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

HEALTH GRADES, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Exhibit J -- Deposition of John Neal
(*selected portions*)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

30(b)(6) DEPOSITION OF HEALTH GRADES, INC.,
Representative John Neal
and
DEPOSITION OF JOHN NEAL
June 13, 2012

HEALTH GRADES, INC.,

Plaintiff,

v.

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

Defendant.

Job No. NJ399592

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Pursuant to Notice and the Federal Rules of Civil Procedure, the 30(b)(6) Deposition of Health Grades, Inc. and Deposition of John Neal, called by Defendant, was taken on Wednesday, June 13, 2012, commencing at 8:22 a.m., at 1200 Seventeenth Street, Suite 3000, Denver, Colorado, before Kelly A. Mackereth, Certified Shorthand Reporter, Registered Professional Reporter, Certified Realtime Reporter and Notary Public within Colorado.

* * * * * * *

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PRODUCTION REQUEST(S):

None.

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Q Is it fair to say that Health Grades has dozens of competitors in this space?

A I think there are categories of competitors, and I would say, yeah, that's an accurate statement.

Q Since 2010, how has Vitals hurt Health Grades by its accused website?

MR. VAZQUEZ: Object to form.

A I think that there's no doubt that what they've done in replicating a lot of what we do, it's allowed them to attract an audience. And I think that's detrimental to Health Grades in that they've redirected consumer interest and traffic.

Q (BY MR. STIMPSON) Anything else?

MR. VAZQUEZ: Object to form. Calls for expert testimony.

A That's the primary concern.

Q (BY MR. STIMPSON) So as we sit here today, you can't think of any other way that Health Grades has been harmed by the presence of MDx, the Vitals website, correct?

MR. VAZQUEZ: Object to form. Calls for expert testimony.

A I'm sorry, can I answer?

names?

A It did.

Q Pardon me?

A It did. We had different names, but that was kind of one we landed on as being the primary. I can't recall exactly which ones were external in terms of what was communicated or accessible via the website in terms of the name.

Q Can you remember any other of the names?

A For the Physician Quality Comparison Report?

Q No, the Physician Research Comparison Report.

A Physician research.

Q It's actually in your deposition notice down there.

If you have it, Jesus. It's under your notebook maybe?

MR. VAZQUEZ: I have it right there.

Q (BY MR. STIMPSON) It's in that parenthetical, the first one, Physician Research Comparison Report.

Do you remember any other names that that used to go by?

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A There was a -- I thought we had the one that we had taken to market was Physician Comparison Report, although reviewing the reports, I can't recall which one was the one that was in that.

Q Have you ever heard the name, how about Comparative Physician Report, is that the same thing?

A Well, it could be. I would be speculating to say for certain if that's the case.

Q Do you know any other names of the Physician Research Comparison Report?

A They all contain some version of comparison or comparative. And that's really the distinction. They all have that commonality.

Q Okay. Did they have patient ratings?

MR. VAZQUEZ: Form.

A They did not.

Q (BY MR. STIMPSON) Okay. How do you know that?

A Because the content of the report was -- it was the third-party data that I referenced earlier. So both that Physician Quality Report and the Physician Research Comparison Report was a compilation of third-party data that was combined into this named report.

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Q How do you know that?

A Because in preparing for this deposition, I looked at the report, and I also recall having seen, you know, that report.

Q Did you discuss this with your -- and I just want a yes or no. Did you discuss this with your counsel between our first -- after our -- during our first break?

A I never said that I hadn't seen these reports. I said I had some uncertainty about the timing of the reports.

Q Okay. So did the Physician Research Comparison Report contain comparison ratings of healthcare providers?

MR. VAZQUEZ: Form.

A There was -- it was just a -- the answer is no.

Q (BY MR. STIMPSON) Um-hum.

A It was just a comparison of -- it was third-party data that was compiled into a single report.

Q Okay. And what was the comparison, then, in those reports?

A So there was no overt comparison. There

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that.

Q How about before 2006, did you ever see a Comparative Physician Report that had healthcare provider ratings?

A No.

Q Let me show you what has been marked previously. Let me show you what has been previously marked as Exhibit 21. If you would identify that for me, please.

