IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:25-CV-80526-DMM

GOOD SAMARITAN MEDICAL CENTER, INC., et al.,	)
Plaintiffs,	)
v.	)
THE LEAPFROG GROUP,	)
Defendant.	)

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE LEAPFROG'S EXPERT WITNESSES

This case is about hospitals owned by a multibillion-dollar corporation wielding a Florida consumer-protection statute to silence free speech. Plaintiffs' aim is clear from their Amended Complaint, where they seek injunctive and declaratory relief and assert that Defendant, The Leapfrog Group's ("Leapfrog"), methodology is unfair, or that its disclosure about that methodology are deceptive, but do *not* seek an injunction addressed at the disclosures or methodology. Instead, they ask this Court to silence Leapfrog by prohibiting it "from including Plaintiffs in its Hospital Safety Grades." (ECF No. 74, at 41). Since Plaintiffs receive uniformly negative grades from other rating entities (including Centers for Medicaid and Medicare ("CMS"), Mayo Clinic, and Healthgrades), it is not surprising that they do not want to be graded.

Now, however, Plaintiffs also seek to silence Leapfrog's expert witnesses through their Motion to Exclude Leapfrog's Expert Witnesses (the "Motion") (*see generally,* ECF No. 96). In Plaintiffs' view, none of Leapfrog's experts (including a neurosurgeon, an epidemiologist, a human factors engineer, and a chartered financial analyst) are qualified to provide expert testimony and none of their opinions are reliable or helpful to this Court. Once again, the fact that Plaintiffs

take this position is not surprising, because Leapfrog's expert witnesses thoroughly undermine the basic theories of Plaintiffs' case. As explained below, however, there is no basis to exclude any of Leapfrog's expert witnesses. The Court can and should hear their testimony.

ARGUMENT

I. THE MOTION SHOULD BE DENIED WITH RESPECT TO MARK RULE.

Mark Rule is a partner and managing director at a global consulting firm with a master's degree from the University of Chicago and over 25 years of experience providing operational, financial, litigation, and other types of consulting to clients in a diverse range of industries, including healthcare. (*See*, ECF No. 96-4, Rule Rep., at ¶¶ 5-6.) He has been qualified as an expert in U.S. federal and state courts as well as arbitrations before the American Arbitration Association, International Chamber of Commerce, and JAMS. (*Id.* at ¶ 5). His role in this case is solely as a rebuttal witness, and his opinions are direct responses to the expert witnesses proffered by Plaintiffs. (*See, Id.* at ¶ 1). In spite of this, Plaintiffs seek to exclude him as unqualified and to exclude his testimony as irrelevant. Those arguments should not be credited.

A. Mr. Rule's Opinion That Plaintiffs' Experts Failed To Demonstrate Any Economic Harm Is Relevant To Whether Plaintiffs Are Aggrieved By Leapfrog's Conduct Or Have Article III Standing.

In his first opinion, Mr. Rule, a rebuttal expert responding directly to Plaintiffs' proffered expert witnesses, concludes that "Plaintiffs' Experts failed to demonstrate" and "have not undertaken the requisite analyses to reliably conclude that Plaintiffs have suffered economic harm (*i.e.*, substantial injury) due to the alleged actions" of Leapfrog. (ECF No. 96-4 at ¶¶ 20, 27.) Despite proffering their own experts' opinions on the same subject, Plaintiffs attempt to discredit Mr. Rule's opinion as "irrelevant" by painting Mr. Rule's opinion as a pure damages opinion and arguing that they have withdrawn their actual damages claim. (*See*, ECF No. 96 at § E.1). Yet this argument completely ignores (as Plaintiffs have repeatedly done throughout this case) Plaintiffs'

burden to establish that they suffered some concrete injury caused by Leapfrog, both to establish that they were "aggrieved" under FDUTPA and to establish Article III standing. Plaintiffs also fail to explain the irreconcilable position that it is relevant for their own experts to opine that the Leapfrog grades likely have a "reputational impact" on Plaintiffs, but irrelevant for Mr. Rule to rebut that opinion.

Leapfrog and Plaintiff Hospitals agree that to succeed on a FDUTPA claim for equitable relief only, Plaintiffs need not quantify a specific amount of actual damages. Instead, they must establish that they are "aggrieved" by the allegedly unfair or deceptive act or practice. Yet Plaintiff Hospitals appear to take this to mean that they have no obligation to show any injury whatsoever, making the term "aggrieved" wholly meaningless. Clearly, this cannot be the correct standard.

To be aggrieved under FDUTPA, "the injury claimed to have been suffered cannot be merely speculative." *Stewart Agency, Inc. v. Arrigo Enterprises, Inc.*, 266 So. 3d 207, 214 (Fla. 4th DCA 2019); *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 173 (Fla. 1st DCA 2015). Further, because Plaintiff Hospitals are business entities and do not "share the characteristics of humans, such as being 'angry or sad,'" they cannot be "aggrieved" simply through hurt feelings or emotional distress. *See Stewart Agency, Inc.*, 266 So. 3d at 213-14; *see also Rosenberg v. DVI Receivables, XIV, LLC*, 2012 WL 5198341, at *5 (S.D. Fla. Oct. 19, 2012) (distinguishing reputational harm to individuals versus corporations and noting that loss of goodwill requires expert testimony and calculations); *St. Paul Fire & Marine Ins. Co. v. Naples Cmt. Hosp., Inc.*, 585 So. 2d 374, 376 (Fla. 2d DCA 1991) (holding that a corporation can only be injured by a false publication with respect to its credit, property, or business, because it "has no reputation in the sense that an individual has").

Further, Leapfrog's alleged deceptive or unfair act or practice must be the but-for cause of Plaintiffs' harm. *See, e.g., Stewart Agency, Inc.*, 266 So. 3d at *214-15 (affirming summary judgment for defendant on FDUTPA claim for equitable relief where plaintiff did not show that it was adversely affected because of defendant's actions); *see also Cravens v. Garda CL Southeast, Inc.*, 2024 WL 5058304, at *12 (S.D. Fla. Dec. 9, 2024) ("A plaintiff is aggrieved under FDUTPA when the deceptive conduct *has caused a non-speculative injury* that has affected the plaintiff beyond a general interest in curbing deceptive or unfair conduct.") (quotations omitted) (emphasis added).

These requirements under FDUTPA also align with Plaintiffs' burden to establish Article III standing, which requires that: (1) they suffered an "injury-in-fact," (2) there is a causal connection between the asserted injury-in-fact and the challenged action, and (3) the injury will be redressed by the requested relief. *Shotz v. Cates*, 256 F. 3d 1077, 1081 (11th Cir. 2001). Thus, Plaintiffs bear the burden of establishing that the allegedly deceptive act or practice caused a concrete, non-speculative injury-in-fact. Mr. Rule's rebuttal opinion is relevant to whether they have done so.

Additionally, while Plaintiff Hospitals concede that their experts did not *quantify* damages, they have not withdrawn any of their expert testimony. Plaintiffs continue to propound the testimony of Dr. Berger and Mr. Chakurda, including their opinions as to whether the Leapfrog grades have a "reputational impact" on Plaintiff Hospitals or are likely "deter consumers from choosing Plaintiff Hospitals." (*See*, ECF No. 96-4 at ¶¶ 10-15 (summarizing opinions of Dr. Berger and Mr. Chakurda)). Plaintiffs fail to satisfactorily explain how the speculative conclusions of their experts are relevant, yet Mr. Rule's rebuttal of those conclusions is not.

Finally, Plaintiffs' assertion that Mr. Rule's opinion is "based on" an incorrect assumption because he was not aware they had withdrawn their request for monetary damages mischaracterizes Mr. Rule's analysis and opinion. Mr. Rule opines that Plaintiffs' experts have not established *any* non-speculative injury caused by the allegedly unfair or deceptive act or practice. This opinion does not hinge or "rest on" what relief Plaintiffs are seeking. Indeed, Mr. Rule testified that the withdrawal did not change his opinions, and that "the easiest way . . . to show that there's substantial injury is to actually quantify the injury." (ECF No. 96-9, Rule Dep., at 263:3-8, 22-25; 267:4-8).

Because Mr. Rule's first opinion directly addresses the sufficiency of Plaintiffs' own expert testimony – which Plaintiffs have not withdrawn – and addresses the key issues of whether they have established non-speculative injury and causation, it is relevant and helpful to the trier of fact. *See Rosenberg*, 2012 WL 5198341, at *5.

