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

HEALTH GRADES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO PARTIALLY EXCLUDE EXPERT TESTIMONY OF DR. RICHARD G. COOPER PURSUANT TO FED. R. EVID. 403 AND 702, AND DAUBERT V. MERRIL DOW PHARMS., INC., 509 U.S. 579 (1993)

Exhibit L

October 9, 2012 Deposition of Richard Cooper

(selected portions)

IN THE UNITED STATES DISTRICT Court
FOR THE DISTRICT OF COLORADO

HEALTH GRADES, INC.,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 11-cv-00520-PAB-BNB
vs.	)	
	)	
MDx MEDICAL, INC. d/b/a,	)	
VITALS.COM,	)	
	)	
Defendant.	)	
	)	

THIS DEPOSITION IS HIGHLY CONFIDENTIAL
ATTORNEYS' EYES ONLY

DEPOSITION OF:
RICHARD G. COOPER, D.Sc.
TUESDAY, OCTOBER 9, 2012
10:00 A.M.

REPORTED BY:
KAREN I. PEARSON-BELL
CSR NO. 3557, RPR

Videotaped deposition of RICHARD G. COOPER, D.Sc., taken on behalf of the Plaintiff, at the Hampton Inn in Hemet, 3700 West Florida Avenue, Ramona Meeting Room, Hemet, California, commencing at 10:00 a.m., on Tuesday, October 9, 2012, before Karen I. Pearson-Bell, RPR, CSR No. 3557.

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Q. Well, sir, you just read this language into the record. It doesn't say it's from physicians. Maybe I will read it into the record. Quote:

"The following information is obtained from one or more third-party sources" --

A. Where are you reading?

Q. Page 6. Third paragraph after Heading E. Quote:

"The following information is obtained from one or more third-party sources: board certification, licensure, disciplinary action information, medical school, medical internship, medical residency and medical fellowship information," close quote.

A. Yes. That's --

Q. I read that accurately; right?

A. Yes, you did. And that is correct.

Q. Okay.

A. As stated here in the interrogatories.

Q. All right. So the Vitals website compiles information about licensure from third parties;

correct?

A. What do you mean by "compile"?

Q. Well, you are the computer expert, sir. What is the common meaning of the word "compile"?

A. To compile a source code, not data. Compiling is something that's done to a program to make it run on a machine. It's not --

Q. Right.

A. -- a term that's used in databases.

Q. And so we started this question or this line of questions by looking at the patent --

A. Yes.

Q. -- and Claim 1, Column 20, beginning at Line 50.

A. Uh-huh.

Q. Do you see where it says, "Compiling information"?

A. I do. That's the claim.

Q. Okay. And are you -- Does that not help you understand what "compiling" means in that claim language?

A. No, it doesn't. I think that's indeterminate, because the word "compiling" -- Hasn't that been construed in the Court's --

Q. Sure was. You read my mind. How about

turning to Exhibit 3?

A. 3. All right.

Q. And at the very last term on Page 24, the back page -- Just flip that over, sir. You'll be right at it.

A. Oh, okay.

Q. And do you see there where Judge Brimmer construed "compiling" or "compiled" to mean, quote, "gathering and/or putting together," close quote?

A. I do.

Q. Okay. So now can we return to my question, which is: The Vitals website compiles information about licensure from third parties; correct?

A. I will agree that that's what the Court construal states, compiling information from third parties, that's correct.

Q. And the Vitals website compiles information about medical school from third parties; right?

A. I believe that's true, yes.

Q. And the Vitals website compiles information about residency from third parties; correct?

A. I would like to see that in my report.

Q. Or you can turn to the response to interrogatories, sir.

A. Okay.

Q. You just read that.

A. What page would that be?

Q. Page 6.

A. Okay. The party?

Q. Yes. The third paragraph.

A. And the thing was residency?

Q. Yes, sir.

A. Medical residency, yes, that is mentioned in there.

Q. So the Vitals website compiles information about medical residency from third parties; correct?

A. According to the Court's construction of "compile," yes.

Q. Yes. And the Vitals website compiles internship information from third parties; correct?

A. Medical internship is also listed, yes.

Q. And the Vitals website compiles information about fellowship from third parties; right?

A. Medical fellowship, yes, that's correct.

Q. And the Vitals website compiles information about Board certification from third parties; right?

A. That's correct.

Q. And the Vitals website compiles information

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about disciplinary action from third parties; correct?
A. That's correct.
Q. Now, in your -- I believe it's your rebuttal report, at Paragraph 24.
A. My rebuttal report?
Q. Yes, sir. Which is Deposition Exhibit 1.
A. Okay. Where in that report?
Q. Paragraph 24.
A. 24. Okay. I'm there.
Q. And if you would please read that paragraph to yourself, and then I will ask you questions.
A. Okay.
Okay.
Q. In that paragraph, the reason why you believe that Vitals website does not literally infringe this third-party verified information limitation is what, sir?
A. Reading Paragraph 24:
"Dr. Greenspun's analysis relies on the fact that MDx obtains various items from third parties....Verification of the data, however, is not the same as receiving the data."

