

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Michael Patrick Murray, <i>et al.</i> ,)	
)	
Plaintiffs,)	
v.	)	Case No. 2001 CA 008479 B
	)	Hon. Alfred S. Irving, Jr.
Motorola, Inc., <i>et al.</i> ,)	
	)	<u>Next event</u> : July 12-23, 2021 Hearing
Defendants.	)	On Defendants' Motion to Exclude
	)	Plaintiffs' Experts
<hr/> Dino Schofield,)	
)	
Plaintiff,)	
)	
v.	)	Case No. 2002 CA 001371 A
)	
Motorola, Inc., <i>et al.</i> ,)	
)	
Defendants.)	
<hr/> Pamela Cochran, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.	)	Case No. 2002 CA 001369 A
)	
Audiovox Communications Corp., <i>et al.</i> ,)	
)	
Defendants.)	
<hr/> David Keller, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.	)	Case No. 2002 CA 001372 A
)	
Nokia, Inc., <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	
)	
)	
<hr/> Richard Schwamb, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.	)	Case No. 2002 CA 001370 A
)	

Qualcomm Inc., *et al.*,

Defendants.

Baldassare Agro, *et al.*,

Plaintiffs,

v.

Motorola, Inc., *et al.*,

Defendants.

Case No. 2002 CA 001368 A

Alan Marks, *et al.*,

Plaintiffs,

v.

Motorola, Inc., *et al.*,

Defendants.

Case No. 2010 CA 003206 B

Shawn Kidd, *et al.*,

Plaintiffs,

v.

Motorola, Inc. *et al.*,

Defendants.

Case No. 2010 CA 007995 B

Cristin Prischman, as Personal Representative of
the Estate of Paul G. Prischman

Plaintiff,

v.

Motorola Inc., *et al.*,

Defendants.

Case No. 2011 CA 002113 B

Bret Kenyon Bocook and
Laura Lynn Bocook,

)	
Plaintiffs,)	
)	
v.	)	Case No. 2011 CA 002453 B
)	
Motorola, Inc., <i>et al.</i> ,)	
)	
Defendants.)	
)	
_____)	
Mindy S. Kemp Brown, individually and as)	
Special Administrator of the Estate of)	
Daniel Todd Brown,)	
)	
Plaintiffs,)	
)	
v.	)	Case No. 2011 CA 006710 B
)	
Nokia, Inc., <i>et al.</i> ,)	
)	
Defendants.)	
)	
_____)	
Monique Solomon, individually and as Special)	
Administrator of the Estate of Andrew J. Solomon,)	
)	
Plaintiffs,)	
)	
v.	)	Case No. 2011 CA 008472 B
)	
Motorola, Inc., <i>et al.</i> ,)	
)	
Defendants.)	
)	
_____)	
Robert P. Noroski, individually, and as Personal)	
Representative of the Estate of)	
Heather Lynn Noroski,)	
)	
Plaintiffs,)	
)	
v.	)	Case No. 2011 CA 008854 B
)	
Samsung Telecomm America, LLC, <i>et al.</i> ,)	
)	
Defendants.)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND
RULE 26(B)(4) EXPERT WITNESS DESIGNATION

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Plaintiffs' motion for leave to add a new expert should be denied. It conflicts with the explicit orders of three superior court judges, who (over a period of seven years) approved this general causation phase, presided over the *Dyas/Frye* hearing, and entered orders allowing Plaintiffs an appropriate opportunity to update their expert reports, but unequivocally and consistently denied Plaintiffs' repeated efforts to add new experts and new expert opinions.

In 2012, at the outset of this general causation phase, Judge Burgess warned Plaintiffs that they could not enter the *Dyas/Frye* hearing with one set of general causation experts and then expect the Court to allow them to name a new general causation expert afterwards.¹ Nevertheless, in 2017—*after* the *Dyas/Frye* hearing, *after* Judge Weisberg found that Plaintiffs' experts' opinions “would almost certainly be excluded under *Daubert*,” and *after* the Court of Appeals rejected the *Dyas/Frye* standard and adopted *Daubert* in its place—Plaintiffs requested leave to add new experts, claiming that “the entire scientific landscape . . . has changed significantly.”² Judge Weisberg denied that motion.

Later in 2017, Plaintiffs submitted supplemental expert reports with new opinions, and attempted to defend that improper expansion of expert opinions by using the same “science has changed” argument. Recognizing Plaintiffs' tactics as an attempted end-run around Judge Weisberg's ruling, Judge Josey-Herring issued no fewer than five orders over the course of nearly two years striking large portions of Plaintiffs' experts' supplemental reports, emphasizing more than a dozen times some variant of Judge Burgess's warning in 2012 and Judge Weisberg's March 16, 2017 Order, particularly:

- “Plaintiffs [are] not entitled to a general causation do-over;”

¹ *Exhibit 1*, Sept. 20, 2012 Hrg. Tr. at 46:13-20.

