No. 16-1345

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE VALSPAR CORPORATION AND VALSPAR SOURCING, INC.,

Plaintiffs-Appellants,

—v.—

E.I. DUPONT DE NEMOURS AND COMPANY,

Defendant-Appellee.

On Appeal From The United States District Court
For The District of Delaware

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS–APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org. AAI submits this brief because the district court's decision, if upheld, would make it unduly difficult, if not impossible, for plaintiffs to defeat summary judgment in price-fixing cases without "smoking gun" evidence of an express agreement, and thereby would encourage oligopolists to use indirect means to fix prices and harm consumers.[1]

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[1] The brief focuses on the most glaring legal errors on the face of the court's opinion, and not the entire factual record, much of which is under seal. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. One of AAI's directors was recused from this matter because her law firm is involved in a pending related class action.

Pursuant to Rule 29(c)(5), amicus curiae states: No counsel for a party has authored this brief in whole or in part; no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief; and no person or entity other than amicus curiae has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal of the district court's award of summary judgment to the defendant ("DuPont") in a price fixing case. Plaintiffs Valspar Corporation and Valspar Sourcing Inc. (collectively, "Valspar") allege that DuPont and other defendants fixed the price of titanium dioxide, a dry chemical powder often used as a pigment in paint and other products. Valspar, a manufacturer of paints and coatings, is a direct purchaser that opted out of a class action in which the district court of Maryland denied summary judgment on largely the same record. *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799 (D. Md. 2013). Valpsar's claims against DuPont were severed from those of other defendants.

The district court accepted that the market for titanium dioxide is conducive to collusion—indeed is "'a text book example of an industry susceptible to efforts to maintain supracompetitive prices.'" Memorandum Opinion ("Op.") at 10 (quoting *Titanium Dioxide*, 959 F. Supp. 2d at 827). And the court accepted that the "market behaved in a noncompetitive manner." *Id.* at 14 (internal quotation marks omitted). Evidence indicated that the industry uniformly raised prices notwithstanding declining demand and excess capacity. These critical facts should be a cause of significant concern. Moreover, evidence that defendants *sought* to coordinate their pricing and put the "industry" ahead of competing for customers should raise alarm bells. Instead, the court placed an excessively high burden on

plaintiffs to defeat defendant's motion for summary judgment. The legal principle that merely interdependent oligopoly pricing is not illegal was stretched beyond recognition into a rule of law appearing to provide that only smoking gun evidence or internal documents referring to an explicit agreement can get a case to a jury. That is not, and should not be, the law.

1. In considering this appeal, the Court should keep in mind the reason that mere interdependent oligopoly price elevation is lawful. It is not lawful because it is benign. On the contrary, such pricing is inconsistent with our expectations for a competitive market system; it represents a market failure. Supracompetitive oligopoly pricing is harmful to consumers, whether it is the product of an express cartel or merely interdependent interaction. And it is a problem of growing concern, as markets become increasingly concentrated. While merger enforcement can prevent mergers that *increase* the dangers of coordinated pricing, it does not address existing oligopoly price elevation.

And simple interdependent oligopoly pricing is lawful not because it would be difficult to read Section 1's agreement requirement to cover it. On the contrary, such pricing behavior fits well within the rubric of a "meeting of the minds" and older Supreme Court cases like *Interstate Circuit* and *American Tobacco*, which held that oligopolists' noncompetitive parallel behavior could satisfy the agreement requirement. Rather, simple interdependent oligopoly pricing has more recently

been construed not to satisfy the agreement requirement because of the practical difficulty of fashioning a remedy; absent utility-like regulation, how could firms know whether or not they could raise prices without triggering liability?

Nonetheless, tacit agreements (distinguished from conscious parallelism) remain unlawful, and "[c]ourts enjoy broad discretion to establish the reach of section 1 by defining" broadly or narrowly the "'extra ingredient of centralized orchestration of policy which will carry parallel action over the line into the forbidden zone of implied contract and combination.'" William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393, 405 (2011) (quoting Louis B. Schwartz et al., *Free Enterprise & Economic Organization: Antitrust* 439 (6th ed. 1983)).