A Do you want me to go through every page?

Q You don't have to. I'll point you to specific pages.

A Okay.

Q The cover e-mail, this is an e-mail from yourself to Scott Montroy on April 17, 2003, correct? That's the bottom part.

A That's what I'm looking at.

Q And then Mr. Montroy responds to you the same day, copying Dave Hicks, correct?

A Okay, yes.

Q And the subject is a sample report?

A Right.

Q And you're asking Mr. Montroy to forward you a sample doctor report?

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years in profession and years in practice, and specialty information in this report, right?

A Yes.

Q Okay. How about languages, is that in here?

A I'm not seeing it. If it is, if you could point it out to me.

Q All right. So anyway, going back and you can start at the beginning of the report again, and after receiving your request for the healthcare provider, Health Grades would compile at least patient provided information regarding the first healthcare provider; is that right?

MR. VAZQUEZ: Form.

A I apologize. I need to get you --

Q (BY MR. STIMPSON) Let me back up a little bit. When did Health Grades start collecting patient provided information?

A It was -- I don't know for certain. It was in the 2006 timeframe, I believe.

Q Okay.

A 2006 to 2007.

Q Okay. Is that the first time it did that even with beta testing in pilot programs?

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MR. VAZQUEZ: Form.

A I just recall 2006 to 2007.

Q (BY MR. STIMPSON) Okay.

A I can't speak to beta specifics.

Q All right. In this report, this Physician Quality Comparison Report, it included information from third parties, including board certification, right?

A Yes.

Q And medical school?

A I believe so.

Q And licensure?

A Let me go through the elements that you're speaking to. I don't recall licensure being listed separately, but --

Q 32067.

A Okay. Got it.

Q Disciplinary information?

A That was incorporated as available.

Q Okay. And medical school?

A Yes, as available.

Q And medical internship? 32064.

A Okay. Yes.

Q And medical residency?

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A Yes.

Q And medical fellowship information?

A Yes.

Q And then the Health Grades website would create a healthcare provider report in response to the request, right?

MR. VAZQUEZ: I'm going to object to form.

Q (BY MR. STIMPSON) Including this Physician Quality Comparison Report, right?

MR. VAZQUEZ: Form.

A The report was produced.

Q (BY MR. STIMPSON) Okay. And that would be made available over the web to the consumers, right?

A It was accessible on the Internet, yes.

Q Why didn't you disclose the Physician Quality Comparison Report to the Patent and Trademark Office in connection with the patent application that led to the '060 patent?

A The intent behind the patent filing was to patent what we believed to be unique where there was no prior art that existed. And this was not deemed to be unique or different.

So that's the reason we didn't reference

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it.

Q Okay. I need a little bit more specifics on that. What was it -- well, first of all, did you talk about the Physician Quality Comparison Reports with your patent attorneys?

MR. VAZQUEZ: You can say whether you discussed it, but, of course, do not disclose what you actually discussed.

A I don't recall the specific conversation. But we covered a range of topics, and I'm sure we reevaluated what we were already doing at that time.

Q (BY MR. STIMPSON) So you did go over with your patent prosecution counsel what Health Grades was doing at the time?

MR. VAZQUEZ: Objection. Misstates the testimony.

A I don't recall exactly what we discussed and how it was discussed.

MR. VAZQUEZ: Did you say so you didn't go over with your patent prosecution counsel what Health Grades was doing at the time?

MR. STIMPSON: I think I said he did.

MR. VAZQUEZ: Oh, okay. So then I withdraw my objection. I thought you said didn't,

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but I see here that it says "did."

Q (BY MR. STIMPSON) Let me just ask you, Mr. Neal, do you have a recollection of discussing Physician Quality Comparison Reports from 2004 or 2005 with your patent prosecution counsel?

A I do not recall that specific conversation.

Q Now, we were talking about why you didn't disclose these Physician Quality Comparison Reports to the Patent and Trademark Office. Let me back up just a bit.

You understood you had a duty of candor to the Patent and Trademark Office?

A I understand the requirements in signing the patent filing.

Q And one of them was that you were to disclose any relevant prior art to the Patent and Trademark Office?

MR. VAZQUEZ: Form.

