



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the Matter of )  
 )  
MCWANE, INC., )  
a corporation, and )  
STAR PIPE PRODUCTS, LTD., )  
a limited partnership. )  
\_\_\_\_\_) )

PUBLIC

DOCKET NO. 9351

REPLY BRIEF IN SUPPORT OF RESPONDENT McWANE, INC.'S MOTION FOR  
SUMMARY DECISION

*REDACTED MATERIAL  
PROTECTED PURSUANT TO JANUARY 5, 2012 PROTECTIVE ORDER ENTERED BY  
THIS COURT*

TABLE OF CONTENTS

SUMMARY OF UNDISPUTED FACTS.....1

ARGUMENT .....7

I. CC DID NOT PRESENT EVIDENCE SUFFICIENT TO OVERCOME  
THE SWORN DENIALS .....7

II. [REDACTED] .....10

III. [REDACTED] .....11

CONCLUSION .....13

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Alvord-Polk, Inc. v. F. Schumacher &amp; Co.</i> , 37 F.3d 996 (3d Cir. 1994).....	14
<i>Brooke Group Ltd. v. Brown &amp; Williamson Tobacco Corp.</i> , 509 U.S. 209 (1993).....	16
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	10
<i>City of Moundridge v. Exxon Mobil Corp.</i> , 409 Fed.Appx. 362 (D.C. Cir. 2011).....	13
<i>City of Moundridge v. Exxon Mobil Corp.</i> , 429 F. Supp. 2d 117 (D.D.C. 2006).....	10
<i>FTC v. Texaco, Inc.</i> , 393 U.S. 23 (1968).....	14
<i>Gas Utils. Co. of Alabama, Inc. v. Southern Natural Gas Co.</i> , 996 F.2d 282 (11th Cir. 1993).....	17
<i>Jefferson Parish Hosp. Dist. No. 2 v. Hyde</i> , 466 U.S. 2 (1984).....	16
<i>Tampa Elec. Co. v. Nashville Coal Co.</i> , 365 U.S. 320 (1961).....	16
<b>OTHER AUTHORITIES</b>	
FTC Act. However.....	14
Rule 56(c).....	10

Respondent McWane, Inc. (“McWane”), submits this reply brief, and the accompanying Supplemental Statement of Material Facts (“SSOF”), in support of its Motion for Summary Decision.

**SUMMARY OF UNDISPUTED FACTS**

Complaint Counsel’s Opposition brief (“Opp.”) fails to establish a genuine dispute over any material fact in this case. To the contrary, Complaint Counsel (“CC”) concedes that the key facts on each Count are undisputed.

Counts 1-3. CC

Indeed, the undisputed testimony is crystal clear:

CC, likewise, concede that

Instead,

<sup>1</sup> As noted in McWane’s opening Memorandum, at 15 n. 4 and 19 n. 9, certain transcripts were unavailable at the time and citations are now provided in the attached Supplemental Statement of Uncontested Facts (“SSOF”) ¶¶ 5, 6, 12, 13, 15. These facts are direct quotations from witness testimony and CC did not dispute them in its Opposition.

It is undisputed that

Indeed, the Complaint itself concedes the point. (AC ¶ 30 (“rising input costs”).)

It is also undisputed that

Finally, CC

that every single witness testified that

In the face of this undisputed evidence, CC attempts to prop up its conspiracy and invitation to collude Counts with a few, scattered documents and its own strained (and, at times, downright fictitious) reading of them - -

. For example, CC argues that

Moreover, the facts demonstrate that

[REDACTED]

CC argues that [REDACTED]

But that argument, too, is not only unsupported, it is contradicted by the undisputed facts. CC's "fact" citation for that paragraph says only that [REDACTED]

[REDACTED]

Undisputed facts also disprove CC's [REDACTED]

---

<sup>2</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

.)<sup>3</sup>

Undisputed testimony, likewise, disproves

[REDACTED]

---

<sup>3</sup>

[REDACTED]

CC cannot manufacture a fact question by cutting and pasting its argument into its CCS.

[REDACTED]

Again, CC cannot manufacture a factual dispute by cutting and pasting its unsupported argument into its CCS.

[REDACTED]

[REDACTED]

[REDACTED]

Counts 4-7. Counts 4-7,

[REDACTED], also fail because [REDACTED]

First, it is undisputed that

[REDACTED]

Second, CC concedes that

[REDACTED]

<sup>4</sup> It is also undisputed that

Third, CC

[REDACTED]

<sup>4</sup> [REDACTED]

## ARGUMENT

Where, as here the critical facts are undisputed, summary judgment is “mandate[d].” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (Rule 56 “mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case”) Here, the undisputed testimony of every single witness [REDACTED]. CC offers nothing in opposition but its own strained interpretations of a few, scattered documents - - [REDACTED] The undisputed facts - - [REDACTED] - also [REDACTED] mandate summary judgment on CC’s claims [REDACTED]. Finally, the undisputed facts show that [REDACTED]

### I. CC Did Not Present Evidence Sufficient To Overcome The Sworn Denials

The law is clear that a plaintiff confronted with sworn denials of a conspiracy must “produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided.” *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted). CC’s few scattered documents fall far short of “significant probative evidence” to overcome [REDACTED]

<sup>5</sup> Nor can CC create a fact dispute by claiming [REDACTED]

[REDACTED] - - particularly since on their face, the documents do not say the things CC claims they say, and the witnesses flatly rejected CC's made-up interpretation.

