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 E. Siler, Jr.

DEFENDANTS' JOINT MOTION TO EXCLUDE MISSISSIPPI'S DESIGNATED DEPOSITION TESTIMONY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

RULES

OTHER MATERIALS

GLOSSARY

Brahana Dep.	Deposition of John van Brahana, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32D-B (Nov. 5, 2007)
Branch Dep.	Deposition of Charles Thomas Branch, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32D-B (Oct. 1, 2007)
Gentry Dep.	Deposition of Randall W. Gentry, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32D-B (Aug. 7, 2006)
MLGW	Memphis Light, Gas & Water Division

I. INTRODUCTION

The Special Master should exclude from the evidentiary hearing the deposition testimony that Mississippi has designated. Broadly speaking, Mississippi has designated two types of deposition testimony: (1) it affirmatively designated testimony from the depositions of its own fact witnesses in *Hood ex rel. Mississippi v. City of Memphis*,[1] and (2) it cross-designated wide-ranging portions of every deposition from which Defendants designated an excerpt. Between these two categories, Mississippi has designated for admission hundreds of pages of out-of-court deposition testimony previously given by its own witnesses.

Mississippi's attempt to rely on such deposition testimony is improper for three reasons. *First*, all of those witnesses are "available" under Federal Rule of Civil Procedure 32(a)(4), and Mississippi has the ability to subpoena them for live testimony without regard to the ordinary territorial limits that apply in federal district courts. *Second*, depositions from *Hood* cannot be used against Tennessee under Rule 32(a)(1)(A) because Tennessee neither participated in nor had notice of them. *Third*,

[1] In 2005, Mississippi sued Memphis and MLGW in federal court in Mississippi for the allegedly wrongful taking of "Mississippi's groundwater" from the Aquifer. The U.S. District Court for the District of Mississippi rejected Mississippi's arguments, finding that the Aquifer was an interstate resource and that Mississippi's rights in that resource could be determined only by interstate compact or an equitable-apportionment action filed in this Court. *See Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646, 648-49 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625 (5th Cir. 2009). Tennessee was not a party to *Hood*.

Mississippi's cross-designations far exceed the scope of Defendants' designations and function merely to smuggle in inadmissible hearsay from witnesses that Mississippi has declined to have testify live.

The main value of an evidentiary hearing (to the extent one is necessary at all) is in affording the Special Master a chance to observe live testimony and cross-examination. Mississippi's proffered deposition testimony would short-circuit that principle. If Mississippi wished to rely on testimony from the witnesses it used in *Hood*, it should have called them live so that Defendants could have an opportunity to cross-examine them in front of the Special Master. Having deprived Defendants of that opportunity, Mississippi's attempt to prove its case through hearsay from a prior lawsuit should be rejected.

II. ARGUMENT

A. The Special Master Should Exclude Mississippi's Deposition Designations Because The Witnesses Are Available And Because Tennessee Was Unable To Cross-Examine Them

Mississippi has affirmatively designated testimony from three *Hood* depositions: John van Brahana, Charles Branch, and Randall Gentry.[2] Because

[2] None is a party or party representative adverse to Mississippi. *Cf.* Fed. R. Civ. P. 32(a)(3). Charles Branch was offered by Mississippi as a fact witness. *See* Ex. 12 (Branch Dep. 12:6). Randall Gentry was an associate professor at the University of Tennessee, and not a party representative. *See* Ex. 13 (Gentry Dep. 11:1-4). John van Brahana was a consultant retained by MLGW to assess technical work he previously had performed on the Memphis-Sparta Aquifer. *See* Ex. 11 (Brahana Dep. 10:3-14).

Mississippi could have called those witnesses live, their depositions are inadmissible. Under Federal Rule of Civil Procedure 32(a), deposition testimony may be admitted against a party at trial only if "the party was present or represented at the taking of the deposition or had reasonable notice of it," and if "the use is allowed by Rule 32(a)(2) through (8)." Fed. R. Civ. P. 32(a)(1)(A), (C).[3] As to the latter requirement, although any party may use a deposition for cross-examination or impeachment of a live witness, *see* Fed. R. Civ. P. 32(a)(2), a party may *affirmatively* offer a deposition as substantive evidence only if the witness is an adverse party or its corporate representative, Fed. R. Civ. P. 32(a)(3), or is "unavailable," Fed. R. Civ. P. 32(a)(4). A witness may be considered unavailable if he or she is dead, outside the subpoena power of the court, or unable to testify because of illness, age, or similar considerations. *See id*.

