

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

SHARTSIS FRIESE LLP
ARTHUR J. SHARTSIS (Bar #51549)
ashartsis@sflaw.com
MARY JO SHARTSIS (Bar #55194)
mjshartsis@sflaw.com
ROBERT E. SCHABERG (Bar #81430)
rschaberg@sflaw.com
SIMONE M. KATZ-O'NEILL (Bar #246490)
skatz@sflaw.com
One Maritime Plaza, Eighteenth Floor
San Francisco, CA 94111
Telephone: (415) 421-6500
Facsimile: (415) 421-2922

Attorneys for Plaintiffs
SKYRIVER TECHNOLOGY SOLUTIONS, LLC
and INNOVATIVE INTERFACES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SKYRIVER TECHNOLOGY
SOLUTIONS, LLC, a California limited
liability company, and INNOVATIVE
INTERFACES, INC., a California
corporation,

Plaintiffs,

v.

OCLC ONLINE COMPUTER LIBRARY
CENTER, INC., an Ohio corporation,

Defendant.

Case No. C 10-03305 JSW

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION TO TRANSFER VENUE TO
THE SOUTHERN DISTRICT OF OHIO**

Date: October 29, 2010

Time: 9:00 a.m.

Judge: Hon. Jeffrey S. White

Ctrm: 11, 19th Floor

Complaint Filed: July 28, 2010

Trial Date: None

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. STATEMENT OF FACTS	2
A. The Parties.....	2
B. Plaintiffs’ Claims Against OCLC	3
III. ARGUMENT	4
A. The “Interests Of Justice” Standard To Be Applied By The Court Favors Plaintiffs’ Choice Of Forum	4
B. All Of The Relevant Factors Weigh In Plaintiffs’ Favor	5
1. This Court Should Give Great Deference To Plaintiffs’ Choice of Forum	6
a. The operative facts and harm to Plaintiffs occurred in California and other places—not Ohio	6
b. OCLC has a substantial presence in California.....	8
2. OCLC Has Not Met Its Burden To Show That The Convenience Of The Parties And Witnesses Favors Ohio.....	9
a. The location of OCLC’s headquarters and potential inconvenience of its executives is not sufficient to warrant transfer.....	9
b. Numerous critical third-party witnesses are located in California.....	11
3. OCLC Has Not Shown That The Ease Of Access To Sources Of Proof Is Greater In Ohio Than California	12
4. California Has A Substantial Interest In This Case	13
5. California Is More Familiar With The Applicable Law	14
6. Relative Court Congestion And Time To Trial Favor California	14
IV. CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Decker Coal Co. v. Commonwealth Edison Co.</i> , 805 F.2d 834 (9th Cir. 1986).....	5, 6, 13, 15
<i>Digby Adler Group LLC v. Image Rent a Car, Inc.</i> , 2010 U.S. Dist. LEXIS 76309 (N.D. Cal. July 20, 2010).....	11, 12
<i>E. & J. Gallo Winery v. F. & P. S.p.A.</i> , 899 F. Supp. 465 (E.D. Cal. 1994).....	9
<i>Ellis v. Costco Wholesale Corp.</i> , 372 F. Supp. 2d 530 (N.D. Cal. 2005)	5
<i>Glaxo Group Ltd. v. Genentech, Inc.</i> , 2010 U.S. Dist. LEXIS 46440 (N.D. Cal. Apr. 12, 2010)	15
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947).....	12
<i>Hatch v. Reliance Ins. Co.</i> , 758 F.2d 409 (9th Cir. 1985).....	4
<i>Invisible Stripes, LLC v. Virag</i> , 2009 U.S. Dist. LEXIS 57956 (N.D. Cal. July 8, 2009).....	4, 5, 6
<i>Jarvis v. Marietta Corp.</i> , 1999 U.S. Dist. LEXIS 12659 (N.D. Cal. Aug. 12, 1999).....	9
<i>Jonathan Browning, Inc. v. Venetian Casino Resort, LLC</i> , 2007 U.S. Dist. LEXIS 95440 (N.D. Cal. Dec. 19, 2007)	4, 6, 9, 13
<i>Lockman Foundation v. Evangelical Alliance Mission</i> , 930 F.2d 764 (9th Cir. 1991).....	13
<i>O'Bannon v. NCAA</i> , 2009 U.S. Dist. LEXIS 122205 (N.D. Cal. Dec. 11, 2009).....	10, 11, 12
<i>OCLC Online Computer Library Center, Inc. v. Kinney</i> , 11 Ohio St. 3d 198, 464 N.E. 2d 572 (1984), 1984 Ohio LEXIS 1136	14
<i>Pacific Car & Foundry Co. v. Pence</i> , 403 F.2d 949 (9th Cir. 1968).....	5
<i>STX, Inc. v. Trik Stik, Inc.</i> , 708 F. Supp. 1551 (N.D. Cal. 1988)	5
<i>Tropos Networks, Inc. v. IPCO LLC</i> , 2006 U.S. Dist. LEXIS 48615 (N.D. Cal. July 7, 2006).....	13

