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' REPLY IN SUPPORT OF MOTION TO EXCLUDE LEAPFROG'S EXPERT WITNESSES

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INTRODUCTION

Leapfrog broadly seeks to cast the Community Hospitals' arguments for excluding Leapfrog's proffered experts as going to weight, rather than admissibility. But the standards set forth in Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), play an important gatekeeping role in precluding putative expert testimony that is grounded in no pertinent expertise, will provide no assistance on the relevant issues, or rests on speculation, incorrect assumptions, anecdotes, or other unreliable foundations. That gatekeeping role has a critical "streamlin[ing]" function even in bench trials. *Salomon Constr. & Roofing Corp. v. James McHugh Constr. Co.*, 2019 WL 5256980, at *4 (S.D. Fla. Mar. 22, 2019).

Each of Leapfrog's putative expert witnesses should be excluded in full because their opinions fail to meet the standards of Rule 702, and indeed some are built on demonstrable misrepresentations about the methodology underlying the Safety Grades. The Court need not devote trial time to, for example: opinions that depend on a discredited and withdrawn opinion (Vredenburgh Opinions One, Two, and Three); opinions on subjects the putative expert admits he knows nothing about (Farrokhi Opinions Three, Four, and Five); a damages opinion in a case where no damages are sought (Rule Opinion One); or opinions rooted in indisputable falsehoods (Harris Opinion One). Several opinions should be excluded due to Rule 26 violations, as well.

(1) ***Michael Vredenburgh ("human factors" engineer).*** Mr. Vredenburgh intends to offer opinions about the purported clarity of two pages on Leapfrog's website. All his opinions should be excluded because he squarely violated **Rule 26(a)(2)** by declining to disclose five binders of documents he considered. Mr. Vredenburgh also is **unqualified** under Rule 702 to offer his opinions because he has no expertise in consumer behavior. Leapfrog provides no sound reason why a human-factors engineer—someone who deals with equipment design—would have that expertise. And Mr. Vredenburgh's opinions are **unreliable, unhelpful, and irrelevant** under Rule 702(a)–(d). Leapfrog cannot escape Mr. Vredenburgh's testimony that three of his opinions relied on a conceded miscalculation. Moreover, his failure to analyze Leapfrog's whole website means his opinions cannot reliably assist the Court in analyzing the net impression of Leapfrog's disclosures.

(2) ***Dr. Farrokh Farrokhi (neurosurgeon).*** Dr. Farrokhi seeks to provide various opinions about Leapfrog's Survey, even though his report did not even *mention* the Survey. These untimely disclosures violate **Rule 26(a)(2)** and justify exclusion. Leapfrog's efforts to recast Dr. Farrokhi's report as about the Survey cannot be reconciled with what the report says or

Dr. Farrokhi's own testimony. Dr. Farrokhi also is **unqualified** under Rule 702 to offer his opinions—he has no experience with Survey benchmarking, reliability, or burden, and his experiences at a single hospital in Seattle cannot qualify him to make broad claims about the purported systemic benefits of the Survey. Those opinions, in any event, are **unreliable and unhelpful** under Rule 702(a)–(d) because they rest at best on anecdotes and at worst on no basis whatsoever. In addition, Dr. Farrokhi's opinions about the purported benefits of the Survey are **irrelevant and unhelpful** under Rule 702(a) because they have no connection to whether Leapfrog has violated FDUTPA.

(3) *Mark Rule (damages accountant).* Mr. Rule first plans to opine that the Community Hospitals' experts did not quantify damages. But the Community Hospitals *waived* their damages claim with prejudice, ECF 66 at 4, so a damages opinion is necessarily **irrelevant and unhelpful** under Rule 702(a). Leapfrog belatedly tries to frame Mr. Rule's damages opinion as relevant to aggrievement under FDUTPA and Article III standing, but neither requires quantified harm.

Mr. Rule's second opinion consists of a counterfactual exercise in which he re-calculated the Community Hospitals' Safety Grades by removing the Four Measures (*see* ECF 96 ("Mot.") 4) from the calculation. That exercise is **irrelevant and unhelpful** under Rule 702(a) because it fails to test the relevant question: the effect that non-participation in Leapfrog's Survey has on Safety Grades, *relative to participation in the Survey*. Mr. Rule's counterfactual is also **unreliable and unhelpful** under Rule 702(a)–(d) because it is not a peer-reviewed or generally accepted way of measuring the effect that non-participation has on Safety Grades. And Mr. Rule is not even **qualified** under Rule 702 to conduct this exercise, because he has no relevant expertise in hospital rating methodologies and admitted to having only a *layperson's* understanding of Leapfrog's methodology. Mr. Rule is a damages accountant—not a health economics expert or statistician.

(4) *Dr. Anthony Harris (epidemiologist).* Dr. Harris makes several claims about Leapfrog's Fall 2024 Safety Grade methodology—for example, that it is "reasonable and ethical"—but those opinions are uniformly **unreliable and unhelpful** under Rule 702(a)–(d) because he failed to understand a critical fact about the methodology: he did not realize Leapfrog automatically assigns the *lowest* possible scores on the Four Measures for non-participating hospitals. Each of Dr. Harris's opinions is unreliable and unhelpful for several other reasons as well; for example, his endorsement of the Safety Grade methodology is based on his assumption that Leapfrog's Expert Panel at least *recommended* it, but the Expert Panel did no such thing. Expert opinions rooted in false assumptions should not consume trial time. So too with opinions not grounded in any peer-

reviewed or generally accepted methodology. For example, Dr. Harris claims the Community Hospitals do not participate in Leapfrog's Survey *because* they perform poorly on Survey measures, but he devised no analytical framework to test that causal claim. In addition, his opinion that the Community Hospitals are poor performers is **irrelevant and unhelpful** under Rule 702(a) because it is rooted in those Hospitals' CMS star ratings, which Leapfrog concedes "do not correspond one-to-one with what Leapfrog measures" via its Safety Grades. ECF 111 ("Opp.") 14.

The Court should grant in full the Community Hospitals' motion to exclude Leapfrog's putative expert witnesses.

ARGUMENT

I. Leapfrog Barely Defends Mr. Vredenburgh's (And Counsel's) Egregious Rule 26 Violation And Disregards Several Reasons Why Mr. Vredenburgh's Opinions Are Unreliable, Irrelevant, And Unhelpful

Leapfrog's arguments confirm that Mr. Vredenburgh's opinions should be excluded on multiple grounds. All of his opinions are tainted by his failure to disclose the documents he considered. His purported expertise in human-factors engineering is irrelevant. Three of his opinions rest on a discredited and withdrawn quantitative analysis. And the fourth is based on conjecture.

A. Mr. Vredenburgh's Failure To Disclose Five Binders Of Documents He Considered Warrants Exclusion Of All His Opinions

Leapfrog all but acknowledges that Mr. Vredenburgh violated Rule 26(a)(2)'s expert-disclosure requirements. "Rule 37(c)(1) requires absolute compliance with Rule 26(a)," *United States v. Batchelor-Robjohns*, 2005 WL 1761429, at *2 (S.D. Fla. June 3, 2005) (citation omitted), and exclusion is warranted unless the Rule 26 violation is "substantially justified" or "harmless," Fed. R. Civ. P. 37(c)(1). Leapfrog concedes that Mr. Vredenburgh reviewed documents "not expressly noted in his [r]eport," Opp. 24, and it cannot identify any justification for this violation, suggesting instead that the multiple omissions were harmless, Opp. 22–28. These arguments fail.

