IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-1345

THE VALSPAR CORPORATION AND VALSPAR SOURCING, INC.,

***Appellants*,**

v.

E. I. DU PONT DE NEMOURS AND COMPANY
***Appellee*.**

Appeal from Judgment of the U.S. District Court for the District of Delaware, No. 1:14-cv-00527-RGA (Hon. Richard G. Andrews)

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INTRODUCTION

Valspar posits its claim of price-fixing in a market in which it unquestionably had [redacted].

The undisputed facts demonstrate that DuPont competed with other TiO2 Suppliers on price, quality, and other terms of value for Valspar's and other customers' business. It is not surprising then, that—despite an enormous discovery record, amassed over several years—Valspar can provide no evidence showing that DuPont acted pursuant to an illicit agreement among competitors, as opposed to its unilateral self-interest, in the interdependent TiO2 market. And it was on that basis that the district court—consistent with decades of precedent from the Supreme Court and this Court—entered summary judgment for DuPont.

To be sure, much of Valspar's evidence could be consistent with a conspiracy. But the law demands more, for good reason. Because actions undertaken independently by firms in concentrated markets can mimic actions taken as part of a conspiracy, the law requires evidence that tends to exclude the possibility of unilateral, if interdependent, conduct. Such a rule is necessary to protect legitimate, lawful conduct from the inevitable chilling effects that would result without it. Thus, to get to a jury, this Court has insisted that plaintiff provide some evidence tending to exclude the possibility that the actions at issue were the

product of independent decision-making. Valspar failed to provide any such evidence, which is why its claim failed at the summary judgment stage.

Recognizing the dispositive effect of the well-established law, which requires evidence that protects against mistaken inferences of collusion from lawful interdependent conduct, Valspar and its amicus argue to change it. They urge that evidence of oligopolists acting in parallel—in ways that could theoretically be consistent with collusion, but are also fully consistent with interdependence and independent decision-making—should be allowed to go to the jury. But their protests are entirely misplaced. The question here is whether the district court properly applied the principles established by this Court and the Supreme Court, and the irrefutable answer is yes. Summary judgment should, therefore, be affirmed.

STATEMENT OF ISSUES

1. Whether the district court correctly applied the proper legal standard in granting summary judgment.

2. Whether the district court correctly held that Valspar's evidence was as consistent with independent action as with conspiracy, and that Valspar failed to provide evidence tending to exclude the possibility that DuPont acted independently.

3. Whether the district court was entitled to reach a different conclusion than that reached by the district court for the District of Maryland.

STATEMENT OF THE CASE

A. The Titanium Dioxide Industry Is an Oligopoly.

Titanium dioxide ("TiO2") is a white pigment known for its opacity, refractive, and UV protectant properties that is used in a variety of products, including paint and other coatings, plastics, rubber, and paper.[1] It is sold in powder and slurry forms and in a wide variety of grades.[2] During the alleged conspiracy period,[3] E. I. du Pont de Nemours and Company ("DuPont") was one of several companies, including Asian and European producers, that sold TiO2 in the United States.[4] The vast majority of TiO2, however, was sold by a handful of companies: DuPont, Huntsman International LLC ("Huntsman"), Kronos Worldwide, Inc. ("Kronos"), Millennium Inorganic Chemicals Inc. ("Millennium," n/k/a "Cristal USA Inc."), and Tronox Inc. (collectively, "Suppliers"). The TiO2 industry thus functioned as an "interdependent oligopoly," in which "a relatively small number of firms [which] are aware of each other [and] monitor each other,"[5] must take into

[1] A09711-18.

[2] *See* A09711-12; A09737-39.

[3] Unless otherwise noted, the events discussed herein occurred in the period 2002–2013.

[4] *See* A09742-43.

[5] *See* A08886-88.

account each other's anticipated reactions when making pricing decisions.[6]

DuPont's Titanium Technologies division ("DTT") manufactured and sold TiO2 to coatings producers, including The Valspar Corporation and Valspar Sourcing, Inc. ("Valspar").[7] Valspar was one of DuPont's largest customers and purchased roughly 40 grades of TiO2.[8] Valspar also purchased TiO2 from DuPont's competitors. The prices and conditions for Valspar's TiO2 purchases were set forth in multi-year supply contracts.

B. Each TiO2 Supplier Unilaterally Issued Price Increase Announcements That Triggered the Start of a Significant Negotiating Process.

Pursuant to the terms of the supply contracts, TiO2 Suppliers typically issued public announcements for a price increase to be effective at a future date, an industry practice going back many years before the alleged conspiracy period. A00024. As Valspar's employees confirmed, [redacted].[9]

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[6] *See* A08741-42 (in deciding whether to announce an increase, [redacted]").

[7] *See* A09737-39,47; A08781.

[8] A08758; A08782-83; A09050 ([redacted]); A09747.

[9] *See*, *e.g.*, A08406-07; A08640; A09562; A07951-52.

Prior to announcing a price increase—and DuPont was frequently the first Supplier to announce—DuPont [redacted].[10] [redacted].[11]

For example, DuPont considered the need to "[redacted].[12] DuPont's [redacted]

[10] *See, e.g.*, A08807-39; A08658-93; A09706-08; A10326-37; A10338-41; A10342-55; A10356; A103537-64; A10365-70; A10371-79; A10380-90; A10391; A10392-99; A10400; A10401-04; A10134-53; A08729-75 (stating that a [redacted]").

[11] A08355-58.

[12] *See* A08729-75; A08807-39; A08658-93; A09706-08; A10326-37; A10338-41; A10342-55; A10356; A10357-64; A10365-70; A10371-79; A10380-90; A10391; A10392-97; A10400; A10401-04; A10134-53.

[redacted]

[redacted]"[13]

On the other hand, given the oligopolistic and interdependent nature of the TiO2 market, Suppliers had an incentive to monitor and follow the public price increase announcements of their competitors. Suppliers generally seized the opportunity to maximize their profits when another competitor issued a price increase announcement by announcing their own because the risk of doing so was minimal. A price increase announcement [redacted]

[redacted]

Valspar, a tough negotiator, [redacted].[14] Valspar's Adam Gilder testified that [redacted].[15] He also testified that [redacted],

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[13] A10383-84.

[14] *See* A08640 ([redacted]); *see generally* A07936-8003; A08050-114; A08266-310; A08365-442; A08465-503; A08548-604; A08605-30; A08840-84; A08931-53; A10079-102; A10103-19; A10120-22; A10123-25; *see also* Statement of the Case ("SOC") Section C.

[15] A08406-07.

consistent with its reputation as a tough negotiator.[16] Another Valspar employee explained that [redacted].[17] Other customers also [redacted].[18] [redacted].[19]

Public price increase announcements served various purposes. They [redacted].[20] They also assured purchasers that the announced price increase applied to all

[16] A08407.

[17] A07951-52.

[18] *See*, *e.g.*, A09760; A09761-76; A09784-95; A09796-97; A09798-811; A09813-826; A09833-47; A09848-65; A09866-73; A09874-76; A09883-85; A09886-906; A09915-18; A09919-34; A09935-41; A09942-43; A09944-62; A09963-68; A09990-93; A1000-01; A10009-16; A10018-19; A10020-21; A10029; A10030-32; A10035-41; A10042-48; A10049-55; A10060; A10069-71; A10072-73; A10077-78.

[19] A09159-61.

[20] *See, e.g.*, A09394 (90 days); A09401 (90 days); A09408 (90 days); A09456 (90 days); A09437 (120 days); A09445 (90 days); A09534 (45 days); A08577-78; A09140.

purchasers and was not an attempt simply to increase the prices for a single purchaser.[21]

Because price announcements were [redacted]. Thus, Suppliers [redacted].

C. TiO2 Suppliers Competed Vigorously for Valspar's Business, and Valspar Consistently Leveraged Its Bargaining Power to Obtain Favorable Contract Terms.

The Suppliers consistently competed for Valspar and other customers' business, [redacted].[22] Valspar exploited that competition. As Valspar's TiO2 purchasing director explained:

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[21] A10406-08; A10436-37; A09138-41; A00024. Valspar's Adam Gildner also testified about [redacted]. A10416-18.

[22] *See, e.g.*, A10079-80; A10213; A09452; A10217; A09473; A10223-26; A10229-30; A10249-50; A10251-52; A10259-81; A10285; A09562; A10289; A10298; A10301; A08204-30; A08729-75; A08776-96; A08709-28; A07907-22; A08807-39; A07936-003; A08031-114; A08266-310 (TiO2 Suppliers competing for Valspar's business); A09758-59; A09762-67; A09781; A09783; A09794-95; A09799-804; A09812; A09819; A09827-34; A09869-73; A09874-76; A09877-82; A09911; A09913-16; A09928-34; A09984; A09990-99; A10008-17; A10002-07;

(continued…)

[redacted].