² *See* Aug. 8, 2014 Memorandum Opinion and Order on Expert Admissibility (“8/8/14 Admissibility Order”) at 25; Jan. 17, 2017 Plaintiffs' Motion for Additional Discovery (“Pltfs.' Mot. for Addt'l Disc.”) at 2.

- Supplementation was “not intended to permit the Plaintiffs to elicit new opinions not previously raised;”
- “Plaintiffs were not permitted to restart discovery;”
- “Discovery in this case cannot be a moving target,” and
- “Neither Judge Weisberg nor this Court authorized the plaintiffs to re-do Phase I expert discovery in this case.”³

Now, with a new judge presiding over the litigation and after the *Daubert* hearing scheduled for June 2020 was postponed until July 2021 due to the COVID-19 pandemic, Plaintiffs seek to add a new expert relying on the *same arguments* that Judge Weisberg and Judge Josey-Herring both rejected. Remarkably, Plaintiffs fail to even mention those prior orders in their motion

The prior orders control and require denial of the instant motion for many reasons. *First*, as the Court previously held, Plaintiffs are not allowed “to use the discovery process to gain an unfair tactical advantage,” such as by naming a new expert after the close of expert discovery to try and cure the flaws exposed in their existing experts’ reports.⁴ *Second*, Plaintiffs seek to add an expert who offers opinions in areas of scientific research that Plaintiffs’ other experts already address. *Third*, all of these reasons apply with even *greater* force given that Plaintiffs made their request only four months before the scheduled two-week *Daubert* evidentiary hearing.

Moreover, Plaintiffs violated their duty of candor to the Court by failing to disclose Judge Weisberg’s and Judge Josey-Herring’s multiple orders rejecting Plaintiffs’ previous efforts to name new experts and otherwise expand expert discovery. Just this month, the Fifth Circuit issued sanctions after a party filed a motion to supplement the record that was “nearly identical” to a previous motion but “failed to notify the court” that its previous motion had been denied.⁵ Here,

³ Aug. 28, 2018 Superseding Amended Order (“8/28/18 Strike Order”) at 4, 8, 18; July 3, 2019 Order Granting in Part and Denying in Part Defendants’ Motion to Strike Unauthorized Portions of Supplemental Reports (“7/3/19 Belyaev Order”) at 2.

⁴ July 3, 2019 Order Denying Plaintiffs’ Motion for Reconsideration (“7/3/19 Reconsideration Order”).

⁵ *Exhibit 2, Tex. All. for Retired Americans v. Hughs*, No. 20-40643 (5th Cir. Mar. 11, 2021). The sanctioned attorneys have now moved for reconsideration of that order.

Plaintiffs' lack of candor is particularly troubling given that this is the first motion they have filed before a new judge presiding over litigation that has a nearly 20-year history. Plaintiffs' conduct provides further grounds for denying their motion. *See also Malibu Media, LLC v. Doe*, 2016 WL 9752317, at *1 (D. Md. Sept. 2, 2016) (finding plaintiff's repeated filing of motions making identical arguments to previously denied motions violated F.R.C.P. 11(b)).

I. PROCEDURAL HISTORY

At the start of Phase I discovery in 2011, Judge Burgess, presiding over Civil I at that time, entered a case management order focusing first on general causation, *i.e.*, whether cell phones can cause gliomas or acoustic neuromas in humans.⁶ As Judge Weisberg later observed, the case management order required Plaintiffs to identify "all of their experts on general causation" and submit expert reports that contained "a complete statement of all opinions the witness will express on general causation and the basis and reasons for them."⁷ Judge Burgess also made clear to Plaintiffs that they had only one shot to name general causation experts, stating: "[W]e're not going to have a Frye hearing about Mr. Smith and Mr. Jones and Mr. Brown, finish it, and then later on you have Mr. Jamison come in or Ms. Jamison come in [to give an expert opinion] . . ."⁸

Pursuant to that order, Plaintiffs proffered nine experts on general causation in January 2013. Defendants moved to exclude their testimony under *Dyas v. U.S.* 376 A.2d 827 (D.C. 1977), and Federal Rule of Evidence 702.⁹ Judge Weisberg, who had by then taken over the case from Judge Burgess, "reviewed pre-hearing briefs, four weeks of expert testimony, thousands of pages of exhibits, post-hearing briefs, various treatises on expert testimony and admissibility, and dozens

⁶ Dec. 7, 2011 Initial Case Management Schedule For Phase I Discovery.

⁷ *See* 8/28/18 Strike Order at 2 (citing Mar. 16, 2017 Order Denying Plaintiff's Motion for Additional Discovery ("3/16/17 Order Denying Add'l Disc.") at 5).

⁸ Exhibit 1, at 46:13-20.