1. Leapfrog half-heartedly contends that no Rule 26 violation occurred because an expert is required to disclose only those documents that he "*relied* on when *forming* his opinions or used *in support* of his opinions." Opp. 24. But Eleventh Circuit precedent holds that Rule 26(a)(2)(B)(ii) mandates "disclosure of any material considered by the expert, from whatever source," *not merely* what he ultimately "relied upon." *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1195 (11th Cir. 2013) (citation omitted). Mr. Vredenburgh did not comply: He reviewed enough documents to fill "five … binders," ECF 96-10 (Vredenburgh) at 45:12–23, 50:3–51:12, but his report lists only a

fraction of those documents, *see* ECF 96-5 (Vredenburgh Rep.) at nn.7–8 & app. C.

2. Leapfrog makes no meaningful attempt to satisfy its "burden of establishing" that this Rule 26 violation "was substantially justified." *Mitchell v. Ford Motor Co.*, 318 F. App'x 821, 824 (11th Cir. 2009). It suggests the "omissions" from Mr. Vredenburgh's report were "inadvertent." Opp. 28. But Mr. Vredenburgh testified they were deliberate: he sought to make the report "easy to follow along for the reader." ECF 96-10 (Vredenburgh) at 51:2–12. That justification is inadequate. Mot. 10. In any event, because "exclusion of evidence under Rule 37(c)(1) is not a remedy for bad faith," an "oversight" or "honest mistake" does not supply a "substantial justification." *Jean-Baptiste v. City of Miami*, 2025 WL 360817, at *4 (S.D. Fla. Jan. 3, 2025).

Leapfrog also asserts that its counsel "reviewed Mr. Vredenburgh's report for compliance with" Rule 26 and "deem[ed]" it "compliant." Opp. 27. But an attorney's misunderstanding of Rule 26 is not adequate justification. *See, e.g.*, *Jean-Baptiste*, 2025 WL 360817, at *4. And Mr. Vredenburgh testified that he could not recall "counsel" "edit[ing]" his report or "advis[ing] [him] at any time of [his] obligations under Rule 26," and he therefore "self-checked" his compliance with Rule 26. ECF 96-10 (Vredenburgh) at 19:24–20:1, 72:16–73:19.

3. Leapfrog has likewise failed to carry its burden on harmlessness. Mr. Vredenburgh's failure to disclose multiple binders' worth of documents he considered deprived the Community Hospitals of a fair opportunity to fully explore the bases for his opinions at his deposition—their lone opportunity to do so before the fast-approaching January 2026 trial. Mot. 10–11. In fact, the Community Hospitals are *still* left "to guess how and why" Mr. Vredenburgh "reached his … conclusion[s]," *Mars v. Macy's Fla. Stores, LLC*, 2019 WL 9078707, at *2 (S.D. Fla. Oct. 2, 2019) (citation omitted), because Mr. Vredenburgh was not even able to recall at his deposition all the documents he reviewed, *e.g.*, ECF 96-10 (Vredenburgh) at 48:6–18, 49:19–50:2, 256:10–14, 262:23–263:1.[1] Leapfrog's efforts to downplay this prejudice are unavailing.

First, Leapfrog contends there is no prejudice because Mr. Vredenburgh disclosed all the *opinions* he intends to offer. Opp. 25. That is a non-sequitur. Compliance with one expert-disclosure requirement does not negate the prejudice that flows from the violation of another. *Cf. Christie*

[1] Leapfrog's cited cases are inapposite. *See Woienski v. United Airlines, Inc.*, 383 F. Supp. 3d 1342, 1347 (M.D. Fla. 2019) (no prejudice where (i) the opposing party "had ample opportunity to complain about the quality of [an] expert's report" and (ii) expert discovery could have been reopened because "the trial ha[d] not been scheduled"); *Tejeda Costco Wholesale Corp.*, 2022 WL 2116710, at *2 (S.D. Fla. May 20, 2022) (denying motion to strike because any prejudice resulting from nondisclosure could be "cured" by reopening expert discovery).

v. Bank of Am., N.A., 2015 WL 10960875, at *2 (M.D. Fla. June 19, 2015) (striking expert witnesses because of "failure to comply with *all* Rule 26(a) requirements" (emphasis added)).

Second, Leapfrog claims Mr. Vredenburgh remedied his violation because he "readily identified" the documents that he "erroneously failed to list in his [r]eport." Opp. 25. This is untrue. Mr. Vredenburgh testified that he could not recall many of the specific documents he considered. *Supra* at 4; Mot. 10. And the handful of documents he identified pales in comparison to the "five … binders" he said he reviewed. ECF 96-10 (Vredenburgh) at 45:12–23, 50:3–51:12.

Third, Leapfrog asserts any documents Mr. Vredenburgh failed to disclose were "undoubtedly known" to the Community Hospitals. Opp. 25–27. But even if all the undisclosed documents were among the *more than 1 million documents* produced in discovery (Mot. 32) or filed on the docket, the problem is that Mr. Vredenburgh failed to specify *which* documents in that massive haystack he considered. The Community Hospitals thus lacked the opportunity to question him about those documents. *See, e.g.*, *Reese v. Herbert*, 527 F.3d 1253, 1266 (11th Cir. 2008) ("the expert witness discovery rules are designed to allow both sides … to prepare their cases adequately and to prevent surprise" (citation omitted)).[2]

Fourth, Leapfrog argues that any prejudice evaporated once the Community Hospitals "question[ed]" Mr. Vredenburgh at the deposition. Opp. 25–26. That has matters backwards. A party incurs prejudice when it is forced to use valuable deposition time attempting to clarify what documents an expert reviewed rather than exploring substance. *See, e.g.*, *Kleiman v. Wright*, 2020 WL 6729362, at *17 (S.D. Fla. Nov. 16, 2020) ("having to depose a party on information that should have been disclosed in a Rule 26 [r]eport is a form of prejudice" (citation omitted)).

Fifth, Leapfrog asserts the Community Hospitals could not have been prejudiced by Mr. Vredenburgh's failure to disclose "documents considered by Dr. Berger" because Mr. Vredenburgh "is, in part, a rebuttal expert to Dr. Berger." Opp. 26. But the Rule 26 disclosure requirements are not relaxed for rebuttal experts. *See, e.g.*, *Greer v. Ivey*, 2016 WL 11464646, at *3 & n.5 (M.D. Fla. June 17, 2016). And Dr. Berger's compliant disclosures could not have put the Community Hospitals on notice of all the documents Mr. Vredenburgh considered, as only *one* of Mr. Vredenburgh's opinions seeks to rebut only *one* of Dr. Berger's four opinions. *See* ECF 96-

[2] It is irrelevant that the Community Hospitals' counsel came "prepared to question Mr. Vredenburgh" about a few documents "not specifically discussed" in his report. Opp. 26 (emphasis omitted). Counsel's diligent preparation cannot cure prejudice, especially as Leapfrog *still* has not revealed all the documents Mr. Vredenburgh considered.

10 (Vredenburgh) at 86:5–9, 145:8–13, 152:17–154:25, 219:9–15.

Sixth, Leapfrog says Mr. Vredenburgh's opinions are too important to be excluded. Opp. 27. The Community Hospitals disagree. Mot. 25; *infra* at 7–9. Regardless, their importance would only "underscor[e] the need" for Leapfrog to have timely disclosed the documents he considered to ensure the Community Hospitals could have a fair opportunity to challenge his testimony. *Geiserman v. MacDonald*, 893 F.2d 787, 792 (5th Cir. 1990); *see also Romero v. Drummond Co.*, 552 F.3d 1303, 1321 (11th Cir. 2008) (other factors "can outweigh" importance).

Seventh, and finally, Leapfrog argues that the "reasons for the failure to disclose" weigh against exclusion. Opp. 27–28. But the (differing) reasons given by Leapfrog and Mr. Vredenburgh do not justify the Rule 26 violation, *see supra* at 4, much less mitigate the prejudice.