TABLE OF AUTHORITIES
(Cont'd)

Page(s)

United States v. National City Lines, Inc.,
334 U.S. 573 (1948)..... 5

Statutes

15 United States Code
§ 22 (Clayton Act)..... 5

28 United States Code
§ 1404(a) 4, 12

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant OCLC Online Computer Library Center, Inc. (“Defendant” or “OCLC”) moves to transfer this action to the Southern District of Ohio located in Columbus, Ohio (“Motion”), asserting that transfer to Ohio is justified because that is where the “center of gravity” is in this case—meaning that is where defendant OCLC and its executives reside. Defendant’s Memorandum (“Def. Memo.”) at 1:27-28. OCLC claims that it is headquartered in Ohio, its executives are “the key witnesses” and reside in Ohio, its corporate documents are located in Ohio, it “made all decisions and actions operative to the [plaintiffs’] allegations” in Ohio, it has a “relatively small presence in California” and California has no “interest in this lawsuit beyond the fact that plaintiffs are residents of California”—as if that were unimportant. *Id.* at 2:1-11. OCLC also asserts that “Ohio has a great interest in this lawsuit because plaintiffs have alleged that one of Ohio’s nonprofit entities is abusing its nonprofit status, an allegation that can impact other Ohio nonprofit entities,” as if either court would decide its nonprofit or for-profit status. *Id.*

OCLC bears a heavy burden on this Motion, a burden that has not even arguably been met. Both plaintiffs, SkyRiver Technology Solutions, LLC (“SkyRiver”) and Innovative Interfaces, Inc. (“Innovative”) (collectively “Plaintiffs”), are California companies and have their principal places of business in the Northern District of California. Many of the events giving rise to this action occurred in the Northern District and in other districts in California, and the harm suffered by SkyRiver and Innovative occurred in the Northern District. Numerous critical witnesses—both third-party and party—reside in the Northern District, and many others reside elsewhere in California and are subject to the subpoena power of this Court. Many other third-party witnesses whose testimony is important to this case are located in states close to California, and others are willing to testify in California even though they do not reside here. In addition, OCLC has a substantial presence in the Northern District with two offices in California and employees or agents who have knowledge of the issues raised by Plaintiffs’ claims.

California has a strong interest in assuring that the numerous academic and research libraries in California—including the libraries of 23 California State Universities and

10 campuses of the University of California as well as numerous other public and private colleges and universities—are protected from the anti-competitive conduct alleged in the Complaint. The harm to Plaintiffs occurred in the Northern District of California, and California’s interest in protecting its citizens from violation of federal and California state antitrust and unfair competition laws exceeds the interest of the Ohio courts. OCLC has not shown that any of the factors relevant to the determination of its Motion weigh in its favor, and this Court should properly defer to Plaintiffs’ choice of forum.

II.

STATEMENT OF FACTS

A. The Parties.

Plaintiff SkyRiver is a California limited liability company. It entered the market for cataloging services in the fall of 2009. Its principal place of business is in Alameda County, California. Complaint, ¶ 7. Despite OCLC’s disparaging description of SkyRiver’s bibliographic database (Def. Memo. at 4:7-12), several libraries prefer SkyRiver’s competing cataloging service to OCLC’s because of the substantially lower cost, the quality of service and the quality of its bibliographic data. Complaint, ¶ 51. Many libraries have nonetheless declined to use SkyRiver’s cataloging service due to OCLC’s use of, and threatened, punitive pricing to wipe out the cost-savings SkyRiver’s cataloging service provides and due to the risk signaled to OCLC member libraries that OCLC may decline to provide interlibrary lending or other services to a library that uses SkyRiver for cataloging. *Id.*

Plaintiff Innovative is a California corporation with its principal place of business in Alameda County, California, and has been in business in the State of California for nearly 30 years. *Id.* ¶ 8. Innovative provides library systems to numerous libraries in the State of California and throughout the United States and worldwide. *Id.*, ¶¶ 8, 19.

OCLC is a nonprofit, Ohio corporation operating as a purported member-based cooperative of libraries, including academic and research libraries, in the United States and throughout the world. *Id.*, ¶ 9. OCLC claims to have 72,000 member libraries worldwide. While OCLC is based in Dublin, Ohio, it has two offices in California—one in San Mateo and one in

Ontario—as well as in Kansas, Washington, Washington, D.C., Asia, Australia, Canada, Europe and Latin America. *See* Declaration of Mary Jo Shartsis (“Shartsis Decl.”), ¶ 4, Exh. C. OCLC also has employees and sales people in California, conducts business with numerous libraries throughout California, including libraries located in the Northern District, such as the University of California (“UC”), and California State University (“CSU”) at Chico and San Jose, and CSU Long Beach in the Central District, as well as various other campus locations. Complaint, ¶ 61; Declaration of Leslie Straus (“Straus Decl.”), ¶ 3, Exh. A, ¶¶ 5-7; Declaration of James Hofbauer (“Hofbauer Decl.”), ¶ 3, Shartsis Decl., ¶ 4, Exh. C.

