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 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

INTRODUCTION

Plaintiff State of Minnesota, by its Attorney General (the "State"), files this memorandum in opposition to the motion of Defendant Accretive Health, Inc. ("Accretive") to dismiss the Second Amended Complaint ("SAC"). Accretive orchestrated a pattern of unlawful and reprehensible conduct toward emergency room and other hospital patients in Minnesota. These patients should be heard, and this lawsuit should move forward.

FACTS

For this motion, the following facts from the 82-page SAC must be taken as true:

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

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

Accretive is a Chicago company and licensed debt collector. (SAC ¶¶ 5, 11, 43, 160.) It has managed the "revenue cycles" of two Minnesota charitable hospitals:

Fairview Health Services ("Fairview") and North Memorial Health Care ("North Memorial"). (SAC ¶¶ 2, 26-27.) 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." (SAC ¶ 29.)

Accretive signed both a revenue cycle agreement (SAC ¶ 26) and a "Quality and Total Cost of Care" ("QTCC") agreement with Fairview in 2010. (SAC ¶ 35.) These contracts have now been terminated. Accretive signed a revenue cycle agreement with North Memorial in 2011. (SAC ¶ 27.) Under both revenue cycle contracts, Accretive manages the hospitals' scheduling, registration, admissions, billing, and collections functions. (SAC ¶¶ 31-32, 77.)

Accretive "infuses" its employees into the hospitals and assumes management responsibility for hospital employees engaged in "revenue cycle" functions. (SAC ¶¶ 2, 24, 28, 77, 95, 99.) Accretive is contractually responsible for the day-to-day management and supervision of hospital "revenue cycle" employees. (SAC ¶¶ 2, 24, 77-78.)

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!" (SAC ¶ 90.)

The main ingredient of the "Secret Sauce" is that only "Accretive hospitals" hustle Emergency Room patients with bedside collection visits. (SAC ¶ 90.)

The impact of the "Secret Sauce" on patients is very real. The SAC incorporates by reference the facts in over 25 patient affidavits filed with the motion to amend. (SAC ¶ 98.) As a result, the facts in the affidavits are part of the SAC.[1] They include stories like that of **Frank Przybilla**, a part-time deputy sheriff and U.S. Army veteran. (*Id.*, incorporating Docket ("Dkt.") #58.) In January, Frank's right leg went numb. At Fairview's Riverside Hospital Emergency Room, Frank was undressed and put in a hospital gown. *Before he saw a doctor*, a woman told him he must pay approximately $350. *Frank and his wife, Carol, believed that if they did not pay on the spot, treatment could be withheld.* Wanting treatment, they handed the woman a blank check, and she charged their account $350. After they paid, Frank finally saw a neurologist, who ordered Frank transferred to another hospital by ambulance. Frank had a mini-stroke. He says: *"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."*

Terry Mackel is a 50 year old lab technician. (*Id.*, incorporating Dkt. ##52-53.) Terry and his wife, Lori, a dietician, have good insurance. Terry, a picture of health, has

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[1] A document incorporated by reference into a complaint becomes part of the complaint. *See, e.g., Brown v. Medtronic, Inc.*, 628 F.3d 451, 459-60 (8th Cir. 2010) ("[D]ocuments attached to or incorporated within a complaint are considered part of the pleadings, and courts may look at such documents for all purposes, Fed. R. Civ. P. 10(c), including to determine whether a plaintiff has stated a plausible claim...."); *Rice v. Greenhaven Group, LLC*, No. 10-3830, 2011 WL 43481, at *2 (D. Minn. Jan. 6, 2011) (quoting *Brown*).

completed seven marathons. Terry went to the Emergency Room with "excruciating" and "debilitating" 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. 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 computer cart into his room and said he must pay $363.55. When Terry's wife, Lori, entered the room, the woman handed her the bill. *The woman wouldn't leave and kept repeating that they owed money "today." The Mackels believed that Terry may not receive treatment if they didn't pay.* 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."*

Timothy Palm's experience was no better. (*Id.*, incorporating Dkt. #57.) Timothy is a 27-year-old accountant from Edina with insurance. He lay alone in a thin gown on a gurney in the Fairview Southdale Hospital ER after 2 a.m., doubled over in "the worst pain I had ever experienced in my life." Before he was diagnosed or treated, a man entered his room. He told Timothy he must pay $800. *Timothy was given the impression that if he didn't pay, he wouldn't get treatment.* The collector rifled through Timothy's wallet and found Timothy's HSA card, which he swiped. Timothy was then whisked into emergency surgery to remove his 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."*

A teacher in the Eden Prairie Schools, **Maureen Fitzgerald** developed severe flu-like systems, a spreading red rash, and her eyes were swollen almost completely shut. (*Id.*, incorporating Dkt. #44.) At Fairview Southdale Hospital's ER, Maureen waited in a curtained area, alone and afraid. The first person to enter—before she saw a doctor—was a woman with a computer cart. She told Maureen she owed $545.20. *Maureen understood that she wouldn't get treated if she didn't pay.* After Maureen let the woman swipe her credit card, Maureen finally saw a doctor, who gave her pain medication and antibiotics through an IV. Maureen was diagnosed with a fast-moving, sometimes fatal, strep infection.

Carol Wall is a project manager for Securian Financial Group. (*Id.*, incorporating Dkt. #63.) Carol began vaginally hemorrhaging lots of blood. At the Fairview Riverside ER, her condition worsened, causing pain, cramping, and wooziness from the blood loss. While Carol was waiting to be diagnosed, a woman wheeled a computer cart to the exam table and told her she owed about $300. The woman insisted that Carol pay money as she bled. Vulnerable, Carol gave the woman her credit card.

Two weeks later, Carol awoke from a nap, partially paralyzed. Paramedics rushed her to the Fairview Riverside ER, where she was hooked up to monitors. A woman with a computer cart 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 another hospital, where she was treated for a stroke caused by a blood clot to the brain.

Linda Schmeichel, 58, works at a structural engineering firm. (*Id.*, incorporating Dkt. #61.) She went to the Fairview Southdale ER with severe chest and back pain.

Before she was diagnosed, a man wheeled in with a computer cart, told her that ER visits are expensive, and that she must pay $700. The man wouldn't leave. Linda finally gave the man a credit card, which he swiped. 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."*

Some conditions are less dramatic, but still require ER treatment. **Penny and Guy Cierzan** rushed their son, Noah, to the Fairview Southdale ER when he gashed his knee at his 11th birthday party. (*Id.*, incorporating Dkt. #43.) Before any suturing, a woman pushed a cart to Noah's bedside and told the family they owed $750. *When Guy asked if Noah would get treatment if they didn't pay right then, the woman wouldn't answer.* Wanting their panic-stricken son to get care, they paid. Playing kickball as part of her sports education degree training at the University of Minnesota, **Lynn Sainati** fractured her collarbone. (*Id.*, incorporating Dkt. #60.) Paramedics rushed her to the Southdale Hospital ER. Before she was given pain mediation or tests, a man with a computer cart arrived and told her she must pay $150. Lynn and the man haggled over what she could afford. He eventually agreed to $50. The man rifled through Lynn's purse for her credit card. After he left, a physician finally gave her pain medication and a cardiovascular EKG.

Retiree **Bruce Folken** volunteers for the Yellow Ribbon program to help military families. (*Id.*, incorporating Dkt. #45.) One day, his left side went numb and his blood pressure spiked. As he lay groggy, in pain, and unclothed in a gown and hooked up to an

IV, heart monitor, and blood pressure machine at the Fairview Ridges Emergency Room, a woman approached his bedside and asked him to pay $493.60. *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, and she scanned it for $493.60. Bruce was then taken for a CT scan of his head.

