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' REPLY BRIEF

FILED UNDER SEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

Contrary to DuPont's characterization, Valspar does not seek to change the law regarding the evidence a plaintiff must present to get a Sherman Act price-fixing claim to a jury. Rather, Valspar contends the district court misapplied precedents of the United States Supreme Court and this Court, thereby making it impossible for Valspar—or *any* plaintiff—to bring a price-fixing conspiracy case involving circumstantial evidence before a jury. DuPont's brief lays bare the district court's fundamental errors, including, but not limited to, the following:

- The district court erred in holding that, in the context of oligopolistic markets, all conduct of market participants is equally consistent with both independent action and collusion; therefore, absent direct evidence of conspiratorial conduct, a price-fixing scheme cannot be proven. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004).

- The district court erred in requiring direct evidence of an express agreement to fix prices among DuPont and its co-conspirators because the law makes clear that antitrust plaintiffs need only show circumstantial evidence that defendants "'exchanged assurances of common action . . . even though no meetings, conversations, or exchanged documents are shown.'" *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 388 (3d Cir. 2015) (quoting *Flat Glass Antitrust Litig.*, 385 F.3d at 361).

- The district court failed to give weight to the stark difference between the 31 parallel price increase announcements during the 2002 through 2013 conspiracy period and the three such parallel price increase announcements in the eight years preceding the conspiracy. *Chocolate*, 801 F.3d at 410.

- The district court failed to give any weight to the opinions of Valspar's liability and damage experts regarding the existence and impact of the price-fixing scheme perpetrated by DuPont and

its co-conspirators. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1240 (3d Cir. 1993).

- The district court erred by reviewing Valspar's evidence piecemeal, rather than as a whole, to determine whether it collectively tended to exclude the possibility that DuPont and its co-conspirators acted independently. *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 456 (3d Cir. 1998); *Flat Glass*, 385 F.3d at 369.

- The district court failed to adhere to the principle of comity when it did not follow the decision of the Maryland District Court, which denied summary judgment on substantially the same record in the class action lawsuit that preceded this case. *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799 (D. Md. 2013); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 367 (7th Cir. 1987).

II. ARGUMENT

A. The District Court Failed to Apply the Correct Evidentiary Standard on Summary Judgment.

DuPont argues, and the district court erroneously ruled, that if evidence is consistent with both a price-fixing conspiracy and the conduct of an oligopolist, a plaintiff like Valspar can never survive summary judgment.[1] (A00032.) However, this misconstrues a plaintiff's burden of proof at the summary judgment stage as established by the United States Supreme Court and this Court.

[1] DuPont places heavy emphasis on the conclusion that all the co-conspirators are oligopolists in order to make the argument that it is natural for competitors to follow one another's pricing in the context of an oligopoly. However, that argument does not explain the conduct of the co-conspirators here because they all *denied* following one another in their pricing decisions. *See infra* Section C.

The fundamental problem with the district court's analysis is found in its own admission that, in the context of an oligopoly, "lawful conduct can bear a great resemblance to unlawful conduct" and vice versa. (A00032.) Under that analysis, the existence of a price-fixing conspiracy can never be proven in the oligopoly context based on circumstantial evidence alone because the inferences that can be drawn from individual pieces of such evidence will always be equally consistent with collusion as with independent parallel conduct. However, both the United States Supreme Court and this Court have repeatedly held that a price-fixing conspiracy may be proven based on circumstantial evidence alone. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 768 (1984); *Flat Glass*, 385 F.3d at 360; *Petruzzi's*, 998 F.2d at 1230. Even the district court acknowledged as much in its opinion. (A00009-11.)