B. Plaintiffs’ Claims Against OCLC.

SkyRiver’s and Innovative’s antitrust and California unfair competition claims against OCLC, as described in the Complaint, are based on OCLC’s monopolization of bibliographic data, cataloging and interlibrary lending services in the academic and research libraries market and its use of its monopoly power in each of these product or service markets to expand into, and attempt to monopolize, the integrated library systems market in the United States. OCLC’s anti-competitive conduct includes:

- excluding competitors in the bibliographic data compilation market by maintaining membership policies that require libraries to contribute all of their bibliographic data to OCLC and to agree *not to transfer or share their own bibliographic holdings with for-profit firms* for commercial purposes. Complaint, ¶¶ 31-37 at 10-12.
- preventing access to the WorldCat bibliographic database by for-profit firms to preclude or inhibit their entry into the cataloging or interlibrary lending markets—both of which are dependent on a substantial bibliographic database. *Id.*
- coercing or intimidating its members to purchase its cataloging service by engaging in punitive pricing or tying other needed services to cataloging if member libraries use, or express an intent to use, SkyRiver’s competing cataloging service. *Id.*, ¶¶ 38-55 at 12-19.
- engaging in unpublished differential pricing and product bundling to member libraries to leverage the power of its three monopolies in an attempt to monopolize the ILS market. *Id.*, ¶¶ 56-65 at 19-23.
- using its tax-exempt profits to expand its monopolies and its markets by acquiring both nonprofit and for-profit competitors. *Id.*, ¶¶ 66-74 at 23-27.
- requiring member libraries to purchase OCLC’s products and services and to participate in pilot programs by committing their resources, largely public, to the development of new OCLC products and services—while depriving for-profit

competitors of equal opportunities—and by-passing public procurement requirements. *Id.*, ¶¶ 58-59 at 20-21.

- using its tax-free profits to pay personal cash inducements to key university library officials and provide them with luxury trips to obtain their commitment to promote the purchase and development of OCLC products and services by their respective libraries, thereby compromising university library procurement practices to the competitive disadvantage of all for-profit enterprises. *Id.*, ¶ 60 at 21.

Both SkyRiver and Innovative were directly harmed by the conduct alleged. *Id.*, ¶¶ 83-87, 89-95, 97-101, 103-113. Defendant’s conduct includes anti-competitive, punitive actions against CSU Long Beach, Michigan State University, Scottsdale Public Library in Arizona and many colleges and universities in numerous states that has harmed both libraries and SkyRiver. *Id.* at ¶¶ 43-55. OCLC’s anti-competitive conduct also includes the use of pilot programs at UC and other universities, the requirement that member libraries purchase OCLC products and make their resources available to OCLC and other practices that have had anticompetitive effects and harmed Innovative and SkyRiver. *Id.* at ¶¶ 15, 32-37, 58-59, 61-62. Plaintiffs seek injunctive relief, treble damages and attorneys’ fees and costs. *Id.* at 37-38 (Prayer).

III.

ARGUMENT

A district court has discretion to transfer an action under 28 U.S.C. section 1404(a) if it finds: (1) that the transferee court is “one where the action might have been brought,” and (2) “that the convenience of parties and witnesses in the interest of justice favor transfer.” *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). Plaintiffs do not dispute that this action could have been brought in the Southern District of Ohio. The first prong of the test accordingly is not at issue. The second prong clearly favors Plaintiffs’ chosen forum.

A. The “Interests Of Justice” Standard To Be Applied By The Court Favors Plaintiffs’ Choice Of Forum.

As the moving party, Defendant OCLC bears the heavy burden of showing that the inconvenience of litigating in this forum strongly favors transfer to Ohio. *Invisible Stripes, LLC v. Virag*, 2009 U.S. Dist. LEXIS 57956 at *8 (N.D. Cal. July 8, 2009); *Jonathan Browning, Inc. v. Venetian Casino Resort, LLC*, 2007 U.S. Dist. LEXIS 95440 at *17-*19 (N.D. Cal.

Dec. 19, 2007) (the defendant “must make a strong showing of inconvenience to upset [the plaintiff]’s choice of forum”). If the gain in convenience to Defendant, however, is offset by the added inconvenience to Plaintiffs, the Court should deny the motion to transfer. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (affirming denial of motion to transfer venue and noting that the “transfer would merely shift rather than eliminate the inconvenience”); *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1556 (N.D. Cal. 1988) (denying motion to transfer venue and explaining that the “plaintiff’s witnesses would be equally inconvenienced by transfer”).

