No. 14-3306

In the United States Court of Appeals for the Sixth Circuit

COLLINS INKJET CORPORATION,
Plaintiff-Appellee,

v.

EASTMAN KODAK CO.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 1:10-CV-00720

BRIEF OF APPELLEE

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DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellee Collins Inkjet Corporation makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

/s/W.B. Markovits
Signature of Counsel

June 2, 2014
Date

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

After thousands of pages of briefing and a three-day evidentiary hearing, the district court issued a preliminary injunction in this case preserving the status quo until September 6, 2014, thereby prohibiting Appellant Eastman Kodak Company ("Kodak") from using its monopoly in one market (refurbished printheads for Versamark printers) to eradicate competition in another market (ink for Versamark printers). Kodak sought to accomplish its anticompetitive goal primarily through tying, an unlawful practice under Section 1 of the Sherman Act.[1] As a result, the district court held that Appellee Collins Inkjet Corporation ("Collins") had demonstrated a strong likelihood of success on the merits of this claim, as well as its companion tortious interference claim.[2] The district court, in other words, applied the well-worn preliminary injunction standard, reviewed the evidence presented, "balance[d] the equities," and found a short-term preliminary injunction preserving the status quo necessary under the circumstances.

Kodak essentially raises two reasons it believes the district court erred. First, Kodak thinks the district court should have applied Kodak's newly-minted

[1] Ironically, this case involves a reprise of the conduct at issue in *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992) ("*Kodak*"). It also involves the same defendant, and a nearly identical factual predicate.

[2] The district court also found that Collins would suffer irreparable harm in that it would lose market share, "suffer damage to its workforce who may be difficult to replace, and is likely to see its goodwill and reputation suffer due to its inability to satisfy customer needs." RE, 98, Opinion, Page ID# 10623. *See also id.* at 10623-34 (finding that "the public interest would be served by granting injunctive relief").

"price-cost test," using plaintiff's costs to analyze its unlawful tying arrangement. The district court, however, properly recognized that not only would it be wrong to apply a price-cost test to an unlawful tying claim, but Kodak's version of the price-cost test using plaintiff's costs got the "test" entirely backwards and, in any event, found no support in the case law. *See* Section II, *infra*. Second, Kodak thinks the district court should have made a number of evidentiary determinations in its favor. The district court, however, properly weighed the evidence in coming to its conclusions. *See* Section III, *infra*. Kodak's contemporaneous emails and internal economic analyses (which concluded that the tying arrangement would have the desired effect of forcing all rational customers to switch to Kodak ink) differed markedly from Kodak's post-hoc rationalizations and litigation expert reports (which attempted to justify the tie and minimize its likely effects). Predictably, the district court gave greater weight to the contemporaneous evidence than the evidence Kodak developed for trial.

The question on appeal is whether the district court *abused its discretion* in weighing the evidence. Despite its quibbling, Kodak has not identified a single misapplication of law or "clearly erroneous" finding of fact constituting an abuse of discretion. The district court's 36-page opinion and analysis is legally and factually sound. And, while Kodak is certainly free to disagree with the district court's decision, that disagreement – as set forth Kodak's brief – is not a legally sufficient basis at the appellate level for reversal. Accordingly, Collins respectfully requests that the Sixth Circuit affirm the district court's decision and leave the preliminary injunction in place, allowing competition on the merits.

STATEMENT OF THE CASE

I. RELEVANT FACTS.[3]

From the 1980's until 2009, Kodak marketed and sold Versamark printers to large commercial printers, resulting in thousands of installations.[4] Versamark printers last ten to twenty years or more, and many remain in operation today.[5] One key component of a Versamark printer is a printhead, which customers must periodically replace by purchasing a refurbished printhead from Kodak.[6] Kodak is and always has been the sole source of Versamark refurbished printheads.[7] Another key component for use with a Versamark printer is specialized Versamark ink.[8] Annual printhead costs for a Versamark customer generally exceed its ink costs.[9] Kodak considers the aftermarket sale of Versamark printheads and

[3] Additional factual background may be found in Plaintiff's Proposed Findings of Fact, RE 89, Appx 7. at 1174-1231.
[4] RE 75, Tr. at 2-108:23-25, Page ID# 7560; PX 198, Appx. 8 at 1639.
[5] RE 75, Tr. at 2-109:1-4, Page ID# 7561; Tr. at 3-117:19-23, Appx. 7 at 1303.
[6] RE 70, Tr. at 1-13:22 – 1-14:4, PAGE ID# 7286-87; PX 173, Appx. 8 at 1638.
[7] RE 70, Tr. at 1-14:11-14, Page ID# 7287; PX 44, Appx. 8 at 1518.
[8] RE 70, Tr. at 1-8:13-20, Page ID # 7281.
[9] RE 74, Tr. at 2-40:18-23, Page ID# 7492; PX 6, Appx. 7 at 1375-76; PX 108, Appx. 6 at 1075; PX 14, Appx. 7 at 1405.

Versamark ink as "proprietary annuities."[10] Collins began manufacturing Versamark ink in competition with Kodak in the early 1990s.[11] By 2001, Collins had captured a large portion of the Versamark ink market due to—as one Kodak manager acknowledged in an internal email—Collins's lower prices, better customer service, and superior ink.[12] One of Collins's strengths has been the development of custom colors of Versamark ink. Over the years Collins has developed thousands of custom colors.[13]

In 2001, Collins and Kodak entered into the first in a series of Supply and Reseller Agreements, under which Collins manufactured Collins-branded Versamark ink using its own formulas and Kodak-branded Versamark ink using Kodak formulas.[14] In October 2011, Collins sought to terminate the Supply and Reseller Agreement then in effect due to its increasing concern with Kodak's financial status.[15] Kodak immediately obtained a preliminary injunction in a Rochester, New York district court, claiming in part that Collins's termination would cause irreparable harm through customer switching and concomitant loss of

[10] PX 148, Appx. 8 at 1616.
[11] PX 3, Appx. 7 at 1364.
[12] PX 39, Appx. 8 at 1501.
[13] PX 51, Appx. 8 at 1546.
[14] RE 70, Tr. at 1-20:17 – 1-21:22, Page ID# 7293-94; PX 217, at ¶11, Appx. 6 at 1119.
[15] RE, 70, Tr. 1-27:2 – 1-28:10, Page ID# 7300-01.

goodwill.[16] Kodak also argued that Collins's concerns regarding Kodak's possible bankruptcy were baseless.[17] Less than three months later, in January 2012, Kodak declared bankruptcy.[18] Collins ended up as an unsecured creditor owed approximately $2 million,[19] unable to extricate itself from its contract with Kodak until May 2, 2012.[20]

In late 2011, Kodak, knowing that its agreement with Collins would terminate, began making preparations. Kodak's internal emails, spreadsheets, powerpoints and analyses from 2011-2013 establish a number of facts. First, Kodak recognized that significant Versamark ink revenues were at stake.[21] Second, Kodak recognized that if it took no action, customers would gravitate to Collins Versamark ink.[22] Third, Kodak recognized and reiterated that it could not win a competition on the merits—that if it engaged in normal price competition with Collins in the market for Versamark ink, it would lose.[23] With that in mind,

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[16] *Eastman Kodak Co. v. Collins Ink Corp.*, 821 F. Supp. 2d 582, 586 (W.D.N.Y. 2011).
[17] *Eastman Kodak Co. v. Collins Ink Corp.*, Case No 6:11-cv-06513, Declaration of Douglas S. Tinnel (Oct. 18, 2011) (Doc. #3-3), at ¶17.
[18] *In re Eastman Kodak Company*, Case No. 12-10202 (Bankr. S.D.N.Y.) (Doc. No. 1, filed on Jan. 19, 2012).
[19] PX 217, at ¶ 18, Appx. 6 at 1121.
[20] RE 70, Tr. at 1-21:23-25, Page ID# 7294.
[21] PX 3, Appx. 7 at 1367; PX 5, Appx. 7 at 1370.
[22] PX 22, Appx. 5 at 972 (analyzing impact of "Do Nothing" and estimating in U.S. and Canada "Top 80% with Collins exposure gone by Q3 . . . .").
[23] RE 74, Tr. at 2-25:3 – 2-26:6, Page ID# 7477-78; PX 39, Appx. 8 at 1502 ("The immediate goal is to try and not get into a price war with Collins. . . . The goal is to

Kodak developed strategies to avoid head-to-head competition. One method was to enter into or renew contracts with customers requiring the purchase of both Versamark printheads and Versamark ink from Kodak.[24] That is, Kodak would have "account by account discussions as contracts come up for renewal, tying fluid usage to refurb and service."[25] Kodak implemented this method with some large customers.[26] But the contractual tying method would not work with many customers, particularly those with existing contracts that did not include a contractual tie between the products. So the primary method Kodak came up with to "take ink share" from Collins or "convert Collins business" was to charge "much higher refurb" to users of Collins ink.[27]

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try and determine a strategy or program whereby, the total cost to print increases by an amount greater than the savings they receive going to a 3rd-party for fluids).

[24] *See, e.g.*, PX 20, Appx. 7 at 1431-33 (June 2012 proposal to [redacted] for 3 year contract tying ink and printheads); PX 33, Appx. 8 at 1448 (November 2011 internal Kodak email regarding a contract with [redacted] stating: "Most importantly, we would like to insure [*sic*] that any contract for refurb is tied to fluids given our current situation with Collins."); RE 74, Tr. at 2-26:11 – 2-28:14, Page ID# 7478.

[25] PX 35, Appx. 8 at 1473.

[26] DX 27, Appx. 8 at 1659-62.