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And finally, on 26, there is a disclaimer by the providers that they do not guarantee or stand by the data and that it may be completely inaccurate.
So I would not consider that verified.
Q. Okay. So this gets back to the construction of what "verified" means; correct?
A. Correct. Are we on the construction document again?
Q. No. I'm just asking you that question.
A. Correct.
Q. And so it's an issue of claim interpretation; correct?
A. I suppose you could say that. I think it's quite clear what "verified" means.
Q. Okay.
A. And I think the Court construction is in line with the way I think it should be. Verifying is stated as checking the accuracy of the claim.
May I take a moment and get a --
Q. Sure. Let's go off the record.
A. -- some water? If you want to. But I can go ahead and answer the questions while I'm getting a refill.
MR. STIMPSON: Here, I'll get it for you.

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THE WITNESS: Oh, all right. Thanks.
MR. VAZQUEZ: You can bring that pitcher over here.
THE WITNESS: That's a good idea.
THE VIDEOGRAPHER: We are still on?
MR. VAZQUEZ: Yes, still on.
MR. STIMPSON: There you go.
THE WITNESS: Thank you.
MR. VAZQUEZ: So could you please read that last answer back about -- just what his response was.
(The answer was read as follows:
"A. And I think the Court construction is in line with the way I think it should be. Verifying is stated as checking the accuracy of the claim.")
BY MR. VAZQUEZ:
Q. Dr. Cooper, do you agree that the term "verified" should be given the same meaning when used in the phrase "healthcare provider verified" as when used in the term "third-party verified information"?
A. You are quoting out of context. But the healthcare provider-verified information is not

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verified in line with the construal by the Court if the healthcare provider was also the originator. The originator of the information can't verify his own information. That's a basic tenet.
Q. So that is your expert testimony, that the originator of the information cannot verify --
A. That's correct.
Q. -- their own information that they have provided?
A. That's correct.
Q. So, for example, a physician verifying that he is a male, under your -- your opinion is that that person cannot verify that?
A. Well, you're welcome to verify it, but he can't if he originated it.
Now, if the information came from elsewhere, then possibly he could.
Q. Okay. Do you agree that the term "verified," in the phrase "third-party verified," required only that MDx receive confirmation from a third party?
A. I'm sorry. Can you go through that again? I didn't -- Where your information is coming from, where is that question --
Q. Sometimes I'm just asking a question.

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BY MR. VAZQUEZ:
Q. All right. And you used the word "toss-up." It's a little more defined than that, isn't it? Didn't Mr. West testify that it would be the one they received from the most sources?
A. Yes. But in the example that you gave him, the hypothetical, you only give two source. So in that case, it would be a toss-up. It would be a probability, like a coin toss, as to which would not would be displayed.
Q. Okay. Let's keep our patent, '060 patent, in front of you, please.
A. Okay.
Q. And that's, again, Exhibit 2. And let's go back to Column 20.
A. Column 20. Okay. I'm there.
Q. Okay. And so I would like to focus on a line -- the element of Claim 1, which begins, "Creating," which is at Line --
A. 58?
Q. -- 58.
A. Would you like me to read the element?
Q. Yes, please. Just up to "providers."
A. "...creating, by the at least one computer processor, a

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healthcare provider report on the first healthcare provider using the healthcare-provider-verified information, the patient-provided information, and the information verified by the independent third-party source, wherein the healthcare provider report on the first healthcare provider includes comparison ratings of healthcare providers...."
Is that --
Q. Yes.
A. Did you want me to continue?
Q. Yes -- No, no. That's fine right there.
A. Okay.
Q. Do you agree, then, that this claim element, Dr. Cooper, does not require the display of healthcare provider-verified information?
A. It says a healthcare provider report. So that would either be displayed, printed, or e-mailed. But in one way or another, it would be readable. So, ultimately, it would have to be displayed in some form.
Q. And where does the claim say "display"?

