

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
)
_____)

**MOTION IN LIMINE TO EXCLUDE CERTAIN OPINIONS AND PRICE ANALYSES
IN DR. PARKER NORMANN'S EXPERT REPORT**

Complaint Counsel ("CC") seeks to exclude any evidence related to the price analyses and related opinions of McWane's economist, Dr. Parker Normann, because they are based on faulty data that are rife with errors and improper methodologies. The data used by Dr. Normann is so flawed that Dr. Lawrence Schumann, CC's expert economist, opted not to use it. Indeed, Dr. Schumann {

} See Castillo

Decl., Tab 3, at 5-6. Not only does Dr. Normann fail to correct or account for these errors, he fails to properly control for variables that influence price, calculate error rates, validate his data through random sampling or other statistical analysis, or even throw out missing data points.

{

} As a result, Dr. Normann's opinions based on the data are patently unreliable.

Even assuming *arguendo* the reliability of the data, Dr. Normann's use of invoice price, rather than the actual transaction price paid by customers renders his conclusions regarding CC's price fixing conspiracy allegations similarly unreliable because invoice prices do not represent the

actual price customers paid for fittings and therefore reveal nothing with respect to competition, collusion, or any other economic characteristic of the Fittings market. Finally, most of Dr. Normann's opinions regarding CC's monopolization allegations are based on this same set of defective data and are therefore also unreliable. While motions in limine are "discouraged," a decision now to exclude the opinions and figures highlighted in Tab 1 will greatly expedite trial and should therefore be granted.

I. BACKGROUND

The Normann Report was produced on June 29, 2012, and Dr. Normann was deposed on July 23, 2012. *See* Castillo Decl., Tab B (Normann Report) & Tab C (Normann Deposition Transcript). Complaint Counsel met and conferred with counsel for Respondent regarding the issues in this Motion but could not resolve these issues. *See* Meet and Confer Statement.

II. ARGUMENT

Courts exclude expert testimony when it fails to meet the standards for relevance and reliability, and require any admissible expert opinions to be: (1) based on sufficient facts or data; (2) derived from reliable principles and methods; and (3) based on reliable methods to apply those principles and methods to the facts of the case. F.R.E 702; *see also Kumho Tire v. Carmichael*, 526 U.S. 137, 149-150 (1999); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591-595 (1993). Courts often strike down expert opinions based on data insufficiency and improper methodology when experts fail to use reliable data that has been tested and verified; and use poor methodologies, such as failing to calculate the error rate of the underlying methodology or to develop a means for controlling the error rate of a technique. *See, e.g., Banta Props., Inc. v. Arch Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 152928, at *11-12 (S.D. Fl. 2011) (striking expert opinion on causation because expert failed to test her methodology, calculate its

rate of error, or maintain methods of control throughout her calculations); *Lantec v. Novell*, 2001 U.S. Dist. LEXIS 24816, at *11-12 (D. Utah, 2001) (excluding expert testimony based on anecdotal evidence without using other means to verify the data calculations).

Here, Dr. Normann's opinions related to his pricing analyses should be excluded for two principal reasons. First, Dr. Normann relies on flawed data – it is not only riddled with errors, but it also does not reflect the true transaction price, or the price actually paid by customers. Second, Dr. Normann uses unreliable principles and methods to analyze the data. These problems apply to Dr. Normann's pricing analyses for the horizontal claims as well as the monopolization claims. Because Dr. Normann's graphs and other pricing analyses cannot reliably support any conclusions with respect to competition, collusion, or any other economic characteristic of the Fittings market, these analyses and all related opinions should be excluded.

A. Dr. Normann Relies on Fatally Flawed Data

Dr. Normann's pricing analyses and related opinions should be excluded because they are based on data with widespread errors that have not been accounted for or fixed. They should also be excluded because Dr. Norman relied on the wrong data. Dr. Norman improperly based his opinions on invoice prices rather than the actual transaction prices paid by customers.

1. Dr. Normann Used Data Sets That Were Rife With Plain Errors

Dr. Normann bases his conclusions on raw data that contains serious defects and do not reliably reflect the prices paid by customers. McWane prices its Fittings based on a national list price and multipliers based on that list price for various states and regions around the country. For example, if a Fitting list price were \$100, and the New York multiplier were .37, the published price for that Fitting purchased in New York would be \$37. Any additional discounts applied to a specific Fitting would further reduce the \$37 price.

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}

These errors affect {

} The extent of these errors may be far worse. We can

only detect errors when {

}

There may be many additional errors {

} These errors would cause a bias in prices, but we

have no way of measuring the extent to which the price data contain this sort of error.

The data set is so seriously flawed that any conclusions drawn from the analysis of the price data is likely to be erroneous and misleading, and should therefore be excluded.

2. Dr. Normann Used the Wrong Data

Even if the data used by Dr. Normann were not fatally flawed, Dr. Normann improperly relied upon the wrong data. Dr. Normann relied on invoice price, rather than actual

¹ Castillo Decl., Tab 2 at ¶ 15, fn 6.

² Castillo Decl., Tab 3, at 88-89.

transactional price paid by the customer.³ {

}

These flaws are further compounded by Dr. Norman's failure to adjust or account for aggregation errors caused by month-to-month differences in both customer mix and order sizes.

{

} Thus, failure to control for customer mix and order size will cause average prices and price indices to rise or fall irrespective of any changes in the degree of competition or collusion.

{

} Yet this critical information is not reflected in the pricing analyses and Dr. Normann does not address it in any form – thereby rendering all of his conclusions based on the pricing

³ Castillo Decl., Tab 3, at 6-7.

data unreliable and potentially misleading. *See generally Haggerty v. Upjohn Co.*, 950 F. Supp. 1160, 1164 (S.D. Fl. 1996) (court excluding expert opinions due to expert’s reliance on the wrong data).