This Court, and others, have articulated "plus factors" that help distinguish between lawful interdependent oligopoly pricing and parallel pricing that amounts to an unlawful agreement. Sometimes this Court has articulated the plus factors in a way that seems to ignore that a tacit agreement may be unlawful and otherwise sets an unduly high bar for the "extra ingredient" necessary to establish unlawful price fixing.

2. Under this Court's precedents, the district court applied an overly restrictive standard for inferring a price fixing agreement from circumstantial evidence. The district court failed to consider plaintiffs' evidence as a whole. More

significantly, the court misapplied *Matsushita* by holding that "ambiguous" evidence is insufficient to defeat summary judgment. Where, as here, plaintiffs' theory of collusion is plausible and the challenged activities are not procompetitive, *Matsushita* and this Court's precedents allow more liberal inferences. All that *Matsushita* and this Court's precedents require is that the existence of a conspiracy must be a reasonable inference and that a factfinder could reasonably find the concerted explanation more likely than not.

3. The district court failed to give sufficient weight to plaintiffs' evidence of plus factors. In particular, the court improperly discounted defendants' confidential information exchange that allowed them accurately to determine their relative market shares as well as industry inventories and capacity trends on a regional and country-by-country basis. Evidence cited by the court suggests that defendants used the exchanged information to facilitate parallel price increases and stabilize market shares. The court held that the fact that the information was shared on an aggregated basis undermined the information's significance, but failed to appreciate that accurate market-share information in particular can be an important tool in allowing oligopolists to detect and police "cheating" on the cartel arrangement.

The court also improperly discounted plaintiffs' evidence that defendants used public price announcements as signaling devices. Public price announcements without a legitimate justification are a well recognized plus factor that

would allow a jury to infer an unlawful price fixing arrangement. The court thought that defendants had a legitimate non-collusive purpose for the announcements, but this was a disputed issue of fact.

ARGUMENT

I. THE HARMFULNESS OF SUPRACOMPETITIVE OLIGOPOLY PRICING SHOULD INFORM THE STANDARDS FOR INFERRING A PRICE FIXING AGREEMENT

It is well established in the economics literature that supracompetitive oligopoly pricing is a serious problem. *See, e.g.,* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L. J. 1, 12-13 (2015) (reviewing contemporary economic scholarship and concluding that it "does not support the assertion that oligopolies typically perform competitively"); Louis Kaplow, *Competition Policy and Price Fixing* 251 (2015) ("Given the extent of oligopolistic price elevation and the number of successful prosecutions of explicit price-fixing arrangements involving substantial overcharges, . . . the existing level of deterrence may be insufficient."); James W. Brock, *Antitrust Policy and the Oligopoly Problem*, 51 Antitrust Bull. 227 (2006) (detailing adverse consequences of oligopolistic interdependence in the petroleum, automobile, tobacco and airline industries). And it is a problem of increasing concern, as markets become increasingly concentrated. *See* Council of Economic Advisors, *Benefits of Competition and Indicators of Market Power* 1, 4–6 (May 2016) (not-

ing that "[s]everal indicators suggest that competition may be decreasing in many economic sectors" and identifying evidence of "increasing concentration across a number of industries"), https://www.whitehouse.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.

There is also consensus that supracompetitive oligopoly pricing is harmful to consumers whether it is the product of an explicit cartel or "merely" interdependent interaction. *See, e.g.*, 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1429b, at 221 (3d ed. 2010); Kaplow, *supra*, at 218. Indeed "the aggregate harm of interdependence may well exceed that of relatively rare express cartels." Areeda & Hovenkamp, *supra*, ¶1432b2, at 243. Merger enforcement policy in the United States under Section 7 of Clayton Act focuses significantly on preventing mergers that increase the likelihood of "coordinated interaction," which typically does not involve an explicit cartel. *See* U.S. Dept. of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines* § 7, at 24 (2010) ("Coordinated Effects") ("A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms consumers."); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229-30 (1993) ("In the § 7 context, it has long been settled that excessive concentration, and the oligopoly price coordination it portends, may be the injury to competition the Act prohibits."). But merger enforcement has not substantially stemmed the

tide of rising concentration, *see Benefits of Competition*, *supra*, at 7, and, in any event, merger enforcement cannot remedy existing oligopoly price elevation.[2]