[27] PX 130, Appx. 8 at 1600 ("It's [*sic*] intent is to provide some protection to Kodak, disincentive for the customer to stay with Collins by charging much higher refurb and service rates."); PX 8, Appx. 7 at 1384 (Focus of pricing program to "Defend" current business and "Disrupt" Collins-branded business.); PX 6, Appx. 7 at 1375 ("This pricing action is determined to be necessary to defend Kodak's current and future annuity model. . ."); PX 9, Appx. 5 at 951 ("3rd party program is designed to protect Versamark category that drives [redacted]% of IPS annuity revenue." PX 36, Appx. 8 at 1482 ("Take ink share. . . with Matched Writing System pricing policy").

Almost immediately after Collins terminated its agreement with Kodak, Kodak announced that Collins was no longer an "approved" supplier of Versamark ink, implied that Collins Versamark ink was of poor quality, and announced a new policy under which Versamark customers who used "non-Kodak ink"—which in the Versamark market is synonymous with Collins ink—would be charged a higher price for Versamark refurbished printheads.[28] This was a surprise change in policy for the large installed base of Versamark customers.[29] The prior price for a refurbished printhead had always been the same regardless of the ink used.[30]

Internal analyses by Kodak personnel responsible for the new policy showed that, for some typical customers, annual costs for refurbished printheads would increase dramatically if they used Collins ink; for some customers, the increased refurbished printhead cost would exceed their total ink cost on an annual basis.[31] Collins could give away its ink for free and still not offset the increased cost of refurbished printheads.

Kodak announced and implemented—but did not initially enforce—the new pricing policy in May 2012.[32] There were several reasons Kodak did not initially enforce the new pricing policy. First, Kodak recognized that the threat of higher

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[28] PX 18, Appx. 7 at 1425; PX 19, Appx. 7 at 1426.
[29] PX 1, ¶¶32, 79, 80, Appx. 5 at 910-11, 927; PX 72, at ¶23-25, Appx. 5 at 1010.
[30] *Id.;* RE 75, Tr. at 2-108:3-15, Page ID# 7560.
[31] *See, e.g.*, PX 9, Appx. 5 at 947.
[32] RE 74, Tr. at 2-41:8-20, Page ID# 7493.

"non-matched" refurbished printhead pricing alone would cause some customers to switch.[33] Second, Kodak recognized that once the policy was enforced, a lawsuit from Collins was likely to follow.[34] And, third, Kodak was unable to immediately manufacture the many Versamark ink custom colors that Collins was currently providing to customers.[35] Kodak knew that the new policy would upset customers; to offset that anger and retain some customer goodwill, Kodak initially allowed some customers to continue to use Collins ink and pay the lower "matched" price while Kodak worked to develop a comparable Kodak-branded substitute ink.[36]

As time wore on, Kodak faced problems with its non-enforcement strategy. Kodak was having difficulty developing comparable substitute inks for customers,

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[33] PX 22, Appx. 5 at 972 ("Threat of increased refurb rates is keeping customers and helping customers convert to Kodak. Threat is false with time and action is needed to keep and/or convert customers back to Kodak."); *id*. at 980 (noting that "20 customers" have "committed to Kodak" in the wake of the new policy); PX 6, Appx. 7 at 1375 ("Customers are not willing to accept any costs increases and have voluntarily switched to Kodak. It is our belief that others have not switched because Kodak is not taken [*sic*] any pricing action"); PX 15, Appx. 5 at 967 (Collecting customers who had agreed to switch from Collins ink to Kodak ink in light of the threatened higher refurbishment charges for Collins ink customers).

[34] Tr. at 3-164:14 – 3-165:12, Appx. 7 at 1350-51.

[35] PX 5, Appx. 7 at 1370; PX 17, Appx. 7 at 1420 (noting as a "Hurdle to conversion" from Collins to Kodak inks that "Kodak does not have a direct substitute for every Collins-Branded fluids [*sic*]. This is especially true for the close to 2,000 custom color fluids.").

[36] PX 73, Appx. 8 at 1584 ("Customers could use 3rd-party without penalty in the event that Kodak cannot supply."); PX 74, Appx. 8 at 1586 (noting that customer "may continue to use 3rd-Party fluids without penalty until Kodak is able to supply approved fluids.").

causing numerous customer complaints.[37] In addition, a number of customers continued to purchase Collins ink due to Kodak's non-enforcement.[38] By the fall of 2013, Kodak recognized that while the "threat of increased refurb rates is keeping customers and helping customers convert to Kodak," the "threat is false with time and action is needed to keep and/or convert customers back to Kodak."[39]

Kodak needed to come up with an enforceable policy while minimizing customer ill-will. One possibility it explored was to blame Collins—*i.e.*, assert that a price differential was necessary because Collins's Versamark inks were inferior and caused damage to Versamark printheads. This would have the added benefit of suggesting to customers that Collins's inks should be avoided. Kodak's internal architect of the new pricing policy, Michael Preiser, suggested testing to show that Collins's inks were inferior, because this was "critical" for "justification of higher refurb rates."[40] Kodak's internal ink expert shot down that idea, because in fact Collins's inks were not inferior.[41] Preiser persevered, however, and

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[37] *See, e.g.*, PX 137, Appx. 8 at 1605-06 (email from customer [redacted] discussing problems resulting from moving from Collins ink to Kodak replacement ink); PX 143, Appx. 8 at 1608-09 ("I just wanted to let you know about the problems I am running into to get my printers switched over to Kodak Ink. . . . We sure are spending a lot of money on ink that doesn't work."); PX 29, Appx. 8 at 1686 (customer complaint from [redacted] about substitute ink).

[38] RE 74, Tr. at 2-41:13-20, Page ID# 7493; RE 71, Tr. at 1-89:6 – 1-90:4, Page ID# 7362-63.

[39] PX 22, Appx. 5 at 972.

[40] PX 52, Appx. 8 at 1554.

[41] PX 52, Appx. 8 at 1553; PX 27, Appx. 8 at 1667.

instructed field service personnel that every customer problem found where Collins ink was being used should be documented as an ink problem.[42]

In July 2013 Kodak announced a slightly revised pricing policy.[43] The new policy continued to impose a large penalty for Collins ink users, increasing their price of Kodak refurbished printheads in a common example by approximately 30%.[44] The letter to customers blamed the increase squarely on alleged damage caused to printheads by third party (read "Collins") ink.[45] A carrot-and-stick approach was used: customers were penalized if they used Collins ink, and given a small discount on refurbished printheads if they used Kodak ink.[46]

Another "carrot" Kodak used under both the May 2012 and July 2013 policies was to offer ink discounts. The policies were designed to keep the customers' ink costs "constant"—which generally meant a small discount from Kodak's normal Kodak-brand ink pricing if the customer used Collins inks.[47] The

[42] PX 53, Appx. 8 at 1558 ("It is important for the long term future of Kodak that we use every print issue as an opportunity to switch Collins Ink out. If they are having a print related issue, please document this issue in CLCA as an INK issue." (Emphasis in original)).

[43] RE 74, Tr. at 2-52:22-25, Page ID# 7504; *see, e.g.* PX 65 (July 24, 2013 form letter to customer), Appx. 5 at 996.

[44] *See, e.g.* PX 65, Appx. 5 at 997; PX 66, Appx. 8 at 1579.

[45] PX 65, Appx. 5 at 997.

[46] *Id.*

[47] *See* PX 108, Appx. 6 at 1075 (July 2013 Policy: "3rd-Party ink users would have constant ink costs and see refurb expenses increase."); PX 90, Appx. 8 at 1587 (internal Kodak email discussing ink discounts to keep "ink costs constant" under

form letters announcing the July 2013 policy offered ink discounts, varying by customer.[48]

Kodak's internal analysis illustrates the impact of the new policy's "stick." A November 7, 2013 PowerPoint presentation titled "Kodak 3rd-Party" charts the impact of the new policy on three existing Versamark customers.[49] For two of the customers, the annual increased cost of refurbished printheads far exceeds the cost of ink; for the third, the annual increased cost of refurbished printheads is 63% of the ink cost.[50] The November 7, 2013 PowerPoint also illustrates that the new policy's impact on customers varies with usage; for example, for five major customers the cost of certain refurbished printheads would often be doubled (and in some cases tripled) if they used Collins ink.[51] And for most customers, the annual cost of refurbished printheads is higher than that for ink.[52] Customers were extremely upset by the May 2012 and July 2013 policies, as Kodak expected.[53]

May 2012 policy); PX 15, Appx. 5 at 967 (Kodak PowerPoint noting "promise of constant ink costs" under May 2012 policy).

[48] *See, e.g.*, PX 64, Appx. 8 at 1576 (offering [redacted]% ink discount); PX 67, Appx. 8 at 1582 (offering [redacted]% ink discount).

[49] PX 108, Appx. 6 at 1075.

[50] *Id.*

[51] *Id.* at 1074.

[52] *Supra*, *n*.9.

[53] PX 9, Appx. 5 at 948 ("Policy understood and not welcomed" and customers "[a]fraid of higher refurb costs"); PX 38, Appx. 8 at 1498 ("He's not happy with Kodak right now since we are forcing them to not use the collins ink ☹" with the internal response "Unfortunately I have a feeling we are going to have to deal with more angry customers since the 3rd Party Ink Use and Refurb letter has gone out.")

Many, seeing no alternative, reluctantly switched to Kodak ink, but expressed dissatisfaction with the need to switch and with the quality of the Kodak substitute ink.[54]

From the announcement of the May 2012 policy through the preliminary injunction hearing, Collins acted to maintain its relationships with Versamark ink customers, relationships that in many cases developed over decades. Collins offered discounts.[55] Collins offered, on a short-term basis, free ink.[56] But on a long-term basis Collins cannot compete against the printhead penalty being imposed.[57] In September 2013, once it became apparent that Kodak intended to enforce its new policy, Collins filed suit, requesting injunctive relief.[58] The parties began a period of intense discovery, exchanging over 170,000 pages of documents, submitting over 200 pages of expert reports and exhibits, and taking 14 depositions. The parties submitted briefs that, with exhibits, totaled over 2,300 pages. This discovery period culminated in a preliminary injunction hearing from December 2-4, 2013, where the court heard testimony from nine witnesses. On December 16, 2013, the parties filed proposed findings of fact and conclusions of law totaling 165 pages.

