

**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.

**DEFENDANT'S REPLY IN SUPPORT OF ITS DAUBERT MOTION
TO EXCLUDE PLAINTIFFS' EXPERT WITNESSES**

WILSON ELSEER MOSKOWITZ EDELMAN &
DICKER LLP

Jura C. Zibas (Bar #124571)
jura.zibas@wilsonelser.com
2063 Main Street, Suite 100
Sarasota, Florida 34237
(941) 866-8561 (Main)
(212) 915-5756 (Direct)

Kimberly E. Blair (*pro hac vice*)
Illinois Bar No.: 6272934
Courtney L. Wood (*pro hac vice*)
Illinois Bar No.: 6344385
161 N. Clark St., Suite 4500
Direct: (312) 821-6139
Main: (312) 704-0550
Mobile: (312) 259-6414
Kimberly.blair@wilsonelser.com

Attorneys for The Leapfrog Group

Defendant's Daubert Motion to Exclude Expert Testimony and Supporting Memorandum of Law (ECF 97) showed that Plaintiffs' purported expert witnesses offered testimony that largely was not helpful, not based upon a reliable methodology applied to sufficient facts or data, and not tethered to the facts of this case. Thus, as part of its gatekeeping function, the Court should exclude the proffered testimony. *See U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004); Fed. R. Evid. 702.

As the party offering expert testimony, Plaintiffs bear the burden of demonstrating that the purported experts are qualified, their methodology is sound, and the proposed testimony will help the trier of fact. *Id.*; *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005). Plaintiffs have not carried that burden.

To that end, it is clear that Plaintiffs hope to use their expert witnesses to cure significant deficiencies in the evidentiary record needed to support their claims. There is no record evidence here that any consumer was misled or harmed by the Safety Grades published on Leapfrog's website. Similarly, there is no evidence that Plaintiffs' reputations were harmed or that they were "aggrieved" by any purportedly deceptive or unfair conduct by Leapfrog. In other words, there is no evidence to meet the fundamental requirements of the Plaintiffs' FDUTPA claim. Plaintiffs desire to paper over this evidentiary gap through their proffered expert testimony, but as detailed below, their expert witnesses should be excluded from trial.

ARGUMENT

I. EXPERT THOMAS CHAKURDA'S OPINIONS & TESTIMONY SHOULD BE EXCLUDED.

"The proponent of expert testimony always bears the burden to show [1] his expert is qualified to testify competently regarding the matters he intended to address; [2] the methodology by which the expert reached his conclusions is sufficiently reliable; and [3] the testimony assists

the trier of fact.” *U.S. v. Frazier*, 387 F. 3d 1244, 1260 (11th Cir. 2004) (quotations omitted). In Plaintiffs’ Opposition to Leapfrog’s Daubert Motion, Plaintiffs’ repeatedly insist that Mr. Chakurda’s “almost 40 years of marketing experience” make his opinions reliable and helpful. (ECF 114 at pp. 4-5, 31-38). Yet “the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express.” *Frazier*, 387 F.3d at 1261 (affirming exclusion of unreliable opinions from generally qualified expert). Leapfrog did not challenge Mr. Chakurda’s general qualifications, as Plaintiffs acknowledge. But qualification is only one requirement for admission of an expert opinion, and Mr. Chakurda’s opinions do not meet the other requirements.

A. Mr. Chakurda’s Opinions Do Not Assist The Trier Of Fact Because They Are General, Easily Understandable Concepts Which Do Not Advance A Material Aspect Of The Case.

Mr. Chakurda’s opinions do not meet the “helpfulness” requirement because they do not advance the trier of fact’s understanding of the material issues in a way that goes beyond what an attorney could argue in closing arguments. Mr. Chakurda’s opinions, as actually expressed in his Report, are merely general assertions of principles he claims are “common sense.” In fact, his opinions are so generic that his summary of his opinions does not even mention Plaintiffs. (ECF 97-1 (Chakurda Rep.) ¶¶ 12-13.

Plaintiffs themselves argued that the relevant “issue before the Court is whether Leapfrog’s use of the Four Measures – the only measures for which Leapfrog imputes scores – artificially depressed the Community Hospitals’ Safety Grades by assigning failing scores despite having no underlying data.” (ECF 96 (Pls’ Daubert Motion) at p. 28). But Mr. Chakurda does nothing to answer this question or to advance the Court’s understanding of it. Indeed, he does not address the

grading methodology or whether it is accurate or fair. (*See*, ECF 114 (Pls. Opp.) at p. 35) (Plaintiffs acknowledge that “Mr. Chakurda is not opining about Leapfrog’s Safety Grade methodology or Leapfrog’s disclosures”). And he does not address whether Leapfrog’s publication of the Safety Grades and disclosure of the methodology is deceptive or misleading to consumers. *Id.* Notably, he even failed to conduct what he admits is the necessary analysis to opine on whether Leapfrog’s Safety Grades, as opposed to other forces, caused harm to Plaintiffs. (*See*, ECF 97-4 (Chakurda Dep. Tr.) at 72:2-10) (admitting he would have to look at all barometers [of brand harm] in conjunction). Instead, Mr. Chakurda merely informs the Court of what “basic human intuition” tells us: that a “D” or “F” grade is “pejorative.” (*Id.* at 106:10-15). Mr. Chakurda then jumps to the conclusion (without tying his opinions to Plaintiffs’ hospitals) that because “D” or “F” grades are bad, it is “common sense” that a “D” or “F” Safety Grade harms a hospital’s brand.

