EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Case No. 11-cv-00520-PAB-BNB

HEALTH GRADES, INC.,
Plaintiff,

vs.

MDX MEDICAL, INC.,
Defendant.

Proceedings before BOYD N. BOLAND, United States Magistrate Judge, United States District Court for the District of Colorado, commencing at 8:30 a.m., April 26, 2012, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

APPEARANCES

JESUS VASQUEZ, JR., GREGORY KANAN and KRISTIN STOLL-DeBELL, Attorneys at Law, appearing for the Plaintiff.

SCOTT STIMPSON, Attorney at Law, appearing for the Defendant.

ROBERT BLUME, Attorney at Law, appearing for the Interested party, iTriage, LLC.

MOTIONS HEARING

P R O C E E D I N G S

(Whereupon, the within electronically recorded proceedings are herein partially transcribed, pursuant to order of counsel.)

THE CLERK: All rise. Court is in session.

THE COURT: Thank you, please be seated.

We're here this morning in Case 11-cv-520, Health Grades, Inc. against MDX Medical, on voluminous motions.

May I have appearances, please?

MR. VASQUEZ: Good morning, Your Honor. Jesus Vasquez from Rothgerber, Johnson & Lyons on behalf of Health Grades. To my right is our expert consultant, Kirsten Stoll-DeBell from Merchant & Gould, and then Mr. Greg Kanan, our partner.

THE COURT: Thank you.

MR. STIMPSON: Good morning, Your Honor. Scott Stimpson, Sills, Cummis & Gross, representing the defendant MDx.

THE COURT: Thank you.

MR. STIMPSON: Also, Your Honor, we have one more appearance.

MR. BLUME: Your Honor, Rob Blume from Gibson Dunn. I'm here in behalf of iTriage, who's a non-party in this litigation subject to a third-party subpoena issued by Health Grades, to which we've objected and are meeting and

conferring and it's the subject of one of the motions that we're here on.

THE COURT: Thank you.

Well, you've overwhelmed me. I have reviewed the briefing. In general I think that the issues are obtuse and the briefing is not particularly helpful. So I will rely on pointed arguments today. In general I ask that you take up each issue, not each motion, each issue individually, but I will allow the movant to reasonably define on the issue by issue presentation. I caution you not to bite off too much as you define your issue, because I've told you already I'm overwhelmed, but we will not go past 12 o'clock noon, so pace yourselves.

My procedure will be to allow the movant to argue as to the issue as defined, I'll allow a response, I'll allow a reply, and I'll rule again on an issue by issue basis. Don't ask to make a sur-reply because I'll deny it, but if I need further information in order to understand an issue or to rule, I'll ask for it as precisely as I can. I was inclined to take up the motions in the order they were filed. That seems unfair to iTriage to have to sit through all of this, so I'll change order and we'll take up motion number 179, MDx's motion to quash.

Mr. Stimpson.

MR. STIMPSON: Thank you, Your Honor. The issue

is whether the Health Grades subpoenas to iTriage are relevant and/or whether they should be quashed. I'll start this brief argument with an apology because I was realizing as I was preparing for this argument that our reply brief said that the Health Grades response did not address relevance and somehow we missed it and at the very end it does address relevance. I'll address it here.

The first issue that we need to address, Your Honor, is standing. Health Grades has questioned our standing, but we have an agreement with Health Grades that no additional discovery would be sought other than for good cause, so we think this is a violation of that agreement. Also iTriage is a business partner, and iTriage has filed objections which are very much the same as ours, so we'd like to get our oar in the water on this issue as well.

The question comes down really I think to relevance. Health Grades has served these three subpoenas on iTriage, and they relate to MDx, the defendant here, licensing data to a third party. That has nothing to do with this case, Your Honor. This is a patent infringement case with just one patent, and it's got nothing to do with that. So Health Grades makes three arguments on relevance at the end of their opposition brief, and I'll address them in order.

At page 9 Health Grades says that the sale of the

data, MDx actually licensing data to a third party, is an infringement of the patent. That is just completely and totally wrong. There is not one claim element in that patent that I could see how that could possibly be an infringement.

The second argument they make, Your Honor, is that this is relevant to damages, convoyed sales. They don't provide any explanation but they say it's relevant to convoyed sales. The seminal case on convoyed sales in patent cases, Your Honor, is the Federal Circuit's Rite-Hite decision. To be a convoyed sales there has to be a functional unit, the patented and unpatented product have to be a functional unit -- and this is Federal Circuit case law -- and it has to be foreseeable that the unpatented product would be sold -- would be a damage. For example, Your Honor, if one competitor selling printers sues another competitor selling printers, they'd have a pretty good argument that the ink is a convoyed sale, because the ink and the printer are a functional unit, you can't use the printer without the ink. That's the type of thing that convoyed sales are addressed to. Here there is no functional unit at all. This has no relationship whatsoever. In fact this isn't even sold to the same person. With my printer example, if I went in and bought a printer, of course I'm going to buy the ink. I'm going to buy both. But here this data is sold to an entirely different third party. They're just totally

and completely unrelated, Your Honor. There is no connection to damages whatsoever.

The final argument that Health Grades makes is that iTriage may be infringing. Well, they don't do anything specific with that, Your Honor, and from what I've seen, I cannot see how they could possibly make that argument and comply with Rule 11. They don't do anything in their brief to show that and it's just not there.

So, Your Honor, this is all entirely irrelevant, and if it was relevant, if this licensing was somehow relevant, then we're the source. Don't go bothering our third party, you know, business partners. We --

THE COURT: I think that's the point, at least that's what I understand Mr. Vasquez's point to be, which is we asked for this in an interrogatory, you gave us only redacted information about advertising sales, you didn't give us any information about other revenues, so then we did a 30(b)(6) notice, and you've moved to quash that, and so now we're trying one more place because we've been unable to get it in any other way.

MR. STIMPSON: Well, they are -- and you're right, Your Honor, they're addressed in different motions, but my point is that's where the battle lies, not here. Third parties should not be pulled into this. We have -- to the extent our licensing data and whatever we made off licensing

that data is relevant, we should be the target of that, not our business partners. We have the same information. And we'll have that discussion today, it's going to be much like what I addressed just now, but this is totally and completely irrelevant, and -- but to the extent the Court is inclined to give any of it, iTriage should have nothing to do with it.

So that's my presentation, Your Honor. If you have any questions.

THE COURT: I think you've addressed mine.

Mr. Vasquez?

MR. VASQUEZ: Your Honor, I just (inaudible) pulled today, this motion (inaudible).

THE COURT: All right.

MR. VASQUEZ: And I'll be brief as well, Your Honor, and the point the Court made at the end of this argument is precisely the point. We have tried to get this information a number of different ways from the defendant, who has refused to give it to us, and that's why we served the subpoenas we served. We have spoken with counsel for iTriage, we realize they have some objections to the scope of that subpoena, which we would continue to discuss with them, and if we weren't able to solve it, they would file a motion to quash, which is the procedure that should be followed here.

The fact of the matter here is this information

may very well bear on damages, including licensing revenues of something related to the product we claim infringes, may have a bearing on what damage experts would say might be a reasonable royalty. That alone makes this information relevant. Mr. Stimpson could have solved this problem and we wouldn't have had to have this motion had he simply said we'll give you the licensing agreement or whatever agreement is applicable and what the dollar amount is that we receive, and this matter might never have come up.

THE COURT: So do you agree with Mr. Stimpson that I should address this issue in connection with your motion to compel interrogatory which was directed to MDx and you'll get whatever answer you get there but you don't need to bring iTriage in because the fight is framed earlier?

MR. VASQUEZ: I would agree, Your Honor, that were that to happen, we would agree to withdraw the subpoenas to iTriage and see what we get from Mr. Stimpson and see what we get in the 30(b)(6) deposition on this issue, and there may be nothing more to do, yes. But I would like to reserve the right if we don't get information we feel we should get that we would reissue the subpoena, and then if there was a matter we had to address with you again, we would do that. But I would agree that if you were to grant our motions with respect to the licensing information in the 30(b)(6) or in the written discovery that we would withdraw the subpoenas

now, yes.

THE COURT: Well, but even if I deny it, that answers the question.

MR. VASQUEZ: Well, I guess if you deny it on the basis that we're just not entitled to the information at all, yes, that would -- yeah.

THE COURT: All right. Thank you.

MR. VASQUEZ: Thank you, Your Honor.

THE COURT: Mr. Blume, I know you're not directly in this but you are here. Did you want to add?

MR. BLUME: Nothing really to add except that I agree with Your Honor's reasoning, that is, what's relevant if at all in this matter is what information MDx provided to iTriage, that package that MDx delivered to iTriage, stopping at our doorstep. That is information that is in the possession/control of MDx. That is the subject of other motions to compel. Whether that's deemed relevant or irrelevant to the underlying lawsuit as Your Honor pointed out, once that's decided, the issue as far as iTriage is concerned is mooted. There are components of the subpoenas and the 30(b)(6) request that go beyond that seeking information about what iTriage has done with the data, what our algorithms are, what our processes are, how we've mixed the bag together. That, Your Honor, is the scope issue that we're speaking of, that it has nothing to do with the issues

that were just discussed, the licensing, the revenue, the damages and all of that. So to the extent that Health Grades is seeking information as they put out in their motion where they say that iTriage may infringe the '06 patent, the effort of Health Grades to use non-party third party discovery to find additional litigants in this case in our view, as we noted in our notice, is simply improper. My view and iTriage's view, frankly, is we should never get to that question because the underlying facts of the data that they seem to want can be resolved by Your Honor between the parties and iTriage should be left out of it altogether.

THE COURT: Thank you. I'm going to deny the -- I'm sorry. I'm going to grant the motion to quash on the condition which Mr. Kanan raised, which is the possibility that should I grant discovery on the issue of licensing and the like as against the defendant and then materials are not forthcoming which may be in the possession of iTriage, you may reassert the subpoenas. But for now I think this fight is between the two parties to the lawsuit, and I'll take up the issue of damages and licensing and the like in connection with the pending motions to compel and to strike the 30(b)(6) notice.

MR. BLUME: Thank you, Your Honor. May iTriage be excused from the proceedings?

THE COURT: Yes, sir.

That brings us to Health Grades' motion to compel, document 126.

MR. VASQUEZ: Good morning, Your Honor.

THE COURT: Good morning. So maybe you can tell me how you will define the first issue that you're going to -- this is one of those where there are many issues, and I think it's best to take it issue by issue.

MR. VASQUEZ: Yes. Well, first, Your Honor, there are really five main issues or five categories of information that the motion seeks the Court to compel; however, we have resolved number 5, we've withdrawn that, and that was the supplemental interrogatory response to interrogatory number 14. So really what remains to be sorted out here today are the first four categories of information.

THE COURT: So the change made to avoid infringement has been rendered -- your dispute's been rendered moot by supplemental discovery?

MR. VASQUEZ: Correct. After the motion was filed, counsel supplemented their response to interrogatory 14, and so we resolved that and we withdrew that.

THE COURT: All right.

MR. VASQUEZ: So, then, Your Honor what remains, I would say there are just four issues. Our request that the Court compel MDx to supplement their invalidity contentions to comply with Local Patent Rule 3-3 of the Northern District

of California patent rules.

Would you like me to go on to the next issue or just stay with this one?

THE COURT: Let's stay with this one, present your argument.

MR. VASQUEZ: Okay.

THE COURT: And I'll let Mr. Stimpson respond, you'll get a chance to reply, then hopefully I'll be able to rule.

MR. VASQUEZ: Well, the rule mandates that when MDx supplied these invalidity contentions that they include an identification of any combinations of prior art that show obviousness. They have asserted the obviousness defense, Your Honor. And so when they filed their supplemental invalidity contentions back in August of last year, they cited certain references, and these are at page 2 and 3 of our motion, public use of websites. Now, they did not cite which documents actually constitute public use within these materials. So we're seeking for them to simply identify what is it that you intend to show at trial to argue this public use. We really shouldn't have to guess about that, Your Honor.

