UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

State of Minnesota, by its Attorney General Lori Swanson, Plaintiff, v. Accretive Health, Inc., Defendant.	Civil File No. 12-145 RHK/JJK **PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO AMEND AND SUPPLEMENT ITS FIRST AMENDED COMPLAINT**

INTRODUCTION

Plaintiff State of Minnesota, by its Attorney General, Lori Swanson (the "State") files this memorandum in support of its motion for leave to file a Second Amended and Supplemental Complaint ("SAC").

FACTS

I. The Accretive Hospitals: Secret Sauces, Emergency Room Collections, Stoplists, Bedside Collection Visits, Baby Prison, and Patient Overcharges.

A. Accretive's Management of Hospitals' Patient Registration and Collection Activities.

Accretive is a Chicago company and licensed debt collector. Affidavit of Jacob Kraus dated June 19, 2012 ("*Kraus Aff.*"), Ex. 1 at p. 4, ¶ 11.[1] It has managed the "revenue cycles" of two Minnesota charitable hospital systems: Fairview Health

[1] For ease of reference, the exhibits to the Kraus Aff. have exhibit numbers, and are also sequentially numbered from pages 1-209. All citations to exhibits to the Kraus Aff. will be cited as follows: Kraus Aff. Ex. [exhibit number] at p. [page range within complete set of exhibits].

Services ("Fairview") and North Memorial Health Care ("North Memorial"). *Id.* Ex. 1 at p. 12, ¶¶ 26-28. Accretive describes the "revenue cycle" like this: "[T]he revenue cycle starts when a patient registers for future service or arrives at a hospital or clinic for unscheduled service and ends when the hospital has collected all the appropriate revenue from all possible sources." *Id.* Ex. 2 at p. 46.

Accretive signed a Revenue Cycle Operations agreement with Fairview in March, 2010. *Id.* Ex. 1 at 12, ¶ 26. Accretive also signed a "Quality and Total Cost of Care" ("QTCC") agreement with Fairview in 2010. *Id.* at Ex. 1, p. 15, ¶ 35. Both contracts have since been terminated. *Id.* Ex. 3 at pp. 47-48. Accretive signed a Revenue Cycle Operations agreement with North Memorial in March, 2011. *Id.* Ex. 1 at p. 12, ¶ 27. Under both revenue cycle contracts, Accretive manages the hospitals' scheduling, registration, admissions, billing, and collections functions. *Id.* Ex. 4 at p. 53; *Id.* Ex. 5 at p. 56.

Accretive "infuses" its own employees into the hospitals and assumes management responsibility for hospital employees engaged in "revenue cycle" functions. *Id.* Ex. 1 at p. 2, ¶ 2. Accretive is contractually responsible for the day-to-day management and supervision of hospital "revenue cycle" employees. *Id.* Ex. 4 at p. 51; *Id.* Ex. 5 at p. 55.

B. Accretive's Emergency Room Collection Visits.

A hospital emergency room is a solemn place. It is a place of medical trauma and emotional suffering for patients and their families. It is a place where parents lose children, children lose parents, and spouses lose each other.

Accretive prepared a document called the "Accretive Secret Sauce," or "ASS," touting: "You've never seen ASS like ours!" and "Check out our ASS!" *Id.* Ex. 6 at pp. 57-58. The main ingredient of the "Secret Sauce" is that only in "Accretive hospitals" are Emergency Room patients hustled with bedside collection visits. The impact of the "Secret Sauce" on patients is very real. Its tactics also violate the law. The impact of the "Secret Sauce" can be seen below.

Minnesota law provides that no debt collector shall "imply or suggest that health care services will be withheld in an emergency situation" when collecting on an "account, bill or other indebtedness." Minn. Stat. §§ 332.31, subd. 6, .37(14) (2010). In addition, the Emergency Medical Treatment and Active Labor Act, or EMTALA, 42 U.S.C. § 1395dd, requires a hospital emergency room to treat patients in emergency situations regardless of their ability to pay. Generally speaking, EMTALA prohibits a hospital from asking a patient for money before the patient has had a medical screening examination and, if an "emergency medical condition" exists, before stabilizing medical treatment is provided. *See* 42 U.S.C. § 1395dd(a), (b), (h). It is therefore either a violation of the collection laws or a deceptive practice for Accretive to lead patients to believe otherwise.

Frank Przybilla served in the U.S. Army and is a part-time deputy with the Ramsey County Sheriff's Department. In January, his right leg went numb, and his doctor told him to go to the Emergency Room. At Fairview's Riverside Hospital in Minneapolis, Frank was taken to a curtained-off area in the ER, where he was undressed and put in a hospital gown. *Before he saw a doctor*, a woman told him he must pay

approximately $350 right then and there. *Frank and his wife, Carol, clearly believed that if they did not pay on the spot, further treatment could be withheld.* Wanting Frank to be treated, Carol handed the woman a blank check. The woman charged their checking account for $350. After the woman left, Frank finally saw an ER doctor and then a neurologist. The neurologist ordered Frank transferred to Fairview-University of Minnesota Medical Center by ambulance. Frank spent the night at UMMC and was diagnosed with a mini-stroke. He says of his ER collection visit: *"It felt like the woman didn't care if I was dying as long as she got the approximately $350 I owed for my treatment." Affidavit of Francis Przybilla.*

Terry Mackel is a 50 year old lab technician for a semi-conductor company. Terry and his wife, Lori, a dietician for the Ramsey County Department of Public Health, have insurance. Terry, a picture of health, is a runner who has completed seven marathons and 12 half marathons. Terry went to the Emergency Room with "excruciating," "debilitating," and "stinging" back pain, dry heaves, and labored breathing. At the Fairview Ridges ER, Terry was stripped of his clothes and put in a thin gown on a gurney in a patient room. He lay alone, groggy, hooked up to an IV, and afraid, suffering from symptoms of the painful kidney stones that were later diagnosed. A woman wheeled a portable computer cart into his room. She told him he must pay $363.55. When Terry's wife, Lori, entered the room, the woman handed the bill to her. *The woman wouldn't leave and kept repeating that they owed the money "today." The Mackels clearly believed that Terry may not receive treatment if they didn't pay.* So they paid. Terry says: "I was in the middle of an emergency, in extreme pain, and drowsy

from the pain medication I was given. We eventually agreed to pay because we did not want to jeopardize my treatment going forward." *Affidavit of Terry Lee Mackel*; *Affidavit of Lori Mackel.*

The collection experience of **Timothy Palm** was not much better. Timothy is a 27 year old accountant from Edina with insurance through HealthPartners. He awoke at 2 a.m. with severe abdominal pain. He went to the Fairview Southdale Hospital ER. He lay alone in a thin gown on a gurney, doubled over in "the worst pain I had ever experienced in my life." He was not yet diagnosed or treated when a man came into his room. He told Timothy he must pay $800. *Timothy states that he clearly was given the impression that if he didn't pay, he wouldn't receive treatment.* The collector rifled through Timothy's coat, found his wallet, and fished through the wallet until he found Timothy's HSA card, which he swiped. Timothy was soon thereafter whisked into surgery to remove an about-to-burst appendix. Timothy says: "I would have done anything asked of me at that point in time in order to make the pain go away and receive the treatment I urgently needed." *Affidavit of Timothy Palm.*

A teacher in the Eden Prairie Schools, **Maureen Fitzgerald,** 51, also teaches fitness classes at the YMCA. In March, 2011, Maureen developed severe flu-like systems, a spreading red rash, and a horrible swelling of her face. Her eyes were swollen almost completely shut. Her clinic sent her to the Emergency Room. At Fairview Southdale Hospital, Maureen was taken to a curtained area in the ER. She was alone and afraid. The first person to come into the curtained area—before she saw a doctor—was a woman with a portable computer cart. The woman told Maureen that she owed $545.20

for the visit. *Maureen understood that she wouldn't get the treatment if she didn't pay.* Maureen was shocked, but then remembered that she had a credit card in her coat. The woman swiped the card and left. Maureen then finally saw a doctor, who gave her pain medication and antibiotics through an IV. Maureen had Erysipelas, a dangerous, fast-moving strep infection that can be fatal. *Affidavit of Maureen Fitzgerald.*

Carol Wall's experience at Fairview Riverside ER was similar. Carol is 53 years old, has a Master's Degree, and is a project manager for Securian Financial Group. On January 21, 2012, Carol began vaginally hemorrhaging large amounts of blood. At the Fairview Riverside Emergency Room, she was brought to an examination table and put in a gown. Her condition worsened, with tremendous pain, cramping, and wooziness from the blood loss. While Carol was waiting to be diagnosed, a woman with a computer cart wheeled up to the exam table and told her she owed about $300. The woman insisted that Carol pay money as she bled profusely. *Carol was vulnerable* and gave the woman her credit card.

