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 FOR SUMMARY JUDGMENT

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.

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The Valspar Corporation and Valspar Sourcing, Inc. ("Valspar") are entitled to proceed to trial on their claim that, for more than a decade, E.I. du Pont de Nemours and Company ("DuPont") conspired with four other titanium dioxide manufacturers to fix and stabilize the price of TiO2. Valspar has offered sufficient evidence from which a reasonable jury could find that the defendants had an actual, manifest agreement to participate in a price-fixing conspiracy to affect the U.S. TiO2 market. The Court should deny DuPont's request for summary judgment or partial summary judgment.

I. SUMMARY OF THE ARGUMENT

DuPont's opening brief in support of its motion for summary judgment reads like a trial brief with arguments well-suited for a closing argument to a jury but irrelevant to the Court's consideration of the pending motion. *See In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 368 (3d Cir. 2004). Indeed, DuPont's motion impermissibly relies upon a recital of facts favorable to it and incorrectly interprets the evidence in a light most favorable to DuPont. *Id.* (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)).

Valspar alleges a conspiracy among the five largest producers of titanium dioxide ("TiO2") to fix prices at a supra-competitive level. Valspar's theory makes "economic sense" and was deemed "plausible" by Judge Bennett when he denied summary judgment in the Maryland Class Action which preceded this case. *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799, 824 (D. Md. 2013). As in *High Fructose Corn Syrup*, this is "a garden-variety price-fixing conspiracy" and "involves no implausibility." 295 F.3d at 651 (distinguishing implausible theory of conspiracy to lower prices in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). The conclusion that Valspar's theory is "plausible" means that Valspar has a lower burden to produce evidence which "tends to exclude the possibility" that DuPont and its co-conspirators acted independently, and that Valspar need not "disprove all non-

conspiratorial explanations for the defendant's conduct" to prevail at summary judgment. *In Re Publication Papers Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting *Phillip E. Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law*, 14.03b, at 14-25 (4th Ed. 2011)).

Here, the record reflects "evidence that tends to exclude the possibility of independent action" among DuPont and its co-conspirators. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). [redacted] Based upon this substantial body of evidence, DuPont's motion for summary judgment should be denied, just as defendants' motion for summary judgment was denied in the Maryland Action.[1]

[1] Summary judgment motions were filed, fully briefed, and argued by DuPont and the other three defendants in the Maryland Action. DuPont settled with the plaintiffs for $72 million

II. SUMMARY OF FACTS

[redacted] (Meyer Dec. § A, Exs. 1-35; *id.* § R, Ex. 983 ¶¶ 46-84.) [redacted] *See, e.g.*, Meyer Dec. § A, Ex. 16 at HILLCO00513923; § G, Ex. 386 [redacted] § L, Exs. 627 at IBMA-Fisher 001783, 630, 633 at MIC00073634 [redacted] § R, Ex. 983 ¶¶ 71-75 and Figures 4-6.) [redacted] (*Id.* § L, Ex. 386; *id.* § A, Ex. 31 (MIC00722972).) Because of these declines, the defendants were motivated to create a cartel.

[redacted] (Meyer Dec. § M, Ex. 701.) [redacted] (*Id.* § M, Exs. 695, 688, 690, 734 at MIC03253571.) [redacted] (*Id.* § R, Ex. 983 at App. XVIII; § E, Exs. 296-354.) Defendants also routinely

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before the court issued its order denying the summary judgment motion. *TiO2 Antitrust Litig.*, 959 F. Supp. 2d 799 (D. Md. 2013); Order of Final Approval [D.I. No. 555], Dec. 13, 2013.

[2] In November 2013, Valspar brought its Sherman Act claim against DuPont, Kronos, Millennium, and Huntsman (collectively, "defendants"), but did not sue Tronox, which had declared bankruptcy. *See In re TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 802, n.2.

[redacted] (*Id.* §§ H, I, P, generally and § R, Ex. 983 ¶¶ 85-146.) Defendants made other decisions during the Conspiracy Period against their individual self-interest. (*Id.* § H; *see also id.*, Ex. 983 at App. VIII.) And they ultimately were successful in their conspiracy, charging an [redacted] than they would have but for the conspiracy. (*Id.* § R, Exs. 981 at 9-10, 983 at 7-8 and App. III.) Valspar purchased [redacted] of titanium dioxide from the defendants from February 2003-December 2013. The conspiracy resulted in an overcharge to Valspar o[redacted] (*Id.*, Ex. 981 at 9-10.)

III. ANTITRUST SUMMARY JUDGMENT STANDARD

Horizontal price-fixing schemes like the one alleged by Valspar and in the Maryland Action are *per se* violations of the Sherman Act. *Flat Glass*, 385 F.3d at 362; *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*). To prove a horizontal price-fixing scheme, a plaintiff must demonstrate: (1) the existence of an agreement, combination or conspiracy, (2) among actual competitors, (3) with the purpose or effect of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity," (4) "in interstate or foreign commerce." *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 223–24 (1940). The only issue contested by DuPont's motion is the first element: whether Valspar has produced sufficient evidence for a reasonable jury to find that the defendants had an actual, manifest agreement to participate in a price-fixing conspiracy to affect the U.S. TiO2 market.

To prove the existence of an agreement, an antitrust plaintiff should present "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764 (internal quotation omitted); *see also Flat Glass*, 385 F.3d at 356-57. In the absence of direct evidence of a price-fixing agreement, *i.e.*, "an admission by the

defendants that they agreed to fix their prices," plaintiffs may present circumstantial evidence from which the existence of an agreement to fix TiO2 prices may be inferred. *High Fructose Corn Syrup*, 295 F.3d at 654–55. DuPont criticizes Valspar's circumstantial evidence as too "ambiguous" to establish a conspiracy. But this is not the question. "The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment." *Id.* at 661. Ambiguous evidence is "not to be disregarded because of [its] ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial." *Id.* at 662. An example of such circumstantial evidence is the defendants' parallel conduct—namely, 31 lockstep price increases.

