IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

DEFENDANT'S OPENING BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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Public Version: September 8, 2015
Dated: September 1, 2015

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

NATURE AND STAGE OF THE PROCEEDINGS

Defendant E. I. du Pont de Nemours and Company ("DuPont") moves for summary judgment on Plaintiffs Valspar Corporation and Valspar Sourcing, Inc. ("Valspar")'s sole claim:[1] that DuPont, Huntsman International LLC ("Huntsman"), Kronos Worldwide, Inc. ("Kronos"), Millennium Inorganic Chemicals Inc. ("Millennium," n/k/a "Cristal USA Inc.") (collectively, "Defendants")[2] violated the Sherman Act by fixing titanium dioxide ("TiO2") prices from 2002 to 2013.[3] After opting out of a class action filed in 2010, 1:10-cv-00318-RDB (D. Md.), Valspar filed its complaint on November 22, 2013. Its claims against DuPont were later severed and transferred to this Court. Fact and expert discovery are closed, and trial is set for January 2016.

SUMMARY OF ARGUMENT

Valspar's entire case hinges on an implausible theory supported by—at best—entirely ambiguous evidence that is insufficient as a matter of law to survive summary judgment. Far from the undetected 11-plus year conspiracy that Valspar hypothesizes, the undisputed evidence shows that the Defendants competed vigorously for Valspar's and other customers' business—frequently undercutting each other to win and retain business—while making independent pricing and other business decisions. Valspar repeatedly took advantage of this competition and its leverage to secure favorable terms, [redacted]. The undisputed evidence of competition is starkly inconsistent with Valspar's claim.

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[1] Valspar's second and third counts were dismissed in February 2014, leaving only Count I.
[2] "Defendants" is used here for brevity and ease of reference. DuPont is the only defendant in this action, as Valspar's claims against Huntsman, Kronos, and Millennium are proceeding in separate courts, and Valspar did not sue the fifth alleged co-conspirator, Tronox Inc.
[3] Unless otherwise noted, the events discussed herein occurred in the relevant time period of 2002-2013.

Despite the benefit of years of extensive discovery, Valspar cannot point to a single document showing DuPont communicated with any other manufacturer of TiO2 regarding prices they would charge customers or plans for price increase announcements, let alone that it agreed with its competitors on prices. Indeed, the notion of an agreement is directly undermined by the unrebutted evidence showing the extensive deliberative process that DuPont undertook to determine whether and when to announce a price increase, and the undeniable competitive process that ensued once it did.

Lacking any evidence that would actually suggest a conspiracy, Valspar instead rests on entirely ambiguous evidence that amounts to nothing more than perfectly legal conscious parallelism, common market conditions, and unremarkable trade association meetings and conduct. But whether viewed in isolation or as a whole, that evidence fails to exclude the possibility that Defendants acted independently, mandating summary judgment. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). Not only is the evidence far short of being "'sufficiently unambiguous' [to] show[ ] that the defendants conspired," *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999) (quoting *Matsushita*, 475 U.S. at 597), the motley assortment of sporadically employed methods through which Defendants supposedly carried out their conspiracy reveals the incoherence—and implausibility—of Valspar's conspiracy theory.

Highlighting the implausibility of its theory is Valspar's reliance on its damages expert's analysis purportedly showing that prices were higher than they should have been. Putting aside the defects in that analysis, its results are very telling:

from the three years after Defendants were sued in Maryland, when prices were at their highest.

It simply defies logic that the hypothesized conspiracy finally became effective eight years after its supposed inception, and that Defendants would aggressively raise prices pursuant to an illegal agreement only after they had been sued and their businesses were under intense scrutiny.[4]

The undisputed evidence, which is consistent with unilateral conduct, precludes an inference of conspiracy. Summary judgment should be granted in favor of DuPont.

FACTS

TiO2 is a white pigment known for its opacity and refractive and UV protectant properties that is used in a variety of products, including paint and other coatings, plastics, rubber, and paper.[5] TiO2 is sold in powder and slurry forms and in various grades.[6] During the relevant time period, DuPont was one of several companies, including the other Defendants, Tronox, and Asian and European producers, that sold TiO2 in the United States.[7] DuPont's Titanium Technologies ("DTT") business manufactured and sold TiO2 to coatings, plastics, and paper producers, including Valspar.[8] [redacted] grades of TiO2, which it uses to manufacture paint and other coatings products.[9]

Valspar also purchased TiO2 from DuPont's competitors. Prices were reached through bi-lateral negotiations between each supplier and Valspar, [redacted] Valspar consistently leveraged its bargaining power as one of Defendants' largest customers to negotiate favorable pricing, service, and other terms in its supply contracts, [redacted]

[4] The undisputed evidence of the many reasons (having nothing to do with collusion) that prices rose after 2010 is discussed in Section III.B.5, *infra*, and Appendix F (Post-2010 Market Conditions).
[5] Clair Decl. Ex. 198.
[6] *See id.* at 1–2; *see also* Clair Decl. Ex. 206 at 239-241.
[7] *See* Clair Decl. Ex. 206 at 244-245.
[8] *See id.* at 239-241, 249; Clair Decl. Ex. 80 at 15:14-19.
[9] Clair Decl. Ex. 74 at 147:12-17; Ex. 80 at 16:4-7, 17:12-18; Ex. 108 ¶ 29 (citing transactional data); Ex. 206 at 249.

[redacted], and [redacted] Defendants competed intensely with one another and other suppliers, often undercutting one another on price. Valspar exploited that by successfully pitting one supplier against another to get the best pricing, often by exercising [redacted] and moving or threatening to move its business. As a result, Defendants' respective shares of Valspar sales fluctuated.[10]

Consistent with the terms of its supply contracts, [redacted]. Each supplier made independent decisions regarding contract negotiations, price increases, and final pricing, and those outcomes varied. Valspar witnesses [redacted].[11] And Valspar and Defendant witnesses testified that the post-2010 price increases were due to a number of factors, [redacted][12]

ARGUMENT

I. Valspar Cannot Reach a Jury Because It Cannot Exclude the Possibility that DuPont Acted Independently.

Valspar cannot survive summary judgment merely by pointing to parallel conduct because parallel conduct, consistent with an interdependent oligopoly, alone is insufficient as a matter of law to support an inference of conspiracy. *Baby Food*, 166 F.3d at 122. Valspar must "present evidence 'that tends to exclude the possibility' that [Defendants] acted independently."

