# UNITED STATES DISTRICT COURT
# DISTRICT OF MINNESOTA

STATE OF MINNESOTA, by its ATTORNEY GENERAL, LORI SWANSON,

Plaintiff,

v.

ACCRETIVE HEALTH, INC.,

Defendant.

Case No. 12-cv-00145 (RHK-JJK)

## DEFENDANT ACCRETIVE HEALTH, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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# TABLE OF CONTENTS

Page

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

Other Authorities

**Rules**

## PRELIMINARY STATEMENT

At its core, this lawsuit is about a third party's theft of an Accretive Health employee's password-protected laptop. Fortunately for all involved, there is no reason to believe that any person has accessed the patient information on the stolen laptop, nor has the Attorney General even alleged that the information has ever been compromised. In the wake of the laptop theft, Accretive Health has thoroughly investigated the incident, notified the client hospitals involved, and implemented additional measures to ensure that all patient information is even more robustly protected in the future.

But rather than simply plead and prove facts concerning this regrettable event, the Attorney General's First Amended Complaint includes allegations that are factually baseless and legally indefensible. What is worse is that rather than litigate this case in the courtroom, the Attorney General orchestrated a nationwide media campaign against Accretive Health, giving numerous television and print interviews to trumpet her release of a so-called "Compliance Review," in which she cherry-picked and mischaracterized selected quotations from dozens of confidential documents, voluntarily-produced by Accretive Health.

But in this Court, Plaintiff must do far more than submit "legal conclusion[s]" or "naked assertion[s]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007). Such allegations are "not entitled to the assumption of

truth" and must be disregarded. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). Instead, the court must identify "the 'hub' of the … complaint—the well-pleaded, nonconclusory factual allegation[s]." *Id.* Taking these allegations as true, the court must then determine whether a complaint states a plausible claim for relief. *See id.* For several reasons, the First Amended Complaint before this Court fails to meet this burden.

***First***, Plaintiff cannot plead Health Insurance Portability and Accountability Act ("HIPAA") claims related to the stolen Accretive Health laptop. As a threshold matter, the First Amended Complaint alleges no injury in fact; thus, Plaintiff cannot demonstrate Article III standing. Courts have consistently held that the loss of personal information, without more, is not an injury that will support Article III standing. In addition, Plaintiff cannot, as a matter of law, be liable for the unforeseeable, criminal act of a third party.

***Second***, Plaintiff baldly asserts that Accretive Health violated more than twenty-some separate HIPAA provisions. But rather than allege particularized facts in support of these claims, Plaintiff simply gives a laundry list of HIPAA provisions, claiming in conclusory fashion that Accretive Health violated each. Because Plaintiff has not "show[n]" an entitlement to relief under Rule 8(a), the Court should dismiss these claims.

***Third***, Plaintiff's Minnesota Health Records Act claim fails for similar reasons: Plaintiff cannot demonstrate Article III standing because Plaintiff does not identify an injury in fact, cannot establish causation, and, even if Plaintiff had alleged an injury, Plaintiff's requested injunction will not redress that injury.

***Fourth***, Plaintiff's claims under Minnesota's debt collection laws and the federal Fair Debt Collection Practices Act fail as a matter of law. Plaintiff's Minnesota claims are barred by res judicata. On February 3, 2012, Accretive Health entered into a Consent Cease and Desist Order with the Minnesota Commissioner of Commerce concerning the very same claims alleged by Plaintiff. And even if they are not barred by res judicata, Plaintiff's allegations related to "pre-collect" activities with respect to non-default debt are not covered by either Minnesota or federal law.

***Fifth***, Plaintiff fails to state a claim under either the Minnesota Consumer Fraud Act or the Minnesota Uniform Deceptive Trade Practices Act because she has not alleged a "false" or "deceptive" statement or practice. As Plaintiff ultimately concedes, Accretive Health's partnership with Fairview Health Services ("Fairview") is a matter of public record and therefore, by its nature, cannot be a "fraud" on anyone. Plaintiff additionally fails to state a claim under the Consumer Fraud Act because she has not alleged (nor could she fairly allege) two other necessary elements of such a

claim: that the alleged omission underlying her claim concerned material information, and that Accretive Health intended reliance upon the alleged omission.

## BACKGROUND[1]

### *Accretive Health, Its Mission, and the Services It Provides*

Accretive Health was founded in 2003 to help not-for-profit healthcare providers who navigate the healthcare industry's most pressing challenges: rising healthcare costs, the explosion in technological sophistication, the complexity of reimbursement, and the growing cultural distance between today's high-tech medicine and the deeply embedded values of care that not-for-profit hospitals trace back to their roots in charitable, religious, or fraternal organizations. Since the company's founding, Accretive Health has helped 250,000 previously uninsured patients find ways to help pay for medical care.

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[1] Accretive Health recognizes that, solely for purposes of this Motion, the Court must accept as true all well-pleaded allegations in the First Amended Complaint. *Twombly*, 550 U.S. at 555-56. As a result of the unprecedented and misleading media campaign launched by Attorney General in conjunction with her lawsuit, however, Accretive Health believes it to be both necessary and appropriate to present in this Motion an accurate portrayal of its business and practices. The majority of the facts contained in this discussion are contained in securities filings and other sources appropriate for consideration in resolving a motion to dismiss. *See*, *e.g.*, *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). None of these facts, however, are necessary to the Court's consideration of the legal issues presented in this Motion.

Accretive Health helps its not-for-profit partners by supplying world-class innovation, advanced technology, and dedicated people to provide two types of services: Revenue Cycle Management and Quality and Total Cost of Care services.[2] Through its Revenue Cycle Management business, Accretive Health increases hospital revenues, mostly by finding otherwise untapped sources of insurance coverage for patients, and by making sure that third-party payors such as insurance companies honor their contractual obligations to healthcare providers. This increased revenue, in turn, helps lower the ultimate out-of-pocket costs assessed to patients and helps hospitals to provide a greater array of cutting-edge healthcare services to more individuals who need healthcare.

Accretive Health's second line of services, Quality and Total Cost of Care ("QTCC"), helps providers manage healthcare for the patients in greatest need of treatment by adopting long-term strategies that improve care while reducing the costs of emergency room visits and hospital stays. QTCC is premised on the philosophy that improving patients' overall health reduces total healthcare costs. Accretive Health works actively with patients and care providers to get patients the right care from the proper source in a

[2] Accretive Health has a third line of business not at issue in this case—Physician Advisory Services—focused on working with hospitals and hospital staff to improve patient management and healthcare outcomes.

timely fashion. This results in healthier patients with fewer medical issues requiring hospitalization.

