No. 143, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSISSIPPI,
Plaintiff,

v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,
AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

On Bill of Complaint
Before the Special Master, Hon. Eugene Siler

REPLY MEMORANDUM IN SUPPORT OF THE STATE OF MISSISSIPPI'S MOTION TO EXCLUDE

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI
GEOFFREY C. MORGAN
ASSISTANT ATTORNEY GENERAL
GEORGE W. NEVILLE
ALISON E. O'NEAL MCMINN
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
Walter Sillers State Office Building, Suite 1200
550 High Street
Jackson, MS 39201
(601) 359-3680
gmorg@ago.state.ms.us
gnevi@ago.state.ms.us
aonea@ago.state.ms.us

C. MICHAEL ELLINGBURG
Counsel of Record
DANIEL COKER HORTON & BELL, P.A.
4400 Old Canton Road,
Suite 400 (39211)
P. O. Box 1084
Jackson, MS 39214-1084
mellingburg@danielcoker.com

JOHN W. (DON) BARRETT
DAVID M. MCMULLAN, JR.
BARRETT LAW GROUP, P.A.
404 Court Square North
Post Office Box 927
Lexington, MS 39095
(662) 834-2488
dbarrett@barrettlawgroup.com
donbarrettpa@gmail.com
dmcmullan@barrettlawgroup.com

LARRY D. MOFFETT
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Blvd., Suite R
P. O. Box 1396
Oxford, MS 38655
(662) 232-8979
lmoffett@danielcoker.com

GEORGE B. READY
GEORGE B. READY ATTORNEYS
Post Office Box 127
Hernando, MS 38632
(662) 429-7088
gbready@georgebreadyattorneys.com

ELIZABETH TIPPING
CHARLES BARRETT
WILLIAM J. HARBISON, II
NEAL & HARWELL, PLC
One Nashville Place
Suite 2000
150 Fourth Avenue North
Nashville, TN 37219
(615) 244-1713
etipping@nealharwell.com
cbarrett@nealharwell.com
jharbison@nealharwell.com

Counsel for the State of Mississippi

REPLY MEMORANDUM IN SUPPORT OF THE STATE OF MISSISSIPPI'S MOTION TO EXCLUDE

Mississippi has moved to exclude all factual assertions and arguments made by Defendants and the United States in support of their Motions for Judgment on the Pleadings which are not based on the well-pled factual allegations contained in Mississippi's Complaint. Such factual assertions and arguments, relying primarily on extraneous materials, make it difficult to identify the facts actually alleged in the Complaint. However, these parties attempt to justify the consideration of their different version of the facts by the virtually unlimited expansion of very limited exceptions to the restriction of Rule 12(c) analysis to the allegations actually made in the Complaint—implied attachment and judicial notice. Neither of these exceptions apply in this case, and Mississippi's Motion to Exclude consideration of all extraneous materials and assertions based on them should be granted.

Standard of Review

The standard for ruling on a Rule 12(c) motion is the same as the well-known Rule 12(b) standard: all well-pled facts in the complaint are taken as true. *Lindsay v. Yates*, 498 F.3d 434, 437 n.5 (6th Cir. 2007); *Bower v. Fed. Ex. Corp*., 96 F.3d 200, 203 (6th Cir. 1996).[1] To this some courts have allowed reference to

[1]Memphis suggests that Mississippi's facts should not be taken as true because they are not well-pled, i.e., they are really legal conclusions. That is incorrect. Mississippi has stated facts and made legal arguments based on those facts. For instance, Mississippi's assertion that the water taken by the Tennessee

specific documents not attached to the complaint which are "integral to the complaint," *Ouwinga v. Benistar*, 694 F.3d 783, 797 (6th Cir. 2012); and, the limited application of judicial notice. None of the documents referenced by Defendants or the United States are attached to Mississippi's Complaint, or meet either of the stated exceptions, and Mississippi's Motion to Exclude should be granted.

