THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:25-CV-80526-DMM

GOOD SAMARITAN MEDICAL CENTER, INC., et al.,

Plaintiffs,

v.

THE LEAPFROG GROUP,

Defendant.

THE COMMUNITY HOSPITALS' OPPOSITION TO LEAPFROG'S MOTION *IN LIMINE* TO PRECLUDE TESTIMONY FROM DR. SEAN NICHOLSON AT TRIAL

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INTRODUCTION

On the eve of trial, Leapfrog asks the Court to impose artificial and out-of-context limitations on the scope of the expert testimony to be provided by Dr. Sean Nicholson, the Community Hospitals' healthcare economics expert on hospital rating methodologies. Yet Leapfrog never clearly specifies the purportedly "new opinions" it seeks to exclude. ECF 143 ("Mot.") ¶ 6. Rather, it says they are reflected in three paragraphs of the Community Hospitals' Proposed Findings of Fact. *Id.* ¶ 3 (citing ECF 136 at 65–66 ¶¶ 219–20, 222). For ease of review, the Community Hospitals have reproduced the relevant paragraphs in an appendix to this brief.

None of the three cited paragraphs contains any new or undisclosed expert opinions. Instead, they largely articulate facts that are supported by existing record evidence and are, by no coincidence, highly damaging to Leapfrog's case. In particular, the evidence at trial will show that *no* hospital that has opted out of Leapfrog's Survey "[s]ince the Fall 2024 Safety Grade methodology change" and that is subject to "Step 2 Imputation" (*i.e.*, automatic assignment of the lowest possible scores on the Four Measures) "has received an 'A' Safety Grade." ECF 136 at 65 ¶ 219.[1] Conversely, not a single participating hospital since the Fall 2024 change has received the lowest possible scores on all Four Measures. *Id.* at 65 ¶ 220. This evidence—detailed in Leapfrog's own documents and data Dr. Nicholson cited and discussed in his report—powerfully confirms that Leapfrog's Safety Grade methodology imposes an arbitrary, deceptive, and unfair penalty on non-participating hospitals that is not tied to those hospitals' actual safety performance. Leapfrog's motion appears to be merely a last-minute, backdoor effort to preempt testimony about these devastating facts.

The cited paragraphs of the Community Hospitals' Proposed Findings of Fact are also fully consistent with and encompassed by the expert opinions and findings disclosed in Dr. Nicholson's report and discussed during his deposition. For example, the primary subject matter of paragraph 222 is the issue of "non-response bias," ECF 136 at 66 ¶ 222—*i.e.*, the unsupported notion that hospitals that do not participate in Leapfrog's Survey do so because they know they would score poorly on the Survey-related measures. Dr. Nicholson squarely addressed that issue in his expert report and deposition testimony, *see, e.g.*, ECF 97-3 (Nicholson Rep.) ¶¶ 67–68, and Leapfrog's putative rebuttal expert, Dr. Anthony Harris, did as well, *see, e.g.*, ECF 96-3 (Harris Rep.) at 13–

[1] The Four Measures are (1) Computerized Physician Order Entry; (2) Bar Code Medication Administration; (3) ICU Physician Staffing; and (4) Hand Hygiene Score. ECF 136 at 21–22 ¶ 67.

15. Paragraph 222 in the Proposed Findings of Fact, along with Paragraphs 219 and 220, do not plow any new ground and only confirm Dr. Nicholson's disclosed opinions.

Leapfrog's motion is also premised on a demonstrable inaccuracy. Leapfrog asserts that the trial exhibit cited in all three paragraphs—PX-412.0 (a spreadsheet containing Leapfrog's own Safety Grade data)—"was not reviewed, referenced or relied on by Dr. Nicholson in his Rule 26 expert report." Mot. ¶ 5. That is incorrect. PX-412.0 is the document marked in discovery as "LEAPFROG00020679," ECF 129 at 56, and that document is expressly identified in the "Documents Considered List" appended to Dr. Nicholson's report and referenced repeatedly throughout his report, *see* ECF 97-3 (Nicholson Rep.) app. C at 1, 5; *id.* ¶¶ 3, 19, 59 & Exs. 2–3, 62 & n.131, 66 & Exs. 5–6, 70 n.154.

