

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

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

DEFENDANT OCLC ONLINE COMPUTER LIBRARY CENTER, INC.'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO FILE A SURREPLY

Pursuant to Local Rule 7.2(a)(2), Plaintiffs have not demonstrated the requisite good cause necessary to support their Motion for Leave to File a Surreply and their Motion should therefore be denied. Plaintiffs present two reasons that they allege a surreply is necessary: first, to reiterate their request for oral argument, which they already raised in their Memorandum in Opposition to OCLC's Motion to Dismiss, and second, to attempt to preserve their right to request leave to file an amended complaint. Neither reason demonstrates good cause under Rule 7.2(a)(2) and Plaintiff's Motion should be denied.

First, Plaintiffs have already made it clear to this Court and OCLC that Plaintiffs desire oral argument in this matter. OCLC has likewise made it clear to Plaintiffs and this Court that it does not believe oral argument is necessary given the eighty pages of briefing from both sides on OCLC's Motion to Dismiss. This Court has already received an additional twenty pages of argument over the typical dismissal briefing. Plaintiffs' request for oral argument is unwarranted

unless the Court has specific issues it wishes to address with counsel. Plaintiffs have not demonstrated good cause as required to reiterate this request in a surreply.

Second, Plaintiffs seek leave to file an amended complaint if the Motion to Dismiss is granted, but fail to identify which portions of their voluminous complaint they would amend if given the opportunity. This again does not demonstrate the good cause required for leave to file a surreply. Federal Rule of Civil Procedure 15(a) states that when a party is required to seek leave of court in order to file an amended pleading, “leave shall be freely given when justice so requires.” A request under Rule 15(a) is subject to the requirements of Rule 7(b), which states that a motion “shall state with particularity the grounds for seeking the order.” *See Evans v. Pearson Enter., Inc.*, 434 F.3d 839, 853 (6th Cir. 2006). Thus, a “bare request” for leave to amend is not a proper motion under Rule 15(a). *Id.*; *see Nation v. United States*, 512 F. Supp. 121, 124-25 (S.D. Ohio 1981) (“Although the Civil Rules do not expressly deal with the manner of presentation of amendments to pleadings, there is substantial authority for the proposition that Civil Rules 7(b)(1) and 15(a) impliedly require submission of the proposed amended pleading with the motion to amend.”). At this point, Plaintiffs’ request to preserve their right to amend the complaint is nothing more than a thinly disguised attempt to have the Court do Plaintiffs’ legwork. That is, Plaintiffs want the Court to tell them where the Complaint fails and then give them the opportunity to try to plead around the deficiencies. This is inappropriate under the Federal Rules of Civil Procedure.

Indeed, despite the fact that OCLC’s Reply cited the requirement articulated by the Sixth Circuit in *Evans* to state with particularity the grounds for seeking to amend (Dock. # 52 at 5), Plaintiffs’ tendered Surreply continues to give no indication of the particular grounds on which amendment would be sought, and thus does not correct the omission in Plaintiffs’ Opposition.

OCLC should not be subject to Plaintiffs' efforts to recast their case when they suffer litigation setbacks; if Plaintiffs did not set forth any cognizable claims – which they did not – OCLC should not be forced to endure successive complaints as Plaintiffs try to get it right. Plaintiffs' request indicates that Plaintiffs seek to improperly use the pleading process as a testing ground to search for viable claims and theories to fit their alleged facts. This is improper and OCLC should not be subject to this demand.

CONCLUSION

Pursuant to Local Rule 7.2 (a)(2), Plaintiffs have not demonstrated the requisite good cause for this Court to grant leave to allow Plaintiffs to file a surreply. Plaintiff's Motion should therefore be denied.

Respectfully Submitted,

/s/ James A. Wilson (filed by MCB)

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CERTIFICATE OF SERVICE

The undersigned being counsel for Defendant certifies that a true copy of the foregoing Memorandum in Opposition to Plaintiffs' Motion for Leave to File a Surreply was served, this 16th day of March, 2011 via the Court's CM/ECF system in accord with Fed. R. Civ. P. 5(b)(2)(E), upon all counsel of record.

/s/ Martha C. Brewer

Martha C. Brewer