Valspar often took advantage of [redacted].[24] On at least one occasion, [redacted].[25]

Valspar also leveraged its bargaining power to negotiate other favorable contract terms, including [redacted], and

(continued…)

A10022-28; A10033-34; A10043-44; A10056-60; A10061-68; A10072-76 ([redacted]).

[23] A08067-68; *see also* A09390-92.

[24] *See, e.g.*, A09451-549 (Valspar [redacted]); A10079-102; A10103-19; A10120-22; A10123-25; A10213-27; A09459; A09473; A10231-49; A10251-52; A10253; A09484; A10254-88; A09562; A10289-93; A09390-92; A10294-98; A09560-61; A10299-10302; A10303-08; A10309-11; A10312-25; A08204-30; A08729-75; A08776-96; A08709-28; A07907-22; A08007-39; A07936-8003; A08031-114; A08266-310; A08365-442; A08465-503; A08548-604; A08605-30; A08840-84; A08931-53 ([redacted]).

[25] *See* A09531; A07983-95; A09532; A09533; A09545-49. [redacted].

. For instance, its 2003–2006 contract with DuPont provided it a ;[26] a ;[27] and a .[28]

.[29]

[26] A09395.

[27] *Id.* *See, e.g.*, A09398; A08221-22.

[28] A09396. . *See also* A09402 (2006–2009 agreement, requiring); A09427-35; A09404-16; A09417-26 ( ).

[29] A09076-77; *see* A09551 (internal Millennium memorandum stating that ; A09553 (internal DuPont email noting); A09485 (internal DuPont email noting ; A09514 (internal Millennium Report noting that ; A09527 (internal Millennium email noting

(continued…)

Significant market-wide share shifts demonstrate that [redacted] A00014.[33]

D. Participation in the TDMA and Statistics Program Served a Legitimate Business Purpose.

In January 2002, DuPont joined, as an associate member, the Titanium Dioxide Manufacturers Association ("TDMA")—a trade group for European TiO2

(continued…)

Dupont for reasons of price."); A09560-61 (internal Valspar email [redacted]); A09473; A09476; A09452-53; A09454-55; A09471; A09554; A09556-57; A09478; A09479; A09518; A09522-24; A09558-59; *compare* A09398-403 *with* A09404-16.

[30] A09087-90.

[31] A09087-90.

[32] A09087-90.

[33] A05829-31 ([redacted]).

producers founded by the European chemical industry, the Conseil Européen des Fédérations de l'Industrie Chimique ("CEFIC"). Japan-based Ishihara Sangyo Kaisha, Ltd. ("ISK"), not alleged to be part of any conspiracy, joined at the same time, also as an associate member. CEFIC, which represents a large group of chemical industries and is not alleged to be involved in any collusion, supervised the TDMA meetings for antitrust compliance. [redacted].[34]

DuPont did not attend the quarterly TDMA General Committee Meetings—the supposed forum for the alleged conspiracy—until 2010.[35] When it did attend TDMA meetings, [redacted].[36] Other TiO2 suppliers throughout the world not alleged to be part of any conspiracy also attended these meetings.[37] There is no evidence suggesting that pricing was discussed at these meetings.[38]

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[34] *E.g.*, A09564-68 [redacted]; A09574-77; A09582-85; A08197-98; A09591; A09592-97 ([redacted]); A09598 ([redacted]).

[35] A08024; A08702-03.

[36] A08198; A08259-60; A08651-52; A08124-27; A07927-28; A08356-57.

[37] There were six TDMA members, in addition to the Suppliers and Tronox, throughout the relevant time period. A09591-98; A09564-68.

[38] A05996-6047; A06107-676.

In 2002, TDMA created the Global Statistics Program ("GSP"). [redacted]

[redacted][39].

[redacted][40].

[redacted][41].

[redacted]

[redacted][42]

[redacted]

[redacted][43].

[39] A09614-16; A08144-45.

[40] A09599-600; A09603; A09608.

[41] A10427-28.

[42] A08140-53; *see also* A09598; A08459; A08241-43; A08541-42; A08802-03; A08510-13; A08528; A08018; A08320-26.

[43] A08320-21.

E. TiO2 Suppliers Occasionally Relied on Consultants to Gain an Edge on Competitors in the Marketplace.

A few, but not all, of the Suppliers occasionally [redacted].[44] [redacted].[45] [redacted].[46] [redacted].[47] [redacted]. There is no evidence that Suppliers used industry consultants to transmit pricing plans or otherwise facilitate a conspiracy.

F. Intercompany Sales Served Legitimate Purposes.

Over the course of the alleged conspiracy period, the Suppliers engaged in a small number of intercompany sales, all for legitimate purposes. [redacted]

[44] A08174-80.

[45] A08019-20.

[46] A08316-19.

[47] A09622-74.

[redacted][48]

[redacted][49]

[redacted][50]

[redacted][51]

[redacted][52]

[48] A10424-25.

[49] A05390-91; A09177-86, A09228 (showing [redacted]); *see* A05390-91.

[50] A05395-400 (showing [redacted]).

[51] A09676; A09693; A09731; A09694; A09696-67; A09698; A09699-705; A09709-10; A09719-22; A09725; A09726; A09728; A09729; A09733.

[52] *See, e.g.*, A09694; A09696-67; A09698; A09699-705; A09709-10; A09719-22; A09725; A09726; A09728; A09729; A09733.

G. Procedural History.

The genesis of this case is a class action filed against the Suppliers in the District of Maryland in 2010, 1:10-cv-00318-RDB (D. Md.).[53] Valspar opted out of that class action and, on November 22, 2013, filed a complaint in the District of Minnesota, alleging that the Suppliers violated the Sherman Act by fixing TiO2 prices from 2002 to 2013. Its claims against DuPont were later severed and transferred to the District of Delaware, where the case was assigned to the Honorable Richard G. Andrews. *The Valspar Corporation, et al. v. E. I. du Pont de Nemours & Co.*, No. 1:14-cv-00527-RGA. Judge Andrews ultimately granted DuPont's motion for summary judgment. *See* A00031-32.

Having carefully considered this Court's precedents, and a ruling denying summary judgment on similar evidence in the Maryland case, the district court held that DuPont was entitled to summary judgment here because Valspar could not point to any evidence tending to exclude the possibility that DuPont acted independently. The court emphasized that the TiO2 industry is an oligopoly and the behavior of the Suppliers was fully consistent with the phenomenon of interdependence in such a market, and DuPont acting independently in that market. The district court also found that some of the evidence cited by Valspar directly undermines the notion of agreement. Following this Court's mandates, it

[53] Summary judgment was denied in the Maryland action, *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799 (D. Md. 2013), after DuPont settled.

ultimately found that "summary judgment cannot be avoided simply by having amassed a significant amount of ambiguous evidence." A00031 (quoting *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 396–97 n.9 (3d Cir. 2015) ("[A] plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment.")).

SUMMARY OF ARGUMENT

The district court applied the appropriate standard, as repeatedly articulated by the Supreme Court and this Court, and properly found that Valspar must proffer evidence tending to exclude the possibility of independent action in the context of an oligopolistic market like the TiO2 market. After examining all the evidence presented, individually and in concert, the district court correctly concluded that Valspar failed to meet its burden because its circumstantial evidence was "ambiguous," meaning that it was at least equally consistent with the rational independent conduct of interdependent firms in a concentrated market like this, and thus insufficient to survive summary judgment.

On appeal, Valspar angles for a lower standard in which a conspiracy could be inferred based only on normal business conduct consistent with independent, albeit interdependent, conduct. Valspar emphasizes the Suppliers' parallel conduct and attempts to identify "plus factors" to support an inference of collusion. But, as the district court rightly held, all of Valspar's evidence was fully consistent with the normal workings of an oligopolistic market. Valspar's critique of the district

court for failing to liberally construe the evidence in its favor directly contradicts this Court's directives to exercise caution in inferring conspiracy from ambiguous evidence in cases alleging price-fixing among interdependent oligopolists.

The district court here was not required to reach the same conclusion as the Maryland district court. District courts are not bound by the decisions of other district court judges in other circuits under any doctrine. The court here independently analyzed the evidence proffered, including evidence of Valspar's ability to capitalize on market competitive dynamics, applied the established precedent of this Court, and reached a different conclusion than the Maryland district court. That was entirely proper.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE APPROPRIATE STANDARD FOR JUDGING VALSPAR'S EVIDENCE.