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A. It doesn't use that word.
Q. Okay.
A. That's my interpretation of what a report is.
Q. Could you turn to Paragraph 37 of your rebuttal report, please.
A. That was 37?
Q. Yes. Paragraph 37 of your rebuttal report.
A. I'm there.
Q. Okay.
A. Okay.
Q. Just one second.
A. Okay.
Q. Turning to the patent, the language from the patent that you just read in, beginning, "Creating."
A. Okay.
Q. You agree that the Court held that this element does not require that all the physician-verified information be used to create the report; right?
A. No. Could you show me where that's in the Court's order?
Q. Okay. Sure. Let's look at Page 20.
A. That's Exhibit 3?

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Q. Yeah.
A. Okay.
Q. And if you see little bit past the halfway point, there is a -- the Court said, quote:
"Furthermore, the categories of information are being 'used' to 'create' a report" --
A. I'm -- I'm missing where that is on this here.
Q. Page 20.
A. Yeah, I'm on 20.
Q. Yeah. About halfway down. The sentence that begins, "Furthermore."
A. "Furthermore." Oh, I -- No. "Furthermore, the categories," but you are --
Q. Right. So --
A. Repeat the question, please.
Q. Okay. It says:
"Furthermore, the categories of information are being 'used' to 'create' a report. There is nothing in the patent that requires, when receiving, acquiring, or compiling information, a predetermination of

what will ultimately be put into a report."

A. I see that.

Q. And then, after citing, in a parenthetical that states:

"('The particular embodiments described herein are not intended to limit the types of information which may be provided and/or verified.')."

The quote went on and states:

"For instance, a patient or healthcare provider might provide information to the website that is not deemed relevant or important upon reaching the step of creating a report."

A. I see that.

Q. Okay. So having now looked at the Court's order, I'll go back to the question, which was: Didn't the Court hold that this element, the creating-by element that we were looking at --

A. Okay.

Q. -- does not require that all of the physician-verified information be used to create the report?

A. That's correct. It does not require that all the information be -- It doesn't specifically call that out.

Q. Okay. Now, did you state just a bit ago, in response to one of my questions, that the report must be displayed?

A. Can you read back my response on that, please.

Q. Well, let me just ask you new.

A. Okay.

Q. Are you stating that the report must be displayed?

A. I am saying, one way or another, the report has to be presented. And whether it's displayed, printed, e-mailed, whatever, is -- is a matter of presentation style.

Q. Okay. But that does not necessarily mean that the things used to create the report need to be displayed, does it?

MR. STIMPSON: Objection to the form.

THE WITNESS: I believe the Court's construction says that not all of it need be displayed, yes.

BY MR. VAZQUEZ:

Q. Exactly. So you agree, then, Dr. Cooper, that this claim element does not require the display of patient-provided information?

MR. STIMPSON: Objection to form. Asked and answered.

THE WITNESS: Yeah, same answer.

BY MR. VAZQUEZ:

Q. Which is it does not?

MR. STIMPSON: Objection to the form. It's asked and answered.

THE WITNESS: (No response.)

BY MR. VAZQUEZ:

Q. Even though your counsel objects, you still have to answer the question.

A. Well, I agree with Counsel. It was asked and answered. And if you would read back the answer, please, then --

MR. VAZQUEZ: Go ahead.

THE REPORTER: What am I reading?

MR. STIMPSON: I think it's around where he was referring to -- where you referred to --

MR. VAZQUEZ: We just --

MR. STIMPSON: Paragraph 37, I think, of his report is where he was referring to.

THE REPORTER: So you want me to search for Paragraph 37?

MR. STIMPSON: I think that's where he said it, yeah.

(The answer was read as follows:

"Q. You agree that the Court held that this element does not require that all the physician-verified information be used to create the report; right?"

"A. No. Could you show me where that's in the Court's order?")

MR. STIMPSON: I'm sorry. It must have been before that. I think it was before that then.

THE REPORTER: I don't know what I am looking for.

MR. STIMPSON: Okay. Sorry.

MR. VAZQUEZ: Can we agree that I can ask the question and you will answer it?

MR. STIMPSON: A second time, you mean?

MR. VAZQUEZ: Yeah. Because you could easily find it.

MR. STIMPSON: Okay. Well -- Oh, I can. Hold on. We will find it.

Q. And so this person needs to figure out which doctor should I pursue looking for more information on. Do you agree with that?
A. I agree that you are alleging that, yes.
Q. Yes. Well, not alleging it. I'm just saying it, Dr. Cooper.
A. Okay.
Q. The person is looking for information on doctors, and he received this information back --
A. Yes.
Q. -- which is about three doctors?
A. Yes.
Q. And then the person asks himself, well, which of these three doctors should I look for more information on. Okay?
A. Uh-huh.
Q. Does this information facilitate that person accomplishing that goal?
A. Within the meaning of the claims, no.
Q. Okay. And, sir, why within the meaning of the claims is your answer no?
A. Because it doesn't meet the limitations of comparing and using that information as specified in Claims 1 or 15, which are the independent claims.

