UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
AMR CORPORATION, *et al.*,	Case No. 11-15463 (SHL)
Debtors.	(Jointly Administered)
CAROLYN FJORD, *et al.*,	
Plaintiffs,	
v.	Adv. Proc. No. 13-01392 (SHL)
AMR CORPORATION, AMERICAN AIRLINES, US AIRWAYS GROUP, INC. and US AIRWAYS, INC.,	
Defendants,	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	
As Intervenor.	

ORDER ON PLAINTIFFS' REQUEST
TO SUPPLEMENT DR. LUNDGREN'S EXPERT REPORT

Before the Court is a letter dated November 8, 2018 [Adv. Proc. ECF No. 178] (the "Letter") regarding, among other things, the parties' dispute about the admissibility of Dr. Lundgren's proposed latest report (the "New Report"). Plaintiffs characterize the New Report as "updated and supplemental" and assert that it is consistent with both the Court's Interim Scheduling Order [Adv. Proc. ECF No. 128] and Summary Judgment Decision [Adv. Proc. ECF No. 177]. Letter at 1. On the other hand, Defendants argue that the New Report is neither updated nor supplemental, but is instead "an impermissible attempt to introduce brand new expert opinions on the eve of trial." Letter at 4. In the Letter, the parties jointly seek the Court's

guidance on this issue. For the reasons discussed below, the Court denies Plaintiffs' request to admit the New Report's new opinion regarding the competitive effects of the merger.

A party's duty to disclose expert testimony is governed by Rule 26(a)(2) of the Federal Rules of Civil Procedure. Rule 26(a)(2) requires that a party must disclose the identity of any witness it may use at trial under Federal Rules of Evidence 702, 703, or 705 and that such disclosure be accompanied by a written report if the witness is retained to provide expert testimony. *See* F.R.C.P. 26(a)(2)(A), (B). Rule 26(a)(2)(E) further mandates that a party must supplement such expert disclosures when required under Rule 26(e). *See* F.R.C.P. 26(a)(2)(E). Rule 26(e), in turn, states that a party must supplement or correct its original disclosure "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing" or "as ordered by the court." F.R.C.P. 26(e)(1)(A), (B).[1]

Notwithstanding a party's duty to supplement an expert report under Rule 26(a)(2)(E), it is well established that "Rule 26(e) 'does not grant a license to supplement a previously filed expert report because a party wants to.'" *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 263 F. Supp. 3d 446, 451 (S.D.N.Y. 2017) (quoting *Sandata Techs., Inc. v. Infocrossing, Inc.*, No. 05 Civ. 09546, 2007 WL 4157163, at *5 (S.D.N.Y. Nov. 16, 2007)). Rather, "a party's duty to supplement its initial expert report arises *only* when the expert learns of information previously unknown or unavailable that renders the original report inaccurate, misleading, or incomplete." *Pergament v. Tracey (In re Thilman)*, 557 B.R. 294, 303 (Bankr. E.D.N.Y. 2016)

[1] For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. *See* F.R.C.P. 26(e)(2).

(citing *Innis Arden Golf Club v. Pitney Bowes, Inc.*, No. 3:06 CV 1352, 2009 WL 5873112, at *3 (D. Conn. Feb. 23, 2009)) (emphasis added).

Courts have consistently denied a party's request to supplement prior disclosures where the alleged supplementation is, in reality, "a second bite at the apple—an opportunity to correct fatal defects in the reports they have submitted." *Cohlmia v. Ardent Health Servs., LLC*, 254 F.R.D. 426, 433 (N.D. Okla. 2008); *see also Cedar Petrochem., Inc. v. Dongbu Hannong Chem. Co. Ltd.*, 769 F. Supp. 2d 269, 278 (S.D.N.Y. 2011) (noting that "experts are not free to continually bolster, strengthen, or improve their reports by endlessly researching the issues they already opined upon, or to continually supplement their opinions") (internal quotation marks omitted).

