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 TO EXCLUDE EVIDENCE

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INTRODUCTION

As the Community Hospitals have explained throughout this case, Leapfrog's deceptive and unfair Safety Grades have caused substantial harm to the Community Hospitals and those they serve. These harms did not stop when fact discovery closed. To the contrary, Leapfrog continued to disseminate its Safety Grades, including most recently in November 2025, and promote the Safety Grades in the press and online. The Community Hospitals, patients, physicians, insurers, and other third parties thus continue to experience negative real-world effects. In light of these unfolding developments, and in response to this Court's summary-judgment order, the Community Hospitals updated their exhibit and witness lists to reflect the evolving state of the evidence.

Leapfrog now seeks to exclude that evidence on the mistaken premise that the Community Hospitals committed discovery violations by not disclosing the witness and exhibits at issue during the discovery period. Leapfrog's arguments are meritless. The Community Hospitals did not "withh[o]ld" these documents in discovery. Mot. 2. Eight of the nine documents at issue did not even *exist* during the discovery period. The ninth document, reflecting the cancellation of a contract with the Community Hospitals, was first reviewed by counsel just days ago—and was promptly disclosed to Leapfrog upon receipt. And *all* the documents, as well as the disclosure of the Community Hospitals' witness Dr. Hernandez, are squarely responsive to the Court's recent summary-judgment order concerning the standard for consumer harm in unfairness claims. *See* ECF 139 at 9 n.5. The Community Hospitals believe that the evidence they submitted in support of their motion for summary judgment, *see* ECF 86 at 13–14, was more than sufficient under applicable law, especially in light of intervening circuit precedent.[1] Nonetheless, the Community Hospitals appreciate the Court's guidance on summary judgment and have accordingly worked diligently to develop and disclose additional evidence demonstrating actual harm to patients, consistent with patient confidentiality constraints.

The challenged evidence underscores the continuing nature of the harm the Community Hospitals and others have experienced due to the Leapfrog Safety Grades, and it bears directly on the issues the Court has identified as relevant for trial. Excluding this evidence—particularly in a case seeking prospective relief—would improperly insulate Leapfrog from evidence of the very

[1] *See also* The Community Hospitals' Motion for Partial Reconsideration, ECF 152 at 2 (explaining that the Eleventh Circuit held in *FTC v. Corpay, Inc.*, 2026 WL 35708, at *18 (11th Cir. Jan. 6, 2026), that a practice is unfair if it "causes *or is likely to cause* substantial injury to consumers").

ongoing harm its Safety Grades perpetuate. Governing law and basic principles of transparency, which Leapfrog claims to promote, support the Court's consideration of the most current and complete record of the real-world consequences that continue to flow from Leapfrog's conduct. Leapfrog's motion should be denied in full.

FACTUAL BACKGROUND

Fact discovery in this case closed on September 25, 2025. Following the end of this period, the parties were not obligated to continue proactively searching for documents responsive to the others' inquiries. Yet real-world events related to this litigation have continued to unfold, including Leapfrog's publication of its Fall 2025 Safety Grades. These events have caused further harm to the Community Hospitals, physicians, patients, insurers, and other third parties. And the Community Hospitals have thus continued to timely disclose to Leapfrog new documents reflecting this ongoing harm. *See* Declaration of Lee Crain ("Decl.") ¶¶ 10–14. The Community Hospitals have also disclosed items specifically in response to the Court's January 7, 2026 order, ECF 139, denying both parties' motions for summary judgment. *See* Decl. ¶¶ 11–12, 14. On January 13, 2026, Leapfrog filed a motion *in limine* to exclude the new evidence included in those lists. ECF 144.

A. Updated Exhibit List

The Community Hospitals added nine (9) documents to their exhibit list on a rolling basis from December 20, 2025 to January 13, 2026.[2] Eight of these nine documents were created *after* the close of discovery in September 2025, so could not *possibly* have been withheld during the discovery period as Leapfrog claims, and all were disclosed promptly after they came into existence or were identified by the Community Hospitals as relevant evidence. These documents fall into the categories discussed below.