Notably, Leapfrog nowhere suggests that anything in the three cited paragraphs reflects expert testimony that is irrelevant, unhelpful, or unreliable under Federal Rule of Evidence 702, or that Dr. Nicholson is not qualified to provide. Leapfrog invokes only Federal Rules of Civil Procedure 26 and 37. But there is no Rule 26 violation, and no prejudice to Leapfrog, because Dr. Nicholson timely disclosed all the expert opinions he will offer at trial and Leapfrog cross-examined Dr. Nicholson extensively about those opinions during his deposition. There is no basis to exclude or limit Dr. Nicholson's fully competent expert testimony, which will assist the Court in understanding critical issues including the unreliability of Leapfrog's Safety Grade methodology, "the relevant measures in dispute," and the "penalty" that the methodology imposes on non-participating hospitals. ECF 139 at 10. Leapfrog's motion should be denied in full.

BACKGROUND

Dr. Nicholson, a Professor of Economics at Cornell University, is an expert in hospital grading methodologies whom the Community Hospitals retained to testify about Leapfrog's Safety Grade methodology. Dr. Nicholson therefore disclosed, in an expert report filed on August 7, 2025, the opinions he intends to offer at trial—namely, that Leapfrog's Safety Grade methodology (1) significantly deviates from peer-reviewed principles for reliably measuring hospital quality (Opinion One), ECF 97-3 (Nicholson Rep.) ¶¶ 22–30, 39–57; (2) generates inflated Safety Grades for hospitals that participate in Leapfrog's Survey and deflated Safety Grades for hospitals that do not participate (Opinion Two), *id.* ¶¶ 58–68; (3) results in Safety Grades that do not reliably predict hospital quality and safety (Opinion Three), *id.* ¶¶ 69–71; and (4) can inflict harm on patients and hospitals (Opinion Four), *id.* ¶¶ 31–38.

As one method of supporting these opinions, Dr. Nicholson analyzed Leapfrog's own raw data regarding the scores hospitals receive on the measures that factor into the Safety Grades. That raw structured data, which takes the form of a spreadsheet, is cited in appendix C to Dr. Nicholson's report and referenced throughout the report. *See* ECF 97-3 (Nicholson Rep.) app. C at 1, 5 (listing "LEAPFROG00020679 ('TLG Hospital Safety Grade data')" in his "Documents Considered List"); *id.* ¶ 59 & Exs. 2–3 (discussing "my analysis of the data produced by TLG in this matter" and citing "TLG Hospital Safety Grade data" as the "Source" for Exhibits 2 and 3); *see also, e.g.*, *id.* ¶¶ 3, 19, 62 & n.131, 66 & Exs. 5–6, 70 n.154 (similar). That spreadsheet is now marked as PX-412.0, and it was included on the Community Hospitals' trial exhibit list filed with the pre-trial stipulation on December 15, 2025. ECF 129 at 56 (noting "LEAPFROG00020679" as the "Bates" number for "PX-412.0").

Dr. Nicholson's analysis of Leapfrog's data formed a core part of his Opinion Two—that Leapfrog's Safety Grades are inflated for participating hospitals and deflated for non-participating hospitals. For example, "[b]ased on [his] analysis of th[at] data," he found that, "in the last available round of [Leapfrog's] [S]urvey"—the "Spring 2025" grading cycle—"participating hospitals still tend to give themselves the highest possible score[s] on the self-reported process measures," *i.e.*, the measures for which "non-participating hospitals are given the lowest possible scores." ECF 97-3 (Nicholson Rep.) ¶ 59. Relatedly, the data showed "marked difference[s]" in Safety Grades "between participating and non-participating hospitals"—in particular, that "98%" of "all U.S. hospitals" that received Safety Grades of "A" or "B" in Spring 2025 "elected to complete [Leapfrog's] Survey." *Id.* ¶ 62 & n.131. In addition, Dr. Nicholson addressed Leapfrog's "implied claims" in public statements "that lack of participation in its [S]urvey is a signal of lower hospital safety." *Id.* ¶ 68; *see id.* ¶ 67 (describing Leapfrog's implied claims). He explained that he was "not aware of any evidence provided by [Leapfrog] to support" such claims, and in fact those claims are "contradicted by academic literature" finding "no statistically significant differences" in "patient health outcomes" "between hospitals that chose to participate in [Leapfrog's] [S]urvey and those that did not." *Id.* ¶ 68.

