

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

COLLINS INKJET CORPORATION	:	
	:	
Plaintiff,	:	Civil Case No.: 1:13-cv-00664-MRB
	:	
v.	:	Judge Michael R. Barrett
	:	
EASTMAN KODAK COMPANY	:	Magistrate Judge
	:	
Defendant.	:	
	:	

PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Collins Inkjet Corporation (“Collins”) hereby moves this Court for a Preliminary Injunction enjoining Defendant Eastman Kodak Company (“Kodak”) from (a) illegally tying the sale of refurbished printheads for Kodak Versamark printers to the sale of Kodak Versamark Ink; (b) publishing and/or disseminating false and defamatory statements about Collins; and (c) engaging in other anticompetitive and tortious conduct against Collins, as alleged in the accompanying Complaint for Injunctive Relief.

As more fully explained in the accompanying Memorandum, absent injunctive relief to both preserve the prior status quo and prevent Kodak from continuing its anticompetitive and tortious conduct, Collins Ink will suffer immediate and irreparable harm.

A Proposed Order is attached.

Respectfully submitted,

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**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION & SUMMARY OF ARGUMENT

Defendant Eastman Kodak Company (“Kodak”) is no stranger to the antitrust laws. Indeed, its anticompetitive actions have been the genesis of two of the seminal Supreme Court antitrust cases under our federal antitrust laws.¹ But far from having learned its lesson, Kodak has once again attempted to foreclose competition through anticompetitive means, adding in unfair competition, trade defamation, and tortious interference for good measure. This time Kodak’s target is Plaintiff Collins Inkjet Corporation (“Collins”) – a comparatively small Cincinnati-based ink manufacturer who, until recently, successfully competed with Kodak in supplying a specialized ink to third-party customers who used Kodak’s Versamark printers. After more than a decade of Collins’ dominance in this specialized Versamark ink market, however, Kodak is now attempting to drive Collins out of the market through (a) an

¹ See *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359 (1927) (upholding finding of monopolization based upon Kodak’s refusal to sell at wholesale to retailer that refused to sell out to Kodak); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992) (affirming reversal of summary judgment for Kodak where allegation was that Kodak unlawfully tied the sale of service for its machines to the sale of parts in an effort to preclude competition from independent service organizations) (“Kodak”).

anticompetitive tying scheme (*i.e.*, economically tying the sale of Versamark refurbished printheads – over which Kodak has a monopoly – to the sale of Versamark ink); and (b) an unlawful public smear campaign, falsely accusing Collins of manufacturing low-quality Versamark ink. Collins seeks a preliminary injunction in this case to protect itself from Kodak’s anticompetitive and tortious conduct.

Injunctive relief is appropriate where, among other things, the moving party has shown both a likelihood of success on the merits and irreparable injury absent the relief. As discussed below, Collins shows both here. Collins is likely to succeed on the merits of its antitrust claims because Kodak’s anticompetitive tying scheme is, ironically, unlawful under the Supreme Court’s *Kodak* decision. Collins is likely to succeed on the merits of its Lanham Act, Ohio Deceptive Trade Practices Act, common law defamation and tortious interference claims because the press release and other materials Kodak disseminated contained verifiably false statements about the quality of Collins ink – damaging Collins and its business relationships in the process. As far as irreparable injury, without immediate Court intervention Collins will lose not only present and future business, but also goodwill and other intangible business assets, as well as the ability to compete going forward. Accordingly, Collins respectfully requests this Court to grant Collins’ motion and preliminarily enjoin Kodak from unlawfully attempting to force Collins out of the Versamark printer ink market.

FACTUAL BACKGROUND

I. KODAK’S VERSAMARK PRINTER INK AND PRINTHEADS.

Kodak is one of the oldest major corporations in the United States, dating back to the 1880.² It is based in Rochester, New York, and, until recently, had been a perennial Fortune 500

² See www.kodak.com/ek/US/en/Our-Company/History_of_Kodak.

company.³ One of Kodak's many business endeavors involves manufacturing and distributing continuous inkjet printers, including the Versamark line of printers. Declaration of Lawrence Gamblin, at ¶4 (September 18, 2013) ("Gamblin Decl.," attached hereto as Exhibit A).⁴ Versamark ink must be formulated specifically for Versamark printers. Declaration of Ashley Neyer, at ¶3 (September 18, 2013) ("Neyer Decl.," attached hereto as Exhibit B). Versamark ink is only suitable for Versamark printers; it cannot be used in other printers, and ink for other printers cannot be used in Versamark printers. *Id.*; Gamblin Decl., at ¶8. Collins has been the dominant manufacturer and provider of the specialized Versamark ink for over a decade. The only other provider of Versamark printer ink in the United States is Kodak itself.

