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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TABLE OF CONTENTS

Table of Authorities iii

Preliminary Statement.. 1

I. Kodak Properly Characterized the Standard of Review................................ 3

II. Collins Cannot Raise New Issues on Appeal 4

III. Collins Did Not Meet Its Burden of Proof on the Price-Cost Test 5

A. The Price-Cost Test Applies to Non-Explicit Tying........................... 5

B. Collins Did Not Carry its Burden on the Price-Cost Test.................... 8

C. Plaintiff's Costs Can Be Used in Applying the Price-Cost Test.......... 9

IV. The District Court Erred in Finding Conditioning 9

A. Most Collins Customers Pay Less if They Continue to Buy Collins Ink 9

B. The Past is Prologue: Kodak Has Not Been Able to and Will Not Be Able to Switch All Rational Buyers to Kodak Ink 13

C. The July Policy Does Not Attempt to Induce Switching 15

D. Even If Collins Customers Could Save on Ink and Refurbishment by Using Kodak Ink, They Still Might Not Switch 16

E. Collins Cannot Hide Behind Section 16 of the Clayton Act 18

F. Collins Never Attempted to Compete 19

V. Kodak Does Not Have Market Power 20

A. Kodak's Attempts to Institute Matched/Unmatched Pricing Do Not Establish Its Market Power 20

B. The Need to Sell Prosper Equipment Deters Kodak from Exploiting the Versamark Aftermarket 22

C. Information Costs Were Low 23

D. Customer Switching to Other Printers Deters Kodak from Exploiting Versamark Customers 25

VI. Collins's Irreparable Injury and Public Interest Arguments Are Without Merit 26

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Cases

Adv. Bus. Sys. & Supply Co. v. SCM Corp.,
415 F.2d 55 (4th Cir. 1969) 14

Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.,
--- F. Supp. 2d ----, 2014 WL 1017914 (D. Ariz. Mar. 17, 2014) 7, 18

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 1, 5

Bonnell v. Lorenzo,
241 F.3d 800 (6th Cir. 2001) 3

Cascade Health Solutions v. PeaceHealth,
515 F.3d 883 (9th Cir. 2008) 7, 28

Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.,
753 F.2d 1354 (6th Cir. 1985) 3, 18

Compuware Corp. v. IBM Corp.,
366 F. Supp. 2d 475 (E.D. Mich. 2005) 14

Conwood Co. v. U.S. Tobacco Co.,
290 F.3d 768 (6th Cir. 2002) 4

Eastman Kodak Co. v. Image Technical Servs.,
504 U.S. 451 (1992) 21

Fortner Enters., Inc. v. U.S. Steel Corp.,
394 U.S. 495 (1969) 21

Foster v. Barilow,
6 F.3d 405 (6th Cir. 1993) 4, 5

Harrison Aire, Inc. v. Aerostar Int'l, Inc.,
423 F.3d 374 (3d Cir. 2005) 17

J.C. Wykoff & Assocs. v. Standard Fire Ins. Co.,
936 F.2d 1474 (6th Cir. 1991) 4

LePage's Inc. v. 3M,
324 F.3d 141 (3d Cir. 2003) 6

Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.,
460 F. Supp. 2d 1012 (S.D. Iowa 2006)..19

Ne. Tel. Co. v. AT&T Co.,
651 F.2d 76 (2d Cir. 1981) 28

NicSand, Inc. v. 3M Co.,
507 F.3d 442 (6th Cir. 2007) (*en banc*)...................................... 9, 20, 26

Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.,
555 U.S. 442 (2009) 6

Performance Unlimited, Inc. v. Questar Publishers, Inc.,
52 F.3d 1373 (6th Cir. 1995) 3

Publications Int'l, Ltd. v. Meredith Corp.,
88 F.3d 473 (7th Cir. 1996) 3, 4

Se. Mo. Hosp. v. C.R. Bard, Inc.,
642 F.3d 608 (8th Cir. 2011) 6

Singleton v. Wulff,
428 U.S. 106 (1976) 4

Spirit Airlines, Inc. v. Nw. Airlines, Inc.,
431 F.3d 917 (6th Cir. 2005) 21, 28

St. Marys Foundry, Inc. v. Emp'rs Ins. of Wausau,
332 F.3d 989 (6th Cir. 2003) 4

Stearns Airport Equip. Co. v. FMC Corp.,
170 F.3d 518 (5th Cir. 1999) 28

Stuller, Inc. v. Steak N Shake Enters., Inc.,
695 F.3d 676 (7th Cir. 2012) 28

Taft Broad. Co. v. United States,
929 F.2d 240 (6th Cir. 1991) 5

Tire Sales Corp. v. Cities Serv. Oil Co.,
637 F.2d 467 (7th Cir. 1980) 13, 14

Tri-State Rubbish v. Waste Mgmt.,
998 F.2d 1073 (1st Cir. 1993) 28

Valassis Commc'ns, Inc. v. News Am. Inc.,
2011 WL 2413471 (D. Mich. June 15, 2011) 7

Virtual Maint. v. Prime Computer,
957 F.2d 1318 (6th Cir. 1992) 10

Warrior Sports, Inc. v. Nat'l Collegiate Athletic Ass'n,
623 F. 3d 281 (6th Cir. 2010) 4

White v. Anchor Motor Freight, Inc.,
899 F. 2d 555 (6th Cir. 1990) 5

Wonderland Shopping Ctr. Venture Ltd. P'ship v. CDC Mortg. Capital, Inc.,
274 F.3d 1085 (6th Cir. 2001) 3

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100 (1969) 18

ZF Meritor, LLC v. Eaton Corp.,
696 F.3d 254 (3d Cir. 2012) 5, 7

Statutes

15 U.S.C. § 15 18

15 U.S.C. § 18 18

15 U.S.C. § 26 18

Other Authorities

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Antitrust Law (3d ed. 2011) 6, 7, 8, 18, 29

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(South-Western Cengage Learning, 6th ed. 2011) 27

Preliminary Statement

In May 2012, when Collins stopped producing Versamark ink for Kodak, Kodak announced a pricing policy whereby customers would pay less for refurbishment if they used Kodak-brand ink. Collins claims Kodak's policy makes buying ink from Collins so expensive that all rational buyers will switch to Kodak. But in the next 17 months, Collins *gained* market share. This is not surprising. Even if Kodak had been able to enforce its policy, most of Collins's top customers would have found it cheaper to buy Collins ink and pay more for refurbishment than buy ink and refurbishment from Kodak. Given this sales trend and the incentive structure, it was clear error for the district court to grant a preliminary injunction.

