

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

COLLINS INKJET CORPORATION,)
)
) **Civil Action No. 1:13-cv-00664-MRB**
) **Plaintiff,**)
) **(Judge Michael R. Barrett)**
v.) **(Magistrate Judge Karen L. Litkovitz)**
)
EASTMAN KODAK COMPANY,)
)
) **Defendant.**)

**DEFENDANT EASTMAN KODAK COMPANY'S
MOTION FOR PARTIAL DISMISSAL AND TO TRANSFER THE ENTIRE CASE**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Eastman Kodak Company ("Kodak"), respectfully moves for an Order partially dismissing Plaintiff's claims for failure to state a claim upon which relief can be granted. The grounds for this motion are set forth in the attached Memorandum in Support. This Motion is also supported by the Declaration of Christopher Payne, and the exhibits that are being filed contemporaneously.

DATED: October 15, 2013

Respectfully submitted,

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MEMORANDUM IN SUPPORT

PRELIMINARY STATEMENT

Starting in 2001, plaintiff Collins Inkjet Corporation (“Collins”) manufactured and sold ink specially formulated for use in defendant Eastman Kodak Company’s (“Kodak”) Versamark printers pursuant to a series of contracts with Kodak. In October 2011, Collins attempted to terminate the parties’ contract. Kodak responded by commencing an action in the United States District Court for the Western District of New York, the parties’ contractually chosen forum, seeking a preliminary injunction. Collins was eventually able to terminate the contract effective May 2, 2012.

Immediately after the termination, Kodak instituted a new policy for refurbishment of Versamark printheads (a key part of a Versamark printer) by which it charged customers who did not use Kodak ink in their Versamark printers more to refurbish their printheads than customers who used Kodak ink. That policy was conveyed to customers in a press release issued in May 2012 (the “Press Release”) and a slide presentation made in June 2012 (the “Slide Presentation”).

In September 2013, more than a year after Kodak’s new policy was announced, Collins filed the instant complaint, alleging, in Count 1, that Kodak’s policies concerning refurbishment of printheads are an unlawful tying arrangement, and that certain statements in the Press Release and Slide Presentation are false and misleading (the claims relating to allegedly false and misleading statements are referred to herein collectively as the “Disparagement Claims”).

The statements plaintiff challenges do not impugn Collins. For the most part, they simply opine that Kodak ink is better for use in a Versamark printer than any other ink. Indeed, most of the statements do not refer to Collins at all. Moreover, the complaint does not

establish any damage to Collins as a result of the allegedly false and misleading statements. To the contrary, it alleges that to the extent any customers switched from Collins to Kodak, they did so because of the new pricing policy for refurbishment, not because they were deceived as to the quality of Collins ink. Accordingly, the Disparagement Claims do not state valid claims for relief.

Moreover, the Press Release and the Slide Presentation were published more than a year ago. The Disparagement Claims based on them are therefore time-barred.

Finally, because the action arises out of or relates to the parties' contract, and because that contract provides for a New York forum for any dispute arising out of or relating to the contract, the case should be transferred to the Western District of New York.

STATEMENT OF FACTS¹

Kodak is the sole manufacturer of Versamark printers, a complex printing system designed to run continuously for large commercial printing companies. Cmpl. ¶¶ 8, 13. Kodak manufactures Versamark printers for some of the largest commercial printing companies around the world, who invest millions of dollars in the Versamark printing systems. *Id.* ¶¶ 8-9. 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, even when run with appropriately compatible ink. *Id.*

Collins has made inks for commercial printers, including Versamark printers, since 1989. *Id.* ¶ 19. Kodak also makes ink for Versamark printers. *Id.* ¶ 15. While Collins has

¹ As required on a motion to dismiss, this statement of facts is based on the complaint even though Kodak disputes many of plaintiff's contentions.

attempted to develop the ability to refurbish printheads, as of today, only Kodak can refurbish Versamark printheads. *Id.* ¶¶ 16, 18.

