UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

GEORGE CANSLER, on his own behalf, and on behalf of a class of those similarly situated, **Plaintiff,** **v.** **UNIVERSITY HEALTH SYSTEMS OF EASTERN CAROLINA, INC., EAST CAROLINA HEALTH-CHOWAN, INC., HALIFAX REGIONAL MEDICAL CENTER, INC., ROANOKE VALLEY HEALTH SERVICES, INC., PITT COUNTY MEMORIAL HOSPITAL, INC., DUPLIN GENERAL HOSPITAL, INC., EAST CAROLINA HEALTH-BEAUFORT, INC., EAST CAROLINA HEALTH-BERTIE, INC., EAST CAROLINA HEALTH-HERITAGE, INC., THE OUTER BANKS HOSPITAL, INC., VIDANT MEDICAL GROUP AFFILIATES, LLC, VIDANT MEDICAL GROUP, LLC, VIDANT INTEGRATED CARE, LLC, and FIRSTPOINT COLLECTION RESOURCES, INC.,** **Defendants.**	**Case No. 4:22-CV-14-FL** **JURY DEMAND**

MEMORANDUM OF LAW IN SUPPORT OF THE VIDANT DEFENDANTS' MOTION TO STRIKE CLASS ALLEGATIONS

Pursuant to Federal Rules of Civil Procedure 12(f) and 23(d)(1)(D), Defendants University Health Systems of Eastern Carolina, Inc.; East Carolina Health-Chowan, Inc. ("Vidant Chowan"); Halifax Regional Medical Center, Inc.; Roanoke Valley Health Services, Inc. ("Vidant Roanoke"); Pitt County Memorial Hospital, Inc.; Duplin General Hospital, Inc.; East Carolina Health-Beaufort, Inc.; East Carolina Health-Bertie, Inc.; East Carolina Health-Heritage, Inc.; The Outer

Banks Hospital, Inc.; Vidant Medical Group Affiliates, Inc.; Vidant Medical Group, LLC; and Vidant Integrated Care, LLC (collectively, "Vidant" or the "Vidant Defendants") submit this Memorandum of Law in Support of their Motion to Strike the Class Allegations from Plaintiff George Cansler's ("Cansler") Complaint.

I. NATURE OF THE CASE

Cansler brings this putative class action on the theory that the Vidant Defendants charge unreasonably high prices for medical services and unlawfully fail to inform patients of the costs of those services. Cansler visited the emergency department at Vidant Chowan and received a CT scan in June 2018. At the time, Cansler had private health insurance through an insurance provider that had negotiated an agreement with Vidant Chowan whereby the insurer's members -- including Cansler -- would be charged rates that were discounted off of the hospital's standard charges. Pursuant to this agreement, Vidant Chowan charged Cansler and his private health insurer the pre-determined, discounted rate that had been negotiated and agreed-upon on Cansler's behalf. While Cansler acknowledges that he was charged this discounted rate, he complains that the portion not covered by his insurance -- the deductible for which he agreed to be responsible as part of his insurance policy -- is unreasonable. In essence, while Cansler cannot contend that Vidant Chowan's bill violates the agreement that was negotiated on his behalf, he is still unhappy with the amount for which he was billed for medical services, and would prefer to pay less.

Cansler's apparent dissatisfaction with the amount of his medical bill has resulted in his seeking an extraordinary form of relief: he asks the Court to allow him to proceed on behalf of a putative class of all individuals -- apparently whether insured or not -- who received emergency department medical services at ***nine*** different hospitals over a four-year period, and to reset the cost of the medical services that were provided to those patients. What Cansler ignores, however,

is that courts repeatedly have rejected his theory of liability and declined the invitation to act as arbiters of the price for medical treatment. As outlined in the Vidant Defendants' contemporaneously-filed Motion to Dismiss and supporting Memorandum of Law, Cansler's North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") and declaratory judgment claims lack merit and should be dismissed with prejudice as a matter of law.

In addition to failing on the merits, Cansler's Complaint also makes clear that he cannot proceed on behalf of the proposed class. Cansler, in essence, asks the Court to determine the "reasonable price" of all emergency department medical services provided at nine hospitals over a four-year period, regardless of the patients' insurance status or prior agreements. Cansler's theory of liability would require the Court to examine countless medical services, offered at different times across different hospitals, and to determine a "reasonable price" for each of those services. The Court then would need to examine the particular circumstances of each putative class member, including but not limited to whether the patient had medical insurance, and the particular price terms of each individual's insurance policy to determine whether the difference between that amount and the price charged by the Vidant Defendants is unlawful. Cansler also contends that the Vidant Defendants refuse to inform their patients of the cost for medical services, which requires an individual examination of the personal interactions between patients and hospital employees. The number of individualized inquiries the Court would have to undertake to determine the ability of any particular class member to prevail against the Vidant Defendants precludes adjudication of this case on a class basis.

