IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE VALSPAR CORPORATION, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 1:14-cv-00527-RGA
	)	
E. I. DU PONT DE NEMOURS AND COMPANY,	)	**PUBLIC VERSION**
	)	
	)	
Defendant.	)	

OPENING BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO EXCLUDE THE EXPERT TESTIMONY OF PLAINTIFFS' EXPERT MICHAEL A. WILLIAMS

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NATURE AND STAGE OF THE PROCEEDINGS

Defendant E. I. du Pont de Nemours and Company ("DuPont") moves to exclude the testimony of Dr. Michael A. Williams, the liability expert upon which Plaintiffs Valspar Corporation and Valspar Sourcing, Inc. ("Valspar") rely in support of their sole claim: that DuPont, Huntsman International LLC ("Huntsman"), Kronos Worldwide, Inc. ("Kronos"), Millennium Inorganic Chemicals Inc. ("Millennium," n/k/a "Cristal USA Inc.") (collectively, "Defendants")[1] violated the Sherman Act by fixing titanium dioxide ("TiO2") prices from 2002 to 2013. After opting out of a class action filed in 2010, 1:10-cv-00318-RDB (D. Md.), Valspar filed its complaint on November 22, 2013. Its claims against DuPont were later severed and transferred to this Court. Fact and expert discovery are closed, and trial is set for January 2016. DuPont has filed a motion for summary judgment (DI 239), which is not yet fully briefed.

SUMMARY OF ARGUMENT

Dr. Williams's opinion is defective in multiple respects that render it unreliable and irrelevant, and therefore inadmissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and its progeny. In an attempt to compensate for Valspar's inability to proffer record evidence of the conspiracy that it hypothesizes, Dr. Williams constructs his opinions—[redacted]—supposedly based on economic evidence. But his opinion is in fact built on little more than speculation and his own interpretation of select documents. His "methodology" lacks the rigor and scientific grounding that are essential predicates to admissibility.

[1] "Defendants" is used here for brevity and ease of reference. DuPont is the only defendant in this action, as Valspar's claims against Huntsman, Kronos, and Millennium are proceeding in separate courts, and Valspar did not sue the fifth alleged co-conspirator, Tronox Inc.

As an initial matter, Dr. Williams exceeds his role as an economist by opining that [redacted]. There is no economic test to determine whether [redacted], and Dr. Williams is no better positioned or qualified to reach that ultimate conclusion than the jury after consideration of all the relevant evidence. Dr. Williams compounds that error, further usurping the role of the jury, by making credibility determinations, relying on his own subjective interpretation of documents, opining on the relative weight of the evidence, and basing his opinions on pure conjecture. Further highlighting the lack of scientific grounding to his approach, Dr. Williams improperly and repeatedly attempts to bolster his opinion by citing to the Maryland court's opinion denying summary [redacted][2] as though it were independent evidence. Finally, while a key pillar of Dr. Williams's ultimate conclusion is the [redacted] his "opinion" that [redacted] relies entirely on the analysis of Dr. McClave, Valspar's damages expert, which Dr. Williams accepts wholesale, with no independent testing, rendering it entirely cumulative of Dr. McClave's opinion. The Court should exercise its gatekeeping function to exclude Dr. Williams's testimony.

LEGAL STANDARD

Courts exercise a critical "gatekeeping" function with respect to the admissibility of expert testimony. Pursuant to this role, the Court should make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." *See Daubert*, 509 U.S. at 592-93; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). The gatekeeping requirement is to "make certain that an expert . . . employs in the

[2] *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799 (D. Md. 2013).

courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Federal Rule of Evidence 702 imposes a "trilogy of restrictions on expert testimony: qualification, reliability and fit." *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). Qualification requires that the witness possess "specialized expertise." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003) (quoting *Schneider*, 320 F.3d at 404). The reliability requirement, which concerns the "scientific validity" of expert testimony, means that such testimony "must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation [and that] the expert must have good grounds for his or her belief." *Schneider*, 320 F.3d at 404 (internal quotation marks omitted). Importantly, this requirement refers to the reliability of the "process or technique" used in formulating the expert's opinions, as opposed to the reliability of his conclusions themselves. *In re TMI Litig.*, 193 F.3d 613, 664 (3d Cir. 1999) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994)). Lastly, Rule 702 mandates that "expert testimony must fit the issues of the case"; that is, it "must be relevant for the purposes of the case and must assist the trier of fact." *Id.*; *see also Daubert*, 509 U.S. at 591-92 ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.").

