IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SKYRIVER TECHNOLOGY SOLUTIONS, LLC, et al.,	:	
	:	Case No. 2:10-cv-1017
Plaintiffs,	:	
	:	Judge Watson
vs.	:	
	:	Magistrate Judge Kemp
OCLC ONLINE COMPUTER LIBRARY CENTER, INC.,	:	
	:	
Defendant.	:	

DEFENDANT OCLC ONLINE COMPUTER LIBRARY CENTER, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' Opposition to OCLC's Motion to Dismiss (the "Opposition" or "Mem. Opp.") makes clear that this case is simply an attempt by Plaintiffs to use the court to gain free access to WorldCat – a resource the Complaint concedes OCLC has built over the last forty years and which is only available for use by libraries that are willing to share in the cost of its maintenance and improvement. In asserting that OCLC has violated the antitrust laws by (1) not giving Plaintiffs the benefits of OCLC's innovation, and (2) by asserting that the Court should regulate OCLC's pricing to allow its customers not to pay for the maintenance and improvement of WorldCat while still receiving its benefits, the Opposition ignores Supreme Court and Sixth Circuit controlling precedent and the facts Plaintiffs have admitted.

Plaintiffs boldly claim that OCLC has mischaracterized their Complaint, but then fail to provide even one example in which OCLC has misstated the claims pled. Instead, Plaintiffs repeatedly claim that their allegations contain facts sufficient to state a plausible claim. However, Plaintiffs only support that assertion with a string cite to conclusory and duplicative allegations in the Complaint, rather than any meaningful discussion of those allegations.

Further, Plaintiffs' Opposition either ignores virtually all relevant authorities cited by OCLC or mischaracterizes the holdings of those cases. A simple comparison of the Tables of Authorities from OCLC's Motion to Dismiss ("Motion") with the Opposition reveals that Plaintiffs do not even mention, let alone distinguish, nineteen Sixth Circuit authorities cited by OCLC, on issues ranging from the pleading standard to antitrust injury to the requirements to state a tying claim.[1] Likewise, the Opposition never addresses three of the leading Supreme

[1] Specifically, the Opposition fails to cite any of the following cases: *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603 (6th Cir. 2009); *Total Benefits Planning Agency, Inc v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430 (6th Cir. 2008); *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426 (6th Cir. 2008*); Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass'n*, 524 F.3d 726 (6th Cir. 2008); *Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493 (6th

Court cases cited in the Motion – *Atl. Richfield Co. v. USA Petroleum Co*., 495 U.S. 328 (1990), *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Similarly, it barely acknowledges the two most significant Supreme Court cases of recent years dealing with monopolization claims – *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc*., ___ U.S. ___, 129 S. Ct. 1109 (2009), and *Verizon Commc'ns. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) – and the *en banc* Sixth Circuit decision in *NicSand v. 3M Co*., 507 F.3d 442 (6th Cir. 2007), addressing the limitations on when a competitor can complain that it does not like the defendant's pricing.

A. Plaintiffs' Assertion that OCLC Has Attached the Wrong Record Use Policy Ignores Plaintiffs' Own Previous Pleadings, and Is an Attempt to Dodge the Lack of Any Specific Allegations as to What the Policy Says.

The Opposition's attack on OCLC for referencing its current records use policy (*i.e.*, "Rights and Responsibilities for use of WorldCat") is a red herring. Neither policy says what Plaintiffs claim, and Plaintiffs conveniently chose not to attach the previous policy. This maneuvering is a clear illustration of why the Supreme Court requires a pleading threshold to support a plausible claim and does not permit conclusory pleadings that dodge such facts. Plaintiffs seek to prohibit the Court from reading for itself the language of any OCLC policy.

In opposing transfer to this Court, Plaintiffs attached OCLC's current records use policy to the sworn declaration of its counsel, averring it to be a "true and correct cop[y] of OCLC's WorldCat use and transfer policy now known as 'WorldCat Rights and Responsibilities for the

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Cir. 2007); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc*., 485 F.3d 880 (6th Cir. 2007); *J.P. Silverton Indus. L.P. v. Sohm*, 243 F. App'x 82 (6th Cir. 2007); *Smith Wholesale Co. v. Philip Morris USA, Inc*., 219 F. App'x 398 (6th Cir. 2007); *Caruana v. Gen. Motors Corp*., 204 F. App'x 511 (6th Cir. 2006); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004); *N.W.S. Mich., Inc. v. Gen. Wine & Liquor Co., Inc*., 58 F. App'x 127 (6th Cir. 2003); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc*., 185 F.3d 606 (6th Cir. 1999); *Valley Prods. Co., Inc. v. Landmark, A Div. of Hospitality Franchise Sys., Inc.*, 128 F.3d 398 (6th Cir. 1997); *Tarrant Serv. Agency v. Am. Standard*, 12 F.3d 609 (6th Cir. 1993); *HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874 (6th Cir. 1991); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co*., 917 F.2d 1413 (6th Cir. 1990); *Axis, S.p.A. v. Micafil, Inc*., 870 F.2d 1105 (6th Cir. 1989); *Smith v. N. Mich. Hosps*., 703 F.2d 942 (6th Cir. 1983); *Richter Concrete Corp. v. Hilltop Concrete Corp*., 691 F.2d 818 (6th Cir. 1982).