Kodak's prices were also above cost. Contrary to the allegations of its own complaint, Collins argues it can challenge Kodak's pricing without showing below-cost pricing. But in *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-41 (1990) and succeeding cases, the Supreme Court held the price-cost test applies to all kinds of price-related exclusionary conduct. Alternatively, Collins asserts *for the first time* on appeal that Kodak's prices were below cost. This is patently improper, and wrong in any event.

Collins also maintains that the district court's finding that all rational buyers would buy Kodak ink instead of Collins ink was adequate, arguing that in the

context of a preliminary injunction, it does not matter that Kodak's pricing did not appreciably affect customer behavior. But whether the context is a preliminary injunction or a full trial on the merits, there is nothing wrong with Kodak's unilateral pricing conduct absent a level of coercion likely to divert *all* rational Versamark customers to Kodak-brand ink.

Versamark customers have a choice of what ink to use. Collins could have further influenced their purchasing decisions by lowering its ink prices, but decided not to do so. Under these circumstances, the antitrust laws do not permit the conclusion that Kodak's policy will induce all rational buyers to switch to Kodak ink. While Collins doubtless prefers fat margins, that is not a harm the antitrust laws were designed to prevent.

Finally, Kodak does not even have the market power necessary to create the problem Collins seeks to remedy. It cannot afford to lose sales of Prosper printers and annuity revenue and thus cannot afford to antagonize its key customers. Thus, Kodak was *not* able to enforce the May 2012 policy and Kodak only sought in July 2013 to give customers a choice. None of this suggests that Kodak can force Versamark customers to buy Kodak ink, much less entitle Collins to a preliminary injunction.

Far from preserving the competitive *status quo*, the district court's order undermines Collins's incentives to compete, and harms customers and the public

interest by protecting a competitor rather than competition. Kodak respectfully submits that the preliminary injunction should be vacated.

I. Kodak Properly Characterized the Standard of Review

Collins implies that Kodak misstated the standard of review, noting that preliminary injunctions are reviewed under an abuse of discretion standard. Collins's Response Brief (May 2, 2014) ("Response") 20. As Collins's own authorities make clear, a district court abuses its discretion where, as here, it relies on "clearly erroneous findings of fact, improperly applies the governing law, or uses an erroneous legal standard." *Wonderland Shopping Ctr. Venture Ltd. P'ship v. CDC Mortg. Capital, Inc.*, 274 F.3d 1085, 1097 (6th Cir. 2001) (quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir. 1985).

Further, contrary to Collins's Response at 24, when a court makes a legal error in issuing a preliminary injunction, it abuses its discretion even if the issue is one of first impression. *See, e.g.*, *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1386 (6th Cir. 1995) (district court abused its discretion in refusing to issue a preliminary injunction under the Federal Arbitration Act notwithstanding that the issue was one of first impression in the Circuit); *Publications Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 482 (7th Cir.

1996) (vacating preliminary injunction because of legal error as to issue of first impression in Circuit.)

II. Collins Cannot Raise New Issues on Appeal

In its Response, Collins repeatedly raises issues it could have raised below. "Issues not presented to the district court but raised for the first time on appeal are not properly before the court." *J.C. Wykoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1488 (6th Cir. 1991); *see also Warrior Sports, Inc. v. Nat'l Collegiate Athletic Ass'n*, 623 F. 3d 281, 286 n.3 (6th Cir. 2010).

Had Collins made these arguments below, Kodak could have developed a factual record on them. *St. Marys Foundry, Inc. v. Emp'rs Ins. of Wausau,* 332 F.3d 989, 995 (6th Cir. 2003) ("Trial level litigation is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues…[and] in order that litigants may not be surprised on appeal.'" (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976))); *accord Foster v. Barilow*, 6 F.3d 405, 409 (6th Cir. 1993).

The requirement that parties first raise arguments below applies equally to experts. *See, e.g.*, *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 791 n.5 (6th Cir. 2002) (rejecting attacks on expert's model not made below; "this Court reviews the case presented to the district court…not a better one fashioned on

appeal…") (citing *White v. Anchor Motor Freight, Inc.*, 899 F. 2d 555, 559 (6th Cir. 1990)).

By waiting until appeal to advance new arguments, Collins deprived this Court of the district court's fact-finding. *Foster*, 6 F.3d at 409; *Taft Broad. Co. v. United States*, 929 F.2d 240, 245 (6th Cir. 1991) (declining to consider new arguments because the district court's judgment "adds much to the deliberative process and allows [the appellate] court…to determine if an erroneous decision was made as to the issues presented").

III. Collins Did Not Meet Its Burden of Proof on the Price-Cost Test

Following an unbroken chain of Supreme Court cases, Kodak argued that its pricing policy could violate the antitrust laws only if Kodak's prices fell below cost. Kodak's Opening Brief (Apr. 30, 2014) ("Brief") 22-23. Collins does not dispute that the price-cost test governs allegedly exclusionary, unilateral pricing conduct, but argues that non-explicit tying requires an exception. It also improperly asserts for *the very first time* that it satisfied the price-cost standard. Response 20-21.

A. The Price-Cost Test Applies to Non-Explicit Tying

The price-cost test clearly applies to Section 1 of the Sherman Act. *E.g.*, *Atl. Richfield*, 495 U.S. at 339-41 (test applied to Section 1 vertical price fixing); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 269 n.9 (3d Cir. 2012) ("analysis

regarding the applicability of the price-cost test is the same" under Sherman 1 and 2 because "the Supreme Court has held that the price-cost test is not confined to any one antitrust statute"); Brief 22-23.

Collins asserts nevertheless that the "price-cost test is generally inapplicable" when the pricing conduct involves "multiple product markets." Response 22. Collins's argument is contrary to *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 442, 442, 451-52 (2009), where the Supreme Court applied the price-cost test in a multiple-product-markets case, rejecting a claim that defendant "squeezed" plaintiff's margins by raising the "wholesale price of inputs" (product market 1) while cutting "the retail price of the finished good" (product market 2). Nor can it be reconciled with application of the price-cost test to bundling, which is analytically indistinguishable from non-explicit tying. Brief 26-28; *see also Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 612-13 (8th Cir. 2011) (suggesting that price-cost principles apply to bundling); 10 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1758 at 358 (3d ed. 2011).[1]

Collins relies on *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). Response 22. But *LePage's* is at odds with other Circuits (Brief 26), and the Third Circuit has questioned its continued vitality because it has "been undermined by

[1] A few commentators would limit the use of the price-cost test under certain conditions (Response 23 n.65), but Collins has not shown that those conditions apply.

intervening Supreme Court precedent." *ZF Meritor*, 696 F.3d at 274 n.11 (citing *linkLine*, 555 U.S. at 447-48).[2]

Contrary to Collins's contention (Response 23-24), lower courts have begun to apply the price-cost test to non-explicit tying. *See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, --- F. Supp. 2d ----, 2014 WL 1017914 at *5 n.28 (D. Ariz. Mar. 17, 2014) (non-explicit tying claim rejected because, *inter alia*, plaintiff had not demonstrated that the package of tied goods failed the price-cost test) (citing 10 Areeda & Hovenkamp, ¶1758 at 358); *Valassis Commc'ns, Inc. v. News Am. Inc.*, 2011 WL 2413471 at *1 (D. Mich. June 15, 2011) ("the cost-based standard is to be used for bundling *and tying*.") (emphasis added). Indeed, to Kodak's knowledge, no non-explicit tying case, except the decision below, has *rejected* the price-cost test.

Finally, Collins contends that the price-cost test should not apply where the defendant has "simply raise[d] the unbundled price of the monopolized good." Response 23. Collins ignores the fact that Kodak increased some prices and lowered others. Brief 5-7; Response 7-8, 10-11, 27. Collins's contention is not valid in any event because the "attribution" form of the price-cost test "picks up

[2] The attribution test, the form of the price-cost test Dr. Langenfeld employed, addresses the concern expressed in *LePage's* about an equally efficient competitor who does not offer all the products in the defendant's bundle. Brief 27 n.8; *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 909 (9th Cir. 2008).

this strategy by attributing the full discount to the tied product." 10 Areeda & Hovenkamp, ¶1758, at 357. Thus, under a properly implemented price-cost test, "only rivals with higher costs will be excluded, whether or not bundling was accompanied by a price increase in the tying product." *Id.*; Brief 23-24.

B. Collins Did Not Carry its Burden on the Price-Cost Test

Although it was Collins's burden to prove below-cost pricing (Brief 30-31), Collins made no attempt to satisfy it below. Op., RE98, Page ID#10605. Collins belatedly seeks to meet its burden by presenting a *brand new* factual analysis to this Court. Not only is this improper (Section II, *supra*), the analysis is defective.

Collins's new analysis hinges on a new calculation of a [redacted]% Kodak ink margin. Response 27. But PX6 (App.5 at 937), the source for this calculation, estimates Kodak's lost margin on the sale of *Collins-brand ink* following Collins's termination of the supply arrangement. PX6 does not report Kodak's margin on the *manufacture* and sale of *Kodak-brand ink*, the proper metric. According to Collins's economist, the "basic margins" on *Kodak-brand ink* are [redacted]%. PX072, App.5 at 1004. While no other correction to Collins's newly proffered calculation is necessary to refute Collins's argument, it is worth noting that Collins calculates a 30% "penalty" based on one example (Response 27), when, as Collins concedes (*e.g.*, Response 11), the "penalty" depends on ink usage, which varies by customer.

C. Plaintiff's Costs Can Be Used in Applying the Price-Cost Test

If using plaintiff's costs is a "newly-minted" test (Response 26), Collins's complaint minted it. Brief 19-20. Not only does Collins ignore its complaint, it ignores the reasons for applying the price-cost test to plaintiff's costs (in addition to defendant's costs) in non-explicit tying cases. Brief 24-28. In such cases, the defendant should prevail if *either* cost standard is not satisfied because pricing above defendant's *or* plaintiff's costs is not coercive and should not result in all rational buyers switching. Brief 28-30.

Collins also ignores *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 452-54 (6th Cir. 2007) (*en banc*), in which this Court found no antitrust violation where *plaintiff* could have matched defendant's discounts but "for whatever reason…chose not to compete." *See also* Brief 26. The Court did not see the "nightmare" that Collins imagines would occur if courts used plaintiff's costs. Response 26. Finally, contrary to Collins's assertion (*id.*), no court would have to assess the costs of "all potential plaintiffs" – just the actual plaintiff's costs. *See NicSand*, 507 F.3d at 452-54.