Starting in 2001, Kodak, or its predecessor in interest, and Collins entered into a series of contracts whereby Kodak was the exclusive reseller of Versamark ink manufactured by Collins. *Id.* ¶ 21. The last agreement between the parties became effective on December 15, 2008 (the “Contract”). Payne Decl., Ex. 1. In October 2011, Collins sought to terminate the Contract because it was concerned about Kodak’s financial condition. *Id.* ¶ 23. Kodak contended that Collins was not entitled to terminate the Contract, and sought a preliminary injunction in the Western District of New York. Collins was eventually able to terminate the Contract, and did so on May 2, 2012.² *Id.* ¶ 25.

On May 3, 2012, Kodak issued the Press Release stating “Collins Ink is no longer an approved supplier of inks and fluids for KODAK VERSAMARK printing systems.” *Id.* ¶ 35. Kodak used the Press Release to promote Kodak ink, telling customers that only Kodak inks come with Kodak’s “assurance” that the inks were “engineered, print tested, and optimized for system fluid consumption prior to customer order.” *Id.* Also in May 2012, Kodak announced a new refurbishment policy for Versamark printheads under which customers would be charged higher prices for refurbishment if they used non-Kodak inks. *Id.* ¶ 29.

A month later, on June 11, 2012, Kodak prepared the Slide Presentation that promoted the benefits of buying Kodak ink. *Id.* ¶ 36. Kodak described its ink as delivering a lower total cost through “increased print quality and greater reliability.” *Id.* Kodak also explained its reasoning behind the new refurbishment policy in the Slide Presentation, *i.e.*, that

² Kodak’s action in the Western District of New York was dismissed without prejudice on September 4, 2012. Cmpl. ¶ 24, n.2.

“non-Kodak brand inks and fluids can potentially disrupt and damage printing components,” leading to higher refurbishment costs. *Id.* ¶ 37.

In the months after these announcements, some customers switched from Collins ink to Kodak ink to avoid the price increases, *id.* ¶¶30-31, but others told Collins that “they would like to continue to use Collins ink,” *id.* ¶ 29, and many continued to purchase Collins ink despite the potential refurbishment surcharge. *Id.* ¶ 31.

On July 24, 2013, Kodak sent customers a letter announcing an updated refurbishment policy requiring customers to identify whether non-Kodak ink was used in printheads sent to Kodak for refurbishment. *Id.* ¶ 32. The letter states: “We are taking 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.” *Id.*

Although Kodak announced its new policy regarding printhead refurbishment in May 2012, until very recently its enforcement of its policy was sporadic and lax. *Id.* ¶ 31. Kodak has recently begun to enforce the new pricing structure for refurbishment. *Id.* ¶ 33.

On September 19, 2013, Collins filed the instant complaint, alleging that Kodak’s refurbishment policy constituted an unlawful tying arrangement (Count 1) and tortious interference with prospective contractual relations (Count 5). The Disparagement Claims are: Count 4, which asserts that the Press Release, Slide Presentation, and one other statement the source of which is not specified (collectively, the “Challenged Statements”) are defamatory; Count 2, which asserts that the Challenged Statements constitute unfair competition under Section 43(a) of the Lanham Act; and Count 3, which alleges that the Challenged Statements are deceptive trade practices under the Ohio Deceptive Trade Practices Act (“ODTPA”). The complaint identifies no damages to plaintiff as a result of Kodak’s alleged conduct in connection

with the Disparagement Claims, and the only relief plaintiff seeks on them is an injunction barring Kodak “from making false or deceptive statements regarding the cost, nature, characteristics and qualities of Kodak’s and Collins’s respective Versamark ink products.” *Id.* ¶ vi, p. 19.

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*, 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*, 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)). To survive a motion to dismiss, a claim must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. at 678. *See also HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 612 (6th Cir. 2012). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.” *Id.*; *see also West Bend Mut. Ins. Co.*, 2013 WL 5467821, at *2 (allegations must suggest “a right to relief above a speculative level”). 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 Ashcroft v. Iqbal*, 556 U.S. at 679).