Q. Okay. Do you believe that the answer to this question is irrelevant, Dr. Cooper?
MR. STIMPSON: Objection to form. What question?
MR. VAZQUEZ: The one I just asked.
THE WITNESS: Would you read the question back, please?
(The question was read as follows:
"Q. And, sir, why within the meaning of the claims is your answer no?")
THE WITNESS: No, that was -- Oh, okay. Because it doesn't satisfy the limitations of the claim.
BY MR. VAZQUEZ:
Q. I thought, Dr. Cooper, that earlier you said that it was not relevant.
A. I don't think it was that question that was irrelevant. I think that question just doesn't satisfy the meaning of the claims.
Can you read the question and the answer where I gave the word "irrelevant," please.
MR. VAZQUEZ: Or "not relevant." Just do a search for "relevant" or "irrelevant" in his responses.

(The record was read as follows:
"Q. ...on Page 23 of 64, Exhibit 10, would not allow a potential patient to choose which profile they want to look at?
"A. I suppose a patient could choose that without practicing the claims. So if you are saying within the meaning of the claims, choosing is not mentioned in the claims. Therefore, it's -- the question is irrelevant.")
THE WITNESS: That's --
BY MR. VAZQUEZ:
Q. That's your response?
A. Yeah. I stand with that response.
Q. Okay. So why is it that you believe that question is irrelevant?
A. Because it doesn't read on the claims.
Q. And so, Dr. Cooper, will you just refuse to answer questions that you think are irrelevant?
A. No.
Q. Just that one?
A. I'm sorry?
Q. Just that one?

A. That one is irrelevant. Therefore, I answered that it was irrelevant.
Q. That's good, Dr. Cooper. That's good. I need to run to the bathroom.
A. Me too.
Q. Let's take a break. Are we agreed?
MR. STIMPSON: Yes. How long have we been going?
THE VIDEOGRAPHER: The time now is 4:27. We are off the record.
(Recess taken.)
THE VIDEOGRAPHER: The time now is 4:39. We are back on the record.
BY MR. VAZQUEZ:
Q. Dr. Cooper, referencing Page 23 of 64 of Exhibit 10 again.
A. Yes.
Q. Okay. Do you agree that clicking a physician's name as listed on this results page, to use your words, allows a potential patient to access a report on a first healthcare provider?
A. I don't have reason to either agree or deny on that, but I will take your word for it if you want to say that it does.
In other words, all I have is the paper,

not the website in front of me.
MR. VAZQUEZ: Just pulling another exhibit here.
Please mark this as our next deposition exhibit, please. I think it's 11.
(Deposition Exhibit 11 was marked for identification by the Reporter and is annexed hereto.)
THE WITNESS: Are we staying on 23?
BY MR. VAZQUEZ:
Q. No. I am going give you a new exhibit.
A. Ah. Thank you.
Q. This is not the best copy. I apologize. I am looking at Page 24 of 32 of what we have just marked as Exhibit 11.
MR. STIMPSON: Can you wait until I get my copy, please? I want to catch up.
MR. VAZQUEZ: Sure.
MR. STIMPSON: Thank you. This is 11? Now, which page are you looking at, Jesus?
MR. VAZQUEZ: 24 of 32.
Q. And, Dr. Cooper, is this a report on Dr. Sujana S. Chandrasekhar?
A. It appears to be, yes.
MR. STIMPSON: I'm sorry. I can't seem

to -- Oh, I see. Okay. I'm with you. Okay.
BY MR. VAZQUEZ:
Q. And do you agree that a potential patient could click here on Dr. Chandrasekhar's name and --
A. Go ahead.
Q. -- and access a full report on the first healthcare provider?
A. All I am looking at is paper. I'm not sure that he could click on it. But if that's your assertion, I will go along with it, since I don't have evidence to the contrary.
Q. So assuming this is -- actually, the patient is looking at this on a screen, which is what we are assuming --
A. Okay.
Q. -- your answer is yes?
A. Yes.
Q. Okay. And is this an example of a healthcare provider report on the first healthcare provider?
A. I don't have evidence one way or the other on that. If you want to assert that, then I will accept that.
Q. Well, I think you agreed it was a report. Right?