OCLC Cooperative,' effective August 1, 2010." Doc. # 21 ¶ 3 & Ex. B. Faced with the actual language of that policy, however, and the fact that it cannot be construed as a prohibition on a library sharing its own records with Plaintiffs or any other entity, Plaintiffs backtrack from their counsel's sworn declaration and claim that it was the *previous* policy that was the problem. But even the title of the old policy – "Guidelines for the Use and Transfer of OCLC Derived Records" (which is cited in the current policy) – belies any contention that the policy was (a) more than a guideline, or (b) applicable to a library's own records.

At least as important, the Opposition simply ignores OCLC's arguments regarding the deficiencies in Plaintiffs' attempt to recast these guidelines as impairing Plaintiffs' ability to offer a cataloging product. The Complaint does not allege that OCLC ever used these guidelines to prevent a library from providing its catalog records to Plaintiffs (or any other entity) or that any of Plaintiffs' customers were unable to provide Plaintiffs with their records. Plaintiffs do not dispute this fact. Likewise, by their silence, Plaintiffs concede that they do not claim that OCLC's policies prevent Plaintiffs from accessing other sources of records, for example, the Library of Congress. The gist of Plaintiffs' argument is that OCLC is prohibited from recommending libraries not sign contracts with commercial entities that want OCLC's records.[2] As discussed below, this falls well short of stating a claim for a violation of the antitrust laws.

B. OCLC's Motion Addresses All of Plaintiffs' Remaining Allegations.

Plaintiffs claim, but never substantiate, that OCLC has avoided the actual allegations in the Complaint. In fact, OCLC's Motion has addressed head-on all of the allegations in the Complaint and has shown them wanting. Specifically, OCLC's Motion provided a detailed

[2] Plaintiffs' assertion that OCLC does not claim a copyright in WorldCat also flies in the face of the Guidelines they have attached. On page 3 of Ex. B (Doc. #21-1,at 18), the Guidelines specifically state: "[w]hile … OCLC claims a copyright in WorldCat as a compilation, it does not claim copyright ownership of individual records." This sentence makes plain that the policy (and its predecessor) in no way seeks to limit a library's use of its own records.

review of what Plaintiffs actually have plead in this case. (Mot. 4-10.) In responding to this review, Plaintiffs simply ignore most of the salient points. For example, Plaintiffs continue to complain about the advantages WorldCat gives OCLC, but they do not claim to sell a competing service. Thus, Plaintiffs concede that they compete with OCLC only in selling a cataloging subscription, where WorldCat functions to enhance OCLC's products and to make them more efficient. (Mem. Opp. 1-2.) Likewise, Plaintiffs continue to maintain (falsely) that Innovative does not compete in the ILL market, but never make any factual allegations that would support the conclusory claim that Innovative has taken steps to enter that market. (*Id.* at 3.) Plaintiffs also disclaim the allegation in the Complaint (¶ 76) that library records in WorldCat should be "freely" available. (Mem. Opp. 3.) Instead they now limit their claim, stating WorldCat should be available at "terms that are just and reasonable," but ignoring the fact that they never made any offer to purchase access to WorldCat. (*Id.*) Plaintiffs also continue to complain about the merging of OCLC and Research Libraries Group, but fail to allege any pertinent facts that would allow an assessment as to whether that transaction was anticompetitive. (*Id.* at 6.) Finally, while Plaintiffs insist that they have adequately pleaded the relevant markets, their market allegations remain conclusory. (Mot. 4-6.) Attaching a request to take judicial notice of library statistics does not solve these deficiencies: the fact that these statistics list a separate category for academic libraries does not make them a separate market or answer the question of how they could be a separate market when they buy the same cataloging products as other libraries.

II. ARGUMENT

A. Plaintiffs Ask the Court to Ignore the Sixth Circuit's Pleading Requirements.

In addressing the standard for a Motion to Dismiss, the Opposition downplays the changes in that standard brought by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and never addresses the Sixth Circuit's articulation of that standard. This Court's own decision in

Kroger Co. v. Sanofi-Aventis, 701 F. Supp. 2d 938, 949 (S.D. Ohio 2010) (Watson, J.), however, rejects any attempt to sidestep the requirement of specific and plausible pleadings: "[S]omething beyond the mere possibility of [relief] must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value." (citations omitted); *see also In re Plavix Indirect Purchaser Antitrust Litig.*, Case No. 1:06-cv-226, 2011 U.S. Dist. LEXIS 8940 *8-9 (S.D. Ohio Jan. 31, 2011) (Watson, J.).

Even before *Twombly*, the Sixth Circuit was "reasonably aggressive" in dismissing antitrust claims at the pleading stage. *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 403 (6th Cir. 1997). *See also NicSand*, 507 F.3d at 450; *Indeck Energy Svcs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 976 (6th Cir. 2000); *In Re Plavix Litig.*, 1:06-cv-226, 2011 U.S. Dist. LEXIS 8940, at *8-9 (S.D. Ohio Jan. 21, 2011). Plaintiffs' attempt to avoid the *Twombly* standard and controlling Sixth Circuit authority is only the first of many times where Plaintiffs ignore pertinent cases.[3]