The source of the contradiction in the district court's analysis—saying in the same comment that collusion may be proven with circumstantial evidence, while simultaneously suggesting such evidence is never enough to prove unlawful conduct in an oligopoly—can be found in its reference to the following statement in this Court's *Chocolate* decision: "a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy to survive summary judgment." (A00031, n.10 (quoting *Chocolate,* 801 F.3d at 396-397 n.9 (citing *Matsushita Elec.*

Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 597 n.21 (1986))).) But this misconstrues *Matsushita*, in which the Supreme Court stated the following:

> Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

475 U.S. at 596-597.

In a footnote, which constitutes dicta, the Supreme Court added: "We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy." *Id.* at 597 n.21. This comment was later explained away in *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). In *Eastman Kodak*, the Supreme Court explained that *Matsushita* "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Id.* at 468. *See also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990) ("Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with inferences of conspiracy and inferences of innocent conduct"), quoted with approval by *Petruzzi's*, 998 F.2d at 1234. Instead, "*Matsushita* demands only that the non-moving party's inferences be reasonable in

order to reach a jury." *Eastman Kodak*, 504 U.S. at 468; *Petruzzi's*, 998 F.2d at 1231.[2]

As this Court also recognized in *Chocolate*, "'defendants are not entitled to summary judgment merely by showing that there is a plausible explanation for their conduct; 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.'" 801 F.3d at 396 (quoting *Rossi*, 156 F.3d at 467). The evidence which tends to exclude the possibility that DuPont and its co-conspirators acted independently is the evidence of plus factors submitted by Valspar. *See Petruzzi's*, 998 F.2d at 1232. The "[e]xistence of these plus factors tends 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 *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999)). "In other words, the factors serve as proxies for direct evidence of an agreement." *Id.*

[2] This Court has also recognized that *Matsushita* is limited to cases involving an *implausible* conspiracy theory, where drawing inferences in favor of the plaintiff could deter competitive conduct. *See Chocolate*, 801 F.3d at 368 n.8; *Petruzzi's*, 998 F.2d at 1232; *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994) ("[I]f the alleged conduct is 'facially anticompetitive and exactly the harm that antitrust laws aim to prevent,' no special care need be taken in assigning inferences to circumstantial evidence.") (quoting *Eastman Kodak*, 504 U.S. at 478).

As discussed below and in Valspar's initial brief, the district court's analysis of the evidence of plus factors in this case was erroneous, both in its analysis of each item of evidence and in its failure to consider the evidence as a whole. In *Flat Glass*, this Court specifically rejected DuPont's suggestion that the court do precisely what the district court did in this case—namely, "consider each individual piece of evidence and disregard it if [the Court] could feasibly interpret it as consistent with the absence of an agreement to raise prices." 385 F.3d at 368. In failing to consider the evidence as a whole, the district court fell into a "trap to be avoided in evaluating evidence of an antirust conspiracy", as Judge Posner explained in *In re High Fructose Corn Syrup Antirust Litigation*, 295 F.3d 651, 655 (7th Cir. 2002).

In its brief, DuPont quotes Judge Posner's phrase "zero plus zero equals zero" without attribution. (DuPont Br. at 26.) DuPont omitted the quotation marks and citation presumably because the line was taken from a paragraph that makes the exact *opposite* point to that urged by DuPont. The full quote from *High Fructose* reads as follows:

> The second trap to be avoided in evaluating evidence of an antitrust conspiracy for purposes of ruling on the defendants' motion for summary judgment is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial? 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.

295 F.3d at 655-656. After examining as a whole the evidence of plus factors submitted by Valspar, this Court should reverse the district court's summary judgment ruling.

B. The District Court Improperly Required Direct Evidence of an Express Agreement Among DuPont and its Co-conspirators.

The district court found that Valspar's proof lacked direct evidence of an express agreement to fix the price of titanium dioxide ("TiO2"). This was erroneous because, as explained above, a price-fixing conspiracy may be proven by inferences from circumstantial evidence in the form of plus factors, which serve as proxies for direct evidence of an agreement. Indeed, unlawful conspiracies are secret, so proof of them will rarely consist of explicit agreements. *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012). "Rather, conspiracies 'nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.'" *Id.* (quoting *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012)). *See also Petruzzi's,* 998 F.2d at 1230 (noting that "smoking gun" evidence is not required to prove a Section I case). However, it is clear that the district court here was looking for smoking gun evidence of an express agreement because the court sought to distinguish cases like *Petruzzi's* and *High*

Fructose, which included documents with "references to some sort of explicit agreement." (A00028.)

