UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

OPPOSITION MEMORANDUM OF PLAINTIFFS SKYRIVER TECHNOLOGY SOLUTIONS, LLC AND INNOVATIVE INTERFACES, INC. TO DEFENDANT OCLC ONLINE COMPUTER LIBRARY CENTER, INC.'S MOTION TO DISMISS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant OCLC Online Computer Library Center ("OCLC" or "Defendant") moves to dismiss the Complaint filed by SkyRiver Technology Solutions, LLC ("SkyRiver") and Innovative Interfaces, Inc. ("Innovative") (collectively "Plaintiffs"), but the complaint described in OCLC's Memorandum in support of its Motion ("Memo") bears little resemblance to the Complaint actually filed by Plaintiffs. Instead, OCLC has made up its own straw-man complaint to attack. OCLC fails to address (other than to deny) Plaintiffs' allegations of anticompetitive and exclusionary membership terms, policies and practices that have been imposed on its member libraries for years. OCLC also mischaracterizes its unlawful punitive pricing and tying arrangements as "vigorous competition."

Plaintiffs' actual Complaint alleges facts sufficient to state claims for monopolization and attempted monopolization in the academic and research libraries market in the United States in violation of Section 2 of the Sherman Act. OCLC is monopolizing three product or service markets—bibliographic data of libraries' holdings; cataloging service; and interlibrary lending service (ILL). OCLC is attempting to monopolize a fourth service market—integrated library systems (ILS). The Complaint also alleges facts sufficient to state claims for violation of Section 1 of the Sherman Act and California law.

Since at least 1987, OCLC has demanded that its member libraries agree to terms of membership that prohibit sharing the metadata of their own library holdings contributed to OCLC's bibliographic database known as WorldCat with any for-profit firms for commercial use and require member libraries to use OCLC's services. OCLC has imposed these membership terms to prevent the development of competing bibliographic databases, cataloging services or ILL services by erecting barriers to entry in these three markets. OCLC is also using its monopoly power in these three markets in its attempt to monopolize the ILS market.

SkyRiver is a new market entrant and OCLC's only competitor for bibliographic data and cataloging. OCLC's intentional actions to eliminate SkyRiver from these markets far exceed the lawful limits of what it calls "vigorous competition." OCLC's use of punitive pricing for essential services imposed *only* on libraries that use SkyRiver instead of OCLC for cataloging service has a single purpose—to eliminate SkyRiver and competition. OCLC's conduct violates the antitrust laws for the reasons explained by the Sixth Circuit in *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 951-53 (6th Cir. 2005), by the Third Circuit in *LePage's, Inc. v. 3M*, 324 F.3d 141, 151-152 (3d Cir. 2003) and other cases discussed below.

OCLC's conduct has injured SkyRiver by deterring libraries from using its service, and has injured libraries that are using SkyRiver to reduce costs by preventing those libraries from uploading their new records into WorldCat at the price charged to everyone except SkyRiver users. OCLC's conduct harms competition by attempting to eliminate a new entrant and by deterring all potential competitors from even trying to enter any of its monopoly markets. OCLC's attempt to monopolize an historically competitive ILS market has injured Innovative and is intended to reduce or eliminate competition and extend OCLC's monopoly power to ILS.

OCLC's description of "Plaintiffs' Allegations" in its Memorandum is neither a fair nor accurate statement of the facts alleged. Memo at 2-11. Nor does OCLC identify the "conclusory allegations" it claims are insufficient. While OCLC acknowledges that Rule 12(b)(6) of the Federal Rules of Civil Procedure requires the Court to treat Plaintiffs' factual allegations as true and draw all inferences in Plaintiffs' favor, OCLC asserts facts with no basis in the Complaint, including that SkyRiver's service is an "inferior product" that is "populated by records" from sources not pleaded. While nowhere alleged in the Complaint, OCLC praises its own supposedly "superior" products, the "richness" of its records, its "pioneering" efforts on behalf of libraries, and its "efficiencies" and "cost effective services" for the improper purpose of influencing this Court to accept as true these self-serving characterizations. OCLC's products are arguably not "superior" or "cost effective." OCLC asserts numerous other "facts" and purported admissions not found in the Complaint and misrepresents that Plaintiffs seek "free access" to WorldCat. Plaintiffs seek access on terms that are "just and reasonable" because WorldCat was compiled by anticompetitive means, cannot be duplicated, and is essential to competition.

OCLC also erroneously asserts that Exhibit 1 to its Memorandum contains the "policies" pleaded in paragraphs 32-37 of the Complaint and argues that Exhibit 1 does not support the allegations. But Exhibit 1 is not the "policies" pleaded; it is a revised OCLC policy that did not become effective until *after* the Complaint was filed. The policies pleaded are exclusionary and have enabled OCLC to obtain and maintain the monopoly power it has today.

OCLC's entire Motion rests on the erroneous argument that Plaintiffs' claims are insufficient to meet the "heightened . . . standard for surviving a motion to dismiss" that is required by the United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (a decision that OCLC misrepresents in several respects). In fact, *Twombly* expressly disavowed the "heightened" pleading standard claimed by OCLC. *Id*. at 569 n. 14. Because Plaintiffs have adequately pleaded facts sufficient to state claims for violation of federal and state antitrust laws, Defendant's Motion to dismiss each claim should be denied.[1]

II. STATEMENT OF THE CASE

Over the past 40 years OCLC has compiled the WorldCat bibliographic database by obtaining the contributions of bibliographic metadata (or records) of the holdings of more than 72,000 libraries in 171 countries and prohibiting those libraries from sharing their records with

[1] All references to "Section 1" or "Section 2" are to the Sherman Act, 15 U.S.C. §§ 1 and 2. All references to a "Rule" are to the Federal Rules of Civil Procedure.

for-profit firms and requiring them to use OCLC's services. This case is about OCLC's monopolization of the relevant markets by anticompetitive conduct and agreements.

A. The Relevant Markets.

The product or service markets at issue are (1) bibliographic data comprising digital electronic records of the holdings of academic libraries, which are defined in the Complaint as "college, university and research libraries" or "libraries"; (2) services for cataloging libraries' holdings and new holdings; (3) interlibrary lending services for national and worldwide borrowing and lending among libraries; and (4) integrated library systems for the operation and management of a library or group of libraries. Compl. ¶¶ 20, 27. The relevant geographic market is the United States. *Id.*, ¶ 30.

Academic libraries differ from other libraries because the unique mission and purpose of academic libraries require continuous access to a vast array of library holdings that are capable of satisfying the scholarly research needs of their individual library communities. *Id*. ¶¶ 22-23. The National Center for Education Statistics and the American Library Association publish statistics for "academic libraries" because they are different than other libraries. The NCES estimated that in 2008 there were 122,101 libraries in the United States, of which only 3,827 were academic libraries. Plaintiffs concurrently request judicial notice of these statistics.