Retired over-the-road truck driver **Don Williams**, 72, awoke around 4 a.m. with sharp abdominal pain. (*Id.*, incorporating Dkt. ##66-67.) He went to the Emergency Room at Fairview Ridges. As Don lay hooked up to monitors, with tubes down his throat, and on a morphine drip for pain, a woman rolled in and told him to pay $50. She dropped his pants on his chest. Don got out his debit card, which she swiped. Don was then taken to surgery for a bowel obstruction. Don's wife, May Ann, a nurse for 50 years, says: *"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."*

C. Accretive's Stoplists.

Accretive's tactics don't stop in the ER. Accretive "stoplisted" patients scheduled for other medically necessary treatment. (SAC ¶ 93.) After 46-year-old **Amy Morris** developed a cough, a pulmonologist told her she had lung cancer. (SAC ¶ 98, incorporating Dkt. ##54-55.) 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 about her young kids. After checking in, she sat down for her final

moments with Hugh. A woman with a computer then 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 was told not to bring valuables to the hospital and had no wallet. Fortunately, Hugh had a credit card, which the woman swiped, and the surgery moved ahead.

Daniel Ritter was stoplisted too. (*Id.*, incorporating Dkt. #59.) Daniel is a 63-year-old Lutheran minister. He checked in early one morning at Fairview Southdale Hospital for hip replacement surgery. Minutes before surgery, a "financial counselor" told Pastor Ritter and his wife Dianne that they needed to pay $1,500 or the surgery could be stopped. When Dianne said they didn't have that much money in their account, the woman said she would take a credit card. The Ritters could not afford $1,500 on their credit card, and negotiated the amount down to $700. Their credit card was swiped.

D. Other Collection Practices.

Accretive became licensed with the Minnesota Department of Commerce as a debt collection agency on January 20, 2011. (SAC ¶¶ 11, 18, 102, 131.) For a time, Accretive operated without a license. Minn. Stat. § 332.33, subd. 5a (2010); SAC ¶ 102. It also didn't properly register its individual collectors (SAC ¶¶ 11, 106, 134), or put proper disclosures on its debt collection mailings, Minn. Stat. §§ 332.37(21) and 332.37(16) and SAC ¶¶ 103-104.

Accretive sent letters to Minnesota patients that read:

> You have a balance of [$_____] with Fairview Health Services that is **seriously past due** and has been assigned to Medical Financial Solutions to determine how this matter can be resolved. Unfortunately, we have been unable to contact you by phone and our previous attempts to contact you by letter went unanswered. We encourage you to take advantage of this

> opportunity to resolve this debt and avoid further collection activity. **We are now reaching the point where your account may be turned over to a collection agency.** We prefer to resolve this matter with you directly.

(SAC ¶ 104, emphasis added.) The letters don't disclose that Accretive *is* a debt collection agency. (SAC ¶¶ 104, 144, 158.) **Ann Johnson** is a registered nurse. (SAC ¶ 98, incorporating Dkt. #49.) Six months after being treated in the Fairview ER for meningitis, Ann got collection calls and letters from Accretive. One letter states that her balance was "seriously past due." The letter is signed by "John Monteith, Patient Financial Advisor"—a fake person. (SAC ¶ 105.) Other Minnesotans received letters from a fictitious "Anna Wittenhall, Patient Financial Advisor." (SAC ¶ 105.)

Kyle Thompson is a construction dispatcher. (SAC ¶ 98, incorporating Dkt. #62.) Late one night, 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 ER. His blood pressure was sky-high. Before he saw a doctor, a woman told Kyle he must pay an old balance. JoAnn told the woman that they left Kyle's wallet at home while rushing to the ER. The woman said she would wait while JoAnn went to her car to get money to pay the old bill. *Kyle and JoAnn state that it was clear to them that Kyle wouldn't receive treatment without paying 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 to pay the old bill. Fortunately, JoAnn found a cash card and raced back into the ER and gave it to the woman, who charged the card. Kyle was then seen by a doctor, who told him he had a precursor to a heart attack.

Tom Fuller was a golf course supervisor. (*Id.*, incorporating Dkt. ##46-47.) Tom, who has pulmonary fibrosis, had a lung transplant. For months afterward, he ate through a feeding tube. Weak and barely able to stand, Tom went to Fairview hospital to replace his feeding tube. Tom was sent to a room without his wife, where he collided with a stern and aggressive man who asked him for his credit card to pay some six-month-old bills. Tom, tired and weak, was told he must call Accretive.

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. (*Id.*, incorporating Dkt. #51.) Her physician referred her to the UMMC-Fairview ER with high blood pressure, an elevated heart rate, and premature ventricular contractions. As Janet was laying on her side on a gurney, hooked up to monitors and an IV, a man entered and told Janet that she must pay a past due bill. Surprised, Janet gave the man a credit card. The man swiped the credit card for $77.68. As it turns out, the payment of $77.68 included a bill from four months earlier and charges for the current visit. After discharge, Janet continued to have a fluttering heart and a racing pulse. Her cardiologist sent her for a cardiac MRI. Janet checked in, was shunted off to a little room, and another man told her that she had outstanding bills. The man gave her a printout of a bill on Accretive's letterhead. Accretive's printout lists bills that had previously been paid, bills for her current visit, and bills that she had not received.

E. Baby Prison and Patient Overbilling.

Accretive uses its own software program, known as AHtoAccess, or A2A, to get money from patients. (SAC ¶¶ 96, 136.) A hospital registration employee using A2A

cannot process a patient record unless she first processes "balls" that pop up on the screen. (SAC ¶ 96.) A2A 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 past balances, as well as the amount of past balances and present bills for uninsured patients. (SAC ¶ 96.) Based upon A2A, patients are told to pay money to the hospital. (SAC ¶ 96.) A2A often calculates the wrong amounts, leading some Minnesota patients to overpay. (SAC ¶ 96.)

For instance, **Amy Zumwalde** works with disabled kids at Richfield Public Schools. (SAC ¶ 98, incorporating Dkt. #68.) Her first child, Max, was born at Southdale Hospital. As Amy and her husband were proudly leaving the hospital to take their 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 she wasn't going to be allowed to take her new baby home, Amy gave the woman her credit card. As it turns out, Amy was overcharged about $800.

Marcia Newton is a savvy businesswoman. (*Id.*, incorporating Dkt. #56.) She and her husband adopted two boys from an orphanage in Kazakhstan. One, Maxx, needed surgery to prevent a ruptured ear drum. When Marcia and Maxx arrived at a Fairview Hospital on the day of the surgery, Marcia was handed a bill for $875.90. *She understood that if she didn't pay, Maxx couldn't have surgery.* She paid. She later learned from her insurer that the surgery cost only $4,267.40 (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).

Lois Weihrauch is an experienced businesswoman too. (*Id.*, incorporating Dkt. #64.) She works for a large insurance company and previously worked at a hospital in billings and collections. 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 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."*

Jack Wiebke, 67, has a business administration degree. (*Id.*, incorporating Dkt. #65.) He checked in at Fairview Ridges Hospital for surgery for kidney stones, which were causing "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 they must pay $1,443.93 before the surgery. She gave them an Accretive invoice. They told the woman they didn't have that much cash with them or a checkbook. The woman

said they could pay by credit card. Jack was in agonizing pain and didn't want to postpone the surgery, so they paid. They were overcharged by about $390. In a similar vein, **Linda Schmeichel** was overcharged by about $200. (*Id.*, incorporating Dkt. #61.) **Penny and Guy Cierzan** were overcharged by about $400. (*Id.*, incorporating Dkt. #43.) **Bruce Folken** was overcharged by $177.42. (*Id.*, incorporating Dkt. #45.)