B. Mr. Vredenburgh Is Not Qualified To Offer Opinions On Whether Consumers Can Understand The Disclosures On Leapfrog's Website

A proffered expert must possess expertise "specific to" his opinions. *Wilson v. Flack*, 2022 WL 4477025, at *5 (11th Cir. Sept. 27, 2022). Mr. Vredenburgh lacks even "minima[l] qualifi[cations]" to opine about how consumers perceive Leapfrog's website disclosures. *Contra* Opp. 28.

1. Leapfrog argues that Mr. Vredenburgh is qualified as an expert on this subject primarily because he has "a degree in human factors and industrial engineering." Opp. 29. But human-factors engineering is not about whether consumers can understand healthcare disclosures on a website; it is about product and equipment design. Mot. 11. Mr. Vredenburgh has previously testified as an expert only in products liability and slip-and-fall cases, *id.*, the natural domain of a human-factors engineer, *cf.* Opp. 29–30 (citing *Rey v. Gen. Motors LLC*, 2022 WL 698115, at *1 (W.D. Mo. Mar. 8, 2022) ("defective [vehicle] design" case); *Snider-Hancox v. NCL Bahamas Ltd.*, 2019 WL 13020778, at *1 (S.D. Fla. Feb. 7, 2019) (slip-and-fall case)). When these cases say that "human factors expert[s] [are] generally qualified to testify regarding whether a person would have seen a condition and how they would have reacted to it," they refer to how someone perceives the *physical* environment around them—for example, whether a person "had sufficient visual cues and time to avoid slipping over [a] liquid." *Snider-Hancox*, 2019 WL 13020778, at *5.

2. Leapfrog also suggests that Mr. Vredenburgh is qualified as an expert in website design. Opp. 29–30. But website design is likewise separate from consumer behavior. *See* ECF 114 at 29. His sole purported qualifications in this area confirm the difference: a nine-credit-hours certificate in "User Experience (UX) and Design Thinking" and an article about "the usability of online learning platforms." Opp. 29–30; *see* ECF 96-10 (Vredenburgh) at 109:15–111:20. The certificate and

article have an engineering focus; neither qualifies Mr. Vredenburgh to offer an expert opinion about the clarity of website disclosures from a *consumer perspective*. And even if website design *were* relevant, a single certificate and single article do not make him qualified in that field. Mot. 12. Indeed, when confronted with a webpage he purportedly created, Mr. Vredenburgh described it as an "AI-generated placeholder project" and "fun little weekend thing." ECF 96-10 (Vredenburgh) at 127:5–18. That dabbling does not qualify him as an expert.[3]

C. Leapfrog's Responses Confirm That Mr. Vredenburgh's Opinions Are Unreliable, Unhelpful, And Irrelevant

Leapfrog's arguments reinforce that Mr. Vredenburgh's opinions are inadmissible.

1. Mr. Vredenburgh withdrew his Opinion Five—that the average user of Leapfrog's website scrolls down far enough to see the footnote disclosure on a hospital's Safety Grade webpage. This is fatal to his Opinions One, Two, and Three, all of which are about the purported clarity of that footnote disclosure and therefore depend on its visibility. Mot. 12–14. Leapfrog admits Mr. Vredenburgh withdrew Opinion Five, yet insists this is not fatal to the other opinions because Mr. Vredenburgh "testified" it was not. Opp. 30–31. But Mr. Vredenburgh's "say so" does not dictate whether an opinion is reliable or helpful under Rule 702. *Thomas v. Publix Super Mkts., Inc.*, 2011 WL 13177240, at *3 (N.D. Ga. July 22, 2011). And he insisted on the continued viability of Opinions One, Two, and Three only *after* withdrawing Opinion Five, having repeatedly admitted for the lion's share of the deposition that Opinion Five was "important" to those other opinions. ECF 96-10 (Vredenburgh) at 163:23–165:6, 269:12–14. In that earlier testimony, Mr. Vredenburgh even explained *why* Opinions One, Two, and Three were contingent on Opinion Five: the "clarity" of the footnote disclosure "depend[s]"—at the threshold—"on users actually scrolling down to [the] footnote." *Id.* at 195:22–25; *see also id.* at 171:18–172:1. By Mr. Vredenburgh's own admission, Opinions One, Two, and Three cannot survive the withdrawal of Opinion Five.[4]

2. Mr. Vredenburgh's Opinions One, Two, and Three are also unreliable, unhelpful, and irrelevant because they selectively account for only two pages on Leapfrog's website: the landing

[3] Leapfrog's cases (at 28–29) are distinguishable because they involved experts who were qualified in a field that matched their opinions. *See, e.g.*, *FDIC v. Castro*, 2014 WL 12461348, at *2 (S.D. Fla. May 22, 2014) (expert who "ha[d] been involved in the banking business for over 35 years" was qualified to testify on loan approvals).

[4] Mr. Vredenburgh at one point deemed it "inconclusive" "whether there was low engagement or high engagement" with the footnote disclosure. Opp. 31 (quoting ECF 96-10 (Vredenburgh) at 303:15–17). If anything, that just proves the point: expert opinions that depend on a premise cannot be reliable or helpful if the veracity of that premise is inconclusive. *Cf. Brashevitzky v. Reworld Holding Corp.*, 348 F.R.D. 107, 122 (S.D. Fla. 2024) (expert opinion that "relies upon an unreliable expert opinion" "is also unreliable" (citation omitted)).

page and a hospital's Safety Grade page. Mot. 14–15. The argument is not merely that Mr. Vredenburgh's report misleadingly suggested that his opinions were about the entire "website," Opp. 31–32—though that is also a problem. Rather, Mr. Vredenburgh's *failure to account for the entire website* renders his opinions inadmissible; they cannot speak to the "net impression" of Leapfrog's disclosures. *FTC v. Life Mgmt. Servs. of Orange Cnty., LLC*, 350 F. Supp. 3d 1246, 1264 (M.D. Fla. 2018). "A critical issue in this case" is *not* whether two specific webpages are deceptive (though the two webpages Mr. Vredenburgh analyzed are deceptive even in isolation), *contra* Opp. 31, but whether Leapfrog's overall presentation is deceptive, *see* ECF 86 at 8–13.

3. Mr. Vredenburgh's Opinion Four—that Leapfrog's alleged user-experience (UX) testing validates the website's clarity—is unreliable and provides no assistance for two independent reasons: (1) Mr. Vredenburgh does not know if any UX testing occurred or whether Leapfrog followed any testing recommendations; and (2) he has no basis to conclude that Leapfrog conducted UX testing *after* Leapfrog changed its Safety Grade methodology in Fall 2024. Mot. 15–17. Leapfrog offers no response to the second point. *See* Opp. 32–34. The hearsay materials on which Mr. Vredenburgh relied suggest any UX testing occurred *more than a decade ago*, and therefore cannot validate the clarity of disclosures regarding the Fall 2024 methodology. Mot. 17.

Leapfrog also has no sound response on the first point. It says Mr. Vredenburgh was entitled to rely on "hearsay" about the alleged UX testing, Opp. 32–33 (citing Fed. R. Evid. 703), but Leapfrog's authorities confirm that Rule 703 is not a license for expert testimony that "amounts to no more than a mere guess or speculation," *United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1040 (11th Cir. 1988). That describes Opinion Four—Mr. Vredenburgh admitted he "can't say with certainty one way or another" whether UX testing occurred, ECF 96-10 (Vredenburgh) at 246:23–247:8, and has "no idea" if any recommendations from the alleged testing were "actually followed," *id.* at 239:10–19. The latter admission is especially critical: the notion that UX testing validates the website's clarity necessarily requires that the website is a product of that testing.

The problem is thus not that Mr. Vredenburgh failed to personally "review" the alleged UX testing, *contra* Opp. 32; the hearsay on which he relied *itself* did not provide a reliable basis for Opinion Four. That distinguishes cases holding that an expert may rely on hearsay evidence "so long as" it "is 'the type of evidence reasonably relied upon by experts in the particular field.'" *Knight ex rel. Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 809 (11th Cir. 2017) (citation omitted). Unsurprisingly, neither Mr. Vredenburgh nor Leapfrog offers any reason to think that putative

experts in UX testing typically rely on inconclusive and incomplete hearsay.