On a Sunday two weeks later, Carol awoke from a nap and couldn't talk or breathe. She was partially paralyzed. The paramedics took her to the Emergency Room at Fairview Riverside Hospital, where she was hooked up to blood pressure devices and had neurological tests. Before Carol was stabilized, a woman with a mobile computer cart again drifted up to her examination table and asked for money. Carol was having a stroke, and her husband kicked the woman out. Carol was then transported to the University of Minnesota Medical Center, where she was treated for a stroke caused by a blood clot to the brain. *Affidavit of Carol Anne Wall.*

Linda Schmeichel, 58, works at a structural engineering firm. In 2011, Linda developed extreme chest and back pain. After she almost passed out, her boss drove her to the Emergency Room at Fairview Southdale Hospital. Before she was diagnosed, a man wheeled in with the mobile computer cart. He told her that Emergency Room visits are expensive and that she needed to pay $700 because her HealthPartners policy had a high deductible. Linda told him that she didn't have the money in her checking account, but the man wouldn't leave. Linda finally asked her son to get her purse and gave the man a credit card, and he swiped it for the visit. She later had her gallbladder removed at a different hospital. Linda says: *"He told me that the hospital needed payment upfront because I hadn't hit my deductible yet. He was very intimidating and made me feel like payment was mandatory." Affidavit of Linda Schmeichel.*

Some medical conditions are less dramatic, but still require ER treatment. On May 9, 2011, **Penny and Guy Cierzan** were celebrating their son, Noah's, 11th birthday. As Noah played outside with his friends, he fell and badly gashed his knee. Penny and Guy rushed him to the Emergency Room at Fairview Southdale Hospital. As care providers came in and out of the room, it was obvious that the gash needed to be stitched up. Before any suturing was undertaken, though, a woman pushed a cart to Noah's bedside and told the Cierzans they owed $750 for the treatment. Since Penny and Guy had good insurance, they questioned this declaration, but the woman wouldn't budge. *When Guy asked her if Noah would get treatment if they asked for the bill to be mailed to them, the woman wouldn't answer.* When Guy said he had no cash or checks on him, the

woman said she would take a credit card. Wanting their panic-stricken son to get stitched up, Guy gave the woman his credit card. *Affidavit of Penny Cierzan.*

Playing kickball as part of her training for her Master's Degree in sports education at the University of Minnesota, **Lynn Sainati** fractured her collarbone. The paramedics rushed her to the Emergency Room at Southdale Hospital. Before she was given pain mediation or tests, a man with a computer cart arrived and told her she was had to pay $150. She told him that she was a student and didn't have that much money. The man refused to leave, the physician wouldn't come in, Lynn was in pain, and she quickly concluded that unless she paid, she wouldn't get any pain medication. Lynn haggled with the finance man over what she could afford to pay. He eventually agreed to take $50. Lynn was in such debilitating pain that she couldn't reach for her purse, so the man rifled through her purse for her wallet and swiped her credit card for $50. After he left her room, a physician gave her pain medication and ordered an EKG of Lynn's cardiovascular area because of the blunt force trauma to her chest. *Affidavit of Lynn Sainati.*

Bruce Folken spends much of his time in retirement volunteering for the Yellow Ribbon program to help military members during and after their deployments. One day, his left side went numb and his blood pressure spiked. His clinic referred him to the Emergency Room. As he lay unclothed in a gown and hooked up to an IV, a heart monitoring machine, and a blood pressure machine at the Fairview Ridges Emergency Room, groggy and in pain, a woman approached his bedside and asked him to pay $493.60. At the time, Bruce recalls wondering if he would be alive to watch his

grandkids grow up. *Bruce determined that he wouldn't get proper treatment if he didn't pay.* The woman brought Bruce his pants, he found his health savings card in his wallet, and she scanned it for $493.60. Bruce was not told how she arrived at that amount. After paying, Bruce was taken for a CT scan to his head. He was overcharged $177.42. *Affidavit of Bruce Folken.*

Retired over-the-road truck driver **Don Williams**, 72, had a similar experience. He woke up around 4 a.m. one morning with sharp abdominal pain. He went to the Emergency Room at Fairview Ridges Hospital. He was brought to an examination table and placed on a bed in a thin gown, hooked up to an IV and a blood pressure monitor, and given a morphine drip for pain. A tube was put down his throat to drain his stomach. As Don lay hooked up to tubes, monitors, and drips, a woman rolled in and told him he needed to pay $50. He tried to resist, but the woman insisted. The woman grabbed his pants and dropped them on his chest. Don got out his debit card, which she swiped. Don was thereafter diagnosed with a bowel obstruction and taken to surgery. Don has been married to his wife May Ann for 44 years. May Ann graduated from the nursing program at Swedish Hospital and was a nurse for 50 years. May Ann says of Don's experience: *"As a nurse, I cannot imagine a situation in which a patient is more vulnerable or under greater duress than laying in an emergency room bed in pain, on morphine, hooked up to tubes, with other tubes down their throat, and not having any idea of the gravity of their medical situation, including whether it is life or death." Affidavit of Donald Williams*; *Affidavit of May Ann Williams.*

Sarah Beckman, of Bloomington, has Lupus. A neighbor rushed her to the Fairview Southdale Emergency Room with extreme chest pain and shortness of breath. Before Sarah saw a doctor, a man wheeled a computer up to her exam table and told her she was uninsured and that he needed money from her. Despite labored breathing and chest pain, Sarah managed to find her debit card. When Sarah said she could afford to pay $75, the man grabbed her card and swiped it. *Affidavit of Sarah Beckman.* When 65-year-old retiree **Marna Gerke** went to a Fairview Emergency Room in January for severe swelling, a woman pushed a cart with a computer into her room before she had seen a doctor and asked her to pay money right then. Marna says: "*There is an intimidation factor to being asked to pay money before you see a doctor in the Emergency Room. It was my impression that I better pay right then.*" *Affidavit of Marna Gerke.*

C. Accretive's Stoplists and Other Bedside Collection Visits.

Accretive's collection tactics don't stop in the Emergency Room. Accretive used "stop lists" on patients scheduled for medically necessary and time-sensitive treatment. *Id.* Exs. 7-11 at pp. 59-67. State law requires that the substantive provisions of the federal debt collection laws be followed while a bill collector is attempting to collect on any "account, bill or other indebtedness." Minn. Stat. § 332.37(12) (2010). Federal law prohibits collectors from collecting money at an "unusual time or place" or in a manner that is "unfair" or "unconscionable." 15 U.S.C. §§ 1692c, 1692f. Accretive routinely violated these provisions at the hospitals under its management.

