IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

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

HEALTH GRADES, INC.,

Plaintiff,

vs.

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

Defendant.

HEALTH GRADES, INC.'S SUPPLEMENTAL RESPONSE TO MDX MEDICAL, INC.'S MOTION TO STRIKE HEALTH GRADES, INC.'S SUPPLEMENTAL INFRINGEMENT CONTENTIONS

Plaintiff Health Grades, Inc. ("Health Grades"), by its undersigned counsel, respectfully submits its Supplemental Response to MDx Medical, Inc.'s Motion to Strike Health Grades, Inc.'s Supplemental Infringement Contentions (the "Motion")[Doc. #62], and states in support:

1. At the hearing held today, Friday, December 2, 2011, on MDx's Motion, counsel for MDx introduced an email that he wrote to counsel for Health Grades on September 22, 2011. Exhibit A, attached hereto.

2. On page 2 of the email, counsel for MDx wrote: "As I mentioned to you yesterday, we may still be willing to reach agreement on this issue, but we need to know that we are receiving similar cooperation and compromise in return."

3. As explained in Health Grades' Response [Doc. # 71], prior to September 22nd the parties had already reached an agreement that they would not oppose each other's respective supplements. Response [Doc. #71] at pg. 2.

4. Setting aside for argument's sake that an agreement was already reached, the September 22nd email shows that as of that date MDx was conditioning the agreement on "receiving similar cooperation and compromise in return." Such "similar cooperation and compromise" was indeed given by Health Grades "in return" by virtue of Health Grades' continuing agreement that it would not oppose if MDx supplemented it's invalidity contentions. The fact that Health Grades agreed that MDx could supplement its invalidity contentions is shown by the letter dated September 2, to counsel for MDx, in which counsel for Health Grades articulated what Health Grades was requesting that MDx include in MDx's supplement. [Doc. # 71-1] Health Grades has always maintained that it would not oppose a supplement by MDx, and MDx has not stated otherwise, either in its Motion or at the hearing.

5. It is not clear what other "similar cooperation and compromise" the September 22nd email contemplated beyond Health Grades' agreement to not oppose MDx's supplement. But what is clear is that Health Grades has always agreed that it would not oppose a supplement by MDx, and – most importantly - ***Health Grades made its supplement less than one month after this email was sent***, i.e., on October 20th. As discussed in the Response and in the *02 Micro* case cited therein - an agreement to supplement between the parties may satisfy the diligence requirement, and reliance on a tentative agreement or on misleading conduct by a party that leads the other party to believe an agreement would be reached may justify delay. *See 02 Micro Int'l, Ltd. v. Monolithic Power Systems, Inc.*, 467 F.3d 1355, 1367 (Fed. Cir. 2006). Here, again setting aside for argument's sake only that an agreement was reached before September 22nd - the September 22nd email shows that Health Grades' justifiably relied on the tentative agreement offered by counsel for MDx, particularly given that Health Grades has always

afforded MDx "similar cooperation and compromise in return" on the issue of supplementing contentions.

Respectfully submitted this 2nd day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2011, I electronically filed the foregoing HEALTH GRADES, INC.'S SUPPLEMENTAL RESPONSE TO MDX MEDICAL, INC.'S MOTION TO STRIKE HEALTH GRADES, INC.'S SUPPLEMENTAL INFRINGEMENT CONTENTIONS 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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