

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 OMNIBUS MOTION *IN LIMINE***

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INTRODUCTION

Defendant The Leapfrog Group (“Leapfrog”) has moved *in limine* to exclude eight sweeping categories of evidence under a slew of sixteen different federal rules. ECF 98 (“Mot.”) (citing Federal Rules of Evidence 401, 402, 403, 602, 701, 702, 703, 801, 802, 805, 901, 902, 1001, and 1002, and Federal Rules of Civil Procedure 26 and 37). Plaintiffs Delray Medical Center, Good Samaritan Medical Center, Palm Beach Gardens Medical Center, St. Mary’s Medical Center, and West Boca Medical Center (the “Community Hospitals”), hereby respectfully oppose the Motion in full.¹ The Court should defer any ruling on this issue until the bench trial scheduled to commence before this Court in January 2026. ECF 36 (scheduling order); 77 (parties’ joint stipulation to a bench trial).

Leapfrog’s Motion seeks to block critical evidence “core” to resolving this Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) action. *See Good Samaritan Med. Ctr., Inc. v. Leapfrog Grp.*, 2025 WL 2223335, at *1 (S.D. Fla. July 15, 2025). Because the Community Hospitals do not participate in Leapfrog’s Hospital Survey, Leapfrog assigns them a so-called “Safety Grade” by flunking them on four of the measures underlying its Safety Grades (the “Four Measures”). Leapfrog then promotes its Safety Grades to the public as indicators of the Hospitals’ safety performance. Leapfrog now seeks to prevent the Community Hospitals from introducing critical evidence showing how Leapfrog’s Safety Grades deceive consumers, as required by FDUTPA’s first element, and how the Community Hospitals are aggrieved, as required by its second.

Leapfrog’s attempt to preemptively exclude broad swaths of evidence is inconsistent with the narrow role motions *in limine* play. Exclusion at this stage is appropriate “*only when [evidence] is clearly inadmissible on all potential grounds.*” *United States v. Gonzalez*, 718 F. Supp. 2d 1341, 1345 (S.D. Fla. 2010) (Middlebrooks, J.) (emphasis added). ““Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context.”” *Id.* (quoting *In re Seroquel Prods. Liab. Litig.*, 2009 WL 260989, at *1 (M.D. Fla. Feb. 4, 2009)). Leapfrog’s Motion repeatedly references the need to protect a “jury” from exposure to unfairly prejudicial or confusing evidence. Mot. 4, 5, 7, 12, 13, 14, 15, 16. But this is a bench trial, “where it is presumed that the

¹ Leapfrog disclosed its intent to file this Motion on the day before the filing deadline, unfortunately leaving no meaningful opportunity for the parties to narrow the issues.

judge will disregard inadmissible evidence and rely only on competent evidence.” *In re Blue Crest Holding Asset, Inc.*, 2018 WL 1463644, at *1 (S.D. Fla. Jan. 24, 2018).

Leapfrog’s eight evidentiary objections are meritless. For example, Leapfrog seeks to exclude a viral TikTok video repeating four of the Community Hospitals’ 2024 Fall Leapfrog Safety Grades and branding those Hospitals “the worst hospitals in Florida” (Request 1). But the video vividly demonstrates the reputational harm the Community Hospitals have sustained due to their failing Safety Grades, and Leapfrog offers no legitimate basis to exclude it. Leapfrog also wishes to prevent the Community Hospitals from discussing the harm they have suffered and from attributing that harm to Leapfrog (Requests 3 & 4). This is an improper effort to seek summary judgment in this Motion and, in any event, the evidence in the discovery record makes clear the relevance of harms to the Community Hospitals and the availability of firsthand lay testimony supporting them. Leapfrog further seeks to insulate itself against any transparency about its own reputation by seeking to exclude any criticism of Leapfrog’s prior Safety Grade methodologies (Request 6)—even though its Motion for Summary Judgment insists Leapfrog has long relied on imputation methodologies and despite its own in-house experts’ continued reliance on studies of prior methodologies. In short, Leapfrog’s motion is a frivolous attempt to pre-try the case, gaining an improper advantage and preventing the Court—and the public—from learning of Leapfrog’s deception.

This Court should deny Leapfrog’s Motion in its entirety, without prejudice to specific evidentiary objections at trial. The Community Hospitals’ evidence is relevant and consistent with the factual record developed in discovery—that it conflicts with Leapfrog’s own narrative and desire to shield itself from scrutiny is not a basis for exclusion. *See City of S. Miami v. Desantis*, 2020 WL 7074644, at *5 (S.D. Fla. Dec. 3, 2020) (“[A] motion *in limine* is not a substitute for a motion for summary judgment, and it is not an appropriate mechanism for testing the law, narrowing the issues to be tried, or attempting to resolve substantive issues.” (citation omitted)). The Court should permit the Community Hospitals to seek to introduce at trial any and all competent and appropriate evidence and to fully try their case.

LEGAL STANDARDS

Motions *in limine* to resolve evidentiary issues are “disfavored,” particularly before bench trials. *In re Am. Airlines Flight 331*, 2013 WL 12340395, at *2 (S.D. Fla. Oct. 7, 2013). Courts exclude evidence *in limine* “only when it is clearly inadmissible on all potential grounds.” *Bredy v. Adl Glob. Hotels, LLC*, 2022 WL 22883966, at *1 (S.D. Fla. Feb. 22, 2022) (quoting *Gonzalez*,

718 F. Supp. 2d at 1345). And “[t]he movant has the burden of demonstrating that the evidence is inadmissible on any relevant ground.” *Penick v. Harbor Freight Tools, USA, Inc.*, 2021 WL 1254338, at *2 (S.D. Fla. Apr. 5, 2021). ““Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context.” *Id.* (quoting *Gonzalez*, 718 F. Supp. 2d at 1345). Moreover, motions *in limine* “should be limited to specific pieces of evidence and not serve as reinforcement regarding the various rules governing trial, or (re)-addressing substantive motions such as motions for summary judgment.” *Hotels of Deerfield, LLC v. Studio 78, LLC*, 2022 WL 18023235, at *1 (S.D. Fla. Oct. 4, 2022).

Relevance and Unfair Prejudice (Rules 401, 402, and 403). “Evidence is relevant if ... it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Fed. R. Evid. 401; Advisory Comm. Notes, Fed. R. Evid. 401 (“The standard of probability under the rule is ‘more probable than it would be without the evidence.’”); *United States v. Patrick*, 513 F. App’x 882, 886 (11th Cir. 2013). Accordingly, “[t]he standard for what constitutes relevant evidence is a low one,” *S. Grande View Dev. Co., Inc. v. City of Alabaster*, 1 F.4th 1299, 1309 (11th Cir. 2021), and relevant evidence is generally admissible at trial, Fed. R. Evid. 402.