The other issue is that those websites, they have hundreds of web pages, and the public use cited is in the time frame where we can't go and recover those materials

and -- so we -- that's another argument for why they should tell us, well, what do you have, are they printouts of certain pages, and so what are they, what is their Bates number.

As I noted earlier, the rule also requires that they identify the combinations showing obviousness, and they simply have not provided a reasonable number of combinations on which they rely. And we then took all the references that they cited, Your Honor, and it just -- there's thousands of possible combinations. In their response they say, well, if we had told them what math we used to come up with that list, then they would tell us why it's wrong. You know, an alternative approach would be to simply say, well, here's our math, here's -- we come up with these many combinations and here is the subset of those that we intend to fill to show obviousness. Our computations show that their disclosures comprise more than 2,000 combinations, Your Honor, and that would be impossible to go through at trial.

That's all I have on that issue, Your Honor.

THE COURT: I was trying to find the basis of my note, but my note here -- well, my note indicates that the defendant responded by saying we don't object to identifying by Bates numbers the specific documents and in fact we've already done it, and you didn't -- you didn't address that I don't think.

MR. VASQUEZ: Well, Your Honor, we just disagree. They have not. There are many -- I mean, I would just ask them to -- again we have already done it. Where? Why not in the next sentence of that argument specify where?

THE COURT: Well, page 9 of their brief: Accordingly, MDx is supplementing its response to this interrogatory -- I'm sorry, that's 14. I was -- I'm sorry. It's page 3.

MR. VASQUEZ: Are you on page 3 of --

THE COURT: If Health Grades still has a problem, then all Health Grades has to do is comply with 7.1 and talk to MDx. Page 3 of MDx's response, which is document 135. It's under the heading The Substance, second sentence, MDx recent second supplemental invalidity contentions, that they're attached as Exhibit 1, including specific citations to specific pages.

MR. VASQUEZ: Your Honor, we don't think that those citations that they're referring to encompass all of the documents that they've identified that they're going to put forward to make their obviousness defense.

THE COURT: Okay. Mr. Stimpson?

MR. STIMPSON: The first issue on this, Your Honor, really has to be Rule 7.1(a). That applies to this entire motion, but this one in particular I think the exhibit they attach to their reply brief, not to their motion, I

mean, I don't need to tell you what Rule 7.1(a), they have to have the specifics in their motion, not their reply, so we didn't get a chance to address it in the opposition, but in any event their reply brief attaches exhibits. It says, look, we've talked about all this stuff, and for this one they have Exhibit 17, and the only part of that exhibit I can even see that's relevant to this is an e-mail that I sent back in September: As you've -- also -- this is my e-mail to Mr. Vasquez: Also you mentioned our invalidity contentions. Can you please respond to our September 12 e-mail and let us know what else you're looking for? And that hardly satisfies a conferral. That's six months ago.

The issues here, Your Honor, we have nothing to hide. We did these invalidity contentions, I think they're perfectly fine, I've done them many times before, but I understand if they have questions, but all we need to do is talk about it. I mean, these little things where he says, you know, I'm not sure that you have a page citation for this or a page citation for that, we went, and as you pointed out in our brief, we showed the Court specifically what pages and that we'd already done that. So, I mean, I'm happy to help. I don't have anything to hide here, Your Honor. But all we need to do is talk about this. If they'd complied with Rule 7.1, we wouldn't even be discussing it right now.

The second issue is about whether we need to

narrow our invalidity contentions. Well, they said there are thousands of invalidity combinations. I can't figure out the math to get to that number, Your Honor, but these are just invalidity contentions. We've cited you cases from California addressing these rules, and one of them says, yeah, here's the invalidity contentions, they have billions of combinations, and that's just fine, there's nothing wrong with that. And I will be narrowing my invalidity contentions sometime, Your Honor, but I can't do it now, and the reason I can't do it now, as you'll see in our motion to compel, we've been fighting with them for eight to 10 months trying to get them to produce to us their prior art and they still haven't given it to us. So until -- and that's the best prior art. So until I get their prior art, I mean, I don't know what I can cut because I don't know the strength of that prior art, I just don't have all the facts in front of me. We will narrow. It will be at the latest in our invalidity expert report, Your Honor.

Do you have further questions?

THE COURT: Well, this is one of those things where I'd just asked Mr. Vasquez, I'm told by the defense that they've done it, he says we don't think so, so let's look at your -- I think you've attached to your response what you believe provides the Bates information. Maybe you can direct me and Mr. Vasquez to what you're referring to.

MR. STIMPSON: This is Exhibit 1 to our opposition, Your Honor.

THE COURT: That's where I am.

MR. STIMPSON: It's the chart. There's a regular memorandum attached to the first place and then there's a chart.

See for example page 5.

THE COURT: Of the chart?

MR. STIMPSON: Yes. This is a Health Grades report prior art, which is one thing I believe they complained about. You can see there's page numbers referenced there. There's page 8, there's page 2. If you turn the page, there's page 3, page 14, page 10, page 11. And page 9 to 10 same thing.

These are just examples, Your Honor, but I think we've given them every -- and I will give them the page numbers. If there's -- if there's something I'm missing, that's fine, I don't have any problem telling them what we're relying on. There's no problem with that. I just think we've done it. And either -- either we've done it and there's just some misunderstanding, and maybe they're just missing it where it is in our invalidity contentions, but realistically in a response to a motion to compel, you know, going through and saying for every piece of prior art where we cite every page is just -- it's just not realistic, but if

we sit down we can -- I know we can work this out. I just don't understand what the problem is.

THE COURT: If -- if I were to agree with you and say I am informed by Mr. Stimpson that he has provided pages by Bates number and so I deny the motion to compel any further specification, that would in my mind mean that you are limited to those pages, and if you try to at some later date say, oh, no, you needed to look at an unreferred-to particular page, you wouldn't be allowed to do that. Are you comfortable that you've identified all the pages that you believe you would need to identify to present your invalidity claim?

MR. STIMPSON: That was our goal when we did these, Your Honor, so yes. What I'd like to do though is I'd like to have a conference with opposing counsel and talk about his specific problems, and we haven't really done that yet. And if there's some -- I may have made a mistake, I may have missed something, but I think it's all there. So I'm comfortable with this. The answer to your question is yes, because we did this with that specific goal in mind. I mean, I've been in Texas and California and everywhere where these invalidity contentions are and I know what it means, you better have it in there. So that was our goal, and I think it's all there, Your Honor. But I would like the opportunity to at least speak with Mr. Vasquez, just have a telephone

conference and we'll talk this through and point it out, I'll show you specific documents if you don't know about them, and there's no problem. I've got nothing to hide here.

THE COURT: Thank you.

MR. STIMPSON: Thank you.

THE COURT: Mr. Vasquez?

MR. VASQUEZ: Your Honor, I think it will be helpful, we're going to put page 1 and page 2 of this chart up on the screen, and just real briefly, Your Honor, you even just said if I deny this, you know, under a representation that counsel has provided page numbers and Bates numbers, what you don't see here, particularly if you see at the bottom of the box, is any Bates number, but furthermore it's just unclear. It's page 2 of what? It says GeoAccess prior art. The GeoAccess prior art meets this claim, CEG page 2. If we go to then page 2 of the chart, we see the same type of vague references continues. Subimo prior art. The Subimo prior art meets this claim language, CEG website use from 2004. Well, what -- what pages and what are the Bates numbers? These documents are Bates numbered. And so I could go through this chart, Your Honor, and that is the issue, and Mr. Stimpson is saying, you know, that we can work this out by conferring, and we're not opposed to doing that, but, Your Honor, I must note we have conferred on this, we have had a lengthy phone conference, Ms. Stoll-DeBell was on the phone

with me and Mr. Stimpson, and we asked specifically can you just give us the Bates numbers, and we could not resolve that. So that's really all we're asking. I think the Court is correct that they ought to be limited to what they have here. The issue of what Mr. Stimpson claims he hasn't received from us is irrelevant. This is about what he has.

THE COURT: So if you continue down on that same page to the 369 prior art --

MR. VASQUEZ: M-hm.

THE COURT: -- one, two, three, four, five, six, seven, eighth line, recommendations submitted by other consumers, page 2, and then I guess that 18 is a Bates number. Is that reference sufficiently specific that you know what that is?

MR. VASQUEZ: No, I do not believe that is a Bates number, because it does not have an MDx or any party acronyms before it, and I'm frankly not sure what that is.

MS. STOLL-DeBELL: Your Honor, if that's the paragraph of the patent publications, and this is only an issue for the public uses, not the patent publications, those are specifically referred to as you noted. It's just with these public uses, we thought -- you know, they say website from 2004. We just want Bates numbers for those things, and I did in fact tell Mr. Stimpson that on a phone call that lasted over an hour long many months ago, so the '369 and any

prior art S number, that's not an issue here. Subimo and HealthScope and GeoAccess and Web RateMDs, those.

THE COURT: I see. Thank you.

The motion to compel insofar as it seeks specific page references on the invalidity contentions is granted. I agree that the plaintiff is entitled to know with particularity what the prior usage was, and I'm persuaded that it is not sufficiently identified here. It is information which the defense knows of because they are making the assertion, and so I don't think it can be reasonably said that it's of equal access to both sides. So I will require that you provide precise Bates numbered references for those pages that you rely on in connection with the prior use invalidity argument.

On the obviousness issue and the multiple references, I agree with the defense that the more references there are goes all the more to showing obviousness. I'm informed that there be some narrowing at some point, but I'm not persuaded that just because it's obvious in a lot of ways means that it has to be narrowed, so I deny with respect to the narrowing of the obviousness materials.

To facilitate the Bates numbering requirement which I have identified, I will require that the parties meet in person for as long as it takes to hash through all of that. If I have to tell you where to meet I will, but I

trust that you have other things you're doing and you can figure that out, and I think that meeting should probably be preceded by an indication, Mr. Vasquez, of -- with as much precision as you can, reasonably can, what it is that you think you're missing so that Mr. Stimpson and his client can have time to identify the information by Bates number if possible.

Okay. Next issue.

MR. VASQUEZ: Your Honor, the next issue relates to our request that the Court compel MDx to supplement its response to interrogatory number 2. That interrogatory, Your Honor, requested that they provide a statement whether MDx's Accused Products provide the elements that they're arguing, you know, that they would argue for non-infringement, that they identify them specifically, and if not, an explanation, simply an explanation how the Accused Products operate or function differently than the elements claimed in the patent.

Their response did not go that far, Your Honor. As noted in our motion at page 6 in response to claims 1 and 15 and the elements addressing specialty information and medical philosophy and so forth, MDx simply said that for most of MDx data the information required by this portion of the claims is not provided by the health care provider. Well, that clearly implies that perhaps there is some data that is provided by the health care provider, but they

neglect to identify that. They don't say what information is verified by the health care provider, they don't say if the information is not verified how it is received. So we simply ask the Court to compel them to supplement with more information the response that they already provided.

THE COURT: So when you say that it should be done on a claim by claim, element by element basis, I am of course aware that this case involves a single patent, but how many claims and how many elements? What is it -- what is the scope of this request?

MR. VASQUEZ: Well, Your Honor, claim 1 has five elements, and it's the subparagraphs shown right after the first claim. Similarly every claim number has elements. So --

THE COURT: So how many claims are there that are at issue?

MR. VASQUEZ: Claims? One answer is two. 1 and 15.

THE COURT: So the interrogatory really goes to those two claims, correct?

MR. VASQUEZ: Well, no. No. It says with respect to any version of their websites, and as the Court is probably aware, we think there are just two versions, the current version and the pre-January 2011 version. We ask them to use a claim chart and to state in detail how their

products don't meet the elements of all of the claims in the patent.

THE COURT: Well, why should they do that? If claim 6 is not at issue.

