UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

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., and FIRSTPOINT COLLECTION RESOURCES, INC.,** ***Defendants.***	**Case No. 4:22-CV-14-JL**

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO ECU DEFENDANTS' MOTION TO DISMISS

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Plaintiff George Cansler, through counsel and pursuant to Local Rule 7.1 and the Court's Order dated September 2, 2022 (ECF 53), hereby respectfully responds to the motion to dismiss (ECF 50) and accompanying memorandum in support (ECF 51, "Mem.") filed pursuant to Federal Rule of Civil Procedure 12(b)(6) by Defendants University Health Systems of Eastern Carolina, Inc. and East Carolina Health-Chowan, Inc. (collectively, "ECU") seeking to dismiss Plaintiff's First Amended Class Action Complaint ("FAC"), ECF 48.

INTRODUCTION

Cansler's claims all relate to the same core scheme: ECU's policy of surprising patients with exorbitant bills for CT scans—in Cansler's case, *charging him 11 times what Medicare pays for the same procedure*—and, when patients question their bill or do not pay up promptly, ECU then harassing them and threatening their credit scores by sending their claims to collections. To justify charging patients thousands of dollars for procedures that should only cost a few hundred, ECU relies on the "Consent Form" patients sign when admitted to the emergency room. That form provides absolutely no notice of how much ECU will decide to bill—it purports instead to obligate patients to pay "all charges" not covered by insurance. Even if a patient were to ask how much a service costs, ECU has a policy of refusing to disclose its price until the bill comes in the mail.

In North Carolina, such wide-open price terms in purported contracts do *not* entitle a hospital to charge whatever it wants. Instead, courts hold that "[f]ailure to agree on the amount of compensation entitles the physician [only] to the reasonable value of his services." *Forsyth Cnty. Hosp. Auth., Inc. v. Sales*, 82 N.C. App. 265, 266, 346 S.E.2d 212, 213 (1986). The prices ECU has sought to extract from Cansler and all members of the putative class are anything but reasonable. Under longstanding contract and equitable principles, Cansler is entitled to a refund of the overpayment ECU extracted from him, as well as a declaration that he does not owe ECU

the thousands of dollars the hospital continues to try to collect.

The billing and debt collection practices ECU subjects Cansler and the putative class to also violate North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C.G.S. § 75-1.1, *et seq*. Courts in North Carolina have recognized that declining to disclose prices until after the provision of services, charging grossly excessive fees, and coercing payment by threatening to damage the customer's credit rating can all violate the statute. *See, e.g.*, *Anderson v. Lab. Corp. of Am. Holdings*, 2019 U.S. Dist. LEXIS 138620 (M.D.N.C. Aug. 16, 2019). That's exactly what ECU has done here.

ECU's arguments to the contrary are meritless. It first resists Cansler's contract and unjust enrichment claims on statute of limitations grounds, because he received treatment more than 3 years ago. But ECU ignores that Cansler has made payment to ECU during the limitations period and, in any event, could not have discovered his contract claim until months after he visited the hospital, because ECU continued to adjust his bill and suggest that he may get some reprieve. And ECU's primary defense to UDPTA—that ECU is a member of a "learned profession"—relies almost exclusively on *Shelton v. Duke Univ. Health System, Inc.*, 179 N.C. App. 120, 633 S.E.2d 113 (2006). But *Shelton*'s categorical rule that members of the medical profession are *per se* immune from UDTPA claims has since been renounced by the North Carolina Supreme Court, which recently held that the statute's "learned profession exemption" only applies if the challenged conduct "directly related to providing patient care." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 336, 828 S.E.2d 467, 473 (2019). Cansler's claims in no way relate to the care he received—they turn entirely on conduct carried out by ECU's billing department, long after treatment, as well as that of the debt collector ECU employed to pressure Cansler to pay the hospital's exorbitant rate.

For these and other reasons given herein, Court should deny ECU's motion to dismiss.

FACTUAL BACKGROUND

Defendants University Health Systems and ECU Chowan are parts of the ECU Health system, a nonprofit organization comprised of nine hospitals serving the eastern North Carolina region. FAC ¶¶ 3–5. On June 6, 2018, Cansler visited the ECU Chowan emergency department due to pain from what was later diagnosed as a kidney stone. *Id.* ¶ 57. While there, he received a CT scan among other services. *Id.* ¶ 61.

At the time of his visit Cansler signed a form entitled "Authorization & Consent for Treatment and Assignment of Benefits" ("Consent Form"), which stated he agreed "to pay all charges of Facility that are not covered or paid within a reasonable time by any medical insurance/coverage, whether or not I am otherwise legally obligated to pay." *Id.* ¶ 62. The term "charges" is not defined anywhere in the form. *Id.* ¶¶ 62–63; ECF 51-1.

In the weeks and months that followed that hospital visit, Cansler received a confusing series of bills and statements reflecting changing and contradictory disclosures of the purported charges to him with regard to the visit. FAC ¶¶ 65–66, 68–72, 76–81, 86, 88. The amounts of the claimed charges in these bills and disclosures varied substantially. *See id.* The one thing they shared in common is that they were not itemized, but simply said Cansler owed a (varying) total amount far above $3,000. *Id.* During that time, Cansler made partial payments to keep his account in good standing, wrote letters, made inquiries, and met with hospital representatives to seek clarification and an explanation for the bill. *Id.* ¶¶ 73–74, 84–85, 87–89. On multiple occasions, ECU officials told Cansler that the ECU had a policy of refusing to disclose prices to patients, because a federal law, EMTALA, precluded them from doing so. *Id.* ¶¶ 88, 91.

At the time of his emergency room visit, Cansler had private group health insurance from

Blue Cross. *Id.* ¶ 53. That day, Cansler paid $100. *Id.* ¶ 60. Later, he paid $150 more because he was worried about his credit. *Id.* ¶ 73. On April 7, 2019, ECU apparently applied an additional amount of $75.41 that Cansler had paid the system to his bill, bringing the total out-of-pocket amount Cansler paid toward the CT scan to $325.41. *Id.* ¶ 76. Blue Cross also paid $456 towards the bill, meaning ECU has been paid a total of $781. *Id.* ¶ 119.

Cansler did not receive an itemized bill from ECU until September 2019, more than a year after he received treatment. *Id.* ¶ 68. The bill showed that ECU Chowan's chargemaster price for a CT scan was $4,000. *Id.* Under his Blue Cross plan, the "allowed amount" for that CT scan was reduced to $3,576. *Id.* Based on various comparators, including Medicare and common measures, the Complaint alleges that a reasonable price for the same CT scan ranges from $472 to $679. *Id.* ¶¶ 115–20. Accordingly, given that ECU has already received $781 for this service, the FAC alleges the hospital has been overpaid between $102 and $309. *Id.* ¶ 120.

ECU continued to maintain that Cansler still owed $2,998, and aggressively pursued payment by sending his claims to a collections agency, which repeatedly called and wrote to Cansler, committing multiple violations of federal and state debt collections laws in the process. *Id.* ¶¶ 86, 94–104. Cansler's claim was never resolved.