*Accretive Health Supports the Charitable Mission of Healthcare Providers*

The vast majority of Accretive Health's clients are not-for-profit care providers whose mission is charitable care. Far from impeding its clients' charitable purpose, Accretive Health's services facilitate the charitable mission by reducing the costs of healthcare to client providers. To understand the services Accretive Health offers, it is important to understand as background that there are costs *to hospitals* of providing healthcare as well as the obvious costs to patients and third-party payors from the receipt of healthcare. The costs to providers include failure to receive full payment for services rendered, as well as inefficiencies incurred in the delivery of needed healthcare services. As described above, by reducing these costs, Accretive Health frees up resources to serve the charitable mission of hospitals. Under both of its offerings to clients, Accretive Health's compensation is based on the benefit it provides to its customers.

*The Theft of Accretive Health's Laptop*

In July 2011, an unidentified thief broke into an Accretive Health employee's automobile and stole a laptop computer containing the confidential health information of thousands of individuals who had received treatment at Fairview or at North Memorial Health Care ("North Memorial").

(1st Am. Compl. ¶¶ 48-49.) Following the theft of its laptop, Accretive Health notified Fairview and North Memorial, who in turn advised the affected patients as well as the appropriate regulators. (*See id.* ¶¶ 50, 53.)

The laptop was password-protected, but not encrypted.[3] Fortunately, no affected individual has reported any resulting incident of identity theft. To this day, Accretive Health continues to monitor the laptop. If the laptop is used to access the Internet, Accretive Health will be notified and will work with law enforcement to bring the person responsible for the theft to justice. Accordingly, the Attorney General does not allege, and it is undisputed for purposes of this Motion, that the data contained on the laptop— stolen nearly ten months ago as of this filing— has never been compromised.

*The Attorney General Files This Lawsuit and Launches A Press Tour.*

On January 19, 2012, without ever once contacting Accretive Health concerning the laptop theft or Accretive Health's business practices, the Attorney General filed this lawsuit, alleging numerous violations of HIPAA and the Minnesota Health Records Act, as well as violations of Minnesota

[3] It is Accretive Health's company policy that all laptops be encrypted so that the laptop contents can be remotely deleted in the event the laptop is lost or stolen. At the time of this incident, however, an individual IT employee inadvertently failed to encrypt approximately 30 of 1,400 laptops, including the laptop stolen in July 2011. Accretive Health has now revised its company policy so that multiple employees work independently to ensure that each Accretive Health laptop is properly encrypted. In addition, the company conducts daily reviews to confirm that each and every laptop remains properly encrypted.

debt collection and consumer protection statutes. But rather than limit herself to legally cognizable claims, the Attorney General's First Amended Complaint, filed February 29, 2012, offers up a meritless attack on an array of Accretive Health's unrelated business practices. In addition, as noted above, the Attorney General also went to the press with a so-called "Compliance Review" based on snippets of documents, taken out of context, as the basis for unfounded and misleading allegations against the company having nothing to do with the claims in this case. The Attorney General's irresponsible actions have already resulted in significant harm to the company, harm to the thousands of employees who work for Fairview and Accretive Health in Minnesota and elsewhere, and harm to the countless patients who deserve quality care at an affordable price.

## ARGUMENT

### I. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT.

Plaintiff's HIPAA claims fall into two categories. First, Plaintiff asserts HIPAA claims related to the stolen Accretive Health laptop. As outlined below, these claims fail because Plaintiff cannot demonstrate Article III standing and cannot prove causation. Second, Plaintiff asserts, in the most conclusory possible fashion, numerous other HIPAA claims related to Accretive Health's unspecified policies, procedures, and practices. But

because Plaintiff does not allege facts in support of these claims, they should be dismissed.

### A. Plaintiff Fails to State HIPAA Claims Related to the Stolen Accretive Health Laptop.

#### 1. Plaintiff does not have standing to assert HIPAA claims as to the stolen laptop.

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" or "Controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). One aspect of the "case-or-controversy" requirement is that the plaintiff must establish that it has standing to sue. *Id.* at 560. There are three requirements for Article III standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* at 560-61 (quotation marks and citations omitted).

Plaintiff purports to bring this action on behalf of the State of Minnesota and, as *parens patriae*, its citizens. (1st Am. Compl. ¶ 10.) Under HIPAA, a state attorney general is authorized to bring an action where "an interest of one or more of the residents of that State has been or is threatened or adversely affected." 42 U.S.C. § 1320d-5(d). To demonstrate Article III

standing in this context, the Attorney General must show an "injury in fact" to either the State of Minnesota or its citizens.[4] *See Massachusetts v. E.P.A.*, 549 U.S. 497, 538 (2007) (Roberts, J., dissenting) ("Nothing about a State's ability to sue [as *parens patriae*] dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III."). As a matter of law, she cannot.

Courts throughout the United States have held that the loss or theft of personal data, without more, is not an injury that will support Article III standing. For example, in *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046 (E.D. Mo. 2009), the plaintiff sued after unauthorized persons gained access to an Express Scripts computer database. *Id.* at 1048-49. The database allegedly contained the plaintiff's confidential personal and health information, but there was no allegation of identity theft or other harm, only the possibility of future harm. *Id.* at 1049. The court granted Express Scripts' motion to dismiss for lack of standing, concluding that "plaintiff's asserted claim of 'increased-risk-of-harm' fails to meet the constitutional requirement that plaintiff demonstrate harm that is 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1053.

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[4] While this discussion addresses Plaintiff's failure to show an injury in fact to either the State of Minnesota or its citizens, Plaintiff also has not alleged any "quasi-sovereign interest" apart from the interests of private parties that would allow it to proceed as *parens patriae*. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 538-39 (2007).