Under Rule 403, a court may not exclude relevant evidence unless “its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. The Eleventh Circuit has “repeatedly cautioned” that excluding evidence on these grounds “is an extraordinary remedy which the district court should invoke sparingly, and the balance should be struck in favor of admissibility.” *Patrick*, 513 F. App’x at 886 (citing *United States v. Lopez*, 649 F.3d 1222, 1247 (11th Cir. 2011)). The Rule’s unfair prejudice component “has no logical application to bench trials,” where the “trial judge is able to discern and weigh the improper inferences” to assess admissibility under Rule 403. *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981); *see also Woods v. United States*, 200 F. App’x 848, 853 (11th Cir. 2006).

Personal Knowledge and Lay Opinion (Rules 602 and 701). Under Rule 602 “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Fed. R. Evid. 602. Lay opinion testimony is admissible under Rule 701 when it is “(a) rationally based on the perception of the witness, (b) helpful to a

clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Testimony grounded in a witness' professional experience or day-to-day business observations satisfies Rules 602 and 701. *See United States v. Barnes*, 481 F. App'x 505, 511-12 (11th Cir. 2012); *United States v. Williams*, 865 F.3d 1328, 1341-42 (11th Cir. 2017).

Expert Testimony (Rules 702 and 703). The admissibility of expert testimony is governed by Rule 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See Wopshall v. Travelers Home & Marine Ins. Co.*, 2022 WL 16949015, at *2 (S.D. Fla. Sept. 6, 2022) (Middlebrooks, J.). Expert testimony is admissible if "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable ...; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998). Rule 703 allows experts to rely on otherwise inadmissible materials "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Fed. R. Evid. 703; *see also* ECF 96 (Community Hospitals' Expert Motion *in Limine*).

Hearsay (Rules 801 through 805). An out-of-court statement offered in court as proof of the matter asserted constitutes hearsay and is generally inadmissible. Fed. R. Evid. 801, 802. However, out-of-court statements offered for *another* purpose—such as their effect on the listener—are not hearsay and are not barred from evidence. *United States v. Grajales*, 450 F. App'x 893, 901 (11th Cir. 2012). Statements otherwise barred as hearsay may be introduced where an exception to the hearsay rule allows their admission. *See* Fed. R. Evid. 803-05.

Authentication (Rules 901 and 902). To be admitted at trial, evidence must be authenticated. To authenticate evidence under Rule 901, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). This "merely requires the proponent to present sufficient evidence to make out a *prima facie* case." *Shutler v. Citizens Disability LLC*, 2024 WL 4483375, at *2 (S.D. Fla. Sept. 23, 2024) (quoting *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir. 2012)). Once this showing has been made, evidence "may be admitted, and the ultimate question of authenticity is then decided by the [factfinder]." *Lebowitz*, 676 F.3d at 1009. "[A]uthentication may occur solely through the use of circumstantial evidence." *United States v. Broomfield*, 591 F. App'x 847, 851-52 (11th Cir. 2014).

At trial, “[e]vidence may be authenticated by its ‘appearance, contents, substance, internal patterns, or other distinctive characteristics ... taken together with all the circumstances.’” *Id.* at 851 (quoting Fed. R. Evid. 901(b)(4)).

Best Evidence (Rules 1001 and 1002). According to the “best evidence rule,” “[a]n original writing, recording, or photograph is required in order to prove its content unless [the Rules] or a federal statute provides otherwise.” Fed. R. Evid. 1002. This rule applies, however, “only when the proponent of the evidence seeks to prove the content of the writing, recording, or photograph.” *Rivera v. Palm Beach Cnty.*, 2021 WL 1062299, at *7 (S.D. Fla. Mar. 15, 2021) (citing *United States v. Howard*, 953 F.2d 610, 612 & n.1 (11th Cir. 1992)).

Discovery Disclosures (Rules 26 and 37). Federal Rule of Civil Procedure 26 governs the conduct of discovery and requires a party “who has responded to an interrogatory, request for production, or request for admission” to “supplement ... its disclosure or response” “in a timely manner.” Fed. R. Civ. P. 26(e)(1)(A). “Rule 37 prevents a party from introducing at trial any information it failed to disclose in violation of Rule 26, ‘unless the failure was substantially justified or is harmless.’” *Hunters Run Prop. Owners Ass’n, Inc. v. Centerline Real Est., LLC*, 2023 WL 2707318, at *5 (11th Cir. Mar. 30, 2023) (quoting Fed. R. Civ. P. 37(c)(1)).

ARGUMENT

I. THE COURT SHOULD DECIDE THE EVIDENTIARY POINTS ADDRESSED IN LEAPFROG’S MOTION IN PROPER CONTEXT AT TRIAL

Leapfrog has styled its eight broad categories of pretrial evidentiary objections as an “Omnibus Motion *in Limine*.” “In the Eleventh Circuit, [such] motions in limine are generally disfavored as admissibility questions should be ruled upon as they arise at trial.” *Britt v. Wal-Mart Stores East, LP*, 599 F. Supp. 3d 1259, 1263 (S.D. Fla. 2022). Unless evidence is “clearly inadmissible,” “evidentiary rulings must be deferred until trial to allow questions regarding foundation, relevancy, and prejudice.” *Id.* (quoting *Lordeus v. Torres*, 2018 WL 1364641, at *1 (S.D. Fla. Mar. 1, 2018)). And for good reason. Courts do not “issue advisory opinions, and it is difficult to rule in a vacuum without having the opportunity to see the proffered testimony in perspective with other evidence in the trial.” *United States v. Everglades Coll., Inc.*, 2014 WL 11578214, at *1 (S.D. Fla. May 28, 2014).

This proscription is even more pronounced “in the context of a bench trial,” where “there is a consensus that courts should exercise caution when ruling on motions in limine regarding evidence admissibility.” *AMF Bruns of Am., L.P. v. Braun Corp.*, 2025 WL 2497996 (S.D. Fla.

