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

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

ORDER DENYING MOTIONS *IN LIMINE* TO PRECLUDE ADMISSION OF EXPERT OPINIONS AND TESTIMONY

I.

Currently pending are: (1) Complaint Counsel's Motion *in Limine* to Exclude Certain Opinions and Price Analyses in Dr. Parker Normann's Expert Report; and (2) Respondent's Motion *in Limine* to Exclude Opinion Testimony from Dr. Laurence Schumann. Each of the foregoing motions was filed July 27, 2012, with the parties' respective oppositions filed on August 7, 2012.

Having fully considered both motions *in limine*, and the oppositions thereto, and as more fully explained below, the motions are DENIED.

II.

A. Complaint Counsel's Motion *in Limine* Directed at Respondent's Expert

Complaint Counsel's motion seeks an order precluding the admission of any evidence pertaining to price analyses and related opinions of Respondent's proffered expert, Dr. Parker Normann. As grounds for its motion, Complaint Counsel asserts that Dr. Normann's pricing analyses and related opinions are unreliable because the underlying pricing data contains errors, and because the pricing data does not accurately reflect actual transaction prices.

Specifically, Complaint Counsel states that the pricing data upon which Dr. Normann relied in preparing his analyses and opinions contained incorrect "multipliers" (discounts off a list price), which when applied to the related list prices, resulted in incorrect "invoice" prices that were then used in Dr. Normann's analyses. According to Complaint Counsel, such errors affect 4.27% of the relevant 2008 McWane invoice data,

with 21% of the errors affecting January 2008 invoices. Complaint Counsel further contends that invoice price is an incorrect basis for any pricing analyses or opinions because it does not account for post-invoice adjustments such as freight discounts and rebates. Moreover, Complaint Counsel states, Dr. Normann's pricing analyses do not adjust or account for aggregation errors caused by month-to-month differences in both customer mix and order sizes, and also fail to account for other variables' potential effects on pricing, including the age of waterworks systems and treatment plants in municipalities, the state of the economy, and seasonal variations in supply and demand conditions. Complaint Counsel argues that the foregoing constitute gross and pervasive deficiencies, which render Dr. Normann's analyses and related opinions meaningless and unreliable.

Respondent contends that the pricing data upon which Dr. Normann relied contained only a small number of anomalies, which even when removed do not affect Dr. Normann's conclusions, and that the vast majority of the sales transactions studied did not contain errors. In addition, Respondent contends that, contrary to Complaint Counsel's assertions, Dr. Norman did, when necessary, control for factors affecting prices, such as product mix and timing. According to Respondent, post-invoice price adjustments such as rebates or freight discounts are immaterial because the Complaint alleges improper conduct only as to job discounting, which is reflected in the invoice price. Based on the foregoing, Respondent argues that Dr. Normann's data is reliable and that Complaint Counsel's asserted deficiencies are best tested through cross-examination at trial, not preclusion.

B. Respondent's Motion *in Limine* Directed at Complaint Counsel's Expert

Respondent seeks an order precluding any expert opinions from Complaint Counsel's proffered expert, Dr. Laurence Schumann, because, according to Respondent, his opinions do not employ any economic expertise, but reflect only Dr. Schumann's interpretation of the record in the case, which interpretation is reserved for the trier of fact. Respondent contends that Dr. Schumann's opinions were not subjected to any statistical testing, and that absent such empirical testing, Dr. Schumann's opinions are nothing more than inadmissible "*ipse dixit*," *i.e.*, unproven assertions.[1] Furthermore, according to Respondent, Dr. Schumann's opinions should be excluded because he ignores "overwhelming" evidence in the record, such as sworn statements denying the existence of any unlawful agreement that, Respondent asserts, contradicts Dr. Schumann's opinions.

Complaint Counsel responds that statistical tests are not a necessary methodology for a social science, such as economics, and that *Daubert* does not imply that economic opinion that is not based on statistical analysis must be barred. Complaint Counsel asserts that the available pricing data in this case is flawed and does not permit reliable statistical testing. However, Complaint Counsel states, Dr. Schumann's opinions do rely on other reliable methodologies, such as economic theories, principles, and models.