Those rules reflect the venerable principle that live testimony remains the preferred mechanism for introducing evidence at trial. *See Garcia-Martinez v. City & Cty. of Denver*, 392 F.3d 1187, 1193 (10th Cir. 2004) ("[A]lthough the federal rules provide a mechanism for the admission of deposition testimony, they do not alter the long-established principle that testimony by deposition is less desirable than oral testimony."). Live testimony allows the factfinder to assess the witness's

[3] The Federal Rules of Evidence and of Civil Procedure guide original-jurisdiction cases, although they are not binding. *See* Sup. Ct. R. 17.2.

credibility, and other parties may be "prejudiced" by deposition designations because of the "inability to rebut [the] deposition testimony" effectively through live cross-examination. *Hall v. Jaeho Jung*, 819 F.3d 378, 383 (7th Cir. 2016). For those reasons, unless Mississippi can establish that their witnesses are "unavailable" – and that Defendants had an adequate opportunity to cross-examine them – their deposition excerpts are inadmissible hearsay.

Mississippi's deposition designations fail on both counts. *First*, Messrs. Brahana, Branch, and Gentry are all "available" to Mississippi for live testimony. The Special Master already has ordered that "[t]he Federal Rules of Civil Procedure applicable to discovery, Rules 26-37 and 45, . . . shall govern the proceedings," with certain amendments, including the elimination of the "100-mile rule in Rules 32(a)(4)(B) and Rule 45." Dkt. No. 57, ¶ 4(b)(vi). Mississippi thus had the power to identify any of these witnesses on its witness list and subpoena them to testify at the evidentiary hearing. *See id.* Moreover, to Defendants' knowledge, none of the witnesses is dead or so infirm as to be unable to testify. Accordingly, Mississippi could and should have called them live.[4]

[4] Defendants have designated several excerpts from depositions taken in *Hood* of Mississippi's corporate representatives, which is proper without any showing of unavailability. *See* Fed. R. Civ. P. 32(a)(3). In an abundance of caution and to preserve their rights, Defendants also designated certain excerpts from the depositions of Charles Branch, Randall Gentry, Richard Spruill, and David Wiley. If the Special Master grants this motion, however, Defendants would withdraw their designations from those latter depositions as substantive evidence, while reserving

Second, availability aside, deposition testimony may be used against a party only if "the party was present or represented at the taking of the deposition or had reasonable notice of it." Fed R. Civ. P. 32(a)(1)(A). This rule reflects "a principle of fairness requiring that the opposing party have the right or opportunity to be present at the deposition." *Bobb v. Modern Prods., Inc.*, 648 F.2d 1051, 1055 (5th Cir. Unit A June 1981), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997). Such basic fairness is lacking here: Tennessee was not a party to *Hood*, and it was neither represented at nor on notice of the depositions that Mississippi has designated. Indeed, Tennessee has not had a chance to ask Messrs. Brahana, Branch, or Gentry a single question under oath. For that reason alone, their depositions may not be admitted against Tennessee.[5]

This is no mere technicality. In original-jurisdiction hearings, no less than at ordinary trials, live testimony and cross-examination in front of the Special Master is important. That is why Rule 32(a)(1)(A)'s exception – allowing a party to submit out-of-court deposition testimony rather than live evidence – is limited to situations in which the adverse party already had a full opportunity to cross-examine the witness. *See Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981)

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the right to use those depositions as appropriate for cross-examination or any other proper purposes under Rule 32(a)(2).

[5] Though not pertinent here (because Mississippi has not designated any part of it), Tennessee was present at the deposition of Dr. Brian Waldron in the *Hood* litigation, as he was a state employee and was represented by state counsel.

("[i]t is clear" that "depositions that were taken prior to" a party's presence in the case cannot be used as evidence against that party, which "did not have an opportunity to cross-examine the deponents"). But Tennessee had no such opportunity with respect to the *Hood* witnesses here. Indeed, allowing Mississippi to admit *Hood* deposition excerpts against Tennessee would be little different from an order barring Tennessee from cross-examining Mississippi's witnesses at the hearing. The Special Master should not make important decisions about an interstate groundwater resource like the Aquifer based on testimony that one of the two States in question never had an opportunity to test through cross-examination.[6]

B. Mississippi's Cross-Designations Are Beyond The Scope Of Defendant's Deposition Designations

Mississippi's cross-designations are likewise improper. Cross-designations are not a tool for presenting new affirmative evidence; they instead are a means for identifying testimony necessary for completion or to place the opposing party's original designations in context. Under Federal Rule of Civil Procedure 32(a)(6), if "a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part

[6] In practice, although Rule 32(a)(1)(C) only bars the use of these depositions against Tennessee, Mississippi cannot use the depositions at all in this hearing. The only issue is whether the Aquifer constitutes an interstate resource; that question cannot be resolved differently as to Tennessee as compared to Memphis and MLGW. Rule 32(a)(1)(C) therefore provides an independent, stand-alone basis for excluding all of Mississippi's deposition designations in their entirety.

introduced, and any party may itself introduce any other parts." Similarly, Federal Rule of Evidence 106 states that, "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part . . . that in fairness ought to be considered at the same time."