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. (SAC ¶ 95.) Accretive's "infused management" supervised another 1,200 Fairview "revenue cycle" employees. (SAC ¶ 95.) Accretive employees are told: "Every patient with a prior balance who visits the hospital must be approached about settling their account(s)." (SAC ¶ 84.) An Accretive "Effective Front End Operator" must "leverage hospital staff to assist in prior balance collections...." (SAC ¶ 93.)

Accretive described 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...."

(SAC ¶ 80.) Accretive says this to staff at employee orientations: "Short version - we run the financial side" of the hospital. (SAC ¶ 81.)

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,....";
- "[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."

(SAC ¶¶ 82-83.)

Accretive implements an aggressive boiler room-type culture within hospitals. It uses "chalk talks" to enforce collection quotas among hospital registration and admissions staff, including in the ER. (SAC ¶ 84.) It gave hospital ER and registration staff prizes for meeting collection quotas. (SAC ¶ 87.) Accretive managers promised to wear clown outfits, Colonel Sanders outfits, Waldo outfits, or shave their heads if hospital employees met collection quotas. (SAC ¶ 87.) It trained hospital employees. (SAC ¶¶ 86, 92-95, 97, 135, 144, 147-48, 174-75.) 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." (SAC ¶ 95.) If Fairview hospital employees didn't collect enough in past due

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?" (SAC ¶ 93.)

II. Laptops, "Smash and Grabs," Data Sharing, and Health Data in Collections.

Accretive accessed high amounts of sensitive personal medical and financial information on tens of thousands of Minnesota patients. (SAC ¶¶ 4, 46, 48.) Accretive told hospitals that it would keep patient data confidential and safeguarded. (SAC ¶¶ 56, 167). It didn't.

Accretive acknowledges that "Common…HIPAA incidents" at Accretive include "[lost] Laptops, unencrypted emails, [and] too much access." (SAC ¶ 61.) Each of these problems is described below.

A. "Smash & Grabs."

On July 25, 2011, an Accretive Vice President, Matthew Doyle, left an unencrypted laptop computer containing personally identifying health information about 23,531 Fairview and North Memorial patients in plain view in the back of a rental car in the Seven Corners neighborhood in Minneapolis. (SAC ¶¶ 48-49, 58.) The computer was stolen and, with it, the patient data. (SAC ¶¶ 4, 48.) The computer contained highly sensitive patient data, including patients' names, addresses, Social Security numbers, health and treatment history, and "scores" that measure patients' frailty, complexity, and hospitalization likelihood. (SAC ¶ 50.) One screen shot on the laptop describes whether a particular patient had any of 22 listed conditions, including bipolar disorder,

schizophrenia, depression, and HIV. (SAC ¶¶ 51-52.) The laptop contained the names of almost one quarter million Fairview patients. (SAC ¶ 50.)

The laptop incident is troubling. First, at the time of the incident, Mr. Doyle was working for Accretive on the North Memorial account. (SAC ¶ 58.) Yet, the laptop still had massive amounts of data of two other hospitals, including Fairview, for which he had not worked for three months. (SAC ¶ 58.) 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 private health data on tens of thousands of Minnesota patients, including patient data from the Fairview QTCC contract, under which he never worked. (SAC ¶ 58.) Third, Mr. Doyle was a Vice President. 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. (SAC ¶ 58.) Fourth, Accretive did not keep track of the information on the laptop. (SAC ¶ 57.) Accretive initially told North Memorial that the laptop had data on 2,841 North Memorial patients. (SAC ¶ 53.) A computer forensics expert hired by North Memorial later discovered that the laptop had data on another 6,690 patients. (SAC ¶ 54.)

Accretive did not have sufficient policies to detect and contain security violations. (SAC ¶ 59.) 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. (SAC ¶ 59.) The laptop was stolen. (SAC ¶ 59.) After discovering the episode through anonymous tips, Fairview pointed out that the loss of Mr. Doyle's laptop may have been prevented if Accretive had alerted Fairview of the first incident and trained its employees not to leave laptops in plain sight in cars. (SAC ¶ 59.)

"Smash and grabs"—or laptops stolen from cars—are common at Accretive. (SAC ¶ 60.) Accretive knows its laptops contain "tons of patient health and financial information." (SAC ¶ 60.) Yet, in the three months prior to February, 2011, there were four "smash & grabs" involving four employees whose Accretive laptops were stolen from cars. (SAC ¶ 60.) Nine company laptops were stolen in 2011 alone. (SAC ¶ 60.) Over 30 laptops were not properly encrypted. (SAC ¶ 60.)

B. North Memorial Business Associate Agreement.

HIPAA requires that, before a hospital provides patient data to a vendor, it must have a written business associate agreement. *See* 45 C.F.R. §§ 164.308(b), .502(e). 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. (SAC ¶ 27.) On October 10, 2011, the Minnesota Attorney General requested North Memorial to provide a copy of the "Business Associate Agreement" under which North Memorial provided patient data to Accretive. (SAC ¶ 64.)

There was no Business Associate Agreement. (SAC ¶ 64.) Faced with harsh sanctions 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. (SAC ¶ 65.) North Memorial and Accretive Senior Vice President Gregory Kazarian signed, on October 13 and 14, 2011, respectively, a Business Associate Agreement which was deceptively made to appear to have been effective since March 21, 2011. (SAC ¶ 65.) On October 17, 2011, North Memorial delivered this agreement to the Attorney General. (SAC ¶ 65.) Accretive knew that the document would be presented to mislead the Attorney General. (SAC ¶ 65.) Accretive's deception surrounding the lack of a Business Associate Agreement with North Memorial, and its backdated presentation to the Attorney General, underscores that: (i) Accretive flaunted even the most basic HIPAA requirements; (ii) Accretive failed to provide adequate HIPAA safeguards and effective training of its workforce; and (iii) high level company officers cavalierly ignored the requirements of HIPAA.

C. Debt Collectors Access Patient Health Records.

Accretive does not limit access to protected health information to employees who need it to carry out their duties. (SAC ¶ 47.) Rather, Accretive has unlawfully and systematically made protected health information readily accessible to employees who should not have access to it, including debt collectors. (SAC ¶ 47.)

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. (SAC ¶¶ 47, 120, 122.) For the first year after contracting to run Fairview's revenue cycle, its debt collectors in Michigan had full access to Fairview's electronic health record system, called PASS. (SAC ¶ 47.) Fairview's PASS system contains extensive health information about Fairview's patients, including detailed information about their specific medical conditions and treatment. (SAC ¶ 47.) Even through "early 2012" (*e.g.*, after this lawsuit was filed), some Accretive debt collectors had access to the extensive health information in Fairview's PASS system. (SAC ¶ 47.) Accretive debt collection agents also had access to health information about Fairview patients, including their diagnoses, through the "WinCollect" software utilized by Accretive. (SAC ¶ 47.)

D. Unencrypted Emails.

Accretive describes "unencrypted emails" as a "Common Accretive HIPAA Incident." (SAC ¶ 61.) A Fairview Internal Audit from December, 2011 faulted Accretive for HIPAA violations, including unencrypted emails. (SAC ¶ 61.)

III. The Hospital Consent Judgment.

A 2007 Consent Judgment between Fairview and the Minnesota Attorney General established collection standards for Fairview. (SAC ¶¶ 66-76.) The Consent Judgment required Fairview to enter into a written contract with any collection agency utilized by it and requires the collection agency to follow the Consent Judgment. (SAC ¶ 67.) The Fairview-Accretive revenue cycle contract states 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...." (SAC ¶ 67.)

Among other things, the Consent Judgment provides that the hospital would not refer a patient's account to a third-party debt collection agency for collection 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; 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." (SAC ¶ 68.)

