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.[1] Here, Dr. Schumann concludes that the available data does not permit reliable statistical testing, and instead he uses other reliable methodologies consistent with well-established economic principles.

[1] For example, the 2010 FTC/DOJ Horizontal Merger Guidelines discuss numerous non-statistical techniques for defining relevant markets. Although Dr. Schumann applies these techniques in opining that there is a relevant market consisting of purchasers of ductile iron pipe fittings pursuant to Buy-American specifications, McWane apparently would exclude that testimony as "junk science" 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 charges. 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 three 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., Inc.*, 509 U.S. 579, 592 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153-54 (1999). *In re 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 *in limine* 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 Bhd. of Elec. Workers Local Union No. 3*, 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 methods and 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 misstating Dr. Schumann's report and testimony.

A. McWane Ignores *Kuhmo Tire* and Incorrectly Applies Natural Science Standards to Dr. Schumann's Social Science Testimony

In its motion, McWane falsely attacks Dr. Schumann for "not employ[ing] any test at all," Resp. Mtn., at 2, because Dr. Schumann did not employ *statistical* tests. But statistical tests are hardly the only appropriate methodology utilized by expert economists.

McWane's improper insistence on statistical tests as the sole appropriate methodology might be warranted in suits involving certain natural science questions, but it has no applicability to the social science questions before this court. In *Daubert*, the Supreme Court warned that its "discussion is limited to the scientific context because that is the nature of the expertise offered here." 509 U.S. at 590 n.9, 594 (assessing methodology underlying expert opinion as "a flexible one"). When applying *Daubert* to disciplines other than the natural sciences, the Court in *Kumho Tire* noted the distinction between technical and "other specialized knowledge," such as economics, and the natural sciences. Accordingly, the *Kumho Tire* Court stressed that judges have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." 526 U.S. at 151-52.

This leeway is particularly important where, as here, the expert testimony offered is in a social science, onto which the *Daubert* factors "do not map easily." *See Durmishi v. National Cas. Co.*, 720 F. Supp. 2d 862, 881-82 (E.D. Mich. 2010) (denying defendant's motion to strike expert testimony because the expert relied on "the knowledge of the industry that informs his method"). *Daubert* does not imply that no economic opinion may be rendered unless statistical analysis can be competently done, as McWane's motion implies. Such a rule would deprive courts of the ability to rely on other analytical tools and opinions that a court might find helpful.

After careful consideration of the price data produced by McWane and its co-conspirators, Dr. Schumann concluded that the data presented **{ }**

Mann Decl., Tab 1 at 5, and that **{**

} *Id.* at 6. Indeed, any statistical or empirical work using the flawed data would fail the *Daubert* standard for reliability and should be excluded.[3]

But economists are not statisticians and their analytical methods are not limited to reviewing data work. In antitrust litigation, economists routinely use their expertise to review the record to ascertain the economic significance of facts when forming their opinions. *See, e.g., U.S. Info. Sys.*, 313 F. Supp. 2d at 236 (finding expert testimony to be admissible because "he has applied his expertise to the facts of the case"); s*ee also Kuhmo Tire*, 526 U.S. at 151. Indeed, Dr. Normann, McWane's economist, relies solely on documents and testimony to form some of his opinions. Mann Decl., Tab 2 at 31-32.

In *U.S. Information Systems, Inc.*, the court admitted an economist's expert opinions based solely on deposition testimony. Specifically, the court approved of the economist applying "economic principles to determine whether the situation described was one that tended to show economic indicators of market dominance and monopoly leveraging," and then drawing his "ultimate conclusions . . . based on the application of 'standard economic methodology' to the facts at hand." *U.S. Info. Sys.*, 313 F. Supp. 2d at 237.

Dr. Schumann applied a similar method. For example, he identifies nine different economic factors that are conducive to coordination and explicit collusion. Dr. Schumann explains the nine factors, applies them to the record evidence, and concludes that **{**

} Resp. Mtn., Exh. 1 at 34. This is exactly the type

[2] Although McWane asserts that Dr. Schumann's concern about the data "was made-up or overblown." Resp. Mtn., at 4, n.2. Counsel for McWane acknowledged the problems with the data. *See* Mann Decl., Tab 3.
[3] Complaint Counsel filed a Motion *In Limine*, on July 27, 2012, to exclude conclusions Dr. Normann draws from this corrupt data.

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 Corp.*, 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 plaintiffs 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 the record 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. The facts 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 considered 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-fixing. As Dr. Schumann explained:

{

}

Resp. Mtn., Exh. 2 at 99:14-24. Here again, Dr. 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 where flawed. 522 U.S. at 143-46. Without those studies to rely on, the *Joiner* Court found the expert's opinion to only consist of *ipse dixit*. *Id*. at 146. That is not the case here. As explained above, Dr. Schumann relies on time-tested, well-established economic principles and theories to analyze the facts of this case.

Finally, it is for the trier of fact to weigh the evidence and determine whether it fairly supports the Complaint's charges. But the Court is not required to weight that evidence as a predicate to the admissibility of expert opinions. Dr. Schumann understands that in the end his opinions are to assist the trier of fact, who will ultimately decide the issues. Resp. Mtn., Exh. 2 at 15:13-19; 20:5-14.

Conclusion

For these reasons, this Court should deny McWane's motion.

Dated: August 13, 2012

Respectfully submitted,

s/ Andrew K. Mann
Edward D. Hassi, Esq.
Linda Holleran, Esq.
Joseph R. Baker, Esq.
Thomas H. Brock, Esq.
Michael J. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.
Monica M. Castillo, Esq.

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Electronic Mail: ehassi@ftc.gov

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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 *In the Matter of McWane, Inc.*, FTC Docket No. 9351, in support of Complaint Counsel's Memorandum in Opposition to McWane, Inc.'s Motion *in Limine* 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 CX2265, 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 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 "Question Re Data in McWane Spreadsheet." CX 2554 is an email sent on 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 the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed this 13th day of August, 2012, at Washington, D.C.

Respectfully submitted,

s/ Andrew K. Mann
Andrew K. Mann
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-2481

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 13, 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:

Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 639-7700
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1000
atruitt@maynardcooper.com
tthagard@maynardcooper.com

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 13, 2012

By: s/ Thomas H. Brock
Attorney