ARGUMENT

I. ECU IS ONLY ENTITLED TO THE REASONABLE VALUE OF ITS SERVICES, BECAUSE THE PARTIES NEVER AGREED UPON A PRICE TERM

The Consent Form Cansler signed does not contain a definite price term, nor any information that would allow Cansler to understand what he would be obligated to pay. All it says is that Cansler would be obligated to pay "all charges" ECU later charged him. FAC ¶ 62. ECU takes the position that "all charges" referred to its chargemaster, or some (high) percentage of that chargemaster. But Cansler had no way of knowing that; ECU admits it had a policy of not

disclosing its chargemaster (or percentage discounts) to patients when they asked. *Id.* ¶ 39; Mem. at 28. Therefore, it was impossible for Cansler (or any class member) to ascertain, much less give consent, at the time of signing what ECU would later decide to charge him; by the Consent Form's plain language, he ostensibly agreed to pay whatever price ECU dictated after the fact.

Contrary to ECU's position, this did not Cansler obligate to pay ECU's (undisclosed) price. Instead, North Carolina law provides that "[f]ailure to agree on the amount of compensation entitles the physician [only] to the reasonable value of his services." *Forsyth*, 82 N.C. App. at 266, 346 S.E.2d at 214. Here, Cansler plausibly alleges that ECU has already been paid more than the reasonable value of the CT scan ECU provided him. FAC ¶¶ 119–21. Therefore, he is entitled to repayment of the amount he overpaid, either under his unjust enrichment claim or his contract claim, which for doctrinal reasons explained below, Cansler pleads in the alternative.

Under either approach, Cansler has met his burden of pleading that the price term is sufficiently vague so as to be unenforceable. *See, e.g.*, *Hall v. Booth*, 249 N.C. App. 681, 791 S.E.2d 875 (2016) (whether the parties have reached a sufficiently "clear and definite agreement as to the essential and material terms" is generally "a question for the jury"). He is therefore entitled to discovery regarding what he should have paid, and ECU "ha[s] the burden to demonstrate the reasonable value of the medical services it provided." *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 48, 727 S.E.2d 866, 869–70 (2012). Moreover, Cansler is entitled to a declaratory judgment that he does not owe ECU the thousands of dollars it continues to seek from him.

A. The Consent Form Cansler Signed Does Not Contain an Enforceable Price Term

While ECU claims "the Consent that Cansler signed is a valid contract, on its face," Mem. at 19, that ignores the core fact relevant to this case: The face of the contract—with its wide-open

statement that Cansler must pay "all charges" ECU imposed—makes plain that the agreement, or, in the alternative, its price term, is unenforceable. Because a material term (*i.e.*, the price) in the Consent Form Cansler signed was undefined and indeterminable, there is no way ECU and Cansler agreed on a price at the time of signing—a material omission that renders that term, or the whole agreement, unenforceable. *See, e.g.*, *Rider v. Hodges*, 255 N.C. App. 82, 86, 804 S.E.2d 242, 246 (2017) ("Compensation is an essential element to a contract for services. Here, there was no agreement as to price, and therefore there was no enforceable contract." (citation omitted)). And while ECU argues that the "all charges" language (purportedly) meant that Cansler would pay a "rate that is discounted from ECU Chowan's chargemaster," Mem. at 5–6, ECU simultaneously admits that it had a policy "***not*** to disclose or discuss" the chargemaster with patients like Cansler before treatment, *id.* at 28 (emphasis in original).[1]

In other words, neither Cansler nor any patient in the putative class could possibly determine before they received treatment what price ECU would charge them. The open-ended price term in the agreement ECU drafted is not enforceable, and Cansler is obligated only to pay

[1] In its brief, ECU repeats the excuse its officers gave Cansler when he asked why the hospital would refuse to disclose prices to patients who inquired: that ECU was *prohibited* from disclosing its prices to patients upon request under the Emergency Medical Treatment and Active Labor Act ("EMTALA"). Mem. at 28 (citing 42 U.S.C. § 1395dd); FAC ¶¶ 88–89, 91 (ECU officers citing EMTALA to Cansler). The Court should not credit this justification.

EMTALA requires emergency rooms to treat patients regardless of their ability to pay; it does *not* prohibit disclosure of the hospital's chargemaster to patients, especially in non-emergent situations, like Cansler's. Notably, in one of the primary cases on which ECU relies, *see* Mem. 12, the hospital—also subject to EMTALA—made its chargemaster available to an emergency room patient. *Gleason v. Charlotte-Mecklenburg Hosp. Auth.*, 873 S.E.2d 70, 2022 N.C. App. LEXIS 432, *14 (June 21, 2022) (table). And since Cansler received treatment, the U.S. Center for Medicare and Medicaid services promulgated a rule requiring hospitals to make their chargemasters and negotiated rates available to consumers—a rule that ECU complies with, despite EMTALA still being on the books. FAC ¶ 114. ECU's unsupported reliance on EMTALA for its refusal to disclose prices also conflicts directly with the FAC's allegation that EMTALA would not prohibit disclosure, *id.* ¶¶ 112–13, which must be taken as true at the 12(b)(6) stage.

the reasonable cost of services.

1. Two differing approaches to contracts with open price terms: no contract vs. implied-in-fact contract

When, as here, a purported contract's price term is unknown and unknowable, North Carolina courts hold *either* that there is a valid "implied-in-fact" contract, with the price term to be filled in by a factfinder, *or* they hold that there is no contract but the seller is entitled to a *quantum meruit* remedy. *See, e.g.*, *Anderson v. Lab. Corp. of Am. Holdings*, 2019 U.S. Dist. LEXIS 138620, at *9 n.9 (M.D.N.C. Aug. 16, 2019) (collecting cases applying alternate approaches). The distinction "makes no practical difference," because in both instances, "the measure of damages is the same: the reasonable value of the services provided to plaintiff by defendant." *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 214 N.C. App. 196, 216 n.3, 714 S.E.2d 476, 489 n.3 (Ervin, J., dissenting) (2011), *rev'd on other grounds*, 366 N.C. 43, 727 S.E.2d 866 (2012).

Cansler's breach of contract claim (Count V) is premised on the former theory—that there is an implied-in-fact contract that ECU breached by charging him more than the contract permitted. His unjust enrichment claim (Count VI) is premised on the latter—that the Consent Form's failure to include a price term renders it void *ab initio* and leaves ECU with only a *quantum meruit* remedy. Under either theory, Cansler is entitled to (1) damages, because ECU has been paid more than the reasonable value of its services, and (2) a declaratory judgment that he does not owe the thousands more ECU continues to seek from him. Cansler briefly lays out the two theories here.

Implied-in-fact contract with reasonable price term to be imputed. One approach courts take to agreements with open price terms is to read the agreement as an "implied-in-fact" contract, and fill in the price term. Under this theory, "[t]he general rule is that when there is no agreement as to the amount of compensation to be paid for services, the person performing them is entitled

to recover what they are reasonably worth." *Turner v. Marsh Furniture Co.*, 217 N.C. 695, 697, 9 S.E.2d 379, 380 (1940); *see also Ellis Jones, Inc. v. W. Waterproofing Co.*, 66 N.C. App. 641, 646, 312 S.E.2d 215, 218 (1984) ("Under such an implied in fact contract, damages are based on the reasonable value of the services 'rendered pursuant to request and agreement to pay therefor [sic].'" (citation omitted)).

That is exactly what the Court of Appeals did in a case similar to this one, in which a patient signed a form agreeing to pay "all charges for said [medical] services." *Forsyth*, 82 N.C. App. at 268, 346 S.E.2d at 214. The court concluded that in this situation "the law implies a contract whereby [the patient] is primarily liable to the hospital for the reasonable value of the services rendered on her behalf." *Id.* at 268–69; *see also Duffell v. Weeks*, 15 N.C. App. 569, 570–71, 190 S.E.2d 379, 381 (1972) ("[W]here there is an express agreement to pay, but the amount is not specified, the person performing the services is entitled to recover on the theory of quantum meruit.").

