PUBLIC

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

In the Matter of	)	**PUBLIC**
MCWANE, INC., **a corporation,** and **STAR PIPE PRODUCTS, LTD.,** **a limited partnership.**	)	**DOCKET NO. 9351**

RESPONDENT'S MOTION IN LIMINE TO EXCLUDE OPINION TESTIMONY

Remarkably, after nearly three years of investigation and litigation, Complaint Counsel proffers an "expert" economist, Dr. Laurence Schumann, who did not employ any economic test of any issue in the case. Instead, he reviewed documents and testimony and simply opined on his interpretation of them - - something that is entrusted to this Court and does not require any economic expertise. Schumann concedes that his opinion is simply his *ipse dixit* and cannot be independently verified or tested. He also concedes that he literally ignores substantial record evidence that flatly contradicts his untestable theories - - including, for example, [redacted] domestic fittings customers in 2010 and again in 2011. Schumann's untestable interpretation of the record is junk science plain and simple. McWane, Inc. ("McWane") accordingly moves to exclude his opinion in its entirety.[1]

SUMMARY OF ARGUMENT

The Supreme Court has been clear: an expert's untestable say-so is not reliable evidence at trial. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579-80 (1993) ("whether the theory or technique in question can be (and has been) tested, [and] whether it has been subjected

[1] Counsel for the parties conferred, but were unable to reach a resolution.

to peer review"); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1977) ("Nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"). To prevent unreliable opinions from getting to trial, the Court mandated that courts "must determine at the outset" that the proposed opinion is "scientifically valid," "properly can be applied to the facts," and "will assist the trier of fact[.]" *Daubert*, 509 U.S. at 592-93. This gatekeeping role requires the exclusion of an expert "when indisputable record facts contradict or otherwise render the opinion unreasonable[.]" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993).

FACTUAL BACKGROUND

I. Schumann's *Ipse Dixit* Opinion Is Not Based On Testable Empirical Analyses

Experts are supposed to use the scientific method to construct tests of the hypotheses put before them. *Meister v. Medical Eng'g Corp*., 267 F.3d 1123, 1127 (D.C. Cir. 2001) ("demands a grounding in the methods and procedures of science, rather than subjective belief or unsupported speculation"). The tests are supposed to be peer-accepted and duplicable, so that any conclusion the expert draws from the tests can itself be subject to the rigors of the scientific method and tested. *Daubert*, 509 U.S. at 580.

That is not what Schumann did: he admits that he did not employ any test at all. [redacted] He concedes that his opinion is untestable:

[redacted]

Instead of employing empirical tests of the issues he was asked to evaluate, Schumann reviewed the record - - and then But that is no "test" at all, it is simply a tautology: he reviewed the record and formed his opinion which he believes is reliable because . . . he reviewed the record and formed his opinion. More critically, it is simply not an *expert* opinion: as he concedes, the Court is tasked with reviewing the record and forming its own conclusions.

Schumann's failure to do any empirical testing led him to extraordinary speculation about the very things he should have tested. For example, he acknowledges that , but he opines that Sigma, Star and McWane " . He cannot define those times because he did not analyze any pricing data from any of the suppliers . Nor does he know whether the suppliers' prices were moving in different directions at the same time or in parallel.

Extraordinarily, Schumann concedes that he did not use the ordinary-course invoice price data of McWane, Sigma, or Star to determine whether their prices suggested competition or a conspiracy - -

Instead, his opinion boils down to his ***assumption*** that prices

He

acknowledges that , but did not study

whether

Schumann conceded that Star grabbed more than domestic fittings customers in 2010,

He

also conceded that Star grabbed of all domestic fittings sold nationwide - - which it

in 2011.

Schumann did not employ any empirical test to determine whether McWane "excluded" Star from domestic production or "raised rivals costs." Indeed,

Nor could he identify any cost Star incurred as a result of McWane's rebate policy.

Instead, he conceded that

he did no empirical study of what amount of sales Star would need to become an efficient competitor, how it would do so, how McWane did anything to prevent its efforts, or whether consumers were better or worse off than they would have been otherwise.

[2] Schumann's Report contained no critique of the invoice price databases the companies maintained in the ordinary course. In his Rebuttal Report, he raised a newfound "concern" about McWane's data. He initially suggested extensive efforts to get to the bottom of his purported concern, claiming that When pressed, however, he recanted the entire story: there were no phone calls, (*id*. at 84:5-15), and he spent little or no time on the issue, (*id*. at 63:16-20), suggesting his "concern" was made-up or overblown. (*Id*. at 84:5-86:14.)

Instead of empirical testing, he just "posited" his say-so

In short, he "posited" the very thing he was supposed to test.

Schumann's opinion with regard to Sigma was equally conclusory and non-expert.