II. Leapfrog Is Unable To Explain Away The Stark Gaps Between Dr. Farrokhi's Report And His Testimony, And Fails To Mount A Sound Defense Of His Qualifications, Reliability, Helpfulness, Or Relevance

Dr. Farrokhi's report opined that "[t]he Leapfrog Group Grade" improves hospital quality (Opinion One). ECF 96-2 (Farrokhi Rep.) at 13. Abandoning that opinion, Dr. Farrokhi offered four others for the first time at his deposition: Leapfrog's *Survey* improves hospital quality (Opinion Two); hospitals can use the Survey as a benchmark (Opinion Three); the Survey is reliable (Opinion Four); and the Survey is not burdensome (Opinion Five). Leapfrog fails to rehabilitate the untimely disclosure of these opinions, and it does not meaningfully explain how any passes muster under Rule 702. The Court should exclude Dr. Farrokhi's testimony in full.

A. Dr. Farrokhi's Opinions Are All Either Withdrawn Or Untimely

Dr. Farrokhi's Opinions Three, Four, and Five were disclosed for the first time on redirect at the tail end of his deposition. Mot. 17–18. And the only opinion in his report (Opinion One) transformed into a different opinion (Opinion Two) at the deposition; Opinion One is thus withdrawn and Opinion Two is untimely. Mot. 18–19 & n.7. Leapfrog does not argue that the untimely disclosures were substantially justified or harmless under Rule 37(c)(1). *See* Opp. 18–22; *Mitchell*, 318 F. App'x at 824 ("nondisclosing party" has "[t]he burden of establishing that a failure to disclose was substantially justified or harmless"). Leapfrog argues only that all these opinions *were* timely—overlooking Dr. Farrokhi's testimony and effectively rewriting his report.

1. Dr. Farrokhi's testimony demonstrates that Opinions Three, Four, and Five were not timely disclosed under Rule 26. He acknowledged that none of those opinions appears anywhere in his report and that the redirect questioning by Leapfrog's counsel was the first time he had been asked to opine on Survey benchmarking (Opinion Three), Survey reliability (Opinion Four), or Survey burden (Opinion Five). Mot. 18. Leapfrog simply disregards this testimony, *see* Opp. 19–22, but it is dispositive, *see, e.g.*, *Brown v. NCL (Bahamas) Ltd.*, 190 F. Supp. 3d 1136, 1142 (S.D. Fla. 2016) (excluding expert opinions that were not disclosed "until the deposition").

Leapfrog's attempts to retroactively shoehorn Opinions Three, Four, and Five into Dr. Farrokhi's report fare no better. Each of these opinions centers around Leapfrog's Survey, but the word "Survey" appears nowhere in the report, as Dr. Farrokhi acknowledged. Mot. 18 (citing ECF 96-7 (Farrokhi) at 306:15–21). This is no mere word game—Leapfrog's own summary-judgment motion frames the Survey as a *component* of Leapfrog's Safety Grades, not as synonymous with

the Safety Grades or Leapfrog's brand more generally. *See* ECF 99 at 2. And a single, broad reference to "external reporting systems on quality" "such as [Leapfrog], CMS, and Healthgrades," ECF 96-2 (Farrokhi Rep.) at 6, cannot convert Dr. Farrokhi's report about "[t]he Leapfrog Group Grade," *id.* at 13, into a report about Leapfrog's unmentioned Survey, *contra* Opp. 18. *Cf. Romero*, 552 F.3d at 1323 (affirming exclusion of experts whose reports did not "stat[e] [their] opinion[s] with sufficient specificity to allow [the opponent] to prepare for rebuttal or cross-examination").

In trying to argue that Opinion Five is in the report, Leapfrog mainly cites *deposition testimony*. Opp. 21–22. And its sole quote from the report has nothing to do with the Survey or how burdensome it is. Opp. 22 (quoting ECF 96-2 (Farrokhi Rep.) at 10).

Nor was Survey benchmarking (Opinion Three) mentioned anywhere in the report. Once again, Leapfrog mainly cites Dr. Farrokhi's belated deposition testimony. *See* Opp. 19–20. With respect to the report, Leapfrog says only that "ideas" pertaining to benchmarking "were expressed on pages 6 and 7." Opp. 20. But the cited pages discuss "shar[ing]" unspecified "results" with "*members of our team and our community*," not using Survey responses provided by *other* hospitals as a benchmark. ECF 96-2 (Farrokhi Rep.) at 6–7 (emphasis added).

Leapfrog similarly can point to nothing in the report discussing the alleged reliability of Leapfrog's Survey or the purported accuracy of Survey responses (Opinion Four). Leapfrog reproduces Dr. Farrokhi's testimony about "creat[ing] a cultural environment" that promotes "hand hygiene," Opp. 20–21 (quoting ECF 96-7 (Farrokhi) at 64:7–65:23), but this passage speaks neither to the Survey nor its reliability. Nor does anything in his report discuss whether hospitals "accurately report" "deficiencies." *Contra* Opp. 20 (citing ECF 96-2 (Farrokhi Rep.) at 5–10). Leapfrog tries to frame Dr. Farrokhi's opinion that "hospitals honestly and accurately report their own data in response to the Leapfrog Survey" as "fundamental to the very idea of self-monitoring and reporting discussed throughout [his] [r]eport." Opp. 21. But the two concepts are distinct: the *fact* that a hospital self-monitors and reports says nothing about *what* it reports.

2. Leapfrog also insists that Dr. Farrokhi's Opinion Two (that Leapfrog's Survey improves hospital quality) was in his report, *see* Opp. 18; but, again, the report was about Leapfrog's "Grade," ECF 96-2 (Farrokhi Rep.) at 13, not the Survey, *see supra* at 9–10. Dr. Farrokhi acknowledged the difference, which Leapfrog cannot now dispute. *See, e.g.,* ECF 96-7 (Farrokhi) at 32:1–21. That material shift renders Opinion Two untimely. *See Brown*, 190 F. Supp. 3d at 1142–43 (excluding expert opinion that had "change[d]" from the version in the report).

3. As for Opinion One (that Leapfrog's "Grade" improves hospital quality), Leapfrog is incorrect that this was "not" the opinion in the report, *contra* Opp. 18, but regardless, that opinion is now unquestionably off the table. Either it was never offered in the first place or it was withdrawn when Dr. Farrokhi replaced it with Opinion Two at his deposition. Mot. 19 n.7.

B. Leapfrog Barely Defends Dr. Farrokhi's Qualifications Or The Reliability, Helpfulness, Or Relevance Of His Opinions

Even if Dr. Farrokhi's opinions could survive sanction under Rule 37(c)(1), he is not qualified to offer any of them, none is reliable or helpful, and Opinions Two and Three are irrelevant and unhelpful. Mot. 20–26. Leapfrog fails to respond to most of these points.