Even though such an implied-in-fact contract "exists by virtue of the parties' conduct, rather than in any explicit set of words," courts treat them as valid contracts. *Kiousis v. Kiousis*, 130 N.C. App. 569, 573, 503 S.E.2d 437, 440 (1998). Thus, any remedy is granted under contract law.

***No valid contract but remedy in* quantum meruit.** The other approach North Carolina courts take when a contract fails to specify a price is to hold that there is no contract formed. "As a general matter, a contract must be sufficiently definite in order that a court may enforce it." *Brooks v. Hackney*, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991). For there to be a "meeting of the minds" legally sufficient to form a valid contract, "the terms of a contract must be definite and certain or capable of being made so; the minds of the parties must meet upon a definite

proposition." *Elliott v. Duke Univ., Inc.*, 66 N.C. App. 590, 596, 311 S.E.2d 632, 636 (1984). Thus, when a material term of the contract, such as the price, is left totally indefinite, some courts hold that no contract is formed. *See, e.g.*, *Howell v. C. M. Allen & Co.*, 8 N.C. App. 287, 289, 174 S.E.2d 55, 56 (1970) ("An offer must be definite and complete, and a mere proposal intended to open negotiations which *contain no definite terms but refers to contingencies to be worked out* cannot constitute the basis of a contract, even though accepted." (emphasis added)).[2]

Under this approach, the party who provided the service to its detriment can obtain compensation by bringing a claim for "quasi contract," sometimes also referred to as an "implied-in-law" contract. *N.C. Baptist Hosps., Inc. v. Dula*, 476 F. Supp. 3d 279, 291 n.12 (W.D.N.C. 2020). Despite its name, an implied-in-law "contract" is not technically a contract; it is "a term of art used to express an equitable remedy used by the court to prevent unjust enrichment." *Waters Edge Builders, LLC v. Longa*, 214 N.C. App. 350, 353, 715 S.E.2d 193, 196 (2011). North Carolina courts have applied this approach in the hospital context. *See, e.g.*, *Talford*, 214 N.C. App. at 198, 714 S.E.2d at 478 ("Our cases hold that the measure of damages for unjust enrichment . . . is the reasonable value of the goods and services to the defendant.").

Under either theory, ECU would be entitled to the same amount of payment—only the reasonable value of its services—which is why courts in both situations use the term *quantum*

[2] To be clear, parties need not agree to an exact, preordained price figure in order for a services contract to be enforceable; price terms are sufficiently definite where the "contract sets the method for determining the price or costs and the costs are determined according to that method." *Brawley v. Brawley*, 87 N.C. App. 545, 550, 361 S.E.2d 759, 762 (1987) (valid price term where contract incorporated by reference specific accounting system and exhibit setting out how costs would be calculated). Thus, North Carolina courts uphold contracts with price terms that are "definite within themselves *or* capable of being made definite." *Tran v. Novo Nordisk Pharm. Indus., Inc.*, 2016 WL 1559137, at *5 (E.D.N.C. Apr. 18, 2016) (emphasis added) (quoting *Brawley*, 87 N.C. App. at 549). But, again, the Consent did not reference ECU's chargemaster and, in any event, if it had Cansler would have been rebuffed if he had asked to see it. FAC ¶ 11 ("ECU has had a policy of refusing to tell patients the prices it plans to charge."); Mem. 28 (same).

meruit to define the recovery. *See Duffell*, 15 N.C. App. at 570–71, 190 S.E.2d at 381 (finding implied-in-fact contract and applying *quantum meruit* remedy); *Dula*, 476 F. Supp. 3d at 291 & n.12 (applying unjust enrichment approach and noting hospital entitled to "what the services are reasonably worth, absent an agreement that the services were rendered gratuitously").

2. The Consent Form did not contain an enforceable price term, meaning ECU is entitled to only the reasonable value of the services it provided

By signing the Consent when he received treatment, Cansler did not agree to anything resembling a definite price term. The Consent by its own terms purportedly entitles ECU to charge whatever ECU wanted—it states that Cansler is obligated to pay "all charges" that ECU would later say he owed "whether or not [Cansler is] otherwise legally obligated to pay," *i.e.*, any "charges not paid by [Cansler's] insurance." FAC ¶ 62; *see* Mem. at 6. Nothing in the Consent referenced any amount that Cansler's insurance had negotiated on his behalf, or incorporated by reference ECU's "chargemaster" or its "regular rates." Indeed, nothing in the purported contract prevented ECU from charging Cansler 1,000 times the Medicare rate, if it so desired.

It does not matter that ECU eventually did pursue Cansler for an amount tied to its chargemaster—the purported price term was void *ab initio* due to its failure to include an amount or to at least incorporate a mechanism for calculating it. *See, e.g.*, *Shaw v. Elon Univ.*, 400 F. Supp. 3d 360, 365 (M.D.N.C. 2019) ("If any portion of the proposed terms is not settled, *or no mode agreed on by which they may be settled*, there is no agreement." (quoting *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921) (emphasis added, alteration omitted)); *Rider*, 255 N.C. App. at 85, 804 S.E.2d at 246 (2017) ("A contract for service must be certain and definite as to the nature and extent of . . . the compensation to be paid, or it will not be enforced." (citation and internal quotations omitted)). In any event, as already noted, by agreeing to pay "all charges" ECU would later impose, Cansler had no way of knowing that this meant

ECU's (secret) chargemaster.

ECU's decision to leave the price term on the Consent Form completely open, rather than provide some mechanism or reference point by which it could be determined beforehand, distinguishes this case from *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 633 S.E.2d 113 (2006), on which ECU heavily relies. In *Shelton*, the patient signed a consent form agreeing to pay the hospital for its services "in accordance with the regular rates and terms" that hospital charged, and the parties agreed that the "regular rates" meant the hospital's chargemaster. *Id.* at 123. The plaintiff nonetheless argued there was no valid contract, because there was "no definite price term . . . agreed upon." *Id.* at 122.

The court disagreed, holding that the contract was "free from ambiguity" because the plaintiff had agreed to pay the hospital's "regular rates" and she "ma[de] no argument in her complaint that she was charged anything other than the 'regular' rates." *Id.* at 124. The contract's reference to the hospital's "regular rates" was definite enough, because the plaintiff herself had alleged that "the 'regular' rates existed on the [hospital's] 'charge master,'" which the court noted she could have ascertained had she asked. *Id.* at 125. "Thus, the price term of 'the regular rates and terms of the Hospital at the time of patient's discharge' was 'definite and certain *or capable of being made so*.'" *Id.* (quoting *Elliott*, 66 N.C. App. at 596, 311 S.E.2d at 636) (emphasis in original).

The Court of Appeals recently issued a similar decision in *Gleason v. Charlotte-Mecklenburg Hosp. Auth.*, 2022 N.C. App. LEXIS 432 (June 21, 2022). As in *Shelton*, the patient in *Gleason* signed a consent form promising to pay Atrium, the hospital-defendant, its "regular rates." *Id.* at *2. The court recognized that its task was to "consider whether the 'regular rates' language in the agreement was sufficiently definite to allow a meeting of the minds on the price

term." *Id.* at *12 (citation omitted). The court held that it was, both because the patient "had access to [the hospital's chargemaster] before signing the Consent Form," and because he had "not alleged that he was charged anything other than the 'regular rates' found in defendant Atrium's chargemaster document." *Id*. at *13. The court therefore affirmed the grant of summary judgment to Atrium and held there was a valid contract. *Id.* at *14-15.

