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*.

**THE COMMUNITY HOSPITALS' OPPOSITION TO LEAPFROG'S MOTION FOR SUMMARY JUDGMENT**

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## GLOSSARY

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|---|---|---|
| **SOF** | Community Hospitals' Rule 56.1 Statement of Material Facts in Support of Motion for Summary Judgment | ECF 87 |
| **LF-SOF** | Defendant's Rule 56.1 Statement of Material Facts in Support of Motion for Summary Judgment | ECF 100 |
| **R-PSOF** | Defendant's Opposing Statement of Material Facts in Response to Plaintiffs' Motion for Summary Judgment | ECF 103 |
| **ASOF** | Defendant's Additional Facts in Response to Plaintiffs' Statement of Material Facts | ECF 104 |
| **RSOF** | Community Hospitals' Response to Defendant's Additional Facts in Response to Plaintiffs' Statement of Material Facts | ECF 108 |
| **OSOF** | Community Hospitals' Response to Defendant's Statement of Material Facts | ECF 116 |
| **CH-ASOF** | Community Hospitals' Additional Facts in Response to Defendant's Statement of Material Facts | ECF 116 |

## INTRODUCTION

Leapfrog's business rests on a promise of "honest[y]." ECF 99 at 1 ("Mot."). It publicly professes that its mission is to promote "transparency and accountability in health care," ECF 102 at 2, and calls itself a "watchdog" for patients, claiming to help them decide which hospitals are safe and which are not, SOF ¶¶ 2-3. Its "Hospital Safety Grades"—the A-through-F scores that Leapfrog promotes nationwide—are marketed as peer-reviewed, data-driven assessments of patient safety. In reality, they are none of those things.

The record indisputably shows that in 2024, Leapfrog rewrote its grading formula to punish hospitals that decline to fill out its proprietary, 350+ page Hospital Survey. Those hospitals are automatically assigned the lowest possible scores on critical measures, *regardless of actual safety performance*. Leapfrog's own witnesses admitted the new methodology is "arbitrar[y]," its purpose is "not accuracy," and its effect is to "penalize" non-participants. SOF ¶¶ 34, 38-39; OSOF ¶¶ 20, 29. And the "Expert Panel" that Leapfrog touts to the public never approved the change.

Leapfrog's motive was simple: money. Survey participation is the lifeblood of Leapfrog's revenue, so low participation in recent years presented a concern. Internally, a member of Leapfrog's Expert Panel called the Fall 2024 methodology change a "simple business decision." SOF ¶ 38. By assigning failing Grades to nonparticipating hospitals, Leapfrog pressured them to comply—threatening reputational ruin to those that resisted. SOF ¶¶ 37, 39. In short, Leapfrog redesigned its grading system not to inform consumers, but to drive participation and boost revenue.

But Leapfrog carried on as usual, pretending it was all about the public interest, and never alerted consumers to the consequences of the "[d]rastic [c]hange" in its methodology. SOF ¶ 29. It falsely asserted that participation does not affect Grades, that hospitals lacking sufficient data "are not graded," and that its methodology is "peer reviewed" and data-based. SOF ¶¶ 17, 45; OSOF ¶¶ 15, 22. Leapfrog then amplified those falsehoods by proclaiming that "patients are twice as likely to die of a preventable problem at a 'C,' 'D,' or 'F' hospital than an 'A' hospital"—a claim that Leapfrog admittedly has no basis to assert under its current methodology. SOF ¶¶ 10, 48.

Floridians justifiably took Leapfrog at its word, saw failing Safety Grades, and concluded their local Community Hospitals were unsafe. Patients canceled surgeries, diverted to other facilities, and even left the emergency room "against medical advice" after seeing Leapfrog's ratings. SOF ¶ 60. This was deception by design, and its impact is undeniable. Leapfrog's deception denigrated the Community Hospitals' hard-won reputations. Patients and physicians questioned the

Hospitals' safety. An insurer raised concerns. And the Hospitals were forced to devote significant time and resources to correcting misinformation and reassuring their patients. These are not speculative injuries; they are the intended outcome of Leapfrog's deception.

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") analysis is straightforward. To prevail, a plaintiff must show that: (1) the defendant engaged in a deceptive or unfair act or practice; and (2) the plaintiff was aggrieved. *SMS Audio, LLC v. Belson*, 2017 WL 1533941, at *4 n.6 (S.D. Fla. Mar. 9, 2017) (Middlebrooks, J.). And to defeat summary judgment, a party must demonstrate only a genuine dispute of material fact. *See* Fed. R. Civ. P. 56. Here, however, the undisputed record shows that deception and unfairness permeated Leapfrog's operation—and that concrete reputational and operational harm to the Community Hospitals was its direct result.

In support of its Motion for Summary Judgment, Leapfrog argues that there is no genuine issue of material fact regarding the absence of deception, unfairness, or harm, and that the Community Hospitals, despite being the direct objects of negative Safety Grades, lack standing. All of these arguments depend on the factual premise that no one was affected by Leapfrog's conduct. But Leapfrog was *created* to influence consumer behavior. It tells consumers that its Safety Grades are "trusted," "transparent," the "gold standard measure of patient safety," used by millions, and that consumers should "always decide" which hospital to visit based on those Grades—since if consumers ignore the Grades and visit a low-scoring facility, they are "twice as likely to die." Yet with its veneer of expert credibility stripped away, Leapfrog now glibly compares its "gold standard" Safety Grades to Yelp restaurant reviews and says no one actually takes Leapfrog at its word. That is not a credible position. In reality, Leapfrog robs patients of the ability to make properly informed choices regarding where to seek essential care. Removing safe choices from the marketplace, in a context as deadly serious as healthcare, is the very definition of consumer harm.

Leapfrog cannot have it both ways. It cannot maintain that its Safety Grades are essential to making vital healthcare choices, yet then insist, after the Grades' façade of legitimacy has collapsed, that no one ever relies on them for their stated purpose. The undisputed record not only precludes judgment for Leapfrog; it compels judgment for the Community Hospitals.

## FACTUAL BACKGROUND

### A. Leapfrog Urges Consumers To Rely On Its Hospital Safety Grades

Leapfrog presents itself as a nonprofit organization devoted to leveraging "transparency" to "support informed [consumer] health care decisions." SOF ¶ 3. It tells consumers they "should

*always* decide on where to receive care based on a hospital's current Safety Grade"—displayed on its website hospitalsafetygrade.org and measured grade-school-style from "A" to "F." SOF ¶ 8 (emphasis added). And it maintains that patients are "*twice as likely to die* of a preventable problem" at hospitals rated "C," "D," or "F," than those with an "A" rating. SOF ¶ 10 (emphasis added).

Consumers take Leapfrog at its word. Leapfrog trumpets the story of a patient who drove 400 miles—a distance nearly as long as the north-south length of the State of Florida—to reach an "A" hospital after seeing poor local Grades. SOF ¶ 43. And its internal materials assert that its Safety Grades are "widely used" "by the public [and] insurance companies," including in "transparency tools used by employers and purchasers reaching virtually all Americans." ECF 88-36 at 518. As Leapfrog's CEO Leah Binder has noted, "millions of people have used Leapfrog to make decisions about health care." CH-ASOF ¶ 84.

But contemporaneous internal documents and deposition testimony show that Leapfrog's professed "transparency" is a smokescreen. Leapfrog is not a public-spirited watchdog for hospital safety; rather, it operates as a commercial ratings vendor focused on raising revenues by maximizing participation in its "burdensome," "resource intensive," 350+ page Hospital Survey. SOF ¶¶ 4, 6, 19-21. As one hospital noted, hospitals feel compelled to participate "to avoid taking the blackmail-like reputational hits" that result from the artificially depressed Safety Grades Leapfrog otherwise assigns. SOF ¶ 39. Hospitals then must grant Leapfrog permission to use the data from their Survey responses "in a commercial manner for profit." SOF ¶ 20. Leapfrog conducts on-site audits at only *four or five* hospitals annually. CH-ASOF ¶ 85. Nonetheless, it licenses that data to insurers and employers and markets data products to third-party purchasers. SOF ¶ 19-20. Thus, when Survey participation declined in 2023, Leapfrog's licensing revenue did too. SOF ¶ 25.

Leapfrog's own records show it recognized the decline in Survey participation as a serious business problem. A December 2024 "Long Range Strategic Intent" document described increasing Survey participation as a critical strategy to grow revenues. SOF ¶ 22; OSOF ¶ 28-29. And a 2024 Board update candidly identified Leapfrog's focus as "growing revenues," explaining that "improving patient safety [wa]s not central" at that time. SOF ¶ 23. Expert Panel member Dr. Patrick Romano confirmed that penalizing hospitals that decline to participate was "a simple business decision," because "Leapfrog's data are not valuable if participation is low." SOF ¶¶ 20, 38; OSOF ¶ 29. CEO Binder likewise recognized that the methodology change would provide "a major incentive" for hospitals to respond to the Survey. SOF ¶ 39.

### B. The Fall 2024 Grade Methodology Was Designed To Penalize And Coerce Nonparticipants, Not Measure Safety

In early 2024, after revenue dropped, Leapfrog internally adopted a "strategic objective" to "penaliz[e] [Survey] nonparticipants." SOF ¶ 30; OSOF ¶ 29. Leapfrog says each Safety Grade uses "up to 22 national patient safety measures," derived from participating hospitals' Survey responses, Centers for Medicare and Medicaid Services ("CMS") data, and other "supplemental data source[s]." OSOF ¶¶ 25, 43. Twelve of these measures depend on data self-reported by the hospital through the Hospital Survey. For non-participants in the Survey (592 hospitals in Spring 2025), Leapfrog uses alternative methods for those measures: it substitutes CMS data for five, throws out three, and applies its "imputation model" to assign values to the remaining four: Computerized Physician Order Entry, Bar-Code Medication Administration, ICU Physician Staffing, and Hand Hygiene (the "Four Measures"). SOF ¶ 13-15. Leapfrog's methodology *automatically* assigns the *lowest score* available on the Four Measures to non-participating hospitals like the Community Hospitals. SOF ¶ 15; OSOF ¶ 29. Yet Leapfrog has continued to tell the public that its Safety Grades reflect "how well a hospital does on safety"—omitting that many such Grades are arbitrarily and punitively assigned to support Leapfrog's own commercial purposes. SOF ¶¶ 45-47.

In prior years, Leapfrog had imputed values for missing measures by drawing on alternative data sources, historical Survey results, or peer averages—external data sources it believed offered a reliable proxy for the hospitals' true safety. OSOF ¶ 23. The new methodology, by contrast, automatically and punitively assigns the lowest possible score on the Four Measures to every hospital that declines to complete the Survey, regardless of actual performance. OSOF ¶¶ 29. These low scores resulted in artificially low overall Safety Grades for nonparticipating hospitals.