There is no effective substitute for OCLC's WorldCat database as its member libraries have been prohibited from sharing the bibliographic data of their respective holdings with commercial firms, thereby preventing the development of a competitive database or competitive services. *Id*. ¶¶ 23-24. OCLC has at least 90 percent of the bibliographic data, cataloging and ILL markets. *Id*. ¶ 20. There are high barriers to entry in each market because of OCLC's monopoly power and its "entrenched buyer preference in each market" obtained and maintained by the anticompetitive conduct alleged over the last 40 years. *Id*. ¶ 26. Regional resource sharing or interlibrary lending among libraries in a limited geographical area is not a substitute or alternative for OCLC's ILL, which facilitates borrowing and lending nationally and worldwide. Libraries that participate in regional interlibrary lending nonetheless require and purchase ILL service because one is not a substitute for the other. There is no substitute for OCLC's ILL service because access to the WorldCat database is essential to a competitive ILL. *Id*. ¶ 24.

Integrated library systems (ILS) are computerized functions of a library, including both public access and back-office operations that typically include managing new library acquisitions, local management of cataloging, circulation, delivery of library inventory and resource sharing among local groups of libraries. ILS is a recognized market separate from other library products and services. *Id*. ¶ 27. OCLC entered this market in 2008 by leveraging the power of its established monopolies. *Id*. ¶ 18

B. OCLC's Acquisition And Maintenance Of Its Monopolies Of Bibliographic Data, Cataloging And ILL And Its Attempt To Monopolize The ILS Market By Exclusionary Membership Terms, Policies And Practices.

For over 20 years OCLC has maintained anticompetitive membership terms, policies and practices that constitute restraints of trade. These membership terms and policies (sometimes labeled "Guidelines") are alleged in paragraphs 32-37 of the Complaint and are referred to throughout the Complaint. OCLC membership obligates each member library to contribute to the WorldCat database the bibliographic metadata representing its holdings, including new holdings. An OCLC number is attached to each library record contributed to WorldCat and is used as the criterion for defining and policing use of "WorldCat-Derived Records" as defined in OCLC's Guidelines for the Use and Transfer of OCLC-Derived Records, an exclusionary policy that has been in effect since 1987 ("Use and Transfer Guidelines"). *Id.* ¶¶16, 33. OCLC does not originate the bibliographic metadata (*i.e.*, the electronic form of records describing a book or other library materials) contributed by libraries to the WorldCat database, and WorldCat does not constitute an original work, proprietary or trade secret information of OCLC.[2] *Id*. ¶ 13. OCLC sells access to WorldCat and sells various products and services, including cataloging and interlibrary lending services that depend on WorldCat, to academic and research libraries, and other libraries, in the United States and worldwide. *Id*. ¶ 14.

Exhibit 1 to OCLC's Motion is a use and transfer policy effective August 1, 2010—not the policy in effect for the last 20 years. The revised policy continues to prohibit libraries from sharing their records with commercial firms for commercial use. OCLC membership also obligates member libraries to cooperate in enforcing the restrictions on use and transfer imposed by OCLC (*id*. ¶¶ 16, 33, 35-37), to purchase OCLC's services (*id*. ¶ 32), and to share their resources with OCLC for a variety of purposes. *Id*. ¶¶ 34, 58-59.

1. OCLC's monopolization of bibliographic metadata.

All other bibliographic databases in the United States have been eliminated or acquired by OCLC. In 2006, OCLC acquired the Research Libraries Group, Inc. ("RLG"), the last remaining U.S. competitor for bibliographic data and cataloging services for academic libraries. *Id*. ¶¶ 67. The WorldCat database has been built and maintained by OCLC's anticompetitive restrictions and is now considered to be "the world's most comprehensive bibliographic database." It is the only comprehensive bibliographic database of the holdings of libraries in the United States and cannot reasonably or practically be duplicated. *Id*. ¶¶ 13-14. Because OCLC members contribute their new holdings to WorldCat, OCLC's monopoly power over bibliographic metadata continues to grow. *Id.*, ¶ 14.

[2] Despite this allegation, which must be taken as true, OCLC falsely asserts that it has "intellectual property rights" and "copyright in WorldCat as a derivative work." Memo at 20. Neither is true, and neither is properly before this Court.

2. OCLC's monopolization of bibliographic cataloging services.

A cataloging service enables libraries to obtain the metadata necessary for cataloging a book or other material. When an OCLC cataloging service subscriber obtains a new item for its collection, if the new item is not already represented in WorldCat, the library generates the metadata necessary for OCLC to identify the book or material, which is then uploaded to WorldCat and is available for ILL and other uses. Once that record is in WorldCat other subscribing libraries can download the metadata for that record. If WorldCat already has the metadata for the acquired item, the subscriber takes a copy of that metadata for its own local library database, and OCLC automatically adds a holdings symbol or code on the WorldCat metadata showing that the subscriber now holds that same book or material and it is available to borrow by other ILL subscribers. Compl. ¶ 16. The copy taken by the library becomes an "OCLC Derived-Record," subject to OCLC's restrictions on use and transfer. *Id*. ¶¶ 33-34.

If an ILL subscribing library does not use OCLC's cataloging service, OCLC has an established practice of batchloading a library's new holdings information into WorldCat for a per-record fee, which before SkyRiver, was 23 cents or less. Compl. ¶ 42. This low fee allowed RLG subscribers and other non-member libraries to batchload their holdings at this fee. OCLC charges separately for its cataloging service and for ILL service. *Id*. ¶ 41.

3. OCLC's monopolization of interlibrary lending.

OCLC uses the WorldCat database to provide a nationwide and worldwide interlibrary lending service (ILL) for borrowing and lending among academic libraries. OCLC's ILL service is essential to academic libraries because of its national and worldwide WorldCat database. For all items to be borrowed through ILL, a holdings record must reside in WorldCat. Compl. ¶ 41. If a library's new holdings are not uploaded into WorldCat, that library cannot lend those holdings because no borrowing library can find them in WorldCat. *Id*. ¶ 41. Both borrowing and lending libraries are thereby harmed. *Id*. ¶ 52. The value of a library's ILL subscription is diminished if the cost of batchloading (uploading) is prohibitively high. *Id*. ¶¶ 52.

4. OCLC's attempt to monopolize integrated library systems.

ILS has historically been served by several for-profit competitors, including Innovative. OCLC began its entry into the ILS market with WorldCat Local in 2008, and offered at no charge an introductory version, WorldCat Local "quick start," as part of its entry. Compl. ¶ 18. OCLC uses the leverage of its membership requirements, monopoly database and ILL service and is bundling those services with its new services in an attempt to monopolize the ILS market. Compl. ¶¶ 18, 58-59.