A I am aware of that.

Q (BY MR. STIMPSON) Yeah, you are aware now but you were also aware then, right?

A Yeah, which is exactly what we did.

Q So let's talk about why this Physician

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Quality Comparison Report from 2004 and 2005, why they were not disclosed to the Patent and Trademark Office.

You said, I thought, if I remember right, you said that the Physician Quality Comparison Report was deemed to be different from what is in your patent '060; is that correct?

A Yes.

Q Okay. How?

A It's bringing together those different elements in types of data and making that accessible to consumers, not just in a report, but more importantly on the website.

And most importantly, to give them a means to differentiate providers based on a rating or a score. And this is not what we were doing in 2004.

Q Okay. So any other reasons? Any other reasons?

A Any other reasons for?

Q For why you didn't disclose it.

A It was about being innovative and ensuring that we were protecting what was not being done by anyone else. That was the intent behind the patent.

Q Any other reasons?

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A Any other reasons for?

Q Why you didn't disclose it.

A It wasn't relevant to the patent application that we were filing.

Q Why? Why not?

A It's for the reason I just said.

Q Okay.

A This patent was to protect a unique experience, something that no one else was doing in any form or fashion in terms of combining data elements, creating a unique experience to consumers on a website.

Q Did you understand then, with your duty of candor, Mr. Neal, that the only prior art you need to disclose was prior art that showed every element of your patent claims?

MR. VAZQUEZ: Form.

A I don't recall what those specific discussions were with our counsel as relates to that.

Q (BY MR. STIMPSON) I'm just trying to get a factual understanding here. Back at the time when this application was pending, was it your understanding, sir, that the only prior art you needed to disclose was prior art that showed every

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element of your patent claims?

MR. VAZQUEZ: Same objection.

A Was it my understanding -- I'm sorry, if you can read back or say that last part. Was it my understanding -- sorry, if you can read back or say that last part, was it my understanding --

(Record read as requested.)

MR. VAZQUEZ: I object to form. Calls for a legal conclusion.

A Yeah, I don't understand the question. Were we supposed to -- I need you to rephrase or re-ask the question. I just don't understand it.

Q (BY MR. STIMPSON) Okay. Well, let me try again, then. I'm talking about the time when your patent application was pending before it issues a patent. And you understood you had a duty of candor to disclose relevant prior art to the Patent and Trademark Office, correct?

MR. VAZQUEZ: Form.

A Yes.

Q (BY MR. STIMPSON) Was it your understanding, sir, at that time that you only needed to disclose prior art that showed every element of your patent claims?

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Q (BY MR. STIMPSON) Are you with me, Mr. Neal?

A I am.

Q Okay. This 2004 Physician Quality Comparison Report shows ratings of hospitals, correct?

A It does.

Q It shows ratings of multiple hospitals, correct?

A It does not show a hospital rating. It shows how they performed by cohort or service line. So they are not hospital ratings.

Q Do you see above the table where it says, What are the ratings for hospitals in my area?

Do you see that? Do you see that, sir?

A Yes.

Q And that's language that's right in this Physician Quality Comparison Report, right?

A It is.

Q And so ratings are provided for multiple hospitals in this report, correct?

A The rating is not assigned to the hospital. It's assigned to the service lines that are parts of that hospital. It's an important

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distinction.

Q Okay. So the ratings are assigned to parts of hospitals, correct?

A They are.

Q And under your own definition, founding your own patent of '060, right, you said that hospitals were healthcare providers, correct?

MR. VAZQUEZ: Form.

A Based on, yes, the abstract definition.

Q (BY MR. STIMPSON) Right. And any user looking at this Physician Quality Comparison Report could compare ratings on these parts of hospitals from this Physician Quality Comparison Report in 2004, correct?

A I'm not sure what interpretation the consumer might make, but there's not a means by which to compare facilities and make a choice. You can choose my service line and evaluate, but there is no method of comparison in there.

Q So you're telling me that a user of this Physician Quality Comparison Report could not look at the Central Baptist Hospital and say, cardiac has a three-star rating and then -- let me just find one word here.