Apr. 29, 2025) (citing cases). The purpose of pretrial evidentiary motions *in limine* is to prevent *the jury* from hearing inadmissible evidence upon which it may not permissibly rely in rendering its verdict. *See Singh v. Caribbean Airlines Ltd.*, 2014 WL 4101544, at *1 (S.D. Fla. Jan. 28, 2014). This rationale has no application in the context of a bench trial, “where it is presumed the judge will disregard inadmissible evidence and rely only on competent evidence.” *Bujarski v. NCL (Bahamas) Ltd.*, 2016 WL 7469997, at *1 (S.D. Fla. Jan. 7, 2016) (citation omitted). And courts in this District overwhelmingly deny pretrial evidentiary motions in non-jury cases as “unnecessary,” deferring such rulings until trial, where the evidence can be evaluated “with[] the benefit of context.” *Singh*, 2014 WL 4101544, at *1; *see also, e.g., RKR Motors, Inc. v. Perez*, 2025 WL 1591451, at *1 (S.D. Fla. May 12, 2025).²

The parties have stipulated to a bench trial in this action. ECF 77. And this Court—serving as both gatekeeper and trier of fact—is fully capable of distinguishing competent from incompetent evidence at trial and assigning each item the weight it deserves when adjudicating the parties’ claims. Nonetheless, Leapfrog’s Motion invites the Court to preemptively exclude multiple categories of evidence, including: (i) a publicly accessible video; (ii) evidence of consumer deception; (iii) testimony about the Community Hospitals’ harm; (iv) commentary critical of Leapfrog’s methodology; and (v) evidence of how Leapfrog monetizes its Safety Grades. Mot. 5-7, 12-13. The Court should reject the invitation. These are precisely the types of evidentiary determinations better made at trial, once the foundation, purpose, and relevance of the evidence can be evaluated in context. *See Bujarski*, 2016 WL 7469997, at *1.

Judicial efficiency similarly counsels in favor of denying Leapfrog’s motion in its entirety now and revisiting any specific objections at trial if they are renewed. *See Roberts v. Charter Nat. Life Ins. Co.*, 105 F.R.D. 492, 493 (S.D. Fla. 1985). Ultimately, “[t]he problem may never arise”: the party “may elect, at trial not to offer the [evidence]” or “[t]he attorneys may agree on admission.” *Id.* And because the Court, as the trier in fact, can in all events hear the evidence in this case, disregard what is inadmissible, and assign the remainder of the evidence appropriate weight at

² Pretrial motions under *Daubert* and Rule 702, by contrast, remain relevant in a bench trial because Rule 702 expressly “applies whether the trier of fact is a judge or jury.” *Berkley Ins. Co. v. Suffolk Constr. Co.*, 699 F. Supp. 3d 1341, 1353 (S.D. Fla. 2023); *see also Sovereign Mil. Hospitaller Ord. of Saint John of Jerusalem of Rhodes & of Malta v. Fla. Priory of Knights Hospitallers of Sovereign Ord. of Saint John of Jerusalem, Knights of Malta, Ecumenical Ord.*, 694 F.3d 1200, 1222 (11th Cir.) (Pryor, J., concurring), *majority opinion vacated and superseded on reconsideration*, 702 F.3d 1279 (11th Cir. 2012) (“Several of our sister circuits have ruled that *Daubert*’s requirements of reliability and relevance continue to apply in a bench trial.” (citations omitted)).

trial, Leapfrog's motion should be denied in full.

II. IN ANY EVENT, LEAPFROG FAILS TO SHOW THAT THE EVIDENCE IT SEEKS TO PREEMPTIVELY EXCLUDE IS "CLEARLY INADMISSIBLE ON ALL POTENTIAL GROUNDS"

Should the Court decide to adjudicate each of Leapfrog's eight sweeping requests for exclusion now, it should find that Leapfrog has not met its burden as to any of them. Evidence may be excluded before trial only when it is "clearly inadmissible on *all* potential grounds." *Penick*, 2021 WL 1254338, at *2 (emphasis added). Leapfrog's threadbare claims—most of which do not even identify the specific exhibits or statements it alleges are inadmissible—do not meet that standard. The Community Hospitals should be permitted to rely upon all admissible evidence to demonstrate at trial how Leapfrog's conduct deceived consumers and harmed their reputations.

A. The TikTok Video Is Relevant And Admissible (Request 1)

Leapfrog seeks to exclude from evidence a viral TikTok video based on the Safety Grades that labels four of the Community Hospitals the "worst" in Florida.³ The TikTok video begins with a narrator asking, "Which is the worst hospital in Florida?" The narrator then proceeds to "rank" the five worst hospitals in Florida, displaying each hospital's name, location, and image *alongside its Safety Grade and the date that Grade was issued*:



ECF 89, 93 at 00:50-00:53. Leapfrog does not dispute that the video displays the Community Hospitals' Safety Grades. Nor does it dispute that the video's webpage displayed engagement counts exceeding one million views and tens of thousands of interactions (*e.g.*, 43,000 "likes," 3,000 comments, 8,000 bookmarks/saves, and 29,000 shares). ECF 88-75; 88-76.

Instead, Leapfrog argues that the video is irrelevant, cannot be authenticated, constitutes

³ The video was included as Exhibit 51 to the Community Hospitals' Motion for Summary Judgment, ECF 88-51, and was conventionally filed with the Court, ECF 89; 93. At present, it is also publicly available at <https://www.tiktok.com/@usamap55/video/7525460573430107405>.

hearsay, and would be unfairly prejudicial. None of these claims has merit. Leapfrog cannot meet its high burden to exclude the TikTok video, particularly at this early stage.

Relevance. Leapfrog asserts that the TikTok video is irrelevant because it “does not even refer to Leapfrog,” and “no evidence shows patients of the [Community] Hospitals have viewed or relied on the video, or that such video causally connects [the Community] Hospitals alleged damages or ‘reputational harm’ to Leapfrog or its Safety Grades.” Mot. 6. But to meet the requirements of Rules 401 and 402, the Community Hospitals must show only that the TikTok video has “*any tendency* to prove or disprove a fact of consequence.” *Patrick*, 513 F. App’x at 886 (emphasis added). They easily surpass that low bar. The video is directly relevant to both FDUTPA elements the Community Hospitals must prove: (1) Leapfrog engaged in a deceptive or unfair act or practice, and (2) the Community Hospitals were aggrieved by that conduct. *See SMS Audio, LLC v. Belson*, 2017 WL 1533941, at *4 n.6 (S.D. Fla. Mar. 9, 2017) (Middlebrooks, J.). With respect to the first element, the TikTok video tends to demonstrate that consumers interpret failing Safety Grades as conveying the actual performance of the Community Hospitals. It reports Leapfrog’s failing Safety Grades for four of the five Community Hospitals as Leapfrog presents them: in a manner that would lead a reasonable consumer to believe those Safety Grades reflect poor safety performance at the relevant hospitals—rather than their decision not to participate in Leapfrog’s Survey. With respect to the second element, the video tends to show how consumers’ interpretations contribute to the reputational harms inflicted upon the Community Hospitals. Palm Beach Gardens CEO Erik Cazares, for example, observed that patient complaints “increas[ed] ... after the Tik Tok video” became viral. ECF 88-90 at 56:14-15. The video is exactly the type of real-world evidence that helps establish consumer deception and the Community Hospitals’ aggrievement under FDUTPA.