B. Mr. Rule's Sensitivity Analysis Is Relevant, Reliable, And Helpful To The Trier Of Fact.

Mr. Rule's second opinion concludes that the four imputed measures used by Leapfrog – the components of Leapfrog's grading methodology that Plaintiffs dispute as deceptive and unfair – are not a significant driver of Plaintiffs' overall safety grades. To form this opinion, Mr. Rule conducted a sensitivity analysis, a common method of assessing the robustness of a data analysis by altering one input or assumption to determine the impact on results or conclusions. Plaintiffs attack this opinion on three grounds: helpfulness of the analysis, reliability of the methodology, and relevance of Mr. Rule's qualifications. All three grounds fail.

1. *Mr. Rule's Counter-Analysis Is A Relevant And Helpful Rebuttal To Plaintiffs' Expert.*

Plaintiffs argue that Mr. Rule's analysis is irrelevant and unhelpful because "(t)he issue before the Court is whether Leapfrog's use of the Four Measures – the only measures for which

Leapfrog imputes scores – artificially depressed the Community Hospitals' Safety Grades." (*See*, ECF No. 96 at 28). Yet this is exactly the question that Mr. Rule's sensitivity analysis answers. (*See*, ECF No. 96-9 at 344:14-17 ("(T)hat's the whole point of the sensitivity analysis is to remove them from the calculation to see if they are the driver of the lower grade.")). Mr. Rule concludes that the four measures for which Leapfrog uses imputed values are *not* a significant driver of Plaintiff Hospitals' overall safety grades. (ECF No. 96-4 at ¶ 34).

Further, Plaintiffs propound their own sensitivity analysis via their expert witness, Dr. Nicholson. Mr. Rule's analysis is a direct counter to that. (ECF No. 96-9 at 371:7-13) (describing analysis as "very similar to plaintiffs' experts"). Specifically, Dr. Nicholson analyzes how the safety grades Leapfrog awarded to Plaintiff Hospitals would change if they received "the average score that participating hospitals gave themselves" for each of the four imputed measures and three other measures, rather than the scores imputed by Leapfrog. (ECF No. 97-3, Nicholson Rep., at ¶ 66). Yet Dr. Nicholson's analysis still relies on "imputation" or assumed data: exactly the issue that Plaintiffs' claim makes the Leapfrog methodology unfair or deceptive. Dr. Nicholson's analysis differs from the actual Leapfrog grades only in that he elects to impute values that are more favorable to the Plaintiffs.

As a counter-analysis, therefore, Mr. Rule eliminates the need to impute any unknown data by considering how Plaintiffs' overall safety grades would (or would not) change if the four disputed measures were removed. Mr. Rule follows the Leapfrog grading methodology to compare with—changing the four disputed measures and redistributing their weight proportionally to the remaining measures in order to assess the impact of those four measures on the overall grade.

Plaintiffs fail to provide any satisfactory explanation for how their own expert's sensitivity analysis, analyzing what they assert is the only question before the Court, is relevant, yet Mr.

Rule's analysis, answering the same question without the need to assume values, "does not relate to any issue in the case." Plaintiffs' argument is illogical.

2. *Mr. Rule Is Highly Qualified To Conduct A Statistical Sensitivity Analysis.*

Mr. Rule holds a master's degree in business administration from the University of Chicago with a concentration in economics and has over 25 years of professional experience working with statistical analysis. (*See,* ECF No. 96-9 at 329:7-17; 328:6-16; ECF No. 96-4 at App'x 1). Much of that experience focuses on hospitals and the healthcare industry. (*See,* ECF No. 96-9 at 27:18-28:7; 31:4-14; 39:6-40:25). He has previously been qualified as an expert on statistical analyses. (*Id.* at 325:20-22). In his twenty-five-year career, he has never had an expert opinion excluded on qualification grounds. (*See, Id*. at 70:16-21; 71:25-72:14).

Plaintiffs' narrow argument that Mr. Rule is unqualified to opine on the particular sensitivity analysis at issue because he has never testified in a case that was specifically focused on hospital ratings or built a hospital grading methodology misses the point. Mr. Rule's proffered opinion does not involve building a hospital rating system or grading methodology. Nor does it involve evaluating the import or validity of such a methodology from a healthcare factors perspective. Instead, Mr. Rule's opinion is limited to analyzing whether, within the existing grading methodology used by Leapfrog, the four disputed measures have a statistically significant or material impact on the overall grades. (*See,* ECF No. 96-9 at 371:7-372:7). Indeed, this is exactly what Mr. Rule completed when he "personally went through and double-checked all the math, making sure that z-scores were being calculated appropriately, making sure that it made sense…from a statistics perspective." (*Id.* at 162:7-17). Mr. Rule is more than qualified to offer that opinion.

3. *Mr. Rule Applies A Reliable And Commonly Accepted Methodology Of Testing The Impact Of Specific Variables On An Outcome.*

Sensitivity analyses such as the one conducted by Mr. Rule are a generally accepted statistical method of analyzing how changes in input variables affect the output or outcome of a model or decision, and are commonly used across multiple industries, from designing and testing clinical research in the healthcare field to assessing financial risk for business plans.[1] Indeed, this methodology is so common that Plaintiffs' own witness used it. (*See,* ECF No. 96-9 at 125:15-22; 155:23 (comparing analysis to that of Dr. Nicholson); ECF No. 97-3, Expert Report of Sean Nicholson, at ¶ 66 (describing "rescoring exercise")). And regardless, Mr. Rule verified his own opinions by personally double checking the math and z-scores used in the sensitivity analysis based on his own statistics perspective. (ECF No. 96-9 at 162:7-17).

To the extent Plaintiffs again argue that Mr. Rule's sensitivity analysis "tests the wrong question," they are mistaken because he tests the very question they claim is at issue in this case. (*See, supra* Section I.B.1). Further, Plaintiffs' assertion that Mr. Rule "acknowledged that the proper 'but-for' world is one where non-participating hospitals participate in Leapfrog's Survey and receive actual scores" misrepresents his testimony and the reliability standard. Nowhere in the deposition transcript pages cited by Plaintiffs does Mr. Rule make such a concession.

However, even if Mr. Rule had made such a statement, this would not make his analysis unreliable. Rule 702 and *Daubert* do not require that an expert use the best or a perfect methodology, only a reliable one. *See United States v. Pete*, 2023 WL 4928523, at *3 (N.D. Fla. July 2023) ("Importantly, the methodology need only be sufficiently reliable under *Daubert*, not

[1] *See, e.g.*, Thabane, L., Mbuagbaw, L., Zhang, S. *et al*. A tutorial on sensitivity analyses in clinical trials: the what, why, when and how. *BMC Med Res Methodol* 13, 92 (2013). https://doi.org/10.1186/1471-2288-13-92 (discussing use of sensitivity models in clinical research, including as a tool for comparing different strategies for imputing missing data); Tim Vipond, *What is Sensitivity Analysis?*, Corporate Finance Institute, https://corporatefinanceinstitute.com/resources/financial-modeling/what-is-sensitivity-analysis/ (describing sensitivity analysis as a tool used in financial modeling, and in a wide range of fields, to analyze how different variables impact the output).

infallible.") (citations omitted); *Adel v. Greensprings of Vermont, Inc.*, 363 F. Supp. 2d 683, 689 (D. Vt. 2005) ("Rule 702 and *Daubert* do not require an expert to use the best method available, they only require that the evidence be relevant and reliable."); *In re Turkey Antitrust Litig.*, No. 19 C 8318, 2025 U.S. Dis. LEXIS 133749, at *8 (N.D. Ill. Jan. 22, 2025) ("It is important to note that *Daubert* requires only a reliable methodology, not a perfect one."). Neither Mr. Rule nor anyone else could compare the grades Plaintiffs received to the grades they would have received if they had provided the survey data – the method argued by Plaintiffs here – because ***Plaintiffs refused to provide that data, even to their own expert***. Thus, both Plaintiffs' own proffered expert and Mr. Rule conducted sensitivity analyses to analyze the impact of the missing or imputed data on the overall grade. (ECF No. 96-4 at ¶¶16-18; 28-34).

