

/s/ Marc Schildkraut

Marc Schildkraut
COOLEY LLP
1299 Pennsylvania Avenue, Suite 700
Washington, DC 20004-2400
Tel: (202) 728-7000
Fax: (202) 842-7899
mschildkraut@cooley.com
Attorney for Defendant
Eastman Kodak Company

/s/ Celia Goldwag Barenholtz

Celia Goldwag Barenholtz
COOLEY LLP
1114 Avenue of the Americas
New York, New York 10036
Tel: (212) 479-6000
Fax: (212) 479-6275
cbarenholtz@cooley.com
Attorney for Defendant
Eastman Kodak Company

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
ARGUMENT	5
I. THE DEFAMATION CLAIM SHOULD BE DISMISSED.....	5
A. The Challenged Statements Are Opinions and Are Not Actionable.....	8
B. At Most, the Challenged Statements are Defamatory Per Quod, and Collins Has Not Pled Any Special Damages.....	10
II. COLLINS’S LANHAM ACT AND ODTPA CLAIMS SHOULD BE DISMISSED.....	12
III. THE REFURBISHMENT CLAIM SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION	14
CONCLUSION	19

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council</i> , 73 Ohio St.3d 1, 651 N.E.2d 1283 (1995)	7
<i>Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.</i> , 280 F.3d 619 (6th Cir. 2002)	13
<i>Adult Video Ass’n v. U.S. Dep’t of Justice</i> , 71 F.3d 563 (6th Cir. 1995)	16
<i>Aetna Life Ins. Co. of Hartford, Conn. v. Haworth</i> , 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937).....	14, 15
<i>Airline Prof’ls Ass’n of Int’l Bhd. of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc.</i> , 332 F.3d 983 (6th Cir. 2003)	16
<i>Allied Erecting & Dismantling Co., Inc. v. Genesis Equip. & Mfg., Inc.</i> , 649 F. Supp. 2d 702 (N.D. Ohio 2009).....	13
<i>Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.</i> , 185 F.3d 606 (6th Cir. 1999)	12
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).....	5, 6, 14
<i>Bassett v. Nat’l Collegiate Athletic Ass’n</i> , 528 F.3d 426 (6th Cir. 2008)	5
<i>Becker v. Toulmin</i> , 165 Ohio St. 549, 138 N.E.2d 391 (1956)	7
<i>Bentkowski v. Scene Magazine</i> , 637 F.3d 689 (6th Cir. 2011)	6, 7
<i>Byrd v. Underwood</i> , 1:13-CV-579, 2013 WL 4776552 (S.D. Ohio Sept. 6, 2013)	5
<i>Cboss, Inc. v. Zerbonia</i> , 4:09-CV-00168, 2010 WL 3835092 (N.D. Ohio Sept. 29, 2010)	12, 13, 14
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).....	19

Compuware Corp. v. Moody’s Investors Servs., Inc.,
499 F.3d 520 (6th Cir. 2007)9

Conway v. Int’l Ass’n of Heat & Frost Insulators & Asbestos Workers,
209 F. Supp. 2d 731 (N.D. Ohio 2002).....10

Davis v. Byers Volvo,
4th Dist. No. 11CA-817, 2012-Ohio-88213

Elec. Furnace Corp. v. Deering Milliken Research Corp.,
383 F.2d 352 (6th Cir. 1967)7, 11

Estate of Barney v. PNC Bank, National Assoc.,
714 F.3d 920 (6th Cir. 2013)6

Fenley v. Bowman,
12th Dist. No. CA98-02-013, 1998 WL 526516 (Aug. 24, 1998).....7

Ferreri et al. v. Plain Dealer Publishing Co. et al.,
142 Ohio App. 3d 629, 756 N.E.2d 712 (8th Dist. 2001).....9

Frigo v. UAW Local 549,
5th Dist. No. 04CA-20, 2005-Ohio-39819

Hampton v. Dispatch Printing Co.,
10th Dist. No. 87AP-1084, 1988 WL 96227 (Sept. 13, 1988)7

HDC, LLC v. City of Ann Arbor,
675 F.3d 608 (6th Cir. 2012)5

Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.,
326 F.3d 687 (6th Cir. 2003)13

Konica Minolta Bus. Solutions, U.S.A., Inc. v. Allied Office Prods., Inc.,
724 F. Supp. 2d 861 (S.D. Ohio 2010)10, 12

Lang v. Pac. Marine & Supply Co., Ltd.,
895 F.2d 761 (Fed. Cir. 1990).....17

Leventhal & Assocs., Inc. v. Thomson Cent. Ohio,
128 Ohio App.3d 188, 714 N.E.2d 418 (10th Dist. 1998).....13

Maryland Cas. Co. v. Pac. Coal & Oil Co.,
312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941).....15

McCartney v. Oblates of St. Francis deSales,
80 Ohio App.3d 345, 609 N.E.2d 216 (6th Dist. 1992).....7

McGee v. Simon & Schuster, Inc.,
154 F. Supp. 2d 1308 (S.D. Ohio 2001)7, 10, 11, 12

MedChoice Fin., LLC v. ADS Alliance Data Sys., Inc.,
857 F. Supp. 2d 665 (S.D. Ohio 2012)6