Authentication. Leapfrog also contends that the TikTok video is inadmissible because the Community Hospitals “have not introduced any person or circumstantial evidence that can authenticate” it under Rules 901 and 902. Mot. 5; *see also id.* (demanding the Community Hospitals establish “when the video was in fact created, including who it was made by”). But the burden to authenticate “is a light one,” *In re Int’l Mgmt. Assocs., LLC*, 781 F.3d 1262, 1267 (11th Cir. 2015), and the Community Hospitals “need only make a prima facie case” that the TikTok video is “what [they] claim[] it to be,” *Zurich Am. Ins. Co. by Maryland Cas. Co. v. Eur. Tile & Floors, Inc.*, 2017 WL 3582744, at *3 (M.D. Fla. Aug. 18, 2017). At trial, the Community Hospitals will introduce the original video file downloaded from the publicly accessible URL—satisfying Rule 1002’s best-

evidence requirement—and witnesses will testify that they personally viewed the same video online. *See, e.g.*, ECF 88-90 at 36:2-12 (Palm Beach Gardens CEO Erik Cazares testifying that he viewed the TikTok video online by clicking a link). They will further testify that they recognized the hospital names and Fall 2024 Safety Grades. For example, the video’s statement that Delray Medical Center “was graded an F in Fall 2024” indicates that the Hospital was given a letter grade (“F”) for a particular period of time (“Fall 2024”)—precisely the way Leapfrog issues and identifies its Safety Grades. And the witnesses will confirm that the “Fall 2024” grades appearing in the video exactly match the Safety Grades that Leapfrog assigned to the Community Hospitals for that period. *See* ECF 75 ¶¶ 72 (West Boca); 59 (Delray); 63 (Good Samaritan); 66 (Palm Beach Gardens); *see also* ECF 88-93 at 258:22-259:5 (Delray CEO Heather Havericak) (“Although [the TikTok video] didn’t reference Leapfrog, it had all the letters assigned to the [S]afety [G]rades.”).

This circumstantial evidence is more than sufficient. For example, in *United States v. Broomfield*, Leapfrog’s own cited case, the Eleventh Circuit affirmed the admission of a YouTube video authenticated solely through circumstantial evidence, holding the government had established that the video was “what they claim it is” based on distinctive features of the video that matched the surrounding evidence. 591 F. App’x at 849. The video depicted the defendant in possession of a firearm, and “the government’s evidence identified the individual in the video as [the defendant], established where and approximately when the video was recorded, and then identified the specific rifle and ammunition depicted in the video.” *Id.* at 851. Similarly here, the distinctive features of the TikTok video—the hospitals’ names, images, and exact Fall 2024 Safety Grades—confirm it is what the Community Hospitals claim: a public-facing communication of Leapfrog’s published Safety Grades.⁴

Hearsay. Leapfrog contends the TikTok video is hearsay because “it is being used by Plaintiff Hospitals to prove the truth of the matter asserted in the video.” Mot. 7. That is clearly wrong; the “truth” asserted—that the identified hospitals are the worst in Florida—is disputed. Rather, the video is offered to demonstrate that it republishes Leapfrog’s Safety Grades and to show its *effect on viewers*, including (1) how reasonable consumers interpret an “F” or “D” Safety Grade (FDUTPA deception and unfairness), and (2) the reputational impact those interpretations

⁴ Leapfrog also premises its authentication objection on the claim that the TikTok video is “AI generated click-bait.” Mot. 5. Regardless of who created the video, Leapfrog does not (and cannot) dispute that it appears on a public social media platform, is accessible to anyone by URL, accurately reports Leapfrog’s Fall 2024 Safety Grades for each of the four Community Hospitals the video identifies, and was widely viewed.

have on the Hospitals (FDUTPA aggrievement). These are textbook non-hearsay uses. *See, e.g., United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015) (statement not hearsay when offered “to show its effect on the hearer”); *Poitevint v. United Recovery Sys., LP*, 899 F. Supp. 2d 1230, 1236 (N.D. Fla. 2012) (statements not hearsay when used “to prove the nature of the communications and the fact that they occurred”). The on-screen text and narration are also admissible as verbal acts contributing to reputational harm, not for their truth. *Lincare Holdings Inc. v. Doxo, Inc.*, 2024 WL 865881, at *3 (M.D. Fla. Feb. 29, 2024) (evidence not hearsay when “not offered for the truth of the matter asserted but rather to show effect on consumers, namely, confusion” (quoting *Streamline Prod. Sys., Inc. v. Streamline Mfg., Inc.*, 851 F.3d 440, 458 (5th Cir. 2017))).

Unfair Prejudice. Leapfrog claims that the TikTok video is unfairly prejudicial and may confuse and mislead the factfinder. Mot. 7. While unfair prejudice may be an important consideration in the jury trial context, the parties here jointly stipulated to a bench trial. ECF 77 at 2. In a bench trial, Rule 403 concerns are substantially diminished because the Court is presumed capable of weighing evidence appropriately and disregarding any improper inference. *Gulf States Utils. Co.*, 635 F.2d at 519; *Mycko v. Sun*, 2015 WL 11197788, at *1 (S.D. Fla. May 26, 2015) (the unfair prejudice calculation of Rule 403 is “not applicable to bench trials” where the Court serves both as adjudicator of unfair prejudice and factfinder). Moreover, Leapfrog identifies no unfair prejudice from re-publication of Safety Grades that it publishes itself. Exclusion of relevant evidence due to the danger of unfair prejudice is an “extraordinary remedy which the district court should invoke sparingly,” and “the balance should be struck in favor of admissibility.” *United States v. Dodds*, 347 F.3d 893, 897 (11th Cir. 2003) (cleaned up). Rule 403 assertions on motions *in limine* in particular are “best limited to those issues that the mere mention of which would deprive a party of a fair trial.” *Britt*, 599 F. Supp. 3d at 1263. The TikTok video comes nowhere close.⁵

B. Evidence Of Patient Harm Is Relevant And Admissible (Request 2)

Leapfrog next contends that the Community Hospitals should be barred under Rule 37(c)(1) from presenting evidence, including lay and expert testimony, that “any patients brought the Leapfrog [G]rade to the attention of any doctor or nurse” or that “any specific patient was harmed by the Leapfrog Safety Grade” assigned to each Community Hospital because no witness has testified “regarding first-hand or personal knowledge they have regarding any specific patient

⁵ Leapfrog asserts without support that the TikTok video is inadmissible under Rules 602 and 1001. These conclusory recitations are insufficient, and in any event, the Court may address these issues at trial, if necessary. *See United States v. Khoury*, 901 F.2d 948, 966 (11th Cir. 1990).

that was harmed by the Leapfrog Safety Grade assigned to any one of the five plaintiff hospitals, and no documents have been produced providing any such evidence.” Mot. 7. That argument misstates both the governing FDUTPA standard and the discovery record.

