

08 13 2012

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____	)	
In the Matter of	)	
	)	PUBLIC
McWANE, INC.,	)	
Respondent.	)	DOCKET NO. 9351
_____	)	

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO  
MCWANE'S MOTION IN LIMINE TO  
EXCLUDE TESTIMONY FROM DR. LAURENCE SCHUMANN

Complaint Counsel intends to call at trial Dr. Laurence Schumann as an expert economist in industrial organization. McWane seeks to exclude Dr. Schumann's testimony in its entirety, but has not met its burden to exclude any of Dr. Schumann's opinions, much less all of them. Rather than separately discussing the varied methodologies supporting Dr. Schumann's opinions, McWane ignores them and seeks to prevent consideration of all of Dr. Schumann's opinions with two ill-founded charges: that Dr. Schumann does not use statistical tests; and that Dr. Schumann does not cite the testimony in which McWane and its co-conspirators {

Statistical testing may aid the social scientist, i.e., an expert economist, but it is not essential to sound analysis. Here, Dr. Schumann concludes that the available data does not permit reliable statistical testing, and instead he uses other legitimate methodologies consistent with well-established economic principles.

\_\_\_\_\_ techniques for  
1. For example, in arguing that there is a relevant  
pursuant to Buy-American specifications, McWane  
for want of statistical tests.

Dr. Schumann considered McWane's and its co-conspirators' } but he opined they did not fairly meet the Complaint's charge. That opinion should not be excluded simply because he fails to cite evidence that McWane favors. That opinion, like Dr. Schumann's other opinions, can be fully tested through vigorous cross-examination before the Court. Accordingly, McWane's motion should be denied.

I. Dr. Schumann, a Qualified Expert Economist, Uses Well-Established Economic Principles to Review the Record and Form His Opinions, Which Will Assist the Trier of Fact

Expert testimony is admissible if it meets the criteria: first, the expert's testimony must be within his qualifications; second, the methodology used to formulate the expert's opinions must be based on reliable and practical application of the expert's professional analytical tools; and third, the expert's testimony must assist the trier of fact to understand the evidence or determine a fact in issue. See F.R.E. 702; *Daubert v. Merrell Dow Pharm.*, 1509 U.S. 579, 592 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153-54 (1999). See Daniel Chapter One, 2009 FTC Lexis 85, at \*21 (Apr. 20, 2009) ("courts traditionally consider whether the expert is qualified in the relevant field and examine the methodology the expert used to reach the conclusions at issue.") (citations omitted).

This court has stated that "[m]otions to discontinue are discouraged." Scheduling Order, at ¶ 8. More specifically, this Court has previously held that, "[r]ather than excluding expert testimony, the better approach under *Daubert* in a bench trial is to permit the expert testimony and allow 'vigorous cross-examination, presentation of contrary evidence, and careful weighing of the burden of proof to test shaky but admissible evidence.'" Daniel Chapter One, 2009 FTC Lexis 85 at \*21-22 (quoting *Daubert*, 509 U.S. at 596) (citations omitted).

McWane's motion ignores these injunctions and fails to satisfy any standard for exclusion of expert testimony. First, Dr. Schumann's relevant economic expertise is unquestioned. See Resp. Mtn., Exh. 1 at 1, 85-87. Second, Dr. Schumann competently applies his professional analytical tools — economic principles, theories and models — to the observed facts. See *U.S. Info. Sys., Inc. v. Int'l Bd. of Elec. Workers Local Union No. 313*, 313 F. Supp. 2d 213, 220 (S.D.N.Y. 2004) (admitting expert testimony after expert economist applied "standard economic definition for market power" and monopolization theory to facts of case). Finally, Dr. Schumann's discussion of the relevant economic concepts — including oligopolistic interdependence, facilitation practices that employ communications to rig the oligopoly game, and communication of assent to price-fixing offers by taking communicative actions that are otherwise inconsistent with a firm's unilateral self-interests — provides a useful framework for the Court to understand McWane's collusive and anticompetitive acts. Similarly, Dr. Schumann competently uses his professional analytical tools to such tasks as market definition, including identifying price discrimination markets, to enable the trier of fact to understand the competitive implications of McWane's restrictive practices in the relevant market.

In short, Dr. Schumann's expert report and testimony meets this Court's expert opinion admissibility standards. McWane's quarrel with Dr. Schumann's methodological opinions is best addressed through vigorous cross-examination and presentation of contrary evidence at trial.

## II. McWane Mischaracterizes the Legal Standard Governing its Request and Misstates Dr. Schumann's Testimony

McWane ignores all of Dr. Schumann's work and fails to argue why any of his individual opinions should be excluded. Moreover, McWane applies the wrong standard to social science testimony and obscures the record by misquoting Dr. Schumann's report and testimony.





of analysis a qualified expert economist may perform to assist the trier of fact, especially where sound data to conduct econometric or statistical analysis is not available.