1. Expertise must be "specific to" the opinions offered, *Wilson*, 2022 WL 4477025, at *5, yet Leapfrog makes no effort to tie Dr. Farrokhi's purported expertise to his opinions, *see* Opp. 16–17. That silence is especially fatal to Opinions Three, Four, and Five, as Dr. Farrokhi has no relevant experience with or knowledge of Survey benchmarking, Survey reliability, or Survey burden. Mot. 20–21. Leapfrog also has no direct response to Dr. Farrokhi's lack of qualifications with respect to Opinion Two: his experiences at a single hospital fail to qualify him as an expert on any systemic impact of Leapfrog's Survey. Mot. 21. Leapfrog points (at 17) to Dr. Farrokhi's *neurosurgery*-related work and a vague reference in his report to "publications focused on patient safety." ECF 96-2 (Farrokhi Rep.) at 4. But none of these publications pertain to Leapfrog's Survey or hospital quality systems. ECF 96-12 (Farrokhi Dep. Ex. 1); ECF 96-7 (Farrokhi) at 61:18–20.[5]

2. On reliability and helpfulness, Leapfrog musters little. Dr. Farrokhi cannot reliably or helpfully opine on Survey benchmarking, reliability, or burden when he knows nothing about those topics. Mot. 23–25. Moreover, Leapfrog acknowledges Opinion Two is based solely on Dr. Farrokhi's "experiences," Opp. 19, and it does not dispute their anecdotal nature, Mot. 22. This is fatal: Opinion Two is a *causal* claim about the impact of the Survey on hospital quality, and "anecdotal" evidence is "universally regarded as an insufficient basis for a conclusion regarding causation." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1316 (11th Cir. 1999) (citation omitted).

3. Opinions Two and Three are also irrelevant. Mot. 25–26. Leapfrog says only that Opinion Two is "helpful" because it will aid the Court in "determin[ing] a fact in issue," Opp. 18–19

[5] Leapfrog asserts that "disputes about an expert witness['s] qualifications" uniformly "do not raise issues about admissibility." Opp. 17 (citing *Vision I Homeowners Ass'n v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1321 (S.D. Fla. 2009)). But putative experts must be at least "minimally qualified," *Vision I*, 674 F. Supp. 2d at 1325, and Dr. Farrokhi fails to clear even that bar, Mot. 20–21.

(citation omitted), but Leapfrog fails to identify which "issue" that is. And there is none: this case is about whether Leapfrog's Safety Grades mislead consumers, not whether Leapfrog's Survey improves hospital quality (Opinion Two) or can be used for benchmarking (Opinion Three).

III. Mr. Rule's Damages Opinion Has No Place In A Case With No Damages Claim, And His Irrelevant, Unhelpful, And Unreliable Tack-On Opinion About Leapfrog's Safety Grade Methodology Lies Well Outside His Expertise

Mr. Rule's opinions fail under Rule 702. Leapfrog cannot escape the straightforward conclusion that a damages opinion is irrelevant and unhelpful in a case with no damages claim. Nor should the Court allow Mr. Rule, who lacks any expertise in hospital rating methodologies, to offer irrelevant, unhelpful, and unreliable testimony about Leapfrog's Safety Grade methodology.

A. Leapfrog Fails To Show That Mr. Rule's Opinion One (His Damages Opinion) Is Relevant Or Helpful In This Case With No Damages Claim

Mr. Rule's Opinion One is that the Community Hospitals' experts did not quantify the Community Hospitals' damages. That opinion is: (1) unhelpful because the Community Hospitals agree their experts did not quantify damages; and (2) irrelevant because the Community Hospitals do not seek damages. Mot. 26–27. Leapfrog has no response to the first point, and its responses to the second mischaracterize the law and record. *See* Opp. 2–5.

1. The Community Hospitals have never argued that "they have no obligation to show any injury whatsoever." *Contra* Opp. 3. To obtain injunctive and declaratory relief under FDUTPA, the Community Hospitals must show they were "aggrieved" by Leapfrog's conduct, *i.e.*, that they have suffered a non-speculative injury. *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 172–73 (Fla. 1st DCA 2015). The Community Hospitals have amply proven aggrievement, ECF 86 at 15–17, which does not require a quantification of harm or damages, *see* Mot. 26; *see also* ECF 115 at 16–17.

2. Leapfrog ultimately agrees that the Community Hospitals "need not quantify a specific amount of actual damages" to obtain FDUTPA relief. Opp. 3. Likewise, the Community Hospitals are "not require[d]" to "quantif[y]" their harm to demonstrate "Article III standing." *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1340 (S.D. Fla. 2016) (citation omitted); *see also* ECF 115 at 17. Leapfrog suggests Mr. Rule's damages opinion is relevant to whether the Community Hospitals incurred a "non-speculative injury" for purposes of aggrievement. Opp. 5. But Opinion One was never intended for this purpose. Mr. Rule's report and testimony repeatedly referred to "substantial injury," which relates to whether a practice is "unfair" under FDUTPA. *SMS Audio, LLC v. Belson*, 2017 WL 11631378, at *3 (S.D. Fla. Apr.

25, 2017) (Middlebrooks, J.); *see, e.g.*, ECF 96-4 (Rule Rep.) ¶ 19; ECF 96-9 (Rule) at 228:9–19. Yet Leapfrog now (correctly) declines to argue that Mr. Rule's Opinion One is relevant to *that* inquiry. *See* Opp. 2–5. In any event, a party can demonstrate aggrievement without quantifying the injury or calculating damages. *See Ahearn*, 180 So. 3d at 173 (no "bright-line test" for aggrievement under FDUTPA); *St. Paul Fire & Marine Ins. Co. v. Naples Cmty. Hosp., Inc.*, 585 So. 2d 374, 376 (Fla. 2d DCA 1991) (corporation may be injured by conduct that "prejudices its trade or business, or deters third persons from dealing with it"); *Rosenberg v. DVI Receivables, XIV, LLC*, 2012 WL 5198341, at *5 (S.D. Fla. Oct. 19, 2012) (an expert should quantify reputational harm where *damages* are sought); *Stewart Agency, Inc. v. Arrigo Enters., Inc.*, 266 So. 3d 207, 214 (Fla. 4th DCA 2019) (plaintiff admitted the conduct at issue did not adversely affect it).

3. Leapfrog also argues that Mr. Rule's Opinion One is relevant to causation for FDUTPA and Article III standing. Opp. 4. But Mr. Rule testified this opinion "relates to damages," ECF 96-9 (Rule) at 224:8–14, and he never suggested he was opining on causation. Even if Mr. Rule had opined on other potential causes of the Community Hospitals' injuries, that opinion would still be irrelevant and unhelpful. A defendant's conduct need not be the "sole cause" of the injury. *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994). Causation for Article III standing likewise "requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). None of Leapfrog's cited cases (at 4) address, much less endorse, Leapfrog's single-cause theory.

4. Finally, Leapfrog suggests that Mr. Rule's Opinion One should be admitted because he is a "rebuttal" expert. Opp. 4. But "rebuttal" experts still must independently satisfy Rule 702's requirements, *Droplets, Inc. v. Yahoo! Inc.*, 2021 WL 11701485, at *2 n.1 (N.D. Cal. Nov. 29, 2021), and Mr. Rule's Opinion One fails to do so.

B. Mr. Rule's Opinion Two Rests On A Counterfactual Exercise That Tested The Wrong Question And That He Is Not Qualified To Perform

Mr. Rule's Opinion Two is that Leapfrog's imputation of scores on the Four Measures is not a significant driver of the Community Hospitals' Safety Grades. The sole basis for this opinion is Mr. Rule's counsel-selected counterfactual exercise, in which he calculated the Community Hospitals' Safety Grades with the Four Measures removed from the calculation. This exercise is inadmissible: (1) it fails to test the relevant question; (2) it is unreliable and unhelpful; and (3) Mr. Rule is not qualified to perform it. Mot. 27–30. Leapfrog's contrary arguments fail.

1. Mr. Rule's counterfactual exercise is irrelevant. Mot. 28. A central issue in this case is

whether Leapfrog's Safety Grade methodology penalizes hospitals that do not participate in the Survey, as compared to hospitals that do participate. ECF 86 at 8–15. The relevant counterfactual thus assigns scores to non-participating hospitals *as if they had participated in the Survey*. That is what Dr. Sean Nicholson, one of the Community Hospitals' experts, did: His counterfactual assigned non-participating hospitals scores on the Four Measures and three other measures, because participating hospitals receive scores for *all seven* of those measures. Opp. 6; *see* ECF 114 at 12. Mr. Rule, by contrast, performed a counterfactual exercise in which he did not assign *any* scores for any of those seven measures, Mot. 27–28—in other words, his counterfactual world is still one in which the Community Hospitals do *not* participate in the Survey.