1. Menacing Third-Party Communication Directed to Good Samaritan (PX-548.0). This exhibit consists of a newspaper article dated November 27-December 3, 2025, regarding competitor hospital Jupiter Medical Center's Fall 2025 "A" Safety Grade, accompanied by an envelope addressed to Sheri Montgomery, the Chief Executive Officer of Good Samaritan Medical Center ("Good Samaritan") from an anonymous sender. *See* ECF 156-13 (PX-548.0). The article contains handwritten commentary reacting to Leapfrog's Safety Grades, including a statement directed at Good Samaritan's leadership: ***"your despicable staff needs to take notes from [Jupiter Medical***

[2] The Community Hospitals do not intend to rely on PX-521.0 at trial, resulting in only nine (9) documents at issue.

Center].” *Id.* (emphasis added). This document was received by Good Samaritan after the close of fact discovery—on December 16, 2025—and was produced to Leapfrog just four days later, on December 20, 2025. *See* Decl. ¶ 10.

2. Surgical Cancellations at Palm Beach Gardens (PX-560.0–560.2). This exhibit consists of an internal email dated November 3, 2025 from Palm Beach Gardens Medical Center's Director of Clinical Projects, attaching a spreadsheet titled "PBG Cancels Week Oct 26." *See* ECF 156-6 (PX-560.0). The attached spreadsheet (produced in native format as PX-560.1 and as a PDF as PX560.2) reflects multiple canceled elective procedures scheduled between October 26 and October 31, 2025. Notably, the spreadsheet reflects that at least one patient canceled a scheduled procedure ***explicitly due to the hospital's "F GRADE***." ECF 156-8 (PX-560.2) at 2 (emphasis added). These documents were created more than a month after the close of fact discovery, were identified during trial preparation following the Court's guidance in its summary-judgment order, and were produced to Leapfrog within approximately 36 hours of their identification by the Community Hospitals. *See* Decl. ¶ 11. Moreover, Leapfrog has been on notice for months that the Community Hospitals would rely on cancellation evidence, given the testimony of the Community Hospitals' CEOs about cancellations and the Community Hospitals' reliance on that evidence in their summary-judgment briefing. *See* ECF 86 at 16; ECF 115 at 6.

3. Insurer Letters Responding to Fall 2025 Safety Grades (PX-549.0, PX-553.0, PX-554.0). These three exhibits are letters from insurer Humana Military sent to the leadership of Delray Medical Center, West Boca Medical Center, and Good Samaritan, respectively. Each letter states that, "[d]uring a recent review of Leapfrog Hospital Safety Grades," ***the recipient hospital was identified as having a "D or below," and asks what steps are being taken to "improve performance."*** ECF 156-9 (PX-549.0 (Delray)); ECF 156-11 (PX-553.0 (West Boca)); ECF 156-5 (PX-554.0 (Good Samaritan)) (emphasis added). These letters were received between December 30, 2025 and January 7, 2026, and each was produced within days of receipt. *See* Decl. ¶ 12. Moreover, Leapfrog was on notice that the Community Hospitals would rely on the Humana letters given that the Community Hospitals had already produced identical letters to Leapfrog, based on earlier Safety Grades, concerning Delray and West Boca. *See* PX-464, PX-465. The newly produced letters are merely identical letters the same hospitals (and Good Samaritan) received after Leapfrog released its Fall 2025 Safety Grades.

4. Emergent Encounter Data (PX-550.0). This exhibit is a compiled spreadsheet reflecting

emergent encounter data (i.e., emergency-room visits) across the Community Hospitals, including through November 30, 2025. *See* ECF 156-10 (PX-550.0). The document was created following the close of fact discovery, after Erik Cazares, CEO of Palm Beach Gardens, noticed an increasing divergence between walk-in and elective visits to his hospital's emergency department. *See* Decl. ¶ 13. The Community Hospitals investigated this trend further and produced this document shortly after they compiled the underlying data, which is kept in the ordinary course of business. *See id.* Leapfrog has been on notice since the inception of this case that the Community Hospitals would rely on such admissions data, given that the Community Hospitals have been producing admissions data throughout the litigation.