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007).....14, 15

Nat’l Rifle Ass’n of Am. v. Magaw,
132 F.3d 272 (6th Cir. 1997)16

Ohio Nat’l Life Ins. Co. v. United States,
922 F.2d 320 (6th Cir. 1990)15

ONY, Inc. v. Cornerstone Therapeutics, Inc.,
720 F.3d 490 (2d Cir. 2013).....9

Outdoor Techs., Inc. v. Vinyl Visions, LLC,
1:06-CV-044, 2006 WL 2849782 (S.D. Ohio Sept. 29, 2006)12, 13

Prasco, LLC v. Medicis Pharm. Corp.,
1:06-CV-313, 2007 WL 928669 (S.D. Ohio Mar. 27, 2007).....15, 19

Prasco, LLC v. Medicis Pharm. Corp.,
537 F.3d 1329 (Fed. Cir. 2008).....15, 17, 18, 19

Re/Max Int’l, Inc. v. Smythe, Cramer Co.,
265 F. Supp. 2d 882 (N.D. Ohio 2003).....10

Rothschild v. Humility of Mary Health Partners,
163 Ohio App. 3d 751, 2005-Ohio-5481, 840 N.E.2d 258 (7th Dist.)8

SanDisk Corp. v. STMicroelectronics, Inc.,
480 F.3d 1372 (Fed. Cir. 2007).....19

Seaton v. TripAdvisor LLC,
728 F.3d 592 (6th Cir. 2013)9

Sierra Applied Sciences, Inc. v. Advanced Energy Indus., Inc.,
363 F.3d 1361 (Fed. Cir. 2004).....17

SPX Corp. v. Doe,
253 F. Supp. 2d 974 (N.D. Ohio 2003).....6, 8

Thomas v. Cohr, Inc.,
197 Ohio App.3d 145, 2011-Ohio-5916, 966 N.E.2d 7915 (1st Dist.).....6

<i>Thomas v. Union Carbide Agric. Prods. Co.</i> , 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985).....	16
<i>Vail v. The Plain Dealer Publ’g Co.</i> , 72 Ohio St.3d 279, 649 N.E.2d 182 (1995)	6, 8
<i>Vantage Trailers, Inc. v. Beall Corp.</i> , 567 F.3d 745 (5th Cir. 2009)	16, 17
<i>Wampler v. Higgins</i> , 93 Ohio St.3d 111, 752 N.E.2d 962 (2001)	6, 8
<i>Weiner v. Klais & Co., Inc.</i> , 108 F.3d 86 (6th Cir. 1997)	4
<i>West Bend Mut. Ins. Co. v. Westfield Ins. Group</i> , 1:13-CV-60, 2013 WL 5467821 (S.D. Ohio Sept. 30, 2013)	5
<i>Whiteside v. Williams</i> , 12th Dist. No. 02AP-1390, 2007-Ohio-1100.....	11
<i>Wilson v. Harvey</i> , 164 Ohio App.3d 278, 2005-Ohio-5772, 842 N.E.2d 83 (8th Dist.)	10
OTHER AUTHORITIES	
28 U.S.C. § 2201.....	14
Lanham Act § 43(a)	12, 13, 14
Federal Rules of Civil Procedure	
§ 8(a)(2)	6
§ 9(g).....	11
§ 10(c).....	4
§ 12(b)(6)	5
2-10 Moore’s Federal Practice - Civil § 10.05[4].....	4

MEMORANDUM IN SUPPORT

PRELIMINARY STATEMENT

In September 2013, Collins Inkjet Corporation (“Collins”) filed a Complaint and moved for a preliminary injunction. Collins alleged, *inter alia*, that Eastman Kodak Company (“Kodak”) had violated the antitrust laws and that statements made by Kodak concerning its May 2012 pricing policy were false and misleading (the claims relating to allegedly false and misleading statements are referred to herein collectively as the “Disparagement Claims”). On March 6, 2014, this Court issued an order (the “Order”), granting Collins’s motion on the antitrust claim, but denying it with respect to the Disparagement Claims. On March 27, 2014, Collins filed its First Amended and Supplemental Complaint (the “Amended Complaint”). The Amended Complaint’s Disparagement Claims are based on different documents than the original Disparagement Claims: a July 24, 2013 letter and two PowerPoint presentations allegedly dated November 2013 (collectively, the “Challenged Statements”).

The Challenged Statements do not impugn Collins. They simply opine that Kodak ink is better for use in Versamark printers than other inks, or explain why Kodak believes its pricing policy protects Kodak’s customers. Nor does the Amended Complaint establish damage to Collins as a direct result of the Challenged Statements, or that Collins customers were misled by the Challenged Statements. Accordingly, the Disparagement Claims do not state valid claims for relief.

The Amended Complaint adds a declaratory judgment claim (the “Refurbishment Claim”). The Refurbishment Claim seeks a declaration that Collins has not violated or misappropriated any valid proprietary rights of Kodak with respect to Collins’s contemplated entry into the business of refurbishing Versamark printheads. At the preliminary injunction hearing, Collins claimed that it has not yet finalized its refurbishment process, and had not

started selling refurbishment services to Versamark customers. The Amended Complaint does not contradict that testimony, nor does it allege that Kodak has done anything to stop Collins from launching a refurbishment business. Accordingly, the Refurbishment Claim is purely hypothetical, and this Court lacks subject matter jurisdiction over it.