A printhead is a component of a Versamark printer that contains various electronics and mechanics, including the nozzles from which the ink "jets." Gamblin Decl., at ¶4. Owners of Versamark printers not only must periodically purchase Versamark ink for their printers, they must also periodically purchase refurbished printheads. *Id.* Kodak is the only supplier of refurbished printheads for Versamark printers; there is no other manufacturer or established aftermarket. *Id.* at ¶29. The cost of purchasing refurbished printheads is a large annual cost; sometimes as high as or higher than ink costs. Gamblin Decl., at ¶¶30, 31; Declaration of Robert Hendricks, at ¶¶6, 8 (September 18, 2013) ("Hendricks Decl.," attached hereto as Exhibit C).

II. THE RELATIONSHIP BETWEEN COLLINS AND KODAK.

As previously stated, Collins manufactures and distributes inkjet inks. Gamblin Decl., at ¶2. Collins started in business as a one-person shop in 1989, was incorporated in 1996, and

³ See, e.g., www.money.cnn.com/magazines/fortune/fortune500_archive/full.

⁴ In all declarations attached to this filing, customers will be referred to by numbers rather than names, and exhibits to those declarations have redacted customer identifying information where appropriate. Customers in the United States will have a "US" prefix, while customers in Europe will have an "EU" prefix. This is being done until appropriate protections can be instituted to protect customer confidentiality, and avoid retaliation against customers by Kodak.

purchased an 83,000 square foot facility in 2007 in Cincinnati, Ohio. *Id.* at ¶¶2-3. Collins now employs 65 people in Cincinnati, and has three outside employees. *Id.* at ¶3. It has grown revenues consistently since it was incorporated, at an average growth rate of 25% per year. Hendricks Decl., at ¶2. Beginning in late 1982, the owner and President of Collins began formulating and manufacturing inks for Kodak Versamark printers. Gamblin Decl., at ¶4. While Collins produces ink for other inkjet printer manufacturers, such as HP or Lexmark, its production of Versamark ink is its primary business. Hendricks Decl., at ¶3. For example, in 2012 Versamark inks accounted for 74% of the ink by volume manufactured by Collins. *Id.* at ¶4. Through 2001, Collins competed directly with Kodak in the manufacture and sale of Versamark ink, by which time Collins provided an estimated 50% of the Versamark ink outside Japan, with Kodak providing the balance, either through its own operations or through a toll manufacturer in Japan. Gamblin Decl., at ¶10. Unlike the ink Collins produces for other manufacturers, where Collins may face up to twenty competitors, over more than two decades Kodak has essentially been Collins' only competitor for Versamark inks. *Id.* at ¶9.

The business relationship between Collins and Kodak formally dates back to 2001, when Collins entered into a series of "Supply and Reseller" agreements with Kodak.⁵ *Id.* at ¶11. In return for granting Kodak the right to resell Collins-branded Versamark inks, Collins manufactured the majority of both Kodak's and Collins' Versamark inks. *Id.* Kodak provided Collins with the formulas and quality assurance procedures Kodak used, so that Collins could manufacture Kodak-branded inks. *Id.* at ¶13. Customers could work directly with, and order inks through, Collins or Kodak. *Id.* at ¶12.

⁵ For a period of time, the sale of Kodak Versamark ink was through a company called Scitex Digital Printing, and the agreements were with Scitex. Gamblin Decl., at ¶11.

Collins terminated the latest agreement effective May 2, 2012, due to its increasing concerns regarding Kodak's outstanding payables and possible insolvency. *Id.* at ¶¶14-16, 18. During 2011, for instance, Kodak had outstanding payables of between \$1.8 to \$2.5 million, which was a large amount for Collins and the largest of Collins's receivables. *Id.* When the last agreement with Kodak terminated, Kodak owed Collins approximately \$1.9 million, an interest Collins held as an unsecured creditor in Kodak's bankruptcy proceeding. *Id.*

III. KODAK'S ANTICOMPETITIVE AND TORTIOUS CONDUCT.

Within days of Collins terminating its "Supply and Reseller" agreement with Kodak, Kodak undertook a series of anticompetitive and tortious acts, including: (1) imposing a new policy that tied the purchase of refurbished Kodak Versamark printheads, which are only available from Kodak, to the use of Kodak Versamark ink ("the tying policy"); (2) disseminating a press release, letters and slide presentations to customers that made multiple false and misleading representations regarding why the Collins/Kodak agreement had been terminated, and the quality and performance of Collins Versamark ink ("the commercial disparagement"); and (3) interfering with Collins' customer relationships by, among other things, sending Kodak ink to customers who requested Collins ink ("the tortious interference"). This section briefly discusses each of these acts.