IV. The District Court Erred in Finding Conditioning

A. Most Collins Customers Pay Less if They Continue to Buy Collins Ink

The district court acknowledged that "most large customers were still ordering from Collins," Op., RE98, Page ID#10597, but found conditioning based

on the "significant" refurbishment price differential.[3] *Id.* at Page ID#10601. The court relied on a single document (PX108, App.6 at 1054-91) that did not use actual Collins prices (Tr., RE74, Page ID#7492) and considered only three unrepresentative Collins customers.[4] PX108, App.6 at 1075; *see also* Langenfeld Rep., RE41, ¶171, p.74; Tr., RE75, Page ID#7576-7578. The court essentially eyeballed the numbers in PX108 and concluded that the overall refurbishment price differential was large based on no enunciated benchmark and no consideration of the policy's impact on other customers. Brief 33-34. It ignored

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[3] Collins defends the court's use of the "differential approach," contending it was "the primary if not sole factor in *Virtual Maintenance's* conclusion that conditioning is present." Response 41. In *Virtual Maint. v. Prime Computer*, 957 F.2d 1318, 1322-23 (6th Cir. 1992), *vacated and remanded on other grounds*, 506 U.S. 910 (1992), the plaintiff had no current business. "Some" customers desired to switch to plaintiff, but *none* did. *Id.* Accordingly, the Court concluded based on ***actual conduct*** that "the large price differential" (25 times larger than the one here (Brief 34)) "induces all rational buyers" of defendant's tying product "to accept" the tied product. *Virtual Maint.*, 957 F.2d at 1323.

[4] Plaintiff's expert did not analyze whether these three companies are representative (Tr., RE75, Page ID#7576), and agreed that an analysis based on more data – such as Dr. Langenfeld's analysis – is better than an analysis based on a small sample. *Id.*, Page ID#7577-78. While Collins argues that Mr. Preiser would not have used these customers if they were atypical (Response 33, n.80), it did not ask Mr. Preiser how he selected them. Brief 33-34.

Collins also argues that "for five major customers the cost of certain refurbished printheads would often be doubled (and in some cases tripled) if they used Collins ink." Response 11. These costs, however, are only for 9" printers for which Collins sells very little ink. *See* PX108, App.6 at 1074. The average increase is only ████% for the Versamark printer central to Collins's business. *Id.* at 1073.

Dr. Langenfeld's rigorous analysis showing it was cheaper for most Collins customers to use Collins ink and pay more for refurbishment than use Kodak ink and pay less. Brief 32-33.

Recognizing this critical defect in the Opinion, *for the first time on appeal* Collins disputes Dr. Langenfeld's analysis. Response 30-33. For example, Collins faults Dr. Langenfeld for using 2011 ink prices in Exhibits 16a and 16b (showing it was cheaper for 80% of Collins customers to use Collins ink and pay more for refurbishment assuming that neither party discounted its prices). Had Collins complained about Dr. Langenfeld's use of 2011 prices below, Dr. Langenfeld could have analyzed 2012/2013 prices and testified about whether they would have made a difference.[5] Having failed to object to the use of 2011 prices below, Collins cannot raise the issue on appeal.[6] *See* Section II, *supra*.

Nor is Collins correct when it asserts that Dr. Langenfeld assumed, counter-factually, that Kodak would not discount. Response 31-33. Dr. Langenfeld

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[5] Using 2012-2013 prices in Exhibits 16a and 16b, Collins would have profitably retained ***96%*** of its customers (assuming no discounting by either party). These calculations are based on Collins data contained in back up to Dr. Langenfeld's report and produced during discovery. Had Collins contested the use of 2011 prices below, Kodak would have put this information into the record. We do not expect the Court to give any credence to this extra-record footnote except for the following: it illustrates why it is improper for Collins to raise new issues on appeal.

[6] Ironically, Collins uses 2011 ink prices in calculating a supposed Kodak ███% ink margin. *See* p.8, *supra*, Response 27.

considered discounting in Exhibit 16c. Langenfeld Rep., RE41, ¶176, p.76; Langenfeld Supp. Rep., RE56-1, Ex.16c. That analysis used Collins's post-termination prices (Langenfeld Rep., RE41, ¶181, p.77-78), and controlled for variations in ink prices by calculating each customer's weighted average price. *See id.* ¶178, n.242, p.77; Langenfeld Supp. Rep., RE56-1, Exs. 16a-16c. Dr. Langenfeld concluded that if Collins discounted down to its average variable cost ("AVC"), and if Kodak discounted down to the 2011 Collins-brand price,[7] Collins would have profitably offset the unmatched refurbishment price for ***78%*** of its ink volumes. Brief 8 (citing Langenfeld Rep., RE41, ¶176, p.76).

Collins asserts that the district court rejected Dr. Langenfeld's findings as "manipulated." Response 32. The court actually said that *both* experts manipulated data. Op., RE98, Page ID#10601. This observation was not made in connection with any specific analysis, and it is not clear what the court meant by it. But even assuming, *arguendo*, that the court had a problem with Dr. Langenfeld's precise methodology, it is clear from Dr. Langenfeld's testimony that a substantial portion of Collins customers pay less in the aggregate if they stick with Collins ink, even if they pay more for refurbishment. Tr., RE81, 3-54:1-56:2. For this reason

[7] This was a conservative assumption. Kodak authorized but did not require its sales force to discount Kodak-brand ink to the average price for Collins-brand ink in 2011. Preiser Decl., RE43, ¶20, p.13.

alone, the conclusion that the refurbishment price differential would induce *all* rational buyers to switch from Collins ink to Kodak ink is clearly erroneous.

