc. v. Bronsberg & Hughes Pontiac, Inc.*, No. 3:16-CV-2470, 2018 WL 11229469 (M.D. Pa. Apr. 24, 2018), the District Court for the Middle District of Pennsylvania denied the plaintiff's motion to exclude expert opinions on the basis that they did not tie damages to specific breaches. The court found that Rule 702 "does not require an

expert to specifically tie each calculation of damages to a particular alleged legal breach." *Id.* at *4. The court concluded that because Rule 702 "does not have an additional requirement that the expert to [sic] precisely identify each legal breach and its causation of damages," the issue is best left "for the attorneys to argue and for the jury to determine." *Id.* The Court agrees with this reasoning, noting that the Defendants are free, through cross examination or their rebuttal expert, to present their own measure of damages, or to cast doubt on the substance of Darr's report or the credibility of his testimony.

Because it will assist the Court in understanding the complex analysis around a hospital's changing enterprise value over time, the Court finds Darr's Reports and his proposed expert testimony at trial to be relevant under Rules 401 and 402 and helpful for purposes of Rule 702. The Court, therefore, will deny this aspect of the Motion.

2. Motion to Exclude Damages Evidence

The Defendants further contend that the Plaintiff never disclosed or supplemented his damages computation for loss of enterprise value, Ankura fees for performing MSA duties, and lost referrals as required under Federal Rule of Civil Procedure 26(a)(1)(A)(iii) and (e), that this failure was neither harmless nor substantially justified, and that the sanction of exclusion is warranted.

Federal Rule of Civil Procedure 26(a)(1)(A)(iii) requires a party to disclose to its opposing party "a computation of each category of damages claimed by the disclosing party—who must also make available . . . the documents or other

evidentiary material . . . on which each computation is based, including materials bearing on the nature and extent of injuries suffered." Subsection (e) of the same rule requires a party to "supplement or correct its [Rule 26(a)] disclosure or response … in a timely manner if the party learns that in some material respect the disclosure or response is inaccurate or incorrect." Fed. R. Civ. Proc. 26(e). And "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence … at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

The purpose of Rule 26(a) is to allow litigants "to adequately prepare their cases for trial and to avoid unfair surprise." *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 190 (4th Cir. 2017) (quoting *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396 (4th Cir. 2014)). A litigant's Rule 26(a)(1)(A)(iii) damages computation "must be more than a lump sum figure or disclosure of financial documents," and instead "must state the types of damages that the party seeks, must contain a specific computation of each category, and must include documents to support the computations." *Intercollegiate Women's Lacrosse Coaches Ass'n v. Corrigan Sports Enterprises, Inc.*, No. 1:20-CV-425, 2023 WL 6800328, at *1 (M.D.N.C. Oct. 12, 2023) (quoting *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5:07CV275, 2012 WL 1596722, at *1 (E.D.N.C. May 7, 2012)). "The level of specificity required varies depending on the stage of the litigation and the claims at issue[,]" *Eisen v. Day*, No. 21-CV-05349-VKD, 2024 WL 1244482, at *1 (N.D. Cal. Mar. 21, 2024), but at its

essence, the computations requirement under Rule 26(a)(1)(A)(iii) "contemplates *some* analysis" and is designed to enable the opposing party to "understand the contours of its potential exposure and make informed decisions as to settlement and discovery." *City & Cty. of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 221 (N.D. Cal. 2003) (emphasis added).

The record before the Court indicates the Plaintiff took measures to satisfy his obligations under Rule 26(a)(1)(A)(iii). He provided an itemized statement of damages in response to Defendants' Interrogatory No. 4, providing specific damages amounts for loss of enterprise value ($32,481,618), Ankura fees ($720,000), preferences ($3,070,804.08 as to Cone Health and $2,516.574 as to MCPS), and constructively fraudulent transfers ($3,100,000). (Docket No. 159, Ex. C). The Report of Stephen Darr provided a more complete breakdown of the Plaintiff's computation for loss of enterprise value as well as a discussion of the evidentiary material on which it was based, which constitutes a supplement under Rule 26(e). *See Silicon Knights,* 2012 WL 1596722, at *3. The Plaintiff also contends, and the Defendants do not dispute, that he provided invoices and time entries supporting the computation of fees incurred by Ankura stemming from breaches of the MSA. (Docket No. 160, ¶ 16).