Finally, Plaintiffs' claim that Mr. Rule "admitted" that "he 'redistributed' the weights 'evenly' without analysis" and "performed no testing and admitted he just trusted 'Leapfrog and their advisors,'" but that claim blatantly misrepresents Mr. Rule's testimony and opinions. Nowhere does Mr. Rule state that he "just trusted" Leapfrog or that he "performed no testing" or operated "without analysis." In response to direct questions from Plaintiffs' counsel, Mr. Rule answered that he does not have any basis to question the validity of Leapfrog's methodology. However, as noted above, his opinion is limited to a statistical analysis of whether the four disputed measures are a driver of Plaintiffs' low grades under the existing methodology. (ECF No. 96-4 at ¶¶28-34). In fact, during his deposition, Mr. Rule even explained in excruciating detail how the statistical excel model works in conjunction with the weights, codes, and formulas. (ECF No. 96-9 at 180:13-191:19). And, Mr. Rule "personally went through and double-checked all the math, making sure that z-scores were being calculated appropriately, making sure that it made

sense…from a statistics perspective." (*Id.* at 162:7-17). Accordingly, he follows the Leapfrog grading methodology closely in order to isolate the changes to the four disputed measures.

Because Mr. Rule is a highly qualified witness, his rebuttal analysis is focused and relevant, and his sensitivity analysis is a reliable and commonly accepted methodology of testing the impact of specific variables on an outcome, Plaintiffs' Motion must be denied with respect to him.

II. THE MOTION SHOULD BE DENIED WITH RESPECT TO DR. ANTHONY HARRIS.

Efforts to exclude expert testimony must clear a high bar. This is because, "in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion." *TRA Farms, Inc. v. Syngenta Seeds, Inc.*, No. 5:12-CV-378-MW/EMT, 2014 WL 1478846, at *2 (N.D. Fla. Apr. 15, 2014) (quoting *Assured Guar. Mun. Corp. v. Flagstar Bank*, FSB, 920 F.Supp. 2d 475, 502 (S.D.N.Y. 2013)). Plaintiffs do not meet these standards. Their attacks on Dr. Harris raise at most credibility questions, not admissibility. As Judge Dimitrouleas has explained, a "credibility challenge goes to the weight" that a factfinder may attribute to an expert's testimony, "not to the admissibility of his opinion." *Sanchez-Knutson v. Ford Motor Co.*, 181 F. Supp. 3d 988, 994 (S.D. Fla. 2016). Judged by these standards, Plaintiffs' criticisms of Leapfrog's experts are overblown.

A. Dr. Harris's First Opinion Is Not Based On Falsehoods And Is Sufficiently Reliable.

Dr. Harris offered his opinion concerning the methodology that generated Leapfrog's Fall 2024 Hospital Safety Grades. (*See*, ECF No. 96-3, Harris Rep., at 12). Dr. Harris testified that Leapfrog's Safety Grade Expert Panel "discussed change" in the company's methodology. (*See*, ECF No. 96-8, Harris Dep., at 105:16-21). Indeed, this is evidenced within the transcript of the expert panel meeting (that was presented as an exhibit in Dr. Harris' deposition) where the panel spent "a majority of the time talking about…some proposed changes to the model…for imputing

scores for hospitals." (ECF No. 88-12 at 13:18-31:20). Following the panel's "recommendation," Leapfrog implemented that change. (ECF No. 96-3 at 14).

One line in Dr. Harris's 27-page report uses the word "chose" to refer to the panel's recommendation. (*Id.* at 13). Plaintiffs fault Dr. Harris's use of the word "chose" rather than "discussed." (ECF No. 96 at 42). Whether the panel chose, discussed, or recommended the change is at most a distinction going to the weight of Dr. Harris's opinion, not admissibility. Particularly in a bench trial, this Court as the factfinder is able to consider the significance (if any) of such semantic distinctions. Any difference between "chose" and "discussed" is no basis for excluding Dr. Harris's opinion.

Plaintiffs also mischaracterize Dr. Harris's testimony. During his deposition, Plaintiffs' counsel posed a hypothetical:

> (I)f there were facts and testimony in this case that one of Leapfrog's goals in its methodology change was to penalize non-participating hospitals to encourage them to participate in the survey, would that change any of your opinions in this case?

(ECF No. 96-8 at 144:20-145:4). In response to this hypothetical, Dr. Harris gave a two-part answer. He first said Leapfrog's "goal is to have every hospital in the country participate in a transparent fashion," and that "that goal is fair." (*Id.* 145:9-14). Dr. Harris contrasted that reality with Plaintiffs' counsel's hypothetical, stating: "If you provide with me data that says they're *actively trying* to penalize nonparticipants, yes, that would change my opinion." (*Id.* 145:16-18 (emphasis added)). Dr. Harris then explained:

> (I)f the imputation method is getting closer to the truth, then it's fair. *If it's getting closer to the truth and then it encourages more hospitals to report their data, then that's fine, because that's the truth.* So I think that's a laudable goal. *If the imputation method is flawed* and it's penalizing people, *which I don't believe is the case*, then, yes, I would change my opinion.

(*Id.* 146:1-9) (emphasis added). Plaintiffs' challenge to Dr. Harris's testimony pretends the italicized language in this answer does not exist. Dr. Harris did *not* accept Plaintiffs' hypothetical

proposition that Leapfrog is "actively trying to penalize nonparticipants," and he did *not* agree that Leapfrog's methodology is "flawed." (*Id.* 145-46). Reading Dr. Harris's testimony as a whole, rather than the misleading snippets that Plaintiffs present, makes clear that Dr. Harris did not, as Plaintiffs claim, "ignore() the record and adopt() assumptions that flatly contradict with (sic) it." (ECF No. 96 at p. 42). Plaintiffs' mischaracterizations provide no basis for excluding Dr. Harris's testimony.

Plaintiffs' misreading of Dr. Harris's testimony is built upon their misreading of another witness's testimony – namely, Dr. Patrick Romano, a volunteer member of Leapfrog's Safety Grade Expert Panel, but *not* a Leapfrog employee. Dr. Romano testified that the purpose of giving below-average scores to nonrespondents "is not accuracy," but rather "to improve the program for everyone." (*See*, ECF No. 88-97, Romano Dep., at 142:21-22). In challenging Dr. Harris's testimony, Plaintiffs seize on the reference to "accuracy" and ignore Dr. Romano's testimony regarding Leapfrog's intent "to improve the program for everyone." (*Id.*). Read as a whole, Dr. Romano's testimony was not a defense of inaccuracy, as Plaintiffs suggest, but rather an explanation that Leapfrog's methodology serves a goal *in addition to* accuracy – namely, as Dr. Harris testified, "getting closer to the truth" by "encourag(ing) more hospitals to report their data." (ECF No. 96-8 at 146:3-5). Dr. Harris' testimony and opinion, therefore, are consistent with Dr. Romano's. But even if it was not, such discrepancy would be of no consequence as Dr. Romano is a volunteer on Leapfrog's Safety Grade Expert Panel and is otherwise not employed by Leapfrog and does not speak for Leapfrog. Regardless, there is no conflict between the two, and no basis for excluding Dr. Harris's testimony.

Finally, Plaintiffs mischaracterize Dr. Harris's testimony regarding Leapfrog's Expert Panel. Plaintiffs falsely claim Dr. Harris "conceded" his assessment of the panel was not based on

any "scientific method." (ECF No. 96 at p. 33). Plainly, Plaintiffs are wrong. Dr. Harris testified that his involvement and experience assessing hospital infection cases and his work advising Centers for Disease Control advisory boards informed his assessment of Leapfrog's panel. (ECF No. 96-8 at 100:4-18). A "formal methodology" in another section of Dr. Harris's report also supported his overall conclusions. (*Id.* at 100:19-101:18). Although "no calculations" informed Dr. Harris's assessment of the Leapfrog panel, (*Id.* at 101:9), no calculations are required. "The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge." *Habecker v. Copperloy Corp*., 893 F.2d 49, 51-52 (3d Cir. 1990) (quoting Fed. R. Evid. 702 advisory committee note). Dr. Harris is a hospital epidemiologist with extensive experience regarding hospital quality improvement, comorbidity risk adjustment, and hospital rankings. (ECF No. 96-3 at p. 3). He is professionally and personally familiar with three panel members. (*Id.* at p. 11). As such, he possesses specialized knowledge that will inform the Court regarding the Leapfrog panel and methodology.

B. Dr. Harris's Second Opinion Is Reliable And Applicable.

Dr. Harris also offered an opinion concerning "nonresponse bias," meaning the inclination to refrain from responding to a performance assessment if a truthful response would reveal poor performance. (ECF No. 96-3 at p. 13). Plaintiffs object that this opinion was not tied to Plaintiffs specifically. (ECF No. 96 at p. 44). Yet again, Plaintiffs misrepresent Dr. Harris's opinion. Dr. Harris discussed Plaintiffs' "numerous opportunities" to participate in the survey and to comment on Leapfrog's methodology. (ECF No. 96-3 at pp. 14-15). Thus, Dr. Harris explicitly did what Plaintiffs demanded – namely, connected the issue of nonresponse bias to the facts of this case. Dr. Harris further connected that issue to this case on pages 15-20 of his Report, which document the Plaintiffs' performance in areas they declined to discuss with Leapfrog through the survey.

