No. 14-3306

In the United States Court of Appeals for the Sixth Circuit

COLLINS INKJET CORPORATION,
Plaintiff – Appellee
v.
EASTMAN KODAK CO.,
Defendant – Appellant

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati

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Oral Argument Requested

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DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellant Eastman Kodak Co. makes the following disclosure:

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

   No.

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

   Blackstone Group LP, a publicly-traded corporation, owns more than 10% of Appellant's outstanding stock through GSO Capital Partners, LP.

/s/ Marc Schildkraut (Signature of counsel)

April 30, 2014 Date

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal involves the application of the price-cost standard to a tying claim under Section 1 of the Sherman Act. Recognizing the Supreme Court's directive that there can be no antitrust liability arising from a defendant's unilateral or exclusionary pricing practices if prices do not fall below an appropriate measure of cost, courts have routinely applied the price-cost test to the kind of pricing conduct at issue here. The district court refused to apply the price-cost standard, and issued a preliminary injunction directing the Appellant to implement immediate changes in the way it prices services to its customers. This appeal therefore presents an issue of considerable importance to antitrust jurisprudence warranting oral argument.

Wholly apart from the price-cost test, the district court misinterpreted the evidence and applied the wrong legal standards in concluding that the Appellee had carried its burden of showing likelihood of success on the merits. The record also demonstrated that Appellee, a competitor, could avoid any loss of market share by discounting the prices it is offering to customers, and still make money. Harm that can be avoided is not irreparable harm. For these and other reasons, Appellant submits that this Court would benefit from the opportunity to question counsel about the record and the applicable law before making its ruling.

JURISDICTIONAL STATEMENT

Appellant Eastman Kodak Company ("Kodak") appeals an order granting the motion of Appellee Collins Inkjet Corporation ("Collins") for a preliminary injunction. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1337 over Collins's claim under the Sherman Act, 15 U.S.C. §1, and pursuant to 15 U.S.C. §1221 and 28 U.S.C. §1338(a) over Collins's claim under the Lanham Act, 15 U.S.C. §§1051 *et seq.* It had supplemental jurisdiction over Collins's state law claims pursuant to 28 U.S.C. §1367. This Court has jurisdiction over this appeal of an interlocutory order pursuant to 28 U.S.C. §1292(a)(1).

STATEMENT OF ISSUES

1. Did the district court fail to follow the law when it rejected the application of the price-cost standard to a Sherman Act Section 1 non-explicit tying claim?

2. Did the district court make clearly erroneous factual findings and rely on incorrect legal standards in concluding that Collins had satisfied the conditioning element of a non-explicit tying claim because the differential between matched and unmatched ink prices was so high that *all* rational buyers would switch from Collins ink to Kodak ink to obtain Kodak's lower "matched" price for refurbishment services when the record unequivocally demonstrated, among other things, that it was cheaper for customers representing about 80% of Collins's

Versamark ink revenues to buy Collins ink and pay the higher "unmatched" rate for refurbishment even without Collins discounting its ink price and Collins had actually gained market share after Kodak announced the matched/unmatched pricing policy?

3. Did the district court make clearly erroneous factual findings and rely on incorrect legal standards in concluding that the aftermarket for refurbishment of Versamark printheads was a well-defined antitrust market in which Kodak had market power when, among other things: Kodak had been unable to exercise market power over Versamark ink for a decade; Kodak had been unable to implement its pricing policy after a year and a half of trying; Kodak's customers were sophisticated, had bargaining leverage, and engaged in lifecycle pricing; some Kodak customers had switched or could credibly threaten to switch to other printing solutions if Kodak attempted to exercise market power in the refurbishment aftermarket; and Kodak had substantial incentives to refrain from unduly raising aftermarket prices because it wanted to sell new printing equipment to Versamark customers?

4. Did the district court make clearly erroneous factual findings and rely on incorrect legal standards in concluding that the public interest and harm to Collins justified a preliminary injunction when it refused to consider that Collins

could and would protect its market share by profitably discounting what it charged for Versamark ink?

STATEMENT OF THE CASE

Facts

Kodak is a printing and imaging company. One of Kodak's primary businesses is commercial printers that use a digital technology called continuous inkjet printing (CIJ). Kodak has two lines of CIJ printers, "Versamark" and "Prosper." Kodak sold its last Versamark printer in 2009, but continues to sell Versamark ink and refurbish Versamark printheads, the printer component through which ink "jets." Defendant's Proposed Findings of Fact ("DFOF"), RE 88, ¶¶1, 5-9, 13, pp.2-5.

Refurbishment involves repairing or replacing printheads. DFOF, RE 88, ¶12, p.4. Collins is attempting to launch a refurbishment business, but the district court found that Collins has not begun to offer refurbishment services. Thus, Kodak is currently the only firm refurbishing Versamark printheads. Opinion and Order ("Op."), RE 98, Page ID# 10592.

Versamark customers are currently replacing their Versamark printers with newer technology, including Prosper printers. From 2010-2013, between [redacted] [redacted] of new Prosper equipment purchasers were legacy Versamark customers. Stewart Decl., Ex. A ("Langenfeld Rep."), RE 41, ¶125. Kodak views Prosper as

the future of its CIJ business. Kodak believes Versamark customers are prime candidates for buying Prosper equipment and that maintaining Kodak's reputation for quality with Versamark customers is necessary for Kodak to expand its Prosper business. DFOF, RE 88, ¶¶15-17, pp.5-7.

Kodak's top 40 Versamark customers, mostly large commercial printers, account for about 80% of Kodak's Versamark aftermarket business. *Id.* ¶24, pp.8-9. These customers are highly sophisticated and highly focused on their total cost of print ("TCOP"). TCOP includes the upfront investment in the printing system and the aftermarket "consumables" (*e.g.*, ink and refurbishment) needed to produce each printed page. Consumables comprise up to 80% of customers' TCOP. *Id.* ¶25, p.9. To obtain concessions on Versamark aftermarket consumables, customers threaten to switch out of Versamark printers. They also use potential purchases of new equipment as bargaining leverage. *Id.* ¶27, p.10.

Collins, an ink manufacturer, competes with Kodak in the sale of Versamark ink. Versamark ink represents less than 25% of Collins's revenues. *Id.* ¶20, pp.7-8.

Prior to 2001, Kodak's predecessor, Scitex, and Collins were essentially the only competitors selling Versamark ink. *Id.* ¶31, p.11. In 2001, they entered into a contractual arrangement whereby Collins manufactured Collins-brand ink and Scitex-brand ink, both of which Scitex (later Kodak), priced and sold to Versamark

customers. *Id.* ¶¶34, 39, pp.12-13. Because of this arrangement, Collins improved the quality of its ink through the wealth of knowledge Scitex and Kodak imparted, and grew its Versamark ink revenues substantially. *Id.* ¶¶35-37, pp.12-13.

In 2011, Collins sought to terminate the contractual relationship without providing the required notice. The United States District Court for the Western District of New York issued a preliminary injunction, delaying termination until May 2012. *Id.* ¶¶54-55, 60, pp.17, 19.

Collins's termination required Kodak to reconsider how to price Kodak-brand Versamark ink and printhead refurbishment. Kodak faced serious restraints in formulating a new policy. Kodak feared it would gain a reputation for exploiting customers if it raised their TCOP too much, and that they would turn to Kodak's competitors when they needed new printers instead of purchasing Prosper. Kodak's executive leadership told its Versamark unit not to implement any policy that harmed Kodak's ability to sell Prosper. *See id.* ¶77-79, pp.25-26; Wilson Dep. Ex. 10, RE 49-14, p.4 ("Avoid major customer dissatisfaction; Limit actions that impact[] future sales").

Kodak attempted to introduce a pricing policy to customers worldwide in May 2012 that employed a "matched" versus "unmatched" concept. Under the policy, customers using third-party ink (unmatched) paid more for refurbishment than customers using Kodak ink (matched). Stewart Decl., Ex. A ("Langenfeld

Rep."), RE 41, ¶45, p.20. Kodak hoped the differential would incentivize customers to switch to Kodak ink, an outcome that would protect Kodak's reputation for quality by giving Kodak control over the fluids going into Versamark systems. Customers who did not switch would pay higher refurbishment rates, generating revenues to support Versamark equipment. DFOF, RE 88, ¶¶63-65, 82-84, pp.19-20, 26-27. Kodak was never able to enforce the policy. Customers pushed back and were never charged the higher rates. *Id.* ¶¶89-91, pp.28-29.

Kodak released a reformulated policy in July 2013. The new policy continued to differentiate between matched and unmatched customers, but it lowered the price of refurbishing generally, and it was less costly for unmatched customers relative to the earlier policy. *Id.* ¶¶92-93, pp.29-30.

While Kodak wanted customers to use Kodak ink to protect their Versamark equipment and hence Kodak's reputation, Kodak made more money if customers paid the unmatched refurbishment price than it did if customers switched to Kodak-brand ink (and paid the lower refurbishment price). *Id. ¶¶*94, 202, pp. 30, 64. In marketing the July 2013 policy, Kodak decided it would no longer try to leverage refurbishment to increase ink sales. Instead, it would tell customers they had a choice of inks, but that using third-party inks would be at their own risk. *Id.* ¶¶94-96, pp.30-31.

The price reduction did not change the reaction of customers. Customers continued to push back against any price increase. Kodak has never attempted to enforce the policy outside the United States. *Id.* ¶99, pp.32-33. In the United States and Canada, unmatched customers representing the majority of Collins ink revenue have been receiving rebates from Kodak that totally negate Kodak's differential pricing. Op., RE 98, Page ID# 10597.

After a year and a half of Kodak efforts, switching from Collins to Kodak ink amounts to less than ***6%*** of Collins's Versamark revenue.[1] DFOF, RE 88, ¶99, pp.32-33. Compare Langenfeld Rep., RE 41, Exs. 14, 16a. Collins has more than compensated for these losses. Collins's Versamark ink business grew ***12%*** in revenue during that same period. Compare Langenfeld Rep., RE 41, Exs. 14-15, DFOF, RE 88, ¶115, p.40, Langenfeld Rep., RE 41, ¶208, pp.86-87.

