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., DELRAY MEDICAL CENTER, INC., PALM BEACH GARDENS COMMUNITY HOSPITALS, INC. D/B/A PALM BEACH GARDENS MEDICAL CENTER, ST. MARY'S MEDICAL CENTER, INC., AND WEST BOCA MEDICAL CENTER, INC.,

Plaintiffs,

v.

THE LEAPFROG GROUP,

Defendant.

THE LEAPFROG GROUP'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. ARGUMENT

a. Plaintiffs Must Show Consumer Harm.

Plaintiffs argue "[t]here is no requirement to show actual individualized reliance and harm." (ECF 115, p. 11) (emphasis removed). This is false and contrary to Florida and Eleventh Circuit precedent. Plaintiffs' analysis is a tortured one, asserted to confuse and to distract from this simple legal reality that is fatal to their claim: "While an entity does not have to be a consumer to bring a FDUTPA claim, it still must prove the elements of the claim, including an injury to a consumer." *Stewart Agency, Inc. v. Arrigo Enters.*, 266 So. 3d 207, 212 (Fl. 4th DCA 2019).[1]

1. Plaintiffs' Statutory Construction Argument is Unavailing.

Plaintiffs first contend that because Fla. Stat. § 501.211(1) permits an injunction against a defendant "likely to violate" FDUTPA, Leapfrog's position must be wrong – otherwise courts could never enjoin "new misrepresentations" until a consumer actually suffered injury. (ECF 115 at p. 18 of 28). That argument fails for several reasons.

First, it ignores that being "a person aggrieved" by way an alleged FDUTPA violation is different from a consumer who incurred actual harm. Section 501.211(1) sets forth when a "person aggrieved" can seek injunctive relief, including when another is "likely to violate" FDUTPA. *See, Ahearn v. Mayo Clinic*, 180 So. 3d 165, 172 (Fla. 1st DCA 2015) (definition of "aggrieved" in §501.211(1) is more expansive than "damaged" or "suffered a loss," which is language contained in §501.211(2)). The language of §501.211(1) on which Plaintiffs anchor their argument bears on standing, and *not* on the burden needed to get a Section 501.211(1) claim past summary judgment.

Second, Plaintiffs' argument in this regard is unsupported by authority and rests on an inapt "snake oil" hypothetical divorced from the issues here (and which Plaintiffs have made before).

Third, the statute, by its terms, authorizes injunctive relief against a person who "has violated, is violating, or is otherwise likely to violate this part." § 501.211(1). Plaintiffs themselves allege that Leapfrog "has violated" and "is violating" FDUTPA, making their appeal to the "likely to violate" clause beside the point. (*See, e.g.,* ECF 74 (Am. Compl.), ¶91).

Fourth, Plaintiffs cite no case holding that the "likely to violate" language dispenses with the need to prove consumer injury, and any such rule would be inconsistent with basic injury-in-

[1] *See also, Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cty., Inc.,* 169 So. 3d 164, 169 (Fla. 4th DCA 2015) (explaining that after the 2001 amendments, while "the claimant *does not have to be a consumer* to bring" a FDUTPA claim, "the claimant would have to prove that *there was an injury or detriment to consumers* in order to satisfy all of the elements of a FDUTPA claim") (emphasis in original).

fact requirements and with precedent requiring proof of consumer harm. Finally on this point, the Plaintiffs, through this argument, appeal to legislative intent and statutory construction, but this Court need not follow Plaintiffs *ipse dixit* in this regard, the Legislature itself stated that FDUTPA's provisions should be applied "[t]o protect the consuming public and legitimate business enterprises from **those who *engage in*** unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." (Fla. Stat. §501.202(2)) (emphasis added). The Legislature does not proscribe that FDUTPA is intended to protect against "those who *are likely to engage in*" unfair and/or deceptive practices.

2. <u>Plaintiffs' Construction of Case Law on this Issue Conflates Deception with the Separate Requirement of Showing Consumer Harm</u>

Next, through an erroneous interpretation of several cases, the Plaintiffs artificially support their erroneous conclusion that they need not show actual consumer harm/injury. (ECF 115, pp. 18-20). Boiled down, Plaintiffs' analysis in this regard conflates the "likely to mislead" standard that relates to judging whether conduct is *deceptive* with the wholly distinct requirement of showing that consumers were actually harmed by the allegedly unfair or deceptive conduct. *State Farm v. At Home Auto Glass LLC*, 2024 WL 4349246, *14 (M.D. Fla. Sep. 30, 2024) (plaintiff must show harm "on at least one consumer"). Lacking proof of consumer harm, Plaintiffs are trying to blur the lines between these two requirements out of necessity – or, desperation. Leapfrog breaks down Plaintiffs' erroneous claims and case citations in this regard below.