(*Id.*). Dr. Harris's opinion concerning nonresponse bias, therefore, is in fact tied to the particular facts of this case.

To be sure, Plaintiffs contend Dr. Harris ought to have considered facts that their counsel withheld in discovery *until the week before his deposition*. (*See,* ECF No. 96-8 at 218:14-220:18). But that does not mean Dr. Harris lacked facts about Plaintiffs. The data Plaintiffs chose to withhold are taken into account in measures conducted by the Centers for Medicare & Medicaid Services ("CMS") and as part of the Hospital Consumer Assessment of Healthcare Providers and Systems ("HCAHPS"). (*See,* ECF No. 96-3 at pp. 15-20). Because Dr. Harris took this information about Plaintiffs into account, his opinion concerning nonresponse bias is reliable.

C. Dr. Harris's third opinion is reliable and applicable.

After falsely claiming Dr. Harris lacked data about Plaintiffs, Plaintiffs then take the opposite position – namely, that Dr. Harris should *not* have considered data about Plaintiffs. (ECF No. 96 at pp. 35-38). As noted above, Dr. Harris considered measures conducted by CMS and as part of the HCAHPS. (*See,* ECF No. 96-3 at pp. 15-20). Specifically, Dr. Harris mentioned Plaintiffs' poor CMS star ratings, which take into account *some* factors that are not part of Leapfrog's Safety Grades. (ECF No. 96 at pp. 35-36). Plaintiffs object to consideration of the star ratings, even though – as Plaintiffs concede – "some of the measures that factor into the CMS star ratings also factor into Leapfrog's Safety Grades." (*Id.* at p. 46). In other words, CMS criteria and Leapfrog's overlap. Although the CMS star ratings do not correspond one-to-one with what Leapfrog measures, the differences do not render the CMS star ratings worthless or Dr. Harris's opinion unreliable. Both the CMS ratings and Leapfrog's methodology are relevant in assessing Plaintiffs' performance and the issues in this case. Consequently, and particularly in light of Plaintiffs' refusal to provide survey responses, consideration of the star ratings is warranted.

Moreover, the star ratings are not the only data that Dr. Harris considered. He also took into account underlying CMS data, including patient experience data; patient falls and injuries; infection data; and overall patient safety and adverse event data. (*See*, ECF No. 96-3 at p. 17). As he explained, such data "are directly related" to the scores Leapfrog imputed to the Plaintiffs. (ECF No. 96-8 at 217:13-19). For example, the rates of Central Line-Associated Bloodstream Infection ("CLABSI") and MRSA infection at the Plaintiffs' hospitals indicated poor hand hygiene performance, which Leapfrog measures. (*Id.* at 267:9-20). As Dr. Harris explained, "hand hygiene is the cornerstone of infection control." (*Id.* at 267:15-16). Thus, Dr. Harris's opinions are amply supported by the available data.

Left without any real criticism of the merits of Dr. Harris's opinions, Plaintiffs resort to nit-picking his deposition testimony. For example, Plaintiffs argue Dr. Harris "could not be sure" what different colors represent in one of his charts. (ECF No. 96 at p. 47). In making this argument, Plaintiffs ignore the fact that Dr. Harris went on to explain what those colors represent. (*See*, ECF No. 96-8 at 278:18-21 & 281:3-16). Although the colors were not explained in his report, Dr. Harris explained them in his deposition. And in any event, color choices have nothing to do with the substance of his opinions. Dr. Harris was "able to adequately explain how the data he relied on led him to his conclusions." *MidAmerica C2L Inc. v. Siemens Energy Inc*., No. 20-11266, 2023 WL 2733512, at *9 (11th Cir. Mar. 31, 2023). Dr. Harris more than satisfied the "duty to adequately explain his or her opinion and methodology." *In re Zantac (Ranitidine) Products Liab. Litig.*, 644 F. Supp. 3d 1075, 1234 (S.D. Fla. 2022). Doing so satisfied Rule 702 and *Daubert*.

In their final critique of Dr. Harris's third opinion, Plaintiffs fault Dr. Harris for opining that criteria making up 24 percent of a hospital's grade are less significant than criteria that make up the remaining 76 percent. (ECF No. 96 at pp. 37-38). As Dr. Harris explained, the four so-called

"structural measures" at issue in this litigation account for less than 25 percent of a hospital's overall rating. (ECF No. 96-3 at p. 19). Consequently, even if a hospital performed better on those criteria than Leapfrog estimated, the difference would at most change a grade of an "F" to a "D." (ECF No. 96-8 at 315:5-6). "That doesn't change the conclusion that it's a poor performing hospital," Dr. Harris testified. (*Id.* 315:6-7). Dr. Harris is entitled to his opinion, even though Plaintiffs dispute it. Their disagreement with Dr. Harris does not make his opinion inadmissible.

D. Dr. Harris's criticism of Dr. Nicholson is reliable and applicable.

Plaintiffs conclude their motion by disputing Dr. Harris's criticism of Plaintiffs' economist, Sean Nicholson. (ECF No. 96 at pp. 48-49). In his expert report, Dr. Nicholson provided "counterfactual" – *i.e.*, hypothetical – scores for hospitals that did not participate in Leapfrog's survey. (*See*, ECF No. 97-3, Nicholson Rep., at p. 36). In making these calculations, Dr. Nicholson recalculated seven of the twelve measures that Leapfrog uses. (*Id.*). In other words, instead of imputing scores on the *four* so-called "structural measures" at issue in this litigation, Dr. Nicholson imputed scores on *seven* of the twelve measures that Leapfrog uses. Dr. Harris's opinion is that imputing scores of only four measures (as Leapfrog did) rather than seven (as Dr. Nicholson did) is preferable. (*See*, ECF No. 96-8 at pp. 255-256). That preference makes sense, because Leapfrog's approach is truer to the nonparticipants' actual performance than Dr. Nicholson's. In any event, Dr. Harris is certainly entitled to opine that using *more* actual data is preferrable to using *less*. Such a preference does not reflect "serious flaws in reasoning or methodology (so as to) warrant exclusion" of Dr. Harris's testimony. *TRA Farms*, 2014 WL 1478846, at *2. Dr. Harris's opinions, therefore, is admissible.

III. THE MOTION SHOULD BE DENIED WITH RESPECT TO DR. FARROKH FARROKHI.

A. Dr. Farrokhi Is Eminently Qualified To Present Expert Testimony.

Dr. Farrokhi is a practicing physician and leader in hospital quality systems. (ECF No. 96-

2, Farrokhi Rep., at 3). More particularly, he is a neurosurgeon at Virginia Mason Franciscan Health, the former Chief of Neurosurgery, and now the Chair of its Quality Council and its Medical Director of Quality. (*Id.* at 4). In these roles, he is part of the team that manages Key Performance Indicators (KPIs) that are reported to external and internal regulatory quality organizations. (*Id.* at 5.) He has helped the hospital system establish a nationally certified Center of Excellence for Spine care and obtain accreditation as a Comprehensive Stroke Center and he founded a robust research institute focused on quality improvement, patient safety, risk reduction, and appropriate care delivery. (*Id.* at 4). He was President of the Washington Association of Neurological Surgeons, and subsequently a member of the board of directors, and he has engaged in research and publications on patient safety. (*Id.*). Patient care and safety are central to Dr. Farrokhi's daily work. He has decades of experience with respect to how hospitals can improve patient safety and how hospitals themselves measure the quality of the services they provide. (*Id.* at 4-5).

Because of this vast real-world experience in measuring, monitoring, and improving patient safety, it is not surprising that the Plaintiff Hospitals desperately seek to prevent this Court from hearing Dr. Farrokhi's testimony. It is directly contrary to the Plaintiffs' navel-gazing approach to public reporting on hospital safety.

As explained above, the standard for qualifying as an expert witness is "not stringent" and can be satisfied based upon training and experience. *See, e.g., Vision I Homeowners Ass'n*, 674 F. Supp. 2d at 1325. Moreover, disputes about an expert witness qualifications do not raise issues about admissibility but instead go to credibility and weight of the testimony. *Id.* Thus, inasmuch as Plaintiffs seek to challenge Dr. Farrokhi's opinions, they can do so at trial, but his decades of training, experience, and leadership in the healthcare industry – briefly listed above and described in more detail in his Report – undoubtedly qualify him as an expert witness in this matter.