While ECU relies heavily on these two cases, *see* Mem. at 10–12, they are readily distinguishable from Cansler's case, because in both instances, while the price was not explicit in the agreement, it was at least "*capable of being made so*." *Shelton*, 179 N.C. App. at 125. In *Shelton* and *Gleason*, the patient could learn the contract's price due to the consent forms' reference to "regular rates"—which both courts observed had been understood by the patient to mean the chargemaster, and which the plaintiffs there had access to. *Id.* at 123; *Gleason*, 2022 N.C. App. LEXIS 432, at *17 (Gleason "had access to the chargemaster document and signed the Consent Form, which obligated him to pay the full hospital bill at the regular charged rates"). Here, by contrast, neither Cansler nor any member of the putative class could possibly have ascertained the chargemaster due to ECU's policy of refusing to disclose it. FAC ¶ 22; Mem. at 28. And even if ECU had disclosed the chargemaster, the Consent Form's language would not put Cansler on notice as to what he was agreeing to pay—the form purportedly obligated him to pay "all charges" the hospital saw fit to impose, not the chargemaster or some other "regular" rate.

Indeed, one Justice of the North Carolina Supreme Court, while sitting on the Court of Appeals, recognized this exact distinction as critical. In a case very similar to this one, then-Judge Ervin found the distinction between a "regular rates" and an "all charges" consent form dispositive—the former created an enforceable price term, but the latter did not. *See Talford*, 214 N.C. App. at 216 (Ervin, J., dissenting). He noted:

> Although this Court has found that a contract for medical services between a hospital and a patient requiring the patient to pay "'the regular rates and terms of the Hospital at the time of patient's discharge'" constitutes a sufficiently definite price term to support an award of damages in reliance on an express contract, [quoting *Shelton*], I am unable to conclude that a provision requiring Defendant to pay "all charges" is entitled to similar treatment.

Id. He thus concluded that the hospital was only entitled to *quantum meruit* (*i.e.*, a reasonable price), under the implied-in-fact approach. *Id.* Notably, the majority did not disagree; it simply concluded that it did not need to reach this issue because on appeal the parties did not dispute that *quantum meruit* was the proper remedy. *See id.* at 197–98 (majority opinion).[3] Thus, if faced with ECU's open-ended price term, the Court of Appeals would, as then-Judge Ervin said he would, hold this case to be distinguishable from *Shelton* on this ground.

While ECU contends that holding the Consent Form's price term unenforceable would create a "devastating slippery slope for our healthcare system," Mem. at 3, courts around the country have adopted Cansler's position here, and hospital systems in those jurisdictions remain alive and well. *See, e.g.*, *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 194, 197 (Tenn. 2001) (agreement holding patient "financially responsible to the hospital for charges" found unenforceable because "the price term . . . is indefinite"); *HCA reports higher earnings, buffered by millions in coronavirus relief*, N.Y. Times (July 22, 2020) ("[HCA] reported $1.1 billion that ended June 30."), *available at* https://perma.cc/ZL2S-QPRS. Indeed, in a thorough decision issued earlier this year, the Colorado Supreme Court explained why courts should be skeptical before concluding that references to "all charges" leave patients on the hook for hospitals' chargemasters:

> Moreover, as courts have observed, hospital chargemasters have become increasingly arbitrary and, over time, have lost any direct connection to hospitals'

[3] The Supreme Court ultimately reversed the appeals court's decision in *Talford*, because the lower court misstated the evidentiary standard applicable to *quantum meruit*—but it agreed that *quantum meruit* was the proper remedy. *Talford*, 366 N.C. at 48. That is exactly the method of determining price Cansler asks the Court to apply here.

> actual costs, reflecting, instead, inflated rates set to produce a targeted amount of profit for the hospitals after factoring in discounts negotiated with private and governmental insurers. This, too, weighs against concluding that "all charges of the Hospital" necessarily referred to the chargemaster.

French v. Centura Health Corp., 509 P.3d 443, 451 (Colo. 2022) (citations omitted).[4] In *French*, as here, the hospital had not provided the chargemaster it claimed was incorporated in the contract by the vague "all charges" language, meaning the parties cannot have agreed on a price term. *Id.* at 452 ("Because French had no knowledge of and did not clearly and knowingly assent to the terms of Centura's chargemaster, we conclude, under long-settled principles of contract law, that the chargemaster was not incorporated by reference into the [consent forms] that French signed.").

The Court should follow the same approach here. "[C]ompensation is an essential term for a contract to render services, and the term 'must be definite and certain or capable of being ascertained from the contract itself.'" *Mayo v. N. Carolina State Univ.*, 168 N.C. App. 503, 508, 608 S.E.2d 116, 121, *aff'd,* 360 N.C. 52, 619 S.E.2d 502 (2005) (quoting *Howell*, 8 N.C. App. at 289). Because ECU's Consent Form did not—indeed, could not have—put Cansler on notice as to what price ECU would later charge him, the agreement's open price term is unenforceable, and Cansler owed ECU only the reasonable value of the services the hospital provided.

[4] The *French* court also discussed and dismissed as unpersuasive the leading case holding that "all charges" language incorporates a hospital's chargemaster, *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255 (3d Cir. 2008), which other courts have "reflexively cited," *French*, 509 P.3d at 451. *French* explained that the *DiCarlo* court felt obligated to imply the chargemaster into the contract because, in its view, a court "could not possibly determine what a 'reasonable charge' for hospital services would be." *Id.* (quoting *DiCarlo*, 530 F.3d at 264). *French* was "unpersuaded by [this] limited analysis"—which was made "with little citation to any applicable authority"—and held to the contrary that there was no sound reason "for treating contracts for medical services differently from all other types of contract." *Id.* The North Carolina Supreme Court has come to the same conclusion. *Talford*, 366 N.C. at 49 (noting *quantum meruit* principles "apply equally when determining the reasonable value of medical services). The Court should follow the same path here and decline ECU's invitation to import *DiCarlo*'s faulty approach. *See* Mem. at 12–13.

B. Under Either his Contract Claim or his Unjust Enrichment Claim, Cansler has Plausibly Alleged that ECU Has Been Overpaid

The Complaint plainly alleges that both ECU's chargemaster rate for CT scans ($4,000) and the "discounted" rate it seeks to hold Cansler responsible for ($2,998.70) are unreasonable. *See* FAC ¶ 106. The Complaint alleges the price "grossly exceed[s] any reasonable value for that service." *Id*. ¶ 34; *cf. In re N. Cypress Med. Ctr. Operating Co.,* 559 S.W.3d 128, 133 (Tex. 2018) ("[B]ecause of the way chargemaster pricing has evolved, the charges themselves are not dispositive of what is reasonable."). As a comparator, "[o]ne measure of the reasonable price for a service is the rate that Medicare pays, because Medicare ties the prices it pays for a given service to the cost of providing that service plus a small profit margin." FAC ¶ 25. Medicare charges $302 for the CT scan Cansler received. *Id.* ¶ 26. Yet ECU told Cansler he owes *more than 11 times more than that*, *id.* ¶ 26, meaning more than 90 percent of that amount would be pure profit.