The "overriding limitation on expert testimony is the requirement that . . . opinions must be helpful to the trier of fact." *United States v. Theodoropoulos*, 866 F.2d 587, 591 (3d Cir. 1989). Expert testimony that states a legal conclusion or opines on governing law or legal standards is both unhelpful to the jury and a waste of time. *Watkins v. New Castle Cnty.*, 374 F. Supp. 2d 379, 392-93 (D. Del. 2005). Expert testimony is not admissible if it would interfere with the court's "pivotal role in explaining the law to the jury." *Berckeley Inv. Grp., Ltd. v.*

Colkitt, 455 F.3d 195, 217 (3d Cir. 2006). Moreover, "the probative value of [an expert's] proposed testimony [can be] substantially outweighed by considerations of 'undue delay, waste of time, or needless presentation of cumulative evidence.'" *United States v. Stevens*, 935 F.2d 1380, 1399 (3d Cir. 1991). Rule 403 likewise "provides for the exclusion of evidence which wastes time." Fed. R. Evid. 704 Advisory Committee Note. These provisions serve as bulwarks against the admission of expert testimony that merely tells the jury what result to reach. *Id.*

ARGUMENT

Advancing an implausible conspiracy theory, and with no probative record evidence supporting that theory, Valspar leans heavily on its liability expert's opinion that the hypothesized conspiracy in fact occurred (and may still be occurring). Dr. Williams contends that [redacted] (Stokes Decl. Ex. 4 ¶ 70.) But that kind of "follow-the-leader" pricing is not unlawful and is common in oligopolistic markets like this one. *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 871-72 (7th Cir. 2015) ("'[F]ollow the leader' pricing ('conscious parallelism,' as lawyers call it, 'tacit collusion' as economists prefer to call it) . . . means coordinating . . . pricing ***without an actual agreement to do so.***") (emphasis added). Dr. Williams buttresses his reliance [redacted]. However, Dr. Williams's conclusions regarding the majority of those claimed plus factors are based on impermissible, unreliable methods, and therefore should be excluded.

The remainder of Dr. Williams's conclusions regarding [redacted] amount to his contention that [redacted]

[redacted] however, cannot themselves—as a matter of either law or economics—support Dr. Williams's primary opinion: [redacted] Not only have courts routinely held these types of market conditions too ambiguous to exclude the possibility of unilateral conduct, *e.g.*, *In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d 777, 789-91 (M.D. Pa. 2014), but Dr. Williams himself has conceded that [redacted]

[redacted]

(Stokes Decl. Ex. 4 ¶¶ 204-07; Stokes Decl. Ex. 2 at 60:3-64:15, 65:14-69:11, 76:21-80:3, 102:19-103:5, 105:2-9, 113:6-126:21.) Dr. Williams nonetheless refused to concede that, [redacted]

[redacted] (Stokes Decl. Ex. 2 at 60:14-64:15.) His approach in that regard illustrates the fundamental defect of his entire analysis: it is entirely result-oriented, untethered to sound economics or reliable methodology. Far from the result of a scientifically valid approach, Dr. Williams's opinion is based on conjecture and is designed to supplant the role of the jury. It should be excluded.

I. PLAINTIFFS' EXPERT IS NOT QUALIFIED TO TESTIFY AS TO THE EXISTENCE OF AN AGREEMENT AMONG DEFENDANTS.

Dr. Williams, an industrial organization economist, is not qualified to determine whether Defendants reached an "agreement" to fix the price of titanium dioxide. Throughout his report, Dr. Williams opines that [redacted]. For example, Dr. Williams opines that "[redacted]" (Stokes Decl. Ex. 3 ¶ 5.) At his deposition, Dr. Williams further clarified "[redacted]

[redacted]" (Stokes Decl. Ex. 1 at 24:16–21.) Dr. Williams reiterated this point throughout both of his depositions and in his rebuttal report:

- "[redacted]" (Stokes Decl. Ex. 1 at 25:16–19.)
- "[redacted]" (*Id.* at 27:18–21.)
- "[redacted]" (*Id.* at 91:21–92:2.)
- "[redacted]" (*Id.* at 98:1–2.)
- "[redacted]" (*Id.* at 236:11–13.)