Plaintiffs contend that the Florida Supreme Court "adopted the *opposite* reading of Leapfrog's in *PNR, Inc. v. Beacon Property Management, Inc.*, 842 So.2d 773, 777 (Fla. 2003)." (ECF 115, p. 18). Plaintiffs continue:

> There [in *PNR*] – after a full-blown jury trial, not merely a decision on the pleadings – that court expressly endorsed the legal standard set out in *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000). *Millennium Communications*, in turn, made clear that FDUTPA's standard is the 'Federal Trade Commission standard for deceptive advertising,' 761 So. 2d at 1263, which merely requires 'probable, not possible, deception,' and 'deceptions *that are likely to cause injury* to a reasonable relying consumer,' *id*. For that reason, *actual* 'reliance by an individual consumer is not necessary in the context of FDUTPA,' and thus '[a] likelihood of consumer confusion is a sufficient basis for injunctive relief' under the statute, *Ghostbed, Inc. v. Casper Sleep, Inc.*, 2016 WL 4145909, at *3 (S.D. Fla. July 19, 2016).

(ECF 115, p. 18) (emphasis in Response, Plaintiffs' emphasis disclosures omitted).

Plaintiffs' conclusion that they need not show actual consumer harm is built on multiple, compounding misinterpretations of case law and the relevant issues – a doctrinal house of cards.

The Florida Supreme Court in *PNR, Inc.* did not "expressly endorse" any legal standard related to the need to show consumer harm from *Millennium*. In fact, the "only issue [the *PNR* Court] address[ed] is whether the FDUTPA may be applied in a private cause of action arising from unfair or deceptive acts involving a single party in a single transaction or directed to a single contract." *PNR, Inc.*, 842 So, 2d at 775. Moreover, the *PNR* Court cited *Millennium* merely *to define what deceptive conduct is* under FDUTPA. *Id.* at 777. The sum total of the *PNR* Court's reference to *Millennium* is the following parenthetical "(stating **that deception occurs if** there is a 'representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.')". *Id.*; citing, *Millennium*, 761 So. 2d at 1263 (emphasis added). How whether deception has occurred is determined is an entirely different inquiry than whether a plaintiff has shown that a consumer suffered harm or injury.

3. <u>Plaintiffs' Ignore Their Own Authority in Their FTC-Related Arguments.</u>

Next, with *Millennium* as a springboard, the Plaintiffs continue their attempt to support their erroneous conclusion by discussing the relationship between FDUTPA and the FTC Act. (ECF 115, p. 18) ("That is exactly how the FTC Act (which FDUTPA tracks) also functions: There is no requirement to show *actual* individualized reliance and harm").

First, Leapfrog notes that §501.204(2) of FDUTPA provides that "[i]t is the intent of the Legislature that, **in construing subsection (1)**, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act." (Fla. Stat. §501.204(2)) (emphasis added). Subsection (1) provides that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." (Fla. Stat. §501.204(1)). Put simply, the FTC and interpretations of the FTC Act are relevant to *what constitutes unfair or deceptive practices;* they are *not* relevant to the question of whether Plaintiffs must show consumer harm. Plaintiffs' FTC-related arguments are classic red herrings.

Second and returning to *Millennium*: That case, and Plaintiffs' discussion thereof, is irrelevant to whether Plaintiffs must show actual consumer harm. There, a company (Millennium) appealed an injunction the Florida Dept. of Legal Affairs obtained in an enforcement action brought under Fla. Stat. §501.207, "Remedies of enforcing authority." *Id.*, 1259. Millennium circulated postcards to consumers advertising an opportunity to obtain a credit card from Continental Consumer Credit Corp. to help repair their credit score to eventually obtain a Visa or MasterCard credit-card. *Id*. Millennium's methods allegedly misled consumers into believing that their application with Continental itself would result in obtaining a Visa or Mastercard. *Id*.,1257-58. The Department obtained a temporary injunction, and Millennium appealed. *Id*., 1259. Notably, whether the Department had to prove harm to consumers (it did, *id*.) was not an issue on appeal. *Id*. at 1260. Millennium argued on appeal that their postcards were not deceptive. *Id*. It is *here* that the *Millennium* Court drew on the FTC Act for guidance. *Id*., 1262-64.

When the *Millennium* Court looked to what the FTC must show to prove a violation of section 5 of the FTC Act (*e.g.*, a showing of probable, not possible, deception defined as "likely to mislead" and not a "tendency and capacity to mislead"), it concluded the Department failed to prove that Millennium's conduct was deceptive. *Id*., 1263-64. Leapfrog's argument at Section III(B)(1) of its Motion (ECF 99, pp. 9-13) is not concerned with whether the alleged conduct was deceptive; it is concerned with the distinct requirement that Plaintiffs show actual consumer harm. Thus, the Response conflates two issues, and the Motion (ECF 99) should be granted.[2]

The FTC Act does *not* inform the analysis of whether Plaintiffs have satisfied the *evidentiary burden* that *FDUTPA case law* has imposed in terms of satisfying the *injury to consumer* requirement. Plaintiffs are conflating "likely to *deceive*" with "likely to *harm*," and the latter is the relevant inquiry. Whether conduct may, in the future, be likely to *deceive* a consumer is one thing, and whether a consumer is likely *to be harmed* is another. Leapfrog's Motion proves that Plaintiffs cannot create a genuine dispute of material fact regarding any consumer suffering actual harm. While *allegations* of *likely* consumer harm are sufficient to beat a motion to dismiss