MR. VASQUEZ: I was mistaken. All the claims are at issue, Your Honor. I thought you were referring to the two claims that we used as an example in our motion, which are just 1 and 15. Obviously we have asserted that they infringe claims 1 through 4 -- if you just give me a second, I'll give you the precise claims that we've identified at issue, Your Honor.

Your Honor, the precise claims that we allege are infringed are number 1, 4, 5, 6, 7, 8, 9, 11 and 14, 15 and 16.

THE COURT: And then in general how many elements do those claims encompass?

MR. VASQUEZ: We're going to put the patent up on the screen, Your Honor, and we can just see exactly what the elements are.

Claim 1 has one, two, three, four, five, six elements.

If I may approach the screen. Claim 4 is a dependent claim, so there's one element. Claim 5 is another dependent claim. That has just one element. Claim 6, 7 again are dependent claims, so each one of those just has one

element. And claim 9 has two elements. And (inaudible) claim 11 is one element, has just one element, it's a dependent claim. And then (inaudible). 14 is one element, 15 is the other big claim, and that has one, two, three, four, five elements. Then 16 is a dependent claim, depending on 15, and that has two elements.

Now, Your Honor, to the extent, you know, this -- there are a number of elements here that we just went through, all we have asked is that they supplement the arguments they've made. We're not asking for any new arguments. So they've made, you know, invalidity arguments that simply are a subset of the number of claims.

THE COURT: This interrogatory 2 I think is as -- I think you say should entitle you to an inspection of the -- oh, no, that's next, demonstrate, that's number 3.

MR. VASQUEZ: Yes, Your Honor.

THE COURT: Okay. If you get a demonstration, does that answer any of this?

MR. VASQUEZ: No, Your Honor.

THE COURT: Those are --

MR. VASQUEZ: That's --

THE COURT: Those are completely distinct.

MR. VASQUEZ: That's -- yes.

THE COURT: Okay.

MR. VASQUEZ: I mean, all we're asking the Court,

Your Honor, is -- we've asked from MDx is that they supplement what they've told us and simply explain how it is that the features of their accused websites do not meet the claim elements that they allege are not met.

THE COURT: All right. Mr. Stimpson?

MR. STIMPSON: Your Honor, if you look to our response, which is Exhibit 4 to the Health Grades motion, we have explained. Mr. Vasquez just said all they want is to know how -- what claim elements we say are missing and how they are missing. We've got four pages here identifying specific elements that are missing and identifying how they're missing both literally and equivalently in detail. For equivalents we have numerous arguments. They asked us why we're not infringing and we told them. These are the elements that are missing, this is why they're missing. I mean, I can't -- I can't understand what else they really want that this interrogatory requests.

THE COURT: Well, I think one of the -- I mean, one of the things that Mr. Vasquez takes exception to is in the literal infringement you say at least several times for most of the data it's not verified by the health care provider.

MR. STIMPSON: That's actually said twice, Your Honor, and I'm happy to provide a supplement to that. I understand how that might be confusing, but basically there's

two versions of the website, so we can tell them, we can supplement this, that's fine. But, I mean, the non-infringement element is there. You know, we have -- for all this data we don't have it verified by the health care provider, and the same one for B, it's not received by the provider itself. That's exactly why we don't infringe. The claim says it has to be received from and verified by the provider, and we don't do it, period. I don't know what else we can say about that. But I do understand the question, Your Honor, about "most," and it's just because there's been some changes over time, and we'll try to identify where that -- where that is.

THE COURT: On the equivalents under A, for numerous reasons, for example, I suppose Mr. Vasquez would say that, well, we need to know all of that, that we don't want an example, we need to know the reasons.

MR. STIMPSON: It's just a lawyer hedging, to be quite frank, Your Honor. They're here. Everything that we're relying on is here. I'll reconsider, but I think that's everything is here, we've put everything there.

I don't want to leave the podium without at least just mentioning 7.1(a) again. I mean, Your Honor, on this one in particular, we asked them to confer, I was literally boarding a plane and got the e-mail that Mr. Vasquez attached to his reply memorandum. He didn't attach my response which

was 5 minutes later which said I'm just boarding a plane, I can't talk right now, can you please give me another time. Last we ever heard of it and he filed the motion. And the rule is just -- it was just totally disregarded here entirely. Thank you.

THE COURT: Mr. Vasquez.

MR. VASQUEZ: Your Honor, that's just simply not true. You'll see as Exhibit 5 to our motion there was a detailed e-mail that I sent Mr. Stimpson. In addition to that there was a phone conversation where we discussed all of this. And, again, Ms. Stoll-DeBell was on that phone call with us. So as stated in -- you know, in our motion and in the declaration that we provided in response to the surprising contentions that we haven't conferred enough, you know, there was conferral here. You know, this could easily be resolved, Your Honor, if Mr. Stimpson would simply provide the answers to the questions we listed and we took time to detail in Exhibit 5 to our motion. Some of that stuff you just covered. They say for most of the MDx data. We stated that's not sufficient, state which specific information of the MDx data is verified and which specific information is not.

THE COURT: So you've directed me to Exhibit 5 --

MR. VASQUEZ: M-hm.

THE COURT: -- of your --

MR. VASQUEZ: Yes, document --

THE COURT: -- motion.

MR. VASQUEZ: Document 126-5.

THE COURT: And at the date it indicates that it was sent on January 17th, but when I look at some of the text, for example, bottom of the second page, please let us know if you'll supplement by September 18, 2012 -- I'm not following that.

MR. VASQUEZ: That is just simply an error, Your Honor, in the e-mail.

THE COURT: So this was sent on January 17 of this year --

MR. VASQUEZ: Yes, sir.

THE COURT: -- and you were asking him to supplement by when?

MR. VASQUEZ: Not --

THE COURT: The next day? January 18?

MR. VASQUEZ: Your Honor, this is the first time I've noted this error in this e-mail. You know, obviously I didn't expect him to give us all this information the very next day. We just would like it in a reasonable time after we ask for it.

THE COURT: So to get to the 7.1(a) requirement, how do you say you satisfied that meet and confer obligation?

MR. VASQUEZ: By conferring via e-mail and then

also in a phone call.

THE COURT: When was the phone call?

MR. VASQUEZ: I don't remember the precise date, but it was after this e-mail.

THE COURT: So after January 17th, 2012.

MR. VASQUEZ: Yes, sir.

THE COURT: But before January 24th.

MR. VASQUEZ: Yes.

THE COURT: When you filed the motion.

MR. VASQUEZ: Yes.

THE COURT: All right. The motion to compel is granted with respect to interrogatory number 2 to require the defendant to eliminate the lawyer hedging as he describes it and to assure that all responsive information is provided. It may be minor alterations that's necessary, that's what I understand Mr. Stimpson to say, it may be more extensive than that, but in any event I will require that information to be provided on how the disputed elements are missing and that a full answer be provided.

MR. VASQUEZ: Your Honor, the third issue on our motion to compel is the demonstration or access information. In our request for production number 2 set forth in our motion at page 8, Your Honor, we ask for information and materials necessary to create and use a working version of the Accused Products. So there simply is no doubt that we've

asked for that. As an alternative, Your Honor, we then in December when we were in New York approached counsel for MDx about granting us access via a login user name and a password. That would provide the same function as having us build a working version. We would simply then have our expert go in and actually examine the working version that exists. In response to that request, Your Honor, first they said, well, you didn't -- you didn't ask for this. We pointed out how we have in our motion that we have and that this is just an easier way to get through this. Then they said, well, we'll give it to you if you give it to us. Now, we said, well, you know, that's just inappropriate, every time we ask for something, well, you say then you give it to us. They certainly had never made any request like we had before then.

Now, Your Honor, in an attempt to resolve this I have conferred with the IT department at Health Grades, and I've confirmed that they also have a portal by which physicians can log in and access the information that is not available to anybody who just gets on the website, and so, you know, we're prepared to grant that dual access if that's still on the table on their end, but really that's just, you know, an attempt to just stop fighting about everything we ask about.

THE COURT: Thank you.

Mr. Stimpson?

MR. STIMPSON: Just briefly, Your Honor. They didn't request this. I didn't hear anything about why they need this, what claim element they think is missing that they need to come into our website and start poking around. You know, I don't know what they're going to do in there, and our client doesn't know either. So, I mean, this is property. It's our space. It's our Internet space. It's just like a request for entry on land. I don't see any practical difference between the two. And if they wanted this, they wanted access to come into our property -- and they're not just going to look around, they're going to -- you know, they're going to have a keyboard, they're going to have a mouse, they're going to, you know, play with it, put in information, make requests, see what happens. I mean, that is a classic 34(a)(2) request, and they just didn't request it, Your Honor. I mean, if -- if need be, we'll do this compromise where we both do it, but I just don't think any of it is necessary. I just don't see how it's relevant, how they -- what they want to do with it.

THE COURT: I should have asked Mr. Vasquez, and I will, a copy of each executable and demonstration version of the code. I mean, it does seem like E and F are trying to get -- you're right, he did not -- the request is not under 34(a)(2), but broadly read isn't that what E and F gets to?

MR. STIMPSON: E and F is different. It's source code. And that's a -- that's very different. In fact I have an agreement with Mr. Vasquez, it was a long time ago, that we weren't going to be producing source code. I can't remember the details of that, but neither party has produced source code.

THE COURT: Okay. So --

MR. STIMPSON: So this is --

THE COURT: So --

MR. STIMPSON: This is something different. This is -- this is like, okay, just let me in and let me play around and see what I can do, and that's completely different. If you want to do that, there's a vehicle for that, and you didn't use it and it's not -- it's just -- that's what the rule's for.

THE COURT: And so you would say discovery is closed, too late.

MR. STIMPSON: Right. Yes.

THE COURT: But the motion was filed before discovery was closed.

MR. STIMPSON: Well, yes, but -- well -- well, yes, the motion was filed, but they -- they didn't file a request and they didn't file a 34(a)(2) request. So --

THE COURT: So suppose I say that I'm going to allow it. That doesn't mean, does it, that I have to let

them in -- I assume you would have your technician there giving them -- watching what they do, doing it for them, whatever it takes to make sure no mischief is achieved.

MR. STIMPSON: Well, they want a user name pass code basically is the way I understand it. I mean, absolutely if anybody's going to be touching our system, I mean, this is -- you can sure imagine how sensitive this is to our client, but if anybody from Health Grades, our -- one of our biggest competitors is going to come in, or expert or whatever it is, and start doing things on our website, we'll want somebody there. But what they've requested is a user name pass code for this whatever it is they want to do that the public can't usually get access to. So it's -- you know, it's very -- it's a sensitive issue. I'm sure you can understand it's a very sensitive issue for both parties. Thank you.

THE COURT: Mr. Vasquez.

MR. VASQUEZ: Yes, Your Honor.

THE COURT: So it does seem to me that there is a specific rule, 34(a)(2), if what you want to do is inspect the property, and you didn't do that. What part of request number 2 do you think meets the requirements of Rule 34(a)(2)?

MR. VASQUEZ: Well, you're correct we did not make the request under that rule, Your Honor, but you asked -- you

pointed out E and F, and counsel is correct, we have agreed to not exchange source code, but demonstration code is not source code, Your Honor. All it -- and I think counsel will agree to that. There is a huge --

THE COURT: But that's not what you want. You don't want demonstration code. You really want to get in and inspect the property.

MR. VASQUEZ: What we really want is for our expert to be able to show the jury at trial how their website works from the prospective of a doctor, one of the doctors who uses the Accused Products. That's really what we want. So -- discovery is not closed, Your Honor, and the alternative to just letting our expert do it is for them to build us a copy as was requested.

THE COURT: So what -- where does it say build a copy?

MR. VASQUEZ: Well, at P, documents sufficient to show the performance, specifications and/or functional characteristics and capabilities of the Accused Products. We don't have that. But that dovetails into what we ask for above, which is not source code.