Leapfrog touts Mr. Rule's counterfactual exercise as "follow[ing] the Leapfrog grading methodology" for non-participating hospitals, Opp. 6, but that is the problem—to be relevant, it needed to follow Leapfrog's methodology for *participating* hospitals. And regardless, Mr. Rule's counterfactual does *not* resemble Leapfrog's Safety Grade methodology, because that methodology *never* excludes the Four Measures. ECF 88-44 at 526–27. Leapfrog also praises Mr. Rule's counterfactual for "eliminat[ing] the need to impute any unknown data." Opp. 6. The Community Hospitals welcome Leapfrog's newfound aversion to assigning scores without underlying performance data. But Leapfrog again misses the point: to isolate the effect of non-participation on Safety Grades, it is necessary to estimate those Grades as if the Community Hospitals had participated in the Survey; that requires assignment of scores on the Four Measures and the other three measures.

2. For similar reasons, Mr. Rule's counsel-selected method is unreliable and unhelpful. Mot. 29. Leapfrog asserts that Mr. Rule's counterfactual amounts to a "[s]ensitivity analys[i]s," which Leapfrog describes as a method of "analyzing how changes in input variables affect the output or outcome of a model or decision." Opp. 8. But Mr. Rule's counterfactual flunks this standard: it does not measure the impact of the relevant input variable (non-participation in the Survey) on the output (the Community Hospitals' Safety Grades). It is thus not relevant or reliable *at all*. *Contra* Opp. 8–9 (collecting inapposite cases noting that no "best" method is required).

The Community Hospitals did not "blatantly misrepresen[t]" (Opp. 9) Mr. Rule's unsupported assumption that the weights for the Four Measures should be redistributed evenly. Mr. Rule claimed this assumption was "supported by Leapfrog and their advisors," ECF 96-9 (Rule) at 353:13–18, and he conducted no independent analysis of its validity, *see, e.g.*, *id.* at 353:19–354:15 ("not aware" of "any literature that endorses [his] method"). Mr. Rule thus did not determine

whether the underlying formula provided a reliable and helpful method. *Contra* Opp. 9.

3. In addition, Mr. Rule was not qualified to conduct the counterfactual exercise. Mot. 28–29. The argument is not just that Mr. Rule "has never testified in a case that was specifically focused on hospital ratings or built a hospital rating system or grading methodology." Opp. 7. A core problem is that Mr. Rule's Opinion Two amounts to a claim about Leapfrog's Safety Grade methodology, but he has only a "layman's understanding" of that methodology. ECF 96-9 (Rule) at 126:17–127:2. By definition, that is not "specialized knowledge." Fed. R. Evid. 702(a).

Leapfrog does not dispute this. Instead, it tries to position Mr. Rule as a general expert in "statistical analysis." Opp. 7. But an expert must possess expertise "specific to the topic at issue," *Wilson*, 2022 WL 4477025, at *5—here, a hospital rating methodology—and Mr. Rule has no such expertise. Mot. 28. Nor is he a statistics expert. He does not have any degree in statistics and has never published any literature in that area. ECF 96-9 (Rule) at 326:15–20, 328:11–23. Although he claimed to have been previously qualified as an expert on "statistical analyses," *id.* at 325:18–22, he clarified he has never been qualified as an expert "solely on statistics" and suggested that the prior cases involved only "statistical aspects of financial modeling," *id.* at 325:23–326:8.[6]

IV. Dr. Harris's Opinions Are Based On False Premises And Unreliable Or Nonexistent Methodologies, Which Are Barriers To Admissibility

Leapfrog's defense of Dr. Harris generally "resorts to the familiar argument" that objections to expert testimony "go t[o] the weight of the evidence and not its admissibility." *Guasto v. City of Miami Beach*, 2024 WL 6887144, at *5 (S.D. Fla. Sept. 3, 2024). But "at some point, an expert's methodology becomes so flawed that it is unreliable," *Superior Consulting Servs., Inc. v. Shaklee Corp.*, 2021 WL 4438518, at *12 (11th Cir. Sept. 28, 2021)—for example, where an opinion rests on "unsupported assumption[s]," *Buland v. NCL (Bahamas)* Ltd, 992 F.3d 1143, 1151 (11th Cir. 2021), or on "*ipse dixit*" "not logically supported by the facts," *Guinn v. AstraZeneca Pharms. LP*, 602 F.3d 1245, 1255–56 (11th Cir. 2010) (citation omitted). Dr. Harris's opinions suffer these and other flaws and are also unhelpful and (in the case of Opinion Three) irrelevant.[7]

[6] Leapfrog also asserts that "[m]uch of" Mr. Rule's experience "focuses on hospitals and the healthcare industry." Opp. 7. But Mr. Rule's testimony was equivocal. *See, e.g.*, ECF 96-9 (Rule) at 24:25–25:8 ("hospital-related consulting" was "[n]ot necessarily" the "focu[s]" of prior work).

[7] Leapfrog's cases are inapposite. *TRA Farms, Inc. v. Syngenta Seeds, Inc.*, 2014 WL 1478846, at *2 (N.D. Fla. Apr. 15, 2014) ("nothing suggest[ed] that [expert's] methodology [wa]s flawed"); *Sanchez-Knutson v. Ford Motor Co.*, 181 F. Supp. 3d 988, 994 (S.D. Fla. 2016) ("impeachment/credibility challenge" based on expert's private conduct).

A. Leapfrog Does Not Dispute That Dr. Harris Misunderstood How Leapfrog's Safety Grade Methodology Works

Dr. Harris's opinions are all unreliable and unhelpful because he did not understand a key fact about Leapfrog's Safety Grade methodology. The methodology automatically assigns non-participating hospitals "the lowest scores available" for the Four Measures. ECF 99 at 3. Yet Dr. Harris thought those hospitals could receive *even lower* scores—a premise foundational to his endorsement of the methodology (Opinions One and Two); his claim that it does not meaningfully impact non-participating hospitals' Safety Grades (Opinion Three); and his attempted rebuttal of Dr. Nicholson (Opinion Four). Mot. 30–31. That false assumption goes well beyond diminishing the weight of Dr. Harris's opinions. *E.g.*, *United States v. City of Miami*, 115 F.3d 870, 873 (11th Cir. 1997) (expert testimony is not "admissible" where expert does not "kno[w] of facts which enable him to express a reasonably accurate conclusion"). Leapfrog has no response. Opp. 10–16.

B. Leapfrog Doubles Down On The False Assumptions That Underlie Dr. Harris's Opinion One

Leapfrog's arguments fail to rehabilitate Dr. Harris's Opinion One—that the Safety Grade methodology adopted in Fall 2024 is reasonable and ethical.

1. Leapfrog all but acknowledges that Opinion One's original premise—the Expert Panel "chose" the Fall 2024 Safety Grade methodology, ECF 96-3 (Harris Rep.) at 13—is false. Opp. 11. That alone requires exclusion. Mot. 32. Still, Leapfrog attempts to defend Opinion One based on a different assumption: that Leapfrog's Expert Panel "discussed" and "recommend[ed]" the Fall 2024 methodology change. Opp. 10–11. But that assumption is *also* false. The evidence indisputably shows the change was not discussed or recommended at the Expert Panel meeting Dr. Harris identified. Mot. 31–32. Leapfrog's lone citation is the transcript of that meeting, Opp. 10–11 (citing ECF 88-12), but the transcript confirms the point beyond dispute. The Expert Panel discussed "some proposed changes" to the methodology, ECF 88-12 at 13:18–21, but *not* "the approach that Leapfrog ultimately adopted," ECF 88-97 (Romano) at 156:17–21. Dr. Harris himself was unable to identify any discussion of the Fall 2024 methodology, ECF 96-8 (Harris) at 135:21–138:14, as no such discussion exists. Because it is "based on a fictitious set of facts," Opinion One is "unreliable." *Wallace v. Carnival Corp.*, 2024 WL 4635127, at *2 (S.D. Fla. Sept. 20, 2024).