C. OCLC's Use Of Its Monopoly Power In ILL And Punitive Pricing To Eliminate SkyRiver As A Competitor.

To protect and maintain its monopolies, OCLC has coerced and intimidated its members to use OCLC's more expensive cataloging service by imposing *only on libraries that use SkyRiver* punitive pricing to batchload (or upload) their new holdings into WorldCat for ILL use. OCLC has an established service of batchloading a library's new holdings information into WorldCat at a per-record fee of 23 cents or less. But a library that seeks cost-savings for cataloging by using SkyRiver must pay the equivalent of $2.85—or twelve times the per-record amount—to upload each new record. Thus, a library must choose whether to realize the savings by using SkyRiver and forego uploading new holdings or buy OCLC's cataloging and ILL services. *Id.* ¶ 45. OCLC's punitive pricing for batchloading necessary to remain a full ILL participant has deterred many libraries from using SkyRiver. *Id*. ¶¶ 43, 51-55. Through this pricing scheme, OCLC is tying its cataloging service to its WorldCat and ILL service to retain its monopolies in all markets. *Id*. ¶¶ 107-110.

OCLC's intent to exclude SkyRiver from the bibliographic database and cataloging markets and to deter any potential competitor from entering those markets was communicated to member libraries in February 2010 by OCLC's Chairman of the Board of Trustees when he referred to a new "lite cataloging service," clearly meaning SkyRiver, and questioned whether libraries that use its competitive cataloging service *"should have access to resource sharing [ILL] and other value added activities that those who are full participants enjoy . . . [a]nd if they do have access then at what price?"* Compl. ¶ 53 (emphasis added); ¶¶ 39-55. The punitive pricing that followed this threat injured SkyRiver, libraries and competition. *Id*., ¶ 52. OCLC's punitive pricing also sent a signal to potential SkyRiver subscribers that OCLC would raise its batchloading price to eliminate any cost savings, thereby harming libraries and competition.

D. Harm To Plaintiffs, Consumers And To Competition.

Those libraries, such as Michigan State University ("MSU") and California State University, Long Beach ("CSULB"), that have chosen SkyRiver's lower-cost cataloging service, but have refused to be coerced either to drop SkyRiver or to pay a punitive price to batchload their new holdings, have suffered harm because not all of their holdings are included in WorldCat and therefore are unavailable to other ILL subscribers to borrow. MSU and CSULB are also not able to earn lending credits because their new holdings are not in WorldCat. The value of their ILL service (for which MSU and CSULB pay OCLC's monopoly prices) is substantially diminished as a result. *Id*. ¶¶ 43, 46, 49. Other ILL libraries are also harmed by not being able to borrow new holdings from libraries that use SkyRiver. *Id.*, ¶¶ 51, 78.

OCLC's conduct has directly injured SkyRiver as numerous libraries that were interested in SkyRiver's service have not subscribed specifically because of OCLC's punitive pricing to upload new holdings and their fear of being denied access to, and full use of, ILL. Compl. ¶¶ 38-55. OCLC's actions harm competition by using its monopoly power to eliminate its first cataloging competitor since it acquired RLG and to deter any other potential competitor from entering its monopoly markets. Libraries and library users, the ultimate consumers of library services, have also been harmed by higher prices and/or diminished services. *Id*. ¶ 78, 85.

OCLC's actions have also harmed Innovative. OCLC engages in undisclosed differential pricing among its own member libraries to leverage the power of its three monopolies in its attempt to monopolize the ILS market that currently consists of Innovative and other for-profit competitors. *Id*. ¶¶ 56-65. OCLC is using its monopoly over its WorldCat database to sell WorldCat Local—its entry product in the ILS market—to exclude and eliminate competition. Competition has been and will be reduced or eliminated unless the relief sought by Innovative is granted. *Id*. ¶ 65, 91, 93. Innovative has lost numerous contracts as a result of OCLC's use of its monopoly power over the WorldCat database. *Id*. ¶ 62.

III. EACH OF PLAINTIFFS' CLAIMS MEETS THE PLEADING STANDARD APPLICABLE TO DEFENDANT'S MOTION

OCLC argues that Plaintiffs' claims are not "plausible" and fail to meet the standard set in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*"), which addressed the pleading requirements of Rule 8(a)(2) of the Federal Rules. Plaintiffs have met that standard.

Twombly involved a price fixing claim under Section 1 of the Sherman Act based on conscious parallelism. The Supreme Court held that "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly* at 557. The Supreme Court concluded:

> [W]e hold that stating such a claim requires a complaint with enough *factual matter (taken as true)* to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it *simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement*. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."

Id. at 556; emphasis added. The Court emphasized that it was not applying a new "heightened" pleading standard, as OCLC claims, and rejected any implication that courts should apply the "how, what, when and where" pleading standard of Rule 9 to meet the standard of Rule 8:

> On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Fed. Rules Civ. Proc. 9(b)-(c). Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]," *ibid.*; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.

Id. at 569-70, n. 14. *See also In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1007 n. 12 (E.D. Mich. 2010) (*Twombly* cannot be read to stand for the proposition that Rule 8 now contains a how, what, when and where requirement).

In *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009) ("*Iqbal*"), the Supreme Court further confirmed that a court may not presume the illegality of conduct that is equally capable of being legal, that only well-pleaded factual allegations are entitled to a presumption of truth (*id.*) and that *Twombly's* "plausibility standard" is not limited to antitrust cases or other cases requiring complex discovery. *Id*. at 1949. Thus, *Twombly* and *Iqbal* require the court to accept all well-pleaded factual allegations as true and determine whether the facts alleged plausibly suggest or imply an entitlement to relief or "a reasonable expectation that discovery will reveal evidence" of a cognizable legal theory or claim. If they do, the motion to dismiss should be denied. *Twombly*, 550 U.S. at 556; *Iqbal*, 129 S. Ct. at 1949.

In *Starr v. Sony BMG Music Entertainment,* 592 F.3d 314 (2d Cir. 2010), the Second Circuit reversed dismissal of a complaint that "alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants." 592 F. 3d at 323. Similarly in *In re Text Messaging Antitrust Litig.*, 2010 U.S. App. LEXIS 26299 *12, *17, *18, ___ F.3d ___ (7th Cir., Dec. 29, 2010), the Seventh Circuit affirmed denial of a motion to dismiss, finding that the factual allegations regarding industry structure and industry practices that facilitate collusion were sufficiently plausible to demonstrate an entitlement to discovery that "may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability." *See also Sepulveda-Villarini v. Department of Education of Puerto Rico*, 2010 U.S. App. LEXIS 25228 at *8 (1st Cir., Dec. 10, 2010) (reversing dismissal of a complaint because the district court "demanded more than plausibility").

