

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION	CIVIL ACTION MDL No. 13-2437 15-cv-1712
THIS DOCUMENT RELATES TO: Ashton Woods Holdings LLC, et al., Plaintiffs, v. USG Corp., et al., Defendants.	

**MEMORANDUM RE: DEFENDANT PABCO'S MOTION FOR SUMMARY
JUDGMENT AND PLAINTIFFS' MOTION TO STRIKE**

Baylson, J.

October 11, 2018

This action was brought by twelve large homebuilders (“Homebuilder Plaintiffs”) in the United States seeking damages for Sherman Act violations by seven (7) separate defendants. This case was consolidated by the Judicial Panel on Multidistrict Litigation with other similar cases already pending in this Court for pretrial litigation purposes only. After several years of litigation, the two classes of drywall purchasers, both Direct and Indirect Purchasers, have reached settlements. The Court has already approved the Direct Purchaser settlement and a request for approval of the Indirect Purchaser settlement is pending.

Although several Defendants have settled with the Homebuilder Plaintiffs, PABCO has not. This Court denied PABCO’s prior motion for summary judgment as reported at 163 F. Supp. 3d 175 (Feb. 18, 2016). (Mot., ECF 309).

Following the class certification settlements in this case, Defendant PABCO has again moved for summary judgment on “liability issues” heavily relying on a recent Third Circuit case, Valspar Corporation v. DuPont, 873 F.3d 185 (Sept. 14, 2017), which was handed down after

PABCO asserts that the Valspar Third Circuit decision requires this Court to reconsider and change its holding denying summary judgment. Plaintiff Homebuilders have answered this Motion for Summary Judgment with a Motion to Strike. (ECF 310).¹

Having carefully reviewed the Valspar decision and this Court’s earlier decision, the Court will deny the PABCO’s Motion and grant the Plaintiffs’ Motion to Strike.

Valspar is, of course, a binding precedent and this Court recognizes it is an important decision in a sequence of precedential antitrust decisions by the Third Circuit on summary judgment motions. Nonetheless, this Court believes that its own analysis of PABCO’s prior Motions for Summary Judgment in the class actions, and denying them at least as to PABCO, was well grounded in existing Third Circuit law, and Valspar does not require or not allow for reconsideration or reversal.

The Valspar decision carefully continued the Third Circuit’s analysis of facts presented of record, taken in the light most favorable to the non-moving party in the context of antitrust law. As is customary, the Third Circuit not only applied traditional summary judgment standards, but also the unique standards that it has consistently held are applicable in antitrust cases charging a price fixing conspiracy, particularly in the context of an oligopoly and facts about pricing, which have been historically referred to as “conscious parallelism.”

¹ Plaintiffs Motion to Strike addresses the summary judgment motions by Defendant PABCO, New NGC, Inc. (“National”), and USG Corporation, United States Gypsum Company, and L&W Supple Corporation (collectively “USG Defendants”). In this memorandum we address only PABCO’s motion, as National has since settled with Plaintiffs, rendering its motion moot. (See ECF 331.) USG Defendants’ motion is addressed separately in an Order filed this date.

In Judge Hardiman’s decision, the Circuit Court recognized that conscious parallelism, standing alone, does not prove any conspiracy to fix prices, but that a court must apply so-called “plus factors” and then determine, from the evidence considered as a whole, whether it was more likely or not that the defendants had agreed upon prices.

Judge Hardiman’s careful analysis of the facts in Vaspar is similar to this Court’s analysis of the facts, in denying PABCO’s prior motion for summary judgment in the class cases. See 163 F. Supp. 3d at 251-259. Consistent with Judge Hardiman’s emphasis on the third plus factor, traditional conspiracy evidence, this Court noted a number of communications between PABCO and other drywall manufacturers that would allow a jury to find an agreement on prices. Id. at 255-257.

Judge Hardiman’s opinion in Valspar relies heavily on three recent Third Circuit cases, In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999), In Re Flat Glass Antitrust Litig., 383 F.3d 350 (3d Cir. 2004), and In Re Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015), which are three of the precedents that this Court also relied upon. See, e.g., 163 F. Supp. 3d at 192-94.

Contrary to PABCO’s arguments, this Court did not ignore or violate the standards set forth in Valspar, nor did it ignore or violate the standards set forth in any of the three cases cited above.

What distinguishes this case from Vaspar is that in considering the plus factors in this case, there was evidence of “traditional” conspiratorial evidence, specifically as to PABCO. See 163 F. Supp. 3d at 255-57 (discussing emails from PABCO’s Director of Sales and VP of Sales and Marketing related to the decision to eliminate job quotes and coordinated behavior among manufacturers).