(*See also* Stokes Decl. Ex. 3 ¶¶ 4, 13, 45, 82-84, 86, 132, 146; Ex. 4 ¶¶ 6, 30, 34, 109, 121, 175; Ex. 1 at 24:12–25:19, 27:1–28:2, 29:11-30:3, 166:16-167:7, 236:8-16; Ex. 2 at 12:12-13:14, 14:19-16:6, 113:6-115:14.)

Such conclusions are well beyond admissible expert opinion. A party can only elicit expert testimony from someone who has "specialized knowledge or training sufficient to qualify him or her to opine on an issue within their field of expertise, and the expert's opinion must be confined to that field." *Oxford Gene Tech., Ltd. v. Mergen Ltd.*, 345 F. Supp. 2d 431, 435 (D. Del. 2004). It is one thing, and well within a qualified economist's role if based on reliable, scientifically-based methods, to opine that the economic evidence is or is not more consistent with collusion than competition. It is quite another—and impermissible—for an economist to affirmatively opine that [redacted]. That ultimate conclusion, which requires a finding of an actual agreement among the alleged participants, is beyond anything that can be discerned through economic analysis. It is properly left to the jury, which is tasked with weighing the evidence and applying the law to the facts. In a very similar case, the Eleventh

Circuit held that an expert statistician, Dr. McClave (who is also one of Valspar's experts), could not opine as to "the existence of a conspiracy in general" because that opinion was "outside of his competence as a statistician." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 565 (11th Cir. 1998); *see also In re Urethane Antitrust Litig.*, 2012 WL 6681783, at *3, (D. Kan. Dec. 21, 2012) (recognizing experts are prohibited from testifying "on the ultimate issue of whether a conspiracy existed"); *Jamsports & Entm't, LLC v. Paradama Prods.*, 2005 U.S. Dist. LEXIS 59, at *30-31 (N.D. Ill. Jan. 3, 2005) (excluding expert's opinion that certain conduct was anticompetitive based on his review of documents from which he drew his own inferences because it is not "proper testimony by an expert in economics"); *SmithKline Beecham Corp. v. Eastern Applicators, Inc.*, 2002 U.S. Dist. LEXIS 23511, at *10 (E.D. Pa. Dec. 3, 2002) (excluding expert testimony that bidders did not collude because "his analysis of whether or not there was collusion among the bidders amounts to no more than speculation").

Dr. Williams's deposition testimony demonstrates the soundness of this rule. Despite opining repeatedly that [redacted] (Stokes Decl. Ex. 2 at 20:22-23:13.) Similarly, despite basing his opinion in large part on [redacted] (Stokes Decl. Ex. 3 App'x XV), Dr. Williams concedes that [redacted] (Stokes Decl. Ex. 2 at 24:5-25:15, 108:1-113:02.) The incongruity between Dr. Williams's certainty about the [redacted] and his inability to articulate even the most basic facts about it highlights why economists are not

permitted to opine on that ultimate conclusion. No economic test can confirm the [redacted] Dr. Williams's repeated assertions that [redacted] exceed his appropriate role and should be excluded.[3] *Tuscaloosa*, 158 F.3d at 565; *SEC v. Lipson*, 46 F. Supp. 2d 758, 762-763 (N.D. Ill. 1999); *see also Kia v. Imaging Scis. Int'l, Inc.*, 2010 U.S. Dist. LEXIS 90065, at *15 (E.D. Pa. Aug. 30, 2010) (excluding expert testimony regarding the reasons for a company's behavior because the expert had no first-hand knowledge and could only offer speculation as to those reasons).

II. DR. WILLIAMS'S OPINIONS ON THE PRESENCE OF ALLEGED "PLUS FACTORS" ARE NOT GROUNDED IN ANY SCIENTIFIC OR RELIABLE METHODS.