[2] The cases cited in fn. 2 of the Response (ECF 115, p. 11, fn. 2; citing, *FTC v. Pointbreak Media, LLC*, 376 F. Supp. 3d 1257, 1282 (S.D. Fla. 2019) and *FTC v. Vylah Tec LLC*, 2018 WL 3656474, *7 (M.D. Fla. Aug. 2, 2018)) are cited for the same erroneous proposition that *Millennium* is cited. FTC guidance on what makes conduct deceptive is irrelevant to the instant question. Regardless, both cases are FTC actions to enforce section 5 of the FTC Act, which has different elements from the subject case. *F.T.C. v. Tashman,* 318 F.3d 1273, 1277 (11th Cir. 2003) (under section 5 of the FTC Act, the FTC must prove three elements: (1) that there was a representation, (2) the representation was likely to mislead customers acting reasonably under the circumstances and (3) the representation was material). The "actual reliance" concept is distinct from the "actual harm" requirement discussed here, yet Plaintiffs try to merge them and make them appear to be one in the same. While actual reliance is not needed to prove that an act was deceptive, whether a reasonably prudent consumer would rely on the deception is relevant to determining whether the conduct was deceptive. *FTC v. Vylah*, at *21.

on this issue,[3] at summary judgment *actual evidence* of *actual consumer harm* is needed. *See, Novo Nordisk, Inc. v. Brooksville Pharms., Inc.*, 785 F. Supp. 3d 1123, 1145 (M.D. Fla. May 12, 2025); citing, *CEMEX Constr. Materials Fla., LLC v. Armstrong World Indus., Inc.*, 2018 WL 905752, *15 (M.D. Fla. Feb. 15, 2018); and, *Stewart Agency*, 266 So. 3d at 212, 214.

4. Plaintiffs' Attempted Criticism of the Motion's Authority Fails.

Instead of arguing that *Novo Nordisk* is irrelevant or otherwise not persuasive, Plaintiffs again resort to *ipse dixit* – this time, urging that that case be ignored because, *inter alia*, the *Novo Nordisk* court "never confronted the [Plaintiffs'] arguments above." (ECF 115, p. 19). First, it is not surprising that the *Novo Nordisk* court did not "confront" Plaintiffs' arguments because Plaintiffs' arguments misstate the issues and the law. Second and in any event, the *Novo Nordisk* Court did reject Novo Nordisk's argument that it was only "'…required to prove [] that Brooksville's actions are 'likely to cause consumer harm.'" *Novo Nordisk*, 785 F. Supp. 3d at 1145. The Court stated "[h]ere, **it is Novo Nordisk that 'misstates the relevant inquiry' – actual patient harm is the proper standard at the summary judgment stage**." *Id*. (emphasis added). Thus, the *Novo Nordisk* court did in fact address an erroneous "likely-to-harm-is-the-standard" argument. Third, that the *Novo Nordisk* court later vacated its merits holding because it found jurisdiction lacking (but preserved its merits holding for Eleventh Circuit review (2025 WL 2306505, *4 (M.D. Fla. June 30, 2025)), does not detract from the reality that the court relied on numerous cases in reaching its merits holding that are relevant here as to the requirement that consumer harm be shown and as to what constitutes evidence in that regard. *See, e.g., Novo Nordisk*, 785 F. Supp. 3d at 1144-47 (collecting cases). Fourth, the case Plaintiffs cite for the proposition that "vacated decisions 'are officially gone' and 'have no legal effect whatever'" (ECF 115, p. 19; citing, *United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002)) dealt with a person seeking to challenge an order that had been previously vacated *in the same case*. *Sigma*, 300 F. 2d at 1279-80. This Court has acknowledged that it can find the reasoning of another district court decision to be persuasive. *See, SEC v. Rondini*, 2024 WL 3432086, *11 (S.D. Fla. April 3, 2024) (Middlebrooks, J.); *also, Truesdale v. Venice Arms, Inc.*, 713 F. Supp. 3d 1350, fn.

[3] This reality also defeats Plaintiffs' criticism of the *Ounijian v. Globoforce, Inc.* (ECF 115, p. 19; citing, 89 F. 4th 852, 861 (11th Cir. 2023)). That was a motion to dismiss decision. *Id.* Plaintiffs' cite (ECF 115 p. 18) to *Ghostbed, Inc. v. Casper Sleep, Inc.*, 2016 WL 4145909, *3 (S.D. Fla. July 19, 2016) is likewise irrelevant; it dealt with a motion to dismiss where "a likelihood" of consumer harm or damage is sufficient. *Id*. at *8-9; citing, *Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.*, 123 So. 3d 1149, 1152 (Fla. 5th DCA 2012) (discussing "aggrieved" requirement, not harm to consumer requirement, of FDUTPA claim).

1 (S.D. Fla. Jan. 27, 2024) (Despite acknowledging that an opinion had "no precedential value" because it was withdrawn due to settlement, the court relied on it because of it found its "analysis immensely persuasive"); *see also, Beach Blitz Co. v. City of Miami Beach*, 2018 WL 11260452, *16 (S.D. Fla. Sep. 24, 2018) ("[T]he Court may look to the decisions of other district courts and circuits as persuasive authority"). Finally, Plaintiffs' attempt to distinguish *Novo*'s facts is specious; what is relevant is that in both cases the plaintiff brought a FDUTPA claim and offered nothing beyond speculation and conjecture with regard to the harm to consumer requirement.

