THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

HEALTH GRADES, INC.,
Plaintiff,

v.

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

HEALTH GRADES, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO SUPPLEMENT ITS RESPONSE TO MDX'S SECOND MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 FOR PARTIAL SUMMARY JUDGMENT OF NON-INFRINGEMENT (DKT. 195)

Plaintiff Health Grades, Inc. ("Health Grades") respectfully replies to Defendant MDx Medical, Inc.'s Opposition ("MDx Opp.") (Dkt. 309) to Health Grades' Motion for Leave to Supplement its Response to MDx's Second Motion Pursuant to Federal Rule of Civil Procedure 56 for Partial Summary Judgment of Non-Infringement ("Health Grades' Motion") (Dkt. 305).

I. THE SUPPLEMENT IS TIMELY

Dr. Cooper's report on non-infringement was served on September 17, 2012. Health Grades' Motion, *which compares Dr. Cooper's opinions to Dr. Greenspun's opinions*, was filed on September 26, 2012, just ***nine days*** after MDx served Dr. Cooper's report. There was no delay, and, given that Dr. Cooper's report was not filed until September 17, 2012, Health Grades' Motion could not have been filed "many months ago" as MDx contends. MDx Opp. at 2.

II. ACCESS TO THE INFORMATION WAS RESTRICTED AND THERE WAS NO BREACH OF CONFIDENTIALITY

Although it has no bearing on the merits of Health Grades' Motion, MDx devotes two and a half pages of its opposition to argue that the purpose of the Health Grades' Motion was to improperly disclose MDx's confidential information to Health Grades' personnel and to "the world." MDx Opp. pp. 2-5. This is not true – in fact, the very next morning after the Health Grades' Motion was filed, counsel for Health Grades assured counsel for MDx that the Court would restrict access to the filings, and also assured him that Health Grades' personnel had not seen any of the confidential information. *See* email dated September 27, 2012, at 9:10 A.M., from Greg Kanan to Scott Stimpson, Exhibit D hereto. MDx filed its opposition eight and a half hours later, at 5:34 P.M. *See* Notice of Electronic Filing, Exhibit E hereto.

Despite being reassured early in the morning that the Court had been advised and would seal the documents, and that no Health Grades' personnel had seen any MDx confidential information, when MDx filed its opposition eight and a half hours later it made no mention of Health Grades' reassurance, and instead chose to paint a misleading picture for the Court. MDx Opp. pp. 2-5. Again, the materials were restricted and no Health Grades' personnel have seen any of MDx's confidential information

III. HEALTH GRADES' INFRINGEMENT EXPERT'S OPINIONS REGARDING INFRINGEMENT ARE RELEVANT TO THE ISSUE OF INFRINGEMENT

MDx contends in conclusory fashion that Dr. Greenspun, who has been properly endorsed as Health Grades' infringement and validity expert, is "not an expert." MDx Opp. at p. 5. To the extent MDx is challenging Dr. Greenspun's qualifications to serve as an expert or

his expert opinions in this case, those issues should be the subject of motion practice and not conclusory and unsupported statements by MDx counsel in MDx's opposition.

Further, in its opposition MDx re-argues what it contends its pending summary judgment motion "shows," and then simply ignores the expert opinions by Dr. Greenspun that are included in Health Grades' Motion that contradict these alleged "showings." Indeed, paragraphs 168, 172, 173, 178, 179, 180, 183, 184 and 186 of Dr. Greenspun's report, which are reproduced in Health Grades' Motion, directly rebut and address the questions raised by MDx regarding comparison ratings, infringement under the doctrine of equivalents and the results list. Health Grades' Motion at pp. 2-4. Thus there is no question that the opinions and evidence are relevant.

IV. CONCLUSION

For the reasons articulated above and in Health Grades' Motion, Health Grades respectfully requests the Court grant its Motion (Dkt. 305) for Leave to Supplement its Response to MDx's Second Motion Pursuant to Federal Rule of Civil Procedure 56 for Partial Summary Judgment of Non-Infringement, and that it thereby allow Health Grades to supplement its response (Dkt. 201) with the new evidence from the parties' competing experts regarding infringement set forth in Health Grades' Motion.

Respectfully submitted this 15th day of October, 2012.

ROTHGERBER JOHNSON & LYONS LLP

s/ Jesús M. Vázquez

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2012, I electronically filed the foregoing **HEALTH GRADES, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO SUPPLEMENT ITS RESPONSE TO MDX'S SECOND MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 FOR PARTIAL SUMMARY JUDGMENT OF NON-INFRINGEMENT (DKT. 195)** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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