Apart from purporting to opine on [redacted], Dr. Williams's opinion is not reliable or scientifically based, and is therefore unhelpful. It should be excluded under Rule 702. The Third Circuit has held that the District Court's inquiry under Rule 702 should be guided by the criteria set forth in *Daubert* and *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), as well as other factors that may be relevant to a given inquiry. Those factors to consider when examining scientific reliability include: "(1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the

[3] Dr. Williams's opinion regarding [redacted] borders on an inadmissible legal conclusion, which is inappropriate expert testimony under Rule 704. *Berckeley*, 455 F.3d at 217; *Tuscaloosa*, 158 F.3d at 565; *Watkins*, 374 F. Supp. 2d at 392-93. While Dr. Williams repeatedly said that he was [redacted].

expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put." *In re TMI Litig.*, 193 F.3d at 664-65, 669-72, 703-04 (affirming exclusion of expert testimony that was based on pure speculation as scientifically unreliable) (quoting *Paoli*, 35 F.3d at 742 n.8).

These factors indicate that Dr. Williams's testimony should be excluded under Rule 702 because several of his conclusions about the TiO2 industry and Defendants' actions are not grounded in any scientific or reliable methods. In lieu of an independent economic analysis, Dr. Williams (1) [redacted] which is the province of the jury, not an expert; (2) [redacted], which also invades the province of the jury; (3) [redacted] (4) [redacted] (5) [redacted] which is not a proper foundation for expert opinion; and (6) [redacted] These flaws permeate Dr. Williams's reports and testimony and render his entire opinion inadmissible.

A. Plaintiff's Expert May Not Testify About Credibility or Draw Inferences That the Jury Is Equally Qualified To Make.

One of Dr. Williams's alleged [redacted] is his opinion that [redacted] (Stokes Decl. Ex. 3 ¶¶ 138-45; Ex. 4 ¶¶ 196-203.) In support, he contends that his "[redacted]" (Stokes Decl. Ex. 3 ¶ 143.) Appendix [redacted] is not an appendix that Dr. Williams compiled through the use of some economic or other scientific method, it is simply an appendix of documents that he posits, based

solely on his personal interpretation, show that [redacted] (Stokes Decl. Ex. 2 at 307:16-308:7.) He performs no additional analysis to support that conclusion, let alone any reliable economic analysis. In addition, Dr. Williams improperly opines on [redacted] (*See, e.g.*, Stokes Decl. Ex. 4 ¶¶ 161-67.) He concludes [redacted] and therefore—*ipso facto*—conforms his [redacted] His "method" is not replicable or anything approaching reliable.

Under Rule 702, an expert's proffered testimony "must assist the jury in understanding what otherwise might be outside its grasp." *Lipson*, 46 F. Supp. 2d at 762-63. But Dr. Williams's conclusions in this regard, grounded only in his subjective interpretation of select documents, do not assist the jury. To the contrary, they impinge upon the jury's function to determine the issues of truth and credibility, and by stating inferences that the jury can competently make without an expert's assistance. Dr. Williams's opinions about "[redacted]" and [redacted] amount to "at worst, rank speculation [and] at best . . . credibility choices that are within the province of the jury." *Id.* at 762-65; *see also Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 262 (3d Cir. 1987) ("Evaluation of witness credibility is the exclusive function of the jury . . . ."); *Anderson News, L.L.C. v. Am. Media, Inc.*, 2015 U.S. Dist. LEXIS 110358, at *12-13 (S.D.N.Y. Aug. 20, 2015) (excluding expert opinion regarding "Defendants' motivations, thought processes, and understanding"); *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 1855980 at *5 (D. Md. May 1, 2013) (excluding expert opinion that defendants' actions were pretextual); *Crowley v. Chait*, 322 F. Supp. 2d 530, 553-54 (D.N.J. 2004) (excluding expert testimony regarding the credibility of witnesses); *Holiday Wholesale v. Philip Morris*, 231 F.

Supp. 2d 1253, 1289 (N.D. Ga. 2002) (excluding expert opinion that defendants' business justifications were pretextual), *aff'd sub nom. Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1321-1323 (11th Cir. Ga. 2003). These opinions, if admitted, would usurp the jury's role to determine the truthfulness and credibility of the Defendants' witnesses, and should therefore be excluded.

B. Dr. Williams's Testimony Is Based on His Own Subjective Interpretation of Documents, Which Is Inadmissible as Expert Testimony.