While evidence of an agreement may be found in each of the three categories of plus factors examined by the district court, including motive and actions against self-interest, this Court has placed greater emphasis on the plus factor category involving "'evidence implying a traditional conspiracy.'" *See Flat Glass*, 385 F.3d at 360-361 (quoting *Petruzzi's,* 998 F.2d at 1244).[3] This plus factor, however, is not to be confused with direct evidence of an express agreement. Rather, "[t]his plus factor looks 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.'" *Chocolate*, 801 F.3d at 398 (quoting *Flat Glass*, 385 F.3d at 361).

Although there is no clear smoking gun in this case, the evidence that DuPont and its co-conspirators exchanged assurances of common action or adopted a common plan more than suffices to create a jury issue of whether the TiO2 manufacturers acted independently in raising their prices. [redacted]

[3] *But see Petruzzi's*, 998 F.2d at 1244 ("[E]ven without . . . evidence purporting to show a traditional agreement . . . a plaintiff can survive summary judgment if it shows that the defendants had a motive to conspire and acted contrary to their self-interest.")

[redacted]. (A06652, A010473-96.)

[redacted]. (A05087.) [redacted]. (A05032, A03439-40, A01513, A05819-20 at ¶ 154.)

Further, the announcements of parallel price increases by advance press releases are themselves evidence that DuPont and its co-conspirators "exchanged assurances of common action", especially because there is no justification for the public price announcements. *See infra* Section C.5, p. 18 n.6; *Petroleum Prods.*, 906 F.2d at 446-447. These exchanges of assurances about the common plan to increase prices are further supported by [redacted]. (A05096, A01950, A01972, A03452-53, A03457, A05105-06, A05107, A05122.) Moreover, admonitions in DuPont's documents about [redacted] also constitute evidence of the

common plan to raise prices. (A05129, A05272, A03483, A03469, A03485-525, A01948-49, A03464, A03955-63, A050191-93, A03533-34, A05083-86, A03441-51, A03474, A03479, A04072, A05087, A05126-28, A05251, A05252-53, A05254-57, A05258-59, A05260, A03464, A05279-81, A01948-49, A03526-37, A03955-63, A05091-93, A05132-35.) The practice of using industry consultants as conduits to share information among competitors is additional evidence from which to infer the existence of a conspiracy. (Valspar Br. at 54-55.)[4]

All of this evidence, taken as a whole, tends to exclude the possibility that DuPont and the other manufacturers acted independently in raising the price of TiO2 on 31 different occasions, which is all *Matsushita* requires. Contrary to DuPont's argument, the evidence here is quite similar to the evidence in other cases where summary judgment was denied. For example, DuPont tries to distinguish evidence in *High Fructose* about competitors not undercutting each other's prices, but the same type of evidence also appears in the record in this case. (A05129, A05272, A03483, A03469, A03485-525, A01948-49, A03464, A03955-63, A050191-93,

[4] DuPont and the district court disagree with Valspar regarding the inference that may be drawn from the use of consultants as conduits for sharing information. However, the District of Maryland, in presiding over the class action, found this evidence persuasive. *Titanium Dioxide*, 959 F. Supp. 2d at 812. Other courts in the Third Circuit have also found it reasonable to infer the existence of a conspiracy based upon similar "conduit" evidence. *See In re Domestic Drywall Antitrust Litig.*, MDL No. 2437, 2016 WL 684035, at *54 (E.D. Pa. Feb. 18, 2016); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 337 (3d Cir. 2010).

A03533-34, A05083-86, A03441-51, A03474, A03479, A04072, A05087, A05126-28, A05251, A05252-53, A05254-57, A05258-59, A05260, A03464, A05279-81, A01948-49, A03526-37, A03955-63, A05091-93, A05132-35.)