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[54] *See, e.g.*, n.36, *supra*.
[55] PX 43, Appx. 8 at 1509; DX 133, Appx. 8 at 1666.
[56] PX 201, Appx. 8 at 1655; DX 133, Appx. 8 at 1666; DX 97, Appx. 8 at 1664.
[57] RE 70, Tr. at 1-44:22 – 1-45:2, Page ID# 7317-18.
[58] RE 1, Collins's Complaint for Injunctive Relief, Page ID# 14-19; RE 2, Collins's Motion for Preliminary Injunction, Page ID# 27 .

II. THE DISTRICT COURT'S PRELIMINARY INJUNCTION OPINION.

On March 6, 2014, the district court issued an Opinion and Order granting a preliminary injunction for six months, retaining the status quo that had existed for over 20 years prior to Kodak's new policy. Until September 6, 2014, customers will pay the same for a refurbished printhead regardless of the brand of ink used.[59]

The district court began by articulating the four factors to be balanced when deciding a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *Id.*, Page ID# 10597-98, *citing Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004) (quotation omitted). The court considered each factor in turn.

In evaluating the probability of success on the merits, the district court applied the basic standard for illegal tying set forth by the Supreme Court and followed in this Circuit. *Id.*, Page ID# 10599, citing *Kodak*, 504 U.S. 451, 456, 462; *PSI Repair Servs. v. Honeywell, Inc.*, 104 F.3d 811, 815 (6th Cir. 1997); *Virtual Maintenance v. Prime Computer*, 957 F.2d 1318, 1323 (6th Cir. 1992), *vacated and remanded on other grounds*, 506 U.S. 910 (1992). The court observed

[59] RE 98, Opinion, Page ID# 10625.

that tying is unlawful when: (1) there are two separate products or services; (2) the sale of one product is conditioned on the purchase of the other product; (3) the seller has appreciable economic power in the market for the tying product; and (4) the arrangement affects a "substantial volume" of commerce in the tied market. *Id.* A defendant can rebut a per se violation by showing a "substantial business justification" for the tie-in. *Id.*

As the district court noted, Kodak conceded that two separate products were at issue, so that element was and is not in dispute. *Id.* Turning to the second element—conditioning—the district court cited the basic standard: "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id.*, Page ID# 10599-600, citing *Kodak*, 504 U.S. at 464 (internal citations omitted). The district court noted the well-established proposition that a tie need not be contractual but may be inferred from circumstances, citing a number of cases. *Id.*, Page ID# 10600 (internal citations omitted).

Applying a price-differential approach used in *Virtual Maintenance*, the district court found that the higher refurbished printhead penalty imposed on Collins's customers "could be considered as inducing all rational buyers to switch to Kodak-branded Versamark ink." *Id.*, Page ID# 10606.[60] The district court relied upon the fact that both parties were "adamant" that cost was a significant, if not the primary, concern of customers deciding which brand of ink to use, and that such customers were "highly cost-sensitive." [61] Kodak announced to customers that under the July 2013 policy they would pay in many cases at least 30% more for refurbished printheads if they used Collins's ink. *Id.*, Page ID# 10597.[62] As examples, the district court cited an internal Kodak analysis showing the effect of the new policy on three customers. *Id.*, Page ID# 10602. In all three examples, the higher cost the customer would pay for its refurbished printheads if it chose Collins ink exceeded the cost of the ink, in two of the cases by more than double.[63] The court thus found a clear factual basis for concluding that the new policy, when enforced, would cause all rational Versamark customers to switch to Kodak ink, precisely as Kodak intended.

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[60] Within the Sixth Circuit, courts have considered in determining conditioning whether "all rational buyers" of the tying product would accept the tied product, although as the district court noted one court within the Sixth Circuit stated the standard as whether there was "no economically practical option" other than to buy the tied product. RE 98, Page ID# 10600, and n.2, citing *Virtual Maintenance*, 957 F.2d at 323 ("all rational buyers"); *Valassis Commc'ns, Inc. v. News Am. Inc.*, No. 2:06-cv-10240, 2011 U.S. Dist. LEXIS 66672, at *17 (E.D. Mich. Jan. 24, 2011), *adopted by*, 2011 U.S. Dist. LEXIS 62495 (E.D. Mich. June 15, 2011) ("no economically practical option").

[61] *Id.*, Page ID# 10602, 10606, & 10609; *see also* RE 75, Tr. at 2-68:7-19, Page ID# 7520; RE 76, 2-186:23 – 2-187:18, Page ID# 7638-39.

[62] RE 98, Opinion, at Page ID# 10597; *see also* n.43, *supra*.

[63] PX 108, Appx. 6 at 1075.

The district court next addressed whether Kodak possessed market power in the tying product—refurbished printheads—beginning with an analysis of whether Kodak Versamark printheads and ink should be considered derivative aftermarkets. *Id.*, Page ID# 10607-08. Following the guidance of *Kodak* and *PSI*, the district court considered information costs, switching costs, and whether Versamark customers were locked in. *Id.*, Page ID# 10608-09.

Regarding information costs, the district court noted that lifecycle pricing of complex durable equipment is difficult, citing the *Kodak* decision. *Id.*, Page ID# 10608. Here, all customers who purchased Versamark printers did so before 2009—obviously prior to either the May 2012 or July 2013 policies. *Id.*, Page ID# 10608-09. During the time Kodak sold Versamark printers, the price of a refurbished printhead was the same regardless of the brand of ink used. *Id.*, Page ID# 10609. The court found no evidence that the installed base of customers knew of or could have expected the radical change in policy that Kodak sought to implement through the July 2013 policy, evidencing significant information costs. *Id.*

The district court similarly found evidence of significant switching costs. *Id.*, Page ID# 10609-10. As in the original *Kodak* case, customers here faced a heavy initial outlay. *Id.*, Page ID# 10610. Versamark printers can last 10 to 20 years. *Id.* It is likely that customers would continue to use a well-functioning machine that is already paid for, rather than pay millions for new equipment and face the additional high cost of new training. *Id*. This is particularly true given that the printing industry is in decline, and customers are cost-sensitive. *Id*. The district court also considered the market reality: even though Kodak announced an increased price for refurbished printheads for 40-50% of its customers (Collins ink users), there is no evidence of those customers switching to alternative brands of printers in response to the announced increase. *Id.*, Page ID# 10610-11.

The district court found substantial evidence of Kodak's market power in the tying market for refurbished printheads. *Id.*, Page ID# 106011-13. Among the evidence it cited was Kodak's 100% market share for refurbished printheads. *Id.*, Page ID# 10611, citing *PSI*, 104 F.3d at 817 (market power "ordinarily is inferred from the seller's possession of a predominant share of the market"). There are high barriers to entry: Kodak has always been the sole provider of refurbished printheads, a fact Kodak attributes in part to refurbished printheads requiring replacement of "Kodak proprietary parts" which are "not for sale" and which have "no substitutes." *Id.*, Page ID# 10612, citing PX44, Appx. 8 at 1518. And Kodak has raised prices and imposed burdensome terms on its customers, causing customer dissatisfaction, with minimal evidence of switching. *Id.*, Page ID# 10612. Considering all of these factors, the court concluded that Collins satisfied its burden at the preliminary injunction stage of showing Kodak's market power in the tying market. *Id.*, Page ID# 10613.

The district court also found the fourth and final tying factor—an effect on a substantial volume of commerce in the tied market—a finding Kodak does not contest on appeal. *Id.*, Page ID# 10613; Brief at 10.

Turning to the issue of whether Kodak could negate a finding of illegal tying by showing a legitimate business justification, the district court viewed Kodak's asserted business justifications "with skepticism." *Id.*, Page ID# 10614. Kodak argued that increased prices for refurbished printheads were necessary to cover the cost of problems caused by Collins ink and prevent "free-riding." *Id.*, Page ID# 10614-15. The district court noted that courts have rejected "free-riding" as a business justification, citing *Kodak*, 504 U.S. at 485. *Id.*, Page ID# 10615. The district court was also factually skeptical due to the lack of any explanation or analyses showing a rational connection between alleged increased costs of fixing printers using Collins ink and the across-the-board price increase imposed on Collins's customers. *Id.*

The district court was similarly critical of Kodak's "justification" that it needed to protect its reputation for quality, which was allegedly threatened if "inferior" Collins ink was used. *Id.*, Page ID# 10615-16. The district court labeled the argument "weak" because: (1) Kodak's own personnel contemporaneously contradicted this "justification"; and (2) substantial evidence suggested Collins's reputation for quality ink is equal or superior to that of Kodak. *Id.*, Page ID# 10622.

The court noted Collins's likelihood of success on the merits of its antitrust claim, stating that the claim, if proven, will have shown that Kodak unlawfully restrained trade. *Id.*, Page ID# 10622. Coupled with evidence that the motive of the July 2013 Policy was to cause customers to stop using Collins ink, the district court found sufficient evidence to show a likelihood of success on the merits of Collins's tortious interference claim. *Id.*, Page ID# 10622-23.

The district court next considered the remaining preliminary injunction factors—irreparable harm, harm to others, and the public interest—and concluded that the balance of equities weighed in favor of Collins. *Id.*, Page ID# 10623-25. The district court found that, absent a preliminary injunction, Collins was likely to suffer irreparable harm in the form of loss of business goodwill and reputation, loss of market share, damage to its work force, and possible preclusion of future attempts to enter the refurbishment market. *Id.*, Page ID# 10623-24 (internal citations omitted). With respect to harm to others, the district court recognized harm to Collins customers who would have to pay more under the policy, while also recognizing that some customers might have to pay more if Kodak instituted an across-the-board price increase. *Id.*, Page ID# 10624. Finally, the district court found that the public interest would be served by a preliminary injunction, because it would promote fair competition, allow customers real choice in suppliers of Versamark ink, and protect customers from improper interference with business relationships. *Id.*, Page ID# 10624-25.