Numerous other courts have, in "data breach" cases, dismissed a plaintiff's complaint at the pleadings stage given the absence of an injury in fact. *See*, *e.g.*, *Key v. DSW, Inc.*, 454 F. Supp. 2d 684 (S.D. Ohio 2006); (granting the defendant's motion to dismiss claim arising from third party's theft of customer financial data); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1 (D.D.C. 2007) (plaintiff lacked standing to pursue claim based on third party's theft of personal data); *Giordano v. Wachovia Sec., LLC*, No. 06-476 (JBS), 2006 WL 2177036 (D.N.J. July 31, 2006) (plaintiff lacked standing to pursue claim for loss of financial data). *See also Hammond v. The Bank of New York Mellon Corp.*, No. 08 Civ. 6060 (RMB) (RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) ("This case is one of many similar litigations … in which plaintiffs seek damages for the loss of personal identification information through accident or theft. … While there is a split in authority as to how to analyze these cases, every court to do so has ultimately dismissed under Rule 12(b)(6) … or under Rule 56 following the submission of a motion for summary judgment.").

Many "data breach" cases involve lost or stolen laptop computers. For example, in *Shafran v. Harley-Davidson, Inc.*, No. 07 Civ. 01365 (GBO), 2008 WL 763177 (S.D.N.Y. Mar. 20, 2008), the plaintiff brought suit on behalf of a putative class of 60,000 Harley-Davidson owners whose personal information was stored on a laptop that was "determined to be missing from defendants'

facilities." *Id.* at *1. The defendants conducted an investigation that revealed "no indication any personal information had been misused" and offered the plaintiff one year of free credit monitoring. *Id.* The plaintiff claimed an injury based on his need to pay for credit monitoring in the future. *Id.* But the court granted the motion to dismiss, concluding that the plaintiff had alleged only a "perceived and speculative risk of future injury that may never occur." *Id.* at *3.

Thus, while Plaintiff purports to bring this action on behalf of the State of Minnesota and its citizens, neither the State nor its citizens has suffered an injury in fact. Because Plaintiff cannot demonstrate Article III standing, the Court should dismiss Plaintiff's HIPAA claims relating to the stolen Accretive Health laptop.

**2. On the facts alleged, Plaintiff cannot prove causation.**

Even if Plaintiff had alleged an injury in fact, which she has not, Plaintiff fails to offer any facts indicating that Accretive Health was the cause of such injury. Rather, any such injury would be the result of the criminal act of the unidentified thief who stole the Accretive Health laptop. (*See* 1st Am. Compl. ¶ 48.) Under Minnesota law, Accretive Health is not liable for the loss of health information contained on the stolen laptop because an unforeseeable, intervening criminal act breaks the chain of causation. *See*, *e.g.*, *Hilligoss v. Cross Cos.*, 228 N.W.2d 585, 586 (Minn.

1975) (landlord was not liable for the value of tenant's stolen property because the theft was an unforeseeable, intervening cause); *Stuedemann v. Nose*, 713 N.W.2d 79, 85 (Minn. App. 2006) (stating the general rule that "[w]hen determining whether negligent conduct was the proximate cause of an injury, an unforeseeable criminal act by a third party serves as an intervening cause sufficient to break the chain of causation"). Plaintiff has not alleged that the laptop theft was foreseeable. For this independent reason, the Court should dismiss Plaintiff's HIPAA claims arising from the stolen Accretive Health laptop.

### B. Plaintiff Fails to Allege Any Facts Concerning Many of Her HIPAA Claims.

In Counts I and II of her First Amended Complaint, Plaintiff claims a laundry list of purported HIPAA violations (*See* 1st Am. Compl. ¶¶ 71, 73, 78.) While Plaintiff's First Amended Complaint includes certain factual allegations concerning the theft of the Accretive Health laptop, Plaintiff does not otherwise specify the factual bases for her kitchen-sink recitation of HIPAA regulations. Rather, Plaintiff simply parrots the text of twenty-two separate HIPAA provisions, without any elaboration as to how Accretive Health supposedly violated each. (*See id.*)

Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy this

requirement, a plaintiff must plead minimal *factual* allegations concerning its claims. *See*, *e.g.*, *Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."); *Iqbal*, 192 S. Ct. at 1950 ("where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not 'show[n]'—that the pleader is entitled to relief.'" (*quoting* Fed. R. Civ. P. 8(a)(2))); *Christiansen v. West Branch Cmty. Sch. Dist.*, No. 11-1904, 2012 WL 952813, at *4 (8th Cir. Mar. 22, 2011) ("A gallimaufry of labels, conclusions, formulaic recitations, naked assertions and the like will not pass muster."). If a plaintiff does not satisfy this standard, Rule 12(b)(6) requires dismissal of the complaint. Fed. R. Civ. P. 12(b)(6).

In the table that follows, Accretive Health has listed each of Plaintiff's HIPAA claims, identifying Plaintiff's specific failures to allege supporting facts:

| Claim | Plaintiff's Failure to Allege Facts |
|---|---|
| First Amended Complaint ("FAC") ¶ 71(a): "Accretive failed to implement policies and procedures to prevent, | Plaintiff simply parrots the language of the cited provision and makes no mention whatsoever of any policies or |

| Claim | Plaintiff's Failure to Allege Facts |
|---|---|
| detect, and correct security violations in violation of 45 C.F.R. § 164.308(a)(1)." | procedures that Accretive Health allegedly failed to implement.[5] |
| FAC ¶ 71(b): "Accretive failed to implement policies and procedures to ensure that all members of its workforce have appropriate access to electronic protected health information and to prevent those workforce members who do not have authorized access from obtaining access to electronic protected health information in violation of 45 C.F.R. § 164.308(a)(3-4)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of any policies or procedures that Accretive Health allegedly failed to implement. |
| FAC ¶ 71(c): "Accretive failed to effectively train all members of its workforce, including agents and independent contractors involved in the data breach, on the policies and procedures with respect to protected health information as necessary and appropriate for the members of its workforce to carry out their functions and to maintain security of protected health information in violation of 45 C.F.R. § 164.308(a)(5)." | Plaintiff's claim does not reference the specific requirements of the cited provision, which are substantially narrower than Plaintiff's claim. In fact, the regulation requires only that a covered entity "[i]mplement a security awareness and training program for all members of its workforce (including management)." 45 C.F.R. § 164.308(a)(5). In any event, Plaintiff makes no mention whatsoever of any training that Accretive Health allegedly failed to provide. |
| FAC ¶ 71(d): "Accretive failed to identify and respond to suspected or known security incidents and to mitigate, to the extent practicable, harmful effects of security incidents that were known to them in violation | Plaintiff again simply parrots the language of the cited provision and makes no mention of any failure by Accretive Health to respond to security incidents. Indeed, Plaintiff concedes that, following the laptop |