The requirement that Plaintiffs bring forth competent evidence of consumer harm is well-settled. No amount of erroneous and irrelevant discussion of "actual reliance" or of FTC requirements or misrepresentations of authority can change that reality.

5. Plaintiffs Fail to Show How Any Purported Class of "Consumer" Was Harmed.

Plaintiffs hedge their erroneous legal analysis and assert that "[i]n any event, Leapfrog's argument is factually baseless even under its preferred standard." (ECF 115, p. 20). Leapfrog's standard is not its "preferred" standard; it is the law. Regardless, these arguments fail too.

First, Plaintiffs argue that the purported "evidence" of consumer harm on which they rely in an attempt to manufacture a genuine dispute of material fact is not hearsay because – according to Plaintiffs – they are not offering the second- and third-hand patient/doctor/insurer complaints for the truth of the matter asserted, which Plaintiffs contend is "that the Hospitals are in fact unsafe." (ECF p. 20). Plaintiffs are ostensibly arguing that the second- and third-hand testimony about complaints is testimony containing out-of-court statements that the Plaintiff Hospitals are unsafe, but those statements are only being offered to show that consumers were deceived by Leapfrog. If that is Plaintiffs' contention, it fails to do anything to support their position as to the lack of evidence of harm-to-consumers because Plaintiffs must show *how* that purported deception *actually harmed* the consumer. *State Farm,* *12-13; citing, *Tymar Distribution LLC v. Mitchell Grp. USA, LLC,* 558 F. Supp. 3d at 1289 (noting that consumer harm under FDUTPA parallels consumer harm under the Sherman Act, which requires "specific damage done to consumers in the market"). In other words, even if true, Plaintiffs' argument *still* does not remedy the fact that the Plaintiffs have no evidence of any consumer suffering a *loss* as *a result of* the purported conduct. *See, Harrod v. Express Scripts, Inc.,* 2019 WL 8273650, *13-14 (M.D. Fla. Aug. 16, 2019) (FDUTPA claim failed where no proof that the consumer encountered the purported misrepresentation and, thus, no proof the consumer suffered a *loss* as a result of the alleged violation). Plaintiffs offer no evidence that patients were "deceived into switching hospitals" (ECF 115, p. 20), and, regardless, they offer no explanation as to how or why switching hospitals caused specific or actual harm. The same problems exist with regard to doctors "ch[oosing] to sign up with competitors" and an insurer believing the Hospitals are unsafe. The purported complaints of patients and insurers or purported statements of doctors identified by Plaintiffs are simply not evidence of actual harm to any consumer *regardless* of the reality that they are hearsay statements.

Second, ignoring that the second- and third-hand out-of-court statements do not, as a matter of substance, evidence consumer harm, Plaintiffs are undeniably offering those statements for the truth of the purported facts therein (*e.g.*, that consumers complained and, thus, were (somehow) harmed). That is the definition of hearsay. Fed. R. Evid. 801(c) (hearsay is an out-of-court statement offered into evidence "to prove the truth of the matter asserted in the statement"). Whatever Plaintiffs' position is, it fails to defeat the Motion's harm-to-consumer arguments.

Finally on the hearsay point, Plaintiffs cite *Lincare Holdings, Inc. v. Doxo, Inc*. (ECF 115, p. 20; citing, 2024 WL 865881, *2 (M.D. Fla. Feb. 29, 2024)). There, plaintiff (Lincare) sued defendant (Doxo, a bill pay service) under various theories (including FDUTPA) related to Doxo's improper use of Lincare's trademarks. *Id*. *2. Doxo sought to exclude Lincare's call logs, arguing they were hearsay and reflected only Lincare's employees' version of a given phone call. *Id*., *5. The logs were admissible under the business records exception because the logs were kept contemporaneously, and testimony showed the employees were "extensively trained" on how to take contemporaneous and accurate records. *Id*., *10-11. That is plainly not the situation here.

Next, Plaintiffs argue *for the first time* that they themselves are "consumers" under FDUTPA. (ECF 115, pp. 20-21). The Plaintiffs state "Leapfrog itself argues that hospitals likewise consume its products" and identify the Hospital Survey as the product. (*Id*., p. 21). First, it is undisputed that the: (i) Safety Grades, not the Survey, is at issue here; (ii) the Safety Grades are separate and distinct from the Survey; and (iii) the Plaintiffs do not participate in the Survey. (ECF 116 (Resp. to Def.'s SOF), ¶15, 18, 35); (*also generally*, ECF 74 (FAC)). Thus, this argument fails from the start. Second, Plaintiffs have admitted – through both the FAC (ECF 74) and response to the motion to dismiss (ECF 40, p. 26) – that the "consumers" are the public, not Plaintiffs. Again, this argument fails. Finally, likely recognizing that they lack evidence that they were deceived by Leapfrog, the Plaintiffs make a passing reference to "subjective reliance" not being required. (ECF 115, p. 21). This "argument" is wholly unexplained and unsupported. Plaintiffs are not consumers.

b. PLAINTIFFS ARE NOT "AGGRIEVED" AND CANNOT ESTABLISH ARTICLE III STANDING.