So what I'm saying is, yes, we have agreed to not produce source code, and we're not asking for source code here, we're asking for demonstration code, which would be, you know, as it says at the bottom of E and F, sufficient to

create and use the working copy.

Now, you know, back when MDx offered to solve this if we had -- if we would agree to provide the same access, there was nothing said about these issues that are coming up now about, well, this is confidential property and we're very concerned.

THE COURT: So there is such a thing as demonstration code, and you would take that and you would build a model of what they have online?

MR. VASQUEZ: That's what our expert would do. I personally would not. That's what we would use it for.

And we say that clearly at the bottom of 8 and page 9 of the motion. All we want is to allow Health Grades' technical expert to demonstrate the software from the point of a physician and a user.

THE COURT: Thank you. So Mr. Stimpson, what about that? Do you get -- you would provide whatever code was necessary so that the plaintiff's expert could build a working version and show the jury how your product works.

MR. STIMPSON: That's even worse, Your Honor. Taking our source code and giving it to the hands of our -- even an expert of our competitor, that's -- that's every client's -- you know, they hate that. Source code in protective orders, there are very strict, strict provisions, like I've got another case right now where I can't leave --

if it's produced it's got to be right in our office under lock and key. Giving source code is far -- far worse.

Why do they need this? Mr. -- Mr. Vasquez says he needs it because he needs to show from the point of view of a user. You can show that by just getting on the website. That's what users see. The point of view of a physician he says, but that has nothing to do with anything. It doesn't make any -- it's not relevant to anything.

So, Your Honor, I come back to, you know, the point that they haven't requested this. They're trying to put a square peg into a round hole. They did not request this.

THE COURT: Well, what do you understand a request for other software objects and conditions necessary to create and use a working Accused Product?

MR. STIMPSON: Your Honor, if you look at that request as a whole, that just requests everything relating to our system. I mean, it's like it's enormous. And this is a request -- it was a request for source code, and what you don't see here is our objections. Forget it; you're not getting our source code. And they haven't produced source code to us either. I don't think so.

THE COURT: So I thought I heard -- I did hear Mr. Vasquez say there's a difference between source code and demonstration code.

MR. STIMPSON: It's all source code, Your Honor. I'm not sure what Mr. Vasquez is referencing there, but if he's talking about -- I just don't know what demonstration source code is, but if it's source code, then about 20 red flags are going up if they're asking for that. You know, we're competitors and this is -- this is -- would be very bad to give the source code. I know it has to be done sometimes, but they didn't request it and you don't need it here. These patent claims talk about a user getting on the website requesting a request for information. You can see just by getting on the website public information, how it works and what happens, and from the point of view of a physician I don't -- I just don't understand that.

THE COURT: Mr. Vasquez, why do you need it? So you can get on and do it from a user's point of view?

MR. VASQUEZ: Your Honor, no, that's actually not correct. Sure we can pull up the Vitals website right now and we can see what's available there, but we cannot go and access what we all know exists, which is physicians who have profiles there, have a user name and a password to access parts of the website, for example, to edit the doctor-verified information. This doctor-verified information is, you know, critical to the claims, the element of claim 1.

So we can't just do what Mr. Stimpson said. You

can't just go to a computer, get on the website and see what we are asking for here. We need to show the jury not only what Mr. Stimpson said but here's what happens when the doctor uses his user name and his special password. He can go in there and edit information about him. That shows that there's a --

THE COURT: Is there any dispute about that? They can do it, can't they, Mr. Stimpson?

MR. STIMPSON: They can change some, yes. In fact, Your Honor, I was going to make a suggestion. There might be a lot easier way to do this. We have the depositions of our people coming up who are technical people. They can just answer these questions. They can just answer these questions.

MR. VASQUEZ: That wouldn't allow us to show the jury.

MR. STIMPSON: Sure it would.

MR. VASQUEZ: Well --

MR. STIMPSON: And then --

THE COURT: Well, but, I mean, if -- they're going to admit, if I heard Mr. Stimpson correctly, that physicians can go in and edit some of this information that's physician-verified, and you claim that that's part of what they're doing that infringes your claim.

MR. VASQUEZ: Yes.

THE COURT: Why do you need to show it to them if it's admitted?

MR. VASQUEZ: Well, first of all, Your Honor, it's -- you'll see in another motion that we felt that we -- was necessary to file, and we filed it yesterday --

THE COURT: I saw that.

MR. VASQUEZ: -- they did not admit that. They're taking on or making all kinds of evasive responses, and we can address that with the Court when the Court's ready, but that's not being admitted. And I'm just citing that as an example, Your Honor. There are numerous other elements, (inaudible), that, you know, are part of this access and login request.

Now, it seems to me, Your Honor, they can either build a demonstration copy, A, give us demonstration software, which is the functional equivalent of the Accused Product, B, or simply give us the -- a -- you know, a dummy user name and password, which they agreed to do earlier if we would do the same. We don't necessarily understand why they do it, but we went to the trouble to see, well, if they give us this, can we give them the same thing, and I confirmed that we can. So there's three options here that would resolve this, but apparently none of them are ones that they want to agree to.

THE COURT: So how would this dummy password

business work? You would go to Mr. Stimpson's office or the office of his technical consultant and you would ask them to do certain things and see how it works?

MR. VASQUEZ: Well, they would -- Vital's IT department would set up a user name and a password for our technical expert to be able to go in there and pretend essentially that he's a doctor and so he can navigate and see the screen shots and the functions and the functionality of their website.

THE COURT: And you're willing to let them do that to you.

MR. VASQUEZ: Yes.

THE COURT: Sounds dangerous to me.

MR. VASQUEZ: Well --

THE COURT: You know, all sorts of -- what happens when somebody says they altered our source code and caused us 6 million dollars in damages?

MR. VASQUEZ: Well, I can assure you that our expert who is, you know, an MIT graduate and has, you know, vast experience in this --

THE COURT: I'm not worried about her, I'm worried about theirs.

MR. VASQUEZ: Well, I think that Health Grades knows how to police what's going on within their website, and this lawsuit --

THE COURT: I mean they'd go onto your website and cost you 6 million dollars in damages.

MR. VASQUEZ: Well, that's what I mean. When this happens, I mean, we can work out details such as when is your expert going to access it. You know, they're going to be aware of everything that the expert has done, and they can track every page the expert visits. So, you know, those concerns, you know, I understand why we would talk about them, but they can be completely ameliorated.

What's important here is there are two websites that are accused here. We -- our expert who is going to be opining as to infringement ought to be able to show the jury here's how the website works, here's how -- what doctors can do, and because this is what they're allowed to do via their special access privileges, we can show that they in fact meet element A, B, C and D of claims 1 and 15 and so forth.

THE COURT: So can you create a dummy system of your system that you could just hand to them on a hard drive and say here's a dummy, it's not hooked up live so you can't go in and change anything but you can manipulate it as if it were part of our system and that's good enough to show how it works?

MR. VASQUEZ: Whether we can create one of the Health Grades system, Your Honor?

THE COURT: Right.

MR. VASQUEZ: Well --

THE COURT: Because if you can't --

MR. VASQUEZ: I -- I --

THE COURT: -- I bet they can't.

MR. VASQUEZ: Well, I guess I cannot answer that. I would have -- I think we could, but this would all be solved -- I mean, they never asked us for a dummy, they never asked us for a functional equivalent. We have as you can see. But the easiest way to do this is just to allow the access via user name and login which they had agreed to do and then now they're taking it off the table, even though we have now affirmed that they could have the equivalent access that they requested, Your Honor.

THE COURT: Anything more, Mr. Stimpson?

MR. STIMPSON: Just one brief point, Your Honor. What is this going to do for them? Suppose they did get access. Okay? So next month we allow this expert to see our -- get into our system. How is that possibly going to help them other than collect the last three months or whatever of discovery. Right? We've got two years before this patent. I mean, the way they're going to do that prior two years is the same way I'm suggesting to the Court, is they just have to ask our witnesses, what did it look like, and that's -- they're going to be under oath, they're going to tell the truth, this is what it looks like, and this is

what doctors can edit and this is what they can't. So they have to do that anyway, so why allow them access to our system where a representative of Health Grades can get into our system, their primary competitor. It's just -- it's not necessary, Your Honor. It's really not relevant.

THE COURT: Well, it is relevant. I mean, if you're saying, as Mr. Vasquez says you are, that they can't really edit it or they can only edit some things and there's a dispute that, what -- how your system works is at issue, isn't it? It's relevant.

MR. STIMPSON: It is, but there's many different ways to get that information, Your Honor, and one is through sworn deposition testimony of our witnesses, which they have requested, they haven't requested this one, and it doesn't put our system into the hands of a representative of our competitor. And then it -- after those depositions if they still -- we can come back and talk about it, but they're going to tell the truth, Your Honor, and they're going to know what they -- they're going to learn what they need to know from those depositions.

THE COURT: And these aren't the 30(b)(6) depositions, these are some other depositions.

MR. STIMPSON: No, actually they'd be the same people I think, but one of the people they've noticed is somebody who's the -- in fact two or three of them, they know

all about our system. So they should be able to get this. If they ask the right questions, they will get these no problem. We'll answer the questions. It's just getting in there and getting them into our system is very sensitive.

If there's nothing further, I have nothing further, Your Honor.

THE COURT: Thank you.

MR. VASQUEZ: Your Honor, just may I add one comment?

THE COURT: I warned you about that.

MR. VASQUEZ: This is not a motion for sur-reply. I just want to follow up.

THE COURT: I'll give you the last word since you had the first word.

MR. VASQUEZ: Your Honor, we've offered three alternatives and he refused all (inaudible). There's even a fourth. As you just mentioned, this could be something that we would have -- we could inquire about in a 30(b)(6) deposition, and so if they would just simply have an executable version of the website at the depositions, it's not enough for just the witness to testify about what it does, but if the witness shows us what it does during the deposition in response to our questions, even that would be sufficient. Thank you.

THE COURT: Mr. Vasquez, let me make sure I

understood your answer. Do you agree that in order to create and use a working Accused Product or create and use a working version of the Accused Product you would need to acquire source code?

MR. VASQUEZ: No, Your Honor. No, I am not a software or source code expert. It's my understanding from our conversations with our technical expert that demonstration software is not source code, demonstration software can be used to give us what we're asking for here.

THE COURT: Thank you. I'm going to deny the motion to compel with respect to request number 2. This is in fact a request to permit inspection of property under Rule 34(a)(2) not properly made, and what is asked for is executable and demonstration versions of code, and there's been an agreement that source code will not be provided. I'm not persuaded that there's something other than source code that can allow you to create and use the Accused Product. So I deny the motion.

Number 4, financial information.

MR. VASQUEZ: Your Honor, the final issue on our motion to compel is the request that the Court compel MDx to provide us with complete financial information. They have only provided financial information related to advertising revenue, yet in the documents that they have provided it states that MDx makes its revenues through licensing of data,

merchandise sales and advertising. So we're entitled to see the revenues related to licensing and merchandising.

THE COURT: So license -- this is something I didn't understand. There's so much I don't understand but this is something I didn't understand. Licensing of the Accused Product or licensing of, for example, the list of doctors?