B. Plaintiffs Ignore the Overwhelming Sixth Circuit Case Law Requiring Dismissal for Failure to Plead Antitrust Injury.

1. Plaintiffs Failed to Allege Antitrust Injury.

While the Sixth Circuit has made it clear that antitrust injury is a threshold issue to be addressed in deciding a motion to dismiss, *NicSand*, 507 F.3d at 450, Plaintiffs avoid OCLC's arguments by asserting, through a string cite to the Complaint, that they have sufficiently pled antitrust injury. Plaintiffs concede, however, that the mere allegation that OCLC is a monopolist is insufficient grounds to support a claim of antitrust injury. (Mem. Opp. 17-18.) Plaintiffs'

[3] Further, Plaintiffs do not assert that their claims can be salvaged by amendment of their Complaint; therefore dismissal with prejudice is appropriate. *Total Benefits Planning Agency*, 552 F.3d at 437; *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 853-54 (6th Cir. 2006); *Sinay v. Lamson & Sessions, Co.*, 948 F.2d 1037, 1042 (6th Cir. 1991).

reliance on factually and legally distinguishable cases – *Lorain Journal*, *Aspen Skiing* and *Conwood*, is the type of conclusory pleading rejected by the Sixth Circuit as not pleading a plausible antitrust injury.[4] *CBC Cos., Inc. v. Equifax*, 561 F.3d 569, 572 (6th Cir. 2009).

Likewise, while Plaintiffs claim they have alleged barriers to entry, the Complaint does not allege any facts related to the records use policy – there are no allegations in the Complaint sufficient to suggest that OCLC's records are in any way necessary for competition, as opposed to simply giving OCLC a competitive advantage. The fact that SkyRiver sold its product without these records, by instead using readily available Library of Congress records, bars any inference that a lack of access to WorldCat records forecloses competition.

While Plaintiffs seek to avoid this fact, the fundamental premise of the Complaint is that the antitrust laws ought to give them access to WorldCat, and that OCLC ought to be prohibited from using the advantages of WorldCat in competing with them. (Compl. ¶¶ 24-25, 76, 83-84.) Plaintiffs do not cite a single case to support the Complaint's core allegations: that OCLC is too strong a competitor. This is precisely the type of allegation that does not state a plausible claim of antitrust injury. *NicSand*, 507 F.3d at 450.

2. Plaintiffs Lack Antitrust Standing.

As discussed in OCLC's Motion, Plaintiffs fail to meet three of the essential elements identified in the Sixth Circuit's test for antitrust standing: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm. *Indeck Energy Servs. v. Consumers Energy Co.*, 250 F.3d 972, 976 (6th Cir. 2000). Plaintiffs' own arguments make it clear that Plaintiffs fail this test. Plaintiffs alleged only a competitive harm to Michigan State

[4] None of these cases addresses antitrust injury, and accordingly, OCLC will address them in its discussion of the monopolization claim, See II.C.1.c, which is as close as these cases come to being relevant to the Motion.

and Cal State – Long Beach, if anyone. Specifically, these libraries allegedly "have suffered harm because not all of their holdings are included in WorldCat and therefore are unavailable to other ILL subscribers to borrow," "are also not able to earn lending credits because their new holdings are not in WorldCat," and do not receive the full value of the ILL subscriptions. (Mem. Opp. 9.) Other libraries purportedly are harmed because of "not being able to borrow new holdings from libraries that use SkyRiver." (*Id.*) All of this purported harm is to *libraries*, not Plaintiffs. The only harm purportedly suffered by Plaintiffs is the speculative loss of sales to unidentified customers. (*Id.*) Under Sixth Circuit precedent, Plaintiffs have not shown that they suffered direct injury (other than pure speculation as to what libraries would do if OCLC subsidized Plaintiffs' prices). Thus, Plaintiffs lack antitrust standing.

C. Plaintiffs Ignore Much of OCLC's Authority and the Requisite Elements of their Alleged Claims.

1. Plaintiffs' Monopolization Claim Fails as a Matter of Law.

a. Plaintiffs Concede by Their Silence that Much of the Complaint Is Insufficient to State a Monopolization Claim.

In its Motion, OCLC addressed the following facts alleged in the Complaint that purported to state a claim of unlawful monopolization:

- OCLC is using its monopoly in its WorldCat database and ILL as leverage to force libraries to purchase cataloging services (Compl. ¶ 80);
- OCLC is maintaining a cataloging monopoly by selective price increases and selective price cuts (*id.* ¶ 80), excluding SkyRiver by raising price for record uploading, and by selectively cutting price as to its cataloging service (*id.* ¶ 81); and
- OCLC is maintaining a monopoly in bibliographic, ILL, and cataloging markets by (a) requiring exclusive dealing, (b) requiring members to assist in developing new products, (c) "aggressive" acquisitions, and (d) unreasonably denying bibliographic metadata in WorldCat and member libraries to SkyRiver (*id.* ¶ 81).

(*See* Mot. 17-23.) The Opposition abandons most of these allegations. Plaintiffs instead reframe their monopolization claim by stating that (a) Plaintiffs purportedly pleaded a predatory pricing

claim; and (b) WorldCat is somehow an "essential facility," and OCLC is therefore obligated to share WorldCat with Plaintiffs, though Plaintiffs do not claim that they ever made any offer to pay for WorldCat. (Mem. Opp. 19-23.) Plaintiffs' Opposition fails to defend their allegations that their illegal monopolization claim is supported by either the assistance provided by libraries to OCLC in developing new products or by OCLC's past acquisitions.[5]

b. Plaintiffs' Backhanded Treatment of the Supreme Court's Recent Monopolization Cases – *Trinko* and *Pacific Bell* – Demonstrates the Insufficiency of their Monopolization Claim.