Collins has failed to plead facts sufficient to establish a defamation claim. 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 7915 (1st Dist. 2011)). 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, 119-120, 752 N.E.2d 962 (2001) (affirming that the Ohio Constitution provides a separate and independent guarantee of protection for opinion, above and beyond what is required by the First Amendment, 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 (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* at 117-120. To evaluate whether the statements are protected opinions under Ohio law, 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 a “statement lacks a plausible method of verification,” the “objective and subjective context of the statement[s],” 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 – that is, a statement 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 (1995)).

For a statement to constitute libel *per se*, it must be “defamatory on its face and by the very meaning of the words.” *Id.* at 1314 (quoting *Fenley v. Bowman*, 12th Dist. No. CA98-02-013, 1998 WL 526516, *2 (Aug. 24, 1998)); *Becker v. Toulim*, 165 Ohio St. 549, 553-54, 138 N.E.2d 391 (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*, on the other hand, is defamation “determined by the interpretation of the listener, through innuendo.” *Id.* (quoting *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 353, 609 N.E.2d 216 (6th Dist. 1992)). Whether a statement is libelous *per se* is a question of law. *Becker* at 554. If a publication 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.” *Id.* at 1315 (citing *Hampton v. Dispatch Printing Co.*, 10th Dist. No. 87AP-1084, 1988 WL 96227, *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 or Are Not Defamatory or Both.

All but two of the Challenged Statements describe qualities of Kodak ink or the benefits customers receive from using Kodak ink in their Versamark printers.³ *See, e.g.*, Cmplt. ¶ 36(c) (Kodak inks provide “more printed pages, increased print quality, and greater reliability”); Cmplt. ¶ 36(d) (Kodak ink is “pure and free from particles, bacteria and other contaminants that can cause catastrophic failures”); Cmplt. ¶¶ 35(b), 36(a), (e) (“only Kodak” inks are based on “proprietary technology,” are “engineered [and] print tested,” and are “optimized for performance” with “consistent job-job results”); Cmplt. ¶ 37 (“Non-Kodak brand inks and fluids can potentially disrupt and damage printing components”). Such statements are imprecise, unverifiable, or speculative, and are therefore opinions.

For example, Kodak’s assertions that its ink is “pure” and delivers “greater reliability,” Cmplt. ¶¶ 36(c), (d), and claims of “optimization” and “increased print quality,” *id.* ¶¶ 35(b), 36(a), (c), (e), do not have a precise meaning. *See, e.g., SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 980 (N.D. Ohio 2003) (statements open to “dual interpretations” and “imply a subjective prediction” lack precise meaning); *Vail v. The Plain Dealer Publ’g Co.*, 72 Ohio St.3d 279, 283, 649 N.E.2d 182 (1995) (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,

³ The Challenged Statements are set out in ¶¶ 35-37 of the Complaint. The statements described in ¶ 35 are from the Press Release. The statements described in ¶ 36 are from the Slide Presentation. The Complaint does not identify the date or source of the statements described in ¶ 37.

Paragraph 32 objects to Kodak’s statement that “our customers have experienced damaged printheads as a direct result of using 3rd-party inks,” but does not allege that the statement is false, defamatory or misleading – only that Collins is not “aware” of such damage. In ¶ 39, the complaint asserts that Kodak “sometimes” told customers that Collins “was no longer in business,” without making clear whether Kodak was conveying that Collins had literally gone out of business, or was merely no longer in business with Kodak. The complaint does not allege that this statement was false, misled customers, or impugned Collins’s reputation. In light of plaintiff’s failure to allege that the statements described in these two paragraphs are false or misleading, we have not included them in our description of the Challenged Statements.