It is also true that Section 1's ban on agreements that unreasonably restrain trade could naturally be read to cover "merely" interdependent oligopoly pricing. As Judge Posner explained, "If a firm raises price in the expectation that its competitors will do likewise, and they do, the firm's behavior can be conceptualized as the offer of a unilateral contract that the offerees accept by raising their prices." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002); *see Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946) (evidence of parallel price increases during Great Depression when demand had dropped was sufficient to infer conspiracy; "conspiracy . . . may be found in a course of dealings or other circumstances as well as in an exchange of words;" key is "finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement"); *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 226 (1939); Kaplow, *supra*, at 33 (2013) ("the term agreement may, consistent with wider usage, readily be defined to embrace interdependent oligopolistic price elevation, which entails the required meeting of the minds").

[2] Indeed, once a concentrated industry is engaged in coordinated interaction to raise prices, it may be difficult to show that additional concentration will make things worse. *See, e.g., New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 363-65 (S.D.N.Y.1995) (rejecting claim that Kraft/Nabisco ready-to-eat cereal merger would increase likelihood of coordinated interaction that state claimed had already been occurring).

However, the Supreme Court has recognized that simple interdependent oligopoly pricing does not violate Section 1. *See Brooke Group*, 509 U.S. at 227; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007). As then Judge Breyer explained:

> Courts . . . have almost uniformly held, at least in the pricing area, that . . . individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act. That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for "interdependent" pricing. How does one order a firm to set its prices *without regard* to the likely reactions of its competitors?

Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988); *see also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432, 448 (9th Cir. 1990) ("Simple interdependent pricing does not violate the Sherman Act, not because it is desirable (it is not), but because permitting proof of conspiracy solely on the basis of price parallelism *is* undesirable."); *Blomkest Fertilizer, Inc. v. Potash of Saskatchewan, Inc.*, 203 F.3d 1028, 1038, 1042 (8th Cir. 2000) (Gibson J., dissenting) ("Even though oligopoly pricing harms the consumer in the same way monopoly does, interdependent pricing [alone] does not violate the Sherman Act for the very good reason that we cannot order sellers to make their decisions without taking into account the reactions of their competitors."); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359-60 (3d Cir. 2004) ("Despite the noncompetitive nature of [oligopoly pricing], which we have

come to call 'conscious parallelism,' we have held that the Sherman Act does not proscribe it.").[3]

Nonetheless, the Supreme Court continues to recognize that "tacit" agreements that unreasonably restrain trade are unlawful. *See Twombly*, 550 U.S. at 553 ("'[T]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954))) (second bracket in original); *see also Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1008 (3d Cir. 1994) (question is "whether the action was the result of some agreement, tacit or otherwise"); *White v. R.M. Packer Co.*, 635 F.3d 571, 576 & n.3 (1st Cir. 2011) (tacit agreement is actionable and is not

[3] In *Flat Glass*, this Court noted two reasons the Sherman Act does not condemn mere interdependent oligopoly pricing, citing Professor Turner's canonical article, Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962). One, echoing the courts cited above, is that "judicial remedies are incapable of addressing the anticompetitive effects of consciously parallel pricing." *Flat Glass*, 385 F.3d at 360. The other is that "there exists the notion that interdependent behavior is not an 'agreement' within the term's meaning under the Sherman Act." *Id.* In fact, however, Turner recognized that interdependent oligopoly pricing "seems equally well described as being an agreement, and the semantics of these terms seem intrinsically incapable of satisfactory resolution of the question. For me, this is a fatal difficulty, and compels the conclusion that the only convincing rationale for absolving oligopoly pricing rests on other grounds." Turner, *supra*, at 671-72. Notably, Turner added, "The immunization of pure oligopoly pricing from the Sherman Act which I have argued for here does not extend to agreements or understandings designed to convert an imperfect oligopoly pricing pattern into a perfect one by eliminating uncertainties." *Id.* at 673.

the same as "tacit collusion" or bare conscious parallelism); Andrew I. Gavil et al., *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 311 (2d ed. 2008) (suggesting that "boundary between tacit agreements—to which Section 1 applies—and parallel pricing stemming from oligopolistic interdependence" is not clear); *see generally* William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 Antitrust L. J. (forthcoming 2017), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760524 (arguing that most courts appropriately recognize illegality of tacit agreements, as distinct from interdependent conduct and express collusion).