From the get-go, Fairview documented Accretive's chronic lack of compliance with the Consent Judgment. (SAC ¶¶ 69-76.) Accretive sent patients in payment plans to collections; sent 6,000 accounts to collections without having sent the patients a collection letter; and failed to process hundreds of patient payments. (SAC ¶ 70.) By September 30, 2011, Fairview told Accretive that its collections tactics were "[r]esulting in numerous patient complaints and confusion for patients," and that "[We] cannot continue this relationship...." (SAC ¶ 73.) Following two formal Fairview Internal Audits that found Accretive to be in violation of the Consent Judgment (SAC ¶¶ 71, 75), on January 10, 2012, Fairview notified Accretive that, effective January 31, 2012, it would no longer utilize the services of Accretive's Michigan collection center. (SAC ¶ 76.)

IV. Accretive and Patient Disclosure.

Minnesota patients are not aware of the sweeping scope of Accretive's involvement in their health care or the data it mines about them. (SAC ¶¶ 101, 158, 160.) Accretive masks its role as a debt collector. (SAC ¶¶ 5, 158.) Accretive further prepared misleading and high-pressure scripts to be used by hospital patient registration staff. (SAC ¶ 97.) Accretive goes so far as to "infuse" employees into hospitals and have its employees wear identification badges and hold themselves out to patients in a manner that suggests or implies they are with the client health care facility. (SAC ¶¶ 42, 99, 158.)

The hospitals' medical authorization forms do not identify Accretive by name or disclose the scope and breadth of information shared with the company. (SAC ¶ 101.) Patients are unaware that Accretive develops analytical scores rating the complexity of their medical condition, the likelihood they will be admitted to a hospital, their "frailty," or the likelihood that they will be able to pay for services. (SAC ¶ 101.) Nor are Minnesota patients aware of the following: (1) that Accretive engages in patient "data mining" and "consumer behavior modeling" (SAC ¶¶ 2, 160); (2) that when a patient registers at a hospital, Accretive begins to compile "complete patient information" on the patient (SAC ¶ 31); (3) that it maintains an "automated electronic scorecard" that tracks each patient, including the patient's payment history, throughout the patient's lifecycle (SAC ¶ 31); (4) that it identifies patient accounts with financial risk by applying "data mining techniques" and performs "skip tracing" (SAC ¶ 31); (5) that Accretive develops "risk scores" on patients and manages health risk assessments, automated care plans, case

and pharmacy management, and duration of hospital stays (SAC ¶¶ 3, 45); (6) that under the QTCC agreement, Accretive helped Fairview negotiate contracts with insurance companies and HMOs that allowed the hospital to earn incentive payments from the insurers and HMOs for cutting health care costs and, in turn, Accretive receives a share of the cuts. (SAC ¶¶ 3, 36.)

Accretive misled Fairview. (SAC ¶¶ 66-76, 84-98, 163-176.) Fairview hired Accretive based upon its representation that it would "deliver all Services in accordance with all applicable laws, rules and regulation, including, but not limited to, [Fairview's] agreement with the Minnesota Attorney General...." (SAC ¶ 67.) As described above, Accretive violated state and federal law, and the Attorney General Consent Judgment, through its harassing, abusive, and deceptive practices at Minnesota hospitals. (SAC ¶¶ 66-76, 84-98, 163-176.) Accretive also told Fairview that it would comply with Minnesota and federal health privacy laws and keep sensitive health information relating to the hospital's patients safe, secure, and "strictly confidential," by using "appropriate safeguards" to prevent the misuse or disclosure of protected health information. (SAC ¶ 56.) It didn't. (SAC ¶¶ 43-63, 99-101, 167.)

ARGUMENT

I. STANDARD OF REVIEW.

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the sole issue is whether the complaint states a claim upon which relief can be granted. *See* Fed. R. Civ. P. 8(a)(2) (providing that complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief"); *see also Radisson*

Hotels Int'l, Inc. v. Westin Hotel Co., 931 F. Supp. 638, 644 (D. Minn. 1996) (stating that liberal notice-pleading standard and availability to conduct extensive discovery means there is no need for claimant to set out in detail every fact upon which he bases his claim). For purposes of the motion, the facts alleged in the complaint "should be read as a whole" and accepted as true. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594-95 (8th Cir. 2009) ("[I]t is sufficient...to plead facts indirectly showing unlawful behavior...."); *accord State of Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001) ("All factual allegations must be accepted as true.").[2]

In addition, "[t]he complaint must be construed liberally, and any allegations or reasonable inferences arising therefrom must be interpreted in the light most favorable to the plaintiff." *Cummins Law Office, P.A. v. Norman Graphic Printing Co.*, 826 F. Supp. 2d 1127, 1129 (D. Minn. 2011) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007)). The complaint need only include enough facts, "accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The SAC properly states claims for relief.

[2] Accretive asserts various "facts" in its brief that are not in the SAC, are disputed by the Attorney General, and are improper for consideration on the pending motion to dismiss. *Armstrong v. Target Corp.*, No. 10-1340, 2010 WL 4721062, at *3 (D. Minn. Nov. 15, 2010).

II. THE SAC STATES A CLAIM FOR RELIEF UNDER HIPAA.

A. The Attorney General Has Article III Standing To Enforce HIPAA Violations.

The Attorney General is exercising the statutory authority granted to her by Congress to bring this HIPAA enforcement action. She is expressly empowered by HIPAA to seek civil penalties, referred to as "statutory damages," and injunctive relief to ensure HIPAA is followed, and to deter and prevent future violations of its provisions.[3] 42 U.S.C. § 1320d-5(d); *accord Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1325-26 (Fed. Cir. 2010) (Congress determined certain conduct was harmful to the public and should be prohibited and government had sovereign interest to enforce statute to prevent such harm); *Pennsylvania v. Mid-Atl. Toyota Distribs., Inc.*, 704 F.2d 125, 131-32 (4th Cir. 1983) (recognizing state attorneys general standing to enforce federal antitrust law to "remedy invasions of the public interest" and promote the "public interest in protecting…citizens from violations of these laws").

Unlike a dispute between private parties, no proof of actual injury to a specific individual is required for enforcement by the Attorney General. 42 U.S.C. § 1320d-5(d) (Attorney General may bring 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

[3] The Attorney General's *parens patriae* interest is a sufficient sovereign interest to establish the Attorney General's standing to bring this enforcement action. *See, e.g., State of Minnesota v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 569-70 (Minn. Ct. App. 2005) ("protecting the privacy of its citizens" is a quasi-sovereign public interest); *State of Minnesota v. Standard Oil Co.*, 568 F. Supp. 556, 563 (D. Minn. 1983) ("A state maintains a quasi-sovereign interest either where the health and well-being of its residents is affected, or where the state works to assure that its residents enjoy the full benefit of federal laws.").

threatened…by any person who violates a provision of [HIPAA]"); *accord Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (stating government suffers an "injury in fact" from "violation of its laws" sufficient to confer Article III standing); *City of Kansas City v. Yarco Co.*, 625 F.3d 1038, 1040-41 (8th Cir. 2010) ("The United States suffers injury in fact when its laws are violated."); *Mid-Atl. Toyota Distribs., Inc.*, 704 F.2d at 127-32 (upholding standing of state attorneys general to enforce federal antitrust law); *Stauffer*, 619 F.3d at 1325 ("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.").