Amy Morris is 46 years old. After Amy came down with a cough, a pulmonologist told her she had lung cancer. Amy needed surgery at Southdale Hospital to remove her tumor or, if it spread, her lung. She arrived at the hospital at 5 a.m. with her husband, Hugh, worried for her two young kids. After checking in, she sat down for the final moments with her husband. Amy was then called to see a woman with a computer, who said she needed $1,509.48 for the surgery. *The woman made it plain that she needed the money before the surgery could start.* Amy had no wallet because she was told not to bring valuables to the hospital. Fortunately, Hugh had a credit card with him, and the woman swiped the credit card. Unfortunately, Amy's cancer has now spread to Stage IV. *Affidavit of Amy Morris; Affidavit of Hugh Morris.*

Former first class naval petty officer **Bill Karsko** had a similar experience. As a retired military veteran, Bill has health coverage through Tri-Care. Bill was scheduled for surgery at Fairview Ridges Hospital to remove a metal plate and screws from his broken arm. He and his wife Kathleen arrived at the hospital 5:00 a.m. Bill was famished because he had no food or water before surgery under the physician's instructions, and he was nervous about undergoing general anesthesia. When Kathleen checked him in with the registrar, she was told they needed to pay $500. Kathleen objected, saying that Fairview never imposed such a requirement before and that she didn't have $500 in her checkbook. The registrar told Kathleen that she didn't need to be in attendance during the surgery, as Bill would be under general anesthesia, and she could go to the bank and get the money. *It was clear to the family that if they didn't make an up-front payment, Bill could not have the surgery.* Kathleen negotiated with the registrar

and finally agreed to pay $250 so that Bill's surgery could get underway. *Kraus Aff.* Ex. 12 at pp. 68-71.

Daniel Ritter was stoplisted too. Daniel is a 63 year old Lutheran minister from Burnsville. When he checked in to Fairview Southdale Hospital for total hip replacement surgery early one morning, he and his wife were shown to a "financial counselor." About 15 minutes before the surgery was to get underway, the financial counselor told Pastor Ritter and his wife Dianne that they needed to pay $1,500 before surgery or the surgery could be stopped. When Dianne told the woman that they didn't have that much money in their checking account, the woman said she would take a credit card. The Ritters could not afford to put that much money on their credit card, and eventually negotiated the amount down to $700. Their credit card was then swiped for $700. *Affidavit of Daniel Ritter.*

D. Other Collection Practices Inside and Outside of the Accretive Hospitals.

State law requires debt collectors to properly identify themselves and their status. Minn. Stat. § 332.37(12), (16), (21) (2010); 15 U.S.C. § 1692e(11). Yet, Accretive regularly sent patients letters that do not properly identify itself as a debt collector. For instance, **Ann Johnson**, 58, has been a Registered Nurse at the University of Minnesota, HCMC and Fairview Southdale Hospital. In 2011, Ann became very sick, with a stiff neck, severe headache, fever, and shakiness. At the Fairview Southdale ER, she was brought to a curtained area, gowned, started on an IV, and hooked up to heart and blood pressure monitors. Before Ann saw a doctor, a woman came into her room, noted that

Ann was uninsured, and asked for money. After Ann said she was laid off and couldn't afford to pay anything, the woman kept pestering her, until a doctor finally came in and told the woman to leave. As the doctor attempted a diagnostic spinal tap to see if Ann had meningitis, the woman returned, and the doctor ordered her out. Two days later, Ann got a call from a doctor stating that she should not have been discharged and that if she didn't return to the ER, he would send an ambulance to get her. Upon admission, the physician again tried a spinal tap, and once again, in the midst of the procedure a woman entered the room, just like before. The doctor chased her out of the room and admitted Ann to the hospital with a diagnosis of meningitis. *Affidavit of Ann Johnson.*

Ann later got collection calls and letters from Accretive. *Id.* ¶ 5. One of the letters arrived six months after Ann's treatment. *Id.* Ex. 1. It states that her balance was "seriously past due" and that, "We are now reaching the point where your account may be turned over to a collection agency." *Id.* The letter does not disclose that Accretive is a collection agency for Fairview or contain the "mini-miranda" warning required by the federal Fair Debt Collection Practices Act. *Id.* *See* 15 U.S.C. § 1692e(11). The letter is signed by "John Monteith, Patient Financial Advisor" and was sent from Accretive's Kalamazoo, Michigan debt collection call center. The State was unable to locate any "John Monteith" on Accretive's employee rosters. It did, however, locate a Reverend John Monteith, founding father of the University of Michigan. He died in 1868. Accretive is a Chicago company. Legend has it that in Chicago dead people sometimes vote. In Minnesota, however, dead people can't collect money. *See* Minn. Stat. §§ 332.37(20) (prohibiting falsification of collection agency documents to deceive

debtor), 332.33, subd. 1 (requiring individual collectors to be registered with the State). Other Fairview patients received letters from "Anna Wittenhall, Patient Financial Advisor." Once again, there is no Anna Wittenhall on Accretive's employee rosters. There is, however, a building called "Anna Whitten Hall" on the community college campus next door to Accretive's Kalamazoo call center.

A veteran of the Coast Guard, **Kyle Thompson** works as a construction dispatcher. Late one night in 2011, Kyle had such serious chest pain that it felt like someone was sitting on his chest. Kyle's wife, JoAnn, rushed him to the Fairview Ridges Emergency Room, where Kyle was taken to a curtained area. Kyle was in pain and his blood pressure was sky-high. He says: "I felt like I was in big trouble, and might be dying." Before they saw a doctor, a woman came in and told Kyle he needed to take care of an old balance that night. JoAnn told the woman that they left Kyle's billfold at home in the rush to get to the ER. The woman asked JoAnn if she had any money. JoAnn said she left her purse in the car. The woman said she would wait while JoAnn went to her car to get money to pay the old balance. *Kyle and JoAnn state that it was clear to them that Kyle would not receive treatment without payment of the old bill.* JoAnn was terrified as she ran to the car, trying to recall the next closest emergency room if she couldn't find enough money in her car. Fortunately, JoAnn found a cash card in her car and raced back into the ER and gave it to the woman, who charged the card. Kyle was then seen by a doctor, who ran many tests and told him he had a precursor to a heart attack. *Affidavit of Kyle Thompson; Affidavit of JoAnn Larson-Thompson.*

Tom Fuller of New Brighton was a golf course supervisor and salesman. He and his wife, Lynn, have three children. Tom has pulmonary fibrosis. Tom had a lung transplant in 2011. For months afterward, he ate through a feeding tube. On November 22, 2011, Tom went to UMMC Hospital to have his feeding tube replaced. Tom was weak and could barely stand. The registration person told Tom to go to a different room without Lynn. In the separate room, Tom collided with a stern and aggressive man who asked him how he was going to take care of some six-month-old bills. The man asked for Tom's credit card, but Tom was too tired and weak. The man then told Tom he must call "Ross" at Accretive. *Affidavit of John Thomas Fuller*; *Affidavit of Lynn Fuller*.

No past due bill is too small for an ER collection attempt. **Janet Legler** has been a surgical nurse at UMMC-Fairview Hospital for 20 years. Janet's leg became swollen and inflamed. Her physician referred her to the UMMC-Fairview Emergency Room. Her blood pressure was high, her heart rate was elevated, and she had premature ventricular contractions. As Janet was laying on her side on a gurney in a patient exam room, hooked up to monitors and an IV, a man entered and told Janet that a new policy required her to pay Fairview for a past due bill. Janet was surprised at owing a bill but gave the man a credit card. The man swiped the credit card for $77.68 and gave her a receipt. As it turns out, the payment of $77.68 included a bill from the prior November (four months earlier) and $48.90 for the current visit. The man never told Janet she was paying anything for the current visit.

After being discharged, Janet continued to have a fluttering heart and a racing pulse. Her cardiologist sent her for a cardiac MRI. Janet checked in for the MRI, and

was shunted off to a little room, where another man told her that she had outstanding bills. She told him she had no outstanding bills. The man then gave her a printout of a bill with Accretive's letterhead, a copy of which is attached to her affidavit. The man acknowledged that she may not have received the bills yet but told her that she needed to pay them. As it turns out, the Accretive printout erroneously lists bills that had previously been paid, bills for her current visit, and bills that she had not received. *Affidavit of Janet Legler.*

E. Baby Prison and Patient Overbilling.

Accretive uses its own software program, known as AHtoAccess, or A2A, to get money from patients. A hospital registration employee using A2A cannot process a patient electronic record unless he or she first processes informational "balls" that pop up on the screen. SAC ¶ 96. The system is derisively referred to by hospital employees as the "Blue Balls" program. A2A purportedly determines the financial responsibility of insured patients for co-pays, deductibles, co-insurance, and for past balances, as well as the amount to be asked of uninsured patients for past balances and present bills. *Id.* Based on the information in A2A, patients are then told to pay money to the hospital. *Id.* The amount calculated by A2A for patients to pay often exceeded the amount owed by the patient. *Id.* As a result, Minnesota patients sometimes paid more than they owed.