⁹ Plaintiffs withdrew one expert at the opening of the *Frye* Hearing. Exhibit 3, Dec. 2, 2014 Hrg. Tr. at 7:1-11.

of trial court and appellate decisions [decided under both *Frye* and *Daubert*]” before issuing a 76-page order with his ruling.¹⁰

A. Judge Weisberg’s Admissibility Order.

Judge Weisberg began his August 8, 2014 Order noting that there is “not . . . enough evidence for *any* scientist” to give a general causation opinion in this case “with the requisite degree of scientific certainty”:

Can cell phones cause brain cancer? If that were the question confronting the court at this phase of the case, the answer would be relatively clear. Although there are a few isolated strands of data pointing in the direction of causation, ***the court could not conclude, based on the present record, that there is enough evidence for any scientist to answer the question “yes” with the requisite degree of scientific certainty.*** There is entirely too much controversy in the scientific community to entrust that question to a jury of laypersons on a case-by-case basis, to have one jury answer the question yes, only to have the next jury, presented with the very same evidence, come to the opposite conclusion.¹¹

Judge Weisberg noted, however, that the issue before him was whether Plaintiffs’ experts, some of whom expressed the opinion that cell phones are more likely than not to cause or promote brain tumors, should be permitted under *Dyas/Frye* to express their opinions to a jury.¹² Judge Weisberg found that some, but not all, of Plaintiffs’ experts used generally accepted methodologies and therefore satisfied what he called the “orthodox” application of *Frye*.¹³ Nevertheless, Judge Weisberg emphasized that all of the experts’ proffered opinions “would almost certainly be excluded under *Daubert*.”¹⁴

¹⁰ 8/8/14 Admissibility Order at 18, n.22.

¹¹ *Id.* at 4 (emphasis added).

¹² *Id.* at 5.

¹³ *Id.* at 25 n.29 (“The District’s rule, focusing on methodology only, is perhaps the most orthodox approach.”). Judge Weisberg excluded the testimony of Drs. Shira Kramer and Gautam Khurana under Federal Rule of Evidence 403, and those experts’ opinions remain excluded. *See* Apr. 4, 2017 Order Clarifying 3/16/17 Order Denying Addt’l Disc. (“4/4/17 Clarification Order”) at 1-2.

¹⁴ 8/8/14 Admissibility Order at 25.

B. Judge Weisberg Certifies His Order for Appeal and the Court of Appeals Adopts Rule 702.

Judge Weisberg amended the Admissibility Order on October 1, 2014, to permit an application for interlocutory appeal to address the expert admissibility standard. In doing so, he considered Plaintiffs’ “protestations about needing additional discovery on general causation,” but noted that “the record on general causation is about as well developed as it is ever going to be.” Judge Weisberg also specifically stated that after remand, “[t]he court could then allow whatever additional discovery might be necessary to place Plaintiffs in a fair position to litigate that issue.”¹⁵

Addressing the interlocutory appeal, the D.C. Court of Appeals sitting *en banc* unanimously adopted Rule 702 in place of the *Dyas/Frye* standard. Highlighting that it had been “presented with a developed record,” the Court of Appeals remanded for the Superior Court to re-evaluate whether those Plaintiffs’ experts’ general causation opinions that had been permitted under *Dyas/Frye* are admissible under Rule 702.¹⁶ The current proceedings are a continuation of Phase I general causation discovery.

C. Plaintiffs Attempt to Improperly Expand Discovery and the Court Repeatedly Rejects Them.

After remand, Plaintiffs embarked on a campaign to expand expert discovery far beyond the bounds of reasonable supplementation of existing expert reports. Asserting that “the general causation landscape has changed dramatically,” Plaintiffs filed in January 2017 a motion for additional discovery that included a request to “name additional experts to address new science and studies.”¹⁷ But Judge Weisberg denied Plaintiffs’ request for new experts, stating that the “initial case management order for Phase I discovery required Plaintiffs to produce *all* of their

¹⁵ Oct. 1, 2014 Certification Order (“10/1/14 Cert. Order”) at 4.

¹⁶ *Motorola Inc. v. Murray*, 147 A.3d 751, 758 (D.C. 2016).

¹⁷ Pltfs.’ Mot. for Addt’l Disc. at 2.

experts on general causation, with a report from each expert setting forth a ‘complete statement of the expert’s opinions.’”¹⁸ Judge Weisberg held that “new science” did not warrant “new experts.”¹⁹

However, consistent with his previous order noting that the Court would allow Plaintiffs the additional discovery necessary to place them in a “fair position to litigate,” Judge Weisberg allowed Plaintiffs’ existing experts to address new science and submit supplemental reports that revised their previous reports in the following two limited ways:

(1) address[] any relevant studies or peer reviewed publications that have been added to the scientific literature since February 2013, and

(2) revis[e] the way they express their opinions to account for the change in the evidentiary standard from *Dyas/Frye* to Federal Rule 702, provided they explain why the change in the evidentiary standard necessitates a change in the way they articulate their opinion.²⁰