Accordingly, Accretive's violations of HIPAA's provisions provide the necessary "injury" to confer Article III standing to the Attorney General. *See, e.g.*, *United States v. Yarbrough*, 452 Fed. App'x 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."); *United States v. F.D.I.C.*, 881 F.2d 207, 209 (5th Cir. 1989) (stating "supervisory and regulatory interest in enforcing the safeguards mandated by [the statute]…provides sufficient standing" for government to bring the enforcement action); *United States v. City of Parma*, 661 F.2d 562, 572 (6th Cir. 1981) (upholding Attorney General's standing to sue to enforce provisions of Fair Housing Act); *United States v. New York*, 700 F. Supp. 2d 186, 197 (N.D.N.Y. 2010) (reasoning that the case or controversy is not "whether an individual has been deprived of rights secured by the [statute], but rather, whether [the defendant] has failed properly to

implement the statute" and no "proof of cognizable harm to an individual" was necessary to establish the government's Article III standing).

The cases cited by Accretive are inapposite. None involve an action by the government, under express statutory authority, to enforce provisions of a statute. They instead involve *private* individuals who must show a particularized and concrete pecuniary injury to establish Article III standing. *See, e.g.*, *Hammond v. The Bank of N.Y. Mellon Corp.*, 2010 WL 2643307, at *2, *7 (S.D.N.Y. 2010) (private plaintiffs failed to allege pecuniary injury sufficient to establish Article III standing); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1048-52 (E.D. Mo. 2009) (same); *Shafran v. Harley-Davidson, Inc.*, 2008 WL 763177, at *1, *3 (S.D.N.Y. 2008) (same).[4]

Furthermore, an ample causal connection exists between the "conduct complained of" and Accretive's violations of HIPAA's security and privacy provisions.[5] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Accretive's violations of HIPAA's security and privacy provisions stem from its failure to adequately safeguard and limit access to the protected health information contained on its laptops by, for example: (i) allowing employees to amass on their laptops voluminous protected health information not needed to do their jobs, SAC ¶¶ 49, 58, 60; (ii) failing to encrypt such

[4] Accretive's citation to the dissent in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007) is particularly disingenuous. There, a majority of the Supreme Court distinguished between the standing of a sovereign state and a private individual and held that Massachusetts had standing to assert its rights under the federal law. *Id.* at 518-20 & n.17.

[5] Accretive limits its specious causation argument to the alleged HIPAA violations involving laptops that contained protected health information and does not challenge the causal connection with respect to the numerous other HIPAA violations alleged in the SAC. *See* SAC ¶¶ 110(b)-(c), (e), (h), 112(a)-(h), 117(b)-(e), 120, 122.

information, SAC ¶¶ 49, 60, 110(e)-(f); (iii) allowing employees to remove unencrypted laptops from hospital facilities and leave them unattended in vehicles, SAC ¶¶ 48-49, 58-60, 110(f), (h); (iv) failing to adequately train employees not to leave laptops in plain sight in cars, SAC ¶¶ 58-60; and (v) failing to prevent, detect, and contain the obvious security risks associated with Accretive's common problem of storing laptops, in plain view, in employees' cars, SAC ¶¶ 59-61, 110(a), (d).

These HIPAA violations are "fairly traceable" to Accretive's conduct, *Lujan*, 504 U.S. at 560-61, and the SAC sufficiently establishes a causal connection. Consequently, the Court has jurisdiction over the SAC's HIPAA claims.

B. The SAC Provides Ample Notice of the State's HIPAA Claims.

The extensive facts in the 82-page SAC—which must be read as a whole, accepted as true, and construed liberally in the light most favorable to the Attorney General, *see, e.g.*, *Braden*, 588 F.3d at 594-95—gives Accretive notice of actionable HIPAA violations. *See, e.g.*, SAC ¶¶ 4, 13, 31, 46-52, 58-61, 64-65.

The SAC's facts provide ample notice of the Attorney General's claims that Accretive failed to properly safeguard protected health information under HIPAA's security provisions. *See, e.g.*, SAC ¶¶ 4, 48-52, 58-61. For instance, the SAC alleges that Accretive failed to encrypt over 30 laptops (SAC ¶ 60), had nine laptops stolen in 2011 alone (including an unencrypted laptop) (SAC ¶¶ 4, 48-52, 58, 60), allowed employees to flaunt obvious security risks (SAC ¶¶ 58-61), and sent unencrypted emails containing protected health information (SAC ¶ 61).

These facts support the SAC's claims that Accretive failed to implement policies and procedures to: (i) prevent, detect, contain and/or correct security violations, 45 C.F.R. § 164.308(a)(1); (ii) effectively train its employees, *id.* § 164.308(a)(5); (iii) identify or respond to security incidents, *id.* § 164.308(a)(6); (iv) limit physical access to its electronic information systems, *id.* § 164.310(a)(1); and (v) safeguard the receipt and removal of laptops from a facility, *id.* § 164.310(d)(1). *See also id.* §§ 164.316, .530(c). The company's systematic and pervasive dissemination of protected health information to employees, including debt collectors, supports the SAC's claims that Accretive did not implement policies and procedures to ensure only appropriate members of its workforce had access to such information, *id.* § 164.308(a)(3)-(4); 164.312(a)(1).

Similarly, the facts in the SAC provide abundant notice of the Attorney General's claims that Accretive failed to obey HIPAA's privacy provisions. For example, the SAC alleges that Accretive failed to execute a business associate agreement with North Memorial, SAC ¶¶ 13, 64-65, and made vast amounts of protected health information that it amassed accessible to employees who do not need it to their job—like debt collectors and Mr. Doyle, SAC ¶¶ 4, 31, 46-52, 58-61.

This supports the SAC's claims that Accretive failed to: (i) limit its use, disclosure, or request of protected health information to the minimum necessary amount, 42 U.S.C. § 17935(b), 45 C.F.R. § 164.502(b)(1); (ii) properly identify the employees who need access to protected health information, 45 C.F.R. § 164.514(d)(2)(i)(A); (iii) for those employees who need it, properly identify the categories of protected health information needed and limit access to such information to the minimum necessary

amount, 42 U.S.C. § 17935(b), 45 C.F.R. §§ 164.514(d)(2)(i)(B), .514(d)(2)(ii)(iv); (iv) limit the protected health information it disclosed and requested to the minimum necessary amount, 42 U.S.C. § 17935(b), 45 C.F.R. §§ 164.514(d)(3), .514(d)(4); and (v) effectively train its employees, 45 C.F.R. § 164.530(b)(1). Such facts also support that Accretive impermissibly and improperly used and disclosed protected health information in violation of HIPAA.[6] *See* 45 C.F.R. § 164.502, *et seq.*

Accordingly, the SAC properly states claims for relief under HIPAA.[7] *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.

III. THE SAC STATES A CLAIM FOR RELIEF UNDER THE MINNESOTA HEALTH RECORDS ACT.

Like HIPAA, the Minnesota Health Records Act (MHRA) protects the privacy of a patient's health information. *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 49 (Minn. Ct. App. 2009). Under the MHRA, any person who receives a patient's health records from a provider "may not *release* [the] patient's health records to a person without: (1) a

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[6] As to Fairview, the SAC also alleges that Accretive is a "covered entity." The SAC alleges that Accretive failed to make the notifications required of a covered entity in the event of a security breach. *See* SAC ¶¶ 57, 117(b).