For instance, **Amy Zumwalde** works with disabled kids at Richfield Public Schools. She and her husband's first child, Max, was born at Southdale Hospital in March of 2011. As Amy was proudly leaving the hospital to take her new baby home, a woman stopped her and said she must cough up a credit card to pay for the delivery.

Amy replied that she had insurance and thought she had 30 days to pay any balance. The woman replied that Amy owed about $800 and that her newborn couldn't be discharged unless she paid. Fearful that she wasn't going to be allowed to take her new infant home, Amy gave the woman her credit card. As it turns out, Amy had already met her deductible and was overcharged about $800. *Affidavit of Amelia Zumwalde.*

A savvy businesswoman, **Marcia Newton**, 45, has a degree in accounting. She and her husband adopted two boys from an orphanage in Kazakhstan while living abroad. One of her sons, Maxx, needed ear tube surgery to prevent a ruptured ear drum. When Marcia and Maxx arrived at Fairview's University of Minnesota Amplatz Children's Hospital in Minneapolis on the day of the surgery, Marcia was handed a bill for $875.90. *She understood that if she refused to pay, Maxx could not have the surgery.* She put the charge on her credit card. She later learned from her insurer, Blue Cross, that the surgery cost only $4,267.40 (less than one-half of the $9,614.76 price she had been told) and that she owed only $200.26, one-fourth of the $875.90 she was forced to pay before Maxx could have surgery. *Affidavit of Marcia Newton.*

Like Marcia, **Lois Weihrauch** is an experienced businesswoman with 30 years in the health care industry. She is employed by a large national insurance company and previously worked at a hospital, where she was in charge of accounts receivable, billing, and collections. In 2011, Lois was diagnosed with breast cancer and twice had surgery at Fairview Southdale Hospital. On the eve of her second surgery, Lois received a call asking her to pay $433.88 for surgery. Lois was surprised to receive a call less than 12 hours before major surgery. When she arrived at the hospital the next morning, Lois's

health savings card was charged for $433.88. As it turns out, Lois had met her deductible and overpaid over $300. When she discovered this, she asked why she wasn't given a refund. She was told: "We don't give overpayments back unless we receive a call from the patient asking for it back." Lois says: *"In my 30 years of experience in the healthcare industry, including two years in patient registration and collections for a Twin Cities hospital and over 25 years working for various insurance companies, I have never heard of, nor experienced a situation like mine. I think it was terrible that I was getting calls immediately before and after breast cancer surgery about a bill I had never seen, and turns out, never owed." Affidavit of Lois Weihrauch.*

Jack Wiebke, age 67, has a degree in business administration. On March 2, 2011, he checked in at Fairview Ridges Hospital for kidney stone surgery, which was causing him "excruciating pain." When Jack and his wife Kathy arrived at the hospital, they were told they must meet with a "financial counselor." The "counselor" told them that they must pay $1,443.93 before the surgery. She gave them an Accretive invoice for this amount. Kathy and Jack told the woman they didn't have that much cash with them and didn't bring their checkbook. The woman told them that they could pay by credit card. Because Jack was in agonizing pain and didn't want to postpone the surgery, they paid. They later discovered that they were overcharged by about $390. *Affidavit of Jack Wiebke.* In a similar vein, **Linda Schmeichel** was asked to pay over $700 in the ER, but was overcharged by about $200. *Affidavit of Linda Schmeichel.* **Penny and Guy Cierzan** paid $750 so their son Noah could get stitched up in the ER and were overcharged by about $400. *Affidavit of Penny Cierzan.* **Bruce Folken,** who was made

to pay $493.60 in the ER, was overcharged by $177.42. *Affidavit of Bruce Folken.* **Maureen Fitzgerald** was overcharged by about $24.59. *Affidavit of Maureen Fitzgerald.*

F. Accretive's Control, Training, and Culture Infusion at Minnesota Hospitals.

Accretive told U.S. Senate investigators that up to 20 of its employees directly collected money from patients at Fairview hospitals *before* they received treatment. *Kraus Aff.* Ex. 13 at pp. 73-74, n.5. In addition, Accretive's "infused management" supervised another 1,200 employees in the Fairview "revenue cycle." *Id.* Accretive front-end personnel are told that: "Every patient with a prior balance who visits the hospital must be approached about settling their account(s)." *Id.* Ex. 14 at p. 80. An Accretive "Effective Front End Operator" must "leverage hospital staff to assist in prior balance collections...." *Id.* Ex. 15 at p. 81.

Accretive summed up the scope of its activities this way in a presentation to North Memorial:

> "[W]e run the money side of the hospital. They [hospitals] outsource those functions to us and then focus on their core business which is providing care....
>
> What we are not—we are not a consulting firm. We do not sell work or projects. We will either run your revenue cycle for you, or we won't...."

Id. Ex. 16 at p. 83. Accretive tells its own staff this at employee orientations: "Short version - we run the financial side" of the hospital. *Id.* Ex. 17 at p. 84.

Accretive describes its management control over hospitals to investors as follows:

- "[W]e assume full responsibility for the management and cost of a customer's revenue cycle....";

- "We seek to embed our technology, personnel, know-how and culture within each customer's revenue cycle activities with the expectation that we will serve as the customer's on-site operational manager beyond the managed service contract's initial term,….";
- "[W]e assume responsibility for the management and cost of the customer's revenue cycle or population health management operations, including the payroll and benefit costs associated with the customer's employees conducting activities within our contracted services,….";
- "We have the right to control and direct the work activities of the [hospital] staff persons and are responsible for paying their compensation out of the base fees….";
- "Under our contracts with customers, we directly manage our customers' employees engaged in the activities we have contracted to manage for our customers."

Id. Ex. 18 at pp. 86, 87, 89, 91, 92.

Accretive implements an aggressive boiler room-type culture within hospitals it manages. It uses "chalk talks" (*Id.* Ex. 19 at p. 94) to enforce collection quotas among hospital registration and admissions staff, including in the ER. SAC ¶ 84. It gave hospital emergency room and registration staff prizes for meeting their collection quotas. *Id.* Exs. 20-24 at pp. 95-101. Accretive managers promised to wear clown outfits, Colonel Sanders outfits, Waldo outfits, or shave their heads if hospital employees met their collection quotas. *Id.* Exs. 25-27 at pp. 102-106. It trained hospital employees. *See, e.g.*, SAC ¶¶ 86, 93. One Accretive training document instructs "front-end" employees to: "[r]emember that every patient must be informed of their estimated Residual Balance as well as any Prior Balances during your initial conversation" and that "Addressing the patient's balance is an imperative part of your role." *Kraus Aff.* Ex. 28 at p. 108. If Fairview hospital employees didn't collect enough in past balances,

Accretive chastised them with threats like: "Do we need to look at having all of the PB's [patients with past balances] that can't pay to start seeing Bruce [an Accretive employee] again?" *Id.* Ex. 29 at p. 109.

II. Laptops, "Smash and Grabs," Data Sharing Without Contracts, and Debt Collection Using Health Data.

Through its management of hospitals, Accretive accessed high amounts of extremely sensitive personal medical and financial information on tens of thousands of Minnesota patients. Accretive represented to hospitals that it would keep patient data confidential. It had a duty to do so under state and federal law. It failed in these duties.

Accretive acknowledges that "Common…HIPAA incidents" at Accretive include "[lost] Laptops, unencrypted emails, [and] too much access." *Id.* Ex. 30 at p. 112. Each of these problems are briefly described below.