Likewise, DuPont notes that *Petruzzi's* included evidence about playing by the rules and not soliciting accounts of others. But again, nearly the same evidence exists in this case in the form of multiple emails about [redacted]. (A05123-25.) Finally, DuPont relies on *Flat Glass*, in which across-the-board price increases directly followed communications among defendants. Yet again, the same evidence exists here with the 31 across-the-board price increases. (*See infra* Section C; Valspar Br. at 16-17 n.51-52; *Titanium Dioxide*, 959 F. Supp. 2d at 830.) Therefore, the district court erred in ruling that a reasonable juror could not conclude that DuPont and its co-conspirators were not acting independently when they raised the price of TiO2 during the period from 2002 to 2013.

C. The District Court Erred in Failing to Give Weight to the Extraordinary Pattern of Parallel Price Increase Announcements.

Like the district court, DuPont downplays the abrupt change in parallel price increase announcements that occurred in 2002, when the TiO2 co-conspirators expanded their information-sharing program to include DuPont. DuPont argues that a reasonable jury could not conclude that 31 parallel price increase announcements

indicated an agreement to raise prices. Further, DuPont argues that a reasonable jury could not identify a significant difference in the parallel price announcements between 1994 through 2001 and 2002 through 2013.

In sum, both DuPont and the district court discount the following evidence: (a) the large number of announcements and the abrupt change in the frequency of announcements starting in 2002; (b) the nearly identical—to the penny—increases in the announcements and their effect in raising TiO2 prices substantially over what they would have been "but for" a price-fixing agreement; (c) the testimony of employees of the co-conspirators [redacted]; (d) the lack of support for any claim concerning [redacted]; and (e) the plausibility of using price announcements to raise transaction prices. As discussed below, this evidence concerning the parallel price increases strongly supports the inference of collusion.

1. The Voluminous Pattern of Parallel Price Increase Announcements, Abruptly Commencing in 2002, Shows an Agreement to Fix TiO2 Prices.

Contrary to DuPont's assertions, parallel pricing was not the norm in the TiO2 industry before 2002. In the eight years prior to 2002, only *three* parallel price announcements occurred. Then, in 2002, the TiO2 competitors embarked on a series of *31* parallel price increases. This conduct was unprecedented in the TiO2

industry—or any other industry—and arose in response to falling TiO2 prices and DuPont's admission into the GSP information-sharing program.

In *Flat Glass,* this Court reversed the lower court's summary judgment ruling because the *three* parallel rate increases at issue raised a jury question regarding the existence of a conspiracy—even without noting any change from the prior pattern of increases. 385 F.3d at 369. In contrast, this Court found three parallel price announcements insufficient to overcome summary judgment in *Chocolate*. 801 F.3d at 410. But it reached this conclusion because the three announcements in the conspiracy period did not represent an "abrupt" or "radical" change from the six parallel announcements in the pre-conspiracy era. *Id.* Moreover, the plaintiffs in *Chocolate* did not premise their shift-in-conduct argument on "an apples-to-apples comparison." *Id.* Instead, the pre- and post-conspiracy price increases "involved different products at different times." *Id.*

This case encompasses 28 more announcements than both *Flat Glass* and *Chocolate*. Plus, unlike *Chocolate*, this case presents an abrupt shift in pricing conduct among the competitors regarding the *same* TiO2 commodity. Indeed, the number of parallel price announcements increased *tenfold* during the conspiracy period.

To skirt this radical shift in conduct, DuPont argues that if a firm may "follow" a competitor's price "sometimes", then it may benignly do so "repeatedly" and

"consistently". (DuPont Br. at 32.) DuPont cites no support for this proposition, likely because none exists. To the contrary, courts analyzing price-fixing cases routinely look to the number of parallel price increases and the departure from pre-conspiracy conduct. *See Chocolate*, 801 F.3d at 410; *Domestic Drywall*, 2016 WL 684035, at *66. Ultimately, the unprecedented shift to 31 parallel price increase announcements during the conspiracy period suffices to raise a jury question regarding the existence of a conspiracy.