MR. VASQUEZ: Well, the question is a good one, Your Honor, because those may well be the same thing. In fact this disclosure of the agreement with iTriage which we just found out about on March 6th, you know, says that MDx has obtained and is allowed to -- or iTriage is allowed to use physician profiles, 750,000 of them that it gets from Vitals. And when you go to the iTriage application and look at, well, let's see what that is, what is -- what that generates, what it generates essentially is a report that sorts and compares doctors, in other words has the comparison ratings elements, appears to, and has all the other elements. There's categories you can sort by whether it's a verified, you can see whether -- patient information that's provided. And so the question is are the profiles that they license or agree to sell in fact an Infringing Product. You know, here we're -- you know, we talk about the Accused Products as the old website and the current website, but that's just all that is, it's a website. The website has data that you can access

via the website, and so they appear to be licensing reports on physicians that contain comparison ratings, that contain doctor-provided information, patient-provided information and third-party information. So there's a direct possibility that in fact what is being licensed is also an Infringing Product, but even if it was not, Your Honor, as we noted in our motion, this information is relevant to our damages theorys because it could be a convoy sale, and under Georgia Pacific, whether the defendant is using the patented product, we contend they are, they're infringing by using what we have patented, or did they use that to then sell other non-patented products. That's right out of the case law. So --

THE COURT: Well, but if they -- if they only sell the verified doctors' names and that's all, or the -- you know, that portion of it where you've got the doctors and it's been verified, verified information, that's not a convoyed sale, because they're just selling that one part. Right?

MR. VASQUEZ: That is -- verified information is an element of the claims that we say they infringe. So that's clearly relevant. They're making money off of that. We should know what it is. You know, they can then later argue, well, you've got to exclude this from what you're seeking in lost profits for reasons X, Y and Z, but right now

to completely preclude us from examining it and knowing exactly what is it that you're selling for this revenue, that's --

THE COURT: So is the verified doctor information an independent claim?

MR. VASQUEZ: No, it's an element within -- within an independent claim.

THE COURT: So if -- if I sell light bulb filaments and there is a valid patent not yet expired for an incandescent light bulb, am I infringing the patent? I only sell the filaments, I don't sell the light bulb.

MR. VASQUEZ: I guess it would depend on what the patent actually claims, Your Honor, but it's possibly that it would.

The point of our argument though, Your Honor, is that even if it's not an Accused Product, even if in your example you don't infringe, it still may be relevant to damages, and is relevant under convoyed sales theorys and under Georgia Pacific specifically for reasonable royalties.

THE COURT: Thank you.

Mr. Stimpson?

MR. STIMPSON: Your Honor, what I understand's been licensed here is our data. Over the years MDx has accumulated data on hospitals, on doctors, whatever it is. It's just data. That's been licensed to somebody. To

infringe a patent, you have to meet all the elements, not just -- you can't get damage on something just because it might relate to one element of one claim. That's just not the law and it never has been.

I won't repeat what I've also -- already referenced with regard to the iTriage, but you're absolutely correct, Your Honor, this is -- under no theory could this possibly be convoyed sales. I'll refer you back to my printer-ink combination. That might be -- might be a convoyed sale. This is just -- it's sold to an entirely different party, it's not -- there's nothing that's -- there's no way, and they haven't tried and they couldn't possibly do it, try to match up what this licensing is to the patent claims. It's just got nothing to do with this case, Your Honor, it's got nothing to do with it.

And just one thing, in MDx's motion -- this is their support for it -- at page 11, they say all revenues are relevant to damages. That could not be farther from the truth. If, you know, H-P gets sued on their cameras, they don't produce revenues on, you know, their printers and their ink and their software. The revenue that's relevant is revenue to the Accused Products. The same thing applies to MDx. We're a smaller company but the same issue. You know, it's a different thing. You just can't get revenue from everything and just throwing it in and saying you're entitled

to damages on it.

THE COURT: Well, when your materials say -- and you don't dispute this I don't think -- that revenue -- that revenue is generated primarily through advertising, licensing and merchandise, doesn't that mean that they are entitled to the licensing and merchandise information about the Accused Product?

MR. STIMPSON: That was talking about MDx overall, Your Honor, the entire company. That's some document they have, I think, that talks about MDx whole company where do we get our revenue. One is advertising and stuff which is the -- from the website, which is the Accused Product. And the other stuff is licensing and, you know, selling merchandise. But licensing our data, that's not connected to our -- there's no connection there. It's just underlying data. That's -- thank you.

THE COURT: Thank you.

Mr. Vasquez?

MR. VASQUEZ: Your Honor, first of all this goes beyond iTriage. This document we were just discussing says they make licensing revenue. We only know of iTriage. They may be licensing other data sets, broader data sets, to other parties. We've been precluded from having any discovery on that. That's just simply improper, Your Honor. And these data sets are part of the Accused Products.

THE COURT: So if I limit your request to any advertising, licensing and merchandise of any elements of the Accused Product, does that meet your needs? I mean, they should -- as Mr. Stimpson says, if you sue a manufacturer of copying machines and cameras about an infringement on the copy machine, you shouldn't get information about cameras.

MR. VASQUEZ: That's correct, Your Honor, but here's why this is different. They don't sell anything. They have a website. That is the company. That is the Accused Product. They are preventing us from taking discovery, peeking behind that screen when you bring up Vitals.com. All of this bears on damages, because all of these data sets, the licensing revenue, merchandising revenue, we don't even know what that is. You know, what's really at issue here is they appear to be selling data sets. We don't know the scope of those data sets or what they contain because they absolutely refuse to allow us to see it.

(TRANSCRIBER NOTE: Mr. Vasquez has moved completely away from any microphone.) So we've put the Georgia Pacific factors up here, Your Honor, and, you know, again, my glasses are a little ineffective from that distance, but factor number 6 clearly states: (Inaudible) patent (inaudible) patent (inaudible) sales of other Georgia Pacific products. In other words, other products. Such as these data sets. The existing value of the invention. That

the generators of sales of non-patented items.

So if they're just saying, well, the patent website is (inaudible) it's clearly relevant (inaudible) warranties, because (inaudible) not-patented items as they contend. We don't agree with that. To the extent (inaudible) infringing (inaudible) invention that any (inaudible) of the value of that is. Clearly, Your Honor, (inaudible) getting in exchange for the data sets whatever those are are probative of value for the use and it goes to our damages case.

Number 13 finally, Your Honor, the Court's going to realize the whole profit issue, the fact it's even mentioned (inaudible) may not have (inaudible) manufacturing process (inaudible) infringes. So again to the extent they contend these are non-patented and therefore shouldn't be produced, and (inaudible) number 13 calls for production so that we can distinguish that.

THE COURT: Thank you. I grant the motion to compel with respect to the requirement to disclose financial information. I find that the information is reasonably calculated to lead to the discovery of admissible evidence or may constitute evidence directly related to the damages claim, and I'll order that the information be provided.

I think that finishes the motion to compel. Do you agree, Mr. Vasquez?

MR. VASQUEZ: Yes, Your Honor, thank you.

THE COURT: All right. We're making slow progress but some. It's 3 minutes till 10. Let's break until 10:10.

THE CLERK: All rise. Court is in recess.

(Recess from 9:57 a.m. to 10:09 a.m.)

THE CLERK: All rise. Court is in session.

THE COURT: Thank you. Please be seated. The next motion is the defendant's motion to strike deposition notices, number 142.

MR. STIMPSON: Thank you, Your Honor. The issue on this motion is whether Health Grades has violated Rule 26(g) and the Court should strike the deposition -- the 30(b)(6) deposition notice with prejudice. I'll be brief because there isn't a lot to add to our briefing in this, Your Honor, but Rule 26(g) is the operative rule here. It's the Rule 11 of discovery requests. If you sign a discovery request, it's certifying that everything you're requesting is warranted and it's not interposed for some improper purpose. I could sit here for hours and tell you about all that that deposition notice requests that has absolutely nothing to do with this case. That won't do any good and it's in our brief anyway, Your Honor.

So very -- it's a ridiculously overbroad, I think just a ridiculously overbroad notice. There is no way we could ever have people prepared to he respond to these

topics. And their opposition doesn't really even address the vast majority of what they're requesting. So, Your Honor if Rule 26(g) is to have any meaning, if they're just allowed a do-over here, then, you know, it has no teeth. This was not -- in my view was not prepared in good faith. They will get the same deponents anyway, just not under a 30(b)(6). So we respectfully request, Your Honor, that the entire deposition notice be stricken in its entirety with prejudice. Thank you.

THE COURT: Thank you.

MR KANAN: Your Honor, a bit of history on conferral on this one. Original 30(b)(6) topics were drafted and sent to Mr. Stimpson. I'm not personally involved in this, I'm relating what Mr. Vasquez and Ms. Stoll-DeBell did. And then there was a conferral because Mr. Stimpson objected these were too vague, too overbroad, didn't agree to a single topic. They were again done. As Mr. Stimpson says in his motion, the 30(b)(6) topics are to be done with painstaking specificity, he quotes a case saying, so if we take that literally and Mr. Stimpson's approach to this literally, we have to say in great detail the topics that we're noticing, which we did. They conferred again and Mr. Stimpson said no, too broad, just as he said here today. He didn't agree that 20 of the 31 topics were okay, or 15, or 5, or 1 topic was acceptable under 30(b)(6), even though they included things

such as the features of the system which he had said in his other discovery responses we would obtain by 30(b)(6) deposition, and he even cited in his motion some of the features that he claims are improperly listed in our topics. The very thing he said, page 6 of his motion, these topics are inappropriate, conception, design, design history and development of every feature, structure, properties, function and operation of every feature, the things that he said we can get in a 30(b)(6) deposition now are too broad, can't be answered. Of course he said here today many of these questions about how the system works can be dealt with in a deposition, and he said today one of the people being deposed is a technical expert. Well, I say if the duty to confer means anything, it means a lawyer has an obligation to agree to the things he should agree to.

Not one topic. Licensing information, other damage information, that clearly goes to the issue of damages. Not a one. Not a one. Not a one so that we could say, well, okay, let's talk about these five that you object to or these 10 that you object to and maybe we can work that out. No, a motion's filed and nothing further.

There's no basis that I know of -- well, I shouldn't say there's no basis, there probably is a basis, I've never heard in 36 years practicing law of someone saying you improperly noticed topics under 30(b)(6) so now you don't

get to take a 30(b)(6) deposition. This is some sort of a gotcha game. You notice up 15 topics and if one of them, if one of them is no good, well, that's it, you had your chance, you don't get to take a 30(b)(6) deposition.

The topics include, and this is at Exhibit A, I think, of Mr. Stimpson's motion, as I noted paragraph 3 all about the features, the information we discussed previously here, defendant's reasons for selecting and developing the features. That bears on many things here in this case, Your Honor, including willfulness. We have documents that we have in our possession produced in this case that show the defendant very closely monitoring the Health Grades site, talking about copying Health Grades' processes. All of these issues bear on legal questions presented in this case.

And of course when we get over to the material rated -- related to -- well, look at 15. Defendant's knowledge of the patent in suit. That's not relevant here? That isn't an issue that should be addressed in a 30(b)(6) deposition?

THE COURT: I'm glad you -- exactly. Exactly. So put yourself, please, in my chair with now only half of the motions left, one of them filed last night at 7 o'clock, by parties that don't seem to be able to figure out how to do a patent lawsuit on any aspect, although experienced patent counsel. What do I do when there's number 19, the

differences between the products and services, clearly proper in my view, and number 23, written or oral communications with anyone about the plaintiff, this lawsuit or the patent, clearly overbroad in my view. Am I to go through these and tailor them one by one because you all can't do it?

MR. KANAN: No, Your Honor, you shouldn't, and I understand your upset and I agree with you completely. This is not good lawyering and this shouldn't have happened, but when -- I was not involved and maybe I'll become involved, but when we are met with a response to 30(b)(6) topics that is the answer not one of these is appropriate for a 30(b)(6) deposition and we get a motion that says we should now be precluded from taking the 30(b)(6) deposition, what are we supposed to do? I guess we could start paring it down unilaterally, but we'd still have this motion, and we surely wouldn't have these things that maybe we wouldn't get anyway but we don't know that for sure, and maybe some of them there's a legitimate dispute about.

So the answer is, Your Honor, you shouldn't have to do this. Maybe there's a process we can still try after today, perhaps, to get topics we agree on, and I would pledge that I would be involved in that, but it can't be met with no topic is acceptable or yes this topic's okay and then later it turns out they're claiming it's not okay.

Could you put up, Kirsten, the Georgia Pacific

factors again?