for example, *how many* “more printed pages” Kodak inks achieve. Cmplt. ¶ 36(c). *See Wampler*, 93 Ohio St.3d at 129, 752 N.E.2d 962 (The court noted that 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 a “catastrophic failure,” Cmplt. ¶ 36(d), is entirely subjective. Thus, Kodak’s assertion that its inks do not have substances that can cause “catastrophic failures” is an opinion. *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* at 128). Similarly, whether non-Kodak brand inks “can *potentially* disrupt and damage printing components,” Cmplt. ¶ 37 (emphasis added), is speculative, qualified, and unverifiable – a nonactionable opinion. *See White Mule Co. v. ATC Leasing Co. LLC*, 540 F. Supp. 2d 869, 895, 899, n.21 (N.D. Ohio 2008) (“Ohio courts have deemed statements that plaintiffs ‘would go bankrupt,’ or were ‘near insolvency,’ to be protected opinions”; assertions that plaintiff would prevail on its claim were also unverifiable) (citing *Ohio Sav. Ass’n v. Bus. First of Columbus, Inc.*, 43 Ohio App. 3d 215, 216, 540 N.E.2d 320 (10th Dist. 1988)).⁴

Moreover, to the extent they are capable of a defamatory meaning at all, none of the Challenged Statements described above (Cmplt. ¶¶ 35(b), 36(a), (c), (d), (e), 37) are defamatory on their face. As a threshold matter, none of them even refer to the plaintiff. *See*

⁴ The fact that the statements challenged in ¶¶ 35 and 36 are in the context of a press release and marketing presentation further supports the conclusion that they are opinions. The documents are clearly meant to persuade customers of the merits of Kodak ink, and thus signal to the reader that Kodak is offering its opinion. *See Vail*, 72 Ohio St.3d at 280, 649 N.E.2d 182 (speech in a persuasive context is generally understood to be statements of opinion).

Konica Minolta Bus. Solutions, U.S.A., Inc. v. Allied Office Products, 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). Nor do any of the statements “reflect injuriously on [plaintiff’s] reputation, or expose [plaintiff] to public hatred, contempt, ridicule, shame or disgrace.” *McGee v. Simon & Schuster, Inc.*, 154 F. Supp. 2d 1308, 1312 (S.D. Ohio 2001). A statement by a competitor touting its own products as superior simply does not injure the reputation of a party who produces a similar product.

Even assuming *arguendo* that a defamatory meaning can be found in these statements, it is only through “interpretation [or] innuendo,” *McGee v. Simon & Schuster, Inc.*, 154 F. Supp. 2d 1308, 1314-15 (S.D. Ohio 2001), or, as Collins explicitly acknowledges, “suggest[ion].” Cmpl. ¶¶ 35(a), 36(d), (e). At most, the statements are defamatory *per quod*, requiring the reader to infer, for example, that because Kodak inks are “pure and free from particles,” Cmpl. ¶ 36(d), Collins inks are not. See *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) (plaintiff’s claim that defendant’s statements were defamatory even “by clear implication” made the statements at most defamatory *per quod*); *Wilson v. Harvey*, 164 Ohio App.3d 278, 2005-Ohio-5772, 842 N.E.2d 83, ¶ 22-23 (2005) (statements that are “facially innocent” and only defamatory through interpretation are defamatory *per quod*).

The only other Challenged Statements are not defamatory on their face. The statement quoted in ¶ 35(a) states only that “Collins Ink is no longer an approved supplier of inks and fluids for KODAK VERSAMARK printing systems.” Approved status can be revoked for

any number of reasons, including the decision of the parties not to do business with each other.⁵ Likewise, the statement in ¶ 36(b), that “Kodak has met all of our obligations to Collins under the terms of our agreement,” is not defamatory on its face. The assertion that Kodak met its obligations does not indicate anything unsavory about Collins; indeed, the complaint does not claim otherwise.⁶