Kodak's revenues also reflect the lack of switching. Kodak projected generating $3 million in revenue, but the policy has generated only about $600,000. Of that, only $200,000 comes from ink sales. The remainder comes from most customers sticking with Collins ink and paying increased refurbishment prices. DFOF, RE 88, ¶116, pp.40-41.

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[1] All percentages of Collins's revenue or sales impacted by the policy are based on Collins's top 20 Versamark customers, who represent 90% of Collins's Versamark ink sales. Langenfeld Rep., RE 41, ¶177, p.76.

Collins's present-day prices for Versamark ink are so much lower than Kodak's that about ***80%*** of Collins's customers (in terms of volume of Collins's top 20 customers) have lower ink and refurbishment costs when they buy Collins ink rather than Kodak ink (assuming no additional ink discounts by either party) and pay the unmatched refurbishment price.[2] Langenfeld Rep., RE 41, ¶176, pp.75-76, Ex. 16B; DFOF, RE 88, ¶¶101-102, p.33.

Despite Collins's already lower ink prices, Collins could lower its price an additional 31% without dipping below its average variable cost. Langenfeld Rep., RE 41, ¶165, p.70, DFOF, RE 88, ¶103, p.34. If Collins discounted down to cost, it could profitably offset the unmatched refurbishment rates 100% of the time. DFOF, RE 88, ¶160, pp.51-52 (assuming no further discounts on Kodak ink). If Kodak matched 2011 Collins-brand ink prices, Collins could profitably offset the refurbishment rate increases for 78% of its ink volume. Langenfeld Rep., RE 41, ¶176, pp.75-76; DFOF, RE 88, ¶¶103, 161, pp.34, 52. Even using average total costs, Collins could discount its ink 20-21%, offsetting Kodak's unmatched refurbishment charge with lower ink prices while remaining profitable at 16 of its top 20 customers. DFOF, RE 88, ¶¶104, 164, pp.34-35, 52-53.

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[2] What customers spend on refurbishment depends on several factors. Morris Declaration ("Morris Decl."), RE 37, ¶14, pp.5-6. Thus, the percentage of TCOP representing refurbishment relative to ink varies from customer to customer. DFOF, RE 88 ¶25, pp.9.

Although Collins can compete with Kodak on price, Collins has not changed its prices since May 2012. Collins toyed with the idea of offering customers who were charged more for refurbishment free ink, but quickly abandoned that plan, preferring litigation. *Id.* ¶106, pp.35-36.

Procedure

In September 2013, Collins filed a complaint in the United States District Court for the Southern District of Ohio, and moved for a preliminary injunction. The first cause of action alleges that Kodak committed tying in violation of Section 1 of the Sherman Act by charging a higher price for refurbishment to customers buying Collins's ink (unmatched) than it charged to customers using Kodak ink (matched). The second, third and fourth causes of action allege that Kodak statements in marketing materials were false and misleading (the "Disparagement Claims"). The fifth asserts that Kodak tortiously interfered with Collins's prospective contractual relations.

On December 2-4, 2013, following expedited discovery and exchange of expert reports, the district court held an evidentiary hearing. On December 16, 2013, the parties submitted proposed findings of fact and conclusions of law. On March 6, 2014, the court issued an Opinion and Order (the "Opinion") granting Collins's motion on the antitrust and tortious interference claims, but denying it on the Disparagement Claims. The preliminary injunction prohibits Kodak from

charging differential prices for Versamark refurbishing services, and thus required Kodak to change its pricing structure.

Kodak filed a timely notice of appeal on March 31, 2014. Fed. R. App. P. 4(a)(1).

Opinion

To establish its tying claim, the lower court held that Collins had to prove that: (1) there are two separate products or services, (2) the sale of one product (ink) is conditioned on the purchase of the other product (refurbishment), (3) Kodak has appreciable economic power in the market for the tying product, and (4) the arrangement affects a substantial volume of commerce in the tied market. Op., RE 98, Page ID# 10599. Only the second and third elements were in dispute.

With respect to the conditioning element, the court acknowledged that Collins had not alleged a "traditional tie," which is "explicitly imposed by agreement." Op., RE 98, Page ID# 10600. Citing *Virtual Maint. v. Prime Computer*, 957 F.2d 1318 (6th Cir. 1992) ("*Virtual Maintenance*"), *vacated and remanded on other grounds,* 506 U.S. 910 (1992), the court held that non-explicit tying arrangements can satisfy the conditioning element "when a deal induces 'all rational buyers' of the tying product to accept the tied product." Op., RE 98, Page ID# 10600. The court observed that the all-rational-buyer standard "sets a very high bar for any plaintiff" and suggested that courts in the Sixth Circuit have

applied the test two ways. The first is to look at the differential charged to customers buying the tied product versus customers buying the competing product (the "Differential Approach"). The court concluded that the refurbishment differential between Kodak and Collins ink customers was big, although it conceded it was smaller than that in *Virtual Maintenance*. The court applied no benchmark other than the comparison to *Virtual Maintenance. Id.*, Page ID# 10601-10602.

The second approach "considers the extent to which buyers continue to purchase products outside the tie" (the "Switching Approach"). *Id.*, Page ID# 10602. The court found that the extent of switching was "not clear." *Id.*, Page ID# 10603. It found some evidence eight customers had switched business amounting to $339,000 in lost sales by Collins, but also found that Collins may have gained business. *Id.*, Page ID# 10603-10604. The Opinion concludes that the "actual percentage of decline in purchases of Collins-brand Versamark ink remains uncertain" but that there was "a trend of declining sales even without full implementation of the policy." *Id.*, Page ID# 10604.

The Opinion found that Collins satisfied the all-rational-buyers test based *only* on the Differential Approach: "while other factors could come into play where there is a less significant price differential, the Court, viewing the evidence as a whole and considering the importance of TCOP, finds that the price

differential in the end fairly could be considered as inducing all rational buyers to switch to Kodak-brand Versamark ink." *Id.*, Page ID# 10606. In making this finding, the court refused to consider whether Collins would lower its ink price to offset Kodak's policy. *Id.*, Page ID# 10605.

The court then turned to whether Kodak has market power. Because Kodak does not have market power in the primary market, printing equipment, *id.,* PAGE ID# 10608, the open issue was whether the Versamark aftermarket is a relevant market in which Kodak can exercise market power. *Id.*, Page ID# 10607. To determine this, the court focused exclusively on criteria identified in *Eastman Kodak Co. v. Image Technical Servs, Inc.*, 504 U.S. 451 (1992).

First, the court considered whether Versamark customers faced high information costs that prevent them from obtaining the information they need when purchasing. Op., RE 98, Page ID# 10607. The court recognized that Versamark customers are "sophisticated, are highly concerned with TCOP [costs], and have some negotiating leverage," but found that there were substantial questions about whether they had the information they needed. *Id.*, Page ID# 10609.

Second, the court found that Collins had raised substantial questions about whether there are high costs for customers to switch from Versamark to competing printers if Kodak raised aftermarket prices unduly, *id.*, Page ID# 10609-10610, even though the plaintiff's expert did not conduct any study of switching costs and

there was evidence that Versamark customers have switched or would switch to competing equipment. In this regard, the court relied heavily on the fact that the majority of customers had not switched away from Versamark equipment in the face of Kodak's new pricing policies. The court did not attempt to reconcile this observation with its earlier finding that, despite a year and a half of trying, Kodak had been unable to enforce either policy, *Id.*, Page ID# 10596-10597, and that the data was "skewed" because so few customers had switched from Collins ink to Kodak ink. *Id.*, Page ID# 10603.

Third, the court considered whether Kodak's desire to sell Prosper equipment to Versamark customers restrained Kodak's ability to exercise market power. *Id.*, Page ID# 10611. The court concluded that Kodak would not have increased refurbishment prices if the need to sell Prosper equipment constrained Kodak's market power. *Id*. Again, the court did not reconcile this conclusion with its earlier finding that Kodak had not been able to implement its policy.

The court then addressed whether Kodak had legitimate business justifications for its policy, such as damage to Kodak's reputation for quality if third-party ink fouled Kodak printheads.[3] The court rejected Kodak's proffered

[3] The court stated that Kodak did not become concerned about the quality of Collins ink until after Collins's termination (Op., RE 98, Page ID# 10616), but failed to appreciate that Kodak's concern was about the impact of termination on quality. Kodak submitted evidence showing (1) Collins stopped print-testing its

business justifications, *id.*, Page ID# 10616, but acknowledged that Kodak might suffer harm to its reputation as the result of the preliminary injunction. *Id.*, Page ID# 10624.

Having found that Collins was likely to succeed on the merits of its tying claim (and concomitantly the tortious interference claim), the court found that the injunction served the public interest, but did not address Kodak's argument that the public interest is not served by undermining Collins's incentives to compete by discounting its ink prices. It also found irreparable harm to Collins, but failed to consider Collins's ability to protect its market share by discounting. *Id.*, Page ID# 10623-10625.

SUMMARY OF ARGUMENT

The district court's finding that Kodak's matched/unmatched pricing of refurbishment services would force *all* rational Versamark customers to buy Kodak-brand Versamark ink (the conditioning element of a tie) was filled with errors. The court essentially eyeballed the size of the differential for refurbishing

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Versamark inks after terminating the relationship (DFOF, RE 88, ¶69, p.22), (2) at least one customer's printheads were damaged by Collins ink post-termination (*Id.*, ¶¶73-76, pp.23-25), and (3) trouble-shooting for Collins ink customers was more difficult for Kodak post-termination (*Id.*, ¶¶66, 85, pp.21, 27). Kodak pointed to a post-termination incident involving customer Cifang, who experienced problems from using the incorrect inkdex for a Collins ink. *Id.*, ¶72, p.23. Although it was not Kodak's fault that Cifang was using the incorrect inkdex (inkdexes are supplied by the ink manufacturer), Cifang blamed Kodak and canceled an order for Prosper equipment. *Id.*, ¶72, p.23.

printheads of matched versus unmatched customers and concluded it was big. The court ignored the evidence showing that about 80% of Collins ink customers would spend less if they continued to buy Collins's ink and paid unmatched refurbishment rates than if they switched to Kodak ink and paid matched refurbishment rates (assuming no additional ink discounting by either party). Compounding the error, although the court concluded that Collins's sales were declining, the record demonstrated that Collins *gained* new sales that more than offset the sales Collins lost during the 18 months following Kodak's policy. Such flawed decision-making cannot satisfy the all-rational-buyers test.