With respect to the tying policy, Kodak initially announced a dramatically higher "non-matched" price of refurbished printheads for users of "non-Kodak" ink.⁶ Gamblin Decl., at ¶¶26-28 (citing Exs. 3-4 to Gamblin Decl.). The policy was directly at odds with Kodak's previous practices. For at least two decades prior to Collins' decision to terminate the "Supply and Reseller" agreement, Kodak did not distinguish between Kodak ink users and Collins ink users in terms of how much it charged for refurbishing Versamark printheads. Gamblin Decl., at

⁶ Inasmuch as the only "non-Kodak" Versamark ink is Collins, the policy is clearly directed at Collins.

¶29. With the new policy, however, Versamark customers would be severely penalized – in the form of exorbitantly high printhead refurbishment costs – for using Collins ink in their printers. This left Collins’ customers with an illusory choice: (a) continue to use the much-preferred, higher quality Collins ink and spend an economically untenable amount on printhead refurbishment, or (b) switch to Kodak ink and avoid Kodak’s printhead refurbishment surcharge.

Kodak’s enforcement of its new pricing policy announced in May 2012 was lax, presumably in large part because it often could not produce custom Versamark inks comparable to those sold by Collins, and the customers therefore could not feasibly switch from Collins to Kodak. More recently, however, Kodak announced another new pricing policy, effective August 1, 2013, that was even more anticompetitive. Gamblin Decl., at ¶32. It increased the cost differential between refurbished printhead purchasers who used Kodak ink and those who used non-Kodak (*i.e.*, Collins) ink. *Id.* Beyond the increased penalty, however, this newer policy adds enforcement mechanisms, such requiring a customer to identify the inks used in returned printheads with Material Safety Data Sheets (“MSDS”). *Id.*; Declaration of John Herman, at ¶¶5, 19 (September 18, 2013) (“Herman Decl.,”) (attached hereto as Exhibit D). Kodak has been enforcing the higher prices even in cases where a comparable Kodak ink is unavailable. Gamblin Decl., at ¶34.

With respect to the commercial disparagement, Kodak issued the following press release *the day after* Collins terminated its “Supply and Reseller” agreement:

ROCHESTER, N.Y., May 3—Customers of KODAK VERSAMARK Digital Printing Systems receive the highest levels of assurance and optimized system performance when using KODAK Brand Inks. Only Kodak can provide VERSAMARK System customers with the assurance that inks and fluids are engineered, print tested, and optimized for system fluid consumption prior to customer order.

“Our customers require that their VERSAMARK Systems operate at the best performance and quality levels possible,” said Michael L. Marsh, Kodak’s General Manager of Inkjet Printing Solutions and Vice President. “When KODAK Inks and Fluids are used, customers gain peace of mind in knowing that their equipment is protected and running with optimal printing performance in all operating conditions.”

Kodak reaffirmed the value to customers in buying KODAK Inks for VERSAMARK Systems as the supplier agreement between Collins Ink and Kodak concluded yesterday. Collins Ink is no longer an approved supplier of inks and fluids for KODAK VERSAMARK printing systems. Current customers of KODAK VERSAMARK Digital Printing Systems may continue to order KODAK Inks directly from Kodak with no change or disruption in service.

Inks and fluids are one of the many engineered components that comprise VERSAMARK Digital Printing Systems. As such, KODAK Inks and Fluids are designed to interact with printing systems software, controllers and printheads as part of a complete printing solution to produce consistent results with maximum uptime. Only Kodak can engineer, optimize system fluid consumption, and test inks for Kodak Systems prior to customer order.

Gamblin Decl., at ¶20 (citing Ex. 2 attached to Gamblin Decl.). Kodak’s press release was false and misleading in several respects. First, it is simply untrue that “only Kodak” can assure that inks are “engineered, print tested, and optimized for system fluid consumption prior to customer order;” Collins does this every day. *Id.* at ¶21. Second, it is false to suggest, as Kodak did, that customers receive the “highest levels” of “optimized system performance” when using Kodak inks; Versamark inks produced by Collins provide a higher level of “optimized system performance” as compared to Kodak inks in the vast majority of cases. *Id.* For the same reason, it is false that Kodak inks ensure equipment runs with “optimal printing performance in all operating conditions.” *Id.* Finally, when read as a whole, the press release is misleading: it implies that Kodak revoked its approval of Collins-branded ink for quality or performance reasons, when in fact Collins itself terminated the “Supply and Reseller” agreement due to concerns over Kodak’s financial stability. *Id.*

Kodak continued with such false and misleading disparagements in subsequent publications including its announcement of the new August 1, 2013 pricing schedule, including falsely suggesting that third-party (*i.e.*, Collins) ink has caused damage to printheads over the past six months. Gamblin Decl., at ¶¶23, 25, 32-33; Herman Decl., at ¶14.