Becker v. Toulim, 165 Ohio St. 549, 138 N.E.2d 391, is instructive. In that case, the defendant sent a letter to its customers stating that it “had found it desirable to terminate plaintiff’s employment.” *Id.* at 549-550. Although the plaintiff alleged that the statement implied that he lacked professional competence, *id.* at 552, the court found that the word “terminate” does not subject a person to “ridicule, hatred or contempt or affecting him injuriously in his trade or profession;” rather, it could mean “an ending . . . accomplished by mutual consent.” *Id.* at 555. Thus the challenged statements were at most libelous *per quod*. *Id.* at 557. Similarly, in *Konica Minolta Bus. Solutions, U.S.A., Inc. v. Allied Office Products, Inc.*, 724 F. Supp. 2d 861 (S.D. Ohio 2010), the plaintiff complained that the defendant’s statement that plaintiff “is no longer an authorized dealer” negatively impacted its professional reputation. But the court held that the statement could have “an equally plausible innocent interpretation,” *i.e.*, suggesting that plaintiff had chosen to stop servicing defendant’s products, and thus was at most defamation *per quod*. *Id.* at 870-71.

⁵ This statement also fails to support a defamation claim because the complaint contains no allegation that it is not true. See *Bentkowski v. Scene Magazine*, 637 F.3d 689, 693-94 (6th Cir. 2011) (elements of defamation under Ohio law include “the assertion of a false statement of fact”); *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) (defamation claim failed because plaintiff failed to establish that any challenged statements were false).

⁶ The statement in ¶ 36(b) is also an opinion because it expresses Kodak’s subjective view that it complied with the terms of the agreement.

B. Plaintiff Has Not Pled Any Special Damages.

As discussed above, the Challenged Statements are either opinions or are not defamatory on their face (or both). To the extent they are potentially capable of being understood as defamatory (*i.e.*, defamatory *per quod*), plaintiff must plead special damages for them to be actionable. *McGee v. Simon & Schuster*, 154 F. Supp. 2d1308, 1314-15 (S.D. Ohio 2001) (citing *Hampton v. Dispatch Printing Co.*, 10th Dist. No. 87AP-1084, 1988 WL 96227, *2 (Sept. 13, 1988)) (dismissing complaint for failure to allege “an actual pecuniary loss” in claim for libel *per quod*); *Elec. Furnace Corp. v. Deering Milliken Research Corp.*, 383 F.2d 352, 356 (6th Cir. 1967) (directing verdict for defendant where plaintiff had not lost any business because of the challenged statement).

The complaint seeks only injunctive relief; Collins has pleaded *no* damages, much less special damages, *i.e.*, “direct financial losses resulting from the plaintiff’s impaired reputation,” *McGee*, at 1314, as is required by Ohio law and Rule 9(G) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. Proc. § 9(G) (“When items of special damage are claimed, they shall be specifically stated”); *Whiteside v. Williams*, 12th Dist. No. 02AP-1390, 2007-Ohio-1100, *2 (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, Collins does not claim that the allegedly defamatory statements caused any harm at all. The complaint does not point to a single customer who stopped doing business with Collins. While the complaint quotes an email from a customer who concluded it was in its “best interests” to use Kodak, it does not allege that the customer actually stopped doing business with Collins. Moreover, the email makes clear that the customer’s analysis was based on cost reasons – not because of any defamatory statements. Cmpl. ¶ 30. Without any allegation that the alleged defamation caused any injury, much less direct financial losses, the complaint fails to

state a cognizable claim. *See Konica Minolta Bus. Solutions*, 724 F. Supp. 2d 861, 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”).

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

Collins’s claims under the Lanham Act and ODTPA are based on the same eight Challenged Statements discussed above, and should be dismissed for similar reasons.

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, 613-14 (6th Cir. 1999). As in defamation claims, 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.” *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*, 409CV00168, 2010 WL 3835092, at *7 (N.D. Ohio Sept. 29, 2010); *Outdoor Technologies, Inc. v. Vinyl Visions, LLC*, 2006 WL

2849782, at *7 (S.D. Ohio Sept. 29, 2006). Whether a statement is literally false is 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 (6th Cir. 2002) (citing *Leventhal & Assocs., Inc. v. Thomson Cent. Ohio*, 128 Ohio App.3d 188, 714 N.E.2d 418, 423 (Ohio Ct. App. 1998).