Rule 37 Exclusion. Leapfrog first argues evidence of patient harm should be excluded under Rule 37(c)(1). But that Rule applies only “[i]f a party fails to comply with its discovery obligations,” such as by unlawfully withholding discovery, *Burden v. City of Opa Locka*, 2012 WL 4764592, at *7 (S.D. Fla. Oct. 7, 2012), not where, as here, the Community Hospitals’ trial evidence fully aligns with the discovery record. Because the Community Hospitals’ trial evidence would be consistent with their discovery responses and CEO deposition testimony discussing harm to patients and others, Rule 37 has no application.

As the Community Hospitals have explained in summary judgment briefing, *see* ECF 107 at 6-7, there is no requirement under FDUTPA to show that individual consumers “actually relied” on an “illegal misrepresentation.” *See Carriulo v. Gen. Motors Co.*, 823 F.3d 977, 986 (11th Cir. 2016). Rather, “[a] likelihood of consumer confusion is a sufficient basis for injunctive relief.” *Ghostbed, Inc. v. Casper Sleep, Inc.*, 2016 WL 4145909, at *3 (S.D. Fla. July 19, 2016). For that reason, “individual identities of consumers who did, in fact, rely on [Leapfrog’s] alleged misrepresentations are not necessary to maintain a claim under the FDUTPA.” *PB Prop. Mgmt., Inc. v. Goodman Mfg. Co., L.P.*, 2014 WL 12640371, at *7 (M.D. Fla. Aug. 14, 2014). The Community Hospitals must demonstrate only a likelihood of consumer deception or unfairness as well as aggravement. *See supra* 8.

Regardless, the Community Hospitals *have* introduced admissible evidence that specific consumers, including particular patients, were misled. The Community Hospitals’ CEOs testified that admissions at their facilities had declined in various areas, *see, e.g.*, ECF 87 (“SOF”) ¶¶ 57, 59-60, shortly following the announcement of their Leapfrog Safety Grades, SOF ¶¶ 58-59. That “temporal” proximity offers “powerful evidence” of causation. *In re Stand ‘N Seal Prods. Liab. Litig.*, 623 F. Supp. 2d 1355, 1374 (N.D. Ga. 2009). The CEOs also testified that patients had reacted to the low safety scores. For example, Delray CEO Heather Havericak testified that she “go[es] out on the units every single day in our hospital and do rounding on patients and families.” ECF 88-93 at 249:14-22. Through this process, she learned that “patients [are] nervous about that [Leapfrog] score they’ve seen,” *id.* at 250:4-6, and that “they had apprehension and anxiety about coming to Delray,” *id.* at 252:24-25. And Palm Beach Gardens CEO Erik Cazares testified that he

gets calls “three to four times a week” from “patients not wanting to go to Palm Beach Gardens Medical Center, specifically citing the F grade,” ECF 88-90 at 35:19-36:1; he also talked to a patient who “did not want to go to Palm Beach Gardens” for a “cardiac procedure” and informed him the “main reason was because of Leapfrog,” *id.* at 32:11-17.⁶ This testimony stems from the personal knowledge and perception of each Community Hospitals’ CEO and is exactly the kind of testimony contemplated by Rules 602 and 701. *Contra* Mot. 7-8. It bears upon how consumers understood Leapfrog’s failing Safety Grades (deception and unfairness) and how that understanding affected consumers’ willingness to seek care at the Community Hospitals (aggrievement). It is thus not “clearly inadmissible on all potential grounds.” *Gonzalez*, 718 F. Supp. 2d at 1345.⁷

Leapfrog also argues the testimony offered by the Community Hospitals’ CEOs is contradicted by instances where they testified about their facilities’ successes. Mot. 8-9. But a motion *in limine* is not an opportunity to weigh evidence or “to determine the sufficiency of the evidence or merits of an issue.” *Powers v. Carnival Corp.*, 2013 WL 12157800, at *1 (S.D. Fla. 2013).

Hearsay. Leapfrog asserts without explanation that Rules 801 and 805 require exclusion. Mot. 7. But, as discussed above, these statements will be reduced to admissible form at trial and may also be offered to show consumers were duped into believing the Community Hospitals are unsafe. *See supra* 9-10; *Lincare*, 2024 WL 865881, at *3. And in any event, any specific hearsay objections can be addressed, if necessary, at trial when the testimony is offered in context.

C. Evidence Of Harm To The Community Hospitals Is Relevant And Admissible (Requests 3 & 4)

Leapfrog also seeks to exclude “any testimony by” the Community Hospitals’ “witnesses that [the Community Hospitals] suffered any type of harm,” including “declining admissions, loss of market share or decreased revenue,” as well as any reference that the Safety Grades “caused” those harms. Mot. 9-12. According to Leapfrog, the evidence that the Community Hospitals will present at trial to demonstrate that they are “aggrieved” and therefore satisfy FDUTPA’s second element is either: (1) “purely speculative”; or (2) inadmissible because the Community Hospitals did not produce in discovery the “computations” or financial damages metrics Leapfrog prefers.

⁶ As explained in the Community Hospitals’ summary judgment reply, Leapfrog is wrong to limit “consumer” harm to patients. In addition to the evidence of patient harm discussed above, the Community Hospitals will also identify at trial harm to physicians, insurers, and the Community Hospitals themselves. ECF 107 at 7-8.

⁷ Leapfrog’s corresponding Rule 702 argument that expert testimony should be excluded fails for the same reasons—its assertion that the Community Hospitals’ experts lack “sufficient facts or data” (Mot. 8) rests on the faulty assumptions that FDUTPA requires proof of injury to a specific identified consumer and that evidence of consumer harm is absent from the record here.

Mot. 10-12. Those arguments mischaracterize both FDUTPA and the record.

Discovery Production. Leapfrog cannot establish that the Community Hospitals *withheld*, in violation of discovery rules contained in Rule 26, the sort of damages calculations it seeks. *See supra* 11. The Community Hospitals need not establish actual, quantified damages to prevail on their FDUTPA claim for declaratory and injunctive relief. *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 172 (Fla. 1st DCA 2015) (aggrieved party “may obtain injunctive relief” under FDUTPA “regardless of whether [it] can recover ‘actual damages’” (citation omitted)). It is accordingly perfectly reasonable that their discovery responses focused on reputational and operational harm—classic forms of aggrievement—rather than the sort of financial computations that might be required to sustain and recover on a claim for actual damages.⁸

Testimony from Personal Knowledge. Across multiple pages of its Motion, Leapfrog claims that none of the Community Hospitals’ witnesses has personal knowledge of any harm experienced by the Community Hospitals. Mot. 9-12. This is untrue. The Community Hospitals’ CEOs testified that Leapfrog’s failing Safety Grades prompted patients, physicians, and community members to express concern, confusion, and reluctance to seek care. *See* ECF 86 at 16; SOF ¶¶ 55-61. That testimony is admissible under Rules 602 and 701 because it is based on the witnesses’ own perceptions and interactions—not speculation—and because it goes directly to how consumers understood the Safety Grades (deception and unfairness) and the resulting reputational harm to the Community Hospitals (aggrievement).