2. The Nearly Identical Amounts and Timing of the Price Increases Further Evidence a Conspiracy.

DuPont's attempts to downplay the significance of the parallel price increases are unavailing. First, DuPont criticizes the price announcements as not "simultaneous"—even though they usually had the same effective date—because the announcements sometimes varied by hours or days. But neither courts nor economists require literal concurrence in price-fixing conspiracies. Indeed, "[t]he relevant case law specifies that *similar* price movements by competitors can be considered, along with other evidence, in determining whether inferences favorable to plaintiffs are warranted." *Domestic Drywall*, 2016 WL 684035, at *49 (emphasis added) (noting that two series of price announcements spaced two weeks and two months apart showed "very similar price increases as to both date and percentage of increase"). *See also Flat Glass*, 385 F.3d at 369 (holding that two weeks between announcements constituted "parallel pricing").

Here, Dr. Williams also found that announcements made within 30 days utilizing identical effective dates were, from an economic perspective, "simultaneous." (A05877-881.) The Maryland district court also adopted this definition in the class action. *Titanium Dioxide*, 959 F. Supp. 2d at 807-808. Thus, the delay between the announcements - which was sometimes only hours and never more than 30 days - does not impact the parallel nature of the price increases and does not bar this case from presentation to the jury.

Second, DuPont tries to undercut the parallel pricing evidence by suggesting that only an "apparent similarity" existed between the prices publicly announced. As a threshold matter, the price increases publicly announced were identical *to the penny* in most of the 31 announcements. (A05877-881, A02051-3421.) Moreover, negotiations that resulted in a variance between the announced price increases and the actual transaction prices do not provide a basis for granting summary judgment. In *Flat Glass*, the defendants argued that the plaintiffs could not establish liability as a matter of law because the negotiated transaction prices did not match the announced increases. 385 F.3d at 362. This Court deemed that argument "simply wrong." *Id*. Instead, "[a]n agreement to fix prices is . . . a per se violation of the Sherman Act even if most or for that matter all transactions occurred at lower prices." *Id.* (quoting *High Fructose*, 295 F.3d at 656).

Admittedly, Valspar and other TiO2 purchasers [redacted]. However, DuPont's repeated references to [redacted] (DuPont Br. at 34-38) are meaningless under *Flat Glass*. Plus, in this case, the repeated price announcements *did* impact price. Econometric analysis of the actual prices paid in every TiO2 transaction between 1994 and 2013 shows that the transaction prices actually paid during the conspiracy period were artificially elevated over the "but for" price. DuPont may argue that the prices would have been even more inflated and fixed at a higher level if each one of the announced price increases was successfully implemented across the board. But, Valspar need not offer evidence of such perfect price-fixing to raise a jury question on the existence of a conspiracy. *See Flat Glass*, 385 F.3d at 363. The pattern of the announcements, the actual prices paid, and the artificial inflation of the actual prices above the "but for" price provide sufficient evidence to allow a jury to decide whether a collusive agreement impacted TiO2 prices.

3. The Co-conspirators Deny that They "Followed" Other Manufacturers' Price Announcements.

DuPont primarily premises its defense on the "follow the leader" principle. According to DuPont, the five firms that controlled the TiO2 market in the United States merely "followed" each other's price announcements without any prior agreement to do so. (DuPont Br. at 6, 8, 24, 31, 32, 34.) The district court accepted

this highly disputed issue as an absolute "fact." (A00023-25.) This finding constituted clear error because [redacted] Thus, the record provides no basis upon which the district court could have found undisputed evidence that the TiO2 manufacturers engaged in what DuPont characterizes as legally permissible following of each other's price announcements.

4. Repeated Identical Pricing Belies Claims of Internal Analyses.

Perhaps realizing this deficit, DuPont argues in the alternative that the TiO2 manufacturers did *not* "follow" each other, but rather each firm independently conducted internal studies and discussions to arrive at its pricing decisions. (DuPont Br. at 33.) Valspar vigorously disputes this contention. There is no explanation in the record of how five different worldwide manufacturers could have conducted strictly internal discussions, but nevertheless developed identical price increases announced within days or even hours of each other, even though these price

increases were not correlated to changes in supply and demand."[5] Overall, the repeated identical pricing by the co-conspirators throughout the conspiracy period belies DuPont's claims regarding independent analyses.

