IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE VALSPAR CORPORATION, AND VALSPAR SOURCING, INC.,

Plaintiffs,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Defendant.

C.A. No. 14-527-RGA

REDACTED PUBLIC VERSION

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE THE EXPERT TESTIMONY OF PLAINTIFFS' EXPERT DR. MICHAEL A. WILLIAMS

OF COUNSEL:
Richard Ihrig
James M. Lockhart
James P. McCarthy
John C. Ekman Jessica L. Meyer **LINDQUIST & VENNUM LLP** 4200 IDS Center 80 South Eighth Street Minneapolis, MN 55402-2274 (612) 371-3211
rihrig@lindquist.com
jlockhart@lindquist.com
jmccarthy@lindquist.com
jekman@lindquist.com
jmeyer@lindquist.com

Frederick L. Cottrell, III (#2555)
Chad M. Shandler (#3796)
Jason J. Rawnsley (#5379)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801
(302) 651-7700
cottrell@rlf.com
shandler@rlf.com
rawnsley@rlf.com

Attorneys for Plaintiffs The Valspar Corporation and Valspar Sourcing, Inc.

DATED: October 7, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Plaintiffs The Valspar Corporation and Valspar Sourcing, Inc. (collectively, "Valspar") respectfully ask the Court to deny the motion of Defendant E.I. du Pont de Nemours and Company ("DuPont") to exclude the expert testimony of Valspar's expert Dr. Michael A. Williams. DuPont repeatedly mischaracterizes his opinion as impermissibly asserting legal conclusions and failing to apply a reliable, accepted methodology to his review of the record. In fact, Dr. Williams is an eminently qualified economist who has offered a permissible and helpful opinion, based on his economic analysis of the record in light of widely accepted plus factors, that [redacted]

In short, DuPont has asserted no basis for exclusion of any portion of Dr. Williams' opinion.

I. SUMMARY OF DR. WILLIAMS' OPINION

Dr. Williams did his undergraduate work in economics at the University of California, Santa Barbara, and he earned an M.A. and a Ph.D. in economics from the University of Chicago. (Stokes Decl. Ex. 3 ¶ 2.) He previously served as an economist with the Antitrust Division of the U.S. Department of Justice and is widely published in academic journals. (*Id.*) Dr. Williams has offered expert economic testimony in numerous courts and other forums. (*Id.* ¶ 2 & Ex. A.)

In this action, Dr. Williams issued an initial report and a rebuttal report. (Stokes Decl. Exs. 3 & 4.) Using various indices identified in the U.S. Department of Justice Horizontal Merger Guidelines and the academic literature, he analyzed first the relevant market for titanium dioxide ("TiO2") and then the evidence as to whether Defendants' actions "in the matter are consistent with coordinated behavior and are inconsistent with competition." (*Id.* Ex. 3 ¶ 46.) In doing so, he analyzed eight widely recognized "plus factors" related to market conditions favorable to collusion and ten "plus factors" related to Defendants' conduct.

In analyzing market conditions, Dr. Williams analyzed [redacted] (*Id.* Ex. 3 at 27–31, 35–40; *id.* Ex. 4 at 30–32, 35–42.) He also analyzed [redacted]

[redacted] (*Id.* Ex. 3 at 31–34, 40–45; *id.* Ex. 4 at 32–34, 42–44.) He analyzed [redacted] (*Id.* Ex. 3 at 45–49; *id.* Ex 4 at 44–46.)

After analysis of these and other market conditions, Dr. Williams analyzed at length [redacted] (*Id.* Ex. 3 at 49–84; *id.* Ex. 4 at 46–111.) He conducted [redacted] (*Id.* Ex. 3 at 50–54; *id.* Ex. 4 at 46–65.) Dr. Williams also analyzed evidence relating to [redacted] (*Id.* Ex. 3 at 55–58; *id.* Ex. 4 at 74–77.) He analyzed [redacted] (*Id.* Ex. 3 at 58–72; *id.* Ex. 4 at 77–80.) He conducted an extensive review and analysis of [redacted] (*Id.* Ex. 3 at 72–78; *id.* Ex. 4 at 80–94.) He considered [redacted] (*Id.* Ex 3 at 78–79; *id.* Ex. 4 at 94–96.) Dr. Williams also used an accepted methodology to analyze [redacted] (*Id.* Ex. 3 at 79–80; *id.* Ex. 4 at 96–103.) He analyzed whether the record revealed [redacted] (*Id.* Ex. 3 at 80–85; *id.* Ex. 4 at 103–12.) Further, Dr. Williams carried out an empirical analysis using peer-reviewed methodology to test whether D[redacted] (*Id.* Ex. 4 at 70–73, 143–45.) Based on his analysis and the results of Dr. McClave's [redacted] Dr. Williams concluded that [redacted] (*Id.* at 73.)