[10] *See* Section II.B, *infra.*
[11] *Id.*
[12] *See* Section III.B.5; Appendix F (Post-2010 Market Conditions).

Matsushita, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764); *see also Baby Food*, 166 F.3d at 124. To avoid deterring procompetitive conduct, "antitrust law limits the range of permissible inferences from ambiguous evidence" and requires that any plaintiff-asserted inferences of conspiracy be plausible. *Matsushita*, 475 U.S. at 588, 593; *see also InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 160 (3d Cir. 2003). Conduct "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588.

Plaintiffs often point to so-called "plus factors" in an effort to satisfy their burden. However, it is insufficient to identify evidence that, in some contexts, might constitute a "plus factor"; what matters is whether the claimed plus factors rule out independent action because, if they do not, they are inadequate to survive summary judgment. *Baby Food*, 166 F.3d at 122-24. "[C]are must be taken with" some potential plus factors, such as "evidence that the defendant had a motive to enter into a price fixing conspiracy" and "evidence that the defendant acted contrary to its interests" because they each "may indicate simply that the defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 322 (3d Cir. 2010).

This caution against inferring a conspiracy from ambiguous evidence is particularly important in markets that are highly concentrated, as Valspar claims this market is,[13] because in such markets, "any single firm's 'price and output decisions will have a noticeable impact on the market and on its rivals'" so "any rational decision" of firms in such markets must necessarily "take into account the anticipated reaction" of competitors. *In re Flat Glass Antitrust Litig.*, 385

[13] Compl. ¶ 38; Clair Decl. Ex. 109 ¶ 28.

F.3d 350, 358-59 (3d Cir. 2004) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* ¶ 1429, at 207 (2d ed. 2000) (hereinafter "Areeda & Hovenkamp"). In an oligopoly, firms tend to set "prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions," which is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); *see also Flat Glass*, 385 F.3d at 359; *Baby Food*, 166 F.3d, at 134-35; *In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d 777, at 787-89 (M.D. Pa. 2014). Mere evidence of interdependence is legally insufficient to support an inference of conspiracy.[14] *Baby Food*, 166 F.3d at 122. "[T]he most important evidence will generally be non-economic evidence that there was an actual, manifest agreement not to compete." *Flat Glass*, 385 F.3d at 360 (internal quotation marks omitted). A mere "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Here, the evidence demonstrates that the Defendants, operating in an oligopolistic market, in fact competed against each other based on their respective unilateral, independent decision-making. And there is no evidence of a "manifest agreement not to compete." An inference of conspiracy is precluded and summary judgment is warranted.

II. The Record, Evidencing a Competitive Marketplace, Supports Summary Judgment.

Valspar erects an implausible theory of conspiracy against the backdrop of a record depicting a competitive marketplace. Valspar claims that DuPont, Kronos, Millennium,

[14] *See* Clair Decl. Ex. 99 at 15:18-16:6 (Valspar's expert describing an "[redacted]").

Huntsman, and Tronox engaged in a conspiracy from sometime in 2002 through at least December 2013 and in which over a hundred people allegedly participated in the predicate acts, and there were numerous changes in pricing decisionmakers, but not one ever objected or accidentally leaked information to tip off someone about the extended scheme.[15] This supposed conspiracy apparently continued undetected despite the due diligence conducted in connection with the involved businesses being bought and sold, and the involvement of the U.S. Trustee in Tronox's bankruptcy proceedings.[16] Valspar also contends that it continued undeterred for years after DuPont and the other Defendants were sued, their documents were produced, their executives were deposed (never invoking the Fifth Amendment), and they reached public settlements. Despite the public nature of the price increase announcements that ground Valspar's theory, and the publicity surrounding the Maryland class action, the DOJ never took action.

It is not surprising, then, that, despite access to an extensive discovery record with well over a million documents and over 100 depositions, Valspar has not unearthed *any* evidence showing any agreement among Defendants.[17] To the contrary, the witnesses explicitly denied knowing about or participating in any price-fixing conspiracy.[18] Two former Valspar employees responsible for TiO2 purchases were in fact "[redacted]" [redacted] "[redacted]."[19]

To compensate for the lack of actual evidence supporting a conspiracy, Valspar relies largely on contorted interpretations of select documents and the opinion of its economic liability

[15] Compl. ¶¶ 187–88; Clair Decl. Ex. 106 ¶¶ 5, 124, 152 & Appendix XV.
[16] *See, e.g.*, Clair Decl. Ex. 110 at 207.
[17] In fact, Dr. Williams [redacted]. Clair Decl. Ex. 100 at 20:05-23:13
[18] *See* Appendix A (Testimony Denying Existence of or Knowledge of the Alleged Conspiracy).
[19] Clair Decl. Ex. 33 at 232:13-234:19.

expert, Dr. Williams. Dr. Williams's opinion in turn relies principally on (1) certain industry conditions that are supposedly conducive to collusion—conditions that, as he admits, are found in numerous competitive industries; (2) parallel price increase announcements; (3) his interpretation of select documents that he concludes satisfy certain additional plus factors; and (4) Valspar's damages expert's opinion that average prices were higher than "but-for" prices predicted by his econometric model.[20] None of that suffices as grounding for an inference of conspiracy as a matter of law.

A. The Court Should Exercise Its Independent Judgment, with the Benefit of Discovery from Valspar and Recent Decisions Involving Similar Facts.