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW.

Kodak cites *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535 (6th Cir. 2007), but fails to mention that the standard of review for preliminary injunctions is abuse of discretion. *Id.* at 541-42. This standard is "highly deferential" to the district court's decision. *Id.* at 542. Absent clearly erroneous findings of fact, improperly applied governing law, or the use of an erroneous legal standard, a district court's weighing of the equities in granting a preliminary injunction is overturned "only in the rarest of cases." *Wonderland Shopping Ctr. Venture Ltd. P'ship v. CDC Mortgage Capital, Inc.*, 274 F.3d 1085, 1097 (6th Cir. 2001) (internal quotation omitted).

II. KODAK'S "PRICE-COST TEST" ARGUMENTS FIND NO SUPPORT IN THE CASE LAW, THE ECONOMIC LITERATURE OR THE EVIDENCE.

Kodak's central argument on appeal is that the district court erred by "refusing" to apply the price-cost test in analyzing Collins's tying allegations. *See, e.g.,* Brief, at 1, 14-16, 19-31. There are at least three problems with this argument: (1) the price-cost test has never been applied to Section 1 tying claims (as the district court noted)—to the extent other jurisdictions have adopted it in multi-product cases (and most have not), they have applied it only to bundled discount claims under Section 2; (2) Kodak's version of the price-cost test—*i.e.*, using Collins's costs as the benchmark instead of Kodak's—has *never* been adopted in any jurisdiction; and (3) even if this were a bundled discount case, and even if this Circuit applied the price-cost test (using Kodak's costs) to bundled discount claims, the evidence before the district court would still demonstrate that Kodak has "failed the test" and, as a result, engaged in anticompetitive activity.

Collins will address each of these issues *seriatim*.

A. *The Price-Cost Test Does Not Apply to Collins's Tying and Tortious Interference Claims.*

As an initial matter, Kodak has grossly mischaracterized where, when and how courts actually use the price-cost test in antitrust cases. The price-cost test is generally used to determine whether a firm is engaging in predatory pricing—which involves charging its customers less than its costs for manufacturing a product (*i.e.,* "below-cost pricing") to drive a competitor out of the market, recouping its sacrifice later by raising prices. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 222 (1993) (discussing theory). Courts have, however, also used the price-cost test in other antitrust contexts involving a single product market. *See, e.g., Brooke Grp.*, 509 U.S. 209 (applying price-cost test to Robinson-Patman claims); *Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S.

104 (1986) (merger challenge); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-41 (1990) (maximum vertical price setting).

Where anticompetitive conduct involves multiple product markets (as opposed to a single product market), a price-cost test is generally inapplicable, although there is a split in the circuits with respect to one type of conduct: bundled discounts. In assessing claims of unlawful bundled discounts, the Ninth and Second circuits apply a price-cost test, while the Third Circuit rejected its application. *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008) (applying the discount attribution test, a price-cost test, to unlawful bundling claims)*; Virgin Atl. Airways Ltd. v. British Airways Plc*, 257 F.3d 256, 266-72 (2d Cir. 2001) (applying price-cost test in assessing bundled discount claims); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), *cert. denied*, 124 S. Ct. 2932 (2004) (rejecting price-cost test in assessing bundled discount claims).

The Third Circuit in *LePage's* specifically rejected the use of a price-cost test and affirmed judgment against 3M based upon a finding that bundled rebates offered by 3M—a monopolist in the transparent tape market—were exclusionary. *LePage's*, 324 F.3d at 154-157. 3M's primary defense, citing *Brooke Grp.*, was that its conduct could not be unlawful as long as its prices remained above cost. *LePage's*, 324 F.3d at 155. The Third Circuit disagreed, noting that bundled rebates may be anticompetitive, even if above cost, with the principal anticompetitive effect being that "when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." *Id.* at 155.[64] This analysis finds support in the literature, which notes a stark contrast between single product predatory pricing, which involves a short-term profit sacrifice, and multi-product bundling, which need not.[65] That is, with bundled discounts, a monopolist does not have to cut price and sacrifice profit to drive out a rival in a competitive market, but rather can simply raise the unbundled price of the monopolized good, penalizing the buyer who refuses the bundle.

Regardless of this apparent split of authority as to whether or not to use a price-cost test in the bundled discount context, courts have not applied a price-cost test to tying claims. Numerous courts have analyzed non-explicit tying claims like the one at issue here. The district court itself cited seven of them;[66] and *none* of the courts in those cases applied a price-cost test in its analysis of the non-explicit

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[64] *See also Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, Case No. 1:05-CV-12024PBS, 2009 WL 4061631 (D. Mass. Nov. 20, 2009) (following *LePage's*, denying summary judgment in above-cost bundled discount).

[65] *See, e.g.*, Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 399, 450-51 (2009); Patrick Greenlee, David Reitman & Davis S. Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 INT'L J. INDUS. ECON. 1132 (2008); Barry Nalebuff, *Exclusionary Bundling*, 50 ANTITRUST BULLETIN 321-23 (2005).

[66] RE 98, Opinion, Page ID# 10600.

tying claim. Some courts analyzing non-explicit tying claims have in fact drawn a distinction, approving use of the price-cost test to bundled discount claims but not to accompanying non-explicit tying claims.[67] Conversely, Kodak has not cited a single case that actually supports its argument that district courts are "required" to apply a price-cost test in analyzing unlawful tying claims.[68] In any event, the district court could not have committed clear error in failing to apply a price-cost test that no court has applied in the unlawful tying context.

B. Kodak's Version of the Price-Cost Test Finds No Support in the Case Law or the Economic Literature.

Even if Kodak were right, and the district court should have applied the price-cost test in analyzing Collins's unlawful tying claim, Kodak has the actual

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[67] In *Valassis,* the court held that when addressing unlawful bundling the conduct would be assessed using the attribution test of *Cascade*, but when addressing tying the conduct would be assessed using traditional tying elements, citing *Virtual Maintenance* and applying a "no economically practical option" standard to evaluate non-explicit tying. *Valassis*, 2011 WL 2420048, at *6. In *Cascade,* the court analyzed the bundled discounting claim using the price-cost test, but vacated a summary judgment for defendant on its tying claim without requiring application of the price-cost test. The court left for determination by the trial court whether the price-cost test should apply if non-explicit tying was alleged, noting that the Antitrust Modernization Committee report, recommending the price-cost test in the case of bundled discounts, said "The Commission is not recommending application of this test outside the bundled pricing context, for example in tying or exclusive dealing cases." 515 F.3d at 916, n.27.

[68] Kodak cites a single case to suggest that a district court rejected a "tying claim because plaintiff failed to prove that defendant's pricing failed the price-cost test." Brief, at 27-28 (citing *Aerotec Int'l, Inc. v. Honeywell Int'l*, 2014 WL 1017914, at *5, n.28 (D. Ariz. March 17, 2014)). That case, however, applied the price-cost test to the bundled discount claim, and rejected the tying claim under a traditional tying analysis, not because of a failure to meet the price-cost test. *Id.* at *4-5.

test completely backwards. Kodak argues that the district court should have applied a price-cost test – again, to an unlawful tying claim – that focuses on the *plaintiff's* costs. Brief, at 28-29. This is an argument that stands the law, the economic literature and logic itself on its head.

A price-cost test—whether in relation to single-product predatory pricing or even in the *Cascade* bundled discount context—focuses on the *defendant's* costs. *See, e.g.*, *Brooke Grp.*, 509 U.S. at 222-23 (citing cases). Predictably, Kodak has presented no case law in support of its novel claim that decades of antitrust jurisprudence should be overturned, and the focus should be on plaintiff's costs.[69] Second, a price-cost test that analyzes a defendant's costs makes sense from an economic perspective—as even Kodak's own cited literature attests. *See* 3B Areeda & Hovenkamp ¶749 at 323 (noting that a price-cost test analyzing defendant's costs "is preferable on grounds of both administrability and principle").[70]

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[69] Kodak's argument that it is aware of "no case that *prohibits* the use of plaintiff's costs" (Brief, at 29) betrays the weakness of its position, particularly when coupled with the absence of citation to any law or literature *supporting* the use of plaintiff's costs. It is also incorrect. Prices that are below a *plaintiff's* costs may still be nonpredatory if above the defendant's costs. *Atl. Richfield*, 479 U.S. at 116. That is why it is "important to look to the [defendant's] costs, rather than the [plaintiff's] costs" in assessing predatory pricing issues. *Internal Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714, 724-25 (5th Cir. 1975).

[70] Kodak cites the Areeda & Hovenkamp treatise for the position that plaintiff's costs should be used, Kodak Brief at 30, citing 3 B Areeda & Hovenkamp ¶768b at 171, but the reference in question simply involves the basic notion that in a single-

The illogic of using plaintiff's costs becomes apparent with one example: what if there is more than one competitor in the tied market, *i.e.*, more than one potential plaintiff? Would a court have to assess the costs of all potential plaintiffs, and would the defendant's pricing then be unlawful as to higher-cost plaintiffs but lawful against lower-cost plaintiffs? Using the defendant's costs avoids this nightmare.

Kodak argues that using defendant's costs might "chill competition" because a plaintiff might be more efficient, allowing it to cut costs even when a defendant has priced below the defendant's costs. Brief at 30. This would hold true in any context where a price-cost is applicable. For example, in a single-product predatory pricing case, it may be that while the defendant's pricing is below its average variable cost, it is still above an efficient plaintiff's average variable cost. According to Kodak, the defendant's action in that case is not anticompetitive, because the plaintiff could still lower its price to compete. According to single-product predatory pricing law, Kodak is wrong.

