UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

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

RESPONDENT'S COMPILATION OF MATERIALS TO PRESENT DURING ORAL ARGUMENT

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Dated: August 15, 2013

Respondent McWane, Inc.'s Oral Argument on Counts 4-7

August 22, 2013

Judge Chappell's Fact Findings Compel A Ruling In McWane's Favor On Counts 4-7

- The Complaint alleged exclusionary conduct…but no one was excluded
  - "Clearly, Star entered the domestic Fittings market." I.D. 382
  - "Sigma did not have a viable domestic production option" and thus "Complaint Counsel has not shown that Sigma was a potential competitor." I.D. 430, F. 1473

"Sigma Did Not Have A Viable Domestic Production Option"

- $$$ debt at "high interest rates"
- "Extremely low" capital expense limits imposed by banks
- "grave" and "precarious" financial straits
- Sigma's "lenders never authorized [it] to invest" in domestic
- It had "no domestic foundries, no contracts with existing foundries to produce Fittings in the US, no core boxes, no machining facilities or contracts for coating, painting, and lining" and "very few of the patterns it needed"
- It "did not have the time required" to get into domestic during the brief ARRA period for shovel-ready jobs
  I.D. 426-429; F. 1484, 1489.

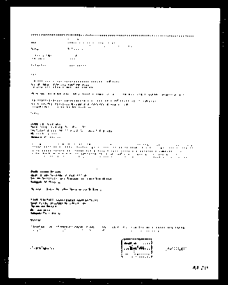
"Clearly, Star Entered The Domestic Fittings Market"

- "Star was able to and did enter the Domestic Fittings market." I.D. 377, F. 1095-96
- Its entry was quick (< 6 months in mid-2009) and effective
  - Star sold $$ millions and grabbed 5% share in 2010
  - Sold fittings "every month and every year" to "more than 100 Distributors," including dozens of exclusive customers
  - Doubled its share to 10% in 2011
  - On pace "to have its best year ever" in 2012. F. 1134, 1141-1144

"Clearly, Star Entered The Domestic Fittings Market"

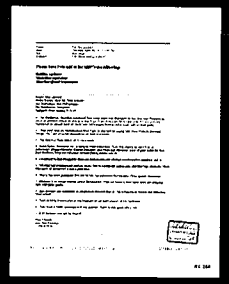
"Clearly, Star Entered The Domestic Fittings Market"

Star's sales force believed McWane's September 2009 letter was "all bark and no bite" and it piled up a "very impressive" average of two new customers every week



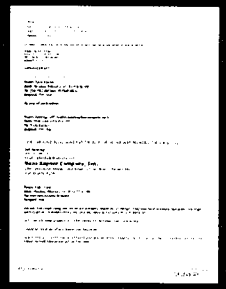
very impressive

RX231



The Tyler program seems to be all bark and no bite.

RX280



yahooxboo!!

CX 585; McCutcheon Tr. Pg. 2612

"Clearly, Star Entered The Domestic Fittings Market"

- Where new entry is easy "**summary disposition of the case is appropriate.**"
  Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993)
- Star's actual, successful entry "precludes" and fully "rebuts" CC's monopolization and attempt claims
  - "Precludes a finding that exclusive dealing is an entry barrier of any significance." *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997)
  - Easy entry conditions fully "rebut inferences of market power." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998)

"Clearly, Star Entered The Domestic Fittings Market"

- Judge Chappell did not find - - and Dr. Schumann did not present - - any evidence meeting requirements for exclusion
- Star was not "frozen out" and McWane did not foreclose "substantial" competition in domestic fittings. *Jefferson Parish*, 466 U.S. at 45 (1984) (O'Connor, J., concurring)
- In fact, Dr. Schumann could not identify a single customer which wanted to buy Star domestic, but did not
- "'[F]oreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent,' and while high numbers do not guarantee success for an antitrust claim, **'low numbers make dismissal easy**.'" *Sterling. v. Nestle, S.A.*, 656 F.3d 112, 124 (1st Cir. 2011)

"Clearly, Star Entered The Domestic Fittings Market"

- Former Commissioner Rosch got it right:
  - "under any objective standard...the undisputed facts demonstrate that Star's entry was not de minimis or trivial"
  - Star's success "undermines CC's basic theory" and "would not lead a rational trier of fact to find for CC on the question of significant foreclosure."