These individualized inquiries, which arise from the face of the Complaint, demonstrate that Cansler cannot establish the requirements of commonality and typicality pursuant to Federal Rule of Civil Procedure 23(a). Assuming arguendo that Cansler could establish commonality and

typicality, the allegations in the Complaint show that he cannot certify a class under Rule 23(b)(3) because individual inquiries predominate over common questions, particularly in light of the fact that proximate cause is a necessary element of a UDTPA claim and requires an individual analysis of reasonable reliance that is inappropriate for class treatment. Finally, Cansler's proposed Rule 23(b)(1) and (b)(2) classes are not cognizable because declaratory relief is not appropriate on a class-wide basis under the circumstances, and because he primarily seeks monetary relief. Cansler's class allegations are completely deficient, and it is evident that he will not be able to proceed on behalf of the proposed class before the Court even reaches the question of class certification. As a result, the Court should grant this Motion and should strike Cansler's class allegations from the Complaint.

II. STATEMENT OF ALLEGED FACTS

The Vidant Defendants operate a nonprofit 1,447 bed hospital system comprised of nine hospitals located in Eastern North Carolina. (Complaint ("Compl.") at ¶ 4, Docket Entry 1). Like other healthcare providers, the Vidant Defendants set retail prices for medical services based on the "chargemaster" at each individual hospital. (*Id.* at ¶¶ 33, 45). The chargemaster rate is the undiscounted rate that hospitals charge patients for their services. (*Id.*). For patients with commercial insurance, like Cansler, the insurance company negotiates with the hospital on a lower rate that the hospital will accept for medical services, which is known as the "allowed amount." (*Id.* at ¶ 27). Under most commercial insurance plans, the patient then is responsible for paying the portion of the allowed amount that the insurance company did not pay, which commonly is known as a deductible. (*Id.* at ¶ 29).

Cansler's claims arise from a visit to the emergency department at Vidant Chowan on June 6, 2018, where he received medical services that included a CT scan. (Compl. at ¶¶ 67, 70, Docket

Entry 1). While he was at the hospital, Cansler signed an "Authorization & Consent for Treatment and Assignment of Benefits" (the "Consent"), through which he agreed to pay all charges that were not covered or paid for by insurance. (*Id.* at ¶ 72). At the time, Cansler carried a private high deductible health insurance plan with Blue Cross Blue Shield of North Carolina ("Blue Cross"). (*Id.* at ¶¶ 29, 63). Vidant Chowan is an "in-network hospital" under Cansler's insurance plan, meaning that Blue Cross negotiated allowed amounts that were lower than the amount of the hospital's chargemaster for services received by its insured patients. (*Id.* at ¶¶ 64-65).

After accounting for the amount that Blue Cross paid towards the services he received, Vidant Chowan sent Cansler a bill for the difference, which he had expressly agreed to pay when he visited the emergency department and executed the Consent. (Compl. at ¶¶ 75-76, 80, Docket Entry 1). Cansler subsequently expressed dissatisfaction with his bill and disputed the amount owed. (*Id.* at ¶¶ 83-84). Vidant Chowan attempted to work with Cansler concerning his bill, but Cansler remained dissatisfied. (*Id.* at ¶¶ 86-88, 94-95). Cansler ultimately filed this lawsuit, accusing the Vidant Defendants of unfair billing practices and asserting claims against them for violation of the UDTPA and declaratory judgment.

Here, Cansler complains that the Vidant Defendants' chargemaster rates are "excessive" and that the amount he was billed for the services he received is higher than the "reasonable value" of those services. (Compl. at ¶¶ 24, 45, 49, Docket Entry 1). Cansler also complains that the Consent contains an "open price term" and that the Vidant Defendants violated the law by refusing to disclose their chargemaster rates to patients prior to treatment. (*Id.* at ¶¶ 34, 45, 49, 55). Cansler does not, however, explain how to determine the reasonable price of any particular medical service, although he vaguely suggests that the rates set by a government payor like Medicare exemplify the price all patients should be charged for medical services. (*See id.* at ¶ 46). Nor does he allege

that he ever asked any employee of Vidant Chowan about the cost of treatment before receiving medical services in the emergency department, despite complaining that the hospital has an alleged policy of refusing to disclose its prices to patients. (*See generally* Compl., Docket Entry 1).

Based on these allegations, Cansler seeks to represent a proposed class encompassing every patient who received treatment at any of the Vidant Defendants' emergency departments over the last four years. Cansler purports to define the "Vidant Class" as: "All individuals who: visited a Vidant facility emergency department within the last four years; signed (personally or through an authorized agent) the 'Authorization & Consent for Treatment and Assignment of Benefits' or a similar form; received a CT scan or other services; and they or their guarantor was thereafter billed personally for Vidant's chargemaster or negotiated rates." (Compl. at ¶ 115, Docket Entry 1). As part of his class allegations, he identifies several issues that purportedly are common to all proposed class members, the majority of which implicate some indeterminate notion of a "reasonable price" or a "reasonable value" of medical services. (*Id.* at ¶ 117). In alleging that his experience is typical of other class members, he suggests that class members only are required to pay a "reasonable amount" for medical services. (*Id.* at ¶ 118). He seeks to certify the proposed class under Federal Rules of Civil Procedure 23(b)(1), (2), and (3). (*Id.* at ¶¶ 120-22).