Several courts have applied *Twombly* in Section 2 cases, and denied the defendant's motion to dismiss where the factual allegations were substantially less detailed than they are in this case. In *Carpenter Tech. Corp. v. Allegheny Techs.,* 646 F. Supp. 2d 726, 735 (E.D. Pa. 2009), the court denied a motion to dismiss even though the factual allegations were "scant" where the defendant was in a position to foreclose competition. In *Delta Turner, Ltd. v. Grand Rapids-Kent County Convention/Arena Authority*, 600 F. Supp. 2d 920, 936-938 (W.D. Mich. 2009), the court denied a motion to dismiss even though "the antitrust case is not clear-cut" because "plaintiff's burden can legitimately fail or succeed only with further development of the factual record." *Id*. at *926. In *Cloverleaf Enters. v. Md. Thoroughbred*, 2010 U.S. Dist. LEXIS 79648, *31-34 (D. Md. Aug. 6, 2010), the court interpreted *Twombly* to be consistent with the rule that "in antitrust cases summary procedures should be used sparingly" (*id*. at *19) and found the allegations sufficient to state a claim for attempted monopolization. *Id*. at *33-34. Plaintiffs' Complaint in this case pleads facts with greater specificity and meets the Rule 8 standard.

IV. THE COMPLAINT PLEADS FACTS SUFFICIENT TO ESTABLISH THE RELEVANT MARKETS, ANTITRUST STANDING AND ANTITRUST INJURY

A. Plaintiffs Have Sufficiently Identified And Defined The Relevant Markets.

Plaintiffs have defined four relevant markets in the United States and alleged that OCLC has a monopoly in three and is leveraging that monopoly power to monopolize a fourth. Plaintiffs have adequately alleged "product or service markets" for which there are no substitutes and Plaintiffs' participation in those markets. *See* Compl. ¶¶ 17, 19, 20-27.

"[T]he reasonable interchangeability standard [is] a method for defining the relevant product or service market." *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 933 (6th Cir. 2005). The definition of "relevant market" presents a factual question, not a legal question, and there is no requirement that the market be pleaded with specificity. *Eastman Kodak Co. v. Image Technical Servs.,* 504 U.S. 451, 481-482 (1992); *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). Only if a market definition suffers from a fatal legal defect on its face is it subject to dismissal. *See Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 436-37 (3d Cir. 1997).

The Complaint defines the first market as "the market for bibliographic data comprised of digital electronic metadata (*i.e.,* records) of the holdings of college, university and research libraries." Compl. ¶ 20. OCLC inaccurately refers to this market as "bibliographical services" and asserts that "while Plaintiffs claim that bibliographical services is a market, they never define this market." Memo at 5. But the WorldCat database is not alleged to be a "service;" rather, it is a utility composed of "digital electronic metadata." OCLC sells access to the WorldCat database through subscriptions to one or more of OCLC's services, such as FirstSearch, cataloging or ILL. *Id.* ¶ 20, 56, 61.

The Complaint defines the second market as cataloging services for the bibliographic records of the holdings and new acquisitions of academic libraries. OCLC again ignores Plaintiffs' allegations when it argues that Plaintiffs "do not plead facts explaining why cataloging services for academic libraries are different from cataloging services for public libraries. . . ."

Memo at 6. Those facts are sufficiently alleged in paragraph 22, which explains why academic libraries are different. Plaintiffs also allege that there "are no existing products or services that are reasonably interchangeable with, or available substitutes for, any of these three products or services" and explain why. Compl. ¶¶ 21-29.

The Complaint defines the third market as "interlibrary lending between and among academic libraries to share their holdings." *Id.* ¶ 20. OCLC misrepresents the Complaint when it argues that "neither plaintiff pleads that it is a part of this [ILL] market."[3] Memo at 5. The Complaint alleges that Plaintiffs have been excluded from the ILL market by OCLC's anticompetitive conduct, its refusal to deal by denying Plaintiffs' access to WorldCat, by erecting insurmountable entry barriers to that market and by its exclusionary policies and agreements that impose restrictions on member libraries. Compl. ¶ 31-37. Plaintiffs have also alleged that access to the WorldCat database is essential, because without access, effective competition with OCLC in the ILL market is not possible. *Id.* ¶¶ 21-30.

The Complaint defines ILS as a fourth market. *Id.* ¶ 27. OCLC is leveraging its entry into the ILS market by bundling its ILS service with its monopolies over bibliographic metadata, cataloging and ILL, by preventing competitors from having access to bibliographic records essential to compete, and by requiring member libraries to use OCLC's services to exclude for-profit firms. *Id.* ¶¶ 28-29, 35-36. The facts pleaded are sufficient, and OCLC's motion to dismiss for failure to define the relevant markets should be denied.

B. Plaintiffs Have Alleged Facts Establishing Antitrust Standing And Injury.

OCLC's argument that Plaintiffs have failed to plead "antitrust injury and standing to

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[3] At the same time OCLC asserts that "in reality, Innovative is a major player in the general ILL market," an assertion that directly contradicts the allegations of the Complaint. Memo at 5, n. 2; Compl. ¶¶ 24, 27.

sue" is baseless. To determine antitrust standing and antitrust injury, courts consider (1) whether there is a causal connection between the violation and harm to the plaintiff and whether the harm was intentional, (2) the nature of the injury and the plaintiff's status as a consumer or competitor, (3) the directness of the injury and whether damages are speculative, (4) the potential for duplicative recovery or complex apportionment, and (5) the existence of more direct victims. *See Associated General Contractors Inc. v. California State Council of Carpenters,* 459 U.S. 519, 539-546 (1983). An antitrust plaintiff must be a "consumer, customer, competitor or participant in the relevant market or otherwise inextricably intertwined with any such entity." *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1087 (6th Cir. 1983). *See also Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1022-1023 (6th Cir. 1999); *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.,* 604 F.3d 1291 (11th Cir. 2010); *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.,* 611 F.3d 495, 502-505 (9th Cir. 2010). Only the first three considerations are relevant in this case and all have been pleaded.

1. Plaintiffs' antitrust standing and antitrust injury.

Plaintiffs are competitors of OCLC in one or more relevant markets or are being excluded from those markets by OCLC's anticompetitive conduct. Compl. ¶ 5. Plaintiffs' factual allegations plead direct and intentional injuries and a direct causal connection between OCLC's "anticompetitive conduct" and the injuries to Plaintiffs as competitors and as participants in the relevant markets. Compl. ¶ 29-30. The damages suffered by Plaintiffs from lost customers and lost contracts are ascertainable—not speculative—and OCLC has not given any basis for its conclusory argument that Plaintiffs' injuries are indirect or speculative or that duplicative recovery or apportionment of damages are issues in this case. Memo at 16-17.