Thus, for largely the same reasons that the defamation claim fails, so too do the Lanham Act and OCTPA claims. All but two of the Challenged Statements are statements of opinion, alleging in essence that Kodak inks are better or best for Kodak Versamark customers. *See* Cmpl. ¶¶ 35(b), 36(a), (c), (d), (e), 37 (asserting, *inter alia*, that "only Kodak" inks are based on "proprietary technology," and are "optimized for performance" with "consistent job-job results"). These Statements are thus "general claim[s] of superiority over comparable products," which courts routinely hold are nonactionable opinions under the Lanham Act or the ODTPA. *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). *See also 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 Technologies, Inc.*, 2006 WL 2849782, *4 (finding that the statements 'most weatherable' and 'strongest warranty' are opinions); *Davis v. Byers Volvo*, 4th Dist. No. 11CA817, 2012-Ohio-882, *11-12 (claims that defendant will "offer superior and more trustworthy service," that is, "vague claims of superiority," are opinions); *Cboss, Inc.*, 2010 WL

3835092, at *8 (holding that the statement that the defendant “may well be the world’s leading expert” is “subjective, speculative and not a statement of quantifiable fact”).

Moreover, none of the Challenged Statements are literally false. What it means for ink to be “optimized,” “pure,” or “consistent” is indefinite and unclear, Cmplt. ¶ 35(b), 36(a), (d), (e); none of the Challenged Statements provide specific data or information to explain exactly what is meant by descriptors like “print tested” or “increased print quality.” *Id.* ¶ 35(b), 36(c). Indeed, Collins admits that several Challenged Statements only “*falsely suggest*” that Collins’s ink is of low quality. Cmplt. ¶¶ 35(a), 36(e), 37 (emphasis added). *See Cboss, Inc.*, 2010 WL 3835092, at *7 (“an ambiguous statement cannot be literally false”).

Moreover, the statement in ¶ 35(a) – that Collins ink is “no longer . . . approved” – is at worst true but misleading. *See Am. Council*, 185 F.3d at 615 (the statement that defendant is “the ONLY approved certifying board for podiatric surgery” is either ambiguous or true but misleading, because “[i]t is wholly unclear what it means to be an ‘approved’ board”).⁷

Because none of the Challenged Statements are “literally false,” or are at worst “true but misleading,” the Lanham Act and ODPTA claims fail because Collins has not pled any facts showing that the Statements will tend to deceive Collins’s extremely sophisticated customers. *See* Cmplt. ¶ 8. Far from alleging any deception, Collins actually claims that many customers wanted to – and in fact did – continue to purchase ink from Collins for months after the publication of the allegedly disparaging statements. Cmplt. ¶¶ 29-33. Accepting these factual averments as true, Collins’s “formulaic recit[als]” that Kodak’s statements “are likely to

⁷ The statement that “Kodak has met all of our obligations to Collins,” Cmplt. ¶ 36(b), is similarly ambiguous, especially in light of the discharge in bankruptcy. *See* Cmplt. ¶¶ 24-25. Collins ultimately elected to terminate the agreement, *id.*, and the case brought by Kodak in the Western District of New York was dismissed without prejudice. *Id.* ¶ 24, n.2. In any event, plaintiff offers no explanation for how this statement could possibly deceive customers as to the quality of Collins ink.

mislead customers,” Cmpl. ¶¶ 58, 62, are not remotely “plausible,” and the claims are insufficient to withstand a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. at 678.

III. The Disparagement Claims Based on the Press Release and Slide Presentation Are Time-Barred.

The only publications Collins specifically identifies that contain the Challenged Statements are the Press Release and the Slide Presentation. To the extent the Disparagement Claims are premised on these documents, they should be dismissed as time-barred.