B. The Past is Prologue: Kodak Has Not Been Able to and Will Not Be Able to Switch All Rational Buyers to Kodak Ink

Kodak's policy has not dented Collins's market share. Faced with that reality, Collins argues that Kodak promised to enforce the policy in July 2013; that the conditions that once kept Kodak from enforcing its policy no longer apply; and that an injunction can address highly speculative future harm.

Collins invented the "promise of enforcement." Response 34. Kodak announced the policy in May 2012, but was not able to implement it.[8] Kodak did not enforce the July 2013 version against the majority of customers. Brief 6-7, 13; Op., RE98, Page ID#10596-97. Whether Kodak would have ever collected more for refurbishing most unmatched customers' printheads thus remained to be seen. Op., RE98, Page ID#10604. Notably, the district court made no finding that Kodak's future "implementation" of the policy would be effective.

Collins relies on *Tire Sales Corp. v. Cities Serv. Oil Co.*, 637 F.2d 467 (7th Cir. 1980), and similar cases for its promise-of-enforcement theory. But these

[8] Collins asserts that "[m]any [customers]…switched to Kodak ink" in response to Kodak's May 2012 policy (Response 12), but the footnote citations provide no indication that *any* customers switched to Kodak. Elsewhere, Collins states, "[t]he announcement of the policy, the threat alone, caused initial significant switching from Collins ink users." Response 36. Collins offers no support for this statement either.

cases take the same empirical approach as all others. *See, e.g.*, *id.* at 474 (customers switched with "rapidity" following threats); *Adv. Bus. Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969) ("SCM effectively…coerce[d] lessees to use only SCM supplies in their rental machines."); *Compuware Corp. v. IBM Corp.*, 366 F. Supp. 2d 475, 480-82 (E.D. Mich. 2005) (tying resulting in defendant winning contracts for the tied product 81% of the time as opposed to 16% without the practice). Far from helping Collins, these cases starkly contrast with the finding here that "the decline in purchase of Collins-brand Versamark ink that Collins will experience as a result of the July 2013 Policy is not clear." Op., RE98, Page ID#10603.

Next, Collins proposes its own conditions to explain Kodak's failure to attract Collins ink customers. Response 7-8, 36. It then suggests that these conditions have run their course and Kodak is now poised to capture all rational customers. *Id.* 37. These conditions are not reflected in the Opinion, and they do not suggest that customers are going to act any differently than they did before.

Indeed, while Collins argues that there was never any substantial customer pushback against the policy (Response 36-37), the district court found otherwise. Op., RE98, Page ID#10596 ("customers pushed back against the policy"). Kodak could not counter this pushback because Kodak management prohibited actions that would cause customer dissatisfaction or sacrifice future sales. *See* PX108,

App.6 at 1057 ("Guidelines from Executive Leadership…Avoid major customer dissatisfaction; Limit actions that impact[] future sales"); PX22, App.5 at 970 ("DP&E executive guidance to IPS: -Don't impact future sales."); PX6, App.7 at 1375 ("Taking the pricing action will roil the printing industry, cause customer complaints"); Tr., RE75, Page ID#7519-21. While Collins now asserts Kodak (and presumably the district court) overstated customer resistance, the lone example it offers – [REDACTED] – provides no support.[9] Response 36-37.

C. The July Policy Does Not Attempt to Induce Switching

Given Kodak's inability to use pricing to persuade Collins ink customers to switch to Kodak ink, it is pure speculation for Collins to say Kodak would have succeeded but for the injunction. Response 37. While Collins attempts to support its argument with statements from Kodak documents, it misleadingly uses those quotations to suggest that Kodak's intent in July 2013 was the same as in May 2012. Response 35.

The adoption of the July 2013 policy was a "fundamental change in approach" reflecting Kodak's revised perception. PX37, App.5 at 994. Kodak

[9] Collins claims that "Kodak's response" to [REDACTED] complaints about Kodak ink was to tell [REDACTED] "There is no option to accept or reject the policy or pricing." Response 37. But the quoted presentation was distributed *to Kodak employees* (not [REDACTED]) as a "starting point for a response." PX48, App.8 at 1528. The same email describes the agreed-upon response to [REDACTED], a plan that included no enforcement, but instead directed the sales representative to "share information" and "gather custom color ink samples from customer to allow new Kodak formulation." *Id.*

recognized that "customers are happier with choice" and Kodak intended to let them make that choice. *Id.* As the author of the July 2013 policy noted, "we really don't care if the ink ever comes back to Kodak or not. Financially, Kodak is better off if the ink does not come back." *Id.* *See also* Tr., RE75, Page ID#7526, 7571; Tr., RE76, Page ID#7616 (Collins's expert acknowledging that Kodak economically preferred customers to use Collins-brand ink under the July 2013 policy); Brief 6.

D. Even If Collins Customers Could Save on Ink and Refurbishment by Using Kodak Ink, They Still Might Not Switch

Pointing to the three customers in PX108, who may not be among the 78-80% of customers financially better off sticking with Collins ink, Collins asserts that "Kodak can hardly be suggesting that once Kodak enforced its policy those customers would not switch if their refurbishment penalty would exceed the total cost of their ink." Response 33. Collins's rhetorical question ignores the record evidence that, despite four months of alleged Kodak enforcement, two of the three PX108 customers continued to buy Collins ink, and Kodak had no expectation that they would switch. Tr., RE75, Page ID#7536-7537; Brief 34.

Even for the 20-22% of Collins customers who could lower their combined costs for ink and refurbishment by switching to Kodak, Collins never established that they would switch. Collins maintains that its inks are superior, differentiated products, it has better service, and it produces more and better custom colors.