Perhaps the most revealing example of the insufficiency of Plaintiffs' Opposition is its dismissive treatment of the Supreme Court's two major recent monopolization decisions, *Trinko* and *Pacific Bell*. Plaintiffs argue that these two cases can simply be ignored because neither case involved anticompetitive conduct. (Mem. Opp. 22-23.) First, this assertion is blatantly untrue. Second, and more importantly, in both cases, the Supreme Court made it clear that Section 2 of the Sherman Act cannot be used to regulate prices or to require OCLC to deal with Plaintiffs on the terms Plaintiffs demand, though this is precisely what Plaintiffs argue.

Contrary to Plaintiffs' claim, both cases involved conduct that was claimed to be anticompetitive. In *Trinko*, by refusing to deal with its competition, the defendant allegedly gave consumers less choice for telephone service. 540 U.S. at 404-05. In *Pacific Bell*, the plaintiff claimed consumers were harmed because the defendant's pricing did not let it compete effectively. 129 S. Ct. at 1115-16. Thus, the two cases *do* address the core issues raised by Plaintiffs: OCLC's alleged obligation to provide Plaintiffs access to WorldCat at a regulated price, and OCLC's freedom to price its products. In addressing both of these issues, Plaintiffs ignore the fundamental limitation on Section 2 claims that the Supreme Court made clear:

[5] Plaintiffs do not dispute that to plead a claim for antitrust violation arising out of an acquisition, a plaintiff must plead acquisitions facts showing: (a) the relevant competitive overlap, (b) the specific competitive impact, and (c) any connection to claimed monopolistic conduct. (Mot. 21-22.) Plaintiffs make no attempt to plead such facts.

- "As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell*, 129 S. Ct. at 1118.

- "To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low. Specifically, to prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) 'the prices complained of are below an appropriate measure of its rival's costs' and (2) there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices." *Id.* at 1120 (citations omitted).

- "Courts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing. No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. . . ." *Id.* at 1121 (citing *Trinko*) (internal quotations omitted).

With these principles in mind, Plaintiffs' monopolization arguments plainly fail.

c. Plaintiffs' Reliance on *Lorain Journal*, *Aspen Skiing* and *Conwood* Betrays the Lack of Factually Analogous Support for their Monopolization Claim.

The weakness of Plaintiffs' monopolization arguments is further betrayed by their reliance upon *Lorain Journal*, *Aspen Skiing* and *Conwood*, three cases that are factually inapposite to the claims pleaded here.

Lorain Journal v. United States, 342 U.S. 143 (1951), was a case in which a monopolist newspaper refused to sell advertising to customers who advertised on a local radio station. The antitrust violation in that case consisted of a refusal to sell to a rival's customers. *Id.* at 152-53. OCLC is not alleged to have done that here; all Plaintiffs alleged is that OCLC offered a price some customers thought was too high. (Compl. ¶¶ 45-47; Mem. Opp. 27.) Plaintiffs do not cite any case contrary to *Trinko* and *Pacific Bell*, wherein a court has used the antitrust laws to justify regulating the prices at which a defendant must sell to its competitor's customers.

Likewise, Plaintiffs' reliance on *Aspen Skiing*, a case "at or near the outer boundary of § 2 liability," *Trinko*, 540 U.S. at 409, is misplaced. Virtually every case since *Trinko* to consider the duty of a defendant to deal with competitor has concluded that the only time a duty to deal

arises is when a history of profitable dealing between the parties exists. *See, e.g.*, *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1194 (10th Cir. 2009); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 Fed. App'x 554, 556 (9th Cir. 2008); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004). As the *Trinko* court explained, "Enforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill suited." *Trinko*, 540 U.S. at 408.

Finally, Plaintiffs' reliance on *Conwood Co. v. U.S. Tobacco*, 290 F.3d 768 (6th Cir. 2002), is completely misplaced. *Conwood* involves non-price predation – literally the claim that the defendant had sent employees out to destroy the display units of its competitors in order to preserve a monopoly. *Id.* at 778-79. Nothing even remotely similar is alleged in this case.[6]

d. Charging Higher Prices, or Offering Lower Packaged Prices, Is Not Monopolization.

Plaintiffs' first specific defense of their monopolization claim is that pricing below marginal costs is not necessary to their claims. They assert that their bare-boned allegation that OCLC has priced the full cataloging subscription too low in comparison to the registration component (what Plaintiffs call "batch loading") states a claim under the antitrust laws. (Mem. Opp. 8.) This argument fails for at least three reasons: first, it mischaracterizes the law; second, it misstates the allegations in the Complaint; and, third, it disregards controlling precedent.

While Plaintiffs now seem to assert that they have pleaded a claim for predatory pricing, their Complaint neither uses the word "predatory" nor pleads any facts supporting any claim that OCLC has priced below cost. As the Supreme Court has held: "Low prices benefit consumers

[6] Likewise, Plaintiffs' reliance on *United States v. Dentsply In'l, Inc.*, 399 F.3d 181 (3d Cir. 2005) (a case in which the defendant was found to have precluded competition by entering into dealer agreements prohibiting the sales of competitors' products), and *United States v. Microsoft Corp.*, 253 F.3d 34, 60 (D.C. Cir. 2001) (a section of the decision discussing Microsoft preventing computer users from loading a different Internet browser program), is improper. These decisions address conduct that has no similarity to this case and are irrelevant to the Motion.

regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 340 (1990).