[7] When a defendant merely complains a plaintiff has not stated a claim "with sufficient detail," the proper motion is not a motion to dismiss, but a motion for a more definite statement under Rule 12(e). *Radisson Hotels Int'l, Inc.*, 931 F. Supp. at 643 n.5; *Babcock & Wilcox Co. v. McGriff, Seibels & Williams, Inc.*, 235 F.R.D. 632, 633 (E.D. La. 2006) (rule 12(e) motion is further disfavored when movant simply seeks a more detailed recitation of facts that are already known to it). Such motions are disfavored due to the liberal notice-pleading standard and the availability for extensive discovery, *Radisson Hotels Int'l, Inc.*, 931 F. Supp. at 644, and should only be granted where the complaint's allegations "are so vague or unintelligible that no reasonable response can be expected." *Lyon Fin. Servs., Inc. v. MBS Mgmt. Servs., Inc.*, No. 06-4562, 2007 WL 2893612, at * 9 (D. Minn. Sept. 27, 2007).

signed and dated consent from the patient or the patient's legally authorized representative authorizing the release; (2) specific authorization in law; or (3) a representation from the provider that holds a signed and dated consent from the patient authorizing the release." Minn. Stat. § 144.293, subd. 2 (2010). The plain language of this provision is clear and unambiguous and must be given effect. *See, e.g.*, *State v. Heiges*, 806 N.W.2d 1, 15 (Minn. 2011) (citing section 645.16 and stating when a statute is unambiguous, the court gives "effect to its plain meaning"). Further, "[S]tatutes intended for the protection of the public are remedial in nature and are to be liberally construed to that end." *Cnty. of Benton v. Kismet Investors, Inc.*, 653 N.W.2d 193, 197 (Minn. Ct. App. 2002).

The plain and ordinary meaning of "release" is "[t]o make known or available." *The American Heritage Dictionary of the English Language* 1483 (5th ed. 2011). "Available" means "accessible." *Id.* at 123. Accretive unlawfully made known, available, and accessible the private health information of 23,531 Minnesota patients when it allowed the information to be carelessly stored on an unencrypted laptop computer, removed from hospital grounds by a Vice President, and left in plain view in a rental car outside of a restaurant, where it was stolen and not recovered. *See* SAC ¶¶ 4, 48-52, 55, 58-60.

Accretive unlawfully made known, available, and accessible private health information of Minnesota patients to employees who were not legally authorized to access this information because they didn't need it to do their job. *See* SAC ¶¶ 31, 47, 58, 61. For example, Mr. Doyle stored private health information of Fairview patients on

his laptop even though he no longer worked for Fairview, SAC ¶ 58, and had private health information about Accretive's work under a QTCC contract on which he didn't work. SAC ¶ 58. Accretive also gave its Kalamazoo debt collectors broad access to Fairview patients' medical records. SAC ¶¶ 31, 47. The SAC therefore states an actionable claim that Accretive unlawfully "released" medical records under the MHRA.[8]

Furthermore, as discussed *supra* at 24-26, the violation of a statute provides the necessary "injury" and sufficient causal connection, *see supra* at 26-27, to allow the Attorney General to enforce the statute. An order enjoining Accretive from further violations of the MHRA will redress the injury and prevent further unlawful releases by Accretive. *See* Minn. Stat. § 8.31, subd. 3 (authorizing attorney general to sue for and have injunctive relief). The State therefore has standing to bring suit under the MHRA.

IV. THE SAC ASSERTS ACTIONABLE VIOLATIONS OF MINNESOTA'S DEBT COLLECTION LAWS.

A. Accretive Has Violated the Most Basic Minimum Standards of the Minnesota Debt Collection Laws.

The Minnesota Collection Agency Act, Chapter 332 of the Minnesota Statutes, establishes basic minimum standards, including a licensing framework, that debt collectors must follow when collecting debts in Minnesota. The MCAA defines a "collection agency" and "collector" as one who collects for others "*any account, bill or*

[8] Even using Accretive's definition of "release," Accretive "permit[ted]…circulation of" 23,531 Minnesota patients' health records stored on the stolen laptop and permitted circulation of other Minnesota patients' health records by providing its employees access they didn't need for their jobs. *See* SAC ¶¶ 4, 31, 47-52, 55, 58-61.

other indebtedness." Minn. Stat. § 332.31, subds. 3, 6 (2010) (emphasis added). The SAC alleges many clear-cut violations of Chapter 332.

First, Accretive unlawfully collected debts from Minnesota patients without first obtaining a collection agency license. Minn. Stat. § 332.33, subd. 1 (2010); SAC ¶¶ 102, 131.

Second, Accretive unlawfully collected debts from Minnesota patients through unregistered individual collectors. Minn. Stat. § 332.33, subd. 5a (2010); SAC ¶¶ 106, 132-134.

Third, Accretive failed to provide required disclosures to consumers, Minn. Stat. § 332.37(12), (16), and (21) (2010); SAC ¶¶ 103, 142, 145-146, and failed to correctly identify itself on notices to consumers, Minn. Stat. § 332.37(16) (2010); SAC ¶¶ 104, 137, 142.

Fourth, Accretive falsified collection agency documents, in violation of Minn. Stat. § 332.37(20) (2010), by: (i) sending collection letters to Minnesota patients signed by fictional individuals posing as "patient financial advisors," SAC ¶¶ 105, 137, 140; (ii) misrepresenting to debtors that it wasn't a collection agency, SAC ¶¶ 103-104, 143; and (iii) falsifying the Business Associate Agreement with North Memorial, SAC ¶¶ 64-65, 139.

Fifth, Accretive violated Minn. Stat. § 332.37(19) (2010) by repeatedly attempting to collect money from patients in amounts and using methods prohibited under the Consent Judgment between Fairview and the Minnesota Attorney General, which Accretive agreed to follow. SAC ¶¶ 66-76, 137, 141.

Sixth, section 332.37(14) (2010) provides that no debt collector shall imply or suggest that health care services will be withheld in an emergency situation. Accretive violated this provision when it implied, suggested, and led some patients to believe that health care services would be withheld if they didn't pay accounts and bills in emergency situations. SAC ¶¶ 92-94, 97-98, 140.

Finally, section 332.37(3) (2010) prohibits a debt collector from using other methods of collection which violate Minnesota law. Accretive violated this provision in numerous ways, including by collecting debts without proper licensure; collecting debts through unregistered individuals; implying that health care services would be withheld in emergencies; requiring patients to pay more than they owed; falsifying its Business Associate Agreement with North Memorial; using names of phony "patient financial advisors" on letters to patients; failing to disclose itself as a collection agency; and through other fraudulent and deceptive acts. SAC ¶¶ 64-76, 84-98, 102-105, 137.

B. Accretive Violated the Provisions of State Collection Laws that Incorporate the Substantive Prohibitions of the FDCPA.

1. The Minnesota Debt Collection Law Broadly Applies to the Collection of "Any Account, Bill or Other Indebtedness."

As noted above, under the MCAA, a collection agency is a company that collects on "*any account, bill or other indebtedness*." Minn. Stat. § 332.31, subd. 3. In addition to the requirements noted above, the MCAA prohibits collection agencies and collectors from violating "any of the provisions of the Fair Debt Collection Practices Act [FDCPA]...**while attempting to collect on any account, bill or other indebtedness**." Minn. Stat. § 332.37(12) (emphasis added).

Accretive violated many substantive prohibitions of the FDCPA, which are incorporated into the MCAA through Minn. Stat. § 332.37(12), including: (i) using "unfair or unconscionable means" to collect money from patients in hospital emergency rooms and other medically necessary settings, *see* 15 U.S.C. § 1692f; SAC ¶¶ 84-98, 148; (ii) collecting money in "unusual times and places" when it shook down patients in hospital emergency rooms and similar settings, *see* 15 U.S.C. § 1692c(a)(1); SAC ¶¶ 84-98, 149; (iii) threatening to take action that cannot legally be taken as a result of the Consent Judgment to which Accretive was bound, *see* 15 U.S.C. § 1692e(5); SAC ¶¶ 84-98, 150; and (iv) engaging in other false, deceptive and misleading representations, *see* 15 U.S.C. § 1692e; SAC ¶¶ 84-98, 145, and deceptive means, *see* 15 U.S.C. § 1692e(10); SAC ¶¶ 84-98, 148, to collect money from patients, including giving patients the impression that they may not receive treatment if they didn't pay, SAC ¶¶ 92-94, 97-98, 145, 148.

