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.	)	

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

POTTER ANDERSON & CORROON LLP
Kathleen Furey McDonough (No. 2395)
John A. Sensing (No. 5232)
Hercules Plaza, Sixth Floor
1313 North Market Street
P.O. Box 951
Wilmington, Delaware 19899
(302) 984-6000 – Telephone
kmcdonough@potteranderson.com
jsensing@potteranderson.com

Attorneys for Defendant E. I. du Pont de Nemours and Company

OF COUNSEL:

Shari Ross Lahlou
CROWELL & MORING LLP
1001 Pennsylvania Avenue N.W.
Washington, DC 20004
(202) 624-2500 – Telephone
slahlou@crowell.com

Joshua C. Stokes
(admitted *pro hac vice*)
CROWELL & MORING LLP
515 S. Flower St., 40th Floor
Los Angeles, California 90066
(213) 622-4750 – Telephone
jstokes@crowell.com

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Other Authorities

SUMMARY OF THE ARGUMENT

In an attempt to prevent the exclusion of Dr. Williams's testimony, which is mandated for the reasons set forth in DuPont's motion, Valspar focuses on his resume and experience, arguing that his opinion is based on an "economic analysis of plus factors." (D.I. 379 at 8.) But merely being an economist is not enough to transform Dr. Williams's defective approach into a reliable, scientifically based methodology. Nor does it render his inappropriate conclusions admissible. While a qualified economist, using reliable methods and appropriate economic data, may testify about the presence or absence of plus factors that are within the scope of economic analysis, Dr. Williams neither employs reliable methods based on economic data nor confines his opinions to issues on which he—as an economist—is qualified to opine. Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), dictate that Dr. Williams's opinions—based largely on his subjective interpretation of documents and reaching questions that are reserved for the jury—are inadmissible. Valspar cannot circumvent its evidentiary burden or supplant the role of the jury by having its expert testify on subjects such as credibility or provide his own interpretation of snippets of certain routine business documents. Because Dr. Williams's flawed methodology permeates his analysis and because [redacted], he cannot render any helpful opinion. The Court should strike his opinion in its entirety.

ARGUMENT

I. Dr. Williams May Not Opine On The Credibility Or Motivations Of Defendants.

Valspar offers no justification for Dr. Williams's opinions that [redacted] *See Daubert*, 509 U.S. at 593 n.10. Credibility determinations are solely within the province of the jury, *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 262

(3d Cir. 1987), which is why courts routinely exclude proffered expert testimony on [redacted] *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); *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 1855980, at *5 (D. Md. May 1, 2013); *Holiday Wholesale v. Philip Morris*, 231 F. Supp. 2d 1253, 1289 (N.D. Ga. 2002), *aff'd sub nom. Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1321-1323 (11th Cir. 2003).

Valspar's attempt to characterize Dr. Williams's opinions in this regard as "analysis from an economic perspective," (D.I. 379 at 15-16), is ineffective. Dr. Williams's opinions are [redacted]. (Stokes Decl. (D.I. 273) Ex. 1 at 99:10-102:5; Ex. 3 ¶¶ 138-45; Ex. 4 ¶¶ 196-203.) His "review" does not qualify as economic analysis. As the court held in *SEC v. Lipson*, 46 F. Supp. 2d 758, 762-63 (N.D. Ill. 1999), "[i]f the opinion is not squarely grounded in the principles and methodology of the relevant discipline, the opinion is inadmissible no matter how imposing [the] credentials of the proffered expert." (internal quotation marks omitted). Dr. Williams's opinion does not aid the members of the jury in understanding matters outside of their grasp—it actually invades the province of the jury to determine issues of credibility. *Id*. Being an economist does not transform his review of documents into a reliable economic analysis.[1]

Valspar cites to *Jamsports & Entertainment, LLC v. Paradama Products*, 2005 U.S. Dist. LEXIS 59, at *30-31 (N.D. Ill. Jan. 3, 2005), to support its position. (D.I. 379 at 7, 16.) But the court in *Jamsports* actually *excluded* the plaintiff's expert opinion based on "his interpretation of