In summary, Dr. Normann’s conclusions based on his pricing analyses should be excluded because it relies on garbage data: garbage in, garbage out. *See also* Castillo Decl., Tab 2, at 20-63 (describing data errors underlying Dr. Normann’s opinions).

B. Dr. Normann’s Empirical Analyses Do Not Comport with Basic Statistical and Econometric Methods

Even if the data were not fatally flawed, Dr. Normann’s failure to control for the many factors that directly and substantially impact prices would render his analysis and conclusions meaningless.⁴ This gross omission is fatal to Dr. Normann’s entire analysis. “The major issue faced by any attempt to estimate the effect of a merger on price, as with any intervention using nonexperimental data, *is the method used to control for other confounding factors that may also have changed at the time of the event.*”⁵ Although this quote refers specifically to the estimation of the effect of a merger on price, the underlying principle applies to “any intervention using nonexperimental data,” and so the issue of controlling for confounding factors is equally applicable here.

To do so requires that one control for all other factors that might affect price besides the event of interest, at least when data are generated in actual markets rather than in controlled

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}

⁵ See Ashenfelter and Hosken, “The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin,” *Journal of Law and Economics* 53 (2010) (emphasis added); Ashenfelter et al., *Generating Evidence to Guide Merger Enforcement*, CEPS Working Paper No. 183, Princeton University, available at <http://www.princeton.edu/ceps/workingpapers/183ashenfelter.pdf>.

laboratory settings. Only by controlling the “*other confounding factors that may also have changed at the time of the event,*” is the effect of the event of interest isolated from the confounding factors that also affect price. Thus, “*the major issue*” in measuring the impact of an event such as a price-fixing agreement on prices is to properly control for all of the other factors besides the price-fixing agreement that might impact prices. Only by doing so can the effect of the price-fixing agreement be determined.

In the Fittings market, factors such as the age of waterworks systems and treatment plants in municipalities, municipal finances, housing starts, the “great recession,” prices of diesel fuel used by trucking, railroad, and shipping companies; and seasonal factors may affect demand and supply conditions and, therefore, prices. {

}

C. Dr. Normann’s Opinions Regarding CC’s Monopolization Claims Suffer The Same Fatal Flaw

Dr. Normann’s opinions with respect to McWane’s monopolization of a domestic-only Fittings market should be excluded as well. They rest on analyses that are grossly flawed. For example, {

} One cannot sensibly conclude or infer much about either category of Fittings, or make even minimally useful comparisons between the categories, given Dr. Normann's mischaracterization problem. And yet Dr. Normann relies on just such conclusions, inferences, and comparisons, and for that reason these Figures and related analyses and opinions should be struck.

In numerous other instances, not only did Dr. Normann {

} As we indicated previously, this is not a mere methodological quibble. It is a failure by Dr. Normann to have adhered to a reasonable standard of economic rigor and professional care, and it cannot yield reliable conclusions or inferences. Dr. Normann's opinions with respect to McWane's monopolization of a domestic-spec Fittings market consist of nothing more than just such conclusions and inferences. Accordingly, these Figures and related analyses and opinions too should be struck.

III. CONCLUSION

For the reasons stated above, Dr. Parker Normann's pricing analyses and related opinions, as identified in Tab 1, should be excluded.

Dated: August 2, 2012

Respectfully submitted,

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PROPOSED ORDER

On July 27, 2012, Complaint Counsel filed a Motion *in Limine* to Exclude Certain Opinions and Price Analyses in Dr. Parker Normann’s Expert Report (“Motion”). Upon consideration of this Motion, and Respondent’s opposition thereto, this Court GRANTS Complaint Counsel’s Motion.

ORDERED:

D. Michael Chappell
Administrative Law Judge

_____, 2012

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COMPLAINT COUNSEL’S MEET AND CONFER STATEMENT

On July 26, 2012 Complaint Counsel met and conferred with counsel for Respondent McWane, Inc., regarding Complaint Counsel’s Motion in *Limine* to Exclude Certain Opinions and Price Analyses in Dr. Parker Normann’s Expert Report. After a good faith attempt to resolve the issue, both sides agreed that they were at an impasse.

Dated: August 2, 2012

Respectfully submitted,

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DECLARATION OF MONICA M. CASTILLO

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness, I could and would testify competently under oath to such facts.
2. I am an attorney at the Federal Trade Commission and Complaint Counsel in these proceedings. Attached to this declaration are the exhibits submitted in support of Motion *in Limine* to Exclude Certain Opinions and Price Analyses in Dr. Parker Normann’s Expert Report.
3. Tab 1 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. The yellow highlighting reflects those portions of the report that Complaint Counsel believes should be excluded for the reasons set forth in the Motion.
4. Tab 2 is a true and correct copy of the CX 2265, the Rebuttal Expert Report of Laurence Schumann, Ph.D.
5. Tab 3 is a true and correct copy of the rough transcript of Parker Normann, Ph.D.’s July 23, 2012 deposition.

I declare under penalty of perjury that the foregoing is true and correct. Executed this
2nd day of August, 2012, at Washington, DC.

s/ Monica M. Castillo
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Counsel Supporting the Complaint

CONFIDENTIAL EXHIBIT

REDACTED IN ENTIRETY

TAB 1

CONFIDENTIAL EXHIBIT

REDACTED IN ENTIRETY

TAB 2

CONFIDENTIAL EXHIBIT

REDACTED IN ENTIRETY

TAB 3

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 electronic mail and 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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Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of 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 the parties and the adjudicator.

August 2, 2012

By: s/ Thomas H. Brock
Attorney