On September 4, 2025—four days before Dr. Nicholson's deposition—Dr. Anthony Harris, Leapfrog's putative methodology expert, served his expert report. ECF 96-3. Among other things, Dr. Harris opined that, due to "[n]onresponse bias," "hospitals that choose not to report their results are hospitals that know that they are poor performing on the process/structural

measures being collected" by Leapfrog's Survey. *Id.* at 13. This opinion echoed Leapfrog's own "implied claims" about non-response bias, which—as noted above—Dr. Nicholson had squarely addressed in his report. ECF 97-3 (Nicholson Rep.) ¶¶ 67–68.

During Dr. Nicholson's September 8, 2025 deposition, he testified extensively about numerous subjects, including: (1) how Leapfrog's data shows that it systemically disadvantages non-participating hospitals compared to participating hospitals, *see, e.g.*, ECF 114-6 (Nicholson) at 24:8–24, 119:24–120:11, 161:9–24; and (2) the "nonresponse bias" issue, reiterating that his analysis of Leapfrog's data had not revealed any information "substantiat[ing]" Dr. Harris's opinion that hospitals choose not to participate in Leapfrog's Survey because they perform poorly on safety measures, *id.* at 81:3–82:24; *see also, e.g.*, *id.* at 83:17–84:7, 136:3–137:1, 147:21–149:1. Related to both subjects, Dr. Nicholson also testified at length regarding his finding that "a majority" of participating hospitals "are getting the maximum value on th[e] seven variables" measured by Leapfrog's Survey. *Id.* at 82:25–83:15; *see also, e.g.*, *id.* at 39:3–16, 60:10–21, 63:7–15, 101:18–102:6, 109:13–110:7, 131:3–132:22, 134:12–22, 138:19–139:2.

On November 10, 2025, the Community Hospitals moved to exclude Leapfrog's putative experts, including Dr. Harris, under Federal Rule of Evidence 702 and Federal Rules of Civil Procedure 26 and 37. ECF 96. And on November 12, 2026, Leapfrog moved to exclude the Community Hospitals' experts under Rule 702. ECF 97. As to Dr. Nicholson, Leapfrog challenged only one component of one of his opinions—namely, the counterfactual analysis he conducted in support of his Opinion Two, in which he calculated the Safety Grades non-participating hospitals might have received had they participated in Leapfrog's Survey as a way of measuring the impact of participation in the Survey versus non-participation. ECF 114 at 6–17. Both motions are pending.

On January 5, 2026, the parties filed their respective Proposed Findings of Fact and Conclusions of Law. ECF 135; ECF 136. On January 13, 2026, Leapfrog moved to exclude purportedly "new" opinions of Dr. Nicholson reflected in paragraphs 219, 220, and 222 of the Community Hospitals' Proposed Findings of Fact. ECF 143; *see* ECF 136 at 65–66, ¶¶ 219–20, 222.

LEGAL STANDARD

Motions *in limine* are generally "disfavored," especially in bench trials, because "admissibility questions should" typically "be ruled upon as they arise at trial." *Begualg Inv. Mgmt., Inc. v. Four Seasons Hotel Ltd.*, 2013 WL 750309, at *1 (S.D. Fla. Feb. 27, 2013). Under Rule 26, expert

reports "must contain … a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). "An expert report meets th[is] requirement 'when it is sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced.'" *Landivar v. Celebrity Cruises, Inc.*, 340 F.R.D. 192, 195 (S.D. Fla. 2022) (citation omitted). "To that end, Rule 26 'does not limit an expert's testimony simply to reading his report' and indeed 'contemplates that the expert will supplement, elaborate upon, and explain his report in his oral testimony.'" *Id.* (quoting *Searcy v. United States*, 2020 WL 4187392, at *3 (S.D. Fla. July 21, 2020)); *accord, e.g.*, *Muldrow ex rel. Est. of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007) (same); *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006) (same). That principle has particular force "in the context of a non-jury bench trial." *Searcy*, 2020 WL 4187392, at *3. An expert is obliged to "supplement" his report only when the report "is incomplete or incorrect" "in some material respect," "and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. 26(e)(1)–(2).