"Plus factors" help distinguish between lawful interdependent oligopoly pricing and parallel pricing that amounts to an agreement, express or tacit. While "[t]here is no finite set of such criteria [and] no exhaustive list exists," this Court has identified "at least three . . . plus factors: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its [independent] interests; and (3) evidence implying a traditional conspiracy." *Flat Glass*, 385 F.3d at 360 (internal quotation marks omitted).[4] Other

[4] The first plus factor involves "evidence that the industry is conducive to oligopolistic price fixing." *Flat Glass*, 385 F.3d at 360. The second involves "'evidence that the market behaved in a noncompetitive manner.'" *Id.* at 361 (quoting *High Fructose Corn Syrup*, 295 F.3d at 655). The third plus factor is said to "involve 'customary indications of traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a

courts and commentators have suggested other plus factors, or framed the issue somewhat differently. *See, e.g.*, *Petroleum Products*, 906 F.2d at 448 (plus factors include "practices which unjustifiably facilitate interdependent pricing and which can be readily identified and enjoined") (internal quotation marks omitted); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.) ("[A] horizontal price-fixing agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants' use of facilitating practices."); Herbert Hovenkamp, *The Antitrust Enterprise* 131 (2005) ("an agreement may be inferred from additional actions that firms take in order to make an oligopoly market more stable").

Sometimes this Court has overstated the significance of the third plus factor. For example, the Court has said, "In the context of parallel pricing, the first two factors largely restate the phenomenon of interdependence," and so, "[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, 361 (quoting *High Fructose Corn Syrup*, 295 F.3d at 661); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 398 (3d Cir. 2015) ("[T]raditional non-economic evidence of a conspiracy [is] the most important plus factor in cases like this one."). This is an unfortunate formulation in several respects.

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common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id.* (quoting Areeda & Hovenkamp, ¶ 1434b, at 243).

First, the formulation ignores that unlawful agreements may be *tacit*, and if there is evidence of "an actual, manifest agreement not to compete," then the whole plus-factor analysis is superfluous. Second, it ignores the important caveat noted in *Flat Glass* itself that sometimes evidence of conduct that is not in the independent self-interest of firms and that facilitates elevated oligopoly pricing can be sufficient to establish liability for price fixing. *See Flat Glass*, 385 F.3d at 361 n.12 ("We also observe that certain types of 'actions against self interest' [such as exchanges of confidential price information] may do more than restate economic interdependence.").

Third, the formulation can be misread to understate the significance of structural and market evidence that the industry is not behaving competitively, or is acting *like* a cartel, which is the predicate for antitrust concern. *See* Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 Iowa L. Rev. Bull. 55, 63 (2010) ("interdependence . . . is a potentially dangerous condition"; "parallel pricing . . . is enough to raise our antennae"). And while additional conduct may be necessary to infer a price-fixing agreement, not much more may be required. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) ("Antitrust law . . . sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable, or accompanied by other conduct

that in context suggests that each competitor failed to make an independent decision.”).

Fourth, the emphasis on traditional conspiracy evidence ignores that supracompetitive oligopoly pricing itself may imply a likelihood of an express conspiracy insofar as such pricing is difficult to sustain without explicit means of communication. *See* Richard Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1574 (1969) (“[I]t seems improbable that prices could long be maintained above cost in a market, even a highly oligopolistic one, without *some* explicit acts of communication and implementation.”); *Brooke Group*, 509 U.S. at 227-28 (“Firms that seek to [raise prices] through the conscious parallelism of oligopoly must rely on uncertain and ambiguous signals to achieve concerted action. . . . This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.”); *Blomkest Fertilizer*, 203 F.3d at 1042 (“While the oligopoly market structure naturally facilitates supra-competitive pricing, the same market structure also makes cooperative arrangements unstable . . . .”) (dissenting opinion); *see also* F.M. Scherer & David Ross, *Industrial Market Structure & Economic Performance* 226 (3d ed. 1990) (conclusion of chapter on oligopoly pricing is that “[c]oordination of pricing policies is not easy”); *cf.* Kovacic, et al., *supra*, at 413 (buyer resistance limits the ability of firms to maintain collusive prices without an explicit cartel).