Plaintiffs seek to dodge this precedent by mischaracterizing the Sixth Circuit's holding in *Spirit Airlines v. Northwest Airline*, 431 F.3d 917 (6th Cir. 2005). Plaintiffs argue that *Spirit Airlines* abridged the Supreme Court's holding that only below-cost pricing is actionable under the antitrust laws. (Mem. Opp. 20.) However, courts have rejected this mischaracterization:

> *Spirit Airlines* does not hold that a party could show predatory pricing without any type of below-cost pricing. To the contrary, *Spirit Airlines* quotes the Supreme Court's statement that 'we have rejected elsewhere the notion that above-cost prices that are below general market levels or the cost of a firm's competitors inflict injury to competition cognizable under the antitrust laws.' *Spirit Airlines*, 431 F.3d at 937 (quoting *Brooke Group*, 509 U.S. at 223).

Invacare Corp. v. Respironics, Inc., No. 1:04 CV 1580, 2006 U.S. Dist. LEXIS 77312 (N.D. Ohio Oct. 23, 2006). *Spirit Airlines* simply addresses the appropriate measure of below cost (or marginal) pricing under the antitrust laws.

Likewise, this Court itself has already rejected Plaintiffs' attempt to rely on *LePage's v. 3M*, 329 F.3d 141 (3d Cir. 2003), and affirmed that bundled prices must be below cost to be predatory: "*LePage's* is not controlling on this Court. And absent persuasive authority that the Sixth Circuit would follow *LePage's* and agree with its conclusions, this Court is not persuaded." *J.B.D.L Corp. v. Wyeth-Ayerst Labs., Inc.*, Nos. 1:01-cv-704 & 781, 2005 U.S. Dist. LEXIS 11676, at *37-38 (S.D. Ohio June 13, 2005) (Beckwith, J.), *aff'd*, 485 F.3d 880 (6th Cir. 2007). As pointed out in OCLC's Motion, the Sixth Circuit in its *en banc NicSand* decision rejected the premise of *LePage's*: "[C]utting prices in order to increase business often is the very essence of competition; and mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." 507 F.3d at 452 (internal quotations and citations omitted). Consistent with this rule, unless the packaged discount offered

(here, OCLC's subscription) is predatory (*i.e.*, priced below the marginal cost of the units sold), it cannot violate the antitrust laws. *See Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 899 (9th Cir. 2008) ("the *LePage's* standard could protect a less efficient competitor at the expense of consumer welfare. As Judge Greenberg explained in his *LePage's* dissent, the Third Circuit's standard 'risks curtailing price competition and a method of pricing beneficial to customers because the bundled rebates effectively lowered [the seller's] costs.'"); *see also Doe v. Abbott Labs.*, 571 F.3d 930 (9th Cir. 2009). Thus, Plaintiffs cannot dodge Supreme Court and Sixth Circuit precedent by the vague claim that OCLC's pricing is "punitive."[7] Absent pleading a plausible claim that OCLC's bundled price for cataloging and registration is predatory, which the Complaint fails to do, this argument in support of Plaintiffs' monopolization claim fails.

e. The Complaint Does Not Plead an Essential Facility Claim or Any Other Basis to Impose a Duty to Deal with Plaintiffs upon OCLC.

In an attempt to salvage their monopolization claim, Plaintiffs assert a newly crafted allegation that OCLC has a duty to deal with Plaintiffs because OCLC's competitive advantages constitute an "essential facility" that must be "freely" provided to Plaintiffs. A breadth of authority stands in the way of this argument.

As noted above, Plaintiffs ignore the *Trinko* decision and its skepticism as to whether the "essential facilities doctrine" even exists. *See Trinko*, 540 U.S. at 410-11 (noting that the Court has "never recognized such a doctrine" and "[t]o the extent respondent's 'essential facilities' argument is distinct from its general § 2 argument, we reject it").[8] None of the cases Plaintiffs rely on were decided after *Trinko*, and thus none address these concerns.

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[7] The Seventh Circuit provides a very clear explanation of this area of the law in *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1412-13 (7th Cir. 1995).

[8] *See also* IIIB Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 772, at 199 (3d ed. 2008) ("'[E]ssential facility' is just an epithet describing the monopolist's situation: the monopolist possesses something the plaintiff wants. It is not an independent tool of analysis; it is only a label . . . ."); Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 ANTITRUST L.J. 841 (1990).

Moreover, categorizing WorldCat as an "essential facility" flies in the face of the cases that have used that approach to determine whether a duty to deal exists. Those cases have all rested on the existence of a literal "facility."[9] In contrast, the ability to use WorldCat to assist in cataloging is simply a beneficial aspect of OCLC's product, not a separate product or facility. Further, like WorldCat, Plaintiffs' cataloging product also contains bibliographic data. In reality, Plaintiffs are alleging that OCLC has a better database, not that WorldCat is the *only* database. Consistent with this view, and as OCLC previously pointed out (Mot. 22), the "essential facilities" doctrine has never been extended to require that a holder of intellectual property rights or intangible assets share those rights with a competitor. *See Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1357-58 (Fed. Cir. 1999), *aff'd*, 253 F.3d 695 (Fed. Cir 2001); *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 747 (D. Md. 2010); *Daisy Mountain Fire Dist. v. Microsoft Corp.*, 547 F. Supp. 2d 475, 490 (D. Md. 2008); *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 743, 745-46 (D. Md. 2003). Indeed, if Plaintiffs' view of the essential facilities doctrine was correct, any competitor who could be labeled a monopoly would be required to share its competitive advantages.