The Complaint also alleges that ECU has already been compensated in excess of the reasonable price of Cansler's CT scan. ECU has already received $781 ($325 from Cansler and $456 from Blue Cross), *id.* ¶¶ 73, 76, 78, 119, which is more than double the Medicare cost and far exceeds any other reasonable measure of the CT scan's value, *id.* ¶ 26.

Importantly, the reasonableness of a hospital's prices is a factual question, and the hospital has the burden to prove the "reasonable value of the medical services it provided." *Talford*, 366 N.C. at 48. Where, as here, the patient and insurer have already paid some portion of the hospital's fee, "the Providers must demonstrate that the sums they have already received from [the patient's] Plan do not amount to the reasonable value of their services," *Dula*, 476 F. Supp. 3d at 292. "This determination will turn on the jury's interpretation and application of the term 'reasonable.'" *Id.*

The Court of Appeals' recent decision in *Gleason* is instructive. There, the hospital brought two counterclaims, one saying the contract price (which referenced the chargemaster) was

enforceable, and the other saying that the patient owed the same price under the doctrine of *quantum meruit*. *Gleason*, 2022 WL 2204433, at *2. With respect to the latter, after discussing the evidence disclosed during discovery, the court noted that "[o]n an order granting summary judgment on a *quantum meruit* claim, we review 'the forecasted evidence to see if there is a genuine issue of material fact regarding whether plaintiff's bill represents the reasonable value of plaintiff's medical services.'" *Id.* at *5 (quoting *Talford*, 366 N.C. at 48). The court then noted that the *plaintiff's complaint expressly disavowed that he was challenging the contract price as unreasonable*, meaning that it was appropriate for the court to enter summary judgment for the hospital on the *quantum meruit* claim. *Id.* at *5–6 (citing *Sales*, 82 N.C. App. at 269).

Here, by contrast, Cansler *does* challenge ECU's stated price as unreasonable, *see* FAC ¶¶ 1, 26–29, 37–39, 56, 106, and he offers at least one alternative (the Medicare rate) price that he claims would be reasonable, *id.* ¶ 25; *see also* ¶ 87 (discussing Healthcare Blue Book, a "fair price" estimator). In discovery and at trial, ECU may put on evidence that its price is reasonable, or that some other price between its charge and the Medicare rate is a better measure. *See Talford*, 366 N.C. at 49 (to determine "reasonable worth" of a service factfinder should look to "the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances" (citation omitted)); *see also French*, 509 P.3d at 452 (noting "it was for the jury to decide the reasonable value of [the hospital's] goods and services"). But Cansler has more than met his burden of stating a claim at this early stage of the proceedings.

C. Based on the Foregoing, Cansler Has Plausibly Alleged Either his Breach of Contract Claim or his Unjust Enrichment Claim

Because Cansler has plausibly alleged that ECU's rates are unreasonable and that ECU has already been paid more than the reasonable cost of services, the Court can either (1) hold that the Consent Form is a valid, implied-in-fact contract and read into it a reasonable price term, or (2)

hold there is no contract, in which case ECU is entitled to a reasonable price under *quantum meruit*.

If the Court holds that the Consent Agreement is an implied-in-fact contract, Cansler has plausibly stated a claim for breach of that contract. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Branch v. High Rock Lake Realty, Inc*., 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002). The Complaint alleges that the contract at issue here contained an open price term, as it stated only that Cansler agreed to pay "all charges." FAC ¶ 62. Nowhere does the contract define those charges, or provide a mechanism for determining them. *Id.* ¶ 63. Because there is no defined price term, ECU Health is entitled only to the reasonable value of its service. *Id.* ¶¶ 182–83. By seeking payment in excess of that amount, ECU violates the contract. And because Cansler alleges he has already paid more than a reasonable amount, he is entitled to contract damages in the amount he overpaid. *See, e.g.*, *Indus. Timber, LLC v. Jackson Furniture Indus., Inc.*, 2022 WL 5265156, at *2 (W.D.N.C. Oct. 6, 2022) (noting alleged overcharge proper basis for breach of contract claim).

If the Court holds there is no contract, Cansler has plausibly alleged that ECU was unjustly enriched by aggressively seeking (and receiving) more from him than ECU is entitled to under the doctrine of *quantum meruit*. There are five elements of a prima facie case of unjust enrichment: (1) one party must confer a benefit upon the other party, (2) the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances, (3) the benefit must not be gratuitous, (4) the benefit must be measurable, and (5) the defendant must have consciously accepted the benefit. *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 230 N.C. App. 537, 541-42, 750 S.E.2d 555, 559 (2013). "Thus, in order to prevail on a claim of unjust enrichment, a plaintiff must show that 'property or benefits were conferred on a defendant under circumstances which give rise to a

legal or equitable obligation on the part of the defendant to account for the benefits received.'" *Butler v. Butler*, 239 N.C. App. 1, 7, 768 S.E.2d 332, 336 (2015) (citation omitted).

The Complaint alleges Cansler bestowed a benefit on ECU by overpaying for a CT scan. FAC ¶ 190–91. ECU has already received $781, *id.* ¶ 119, which is more than double the Medicare cost and far exceeds any other reasonable measure of the CT scan's value, *id.* ¶ 26. Cansler paid ECU even after he believed ECU was reasonably compensated because ECU demanded it, with threats (which it made good on) of sending him to collections. *Id.* ¶¶ 73, 78. Indeed, ECU continues to seek even more payment, and continues to threaten Cansler's credit if he does not give in. *Id.* ¶¶ 90–105. The amount ECU has been overpaid is measurable, as it is common in healthcare cases to assess the reasonable value of a given medical service. *See Talford*, 366 N.C. at 48. And there can be no question ECU consciously accepted this benefit.

D. Cansler Is Entitled to Declaratory Judgment

Finally, based on the foregoing causes of action, Cansler is also entitled to a declaratory judgment that he does not owe ECU the amount ECU continues to try to collect. *See* FAC ¶¶ 155–165 (Count II). This claim is redressable under the Declaratory Judgment Act. *See* 28 U.S.C. § 2201(a) (a district court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought").

The Fourth Circuit has identified three elements to determine whether a plaintiff has stated a claim under the Declaratory Judgment Act: (1) the complaint must state an actual controversy between the parties of sufficient reality to warrant issuance of a declaratory judgment; (2) there must be an independent basis for jurisdiction; and (3) the court should not abuse its discretion in exercising jurisdiction. *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.,* 386 F.3d 581, 592 (4th Cir. 2004). Cansler easily satisfies all three.

First, ECU continues to assert that Cansler owes the hospital system $3,576 (less what he and Blue Cross have already paid) for the CT scan Cansler received. *See* Mem. at 6. Because the first factor requires only that the plaintiff have "an ongoing or future injury in fact," *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018), the parties' current financial dispute here suffices.

Second, there is an independent basis for jurisdiction—supplemental jurisdiction under 28 U.S.C. § 1367, based on Cansler's federal Fair Debt Collection Practices Act claim, which arises out of the same transaction and occurrence as Cansler's claims state-law claims. *See* FAC ¶ 7.

Third, the Court would not abuse its discretion by adjudicating Cansler's declaratory relief claim. This claim asserts that the consent form ECU has its patients sign—which contains no definite price term, nor any method or reference by which such a price could be determined—is not an enforceable contract, and that Cansler and the putative class therefore only owe ECU the "reasonable price for the medical services they received." *Id.* ¶ 160. Adjudicating this claim will settle legal liabilities between Cansler and ECU that are not the subject of any other proceeding, and it will provide the parties "relief from the uncertainty, insecurity, and controversy" giving rise to the proceeding—namely, the debt ECU has imposed on Cansler that is currently in collections. *Cf. Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 422 (4th Cir. 1998).