Courts have been particularly critical of parties who attempt to introduce new disclosures under the guise of supplementation on the eve of trial. *See Cohlmia*, 254 F.R.D. at 433 ("Supplementation would undermine the schedule entered in this case and already extended once at Plaintiffs' request. … 'Supplementation' of these expert reports up to 30 days before trial is simply not realistic."); *Allen v. Dairy Farmers of America, Inc.*, No. 5:09-cv-230, 2014 WL 2040133, at *5 (D. Vt. May 16, 2014) ("Indeed, Plaintiffs' approach to expert supplementation would disrupt trials and trial preparation to the point of chaos and would render the expert disclosure rules meaningless.").

Here, Plaintiffs propose that the New Report will serve two purposes. First, it "will use new DB1B data from the Bureau of Transportation Statistics and incorporate data from April 1, 2017 through March 31, 2018, which was not available at the time Dr. Lundgren prepared his earlier reports[,]" (such data, the "Updated Data"). Letter at 2. Second, it will, "based on the current data, render an opinion about the anti-competitive effects of the merger in the particular

city-pair markets that the Court has directed the Plaintiffs to identify," (such opinion, the "Effects Opinion"). *Id.*

The sole purpose of Dr. Lundgren's prior report was to review and update the DOJ's HHI calculations and to calculate post-merger HHI for the most recent four quarters of data, *i.e.*, 2015Q4, 2016Q1, 2016Q2, and 2016Q3, covering the time period October 1, 2015 to September 30, 2016. *See* Expert Report of Carl Lundgren for the Alioto Law Firm in the Matter of the Merger of American Airlines and US Airways [Adv. Proc. ECF No. 141-1] (the "Prior Report") at 4. His Prior Report made crystal clear that these calculations were "presented without further analysis or conclusions based on statistical, econometric, or other expert economic analysis." Declaration of Carl Lundgren In Support of Plaintiffs' Cross-Motion for Summary Judgment And In Opposition to Defendants' Motion for Summary Judgment [Adv. Proc. ECF No. 149-4] (the "Lundgren Decl.") ¶ 16. It is not clear from the Letter whether the Updated Data in the New Report simply constitutes more recent figures for the same post-merger HHI already contained in the Prior Report and, if so, whether Defendants believe the Updated Data is an entirely new, impermissible opinion. As such, the Court encourages the parties to discuss whether the Updated Data is a permissible supplement under Rule 26(e). The Court will revisit this issue to the extent that the parties cannot resolve it among themselves.

It is wholly inappropriate, however, for Plaintiffs to be allowed to admit the Effects Opinion from the New Report. Plaintiffs assert that "*the causal effect* of the merger now on relevant city-pairs depends upon what has happened up to now in those markets, not what happened one, two or five years ago," Letter at 2 (emphasis added). But Dr. Lundgren has never previously opined on the causal effect of the merger in the Prior Report or any time during the five-year history of this litigation. *See* Summary Judgment Decision at 56:12–15 ("In fact, Dr.

Lundgren makes a point in his submission of not making any casual [sic] or predictive conclusions regarding the impact of the merger on the industry or customers."); *see also* Prior Report at 4 ("I was asked to review and update the DOJ's HHI calculations and to calculate post-merger HHI for the most recent four quarters of data."); Lundgren Decl. ¶¶ 2, 16 ("I have been asked by counsel for the Plaintiffs to identify the city-pair markets from the list of 1,008 city-pairs initially identified by the Department of Justice ("DOJ") to be presumptively illegal after the US Air-American merger, where average airfares have increased since the merger. … [T]hese figures are presented without further analysis or conclusions based on statistical, econometric, or other expert economic analysis.")). Accordingly, and based on the foregoing case law, the Effects Opinion in the New Report is not a "supplement" within the meaning of Rule 26(e).