A. It's an HTML display, which could be construed as a report under the right circumstances, but I don't know that it's construed as a report under Claims 1 or 15.
Q. Is it a report on this particular doctor, Dr. Chandrasekhar?
A. It mentions Dr. Sujana S. Chandrasekhar, M.D., but you haven't established that it's a report on the -- within the meaning of the claims. It is an HTML page, it looks like, that's been printed. It says at the bottom Screenshot 12.
Q. Yup. And is it a report on a particular doctor about whom information was requested?
A. I have no way of knowing that. In Paragraph 24:
"I" -- whoever "I" is --
"captured the entire page in four screenshots shown below:"
If that's correct, then the four screen shots would be 12, 13, 14, and 15.
Q. What are you referring to when you say "24 I"?
A. In Paragraph 24 --
Q. Oh, the word "I"?
A. "I" is used, yes, whoever "I" is.

Q. Okay. What happens, Dr. Cooper, when you click on a doctor's name in a results list on the Vitals website?
A. I don't know. I haven't clicked on that name. I have found that I can't get a report that meets the construction of the claim. That's all I know.
Q. Did you say you found that you can't, cannot get a report?
A. I cannot find a report that meets the construction of the claim.
Q. Okay. So I asked you what happens when you click on a doctor's name on a results list.
A. And I said I don't know, but I will accept your assertion that it brings up a report.
Q. Okay. But -- So have you done it yourself?
A. I have not looked at it that way, no. I looked at the report first, the results list second.
Q. Have you, yourself, clicked on a doctor's name in the report on the Vitals website?
A. In a report?
Q. Uh-huh.
A. This is -- I have not clicked on a

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doctor's name in a report, no.
Q. Have you -- So as part of just preparing for rendering your opinions or working on the case, Dr. Cooper, have you been on the Vitals website?
A. Yes, I have.
Q. How much time have you spent on the Vitals website?
A. Oh, I have no idea.
Q. Well, more than an hour?
A. Probably more than an hour, probably less than two.
Q. Okay. Thanks.
And so whether it's on a report within the meaning of the claims or a results list, have you had a chance to simply click on a doctor's name when it comes up on the Vitals website?
A. I don't recall clicking on the name itself. I have clicked on pages. I don't recall the name being one of those. Whether the name is a sensitive link or just text isn't clear from this material.
Q. Have you run a sample search query --
A. Yes.
Q. -- in the time you spent on the Vitals website?

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A. Yes, I have.
Q. And do you recall what query that was or what queries they were?
A. I ran a number of queries to see what the various attributes of the claim elements were practiced.
Q. So, for example, did you just run a search for a type of doctor?
A. Only a type of doctor?
Q. Yes.
A. I believe I did not. I searched for a type of doctor within a location of my -- my home within Hemet.
Q. Okay. Good. And so you received information in response to the query you submitted; correct?
A. That's correct.
Q. And did the information include doctors' names?
A. Yes, it did.
Q. And so did you click on any of those doctors' names?
A. Same answer as before. I don't recall clicking on the name, no.
Q. Okay. So, Dr. Cooper, you don't recall

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clicking on a name. Do you recall getting to a report on a doctor?
A. Yes. I did.
Q. Okay. And what was the information that you recall you accessed when you did that?
A. I don't recall that. I was on -- Information that may or may not have been equivalent to this.
Q. Well, then, how did you -- Do you recall how you got that report?
A. I recall I searched. I don't recall the details. Do you have access to the website now? Maybe we could clarify that.
Q. No. As you can see, we've got a pretty slow connection here.
A. Yes.
Q. Otherwise I would indulge you in that.
A. Okay.
Q. I'm just trying to see whatever you remember about the search queries you said you ran.
A. Yes.
Q. Obviously, you ran for, as you said, a type of doctor near Hemet?
A. Yes.
Q. You received some information. You say you

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remember getting to a doctor report?
A. I was getting to a doctor report, but whether that's within the meaning of the claims, my contention is no, it's not, because it didn't practice all the elements.
And that's what I spent my time looking for, whether the elements were practiced.
MR. VAZQUEZ: All right. I'll just move to strike that response. It's nonresponsive.
Q. Let's just move on, Dr. Cooper. Okay, Dr. Cooper, let's -- How was it that you pronounced the doctor's last name on Page 24 of 32 of Exhibit 11?
A. I pronounced it Sujana. I'm not sure if that's right. Chandrasekhar, which I believe is a reasonable approximation.
Q. Okay.
A. Probably not right --
MR. STIMPSON: Couldn't you pick Dr. Smith or something?
THE WITNESS: Smith, Jones.
MR. STIMPSON: Whose idea was this?
MS. STOLL-DeBELL: I have no idea.
BY MR. VAZQUEZ:
Q. Well, how about, just for simplicity, I