The district court also refused to consider Collins's ability to profitably offset the price differential by lowering its ink prices. That decision is at odds with Supreme Court precedent that unilateral or exclusionary pricing conduct (the kind of conduct at issue here) *never* offends the antitrust laws absent below-cost pricing. In rejecting Kodak's proof that Collins could have offset Kodak's policy, the court held that even if costs were relevant, the only arguably relevant costs are defendant's, and the court did not have evidence about Kodak's costs. Where the conduct at issue is a non-explicit tie, and where the plaintiff is the efficient competitor, it makes sense to use the plaintiff's costs. But even if defendant's costs govern, it was not Kodak's burden to prove its costs. Plaintiff must satisfy

the price-cost standard. Collins, which had the benefit of expedited discovery, adduced no evidence that Kodak was pricing below its costs.

The court's finding that Kodak has market power in the aftermarket is also clearly wrong. Kodak proffered direct evidence that it cannot exercise market power in the aftermarket. The district court ignored that evidence, focusing on the factors identified in *Kodak* without considering the market realities that should have influenced its assessment of those factors.

The court's market power analysis was also flawed by its unwillingness to balance countervailing market forces. For example, it acknowledged that some customers would switch from Kodak equipment to other printing technologies if Kodak raised aftermarket prices unduly, yet found the switching criteria had been met because other customers would not. The prospect of some customers switching could be enough to eliminate Kodak's incentive to increase aftermarket prices. And even it if isn't, if some customers would switch from Kodak equipment, all rational buyers would not be switching to Kodak ink, defeating the tying claim whether or not Kodak had market power.

Worse still, the court repeatedly used Kodak's attempt to implement the policy to establish Kodak's putative market power without considering the court's conclusion that Kodak had *not* been able to enforce its policy, and that almost *no* customers had actually switched from Collins ink to Kodak ink. Given that

customer push back prevented Kodak from implementing the challenged price policy with respect to the majority of Collins's customers after 18 months of trying, the only rational conclusion is that Kodak lacks market power.

The court's findings on two other prongs of the preliminary injunction standard are equally flawed. Collins could not be irreparably harmed when it could avoid the loss of market share by profitably discounting, and the public interest is best served by Collins protecting its market share through bringing lower prices to customers.

ARGUMENT

A preliminary injunction is "one of the most drastic tools in the arsenal of judicial remedies." *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001) (internal quote omitted); *see also Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972) (preliminary injunction is the strong arm of equity and should not be extended in cases that are doubtful or that do not come within well-established principles of law). In determining whether to issue a preliminary injunction, the district court must consider: (1) likelihood of success on the merits; (2) irreparable harm; (3) the balance of equities; and (4) the public interest. *Rhinehart v. Scutt*, 509 Fed.App'x 510, 513 (6th Cir. 2013).

The movant bears the burden of proof on all elements, *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 443 (1974), and must show likelihood of success and irreparable harm. *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction"); *Bonnell*, 241 F.3d at 825 (failure to show likelihood of success on the merits requires denial of preliminary injunction). In granting a preliminary injunction, the district court must make legal conclusions that are supported by specific factual findings; conclusory legal or factual findings are insufficient. *Gonzales v. Galvin*, 151 F.3d 526, 532 (6th Cir. 1998).

On appeal, the district court's legal conclusions are reviewed *de novo* and its findings of fact are reviewed for clear error. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (internal quotation omitted). Factual findings are clearly erroneous when they are unsupported or contradicted by the record evidence, *see King v. Zamiara*, 680 F.3d 686, 701-02 (6th Cir. 2012), ignore undisputed evidence, *see Brown v. Local 58*, *Int'l Bhd. Of Elec. Workers, AFL-*

CIO, 76 F.3d 762, 772 (6th Cir. 1996), misinterpret the record*, see Platsis v. E.F. Hutton & Co.*, 946 F.2d 38, 42 (6th Cir. 1991), or fail to consider relevant evidence, *see Petty v. Metro. Gov't of Nashville Davidson Cnty.*, 538 F.3d 431, 447-48 (6th Cir. 2008). The district court's decision to grant a preliminary injunction must be reversed where, as here, the district court "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Bonnell*, 241 F.3d at 809.

I. The District Court's Refusal to Use the Price-Cost Test to Determine Whether Unilateral Pricing Conduct Is Unlawful Is Reversible Error

This case does not involve an explicit tie where Kodak required Versamark customers to buy Kodak ink to obtain refurbishment services. Accordingly, to show tying, Collins had to demonstrate that Kodak's pricing behavior induced "'all rational buyers' of the tying product to accept the tied product." Op., RE 98, Page ID# 10600-10601 (citing *Virtual Maintenance*, 957 F.2d at 323).

To demonstrate this economic coercion, Collins's complaint alleged that the "amount of the price increase was dramatic; it could not and cannot be cost-justified; and it made it economically infeasible for customers to continue to use Collins ink" and that "Collins estimated that it would have to sell its ink at below cost, and in some cases give it away for free, to keep a customer's total cost from increasing if that customer was forced to pay the higher price for refurbished printheads." Compl., RE 1, Page ID# 8-9.

Kodak refuted these allegations by showing that Collins's present ink prices are so much lower than Kodak's that most Collins customers would pay less for ink and refurbishment if they stayed with Collins rather than switch to Kodak. Kodak also showed that, absent a preliminary injunction, all rational buyers of Collins ink would *not* switch to Kodak because Collins, as a rational actor, could and would discount its ink to offset Kodak's policy. It is the latter showing that is at issue in this section.

Kodak's economic expert, Dr. James Langenfeld, analyzed Collins's top 20 customers, who represent 90% of Collins's sales. DFOF, RE 88, ¶155 p.50; Op., RE 98, Page ID# 10603. Dr. Langenfeld determined that Collins could have discounted its price by 31% on average without dipping below its average variable cost. DFOF, RE 88, ¶103, p.34. Considering just the differential in refurbishment prices between "matched" and "unmatched" customers, Collins could have *profitably* offset the higher refurbishment rates for *all* those customers by lowering its ink price. *Id*. If Kodak lowered its ink price to the Collins-brand 2011 price, Collins still could have profitably offset the Kodak policy to customers accounting for 78% of Collins ink volumes. *Id*. Using an average *total* cost standard, Collins could profitably offset the higher refurbishment charge to 16 of its top 20 customers. *Id.,* ¶104, pp.34-35. Thus, Kodak demonstrated that Collins could

offset the effect of Kodak's pricing policy just by competing—by lowering its ink prices.

The district court acknowledged this evidence, but dismissed it, wrongly concluding that (1) the cost-based approach does not apply to a Section 1 claim, (2) that the all-rational-buyers test does not focus on "what Collins can do" but rather on "what a rational buyer would do" and (3) that even if a cost-based approach is appropriate, the focus should be on Kodak's costs, and the court did not have evidence of Kodak's costs.[4] Op., RE 98, Page ID# 10604-10605.

These conclusions are at odds with antitrust law, which protects competition, not competitors. *See*, *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488, 498 (1977) ("antitrust laws . . . were enacted for 'the protection of *competition* not *competitors*'"); *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."). Properly

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[4] While Kodak does not consider the application of the price-cost standard to a non-explicit tying claim to present a novel issue, if this Court views the issue or its application to present novel issues, it counsels against a preliminary injunction. *See Dalmo Sales Co. v. Tysons Corner Reg'l Shopping Ctr.*, 308 F. Supp. 988, 994 (D.D.C. 1970), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970) ("The presence of novel legal issues, which require resolution at trial, preclude the grant of a preliminary injunction."); *Cincinnati Bengals, Inc. v. Bergey*, 453 F. Supp. 129, 145 (S.D. Ohio 1974) (preliminary injunction should be denied when there are novel issues of law); *accord* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil §2948.3 (3d ed.).

applied, the antitrust laws would encourage Collins to compete with Kodak by lowering its ink prices. The preliminary injunction does the opposite, protecting Collins's market share while dampening Collins's incentive to engage in price competition.

A. The Price-Cost Test Applies to All Unilateral Pricing Behavior

Whenever the Supreme Court has considered whether unilateral or exclusionary pricing behavior – the kind of conduct at issue here – is unlawful, it has concluded that, "regardless of the type of antitrust claim involved," a defendant's "pricing practices" are not unlawful when prices did not fall below an appropriate measure of cost. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990).

Thus, the Supreme Court has continually required the plaintiff to establish that prices were below costs for the defendant's conduct to be actionable. For instance, in *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986), the Court rejected plaintiff's Clayton Act challenge to a merger because the claim was that the combined company would engage in anticompetitive but not below-cost price cutting. *Id.* at 114-15, 117-19. Next, in *Atl. Richfield Co.*, 495 U.S. at 339-41, the Court rejected claims of unlawful maximum vertical price setting under Sherman Act *Section 1* because there was no proof of below-cost pricing. In *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a primary line

price discrimination case under the Robinson-Patman Act, the Court required the plaintiff to satisfy the price-cost test. *Id.* at 222. In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007), the Court threw out a claim for predatory overbidding because the practice did not result in below-cost pricing. *Id*. at 325-26. And in *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc*., 555 U.S. 438 (2009), the Court rejected a "price squeeze" theory because the complaint did not allege below-cost pricing. *Id.* at 451-52.

No matter what the antitrust statute, whenever a plaintiff has challenged a defendant's unilateral or exclusionary pricing conduct, the Court has required proof of below-cost pricing because price competition is the "'very conduct the antitrust laws are designed to protect.'" *linkLine*, 555 U.S. at 451 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 594 (1986)).