Despite Valspar's attempt to muddy the waters, the Supreme Court and this Court have set forth clear standards for determining whether an antitrust plaintiff alleging an agreement to fix prices in an oligopoly has presented the type of evidence that raises an issue for a jury. The district court properly applied that standard in a well-reasoned opinion.

The district court correctly began by noting that the "hallmark" of a Section 1 claim is the "existence of an agreement." A00008 (quoting *In re Baby Food*

Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999)). Absent evidence of "some form of concerted action," a Section 1 claim cannot survive summary judgment. *Id.*

Although "the summary judgment standard in antitrust cases is generally no different from the standard in other cases," *Chocolate*, 801 F.3d at 396, an "important distinction exists." A00009 (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004)). "[A]ntitrust law limits the range of permissible inferences [that may be drawn] from ambiguous evidence." A00009. Thus, "a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of conspiracy sufficient to survive summary judgment." A00009 (quoting *Chocolate*, 801 F.3d at 396–97).

"[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Therefore, to survive summary judgment, a plaintiff must present evidence "'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

As this Court has recognized, the "purpose of this standard is to avoid mistaken inferences that could impose liability for lawful conduct and, consequently, chill the very conduct the antitrust laws are designed to protect." *Chocolate*, 801 F.3d at 396. As a result, this Court "ha[s] been cautious in

accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists," due to the theory of "interdependence." *Flat Glass*, 385 F.3d at 358–59. That caution is rooted in the understanding that, in oligopolistic markets, like the TiO2 market, "a single firm's change in output or price 'will have a noticeable impact on the market and on its rivals.'" *Chocolate*, 801 F.3d at 397 (quoting *Flat Glass,* 385 F.3d at 359). As a result, "any rational decision must take into account the anticipated reaction of the other firms." *Flat Glass*, 385 F.3d at 359 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 207 (2d ed. 2000)).

Therefore, in an oligopoly, pricing is often interdependent: the success of one oligopolist's independent pricing strategy may depend on others independently following the same strategy, and those independent decisions may result in supracompetitive prices. The bottom line is that this practice, known as "conscious parallelism," is lawful (and common in an oligopoly) and "is not an agreement." *Chocolate*, 801 F.3d at 397–98 ("[O]ligopolists may maintain supracompetitive prices through rational, interdependent decision-making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices.") (citing *Flat Glass*, 385 F.3d at 359).

As Valspar's amicus points out, the oligopolistic tendency to follow the lead on prices, independently determined, may have economic impacts on market prices similar to an agreement to raise prices. Amicus Br. at 9–10. Similarly, it is quite

easy to confuse independent, but interdependent, profit-maximizing decisions in an oligopoly, which result in parallel pricing, with an agreement among oligopolists to raise prices. Indeed, the two practices can so easily be confused that the amicus complains that independent, but interdependent, decisions might easily have been deemed an actual agreement to fix prices. Amicus Br. at 10 n.3. But of course, that is not the law.

To the contrary, the cases remain clear that only an actual agreement among competitors is a violation of the antitrust law, whereas independent decision-making, even if done with the hope and expectation that others follow, is lawful. *See Chocolate*, 801 F.3d at 397. Conscious parallelism is lawful both (1) because it is "not an agreement," but "can be a necessary fact of life" in oligopolies, and (2) because the antitrust laws can provide no effective remedy for such independent, profit-maximizing conduct. *Chocolate*, 801 F.3d at 397–98 (quoting (in part), *Baby Food*, 166 F.3d at 122).

The Seventh Circuit recently highlighted why it would be impractical to declare unlawful the kind of "tacit collusion" implicit in price-following and common in an oligopoly:

> A seller must decide on a price; and if tacit collusion is forbidden, how does a seller in a market in which conditions . . . favor convergence by the sellers on a joint profit-maximizing price without their actually agreeing to charge that price, decide what price to charge? If the seller charges the profit-maximizing price (and its "competitors" do so as well), and tacit collusion is illegal,

> it is in trouble. But how is it to avoid getting in trouble? Would it have to adopt cost-plus pricing and prove that its price just covered its costs (where cost includes a "reasonable return" to invested capital)? Such a requirement would convert antitrust law into a scheme resembling public utility price regulation, now largely abolished.

In re Text Messaging Antitrust Litig., 782 F.3d 867, 874 (7th Cir. 2015).

Valspar argues, in essence, that all these cases get it wrong. It asserts that *Matsushita*'s requirement that plaintiff produce evidence that "tends to exclude the possibility that the alleged conspirators acted independently" should be limited to circumstances where conspiracy might be viewed "implausible," and not apply to "garden variety" conspiracies to raise prices. Br. at 33. Indeed, Valspar anomalously argues that even if parallel pricing by oligopolists is fully lawful, it nonetheless involves "exactly the harm" the antitrust laws guard against.[54] *Id.* at 25. Therefore, it says, courts should draw "liberal inferences" from interdependent, oligopolistic conduct, such as instances of parallel pricing or alleged "supracompetitive" profits.

[54] Valspar's amicus, AAI, takes a more extreme approach, arguing that interdependence, sometimes referred to as tacit collusion, should itself be illegal. And it sees no harm in allowing juries to potentially impose enormous antitrust liability on companies that have not participated in unlawful agreements because AAI regards the economic effect of conscious parallelism to be the same as price-fixing. But Section 1's requirement of an agreement, and the established applicable precedent, do not allow for such an approach.

Valspar's proposed liberalized approach would allow a jury to infer and declare the existence of a "conspiracy" from conduct that is as consistent with lawful, independent, interdependent action, as it is with an unlawful agreement. It thus risks the imposition of large-scale antitrust liability on firms that carefully steer clear of unlawful agreements, and engage only in independent behavior that they view as profit-maximizing, precisely as the antitrust laws allow. But Valspar is definitively wrong on the law and the logic of the cases.

This Court's cases dealing specifically with oligopolistic pricing reject Valspar's theory that *Matsushita* should be applied grudgingly, or limited to only certain kinds of alleged conspiracies. Indeed, the Court's cases requiring plaintiff to present evidence tending to exclude the possibility of independent action apply directly to "garden variety" price-fixing claims in an oligopoly. They apply precisely because follow-the-leader pricing in this context is a perfectly rational, *independent* course of action and, thus, is beyond the reach of antitrust laws. Not surprisingly, other courts have also expressly rejected Valspar's contention that the requirement that plaintiffs provide evidence tending to exclude the possibility of independent action applies only in certain settings, and not to allegations of horizontal price-fixing. *See, e.g.*, *In re Citric Acid Litig.*, 191 F.3d 1090, 1102–03 (9th Cir. 1999) (rejecting an earlier interpretation of *Matsushita* that would have limited that case only to pro-competitive conduct).

Thus, Valspar cannot avoid the reality that the centerpiece of its case—parallel price announcements—"cannot alone create a reasonable inference of a conspiracy" precisely because price-following may be natural in an oligopoly, and the product of independent decision-making. *Chocolate*, 801 F.3d at 398. It must, therefore, "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* at 396 (quoting *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764)). Without such evidence, it fails "[t]o move the ball across the goal line," and summary judgment is warranted. *Id.* at 398.

This Court has recognized three types of evidence—plus factors—that may, *in certain settings*, tend to exclude the possibility of independent action, and thus allow a jury to infer an agreement: "(1) evidence that the defendant had a motive to enter into a price-fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." *Chocolate*, 801 F.3d at 398 (internal quotations omitted). The plus factors requirement ensures "that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors." *Id.*

Equally important, this Court has recognized that, where the claim is price-fixing among oligopolists, as here, "the first two factors largely restate the phenomenon of interdependence" and therefore are not "sufficient to preclude summary judgment." *Id*. Because the first two factors simply do not tend to exclude the possibility of independent action in such a market, a plaintiff must

produce "traditional conspiracy evidence," which is "non-economic evidence that there was an actual, manifest agreement not to compete." *Flat Glass*, 385 F.3d at 361; *Chocolate*, 801 F.3d at 398, 401; A00007. Valspar failed to do so here, meriting summary judgment.

Contrary to Valspar's contention, the district court did not require Valspar's evidence to "strongly outweigh the defendant's explanation for its conduct" or require Valspar to "disprove every rationalization proffered by the defendants for their conduct." Br. at 32. Instead, the district court appropriately examined whether the evidence, individually and in concert, actually tended to exclude the possibility of independent conduct. It did not.