Under Ohio Rev. Code 2305.11(A), an action for defamation must be brought within one year after the cause of action accrues, which in Ohio is the date of publication. *Lewis v. Delaware Cty. JVSD*, 161 Ohio App.3d 71, 2005-Ohio-2550, 829 N.E.2d 697, ¶ 38 (5th Dist.); *Rennick v. Provident Bank*, 2008 WL 696893 (S.D. Ohio Mar. 12, 2008). The Press Release and Slide Presentation, which account for at least seven of the statements that form the basis for plaintiff’s defamation claim, were published on May 3, 2012 and June 11, 2012 respectively, Cmpl. ¶¶ 35-36, but the complaint was filed over a year later, on September 19, 2013. To the extent the defamation claim is premised on the Press Release and the Slide Presentation (or any other statement published more than a year ago), it is time-barred, and should be dismissed.

The Lanham Act and ODTPA claims are also based in whole or substantial part on the Press Release and the Slide Presentation, and should be dismissed as time-barred to the extent they are premised on these publications. Because the Lanham Act and ODTPA do not have specific statute of limitations, courts apply the equitable doctrine of laches, which begins by determining the statute of limitations for the analogous state law tort. *Prakash v. Altadis U.S.A. Inc.*, 2012 WL 1109918, at *20 (N.D. Ohio Mar. 30, 2012).

In *Ameritech, Inc. v. Am. Info. Technologies Corp.*, 811 F.2d 960, 963 (6th Cir. 1987), the Sixth Circuit held that the applicable statute of limitations for trademark infringement

claims under the Lanham Act is the Ohio statute for injury to personal property. Some cases in this District have interpreted *Ameritech* to mean that the injury to personal property statute of limitations is the appropriate analog for *all* Lanham Act claims, including false advertising claims. *See, e.g., Logan Farms v. HBH, Inc. DE*, 282 F. Supp. 2d 776, 790 (S.D. Ohio 2003) (citing *Ameritech*). However, while a trademark infringement claim is analogous to the injury to personal property tort (as it involves an injury to a property right), claims for commercial disparagement involve an injury to reputation caused by false statements, and are therefore more akin to defamation.

Judge Graham recently addressed this very issue. In *Lasmer Indus., Inc. v. AM Gen., LLC*, 741 F. Supp. 2d 829 (S.D. Ohio 2010), the plaintiff alleged that the defendant, its competitor, had falsely misrepresented to their mutual customer that the plaintiff's products were to blame for a system failure. *Id.* at 834. The plaintiff asserted a claim under Section 4165.02(A)(10) of the ODTPA – the section that makes it unlawful to disparage the goods, services, or business of another by false representation of fact. The plaintiff argued that the appropriate analog was an action for fraud, and that the four-year statute of limitations for fraud should apply to the ODTPA claim. But looking at the ground of the action and the nature of the plaintiff's demand, Judge Graham concluded that the type of disparaging comments applicable to a violation of § 4165.02(A)(10) – *i.e.*, false statements injuring the reputation of the plaintiff – are most analogous to claims for defamation, and dismissed the ODTPA claim as time-barred. *Id.* at 839.

Judge Graham's reasoning is persuasive here. Collins, like the plaintiff in *Lasmer*, relies on Section 10 of the ODTPA for its disparagement claims. Moreover, Collins has asserted a claim for defamation based on the same allegations that underlie its ODTPA and

Lanham Act claims. Cmpl. ¶¶ 65-67. Collins's ODTPA and Lanham Act claims are thus not only closely related to a defamation claim in the legal sense, as the *Lasmer* court found – they are based on the *very same* statements that are alleged to give rise to Collins's defamation claim. Accordingly, to the extent the ODTPA and Lanham Act claims are based on the Press Release and the Slide Presentation (or any other statements published more than a year ago) they should be dismissed as time-barred.

IV. The Complaint Should Be Transferred to the Western District of New York under 28 U.S.C. § 1404(a) Given the Parties' Contractual Choice-of-Forum Agreement.