STATEMENT OF FACTS

Kodak is the sole manufacturer of Versamark printers. Am. Compl. ¶ 8. Owners of Versamark printers must use specialized inks that are compatible with Versamark printers and printheads, the component of the printer through which the ink “jets” out onto the paper. *Id.* ¶¶ 12, 14. Printheads need regular refurbishment. *Id.* ¶ 13. Kodak is currently the only company that provides Versamark customers with refurbished printheads. *Id.*

Collins makes inks for Versamark printers. Am. Compl. ¶ 19. Starting in 2001, Kodak and Collins (or their predecessors in interest) entered into a series of contracts whereby Kodak was the exclusive seller of Versamark ink manufactured by Collins. *Id.* ¶ 21. On May 2, 2012, Collins terminated the contract with Kodak. *Id.* ¶ 25.

Upon Collins’s termination, Kodak announced a new pricing policy for refurbishment of Versamark printheads (the “May 2012 Policy”). Am. Compl. ¶ 29. According to that policy, customers who used non-Kodak inks were to be charged more for refurbishment than customers who used Kodak ink. *Id.* Kodak did not implement the May 2012 Policy, and Collins customers continued to use Collins ink. *Id.* ¶ 31. Kodak announced a revised pricing policy in July 2013 (the “July 2013 Policy”) in a letter to customers dated July 24, 2013 (the “July 2013 Letter”). *Id.* ¶ 32.

On September 19, 2013, Collins filed its Complaint. The original Disparagement Claims were based on statements in a May 2012 press release and other 2012 marketing materials concerning the May 2012 Policy. Compl. ¶¶ 35-36 (Doc. No. 1).

On October 15, 2013, Kodak filed a Partial Motion to Dismiss and Motion to Transfer in which Kodak argued, among other things, that the Disparagement Claims should be dismissed as time-barred and not actionable. The Court deferred Collins's response to the motion until after the preliminary injunction hearing. (Doc. No. 29).

On December 2, 3, and 4, 2013, the Court held a preliminary injunction hearing. At the hearing, Collins's owner and President, Lawrence Gamblin, testified that Collins had not yet "had a positive test that indicates our approach [to refurbishment] works," and that he did not know how long it would "take to get it to the point where it does work." Barenholtz Decl., Ex. A (Hr'g Tr. 1-125:10-17). He also claimed that Collins could not refurbish a Versamark printhead if certain key components were damaged. *Id.* (Hr'g Tr. 1-125:18-20). Mr. Gamblin's testimony established that Collins is still developing its methodology, and has not yet begun to provide refurbishment services to customers.

On March 6, 2014, the Court issued its preliminary injunction order (the "Order"). (Doc. No. 94). The Court found that Collins was likely to succeed on the merits of its anti-trust claim, but not the Disparagement Claims. Order at 32-33, 36. With respect to Collins's efforts to refurbish printheads, the Court found that "Collins does not provide printhead refurbishment services to its customers. . . . It has expended a significant amount of time and money in its effort, but has not yet been able to enter into that market. Its anticipated date for being able to enter the market is not clear, but Collins predicts it will not be any time in 2014." Order at 3.

Collins filed the Amended Complaint on March 27, 2014. In what appears to be an effort to avoid time-barred claims, the Amended Complaint asserts that Kodak disparaged Collins in different documents than those alleged in the original Complaint. The Disparagement Claims are now based on the July 2013 Letter and two PowerPoint presentations, allegedly dated November 2013 (the “2013 PowerPoints”).

The July 2013 Letter states that Kodak has “tak[en] action on our printhead refurbishment process, as over the last 6 months our customers have experienced damaged printheads as a direct result of using 3rd-Party inks and fluids.” Barenholtz Decl., Ex. B at 2.¹ The Letter pitches Kodak as “a full solution print provider,” whose goal is to provide customers “peace of mind” with “the assurance of reliable system performance and longevity, under all operating conditions, through a perfectly matched system of printheads, inks and fluids.” *Id.* at 1.

The 2013 PowerPoints claim “Only Kodak can ensure that inks and fluids are optimized for performance on Kodak printing systems” and that “A matched system delivers a lower TCOP through more printed pages, increased print quality, and greater reliability.” Am. Compl. ¶¶ 33-34; Barenholtz Decl., Exs. C and D. Like the July 2013 Letter, the 2013 PowerPoints tout Kodak inks as a superior product, meant to ensure “high-quality printhead output and printhead life,” through testing and optimization that will provide customers with reliable high-quality service and “peace of mind.” *See* Ex. C at 2-3.

The Amended Complaint seeks injunctive relief and “proximately caused damage[s] . . . in an amount to be determined at trial” on the Disparagement Claims. Am. Compl. ¶¶ 65, 69, 72.

¹ A document central to the plaintiff’s claim for relief but not formally attached to the pleading may be offered by a party in support of a motion to dismiss the pleading. *See* 2-10 Moore’s Federal Practice - Civil § 10.05[4] (interpreting Fed. R. Civ. P. 10(c)); *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997).

However, it does not allege that Collins has lost any customers because of the Challenged Statements, nor does it allege that any customers have been deceived or misled by them.

The Refurbishment Claim is entirely new. It alleges, upon information and belief, that an unnamed Kodak representative told an unnamed customer in a meeting in Rome in December 2013 that Kodak would stop Collins from refurbishing Versamark printheads. Am. Compl. ¶ 82. It alleges that this “threat” is consistent with internal documents dated November 2012 and February 2013 in which Kodak employees opined that Collins would not be able to refurbish Versamark printheads without using Kodak proprietary parts. *Id.* ¶¶ 18; 82. On the basis of these meager allegations, the Refurbishment Claim seeks an order decreeing that Collins has not “violated or misappropriated any valid proprietary rights of Kodak.” *Id.* at 20.