As discussed in Leapfrog’s Daubert Motion, an expert opinion is not admissible if it “offers nothing more than what lawyers for the parties can argue in closing arguments” or does not “logically advance[] a material aspect of the case.” *Blue Chip Alliance, LLC v. Chetu, Inc.*, 2025 WL 50391, at *11 (S.D. Fla. Jan. 8, 2025). First, Plaintiffs attempt to gloss over this blatant shortcoming by asserting, in a conclusory fashion, that Mr. Chakurda’s opinions are “relevant” because they address reputational and economic harm. But as discussed above, Mr. Chakurda’s opinions are general concepts untethered to the facts and therefore do not actually assist the trier of fact with addressing the question of whether the Plaintiffs *in this case* have been harmed by Leapfrog in a non-speculative, recoverable way. *See, Umana-Fowler v. NCL (Bahamas) Ltd.*, 49 F. Supp. 3d 1120, 1123-24 (S.D. Fla. 2014) (holding testimony unhelpful to determining standard of care where expert offered only vague testimony about crowd control barricades, but no opinion

on precisely how crowd control should have been executed differently in specific context and location, or how that would have impacted the outcome for the plaintiff).

In a second attempt, Plaintiffs then argue that Mr. Chakurda's opinions assist the trier of fact and "undoubtedly exceed a layman's understanding" because they are "grounded in 40 years of experience." (ECF 114 (Pls. Opp.) at p. 36) (quotations omitted). But Mr. Chakurda's own testimony belies this argument. When questioned about the bases for his opinions, Mr. Chakurda repeatedly testified that his opinions were limited to matters that were "common sense," "basic human intuition," and what "we all know." (See, ECF 97-4 (Chakurda Dep. Tr.) at 63:17) (responding to question about what evidence supports his conclusion with "quite frankly, I think it is common sense, you know, a lot of this is common sense in intuitive thinking."); (69:8-20) ("We all know what getting an F in school, the impact that had on your parents versus an A. . ."); (106:10-15) ("[B]asic human intuition knows that an F is much more pejorative and a D is much more pejorative than a B or an A"); (109:6-14) (admitting he "wouldn't be hesitant to characterize" his opinion about public awareness of Leapfrog Safety Grades as "not based on any sort of research [he has] done, just sort of . . . common sense"). Plaintiffs' attempt to rehabilitate Mr. Chakurda's opinions through their Opposition brief cannot overcome his own testimony. (ECF 114 at pp. 4-5, 31-38). Because Mr. Chakurda's general, conceptual opinions (1) do not advance a material issue in the case; (2) do not require expert assistance to understand; and (3) are not helpful to the trier of fact. Mr. Chakurda's intuitive opinions should not be admitted.

B. Mr. Chakurda Did Not Apply A Reliable Methodology To Sufficient Facts Or Data To Opine About The Existence Of Any Actual, Non-Speculative Harm To Plaintiffs.

Although Mr. Chakurda's written opinions are limited to general concepts as described *supra*, himself and Plaintiffs have indicated that, if allowed to testify at trial, Mr. Chakurda would

opine that the five Plaintiff hospitals in this case did in fact suffer harm. (*See, e.g.*, ECF 114 (Pls. Opp.) at p. 36) (“[I]f this case proceeds to trial, [Plaintiffs] should be permitted to put on experts who can testify to the reputational and economic *harm that the Community Hospitals have suffered.*”) (emphasis added); (ECF 97-1 (Chakurda Rep.) ¶ 56) (reserving rights to adjust or supplement his opinions and conclusions); (ECF 97-4 (Chakurda Dep. Tr.) at 72:19-2) (opining, without further basis, that low grades have an impact on the Plaintiff hospitals’ brands because “[t]hey are the scarlet D and the scarlet F”). Yet, Mr. Chakurda did not consider any objective data or verified facts in forming these new opinions that are *not* contained in his Report. (ECF 97-1). Instead, the Plaintiffs carefully characterize Mr. Chakurda’s conceptual opinions as stating that “(1) a hospital’s brand is critical to its reputational and economic success (Chakurda Opinion One); and (2) hospitals that are assigned ‘D’ and ‘F’ Safety Grades experience harm to their brand (Opinion Two).” (ECF 114 (Pls. Opp.) at p. 4). In an attempt to avoid producing any actual data or evidence – the same data and evidence Plaintiffs have refused to produce since the inception of this case – Plaintiffs skip right over to the unsupported conclusion that *they* were harmed by Leapfrog. An expert opinion based on such a leap is inadmissible because it is not based on a reliable methodology as applied to sufficient facts or data.¹ *See, Umana-Fowler*, 49 F. Supp. 3d at 1122 (“a court properly excludes expert opinion when a leap from data to opinion is too great”) (quotations omitted); *Affiliati Network, Inc. v. Wanamaker*, 2017 WL 7361048, at *10 (S.D. Fla.