Those rules reflect "[t]he common-law 'rule of completeness.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988). Under that rule, "'[t]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.'" *Id.* at 172 (quoting 7 John Henry Wigmore, *Evidence in Trials at Common Law* § 2113, at 653 (James H. Chadbourn ed., rev. 1978)). Cross-designations must be relevant, and they must explain or qualify the portion offered by the opponent. *See United States v. Lewis*, 954 F.2d 1386, 1392 (7th Cir. 1992) ("In addition to being relevant, the remainder of the statement should be admitted if 'it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding.'") (quoting *United States v. Sweiss*, 814 F.2d 1208, 1211-12 (7th Cir. 1987)).

Mississippi's cross-designations violate those rules. The Appendix to this Motion identifies Mississippi's deposition cross-designations and demonstrates that they go far beyond what is necessary to clarify or place Defendants' testimony in

context. Indeed, Mississippi has designated any and all testimony that it seeks to admit into evidence, regardless of the relationship to Defendants' designations.

Below is a chart that indicates the number of transcript pages from each deposition in which Defendants designated testimony, compared to the number of transcript pages contained in Mississippi's cross-designations:

Deposition	Total Pages in Transcript	Number of Pages with Designations by Defendants	Number of Pages with Cross-Designations by Mississippi
David Wiley (2007) Vol. 1	155	13	77
David Wiley (2007) Vol. 2	79	0	42
Randall Gentry (2007)	173	1	117
Charles Branch (2007)	101	3	77
Sam Mabry (2007)	40	10	18
David Wiley (2017)	242	72	75
Richard Spruill (2017)	295	35	76

This comparison alone – in which the size of the cross-designations often dwarfs the size of the original designations – makes clear that the former are improper. Moreover, the transcripts themselves reinforce the point. For example, Defendants' only designation from the transcript of the deposition of Randall Gentry was one question and answer from page 165 of the transcript. *See* Ex. 16 (Excerpts from Defendants' Joint Deposition Designations, Gentry Dep. 165:12-16, Sept. 14, 2018). The subject of that question and answer was water moving from Mississippi

into Tennessee prior to any pumping of water out of the Aquifer. *See id.* In contrast, Mississippi's 117 pages of counter-designations cover such diverse topics as MLGW's funding of the Ground Water Institute at the University of Memphis; documents that Mr. Gentry produced in response to a subpoena; entities that currently pump groundwater in Shelby County, Tennessee; the meaning of such terms as "storativity" and "windows"; and how "older" water compares to "younger" water. *See* Ex. 17 (Excerpts from Mississippi's Deposition Counter-Designations, Gentry Dep. 130:2-31, 148:6-149:8, 149:20-150:11, 150:21-151:12, 151:21-152:6, 152:13-153:8, 153:13-154:22, Oct. 5, 2018).

Such unrelated testimony is not proper cross-designation material. As the Gentry example and the chart above demonstrate, Mississippi has gone far beyond placing Defendants' designations in context. Indeed, Mississippi's expansive cross-designations are not truly cross-designations at all; they are out-of-court statements by Mississippi's own witnesses that Mississippi is seeking to use affirmatively to support its position. That runs headlong into Rule 32(a), which sets out various circumstances when it is appropriate to use "all or part of a deposition . . . *against* a party." Fed. R. Civ. P. 32(a)(1) (emphasis added). Mississippi should not be permitted to circumvent that principle by seeking to admit affirmative evidence under the guise of cross-designations.