The Extraneous Documents Are Not Integral to Mississippi's Claims

In support of its Motion for Leave to File Bill of Complaint, Mississippi attached an Appendix to demonstrate the seriousness, character, and dignity of a controversy between States for jurisdictional purposes. However, Mississippi's Motion for Leave is not a pleading, *see* Fed. R. Civ. P. 7(a), and the Appendix is neither attached to nor incorporated in the Complaint. Nevertheless, both Tennessee and the United States argue that selective excerpts excised from the Appendix and documents mentioned in the Complaint should be considered in support of their divergent version of the facts. *See* Tenn. Resp. Mot. to Excl. at 2; U.S. Resp. to Mot. to Excl. at 3.[2] Aside from confirming that various facts are in

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Parties naturally resides within Mississippi's borders and is forcibly extracted by the Tennessee Parties' wells is *a fact*. Mississippi's legal claim to this water is *a legal assertion*. Memphis fails to see or recognize this distinction.

[2] The United States suggests that Defendants may rely on their answer and its attachments for their facts. This would allow defendants to answer, attach anything to their answer, and rely on its contents as facts to support its Rule 12(c) motion. The case cited by the United States, *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d

dispute, their selective references do not come from any document integral to the Complaint. To be integral to the Complaint for the purposes of consideration under Rule 12(c) a document must be central to the plaintiff's claim and not subject to factual dispute. *E.g., Johnson v. Fed. Home Loan Mortg. Corp*., 793 F.3d 1005**,** 1007 (9th Cir. 2015) (deed of trust); *Schaefer v. IndyMac Mortg. Servs.*, 731 F.3d 98, 100 n.1 (1st Cir. 2013) (mortgage document); *Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1021 (8th Cir. 2013) (partnership agreement and power of attorney); *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999) (insurance policies).

GFF Corp. v. Associated Wholesale Grocers, 130 F.3d 1381 (10th Cir. 1997) cited by Tennessee is not as clear as the cases cited above, but it leads to no different conclusion. In *GFF* both parties were relying on the same document as the basis for the claim and defense, and its authenticity was not questioned. Mississippi's claim is not a contract dispute. It is a dispute over competing sovereign rights between two States under the Constitution of the United States, which is integral to Mississippi's complaint. The host of extraneous documents which Defendants and the United States want to cite as authority for their

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419, 421-22 (2d Cir. 2011), involves attachments which meet the "integral to" test, which requires specific documents at the core of the case about which there is no factual dispute. The United States tacitly recognizes the doubtfulness of its reliance on the cited cases with its acknowledgement that a statement in an answer, where it is contradicted by the Complaint, is entitled to "a different value." U.S. Resp. to Mot. to Excl. at 2.

arguments do not meet this test, and all such references should be excluded from consideration for the pending Motions for Judgment on the Pleadings.

Case Law Does Not Support Defendants' Use of Judicial Notice

Defendants in varying degrees advance the argument that they are entitled to essentially disregard the well-pled facts of Mississippi's Complaint within the bounds of a Rule 12(c) motion through the expansive use of judicial notice. Memphis cites *Autozone, Inc. v. Glidden Co.*, 737 F. Supp. 2d 936, 942 (W.D. Tenn. 2010) to assert that a court can take judicial notice of "all items appearing in the case records," Mem. Resp. to Mot. to Excl. at 6; Tennessee suggests that statements in briefs in prior, separate litigation, can be treated as "judicial admissions," Tenn. Resp. to Mot. to Excl. at 3; and the United States relies on a broad definition of "factual background" for its heavy reliance on the prior proceedings dismissed without prejudice before any factual findings. Without regard to degree, the case law simply does not support use of judicial notice in the manner argued by these parties.

Within the framework of Rule 12(b) motions the reported cases severely restrict the use of judicial notice of prior proceedings as a source of information, much less "facts" when considering the motion. Courts do not take judicial notice of prior opinions for "the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."