Dr. Williams's opinions outlined in his opening and rebuttal reports are replete with, and largely premised on, his own interpretation of documents in the record. Dr. Williams merely takes the documents that [redacted], without supporting economic evidence. That is not the province of an economist and is not admissible expert testimony. Courts regularly exclude testimony in which the expert merely provides his or her own interpretation of documents. *Anderson News*, 2015 U.S. Dist. LEXIS 110358, at *11 (excluding expert opinions that "'merely recit[e] what is on the face of . . . document[s] produced during discovery.'") (citing *Cross Commerce Media, Inc. v. Collective, Inc.*, 2014 U.S. Dist. LEXIS 117244, at *22 (S.D.N.Y. Aug. 21, 2014)); *In re Fresh Del Monte Pineapples Antitrust Litig.*, 2009 U.S. Dist. LEXIS 97289 (S.D.N.Y. Sept. 30, 2009) (excluding expert report that recited selective facts in the record and provided legal conclusions on delayed entry by competitors because it did not demonstrate any reliable scientific technique); *Lipson*, 46 F. Supp. 2d at 763-64 (excluding expert accountant testimony based on the expert's review of witness statements

because it did not "comport with the principles and methodology of the accountancy profession").[4]

Dr. Williams's report is littered with his own interpretation of [redacted] not for the purposes of conducting an economic analysis or gleaning the data necessary for such an analysis, but simply to provide his own interpretation of the documents consistent with his alleged "[redacted]" In fact, large sections of his opening and rebuttal reports, including sections [redacted] in his opening report and sections [redacted] in his rebuttal, are premised heavily or exclusively on his own interpretation of selected documents in the record. (Stokes Decl. Ex. 3 ¶¶ 90-99, 108-24, 131-44; Ex. 4 ¶¶ 121-37, 148, 161-73, 187, 191, 196-221.)

As but one example, Dr. Williams makes much of [redacted] (Stokes Decl. Ex. 3 ¶¶ 109-10, 123.) [redacted] (Stokes Decl. Ex. 7.) [redacted] (Stokes Decl. Ex. 5 at 143:14-152:05; Ex. 6 at 101:18-104:05.) Nevertheless, Dr. Williams juxtaposes this [redacted] (Stokes Decl.

[4] *See also, Kia*, 2010 U.S. Dist. LEXIS 90065, at *14; *Crowley*, 322 F. Supp. 2d at 553-54; *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986) ("Stated more directly, the trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument.").

Ex. 8.) Dr. Williams focuses on [redacted]

[redacted]

(*Id.*) (emphasis added to show the portion Dr. Williams quotes.) Despite the fact that [redacted] (Stokes Decl. Ex. 7)—[redacted] (Stokes Decl. Ex. 5 at 149:1-150:9)—[redacted] (Stokes Decl. Ex. 1 at 64:05-67:17; Ex. 3 ¶¶ 110, 123; Ex. 4 ¶¶ 164-67.) But, Dr. Williams's own report shows that [redacted] (Stokes Decl. Ex. 3 at 394, App'x XX.) Dr. Williams simply takes [redacted] (Stokes Decl. Ex. 1 at 64:05-67:17.) That type of specious interpretation of documents is inappropriate for an expert economist. Besides not being "generally accepted" in the field or subject to peer review, and having a high "potential rate of error," it is also ungoverned by any "standards controlling the technique's operation."

See In re TMI Litig., 193 F.3d at 664–65. If Valspar wants the jury to make that inference, it may attempt to introduce the underlying evidence and make that argument. It may not, however, try to cloak its own argument with the weight of expert opinion.

This example is emblematic of Dr. Williams's entire approach, in which he repeatedly [redacted] (Stokes Decl. Ex. 3 App'x III-XX.) [redacted] (Stokes Decl. Ex. 1 at 99:10-102:5.) In short, Dr. Williams's [redacted] does not, and cannot, suffice as reliable economic analysis sufficient to render his opinion admissible. His testimony should be excluded under Rule 702.