III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(f) allows the Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Federal Rule of Civil Procedure 23(d)(1)(D) instructs that the Court may "require that the pleadings be amended to eliminate allegations about the representation of absent persons . . . ." In this regard, "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may

be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). As a result, "a court may strike . . . class allegations under Rule 23(d)(l)(D) before deciding a motion to certify under Rule 23(c)(1)." *Hooker v. Sirius XM Radio, Inc.*, 2014 WL 12597593, at *4 (E.D. Va. June 5, 2014).

Indeed, "'a motion to dismiss a complaint's class allegations should be granted when it is clear from the face of the complaint that the plaintiff cannot and could not meet Rule 23's requirements for certification because the plaintiff has failed to properly allege facts sufficient to make out a class or could establish no facts to make out a class.'" *Bigelow v. Syneos Health, LLC*, 2020 WL 5078770, at *4 (E.D.N.C. Aug. 27, 2020) (quoting *Williams v. Potomac Family Dining Grp. Operating Co., LLC*, 2019 WL 5309628, at *5 (D. Md. Oct. 21, 2019)); *see also Waters v. Electrolux Home Prod., Inc.*, 2016 WL 3926431, at *4 (N.D. W.Va. July 18, 2016) ("A court may grant a motion to strike class allegations where the pleading makes clear that the purported class cannot be certified and no amount of discovery would change that determination."). "Striking or dismissing class allegations before the plaintiffs file a motion for class certification is not premature where it is unnecessary for the court to probe behind the pleadings before coming to rest on the certification question." *Waters*, 2016 WL 3926431, at *4 (citation and quotations omitted). A failure to strike facially insufficient class action allegations, on the other hand, is prejudicial to a defendant where it forces the defendant to engage in the exorbitant costs of class discovery or to settle in order to avoid them. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677–78 (7th Cir. 2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good").

The early stage of this action should not deter the Court from striking Cansler's deficient class allegations from the Complaint.

IV. ARGUMENT

Federal Rule of Civil Procedure 23 sets forth the requirements plaintiffs must satisfy in order to have a class action certified. Rule 23(a) "requires that [a] prospective class comply with four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). "In addition [to the Rule 23(a) requirements], the class action must fall within one of the three categories enumerated in Rule 23(b)." *Id.* Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions by or against individual class members would create a risk of" either "inconsistent or varying adjudications," or "adjudications . . . that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." FED. R. CIV. P. 23(b)(1). Certification under Rule 23(b)(2) is appropriate "only when a single injunction or declaratory judgment would provide relief to each member of the class." *EQT Prod. Co.*, 764 F.3d at 357. Finally, a plaintiff seeking certification under Rule 23(b)(3) must show "(1) common questions of law or fact . . . predominate over any questions affecting only individual class members; and (2) proceeding as a class [is] superior to other available methods of litigation." *Id.*

Cansler seeks to represent the following proposed class: "All individuals who: visited a Vidant facility emergency department within the last four years; signed (personally or through an authorized agent) the 'Authorization & Consent for Treatment and Assignment of Benefits' or a similar form; received a CT scan or other services; and they or their guarantor was thereafter billed personally for Vidant's chargemaster or negotiated rates." (Compl. at ¶ 115, Docket Entry 1). On

its face, Cansler's proposed class cannot satisfy the requirements of Rule 23. The allegations in the Complaint will require numerous individualized inquiries which defeat the Rule 23(a) requirements of commonality and typicality. The individualized inquiries inherent in Cansler's theory of liability also render him unable to satisfy Rule 23(b)(3)'s predominance requirement. Furthermore, Cansler is unable to satisfy the requirements for certifying a class under Rule 23(b)(1) and (2) because the requested declaratory judgment would not be an appropriate class-wide remedy, and because his requests to certify a class under those provisions are incidental to his requests for monetary damages under the UDTPA. These flaws, which directly bear on Cansler's entire theory of liability, are apparent from the face of the Complaint. As a result, the Court should strike Cansler's class allegations.

A. Cansler's Class Allegations Cannot Satisfy the Rule 23(a) Requirements of Commonality and Typicality.

Commonality and typicality are threshold requirements for any class action under Rule 23(a). As an initial matter, Cansler cannot satisfy Rule 23(a)'s commonality requirement because the nature of his claims and the individualized inquiries inherent in adjudicating them will not generate common answers to common questions. While this fact alone renders the proposed class deficient, the Complaint also shows that Cansler's claims are not typical of other class members because of the number of individualized inquiries that will be required to determine whether the Vidant Defendants are liable to any individual class member. Furthermore, Cansler's claims depend on the individual nature of personal interactions between patients and hospital employees, which separately are inappropriate for class treatment. These threshold failures plague Cansler's entire theory of liability, and they preclude certification of a class under Rule 23(a).

1. Cansler's Proposed Class Will Not Generate Common Answers to Common Questions.

As to commonality, "[a] question is not common . . . if its resolution turns on a consideration of the individual circumstances of each class member." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006). "Although the rule speaks in terms of common questions, 'what matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *EQT Prod. Co.*, 764 F.3d at 360 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (emphasis in original)). Commonality is lacking where "unique factual circumstances in the claims" create "significant separate issues of proof." *Morris v. City of Charlottesville*, 2001 WL 743771, at *4-5 (W.D. Va. July 3, 2001) (citations omitted).