Defendant's Proposed Findings of Fact ("DFOF"), RE88, ¶107, p.36. It asserts that after the termination of the parties' relationship some Collins-brand customers tested Kodak-brand inks and found them wanting. Response 8-9, 37 (discussing [redacted]). The one customer who testified said he would not buy Kodak-brand ink if his customers would be dissatisfied with his product. Defendant's Conclusions of Law ("DCOL"), RE88, ¶14, p.70. This evidence indicates that Collins's customers may be willing to pay a premium for Collins-brand ink. After all, Kodak-brand customers pay a premium, and they have not switched to Collins ink. DFOF, RE88, ¶201, pp.63-64. Given this record, the district court should have required Collins to demonstrate that its customers would actually switch to Kodak *if* they had to pay more because of Kodak's policy. *See Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005) ("Competitive markets are characterized by both price and quality competition, and a firm's comparatively high price may simply reflect a superior product.").

In sum, the record does not support the court's conclusion that "when push comes to shove" customers' decisions will be based solely on the refurbishment price differential. Op., RE98, Page ID#10606.[10] The court's conclusion is also

[10] The district court noted the importance of total cost of print ("TCOP"), but ignored the fact that TCOP includes all factors that affect printers' costs. This includes the costs printers incur when an ink problem causes its equipment to shut down, or when its customers are unhappy with a custom color. *See, e.g.*, Tr.,

inconsistent with the leading antitrust treatise, which recommends a presumption of non-tying as long as customers continue to buy from plaintiff. 10 Areeda & Hovenkamp, ¶1758 at 358; *Aerotec*, 2014 WL 1017914 at *5 n.28.

E. Collins Cannot Hide Behind Section 16 of the Clayton Act

Section 16 and *Christian Schmidt* do not excuse Collins's failure to demonstrate conditioning. Response 28. As *Christian Schmidt*, 753 F.2d at 1358, recognizes, Section 16 provides a "lower threshold standing requirement" for injunctive relief, 15 U.S.C. § 26, in contrast to Section 4 of the Clayton Act, 15 U.S.C. § 15, which requires an actual injury to plaintiff's business or property. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). But while Section 16 lowers the threshold for *standing*, the plaintiff must still "meet the customary requirements for a grant of preliminary injunctive relief." *Christian Schmidt*, 753 F.2d at 1357-58.

Christian Schmidt also concerned a proposed merger. Unlike mergers, which are illegal if "the effect…*may* be substantially to lessen competition," 15 U.S.C. § 18 (emphasis added), a pricing policy like Kodak's is problematic only if it forces "all rational buyers" to buy its ink. Brief 10, 31-32. Thus, a party seeking a preliminary injunction based on non-explicit tying must prove what "all rational

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RE70, Page ID#7292 (testimony by Mr. Gamblin that "ink quality and the service are critical to plants that operate 24 hours a day, where a downed press costs a business between, say, fifteen hundred to thirty-five hundred dollars an hour.").

buyers" have done or will do. *See Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, 460 F. Supp. 2d 1012, 1023-24 (S.D. Iowa 2006) (denying preliminary injunction because plaintiff had not demonstrated that the defendant's packaged offer was the only viable economic option). Here, the challenged conduct was announced by Kodak 17 months *prior* to the hearing yet none of the anticompetitive effects Collins claims will occur have occurred. This type of speculative harm cannot justify a preliminary injunction. *See generally* Brief 54.

Further, as Collins acknowledges, the preliminary injunction halted any potential anticompetitive effect "*before* it occurred." Response 29 (emphasis in original). In other words, there has not been – and, if the preliminary injunction stands, will never be – the pattern of switching that courts have always used to satisfy the all-rational-buyer standard. Brief 31-38. This makes it more difficult, perhaps impossible, to conclude that Collins has any likelihood of success on the merits.

F. Collins Never Attempted to Compete

Collins concludes its argument on conditioning by making the remarkable assertion that it attempted to compete by offering discounts and free ink. Response 12, 37-38. The documents it cites in support of this assertion concern potential plans to offer discounts – not actual discounting. *Id.* at 12 n.55-56. Collins's president admitted that Collins *never* discounted its ink in the United States

(Gamblin Dep., RE53, 298:22-299:4), and gave free ink to only two customers in Europe (where the policy was never enforced). *Id*. 121-123; Wieczorek Dep., RE52, 151, 159-163; DFOF, RE88, ¶98, p.32.

As for Collins's contention that competition is futile (Response 38), this Court has warned that plaintiffs cannot hide behind their own disinclination to compete. *NicSand*, 507 F.3d at 452-54. Of course, if that competition resulted in Kodak pricing below cost, Collins might satisfy the price-cost standard. But this Court should not allow Collins to prevail based on a speculative concern about too much future competition.

V. Kodak Does Not Have Market Power

A. Kodak's Attempts to Institute Matched/Unmatched Pricing Do Not Establish Its Market Power

Collins argues that Kodak's attempt to increase unmatched refurbishment prices establishes Kodak's market power. Response 42. However, the district court found that Kodak "never officially implemented [the May 2012 Policy], as many customers pushed back," that Kodak had not enforced the July 2013 Policy against large customers who "represent the majority of ink volume and revenue," and that "[m]ost large customers still were ordering from Collins." Op., RE98, Page ID#10596. The July 2013 policy became effective on August 1, 2013, but only in the United States and Canada, and only for a minority of customers in terms of volume. Tr., RE75, Page ID#7522, 7547. Collins did not establish that

this partial implementation diminished its market share. This natural experiment clearly demonstrates that Kodak has no market power. It is buttressed by a second natural experiment regarding Kodak's inability to raise ink prices.[11] Brief 40-41.