B. Dr. Farrokhi Did Not Withdraw His Opinion.

Plaintiffs state that Dr. Farrokhi's Report contains only one opinion (which Plaintiffs call Opinion One), which they falsely paraphrase as being "that Leapfrog's 'Grade' improves hospital quality." (ECF No. 96 at p. 18). Plaintiffs also falsely assert that Dr. Farrokhi withdrew this opinion. (*Id.* at 19, n.7). Neither statement is true. In fact, his Report makes clear Dr. Farrokhi's opinion that a hospital's *reporting* of patient quality measurements to organizations such as Leapfrog improves patient safety: "The decision by our healthcare system to participate in multiple transparent *external reporting systems* on quality (*such as Leapfrog*, CMS, and Healthgrades), and to share the results with all members of our team and our community, has been critical to developing the *safest space for practicing medicine*." (ECF No. 96-2 at 6 (emphasis added)). Dr. Farrokhi's Report does not offer the simple opinion that the Leapfrog "Grade" improves hospital safety.

To confuse matters, Plaintiffs not only wrongly suggest that Dr. Farrokhi withdrew his opinion, but also that he changed it during deposition, and that his new opinion (which they refer to as Opinion Two) is "that the Survey, not the Safety Grade, improves quality." (ECF No. 96 at 3). This is not a new opinion. As quoted above, Dr. Farrokhi's Report clearly opines that, based upon his experience, reporting internal safety information to third parties such as Leapfrog (*i.e.*, completing the Survey) has helped improve hospital safety. (ECF No. 96-2 at 6).

That opinion is helpful and reliable and therefore admissible. It is helpful, of course, because hospital and healthcare center operations and decision-making are enormously complicated matters. Collecting and assessing internal hospital safety data is similarly complicated. And assessing how the collection and external reporting of such data impact a hospital's own patient-safety is a matter far beyond common knowledge and is instead a matter as to which expert opinion is undoubtedly necessary. Thus, Dr. Farrokhi's opinion "will help the trier

of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). As such, the opinion is admissible.

Moreover, contrary to Plaintiffs' arguments, Dr. Farrokhi's opinion is reliable. During his deposition, Dr. Farrokhi testified at length about the need for hospitals constantly to improve safety, how safety improvements occur in real-world hospital conditions, and how the rigorous collection and reporting of safety data improves hospital performance and patient outcomes. (*See, e.g.*, ECF No. 96-7, Farrokhi Dep., at 20:14-26:16; 34:9-37:3; 49:21-50:8; 56:24-57:15; 58:6-59:20). The law is clear that an expert witness is permitted to provide opinions based upon his actual experiences. Fed. R. Evid. 702. That is precisely what Dr. Farrokhi has done. Thus, his opinion about the benefits of hospitals reporting survey results to Leapfrog is reliable and admissible.

C. Dr. Farrokhi's Did Not Disclose "New" Opinions At His Deposition.

Plaintiffs contend that during his deposition, Dr. Farrokhi offered a series of "new" and inadmissible opinions (which Plaintiffs refer to as Opinions Three, Four, and Five). In reality, however, Dr. Farrokhi's testimony merely reflects elaboration on and corroboration of his core opinion that, based upon his experience, reporting information to third parties such as Leapfrog (*i.e.*, completing the Leapfrog survey) has helped improve hospital safety.

Thus, while Plaintiffs assert that Dr. Farrokhi improperly offered the "new" opinion that hospitals use the Leapfrog Survey for benchmarking, in reality that idea is central to his opinion, as is clear throughout his Report and his deposition testimony, where he stated that "the fact that we are measuring leads to improvement. And we measure with purpose of improving." (ECF No. 96-7 at 302:11-13). As a result, "those topics" – meaning the use of external reports to Leapfrog to benchmark measurements at the hospital and to improve patient safety – "go hand in hand, as I believe I've stated innumerable times today." (*Id.* 302:13-14). In other words, "(w)e benchmark

by using this data and trying to make it better." (*Id.* 303:1-2). These ideas are expressed on pages 6 and 7 of his Report. (ECF No. 96-2 at pp. 6-7). Dr. Farrokhi did not proffer a new or additional opinion regarding benchmarking, and thus there is no basis to exclude his opinion as belatedly disclosed.

Plaintiffs also assert that Dr. Farrokhi offered the "new" opinion that the Leapfrog Survey is reliable (which Plaintiffs refer to as Opinion Four) and argue that this so-called new opinion is not admissible. Once again, however, Plaintiffs proffer a strawman argument. The key point of Dr. Farrokhi's testimony and Report is that by measuring and reporting a hospital's results on key performance indicators, a hospital improved and will continue to improve safety. Plaintiffs appear to operate on the assumption that when a hospital reports data about its own conduct, that hospital will necessarily "fudge" the data to make itself look better. That might be the approach that Plaintiffs have taken, but Dr. Farrokhi's experience is just the opposite – that hospitals that truly care about improving safety will closely monitor themselves, will recognize deficiencies, will accurately report them, and will strive to correct them. (ECF No. 96-2 at pp. 5-7; 8-10).

For instance, Dr. Farrokhi testified at length about the importance of hand hygiene and keeping accurate statistics about it in order to protect patients from infection. As he explained:

> So hand hygiene has been well documented as a connection between care of a patient and reduction in risk of communication -- of communicable diseases and infection rates, and so on and so forth. So how do you measure that? Not easy.
>
> You -- in our world, we have members of our team who are tasked with spending a certain number of hours of their day observing as people walk in and out of a patient's room in the hospital, or in and out of a patient room in the clinic, whether they use the gel dispenser outside the door, and then they log the percentage of those patients per day, per week, per month that actually used the gel dispenser and paused for the few seconds it takes to let that gel dry, where we know that it does its effect, before they enter the room. And same in reverse on their way out.
>
> Direct visual auditing has been the most effective mode of measurement. And it allows -- as you distribute this work among many members of the team, it allows for an increased awareness. So when I fail to do that, if I were in a rush, I would

> notice a nurse assistant tapping me on the shoulder, 'Hey, Doc, you forgot to wash your hands on the way in.' And I would say -- and it creates a cultural environment where, if I forget, someone can help me remember. And that's why it's the work of everyone in the environment.
>
> There are other mechanisms, like measuring the volume of gel consumed in a hospital. Technological options have come up, too, where the doors won't open to a patient's space until you gel in and -- or you have a badge that will trigger an alarm if you walk through without getting close enough to the gel dispenser and the gel dispenser dispensing the appropriate volume of gel.
>
> So a really complicated way to measure a really, really important -- one tiny little metric of these hundreds that we have to measure. But not only is that particular measure relevant to improving the health of our patients, but the cultural environment it establishes when you make that a priority in your work environment, in getting everyone to think about washing their hands, and that that's better for your patient.

(ECF 96-7 at 64:7-65-23). Reporting accurate information in response to the Leapfrog Survey – and other surveys – is central to the very notion of improving patient safety. Plaintiffs may contend that Dr. Farrokhi's opinion that hospitals honestly and accurately report their own data in response to the Leapfrog Survey is a "new" opinion, but in truth it is fundamental to the very idea of self-monitoring and reporting discussed throughout Dr. Farrokhi's Report. There is no legitimate basis to exclude Dr. Farrokhi's testimony on this point as "new" or undisclosed.

Finally, Plaintiffs complain that Dr. Farrokhi offered the "new" opinion that completing the Leapfrog Survey is not burdensome to hospitals (which they refer to as Opinion Five). Indeed, this too is *not* a "new opinion," but rather an elaboration on and corroboration in support of the opinions contained in his report. (*See generally,* ECF No. 96-2). Dr. Farrokhi's Report is predicated on two decades worth of experience that forms the basis for his opinions related to completing the Leapfrog Hospital Survey and how participation improves quality and safety in hospitals. (ECF No. 96-7 at 19:1-20:8). Dr. Farrokhi's Report specifically opines on how participation in programs, like the Leapfrog Hospital Survey, is critical to providing patients, providers, and payors visibility into the healthcare system. (ECF No. 96-2 at pp.12-13) (*See also,*

ECF No. 96-7 at 20:16-21:12). His expertise is likewise based on 25 years of experience in collecting patient safety data. (ECF No. 97-7 at 24:11-25:22). Thus, it is Dr. Farrokhi's view that completing the Leapfrog Survey is "a little bit of work for a large number of individuals. But when it's incorporated into a quality culture and quality structure, everybody has a small piece of it." (*Id.* at 200:15-19). This directly supports his opinion that despite internal resistance over the years, "the culture of transparent reporting of performance and systematic focus on improvement is foundational and cannot be abandoned or ignored." (ECF No. 96-2 at p. 10). Dr. Farrokhi does not offer a "new opinion" that the Leapfrog Hospital Survey is either burdensome (or not) because it depends on whether a hospital has "all the people in place to fill in the blanks of this particular survey as well as all the other data reporting structure"…and if the hospital has "ability to collect and react to that data." (ECF No. 96-7 at 294:1-6). Nonetheless, based on his experience Dr. Farrokhi is confident that "if you follow the recipe and try to measure all the things that are in that survey thoughtfully, you are bound to create a structure…of measuring to improve." (*Id.* at 294:13-17). Indeed, this is the very theme of his report. (*See generally*, ECF No. 96-2 at pp.8-13).