ARGUMENT

I. The Defamation Claim Should Be Dismissed.

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiff, and accept as true the plaintiff’s factual allegations. *West Bend Mut. Ins. Co. v. Westfield Ins. Group*, 1:13-CV-60, 2013 WL 5467821, at *2 (S.D. Ohio Sept. 30, 2013) (*quoting Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426, 430 (6th Cir. 2008)). However, a complaint that offers merely “labels and conclusions” or a “formulaic recitation of the elements of a cause of action” will not suffice. *Byrd v. Underwood*, 1:13-CV-579, 2013 WL 4776552, at *1 (S.D. Ohio Sept. 6, 2013) (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). *See also HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 613 (6th Cir. 2012) (“A complaint that includes only conclusory allegations . . . without supporting factual allegations does not sufficiently show entitlement to relief”). Where the well-pleaded facts do not permit the court to infer more than the “mere possibility of

misconduct,” the complaint has not shown that the pleader is entitled to relief as required by Fed. R. Civ. P. 8(a)(2). *Estate of Barney v. PNC Bank, National Assoc.*, 714 F.3d 920, 924-25 (6th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 679).

The elements of a defamation claim under Ohio law are: “(1) a false and defamatory statement; (2) about the plaintiff; (3) published without privilege to a third party; (4) with fault or at least negligence on the part of the defendant; (5) that was either defamatory *per se* or caused special harm to the plaintiff.” *MedChoice Fin., LLC v. ADS Alliance Data Sys., Inc.*, 857 F. Supp. 2d 665, 673 (S.D. Ohio 2012) (citing *Thomas v. Cohr, Inc.*, 197 Ohio App.3d 145, 2011-Ohio-5916, 966 N.E.2d 791, ¶ 24 (1st Dist.)). For a statement to be defamatory, it must be a statement of fact and not of opinion. *Wampler v. Higgins*, 93 Ohio St.3d 111, 119-20, 752 N.E.2d 962, 971-72 (2001) (affirming that the Ohio Constitution provides a guarantee of protection for opinion, and that statements of opinion are categorically not actionable) (citing *Vail v. The Plain Dealer Publ’g Co.*, 72 Ohio St.3d 279, 281, 649 N.E.2d 182, 185 (1995)).

Whether a statement is an opinion is a question of law, and is appropriately decided on a motion to dismiss. *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 978 (N.D. Ohio 2003). *See also Wampler*, 93 Ohio St.3d at 117-20. To evaluate whether a statement is an opinion, the court must consider: “(1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared.” *Bentkowski v. Scene Magazine*, 637 F.3d 689, 693-94 (6th Cir. 2011) (citations omitted). The test involves analyzing “whether the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications,” whether it “lacks a plausible method of verification,” the “objective and subjective context of the statement,” and other “social

conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Id.* at 694-95.

To be actionable, a statement must also be defamatory – *i.e.*, it must be about the plaintiff and “reflect[] injuriously on [plaintiff's] reputation, or expos[e] [plaintiff] to public hatred, contempt, ridicule, shame or disgrace, or affect[] [plaintiff] adversely in his or her trade, business or profession.” *McGee v. Simon & Schuster, Inc.*, 154 F. Supp. 2d 1308, 1312 (S.D. Ohio 2001) (citing *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 6, 651 N.E.2d 1283, 1289 (1995)).

For a statement to constitute libel *per se*, it must be “defamatory on its face and by the very meaning of the words.” *McGee*, 154 F. Supp. 2d at 1314 (quoting *Fenley v. Bowman*, 12th Dist. No. CA98-02-013, 1998 WL 526516, *2 (Aug. 24, 1998)); *Becker v. Toulmin*, 165 Ohio St. 549, 553-54, 138 N.E.2d 391, 395 (1956) (“in order to constitute libel *per se*, it must appear that the words in the publication of themselves injuriously affect the person concerning whom they are said. If they can reasonably have another and innocent meaning and are not libelous of themselves, they cannot constitute libel *per se*”). Defamation *per quod* is “determined by the interpretation of the listener, through innuendo.” *McGee*, 154 F. Supp. 2d at 1314 (quoting *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 353, 609 N.E.2d 216, 222 (6th Dist. 1992)). Whether a statement is libelous *per se* is a question of law. *Becker*, 165 Ohio St. at 554. If a statement is not libelous *per se*, it is not actionable under Ohio law in the absence of pleading and proof of special damages, which are “direct financial losses resulting from the plaintiff's impaired reputation.” *McGee*, 154 F. Supp. 2d at 1315 (citing *Hampton v. Dispatch Printing Co.*, 10th Dist. No. 87AP-1084, 1988 WL 96227, at *2 (Sept. 13, 1988) and *Elec. Furnace Corp. v. Deering Milliken Research Corp.*, 383 F.2d 352, 356 (6th Cir. 1967)).

