

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.

Before the Honorable Eugene E. Siler, Jr., Special Master

**CITY OF MEMPHIS, TENNESSEE AND MEMPHIS LIGHT, GAS &
WATER DIVISION'S RESPONSE IN OPPOSITION TO STATE OF
MISSISSIPPI'S MOTION TO EXCLUDE**

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I. INTRODUCTION

In this matter, the State of Mississippi sues the State of Tennessee, the City of Memphis, Tennessee (“Memphis”), and Memphis, Light, Gas & Water Division (“MLGW”), alleging conversion of and trespass to groundwater in the Memphis Sand Aquifer or Sparta Aquifer (the “Aquifer”). The Aquifer is an extensive, water-bearing resource underlying northwestern Mississippi, western Tennessee, and portions of other states. Mississippi alleges that by pumping groundwater from the Aquifer entirely within Tennessee’s borders, Defendants have converted and trespassed upon “Mississippi’s share” of the Aquifer groundwater—a share Mississippi erroneously claims to “own” as an inherent right.

On February 24, 2016, Defendants Memphis and MLGW (collectively, “Defendants”) filed a Motion for Judgment on the Pleadings. The State of Tennessee filed a Motion for Judgment on the Pleadings on February 25, 2016. Mississippi filed a consolidated Response to both Motions for Judgment on the Pleadings on April 6, 2016.

Also on April 6, 2016, Mississippi filed a separate Motion to Exclude (“Motion”), to which Defendants herein respond. In its Motion, Mississippi concludes, without authoritative support, that the Court should exclude certain materials relied upon by Defendants in their Motion for Judgment on the Pleadings because they are allegedly “outside Mississippi’s Complaint.” Specifically,

Mississippi identifies the following materials as “outside Mississippi’s Complaint” and thus subject to exclusion: (1) the Appendix Mississippi filed with its Motion for Leave to File Bill of Complaint in Original Action; (2) the record on appeal of the first lawsuit between Defendants and Mississippi; (3) statements made at the January 26, 2016 case management conference; (4) the briefs filed in support of and in opposition to Mississippi’s Motion for Leave to File Bill of Complaint in Original Action; (5) Defendants’ Answers; and (6) publicly available groundwater studies and population estimates. *See* Motion, ¶ 3.

Mississippi’s Motion is meritless. Contrary to Mississippi’s unfounded assertions, Defendants properly relied on all of the aforementioned materials in their Motion for Judgment on the Pleadings, and the Court should not exclude them from its consideration. Federal Rule of Civil Procedure 12(c) and case law interpreting that rule support Defendants’ reliance upon all of the documents about which Mississippi now complains. For the reasons set out herein, Mississippi’s Motion should be denied.

II. LAW AND ARGUMENT

A. APPLICABLE STANDARD FOR MOTIONS FOR JUDGMENT ON THE PLEADINGS.

1. The Court Need Only Consider Well-Pled Facts.

When considering a motion for judgment on the pleadings, a court is not required to accept as true “[c]onclusory allegations or legal conclusions

masquerading as factual allegations.” *Faber v. Metropolitan Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011); *Eidson v. Tenn. Dept. of Children’s Servs.*, 510 F.3d 631, 634 (6th Cir. 2007); *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986) (“[W]e are not bound to accept as true a legal conclusion couched as a factual allegation.”); *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993) (“Because only well-pleaded facts are taken as true, we will not accept a complainant’s unsupported conclusions or interpretations of law.”).

A court is not required to “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences,” *id.*, or “allegations which are contradicted by documents referred to in the complaint,” *id.* at 989 (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998)). *See Memphis & MLGW’s Motion for Judgment on the Pleadings*, pp. 11-13.

2. The Court Can Properly Consider Materials of Which It Can Take Judicial Notice.

For purposes of deciding a motion for judgment on the pleadings, courts may properly consider materials of which it can take judicial notice. *See Does I through III v. D.C.*, 238 F. Supp. 2d 212, 216-17 (D.D.C. 2002); Fed. R. Civ. P.

12(c). The Court can and should take judicial notice of all of the materials sought to be excluded in Mississippi's Motion.

A court can take judicial notice of facts generally known and facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *U.S. v. Rivera-Alvarado*, 472 F. App'x 746, 746 (9th Cir. 2012) (citing Fed. R. Evid. 201(b)(2)). "Appropriate subjects of judicial notice include matters of public record, orders, and items appearing in the case records, as well as other court proceedings." *See AutoZone, Inc. v. Glidden, Co.*, 737 F. Supp. 2d 936, 942 (W.D. Tenn. 2010) (internal citations omitted).