In addition to evidence of parallel price increases, plaintiffs must establish certain so-called "plus" factors, which are "proxies for direct evidence" and, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy. *Flat Glass*, 385 F.3d at 359-61; *see also Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, 490 F. App'x 492, 498 (3d Cir. 2012) ("Plus factors are 'circumstances under which . . . the inference of rational independent choice [is] less attractive than that of concerted action'"); *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012), *quoting Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012) ("[b]ecause unlawful conspiracies tend to form in secret, such proof will rarely consist of explicit agreements. Rather, conspiracies 'nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.'") The most relevant plus factors include: (1) a motive to conspire, which can be evidence that the industry is susceptible to price-fixing; (2) noncompetitive behavior, *i.e.*, evidence that the defendants acted contrary to their economic self-interest; and (3) evidence of a

traditional conspiracy, such as a high level of inter-firm communications that would suggest that the defendants consciously agreed not to compete. *Flat Glass*, 385 F.3d at 360.[3]

Establishing an antitrust case on the basis of circumstantial evidence necessarily means that evidence produced in connection with the plus factors is susceptible to differing inferences -- either that the defendants were engaged in illegally collusive behavior or that they were engaged in lawful, independent parallel conduct. To defeat a motion for summary judgment a plaintiff need only "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 575 (quoting *Monsanto*, 465 U.S. at 764).

The summary judgment standard in antitrust cases is generally no different than in other cases. *Flat Glass*, 385 F.3d at 357. Indeed, DuPont overstates Valspar's burden on summary judgment by misconstruing the Supreme Court's direction in *Matsushita* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. Subsequent courts analyzing *Matsushita* have not adopted DuPont's position that, where, as here, a plaintiff has put forward evidence establishing a plausible inference of illegal collusive behavior, summary judgment nevertheless is appropriate if it does not absolutely or even strongly outweigh DuPont's explanation for its conduct and the conduct of its co-conspirators. *See Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 467 (3d Cir. 1998) (stating that "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

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[3] In concluding that DuPont and its co-conspirators' conduct was consistent with coordinated behavior and inconsistent with competition, Valspar's expert Dr. Williams [redacted] (Meyer Dec., § R, Exs. 983-985.) DuPont's expert, Dr. Willig, [redacted] (Meyer Dec. § T, Ex. 1356 at 238-39.)

exclude the possibility that the defendants were acting independently"). To adopt DuPont's position would permit the Court to stand in the stead of the fact-finder at trial by weighing competing inferences and determining which party has established the "better" explanation. But "*Matsushita* ... did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468 (1992).

Fundamentally, "tends to exclude" does not mean "excludes." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 167 (D. Conn. 2009). Rather, *Matsushita* requires only that, construing Valspar's evidence in the light most favorable to it as the nonmoving party, a reasonable fact-finder could find that DuPont could not have also been engaging in independent, permissible conduct. As *Eastman Kodak* explained,

> [T]he [*Matsushita*] Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.

Eastman Kodak, 504 U.S. at 468–69 (emphasis in original) (footnote omitted).

Where a plaintiff's theory is "plausible," the task of weighing "competing permissible inferences remains within the province of the fact-finder at a trial." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987). At most, the court's role in examining the factual inferences at the summary judgment stage is limited to determining whether the parties have drawn "reasonable and therefore permissible," inferences from the evidence presented. *Id.*; *see also Flat Glass*, 385 F.3d at 368.

DuPont's arguments in favor of summary judgment are precisely the "traps" that the Seventh Circuit in *High Fructose Corn Syrup* cautioned that courts must avoid when examining motions for summary judgment in price-fixing suits. 295 F.3d at 655. Specifically, when determining whether Valspar's evidence sufficiently defeats summary judgment, the Court

should not: weigh conflicting evidence, because that is the job of the jury; attach great significance to the lack of a single piece of evidence that unequivocally demonstrates a conspiracy; or "fail[ ] to distinguish between the existence of a conspiracy and its efficacy." *Id.* at 655-56. As the Seventh Circuit notes, evidence that is "susceptible of different interpretations" is not "devoid of probative value" for the nonmoving party, and it is the role of the jury to determine "whether, when the evidence [is] considered as a whole, it [is] more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices." *Id.*

IV. LEGAL ARGUMENT

A. The TiO2 Market Is Undisputedly Conducive to a Price-Fixing Conspiracy.

The structure and characteristics of the U.S. TiO2 market evidence DuPont's motivation to enter into a price-fixing conspiracy. [redacted] (Meyer Dec. § A, Exs. 7 at 14-16, 11, 24 at 24310-14, 31), [redacted] (*id.* § B, Exs. 36, 48, 50-52, 58 at 2, 59 at 4), [redacted] (*id.* § A, Ex. 19 at 5, § D, Ex. 113), [redacted] (*id.* § A, Exs. 31 at 722969, 34 at 428077, 35 at 119), [redacted] (*id.* § R, Ex. 983 ¶¶ 66-67 and Figures 2 and 3; *id.* § K, Ex. 622; *see also id.* § C, Ex. 77, § E, Ex. 156, § I, Ex. 520, and § K, Exs. 608, 617), [redacted] (*Id.* § R., Ex. 983 ¶¶ 72-75 and Figures 4-6; *id.* § K, generally; *see also id.* § R., Ex. 983 ¶¶ 47-84.) These factors make the TiO2 market "a text book example of an industry susceptible to efforts to maintain supracompetitive prices." *TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 827, citing *Flat Glass*, 385 F.3d at 361; *see also* Meyer Dec., Ex. 983 ¶ 5. DuPont does not dispute that the TiO2 industry is conducive to oligopolistic price fixing, a plus factor evidencing DuPont's motive to enter into a price-fixing conspiracy. (DuPont Br. [D.I. No. 240] at 18; *see also Flat Glass*, 385 F.3d at 360.)