Cansler's allegations make clear that the class he proposes only would generate individual answers, not common ones. Cansler contends that the price he was charged for medical services exceeded some unspecified notion of "reasonable price." Indeed, nearly all of the purportedly common issues Cansler identifies in the Complaint implicate the concept of a "reasonable price" or a "reasonable value" of medical services. (Compl. at ¶ 117, Docket Entry 1). Even assuming that his theory of liability is legally cognizable (it is not), adjudicating Cansler's claims on a class basis would require the Court to ascertain the "reasonable price" of every emergency department medical service offered at hospitals operated by the Vidant Defendants over the course of four years, and then examine each class member's individual circumstances to evaluate the difference (if any) between that amount and the price charged. The breadth of such an undertaking is evident from the face of the Complaint. (*See id*. at ¶ 4 (describing the Vidant Defendants as operating "one of the largest health systems in the State"); ¶ 116 (alleging that the Vidant Defendants have provided "thousands of services within the last four years" to the proposed class)).

The first step alone would require an individual examination of: (1) the price the Vidant Defendants charged for every emergency department service provided to every class member at nine different hospitals over a four-year period; (2) the cost basis for each of those thousands of services at each of the various hospitals; (3) the prices charged to all other buyers --including third-party payors, the government, and uninsured patients -- for each one of those services at each of the various hospitals based on the time period those services were performed; (4) the prices charged by each available competitor who offers the same services during the four-year period; and (5) other price data from every potentially relevant resource that may bear on the "reasonable" rate for each of the thousands of services at issue. This extreme undertaking alone renders Cansler unable to satisfy the commonality requirement. *See Colomar v. Mercy Hosp., Inc.*, 242 F.R.D. 671, 676-77 (S.D. Fla. 2007) (denying certification on lack of commonality grounds where "the legality -- or ultimate reasonableness -- of Mercy's charges can only be determined by looking at the specific bills in question and analyzing them against factors like the market rate for the same services at other hospitals, Mercy's internal costs for those particular services, and the prices Mercy charged for those services to patients with health insurance or other benefits"); *Bowden v. Med. Ctr., Inc.*, 309 Ga. 188, 197, 845 S.E.2d 555, 562 (2020) (commonality factor not satisfied in excessive medical charge class action where the answer to the question of what specifically constitutes a reasonable charge in each class member's case would "require[ ] an individual analysis of each medical service provided [to] each class member."). Indeed, the answer to the question of what constitutes a "reasonable price" for medical services varies from class member to class member and is not subject to resolution for the entire class, which defeats commonality.

The second step would require evaluating the individual circumstances of each class member, including: (1) whether the class member had health insurance; (2) for those who did have

insurance, the terms of their individual policy; (3) for those who did have insurance, the terms of any agreement between the insurer and the relevant Vidant hospital; (4) the amount charged to each class member for each service; (5) the value of the services rendered to each class member; and (6) the amount ultimately paid by each class member, if any, including discounts or other similar relief. This also renders Cansler unable to satisfy the commonality requirement. *See Howard v. Willis-Knighton Med. Ctr.*, 924 So. 2d 1245, 1263 (La. Ct. App. 2006) (affirming denial of certification of uninsured patient class on commonality grounds where "the reasonableness of charges inquiry requires individual considerations that may include, for example, the patient's financial status, the actual hospital services rendered, their customary value, and the amount of a recovery from a third party or his insurer").

Moreover, whether Cansler was charged an "unreasonable price" for the medical services received (which he was not) has no bearing on the prices charged to other proposed class members, each of whom received different services, in different places, at different times, and likely under a different set of contractual agreements. In other words, even if the Court somehow could determine a "reasonable price" for Cansler's CT scan and associated medical services, this determination would not reveal anything about the price associated with an appendectomy or other type of medical procedure. *See Butts v. Iowa Health Sys.*, 2015 WL 1046119, at *5 (Iowa Ct. App. 2015) ("[P]laintiffs cannot answer a simple question: why is a judicial determination that the rate charged for Ramsey's appendectomy was or was not reasonable at all probative of whether the rate charged for Williams's CAT scan was or was not reasonable? We see no logical connection between the two."). Thus, the allegations in the Complaint plainly display that resolution of Cansler's claims will not generate common answers to common questions.

These commonality deficiencies bear directly on Cansler's theory of liability and not merely on the calculation of damages. As a result, courts consistently have rejected class treatment of similar excessive medical charge cases on lack of commonality grounds. *See, e.g.*, *Colomar*, 242 F.R.D. at 676-77, *Bowden*, 309 Ga. at 197, 845 S.E.2d at 562; *Howard*, 924 So. 2d at 1263; *Butts*, 2015 WL 1046119, at *5-6; *Harrison v. Blount EMS, Inc.*, 2010 WL 11615000, at *5 (N.D. Al. Jan. 12, 2010). This Court should do the same and strike Cansler's class allegations.

2. Cansler's Claims Are Not Typical of Other Class Members.

While the absence of commonality renders the proposed class deficient, the Complaint also demonstrates that Cansler's claims are not typical of the proposed class. Typicality is not present where "[a] plaintiff's claim [is] so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006). "The essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Id.* (citation omitted). With respect to Rule 23(a), "[t]he requirements for typicality and commonality often merge." *Romero v. Mountaire Farms, Inc.*, 796 F. Supp. 2d 700, 714 (E.D.N.C. 2011).