With respect to the tortious interference, Kodak engaged in a systematic campaign to destroy Collins' business relationships with its longtime customers. For instance, shortly after Collins terminated its agreements with Kodak, Kodak began to send letters to customers reiterating some of the falsehoods from the May 3, 2012 press release (*e.g.*, the purported "optimal" or "maximum" performance obtained when using Kodak inks). Gamblin Decl., at ¶¶22-23 (citing Ex. 3 to Gamblin Decl.). But the letters went further than the press release falsehoods, asserting, for instance, that "non-Kodak brand inks and fluids can potentially disrupt and damage printing components, system operations, and color matching/color management." *Id.* Given that Collins is the only producer of "non-Kodak brand inks" for Versamark printing systems in the world, the reference to "non-Kodak brand inks" is clearly a reference to Collins, and would be understood as such by the customers. *Id.*

More to the point, Kodak's suggestion that Collins ink may damage printing components is false. Indeed, it is Kodak's Versamark inks – not Collins' Versamark inks – that have caused problems of the nature alleged. *Id.* at ¶24. Kodak has had two major quality issues in the last four years. *Id.* In one case, Kodak chose to introduce what turned out to be a problematic dye into its formulations. *Id.* Shortly after Kodak reformulated its ink, customers using those inks experienced debilitating problems. *Id.* Kodak also began to find a susceptibility of its inks to biological growth. *Id.* This was due to shortcomings with the ingredients Kodak used to prevent biological growth in its inks. *Id.* By contrast, Collins did not experience the same problems as

Kodak because Collins had been using a superior blend of ingredients that neutralized the contaminated dyes. *Id.*

Kodak also tortiously interfered with Collins' business relationships through use of a June 11, 2012 slide presentation to customers. *Id.* at ¶25 (citing Ex. 4 to Gamblin Decl.). In addition to repeating the previously-described falsehoods, the slide show made other misrepresentations about Collins. For instance, the presentation misrepresented that "Kodak has met all of our obligations to Collins under the terms of our agreement;" in fact Kodak owed \$1.9 million to Collins under the agreement. *Id.* Moreover, the presentation falsely stated that "[a] matched system [using Kodak inks with the Kodak printer] delivers a lower TCOP through more printed pages, increased print quality, and greater reliability;" in fact Collins delivers the lower total cost of production, and has more printed pages, has higher print quality, and has greater reliability. *Id.* In addition, the presentation falsely states that "Kodak inks are pure and free from particles, bacteria and other contaminants that can cause catastrophic failure," implying that Collins inks are not. *Id.* In fact, Collins has never had a problem in that regard, while Kodak just in the past few years had an instance of bacterial contamination leading to disruption of a customer's business. *Id.*⁷

Finally, Kodak took additional, more direct actions to interfere with Collins' customer relationships. For example, one customer that had historically ordered Collins ink through Kodak ordered Collins ink from Kodak after Collins had terminated the "Supply and Reseller" agreement, but Kodak sent its own ink instead. Herman Decl., at ¶15. And, to induce a customer to purchase Kodak ink, Kodak falsely represented to that customer that Collins was no longer in business – at which point the customer purchased Kodak ink instead of Collins ink. *Id.*

⁷ The slide presentation also acknowledged that "Kodak branded fluids will cost more than 3rd party fluids on a price/liter comparison" and "Kodak fluids will generally cost more on a per liter basis." Gamblin Decl., at ¶40 (citing Ex. 4 to Gamblin Decl.).

at ¶16. Kodak's tortious interference with Collins' business relationships is both widespread and ongoing.

IV. THE EFFECTS OF KODAK'S ANTICOMPETITIVE AND TORTIOUS CONDUCT ON COLLINS AND ITS CONSUMERS.

Kodak's anticompetitive and tortious conduct affects both Collins and consumers, albeit in slightly different ways. The effects of Kodak's unlawful activity on Collins were immediate. For example, the volume of Versamark inks Collins manufactured dropped 73% in the first quarter of 2013 as compared to the same quarter of the prior year. Hendricks Decl., at ¶11. The largest effect is yet to come, however, because until recently Kodak has not strongly enforced its new policy for refurbished printheads.⁸ Now that it has decided to step up enforcement of the tying policy, more Versamark ink customers are leaving Collins. Gamblin Decl., at ¶42; Hendricks Decl., at ¶¶9, 11.