CC [REDACTED]

The Court should reject CC's attempt to manufacture a disputed issue of fact by proffering its own, strained (and, often, fictitious) reading of a few scattered documents. [REDACTED]

CC cannot manufacture evidence by positing [REDACTED]

[REDACTED] Court after court has, like the *Moundridge* court, rejected efforts by plaintiffs to prop up an antitrust claim in the face of sworn denials, holding that strained interpretations of a "few scattered documents" that the witnesses flatly rejected "falls far short" of creating an genuine issue of material fact. (*See also* McWane Opening Br. at 24-26 (citing similar cases affirming summary judgment including from the 3rd, 7th, 8th, 11th and DC Circuits).)

The only other thing that CC points

- - and a mere opportunity to conspire is, of course, insufficient as a matter of law.<sup>6</sup> *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir. 1994) (affirming summary judgment because the “evidence tends to show only an opportunity to conspire, not an agreement to do so”).<sup>7</sup>

CC concedes that

that

It is undisputed

---

<sup>6</sup> The invitation to collude count fails for another reason: numerous courts have rejected antitrust liability premised on a one-way offer or invitation or attempt to collude and no court has affirmed liability in a litigated cases under Section 5 or otherwise. CC implicitly acknowledges this absence of caselaw by pointing only to consent orders. But consent order cannot create new law. *FTC v. Texaco, Inc.*, 393 U.S. 23, 226 (1968).

<sup>7</sup>

[REDACTED]

The case law McWane cited in its opening brief conclusively establishes that [REDACTED] does not give rise to an inference of conspiracy -- on the contrary, it is well-settled that such data-gathering by a trade association is legitimate and, often, pro-competitive. (See McWane's Mem. Supp. at 25-30 (citing cases); see also *Williamson Oil*, 346 F.3d at 1313 (gathering volume data was entirely consistent with each participant's unilateral self-interest). [REDACTED]

[REDACTED]

II. [REDACTED]

CC do not dispute that [REDACTED]

that [REDACTED] CC also do not dispute [REDACTED]



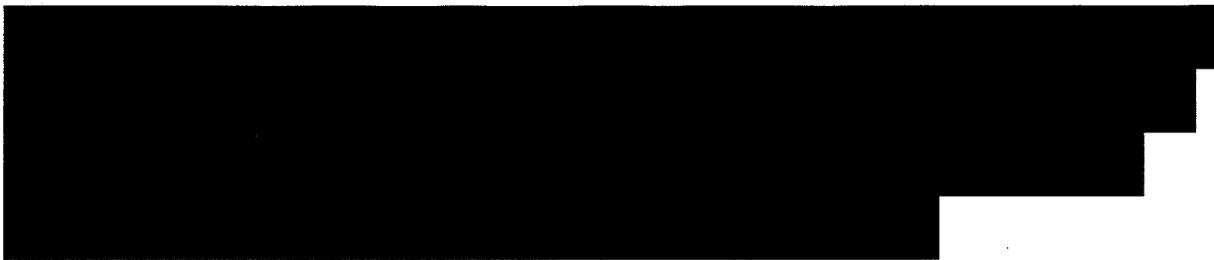
[REDACTED]

that a would-be supplier is not an “actual potential competitor” unless it has taken “affirmative steps to enter the business” and has shown a “preparedness” to do so. *See also Gas Utils. Co. of Alabama, Inc. v. Southern Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993) (“Inquiry into procedures is insufficient to establish preparedness . . . party must take some affirmative step to enter”).

[REDACTED]

CC’s effort to salvage its “exclusion” case by claiming that

[REDACTED]



**CONCLUSION**

For the foregoing reasons, McWane's Motion for Summary Decision should be granted.