II. ECU'S DEFENSES TO CANSLER'S CONTRACT AND UNJUST ENRICHMENT CLAIMS ARE WITHOUT MERIT

A. Cansler's Contract Claim Is Not Time-Barred

Cansler agrees the contract claim is subject to North Carolina's three-year statute of limitations, set forth at N.C.G.S. § 1-52(1). However, ECU neglects to note that the Supreme Court recently confirmed that a discovery rule applies to that statute of limitations period. *See Chisum v. Campagna*, 376 N.C. 680, 701, 855 S.E.2d 173, 188 (2021) ("[A] statute of limitations should not begin running against [a] plaintiff until [the] plaintiff has knowledge that a wrong has

been inflicted upon him.") (citation omitted)).

Here, Cansler alleges that, as he diligently inquired and met with hospital representatives about his bill, ECU on multiple occasions changed the information in its bills and changed its position regarding what he owed. The claim was not ripe by the end of the initial emergency department visit on June 6, 2018, because the form he signed at that time had a silent price term, merely stating that he had agreed to pay "charges." FAC ¶ 62. As of June 19, 2018, Cansler was told that he "may" be billed $4,262.91. FAC ¶¶ 65–66. As of April 7, 2019, also within the period, the hospital had applied funds toward this bill that he had paid during a separate visit. FAC ¶ 76. As of July 29, 2019, he was advised that, actually, what he owed was $3,871.70. FAC ¶ 79. Leading up to an August 15, 2019 personal visit he made to the hospital's business office, the amount ECU sought once again changed, to $2,998.70. FAC ¶¶ 85–87. It was not until September 2019, within the three-year limitations period, that he was provided an itemized bill, this time stating that the amount that he owed was $3,119.39. FAC ¶ 68. Finally, as of October 13, 2020 the collection agency hired by ECU reiterated the claimed amount of $2,998.70. FAC ¶ 94. In any event, the breach continues to this day, because ECU continues to seek excessive compensation from Cansler, in violation of the contract. *See* Mem. at 6.

In short, Cansler did not even have certainty as to what price the hospital was claiming until late 2019 into 2020, well within the statute of limitations. It is only at that point, when it was clear ECU planned to carry forward on its threats to collect an outrageous and unreasonable amount, that Mr. Cansler could have known he had a breach of contract claim.

B. Cansler's Unjust Enrichment Claim Is Not Precluded

Nor is Cansler's unjust enrichment claim time-barred. The FAC alleges that, on April 7, 2019, less than three years prior to this suit, "ECU Health apparently applied an additional $75.41 in payment to the bill in error. Payment was from Plaintiff for a different medical event and was

mis-applied to the wrong invoice. Accordingly, the total amount Cansler is believed to have paid toward the CT scan was $325.41 ($100 plus $150 plus $75.41)." FAC ¶ 76. ECU applied this payment, made within the limitations period, to Cansler's CT scan bill because it continued to unjustly seek an unreasonable payment from Cansler.[5]

Nor is Cansler's unjust enrichment claim barred under the voluntary payment doctrine. For that doctrine to apply, the movant (ECU) must establish that the plaintiff paid with full knowledge of the facts. Here, as alleged in the FAC, the April 7, 2019 payment was supposed to be applied to the charge from a different visit. And Cansler certainly did not make that payment or any of the others with full knowledge of the facts, given the allegations as to concealment, conflicting and changing billing amounts and explanations, and pretextual reliance on EMTALA. *See supra* at 6 n.1. North Carolina courts have declined to find that the voluntary payment rule barred an unjust enrichment claim when the facts reflected that the plaintiff did not have full knowledge. *See, e.g.*, *Shoe Show, Inc. v. One-Gateway Assocs., LLC*, 2015 U.S. Dist. LEXIS 129027, *31 (M.D.N.C. Sept. 25, 2015) (noting the "well established rule of law that the voluntary payment of money by a person *who has full knowledge of all the facts* can not [sic] be recovered") (emphasis added).

Moreover, this Court recently recognized that the voluntary payment doctrine does not apply where there is "some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another." *Cross v. Formativ Health Mgmt., Inc.*, 439 F. Supp. 3d 616, 630–31 (E.D.N.C. 2020) (Flanagan, J.). The Complaint alleges that Cansler made his payments to "keep his account in good standing,"

[5] ECU argues in a footnote that this payment was "irrelevant to the accrual of Cansler's unjust enrichment claim," because it related to a different medical event. Mem. 9 n.5. But ECU ignores the fact that *ECU* treated this as payment towards Cansler's CT scan, because ECU believed (and still does) that Cansler owes it thousands of dollars. It is thus directly relevant to Cansler's unjust enrichment claim.

only after receiving multiple bills from ECU, FAC ¶¶ 70–73, and out of fear that ECU's aggressive debt collection practices would threaten his credit score, *e.g.*, *id.* ¶¶ 38, 47, 57–58. Thus, he made his payments involuntarily, because ECU threatened (and continues to threaten) his financial well-being if he does not pay the thousands more ECU says he owes. His payments were not voluntary.

III. CANSLER HAS PLAUSIBLY ALLEGED HIS UDTPA CLAIM

The FAC also adequately pleads Cansler's claim that ECU's unreasonable billing and collection practices violate UDTPA. *See* FAC ¶¶ 134–54 ("Count One").

A. The FAC Plausibly States a UDTPA Claim

To establish a UDTPA claim, a plaintiff must prove that (1) the defendant's act was in or affecting commerce, (2) the defendant committed an unfair or deceptive act or practice, and (3) the defendant's act was the proximate cause of the plaintiff's injury. *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013). Cansler satisfies each element.

First, ECU's conduct occurred in commerce. Cansler presented at ECU Chowan complaining of pain, FAC ¶ 57, he paid a fee of $100, *id*. ¶ 60, received other services for which there were charges, *id*. ¶ 61, executed a Consent Form, *id*. ¶ 62, and later received a bill for those services, *id*. ¶ 69. ECU does not meaningfully dispute that its conduct is in commerce, other than to argue that it is exempted by the learned profession exemption, which does not apply. *Infra* Section III.A.1.

Second, ECU's conduct is both unfair and deceptive. North Carolina courts have stated that business practices are unfair if they are "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," and are deceptive if they have "the capacity or tendency to deceive." *Ace Chem. Corp. v. DSI Transps., Inc*., 115 N.C. App. 237, 247, 446 S.E.2d 100, 106 (1994). Here, ECU charged Cansler an exorbitant fee to which he never assented. Indeed, he could

not have assented because ECU intentionally—and pursuant to centralized policy—obscured that fee and deliberately refused to disclose it on specious grounds. FAC ¶ 40; *see supra* 6 n.1. Moreover, when consumers are unable to pay, ECU harasses them, before sending the debt to collections and potentially damaging consumers' credit scores. *Id.* ¶ 12. ECU's practices are definitionally unscrupulous and substantially injurious—and clearly deceptive.