Kodak's enforcement of this new policy will devastate Collins. As Collins loses its ability to sell Versamark ink – 74% of its manufactured ink by volume in 2012 – it will have to radically downsize. Gamblin Decl., at ¶42; Hendricks Decl., at ¶¶12-13. Personnel with highly specialized knowledge regarding Versamark inks will be lost, and it may be impossible to rehire them once Collins prevails at trial. *Id.* Collins will lose the goodwill of customers that it has taken decades to develop. Gamblin Decl., at ¶44. Collins' loss of revenue will make it difficult to fund this litigation. *Id.* at ¶43. And if Collins eventually seeks damages against Kodak, Kodak may be insolvent and uncollectable. *Id.* at ¶43; Declaration of Michael Boudreau, at ¶¶4-11 (September 19, 2013) ("Boudreau Decl.,") (attached hereto as Exhibit E).

⁸ Kodak could not enforce its policy until recently because it simply did not have the capacity to duplicate Collins's custom Versamark inks and could not afford to alienate the customers who depended upon Collins inks. Gamblin Decl., at ¶32. For example, Collins for years manufactured and sold an ink with a certain color to a major customer; Kodak was unable to duplicate the color, and Kodak allowed the customer to purchase the ink from Collins without imposing the surcharge for refurbished printheads. *Id.* Now, however, it appears Kodak will be enforcing the surcharge, and the customers must therefore switch to Kodak inks. Gamblin Decl., at ¶34; Herman Decl., at ¶¶11, 13.

As for Collins' customers, Kodak has intentionally made it impossible for them to continue to use Collins Versamark ink. Customers are "locked-in" to Versamark printers, and Versamark printheads. Versamark printers and their associated presses are a long-term, substantial investment. Collins' top ten customers each likely have at least \$15 million invested in their Versamark-related equipment. Gamblin Decl. at ¶41. Customers generally keep their Versamark printers for years; many of Collins' customers have Versamark printers dating from the 1990's. *Id.* Switching costs would be extremely high. If customers do use Collins ink, they will have to pay the surcharge imposed and recently enforced by Kodak. The cost of purchasing refurbished printheads is a large annual cost, often as high or higher than ink costs. *Id.* at ¶31. Kodak has priced the surcharge at a level that makes it economically infeasible for a customer to continue to use Collins ink. Hendricks Decl., at ¶¶6-8. Collins cannot reduce its price to cover the difference; this would generally require pricing below cost, and in some cases the price differential to the customer could not be offset even were Collins to give its customer the ink for free. Gamblin Decl., at ¶31; Hendricks Decl., at ¶¶6-8.

The injury to the consumers absent an injunction will also be great. Consumers will be forced to buy higher cost, lower quality Kodak Versamark ink instead of the lower price, higher quality Collins Versamark ink. Gamblin Decl., at ¶¶39-40. Kodak has admitted that its Versamark ink is generally higher cost. *Id.* at ¶40 (citing Ex. 4 to Gamblin Decl.). And the higher quality and reliability of Collins ink is objectively verifiable. *Id.* at ¶¶13, 23-25, 36-37; Neyer Decl., at ¶¶8-11. From 2001 to 2012, Collins produced the majority of Kodak Versamark ink according to Kodak specifications; and, therefore, Collins possesses empirical evidence that Collins used better and higher quality ingredients, and adopted tighter specifications and variances, than Kodak – all leading to higher quality and reliability. *Id.* Consumers will also be

denied the choices they had from Collins' custom inks. Over the years Collins has produced over 3,000 distinct Versamark inks, often custom blending at customer sites, while Kodak has developed only 100-200 Versamark inks. Gamblin Decl., at ¶35; Neyer Decl., at ¶¶5-6.

And, while more subjective in nature, consumers will be denied the superior customer service that has been a hallmark of Collins' business. Gamblin Decl., at ¶¶12, 30, 38; Declaration of Kristin Adams, at ¶¶3-5 (September 18, 2013) ("Adams Decl.") (attached hereto as Exhibit F). One objective measure of customer preference is the fact that, until the surcharge policy was imposed, Collins' Controller is aware of no customers who switched from using Collins ink to using Kodak ink since he started with the Company in 2001. Hendricks Decl., at ¶9. There were, during this same period, many Collins ink customers who had switched from using Kodak Versamark ink. *Id.* Finally, consumers face a huge risk if Kodak is allowed to drive Collins out of business. Kodak just exited bankruptcy on September 3, 2013, and its financial situation is dire. Boudreau Decl., at ¶¶4-11. If Kodak drives Collins out of business, and then is itself unable to provide the ink necessary for Versamark owners, the commercial disruption and injury will be enormous.