Thus, the TiO2 market makes a price-fixing conspiracy feasible and evidences DuPont's motivation to participate in such a conspiracy.

B. The Defendants' Voluminous Pattern of Parallel Price Increase Announcements Evidence an Agreement to Fix and Stabilize TiO2 Prices.

During the Conspiracy Period, and following the start of the GSP, the top five producers of TiO2 issued [redacted] (Meyer Dec., Ex. 983 at 51-53 and App. XIV and XIX; *id.* § E, Exs. 125-295 [redacted].) Price increases during the Conspiracy Perio[redacted]

The frequency and similarity of the timing and amount of the Conspiracy Period price increases stand in stark contrast to the period from 1994-2001 [redacted] Meyer Dec., Ex. 983 ¶¶ 87-89 and Figures 7 and 8; Ex. 985 ¶ 69, Figure 5.) [redacted] (*Id.*)

The sheer volume of parallel price increases in this case is unprecedented and reflects strong circumstantial evidence of a conspiracy. Indeed, courts routinely deny summary judgment on records with far fewer instances of parallel conduct. *See Publ'n Paper*, 690 F.3d at 51 (denying summary judgment with evidence of three parallel price increases over one year); *Flat Glass*, 385 F.3d at 355 n.5 (denying summary judgment with evidence of seven parallel price increases, "by the same amount and within very close time frames," across five years); *EPDM*

Antitrust Litig., 681 F. Supp. 2d at 166 (finding "six lockstep price increases" to be strong circumstantial evidence of a price-fixing agreement); *see also TiO2 Antitrust Litig.*, 959 F. Supp. 2d 799.

The Third Circuit's decision in *In re Chocolate Confectionary Antitrust Litig.* does not change the impact of defendants' parallel announcements. There, the court considered only three parallel increases during a six-year period, only one of which was as temporally proximate as the price increases here. 2015 WL 5332604, at *2 (3d Cir. Sept. 15, 2015). Unlike this case, the *Chocolate* plaintiffs also were unable to muster corroborating plus factors, discussed in detail below. Likewise, in *In re Text Messaging*, the price increases were implemented across several months and up to nearly a year apart. *In re Text Messaging Antitrust Litig.*, 46 F. Supp. 3d 788, 807-08 (N.D. Ill. 2014), *aff'd*, 782 F.3d 867 (7th Cir. 2015). The *Text Messaging* court contrasted that evidence with the lockstep parallel increases in *High Fructose Corn Syrup* that occurred between March and May of the same year. *Id.* Because the number, frequency and duration of lockstep price announcements in this case vastly exceed those of *High Fructose Corn Syrup* and *Text Messaging*, the facts and holding of *Text Messaging* are readily distinguishable.

Similarly unpersuasive are DuPont's competing contentions that each price increase announcement was the result of independent and careful evaluation by each defendant of its "pricing structure" and that any parallel pricing simply constituted "follow the leader" pricing. (DuPont Br. 9.) To the contrary, [redacted] Meyer Dec. § T, Exs. 1345, 1349, 1333, 1354 (*e.g.*, Stoll Dep. 47:24-48:7 (Millennium), Quinn Dep. 30:12-17 (Huntsman), Rubin Dep. 36:6-11 (DuPont), Becker Dep. 106:13-17 (Kronos).) Indeed, [redacted] (*Id.*, Exs. 1349, 1333, 1354 (*e.g.*,

Quinn Dep. 28:20-30:17, 61:1-61:4, Rubin Dep. 36:6-36:18, Becker Dep. 106:13-106:17).)

It also is inconceivable that each defendant,

(*See, e.g.*, Meyer Dec. § T, Exs. 1341, 1349, 1345 (Maas Dep. 121:17-123:15; 142:3-146:8; Quinn Dep. 75:13-76:23; Stoll Dep. at 124:15-24).) Equally inconceivable is DuPont's assertion that the defendants were able to repeatedly compile such complex pricing analyses in the short time between the leader's announcement and those of the alleged followers.[4]

The "follow the leader" theory also contemplates the possibility that a price leader would be forced to rescind its increase because competitors decided not follow it. *Flat Glass*, 385 F.3d at 358 (quoting *Areeda & Hovenkamp* § 1429, at 207–08). Yet during the Conspiracy Period the leader never backed down. And DuPont's arguments that this unprecedented number of lockstep price increases merely reflect conscious parallelism must fall on deaf ears when looked at in comparison with industry price announcements prior to the beginning of the conspiracy, when the defendants only engaged in only a small number of parallel price increases. *See, In re TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 825. DuPont's follow-the-leader justification runs contrary to the evidence of this case. But to defeat summary judgment Valspar need not disprove DuPont's theory. *See Publ'n Paper*, 690 F.3d at 63

[4] *See, e.g.*, Meyer Dec. § E generally and Ex. 128 6/08-5/13); § G, Ex. 394 § N, Ex. 798 (same), § P, Exs. 900 and 911 (same); *see also id.* § E, Exs. 202, 248 at 724698, 258, 197 Exs. 147, 175, 211, 283 Exs. 138, 241, 281, 280, 184

(reasoning that a plaintiff need not "disprove all nonconspiratorial explanations for the defendants' conduct" to prevail at summary judgment.) Rather, "the determination whether these price increases are the result of independent or collusive behavior is a decision for the jury." *TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 826.

C. DuPont and the Defendants Routinely Acted Against Their Independent Self-Interest in Participating in Concerted Pricing Conduct.

