

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiff,

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

v.

ACCRETIVE HEALTH, INC.,

Defendant.

**DEFENDANT ACCRETIVE HEALTH, INC.'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Accretive Health, Inc. ("Accretive Health") hereby moves to dismiss the First Amended Complaint brought by State of Minnesota Attorney General Lori Swanson. In further support of this Motion, Accretive Health states as follows:

1. Accretive Health provides revenue cycle management and health care quality consulting services to hospitals and other providers, including Fairview Health Services ("Fairview") and North Memorial Health Care ("North Memorial") in Minnesota.

2. On July 25, 2011, a thief broke into the vehicle of an Accretive Health employee and stole his laptop computer. Because the employee had

performed services for both Fairview and North Memorial, the laptop, which was password-protected, contained records for approximately 23,000 patients at those facilities. Fortunately, there is no evidence (and the Attorney General does not allege) that the data contained on the stolen laptop has ever been compromised.

3. Despite this, the Attorney General has leveraged this isolated incident to pursue a wide-ranging, factually baseless, and legally meritless attack against the full gambit of Accretive Health's business practices. The Attorney General alleges four sets of statutory violations: (1) the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936, as amended by the Health Information Technology for Economic and Clinical Health ("HITECH") Act, Pub. L. No. 111-5, 123 Stat. 226, and Department of Health and Human Services ("HHS") regulations found at 45 C.F.R. § 160, *et seq.*; (2) the Minnesota Health Records Act, Minn. Stat. § 144.291, *et seq.*; (3) the Minnesota Debt Collection Act, Minn. Stat. § 332.31, *et seq.*; and (4) and Minnesota's Consumer Fraud Act and Uniform Deceptive Trade Practices Act, Minn. Stat. 325D.43, *et seq.*, and 325F.68, *et seq.*

4. Each of these four sets of allegations fails to state a claim. *First*, the Attorney General's HIPAA allegations cannot establish Article III standing because they do not demonstrate, nor can they, that the data

contained on the stolen laptop has been compromised or that any individual has been injured in fact. *See, e.g., Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046 (E.D. Mo. 2009). In addition, Accretive Health cannot, as a matter of law, be liable for the unforeseeable, criminal act of a third-party thief. *See Stuedemann v. Nose*, 713 N.W.2d 79, 85 (Minn. App. 2006). And the Attorney General's kitchen-sink recitation of twenty-two separate HIPAA provisions that were purportedly violated by Accretive Health's unspecified policies, procedures, and practices fails to meet fundamental pleading standards. *See 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.").

5. **Second**, Plaintiff's Minnesota Health Records Act claim, the state law equivalent to HIPAA, fails for similar reasons. The Attorney General cannot demonstrate Article III standing because she does not identify an injury in fact, cannot establish causation, and, even if an injury had been alleged, the relief requested would not redress it.

6. **Third**, the Attorney General's claims under Minnesota's debt collection laws and the federal Fair Debt Collection Practices Act are barred by res judicata as the result of a Consent Cease and Desist Order entered into in a parallel proceeding between Accretive Health and the Minnesota

Department of Commerce. See *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 [government] representative ... is *res judicata* in relitigation of the same issue between that party and another officer of the government.”) Even if not barred, the Attorney General’s allegations that Accretive Health failed to meet disclosure requirements with respect to “pre-collect” activities related to non-defaulted debt fail to state a claim because those activities are not covered by either Minnesota or federal debt collection laws. See *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 (2d Cir. 2003) (“In applying the FDCPA, courts have repeatedly distinguished between a debt that is in default and a debt that is merely outstanding”).

7. **Fourth**, the Attorney General 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. Accretive Health’s partnership with Fairview is a matter of public record and cannot support a consumer fraud claim. See *Corazalla v. Quie*, 478 N.W.2d 197, 198 (Minn. 1991) (affirming summary judgment given “evidence of public record, readily available for inspection by a purchaser ... clearly discloses the fact [at issue]”). Plaintiff additionally fails to state a claim under the Consumer Fraud Act because she has not

alleged, nor could she, either of two necessary elements of such a claim: that the alleged omission underlying her claim concerned material information, or that Accretive Health intended reliance upon the alleged omission. See *Ford Motor Credit Co. v. Majors*, No. 04-1468, 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.”).

For all of these reasons, and those contained in the accompanying Memorandum in Support, defendant Accretive Health respectfully requests that the Attorney General’s First Amended Complaint be dismissed with prejudice.

Dated: April 30, 2012

Respectfully submitted,

/s/ Patrick J. O'Connor

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