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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

SHARON TAYLOR, JAMES DOUGLAS BOOKER, WILLIE B. BOOKER, LOWRY BRILEY, TWILAH BROWN, JAMES D. CLARY, SHARON A. CLARY, ALICE M. COOKS, ARLANDO COOKS, ELIZABETH DeWITT, KENNETH GOSSIP, SR., KENNICE GOSSIP, PAMELA HENSLEY, ROBERT G. HOLLINESS, CAROLYN LATHAM HOLUB, BRANDI JEWELL, TRACY KARP, VENISIA BOOKER McGUIRE, DAVID PATTERSON, RONNIE PHILLIPS, JAMES ROBERTS, LUZ ANN ROBERTS, KIMBERLY DAWN UNDERWOOD, MARILYN WHITAKER, and WILLIAM "TROY" WILSON, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

ACXIOM CORPORATION, a Delaware Corporation; CHEX SYSTEMS, INC., a Minnesota Corporation; CHOICEPOINT PUBLIC RECORDS DATABASE TECHNOLOGIES, INC. a Georgia Corporation; CHOICEPOINT PUBLIC RECORDS, INC. a Georgia Corporation; CHOICEPOINT, INC. a Georgia Corporation; CHOICEPOINT SERVICES, INC., a Georgia Corporation; SEISINT, INC., a Florida Corporation; and LEXISNEXIS, REED ELSEVIER, INC., a Massachusetts Corporation,
Defendants.

CAUSE NO. 2:07cv01

JUDGE: T. JOHN WARD

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR DEFAULT JUDGMENT OR ALTERNATIVELY JUDGMENT ON THE PLEADINGS

PLAINTIFFS' SUR-REPLY IN FURTHER OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT OR, ALTERNATIVELY TO STAY PLAINTIFFS' ACTION

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR DEFAULT JUDGMENT OR ALTERNATIVELY JUDGMENT ON THE PLEADINGS

Plaintiffs, SHARON TAYLOR, JAMES DOUGLAS BOOKER, WILLIE B. BOOKER, LOWRY BRILEY, TWILAH BROWN, JAMES D. CLARY, SHARON A. CLARY, ALICE M. COOKS, ARLANDO COOKS, ELIZABETH DeWITT, KENNETH GOSSIP, SR., KENNICE GOSSIP, PAMELA HENSLEY, ROBERT G. HOLLINESS, CAROLYN LATHAM HOLUB, BRANDI JEWELL, TRACY KARP, VENISIA BOOKER McGUIRE, DAVID PATTERSON, RONNIE PHILLIPS, JAMES ROBERTS, LUZ ANN ROBERTS, KIMBERLY DAWN UNDERWOOD, MARILYN WHITAKER, and WILLIAM "TROY" WILSON, on behalf of themselves and all others similarly situated, file this, their Reply in Further Support of Their Motion for Default Judgment or Alternatively Motion for Judgment on the Pleadings and in support thereof, state:

The purpose of this reply brief is to address Plaintiffs' supposed "disregard of established case-law" as asserted in Defendants' Opposition Brief (doc. 20).

Nothing in the rules of civil procedure allow a party to forego a responsive pleading based on the filing of motion to stay or a motion to dismiss under the "first to file" rule.

The only binding authority[1] presented by Defendants consists of two cases in which the Court simply analyzed whether to apply the "first to file" rule based on the facts of that particular case.[2] Neither case involved a challenge that the motion was improper under Rule 12 and neither analyzed whether the filing of the motion tolled the answer deadline.

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[1] Professors Alan Wright and Arthur Miller, based on handful of cases which merely analyze whether a case was improperly stayed or dismissed, conclude that there is a modern trend toward hearing such motions and tolling the plaintiffs' answer deadline. With all due respect to professors Wright and Miller, Plaintiffs submit that they are taking an overly expansive view of the relevant authority.

[2] *See Brillhart v. Excess Ins. Co. of Am.* , 316 U.S. 491 (1942); *Cadle Co. V. Whataburger of Alice, Inc.*, 174 F.3d 599, 602 (5th Cir. 1999).

The Eighth Circuit opinion cited by Defendants merely states in *dicta* that "district courts have the *discretion* to recognize additional pre-answer motions, including motions to stay cases within federal jurisdiction when a *parallel state action* is pending." (emphasis added).

Thus, the well-established case law described by Defendants consists of two district court opinions – one from Delaware and an unreported case from New York.

Plaintiffs, alternatively, present two district court opinions which explicitly state that the filing of a motion such as Defendants' is improper under Rule 12. Contrary to Defendants' assertions, these cases were not rejected by the United States Supreme Court in *Brillhart*. *Brillhart* merely held that the district court was within its discretion to dismiss the case, without analyzing whether the motion was proper or whether the motion tolled the defendant's answer deadline.

The bottom line is that the Federal Rules of Civil Procedure themselves do not recognize such a motion as tolling Defendants' answer deadline. Defendants have failed to cite a case which is binding on this Court holding that the filing of a motion to stay tolls Defendants' answer deadline. For these reasons, Plaintiffs urge this Court to hold Defendants to a literal interpretation of the rules and rule that Defendants should not have filed their Motion in lieu of a responsive pleading.

For all of the reasons expressed in Plaintiffs' Original Motion, Plaintiffs respectfully request the relief sought therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 12, 2007, I electronically filed the above Motion with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or by U. S. mail for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Jeremy R. Wilson