To determine whether OCLC has met its burden of showing that the interests of justice require transfer, the Court generally considers multiple factors. Those factors typically are: (1) deference to the plaintiff’s choice of forum; (2) the convenience of the parties and witnesses; (3) the ease of access to sources of proof; (4) the local interest in adjudicating the controversy; (5) the familiarity of each forum with the applicable law; and (6) the relative congestion in each forum, particularly the elapsed time from filing to disposition. *See Decker Coal Co.*, 805 F.2d at 843; *Invisible Stripes, LLC*, 2009 U.S. Dist. LEXIS 57956 at *8, *10. OCLC has failed to carry its heavy burden of demonstrating that any of these factors favor transfer to Ohio.

B. All Of The Relevant Factors Weigh In Plaintiffs’ Favor.

Congress intentionally gave antitrust plaintiffs a wide choice of forum so that a plaintiff would “not be forced to follow the defendant into the defendant’s home district” but could bring suit where the “defendant had committed violations of the Act and inflicted the forbidden injuries.” Clayton Act, 15 U.S.C. § 22; *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968), quoting *United States v. National City Lines, Inc.*, 334 U.S. 573, 588 (1948). This Congressional mandate strongly favors an antitrust plaintiff’s choice of forum so long as it does not exceed “reasonable limits.” *Id.*; *Ellis v. Costco Wholesale Corp.*, 372 F. Supp. 2d 530, 537 (N.D. Cal. 2005) (“where venue is governed by a more permissive standard, a plaintiff’s choice is entitled to greater deference as a matter of law”).

Plaintiffs’ choice of this forum is reasonable because Plaintiffs are domiciled here, significant conduct violating the antitrust laws occurred here, many third party witnesses are

1 located here and the harm to Plaintiffs is continuing to be suffered in this District. All of the
2 relevant factors recognized by this Court and the Ninth Circuit Court of Appeals weigh in favor
3 of Plaintiffs' choice of forum and against transfer to Ohio. None of the factors the Court has
4 considered as diminishing the deference to a plaintiff's choice are present in this case.

5 **1. This Court Should Give Great Deference To Plaintiffs' Choice of Forum.**

6 The plaintiff's choice of forum is given substantial deference unless the defendant can
7 show that other factors strongly outweigh the plaintiff's choice. *Decker Coal Co.*, 805 F.2d at
8 843; *Jonathan Browning, Inc.*, 2007 U.S. Dist. LEXIS 95440 at *17-*19. Where, as here,
9 Plaintiffs are citizens of the forum state, their choice of forum is given even greater weight.
10 *Jonathan Browning, Inc.*, 2007 U.S. Dist. LEXIS 95440 at *18-*19 (explaining that the plaintiff's
11 "choice of forum is favored" because plaintiff is located in San Francisco); *Invisible Stripes, LLC*,
12 2009 U.S. Dist. LEXIS 57956 at *8, *10 (giving great weight to the plaintiff's choice of forum
13 because plaintiff is a California citizen).

14 While paying lip service to this well-established standard of great deference, OCLC
15 argues that "Plaintiffs' choice of forum is entitled to little weight" because the "operative
16 facts . . . all occurred in Ohio." Def. Memo. at 7:12-13. To support this argument, OCLC
17 reiterates that "OCLC's operations are all based in Ohio, and Ohio is where OCLC made all of
18 the decisions and created all of the policies that Plaintiffs claim constitute anti-competitive
19 behavior." *Id.* at 7:12-15. This argument is both factually wrong and inconsistent with the liberal
20 venue policy applicable in this case.

21
22 **a. The operative facts and harm to Plaintiffs occurred in California and other places—not Ohio.**

23 The argument that the "operative facts" include only OCLC's anti-competitive policies
24 and decisions—rather than its actual conduct in California and the harm to Plaintiffs in
25 California—resulting from that conduct is unsupported by any authority. One of the major harms
26 suffered by SkyRiver has resulted from OCLC's treatment of CSU, Long Beach (Complaint,
27 ¶¶ 49-55). That treatment has had repercussions throughout the 23-campus CSU system,
28 including CSU Chico and CSU San Jose, and to other California libraries as well as libraries in

1 other states. *See* Straus Decl., ¶ 6. Similarly, Innovative has been harmed by OCLC’s
2 inducement of UC—as a requirement of membership—to participate in “pilot programs” that
3 used the resources of UC to develop and install an OCLC system to replace UC’s statewide union
4 catalog without competitive bidding and without complying with UC’s procurement
5 requirements. Hofbauer Decl., ¶ 3. Competition and the citizens and taxpayers of California
6 have been harmed as a result. Complaint, ¶¶ 58-59, 61.

