IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-CV-00520-PAB-BNB

HEALTH GRADES, INC.,

Plaintiff,

v.

MDX MEDICAL, INC. d/b/a VITALS.COM,

Defendant.

MDX MEDICAL, INC.'S MOTION TO SUPPLEMENT
ITS CLAIM CONSTRUCTION RESPONSE AND EVIDENCE

Defendant and Counterclaim Plaintiff MDx Medical, Inc. ("MDx"), by its undersigned attorneys, submits this Motion to Supplement Its Claim Construction Response and Evidence (the "Motion").

Pursuant to D.C.COLO.LCivR 7.1(A), counsel for MDx on January 17, 2012, attempted to confer, within the constraints of the limited time available, with counsel for Plaintiff and Counterclaim Defendant Health Grades, Inc. ("Health Grades") regarding this motion. Counsel for MDx has not heard from counsel for Health Grades regarding this Motion and, on that basis, states that Health Grades opposes this Motion.

I. INTRODUCTION

"An inventor is a competent witness to explain the invention and what was intended to be conveyed by the specification and covered by the claims." *Voice Techs. Group, Inc. v. VMC Sys., Inc.*, 164 F.3d 605, 615 (Fed. Cir. 1999). *See also Intelligent Computer Solutions v. Voom*

Techs., Inc., 509 F. Supp. 2d 847, 861 (C.D. Cal. 2006) (same); *Phillip M. Adams & Assocs., LLC v. Winbond Elecs. Corp.*, 2010 U.S. Dist. LEXIS 95897 (D. Utah Sept. 14, 2010) (finding that the inventor "may explain the technology and what was invented and claimed").

The deposition of named inventor David Hicks was taken on January 11, 2012, and the deposition of named inventor Scott Montroy was taken on January 16, 2012. Their testimony solidly supports the MDx proposed constructions on several terms, and accordingly MDx seeks leave to supplement its Claim Construction Response and Evidence (Dkt. # 93, "Response") based on portions of Mr. Hicks' draft deposition testimony transcript ("Hicks Transcript", submitted as Exhibit A) and portions of Mr. Montroy's draft deposition testimony transcript ("Montroy Transcript", submitted as Exhibit B).[1]

II. DEPOSITION TESTIMONY IN RELATION TO PROPOSED TERMS FOR CONSTRUCTION

The sections of MDx's Response are supplemented with the Hicks Transcript and the Montroy Transcript, as shown below.

Response § III.A. – "First Healthcare Provider"

- Hicks Transcript, at 31 (healthcare providers includes more than just physicians); 33 ("first healthcare providers" refers to a ***specific provider***); 33-34 (twice confirming that later claim references to "the first healthcare provider" refers back to the ***specific*** first healthcare provider).
- Montroy Transcript, at 42:6-12 ("first healthcare provider" in the claims is the "***specific provider that the request is made about***").

Response § III.B. – "Healthcare Provider Report On The First Healthcare Provider"

- Montroy Transcript, at 49:13-24 (assuming that the report on the first healthcare provider is a report on the same "first healthcare provider" first mentioned in the claim).

[1] In an abundance of caution, Exhibits A and B are separately filed as restricted documents pursuant to D.C.COLO.LCivR 7.2(D), in case Health Grades considers them to be confidential.

Response § III.C. – "Report On The First Healthcare Provider Includes Comparison Ratings of Healthcare Providers"

- Hicks Transcript, at 101-102 (refusing to agree that "star ratings" were comparison ratings of healthcare providers -- compare Health Grades' opening brief at 15, attempting to convince the court otherwise); 103 (claim language means "ratings [plural] of health care providers [plural] that you can use to look at doctors").

- Montroy Transcript, at 50:2-19 ("comparison ratings of healthcare providers" is "putting ratings side by side so they can be compared").

- Montroy Transcript, at 66:10 - 67:18 (after request and compliance to review Exhibit C hereto, confirming that only the box on the bottom right is "comparison ratings of healthcare provider"; and despite the presence of "star ratings" on the specific doctor in the report, nothing else in the report could be "comparison ratings of healthcare providers") (highlighting added to Exhibit C by counsel for MDx). *See also id.*, at 77:25-78:19 (all other parts of the exhibit are "details on a ***singular physician***" and thus are ***not*** "comparison ratings of healthcare providers") (emphasis added).

Response § IV.A and § V – "Verified" Information

- Montroy Transcript, at 44:4-10 ("verified" means it has been "checked for accuracy")

III. CONCLUSION

MDx respectfully requests grant of this Motion and consideration of the foregoing MDx's supplemental response and evidence at the Markman Hearing scheduled for January 19, 2012.

Dated: January 17, 2012

Respectfully submitted,

s:/Scott D. Stimpson
Scott D. Stimpson
Scott B. Murray
David C. Lee
Sills Cummis & Gross P.C.

30 Rockefeller Plaza
New York, New York 10112
Tel: (212) 643-7000
Fax: (212) 643-6500
E-mail: sstimpson@sillscummis.com
E-mail: dlee@sillscummis.com

and

Terence Ridley, Atty. No. 15212
Ramona Lampley, Atty. No. 37288
Wheeler Trigg O'Donnell LLP
1801 California Street, Suite 3600
Denver, Colorado 80202
Tel: (303) 244-1800
Fax: (303) 244-1879
E-mail: ridley@wtotrial.com
E-mail: lampley@wtotrial.com

Attorneys for Defendant
MDx Medical, Inc. d/b/a VITALS.COM

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on January 17, 2012, I have caused a true and correct copy of the foregoing MDX MEDICAL, INC.'S MOTION TO SUPPLEMENTAL ITS CLAIM CONSTRUCTION RESPONSE AND EVIDENCE to be served upon counsel for Health Grades, Inc. by electronic mail transmission to the following individuals:

Jesus Manuel Vazquez , Jr.
Kris John Kostolansky
Jeffrey David Phipps
ROTHGERBER JOHNSON & LYONS LLP
One Tabor Center, Suite 3000
1200 Seventeenth Street
Denver, CO 80202
Tel: (303) 623-9000
Fax: (303) 623-9222
jvazquez@rothgerber.com
kkosto@rothgerber.com
jphipps@rothgerber.com

Attorneys for Plaintiff Health Grades, Inc.

s:/David C. Lee