As discussed below, the extensive record of competition and DuPont's independent decision making negates any legitimate inference of conspiracy and warrants summary judgment. DuPont recognizes that in response Valspar will no doubt rely on the Maryland court's order denying summary judgment in the previous class case in an attempt to persuade this Court to rule the same way.[21] That decision, which rested on unsound legal analysis and flawed factual inferences, was in error and merits a fresh look. That error becomes more apparent when examined with the benefit of (1) new decisions analyzing the kind of conscious parallelism at issue here and (2) new evidence not previously available to the court in Maryland.

In *In re Text Messaging Antitrust Litigation*, 782 F.3d 867, 871 (7th Cir. 2015), a "small number of leading firms" allegedly engaged in "exchanges of price information, orchestrated by

[20] *See* Clair Decl. Ex. 106 ¶ 92. Dr. Williams testified that he is relying on [redacted]. [redacted] Decl. Ex. 100 at 60:9-63:8.

[21] Indeed, Valspar's liability expert cites that order repeatedly in his report. Clair Decl. Ex. 106 at ¶¶ 49, 54, 63, 74, 82, 88, 91, 98, 104, 106, 121, 126, 142, 144. DuPont reached a settlement prior to the Maryland court's ruling; the court thus did not rule on DuPont's independent motion, which outlined (among other things) its extensive and independent deliberative process in determining whether and when to announce a price increase, outlined in Appendix E to this motion.

the firms' trade association,"[22] and implemented "uniform price increases." The Seventh Circuit affirmed summary judgment for the defendants, holding that the plaintiff's circumstantial evidence (*e.g.*, ambiguous documents, parallel pricing, and market conditions) was insufficient to defeat summary judgment because while the plaintiff "presented circumstantial evidence consistent with an inference of collusion," plaintiff's "evidence [was] equally consistent with independent parallel behavior." *Id.* at 871-79. Collusion is unlawful "only when based on agreement" and it is not illegal "for a firm to raise its price, counting on its competitors to do likewise (but without any communication with them on the subject) and fearing the consequences if they do not." *Id.* at 876, 879.

Similarly, *In re Chocolate*, 999 F. Supp. 2d at 782, 787-88, decided by another court within this Circuit, concerned a "highly concentrated" market in which one major supplier announced price increases that others quickly followed. In granting defendants summary judgment, the court recognized that parallel price announcements are consistent with unilateral conduct and found persuasive the "record demonstrating that each [defendant] independently and carefully evaluated its pricing structure, and that each strategically and competitively priced its products to realize whatever profit it could." *Id.* at 796. Plaintiffs' allegations regarding oligarchic market conditions, "general assertions" of pretext, membership in trade associations, and other circumstantial evidence were insufficient to permit "a reasonable inference of a price-fixing agreement." *Id.* at 797-805.

Valspar's theory rests in large part on parallel price increase announcements in which one defendant would announce and the other defendants frequently followed thereafter. But as these and several other decisions make clear, a pattern of "follow the leader" pricing is innocuous:

[22] It is undisputed that no such exchanges took place here.

"'follow 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.***" *Text Messaging*, 782 F.3d at 871 (emphasis added). "Express collusion violates antitrust law; tacit collusion does not." *Id.* at 872. *Text Messaging* and *Chocolate* are well in line with previous authorities, but their similarity to the facts here, and their clarity about the inferences that can—and cannot—be made from evidence of conscious parallelism make both particularly helpful persuasive authority for evaluating Valspar's claim.

This Court also has the benefit of additional evidence of Valspar's own experience as a TiO2 purchaser. That evidence, as discussed below, further demonstrates the competitive nature of the market. Valspar engaged in aggressive negotiations with the Defendants, and successfully played one off the other to secure the most favorable pricing and other terms.

In addition to taking into account the new legal and factual landscape, DuPont respectfully requests that the Court examine critically the Maryland court's conclusions. For example, although it recognized that in an oligopolistic market, such as the TiO2 industry, follow-the-leader pricing is consistent with unilateral behavior, the Maryland court found the sheer *number* of parallel price increases over the extended time period as suggesting collusion.[23] But why would it be in oligopolists' respective self-interest to follow rivals' pricing lead sometimes, but not all the time—particularly where, as here, announcements only start a negotiation? The court also relied on *Flat Glass* to conclude that lawful conscious parallelism occurs only where there is a "possibility that a price leader would be forced to rescind its increase because competitors decided not follow it" and denied summary judgment based on plaintiffs' argument that none of the Defendants rescinded the formal price increase

[23] *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799, 825-26, 830 (D. Md. 2013) (hereinafter "Maryland Order").

announcements in the relevant time period.[24] But the portion of *Flat Glass* that the Maryland court relies upon actually makes the opposite point, recognizing that other firms in the market would recognize it is in their respective unilateral interests to match the increase, eliminating the need for the first firm to rescind it. *Flat Glass*, 385 F.3d at 359 ("Because each of the other firms knows this . . . [t]hey will obviously choose X when they believe that it will maximize industry profits.") (quoting Areeda & Hovenkamp, *supra*, ¶ 1429, at 207-08). The court in *Flat Glass* recognized what economists routinely have: firms in an oligopoly, acting independently, will "obviously" follow a leader's increase when it will maximize industry profits and that doing so is not a violation of the Sherman Act. *Id.*

The Maryland court also focused on the possibility that Defendants had "fixed" announced prices, even if they did not fix *actual* prices, relying on *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F. 3d 651, 656 (7th Cir. 2002).[25] But that conclusion ignores Judge Posner's caveat in that same case: "[I]f many sales are made at prices below the list price, the fact that the sellers' list prices are the same is not compelling proof of collusion." *Id.* (citing *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53-54 (7th Cir. 1992)); *see also*, *In re Citric Acid Litig.*, 191 F.3d 1090, 1102-03 (9th Cir. 1999).[26] It also ignores the

[24] *Id.* at 825. [redacted] *See infra* Section III.B.1.c; *see also* [redacted].

[25] Maryland Order at 825-26.