Dr. Williams reviewed evidence relating to each plus factor considered by economists and courts in evaluating Defendants' conduct. (*Id.* Ex. 3 at 26–84; *id.* Ex. 4 at 29–111.) After

consideration of all plus factors, Dr. Williams concluded that the evidence [redacted] (*Id.* Ex. 3 ¶ 5.)

II. LEGAL STANDARD

Expert testimony is admissible if the expert's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993), this Court is tasked as a gatekeeper with respect to proffered expert testimony. In applying the *Daubert* standard, several factors serve "as guideposts in determining if proffered expert testimony is sufficiently relevant and reliable to be admissible." *Oddi v. Ford Motor Co.*, 234 F.3d 136, 144 (3d Cir. 2000). Although couched in terms of "scientific knowledge," the standard set forth in *Daubert* is applicable to technical and other specialized knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

First, the court should consider whether the challenged expert's theory or technique "can be (and has been) tested." *Daubert*, 509 U.S. at 593. Second, the court should consider "whether the theory or technique has been subjected to peer review and publication," keeping in mind that publication in a peer-reviewed journal "is not a sine qua non of admissibility," as it does not "correlate with reliability." *Id.* at 593–94. Third, the court should consider the method's rate of error. *Id.* Finally, the general acceptance of the technique bears on the inquiry, but it is "not a necessary precondition to the admissibility of scientific evidence." *Id.* at 597.

The parties proffering expert testimony need not "demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct[;] they only have to demonstrate by a preponderance of evidence that their opinions are reliable." *Oddi*, 234 F.3d at 145. This "very important distinction" means that the court is tasked with determining

whether a "particular opinion is based on valid reasoning and reliable methodology," while the trier of fact is left to weigh the expert's conclusions. *Id.* at 145–46.

III. ARGUMENT

A. Dr. Williams Is Unquestionably Qualified To Testify that Defendants' Conduct Is More Consistent with Collusion than with Competition.

DuPont contends that Dr. Williams is not qualified to determine whether Defendants reached an agreement to fix the price of TiO2. (DuPont's Mem. [D. I. No. 280] at 5.) This contention both mischaracterizes and overstates Dr. Williams' proffered testimony. DuPont admits that it is "well within a qualified economist's role if based on reliable, scientifically-based methods, to opine that the economic evidence is or is not more consistent with collusion than with competition" (*id.*)—which is just the testimony Dr. Williams will provide.

There can be no question that Dr. Williams is a qualified economist, and DuPont advances no argument that he is not. Moreover, courts regularly permit economists with credentials similar to those of Dr. Williams to opine that conduct is more consistent with collusion than with competition. *See In re Titanium Dioxide Antitrust Litig.*, No. RDB-10-0318, 2013 WL 1855980, at *4 (D. Md. May 1, 2013) ("The three experts in this case intend to opine, based on their economic analyses, that the Defendants' behavior is consistent with collusion and inconsistent with competition. This testimony is admissible under Rule 704(a), because it does not state a legal standard or draw a legal conclusion." (internal quotation marks, citations, and alteration omitted)); *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3, AFL-CIO*, 313 F. Supp. 2d 213, 240 (S.D.N.Y. 2004) ("Economists often explain whether conduct is indicative of collusion."); *In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348, 1354–55 (N.D. Ga. 2000) (admitting expert testimony "implying that Defendants engaged in a conspiracy to fix prices"); *In re Urethane Antitrust Litig.*, MDL No. 1616, No. 04-1616-JWL,

2012 WL 6681783, at *3 (D. Kan. Dec. 21, 2012) (permitting an economist to testify that alleged conspirators' conduct is "consistent with the existence of an agreement to fix prices").

DuPont's mischaracterization of Dr. Williams' proffered testimony does not mandate a different result. DuPont contends that Dr. Williams "opines that [redacted]"[1] (DuPont's Mem. at 5.) An examination of the language Dr. Williams uses in his report to assert his opinion makes clear that DuPont's contention is wrong:

[redacted]

(Stokes Decl. Ex. 3 ¶ 5.) Contrary to DuPont's characterization, Dr. Williams does ***not*** opine that [redacted] instead, he opines that [redacted] In other words, the limitations on his opinion are clear, and it falls squarely within the bounds that DuPont has admitted are acceptable: "Defendants' conduct is consistent with coordinated