In so concluding, the district court reached conclusions that largely paralleled this Court's ruling in *Chocolate* where it found that "all of this evidence is as consistent with interdependence as with a conspiracy, and as such, it does not tend to exclude the possibility that [defendants] acted lawfully." *Chocolate*, 801 F.3d at 412. Notably, this Court affirmed the grant of summary judgment in that case despite evidence that (1) the same defendants had conspired to fix the prices of chocolate in Canada, and (2) the defendants had some advance knowledge of their competitors' price increases. *Id.* at 402–09. Valspar cannot even muster that much here.

Valspar's criticism of the district court for finding the "evidence . . . too ambiguous to establish a conspiracy" only highlights Valspar's misperception of

the applicable standard. Br. at 30. Courts are required to ascertain "whether the plaintiffs have presented 'evidence that is sufficiently unambiguous' showing that the defendants conspired." *Baby Food*, 166 F.3d at 124 (quoting *Matsushita*, 475 U.S. at 597). Valspar's apparent contention that the sheer quantity of ambiguous evidence and ingenious argument can be sufficient to make that showing is simply wrong as a matter of law and logic. Two or twenty pieces of evidence that are as consistent with interdependent conduct as with unlawful agreement are no more probative than one piece of evidence. Zero plus zero plus zero still equals zero.

Equally unavailing is Valspar's complaint that the district court's approach would "essentially eliminate[] a plaintiff's ability to establish a price-fixing conspiracy with circumstantial evidence." Br. at 1. Direct evidence of conspiracy is, of course, available in many price-fixing cases, and one might well expect to find such direct evidence in the kind of longstanding conspiracy Valspar hypothesizes here—if there were such a conspiracy. Circumstantial evidence might also be used to prove an agreement; it must, however, tend to exclude the possibility that the conduct being observed is the product of independent, interdependent action. And that was what Valspar failed to produce here. The district court correctly concluded that "Valspar . . . failed to obtain any evidence which, while consistent with conspiracy, is not just as consistent with the phenomenon of interdependence which is characteristic of oligopolies." A00032. In the process, it distinguished Valspar's evidence from circumstantial evidence in

other cases that sufficiently tended to exclude the possibility of independent conduct. *See, e.g.*, A00028. It did not suggest a requirement of direct evidence.

The district court both identified the correct standard and correctly applied that standard to Valspar's summary judgment submission.

II. THE DISTRICT COURT CORRECTLY HELD THAT ALL OF VALSPAR'S PROFFERED EVIDENCE WAS AT LEAST EQUALLY CONSISTENT WITH INDEPENDENT CONDUCT AND THUS INSUFFICIENT TO SUPPORT AN INFERENCE OF CONSPIRACY.

Against the backdrop of undisputed evidence of DuPont and the other manufacturers actively competing for Valspar's and other customers' business[55]—evidence that Valspar wholly ignores—Valspar contends that the apparent similarity in public price announcements is not conscious parallelism at all, but instead indicative of an agreement. It asserts that it has put forth evidence of "plus factors" that should allow it to take its claim to a jury. But, as the district court correctly concluded, nothing Valspar proffers is sufficient to support an inference of conspiracy when judged in the context of the interdependent oligopolistic nature of the TiO2 industry because everything it has tendered is fully consistent with independent decision-making.

[55] SOC Sections B–C.

A. The TiO2 Market Conditions Are Insufficient to Support a Reasonable Inference of Conspiracy.

The first potential "plus factor" identified by this Court is evidence of a "motive to enter into a price-fixing conspiracy," meaning that the industry and market structure is conducive to price-fixing. *Flat Glass*, 385 F.3d at 360; *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002); A00013. Valspar relies on its expert Dr. Williams' opinion that [redacted][56] [redacted] Br. at 40. But even accepting Dr. Williams' conclusions as true, as the district court did, they are insufficient as a matter of law to support an inference of conspiracy.[57] The characteristics identified by Dr. Williams may well be conducive to conspiracy. But they are just as conducive to interdependent conscious parallelism, which is entirely lawful. Thus, the type of market conditions highlighted by Dr. Williams simply cannot "create a reasonable inference of concerted action." A00013. *See Chocolate*, 801 F. 3d at 398; *Baby Food*, 166 F.3d at 122; *Flat Glass*, 385 F.3d at 361; *Text Messaging*, 782 F.3d at 876–79. Indeed, Valspar does not seriously contest the point.

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[56] A05344-57; A05759-64 (setting forth "Market Conditions" as an alleged plus factor).

[57] A08899-08925.

B. No Reasonable Jury Could Infer that DuPont and the TiO2 Suppliers Were Acting Against Their Unilateral Self-Interest.

Nor has Valspar provided "evidence that the defendant acted contrary to its interests." *Flat Glass*, 385 F.3d at 360–61. This factor requires "evidence of conduct that would be irrational assuming that the defendant operated in a competitive market or . . . 'evidence that the market behaved in a noncompetitive manner.'" *Id.* (quoting *Corn Syrup*, 295 F.3d at 655); *Baby Food*, 166 F.3d at 122. But in a market structured as this one, the district court properly concluded that Valspar's evidence did not "go beyond interdependence" and thus could not create an inference of conspiracy. A00017-18. Its conclusion is entirely consistent with the teachings of this Court. *Baby Food*, 166 F.3d at 122 ("The concept of 'action against self-interest' is ambiguous and one of its meanings could merely constitute a restatement of interdependence. . . . Thus, no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons."); *Flat Glass*, 385 F.3d at 359–61.

1. Parallel Price Increase Announcements Are Consistent With Unilateral Action in Oligopolistic Markets.

The central focus of Valspar's evidence is what it characterizes as 31 simultaneous price increases. While there is no dispute that DuPont and the other Suppliers issued parallel price increase announcements—in which one Supplier announced a price change to be effective in the future and others often followed with similar announcements—that parallel pricing cannot support an inference of a

conspiracy. *Chocolate*, 801 F.3d at 397–98 ("[T]his practice of parallel pricing . . . is lawful under the Sherman Act. . . ."); *Text Messaging*, 782 F.3d at 871 ("'[F]ollow the leader' pricing . . . means coordinating . . . pricing *without an actual agreement to do so*.") (emphasis added).

a. Parallel Pricing Among Oligopolists Is Not Indicative of Conspiracy.

Parallel pricing has long been deemed insufficient evidence of conspiracy because it simply reflects the interdependence of firms in an oligopoly. *Chocolate*, 801 F.3d at 397–98 ("conscious parallelism is not an agreement; instead, it can be a necessary fact of life in oligopolies") (internal quotations omitted); *Flat Glass*, 385 F.3d at 360–61; *Baby Food*, 166 F.3d at 121–22.

That such parallel or follow-the-leader price increases are in the unilateral interests of competitors in interdependent, oligopolistic markets is the very essence of the acknowledgment that rational oligopolists will consider rivals' anticipated reactions when making pricing decisions. *Chocolate*, 801 F.3d at 397. Oligopolists may readily, rationally, and most importantly, "independently conclude that the industry as a whole would be better off by raising prices." *Id.* (citing *Flat Glass*, 385 F.3d at 358–60);[58] *see also White v. R.M. Packer Co.*, 635

[58] *Chocolate* provides clear guidance here. Like Valspar, plaintiffs there alleged a conspiracy based on parallel price increases in an oligopolistic market, "ripe for collusion," and price increases not always tied to increases in cost or demand.

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F.3d 571, 585–86 (1st Cir. 2011) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry."); *Wilcox v. First Interstate Bank of Or., N.A.*, 815 F.2d 522, 526–27 (9th Cir. 1987).[59] Thus, to draw an inference of conspiracy, the "[p]arallel price-fixing must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *Baby Food*, 166 F.3d at 135. As the district court correctly found, no such evidence exists here. A00015-16.

Nonetheless, Valspar focuses on the number of such announcements, arguing that Suppliers "issued 31 parallel price increase announcements nearly simultaneously"[60] and claiming that "is unprecedented and highly probative of an

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Chocolate, 801 F.3d at 398. The *Chocolate* plaintiffs also argued that Hershey acted against its self-interest by following its competitors' price increases, even though it had a more favorable cost structure than its rivals, as Valspar contends DuPont did here. *Id.* at 401. Nonetheless, this Court held these were insufficient bases to defeat summary judgment.

[59] *See also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (describing "oligopolistic price coordination or conscious parallelism" as "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions"); *Text Messaging*, 782 F.3d at 871 ("'[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.").

[60] It is undisputed that the price increases announcements were made days and weeks apart, as in *Citric Acid*, 191 F.3d at 1102–03. A09143-49. Notably, at his

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agreement to fix and stabilize the price of TiO2." Br. at 34. But there is no legal or evidentiary backing to Valspar's protest. If it is rational for oligopolists to follow a competitor's price increase announcements sometimes, it is rational to do so repeatedly and consistently.