As for Plaintiffs' failure to demonstrate that they are "aggrieved" such that they can maintain their claim, Plaintiffs resort to rhetoric and never-previously-disclosed documentation. (ECF 115, p. 23-24). Plaintiffs' ASOF (ECF 116, ¶98-99) attaches purported internal documents regarding Plaintiffs' revenue and reference those in the Response, stating "[t]he resulting economic harms have been substantial." (ECF 115, p. 14). This material is improperly raised for the first time on summary judgment and should be ignored. *Rigby v. Philip Morris USA Inc.*, 717 Fed. Appx. 834, 835-36 (11th Cir. 2017) (affirming exclusion of material not disclosed during discovery and raised on summary judgment). Plaintiffs' remaining response on the "aggrievement" issue is, essentially, arguing that the plainly speculative "evidence" of aggrievement is not, in fact, speculative. But, the purported evidence is speculative and fails to show how Plaintiffs' legal rights have been infringed upon. *Stewart Agency*, 266 So. 3d at 213-14. Similarly, since Article III standing when seeking injunctive relief requires a showing, beyond conjecture, of the threat of future injury, Plaintiffs lack standing. *Emory v. Peeler*, 756 F. 2d 1547, 1552 (11th Cir. 1985).

c. PLAINTIFFS' ARGUMENTS REGARDING THE PURPORTED DECEPTIVE AND UNFAIR CONDUCT IGNORE THE "TOTALITY OF THE CIRCUMSTANCES" INQUIRY.

Plaintiffs' opposition rests on selective quotations – like ripping the word "drastic" from context – omitted context, and outright mischaracterizations. These tactics are addressed in Leapfrog's response to the ASOF and further below. As a threshold matter, however, Plaintiffs' self-serving spin is irrelevant. The undisputed record conclusively shows that the Methodology change was rigorously vetted internally, reviewed and approved by an expert panel, circulated for public comment before adoption, and – after adoption – published in full on Leapfrog's website with detailed explanations of the Methodology and the specific changes. Given this transparent, deliberative process and extensive public disclosure, Plaintiffs cannot manufacture a genuine dispute: Leapfrog's conduct was neither deceptive nor unfair.

Leapfrog addresses these matters in Response to Plaintiffs' ASOF and summarize some here. (*See, e.g.*, Resp. to ASOF, ¶85) (L. Binder testimony of onsite verification measures beyond "audits"); (¶87-88) (Expert Panel did not describe proposed change as "drastic"); (¶103-114) (noting that, after Plaintiffs filed MSJ, the fall 2025 grades were released and changes to the website were made (which, per testimony, happens regularly and particularly when new grades are released) and that all the webpages submitted by Leapfrog are dated, contrary to the implication of surreptitious alterations); (¶90-92) (clarifying implication that full methodology can only be accessed after some dramatic site-navigation); (¶100) (Leapfrog Comms. Director Bailey actually testified opposite of the assertion that Leapfrog solicited negative publicity for Plaintiffs); (¶114) (clarifying implication of nefarious conduct by Leapfrog proposing changes to the *Survey*).

Further, Plaintiffs misrepresent Leapfrog's website, and state "[Leapfrog] tells consumers they 'should *always* decide on where to receive care based on a hospital's current Safety Grade'…" (ECF 115, p. 3; citing, PSOF ¶8) (emphasis in Resp.). This statement, in context, recommends consumers to use *the most up to date grade*, rather than old grades. (ECF 88-63 "How to Use the Grade"). Leapfrog is not advising consumers to always decide hospitals based on Safety Grades, and in fact Leapfrog's webpages all encourage consumers to never delay seeking treatment and that the material is offered for informational purposes only. (ECF 100, ¶44). Further: (i) Leapfrog did not implement the step 1 "drastic change" on which Plaintiffs harp (ECF 88-88 (Campione) 270:1-3; *also* ECF 88-13 (methodology change proposals) versus ECF 101-22, pp. 15-16 (fall 2024 methodology); (ii) Leapfrog testified the aim of the change was assure patients they are going somewhere safe, and not penalty (ECF 88-12 (Danforth) 25:22-26:2; 26:3-17); (iii) Plaintiffs take issue with the purported removal of "Expert Panel Guiding Principles," but Leapfrog's 30(b)(6) representative for the Expert Panel confirmed that she did not recognize the document, that it was likely from the early developments of the Safety Grade when working with Dicern Consulting and was "not aware this was on [Leapfrog's] public website." (*Id.* at 485:15-489:12; 489:8-19); (iv) Plaintiffs' claim that the Johns Hopkins whitepaper was removed is false[4], and Dr. Austin confirmed the white paper is still accurate. (ECF No. 101-6 (Austin) at 106:16-107:1); (v) contrary to persistent claims that the change was arbitrary or "not accuracy driven," Dr. Austin confirmed the Expert Panel supported the change. (*Id.*, at 205:2-4); (*also*, ECF 88-88 (Campione) at 392:6-11); (vi) Dr. Romano does not speak for Leapfrog and was not at the panel meeting (ECF 88-97 (Romano) p. 44:5, 188:18-20); and (vii) "[i]mputed scores are data points," Leapfrog "and the expert panel considers imputed data data" (ECF No. 101-4 (Danforth) at 499:7-8, 519: 18-19).

