

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

BUCKHORN, INC., et al.,

Plaintiffs,

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Case No. 3:08-cv-459

-vs-

District Judge Timothy S. Black

Magistrate Judge Michael R. Merz

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ORBIS CORPORATION, et al.,

Defendants.

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**DECISION AND ORDER**

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This case is before the Court on Plaintiffs’ letter request for an informal telephone conference call “regarding Plaintiffs’ request for an order compelling the Defendants to produce certain documents responsive to document requests served by the Plaintiffs and to provide Mr. Randall J. Phelps for deposition.” (Letter of Paul Grandinetti dated May 24, 2010, Doc. No. 48, PageID 340<sup>1</sup>.) Defendants’ have opposed the request, also by letter (Letter of John W. Lomas, Jr. dated May 27, 2010, PageID 365-371.), and Plaintiffs’ have responded by letter (Letter of Paul Grandinetti dated June 3, 2010, PageID 412).

Plaintiffs’ request is **DENIED** because the Court concludes the discovery dispute(s) are not yet sufficiently formulated to permit resolution in an “informal telephone conference.” In addition to the denial, the Magistrate Judge offers the following observations which he hopes will prove

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<sup>1</sup>Since installation of the current version of District Court electronic filing software, all pages filed in this Court have received automatically a distinctive page number which appears in the upper-right-hand corner of the document. Counsel are requested, when referring to documents filed in the case, to provide PageID numbers. The software works “retroactively” to cover all documents filed electronically.

useful in the management of the case:

1. Plaintiffs desire to obtain certain discovery, including the Phelps deposition, before mediation in the case. Defendants oppose at least holding the Phelps deposition and perhaps providing additional sought documents until after the mediation, relying on Mr. Kaiser's observations that early mediation is often more productive than mediation held after discovery expense. That observation was not made with particular reference to this case, but published to the bar generally and does not control mediation in this case.

The Court's position is that mediation is a voluntary process and it will not compel mediation to proceed against the will of either party. If Plaintiff wishes to postpone the mediation until after certain discovery is accomplished, or to opt out of mediation altogether, the Magistrate Judge will grant a motion to that effect if it is filed.

2. Attention of counsel is called to S. D. Ohio Civ. R. 7.2(c) which provides in part:

Letters to the Court are generally inappropriate and disfavored, unless (1) requested by the Court in a specific matter, or (2) advising the Court of the settlement of a pending matter. All other written communications shall be by way of formal motion or memorandum submitted in compliance with these Rules.

Dayton location of court General Order No. 1 at 11 (available at

[www.ohsd.uscourts.gov/generalorders](http://www.ohsd.uscourts.gov/generalorders)) encourages informal contact with the Court to resolve urgent discovery matters, but is not intended to encourage lengthy "informal" correspondence of the sort presently before the Court.

3. In the Preliminary Pretrial Conference Order (Doc. No. 37), Judge Rose provided that this case would be governed by the Local Patent Rules. With minor changes from the draft which was extant in February, 2010, when the Order was entered, those Rules became formally effective on June 1, 2010, and apply to "all other pending patent cases if just and practicable." By virtue of the parties express adoption of these Rules in their draft form

(Rule 26(f) Report, Doc. No. 34, PageID 276), the Court concludes that they should continue to apply by force of law from and after their effective date.

4. Pursuant to the Preliminary Pretrial Conference Order a number of documents defined in the Local Patent Rules were to have been “served” by one party or the other at various dates from March 25, 2010, through June 1, 2010 (PPTO, Doc. No. 37, PageID 302, ¶¶ 5, 7.) If those documents have been served, they have not been filed with the Court. Fed. R. Civ. P. 5(d) requires that papers after the complaint which are required to be served – except for disclosure and discovery papers – are to be filed. Have the required documents been served? If so, why have they not been filed?
5. The Magistrate Judge concludes that the discovery plan embedded in the Rule 26(f) Report is not sufficiently detailed to permit the parties to proceed with discovery in a manner calculated to complete it within the time allowed. The parties are accordingly ORDERED to file a joint discovery plan setting forth the names of all persons intended to be deposed and proposed dates for completing those depositions. If the parties are unable to agree on a joint plan, they shall file separate proposed plans. These plans shall be filed by July 1, 2010.

June 4, 2010.

s/ **Michael R. Merz**  
United States Magistrate Judge