The Supreme Court also has made clear that it does not matter to the antitrust analysis whether the allegedly wrongful unilateral pricing activity consists of raising prices or lowering them (or, as here, a combination) so long as there is no violation of the price-cost test. "[C]harging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004).

Indeed, whether Kodak's policy increased or decreased prices is a matter of semantics. Under *Trinko,* Kodak could have lawfully raised its refurbishment

prices across the board, and then given discounts on refurbishment to all customers who purchased Kodak ink so long as it did not violate the price-cost standard. *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 892-93, 910 (9th Cir. 2008) (bundling must meet the price-cost standard despite the fact that the defendant increased prices as part of its bundling); 10 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶1758 at 357 (3d ed.) ("Areeda & Hovenkamp") (under the price-cost standard, "only rivals with higher costs will be excluded . . . by a price increase in the tying product.").

B. The Price-Cost Test Is a Necessary Component of the All-Rational-Buyers Test

The lower court also declined to apply the price-cost test to Collins's claim because the cost-based approach "focuses on what Collins can do and not what a rational buyer would do given the circumstances presented to it." Op., RE 98, Page ID# 10605. However, "the circumstances presented to" a Collins customer surely include the price Collins is charging for its ink, as the court recognized elsewhere in the Opinion. *See, e.g., id.*, Page ID# 10602.

Collins recognized the significance of its ability to offset Kodak's policy in its complaint. The complaint does not allege that Kodak's policy resulted in prices below Kodak's costs; it alleges that the prices were below Collins's cost.

Complaint, RE 1, Page ID# 8-9. Unfortunately for Collins, Dr. Langenfeld's testimony completely refuted this allegation. *See* p.20-21*, supra.*

The district court's view that the all-rational-buyers test does not "focus[] on what Collins can do," Op., RE 98, Page ID# 10605, ignores the policies underlying the antitrust laws that encourage competition, rather than resort to the courts for protection from competition. If Collins's ability to meet Kodak's pricing policy is irrelevant, Collins would be free to raise its ink price and drive its customers to Kodak to bolster its claim that the rational buyer would switch to Kodak. Under the district court's reasoning, the one thing Collins (or any other plaintiff asserting a non-explicit tie) should not do is cut its price, as competing might cause customers to stay with Collins, thus defeating the claim that all rational buyers would switch.

The results are equally ludicrous if we consider two different plaintiffs, one, an aggressive competitor, who prices near its costs; the second, a more sluggish competitor, who prices well above its costs. When the defendant attempted to tie its ink to its refurbishment service, the first plaintiff lost no customers because of its lower ink price, while the second plaintiff lost all its customers. The district court would throw the first plaintiff out of court and award the second plaintiff treble damages for its sluggishness.

Because these results are utterly absurd, lower courts have applied the price-cost standard to various forms of exclusionary conduct. In cases of *de facto* exclusive dealing and bundling the First, Second, Sixth, and Ninth Circuits, have utilized the price-cost test to assess liability. *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230-36 (1st Cir. 1983); *Virgin Atl. Airways Ltd. v. British Airways Plc*, 257 F.3d 256, 266-72 (2d Cir. 2001); *Cascade*, 515 F.3d at 892, 903.[5]

In *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007) (*en banc*), the defendant made up-front, above-cost payments (cash payments of $200,000 to $1 million) to be the exclusive brand of sandpaper on retailers' shelves. *Id.* at 448, 451, 453. These payments did "not offend the antitrust laws, much less undermine the competitive environment those laws were designed to foster" because the plaintiff could have profitably lowered its price to compete for the shelf space. *Id.* at 452-54. The plaintiff had nothing to complain about when it could have cut its own margins to compete. *Id.* at 452. Here too, Collins has nothing to complain about because it could and would have profitably lowered its ink price to offset Kodak's policy.

[5] The Third Circuit rejected the price-cost test in a bundling case, *LePage's Inc. v. 3M,* 324 F.3d 141, 155 (3d Cir. 2003), but adopted it to assess *de facto* exclusive dealing when price is the vehicle of exclusion. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 273-75 (3d Cir. 2012).

The alleged non-explicit tying in this case is similar to *de facto* exclusive dealing, and virtually identical to bundling.[6] *See Cascade*, 515 F.3d at 900-01 (noting the similarity of bundled discounts and tying); *see also* Langenfeld Rep., RE 41, ¶47, pp.20-21.[7] Recognizing the analogy to bundling claims, Areeda & Hovenkamp, the leading antitrust treatise, would apply the price-cost test to non-explicit tying under Section 1, as it would be "perverse" to limit the statutory context in which the test applies.[8] *See also Aerotec Int'l, Inc. v. Honeywell Int'l,*

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[6] Here, the bundled price would be Kodak's price of printhead refurbishment and Kodak Versamark ink. *De facto* exclusive dealing claims often involve a discount based on the percentage of a customer's business the defendant received, thus causing the plaintiff to lose sales if it could not match the discount. Kodak's pricing policy allegedly had the same exclusionary effect because it induced customers to move their ink business to Kodak because of the cost savings achieved.

[7] The *Cascade* court explained that if the trial upon remand focused on non-explicit tying, "such a claim might raise the question of whether, to establish the coercion element of a tying claim through a bundled discount, McKenzie [the plaintiff] must prove that PeaceHealth [the defendant] priced below a relevant measure of its costs." 515 F.3d at 916 n.27. The court did not resolve this issue because "[t]he parties have not briefed this issue to us, and the parties did not raise the issue before the district court." *Id.*

[8] Areeda & Hovenkamp call the price-cost test the "attribution test" and would apply a "presumption of non-tying" if it is met. 10 Areeda & Hovenkamp ¶1758 at 354-55, 358. To apply the attribution test to the conduct alleged here, you take the unmatched refurbishment price, and then calculate the discount implicit in the matched refurbishment price. You then attribute that discount to the price of Versamark ink and ask whether the price is below the efficient firm's cost of making Versamark ink. Areeda & Hovenkamp assume that the defendant is the more efficient firm, but as described in the next section, Collins may be the more

Inc., 2014 WL 1017914, at *5 n.28 (D. Ariz. Mar. 17, 2014) (rejecting Section 1 tying claim in part because plaintiff failed to prove that defendant's pricing failed the price-cost test).

In holding that the all-rational-buyers test does not require considering Collins's incentive and ability to retain its customers by lowering its prices, the district court stood antitrust law on its head. A non-explicit tie does not injure competition where Competitor A (Collins) could and would profitably prevent all rational buyers from going to Competitor B (Kodak) by lowering its prices.

C. The District Court Should Have Used Collins's Costs to Determine Whether All Rational Customers Would Switch to Kodak Ink

Although directly responsive to the allegations in the complaint, the district court refused to consider the evidence that Collins could offset Kodak's pricing, finding that, even if the price-cost standard applies, defendant's costs are the appropriate benchmark. The court noted that *Cascade* considered whether the defendant had priced below its costs. Op., RE 98, Page ID# 10605.

Cascade was a bundling case. Bundling cases have looked to the defendant's costs, but it makes sense to look first to the plaintiff's costs in a non-explicit tying case because plaintiff's costs respond directly to the question of

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efficient firm here. Dr. Langenfeld's analysis produced results that were identical to the attribution test.

whether all rational buyers would switch. Where, as here, the plaintiff could and would lower its price to offset the defendant's pricing (in the absence of an injunction) the answer is clearly "no." Recognizing as much, the complaint specifically alleges that Collins cannot profitably lower its prices to meet Kodak's policy. Kodak disproved this critical allegation: but for the preliminary injunction, Collins would do the profitable thing and discount its prices to offset Kodak's policy and stave off market share losses.[9]

In this case, there is another reason using plaintiff's costs makes sense. As the Opinion indicates (Op., RE 98, Page ID# 10595), and Collins's expert testified (Tr., RE 75, Page ID# 7582-7583), Collins's costs may be lower than Kodak's. Using the lower party's costs maximizes competition on the merits. Kodak is aware of no case that prohibits the use of plaintiff's costs when those costs are lower than defendant's.

Typically, courts use defendant's costs because the defendant is the more efficient competitor, and courts have concluded that allowing prices to be cut to the more efficient competitor's cost level maximizes competition on the merits.

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[9] In focusing on the defendant's costs, the *Cascade* court was concerned about the defendant's need to know in advance how far it can discount. 515 F.3d at 905. But in the case of non-explicit tying, a more efficient plaintiff also needs to know how far it should discount to offset defendant's conduct. A plaintiff will only know its own costs in making that determination.

Indeed, courts value competition so much that they have looked to a defendant's lower cost structure even when the defendant's pricing drives the less-efficient plaintiff from the market. *See, e.g.*, *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056 (6th Cir. 1984) (the defendant "cannot be found to have committed predatory pricing simply because it was more cost efficient than its competitors and could afford to submit a lower bid.").

Because it appears that Collins's costs are below Kodak's, DFOF, RE 88, ¶102, p.32, it maximizes competition on the merits for Collins to lower its price to its costs or just above that level to offset Kodak's allegedly exclusionary pricing. As the Supreme Court warned in *Brooke Grp.*, 509 U.S. at 233, using a higher cost standard (in this case, defendant's costs) would chill competition because it would reduce the magnitude of price discounts available to customers. To prevent such chilling, it is desirable to use a standard that encourages an efficient and "aggressive rival" to "steal sales by matching" the defendant's competitive offering. 3B Areeda & Hovenkamp ¶768b at 171.

D. Even If the Right Standard Is Defendant's Costs, the Court Erred by Not Requiring Collins to Prove that Kodak's Prices Were Below Its Costs

But even if defendant's costs are the only costs relevant to the price-cost test, the plaintiff must prove it has satisfied the price-cost test to have an antitrust claim. The test is *not* a defense. *linkLine,* 555 U.S. at 451-52 ("a plaintiff must

demonstrate that: (1) 'the prices complained of are below an appropriate measure of its rival's costs'" (*quoting Brooke Grp.*, 509 U.S. at 222-24)); *Aerotec*, 2014 WL 1017914 at *5 n.28 (no Section 1 tying in part because plaintiff did not demonstrate that defendant's pricing failed the price-cost test).