[1] *See* http://www.merriam-webster.com/dictionary/ipse%20dixit.

Complaint Counsel notes that, among other things, Dr. Schumann reviewed the record and applied a variety of economic concepts, such as oligopolistic interdependence, to draw conclusions about the relevant market and the behavior of Respondent and others in the market. Dr. Schumann's opinions, and the underlying methodology, are best tested, Complaint Counsel argues, through vigorous cross-examination.

In addition, Complaint Counsel states that Dr. Schumann did not ignore the sworn statements denying any unlawful agreement, but considered the statements and concluded that the denials did not fairly meet the allegations of the Complaint. Finally, Complaint Counsel asserts that Dr. Schumann's opinions are not offered to replace the function of the trier of fact, but to assist the trier of fact by placing the evidence in an economic context.

III.

A. Applicable Legal Standards

As stated most recently in the Order Denying Respondent's Motion to Preclude Complaint Counsel's Proposed Proffer of Investigational Hearing Transcripts at Trial, issued August 15, 2012:

> "Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984); *see also In re Motor Up Corp.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. The practice has also been used in Commission proceedings. *E.g., In re Telebrands Corp.*, Docket 9313, 2004 FTC LEXIS 270 (April 26, 2004); *In re Dura Lube Corp.*, Docket 9292, 1999 FTC LEXIS 252 (Oct. 22, 1999).
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> Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL) (AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003).
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> In addition, "*[i]n limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial." *In re Daniel*

> *Chapter One*, No. 9329, 2009 FTC LEXIS 85, at *20 (Apr. 20, 2009) (citations omitted). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Id.* (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)).

(quoting in part *In Re POM Wonderful LLC*, 2011 FTC LEXIS 77, at *3-4 (May 5, 2011)).

When ruling on the admissibility of expert opinions, in particular, courts consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and the many cases applying *Daubert*, including *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153-54 (1999). However, as noted in *In re Daniel Chapter One*, 2009 FTC LEXIS 85, the court's role as a "gatekeeper," pursuant to *Daubert*, to prevent expert testimony from unduly confusing or misleading a jury, has little application in a bench trial. 2009 FTC LEXIS 85, at *21-22 (Apr. 20, 2009), citing *Clark v. Richman*, 339 F. Supp. 2d 631, 648 (M.D. Pa. 2004) (stating that "[a]s this case will be a bench trial, the court's 'role as a gatekeeper pursuant to *Daubert* is arguably less essential.'"); *Albarado v. Chouest Offshore, LLC*, Civil Action No. 02-3504 Section "J"(4), 2003 U.S. Dist. LEXIS 16481, at *2-3 (E.D. La. Sept. 5, 2003) (stating that "[g]iven that this case has been converted into a bench trial, and thus that the objectives of *Daubert* . . . are no longer implicated, the Court finds that defendant's motion should be denied at this time. Following the introduction of the alleged expert testimony at trial, the Court will either exclude it at that point, or give it whatever weight it deserves."). Rather 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." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *21; *see Fierro v. Gomez*, 865 F. Supp. 1387, 1396 n.7 (N.D. Cal. 1994) (quoting *Daubert*, 509 U.S. at 596)).

B. Analysis

1. Complaint Counsel's Motion *in Limine* Directed at Respondent's Expert

Based upon the foregoing legal standards, Complaint Counsel's Motion *in Limine* is denied. Complaint Counsel's criticisms of Dr. Normann's data are based largely on the opinions of its proffered expert, Dr. Schumann; however, the validity of Dr. Schumann's opinions in this regard has yet to be determined. *See In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *23-24 (Apr. 20, 2009) (denying motion *in limine* to exclude expert where alleged inadequacies in opinions were based upon Complaint Counsel's version of the facts, which had yet to be proved at trial).