Below is a list of Mississippi's witnesses from whose depositions Mississippi has cross-designated large swaths of hearsay:

- David Wiley (2007) Vol. 1 – Mississippi Expert Witness
- David Wiley (2007) Vol. 2 – Mississippi Expert Witness
- David Wiley (2017) – Mississippi Expert Witness
- Richard Spruill (2017) – Mississippi Expert Witness
- Jamie Crawford (2007) – Mississippi Rule 30(b)(6) Witness
- Jim Hoffman (2007) – Mississippi Rule 30(b)(6) Witness
- Sam Mabry (2007) – Mississippi Rule 30(b)(6) Witness
- Charles Branch (2007) – Former Director, Mississippi Dep't of Environmental Quality, Office of Land and Water Resources

If Mississippi wanted to rely on testimony from its own witnesses, it should have elicited that testimony live in front of the Special Master. Instead, Mississippi waited for Defendants to designate limited parts of their testimony – which was proper under Rule 32(a) or for impeachment purposes – and then cross-designated unrelated, often-irrelevant, and otherwise-inadmissible testimony. Those cross-designations should be excluded.

III. CONCLUSION

The Special Master should exclude from the hearing all deposition testimony designated or cross-designated by Mississippi.

Respectfully submitted this 1st day of November 2018,

s/ David C. Frederick
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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail, this 1st day of November 2018.

/s/ *David C. Frederick*

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Special Counsel to Defendant
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APPENDIX

PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF CHARLES BRANCH	
IMPROPER CROSS-DESIGNATION AND IMPROPER USE OF A DEPOSITION	
10:25-11:13	63:18-68:6
15:22-23	69:5-18
16:1-18	70:2-9
19:6-19:14	71:4-9
20:22-24	71:20-72:18
21:3-7	73:13-75:22
21:11-24:5	75:25-76:21
24:18-25:24	76:25-78:5
26:3-21	78:17-80:2
28:5-22	81:16-82:15
29:16-30:6	83:6-84:11
30:11-31:8	84:14-85:8
32:8-23	85:10-17
33:9-21	85:21-86:4
37:2-38:3	86:21-89:7
40:4-9	89:22-90:4
41:4-42:5	90:8-11
47:10-48:2	89:10-20
50:24-51:4	91:5-91:25
53:19-54:0	92:12-94:6
57:6-15	94:13-96:6
61:1-63:16	

PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF RANDALL GENTRY	
IMPROPER CROSS-DESIGNATION	
18:16-20:06	81:18-19
21:9-22:12	81:22-5
23:25-24:21	83:2-7
24:24-25:7	86:21-25
25:18-22	87:14-17
26:3-17	88:6-89:4
27:19-28:7	89:6-17
28:14-23	90:8-92:5
29:1-13	92:18-94:12
29:23-30:8	94:14-95:8
30:22-24	95:10-17
32:23-33:6	95:19-96:10
33:10-12	96:17-97:3
33:15-24	97:9-16
34:2-19	98:11-101:15
34:24-35:13	101:18-20
35:15-17	102:5-7
35:19-36:13	106:25-107:8
36:15-37:1	107:11
37:6-9	107:15-25
37:15-38:12	108:8-109:5
38:18-39:7	109:7
39:17-40:4	109:9-12
40:6-17	109:20-110:5
40:21-41:18	110:19-111:19
42:2-42:5	111:21-112:6
42:8-21	112:11-14
44:11-45:3	112:20-25

46:3-48:7	113:8-14
48:10-49:2	114:15-19
49:4-20	117:6-7
53:5-59:7	117:10-11
60:1-12	125:13-18
60:23-61:10	130:2-131:8
61:17-62:19	131:10-12
62:21-65:14	132:15-133:4
66:9-67:7	138:19-21
68:2-11	138:25-19
68:13-20	140:5-23
69:1-17	140:25-141:2
69:20-70:3	141:4-7
70:21-71:7	146:14-17
71:20-73:10	148:15-149:8
73:13-17	149:20-150:11
73:19-74:2	150:21-151:12
77:7-78:1	151:21-152:6
79:8-17	152:13-153:8
79:21-23	153:13-154:22
80:1-2	165:17-167:11
81:9-13	168:2-6

PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF JAMIE CRAWFORD	
IMPROPER CROSS-DESIGNATION AND IMPROPER USE OF A DEPOSITION	
16:20-17:17	110:1-8
26:14-29:15	110:18-20
29:23-30:1	139:2-142:22
32:15-33:17	148:18-25
33:22-36:11	151:12-20
37:9-23	152:7-154:9
38:7-39:4	154:22-157:2
40:11-14	157:18-160:7
40:20-41:10	160:11-161:10
43:8-19	161:22-24
44:25-46:2	162:1-2
49:18-50:16	162:6-25
60:21-25	162:8-25
62:14-19	164:22-165:6
86:8-15	166:13-15
88:9-15	166:21
90:23-91:18	167:2-168:10
98:1-22	168:14-169:18
101:4-102:1	169:22-170:3
102:20-104:13	170:18-171:9
107:2-108:8	174:1-175:19

PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF JIM HOFFMAN	
IMPROPER CROSS-DESIGNATION AND IMPROPER USE OF A DEPOSITION	
13:22-14:21	22:7-20
15:8-15	27:6-10
16:24-17:18	28:3-10
17:22-18:5	28:15-20
21:7-20	
PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF SAM MABRY	
IMPROPER CROSS-DESIGNATION AND IMPROPER USE OF A DEPOSITION	
16:17-17:19	32:3-33:3
18:9-19:5	33:24-33:21
29:1-6	34:14-16
29:9-14	34:20-36:5
29:16-31:6	36:19
31:12-25	36:21-37:13
PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF RICHARD SPRUILL	
IMPROPER USE OF A DEPOSITION	
9:10-10:23	11:2-11
IMPROPER CROSS-DESIGNATION AND IMPROPER USE OF A DEPOSITION	
16:9-10	90:8-14
16:13-21:8	92:1-93:6
22:2-4	94:9-95:18
22:7-23:16	95:21-97:5
23:20-24:24	100:10-101:18
49:18-50:2	102:17-103:21

54:15-57:15	104:12-105:8
59:17-20	126:1-24
59:22-60:14	127:8-12
63:11-21	141:4-13
64:15-65:6	180:20-182:17
75:10-76:1	192:15-193:16
80:9-18	206:8-14
81:22-82:10	227:22-228:13
82:19-83:3	246:2-247:7
88:10-14	250:13-252:10
88:16-90:6	253:12-254:23
PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF DAVID WILEY (2007) - VOLUME 1	
IMPROPER CROSS-DESIGNATION AND IMPROPER USE OF A DEPOSITION	
7:5-12	87:22-88:5
8:14-18	88:22-89:25
10:2-15	90:8-91:1
21:9-23	91:7-13
23:9-24:4	91:18
24:7-25:8	91:20-92:2
25:19-26:2	92:7-21
26:24-27:2	93:4-7
27:8-11	102:25-103:11
27:14-28:1	104:13-105:2
28:9-15	107:2-10
30:12-31:15	108:3-24
32:3-8	109:12-110:2
32:14-21	124:6-8
33:15-34:4	124:12-126:1
34:7-9	126:3-128:14

34:19-35:9	129:1-13
35:15-36:13	129:21-25
36:16-25	130:6-18
37:6-21	131:12-132:2
38:11-21	132:15-24
41:19-42:5	135:25-136:23
43:17-44:17	139:6-15
45:1-18	140:2-24
50:7-18	144:9-23
70:23-71:10	148:20-16
81:8-24	149:25-150:16
82:1-24	150:24-7
83:11-19	151:21-152:14
84:16-85:13	153:2-4
86:1-3	153:8-12
86:11-15	153:23-24
86:25-87:15	
PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF DAVID WILEY (2007) - VOLUME 2	
IMPROPER CROSS-DESIGNATION AND IMPROPER USE OF A DEPOSITION	
2:2-10	24:24-25:8
5:12-22	25:24-29:11
6:1-3	29:15-17
6:9-8:8	29:24-30:11
11:12-17	30:16-31:1
11:23-12:2	31:4-20
12:11-13:16	32:8
13:21-14:13	32:11-13
15:4-12	32:16-33:5
15:15-22	33:10-34:17

16:18-17:6	36:9-25
18:14-19:1	38:6-15
19:15-23	39:5-8
20:1-8	39:20-24
20:13-21:6	43:4-45:12
21:11-23:3	70:12-73:8
23:6-24:20	74:1-76:14
PLAINTIFF'S CROSS-DESIGNATIONS FOR THE DEPOSITION OF DAVID WILEY (2017)	
IMPROPER CROSS-DESIGNATION AND IMPROPER USE OF A DEPOSITION	
22:16-19	97:21-98:22
37:9-14	99:4-18
39:16-40:17	99:21-100:3
41:18-42:20	105:19-106:19
52:16-24	121:9-122:4
55:11-14	126:10-19
61:2-62:3	131:5-7
62:10-17	131:10-11
62:19-63:16	136:3-12
64:9-65:1	143:1-145:11
66:19-67:10	146:12-147:16
67:13-15	151:7-152:10
67:17-20	153:22-:24
67:24-68:10	164:15-166:8
68:15-23	185:20-186:5
74:18-75:6	187:15-18
97:7-10	187:20-188:1
97:13-18	196:5-10