5. Hospital for Special Surgery ("HSS") Termination (PX-561.0). This exhibit is a letter sent from the New York Society for the Relief of the Ruptured and Crippled (which maintains the Hospital for Special Surgery) to Good Samaritan noting the ***termination of an orthopedic surgery agreement between the parties.*** *See* ECF 156-14 (PX-561.0). Leapfrog had been on notice of the perilous status of the HSS contract since the deposition of Good Samaritan CEO Sheri Montgomery on September 15, 2025. Unfortunately, the termination became effective on September 30, 2025, as reflected in this letter. *See* PX-561.0 (noting that termination is effective on "the last day of [the] Initial Term" of the Agreement). This document did not hit on the parties' negotiated search terms, was first reviewed by counsel for the Community Hospitals on January 12, 2026, and was produced to Leapfrog a mere twelve hours later. *See* Decl. ¶ 14.

B. Updated Witness List

In the wake of the Court's summary-judgment order, the Community Hospitals worked diligently to identify an additional witness who could testify to patient harm. Decl. ¶ 15. That effort was necessarily constrained by HIPAA, patient-confidentiality obligations, and the operational realities of hospital care, which limit the circumstances under which patient-specific harm can be presented in litigation. Decl. ¶ 16. Through that process, the Community Hospitals identified Dr. Anthony Hernandez, a treating physician with ***first-hand knowledge of patient harm*** who can testify without compromising patient privacy. Decl. ¶ 17.

Upon identifying Dr. Hernandez, the Community Hospitals promptly disclosed him to Leapfrog on January 12, 2026, provided a proffer of his testimony, and simultaneously advised that he would be made available for deposition. Decl. ¶ 18. The Community Hospitals disclosed to Leapfrog that Dr. Hernandez is a Florida-licensed physician who serves as a hospitalist at West

Boca and supports the hospital's emergency department. *See* ECF 146-4 (Proffer). As explained in the detailed written proffer provided to Leapfrog contemporaneously with the disclosure, Dr. Hernandez will testify regarding an incident on August 22, 2025 involving a 58-year-old patient, Mr. J.D., about which Leapfrog has long been on notice since the timely production of PX-552.0 and PBHN00015728 in September 2025—over a week before the deposition of West Boca CEO Jerad Hanlon. *See id.* While this incident is supported both by business records and the testimony of CEO Hanlon, Dr. Hernandez can provide further details about this troubling incident offered by the Community Hospitals as an example of the harm to patients, physicians, and the reputation of the Community Hospitals caused by the Leapfrog Safety Grades.

Dr. Hernandez will testify that he was personally involved in the treatment of Mr. J.D. The patient presented with an open fracture of the second phalanx of the index finger—an injury with a significant risk of infection and potential loss of hand function if treatment is delayed. *See* ECF 146-4. Dr. Hernandez will testify that Mr. J.D. was advised to proceed immediately to surgery. *See id.* When Dr. Hernandez entered the treatment room to admit Mr. J.D., ***Mr. J.D.'s adult daughter opposed her father's treatment at West Boca based on a TikTok video and the Leapfrog Safety Grade website***. *See id.* Dr. Hernandez will testify that he tried to convince Mr. J.D. to stay at West Boca and proceed with immediate surgery by a specialized hand surgeon, and that he advised the family that transfer was against medical advice because it would delay care and increase the risk of infection and loss of function. *See id.* Despite these efforts, Mr. J.D. left West Boca against medical advice. *See id.*

Although the Community Hospitals made Dr. Hernandez available at Leapfrog's convenience to testify to these facts before trial, Leapfrog declined to depose him. Decl. ¶¶ 20–21.

LEGAL STANDARD

Motions *in limine* to resolve evidentiary issues are "disfavored," particularly before bench trials. *In re Am. Airlines Flight 331*, 2013 WL 12340395, at *2 (S.D. Fla. Oct. 7, 2013). Federal Rule of Civil Procedure 26 governs the conduct of discovery and requires a party to disclose "information about the evidence that it may present at trial," including a list of its exhibits and the names of potential witnesses. Fed. R. Civ. P. 26(a)(3)(A)(i)–(iii). In addition, a party "who has responded to an interrogatory, request for production, or request for admission" must "supplement … its disclosure or response" "in a timely manner." Fed. R. Civ. P. 26(e)(1)(A). "Rule 37 gives a trial court discretion to decide how best to respond to a litigant's failure to make a required

disclosure under Rule 26." *Taylor v. Mentor Worldwide LLC*, 940 F.3d 582, 593 (11th Cir. 2019) (citing Fed. R. Civ. P. 37(c)(1)). In exercising that discretion, courts consider whether the failure to disclose "'was substantially justified or is harmless.'" *Hunters Run Prop. Owners Ass'n, Inc. v. Centerline Real Est., LLC*, 2023 WL 2707318, at *5 (11th Cir. Mar. 30, 2023) (quoting Fed. R. Civ. P. 37(c)(1)).