Collins did not demonstrate that Kodak's prices were below its average variable costs. Op., RE 98, Page ID# 10605 ("There is no evidence presented to the Court about whether Kodak priced above its average variable cost when the discounts are applied as they are under *Cascade*.") Thus, even if the price-cost standard looks to defendant's costs, the court erred in finding that Collins had demonstrated a likelihood of success on the merits when Collins did not prove Kodak was pricing below its costs. ***This error alone requires reversal.***

II. Even If Collins Does Not Have to Satisfy the Price-Cost Test, the District Court Erred in Finding Conditioning

The district court also committed reversible error in finding that Kodak's pricing policy would induce all rational buyers to switch to Kodak ink. Kodak announced the matched-unmatched concept in May 2012. Yet, as of the preliminary injunction hearing, Collins had *gained* market share. Langenfeld Rep., RE 41, ¶169-170, pp.71-72. Under these circumstances, the finding that Collins satisfied the all-rational-buyer test is bewildering.

The district court correctly observed that the all-rational-buyers standard sets "a very high bar for any plaintiff" and that courts "should only in the rarest of

circumstances and under the most coercive of conditions infer a tying arrangement." Op., RE 98, Page ID# 10603 (quoting *Shamrock Mktg., Inc. v. Bridgestone Bandag, LLC*, 775 F. Supp. 2d 972, 981 (W.D. Ky. 2011). But it went off track when, relying on *Virtual Maintenance*, it adopted the Differential Approach. *Virtual Maintenance* does not hold that a large price differential alone satisfies the all-rational-buyer test. *Virtual Maintenance* made an empirical observation, explaining "[a]lthough some purchasers of Prime's software support desired to use Virtual's hardware maintenance, the design companies in need of the continuous software support were reluctant to switch to Virtual's hardware maintenance because of the increased price Prime charged for the purchase of software support apart from its hardware." *Virtual Maintenance,* 957 F.2d at 1323. *Virtual Maintenance* merely observed that rational customers did not switch to the plaintiff because of the differential. Nowhere does *Virtual Maintenance* suggest that the differential would be sufficient independent of the observed effect on all rational buyers.

But even if *Virtual Maintenance* endorsed the Differential Approach, the record does not support the district court's finding that the differential here was significant enough to cause *all* rational buyers to switch to Kodak.

The record evidence showed that Collins's ink prices were on average 38% lower than Kodak's prices. DFOF, RE 88, ¶201, pp.63-64. As a result, Dr.

Langenfeld determined—and his finding was not disputed—that about ***80% of the time, Collins's ink customers have lower ink and refurbishment costs even after paying Kodak's unmatched refurbishment price*** (assuming no additional discounting by either party). *Id.*, ¶157, p.51. Given Dr. Langenfeld's conclusion that customers representing about 80% of Collins's revenues do not pay more because of Kodak's policy, the differential is not enough to compel *all* rational customers to switch. *See King*, 680 F.3d at 702 (reversing as clear error factual finding that was "directly contradicted by the undisputed record."); *Kodak*, 504 U.S. at 468-69 ("If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor").

To determine the differential, the court looked not to Dr. Langenfeld's analysis but to a single Kodak document, PX108 (Wilson Dep., Ex. 10, RE 49-14), which analyzed the effect of the July 2013 policy on three customers. Op., RE 98, Page ID# 10602. There is no evidence that those customers—none of whom is in Collins's top 20 customers—are typical.[10] Tr., RE 75, Page ID# 7576. Further, while the differentials reflected in PX108 depend on Collins's ink price, the document's author had to guess Collins's ink prices for most of the period.[11] Tr.,

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[10] Langenfeld Rep., RE 41, Ex. 16a lists Collins's top 20 customers.

[11] By contrast, Dr. Langenfeld had that information. Langenfeld Rep., RE 41, Ex. 2.

RE 74, Page ID# 7492. Of greatest importance, however, of the three customers addressed in PX108, ***two have not switched from Collins to Kodak*** and Kodak has no expectation that they will. Tr., RE 75, Page ID# 7436-7537. Based solely on PX108, the district court concluded that the differential was significant, although it recognized that the "the incentive here does not quite match the one in *Virtual Maintenance*." Op., RE 98, Page ID# 10602. In fact, it does not come close. The differentials in PX108 ranged from 7% to 35%. The differential in *Virtual Maintenance* was 900%. *Virtual Maint. Inc. v. Prime Computer Inc.*, 11 F.3d 660, 666 (6th Cir. 1993).

The district court's conclusion that the PX108 range of differentials is so "significant" that all rational buyers would switch, Op., RE 98, Page ID# 10601-10602, not only ignored the *only* rigorous, systematic analysis of differentials in the record (Dr. Langenfeld's), it reached the conclusion without the application of any standard or benchmarks. Such *ipse dixit* does not satisfy antitrust standards, which "must be clear enough for lawyers to explain them to clients." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.); *linkLine*, 555 U.S. at 451-53 (firms need to "know they will not incur liability" for their pricing practices) (citing *Town of Concord* with approval).

The court also entertained the Switching Approach, but acknowledged that the future decline in Collins's market share was "not clear," Op., RE 98, Page ID#

10603, and "remains uncertain." *Id.*, Page ID# 10604. Thus, it did not find that the Switching Approach satisfied the all-rational-buyer standard. *Id.*, Page ID# 10606. The most it could find under the Switching Approach was "a trend" of declining Collins sales.[12] *Id.*, Page ID# 10604.

The record contradicts even that finding. The court observed that Kodak was close to capturing three customers who account for 50% of Collins's annual Versamark ink volume. *Id.*, Page ID# 10603. But the cited exhibit, PX6 (Markovits Decl., Ex. 7, RE 33-3), refers to Kodak's first policy, not the second policy, which was less costly for unmatched customers. DFOF, RE 88, ¶¶92-93, pp.29-30. Moreover, the district court conceded that after one and a half years of Kodak trying to get customers to switch: "two of those customers still have continued to purchase some Collins ink." Op., RE 98, Page ID# 10603.[13]

The court, however, mainly relied on Dr. Langenfeld's analysis of lost sales. Dr. Langenfeld's analysis was based on a Collins interrogatory response that

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[12] The complaint makes it seem as if Collins lost significant customers, but the evidentiary hearing demonstrated the opposite. DFOF, RE 88, ¶¶109-116, pp.37-41. For example, the top Collins customer referred to in paragraph 30 of the complaint who told Collins in April 2012 that it had been "forced to conclude that it . . . [is in] our best interests to use Kodak as our most significant supplier," Complaint, RE 1, Page ID# 9, was still buying its ink from Collins as of the hearing. Tr., RE 74, Page ID# 7459-7460.

[13] PX15 (Markovits Decl., Ex. 16, RE 33-3) and PX22 (Markovits Decl., Ex. 23, RE 33-4) also refer to the first policy. Op., RE 98, Page ID# 10596.

claimed that Collins had lost $724,777 in annual sales from 13 customers. Dr. Langenfeld compared Collins's response to actual transaction data, and found that Collins had lost only $339,000 in sales from eight of the 13 customers. Op., RE 98, Page ID# 10603 (citing Langenfeld Rep., RE 41, ¶¶166-168, p.70-71, Ex. 14).

Based on Dr. Langenfeld's analysis, the court found "some evidence that eight customers have switched as a result of the policy," suggesting that these switchers were eight of Collins's top 20 customers. Op., RE 98, Page ID# 10603. But Dr. Langenfeld made no conclusions about *why* these eight customers had switched, Tr., RE 81, p.3-25:1-6, and his analysis was confined to the 13 customers listed in Collins's interrogatory response. Tr., RE 81, pp.3-23:1-25-3-24:1-25. Only three of those 13 customers are in Collins's top 20 (DST, Pollard, and RR Donnelley)[14] and business lost from RR Donnelley is trivial ($1,757 per month).[15] Given the fact that Collins's top 20 customers comprise 90% of Collins's business, the only rational conclusion to draw from Dr. Langenfeld's analysis is that despite

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[14] *See* Langenfeld Rep., RE 41, Ex. 16a (total sales of Collins's top 20 customers).

[15] R.R. Donnelley operates out of many plants. Tr., RE 72, Page ID# 7418-7419. Collins's interrogatory response claimed that Collins lost business from only one R.R. Donnelley plant. Tr., RE 71, Page ID # 7366-7367; Burke Decl., Ex. PP, RE 44, p.3.

Kodak's efforts, there was only a meager amount of switching (only ***6%*** of Collins's sales).[16]

The district court also concluded from Dr. Langenfeld's analysis that: "there is evidence to show a trend of declining sales even without full implementation of the policy." Op., RE 98, Page ID# 10604. But the evidence the court relied on for this finding, Ex. 15, ***shows that the court was clearly wrong, Collins's ink sales were increasing***. Collins's annualized ***gain*** in ink sales was $556,600. Langenfeld Rep., RE 41,, Ex. 15; DFOF, RE 88, ¶¶152-154, pp.49-50. *See also* Langenfeld Rep., RE 41, ¶170, pp.72-73 and Exs. 12-13. Accordingly, what the record showed was that while Kodak was struggling to implement its policy, Collins's Versamark ink business ***grew 12%*** in revenue. DFOF, RE 88, ¶¶115, 150-151, pp.40, 49, Langenfeld Rep., RE 41, ¶208, pp.86-87. Notably, Collins was able to capture these ink sales ***without*** lowering its prices. DFOF, RE 88, ¶106, pp.35-36.

No decision, until this one, has found conditioning under similar circumstances. *See, e.g., Shamrock*, 775 F. Supp. 2d at 981 (even though plaintiff lost 90% of sales, "proving actual coercive conditions could [still] be difficult" for plaintiff); *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1161 (9th Cir.

[16] This assumes that Collins lost *all* $339,000 in sales because of Kodak's policy, a generous assumption as there was evidence that some of these lost sales were not due to Kodak's policy. Defendant's Conclusions of Law ("DCOL"), RE 88, ¶14, p.70.