[26] Both *Corn Syrup* and *Flat Glass*, to which the Maryland court compared the facts of this case, are actually quite different. In *Corn Syrup*, there was actual evidence that the defendants had "an understanding within the industry not to undercut each other's prices"; "evidence of explicit agreement, and other economic evidence as well that bolsters the plaintiffs' case"; and two of the witnesses in the case invoked their Fifth Amendment rights regarding participation in the alleged conspiracy. *Corn Syrup*, 295 F.3d at 662-64. Similarly, in *Flat Glass*, one of the competitors applied for leniency under the Department of Justice's Corporate Leniency Policy, admitting to

undisputed evidence that TiO2 is not sold at list prices, [redacted][27] which following Judge Posner's guidance itself makes the inference of collusion "not compelling." In short, the Maryland court's summary judgment opinion cannot fairly be reconciled with the law or the evidence.

B. Defendants' Vigorous Competition Precludes an Inference of Conspiracy.

Valspar's conspiracy theory is contradicted by the unrebutted evidence of Defendants' consistent competition for Valspar's—and other customers'—business.[28] This competition resulted in "significant market share shifts," and is "plainly . . . inconsistent with" and "strongly undermines" an inference of conspiracy. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1318 (1st Cir. 2003); *see also Baby Food*, 166 F.3d at 137-38 (affirming summary judgment in light of evidence of "strong, intensive competition"); *Citric Acid Litig.*, 191 F.3d at 1102-03.

1. Valspar Leveraged its Bargaining Power to Obtain Favorable Price and Non-Price Terms In Its Supply Contracts.

The record is replete with evidence of competition between DuPont and its alleged co-conspirators. Valspar's own experience is exemplary of that consistent competition. Valspar, as [redacted]. Bennett Bomar, Valspar's TiO2 purchasing director, explained:

> [redacted]

"an agreed upon, across the board price increase for the entire United States." 385 F.3d at 363-67. The facts in *Flat Glass* and *Corn Syrup* are actually quite dissimilar to this case; this case more closely mirrors the facts in *Baby Food*, *Text Messaging*, and *Chocolate*.

[27] *See infra* Section III.B.1.c; *see also* Appendix D.

[28] *See* Appendices B & C.

[29] Clair Decl. Ex. 108 ¶ 36

[redacted].[30]

Through those negotiations, Valspar extracted very favorable terms. For instance, [redacted];[32] [redacted];[33] [redacted] that [redacted].”[34]

Valspar’s contracts also contained [redacted], which it repeatedly used to provoke competition and lower its costs between the suppliers.[35] For example:

- [redacted] and

[30] Clair Decl. Ex. 9 at 62:15-63:1; *see also,* Clair Decl. Ex. 111.
[31] Clair Decl. Ex. 112 at 850.
[32] *Id.* The volumes stated in the contract were anticipated ranges, not fixed volumes. *See, e.g.*, Clair Decl. Ex. 113 at 829 (2006-2009 contract clarifying that “[redacted]”); Clair Decl. Ex. 23 at 152:22-153:6.
[33] Clair Decl. Ex. 112 at 849.
[34] *Id.* at 6851. [redacted]. Clair Decl. Ex. 102 at 124:11-19; 236:14-237:15 (stating that Valspar and DuPont were “[redacted]” and recounting a DuPont representative stating “[redacted]”); *see also*, Clair Decl. Ex. 113 (2006-2009 agreement); Ex. 114 (2009-2010 agreement); Ex. 115 (2011-2013 agreement).
[35] *See, e.g.* Clair Decl. Ex. 116 at 977 (2001-2003 agreement); Ex. 113 at 831 (2006-2009 agreement); Ex. 114 at 1080 (2009-2010 agreement); Ex. 115 at 969 (2011-2013 agreement); Ex. 117 at 524 (2004-2005 agreement [redacted]); Ex. 118 (2006-2007 agreement); Ex. 119 at 418 (2006-2007 agreement [redacted]); Ex. 120 at 536 (2001-2005 agreement [redacted]).
[36] Clair Decl. Ex. 121 at 761; Ex. 122 at 793-794; Ex. 123 at 885-886; Ex. 124 at 247-249.

[redacted].[37]

- [redacted].[38]
- [redacted],[39] [redacted] "[redacted]."[40] [redacted][41]
- [redacted]."[42]
- [redacted],[44] [redacted].[45]
- [redacted].[46]

And, on at least one occasion, Valspar [redacted]

[redacted].[47] [redacted]

[37] Clair Decl. Ex. 125; Ex. 126.
[38] Clair Decl. Ex. 127; Ex. 128; Ex. 129; Ex. 33 at 167:16-22; Ex. 130 ("[redacted]"); Ex. 131 (Millennium's Jerry Bassett reporting that: "[redacted]").
[39] Clair Decl. Ex. 132 at VAL0068233_0002; Exs. 133-36.
[40] Clair Decl. Ex. 137; Ex. 90 at 183:12-184:9, 190:9-16.
[41] Clair Decl. Ex. 138 at 565.
[42] Clair Decl. Ex. 139.
[43] Clair Decl. Ex. 140 at 408.
[44] Clair Decl. Ex. 141 at 721; Ex. 142 at 133-134; Ex. 143 at 239-240; Ex. 144.
[45] Clair Decl. Ex. 145 at 087; Exs. 146-148.
[46] Clair Decl. Ex. 149 at 859; Ex. 150 at 587; Ex. 151 at 771-772; Ex. 152 at 467.
[47] *See* Clair Decl. Ex. 153; Ex. 6 at 336:13-348:21; Clair Decl. Ex. 154 ; Clair Decl. Ex. 156. [redacted]

[redacted][49]

It is simply implausible that Valspar could successfully utilize [redacted], against members of a price-fixing conspiracy. 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 shows successful conversions based on meet-or-release clauses and no evidence of punishment. Lacking evidence of actual punishment, Valspar's liability expert relies on "the ability to punish" as a supposed "plus factor."[50] But that makes no sense, especially when one considers the duration of the supposed conspiracy. Rather than the tortured inference Valspar urges, the more plausible inference is that the lack of punishment in the face of competition means that there was no conspiracy at all. *Matsushita*, 475 U.S. at 594 ("[C]utting prices in order to increase business often is the very essence of competition.").

