

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN 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. 2:10-cv-01017-MHW-TPK

District Judge: Hon. Michael H. Watson
Magistrate Judge: Hon. Terence P. Kemp

**RULE 26(f)
REPORT OF PARTIES**

1. Pursuant to Fed. R. Civ. P. 26(f), the Parties held a teleconference on **March 8, 2011**. The following counsel participated:

- Arthur J. Shartsis, Robert E. Schaberg and Simone Katz-O'Neill, counsel for Plaintiffs SkyRiver Technology Solutions, LLC and Innovative Interfaces, Inc; and
- James A. Wilson and Douglas R. Matthews, counsel for Defendant OCLC Online Computer Library Center Inc.

2. **Magistrate Jurisdiction.**

- The Parties do not consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

3. **Jurisdiction and Venue.**

a. Describe any contested issues relating to (1) subject matter jurisdiction, (2) personal jurisdiction, and/or (3) venue:

- None.

b. Describe the discovery, if any, that will be necessary to the resolution of issues relating to jurisdiction and venue:

- None.

c. Recommended date for filing motions addressing jurisdiction and venue:

- None.

4. **The Pre-Discovery Disclosures.**

- During the March 8, 2011, Rule 26(f) meet and confer telephone conference, the Parties discussed the exchange of Rule 26(a)(1) Initial Disclosure materials with a view toward identifying a mutually agreeable exchange date. The Plaintiffs acknowledged that under Rule 26(a)(1)(C), Initial Disclosures would normally be exchanged on March 22, 2011. That said, Plaintiffs suggested that the Parties agree upon an exchange date within a reasonable time after the Preliminary Pretrial Conference. Defendant suggested that the Parties defer the exchange date until after the Court enters an order ruling on the pending motion to dismiss, in keeping with the Parties agreement to stay discovery until that time. (*See* Section 5, *infra*.) Plaintiffs objected to this proposal. Since the Parties were unable to reach agreement on this issue, each Party's position is set forth below for discussion with the Court on March 29, 2011.

- **Plaintiffs' Position.**

Plaintiffs request that the Court order that the Parties exchange their respective Initial Disclosure materials and information no later than April 26, 2011 because Initial Disclosures are not "discovery." Defendant contends that the Initial Disclosures constitute "discovery" and are encompassed within the agreed upon

stay of discovery. Plaintiffs disagree for several reasons.

First, it is apparent that Rule 26 draws specific distinctions between Initial Disclosures, on the one hand, and “discovery,” on the other hand. Rule 26(a)(1)(A)(i)-(iv) lists specific categories of information or data that shall constitute a party’s initial disclosures, and Rule 26(a)(1)(C) establishes a specific deadline for the completion of those disclosures. In contrast, Rule 26 addresses “discovery” as a separate category of information and data that are “requested” or “sought” by a “party” typically pursuant to Rules 30, 33, 34 and 36. Initial Disclosures are not “responsive” to an adversary’s discovery request, but rather the product of a party’s own assessment of the information and data that the “disclosing party may use to support its claims or defenses.”

Second, the Joint Motion to Stay Discovery does not reference the Initial Disclosure obligations set forth in Rule 26(a)(1)(A). Rather, it only references “discovery.” Given the distinctions drawn by Rule 26, Plaintiffs’ counsel reasonably understood that the discovery stay did not include Initial Disclosures. Plaintiffs’ understanding is supported by *In re Comdisco Sec. Litigation*, 166 F. Supp. 2d 1260, 1262-63 (N.D. Ill. 2001) in which the court held that initial disclosures are a discrete category separate from “discovery” under Rule 26 and need not be stayed pending a motion to dismiss, While the Ninth Circuit in *Medhekar v. U.S. Dist. Court*, 99 F.3d 325, 327-28 (9th Cir. 1996) held that initial disclosures are a “subset of discovery” under Rule 26 and must be stayed pending a motion to dismiss, the Sixth Circuit has not spoken on this issue. Plaintiff submits that the *Comdisco* decision is the better reasoned decision. *Medhekar*

reached its conclusion in part because the Rule regarding initial disclosures was found in the section headed “Depositions and Discovery.” 99 F.3d at 328. As *Comdisco* points out, however, the title to the relevant portion of Rule 26 was in fact changed from “General Provisions Governing Discovery” to “General Provisions Governing Discovery; Duty of Disclosure” *upon the introduction of the initial disclosures provisions into Rule 26*. This two-category characterization undermines any argument that initial disclosures are a “subset” of formal discovery; or, as stated in *Comdisco*, the disparate interpretations at least indicate that *Medhekar* placed “excessive weight on an extraordinarily slim reed.” 166 F. Supp. 2d at 1262. As the *Comdisco* court concluded, “when *Medhekar*’s attempted underpinning by the generic heading is thus removed, this Court submits that the entire analytical structure collapses.” *Id.*