Finally, the formulation may be misread to suggest that the *more* prone an industry is to supracompetitive oligopoly pricing,[5] the *greater* is the quantum of traditional conspiracy evidence that is required to prove an agreement. Such a "paradox of proof" makes no sense from a public policy perspective. *See* Kaplow, *supra*, at 126 (in situations "in which the danger [of coordinated pricing] is most serious, liability may become less likely"); Posner, *supra*, at 100 (noting "paradox that the more conducive the market's structure is to collusion without express communication, the weaker the plaintiff's case"); Areeda & Hovenkamp, *supra*, ¶1432b1, at 242 (noting "perverse" result when "the more concentrated market makes the [express] agreement unnecessary, and thus the conduct can be explained without it").

In short, while interdependent oligopolistic price elevation is not illegal by itself, it is harmful and not to be encouraged. Oligopolistic price coordination should raise alarm bells, and be condemned when it goes beyond simple price leadership and is facilitated through means that serve little independent purpose. At the very least, the legality of mere interdependent pricing behavior should not

[5] The economics of cartel behavior does not distinguish between explicit cartels and those that involve "mere" interdependent conduct. *See* Kaplow, *supra*, at 177-181; *see also* Richard A. Posner, *Antitrust Law* 94 (2d ed. 2001) ("From an economic standpoint it is a detail whether the collusive pricing scheme was organized and implemented in such a way as to generate evidence of actual communications.").

be a justification for restrictively interpreting evidence of plus factors designed to distinguish between lawful interdependent conduct and actionable collusion.

II. THE DISTRICT COURT APPLIED AN OVERLY RESTRICTIVE STANDARD FOR INFERRING A PRICE FIXING AGREEMENT FROM CIRCUMSTANTIAL EVIDENCE

A. The District Court Misapplied *Matsushita* in Holding that "Ambiguous Evidence" Is Insufficient to Defeat Summary Judgment

The district court misapplied the summary judgment standard set forth in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and elaborated by *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), and by several of this Court's cases. The court repeatedly rejected evidence of plus factors suggestive of a price fixing agreement on the basis that each piece of evidence was open to a non-collusive interpretation and hence failed to exclude the possibility of independent action. And the court held that even though plaintiffs' theory of price fixing is plausible, ambiguous evidence of an agreement is insufficient to defeat summary judgment. *See* Op. at 6, 28 n.10. This was error, for two reasons.

In the first place, the district court failed to consider plaintiffs' evidence as a whole, as this Court's precedents consistently require. *E.g.*, *Flat Glass*, 385 F.3d at 357. More significantly, where, as here, plaintiffs' theory of collusion as supported by the evidence they proffered is plausible, and the challenged activities are not procompetitive, "more liberal inferences from the evidence should be permitted

than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.3d 1224, 1232 (3d Cir. 1993). All that *Matsushita* requires is that "the inferences drawn from the proffered evidence must be reasonable." *Id.* at 1231 (citing *Kodak,* 112 S.Ct. at 2083); *see Alvord-Polk*, 37 F.3d at 1001 ("if the alleged conduct is 'facially anticompetitive and exactly the harm the antitrust laws aim to prevent,' no special care need be taken in assigning inferences to circumstantial evidence" (quoting *Kodak*, 112 S. Ct. at 2088)); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999) ("The acceptable inferences which we can draw from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the danger associated with such inferences."); *accord Flat Glass*, 385 F.3d at 357-58. Contrary to the district court's apparent belief, summary judgment for defendants is not appropriate when the individual pieces of evidence "could feasibly [be] interpret[ed] as consistent with the absence of an agreement to raise price," or that plaintiffs' "evidence does not in isolation lead inexorably to the conclusion that [defendants] entered into an agreement." *Id.* at 368.