Anderson v. Lab. Corp. of Am. Holdings, 2019 U.S. Dist. LEXIS 138620 (M.D.N.C. Aug. 16, 2019) is instructive. There, plaintiff alleged that the defendant had "a number of business practices that tricked[ed] and harass[ed] customers into paying excessive prices" for medical lab tests. *Id.* at *21–22 (internal citations omitted). As here, the defendant declined to disclose prices until after the provision of services, and then charged excessive fees and coerced payment by threatening to damage the customer's credit rating. The Court thus declined to fully dismiss plaintiff's UDTPA claim. Cansler submits that *Anderson* is squarely on point.[6]

The grossly excessive nature of hospital chargemaster rates like ECU's has been well documented. *See, e.g.*, *French*, 509 P.3d at 451–52 ("Courts and commentators have observed, hospital chargemasters have become increasingly arbitrary and, over time, have lost any direct connection to hospitals' actual costs, reflecting, instead, inflated rates set to produce a targeted amount of profit for the hospitals after factoring in discounts negotiated with private and governmental insurers."); *In re N. Cypress Med. Ctr. Operating Co*., 559 S.W.3d at 132 (collecting authorities); *see also Doe*, 46 S.W.3d at 194 (noting that chargemaster rates are marked up to

[6] Moreover, *Bumpers*, upon which ECU relies, qualified its holding by noting that "there may be circumstances . . . when an unreasonably excessive price would constitute a violation of [the UDTPA]." *Id*. at 229; *see also Sullivan v. Lab. Corp. of Am. Holdings*, 2018 U.S. Dist. LEXIS 51689, at *10 (M.D.N.C. Mar. 28, 2018) (describing *Bumpers* as holding that "where there was no element of . . . misrepresentation, or compulsion"). The FAC alleges both that ECU's prices are unreasonably excessive *and* that there was misrepresentation and compulsion.

produce a targeted amount of profit for the hospital).

Finally, there can be no serious dispute that ECU's conduct is the cause of Cansler's injuries. ECU's conduct—its unfair decision to charge exorbitant fees and its refusal to disclose its rates *ex ante*—caused Cansler to purportedly owe thousands of dollars, to be harassed, and for his account to be sent to collections. FAC ¶¶ 152–54.

1. The learned profession exemption is inapplicable to Cansler's claim regarding ECU's billing practices

Cansler's UDTPA claim does not relate in any way to the medical treatment he received during his 2018 emergency room visit. Nowhere does he allege he received inadequate or inappropriate care, or that he was harmed by the medical professionals who treated him. Instead, his claim relates only to the unreasonable charge he was sent by ECU's billing department, FAC ¶¶ 65–104, ECU's headquarters' policy refusing to disclose prices to patients, *id.* ¶¶ 22, 39, and the hospital system's unlawful attempt to collect its purported debts, *id.* ¶¶ 65–104.

UDTPA's learned profession exemption under which ECU seeks immunity provides as follows: "For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b). Because Cansler's claim relates *only* to a "business activity" and not in any way to the "professional services rendered by a member of a learned profession," ECU has not met its burden of proving that UDTPA's "learned profession" exemption applies. *See* N.C.G.S. § 75-1.1(d) (proving exemption's applicability is defendant's burden); *see also Mason v. Health Mgmt. Assocs., LLC*, 421 F. Supp. 3d 237, 245 (W.D.N.C. 2019) (holding "the learned profession exception [did] not apply" to UDTPA claim against hospital "[b]ecause this claim arises out of the business relationship").

a. Overview of the learned profession exemption as applied by the North Carolina Supreme Court

A recent North Carolina Supreme Court decision—the only one in which that court has addressed the learned profession exemption—held that a defendant must prove two elements to establish that a UDTPA claim is covered by the learned profession exemption: (1) the defendant must be a member of a learned profession, *and* (2) "the conduct in question must be a rendering of professional services." *Sykes*, 372 N.C. at 334.

On the first element, that Supreme Court held that the defendants—individual chiropractors and the company they were members of—were "members of health care professions fall within the learned profession exemption. *Id.* at 334. Importantly, the court held that the company itself was a learned professional because "all members" were chiropractors. *Id.* at 336.

On the second element—whether the conduct was a "rendering of professional services"—the court noted that "the mere status of a defendant as a member of a 'learned profession' does not shield that defendant from any claim under [UDTPA] regardless of how far removed the claim is from that defendant's professional practice." *Id.* at 336. It then analyzed the plaintiffs' substantive claim, which was that the defendants had allegedly used their market power to artificially restrain the amount of chiropractic care to drive up their own profits. The court held this conduct satisfied the second element because it was "directly related to patient care." *Id.* (conduct was "sufficiently related to patient care" because "the basis for plaintiffs' [UDTPA] claim is that chiropractors are reducing the level of services patients receive").

b. Under Sykes*, ECU's unlawful billing scheme does not "sufficiently relate" to the rendering of services "professional services rendered by a member of a learned profession."*

Sykes demonstrates that, contrary to most decisions preceding it, a defendant does not automatically qualify for the exemption simply because it is a medical professional; the nature of

the claim must be "directly related to providing patient care." *Id.* This gives meaning to the statute's text, which exempts only "*professional services rendered* by a member of a learned profession"—not any and all conduct that professional (or its corporate employer) may engage in.

ECU disagrees, relying almost exclusively on *Shelton*. Mem. at 19 (citing *Shelton* as "extremely persuasive authority" that is "on all fours" with this case). But *Shelton* simply said, "Our Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75–1.1(a)." 179 N.C. App. at 126. That is, *Shelton* held that being a member of a learned profession *renders one categorically immune* to UDTPA. This flatly contravenes *Syke*'s holding that "the mere status of a defendant as a member of a 'learned profession' does not shield that defendant from any claim under [UDTPA] regardless of how far removed the claim is from that defendant's professional practice." 372 N.C. at 336. Thus, ECU is simply wrong that "[m]edical professionals are expressly excluded from the scope of [UDTPA]." Mem. at 10 (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 543 S.E.2d 660, 664 (2000)).

The other Court of Appeals authorities ECU cites—all of which pre-dated *Sykes*—either applied the exemption categorically (as did *Shelton*), *see, e.g.*, *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 378, 573 S.E.2d 600, 604 (2002), or engaged in the kind of analysis *Sykes* later required, under which Cansler would win here, *see, e.g.*, *Cameron v. New Hanover Mem. Hosp., Inc.*, 58 N.C. App. 414, 445, 293 S.E.2d 901, 920 (1982) (concluding conduct plaintiff challenged was actually an "important quality control component" that was "a necessary assurance to good health care"). ECU also declines to note that even before *Sykes* the Court of Appeals had held that "[t]he exchange of money for services" constitutes non-exempt "business activity," even when related to medical care. *Jacobs v. Physicians Weight Loss Ctr. of*

Am., Inc., 173 N.C. App. 663, 671, 620 S.E.2d 232, 238 (2005).

Indeed, a recent *amicus* brief filed by the North Carolina Attorney General while *Sykes* was pending argued that *Shelton* and ECU's other authorities "expanded the reach of the exemption far beyond its text and original design." Brief of Amicus Curiae the State of North Carolina, *Hamlet H.M.A., LLC v. Hernandez*, No. 425A18, at 28–35 (N.C. May 8, 2019) (hereinafter "*Hamlet* AG Amicus"), *available at* https://perma.cc/4YRN-YALK. The Attorney General notes that these decisions "immunize[d] a wide swath of commercial activities" that UDTPA was designed to prohibit, including "abusive debt-collection practices" like those at issue here. *Id.* at 3–4. With respect to *Shelton* specifically, the brief notes "the Court of Appeals did not even inquire into whether the challenged conduct constituted the rendering of professional services, as the statute's text requires." *Id.* at 31. *Sykes* fixed this problem by limiting the exemption to conduct "directly related to patient care." *Sykes*, 372 N.C. at 336.