Finally, Plaintiffs' essential facilities claim fails because they do not allege that they *ever* offered to purchase access to WorldCat – to the contrary, while they now disavow it, they allege that access to WorldCat should be given "freely." (Compl. ¶ 76.) The essential facility doctrine has never been grounds for allowing free access to the competitive advantages or innovations of a competitor or to turn a Court into a regulatory agency governing "fair and just" pricing. Thus, the essential facilities doctrine, especially post-*Trinko*, cannot salvage Plaintiffs' claim.

[9] For example, a few cases have involved sports stadiums that facilitate the display of indoor sports. *See Fishman v. Estate of Wirtz*, 807 F.2d 520, 532 (7th Cir. 1986); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 989 (D.C. Cir. 1977). Likewise, railroad bridges permit continuation of rail service and delivery of freight, *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 392-94, (1912), and telecommunications networks distribute information. *MCI Commc'n Corp. v. AT&T*, 708 F.2d 1081, 1093 (7th Cir. 1983).

2. Plaintiffs' Attempted Monopolization Claim Fails as a Matter of Law.

OCLC's Motion argued for dismissal of the attempted monopolization claims of both Plaintiffs, SkyRiver and Innovative. The Opposition addresses only the claim that OCLC has attempted to monopolize the ILS market in which Innovative competes, but never addresses the remainder of the claim in the Complaint's second count, that OCLC attempted to monopolize other markets. (Compl. ¶¶ 91-95.)

OCLC offered three reasons for dismissing Innovative's claim that OCLC has attempted to monopolize the ILS market: (1) Innovative failed to adequately plead the ILS market; (2) Innovative failed to plead a dangerous probability of success; and (3) Innovative failed to plead specific intent to monopolize the ILS market. (Mot. 24-25.) Plaintiffs never address the first of these arguments, and in particular, the Sixth Circuit's requirement that a plaintiff must plead the existing participants in a market in order to state a plausible Sherman Act claim. *See Total Benefits Planning Agency, Inc v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008) ("[w]ithout an explanation of the other [competitors] involved, and their products and services, the court cannot determine the boundaries of the relevant product market and must dismiss the case for failure to state a claim"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004). While Plaintiffs purport to address the other requirements of an attempted monopolization claim, their arguments simply do not square with Supreme Court and Sixth Circuit authority.

a. Plaintiffs' Claim of Monopoly Leveraging is Legally Insufficient in Light of the Supreme Court's Holding in *Trinko*.

Plaintiffs incongruously seek to salvage their attempted monopolization claim by asserting that it is in fact a monopoly *leveraging* claim. (Mem. Opp. 23-24.) However, since *Trinko*, which Plaintiffs fail to address, courts have repeatedly held that a monopoly leveraging

claim cannot be pleaded absent allegations of anticompetitive conduct in the market the defendant is purportedly attempting to monopolize. In *Trinko*, the plaintiff, a retail customer of one of Verizon's competitors in the downstream market, alleged that Verizon used its monopoly power in the wholesale market in which it sold access to its local network to gain a competitive advantage in the downstream retail local telephone service market. *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp*., 305 F.3d 89, 108 (2d Cir. 2002), *rev'd*, 540 U.S. 398 (2004). The Second Circuit held that these allegations, which were insufficient to establish a claim of attempted monopolization, could state a potential monopoly leveraging claim sufficient to survive the defendant's motion to dismiss. *Id.* The Supreme Court reversed, holding that the court of appeals erred in ignoring the requirement that there be a "dangerous probability of success" in monopolizing the second market. 540 U.S. at 415 n.4. The Supreme Court also emphasized that "leveraging presupposes anticompetitive conduct," indicating that leveraging itself does not *per se* violate Section 2, but instead that any claim for extension of monopoly conduct from one market into another must include a showing of anticompetitive conduct. *Id.* Because the Court rejected the plaintiff's refusal to deal claim, which was the only alleged anticompetitive conduct at issue, the leveraging claim also failed.

Following *Trinko*, courts have recognized that a claim of monopoly leveraging now requires a showing of anticompetitive conduct in the second market that creates a dangerous probability of monopolizing that market. *See, e.g., Morris Commc'n. Corp. v. PGA Tour*, 364 F.3d 1288, 1294 n.11 (11th Cir. 2004); *Covad Commc'n Co. v. BellSouth Corp*., 374 F.3d 1044, 1049 n.4 (11th Cir. 2004); *Syncsort Inc. v. Innovative Routines Int'l*, No. 04-3623, 2005 U.S. Dist. LEXIS 15432, at *22-23 (D.N.J. May 6, 2005). Courts have dismissed leveraging claims where there is no evidence of anticompetitive conduct in the leveraged market (here, the ILS

market). *See, e.g., Jensen Enters. v. Oldcastle, Inc.*, C 06-00247 SI, 2006 U.S. Dist. LEXIS 68262, at *21-22 (N.D. Cal. Sept. 7, 2006) (rejecting monopoly leveraging as an independent theory of liability under § 2).[10] The Complaint contains no allegations that OCLC has engaged in any anticompetitive conduct in the ILS market – to the contrary, all it can fairly be read to allege is that OCLC has introduced a new product that makes the ILS market more competitive.

b. The Complaint Does Not Contain the Sufficient Allegations of a Dangerous Probability of Success.