The district court, Op. 6, 28 n.10, relied on a sentence in *Chocolate Confectionary* that states, "Importantly, even when armed with a plausible economic theory, a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment." 801 F.3d at

396.[6] This sentence, based on a footnote in *Matsushita*, conflicts with *Alvord-Polk*, *Petruzzi's*, *Baby Food*, and *Flat Glass*, which relegate *Matsushita*'s restrictive approach towards ambiguous evidence to conspiracies that are implausible or involve facially pro-competitive conduct (such as the price *cutting* at issue in *Matsushita* itself).[7]

In any event, *Chocolate Confectionary* itself made clear 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 exclude the possibility that the defendants were acting independently." 801 F.3d at 397 (internal quotation marks

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[6] Indeed, the district court explained its disagreement with the Maryland district court partly on the basis of this language. *See* Op. 28 & n.10 (reading *Chocolate Confectionary* to suggest that, "in the antitrust oligopoly context, summary judgment cannot be avoided by having amassed a significant amount of ambiguous evidence," and noting that *Chocolate Confectionary* was decided after the Maryland class action ruling); *cf. Titanium Dioxide*, 959 F. Supp. 2d at 804 ("[I]n the absence of an admission of guilt by the Defendants, the Plaintiffs may rely on purely circumstantial, or 'ambiguous,' evidence from which the existence of a conspiracy may be inferred.").

[7] *Matsushita* held: "Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." 475 U.S. at 596-97. In dicta, in a footnote, it added, "We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy." *Id.* at 597 n.21. Particularly in light of *Kodak*, which held that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury," 504 U.S. at 468, the *Matsushita* footnote cannot be taken literally.

and brackets omitted). Plus factors provide the evidence that "tends to exclude the possibility that defendants acted independently." *Petruzzi's*, 998 F.2d at 1232-33; *see also In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference."); *High Fructose Corn Syrup*, 295 F.3d at 662 ("most cases are constructed out of a tissue of [ambiguous] statements and other circumstantial evidence"); *Petroleum Products*, 906 F.2d at 439 ("Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct." (quoted with approval by *Petruzzi's*, 998 F.2d at 1231)).

Given the plausibility of plaintiffs' theory of collusion and the absence of any concern about chilling pro-competitive behavior, ambiguous evidence can be sufficient to defeat summary judgment—even on a theory of express conspiracy—if it would "allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 14.03[B], at 14-25 (4th ed. 2014 Supp.).

B. The District Court Failed to Give Sufficient Weight to Plus Factors Indicative of an Express or Tacit Agreement

Besides misreading *Matsushita* and taking an unduly restrictive approach to ambiguous evidence, the district court failed to appreciate the significance of plaintiffs' plus-factor evidence. The district court found that the market for titanium dioxide was conducive to price fixing and that the defendants had a motive to conspire because demand and prices had declined substantially. It agreed with the Maryland court's conclusion that this was "'a text book example of an industry susceptible to efforts to maintain supracompetitive prices.'" Op. 10 (quoting *Titanium Dioxide*, 959 F. Supp. at 827). The court found that plaintiffs presented sufficient evidence that the "market behaved in a noncompetitive manner." *Id.* at 14 (internal quotation marks omitted). It accepted that the 31 industry-wide parallel price increase announcements during the 11-year conspiracy period were a departure from the prior seven years when such parallel price increases were few in number.[8] *Id.* at 9, 27. And, according to the court, the evidence could support the