2. The Community Hospitals do not "mischaracterize Dr. Harris's testimony," *contra* Opp. 11, in noting his statement that he "would change [his] [O]pinion [One]" if there were evidence that Leapfrog selected the Fall 2024 methodology "to penalize" hospitals that do not

participate in Leapfrog's Survey, ECF 96-8 (Harris) at 144:15–146:14; *see* Mot. 32. And Dr. Patrick Romano, a member of the Expert Panel, testified that the methodology "penal[izes]" non-participants and that its "purpose" "is not accuracy." ECF 88-97 (Romano) at 142:12–22; *see also, e.g.*, ECF 87 ¶¶ 30, 38. Leapfrog quibbles with this testimony, Opp. 12, but cannot escape Dr. Romano's clear admission. Leapfrog cannot maintain both that Opinion One is reliable *because* of the Expert Panel's alleged involvement in the adoption of the Fall 2024 Safety Grade methodology, Opp. 10–11, and simultaneously suggest that the views of Panel members are misguided. Leapfrog's claim that Dr. Romano "does not speak for Leapfrog," Opp. 12, is also puzzling given that Leapfrog exerts enough control to bring him from California to testify live at a Florida trial.

3. Dr. Harris's Opinion One also does not rest on any reliable or helpful methodology. Mot. 33–34. Leapfrog mainly contends Dr. Harris's "assessment" of the credentials of the Expert Panel is based on his "experience." Opp. 13. But an expert relying on "experience" still "must explain *how* that experience leads to the conclusion reached" and "why that experience is a sufficient basis for the opinion." *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (en banc) (citation omitted). Dr. Harris offered nothing more than his "*ipse dixit*" that the Safety Grade methodology is reasonable and ethical because the Panel members have impressive credentials. *Id.*; *see* Mot. 33. Leapfrog also overlooks that Dr. Harris *did* frame Opinion One as a "scientific" conclusion. *Contra* Opp. 13 (quoting *Habecker v. Copperloy Corp.*, 893 F.2d 49, 51–52 (3d Cir. 1990)). He claimed to have reached a "reasonable degree of *scientific certainty*" that the Safety Grade methodology is "reasonable and ethical." ECF 96-3 (Harris Rep.) at 12 (emphasis added). The lack of any "scientific method" to back up that claim, ECF 96-8 (Harris) at 100:4–101:18, is thus fatal to its admissibility, *Allison*, 184 F.3d at 1319 n.23 ("*Daubert* does require" that "scientific testimony" be "derived from" a "scientific method").[8]

C. Leapfrog Fails To Identify Any Methodology Or Facts That Support Dr. Harris's Opinion Two

Dr. Harris's Opinion Two is that Leapfrog's Safety Grade methodology appropriately accounts for non-response bias—*i.e.*, the abstract notion that hospitals choose not to participate in the Survey *because* they know they are poor-performing hospitals. This opinion is unreliable and unhelpful for two independent reasons: (1) it suggests a causal claim about *why* hospitals choose

[8] Leapfrog also does not dispute that the Court can review the Expert Panel members' online biographies for itself—an independent basis for excluding Dr. Harris's Opinion One as unhelpful. Mot. 33; *see* Opp. 12–13.

not to participate, yet Dr. Harris conducted no analysis to test that claim; and (2) it is divorced from the evidence showing the Community Hospitals perform *well* on the Four Measures imputed for non-participating hospitals. Mot. 34–35. Leapfrog offers no direct response on the first point and does not dispute that "causation" expert opinions must be supported by a "valid methodology." *Rapoport v. Classic Cruise Holdings, S. de R.I.*, 2009 WL 10700258, at *2 (S.D. Fla. Sept. 10, 2009); *see* Opp. 13–14. Instead, it offers three non-responsive rejoinders on the second point.

First, Leapfrog argues that Dr. Harris "connected the issue of nonresponse bias to the facts of this case" because the Community Hospitals had "numerous opportunities" to respond to the Survey. Opp. 13. But the question is not *whether* the Community Hospitals participate in the Survey but *why* they do not. And the unrebutted evidence shows the Community Hospitals stopped participating in the Survey to focus on patient care and quality initiatives. ECF 87 ¶ 49.

Second, Leapfrog claims Dr. Harris did not analyze discovery about the Community Hospitals' performance on Survey-related measures because it was not produced "until the week before his deposition." Opp. 14 (emphasis omitted). Again, that misstates the record: Leapfrog did not request this discovery until July 11, 2025; the Community Hospitals then worked diligently to produce it; and they did so on August 23, more than a *month* before Dr. Harris's September 29 deposition and almost two weeks before he submitted his report. Crain Decl. ¶¶ 3–8. Dr. Harris's failure to review that production is simply another manifestation of the scant amount of time he spent on this case. Mot. 32.

Third, Leapfrog argues that Dr. Harris "account[ed]" for CMS data that overlaps with the Survey-related data he failed to consider. Opp. 13–14. But he did not reliably show why that data reflects poor performance, Mot. 36–37, and did not "perform a causal analysis" that sought to draw a link between the Community Hospitals' "CMS scores … for the infection control measures" and those Hospitals' "decision not to participate in the hand hygiene survey," ECF 96-8 (Harris) at 390:20–391:5. His reliance on CMS data thus does not rehabilitate his Opinion Two.

D. Leapfrog Cannot Justify The Irrelevant, Unhelpful, And Unreliable Premises Underlying Dr. Harris's Opinion Three

Dr. Harris's Opinion Three—that the Community Hospitals are "underperformers," ECF 96-8 (Harris) at 73:8–14—is inadmissible because it rests on irrelevant, unhelpful, and unreliable premises: (1) the Community Hospitals' irrelevant CMS star ratings; (2) an unreliable and unhelpful analysis of CMS data; and (3) an unreliable and unhelpful claim that imputation of scores on the Four Measures does "not really affect" the Community Hospitals' Safety Grades. Mot. 35–38.

Leapfrog has no sound response to any of these independent grounds for exclusion.

1. Neither Dr. Harris nor Leapfrog can explain how CMS star ratings are relevant. Indeed, Leapfrog concedes that CMS star ratings are "differen[t]" from Leapfrog's Safety Grades and "do not correspond one-to-one with what Leapfrog measures." Opp. 14. Although Leapfrog asserts the CMS star ratings are relevant to unspecified "issues," *id.*, the "*ipse dixit* of [a] lawyer" (or a party) "is no better than the *ipse dixit* of the expert in establishing the foundation for admissibility of expert testimony," *Jones v. Anderson*, 2018 WL 2717221, at *10 (S.D. Ga. June 6, 2018).