C. <u>Aspects of Dr. Williams's Opinion Are Based on Pure Conjecture.</u>

Compounding the problem of basing his opinion largely on [redacted] Dr. Williams resorts to mere conjecture to support some of his opined "[redacted]" For example, he opines that [redacted] (*See, e.g.*, Stokes Decl. Ex. 3 ¶¶ 100-107.) But Dr. Williams admits that [redacted] (Stokes Decl. Ex. 1 at 242:13-244:5.) Nor did he attempt to [redacted] (*Id.* at 251:15-253:7; Stokes

Decl. Ex. 2 at 240:21-241:9.) In fact, Dr. Williams cannot even opine as to [redacted] (Stokes Decl. Ex. 2 at 164:4-14), and he admits that "[redacted]" (*Id.* at 240:1-241:19.) Moreover, Dr. Williams concedes that [redacted][5]

In reality, these [redacted] (Stokes Decl. Ex. 10 ¶¶ 194-209.) For example, Dr. Williams admits in his report that [redacted] "[redacted]" (Stokes Decl. Ex. 3 ¶ 103 n.157.) Similarly, [redacted] (Stokes Decl. Ex. 10 at Tbl. 25.) [redacted] (Stokes Decl. Ex. 10 ¶ 199, Tbl. 25.) [redacted] (*Id.* at Tbl. 26; Stokes Decl. Ex. 9.) The notion that [redacted]

[5] Stokes Decl. Ex. 3 at Figs. 12-17 ([redacted]), ¶ 103 (Dr. Williams describing [redacted]

[redacted] is belied by the record and, more importantly, constitute complete speculation by Dr. Williams.

Similarly, Dr. Williams opines that [redacted] "[redacted]" (Stokes Decl. Ex. 3 ¶ 125.) Dr. Williams asserts that "[redacted]" (*Id.*) But, as Dr. Williams admitted in his deposition, [redacted] (Stokes Decl. Ex. 2 at 20:5-25:6, 105:10-113:2.) Furthermore, [redacted] (Stokes Decl. Ex. 3 ¶ 125, App'x XX n.2.) Making matters worse, [redacted] (Stokes Ex. 1 at 49:4-15.) In fact, Dr. Willig shows that [redacted] (Stokes Decl. Ex. 10 ¶ 187, Tbl. 20; Ex. 2 at 282:09-283:22.) In light of his lack of any reliable analysis, Dr. Williams's argument that [redacted] That kind of speculation is far from helpful to the jury, and adds no expertise that the jurors do not themselves have.

D. Dr. Williams Improperly Opines on His Personal View of the Weight of the Evidence.

Expert testimony "that constitutes mere personal belief as to the weight of the evidence invades the province of the fact-finder." *Oxford Gene Tech.*, 345 F. Supp. 2d at 435. In his analysis of plus factors showing that Defendants allegedly engaged in a conspiracy, Dr. Williams repeatedly refers to "[redacted]" that is, "'[redacted]'" (Stokes Decl. Ex. 3 ¶ 90 (quoting Kovacic at 418.) Dr. Williams opines that [redacted]

This type of opinion is inappropriate because it improperly attempts to attribute more weight to certain evidence and should therefore be excluded. *Anderson News*, 2015 U.S. Dist. LEXIS 110358, at *10-13. In *Anderson News*, the court prohibited Dr. Marx, one of the authors of the Kovacic article that Dr. Williams so heavily relies upon, from testifying about alleged "super plus factors" because that label "appears to be a label conjured up for litigation rather than the 'product of reliable principles and methods.'" *Id.* at 10 (quoting Fed. R. Evid. 702(c)). The court noted that "the fact that the term has not been adopted or used by anyone other than Dr. Marx and her colleagues indicates that this term has not been generally accepted by the scientific community." *Id.* at 11 (citing *Daubert*, 509 U.S. at 594); *see also In re TMI Litig.*, 193 F.3d at 664–65 (considering whether a method is "generally accepted" and put to "non-judicial uses"). Those same opinions should be excluded in this case.

