UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

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

DEPOSITION OF DAVID HICKS January 11, 2012

HEALTHGRADES, INC.,

Plaintiff,

vs.

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

Defendant.

Condensed Copy

APPEARANCES

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Appearing on behalf of Plaintiff

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Job No. NJ371356

EXHIBIT 11

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A. That was the determination of what other data sources are available, either public or private, that we could obtain key pieces of information that we felt like the patient would like to see.
Q. And how did you distinguish between what would be verified by a third party and what would be verified by the healthcare provider?
A. We believe the third-party-provided information provided us with much more data on -- it was kind of a speed to market; so how fast can we obtain a broader, more expanded universe of data.
Q. Anything else?
A. I think that -- yeah. There may be other components of that, but I don't -- that was the basis of it.
Q. Was there also sort of a common sense approach that some types of data you don't want to rely on the healthcare provider itself, like, for example, disciplinary action?
A. We looked at each one of those data elements, and we were making those determinations too.
Q. Were you involved in the decision to bring this litigation?
A. I really don't remember.
Q. You don't remember whether you were involved at

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all in the decision to sue Vitals on your patent?
MR. VÁZQUEZ: Form.
A. I really wasn't. I mean --
Q. (By Mr. Stimpson) You weren't --
A. -- I really don't remember.
Q. Do you know if anybody from HealthGrades looked at the Vitals Web site in, say, two months prior to bringing litigation?
A. I don't know.
Q. But to your knowledge you don't know of anybody who actually looked at the Vitals Web site within a couple months of bringing litigation, right?
A. Yeah. I'm not sure.
Q. Okay. Let's put the patent aside for just a second, okay? I'm going to put back in front of you Defendant's Deposition Exhibit 4, the prosecution history.
Did you get copies of the correspondence back and forth with the patent and trademark office when this application was pending?
A. I don't remember.
Q. Were you involved in the prosecution at all; that is, determining how the claim should be changed or how to argue over prior art?
MR. VÁZQUEZ: Form.

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A. I really don't remember.
Q. (By Mr. Stimpson) Do you know of anybody who was involved with the patent prosecution?
A. Not really. I don't know who would have been doing that.
Q. Do you remember any meetings, with regard to the pending application, what was happening during the patent prosecution?
A. No, I don't recall.
(Exhibit 5 was marked.)
Q. (By Mr. Stimpson) Let me show you what's been marked as Defendant's Deposition Exhibit 5, Mr. Hicks. Take a minute to flip through that, and I'll ask you a couple of questions about it.
If it helps, Mr. Hicks, too, it might help your review, I'll represent to you that that is the provisional application, which is the first application that was filed on the '060 patent. It's referenced right there. That's so just so you have some context. But take a look.
A. (Deponent complied.)
MR. VÁZQUEZ: Do you want him to read it, Counselor, or just sort of flip --
MR. STIMPSON: No, no, just flip through it. I mean --

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MR. VÁZQUEZ: If you're asking him a specific question, just give him a chance to read it.
MR. STIMPSON: Yeah.
Q. (By Mr. Stimpson) My first question is, do you recognize this as your provisional application that was filed in February of '06?
A. I'm sorry. I don't remember.
Q. This was a -- there was a second application that was filed, a thicker application, which is in the prosecution history here in Exhibit 4. That was filed in August of 2006. Do you have any recollection as to the -- what was added from the provisional application to the regular application of August of 2006?
MR. VÁZQUEZ: Form.
A. I don't have any recollection. Yeah.
Q. (By Mr. Stimpson) I'm sorry. You can put that away then. That's all.
(Exhibit 6 was marked.)
Q. (By Mr. Stimpson) Let me show you what's been marked as Defendant's Deposition Exhibit 6. And I'll represent to you, sir, this is a copy out of a prior art reference that was cited during the prosecution of your patent application. Have you ever seen this before?
A. I really don't remember.
Q. As you're a named inventor on the patent, I'm

the declaration, you understood, sir, that you had a duty of candor and good faith in dealing with the patent office, including a duty to disclose to the patent office all information known to you to be material to patentability, correct?
MR. VÁZQUEZ: Form.
A. I believe so.
Q. (By Mr. Stimpson) And that duty to disclose information exists with respect to each pending claim. You understood that at the time, right?
A. I believe so.
Q. If you could look down to Section (b) where it starts, "Under this section." Do you see that?
A. Yes.
Q. You understood, sir, in October of 2006 that information is material to patentability when it's not cumulative to information already of record or being made of record in the application, and -- skipping down to part two -- it refutes, or is inconsistent with, a position the applicant takes during the prosecution, right?
MR. VÁZQUEZ: Form.
A. I'm sorry. What was the question?
(Requested portion was read.)
MR. VÁZQUEZ: Same objection.

A. So was the question did I understand that?
Q. (By Mr. Stimpson) At the time in October of 2006.
A. At the time? I believe so.
Q. And you also understood, sir, that information is material to patentability when it's not cumulative to information already of record or being made of record in the application, and -- in part one there -- it establishes by itself or in combination with other information a prima facie case of unpatentability of a claim, correct?
MR. VÁZQUEZ: Form.
A. Yeah. I don't understand a lot of the legal parts of that, but yes.
Q. (By Mr. Stimpson) You read it at the time?
A. I believe so.
Q. And you had the opportunity to speak with your counsel if you had any questions about it, right?
A. I don't remember, but I believe so.
Q. Can you identify -- we'll put that away, okay? Can you identify for me, please, competitors to HealthGrades.com?
A. Yes. Yes.
Q. Could you please name them?
A. At what period of time?

Q. Well, let's start with the issuance of this patent, around July of 2010.
A. I believe one of them would be, I think, US News & World Report.
Q. Any others?
A. I'm not -- I'm not sure what all the other competitors would be.
Q. Can you name the ones that you remember, please?
A. I know the US News & World Report was, but I'm sure there's others.
Q. You can't name others as we sit here?
A. In 2006, I'm not sure.
Q. Not 2006.
A. Oh, I'm sorry.
Q. The issue date of July 6, 2010; so the summer starting --
A. I'm sorry.
Q. The summer of 2010. So, first of all, would US News & World Report be a competitor in 2010?
A. I don't know.
Q. Okay.
A. I'm not sure.
Q. Who would be a competitor in summer of 2010?
A. Vitals, WebMD, and I'm sure there's some other

ones out there.
Q. Do you remember any others?
A. I'm sure there's other ones, but I don't know what they are.
Q. Have you ever -- has HealthGrades to your knowledge ever approached WebMD with respect to this patent?
A. I'm not aware.
Q. Have you ever considered the fact -- let me rephrase that.
Have you ever considered whether WebMD might be infringing the patent?
MR. VÁZQUEZ: Form.
A. I don't know.
Q. (By Mr. Stimpson) To your knowledge has HealthGrades ever approached any other company besides Vitals with respect to this patent?
A. I don't know.
Q. Why did HealthGrades sue Vitals?
A. I'm not -- I'm not sure.
Q. Are you familiar with UCompareHealthCare?
A. Yes.
Q. Is that a competitor?
A. I'm not sure.
Q. How about Wellness.com?