¹ The Plaintiffs attempt to paint Leapfrog’s arguments as inconsistent by claiming Leapfrog argued Mr. Chakurda “should have conducted multiple additional studies to support his ‘easily understandable’ conclusions.” (ECF 117 (Pls. Opp.) at p. 37). This misrepresents Leapfrog’s Daubert Motion and conflates the issues. To the extent Mr. Chakurda’s report offers only general, easily-understood concepts untethered to the facts of this case, those opinions are unhelpful. To the extent Mr. Chakurda opines as to actual, non-speculative harm suffered by Plaintiffs, his opinion is unreliable.

Aug. 14, 2017) (rejecting expert assumption that any complaints lodged during marketing campaign were the result of campaign as “complete speculation” and “wholly unreliable”).

To be reliable, expert testimony must be both the product of reliable principles and methods and based on sufficient facts or data. *See*, Fed. R. Evid. 702. Courts routinely hold that expert opinions as to reputational harm are unreliable and inadmissible where the proffered witness “made no actual inquiry into the impact Defendants’ actions had on Plaintiffs’ reputations.” *See, e.g., Platinum Properties Investor Network, Inc., v. Sells*, 2021 WL 4428991, at *1 (S.D. Fla. Mar. 22, 2021) (holding expert witness could not testify as to reputational harm); *see also, Affiliati Network*, 2017 WL 7361048, at *9-10 (expert opinions concerning reputational harm were inadmissible because they were speculative and based on unverified, anecdotal complaints). Likewise, as here, Mr. Chakurda only offered general concepts and conclusions and made no actual inquiry into whether Leapfrog’s actions impacted the Plaintiffs’ reputations by causing them economic harm.

To that end, Plaintiffs argue that Mr. Chakurda need not apply the “best method” or conduct his own surveys. (ECF 114 (Pls. Opp.) at 44). Yet, when even looking to Mr. Chakurda’s own explanation of what a reliable method for arriving at his conclusions could be, he failed to apply it. Mr. Chakurda identified several factors that could be reliable, objective measures of reputational harm or harm to a hospital’s brand: market share, revenue, philanthropy, recruitment and retention of staff, and physician referrals. (ECF 97-4 (Chakurda Dep. Tr.) at 53:21-54:18) (listing barometers of a hospital’s brand or reputation); (61:7-62:8) (stating the same). Further, when asked how brand damage could be reliably isolated and attributed to one event (such as publication of Leapfrog’s grades) as opposed to other factors (such as market competition, changes in a hospital’s leadership, or unrelated PR issues), Mr. Chakurda testified that it would be necessary to look at *all* the

barometers of a hospital brand in conjunction with each other. (*Id.* at 72:2-10). Yet, he did *not* consider *any* of the objective factors he described.

In fact, Mr. Chakurda admitted that he did not consider data provided regarding Plaintiffs' market share. (*Id.* at 63:9-22). Nor did he speak with anyone at any of Plaintiffs' hospitals or at Tenet Healthcare System about market share before and after the November 2024 Safety Grades. (*Id.* at 60:23-61:6). Nor did he consider any of Plaintiffs' revenue data. (*See generally*, ECF 97-1 (Chakurda Rep.)). Instead, he relied only on narrow, self-serving *allegations* in the complaint that Plaintiffs allegedly experienced a decline in elective admissions; but at the same time, he admitted performing no analysis to verify those allegations. (ECF 97-4 (Chakurda Dep. Tr.) at 59:21-60:22).

Mr. Chakurda even admitted that he did not know what the philanthropy profile of the five Plaintiff hospitals is. (*Id.* at 54:13-22). He did not consider any data regarding recruitment and retention at those hospitals. And again, Mr. Chakurda relied only on a few anecdotal, hearsay comments about staff morale, but admitted he made no attempt to verify that information. (*Id.* 59:21-60:22). Relatedly, Mr. Chakurda did not consider any data regarding physician referrals to the Plaintiff hospitals. (*Id.* at ¶¶ 25-27) (asserting general conclusions about the importance of physician referrals but referencing no data and offering no opinion about referrals to Plaintiffs' hospitals).

Thus, it is clear that Mr. Chakurda "made no actual inquiry into the impact that [Leapfrog's] actions had on the Plaintiffs' reputations," and he cannot offer a reliable opinion as to whether they were harmed or aggrieved. *See, Platinum Properties*, 2021 WL 4428991, at *1.

Plaintiffs also claim that Mr. Chakurda did not need to conduct additional analyses because his opinions "reflect a rigorous application of insights gleaned over a nearly 40-year career," but again cite only to testimony about his general qualifications as a marketing expert. (ECF 114 (Pls.

Opp.) at 38) (citing to awards received for “excellence in marketing and communications”). Reliability is a discrete criterion, and where an expert is relying, solely or primarily, on experience, he must explain, *inter alia*, “how that experience is reliably applied *to the facts*.” *Frazier*, 387 F.3d at 1261 (emphasis added). Because Mr. Chakurda did not consider sufficient facts and data – and ignored the limited market share data he was provided – he cannot simply claim his general marketing experience and intuition inform him that the Plaintiffs were allegedly harmed and expect the Court to take his word for it. Therefore, Mr. Chakurda should be prohibited from providing any testimony regarding whether Plaintiffs experienced reputational or economic harm as a result Leapfrog’s Safety Grades.