Before Plaintiffs’ experts submitted the supplemental reports, Judge Josey-Herring (who next presided over this case) also issued an order agreeing with Judge Weisberg’s reasons for denying Plaintiffs’ requests to add new experts and reiterating the two grounds on which Plaintiffs’ experts could prepare supplemental reports. Judge Josey-Herring emphasized that “*there is no occasion for new experts to be named* and the scope of discovery is not to be expanded.”²¹

Notwithstanding the clear direction from both judges, Plaintiffs did not submit supplemental expert reports consistent with the Court’s orders. Instead, the new reports greatly expanded the scope of their original reports (often doubling them in length), and in some cases introduced entirely new general causation opinions. This did not go unchecked. Ruling on Defendants’ motion to strike portions of these supplemental reports, Judge Josey-Herring rejected Plaintiffs’ attempts “to counter the Court’s previous evidentiary findings after the fact,”²² and

¹⁸ 3/16/17 Order Denying Addt’l Disc. at 5 (emphasis in original).

¹⁹ *Id.* at 5-6.

²⁰ *Id.* at 7.

²¹ Apr. 4, 2017 Scheduling Order (“4/4/17 Scheduling Order”) at 1 (emphasis added).

²² 8/28/18 Strike Order at 2; 3/16/17 Order Denying Addt’l Disc. at 5-6.

struck large sections of the supplemental reports, including, in particular, those that set forth general causation opinions that the experts had not proffered in their original reports. Judge Josey-Herring emphasized that the Court did not “authorize[] a re-do of expert discovery in this case.”²³ For example, the Court rejected Plaintiffs’ attempt to convert two of their experts, Drs. Plunkett and Liboff—who both disclaimed causation opinions in 2013—into causation witnesses, stressing that the “supplementation [process] was not intended to permit the Plaintiffs to elicit new opinions not previously raised. Discovery in this case cannot be a moving target.”²⁴

Plaintiffs next moved the Court in October 2018 to reconsider its strike order, again arguing that the “science has significantly evolved” and citing some of the same studies they cite again in their instant motion.²⁵ The Court rejected Plaintiffs’ recycled arguments as “either unpersuasive or without merit.”²⁶ Judge Josey-Herring ruled that allowing the additional expansion of discovery would give Plaintiffs “an unfair tactical advantage”²⁷ and re-confirmed that “the Court explicitly limited the scope of permissible expert report supplementation to—among other things—avoid the credible prejudice that would occur if the Court allowed for the wholesale reopening of Phase I discovery.”²⁸ Moreover, the Court took the additional step of precluding Plaintiffs from “filing any further requests for reconsideration without first obtaining leave of Court.”²⁹

The parties then: (1) completed discovery on Plaintiffs’ experts’ supplemental reports (which included depositions of Plaintiffs’ experts, updating the reports from Defendants’ experts,

²³ 8/28/18 Strike Order at 2.

²⁴ *Id.* at 8 (striking Dr. Liboff’s new causation opinion); *see also id.* at 3-4 (striking Dr. Plunkett’s causation opinion because she testified, and Judge Weisberg found, that she “‘offered no causation opinions’ and therefore was prohibited ‘from testify[ing]’” on causation).

²⁵ Oct. 12, 2018 Pltfs.’ Motion for Reconsideration (“10/12/18 Pltfs. Mot. for Reconsideration”) at 5-7.

²⁶ 7/3/19 Reconsideration Order at 3.

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 1, 3.

²⁹ *Id.* at 10. While not calling the instant motion a motion for reconsideration, that is clearly what it is—Plaintiffs again seek the same relief that they sought numerous times before—and they cannot avoid the real import of this motion by ignoring the history of this case.

and depositions of Defendants' experts); and (2) fully briefed Defendants' Motion to Exclude those experts under *Daubert* and Rule 702.³⁰ The Court scheduled an evidentiary hearing to begin June 16, 2020, but the hearing could not go forward because of the COVID-19 pandemic. On August 4, 2020, the Court re-scheduled the two-week evidentiary hearing to begin on July 12, 2021. On March 3, 2021, Plaintiffs filed this motion, seeking to do what they have been told repeatedly they cannot do, without even mentioning their prior numerous, unsuccessful attempts.

II. ARGUMENT

The Court should reject Plaintiffs' three grounds purporting to support their request to add a new expert witness at this late stage, none of which are sufficient to justify adding a new expert. *First*, Plaintiffs misapply Rule 26 as having "allowed and required" supplementation of expert disclosure by adding a new expert. *Second*, there has been no "explosion of scientific studies and research" warranting a new expert. *Third*, the circumstances here do not satisfy the five factors set forth in *Abell* for filing an untimely Rule 26(b)(4) statement.