Throughout the cartel period, the defendants repeatedly acted against their own self-interests to support their price increase initiatives. "Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market . . . Put differently, in analyzing this factor a court looks to 'evidence that the market behaved in a noncompetitive manner.'" *Flat Glass*, 385 F.3d at 360-61.

[redacted] (Meyer Dec. § J, Ex. 584; *id.*, § R, Ex. 985 ¶¶ 174-184).

Moreover, throughout the cartel period, the defendants repeatedly referenced [redacted] with respect to specific customers and North America as a whole. For example, in November 2005, when [redacted] (Meyer Dec. § N, Ex. 832.) DuPont also indicated that it would not be [redacted] *(id.)* In 2007, John Hall advised that [redacted] (*Id.* § P, Ex. 937; *see also id.* § H, Ex 466 ([redacted].) The next year, Millennium noted that [redacted]

[redacted] (*Id.* § N, Ex. 817.) And a 2012 Millennium email "[redacted] (*Id.* § P, Ex. 957.) Myriad other documents reflect the defendants' repeated refusal to take share from their competitors.[5] DuPont's [redacted] even more clearly an action against its self-interest but for an agreement to increase prices. (Id. § A, Ex. 1 at 6067; § C, Ex. 65 at 20117101; § D, Ex. 93 at 20243711.)

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

TiO2 Antitrust Litig., 959 F. Supp. 2d at 827, citing *Flat Glass*, 385 F.3d at 360; *High Fructose Corn Syrup*, 295 F.3d at 659. In addition to Dr. McClave's opinion of [redacted] there is ample evidence that price increases were not correlated to supply-and-demand principles. For example, in 2006 a DuPont executive wrote that Millennium's and Huntsman's [redacted] Meyer Dec. § M, Ex. 657.) In March 2009, as [redacted] a DuPont executive commented, [redacted]

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[5] *See* Meyer Dec. § H generally and Exs. 442 [redacted], 456 [redacted]"), 474 [redacted]"); § P, Exs. 920, 930, 931, 933, 935, 948.

[redacted] (*Id.* § P, Ex. 861.) In reply, the executive wrote, [redacted] . ." (*Id.*)[6]

Finally, there is evidence that the defendants made inter-company sales at nonmarket prices. (Meyer Dec., Ex. 983 at 61-70 (Figures 9-17 and ¶ 105).) In fact, the [redacted] For example, [redacted] *Id.* at 61 (Figure 9.) Numerous other documents reflect inter-company sales and exception pricing. (Meyer Dec. § I, Exs. 476-579.)[7]

Although DuPont tries to brush off these transactions as sporadic and legitimate, where a seller buys from another at below retail price it is a resource transfer between competitors for which there is no reasonable non-collusive explanation. (Meyer Dec. § R, Ex. 985 ¶ 132, quoting *Kovacic, et al.* at 423.) [redacted] . (*Id.*) The court in *TiO2 Antitrust Litig.* rejected defendants' arguments to the contrary and specifically identified such transactions as evidence against a firm's self-interest but for the existence of an agreement: "Instead of competing for Millennium's customers, DuPont appears to have provided help to Millennium, selling titanium dioxide at a rate lower than that on the market." 959 F. Supp. 2d at 815.

There are numerous instances where DuPont and its co-conspirators acted against their unilateral self- interests but for the existence of a cartel, presenting a fact issue for the jury.

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[6] *See also id.* § G, Ex. 395 [redacted] "); § P, Ex. 971 [redacted] § S, Ex. 1142.

[7] *See also id.* § P, Ex. 880 [redacted]

D. The Record is Replete with Evidence Reflecting a Traditional Conspiracy.

A third category of evidence that tends to exclude the possibility that the defendants acted independently when raising prices is evidence implying there was an actual agreement not to compete. *Flat Glass*, 385 F.3d at 360-61. "That evidence may involve 'customary indications of traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." *Id.* at 361.

"[C]ollusive communications can be based upon circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways." *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010) (stating the preceding in the context of ruling on a motion to dismiss); *see also In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685, 691 (D. Minn. 1995) (drawing inference of conspiracy from evidence of defendants' participation in speeches, meetings, events, official and unofficial corporate utterances, and conferences at which information was exchanged.)

DuPont complains that many of its statements and those of its co-conspirators are "ambiguous." Valspar disputes this characterization of the evidence, which, in any event, sounds like a jury argument as opposed to an argument for summary judgment. Regardless, "[a]mbiguous statements by competitors, taken as a whole, may support the inference of a price-fixing conspiracy." *TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 829; *see infra*, Sec. I, above.

1. [redacted]

The evidence confirms that the GSP was a means by which defendants shared sensitive information and coordinated price increases and from which they could determine relative

market share, firm inventories and capacity utilization. (*See, e.g.*, Meyer Dec. § M, Ex. 678.) The GSP—and the highly confidential information shared within it—provides substantial evidence from which a jury could infer that defendants' participation facilitated the exchange of collusive communications and information relevant to policing the conspiracy.

In September 2001, at the trough of TiO2 prices, TDMA's General Committee [redacted] (Meyer Dec. § M, Ex. 734 at 3253571.) At the time, [redacted] (*Id.* § T, Ex. 1347 (Cianfichi Dep. at 30:24-31:9.) TDMA needed DuPont—the world's largest TiO2 producer—to participate in the new GSP because, without DuPont, it would not be able to provide meaningful North American or worldwide data to its members. (*See* Declaration of Kathleen M. Clair [D.I. 242], Ex. 182.) On January 24, 2002, TDMA [redacted] (Meyer Dec. § M, Ex. 712 at 25553-54.) Days later, defendants increased the price of TiO2 globally. (*Id.* § E, Exs. 162, 271, 224, 196.) On September 24, 2002, DuPont was [redacted] (*Id.*, § M, Ex. 701.)