For example, Delray CEO Heather Havericak testified that, based on personally “go[ing] out on the units every single day in [her] hospital,” she learned that “patients ... have ... a lesser confidence in [the] medical center” “because of that Leapfrog score.” ECF 88-93 at 249:14-250:3. And Good Samaritan CEO Sheri Montgomery testified that “physicians have told [her] that they are getting on staff at” a local competitor hospital because Good Samaritan received “an F” Safety Grade from Leapfrog. ECF 88-96 at 296:24-297:11; *see also supra* 11-12 (discussing additional examples). These are classic forms of reputational harms that satisfy FDUTPA’s aggrievement requirement. *See Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.*, 123 So. 3d 1149, 1152 (Fla. 5th DCA 2012) (“consumer confusion” and “damage [to] goodwill” satisfy FDUTPA’s

⁸ Leapfrog’s cited case, *City of Rome v. Hotels.com, L.P.*, 549 F. App’x 896 (11th Cir. 2013), is inapposite. *City of Rome* involved monetary damages and expert damages computations—neither of which is at issue here. *See id.* at 898, 905. The Community Hospitals do not seek monetary relief under FDUTPA and therefore have no obligation to prove such damages computations. *See, e.g., Ahearn*, 180 So. 3d at 172.

aggrievement element); *Colonial Van Lines, Inc. v. Colonial Moving & Storage, LLC*, 2020 WL 6700449, at *4 (S.D. Fla. Oct. 20, 2020) (same for “consumer confusion about Plaintiff’s business, rates, and quality of service”).⁹ And the fact that some of those patients may have ultimately received care at the Community Hospitals is beside the point.

In any event, the Community Hospitals’ CEOs also testified from personal knowledge regarding operational harms caused by Leapfrog’s failing Safety Grades. *See* SOF ¶¶ 56-60. Several noted declines in particular services or admissions. *E.g.*, ECF 88-95 at 231:7-15 (St. Mary’s CEO testifying that she “attribute[s]” the hospital’s “decline in number of births delivered,” “decline in elective outpatient pediatrician physical therapy,” “decline in elective outpatient surgeries,” and “decline in volume in [its] emergency department” “to the Leapfrog [G]rade”). And they testified to expending time and resources to respond to the concern and confusion caused by the Safety Grades. *E.g.*, ECF 88-92 at 78:2-14 (West Boca CEO testifying that “it’s required a lot of expense, resources, and time to explain [the misleading Safety Grade] to not only our board members, medical staff, and staff, but also to try to convey an accurate portrayal to the community, as well.”).

Leapfrog argues the Community Hospitals are not aggrieved by Leapfrog’s deceptive Safety Grades because their CEOs testified to increased revenue or profits in certain areas. Mot. 10. But a motion *in limine* cannot be used to weigh competing evidence or assess credibility. *Gonzalez*, 718 F. Supp. 2d at 1345. And, of course, increased revenues in some departments does not negate reputational injury; Leapfrog has not shown that revenues would not have increased *further* absent the drag of failing Safety Grades. *See Wyndham Vacation Ownership, Inc. v. Slattery, Sobel & Decamp, LLP*, 2024 WL 5703196, at *11 (M.D. Fla. Aug. 14, 2024) (that a plaintiff may have “generated a net profit ... does not demonstrate that [it] suffered no harm”).

Finally, Leapfrog’s attempt to exclude evidence of “causation” (Mot. 12) is misdirected. The Community Hospitals’ CEOs have testified that patients, physicians, and other community members expressed concern and confusion about the Community Hospitals *because of* their failing Safety Grades and, in fact, specifically referenced those Grades in doing so. *See, e.g.*, ECF 88-93 at 249:23-25 (Delray CEO explaining that patients told her they were “scared to come to Delray *because of* that Leapfrog score” (emphasis added)); 88-95 at 231:13-25 (St. Mary’s CEO describing her Hospital’s diminished “reputation that’s been developed *because of* the Leapfrog grade”

⁹ These statements are not hearsay because the Community Hospitals’ witnesses will offer them “to show effect on consumers, namely, confusion.” *Lincare*, 2024 WL 865881, at *3.

(emphasis added)). Such testimony is more than sufficient to show FDUTPA aggrievement at this stage.

Unfair Prejudice. Leapfrog does not explain the rationale for its claim that introduction of this evidence would be unfairly prejudicial. Mot. 9, 12 (string citing Rule 403). Any claim of this type would be inappropriate in advance of a bench trial. *See supra* 3. This Court should await proper context and a full record before ruling on Leapfrog’s claim of unfair prejudice.¹⁰

D. Evidence Concerning The Community Hospitals’ Strong Performance On The Imputed Measures Is Relevant And Admissible (Request 5)

Leapfrog seeks to exclude for “lack of evidence produced” any lay or expert testimony “related to [the fact that] any of the five [Community Hospitals] were performing above ‘Limited Achievement’ on the 4 imputed Measures.” Mot. 12 (citing Rules 403, 602, 701, 702, and 703). Such a broad and ill-defined exclusion request is improper on a motion *in limine*. *See, e.g., RJ’s Int’l Trading, LLC v. Crown Castle S. LLC*, 2021 WL 6135137, at *2 (S.D. Fla. Dec. 2, 2021) (“[T]he Court cannot impose a blanket exclusion of lay and expert testimony without the objector identifying the specific testimony sought to be limited.”). In any event, the evidence Leapfrog appears to target could demonstrate the deceptive nature of Leapfrog’s Safety Grade methodology as applied to the Community Hospitals and may be critical to rebut Leapfrog’s efforts—evident in their extensive and ongoing press campaign against the Community Hospitals—to denigrate their performance. *See* ECF 115. Leapfrog’s objections to its admission are meritless.

Sufficiency of the Evidence. Leapfrog’s contention that “no evidence has been established” regarding the Community Hospitals’ strong performance on the imputed measures is, in reality, a thinly veiled sufficiency-of-the-evidence argument. Mot. 13. But a motion *in limine* cannot be used “to determine the sufficiency of the evidence or merits of an issue.” *Soliday v. 7-Eleven, Inc.*, 2011 WL 1837807, at *1 (M.D. Fla. Apr. 20, 2011). Nor is it “a substitute for a motion for summary judgment,” or “an appropriate mechanism for testing the law, narrowing the issues to be tried, or attempting to resolve substantive issues.” *City of S. Miami*, 2020 WL 7074644, at *5 (citations omitted). Leapfrog cannot convert a dispute about the Community Hospitals’ performance on the Four Measures into a question of admissibility.