A. Plaintiffs' Reliance on Rule 26 Is Misplaced.

Plaintiffs' reliance on Rule 26 is misplaced. Plaintiffs seek to name a new expert, but Rule 26(e)(2), upon which Plaintiffs rely in support of their argument, applies to supplementing an *existing* expert's report with additional information or testimony, which Plaintiffs were allowed to do. Consistent with the rule's scope, the cases Plaintiffs cite in their motion involve a party seeking to supplement *existing* experts' testimony or disclosures, not the addition of a new expert. *See Ferrell v. Rosenbaum*, 691 A.2d 641, 647-48 (D.C. 1997) (overruling trial court's exclusion of supplemental statement by plaintiff's previously disclosed expert); *Russell v. Call/D, LLC*, 122 A.3d 860, 864-65 (D.C. 2015) (finding no prejudice where court denied addition of supplemental

³⁰ Judge Anderson presided over the briefing of Defendants' motion to exclude Plaintiffs' experts and set the schedule for the hearing date on the motion.

statement with additional publications); *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017) (finding error where party sought leave to supplement previously-disclosed expert's report after remand for trial). The one case Plaintiffs cite in which a court did allow a party to add new experts is easily distinguishable because, unlike here, the trial court there never issued an order setting the schedule for expert disclosures and (also unlike here) the trial court had not (repeatedly) rejected plaintiffs' request to name an additional expert. *See Daniels v. Beeks*, 532 A.2d 125, 127 (D.C. 1987) (finding reversible error where trial court's failure to issue pretrial order and subsequent denial of additional experts prejudiced plaintiff). The history of general causation expert discovery in this case bears no resemblance to the procedural history in *Daniels*.

This is not the first time Plaintiffs have tried to use Rule 26 to justify a “re-do” of their expert opinions. Judge Josey-Herring already rejected Plaintiffs' effort to use Rule 26 as support for allowing their existing experts to offer new opinions, holding that: “This Court is . . . not of the view that Rule 26 permits a party to upend the discovery process to gain an unfair tactical advantage and thereby disregarding other discovery rules and applicable deadlines.”³¹ Judge Josey-Herring noted that: (1) Rule 26(a)(2)(B) permits disclosure of written reports “[u]nless otherwise stipulated or ordered by the Court;” and (2) Rule 26(e) requires supplementation “as ordered by the court.”³² Because Judge Weisberg issued a specific order establishing the boundaries of expert report supplementation, Judge Josey-Herring held that the Rule 26 general supplementation rules did not apply.³³

For the same reason, Rule 26 supplementation requirements do not apply to Plaintiffs' current attempt to add a new expert in light of the Court's orders: (1) setting a deadline for

³¹ 7/3/19 Reconsideration Order at 3-4 (stating that Rule 26 does not give Plaintiffs “the unfettered ability to supplement their expert reports”).

³² *Id.* at 4 (emphasis omitted).

³³ *Id.*

disclosure of all expert reports; (2) setting a schedule for completing expert discovery; (3) denying Plaintiffs' request to name new experts; (4) permitting Plaintiffs' existing experts to address new science; (5) rejecting Plaintiffs' efforts to expand their existing expert opinions beyond the permitted supplementation; and (6) setting a schedule to complete limited supplemental expert discovery. Rule 26(a)(2)(D) explicitly states that disclosure of expert testimony must be made "at the times and in the sequence set forth in the scheduling order." Thus, by the terms of Rule 26 itself, those orders control over any Rule 26 supplementation requirements that could possibly apply to adding a new expert.

B. "New Science" Does Not Justify Plaintiffs' Latest Attempt to Add a New Expert.

Plaintiffs claim that they should be allowed to add a new expert witness because there has been an "explosion of scientific studies and research" relating to this case.³⁴ Plaintiffs are wrong and, in any event, new science is not a justification for adding a new witness.

The reality is that recent scientific research has only *strengthened* Judge Weisberg's previous conclusion that "there is [not] enough evidence for *any* scientist" to opine that cell phones cause brain cancer.³⁵ Just last year, the International Agency for Research on Cancer ("IARC") released its World Cancer Report and concluded that "[d]espite considerable research efforts, no mechanism relevant for carcinogenesis of radiofrequency electromagnetic fields has been

³⁴ Mar. 3, 2021 Plaintiffs' Motion for Leave to Amend Rule 26(b)(4) Expert Witness Designation in Order to Add Christopher J. Portier, BS, MS, Ph.D. as Testifying General Causation Expert in Environmental Health and Carcinogenicity Research ("Mot.") at 2.