In addition, it is readily apparent from a review of Complaint Counsel's criticisms of Dr. Normann's data, and Respondent's responses thereto, that the challenge to Dr. Normann's pricing analyses is not that they have no basis, but that the bases, according to Complaint Counsel, are flawed. Thus, the motion presents "a classic disagreement between experts that goes to the credibility of each expert's opinions, not to the reliability of their methodology" for purposes of admissibility. *Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1092 (D. Colo. 2006). As recognized by *Lantec, Inc. v. Novell, Inc*, a case cited by Complaint Counsel, "the 'perceived flaws' in an expert's testimony often should be treated as 'matters properly to be tested in the crucible of the adversarial system,' not as 'the basis for truncating that process.'" 2001 U.S. Dist. LEXIS 24816, at *5 (D. Utah 2001 (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1079 (5th Cir. 1996)). *Compare Haggerty v. Upjohn Co.*, 950 F. Supp. 1160, 1167 (S.D. Fla. 1996), relied upon by Complaint Counsel, which excluded expert opinions from consideration in opposition to summary judgment because the opinions had no scientific basis.

Banta Properties v. Arch Specialty Insurance Co., 2011 U.S. Dist. LEXIS 152928 (S.D. Fla. 2011), also cited by Complaint Counsel, is also inapposite. In that case, the court *denied* the motion to exclude expert opinion, rejecting the argument, *inter alia*, that the expert's opinion on causation failed to account for other possible causes of the damage at issue in the case. *Id.* at *9-12. The court held that the expert's failure to account for other possible causes "goes to the weight and credibility the jury should afford to [the] opinion," not its admissibility. *Id.* at *11. In the instant case, it cannot be determined at this stage of the proceedings, outside the context of trial, that the data upon which Dr. Normann relied is so flawed as to render his analyses and opinions "unreliable" and, therefore, excludable under *Daubert*.

2. Respondent's Motion *in Limine* Directed at Complaint Counsel's Expert

The foregoing reasoning applies with equal force to Respondent's Motion *in Limine*, which is also denied. While *Daubert* clearly requires that expert opinion be based on something more than the expert's own bare assertions, Respondent's contention that only statistical testing can provide a proper foundation for expert opinion is unpersuasive, and the cases relied upon by Respondent are distinguishable.

For example, the case of *City of Moundridge v. Exxon Mobil Corp.*, 2009 U.S. Dist. LEXIS 123954 (D.D.C. Sept. 30, 2009), cited by Respondent, did not exclude expert testimony, and specifically stated that it was "unclear" whether or not the experts' opinions would be admissible. *Id.* at *10 n.5, *40-42, and n.10. In *Moundridge*, in granting summary judgment, the court determined that each of the relevant expert opinions was wholly unsupported and speculative, and therefore were insufficient to create a triable issue of fact. *Id.* at *40-42, and n.10. *In re Baby Food Antitrust Litigation*, relied on by Respondent, did not involve a motion *in limine*, but whether the expert opinion at issue – along with other evidence – created a triable issue of fact to

defeat summary judgment. *Jacob Blinder & Sons, Inc. v. Gerber Prods. Co.* (*In re Baby Food Antitrust Litig.*), 166 F.3d 112, 117 (3d Cir. 1999). In that case, the expert's opinion that the defendants exchanged price information was based on nothing more than unreliable speculation where there was no other evidence in the record to support the opinion, and therefore could not defeat summary judgment. *Id.* at 135. In the instant case, whether the record does or does not support any opinions of Dr. Schumann, and whether such opinions are based upon valid economic principles, are issues best determined at trial, not by way of a motion *in limine.*

Respondent has failed to demonstrate that Dr. Schumann's opinions are wholly unsupported for failure to be subjected to statistical testing. As acknowledged by the court in *Moundridge*, expert opinion may properly draw on economic experience and knowledge. 2009 U.S. Dist. LEXIS 123954, at *39. Moreover, it cannot be concluded at this stage of the proceedings that Dr. Schumann's opinions will not assist the trier of fact. Finally, whether Dr. Schumann's opinions gave proper consideration to evidence in the record that is contrary to his opinions is best tested by cross-examination at trial.

IV.

Having fully considered both motions and the oppositions thereto, and for all the foregoing reasons, Complaint Counsel's Motion *in Limine* to Exclude Certain Opinions and Price Analyses in Dr. Parker Normann's Expert Report is DENIED and Respondent's Motion *in Limine* to Exclude Opinion Testimony is DENIED. This Order is not a determination, and shall not be construed as a ruling, as to the admissibility of any expert testimony that may be offered at trial.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August 16, 2012