---

[1] DuPont's assertion that Dr. Williams' references to '[redacted] at his deposition somehow change the nature of his opinion and render it beyond his qualifications is misplaced. Their argument ignores two salient facts. First, many of Dr. Williams' references to [redacted] were in response to questions that themselves referenced [redacted]' (*See* Williams Dep., May 29, 2015 (McCarthy Decl. Ex. A), at 24:22–25:19 (responding to a question regarding [redacted]), 27:8–21 (responding to a question regarding whether [redacted]), 91:11–92:2 (responding to a question about his [redacted].) Second, Dr. Williams regularly characterized Defendants' conduct as "alleged." (*See id.* at 85: 20–86:3, 128:1–6, 167:7–14, 169:20–170:7, 193:8–13; Williams Dep., Aug. 21, 2015 (McCarthy Decl. Ex. B), at 12:7–11, 13:12–14, 13:17–20, 51:17–52:1, 185:20, 223:3–10, 248:18–21, 249:13–16, and 286:12–22.) The fact that Dr. Williams did not in every instance in his deposition [redacted] does not change the nature of his opinion or render it inadmissible.

behavior and inconsistent with competition." (*Id.*; *see also* DuPont's Mem. at 6.) DuPont, of course, disagrees with this opinion, but DuPont's disagreement misses the point. Valspar has no obligation to demonstrate, in opposing a *Daubert* challenge, that Dr. Williams' opinion is correct. *See Oddi*, 234 F.3d at 145. At trial, DuPont will have every opportunity to cross-examine Dr. Williams on the reasonableness of and basis for his opinion, and DuPont is "free to monitor Dr. [Williams'] testimony at trial to ensure that he does not simply and impermissibly lend an expert imprimatur to plaintiffs' position on disputed facts, but that he instead testifies about how particular conduct relates to price-fixing." *In re Urethane*, 2012 WL 6681783, at *3.

DuPont also argues that Dr. Williams offers an "ultimate conclusion" that invades the province of the jury, "which is tasked with weighing the evidence and applying the law to the facts." (DuPont's Mem. at 6.) Not only has Dr. Williams not offered an opinion on the ultimate question that the jury will be asked to answer— whether Defendants violated Section 1 of the Sherman Act because they agreed to fix prices —but Dr. Williams also made clear throughout his deposition testimony that he was not offering a legal opinion but his expert opinion based on economic analysis of the record. (*See, e.g.*, McCarthy Decl. Ex. A at 34:9–19 [redacted], 177:10–18, 230:3–16, 255:9–21; McCarthy Decl. Ex. B at 14:19–15:6, 75:9–18, 232:18–234:6.)

Moreover, the cases on which DuPont relies are distinguishable and do not mandate the exclusion of Dr. Williams' opinion. For example, DuPont (as it did unsuccessfully in its *Daubert* motion in the Maryland action) points the Court to *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 565–66 (11th Cir. 1998), in which a statistician was limited from

offering certain testimony "regarding the existence of a conspiracy in general" because such testimony was "outside of his competence as a statistician," but was permitted to offer "most" of his proffered testimony because the court determined it was "entirely within his competence as a statistician." *See In re Titanium Dioxide*, 2013 WL 1855980, at *4. The bounds of permissible testimony from a statistician have little bearing on the qualifications of an economist, and in fact economists are widely recognized as competent to opine on whether conduct is consistent with an anti-competitive agreement. *See, e.g.*, *U.S. Info. Sys.*, 313 F. Supp. 2d at 240. In addition, *In re Urethane*, which DuPont also cites, bolsters Valspar's position, rather than DuPont's, in that the court in that case denied a motion to exclude the testimony of an expert, just like the proffered testimony of Dr. Williams, "that certain conduct by the alleged conspirators is consistent with the existence of an agreement to fix prices." 2012 WL 6681783, at *3.

DuPont also relies on *Jamsport Entertainment, LLC v. Paradama Productions, Inc.*, No. 02 C 2298, 2005 WL 14917, at *10 (N.D. Ill. Jan. 3, 2005), for the proposition that it is improper for an economic expert to "dr[a]w his own inferences" from documents. (DuPont's Mem. at 7.) The *Jamsport* court, however, did not hold—as DuPont argues—that it is improper for an economist to render an opinion on whether "certain conduct was anticompetitive." 2005 WL 14917, at *10. Instead, the court recognized that it is both permissible and helpful to a trier of fact for an economist to characterize certain conduct as anticompetitive based on "inferences from the documentary evidence . . . that . . . have a grounding in economics and a relationship to [the expert's] expertise." *Id.* This is what Dr. Williams has done in his written opinion and will do for the jury: bring his economic analysis to bear on the record in concluding that Defendants' conduct is more consistent with collusion than with competition. Finally, *SmithKline Beecham Corp. v E. Applicators, Inc.*, No. 99-CV-6552, 2002 WL 31750188, at *3 (E.D. Pa. Dec. 3,