[5] None of Plaintiff's claims reference the date of these alleged HIPAA violations, making Accretive Health's attempt to investigate and respond meaningfully to these claims that much more difficult.

| Claim | Plaintiff's Failure to Allege Facts |
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| of 45 C.F.R. § 164.308(a)(6)." | theft referenced in her First Amended Complaint, Accretive Health informed both Fairview and North Memorial of the theft, both of whom then provided notification to the affected patients and regulators. (1st Am. Compl. ¶¶ 50-51, 53-54.) |
| FAC ¶ 71(e): "Accretive failed to implement policies and procedures to limit physical access to its electronic information systems in violation of 45 C.F.R. § 164.310(a)(1)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of any policies or procedures that Accretive Health allegedly failed to implement to appropriately limit physical access. |
| FAC ¶ 71(f): "Accretive failed to implement policies governing the receipt and removal of hardware and electronic media that contain electronic protected health information into and out of a facility, and the movement of these items within the facility in violation of 45 C.F.R. § 164.310(d)(1)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of any policies or procedures that Accretive Health allegedly failed to implement with respect to properly receiving and removing electronic hardware and media. |
| FAC ¶ 71(g): "Accretive failed to implement technical policies and procedures for electronic information systems that maintain electronic protected health information to allow access only to those persons or software programs that have been granted access rights in violation of 45 C.F.R. § 164.312(a)(1)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of any policies or procedures that Accretive Health allegedly failed to implement to appropriately limit access to electronic protected health information. |
| FAC ¶ 71(h): "Accretive failed to implement reasonable and appropriate policies and procedures to comply with the standards, implementation specifications, or other requirements of Part 164, Subpart C in violation of 45 C.F.R. § 164.316." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of any policies or procedures that Accretive Health allegedly failed to implement, or any standards, implementation specifications, or other requirements with which Accretive Health allegedly |

| Claim | Plaintiff's Failure to Allege Facts |
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| | did not comply. Further, this provision has no substantive requirements of its own but rather incorporates by reference the other provisions of Part 164, many of which are cited above. Thus, this claim duplicates Plaintiff's prior HIPAA claims. |
| FAC ¶ 73(a): "Accretive impermissibly and improperly used and disclosed protected health information to unauthorized persons in violation of 45 C.F.R. § 164.502, *et seq*." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of a particular "use[ ] or disclos[ure]" aside from the laptop theft, which is not actionable for the reasons outlined above. |
| FAC ¶ 73(b): "Accretive failed to limit the use, disclosure, or request of protected health information, to the extent practicable, to the "limited data set" as defined in 45 C.F.R. 164.514(e)(2) or to limit the use, disclosure, or request of protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request in violation of 42 U.S.C. §§ 17934(a), 17935(b) and 45 C.F.R. § 164.502(b)(1)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of the factual basis for the claim that Accretive Health failed to limit access to protected health information. |
| FAC ¶ 73(c): "Accretive failed to properly identify persons or classes of persons, as appropriate, in its workforce who need access to protected health information to carry out their duties in violation of 45 C.F.R. § 164.514(d)(2)(i)(A)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of the factual basis for the claim that Accretive Health failed to limit access to protected health information to appropriate personnel. |
| FAC ¶ 73(d): "Accretive failed to properly identify for each person or class of person the category or categories or protected health | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of the factual basis for the claim that |

| Claim | Plaintiff's Failure to Allege Facts |
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| information to which access is needed and any conditions appropriate to such access in violation of 45 C.F.R. § 164.514(d)(2)(i)(B)." | Accretive Health failed to limit access to appropriate categories of protected health information. |
| FAC ¶ 73(e): "Accretive failed to make reasonable efforts to limit the access of persons or classes of persons who need access to protected health information, to the extent practicable, to only the "limited data set" as defined in 45 C.F.R. § 164.514(e)(2) or to the limited categories of protected health information to which such access was needed in violation of 42 U.S.C. §§ 17934(a), 17935(b) and 45 C.F.R. § 164.514(d)(2)(ii)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of the factual basis for the claim that Accretive Health failed to limit access both to appropriate categories of protected health information and to appropriate personnel. This claim also duplicates Plaintiff's other HIPAA claims. |
| FAC ¶ 73(f): "Accretive failed to limit the protected health information that it disclosed, to the extent practicable, to the "limited data set" as defined in 45 C.F.R. § 164.514(e)(2) or to the minimum amount reasonably necessary to accomplish the purpose of the disclosure in violation of 42 U.S.C. §§ 17934(A), 17935(b) and 45 C.F.R. § 154.514(d)(3)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of the factual basis for the claim that Accretive Health failed to limit access to protected health information. This claim also duplicates Paragraph 73(b). |
| FAC ¶ 73(g): "Accretive failed to limit its requests for protected health information from North Memorial, to the extent practicable, to the "limited data set" as defined in 45 C.F.R. § 164.514(e)(2) or to the minimum amount reasonably necessary to accomplish the purpose for which the request was made in violation of 42 U.S.C. §§ 17934(a), | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of the factual basis for the claim that Accretive Health failed to limit its request for necessary information. |

| Claim | Plaintiff's Failure to Allege Facts |
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| 17935(b) and 45 C.F.R. § 164.514(d)(4)." | |
| FAC ¶ 73(h): "Accretive failed to reasonably safeguard, through appropriate administrative, technical, and physical safeguards, protected health information from any intentional or unintentional use or disclosure as well as to limit incidental uses or disclosures in violation of 45 C.F.R. § 164.530(c)." | Plaintiff again simply parrots the language of the cited provision and makes no mention whatsoever of the safeguards Accretive Health did or allegedly did not have in place. |
| FAC ¶ 78(a): "Accretive has violated HIPAA's standards, requirements, and implementation specifications governing the security of electronic protected health information, *see* 45 C.F.R. §§ 164.308, *et seq.*, .310, *et seq.*, .312(a)(1), and .316, as alleged above in paragraph 71, subparts (a) through (h)." | Plaintiff makes no mention whatsoever of any standards, requirements, or implementation specifications with which Accretive Health allegedly did not comply. |
| FAC ¶ 78(b): "Accretive has violated HIPAA's standards and implementation specifications requiring that certain notifications be made in the event of a breach of unsecured protected health information in violation of 45 C.F.R. §§ 164.404, 164.406, and 164.408." | Plaintiff makes no mention whatsoever of any standards or implementation specifications with which Accretive Health allegedly did not comply. Indeed, Plaintiff concedes that, following the laptop theft at issue here, Accretive Health informed both Fairview and North Memorial of the theft, both of whom then provided notification to the affected patients and regulators. (1st Am. Compl. ¶¶ 50-51, 53-54.) These actions satisfy HIPAA's requirements. |
| FAC ¶ 78(c): "Accretive has violated HIPAA's standards, requirements, and implementation specifications governing the privacy of protected health information, *see* 42 U.S.C. § 17935(b); 45 C.F.R. §§ 164.502, *et* | Plaintiff makes no factual allegations and fails to identify any standards, requirements, or implementation specifications with which Accretive Health allegedly did not comply. |