Contrary to DuPont's assertion, the GSP is nothing like the Department of Commerce's annual publication, which produced annual data that the defendants found to be "[redacted]" (Meyer Dec. § M, Ex. 707.) Instead, beginning in 2002, defendants [redacted] (*See, e.g., id.* § M, Ex. 688, 690.) [redacted] *Id.*; *see also id.*, Ex. 712; Clair Dec., Ex. 185.)

[redacted] (*Id.*, Ex. 701 at MIC0020230; Clair Dec., Ex. 184.)[8]

The GSP gave the defendants [redacted] (Meyer Dec. § M, Ex. 638 at 4932.)[9] The data allowed the defendants to determine a variety of things including [redacted] (*Id.* § T, Ex. 1341 (Maas Dep. 37:18-39:12.) The defendants were able to [redacted] to better track [redacted] (*See TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 828; *see also* Meyer Dec. § M, Ex. 678; *id.* § P, Ex. 919; *id.* § N, Ex. 654.)[10]

The GSP allowed each defendant to [redacted] As reported by

[8] DuPont inaccurately states that Dr. Williams [redacted] DuPont Br. at 26.) While Dr. Williams stated that [redacted] (Meyer Dec. § T, Ex. 1358 at 126:2-21; § R, Exs. 983 ¶¶ 108-123, 985 ¶¶ 138-167.)

[9] [redacted] (*See* Meyer Dec. §§ M and S, Exs. 707, 1153-1156; *see also* Clair Dec., Ex. 179 [redacted]").)

[10] The fact that defendants were able to [redacted] distinguishes the GSP from the information sharing in *In re Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. 1999), a case relied upon by DuPont.

Millennium, [redacted] (Meyer Dec. § M, Ex. 727 (emphasis added).)[11]

The defendants also stressed the confidentiality of the existence of and data generated by the GSP. (Meyer Dec. § M, Ex. 701 at 20230 (noting new data input forms [redacted]"); *see also In re TiO2 Litig.*, 959 F. Supp. 2d at 806.) Defendants also conveyed this information to their employees, explaining that the aggregated GSP data had [redacted] (Meyer Dec. § M, Ex. 722 [redacted]; *see also id.* §§ D, Ex. 106 and M, Ex. 683.) As anticipated, the GSP had a substantial influence on pricing decisions. DuPont's Ian Edwards [redacted] (Meyer Dec. § M, Ex. 657.) The same day, DuPont's Connie Hubbard [redacted] (*Id.* § E, Ex. 160.) Numerous additional documents reflect the GSP's substantial effect on pricing.[12] The GSP lasted until late 2013,

[11] *See also* Meyer Dec. § N, Ex. 816 ("[redacted] § P, Ex. 957 [redacted]

[12] *See, e.g.*, Meyer Dec. § D, Exs. 106 and 113; § H, Ex. 465 [redacted]; § I, Ex. 476; § M (generally) and Exs. 640, 654, 684, 690, 698; § N, Exs. 748, 767 [redacted].

[redacted] destroying the efficacy of the data and ushering in its end. (Meyer Dec. § T, Ex. 1337 (Hubbard Dep. 51:24-52:20).)

Finally, communications between competitors, followed by price increases by multiple sellers, may indicate that prices rose pursuant to an agreement. *See Flat Glass*, 385 F.3d at 364–67 (considering inter-firm communications leading up to three price increase announcements); *Publ'n Paper*, 690 F.3d at 57–59 (analyzing three parallel price increases following private meetings and phone calls). From 2002-2010, the vast majority of the prince increase announcements occurred [redacted] of a General Committee meeting of the TDMA. (*Compare generally* Meyer Dec. § E *with* §§ S, Exs. 1193-1227 and M; *see also In re TiO2 Litig.*, 959 F. Supp. 2d at 830 (finding that plaintiffs show that [redacted] of the announcements came within [redacted] of TDMA General Committee meeting).) In 2011, all of the increase announcements occurred [redacted] of a TDMA meeting. (*Compare* Meyer Dec.§ E, Ex. 128 at 185771_0008-0009 *with* § S, Exs. 1145-52.) Thus, it is permissible to infer that the defendants used the TDMA meetings to communicate their pricing plans, coordinate price increases, and confirm that each competitor would follow the leader on a price increase. *See TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 830; Meyer Dec., Ex. 983 at 45-46.

2. [redacted]

There is substantial evidence of defendants' use of price increase announcements and other public statements to signal price, and of defendants' understanding that they were engaged in price signaling. Price increase announcements can serve as "price beacons to competitors for the purpose of gauging their willingness to raise prices." *In re Currency Conversion Fee Antitrust Litig.*, 773 F. Supp. 2d 351, 371 (S.D.N.Y. 2011), *citing In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 446 (9th Cir. 1990) (noting that announcements of price

"information made the market more receptive to price coordination than it otherwise would have been."); *TiO2 Antitrust Litig.*, 959 F. Supp. 2d 828 ("Frequent price increase announcements could have served as 'signals,' making further exchange of actual price information superfluous."). Thus, th[redacted]of parallel price increase announcements are reflective of defendants' efforts to signal pricing to their co-conspirators.