When Plaintiffs' contortions of the record are set aside, the record reflects numerous and conspicuous disclosures to consumers at every point of use, including asterisks, bolded language, specific labeling of the affected measures, and explanations that certain scores were assigned to

[4] https://www.hospitalsafetygrade.org/LivesLost

reflect lack of information. Plaintiffs' focus on isolated snippets ignores the reality that this inquiry is an objective one, taking into account the totality of the information available to the consumer. *Carriuolo v. GM Co.*, 823 F.3d 977, 983-84 (11th Cir. 2016). Plaintiffs simultaneously take issue with the amount of information presented to a consumer and the purported lack of transparency provided. The reality is that the Safety Grades are reached *via* a complex Methodology, and the entirety of the Methodology is published and explained (along with myriad other disclosures/disclaimers). Indeed, it is presumed that a reasonable consumer would not ignore these things. *See., e.g., Piescik v. CVS Pharm., Inc.*, 576 F. Supp. 3d 1125, 1133-34 (S.D. Fla. Dec. 15, 2021). Thus, Plaintiffs try to avoid summary judgment through "fanciful interpretation[s]," which is unavailing. *Griffin v. Publix Super Mkts., Inc.*, 2024 WL 2318143, *3-4 (M.D. Fla. May 22, 2024) (collecting cases). Plaintiffs have not identified a genuine dispute of material fact; there is no evidence of "possible deception," let alone "probable deception," which is the standard. *Piescik*, at 1132. When information is expressly disclosed, it "is not itself deceptive because it is patently obvious." *Colomar v. Mercy Hosp.*, 2006 U.S. Dist. LEXIS 95834, *21 (S.D. Fla. Mar. 2, 2006).

Plaintiffs make claims of unfairness rooted entirely upon mischaracterizations of the record outlined above. Plaintiffs' mischaracterizations and opinions do not make Leapfrog's purported conduct unfair. First, considering the totality of the information provided to consumers discussed above and in the SOF (*e.g.*, ECF 100, ¶¶44-45), any purported injury could be reasonably avoided and, thus, the alleged conduct is not unfair. *Medmoun v. Home Depot*, 2022 WL 1443919, *14-15 (M.D. Fla. May 2, 2022). Second, it is undisputed that hospitals use Leapfrog's Survey as a benchmarking tool (ECF 100 (SOF) ¶14) and that Leapfrog's mission is, in part, to advance public safety (*id*. ¶1). This, combined with Plaintiffs' failure to show consumer injury, is such that the public benefit weighs any injury, meaning the alleged conduct was not unfair. *SMS Audio, LLC v. Belson*, 2017 WL 11631378, *10 (S.D. Fla. April 24, 2017). Finally, ignoring that Plaintiffs' characterizations of Leapfrog's motives are false, Plaintiffs do not, and cannot, identify any authority stating that conduct undertaken in pursuit of monetary returns (assuming, *arguendo*, that is Leapfrog's motivation), without more, is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Plaintiffs have failed to offer any material evidence that would create a *genuine* dispute about whether Leapfrog's conduct was "unfair."

WHEREFORE, Defendant, The Leapfrog Group, respectfully requests that this Honorable Court grant its Motion (ECF 99) and enter its proposed order (ECF 99-1).

Date: December 3, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2025, a true and correct copy of the foregoing was served on all counsel or parties of record via the ECF system.

By: _/s/ *Cheryl A.Kujawski*
Cheryl A. Kujawski

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 LEAPFROG GROUP'S RULE 56.1 REPLY TO PLAINITFFS' ADDITIONAL STATEMENT OF MATERTIAL FACTS IN RESPONSE TO LEAPFROG'S MOTION FOR SUMMARY JUDGMENT

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84. **Undisputed** that the video posted on Leapfrog's Facebook page contains, among other things, the quoted material in Plaintiffs' ASOF ¶1. Further, the video highlights the benefit Leapfrog confers the public which Plaintiffs fail to show is outweighed by any purported consumer injury. (ECF 99 (Def.'s MSJ) p. 17).

85. **Undisputed** that Leah Binder testified that Leapfrog conducts onsite audits for four or five hospitals; however, **disputed** and lacking context that Leapfrog verifies survey response in various other ways. (ECF No. 88-87 at 66:17-70:17) (Binder explaining that in addition to onsite verification, Leapfrog uses "significant built-in safeguards" to assure accuracy of survey responses for every section of the survey including requesting supporting documentation from hospitals, which can result in decertification of a hospital's survey responses).