Collins's focus on Kodak's attempts to effectuate its policy to establish Kodak's power ignores the fact that market or monopoly power requires more than an *attempt* to raise price or restrict output; it is "the *ability* of a single seller to raise price and restrict output" that matters. *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 935 (6th Cir. 2005) (emphasis added) (citing *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 464 (1992), quoting *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969)). Even Collins's expert agreed that determining whether Kodak had market power requires determining whether market conditions force customers to switch to Kodak ink. Tr., RE75, Page ID#7588. Kodak's failure to fully implement the policy, and the policy's failure to cause customers to switch, refute plaintiff's market-power claim.

[11] Collins asserts that its expert showed flaws in Dr. Langenfeld's natural experiment concerning ink prices. Response n.98. Collins's expert suggested that changes in input costs *may* have biased the experiment. PX72 at ¶32, App.5 at 1012. He provided no evidence of that, and Dr. Langenfeld testified that input costs had not changed substantially. Langenfeld Rep., RE41, ¶164, p.70.

B. The Need to Sell Prosper Equipment Deters Kodak from Exploiting the Versamark Aftermarket

Collins barely addresses how Kodak's incentive to sell Prosper printers deters Kodak from exploiting Versamark customers.[12] Brief 50-54; Response 43-44. There is overwhelming evidence of the deterrent effect. *See, e.g.*, Langenfeld Rep., RE41, ¶125, p.55 (indicating that from 2010-2013, between [REDACTED] of new Prosper equipment purchasers were legacy Versamark customers); Op., RE98, Page ID#10591 (finding that Versamark customers are prime candidates for buying Prosper equipment); RE38, ¶41, p.19-20 (Mansfield Decl.) ("while the Versamark consumables revenue is an important aspect of Kodak's business, if faced with an opportunity to sacrifice Versamark margin to secure a Prosper future, I would always secure the Prosper future."); Tr., RE75, Page ID#7521 ("[Executive management]…didn't want us to dissatisfy the customers" because "it would impact the ability to sell our Prosper equipment."). Kodak management

[12] Collins refers to its expert's rebuttal report (Response 43 n.99) but fails to describe it. Kodak's expert determined that it made no economic sense for Kodak to sacrifice significant Prosper sales to gain relatively minor annuity ink sales. DX186 at ¶¶116-125, App.3 at 452-58. Collins's expert asserted that Kodak's projections have been wrong before, so its Prosper projections may be inaccurate. PX72 at ¶28, App.5 at 1011. Even if this were correct, if Kodak believes its projections, it will not take actions that imperil those projections. Collins's expert also asserted Kodak is apprehensive about a second bankruptcy, and thus unconcerned about long-term Prosper profits. PX72 at ¶30, App.5 at 1011-12. But he presented no evidence supporting this theory relating to concerns about a second bankruptcy, and it is contrary to the bankruptcy court's confirmation order, which binds the parties in this court. DCOL, RE88, ¶76, p.95.

continually instructed its personnel not to enforce any policy that would result in lost Prosper sales. *See* pp.16-17, *supra*. As a result, Kodak did not enforce its May 2012 policy, and only attempted to enforce the July 2013 iteration against a minority of customers. Brief 6-7.

Collins also fails to address how Kodak could have market power given its reliance on sophisticated, penny-conscious customers who can decline to purchase Prosper equipment. To determine whether a firm can exercise market power, a court must determine whether the benefit of the price increase (*e.g.*, higher ink revenue) outweighs the revenue from lost sales (*e.g.*, lost Prosper revenues). Brief 47. Neither the district court nor Collins undertook this required analysis.[13]

C. Information Costs Were Low

Collins's information-cost argument begins by suggesting that Kodak cherry picked "example[s]" where the *Kodak* Court would not find an information cost problem. Response 45. If they are "examples," they reveal the Court's reasoning, and that reasoning applies here. For instance, the Court was concerned that customers would refrain from lifecycle pricing where the cost of service is small

[13] *For the first time*, Collins cites PX22, App.5 at 971, for the proposition that the financial impact of not enforcing the policy was higher than the impact of enforcing. Response 44. The page Collins references does not discuss the policy at issue in this case—it is about refusing to refurbish entirely. The author of the document does not recommend a "no refurb" policy and one has never been implemented. Finally, the profits discussed on page 971 are *2013* profits, not Kodak's profits from long-term Prosper sales.

compared to equipment prices. Because the cost of service is not small compared to equipment prices (Brief 44), Collins's customers would protect themselves through lifecycle pricing, a suggestion that is borne out by the evidence: Versamark customers engage in lifecycle pricing. Brief 44. The *Kodak* Court also recognized that sophisticated customers would protect themselves through lifecycle pricing, but expressed concern about the remaining customers. Collins cannot deny the sophistication of Versamark customers. Brief 45.

Next, Collins argues that Kodak's policy surprised its customers (Response 45), but offers no supporting evidence. Response 45, n.87. It would not surprise sophisticated customers that a supplier would exercise market power if a contractual lock-in gave the supplier market power. If sophisticated customers lock themselves in, they would either protect themselves upfront *or* they must have concluded that the lock-in does not generate supplier market power. Brief 44-46. This explains why customers would only be surprised by an unexpected change in market structure (not evident here) that gives the supplier market power. Brief 45; DFOF, RE88, ¶¶173-76, p.56-57; Tr., RE75, Page ID#7593-96.

Finally, Collins never established that until recently Kodak's "price for a refurbished printhead had always been the same regardless of the ink used." Response 7. Collins cites to no evidence covering the period before the Supply

and Reseller Agreement when Collins and Kodak were competing. *Id.* at n.29. That is when you would expect to see such price differences among customers.

D. Customer Switching to Other Printers Deters Kodak from Exploiting Versamark Customers

Collins offers no analysis to bolster the lower court's inadequate findings regarding the extent to which switching disciplines Kodak's exercise of market power. Brief 47; Response 46-48. The fundamental unanswered question is whether customers switching away from Versamark printers would contribute to making an aftermarket price increase unprofitable. Brief 47-48.