The record also includes ample evidence suggesting additional efforts to signal pricing moves among the co-conspirators. (*See* Meyer Dec. § G, generally.) On September 13, 2009, DuPont employee Lloyd Sommers[redacted]' (*Id.* § N, Ex. 770.) In the email, Sommers wrote:

[redacted]

(*Id.*) DuPont noted in a strategic pricing presentation that[redacted]while identifying in a[redacted]slide titled '[redacted]' that,[redacted](*Id.* § D, Ex. 93) In October 2006, DuPont's Edwards noted that[redacted](*Id.* § H, Ex. 447.) He further noted DuPont's ability to punish any competitors who take business:[redacted]*Id.*) Kronos clearly understood the signaling that was happening in the market. On October 24, 2008, Thomas Cerny[redacted](*Id.* § G, Ex. 407.) DuPont's Collette Daney[redacted]

Id. § F, Ex. 297.) And a Millennium email

Id., Ex. 344.)[13]

On August 25, 2004, Millennium's Tim Edwards

' (Meyer Dec. § H, Ex. 462.) Thereafter, on September 13, 2004, Millennium's CEO met with Huntsman's President and Vice President. (*Id.* § I, Ex. 519.) The next day, Cianfichi

(*Id.*)[14] There are numerous examples of defendants' acknowledgement that they were engaged in price signaling.[15] And defendants' signaling included

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[13] Like other purchasers, Valspar has supply agreements with defendants that govern the timing of price increases. As such, there is no legitimate purpose for public announcements detailing the amount and effective date of price increases. In fact, defendants provided written notification of any price increase directly to each customer. (Meyer Dec. § T, Exs. 1354, 1347, 1338, 1331 (Becker Dep. at 102:5-105:10 Cianfichi Dep. 66:4-14; Rogers Dep. 60:17-61:14; Hartsgrove Dep. at 298:23-99:23.) Defendants' public price announcements only served to signal their co-conspirators of an intended price increase. Notably, none of the defendants publicly announced any price reductions. (Id., Exs. 1332, 1337, 1349, 1338 (Clover Dep. 102:6-12, Hubbard Dep. 82:19-22, Quinn Dep. 61:5-7, Rogers Dep. 62:9-18).)

[14] In its *Daubert* motion, DuPont contends Dr. Williams (DuPont Memo. [D.I. No. 280] at 13.)

[15] *See, e.g.*, Meyer Dec. § D, Exs. 93, 123 (" § F, Exs. 314 (DuPont email 331 (Kronos email citing , § G, Exs. 366, 373, 380 . . . ."), 414 (Kronos email citing DuPont

[redacted][16]

Defendants' unprecedented pattern of parallel price increases and additional evidence of price signaling constitute powerful evidence of their conscious commitment to a common scheme to raise the price of TiO2 during an 11-year period. *See Monsanto,* 465 U.S. at 764.

3. [redacted]

The record includes ample evidence revealing defendants' awareness of the potential appearance of collusion in the TiO2 industry and their attempts to minimize that appearance, which the Maryland Court deemed evidence of a traditional conspiracy. *See In re TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 829-830. For example, on January 7, 2002, DuPont's Dave Young sent an e-mail to his colleagues regarding a [redacted] (Meyer Dec. § S, Ex. 1129.) Under the heading [redacted] Young described two alternatives. (*Id.*) [redacted] (*Id.*) Millennium's Cianfichi drafted a memorandum regarding [redacted] (*Id.* § S, Ex. 1140 at MIC0029317.) Similarly, on

[redacted] 419, 428, 436 (Millennium e-mail: [redacted]; § N, Exs. 775 [redacted] 777 (note from Daney stating [redacted] 795 [redacted] 814 [redacted] 817 (Millennium email [redacted]; § P, Exs. 903, 909, 951, 954; § S, Exs. 1129, 1143; Clair Dec., Ex. 543.)

[16] *See, e.g.*, Meyer Dec. § A, Ex. 4; § D, Ex. 109; § G, Ex. 429; § S, Ex. 1055 [redacted]

May 22, 2008, Ian Edwards sent an e-mail reacting to a surcharge noting parenthetically, [redacted] (*Id.* § P, Ex. 974.)

Millennium even modeled some of its price increase announcements off competitor's announcements. On June 25, 2008, Millennium's Clover [redacted] (Meyer Dec. § P, Ex. 936 [redacted].) And the day after a DuPont price increase that was effective immediately (*id.* § E, Ex. 128), Millennium's communications manager [redacted] (*Id.* § G, Ex. 427.)

4. [redacted]

There is other evidence in the record of a traditional conspiracy.[17] In addition to those described above, the record reflects evidence that DuPont and its co-conspirators made repeated statements regarding [redacted]" (Meyer Dec. § M, Ex. 746; *see also id.* §§ H, Ex. 464, K, Ex. 621 at MIC04080305 and M, Ex. 746 at MIC05771277.) For example, a Huntsman email in September 2007 [redacted] *Id.* § G, Ex.

[17] Valspar's expert Dr. Williams [redacted] (Meyer Dec., Ex. 985 at 70-73 and App. III.) DuPont does not challenge this analysis in its recently filed *Daubert* motion challenging certain of Dr. Williams' opinions. (*See* D.I. Nos. 272-273.)

394.) A 2007 Millennium email [redacted] (*Id.* § P, Ex. 937). Defendants' '[redacted] continued well beyond 2010.[18]

There also are communications involving industry consultants Jim Fisher and Gary Cianfichi that demonstrate these consultants served as conduits in the price-fixing conspiracy. Specifically, the defendants used these consultants to [redacted] Of course, use of a third party to facilitate a price-fixing conspiracy is not alien to antitrust law. *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 234, 243 (E.D. Pa. 2014), citing *In re TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 806 (denying summary judgment where communications with industry consultant suggested that he acted as a conduit for information sharing for a price-fixing scheme). And DuPont's efforts to minimize Cianfichi's and Fisher's involvement in coordinating this conspiracy are not compelling. It makes no difference whether Valspar used industry consultants. Even if there are legitimate reasons to utilize an industry consultant, the evidence supports the inference that DuPont and its co-conspirators utilized Fisher and Cianfichi as conduits to distribute confidential information in furtherance of the conspiracy. Therefore, unlike the facts of *Mitchael* on which

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[18] *See* Meyer Dec. § D, Ex. 80 (2011 email noting [redacted] § G, Ex. 428 (2011 email noting [redacted]; § I, Ex. 476 [redacted]"); § K, Ex. 593 [redacted]"); § N, Ex. 748 (2011 email noting [redacted]

[19] *See, e.g.*, Meyer Dec. § S, Exs. 991 1057, 1074-76 [redacted] 1222, 1228, 1233-35); *id.* §§ H and S, Exs. 443, 987-88, 993, 997, 1018-20, 1025, 1026, 1029, 1033 (email describing [redacted] 1056 (email regarding [redacted] 1058-59, 1061, 1085, 1087, 1223-24, 1230, 1232, 1237; *see also id.* §§ G, H, L and N, Exs. 371, 373, 413, 437, 445, 471, 627, 797.)