[redacted]

[48] Clair Decl. Ex. 153-154; Ex. 157 at 789-790; Ex. 158-159; Ex. 6 at 335:11-341:22.
[49] Clair Decl. Ex. 6 at 336:12-348:22; Ex. 156.
[50] Clair Decl. Ex. 109 ¶ 190.

2. Defendants' Shares of Valspar's Business Shifted Dramatically.

Competition for Valspar's business is reflected in Defendants' undisputed significant share shifts.[51] DuPont's share at Valspar ranged from [redacted]% at its highest to [redacted]% at its lowest; Millennium's ranged from [redacted]% to [redacted]%; Kronos, from [redacted]% to [redacted]%; and Huntsman's from [redacted]% to [redacted]%.[52] [redacted]

[51] Valspar's expert Dr. Williams contends [redacted] Decl. Ex. 106, ¶ 129. [redacted] Clair Decl. Ex. 108 ¶¶ 80-86. Dr. [redacted].

[52] Clair Decl. Ex. 108 ¶ 73.

[53] *See e.g.*, Clair Decl. Ex. 160 at 132 ([redacted] "[redacted]. [redacted]; Ex. 131; Ex. 122 at 793-794; Ex. 123 at 885-886; Ex. 127; Ex. 161 [redacted]; Ex. 162 at 224 (Sept. 1, 2004 [redacted] "[redacted]" with Kronos); Ex. 163 at 254; s*ee also* Ex. 108 ¶ 74.

[54] Clair Decl. Ex. 138 at 565 [redacted] "[redacted]"); Ex. 132 at VAL0068233_0002; Ex. 133.

[55] Clair Decl. Exs. 164-166; Ex. 167 at 456; Ex. 168 at 854.

[56] Clair Decl. Ex. 169 at 465; Ex. 170 [redacted] "[redacted]."); Ex. 147 at 992 [redacted] "[redacted]"); Ex. 145 at 087.

[redacted][59]

And although it is a particularly large customer known for its aggressive negotiating tactics, Valspar was not unique in its ability to negotiate pricing and other terms with DuPont and the other suppliers. The record is rich with examples of price competition among Defendants for other customers, showing competition on price and other terms was very much the norm.[60] Valspar's allegations are rebutted by the extensive, undisputed record of price competition and corresponding share shifts. That is entirely dispositive of its claim. *Baby Food*, 166 F.3d at 131 ("[C]ontemporaneous documents" showing a defendant's "independent pricing decisions" and plans to undercut competitors' prices in an effort to "improve the volume" of its own sales were inconsistent with conspiracy); *Chocolate*, 999 F. Supp. 2d at 794 ("internal documents" reflecting "aggressive in-house pricing discussions focused on catching competition off guard" and "record evidence" of "frustration among competitors when these attempts were successful" showed "independent decision-making" that defeated conspiracy claims).

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[57] Clair Decl. Ex. 149 at 859 [redacted] ."); Ex. 150 at 587; Ex. 151 at 771-773; Ex. 152 at 467 [redacted] ."); Ex. 171 at 479-480; Ex. 108 ¶ 74-75 & Tbl. 6 [redacted]; *compare* Ex. 113 ([redacted]) with Ex. 114 [redacted]

[58] Clair Decl. Ex. 108 ¶ 75 & Tbl. 6 [redacted]; *see also, e.g.*, Ex. 172 at 416 [redacted] "[redacted]").

[59] Clair Decl. Ex. 108 ¶¶ 74-75 & Tbl. 6 [redacted]; *see also, e.g.*, Ex. 173 at 089 [redacted]).

[60] *See* Appendix C (Evidence of Competition for Other Customers' Business)

III. Each of the Pillars of Valspar's Case Is Equally Consistent with Independent Conduct and Is Insufficient to Support an Inference of Conspiracy.

With no direct evidence of a conspiracy, Valspar relies on a number of alleged "plus factors," outlined by Dr. Williams, that it contends are circumstantial evidence of a conspiracy. Dr. Williams categorizes his alleged plus factors as (1) market conditions he claims make the TiO2 market in North America favorable for collusion and (2) actions that the Defendants allegedly took against their own self-interests but for the existence of an agreement.[61] The mere presence of alleged "plus factors," however, is insufficient to defeat summary judgment unless those plus factors can exclude the possibility of independent action. *Ins. Brokerage*, 618 F.3d at 321-24. Here, the circumstantial evidence is equally or more consistent with unilateral action, and summary judgment is appropriate. *Matsushita*, 475 U.S. at 588; *Baby Food*, 166 F.3d at 122-24.

A. Market Conditions Are Insufficient To Support a Reasonable Inference of Conspiracy.

Valspar's attempt to buttress its claim by pointing to certain market conditions that Dr. Williams contends are conducive to collusion fails. Dr. Williams contends that the market for TiO2 is ripe for collusion because: [redacted][62] But even accepting his conclusions for purposes of this motion, they are insufficient as a matter of law to support an inference of conspiracy. Dr. Williams [redacted]

[61] Clair Decl. Ex. 106 at 26-85.
[62] *See* Clair Decl. Ex. 106 ¶ 47; *see also id.* at 17-45.

[redacted].[63] Unsurprisingly, courts routinely hold that market conditions and a motive to collude are insufficient bases from which to infer a conspiracy. *Chocolate*, 999 F. Supp. 2d at 789-91 (relying on *Baby Food*, 166 F.3d at 122); *see also Text Messaging*, 782 F.3d at 876-79.

B. Valspar's Alleged Evidence of Actions Against Defendants' Self-Interest Does Not Exclude the Possibility of Independent Action.

