

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

**MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE
IN OPPOSITION TO STATE OF MISSISSIPPI'S MOTION TO EXCLUDE**

JOHN C. CRUDEN
Assistant Attorney General
JAMES J. DUBOIS
STEPHEN M. MACFARLANE
JUDITH E. COLEMAN
Attorneys
Environment and Natural
Resources Division

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor
General

U.S. Department of Justice
Washington, D.C. 20530-0001
SupremeCourtBriefs@usdoj.gov
(202) 514-2217

MEMORANDUM IN OPPOSITION TO MOTION TO EXCLUDE

On March 3, 2016, the United States filed a brief as *amicus curiae* in support of Defendants' motions for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. On April 6, 2016, the State of Mississippi filed a Motion to Exclude ("Miss. Mot.") requesting "that the Special Master exclude all materials outside the Complaint that have been presented by Defendants and the United States and all statements and arguments made by them in reliance thereon." Miss. Mot. 5. Because the referenced materials are properly considered on a motion for judgment on the pleadings, the Court should deny Mississippi's motion.

On a motion pursuant to Rule 12(c), "the court considers 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." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (internal quotation marks and citation omitted). See also *Pac. Space Design Corp. v. PNC Equip. Fin., LLC*, No. 1:13-CV-00460, 2014 WL 6603288, at *2 (S.D. Ohio Nov. 19, 2014), appeal dismissed (Mar. 6, 2015) (discussing applicable standards). Mississippi is therefore incorrect to imply that the Court's review is limited to "the matters in the Complaint or expressly incorporated therein by reference," Miss. Mot. 4, and Mississippi does not cite any rule or case standing for that proposition.

All of the materials Mississippi seeks to exclude are properly reviewable on a Rule 12(c) motion. Filings and decisions in prior litigation are public records appropriate for judicial notice, and may be cited for their existence, *see Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008), and were cited for that purpose (at U.S. Br. 5-7) for the “factual background of the case,” *L7 Designs*, 647 F.3d at 422 (citation omitted). Defendants’ answers can also be considered because answers are pleadings. *See Pac. Space Design Corp.*, 2014 WL 6603288, at *2. Although “[t]he factual allegations of the [a]nswer are taken as true only where and to the extent they have not been denied or do not conflict with the complaint,” *Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 433 (M.D.N.C. 2011) (internal quotation marks and citation omitted), that qualification does not apply here because the allegations cited from the answers were also found in allegations in the Complaint. *See, e.g.*, U.S. Br. at 4 (citing allegations in both complaint and in Memphis and MLGW’s answer concerning location of MLGW’s wellfields). *Compare* U.S. Br. at 22 (citing allegations in Tennessee’s answer that surface water is “instrumental to recharging . . . the Aquifer”) *with* Compl. ¶ 16 (alleging that rainwater enters the Aquifer from surface outcrops in Mississippi). *See also* 5C Wright & Miller, *Fed. Prac. & Proc.* § 1368 (3d ed. 2004). And even if there had been a conflict, the Court would simply assign a different value to the allegations in the answer—not exclude those allegations categorically from review.

The Appendix filed with Mississippi's Motion for Leave to File a Bill of Complaint is also reviewable by the Court because it was attached to Mississippi's proposed pleading and served as an exhibit to it. The Appendix need not have been "expressly incorporated . . . by reference," as Mississippi suggests, *Miss. Mot. 4. See Commercial Money Ctr. , Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335 (6th Cir. 2007) ("[D]ocuments attached to the pleadings become part of the pleadings and may be considered on a motion to dismiss." (citation omitted)). The Appendix should also be considered part of the pleadings because Mississippi used it to urge the Court to accept the Complaint for filing: Mississippi cited the Appendix on nearly every page of its brief supporting its motion for leave to file. Mississippi relied upon those citations to support not only the factual allegations underlying its legal theory, *see, e.g.*, *Miss. Br. in Support of Motion for Leave to File 6-7 & n.4* (citing Appendix for allegation that the Aquifer is "not a shared resource"), but also to show that the Complaint warranted the Court's exercise of jurisdiction, *see, e.g., id.* at 3 (citing Appendix to demonstrate "[r]eal and [s]ubstantial" injury). Mississippi should not be allowed to shield its Complaint from the very materials Mississippi cited to secure review in this Court in the first place.

Mississippi's other objections are without merit. The citation (at U.S. Br. 5) to the appendix to Tennessee's Brief in Opposition to the motion for leave to file is

actually a citation to the allegations in Mississippi's proposed complaint in Original Action No. 139, which is subject to judicial notice. The data cited at U.S. Br. 18 from a 1965 paper is cumulative of Mississippi's own materials (Compl. App. 70a), and the Court is capable of assigning that "see also" citation whatever weight it deems appropriate without taking the extraordinary step of striking words from an amicus brief.

CONCLUSION

The Court should deny Mississippi's Motion to Exclude.

Respectfully submitted.

JOHN C. CRUDEN
Assistant Attorney General
JAMES J. DUBOIS
STEPHEN M. MACFARLANE
JUDITH E. COLEMAN
Attorneys
Environment and Natural
Resources Division

DONALD B. VERRILLI, JR.
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April 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2016, I electronically served the foregoing document on all those identified on the Court's Service List of February 19, 2016.

/s/ James J. DuBois
JAMES J. DUBOIS
Attorney