³⁵ Exhibit 4, Excerpts of Stampfer Supplemental Report at 36 (Feb. 1, 2019) (describing how "the expert consensus has strengthened against causation," citing various authoritative reviews); Exhibit 5, Excerpts of Laterra Supplemental Report at 2 (Feb. 4, 2019) ("There is a broad consensus among clinical and experimental brain cancer experts that there is no evidence to support a role for RF exposure in the cause or subsequent behavior of" glioma or acoustic neuroma). Scientific authorities tend to make prudential calls for continuing observation, particularly through monitoring the incidence data. *See, e.g., Exhibit 6*, Samet et al., *Mobile Phones and Cancer Next Steps After the 2011 IARC Review* 25 EPIDEMIOLOGY 23, 24 (2014) (IARC leadership recommending same, but recommending against conducting more case-control studies like Hardell's due to their "clear limits").

consistently identified to date. Also, most of the epidemiological research does not indicate carcinogenicity of radiofrequency electromagnetic fields.”³⁶ The U.S. Food & Drug Administration opined in February 2020 that “there is insufficient evidence to support a causal association between RFR exposure and tumorigenesis.”³⁷ The Federal Communications Commission stated in December 2019 that “no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses.”³⁸ That these organizations released such strong statements against any causal link between cell phones and cancer is no surprise. As Defendants set forth in their Motion to Exclude, the scientific data overwhelmingly demonstrates that there is no reliable scientific basis to conclude that radiofrequency (“RF”) from cell phones causes brain cancer.³⁹

Even if the science *had* changed (it has not), the Court previously has addressed and rejected Plaintiffs’ arguments that changes in the science justify new experts. (*See* Appendix 1, comparing Plaintiffs’ “new science” arguments before Judge Weisberg and Judge Josey-Herring to their arguments here.) Plaintiffs tried the very same argument with Judge Weisberg in 2016, and he rejected it. Although Plaintiffs’ existing experts were allowed to supplement their opinions to address new studies released after their original reports, Judge Weisberg was clear that because the initial case management order “required Plaintiffs to produce *all* of their experts on general causation,” there was no occasion for new experts to be named, despite what Plaintiffs had similarly characterized as a “dramatic” change in the scientific landscape. Judge Josey-Herring

³⁶ Exhibit 7, Excerpts of IARC World Cancer Report, at 85 (2020).

³⁷ Exhibit 8, Excerpts of U.S. Food & Drug Administration, *Review of Published Literature between 2008 and 2018 of Relevance to Radiofrequency Radiation and Cancer*, at 6 (Feb. 2020).

³⁸ Exhibit 9, Excerpts of FCC Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and Memorandum Opinion and Order, at 7 (Dec. 4, 2019).

³⁹ *See* July 19, 2019 Defendants’ Memorandum in Support of their Motion to Exclude Plaintiffs’ Expert Testimony (“7/19/19 Defs.’ Mem. in Supp. of Mot. to Exclude Pltfs.’ Experts”), at 12-27.

likewise rejected Plaintiff's "new science" arguments when she denied their attempts to expand their experts' opinions.⁴⁰

In addition, the Court already permitted Plaintiffs' existing experts to address new science, the parties thoroughly litigated the appropriate scope of that supplementation, and the Court issued detailed rulings that Plaintiffs simply ignore here. Thus, several of Plaintiffs' current experts *already address* all but two of the "new" published studies that Plaintiffs now claim necessitate the addition of a seventh expert witness.⁴¹ The overwhelming majority of studies and data Plaintiffs cite as part of this "explosion" were published years ago, and long before their experts submitted supplemental reports in August 2017.⁴² In short, like the other judges who have considered this same argument, the Court should reject this recycled and meritless rationale for adding a new expert witness at this late stage.

C. The *Abell* Factors Do Not Apply Here, But in Any Event Weigh Heavily Against Allowing Plaintiffs to Add a New Causation Expert.

Plaintiffs' reliance on *Tisdale v. Howard Univ.*, 697 A.2d 53 (D.C. 1997) and *Abell v. Wang*, 697 A.2d 796 (D.C. 1997) to support their motion to add a new expert is misplaced. As an initial matter, neither case applies here. Both are sanctions cases in which a plaintiff violated scheduling orders for the submission of expert evidence, and the Court excluded that evidence as

⁴⁰ 7/3/19 Belyaev Order.

⁴¹ The two "new" studies Plaintiffs cite to were both published in 2018. *See* Falcioni et al., *Report of final results regarding brain and heart tumors in Sprague-Dawley rats exposed from prenatal life until natural death to mobile phone RF field representative of 1.8 GHz GSM base station environmental emission*, ENVIRON. RES. (2018); Philips et al., *Brain Tumours: Rise in Glioblastoma Multiforme Incidence in England 1995–2015 Suggests an Adverse Environmental or Lifestyle Factor*, J. ENVIRON. AND PUB. HEALTH (2018).