The harm to competition is evident: *OCLC has excluded all competition in two of OCLC's three monopoly markets by its anticompetitive and exclusionary conduct, and SkyRiver,* *a new entrant in the third market (cataloging), has been directly targeted for elimination*. The harm to competition in the fourth market (ILS) is OCLC's use of its monopoly power and requirement that members purchase OCLC products as leverage in an attempt to monopolize what has been a competitive market.

OCLC also argues that Plaintiffs have not alleged antitrust injury because they have not alleged predatory pricing (*i.e.*, below cost sales), and because MSU and CSULB "turned down OCLC's offer" of punitively-priced uploading fees. OCLC's punitive pricing is "predatory," even assuming that it was above average marginal cost, for the reasons explained by the Supreme Court in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Sixth Circuit in *Spirit Airlines,* 431 F.3d at 951, the Third Circuit in *LePage's, Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003) and in other cases discussed in Section V.A.1. below. *See also Einer* Elhauge, *Tying, Bundled Discounts, And The Death Of The Single Monopoly Profit Theory,* 123 Harv. L. Rev. (No. 2) 397 at 423, 436, 470-473 (2009), which analyzes the anticompetitive effects of tying and bundling that are applicable to this case. OCLC's punitive pricing to MSU and CSULB was intended to eliminate SkyRiver and therefore to eliminate competition in the cataloging market and potential competition in OCLC's other monopoly markets.

The Supreme Court found harm to competition in *Lorain Journal* when a monopoly newspaper refused to accept advertisements from advertisers that also advertised on a new local radio station in order to destroy competition. OCLC is doing effectively the same thing here: it is punishing ILL libraries who use SkyRiver to threaten and prevent other libraries from using SkyRiver and force them to use OCLC's cataloging service. The harm to competition has been no less than the harm in *Lorain Journal*.

Similarly, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 603

(1985), the Supreme Court affirmed a judgment for a refusal to deal that violated Section 2, holding that the defendant "monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id*. Prior to SkyRiver's entry, OCLC had a long standing practice of providing uploading service to libraries that used a competitor's cataloging service, as well as libraries that did not use any cataloging service, to upload their records at a minimal fee. Compl. ¶ 108. Both SkyRiver and libraries relied on this practice—SkyRiver to enter the market and libraries to decide to use SkyRiver.

OCLC has punished member libraries for changing to SkyRiver by making uploading of their records for ILL prohibitively expensive. This deviation from prior practice was designed to harm libraries and library users (*i.e.*, consumers) and competition in general by reducing competition and eliminating a competitor. *Id*. ¶¶ 40-51, 56, 64-65. Here, as in *Aspen Skiing,* the change in an established practice to eliminate SkyRiver as a competitor violated Section 2. Plaintiffs also allege that OCLC's punitive and differential pricing has inflicted significant and substantial antitrust injury on the competitive structure of the market (*i.e.*, "competition") and on academic libraries (*i.e.*, "consumers"), and directly on competitors or potential market entrants. Compl. ¶ 15, 74. *See also Safeway Inc. v. Abbott Labs.*, 2010 U.S. Dist. LEXIS 2145 (N.D. Cal. Jan. 12, 2010) at *14-*15.

Contending that Plaintiffs also fail to plead the markets in which OCLC's acquisitions reduced competition, OCLC asserts that "a competitor does not suffer antitrust injury as a result of two other competitors merging" and that its numerous acquisitions do not give rise to antitrust injury. Memo at 15. Although competitor challenges to mergers require careful analysis, the Second Circuit has had "little doubt that antitrust injury to a competitor can be found when the market share of the merging firms threatens to be decisive." *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 108 (2d Cir. 1989). Moreover, Plaintiffs have not pleaded that each acquisition by OCLC, standing alone, is sufficient to establish antitrust injury, but rather that OCLC did not earn its monopoly power by "superior products" or "business acumen." OCLC's acquisitions were intended to obtain or maintain its monopoly power by eliminating its competitors and to extend its monopoly power to an additional market—ILS. Compl. ¶ 67.

OCLC also contends that "Plaintiffs cannot have suffered injury in the ILL market since they deny participating in that market" and that "Plaintiffs have not pointed to a single specific sale that they have not made as the result of any action of OCLC." Memo at 17.[4] Both arguments ignore the Complaint's factual allegations that Plaintiffs have been excluded from participation in the ILL market by the barriers to entry resulting from OCLC's anticompetitive conduct. Compl. ¶¶ 40-51, 56-65. Moreover, neither SkyRiver nor Innovative is required by Rule 8 to identify by name in the Complaint each lost contract, customer or sale. That is the role of discovery.

2. The cases OCLC cites do not support dismissal for lack of antitrust standing or injury.

The absence of any merit to OCLC's challenge to antitrust standing or injury is evident by the two cases it cites that have no factual similarity whatever to this case—*CBC Cos. v. Equifax, Inc.*, 561 F.3d 569 (6th Cir. 2009) and *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007). In *CBC Companies,* plaintiffs' allegations were conclusory, injury was speculative and plaintiffs failed to allege that competition in the relevant market decreased due to the defendants' conduct. *CBC Companies*, 561 F.3d at 572. In *NicSand*, plaintiff was a former monopolist

[4] *Hodges v. WSM, Inc.*, 26 F.3d 36 (6th Cir. 1994) cited by OCLC regarding a "supplier's" loss of business has no relevance to this case. Plaintiffs are competitors who are directly injured, not suppliers who suffered an indirect injury.

whose market share shrank as a result of the lower prices offered by a new market entrant, and the court concluded that "to allow this litigation to continue . . . is to allow one monopolist to sue a competitor for seizing its market position by charging less for its goods." *NicSand*, 507 F.3d at 457. OCLC also cites *Barton & Pittinos v. Smithkline Beecham Corp.*, 118 F.3d 178, 181 (3d Cir. 1997). *Barton* has no relevance as the trial court granted summary judgment for defendant because the plaintiff was not a competitor and had no standing based on facts developed during discovery. Plaintiffs have pleaded facts sufficient to establish antitrust standing and injury.

V. EACH OF PLAINTIFFS' CLAIMS IS SUFFICIENT TO STATE A CLAIM AGAINST OCLC

A. The First Claim Of SkyRiver For Monopolization Of Bibliographic Metadata, Cataloging And ILL Markets Is Sufficient To State A Claim.