ARGUMENT

I. The Challenged Documents Are Strong Evidence Of Post-Discovery Harm And Were Promptly Disclosed To Leapfrog

Leapfrog's bid to secure exclusion of the challenged documents hinges on the notion that the Community Hospitals violated Federal Rule of Civil Procedure 26 by purportedly withholding the documents at issue "in discovery" and "during discovery." Mot. 2, 4. Leapfrog therefore seeks exclusion of the documents on the grounds that they "were not produced during discovery in this litigation." ECF 144-2 at 1 (Leapfrog's proposed order).

Throughout its motion, Leapfrog repeatedly suggests that the Community Hospitals strategically withheld these documents as part of a "gamble" to deprive Leapfrog of the ability to understand the Community Hospitals' case. Mot. 2. But the factual premise of Leapfrog's argument is mistaken. Leapfrog's principal evidence of that purported gamble is language from the Community Hospitals' protective order briefing, ECF 55, which argued that "[p]atient complaints, staff complaints, and union complaints" are not relevant to whether Leapfrog engages in deceptive and unfair practices with respect to its Safety Grades. The Community Hospitals plainly were arguing that complaints *unrelated* to Leapfrog's Safety Grades are not relevant to this case *about* Leapfrog's Safety Grades. The purpose of the protective order was to prevent Leapfrog's effort to engage in character assassination of the Community Hospitals and then suggest that the Community Hospitals suffered no injury from the Safety Grades due to performance complaints that had nothing to do with the Grades. *See* ECF 55 at 5. The Community Hospitals have never taken the position that complaints *arising from* Leapfrog's Safety Grades are irrelevant to this litigation, and indeed extensively briefed examples of complaints arising from Leapfrog's conduct during the summary-judgment proceedings. *See, e.g.*, ECF 86 at 16; ECF 107 at 7; ECF 115 at 13. Leapfrog's intimations of a "bad faith" change in position, Mot. 5, rest on an egregious distortion of the Community Hospitals' protective-order briefing.

Leapfrog's legal arguments about discovery standards fare no better. The Community Hospitals have responsibly satisfied their disclosure obligations. Rule 26 does not impose a

freestanding duty to produce documents that do not yet exist, and courts in this District have made clear that the rule "does not create a new and additional obligation to produce document[s] *created* after close of discovery." *Coquina Invs. v. Rothstein*, 2012 WL 3202273, at *11 n.10 (S.D. Fla. Aug. 3, 2012) (emphasis in original); *see also id.* at *11 (collecting cases). The Community Hospitals could not conceivably produce in discovery documents that *did not yet exist*. The notion that a litigant violates discovery rules by not producing documents that were impossible to produce has no basis in law or logic. Unsurprisingly, courts have recognized that "events that occurred after discovery should not be excluded from trial merely because they were not disclosed during discovery." *Candy Craft Creations, LLC v. Gartner*, 2015 WL 6391202, at *3 (S.D. Ga. Oct. 22, 2015) (collecting cases).

These caselaw principles squarely defeat Leapfrog's argument. Eight of the nine documents Leapfrog challenges post-date the September 25, 2025 close of fact discovery and compellingly reflect the ongoing harm caused by Leapfrog's continued publication of its Safety Grades. As summarized above, the Community Hospitals added to their exhibit list: (i) a menacing third-party communication directed to hospital leadership reacting to a competitor's favorable Fall 2025 Safety Grade, released in November 2025 (PX-548.0); (ii) internal records documenting post-discovery surgical cancellations tied explicitly to the Safety Grades (PX-560.0–560.2); (iii) insurer letters responding directly to Leapfrog's Fall 2025 Safety Grades and questioning the hospitals' performance (PX-549.0, PX-553.0, PX-554.0); and (iv) post-discovery emergent encounter data compiled after hospital leadership identified new trends in November 2025 (PX-550.0).[3] Each document was created *after* discovery closed and was disclosed promptly after it was identified. *See* Decl. ¶¶ 10–13.