86. **Undisputed** that Exhibit H (which speaks for itself) contains the quoted language; however, **disputed** as to "contracted with;" Ex. H is not signed by MetaStar and reflects only efforts to retain. Ex. H is not evidence of whether MetaStar did "conduct on-site verification"…"for [t]hree (3) hospitals [and] [t]wo (2) ambulatory surgery centers" between October 1, 2023 and November 30, 2024. ECF No. 117-8 (P. Ex. H) at p. 1. Exhibit I speaks for itself but is not direct evidence of whether "Amendment 1" was completed. ECF No. 117-9.

87. **Undisputed** that the partial quotes are accurate, but lack context. During the Expert Panel meeting that discussed the proposed Fall 2024 methodology change, expert Sara Singer acknowledged that "step two is…already socialized with the group" and that there is "acknowledgment of its validity." ECF No. 88-12 (Panel Mtg. Transcript) at 24:6-11. Expert Arjun Srinivasan suggested Leapfrog "assign [non-reporting hospitals] to the bottom quartile" based on the assumption that non-reporting hospitals "are in the bottom part and [] want that boost in score to get [] to the mean." *Id.* at 25:9-21. This came after expert Peter Pronovost confirmed that in meetings with CMOs, they already discuss how hospitals that "don't complete the survey, [] can do better." *Id.* at 19:3-18. None of the panel members referred to assigning the bottom quartile as "drastic." *See generally,* ECF No. 88-12 (Panel Mtg. Transcript) at pp. 13-31. *See infra* at ¶88.

88. **Undisputed** but lacks context. Dr. Austin testified that "[f]rom my notes here, it indicates that the expert panel supported the idea of assigning the bottom performance category" (ECF No. 101-6 (Austin) at 205:2-4) and Ms. Campione clarified that, in fact,"[i]t's not arbitrary to assign [] the limited achievement category." (ECF No. 88-88 at 392:6-11).

89. **Undisputed** but Leapfrog notes that the expert panel supported *several* proposals made during the April 12, 2024 meeting. *See generally,* ECF No. 88-12 (Panel Mtg. Transcript).

90. **Undisputed** but this is not the only way to reach the full methodology. ECF 101-3 (Binder), 409:4-10 (Binder explaining that Leapfrog "link[s] the scoring methodology in several different places on the Hospital Safety Grade website and [Leapfrog] explain[s] in layman's terms to anyone who is looking at any particular hospital how they do on each measure and that [Leapfrog] assign[s]…scores when [it does not] have the data").

91. **Undisputed** only if the methodology is trying be reached in the method described in P-ASOF, ¶91; that way described is but one way and thus **disputed** insofar as P-ASOF ¶91 asserts that this is the only way to view the Safety Grade scoring methodology pdf. Further, the thirty-two rows that "must then [be] scroll[ed] past" contain detailed explanations of what each measure is that goes into the Safety Grade ("What's This" hyperlink), a comparison of that particular hospital's scores ("The Hospital's Score" as compared to the "Worst Performing Hospital," "Average Performing Hospital," and "Best Performing Hospital") in addition to the data source for each measure (CMS, imputation, or Leapfrog Hospital Survey) and the relevant time period covered. ECF Nos. 101-37-39. **Disputed** for the same reasons stated in response to ¶90.

92. **Disputed** as to "so called" and: Following the table of contents, the first substantive page of the scoring methodology reflects the eligibility requirements for a hospital to receive a Safety Grade and the next pages provide an overview of the 12 process measures (including CPOE, BCMA, IPA and hand hygiene), which state that the secondary data source is an imputation model and hyperlinks the "secondary data source" page that leads directly to page 15 where the imputation model is fully explained. ECF No. 101-22 (Fall '24 Methodology) at pp. 5-6, 15.

93. **Disputed**. St. Mary's did not produce monthly reports to show these alleged decreases despite testifying those reports are what it relies on to show that the Safety Grade allegedly impacted the hospital (ECF 101-23 (McCauley) at 104:12-16); contrary to this assertion, McCauley admits that she is not certain on these numbers (*Id*. at 104:7-8) and "not certain with [what] a consumer[] look[s] at" when deciding what hospital to go to. *Id.* at 229:15-17.

94. **Disputed**. Good Samaritan did not produce monthly reports to show these alleged decreases despite admitting reliance on said reports (ECF No. 101-26 (Montgomery) 64:5-65:18) and regardless, Montogomery admits she cannot identify any patients or doctors who left or refused to treat due to the Grade. ECF 100 (LF SOF), ¶57; ECF 116 (LF-Resp. PSOF, ¶57).

95. **Disputed**. Palm Beach did not produce records to show these alleged decreases and is unsure of actual numbers (ECF 101-27 (Cazares) at 78:9-79:2) and admits the hospital has not taken on any survey or research to determine *what* is causing the alleged decreases. *Id.* at 79:3-7.

96. **Disputed**. CEO, Jared Hanlon, of West Boca admits that emergency room visits have declined since he became CEO in 2023 (prior to the Fall 2024 methodology change) and no documents have been produced to support this assertion. ECF No. 101-25 (Hanlon) at 35:12-21.