2. Leapfrog does not dispute that Dr. Harris failed to "perform a causal analysis" to back up his claim that the Community Hospitals' performance on certain CMS measures creates a likelihood of "poor" performance on Leapfrog's hand-hygiene measure, Mot. 37—a failure that renders this testimony unreliable, *see Frazier*, 387 F.3d at 1265 ("probabilistic opinion" requires "sufficiently verifiable, quantitative basis"). Indeed, Dr. Harris admits this claim, which appears nowhere in his report, amounts to a "hypothesis." ECF 96-8 (Harris) at 268:1–269:14; *see Williams v. Mosaic Fertilizer, LLC*, 2016 WL 7175657, at *16 (M.D. Fla. June 24, 2016) (excluding expert testimony that was "nothing more than a hypothesis"), *aff'd*, 889 F.3d 1239 (11th Cir. 2018). And the Community Hospitals are not "nit-picking," Opp. 15, by observing that Dr. Harris could not explain basic facts about the method he used to generate the charts at the center of his analysis of CMS data, Mot. 36–37—*e.g.*, how he chose the comparator hospitals for his "[c]omparison" chart, and how he chose the categories of "above average," "average," and "poor" performance for his "[p]erformance" chart, ECF 96-3 (Harris Rep.) at 17–18; *see, e.g.*, ECF 96-8 (Harris) at 281:3–14, 282:17–19. An expert's "duty to adequately explain" his methodology demands far more. *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 644 F. Supp. 3d 1075, 1234–35 (S.D. Fla. 2022); *accord MidAmerica C2L Inc. v. Siemens Energy Inc.*, 2023 WL 2733512, at *9 (11th Cir. Mar. 31, 2023) (excluding expert who was "unable to adequately explain *how* he reached his conclusions").

3. Dr. Harris also contends in Opinion Three that imputation does "not really affect" Safety Grades because the Four Measures account for only 24% of a hospital's overall Safety Grade. Mot. 37. The Community Hospitals are not "fault[ing] Dr. Harris for opining" that "24 percent" is less than "76 percent." *Contra* Opp. 15. Instead, Dr. Harris's claim is an inadmissible "rough approximation." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005); *see* Mot. 37–38. Leapfrog does not respond to this point, except to note that "Dr. Harris is entitled to his opinion[s]," Opp. 16—an observation that does nothing to render this testimony reliable or helpful.

E. Dr. Harris's Opinion Four Is Inadmissible Because His Counterfactual Exercise, Like Mr. Rule's Counterfactual, Tested The Wrong Question

The Community Hospitals' expert, Dr. Nicholson, performed a counterfactual analysis that is peer-reviewed and generally accepted and tested the relevant question: whether Leapfrog's Safety Grade methodology penalizes non-participating hospitals relative to participating hospitals. ECF 114 at 11–15; *supra* at 13–14. Dr. Harris, by contrast, performed a counterfactual exercise that is *not* peer-reviewed or generally accepted and did *not* test the relevant question because he did *not* assign the Community Hospitals scores for three measures on which participating hospitals receive scores. Mot. 38–39. Leapfrog tries to pass off Dr. Harris's different method as a mere "preference," but it is a "serious fla[w]" that "warrant[s] exclusion" of Dr. Harris's Opinion Four. Opp. 16 (citation omitted); *supra* at 14 (similar problem for Mr. Rule's Opinion Two). Leapfrog does not and cannot dispute that Dr. Harris's counterfactual fails to test the impact of non-participation in the Survey *relative to participation in the Survey*. *See* Opp. 16. Dr. Harris's exercise thus fails to "test the relevant inquiry" and is incapable of providing a reliable or helpful rebuttal to Dr. Nicholson. *Bowe v. Pub. Storage*, 2015 WL 10858370, at *5 (S.D. Fla. June 2, 2015).

Leapfrog's responses only underscore the inadmissibility of Dr. Harris's Opinion Four. Leapfrog says his counterfactual hews closely to "Leapfrog's approach" for "nonparticipant[s]," Opp. 16, but to be admissible, it needed to hew closely to Leapfrog's methodology for *participating* hospitals. Leapfrog also claims that its methodology for non-participants (and thus Dr. Harris's method) "is truer to the nonparticipants' actual performance than Dr. Nicholson's." *Id.* That misunderstands Dr. Nicholson's analysis—he sought to measure the impact of non-participation on Safety Grades, not actual safety performance. ECF 114 at 15. Dr. Harris's counterfactual, premised on that same misunderstanding, *see* ECF 96-3 (Harris Rep.) at 20–24; ECF 96-8 (Harris) at 252:1–254:19, is inadmissible, *cf. In re Trasylol Prods. Liab. Litig.*, 2010 WL 4065436, at *2 (S.D. Fla. Aug. 6, 2010) (Middlebrooks, J.) ("Rebuttal testimony is permitted only when it directly addresses an assertion raised by an opponent's experts.").[9]

CONCLUSION

The Court should grant the Community Hospitals' motion in full and exclude each of Leapfrog's proffered expert witnesses from testifying at trial.

[9] Leapfrog does not respond to the Community Hospitals' arguments for excluding Dr. Harris's Opinion Five, which was not timely disclosed and is unreliable and unhelpful. Mot. 39 n.9; *see* Opp. 10–16. That opinion should be barred.

Dated: December 1, 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.

DECLARATION OF LEE R. CRAIN IN SUPPORT OF THE COMMUNITY HOSPITALS' REPLY IN SUPPORT OF MOTION TO EXCLUDE LEAPFROG'S EXPERT WITNESSES

I, Lee R. Crain, declare and state as follows:

1. I am a partner at the law firm of Gibson, Dunn & Crutcher LLP. I am an attorney and admitted to practice law in the State of New York. I have been granted permission by the Court to participate *pro hac vice* in this case. ECF 14. I represent the Community Hospitals in this matter and submit this declaration in support of the Community Hospitals' Reply in Support of Motion to Exclude Leapfrog's Expert Witnesses filed contemporaneously herewith.

2. I am over the age of eighteen and make this declaration from personal knowledge based on the information and documents referenced in this declaration.

3. On July 11, 2025, Leapfrog served its First Set of Requests for Production ("RFPs") on the Community Hospitals. *See* ECF 55-5–55-9. In those RFPs, Leapfrog sought information concerning the Community Hospitals' safety and clinical performance. *See, e.g.*, ECF 55-5 at RFPs 15, 23, 28, 41–42. Several of these requests specifically sought documents and communications concerning the Community Hospitals' perfomance on Leapfrog's imputed measures (intensive-care unit physician staffing ("IPS"), hand hygiene, computerized physician order entry ("CPOE"), and bar code medication administration ("BCMA") (collectively, the "Four Measures")). For example, Leapfrog demanded documents and data reflecting the Community Hospitals'

"performance on" the Four Measures and any "adverse patient events related to" the Four Measures. *Id.* at RFPs 41–42.

4. The Community Hospitals disagreed that the expansive discovery Leapfrog sought was relevant or proportional to the core issues in this case and maintained this position through numerous meet-and-confers. *See* ECF 55-4 at 3. Nonetheless, as a good-faith compromise, the Community Hospitals agreed to produce documents, to the extent they existed, sufficient to answer the questions in Leapfrog's Hospital Survey applicable to the Four Measures. *See, e.g.* ECF 55 at 3–4. Leapfrog remained unwilling to withdraw or sufficiently narrow its overbroad RFPs. On August 13, 2025, the Community Hospitals moved for a protective order. *See* ECF 55, 55-32.

5. On August 23, 2025, the Community Hospitals produced 82 documents sufficient to respond to the Hospital Survey questions on the Four Measures. These materials included: (a) executed contracts with intensive-care specialists showing that the Community Hospitals' intensive-care units are staffed; (b) handwashing policies and training materials; (c) policies, training documents, and data showing that the Community Hospitals employ BCMA systems; and (d) the Community Hospitals' CPOE data.

6. After a discovery hearing before Judge William Matthewman on August 26, 2025, ECF 70, the parties engaged in further good-faith negotations to resolve their outstanding discovery disputes. As part of those discussions, Leapfrog agreed that the Community Hospitals' proposal to produce documents sufficient to answer the Hospital Survey questions on the Four Measures was acceptable to resolve the pertinent discovery dispute. *See* ECF 76.

7. On September 4, 2025, Dr. Anthony Harris, one of Leapfrog's putative expert witnesses, served his expert report. *See* ECF 96-3.

8. On September 29, 2025, the Community Hospitals deposed Dr. Harris. *See* ECF 96-8.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2025, in New York, New York.

Lee R. Crain