These -- the damages topics that we've identified here, of course you're ruling now on licensing revenue that they refused to agree was an appropriate topic for 30(b)(6) deposition. The Georgia Pacific factors: The extent to which the infringer used the invention and any evidence probative of the value of that use. Number 11. Now, if we'd have used that as a topic in our 30(b)(6), I'm positive Mr. Stimpson would have said too broad, but the fact of the matter is that's what we tried to answer in some of these topics.

So I guess what I would say to you is there's no question we are entitled to take a 30(b)(6) deposition. There's no question in my mind that the vast majority of these topics are appropriate. I am willing if the Court instructs us to do this that we once more try to talk about this, Mr. Stimpson and I and perhaps others as well, and come to a conclusion. If you perhaps advise us that in your view at least some topics here are appropriate and at least some topics are inappropriate and then both sides, you know, we got some skin in the game here, we've got to solve this problem, and I would pledge to do that.

THE COURT: Mr. Stimpson?

MR. STIMPSON: Your Honor, as we said in our opposition -- as in our motion paper and our reply, we don't

dispute that there's relevant information requested in these 30(b)(6) topics. I think you hit the nail on the head, Your Honor. It's not your job to go through this and try to figure out what they should have done. I'll take that one step further. It's not my job either. Okay? When I get a notice like this of deposition topics, it's just so ridiculous. The answer has to be go back and do it right. And that's what I told them. And this is just -- I told them, I told them 26(g), I said read the rule, 26(g), go back and do it, then we'll talk, and they came back with an even worse notice.

So, Your Honor, it wasn't good faith, and there has -- that's what 26(g) is about, good faith, doing stuff in good faith, and if you don't do it in good faith, there should be a consequence.

Mr. Kanan said he's never seen a motion like this before. Well, I have, I've seen it once before. I filed it and I filed it in only one case I've ever been in I've had to do this before, and the Judge there had exactly the same reaction you did, Your Honor, this is -- this is not something I'm going to go through, and the Judge was furious and she struck the requests. And that's what 26(g) is all about. Telling them go back and do it right is -- it just -- there's no consequence. A do-over does nothing. They will get these deponents but just not as 30(b)(6)'s.

THE COURT: The motion is -- to strike is denied -- well, is granted in part and denied in part. I do strike these requests. I agree with Mr. Stimpson that many of them are simply far too broad and sweeping and need to be narrowed. On the other hand, I do not agree that the request is made in bad faith and should bar a 30(b)(6) deposition. Many of the requests are appropriate. And you need to work that out among yourselves. The trick in 30(b)(6) depositions in my experience these days is for the plaintiff to be more general and the defendant comes in and says, oh, it's overbroad, or for the plaintiff to be very specific and the defendant comes in and says, well, we can't properly prepare anybody for all this specificity. It's a no-win situation, and I'm not going to allow that. You must prepare a proper 30(b)(6) deposition notice but you're entitled to a 30(b)(6) deposition and you should -- you should work together to figure out what that's going to look like. So the motion is granted to strike this exhibit of topics but denied insofar as it seeks to preclude any 30(b)(6) deposition, and a new notice, new proper notice should be submitted.

The Health Grades motion to amend its infringement contentions.

MR. VASQUEZ: Your Honor, the issues here are succinct. It's whether there's been a timely showing of good cause to make these amendments and whether undue prejudice

will result to MDx. We've put up on the screen, Your Honor, Rule 3-6, which is the operative rule, and that rule provides that a party may amend its infringement contentions by order of the Court when the party makes a timely showing of good cause. The rule also provides that absent undue prejudice to the non-moving party, a claim construction by the Court that is different from that proposed by the party seeking the amendment supports a finding of good cause.

So, Your Honor, this case presents the exact circumstances that are contemplated by the rule. First, Health Grades has made a timely showing of good cause. The showing is timely because we moved just 18 days after Judge Brimmer's claim construction order which was issued on February 15th; we filed our motion on March 2nd.

Next, there is good cause because the Court's claim constructions are different than the construction that was proposed by Health Grades for the terms listed in our motion, and those are first health care provider -- we've got those on the screen as well, Your Honor -- health care provider report on the first health care provider. Health care provider report includes comparison ratings of the health care providers. And then finally received from the first health care provider.

These new constructions by Judge Brimmer, Your Honor, mainly impact two claim elements. We were looking at

the patent before. So what we have on the screen now is claim 1, and we've blown up language from those claims, which use the terms that I just listed that were interpreted by Judge Brimmer, so you can see that this impacts these two elements of claim 1.

Now, the Court's construction for these terms is different from those that were proposed by Health Grades, they're different literally, Your Honor, and different and unexpected in their effect from the constructions proposed by Health Grades, and I'll show you why. Before I do that I think it's important to note that MDx does not dispute that Judge Brimmer's constructions are significantly different from those proposed by Health Grades. In fact MDx repeatedly asserts in its papers that Judge Brimmer rejected Health Grades' proposed constructions, and you can see that at page 6 and 7 of their response to our motion, Your Honor. Now -- because it goes to the issue of good cause, I'd like to just briefly walk through how the constructions are different than those proposed by Health Grades.

So on the screen -- if you could put number 5 up, thank you.

One moment, Your Honor.

Okay. So, Your Honor, here we have the term "the first health care provider," which is used within the phrase "receiving a request for information about a health -- first

health care provider." Health Grades' proposed construction, Your Honor, was that that should be construed as a physician or other health care professional. As you can see, Judge Brimmer's construction is different; it is a particular health care provider about whom information is requested and a report is produced. When I talk about a -- this being not just different literally but in effect, that's because Health Grades' proposed construction was that this could be more than one health care provider, and that's confirmed at page 7 of Judge Brimmer's claim construction order. The Court's construction limits this term, the scope of it, to only one, it refers to a particular health care provider. So here we see that Judge Brimmer's construction is different.

If we could put slide 12 on, please.

So the construction of health care provider report on the first health care provider. At Markman, Your Honor, the parties did not dispute what the report, the structure of the report, should be. The reason we're -- this is at issue here in our request to amend our infringement contentions, Your Honor, is because given that the Court construes health care provider, it impacts how this -- what this term means, what this phrase means. So Health Grades proposed that this be a formatted -- as you can see here -- a formatted and organized presentation of information that relates to one or more health care providers identified in response to a query

of information regarding health care providers. Judge Brimmer's construction, however, was he declined to construe it, but there's no dispute that in light of the construction of first health care provider that would -- the phrase is, as we put here, a health care provider report on a particular health care provider. So again a very big difference where our construction was that it be one or more, his construction is, no, you are limited to only one.

Now, if you could put up slide 12, please. Thank you.

The construction of comparison ratings of health care providers. You know --

UNIDENTIFIED SPEAKER: I'm sorry, Your Honor, (inaudible).

MR. VASQUEZ: Your Honor, Health Grades proposed that this be construed as a rating system that facilitates comparisons -- and that's with a parenthetical with an S so it could be a comparison or comparisons -- amongst physicians to highlight which physicians identified in response to a query for information best fit one or more criteria. Importantly, implicitly in the proposed construction by Health Grades is the concept that comparison -- it did not require inclusion of ratings for other physicians. In other words, simply having one physician showing a one star rating was comparison ratings because that star rating is comparing

that physician to a data base of numerous physicians, so we contended, you know, that's the important distinction here. The Court said that this had to be ratings on multiple health care providers including a first health care provider in the report on that first health care provider, thus permitting comparison of the first health care provider with other potential health care providers. So this includes, Judge Brimmer's construction as he confirms on page 14 of his claim construction order, it includes ratings on multiple health care providers, as you can see here. So again Judge Brimmer's construction is new, its effect is unexpected.

So, Your Honor, it's clear that Judge Brimmer's constructions for these terms are different from those proposed by Health Grades, not just literally but substantively, and the Court's constructions require that Health Grades now show and give notice as to how the accused websites infringe, and that is done by applying the claims as construed to the features of the accused websites. Infringement is a two-step process. Infringement is determined by construing the claims and then applying the claims as construed to the features of the Accused Products, and that's all we are seeking to do with these proposed amendments.

Now, the Court's new constructions create issues such as whether the health care provider report on the first

health care provider must refer to or include information on only one health care provider given that he construed that to be on a particular health care provider, and if that's true, Your Honor, how that report must also include comparison ratings on other health care providers. This is per the Court's construction of comparison ratings of health care providers. The Court said it has to be multiple. On the one hand, the first health care provider is one, one health care provider that a report is generated on; on the other hand, the report must also include comparison ratings on multiple health care providers. So what we've done in our amendments, Your Honor, is simply taken the claims as construed by Judge Brimmer, compared them to the accused -- the features of the accused websites and articulated how now in light of these new constructions the accused websites still infringe.

Now, Your Honor, last issue here is the undue prejudice. Here there is no prejudice to MDx, much less undue prejudice. The fact that discovery closes on June 15, initial expert reports are due on June 29, rebuttal reports are due on July 16th and expert discovery closes on July 27th. With respect to the two inventors who have been deposed, MDx has argued, well, we've already talked to those guys and now, you know, that opportunity to ask them about infringement in light of these constructions is lost, and so they claim undue prejudice there, but, Your Honor, they do

not have any relevant information regarding the question of infringement. As I said earlier, that infringement involves construing claims and then applying the construed claims to the accused websites. Well, here Judge Brimmer already denied MDx's attempt to insert those -- the testimony of those two deposed inventors into the Markman hearing. He denied MDx's motion to supplement their Markman brief by inserting their testimony. And you can see that at docket 120, Your Honor. Furthermore, as Judge Brimmer was aware, the law is well settled that the inventor's subjective intent is simply not relevant to claim construction.

Now, as to the second step required to determine infringement, the inventors testified, as we noted in our motion, that they're not aware of the accused websites, they're not aware of why Health Grades asserts that its products infringe, Your Honor. Neither of them work for Health Grades any longer. So it's clear as you can see by Exhibits 11 and 12 to our motion, Your Honor, which is deposition transcript, portions of the deposition transcripts, and also at page 8 of our motion, that they simply don't have relevant information about infringement.

Now, Your Honor, notwithstanding, if MDx truly believes that they must re-depose those two inventors on these narrow issues, Health Grades is willing to make them available. So there is no undue prejudice here, so we would

ask that the Court grant our motion to amend our infringement contentions.

THE COURT: The amendments relate only to phrases that have -- that the -- the phrases that you've identified on pages 5 and 6.

MR. VASQUEZ: Yes.

THE COURT: Thank you.

Mr. Stimpson?

MR. STIMPSON: Well, Your Honor, these can be broken down into two separate claim construction groups. The first group is the three that Mr. Vasquez addressed on the comparison ratings of the health care providers, and then the second one is about the information received from the first health care provider. There are three terms in the first group and then just one element at the end. So they need to be addressed separately because they're really different facts.

The first group, the comparison ratings of health care providers, Health Grades addressed this in their original infringement contentions.

First of all, just backing up about this is both untimely and there's absolutely no good cause here. Addressing the untimeliness issue first, Your Honor, they already addressed this in their original infringement contentions. Now all they want to do is they just want to

add new evidence, evidence that they've had for a long time, evidence that was available on our website when they filed this case. So they've known about our constructions, Your Honor, they've known about it since the beginning of the case. They've known how we were interpreting this and how we said we weren't infringing.

April 19, 2011, this is our summary judgment brief. Mr. Vasquez is talking about how, you know, he needs to add new evidence because the report on the first health care provider now Judge Brimmer's interpreted that to include these comparison ratings of other providers. This is what we said in our first brief, April 2011: Every claim in the '060 patent requires a generation of a report on a first health care provider and this report contained comparison ratings of health care providers. They knew that back then. And not only did they know it, Your Honor, if you look at Exhibit 8 of their brief, page 3, they actually cite to our summary judgment motion as to why they're adding equivalents arguments in their original infringement contentions. They have known this forever, and even if this didn't exist, Your Honor, in September of 2011 we exchanged claims constructions, so even if we had never filed the summary judgment, they knew about it then, and that was six months ago. So the timeliness issue, there's just no way this is timely, Your Honor.