Unlike the FDCPA, the MCAA's reach does not depend on whether a debt is in "default." Rather, as discussed above, the MCAA prohibits a collection agency from violating the FDCPA substantive provisions "**while attempting to collect on any account, bill or other indebtedness.**" Minn. Stat. § 332.37(12) (emphasis added). The plain language of the words "any account, bill or other indebtedness" must be given effect.[9] *See, e.g.*, Minn. Stat. § 645.16; *W. Nat'l Ins. Co. v. Thompson*, 797 N.W.2d 201,

[9] Even if the statute were ambiguous, it should be construed liberally to benefit the public 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. Comm'r of Pub. Safety*, 745 N.W.2d 869, 873-74 (Minn. Ct.

205 (Minn. 2011) ("When a statute is unambiguous, its plain meaning is given effect."); *Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust*, 659 N.W.2d 755, 760 (Minn. 2003) ("[W]here the intention of the legislature is clearly manifested by plain and unambiguous language, [the court has] neither the need nor the permission to engage in statutory interpretation.").

Other courts have concluded that a state debt collection law that incorporates the FDCPA by reference imports the *substantive* provisions of the FDCPA but not its *definitional* provisions. *See Alkan v. Citimortgage, Inc.*, 336 F. Supp. 2d 1061 (N.D. Ca. 2004) (rejecting 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.*, No. 10-1373, 2012 WL 273763 (S.D. Ca. Jan. 31, 2012) (same); *see also Flores v. Rawlings Co., LLC*, 177 P.3d 341, 347-48 (Haw. 2008) (Hawaii's statute, which applied to "claims or money due on accounts or other forms of indebtedness," had broader scope than FDCPA). Accordingly, Accretive's collection activities—whether involving very old bills, or other more recent bills, accounts and debt (*e.g.*, what Accretive likes to call the "pre-collect" phase)—are expressly actionable under the plain language of the MCAA.

App. 2008) (statutes intended to protect the public are remedial in nature and liberally construed), *review denied* (Minn. May 20, 2008).

2. The SAC Alleges that Accretive Collected on "Accounts, Bills or Other Indebtedness"—Including Debt in Default—In Violation of State Law.

Even assuming that there is a "default" requirement implicitly incorporated into the portion of Chapter 332 that makes actionable under state law substantive violations of the FDCPA when collecting on "accounts, bills or other indebtedness," the SAC sufficiently pleads that Accretive often collected on debt in default.

For example, the SAC alleges that "Accretive has orchestrated aggressive collection of **past due balances** and more current bills in hospital emergency rooms" (SAC ¶ 88), "orchestrated and implemented at hospitals in Minnesota a scheme of aggressive collections of **past due balances** and current bills" (SAC ¶ 92), used "stoplists" to get patients "to pay **past balances** and current bills when checking in at the hospital registration desks" (SAC ¶ 93), sent letters to patients stating that "You have a balance of [$___] with Fairview Health Services that is **seriously past due**...." (SAC ¶ 103), and that "Accretive employees directly asked patients for money (including both current bills and **past due balances**)."[10] SAC ¶ 97.

Indeed, Accretive used *every* patient interaction as an opportunity to collect past due amounts. It trained employees that "every patient with a prior balance who visits the

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[10] Accretive violated the debt collection laws whether it engaged in these acts through its own employees or through hospital employees who it trained and managed. *See Martinez v. Albuquerque Collection Servs., 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 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.

hospital must be approached about settling their account(s)." SAC ¶ 84. The SAC's allegations—which are rife with Accretive's attempts to collect on both very old, past due balances and more current bills from hospital patients in every location ranging from the hospital emergency room to the patient bedside to its Michigan call center—clearly state actionable claims under Chapter 332. *See also* SAC ¶ 98, incorporating Dkt. ##46-47, 49, 51, 62 (stories of patients pursued for old balances).

These facts amply state a claim for relief under the portion of Chapter 332 that incorporates the FDCPA's substantive provisions, even if the Court were to import into the law the FDCPA's definition of "defaulted" debt. Moreover, the question of when a debt goes into default under the FDCPA is a "heavily fact-based" inquiry, not suitable for resolution on this motion to dismiss. *See, e.g., Sindles v. Saxon Mortgage Servs., Inc.*, No. 11-7224, 2012 WL 1899401, *6 (N.D. Ill. May 22, 2012). It is noteworthy that courts have found a debt to be in "default" under the FDCPA if the collector treats it as being in default. *See* 15 U.S.C. § 1692a(6)(F) (FDCPA applies to "any debt owed or due or *asserted to be owed*") (emphasis added); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 539 (7th Cir. 2003) (even where debt was not actually in default, where collector told debtors they were "in default," FDCPA applied); *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 87, 87-88 (2d Cir. 2003) (even where debt was not in default, where collector acted as if debt was in default, FDCPA applied). The SAC alleges that Accretive treated these debts as in default. *See* SAC ¶¶ 77-98, 136, 141, 144, 147-149.

Accordingly, Accretive's motion to dismiss should be denied.

C. The Minnesota Attorney General Has Independent Authority to Enforce Minnesota's Debt Collection Laws.

The Minnesota Attorney General has broad, independent *parens patriae* and statutory authority under Minn. Stat. § 8.31 to enforce Minnesota law, regardless of some parallel authority of a state agency. *See State of Minnesota v. Am. Family Ins. Co.*, 609 N.W.2d 1, 4 (Minn. Ct. App. 2000) (Attorney General has independent *parens patriae* and statutory authority under Minn. Stat. § 8.31 to enforce laws also within the jurisdiction of the Department of Commerce), *review denied* (Minn. June 13, 2000); *Head v. Special Sch. Dist. No. 1*, 182 N.W.2d 887, 892 (Minn. 1970) ("The attorney general may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of legal right."), *overruled on other grounds by Nyhus v. Civil Serv. Bd.*, 232 N.W.2d 779, 780 n.1 (Minn. 1975); *Peterson v. City of Fraser*, 254 N.W. 776, 778-79 (Minn. 1934) (Attorney General's discretion "as to what litigation shall or shall not be instituted by [her] is beyond the control of any other officer or department of the state").

Just six weeks ago, the Minnesota Supreme Court underscored these points when it held that even a party acting as a "private attorney general" under Minn. Stat. § 8.31 did not have the authority to release the same claims of the Minnesota Attorney General for the same conduct under the same statute. *Curtis v. Altria Grp., Inc.*, 813 N.W.2d 891, 901 (Minn. 2012). Section 8.31 states that the Attorney General "shall investigate violations of the law of this state respecting unfair, discriminatory, and other unlawful

practices in business, commerce, or trade" and is empowered to enforce those laws. Minn. Stat. § 8.31, subd. 1. In addition to injunctive relief, the Attorney General may obtain civil penalties of up to $25,000 *per violation*, as well as restitution. Minn. Stat. § 8.31, subds. 3, 3a. *See State of Minnesota v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 896 & n.4 (Minn. Ct. App. 1992) (recognizing Attorney General's authority to seek restitution and a $25,000 civil penalty for each violation of law), *aff'd*, 500 N.W.2d 788 (Minn. 1993).

Accretive's *res judicata* argument is specious. The Consent Order referred to by Accretive is an *interim measure* while the Minnesota Department of Commerce, the agency that licenses collection agencies, also investigates Accretive's conduct. The Consent Order can be terminated at Accretive's request, Order at p. 2, and explicitly states that the Order "does not address any violations that have previously occurred." Order at ¶ 2. Of course, such prior violations are the subject of the SAC. The Commerce Department does not even have the authority, for example, to obtain restitution on behalf of consumers, as does the Attorney General. *See* Minn. Stat. § 8.31, subd. 2c.