For all of the reasons stated above, Mr. Chakurda’s opinions are fatally flawed and should be excluded. Thus, Leapfrog’s motion to exclude his opinions should be granted.

II. DR. JONAH BERGER’S OPINIONS & TESTIMONY SHOULD BE EXCLUDED.

As evidenced in Leapfrog’s Daubert Motion, the testimony of Jonah Berger should be excluded because it is not helpful, is not reliable, and is not based on sufficient facts or data. (ECF 97) And Nothing in the Opposition remedies those deficiencies. (ECF 114).

A. Mr. Berger’s First Opinion Is Not What Plaintiffs Now Claim and Is Not Admissible.

Plaintiffs adopt an unusual tactic when defending the proffered testimony of Mr. Berger: they argue for the helpfulness and reliability of opinions Dr. Berger’s Report *never* expressed.

Most critically, the first opinion offered in the Berger Report is: “Leapfrog’s ‘D’ or ‘F’ Hospital Safety Grades for Plaintiff Hospitals likely impact consumers perceptions of Plaintiff Hospitals and deter consumers from choosing to receive care there.” (ECF 97-2 at ¶15). The Opposition attempts to restate this as two opinions – (1) that Leapfrog’s Safety Grades “likely *damage*” the Plaintiffs’ “*reputations* among consumers” and (2) that the Safety Grades “likely

deter consumers from choosing to receive care at” Plaintiffs’ hospitals. (ECF 114 (Pls. Opp.) at p. 17) (emphasis added).² But in reality, the Berger Report never opines that the Leapfrog Safety Grades *damaged* Plaintiffs’ *reputations*. (*See generally*, ECF 97-2). Indeed, the word “damage” appears only once in the Report, in the name of an academic article cited in a footnote, and rather *not* in connection with Dr. Berger opining on damage to the Plaintiffs’ reputations. (*Id.* at ¶23, n.25). And although the word “reputation” appears a few times in the Report, that too never appears in the context of Dr. Berger opining about *Plaintiffs’* reputations. (ECF 97-2).

This absence makes sense, of course, because Dr. Berger holds no actual knowledge about the quality of patient safety at the Plaintiffs’ hospitals or what their reputations for patient safety were *before or after* Leapfrog published its Safety Grades. (ECF 97-5 (Berger Dep. Tr.) at 99:18-22). Nor did he consider whether the poor grades those hospitals received from other grading sites, such as CMS or U.S. News & World Report, impacted Plaintiffs reputations. (*Id.* at 99:7-17). Without knowing the quality of patient safety at the Plaintiffs’ hospitals, or what those hospitals’ reputations were, or whether those reputations have changed, it would be neither logical nor reasonable but rather disingenuous for Dr. Berger to opine on how Plaintiffs’ reputations were allegedly affected by the Safety Grades (if even affected at all). Plaintiffs hope this Court will mistakenly assume, without evidence, that their reputations were good before Leapfrog published its Safety Grades, and bad thereafter. But there is no evidence to support that false proposition.

Logically, a plaintiff claiming injury to its reputation must show both that it began with a good reputation and that that reputation reflected reality. Indeed, as (now) Justice Gorsuch

² These are not two separate opinions. Whether a corporation’s reputation has been injured is established by showing that it lost business. Thus, the Plaintiffs cannot show reputational injury unless and until they show that consumers, in fact, were deterred from doing business with them or suffered some other economic injury. *See infra* n.3. Here, the Plaintiffs have not and cannot make that showing.

explained, the reason the law provides a remedy for reputational injury is “not about compensating for damage done to a false reputation by the publication of hidden facts. It’s about protecting a good reputation honestly earned.” *Bustos v. A&E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011); *see also Marder v. TEGNA, Inc.*, No. 19-81283-CIV-SMITH, 2020 WL 3496447, at *5 (S.D. Fla. Jun. 29, 2020) (same; quoting *Bustos*). However here, Plaintiffs did not have good safety reputations honestly earned before Leapfrog’s recent Safety Grades. (See Plaintiffs’ 2023-2025 Safety Grades at ECF 101-28). This likely explains why Plaintiffs made no effort to apprise Dr. Berger of their safety records before he issued his Report. But Plaintiffs are not now permitted simply to rewrite Dr. Berger’s Report to express an opinion he never expressed and for which he considered no evidence.

Plaintiffs try to contort Leapfrog’s arguments for excluding Dr. Berger’s testimony by derisively asserting that they “welcome” Leapfrog’s “tacit admission that failing safety grades by their nature inflict reputational harm.” (ECF 114 (Pls. Opp.) at p. 21). But Leapfrog’s Daubert Motion made no such admission, either tacitly or expressly, and nothing in the Berger Report – or in the record evidence – supports Plaintiffs’ unfounded claim that their reputations have been harmed. By way of example, if a student received an “F” on his first math test, an “F” on his second math test, and a “D” on his third math test, no one would dispute that each is a bad grade. But recognizing that a “D” is a bad grade is plainly not the same thing as “admitting” that that grade damaged the student’s reputation. Similarly, there is no record evidence whatsoever that Plaintiffs’ reputations were harmed by Leapfrog’s Safety Grades, and Dr. Berger never opined that they were.³