A. The Challenged Statements Are Opinions and Are Not Actionable.

The 2013 PowerPoints describe the qualities of Kodak ink and the benefits customers receive from using Kodak ink in their Versamark printers, stating that Kodak inks are “optimized for performance” and that using Kodak inks in Kodak Versamark printers “delivers a lower TCOP through more printed pages, increased print quality, and greater reliability.” Barenholtz Decl., Exs. C and D. These statements do not have a precise meaning. *See, e.g., SPX Corp.*, 253 F. Supp. 2d at 980 (statements open to “dual interpretations” and “imply a subjective prediction” lack precise meaning); *Vail*, 72 Ohio St.3d at 283 (statements that are “value-laden and represents a point of view that is obviously subjective” are opinions). No data or specific numbers are provided to indicate, for example, *how many* “more printed pages” Kodak inks achieve. *See Wampler*, 93 Ohio St.3d at 129 (If the defendant falsely stated that plaintiff “sought to double or triple” rent – instead of simply describing the rent as “exorbitant” – the statement might have constituted a verifiable fact; but describing the rent as “exorbitant” was an unverifiable statement of opinion). What constitutes higher quality, optimization, or greater reliability is entirely subjective. *See, e.g., Rothschild v. Humility of Mary Health Partners*, 163 Ohio App. 3d 751, 2005-Ohio-5481, 840 N.E.2d 258, ¶ 15 (7th Dist.) (statements that are “inherently subjective and open to many interpretations” are opinions) (citing *Wampler*, 93 Ohio St.3d at 128). Indeed, this Court previously held that similar statements describing Kodak ink as “engineered, print tested, and optimized” and providing “optimized system performance” are “ambiguous,” “imprecise,” and “appear to be subjective puffery or opinion.” Order at 29.

The July 2013 Letter is a marketing document in which Kodak touts its ink as “perfectly matched” and providing customers with “a full solution” and “peace of mind.” Barenholtz Decl., Ex. B at 1. This context makes clear that Kodak’s view as to what caused the damage to the

printhead is Kodak's subjective opinion. *See Seaton v. TripAdvisor LLC*, 728 F.3d 592, 600 (6th Cir. 2013) (finding that the "general tenor" of a document, listing obvious opinions, supports the conclusion that a particular statement within the document "cannot reasonably be understood as communicating an actual fact"). Versamark customers are sophisticated, *see* Am. Compl. ¶ 8, and would understand that a statement about the cause of a printhead failure or damage is an opinion. *See Compuware Corp. v. Moody's Investors Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) ("a viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts"). Kodak's belief about the cause of the customer's printhead damage is a "contestable scientific hypothes[is]," rather than the kind of "verifiable fact" that can be the subject of a defamation claim. *Cf. ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013). That Collins disagrees with Kodak's conclusion as to the cause of the printhead damage only buttresses the conclusion that the statement is nonactionable opinion.²

To the extent that Collins alleges that this statement is false because of the alleged date of the damaged printhead ("within six months" of the letter), Collins has no claim by virtue of the "incremental harm" doctrine. If the only factually incorrect statement is that the damage occurred six months prior to the July 2013 Letter instead of, for example, nine months prior, then any harm caused by the statement is nominal or nonexistent. *See Ferreri et al. v. Plain Dealer Publishing Co. et al.*, 142 Ohio App. 3d 629, 642-43, 756 N.E.2d 712, 723 (8th Dist. 2001); *Friego v. UAW Local 549*, 5th Dist. No. 04CA-20, 2005-Ohio-3981, at *3.

² The statements in *ONY* were made in a scientific article. Nonetheless, the analysis in *ONY* applies equally to the situation here. As in *ONY*, the readers are sophisticated and understand that what causes printhead damage is a matter of opinion, and subject to legitimate disagreement among professionals.

B. At Most, the Challenged Statements are Defamatory *Per Quod*, and Collins Has Not Pled Any Special Damages.

The Challenged Statements are not defamatory on their face. None of them mention even Collins. The statements in the 2013 PowerPoints discuss only Kodak ink. Statements by a competitor touting its own products as superior do not injure the reputation of a party who produces a similar product. At most, the statements require the reader to infer, for example, that because Kodak inks are “optimized for performance,” Am. Compl. ¶ 33, Collins inks are not. Similarly, the statement in the July 2013 Letter refers to an unnamed “3rd-Party.” Collins admits in its complaint that Versamark printers cannot run without specialized Versamark ink. Am. Compl. ¶ 14. *See also* Order at 29 (“Collins concedes that the wrong ink could damage a Versamark system”). Versamark customers reading the Letter could conclude that the “3rd-Party” ink damaged the printhead because it was not specially formulated for a Versamark printer, and would not *necessarily* infer (as required for libel *per se*) that the “3rd-party” ink was Collins ink. *See Konica Minolta Bus. Solutions, U.S.A., Inc. v. Allied Office Prods., Inc.*, 724 F. Supp. 2d 861, 868 (S.D. Ohio 2010) (plaintiff “must establish that a false and defamatory statement was made about him”); *Re/Max Int’l, Inc. v. Smythe, Cramer Co.*, 265 F. Supp. 2d 882, 894 (N.D. Ohio 2003).

Thus, the Challenged Statements do not, on their face, “reflect[] injuriously on [plaintiff’s] reputation, or expos[e] [plaintiff] to public hatred, contempt, ridicule, shame or disgrace.” *McGee*, 154 F. Supp. 2d at 1312. Any defamatory meaning can be found only by “interpretation [or] innuendo” or, as Collins alleges, through “clear implication.” *Id.* at 1314-15; *Conway v. Int’l Ass’n of Heat & Frost Insulators & Asbestos Workers*, 209 F. Supp. 2d 731, 755 (N.D. Ohio 2002), *aff’d*, 93 F. App’x 780 (6th Cir. 2004). Thus, to the extent the Challenged Statements are defamatory at all, they are only defamatory *per quod*. *See Wilson v. Harvey*, 164

Ohio App.3d 278, 2005-Ohio-5772, 842 N.E.2d 83, ¶ 22-23 (8th Dist.) (statements that are “facially innocent” and are only defamatory through interpretation are defamatory *per quod*).