Leapfrog's full Expert Panel never approved that change: The slideshow presentation, video recording, transcript, and draft minutes from the relevant April 2024 meeting all confirm no discussion or vote occurred. SOF ¶¶ 28, 46; ECF 88-84 (Austin) at 144:8-145:1. *After* the meeting, Leapfrog staff internally proposed the "drastic" idea of assigning nonparticipating hospitals the lowest scores on key measures. CH-ASOF ¶ 87; *see also* SOF ¶ 29. Only a month later did a member of the team run by Leapfrog science advisor Dr. Matthew Austin circulate notes stating—contrary to every contemporaneous record—that the Expert Panel had discussed and supported the change at the April 2024 meeting. *See* CH-ASOF ¶¶ 88-89. Meanwhile, Leapfrog's witnesses internally acknowledged the "[d]rastic" methodology change was "arbitrar[y]," "random," and "not accuracy" driven. SOF ¶¶ 29, 34, 38. And Dr. Austin admitted that the "imputation model" was

never peer-reviewed. SOF ¶ 45; ECF 88-84 (Austin) at 306:15-17. Externally, though, Leapfrog continued telling the public that its Safety Grades are based on a "peer-reviewed" methodology "calculated" by "top patient safety experts under the guidance of a National Expert Panel," and reflect "how well a hospital does on safety." SOF ¶¶ 45-47.

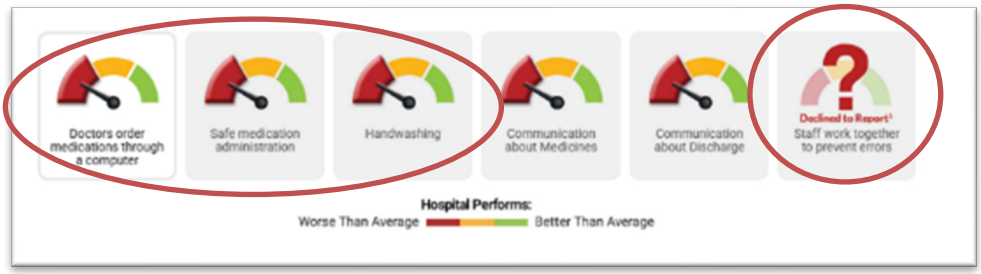
Leapfrog's internal communications confirm the redesign was about revenue, not rigor. Dr. Romano testified that the changes "achieve[d] [the] strategic objective of penalizing nonparticipants." SOF ¶ 30. And Alexandra Campione, the program analyst who helped implement the change, "completely agree[d]." SOF ¶ 30. Leapfrog achieved that objective: Each Community Hospital, for example, saw its Safety Grade fall by at least one letter by Spring 2025—some from "B" or "C" to "D" or "F"—despite no change in actual safety performance. SOF ¶¶ 49-50.

### C. Leapfrog's Public Messaging Misleads Consumers

From the homepage of Leapfrog's website, consumers can navigate directly to an "About the Grades" webpage describing the methodology. That page includes several unqualified representations about the Grades. *First*, Leapfrog claims that a "Safety Grade is the gold standard measure of patient safety" and "represent[s] a hospital's overall performance in keeping patients safe from preventable harm and medical errors." SOF ¶ 48. But Leapfrog's chief science advisor, Dr. Austin, admitted that Leapfrog has not "conducted any analysis" supporting this statement. SOF ¶ 48. *Second*, Leapfrog claims that "where a hospital's information is not available for a certain measure, Leapfrog uses a supplemental data source." But Leapfrog uses no "supplemental data source[s]" for non-participants lacking recent historical scores. OSOF ¶ 43. *Third*, Leapfrog says "[a] hospital must have enough safety data available to our experts to issue them a letter grade. Hospitals missing more than **six** process measures … are not graded." SOF ¶ 17. But Leapfrog graded the Community Hospitals despite missing data for seven measures—filling the gaps with the lowest-possible "imputed" scores on the Four Measures. SOF ¶¶ 11-16, 34-36. *Fourth*, Leapfrog says its "Safety Grade methodology has been peer reviewed," which is false. SOF ¶ 45.

Leapfrog's webpage for each specific hospital amplifies these representations. It displays the hospital's overall letter grade and, below, depicts the hospital's score on the different measures. SOF ¶ 40. For each measure, Leapfrog includes a "gas-gauge" graphic indicating hospital performance. *Id*. There, Leapfrog displays red bars and "Worse Than Average" indicators for three of the imputed measures for each of the Community Hospitals, visually implying real safety data where none exists. SOF ¶¶ 14-16, 40-42, 44. The site shows these red, low-score bars in parallel

with a measure labeled "Declined to Report"—falsely suggesting hospitals declined to report data for only one measure and performed poorly on the other "imputed" measures depicted. SOF ¶ 40.




SOF ¶ 40. (red circle emphases added). But the Community Hospitals did not provide data for *any* circled measure. *E.g.*, SOF ¶¶ 14-16, 44, 49. A footnote—visible only after scrolling—further states "a score was assigned to reflect the lack of information available." SOF ¶ 42; OSOF ¶¶ 30, 38. Leapfrog's own staff recognized "the public may misinterpret the assigned measure scores" and believe they reflect estimated or neutral calculations, not an automatic penalty. SOF ¶ 33. Nevertheless, Leapfrog never amended the disclaimer to reveal that nonparticipants automatically receive *the lowest possible score*. To the contrary, another disclaimer on the same pages falsely says Leapfrog "scores hospitals on their overall performance in keeping patients safe." RSOF ¶ 6.

The only place on its website that Leapfrog hints at the consequence of nonparticipation on Grades is a 28-page "Scoring Methodology" document. To view the imputation discussion, users must click through two small hyperlinks on separate pages, then scroll to page 15 of that document. SOF ¶ 11; CH-ASOF ¶¶ 90-92. Only about *three percent* of those who have visited the Community Hospitals' Safety Grade pages even downloaded that document, and CEO Binder conceded that it "is not that accessible to the average layman." RSOF ¶ 7.

**D. Leapfrog's False Safety Grades Cause Concrete And Ongoing Harm**

Leapfrog's false Safety Grades have inflicted serious reputational harms upon the Community Hospitals. Each Hospital's CEO testified that patients, physicians, and insurers reacted immediately to the failing Grades. Patients canceled surgeries and diverted to competitors. SOF ¶¶ 56-61. Physicians sought privileges elsewhere, and an insurer questioned the Hospitals' safety. SOF ¶¶ 56-61. Births at St. Mary's fell roughly 2 percent, elective and emergency visits at Good Samaritan declined 5 percent, Palm Beach Gardens' emergency-room visits dropped 6 percent, West Boca's emergency-room volume decreased 17 percent year-over-year, and Delay experienced "a significant dip in admissions" when a viral video emerged recounting Leapfrog's Safety

Grades. SOF ¶ 57-60. The resulting economic harms have been substantial, given that the Community Hospitals typically generate nearly $2 billion of net revenue annually. CH-ASOF ¶ 98-99.

Behind the scenes, Leapfrog activated its media machine to maximize the impact of its Safety Grades. Leapfrog's Director of Communications, Lauren Bailey, confirmed that Leapfrog sought one "negative" story "at minimum every three days about Tenet [the Community Hospitals' parent company] or one of the plaintiff hospitals." CH-ASOF ¶ 100. Leapfrog's goal was to "hurt Tenet." SOF ¶ 53. Leapfrog even purchased ads ensuring that the Community Hospitals' failing Safety Grades appeared any time web users searched those Hospitals. CH-ASOF ¶ 101. The Safety Grades generated national and local headlines—including "Tenet Gets an F." SOF ¶ 52; ECF 88-32 at 5138. The amplified publicity reached more than a million consumers. SOF ¶¶ 51-53. In fact, Leapfrog continues to blast its Safety Grades to Florida consumers, most recently in support of its Fall 2025 Safety Grades released on November 13, 2025. CH-ASOF ¶ 102.

### E. After This Suit Was Filed, Leapfrog Quietly Edits Its Website To Remove Some Deceptive Claims, Yet Replaces Them With Other Evasive Language

In the wake of this suit, Leapfrog has continued to disseminate its false Safety Grades. Leapfrog has also quietly edited its website to remove some of the statements challenged here, only to replace them with other evasive and misleading language. Specifically, some time after October 24, 2025, Leapfrog altered its "FAQ" page to remove the statement that a "Safety Grade reflects how well a hospital does on safety, not whether they complete the Leapfrog Hospital Survey." SOF ¶ 47; CH-ASOF ¶¶ 103-105. The page now says that "[r]eporting to the Leapfrog Hospital Survey doesn't automatically improve a hospital's Safety Grade"—which still deceptively omits the critical fact that nonparticipation *harms* Safety Grades. CH-ASOF ¶ 105. The FAQ page also no longer states that "if a hospital does not report to the Leapfrog Hospital Survey, other sources of data are used to calculate a Grade." SOF ¶ 44. Instead, it represents that "[m]ost of the data used to calculate the Grade comes from the Centers for Medicare and Medicaid Services (CMS), the federal agency that runs Medicare. If a hospital voluntarily reports to the Leapfrog Hospital Survey, some of that data is used to calculate a Safety Grade." CH-ASOF ¶¶ 106-108. Again, however, this text does not disclose that Leapfrog simply assigns low scores to nonparticipants based on no data. Leapfrog also removed its claim that "patients are twice as likely to die of a preventable problem at a 'C,' 'D,' or 'F' hospital than an 'A' hospital," SOF ¶ 10, though its site elsewhere still claims that a 2019 Johns Hopkins analysis "found that D and F hospitals carry nearly twice the risk of mortality of A hospitals," CH-ASOF ¶ 111. To the Community Hospitals'

knowledge, Leapfrog has never informed the Court of these changes, which the Community Hospitals discovered only recently. Despite those changes, Leapfrog admitted (apparently incorrectly) in its statement of facts opposing the Community Hospitals' summary-judgment motion that each of the statements above continues to appear on Leapfrog's website. *See* R-PSOF ¶¶ 10, 44, 47.[1]

## ARGUMENT

### I. THE SAFETY GRADES ARE INDISPUTABLY DECEPTIVE AND ARBITRARY

The undisputed record shows that (1) Leapfrog's Safety Grades and associated representations are deceptive and misleading; (2) Leapfrog's "imputation" model is arbitrary, punitive, and unfair; (3) Leapfrog's deceptive and unfair practices have imposed concrete harm on consumers; and (4) Leapfrog has now engaged in selective post-litigation edits to its website, destroying any pretense that Leapfrog's status quo disclosures are "comprehensive," Mot. 10, 11, and "as transparent as possible," ECF 88-91 (Danforth) at 540:3-4. Because nothing in Leapfrog's own opposition, ECF 102, or its squabbles about expert testimony, ECF 111, creates a genuine dispute, it is the Community Hospitals—not Leapfrog—that are entitled to summary judgment.[2]

#### A. The Record Establishes Consumer Deception Beyond Any Genuine Dispute

Leapfrog cites *no* evidence disputing the falsity of its public statements about how its Safety Grades are calculated and what they represent; its lack of data for the Four Measures; the absence of Expert Panel approval of the new methodology; the lack of peer review of that methodology; or the concrete harms that Leapfrog's practices are inflicting on consumers.