³ “Since a corporation has no reputation in the sense that an individual has, it is only with respect to its credit, property or business that a corporation can be injured by a false publication.” *St. Paul Fire & (footnote continued on next page)*

Of course, even if the Berger Report had opined that Leapfrog’s Safety Grades caused damage to Plaintiffs’ reputations, that opinion would be inadmissible. “An expert . . . may not testify to the legal implications of conduct.” *Falic v. Legg Mason Wood Walker, Inc.*, No. 03–80377–CIV, 2005 WL 5955704, at *4 (S.D. Fla. Jan. 10, 2005) (citing *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990)). In *Falic*, the Court excluded expert testimony about whether allegedly false and defamatory statements caused the plaintiff’s injury. *Id.*; see also, *Commodores Entertainment Corp. v. McClary*, 879 F.3d 1114, 1128 (11th Cir. 2018) (“experts may not testify to the legal implications of conduct”) (internal quotation omitted); *Chappell v. Carnival Corp.*, 666 F. Supp. 3d 1316, 1325 (S.D. Fla.) (excluding expert testimony that the plaintiff’s alcohol consumption “caused or contributed to her fall”). Here, Dr. Berger is similarly prohibited from opining that the Safety Grades caused damage to Plaintiffs’ reputations.

Inasmuch as Dr. Berger’s opinion – that the safety grades likely “deter consumers from choosing to receive care” at the Plaintiff hospitals, (ECF 97-2 (Berger Rep.) at ¶15) – is meant to establish that these hospitals lost patients or revenue because of the Safety Grades, that opinion must be rejected for the same reason: it is nothing more than a proposed legal conclusion (*i.e.*, that Plaintiffs were “aggrieved” within the meaning of FDUTPA). Plaintiffs uniformly testified that they did *not* lose patients or revenue because of the Leapfrog Safety Grades. (See, ECF 100 (Def. Rule 56.1 Statement of Material Facts in Support of its MSJ) at ¶¶ 53-81). Plaintiffs cannot erase those facts by having an expert assert that he *believes* they *should* have lost patients or revenue,

Marine Ins. Co. v. Naples Cmty. Hosp., Inc., 585 So. 2d 374, 376 (Fla. 2d DCA 1991) (internal quotation omitted); *Open Sea Distrib. Corp. v. Artemis Distrib., LLC*, 692 F. Supp. 3d 1151, 1203-04 (M.D. Fla. 2023) (granting summary judgment because corporation failed to prove actual damages, such as lost customers, attributable to allegedly defamatory statement). The evidence here shows that Plaintiffs did *not* lose customers or credit or revenue because of the LEAPFROG grades – that is, it shows that their reputations were not harmed.

because a party “cannot rely on legal conclusions articulated by an expert to meet his burden of coming forward with relevant evidence.” *Drew Estate Holding Co. LLC v. Fantasia Distrib., Inc.*, 875 F. Supp. 2d 1360, 1370 (S.D. Fla. 2012) (quoting *Omar v. Babcock*, 177 Fed. Appx. 59, 63 n.5 (11th Cir. 2006)). Dr. Berger’s opinions should be excluded from trial on this basis alone.

The Plaintiffs maintain that Dr. Berger can speculate about potential injury without considering actual contradictory facts, but the cases they cite for this proposition do not help them. For instance, Plaintiffs argue that under *Colonial Van Lines, Inc. v. Colonial Moving & Storage, LLC*, 2020 WL 6700499 (S.D. Fla. Oct. 20, 2020), the extent of their purported injury need not be “quantified.” (ECF 114 (Pls Opp.) at p. 24). However, *Colonial Van Lines* was a FDUTPA case in which the alleged deceptive conduct was trademark infringement wherein the defendant failed to answer the complaint and was defaulted. 2020 WL 6700499, at *1, *4. Nevertheless, the plaintiff in *Colonial Van Lines* (unlike Plaintiffs here) provided evidence of actual “consumer confusion about [the p]laintiff’s business, rates, and quality of service.” *Id.* at *4. Here, by contrast, Plaintiffs have adduced no evidence that consumers were confused about their businesses, rates, or quality of service. More critically, *Colonial Van Lines* never suggests that a FDUTPA plaintiff can show that it was “aggrieved” merely by having an alleged expert opine that it was aggrieved, especially where the evidence refutes that opinion. Plainly, Plaintiffs misapply *Colonial Van Lines* here. *Id.*

Similarly, the Plaintiffs’ reliance on *Ahearn v. Mayo Clinic*, 180 So. 3d 165 (Fla. 1st DCA 2015), is not helpful. (ECF 114 (Pls. Opp.) at pp. 19, 24). There, an individual brought a FDUTPA claim based on treatment he received at the defendant hospital. In assessing whether the plaintiff was “aggrieved,” the court relied on *Black’s Law Dictionary* for its definition of “aggrieved,” meaning: “(Of a person) angry or sad on grounds of perceived unfair treatment.” 180 So. 3d at 172. But as the Fourth DCA has recognized, corporate plaintiffs are not people and cannot feel

angry or sad, so the definition proposed in *Ahearn* is irrelevant when FDUPTA plaintiffs are companies. See, *Stewart Agency, Inc. v. Arrigo Enters., Inc.*, 266 So. 3d 207, 213-14 (Fla. 4th DCA 2019). Just as critically, *Ahearn* does not authorize a corporate FDUTPA plaintiff to show that it was “aggrieved” through expert testimony that conflicts with the plaintiff’s own financial records. And Plaintiffs are not permitted to do that here either. *Drew Estate Holding*, 875 F. Supp. 2d at 1370.