A Section 2 monopolization claim has two elements: "(1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident." *Eastman Kodak*, 504 U.S. at 481-483 *citing United States v. Grinnell Corp.,* 384 U.S. 563, 570-71 (1966); *Aspen Skiing,* 472 U.S. at 596 n. 19. Conduct that is otherwise legal can be exclusionary, anticompetitive and predatory, and thus violate Section 2, when that conduct is by a monopolist. Anticompetitive conduct that violates Section 2 includes the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak,* 504 U.S. at 482-83. *See also*, *Image Tech. Servs. v. Eastman Kodak Co.,* 125 F.3d 1195, 1207 (9th Cir. 1997).

The Complaint alleges that OCLC has at least a 90 percent share of the bibliographic data, cataloging and ILL markets. Compl. ¶ 20. These allegations, taken as true, satisfy the first element. The second element—willful acquisition or maintenance of its monopolies by anticompetitive conduct—is also sufficiently alleged. Compl. ¶¶ 21-30.

1. The Complaint alleges predatory pricing and predatory conduct by OCLC and states a claim for unlawful monopolization.

In *Spirit Airlines,* 431 F.3d at 921, plaintiff, Spirit Airlines, a new market entrant, alleged that defendant, Northwest Airlines, violated Section 2 by using its monopoly power to eliminate Spirit from the market. The Sixth Circuit reversed summary judgment for Northwest, holding that Northwest's pricing conduct was predatory, *even though not below marginal cost*, because Northwest had monopoly power and was using that power by significantly and selectively lowering prices to eliminate a new market entrant. *Id.* at 951. OCLC ignores this controlling Sixth Circuit authority by maintaining that "[u]nless the packaged discount offered . . . is predatory (*i.e.*, priced below the marginal cost of the units sold), it cannot violate the antitrust laws." Memo at 19.

Predatory pricing, *i.e.*, sales below cost, was not required to prove a violation of Section 2 in *LePage's*, 324 F.3d 141, which affirmed a jury verdict for plaintiff *LePage's.* The evidence showed that 3M had not sold its product below cost but had engaged in a predatory scheme of tactical exclusionary practices, including exclusive dealing arrangements and bundled rebates that were designed to expand and solidify 3M's monopoly in the private label tape market. *Id*. at 150-163 and 157-158.

In *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), the Sixth Circuit affirmed a jury verdict that the defendants had monopolized the moist snuff market by engaging in predatory, non-price conduct that was designed systematically to exclude competition and violated Section 2. *Id*. at 783. In *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005), the Third Circuit reversed a judgment for defendant Dentsply (an artificial tooth manufacturer) because the defendant had prevented its dealers from selling Dentsply's competitors' products to preserve its monopoly prices. *Id*. at 190-191. *See also United States v.*

Microsoft Corp., 253 F.3d 34, 60 (D.C. Cir. 2001) (affirming judgment that Microsoft had monopolized the operating systems market by conduct intended to destroy competitor Netscape in the browser market to maintain its monopoly in the operating systems market).

As in *Spirit Airlines*, OCLC has engaged in selective anticompetitive pricing specifically intended to eliminate SkyRiver from the cataloging market. *See* Compl. ¶¶ 50-55. As in *Conwood*, *Dentsply* and *3M,* OCLC implemented a predatory scheme to eliminate a competitor to protect its monopolies. Compl. ¶¶ 31-65. Like *Microsoft*, OCLC used its monopoly power over its WorldCat database and ILL to maintain those monopolies and, at the same time, maintain and solidify its monopoly power over cataloging service. Compl. ¶¶ 41-55. Also, like *Lorain Journal*, OCLC targeted only customers who wanted to buy a competitor's product in order to destroy the competitor. Compl. ¶¶ 54. SkyRiver's allegations are sufficient to state a claim for violation of Section 2.

2. OCLC's exclusionary membership terms and policies and its unlawful refusal to deal with for-profit firms have been sufficiently pleaded.

The Complaint alleges that OCLC has prohibited its member libraries, whose records comprise the WorldCat database, from sharing their records with for-profit firms since at least 1987. Its exclusionary membership terms, which member libraries agree to abide by, have enabled OCLC to obtain a comprehensive database that cannot practically be duplicated today and for which there is no substitute. *Id*. ¶¶ 24, 26, 51, 84, 91. The restrictions imposed by OCLC constitute a refusal to deal. The Supreme Court and other courts have found that refusals to deal violate the antitrust laws under circumstances similar to those here.

Plaintiffs allege that access to the WorldCat database is essential to competition. An unlawful refusal to deal involving an essential facility occurs where: (1) a monopolist controls an essential facility; (2) competitors cannot practically or reasonably duplicate the essential facility; (3) use of the facility is denied to a competitor; and (4) access to the facility is feasible. *Aspen Skiing*, 472 U.S. at 601-603, 611 n. 44 (evidence supported verdict for illegal refusal to deal); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-374 (1973) (illegal refusal of a regulated electric utility to provide access to its essential facility); *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987) ("where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms"); *MCI Communications Corp. v. ATT*, 708 F.2d. 1081, 1132-1134 (7th Cir. 1983) (ATT violated Section 2 by refusing to connect MCI to its network).

All of these elements have been sufficiently pleaded—(1) OCLC has complete control over the WorldCat database, (2) the database cannot practicably be duplicated by any competitor or potential competitor, (3) OCLC has refused to deal with for-profit firms for access to the WorldCat database for commercial use for over 20 years, and (4) access is entirely feasible as all member libraries have access and OCLC provides access to others. Compl. ¶¶ 24, 26, 51, 84, 91, 92. Where, as here, a monopolist has a long-standing published policy of denying access to WorldCat for commercial use to prevent competition, the conduct constitutes an actionable refusal to deal, since a demand to deal would be futile. *See Safeway Inc.*, 2010 U.S. Dist. LEXIS 2145 at *21-22 (refusal to deal sufficiently pleaded by a published prohibitive price for a product following a practice of selling that product at a substantially lower price). That SkyRiver entered the cataloging service market with a substantially smaller database and lower prices does not mean that WorldCat is not essential to a competitive database to support other services, particularly where OCLC is attempting to drive SkyRiver from the market or prevent it from expanding by the very practices at issue in this case.