There Was No Harm To Competition Or Consumers

- The Complaint alleged competitive and consumer harm from Star's "exclusion"…but Judge Chappell found that McWane's rebate letter (not a contract)
  - did not obligate customers to buy anything from McWane
  - did not require customers to refrain from buying Star
- Customers were free to disregard it entirely – and did, in droves: Star had > {} customers in 2010 and again in 2011 and again in 2012

There Was No Harm To Competition Or Consumers (cont.)

- The letter's short-term nature ("for up to 12 weeks") makes it "presumptively lawful" *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984)
- And "negate[s]" any potential foreclosure
  E.g., Gilbarco, 127 F.3d at 1163-64 (9th Cir. 1997)
- "Discounts conditioned on exclusivity in relatively short-term contracts are rarely problematic." XI AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 1807a at 129 (2d ed. 2000)

There Was No Harm To Competition Or Consumers (cont.)

- McWane's domestic prices were lower than Star's across the country
- Star was "less efficient supplier of domestic Fittings than McWane"
- Its "costs were higher, and therefore, its prices were higher"
- Star's higher prices "hindered [its] ability to compete effectively." I.D. 411
- No customer complained about McWane's domestic prices

There Was No Harm To Competition Or Consumers (cont.)

- It is axiomatic that the antitrust laws protect competition, not inefficient competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)
- It is "not a function of the antitrust laws" to "support artificially firms that cannot effectively compete on their own." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991)
- "Virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market," but that is not antitrust injury. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.)

There Was No Harm To Competition Or Consumers (cont.)

- Judge Chappell did not find any concrete consumer harm
- Dr. Schumann did not quantify any concrete consumer harm
- No customer complained about McWane's domestic prices
- "An efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is…precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Copperweld*, 467 U.S. at 767 (1984)

There Is No Domestic-Only Market

- All fittings, wherever made, are "functionally interchangeable with any other Fitting that meets the same specification." F. 323-324
- There is significant competition for the specification and the vast majority of specs have been open to imports for years. F. 332-35
- Imports have grabbed >80-85% of all sales in recent years and outsold domestic 2:1 even during ARRA. F. 1028-35
- The ITC unanimously held that cheap imports "were materially injuring the domestic fittings producers." F. 471
- US Pipe, Griffin, ACIPCO, McWane exited domestic or cut back
- McWane's expert, Dr. Normann, testified – from data-driven analyses – that all fittings competed and there was no separate domestic-only market.

There Is No Domestic-Only Market (cont.)

- The Complaint alleged a domestic-only market…but **CC proffered no economic evidence** at trial. I.D. 338, 378-380
- Dr. Schumann conceded he conducted
  - No elasticity study, SSNIP test, or any empirical test demonstrating a domestic-only market
  - No test demonstrating McWane possessed or exercised monopoly power over domestic fittings, *e.g.*, that it priced "substantially" above competitive levels for a "significant" period of time. *AD/SAT v. AP,* 181 F.3d at 227 (2d Cir. 1999)
  - No test of exclusion or foreclosure
  - No test or quantification of consumer or competitive harm

Dr. Schumann's Say-So Cannot Create A Market Definition

- Dr. Schumann conceded he flatly ignored evidence contradicting his assumed domestic-only market
  - Numerous blanket nationwide and individual ARRA waivers granted by EPA
  - Star's domestic bid logs reporting that customers purchased imports under ARRA waivers
  - Evidence that imports outsold domestic 2:1 during ARRA

Dr. Schumann's Say-So Cannot Create A Market (cont.)

- It is unsupported by any empirical economic test
- And contradicted by hard evidence
  - "Nothing…requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1977)
  - "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993)
  - Valid expert testimony "demands a grounding in the methods and procedures of science, rather than subjective belief or unsupported speculation." *Meister v. Medical Eng'g Corp.*, 267 F.3d 1123, 1127 (D.C. Cir. 2001)
  - Excluding expert who "did not calculate the cross-elasticity of demand to determine which products were substitutes." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d at 1025-26 (10th Cir. 2002)

McWane Had No Specific Intent And No Dangerous Probability

- Complaint alleged specific intent to monopolize and dangerous probability of success…but Judge Chappell found:
  - McWane "did not want to overcharge for Domestic Fittings." F. 1086
  - McWane's average prices lower than Star's across the country. F. 1086, 1089-1090; Normann, Tr. 4962-64; RDX 038
  - McWane's share of domestic fittings steadily declined
  - Domestic industry "materially damaged" by cheap imports
  - Imports are >80% of all fittings sold in the US