That is particularly true in this industry, [redacted][61] [redacted]. Thus, whether there were 3, 31, or 60 announcements, the result is the same because such parallelism is not evidence of conspiracy.

b. DuPont's Announcements Resulted from Internal and Unilateral Deliberation, Not Collusion.

The nature of the market here itself negates the ability to infer that the parallel price announcements were the product of conspiracy. But the undisputed affirmative evidence of DuPont's independent deliberations regarding potential

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deposition, Dr. Williams clarified that "simultaneous" meant that announced *effective dates* were often identical or within a month of each other. A05786.

[61] SOC Section B.

price increases further undermines such an inference. DuPont's deliberative process involved numerous people over the years who analyzed many factors, including [redacted].[62] The depth and extent of DuPont's deliberations and concern about the competitive effects of announcing price increases were in the firm's self-interest and demonstrate the absence of the agreement Valspar theorizes. *See In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d 777, 794–96 (M.D. Pa. 2014), *aff'd*, 801 F.3d 383 (3d Cir. 2015).

c. Significant Negotiation After Announcements Confirms They Were in DuPont's Unilateral Self-Interest.

While Valspar's evidence concerning price announcements is insufficient even under its portrayal of them as final prices, that is not what they were. Rather, price announcements [redacted]. That undisputed competition following announcements also undermines the existence of any agreement.

As Valspar's witnesses confirmed, [redacted]

[62] *See* SOC Section B. Valspar proffers no evidence contradicting DuPont's evidence of significant internal deliberations before issuing price announcements. The evidence it cites, *e.g.* A01950-84, bears out that deliberative pricing process. Br. at 51.

[redacted]. The undisputed evidence shows that [redacted]

[redacted].[63] [redacted]

[redacted].[64]

As a result of this negotiation process, [redacted]

[redacted]. *Reserve Supply Corp. v. Owens Corning Fiberglas Corp.*, 971 F.2d 37, 53–54 (7th Cir. 1992).

Valspar's undisputed ability to [redacted], further renders Valspar's reliance on

[63] *See* SOC Sections B–C.

[64] A09159-61.

price announcements defective.[65] If Valspar notified the incumbent Supplier that another member of the alleged conspiracy presented a competitive offer, the incumbent would immediately discover the cheating. It then would either prevent the offender from taking the business at a lower price, or take some action to punish the cheater. But the record unequivocally shows [redacted] and no evidence of punishment.[66]

2. Market Shares Shifted Dramatically and Do Not Evince Collusion.

As Suppliers won and lost Valspar's and other customers' business through the competitive process, [redacted].[67] [redacted] are inconsistent with Valspar's theory of an agreement not to compete, and cannot as a matter of law support the conspiratorial inference Valspar seeks.

Valspar's expert Dr. Williams' contention that [redacted], is also of no use to Valspar.[68] As the district court correctly concluded,

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[65] SOC Section C.

[66] Lacking evidence of actual punishment, Valspar cites DuPont's "*ability* to punish" as a supposed plus factor, indicating an ability to dictate its competitors' behavior. Br. at 18, 51; *see also* A05836-37. But this makes no sense, especially considering the duration of the alleged conspiracy, no evidence of actual punishment, and Valspar's [redacted].

[67] *See* SOC Section C.

[68] A05410. *See also* Br. at 41.

"[e]ven granting that Valspar's interpretation of stability is correct, this is entirely consistent—according to Valspar's own expert—with market shares in a concentrated, oligopolistic market." A00014.[69] Further, there was less variation in market share *before* the alleged conspiracy period, which is inconsistent with a theory of conspiracy.[70]

In response, Valspar inexplicably contends that "the district court isolated and weighed Dr. Williams' findings regarding static market shares . . . separately from other plus factors." Br. at 42. Of course, the district court addressed the evidence separately in its Opinion, as it had to in order to determine whether it was inconsistent with unilateral oligopolistic conduct. But the district court clearly analyzed, individually and collectively, all of the "several types of evidence" Valspar put forward to make the same determination. A00014. After doing so, the court correctly concluded that "Valspar . . . failed to obtain any evidence which, while consistent with conspiracy, is not just as consistent with the phenomenon of interdependence which is characteristic of oligopolies." A00032. *See Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1304 (11th Cir. 2003).

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[69] A05829-31; SOC Section C. Notably, Dr. Williams relies on an article describing similar share variation as consistent with *non-collusive*, concentrated industries. A10451; A09072-94.

[70] SOC Section C.

3. Intercompany Sales Were Sporadic and Served Legitimate Purposes.

The record also demonstrates that, over the course of a decade, the TiO2 Suppliers engaged in a handful of intercompany sales that occurred for legitimate, non-collusive reasons. The undisputed evidence illustrates that these transactions were in the unilateral self-interest of each Supplier. [redacted].[71] [redacted],[72] [redacted]. Indeed, Dr. Williams expressly conceded that [redacted].[73] Dr. Williams also admits that [redacted].[74] This negates any supposed inference from sub-market pricing. It is also undisputed that, [redacted]

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[71] *See* A05390-91; A09180-82.

[72] *See id.*; A05392-402.

[73] A05390-91 ([redacted]).

[74] *See* SOC Section F.

[redacted].[75]

Valspar's assertion that that the district court ignored "numerous examples" of below-market intercompany sales in periods other than 2005–2006 is without merit.[76] The district court "may not have specifically addressed this [evidence] but that does not mean the court ignored it." *Baby Food*, 166 F.3d at 131. Any intercompany sales were minor, sporadic, and legitimate.[77] Valspar offers no facts in dispute.

As a result, Dr. Williams' contention that such transactions could be "true-ups" in furtherance of a conspiracy is belied by the undisputed evidence. Dr. Williams in fact acknowledges the legitimate bases for most intercompany sales, and does not attempt to connect any of the sales to the gains or losses in share that supposedly were being redistributed or "true[d] up." Indeed, his concession that "the sales [were] relatively small volumes" would make any such effort futile.[78]

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[75] *See id*.

[76] Valspar contends that the district court "[c]onflat[ed] the two distinct theories" on intercompany sales offered by Dr. Williams, below-market sales and the "sale of anything at nonmarket prices," the latter of which Dr. Williams stated had no "volume component." Br. at 43. Valspar cites no support for this assertion, and it is irrelevant nonetheless, as explained above.

[77] *See* SOC Section F.

[78] A10424-25.

C. Traditional Evidence of Conspiracy Is Entirely Lacking.

As this Court has repeatedly held, to get its claim to a jury, Valspar must produce evidence satisfying the third and "most important" plus factor: "traditional conspiracy evidence." It is the most important plus factor in markets like this one, in which normal interdependent conduct could easily and mistakenly be construed as evidence of conspiracy.

Traditional conspiracy evidence is "non-economic evidence that there was an actual, manifest agreement not to compete." *Flat Glass*, 385 F.3d at 361; *Chocolate*, 801 F.3d at 398, 401; A00011. To satisfy this key plus factor, courts look for "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; *see also Chocolate*, 801 F.3d at 398, 401; A00011. Indeed, every case before this Court in which summary judgment was denied included some type of non-economic evidence of traditional conspiracy to buttress the conspiracy claim.[79]

But, here, Valspar cannot point to a single piece of evidence showing "assurances of common action" or a "common plan." The unrebutted evidence instead shows actions consistent with the normal workings of an oligopolistic market that do not tend to exclude the possibility of unilateral action.

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[79] *See infra* Section II.C.3.

Lacking actual traditional conspiracy evidence sufficient to satisfy its burden of proof, Valspar largely mislabels ordinary competitive activity (such as participation in trade associations) and normal interdependent conduct (parallel price announcements) as "traditional conspiracy evidence." But public price announcements, DuPont's participation in the TDMA and GSP, and email communications referencing industry activity and the Suppliers' incentives to steal business are all legitimate business actions that do not tend to exclude the possibility of independent conduct because they are fully consistent with individual decision-making. Indeed, they are common practices in a competitive oligopolistic environment. Valspar's attempt to transform them into "traditional conspiracy evidence" fails.