⁴² Plaintiffs specifically call out studies published in 2014, 2015, and 2016 in support of this alleged "explosion." Mot. at 2-3. Plaintiffs' general citation to 36,000 studies is disingenuous, as it is based on the very extensive category of "electromagnetic radiation," rather than focusing on RF fields and brain cancer. *Id.* at 2. Plaintiffs do not explain why they need a new witness to opine on these same studies, particularly when their six existing expert witnesses cover all the major scientific topics at issue here. Curiously, Plaintiffs also cite to ongoing and unpublished scientific research, the results of which are not yet known, to support the belated addition of their proposed new expert—even though the proposed expert report does not (because it cannot) address these unfinished studies. *Id.* at 5-6.

a sanction, effectively leaving plaintiffs with no expert. Accordingly, the sanction led the trial courts to enter summary judgment against the plaintiffs. Because the trial courts “failed to hold a hearing or consider lesser sanctions,” the Court of Appeals reversed and remanded both cases and ordered the trial courts to reconsider the sanctions in light of five factors. *Tisdale*, 697 A.2d at 54.

Here, the Court has not excluded any expert evidence as a sanction, let alone levied any sanction that would subject Plaintiffs to summary judgment. What is before the Court is Plaintiffs’ request to name an expert *long* after the deadline to do so and despite the fact that the Court previously denied this request. And Plaintiffs already have six experts who are scheduled to testify in July. Thus, *Tisdale* and *Abell* are irrelevant. Nevertheless, even applying the *Abell* factors here weighs strongly in favor of denying Plaintiffs’ motion.

First, Plaintiffs are incorrect that the addition of a new expert at this time “would not incurably surprise or prejudice Defendants.”⁴³ For the past decade, the parties have followed the Initial Case Management Order set by Judge Burgess and all subsequent orders that have prohibited Plaintiffs from adding new general causation experts or allowing their experts to offer wholesale new opinions.⁴⁴ The record on expert discovery closed long ago. Faced with Defendants’ pending *Daubert* motion that lays bare the specific defects in Plaintiffs’ experts’ opinions, Plaintiffs now want a new expert to try and cure those defects.⁴⁵ Dr. Kundi himself was not permitted to try to plug the analytical gaps in his original expert report by offering new analyses

⁴³ Mot. at 3.

⁴⁴ See 3/16/17 Order Denying Addt’l Disc.; 4/4/17 Scheduling Order; Nov. 6, 2017 Order (“11/6/17 Order”).

⁴⁵ See generally 7/19/19 Defs.’ Mem. in Supp. of Mot. to Exclude Pltfs.’ Experts. By way of example (and there are many), Defendants challenge the reliability of Dr. Kundi’s opinions—which cover many of the same topics as Dr. Portier’s proposed opinions—because he fails to address critical elements in his original causation analysis (*i.e.*, recall bias, meta-analysis, quality of official cancer registries, dose-response in epidemiology, specificity, selection bias, and confounding). No coincidence, Dr. Portier’s “new” causation analysis purports to address each one of these fatal flaws from Dr. Kundi’s original analysis. See, *e.g.*, *id.* at 47-50 (recall bias), 49-50 (confounding & selection bias), compare with Mot. Exhibit 3 at 32, 51, 72 (recall bias), 33, 51, 72 (confounding), and 32, 51, 72 (selection bias).

in his supplemental report, nor was Dr. Plunkett permitted to offer a causation opinion after originally declining to do so.⁴⁶ But the Court should not permit an entirely new expert to provide opinions that purport to fill those gaps. Courts routinely reject efforts to allow parties to add a new expert to rehabilitate gaps in the general causation opinions of their existing experts exposed in discovery. *See Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) (rejecting the notion that “parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail”); *Winters v. Fru-Con Inc.*, 498 F.3d 734, 743 (7th Cir. 2007) (“The litigation process does not include ‘a dress rehearsal or practice run’ for the parties.”); *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 250 (6th Cir. 2001) (holding that “fairness does not require that a plaintiff . . . be afforded a second chance to marshal other expert opinions and shore up his case”). As Judge Josey-Herring previously ruled in this case, “the Court did not seek to give the parties an unfair opportunity to counter the Court’s previous evidentiary findings after the fact.”⁴⁷ The Court should not allow a new expert to come in now, after completed expert discovery and multiple swings and misses with Judges Weisberg and Josey-Herring to try and fix the fatal flaws in Plaintiffs’ general causation theory.⁴⁸

Moreover, allowing a new expert four months before the long-planned (and delayed) *Daubert* hearing would disrupt the existing schedule and unfairly prejudice Defendants. Defendants would need to engage in further written and oral discovery related to the new expert. Defendants’ experts would need to respond to and rebut the new report (which spans 146 pages). Plaintiffs likely would then want to depose Defendants’ experts on their updated reports.

⁴⁶ 7/3/19 Reconsideration Order at 6-7.

⁴⁷ 8/28/18 Strike Order at 2; 7/3/19 Reconsideration Order at 3.

⁴⁸ Plaintiffs’ suggestion that the parties’ reservation of their right to amend or supplement their Rule 26(b)(4) submissions is irrelevant. Mot. at 11. A boilerplate “reservation of rights” does not usurp court orders to the contrary.