Rather than addressing this question, Collins compares the cost of switching printers with unmatched refurbishment costs. Neither Collins nor the district court squares this comparison with the undisputed fact that newer technologies are replacing Versamark printers. DFOF, RE88, ¶¶13, 26, pp. 4-5, 9-10. A Kodak attempt to exploit its customers could tip the balance and cause Versamark customers who are considering upgrading to do so. Tr., RE75, Page ID#7592. Indeed, the record reflects such consideration and such switching. Brief 48; Tr., RE75, Page ID#7520, 7590-92; Tr., RE76, Page ID#7638-39.

Kodak accounted for this phenomenon in its July 2013 policy, noting that Kodak was making a "fundamental change in our approach" because the annuity revenue that results from keeping customers using Versamark "is critical" and leveraging its position in refurbishment would be to Kodak's "disadvantage."

PX37, App.5 at 994. *See also* p.14, *supra* (concerning the ever-present management concern that Kodak not act in a way that sacrificed future sales).

Finally, neither the court nor Collins consider the potential that switching by a minority of customers could deter Kodak from exercising market power, as the loss of those customers might reduce profits more than the sale of additional ink increased profits. Brief 49. Such switching has an additional implication: it means the all-rational-buyer standard cannot be satisfied as some customers would switch printers rather than buy Kodak ink.[14] Brief 49.

VI. Collins's Irreparable Injury and Public Interest Arguments Are Without Merit

Collins argues that it will be irreparably injured if it discounts to AVC because pricing at AVC would eventually drive Collins from the ink market. Response 48-49. There is no doubt *NicSand* requires plaintiffs to discount to avoid injury. Brief 26. So Collins argues for an average-total-cost ("ATC") rather than AVC standard. Response 49-51. The Court, however, need not decide between AVC and ATC because Collins has not met its burden under either standard.

For the first time, Collins challenges Dr. Langenfeld's finding that Collins could retain 78% of its sales without going below its ATC (DFOF, RE88, ¶164,

[14] Collins, like the district court, reverses the burden of proof contending, "Kodak provided no evidence that customers, facing high switching costs, would nevertheless switch to new printers rather than switch to Kodak ink when faced with a possible price penalty." Response 47.

pp.52-53; DX800 (Tab 24), App.5 at 817), on the ground that Dr. Langenfeld "arbitrarily subtracted $1,000,000 in refurbishing development costs from Collins *Versamark Ink division's* cost figures." Response 50 n.111 (emphasis in original). The $1,000,000 represented monies Collins spent to develop a *printhead refurbishment* operation. *See* Tr., RE72, Page ID#7414-15. Because that has nothing to do with the cost *of producing ink*, Dr. Langenfeld properly removed it from the calculation. Tr., RE81, 3-44:21-47:13.

Even if Collins *had* pointed to real errors in the ATC analysis, the AVC benchmark is consistent with economics and the logic of a preliminary injunction. A preliminary injunction is an interim remedy. Over the long run, a firm might not continue to invest in a particular activity if it could not cover its ATC.[15] Response 50. But over the shorter run even the authors of the text Collins cites agree that a firm only shuts down if the price it receives is less than it marginal cost (for which AVC is the proxy used by the courts and commentators). N. Gregory Mankiw, *Principles of Microeconomics* 285 (South-Western Cengage Learning, 6th ed. 2011) ("The short-run and long-run decisions differ because most firms cannot avoid their fixed costs in the short run but can do so in the long run"); *see also* Tr., RE81, 3-36:5-37:2 (explaining that the AVC test is relevant for a preliminary

[15] Contrary to Collins's assertion (Response 49), direct labor expenses are included in Dr. Langenfeld's AVC calculation. DX800 (Tab 14), App.5 at 810.

injunction and that it would be economically rational for Collins to continue to compete for at least the next two years). *See also* Tr., RE81, 3-36:14-17.

Collins has not established that it would forgo any investment in ink, let alone that it would exit the ink market, if it had to price at AVC during the preliminary injunction period. The clear conclusion is that AVC can be used here and generally in a preliminary injunction context.[16]

The AVC benchmark is also the conventional benchmark for the price-cost standard. Indeed, this Court deems AVC "a generally reliable indicator" (although it offers some latitude if the plaintiff proves things that Collins has not established). *Spirit Airlines*, 431 F.3d at 938. Other courts are even more definitive in the use of AVC. *See, e.g.*, *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999); *Tri-State Rubbish v. Waste Mgmt.*, 998 F.2d 1073, 1080 (1st Cir. 1993); *Ne. Tel. Co. v. AT&T Co.*, 651 F.2d 76, 87-88 (2d Cir. 1981); *Cascade*, 515 F.3d at 909-10 (adopting variable cost for use in bundling cases). *See also* Phillip Areeda & Donald F. Turner, *Predatory Pricing & Related*

[16] *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 679 (7th Cir. 2012) is not to the contrary. Response 52. In *Stuller*, a franchisee alleged that the franchisor's pricing policy violated the franchise agreement. The Seventh Circuit affirmed the grant of a preliminary injunction, stating that the franchisee's harm would not be self-inflicted if, for example, the mandated pricing policy made it "impossible to viably operate." *Id.* Collins can viably operate by pricing above AVC.

Practices under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 700-18 (1975); 10 Areeda & Hovenkamp ¶739b.

Collins also asserts competition is not in the public interest. Response 51. This *new argument* does not recognize that if Collins discounted, Kodak might respond and Collins might match that response. Customers would benefit from that competition. Collins worries about Kodak responding with higher "penalties" or lower prices. *Id*. But if Kodak's response forces Collins below AVC, Collins could then satisfy the price-cost standard. Until then, Collins must compete.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 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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