1. DuPont's Participation in the TDMA and GSP Does Not Support an Inference of Conspiracy.

The district court correctly found that the Suppliers' participation in the TDMA and GSP was fully consistent with competition, an ordinary business practice, and assuredly not against the Suppliers' unilateral self-interest. A00019-22. Trade association membership and activity is a routine, legitimate activity for businesses and does not give rise to an inference of conspiracy. *Chocolate*, 999 F. Supp. 2d at 803–04; *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 910–11 (6th Cir. 2009); *Citric Acid*, 191 F.3d at 1097, 1105–06. Participation in a trade association such as the TDMA is "more likely explained by . . . lawful, free-

market behavior" than by collusion. *Travel Agent*, 583 F.3d at 911; *see also Chocolate*, 801 F.3d at 409; *Citric Acid*, 191 F.3d at 1097, 1105–06. Here, CEFIC affirmatively monitored TDMA meetings for antitrust compliance, and the minutes of the meetings reflect their legitimate business purpose.[80] Further, TDMA meetings were attended by numerous suppliers throughout the world not alleged to be part of any conspiracy.[81]

Valspar has not produced any evidence that pricing was discussed at TDMA meetings, much less any agreement on pricing. A00021. Any time industry participants get together, one can imagine that they have an "opportunity" to conspire. But "mere opportunities to conspire," are legally insufficient to support an inference of conspiracy. *Chocolate*, 801 F.3d at 409; *Baby Food*, 166 F.3d at 126; *Petruzzi's IGA Supermarkets, Inc. v. Darling–Delaware Co.*, 998 F.2d 1224, 1242 n.15 (3d Cir. 1993).

Valspar's claim that "the vast majority" of the TiO2 Suppliers' price increase announcements occurred 30 days *before or after* a TDMA General Committee quarterly meeting does not suffice. Br. at 16, 49. By Valspar's logic, any price increase announcement "which occurred in eight of twelve months" would permit an inference of conspiracy, which "proves too much." A00021.

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[80] *See, e.g.*, SOC Section D.

[81] *Id*.

Valspar also cannot explain how TDMA meetings could have facilitated coordination of price increase announcements issued *before* the meetings. A00021-22. And, of course, DuPont did not even attend those meetings until 2010, [redacted].[82]

DuPont's participation in the TDMA's GSP is no more probative of conspiracy. Valspar alleges that [redacted].[83] [redacted].[84] *See, e.g.*, *Baby Food*, 166 F.3d at 118. It is further undisputed that the GSP did not contain pricing information, making the allegation that it was a conspiratorial

[82] *Id.*

[83] A09614-16; A08144-45.

[84] A09599; A09603; A09608-09.

device all the more untenable.[85] Contrary to Valspar's allegations, [redacted].[86]

DuPont participated in the GSP for the legitimate and procompetitive reason of [redacted].[87] TDMA members invited DuPont, along with Japanese firm ISK, to participate in the GSP [redacted]."[88] Valspar contends that the GSP provided the Suppliers with "a very powerful and timely overview of market supply (production) and demand (region, country, market segment) conditions," (Br. at 8), but that is entirely consistent with unilateral, procompetitive behavior. *Baby Food*, 166 F.3d at 118 ("Exchanges of information . . . 'can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.'") (quoting *United States v.*

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[85] A10426.

[86] A10427-28.

[87] A08320-21.

[88] A08146-48; *see also* A08140-43,45,49-53; A09599-600; A08459; A08241-43; A08541-42; A08802-03; A08510-13; A08528; A08018; A08320-26.

United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)); *Williamson*, 346 F.3d at 1313. Even Dr. Williams admitted that [redacted].[89]

The GSP is analogous to the global statistics program in *In re Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999), conducted by another CEFIC group that "collected figures on production and sales from its members . . . and produced statistics aggregated by country" to its members. *Id.* at 1098. The Ninth Circuit held that the program did not support the conclusion that the defendant fixed prices even though, unlike here, other members of that program had actually *admitted* to price-fixing. *Id.* at 1093, 1097–100 (the program was "equally well, if not better, interpreted as a decision in [the company's] own independent self-interest").[90] Just as in *Citric Acid*, participation in the GSP "is as consistent with legitimate behavior as with conspiratorial behavior," and fails to support an inference of conspiracy. *Id.* at 1098–99; *see also Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 582–83, 586 (1925) ("It is the consensus of opinion of economists and of

[89] A08918-25.

[90] *See also*, *Williamson*, 346 F.3d at 1313 ("[I]t is far less indicative of a *price-fixing* conspiracy to exchange information relating to sales as opposed to prices.") (emphasis in original); *Superior Offshore Int'l, Inc. v. Bristow Group, Inc.*, 738 F. Supp. 2d 505, 516 (D. Del. 2010) (information exchanges "can . . . increase economic efficiency") (internal quotations omitted).

many of the most important agencies of government that the public interest is served by the gathering and dissemination" of information regarding production, distribution, costs, sales, and past prices of market commodities.).

By contrast, *Havens v. Mobex Network Servs., LLC*, 820 F.3d 80, 83 (3d Cir. 2016), cited by Valspar, did not involve a statistics program. *Havens* rejected plaintiffs' "speculative" evidence of market-allocation that merely "show[ed] an opportunity for, not the existence of, an unlawful agreement." *Id.* at 92. The references to earlier case law holding that evidence of competitors directly sharing confidential information with one another—which is completely absent in this case—"*may* be evidence of a conspiracy, not that it *must* be," are irrelevant here. *Id.* at 92 (emphasis in original). Thus, DuPont's participation in the TDMA and GSP does not raise an inference of conspiracy because it was entirely within DuPont's self-interest and equally or more consistent with ordinary unilateral action.[91]

[91] *In re McWane, Inc.*, No. 9351, 2012 WL 4101793 (FTC Sept. 14, 2012), cited by amicus (Amicus Br. at 23), has no bearing here. Defendants there were the founding members of the information-sharing program, there was evidence that defendants *directly* exchanged confidential information, and they "fail[ed] to identify a single procompetitive purpose for the [information] exchange." *Id.* at *4, *14, *17. And in any event, that case stands for no more than that the exchange of confidential information can in certain circumstances (lacking here) be probative of conspiracy.

2. Public Price Increase Announcements Do Not Provide Evidence of an "Actual, Manifest Agreement Not to Compete."

Valspar's attempt to transform the Suppliers' lawful price increase announcements into traditional conspiracy evidence by labeling them "price beacons to competitors for the purpose of gauging their willingness to raise prices," and highlighting internal communications about [redacted], also fails. Br. at 17–21.

At bottom, Valspar's "signaling" argument "neglects the theory of interdependence, as well as the distinction between tacit and express collusion." A00023; *see also Flat Glass*, 385 F.3d at 359. While it may be true that Suppliers monitor each other's pricing movement, this is expected and entirely lawful. *Text Messaging*, 782 F.3d at 875 (in concentrated markets, competitors "watch each other like hawks"); *accord Williamson*, 346 F.3d at 1305 ("in competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions") (internal quotations omitted). Indeed, the very point of interdependence is that one participant in the oligopolistic market, seeking to increase prices, might wish others to follow suit, *if they unilaterally so choose*.

And the undisputed evidence here actually negates any inference that public price announcements were associated with price coordination. The industry practice of publicly announcing price increases long preceded the alleged

conspiracy period, satisfied contractual requirements, and vitiated customer concerns.[92] As the district court explained, "price announcements here served several purposes, including the satisfaction of a 'contractual condition' to provide 'some formal notification' to customers and the assurance to customers that announced prices (the starting point for negotiations) were raised to *all* customers." A00024 (emphasis in original).

Nothing about Valspar's cited cases changes the result. In *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432, 446 (9th Cir. 1990), the Ninth Circuit noted that—in contrast to this case—that there was no explanation for public price announcements except to facilitate some form of price coordination. *Id*. Further, while the Ninth Circuit conceded that public price announcements were as consistent with lawful interdependent price behavior as with unlawful collusion, *id*. at 447–48, it applied a now-firmly rejected standard in holding that this could nonetheless allow plaintiffs to get to the jury. The Ninth Circuit's reasoning in *Petroleum* on this precise point was later *explicitly* rejected by the Ninth Circuit

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[92] *See* A10406-08 ( ); A10436-37; A09138-41. Dr. Williams conceded that " A10406. *See also Reserve Supply Corp.*, 971 F.2d at 53–54 (public statements "served an important purpose in the industry" and are readily "explainable apart from any agreement to fix prices"); *Williamson*, 346 F.3d at 1305–10 (defendants' public pricing announcements were "legitimate communication[s] within the market").

itself, which held (consistent with this Court and others) that "a plaintiff who relies solely on circumstantial evidence of conspiracy . . . must produce evidence tending to exclude the possibility that defendants acted independently." *Citric Acid*, 191 F.3d at 1096–97.[93] Under this Court's well-established law, no inference of agreement can be drawn from evidence consistent with interdependent pricing in an oligopoly, and that is unquestionably what the public price announcements are.