Defendants also would have to revise and supplement their Motion to Exclude, which has now been pending and fully briefed for nearly two years, and the parties would have to brief that supplementation. Inevitably, Plaintiffs' proposal would jeopardize the July 12 hearing and further delay resolution of the general causation phase in this case.⁴⁹ *See French v. Levitt*, 997 A.2d 701, 703-704 (D.C. 2010) (assessing the impact of delay and additional expense imposed on the opposing party if an additional expert was allowed to replace an expert plaintiff had known for months was problematic).

Second, denying a new expert would not "incurably prejudice" Plaintiffs. In the cases Plaintiffs cite, the Court's sanction of barring evidence rendered the plaintiff without *any* expert evidence. Here, in stark contrast, the qualifications of Plaintiffs' six other experts cover every major topic in the proposed new expert's report.⁵⁰ Thus, Plaintiffs' proposed expert provides no new expertise. Accepting the current situation as "incurable prejudice" to Plaintiffs would mean nothing less than allowing any plaintiff to name an entirely new expert following rulings or testimony that the party sought to avoid. The law does not support that result.

Third, the *Abell* factor regarding whether a plaintiff failed to comply with evidentiary rules includes "failure to comply with other procedural requirements," such as the Court's own orders. *Dada v. Children's Nat. Med. Ctr.*, 715 A.2d 904, 910 n.7 (D.C. 1998) (noting consideration of other factors, such as "whether the moving party was diligent in obtaining discovery within the guidelines established by the court"). Here, Plaintiffs' unabashed disdain for existing court orders

⁴⁹ *See* 7/3/19 Reconsideration Order at 3 (noting "the Court explicitly limited the scope of permissible expert report supplementation to—among other things—avoid the credible prejudice that would occur if the Court allowed for the wholesale reopening of Phase I discovery").

⁵⁰ Plaintiffs have six current experts who have the background covering the scientific topics relevant to general causation: Dr. Kundi, a professor of epidemiology and occupational health; Dr. Belyaev, a radiation biologist; Dr. Mosgoeller, a medical doctor focusing of medical cell biology; Dr. Panagopoulos, a physicist and biologist; Dr. Liboff, a medical physicist; and Dr. Plunkett, a toxicologist, pharmacologist, and human health risk assessor. 8/8/14 Admissibility Order.

establishing discovery procedures and guidelines constitutes anything but compliance with evidentiary rules and procedural requirements. *See Lowrey v. Glassman*, 908 A.2d 30, 35 (D.C. 2006) (affirming exclusion of expert as a sanction where plaintiff “overlook[ed] or ignore[d] the fact that the trial court’s scheduling order imposed on [plaintiff] an affirmative duty to disclose the information”).

Moreover, Plaintiffs’ proposed expert, Dr. Portier, testified in 2017 (in an unrelated matter) that Plaintiffs’ counsel *in this case* retained him in March 2015.⁵¹ While it is unclear whether that work related to this case specifically or RF exposures more generally, what is clear is that Plaintiffs knew Dr. Portier, that he served on the IARC working group for evaluation of radiofrequency energy in 2011, and that their lawyers have had an ongoing contractual relationship with him since 2015. These facts undermine Plaintiffs’ assertion that that they brought this motion “[a]s soon as Plaintiffs learned about Dr. Portier’s recent expert conclusions.”⁵²

Finally, excluding Plaintiffs’ new proposed expert would not impact the completeness of the information before the jury for the same reasons it would not prejudice Plaintiffs. The proposed new opinion does not add a new subject matter or expertise to the already-updated opinions of Plaintiffs’ existing experts—who have already been fully deposed, and should be ready to testify in July—and would be cumulative of evidence already before this Court. *See supra* Sec. II.A.

In short, not only does Plaintiffs’ defiance of and lack of candor regarding this Court’s discovery orders warrant the exclusion of Dr. Portier as an expert witness on general causation, but Plaintiffs do not in any event satisfy any of the *Abell* factors, and their motion must be denied.

⁵¹ Exhibit 10, *In re: Roundup Prods. Liab. Litig.*, MDL No. 2741, Deposition Transcript of C. Portier at 78:5-16, 79:12-17 (N.D. Cal. Sept. 5, 2017).

⁵² Mot. at 12.

CONCLUSION

At this late date, there is no factual or legal justification for permitting Plaintiffs to start over with a new expert in defiance of multiple previous orders of this Court that embodied the shared vision of three judges for how this process should proceed. The Court should therefore deny Plaintiffs' Motion for Leave to Amend Rule 26(b)(4) Expert Witness Designation and order such other and further relief as it deems appropriate.

Date: March 31, 2021

Respectfully submitted,

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I hereby certify that on March 31, 2021, a copy of the foregoing document was electronically filed using the CaseFile Xpress system, which will send notice of such filing to counsel of record.

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