2002), in which the court held that an architect without any "specialized knowledge, skill or experience" was not qualified to render an opinion on whether conduct was collusion, is wholly inapt to the question of whether an economist with the credentials and experience of Dr. Williams is qualified to opine that conduct is more consistent with collusion than with competition. There can be no question that Dr. Williams is so qualified and that his opinion to this effect will be helpful to the jury, and therefore DuPont's motion to exclude Dr. Williams as an expert should be denied. Moreover, DuPont's own expert, Dr. Willig, opines that [redacted] (Stokes Decl. Ex. 10 ¶ 292.) DuPont has not withdrawn that opinion, suggesting that DuPont recognizes that such opinion testimony is in fact admissible.

B. The Basis of Dr. Williams' Opinion, an Economic Analysis of Certain Plus Factors, Is Recognized and Accepted in Antitrust Literature.

In addition to arguing that Dr. Williams is somehow not qualified to render an opinion on whether Defendants' conduct is more consistent with collusion than with competition, DuPont also argues that "several of his conclusions . . . are not grounded in any scientific or reliable methods." (DuPont's Mem. at 9.) Dr. Williams' opinion is based on his economic analysis of plus factors, a methodology widely accepted in antitrust cases and by economists, including DuPont's own expert, who [redacted] (Willig Dep., July 16, 2015 (McCarthy Decl. Ex. C), at 238:2–239:12.) *See, e.g.*, *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) ("Existence of these plus factors tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors."); *In re Titanium Dioxide*, 2013 WL 1855980, at *12; *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012) (citing *Monsanto Co. v. Spray-Rite Service*

Corp., 465 U.S. 752, 761 (1984)); William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393 (2011); Robert C. Marshall & Leslie M. Marx, *The Economics of Collusion: Cartels and Bidding Rings* 213–37 (2012) (McCarthy Decl. Ex. F); ABA Section of Antitrust Law, *Antitrust Law Developments* 11–16 (6th ed. 2007) (McCarthy Decl. Ex. G); ABA Section of Antitrust Law, *Proof of Conspiracy Under Federal Antitrust Laws* 69–91 (2010) (McCarthy Decl. Ex. H).

DuPont's argument that Dr. Williams' opinion is not grounded in a reliable, accepted methodology simply ignores the facts that the use of plus factors is widely accepted, *see In re Flat Glass*, 385 F.3d at 360, and that expert testimony on plus factors based on an expert's review of documents and testimony is considered helpful to a trier of fact, *see Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 47 (1st Cir. 2013), and *In re Urethane*, 2012 WL 6681783, at *3 (rejecting a challenge that an expert's "economic analysis" of defendants' conduct and "non-economic factors" was "not sufficiently scientific or technical," and recognizing that expert testimony about market conditions and defendants' conduct by an economist similar to Dr. Williams, based on review of portions of the record, "is well-accepted in this field" and "would be helpful to a jury to put events into an economic context"). In short, none of DuPont's arguments warrant exclusion of any aspect of Dr. Williams' opinion.

1. Dr. Williams Must Analyze Testimony and Documents in Rendering His Opinion.

DuPont seeks exclusion of Dr. Williams' testimony because Dr. Williams supports his opinion on plus factors through an analysis of documents and testimony. Not only is this permissible, but it is expected that an economist will render an expert opinion based on analysis of the record. *See Jamsport*, 2005 WL 14917, at *10 (holding that "inferences from the documentary record . . . that . . . have a grounding in economics and a relationship to [the

expert's] expertise" are admissible and helpful). In fact, had Dr. Williams not done so, one could imagine a motion from DuPont seeking exclusion of Dr. Williams' opinion as untethered from and unsupported by the record. *See, e.g.*, *King v. Cessna Aircraft Co.*, No. 03-20482-CIV, 2010 WL 1980861, at *5 (S.D. Fla. May 18, 2010) (granting a motion to exclude expert testimony that does not derive from the record or from the expert's experience). Instead, throughout his opinion, Dr. Williams brings his experience as an economist to bear in a review of the record.