| Claim | Plaintiff's Failure to Allege Facts |
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| *seq.*, 164.514(d), *et seq.*, and 164.530(c), as alleged above in paragraph 73, subparts (a) through (h)." | |
| FAC ¶ 78(d): "Accretive failed to effectively train all members of its workforce, including agents and independent contractors involved in the data breach, on the policies and procedures with respect to protected health information as necessary and appropriate for the members of its workforce to carry out their functions and to maintain the security and privacy of protected health information in violation of 45 C.F.R. § 164.530(b) and 45 C.F.R. § 164.308(a)(5)." | Plaintiff again simply parrots the language of the cited provisions and makes no mention whatsoever of any training that Accretive Health allegedly failed to provide. |
| FAC ¶ 78(e): "Accretive failed to apply appropriate sanctions against members of its workforce, including agents and independent contractors, who failed to comply with the standards and requirements of HIPAA's privacy rule, in violation of 45 C.F.R. § 164.530(e)(1)." | Plaintiff again simply parrots the language of the cited provisions and makes no mention whatsoever of any facts concerning Accretive Health's alleged failure to sanction non-compliant members of its workforce. |

Rather than allege facts, as required by Rule 8(a), Plaintiff has opted to pad her First Amended Complaint with a laundry list of HIPAA provisions.[6] Aside from the now-moot allegation at Paragraph 73(a) related to the theft of

[6] The kitchen sink 'nature of Plaintiff's First Amended Complaint is all the more clear when compared with Plaintiff's initial Complaint, which included eight HIPAA claims. (*See* Compl. ¶ 65 (Dkt. No. 1).) Without pleading any additional relevant facts, Plaintiff in her First Amended Complaint now alleges twenty-two HIPAA violations. (*See* 1st Am. Compl.¶¶ 71, 73, 78.)

the stolen laptop, Plaintiff does not indicate in her First Amended Complaint how Accretive Health allegedly violated any of these provisions.[7] There is no way for Accretive Health to investigate or respond meaningfully to these claims, and they are inadequate to state a claim as a matter of law.

In short, Counts I and II of Plaintiff's First Amended Complaint are rife with the very sort of conclusory allegations that the Supreme Court has rejected time and time again as insufficient. Accordingly, the Court should dismiss Plaintiff's HIPAA claims.

## II. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE MINNESOTA HEALTH RECORDS ACT.

In addition to her HIPAA allegations, Plaintiff brings a claim under the Minnesota Health Records Act ("MHRA") seeking to hold Accretive Health liable for the laptop theft. (*See* 1st Am. Compl. ¶ 87.) This claim is flawed for similar reasons. As an initial matter, there was no "release" of health

[7] Should Plaintiff's HIPAA claims survive this Motion, Accretive Health will establish at summary judgment that these claims have no merit. Given that much of this evidence has now been made available to Plaintiff on account of Accretive Health's voluntary production of more than 100,000 pages of documents, Plaintiff is obliged by Rule 11 to reconsider her claims and voluntarily dismiss those which have no evidentiary support. *See*, *e.g.*, *Boyer v. KRS Computer & Bus. Sch.*, No. Civ. 00-1039 (RHK/JMM), 2001 WL 1090237 (D. Minn. Sept. 21, 2001) (granting in part defendant's motion for Rule 11 sanctions against plaintiff's attorney for failing to conduct a reasonable investigation to determine whether the claims asserted in the case had a good faith basis in fact, and for refusing to voluntarily dismiss the claims following a deposition of plaintiff that revealed that the claims had no basis).

records pursuant to Minn. Stat. § 144.293, subdiv. 2. The term "release," as commonly understood, and as defined by Webster's New College Dictionary, means "to permit performance, sale, publication, or circulation of."[8] In other words, a "release" or medical records is a voluntary, willful act. An unforeseeable theft of medical records by a criminal is not a "release" of medical records.

Even if the theft of the Accretive Health laptop constituted a "release" of medical records, which it does not, Plaintiff lacks standing to bring suit under the MHRA. As outlined above, Article III standing has three elements: (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Plaintiff cannot demonstrate any of the elements of Article III standing. As there is no evidence that any unauthorized party has accessed the confidential health information contained on the (password-protected) laptop, there is no injury in fact, only the "perceived and speculative risk of future injury that may never occur." *Shafran*, 2008 WL 763177, at *3. Plaintiff cannot establish causation given that the laptop theft resulted from the unforeseeable, criminal act of a third party. *See Hilligoss*, 228 N.W.2d at 586. And, Plaintiff requests as her only remedy an order "enjoin[ing] Accretive from further violations of Minn. Stat.

[8] Webster's New College Dictionary at 958 (3d ed. 2005).

§ 144.291, *et seq.*" (1st Am. Compl. ¶ 89.) But even if there were some injury that had arisen from the theft of the laptop containing confidential health information, and even if such injury were attributable to Accretive Health, it could not be redressed by the requested injunction as the loss has already occurred. Because Plaintiff cannot demonstrate Article III standing, the Court should dismiss Plaintiff's Minnesota Health Records Act claim with prejudice.

## III. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE MINNESOTA DEBT COLLECTION LAWS.

Plaintiff claims that Accretive Health violated the Minnesota Debt Collection Act by: (1) failing to register individual debt collectors under Minn. Stat. § 332.33, subdiv. 5a; and (2) failing to make statutorily-mandated disclosures during both "pre-collect" and default debt collection activities. (1st Am. Compl. ¶¶ 90-103.) These claims fail for two independent reasons. First, Plaintiff's claims are barred by res judicata as the result of a Consent Cease and Desist Order ("Consent Order") entered into between Accretive Health and another Minnesota state agency, the Minnesota Department of Commerce, suspending all collection activities in the state. Second, even if not barred by res judicata, Plaintiff's allegations concerning "pre-collect" activities are not governed by the Minnesota Debt Collection Act as a matter of law. For these reasons, Count IV should be dismissed.