Nevertheless, the Defendants assert that the Plaintiff's computation disclosures were deficient in several respects. They first request that the Plaintiff be barred from presenting evidence as to loss of enterprise value invoking the same rationale they cited in moving to exclude the reports and testimony of Stephen

Darr, i.e., that Darr failed to link his assessment of damages to specific breaches of the MSA. This argument is unpersuasive for many of the same reasons discussed above, particularly the potential for overlapping damages between the numerous alleged breaches of the MSA left to be tried. One treatise described the impact of overlapping damages on a litigant's computation burden:

> While disclosing damages claim-by-claim may be preferable, this may be difficult or impossible when the claims are overlapping, e.g., when a party claims emotional distress damages arising out of defamation and intentional infliction of emotional distress. So long as a party discloses the information then reasonably available to it, and timely supplements as appropriate, the inability to parse damages between claims should not be considered a violation of one's disclosure obligations.

James M. Wagstaffe, PRACTICE GUIDE: FEDERAL CIV. PROC. BEFORE TRIAL § 26.96 (2023).

Plaintiff's inability to break down its loss of enterprise value computation by individual breach of the MSA does not render his evidence of those damages subject to exclusion. The Defendants cannot point to a single authority for the proposition that a breach of claim computation must be tied to each alleged breach. And at least one court considered and rejected the Defendants' theory, finding no such requirement exists:

> Defendants argue that Plaintiffs have failed to set out damages by each particular breach by Defendants. As Defendants acknowledge, Plaintiffs have identified evidence of a number of different failures by Defendants that have collectively harmed Plaintiffs. Defendants argue that Plaintiffs must parse out the damages among each individual breach, but Defendants fail to cite any authority requiring Plaintiffs to calculate damages by each individual breach.

*Med. Sales & Consulting Grp. v. Plus Orthopedics USA, Inc.*, No. 08CV1595 BEN BGS, 2011 WL 1898600, at *3 (S.D. Cal. May 19, 2011). The Court finds this reasoning persuasive and declines to find the Plaintiff's computation deficient under Rule 26(a)(1)(A)(iii). The Court echoes the comments of the District Court for the Southern District of California, noting that the Plaintiff, here, ultimately "must prove [his] damages at trial with reasonable certainty" and if the Court finds that Cone Health breached certain of its obligations under the MSA, it will only award damages that are proven to flow from that breach. *Id.*

The Defendants also request that the Plaintiff be barred from presenting evidence or testimony as to the fees Ankura incurred as a result of Cone Health's alleged breaches of the MSA. The Defendants repeat their prior argument that exclusion is warranted because the Ankura fees are not broken down by each alleged breach. The Court declines to adopt this view for the same reasons discussed above. The Defendants point to no authority supporting its view that Rule 26(a)(1)(A)(iii) requires such damages to be subdivided and tied to a particular breach of a contract. Moreover, there is a likelihood of overlapping damages between any of the ten alleged breaches of the MSA; there are genuine issues of material fact as to the nature and scope of the itemized services required under Section 3 as well as which subsections of the MSA that Ankura's billed work should be attributed. The Defendants also claim that the computation for Ankura fees is merely a lump sum figure that does not satisfy Rule 26(a)(1)(A)(iii), *see Intercollegiate Women's Lacrosse*, 2023 WL 6800328, at *2, but the Plaintiff

provided invoices and time entries supporting his computation of fees incurred by Ankura. (Docket No. 160, ¶ 16). The Court finds that, given the nature of the Plaintiff's breach of contract claim, the computation provided for Ankura's fees, along with the evidentiary support that was provided to the Defendants, are sufficient to meet the "relatively low bar" for compliance under Rule 26(a)(1)(A)(iii). *W.N. Motors, Inc. v. Nissan N. Am., Inc.*, No. 21-CV-11266-ADB, 2022 WL 1568443, at *5-6 (D. Mass. May 18, 2022).[4]