McWane's reliance on City of Moundridge v. Exxon Mobil Co., 2009 U.S. Dist. Lexis 123954 (D. D.C. Sept. 30, 2009), is misplaced. The district court in City of Moundridge granted summary judgment for the defendants because the plaintiff relied solely on their expert's report, which "offered no explanation[s] to connect . . . fact[s] to his opinion[s]." Id. at \*40. That is not the case here. Dr. Schumann religiously connects facts to his opinions. For example, Dr. Schumann discusses how one co-conspirator's

} is inconsistent with unilateral conduct, and how it is only comprehensible in the context of a pre-existing price-fixing agreement. Specifically, Dr. Schumann states that,

} Resp. Mtn.,

Exh. 1 at 45. Indeed, Dr. Schumann describes

Id. Then, in the context of oligopoly theory, Dr. Schumann connects these facts to his opinion that{

} Id. at 44

Additionally, Dr. Schumann reaches his conclusion that McWane, Sigma and Star

} by first identifying specific facts and then connecting them to this conclusion. That's Dr. Schumann connects, include:

} Id. at 48-56.

Dr. Schumann likewise connects the facts concerning the marketing and pricing of Fittings in the context of projects having different requirements to his economic understanding of discrimination markets. Together, this led him to opine that

} Id. at 15-16.

B. McWane Misstates Dr. Schumann's Report and Testimony

McWane's claim that Dr. Schumann "ignores substantial evidence that flatly contradicts his opinion" is meritless. Resp. Mtn., at 5. For this, McWane points only to

} Id.

As McWane is well-aware, Dr. Schumann ~~discussed~~ this evidence, but concluded that { } simply do not meet the Complaint's charges,

which involve something other than the } that most lay people  
associate with price-fixingAs Dr. Schumann explained:

{

Resp. Mtn., Exh. 2 at 99:14-24. Here again, Schumann does exactly what an expert  
economist should do: he reviews the record evidence and applies economic principles to put  
them in the context for the trier of fact.

McWane's reliance on General Electric Co. et al., v. Joiner 522 U.S. 136 (1997) fails.  
The Joiner Court affirmed the district court's exclusion of expert testimony because the studies  
the expert relied upon were flawed. 522 U.S. at 143-46. Without those to rely on, the  
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Dated: August 13, 2012

Respectfully submitted,

s/ Andrew K. Mann  
Edward D. Hassi, Esq.  
t11610da Holleransq.

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DECLARATION OF ANDREW K. MANN

Pursuant to 28 U.S.C. § 1746, I make the following statement:

1. My name is Andrew K. Mann I am making this statement in the Matter of McWane, Inc., FTC Docket No. 9351, in support of Complaint Counsel's Memorandum in Opposition to McWane, Inc.'s Motion to Exclude Opinion Testimony from Dr. Laurence Schumann at Trial. All statements in this Declaration are based on my personal knowledge as a Staff Attorney for the U.S. Federal Trade Commission, Bureau of Competition, and if called upon to testify, I could competently do so.
2. Tab 1 is a true and correct copy of CX 2265, Rebuttal Expert Report of Laurence Schumann, Ph.D.
3. Tab 2 is a true and correct copy of CX 2550, the June 29, 2012 Expert Report of Parker Normann, Ph.D and CX 2551, which contain replacement pages to the June 29, 2012 Expert Report of Parker Normann, Ph.D.
4. Tab 3 consists of true and correct copies of CX 2552, CX 2553, and CX 2554. Specifically, CX 2552 is an email sent on June 5, 2012, from William Lavery, counsel for McWane, to Michael J. Bloom, with carbon copies to Jeanine Balbach and Linda Holleran, counsel supporting the complaint, regarding "Questions re McWane

Spreadsheet.” CX 2553 is an email sent June 5, 2012, from William Lavery, counsel for McWane, to Michael J. Bloom, with carbon copies to Jeanine Balbach and Linda Holleran, counsel supporting the complaint, regarding “Question Re Data in McWane Spreadsheet.” CX 2554 is an email sent April 18, 2012, from William Lavery, counsel for McWane, to Linda Holleran, counsel supporting the complaint, with carbon copies to Michael J. Bloom, counsel supporting the complaint, and JElmer@maynardcooper.com, counsel for McWane, re “Data questions.”

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is

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CONFIDENTIAL EXHIBIT  
REDACTED IN ENTIRETY

TAB 1

CONFIDENTIAL EXHIBIT  
REDACTED IN ENTIRETY

TAB 2



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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the ~~Secret~~ the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by th

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