Dr. Williams does not "merely recite what is on the face of documents produced during discovery" in rendering his opinion.[2] (*See* DuPont's Mem. at 11 (alterations and citation omitted).) Instead, Dr. Williams has, in forming his opinion, analyzed documents and testimony in light of eighteen plus factors—plus factors that are a widely accepted methodology in antitrust matters. *See In re Flat Glass*, 385 F.3d at 360. Nonetheless, DuPont argues that in several sections of his reports Dr. Williams relies "on his own interpretation of selected documents in the record." (DuPont's Mem. at 12.) A review of DuPont's cited examples, however, establishes that Dr. Williams has not simply recited the content of documents in the record; he has instead reviewed these documents through the lens of each plus factor and concluded, as an economist is permitted to do, that certain evidence in the record supports the existence of that plus factor. (*See, e.g.*, Stokes Decl. Ex. 3 ¶ 97 (analyzing [redacted], ¶¶ 109–23 (analyzing

[2] DuPont's reliance on *Anderson News, L.L.C. v. American Media, Inc.*, No. 09 Civ. 2227 (PAC), 2015 WL 5003528, at *4 (S.D.N.Y. Aug. 20, 2015), and *In re Fresh Del Monte Pineapples Antitrust Litigation*, No. 04-md-1628 (RMB) (MHD), 2009 WL 3241401, at *16 (S.D.N.Y. Sept. 30, 2009), is misplaced. In *Anderson News*, addressing defendants' refusal to deal with plaintiff after plaintiff raised prices, the court found the expert did not conduct *any* analysis regarding the defendants' alleged financial incentives to pay plaintiff higher prices. In *In re Fresh Del Monte Pineapples*, the court excluded expert testimony not for failure to analyze documents but because the proposed testimony "does not demonstrate any particular scientific expertise that can be assessed for reliability." Here, Dr. Williams' proffered testimony is rooted in an economic analysis of the record in light of widely recognized and accepted plus factors.

[redacted], ¶¶ 134–36 (analyzing [redacted]; Stokes Decl. Ex. 4 ¶¶ 125–26 (reviewing [redacted], ¶¶ 133–35 (discussing [redacted], ¶ 148 (rebutting [redacted], ¶ 162 (rebutting [redacted], ¶¶ 165–66 (rebutting [redacted], ¶ 170 (analyzing [redacted] ¶ 187 (analyzing [redacted], ¶¶ 197–201 (rebutting [redacted]) If DuPont disagrees with Dr. Williams' conclusions, it is welcome to cross-examine him on the documents cited and present him with documents not cited, but DuPont has not provided a basis for the wholesale exclusion of Dr. Williams' opinion.

In fact, the very example that DuPont provides demonstrates that DuPont has, at most, raised an issue with respect to the weight the jury ought to afford Dr. Williams' testimony, not its admissibility under *Daubert*. Specifically, DuPont contends that Dr. Williams [redacted]

[redacted]

(Stokes Decl. Ex. 3 ¶ 110 (footnote omitted).) However, DuPont ignores the fact that Dr. Williams [redacted] Moreover, DuPont's contention that Dr. Williams mischaracterized [redacted] misses the point [redacted]. [redacted]

Ultimately, what DuPont has offered the Court is not an argument in favor of excluding Dr. Williams' opinion; it is a script for cross-examination, when DuPont will have the opportunity to challenge Dr. Williams' opinion and the jury will have the opportunity to determine how much weight it deserves.

DuPont also argues that Dr. Williams' methodology in analyzing documents through his economic lens is inappropriate because it is not subject to peer review or "standards controlling the technique's operation." (DuPont's Mem. at 13.) This argument is a feat of misdirection. Dr. Williams' methodology is not the analysis of the record, as DuPont would have the Court believe, but the widely accepted use of plus factors. (*See* McCarthy Decl. Ex. C at 238:2–239:12.) *See In re Flat Glass*, 385 F.3d at 360; *In re Elec. Books*, 859 F. Supp. 2d at 681; Kovacic et al., *supra*; Marshall & Marx, *supra*. Moreover, peer review is not the sine qua non of

admissibility, and expert testimony, even where it is not "scientific" in nature, can still be helpful to the jury. *Daubert*, 509 U.S. at 594, 597.

DuPont's argument is also undercut by the expert opinions it has submitted. For example, DuPont's expert Dr. Willig repeatedly [redacted] (*See, e.g.*, Stokes Decl. Ex. 10 ¶¶ 33, 43, 92, 96, 97, 98, 99,100, 114, 131, 135, 175, 176, 228, 242, 243, 244, 245, 246, 247, 262, 276.) Indeed, [redacted] (*Id.* at 68.) While DuPont complains that Dr. Williams' report [redacted] (DuPont's Mem. at 14), the appendices to Dr. Williams' report [redacted] whereas Dr. Willig often simply [redacted] (*see, e.g.*, Stokes Decl. Ex. 10 at 69 n.195). Since DuPont has not withdrawn its expert's opinion, it has tacitly recognized Dr. Williams' opinion is properly supported and based on a sound methodology.