### A. Plaintiff's Debt Collection Claims Are Barred by Res Judicata.

On February 3, 2012, Accretive Health entered into a Consent Order (attached as Ex. 1) with the Minnesota Commissioner of Commerce. The Consent Order alleged violations of the Minnesota Debt Collection Act, Minn. Stat. §§ 332.33, .37, identical to those charged in Count IV. (1st. Am. Compl. ¶¶ 90-103.) To resolve those allegations, Accretive Health agreed, among other relief, to "cease and desist from any further activity requiring a collector's license in the State of Minnesota" pending reinstatement by the Commissioner.[9] (Consent Order at 2 (Ex. 1).)

Under Minnesota law, the elements of res judicata are: "(1) the cause of action or claim involved the same set of factual circumstances; (2) the cause of action or claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter." *Rucker v. Schmidt*, 794 N.W.2d 114, 122 (Minn. 2011). All of these elements are met with respect to Plaintiff's debt collection claims, and thus they are barred under res judicata.[10]

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[9] Pursuant to Minn. Stat. § 45.027, subdiv. 5a, "A cease and desist order issued under this subdivision remains in effect until it is modified or vacated by the commissioner."

[10] The Consent Order further alleged violations of one HIPAA provision, 45 C.F.R. § 164.308(a)(1), the same regulation charged in Counts I and II of the First Amended Complaint (1st Am. Compl. ¶¶71(a), 78(a)), and of the Minnesota Health Records Act, Minn. Stat. § 144.293, as charged in Count

*First*, the identical factual circumstances and legal allegations at issue in the First Amended Complaint are resolved in the Consent Order. In particular, the First Amended Complaint alleges that Accretive Health did not register individual debt collectors under Minn. Stat. § 332.33, subdiv. 5a (1st Am. Compl. ¶ 95), and that Accretive Health violated Minnesota debt collection laws and the incorporated Federal Debt Collection Practices Act ("FDCPA") when, in communications to Minnesota patients, it: (1) failed to disclose its full name (*id.* ¶ 97), (2) failed to include a statement that, "This collection agency is licensed by the Minnesota Department of Commerce" (*id.* ¶ 98), and (3) failed to include the "mini-*Miranda*" warning that "the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." (*Id.* ¶¶ 99, 101.) These identical claims are expressly covered by the Consent Order, which charges Accretive Health with: (1) engaging in a practice of allowing unregistered persons to act as debt collectors in violation of Minn. Stat. § 332.33 (Consent Order ¶ 1(B) (alleged at 1st Am. Compl. ¶¶ 93-95)); (2) failing to provide proper notice to Minnesota debtors in violation of Minn. Stat. § 332.37 (Consent Order ¶ 1(C) (alleged at 1st Am. Compl. ¶¶ 96-98)); and (3) using false, deceptive, or misleading representations or means in connection with the collection of

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III. (*Id.* ¶¶ 86, 88.) Accordingly, res judicata applies equally to bar those claims as well.

debts in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e and Minn. Stat. § 332.37 (Consent Order ¶1 (D) (alleged at 1st Am. Compl. ¶¶ 99-103)). By its express terms, the Consent Order applies to the exact same set of factual circumstances and legal allegations that are charged in Plaintiff's First Amended Complaint.

*Second*, as a matter of law, the Attorney General is in privity with the Commissioner. *See, e.g.*, *Nash Cnty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 487 (4th Cir. 1981) (Board of Education and state Attorney General were in privity for purposes of res judicata when the Attorney General produced a consent judgment); *State v. Lemmer*, 736 N.W.2d 650, 666 (Minn. 2007) ("There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.").

*Third*, for purposes of res judicata, the Consent Order is a "final judgment" on the merits.[11] *State Bank of New London v. W. Cas. & Sur. Co.*,

[11] Accretive Health does not dispute the Commissioner of Commerce's authority to seek to impose further sanctions, including monetary penalties, in addition to the relief contained in the Consent Order. Minn. Stat. § 45.027, subdiv. 6 ("The commissioner may impose a civil penalty not to exceed $10,000 per violation upon a person who violates any law, rule, or order related to the duties and responsibilities entrusted to the commissioner unless a different penalty is specified."). But such money damages are available only to the Commissioner of Commerce, *not* to the

178 N.W.2d 614, 617 (Minn. 1970) ("most courts hold the consent judgment is a bar and is an adjudication on the merits"); *Bailey v. U.S. Army Corps of Eng'rs*, No. Civ. 02-639, 2002 WL 31728947, at *13 (D. Minn. Nov. 21, 2002) (barring re-litigation on res judicata grounds when private individual attempted to re-litigate issues that were subject of a consent decree: "A dismissal with prejudice based on a stipulation [or consent] is a final adjudication on the merits"); *Pangalos v. Halpern*, 76 N.W.2d 702, 707 (Minn. 1956) ("'[A] valid judgment, decree, or … order … entered by agreement or consent, operates as res judicata to the same extent as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties and those in privity with them.'").

*Fourth*, the Minnesota Commissioner of Commerce had a full and fair opportunity to litigate the debt collection claims at issue here. The Commissioner has statutory authority to bring claims under Minnesota's debt collection laws and the federal Fair Debt Collection Practices Act. Minn. Stat. § 45.027. The Consent Order expressly states that the Commissioner "is prepared to commence formal action" pursuant to this authority. (Consent

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Attorney General in an action under the Minnesota Debt Collection Act, Minn. Stat. §§ 332.39, 332.40. Thus, because the suspension of Accretive Health's debt collection license is indefinite pending "modif[ication] or vacat[ion] by the Commissioner," Minn. Stat. § 45.027, subdiv. 5a, and because there is no other relief that this Court could grant to the Attorney General, the Consent Order is "final" for purposes of applying res judicata to this lawsuit.

Order ¶ 1 (Ex. 1).) And it is Accretive Health that waived "its rights to a hearing in this matter, to present arguments to the Commissioner, and to appeal from any adverse determination after a hearing … ." (*Id.* ¶ 2.)