So what Health Grades is doing, Your Honor, is they're saying, well, look at Judge Brimmer's claim construction and nobody saw this coming, this is unexpected and so now we have to add new evidence. First of all, what that rule says, Your Honor, is not that a claim construction is good cause, it says that it may be good cause, and we've cited some cases on this from California -- I believe it's California, it may be Texas. But it's good cause if you don't expect it. If the Judge -- which they do from time to time, Judges sometimes take their own construction, they do their own thing, and that can be good cause, but this is not a situation like that, Your Honor.

Starting at page 5 of their reply brief, Health Grades addresses three issues where they think that this is so different from what the parties proposed that they should be able to amend. The first one -- this is at page 5 of their brief -- they say that the ratings can include the ratings of the first health care provider. So, in other words, that this report has the ratings of the first health care provider as well as comparison ratings. And their statement at page 5 is that Judge Brimmer rejected our position on that. That's just -- it's just not correct. Here's our claim construction paper. I'll refer -- reference it's document number 93, page 12. MDx does not take issue with the fact that ratings of the first health care provider

will be in the report too. It was just totally a non-issue. And neither Health Grades nor MDx contested that at all. Nobody's contested that.

The second thing they reference, Your Honor, is at page 6, and page 6 of their reply they say that MDx -- that Judge Brimmer ruled that the report on the first health care provider had to have the first -- the comparison ratings, and they say that neither party ever requested that. Well, Your Honor, we most certainly did. This is page 11 from our claim construction brief, document number 93. Quote: The claim language is perfectly clear. The report on the first health care provider includes these comparison ratings of health care providers. This is plain English. We argue that. And Judge Brimmer agreed with it. So how can they say it was unexpected, and how can they say that we never argued it? It's right in our claim construction brief.

And the last thing, Your Honor, is at page 6 where they say that Judge Brimmer rejected our position that the report on the first health care provider had to be specifically directed to the first health care provider. I just can't see how they can even say that, Your Honor. Even the quote they have in their brief, this is Judge Brimmer's actual language: Defendant contends that the report relates only to the particular first health care provider. For the reasons discussed earlier when construing first health care

provider, the Court agrees with the defendant. So how can Health Grades say that Judge Brimmer just went off and did his thing and didn't follow what we had suggested? He's saying he agrees with us.

None of these reasons they're giving for this supposed big surprise from Judge Brimmer, it's just a total fallacy. They knew this since day one, they had it in their original infringement contentions, they reference our summary judgment motion there, they followed -- they knew our claim constructions in September, and Judge Brimmer did what we asked Judge Brimmer to do on these terms.

THE COURT: Well, the rule says that if the construction is different from that proposed by the party seeking amendment. So if the plaintiff had taken the position that a wheel must be circular and you had taken the position that a wheel could be circular or spherical and Judge Brimmer agreed with you, but in their claim construction they were pretty sure he wasn't going to agree with you, then shouldn't they be allowed to amend because the judge took a -- adopted your position but it wasn't what the plaintiff thought he was going to do?

MR. STIMPSON: Well, Your Honor, I'm not sure that they should be able to do that, because this is not unexpected. And if you see the cases we cite, if the Judge does something different from what the parties oppose and

it's really unexpected, that's good cause. That situation, Your Honor, where I -- that would be a really surprise construction, maybe there would be an argument there. But here it's different.

We have to remember here that they already addressed this in their original infringement contentions. They cited to our motion for summary judgment in their original infringement contentions. How can they say they didn't see this coming? They saw it coming and they addressed it. Now they just want to add new evidence. So it's entirely different.

The next element, Your Honor, received from the first health care provider, that's even -- that's even -- I mean, that one surprises me too. It's untimely and there's no good cause. Judge Brimmer -- Judge Brimmer said that received from the first health care provider can be from the first health care provider or from an agent of the first health care provider. We didn't want the agent part, we lost that, so what Health Grades says is, well, that's a surprise, Judge Brimmer didn't agree with MDx and we never really proposed it so that's really surprising too. Your Honor, that is exactly what Health Grades asked Judge Brimmer to do. Here is a quote from Health Grades' brief. This is document number 79: For example, a physician may provide her secretary with information she feels will help a patient

choose her as a physician and instruct her secretary to provide this information to the company managing the website. That's page 20 from Health Grades' own brief, and now they're saying they didn't anticipate Judge Brimmer saying that agents could help? Page 21: This Court should reject MDx's proposed definition and hold that the scope of the '060 patent claims is not limited to health care provider-verified information that was provided personally from the health care provider. Health Grades asked for that construction, and now they're telling you they're surprised and that they should now be able to amend their infringement claim? That was what they wanted. Your Honor, there is no good cause here, there's no good cause, none of this.

On the prejudice issue, it's not -- it shouldn't be relevant because if there's no good cause and it's untimely, prejudice is not an issue, but to the extent the Court wants to consider it, we relied on these infringement contentions, for our invalidity contentions, for our prior art searching, it set the playing field, as all infringement contentions do, it sets the playing field for the whole case. Health Grades says, well, wait a second, inventors don't really have anything to do -- you don't need to ask an inventor about that. That is just wrong, Your Honor. For example, one of the inventors in this case, I took something from their infringement contentions, something they said

infringed the patent under their infringement contentions, and I asked the inventor about it, and he was not on board. That is -- that is extremely relevant. And if their technical expert now tries to take the stand and put on that infringement case, I've got them, I've got the goods on them, because the inventor doesn't even agree with them. So it is extremely important to take the inventor depositions with the final and proper infringement contentions. We would be extremely prejudiced at this late stage.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Vasquez?

MR. VASQUEZ: Your Honor, there is a fair amount of distraction in what I just heard. The rule is simple, and what we've shown you in our brief is exactly what the parties argued at the Markman hearing. Okay? The rule says that unless there is undue prejudice, and I don't think there's been any convincing argument that is made here, we should be allowed to make these amendments because the claim constructions proposed by Judge Brimmer are different than those proposed from ours.

THE COURT: What about the last one? Mr. Stimpson made a pretty convincing argument that you got exactly the construction you wanted. You said no construction was necessary but if there was to be a construction it shouldn't

be MDx's, it should allow agents to make a proposal.

MR. VASQUEZ: Well, Your Honor, you're talking about received from the first health care provider, correct?

THE COURT: Yes, I am.

MR. VASQUEZ: So we did, we did propose -- say that no construction was necessary. Judge Brimmer said, well, I'm going to construe it as meaning a receipt of information from the first health care provider or one of his or her agents such as an employee as distinguished from information received from patients or public sources. You know, just on its face --

THE COURT: But that's the construction you urged. Mr. Stimpson told me that's the construction you urged.

MR. VASQUEZ: One second, Your Honor.

Your Honor, may I approach you? These are copies of our proposed amendments. They're Exhibit 5 to our motion.

THE COURT: I have Exhibit 5.

MR. VASQUEZ: Okay. So this is -- this is the Exhibit A claim chart to MDx's current website. And at page 19 of 129.

THE COURT: Exhibit 5 is 64 pages long.

MR. VASQUEZ: No, I'm talking about -- this is one of the Exhibit 5's in our motion, Your Honor, and it is 129 pages.

It's Exhibit 3, I'm sorry.

THE COURT: All right.

MR. VASQUEZ: And it's up.

And so all we're -- what I'm trying to show you is this is what we seek to amend in our infringement contentions.

THE COURT: Where should I look? Page?

MR. VASQUEZ: On page 19 of 129.

THE COURT: Page 19. All right.

MR. VASQUEZ: And so you'll see there that there is -- what we seek to add is the statement at the top in the right-hand column that says the Court's Markman order defines received from the first health care provider to mean, as we just discussed. That's also the Markman order at page 24.

And then on the left side, or the next column off to the left, it's the column that says Markman order, is what we propose to add. That flows directly from the Court's construction. Of course it goes on then to page -- the next page, Your Honor, page 20, in that column labelled Markman order. That's what we propose to add here.

Any questions, Your Honor?

THE COURT: I don't think so.

MR. VASQUEZ: Thank you.

THE COURT: The motion to amend infringement contentions is granted. I find that the claim construction by Judge Brimmer is different from that proposed by the party

seeking amendment. I find also that there is no undue prejudice to the defendant. To the extent that there is any prejudice that has been identified with any degree of particularity, it concerns the deposition of an inventor, and at the defendant's option the deposition of that inventor may be reopened solely to inquire about these revised infringement contentions.

The motion for protective order.

MR. STIMPSON: Thank you, Your Honor. The issue here is very simple. Should Health Grades be allowed to disclose our confidential and highly confidential information to third parties and unidentified experts without any opportunity for MDx, any advance notice to MDx with opportunity to object. The language we have in our protective order, and actually the language they have in their protective order, Your Honor, really doesn't matter which one we use, although in theirs it's crossed out, it was originally proposed by Health Grades, and it's standard language in protective orders in patent cases that you're not going to disclose confidential information of the other party unless you give them advance notice of who's going to see it.

So really that's it, Your Honor. I don't have anything else to add to that. It's just a standard protection from -- under a protective order. And we cite two Colorado cases having similar language. Thank you.

THE COURT: Mr. Vasquez?

MR. VASQUEZ: Your Honor, it is a simple issue, however it is not about -- the issue is not about giving advance notice, it's about the veto power that MDx requests. That's where we take issue. And it also -- this is not even dealing with experts, because both parties have already told each other who their experts are and there are no issues there, but this relates to what it has related to from the outset once, yes, we did supply a draft and then we're looking at the terms and of course both sides proposed revisions, and what we propose is, you know, there's a possibility here that we may determine that in order to prepare appropriately for trial that we will have to show a third-party witness, fact witness, confidential information, and again -- and also what's -- it's just confidential information, Your Honor, not highly confidential. Highly confidential both parties agree means attorneys eyes only, so that wouldn't go to such a witness. But the issue is if there's a third-party witness that we feel we must show some confidential information received from MDx in order to be properly prepared for trial and that third-party witness agrees to abide by the confidentiality provisions of the protective order, then we ought to be able to do that. And, you know, this iTriage situation that just surfaced is a very good example of this, Your Honor. It may be necessary for us

to call witnesses from iTriage and show them confidential documents that we received from MDx to compare MDx's story regarding those licensing activities or how to sell these data sets versus what the iTriage witness says or recalls.

So that's -- that's really the issue, Your Honor. I have nothing further to add. If you have any questions.

THE COURT: So let's look at Exhibit A to your response.

MR. VASQUEZ: Okay.

THE COURT: You don't want 5.3. Is that where the -- that is the issue, is just 5.3? I mean 5.3 and the -- 5.3 and points following that. 5.3 through 5.3.3.

MR. VASQUEZ: I'm just making sure that it also doesn't include -- I'm just reading the e-mail very quickly, Your Honor.

It's really what we -- the issue that remains here is section 5.1.7 in that Exhibit A that you just referred me to, Your Honor. That's where we say we also added a new section 5.1.7 to allow third-party witnesses access once they agree to abide by the PO, or protective order. 5.3 relates to screening of the experts. We also, you know, at the time this was written were disputing whether it could just veto our experts, experts we intended to use. Since then we've disclosed the identity of our experts, they don't have any objections. So that's not at issue here.

THE COURT: So 5.3 would not be taken out anymore?

MR. VASQUEZ: It's essentially moot, yes, because at this point both parties have talked about their experts, or at least we have disclosed our experts to them because they insisted on this, so we agreed to it.

THE COURT: Well, maybe I wasn't paying attention. I thought Mr. Stimpson was still talking about experts.

MR. VASQUEZ: Well, I think Mr. Stimpson can explain that at this point, because he insisted before we arrived at any resolution as to the protective order that we tell him who our experts were, were going to be, I did, and that they've agreed that they're fine.