To the extent Dr. Berger’s first opinion is simply that consumers view “D” and “F” as bad grades, that too should be excluded because it concerns matters that “lie within the understanding of the average lay person.” *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1111 (11th Cir. 2005); see also *Blue Chip Alliance, LLC v. Chetu, Inc.*, 2025 WL 50391, at *11 (S.D. Fla. Jan. 8, 2025) (expert testimony not admissible “when it offers nothing more than what lawyers for the parties can argue in closing arguments”) (quoting *U.S. v. Frazier*, 387 F. 3d 1244, 1262-63 (11th Cir. 2004)). Plaintiffs do not even attempt to argue that this Court will need to hear from an expert to understand that “D” and “F” are bad grades.

B. Because Dr. Berger’s Second Opinion Is Essentially The Same As His First Opinion, It Too Should Be Excluded.

Dr. Berger’s second opinion – that if Leapfrog publishes the failing grades in the future, the “effects are likely to be amplified,” (ECF 97-2 (Berger Rep.) at ¶ 15) – should be excluded for the same reasons discussed above. Dr. Berger did not consider and does not know whether the Safety Grades did, in fact, have any effect on Plaintiffs’ reputations or caused them damages, so he certainly does not have any basis to know whether Plaintiffs will suffer damages in the future. As noted above, the Berger Report does not even opine on alleged damage to Plaintiffs’ reputation. (ECF 97-5 (Berger Dep. Tr.) at 99:7-17). Moreover, as also explained above, any purported opinion that Leapfrog caused damages to Plaintiffs’ reputations, or that Plaintiffs lost revenue or

customers because of the Safety Grades, would be testimony either opining as to what the facts should be or testimony going to the legal implications of purported conduct, and thus beyond the scope of proper expert testimony.

C. Dr. Berger's Third Opinion Is Neither Helpful Nor Reliable.

Dr. Berger's next proffered opinion is that "consumers are unlikely to understand that [Leapfrog] assigns the minimum possible score on imputed measures and the impact of the imputation methodology on the Hospital Safety Grades for non-participating hospitals." (ECF 97-2 (Berger Rep.) ¶15). As explained in Leapfrog's Daubert Motion, this opinion should be excluded as Dr. Berger is neither an expert in website design nor digital low literacy and admittedly never consulted with or surveyed any users of the Leapfrog website. (ECF 97-5 (Berger Dep. Tr.) at 14:2-15). And regardless, he cannot and does not offer any explanation for how inherently complex information can be presented to consumers without some chance of misunderstanding. (*See generally*, ECF 97-2 (Berger Rep.)). Taken to its logical conclusion, his opinion essentially implies that websites can never convey complex information to consumers without running afoul of FDUTPA. These continue to be the fundamental bases for excluding Dr. Berger's testimony.

To that end, Dr. Berger's opinion should be excluded because his Report essentially walks through the Leapfrog website's various webpages, describes the information that is on them, and then simply opines on how consumers will understand or not understand the pages. (ECF 97 (Def. Mot.) at pp. 16-17). In Opposition, the Plaintiffs claim that Dr. Berger "mapped Leapfrog's website" to show where certain disclosures are made and to argue that other disclosures are either inconsistent or incomplete. (ECF 114 (Pls. Opp.) at p. 33). But as explained in Leapfrog's Daubert Motion, simply clicking through website pages does not require an expert. (ECF 97 (Def. Mot.) at pp. 16-17). In And with regard to opining on how information is provided on various webpages,

Dr. Berger concedes that he is not an expert in website design or in how “digital low literacy” consumers would encounter or understand those pages. (ECF 97-5 (Berger Dep. Tr.) at 14:2-15). Rather, he simply tells the Court what the pages say.

Plaintiffs also argue that Dr. Berger’s opinion is not about the design of Leapfrog’s website, but is instead about the website’s “readers,” meaning “consumers.” (ECF 114 (Pls. Opp.) at p. 29). But Dr. Berger admitted that when reviewing Google Analytic data about visits to the Leapfrog website, he did not know whether the visits were from potential patients, or doctors, or hospital employees, or members of the press, or anyone else. (ECF 97-5 (Berger Dep. Tr.) at 53:21-56:10). Given this admission, any opinion about what “consumers” gleaned from the website is pure speculation and thus not proper expert testimony. *See, e.g., Hi Ltd. Partnership v. Winghouse of Fla., Inc.*, No. 6:03-cv-116-Orl-22JGG, 2004 WL 5486964 (M.D. Fla. Oct. 5, 2004) (excluding expert testimony as “product of guesswork”).