As such, Collins’s defamation claim must be dismissed for failure to plead special damages. The summary allegation of “proximately caused damage” is plainly insufficient. Am. Compl. ¶ 72. *See McGee*, 154 F. Supp. 2d at 1314-15 (dismissing complaint that alleged only “proximately caused . . . damage” with “no mention of an actual pecuniary loss”). Far from “specifically stat[ing]” “item[s] of special damage,” as required by Fed. R. Civ. P. 9(g), Collins has pled *no* special damages, and has alleged *no* “direct financial losses resulting from the plaintiff’s impaired reputation.” *McGee*, 154 F. Supp. 2d at 1315. *See also Whiteside v. Williams*, 12th Dist. No. 02AP-1390, 2007-Ohio-1100, ¶ 7-8 (dismissing complaint where “there is no indication in the complaint that appellant could have possibly suffered special damages,” and appellant did not comply with Rule 9(g)).

Indeed, the Amended Complaint does not plead any facts showing that the Challenged Statements caused Collins any harm at all. It does not point to a single customer who stopped doing business with Collins because of the Challenged Statements. To the contrary, it alleges that Collins customers prefer Collins ink over Kodak ink, and believe it to be of higher quality than Kodak ink. Am. Compl. ¶ 27. To the extent any Collins customers have thought about switching ink providers, it is because of Kodak’s pricing policies, not because they believe Collins ink could damage their printheads. Am. Compl. ¶ 30. *See Elec. Furnace Corp.*, 383 F.2d at 356 (directing verdict for defendant where plaintiff had not lost any business because of the challenged statement).

Without any allegation that the Challenged Statements caused any injury, much less the direct pecuniary losses required, the Amended Complaint fails to state a cognizable claim for

defamation. *McGee*, 154 F. Supp. 2d at 1315; *see also Konica Minolta Bus. Solutions*, 724 F. Supp. 2d at 870 (granting summary judgment for defendant where the plaintiff alleged that one customer had cancelled a contract, but did not “provide any evidence that [the customer] did so *because* of the alleged defamatory statement” (emphasis added)).

II. Collins’s Lanham Act and ODTPA Claims Should Be Dismissed.

A claim under §43(a) of the Lanham Act has five elements. The plaintiff must show that “1) the defendant has made false or misleading statements of fact concerning his own product or another’s; 2) the statement actually or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence the deceived consumer’s purchasing decisions; 4) the advertisements were introduced into interstate commerce; and 5) there is some causal link between the challenged statements and harm to the plaintiff.” *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 613 (6th Cir. 1999). The allegedly misleading statements must be statements of fact; opinions are not actionable, and whether the statement is an opinion is a matter of law. *Id.* at 614.

Additionally, if a statement is not “literally false,” or is only “true but misleading,” a plaintiff seeking injunctive relief must show “that the defendant’s representations about its product have a tendency to deceive consumers,” and a plaintiff seeking money damages must plead that the representations have *actually* deceived customers. *Am. Council*, 185 F.3d at 618. “[A]n ambiguous statement cannot be literally false,” nor can “commercial claims that are implicit, attenuated, or merely suggestive.” *Cboss, Inc. v. Zerbonia*, 4:09-CV-00168, 2010 WL 3835092, at *7 (N.D. Ohio Sept. 29, 2010); *Outdoor Techs., Inc. v. Vinyl Visions, LLC*, 1:06-CV-044, 2006 WL 2849782, at *7 (S.D. Ohio Sept. 29, 2006). Whether a statement is literally false is also a matter of law. *Am. Council*, 185 F.3d at 618.

The elements for Collins's ODTPA claim are the same. "Both Ohio and federal courts have recognized that the same analysis applies to claims under Ohio's statutory and common law of unfair competition and the Lanham Act." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 626 n.2 (6th Cir. 2002) (citing *Leventhal & Assocs., Inc. v. Thomson Cent. Ohio*, 128 Ohio App.3d 188, 194, 714 N.E.2d 418, 423 (10th Dist. 1998)).

For largely the same reasons that the defamation claim fails, so too do the Lanham Act and OCTPA claims. As discussed above, all the Challenged Statements are opinions. See Section I.A, *supra* at 8-9; see also *Allied Erecting & Dismantling Co., Inc. v. Genesis Equip. & Mfg., Inc.*, 649 F. Supp. 2d 702, 725-26 (N.D. Ohio 2009) (statements that one product has "unmatched power" or "outlasts" another are opinions); *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 699 (6th Cir. 2003) (statements calling a product "redesigned and improved" are opinions); *Outdoor Techs., Inc.*, 2006 WL 2849782 at *4 ("most weatherable" and "strongest warranty" are opinions); *Davis v. Byers Volvo*, 4th Dist. No. 11CA-817, 2012-Ohio-882, ¶ 44 ("vague claims of superiority" are opinions); *Cboss, Inc.*, 2010 WL 3835092 at *8 (statement that the defendant "may well be the world's leading expert" is "subjective, speculative and not a statement of quantifiable fact").³

Even if the Court were to find that the Challenged Statements are not opinions, they are not "literally false." See Section II, *supra* at 12. What Collins claims is "false" about the Challenged Statements (*e.g.*, that Kodak inks are better than Collins inks, or that Collins ink damaged a customer's printhead) is not what the Statements *actually say* – the Challenged Statements say *only* that Kodak ink is optimized, and that a 3rd-Party ink damaged a printhead.