2. Dr. Williams' Opinion Is Rooted in the Record—Not, as DuPont Contends, on "Pure Conjecture."

DuPont contends that Dr. Williams' opinion regarding [redacted] and [redacted] both of which Dr. Williams opines support his opinion that Defendants' conduct was more consistent with collusion than with competition, are based on "pure conjecture." (DuPont's Mem. at 14–16.) To the contrary, Dr. Williams' opinions on both of these points are well supported by his economic analysis of the record, and DuPont's attempt to argue that Dr. Williams' opinion is incorrect is a misuse of a *Daubert* motion, which should serve to test whether an expert is qualified to render a reliable opinion that fits the evidence, not whether that opinion is "correct." *Oddi*, 234 F.3d at 145–46.

First, with respect to Dr. Williams' opinion that [redacted] is consistent with collusion, DuPont inaccurately characterizes Dr. Williams' opinion. DuPont suggests that Dr. Williams failed to analyze whether [redacted] but that was not his opinion. Instead, Dr. Williams clearly opines that [redacted] (Stokes Decl. Ex. 3 ¶¶ 101–02 (citing Kovacic et al.).) Dr. Williams then analyzes [redacted] DuPont, notably, does not challenge [redacted] (*Id.* at 61–65.) He concludes that, [redacted] (*Id.* ¶ 102.) With regard to [redacted] that DuPont expressly challenges—[redacted]—DuPont similarly mistakes their import. Dr. Williams clearly states that [redacted] (*Id.* ¶ 103.) DuPont's attempt to [redacted] has no basis in law or fact, and DuPont is free to test Dr. Williams' opinion at trial on this basis. It cannot argue, though, that this is a sufficient basis to exclude Dr. Williams' opinion.

Second, DuPont wrongly characterizes as [redacted] Dr. Williams' opinion that [redacted] (DuPont's Mem. at 16.) DuPont's contention that Dr. Williams [redacted] is not supported by the record. Dr. Williams empirically analyzed [redacted]

[redacted] he analyzed [redacted] (Stokes Decl. Ex. 3 at 52–53.) He noted that D[redacted] and he conducted an empirical analysis of [redacted] (Stokes Decl. Ex. 4 ¶¶ 115–20.) Further, Dr. Williams noted that Dr. Willig's analysis shows that [redacted] (*Id.* Ex. 10 ¶ 180.) To the extent that DuPont believes that the fact that [redacted] undermines Dr. Williams' opinion, DuPont can cross-examine him to that effect at trial. This disagreement, however, does not negate the fact that Dr. Williams engaged in economic analysis of the record in forming his opinion.

3. Dr. Williams May Opine About the '[redacted] Plus Factor.

One of the recognized plus factors is whether cartel members attempted to conceal their activity or offered pretextual explanations for price increases. *See, e.g.*, *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1164 (D. Kan. 2012) (citing *In re Magnesium Oxide Antitrust Litig.*, No. 10-5943 (DRD), 2012 WL 1150123, at *6 (D.N.J. Apr. 5, 2012)). As set forth in Dr. Williams' expert reports (Stokes Decl. Ex. 3 ¶¶ 138–145, App'x XIX; *id.* Ex. 4 ¶¶ 196–203, App'x XIX), Dr. Williams [redacted] DuPont, however, argues that Dr. Williams cannot opine on this plus factor because his opinion is based "solely on his personal interpretation" of the record, which usurps the province of the jury. (DuPont's Mem. at 9–10.) In fact, Dr. Williams' economic—rather than "personal"—analysis of the record informed his opinion that [redacted] (*see, e.g.*, Stokes Decl. Ex. 4 ¶ 199

(contrasting [redacted]; *id.* ¶¶ 197–202), and this is just the kind of testimony that will be helpful to the jury in a complex antitrust case like this one. *See Jamsport*, 2005 WL 14917, at *10 (holding that "inferences from the documentary evidence . . . that . . . have a grounding in economics and a relationship to [the expert's] expertise" are admissible and helpful); *In re Urethane*, 2012 WL 6681783, at *3. Moreover, Dr. Williams does not weigh the credibility of witnesses in opining that [redacted] rendering much of DuPont's cited authority for this position inapposite. DuPont is free to cross-examine and challenge Dr. Williams' opinion on this point, but at most its complaint goes to the weight that the jury should afford Dr. Williams' opinion, not its baseline admissibility.