DuPont relies, the evidence in this case clearly supports the inference that Fisher and Cianfichi "facilitated aconspiracy" among DuPont and its co-conspirators. *See Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999).

Although DuPont urges the Court to revisit the ruling in the Maryland Action, DuPont offers no legitimate basis on which the Court should deviate from Judge Bennett's ruling that, "[h]aving carefully considered the sheer number of parallel price increase announcements, the structure of the titanium dioxide industry, the industry crisis in the decade before the [conspiracy period], the Defendants' alleged acts against their self-interest, and the myriad non-economic evidence implying a conspiracy, this Court finds that the Plaintiffs put forward sufficient evidence tending to exclude the possibility of independent action." *TiO2 Antitrust Litig.*, 959 F. Supp. 2d at 830. Much like the record in *Flat Glass*, and unlike the evidence presented in *Chocolate* or in *Text Messaging*, this case involves an ample record from which the jury can reasonably conclude DuPont and its co-conspirators engaged in a price-fixing conspiracy. Therefore, DuPont's summary judgment motion should be denied.

E. Negotiations and Share Shift with Individual Customers Are Irrelevant to the Establishment of Conspiracy to Fix Prices.

The possibility that purchasers could negotiate prices in a market conducive to price-fixing does not alter the conclusion that collusive conduct artificially inflated the baseline prices for any negotiation. *See TiO2 Antitrust Litig.*, 284 F.R.D. 328, 346-47 (D. Md. 2012) (rejecting "extensive negotiations" argument). Rather "[t]he fact that a plaintiff may have successfully employed bargaining power to fend off the *effect* of the conspiratorial practices does not mean that it has not been put in a worse position but-for the conspiracy." *EPDM Antitrust Litig.*, 256 F.R.D. at 89; *see also Flat Glass*, 191 F.R.D. 472, 486 (W.D. Pa. 1999) ("even though some plaintiffs negotiated prices, if plaintiffs can establish that the base price from which these

negotiations occurred was inflated, this would establish at least the fact of damage, even if the extent of the damage by each plaintiff varied"); *Plymouth Dealers' Ass'n v. U.S.*, 279 F.2d 128, 132 (9th Cir. 1960) (ability to obtain concessions off a list price is in no way inconsistent with a conclusion that the list prices were conspiratorially established). *High Fructose Corn Syrup*, 295 F.3d at 658 (denying summary judgment where evidence of "hard bargains" by large buyers to obtain "large discounts" because this didn't mean defendants "could not and did not fix prices").

The Third Circuit has rejected the argument that variation in actual transaction prices precluded a finding of liability. *Flat Glass*, 385 F.3d at 362. The court explained that "[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 Corn Syrup*, 295 F.3d at 658; *see also In re Yarn Processing Patent Validity Litig.*, 541 F.2d 1127, 1136-37 (5th Cir. 1976) ("Interference with the setting of price by free market forces alone is sufficient. There is no requirement ... that all avenues of competition be eliminated, or that the price fixing effectuate its purpose.")

However, the evidence here supports a finding that defendants were successful, despite negotiations with their customers. A 2011 Millennium email makes clear the connection between price increase announcements and higher prices: [redacted] (Meyer Dec. § D, Ex. 81.) And another Millennium document shows the causal connection between price increase announcements and higher prices, explaining [redacted] (*Id.* § E, Ex. 274

(emphasis added).) In addition, DuPont's own expert concedes [redacted] Meyer Dec. § R, Ex. 986, ¶ 171; *see also* Clair Dec., at Ex. 108, ¶ 180; Table 22.) Dr. McClave's [redacted] Meyer Dec. § R, Ex. 981 at 8-10; App. A.)

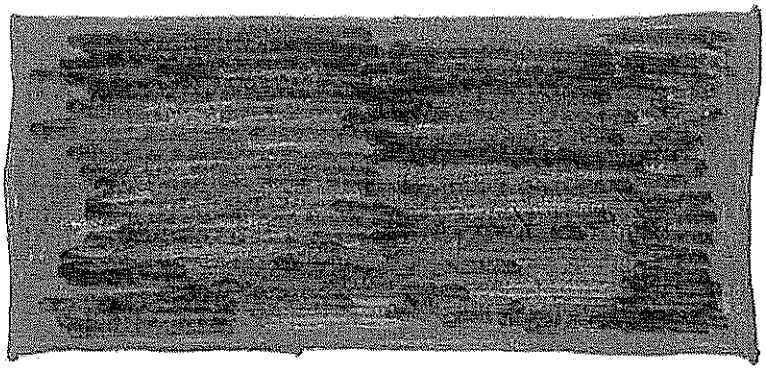
DuPont also argues that fluctuations in the shares of TiO2 sold by Defendants to Valspar and other customers is inconsistent with the existence of a conspiracy. That argument is also inapposite. As explained by Dr. Williams, [redacted] Meyer Dec., Ex. 985 ¶ 175.) Contrary to DuPont's mischaracterization (DuPont Brf. 16, n. 51), Dr. Williams demonstrates [redacted] (*Id.*, Ex. 985 ¶¶ 174-184, Figure 8.) [redacted] *Id.* at 100 ¶ 179.) DuPont has not brought a *Daubert* challenge to Dr. Williams' [redacted]

F. Admissible Evidence of a [redacted] Establishes a Question of Fact.

Valspar has submitted expert testimony that the prices actually charged by DuPont and defendants were on average [redacted] (Meyer Dec., Exs. 981, 982.) DuPont has not moved to exclude this testimony. Thus, Valspar has provided "admissible evidence that higher prices during the period of alleged conspiracy cannot be fully explained by causes consistent with active competition." *High Fructose*, 295 F.3d at 660. [redacted] (DuPont Brf. 30, n. 114.)