##### 1. Leapfrog Deceives Consumers Through Multiple False Claims

Leapfrog's effort to show that its representations are non-deceptive addresses everything *but* those representations. Mot. 10-13. The reason why is obvious: The concessions of Leapfrog and its witnesses inescapably show that Leapfrog's practices are deceptive as a matter of law.

*First*, Leapfrog falsely represents that "[t]he Hospital Safety Grade reflects how well a hospital does on safety, not whether they complete the Leapfrog Hospital Survey." SOF ¶ 47. Leapfrog's brief ignores this representation and does not defend it as true. In fact, uncontroverted evidence has proven it false as a matter of law, given that Leapfrog undisputedly assigns the lowest

[1] On November 24, the Community Hospitals received a generic email from a Leapfrog "help desk" email account discussing various changes to Leapfrog's *Survey*, none of which are relevant to this litigation. CH-ASOF ¶¶ 112-114.

[2] Leapfrog's Statement of Material Facts is replete with statements that are unsupported, *see* LF-SOF ¶¶ 6, 9, 15, 20, 23-24, 28, 31, 34-35, 38, 40-41, 43-46, 48, 50, 53, 58, 62, 69, 71-72, 78, 81, dependent on inadmissible hearsay, ¶¶ 1-7, 9-10, 14, 20, 34, 47, and/or vague or confusing, ¶¶ 4, 15, 17-20, 22, 28-32, 39.

score to non-participating hospitals on the Four Measures simply because they do not participate. SOF ¶ 15; OSOF ¶ 29. Indeed, Leapfrog has conceded that "[s]ome hospital[s'] Safety Grades *may feel negative effects* from receiving limited achievement scores"—*i.e.*, the scores assigned to non-participants. ECF 102 at 9 (emphasis added). And it is uncontroverted that each Community Hospital's Grade dropped by a full letter from Spring 2024 to Spring 2025. SOF ¶¶ 49-50.

*Second*, Leapfrog falsely claims that "[a] hospital must have enough safety data available for our experts to issue [it] a letter grade," so "[h]ospitals missing more than six process measures … are not graded." SOF ¶ 17. In reality, Leapfrog grades nonparticipants despite lacking data on *seven* measures. Leapfrog witnesses admitted as much. *See* SOF ¶ 13; ECF 88-88 (Campione) at 72:15-19 (agreeing "Leapfrog has no data for any of those seven measures if a hospital does not participate"). Leapfrog's *own Answer* admits the same—that Leapfrog "abandons three measures," uses imputation for four, and that imputation is how Leapfrog assigns "a value for a measure when [Leapfrog] *lacks any data pertaining to it.*" Answer ¶¶ 21-22 (emphasis added). That judicial admission is "beyond the power of evidence to controvert," *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1178 (11th Cir. 2009), and thus places Leapfrog's deception beyond debate.

*Third*, Leapfrog falsely asserts that "[t]he Hospital Safety Grade uses a public, peer-reviewed methodology." R-PSOF ¶ 46. That is false, because the new imputation methodology implemented in Fall 2024 has *never been* peer-reviewed. Leapfrog's science advisor, Dr. Matthew Austin, admitted this. ECF 88-84 (Austin) at 306:15-17 ([Q:] "The imputation model, has that been peer reviewed?" [A:] "No."). Leapfrog elsewhere has admitted that concession. ECF 102 at 11. Unable to defend its actual representation to the public (that its Safety Grades use a peer-reviewed methodology), Leapfrog's motion now shifts to the claim that its Safety Grades are based on "peer-reviewed literation [*sic*] and subject matter expertise." Mot. 4 n.1. That is irrelevant. Leapfrog tells the public that its operative *methodology* is peer-reviewed—not that the methodology is based on *other* literature that purportedly was peer-reviewed.

*Fourth*, Leapfrog falsely claims through its "gas gauge" graphics that a "Hospital Performs … Worse Than Average" on the Four Measures. SOF ¶ 40. Leapfrog does this even though it is now uncontroverted that the failing gas-gauge visuals are based solely on imputation, SOF ¶¶ 35, 40, which rests on no underlying data, SOF ¶ 16. Leapfrog's Motion ignores the gauges, other than to mention two disclaimers found on the same pages (that a "hospital was asked to provide this information to the public, but did not," and that a "score was assigned to reflect the lack of

information available"). Mot. 4. Yet those disclaimers nowhere explain *how* Leapfrog "assigned" the scores—that it arbitrarily awarded "Limited Achievement" even though it has no supporting data. SOF ¶ 16; OSOF ¶¶ 38, 43. Moreover, Leapfrog's own Motion mentions (at 4), but then deceptively omits, the third relevant disclaimer on those webpages—which falsely asserts that Leapfrog "scores hospitals on their overall performance in keeping patients safe." RSOF ¶ 6.

Leapfrog's caselaw discussion (Mot. 10-12) is irrelevant. Leapfrog's website is not akin to a bottle of hand sanitizer that "clearly discloses" on the back which germs it kills. *Piescik v. CVS Pharmacy, Inc.*, 576 F. Supp. 3d 1125, 1133 (S.D. Fla. 2021). The one place Leapfrog purports to describe how its Safety Grades work (the Scoring Methodology document) requires clicking through various links; only about *three percent* of those who view the Community Hospitals' Safety Grades download the document; and that document concededly is "not that accessible to the average layman." RSOF ¶ 7. Nor is this a case about a "niche, specialty product" where users "would likely know more" than typical consumers about why Leapfrog's unqualified representations are false. *Moore v. Trader Joe's Co.*, 4 F.4th 874, 884 (9th Cir. 2021). Leapfrog markets its Grades as a way to "quickly assess" hospital safety, urges "[p]atients [to] always" rely on them, and indiscriminately blasts those Grades to the public. SOF ¶¶ 8-9, 51; *see also* SOF ¶ 52. Finally, this case has nothing to do with Yelp reviews—where unvetted third parties blow off steam about poor service. Leapfrog portrays itself as a singularly "trusted" and "transparent" source about where to receive care. SOF ¶ 5; OSOF ¶ 7. The notion that consumers treat Safety Grades like Yelp reviews is unevidenced and baseless. Thus, Leapfrog has not even attempted to identify evidence refuting its deception, and its cases simply confirm that Leapfrog *perpetrates* deception.

**2. Leapfrog Misleads Patients, Physicians, Insurers, And Hospitals**

**a.** Leapfrog's "consumer harm" argument is also wrong as a matter of law and, even if it were correct, is factually baseless. Leapfrog says FDUTPA embraces a "two-part" inquiry for deception claims, Mot. 10, so that a plaintiff must show a challenged practice is "likely to mislead" a reasonable consumer, but then must *also* show that the deception actually worked to some specific consumer's "detriment"—that is, a particular consumer "erroneously relied on the Safety Grades," and then suffered "specific damage," which Leapfrog defines as "adverse health outcomes" or being "charged an inflated fee," *id.* at 8, 9. Leapfrog further suggests that even if FDUTPA embraces a "likelihood" standard at the *pleading* stage, the burden shifts to demonstrate *actual* consumer reliance and harm whenever it comes to obtaining an injunction. *See id.* at 9-10.

Those assertions have no basis in FDUTPA's plain text or Florida precedent. Section 501.211(1) of the statute specifically provides that a plaintiff can enjoin a defendant who is "likely to violate" FDUTPA. Fla. Stat. § 501.211(1). That language would be meaningless if plaintiffs were required to show that individual consumers *already* had actually relied on, and been injured by, a deceptive representation; the violation by then would be consummated, not merely "likely." Leapfrog's contrary reading makes no practical sense and would neuter FDUTPA's "remedial" scheme "to protect consumers." *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005). If Leapfrog were correct, courts could never enjoin new misrepresentations, no matter how harmful, until an individual consumer actually suffered injury. For example, a snake-oil salesman could offer free samples of a "life extending elixir" in fact filled with poison, yet no one (according to Leapfrog) could enjoin that misrepresentation until a consumer dropped dead. Leapfrog never explains why the Florida Legislature would have drafted the statute to contain that remedial loophole—presumably because the Legislature in fact wrote the opposite.

That is also why the Florida Supreme Court, the "true and final arbiter" of Florida law, *In re Cassell*, 688 F.3d 1291, 1292 (11th Cir. 2012), adopted the *opposite* reading of Leapfrog's in *PNR, Inc. v. Beacon Property Management, Inc.*, 842 So. 2d 773, 777 (Fla. 2003). There—after a full-blown jury trial, not merely a decision on the pleadings—that court expressly endorsed the legal standard set out in *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000). *Millennium Communications*, in turn, made clear that FDUTPA's standard is the "Federal Trade Commission standard for deceptive advertising," 761 So. 2d at 1263, which merely requires "probable, not possible, deception," and "deceptions *that are likely to cause injury* to a reasonable relying consumer," *id.* (emphasis added). For that reason, *actual* "reliance by an individual consumer is not necessary in the context of FDUTPA," *Turner Greenberg Assocs., Inc. v. Pathman*, 885 So. 2d 1004, 1009 (Fla. 4th DCA 2004), and thus "[a] likelihood of consumer confusion is a sufficient basis for injunctive relief" under the statute, *Ghostbed, Inc. v. Casper Sleep, Inc.*, 2016 WL 4145909, at *3 (S.D. Fla. July 19, 2016). That is exactly how the FTC Act (which FDUTPA tracks) also functions: There is no requirement to show *actual* individualized reliance and harm.[3]

[3] *See, e.g.*, *FTC v. Pointbreak Media, LLC*, 376 F. Supp. 3d 1257, 1282 (S.D. Fla. 2019) ("[T]he FTC need only show that the representation had 'a tendency to deceive,' as 'proof of actual consumer deception is unnecessary.'"); *FTC v. Vylah Tec LLC*, 2018 WL 3656474, at *7 (M.D. Fla. Aug. 2, 2018) ("[I]t is not necessary for the FTC to show actual reliance by each individual consumer.").

Leapfrog's principal response is to cite *Novo Nordisk, Inc. v. Brooksville Pharmaceuticals, Inc.*, 785 F. Supp. 3d 1123 (M.D. Fla. 2025), but that decision is much too flimsy a basis on which to overhaul Florida's entire consumer-protection regime. The decision's FDUTPA analysis is vacated, "*dicta*," and never confronted the Community Hospitals' arguments above. *Novo Nordisk, Inc. v. Brooksville Pharms., Inc.*, 2025 WL 2306505, at *2, *4 (M.D. Fla. June 30, 2025); *United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (vacated decisions "are officially gone" and "have no legal effect whatever"). And the decision is wholly inapposite. There, Novo Nordisk (the maker of a brand-name drug) sued Brooksville (the maker of a generic version) on the theory that the generic was impure—even though sales of the generic were FDA-authorized and the purported "impurities" in the generic were "within Novo Nordisk's own drug product specifications." *Novo Nordisk, Inc.*, 785 F. Supp. 3d at 1129, 1131. Novo Nordisk's claim thus hinged entirely on the "hypothetical possibility of some future injury to Florida consumers based on [the] impurities," *id.* at 1146—not a practice inflicting deception upon consumers in the here-and-now. It thus has nothing to do with Leapfrog's *ongoing* deception of consumers.