7 Moreover, although OCLC asserts that all policies were created and all decisions were
8 made in Ohio, OCLC’s executives are not the ultimate policy or decision makers. OCLC is
9 governed, at least theoretically, by a Board of Trustees, only one member of which is located in
10 Ohio. Complaint, ¶ 15; Shartsis Decl., ¶ 2, Exh. A. OCLC’s exclusionary and restrictive record
11 use and transfer policy is a major issue in this case. *See* Complaint, ¶¶ 33-37. In 2009, after
12 withdrawing a policy that created uproar and dissension among librarians, OCLC’s Board of
13 Trustees appointed a 12-person panel to review the existing 1987 policy. The committee
14 appointed by the Board of Trustees developed a new policy which became effective August 1,
15 2010, and is now known as “WorldCat Rights and Responsibilities for the OCLC Cooperative.”
16 Complaint, ¶ 36; Shartsis Decl., ¶ 3, Exh. B. The Committee that reviewed OCLC’s record use
17 and transfer policy included only two Ohio residents, who are both representatives of OCLC
18 management. *See* Shartsis Decl., ¶ 3, Exh. B. One of the members of OCLC’s policy review
19 team, Brian E.C. Schottlaender is, or will soon be, an OCLC Trustee, is a California resident and
20 a librarian at UC San Diego. *Id.*, ¶ 2, Exh. A; ¶ 3, Exh. B. All but one member of the OCLC
21 Board of Trustees, including its Chair, are located in states or countries other than Ohio. And,
22 according to OCLC, the Board of Trustees has the ultimate authority to decide policy issues and
23 set the strategic goals and directions of OCLC. *Id.*, ¶ 2, Exh. A.

24 In addition, California is not merely the headquarters of SkyRiver and Innovative as
25 OCLC argues. California is where much of OCLC’s anticompetitive conduct occurred and where
26 the substantial harm to both SkyRiver and Innovative is continuing to occur. It is also where
27 many important third-party and party witnesses reside. California has the highest number of
28 postsecondary degree-granting institutions of any state, with 359. *See* Plaintiffs’ Request for

Judicial Notice (“RJN”), Exh. A. Of those, 202 are four-year institutions and 157 are less than four-year. Ohio has less than half the total number, with 171 total postsecondary institutions, of which only 78 are four-year institutions and the remaining 50 are less than four years. *Id.* The CSU system alone includes 23 campuses, and the UC system includes 10 campuses. The impact on both SkyRiver and Innovative as California companies and the impact on the libraries of 202 academic institutions makes California an especially appropriate and convenient forum. OCLC’s anticompetitive policies and conduct in other states throughout the United States are also harming academic libraries nationwide.

b. OCLC has a substantial presence in California.

OCLC’s representations in support of its Motion fail to acknowledge its substantial presence in California and the Northern District. OCLC, Vice President of Research, James Michalko, is based in San Mateo County (the Northern District) and was formerly the Chief Executive Officer of the Research Libraries Group (“RLG”), which was OCLC’s last remaining competitor for cataloging services until it was acquired by OCLC in 2006. *See* Complaint, ¶¶ 39, 67. Michalko is an important witness concerning the circumstances and competitive environment at the time of OCLC’s acquisition of RLG and is knowledgeable about OCLC’s batch loading policies for RLG members that did not use OCLC’s cataloging service. Straus Decl., ¶ 3, Exh. A. The batch loading issue is central to the anti-competitive practices related to Michigan State University libraries and CSU Long Beach library (Complaint, ¶¶ 45-46, 49-50) that have harmed both of those libraries and SkyRiver.

Brian Ahern is an OCLC Customer Service Consultant and maintains an OCLC office in Ontario, California. He has been involved in OCLC’s sales activities in California and, in particular, at CSU Long Beach at the time it switched to SkyRiver for cataloging services and thereafter. He has knowledge relevant to SkyRiver’s and Innovative’s claims and is likely to be an important witness. Straus Decl., ¶ 3, Exh. A. OCLC has acknowledged, without identifying, one of its salespersons in Las Flores, California, who has knowledge of facts material to Plaintiffs’ claims. Crocco Decl., at 4:25-27.

OCLC employees have also been working with UC libraries since at least 2008 to develop

1 and install the OCLC product known as WorldCat Local and to bypass UC's public procurement
2 requirements. Hofbauer Decl., ¶ 3. Both UC librarians and UC executives are important third-
3 party witnesses who reside in the Northern District and would not be available were the trial to be
4 held in Ohio.

5
6 **2. OCLC Has Not Met Its Burden To Show That The Convenience Of The
Parties And Witnesses Favors Ohio.**

7 OCLC has not shown that Ohio is a more convenient forum for party or third-party
8 witnesses than California. The Court should consider the relative convenience to all parties and
9 their witnesses, not just OCLC's senior executives. *Jonathan Browning, Inc.*, 2007 U.S. Dist.
10 LEXIS 95440 at *18. The convenience of the witnesses, particularly third-party witnesses, is
11 often the most important factor in resolving a motion to transfer. *Jarvis v. Marietta Corp.*, 1999
12 U.S. Dist. LEXIS 12659 at *11 (N.D. Cal. Aug. 12, 1999). OCLC has the burden of producing
13 information regarding the identity of the Ohio witnesses, the content of their testimony, and why
14 such testimony is relevant to the claims at issue. *Id.* Affidavits or declarations are typically the
15 source of this information. *E. & J. Gallo Winery v. F. & P. S.p.A.*, 899 F. Supp. 465, 466 (E.D.
16 Cal. 1994). OCLC has not met its burden to show that Ohio is more convenient for the parties or
17 third-party witnesses.