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So you're telling me, Mr. Neal, that a user could not look at this Physician Quality Comparison Report and look, for example, and see that Central Baptist Hospital in neurosciences -- I'm sorry, in pulmonary, has a three-star rating, and also note from the same exact document that Pattie A. Clay Hospital in Richmond, Kentucky had a five-star rating in pulmonary, right?

MR. VAZQUEZ: What is the question?

Q (BY MR. STIMPSON) The user could do that, right?

A They could look at this report and see that information.

Q Right, and the way they do that is they look at the ratings for the Central Baptist Hospital under pulmonary, and then they compare it to the Pattie A. Clay Hospital, pulmonary, right, and you'd see that the Pattie A. Clay Hospital had a much better rating than the Central Baptist Hospital, correct?

A A consumer might do that.

Q If a consumer did that -- well, let me just back up.

Actually, that's exactly the reason why

these ratings are here, right, so the consumers can compare these ratings to these various hospitals in the various areas, right?

MR. VAZQUEZ: Object to form. Compound.

A That may be a reason why.

Q (BY MR. STIMPSON) Okay. Thank you.

Now, you also knew that the Health Grades website was managed by Health Grades in the 2004 timeframe, right?

A The Health Grades website -- I'm just repeating the question. Repeat the question, please.

(Record read as requested.)

A Okay, yes, I did.

Q (BY MR. STIMPSON) And you knew that the Physician Quality Comparison Reports for 2004 included board certification, right?

A Correct.

Q You knew that came from third parties?

A It did.

Q Okay. And you knew it included licensure, right?

A I believe that was one of the elements we identified, yes.

Q And you knew that came from third parties?

A Yes.

Q Okay. You knew that the Physician Quality Comparison Report of 2004 included disciplinary information?

A Yes.

Q And you knew that came from third parties?

A Correct.

Q You knew that the Physician Quality Comparison Reports from 2004 included medical school information, right?

A Yes.

Q And you knew that came from third parties?

A Yes.

Q Okay. And you knew it also included internship, residency, and fellowship information, right?

A Correct.

Q And you also knew that all three of those came from third parties, right?

A Correct.

Q And then you also knew that the Health Grades website, in response to the request from the consumer, would create a report, could create a report on healthcare providers, right?

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A That's correct.

Q And you also knew that that report could be created using this information that we just talked about that came from third parties, right?

A Yes.

Q And you also knew that the report would also be made available to the consumer over the website, right?

A Yes.

Q So, Mr. Neal, the physician quality comparison reports for 2004 had numerous of the claim elements from your '060 patent, right?

MR. VAZQUEZ: Form. And, again, calls for expert testimony. He's not an attorney.

To the extent you can answer it, go ahead.

A I would have to defer to counsel on that one.

Q (BY MR. STIMPSON) So you're not going to answer that question?

A No.

MR. STIMPSON: Did he say no?

A I'm going to say I would defer to counsel.

Q (BY MR. STIMPSON) Okay. But my question is, are you refusing to answer that question?

have been 2003.

MR. STIMPSON: Actually, let me have this, David.

Q (BY MR. STIMPSON) Do you know what a premium report is?

A If you'd explain to me the definition.

Q Well, I'm just asking you if you know what a premium report is?

A It could mean a lot of different things to different people.

Q Well, did Health Grades have a premium report for its physicians?

A The name vaguely rings a bell with me, premium. We had a lot of different names assigned to what effectively were the same reports.

(Exhibit 50 marked.)

MR. STIMPSON: Let me show you what has been marked Exhibit 50, a multipage document bearing Bates numbers HGMKES 022179 and 80.

Q (BY MR. STIMPSON) This is an e-mail from Scott Montroy to Dave Hicks copying you, February 16, 2005, correct?

A It is.

Q Prepared and kept in the ordinary course

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of business at Health Grades?

A It appears so.

Q What is a pilot project? Can you explain to me what the pilot project is there?

A Pilot project for Dr. David Drucker was our prototype physician profile.

Q And when was that first put on the website?

A Let's see. This is February of 2005. So the prototypes, it suggests, based on this e-mail, that that prototype profile was hard-coded on our website in February of 2005.

Q Okay. What do you mean hard-coded?