2003) (summary judgment granted where only 50% of customers purchased the alleged tied product); *Shop & Save Food Mkts., Inc. v. Pneumo Corp.*, 683 F.2d 27, 30-31 (2d Cir. 1982) (summary judgment affirmed where customer purchased both the alleged tied product and alternative products); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1501 (8th Cir. 1992) (summary judgment affirmed where plaintiff could not show declining sales).

In sum, no authority supports finding that the all-rational-buyers test can be met on the basis of differential alone. Moreover, the differential calculated by Dr. Langenfeld indicates that Collins can profitably retain about 80% of its Versamark ink volumes without any discounting. The Switching Approach shows that Collins sales are increasing. The best the district court could say was that the level of future switching "remains uncertain," Op., RE 98, Page ID# 10604; what will happen is "not clear," *id.*, Page ID# 10603; and the results "remain to be seen." *Id.*, Page ID# 10604. There was so little switching, the district court wondered if the data was "skewed" by Kodak's inability to implement. *Id.*, Page ID# 10603. *See also id.*, Page ID# 10596 ("The May 2012 Policy was never officially implemented, as many customers pushed back against the Policy."), *id.*, Page ID# 10597 (July 2013 policy never enforced against group of large customers that "represent the majority of ink volume and revenue.") The court's conclusion that Collins had shown conditioning—an inference that should be made "only in the

rarest of circumstances and under the most coercive of conditions"—is clearly erroneous. *See Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 601 (6th Cir. 2001) (reversing as clearly erroneous factual findings that were contradicted by the record); *In re Ohio River Disaster Litig.*, 862 F.2d 1237, 1246-49 (6th Cir. 1988) (reversing as clearly erroneous factual findings that were unsupported by the record).

III. The District Court's Finding that Kodak Has the Market Power to Compel All Rational Customers to Switch to Kodak Ink Is Clearly Erroneous

"[M]arket power in the tying product market is an indispensable requirement" for unlawful tying. Op., RE 98, Page ID# 10606 (citing *PSI Repair Servs. v. Honeywell, Inc.*, 104 F.3d 811, 815 n.2 (6th Cir. 1997)). The court did not dispute that Kodak lacks market power in the primary, equipment market where it competes with manufacturers like Hewlett Packard, Canon, and Xerox for sales of printing equipment. Mansfield Decl., RE 38, ¶26, p.12. Nor did it dispute that the primary market (printing equipment) and the aftermarket (Versamark refurbishment services) comprise a single relevant market when competition in the primary market restrains the power in the aftermarket. Op., RE 98, Page ID# 10607-10608.

Thus, Kodak could not engage in unlawful tying unless it has market power in an antitrust aftermarket. A well-defined "market is 'any grouping of sales

whose sellers, if unified by a hypothetical cartel or merger, could raise price significantly above the competitive level.'" *Virtual Maintenance*, 957 F.2d at 1325 (citing *H.J., Inc. v. Int'l Tel. & Tel. Corp*., 857 F.2d 1531, 1537 (8th Cir. 1989)). Similarly in *In re Southeastern Milk Antitrust Litig*., 739 F.3d 262, 277 (6th Cir. 2014), to define a relevant market, this Court asked whether a "hypothetical monopolist" could "profit if it imposed" a price increase. In this case, given the court's finding that Kodak is the only refurbishment provider, Kodak would be a monopolist *if* Versamark refurbishment were an antitrust market. So if Kodak does *not* have the power to profitably impose a significant price increase, the Versamark aftermarket is *not* a relevant antitrust market.

The record before the district court contained direct evidence, the results of two natural experiments, that demonstrated that Kodak cannot raise aftermarket prices significantly.[17] *See* Langenfeld Rep., RE 41, ¶¶21, 153-156, pp.9, 65-66.

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[17] A "natural experiment" considers how markets have worked in the past to shed light on market definition and market power. *See SanDisk Corp. v. Kingston Tech. Co*., 863 F. Supp. 2d 815, 826-27 (W.D. Wis. 2012) (court looked to natural market experiment to analyze effect of licensing program on market conditions). Contrary to what the lower court apparently believed, *Kodak* stands for the proposition that that evidence regarding actual market realities is highly relevant to assess market power in an alleged aftermarket. *E.g., Alcatel USA, Inc. v. DGI Tech., Inc.,* 166 F.3d 772, 784 (5th Cir. 1999) (rejecting aftermarket monopoly claim because "proffered relevant market does not comport with market realities"); *Harrison Aire, Inc. v. Aerostar Int'l Inc*., 423 F.3d 374, 383 (3d Cir. 2005) (factors for assessing market power in aftermarket include evidence of actual supracompetitive pricing).

See also Kodak, 504 U.S. at 477 (concluding that "direct evidence" that Kodak had "raise[d] prices and drive[n] out competition" would be reasonable evidence from which to infer market power). That evidence should have been dispositive on the issue of market power. Instead, the district court barely considered it.

The district court acknowledged one natural experiment, but did not consider its relevance to market power: Kodak never implemented the first policy (Op., RE 98, Page ID# 10596), and never enforced the second against customers who "represent the majority of ink volume and revenue." *Id.*, Page ID# 10597. The problem with implementation was that Kodak faced sophisticated customers, with bargaining leverage, *id.*, Page ID# 10609, who pushed back. *Id.*, Page ID# 10596.

The court did not even mention the second natural experiment. Before 2001, Collins and Kodak's predecessor, Scitex, competed in the sale of Versamark ink. In 2001, the competitors "unified" with Collins supplying ink to Kodak and Kodak dictating the price of Kodak-brand and Collins-brand ink. If a Versamark aftermarket were an antitrust market, Kodak as the sole supplier for a decade would have raised the price of ink significantly. Kodak did not do so. DFOF, RE 88, ¶196, p.62; Langenfeld Rep., RE 41, ¶154, pp.65-66.

These natural experiments conclusively demonstrate that Kodak cannot exercise market power, and that the aftermarket is not a relevant market. Instead

of using this direct evidence, the district court concluded that Kodak had market power based on factors identified in *Kodak*, 504 U.S. 451.

Kodak presented a very different situation than the case at bar. It involved a traditional tie, not pricing conduct. *Id*. at 461-63. There, Kodak argued that its lack of market power in the primary market precluded, as a matter of law, the possibility of market power in an aftermarket. *Id*. at 454-55, 466. The Court rejected Kodak's position, identifying factors that might suggest that competition in the primary market did not discipline competition in the aftermarket.

By contrast, here, "actual market realities," *Id.* at 466, establish that the aftermarket is not a separate market, *i.e.*, the two natural experiments. This direct evidence told the district court everything it needed to know to find that competition in the primary market disciplines competition in the aftermarket. *See Harrison Aire*, 423 F.3d at 383 ("In broad terms, *Kodak* stands for the proposition that market reality is the touchstone of antitrust analysis.").

But even if separate consideration of the *Kodak* factors was necessary, the court's conclusions regarding them were contrary to the law and ignored direct evidence that should have influenced the analysis of these factors, namely, the results of these natural experiments.

A. Customers Have the Information They Need to Make Informed Decisions among Suppliers

The first *Kodak* factor is the customers' cost of obtaining information: if Versamark customers did not know what they needed to know to make informed purchase decisions, could they lock themselves into Kodak equipment, giving Kodak the ability to charge supracompetitive aftermarket prices? The second natural experiment demonstrated that there was no reason to be concerned about this possibility. While Kodak was the sole supplier of Versamark ink, it did not raise ink prices (it actually lowered them in real terms). DFOF, RE 88, ¶¶39, 181, pp.13, 58.

The district court concluded, without citation to supporting evidence, that Collins had raised "a serious and substantial question" about whether customers "knew or could have expected that at some later time they would be charged a much higher rate for refurbishment services." Op., RE 98, Page ID# 10609. But that is not the question articulated in *Kodak*. The Supreme Court was concerned about the possibility that customers might not "engage in accurate lifecycle pricing" because it is not "cost efficient" to do so "[i]f the cost of service were small compared to the equipment price."[18] 504 U.S. at 473-74.

[18] *Kodak* concerned purchasers of copying equipment like banks, insurance companies, and government offices. *Kodak*, 504 U.S. at 457. By contrast, most

Versamark customers, however, are "sophisticated, are highly concerned with TCOP, have some negotiating leverage" (Op., RE 98, Page ID# 10609), and engage in lifecycle pricing at the time of purchase. DFOF, RE 88, ¶178, p.57; Tr., RE 82, Page ID# 7840-7841; Markovits Decl., Ex. 2 ("Bowblis Decl."), RE 33-2, ¶67, p.24. Further, TCOP includes both the investment in the printing system and consumables needed to produce each printed page. These consumables (the equivalent here to the cost of service) comprise up to 80% of customers' TCOP. DFOF, RE 88, ¶¶25, 27, pp.9-10. The district court did not find that this is small compared to the equipment price.

The *Kodak* Court also did not doubt that there were "large-volume, sophisticated purchasers," as there are here, who would "insist in return for their patronage, that Kodak charge them competitive lifecycle prices." 504 U.S. at 475. The Court expressed no concern about the possibility that those sophisticated customers would be locked in because of high information costs. *See also Universal Avionics Sys. Corp. v. Rockwell Int'l Corp.*, 184 F. Supp. 2d 947, 957 (D. Ariz. 2001), *aff'd*, 52 F. App'x 897 (9th Cir. 2002) ("A supplier is unlikely to exercise market power where, as here it faces a limited number of sophisticated customers on whom it depends for repeat business"). The Court did doubt,

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Versamark customers are large commercial printing establishments with the potential to be repeat customers of Kodak. DFOF, RE 88, ¶24, pp.8-9.

however, "that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too." *Kodak*, 504 U.S. at 475.

The district court made no finding that there are unsophisticated Versamark customers and it is worth re-emphasizing that Collins's top 20 customers account for 90% of Collins's sales. DFOF, RE 88, ¶155, p.50. Moreover, even if there were some unsophisticated customers, the fact that most are sophisticated would preclude any concern about ***all*** rational buyers, ***meaning that unlawful conditioning could not be established***.