A. "Smash & Grabs" and the Loss of Laptop Patient Data.

On July 25, 2011, an Accretive Vice President named Matthew Doyle left an unencrypted laptop computer containing personally identifying health information about 23,531 Fairview and North Memorial patients (and data from St. John's Hospital in Detroit) in plain view in the back seat of a rental car in Seven Corners neighborhood in Minneapolis. *Id.* Ex. 31 at p. 114; Ex. 13 at pp. 77-78. The computer was stolen and, with it, the patient data. The computer contained highly sensitive patient data, including patients' names, addresses, Social Security Numbers, health history, treatment history, and scores to measure patients' frailty, complexity, and hospitalization likelihood. *Id.* Ex. 1 at pp. 20-22, ¶¶ 51-52. For example, one screen shot on the lost computer

describes whether a particular patient had any of 22 listed conditions, including bipolar disorder, schizophrenia, depression, and HIV. *Id.* at pp. 21-22, ¶ 52. All told, the laptop contained the names of almost one quarter million Fairview patients. SAC ¶ 49.

The laptop incident was troubling in many respects. First, at the time of the incident, Mr. Doyle was working for Accretive on the North Memorial account. SAC ¶ 58. Yet, he still had massive amounts of data of two other hospitals, including Fairview, on whose behalf he had not worked for over three months. Second, under HIPAA, a contractor should only access the "minimum necessary" information on a "need to know basis." *See* 42 U.S.C. § 17934; 45 C.F.R. § 164.514(d). Mr. Doyle was a revenue cycle employee. SAC ¶ 58. Yet, his laptop contained personal, sensitive, private health data on tens of thousands of Minnesota patients, including patient data arising out of the Fairview QTCC health care delivery contract under which he never worked. *Id.* Third, Mr. Doyle was a Vice President of Accretive. If a top company official can access patient data he didn't need, load his laptop with immense amounts of patient data he didn't need, keep the data on his laptop months after he had any hint of pretense for needing it, and take the data out of the hospital facilities and throw it in the backseat of a rental car—then Accretive clearly didn't properly train its employees.

In fact, 13 months earlier, another Accretive employee (Brandon Webb) working for Fairview left a company laptop in plain view in the back of his rental car outside a restaurant. *Id.* Ex. 32 at p. 115. The laptop was stolen. *Id.* Fairview, which discovered the episode through anonymous tips (*Id.* Ex. 33 at p. 118), pointed out that perhaps the loss of Mr. Doyle's laptop could have been prevented if Accretive had alerted Fairview

of the first incident and better trained its employees not to leave laptops in plain sight in cars. *Id.* Ex. 34 at p. 119.

As it turns out, "smash and grabs"—or laptops stolen from cars—are common at Accretive. *Id.* Ex. 30 at p. 112. Accretive was well aware that its laptop computers contain "tons of patient health and financial information." *Id.* Ex. 35 at p. 122. In just the three months prior to February, 2011, the company had four "smash & grab incidents" involving four separate employees whose Accretive laptops were stolen from their cars. *Id.* at p. 121. Accretive told the U.S. Senate that nine company laptops were stolen in 2011 alone. *Id.* Ex. 13 at p. 76. It further indicated that over 30 of its laptops had not been properly encrypted. *Id.* at p. 78.

Despite all this, Accretive hands out over 1,200 portable laptops to its employees, apparently finding no problem with so many employees walking off hospital campuses with so much sensitive patient data.

B. North Memorial Business Associate Agreement.

HIPAA requires that, before a hospital provides patient data to a vendor, it must have in place a written business associate agreement. *See* 45 C.F.R. §§ 164.308(b), .502(e). Indeed, the criminal laws provide for severe sanctions if a person provides or receives health data without such an agreement. See 42 U.S.C. § 1320-6(a), (b) (imposing criminal penalties of $50,000 to $250,000 and 1-10 years of imprisonment on a person who knowingly obtains or discloses protected health information in violation of HIPAA). North Memorial and Accretive signed a revenue cycle contract in March, 2011. *Kraus Aff.* Ex. 1 at p. 12, ¶ 27. On October 10, 2011, the Minnesota Attorney General's

Office requested North Memorial to provide a copy of the "Business Associate Agreement" under which North Memorial provided patient data to Accretive employees. *Id.*

There was no Business Associate Agreement. Faced with the harsh sanctions described above for sharing health records without such an agreement, Accretive and North Memorial executives and attorneys created a Business Associate Agreement in October, 2011 and falsely presented it to the Attorney General as if it had existed since March, 2011.

Attached as Exhibit 36 to the Kraus Affidavit is an e-mail string showing that North Memorial and Accretive Senior Vice President and attorney Gregory Kazarian signed, on October 13 and 14, 2011, respectively, a Business Associate Agreement, which was made to deceptively and falsely appear to have been effective since March 21, 2011. *Id.* Ex. 36 at p. 123. On October 17, 2011, North Memorial delivered this agreement to the Attorney General. *Id.* Ex. 37 at pp. 124-128. Accretive knew that the document would be deceptively presented to mislead the Attorney General. Accretive's deception surrounding the lack of a Business Associate Agreement with North Memorial, and its backdated presentation to the Attorney General, further underscores that (i) Accretive did not honor even the most basic HIPAA requirements; (ii) Accretive failed to provide adequate HIPAA safeguards and effective training of its workforce to carry out its HIPAA obligations; and (iii) as was the case with Mr. Doyle, even high level company officers cavalierly ignored the requirements of HIPAA.

C. Debt Collectors Access Patient Health Records.

Under HIPAA, only the "minimum necessary" amount of protected health information may be shared with employees, and then only on a "need to know" basis. *See* 42 U.S.C. § 17934; 45 C.F.R. § 164.514(d). Accretive gave its debt collectors extensive access to patient health information. For the first year or so after contracting to run Fairview's revenue cycle, its debt collectors in Kalamazoo, Michigan had full access to Fairview's electronic health record system, called PASS. *Kraus Aff.* Ex. 13 at p. 75. Fairview's PASS system contains extensive health information about Fairview's patients, including detailed information about their specific medical conditions and treatment. For example, PASS would tell a debt collector if a patient was depressed or had attempted suicide. Even through "early 2012" (e.g. after this lawsuit was filed), some of Accretive's debt collectors continued to have access to the extensive health information in Fairview's PASS system. *Id.* Accretive debt collection agents also had access to health information about Fairview patients, including their diagnoses, through the "WinCollect" software utilized by Accretive. *Id.* Ex. 38 at p. 129.

D. Unencrypted Emails.

Accretive describes "unencrypted emails" as a "Common Accretive HIPAA Incident." *Id.* Ex. 30 at 112. A Fairview Internal Audit from December, 2011, which substantiated HIPAA violations by Accretive, noted that "there have been other instances of Privacy and/or Security issues unrelated to this specific audit...." and that Accretive sent unencrypted emails. *Id.* Ex. 39 at p. 131.

III. Regulatory Infractions and the Minnesota Attorney General Consent Judgment.

Accretive has chronic problems with regulatory compliance. It has been unable to comply with even the most basic corporate requirements. As noted above, Accretive signed a revenue cycle contract with Fairview in March, 2010. *Id.* Ex. 1 at p. 12, ¶ 26. Yet, it did not bother to register to transact business in Minnesota as a foreign corporation (Minn. Stat. § 303.03 (2010)) until December 20, 2010 (nine months after starting business in Minnesota), did not file for a debt collector's license until January 20, 2011 (Minn. Stat. § 332.33, subd. 1 (2010)), after it began to collect debts in Minnesota, and only initially registered one of its individual collectors—even though dozens of employees should have been registered under state law (Minn. Stat. §332.33, subd. 5a (2010))—until after this lawsuit was filed.

An obvious example of Accretive's regulatory infractions relates to its violations of a billing and collections agreement between Minnesota hospitals and the Minnesota Attorney General. In 2007, every Minnesota hospital (about 125 in total)—including Fairview and North Memorial—agreed with the Minnesota Attorney General to enter into Consent Judgments in Ramsey County District Court to adhere to certain billing collection standards. *Kraus Aff.* Exs. 40-41 at pp. 132-175.