5. Publicizing Repeated Uniform Price Increases is a Plausible Way to Raise Transaction Prices.

DuPont also argues that it is entitled to summary judgment because it is "highly implausible" that the TiO2 manufacturers would use price increase announcements as a tool to artificially raise the price of TiO2.[6] (DuPont Br. at 35.) But DuPont's own expert found that [redacted]. (A05826-27 at ¶ 171), A09168, Table 22.) Moreover, it cannot be "seriously contend[ed]" that producers would increase their list prices "with no intention of affecting transaction prices." *Flat Glass*, 385 F.3d at

[5] DuPont incorrectly states that it is undisputed that the price increases were "supported" by "increased costs." (DuPont Br. at 57 n.108.) Dr. McClave's econometric analysis [redacted].

[6] DuPont also argues that public announcements of price increases were [redacted]. Notably, none of the co-conspirators publically announced any price reduction. (*See e.g.*, A07839, Quinn Dep. 61:5-7; A7568-69, Rogers Dep. 62:9-18.)

362. Indeed, "[s]ellers would not bother to fix list prices if they thought there would be no effect on transaction prices.'" *Id.* at 362-63 (citing *High Fructose*, 295 F.2d at 656). In any event, DuPont's argument presents a jury question improper for summary judgment.

Ultimately, DuPont argues that the district court correctly held that the frequency, duration, simultaneity, and effectiveness of the price increase announcements do not allow one "to draw an inference of conspiracy" and, therefore, do not constitute "evidence of conspiracy." (DuPont Br. at 31, 33). Granted, unprecedented parallel pricing may not *alone* provide a basis for finding a conspiracy. However, it is persuasive evidence that leads courts to conclude, along with other corroborating circumstantial evidence, that evidence regarding the existence of a conspiracy is sufficient to go to a jury.

Here, the record provides substantial evidence that there was an abrupt change in the price increase announcements, that the price increase announcements proceeded in lockstep for the entire period of the conspiracy, that the announced prices were nearly identical, that they were announced within 30 days of each other, that the co-conspirators denied "following" other manufacturers, that transaction prices were raised following announcements, and that the raised prices were above the "but for" prices. Taken together, all this evidence concerning the parallel price increases strongly supports an inference of collusion.

D. The District Court Erred by Failing to Consider All the Plus Factor Evidence in its Totality.

The district court erred by failing to consider the evidence of multiple plus factors as a whole. Specifically, the district court adopted the approach rejected by this Court in *Flat Glass* by "consider[ing] each individual piece of evidence and disregard[ing] it, if [the court] could feasibly interpret it as consistent with the absence of an agreement to raise prices." *See* 385 F.3d at 369. Additionally, the district court failed to view the evidence in the light most favorable to Valspar. The totality of the evidence—including the parallel pricing evidence presented above and the additional plus factor evidence discussed below—suffices to survive summary judgment.

1. Market Share Stability in the TiO2 Industry Supports an Inference of Conspiracy.

The district court erred by disregarding the evidence of market share stability. The maintenance of relatively stable market shares is indicative of conduct contrary to the self-interest of market participants. William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393, 399 (2011). Accordingly, market share stability can weigh against summary judgment when considered alongside other evidence. *Flat Glass*, 385 F.3d at 369.

Here, Dr. Williams conducted a statistical analysis of market stability and concluded that [redacted]. First, the

district court improperly attempted to weigh the validity of this analysis by suggesting that the percentage changes did not support a finding of stability. Such weighing of expert conclusions by the district court is improper at the summary judgment stage. *See Petruzzi's*, 998 F.2d at 1239. Second, the district court ultimately disregarded this well-recognized plus factor on the theory that if similar traits may be found in an oligopoly, then the evidence supporting the plus factor must be disregarded altogether. (A00014.) Such failure to consider this evidence of market share stability "in context of other evidence" constituted error. *Flat Glass*, 385 F.3d at 369.