[1] Furthermore, as the Third Circuit recently held, [redacted] does not itself create a reasonable inference of conspiracy. *In re Chocolate Confectionary Antitrust Litig.*, 2015 WL 5332604, at *20 (3d Cir. Sept. 15, 2015). Dr. Williams's testimony on "[redacted]" is simply unhelpful to the trier of fact and should be excluded.

correspondence and other evidence" because there "is nothing in [the economist's] expertise that suggests that he is any more competent than the average juror in interpreting these communications or in divining from them the intent of [the defendant] and others." *Id.* at *30. The court differentiated between opinions that "have a grounding in economics and a relationship to [the economist's] expertise," and impermissible opinions "that consist of little more than the interpretation of written or verbal statements by others," holding that "[s]uch 'findings,' . . . are not an appropriate subject for expert testimony." *Id.* at 32-33; *see also Anderson News*, 2015 U.S. Dist. LEXIS 110358, at *12-13. Neither Dr. Williams's conclusions nor his methodology on [redacted] is appropriate under Rule 702. The Court should preclude his testimony on these issues.[2]

II. Dr. Williams's Subjective Interpretation Of Documents Is Not Admissible.

Valspar claims that that Dr. Williams conducted an "empirical" review of documents produced in discovery to support his opinions regarding his other alleged plus factors. (D.I. 379 at 8-13.) But just because Dr. Williams is an economist does not mean that his review of ordinary course documents—the same as the jury would undertake—equates to an "empirical" review. Indeed, noticeably absent from the bulk of Dr. Williams's reports are the kinds of data-based empirical analyses that one would expect from an economist seeking to render the kinds of opinions that Dr. Williams does. Instead, numerous sections of his reports (V.B.ii, iii, v, vi, vii, ix, and x in his opening report and IV.B.iii, iv, v, vi, vii, ix, and x in his rebuttal report) [redacted]

[2] Valspar argues that DuPont's expert opines [redacted], thereby justifying Dr. Williams's opinion. (D.I. at 379 at 16.) [redacted]. (Stokes Decl. (D.I. 273) Ex. 10 ¶¶ 169-176, *see also* ¶¶ 108-135.)

entirely or principally on his selective quotations from and interpretation of emails and documents. (*See generally* Stokes Decl. (D.I. 273) Exs. 3, 4.)

Valspar attempts to justify Dr. Williams's inadmissible opinions by arguing that he had to evaluate the record to support his opinion. (D.I. 379 at 10.) But the question is "whether the reasoning or methodology underlying the testimony is scientifically valid and [] whether that reasoning or methodology properly can be applied to the facts at issue." *Daubert*, 509 U.S. at 592-93; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). Simply labeling something a "plus factor" does not discharge the expert's obligation to employ reliable and scientifically based methods. Nor does it qualify the expert to interpret routine emails and similar documents that are outside the purview of economic analysis. *Jamsports*, 2005 U.S. Dist. LEXIS 59, at *30-31; *Lipson*, 46 F. Supp. 2d at 762-63. Because his purported "empirical" review amounts to nothing more than quoting from and interpreting documents in a manner to fit his opinion, Dr. Williams's approach lacks the requisite rigor, is void of a discernible methodology, and has no connection to his expertise as an economist.[3] It is thus inadmissible. *Anderson News*, 2015 U.S. Dist. LEXIS 110358, at *11.

[3] Valspar argues that DuPont's expert, Dr. Willig, "interprets documents" as well. (D.I. 379 at 12.) [redacted]. He does not simply interpret the documents based on what they say. *See, e.g.*, Stokes Decl. (D.I. 273) Ex. 10 ¶ 33 ([redacted]); ¶ 43 ([redacted]); ¶¶ 92, 96-100 ([redacted]); ¶ 114 ([redacted]); ¶ 131 ([redacted]); ¶ 135 ([redacted]); ¶ 228 ([redacted]); ¶ 262 ([redacted]). [redacted].