LEGAL ARGUMENT

I. INJUNCTIVE RELIEF IS WARRANTED UNDER THESE CIRCUMSTANCES.

Courts will issue preliminary injunctions where, as in this case, such relief will protect the status quo until they can fully review the issues at a hearing, at summary judgment, or at trial. Generally, courts will consider four factors in determining whether such relief is appropriate: (1) the likelihood that the plaintiff will succeed on the merits of its claims at trial; (2) the irreparable harm to the plaintiff should an injunction not be issued; (3) the probability that issuing the injunction will cause substantial harm to others; and (4) the impact of the ruling on the public

interest. See *Tucker v. City of Fairfield*, 398 F.3d 457, 461 (6th Cir. 2005); *Tri-County Wholesale Distribs., Inc. v. Wine Group, Inc.*, No. 10-4202, 2012 WL 2478357, at *3 (6th Cir. June 29, 2012) (granting preliminary injunction to terminated wine distributor). These four considerations are “factors to be balanced, not prerequisites that must be met.” *Id.* In cases such as this one, in which the “balance of hardship tips decidedly toward” the plaintiff, it is ordinarily sufficient that the plaintiff “raise questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.” *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

As demonstrated below, Collins satisfies each of these four factors.

A. *Collins Has Demonstrated a Strong Likelihood of Success As to Each of its Claims.*

Collins has a strong likelihood of succeeding with respect to each of its claims: (1) illegal tying under the federal antitrust laws; (2) Lanham Act violations; (3) Ohio Deceptive Trade Practices Act (“ODTPA”) violations; (4) defamation; and (5) tortious interference with a business relationship. The following section briefly addresses the strong likelihood of success relative to each of these claims.

1. Collins’ Antitrust Claims.

A tying arrangement is defined as “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.” *Kodak*, 504 U.S. at 461. To establish a *per se* tying arrangement, a plaintiff must show: (1) a tying arrangement between two distinct products or services; (2) sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and (3) a not insubstantial effect on commerce.

Shamrock Mktg., Inc. v. Bridgestone Bandag, LLC, 775 F. Supp. 2d 972, 979 (W.D. Ky. 2011). All three elements are met in this case.

With respect to the first element, two products are separate products if there is “sufficient consumer demand so that it is efficient for a firm to provide [one product separately from the other].” *Kodak*, 504 U.S. at 462. Here, the Versamark ink and the Versamark refurbished printheads are, without question, separate products – they have been provided separately for decades, and there was sufficient consumer demand for Collins to provide Versamark ink but not provide refurbished printheads.

With respect to the second element, Kodak has sufficient economic power in this tying market: it is the only producer of Versamark refurbished printheads. This sufficient economic power element was addressed at length in the previous *Kodak* tying case. In that case, with facts very similar to this one, the antitrust plaintiffs were a group of independent service organizations that had been servicing Kodak copying and micrographic equipment since the early 1980s. They brought suit after Kodak began restricting the sale of replacement parts for its photocopiers and micrographic equipment to only those buyers who also purchased Kodak service or repaired their own machines. *Id.* at 457. Kodak equipment was unique; its parts were not compatible with its competitors’ machines. Because of Kodak’s policy, the independent service organizations were unable to obtain suitable parts and many were forced out of business. The plaintiffs also offered evidence that some customer who preferred the plaintiffs’ services were forced, as a result of Kodak’s practice, to switch to Kodak’s service. *Id.* at 458.

At the Supreme Court, Kodak argued that interbrand competition foreclosed a finding of monopoly power in the derivative aftermarkets. The Supreme Court disagreed, finding that “significant information and switching costs” could alter behavior in the primary and derivative

markets for complex and durable goods. *Id.* at 473. Regarding information costs, the Court observed that in order for the service-market price to affect equipment demand, consumers must engage in accurate “lifecycle pricing” (*i.e.*, inform themselves of the total cost of the package at the time of purchase) which is difficult to accomplish. *Id.* Furthermore, the cost of switching products may be high, and consumers who have already purchased the equipment will tolerate some level of price increase before switching equipment brands. *Id.* “Under this scenario, a seller profitably could maintain supra-competitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchases.” *Id.* at 476. The same is true here: the fact that Kodak may face competition from other printer manufacturers does not prevent Kodak’s exercise of market power, especially given that the change in policy occurred after the customers were locked-in (*i.e.*, after the customers had already spent millions of dollars on Versamark printers). *See PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 820 (6th Cir. 1997) (terming such post-lock-in changes “crucial factors”). *See also* Declaration of Simone Wieczorek, at ¶¶7-8 (September 18, 2013) (“Wieczorek Decl.”) (attached hereto as Exhibit G).