With respect to typicality, Cansler contends that his claims are typical of the proposed class because he "was billed far above the reasonable value of the service" he received and "by law was only obligated to pay a reasonable amount." (Compl. at ¶ 118, Docket Entry 1). The individualized inquiries inherent in Cansler's theory of liability, which are described above, mean that there can be no typical claim for purposes of class treatment. *See Colomar*, 242 F.R.D. at 677 (holding that typicality was not satisfied where the lead plaintiff failed to demonstrate that she shared the same interests or suffered the same injury as the unnamed class members); *see also Deiter*, 436 F.3d at 466-67 (holding that a named plaintiff's claim "cannot be so different from the

claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim").

Indeed, Cansler's individual allegations demonstrate the varying range of circumstances among proposed class members. Cansler broadly defines the proposed class to include *all* emergency department visitors to Vidant hospitals within the last four years, regardless of the type of services they received or whether they carried commercial insurance at the time. (Compl. at ¶ 115, Docket Entry 1). Cansler alleges, however, that there is a sharp contrast between the Vidant Defendants' chargemaster rates and the Medicare rate for the same services. (*Id.* at ¶ 37). The billing experience of a patient with Medicare thus would not be typical of a patient with commercial insurance through Blue Cross, like Cansler. There also is a steep variation in the alleged chargemaster rates for a CT scan among the nine individual Vidant hospitals. (*Id.* at ¶ 48). The billing experience of a patient who received a CT scan at Vidant Chowan, like Cansler, and a patient who received the same service at Vidant Roanoke, for example, would not be typical of one another given the nearly $2,300 difference in the alleged chargemaster rate for the procedure. Furthermore, Cansler does not account for the fact that insurance companies other than Blue Cross may negotiate rates for services with the Vidant Defendants that are not typical of those negotiated by Blue Cross. (*See id.* at ¶ 28 (alleging that commercial health plans "negotiate with hospitals for bundles of services that the health plan will offer to members as 'in-network' benefits")).

The court's typicality analysis in *Colomar* also is instructive as to the problems that are evident on the face of Cansler's Complaint. There, the lead plaintiff also alleged that her contract with the hospital contained an open price term, but the court determined that just because the contract "contains the same undefined price term as the other class members does not automatically make the Plaintiff's and the class members' interests the same." *Colomar*, 242 F.R.D. at 677. The

court then noted that to establish her claims for breach of contract and violation of the Florida Deceptive and Unfair Trade Practices Act, the plaintiff would need to prove that the plaintiff's charges were unreasonable in light of (1) the costs for those services, (2) what the hospital charged other patients -- including those with benefits or insurance -- for those same services, and (3) what other hospitals charge for similar services. *Id.* That analysis, however, was not typical of the analysis other class members would need to undertake because the analysis for other class members would "entail entirely different services and, hence, entirely different facts." *Id.* As with the lack of commonality described in *Butts*, the court in *Colomar* noted that typicality was not present because proving the lead plaintiff's case with respect to the respiratory services she received proved nothing about the reasonableness of charges for cardiac services at the hospital. *Id.* The analysis is the same here and is evident on the face of the Complaint -- the proof Cansler offers with respect to the price Vidant Chowan charged for his CT scan and related medical services at Vidant Chowan will not advance the claims of absent class members who received different services at different hospitals under different contractual terms.

Furthermore, even with respect to medical services similar to those Cansler received, the analysis as to a "reasonable price" for those services will differ across different time periods, and Cansler seeks to certify a proposed class encompassing every emergency department patient who visited a Vidant hospital over a four-year period. Whether a charge for medical services was reasonable in 2018, when Cansler received care, says nothing about whether the price for the same service is reasonable in 2022. As in *Colomar*, this is not a case where Cansler simply can show that his charges were unreasonable (they were not), and correspondingly establish the Vidant Defendants' liability as to each class member by proving his claims. As a result, his claims are not typical of the proposed class, and his class allegations should be stricken from the Complaint.

3. Cansler Bases His Theory of Liability on Personal Interactions that Necessarily Defeat Commonality and Typicality.

In addition to claiming that the Vidant Defendants charge excessive prices for medical services, Cansler also claims -- despite never alleging that he himself asked about the cost of his treatment -- that the Vidant Defendants have a policy whereby they refuse to disclose their chargemaster rates to patients, even when asked. (Compl. at ¶¶ 34, 45, 49, Docket Entry 1). Inherent in such an allegation are the questions of, among other things, whether a patient was in a condition to ask about pricing, whether a patient asked for the pricing and, if so, how the Vidant Defendants responded, and whether the patient chose not to ask about pricing because the pricing was not material to their decision-making. Cansler's claims thus depend on the individualized circumstances surrounding personal interactions between patients and hospital employees, which make his claims against the Vidant Defendants unsuitable for class treatment based on a lack of commonality and typicality.