Valspar attempts to defend Dr. Williams's defective approach by arguing that [redacted]. (D.I. 379 at 11-12.) But that example actually proves DuPont's point and demonstrates the central flaw in Dr. Williams's approach: Namely, that he performs no economic analysis of the documents but merely reads them in conjunction and infers that they are somehow related. Valspar argues that [redacted]" (D.I. 379 at 12.) As an initial matter, that is a significant leap to take given that [redacted]. (Stokes Decl. (D.I. 273) Exs. 7-8.) And contrary to Valspar's argument, [redacted]. (Suppl. Stokes Decl. Ex. 1 at 394:19-396:06.) But more to the point, the jury does not need Dr. Williams's opinion to evaluate the proffered inference because there is nothing in that "analysis" that requires special skill or understanding. Fed. R. Evid. 702; *Lipson*, 46 F. Supp. 2d at 762-63 (an expert's proffered testimony "must assist the jury in understanding what otherwise might be outside its grasp"); *Anderson News*, 2015 U.S. Dist. LEXIS 110358, at *11.

The same is true of Dr. Williams's review of [redacted]" (D.I. 379 at 10-11.) The alleged "[redacted]

[redacted]. (Stokes Decl. (D.I. 273) Ex. 3 ¶¶ 108-123.) Dr. Williams's review of Defendants' "[redacted].[4] (*Id*. at ¶¶ 124-25.) Whatever that is, it is neither an empirical nor economic review of the evidence. Valspar's counsel may try to argue its proposed inferences to the jury, but this type of interpretation is outside the scope of Dr. Williams's expertise and outside the scope of admissible expert opinion.[5]

III. Dr. Williams's Opinion Is Premised On Speculation And Conjecture.

DuPont pointed to two principal respects in which Dr. Williams's opinion is based solely on speculation: [redacted]. (D.I. 273 at 14-16.) With regard to the first category, Valspar mischaracterizes Dr. Williams's opinion. (D.I. 379 at 14.) [redacted]. (Stokes Decl. (D.I. 273) Ex. 3 ¶ 100.) Dr. Williams further opines that [redacted]

[4] [redacted]. (Stokes Decl. (D.I. 273) Ex. 1 at 51:7-56:19; Ex. 2 at 20:5-25:6, 105:10-113:2.)

[5] The documents cited in Dr. Williams's report may be found attached to the Declaration of Jessica Meyer. (D.I. 288.)

[6] William E. Kovacic, *et al.*, *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393, 393-436 (2011).

[redacted]. (Stokes Decl. (D.I. 273) Ex. 3 at ¶¶ 102-03; Ex. 4 ¶ 132.) But Dr. Williams's opinion [redacted]. (Stokes Decl. (D.I. 273) Ex. 10 ¶¶ 194-209.) Similarly, [redacted]. (Stokes Decl. (D.I. 273) Ex. 10 ¶¶ 194-209.) [redacted]. (Stokes Decl. (D.I. 273) Ex. 1 at 242:13-244:5.) [redacted]" (Stokes Decl. (D.I. 273) Ex. 2 at 164:4-14, 240:1-241:19.) Dr. Williams's opinion [redacted] is not supported by any reliable economic analysis but is simply conjecture, rendering it inadmissible. *Oddi v. Ford Motor Co.*, 234 F.3d 136, 158 (3d Cir. 2000).

Second, Dr. Williams opines that "[redacted]" (Stokes Decl. (D.I. 273) Ex. 3 at ¶ 124.) As noted above, [redacted]

[redacted]. (Stokes Decl. (D.I. 273) Ex. 3 at ¶¶ 108-125.) Dr. Williams also opines that [redacted]. (Stokes Decl. (D.I. 273) Ex. 2 at 20:5-25:6, 105:10-113:2; Ex. 3 at ¶ 125.) That opinion is simply speculation, and the Court should not allow it.

IV. Dr. Williams Cannot Testify As To "Super Plus Factors."

Throughout his reports, [redacted]. In this way, Dr. Williams and Valspar attempt to ascribe more significance to certain evidence, thereby again invading the province of the jury. Valspar offers no basis to justify that approach. The Kovacic Article defines "super plus factors" as "actions or conduct that could occur in the presence of a collusive agreement but that are highly unlikely to occur in its absence." (Stokes Decl. (D.I. 273) Ex. 3 ¶ 90.) [redacted]. *Chocolate*, 2015 WL 5332604, at *10-11, 17 (expert opinion of supracompetitive prices and trade association membership is insufficient to form an inference of conspiracy);[7] *In re Citric Acid Litig.*, 191 F.3d 1090, 1098-99 (9th Cir.

[7] [redacted] His testimony should be excluded on that basis as well.

1999) (evidence of trade association and statistics program insufficient for inference of conspiracy); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004) (firms in oligopolies may rationally choose to raise prices unilaterally rather than take share). In fact, the authors of the Kovacic Article advocate a "reformulated standard in circumstantial evidence cases" that is contrary to established caselaw. (Suppl. Stokes Decl. Ex. 2 at 408.) [redacted] contradicts Third Circuit law and, in the words of the *Anderson News* court, "appears to be a label conjured up for litigation rather than the 'product of reliable principles and methods.'" 2015 U.S. Dist. LEXIS 110358, at *10 (quoting Fed. R. Evid. 702(c)). Just as the court in *Anderson News* excluded one of the article's authors, Dr. Marx, from testifying about "super plus factors," this Court should do the same with Dr. Williams. *See Williamson Oil*, 346 F.3d at 1321-23 (affirming exclusion of expert testimony "positing a new theory" regarding conscious parallelism).

Valspar argues that Dr. Williams's inappropriate weighting of the evidence should be allowed because "[c]ourts and commentators regularly use singular weighting descriptors, such as 'the strongest plus factor.'" (D.I. 379 at 17.) Valspar's sole example of a commentator so opining is none other than Dr. Leslie Marx (D.I. 379 at 17; D.I. 380 Ex. F), one of the co-authors of the Kovacic Article and the expert prevented from testifying on "super plus factors" in the *Anderson News* case. 2015 WL 5003528, at *10. Valspar is, therefore, attempting to bootstrap its argument that commentators use this term by again citing back to the only economist that it has identified who uses the term. Furthermore, Valspar's argument that courts place emphasis on certain plus factors (D.I. 379 at 17) is self-defeating. The cases demonstrate that the courts place more emphasis on traditional non-economic evidence of conspiracy rather than on the [redacted]

[redacted]" *Chocolate*, 2015 WL 5332604, at *20; *Flat Glass*, 385 F.3d at 361. The Court should not allow Dr. Williams [redacted]"

V. Dr. Williams Cannot Testify As To An Actual Agreement Or On Legal Conclusions.

Recognizing the inappropriateness of Dr. Williams opining that [redacted], Valspar now concedes that [redacted]. (D.I. 379 at 4.) The Court should also prohibit Dr. Williams from testifying that "[redacted]" as this testimony improperly sets forth his own personal belief as to the weight of the evidence. *Oxford Gene Tech. v. Mergen Ltd.*, 345 F. Supp. 2d 431, 435 (D. Del. 2004). Valspar also concedes that it will not elicit testimony from Dr. Williams referencing the summary judgment order from the Maryland litigation. The Court should also prevent Dr. Williams from testifying about the existence or meaning of other court decisions, as doing so will invade the Court's role to instruct the jury as to the law to be applied to the case.

CONCLUSION

As demonstrated in DuPont's briefs, Valspar intends to elicit testimony from Dr. Williams that far exceeds the appropriate bounds of admissible expert opinion. The Court should not allow that testimony. Dr. Williams [redacted]. (Stokes Decl. (D.I. 273) Ex. 2 at 60:9-64:15.) Because several of the bases of his opinion, [redacted] must be stricken as inappropriate, his entire opinion must be excluded.

POTTER ANDERSON & CORROON LLP

By: */s/ John A. Sensing*
Kathleen Furey McDonough (No. 2395)
John A. Sensing (No. 5232)
Hercules Plaza, Sixth Floor
1313 North Market Street
P.O. Box 951
Wilmington, Delaware 19899
(302) 984-6000 – Telephone
kmcdonough@potteranderson.com
jsensing@potteranderson.com

Attorneys for Defendant E. I. du Pont de Nemours and Company

OF COUNSEL:

Shari Ross Lahlou
CROWELL & MORING LLP
1001 Pennsylvania Avenue N.W.
Washington, DC 20004
(202) 624-2500 – Telephone
slahlou@crowell.com

Joshua C. Stokes
(admitted *pro hac vice*)
CROWELL & MORING LLP
515 S. Flower St., 40th Floor
Los Angeles, California 90066
(213) 622-4750 – Telephone
jstokes@crowell.com

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