Plaintiffs recognize that the Supreme Court has made pleading a dangerous probability of success a prerequisite to an attempted monopolization claim. Plaintiffs attempt to dodge that requirement by asserting that market share pleadings are not necessary to establish a dangerous probability of success. (Mem. Opp. 24.) However, each of the cases they cite – none of which rely on Sixth Circuit authority – contain specific pleadings purporting to show that monopolization of the target market was substantially likely to occur.

In the Sixth Circuit, for there to be "a dangerous probability of monopolization," the party must have the ability to lessen or destroy competition in the relevant market. *Smith Wholesale Co. v. Philip Morris USA, Inc.*, 219 Fed. Appx. 398, 2007 U.S. App. LEXIS 4754, at *35-36 (6th Cir. 2007). The Sixth Circuit has found that a "dangerous probability" requires "market strength that approaches monopoly power – the ability to control prices and exclude

[10] *See also Stein v. Pac. Bell*, 172 Fed. Appx. 192, 194 (9th Cir. 2006) (finding no basis for a monopoly leveraging claim when all other claims of anticompetitive conduct had been rejected); *Old Monmouth Stock Transfer Co. v. Depository Trust & Clearing Corp.*, 485 F. Supp. 2d 387, 395 (S.D.N.Y. 2007) (holding that a monopoly leveraging claim requires that defendant (1) possessed monopoly power in one market; (2) used that power to create a dangerous probability of monopolizing another market; and (3) caused injury by such anticompetitive conduct); *Wellnx Life Scis., Inc. v. Iovate Health Sci. Research*, 516 F. Supp. 2d 270, 296 (S.D.N.Y. 2007) (identifying elements of leveraging); *In re Educ. Testing Serv. Litig.*, 429 F. Supp. 2d 752, 758 (E.D. La. 2005) (holding that the leveraging claim was deficient because the conduct at issue was not anticompetitive conduct); *Compuware Corp. v. IBM Corp.*, 366 F. Supp. 2d 475, 489 (E.D. Mich. 2005) (granting summary judgment on leveraging claim where the plaintiff failed to demonstrate that IBM, which had a monopoly in high-end mainframe computers and the basic software used to run them, had a dangerous probability of successfully monopolizing the secondary market of software tools needed to run its mainframe systems).

competition." *Id.*; *Ford v. Stroup*, 113 F.3d 1234,[11] 1997 U.S. App. LEXIS 8692, at *5-6 (6th Cir. April 23, 1997) (citing cases). A claim for attempted monopolization cannot succeed unless the defendant has market power. *Id.* at *6-7 (citing *Spectrum Sports*, 506 U.S. at 457). Generally, monopoly power requires more than sixty percent market power. *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1112 (N.D. Ohio 2004).

Thus, in *Dish Network, LLC v. Fun Dish, Inc.*, 1:08CV1540, 2010 U.S. Dist. LEXIS 137926, at *28-29 (N.D. Ohio July 30, 2010), the court found that dismissal was warranted when there was no factual allegation that defendant has monopoly power, *i.e.*, more than sixty percent market power, or the ability to achieve such power in that market. The defendants argued that, by attempting to restrict competition in the retail services market, DISH Network "is improperly trying to enhance its position in the broader DBS market." This was not sufficient, and the Sixth Circuit has consistently maintained this view. *See, e.g., Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413 (6th Cir. 1990) ("that it would be rare indeed to find that a firm with only 25 [%] or 50 [%] of the market could control price over any significant period"); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir. 1981) (a market share that had declined from 40% to 30% did not establish a dangerous probability of success).[12]

3. Plaintiffs' Exclusionary Agreement Claim Fails as a Matter of Law.

In seeking dismissal of the third count of the Complaint, OCLC first pointed out that none of OCLC's unilateral actions, or even the terms on which it deals with libraries, constitute an agreement within the meaning of Section 1. Thus, its alleged refusal to deal with Plaintiffs (who never asked to deal), its offering products to libraries for free, and its packaging of products

[11] Published in full-text format at 1997 U.S. App. LEXIS 8692.

[12] Other courts are in accordance with this view. *See United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976) (50% market share does not establish dangerous probability); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981) (30% market share is not enough); *Tdata Inc. v. Aircraft Tech. Publishers*, 2:03-cv-264, 2006 U.S. Dist. LEXIS 23464 (N.D. Ohio Apr. 26, 2006) (35% market share does not show dangerous probability element.)

are not "agreements" actionable under Section 1. *See Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Plaintiffs offer no answer to this argument.

Indeed, instead of addressing OCLC's arguments, Plaintiffs cite irrelevant cases and argue that OCLC's agreements with libraries constitute an unlawful horizontal conspiracy. This argument fails because: (1) Plaintiffs cannot overcome the fact that the Complaint did not plead facts sufficient to plausibly demonstrate any kind of exclusionary agreement; and (2) it ignores controlling Sixth Circuit distinctions between horizontal and vertical agreements.