Similarly, Dr. Berger reviewed Google Analytics data in an effort to determine the percentage of visitors who navigated to or viewed Leapfrog’s scoring methodology document from its website. According to Dr. Berger, a user must visit Leapfrog’s Detailed Table View webpage to find a link to Leapfrog’s full scoring methodology used in assigning its Safety Grades. (ECF 97-5 (Berger Dep. Tr.) at 209:1-6). But again, Dr. Berger admits that he did not know whether the visits were from potential patients, or doctors, or hospital employees, or members of the press, or anyone else. (ECF 97-5 (Berger Dep. Tr.) at 53:21-56:10). And regardless, there are various ways that a consumer can navigate Leapfrog’s website to access information related to Leapfrog’s scoring methodology pdf; thus, the narrow Google Analytics data, for which Dr. Berger relies upon, is not a comprehensive reflection of who, when, or how consumers access Leapfrog’s information. In other words, Dr. Berger’s opinions are unreliable at best.

Leapfrog’s Daubert Motion also pointed out that Dr. Berger did not undertake a survey or any other analysis of what visitors to the Leapfrog website actually understood about Leapfrog’s Safety Grades or scoring methodology. (ECF 97 at pp. 16-17). Leapfrog noted that empirical data gathered from a consumer survey would be the best method of gauging user understanding of the website. (*Id.*). Rather than confront this point, Plaintiffs mischaracterize it, arguing that “asking consumers ‘whether they understand’ the [website’s] disclosures would be unreliable because ‘consumers may think they understand the information, but they may not actually.’” (ECF 114 (Pls. Opp.) at p. 30) (quoting ECF 97-5 (Berger Dep. Tr.) at 52:6-18). But Leapfrog never suggested that a proper survey would consist of simply asking consumers whether they understood the website, any more than a proper academic test would consist of asking the students whether they understand the subject. Obviously, to assess consumer understanding, any survey would need to analyze the information retained by consumers and whether it was comprehended correctly. Dr. Berger made no effort to determine what actual consumers understood from Leapfrog’s website even though such a survey would be critically important. For this reason, his opinion should be excluded. *See FTC v. Simple Health Plans LLC*, No. 18-CV-62593-Gayles/Strauss, 2021 WL 810262, at *7 (S.D. Fla. Mar. 3, 2021) (excluding expert opinion as speculative where “data was available, and [the expert] acknowledged he could have conducted, but did not conduct a survey to test his results”).

Dr. Berger opines that consumers are unlikely to understand that Leapfrog assigns the minimum possible score for the four imputed measures or the application of the scoring methodology. (ECF 97-5 (Berger Dep. Rep.) ¶15). However, as Leapfrog pointed out in its Daubert Motion, Dr. Berger does not opine as to how this information could be simplified for typical reasonable consumers, or if he even believes it is possible at all. And, in fact, Leapfrog’s human

factors/experience expert opines that the Hospital Safety Grade website's clarity, transparency, and usability is "significantly bolstered by content written at an accessible reading level" as the website can be understood by an audience with an 8th grade comprehension level. (ECF 96-5 (Vredenburg's Report) at p. 10). Indeed, Dr. Berger offers no such comparable opinion. Instead, the implication of Dr. Berger's approach is that because "complex" information can be difficult to convey in an easily comprehensible way, any consumer-oriented website trying to convey complex information is, by definition, deceptive (or at least potentially deceptive). Because he offers no expert opinion on how or whether such information can be presented in a way that he believes would be fully comprehensible to consumers, his opinion essentially constitutes an argument for the complete prohibition on presenting complex information to consumers. Such an opinion is not helpful or useful to the Court.

For all of the reasons stated above, Dr. Berger's opinions are fatally flawed and should be excluded. Thus, Leapfrog's motion to exclude his opinions should be granted.

III. DR. SEAN NICHOLSON'S OPINIONS & TESTIMONY SHOULD BE EXCLUDED.

Plaintiffs' attempts to salvage Dr. Nicholson's opinions are similarly flawed. Their Opposition hinges on this Court being willing to ignore the requirement that an "expert's opinion reflects a reliable application of the principles and methods *to the facts of the case.*" Fed. R. Evid. 702(d) (emphasis added). This requirement means an expert opinion that "is largely untethered from the actual facts of this case" should be excluded. *Laumann v. Nat'l Hockey League*, 117 F. Supp. 3d 299, 315 (S.D.N.Y. 2015). Dr. Nicholson's opinions fall short of this requirement because, as he testified, information regarding the actual performance of Plaintiffs' hospitals was "not available" to him. (ECF 97-6 (Nicholson Dep. Tr.) at 61:4). Dr. Nicholson even admits that he "was not asked to conduct an analysis of Plaintiff Hospitals' quality or measures that they're

using to manage their quality.” (*Id.* 41:2-5. Thus, Dr. Nicholson’s opinions are completely divorced from the quality (or lack of quality) of each Plaintiff hospital.