Dated: June 28, 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  
William Lavery  
*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  
william.lavery@bakerbotts.com

*Attorneys for Respondent McWane, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on June 28, 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 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:

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.  
Devon Kelly  
Terri Martin

By:           /s/ William C. Lavery            
One of the Attorneys for McWane

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

---

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

---

SUPPLEMENTAL STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS  
NO GENUINE DISPUTE IN SUPPORT OF RESPONDENT MCWANE, INC.'S  
MOTION FOR SUMMARY DECISION

*REDACTED MATERIAL  
PROTECTED PURSUANT TO JANUARY 5, 2012 PROTECTIVE ORDER ENTERED BY  
THIS COURT*

TABLE OF CONTENTS

	<u>Page</u>
I. Supplemental Facts As To Which There Is No Genuine Dispute .....	3
II. Respondent McWane, Inc.'s Response To Complaint Counsel's Statement of Facts .....	9

Pursuant to Rule 3.24 of the Federal Trade Commission's Rules of Practice, Respondent McWane, Inc. ("McWane"), submits this Supplemental Statement of Material Facts as to Which there is no Genuine Dispute ("SOF"), and Response to Complaint Counsel's Statement of Material Facts, in support of its Motion for Partial Summary Decision.

There is no genuine dispute as to the following facts:

**I. Supplemental Facts As To Which There Is No Genuine Dispute**

1. [REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. [REDACTED]

6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7. [REDACTED]

8. [REDACTED]

[REDACTED]

9. Complaint Counsel relies on [REDACTED]

[REDACTED]

10. Complaint Counsel has not pointed to any evidence that [REDACTED]

[REDACTED]

11. Evidence also makes clear that [REDACTED]

[REDACTED]

12. [REDACTED]

13. [REDACTED]

14. The Administrative Complaint alleges in conclusory fashion that SIP’s attempt to expand into domestic fittings was somehow thwarted by McWane. (AC ¶¶ 44 (“Federal stimulus gave Sigma, Star and Serampore Industries Private, Ltd. (“SIP”), another imported DIPF supplier, an incentive to enter the domestic DIPF market”), 45 (“Sigma, Star and SIP all attempted to enter the relevant domestic DIPF market in response to the ARRA”), 61 (“McWane’s exclusive dealing policies have also raised barriers to entry into the relevant domestic DIPF market by other potential entrants, including SIP.”).)

15. [REDACTED]

[REDACTED]

16.

[REDACTED]

## II. Respondent McWane, Inc.'s Response To Complaint Counsel's Statement of Facts<sup>1</sup>

### General Objections

Respondent McWane, Inc. objects to Complaint Counsel's Statement of Facts on the ground that it is not required to specifically respond to each of Complaint Counsel's "facts" under Rule 3.24. McWane further objects on the ground that many of Complaint Counsel's statements are factually incorrect, misleading, vague, or merely repeat factual allegations in the Complaint that have been contradicted by the undisputed evidence in this case, as stated in McWane's Statement of Material Facts. Specifically, and without waiving its right to specifically object to the remaining paragraphs, McWane objects to the following paragraphs as factually incorrect: ¶¶ 4, 11, 13, 15, 17-19, 26(a)-(d), 27(a)-(d), 28-29, 30(a)-(g), 31, 32(a)-(d), 33-34, 35(a)-(c), 36(a)-(d), 37-41, 42(a)-(d), 43-45, 47-50, 52-54, 56-57, 59, 60-68, 70-71, 73-74, 77-90, 92-96, 98-101, 104-115, 118-122, 124, 126-27, 130-34, 135(a)-(g), 137, 140, 153-58, 160-61, 164-65, 167, 175-203, 205-207.

---

<sup>1</sup> Complaint Counsel's Response to McWane's Statement of Material Facts falls short of what is required to avoid summary judgment, as it often lumps together and incorporates by reference literally dozens of paragraphs of its own CCS - - and those paragraphs often simply repeat CC's legal arguments with no citation to the record, contain rank speculation about the meaning of documents that

Summary judgment case law makes clear that "A nonmovant's statement of genuine issues is intended to 'isolate [] the facts that the parties assert are material, distinguish[] disputed from undisputed facts, and identif[y] the pertinent parts of the record.'" *City of Moundridge v. Exxon Mobil*, 2009 WL 5385975 at \*4 n.4 (D.D.C. 2009). Where non-movant's counter-statement of facts incorporates legal arguments with factual assertions, and asserts "facts" with no proper citation to the record, the movant's statement of material facts is not properly rebutted and should be deemed as admitted. *Id.*

Dated: June 28, 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

William Lavery

*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

william.lavery@bakerbotts.com

*Attorneys for Respondent McWane, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on June 28, 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 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:

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.  
Devon Kelly  
Terri Martin

By:           /s/ William C. Lavery            
One of the Attorneys for McWane

# **EXHIBIT 35**

**This exhibit has been  
marked Confidential  
and redacted in its  
entirety**

# **EXHIBIT 36**

**This exhibit has been  
marked Confidential  
and redacted in its  
entirety**

# **EXHIBIT 37**

**This exhibit has been  
marked Confidential  
and redacted in its  
entirety**

# **EXHIBIT 38**

**This exhibit has been  
marked Confidential  
and redacted in its  
entirety**

# **EXHIBIT 39**

**This exhibit has been  
marked Confidential  
and redacted in its  
entirety**

# **EXHIBIT 40**

**This exhibit has been  
marked Confidential  
and redacted in its  
entirety**