The Proposed Injunctive Remedy Is Moot

- Challenged conduct is long over (and ARRA expired in 2010)
- The MDA terminated in 2010
- The rebate letter changed in 2010, in 2011, and 2012
- CC argues there is a "possibility" that McWane will sign another MDA or reinstate the rebate letter
- Possible recurrence is not enough to warrant injunction
- Injunctive relief is only appropriate when threatened injury is "concrete and particularized" and "actual and imminent, not conjectural or hypothetical[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)

Respondent McWane, Inc.'s Oral Argument on Counts 1-2

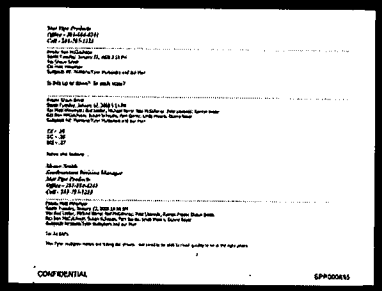
August 22, 2013

Judge Chappell's Dismissal Of Counts 1 and 2 Should Be Upheld

- "Substantial evidence," including "substantial, probative economic evidence" established that McWane priced:
  - "independently" and
  - with a "procompetitive purpose"
- Mr. Tatman prepared a detailed state-by-state spreadsheet in Winter and Spring 2008 determining McWane's prices which:
  - "resulted in reductions in 28 states and no change in another 8 states" and were
- *Substantially below* Sigma and Star.
  I.D. 266, 292, 349, F. 625-31, 633, 636.

McWane's "Independent" And "Pro-Competitive" Prices

Sigma or Star were surprised and disappointed by McWane's lower prices given "significant" raw materials increases

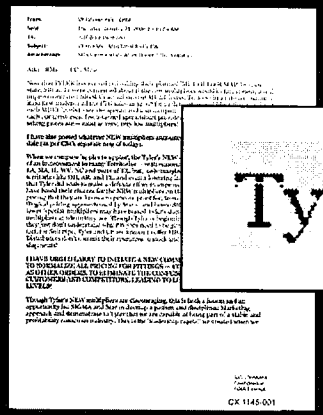


Is this up or down? In each state?

CX1145

The Tyler multiplier letters are hitting the streets.

RX 24



Tyler's NEW multipliers are discouraging,

CX1145

McWane Repeatedly Underpriced Its Competitors

- McWane offered a "waterfall" of price concessions, including hundreds of special job discounts *and* additional rebates *and* cashbacks *and* credit extension *and* freight absorption
- Customers considered McWane's pricing "extremely aggressive" in 2008 - - and it got even more aggressive in the second half of the year during DIFRA's brief operational period. I.D. 284; F. 851
- Sigma and Star blamed McWane for leading markets downward and starting a "price war." I.D. 273; F. 686
- In Spring 2009, McWane dramatically *lowered* its medium and large diameter list prices 25% to target Star and Sigma's strongholds. Tatman, Tr. 363-64, 882-93, 967, 978, 1005-06

McWane Repeatedly Underpriced Its Competitors

- "This is competitive, not unlawful, conduct by McWane." I.D. 296
- McWane's prices "declined over the course of a multi-year period from January 2007 through November 2010, including before, during, and after" the alleged conspiracy. I.D. 344
- This "price decline by McWane during the same period as price increases by Sigma and Star is inconsistent with a conspiracy to raise prices involving McWane." I.D. 344; F. 942, 961-62

McWane Repeatedly Underpriced Its Competitors

- McWane's prices were "consistent with competitive decision-making by McWane"
  - "changed in different directions and by different amounts on a state-by-state basis,"
  - Its price variation below published was more pronounced and "generally higher" in 2008, and
  - "contradict a parallel curtailment of Project Pricing." F. 845-47, 936, 939, 959

McWane's "Independent" And "Pro-Competitive" Prices

- "Ample credible and probative evidence," including "reliable and persuasive expert opinion," established McWane's "independent" and "procompetitive" pricing.
  I.D. 276, 320, 321 n. 23, 341
- McWane underpriced Sigma and Star "in order to beat prices being offered by its competitors, which is a pro-competitive purpose." I.D. 292, F. 959
- McWane's prices were "designed to put financial pressure on its competitors." I.D. 267; F. 633
- "McWane's strategy was designed to serve its goal of increasing volume and gaining market share." F. 636