In any case, Kodak cannot point to even a single case supporting the use of its newly-minted price-cost test focusing exclusively on plaintiff's costs. And, to be sure, Kodak cannot point to any support for the proposition that the district court committed clear error by failing to use this newly-minted price-cost test.

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product market cost-cutting is encouraged so long as it is above-cost; it does not address the use of plaintiff's costs in a price-cost test.

Accordingly, Kodak's argument in this context does not provide a basis for overturning the district court's well-reasoned opinion.

C. Even if the District Court Should Have Applied the Price-Cost Test to Collins's Unlawful Tying Claims, Kodak's Internal Analyses Show that Kodak Would Have "Failed the Test" Here.

Even if the district court determined to chart a new legal course and apply the *Cascade* price-cost test to Collins's tying claims, the evidence demonstrates that Kodak would have "failed the test" anyway. A number of Kodak internal documents illustrate the point. For example, Kodak recognized revenues of $[redacted] for refurbished printheads and $[redacted] for ink for [redacted] sites in the United States and Canada in 2011.[71] Kodak's margin on its ink sales was $[redacted], or about [redacted]%. *Id.* The new policy suggested a "discount" consisting of a 30% penalty to Collins ink users and a 4% discount to Kodak ink users. *Supra*, n.44. When applied to Kodak's ink, that "discount" is well in excess of the [redacted]% ink margin, meaning Kodak is pricing below cost under the *Cascade* price-cost test. Other internal Kodak analyses bear this out, particularly where the penalty on refurbished printheads is well in excess of the total annual ink cost. *Supra*, nn. 31, 49-51.

In sum, even indulging all of the assumptions disproved above (*i.e.*, that the price-cost test applies in unlawful tying cases, etc.), the district court's analysis

[71] PX 6, Appx. 7 at 1375.

would not have changed: applying the price-cost test to the facts still would reveal a strong likelihood of success on the merits.

III. THE DISTRICT COURT CONSIDERED, AND APPROPRIATELY REJECTED, KODAK'S ARGUMENTS REGARDING THE LIKELIHOOD OF CONDITIONING, KODAK'S MARKET POWER, INFORMATION COSTS, AND SWITCHING COSTS.

Kodak nitpicks the district court's findings regarding Collins's likelihood of success on tying, presenting in summary fashion arguments that the district court rejected based on the extensive record developed at the preliminary injunction hearing. Kodak's exacting critique of the evidentiary bases for the district court's findings on conditioning, market power, information costs, and switching costs seeks to impose unrealistic demands both on a district court deciding a preliminary injunction motion in an antitrust case and on this Court in reviewing such a preliminary ruling.

Recognizing that preliminary injunction motions in antitrust cases inevitably are decided based on something less than "full proof of the facts," this Court has accorded deference to district court findings in such circumstances. *See Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., Inc.*, 753 F.2d 1354, 1356 (6th Cir. 1985). *See also Brandeis Mach. & Supply Corp. v. Barber-Greene Co.*, 503 F.2d 503, 505 (6th Cir. 1974) (affirming preliminary injunction in tying case). Given the inherently preliminary nature of district court fact-finding in such a situation, this Court has explained that it expects no more of a district court than "a realistic appraisal of all the traditional factors weighed by a court of equity." *Christian Schmidt Brewing*, 753 F.2d at 1356. In scrutinizing such rulings, the Court has been careful to "refrain from unnecessary comment on the evidence or review of the merits of the case since the case has yet to be heard in full on the merits." *Id.*

Another feature of the district court's difficult task gets lost in Kodak's critique. Section 16 of the Clayton Act—the antitrust statute providing for injunctive relief—serves a prophylactic purpose; it protects against "threatened" loss or damage by violation of the antitrust laws. *Christian Schmidt Brewing*, 753 F.2d at 1358 ("Section 16 is designed to stop anticompetitive behavior in its incipiency."). The district court was confronted, therefore, with a statutorily mandated task made urgent by Kodak's haste to enforce its 2013 pricing policy: realistically appraising a fluid situation and preventing threatened harm to competition *before* it occurred. Contrary to Kodak's critique, the court did not have the luxury of waiting to intervene until after that harm had occurred and could be established with the certainty of hindsight.

As demonstrated below, none of the issues Kodak raised concerning the district court's factual findings come close to the "clearly erroneous" standard required to find an abuse of discretion.

A. Kodak's Conditioning Arguments.

1. Kodak's fact-based conditioning arguments.

Kodak claims that the district court erred in finding that the July 2013 policy as a practical matter would condition, coerce or force Versamark customers to purchase Kodak ink, because the record "unequivocally" demonstrates that using "present-day prices" it would be cheaper for about 80% of Collins's customers to buy Collins ink and pay the higher unmatched rate for refurbishment. Brief at 1-2, 8, 15, 31, 32-33, 38. The various forms of this argument repeated throughout Kodak's brief all are based upon opinions presented by Kodak's litigation economist, Dr. Langenfeld. His analysis, on its face, makes no sense for a variety of reasons including: he does not use "present-day prices"; he does not compare prices for comparable inks; and he ignores discounting by Kodak.

Kodak claims that Langenfeld's analysis shows that Collins's "present-day prices" are on average 38% lower than Kodak's. Brief at 8, 32. Langenfeld, however, admits in his report that he was not using "present-day prices" as claimed by Kodak, but rather the ink prices of Kodak and Collins in 2011.[72] In 2011, prior to the termination of the Supply and Reseller Agreement between Kodak and

[72] Dr. Langenfeld states: "For that analysis, I compared the weighted average price of Collins-branded inks in 2011 to the weighted average price of Kodak brand inks in 2011. The results of that analysis indicate that the Kodak average price per liter ([redacted]) was approximately 38 percent above the Collins average price per liter ([redacted])." DX 186 at ¶ 178, n. 242, Appx. 3 at 480.

Collins, Kodak set the prices for both Kodak and Collins ink.[73] This has no demonstrable relation to the 2012 or 2013 post-termination ink prices of Kodak and Collins.

Compounding this error, Langenfeld ignores differences in the types of ink sold by Kodak and Collins. Kodak and Collins make various types of Versamark ink—ink for 4-inch printheads, ink for 9-inch printheads, ink for lottery tickets, and so on—and the price of ink varies based on type.[74] Collins's and Kodak's shares of the sales of various types and prices of ink differed. While Kodak's sales were heavily biased toward expensive 9-inch inks, Collins sold primarily 4-inch inks in the U.S.[75] Langenfeld simply compared Kodak's overall average revenue per liter to Collins's average revenue per liter, ignoring the fact that, on average, Kodak and Collins sell substantially different types of ink. It's an apples-to-oranges comparison.

Finally, Langenfeld's "assumption" of no discounts is counter-factual. Kodak's internal documents reflect that the plan under the May 2012 and the July

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[73] RE 71, Tr. 1-65:2-6, Page ID# 7338.

[74] *See, e.g.*, PX 20, Appx. 7 at 1433 (1-inch black ink is $[redacted]/liter, 4-inch black ink is $[redacted]/liter, 9-inch black (custom color) is $[redacted]/liter). *See also* PX 131, Appx. 8 at 1603.

[75] PX 39, Appx. 8 at 1501 (Kodak November 2, 2011 email noting that "Collins brand is about [redacted]% of Americas total (all categories) ink revenues" and that Collins has "about [redacted]% of the 4" market."); PX 9, Appx. 5 at 953 (Kodak has primary share of 9" ink market); PX 20, Appx. 7 at 1433 (showing higher 9" ink pricing).

2013 differential pricing policies was to keep a customer's ink cost constant, only increasing the refurbishment cost for customers who use Collins ink. *Supra*, n.47. Kodak offered ink discounts to customers to achieve that goal.[76] Kodak has taken the same basic approach with the July 2013 policy that was in the initial stages of enforcement prior to the district court's injunction. The form letters that went out with the July 2013 policy consistently reflected Kodak ink discounts.[77]

When the price comparison is made for the specific inks used by a specific customer using the prices actually offered, thereby comparing apples to apples, the price differential is much smaller than Langenfeld's suggested 38%.[78]

Understandably, the district court chose to ignore what it termed the "manipulated" data and timeframes presented by Langenfeld, focusing instead on the internal Kodak documents in concluding that "the reality is that a Collins-ink brand ink customer pays significantly more for refurbishment services than a

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[76] *See, e.g.*, PX 114, Appx. 8 at 1598.

[77] *Supra*, n. 48. Langenfeld purports to address discounting in his Exh. 16c, but again fails to examine Kodak's and Collins's current pricing for comparable ink. He simply *assumes* Kodak's prices for its ink in 2012/2013 might look like the prices Kodak charged for Collins-brand ink in 2011. Despite this unsupported assumption, Exh. 16c still shows forcing: for all but two customers the "Refurb Differential" is greater than the "Kodak Ink Price Differential." That is, the refurbished printhead penalty will be greater than the (purported) premium for Kodak ink.

[78] *See, e.g.*, PX 62, Appx. 8 at 1569 (Kodak personnel stating in 2011 that "Kodak ink is about [redacted]% higher [than Collins] on a per liter basis"); PX 20 Appx. 7 at 1431, (Kodak 2012 document showing a [redacted]% ink differential). PX 109, Appx. 8 at 1595 (Kodak 2013 letter showing Kodak prices [redacted]% above Collins, and offering a discount to match Collins' prices.).

Kodak-brand ink customer under the July 2013 Policy."[79] As previously described, one internal example of the effect of the July 2013 policy using three customers showed that it would be economically irrational for them to stay with Collins, particularly because in two of the cases the increased costs for refurbished printheads would exceed the cost of the ink. PX 108, Appx. 6 at 1075. Other data show even more dramatic increases in customers' costs for refurbished printheads—doubling and even tripling under the new policy. *Id.* at 1074.