The Consent Judgment requires Fairview to enter into a written contract with any collection agency utilized by it to collect debts from patients and states the contract must require the collection agency to act in accordance with the terms of the Consent Judgment. *Id.* Ex. 40 at p. 140. Accretive agreed to follow the Consent Judgment

through the revenue cycle contract with Fairview, which provides that: "Accretive Health shall deliver all Services in accordance with all applicable laws, rules and regulations, including, but not limited to, [Fairview's] agreement with the Minnesota Attorney General...." *Id.* Ex. 4 at p. 50, ¶ 6. Copies of the Fairview and North Memorial Consent Judgment are attached to the Kraus Affidavit as Exs. 40-41.

One of the purposes of the Consent Judgment was to make sure that "debt collection policies—by both hospital staff and external collection agencies—should reflect the mission and values of the hospital." *Id.* Exs. 40-41 pp. 132, 154. Among other things, the Consent Judgment provides that the hospital would not refer a patient's account to a third-party debt collection agency to collect a debt unless the applicable insurance company was first billed and given a chance to pay; that the hospital would not pursue collections against patients in payment plans; that the hospital would give patients a reasonable opportunity to submit applications for charity care; and that the hospital would adhere to a "zero tolerance policy for abusive, harassing, oppressive, false, deceptive, or misleading language or collections conduct by its debt collection attorney and agency, and their agents and employees, and Hospital employees responsible for collecting medical debt from patients." *Id.* at pp. 140-141, 147-148; pp. 162-163, 169-170.

In April, 2011, Fairview prepared an "Issues Log" that delineated problems with Accretive's collection activity and violations of the Consent Judgment, including that Accretive sent patients in current payment plans to collections; sent 6,000 accounts to

collections without ever having sent the patients a collection letter; and failed to process 300 patient payments. *Id.* Ex. 42 at pp. 176-177.

On or about May 5, 2011, Fairview published an internal audit of Accretive's lack of compliance with the Consent Judgment, finding numerous problems and violations by Accretive. *Id.* Ex. 43 at pp. 178-189.

On September 30, 2011, Fairview again notified Accretive that its collection activities were not in compliance with the Consent Judgment or Fairview's charity care policies. *Id.* Ex. 44 at pp. 190-193. Fairview told Accretive that patients in active payment plans continued to receive collection notices and phone calls, that its actions were "[r]esulting in numerous patient complaints and confusion for patients," and that "[We] cannot continue this relationship...." *Id.* at p. 193.

On December 30, 2011, Fairview issued another internal audit report which documented problems with Accretive's violations of HIPAA, the FDCPA, the Consent Judgment, and Minn. Stat. § 332.37(21) (2010) (requiring debt collector to disclose to patients that it is licensed as a debt collector). *Id.* Ex. 45 at pp. 194-206. On January 10, 2012, Fairview notified Accretive that it was transitioning the collection activity at Accretive's Kalamazoo, Michigan office away from Accretive effective January 31, 2012. *Id.* Ex. 46 at pp. 207-209.

ARGUMENT

Federal Rule of Civil Procedure 15 allows a party to amend its pleading with leave of court and "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). *See also Popp Telcom v. Am. Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir.

2000) ("[g]iven the courts' liberal viewpoint towards leave to amend, it should normally be granted absent good reason for a denial.") (citation omitted).

Rule 15(d) similarly allows a party to supplement the Complaint "on just terms" to state any "transactions, occurrences or events that happened after the date of the pleading to be supplemented." *See, e.g., Jones v. Bernanke*, 685 F. Supp. 2d 31, 35 (D.D.C. 2010) (stating Rule 15(d) "authorizes the court . . . to permit a party to serve a supplemental pleading setting forth events which have occurred since the filing of the original complaint. . . . The rule's basic aim is to make pleadings a means to achieve an orderly and fair administration of justice.") (citation and internal quotation omitted). Like a motion to amend, a motion to supplement should be liberally granted. *See, e.g., Capital Solutions, LLC v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 695 F. Supp. 2d 1149, 1150 (D. Kan. 2010) ("[m]otions to supplement . . . should be liberally granted . . . ."). The State seeks leave of the Court to both amend and supplement its First Amended Complaint.

The decision whether to grant such leave rests in the discretion of the trial court. *See, e.g., Hanson v. M & I Marshall and Ilsley Bank*, 737 F. Supp. 2d 988, 990 (D. Minn. 2010) (Keyes, J.) ("'[D]enial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated.'") (quoting *Roberson v. Hayti Police Dep't*, 241 F.3d 992, 995 (8th Cir. 2001); *Salazar v. Bowne Realty Associates*, L.L.C., 796 F. Supp. 2d 378, 383 (E.D.N.Y. 2011) (stating that "the analysis under Rule 15(a) and Rule 15(d) is the same.").

I. THE SECOND AMENDED COMPLAINT IS TIMELY.

This motion arises out of the State's continuing investigation. The litigation itself is at an early stage. The lawsuit was only filed in January of 2012, and no scheduling order has been issued. When litigation is in its infancy, as is the case here, courts routinely allow complaints to be amended and supplemented. *See, e.g., Burch v. Qwest Commc'ns Int'l., Inc.*, Civil File No. 06-cv-3523 (MJD/AJB), 2007 WL 5307978, at *2 (D. Minn. Apr. 10, 2007) (allowing amendment and noting that "[t]his case is still at an early stage in the litigation"); *see also In re The IT Group, Inc.*, 361 B.R. 417, 420-22 (Bankr. D. Del. 2007) (granting motion to amend complaint that was filed less than six months after original complaint). Accordingly, the State's motion for leave to file its SAC is timely, and Accretive cannot show that it would be unfairly prejudiced by granting the State's motion.

II. ACCRETIVE'S PENDING MOTION TO DISMISS IS IRRELEVANT TO THE COURT'S CONSIDERATION OF THE STATE'S MOTION.

The pendency of a motion to dismiss is of no relevance to whether the Court should grant the State's motion. *See, e.g., Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 956-57 (8th Cir. 2002) (vacating dismissal of complaint and stating, "[i]f anything, [plaintiff's] motion to amend the complaint rendered moot [defendant's] motion to dismiss the original complaint."). *See also Murrin v. Fischer*, No. 07-CV-1295 (PJS/RLE), 2008 WL 540857, at *27 (D. Minn. Feb. 25, 2008) (allowing opportunity to amend first amended complaint even though a motion to dismiss was pending and stating "it is procedural error to grant a pending Motion to Dismiss, and subsequently dismiss a

Motion to Amend the Complaint as moot...."); 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1488 (2012) (collecting cases).

As a practical matter, Accretive can either file a new Motion to Dismiss directed at the State's SAC, or move forward with its Motion as it is currently drafted, at its discretion. *See Johnson v. Homeownership Preservation Found.*, Civil No. 09-600 (JRT/JSM), 2009 WL 6067018 (D. Minn. Dec. 18, 2009) (after the court granted the motion to amend while motion to dismiss was pending, defendant responded to the amended complaint by filing a new motion to dismiss). The State, of course, will respond to either Accretive's current motion to dismiss, or any new dismissal motion it may choose to file.

III. THE STATE'S SAC PLEADS IMPORTANT NEW CLAIMS BASED ON INFORMATION LEARNED IN THE STATE'S CONTINUING INVESTIGATION.

The State's SAC contains additional facts from the State's ongoing investigation that support both its current and additional claims. These additions, which relate to the State's claims in three principal respects, unquestionably meet the requisite standards for granting a motion to amend and supplement a pleading. *See, e.g., Burch*, 2007 WL 5307978, at *3 (amendments should be allowed unless "clearly frivolous") (citing *Popp Telecom*, 210 F.3d at 944); *Hanson*, 737 F. Supp. 2d. at 990 ("'Likelihood of success on the new claim or defenses is not a consideration for denying leave to amend unless the claim is clearly frivolous.'") (citations omitted).[2]

[2] Accretive argues in its motion to dismiss that the State's HIPAA claims must be dismissed because there is no "injury in fact." HIPAA, however, specifically empowers state attorneys general to bring an enforcement action for violation of any provision of

A. The SAC Includes Additional HIPAA Facts and Claims.

The proposed amendments and supplementations to the Complaint set forth numerous additional failures to safeguard and keep private protected health information, as well as a disregard for basic HIPAA requirements. The SAC also alleges that, for months, Accretive accessed voluminous health records relating to North Memorial patients without having executed the business associate agreement required by federal law, and then tried to deceive the State into believing it did have this required agreement in place by concocting an agreement when the State asked for a copy. *See* SAC ¶¶ 64-65. The proposed pleading further alleges that Accretive has a long history of losing laptops with protected health information to theft, yet failed to change its policies, and gave wide-ranging access to employees who had no need for access to such sensitive information. See *id.* at ¶¶ 47-61.