The Supreme Court's decisions in both *Pac. Bell Tel. Co. v. linkLine Communs.*, Inc., ___ U.S. ___, 129 S. Ct. 1109 (2009), and *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004), relied on by OCLC, were both predicated on the absence of any anticompetitive conduct. The Supreme Court concluded the defendant in each case had no duty to deal because it had obtained its monopoly legally and had not engaged in any anticompetitive conduct to maintain its monopoly. Where, as here, anticompetitive conduct in acquiring or maintaining a monopoly is alleged, and where the other anticompetitive elements are pleaded, neither *Trinko* nor *linkLine* precludes a court from imposing liability for a refusal to deal. *See Safeway Inc.,* 2010 U.S. Dist. LEXIS 2145 at *6-*11 (motion to dismiss denied where defendant allegedly altered a course of dealing that indicated an intent to harm competition, citing *Aspen Skiing*). In addition, the Supreme Court in *Trinko* did not reject its prior authority addressing the essential facilities doctrine, such as *Otter Tail* or *Aspen Skiing.* It simply noted that it had "no need either to recognize it or to repudiate it here." 540 U.S. at 410. SkyRiver has pleaded facts sufficient to state a claim for violation of Section 2.

B. The Second Claim Of Innovative For Attempted Monopolization Of The ILS Market Is Sufficient To State A Claim Against OCLC.

The elements of a claim for an attempt to monopolize under Section 2 are: (1) a specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; and (3) a dangerous probability of success. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993); *Image Tech. Servs.,* 125 F.3d at 1202. Whether there is a dangerous probability of success is a fact-intensive inquiry, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 319 (3d Cir. 2007), that cannot be resolved at the pleading stage "unless it is clear on the face of the complaint that the 'dangerous probability' standard cannot be met as a matter of law." *Carpenter Tech. Corp.*, 646 F. Supp. 2d at 735.

Innovative has alleged that OCLC is using the combined power of its three monopolies and its continuing anticompetitive membership terms that require member libraries to purchase OCLC's products in its attempt to monopolize the ILS market. The Complaint sufficiently alleges monopoly leveraging and a dangerous probability of success. *See* Compl. ¶ 29, 59, 62, 64, 65. The Supreme Court acknowledged and approved "monopoly leveraging" in *Eastman Kodak Co.,* 504 U.S. at 477 as a basis for a Section 2 claim. Following remand and a jury verdict for plaintiff, the Ninth Circuit affirmed that judgment and reaffirmed that a defendant "using its monopoly in one market to monopolize or attempt to monopolize the downstream market" violates Section 2. *Image Tech. Servs.,* 125 F.3d at 1209. *See also Doe v. Abbott Labs.*, 571 F.3d 930, 935 (9th Cir. 2009); *Safeway Inc.*, 2010 U.S. Dist. LEXIS 2145 at *14-24; *Meijer, Inc. v. Abbott Labs.*, 544 F. Supp. 2d 995, 1000 n.2 (N.D. Cal. 2008).

Because OCLC has monopoly power in three related markets, there is a dangerous probability of successful monopolization in the fourth related market. Where the nature of the market renders it susceptible of successful monopolization by the defendant, as it does here, an allegation of market share is not required. *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1543 (8th Cir. 1989) (dangerous probability found despite defendant's zero present market share because of strength of defendant outside market and presence of entry barriers); *Medtronic Ave v. Boston Scientific Corp.*, Civil Action No. 98-478-SLR, 2001 U.S. Dist. LEXIS 9056 (D. Del. Mar. 30, 2001) at *3 ("Plaintiff is incorrect in its assertion that there is a minimum market share requirement for an attempted monopolization claim. The case law is clear that market share is just one factor a court considers in evaluating the existence of monopoly power"); *L & W Lindco Prods. v. Pure Asphalt Co.*, 979 F. Supp. 632, 637 (N.D. Ill. 1997) (firm with 5%-10% share sufficiently alleged to be "well on the way to capture" 40% share). Innovative has alleged that OCLC has a monopoly in three closely related library markets involving the same customers and is using the power of its monopolies and its membership requirements to eliminate competition in the ILS market, and the facts alleged are sufficient to state a claim for attempted monopolization.

C. The Third Claim For Relief Of Innovative And SkyRiver For Unlawful Exclusionary Agreements States A Claim For Violation Of Section 1.

To state a claim for violation of Section 1, a plaintiff must plead facts that show or support an inference that the defendant agreed, combined, or conspired with others and engaged in conduct resulting in adverse anticompetitive effects within the relevant product and geographic markets and that the illegal conduct injured the plaintiff. *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 907 (6th Cir. 1989). *See also American Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996). The "rule of reason" tests whether a restrictive practice should be prohibited because it imposes an unreasonable restraint on competition. *Continental T.V. v. GTE Sylvania,* 433 U.S. 36, 49 (1977).

An agreement between an organization and its members violates Section 1 when the agreement includes anticompetitive terms or practices or requires exclusionary conduct. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court held that the bylaws of defendant Associated Press prohibiting its members from selling news to non-members constituted a combination or conspiracy in restraint of trade because it stifled competition in the newspaper market. *Id*. at 1420-21, 1424. Here, SkyRiver and Innovative allege that OCLC has imposed agreements that restricted members from sharing their bibliographic metadata of their holdings with potential competitors of OCLC since at least 1987. Compl. ¶¶ 32-37, 96-101. Like the bylaws in *Associated Press*, OCLC's membership terms and policies are agreements that OCLC uses to exclude competitors from OCLC's monopoly markets by depriving them of the bibliographic metadata essential to competition.

Similarly, in *North American Soccer League v. National Football League*, 670 F.2d 1249, 1256-57 (2d Cir. 1982) an agreement between members of the NFL that banned ownership by NFL members of other major professional sports teams was found unreasonably to restrain competition and violated Section 1. In *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988), a professional sports association violated Section 1 when the members refused to deal with owners, producers, sponsors and players who refused to abide by the association's terms and conditions.

While OCLC characterizes its conduct as "unilateral actions," the Complaint alleges otherwise—that the membership terms and policies constitute agreements not to share their records with for-profit firms, to deal exclusively with OCLC by purchasing its products and other exclusionary conduct. The policies and agreements are just as binding on member libraries as the restrictions in AP's bylaws were on its members. Compl. ¶¶ 26, 32-37. OCLC also argues that Plaintiff's Third Claim should be dismissed because the Complaint does not allege "time, place, or participant elements of an illegal agreement under Section 1," citing *Twombly*, 550 U.S. at 565 n. 10. Memo at 27. But *Twombly* expressly rejected this interpretation of Rule 8(a)(2) (*Twombly,* 550 U.S. at 569-70, n. 14), and at least one district court has expressly agreed that *Twombly* does not support any such requirement. *See In re Packaged Ice Antitrust Litig.,* 723 F. Supp. 2d at 1007, n. 12. Moreover, Plaintiffs have sufficiently pleaded those agreements and their terms. Compl. ¶¶ 32-37, 96-101.