Rule 37 therefore has no application, and Leapfrog's argument for exclusion or other sanctions fails at the threshold. *See Burden v. City of Opa Locka*, 2012 WL 4764592, at *7 (S.D. Fla. Oct. 7, 2012) (explaining that Rule 37 applies only "[i]f a party fails to comply with its discovery

[3] Contrary to Leapfrog's contention, all the challenged documents were produced in accordance with the parties' ESI protocol. ECF 38. To the extent Leapfrog now claims that certain metadata is missing, this motion marks the first time the Community Hospitals were made aware of any such issue. Leapfrog never raised a metadata concern in the weeks following production, and it did not seek to meet and confer regarding this perceived deficiency before filing its motion.

obligations").[4] Again, failing to produce documents in discovery that do not exist or that are not in the party's possession does not constitute a violation of Rule 26. *Cf. Advanced Cable Ties, Inc. v. Am. Elite Molding, LLC*, 2019 WL 13280288, at *5 (N.D. Fla. Feb. 7, 2019) ("A 'party is not obliged to produce ... documents that it does not possess or cannot obtain.'" (quotation omitted)).

The ninth document concerning termination of the HSS contract (PX-561.0) existed during the discovery period in the sense that the letter had been written by then according to the date of the letter. But because the document did not hit on the parties' search terms, counsel for the Community Hospitals did not review it until January 12, 2026—well after the close of discovery. Decl. ¶ 14. And the Community Hospitals produced it to Leapfrog within *one day* of reviewing the document. Thus, even assuming a Rule 26 violation, exclusion or other Rule 37 sanctions are plainly inappropriate in these circumstances. *See, e.g.*, *United States v. McCarthy Improvement Co.*, 2017 WL 443486, at *7 (M.D. Fla. Feb. 1, 2017) (holding that "sanctions are unwarranted" where party "was unaware the documents existed despite seeking the information" and thus "could not be expected to produce them"); *accord Russell Corp. v. Design & Cut, Inc.*, 2006 WL 8553671, at *3 (N.D. Ga. Jan. 6, 2006) (parties "were substantially justified in not producing" information "[g]iven counsel's apparent belief that no more responsive documents existed").

II. The Challenged Witness Will Provide Important Testimony and His Identity Was Promptly Disclosed in Response to the Court's Order

There is also no basis for Leapfrog's requested exclusion of Dr. Hernandez because his

[4] Alternatively, any failure to produce during discovery would be "substantially justified" under Rule 37(c) because "the document[s] did not exist" at the time. *Wells v. John Wiley & Sons, Inc.*, 2016 WL 889786, at *7 n.12 (S.D.N.Y. Feb. 17, 2016); *see also Pitts v. HP Pelzer Automotive Sys., Inc.*, 331 F.R.D. 688, 694 (S.D. Ga. 2019). Leapfrog's cited cases excluding witnesses and exhibits under Rule 37(c) are inapposite and do not lead to a contrary result. *See Mitchell v. Ford Motor Co.*, 318 F. App'x 821, 824–25 (11th Cir. 2009) (expert witness excluded for failure to disclose "additional bases for his opinion" until "[s]eventeen months" after his initial Rule 26 disclosures); *Lara v. G&E Fla. Contractors, LLC*, 2016 WL 8739998, at *1 (S.D. Fla. Mar. 23, 2016) (excluding documents that were "in existence prior to the close of discovery, but not produced" before trial); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Tyco Integrated Sec., LLC*, 2015 WL 11251736, at *3 (S.D. Fla. July 29, 2015) (exclusion under Rule 37(c) appropriate where (1) the plaintiff "conceded the point," (2) "offer[ed] no compelling reason for its failure [to disclose]," and (3) failed to show that the challenged testimony was relevant to "the ultimate issues" in the case); *Touzout v. Am. Best Car Rental KF Corp.*, 2017 WL 2541225, at *2 (S.D. Fla. June 12, 2017) (plaintiff engaged in "bad faith during the discovery process" by "purposely not disclosing witnesses [and exhibits] to Defendants because it was 'not good for [his] case'"). Moreover, two of Leapfrog's key cases do not even apply Rule 37(c). *See White Cap, L.P. v. Heyden Enters.*, LLC, 2024 WL 5455557, at *5 (S.D. Fla. Dec. 30, 2024) (imposing sanctions "[u]nder Rule 37(b)" for a party's failure to comply with a discovery order); *Sciarretta v. Lincoln Nat. Life Ins. Co.*, 778 F.3d 1205, 1212–13 (11th Cir. 2015) (exercising "inherent power" to sanction party that "acted in bad faith" during witness preparation).