Leapfrog's other cases are similarly misdescribed. Leapfrog selectively quotes the Eleventh Circuit's decision in *Ounjian v. Globoforce, Inc.*, 89 F.4th 852, 861 (11th Cir. 2023), but ignores its clear statement that liability turns on whether there were "deceptive or unfair actions in the conduct of trade or commerce that injured *or were likely to injure* consumers." *Id.* (emphasis added). That accords with the Eleventh Circuit's recognition that FDUTPA liability does "not" hinge on whether consumers "actually relied on the illegal misrepresentation." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 986 (11th Cir. 2016). Leapfrog also plucks stray lines from other cases that, in context, are not supportive. *Caribbean Cruise Line, Inc. v. Better Business Bureau*, for example, says plaintiffs must show "an injury or detriment to consumers," but does not purport to require individualized reliance or harm (beyond the deception itself). 169 So. 3d 164, 169 (Fla. 4th DCA 2015). Indeed, the opinion cited *PNR* for the controlling standard, *id.*, and *PNR*'s test asks whether deception is "likely to injure" consumers. *Supra* 11. *Stewart Agency, Inc. v. Arrigo Enterprises, Inc.*, 266 So. 3d 207, 214 (Fla. 4th DCA 2019), did not (and had no reason to) examine whether individualized actual reliance and harm are required because it simply found "no evidence" of "any misrepresentations." Finally, *CMR Construction & Roofing, LLC v. UCMS, LLC*, 2022 WL 3012298, at *5 (11th Cir. July 29, 2022), and *State Farm Mutual Automobile Insurance Co. v. At Home Auto Glass, LLC*, 2024 WL 4349246, at *5 (M.D. Fla. Sept. 30, 2024), also do not

purport to require individualized evidence of actual reliance and harm. The claims in those cases failed because the plaintiffs alleged only that *they* (a roofing company and an insurer, respectively) were "consumers," but failed to show that *they* consumed roofing and insurance services.

**b.** In any event, Leapfrog's argument is factually baseless even under its preferred standard. FDUTPA protects "consumers," a term that broadly includes any "individual," "business," "corporation," "or any other group or combination," Fla. Stat. § 501.203(7), at least when those entities are not themselves the "provider" of the challenged service (*i.e.*, the Grades), *State Farm Mut. Auto. Ins. Co.*, 2024 WL 4349246, at *5. Under that standard, the Community Hospitals have established (and at minimum have shown genuine disputes as to) multiple categories of consumers. Leapfrog's only response is to call (some of) that evidence "hearsay," Mot. 7, which is false.

*First*, patients were deceived into switching hospitals. The Community Hospitals' CEOs consistently testified to declining admissions in multiple categories of care shortly after Leapfrog disseminated the Grades throughout Florida. *See, e.g.*, OSOF ¶¶ 74, 77. That "temporal" proximity itself is "'powerful evidence'" of causation. *In re Stand 'N Seal Prods. Liab. Litig.*, 623 F. Supp. 2d 1355, 1374 (N.D. Ga. 2009). The Hospitals also put on evidence that "patients" were "voicing complaints about the hospital's low safety score." ECF 88-90 (Cazares) at 89:20-21. Those patient complaints are not offered for "the truth of the matter asserted," Fed. R. Evid. 801(c)(2) (*i.e.*, that the Hospitals in fact are unsafe), but instead show that Leapfrog deceived consumers into believing the Hospitals are unsafe. Thus, those patient complaints "are not hearsay." *Lincare Holdings Inc. v. Doxo, Inc.*, 2024 WL 865881, at *2 (M.D. Fla. Feb. 29, 2024) (collecting cases). And Leapfrog's assertion that the Community Hospitals must *also* show that those patients suffered "adverse health outcomes" at competitor institutions (Mot. 9) is false. Deceiving consumers into using a service violates FDUTPA even when consumers ultimately "were happy with" the service. *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 702 (Fla. 3d DCA 2000). *Second*, physicians were also harmed, as they chose to sign up with competitors after the Grades were released. SOF ¶¶ 57, 60. *Third*, a prominent insurer (Humana) was deceived into believing the Hospitals are unsafe, and thus sent letters to two Hospitals imploring them to address their "performance on safety measures." SOF ¶ 56, 60. Those letters likewise are not offered for the truth of the statements therein (that the Hospitals *in fact* need to address purportedly failing safety performance), but to show that Leapfrog deceived Humana into believing the Hospitals are unsafe. *Finally*, the Hospitals are themselves injured consumers of Leapfrog's Safety Grades. *See infra* 14. Despite

Leapfrog's claim that only patients are "consumers," Mot. 9, Leapfrog itself argues that hospitals likewise consume its products, *id.* at 14 (asserting that "hospitals," including "the [Community] Hospitals," use its "Survey"). That the Hospitals were not themselves deceived about their own quality of care is irrelevant, since "subjective reliance" is not required under FDUTPA. *Webber v. Esquire Deposition Servs., LLC*, 439 F. App'x 849, 851 (11th Cir. 2011) (per curiam).

**B. Leapfrog's Arbitrary Penalties Are Unequivocally Unfair**

Leapfrog's conduct is also indisputably unfair. Leapfrog's witnesses admitted that the new imputation methodology is an "arbitrar[y]" and "random" "penalty" imposed on non-participants—intended to "sound" "legitimate" despite lacking support in either data or peer review—the "purpose" of which is "not accuracy" but to provide "a major incentive to report to the Survey." SOF ¶¶ 16, 34, 38, 39. As Dr. Romano summed up Leapfrog's ploy, "It's just business, folks!" SOF ¶ 38. If *that* conduct is not unfair under FDUTPA, nothing is.

Leapfrog responds first by mischaracterizing the relevant legal inquiry. It claims that the newer, three-factor unfairness test is how unfairness is shown under the older test described in *PNR, Inc.*, 842 So. 2d at 777. *See* Mot. 13. That is false. The *PNR* test and the three-factor test are *two different tests* promulgated years apart by the FTC. *PNR*'s test derives from the FTC's 1964 policy statement—which is framed in the disjunctive ("… *or* [is] substantially injurious to consumers") and thus does not "definitively requir[e] consumer injury." *See SMS Audio, LLC*, 2017 WL 11631378, at *4. By contrast, the three-factor test is a "newer definition" from the FTC's 1980 policy statement. *Id.* Because *PNR*'s endorsement of the 1964 approach is "the latest statement of state law by the state supreme court," *World Harvest Church, Inc. v. Guideone Mut. Ins. Co.*, 586 F.3d 950, 957 (11th Cir. 2009), it controls. In any event, Leapfrog's conduct violates both tests.

Under *PNR*'s 1964 test, Leapfrog's conduct "offends established public policy" and is "oppressive" and "unscrupulous." *PNR, Inc.*, 842 So. 2d at 777. Leapfrog witnesses' own admissions establish that the Safety Grades are an "arbitrarily assign[ed]" "penalty" "based on a lack of data," the "purpose" of which "is not accuracy." SOF ¶¶ 16, 34, 38. Arbitrarily penalizing hospitals without supporting data to create "a major incentive to report to the Survey," SOF ¶ 39, is the sort of "deceptive and bullying conduct" that violates Florida public policy. *Marco Island Cable v. Comcast Cablevision of S., Inc.*, 312 F. App'x 211, 214 (11th Cir. 2009). That conduct is also "oppressive" because it imposes an illegitimate penalty for non-participation—particularly because it is tied to Leapfrog's own revenues. *See* R-PSOF ¶ 21 (conceding that "more organizations … using"

Leapfrog's data results in "increased revenues"). And it is "unscrupulous" because Leapfrog dishonestly represents how it calculates its Safety Grades and what they represent—publicly claiming that participation does not affect Grades, that Grades measure real-world performance, that the methodology is peer-reviewed, and that Leapfrog does not grade hospitals when it lacks sufficient data, SOF ¶¶ 17, 45, 47-48, 51, even though none of that is true.

For those reasons, Leapfrog's undisputed conduct is "unfair" as a matter of law under the Florida Supreme Court's test. That conclusion accords with a vast body of law applying the FTC Act, which FDUTPA tracks. The FTC has long held that "deceptive practices are always unfair." *In re Figgie Int'l, Inc.*, 107 F.T.C. 313, 373 n.5 (1986), *aff'd*, 817 F.2d 102 (4th Cir. 1987). And the Eleventh Circuit has recognized the same point. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172 (11th Cir. 1985) ("An act or practice is … unfair … if it has the tendency or capacity to deceive."). Thus, the Community Hospitals—not Leapfrog—merit summary judgment.

Leapfrog's conduct is also unfair as a matter of law under the 1980 three-factor test.

*First*, Leapfrog claims there is no evidence of consumer injury, which is factually false, *see supra* 13-14, and that even if there were, those injuries are not "substantial," which is legally erroneous. Mot. 13. The reference to "substantial" injuries in the FTC's 1980 policy statement is merely intended to weed out "trivial" or "speculative" claims; for example, based on "[e]motional impact" or allegations that "the tastes or social beliefs" of "some viewers" were offended. *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1101 (Fla. 3d DCA 2014). By contrast, the same policy statement makes clear that businesses may *not* "withhol[d] … performance data" so as to leave consumers "with insufficient information for informed comparisons"—a tactic "properly banned as an unfair practice." *Id.* at 1102. Because Leapfrog deprives consumers of precisely those "informed comparisons," the deception it inflicts upon consumers is plainly "substantial."

*Second*, Leapfrog's claim that its practices have countervailing benefits is unsubstantiated. The relevant question is not whether Leapfrog's *Survey* in the abstract has some beneficial use, but whether its "unfair or deceptive *acts or practices*" *themselves*, Fla. Stat. § 501.204(1) (emphasis added), "produc[e]" the countervailing benefit, *SMS Audio, LLC*, 2017 WL 1163137, at *3. There is "no countervailing benefi[t]" to "intimidating, threatening, and coercing consumers." *FTC v. World Patent Mktg., Inc.*, 2017 WL 3508639, at *16 (S.D. Fla. Aug. 16, 2017). The closest Leapfrog comes to suggesting that its coercive *practices* pose a benefit is to suggest that hospitals actually "improve patient safety" and patients gain greater access to "patient safety data" from

increased participation. Mot. 14. But Leapfrog *does not even audit* virtually all of the data it receives, SOF ¶ 12; CH-ASOF ¶¶ 85-86, so has no way to say with confidence whether safety *actually* is improving, or whether, instead, hospitals are simply *reporting* better outcomes. Leapfrog thus failed to meet its burden to identify evidence showing a countervailing benefit.

