

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



In the Matter of)
)
)
McWANE, INC.,)
 a corporation, and)
STAR PIPE PRODUCTS, LTD.,)
 a limited partnership.)
)
)
_____)

DOCKET NO. 9351

RESPONDENT MCWANE, INC.'S PROPOSED STIPULATIONS OF LAW, FACT, AND AUTHENTICITY

Respondent McWane, Inc. ("McWane") hereby submits its proposed stipulations of law, fact, and authenticity. The following proposed stipulations are in addition to the Joint Stipulations of Fact and Law, filed by the parties on August 28, 2012, pursuant to the Scheduling Order. McWane notes that the parties could not reach an agreement on the proposed stipulations below. McWane reserves the right to offer any additional stipulations of law, fact and authenticity subsequently agreed to by the parties, as provided for in the Scheduling Order.

I. Stipulations of Law

1. The standards outlined by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), apply to all expert testimony, including that of economists. *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999) ("There is no clear line that divides the one from the others.").
2. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993).

3. “Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.” *Id.*

II. Stipulations of Fact

1. There is no evidence that McWane directly communicated its prices to any other DIWF manufacturer or supplier in advance of communicating them to its customers or potential customers.
2. There is no evidence that any other DIWF manufacturer or supplier learned of McWane’s prices in advance of McWane informing its customers.
3. DIFRA was only operational from mid-2008 through the end of 2008.
4. There is no evidence that DIFRA will become operational again or will gather and disseminate DIWF sales or any other volume data at any point in the future.
5. There are more than 630 waterworks distributors in the United States.
6. Complaint Counsel cannot identify a single waterworks distributor that was prevented from purchasing Star’s domestic fittings by McWane’s September 2009 rebate policy.
7. There are more than 400 waterworks distributors in the United States that did not purchase domestic fittings from McWane between September 2009 and September 2010.
8. Complaint Counsel’s expert, Dr. Schumann, has not quantified any degree of foreclosure that Star has incurred as a result of McWane’s September 2009 rebate policy.
9. Complaint Counsel’s expert, Dr. Schumann, has not quantified any costs Star has incurred as a result of McWane’s September 2009 rebate policy.
10. Complaint Counsel’s expert, Dr. Schumann, concedes that there were no meetings between McWane and any competitor in “smoke-filled rooms” to discuss prices.
11. McWane’s January 11, 2008 letter to its customers (CX 2172) does not say anything on its face regarding centralized authority for project pricing.

12. McWane's January 11, 2008 letter to its customers (CX 2172) does not say anything on its face regarding reducing or discontinuing project pricing.

13. McWane's May 7, 2008 letter to its customers (CX 2170) does not say anything on its face regarding DIFRA.

14. In June 2009, Star announced that it would begin selling a full range of small, medium and large diameter fittings made for Star by outside foundries in the United States.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

34. Sigma approached McWane in 2009 regarding entering the Master Distributorship Agreement.

35. At all relevant times, domestic fittings and non-domestic fittings competed against each other in open preference jobs including before, during, and after ARRA.

36. Domestic fittings and non-domestic fittings are functionally interchangeable.

37. Since at least 2003, the majority of requests for proposal and specifications that include DIWF that were issued in the United States were open preference.

38. Non-domestic fittings have accounted for the majority of all sales of DIWF in the United States since at least 2007.

39. McWane's average price for non-domestic fittings was lower in 2010 than in 2008.

40. Between 2003 and 2011, McWane's share of domestic and non-domestic fittings dropped from approximately 70% to 40%.

41. In the last 15 years, domestic fittings have lost substantial market share to non-domestic fittings.

42. Between 2000 and 2007, according to the U.S. ITC, sales of non-domestic fittings into the United States have increased by 47.2%.

III. Stipulations of Authenticity

McWane proposes stipulating to the authenticity of the following documents. McWane reserves the right to object to any document as irrelevant, immaterial, hearsay or for any other basis permitted for objection under the Federal Rules of Evidence or Rules of this Court.

[REDACTED]

[REDACTED]

Dated: September 20, 2012

/s/ J. Alan Truitt

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
Phone: 205.254.1000
Fax: 205.254.1999
atruitt@maynardcooper.com
tthagard@maynardcooper.com

/s/ Joseph A. Ostoyich

Joseph A. Ostoyich
Erik T. Koons
William C. Lavery
Heather Souder Choi
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420
Phone: 202.639.7700
Fax: 202.639.7890
joseph.ostoyich@bakerbotts.com
erik.koons@bakerbotts.com
william.lavery@bakerbotts.com
heather.choi@bakerbotts.com

Attorneys for Respondent McWane, Inc

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 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 overnight mail 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 served via electronic mail a copy of the foregoing document to:

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
Thomas H. Brock, Esq.
Michael L. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.

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