Moreover, admitting this new Effects Opinion now is especially inappropriate in light of the timing of the request. Discovery has closed and, in fact, the parties already both moved for summary judgment, signaling their belief that the case is ready to be decided on the merits. A trial date has been chosen. Allowing this new expert opinion now is particularly problematic because it addresses the Plaintiffs' lack of an expert analysis on competitive effects, which is a deficiency continuously pointed out by the Court throughout the five-year span of this litigation. *See* Nov. 27, 2013 Mem. of Decision [Adv. Proc. ECF No. 72] at 12 ("The Court has no evidence whatsoever regarding who the Plaintiffs are, what the nature of their interest in the airline industry is, or how they will be individually harmed by the proposed merger."); Mar. 14, 2014 Mem. of Decision [Adv. Proc. ECF No. 101] at 5 (referencing the Nov. 27, 2013 decision which articulated, among other things, "the lack of evidence pertaining to the plaintiffs' relationship with the airline industry … and the failure to articulate the anticipated harm to these

plaintiffs upon closure of the merger"); Mar. 15, 2015 Mem. of Decision [Adv. Proc. ECF No. 115] at 22 (same); Summary Judgment Decision at 56:12–15 ("In fact, Dr. Lundgren makes a point in his submission of not making any casual [sic] or predictive conclusions regarding the impact of the merger on the industry or customers."). Plaintiffs have had years to address their failure to provide an expert opinion on competitive effects but chose not to do so. *See* Feb. 13, 2014 Hr'g Tr. [Adv. Proc. ECF No. 100] at 80:20–22 ("We've taken the position, Your Honor, that we don't need any experts, the plaintiffs, the defendants do."); Letter at 4 ("As the Court knows from the recent summary judgment briefing and argument, five years into this litigation, Plaintiffs have not offered any expert evidence on anticompetitive effects. They expressly chose not to: Plaintiffs initially did not present any expert report on the merits of this case, and told the Court that they did not need to do so."). The Court will not permit the Plaintiffs to upend the trial schedule and cause further delay simply because they have had a change of heart at the eleventh hour.[2]

Plaintiffs are wrong to rely on the Court's Summary Judgment Decision as a basis to allow the Effects Opinion. In that decision, the Court's job was to determine if this case could be decided on the merits based on the undisputed evidence without a trial. The Court determined that it could not, meaning that the outcome of the case requires a trial. While the Court expressed its puzzlement about Plaintiffs' lack of any expert opinion about competitive effects, that observation was not a new one. Nothing about the Summary Judgment Decision changed

[2] Plaintiffs' argument that supplementing the Prior Report with the Effects Opinion is warranted under the *Outley* factors, *see* Letter at 3, is likewise undermined by their continued failure to address the lack of an expert opinion about competitive effects. In *Outley*, plaintiff's counsel inadvertently failed to supplement a prior interrogatory response with crucial information, and defendant's counsel never contacted plaintiff's counsel with a request for such information. *See Outley v. City of New York*, 837 F.2d 587, 588–89 (2d Cir. 1988). The Court noted that "there is no suggestion in the record that the failure of plaintiff's counsel was anything but the good-faith oversight of an inexperienced practitioner … Plaintiff's good faith mistake, in the absence of any prior request from the [Defendant], in no way suggests preclusion as the appropriate sanction." *Id.* at 590. By contrast here, this lack of an expert by Plaintiffs has been the subject of continuous discussion since at least November 2013.

the requirements for the disclosure of expert opinion in this case. *See* Summary Judgment Decision at 72:13–17 (addressing suggestion that individual plaintiffs might provide expert testimony by observing that "any such testimony would need to satisfy all applicable requirements under the law, including [disclosure] and discovery requirements, as well as the rules of evidence").

Finally, Plaintiffs are incorrect in concluding that supplementation is warranted under the Court's Interim Scheduling Order. The Interim Scheduling Order clearly specified deadlines to serve expert discovery, and the word "interim" cannot be used to circumvent the disclosure requirements articulated under Rule 26 or to change the fact that discovery is closed. Likewise, the fact that Plaintiffs made a *prima facie* showing that the merger violates section 7 of the Clayton Act does not mean that they can now "present expert opinion showing the relevant markets and the merger's effects on them," Letter at 3, when the time to do so under Rule 26 has long passed. Nor does the fact that Plaintiffs feel they are "unlikely … [to] be able to support their theory without Dr. Lundgren's report," Letter at 3, justify complete disregard for the applicable legal standard and supporting case law.

For the foregoing reasons, the Court denies Plaintiffs' request to admit the New Report's new opinion regarding the competitive effects of the merger.

Dated: New York, New York
December 10, 2018

/s/ Sean H. Lane
HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE