No. 16-1345

United States Court of Appeals for the Third Circuit

THE VALSPAR CORPORATION AND VALSPAR SOURCING, INC.,

Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,

Appellee.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

APPELLANTS' BRIEF
FILED UNDER SEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Appellants The Valspar Corporation and Valspar Sourcing, Inc. make the following disclosures:

The Valspar Corporation hereby discloses that it does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Valspar Sourcing, Inc., hereby discloses that it is a wholly owned subsidiary of The Valspar Corporation.

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I. INTRODUCTORY STATEMENT

This is an appeal from the dismissal on summary judgment of a price-fixing claim The Valspar Corporation and Valspar Sourcing, Inc. ("Valspar" or "Appellant") brought under the Sherman Antitrust Act. This appeal concerns a plaintiff's burden of proof to establish a *prima facie* case with circumstantial evidence that increased prices resulted from collusion.

This Court and the United States Supreme Court recognize that the existence of a price-fixing conspiracy in violation of Section I of the Sherman Antitrust Act may be proved by circumstantial evidence alone. The decision below must be reversed because its holding essentially eliminates a plaintiff's ability to establish a price-fixing conspiracy with circumstantial evidence. Although the district court relied upon this Court's recent decision in *In re Chocolate Confectionary Antitrust Litigation*, 801 F.3d 383 (3d Cir. 2015), a case with facts readily distinguishable from this case, the district court misinterpreted and misapplied that decision.

In addition, the district court ignored the principles of comity by reaching a decision at odds with the prior decision in a related class action venued in the United States District Court for the District of Maryland, where the court denied summary judgment on a materially identical record. In doing so, the district court identified no error made by the Maryland court. Instead, it simply chose to interpret identical evidence differently than did the Maryland court and improperly drew inferences

favorable to DuPont. Specifically, the district court improperly dismissed Valspar's evidence of "plus factors" as being equally consistent with both independent conduct of oligopolists and collusion. The district court similarly ignored the significance of 31 parallel price increases in which the conspirators all joined, often times within days, compared to just three parallel price increases occurring in the ten years preceding the conspiracy. The district court also ignored the significance of the co-conspirators' sharing of confidential information among themselves. Ultimately, the court improperly required direct evidence of an agreement to fix prices. However, neither this court nor the United States Supreme Court require such a "smoking gun."

The district court erred in requiring Valspar to produce more than circumstantial evidence of collusion to get its price-fixing case to a jury. This Court should reverse the decision granting summary judgment in favor of DuPont.

II. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1337 and §4(a) of the Clayton Act, 15 U.S.C. §15(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291 because this is an appeal from a final judgment entered pursuant to an Order entered on January 25, 2016 upon a grant of summary judgment to DuPont, the only defendant (hereinafter "Order"). Valspar timely filed its Notice of Appeal on February 16, 2016.

III. STATEMENT OF ISSUES ON APPEAL

1. Did the district court err in concluding that there was insufficient evidence from which a jury could reasonably infer DuPont's participation in a price fixing conspiracy?

2. Did the district court err by ignoring the economic evidence, including regression analyses, of Valspar's experts, who found the pricing and other conduct of DuPont and it alleged co-conspirators to be consistent with collusion and inconsistent with a competitive market?

3. Did the district court, after finding that DuPont engaged in parallel pricing, err in holding that Valspar failed to introduce sufficient evidence of "plus factors" tending to exclude the possibility that DuPont and its co-conspirators acted independently?

IV. STATEMENT OF RELATED CASES AND PROCEEDINGS

In 2010, a class of direct purchasers initiated an action involving the same titanium dioxide price-fixing conspiracy at issue in this appeal in the United States District Court for the District of Maryland, captioned *In re Titanium Dioxide Antitrust Litigation*, Civil Action No. 10-cv-00318- RDB (the "Maryland Action"). Summary judgment was denied in the Maryland Action. *In Re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799 (D. Md. 2013). The case later settled before trial.

Valspar opted out of the Maryland Action and brought its opt-out claims in the United States District Court for the District of Minnesota, Court File No. 13-3214-ADM-LIB, against DuPont and its co-conspirators, Millennium, Kronos, and Huntsman. Motions to transfer venue were granted, transferring Valspar's claims against DuPont to the District Court of Delaware and its claims against Kronos and Huntsman to the United States District Court for the Southern District of Texas, *The Valspar Corporation, et al. v. Huntsman International, LLC, et al.*, Court File No. 4:14-cv-01130 ("Texas Action"). Valspar's claim against Millennium remained in the District Court of Minnesota, *The Valspar Corporation, et al. v. Millennium Inorganic Chemicals, Inc.*, Court File No. 13-3214-ADM-LIB ("Minnesota Action"). The Texas Action and Minnesota Action both settled.

V. STATEMENT OF FACTS

A. The Titanium Dioxide Industry Was Ripe for Conspiracy.

Titanium dioxide ("TiO2") is a dry chemical powder that is primarily used as a white pigment.[1] TiO2 has certain refractive and UV properties that make it useful in paint and coatings to provide opacity and white color properties. TiO2 is a standardized commodity-like product for which there are no viable substitutes.[2]

[1] A00086 at ¶ 28.

[2] A01510, A01633, A01671, A01675-76, A01677-709, A01710-17, A01719, and A01732-33; A00087 at ¶ 30.

DuPont, Huntsman, Kronos, Millennium, and Tronox[3] dominated the United States TiO2 market.[4] [redacted].[5] The high capital investment needed to open a TiO2 plant prevents competition from entering the market.[6]

During the 1990s, the TiO2 industry suffered substantial declines in consumption and price.[7] Profitability reached an all-time low in 2001.[8] Ian Edwards, DuPont's Global Business Director, was quoted as saying that "[redacted]," while Gary Cianfichi, Millennium's Director of Sales for Europe, similarly explained that [redacted].[9]

[3] In November 2013, Valspar brought its Sherman Act claim against DuPont, Kronos, Millennium, and Huntsman, but did not sue Tronox, which had declared bankruptcy. *See Titanium Dioxide*, 959 F. Supp. 2d at 802 n.2.

[4] A00135-A01674 and A05357-80 at ¶¶ 46-84.

[5] A000155, A01909, and A01968.

[6] A01045 and A01994-2016; A05354-55, A05365-66 at ¶¶ 39-40, 62-64; *see Titanium Dioxide*, 959 F. Supp. 2d at 826.

[7] *See, e.g.*, A00831, A01508-63, A03439-40, A04250, A04291-880, A04885, and A05371-76 at ¶¶ 71-75 and Figures 4-6. *See also* A03439-40 and A01513.)

[8] A03439-40 and A01513.

[9] A04881-82.

By 2002, the United States TiO2 market "was conducive to conspiracy" and "'a text book example of an industry susceptible to efforts to maintain supracompetitive prices' and . . . DuPont had a motive to enter into such a conspiracy." (Order at 10, A00013 (quoting *Titanium Dioxide*, 959 F. Supp. 2d at 827).) The co-conspirators began systematically altering the TiO2 market by enlisting the largest producer, DuPont, into their trade association, which expanded their sales and capacity information sharing program. Additionally, the co-conspirators completed an unprecedented 31 parallel price announcements that [redacted].

B. DuPont Joins the TDMA and Begins Sharing Data with Competitors.

Until January 2002, DuPont was unable to join the Titanium Dioxide Manufacturers Association ("TDMA")—a trade group founded by European TiO2 producers that formed part of a larger trade association for the European chemical industry, the Conseil Européen des Fédérations de l'Industrie Chimique ("CEFIC")[10]—because membership was restricted to European-based manufacturers, like Huntsman, Kronos, and Millennium.[11] However, TDMA began pursuing a new Global Statistics Program ("GSP") designed to [redacted]

[10] A04995-5004.

[11] A05081, A03439-40 and A01513.

[redacted].[12] Because of DuPont's worldwide market share, it was critical to the success of the GSP to gain access to DuPont's data.[13]

[redacted].[14]

Four days later, on January 28, 2002, DuPont announced a price increase.[15] Millennium matched that increase on January 30, 2002, Kronos did so on February 1, 2002, and Huntsman upped its price on February 12, 2002.[16] Each increase had an identical effective date of March 1, 2002. (*Id.*) This was the first of what would ultimately total 31 simultaneous price increase announcements from 2002 through 2013 (the "Conspiracy Period").[17]

[12] A05081, A03439-40 and A01513; *see also* A04969-78, A04979-88, and A05077-86.

[13] A07906-07.

[14] A04995 and A05013-14.

[15] A02150-63.

[16] A03136-38 (Millennium), A02225 (Huntsman), A06096-106 (Kronos).

[17] A02150-63, A03136-38, A02622, A02225.

C. The GSP Facilitated [redacted].

[redacted]

[18] A04916.

[19] *See Titanium Dioxide*, 959 F. Supp. at 828; *see also* A07602-04, A04930-32, A05250, A04925-26, A04939-A05076, A05123-24.

[20] A05123-24.

[21] A05279-81.

[redacted]

[22] A03950-54 and A05827-34 at ¶¶ 174-184.

[redacted]

[redacted][23]

The co-conspirators' "discipline" continued well beyond 2010. In 2011, one co-conspirator noted that, "[redacted]" and that producers "[redacted]"[24] By 2012, Millennium openly stated that it "[redacted]."[25]

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[23] *See* A05129, A05272, A03483, A03469, A03485-A03525, A01948-49, A03464, A03955-63, and A05091-93, respectively. *See also* A03533-34 (December 2011 Cristal Steering Body minutes noting [redacted]"), A05132-35 (2011 email advising Millennium to [redacted]"), A03441-51, A03474 (Kronos email noting volume "[redacted]."), A03479, A04072, A05087, A05126-28, A05251, A05252-53, A5254-57, A05258-59, A05260 and A05273-74.

[24] A03464.

[25] A05279-81; *see also* A01948-49, A03526-37, A03955-63, A05091-93, and A05132-35.

Paired with this "discipline" was [redacted].[26] The co-conspirators also shifted inventory among themselves with intercompany sales to each other at below-market prices.[27]

[redacted].[29] In fact,

[26] A05366-68 at ¶¶ 66-67 and Figures 2 and 3 and A04198-247. *See also* A01913-47, A02127-38, A03629-92, A03964-73, and A03974-A04065.

[27] A05138-57 (internal DuPont email [redacted]).

[28] A04927 [redacted], A01985-90, A01194-A02046, A02146-47, A03480 [redacted], A3526-37, A4920-24, A04925-26, A04949-68, A04979-88, A04989-94, A05091-93 and A05094 [redacted], and A04911-A05091 (generally).

[29] A05000 [redacted]) (emphasis in original), A05019 [redacted]

[redacted].[30] [redacted]

[redacted]

[redacted].[32]

D. The Co-conspirators Issue 31 Parallel Public Price Increase Announcements.

Rather than competing with each other, the co-conspirators worked together to systematically increase the price of TiO2 and stabilize their respective market shares. To do so—despite varying cost structures, a declining demand for TiO2, and [redacted]—the co-conspirators issued 31 parallel price increase announcements during the Conspiracy Period, typically in identical

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[redacted], A01985-90, and A04933-48. *See also Titanium Dioxide*, 959 F. Supp. 2d at 806.

[30] A05000 (noting [redacted]), A05019 [redacted]). *See also* A01985-90, A04933-48 and *Titanium Dioxide*, 959 F. Supp. 2d at 806.

[31] A05005-07, A06048-54; *see also* A07905 ([redacted]).

[32] A07489-90 (Hubbard Dep. 51:24-52:20).

amounts that impacted all grades of TiO2.[33] This unprecedented wave of parallel announcements began in 2002.

As an example, in 2004, Millennium, Kronos, DuPont, Huntsman, and Tronox engaged in four parallel price increases.[34] The producers matched the lead announcements within a relatively short period of time, and in one instance, all of the co-conspirators matched the increase within one week. (*Id.*)

Often, identical price increase announcements from the co-conspirators were separated by hours or at most days.[35] For example, DuPont announced a $0.06/lb. increase on September 29, 2005, at 11 a.m. E.S.T. Tronox matched the increase seven hours later. And Kronos matched it within eight hours.[36] [redacted]

[redacted][37]

[33] A05382-85 at ¶¶ 88-89, A05383-84, Figures 7-8 and A05599-614 and A05724-29 ; A05877-81; A02051-3421 (collecting increase announcements).

[34] A05382 at ¶ 88, A05384, Figure 8 and A05724-29 ; *see also* A02051-A03421.

[35] *See, e.g.*, A02054-65 (list of industry announcements 6/08-5/13), A03441-51 (list of announcements), A05111-121 (same), A05158-66 and A05244-49 (same); A02584 (DuPont 2/19/04), A02996 (Kronos 2/20/04), A03121 (Millennium 2/20/04), A02226-580 (Huntsman, 2/23/04); A02084 (DuPont 9/29/05), A02195 (Huntsman 9/29/05), A02605 (Kronos 9/29/05), A03167-74 (Millennium 9/30/05); A02075 (DuPont 12/7/09), A02779-81 (Kronos 12/9/09), A03165 (Tronox 12/9/09), A03160-64 (Millennium 12/9/09), and A02204 (Huntsman 12/11/09).

[36] A05275-76.

[37] A05275-76.

Millennium and Huntsman announced parallel increases the next day.[38] An example later in the Conspiracy Period is DuPont's December 7, 2009 price increase announcement, to be effective January 1, 2010.[39] Two days later, on December 9, 2009, Kronos, Millennium, and Tronox matched the price increase, and Huntsman followed on December 11.[40]

These price increases occurred in lockstep, with little or no deliberation by the competitor firms, negating any argument that [redacted]. For example, [redacted]

[38] A05877-81.

[39] A02075.

[40] A02779-81, A03160-34 and A03165.

[41] A05261 [redacted]).

[42] A02054-65.

[43] A03462-63.

[redacted]

The co-conspirators' supply contracts [redacted]

[redacted]

[44] A03454-55.

[45] A05289-91, A05976-90 and A05991; *see also Titanium Dioxide.*, 959 F. Supp. 2d at 829-830.

[46] A07594-723, A07812-69, A07451-81, A07870-903 (*e.g.*, [redacted]).

[47] A07812-69, A07451-81, A07870-903 (e.g., [redacted]).

[redacted].[48] Notably, none of the co-conspirators publicly announced any price reductions.[49]

The frequency and similarity of the timing and amount of the price increases during the Conspiracy Period stand in stark contrast to the period from 1994 through 2001, during which the co-conspirators issued at most three parallel announcements (out of a total of 13 announcements).[50] [redacted], the co-conspirators announced price increases in concert 31 times (out of 36 total announcements), or more than 86% of the time. (*Id*.) From 2002 through 2010, the vast majority of the price increase announcements occurred within 30 days of a General Committee meeting of the

[48] A07870-903, A07793-811, A07557-93, A07329-51 ([redacted]).

[49] A07352-450, A07482-556, A07812-69, A07557-93 ([redacted]).

[50] A05381-85 at ¶¶ 87-89 and Figures 7 and 8; A05778-79 at ¶ 69, Figure 5.

TDMA.[51] In 2011, all of the increase announcements occurred within 30 days of a TDMA meeting.[52]

E. Together with Price Increase Announcements, the Co-conspirators Signaled Price Increases and Dictated Market Behavior.

There is substantial evidence of price signaling and an understanding by the co-conspirators that they were engaged in price signaling.[53] In addition to the price announcements which signaled increases to competitors, the co-conspirators [redacted]. For example, on September 13, 2009, [redacted]

[redacted]

[redacted]"[55]

[51] *Compare generally* A02051-A03421 *with* A05882-A06800, A06107-A06676 and A04911-A05090; *see also Titanium Dioxide.*, 959 F. Supp. 2d at 830 (finding that plaintiffs showed that 88 percent of the announcements came within 30 days of TDMA General Committee meeting).

[52] *Compare* A02062-63 *with* A05996-A06047.

[53] *See generally* A03432-A03468.

[54] A05096-102.

[55] A05096-102.

Expressing a similar sentiment, [redacted].[56] In October 2006, DuPont's Edwards noted that [redacted]."[57] He further noted [redacted]" (*Id.*) DuPont's Collette Daney similarly wrote that [redacted]"[58] Additionally, a Millennium email [redacted][59]

On August 25, 2004, Millennium's Tim Edwards suggested that [redacted]"[60] Thereafter, on September

[56] A01950-84 and A05096-102.

[57] A03472-73.

[58] A03422-25.

[59] A03430-31.

[60] A03476-78.

13, 2004, [redacted].[61] The next day, Cianfichi sent an e-mail to colleagues stating, "[redacted]" (*Id.*) A May 2008 Millennium email also noted that [redacted]"[62]

There are numerous other examples of the co-conspirators acknowledging they were engaged in price signaling, thereby evidencing their agreement to increase price in lockstep.[63] Plus, the co-conspirators' signaling included communications

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[61] A03628.

[62] A05126-128.

[63] *See* A01972 ([redacted]."), A02047 ("[redacted]"), A03426 (DuPont email noting that [redacted]), A03428 (Kronos email citing [redacted]"), A03432-33, A03436, A03437 ([redacted]"), A03452-53, A03457 (Kronos email citing [redacted]."), A03458-61, A03464, A03466, A05103 ([redacted]), A05105-06, A05107 (Kronos email advising to [redacted]), A05122 (email stating "[redacted]"), A05167-242, A05243, A05275-76, A05277-78, A05976-90, and A05995.

through industry publications, trade shows, and other public statements.[64] The co-conspirators also used industry consultants Jim Fisher and Gary Cianfichi as conduits in the price-fixing conspiracy. Specifically, they used these consultants to [redacted].[65]

Indeed, Kronos' Joe Maas [redacted].[66] For example, on May 23, 2002, [redacted].[67] Two weeks later, [redacted],

[64] *See, e.g.*, A000313-15, A01991-93, A03465, and A05900 (noting that [redacted]).

[65] *See, e.g.* A05886-907, A05911-12, A05965-71 ([redacted]), A06652-53, A06677, A06685-799, A03470, A05882-85, A05888-90, A05891, A05892-94, A05895, A05896, A05897, A05898-99 (email [redacted]"), A05910 (email regarding [redacted]), A05913-14, A05915-964, A05972, A05973, A06654-59, A06629-34, A06635, A06751; A03434-35, A03436, A03456, A03467-68, A03471, A03484, A04248-290, A05110-11, and A05380-401 at ¶¶ 85-146 and A05521-598.

[66] A07262, Maas Dep. at 116; A06654 and A03456.

[67] A03456.

2002, [redacted]

[redacted].[68]

On October 26, 2009, and despite CEFIC's strict confidentiality requirements,

[redacted]

Fisher replied, [redacted].[70]

F. DuPont's Conspiracy Succeeded.

Dr. McClave's multiple regression analysis establishes that [redacted]

[redacted].[71] Valspar purchased [redacted] of TiO2 from

[68] A03436.

[69] A05966-67.

[70] A06684; A01911 [redacted]). [redacted]. *See* A05130-31, A05292-326, A05974-75, A06798, A06799, A06801-7233.

[71] A05300-01.

DuPont and the other co-conspirators in the period from February 2003 through December 2013. The conspiracy resulted in [redacted].

VI. STATEMENT OF THE STANDARD OF REVIEW

This Court reviews the district court's summary judgment determination *de novo*, applying the same standard as the district court. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). *See also InterVest Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 158 (3d Cir. 2003). To avoid a grant of summary judgment, the plaintiff must show that a genuine issue of material fact exists as to whether the defendants entered into an anti-competitive agreement. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). In determining whether the plaintiff met this standard, this Court must "view the facts and any reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment." *InterVest*, 340 F.3d at 160.

Additionally, this Court must consider the evidence as a whole—"not tightly compartmentalize" individual pieces of evidence. *Petruzzi's*, 998 F.2d at 1230. Indeed, to raise a genuine issue of material fact, the non-movant "'need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." *Id.* (quoting *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992)).

Despite the complexity of antitrust litigation, "[a] non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case." *Id.* (quoting *Big Apple BMW*, 974 F.2d at 1363). Thus, "a nonmovant plaintiff in a section I case does not have to submit direct evidence, *i.e.*, the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence." *Id.* Furthermore, once the nonmovant presents circumstantial evidence showing an inference of a section I violation, the burden shifts to the movant to prove that drawing an inference of unlawful behavior is unreasonable. *Id.*

Antitrust defendants are "not entitled to summary judgment simply because they demonstrated a plausible rationale for their behavior." *Id.* at 1232. *See also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468 (1992) (holding that moving party cannot secure summary judgment merely by "enunciate[ing] *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market") (emphasis original). "Rather, the focus must remain on the evidence proffered by the plaintiff and whether that evidence 'tends to exclude the possibility that [the defendants] were acting independently'" at the time of the alleged violations. *Petruzzi's*, 998 F.2d at 1232 (quoting *Monsanto*, 465 U.S. at 764). *See also Chocolate*, 801 F.3d at 397 (same).

VII. SUMMARY OF ARGUMENT

The district court's decision fundamentally misconstrues precedent of the United States Supreme Court and this Court regarding the plaintiff's burden of proof at the summary judgment stage in an antitrust price-fixing case involving circumstantial evidence. The district court further erred in ignoring principles of comity in reaching a result contrary to the district court in the Maryland Action where summary judgment was denied based on substantially the same record.

The precedential case law governing antitrust price-fixing cases does not support the conclusion reached below. In *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986), the Supreme Court considered an antitrust claim that did not make "economic sense" because the plaintiffs alleged a conspiracy to charge lower prices in order to increase business. Because cutting prices to increase business is "the very essence of competition," the *Matsushita* Court was concerned that mistaken inferences made from the plaintiffs' circumstantial evidence would "chill" the procompetitive conduct that the antitrust laws seek to protect. *Eastman Kodak*, 504 U.S. at 477.

The present case involves the opposite scenario. As the district court acknowledged, this is a garden variety price-fixing case that makes perfect economic sense. (Order at 9, A00012.) *See also Titanium Dioxide*, 959 F. Supp. 2d at 824 ("[A]n agreement among the five largest producers of titanium dioxide 'to fix prices

at a supracompetitive level . . . makes perfect economic sense."); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 358 (3d Cir. 2004) ("Here, like in *Petruzzi's*, plaintiffs' theory of conspiracy—an agreement among oligopolists to fix prices at a supracompetitive level—makes perfect economic sense."). Moreover, coordinating price increases is facially anti-competitive and exactly the harm that the antitrust laws are intended to prevent. Therefore, in the context of this case, *Matsushita* does not create any presumption in favor of summary judgment for DuPont. *See id.* Plus, liberal inferences from the evidence are appropriate here, as the attendant dangers from drawing inferences recognized in *Matsushita* are not present. *See id*.; *Petruzzi's*, 998 F.2d at 1232.

In prior decisions, this Court properly has recognized the limits of the Supreme Court's decision in *Matsushita* and has reversed decisions granting summary judgment in price-fixing cases with facts analogous to this case. For example, in *Petruzzi's* this Court concluded that two of three defendants acted against their self-interest "not attributable to interdependence," explaining that the defendants' actions did not make economic sense absent an agreement. 998 F.2d at 1245-46. As discussed below, there is similar evidence in this case of actions taken by DuPont and its co-conspirators against their self-interests. (*See infra* VIII.B.4.) Also, like in *Petruzzi's*, there is traditional conspiracy evidence that the co-conspirators [redacted]

[redacted]. (*See infra* VIII.B.3.) Finally, both *Petruzzi's* and this case present expert testimony concluding that "economic data was consistent with a conspiracy." *Id*.

Further, in *Flat Glass*, this Court concluded that the plaintiff's traditional conspiracy evidence was sufficient to defeat summary judgment where documents emphasized that "price increases were not economically justified or supportable, but required competitors to hold the line." 385 F.3d at 369. There is similar evidence here. And this Court relied on evidence that defendants' predictions of their competitors' price behavior were followed by actual price changes. *Id*. Similar conduct occurred here.

Just as this case is similar to *Petruzzi's* and *Flat Glas*s, it is distinguishable from this Court's recent decision in *Chocolate*, 801 F.3d at 383. In *Chocolate*, plaintiffs' evidence of a traditional conspiracy was limited to evidence about a conspiracy in Canada, without evidence tying that conspiracy to conduct in the United States. *Id*. at 403. Here, there is substantial traditional conspiracy evidence, including, but not limited to, evidence of price signaling and [redacted]. (*See infra* VIII.B.3.a.) Absent other traditional conspiracy evidence, the plaintiffs in *Chocolate* attempted to rely on defendants' departure from their pre-conspiracy conduct with respect to parallel price increase announcements. 801 F.3d at 410.

However, this Court concluded that the three parallel price increases were not a sufficiently abrupt or radical departure from the defendants' pre-conspiracy pattern of price increase announcements. *Id.* In contrast, the pattern in this case of 31 parallel price increases over a 10-year conspiracy period stands in stark contrast to just three parallel price increase announcements that occurred between the co-conspirators in the 10 years before the conspiracy. (*See infra* VIII.B.1.) The district court erroneously concluded otherwise.

The district court also committed the error of compartmentalizing its analysis of the plus factors. As explained in *Flat Glass*, "[a] court must look to the evidence as a whole and consider any single piece of evidence in the context of other evidence." 385 F.3d at 369. *See also Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) ("[W]e are not to 'tightly compartmentalize the evidence,' but rather we must evaluate it as a whole to see if it supports an inference of concerted action") (quoting *Petruzzi's*, 998 F.2d at 1230); *In Re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002) ("The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.").

These errors are particularly egregious when considered in light of the decision in the Maryland Action where summary judgment was denied based upon substantially the same record. There, the court explained:

> Having carefully considered the sheer number of parallel price increase announcements, the structure of the titanium dioxide industry, the industry crisis in the decade before the Class Period, the Defendants' alleged acts against their self-interest, and the myriad non-economic evidence implying a conspiracy, this Court finds that the Plaintiffs put forward sufficient evidence tending to exclude the possibility of independent action.

Titanium Dioxide, 959 F. Supp. 2d at 830. (*See also* Order at 28, A00031.)

When, as here, the defendants' activities span multiple federal courts, "only the gravest reasons should lead the court in the opt-out suit to come to a conclusion that departs from that in the class suit." *Premier Elec. Constr. Co. v Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 367-368 (7th Cir. 1987). The district court did not address any "grave errors" in the Maryland decision. Rather, it simply weighed the evidence differently than did the Maryland court, which highlights why this case should have been submitted to the jury. *In re Domestic Drywall Antitrust Litig.*, MDL No. 2437, 2016 WL 684035, at *53 (E.D. Pa. Feb. 18, 2016) (denying summary judgment in part because evidence of conspiracy presented by plaintiffs was "susceptible to multiple reasonable interpretations"). *See also High Fructose*, 295 F.3d at 655 (noting that a court asked to dismiss a price-fixing case on summary judgment must be careful to avoid the trap of weighing conflicting evidence, which

is "the job of the jury.") Ultimately, Valspar satisfied its burden of proof at the summary judgment stage, and the district court erred in concluding otherwise. Thus, its decision should be reversed.

VIII. ARGUMENT

A. The District Court Did Not Follow Established Law in Granting DuPont's Motion for Summary Judgment.

Horizontal price-fixing schemes like the one alleged in both this case and the Maryland Action are *per se* violations of the Sherman Act. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*); *Flat Glass*, 385 F.3d at 362. To prove a horizontal price-fixing scheme, a plaintiff must demonstrate: "(1) the existence of an agreement, combination or conspiracy, (2) among actual competitors, (3) with the purpose or effect of 'raising, depressing, fixing, pegging, or stabilizing the price of a commodity,' (4) in interstate or foreign commerce." *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 223–24 (1940). The only issue on appeal is the first element: whether Valspar has produced sufficient evidence for a reasonable jury to find that the co-conspirators had an actual, manifest agreement to participate in a price-fixing conspiracy.

To prove the existence of an agreement, an antitrust plaintiff should present "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto,* 465 U.S. at 764 (internal

quotation omitted); *see also Flat Glass*, 385 F.3d at 356–57. Notably, Section I plaintiffs "can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence." *Petruzzi's*, 998 F.2d at 1230.

Here, the district court criticized Valspar's circumstantial evidence as too ambiguous to establish a conspiracy. But that is not the question. "The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment." *High Fructose*, 295 F.3d at 654–55. Thus, ambiguous evidence is "not to be disregarded because of [its] ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial." *Id.* at 662. Moreover, the presentation of contrary evidence by the defendant does not change this result at the summary judgment stage. *Monsanto*, 465 U.S. at 768 n.14.

An example of sufficient circumstantial evidence is the co-conspirators' parallel conduct in this case—namely, 31 lockstep price increases. Indeed, "[p]arallel behavior among competitors is especially probative of price fixing because it is the sine qua non of a price fixing conspiracy." *Southway Theatres, Inc. v. Ga. Theatre Co.*, 672 F.2d 485, 501 (5th Cir. 1982). *See also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 121 (3d Cir. 1990) ("The theory of conscious

parallelism is that uniform conduct of pricing by competitors permits a court to infer the existence of a conspiracy between those competitors.").

However, in addition to evidence of parallel price increases, plaintiffs must establish certain "plus factors," which "tend[] to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors." *Flat Glass*, 385 F.3d at 360 (quoting *Baby Food*, 166 F.3d at 122). The most relevant plus factors include: (1) a motive to conspire, which can be evidence that the industry is susceptible to price-fixing; (2) noncompetitive behavior, *i.e.*, evidence that the defendants acted contrary to their economic self-interest; and (3) evidence of a traditional conspiracy, such as a high level of inter-firm communications that would suggest that the defendants consciously agreed not to compete. *Id.* at 360. When viewed in conjunction with parallel acts, plus factors can serve as "circumstantial evidence from which, when supplemented by additional evidence, an illegal agreement can be inferred." *Petruzzi's*, 998 F.2d at 1242 (citation omitted). Such additional evidence includes any "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." *Flat Glass*, 385 F.3d at 361 (internal quotation and citation omitted).

Here, the district court overstated Valspar's burden on summary judgment by misconstruing the Supreme Court's direction in *Matsushita* that "conduct as

consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. Subsequent courts analyzing *Matsushita* have not adopted the position that where a plaintiff has put forward evidence establishing a plausible inference of illegal collusive behavior, summary judgment nevertheless is appropriate if the plaintiff's evidence does not strongly outweigh the defendant's explanation for its conduct. *See, e.g.*, *Petruzzi's*, 998 F.2d at 1231–32; *Chocolate*, 801 F.3d at 397 (quoting *Rossi*, 156 F.3d at 467) . To defeat a motion for summary judgment, a plaintiff need not disprove every rationalization proffered by the defendants for their conduct. *See Monsanto*, 465 U.S. at 764. Instead, a plaintiff need only "present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 575 (quoting *Monsanto*, 465 U.S. at 764). *See also Eastman Kodak*, 504 U.S. at 468-469 ("*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.") Fundamentally, "tends to exclude" does not mean "excludes." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig*., 681 F. Supp. 2d 141, 167 (D. Conn. 2009). *Matsushita* requires only that, construing Valspar's evidence in the light most favorable to it, a reasonable fact-finder could find that DuPont was not engaging in independent, permissible conduct.

Unlike *Matsushita*, in which the defendants' conspiracy theory was deemed implausible, Valspar sets forth a "garden variety" type of conspiracy to artificially raise prices in the TiO2 industry that is "plausible." *See Titanium Dioxide*, 959 F. Supp. 2d at 824; *High Fructose*, 295 F.3d at 656. Accordingly, the task of weighing competing permissible inferences fell within the province of the fact-finder—not the district court. *See Petruzzi's*, 998 F.2d at 1230. At most, the court's role was limited to determining whether the parties drew "reasonable and therefore permissible" inferences from the evidence. *See Flat Glass*, 385 F.3d at 368.

Specifically, when determining whether Valspar's evidence was sufficient to defeat summary judgment, the district court should not have (a) weighed conflicting evidence; (b) attached great significance to the lack of a single piece of evidence unequivocally demonstrating a conspiracy; or (c) "fail[ed] to distinguish between the existence of a conspiracy and its efficacy." *See High Fructose*, 295 F.3d at 655-56. As discussed below, the district court impermissibly did each of these things and failed to acknowledge that Valspar "proffered evidence sufficient to allow a reasonable jury to conclude that the defendants acted in concert." *See Petruzzi's*, 998 F.2d at 1230. Consequently, reversal is warranted.

B. Valspar Presented Strong Circumstantial Evidence that DuPont was Involved in the Price-Fixing Conspiracy.

1. The Co-conspirators' Voluminous Pattern of Parallel Price Increase Announcements Evidence an Agreement to Fix and Stabilize TiO2 Prices.

The evidence of parallel conduct in this case is unprecedented and highly probative of an agreement to fix and stabilize the price of TiO2. During the Conspiracy Period, and following the start of the GSP, the top five producers of TiO2 issued 31 parallel price increase announcements nearly simultaneously, almost always in an identical amount and with identical effective dates.[72] This pattern reflects a radical change from practice prior to 2002. In fact, after DuPont and its co-conspirators [redacted], they announced price increases in concert 31 times (out of 36 total announcements), or more than 86% of the time.[73]

The district court questioned the "simultaneous" characterization of the parallel price announcement because some occurred "days and weeks apart." (Order at 9, A00012.) But to demonstrate that DuPont and its co-conspirators engaged in parallel pricing, Valspar need only show that the price increases were "reasonably

[72] A02051-A03421, A05382-85 at ¶¶ 88-89 and A05709-29.

[73] *Id*.

proximate in time." *Chocolate*, 999 F. Supp. 2d at 787).[74] Valspar was "not required to plead simultaneous price increases—or that the price increases were identical—in order to demonstrate parallel conduct." *See In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 630 (E.D. Pa. 2010) (citing *Baby Food*, 166 F.3d at 132). Here, there are instances where DuPont and its co-conspirators announced price increases mere hours or days apart.[75]

The timing of the announcements paired with the sheer volume of parallel price increases in this case and the abrupt change in the pattern of parallel announcements is unprecedented and constitutes strong circumstantial evidence of a conspiracy. Indeed, courts routinely deny summary judgment on records with far fewer instances of parallel conduct. *See, e.g, In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 55 (2d Cir. 2012) (denying summary judgment with evidence of three parallel price increases over one year); *Flat Glass*, 385 F.3d at 355 n.5 (denying summary judgment with evidence of seven parallel price increases, "by the same

[74] Both the Maryland court and Valspar's expert Dr. Williams defined "simultaneous" from an economic point of view to be effective dates within one month. A05382-84 at ¶¶ 88, n. 131; A05778 at ¶ 69, n. 148.

[75] *See, e.g.,* A02054-65 (list of industry announcements 6/08-5/13), A03441-51 (list of announcements), A05111-21 (same), A05158-66 and A05244-49 (same), A02586 (DuPont 2/19/04), A02996 (Kronos 2/20/04), A03121 (Millennium 2/20/04), A02226-580 (Huntsman, 2/23/04); A02084 (DuPont 9/29/05), A02195 (Huntsman 9/29/05), A02605 (Kronos 9/29/05), A03167 (Millennium 9/30/05); A02075 (DuPont 12/7/09), A02779-81 (Kronos 12/9/09), A03165 (Tronox 12/9/09), A03160-64 (Millennium 12/9/09), A02204 (Huntsman 12/11/09).

amount and within very close time frames," across five years); *EPDM*, 681 F. Supp. 2d at 167 (finding "six lockstep price increases" to be strong circumstantial evidence of a price-fixing agreement).

The Third Circuit's decision in *Chocolate* does not change the impact of the conspirators' parallel announcements. There, the Court considered only three parallel increases during a six-year period, only one of which was as temporally proximate as the price increases here. *Chocolate*, 801 F.3d at 391. Unlike this case, the *Chocolate* plaintiffs also were unable to muster corroborating plus factors, as discussed in detail below.

The public price increase announcements DuPont and its co-conspirators issued here also must be considered in the context of industry practice. The co-conspirators need not have publicly announced increases at all, given their contractual requirements to provide individual customers written notification of price increases. And they never publicly announced price decreases.

The public announcements spurred the other conspirators to respond—to carry forward the agreement to raise prices. The notion that each price increase was the result of independent and careful evaluation by each conspirator of its "pricing structure" and that any parallel pricing simply constituted "follow the leader" pricing is unsupported by the evidence. [redacted]

[redacted]. (*See supra* V.D.) For example, Kronos' Maas testified that [redacted].[76]

Further, the "follow the leader" theory contemplates the possibility that a price leader would be forced to rescind its increase because competitors decided not to follow it. *Flat Glass*, 385 F.3d at 358 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 1429, at 207–08 (4th ed. 2011)). Yet, 31 times during the Conspiracy Period the leader never backed down. [redacted].[77]

It is inconceivable that all the co-conspirators, [redacted][78] Equally inconceivable is the notion that the manufacturers were able to

[76] A07634, A07630, [redacted]).

[77] And typically the price increase announcements were matched to the penny. A05717 and A05784 at ¶ 76 and A05877-81.

[78] *See, e.g.*, A07659-60, A07679-82, A07848-49, A07757 ([redacted]).

repeatedly compile such complex pricing analyses in the short time between the leader's announcement and those of the alleged followers.[79]

But to defeat summary judgment, Valspar need not disprove all nonconspiratorial explanations for the co-conspirators' conduct. *See Publ'n Paper*, 690 F.3d at 63. Rather, "the determination whether these price increases are the result of independent or collusive behavior is a decision for the jury." *Titanium Dioxide*, 959 F. Supp. 2d at 826. Viewing these price increases in conjunction with the evidence of other plus factors makes clear that the district court committed error when it did not submit the case to a jury.

2. The District Court Erred in Disregarding and Mischaracterizing Valspar's Expert Economic Evidence.

The district court erred in disregarding Valspar's proffered expert testimony from Drs. McClave and Williams concerning the plus factors indicating the existence and impact of a conspiracy. As this Court made clear in reversing summary judgement in *Petruzzi's*, the district court cannot "impermissibly weigh[]" expert testimony by "commenting on its weakness." 998 F.2d at 1240. *See also J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1538 (3d Cir. 1990) (holding

[79] *See, e.g.*, A02054-65 (list of industry announcements 6/08-5/13), A03441-51 (list of announcements), A05111-21 (same), A05158-66 and A05244-49 (same), *see also* A02586, A02996, A03121, A02226-580 (February 2004 increases), A02084, A02195, A02605, A03167-74 (September 2005 increases), A02075, A02779-81, A03165, A03160-64, and A02204 (December 2009 increases).

that district court improperly dismissed opinion of expert because "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Similarly, the district court must consider expert testimony "in conjunction with other evidence." *Petruzzi's*, 998 F.2d at 1240. Here, the district court erred by both weighing Valspar's expert evidence and considering it in isolation.

Dr. McClave is a well-respected econometrician whose expert analysis and testimony has been admitted in numerous federal price fixing cases.[80] In this case, he conducted multiple regression analysis of all TiO2 sales in the United States over 14 years and found that [redacted].[81] Dr. McClave factored into his analysis changes in costs and demand. For purposes of summary judgment, DuPont did not challenge his credentials or his conclusions. The district court noted Dr. McClave's conclusion of [redacted], but failed to consider it in "conjunction with other evidence" of plus factors and the radical shift to 31 parallel price increase announcements. Rather, the district court observed that

[80] A05314-26.

[81] A05300-01

Dr. McClave's unchallenged conclusions, standing alone, did not mandate a price conspiracy. This was erroneous. *See Petruzzi's*, 998 F.2d at 1240.

Not only did the district court fail to evaluate Dr. McClave's conclusion in connection with the evidence of parallel pricing and plus factors and Dr. Williams' opinion on plus factors, the district court also misinterpreted and "impermissibly weighed" Dr. Williams' analysis of the plus factors.

Dr. Williams has a Ph.D. in Economics from the University of Chicago, previously served as an economist in the Antitrust Division of the U.S. Department of Justice and has testified as an expert in numerous courts and other forums.[82] Dr. Williams analyzed the relevant TiO2 market and addressed whether the co-conspirators' actions were "consistent with coordinated behavior and … inconsistent with competition."[83] In concluding that market conditions were conducive to collusion, he examined eight widely recognized plus factors, including production, capacity, demand, sales, the number of buyers making repetitive purchases, and the [redacted].[84]

[82] A05332-33, ¶¶ 1,2, A05423-30

[83] A05357, ¶ 46.

[84] A05358, ¶¶ 47–86, A05761-76, ¶¶ 35–65.

After analysis of the market conditions, Dr. Williams evaluated at length ten plus factors related to the co-conspirators' conduct.[85] He analyzed the frequency, unanimity, and pricing of the price increase announcements from 1994 to 2013 and concluded the pattern constituted a plus factor indicative of collusion.[86] Dr. Williams found there was evidence of [redacted] consistent with collusion.[87] He studied co-conspirator communications and intercompany transactions and found below market sales and information sharing consistent with collusion.[88] He compared actual prices achieved by the co-conspirators, comparing them to but-for prices and determined the co-conspirators' information exchanges and price increase announcements affected their prices.[89] Dr. Williams also studied the stability of sales market shares and found [redacted].[90] He concluded there was economic evidence of ability to enforce their price-fixing agreement.[91] Further, Dr. Williams carried out an empirical analysis using peer-reviewed methodology, which confirmed that DuPont and its co-conspirators'

[85] A05380-416, ¶¶ 85–145; A05777-843, ¶¶ 66–203.

[86] A05381-85, ¶¶ 87–89; A05777-80, ¶¶ 68–69.

[87] A05386-89, ¶¶ 95-99; A05805-08, ¶¶ 121-130.

[88] A05389-407, ¶¶ 101-120; A05808-24, ¶¶ 132-167.

[89] A05409-10, ¶¶ 125-127; A05825-27, ¶¶ 170-173.

[90] A05410-11, ¶¶ 128-130; A05827-34, ¶¶ 174-184.

[91] A05411-13, ¶¶ 131-137; A05834-39, ¶¶ 185-195.

conduct was consistent with an agreement to fix prices.[92] Based on his own work and Dr. McClave's regression analysis, Dr. Williams concluded that [redacted].[93]

Viewing all of the 18 plus factors in their totality, Dr. Williams concluded that the evidence reasonably excludes the inference that the co-conspirators acted independently and that the co-conspirators' conduct was consistent with collusion and inconsistent with competition.[94]

Dr. Williams' expert qualifications were not challenged, and no portion of his opinions were excluded; thus, the district court should have accepted his economic conclusions for purposes of summary judgment. But rather than considering Dr. Williams' opinions along with other evidence in the case, the district court isolated and weighed Dr. Williams' findings regarding [redacted] and intercompany sales separately from other plus factors. (Order at 11-14, A00014-17.)

[92] A05801-04, ¶¶ 115-120, A05874-76.

[93] A05386, ¶ 94.

[94] A05333-34, A05357, A05418 at ¶¶ 5, 46, 149; A05760-61, A05843-46, ¶¶ 34, 204-207.

Market share stability where firms have excess capacity and prices are rising is a recognized plus factor.[95] Dr. Williams performed multiple empirical analyses and found [redacted].[96] However, the district court impermissibly weighed and questioned Dr. Williams' opinion [redacted] and concluded that it "does not support an inference of conspiracy." (Order at 11, A00014.) Even if [redacted], standing alone, is not solely determinative, it is a well-recognized factor that "supports" a finding of conspiracy alongside other evidence.

For intercompany sales, the district court erred by misconstruing Dr. Williams' opinion. The court found that below-market intercompany sales "fail - under the theory advanced by Dr. Williams to be probative of conspiracy" *Id.* at 14. But this holding ignores the fact that Dr. Williams' opinion was based on *two separate theories* by which intercompany sales constitute a factor indicating conspiracy. The first is "true up" or sales at even market prices when there is excess capacity. The other theory is the "sale of anything at nonmarket prices," which results in a transfer for which there is no reasonable noncollusive explanation." Dr. Williams pointed out there is no "volume" component to the second theory.

[95] A05827-28, ¶ 174, citing various authorities including William E. Kovacic, et al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393, 435 (2011).

[96] A05827-34, ¶174-184 and Figure 8.

Conflating the two distinct theories, the district court found insufficient volume of below-market sales to satisfy the "true up" theory. *Id.* As to Dr. Williams' demonstration of below-market sales,[97] the district court discounted the evidence because [redacted]. *Id*. The court also repeated Dr. Williams' report that [redacted][98], but ignored Dr. Williams' conclusion that the sales in other periods demonstrate numerous examples of below-market intercompany sales for which no extenuating circumstances existed. *Id*.[99]

In similar fashion, the court below misinterpreted Dr. Williams' conclusion that [redacted]

[97] A05390, A05392-93, ¶ 102 and Figures 9, 10.

[98] A05390, ¶ 102.

[99] A05390-91, ¶ 103, n. 157.

[100] A05819-20 at ¶ 154.

The court—quoting Williams' deposition testimony regarding [redacted]—found that Williams' conclusions about information sharing and monitoring did not support a finding of conspiracy. (Order at 17, A00020.) But this is exactly the type of impermissible weighing of expert opinion at summary judgment that this Court rejected in *Petruzzi's*, 998 F.2d at 1240. *See also Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 931 (6th Cir. 2005) (concluding that "if the opposing party's expert provides a reliable and reasonable opinion with factual support, summary judgment is inappropriate.").

The district court's impermissible weighing of expert opinions was compounded by its compartmentalized analysis of the experts' opinions and evidence of each plus factor. This Court has cautioned that all circumstantial evidence and plus factors must be weighed together in their totality. *Petruzzi's*, 998 F.2d at 1240. Although parallel pricing, information sharing, or intercompany sales at below-market prices may not independently establish a conspiracy, evidence of multiple plus factors taken together provides a sufficient basis for doing so. *Id.*

3. The District Court Disregarded Or Summarily Dismissed Evidence from Which a Jury Could Reasonably Infer DuPont's Participation in the Conspiracy.

A third category of evidence that tends to exclude the possibility that the co-conspirators acted independently when raising prices is evidence implying there was an actual agreement not to compete. *Flat Glass* at 360-61. "That evidence may

involve 'customary indications of traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id*. (quoting Areeda, *supra*, § 434b, at 243).

"[C]ollusive communications can be based upon circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways." *In re Delta/AirTran Baggage Fee Antitrust Litig*., 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010). *See also In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 372 (M.D. Pa. 2008) (concluding that plaintiffs plausibly suggested conspiracy based, in part, on "temporal proximity of the price increase to the TLMI conference," where defendants allegedly held "discussions about the need to collaborate on price increases"); *In re Travel Agency Comm'n Antitrust Litig*., 898 F. Supp. 685, 691 (D. Minn. 1995) (drawing inference of conspiracy from evidence of defendants' participation in speeches, meetings, events, official and unofficial corporate utterances, and conferences at which information was exchanged.)

a. The Global Statistics Program [redacted].

Through the GSP, the co-conspirators [redacted]

[redacted].[101] The GSP and its [redacted] provide substantial evidence from which a jury could infer that the co-conspirators' participation facilitated the exchange of collusive communications and other information regarding the conspiracy.

As detailed above, [redacted].[103]

[redacted],

[101] *See, e.g.*, A04930-32.

[102] A05081; A07796-97 ([redacted]).

[103] A07906

[104] A04916. [redacted]).

[redacted].[107] This type of data sharing differs from the information sharing in *In Re Citric Acid Litigation*, 191 F.3d 1090, 1099 (9th Cir. 1999), which the district court deemed analogous. [redacted] through the GSP greatly facilitated the co-conspirators scheme of coordinated price increases.

The co-conspirators also [redacted]

[105] A07602-04, Maas Dep. 37:18-39:12.

[106] A04927-29.

[107] *See Titanium Dioxide*, 959 F. Supp. at 828; *see also* A04930-32, A05250, and A04925-26.

[108] A05029-76 (emphasis added); *see also* A05279-81.

[109] A05000 ([redacted]); *see also Titanium Dioxide*, 959 F. Supp. 2d at 806.

[redacted][110]

As anticipated, the GSP [redacted][113]

[redacted].[114] However, the [redacted]

[110] A05019 ("[redacted]."); *see also* A01985-90, A04933-48.

[111] A04927-29.

[112] A02146-47.

[113] *See, e.g.*, A02146-47, A01994-2046, A03480-82 [redacted]), A03526-37, A04920-24, A04925-26, A04949-68, A04979-88, A04989-94, A05091-93, and A05094-95 (DuPont [redacted]").

[114] A07489-90 ([redacted]).

[redacted]. *See Flat Glass*, 385 F.3d at 364–67 (considering inter-firm communications leading up to three price increase announcements); *Publ'n Paper*, 690 F.3d at 57–59 (analyzing three parallel price increases following private meetings and phone calls). In fact, from 2002 to 2010, the vast majority of the price increase announcements occurred within 30 days of a General Committee meeting of the TDMA.[115] In particular, in 2011, all of the increase announcements occurred within 30 days of a TDMA meeting.[116] Thus, it is permissible to infer that the co-conspirators used the TDMA meetings to communicate their pricing plans, coordinate price increases, and confirm that each competitor would follow the leader on price increases.[117] *See Havens v. Mobex Network Servs., LLC*, 820 F.3d 80, 92 (3d Cir. 2016) (noting that "the sharing of confidential information *may* be evidence of a conspiracy") (emphasis original). The district court erred by ignoring this circumstantial evidence of a conspiracy and granting summary judgment. *See id.* (holding that trial court "properly denied summary judgment and allowed the claims to proceed to [bench] trial," where "the

[115] *Compare generally* A06107-676 and A02051-3704, and *Titanium Dioxide*, 959 F. Supp. 2d at 830 (finding that plaintiffs show that 88 percent of the announcements came within 30 days of TDMA General Committee meeting).

[116] *Compare* A02062-63 *with* A05996-6047.

[117] *See Titanium Dioxide.*, 959 F. Supp. 2d at 830.

court was then tasked with evaluating the credibility of the witnesses and weighing the evidence that plaintiffs actually put forth.").

b. The Co-conspirators Knowingly Used Price Increase Announcements and Other Means of Communication to Signal Price Increases and Dictate Behavior.

There is substantial evidence of the co-conspirators' use of price increase announcements and other public statements to signal price, and of the co-conspirators' understanding that they were engaged in price signaling. Price increase announcements can serve as "price beacons to competitors for the purpose of gauging their willingness to raise prices." *In re Currency Conversion Fee Antitrust Litig.*, 773 F. Supp. 2d 351, 371 (S.D.N.Y. 2011) (citing *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 446 (9th Cir. 1990)) (noting that announcements of price "information made the market more receptive to price coordination than it otherwise would have been."). *See also Titanium Dioxide*, 959 F. Supp. 2d at 828 ("Frequent price increase announcements could have served as 'signals,' making further exchange of actual price information superfluous."). Thus, the 31 instances of parallel price increase announcements are reflective of the co-conspirators' efforts to signal pricing to each other. The record also includes [redacted]

[redacted]

[118] *See* A05647-57.

[redacted][119] Indeed, DuPont [redacted][120] Consequently, DuPont [redacted][121] Similarly, DuPont [redacted][122] And if competitors failed to follow the lead, [redacted]

There are numerous other examples of the [redacted]. (*See supra* V.B-E and A05566-85.) Ultimately, their goal [redacted].[123] Taken together, the co-conspirators' unprecedented pattern of parallel price increases and additional evidence of price signaling powerfully show their conscious commitment to a common scheme to raise the price of TiO2 during an 11-year period. *See Monsanto*, 465 U.S. at 764.

[119] A05096-102.

[120] A01950-84.

[121] A03422-25.

[122] A01950-84.

[123] A03628.

c. DuPont and its Co-conspirators Knew their Conduct May Appear Collusive in the TiO2 Industry.

The record includes ample evidence revealing [redacted], which the Maryland Court deemed evidence of a traditional conspiracy. *See Titanium Dioxide*, 959 F. Supp. 2d at 829-830. For example, on January 7, 2002, DuPont's Dave Young [redacted]" (*Id.*) Millennium's Cianfichi [redacted]"[125] Similarly, on May 22, 2008, Ian Edwards [redacted]"[126]

[124] A05976-90.

[125] A05991.

[126] A05289-91.

[redacted]. On June 25, 2008, Millennium's Clover [redacted].[127] [redacted]"[129]

d. Other Evidence of Traditional Conspiracy Exists.

There is other evidence in the record of a traditional conspiracy. In addition to those described above, the record reflects evidence that DuPont and its co-conspirators [redacted] For example, [redacted].[131] A 2007 Millennium email

[127] A05261-71 [redacted].").

[128] A02054-65.

[129] A03462-63.

[130] A05087-90; *see also* A03479, A04072, and A05087.

[131] A03441-51.

[redacted].[133]

There also are communications involving industry consultants Jim Fisher and Gary Cianfichi that demonstrate these consultants served as conduits in the price-fixing conspiracy. Specifically, [redacted].[134] Of course, use of a third party to facilitate a price-fixing conspiracy is not alien to antitrust law. *Domestic Drywall*, 300 F.R.D. at 243 (citing *Titanium Dioxide*, 959 F. Supp. 2d at 806) (denying summary judgment where communications with industry consultant suggested that he acted as a conduit for information sharing for a price-fixing scheme).

The district court below improperly construed evidence regarding [redacted] in a light most favorable to DuPont. For example, the court dismissed the relevance of a Millennium email [redacted]

[132] A05272.

[133] A01948, A03464, A03526-37, A03955-3963, and A05091-93.

[134] *See, e.g.*, A03436, A03456, A03467-68, A03471, A03484, A04248-90, A05109-10, A05886-87, A05911-12, A05965-71, A06652-53, A06677, A06685-799, A03470, A05882, A05888-90, A05891, A05892-94, A05895, A05896, A05897, A05898-99, A05910, A05913-14, A05915-64, A05972, A05973, A06654-60, A06678-83, A06684, A06800, A03434-35.

[redacted]." (See Order at 23, n.9, A00026 (citing A05087).) The email further noted: [redacted] (Id.) Despite language referring directly to the industry and to a meeting of Kronos, Huntsman and Millenium discussing DuPont's admission to GSP, the court concluded that "our collective needs" referred only to Millennium. (Order at 23, n.9, A00026.) However, a reasonable jury could infer (as the Maryland court did in its decision) that "our collective needs" referred to the industry, and not simply the employees included in the email. As it did with other evidence offered by Valspar, the court improperly interpreted the email in the light most favorable to DuPont.

4. DuPont and the Co-conspirators Acted in a Manner Contrary to their Independent Economic Interests.

Throughout the Conspiracy Period, DuPont and its co-conspirators repeatedly acted against their own self-interests to support their price increase initiatives.[135] "Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market." *Flat Glass*, 385 F.3d at 360. "Put differently, in analyzing this factor a court looks to 'evidence that the market behaved in a noncompetitive manner.'" *Id.* (quoting *High Fructose*, 295 F.3d at 655). While DuPont asserts that

[135] *See* A05380-415, ¶¶85-144 and A05549-98; A05777-843, ¶¶ 66-203.

[redacted], the evidence demonstrates that [redacted].[136]

Moreover, throughout the Conspiracy Period, DuPont and its co-conspirators repeatedly [redacted]

Additionally, and as Judge Bennett stated in the Maryland Action,

> [A]bsent increases in marginal cost or demand, raising prices generally does not approximate—and cannot be mistaken as—competitive conduct. Indeed, price increases that are not correlated with principles of supply and demand may be especially probative of behavior contrary to self-interest. Additionally, a seller that buys product from a competitor when it has excess capacity acts against its competitive self-interest.

Titanium Dioxide, 959 F. Supp. 2d at 827 (citing *Flat Glass*, 385 F.3d at 360). *See also High Fructose*, 295 F.3d at 659.

In addition to Dr. McClave's opinion of a [redacted], there is ample evidence that price increases were not correlated to supply-and-demand principles. For example, in 2006 a DuPont executive wrote that [redacted]

[136] A03950-54 and A05827-34, ¶¶ 174-184.

[redacted]"[137] In March 2009, [redacted] a DuPont executive commented, [redacted]"[138] In reply, the executive wrote, "[redacted]"[139]

There is also evidence that [redacted].[141]

[redacted]

[137] A04927-29.

[138] A05136-37.

[139] *Id.*; *see also* A03452 (stating [redacted]), A05282 (stating [redacted]"), and A05993-94.

[140] A05392-401 at Figures 9-17 and ¶ 105.

[141] A05390, A05392, ¶ 102 and Figure 9; A03526-3949, A05138-57. *See also* discussion of [redacted].

transfer between competitors for which there is no reasonable non-collusive explanation.[142] Such below-market sales between competitors are indicative of collusion regardless whether the volume of such sales results in any "true up." [redacted]. The court in *Titanium Dioxide* rejected the conspirators' arguments to the contrary and specifically identified such transactions as evidence against a firm's self-interest but for the existence of an agreement: "Instead of competing for Millennium's customers, DuPont appears to have provided help to Millennium, selling titanium dioxide at a rate lower than that on the market." 959 F. Supp. 2d at 814.

C. The District Court Misapplied the *Chocolate* Opinion.

The district court conceded that "there is substantially the same record in this case as in the Maryland Action." (Order at 28, A00031.) Two federal district courts have reviewed the "substantially the same record" and come to different conclusions. The Maryland court concluded that there is sufficient circumstantial evidence of an agreement to artificially raise prices through parallel price increases to submit the conspiracy issue to the jury. The court below erroneously took the role of the jury and conducted its own evaluation of documentary and testamentary evidence. In its overbroad extension of *Chocolate*, the district court, in essence, held

[142] *See supra* n.33.

that no Sherman Act claim can be based on circumstantial evidence. That has never been the law. The United States Supreme Court has held that antitrust conspiracy may be proven by direct or circumstantial evidence. *Matsushita*, 475 U.S. at 575.

The Third Circuit's decision in *Chocolate* does not limit or overrule *Flat Glass* or provide a factually analogous precedent to the present case. There, the court considered only three parallel increases during a six-year period, only one of which was as temporally proximate as the price increases here. *Chocolate*, 801 F.3d at 391. Unlike this case, the *Chocolate* plaintiffs also were unable to muster corroborating plus factors, discussed in detail above. As recognized by the Maryland court, the record in these TiO2 conspiracy cases of the radical shift in industry behavior to 31 parallel price increases, and, in addition, the numerous plus factors supporting the existence of a conspiracy, is similar to the facts in *Flat Glass* and *High Fructose*.

As the Court in *Chocolate* recognized, "defendants are not entitled to summary judgment merely by showing that there is a plausible explanation for their conduct." 801 F.3d at 397. The court in this case incorrectly ended its analysis once it deciphered a "plausible explanation" for DuPont and its co-conspirators' conduct. Thus, it erroneously let that possible "explanation" override the "evidence proffered by the plaintiff" that the Maryland court found "tends to exclude the possibility that the defendants were acting independently." *Chocolate*, 801 F.3d at 397. As such, the district court's decision is contrary to precedents established by the United States

Supreme Court and the United States Court of Appeals for the Third Circuit in *Matsushita, Flat Glass,* and *Chocolate.*

The court below allowed itself to commit these errors by compartmentalizing the evidence and never looking at it as a whole. As explained by this Court in *Rossi*, in evaluating evidence in the context of summary judgment motions in these cases, courts "are not to 'tightly compartmentalize the evidence';" rather a court "must evaluate it as a whole to see if it supports an inference of concerted action." 156 F.3d at 466 (quoting *Petruzzi* 998 F.2d at 1230). *See also Flat Glass,* 385 F.3d at 369 ("[a] court must look at the evidence as a whole and consider any single piece of evidence in the context of other evidence."). The court below did not do this. Instead it reviewed and dismissed each item of evidence individually, concluding that on its own it would not support any inference of concerted action. This was error. Viewed as a whole, as the Maryland court concluded, the record in this case clearly supports the inference that DuPont and its co-conspirators were engaged in a price-fixing conspiracy in violation of Section I of the Sherman Antitrust Act.

Finally, principles of comity and the doctrine of *stare decisis* should have given the Delaware court greater pause before reaching a decision in conflict with the Maryland Action. In class action cases, "*stare decisis* should be particularly potent." *Premier Elec.*, 814 F.2d at 367. Indeed, courts presiding over class actions understand that each of their rulings creates "a formidable precedent which, under

the principles of *stare decisis*, will likely be accepted as persuasive by any other court that is called upon to consider the same issues." *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 98 F.R.D. 254, 272 (D. Del. 1983). Therefore, "only the gravest reasons should lead to court in the opt-out suit to come to a conclusion that departs from that in the class suit." *Premier Elec.*, 814 F.2d at 367-368. (indicating that later court may go "to the point of suppressing doubts in order to prevent the creation of a conflict . . . when the two courts are dealing with the same set of facts").

Here, the district court did not give any deference to the Maryland Action—let alone treat it as a "formidable precedent." The district court did not identify any grave errors in the Maryland decision either. Instead, it merely interpreted the same evidence differently and reached a contrary decision. This highlights the district court's error of deciding fact issues instead of submitting them to a jury.

IX. CONCLUSION

For the reasons set forth above, the decision of the district court granting summary judgment in favor of DuPont and dismissing Valspar's claims should be reversed.

Respectfully Submitted,

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CERTIFICATION OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to Third Circuit Local Appellate Rule 46.1(e) that the attorney whose name appears on the foregoing brief, James M. Lockhart, is a member of the bar of this Court.

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I hereby certify that a virus check was performed on the E-Brief using Kaspersky Security for Virtualization 3.0 Light Agent and that no viruses were found.

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