*Third*, Leapfrog offers no evidence that consumers could reasonably avoid its practices. It simply ignores that hospitals are "consumers" under FDUTPA, *see supra* 13-14, and thus never explains how hospitals could reasonably avoid Survey participation when Leapfrog imposes a "penalty" for non-participation. SOF ¶ 38. Leapfrog instead claims that *patients* could reasonably avoid its deceptive practices, which is also false. Leapfrog runs a sophisticated media operation to ensure that its Safety Grades are widely publicized throughout Florida, SOF ¶ 51, and even purchases ads to "hurt" the Community Hospitals by ensuring their failing Grades appear whenever they are searched, SOF ¶ 53. All Leapfrog offers in response are disclaimers found in small print at the bottom of the Safety Grade pages or elsewhere on its site. Mot. 15. But Leapfrog cites no evidence showing that patients read or understand those inconspicuous disclaimers. And the disclaimers are irrelevant on their face. For example, if a patient were choosing between two equidistant hospitals (one an "A" and the other an "F"), she would not be "avoid[ing]" or "delay[ing]" medical care by visiting the "A" hospital—but she *would* have been deceived into believing the "F" hospital is an unsafe option. Mot. 15. Thus, the FTC's 1980 unfairness test is satisfied as well.

**C. The Community Hospitals' Injuries Put Aggrievement Beyond Dispute**

The Community Hospitals also satisfy FDUTPA's capacious "aggrieve[ment]" requirement. A plaintiff seeking injunctive relief need only show an identifiable, non-speculative injury, *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 173 (Fla. 1st DCA 2015), which may include reputational harm and damage to "good will," ECF 41 at 8; *Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.*, 123 So. 3d 1149, 1152 (Fla. 5th DCA 2012); operational disruption; and "consumer confusion" regarding the "quality of service," *Colonial Van Lines, Inc. v. Colonial Moving & Storage, LLC*, 2020 WL 6700449, at *4 (S.D. Fla. Oct. 20, 2020).

The Community Hospitals' evidence easily clears that threshold. All Community Hospitals were subject to a media firestorm ignited by their "failing" Safety Grades. SOF ¶¶ 51-52. And all five CEOs testified to the same ensuing pattern: patient confusion, diverted procedures, insurer concern, and reputational injury amplified to over a million Florida consumers. *See* ECF 88-90 (Cazares) at 89:19-21 (Palm Beach CEO Cazares testifying that "patients" were "complaining

about the hospital's low safety score"); SOF ¶ 56 & OSOF ¶ 61 (Delray CEO Havericak testifying to reputational injury); ECF 88-53 (letter from Humana to Delray imploring hospital to address "performance on safety measures"); SOF ¶ 60 (decline in emergency-room admissions at West Boca after Grades were released); ECF 88-52 (similar Humana letter sent to West Boca); SOF ¶ 57 & OSOF ¶¶ 55-56 (noting Good Samaritan's declines in admissions, observation cases, and emergency-room visits; top surgeons got on staff at competitor); SOF ¶ 59 & OSOF ¶ 77 (decline in number of births, outpatient surgeries, and emergency admissions at St. Mary's).

Leapfrog's legal objections are baseless. None of that evidence is "hearsay"; it relies either on objective evidence within the CEOs' own knowledge or consists of statements showing confusion, not the truth of the matter asserted. *See supra* 13. Leapfrog's citation of *Stewart Agency, Inc. v. Arrigo Enterprises, Inc.*, 266 So. 3d at 207, is similarly misplaced. The *Stewart* plaintiff admitted the defendant's sales of defective airbags had *no impact* on its own sales. *Id.* at 211. Here, by contrast, operational impact is uncontroverted. Leapfrog also objects that the Community Hospitals' revenue did not decline, Mot. 17, which is irrelevant. Injunctions by definition do not require proof of damages, *see supra* 16, and a general increase in revenues does not negate the existence of discrete, cognizable harms like falling admissions for *some* procedures or resource diversion to handle complaints. Indeed, that a plaintiff "generated a net profit" "does not demonstrate that [it] suffered no harm." *Wyndham Vacation Ownership, Inc. v. Slattery, Sobel & Decamp, LLP*, 2024 WL 5703196, at *11 (M.D. Fla. Aug. 14, 2024); *Pals Grp., Inc. v. Quiskeya Trading Corp.*, 2017 WL 5598721, at *4 (S.D. Fla. Nov. 20, 2017) (no "contradiction" that plaintiff was "profitable" when it could "have earned *more* profits" absent defendant's wrongdoing).

## II. LEAPFROG'S JURISDICTIONAL AND CONSTITUTIONAL DEFENSES FAIL

### A. The Community Hospitals' Standing Is Self-Evident

Leapfrog's belated challenges to standing and the amount-in-controversy requirement each fail. "If there is a genuine issue of material fact as to whether the [Community Hospitals] have standing, summary judgment against them on standing grounds is inappropriate." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1286 (11th Cir. 2001).

Leapfrog has not come close to *disproving* a genuine issue, and the undisputed record in fact *confirms* the Community Hospitals' standing. *First*, reputational harms, diversion of resources, and loss of customers are all well-recognized injuries-in-fact—all of which will continue as Leapfrog continues to disseminate its false Safety Grades to the public. *TransUnion LLC v.*

*Ramirez*, 594 U.S. 413, 425 (2021); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009); *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991). *Second*, the undisputed record precludes any challenge to traceability. Insurer letters raising concerns specifically due to Leapfrog's Safety Grades, resource diversion to address complaints based on those Safety Grades, and newfound declines in admissions closely corresponding to the release of the Safety Grades are all harms directly traceable to Leapfrog. *Third*, redressability is easily established as well. An order providing that the Community Hospitals no longer may be included in Leapfrog's deceptive Safety Grades plainly would redress injuries flowing from those Grades.

Aside from its baseless "no harm" argument on injury-in-fact, Leapfrog appears to assert that the Community Hospitals' injury is self-inflicted because they could submit to the Survey and thus gain "control over the Four Imputed Measures." Mot. 18. But the Supreme Court has "never recognized a rule of this kind under Article III," *FEC v. Cruz*, 596 U.S. 289, 297 (2022), instead explaining that injuries "remai[n] fairly traceable" to unlawful conduct "even if the injury [is] in some sense … willingly incurred," *id.* Here, the Community Hospitals did not "willingly" embrace Leapfrog's deceptive aspersions, so the case for traceability is even stronger than it was in *Cruz*. Indeed, it is incoherent to say that a plaintiff lacks standing to challenge a practice as coercive simply because he could "submit to the very [act]" that "he complains" is coercive. *Williams v. Albemarle City Bd. of Educ.*, 508 F.2d 1242, 1244 (4th Cir. 1974).

**B. The Amount-In-Controversy Requirement Is Plainly Satisfied**

Leapfrog's objection to the amount-in-controversy requirement is also baseless. The amount in controversy is assessed when a suit is *filed*—not thereafter. *See PTA-FLA, Inc. v. ZTE USA, Inc.*, 844 F.3d 1299, 1306 (11th Cir. 2016). Here, the Community Hospitals plausibly pleaded over $75,000 in damages, ECF 1, which Leapfrog never questioned, ECF 39, so the content of later "testimony" and "documents," Mot. 18, is irrelevant. In any event, the "value" of injunctive relief here well exceeds $75,000. *See Cohen v. Off. Depot, Inc.*, 204 F.3d 1069, 1077 (11th Cir. 2000). The Community Hospitals typically earn around $2 *billion* in net revenue per year. CH-ASOF ¶ 98. It is thus a "reasonable inferenc[e]" that halting Leapfrog's deception would save them at least $75,000 in lost admissions and resource diversion. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 754 (11th Cir. 2010). A hospital that typically earns $250 million annually, for example, plainly suffered at least a $75,000 loss from a *17% decline* in emergency admissions, CH-ASOF ¶¶ 96, 99, and such losses will continue until Leapfrog's deceptive and unfair conduct

is halted. Thus, even if the Court entertained Leapfrog's improper request to assess the amount in controversy based on the state of the case after its inception, that argument would fail anyway.

**C. Leapfrog's Repackaged First Amendment Defense Fails**

Leapfrog's purported "affirmative defense" of anti-SLAPP should also be rejected. Mot. 18. Leapfrog has established *none* of the elements of that defense: that the Community Hospitals' claims are "[1] without merit and [2] primarily because such person or entity has exercised [3] the constitutional right of free speech in connection with a public issue." Fla. Stat. § 768.295(3).

*First*, this suit is not "without merit," Fla. Stat. § 768.295(3), because the Community Hospitals are entitled to summary judgment, *see* ECF 86, 107, and because at minimum Leapfrog itself is *not* entitled to summary judgment. What in fact is without merit is Leapfrog's purported "affirmative defense" of anti-SLAPP, which is procedurally improper. "An affirmative defense is established only when a defendant *admits the essential facts* of a complaint and sets up other facts in justification or avoidance." *Wyndham Vacation Ownership, Inc. v. Square One Dev. Grp., Inc.*, 2022 WL 21374382, at *1, *4 (M.D. Fla. Feb. 2, 2022) (striking anti-SLAPP "affirmative defense"). Here Leapfrog at least purports to *dispute*—not admit—the essential facts of the Community Hospitals' case. *See* ECF 102. Leapfrog thus seeks summary judgment on a supposed "affirmative defense," Mot. 18, that was improperly asserted in the first place.

*Second*, Leapfrog does not even *attempt* to show that the Community Hospitals filed suit "primarily" to retaliate against Leapfrog's exercise of purported constitutional rights. Fla. Stat. § 768.295(3). The reason is obvious: The Community Hospitals filed this suit "primarily" (indeed, exclusively) in response to the operational and reputational harms Leapfrog's unlawful conduct is inflicting. Leapfrog musters *no* evidence showing a different (much less primary) purpose.

*Third*, this case does not implicate Leapfrog's asserted "right of free speech." Fla. Stat. § 768.295(3). Leapfrog says its statements implicate "matters of public concern," and thus the First Amendment. Mot. 19. That is wrong, as this Court has recognized. Leapfrog has no right to "mislead consumers" "about its methodology." ECF 41 at 6; *accord Caribbean Cruise Line, Inc.*, 169 So. 3d at 167 (false "representations" about "the methods [a company] employs, in conducting its own business," are not protected). Leapfrog's argument also fails on its own terms. Addressing a matter of purported "public concern" does not bar liability—it simply would require clear evidence that Leapfrog knew its representations are "false" or "reckless[ly] disregarded" the risk of falsity. *Hunt v. Liberty Lobby*, 720 F.2d 631, 642 (11th Cir. 1983); *see id.* at 645-46 (publisher "knowingly

chose language" open to false interpretation, despite "sufficient time" to confirm assertion's accuracy). Here, the Community Hospitals have shown that Leapfrog's personnel *admittedly* knew its methodology is "arbitrar[]y," "random," a "penalty," not peer-reviewed, and based on no data—readily establishing subjective knowledge of falsity. SOF ¶ 34, 38; *see also* OSOF ¶ 29. Leapfrog's claim that this suit would impose a "prior restraint," Mot. 19, is equally baseless. There is no constitutional prohibition on restricting future speech already adjudicated to be unlawful—which would be the case if the Community Hospitals are granted judgment. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973); *Lucero v. Trosch*, 121 F.3d 591, 601 (11th Cir. 1997). The First Amendment is thus no bar to relief.