Valspar's reliance on *In re Currency Conversion Fee Antitrust Litig*, 773 F. Supp. 2d 351 (S.D.N.Y. 2011) is similarly ineffective. There, senior representatives of defendant credit card companies met and discussed issues related to the foreign exchange fees in advance of the public price increase announcements and the subsequent price announcements arguably served as confirmation of the agreement. *Id.* at 368–71. There is no similar evidence here.

The documents cited by Valspar in this context are entirely consistent with unilateral behavior in an oligopolistic market, and often demonstrate that DuPont was unaware of its competitors' strategies. For example, Valspar quotes a single line, [redacted]

[93] In fact, in *Citric Acid*, the court distinguished *Petroleum* as a case where there had been "direct evidence of conspiracy . . . thus making dicta any discussion therein of the standard applicable when plaintiffs rely exclusively on circumstantial evidence." *Citric Acid*, 191 F.3d at 1096.

[redacted]. [94] That quote is completely consistent with unilateral behavior in an oligopolistic market. *See, e.g.*, *Flat Glass,* 385 F.3d at 359 ("In a highly concentrated market . . . any single firm's "price and output decisions *will have a noticeable impact on the market and on its rivals*.") (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1429, at 206 (2d ed. 2000) (emphasis added); *see also Chocolate*, 801 F.3d at 397; A00023-24.

Similarly, Valspar's reference to [redacted] A00022.

Valspar's other cited emails also fail to reveal any "nefarious inference of prior knowledge" of a competitor's future price increase. *Id.* at 20 n.7. To illustrate, a Millennium email stating that "[redacted]

[94] A01984.

[redacted]." *Id*. None of the evidence about price announcements qualifies as traditional conspiracy evidence.

3. Internal Email Communications Undermine Any Inference of Conspiracy.

Valspar also points to alleged "traditional conspiracy evidence" in the form of [redacted][95] [redacted],[96] [redacted].[97] But these too fail to raise an inference of conspiracy because "they are just as consistent with oligopoly as they are with conspiracy." A00025.

"[T]here is no indication that any author or recipient 'believed there was a conspiracy among the [TiO2 Suppliers].'" A00027 (quoting *Text Messaging*, 782 F.3d at 873). In fact, the emails "actually suggest the absence of an agreement" as the Suppliers "repeatedly emphasize their lack of assurance as to what the other players in the industry were doing or were intending to do." A00027. For example, Valspar repeatedly cites [redacted]

[95] *See e.g.*, A03955-63; A04066-197; A05087-90.

[96] *See e.g.*, A03474-75; A05123-25; A05272.

[97] *See e.g.*, A04927-29; A05136-37.

[redacted]. As the district court recognized, this email reveals "an awareness of how other firms *might* act, but not an express agreement." A00027 (emphasis added).

Also perfectly consistent with unilateral, interdependent oligopolistic conduct are the internal emails Valspar cites referencing [redacted]. The result is lower prices and no increase in revenues.[98]

The emails at issue are "markedly different" from communications deemed sufficient to survive summary judgment in other cases because there are no "references to [any] sort of explicit agreement between competitors." A00028. Nor do those cases identify evidence of competition that is undisputedly present here. In *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2002), employees identified "an *understanding* within the industry not to undercut each other's prices," and "one executive stated that 'every business [he was] in [was] an organization,' and in context, 'it appear[ed] that 'organization'

[98] A09036,72-73.

meant price-fixing conspiracy.'" A00028 (quoting *Corn Syrup*, 295 F.3d at 662).[99] Employees also made statements such as "our competitors are our friends. Our customers are the enemy." 295 F.3d at 662.

Likewise, in *Petruzzi's*, 998 F.2d 1224,[100] there was evidence of "play[ing] by the rules" and that a defendant "followed a 'code' in not soliciting the accounts of other renderers." *Id.* at 1233–36. In *Flat Glass*, 385 F.3d 350, there was extensive "'traditional' conspiracy evidence," including multiple private communications *among* the defendants that were immediately followed by parallel price increases, and an admission to "an 'across the board' price increase" by one of the settling defendants, as part of a proffer to Department of Justice. *Id.* at 362–369. Those communications, unlike the ones featured here, "tend[ed] to exclude the possibility . . . of independent action." *Petruzzi's*, 998 F.2d at 1241. As the district court rightly acknowledged, any such evidence—or anything close—is entirely lacking here. A00028.

Thus, Valspar's assertion that the district court "improperly required direct evidence of an agreement to fix prices" (Br. at 2) is baseless. The court merely

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[99] In addition, three of the witnesses, two of which were already incarcerated for price-fixing other products, invoked their Fifth Amendment right to avoid testifying about their role in the conspiracy. 295 F.3d at 663–65.

[100] *Petruzzi's* is also fundamentally distinguishable because it does not deal with parallel pricing, but with refusals to bid on certain accounts. 998 F.2d at 1244. As the Court noted, some of the concerns raised by interdependent oligopolies and parallel pricing, highly relevant here, were "not germane" in that case. *Id.*

examined all of the proffered evidence, and concluded that it was of a different ilk than that at issue in cases like those above in which certain communications in conjunction with other evidence were sufficient to support an inference of conspiracy. But there are no communications revealing an "explicit agreement between competitors" here, and the undisputed evidence that DuPont and other Suppliers vigorously competed for Valspar's and other customers' business further undermines the suggestion that the internal communications highlighted by Valspar could support an inference of conspiracy.[101] A00028.

Valspar's contention that the district court "improperly construed" evidence "in a light most favorable to DuPont," because "a reasonable jury could infer" conspiratorial conduct from the emails turns the applicable standard on its head. Br. at 55. The question is not whether a reasonable jury could make such an inference, but whether such an inference is more likely than an inference of unilateral conduct. If the evidence is equally explained by unilateral conduct, it is insufficient proof as a matter of law. *Matsushita*, 475 U.S. at 588.

4. The Use of Industry Consultants Is Normal Business Conduct Not Indicative of Conspiracy.

Valspar's assertion that agreement can be inferred from the fact that the Suppliers used "industry consultants . . . to exchange information regarding price, demand, inventory, and capacity utilization" is equally baseless. Br. at 20. Use of

[101] *See supra* Section II.B; *see also* SOC Section C.

consultants is ordinary business practice and there is no evidence that the industry consultants here did anything to further or facilitate a conspiracy. A00029. Valspar cannot identify a single communication demonstrating that any Supplier used an industry consultant to convey its pricing plans to, or gain agreement from, any other Supplier. None of the documents cited indicate the transmission of one Supplier's pricing plans to another, or any other kind of information supportive of a conspiracy and inconsistent with unilateral conduct.[102]

At most, the evidence shows that [redacted]. *See, e.g.*, *Baby Food*, 166 F.3d at 126 ("[I]t makes common sense to obtain as much information as possible of the pricing policies and marketing strategy of one's competitors."). [redacted] A00029; *see also* *Williamson*, 346 F.3d at 1313 ("to keep tabs on the commercial activities of [one's] competitors" is "economically beneficial").[103] Valspar's expert admitted that [redacted]

[102] Indeed, none of the evidence cited in Valspar's brief—"much of [which] has little, if anything, to do with the activities of competitors within the industry"—shows communications on price or market share between the Suppliers. A00029. Instead, they show internal discussions about the market consistent with an interdependent oligopolistic market.

[103] *See also* A08886-89 (Valspar's expert testifying that, [redacted].

[redacted][redacted][redacted][104] *Mayor of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 139 (2d Cir. 2013) (inquiries to consultants about competitors' activity "tend to suggest the *absence* of [competitor] communications" because if competitors were communicating directly they "would not have had to rely on third parties to confirm [each other's] strategy") (emphasis in original).

Therefore, the use of consultants to gather information "does not tend to exclude the possibility of independent action or to establish anticompetitive collusion." *Williamson*, 346 F.3d at 1313.

5. There Was No Significant Deviation from Conduct Before the Alleged Conspiracy.

Valspar's argument that a supposed "abrupt change in the pattern of parallel announcements is unprecedented and constitutes strong circumstantial evidence of conspiracy" (Br. at 35) fares no better than its other supposed traditional conspiracy evidence. This Court has recently held that "[f]or a change in conduct to create an inference of conspiracy, the shift in behavior must be a 'radical' or 'abrupt' change from the industry's business practices." *Chocolate*, 801 F.3d at 410. No such evidence exists here.

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[104] A08886-87.