The court's finding that Versamark customers could not have anticipated "they would be charged a much higher rate for refurbishment services" (Op., RE 98, Page ID# 10609) was apparently based on the surprise theory advanced by plaintiff's expert. But that theory concerns a surprise that changes the supplier's market power. DFOF, RE 88, ¶¶173-75, p.56. There were no such surprises here. Most of the sales of Versamark equipment took place when Kodak was the only firm setting prices in the aftermarket, when Kodak's power would be at its maximum if it had any market power at all. As the *Kodak* Court well understood, sophisticated customers would know that they needed to protect themselves from price increases *if* Kodak had market power, and they would have done so *if*

necessary before they acquired Versamark equipment.[19] Tr., RE 82, Page ID# 7842; DFOF, Re 88, ¶¶176-81, pp.56-58; Langenfeld Rep., RE 41, ¶¶126-129, pp.55-56.

Thus, the district court erred in concluding that there were high information costs in the sense relevant to the *Kodak* case, *i.e.*, costs that could cause Versamark customers to be hoodwinked by a change in Kodak's policy. Because Versamark customers are sophisticated, they would have recognized that Kodak would increase prices *if* the purchase of Versamark equipment bestowed Kodak with aftermarket power. They would have protected themselves if they thought that and if they didn't protect themselves, they must have thought that the purchase of equipment would not bestow aftermarket power on Kodak. Again, the natural experiments strongly support the latter conclusion.[20]

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[19] The holding in *PSI*, 104 F.3d at 820 is not to the contrary. *PSI* simply held that "an antitrust plaintiff cannot succeed on a Kodak-type theory when the defendant has not changed its policy after locking-in some of its customers." *Id.* This does not mean that a defendant who changes its policy thereby obtains market power. *See Harrison Aire*, 423 F.3d at 384 ("We emphasize, however, that an 'aftermarket policy change' is not the *sine qua non* of a *Kodak* claim. An aftermarket policy change is an important consideration, but only one of several relevant factors.").

[20] As in *PSI*, Versamark customers negotiate with Kodak extensively over equipment purchases. DFOF, RE 88, ¶27, p.10.

B. The District Court Erred in Its Analysis of the Cost of Switching Away from Versamark Printers

It is worth explaining that there are two forms of switching at issue. The first is whether all rational customers will switch from Collins to Kodak ink because of Kodak's policy. The second, at issue in this section, is whether customer switching from Versamark printers to competitors' printers deters Kodak from exercising market power.

The district court erred in concluding that Collins raised substantial questions as to whether there are high costs that would deter customer from switching to other printing solutions. Op., RE 98, Page ID# 10609. Again, the court cited *no evidence* supporting its conclusion and provided *no standard* for determining that switching costs are high. According to *Kodak*, switching costs have to be "high relative to the increase in service prices." *Kodak*, 504 U.S. at 476. The *Kodak* Court was thus asking the same question courts ask to define the relevant market: could a hypothetical monopolist impose a significant, anticompetitive price increase. *See* p.40, *supra*. The district court should have asked: could Kodak profitably raise the price of refurbishment significantly or would so many customers switch out of their Versamark equipment to competitors' equipment (because switching costs are low relative to the increase in refurbishment prices) that it would contribute to making the price increase unprofitable?

Nothing in the district court's opinion answers this fundamental question. Switching costs must be offset against the potential benefits of switching, such as increased profits through lower TCOP. DFOF, Re 88, ¶184, pp.58-59. As noted, consumables comprise up to 80% of customers' TCOP. Thus, it might not take much of a reduction in its consumable costs achieved by switching to new equipment to convince a Versamark customer to switch out of old, fully depreciated equipment. Op., RE 98, Page ID# 10610; Markovits Decl., Ex. 1 ("Gamblin Decl."), RE 33-2, ¶47, pp.17-18. In fact, "there is evidence that several Versamark customers have or would switch to new equipment." Op., RE 98, Page ID# 10610; *see also* DFOF, RE 88, ¶186, p.59. Some of these customers switched to lower their TCOP. DFOF, Re 88, ¶26, pp.9-10. Others demanded price concessions on their Versamark needs by threatening to switch to competitors. *Id.*, ¶27, p.10. The court does not explain why these firms switched from Versamark printers to other technologies if switching costs are high. The obvious answer is that they are not high compared to the savings attained from switching. *Id.*, ¶¶26, 184, pp.9-10, 58-59.

Instead, the district court improperly reversed the burden of proof, concluding that the evidence "does not necessarily demonstrate that switching costs are not significant for the majority of customers." Op., RE 98, Page ID# 10610. But even *if* the majority of Versamark customers would not switch because

of a Kodak price increase, that still does not tell us whether the prospect of switching to competitors' equipment by a minority of customers would discourage Kodak from raising aftermarket prices unduly. It might only take a few customers switching to deter Kodak. *See United States v. Englehard Corp*., 126 F.3d 1302, 1306 (11th Cir. 1997) ("it is possible for only a few customers who switch to alternatives to make the price increase unprofitable"). That depends on the profits that Kodak sacrifices by losing Versamark ink and refurbishment sales versus the profits that Kodak gains by retaining the remainder of aftermarket sales at higher prices. The district court never attempted to strike this balance. Tr., RE 82, Page ID# 7850; DFOF, RE 88, ¶187, p.60.

Nor is the court's "majority" finding compatible with the all-rational-buyer test. If a minority of customers would switch to other printers because of Kodak differential refurbishment prices, then clearly Kodak's policy could ***not*** cause ***all*** rational customers to switch to Kodak's ink ***and the tying claim fails***.

Finally, the court supported its conclusion that switching costs were high because Kodak's new policy resulted in little switching by Versamark customers to Kodak's competitors. Op., RE 98, Page ID# 10610-10611. When Kodak pointed to the lack of customer switching from Collins ink to Kodak ink, however, the court took an inconsistent position, concluding that the dearth of switching just indicated that the results "remain to be seen." *Id.*, Page ID# 10604.

If the exact same evidence prompts the court to say the results "remain to be seen" on one occasion, the court cannot logically conclude, as it did, that the results have been seen on another occasion. Findings that are "internally inconsistent" are clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). *See also United States v. McNeal*, 995 F.2d 1067, 1075 (6th Cir. 1992) (findings that are "internally inconsistent, facially implausible [or] contradicted by extrinsic evidence" are clearly erroneous).

Obviously one cannot judge whether customers will switch to non-Kodak printers until Kodak has "forced" customers to pay more for a considerable period—something that is unlikely to happen based on the experience of the last year and a half. Thus, even if the district court had not reversed the burden of proof, it erred in finding that Collins had raised a substantial question as to whether there are significant switching costs because Versamark customers had not switched out of their Versamark equipment. Op., RE 98, Page ID# 10609.

C. The District Court Erred by Not Adequately Accounting for Kodak's Desire to Sell Prosper Printers

The evidence showing that Kodak has no market power in the aftermarket is amply demonstrated by the next issue the court addressed: whether the need to sell Prosper equipment to Versamark customers disciplines Kodak's behavior in the aftermarket. Op., RE 98, Page ID# 10611.

The district court did not seem to dispute that Kodak "needs to retain customers to sell its new Prosper equipment." *Id.* Indeed, the court found that Prosper is "a new and improved technology that is replacing Versamark printers," *id.*, Page ID# 10591; that "it is the future of [Kodak's] inkjet business," *id.*, *see also* DFOF, RE 88, ¶¶15, 190, pp.40, 60; and that "Versamark customers [are] prime prospects for buying Prosper systems." *Id.*

The court, however, failed to answer the question the *Kodak* Court held was fundamental to this issue, "whether the priced service would more than compensate for the lower revenues from lost equipment sales." *Kodak*, 504 U.S. at 476. Perhaps the court was attempting to address this issue through three observations. *First*, the printing industry as a whole is declining. Op., RE 98, PAGE ID# 10610. While the court did not explain why this is significant, perhaps it was thinking that Kodak cannot sell Prosper anyway given the market's decline. This, however, is contrary to the court's finding that Kodak [redacted] (*Id.*, Page ID# 10591), and the evidence that digital printing, which includes Prosper, is growing. DFOF, RE 88, ¶29, pp.10-11.

Second, the court may have been suggesting that Kodak would sacrifice long-term Prosper profits for short-term Versamark gains because Kodak, which

recently emerged from bankruptcy, "has some need for immediate revenue to fund its operations." Op., RE 98, Page ID# 10611. The court cites *no* evidence to support the finding, and there is none. To the contrary, the record evidence demonstrated the opposite.[21] Langenfeld Rep., RE41, ¶¶ 134-150, pp.57-64; *see also* DCOL, RE 88, ¶76, p.95. Nor is there any record evidence that the emergence from bankruptcy had anything to do with Kodak's incentives; to the contrary, there is no dispute that Kodak considers Prosper critical to its long-term success. Op., RE 98, Page ID# 10591; DFOF, RE 88, ¶¶15, 190, pp.5, 60 .

Third, the court observed that Kodak's policy "undercuts its argument that it is constrained by the responses of its customers." Op., RE 98, Page ID# 10611. Once again, the court forgot its own finding that Kodak had not been able to enforce its policy because "many customers pushed back." *Id.*, Page ID# 10596. That push back was effective *because* Kodak is trying to sell Prosper equipment to the same customers who need refurbishment of Versamark printheads. DFOF, RE

[21] Plaintiff's expert's conclusion that Kodak places a greater emphasis on "short run" profits is speculation. Plaintiff's expert pointed to an old article that cited Kodak's need to raise cash to exit bankruptcy, which Kodak has already done. He also cited articles that discuss a credit facility Kodak obtained in August 2013 that needs to be repaid or refinanced within six to seven years and hypothesized that Kodak's financial position makes it place a greater emphasis on generating cash and profits in the short run. He failed to explain why a loan that needs to be repaid by 2019 would lead Kodak to exploit its Versamark customers to the detriment of its Prosper customers Op., RE 98, Page ID# 10591.

88, ¶17, pp.6-7. This trade off certainly influenced Kodak senior management, which instructed its employees not to implement any policy that undermines Prosper sales. Wilson Dep. Ex. 10, RE 49-14, p.22. Thus, for two of the three market-power/market-definition criteria it considered, the court contradicted itself, concluding that Kodak had market power because it had a policy *even though* the policy was not succeeding.