### D. Leapfrog's Post-Litigation Website Edits Do Not Affect Jurisdiction—And Only Further Confirm The Need For Relief

Finally, Leapfrog's last-minute effort to surgically alter its website only confirms the deceptive nature of its practices. While Leapfrog and its witnesses were boasting to this Court that Leapfrog's extant disclosures are "comprehensive," show "extraordinary transparency," Mot. 5, 10, and are "as transparent as possible," ECF 88-91 (Danforth) at 540:3, Leapfrog was quietly modifying some of the *same* representations. Those stealth edits squarely "impeac[h]" Leapfrog's "superlative" assessment of its pre-litigation disclosures—showing that Leapfrog in fact was *not* exhibiting the transparency it claimed. *Wood v. Morbark Indus., Inc.*, 70 F.3d 1201, 1208 (11th Cir. 1995). And those revisions pose no mootness obstacle to relief. Leapfrog's new language is equally slippery and avoids the real problems with the methodology; Leapfrog's *other* deceptive misstatements remain; the false Safety Grades themselves are still being propagated and imposing harm; and Leapfrog has not shown it is "absolutely clear" it will not reinstate the specific representations it modified. *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC)*, 528 U.S. 167, 189 (2000). To the contrary, it "vigorously defends" those same misrepresentations as lawful. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007). In any event, it also admitted (inexplicably) that its withdrawn statements continue to be present on its website—which is binding for jurisdictional purposes. *See Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 905 (11th Cir. 1997). Leapfrog's new and similarly evasive disclaimers merely confirm that Leapfrog will continue deceiving consumers while failing to address the core issue: a fabricated, punitive methodology and the alarmist "Safety Grades" it produces.

## CONCLUSION

The Court should deny Leapfrog's motion for summary judgment.

Dated: November 26, 2025

Respectfully submitted,

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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*.

**THE COMMUNITY HOSPITALS' RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS, AND THE COMMUNITY HOSPITALS' ADDITIONAL FACTS IN RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS**

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1. **UNDISPUTED** that The Leapfrog Group ("Leapfrog") is registered as a nonprofit and claims it was "founded in 2000 by a group of employers who came together to address critical, complex public safety issue 'severe dysfunction in the health care marketplace,'" and that "employers further recognized the need to make healthcare more transparent, safer, reduce the loss of lives from preventable errors, and inform their employees about healthcare risks and ensure their employees receive excellent care." The Community Hospitals object to the use of Ex. 1 (ECF 101-2) as inadmissible hearsay.

2. **UNDISPUTED** that the article *To Err is Human: Building a Safer Health System* states that the number of "Americans [who] die in hospitals each year as a result of medical errors" may be as high as 98,000. Ex. A at 26[1]. **UNDISPUTED** that Leapfrog claims it was founded "to address the problem by advocating for more transparency to allow consumers to compare among hospitals their safety record before choosing where to seek care." The Community Hospitals object to the cited testimony and Ex. 1 as inadmissible hearsay.

3. **UNDISPUTED** that Leapfrog claims its "mission" is to "trigger giant leaps forward in the safety, quality and affordability of U.S. health care by using transparency to support informed health care decisions and promote high-value care." The Community Hospitals object to the use of Ex. 4 (ECF 101-5) as inadmissible hearsay.

4. **UNDISPUTED** that Dr. Matthew Austin testified that he "started working with" Leapfrog "in March of 2007." Ex. 5 (ECF 101-6) (Austin) at 39:7–11. The Community Hospitals object that the phrases "became involved in" and "late 2000s" are vague. The Community Hospitals object to the use of Ex. 6 (ECF 101-7) as inadmissible hearsay.

5. **UNDISPUTED** that Leapfrog claims "[o]ne of Leapfrog's first steps in its mission was the launch of its Hospital Survey in 2001." The Community Hospitals object to the use of Ex. 1 (ECF 101-2) as inadmissible hearsay.

6. **UNDISPUTED** that hospitals do not pay a fee to Leapfrog to submit the Leapfrog Hospital Survey ("Survey" or "Hospital Survey"), and Leapfrog claims that 2,400 hospitals responded to the Survey in the past year. Ex. 2 (ECF 101-3) (Binder) at 74:2–4, 415:15–19. **DISPUTED** to the extent that the documents cited in Statement No. 6 do not support that the Survey is a

[1] Citations to letter exhibits refer to exhibits attached to the Declaration of Lee R. Crain in Support of the Community Hospitals' Response to Defendant's Statement of Material Facts, and the Community Hospitals' Additional Facts in Response to Defendant's Statement of Material Facts.

"benchmarking tool." Further **DISPUTED** in that the Community Hospitals do not rely on the Survey as a "benchmarking tool." ECF 88-98 (West) at 97:19–98:18. The Survey, in practice, is not "free" because hospitals must expend significant financial resources and personnel time to complete it, Ex. 22 (ECF 101-23) (McCauley) at 79:11–22 ("it's a 300-plus-page survey that takes a significant amount of time to complete"); Ex. 23 (ECF 101-24) (Havericak) at 109:18–110:3 ("it's very laborious because it's not just about filling out the survey, but it's about validating your data and ensuring it's accurate")—and sign over rights to the data, *see* Ex. 9 (ECF 101-10) at 46 (requiring Survey participants to affirm that "The Leapfrog Group may use this information in a commercial manner for profit"); the Survey, in practice, is not "voluntary," ECF 88-97 (Romano) at 142:12–22 ("a penalty," the "purpose" of which "[was] not accuracy"); ECF 88-35 at 346[2] ("[i]t truly is marketing blackmail"); Ex. 5 (ECF 101-6) (Austin) at 236:21–237:5 ("the changes will penalize hospitals that don't submit" a Survey); Ex. B at 683 (May 15, 2024 email from Dr. Patrick Romano describing participation in the Survey as "'pay for reporting'"). The Community Hospitals object to Ex. 7 (ECF 101-6) as inadmissible hearsay.

7. **UNDISPUTED** that Leapfrog claims the Survey was created to "collect and transparently report hospital and ASC [Ambulatory Surgery Centers] performance, empowering purchasers to find the highest-value care and giving consumers the lifesaving information they need to make informed decisions." The Community Hospitals object to Ex. 8 (ECF 101-9) as inadmissible hearsay.

8. **UNDISPUTED**.

9. **DISPUTED** to the extent that the use of Ex. 10 (ECF 101-11) is inadmissible hearsay and the cited testimony in Ex. 3 (ECF 101-4) does not support the proposition.

10. **DISPUTED** to the extent that the use of Ex. 10 (ECF 101-11) is inadmissible hearsay.

11. **UNDISPUTED**.

12. **UNDISPUTED**.

13. **UNDISPUTED**.

14. **UNDISPUTED** to the extent that Leapfrog has claimed that some hospitals have reported to Leapfrog that those hospitals have used the Survey for benchmarking. The Community Hospitals object to the use of Exs. 3 (ECF 101-4) (Danforth), 5 (ECF 101-6) (Austin), 16 (ECF

[2] Citations to Bates-stamped documents refer to the last three digits of the Bates number on the cited page.

101-17), 17 (ECF 101-18), and 18 (ECF 101-19) as inadmissible hearsay. **DISPUTED** that the Community Hospitals ever "report[ed] to Leapfrog that they use the hospital survey as a benchmark to improve on various measures," as Exs. 17 (ECF 101-18) and 18 (ECF 101-19) do not support that statement. The Community Hospitals did not use the Survey for benchmarking. ECF 88-98 (West) at 97:19–98:18.

15. **UNDISPUTED** that the Hospital Safety Grade program was launched in 2012 and a Safety Grade is assigned to qualifying hospitals in the United States regardless of whether they participated in the Survey. The Community Hospitals object to the use of "separate and distinct" as vague, compound, and confusing, and further object that the phrase is unsupported by the cited documents. **DISPUTED**, BUT IMMATERIAL, that Leapfrog assigns a Safety Grade to "every general hospital in the United States." Ex. 20 (ECF 101-21) at 3 ("Leapfrog is not able to calculate a Safety Grade for every hospital in the U.S."). **DISPUTED** that the Survey is voluntary. *Supra* ¶ 6.

16. **UNDISPUTED**.

17. **UNDISPUTED** that Leapfrog's Hospital Safety Grade is presented to consumers. The Community Hospitals object to the phrase "consumable format" as vague. **DISPUTED** as to whether the Safety Grade provides "patient safety information," *see* Ex. 5 (ECF 101-6) (Austin) at 239:19–240:7 (testifying that Delray's imputed score is "based on a lack of data"); ECF 88-23 at 863–64 (Leapfrog was "arbitrarily assigning" non-participating hospitals "points associated with the bottom scoring category"), and whether the website provides "patient safety information" in "a consumable format specifically designed to be used by patients," *see* Ex. 2 (ECF 101-3) (Binder) at 409:12–16 (the scoring methodology is "not that accessible to the average layman"), 428:22–429:7 ("The scoring methodology document is written in a way that is aimed at somewhat knowledgeable hospital people.").

18. **UNDISPUTED** that the Community Hospitals have received Safety Grades from Leapfrog since 2012. The Community Hospitals object to the phrase "taking issue" as vague.

19. **UNDISPUTED** that the Community Hospitals commenced this action after the Fall 2024 Safety Grade methodology change. ECF 74. The Community Hospitals object to the phrase "take issue" as vague.

20. **UNDISPUTED** that Leapfrog exchanged emails between May 7 and May 14, 2024, with two members of the Leapfrog Safety Grade Expert Panel ("Expert Panel"), Dr. Peter Pronovost,

*see* Ex. C, and Dr. Patrick Romano, *see* ECF 88-17, about changes to the Fall 2024 Safety Grade methodology that would "penaliz[e] nonparticipants," ECF 88-17 at 490. The Community Hospitals object to the phrase "in consultation with" as vague and as relying on inadmissible hearsay, and they **DISPUTE** that the Expert Panel considered or approved the Fall 2024 change at any time. ECF 88-12 (Transcribed Recording of Expert Panel Meeting); ECF 88-11 (Transcript of Expert Panel Meeting); ECF 88-10 (Expert Panel Meeting Video Recording).

21. **UNDISPUTED**.

22. **UNDISPUTED** that, at times, Leapfrog has reviewed its methodology to "keep up with the latest information and evidence." Ex. 5 (ECF 101-6) (Austin) at 90:3–13. Otherwise, **DISPUTED** because none of the cited documents show how far in advance changes are announced or that Leapfrog's review occurs annually—and emails with expert panelist Dr. Romano indicate it does not. *See* Ex. D at 804. The Community Hospitals object to the phrase "well in advance" as vague.

23. **DISPUTED** that Statement No. 23 accurately reflects the methodology explained in Leapfrog's own documents because the "2 step imputation" did not apply to the IPS measure. The Community Hospitals respectfully direct the Court to Ex. 29 (ECF 101-30) at 287 (Spring 2024 Safety Grade Methodology), which they understand reflects the methodology Leapfrog used immediately prior to the Fall 2024 methodology. The Community Hospitals also **DISPUTE** that hospitals were previously assigned "the mean score" of similar, cohort hospitals under Step 2, because hospitals were "assigned the **lower of two possible** mean scores for CPOE, BCMA, and Hand Hygiene." *Id.* (emphasis added).