The Valspar decision clearly holds that there was no such evidence as to DuPont and this absence of evidence was the major factor in affirming the grant of summary judgment in favor of DuPont by the district court. Valspar, 873 F.3d at 202 (“Valspar did not offer any single **FORM (check)** of evidence that would have gotten it close to showing that a conspiracy is more likely than not.”)

We also note that following this Court’s decision denying summary judgment to all defendants which had moved for summary judgment (but one), this Court granted non-settling defendants’ motion for certification under 28 U.S.C. § 1292(b), for interlocutory appeal. (See 13-2437, ECF 391). We determined that the statutory prerequisites for interlocutory appeal were satisfied, and cited the district court’s decision in Valspar, with a note that “if the Third Circuit affirms Valspar in a precedential opinion, this Court may reconsider its summary judgment decision.” (13-cv-2437, ECF 384). However, the Third Circuit rejected the defendants’ request for certification in this case.

Vaspar continued the well-settled Third Circuit standards for adjudicating summary judgment motions in antitrust cases charging price agreements in violation of the Sherman Act. Because of the absence of any “plus factors” as to DuPont, the Third Circuit affirmed the grant of summary judgment by the district court. To the contrary, in view of the evidence of plus factors applicable to PABCO, as set forth in detail in this Court’s prior opinion denying summary judgment, PABCO does not have any right to a second “bite at the summary judgment apple” – but it retains its defenses for trial, as this Court has only upheld the sufficiency of the Plaintiffs’ evidence to allow a jury to find that there was an agreement. This Court’s prior denial of PABCO’s summary judgment motion in no way relieves Homebuilder Plaintiffs of proving to

the satisfaction of a jury that PABCO was in fact a member of a conspiracy to fix prices of drywall.

In sum, as explained in our extensive February 18, 2016 decision, Defendant PABCO has not demonstrated that there is no genuine issue of material fact as to the alleged conspiracy, and has not shown that Valspar changes Third Circuit law or requires this Court to conclude that its prior decision as to PABCO was erroneous. We will therefore grant the Homebuilder Plaintiffs' motion to strike as to PABCO only.

An appropriate order follows.

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ORDER RE: PENDING MOTIONS FOR SUMMARY JUDGMENT AND SCHEDULING

In this last remaining case in this multi-district litigation, twelve large homebuilder plaintiffs (hereinafter “Homebuilder Plaintiffs”) have claimed damages for antitrust violations. Only three defendants remain in this case, PABCO, and United States Gypsum Company (“USG”) and its wholly-owned subsidiary, L&W Supply Corporation. (“L&W”).

PABCO, whose prior motion for summary judgment (MDL Dkt., ECF 205) was denied, asserts that a recent Third Circuit case Valspar Corporation v. DuPont, 873 F.3d 185 (Sept. 14, 2017) requires reconsideration and granting summary judgment in its favor against the Homebuilder Plaintiffs. (ECF 745.)

As discussed in the foregoing memorandum, the Court has concluded that the Third Circuit’s decision in Valspar does not change Third Circuit law and does not require this Court to reexamine its prior holding denying summary judgment as to PABCO and the other defendants who had moved for summary judgment.

Defendants USG/L&W are in a different situation than PABCO. USG/L&W settled the claims of the Direct and Indirect Purchaser classes as of February 12 and 13, 2015 (ECF 180 & 181), when the class Plaintiffs filed Motions for Preliminary Approval. This was prior to the transfer of the Homebuilders' Complaint, which had been filed in the United States District Court for the Northern District of California as of March 17, 2015, and was transferred to this Court by the Judicial Panel on Multidistrict Litigation, as a "tag along" case. The first docket entry of the Homebuilder Plaintiffs in this Court is April 2, 2015, which is after the USG/L&W settlement became public knowledge by the filing of the motion for preliminary approval.

On May 31, 2018, in this case, USG/L&W filed a motion for summary judgment (ECF 740) asserting that Homebuilder Plaintiffs do not have sufficient evidence to allow a jury to find that USG/L&W had entered into any agreement with a competitor to fix the price of the drywall. Thus, USG/L&W now moves for summary judgment against the Homebuilder Plaintiffs, as the other Defendants had moved for summary judgment against the class Plaintiffs.¹

USG/L&W assert that their motion for summary judgment is timely because they had settled the class claims (Direct Purchasers and Indirect Purchasers) against them, prior to the close of discovery and prior to all other non-settling defendants having filed motions for summary judgment on May 12, 2015 (ECF 204-208). USG/L&W have not previously presented to this Court their independent grounds for summary judgment.

