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.

PARTIES' JOINT AND AGREED-TO MOTION TO MODIFY SCHEDULING ORDER AND EXTEND FACT DISCOVERY CUT-OFF, EXPERT REPORTS DEADLINE AND EXPERT DISCOVERY CUT-OFF

Plaintiff and Counterclaim Defendant Health Grades, Inc. ("Health Grades"), and Defendant and Counterclaimant MDx Medical, Inc. d/b/a Vitals.com ("MDx")(collectively, the "Parties"), by their respective undersigned counsel, pursuant to D.C.Colo.LCivR 6.1(C) and (D), D.C.Colo.LCivR 7.1, and Sections 12 and 13 of the Scheduling Order in this case, respectfully submits their Joint and Agreed-To Motion to Modify Scheduling Order and Extend Fact Discovery Cut-Off, Expert Reports Deadline and Expert Discovery Cut-Off, and state in support:

Conferral pursuant to D.C.Colo.LCivR 7.1(A)

Undersigned counsel have conferred with each other regarding the relief requested herein and have agreed to the modifications to the Scheduling Order requested herein.[1]

[1] In its pending motion to compel discovery [Doc. # 65], MDx stated in footnote 10 (p. 13) its objection to any extension of the fact discovery deadline that would delay the timely adjudication of this case on the merits. MDx has only agreed to the extension requested herein given that the parties are not requesting any extension of the pre-trial conference date.

Joint and Agreed-To Motion

1. In accordance with Section 9 of the Scheduling Order in this case [Doc. #34], the fact discovery cut-off is January 16, 2012, and the expert discovery cut-off is March 31, 2012. Also pursuant to Section 9, expert reports are due by January 16, 2012, and rebuttal expert reports are due by February 16, 2012.

2. The Parties have conferred and have agreed that in light of the anticipated depositions that remain to be taken in the case, good cause exists for a thirty-day extension to the foregoing deadlines.

3. Health Grades is taking the deposition of Mr. Jeff LaPointe in New York on December 15, 2011. Health Grades had agreed to take the deposition of Mr. Mitchell Rothschild, MDx's CEO, on December 16, 2011, also in New York. However, Mr. Rothschild has indicated that due to religious reasons he is not available for the entire day on the 16th, and thus the Parties have agreed to reschedule his deposition. Health Grades has also advised MDx that it intends to take a Rule 30(b)(6) deposition of MDx, as well as the depositions of MDx employees Larry West, Erica Boyer, and Jeff Cutler.

4. MDx is taking the inventor depositions of Mr. John Neal on January 11, 2012, and of Mr. Dave Hicks on January 12, 2012. MDx also intends to take the deposition of Mr. Scott Montroy, the third inventor. Mr. Montroy is available for his deposition the week of January 16, 2012 and the Parties are working to schedule his deposition. MDx has also informed Health Grades that it intends to take Rule 30(b)(6) depositions of Health Grades regarding prior art and damages issues, respectively. MDx has provided Health Grades with lists of topics for those depositions so that Health Grades can determine designees and available deposition dates.

5. In light of the time required to adequately prepare for and to take the foregoing depositions, and of the fact that the *Markman* hearing in this case is set for January 19, 2012, at 8:30 a.m., the Parties respectfully submit that additional time is needed to complete fact discovery, to submit their expert reports, and to complete expert discovery. The Parties therefore request that the deadlines set forth in paragraph 1 above be modified as follows:

> Fact discovery cut-off: February 16, 2012
>
> Expert discovery cut-off: April 30, 2012.
>
> Expert designations and all information specified in Fed. R. Civ. P. 26(a)(2) by February 16, 2012.
>
> Rebuttal expert designations and all information specified in Fed. R. Civ. P. 26(a)(2) by March 16, 2012.

6. The foregoing modified deadlines are well in advance of the final pretrial conference scheduled on June 14, 2012, at 8:30 a.m.

7. The Parties have not previously requested that these deadlines be modified. A copy of this motion will be simultaneously served on Health Grades and MDx by their respective undersigned counsel.

WHEREFORE, for good cause shown, the Parties respectfully request that the Court grant their motion and modify the deadlines as set forth in paragraph 5 above, and that the Court amend the Scheduling Order accordingly.

Respectfully submitted this 9th day of December, 2011.

ROTHGERBER JOHNSON & LYONS LLP

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2011, I electronically filed the foregoing **PARTIES' JOINT AND AGREED-TO MOTION TO MODIFY SCHEDULING ORDER AND EXTEND FACT DISCOVERY CUT-OFF, EXPERT REPORTS DEADLINE AND EXPERT DISCOVERY CUT-OFF** 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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