HIPAA, including civil penalties referred to as "statutory damages," and injunctive relief to deter and prevent future violations of HIPAA. *See* 42 U.S.C. § 1230d-5(d). No actual injury to a specific individual is required for enforcement by the Attorney General. *Id.* (allowing Attorney General to bring civil action "in any case in which the attorney general . . . has reason to believe that an interest of one or more of the residents of [the] State . . . is threatened . . . by any person who violates a provision of [HIPAA]."). Indeed, the violation of the statutory interest by itself provides the necessary injury. *See, e.g., Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (recognizing the government suffers an "injury in fact" from "violation of its laws" sufficient to confer Article III standing); *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010) ("Congress has, by enacting [the statute] defined an injury in fact to the United States. In other words, a violation of that statute inherently constitutes an injury to the United States."); *United States v. Yarbrough*, 452 Fed. App. 186, 189 (3d Cir. 2011) ("Because the Government has standing to enforce its own laws, [defendant's] argument that the Government has failed to allege an injury in fact is frivolous."). If Accretive continues to make this specious argument in a motion to dismiss, the State will brief the issue in response.

These additional facts are relevant to the HIPAA claims asserted by Plaintiff. The proposed amendments and supplementations support Plaintiff's claims that Accretive failed to safeguard protected health information, through appropriate administrative, technical, and physical safeguards, as required by HIPAA's security provisions. *See* SAC ¶¶ 110, 117, 120 (alleging violations of the following HIPAA security provisions, 45 C.F.R. §§ 164.308(a)(1); .308(a)(3-4); .308(a)(5); .308(a)(6); .310(a)(1); .310(d)(1); .312(a)(1)). The proposed amendments and supplementations similarly support Plaintiff's claims that Accretive failed to limit its use, disclosure, or request of protected health information to the "limited data set" or to the minimum necessary amount to accomplish the use, disclosure, or request, as required by HIPAA's privacy provisions. *See id.* at ¶¶ 112, 117, 122 (alleging violations of the following HIPAA privacy provisions, 42 U.S.C. § 17935(b); 45 C.F.R. §§ 164.502; .502(b)(1); .514(d)(2)(i)(A); .514(d)(2)(i)(B); .514(d)(2)(ii); .514(d)(3); .514(d)(4); .530(b)(1); .530(c)). The additional facts further support Plaintiff's claims that Accretive failed to implement reasonable policies and procedures to comply with even the most basic HIPAA requirements, *see, e.g.,* 45 C.F.R. §§ 164.316; .502(b); .530(c), or effectively train its workforce members with regard to such requirements. *See* SAC. at ¶¶ 112, 117, 122 (proposing to add additional HIPAA violation pursuant to 45 C.F.R. § 164.530(b)(1)).

B. The SAC Includes Additional Debt Collection Facts and Claims.

The SAC contains factual and legal additions which are clearly appropriate amendments and supplementations to a complaint. *See, e.g., Jeter v. Alliance One Receivables Mgmt., Inc.*, No. 10–2024–JWL, 2010 WL 2025213 (D. Kan. May 20, 2010)

(granting plaintiff's motion to amend pleading which "added factual allegations" and linked those allegations to "specific conduct by defendant to sections of the [Federal Debt Collection Protection Act] under which [plaintiff] assert[ed] claims....").

Minn. Stat. Ch. 332—the Minnesota state debt collection law—contains many substantive provisions that have been violated by Accretive as a licensed debt collector. Some of these violations were set forth in the State's First Amended Complaint. The State seeks to supplement and amend this pleading to allege additional factual and legal violations under Chapter 332, as follows:

First, Minn. Stat. § 332.33, subd. 1 (2010) provides that no person shall conduct business in Minnesota without first having applied for and received a debt collection agency license. The SAC alleges that Accretive collected debts in Minnesota for a period of time without proper licensure. (SAC ¶¶ 102, 132.)

Second, Minn. Stat. § 332.37(20) (2010) provides that no licensed collection agency shall falsify any collection agency documents with the intent to deceive either a debtor or government agency. The SAC alleges that Accretive violated this provision in several respects, including by: (i) sending collection letters to Minnesota patients that were signed by fictional individuals who posed as "patient financial advisors" (SAC ¶¶ 105, 137, 140); (ii) falsely misrepresenting to debtors that it was not a collection agency (SAC ¶¶ 103, 104, 143); and (iii) falsifying the Business Associate Agreement with North Memorial for presentation to the Attorney General (SAC ¶¶ 64, 65, 139).

Third, Minn. Stat. § 332.37 (19) (2010) provides that no collection agency shall attempt to collect money from a debtor that is not authorized under an agreement with the

client (in this case, Fairview). The SAC alleges that Accretive violated this provision by repeatedly attempting to collect money from debtors in ways and amounts that were prohibited under the Consent Judgment between Fairview and the Minnesota Attorney General—a Consent Judgment that Accretive agreed to follow in its revenue cycle contract with Fairview. (SAC ¶¶ 66-76, 137, 141.)

Fourth, Minn. Stat. § 332.37(20) (2010) provides that no debt collector shall imply or suggest that health care services will be withheld in an emergency situation. Under state law, a debt collector is a person who collects on any "account, bill or other indebtedness" on behalf of another person. Minn. Stat. § 332.31, subd. 3 (2010). The SAC alleges that Accretive violated this provision when it implied, suggested, and lead some patients to believe that health care services would be withheld if they did not first pay accounts and bills in emergency situations. (SAC ¶¶ 92-94, 97, 98, 140.) Accretive violated this provision whether it engaged in these acts through its own employees or through hospital employees who it trained and managed. *See Martinez v. Albuquerque Collection Services, Inc.*, 867 F. Supp. 1495, 1502 (D.N.M. 1994) (holding that debt collectors that use . . . "agents to carry out debt collection practices that violate the FDCPA are vicariously liable for their agents' conduct"); *see also West v. Costen*, 558 F. Supp. 564, 573 n. 2 (W.D. Va.. 1983)(recognizing a debt collector's vicarious liability under the FDCPA for actions of those under the debt collector's control). *See, e.g.* SAC ¶¶ 77-98, 136, 145-150.

Fifth, Minn. Stat. § 332.37(21) (2010) requires written communications sent by a debt collector to a Minnesota resident to disclose: "This collection agency is licensed by

the Minnesota Department of Commerce." The SAC clarifies that not only did Accretive ignore this provision, it affirmatively misrepresented to patients that it was *not* a collection agency. (SAC ¶¶ 104, 143.)