2. Inter-Company Sales Below Market Price Indicate the Existence of a Conspiracy.

The district court and DuPont failed to properly analyze the evidence of below-market sales between the TiO2 co-conspirators. Selling products to competitors at below-market prices runs contrary to the self-interest of the seller, regardless of the volume or duration of sales. Indeed, "[i]f one seller buys *anything* from another at nonmarket prices, then a resource transfer is made for which there is no reasonable, noncollusive explanation." Kovacic, *supra*, at 423 (emphasis added). Thus, economists look to the presence of *any* below-market sales to competitors, not just large volumes of sales. (A05808-09 at ¶ 132.)

Here, Dr. Williams identified [redacted]

[redacted]. (A05390-95 at ¶ ¶ 102, 103, Figures 9, 10, 11, 12.)[7] DuPont discredited this finding on the ground that the volume of below-market sales was too small to constitute action against self-interest. (DuPont Br. at 15.) The district court followed suit, deeming the volume of below-market sales insufficient to result in a "redistribution" or "true up." (A00017.) But as noted above, in the absence of a price-fixing agreement, it is *never* in the self-interest of a supplier to sell to its competitors below-market. The volume or duration of sales simply does not impact this principle. Thus, the district court erred by failing to give proper weight to the evidence of below-market inter-company sales.

3. The Global Statistics Program Created an Environment Ripe for Conspiracy.

The district court also erred in compartmentalizing its analysis of the GSP evidence. "Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement." *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2nd Cir. 2001).[8] Accordingly, "a jury should be allowed 'to consider

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[7] DuPont argues that [redacted]. (A09675-691.)

[8] DuPont mistakenly relies on *Maple Flooring Manufacturers' Association v. United States*, 268 U.S. 563 (1925), to argue that the information exchange through the GSP is not evidence from which a conspiracy may be inferred. But *Maple Flooring* did not address information sharing as circumstantial evidence of a conspiracy. Instead, *Maple Flooring* involved an "analytically distinct type of claim,

exchanges of information [and] other communications among the parties to an alleged conspiracy . . . as circumstantial evidence of alleged price fixing.'" *Petroleum Prods.*, 906 F.2d at 447 (quoting Richard A. Posner, *Information and Antitrust: Reflections on the* Gypsum *and* Engineers *Decisions*, 67 Geo. L. J. 1187, 1199 (1978)).

Here, DuPont indisputably participated in the GSP along with its competitors in the TiO2 industry. This serves as evidence of both traditional conspiracy and actions against self-interest. Indeed, the GSP [redacted]. (A04916, A05005-07, A06048-95, A07905.) [redacted]. (A07594-723, Maas Dep. 37:18-39.1.) [redacted]. (*See* A05000, A01985-90, A04933-48,

also based on § 1 of the Sherman Act, where the violation lies in the information exchange itself—as opposed to merely using the information exchange as evidence upon which to infer a price-fixing agreement." *Todd*, 275 F.3d at 198. Because there was "no allegation or proof of an agreement to fix prices" in *Maple Flooring*, it is inapposite. *See U.S. Maltsters Ass'n v. Fed. Trade Comm'n*, 152 F.2d 161, 166 (7th Cir. 1945).

A05019, A01985-90, A04933-48683.)[9] Further, the timing of DuPont's entrance into the GSP coincides with the start of the 31 parallel price increases.

In ruling that the information exchange in the GSP was strictly benign, the district court improperly discounted evidence from the co-conspirators themselves [redacted]. (A04927, A01985-90, A01194-2046, A02146-47, A03480, A03526-27, A04920-24, A04925-26, A04949-68, A04979-88, A04989-94, A05091-93, A05094, A04911-91.) Additionally, the district court did not properly weigh Dr. Williams' testimony that [redacted]. (A05403-408 at ¶ ¶108-123, A05811-824 at ¶¶ 138-167.) Ultimately, the [redacted]—together with the evidence of [redacted]—provide substantial evidence from which a jury could infer collusive conduct. The district court erred in holding otherwise.

E. The District Court Failed to Give Proper Weight to the Opinions of Valspar's Experts.

The district court improperly weighed the testimony from Valspar's experts and incorrectly considered each aspect of their testimony in isolation. This Court has

[9] [redacted]. (DuPont Br. at 13.)

repeatedly cautioned against weighing expert testimony at the summary judgment stage. *See, e.g., Petruzzi's*, 998 F.2d at 1241; *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1538 n.14 (3d Cir. 1990). In fact, this Court reversed summary judgment in *Petruzzi's* because the district court "impermissibly weighed" expert testimony by "commenting on its weakness." 998 F.2d at 1241.