Indeed, "claims based substantially on oral rather than written communications are inappropriate for treatment as class actions unless the communications are shown to be standardized." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d at 331, 341 (4th Cir. 1998) (citation omitted); *see also Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 190 (3d Cir. 2001) ("[I]t has become well-settled that, as a general rule, an action based substantially on oral rather than written communications is inappropriate for treatment as a class action."). That is because reliance on "personal interactions and conversations" necessarily requires individualized inquiry and defeats commonality and typicality. *Flint v. Ally Fin., Inc.*, 2020 WL 1492701, at *4 (W.D.N.C. Mar. 27, 2020).

Federal courts in North Carolina and elsewhere in the Fourth Circuit have stricken class allegations where the named plaintiff's theory of relief is based on personal interactions with the

defendant, as it is here. For example, in *Flint v. Ally Financial, Inc.*, the court considered a named plaintiff's allegations that he verbally objected to signing a waiver in order to redeem his repossessed vehicle. 2020 WL 1492701, at *4. The Court granted the motion to strike the class allegations because the plaintiff's "claims hinge[d] on personal interactions and conversations . . . including representations as to whether a waiver 'must' be signed and whether the party objected to signing the waiver prior to execution." *Id.* Similarly, in *Cornette v. Jenny Garton Ins. Agency, Inc.*, 2010 WL 2196533 (N.D. W.Va. May 27, 2010), the court granted a motion to strike where the named plaintiff alleged that defendant's agents verbally told her that her insurance policy covered services excluded by the written contract. The court reasoned that "[p]roving that these [oral] misrepresentations were made . . . will undoubtedly require individualized evidence." *Id.* at *2. Thus, striking class allegations is proper where the face of the complaint indicates that the named plaintiff's claims will turn on personal interactions.

Here, Cansler -- who does not allege he asked about the cost of his treatment -- contends that the Vidant Defendants refuse to disclose their allegedly unreasonable prices to patients prior to treatment, even when asked. (Compl. at ¶¶ 49-50, Docket Entry 1). Cansler's theory of recovery necessarily hinges on personal interactions between class members and Vidant employees, meaning a patient who had a different interaction from Cansler during their visit to a Vidant hospital cannot proceed under Cansler's theory of relief. For example, the experience of a patient who actually asked about the cost of medical treatment would not be common to or typical of Cansler's experience at Vidant Chowan. Nor would the experience of a patient who was unconscious or otherwise without capacity when they arrived at the emergency department. As such, Cansler's theory that the Vidant Defendants unlawfully refused to disclose prices further

underscores the deficiencies in his Complaint as to the commonality and typicality requirements, and the Court should strike his class allegations as a result.[1]

B Cansler Cannot Certify a Class Under Rule 23(b)(3) Because Individualized Inquiries Predominate Over Common Questions.

Cansler seeks to certify the proposed class under Rule 23(b)(3), but the requirements of that provision only confirm that striking the class allegations is appropriate. To certify a class under Rule 23(b)(3), Cansler must establish that questions of law or fact common to class members "predominate over any questions affecting only individual members." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The predominance requirement thus focuses on the balance between individual and common issues. *See Brown v. Nucor Corp.*, 785 F.3d 895, 917-21 (4th Cir. 2015). This requirement is "far more demanding" than the commonality requirement under Rule 23(a). *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004); *see also Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 n.4 (4th Cir. 2001) ("In a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over other questions."). Cansler's inability to satisfy the commonality requirement, as described above, necessarily means he cannot satisfy the predominance requirement to certify a class under Rule 23(b)(3).

But even where courts have assumed commonality in excessive medical charge cases, they still consistently have concluded that individualized issues predominate over common questions. The Fifth Circuit, for example, has held that "[t]he fact-specific rather than class-oriented nature

[1] Furthermore, as set forth in the Vidant Defendants' Motion to Dismiss and supporting Memorandum of Law, their alleged failure to disclose the costs of emergency department services under the circumstances of Cansler's visit is entirely consistent with their statutory obligations under the Emergency Medical Treatment and Active Labor Act. *See* 42 U.S.C. § 1395dd.

of the claims thus predominates not only at the plaintiffs' level, since two patients' care and financial circumstances are hardly ever comparable, but also in determining a 'reasonable' charge for each service from among the mélange of third-party payer discounts." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 526 (5th Cir. 2007). Other courts similarly have held that a myriad of individualized issues in determining a reasonable price for medical services preclude class treatment based on lack of predominance. *See Hefner v. Mission Hosp., Inc.*, 2014 WL 7591860, at *8-9 (N.C. Super. Ct. Dec. 8, 2014) (denying certification under analogous North Carolina rule on lack of predominance grounds where "there are significant variations among putative class members themselves as to how they may have been billed, negotiated discounts, paid their bill, or qualified for revised charges based on ultimate Medicaid eligibility"); *Hale v. Sharp Healthcare*, 232 Cal. App. 4th 50, 65, 180 Cal. Rptr. 3d 825, 838 (2014) (denying certification under analogous state class-action rule on lack of predominance grounds where "to determine the reasonableness of the [hospital's] Chargemaster rates, one must analyze over 7,000 line items for individual and bundled procedures, services, and goods derived for each individual patient"); *Eufaula Hosp. Corp. v. Lawrence*, 32 So. 3d 30, 46 (Ala. 2009) ("[T]he individualized issues presented in determining a reasonable charge overwhelm class cohesiveness and render certification of a class action under . . . [Alabama's analogous] Rule 23(b)(3) inappropriate."). In short, "[t]he amount patients were charged and the amount that is 'reasonable' for the services they received is necessarily an individual inquiry that will depend on the specific circumstances of each class member." *Maldonado*, 493 F.3d at 524.