Sixth, Chapter 332—the state debt collection law—is broader than federal debt collection law. Minn. Stat. § 332.37(12) (2010) prohibits a debt collector from violating any substantive provision of the federal Fair Debt Collection Practices Act, or FDCPA, **"while attempting to collect on any account, bill or other indebtedness."** In other words, the Minnesota collection agency law imports the substantive provisions of the FDCPA, while expanding them to include attempts to collect on "**any** account, bill or other indebtedness."[3] The SAC alleges that Accretive violated the substantive standards of the FDCPA in numerous ways, including by: (i) using "unfair or unconscionable

[3] As discussed above, Minn. Stat. § 332.37 states that "[n]o collection agency or collector shall . . . violate any of the provisions of the [FDCPA], while attempting to collect on *any account, bill or other indebtedness*." (Emphasis added.) Accordingly, the plain language of this provision of the MCAA is not limited to debts "in default," as Accretive argues. *See, e.g., River Valley Truck Center, Inc. v. Interstate Companies, Inc.*, 704 N.W.2d 154, 161 (Minn. 2005) (stating plain language of statute must be given effect). Even if the statute was ambiguous, it must be construed in favor of the public interest rather than Accretive's private interest. *See, e.g.*, Minn. Stat. § 645.17(5) (In ascertaining legislative intent, it is presumed that the "legislature intends to favor the public interest as against any private interest"). *See also Riehm v. Commissioner of Public Safety*, 745 N.W.2d 869, 873-74 (Minn. Ct. App. 2004) (holding that statutes intended to protect the public are remedial in nature and liberally construed). Other cases have reached the same result. *See Alkan v. Citimortgage, Inc.*, 336 F. Supp.2d 1061 (N.D. Ca. 2004) (rejecting the argument that the California debt collection law, which incorporates the FDCPA by reference, incorporates the FDCPA's definition of "debt collector."); *Aho v. Americredit Fin. Servs., Inc.*, 2012 WL 273763 (S.D. Ca. Jan. 31, 2012) (same). This issue will also be more fully briefed in response to any motion to dismiss.

means"[4] to collect money from patients in hospital emergency rooms and other medically necessary settings (SAC ¶¶ 84-98, 148); (ii) collecting money in "unusual times and places"[5] when it shook down patients in hospital emergency rooms and similar settings (SAC ¶¶ 84-98, 149); (iii) threatening to take action that cannot legally be taken[6] as a result of the Minnesota Attorney General Consent Judgment to which Accretive became bound under its contract with Fairview (SAC ¶¶ 84-98, 150); (iv) engaging in other false, deceptive and misleading representations[7] (SAC ¶¶ 84-98, 145) and deceptive means[8] (SAC ¶¶ 84-98, 148) to collect money from patients, including by giving patients the impression that they may not receive treatment if they did not pay money.[9] (SAC ¶¶ 92-94, 97, 98, 145, 148).

Finally, Minn. Stat. § 332.37(3) (2010) prohibits a debt collector from using or threatening to use other methods of collection which violate Minnesota law. The SAC alleges that Accretive violated this provision in numerous respects, including by collecting debts without proper licensure, collecting debts through individual collectors

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[4] *See* 15 U.S.C. § 1692f (providing that collector may not use any "unfair or unconscionable means to collect or attempt to collect any debt").

[5] *See* 15 U.S.C. § 1692(c)(a)(1) (prohibiting debt collector from collecting debt at an "unusual time or place or a time or place known or which should be known to be inconvenient to the consumer").

[6] *See* 15 U.S.C. § 1692e(5) (prohibiting debt collectors from "threat[ening] to take any action that cannot legally be taken....")

[7] *See* 15 U.S.C. § 1692e (prohibiting any false, deceptive, or misleading representation or means in connection with the collection of any debt).

[8] *See* 15 U.S.C. § 1692e(10) (prohibiting the use of any false representation or deceptive means to collect or attempt to collect a debt).

[9] The SAC alleges that the emergency room shakedowns included both current bills and old bills. Thus, even if the FDCPA definitions had been imported into state law, Accretive would be liable under the FDCPA for its unlawful acts in collecting old bills in hospital emergency rooms.

who were not properly registered, violating substantive provisions of the FDCPA when collecting on accounts and bills, implying that health care services would be withheld in emergency situations, using an A2A software system that required patients to pay more than they owed, falsifying its Business Associate Agreement with North Memorial for presentation to the Attorney General, using names of phony "patient financial advisors" on letters sent to patients, failing to disclose it is a collection agency, and through other fraudulent and deceptive acts. (SAC ¶¶ 64-76, 84-98, 102-105, 137.)[10]

C. The SAC Includes Additional Consumer Protection Facts and Claims.

The SAC expands on the State's factual and legal consumer protection claims. Minn. Stat. § 325F.69, subd. 1 (2010) generally prohibits the use of frauds, false promises, misrepresentations and other misleading statements and deceptive practices in the sale of merchandise. "Merchandise" includes services like health care services. Minn. Stat. § 325F.68, subd. 2 (2010). Similarly, Minn. Stat. § 325D.44 (2010) prohibits an array of enumerated deceptive practices and contains a "catch all" prohibition in subdivision 13 against conduct which creates a likelihood of confusion or

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[10] Contrary to Accretive's contention, the Minnesota Department of Commerce's subsequent investigation of Accretive's debt collection violations does not preclude the Attorney General's action. The Attorney General is a state constitutional officer with independent authority to remedy violations of Minnesota's debt collection laws, including past violations of those laws. *See State of Minnesota v. Am. Family Ins. Co.*, 609 N.W.2d 1, 4 (Minn. Ct. App. 2000) (concluding that Attorney General has independent authority under Minn. Stat. § 8.31 and its *parens patriae* authority to enforce laws also within the jurisdiction of the Commerce Department). *See also Curtis v. Altria Group, Inc.*, 2012 WL 1934726 (Minn. May 30, 2012) (recognizing broad authority of Attorney General). The State will further brief this issue, as necessary, in response to a motion to dismiss.

misunderstanding. The consumer protection laws are to be "liberally construed" in favor of protecting consumers. *State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 892 (Minn. Ct. App. 1992), *aff'd* 500 N.W.2d 788 (Minn. 1993); *see also State by Humphrey v. Phillip Morris, Inc.*, 551 N.W.2d 490, 496 (Minn. 1996) (deceptive trade practices act is broadly construed to enhance consumer protection).

The SAC expands the State's factual and legal consumer protection claims as follows:

First, the SAC alleges that Accretive—through the use of its A2A computer system—overcharged some patients in violation of Minnesota law. *See* Minn. Stat. §§ 325D.44, subd. 5 and 325F.69 (2010) and SAC ¶¶ 96, 98, 171-173.

Second, EMTALA requires a hospital to treat patients in emergency situations regardless of their ability to pay, 42 U.S.C. § 1395dd(a), and prohibits the delay of a medical screening examination or treatment to inquire about the individual's method of payment or insurance status. 42 U.S.C. 1395dd(h). The SAC alleges that Accretive deceived patients by implying they may not be treated if they didn't pay money on-the-spot in emergencies or for other medically necessary treatment. SAC ¶¶ 92, 94, 97, 98, 174-177. This claim applies to any portion of Accretive's in-hospital conduct that does not constitute "debt collection" activities under state debt collection law. *See* SAC ¶¶ 174.

Third, the assets of charitable hospitals are held in trust for the benefit of the citizens of Minnesota. Minn. Stat. § 501B.35, subd. 3; *In re Peterson's Estate*, 277 N.W. 529, 532 (Minn. 1938) (charity takes a charitable devise "not beneficially, but as trustee,

to use the funds in furtherance of [its] charitable purpose."). The Minnesota Supreme Court has held that non-profit health care organizations are "consumers" under the above consumer protection laws. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001). The SAC alleges that Accretive deceived Minnesota hospitals by representing that it would manage their revenue cycles in accordance with state law, the Attorney General Consent Judgment, patient privacy standards, and the duties of a charitable organization and then failing to do so. SAC ¶¶ 64-76, 84-98, 102-105.

Finally, the SAC expands upon the FAC by further enumerating the ways in which Accretive hid its role from Minnesota patients. SAC ¶¶ 101-106, 156, 162, 163.

CONCLUSION

For the above-stated reasons, the State respectfully requests that the Court grant its motion to amend and supplement the FAC.

Dated: June 19, 2012

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

State of Minnesota, by its Attorney General Lori Swanson,

Plaintiff,

v.

Accretive Health, Inc.,

Defendant.

Civil File No. 12-145 RHK/JJK

LR 7.1(d) WORD COUNT COMPLIANCE CERTIFICATE REGARDING PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO AMEND AND SUPPLEMENT ITS FIRST AMENDED COMPLAINT

I, Jacob Kraus, certify that Plaintiff's Memorandum in Support of Its Motion to Amend and Supplement Its First Amended Complaint complies with Local Rule 7.1(d).

I further certify that, in preparation of this memorandum, I used Microsoft Word Version 2003 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 11,504 words.

Dated: June 19, 2012

Respectfully submitted,

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