DuPont mistakenly relies on *Baby Food*, *White*, and *Blomkest* for the proposition that summary judgment could be granted in the face of an expert report finding an overcharge. In *Baby Food*, the district court granted summary judgment because, upon review of the expert's report, the court concluded that "defendants' prices were not parallel," *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 128 (3d Cir. 1999). In *White*, the court granted summary judgment where the expert admitted in his report that his investigation of the cooperative versus noncooperative behavior yielded "mixed" results. *White v. R.M. Packer Co.*, 635 F.3d 571, 585-86 (1st Cir. 2011). And in *Blomkest*, the court found the expert's report "fundamentally unreliable." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1038 (8th Cir. 2000). Neither *Baby Food* nor *White* relate to an overcharge determination and DuPont has not challenged the validity of Dr. McClave's model as unreliable as occurred in *Blomkest*.

DuPont's argument regarding Dr. McClave's finding [redacted] As explained by Dr. McClave, [redacted] (Meyer Dec. § R, Exs. 981 at 9-10 and 982 at 20-21.) Dr. McClave [redacted] time period. (*Id.* § T, Ex. 1357 (McClave Dep. at 222:5 – 224:14) and § R, Ex. 982 at 19-21.) DuPont's contention that its pricing was justified by "legitimate" market forces, including a spike in raw material prices in particular, misses the mark. Dr. McClave's [redacted] (Meyer Dec. § R, Exs. 981, 982.) The evidence, as illustrated by the following chart, shows that the substantial increase in TiO2 prices in 2010-2012 preceded the run-up in Defendants' raw material costs by about a year:



(*Id.*, Ex. 982 at 19-21, Figure 4.) Moreover, the evidence does not, as DuPont suggests, support a conclusion that [redacted] Rather, the record reflects [redacted] and [redacted] (*Id.*, Ex. 983 ¶¶ 65-67, Figures 2 and 3.)

DuPont's argument also relies on its unsupported suggestion that DuPont and its co-conspirators would not have continued to fix the price of TiO2 after commencement of the Maryland Class Action lawsuit in 2010. DuPont's own liability expert [redacted] Meyer Dec. § T, Ex. 1356 (Willig Dep. at 100-105).) To the contrary, economic literature says that it is economically reasonable for prices to remain at supracompetitive levels during litigation involving a conspiracy. Harrington, J., "Post-Cartel Pricing During Litigation," Journal of Industrial Economics, vol. 52, pp. 517-533 (2004); Meyer Dec. § R, Ex. 985 ¶ 114. Moreover, as shown below, substantial evidence in the record shows that the TiO2 price fixing conspiracy continued unabated through 2013.

G. The TiO2 Price-fixing Conspiracy Continued After 2010.

Defendants' conduct after 2010 shows that the conspiracy continued unabated after the commencement of the Maryland Action. DuPont cites no authority, evidence, or economic basis supporting its position that the conspiracy would have ended with the filing of the class action

and relies generally on allegations about the nature of the TiO2 market.[20] (DuPont Br. p. 29-30.) Yet Defendants' own representatives testified [redacted] *See, e.g.*, Meyer Dec. § T, Exs. 1333, 1349, 1338, 1345 (Rubin Dep. 208:1-208:17; Quinn Dep. 138:24-140:10; Rogers Dep. 194:10-194:14; Stoll Dep. 204:10-205:2; Daney Dep. 93:22-95:24).) Indeed, that behavior included the same use [redacted][22] Valspar's expert opines that [redacted] (Meyer Dec. § R, Exs. 981 at 9-10, 985 ¶¶ 109-114; *see also id.* § J, Ex. 581 (noting in March 2012 that markets in North America [redacted]").) And none of authority on which DuPont relies supports its request for partial summary judgment. DuPont's request for summary judgment post-2010 should be denied.

V. CONCLUSION

For the reasons set forth above, DuPont's request for summary judgment, or, alternatively, partial summary judgment, should be denied.

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[20] Even though the conspiracy and damages period in the Maryland case extended through December 31, 2010, DuPont did not argue, as it does here, that the conspiracy or damages ended on February 9, 2010, when the complaint was filed. DuPont also argues that failure of the DOJ to bring an enforcement action after the Maryland class action filing renders the price-fixing claim implausible.(DuPont Br. at 6.) But that argument has been rejected in *High Fructose Corn Syrup*, 295 F.3d at 664.

[21] The only changes made by Defendants did not occur until late in the conspiracy period. [redacted]. (Meyer Dec. § T, Exs. 1352, 1333, 1341, 1345, 1351 (Daney Dep. 94:19-95:24; Rubin Dep. 74:15-75:4; Maas Dep. 199:13-200:23; Stoll Dep. 204:10-205:2; Fisher Dep. 142:13-143:8); § S, Ex. 977 at 3-4 [redacted] These admissions regarding the impropriety of Defendants' conduct provide yet another basis for denial of DuPont's motion.

[22] Meyer Dec. § D, Exs. 114, 115; § G, Exs. 359 (in May 2011 email, Millennium's Quinn [redacted], Ex. 360, 361, 362, 363; § M, Exs. 640, 642, 698; § S, Ex. 1144 (May 2013 Millennium form noting that [redacted]).

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: September 29, 2015

/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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 29, 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