Finally, OCLC argues that its agreements with member libraries are "vertical." Memo at 27. However, the member libraries' agreements to abide by OCLC's membership terms and restrictions are horizontal—not vertical; they are agreements among its members and OCLC. But even if they are vertical, non-price restraints such as those alleged in this case are subject to the antitrust laws. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Continental T.V.*, 433 U.S. at 49. Plaintiffs' allegations of anticompetitive agreements between OCLC and its member libraries state a Section 1 claim.

D. The Fourth Claim Of SkyRiver For Unlawful Tying States A Claim For Violation Of Section 1.

SkyRiver alleges that OCLC forces libraries to buy its cataloging service (the tied product) by using its market power over ILL (the tying product). Before SkyRiver entered the market, OCLC offered separate prices for ILL and cataloging services. Compl. ¶¶ 102-113. After SkyRiver entered the cataloging market, and knowing the vital importance of full ILL participation, OCLC established a new punitive price for uploading records to WorldCat for ILL use that applies only to libraries that subscribe to SkyRiver's cataloging service. *Id.* ¶¶ 41-46 and 49-53. As a result, for a library that uses the lower cost SkyRiver for cataloging, the prohibitively new punitive cost to be a full participant of ILL (the tying product) (*i.e.,* to upload new acquisitions for ILL use) resulted in direct harm to the library by being forced *not* to upload new holdings. *Id.* SkyRiver also suffered direct injury because the imposition of the punitive uploading charge makes the price of the tying product (ILL) so prohibitive that it forces subscribers who must have OCLC's ILL service to use OCLC's cataloging service rather than consider SkyRiver's less expensive cataloging service on the merits. *See Virtual Maintenance v. Prime Computer*, 11 F.3d 660, 666 (6th Cir. 1993) (*en banc*) (defendant's price differential between the individual product and the tying and tied product package, as well as market power over the tying product, permitted defendant to "exploit control over the tying product to force the buyer to purchase an unwanted tied product").

Tying arrangements that violate Section 1 of the Sherman Act are either *per se* unlawful or tested under the rule of reason. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394

U.S. 495, 498-504 (1969). Plaintiffs have alleged facts sufficient to establish a *per se* violation because the fact that MSU and CSULB refused to pay OCLC's punitive uploading price (as have all other SkyRiver customers) demonstrates that those services are not available outside the OCLC bundle with cataloging. In addition, many libraries who were interested in SkyRiver stayed with OCLC for cataloging because they would not pay the punitive uploading price. At a minimum, plaintiffs have stated a rule of reason tying claim by showing "an adverse effect on competition." *Compuware Corp. v. IBM*, 366 F. Supp. 2d 475, 479 (E.D. Mich. 2005). *See* Einer Elhauge, *Tying, Bundled Discounts, And The Death Of The Single Monopoly Profit Theory,* 123 Harv. L. Rev. (No. 2) 397 at 423, 436, 470-473 (2009).

To determine whether a tying arrangement is likely to have an anticompetitive effect: "(1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller has or will acquire monopoly power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct." *Hand v. Central Transport, Inc.*, 779 F.2d 8, 11 (6th Cir. 1985). OCLC, the seller of the tying product, "has a direct economic interest in the sale of the tied product" and SkyRiver has suffered antitrust injury as a result of the tying arrangement. *Arnold v. Petland, Inc.*, 2009 U.S. Dist. LEXIS 31377, *12 (S.D. Ohio Mar. 26, 2009); *Hodges*, 26 F.3d at 39. In applying the rule of reason, the court considers market conditions before and after the restraint, the nature of the restraint, the history of the restraint and the possible remedy. *Hand,* 779 F.2d at 10. All of these elements are pleaded in Plaintiffs' Complaint.

OCLC nonetheless argues that SkyRiver's Section 1 tying claim must be dismissed because (1) "there is no allegation that OCLC has refused to separately sell uploading services," and (2) since MSU and CSULB declined to pay the uploading fees, the coercion element of the claim fails "as a matter of law." Memo at 28-29. The Complaint alleges OCLC unreasonably increased the price of full participation in its ILL service and/or uploading charges only for libraries using SkyRiver's cataloging service" to exclude SkyRiver and to force libraries to use OCLC's cataloging service. Compl. ¶¶ 107-109. This conduct is sufficient to state or imply "an adverse effect on competition" (*Compuware* at 366 F. Supp. 2d at 479) and meets all three tests of *Hand v. Central Transport*. Furthermore, the punitive price increase was intended to be economically prohibitive, and effectively constitutes a refusal to sell "reasonably priced" uploading services to libraries that have switched to SkyRiver. *See Safeway Inc.*, 2010 U.S. Dist. LEXIS 2145 at *20-21. The fact that MSU and CSULB refused to succumb to OCLC's economic coercion does not demonstrate that the coercion element of the claim cannot be established. In fact, it demonstrates the opposite: the unwillingness of MSU and CSULB and other SkyRiver libraries to buy ILL services at the exorbitant unbundled price (*i.e.*, ILL with punitive priced uploading) shows that the ILL service was not separately available from OCLC's cataloging service as a practical matter. The fact that no library is buying uploading at the exorbitant price proves that a tie exists. *Ortho Diagnostic Sys. v. Abbott Lab.*, 920 F. Supp. 455, 471 n. 17 (S.D.N.Y. 1996) (package pricing can satisfy coercion element if customers do not make substantial purchases outside the package). SkyRiver has alleged that OCLC's punitive pricing scheme "was intended to, and did, intimidate other libraries not to use SkyRiver's cataloging service." Compl. ¶ 109. SkyRiver has also alleged that it has lost business as a direct result of OCLC's punitive pricing and its threats to other libraries. *Id.* ¶ 52, 53. OCLC's motion to dismiss SkyRiver's Fourth Claim should be denied.

E. The Fifth And Sixth Claims Of SkyRiver And Innovative Are Sufficient.

California's Cartwright Act is patterned after Section 1 of the Sherman Act. Cal. Bus. & Prof. Code § 16700. Plaintiffs sufficiently allege violation of Section 1, and OCLC's motion to dismiss Plaintiffs' Fifth Claim should be denied. California's Unfair Competition Law ("UCL") prohibits "unfair competition," which includes any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200, *et seq*. Plaintiffs' Sixth Claim alleges UCL violations based on OCLC's unlawful and unfair acts or practices. Compl. ¶ 129. Thus, even if Plaintiffs' antitrust claims are insufficiently pleaded, Plaintiffs' state a Section 17200 claim for "unfair" business practices. *See Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999).

VI. CONCLUSION

For all of the foregoing reasons, Defendant's motion to dismiss should be denied.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument as essential to a fair resolution of the Motion in light of the breadth and scope of the Motion and the complexity of the issues and the relevant markets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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