IN 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.

MDX MEDICAL, INC.'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE IN PART THE SUR-REPLY OF HEALTH GRADES, INC.

Defendant and Counterclaim Plaintiff MDx Medical, Inc. ("MDx") hereby submits this Reply In Support of Its Motion to Strike in Part the Sur-Reply of Health Grades, Inc. (the "Motion", dkt. # 38).

Health Grades refuses to directly address the following facts in its opposition to MDx's Motion ("Opposition", dkt. # 47):

(1) In its opposition (dkt. # 23) to MDx's motion for partial summary judgment of non-infringement, Health Grades advanced the singular infringement argument that the MDx "patient rating" found in the report on a specific healthcare provider (as shown in MDx's Attachment D to Exhibit 1 to dkt. # 9) met the "comparison ratings of healthcare providers" required by every claim of the '060 Patent (*see* dkt. # 23, at 6); and

(2) In its sur-reply ("Sur-Reply", dkt. # 37), Health Grades changed course entirely – now pointing to a different part of the MDx www.vitals.com website (the "MDx Website") that is entirely separate from the report on a specific healthcare provider – while expanding its

infringement arguments **threefold** in contending that "MDx's website provides 'Comparison Ratings' in at least three instances". Sur-Reply at 3-6.

The proper time for Health Grades to advance all of its infringement theories was in response to MDx's argument that there is no infringement, *i.e.*, in its opposition to MDx's motion for summary judgment of non-infringement, and indeed Health Grades provides no explanation as to why it could not have done so. While Health Grades states (on at least six different occasions) that its newest infringement theories were inserted as a "direct consequence" of, or to "respond to" the MDx claim construction (Opposition at 3-5), it nowhere attempts to explain that bald statement.[1]

Indeed, MDx's proposed claim construction of "comparison ratings of healthcare providers" has been consistent throughout, *i.e.*, plain and ordinary meaning. *See* MDx reply, dkt. # 30, at 5 ("the **plain and ordinary reading** of comparison ratings of healthcare providers must be ratings of multiple providers other than the first provider on whom the report is provided") (emphasis added). Was the genesis of the new Health Grades infringement theories really the MDx claim construction, or is Health Grades simply waffling on its infringement theories and unable to find one that works?

While the new Health Grades arguments should be stricken, in the end, whether Health Grades points to the "patient rating" in the report on a particular healthcare provider, or to the listing of doctors and ratings that are entirely separate from any report on a particular healthcare provider, the infringement allegation fails. The simple fact is this: ***the current MDx Website***

[1] To the extent Health Grades argues that certain arguments in MDx's reply in support of its summary judgment motion (dkt.# 30) should be deemed waived, this argument of Health Grades should be denied in view of Health Grades having filed its Sur-Reply.

lacks any "comparison ratings of healthcare providers" in a report on a particular healthcare provider, as required by every claim of the Health Grades patent.

MDx respectfully requests that Section B of the Health Grades Sur-Reply, and corresponding Exhibits A and B, be stricken in their entirety, and the Court grant MDx's motion for partial summary judgment of non-infringement.

Dated: August 2, 2011

Respectfully submitted,

s:/Scott D. Stimpson

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2011, I electronically filed the foregoing MDX MEDICAL, INC.'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE IN PART THE SUR-REPLY OF HEALTH GRADES, INC. 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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