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The district court observed that market power is the ability to force a purchaser to "do something that he would not do in a competitive market." Op., RE 98, Page ID# 10606-10607. But in finding market power, the court failed to apply that standard to the evidence. In a competitive market, a supplier cannot force customers to do something they do not want to do because competitors will check the exercise of market power. If a supplier raises its prices, for example, competitors would expand output to service those customers at better prices. The supplier would lose so many sales that it would have to lower its price to its former level. That is exactly the proof that Kodak presented as to what Collins would do to offset Kodak's pricing policy. *See* p.24, *supra*. So even if Versamark customers did not engage in lifecycle pricing and could not shift to competing equipment, Kodak still could not force customers to switch to Kodak ink because Collins would do what competitors do: cut its price to protect its market share.

Irrespective of whether meeting the price-cost test is required, the court committed reversible error in failing to apply its own market-power standard to the evidence.

IV. None of the Other Prongs of the Preliminary Injunction Standard Support the Issuance of an Injunction

As demonstrated above, the district court made numerous legal and factual errors in concluding that Collins had shown ***likelihood of success on the merits***.[22] That requires reversal, as likelihood of success is an essential requirement of a preliminary injunction. *See* p.18*, supra*.

Collins also had to show ***irreparable injury.*** Irreparable injury requires harm that is not speculative or theoretical, but certain and imminent. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991); *see also United States v. Emerson*, 270 F.3d 203, 262-63 (5th Cir. 2001) (a "trial court will abuse its discretion if it grants a temporary injunction when the evidence does not clearly establish that the applicant is threatened," not with a speculative, conjectural harm, but "with an actual, irreparable injury.") (internal quotations omitted). The district court *predicted* that Kodak's policy would eventually harm Collins by causing Collins to lose market share and suffer other concomitant adverse effects. Op., RE 98, Page ID# 10623-10624. But the court

[22] The court found likelihood of success on the merits of the tortious interference claim because it found likelihood of success on the antitrust claim. Op., RE 98, Page ID# 10622-10623. Hence, if success on the antitrust claim is not likely, success on the tortious interference claim is also not likely.

seemed oblivious to the impact of Collins's *predicted* conduct on the outcome. As the record makes clear, in the absence of an injunction, Collins could retain its customers by acting as a profit-maximizing competitor and cutting price. This would protect Collins's market share, and its workforce.[23] *See* p. 20, *supra*; DFOF, RE 88, ¶165, p.53.

If harm is avoidable, it is not irreparable. *See Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003) (Two things could keep plaintiff in business "an injunction or a license . . . Injury caused by failure to secure a readily available license is self-inflicted, and self-inflicted wounds are not irreparable injury."); *Med-Care Diabetic & Med. Supplies, Inc. v. Strategic Health Alliance II, Inc.*, 2014 WL 325663, at *6 (S.D. Ohio Jan. 29, 2014) ("Med-Care can avoid any potential harm to its reputation and the goodwill it has with its customers and physicians by continuing to deliver the prescription drugs.)" To be sure, price discounting would cut into Collins's profits. But the antitrust laws do

[23] The court was also concerned about Collins's ability to continue to develop its refurbishment business without a preliminary injunction. Op., RE 98, Page ID# 10624. Collins has annual revenues of over $35 million, and no debt. DFOF, RE 88, ¶19, p.7. There was no evidence that Versamark ink discounting would mean that Collins did not have enough cash to fund its fledgling refurbishment operation (*Id.*, ¶¶119-121, p.41). But if there was not enough cash, no evidence suggested that Collins could not borrow. The fact that Collins wants to fund its refurbishment business from its Versamark ink revenues (Tr., RE 81, pp.3-41:22-3-43:4; Gamblin Dep., Ex. 42, RE 53-25) does not constitute irreparable injury.

not "protect competitors from the loss of profits due to such price competition." *Cargill*, 479 U.S. at 116 (1986); *NicSand,* 507 F.3d at 452 ("NicSand gives no explanation why it has a right to preserve 38-49% margins—under the antitrust laws"). Thus, the only irreparable harm resulting from the preliminary injunction is the harm to Kodak. Op., RE 98, Page ID# 10624 ("Kodak also will be directly impacted financially by a preliminary injunction, and may suffer harm to its reputation.").

For the same reasons, the court's finding that a preliminary injunction is in the ***public interest*** is clearly erroneous because promoting competition is in the public interest. *See Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (noting that Congress has made the policy decision that "a policy favoring competition is in the public interest"); *Intergraph Corp. v. Intel Corp*., 195 F.3d 1346, 1360 (Fed. Cir. 1999) ("the purpose of the antitrust laws is to foster competition in the public interest, not to protect others from competition, in their private interest."). *See also* p. 21, *supra*. The district court's notion of "fair competition" (Op., RE 98, Page ID# 10625) is without legal authority because the antitrust laws do not create a federal law of unfair competition. Even an act of pure malice by one business competitor against another does not without more state a claim under the antitrust laws. *Brooke Grp.,* 509 U.S. at 225.

The district court also concluded that the injunction would protect the interest of Versamark customers in having "real choices." Op., RE 98, Page ID# 10625. There is no reason to believe Versamark customers will be deprived of choices given Collins's growing market share and its ability to offset Kodak's refurbishment policy by discounting. Thus, contrary to the district court's terse conclusion, the injunction harms the public interest by undermining Collins's incentives to offer discounts to its customers. Why lower your ink price when a court order is protecting your market share? As this Court has stated, "[i]t would be ironic indeed if the standards" for establishing antitrust injury 'were so low that antitrust suits themselves became a tool for keeping prices high.'" *NicSand*, 507 F.3d at 452 (quoting *Brooke Grp.*, 509 U.S. at 226-27).

Despite finding that the injunction was in the public interest, the court paradoxically acknowledged that there was ***substantial harm to others*** as a result of its injunction, Op., RE 98, Page ID# 10624 (noting that the injunction does not prevent "an across-the-board price increase"). This conclusion is even more compelling once one recognizes how the injunction's subversion of Collins's price-discounting incentives harms customers.

Finally, on several issues concerning likelihood of success, the court only found "serious and substantial questions" as opposed to a strong likelihood of success. Under these circumstances, Collins had to make a stronger showing on

the three other factors for a preliminary injunction to issue. *In re DeLorean Motor Co.,* 755 F.2d 1223, 1230 (6th Cir. 1985) (holding that "a lower court is within its discretion in issuing a preliminary injunction if the merits present a sufficiently serious question to justify further investigation" when the three other prongs are "all strongly in favor of issuing the injunction"); *see also Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1385-86 (6th Cir. 1995) (degree of likelihood of success required depends on other three factors). Because the other three factors tilt against Collins, substantial questions are not enough to justify a preliminary injunction.

CONCLUSION

For the reasons set forth above, the Court should vacate the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2014, the foregoing document was filed under seal, and served on the following parties via electronic mail and by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(g), Defendant-Appellant Eastman Kodak Company designates the following district court documents as relevant:

RECORD NO.	DESCRIPTION	PAGE ID# *OR* DOC. PAGE #
R. 1	Complaint for Injunctive Relief against Eastman Kodak Company	Page ID# 1-20
R. 2	Motion for Preliminary Injunction by Plaintiff Collins Inkjet Corporation	Page ID# 27-51
R. 18	Answer by Defendant Eastman Kodak Company	Page ID# 340-355
R. 33	Sealed Document. Response in Opposition to Motion for Preliminary Injunction by Defendant Eastman Kodak	pp.1-32
R. 33-2	Sealed Document. Amended Declaration of W.B. Markovits, Ex. 1	Exs. 1-2
R. 33-3	Sealed Document. Amended Declaration of W.B. Markovits, Exs. 7, 16	Exs. 3-18
R. 33-4	Sealed Document. Amended Declaration of W.B. Markovits, Ex. 23	Exs. 19-32
R. 37	Sealed Document. Declaration of Brian Morris filed in Support of Response to Opposition to Motion for Preliminary Injunction by Defendant Eastman Kodak Company	¶¶1-37, pp.1-12, Exs. A-G
R. 38	Sealed Document. Declaration of William Mansfield	¶¶1-83, pp.1-34, Exs. A-W
R. 41	Sealed Document. Declaration of Brandi M. Stewart filed in Support of Response to Opposition to Motion for Preliminary Injunction by Defendant Eastman Kodak Company, Ex. A (Langenfeld Expert Report)	¶¶1-211, pp.1-88, Exs. 1-21
R. 44	Sealed Document. Declaration of James E. Burke filed in Support of Response to Opposition to Motion for Preliminary Injunction by Defendant Eastman Kodak Company, Ex. PP	¶¶1-43, pp.1-6, Exs. A-PP
R. 49-14	Sealed Document. Deposition of Eric Wilson taken on November 14, 2013, Ex. 10	pp.1-38

R. 53-25	Sealed Document. Deposition of Lawrence Gamblin taken on November 10, 2013, Ex. 42	pp.1-2
R. 71	Transcript of Proceedings (Preliminary Injunction – Day 1, Part 3)	Page ID# 7328-7388
R. 72	Transcript of Proceedings (Preliminary Injunction – Day 1, Part 4)	Page ID# 7389-7451
R. 74	Transcript of Proceedings (Preliminary Injunction – Day 2, Part 1)	Page ID# 7453-7508
R. 75	Transcript of Proceedings (Preliminary Injunction – Day 2, Part 2)	Page ID# 7509-7598
R. 81	Sealed Document. Transcript of Proceedings (Preliminary Injunction – Day 3, Part 1)	pp.3-1 - 3-57
R. 82	Transcript of Proceedings (Preliminary Injunction – Day 3, Part 2)	Page ID# 7830-7874
R. 88	Sealed Document. Proposed Findings of Fact and Conclusions of Law filed by Defendant Eastman Kodak Company	¶¶1-83, pp.1-98
R. 98	Redacted Preliminary Injunction Order	Page ID# 10590-10625
R.103	Notice of Appeal	Page ID# 10694-10696