Selkridge v. United of Omaha Life Ins. Co., 360 F.3d 155, 164 n.15 (3rd Cir. 2004) (*citing S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd*., 181 F.3d 410, 426 (3d Cir. 1999)). *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008) is to the same effect, quoting *Southern Cross* for the following proposition: "Specifically, on a motion to dismiss, we may take judicial notice of another court's opinion not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."

In *Winget* plaintiff sued JP Morgan alleging misconduct by JP Morgan in bankruptcy proceedings with regard to Winget assets which had been sold in bankruptcy proceedings pursuant to an order of sale. JP Morgan raised res judicata as a defense in its answer. In considering the defendant's motion for judgment on the pleadings, the district court considered two documents from the bankruptcy proceeding: "the Sale Order and Winget's own objections to the Sale Order, which were eventually resolved." *Id.* The trial court did not take judicial notice of facts and its decision was upheld. In contrast, Defendant's seek to inject alleged facts, law, and inferences from pleadings and opinions in the prior proceedings as the foundation for their Rule 12(c) motions. No relevant authority supports such an expansive use of judicial notice, much less in the current context, and Mississippi's motion should be granted.

Likewise, courts do not automatically take judicial notice of reports by the United States Geological Survey or similar publications, and isolated references to these reports by Defendants without a sponsoring witness and a stronger foundation should be stricken. *See United States v. Washington*, 20 F. Supp. 3d 828, 836 & n.3 (W.D. Wash. 2007) (court denied request that judicial notice be taken of USGS map of Puget Sound in dispute over boundaries of a body of water). Fundamentally, judicial notice cannot be taken if the accuracy of the "fact" is subject to any reasonable dispute and none of the "facts" Mississippi seeks to exclude can pass this test.

Conclusion

The Court should grant Mississippi's Motion to Exclude and limit its consideration of Defendants' Rule 12(c) Motions to Mississippi's well-pled Complaint.

MAY 5, 2016

RESPECTFULLY SUBMITTED,

/S/ C. MICHAEL ELLINGBURG
C. MICHAEL ELLINGBURG
Counsel of Record
DANIEL COKER HORTON & BELL, P.A.
4400 Old Canton Road, Suite 400
(39211)
P. O. Box 1084
Jackson, MS 39214-1084
mellingburg@danielcoker.com

JIM HOOD
Attorney General
State of Mississippi
GEOFFREY C. MORGAN
Assistant Attorney General
GEORGE W. NEVILLE
ALISON E. O'NEAL MCMINN
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
Walter Sillers State Office Building, Suite 1200

550 High Street
Jackson, MS 39201
(601) 359-3680
gmorg@ago.state.ms.us
gnevi@ago.state.ms.us
aonea@ago.state.ms.us

JOHN W. (DON) BARRETT
DAVID M. MCMULLAN, JR.
BARRETT LAW GROUP, P.A.
404 Court Square North
Post Office Box 927
Lexington, MS 39095
(662) 834-2488
dbarrett@barrettlawgroup.com
donbarrettpa@gmail.com
dmcmullan@barrettlawgroup.com

LARRY D. MOFFETT
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Blvd., Suite R
P. O. Box 1396
Oxford, MS 38655
(662) 232-8979
lmoffett@danielcoker.com

GEORGE B. READY
GEORGE B. READY ATTORNEYS
Post Office Box 127
Hernando, MS 38632
(662) 429-7088
gbready@georgebreadyattorneys.com

ELIZABETH TIPPING
CHARLES BARRETT
WILLIAM J. HARBISON, II
NEAL & HARWELL, PLC
One Nashville Place
Suite 2000
150 Fourth Avenue North
Nashville, TN 37219
(615) 244-1713
etipping@nealharwell.com
cbarrett@nealharwell.com
jharbison@nealharwell.com

Counsel for the State of Mississippi

CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's order on Initial Conference, I hereby certify that all parties on the Special Master's approved service list have been served by electronic mail.

/s/ C. Michael Ellingburg
C. Michael Ellingburg