Lastly, although the Consent Order by its terms did "not address any violations that have previously occurred" (*Id.*), this is of no moment to application of res judicata here. The *only* remedy available to the Attorney General under the Minnesota Debt Collection Act is injunctive relief, including as the ultimate penalty suspension/revocation of a debt collection license. Minn. Stat. §§ 332.39, 332.40. Through the Consent Order, Accretive Health already has accepted that penalty, placing itself under the discretion of the Commissioner as to whether that license ever is reinstated. This Court could go no further. Under the Minnesota Debt Collection Act, there is no provision for money damages.[12] Thus, in the absence of any available relief beyond that already agreed to by Accretive Health pursuant

[12] Minn. Stat. § 8.31(3), entitled "Injunctive Relief," makes available to the Attorney General a catch-all maximum civil penalty of $25,000 in addition to the express penalties provided under other applicable laws. By the express terms of the statute, however, such relief is available only in conjunction with an award of injunctive relief. *Id.* ("On becoming satisfied that any of those laws has been or is being violated, or is about to be violated, the attorney general shall be entitled, on behalf of the state; (a) to sue for and have injunctive relief in any court of competent jurisdiction against any such violation or threatened violation without abridging the penalties provided by law; ***and*** (b) to sue for and recover for the state, from any person who is found to have violated any of the laws referred to in subdivision 1, a civil penalty, in an amount to be determined by the court, not in excess of $25,000" (emphasis added)).

to the Consent Order, the Minnesota Debt Collection Act claim is barred is a matter of law. *See Wojewski v. Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 342 (8th Cir. 2006) (dismissing as moot Title III claim under ADA because Title III only provides injunctive relief which became impossible upon plaintiff's death); *Randolph v. Rodgers*, 253 F.3d 342, 345-46 (8th Cir. 2001) (dismissing as moot *Ex parte Young* claims against prison officials who, after alleged transgressions, were transferred from plaintiff's prison to a different facility; *Ex parte Young* only allows prospective injunctive relief, which was unavailable given these transfers).

### B. As to "Pre-Collect," Plaintiff Fails to State a Claim for Violation of the Disclosure Requirements of Minnesota and Federal Debt Collection Statutes.

To the extent not barred by res judicata, Plaintiff's allegations aimed at Accretive Health's purported failure to make necessary disclosures during "pre-collect" activities of non-defaulted debt fail as a matter of law. Federal law expressly distinguishes between "defaulted" debt, which is subject to debt collection laws, and merely "delinquent" or "pre-collect" debt, which is not. 15 U.S.C. § 1692(a)(6)(F)(iii) (excluding from definition of "debt collector" someone seeking to collect "a debt which was not in default"); *see also McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 501 (7th Cir. 2008) ("[O]ne who acquires a 'debt not in default' is categorically not a debt collector"); *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 87 (2d Cir. 2003)

(third party is not a "debt collector" when attempting to collect a debt that is delinquent but not in default); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("[A] debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned."); *Miller v. BAC Home Loans Servicing, LP*, No. 6:11cv22, 2012 WL 1206510, at *4 (E.D. Tex. Mar. 23, 2012) (loan servicer is not a debt collector under 15 U.S.C. § 1692a(6)(F)(iii) of the FDCPA when it seeks payment on debt that is overdue but not in default); *Skerry v. Mass. Higher Educ. Assistance Corp.*, 73 F. Supp. 2d 47, 51 (D. Mass. 1999) (activities to collect delinquent student loan debt are not subject to the FDCPA); *Jones v. Intuition, Inc.*, 12 F. Supp. 2d 775, 779 (W.D. Tenn. 1998) ("The FDCPA … provides an exemption to any collection agency engaged in the collection of debt not yet in default at the point in which the agency develops an interest in the debt."). Minnesota debt collection laws expressly incorporate the terms of the FDCPA. Minn. Stat. § 332.37(12) (incorporating "provisions of the Fair Debt Collection Practices Act of 1977").

The exclusion of "pre-collect" debt from the debt collection laws is mandated not only by the express terms of the statutes and case law but by reason and common sense. Were the Attorney General's unbounded interpretation to hold, then every inquiry or follow-up seeking to recover an amount owing after a bill becomes due (including the simple act of sending a

past due notice) would subject the sender to the full panoply of debt collection laws. Equally, this interpretation would qualify every consumer who is even a single day late paying a bill as being in default and subject each such consumer to the full range of remedies accompanying that characterization. As a matter of law and common sense, this is not the result that either Congress or the Minnesota legislature intended. *Alibrandi*, 333 F.3d at 86 ("In applying the FDCPA, courts have repeatedly distinguished between a debt that is in default and a debt that is merely outstanding").

Nor can Accretive Health be bound by the debt collection laws during pre-collect activities merely because it also serves at other times as a debt collector. *See, e.g., Citibank (South Dakota) N.A. v. Mazzarella*, No. TTDCV106002096S, 2010 WL 5610861, at *6 (Conn. Super. Ct. Dec. 14, 2010) (neither the FDCPA nor the Connecticut Creditor's Collection Practices Act requires disclosures of dual role of attorney as collection agent); *Mabry v. Ameriquest Mortg. Co.*, No. 09-12154, 2010 WL 1052353, at *3 (E.D. Mich. Feb. 24, 2010) (law firm not subject to FDCPA when acting as foreclosure counsel despite "dual role" as debt collector); *State ex rel. Swanson v. Messerli and Kramer, P.A.*, Nos. A08-0415, A08-0551, 2009 WL 1046869, at *3 (Minn. App. Apr. 21, 2009) (law firm specifically hired to collect debts was not a "collection agency").

Simply put, when Accretive Health is acting as a licensed "debt collector" (or a licensed "collection agency" under Minnesota law), it is subject to applicable debt collection laws. When it is engaged in some other business, such as billing or "pre-collect" collection as part of providing its revenue cycle management services, it is not. Plaintiff's disclosure claims are solely about acts that Accretive Health took when not acting to collect debts in default and, therefore, should be dismissed.

## IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER MINNESOTA'S CONSUMER PROTECTION STATUTES.

### A. Plaintiff Fails to Allege a "False" or "Deceptive" Statement or Practice.

Plaintiff alleges violations of two Minnesota consumer protection statutes: the Consumer Fraud Act, Minn. Stat. §§ 325F.68, *et seq.*, and the Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43, *et seq.*, both of which create liability for a "false" or "deceptive" statement or practice. Plaintiff's only substantive allegation related to either claim is that Accretive Health "infused" its employees into Fairview's staff but failed to identify these employees to patients. (1st Am. Compl. ¶ 110.) As a factual matter, this is simply not true: the badges worn by Accretive Health employees working in Minnesota clearly identify them as contractors or Accretive Health consultants.

But even accepting the Attorney General's specious factual allegations as true, they fail as a matter of law. As a starting point, the Attorney General's consumer protection claims are premised on the false notion that Minnesota patients have an absolute right "to know the identity of outside providers." (1st Am. Compl. ¶ 109(3).) This is not the law. Minn Stat. § 144.651, subdiv. 8, provides that "[p]atients and residents who receive services from an outside provider are entitled, *upon request*, to be told the identity of the provider." *Id.* (emphasis added). Plaintiff does not allege that any patient ever inquired as to whether QTCC-related services were being provided by Fairview personnel or an outside contractor, much less made a specific request for such information.

Further, the Attorney General's allegations that Accretive Health somehow concealed its identity from Fairview patients do not state a claim because detailed information about Accretive Health's work with its hospital clients, including Fairview, is publicly available in documents Accretive Health files with the U.S. Securities and Exchange Commission ("SEC").[13] Plaintiff concedes as much. (*See*, *e.g.*, 1st Am. Compl. ¶ 113 ("In sharp contrast to the lack of information provided by Accretive to Minnesota patients, it provides much more detailed information to Wall Street investors

[13] *See*, *e.g.*, 10-K, Accretive Health, Inc. (filed Feb. 29, 2012) (Ex. 2).

about its role in the health and lives of its patients.").) Among other information, Accretive Health's SEC filings disclose the following:

- "Our goal is to be the partner-of-choice for U.S. healthcare providers in revenue cycle, quality and total cost of care services and physician advisory services to enable them to focus on their mission of providing better care to the communities they serve. Since our inception, we have worked with some of the largest and most prestigious healthcare systems in the United States, such as ... Fairview Health Services .... "[14]

- "We refer to our management and staff employees that we devote on-site to customer operations as infused management. ... The employees we deploy on customer sites typically have significant experience in revenue cycle operations, care coordination, technology, quality control or other management disciplines. "[15]

- "Our quality and total cost of care service offering, introduced in 2010, enables healthcare providers to effectively manage the health of a defined patient population by identifying those individuals who are most likely to experience an adverse health event and, as a result, incur high healthcare costs in the coming year. This data allows providers to focus greater efforts on managing these patients within and across the delivery system, as well as at home, to create a better care experience while reducing healthcare costs. "[16]

In other words, and as the Attorney General herself alleges, information in the public domain discloses that (1) Fairview is an Accretive Health QTCC client, (2) Accretive Health has management and staff on-site with its clients,

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14 *Id.* at 5.

15 *Id.* at 42.

16 *Id.* at 4.

and (3) Accretive Health's services to its clients include tools to more effectively manage patient care.

As a matter of Minnesota law, the availability of information in the public domain precludes a fraud-based claim for failure to provide the same information to a specific individual. In *Corazalla v. Quie*, 478 N.W.2d 197 (Minn. 1991), the plaintiff purchased a piece of real property abutting a lake. *Id.* at 198. The sellers misrepresented that the lake was "private," and they failed to inform the buyer that a second property bordered the lake. *Id.* When the buyer discovered that a second property did, in fact, abut his supposedly "private" lake, he sued the sellers for fraud. *Id.*

The Minnesota Supreme Court affirmed the trial court's decision to enter summary judgment for the sellers. The Court reasoned that "evidence of public record, readily available for inspection by a purchaser of real property, … clearly disclose[d] the fact that two parcels of land abut the lake." *Id.* at 198-99. *See also Randalls v. Best Real Estate, Inc.*, 612 N.E.2d 984, 988-89 (Ill. App. 1993) (real estate broker's failure to inform purchaser that new home would have a sewer hookup was not an actionable omission under the Illinois Consumer Fraud and Deceptive Business Practices Act given that the ordinance requiring the hookup was a matter of public knowledge). Similarly, in *Sailors v. N. States Power Co.*, 4 F.3d 610 (8th Cir. 1993), a shareholder of the defendant, an electric utility, sued under federal

and Minnesota securities laws and the Consumer Fraud Act based on the utility's failure to make certain disclosures about its request to the Minnesota Public Utility Commission for a rate increase. *Id.* at 611. Both the trial court and the Eighth Circuit rejected the shareholder's claims, relying on the utility's public disclosure of information about the rate increase request. *See id.* at 613. Accordingly, because Plaintiff concedes that information concerning Accretive Health's work with Fairview was in the public domain, there is no "false" or "deceptive" statement or practice and Plaintiff's consumer protection claims should be dismissed.

### B. Plaintiff Fails to Allege Other Elements of Her Consumer Fraud Act Claim.

To prevail on her Consumer Fraud Act claim, Plaintiff must additionally plead and prove that (1) the alleged omission underlying her claim concerned material information, and (2) Accretive Health intended that patients rely on the alleged omission. *See Ford Motor Credit Co. v. Majors*, No. A04-1468, 2005 WL 1021551, at *4 (Minn. App. May 3, 2005) ("An omission or misrepresentation through silence is actionable under the [Consumer Fraud Act] if the information is material and there is a duty to disclose based on a relationship of trust or confidence or an unequal access to information."); *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12

(Minn. 2001) (to violate the Consumer Fraud Act, "[t]he defendant must intend that its conduct be relied on.").

Plaintiff does not allege facts concerning either element of her claim. First, while Plaintiff includes in her First Amended Complaint vague and conclusory references to "material omissions" and "material facts" (*see* 1st Am. Compl. ¶¶ 114, 115), she does not allege any facts concerning how or to whom the alleged omissions are material. Second, Plaintiff does not allege any facts at all concerning Accretive Health's intent. Plaintiff's Consumer Fraud Act claim should be dismissed.

## CONCLUSION

Because the Attorney General has not stated a claim upon which relief can be granted, and for all of the foregoing reasons, Accretive Health respectfully requests that this Court dismiss Plaintiff's First Amended Complaint in its entirety, with prejudice.

Dated: April 30, 2012

Respectfully submitted,

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