A Hard-coded means that it was one of a kind. We didn't have an automated system to support other physicians being able to update the profile. Hard-coded means that within the actual development of the program code on the website, whatever content was visible on that physician profile had to be hard-coded in.

So it was actually typed in, there was an image that may have appeared within it. It was one of a kind. It was a prototype.

Q Do you think that was available on the

website as of at least February 2005, right?

A This doesn't say it was available on the website. I'm uncertain of the timing. So I can't say based on this document that it was the case.

Q The second bullet there, it says, Drucker patient experience data on pilot report in prod.

What does that mean?

A So in prod would be -- that would mean in production. So that would be on the website in some form.

Q So we know, as of February 16, 2005, at least that early, there was patient experience data in Dr. Drucker's report on the website available to the public, correct?

A Yes. I think that's a fair assumption.

Q And how would consumers find Dr. Drucker's report?

MR. VAZQUEZ: Form.

Q (BY MR. STIMPSON) For example -- let me just withdraw that, and I'll start another question.

A consumer could get on the Health Grades website in February 2005, type in, you know, doctors and, you know, Dr. Drucker in New York and up would pop Dr. Drucker's report?

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Q (BY MR. STIMPSON) I show you what has been marked as Exhibit 10, Mr. Neal.

Have you seen this document before?

A Press Release, I do recall seeing this.

Q And this confirms that as of August 2, 2005, Health Grades was adding physician -- adding physician satisfaction survey results to its Physician Quality Reports, correct?

A That's what the document says.

Q It also confirms that detailed physician and practice information from physicians themselves are being added as of that date?

A Yes, that's what it says.

Q What was the first time, to your recollection, that comparison ratings were provided to the Health Grades reports?

MR. VAZQUEZ: Object to form.

A What's the definition of a comparison rating?

Q (BY MR. STIMPSON) Well, what do you understand it to be?

A By my definition, a comparison rating is a score or rating that's assigned to an individual physician.

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Q Okay. Using that definition, when were comparison ratings first added to Health Grades' reports?

MR. VAZQUEZ: Form.

A I don't know.

Q (BY MR. STIMPSON) Well, how would the comparison ratings then differ from the physician satisfaction surveys, under your definition?

A The survey is just a survey.

Q Okay.

A We haven't assigned any type of rating or score. It's just a survey.

Q Okay. So how were they displayed in the Physician Quality Reports then?

A It would have just been the actual survey results, a compilation of those, but there were no scores assigned, and that was intentional for the reasons that I mentioned previously, because it was a risk to our business model.

Q All right. So as of August 2, though, we have physician satisfaction surveys and detailed physician and practice information from physicians in the quality reports, right?

A That's what this indicates.

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MR. STIMPSON: David, could I have this, please?

Q (BY MR. STIMPSON) Actually, before I get to this document, let me ask you this. The Drucker report we saw in Exhibit 51, why didn't you disclose that to the Patent and Trademark Office in connection with the application that led to the '060 patent?

A We weren't patenting the Drucker report. It was unrelated to what we were patenting.

Q Any other reasons?

A I think that's probably a good enough reason, at least in my mind.

Q All right. And how, in your mind, did what you were patenting differ from the Drucker report?

A The Drucker report was a prototype. It was for us to try to gain an understanding and try to conceptualize certain thoughts and ideas that we had.

But as it turns out, we ended up doing things differently. And maybe as a result of that, that influenced our future ideas in the way that we presented information and results and combined those results on our website.

Q So you said the reason you didn't disclose

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it was because it was unrelated, and I asked you how. And one reason you gave me was it was a prototype, right?

A Right.

Q Any other reasons?

A Why we didn't disclose it?

Q Yeah.

A It was not central to what we were patenting.

Q Why not?

A The patent was about the experience for the consumer on our website and specifically how we combined different elements of data to make it relevant to their experience and allowed them to differentiate physicians.

And the way that we were doing it was all about the experience, not an individual physician profile on our website. It was the overall experience.

So a report takes many forms. It's not just a physician profile. It's a list of physicians that are presented within search results. It's many different things. It's that form of presentation and the content of that presentation and the means of

differentiation which made up the patent. That didn't exist in the Drucker report.

Q Anything else? Anything else? Any other reasons?