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions"

- CC did not offer a single instance of an advance price communication
- Dr. Schumann acknowledged he found no evidence of agreements or meetings "in a smoke-filled room." Schumann, Tr. 3847, 4171-4173
- CC "did not offer any expert opinion that there was economic evidence indicating a conspiracy to raise and stabilize Fittings prices." I.D. 338

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

- Instead of hard evidence, CC offered only "noneconomic, circumstantial evidence" that was
  - "weak," "unverified," "unpersuasive," and "not probative"
  - "strained," "unsupported," "pure speculation," that "overreaches"
  - "not sufficiently grounded in evidence," "against the greater weight of the evidence," and "inconsistent" with any conspiracy
  - "no evidence," "lacking" and "without merit"

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

- "When fairly and objectively scrutinized and weighed, the evidence fails to prove that McWane conspired with Sigma and Star to raise and stabilize prices in the Fittings market, as alleged in the Complaint." I.D. 350-51
- "Complaint Counsel's daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement involving McWane, and the multilayered inference is rejected." I.D. 305-07
- "The totality of the evidence, given due weight and viewed as a whole, fails to demonstrate that McWane, together with Sigma and Star, had an agreement" or "engaged in parallel conduct by curtailing Project Pricing, as claimed by Complaint Counsel." I.D. 317-18

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

- The PowerPoint that CC claims was a blueprint for conspiracy was "an independently formed pricing strategy" that "refers only to unilateral conduct by McWane" and was "credibly" explained by its author. I.D. 290, 296, 350
- It was "an internal McWane discussion document that was not shared" and "not shared with Sigma or Star." I.D. 294, 295

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

- McWane's customer letters
  - "did *not* include any language indicating that McWane would support future price increases only if Sigma and Star curtailed Project Pricing." I.D. 297
  - "did not include any language concerning Sigma's and Star's 'pulling pricing authority away from front line sales.'" I.D. 298, F.645,
  - "do[]not set forth the alleged 'offer' of a price increase"
  - are "far from a 'naked invitation' to fix prices." I.D. 325, 368
- Indeed, CC did not appeal Judge Chappell's rejected of its Count 3 invitation to collude claim

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

- The evidence "fails to show" that Sigma or Star understood McWane's customer letter "to communicate anything with regard to DIFRA, much less an offer of a price increase contingent on submission of DIFRA data." I.D. 327
- Every fact witness likewise rejected the supposed secret message:
  - "Absolutely none. As a matter of fact, the first time that thought – I've even heard that was today. Of linking that to DIFRA?" JX 698 (McCutcheon Dep. at 198-199)
  - "It is so farfetched and ridiculous, what can I say? No, no." JX 687, Pais Dep. at 381-382
- "The strained inferences required to accept this argument are thus rejected" as "not logical or persuasive." I.D. 330

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

- CC has tried to play "fast and loose" with Star and Sigma phone records by suggesting that McWane was regularly communicating with its competitors. Closing, Tr. 15
- But only a small handful were to/from McWane and Sigma (and none with Star) and CC failed to prove what "if anything" was discussed in those very brief calls (3, 6, 3, and 9 minutes)
- Mr. Rybacki and Mr. Tatman flatly denied discussing prices. I.D. 300, F. 623-24, 639-40, 793

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

- "None of the foregoing indicates any discussion about Fittings prices, Project Pricing, or an agreement to curtail Project Pricing." I.D. 315
- Judge Chappell properly "rejected" CC's plea to "fill in the gaps" and assume that prices must have been discussed as "unwarranted," "unjustified," "unsupported" and "pure speculation." I.D. 300, 317
- The mere opportunity is insufficient to suggest a conspiracy. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011)
- "A litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000)

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

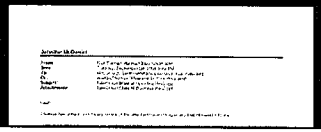
- Judge Chappell properly rejected CC's plea to for a "multilayered" "daisy chain of assumptions" that Star's internal use of the word "cheating" constituted an admission of Star of its involvement in a conspiracy which should then somehow be attributable to McWane
- There was "no evidence" Star's term was unique to fittings, and it was used for large diameter and other products not involved in the alleged conspiracy. I.D. 306-07
- The only Star witness CC called at trial (a recipient, not the author) denied the conspiracy and testified it was "an internal Star term used to refer to any pricing that was below the published multiplier, including among other things, Project Pricing." F. 903; I.D. 306
- Any connection to McWane was "unproven." I.D. 308-311

CC's "Complex Web" Of "Non-Persuasive" And "Unsupported" "Pure Speculation" And "Daisy Chain Of Assumptions" (cont.)