It is undisputed that the Suppliers publicly announced parallel price increases in the prior period, when Valspar claims there was no conspiracy.[105] *See* A00031 ("The behavior of DuPont and the other defendants is 'consistent with how this industry has historically operated.'") (quoting *Chocolate*, 801 F.3d at 410). The suggestion that such announcements were greater in number or more frequent during the much longer alleged conspiracy period does not suffice to constitute an "abrupt" or "radical" departure from historical conduct. [redacted].[106] For example, [redacted].[107] No conspiratorial action can therefore be inferred from DuPont's and the other Suppliers' repeated (often unsuccessful) efforts [redacted].[108] Further, "it is generally unremarkable for the pendulum in

[105] A09143-49. There are also reasons to believe that the record is not complete with respect to the earlier period due to the passage of time.

[106] SOC Section B, *supra*; A07936-08003; A08050-114; A08605-30; A10126-29; A10130-31; A10132-33; A10154-56; A10157-58; A10159-60; A10161-62; A10163-67; A10168-69; A10170-202; A10203; A10204-12; A08954-9025; A08987; A09104-08.

[107] A09105-06.

[108] The undisputed evidence of [redacted]

oligopolistic markets to swing from less to more interdependent and cooperative." *Chocolate*, 801 F.3d at 410.

D. Valspar's Expert Evidence Is Insufficient to Overcome Its Evidentiary Deficiencies.

Valspar's attempt to overcome the deficiencies in its evidence by arguing that its experts' opinions alone should get them to a jury is misguided. Br. at 42. Valspar's experts identified [redacted], but the district court correctly concluded that these phenomena are equally consistent with oligopolistic, profit-seeking, conscious parallelism. A00014-17.

For example, the district court concluded that Dr. McClave's evidence of [redacted]—was "not necessarily. . . evidence of an agreement" because "oligopolists may maintain supracompetitive prices through rational, interdependent decision making" if they independently determine that doing so is within their own self-interest. A00015-16. The court then undertook—as it must—an examination whether the "price increase [was] the result of lawful, rational interdependence or of an unlawful price-fixing conspiracy," and concluded, based on the undisputed evidence, that it was the former. A00016. The plaintiffs in *Chocolate* also relied on Dr. McClave's and other experts' findings of [redacted]

[redacted]. But this Court held that such evidence could not defeat summary judgment because "evidence of a price increase disconnected from changes in cost or demand only raises the question: was the anticompetitive price increase the result of lawful, rational interdependence or of an unlawful price-fixing conspiracy?" 801 F.3d at 399–400.

In addition, Valspar's contention that, because "Dr. Williams' expert qualifications were not challenged, and no portion of his opinions were excluded . . . the district court should have accepted his economic conclusions for purposes of summary judgment" finds no support in fact or law.[109] Br. at 42. Admissibility standards are completely separate from the standard that there must be evidence that tends to exclude the possibility of independent conduct under *Matsushita*, 475 U.S. at 588. Expert opinions are just that—opinions; they are not facts. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.").

The district court was not required to accept Dr. Williams' conclusion that the Suppliers' conduct was more consistent with agreement than independent

[109] DuPont did move to exclude Dr. Williams' testimony, challenging his qualifications to testify as to the existence of an agreement and arguing that his "plus factor" test was unscientific and unreliable. (D.I. 272). The district court did not rule on that motion because it determined that doing so was unnecessary for it to reach a decision on summary judgment.

action. This is true for two reasons: Dr. Williams mistakenly interpreted evidence that is widely recognized as ambiguous as if it were affirmatively supportive of unlawful agreement, and thus he was applying the wrong standard. A00014,16-17, 20. In addition, whether the evidence suffices to raise an inference of an agreement is ultimately a legal conclusion, on which the expert is entitled an opinion, but which is integrated with the legal issue before the court, on which the court is the final arbiter. *Dalberth v. Xerox Corp.*, 766 F.3d 172, 189 (2d Cir. 2014) ("An expert may be entitled to his opinion, but he is not entitled to a conclusion that his view of the facts necessarily precludes summary judgment.").

Contrary to Valspar's complaint that the district court "ignor[ed] the economic evidence . . . of [its] experts," (Br. at 3) the court examined the expert evidence and even relied on it in reaching many of its conclusions. A00014,16-17, 20. This reliance in no way constitutes "impermissibly weigh[ing]" expert evidence, as Valspar contends. Br. at 39. Nor is there any indication that the district court improperly "compartmentalized" the evidence or failed to consider it in totality. Br. at 45.

Valspar's theory of nearly complete judicial deference to expert evidence would undermine the long-established law and the important principles underlying it. Courts are not required to defer completely to an expert's "economic" conclusions for purposes of summary judgment, and Valspar cites no authority in support of its novel theory. If it were right, the logical result would be that any

plaintiff alleging price-fixing and armed with expert opinion on ambiguous evidence of oligopolistic conduct would get to trial. That is clearly not the law, and for good reason—it would undoubtedly chill legitimate, procompetitive conduct.

III. THE DISTRICT COURT PROPERLY REACHED A DIFFERENT CONCLUSION THAN THE MARYLAND DISTRICT COURT.

In granting summary judgment to DuPont, the district court acknowledged and thoughtfully considered the fact that it was reaching a conclusion at odds with the one reached by the Maryland district court, which examined similar evidence and denied summary judgment in that case. A00031. The court was entirely proper in its approach and conclusion. *See Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co., Ltd.*, 240 F.3d 956, 965 (11th Cir. 2001); *see also Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1381 (Fed. Cir. 2001) (a judge may depart from the holding of another judge, even in the same district, "if he is convinced through independent analysis that the holding of his colleague is incorrect").

Invoking both comity and *stare decisis*, Valspar suggests that some greater deference to the Maryland decision was required. Br. at 1, 61. But Valspar's arguments are devoid of legal support and defied by common sense. Indeed, they would create a "win-win" for class action opt-outs, allowing them to both take

advantage of rulings in the class case they abandoned and to pursue a case on their own.

First, intra-court comity is a discretionary doctrine. *Am. Silicon Techs.*, 261 F.3d at 1381. Decisions by fellow district court judges, *even in the same district*, are persuasive, but are not binding authority. *Fishman*, 240 F.3d at 965 ("district courts are not held to the same standard" as circuit courts); *Am. Silicon Techs.*, 261 F.3d at 1381. Thus, the district court here, while owing respectful consideration to the views of the Maryland judge, was required to consider the evidence before it and employ its independent judgment in analyzing the evidence and applying the precedents of this Circuit. This included following this Court's most recent precedent, *Chocolate*, "decided after the Maryland Class Action ruling," which supplied useful guidance to the district court on this Circuit's governing legal standards. A00031.

Second, the doctrine of *stare decisis* has no application here. It is highly questionable whether a non-merits determination like denial of summary judgment could even be considered *stare decisis*, but in any event, it only applies "in situations where a court is bound by its own controlling decisions or that of courts to which it is obedient." *Fishman*, 240 F.3d at 965 n.14. The district court here must follow the rulings of the Supreme Court and this Court, not a Maryland district court.

Valspar relies on *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358 (7th Cir. 1987), which applied the doctrine of *stare decisis* to suggest that opt-out suits should not depart from earlier determinations in the class action suit. 814 F.2d at 367–68. But this conclusion rested on the fact that the earlier decision was that of a court of appeals. *Id*. One court of appeals will defer to the rulings on the merits of another in order to avoid inter-circuit conflicts and Supreme Court review. *Id*., *Fishman*, 240 F.3d at 965. These principles do not apply among and between district courts, and are not applicable here. *See Fishman*, 240 F.3d at 965.[110]

CONCLUSION

Valspar failed to produce evidence tending to exclude that DuPont acted unilaterally. The judgment should be affirmed.

[110] Valspar's reliance on *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 98 F.R.D. 254 (D. Del. 1983), is misleading. Valspar does not quote the court's holding, but rather its recitation of plaintiff's argument. *See id.* at 272.

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Certification of Bar Membership

I, Shari Ross Lahlou, counsel for Appellee E.I. du Pont de Nemours & Company certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Word Count

This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The "Word Count" function of Microsoft Word 2010 was used for this purpose.

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

3. Virus Check

I further certify that a virus check of the electronic PDF version of this Brief was performed using Avast version 9.0.2011 software, and according to that program, it is free of viruses.

4. Certificate of Identical Compliance of Briefs

I hereby certify that the text within the electronic and hardcopy forms of this brief are identical.

Dated: March 29, 2017

/s/ Shari Ross Lahlou
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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25 and Local Appellate Rules 25 and Misc. 113.4, I hereby certify that I have, on this 29th day of March, 2017, caused the Redacted Final Brief for Appellee E.I. du Pont de Nemours & Company to be served upon each party identified in the attached service list, via CM/ECF.

/s/ Shari Ross Lahlou
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