24. **UNDISPUTED** that Leapfrog used "an 'imputation' model process" before and after the Fall 2024 Safety Grade methodology change with respect to its "Step 1," which "imputed" certain hospitals' historical scores. **DISPUTED** that the Fall 2024 Safety Grade methodology change applies any "imputation" under "Step 2" because, for that step, Leapfrog assigns the same score automatically to all hospitals to which that Step applies. Ex. 21 (ECF 101-22) at 475. The Community Hospitals maintain that Step 2 (*i.e.*, wholesale assigning non-participating hospitals that have not submitted a Survey response in the past two grading rounds the lowest measure score) is not a type of "imputation." In fact, Leapfrog's "expert" Dr. Romano agrees with Community Hospitals that Step 2 of the Fall 2024 Safety Grade methodology is not imputation but assignment of "a penalty" unconcerned with its "accuracy." ECF 88-97 (Romano) at 142:12–22.

25. **UNDISPUTED**.

26. **UNDISPUTED** that an "explan[ation]" of the measures is "publicly available," though Leapfrog's CEO has admitted the explanation is "not that accessible to the average layman." Ex. 2 (ECF 101-3) (Binder) at 409:12–410:10; 429:5–7 ("[T]he scoring methodology document is written in a way that is aimed at somewhat knowledgeable hospital people.").

27. **UNDISPUTED** that the Fall 2024 Safety Grade methodology implemented a change to Leapfrog's imputation model. **DISPUTED** that the change related "solely" to the methodology because, among other reasons, the change related to a "simple business decision," ECF 88-34 at 208, and was meant to be a "penalty" for non-participating hospitals to compel Survey responses, ECF 88-97 (Romano) at 142:12–22; *see also* ECF 88-30 at 926, 929 (December 2024 Board-approved *Long Range Strategic Intent* document calling for "increas[ing] participation" in the Survey).

28. **DISPUTED** as unintelligible. To the extent that Statement No. 28 can be read to say that hospitals were incentivized to not take the Survey under the pre-Fall 2024 Safety Grade methodology, that claim is unsupported by the cited testimony because Leapfrog did not analyze or identify any actual relationship between incentives to take the Survey and higher cohort scores, Ex. 5 (ECF 101-6) (Austin) at 119:1–122:3, and the evidence shows one reason hospitals did not report to the Survey was that it was "too burdensome," ECF 88-17 at 490. Contrary to Statement No. 28, hospitals were instead incentivized to self-report because participating inflates their scores. Ex. E at 342, 344.

29. **UNDISPUTED** except to the extent that Statement No. 29 suggests that the Safety Grade methodology change was designed to address an incentive not to report to the Survey, when in reality the change was a "penalty" against non-responding hospitals, ECF 88-97 (Romano) at 142:12–22; ECF 88-15 at 635, and except to the extent Statement No. 29 suggests the change was made in consultation with experts, given the Expert Panel never reviewed it, and Leapfrog exchanged only two emails with Drs. Pronovost and Romano. *See* ECF 88-17; Ex. C. **UNDISPUTED** that, as part of the change to Step 2 of the Safety Grade methodology, Leapfrog assigns a Limited Achievement score, which is the lowest possible Leapfrog Hospital Survey Performance Category. The Community Hospitals object to the use of "[t]o address this" as vague. To the extent "this" refers to Statement No. 28, the Community Hospitals incorporate their responses to that Statement.

30. **UNDISPUTED** that Leapfrog's Scoring Methodology document is publicly available online, that 3% of users who view a Community Hospitals' Safety Grade downloads it, ECF 107 at 6; ECF Nos. 109-1–109-10, and that the document is not accessible to the average layman, Ex. 2 (ECF 101-3) (Binder) at 409:12–410:10. The Community Hospitals object to the use of "[t]his" as vague. To the extent that "[t]his" refers to Statement No. 29, the Community Hospitals incorporate their responses to that Statement.

31. **DISPUTED** that imputation is a "well-settled and reliable methodology" because the cited testimony does not support that proposition and because the evidence, including Leapfrog's own internal documents, supports the contrary. ECF 88-80 at 050 (Leapfrog's formerly available Expert Panel "Guiding Principles," which state that "no grade should be issued for" a hospital "missing data for a large number of performance measures"); ECF 88-97 (Romano) at 179:8–25 ("[I]mputations always involve assumptions. The assumptions are usually wrong in various ways."). The Community Hospitals object to "[i]mputation" and "consistently applied" as vague and inaccurate.

32. **UNDISPUTED** to the extent that "the foregoing adjustment" refers to the Fall 2024 Safety Grade change in how IPS, CPOE, BCMA, and Hand Hygiene scores were assigned. The Community Hospitals object as to the vagueness of "foregoing adjustment" and "remained the same."

33. **DISPUTED**. Leapfrog has previously used other measure scores and performance categories, including "Willing to Report," ECF 88-88 (Campione) at 242:8–17. *Compare* Ex. 20 (ECF 101-21) at 469–70, 472, *with* Ex. F at 705–07.

34. **DISPUTED**, BUT IMMATERIAL. Leapfrog's measure scores and performance categories have changed. *Supra* ¶ 33. The Community Hospitals object to Statement No. 34 as duplicative, *see supra* ¶¶ 9, 22, 33, and inadmissible hearsay, *see* Ex. 3 (ECF 101-4) (Danforth) at 502:10–505:18 ("I just wasn't at Leapfrog when [assigning numbers to each performance category] occurred. . . This would have happened probably in 2006 and 2007[.]"). Ex. 3 (ECF 101-4) also does not support the proposition.

35. **UNDISPUTED** that the Community Hospitals were aware and informed of the proposed Fall 2024 Safety Grade methodology change and its impact on their Safety Grades. **DISPUTED** also to the extent that Leapfrog characterizes itself as "transparently" opening the methodology for public comment because it has offered no facts supporting this proposition.

36. **UNDISPUTED**.

37. **UNDISPUTED**.

38. **DISPUTED** because the asterisked footnote ("* The hospital declined to report their performance on this measure, so a score was assigned to reflect the lack of information available") only appears when a user clicks on the "Doctors order medications through a computer," "Safe medication administration," and "Handwashing" measures. *Compare* Ex. 37 (ECF 101-38) at 2–3, *with* ECF 88-74 at 2–4.

39. **UNDISPUTED** except to the extent that the phrase "Navigation of the Grades and measure-by-measure scores leads to a link allowing access to the full Methodology" is vague and unintelligible.

40. **DISPUTED** because the "Using Secondary Data Sources" section of the cited document, not the "Dealing with Missing Data" section, explains the so-called imputation model as applied to non-participating hospitals. Ex. 20 (ECF 101-21) at 15–16, 23–24. **UNDISPUTED** that Ex. 20 (ECF 101-21) contains information about how non-reporting hospitals' Safety Grades are determined, except that the document is not "accessible to the average layman," Ex. 2 (ECF 101-3) (Binder) at 409:12–410:10, and only 3% of users who view a Community Hospitals' Grade download it, ECF 107 at 6; ECF Nos. 109-1–109-10.

41. **DISPUTED** because Leapfrog has not offered any evidentiary support.

42. **UNDISPUTED**.

43. **UNDISPUTED** except to the extent that the cited document does not support the statement "materials [were] shared with hospitals."

44. **DISPUTED** because the cited document does not show that the legal disclaimer appears on either the Safety Grade website or Leapfrog's website.

45. **DISPUTED** because the cited document does not support the proposition.

46. **UNDISPUTED** that Leapfrog published summaries of a subset of public comments and its responses to those comments regarding the Fall 2024 Safety Grade methodology change and declined to adopt feedback submitted by public commenters. *See, e.g.*, Ex. 16 (ECF 101-17) at 4–6 ("These changes will penalize hospitals that do not submit a Leapfrog Survey. The public will not understand nor dig into the methodology of these grades, and hospitals will be falsely represented with a lower grade, because they chose not to complete a survey."). **DISPUTED** to

the extent that the cited documents do not support the proposition that Leapfrog "carefully reviews" each comment.

47. **UNDISPUTED** that the Community Hospitals are indirectly owned by Tenet Healthcare. The Community Hospitals object to the use of Ex. 42 (ECF 101-43) as inadmissible hearsay.

48. **DISPUTED** because the cited document does not support the proposition. Ex. 43 (ECF 101-44) at 2 (stating that the rebrand applies to the "Palm Beach Health Network ***Physician Group***," which is distinct from the "Palm Beach Health Network" (emphasis added)).

49. **UNDISPUTED** to the extent "these grades" refers to the Safety Grades between 2023 and Spring 2025, reflected in the cited document. Ex. 27 (ECF 101-28) at 5334, 5370, 6225, 6504, 6351.

50. **DISPUTED** because the cited document does not support the proposition.

51. **UNDISPUTED**, but the Community Hospitals object to the use of Ex. 45 (ECF 101-46) as inadmissible hearsay.

52. **UNDISPUTED**, but the Community Hospitals object to the use of Ex. 45 (ECF 101-46) as inadmissible hearsay.

53. **DISPUTED** because Leapfrog has not offered any evidentiary support and the webpages on healthlocator.org are not authenticated by an attorney declaration.

54. **UNDISPUTED**.

55. **UNDISPUTED** to the extent that "damages" should be read as "damaged."

56. **UNDISPUTED**.

57. **UNDISPUTED** to the extent that Ms. Montgomery did not identify by name patients who said they would not "treat at the hospital" or doctors who "left" Good Samaritan Medical Center. Ms. Montgomery did identify, by name, physicians who obtained co-admitting privileges at Good Samaritan's competitor, Jupiter Medical Center, due to the Safety Grade. Ex. 25 (ECF 101-26) (Montgomery) at 296:3–298:14.

58. **DISPUTED** because the cited testimony does not support the proposition.

59. **UNDISPUTED**.

60. **UNDISPUTED** except to the extent Statement No. 60 immaterially misquotes Heather Havericak, who stated "will lose" rather than "lost," and paragraph 27, not paragraph 17, of Ms. Havericak's declaration addresses Delray Medical Center's damaged relationships with physicians as a result of the Safety Grade. ECF 25 ¶¶ 27, 29.

61. **UNDISPUTED** BUT INCOMPLETE. In addition to testifying generally that she was hearing complaints, Ms. Havericak also specifically noted that she had spoken with up to 20 physicians about their concerns regarding bringing patients to Delray because of the Safety Grade. Ex. 23 (ECF 101-24) (Havericak) at 253:19–254:6.

62. **DISPUTED** because the cited testimony does not support the proposition.

63. **UNDISPUTED**.

64. **UNDISPUTED**.

65. **UNDISPUTED**.

66. **UNDISPUTED** that at his deposition, Jerad Hanlon testified to reputational harm and loss of goodwill. **DISPUTED** BUT IMMATERIAL as to incorrectly stating that Mr. Hanlon himself made complaints, or characterizing the complaints as "general," where Mr. Hanlon's testimony provided examples of reputational harm and loss of goodwill. Ex. 24 (Hanlon) at 78:6–14.

67. **UNDISPUTED**.

68. **UNDISPUTED**.

69. **DISPUTED** in that Statement No. 69 is unsupported by the cited testimony.