MR. STIMPSON: That's true, Your Honor, but I don't know if they're going to have another expert or not and -- I'm fine with it as long as they can represent they're not -- other than the experts we know.

I don't mind just taking out on experts, but we need something like this on third parties. He just mentioned iTriage, which is in the business, and he wants to show them our confidential internal documents. We need something like this for third parties. I just don't want them taking our confidential information and showing them to other people in the business as they see fit.

THE COURT: So 5.1.7 is the issue, and you want to require that not only they sign and be bound but also that

there be disclosure and a period of time for your objection.

MR. STIMPSON: Just a brief period is all we need, Your Honor. Yes, please.

THE COURT: So I'm not sure if there's a problem with 5.3 anymore.

MR. STIMPSON: Well, there's not a problem with 5.3 if they're representing they don't have -- they will not have any more experts. If that's the case, then the experts are done and it's moot. But if there's a possibility that he may get to the damages phase or something and say, wow, I better have an accountant or something, which happens, then this needs to be in there.

On the other hand, we need something like this, something with advance notice and just a brief period for us, especially if he's talking about showing our confidential information to other people in the industry, we need an opportunity to object, please.

MR. VASQUEZ: Your Honor, my issue, just to be sure there's no ambiguity, is that this object right is really -- as I understand it, that Stimpson referred to is just the objection means no, you may not use the (inaudible) and that's that.

THE COURT: So where is it I look to see the --

MR. VASQUEZ: (Inaudible) veto. Veto.

THE COURT: -- objection language that you don't

like?

MR. VASQUEZ: Well, if -- if --

THE COURT: If no agreement is reached they may move the Court.

MR. VASQUEZ: I'm sorry, Your Honor, are you reading...

THE COURT: Right. Looking again --

MR. VASQUEZ: Yes.

THE COURT: -- at Exhibit A to your --

MR. VASQUEZ: M-hm.

THE COURT: -- response, it's -- it was -- it's on page 11, it was 5.3.3, it somehow got numbered to 5.2.3, it's still stricken, and it says that if you can't -- there's a -- there's a disclosure, there's a meet and confer, if you can't agree then producing party may move the Court that the disclosure not be permitted, and it shall be the burden of the producing party to show that the disclosure should not be made and it has to be within 14 days.

MR. VASQUEZ: Right. So that language that you're referring to, Your Honor, that is stricken because we don't agree to it. That is the language that gives them this veto power that we're objecting to.

THE COURT: But it just creates a mechanism for judicial review. I mean, why would you have it happen? If you're going to -- if you're going to show it to somebody,

you're going to show -- you're going to show something really sensitive because it's marked as really sensitive to a direct competitor and they don't want that to happen, I mean, aren't they entitled to some protection and why is this an unreasonable protection?

MR. VASQUEZ: Well, the first question, Your Honor, that's what the protective order is for, it affords them protection, and even without this, if such a witness agrees to keep it confidential and abide by the terms of the protective order, it's our position that that's enough protection. We're willing to live that in the other case if they want to do it with a third-party witness.

THE COURT: Okay. The motion for protective order is granted. I will leave it to you to decide exactly what it looks like, but I agree with Mr. Stimpson that there must be notice before confidential information is shown to an expert or to a third party, and there must be a mechanism for an objection to that disclosure and for judicial review before the disclosure is made.

MR. STIMPSON: The next motion, Your Honor, I think is our motion to compel?

THE COURT: It is.

MR. STIMPSON: The issue here, Your Honor, is not the scope of documents that should be produced but timing. We have been fighting this battle for 10 months. In June of

2011 we served a document request asking for prior art. They told us they did not have any, they even swore in interrogatory response they didn't have any. We then found through third party and our own independent research that they in fact did have prior art, and we've been fighting that battle ever since. At Mr. Montroy's deposition, the inventor's deposition, he's no longer employed by Health Grades, but he said, yeah, we have documents that show precisely what we disclosed to the public in (inaudible), and so I immediately requested them. We then agreed on search terms, and so attached as, I think it's Exhibit A to our brief, are the agreed search terms. There are 10 terms, and we agreed to them, I think it was March 2 or maybe March 5. It's been nearly two months, we have a few hundred pages, they have not completed even the searching yet, and we -- it's taken two months and we just have virtually nothing. And the reason I had to file this motion, Your Honor, is because we have a fact discovery cutoff of June 16, and they're just taking way too much time to do this, and without a Court order we're just not going to get them in time to review them and take the depositions. So we really need an order that Health Grades do this.

Just as a little comparison, when Health Grades sent them -- sent us their search terms, I asked my associates, I wanted to make sure I was correct about this,

they asked in like November 9 and within two months, about this period, we had produced like 53,000 pages. And so now we've been in about the same period, we've got a few hundred pages, and they haven't even run all the search terms. They have no incentive to do this. It's invalidity, it's inequitable conduct, and it's going to go directly to our request for fees and costs. So they have no incentive to produce this. And so all I'm asking for really, Your Honor, is incentive, I think we need your involvement to order them to produce it by we think May 10, which would give us enough time to review them and take the depositions before the close of fact discovery. Thank you.

THE COURT: Thank you.

MR. VASQUEZ: Well, Your Honor, just very briefly. MDx took 75 days, not just under two months, to produce results of our ESI requests, and I assure you that those ESI requests were much narrower than what they've asked us to do here. There are not just 10 terms, there are 16 terms. Even though they numbered them as, you know, 10 when they made their request, three of those are term X or term Y. In fact the third one is term X, term Y or term Z, so that really effectively, because what Health Grades has in its IT department, it's not like Westlaw where you can say this or that, effectively what is required is that Health Grades search for 16 terms on its e-mail server and for 16 terms on

its file server. Now --

THE COURT: When can you have it?

MR. VASQUEZ: Well, Your Honor, I can tell you just yesterday I received a report from Health Grades IT department, and all of the searches on the file server have been completed. One of the terms that they requested produced 22,494 documents. As with all of the search results, and that's the one of the greatest magnitude, there's 1,068 on one term, 500, 400, 800, all of these obviously require us to take time to review them for privilege before producing. I think that setting aside the one where we received 22,000 hits for, I can have the non-privileged results of all of the other ones by May 10th as to -- (inaudible) search results on the file server.

As to the searches that Mr. Stimpson correctly said are still ongoing, how can I say -- I said this in our response, Your Honor, how can I tell you and represent to you here in Court that I'll have it by a certain date when, A, we don't know the volume of results which may come from the searches, we're talking about e-mails here, this likely will be more than just files. We've agreed that if the results are unreasonably broad that we will then confer to try and narrow or find a way to get more concise, narrower group of search results. So how can I tell you by when I will have it if, A, we don't know the volume of the results because the

searches are still ongoing?

THE COURT: Well, so, there's been a month -- well --

MR. VASQUEZ: Well --

THE COURT: There's been --

MR. VASQUEZ: March 8th is when -- is when we came to an agreement as to narrower searches.

THE COURT: All right. So March 8. April 8. Nearly two months time.

MR. VASQUEZ: Nearly two months, Your Honor.

THE COURT: So I don't understand why all of the searches haven't been run within two months time, even if there are 16 instead of 10 as you say.

MR. VASQUEZ: Well, you know, what the client advises us is that this takes significant time, upwards of 16 and 32 hours per term per search, and that in many of the searches that they run, when they look at the results, they realize, oh, this is corrupted, or other, you know, issues come up that are technical. It happened with them when they took 75 days to produce their ESI and, you know, I received letters, we had a foul-up, it's going to take longer.

I think it's important, Your Honor, to note that, you know, we have on March 30 and then on April 16 sent them search results already to the two terms that they were most concerned about, because when we agreed to narrow these

searches we also agreed to an order of priority. We also agreed, Your Honor, to do two at a time on a rolling basis. The notion that 32 are run simultaneously, A, is not possible, B, it's not what we agreed to do.

You know, I illustrated -- or, you know, included in our response an e-mail which set forth the circumstances that led to this. You know, initially a lot of time was lost because MDx simply said run these searches and give them to us. When we said okay, let's start, and then reported we got 37,000 hits so we've got to work together and confer to narrow this, Mr. Stimpson said no, that's unacceptable, period. Then we undertook to consult with an outside document -- forensic document consultant and prepare to file a motion with the Court asking that the Court shift the cost of that discovery to MDx, and there's case law that said that, you know, when the parties, you know, unreasonably refuse to work to narrow searches, as happened here, that that shift in costs is appropriate. Well, that finally got Mr. Stimpson to say, oh, well, okay, we'll give you narrower searches. And so we date restricted them, and that's what happened beginning March 8th.

So, Your Honor, what I would propose is this. We have results here. All the searches are done on the file server. Searches are ongoing, and it's my understanding that they'll be completed within a week on the e-mail server. I

don't know what the volume will be, but perhaps I can report to the Court in a pleading on May 10th, or the date that you order me to, here is -- we've completed searches, here are the results, and we could then, you know, say, well, these are too broad or based on the volume we will need this time to conduct our privilege review. We are perfectly willing to staff a room with 10 attorneys, you know, to get through this, but, you know, if it comes back with 20,000 results for a bunch of these things, we're going to have to confer and try to narrow it. So I guess --

THE COURT: So I -- what you just said is especially troubling. You had six or seven weeks and you've run 16, you say you can do 16 more in one week.

MR. VASQUEZ: That's because those have been begun. It's not like we're just starting these now because of this motion, Your Honor. Mr. Stimpson is well aware. I've informed him. These searches are ongoing. And it's not like they just start one and then sit there looking at the machines until it's done. They start, it goes through a certain volume of data, then the IT people at Health Grades have to shift priorities and run the business. You know. Or sit down and figure out what happened, how come this search stopped, how come these results don't look right. It takes time to do this, Your Honor. So I don't think this should be troubling. In fact I think what we are proposing to do here

is the most reasonable thing in these circumstances.

THE COURT: Okay.

Mr. Stimpson?

MR. STIMPSON: The 37,000 hits, that's old news, Your Honor. Before we agreed in early March -- you hit the nail on the head, Your Honor, it's been two months, they haven't even run the searches. They haven't even completed searches. And then you ask Mr. Vasquez when are you going to have it done, and I didn't hear an answer. The answer is, you know, whenever. That's why I had to file this motion, because that's the same answer I'm getting, Your Honor, and with the fact discovery close coming up, we just need the Court's involvement.

There's one truth here, you know, Mr. Vasquez talked about they have to shift priorities around maybe to do this, then they'll need to do that, but we have a fact discovery cutoff and we have to meet it. So the truth, Your Honor, the universal truth, is if a judge orders you to do it, you're going to do it, and I think if the Court says May 10, believe me, we will have those documents by May 10. Thank you.

THE COURT: The motion to compel responsive documents to the electronic search by May 10 is granted. I am not an unreasonable person. On a substantial evidentiary showing that it simply was impossible, substantial compliance

has been achieved but it was impossible to complete full compliance, supported by evidence, what remains to be done and what it will be take, I will consider extending as necessary that deadline, but it will take -- but I expect that the production will be completed or almost completed by May 10. My suggestion that evidence might lead to some brief extension is not an invitation to come back and say we've only -- we've still got an awful lot to do.

I think that's everything that's ripe.

MR. STIMPSON: Yes.

THE COURT: All right. Anything more, Mr. Vasquez?

MR. VASQUEZ: No. Thank you, Your Honor.

THE COURT: Mr. Stimpson?

MR. STIMPSON: No, thank you, Your Honor.

THE COURT: Thank you very much.

THE CLERK: All rise. Court is in recess.

(Whereupon, the within hearing was then in conclusion at 11:19 a.m. on this date.)

I certify that the foregoing is a correct transcript, to the best of my knowledge and belief (pursuant to the quality of the recording) from the record of proceedings in the above-entitled matter.

_____ _____

Signature of Transcriber Date