Again, DuPont's proffer of Dr. Willig's expert testimony that [redacted] (Stokes Decl. Ex. 10 at 122) undercuts its objection to Dr. Williams' testimony. DuPont has not withdrawn this opinion. It is inconsistent for DuPont to argue that its expert can opine [redacted] but that a similarly qualified economist cannot opine [redacted] Dr. Williams' expert opinion regarding [redacted] is grounded in an analysis of relevant documents from an economic perspective, and his opinion should therefore be admissible. *See Jamsport*, 2005 WL 14917, at *10.

4. Weighing Plus Factors Is Within the Purview of Economic Expertise.

DuPont argues that Dr. Williams should be barred from using '[redacted] with respect to certain well-recognized plus factors because such testimony gives more weight to some plus factors than to others. (DuPont's Mem. at 17.) The characterization of certain plus factors as [redacted]' is not a label that Dr. Williams "conjured up for litigation." (*Id.*) Instead, it derives from an influential and oft-cited law review article written by three professors of

economics and one professor of law and policy. Kovacic et al., 110 Mich. L. Rev. at 393 n.a1–aaaa1; *SD3, LLC v. Black & Decker (U.S.) Inc.*, __ F.3d __, No. 14-1746, 2015 WL 5334119, at *7 (4th Cir. Sept. 15, 2015) (citing Kovacic et al. for the proposition that plus factors must be analyzed in groups or "constellations").[3] Courts and commentators regularly use singular weighting descriptors, such as "the strongest plus factor." *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98-2847, 1999 WL 691840, at *10 (4th Cir. 1999); McCarthy Decl. Ex. F at 235–37. Dr. Williams' reliance on and citation to an accepted methodology for analyzing whether conduct in a market is competitive or collusive is proper under *Daubert*.[4]

DuPont also argues that Dr. Williams' testimony regarding plus factors does not "fit the facts of this case" because he [redacted] (DuPont's Mem. at 18 n.6.) In fact, Dr. Williams' proffered testimony specifically fits the facts of this case. As he testified, he [redacted] (Stokes Decl. Ex. 1 at 18:16–17.) Instead, he recognized that [redacted] (*Id.* at 20:16–21:1.) In other words, Dr. Williams' analysis specifically looks at [redacted] *See In re Ins.*

[3] Indeed, DuPont's expert Dr. Willig relies on [redacted] (*See* Stokes Decl. Ex. 10 Ex. 3 at 16).

[4] DuPont relies on *Anderson News*, 2015 WL 5003528, at *3, but *Anderson News* did not exclude expert testimony on plus factors; it merely held that the expert could not use the adjective "super" to describe certain plus factors. In so holding, the court ignored the fact that all economic analysis involves weighing economic factors, *see, e.g.*, *In re Urethane*, 2012 WL 6681783, at *3 (holding that the "weighing" of "non economic factors" does not usurp role of jury), and that the shorthand term "super" was used not just by the challenged expert, but also by other noted economists and a law professor who was the former chair and former general counsel of the FTC (William Kovacic).

Brokerage Antitrust Litig., 618 F.3d 300, 321–22 (3d Cir. 2010) (cautioning courts to look at all plus factors together). Therefore, because Dr. Williams' testimony regarding plus factors stems from an accepted methodology and from an analysis of the behavior in the specific market at issue in this case, his testimony about plus factors should not be excluded.

5. Dr. Williams' Opinion Does Not Rely on [redacted]

DuPont characterizes Dr. Williams' references to [redacted] in his report as "improper." (DuPont's Mem. at 18–19.) However, DuPont cannot identify a single instance in Dr. Williams' report where he relies on [redacted] as the sole support for his opinion. This is because Dr. Williams does no such thing. Dr. Williams expressly testified that [redacted] (McCarthy Decl. Ex. A at 33:14–19, 222:17–223:3, 269:10-16; McCarthy Decl. Ex. B at 135:1–8.) Instead, Dr. Williams' references to [redacted] (*See, e.g.*, Stokes Decl. Ex. 3 ¶ 54 (noting [redacted], ¶ 142 (noting, [redacted].) Moreover, Valspar has never had any intention to elicit testimony at trial from Dr. Williams that [redacted]

In addition, DuPont argues that Dr. Williams may not mention [redacted] in his report. The cases that DuPont cites for this proposition are wholly distinguishable because they hold only that "an expert is prohibited from rendering a legal opinion," which Dr. Williams does not do. *See Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006); *Watkins v.*

New Castle Cty., 374 F. Supp. 2d 379, 392 (D. Del. 2005) (holding that an expert cannot testify to legal conclusions). Instead, just as a damages expert in a patent case would be expected to cite to the *Panduit* factors, Dr. Williams cites to [redacted] He does not attempt to "elevate their significance and apply [redacted] to the facts here." (DuPont's Mem. at 19.) Dr. Williams' [redacted] instead establish that his opinion [redacted] (*See, e.g.*, Stokes Decl. Ex. 3 ¶ 65 (noting [redacted], ¶ 18 (noting '[redacted] Dr. Williams' citation to [redacted] establishes that his opinion [redacted] As such, his opinion should not be excluded.