Regardless, the record evidence developed in discovery amply demonstrates that the

¹⁰ Leapfrog’s cursory references to Rules 702 and 1002 do not provide any basis for exclusion; any foundation or expert-methodology objections can be addressed, if necessary, at trial.

Community Hospitals performed well above “Limited Achievement” on the Four Measures. To satisfy Leapfrog’s discovery demands, the Community Hospitals produced over *eighty documents* showing that, if they had responded to the Survey, they would have scored highly on the Four Measures. Having insisted that the Community Hospitals produce this material in discovery and accepted its production as satisfaction of its demand, *see* ECF 76, Leapfrog cannot now claim a “lack of evidence” on this score.

Unfair Prejudice. Leapfrog fleetingly cites Rule 403 but then makes no attempt to explain how admitting testimony regarding the Community Hospitals’ strong performance on the Four Measures could cause unfair prejudice, confusion, or delay. Mot. 12. As the Community Hospitals have long maintained, their actual clinical performance is not an essential—or even relevant—aspect of this case. ECF 40; 55. But Leapfrog has repeatedly claimed the Community Hospitals are underperformers. Now, Leapfrog seeks an asymmetric exclusion, presumably aiming to introduce evidence that the Community Hospitals perform poorly while excluding any testimony to the contrary. Acceding to its request would *create*—not prevent—unfair prejudice by allowing Leapfrog to present its narrative while silencing contrary proof. *United States v. Routh*, 2025 WL 2315626, at *4 n.5 (S.D. Fla. June 23, 2025) (Rule 403 is “not meant to sanitize” the factual record (cleaned up)); *Fisher v. Bumbo Int’l Tr.*, 2014 WL 12042519, at *5 (S.D. Fla. Aug. 27, 2014) (rejecting Rule 403 challenge where evidence was necessary to “paint a more complete picture” of events).

Testimony from Personal Knowledge. Leapfrog contends that unnamed witnesses *might* offer “speculative” testimony regarding the Community Hospitals’ performance. Mot. 12-13. This claim is *itself* speculative and not a legitimate basis for exclusion. *See Southpoint Condo. Ass’n, Inc. v. Lexington Ins. Co.*, 2020 WL 3547028, at *4 (S.D. Fla. June 30, 2020) (denying motion *in limine* because it “fail[ed] to cite any specific evidence or specific testimony beyond the abstract”). It also rests on a misunderstanding of Rules 602 and 701, which require a lay witness to have personal knowledge of the matter or opinion about which they testify. *See Williams*, 865 F.3d at 1341-42. Here, the Community Hospitals’ CEOs have general oversight of patient-safety and quality initiatives within their facilities and are routinely informed about the measures that Leapfrog purports to evaluate, including by attending the relevant quality committee meetings; they therefore possess the firsthand knowledge and experience needed that satisfy the Rules. *E.g.*, ECF 88-92 at 82:9-14 (West Boca CEO testifying that “we review our [quality] data on a monthly and even

weekly basis”); 88-93 at 46:9-18 (Delray CEO testifying that she “sit[s] on the [quality] committee”); 88-95 at 59:9-12 (St. Mary’s CEO testifying that she “attend[s]” monthly quality committee meetings). Furthermore, their testimony will be grounded in the more than eighty documents produced during discovery confirming the Community Hospitals’ performance on the Four Measures. *See supra* 16. Leapfrog does not, and cannot, dispute these points.

Expert Opinions. Leapfrog references Rules 702 and 703, which pertain to expert testimony. Mot. 13. But it does not cite a single expert opinion implicated by its exclusion request, and the Community Hospitals are unable to divine one. Regardless, any such opinion would be well-supported by the documents and data the Community Hospitals produced in this case—precisely “the type [of materials] reasonably relied on by experts in the relevant field.” *Nat’l Union Fire Ins. Co. v. Tyco Integrated Sec., LLC*, 2015 WL 11251759, at *14 (S.D. Fla. July 6, 2015). Any disagreements regarding how those materials are interpreted or applied go “to the weight, not the admissibility, of the evidence ... offered.” *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003).

E. Commentary Critical Of Prior Leapfrog Methodologies Is Relevant And Admissible (Request 6)

Leapfrog seeks to exclude “any reference, testimony, or attempts by a witness, including an expert witness, referencing in any way articles, research, or complaints critical of prior Leapfrog methodologies.” Mot. 13 (citing Fed. R. Evid. 401, 403). Contrary to Leapfrog’s suggestion, this testimony is directly relevant to the deceptive and unfair nature of Leapfrog’s present representations to the public under FDUTPA’s first element, and it is not unfairly prejudicial; it is admissible.

Relevance. Leapfrog’s relevance arguments are belied by its own reliance on publications discussing prior iterations of its Safety Grade methodology to promote its *current* Safety Grades. Leapfrog’s website claims that its Safety Grade methodology is “peer reviewed and published in the *Journal of Patient Safety*.” ECF 88-44 at 3. But the referenced article analyzes an *earlier version* of the Leapfrog Safety Grade methodology (the 2013-2020 approach). By invoking that publication as validation for its current methodology, Leapfrog ties the reliability of its *prior* methodology to its *current* one. *See also* ECF 99 at 3-4 (Leapfrog’s Motion for Summary Judgment relying on its historical use of imputation). The same is true of Leapfrog’s reliance on its 2016 and 2019 “white papers,” which Leapfrog continues to cite in support of its claim that “D and F hospitals carry twice the risk of mortality as A hospitals.” *See* ECF 88-83 at 1. Those white papers, however, analyzed data from much earlier grading methodologies that have long been replaced,

including by the methodology at issue here. Because Leapfrog bootstraps these analyses of its earlier methodologies to endorse the current one, evidence exposing their flaws confirms Leapfrog's deception and is directly relevant under Rule 401. As the Eleventh Circuit has explained, "[i]n the law, what's sauce for the goose is normally sauce for the gander." *United States v. Graham*, 123 F.4th 1197, 1267 (11th Cir. 2024) (citation omitted) (applying this principle to relevance determination). Excluding this evidence would not only unfairly prejudice the Community Hospitals but also leave the Court with an incomplete and distorted record of how Leapfrog promotes its Safety Grades and their underlying methodology.