Even when a violation of Rule 26(a) or Rule 26(e) has occurred, exclusion is not permitted if the non-disclosure is "substantially justified" or "harmless." Fed. R. Civ. P. 37(c)(1). Non-disclosure is "substantially justified" if there "exist[s] 'justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required'" to make the disclosure. *Searcy*, 2020 WL 4187392, at *3 (citation omitted). Non-disclosure is "harmless" where "there is no prejudice to the party entitled to receive the disclosure." *Id.* (citation omitted).

ARGUMENT

The Community Hospitals have not violated Rule 26, and Leapfrog has not suffered any prejudice, because Dr. Nicholson had no obligation to "supplemen[t]" his expert report. *Contra* Mot. ¶ 12. The opinions he will offer at trial are the same ones contained within his report timely served on August 7, 2025, and to which he testified at his September 8, 2025 deposition. Paragraphs 219, 220, and 222 of the Community Hospitals' Proposed Findings of Fact do not encompass any new opinions; instead, they reflect facts and anticipated trial testimony that support and confirm Dr. Nicholson's previously disclosed opinions. And contrary to Leapfrog's assertion, Mot. ¶ 5, the trial exhibit cited in those paragraphs—PX-412.0—was extensively cited and discussed in Dr. Nicholson's report (and at his deposition). Leapfrog offers no basis to limit Dr. Nicholson's relevant, helpful, and reliable expert testimony that he is highly qualified to provide.

I. There Is No Rule 26 Violation Because Dr. Nicholson Will Not Be Providing Any New Expert Opinions At Trial

No violation of Rule 26 has occurred because Dr. Nicholson's timely served expert report contains "a complete statement of all opinions [he] will express" at trial "and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). Paragraphs 219, 220, and 222 of the Community Hospitals' Proposed Findings of Fact do not reflect any new expert opinions.

Paragraphs 219 and 220. The second sentence of paragraph 219 and the sole sentence in paragraph 220 assert facts that are devastating to Leapfrog's case: (1) "[s]ince the Fall 2024 Safety Grade methodology change," "[n]o nonparticipating hospital has received an 'A' Safety Grade when Leapfrog assigned '[L]imited [A]chievement' on all Four Measures under Step 2 Imputation," ECF 136 at 65 ¶ 219 (citing PX-412.0); and (2) conversely, since the change, "no participating hospital has received 'Limited Achievement' scores on all Four Measures," *id.* at 65 ¶ 220 (citing PX-412.0). In other words, Leapfrog's Safety Grade methodology imposes an automatic penalty on non-participating hospitals that bears no relation to their actual safety performance. The cited trial exhibit that supports these facts, PX-412.0, contains Leapfrog's own Safety Grade data and was discussed several times in Dr. Nicholson's report. *See, e.g.*, ECF 97-3 (Nicholson Rep.) ¶¶ 3, 19, 59 & Exs. 2–3, 62 & n.131, 66 & Exs. 5–6, 70 n.154.

These facts directly support one component of Dr. Nicholson's forthcoming trial testimony—reflected in the first sentence of paragraph 219—that "Safety Grade outcomes have diverged sharply between participating and nonparticipating hospitals" since the Fall 2024 change. ECF 136 at 65 ¶ 219. That testimony is a key premise for Dr. Nicholson's Opinion Two—that Leapfrog's Safety Grade methodology is systematically biased against non-participating hospitals as compared to participating hospitals—and it comes directly from Dr. Nicholson's report and deposition testimony. *See, e.g.*, ECF 97-3 (Nicholson Rep.) ¶ 3 ("[H]ospitals that participate in [Leapfrog's] [S]urvey are unfairly advantaged relative to those that do not."); *id.* ¶ 62 ("the Spring 2025 [Leapfrog] [Safety] [G]rades" "demonstrate the marked difference in [Safety] [G]rades between participating and non-participating hospitals"); ECF 114-6 (Nicholson) at 39:3–16 ("[Leapfrog's] method inappropriately inflates those scores for the hospitals that report [data to the Survey] and inappropriately deflates the score[s] for hospitals that don't report.").