A Not that I can recall right now.

Q Why don't you get the patent, Exhibit 3, please.

A Okay.

Q And you know where the claims are, right? Look at claim 1, starting with column 20. Sir, at the back, column 20.

A Column 20?

Q Yeah.

A Got it.

Q Can you go through that claim 1, sir, and -- actually, let me back up here.

Can I just have his last answer read back, something about it was not central to what we were patenting?

(Record read as requested.)

Q (BY MR. STIMPSON) Okay. We'll talk about that a bit later.

You had -- apart from the Drucker report, you had the Health Grades website, it was available

as of 2004. Consumers could get on and do searches for healthcare providers, right?

A Yes.

Q Let me show you what has been marked as Exhibit 53. It's a two-page document bearing Bates number HG 0209051 to 52.

(Exhibit 53 marked.)

Q (BY MR. STIMPSON) Actually, Mr. Neal, before I move on, though, I exhausted your reasons -- I just wanted to make sure I exhausted your reasons for why the Drucker report was not disclosed.

A To the best of my recollection, I shared with you --

Q Okay. Take a second and take a look at this e-mail and then I'll ask you some questions.

A Okay.

MR. STIMPSON: Jesus, same reason for redacting?

MR. VAZQUEZ: Yes. Pretty much any one that will be on the top like that is forwarding.

MR. STIMPSON: Gotcha.

A Okay.

Q (BY MR. STIMPSON) This is a series of e-mails, including you as a copy holder and an

addressee, in March of 2005?

A Yes.

Q Prepared and kept in the ordinary course of business?

A I believe so.

Q Who is Sarah Loughran, L-O-U-G-H-R-A-N? How do you pronounce that?

A Sarah Loughran.

Q Who was she?

A She was a senior executive at Health Grades. I think SVP provider services, if I recall correctly.

Q And Kerry Hicks was the president?

A CEO.

Q CEO. And Allen Dodge and Dave Hicks we know. What was the subject PNMM patent?

A So, that actually -- it wasn't so much a PNMM patent. PNMM, is that what you're asking about?

Q Yeah.

A I can't remember exactly what the acronym stands for. It had something to do --

Q Physician New Marketing Media?

A Okay, that sounds right. So, no, I notice that -- I'm saying the same things that I talked

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A No.

Q So how would I know whether I've got a complete list of the Health Grades products and services?

A Via all the disclosure that's been made today.

Q Right, but I mean, how would I know from this deposition whether I've got all the products and services that Health Grades was using before August 29, 2006?

A To the best of my ability, I have attempted to disclose those and communicate those to you today.

Q Were you involved in the prosecution of the '060 patent?

A What does involved mean?

Q Well, let me just change the question then.

Did you get copies of office actions from the Patent and Trademark Office?

A I don't recall receiving those.

Q Did you have any input into responses to the office actions?

A I'm sorry, can you go back and state the

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original question? I want to make sure that I'm following the line of questioning.

Q Sure. What I'm trying to get at, Mr. Neal, is whether or not you were kept up to speed as to what was happening in the prosecution of the '060 patent?

MR. VAZQUEZ: Object to form.

A As it relates to this and the MDx case?

Q (BY MR. STIMPSON) Yeah, well, it's about the '060 patent. So how that patent was obtained from the Patent and Trademark Office, I want to know whether you were kept up to speed as to what was happening during the prosecution?

MR. VAZQUEZ: Form.

A You're talking about the prosecution as it relates to this suit with MDx?

Q (BY MR. STIMPSON) As it relates to the '060 patent, yeah.

MR. VAZQUEZ: Form.

A So I'm confused by your question. Is it specific to the patent itself and being updated on what claims were granted as it relates to this patent? I don't think that's the question you're asking me.

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Q (BY MR. STIMPSON) No, that's not really part of it.

A Okay.

MR. VAZQUEZ: Just -- I think the confusion is the meaning of prosecution.

MR. STIMPSON: Okay. I'll explain it to him.

Q (BY MR. STIMPSON) So during the life cycle of the patent application, you file a patent application. Then, at least in this case, the patent officer rejected the claims, and then there was a response, and then maybe another rejection or response, and then eventually the patent issued.