97. **Disputed.** In the same breath CEO Heather Havericak admitted that Delray did not see a decline in admissions after the Safety Grade came out (ECF No. 101-24 (Haverciak) at 257:22-25), patients still treat at Delray (*Id.* at 252:16-25) and regardless, Delray has produced no documents, and is aware of none, to support its assertions in ¶97. (*Id*. 261:22-262:1).

98. **Disputed**. This purported internal document (with an 11/26/2025 at 8:19 timestamp) (ECF 117-13, bottom left) has never been produced in discovery, bears no bates label and thus is disputed and cannot be relied upon. *See, e.g., Rigby v. Philip Morris USA Inc.*, 717 Fed. Appx. 834, 835-36 (11th Cir. 2017) (affirming exclusion of material not disclosed during discovery and raised on summary judgment). Further, ECF 117-13 appears to be a conformed version of a spreadsheet Plaintiffs produced (000015890) and designated Confidential, and which Plaintiffs refused to remove Confidentiality designation, but now seeks to use this never-before-produced version when convenient.

99. **Disputed.** *See supra,* at ¶98.

100. **Disputed**. Lauren Bailey testified "[w]e didn't do it" in response to Plaintiffs' counsel's question that forms the basis of P-ASOF ¶100. (ECF 88-85 (Bailey) 372:7-15).

101. **Disputed**. Mischaracterizes testimony. LF used Megaphone before this case to run google ads (*Id.*187:8-17) and only publicizes its site as the Google grant allows. *Id.*, 332:2-15.

102. **Undisputed** that Binder is quoted in articles following publication of the Fall 2025 Grades and that CEO, Mike Irvin, of HCA Florida Trinity Hospital agrees that a Leapfrog "A" demonstrates "clinical excellence and a safe experience" for patients. ECF 117-17 (Article) p. 1.

103. **Undisputed** that ECF No. 88-59 is a webpage print out of Leapfrog's "[FAQs] About The Leapfrog Hospital Safety Grade" as of the date printed thereon, October 24, 2025.

104. **Undisputed** that Plaintiffs filed their MSJ on October 28, 2025. ECF No. 86.

105. **Undisputed,** but irrelevant and disputed as to implication. Communications Director, Lauren Bailey, testified Leapfrog updates hospitalsafetygrade.org "twice a year around

the launch of a new round of the safety grade." ECF 88-85 (Bailey) at 161:6-13; *see also, Id*. at 160:3-12 (testifying about regular updates to site). The Fall 2025 Safety Grades were published by Leapfrog on November 13, 2025. ECF 117-15 (Fall 2025 Grade Announcement).

106. **Undisputed** that ECF No. 88-59 is a webpage print out of Leapfrog's "[FAQs] About The Leapfrog Hospital Safety Grade" as of the date printed thereon, October 24, 2025.

107. **Undisputed,** but irrelevant and disputed as to implication. *See supra* at ¶105.

108. **Undisputed** that ECF No. 88-59 is a webpage print out of Leapfrog's "[FAQs] About The Leapfrog Hospital Safety Grade" as of the date printed thereon, October 24, 2025.

109. **Undisputed** that Plaintiffs filed their MSJ on October 28, 2025. ECF No. 86.

110. **Undisputed**, but irrelevant and disputed as to implication. *See supra* at ¶105. Disputed to the extent Plaintiffs assert/imply that Leapfrog removed reference to Johns Hopkins findings in the white paper because of some purported inaccuracy; Dr. Austin confirmed the white paper is still accurate (ECF 101-6 (Austin) at 106:16-107:1). Dr. Austin further confirmed that "the numbers with the imputed scores are more reflective of the actual reality[;]" thus, in 2025 a patient "would be probably two and a half times" more likely to die if they went to a "C," "D," or "F" hospital as compared to an "A" hospital. *Id.* at 353:11-20.

111. **Undisputed** and confirmed through Dr. Austin testimony. *See supra* at ¶110.

112. **Undisputed** to the extent Ex. U (ECF 117-21) appears to be what it purports to be, but irrelevant and disputed as to implication and as not part of discovery prior to closure. *See, Rigby*, 717 Fed. Appx. at 835-36.

113. **Undisputed** that Ex. V (ECF 117-22) is what it purports to be; it is publicly available on Leapfrog's website: https://www.leapfroggroup.org/survey-materials/proposed-changes-2026-leapfrog-hospital-survey.

114. **Undisputed** because the Leapfrog Hospital Survey does not "assign[] CPOE, BCMA, IPS, and Hand Hygiene scores for hospitals" or provide "weights" for scores. Plaintiffs conflate the Leapfrog Hospital Survey and the Safety Grade. Scores for measures in the Safety Grade (to which Plaintiffs refer in ¶114) would never be included in proposed changes to the Survey because the Survey and Safety Grade are wholly distinct and separate. ECF 101-4 (Danforth) *compare,* 54:6-18 and 73:9-18; *see also*, ECF 101-10 (Survey), p. 20 ("The Leapfrog Hospital Survey and the Hospital Safety Grade are distinct programs administered by The Leapfrog Group.

Date: December 3, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2025, a true and correct copy of the foregoing was served on all counsel or parties of record via the ECF filing system.

By: /s/ *Kimberly E. Blair*
KIMBERLY E. BLAIR