B. THE COURT CAN TAKE JUDICIAL NOTICE OF THE MATERIALS CITED BY DEFENDANTS IN THEIR MOTION FOR JUDGMENT ON THE PLEADINGS.

1. The Court Can Take Judicial Notice of Those Materials From This Action.

Mississippi incorrectly asserts that the Court should not consider matters within the record of this litigation, such as materials contained within the Appendix that Mississippi filed in support of its Motion for Leave to File Bill of Complaint in Original Action; statements made at the case management conference; the briefs filed in support of and in opposition to Mississippi's Motion for Leave to File Bill of Complaint in Original Action; and Defendants' Answers. *See* Motion, ¶ 3 (items 1, 3, 4 & 5). Mississippi's assertion is without support.

Consistent with the language of Rule 12(c), it is well settled that courts can consider the pleadings and other filings in the matter in which the motion for judgment on the pleadings is pending. *See Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009) (“When considering a motion for judgment on the pleadings, a court may “rely on the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case.”) (emphasis added). This extends to all “items appearing in the case records.” *See, e.g., AutoZone, Inc.*, 737 F. Supp. 2d at 942 (emphasis added). The Court, therefore, may properly take judicial notice of and consider Defendants’ Answers, in addition to other materials appearing in this case’s record. Mississippi’s attempt to exclude consideration of materials filed in this litigation should, therefore, be rejected.

2. The Court Can Take Judicial Notice of the Record in the Prior Litigation Among the Parties.

In addition to items appearing the record of the pending case, “it is well established that courts ‘are allowed to take judicial notice of matters in the general public record, including ... records of prior litigation’ without triggering the conversion requirement.” *Does I through III v. D.C.*, 238 F. Supp. 2d 212, 216-17 (D.D.C. 2002) (emphasis added) (citing *Black v. Arthur*, 18 F. Supp. 2d 1127, 1131 (D. Or. 1998); *Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994); *Henson v. CSC Credit Servs.*, 29 F.3d 280 (7th Cir. 1994); *Phillips v. Bureau of Prisons*, 591 F.2d

966, 969 (D.C. Cir. 1979); *Dale v. Executive Office of the President*, 164 F. Supp. 2d 22, 25 (D.D.C. 2001); *Baker v. Henderson*, 150 F. Supp. 2d 13, 15 (D.D.C. 2001)).

The record on appeal in from Mississippi’s prior suit against Defendants is a “record of prior litigation” and thus the Court can, and should, take judicial notice of it. *See Does I through III*, 238 F. Supp. 2d at 216-17; *see also AutoZone, Inc.*, 737 F. Supp. 2d at 942 (“Appropriate subjects of judicial notice include matters of public record, and items appearing in case records, . . . as well as other court proceedings.” (emphasis added)). *See* Motion, ¶ 3 (item 2). Mississippi’s contention that the Court cannot consider the record on appeal is without merit.

3. The Court Can Take Judicial Notice of USGS Reports.

Additionally, the Court can take judicial notice of records and reports of administrative bodies. *See Does I through III*, 238 F. Supp. 2d at 216-17 (“courts are allowed to take judicial notice of matters in the general public record, including records and reports of administrative bodies”) (internal quotation marks omitted); *see also United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) (“Public records and government documents are generally considered ‘not to be subject to reasonable dispute.’ This includes public records and government documents available from reliable sources on the internet.”) (quoting *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999)).

Information from reports prepared by the United States Geological Survey (“USGS”) is properly included in Memphis and MLGW’s Motion for Judgment on the Pleadings. *See* Memphis & MLGW’s Motion for Judgment on the Pleadings, p. 47. Because USGS reports are governmental documents, the Court can, and should, take judicial notice of them. *See Michigan v. U.S. Army Corps of Engineers*, 758 F.3d 892, 899 (7th Cir. 2014) (taking judicial notice of a USGS report, “whose accuracy cannot be reasonably questioned,” regarding “the potential for Asian carp reproduction in the Great Lakes Basin”). *See* Motion, p 3 (item 6). The Court should reject Mississippi’s averment that USGS reports are not appropriate subject matter for judicial notice.

III. CONCLUSION

Based on the foregoing, the Court can, and should, take judicial notice of all of the materials relied upon by Memphis and MLGW in their Motion for Judgment on the Pleadings. Defendants therefore respectfully request that the Court deny Mississippi’s Motion to Exclude in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for Defendants City of Memphis and Memphis Light, Gas & Water Division certifies that a copy of the foregoing has been served by e-mail on the following, this 28th day of April, 2016:

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