The Homebuilder Plaintiffs have moved to strike the USG/L&W Motion and assert that USG/L&W's motion comes much too late and cannot succeed since the evidence introduced by

¹ Other motions for summary judgment are also pending and fully briefed, but are not affected by this Order. See Defendants' Motion for Partial Summary Judgment on Umbrella Damages (ECF 724), Defendants' Motion for Summary Judgment on Choice of Law (ECF 754), Defendants' Motion for Partial Summary Judgment concerning Certainteed, Continental, Georgia-Pacific, Lafarge, Panel Rey, and Tin (ECF 756), and Defendants' Motion for Partial Summary Judgment on Unassigned Claims (ECF 755).

Plaintiffs in opposing the prior motions for summary judgment clearly applies to USG and L&W.

In their Motion to Strike, the USG/L&W Motion for Summary Judgment, Homebuilder Plaintiffs accurately point out that in prior memoranda and orders, after the Homebuilder Plaintiffs case became part of this multidistrict litigation, this Court often referred to “defendants,” including by definition USG/L&W, when, in fact, USG/L&W were no longer part of the continuing litigation of the class actions because they had settled those actions only, but not this case.

Notwithstanding this arguably overly broad use of the term “defendants,” Homebuilder Plaintiffs surely knew USG/L&W were not included in the Court’s broad references to Defendants merely because they had already settled with both proposed classes, but had not settled with the Homebuilder Plaintiffs.

When Homebuilder Plaintiffs entered this MDL after USG/L&W reached a settlement with the class Plaintiffs, Homebuilder Plaintiffs were fully involved in the MDL. The USG/L&W settlements were finally approved on August 20, 2015 (ECF 276 & 278). Homebuilder Plaintiffs thus knew that USG/L&W were no longer in the class action, and also, had not yet filed a motion for summary judgment in this case. In addition, this Court’s lengthy opinion dated February 18, 2016, granting summary judgment to Certaineed, but denying it to all other moving defendants (not including USG/L&W)² quite obviously put Homebuilder Plaintiffs on notice that USG/L&W had not moved for summary judgment because of the prior settlement with both classes.

² Homebuilder Plaintiffs’ brief, pp. 9-12, details numerous facts, cited in this Court’s opinion, concerning USG/L&W communications with other defendants. USG/L&W’s reply brief shall respond as to these facts of record.

The Court notes the joint stipulation setting a schedule for dispositive motions in this case (ECF 735), filed May 21, 2018, set a deadline for any dispositive motions for July 2, 2018.

Thus, the USG/L&W motion for summary judgment is timely.

Therefore, the Court finds, without deciding the merits of the USG/L&W motion for summary judgment at this time, that the Homebuilder Plaintiffs, whose counsel have consistently had impressive mastery of the underlying facts in this case, and the procedural history, are not prejudiced by being required to respond to the USG/L&W motion for summary judgment at this time. Denying USG/L&W's right to file such a motion, as Rule 56 allows in every case, would be unfair.

For the reasons stated above and in the foregoing Memorandum, this Court concludes and **ORDERS:**

1. Homebuilder Plaintiffs' Motion to Strike (15-cv-1712, ECF 310) will be **GRANTED** as to PABCO but will be **DENIED** as to USG and L&W.

2. Although the Court does not see any need for any further discovery, if Homebuilder Plaintiffs and/or USG/L&W assert discovery is necessary, they should promptly confer with each other, and may conduct agreed upon discovery. In the absence of agreement, either party should file a motion to compel, within 21 days, without legal memorandum, following which the Court will have a recorded telephone conference. If discovery is to take place, the following schedule will be changed.

3. Homebuilder Plaintiffs shall respond to the USG/L&W Motion for Summary Judgment within thirty (30) days, and shall incorporate by reference, without repetition or new submission of previously submitted exhibits, the arguments and evidence presented by the class plaintiffs in opposing the prior motions for summary judgment.

4. Moving defendants, USG/L&W, shall file a reply brief within 21 days.

5. The Court will have oral argument on the USG/L&W Motion at a date to be set after briefs have been filed. Because counsel for these clients are out of town, the Court will approve, if mutually agreed, “live streaming” of the argument rather than requiring counsel to appear in Philadelphia.

BY THE COURT:

Dated: 10/11/18

/s/ Michael M. Baylson
MICHAEL M. BAYLSON
United States District Court Judge