So that's a series of things that happened in the life of that application that eventually led to the issuance of the patent.

A All right.

Q So my question to you, sir, is this was filed in 2006 and it issued in 2010. In that four-year period, were people keeping you up to speed and telling you what the Patent Office was doing?

A Oh, yes.

Q So you would get copies of the office actions?

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A I don't recall what they were, but I do remember speaking with the attorneys.

Q Okay. So would you have input into how responses were provided to the Patent and Trademark Office?

MR. VAZQUEZ: Form.

A There was communication with counsel. I can't recall the content of those conversations.

MR. STIMPSON: Can I have Defendant's Deposition Exhibit 12, please, David?

Just one second. Let's see if we need it. Well, maybe we can skip this and ask another question.

Q (BY MR. STIMPSON) It's your recollection that you were kept up to speed from your patent prosecution counsel as to what was happening in the prosecution of the '060 patent?

A Yes.

Q Okay. That's easy.

Did you get copies of prior art that was cited --

MR. VAZQUEZ: Object to form.

Q (BY MR. STIMPSON) -- from the Patent Office?

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A I do recall seeing something returned from the Patent Office that included references to prior art.

Q Did you read the references?

THE DEPONENT: This involved discussions and dialogue with counsel.

MR. VAZQUEZ: Right. As so we've talked, sometimes when you're in a deposition, you can answer his questions to the best of your ability. Just do not disclose the discussions, what was literally said in the meetings with prosecution counsel or with us.

A Okay. Prior art was a discussion topic.

Q (BY MR. STIMPSON) Okay. But my question was, did you read the prior art?

A I do recall having some conversation about the prior art.

Q But do you remember reading the prior art?

A In terms of looking exactly at what the patent officer returned to us?

Q Yeah, the prior art itself. For example, you might remember the Henley reference that was cited by the Patent Office?

A Yes.

Q Did you read that?

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A I did look at that prior art at the time.

Q Okay.

A I do recall looking at that.

Q Do you remember, Mr. Neal, that during patent prosecution Health Grades disclosed websites of other companies in connection with its patent prosecution?

A I don't recall.

Q Let's see if I can refresh your memory here.

(Discussion off the record.)

(Recess taken from 3:15 p.m. to 4:02 p.m.)

(Ms. Stoll-DeBell not present following recess.)

Q (BY MR. STIMPSON) I show you what has been marked as Exhibit 4. This is a record of the prosecution history before the Patent and Trademark Office, Mr. Neal.

Have you seen this before?

A I don't know what parts I may or may not have seen.

Q In the part that is flagged, there's an information disclosure statement. And it identifies, and I'll represent to you this is where Health Grades

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is disclosing to the Patent and Trademark Office websites of competitors.

Do you know, sir, why Health Grades disclosed websites of competitors as prior art?

A I don't recall.

Q Do you remember discussing this at all with counsel for -- your counsel?

MR. VAZQUEZ: Again, just if you discussed it, you can say yes or no. Just don't disclose any actual contents of the discussions.

A Yes.

Q (BY MR. STIMPSON) Yes, you did discuss it?

A Yes.

Q Okay. Did you discuss disclosing Health Grades' prior websites? Same conversation?

A I don't recall.

Q So you don't have -- you can't tell me today why these were disclosed but not the Health Grades prior websites?

A I don't recall any specific discussions about either Health Grades or any of these individual companies.

Q All right. But you know they were

discussed?

A The topic was discussed, yes.

Q All right. That's enough. That's a big document for just a short question. Thanks.

Have you talked to Mitch Rothschild before?

A I have, yes.

Q How many times have you talked to him?

A I believe only one time.

Q Okay. And when was that?

A I'm guessing that was -- it was 2009 or 2010.

Q What about?

MR. VAZQUEZ: Form.

Q (BY MR. STIMPSON) I'm sorry, what did you discuss with Mr. Rothschild?

A It was -- he had engaged a consultant to work for him that had formerly worked at Health Grades. The guy's name is John Morrow.

Q Um-hum.

A And I've known John going back some period of time. And John suggested that there may be an opportunity for a working relationship between Vitals and Health Grades at that point in time.