In fact, some of the "[redacted]" found in Dr. Williams's report are simply the type of economic evidence from which courts are wary of inferring conspiratorial conduct because they may simply restate the economic interdependence of an oligopolistic market. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004); *see also Anderson News*, 2015

U.S. Dist. LEXIS 110358, at *10 ("Nor is there an explanation of why 'super-plus factors' demonstrate a stronger inference of collusion than traditional 'plus factors.'"). For example, Dr. Williams opines that [redacted] (Stokes Decl. Ex. 3 ¶¶ 94, 95-99, 107, 123, 128-30.) Aside from his failure to support the [redacted] all of these [redacted] precisely the kind of economic evidence that courts treat with caution because such actions may merely restate the condition of tacit collusion arising from an interdependent oligopoly, which is not illegal, rather than properly support an inference of conspiracy.[6] *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 322 (3d Cir. 2010); *In re Citric Acid Antitrust Litig.*, 191 F.3d 1093, 1097-1100 (9th Cir. 1999). Accordingly, Dr. Williams's testimony regarding "super plus factors" should be excluded.

E. Dr. Williams's Citations to and Quotations from [redacted] Are Improper.

Throughout his reports, Dr. Williams quotes extensively from [redacted] (Stokes Decl. Ex. 3 ¶¶ 49, 54, 63, 74, 82, 88, 91, 98, 104, 106, 121, 126, 142, 144; Ex. 4 ¶¶ 64, 70, 82, 100, 142, 197.) While Dr. Williams claimed in deposition that [redacted]

[6] Despite admitting that [redacted] Dr. Williams [redacted] Dr. Williams admitted that his report does not address [redacted] (Stokes Decl. Ex. 1 at 18:11-21:1.) Accordingly, Dr. Williams's report does not fit the facts of this case and is not helpful to the trier of fact. *Daubert*, 509 U.S. at 591–92 ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."); *Schneider*, 320 F.3d at 404.

[redacted] Dr. Williams presents [redacted] Regardless, those repeated references and quotations do not constitute an economic or scientific analysis—let alone a reliable, testable, or peer reviewed one. The intent is clear: To elevate the significance of [redacted] to improperly influence the outcome of this case. That is impermissible.

Similarly, Dr. Williams quotes [redacted] (Stokes Decl. Ex. 3 ¶¶ 71, 74, 91); [redacted] (7th Cir. 2002) (*Id.* ¶¶ 65, 74); [redacted] (*Id.* ¶¶ 16 n.27, 18, 28, 30), again seeking to elevate their significance and apply [redacted] to the facts here. But it is not the role of an expert to express legal opinions, to opine about the relative significance or weight of legal authorities, or otherwise to usurp the role of the Court to instruct the jury on the law. *Berckeley*, 455 F.3d at 217; *Watkins*, 374 F. Supp. 2d at 392–93. It is the jury's role to apply the law to the facts, not Dr. Williams's. Dr. Williams should be precluded from testifying about any legal standards, [redacted] or otherwise referring to the substance or significance of [redacted].

F. Dr. Williams's Conclusions Regarding [redacted] Are Cumulative of Dr. McClave's Report.

A core underpinning to Dr. Williams's opinion is [redacted] (*See, e.g.*, Stokes Decl. Ex. 3 ¶¶ 13, 90-94, 151.) At his first deposition, when Dr. Williams was asked whether [redacted]

[redacted] (Stokes Decl. Ex. 1 at 83:12-20.) And despite the importance of [redacted] to Dr. Williams's opinion, Dr. Williams confirmed that he first saw [redacted] (Stokes Decl. Ex. 1 at 82:10-83:11), and that [redacted] (Stokes Decl. Ex. 2 at 190:14-191:12.) Dr. Williams affirmed that [redacted] (Stokes Decl. Ex. 1 at 83:9–11, 85:1–4.) Dr. Williams simply incorporates and parrots [redacted] which renders Dr. Williams's "opinion" [redacted] cumulative at best and inadmissible under Rule 702.

CONCLUSION

Most of Dr. Williams's expert opinion is a mixture of inadmissible and cumulative testimony. Dr. Williams asserts that his opinion is "[redacted]" identified in his report and that he cannot say whether [redacted] (Stokes Decl. Ex. 2 at 60:9-64:15.) He has refused to opine on [redacted] (*Id.* at 60:3-64:15.) Accordingly, by his own description, [redacted] If the Court correctly rules that Dr. Williams may not testify as to any one of the "[redacted]" set forth in his opinion, Dr. Williams's opinion must be stricken completely. At the very least, however, Dr. Williams should be precluded from offering any of the inadmissible and cumulative testimony at trial.

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