Dr. Williams supplements [redacted]

[redacted][64] When confronted with accusations that the defendants have acted contrary to their interests, "a court looks to 'evidence that the market behaved in a noncompetitive manner.'" *Flat Glass*, 385 F. 3d. at 361 (quoting *Corn Syrup*, 295 F.3d at 655). But, because such evidence "could merely constitute a restatement of interdependence . . . no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons." *Baby Food*, 166 F.3d at 122; *see also, Flat Glass*, 385 F. 3d. at 359-61. These supposed plus factors are insufficient to carry Valspar's burden.

1. Nothing About Defendants' Price Increase Announcements Supports an Inference of Conspiracy.

Valspar and Dr. Williams rely heavily on [redacted]"[65] But the

[63] Clair Decl. Ex. 100 at 65:14-69:11, 76:21-80:3, 102:19-103:5, 105:2-9, 113:6-126:21.
[64] Clair Decl. Ex. 106 at 49-85.
[65] Clair Decl. Ex. 106 at ¶¶ 87-89 [redacted]; Ex. 174, Response to Interrogatory No. 6 at 16.

pattern of so-called "simultaneous" announcements—which were not simultaneous—is fully in line with expected, unilateral, oligopolistic conduct. It therefore is defective as proof of a conspiracy as a matter of law. And the evidence establishes that [redacted] [redacted][66]—further disqualifying the announcements as adequate evidence to survive summary judgment.

a. Parallel Price Increases Were in Each Firm's Unilateral Self-Interest Absent Agreement.

Parallel price announcements, in which one supplier announces a change and the others follow closely behind, do not support an inference of a conspiracy. *Text Messaging*, 782 F.3d at 871 ("'[F]ollow the leader' pricing . . . means coordinating . . . pricing ***without an actual agreement to do so***.") (emphasis added); *see also Chocolate*, 999 F. Supp. 2d at 788-92. Indeed, both the law and economic theory establish that such conduct is in the unilateral, independent interests of competitors in interdependent, oligopolistic markets, who must consider rivals' anticipated reactions when making pricing decisions.[67] As the First Circuit explained in a similar context,

> After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry."

White v. R.M. Packer Co., 635 F.3d 571, 585-86 (1st Cir. 2011); *see also, Wilcox v. First Interstate Bank of Or., N.A.*, 815 F.2d 522, 526-27 (9th Cir. 1987).

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[66] *See infra* section III.B.1.c; *see also generally* Appendix D.

[67] *See supra*, sections I and II.A; *see also* Clair Decl. Ex. 74 at 34:11-35:5 (in deciding whether to make price increase announcements, "[redacted]").

The undisputed facts reveal this is the precise phenomenon that occurred here. Because price announcements were [redacted], [68] the announcements represented the upper limit of any increase a supplier could achieve in the coming months. Thus, to ***not*** follow a competitor's announcement was to leave money on the table and forego even the ***option*** of negotiating for that increase. *See Chocolate*, 999 F. Supp. 2d at 796 (recognizing competitor's "failure to follow the price increases of its competitors would have been detrimental to its economic self-interest.").

Further, despite Valspar's incantations of "simultaneous" announcements, it is indisputable that they were made days and weeks apart.[69] At his deposition, Dr. Williams [redacted].[70] But, such economically predictable "follow the leader" pricing simply does not give rise to an inference of conspiracy. *Baby Food*, 166 F.3d at 122.

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

DuPont's independent deliberations regarding potential price increases establish that DuPont acted unilaterally, as did the other suppliers.[71] DuPont's deliberative process involved a vast number of people over the years. Decisions on whether to announce price increases were

[68] *See, e.g.*, Clair Decl. Ex. 112 at 849 (90 days); Ex. 113 at 832 (90 days); Ex. 114 at 081 (90 days); Ex. 124 at 247 (90 days); Ex. 117 at 523 (120 days); Ex. 119 at 418 (90 days); Ex. 155 at 543 (45 days); Ex. 48 at 82:21-83:24 ("[redacted]"); Ex. 108 ¶ 155.
[69] Clair Decl. Ex. 108 ¶¶ 161-68.
[70] Clair Decl. Ex. 109 ¶ 81.
[71] *See* Appendix E (Evidence of Defendants' Independent Deliberation Regarding Price Increases).

made by [redacted][72] Those individuals [redacted][73] For example, prior to the January 10, 2003 price announcement, [redacted][74] And before the June 4, 2007 price announcement, [redacted]"[redacted]" "[redacted]."[75] The depth and extent of DuPont's deliberations themselves demonstrate the absence of the agreement Valspar theorizes. *See Chocolate*, 999 F. Supp. 2d at 794-96; Appendix E.

c. Significant Negotiation After Price Increase Announcements Makes Them an Implausible Tool For a Conspiracy

As Valspar's witnesses all confirmed, [redacted]

[72] Clair Decl. Ex. 31 at 233:2-236:23.
[73] *See* Appendix E; *see also*, Clair Decl. Ex. 74 at 32:4-33:9 [redacted]" and identifying as some of the factors considered: "[redacted]").
[74] *See* Appendix E.
[75] *Id.*; Clair Decl. Ex. 545 at 704-705.

[redacted]. And Valspar often successfully [redacted] [redacted][76] For example, one Valspar employee explained that he would "[redacted] [redacted] [redacted]."[77]

Valspar's success in negotiating announced increases is supported by the unrebutted empirical evidence, which demonstrates that [redacted] [redacted] [redacted] [redacted].[78] The significant degree of individual negotiation of actual prices makes it highly implausible that Defendants would have chosen such an ineffectual tool to execute a price-fixing conspiracy. *Reserve Supply Corp.*, 971 F.2d at 53-54. The pattern of price increase announcements is entirely defective as proof of a conspiracy.

2. Participation in the TDMA Trade Association Does Not Give Rise to an Inference of Conspiracy.

Dr. Williams opines that [redacted] [redacted] [redacted] [redacted].[79] Trade association participation is common, legitimate activity "more likely explained by . . .