II. Schumann Ignores Substantial Evidence That Contradicts His *Ipse Dixit*

Schumann's review of the record ignores substantial evidence that flatly contradicts his opinion.

But the totality was not very much. He relied only upon a small handful of purported communications - -

Schumann's opinion thus boils down to [redacted] He does not identify the specific amount or number of instances of any agreed-upon reduction, [redacted] and is unable to point to anything that supports his opinion :

[redacted] But when pressed, he conceded they were ***not*** of one mind: [redacted] More importantly,

[3] Schumann's Report ¶¶ 87-88 cited a few other documents - - but acknowledged that they could not have led to a conspiracy in *early* 2008 because they were dated in *late 2008 or mid-2009*, *after* the alleged conspiracy ended. [redacted]

Schumann did not empirically study whether job price discounts, in fact, declined. On the contrary, he acknowledges that job discounting continued throughout 2008 - - McWane reported

ARGUMENT

"[T]he trial judge ***must*** ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589 (emphasis added. This requires a determination that the expert's methodology is generally accepted in the scientific community, testable, and properly applied to the facts. *Id.* at 592-93 (emphasis added). A leading treatise identifies "red flags" which indicate unreliability and inadmissibility, including subjectivity and untestability, piecemeal review of the record, and failure to evaluate contradictory evidence. 2 Saltzburg, Martin & Kapra, *Federal Rules of Evidence Manual*, 1229-37 (7th ed. 1998). Schumann's opinion raises all of those red flags.

I. Courts Routinely Exclude Expert Opinions That Are Untestable

Expert opinion that is nothing more than the expert's untestable say-so is inadmissible as matter of law. *Joiner,* 522 U.S. at 146*; Weisgran v. Manley Co.*, 528 U.S. 440, 453 (2000) (contributes "nothing to a 'legally sufficient evidentiary basis'"); *Calhoun* 350 F.3d at 321 ("'must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation.'").

Schumann's opinion is not based on any peer-accepted empirical test. Instead, he subjectively interprets a few select documents and testimony. He concedes that his interpretation cannot be tested. Courts routinely exclude expert opinions based entirely on the expert's own say-so. In *City of Moundridge v. Exxon Mobil Corp.*, No. 04-940, 2009 U.S. Dist. LEXIS

123954, at * 39 (D. D.C. Sept. 30, 2009), the court held that plaintiffs' expert was entitled to "no weight" because his opinion ignored dozens of sworn denials and was "wholly unsupported and speculative." The D.C. Circuit affirmed and held that the expert's "unsupported assertion[]," based on a "few scattered communications," "falls far short" of the proof necessary to create a genuine fact issue. 409 Fed. Appx. 362, 364 (D. C. Cir. 2011); *see also In re Baby Food Antitrust Litig*., 166 F.3d 112, 135 (3d Cir. 1999) (opinion "based on meager superficial information" was "highly speculative, unreliable, and of dubious admissibility").

II. Overwhelming Record Evidence Contradicts Schumann's *Ipse Dixit*

Schumann's say-so is particularly unreliable because he flatly ignores substantial record evidence that contradicts his subjective belief - - for example,

domestic fittings customers in 2010. "[W]hen indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group*, 509 U.S. at 242. Again, courts routinely exclude experts whose *say-so is* contradicted by the evidence. *Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410, 416-17 (8th Cir. 2005) (failed to "take into account a plethora of specific facts"); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1323 (11th Cir. 2003) ("did not differentiate between legal and illegal pricing behavior" and "could not have aided a finder of fact"); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) ("mere speculation," "not supported," "indisputable record facts contradict or otherwise render the opinion unreasonable") (quoting *Brooke Group*, 509 U.S. at 242).

Dated: August 2, 2012

/s/ J. Alan Truitt

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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By: _____/s/ William C. Lavery_____
William C. Lavery
Counsel for McWane, Inc.

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STAR PIPE PRODUCTS, LTD., a limited partnership,	)	
	)	
Respondents.	)	
	)	

PROPOSED ORDER

On July 27, 2012, McWane, Inc. filed its Motion in Limine to Exclude Opinion Testimony of Dr. Laurence Schumann. Upon consideration of this motion, it is hereby GRANTED.

ORDERED:

_____
D. Michael Chappell
Administrative Law Judge

_____, 2012

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STATEMENT REGARDING MEET AND CONFER

Pursuant to Paragraph 4 of the Scheduling Order, counsel for McWane met and conferred in good faith with Complaint Counsel regarding the issues raised in this motion but could not reach an agreement.

By: _/s/ William C. Lavery_____

Counsel for McWane, Inc.

EXHIBIT 1

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT 2

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT 3

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EXHIBIT 4

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EXHIBIT 5

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EXHIBIT 7

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EXHIBIT 8

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EXHIBIT 9

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EXHIBIT 10

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