Third, it is significant that Judge Watson’s published form for a “Rule 26(f) Report of Parties” specifically refers to initial disclosures as “Pre-Discovery Disclosures” and supports Plaintiffs’ understanding that a party’s initial disclosure obligations are separate and apart from formal “discovery.”

Fourth, as a practical matter, the initial disclosures are not burdensome. The initial disclosure called for by Rule 26(a)(1)(A)(i) (identity of potential witnesses) has occurred to some extent in the parties’ briefs filed in connection with OCLC’s Section 1404(a) Motion to Transfer. At most, this information may need to be updated. The initial disclosure called for by Rule 26(a)(1)(A)(iii) (“Damages”) does not apply to OCLC, and it is unlikely that the initial disclosure called for by Rule 26(a)(1)(A)(iv) (insurance agreements) is implicated by the existing claims.

OCLC's initial disclosure of materials called for by Rule 26(a)(1)(A)(ii) (a copy or a description and location of documents that may support its defenses) should proceed since OCLC has had seven months since the Complaint was filed to identify, segregate and gather these documents and it will have additional time – until April 26, 2011 – to do so.

Fifth, we are fast approaching the one year anniversary of the filing of Plaintiffs' Complaint (July 28, 2010). This litigation should commence moving forward at the earliest possible time.

- **Defendant's Position.**

Defendant objects to making Rule 26(a) disclosures until after the motion to dismiss has been ruled upon for the same reasons as set forth in the joint motion to stay discovery.

Shortly after this case was filed in the Northern District of California, Defendant filed a motion to transfer venue, in which it set forth information regarding the primary witnesses in this case and a basic description of the likely relevant documents. After Defendant's motion to transfer venue to this Court was granted and Defendant filed its motion to dismiss in this Court, Plaintiffs approached Defendant to request agreement to a joint motion to stay discovery. Defendant concurred that that the *Twombly and Iqbal* decisions and the related subsequent decisions by Sixth Circuit (*see Nicsand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc)) and this Court (*In re Plavix Indirect Purchaser Antitrust Litig.*, Case No. 1:06-cv-226, 2011 U.S. Dist. LEXIS 8940 *8-9 (S.D. Ohio Jan. 31, 2011) (Watson, J.); *Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d

938, 949 (S.D. Ohio 2010); *CBCInnovis v. Equifax Info. Servs. LLC*, 2008 U.S. Dist. LEXIS 11700, at *9, 2008-1 Trade Cas. (CCH) ¶ 76,199 (S.D. Ohio Feb. 4, 2008) (Smith,.J.), affirmed 561 F.3d 569 (6th Cir. 2009)) made clear that pleadings must be sufficient to state a plausible claim for discovery to proceed in a complex antitrust case, so Defendant agreed with Plaintiff's suggestion of a joint motion to stay. Relying on the fact that the joint motion to stay was then filed, Defendant has not incurred the substantial expense required to prepare for initial disclosures or discovery by further identifying relevant witnesses and documents beyond what was required to fulfill its preservation obligations and to support the motion to transfer venue.

As the joint motion pointed out, *Twombly*, *Iqbal*, and the subsequent cases call for a stay of discovery in complex antitrust cases on the compelling grounds that it is much more efficient to resolve the issue of whether a Complaint states an antitrust claim upon which relief can be granted before the parties incur the substantial expense of discovery. Defendant submits that the term "discovery" in the joint motion to stay discovery should be read to include Rule 26(a) initial disclosures, because there is no policy reason to distinguish between such initial disclosures and other types of discovery. The burdens of complying with the obligations under Rule 26(a) -- identifying the name of each individual likely to have discoverable information and the subjects of that information; and producing or describing all documents and electronically stored information that a party may use to support its claims or defenses -- in a complex antitrust case are substantial. Defendant should not be forced to incur the expense of complying with these