18
19 **a. The location of OCLC's headquarters and potential inconvenience of
its executives is not sufficient to warrant transfer.**

20 OCLC relies on the Declaration of Bruce Crocco, OCLC Vice President Library Services
21 for the Americas, who identifies himself and six other executives as "key employees who have
22 knowledge or information that relates to the claims made in this case. . . ." Crocco Decl., at
23 5:14-15. All seven are located at OCLC's headquarters in Dublin, Ohio. However, only four of
24 these witnesses—Mr. Crocco, Catherine DeRosa, Vice President for the Americas and Global
25 Vice President of Marketing, Robert Jordan, President and CEO of OCLC and Karen Calhoun,
26 Vice President, WorldCat and Metadata Services—are identified as having information relating to
27 this case. Whether the remaining three witnesses identified possess probative evidence material
28 to the claims in the litigation cannot be determined by OCLC's cryptic description that these three

1 witnesses will testify about OCLC’s “strategy and direction,” “competition in products and
2 services,” and “development of ILS product.” *See id.*, ¶ 16. The three OCLC representatives
3 who reside in California—James Michalko, Brian Ahern and an unnamed salesperson—are not
4 even mentioned in Mr. Crocco’s Declaration. Mr. Crocco not only has been less than candid in
5 his description of OCLC’s two California offices, his Declaration also fails to mention that OCLC
6 has offices in various locations in the United States and worldwide. *See Shartsis Decl.*, ¶ 4,
7 Exh. C.

8 Even if all of OCLC’s executives’ testimony is relevant, however, the purported
9 inconvenience to OCLC employees should be given minimal or no weight because a party is able
10 to compel its officers, directors and employees to appear at trial. *O’Bannon v. NCAA*, 2009 U.S.
11 Dist. LEXIS 122205 at *7 (N.D. Cal. Dec. 11, 2009) (discounting inconvenience to party’s
12 witnesses who are employees because they can be compelled to testify). Mr. Crocco asserts that
13 requiring these key employees “to travel from their homes and workplaces to San Francisco . . .
14 would cause substantial disruption to their personal and professional lives” and their absence
15 “from their offices to testify for this case would cause material harm to OCLC.” Crocco Decl.,
16 ¶¶ 17-18. Mr. Crocco also asserts that these key executives “are essential to OCLC’s day-to-day
17 operations.” *Id.*, ¶ 18.

18 These contentions lack credibility and are highly suspect. OCLC has 72,000 member
19 libraries and offices all over the world. *See Shartsis Decl.*, ¶ 4, Exh. C. The representations in
20 Mr. Crocco’s Declaration that his and other officers’ presence in Ohio is critical to OCLC’s daily
21 operations is simply implausible. It is likely that their positions require travel not only to various
22 states and countries that use OCLC’s services, but to numerous trade conferences all over the
23 country and the world. Mr. Crocco also overstates the burden. The presence of OCLC’s
24 executives in California would only be required for trial and only for the time necessary to testify.
25 The same inconvenience would be imposed on the executive officers and employees of SkyRiver
26 and Innovative to travel to Ohio. *See Straus Decl.*, ¶¶ 2-3, Exh. A, ¶ 5; Hofbauer Decl., ¶ 2.
27 Finally, as noted above, OCLC has a presence in California and several representatives here who
28 have material information relevant to this case. Defendant has not identified a single witness in

Ohio who is not directly employed by OCLC and under its control.

b. Numerous critical third-party witnesses are located in California.

Greater weight is typically given to potential third-party witnesses who are within the subpoena power of the chosen forum. *See, e.g., O'Bannon*, 2009 U.S. Dist. LEXIS 122205 at *7-*8 (finding that location of non-party witnesses weighed against transfer because the witnesses could not be compelled to testify in the proposed transfer state). None of the third-party witnesses identified by OCLC is located in Ohio and none would be subject to the subpoena power of either the Ohio Court or the California Court. By contrast, many third-party witnesses identified by Plaintiffs reside in California and are within the subpoena power of this Court.

Plaintiffs have identified in Ms. Straus's Declaration the known third-party witnesses, all of whom have direct knowledge of the conduct at issue in this case, and there are several other witnesses whose identity is as yet unknown. Straus Decl., ¶ 3, Exh. A, ¶ 7. While many potential witnesses reside in other states, including Washington, Oregon and Arizona, most major cities across the United States have nonstop flights to San Francisco, making travel relatively easy and convenient. *Id.* Even if those witnesses are unwilling to testify at trial, their deposition testimony will still be admissible at trial. *See Digby Adler Group LLC v. Image Rent a Car, Inc.*, 2010 U.S. Dist. LEXIS 76309 at *16-*17 (N.D. Cal. July 20, 2010) (use of deposition testimony for non-party witnesses permits the parties to "make their case in the Northern District of California").