The Defendants offer a more compelling argument regarding the Plaintiff's claim for lost referral damages. In his initial disclosures, the Plaintiff stated he was seeking damages for the "loss of physician referrals and procedures caused by Cone Health's actions, including without limitation recruiting physician groups which were affiliated with Randolph Health or in which Randolph Health had or expressed an interest." (Docket No. 159, Ex. A). It does not appear, however, that the Plaintiff ever computed these damages, referring to the amount in his response to interrogatories as merely "TBD." (Docket No. 159, Ex. C). The Plaintiff himself, in his Rule 30(b)(6) deposition, made no reference to the category or amount of the lost referral damages. In his Objection, the Plaintiff similarly did not contest the Defendants' representations as to the purported computation deficiencies for the

[4] The Court observes that most decisions excluding evidence for failures to comply with Rule 26(a)(1)(A)(iii) "involve extreme situations" where there was a "lack of any supporting evidence." *Tutor-Saliba Corp.*, 218 F.R.D. at 220 (collecting cases). That was the context for *Intercollegiate Women's Lacrosse*, the primary case cited and relied upon by the Defendants, where the District Court found the defendant provided only a theory of damages and never actually computed those damages until responding to the motion in limine. 2023 WL 6800328, at *2. Here, before the close of discovery, the Plaintiff disclosed its theory for damages around fees incurred by Ankura, a computation of the amount of those fees, and the invoices and time entries supporting that computation.

lost referrals. The Court is unable to find anywhere in the record where the Plaintiff offered any computation of, or evidentiary support for, alleged damages stemming from lost referrals. Consequently, the Court finds this to be a violation of the disclosure requirements of Rule 26(a)(1)(A)(iii).

As the Plaintiff has failed to provide information required by Rule 26(a), he "is not allowed to use that information … at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). The Court has "broad discretion" to determine whether a violation of Rule 26(a) is substantially justified or harmless, and should be guided by the following five factors: "(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence." *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596-97 (4th Cir. 2003). "The burden of establishing these factors lies with the nondisclosing party." *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014); *see also R & R Sails, Inc. v. Ins. Co. of the Pa.*, 673 F.3d 1240, 1246 (9th Cir. 2008).

The Plaintiff has failed to offer any justification for his failure to compute the lost referral damages. Allowing the Plaintiff to present evidence on those damages, which have not been tabulated, explained, or supported, would both surprise and prejudice the Defendants. It would also further delay and disrupt the impending trial by requiring additional time for discovery. The Court finds the *Southern States*

factors weigh decidedly in favor of the Defendants on the question of lost referrals damages and will grant the Motion to that extent. The Court, therefore, will bar the Plaintiff from presenting testimony or evidence on damages stemming from the loss of physician referrals and procedures.

## CONCLUSION

Based on the foregoing analysis and reasoning, IT IS HEREBY ORDERED that the Defendants' Motion (Docket No. 159) is GRANTED IN PART AND DENIED IN PART as follows:

1. The Defendants' Motion is GRANTED to the extent it seeks the exclusion of evidence at trial pertaining to damages stemming from the loss of physician referrals and procedures caused by Cone Health's actions, including without limitation recruiting physician groups which were affiliated with Randolph Health or in which Randolph Health had or expressed an interest;
2. The Plaintiff is barred from presenting evidence or testimony pertaining to damages stemming from the loss of physician referrals and procedures caused by Cone Health's actions; and
3. The Defendants' Motion is DENIED in all other respects.

**END OF DOCUMENT**

# PARTIES TO BE SERVED

Louis E. Robichaux, IV, as Liquidation Trustee of Randolph Health Liquidation Trust

v.

The Moses H. Cone Memorial Hospital Operating Corporation d/b/a Cone Health

ADV. No.: 22-02002

Case No.: 20-10247

Jody Bedenbaugh on behalf of Plaintiff Louis E. Robichaux, IV, as Liquidation Trustee of Randolph Health Liquidation Trust
*via cm/ecf*

Rebecca F. Redwine on behalf of Plaintiff Louis E. Robichaux, IV, as Liquidation Trustee of Randolph Health Liquidation Trust
via cm/ecf

Thomas W. Waldrep, Jr. on behalf of Defendant Moses Cone Physician Services, Inc. d/b/a Triad Hospitalists
*via cm/ecf*

Paul T. Collins on behalf of Plaintiff Louis E. Robichaux, IV, as Liquidation Trustee of Randolph Health Liquidation Trust
*via cm/ecf*

Kelly Alfred Cameron on behalf of Defendant The Moses H. Cone Memorial Hospital Operating Corporation d/b/a Cone Health
*via cm/ecf*