Under *Sykes*, Cansler's claim does not qualify as the "rendering of a professional service." Unlike in *Sykes*, where the challenged conduct would affect the "level of services patients receive," *id.*, here the FAC alleges that ECU could still operate at a profit if it charged a lower rate, such the Medicare price. FAC ¶ 26. Moreover, the FAC alleges that disclosure of prices before offering services would not materially affect treatment, contrary to ECU's argument regarding EMTALA. *Id.* ¶ 44. And, of course, ECU's debt-collection practices, which form a substantial part of Cansler's UDPTA claim, *id.* ¶¶ 45–51, in no way relate to the provision of medical care. Simply put, none of the conduct that forms the basis of Cansler's claim was directly related to the care he received, as *Sykes* requires. These allegations, when construed in the light most favorable to Cansler, establish that the learned profession exemption does not apply. *See Jacobs*, 173 N.C. App. at 671 ("exchange of money for services" provided by physicians "are not protected by the

learned profession exemption"); *see also Mason*, 421 F. Supp. 3d at 245 (exemption inapplicable to "business" dispute not involving "the rendering of medical care"); *Scull v. Groover*, 435 A.3d 1186, 1197 (Md. 2013) (interpreting Maryland's similar professional services exemption and concluding "[t]he commercial aspects of a medical practice, such as [medical billing practices], are not exempt").

c. Contrary to ECU's contention, courts have treated the learned profession exemption's applicability as a question of fact

Finally, to the extent ECU argues on reply that its billing practices are "integral to its role in ensuring the provision of adequate medical care," *Sykes*, 372 N.C. at 335, the Court should permit this claim to go to discovery to test that assertion. ECU has the burden of proving this exception applies, *see* N.C.G.S. § 75-1.1(d), and the FAC alleges that ECU's billing practices are not necessary for it to continue offering medical care at a profit, FAC ¶ 25. To the extent ECU disagrees, that is a factual question that warrants discovery.

While ECU is correct that the learned profession exemption can sometimes be decided as a matter of law, *see* Mem. at 18, courts in North Carolina and other states applying UDTPA have held that discovery may be necessary to resolve the issue. *See, e.g.*, *Cameron*, 58 N.C. App. at 446 (assessing documentary evidence and testimony before concluding that conduct at issue was an "important quality control" measure and therefore covered by the exemption); *Bright v. Brookdale Senior Living, Inc.*, 2021 WL 6496799, at *6 (M.D. Tenn. Mar. 12, 2021) ("At this juncture, the Court does not find cause to dismiss the [UDTPA] claim based on the learned profession exception. However, the parties may revisit this issue on summary judgment when the facts of the case have been developed through discovery.").

In sum, Cansler's claim does not relate to the care he received but rather to ECU's billing, disclosure, and collections practices. The learned profession exemption therefore does not apply.

2. ECU was the proximate cause of Cansler's injuries

ECU next argues—incredibly—that it was not the proximate cause of Cansler's injury. *See* Mem. 28–29. This argument is easily met. To return to first principles, the harm that Cansler alleges, as to himself and as to the putative class, is ECU's policy of overbilling, refusing to disclose its rates, and sending accounts to collections to have customers harassed and threatened.

As a threshold matter, Cansler need not prove reliance. ECU acts as if the failure to disclose their unreasonable rates was the only harm Cansler suffered. This is of course not the case. ECU likely argues this to force a fraud framework onto a much broader set of allegations. Cansler also alleges *unfair* practices, of which reliance is not an element. Indeed, in *Bender v. Beach Realty of N.C., Inc.*, No. 2:06-cv-12, 2007 U.S. Dist. LEXIS 72412, at *31 (E.D.N.C. Sep. 26, 2007), the Court denied summary judgment as to a UDTPA claim where the defendant had made threats to subcontractors—essentially a tortious interference claim for which reliance was not required. *See also Wilder v. Squires,* 68 N.C. App. 310, 315 S.E.2d 63 (1984) (threatening not to pay unless plaintiff agreed to particular course of action was coercive an unfair and deceptive trade practice).[7]

In any event, while ECU claims Cansler did not rely upon its non-disclosure, this is not accurate. As noted above, the Consent Form contained an improperly vague price term to which Cansler could not assent and which ECU, as a matter of policy, did not disclose until *after* Cansler received services. This put Cansler in a situation in which he was charged an unreasonable

[7] ECU concedes that its reliance argument applies only to a UDTPA claim sounding in fraud. *See* Mem. at 28 ("***If*** a UDTPA claim is premised upon an alleged misrepresentation or fraudulent concealment…" (emphasis added)). ECU's authorities on this point are thus inapposite. For example (Mem. 29), *Dan King Plumbing & Air Conditioning, LLC v. Harrison*, involved a forged contract. 281 N.C. App. 312 (2022), ("the Court held that the plaintiff failed to establish proximate cause because he had no knowledge of the ***alleged deceptive act***) (emphasis added).

amount—thousands more than what the procedure should cost—and to have his account sent to collections when he disputed it. FAC ¶¶ 151–53. Further, the FAC alleges that if ECU had provided price disclosure, he would not have elected to receive the CT scan. *Id*. ¶ 64.

3. Cansler adequately alleges the existence of an aggravating factor allowing both contract and UDTPA claims to be alleged

Finally, ECU's argument that Cansler's UDTPA is precluded by the existence of a contract is meritless. Mem. at 23-25. Most importantly, as noted above, North Carolina courts regularly conclude that agreements with an open price term are *not* valid contracts. *See supra* section I.A. In any event, there is no *per se* rule against a given set of facts permissibly giving rise to both a contract and a UDTPA claim. *See, e.g.*, *Garlock v. Henson,* 112 N.C. App. 243, 245, 435 S.E.2d 114, 115 (1993) (UDTPA claim may lie when a contractual breach is "accompanied by aggravating circumstances"); *Sampson-Bladen Oil Co. v. Walters,* 86 N.C. App. 173, 356 S.E.2d 805 (1987) (finding the facts gave rise to a claim under UDTPA regardless of the fact of an underlying contract.). Likewise, this Court has permitted contract and UDTPA claims to proceed together at the Rule 12(b)(6) stage. *Page v. Corvias Grp., LLC*, 2021 U.S. Dist. LEXIS 172968, *20–21 (E.D.N.C. Sept 13, 2021) ("However, conduct constituting an unfair or deceptive trade practice under the UDTPA, even arising from a contractual relationship, is actionable.").

Here, Cansler's claim is *not* premised solely on a breach of contract. Rather, Cansler alleges that ECU's refusal to disclose prices, repeated obfuscation about the amount he owed, and aggressive and unlawful debt collection efforts, taken together, constitute an unfair trade practice. That a contract may (or may not, *supra* section I.A) also be at issue does not preclude this claim. Cansler has alleged the precise aggravating circumstances North Carolina courts require.

CONCLUSION

Plaintiff respectfully requests that Defendants' motion to dismiss be denied.

This the 14th day of October, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby shows that by filing this document electronically on October 14, 2022, he caused the electronic ECF filing system to cause electronic service to be effected on all counsel of record.

This the 14th day of October, 2022.

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