Kodak's primary response to PX108, the internal document reflecting the effect of the July 2013 policy on three customers, is to point out that two of the three customers have not yet switched all ink purchases to Kodak ink. Brief at 33-34. But the July 2013 policy was only in the initial process of enforcement when the preliminary injunction hearing took place, and Kodak can hardly be suggesting that once Kodak enforced its policy those customers would not switch if their refurbishment penalty would exceed the total cost of their ink.[80]

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[79] RE 98, Opinion, Page ID# 10601-02.

[80] Kodak also attempts to discredit its own internal analysis, as reflected in part in PX108, by saying that it may not have used "typical" customers and that the internal Kodak economist who prepared the analysis had to guess at Collins's prices (an assertion supported nowhere in the record). Brief at 33-34. It is doubtful that Mr. Preiser, preparing PX108 and similar documents for management, would have presented atypical data, or data without a strong factual basis. In any case, Kodak can hardly argue that the district court's reliance on the facts presented in Kodak's own documents was clearly erroneous.

This raises a point regarding another argument emphasized by Kodak—that there has not yet been wholesale switching to Kodak ink, and that after the May 2012 policy Collins's market share increased. The question confronting the district court was not what happened in the past, but what would happen once Kodak enforced the July 2013 policy, as it promised to do. According to Kodak's reasoning, the district court had to wait until Collins actually suffered irreparable competitive harm—after it has actually lost the customers to switching—before issuing an injunction. That makes no sense and would turn the law on its head.[81] As noted above, Section 16 of the Clayton Act is designed to protect against *threatened* harm. By virtue of Kodak having announced a pricing policy that threatens competition and having promised to enforce it, the district court acted reasonably in disregarding Kodak's feints not to enforce it rigidly or to enforce selectively.

The court recognized that Kodak's lack of enforcement to date was not dispositive. RE 98, Opinion, Page ID#10604, citing *Tire Sales Corp. v. Cities Serv. Oil Co.*, 637 F.2d 467, 474 (7th Cir. 1980) ("An oil company's threat to

[81] It would also have prevented Kodak from obtaining its injunction against Collins from the Rochester, New York district court. When Collins announced its intent to terminate its most recent Supply and Reseller agreement with Kodak, Kodak obtained an injunction—before the termination took effect—on the argument that the termination would cause it irreparable harm through the loss of customer goodwill. *Supra*, n.15. The agreement had not yet been terminated, and Kodak had not yet lost customers.

cancel a franchisee's lease is overt coercion whether it is ultimately acted upon or not."). This idea finds support in additional case law, including Supreme Court precedent relating to tying. In *Northern Pacific*, the Supreme Court held that products were unlawfully tied together even though the obligation to buy the tied product was often unenforced, waived, or leniently administered. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 11-12 (1958).[82]

The facts belie both the notion that the May 2012 policy "threat" had no appreciable effect, and that the July 2013 policy, once enforced, would not cause all rational customers to switch. The facts showed, for example, that:

- Kodak determined it could not compete with Collins on the merits in the ink market, and if it attempted to do so it would lose 80% of its customers. *Supra*, n.22.

- Kodak developed the May 2012 policy, the intent of which was to cause Collins ink users to switch to Kodak ink because of a penalty in the price of refurbished printheads for Collins ink. *Supra*, n.27.[83]

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[82] *See also Advance Bus. Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969) (tying found where "The overhanging threat of enforcement is ever present, and implied agreements, like express contracts, may be 'held over the heads of vendees (and) deny defendant's competitors access to the fended-off market on the same terms as the defendant.'" (citations omitted)); *Detroit City Dairy, Inc. v. Kowalski Sausage Co., Inc.*, 393 F. Supp. 453, 466 (E.D. Mich. 1975) (tying found despite the fact that some customers did not purchase tied good from defendant); *Compuware Corp. v. Int'l Bus. Mach. Corp.*, 366 F. Supp. 2d 475, 481 (E.D. Mich. 2005) (summary judgment denied despite selective enforcement of tying).

[83] *See Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) (the purpose for a restraint "tends to show [its] effect").

- The announcement of the policy, the threat alone, caused initial significant switching from Collins ink users and retention of Kodak ink users. Instead of Collins ending up with the 80% share predicted by Kodak with competition on the merits, Collins ended up with approximately a 40% share.[84]

- Kodak chose not to enforce the May 2012 policy for three primary reasons: 1) it did not have comparable substitute inks to offer Collins customers, and it could not very well tell customers "you must use our ink" when it did not have the ink for them to use; and 2) Kodak knew that once it actually began to enforce the policy, Collins would likely file suit; and 3) Kodak knew the threat alone would cause many customers to switch. *Supra*, nn.33-35.

- But Kodak realized that the "threat became false with time" and that, again, if it did nothing they would likely lose a huge portion of its market share to Collins. *Supra*, n.39.

- So Kodak released, in July 2013, a slightly modified pricing policy, offering in addition to a printhead pricing penalty to Collins ink users, a small printhead pricing discount to Kodak ink users. *Supra*, n.43.

- If Kodak enforces the July 2013 policy, and once customers believe that Kodak will this time in fact enforce its policy, the economics will compel all rational customers to switch to Kodak ink. *Supra*, nn.49-52.

Kodak also overstates the evidence relating to the "pushback" by current Collins ink customers. Kodak consistently told customers, from May 2012 until the new policy was announced in July 2013, that the May 2012 policy would be enforced.[85] The "pushback" from customers came in the form of complaints about the new policy, complaints about the need to switch, and complaints about the quality of the substitute ink provided when they did switch. *Supra*, n.36. For

[84] Tr. at 3-140:13-19, Appx. 7 at 1245.
[85] RE 75, Tr. at 2-87:12-18, Page ID# 7539.

example, one company, [redacted], switched following announcement of the May 2012 policy and began to use a Kodak ink that Kodak claimed was comparable to the Collins ink [redacted] had been using.[86] The ink performed poorly, and [redacted] informed Kodak it was going back to Collins ink, and it refused to pay the higher price. *Id.* Kodak's response was "Kodak's 3rd Party policy makes no performance guarantees. There is no option to accept or reject the policy or pricing. [redacted] may elect to partner with Kodak and work together as partners in print or not."[87] Kodak was not saying to customers, in response to their complaints, "o.k., we won't enforce the policy against you." They were at most saying "we won't enforce the policy until we have provided you with a comparably performing Kodak ink." *Supra*, n.36. The July 2013 policy, when enforced, will: cause customers to switch to an ink they would rather not use; exclude Collins as a competitor in the ink market and potential competitor in the printhead market; and prevent competition on the merits in the ink market. The district court did not abuse its discretion in so finding.

Finally, Kodak argues that Collins is at fault if it loses customers because it refuses to compete. Brief at 9, 26.[88] This is particularly ironic, given that the

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[86] PX 48, Appx. 8 at 1529-30, 1540.
[87] *Id*. at 1545.
[88] Kodak argues that Collins can "bolster" its tying claim by raising ink prices and driving customers to Kodak. Brief at 25. This is wrong. If Collins raises its ink prices, Kodak can simply compete on the merits in the ink market, undercutting

whole intent of Kodak's policy is to avoid competition on the merits in the ink market. *Supra*, n.27. Collins has attempted to compete, offering discounts and free ink,[89] but cannot: (1) offer its ink for free on an ongoing basis, as would be required for many customers; (2) compete where all Kodak has to do is match or even exceed Collins's price for ink, and the printhead pricing penalty will cause customers to switch; and, in particular, (3) compete where Kodak does not even have to lower its ink price to compete, but can simply raise the penalty suffered by Collins users for refurbished printheads to retain customers. Collins welcomes competition on price and quality in the ink market—the type of competition that promotes consumer welfare. The "competition" Kodak seeks removes consumer choice, and the benefit of any price decrease by Collins to keep a customer redounds to Kodak in the form of a penalty, not to the consumer in the form of cost savings.

The district court had a strong factual basis for finding that Kodak's July 2013 policy, when enforced, will cause all rational customers to switch to Kodak ink.

Collins's price, and engaging in the type of competition on the merits that results in consumer welfare.

[89] *Supra*, nn.55-56.

2. Kodak's law-based conditioning arguments.

Kodak argues that the district court erred in finding conditioning by adopting and misapplying the "Differential Approach" from *Virtual Maintenance* and ignoring the lack of evidence under the "Switching Approach." Brief at 31-39. While the district court noted the two general approaches sometimes used by courts in this Circuit, it recognized that a court must look at all of the facts and circumstances to determine whether conditioning is present. RE 98, Opinion, Page ID# 10600, citing *Shamrock Mktg., Inc. v. Bridgestone Bandag, LLC*, 775 F. Supp. 2d. 972, 980 n.7 (W.D. Ky. 2011) ("Courts have also inferred the existence of a tying arrangement where the circumstances surrounding a transaction, for all practical purposes, force a buyer into purchasing the tied product." (Citing cases)). For example, in *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407 (11th Cir. 1987), cited by the district court, the court found conditioning where the "facts and circumstances surrounding the transaction as a practical matter forced the buyer into purchasing the tied product." *Id*. at 1418. The court found, and the appeals court affirmed, that "as a practical matter," the Omni lease was conditioned upon the use of a particular ticket seller, as evidenced by: (1) an agreement that fell only "slightly" short of an express tie, and (2) a negotiating process that made clear the particular ticket seller was to be used. *Id*. at 1416-18.