The Contract provides: “[a]ll actions arising out of or related to this Agreement must be filed in the New York State Courts with jurisdiction in Monroe County, New York or in the United States District Court for the Western District of New York.” Payne Dec. Ex. 1 at 11.13. The complaint alleges a course of conduct relating to the parties' contract and repeatedly refers to the parties' contractual relationship. *See, e.g.*, Cmpl. ¶¶ 21-22 (describing details of contractual relationship); 23-25 (describing termination); 28 (describing Kodak's alleged reaction to termination); 35(a) (alleging that Kodak told customers Collins was no longer “an approved supplier” of VERSAMARK ink).

Moreover, one of the Challenged Statements explicitly requires a determination of whether Kodak complied with the Contract. In ¶ 36(b), Collins alleges that Kodak told customers it had “met all of our obligations to Collins” under the terms of the Contract, and that this statement “was and is” false because “Kodak owes approximately \$1.9 million to Collins under the terminated agreement” and because “Kodak also refused to supply Collins with detailed customer order information as required upon termination of the agreement.” This paragraph is also incorporated into both Collins' antitrust claim and its tortious interference with prospective contractual relations claim. *See* Cmpl. ¶¶ 46, 68. Determining whether these

statements are false will require the Court to construe and apply the Contract. *See J. L. Moore, Inc. v. Settimo*, 2011 WL 220005, at *3 (N.D. Ohio Jan. 20, 2011) (defamation and tortious interference claims were subject to arbitration clause because “a determination of whether some of the statements made . . . were false would require analysis as to whether [Plaintiff] had performed as agreed under the contract.”). Accordingly, this action “aris[es] out of” and “relat[es] to” the Contract even though it does not contain a breach of contract claim. *See, e.g., Rini Wine Co. v. Guild Wineries and Distilleries*, 604 F. Supp. 1055, 1058-59 (N.D. Ohio 1985) (applying contractual choice of forum clause to antitrust claims brought by plaintiff); *Micropower Group v. Ametek, Inc.*, 2013 WL 3480378, at *3 (S.D. Ohio July 8, 2013) (applying forum selection clause to tort claims).

The parties’ choice of forum, as manifested in their contractual choice of forum clause, is entitled to “substantial consideration” in balancing the relevant factors under 28 U.S.C. § 1404(a). *Egrsco, LLC v. Evans Garment Restoration, LLC*, 2009 WL 3259423, at *5 (S.D. Ohio Oct. 8, 2009). “While courts normally defer to a plaintiff’s choice of forum, when a valid forum selection clause exists, the burden shifts to the plaintiff to demonstrate why he should not be bound by his contractual choice of forum.” *Id.* (citing *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995); *see also Jumara*, 55 F.3d at 880 (“a forum selection clause is treated as a manifestation of the parties’ preference as to a convenient forum.”)).

The other 28 U.S.C. § 1404 factors are neutral or weigh in favor of transfer. The acts at issue took place in both Ohio and New York. *See Payne Dec.* ¶¶ 4-5 (some of the statements challenged by Collins originated from Kodak personnel located in Rochester, New York). The parties’ documents are located in both jurisdictions, and the parties’ customers are located throughout the world. *See id.* ¶ 6. The defendant’s preference is for the contractually-

mandated forum, which is also a more efficient forum given that court's familiarity with the parties and the Contract as a result of the prior litigation. *See id.* ¶ 3. *See generally Egrsco*, 2009 WL 3259423, at *6-7 (applying public and private factors and enforcing forum selection clause). Moreover, the forum selection clause is strong evidence showing that the parties, at the time of the negotiation of the Contract, considered New York to be the most convenient forum. *See id.* at *6 (citing *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-94 (1991)). Accordingly, the action should be transferred pursuant to 28 U.S.C. § 1404(a).

CONCLUSION

For the foregoing reasons, the Disparagement Claims should be dismissed and the whole case should be transferred to the Western District of New York.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 15, 2013, 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: October 15, 2013

/s/ James E. Burke

James E. Burke

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