Furthermore, Kodak can (and has) restrained competition in the tied product market – Versamark inks. Courts have found tying arrangement where, as here, the buyer’s only economically viable option is to purchase both the tying and the tied product. *Shamrock*, 775 F. Supp. 2d at 980. *See also Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1180 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1500 (8th Cir. 1992). 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. *See, e.g., Tic-X-Press*,

Inc. v. Omni Promotions Co., 815 F.2d 1407, 1418 (11th Cir. 1987); *Tire Sales Corp. v. Cities Serv. Oil Co.*, 637 F.2d 467, 474 (7th Cir. 1980); *Bogosian v. Gulf Oil, Co.*, 561 F.2d 434, 452 (3d Cir. 1977), *abrogated on other grounds by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 977 (5th Cir. 1977); *Advance Bus. Sys. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969).

With respect to the third element, the effect on commerce is not insubstantial. Tens of millions of dollars' worth of Versamark ink is sold annually both interstate and worldwide. Hundreds of millions of dollars' worth of Versamark printers and related presses are involved. Accordingly, Collins has established all three elements of an illegal tying arrangement, and, in turn, a likelihood of success on the merits of its antitrust claims.

2. Collins' Lanham Act and ODTPA Claims.

To prove a claim for false advertising or commercial disparagement under either the Lanham Act or the ODTPA, a plaintiff must establish that: (1) the defendant has made false or misleading statements of fact concerning his 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. *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 323 (6th Cir. 2001); *HER, Inc. v. RE/MAX First Choice, LLC.*, 468 F. Supp. 2d 964, 979 (S.D. Ohio 2007) (“[A]n analysis appropriate for a determination of liability under ... the Lanham Act is also appropriate for determining liability under the [ODTPA].”).

This is not a situation where the statements at issue are true but misleading or confusing; they are simply false, as discussed at length in Section III of the Factual Background section

above. *See* pages 5-10, *supra*. *See also* Wieczorek Decl., at ¶9. In this situation, the falsity may allow a plaintiff to obtain injunctive relief without evidence that the false statements actually misled consumers because actual deception is presumed. *See LidoChem, Inc. v. Stoller Enters., Inc.*, 500 Fed. Appx. 373, 380 (6th Cir. 2012). There is no dispute that Kodak put the press release into interstate commerce. And, the link between Kodak’s disparagements of Collins ink and the harm those statements have done, and will continue to do, to Collins cannot be overstated. As such, Collins has established a likelihood of success on the merits of its Lanham Act and ODTPA claims.

3. Collins’ Defamation Claim.

In Ohio, defamation occurs when a publication contains a false statement “made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.” *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 9 (2008) quoting *A & B–Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283 (1995). These requirements are met here where Kodak – with a clear and malicious intent to adversely affect Collins in its business – published the false statements at issue. *See* pages 5-10, *supra*. Accordingly, Collins has established a likelihood of success on the merits of its defamation claim.

4. Collins’s Tortious Interference With A Business Relationship Claim.

The elements of tortious interference with a business relationship are (1) a business relationship, (2) the tortfeasor’s knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and, (4) damages resulting therefrom. *Veracity Group, Inc. v. Cooper-Atkins Corp., Inc.*, No. 1:11-cv-526, 2012 WL 203415, at *4 (S.D. Ohio Jan. 24,

2012) (tortious interference based on defendant's voiding of warranties and other anticompetitive behavior). Kodak knows that its customers for refurbished printheads are using Collins Versamark ink if they are not using Kodak Versamark ink. Kodak therefore knows that these customers have business relationships with Collins. As discussed in pages 10-12 above, Kodak is intentionally interfering with those relationships by forcing Collins' customers to terminate their business relationships with Collins through unlawful means. *See also* Wieczorek Decl., at ¶¶7-8. Collins is, therefore, also likely to succeed on its tortious interference claim.

B. Collins Will Suffer Irreparable Harm Absent Injunctive Relief.

While it is not necessary to prove each of the factors relevant to a preliminary injunction to obtain relief, a showing of irreparable harm is critical. A plaintiff must show that a damages remedy is inadequate; one court listed four reasons why this may be so: (1) the damage award may come too late to save plaintiff's business; (2) the plaintiff may not be able to finance his lawsuit against the defendant without the revenues from his business that the defendant is threatening to destroy; (3) damages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected; and (4) the nature of plaintiff's loss may make damages very difficult to calculate. *Basicomputer Corp. v. Scott*, 791 F. Supp. 1280, 1292 (N.D. Ohio 1991), *aff'd in relevant part*, 973 F.2d 507, 511-12 (6th Cir. 1992) (both citing *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). Courts within the Sixth Circuit also focus on (5) the loss of goodwill or (6) the loss of fair competition as irreparable harm. *See, e.g., Basicomputer*, 973 F.2d at 511-12. Most of these reasons apply to Collins here.

As to the first reason, if Kodak is permitted to continue its unlawful activity, particularly the illegal tying and tortious interference, Collins will continue to lose its Versamark customers.

