

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 IN LIMINE TO EXCLUDE
PLAINTIFF'S EXHIBITS THAT CANNOT BE AUTHENTICATED
AND/OR FOR WHICH THERE IS NO FOUNDATION**

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Pursuant to Section I(C)(1) of the Special Master’s Corrected Pre-Hearing Scheduling Order (Dkt. No. 69), Defendants State of Tennessee, City of Memphis, Tennessee, and Memphis Light, Gas & Water Division (“MLGW”) (collectively, “Defendants”) respectfully move the Special Master to strike all of Mississippi’s proffered exhibits that cannot be authenticated or for which there is no foundation.

Before any exhibit may be admitted into evidence, it must be properly authenticated. “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). An exhibit may be authenticated by testimony of a witness with personal knowledge of the record and the underlying facts. *See* Fed. R. Evid. 901(b)(1); *United States v. Goldin*, 311 F.3d 191, 197 (3d Cir. 2002); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773-74 n.8 (9th Cir. 2002) (“‘A document can be authenticated [under Rule 901(b)(1)] by a witness who wrote it, signed it, used it, or saw others do so.’”) (quoting 31 Charles Alan Wright et al., *Federal Practice and Procedure* § 7106, at 43 (2000)) (alteration in original); *Kruse v. Hawai’i*, 857 F. Supp. 741, 746 n.5 (D. Haw. 1994) (“In order to be properly authenticated, a witness with personal knowledge of the facts sufficient to attest to the identity and accuracy of the contents must so declare.”). A witness cannot testify about material that is outside her personal knowledge unless she previously has been established as an expert on

the specific subject matter, *see* Fed. R. Evid. 602, 701, and failure to satisfy the personal-knowledge requirement can bar admission of the evidence in question. *See Hansen v. PT Bank Negara Indonesia (Persero)*, 706 F.3d 1244, 1250-51 (10th Cir. 2013).*

It is the introducing party's burden to authenticate its evidence, by producing a witness who can authenticate the record or alternatively establishing that the record in question meets one of the specifically delineated categories for authentication. *See Life Inv'rs Ins. Co. of Am. v. Federal City Region, Inc.*, 687 F.3d 1117, 1122 (8th Cir. 2012) ("The burden of authenticating evidence is on the proponent of the evidence.").

Mississippi's proposed list of exhibits, *see* Ex. 18, included many documents that, based on the witnesses and deposition designations identified by Mississippi, cannot be admissible because they cannot be authenticated and/or have no foundation. Specifically, this Motion seeks to exclude those exhibits identified by Mississippi that cannot be authenticated and/or for which a proper foundation cannot be laid because Mississippi has not identified a witness (whether live or by deposition) through which the exhibit can be admitted.

* Certain records may be authenticated by other means. *See* Fed. R. Evid. 901(b)(2)-(10), 902. For example, there are some records that have distinctive characteristics that demonstrate that the records are genuine. *See* Fed. R. Evid. 901(b)(4). In addition, there are narrow categories of self-authenticating records, and, for these documents, the possibility of fraud, forgery, or misattribution is slight. *See* Fed. R. Evid. 902.

For example, Mississippi identified several newspaper articles and other documents that it produced during discovery in the original district court litigation. However, neither Mississippi nor Defendants have identified any witness who has personal knowledge of those documents or who can lay a proper foundation for them.

Because Mississippi has not identified any witness who can authenticate and/or lay a proper foundation for many of its exhibits, including (but not limited to) the exhibits listed below, the Special Master should strike them. Defendants reserve their rights to object to these exhibits on other grounds as well, and to object to other evidence as appropriate based on a failure to authenticate or lay foundation for such evidence at the hearing.

NEWSPAPER ARTICLES	
P-52	“Memphis Water Termed ‘Sweetest in the World,’” Water World (March 2003)
P-53	Ward Archer, Jr., “Liquid Assets,” Memphis magazine (March 2005)
P-71	Tom Charlier Commercial Appeal article entitled “Water – a giant sucking sound?” (May 1, 2005)
P-94	Charlier Commercial Appeal article November 16, 1998 (Pickel Dep. Exh. 4)

MDEQ GROUNDWATER PERMIT DOCUMENTS	
P-75	Application for Water Permit submitted by City of Hernando (collective)
P-76	Letter from James L. Crawford, Director, Division of Permitting and Monitoring, Mississippi Department of Environmental Quality, enclosing four permits issued to the City of Hernando
P-77	Test data relating to City of Hernando Well No. 3 (collective)
P-78	Letter from James L. Crawford, Director, Division of Permitting and Monitoring, Mississippi Department of Environmental Quality, enclosing water use permits issued to the City of Holly Springs
P-79	Letter from Lloyd G. Long, Hydrologic Technician, Mississippi Department of Natural Resources, to City of Holly Springs
P-80	Letters from Marlon G. Stewart, Jr., P.E., Chief, Groundwater Section, Mississippi Department of Natural Resources, to City of Holly Springs (collective)
P-81	Mississippi Department of Environmental Quality water use permits issued to Horn Lake Water Association, Inc. (collective)
P-82	Mississippi Department of Environmental Quality water use permits issued to Marshall County Water Association, Inc. (collective)
P-83	Letter from James L. Crawford, Director, Division of Permitting and Monitoring, Mississippi Department of Environmental Quality, enclosing water use permits issued to North Mississippi Utility Company, Inc.
P-84	Mississippi Department of Environmental Quality water use permit issued to Metro Desoto Utility Co.
P-85	Mississippi Department of Environmental Quality, Office of Land and Water Resources, Water Supply Information Sheet for Metro Desoto Utility Co.
P-86	Letter from David L. Hardin, Jr., Director, Division of Permitting and Monitoring, Mississippi Department of Environmental Quality, enclosing water use permit issued to City of Southaven
P-87	Mississippi Department of Environmental Quality water use permit issued to City of Southaven and related proof of publication documents (collective)
P-88	Letter from David L. Hardin, Jr., Director, Division of Permitting and Monitoring, Mississippi Department of Environmental Quality, enclosing water use permits issued to City of Southaven
P-89	Southaven Well Test log information

CONCLUSION

Mississippi cannot seek to admit the above exhibits into evidence without a witness to authenticate and lay a foundation for them. Mississippi has not identified any fact witnesses who can do so. Defendants ask the Special Master to grant this Motion and strike the above exhibits.

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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