burdens any more than they should be compelled to respond to requests for production or interrogatories or be subject to depositions of its employees, until Defendant's motion to dismiss has been decided. As Plaintiffs have conceded, the only appellate court that has addressed the issue of whether Rule 26(a) initial disclosures are "discovery" concluded that Rule 26(a) initial disclosures should be considered to be discovery in the context of a stay of discovery pending a decision on a motion to dismiss. In *Medhekar*, the Ninth Circuit issued a writ of mandamus requiring the trial court to stay initial disclosures pending a rule on the motion to dismiss in a case under the Private Securities Litigation Reform Act of 1995, which requires that "all discovery and other proceedings" must be stayed pending the disposition of a motion to dismiss a securities action covered by the Act. The Ninth Circuit was based largely on its conclusion that "the time and expense involved in the identification and production of documents and other items required by the disclosure rule is exactly the type of burden sought to be eliminated by the Act." The *Comdisco* case that Plaintiffs cite references *Medhekar* as setting out the two purposes for staying disclosures, (1) "to prevent the imposition of any unreasonable burden on a defendant before disposition of a motion to dismiss the complaint" and (2) "to avoid the situation in which a plaintiff sues without possessing the requisite information to satisfy the [PLSRA's] heightened pleading requirements, then uses discovery to acquire that information and resuscitate an otherwise dismissible complaint." The *Comdisco* court ultimately found that neither concern was implicated because the limited request was for production of insurance policies, which did not involve any

burden or undue prejudice. This is not the case in this lawsuit, where Defendants possess a large volume of documents that will likely be at issue in this litigation and that would be extremely burdensome to produce at this point. Likewise, the only court Defendant has found that was faced with a request to stay disclosures together with discovery under the *Twombly* precedent have concluded that disclosures should be stayed as well. See *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417 WHA, 2007 U.S. Dist. LEXIS 57982 (N.D. Cal. July 24, 2007).

Moreover, even were Rule 26(a) initial disclosures technically distinguishable from other discovery under Rule 26, it would be a distinction without a difference. Again, the efficiencies gained by postponing discovery in a complex antitrust case until a determination has been made on whether the Complaint sets for a claim upon which relief can be granted are the same with respect to Rule 26(a) initial disclosures. Thus, it is equally appropriate to postpone the initial disclosures until after the motion to dismiss has been determined as it is to stay other discovery.

Defendant further submits that Plaintiffs' assertions regarding the need for and the burden of initial disclosures in this case are inconsistent. Plaintiffs argue that the burden on Defendant to provide Rule 26(a) disclosures would be minimal, because Defendant has already provided most of the information required by Rule 26(a) with regard to witnesses and documents in its motion to transfer venue. However, if Defendant's previous disclosure of primary witnesses and description of the categories of documents in the motion to transfer was sufficiently detailed,

then there is no substantial need for Defendant to compile and provide additional information at this time. If Rule 26(a) requires the disclosure of more detailed information, and the language of Rule 26(a) suggests that it does, then Defendant should not be forced to incur that cost until the motion to dismiss has been ruled upon for the same reasons set forth in the joint motion to stay. As detailed in the motion to dismiss, Plaintiffs' have wrongfully portrayed a wide variety of Defendant's business practices as monopolistic. Thus, to identify every individual with information relating to Plaintiffs' claims and the subjects of such information and to identify and categorize all of the documents that would be required to refute Plaintiffs' wide-ranging accusations would require significant time and effort involving numerous witness interviews and document review. It would be extremely inefficient to require Defendant to incur the expense of such an effort until the motion to dismiss is decided. Even if the motion to dismiss is granted only as to some of Plaintiff's claims, such narrowing of the allegations could significantly reduce the effort required of Defendant to comply with its Rule 26(a) obligations.

In sum, Defendant submits that that, for the reasons in the joint motion to stay discovery, Rule 26(a) initial disclosures should not be required until 30 days after the ruling on the motion to dismiss if any claims survive that ruling.