DuPont attempts to justify the district court's error by claiming that Valspar has suggested a "novel theory" of "nearly complete judicial deference to expert evidence." (DuPont Br. at 60.) This mischaracterizes Valspar's position. Valspar has not suggested any "novel theory", but rather seeks application of the longstanding principle that "credibility determinations are not the function of the judge; instead the non-movant's evidence must be credited at [the summary judgment] stage." *J.F. Feeser*, 909 F.2d at 1531 n.14.[10]

DuPont further argues that the district court correctly discounted Dr. McClave's evidence of [redacted] on the premise that such evidence should be considered in isolation. But this Court has held that expert testimony must be considered "in conjunction with other evidence." *Petruzzi's*, 998 F.2d at 1241. Thus, DuPont and the district court must analyze [redacted]

[10] DuPont's unsupported assertion that Dr. Williams offered "legal conclusions" is also incorrect. Dr. Williams simply offered his opinion of economic evidence of plus factors.

[redacted]—in connection with the radical shift in public price increase announcements and the evidence of other plus factors. Doing so creates a reasonable inference of collusive conduct.

F. The District Court Should Have Followed the Maryland District Court, which Denied Summary Judgment on the Same Record.

Consistent with principles of comity, the district court should have more fully considered the Maryland Action before reaching a contrary decision in this case. Admittedly, inter-circuit comity at the district court level and appellate court level is largely discretionary. However, deference to other federal courts should play a "particularly potent" role in the context of class actions. *Premier Elec.*, 814 F.2d at 367. Thus, when the court in the opt-out suit and the court in the class suit "are dealing with the same set of facts", they should avoid reaching conflicting results in order to foster uniformity in the judicial system. *Id*. at 368.

The cases cited by DuPont do not diminish this standard. *See Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1381 (Fed. Cir. 2001); *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co., Ltd.*, 240 F.3d 956, 965 (11th Cir. 2001). *American Silicon* does not involve an opt-out suit and a class suit, but rather two distinct defendants raising similar legal questions in separate litigation. 261 F.3d at 1381. Because of this, "it [was] not clear" to the reviewing court that "the factual record was the same" in the two actions. *Id*. Thus, "it [was] not at all clear . . . that

the two judges were faced with identical issues." *Id.* Accordingly, the latter judge did not abuse the doctrine of comity by reaching a different result than the former. *Id*.

Fishman also does not arise in the class action context. In *Fishman*, the appellants raised arguments related to both collateral estoppel and intra-court comity. 240 F.3d at 962, 965. The Eleventh Circuit determined that collateral estoppel did not apply because the present action was "factually dissimilar and legally incomparable" to the prior case. *Id*. at 962. The Eleventh Circuit also determined that intra-circuit comity did not apply to the two unrelated cases at issue. *Id*. at 965. Nonetheless, it still acknowledged "the need for consistency in the administration of the judicial process" and the importance of "a uniform interpretation of the law." *Id.*

Ultimately, neither *Fishman* nor *American Silicon* addresses the unique need for uniformity that arises in a case such as this, where an opt-out action presents nearly identical facts as an earlier class action. In this context, "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.*, 814 F.2d at 367-368. Moreover, the difference between the Maryland decision and the district court decision only emphasizes the factual issues here, which are susceptible to multiple reasonable interpretations and, therefore, should be decided by a jury.

III. CONCLUSION

Like this Court noted in *Flat Glass*, DuPont's brief reads like a trial brief rather than a summary judgment brief. 385 F.3d at 368. DuPont's arguments are well-suited for a jury, but irrelevant to this Court on appeal. *See id.* Ultimately, "[t]he evidence here, in its totality, is sufficient to go to the jury." *See id.* at 369. Accordingly, for the reasons set forth above and in Valspar's initial brief, 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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