

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

KAREN McPETERS, individually, and on §
 behalf of those individuals, persons and entities §
 who are similarly situated §
 Plaintiff §

vs.

§ CIVIL ACTION NO. 4:10-CV-01103

§
 § **JURY**

THE HONORABLE FREDERICK E. §
EDWARDS; BARBARA GLADDEN §
ADAMICK, DISTRICT CLERK; §
MONTGOMERY COUNTY, TEXAS, and §
REED ELSEVIER, INC. d/b/a LexisNexis §
 Defendants §

PLAINTIFF’S MOTION TO DETERMINE TREATMENT OF MOTIONS

TO THE HONORABLE KEITH P. ELLISON, U.S. DISTRICT JUDGE:

1. Each Defendant has filed a motion to dismiss for failure to state a claim upon which relief can be granted. These motions are pending and require a response. Plaintiff’s response is being prepared.

2. However, the parties have each submitted voluminous exhibits in support of their respective positions. Many of the exhibits address matters outside the pleadings. Accordingly, Fed. R. Civ. P. 12(d) provides that each “motion must be treated as one for summary judgment under Rule 56” and further provides that “[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”

3. The Plaintiff maintains that the numerosity of exhibits demonstrates questions of fact which certainly preclude relief to Defendants under Fed. R. Civ. P. 12(b)(6) and will also prevent relief to Defendants under Fed. R. Civ. P. 56.

4. However, in fairness to the parties and to give direction to the parties as to the correct focus of their briefing, Plaintiff respectfully requests a determination as to the rule under which the pending motions will be considered and ruled upon.

5. Conversion to a summary judgment motion takes place at the court's discretion, when the court affirmatively decides to consider extrinsic materials. *Finley Lines Joint Prot. Bd. V. Norfolk S. Corp.*, 109 F.3d 993, 996-97 (4th Cir. 1997); *Aamot v. Kassel*, 1 F.3d 441, 444-45 (6th Cir. 1993) If the court elects to consider the filings herein under Rule 56, Plaintiff McPeters requests that the Court set a response date by which the parties should submit their briefs and other evidence. *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 67 (2d Cir. 2008); *In re Rockefeller Ctr. Props., Inc. Secs. Litig.*, 183 F.3d 280, 288 (3d Cir. 1999); *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 859 n.2 (10th Cir. 1996).

6. Plaintiff McPeters requests that the court specify under which rule, 12(b)(6) or 56, the motions will be considered, so that she may meet the substance of the issues in the case.

Respectfully submitted,

/S/ Robert L. Mays, Jr.
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CERTIFICATE OF CONFERENCE

I certify that I conferred with opposing counsel on July 20, 2010. Counsel for Defendants were opposed to this Motion. The motion is presented to the court for its determination.

CERTIFICATE OF SERVICE

I certify that on July 20, 2010, after filing this motion and proposed order, each counsel for Defendants should be served via the court's ECF system.

/S/ Robert L. Mays, Jr.
Robert L. Mays, Jr.