Paragraphs 219 and 220 thus contain *facts*, not opinions, and certainly not *new* opinions. They do not show any Rule 26 violation and do not warrant any limitations on Dr. Nicholson's trial testimony. *See* Fed. R. Civ. P. 26(e)(1)(A) (supplementation required only if "the disclosure"

is "incomplete or incorrect" "in some material respect"); *accord, e.g.*, *Landivar*, 340 F.R.D. at 195 (Rule 37(c)(1) applies only to "undisclosed" expert opinions); *Ahmed v. Johnson & Johnson Healthcare Sys., Inc.*, 2024 WL 693078, at *12 (S.D. Ala. Feb. 20, 2024) ("no supplementation is needed for merely explaining an opinion that [the expert] already detailed in his report"). Indeed, Leapfrog itself invokes paragraphs 219 and 220 only insofar as purportedly "new opinions and analyses" contained in paragraph 222 "rel[y]" on the facts in those paragraphs. Mot. ¶ 4.

Paragraph 222. Paragraph 222 likewise contains no new opinions. The paragraph is a proposed factual finding that "non-response bias" is not a valid basis for Leapfrog's Safety Grade methodology. ECF 136 at 66 ¶ 222. Dr. Nicholson squarely addressed that issue in his expert report in rebutting Leapfrog's "implied claims that lack of participation in its [S]urvey is a signal of lower hospital safety." ECF 97-3 (Nicholson Rep.) ¶ 68. He also addressed "nonresponse bias" numerous times at his deposition. ECF 114-6 (Nicholson) at 81:3–82:24, 83:17–84:7, 147:21–149:1. All this refutes any notion that paragraph 222 reflects new opinions.

Each sentence in paragraph 222 corresponds to portions of Dr. Nicholson's report and deposition testimony. The first sentence explains that hospitals "that did not participate in the Survey in 2024 but chose to participate in 2025" "received, on average, scores far exceeding" the "'Limited Achievement'" scores that non-participating hospitals receive on the Four Measures. ECF 136 at 66 ¶ 222. That fact is reflected in PX-412.0, *see id.* (citing PX-412.0), which is the spreadsheet containing Leapfrog Safety Grade data that was cited, discussed, and analyzed in Dr. Nicholson's report. *See supra* at 3, 6. And that fact corresponds to Dr. Nicholson's finding, based on his analysis of Leapfrog's data, that "the majority of participating hospitals" in the "Spring 2025" Safety Grade cycle received "the highest possible score[s]" on the Survey measures—*i.e.*, scores far exceeding the minimum "Limited Achievement" scores Leapfrog automatically assigns to non-participating hospitals. ECF 97-3 (Nicholson Rep.) ¶¶ 59, 61; *see also, e.g.*, ECF 114-6 (Nicholson) at 39:3–16, 60:10–21, 63:7–15, 82:25–83:15, 101:18–102:6, 109:13–110:7, 131:3–132:22, 134:12–22, 138:19–139:2.

The second sentence of paragraph 222 directly *quotes* Dr. Nicholson's report—specifically, his discussion of "academic literature finding 'no statistically significant differences'" in "'patient health outcomes'" "'between hospitals that chose to participate in [Leapfrog's] hospital [S]urvey and those that did not.'" ECF 136 at 66 ¶ 222 (quoting PX-937.0 ¶ 68); *see* ECF 129 at 68 ("PX-937.0" is the "Expert Report of Professor Sean Nicholson"). Dr. Nicholson discussed that

same academic literature at his deposition. *See, e.g.*, ECF 114-6 (Nicholson) at 136:17–137:1 (responding to question about "the nonresponse bias that Dr. Harris discusses" by saying, "I cite literature that does show in [many] instances the nonrespondents have very similar patient safety, patient quality measures as the respondents"); *id.* at 62:21–63:15, 81:3–14, 82:25–83:15, 85:14–25, 136:3–15. And the third sentence of paragraph 222 states that "[n]either Leapfrog's Expert Panel nor Leapfrog considered or identified any empirical data suggesting nonparticipating hospitals would perform poorly on the Four Measures before rigging the 'imputation model' to assign nonparticipants 'Limited Achievement.'" ECF 136 at 66 ¶ 222. That is a fact supported by the evidence, and it corresponds to Dr. Nicholson's statement in his report that he is "not aware of any evidence provided by [Leapfrog] to support" Leapfrog's "implied claims that lack of participation in its [S]urvey is a signal of lower hospital safety." ECF 97-3 (Nicholson Rep.) ¶ 68. Dr. Nicholson also repeatedly explained and elaborated on that statement during his deposition. *See, e.g.*, ECF 114-6 (Nicholson) at 81:3–14 ("I haven't seen any information from the Leapfrog Group" that "substantiate[s]" Leapfrog's and Dr. Harris's assumption of "nonresponse bias"); *id.* at 149:2–8 (not "recall[ing] seeing" "anything quantitative" or "even" "theoretica[l]" "about nonresponse bias" in "meeting minutes" from Leapfrog's "[S]afety [G]rade [E]xpert [P]anel meetings").