Plaintiffs’ Opposition does not explain why they kept their hospitals’ performances secret from Dr. Nicholson. But his ignorance undermines all his testimony. For example, as the Opposition concedes, the Plaintiffs “must show that they were ‘aggrieved’ by LEAPFROG’s conduct.” (ECF 114 (Pls. Opp.) at 14). And Plaintiffs rely on Dr. Nicholson’s testimony to show that. (*Id.*). But showing that Plaintiffs were “aggrieved” requires *evidence* that they deserved better grades than what Leapfrog gave them. Dr. Nicholson is ignorant on that subject, because the actual performance of Plaintiffs on Leapfrog criteria was “not available” to him. (ECF 97-6 (Nicholson Dep. Tr.) at 61:4). His testimony, therefore, “is largely untethered from the actual facts of this case.” *Laumann*, 117 F. Supp. 3d at 315. Instead, Dr. Nicholson is a generalist, constructing his opinions without knowledge of how Plaintiffs would have performed had they responded to Leapfrog’s survey and without even a general understanding of their safety record. Plaintiffs are not permitted to use expert testimony to sidestep their requirement to show that they did *in fact* receive lower scores than they would have received had they voluntarily participated in Leapfrog’s survey. *Drew Estate Holding*, 875 F. Supp. 2d at 1370.

The same flaw undermines Dr. Nicholson’s opinion that the Safety Grades do not “reliably predict actual patient safety outcomes.” (ECF 114 (Pls. Opp.) at p. 18). The alleged unreliability of the Safety Grades in the abstract is irrelevant. Plaintiffs must show *their grades* do not reliably predict actual patient safety outcomes *at their hospitals*. Dr. Nicholson is unable to do so, because again the relevant information about their hospitals was “not available” to him. (ECF 97-6 (Nicholson Dep. Tr.) at 61:4).

Plaintiffs attempt to explain their decision to hide this data from Dr. Nicholson by saying he did not need it – that Plaintiffs’ actual performance “was not the question his analysis was designed to answer.” (ECF 114 (Pls. Opp.) at p. 21). Instead, the Plaintiffs argue, Dr. Nicholson’s opinions are that Leapfrog is biased against nonparticipating hospitals generally. (*Id.*). Such an opinion matters, however, only if applied “to the facts of the case.” Fed. R. Evid. 702(d). Dr. Nicholson is unable to make that connection, because like the economist in *Sheffield v. Int’l Paper Co.*, No. 2018-CV-02701-JPM-CGC, 2020 WL 1882906 (W.D. Tenn. Feb. 26, 2020), Dr. Nicholson offers opinions that are “untethered from actual known factual data on the Plaintiff [hospitals] in the case,” including their “individual traits.” *Id.* Such generalities do not satisfy Rule 702.

The Opposition addresses the applicable case law only briefly in a footnote. (ECF 114 at p. 22 n. 6). The obligation to tie experts’ opinions to the actual facts, Plaintiffs say, does not apply in this case. (*Id.*). However, Rule 702 and case law make clear that *Daubert* and its progeny apply to *all* expert opinions. As the U.S. Supreme Court explained in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999):

Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to “ensure that any and all scientific testimony ... is not only relevant, but reliable.” [quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).] The initial question before us is whether this basic gatekeeping obligation applies only to “scientific” testimony or to *all expert testimony*. We, like the parties, believe that it applies to *all expert testimony*.

Id. at 146. The Plaintiffs cite no case law – and offer no reason – why this gatekeeping obligation applies in the “antitrust context” (ECF 114 (Pls. Opp.) at p. 22 n. 6) but not in this case. Rule 702 and its case law apply to “all expert testimony.” *Kumho Tire*, 526 U.S. at 146. And yet in the same way that the excluded economist in *Sheffield* relied on “general statistics about average Americans,” 2020 WL 1882906, at *4, Dr. Nicholson relied upon the scores of the average

hospital. (ECF 97-6 (Nicholson Dep. Tr.) at 60:10-61:20); (ECF 97-3 (Nicholson Rep.) ¶ 66). His opinions, therefore, are “untethered from actual known factual data on the Plaintiff[s] in this case.” *Sheffield*, 2020 WL 1882906, at *4. Consequently, Dr. Nicholson’s opinions do not satisfy Rule 702.

For all of the reasons stated above, Dr. Nicholson’s opinions are fatally flawed and should be excluded. Thus, Leapfrog’s motion to exclude his opinions should be granted.

CONCLUSION

WHEREFORE, Defendant The Leapfrog Group respectfully requests that the Court grant its Daubert Motion, exclude the testimony of Plaintiffs’ expert witnesses, and grant such other and further relief as the Court deems proper. (*See*, proposed order at ECF 97-7).

Dated: December 3, 2025

Respectfully submitted,

WILSON ELSEER MOSKOWITZ
EDELMAN & DICKER LLP.

By: /s Jura C. Zibas
Jura C. Zibas, Esq.
Florida Bar No.: 124571
2063 Main Street - Suite 100
Sarasota FL 34237
Telephone: 941-866-8561
Fax: 941-210-5979
Jura.Zibas@wilsonelser.com
Cheryl.Kujawski@wilsonelser.com

Kimberly E. Blair
Kimberly E. Blair (pro hac vice)
kimberly.blair@wilsonelser.com
Illinois Bar ID # 6272934
161 N. Clark, Ste. 4500
Chicago, IL 60601
312.821.6139 (Direct)
Attorneys for Defendant, The Leapfrog Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 3, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send an electronic notification of such filings to all counsel of record in the Court's ECF filing system.

/s/ Jura Zibas

Attorney for Defendant