The Opposition completely disregards *Total Benefits*, which precludes Plaintiffs' claims. In *Total Benefits*, 552 F.3d at 436, the Sixth Circuit affirmed dismissal of a complaint of an illegal group boycott and "blacklist" for failure to plead sufficiently specific facts. As noted above, Plaintiffs' allegations of exclusive contracts are entirely conclusory – they do not point to a single agreement precluding a library from doing business with them. Furthermore, Plaintiffs' conclusory allegations about the records use policy, which Plaintiffs neither attached nor quoted, do not plead the plausible existence of an exclusionary agreement *among libraries*.[13]

Further, Plaintiffs' claim that the records use policy somehow constitutes a horizontal agreement is directly contradicted by the Sixth Circuit's reasoning in *Total Benefits.* Simply put, the fact that multiple entities enter into a common policy to do business with an upstream supplier does not turn a vertical policy into a horizontal agreement. 552 F.3d at 435-36.[14] Plaintiffs' inability to distinguish the Sixth Circuit's controlling authority in itself requires dismissal of the third count of the Complaint.[15]

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[13] Thus, *AP v. U.S.*, 326 U.S. 1 (1945), *N.A. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982), and *Volvo NA Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55 (2d Cir. 1988), cited by Plaintiffs, are irrelevant to this case.

[14] The agreements are between a seller and buyers (OCLC and libraries), the essence of a vertical agreement. *See Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1013 (6th Cir. 2005).

[15] Plaintiffs' citation to *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007), and *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977), undercuts their argument. Both cases recognize that vertical restraints are often pro-competitive, and by implication require specific pleading of an anticompetitive effect of such a restraint.

4. Because Plaintiffs Avoid Addressing Head-On the Requirements for a Tying Claim, this Claim Fails as a Matter of Law.

In purporting to allege a tying claim, Plaintiffs did not allege that OCLC refused to sell its registration subscription unless a library purchased a cataloging subscription. In fact, and to the contrary, Plaintiffs pleaded that Michigan State and Cal State – Long Beach declined to purchase the alleged tied product. (Compl. ¶ 49-51.) In seeking to rebut this argument, Plaintiffs ignore the requirements for an illegal tie under Sixth Circuit law and never address the fact that their own Complaint admits facts that defeat a tying claim.

The Opposition never addresses these arguments or the controlling Sixth Circuit authority cited by OCLC. Under Sixth Circuit precedent, a tying arrangement is defined "as an agreement by a party to sell one product . . . only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Mich. Div.-Monument*, 524 F.3d at 731-32 (citations omitted). The Opposition concedes that Michigan State and Cal State – Long Beach do not meet this test, since neither bought OCLC's registration subscription. (Mem. Opp. 28.) Thus all that Plaintiffs are left with is the vague claim that some unidentified libraries told SkyRiver they would have bought its product if OCLC sold its registration subscription more cheaply. (Compl. ¶ 51.) Such allegations fall short of pleading a plausible tying claim, and thus this claim must be dismissed.

5. Plaintiffs Cannot Salvage their California Law Claims by Asserting they Rest on Some Basis other than their Defective Antitrust Allegations.

The Opposition fails to address the shortcomings in Claims Five and Six, regarding violations of California's Unfair Competition Law ("UCL") that OCLC raised in its Motion to Dismiss. As OCLC explained in its Motion, and which Plaintiffs failed to refute beyond reiterating their belief that they stated a claim, Plaintiffs have failed to state an antitrust violation under either Claim Five or Claim Six. Claim Five fails because Claims 1-4 fail to state a claim.

Plaintiffs make a final attempt to salvage Claim Six by latching onto the law's fairness prong. (Compl. ¶ 129.) Under the UCL, "'Unlawful' practices are those practices that are prohibited by law." *Qarbon.com v. eHelp Corp.* 315 F. Supp. 2d 1046, 1051 (N.D. Cal. 2004). "'Unfair' practices are those practices whose harm to the victim outweighs its benefits." *Id.* (internal citations omitted). The "unfair" standard is limited in cases, as this, between business competitors. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). Indeed, recognizing a history of abusive lawsuits filed under the UCL, the California Supreme Court has substantially narrowed the application of the fairness prong. *Cel-Tech Commc'ns*, 20 Cal. 4th at 183-84. When a business invokes this prong against its competitor, the only conduct that is actionable is that which "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id.* at 185-87. As shown above, OCLC's actions do not threaten an "incipient violation of an antitrust law," violate "the policy or spirit of one of those laws," or otherwise threaten or harm competition. Because "[i]njury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws," *id*. at 187, and the Complaint insufficiently pleads any unfair or anticompetitive behavior by OCLC, Claim Six fails.

III. PLAINTIFFS' REQUEST FOR ORAL ARGUMENT

OCLC believes that the extensive written briefing of this Motion fully addresses the issues presented, and that oral argument is unnecessary unless the Court has specific points it wishes to clarify with counsel.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint with prejudice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned being counsel for Defendant certifies that a true copy of the foregoing Memorandum was served, this 22nd day of February, 2011 via the Court's CM/ECF system in accord with Fed. R. Civ. P. 5(b)(2)(E), upon all counsel of record.

/s/ James A. Wilson
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