Kodak attempts to emphasize as a necessary factor what it calls the "Switching Approach"—an inquiry into declining sales or market share. Brief at 35-39.[90] But unlike the cited cases where policies had already been implemented and enforced, an inquiry into declining sales or market share is of less relevance here. What *will* happen is key, not what *has* happened. What has happened with threats alone certainly portends that full enforcement will result in rampant switching by all rational customers, but of course actual results would have to await full enforcement.[91]

Absent an ability to observe switching, the district court, like the court in *Virtual Maintenance*, focused primarily on the pricing differential to hold that all rational buyers would likely switch to Kodak under the new policy.[92] Kodak suggests that *Virtual Maintenance* does not hold that a large differential alone satisfied the all-rational-buyers test, falsely suggesting that the court observed a

[90] Kodak's citation of case law to support the precedence of the "Switching Approach" as the sole or primary factor is strained. For example, Kodak cites *Paladin Assocs. v. Mont. Power Co*, 328 F.3d 1145, 1161 (9th Cir. 2003) with the parenthetical: "summary judgment granted where only 50% of customers purchased the alleged tied product." Brief at 38. Customer switching was indeed a factor noted by the court, but there were others. One was that a "balancing penalty" claimed by plaintiff as evidence of coercion was only communicated to plaintiff: "The record shows only that MPC communicated to Paladin its intention to charge one customer the balancing penalty. Paladin points to no evidence that the alleged statement was communicated to industrial customers generally." *Id*. at 1161. Contrast the facts here, where the penalty was communicated to all.

[91] RE 98, Opinion, Page ID# 10604.

[92] RE 98, Opinion, Page ID# 10606.

switching effect on "all rational buyers." Brief at 32. First, *Virtual Maintenance did* suggest that the differential was the primary if not sole factor, stating: "A tying arrangement clearly exists here because the large price differential between software support alone and the software support/hardware maintenance package induces all rational buyers of Prime's software support to accept its hardware maintenance." 937 F.2d at 1323. Second, there was no "observed effect on all rational buyers." There was an observation that "some" purchasers of defendant's software support desired to use the plaintiff's hardware maintenance, and "some" design companies were reluctant to switch, but "It is unclear how many Prime 50 Series owners do design work for Ford or how many of these owners desired to switch to Virtual for hardware maintenance." *Id.* at 1322. That is, there was evidence of *some* possible switching effect, just as in this case prior to full enforcement.[93]

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[93] *Compuware Corp. v. International Business Machines Corp.*, 366 F. Supp. 2d 475 (E.D. Mich. 2005), provides additional support for the district court's approach. In *Compuware*, summary judgment for IBM was denied on a tying claim by Compuware, a vendor of independent software tools for IBM mainframes. Compuware alleged that IBM began to tie its tool products to its monopoly mainframe products, in part by bundling and pricing so that customers have "no sound economic alternative" but to accept the offer. 366 F. Supp. 2d at 480. In some cases, the price of the non-monopolized product (tools) was negative—that is, the price of the bundle without the software tools was higher than the price of the bundle with the tools. *Id*. The same evidence exists here. PX 108, Appx. 6 at 1074-75. The district court in *Compuware* also found a tying claim even though the tying was targeted, not universal. *Id.*

The district court's legal analysis regarding conditioning in non-explicit tying cases was sound.

B. Kodak's Market Power Arguments.

To determine market power, "the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 817 (6th Cir. 1997) (internal citations omitted). The district court employed a standard market power analysis, examining market share (100%) and barriers to entry (high), and noting that Kodak had in fact raised prices and imposed burdensome terms in reaching its conclusion that Kodak possesses market power in the market for refurbished printheads. [94]

Kodak argues that its decision not to enforce the May 2012 policy demonstrates a lack of market power. Brief at 16-17, 41. But Kodak implemented and began enforcing the July 2013 policy—billing customers at higher rates—shortly before the preliminary injunction hearing. [95] Kodak's implementation and initial enforcement of a policy that would raise the price of a refurbished printhead 30% or more for almost half of its customers (the 40% Collins ink users) is a clear demonstration of market power, especially when considering the customer focus

[94] RE 98, Opinion, Page ID# 10611-10613.
[95] RE 75, Tr. 2-95:24 – 2-96:23. Page ID# 7547-48.

on cost.[96] Kodak's argument that its lack of market power in the *printhead* market is demonstrated by an alleged "failure" to exercise market power in the *ink* market by raising prices—what it calls a "natural experiment"—cannot overcome the market reality of the July 2013 policy.

Kodak's analysis is flawed in any case. Kodak's aftermarket margins in ink, service and in particular refurbished printheads are huge. Financials suggest margins of approximately [redacted]% for ink, and [redacted]*% or more* for refurbished printheads (one internal email suggests printhead margins of over [redacted]%).[97] It is likely at those margins that Kodak has already been extracting monopoly rents.[98]

Kodak's economist gave reasons why Kodak's desire to sell Prosper printers should prevent its exercise of market power, and Collins's economist gave reasons why that would not hold true.[99] The district court considered these theoretical arguments, but focused on the practical: Kodak implemented the May 2012 and July 2013 policies to the anticipated dissatisfaction of many customers,

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[96] RE 98, Opinion, Page ID# 10611-12; RE 76, Tr. 2-159:6-23, Page ID# 7611.

[97] PX 6, Appx. 7 at 1375; PX 37, Appx. 5 at 994 (May 10, 2013 Kodak email stating that Kodak carries a [redacted]% margin on printhead refurbishment); PX 12, Appx. 7 at 1400.

[98] The flaws in Dr. Langenfeld's "natural experiment" arguments are discussed at greater length in the rebuttal report of Dr. Bowblis. PX 72, Appx. 5 at 999.

[99] PX 72 at ¶¶3, 26-31, Appx. 5 at 1004, 1010-1012; DX 186 at ¶¶ 70-71, Appx. 3 at 431-434.

undercutting its argument that its desire to keep potential Prosper customers happy would prevent exercise of market power.[100]

C. Kodak's Information Costs Arguments.

The *Kodak* case highlighted that lifecycle pricing for complex durable equipment is difficult, and at times impossible:

> Lifecycle pricing of complex, durable equipment is difficult and costly. In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "downtime," and losses incurred from downtime. Much of this information is difficult—some of it impossible—to acquire at the time of purchase.

Kodak., 504 U.S. at 473-74. In an aftermarket tie, this Court has held that a plaintiff must show an unexpected change in policy, because if the policy was known at the time of purchase the customer could have shopped around for more competitive life-cycle prices. *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 819 (6th Cir. 1997).

The May 2012 and July 2013 policies were unexpected changes in Kodak's pricing policies, as found by the district court. Kodak misconstrues the

[100]RE 98, Opinion, Page ID# 10611; Kodak also estimated that the monetary impact of doing nothing would be higher than the monetary impact of potential lost sales even if Kodak took a harsher approach and refused to provide refurbished printheads at any price if Collins ink was used. PX 22, Appx. 5 at 971.

eponymous case, suggesting that *Kodak* was solely concerned about lifecycle pricing where the cost of service is small compared to the equipment price (which was simply one example used in *Kodak*), and contending there is no concern where the purchasers are sophisticated (another theoretical example). Brief at 43-45. In the *Kodak* case, involving equipment and types of purchasers directly analogous to those found in this case, the Supreme Court concluded that "it makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decision are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine." *Kodak*, 504 U.S. at 475-76. Similar reasoning applies here: Kodak provided no evidence that Versamark customers accurately predicted Kodak would change its pricing policy to tie the purchase of printheads and ink; to the contrary, all evidence suggests that customers were surprised and dissatisfied. *See, e.g.,* n.87, s*upra.*

Kodak also argues that, according to its economist, the change in policy required is a change in the defendant's market power. Brief at 45-46. That proposition is unsupported in the case law, as the absence of citations in Kodak's brief would suggest. The only change required is a change in policy after some customers have been locked-in. *PSI*, 104 F.3d at 820 (6th Cir. 1997). In this case, the thousands of Versamark installations prior to 2010 locked in customers who had no way of knowing that Kodak would radically change its pricing structure as reflected in the May 2012 and July 2013 policies.[101]

D. Kodak's Switching Costs Arguments.

Kodak argues that the district court "cited no evidence" to support its conclusion that switching costs are high. Brief at 47. This is simply untrue. The district court noted that switching requires purchase of new equipment that could (and often does) cost more than a million dollars, along with the investment of time and money training employees on new equipment.[102] It further noted that customers had already made heavy initial outlays for their Versamark equipment, and the time and money to train employees on that equipment, and that where profit margins in printing are small it makes sense for customers to use equipment that has already been paid for. *Id*. These findings were based on well-established evidence.[103]

Kodak argues that switching costs must be examined in light of the increase in refurbishment prices. Brief at 47-50. That comparison, however, proves the district court's point. Customers paid millions, and large customers paid tens of

[101] This "lock-in" – developed over time—reflects some change in market power in any case, which would meet the requirement Kodak seeks to impose.

[102] RE 98, Opinion, Page ID# 10591, 10610-11.

[103] RE 75, Tr. at 2-104:20 – 2-106:19, Page ID# 7556-58; RE 70, Tr. at 1-7:5-22, Page ID# 7280; RE 75, Tr. at 2-139:2-5, Page ID# 7591; *see also* PX 95, Appx. 8 at 1593 (showing price list for Versamark printing systems costing millions of dollars); PX 1 at ¶¶81-90, Appx. 5 at 927-30; PX 72, at ¶¶15, 18, 19, Appx. 5 at 1008-09.

millions, for their Versamark equipment, and would have to pay a comparable amount along with training expense to switch.[104] Most customers pay in the tens of thousands for refurbishment annually, with only a handful of customers in excess of a hundred thousand.[105] No rational customer is going to switch printers and pay millions because of an average 30% increase in refurbishment prices costing thousands, particularly where that increase could be avoided by switching to Kodak ink.

Kodak argues that switching costs are not high because some customers have switched, and that the district court improperly reversed the burden of proof by saying that switching does not negate a conclusion that switching costs are high. Brief at 48. The district court was correct in finding that (a) switching costs are high, and (b) some switching, without more, does not prove a lack of market power. There will always be switching; Versamark printers are durable equipment with long, but not infinite, useful lives. Kodak provided no evidence that customers, facing high switching costs, would nevertheless switch to new printers rather than switch to Kodak ink when faced with a possible pricing penalty for using Collins ink.