Dr. Farrokhi is a qualified expert whose opinions are reliable and admissible. The Motion should be denied.

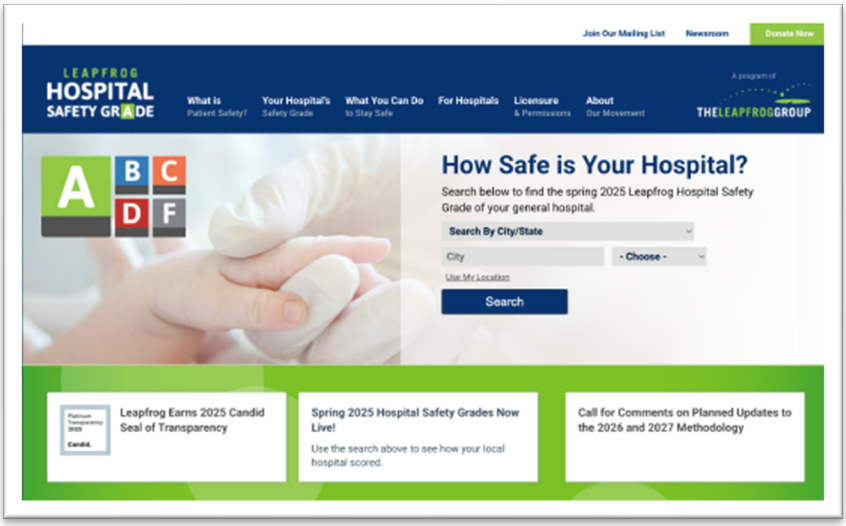
IV. THE MOTION SHOULD BE DENIED WITH RESPECT TO MR. MICHAEL VREDENBURGH.

A. To The Extent His Report Neglected To Identify Any Documents Reviewed, The Error Was Harmless – If Even An Error At All.

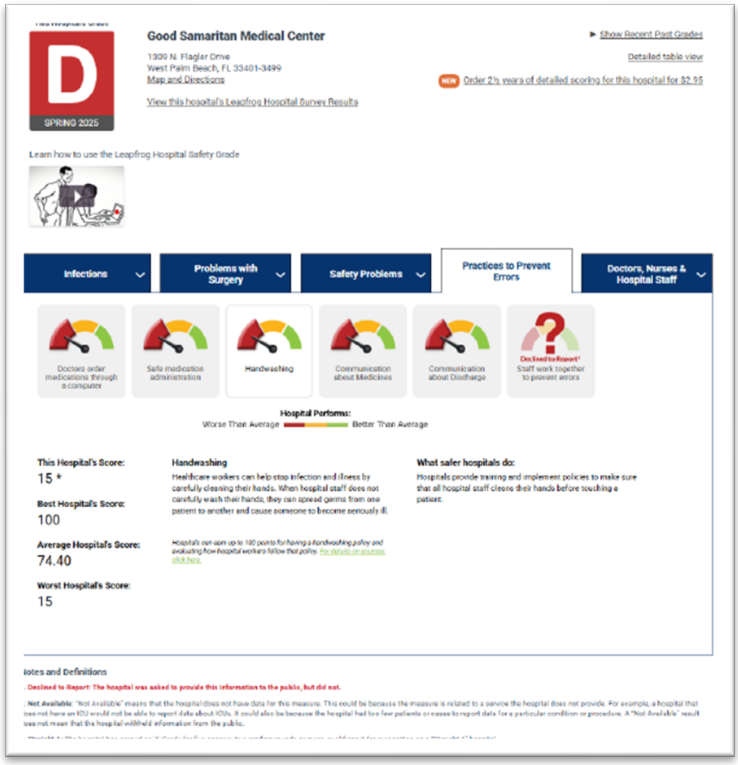
Michael Vredenburgh, an expert in human factors engineering, primarily offers an expert opinion on two key pages from Leapfrog's website: its landing page[2] and a safety grade webpage for one of the Plaintiff Hospitals.[3] (*See*, ECF No. 96-5, Vredenburgh Report, at 6-7). Those

[2] (https://www.hospitalsafetygrade.org/)
[3] (https://www.hospitalsafetygrade.org/h/good-samaritan-medical-center?findBy=hospital&hospital=Good+Samaritan+Medical+Center&rPos=0&rSort=grade)

webpages, which are displayed in the Vredenburgh Report and referred to as Figure 1 and Figure 2, are set forth below.



(ECF No. 96-5 at p. 6, Figure 1 (https://www.hospitalsafetygrade.org/))



(*Id.* at p. 7, Figure 2 (https://www.hospitalsafetygrade.org/h/good-samaritan-medical-center?findBy=hospital&hospital=Good+Samaritan+Medical+Center&rPos=0&rSort=grade)).

The Vredenburgh Report opines that these pages "demonstrate exemplary clarity, transparency, and usability for a reasonable consumer seeking healthcare information," (ECF No. 96-5 at ¶ 24); that its "clarity, transparency, and usability are significantly bolstered by content written at an accessible reading level, specifically tailored for a general audience with an 8th-grade comprehension level as evidenced by a Flesch-Kincaid Grade Level Score of 7.9 and a Gunning Fog Index score of 8.3, (*Id.* ¶ 25); and "that it is readily apparent to a reasonable consumer with at least an 8th-grade reading level that scores for missing data . . . are assigned a minimum imputed value when hospitals decline to participate in the voluntary survey." (*Id.* ¶ 26).

Plaintiffs' primary argument for excluding Mr. Vredenburgh's testimony is his purported failure, under Rule 26, to disclose "scores of documents that he considered in forming his opinions." (ECF No. 96 at 9). Rule 26, however, "is designed to prevent surprise and prejudice and not to serve as a technical barrier to otherwise proper expert testimony." *Woienski v. United Airlines, Inc.*, 383 F. Supp. 3d 1342, 1350 (M.D. Fla. 2019). The reality here is that during his deposition, Mr. Vredenburgh identified the limited documents he reviewed that were not expressly noted in his Report – documents Plaintiffs had in their possession – and he was thoroughly questioned about them. Moreover, Rule 26 requires an expert to disclose facts or data considered when *forming* the opinion and/or exhibits that will be used to summarize or *support* the opinion. Fed. R. Civ. P. 26(a)(2)(B)(ii)-(iii). Plaintiffs mischaracterize and attempt to expand the universe of documents in which Mr. Vredenburgh *relied* on when *forming* his opinions or used *in support* of his opinions, which wholly improper. Regardless, Plaintiffs were not prejudiced in any way.

In other words, any technical error in disclosure was harmless. Whether a Rule 26 disclosure error is harmless involves the consideration of five factors:

(1) the surprise to the party against whom the evidence would be offered;

(2) the ability of that party to cure the surprise;

(3) the extent to which allowing the evidence would disrupt the trial;

(4) the importance of the evidence; and

(5) the nondisclosing party's explanation for its failure to disclose the evidence.

Id. at 1345 (denying motion to exclude expert witness) (internal quotation omitted); *Tejeda v. Costco Wholesale Corp.*, No. 1:20-cv-24790-JEM/Becerra, 2022 WL 2116710 (May 20, 2022) (same) (internal quotation omitted). These factors weigh heavily against Plaintiffs' Motion.

In contrast to many cases applying these factors, Leapfrog is *not* seeking to offer at trial additional evidence beyond the opinions offered in Mr. Vredenburgh's Report. Rather, he continues to offer the opinions listed in his Report with the acknowledgement that he viewed some additional documents before forming those opinions. Surprise and prejudice are nonexistent here.

