



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 OPPOSITION TO COMPLAINT COUNSEL’S MOTION IN LIMINE
TO EXCLUDE CERTAIN OPINIONS AND PRICE ANALYSES IN DR. PARKER
NORMANN’S EXPERT REPORT**

Complaint Counsel (“CC”) does not challenge Dr. Normann’s expertise or his qualifications to testify as an economist, which are based on his PhD in economics and more than 15-years of experience analyzing and empirically testing a wide range of antitrust economic issues. Nor does CC challenge the vast majority of his analyses and opinions. For example, CC raises no issue with Dr. Normann’s opinions based on volume tonnage data or other non-price business records, which encompass Figures 1, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 25, 26, and 32.

Instead, CC narrowly challenges only opinions based on Dr. Normann’s invoice price analyses which are contained in Figures 2A, 2B, 3, 4, 9-10, 23, 24, and 28-31. Those analyses - - which show that McWane’s prices declined during the alleged conspiracy period (Figure 2A) and were not parallel with Sigma or Star’s prices (Figure 2B), that job pricing continued throughout the alleged conspiracy (Figure 4), that Star sold _____ in its first year with domestic fittings, and that _____ after Star’s expansion into domestic (Figures 27-31) - - *are based on*

invoice prices that McWane, Sigma, and Star kept in the ordinary course and relied on to run their businesses.

Dr. Normann and his team thoroughly investigated the data which contains millions of discrete pieces of information, including invoice prices, SKUs, quantities, dates, and ship-to locations. Dr. Normann found anomalies in a very (e.g., blank data fields or typos). He and his team thoroughly compared those anomalies to surrounding non-anomalous data and satisfied themselves that the anomalies were explainable on their face (e.g., decimal point out of place) or could be properly interpreted using the kinds of reasonable assumptions economists routinely use in assessing complex databases. Dr. Normann thus found that more than 99% of the data at issue was entirely understandable and reliable. *Dr. Normann also satisfied himself that the data was sufficiently robust because he ran the same tests with and without the tiny fractional percentage of anomalies - - and saw the same results.*

CC argues that the small incidences of anomalies in the McWane database renders *all* of the data from McWane, Sigma and Star - - despite the fact that they relied upon it for the last decade to conduct their businesses. That is preposterous. CC's assertion is entirely based on their own expert, Dr. Schumann's, *new-found claim in his Rebuttal Report*. Indeed, Dr. Schumann conceded that his affirmative Report - - which contained all of his affirmative conclusions - - *raised no critique of the data at all.* He also conceded he was not personally involved and spent "not very much time at all" analyzing and trying to understand the data.¹

¹ [REDACTED]

CC's remaining critique - -

- - simply mischaracterizes Dr. Normann's methodology. Dr.

Normann's tests controlled for exogenous factors when there was a need to control for them. When there was not a need to control for exogenous factors, he did not. For example, to test the hypotheses set out in the Complaint (¶¶ 32-34) that the January and June 2008 multipliers were "*price increases*" that were "the result of a combination and conspiracy" by which Star and Sigma "*limit[ed] their discounting from public price levels* in order to induce McWane to support *higher price levels*," Dr. Normann studied the January and June 2008 multipliers and the invoice data (which reflects discounts below the multiplier discounts) - - the very price decisions allegedly at issue - - and found evidence that conclusively disproved the hypotheses on its face (without any need to control for outside factors):

[REDACTED]

Dr. Normann's opinions and price analyses readily satisfy the Fed. R. Evid. 702 and *Daubert* requirements. He is indisputably qualified, and carefully and thoughtfully applied a reliable methodology to reliable data that was used by the parties in the ordinary course of

[REDACTED]

² Any further post-invoice price concessions (such as rebates) are immaterial because the Complaint does not allege an agreement to reduce those concessions. The Complaint only alleges an agreement to limit job discounts, which are reflected on the invoice.

running their businesses over the last decade. CC's assertions to the contrary, based entirely on its own expert's after-the-fact, minor critique, are pure fiction.³

FACTUAL BACKGROUND

I. Dr. Normann Used Reliable Data

The transactional data Dr. Normann and his team analyzed is the same data that has been used by McWane, Star and Sigma in the ordinary course of their businesses for the past decade.

The invoice level data contained literally millions of entries, and only a very

contained any anomalies.

Dr. Normann and his staff conducted

numerous robustness checks of the data and results, including re-running the analysis excluding the small fraction of potentially anomalous data entries, and found that even removing all of those transactions did not affect his analyses or conclusions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Normann found that after additional study and testing, the vast majority of the small fraction of anomalous data entries were explainable on their face. Specifically, Dr. Schumann incorrectly considers any transaction where the actual multiplier exceeds the published multiplier an error. [REDACTED] However, the vast majority of the transactions in McWane's data set have a calculated (or actual) multiplier either at the published multiplier, or consistent with job price discounting. Dr. Normann and his team identified and further studied

³ Indeed, CC did not affirmatively reach out to counsel for McWane to conduct meet and confer regarding Dr. Normann's price analyses, and only raised the issue as a tit-for-tat when McWane called to confer on its motion to exclude Dr. Schumann.

this low number of potentially suspect transactions and found that the actual transaction prices were sound.