Furthermore, Cansler's UDTPA claim, which is the only claim on which he seeks damages from the Vidant Defendants, is particularly unsuitable for class treatment. Indeed, the application

of Rule 23 often turns on the cause of action. *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655 (4th Cir. 2019). In *Krakauer*, the court noted:

> As a general matter, the limits of Rule 23 are designed to ensure vigorous adversarial process, efficient adjudication of class-wide questions, and a practical means of identifying and notifying those who may be affected by a judgment. Each of these issues is inextricably linked with the elements of a particular claim. A cause of action that includes a fact-bound element or a claim-specific affirmative defense may be less susceptible to class treatment than one that does not. Efficient and manageable classes require common proof, and the availability of such proof turns on what exactly needs to be proven.

Id.

To establish a claim for violation of the UDTPA, a plaintiff must show that the defendant's conduct proximately caused the alleged injury. *Rider v. Hodges*, 255 N.C. App. 82, 90, 804 S.E.2d 242, 249 (2017). Claims that turn on individualized questions about whether a defendant's conduct proximately caused a plaintiff's injury are not proper for class treatment. For example, in *Waters v. Electrolux Home Products*, the court struck class allegations in part because the underlying claim's elements required a showing of proximate cause and damages. 2016 WL 3926431, at *4. The court reasoned that proof as to whether the defendant proximately caused the alleged damage -- a necessary element -- would "require individualized factual determinations." *Id.* at *6; *see also Koepplinger v. Seterus, Inc.*, 2020 WL 2063416, at *33-34 (M.D.N.C. Apr. 29, 2020), *adopted* 2020 WL 5705915 (M.D.N.C. Aug. 26, 2020) (declining to certify class because plaintiffs could not show defendant proximately caused injury to each class member without individualized proof); 1 McLaughlin on Class Actions § 4:19 (16th ed.) ("[T]he causation-related determination of whether class members were injured at all by the defendants -- the fact of damage -- ordinarily must be amenable to classwide disposition in order for predominance to be satisfied.").

Cansler's proposed class definition illustrates the individualized inquiries that would be necessary to determine whether the Vidant Defendants proximately caused injury to a putative

class member. For example, Cansler broadly defines the proposed class to include *all* patients who visited the emergency department at a Vidant hospital within the past four years. (Compl. at ¶ 115). At the same time, Cansler suggests that the Medicare rate often represents "a fair amount for the procedure." (*Id.* at ¶ 46). The Complaint thus does not, and cannot, articulate how the Vidant Defendants proximately caused injury to patients with Medicare during the relevant period, even though the putative class encompasses such patients.

Furthermore, when a UDTPA claim is premised upon an alleged misrepresentation or fraudulent concealment, the element of proximate cause requires that "a plaintiff must demonstrate that they detrimentally relied on the defendant's alleged misrepresentation or deception in order to recover under the statute." *Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison*, 2022-NCCOA-27, 869 S.E.2d 34, 43 (N.C. Ct. App. 2022); *see Bumpers v. Community Bank of N. Virginia.*, 367 N.C. 81, 88-89, 747 S.E.2d 220, 226 (2013). "The first element [of detrimental reliance] -- actual reliance -- requires a showing that 'the plaintiff [] affirmatively incorporated the alleged misrepresentation into his or her decision-making process . . . .'" *Id*. (citing *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227). In other words, "the plaintiff must have 'acted or refrained from acting in a certain manner due to the defendant's representations.'" *Id*. (quoting *Williams v. United Cmty. Bank*, 218 N.C. App. 361, 368, 724 S.E.2d 543, 549 (2012).

The detrimental reliance element of a UDTPA claim only solidifies the notion that individualized inquiries predominate over common questions in this lawsuit. Indeed, proof of detrimental reliance is not suitable for class treatment. *See Gariety*, 368 F.3d at 362 ("Because proof of reliance is generally individualized to each plaintiff allegedly defrauded, fraud and negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417,

435 (4th Cir. 2003) ("[T]he reliance element . . . [is] not readily susceptible to class-wide proof; rather, proof of reasonable reliance . . . depend[s] upon a fact-intensive inquiry into what information each [plaintiff] actually had."). As a result, the Court should strike Cansler's allegations seeking certification of a class under Rule 23(b)(3).

C. Cansler Cannot Certify a Class Under Rule 23(b)(1) or Rule 23(b)(2) Because Declaratory Relief Is Inappropriate and Because He Predominantly Seeks Monetary Relief.

Cansler also asks the Court to certify the proposed class under Rules 23(b)(1) and (2). (Compl. at ¶¶ 120-21, Docket Entry 1). His requests for certification under these provisions are similarly defective and should be stricken from the Complaint.