³ Indeed, this Court has already found that Collins has not shown a likelihood of success on the merits on its Lanham Act and ODTPA claims based on the "lower TCOP" statement because Collins evidence of the statements (or similar statements) falsity, like the statements themselves, were "only opinions" and "lack[ed] objectivity." Order at 30.

Thus, the falsehood Collins alleges exist in each Statement is necessarily implicit and ambiguous, and “an ambiguous statement cannot be literally false.” *Cboss, Inc.*, 2010 WL 3835092 at *7. *See also* Order at 29 (finding statements similar to the PowerPoint statements were “either ambiguous or true but misleading”); Order at 31 (finding with respect to the damaged printhead statement that Collins has not shown a likelihood of success in proving that the statements were literally false).

Thus, the Lanham Act and ODPTA claims fail because the statements are not “literally false” and Collins has not pled any facts showing that the Statements will tend to deceive, or have actually deceived, Collins’s extremely sophisticated customers. Far from alleging any deception, Collins actually claims that customers “view Collins’ customer service as superior to Kodak” and prefer Collins ink over Kodak ink. Am. Compl. ¶ 27. Accepting these factual averments as true, Collins’s “formulaic recit[als]” that Kodak’s statements “are likely to mislead customers,” *Id.* ¶¶ 63, 67, are not remotely “plausible,” and the claims are insufficient to withstand a motion to dismiss. *See Iqbal*, 556 U.S. at 678.

III. The Refurbishment Claim Should Be Dismissed for Lack of Subject Matter Jurisdiction

To obtain relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, the plaintiff must demonstrate an “actual controversy,” *i.e.* that the alleged dispute is “definite and concrete,” “real and substantial,” and able to be resolved through “specific relief . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007) (citing *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41, 57 S. Ct. 461, 81 L. Ed. 617 (1937)). This justiciability inquiry is a fact-specific “totality of the circumstances” test: the court must determine “whether the facts alleged, under all the circumstances, show that there is a

substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune*, 549 U.S. at 127 (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)); see also *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1338 (Fed. Cir. 2008) (“*Prasco II*”), *aff’g Prasco, LLC v. Medicis Pharm. Corp.*, 1:06-CV-313, 2007 WL 928669, at *2 (S.D. Ohio Mar. 27, 2007) (“*Prasco I*”). If the claim is not justiciable, then the court lacks subject matter jurisdiction, and it must be dismissed. *Aetna*, 300 U.S. at 239-40.

On a motion to dismiss a claim for lack of subject matter jurisdiction, the court may look to the allegations of the complaint and dismiss if they are facially insufficient. *Ohio Nat’l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). The defendant may also challenge “the factual existence of subject matter jurisdiction,” in which case the court is free to consider materials outside the complaint. *Id.*; see also *Prasco I*, 2007 WL 928669 at *2. While Kodak submits that the Amended Complaint is facially deficient, it has submitted excerpts from Mr. Gamblin’s testimony which establish beyond cavil that the Refurbishment Claim is not justiciable.

According to the Amended Complaint, Collins is “currently attempting to enter the refurbished printhead market” and “has not yet been able to do so except on a trial basis.” Am. Compl. ¶ 18. At the preliminary injunction hearing, Mr. Gamblin testified that Collins could not yet refurbish printheads, and that key components of a refurbished printhead were still in development. Barenholtz Decl., Ex. A (Hr’g Tr. 1-125:18-20) (Q: “If I bring you a printhead with a broken charge plate, you can’t fix that printhead?” A: “I can’t fix it”). Nor was Mr. Gamblin able to say when Collins would be able to refurbish a printhead, although he predicted it would take at least another year. *Id.* (Hr’g Tr. 1-16, 1-125). Mr. Gamblin claimed that there is

“no guarantee” when, if ever, Collins could make its designs work. *Id.* (Hr’g Tr. 1-122:4-16).

This Court credited that testimony in its Order, finding that “Collins does not provide printhead refurbishment services to its customers,” “has not yet been able to enter into that market,” and has no clear “date for being able to enter the market.” Order at 3.

As long as Collins’s ability to enter the refurbishment business remains uncertain, it cannot establish an immediate and real controversy sufficient to warrant the issuance of a declaratory judgment. While Mr. Gamblin *believes* Collins will be able to launch a refurbishment business, he testified that Collins may never be able to do so. Barenholtz Decl. Ex. A (Hr’g Tr. 1-123:23-124:3). Under these circumstances, the dispute outlined in the Refurbishment Claim is purely hypothetical. *See, e.g., Adult Video Ass’n v. U.S. Dep’t of Justice*, 71 F.3d 563, 567-68 (6th Cir. 1995) (a case is not ripe for review when it depends on contingent future events that may not occur) (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)); *Airline Prof’ls Ass’n of Int’l Bhd. of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc.*, 332 F.3d 983, 988 (6th Cir. 2003) (Article III bars “adjudicating a dispute anchored in future events that may not occur as anticipated, or at all”) (citing *Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997)). Indeed, because Collins’s refurbishment operation is still a work in progress, neither Kodak nor the Court can know what technology Collins plans to employ (and thus whether it violates any of Kodak’s proprietary rights).