During Mr. Vredenburgh's deposition, he readily identified any documents he erroneously failed to list in his Report and Plaintiffs were able to question him extensively about those matters. Some of those documents were simply additional pages from Leapfrog's website, such as the FAQ page, which Mr. Vredenburgh examined but about which he proffered no opinion. (ECF No. 96-10, Vredenburgh Dep., at 81:8-82:19). Similarly, as noted above, Mr. Vredenburgh's Report focuses on two pages from the Leapfrog Safety Grade website while simultaneously acknowledging the obvious fact that users can click beyond those pages to reach more detailed and more complex information. But his Report does not analyze or opine on those other pages, and their existence is both referenced in his Report and undoubtedly known to Plaintiffs and their lawyers. (*See, e.g.*, ECF No. 96-5 at ¶¶ 24, 26, 27). Thus, Mr. Vredenburgh did not rely on such webpages when *forming* his opinions or used *in support* of his opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii).

Similarly, Mr. Vredenburgh acknowledged that the webpage shown in Figure 2 includes an embedded link to a video that he clicked to but that the video was not part of his actual analysis.

(ECF No. 96-10 at 62:6-8 ("So the content of the video, that goes beyond the – that goes beyond the scope of my analysis.")). Plaintiffs are very familiar with the Leapfrog website and undoubtedly were prepared to question Mr. Vredenburgh about other pages within it. In fact, during Mr. Vredenburgh's deposition, Plaintiffs' lawyers introduced six exhibits that were pages from the Leapfrog website *not* specifically discussed in the Vredenburgh Report. (*Id.* at pp. 4-5). They even introduced a written transcript of the video that was linked in Figure 2 and questioned him about that. (*Id.* at 60:25-62:15). Plaintiffs were not caught off guard or surprised by the notion that Mr. Vredenburgh looked through Leapfrog's website. They were prepared to question him about the website and did so.

Moreover, Mr. Vredenburgh is, in-part, a rebuttal expert to Dr. Berger. (ECF No. 96-5 at ¶¶13-15). Dr. Berger's report is 87 pages, inclusive of a 10-page "Appendix C" that lists hundreds if not thousands of pages of "documents considered." (ECF 97-2 at App'x C)[4]. Indeed, most of the documents Plaintiffs complain of are the very documents listed in their own expert's opinion to which Mr. Vredenburgh rebutted. While Mr. Vredenburgh reviewed Dr. Berger's report and documents considered (which is noted in his report), there is no requirement under the Federal Rules for a rebuttal expert to relist every document referenced in the primary expert's report if it was not used in forming the rebuttal expert's opinion. (ECF No. 96-5 at ¶¶13-15). Plaintiffs are fully aware that Mr. Vredenburgh is an in-part rebuttal expert to their own expert, Dr. Berger; thus, any reference to documents considered by Dr. Berger is neither a surprise nor caused any prejudice to Plaintiffs.

Plaintiffs also attempt to make heavy weather out of the fact that Mr. Vredenburgh received from Leapfrog's counsel various "legal filings" in this matter, which he skimmed through, but

[4] In an effort to promote judicial economy and limit reproduction of formerly utilized exhibits, Leapfrog references exhibits used in other motions or pleadings formerly filed before this Court.

which were largely not pertinent to his analysis, other than the Amended Complaint, which he reviewed and disclosed in his Report. (ECF No. 96-10 at 45:1-46:19); (*see also,* ECF No. 96-5 at 23). The "legal filing" documents, including pleadings, motions, deposition transcripts, and Plaintiffs' own expert reports, plainly were not unknown to Plaintiffs' counsel. More critically, other than the Amended Complaint, they generally played little-to-no role in Mr. Vredenburgh's Report. Thus, Plaintiffs were not surprised or prejudiced by the fact that Mr. Vredenburgh had generally reviewed the conduct of this litigation.

Given these facts, the first three prongs of the test cited above confirm that any purported error was harmless (if any error really at all): Mr. Vredenburgh's opinions did not depend upon the unlisted documents, Plaintiffs knew about the documents and deposed Mr. Vredenburgh about them, and no *new evidence* will be introduced at trial that could cause any alleged disruption.

With respect to the fourth prong – the importance of the evidence – Mr. Vredenburgh's opinion concerns the core issues in this case. Among other things, Plaintiffs claim that consumers were misled by Leapfrog's website, but they have not proffered evidence of any allegedly misled consumer. Mr. Vredenburgh's opinions concerning the clarity, transparency, and usability of key webpages, concerning the grade level at which information is provided, and concerning the comprehensibility of Leapfrog's disclosures about imputing minimum scores to non-participating hospitals, are all of central importance in this case. This relevant testimony should be presented to the Court.

Finally, with regard to the fifth prong of the test (the reasons for the failure to disclose), Mr. Vredenburgh was clear in his deposition that he did review the federal rules when preparing his report. (ECF 96-10 at 72:25-73:13). Regardless, and of no consequence, counsel for Leapfrog consulted with and reviewed Mr. Vredenburgh's report for compliance with Federal Rules 26 and

702, which counsel clearly deems compliant as discussed *supra* and *infra*. But, as noted above, Mr. Vredenburgh merely looked at materials already available to (or actually provided by) Plaintiffs. During his deposition he was forthcoming about what he reviewed and about any inadvertent omissions from his Report. (*Id.* at 233:3-5) ("So I apologize. That was a mistake. This document I reviewed, and it should have been on there. It was just an honest mistake."). And he answered questions about those materials. There was no effort here to "hide" anything from Plaintiffs. In light of all these facts, any failure to disclose amounted to harmless error and provides no basis for excluding Mr. Vredenburgh's testimony.

B. Mr. Vredenburgh Is A Qualified Expert.

Mr. Vredenburgh is an expert in human factors engineering. He has a master's degree in industrial and human factors engineering. (ECF No. 96-5 at ¶ 2). He has authored numerous articles concerning human factors engineering and consumer risk. (*Id.* at ¶ 3). And he has served as the "primary retained expert in over 100 litigation matters in the last 4 years, applying human factors principles to evaluate human-system interactions, visibility issues, and risk perception in dynamic environments." (*Id.* at ¶¶ 1, 3). Among other things, in this matter he utilized his expertise to apply Flesch-Kincaid Grade Level test and the Gunning Fog Index readability test to estimate the years of formal education needed to understand the webpages displayed in Figures 1 and 2. (*Id.* at ¶ 25).

"The qualification standard for expert testimony is not stringent, and so long as the expert is minimally qualified, objections to the level of the expert's expertise (go) to credibility and weight, not admissibility." *Vision I Homeowners Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1321, 1325 (S.D. Fla. 2009) (internal quotation omitted); *FDIC v. Castro*, No. 13-80596-CV-Middlebrooks/Brannon, 2014 WL 12461348, at *2 (S.D. Fla. May 22, 2014) (same)

(Middlebrooks, J.); *see also Lewis v. Carnival Corp*., 570 F. Supp. 3d 1189, (S.D. Fla. 2021) ("The qualifications of an expert must satisfy a relatively low threshold, beyond which qualification becomes a credibility issue for (fact finder).") (internal quotation omitted).

Notwithstanding these standards, Plaintiffs contend that Mr. Vredenburgh lacks sufficient expertise to testify. But the two arguments they offer are largely perfunctory and do not engage with the relevant standards. First, Plaintiffs assert that while Mr. Vredenburgh is an expert in human factors engineering, "(h)uman-factors engineering is not about consumer behavior or psychology." (ECF No. 96 at 11). Next, Plaintiffs maintain that Mr. Vredenburgh is not a "user experience" or "low literacy" expert. (*Id.* at 11-12). Despite being proffered as two distinct arguments, both arguments are essentially the same – *i.e.*, that Mr. Vredenburgh is not qualified to testify about how consumers will interact with or understand the relevant webpages. Plaintiffs are mistaken.

As Mr. Vredenburgh testified, "human factors engineering is trying to make products or systems that we live in for humans…And I do have a degree in human factors and industrial engineering, a master's in that…And human factors would be…'How do I make a website understandable.'" (ECF No. 96-10 at 88:6-20). To utilize human factors engineering to analyze whether a website – or a user's manual or a warning sign – is understandable necessarily involves considering the way in which the user will interact with the information. In fact, a critical focus of human factors engineering is "the study of warnings, labels, and instructions, and how to effectively communicate risk information to product purchasers and users." *Rey v. Gen. Motors LLC*, No.: 4:19-cv-00714-DGK, 2022 WL 698115, at*1 (W.D. MO. Mar. 8, 2022). Thus, Plaintiffs' contention that a human factors engineer lacks any expertise about how consumers act or react is inaccurate and plainly wrong. Instead, an expert in human factors engineering "is

generally qualified to testify regarding *whether* a person would have seen a condition and *how* they would have reacted to it." *Snider-Hancox v. NCL Bahamas Ltd.*, No. 17-20942-CIV-Martinez/Louis 2019 WL 13020778, at *5 (S.D. Fla. Feb. 7, 2019) (emphasis added).