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[104] RE 70, Tr. at 1-7:5-22, Page ID#7280; RE 75, Tr. at 2-139:2-5, Page ID# 7591; Tr. at 3-115:5-9, Appx. 7 at 1301; *see also* PX 95, Appx. 8 at 1593 (showing price list for Versamark printing systems costing millions of dollars); *see also* PX 1, at ¶¶82-83, 87-88, 92, Appx. 5 at 928-30.

[105] PX 6, Appx. 7 at 1376-78.

A key piece of evidence is Kodak's own view of its power, and the resultant likelihood of switching. In crafting its May 2012 and July 2013 policies, Kodak considered many factors and ran many financial analyses, but one factor it did not even bother to analyze was the financial impact that imposition of the policies would cause based upon Versamark customers switching printers. Kodak viewed the Versamark customers as "captive."[106]

IV. THE DISTRICT COURT'S BALANCING OF THE EQUITIES WAS NOT AN ABUSE OF DISCRETION.

Kodak challenges the district court's balancing of the equities, centered around the argument that "Collins should compete." Brief at 54-56. For instance, Collins is not irreparably harmed, Kodak argues, because Collins can lower its price to retain its market share. *Id.* An injunction is not in the public interest, Kodak argues, because promoting competition is in the public interest, which means that Collins should lower its price to compete. *Id.* All of these arguments are based upon the fundamentally mistaken premises that Collins can "compete" and that to do so would "promote competition in the public interest." Kodak is wrong that Collins could survive after instituting discounts sufficient to offset the penalty. Even if Collins could survive, it is inequitable to allow Kodak to appropriate profits that belong to Collins (due to its innovation and efficiency)

[106] PX 9, Appx. 5 at 942.

when the countervailing "harm" to Kodak is that it is forced to compete on the merits, reducing its profits.

Kodak argues that Collins can lower its price an additional 31% without falling below its average variable cost. Brief at 8, 20. However, Kodak references Collins's short-run average variable costs, as calculated by their expert. Even supposing the Kodak economist's calculations are correct, he admitted that a firm pricing above average variable cost does not equate to a firm making a long-term profit.[107] Dr. Langenfeld would have Collins discount to his calculated average variable cost, a price so low that according to his calculations there is no gross profit left to pay wage expenses, employee benefits, or legal expenses.[108] Kodak, claiming Collins suffers no irreparable harm at these prices, is nevertheless arguing that Collins should be forced to absorb long-run economic losses during the possible number of years this case will take to reach its final disposition. Kodak is proposing a rule that would only allow firms with very deep pockets to survive.

The question of irreparable harm is fundamentally a question of whether Kodak's policy, unchecked by an injunction, will drive Collins from the market. Dr. Langenfeld acknowledged in his report that he was examining an exit

[107]Tr. at 3-151:21 – 3-152:9, Appx. 7 at 1337-38.
[108] DX 186, Exhibit 12, Appx. 3 at 519.

decision.[109] Economists universally agree average total cost is the correct measure for exit decisions.[110] Dr. Langenfeld estimated Collins's margin over total costs at less than 5%.[111] With Kodak matching Collins's current prices and Collins having minimal room to offer further discounts, only one of the customers [redacted] in Langenfeld's Exh. 16 could theoretically be profitably retained by Collins. Practically, however, once that customer was the sole source of revenue to support Collins's fixed costs, even it would be lost.

As previously shown, according to Kodak's internal calculations, in many cases Collins cannot discount to retain market share and stay above any measure of its cost, because the pricing penalty exceeds the customer's ink cost, meaning Collins would need to pay the customer to use its ink. *Supra*, nn.49-52. In other

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[109] DX 186 at ¶175, Appx. 3 at 478 ("To assess Collins' claim that Kodak's refurbishment policy would very likely drive it out of business….").

[110] *See, e.g.*, Mankiw, N. Gregory, *Principles of Microeconomics*, 6th Ed., 2011, South-Western Cengage Learning, p. 288

[111] DX 186, Exhibit 12, Appx. 3 at 519. At trial, Collins's CEO Lawrence Gamblin estimated this margin at 6.5%. RE 70, Tr. 1-47:13-18, Page ID# 7320. At trial Dr. Langenfeld attempted to correct his error of using variable costs in Exh. 16, by recalculating it using a measure of total costs. DX 800, Appx. 5 at 819. He claimed, contrary to Gamblin's testimony and his own earlier calculations, that Collins had a 20%-21% net margin on inks. However, Langenfeld derived this estimate using a completely erroneous, and unsupported, modification to his Exh. 12. In his revised Exh. 12 (DX 800, Appx. 5 at 810), Langenfeld arbitrarily subtracted $1,000,000 in refurbishing development costs from Collins *Versamark Ink division's* cost figures; Collins, not surprisingly, reports only Versamark Ink costs in that division's costs figures and reports refurbishing development expenditures in the refurbishing division's cost accounts: Langenfeld subtracted costs that were nowhere reported in the data he used.

cases, again according to Kodak's internal calculations, to discount and retain market share would require Collins to price well below any credible measure of short-run average variable cost. *Id.*

An "economically rational" Collins would not discount its price when to do so would be unprofitable long-term, and when its only competitor is employing a pricing policy that exploits its monopoly power in a related market. Kodak does not even have to engage in a "profit sacrifice" to compete (as occurs in single-product predatory pricing). If Collins discounts its ink, Kodak can simply respond with higher penalties, rendering the discount ineffective at retaining customers that Kodak chooses to target. Collins's discounts, on the other hand, would prevent it from obtaining any surplus that could be used for innovation, or to engage in the research and development necessary to enter the printhead market.

Of greater importance, social and consumer welfare are not served by Collins discounting its price to retain market share. The benefit of that lower price does not go to the customer but rather to Kodak, and the customer pays the same under the "unmatched" pricing with Collins's discounting as under the "matched" using Kodak ink.

Kodak asks: "Why lower your ink price when a court order is protecting your market share?" Brief at 57. The injunction is not protecting Collins's market share; it is protecting competition on the merits. As Kodak realized in implementing its May 2012 and July 2013 policies, Collins can and will discount its ink prices to compete with Kodak in the ink market.[112] Kodak is free, under the injunction, to compete on ink price and attempt to win market share from Collins. Consumers will benefit.

Kodak's view of "irreparable injury"—suggesting that Collins's harm is not irreparable because it is "avoidable"—stretches that concept beyond supportable bounds. Many injunctions are issued for injuries deemed irreparable, even though they are in some sense avoidable. *See Stuller, Inc. v. Steak n Shake Enterprises, Inc.*, 695 F.3d 676, 679 (7th Cir. 2012) (affirming preliminary injunction over claim of avoidable harm).[113] Kodak itself received an injunction for "irreparable injury" it would suffer from Collins termination of a Supply and Reseller Agreement, an injury that was "avoidable" if Kodak had simply agreed to pay Collins its receivables and keep receivable costs low.[114] Here, Kodak's pricing scheme is unlawful, and is not made less so by suggesting that Collins needs to

[112] PX 40, Appx. 8 at 1507. (Kodak noting that Collins "will renew this with vigor and underprice us wherever they can.")

[113] In *Stuller*, the Seventh Circuit clarified the "avoidable harm" issue raised in *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003), cited by Kodak. Brief at 55. Kodak attempts the same unwarranted extension of the concept of avoidable harm as the defendant in *Stuller*.

[114] PX 3, Appx. 7 at 1367 (Kodak analyzing that they would lose more money from termination than they would from lowering the accounts receivable as Collins requested).

hand its profits, profits rightfully accruing to Collins's superior business acumen, to Kodak before a court can put a stop to it.

CONCLUSION

For the reasons set forth above, Collins respectfully requests that the Court affirm the preliminary injunction.

Respectfully submitted,

/s/ W.B. Markovits
W.B. Markovits
MARKOVITS, STOCK & DEMARCO, LLC

CERTIFICATE OF COMPLIANCE

I certify that this Brief of Appellee is in compliance with Federal Rule of Appellate Procedure 32(a)(7)(B). This Brief contains 13,837 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

June 2, 2014

/s/ W.B. Markovits
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellee has been filed electronically this 2nd day of June, 2014. Notice of this filing was sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM / ECF system.

/s/ W.B. Markovits
W.B. Markovits
MARKOVITS, STOCK & DEMARCO, LLC

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 14-3306

Case Caption: *Collins Inkjet Corporation v. Eastman Kodak Co.*

**APPELLEE'S DESIGNATION
OF RELEVANT DOCUMENTS**

Plaintiff-Appellee Collins Inkjet Corporation, pursuant to 6 Cir. R. 28(b)(1)(A)(i) and 6 Cir. R. 30(g)(1), hereby designates the following filings in the district court's electronic record:

Description	**Record Entry**	**Page ID # or Doc. Page #**
Complaint for Injunctive Relief against Eastman Kodak Company	1	1 – 20
Motion for Preliminary Injunction by Plaintiff Collins Inkjet Corporation	2	27 – 51
Exhibits to Motion for Preliminary Injunction by Plaintiff Collins Inkjet Corporation	2-1 through 2-7	52 - 228
Sealed Document. Plaintiff's Amended Revised Reply Memorandum in Support of Its Motion for Preliminary Injunction	33	1 – 34
Sealed Document. Amended Declaration of W.B. Markovits in Support of Plaintiff's Reply Memorandum in Support of Its Motion for Preliminary Injunction	33-1 through 33-4	1 – 7 Exs. 34 - 76
Transcript of Proceedings (Preliminary Injunction – Day 1, Part 1)	62	5265 – 5350
Transcript of Proceedings (Preliminary Injunction – Day 1, Part 2)	70	7274 – 7327
Transcript of Proceedings (Preliminary Injunction – Day 1, Part 3)	71	7328 – 7388

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Transcript of Proceedings (Preliminary Injunction – Day 3, Part 3)	83	8031 - 8093
Preliminary Injunction Opinion and Order	98	10590 - 10625