disclosure was timely, and any purported deficiencies identified by Leapfrog are harmless and substantially justified. Dr. Hernandez's testimony goes to the heart of the issues the Court has identified as relevant for trial and was disclosed in direct response to the Court's summary-judgment order. Following that order, and consistent with Rule 26(e), the Community Hospitals supplemented their disclosures by proffering Dr. Hernandez's testimony. *See* Fed. R. Civ. P. 26(e)(1) (requiring supplementation "in a timely manner" after a "party learns that in some material respect the disclosure or response is incomplete"). The disclosure of Dr. Hernandez was made "in a timely manner" because it occurred promptly after the Community Hospitals identified him as a relevant witness considering the Court's additional guidance in its summary-judgment order. *See id.*

Even if Leapfrog were correct that the disclosure of Dr. Hernandez was untimely (it was not), that would not require exclusion under Rule 37(c). When determining whether to allow testimony from a late-disclosed witness, courts consider: "(1) the importance of the testimony; (2) the reason for the party's failure to disclose the witness earlier; and (3) the prejudice to the opposing party." *Salomon Constr. & Roofing Corp. v. James McHugh Constr. Co.*, 2019 WL 5212602, at *1 (S.D. Fla. Feb. 15, 2019) (internal brackets omitted). Each factor weighs decisively in favor of permitting Dr. Hernandez to testify.

First, Dr. Hernandez's testimony is important and directly responsive to the Court's summary-judgment order. Dr. Hernandez will offer key, fact-based testimony concerning patient harm directly tied to Leapfrog's Safety Grades. His testimony concerns an incident in which a patient specifically declined medically necessary care based on information obtained from Leapfrog's website and related social media content, despite being advised that a transfer was against medical advice and posed a heightened risk of infection and loss of function in his hand. *See* ECF 146-4.

That testimony bears directly on issues the Court highlighted in its summary-judgment order—namely, evidence of actual patient impact flowing from Leapfrog's Safety Grades. It provides concrete, real-world evidence of how Leapfrog influences patient decision-making in clinical settings. Given the targeted nature of the testimony and its direct connection to the Court's guidance, its importance weighs strongly in favor of admission. *See, e.g.*, *Medina v. United Christian Evangelistic Ass'n*, 2009 WL 4855481, at *2 (S.D. Fla. Dec. 9, 2009) (allowing testimony that was "directly related to the elements" of the claim); *Fair Fight Action, Inc. v. Raffensperger*, 2022 WL 6354499, at *1 (N.D. Ga. Mar. 25, 2022) (allowing testimony that "'constitutes important real-world evidence of [program's] impact' and is relevant to" the claim at issue).

Second, the timing of the disclosure reflects diligence, not delay. The Community Hospitals have consistently maintained that they are not required to present direct evidence of actual patient harm to prove their claim. *See* ECF 86 at 13–14. This Court's summary-judgment order *agreed* with that understanding with respect to deception claims. ECF 139 at 9. And just recently, the Eleventh Circuit confirmed that unfairness claims likewise are subject to a "likely to cause substantial injury" standard. *See Corpay, Inc.*, ---F.4th---, 2026 WL 35708, at *18–19. In light of that legal framework, the Community Hospitals reasonably focused their witness and exhibit lists on Leapfrog's conduct, methodology, and representations, rather than identifying individual patient-level incidents—an endeavor that is inherently constrained by HIPAA, patient confidentiality, and the operational realities of hospital care.