If Collins loses its customers for Versamark ink – ink that constitutes about 70% of Collins’ current output – Collins will likely have to downsize, losing valuable employees with specialized knowledge that it may not be able to replace by the time it is vindicated at trial. Gamblin Decl., at ¶42; Hendricks Decl., at ¶¶12-13. This is irreparable harm. *See Basicomputer*, 791 F. Supp. at 1292.

As to the second reason, a lawsuit such as this one can be expensive and time-consuming and is not entered into lightly. Collins, if out of business or deprived of revenues derived from 74% of its ink output, may not be able to shoulder the financial burden of continuing the lawsuit. Gamblin Decl., at ¶43. *Basicomputer*, 791 F. Supp. at 1292.

As to the third reason, Kodak just exited bankruptcy. Its financial situation is dire. Boudreau Decl., at ¶¶4-11. It may very well be that Kodak is insolvent before any money damages may be collected by Collins, should it choose to seek such damages in the future. *Basicomputer*, 791 F. Supp. at 1292.

As to the fourth reason, damages may be difficult to calculate. Collins’ customers are generally companies that are printing advertising and other materials for other businesses – the end-users. Forced to use lower-quality, higher-cost Kodak ink, Collins’ former printing customers may in turn have dissatisfied end-user customers, who have to pay more for lower quality printing. These end-user customers may ultimately go elsewhere as a result for their printing needs. It will be difficult if not impossible to calculate this loss of business. *Basicomputer*, 791 F. Supp. at 1292.

As to the fifth reason, the loss of customer goodwill that will result if Kodak is allowed to continue its illegal acts is difficult to quantify. Kodak’s illegal acts, including but not limited to disparagement of Collins, threatens the goodwill that Collins has spent decades carefully

nurturing. *Basicomputer*, 973 F.2d at 511-12. As the Sixth Circuit noted in an analogous context, “TWG’s products comprise a significant portion of Plaintiffs’ sales. Moreover, Plaintiffs have promoted and distributed TWG’s beverages for decades. It is therefore reasonable to infer the Plaintiffs have acquired substantial good will in connection with their distribution of TWG’s products, which include, in TWG’s own words, “several unique, high velocity wines.” *Tri-County*, 2012 WL 2478357, at *5.

As to the sixth reason, the loss of fair competition that results from Kodak’s illegal tying and other anticompetitive acts constitutes irreparable harm. *Id.*

Having met these indicia of irreparable harm, a preliminary injunction is warranted here.

C. Absent Injunctive Relief, Third Parties Too Will Be Injured As A Result of Kodak’s Unlawful Actions.

Not only will Collins be harmed as a result of Kodak’s unlawful actions, consumers too will be harmed because businesses with Versamark printers will be paying for higher cost, lower quality Kodak Versamark ink. *See, e.g., Gamblin Decl.*, at ¶¶35-41. On the other hand, the harm from issuing the requested injunctive relief is negligible. If Kodak is required to offer refurbished printheads at the same price for all users of Versamark ink – whether from Kodak or Collins – this would simply continue the practice that has been in effect for decades. If Kodak is required to correct its falsehoods, and tell the truth regarding the comparative quality of Kodak and Collins Versamark ink in the future, this is not a “harm” to be avoided.

D. Injunctive Relief Serves The Public Interest.

Injunctive relief serves the public interest in several ways. First, the public has an interest in fair competition, which would be maintained by the injunction. And in this case, that competition would prevent the forced use of a higher cost, lower quality Kodak Versamark ink. Second, the public has an interest in preservation of competition, and injunctive relief would

prevent the elimination of employment for multiple Collins employees that would unfairly hinder Collins' ability to compete. Third, the injunction would prevent the destruction of goodwill resulting from long-term customer relationships that in some cases have lasted for decades. Fourth, the injunction would protect the public interest in the truthful dissemination of business information. Finally, issuing an injunction will demonstrate that businesses operating in the State of Ohio must comply with applicable laws.

III. THE COURT SHOULD ORDER THAT A NOMINAL BOND BE POSTED.

Under Rule 65(c) of the Federal Rules of Civil Procedure, "no restraining order or preliminary injunction shall issue except upon the giving of surety by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Because Kodak will be able to continue to sell its Versamark Ink and refurbished printheads, under the same general conditions as it has for decades, Kodak will suffer no harm during the period of preliminary injunction if granted by this Court. As a result, this Court should order that only a nominal bond need be posted to effectuate the preliminary injunction sought by this Motion.

CONCLUSION

For the foregoing reasons, Collins respectfully requests that its Motion for Preliminary Injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September 2013 this document was filed electronically with the Clerk of the United States District Court for the Southern District of Ohio, Western Division, and that notice of this filing will be sent to all other parties by operation of the Court's electronic filing system, and the following parties will be served by certified U.S. mail, postage pre-paid:

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