Although OCLC has identified three third-party witnesses located in East Lansing, Michigan, who are library officials at Michigan State University and whose testimony is important to this case, all three of these witnesses have indicated that they are willing to attend trial in California. *See* Straus Decl., ¶ 4. Four other third-party witnesses are identified by OCLC who reside in Michigan or Illinois, but no information is provided as to why these witnesses are important, what the subject or relevance of their testimony would be or why their videotaped depositions would not be sufficient if they have relevant information to be offered at trial. *See Digby Adler Group LLC*, 2010 U.S. Dist. LEXIS 76309 at *16-*17. More importantly, they cannot be subpoenaed to trial in Ohio. It is unlikely that many, if any, California third-party witnesses would be willing to travel to Ohio given the inconvenience and time involved. Straus

Decl., Exh. A. The convenience of the parties and witnesses favors Plaintiffs' choice of forum.

3. OCLC Has Not Shown That The Ease Of Access To Sources Of Proof Is Greater In Ohio Than California.

Access to sources of proof is another factor to be considered in evaluating a motion to transfer under section 1404(a). *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). OCLC has made no showing, however, that this factor weighs in its favor. Mr. Crocco's Declaration describes various documents in paragraph 21 and states in paragraph 15: "Documents (both electronic and hard copy) are, for the most part, stored at the OCLC's Dublin, Ohio headquarters or in nearby servers. Business records and transactional databases are all located at OCLC headquarters in Dublin or in nearby servers." Crocco Decl., ¶ 15.

All of SkyRiver's and Innovative's business and transactional documents, databases and servers are located in the Northern District at Plaintiffs' headquarters. Straus Decl., ¶ 2; Hofbauer Decl., ¶ 2. While the Court should weigh the competing sources of proof to determine which location affords the most efficient access to evidence, there is no factual basis on which this Court could conclude that this factor favors OCLC. In addition, all of the evidence identified is documentary and is largely in electronic form. This Court should give this factor "little weight because modern technology has significantly reduced the costs associated with the transfer of documents." *O'Bannon*, 2009 U.S. Dist. LEXIS 122205 at *7-*8. *See also Digby Adler Group LLC*, 2010 U.S. Dist. LEXIS 76309 at *17-*18 (finding that "the ease in access to documents does not weigh heavily in the motion to transfer analysis" given the advances in technology).

In fact, OCLC has a massive website that publishes its policies, products, services, annual reports, tax returns and many other similar documents online. *See www.oclc.org*. OCLC has made no showing that evidence relevant to Plaintiffs' claims located in Ohio that is not already computerized would be unduly burdensome to put on CDs for production and trial or that the burden on OCLC outweighs the burden that would be placed on Plaintiffs by transfer to Ohio when all of their sources of proof are in California—not Ohio.

More importantly, there is substantial documentary evidence of third-party witnesses located in California at UC and CSU, at the offices of OCLC maintained in San Mateo and

1 Ontario, and at libraries in California and in other States, including Michigan State University,
2 and the University of Washington. The Court should therefore consider these third-party sources
3 of proof. *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 769-70 (9th Cir.
4 1991). Because third-party documents are critical and because OCLC has made no showing that
5 the burden on it would be any greater than the burden on Plaintiffs, this factor weighs in favor of
6 Plaintiffs' choice of forum or, at a minimum, is neutral.

7 **4. California Has A Substantial Interest In This Case.**

8 The fourth factor to consider is the California Court's interest in having controversies
9 adjudicated in the plaintiff's forum state. *Decker Coal Co.*, 805 F.2d at 843. "California has a
10 strong public interest in deciding controversies involving its citizens." *Jonathan Browning, Inc.*,
11 2007 U.S. Dist. LEXIS 95440 at *19, citing *Lockman Foundation*, 930 F.2d at 769. The weight
12 given this factor should be substantial because (1) Plaintiffs have asserted California state law
13 claims, and (2) many of the operative facts directly associated with the federal and state law
14 claims occurred within the Northern District or within California and have had an effect in the
15 Northern District and throughout California. *Jonathan Browning, Inc.*, 2007 U.S. Dist. LEXIS
16 95440 at *19 (holding that California's strong interest in "protecting its citizens prevails" and
17 weighs against transfer). As this Court has previously concluded, where there are claims "under
18 California State [law], including an unfair competition claim, this Court would have greater
19 familiarity with those claims" than the court of another state. *Tropos Networks, Inc. v. IPCO*
20 *LLC*, 2006 U.S. Dist. LEXIS 48615 (N.D. Cal. July 7, 2006) at *12.