70. **UNDISPUTED** that Mr. Hanlon testified that revenue is up from 2024. Ex. 24 (Hanlon) at 36:5–7. **DISPUTED** that his testimony was "contrary" to his declaration, which stated that the Medical Center would "lose" revenue, not that revenue would decrease. ECF 24 ¶ 26.

71. **DISPUTED** in that Statement No. 71 is unsupported by the cited testimony.

72. **DISPUTED** in that Statement No. 72 is unsupported by the cited declaration, which was made by Ms. Havericak. ECF 25.

73. **UNDISPUTED**.

74. **UNDISPUTED** to the extent "Palm Beach" refers to Palm Beach Gardens Medical Center.

75. **UNDISPUTED**.

76. **UNDISPUTED**.

77. **UNDISPUTED**.

78. **DISPUTED** in that Statement No. 78 is unsupported by the cited testimony. To the extent Cynthia McCauley testified regarding a Google review, she provided that as "an example." Ex. 22 (McCauley) at 231:16–232:9.

79. **DISPUTED** in that Statement No. 79 mischaracterizes Ms. McCauley's testimony. Ms. McCauley testified: "I do attribute it to the Leapfrog grade. And I can give an example where a

patient who came to the facility indicated to me that he was nervous that his wife was brought to St. Mary's because of what he has heard. This is fairly recent. But he was pleasantly surprised at what an amazing experience and outcome his spouse had at the facility. But that reputation that's been developed because of the Leapfrog grade has resulted in patients not selecting St. Mary's as evidenced by our decreased elective volumes." Ex. 22 (McCauley) at 231:15–25.

80. **DISPUTED** in that Regina West was not designated, and did not testify, as a representative of any corporate entity. *Compare* ECF 88-98 (West) at 7:10–9:12, *with* Ex. 23 (Havericak) at 6:11–7:14.

81. **UNDISPUTED** except to the extent it is unsupported by the evidence. S*upra* ¶ 80.

82. **UNDISPUTED** to the extent the Statement can be read to state "does not identify."

83. **UNDISPUTED**.

## ADDITIONAL FACTS

### I. Impact of Leapfrog Hospital Safety Grade

84. In a video prepared for Leapfrog's 2022 "Greenlight Gala," Leapfrog's Chief Executive Officer and President Leah Binder stated, "millions of people have used Leapfrog to make decisions about health care." Ex. G at 1; Ex. G-1 at 1.

### II. Leapfrog's Purported "Auditing" of Hospital Survey Responses

85. Leah Binder testified that Leapfrog conducts onsite audits on "four or five hospitals" each year out of the 2,400 hospitals Leapfrog claims submit the Leapfrog Hospital Survey. ECF 88-87 (Binder) at 64:18–65:17, 415:15–19.

86. Leapfrog contracted with MetaStar to conduct Leapfrog's "on-site verification" at only three hospitals between October 2023 and November 2024, Ex. H at 945, and four hospitals between December 2024 and November 2025, Ex. I at 5514, out of the 2,400 hospitals Leapfrog claims submit responses to the Survey. ECF 100 ¶ 6.

### III. Leapfrog's Fall 2024 Methodology Change

87. In April 2024, Leapfrog employees Alexandra Campione and Missy Danforth characterized the idea of assigning nonparticipating hospitals "to the bottom performance category" for CPOE, BCMA, IPS, and Hand Hygiene—the methodology change Leapfrog ultimately made in Fall 2024—as "drastic." Ex. J at 560 (Danforth: "That would be drastic but let's talk about it lol"; Campione: "[I]t would be drastic"); ECF 88-6 at 942–944.

88. On May 15, 2024, Preeti Joshi, a Research Data Analyst at the Armstrong Institute for Patient Safety and Qualify, sent an email to the Expert Panel and Leapfrog staff attaching a document titled, "Leapfrog Hospital Safety Grade Expert Panel Meeting Notes 041224." Ex. K at 986. That document purported to be the meeting minutes from the Expert Panel's April 12, 2024 meeting. Ex. K at 986–987.

89. The document titled "Leapfrog Hospital Safety Grade Expert Panel Meeting Notes 041224" contained the following text: "2. Proposed changes to the imputation model," and included a bullet point stating "The expert panel were in support of having hospitals share their current performance, so liked the idea of imputing the equivalent of 'Willing to Report' to hospitals that do not submit a survey[.]" Ex. K-1 at 989.

## IV. Leapfrog's Website

90. For consumers viewing a hospital's Safety Grade page to navigate to Leapfrog's explanation of its Safety Grade methodology, a consumer must first click on a hyperlink titled "Detailed table view," which takes the consumer to a webpage showing a list of Survey measures. ECF 101-38 at 1.

91. To read Leapfrog's explanation of the Safety Grade methodology, a consumer must then scroll past thirty-two rows of information on the "Detailed table view" page to reach the bottom of the page where the consumer can click on the hyperlink titled "For a full description of the methodology, click here." ECF 101-39 at 3.

92. Once a consumer clicks on the hyperlink "For a full description of the methodology, click here," the consumer must then navigate to page 15 of the document to read Leapfrog's explanation of the so-called "Imputation Method" used to grade non-participating hospitals. *Id.*; ECF 101-21 at 17–18.

## V. Leapfrog's Safety Grades Have Caused the Community Hospitals Significant Harm

93. At St. Mary's Medical Center, births "declined by 2 percent," "pediatric outpatient therapy has declined 17 percent," and emergency room volume decreased "ten or so patients a day" from 2024 and 2025. ECF 88-95 (McCauley) at 102:8–23.

94. At Good Samaritan Medical Center, year-to-date "admissions and [multi-day observations cases]" were five percent less in August 2025 than in August 2024. ECF 88-96 (Montgomery) at 63:1–7.

95. At Palm Beach Gardens Medical Center, emergency room visits and "outpatient services" decreased by "roughly, 5, 6 percent" between 2024 and 2025. ECF 88-90 (Cazares) at 78:9–79:2.

96. At West Boca Medical Center, emergency room visits decreased by "17 percent year over year" between 2024 and 2025. ECF 88-92 (Hanlon) at 35:12–17.

97. Delray Medical Center experienced a "significant dip in admissions" and "a dip in people coming for elective procedures" in August 2025, soon after the release of a viral TikTok video about the Community Hospitals' Safety Grades. ECF 88-93 (Havericak) at 257:22–258:9.

98. In 2024, the Community Hospitals together earned approximately $1.8 billion in "Net Patient Revenue." Ex. L at 1.

99. The lowest two hospital revenues were West Boca Medical Center (approximately $254 million) and Palm Beach Gardens Medical Center (approximately $248 million), respectively. *Id.*

100. Following the filing of this action, Leapfrog solicited "negative publicity or stories" "about [the Community Hospital's indirect parent company] Tenet or one of the [Community H]ospitals" to be published "at a minimum every three days," at least in part, "to hurt Tenet." ECF 88-85 (Bailey) at 372:7–373:1.

101. In May 2025, Leapfrog worked with a digital marketing vendor, Nonprofit Megaphone, to purchase Google Ads so that when consumers searched for any of the Community Hospitals on Google, the search results included a sponsored advertisement that said "Leapfrog [H]ospital [S]afety [G]rade" and linked to the Community Hospitals' Safety Grade. ECF 88-85 (Bailey) at 292:19–294:3; Ex. M at 875.

102. On November 13, 2025, Leapfrog announced the release of the Fall 2025 Hospital Safety Grades, Ex. N at 1, and Ms. Binder was quoted in multiple Florida publications discussing the Fall 2025 Safety Grades. *See, e.g.*, Ex. O at 2 (Binder: "Achieving an 'A' Hospital Safety Grade reflects enormous dedication to patient safety," *South Florida Hospital News and Healthcare Report*); Ex. P at 1 (Binder: "Earning an 'A' Grade means HCA Florida Trinity Hospital made a true commitment to put patient safety first," *HCA Florida Healthcare*).

## VI. Recent Changes to Leapfrog's www.hospitalsafetygrade.org Website

103. As of October 24, 2025, the "FAQ" page on Leapfrog's website, hospitalsafetygrade.org, stated, "The Hospital Safety Grade reflects how well a hospital does on safety, not whether they complete the Leapfrog Hospital Survey." ECF 88-59 at 4.

104. On October 28, 2025, the Community Hospitals moved for summary judgment and argued that the language quoted in ¶ 103 violated the Florida Deceptive and Unfair Trade Practices Act. ECF 86 at 5, 9, 10.

105. Subsequent to the filing of the Community Hospitals' Motion for Summary Judgment, Leapfrog replaced the language quoted in ¶ 103 with: "Reporting to the Leapfrog Hospital Survey doesn't automatically improve a hospital's Safety Grade." Ex. R at 6 (redlined to show change).

106. As of October 24, 2025, Leapfrog's "FAQ" webpage stated, "If a hospital does not report to the Leapfrog Hospital Survey, other sources of data are used to calculate a Grade." ECF

88-59 at 3.

107. Subsequent to the filing of the Community Hospitals' Motion for Summary Judgment on October 28, 2025, ECF 86, Leapfrog replaced the language quoted in ¶ 106 with: "Most of the data used to calculate the Grade comes from the Centers for Medicare and Medicaid Services (CMS), the federal agency that runs Medicare. If a hospital voluntarily reports to the Leapfrog Hospital Survey, some of that data is used to calculate a Safety Grade." Ex. R at 5–6 (redlined to show change).

108. As late as October 24, 2025, Leapfrog's "FAQ" webpage also claimed that "patients are twice as likely to die of a preventable problem at a 'C,' 'D,' or 'F' hospital than an 'A' hospital." ECF 88-59 at 2.

109. On October 28, 2025, the Community Hospitals moved for summary judgment and argued that the language quoted in ¶ 108 violated the Florida Deceptive and Unfair Trade Practices Act. ECF 86 at 2, 6, 11 n. 4.

110. Subsequent to the filing of the Community Hospitals' Motion for Summary Judgment, Leapfrog removed the language quoted in ¶ 108 from its "FAQ" page. Ex. R at 3 (redlined to show change).

111. The "Lives Lost and Lives Saved" page on Leapfrog's website claims that the Johns Hopkins Armstrong Institute "found that D and F hospitals carry nearly twice the risk of mortality of A hospitals." ECF 88-82 at 1; ECF 88-83 at 1; Ex. S at 1.

112. On November 24, 2025, the Community Hospitals received an email from helpdesk@leapfrog-group.org, announcing "proposed changes to the 2026 Leapfrog Hospital Survey." Ex. U.

113. The November 24 email from helpdesk@leapfrog-group.org contains text that reads, "View proposed changes on the 2026 Leapfrog Hospital Survey," that links to a webpage on leapfroggroup.org titled "Proposed Changes to the 2026 Leapfrog Hospital Survey." Ex. U, V at 1.

114. None of the changes listed in the "Proposed Changes to the 2026 Leapfrog Hospital Survey" webpage alter how Leapfrog assigns CPOE, BCMA, IPS, and Hand Hygiene scores for hospitals that do not participate in the Survey or the weight given to those scores for the purpose of Leapfrog assigning a Safety Grade. Ex. V at 1–2.

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Respectfully submitted,

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