6. Dr. Williams' Reliance on Dr. McClave's Opinion Is Permissible.

Finally, DuPont contends that Dr. Williams' opinion should be excluded simply because he relies on Dr. McClave's [redacted] and particularly on Dr. McClave's opinion on [redacted] (DuPont's Mem. at 19–20.) Notably, DuPont has not challenged the admissibility of Dr. McClave's opinion; instead, it seeks to exclude a different expert for relying in part on an opinion that DuPont itself acknowledges is reliable and helpful to the trier of fact.

The court's analysis in *In re Urethane* is instructive on this issue. There, the defendant moved to exclude the opinion of the plaintiffs' liability expert, an economist, to the extent that the expert relied on the opinion of the plaintiffs' damages expert, an econometrician (Dr. McClave, who is also Valspar's expert in this case). 2012 WL 6681783, at *3–4. The defendant complained, as DuPont does here, that the liability expert had not "independently determin[ed]

that [the damages expert's] opinions are sound or reliable." *Id.* The court denied the motion, holding that the liability expert had the expertise to understand the opinion of the damages expert, even if he did not fully replicate it independently. *Id.*[5] Moreover, the court observed that the defendant would have the opportunity to cross-examine both experts at trial. *Id.*

Nor does Dr. Williams' report duplicate Dr. McClave's [redacted] (*See* McClave Expert Report, Apr. 13, 2015 (McCarthy Decl. Ex. D) & McClave Rebuttal Expert Report, July 30, 2015 (McCarthy Decl. Ex. E).) Dr. Williams looks to Dr. McClave's [redacted] in connection with specific plus factors, such as the fact that [redacted], and he confirms that Dr. McClave's opinion is supported by sound econometric methodology and the record. (*See, e.g.*, Stokes Decl. Ex. 3 ¶¶ 92–93.) The opinions may be complementary, but they are not cumulative. Dr. Williams' limited reliance on Dr. McClave's specific expertise does not warrant exclusion of any portion of Dr. Williams' opinion.

IV. CONCLUSION

For the foregoing reasons, Valspar respectfully asks the Court to deny in its entirety DuPont's motion to exclude the expert testimony of Michael A. Williams.

[5] DuPont's suggestion that Dr. Williams could not understand the material in Dr. McClave's reports simply ignores the fact that Dr. Williams is an "applied econometrician" (McCarthy Decl. Ex. A at 83:21–84:22.) and that discussions between the staffs of each expert, between the experts and their own staffs, and between the expert and the staff of the other expert were not subject to discovery or testimony (Stipulation and Order Regarding Expert Discovery, Apr. 14, 2015 [D. I. No. 227]).

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)
Chad M. Shandler (#3796)
Jason J. Rawnsley (#5379)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801
(302) 651-7700
cottrell@rlf.com
shandler@rlf.com
rawnsley@rlf.com

Attorneys for Plaintiffs The Valspar Corporation and Valspar Sourcing, Inc.

OF COUNSEL:
Richard Ihrig
James M. Lockhart
James P. McCarthy
John C. Ekman
Jessica L. Meyer
LINDQUIST & VENNUM LLP
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2274
(612) 371-3211
rihrig@lindquist.com
jlockhart@lindquist.com
jmccarthy@lindquist.com
jekman@lindquist.com
jmeyer@lindquist.com

DATED: October 7, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 7, 2015, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to registered participants, and further certify that I caused copies of the foregoing document to be served upon the following via electronic mail:

Kathleen Furey McDonough
John A. Sensing
POTTER ANDERSON & CORROON LLP
Hercules Plaza, Sixth Floor
1313 North Market Street
P.O. Box 951
Wilmington, DE 19801
(302) 984-6000
kmcdonough@potteranderson.com
jsensing@potteranderson.com

Shari Ross Lahlou
CROWELL & MORING LLP
1001 Pennsylvania Avenue N.W.
Washington, DC 20004
(202) 654-2500
slahlou@crowell.com

Joshua C. Stokes
CROWELL & MORING LLP
515 South Flower Street
40th Floor
Los Angeles, CA 90071
jstokes@crowell.com

/s/ Jason J. Rawnsley
Jason J. Rawnsley (#5379)
rawnsley@rlf.com