Accretive's citation to cases involving the *res judicata* effect of judgments and consent orders issued *by a court* (pp. 26-27) is irrelevant. The Consent Order has no preclusive effect on this action. *See Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000) (stating *res judicata* requires prior final judgment on merits involving same parties or privies); *see also State v. Lemmer*, 736 N.W.2d 650, 661 (Minn. 2007) (determining collateral estoppel cannot apply to action of another governmental agency to avoid interference with statutory allocation of governmental authority).

V. THE SAC STATES A CLAIM FOR RELIEF UNDER MINNESOTA'S CONSUMER PROTECTION LAWS.

A. Minnesota's Consumer Protection Laws Are Broadly Construed to Protect Consumers.

Minnesota's consumer protection laws "reflect a clear legislative policy encouraging aggressive prosecution of statutory violations" and are "very broadly construed to enhance consumer protection." *State of Minnesota v. Philip Morris, Inc.*, 551 N.W.2d 490, 495-96 (Minn. 1996). These laws are "remedial and should be liberally construed in favor of protecting consumers." *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000). Just two weeks ago, in *State of Minnesota v. Am. Family Prepaid Legal Corp.*, No. A11-1848, 2012 WL 2505843, at *13 (Minn. Ct. App. July 2, 2012), the Minnesota Court of Appeals again underscored that "[c]onsumer-protection laws in Minnesota are interpreted broadly...in favor of consumers because of their remedial purpose."

Accretive is just plain wrong when it claims that the Attorney General must plead an intent to mislead or materiality. In this month's Minnesota Court of Appeals ruling, the court again reaffirmed that "[s]tatutory-fraud laws eliminate several elements of proof required under common-law fraud. Neither a defendant's intent to deceive nor the consumer's reliance on a defendant's conduct is required to prove statutory fraud." *Am. Family*, 2012 WL 2505843, at *13. Rather, the Attorney General only must allege that Accretive engaged in conduct prohibited by the statute. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12 (Minn. 2001). Further, the CFA contains no requirement

that any misrepresentation be material. *See* Minn. Stat. § 325F.68, *et. seq.*[11] The State has alleged that Accretive violated the statutes.[12]

B. The SAC Alleges Actionable Violations of Minnesota's Consumer Protection Laws.

The SAC alleges claims under both the Minnesota Prevention of Consumer Fraud Act ("CFA"), Minn. Stat. § 325F.68, *et. seq.*, and the Uniform Deceptive Trade Practices Act ("UDTPA"), Minn. Stat. § 325D.43, *et. seq.* The CFA generally prohibits the use of frauds, false promises, misrepresentations and other statements and deceptive practices in the sale of merchandise. "Merchandise" includes health care services. Minn. Stat. § 325F.68, subd. 2 (2010). Similarly, the UDTPA prohibits an array of enumerated deceptive practices, including a "catch all" for conduct which creates a "likelihood of confusion or of misunderstanding." The SAC details extensive affirmative misrepresentations by Accretive.

First, the SAC alleges that Accretive's A2A computer system overcharged patients in violation of the consumer fraud laws. *See, e.g.,* SAC ¶¶ 96-97, 170-172; SAC ¶ 98, incorporating Dkt. ##43, 45, 56, 61, 64-65, 68 (setting forth patient stories of overbilling).

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[11] Accretive makes the preposterous argument that overcharging patients hundreds of dollars and holding them hostage to collectors in the ER may not be "material" to patients. Accretive Memo. at 28. That such conduct is "material" to a hospital patient is self-evident. Further, the SAC sufficiently alleges its materiality. *See* SAC ¶¶ 89-98, 170-176.

[12] Regardless, the SAC expressly alleges that Accretive intended to mislead Fairview's patients and Fairview. *See* SAC ¶¶ 162, 168, 172, 176.

Second, the SAC alleges that Accretive deceived patients by employing its "Secret Sauce" and implying that patients may not be treated if they did not make on-the-spot payments in emergencies or for other medically necessary treatment. *See, e.g.*, SAC ¶¶ 84-98, 173-176; SAC ¶ 98, incorporating Dkt. ##43-45, 52-53, 57-58, 61 (setting forth stories of patients who thought they wouldn't be treated if they didn't pay). The SAC alleges that Accretive collected debt from Minnesota patients through its own employees, SAC ¶¶ 77-83, 174-175, and through hospital employees who it trained, managed, and supervised. *Id.*[13] The scripts, for example, deceptively tell patients that payment is due "today," even when payment is optional. SAC ¶ 94. Over 25 affidavits describing the experiences of Fairview patients are incorporated into the SAC by reference, SAC ¶ 98, and they are replete with stories of patients who were given the impression they wouldn't be treated if they didn't pay. *See, e.g.*, SAC ¶ 98, incorporating Dkt. ##43-45, 52-53, 57-58, 61. The detailed factual allegations in the SAC readily satisfy the pleading requirements of Fed. R. Civ. P. 9(b).[14]

Third, Accretive made many misrepresentations to Fairview hospitals regarding compliance with federal and state law and how it would treat the confidential medical information of Fairview's patients. SAC ¶¶ 63-68. Under Minnesota law, a non-profit

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[13] Under the CFA and UDTPA, any participant who engages in the fraud can be held liable. *See Fleet Mortgage*, 158 F. Supp. 2d at 967-68 (holding that even though Fleet did not directly participate in telemarketing calls, it "engaged in the misleading conduct" by approving scripts, and financially benefited from the scheme).

[14] The Eighth Circuit has emphasized that Rule 9(b) should be read "in harmony with the principles of notice pleading." *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007) (quotations omitted).

health care organization can be a "consumer." *See, e.g., Group Health Plan*, 621 N.W.2d 2 (Minn. 2001).

The SAC also sufficiently alleges numerous material omissions. SAC ¶¶ 99-106, 156-162. Material omissions that affect consumers' conduct are actionable under the CFA and UDTPA. *See, e.g., Fleet Mortgage*, 158 F. Supp. 2d at 967 (denying defendant's motion to dismiss Attorney General's consumer fraud claim based on allegation that defendant "omitted material information that naturally affected consumers' conduct"). Indeed, "one who speaks must say enough to prevent his words from misleading the other party," *Klein v. First Edina Nat'l Bank*, 196 N.W.2d 619, 622 (Minn. 1972), and a duty of disclosure exists when it is "necessary to clarify information already disclosed, which would otherwise be misleading." *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992).

The SAC is replete with allegations of Accretive's actionable material omissions, including that: (i) Accretive hid its true identity from Minnesota patients when attempting to collect debt, SAC ¶¶ 5, 99-101, 158-162; (ii) infused its employees into Fairview and North Memorial sites and held those employees out to patients as if they were the hospital's employees, SAC ¶¶ 99-101, 158-162; (iii) "recycled" the payroll of Fairview and North Memorial to hide its management role, SAC ¶ 99; and (iv) failed to disclose to patients its broad managerial control over Fairview and North Memorial and the extent to which it amasses and analyzes voluminous amounts of highly sensitive patient health data, SAC ¶¶ 99-101. The SAC further alleges that Accretive used this deception to its advantage in collecting unpaid balances as well as collecting and analyzing extensive

private health information concerning patients, *see, e.g.*, SAC ¶¶ 34-63, 99-106, 157-162, and that the undisclosed information was material to Minnesota patients. *See id.* These detailed factual allegations easily satisfy the pleading requirements of Fed. R. Civ. P. 9(b).

CONCLUSION

The State respectfully requests that Defendant's motion to dismiss the SAC be denied in its entirety.

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Respectfully submitted,

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