Additionally, academic and professional criticisms of Leapfrog's prior methodologies remain relevant due to Leapfrog's own position that the prior and current methodologies contain material commonalities. Leapfrog's in-house expert, Dr. Matthew Austin, admitted, for example, that the data used for Leapfrog's 2019 "lives lost" white paper differs materially from the 2025 data, yet he nonetheless testified that the white paper remains relevant to evaluating Leapfrog's current Safety Grade methodology. *See* ECF 88-84 at 105:14-107:1, 349:12-350:19. Leapfrog cannot selectively rely on prior methodology materials to bolster its current methodology—all while attempting to exclude contemporaneous criticisms of those same materials. Nor can it insulate its current methodology from meaningful scrutiny by barring critiques of its predecessor at the outset.

Unfair Prejudice. Leapfrog also asserts a Rule 403 objection, arguing that because outdated articles do not deal with the current Safety Grade methodology, they would unfairly prejudice the factfinders. But in a bench trial, Rule 403 concerns are significantly diminished, as the Court can weigh the evidence appropriately and disregard any improper inference. *See supra* 3. Any concern about potential confusion is best addressed at trial, not through pretrial exclusion.

F. Evidence Concerning Leapfrog's Financial Incentives Is Relevant And Admissible (Requests 7 & 8)

Leapfrog's final two requests seek to exclude "any reference, testimony, or attempts by a witness, including an expert witness, that Leapfrog in any way takes money in exchange for better grades" and that it "provides paid consulting services in exchange for giving hospitals better grades," on the ground that "no documentary evidence (or testimony)" supports these statements. Mot. 14-16 (citing Fed. R. Evid. 401, 403, 602, 701, 702). Like those that came before, these objections misstate what the Community Hospitals intend to prove and ignore the record evidence.

Sufficiency of Evidence. Leapfrog's contention that "no evidence" supports allegations regarding Leapfrog's financial incentives is not an evidentiary objection—it is an improper attempt

to litigate the sufficiency of proof through a motion *in limine*. *See supra* 12; *Soliday*, 2011 WL 1837807, at *1; *City of S. Miami*, 2020 WL 7074644, at *5. Even if such a challenge were appropriate, Leapfrog’s argument fails because it mischaracterizes what the Community Hospitals actually allege and ignores the record evidence developed in discovery.

The Community Hospitals do not claim that Leapfrog literally sells its Safety Grades to the highest bidder. Rather, the Community Hospitals allege—and the evidence shows—that Leapfrog’s financial structure, including its data sales, sponsorship, membership, and consulting programs, creates powerful incentives that undermine the objectivity and public-spiritedness it professes. Discovery confirmed that Leapfrog earns most of its revenue through two primary channels: (1) licensing and selling hospitals’ self-reported Survey data to insurers, researchers, and other third-parties; and (2) charging hospitals substantial fees—often \$5,700 to \$29,000—to license and market their Safety Grades. SOF ¶ 19; ECF 88-34 at 208 (Leapfrog Expert Panelist Dr. Patrick Romano: “[Leapfrog’s] business model ... depends on producing data,” and Leapfrog’s “data are not valuable if [Survey] participation is low.”); 88-57 (agreement to license logo and promote Safety Grades). Hospital participation and resulting high Safety Grades are thus central to Leapfrog’s business model: its revenue grows depending on the number of hospitals that participate in its Survey (and thereby augment its data set) and the amount of Safety Grades it can license. SOF ¶¶ 20-21.¹¹

To accomplish its goal of increasing revenue by increasing Survey participation, Leapfrog deliberately altered its Safety Grade methodology in Fall 2024. After participation rates plateaued in 2023, Leapfrog’s Board and executives emphasized the need to “focus on growing revenues” and “increase participation” in the Survey. SOF ¶ 22. The solution was to reengineer the Safety Grade methodology to penalize hospitals that chose not to participate. *See id.* ¶¶ 27-39. As Dr. Romano put it, the change would “achieve [Leapfrog’s] strategic objective of penalizing nonparticipants ... in a clear and unmistakable manner.” ECF 88-17 at 490. He later described the change as a “simple business decision.” ECF 88-34 at 208 (“It’s just business, folks!”). The strategy worked: Leapfrog saw “record participation” in Fall 2024. ECF 88-27 at 185.

The consequences to hospitals of nonparticipation are punitive—and deliberately so. Under

¹¹ Leapfrog apparently takes issue with the “pay-to-play” phrase, but Dr. Romano, a member of its own Expert Panel, described participation in the Hospital Survey as “pay for reporting”—which directly supports the Community Hospitals’ “pay-to-play” characterization. ECF 117-2 at 1.

the current Fall 2024 Safety Grade methodology, hospitals that do not complete Leapfrog’s lengthy Survey automatically receive the lowest scores on the Four Measures—which together make up 25% of their Safety Grade—artificially deflating the Safety Grade that Leapfrog markets to the public as reflecting overall safety performance. ECF 88-27 at 185 (the change “dramatically lower[ed] imputed scores” for nonparticipating hospitals); SOF ¶ 39 (describing Leapfrog’s coercive methodology as “marketing blackmail”). Participating hospitals, by contrast, not only escape punitive scoring but also gain tangible advantages, including the ability to license Leapfrog’s branding to market their “A” Grades, ECF 88-57, and, if desired, to purchase access to Leapfrog’s consulting services aimed at improving Survey performance. This evidence of Leapfrog’s incentives is undisputed and sufficient to support trial testimony on these central issues.

Relevance. Contrary to Leapfrog’s cursory suggestion, evidence of its financial relationships and consulting activities is relevant under Rule 401 because it bears on Leapfrog’s bias and motive—both of which are admissible considerations. *See United States v. Abel*, 469 U.S. 45, 52 (1984). The evidence also tends to show that Leapfrog has financial incentives to maintain participation and portray nonparticipants negatively, which directly supports the Community Hospitals’ theory that Safety Grade marketing misleads consumers and is unfair under FDUTPA.

Unfair Prejudice. Leapfrog’s repeated assertion that financial incentive evidence should be excluded as unfairly prejudicial under Rule 403 likewise fails. Mot. 14-16. As discussed, Rule 403’s bar of unfairly prejudicial evidence “has no logical application to bench trials.” *Woods*, 200 F. App’x at 853; *see supra* 3. Excluding this evidence would do the opposite of what Rule 403 intends—it would deprive the Court of critical context regarding Leapfrog’s bias, motives, and the integrity of its grading system.¹²

CONCLUSION

The Court should deny Leapfrog’s omnibus motion *in limine* in full. The evidentiary issues Leapfrog has alleged are not just relevant, among other things, they go to the heart of the issues about the fairness and accuracy of Leapfrog’s Safety Grade methodology and how that process has harmed the Community Hospitals. At the very least, this Court can address these questions at trial, as they arise and in proper context.

¹² To the extent Leapfrog also invokes Rules 602, 701, and 702, those objections merely raise foundational or weight issues properly addressed at trial. Not through a categorical motion *in limine*.

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Respectfully submitted,

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