In addition to his master's degree in human factors engineering, Mr. Vredenburgh also has received a certification from Wright State University in "User Experience (UX) and Design Thinking," which focuses on "applying human factors to computer interactions." (ECF No. 96-5 at ¶ 2); (*see also*, ECF No. 96-10 at 89:8-16). And he has published research on "evaluating the usability of online learning platforms" for Wright State University. (ECF No. 96-10 at 91:13-92:4). Because Mr. Vredenburgh opines about the way in which information is presented on the relevant Leapfrog webpages and whether those pages demonstrate clarity, transparency, and usability – as opposed to opining about the actions consumers take in response to those pages – Plaintiffs' argument that he lacks the expertise to opine about consumer behavior or psychology is a red herring.

Nevertheless, understanding the manner in which consumers are likely to respond to warnings and usage information is a fundamental component of human factors engineering, not some distinct and extraneous field. Relatedly, low literacy is again a subtopic of UX. (*Id.* at 311:2-5). Mr. Vredenburgh's Report specifically addresses the literacy levels necessary to read and understand the Leapfrog webpages, and Plaintiffs have proffered no argument that Mr. Vredenburgh misunderstood, misapplied, or lacked the requisite expertise to determine the reading levels at which the Leapfrog webpages are accessible. Mr. Vredenburgh plainly has the requisite expertise and experience to support his opinions.

C. Mr. Vredenburgh First, Second, And Third Opinions Are Reliable And Helpful.

To support their arguments that Mr. Vredenburgh's first, second, and third opinions are unreliable, Plaintiffs mischaracterize the evidence. Mr. Vredenburgh's fifth opinion, which he has

withdrawn, was that Google analytics data demonstrated high user engagement with full LEAPFROG webpage content, ensuring visibility of key disclosures. (ECF 96-5 at ¶ 29). He withdrew this Opinion because it relied upon a misapprehension of certain definitions provided by Google. (ECF No. 96-10 at 302:15-303:7). Plaintiffs argue that his first three opinions were contingent on his fifth opinion, and since Mr. Vredenburgh withdrew his fifth opinion, the other opinions must fall. (ECF 96 at 12-14). But that is false. Plaintiffs specifically asked Mr. Vredenburgh if his first three opinions were contingent upon his fifth opinion and needed to be withdrawn, and he testified that they were *not*. (ECF No. 96-10 at 303:13-307:14). Moreover, while Mr. Vredenburgh did withdraw his fifth opinion, he did *not* conclude, as Plaintiffs imply, that visitors to the Leapfrog webpage do not read the relevant disclosures. To the contrary, he testified that "the Google Analytic data is actually inconclusive. It doesn't say whether there was low engagement or high engagement." (*Id.* 303:15-17).

Mr. Vredenburgh's first three opinions – about the clarity, transparency, and usability of the webpages, the tailoring of those pages to the appropriate reading level, and the clear disclosure than non-participating hospitals are assigned an imputed score for certain measures – remain reliable. Plaintiffs have not shown otherwise.

Those opinions also remain helpful. A critical issue in this case is whether consumers visiting the Leapfrog website would be deceived by Leapfrog's Safety Grades and the information presented on the Safety Grade webpages at issue. Mr. Vredenburgh's first three opinions provide expert analysis relevant to this issue. Plaintiffs argue that the opinions are unhelpful because the Vredenburgh Report uses the word "website" in certain instances where the more appropriate word would be "webpage." But any rational reading of the Report makes clear that Mr. Vredenburgh's first three opinions concern the webpages displayed in the Report as Figures 1 and 2. Because the

Report does not analyze any other webpages from the Leapfrog website, Plaintiffs' argument that the Report is unhelpful because it about the entire website, rather than the webpages actually discussed and displayed in the Report, is disingenuous at best. There is no basis to exclude Mr. Vredenburgh's first three opinions.

D. Mr. Vredenburgh's Fourth Opinion Is Reliable And Helpful.

For Mr. Vredenburgh's fourth opinion, his Report states:

> In evaluating the clarity, transparency, and usability of the Leapfrog Hospital Safety Grade website, I conclude that its design aligns with best practices for transparent communication in healthcare ratings, as demonstrated by Leapfrog's own UX testing (lead by Dr. Christina Zarcadoolas) and comprehension studies, which empirically optimized the site for consumer effectiveness (unlike Dr. Berger's methodology, which notably omitted any scientific UX comprehension test to assess actual user understanding despite the opportunity to do so).

(ECF No. 96-5 at ¶ 27 (footnotes omitted)). Plaintiffs contend that because Mr. Vredenburgh did not review the actual UX testing performed by Leapfrog, he has no basis for his opinion and thus that the opinion is not helpful. But once again, Plaintiffs misapply the relevant law.

As explained above, Mr. Vredenburgh has experience and expertise in human factors engineering, UX (user experience), and the subtopic of low literacy, with a particular emphasis on "applying human factors to computer interactions." (ECF No. 96-10 at 89:11-16). In forming his fourth opinion, Mr. Vredenburgh not only reviewed and analyzed key webpages from the Leapfrog website (Figures 1 and 2) but also reviewed the Final Narrative Report of the UX testing of the Leapfrog website, Leapfrog's contract with the consultant overseeing that testing (Dr. Christina Zarcadoolas), received confirmation from Leapfrog's Senior Vice President of Healthcare Ratings Missy Danforth, that the contract was performed, and reviewed deposition testimony from Leapfrog's CEO, Leah Binder, confirming the same. (*Id.* at 25:3-12; 232:14-233:5; 227:24-228:3). These materials are more than sufficient to support his fourth opinion.

Federal Rules of Evidence 703 provides that an "expert may base an opinion on facts or

data in the case that the expert has been made aware of or personally observed." It also provides that such facts or data "need not be admissible for the opinion to be admitted." Fed. R. Evid. 703. Accordingly, the Advisory Committee Notes to Rule 703 explain that an expert witness may rely on facts or data obtained through "firsthand observation of the witness" but also when presented to the expert "outside of court and other than by his own perception." Thus, for example, experts may rely upon hearsay evidence, so long as it is the type of evidence usually relied upon by experts in the field. *Knight v. Miami-Dade Cty.*, 856 F.3d 795, 809 (11th Cir. 2017).

Here, Mr. Vredenburgh's fourth opinion (that the clarity, transparency, and usability of the Leapfrog website comports with best practices for transparent communication in healthcare ratings, as shown by Leapfrog's own UX testing) is supported by the Final Narrative Report he reviewed, conversations and confirmation from Leapfrog' Senior Vice President of Health Care Ratings, and testimony from Leapfrog's CEO. The Final Narrative Report described cognitive testing conducted on users of Leapfrog's website and the major revisions that were implemented as a result. (ECF No. 96-10 at Ex. 17 at 2). For example, when designing its website, Leapfrog faced "the challenge of trying to communicate measures for which a lower number indicated a better score" where "intuitively, it is hard for consumers to comprehend a metric in which zero is the best possible score." (*Id.*, Ex. 17 at 5). This resulted in Leapfrog adopting "a gas gauge image to depict a hospital's performance on each of the 28 (safety) measures." (*Id.*, Ex. 17 at 5). Mr. Vredenburgh's Report specifically called out these gas gauge images which effectively "simplify complex data" for consumers. (ECF No. 96-5 at ¶ 28).

"(W)here the expert's testimony has a reasonable factual basis, a court should not exclude it. Rather, it is for opposing counsel to inquire into the expert's factual basis." *U.S. v. 0.161 Acres of Land*, 837 F.2d 1036, 1040 (11th Cir. 1988). Accordingly, because Mr. Vredenburgh's fourth

opinion is properly based upon permissible facts and data and provides helpful insight to the Court on important issues of webpage clarity, transparency, and usability for consumers, the Motion should be denied with respect to it.

CONCLUSION

WHEREFORE, Defendant, The Leapfrog Group respectfully requests that the Court deny Plaintiffs' Motion to Exclude Leapfrog's Expert Witnesses and grant such other and further relief as the Court deems proper.

Dated: November 24, 2025

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 24, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send an electronic notification of such filings to all counsel of record in the Court's ECF filing system.

/s/ *Jura Zibas*
Attorney for Defendant