21 OCLC argues that because the Complaint alleges that OCLC has abused its tax-exempt
22 status, the interests of the Ohio court are greater than the interests of this California Court. The
23 purported reason given is that the court's decision may have an impact on other Ohio nonprofit
24 corporations. Def. Memo. at 12:23-28. This Court, however, is not going to determine OCLC's
25 state or federal tax-exempt status nor would an Ohio court. Moreover, OCLC has not explained
26 how any impact on other nonprofits involved in other unrelated activities would result whether
27 this case is tried in California or Ohio. Nor has OCLC explained why a federal court decision
28 will affect only nonprofits in Ohio. In fact, the Supreme Court of Ohio in 1984 determined that

OCLC was engaged in commercial activities and upheld an Ohio Board of Tax Appeals' decision denying OCLC an exemption from property taxes. *See OCLC Online Computer Library Center, Inc. v. Kinney*, 11 Ohio St. 3d 198, 464 N.E. 2d 572 (1984), 1984 Ohio LEXIS 1136. A copy of this decision is attached to the Shartsis Decl., ¶ 5, Exh. D. Apparently, OCLC had the political clout in Ohio to have the Supreme Court's decision nullified legislatively.

OCLC also argues that if injunctive relief were granted, it would be easier for an Ohio court to monitor its enforcement. Def. Memo. at 6:19-22. The California Court is perfectly capable of issuing and enforcing any relief it awards, and it is the appropriate court to do so because California's interest and that of California businesses and university libraries are at stake. Moreover, the relief sought is likely to be nationwide.

5. California Is More Familiar With The Applicable Law.

As a general matter, weight may be attributed to the forum court that has greater expertise and familiarity with the body of law that is relevant and applicable to the claims at issue in the lawsuit. To the extent that federal antitrust claims are involved, presumptively this factor is neutral because both federal courts would be applying the same federal law. However, court statistics, in fact, show that the Northern District has substantially more experience handling antitrust cases than the Southern District of Ohio. As demonstrated by the civil filing statistics for both forums, for the years 2004 through 2009, the Northern District of California handled a yearly average of 153 antitrust cases, while the Southern District of Ohio only handled a yearly average of 11.83 antitrust cases. *See Shartsis Decl.*, ¶ 6, Exh. E; RJN, Exhs. B and C. The Northern District of California accordingly has substantially more experience with cases involving the federal antitrust laws. Moreover, this factor weighs in Plaintiffs' favor because, as noted above, this case also involves significant California state law claims, including an unfair competition claim, that are unique to California. The Northern District of California is better suited and more capable of adjudicating all of the claims in this case. Thus, this factor also favors Plaintiffs' choice of forum.

6. Relative Court Congestion And Time To Trial Favor California.

Although less significant, the relative court congestion of the competing forums is another

factor that the Court may consider. *Decker Coal Co.*, 805 F.2d at 843. In analyzing relative court congestion, the Court's focus is normally on the elapsed number of days between the filing of a civil complaint and its final disposition or speed of adjudication. *Glaxo Group Ltd. v. Genentech, Inc.*, 2010 U.S. Dist. LEXIS 46440 at *15 (N.D. Cal. Apr. 12, 2010) (considering median time to disposition and trial as relevant factors in the analysis of relative court congestion).

The available statistics for each court establish that the Northern District of California disposes of its civil cases more promptly than the Southern District of Ohio. Shartsis Decl., ¶ 6, Exh. E. RJN, Exhs. B and C. For the years 2004 through 2009, the average of the median time from filing to disposition in the Northern District was 8.2 months, compared to 11.25 months for the Southern District of Ohio. The average of the median time from filing to trial in the Northern District was 25.82 months, compared to 29.23 months in the Southern District of Ohio. *See* Shartsis Decl., Exh. E. In addition, the total civil and criminal trials completed per judge was 8 in the Northern District, compared to 21.17 in the Southern District of Ohio. These statistical factors favor the Northern District of California. *Glaxo Group Ltd.*, 2010 U.S. Dist. LEXIS 46440 at *15 (median time for case disposition: 6.7 v. 8.7 months; median time to trial: 19.8 v. 25.5 months). Shartsis Decl., Exh. E. This factor also favors the Northern District of California.

IV.

CONCLUSION

All of the facts to be considered in determining whether deference should be given Plaintiffs' choice of forum weigh in Plaintiffs' favor. Defendant has failed to meet its heavy burden to show that any of the factors strongly outweigh Plaintiff's choice of forum. Defendant's Motion should accordingly be denied.

DATED: September 27, 2010

SHARTSIS FRIESE LLP

By: /s/ Mary Jo Shartsis

MARY JO SHARTSIS
Attorneys for Plaintiffs
SKYRIVER TECHNOLOGY SOLUTIONS,
LLC and INNOVATIVE INTERFACES, INC.

5556\005\1668935.6