- Two internal Sigma documents refer to McWane—neither of which mention "cheating"—from Sigma's OEM account manager, Mitchell Rona, to other Sigma employees. CCAB 29
- The emails, on their face and according to Mr. Rona, were generated in the course of legitimate, arm's-length **buy-sell discussions** he had with McWane in 2008
- Mr. Rona was McWane's customer, not competitor
- Mr. Rybacki, in charge of distributor sales, was uninvolved
- "Quick and sharp erosion in market pricing" after the e-mails in second half 2008

DIFRA Did Not "Facilitate" Price Coordination

- McWane *underpriced* Sigma and Star in Spring '08 (and Spring '09)
- Its aggressive job pricing not only continued during DIFRA's brief operation, it got more aggressive and prices declined
- Sigma and Star blamed McWane for dragging markets down: "Union/Tyler leading markets downward." RX115



I don't believe the market or competitive conditions over the next 3 - 5 years will provide a reasonable opportunity to generate acceptable income or normalize inventory levels with the current structure.

RX616

DIFRA Did Not "Facilitate" Price Coordination

- DIFRA was carefully monitored by experienced antitrust counsel – **and *no price data was ever communicated.***
  F. 713, 718-19, 751
- Tons-shipped data was "aggregated" and stale –
  Dr. Schumann conceded it could have been sold anywhere in the country any time over the preceding 6 months plus
- Every witness flatly denied using the data to stabilize prices

DIFRA Did Not "Facilitate" Price Coordination

- Court after court has held that the volume information – even when disaggregated and directly exchanged – can be pro-competitive and is insufficient to suggest a conspiracy.
- "If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action." *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999)
- Volume information "does not tend to exclude the possibility of independent action or to establish anticompetitive collusion." *Williamson Oil v. Philip Morris* , 346 F.3d at 1313 (11th Cir. 2003)
- "It is far less indicative of a ***price fixing*** conspiracy to exchange information relating to sales as opposed to prices." *Id.*

The Ever-Shifting "Conspiracy"

- The Complaint alleged a conspiracy to increase the January and June 2008 multipliers…but during its closing, CC utterly recanted:
  - "We don't allege that they agreed on those multipliers at all." Closing, Tr. 230
- The Complaint alleged advanced price communications…but the ALJ found – and CC's expert conceded – there was no such evidence. Schumann, Tr. 4171-73, 4186-87, 4236-37
- The Complaint alleged parallel pricing…but CC "failed to show that the Suppliers engaged in parallel conduct." I.D. 265-66, 277

The Ever-Shifting "Conspiracy"

Dr. Schumann claimed that McWane's January 11, 2008 customer letter was "clear; McWane's rivals must cooperate or prices will not increase further"...

- But during cross-examination, he conceded that none of those words (or anything like them) were actually in the letter. Schumann Tr. 4203
- Judge Chappell agreed: the letter "did *not* include" the made-up language. I.D. 297

The Ever-Shifting "Conspiracy"

The Complaint alleged a short conspiracy ending in early '09…

- But CC later told the Judge (after the close of discovery) that was wrong and there was "one conspiracy" that stretched well into '10
  - JUDGE CHAPPELL: Whoa, whoa, whoa. Let's get down to the bottom line. Are you saying that April 2009 and June 2010 are different conspiracies?

    Mr. HASSI: No, You Honor.

    JUDGE CHAPPELL: How many conspiracies are there?

    Mr. HASSI: Your Honor, there's one conspiracy…

The Ever-Shifting "Conspiracy"

And then Dr. Schumann contradicted CC

- Dr. Schumann conceded he saw no evidence of that
  - Q. And therefore, Dr. Schumann, you did not find one big, long conspiracy that lasted into 2010 –

    A. Right.

    Q. Correct?

    A. Yes, that's correct.
    Schumann Tr. 4066

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2013, a true and correct copy of Respondent's Compilation of Materials to Present During Oral Argument was filed electronically using the FTC's e-filing system, and served by hand on the following:

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