Courts have repeatedly found declaratory judgment claims to be premature on facts like those presented here. For example, in *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 749 (5th Cir. 2009), the plaintiff had “worked with an engineer on product development, began construction of a new manufacturing facility, purchased specialized equipment, built a sub-

frame, and offered to sell its new model trailer.” The court nonetheless found that the plaintiff’s design of its trademark was not “sufficiently fixed” to evaluate whether there was the potential for an infringement suit, and dismissed the declaratory judgment claim. *Id.* at 750-51. *See also Sierra Applied Sciences, Inc. v. Advanced Energy Indus., Inc.*, 363 F.3d 1361, 1379-80 (Fed. Cir. 2004) (dismissing declaratory judgment claim because the design at issue was “fluid and indeterminate” and “it was impossible to determine [at the time of the complaint] whether any eventual design . . . would infringe [the] patents.”); *Lang v. Pac. Marine & Supply Co., Ltd.*, 895 F.2d 761, 764 (Fed. Cir. 1990) (denying declaratory relief where allegedly infringing ship hull would not be finished until at least nine months after the complaint was filed, and the ship builder had not “engaged in any activity indicating that the ship would in fact be ready for sea”).

But even if Collins’s plans with respect to its Refurbishment business were more concrete, the Refurbishment Claim is still not justiciable because Collins has not alleged a “*real* and *immediate* injury or threat of future injury that is *caused by the defendant*” – an objective standard that cannot be met by a purely subjective or speculative fear of future harm.” *Prasco II*, 537 F.3d at 1339 (emphasis in original).

The Amended Complaint does not allege that Kodak has sent Collins a cease and desist letter or told Collins – either directly or indirectly – that Collins’s refurbishment business violates Kodak’s proprietary rights. Nor does it allege that Kodak has taken affirmative steps to stop Collins from continuing its ongoing efforts to launch a refurbishment business. It merely alleges – upon information and belief – that, while in Rome, an unidentified Kodak employee claimed to a Versamark customer that Kodak would stop Collins’s entry into the Versamark refurbished printhead market. There is no indication that Kodak has an official position, the speaker was authorized to express (or was even privy to) Kodak’s official position, or that the

statement was meant to be conveyed to Collins, or that the means Kodak planned to use to “stop” Collins involved the assertion of Kodak’s proprietary rights. Am. Compl. ¶ 82.

While the Amended Complaint alleges that the statements made at the Rome meeting are consistent with a November 2012 email and a Spring 2013 PowerPoint in which Kodak employees expressed the belief that Collins would not be able to refurbish Versamark printheads without using Kodak proprietary parts, the Refurbishment Claim does not assert that Kodak took any steps to act on the beliefs expressed in those internal documents. The lack of any such allegation is particularly striking given that Collins issued a press release announcing its entry into the refurbishment business in September 2013. Barenholtz Decl. Ex. A (Hr’g Tr. 1-113:6-22). While Collins now claims that it has not actually launched a refurbishment business, Ex. A (Hr’g Tr. 1-113:25-1-114:3), the fact remains that Collins made public statements which put Kodak on notice that Collins was actually refurbishing Versamark printheads in September 2013, yet Kodak did not tell Collins that its refurbishment business violated patents held by Kodak, or any other proprietary rights of Kodak.

The Refurbishment Claim does not come close to showing that Kodak has taken any steps, in or out of court, to prevent Collins from attempting to develop a refurbishment business. *Prasco* is instructive. In *Prasco*, “the defendants [had] not accused Prasco of infringement or asserted any rights” with respect to the product at issue; nor had the defendants “taken any actions which imply such claims.” *Prasco II*, 537 F.3d at 1340. All the plaintiff had alleged was “that its product does not infringe the defendants’ patents.” *Id.* The court found that there was an utter “lack of any evidence that the defendants believe or plan to assert that the plaintiff’s product infringes their patents,” and noted that a plaintiff’s purely subjective fear of future harm, “without some affirmative act by the patentee,” cannot form the basis of an Article III case or

controversy. *Id.* at 1338-39 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1380-81 (Fed. Cir. 2007)). As such, there was no actual or imminent injury. *Prasco II*, 537 F.3d at 1341.

Collins's allegations come nowhere near the activity alleged by the *Prasco* plaintiff. Indeed, all Collins has alleged, in essence, is that Kodak "may at some undetermined point in time choose to file an infringement suit against an unspecified potential[ly infringing product]." *Prasco I*, 2007 WL 928669 at *4. That is not enough.

CONCLUSION

For the foregoing reasons, the Amended Complaint's Third, Fourth, Fifth and Seventh causes of action should be dismissed.

DATED: April 9, 2013

Respectfully submitted,

/s/ James E. Burke

James E. Burke (0032731)
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Tel: (513) 579-6400
Fax: (513) 579-6457
jburke@kmklaw.com
*Trial Attorney for Defendant
Eastman Kodak Company*

/s/ Marc Schildkraut

Marc Schildkraut
COOLEY LLP
1299 Pennsylvania Avenue, Suite 700
Washington, DC 20004-2400
Tel: (202) 728-7000
Fax: (202) 842-7899
mschildkraut@cooley.com
*Attorney for Defendant
Eastman Kodak Company*

/s/ Celia Goldwag Barenholtz _____

Celia Goldwag Barenholtz

COOLEY LLP

1114 Avenue of the Americas

New York, New York 10036

Tel: (212) 479-6000

Fax: (212) 479-6275

cbarenholtz@cooley.com

Attorney for Defendant

Eastman Kodak Company

CERTIFICATE OF SERVICE

I hereby certify that, on April 9, 2014, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

DATED: April 9, 2014

/s/ James E. Burke

James E. Burke