With respect to the pricing data (used in Figures 2A, 2B, 3-4, 9-10, 23-24, 28-31, and opinions based on them) that CC characterizes as containing the vast majority of the transactions studied are attributable to data that was objectively not problematic. For each of these figures, between *99% and 100% of the volume* can be attributed to undisputed transactions; and even *potentially* problematic transactions are limited to a small number of transactions in McWane's price series only (Star and Sigma's data were not affected), thus making *any* anomalies immaterial. [REDACTED]

[REDACTED] This low number of even *potentially* suspect transactions is well below a threshold required to justify the discarding of all the data produced in this litigation. [REDACTED]

II. Dr. Normann Controlled For The Factors Necessary To Conduct His Analysis

Where relevant, Dr. Normann controlled for factors that impacted prices his graphs on a number of his figures, and when he did not attempt to control for any factors, it was not necessary. For example, for Figures 2A, 2B, 3 and 4, Dr. Normann controlled for both product mix and timing. For figure 6 the series are indexed and overlapped to control for seasonality.⁵

⁴ Notably, Dr. Schumann uses these same fields in his own report. [REDACTED]

⁵ [REDACTED]

As explained in further detail in his declaration, it was not necessary to control for factors beyond what he controlled for.

Finally, no controls were necessary for Figures 7, 8, 12, 16, and 21-31. (Ex. 3, at ¶¶14-15.) CC's allegations focused on "price increases" in January and June 2008 that were "the result of a combination and conspiracy" by which Star and Sigma "limit[ed] their discounting from public price levels in order to induce McWane to support higher price levels" - - i.e., an alleged agreement to *increase* multipliers and to *increase* invoice prices by limiting invoice-level job discounts. (Compl. at ¶¶ 32-34.) Both allegations are measureable by analyzing the data. Thus, there was no need to control for additional factors because the data on its face disproves the hypothesis that McWane increased multipliers and invoice job prices, and that it did so in conjunction with Sigma and Star.

Indeed, Dr. Normann's key price graphs and conclusions are corroborated by contemporaneous documents and testimony - - and, often, by CC's own expert. [REDACTED]

[REDACTED]

[REDACTED] Dr. Normann's Figure 4 shows that McWane's invoice job price discounts continued throughout 2008 and do not move in parallel with Star or Sigma. That is entirely consistent with independent decision-making and the *250-plus sworn denials* of any conspiracy in this case - - and entirely consistent with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and

his inability to define in any fashion any agreement to reduce either the incidences or the amount of job discounts.

ARGUMENT

Pursuant to Federal Rule of Evidence 702 and relevant case law, a court should be able to obtain the benefit of an expert's opinion so long as (1) the expert is qualified; (2) the expert's opinion is based on reliable methods and principles; and (3) the expert's methods fit the facts of the case. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579-80 (1993). Dr. Normann easily meets the standards of Rule 702 and *Daubert*. He is indisputably qualified by education, training, and experience to testify as an expert in this matter, and quibbles over his assumptions regarding a small fraction of anomalous data entries in a very large amount of data is not a proper reason to exclude his expert opinion. *Fisher v. Ciba Specialty Chemicals Corp.*, 2007 WL 2302470 at *15 fn.31 (S.D. Ala. 2007) ("To the extent that [parties] now quibble with the accuracy of the living history data . . . the remedy is not to throw out [expert] testimony in its entirety as unreliable under *Daubert*"); *Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1092 (D. Colo. 2006) (disputes over the reliability of data set was "a classic disagreement between experts that goes to the credibility of each expert's opinions, not to the reliability of their methodology within the meaning of Rule 702.").

"Vigorous cross-examination [and] presentation of contrary evidence" are the traditional and appropriate means of attacking the evidence upon which a qualified expert bases his opinions. *Daubert*, 509 U.S. at 595; *Oddi v. Ford Motor Co.*, 234 F.3d 136, 145 (3d Cir. 2000) ("The test of admissibility . . . is whether the particular opinion is based on valid reasoning and reliable methodology. The analysis of the conclusions themselves is for the trier of fact when the expert is subjected to cross-examination."). "Rule 702 embodies three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability and fit." *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000). Exclusion, in contrast, is based for the situations when - - as with Dr. Schumann's opinion in this matter - - the expert's opinion is nothing more

than his “wholly unsupported and speculative” belief. *City of Moundridge v. Exxon Mobil Corp.*, No. 04-940, 2009 U.S. Dist. LEXIS 123954, at * 39 (D. D.C. Sept. 30, 2009), *aff’d*, 409 Fed. Appx. 362, 364 (D. C. Cir. 2011).

The price data Dr. Normann analyzed was reliable and sufficiently robust to test the hypotheses raised in the Complaint. Dr. Normann’s opinion is thus sound in concluding that: (1) McWane’s published multiplier price changes in January or June of 2008 were different from and often lower than Sigma’s and Star’s; (2) McWane’s invoice-level job discounts continued in 2008; (3) McWane’s declining invoice prices moved in different directions from those of Sigma and Star; (4) there is no economic evidence for an agreement to reduce job pricing; (5) McWane’s rebate policy was not exclusionary, as Star was able to quickly enter the domestic fitting segment; and (6) McWane’s average domestic fittings invoice prices were at all times lower than Star’s.

The invoice job price data from McWane, Star and Sigma was fully reliable and sufficiently robust to support Dr. Normann’s conclusion that the data directly contradicts the Complaint’s allegations. CC’s critique - - when its own expert did not raise any concern at all with the data in his affirmative Report and conceded that he spent little or no time investigating [REDACTED] he says *might* be of concern - - rings hollow. The fact that the results of each of Dr. Normann’s extensive tests are consistent with undisputed testimony and other record evidence in this case (and, often, with the view of CC’s own expert) further confirms the reliability of Dr. Normann’s analyses and the validity of his resulting opinion. Thus, any dispute over the data Dr. Normann relied on or the factors he controlled for, is an issue for the trier of fact and not proper grounds for a *Daubert* motion.

Dated: August 13, 2012

/s/ J. Alan Truitt

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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:

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

The Honorable D. Michael Chappell
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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EXHIBIT 1

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entirety**

EXHIBIT 2

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