[76] For example, Valspar's Adam Gilder testified [redacted] "[redacted] [redacted]. [redacted] Decl. Ex. 33 at 114:08-115:16. [redacted] [redacted] [redacted] [redacted]. *Id.* at 115:10-13. *See also* Clair Decl. Ex. 65 at 173:15-25 [redacted] [redacted]."); Ex. 175 [redacted] [redacted]. [redacted]; *see also generally* Appendix D ([redacted]).

[77] Clair Decl. Ex. 6 at 99:22-100:21.

[78] Clair Decl. Ex. 108 ¶ 187.

[79] Clair Decl. Ex. 106 ¶ 109.

lawful, free market behavior" than by collusion. *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009); *see also Citric Acid Antitrust Litig.* 191 F.3d at 1097, 1105-06; *Chocolate*, 999 F. Supp. 2d at 804 (conspiracy claim based on trade association attendance is "pure conjecture"). CEFIC, which represents a large group of industries and is not alleged to be involved in any collusion, supervised the TDMA meetings for antitrust compliance, and the minutes of the TDMA meetings—at which Valspar speculates that Defendants may have conspired—reflect their legitimate business purposes.[80] These meetings were also attended by other TiO2 suppliers throughout the world not alleged to be part of any conspiracy.[81] DuPont did not even attend TDMA General Committee meetings, the supposed forum for Defendants' contact, before 2010.[82] And when it did attend TDMA meetings, [redacted].[83] There is no evidence that Defendants discussed pricing at these meetings. Dr. Williams even admitted at his deposition that [redacted][84] Instead, [redacted] *Id.* The assumption that TDMA meetings facilitated a conspiracy among Defendants is just that—an assumption—and an implausible one. It is insufficient as a matter of law.

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[80] *E.g.*, Clair Decl. Ex. 176 at 380-384 (Sept. 29, 2003 Meeting Minutes noting discussion of [redacted]); Ex. 177 at 739-742; Ex. 178 at 226-229; Ex. 21 at 123:14-124:06; Ex. 179; Ex. 180 (global statistics sub-committee); Ex. 181 (same).

[81] TDMA members throughout the relevant time period have included, in addition to Defendants and Tronox, Cinkarna Celje d.d., Evonik Industrie, Precheza AS, Sachtleben GmbH, Zaklady Chemiczne POLICE S.A., Ishihara Sangyo Kaisha, Ltd., and Tayca. Clair Decl. Exs. 179-181; Ex. 176 at 380-384.

[82] Clair Decl. Ex. 7 at 147:15-25; Ex. 70 at 302:15-303:2.

[83] Clair Decl. Ex. 21 at 124:7-17; Ex. 25 at 161:21-162:19; Ex. 67 at 32:3-33:15; Ex. 12 at 24:9-24:10, 98:1-99:6; Ex. 4 at 115:19-116:12; Ex. 31 at 234:15-235:19.

[84] Clair Decl. Ex. 100 at 276:15-279:14.

No more probative of a conspiracy inference is Valspar's reliance on the TDMA's Global Statistics Program ("GSP").[85] In 2002, [redacted].[89]

The Ninth Circuit in *In re Citric Acid Antitrust Litigation* held that a very similar statistics program run by another CEFIC group did not support an inference that a defendant fixed prices even though, unlike here, other members of that program had actually *admitted* to price-fixing. 191 F.3d at 1093, 1097-1100 (the program was "equally well, if not better, interpreted as a decision in [the company's] own independent self-interest."); *see also, Williamson Oil Co.*, 346 F.3d at 1318 ("[I]t is far less indicative of a *price fixing* conspiracy to exchange information relating to sales as opposed to prices."); *Superior Offshore Int'l, Inc. v. Bristow Group, Inc.*, 738 F. Supp. 2d 505, 516 (D. Del. 2010) (such information exchanges "'can

[85] Clair Decl. Ex. 106 ¶¶ 80-82.
[86] Clair Decl. Ex. 182; Ex. 183 at 237; Ex. 184 at 656.
[87] Clair Decl. Ex. 185 at 022-024; Ex. 13 at 41:5-42:7.
[88] Clair Decl. Ex. 13 at 179:2-181:3; *see also, id.* at 25:2-28:24, 42:1-7, 246:8-247:6, 257:4-259:1; Ex. 182; Ex. 37 at 119:8-25; Ex. 24 at 205:8-207:9; Ex. 46 at 95:23-96:10; Ex. 85 at 87:8-88:15; Ex. 40 at 120:24-123:5; Ex. 45 at 145:1-22; Ex. 7 at 46:2-25; Ex. 28 at 44:7-45:16, 47:17-48:18, 51:3-53:19.
[89] Clair Decl. Ex. 28 at 44:9-45:6.

in certain circumstances increase economic efficiency'").[90] Indeed, even Dr. Williams admitted that [redacted].[91] Dr. Williams's contention that [redacted] is without explanation or legitimate basis. DuPont's participation in the GSP does not exclude the possibility that it acted unilaterally.

3. Use of Consultants Does Not support an Inference of a Conspiracy.

Valspar also alleges that the Defendants exchanged information through the use of industry consultants. The use of industry consultants is a legitimate and commonplace activity, in which Valspar itself engaged.[92] Some, [redacted] For instance, DuPont engaged [redacted].[95] [redacted]

[90] *See also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (statistical data exchanges "among competitors [do] not invariably have anticompetitive effects" and can "render markets more, rather than less, competitive"); *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 573-74, 586 (1925); *Cement Mfrs.' Protective Ass'n v. United States*, 268 U.S. 588, 603-06 (1925).

[91] Clair Decl. Ex. 100 at 119:8-126:21.

[92] *E.g.*, Clair Decl. Ex. 26 at 77:2-15; 78:14-16; 90:12-92:18; 98:2-106:5 ([redacted]); *see also* Clair Decl. Ex. 33 at 98:11-100:1 ([redacted]).