5. **Discovery Subjects and Dates.**

- On or about December 3, 2010, the Parties filed a Joint Motion to Stay Discovery "pending determination of the motion to dismiss [that] OCLC will file on December 13, 2010." Plaintiffs' Memorandum in Opposition was filed on

February 4, 2011. Defendant's Reply was filed on February 22, 2011. To date, the Court has not entered an order concerning the Joint Motion to Stay Discovery.

a. **Subjects.**

- A detailed response to this item is premature given the current procedural posture of the litigation. However, that said, the Parties agree that, absent a final order dismissing all claims with prejudice, discovery will be necessary, and agree that such discovery will focus on all Rule 26(b)(1) information that relates to or concerns Plaintiffs' claims for relief and Defendant's defenses to such claims for relief. The Parties have agreed that discovery shall commence subsequent to entry of the Court's order ruling on the pending motion to dismiss.

b. **Phases of Discovery.**

- Discovery should be bifurcated between liability and damages.
- Discovery should be bifurcated between expert and non-expert.
- Discovery should be limited or focused upon particular issues related to _____.
- Discovery need not be bifurcated or limited.

c. **Electronically Stored Information ("ESI").**

- The Parties anticipate that discovery will involve the production of a substantial amount of electronically stored information ("ESI"), as well as a lesser amount of hard-copy documents. The Parties have accordingly met and are continuing to confer concerning the issues raised in Rule 26(f)(3)(C), and are working toward an agreement upon a Joint Stipulation and Order Regarding ESI Protocols.

d. **Protective Order.**

- The Parties agree that a protective order will be necessary in order to protect any confidential, proprietary or trade secret information or data that is responsive to a Party's discovery request. The Parties have accordingly agreed upon a Stipulated Protective Order which is attached hereto as Exhibit A. The Parties hereby request that the Court enter this Stipulated Protective Order.

e. **Non-Waiver of Privilege.**

- The Parties agree that, despite each Party's diligent efforts to identify and withhold from prosecution any and all documents protected by the work-product doctrine and/or attorney-client privilege ("Privileged Documents"), given the volume and nature of materials that will be exchanged during discovery, a possibility exists that Privileged Documents may be produced inadvertently. The Parties have accordingly agreed upon the Stipulated Protective Order Regarding Non-Waiver of Privilege, which is attached hereto as Exhibit B, and hereby request that the Court enter the Order.

f. **Expert Testimony.**

- The Parties agree that, absent a final order dismissing all claims with prejudice, expert testimony will be necessary in connection with a variety of issues, and the Parties expect that each Party will be retaining experts within the meaning of Rule 26(a)(2).

g. **Dates.**

- Date for disclosure and report of Plaintiff(s) expert(s): N/A.
- Date for disclosure and report of Defendant(s) expert(s): N/A.

- Date for disclosure and report of rebuttal expert(s): N/A.
- Date for disclosure of non-expert witnesses: N/A.
- Discovery Cutoff Date: N/A.

6. **Discovery Limitations.**

- The Parties expect that changes to the relevant and applicable discovery limitations may become necessary. For example, the Parties may stipulate to more than 10 depositions under Rule 30(a)(2)(A), and may seek leave of Court for more than 25 written interrogatories under Rule 33(a)(1). The Parties will meet and confer on these issues once they have commenced document discovery.
- N/A. The maximum number of interrogatories by each party to any other party shall be _____.
- N/A. The maximum number of requests for admission by each party to any other party shall be _____.
- N/A. The maximum number of depositions taken by plaintiff(s) and by defendant(s) shall be _____, each limited to a maximum of _____ hours unless extended by agreement of Parties.
- N/A. No changes to limitations under Fed. R. Civ. P.

7. **Other Matters:**

a. **Settlement.**

- This item is premature given the current procedural posture of the litigation.
- Date by which a demand can be made: N/A.
- Date by which a response can be made: N/A.

b. **Motion Deadlines.**

- This item is premature given the current procedural posture of the litigation.
- Deadline to amend the pleadings and/or add Parties: N/A.
- Deadline for motions relative to the pleadings: N/A.
- Deadline for dispositive motions: N/A.

c. Pretrial Conference Dates.

- This item is premature given the current procedural posture of the litigation.
- Recommended date for final pretrial conference: N/A.

8. Settlement Week Referral

- This item is premature given the current procedural posture of the litigation.
- The earliest Settlement Week referral reasonably likely to be productive is the
- N/A. March 2011 Settlement Week
- N/A. June 2011 Settlement Week
- N/A. September 2011 Settlement Week
- N/A. December 2011 Settlement Week

9. Other matters pertinent to management of this litigation:

- None.

Respectfully submitted,

s/ Thomas L. Long per email authorization

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 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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