[8] To be sure, the district court characterized the pricing conduct as "an 'unremarkable' swing of the pendulum in an interdependent, oligopolistic market." Op. 28. *But cf. Titanium Dioxide*, 959 F. Supp. 2d at 825 (parallel price increases are "noteworthy because they were so pervasive," and "no producer rescinded a price increase during the [conspiracy] period"). The court also cited the stringent standard that, "'For parallel pricing to go 'beyond mere interdependence,' it 'must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it.'" Op. 12 (quoting *Baby Food*, 166 F.3d at 135). However, showing that it would be irrational to raise prices absent a prior agreement is only one way that parallel pricing may support an inference of conspiracy. *See Petruz-*

conclusion that the defendants significantly boosted prices above cost increases ("overcharging" Valspar by 16%), and that market shares arguably remained relatively stable during the conspiracy period. *Id.* at 11, 12. There was also evidence that the price increases were implemented notwithstanding that this period was marked by low and stable, or declining, demand and excess industry capacity. *Titanium Dioxide*, 959 F. Supp. 2d at 809.

Beyond this structural and market evidence indicating that the industry behaved like a cartel, plaintiffs presented evidence that defendants did much more than engage in follow-the-leader pricing behavior. However, the district court viewed defendants' collective efforts to boost industry prices as perfectly natural and "noncollusive" behavior of oligopolies,[9] and seemed to demand smoking-gun evidence in the form of an admission of an agreement by the defendants.[10] In par-

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zi's, 998 F.3d at 1242 ("While . . . mere consciously parallel behavior alone is insufficient to prove a conspiracy, it is circumstantial evidence from which, when supported by additional evidence, an illegal agreement can be inferred."); *cf. Flat Glass*, 385 F.3d at 366 n.19 (post-increase communications may show agreement to make parallel price increases stick).

[9] For example, the district court downplayed internal emails referring to industry discipline and the collective needs of the industry, noting that "[i]n an oligopoly, it may be in a firm's best interest to consider the interests and needs of the industry as a whole." Op. 25. Such evidence should be alarming rather than exculpatory.

[10] The district court distinguished cases like *Petruzzi's* and *High Fructose Corn Syrup* on the basis that in those cases "[t]here were references to some sort of explicit agreement" in the documents. Op. 25.

ticular, the district court improperly discounted two plus factors indicative of an express or tacit agreement:

1. **Information exchange**. The industry adopted an information exchange (the Global Statistics Program) that "gave the defendants 'a very powerful and timely over view [sic] of market supply . . . and demand . . . conditions.'" Op 16. It allowed the defendants to accurately determine their relative market shares, as well as industry inventories and capacity trends on a regional and country-by-country basis. *Id.* Such data can be an important tool in allowing oligopolists to infer "cheating" on coordinated pricing. *See* George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44, 46 (1964) ("Fixing market shares is probably the most efficient of all methods of combatting secret price reductions."); Kaplow, *supra*, at 281 ("uncertain demand . . . may constitute the greatest threat to the sustainability of coordinated oligopoly pricing" because "firms' inability to distinguish sales lost to demand fluctuations from those lost to cheating can trigger price wars"). And in this case, evidence cited by the court suggests that market-share information may have been used for that purpose.[11] Moreover, the data more generally was apparently used to reduce the uncertainty that a price increase would stick.[12]

[11] The court cited several emails relating to market share, noting that an executive of one of the defendants advised, "[b]e disciplined, keep our volume, do not take others;" another advised seeking business when its share was below its "historical and sustainable share" as "[c]ompetitors will let us have this;" and another advised

The district court rejected this evidence as a plus factor because it concluded that the defendants could not "determine any individual statistics about any firm other than their own," and the data were "historical, aggregated market statistics which firms could use to analyze their position within the market." *Id.* at 17.[13] But analyzing their position in the market is exactly the point. While the exchange of such information is benign in many settings, it can facilitate an express or tacit agreement to fix prices in an oligopoly conducive to coordinated interaction. *See, e.g., In re McWane, Inc.*, 2012 WL 4101793, at *14 (FTC Sep. 14, 2012) (sharing aggregated sales volume data can support inference of conspiracy where it was linked to parallel price increases and it allowed rivals "to determine whether they were losing sales due to downturn in the market (shown by a steady market share)

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that additional sales may be made "as this will not disrupt DUP[ONT]." Op. 23 (first brackets in original).

[12] The court cited a DuPont email that its competitors "reading of the [GSP data] like ours should give them confidence that [North America] price increases can be prosecuted." Op. 23.