[93] Clair Decl. Ex. 14 at 134:17-136:15 (detailing [redacted]), 147:5-15 (discussing [redacted]), 151:17-152:4, 161:10-21 (describing [redacted]).

[94] Clair Decl. Ex. 7 at 56:2-57:23.

[95] Clair Decl. Ex. 28 at 27:19-30:15.

[redacted].[96] This kind of information gathering about one's competitors is a *pro-competitive* activity well within firms' unilateral best interest. *Williamson Oil*, 346 F.3d at 1313 ("to keep tabs on the commercial activities of [one's] competitors" is "economically beneficial").[97] Valspar's expert admitted that firms "[redacted]."[98] Even when multiple competitors use a common consultant, providing that consultant with information about their own respective businesses in order to obtain the consultant's advice and analysis is a legitimate and rational activity, not indicative of conspiracy. *Williamson Oil*, 346 F.3d at 1295-96, 1313. The law is clear that the use of common consultants is simply irrelevant to conspiracy claims "[a]bsent some indication" that the consultants "facilitated a conspiracy . . . to restrain trade." *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999). No such indication exists here. Valspar cannot point to a single piece of evidence demonstrating that any of the Defendants used a consultant to convey its pricing plans to, or gain agreement from, the other Defendants.

4. Inter-company sales were sporadic and served legitimate purposes.

Over the course of a decade, Defendants engaged in a handful of inter-company sales that, as the undisputed record makes clear, occurred for legitimate, non-collusive reasons. Dr. Williams [redacted][99] [redacted]"

[96] Clair Decl. Ex. 187.
[97] *See also* Clair Decl. Ex. 99 at 15:18-18:10 (Valspar's expert testifying that in an interdependent oligopoly, it would be in firms' unilateral interest to [redacted]).
[98] Clair Decl. Ex. 99 at 15:18-16:6.
[99] S*ee* Clair Decl. Ex. 106 ¶ 100, Fig. 18; Ex. 99 at 251:15-253:7.

[redacted][100] [redacted][102] [redacted][103] [redacted][104]

Moreover, Dr. Williams [redacted][105] It is also undisputed that the [redacted],[106] [redacted][107] None of Valspar's theories "exclude the possibility of independent action." *Monsanto*, 465 U.S. at 768. To the contrary, the evidence

[100] *See* Appendix G (Evidence of Inter-Company Sales).
[101] *See id.*
[102] *See* Clair Decl. Ex. 106 at Figs. 9-18; Appendix G.
[103] Indeed, Valspar's expert acknowledges that [redacted]" Clair Decl. Ex. 106 ¶ 103 n.157.
[104] *See* Appendix G.
[105] Clair Decl. Ex. 106 at Figs. 12-17 [redacted].
[106] Clair Decl. Ex. 188 at 220; Ex. 189 at 568; Ex. 204, at 076.
[107] *See, e.g.*, Clair Decl. Ex. 190 at 393; Ex. 191 at 072-073; Ex. 192; Ex. 193 at 993-999; Ex. 197 at 105-106; Ex. 199 at 149-152; Ex. 200; Ex. 201 at 196; Ex. 202; Ex. 203 at 434; Ex. 205.

provides legitimate, non-collusive reasons for these transactions and their prices, and Valspar cannot manufacture an issue of material fact by ignoring it.

5. Valspar's Damages Expert's Claim is Insufficient to Support an Inference of Conspiracy and Undermines Valspar's Entire Case.

Valspar's reliance on its damages expert's conclusion that [redacted] cannot save its claim.[108] In fact, the notion reveals the fallacy of its theory. The supposed [redacted] *after* the Defendants were sued in the Maryland action.[109] Simply excluding the period after the Maryland complaint was filed (March 2010 through December 2013) reduces the alleged [redacted][110] The notion that DuPont and the other Defendants would brazenly conspire to raise prices—and significantly more than they had in the preceding years—*after* they were sued and under a spotlight simply defies logic. The post-2010 TiO2 market was subject to several legitimate market forces that drove pricing: [redacted][111] Market conditions, not some conspiracy, explain the increased pricing.[112] That Valspar has to

[108] Clair Decl. Ex. 106 ¶¶ 90-94; *see also* Ex. 105 at 9.
[109] Clair Decl. Ex. 107 ¶¶ 69-70.
[110] Clair Decl. Ex. 108 at 140.
[111] *See* Appendix F (Evidence of Post-2010 Market Conditions); Clair Decl. Ex. 9 at 319:13-325:21; Ex. 207; Ex. 208.
[112] [redacted] Clair Decl. Ex. 109 ¶¶ 122, 124, 204.

rely so heavily on this post-2010 period undermines the entirety of Valspar's claims.[113]

Furthermore, the fact that Valspar's expert developed a regression showing an alleged overcharge[114], which every plaintiff's expert does, cannot itself be sufficient to support an inference of conspiracy. Courts often grant summary judgment in the face of expert opinion that an assumed conspiracy inflated pricing. *See*, *e.g.*, *Baby Food*, 166 F.3d at 123; *White*, 635 F.3d at 585-86; *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1037-38 (8th Cir. 2000); *see also Matsushita*, 475 U.S. at 1360 n.19. Valspar's alleged overcharge simply cannot rule out the possibility of independent, competitive action.

CONCLUSION

For the foregoing reasons, DuPont respectfully requests that this Court grant its motion for summary judgment on Valspar's claim in its entirety and, in the alternative, on Valspar's claims for damages accrued after February 9, 2010.

[113] DuPont believes that the entire conspiracy is belied by the evidence, but the added implausibility of a conspiracy from February 2010 forward should be adequate grounds to grant DuPont's motion for summary judgment on that portion of Valspar's claims.

[114] DuPont disputes that there was any overcharge at all given [redacted] Decl. Ex. 107 ¶¶ 48-53), but DuPont will not dispute it for the purposes of this motion.

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Public Version: September 8, 2015
Dated: September 1, 2015
[1202714 / 20120-666]