This Court decided in its summary-judgment order that unfairness claims are subject to a heightened evidentiary standard—"actual consumer harm." ECF 139 at 9 n.5. Once the Court issued its legal ruling, the Community Hospitals undertook focused efforts in response to the Court's guidance aiming to identify a witness who could testify to such harm in a manner consistent with those constraints. The Community Hospitals disclosed Dr. Hernandez as a witness promptly once his relevance became apparent. Courts have recognized that supplementing the record in this manner is appropriate in light of legal developments, such as the Court's summary-judgment order, "that may change what is relevant." *In re Powe*, 281 B.R. 336, 344 (Bankr. S.D. Ala. 2001) (deeming it "equitable to allow the admission of the exhibits" when "supplemental affidavits were offered after the deadline fixed by the scheduling order" given "recent opinions being issued by this Court and others that may change what is relevant"). Accordingly, on this record—which involves a highly expedited discovery and dispositive-motion schedule—the reason for the timing of the disclosure weighs in favor of admission. *See Morrison v. Mann*, 244 F.R.D. 668, 673 (N.D. Ga. 2007) (allowing testimony where party "could not have known that the [witness] was necessary").

Third, any prejudice to Leapfrog is minimal. The Community Hospitals disclosed Dr. Hernandez with a proffer that described in detail his planned testimony, *see* ECF 146-4 (Proffer), and made him available for deposition before the start of trial, Decl. ¶ 20. Leapfrog, however, declined to take his deposition. Decl. ¶ 21. Moreover, Dr. Hernandez's testimony is narrow in scope and limited to a single, discrete incident that was already disclosed in documentary evidence to Leapfrog on September 12, 2025—*months* before trial. *See* Decl. ¶ 19; ECF 146-4 (discussing testimony already reflected in PX-552.0). He is not offered as an expert and will not opine broadly on

Leapfrog's practices, causation, or damages. Rather, his testimony is confined to factual observations concerning a single, identified patient interaction.

That this case is a bench trial further reduces any risk of unfair surprise or prejudice. *See, e.g.*, *Pearson v. Countrywide Home Loans, Inc.*, 2015 WL 545570, at *2 (M.D. Fla. Feb. 10, 2015) ("This matter is currently scheduled for a bench trial, which should alleviate confusion of the issues or prejudice to the Defendants."); *accord* ECF 151 at 2 (explaining that the Court is "fully capable of distinguishing competent from incompetent evidence at trial and assigning each item the weight it deserves when adjudicating the Parties' claims."). Under these circumstances, any potential prejudice is minimal and does not warrant exclusion. *See Fonte v. Lee Memorial Health Sys.*, 2020 WL 4596872, at *2 (M.D. Fla. Aug. 11, 2020) (finding minimal prejudice and allowing testimony where "[m]ost of the information . . . is found elsewhere in the record").

In sum, neither Rule 26 nor Rule 37 requires exclusion of Dr. Hernandez. The Community Hospitals supplemented their disclosures "in a timely manner" as soon as they learned of Dr. Hernandez's relevance from the summary-judgment order. *See* Fed. R. Civ. P. 26(e)(1). Rule 37 is therefore inapplicable given the lack of a Rule 26 violation. And even if Rule 37 were implicated here, the Community Hospitals' disclosure of Dr. Hernandez is both substantially justified and harmless for the reasons discussed above. Therefore, his testimony should be admitted.

CONCLUSION

The Court should deny in full Leapfrog's motion *in limine*.

Dated: January 15, 2026

Respectfully submitted,

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

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

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

Plaintiffs,

v.

THE LEAPFROG GROUP,

Defendant.

DECLARATION OF LEE R. CRAIN IN SUPPORT OF THE COMMUNITY HOSPITALS' OPPOSITION TO LEAPFROG'S MOTION TO EXCLUDE EVIDENCE

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

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

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

3. Fact discovery in this action closed on September 25, 2025.

4. On October 28, 2025, the Community Hospitals filed their motion for summary judgment. On November 12, 2025, Leapfrog filed its motion for summary judgment.

5. Following the close of discovery and while summary judgment briefing was pending, Leapfrog published its Fall 2025 Hospital Safety Grades.