The full context here confirms that trial testimony from Dr. Nicholson on the subject of "nonresponse bias," ECF 136 at 66 ¶ 222, is wholly appropriate. As noted, Dr. Nicholson directly addressed nonresponse bias in his report, as part of his Opinion Two that Leapfrog's Safety Grade methodology artificially deflates the Safety Grades of non-participating hospitals. *See, e.g.*, ECF 97-3 (Nicholson Rep.) ¶¶ 67–68. The issue of nonresponse bias then became even *more* salient when Dr. Harris served his expert report, which contained an opinion about "[n]onresponse bias." ECF 96-3 (Harris Rep.) at 13. Dr. Nicholson's deposition took place four days after Dr. Harris served his report; having reviewed that newly issued report, Dr. Nicholson's testimony addressed Dr. Harris's opinion on nonresponse bias head-on, drawing from the opinions and findings that Dr. Nicholson had already addressed and disclosed in his report. *See, e.g.*, ECF 114-6 (Nicholson) at 81:3–82:24, 83:17–84:7, 147:21–149:1. Paragraph 222 thus reflects testimony that is consistent with Dr. Nicholson's report and deposition testimony and that is based on the documents cited and discussed in his report, including the spreadsheet now marked as PX-412.0. That testimony is well within the scope of Dr. Nicholson's disclosed opinions, ensuring no Rule 26 violation. *See, e.g.*, *Landivar*, 340 F.R.D. at 195 (expert is "not limited 'to reading his report'" (citation omitted));

Searcy, 2020 WL 4187392, at *3 (expert can "elaborate upon … and explain his report in his oral testimony" (citation omitted)); *Ward v. Carnival Corp.*, 2019 WL 1228063, at *3 (S.D. Fla. Mar. 14, 2019) ("neither declaration constitutes a 'new' expert opinion" because "[b]oth … buil[t] upon the original reports, without changing any of the conclusions or opinions found therein").[2]

II. There Is No Prejudice To Leapfrog

Leapfrog is not prejudiced here because, first and foremost, Dr. Nicholson timely disclosed the opinions he intends to offer at trial and paragraphs 219, 220, and 222 reflect no new opinions or new documents, as explained above. There is also no prejudice because Dr. Nicholson sat for a full-day deposition and provided extensive testimony on the subjects at issue in paragraphs 219, 220, and 222. *See supra* at 6–8. Leapfrog thus has had more than a "reasonable opportunity to prepare for effective cross-examination and … arrange for expert testimony" that attempts to rebut Dr. Nicholson. *Contra* Mot. ¶ 10. Indeed, Leapfrog *has* in fact proffered a rebuttal expert—Dr. Harris—who squarely opined on the issue of nonresponse bias addressed in paragraphs 219, 220, and 222 (though Dr. Harris's opinion on nonresponse bias is inadmissible under Rule 702 because it is unreliable and unhelpful, *see* ECF 96 at 34–35). For all these reasons, the only case Leapfrog cites in its motion—*Reese v. Herbert*, 527 F.3d 1253 (11th Cir. 2008)—is inapposite. There, the putative expert's *initial* expert report was not served until "nearly seven weeks after the expiration of the discovery period." *Id.* at 1264. There is no dispute here that Dr. Nicholson was timely disclosed as an expert and that his report was timely served.