[13] The court also thought this reference to the use of the GSP data, and similar references "actually suggest the absence of an agreement. The employees of DuPont and the other defendants repeatedly emphasize their lack of assurance as to what the other players in the industry were doing or were intending to do." Op. 24. However, even an explicit cartel can involve a high degree of uncertainty over cartel members' adherence to the cartel understanding, which is why cartels need a monitoring mechanism to be effective.

or discounting by competitors (evidenced by a declining share)," and defendants "believed the information would help maintain pricing stability").[14]

2. **Price Signaling**. The evidence cited by the court indicates that defendants engaged in signaling behavior. At least some public price increase announcements (and decisions not to bid for certain customers) were intended to send a message to rivals and were timed to facilitate such signaling. *See, e.g.,* Op. 19-20 (quoting DuPont executive stating "we've begun the process of 'training' our competitors to follow our lead on price increases (or, in one example, that we'll follow if they lead)."). The district court dismissed this evidence as a plus factor because it concluded that the "defendants had lawful, noncollusive reasons for making public price announcements." *Id.* at 21. Moreover, the court seemed to suggest that price signaling was typical oligopoly behavior and that penalizing it would mean that "any evidence of lawful interdependence would also necessarily be evidence of actionable conspiracy." *Id.* at 22.

The district court's analysis is faulty on two counts. First, the court's analysis ignores that advance public price announcements without a legitimate justification are a recognized plus factor that would allow a jury to infer an unlawful price-

[14] The district court cited *In re Citric Acid Litig*., 191 F.3d 1090, 1099 (9th Cir. 1999), for the proposition that an exchange of aggregated sales and production information could not support an inference of conspiracy. Op. 17. But *Citric Acid* is distinguishable because there was no suggestion in that case that the defendant was using the information to monitor compliance with coordinated pricing or market-share benchmarks.

fixing agreement. *See, e.g., Petroleum Products*, 906 F.2d at 446 ("[E]vidence concerning the purpose and effect of price announcements, when considered together with the evidence concerning the parallel pattern of price restorations, is sufficient to support a reasonable and permissible inference of an agreement, whether express or tacit, to raise or stabilize prices."); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010) (public announcements of prices can be circumstantial evidence of price fixing); *McWane*, 2012 WL 4101793, at *13 (public pricing announcements "could reasonably be read as veiled communications to" rivals and were understood as such); *see also* Michael D. Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y. L. Sch. L. Rev. 881, 901-03 (1979) (pricing announcements may be construed as an assurance or commitment and hence support an inference of an unlawful agreement, depending on the intent and understanding of the parties) (article cited with approval in *Twombly*, 550 U.S. at 556 n. 4); Lawrence J. White, *A Legal Attack on Oligopoly Pricing: The* Automobile Fleet Sales *Case*, 9 J. Econ. Issues 271, 279 (June 1975) ("When there are strong temptations for 'cheating' . . . signaling may be necessary for mutual reassurance").

Second, plaintiffs presented evidence that the public announcements were unnecessary because, under their supply agreements with Valspar, defendants were

required to—and did—provide direct written notice of such increases. *See* Plaintiffs' Summary Judgment Brief at 21 n.13 (Sep. 29, 2015). It was thus a jury question whether there was a legitimate purpose for the announcements in this case. *Cf. Petroleum Products*, 906 F.2d at 449 (public posting of prices was signaling where any changes in prices or dealer discounts were directly reported to the dealers).

The district court should not have dismissed plaintiffs' evidence concerning the Global Statistics Program and price signaling. Exchanges of confidential information, signaling, and other conduct that helps maintain supracompetitive prices are recognized plus factors that distinguish between mere lawful interdependent behavior and unlawful collusion.

CONCLUSION

This Court should reject the district court's overly restrictive approach for allowing a price-fixing claim to reach a jury in a circumstantial evidence case.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Richard M. Brunell, hereby certify that:

1. Pursuant to Local Appellate Rule 46.1, I am member of the bar of this court;

2. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)((7)(B) because it contains 6556 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Appellate Rule 29.1(b).

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July 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

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