6. After the close of discovery, the Community Hospitals continued to receive and identify documents reflecting ongoing harm associated with Leapfrog's Safety Grades. As

discussed below, the Community Hospitals disclosed such documents to Leapfrog promptly after they came into existence or were reviewed.

7. On January 7, 2026, the Court issued its order denying both parties' motions for summary judgment ("Order").

8. From December 20, 2025, to January 13, 2026, the Community Hospitals disclosed to Leapfrog the challenged exhibits at issue on a rolling basis. On January 12, 2025, the Community Hospitals also disclosed an additional witness whose testimony will bear directly on issues the Court's Order identified as relevant for trial.

9. Leapfrog did not raise any objection concerning metadata or compliance with the parties' ESI protocol with respect to the challenged documents prior to filing its motion to exclude on January 13, 2026.

I. The Challenged Documents

10. PX-548.0 consists of a newspaper article dated November 27-December 3, 2025 and an envelope addressed to Sheri Montgomery, Chief Executive Officer of Good Samaritan Medical Center ("Good Samaritan"), from an anonymous sender. The letter containing the article was received by Good Samaritan on December 16, 2025, after the close of discovery, and was produced to Leapfrog on December 20, 2025.

11. PX-560.0–560.2 consist of internal records from Palm Beach Gardens Medical Center documenting post-discovery surgical cancellations. These documents are dated November 3, 2025, were identified during trial preparation, and were produced on January 9, 2025, within approximately 36 hours of identification.

12. PX-549.0, PX-553.0, and PX-554.0 are letters from insurer Humana Military addressed to leadership at Delray Medical Center, West Boca Medical Center, and Good Samaritan, respectively. These letters were received between December 30, 2025, and January 7, 2026, and were disclosed to Leapfrog within days of receipt. PX-549.0 and PX-553.0 were both disclosed on January 6, 2026. PX-554.0 was disclosed on January 9, 2026.

13. PX-550.0 is a compiled spreadsheet reflecting emergent encounter data across the Community Hospitals from January 1, 2023 through November 30, 2025. This document was created after the close of discovery after Erik Cazares, Chief Executive Officer of Palm Beach Gardens Medical Center, identified a divergence between walk-in and elective visits to the hospital's emergency department. Following identification of that trend, the Community Hospitals

conducted a review to determine its scope and produced PX-550.0 on January 6, 2026, shortly after the compilation was completed. The data reflected in PX-550.0 are maintained in the ordinary course of business.

14. PX-561.0 is a letter from the New York Society for the Relief of the Ruptured and Crippled (which maintains the Hospital for Special Surgery) to Good Samaritan noting the termination of an orthopedic surgery agreement between the parties. The document did not hit on the parties' negotiated search terms, was first reviewed by counsel for the Community Hospitals on January 12, 2026, and was produced to Leapfrog approximately twelve hours later.

III. Identification of Dr. Anthony Hernandez

15. Promptly after the Court's Order, ECF 139, the Community Hospitals undertook focused efforts to identify a witness who could testify regarding patient harm in light of the Court's observations concerning evidence of actual consumer harm.

16. That effort was constrained by HIPAA, patient-confidentiality obligations, and the operational realities of hospital care, which limit the circumstances under which patient-specific harm can be presented in litigation.

17. Through that process, the Community Hospitals identified Dr. Anthony Hernandez, a Florida-licensed physician who serves as a hospitalist at West Boca Medical Center and supports the hospital's emergency department.

18. On January 12, 2026, the Community Hospitals disclosed Dr. Hernandez to Leapfrog and provided a written proffer describing his anticipated testimony.

19. As explained fully in that proffer, Dr. Hernandez's testimony concerns a specific incident involving a 58-year-old patient, identified as Mr. J.D., who declined medically necessary care after his daughter reviewed Leapfrog's Safety Grades and related social-media content, despite being advised that transfer was against medical advice. This testimony directly reflects information contained in PX-552.0 and PBHN00015728, which were produced to Leapfrog on September 12, 2025.

20. Upon identifying Dr. Hernandez, the Community Hospitals advised Leapfrog that Dr. Hernandez would be made available for deposition.

21. Leapfrog has declined to depose Dr. Hernandez.

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

Executed on January 15, 2026, in West Palm Beach, Florida.

/s/Lee R. Crain
Lee R. Crain