Leapfrog also makes the curious decision to devote approximately half of its motion to an unrelated, non-testimonial attorney exchange at the deposition of a *different* expert, Dr. Harris, suggesting that Leapfrog is "extremely prejudiced" because the exchange purportedly demonstrates bad-faith tactics on the part of the Community Hospitals' counsel. Mot. ¶¶ 13–18. Nothing could be further from the truth. At Dr. Harris's deposition, the Community Hospitals' counsel marked "Exhibit 11," which counsel accurately described as "a demonstrative that was prepared using the Leapfrog [S]afety [G]rade data that Leapfrog produced in this litigation." ECF 96-8 (Harris) at 227:21–228:11. This Exhibit 11 is *not* the PX-412.0 exhibit upon which Dr. Nicholson relied when preparing his report and that is cited in paragraphs 219, 220, and 222 of the

[2] At bare minimum, Dr. Nicholson's decision not to supplement his report with findings and conclusions that duplicate, are fully consistent with, and are supportive of the opinions already disclosed in that report was "substantially justified" because "a reasonable person" would be "satisf[ied]" "that parties could differ as to whether" supplemental disclosures were "required" in that scenario. *Searcy*, 2020 WL 4187392, at *3 (citation omitted).

Community Hospitals' Proposed Findings of Fact—Exhibit 11 is a demonstrative *based on* the raw data in PX-412.0. *See* ECF 143-3 ("Source: TLG Hospital Safety Grade Data"). When marking Exhibit 11, counsel stated that "Dr. Nicholson" and "The Cornerstone Group" "facilitated in [its] preparation." *Id.* at 228:12–20. Counsel's reference to "Dr. Nicholson" was inadvertent—only Cornerstone prepared Exhibit 11, as counsel promptly "certif[ied]" on a signed errata sheet. ECF 143-4.

Contrary to Leapfrog's accusation, counsel was not "attempt[ing] to hide" anything via the errata sheet—to the contrary, counsel was being fully transparent and responsible in correcting an inadvertent misstatement made during Dr. Harris's full-day deposition. *Contra* Mot. ¶ 16. And Leapfrog's suggestion that this exchange and errata sheet were part of "an attempt to ambush" Leapfrog at trial with undisclosed opinions from Dr. Nicholson is equally unfounded. *Contra* Mot. ¶ 15. Counsel stated during the exchange that Dr. Nicholson "has not supplemented his opinion[s]," ECF 96-8 (Harris) at 228:21–229:7; that was and remains true for all the reasons explained. Dr. Nicholson was not involved in the preparation of Exhibit 11 and does not intend to use it in his trial presentation, the spreadsheet data that formed the basis for Exhibit 11 was cited and discussed in his expert report, and the opinions he intends to offer at trial are fully consistent with that report and his deposition testimony.

CONCLUSION

Leapfrog's motion to exclude Dr. Nicholson's purportedly "new" expert opinions should be denied in full.

Dated: January 15, 2026

Respectfully submitted,

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APPENDIX

THE COMMUNITY HOSPITALS' PROPOSED FINDINGS OF FACT THAT ARE INVOKED IN LEAPFROG'S MOTION

Paragraph	Proposed Findings of Fact
¶ 219	Since the Fall 2024 Safety Grade methodology change, Dr. Nicholson observed that Safety Grade outcomes have diverged sharply between participating and nonparticipating hospitals. No nonparticipating hospital has received an "A" Safety Grade when Leapfrog assigned "limited achievement" on all Four Measures under Step 2 Imputation. PX-412.0.
¶ 220	At the same time, no participating hospital has received "Limited Achievement" scores on all Four Measures, PX-412.0,—confirming Leapfrog's "imputation" of "Limited Achievement" for the Four Measures has no connection to perceived performance at *any* hospital nationwide.
¶ 222	Belying the non-response bias arguments and Leapfrog's methodology more generally, Dr. Nicholson found that hospitals that did not participate in the Survey in 2024 but chose to participate in 2025 after Leapfrog imposed its punitive methodology received, on average, scores far exceeding "Limited Achievement", and even above Leapfrog's "Considerable Achievement" threshold. PX-412.0. Dr. Nicholson's findings are consistent with academic literature finding "no statistically significant differences between hospitals that chose to participate in [Leapfrog's] hospital survey and those that did not, in terms of several patient health outcomes measured by CMS in its Hospital Compare program." PX-937.0 ¶ 68. Neither Leapfrog's Expert Panel nor Leapfrog considered or identified any empirical data suggesting nonparticipating hospitals would perform poorly on the Four Measures before rigging the "imputation model" to assign nonparticipants "Limited Achievement."

See ECF 136 at 65–66 ¶¶ 219–20, 222.