Turning first to Rule 23(b)(2), "[c]ertification under this provision is appropriate 'only when a single injunction or declaratory judgment would provide relief to each member of the class.'" *EQT Prod. Co.*, 764 F.3d at 357 (quoting *Dukes*, 564 U.S. at 360). In prior excessive-charge cases, however, courts have found that "neither declaratory nor final injunctive relief would be an appropriate class-wide remedy." *Colomar*, 242 F.R.D. at 683. The same analysis applies here. The Court cannot determine a "reasonable price" for the Vidant Defendants' emergency department services simply by reference to the evidence needed to resolve Cansler's claims concerning the CT scan that he received at Vidant Chowan. Indeed, "[b]ecause determining each plaintiff's entitlement to relief and damages would require a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case, Rule [23](b)(2) certification is inappropriate." *Maldonado v. Ochsner*, 237 F.R.D. 145, 151 (E.D. La. 2006), *aff'd*, *Maldonado*, 493 F.3d at 526.

Furthermore, "[w]here monetary relief predominates, Rule 23(b)(2) certification is inappropriate." *Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015). Monetary relief

predominates if it is more than "incidental to injunctive or declaratory relief." *Id.* Claims for "individualized monetary relief . . . are not 'incidental' for purposes of Rule 23(b)(2). *Id.* (citing *Dukes*, 564 U.S. at 360). Compensatory damages necessarily "require[] individualized proof and determinations" and "do not qualify as incidental damages." *Adams v. Henderson*, 197 F.R.D. 162, 171 (D. Md. 2000). Courts in this Circuit have stricken Rule 23(b)(2) allegations where a plaintiff alleges a Rule 23(b)(2) class but predominantly seeks monetary relief. *See, e.g.*, *Stanley v. Cent. Garden & Pet Corp.*, 891 F. Supp. 2d 757, 771 (D. Md. 2012).

Here, Cansler seeks compensatory damages through his claim for violation of the UDTPA. (Compl. at ¶ 142, Docket Entry 1). In addition, one of the purportedly common issues he raises is whether patients are entitled to disgorgement of the amounts they paid that exceed the "reasonable value" of services they received. (*Id.* at ¶ 117). These types of damages "require[] individualized proof and determinations" and therefore "do not qualify as incidental damages." *Adams*, 197 F.R.D. at 171. Cansler also frames this lawsuit as one for "*damages and* declaratory relief[,]" further demonstrating that the damages sought are not incidental to the request for declaratory relief. (Compl. at ¶ 1 (emphasis added), Docket Entry 1). Because the monetary relief Cansler seeks is more than incidental to his claim for declaratory relief, the Court should strike his Rule 23(b)(2) allegations from the Complaint.

Turning next to Rule 23(b)(1), subsection (b)(1)(A) permits an action where "individual adjudication . . . would prejudice . . . the party opposing the class." *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986). Similar to Rule 23(b)(2), "class action certification under Rule 23(b)(1) is generally inappropriate where the plaintiffs seek money damages." *Cuming v. S.C. Lottery Comm'n*, 2008 WL 906705, at *6 (D.S.C. Mar. 31, 2008). Additionally, because this element is about prejudice ***to the defendant*** absent certification, the fact that a defendant does not contend

that it would be prejudiced if no class were certified weighs heavily against Rule 23(b)(1)(A) certification. *Zimmerman*, 800 F.2d at 389 (considering factor in denying certification under Rule 23(b)(1)(A)). Here, Cansler predominantly requests monetary damages, and the Vidant Defendants do not contend that they would suffer prejudice if no class were certified. Accordingly, Cansler fails to adequately allege that certification is proper under Rule 23(b)(1)(A).

Finally, Rule 23(b)(1)(B) permits class certification where "individual adjudication . . . would prejudice . . . the class members themselves." *Zimmerman*, 800 F.2d at 389. The provision generally applies to a narrow set of cases known as "limited fund" cases, "in which numerous persons make claims against a fund insufficient to satisfy all claims." *Davis v. White*, 2017 WL 6273488, at *26 (E.D. Va. Dec. 8, 2017), *aff'd sub nom*, 748 Fed. Appx. 509 (4th Cir. 2019) (citation omitted). Cansler does not allege that this is a limited fund situation. Accordingly, Rule 23(b)(1)(B) also is not a proper basis for certification.[2]

V. CONCLUSION

For these reasons, the Vidant Defendants request that the Court grant the Motion and strike the class allegations from Cansler's Complaint.

[2] Cansler also vaguely contends that the Court should certify an issue class under Rule 23(c)(4), but he does not identify the issue(s) on which he seeks certification. (Compl. at ¶ 123, Docket Entry 1). As an initial matter, it is unclear whether issue certification is proper in the Fourth Circuit. *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 77 (E.D.N.C. 2008); *see Gunnells*, 348 F.3d at 422-30 (appearing to hold that a district court may certify individual *causes of action,* not individual *issues,* for class treatment). Nevertheless, "a district court should decline to certify issues where there are so many individual issues in the case that certifying the common issues would have a negligible effect on judicial efficiency." *Farrar & Farrar*, 254 F.R.D. at 77. The individualized inquiries described above thus preclude issue certification under Rule 23(c)(4).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served upon all counsel of record via the Clerk of Court's ECF system, this May 20, 2022.

/s/ Erin Palmer Polly