

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.

**PLAINTIFF'S RESPONSE TO DEFENDANTS' JOINT MOTION TO
EXCLUDE MISSISSIPPI'S DESIGNATED DEPOSITION TESTIMONY**

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Counsel for the State of Mississippi

I. INTRODUCTION

Defendants have moved to exclude *all* of Mississippi's deposition designations and cross-designations. *See* Dkt. No. 80. The Court should deny Defendants' Motion for multiple reasons:

First, because Defendants themselves designated portions of the depositions of Charles Branch and Randall Gentry, Mississippi may introduce "any other parts" of those depositions under Federal Rule of Civil Procedure 32(a)(6). Nor is there any prejudice simply because these depositions took place before Tennessee became a party to this dispute. In fact, Tennessee had ample notice and opportunity to depose these individuals in this proceeding—*but chose not to do so*. Moreover, because Defendants' interests are identical,¹ MLGW's presence at these depositions ensured they were taken under adversarial circumstances—*i.e.*, Tennessee's presence would not have changed anything. Thus, Mississippi's designations are proper.

Second, Defendants' objection to Mississippi's cross-designations is based entirely on a selective (and erroneous) reading of Rule 32(a)(6). Mississippi's cross-designations do not have to be limited solely to those of "fairness" or "completeness." Rather, under Rule 32(a)(6), Mississippi has the right to cross-

¹ Indeed, Tennessee and MLGW have jointly made all significant filings in this case. *See, e.g.*, Dkt. Nos. 77-82.

designate *any other parts* of the transcripts it wishes to present. Thus, Mississippi's cross-designations are proper.

II. BACKGROUND

Pursuant to Section 4(e) of the Court's October 26, 2016 Case Management Order (Dkt. No. 57), the Parties exchanged witness lists on April 28 and May 1, 2017, and identified all fact witnesses whose testimony they intend to introduce at the upcoming evidentiary hearing. *See* Ex. 1 (Mississippi's list of fact witnesses); Ex. 2 (Memphis-MLGW's list of fact witnesses); Ex. 3 (Tennessee's list of fact witnesses). The Court's April 12, 2018 Scheduling Order: (1) recognized that the Parties had exchanged witness lists; (2) provided that the Parties would exchange exhibit lists and deposition designations by September 14, 2018; and (3) further provided for exchange of deposition cross-designations by October 5, 2018. *See* Dkt. No. 69 at Section I(A)(2)-(3).

The Parties exchanged their initial deposition designations on September 14, 2018. Mississippi designated testimony from the depositions of Charles Branch, Randall Gentry, and John Van Brahana—all of which were taken in the prior district court proceeding (*Hood ex rel. Mississippi v. City of Memphis*). Defendants designated testimony from the depositions of David Wiley, Richard Spruill, Jamie Crawford, Jim Hoffman, Sam Mabry, Charles Branch, and Randall Gentry. *See* Dkt.

No. 80 at 8 (listing Defendants' deposition designations).² On October 5, 2018, the Parties exchanged their respective deposition cross-designations.

Defendants' Motion seeks to exclude both Mississippi's initial deposition destinations and its cross-designations in their entirety. *See* Dkt. No. 80.

III. ARGUMENT

A. Mississippi's Designations Are Proper

Defendants first argue that the Court should exclude *all* of Mississippi's initial designations (of Charles Branch, Randall Gentry, and John Van Brahana) because those witnesses may be subpoenaed to attend the January 2018 evidentiary hearing (and are therefore not "unavailable"). *See* Dkt. No. 80 at 2-6. This argument is without merit. The Court should deny Defendants' Motion on these grounds.

To begin, Mississippi does not dispute that these witnesses could be compelled to attend the upcoming hearing. Rather, when Mississippi submitted its

² David Wiley is one of Mississippi's experts, and Defendants designated his testimony given in both this proceeding and the prior *Hood* proceeding. *See* Dkt. No. 80 at 8. Richard Spruill is also one of Mississippi's experts, and Defendants designated testimony from his deposition in this proceeding. *See id.* Defendants' designations for Messrs. Crawford, Hoffman, Mabry, Branch, and Gentry were all from depositions taken in the prior *Hood* proceeding. *See id.* Defendants' witness lists, however, did not include Messrs. Wiley, Spruill, or Gentry as witnesses Defendants may call by deposition transcript. *See* Ex. 2 (Memphis-MLGW's list of fact witnesses; Ex. 3 (Tennessee's List of fact witnesses).

initial designations, it pursued what it believed to be the most efficient, cost-effective way to present these witnesses' sworn testimony.³

1. Mississippi May Introduce “Any Other Parts” of the Branch and Gentry Depositions Under Rule 32(a)(6)

As an initial matter, Defendants have waived their right to object to Mississippi's use of the Branch and Gentry depositions. Defendants included *both* these depositions in their initial designations. *See* Dkt. No. 80 at 8. Mississippi may therefore introduce “any other parts” of those depositions. *See* Fed. R. Civ. P. 32(a)(6) (providing that 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 introduced, *and any party may itself introduce any other parts.*” (emphasis added)). Put another way, Defendants' own designations of the Branch and Gentry depositions opened the door for Mississippi to use any other relevant parts of those depositions at the evidentiary hearing.

Defendants did not provide initial designations from Dr. Brahana's deposition. Thus, because of Defendants' objection (and because Mississippi recognizes that the 100-mile subpoena limitation does not apply to this proceeding),

³ Mississippi was also mindful of the distance each of these witnesses will have to travel if they are required to attend the hearing. Mr. Branch lives in Pickens, Mississippi (approximately 370 miles from Nashville); Dr. Gentry lives in Pittsburgh, Pennsylvania (approximately 570 miles from Nashville); and Dr. Brahana lives in Fayetteville, Arkansas (approximately 530 miles from Nashville). *See* Ex. 1 (Mississippi's list of fact witnesses).

Mississippi requests the Court issue a subpoena requiring the attendance of Dr. Brahana at the upcoming evidentiary hearing.

2. *Tennessee Had Reasonable Notice and the Opportunity to Depose Branch, Gentry, and Brahana—But Did Not*

Defendants further argue that, availability aside, Mississippi cannot use the Branch, Gentry, or Brahana depositions because “Tennessee has not had a chance to ask Messrs. Brahana, Branch, or Gentry a single question under oath.” Dkt. No. 80 at 5. This assertion is not accurate.

First, Tennessee had ample notice and opportunity to take these depositions. Although Tennessee did not participate in their depositions in the prior *Hood* proceeding, Mississippi disclosed these individuals as fact witnesses in this proceeding on May 1, 2017. *See* Ex. 1 (Mississippi’s list of fact witnesses). Because discovery was still open at that time, Tennessee had reasonable notice and opportunity to take their depositions. Tennessee, however, chose not to do so. Simply put, Defendants should not be allowed to manufacture a defense to Mississippi’s use of these depositions by sitting idly on the sidelines. *See, e.g., Kmart Corp. v. Footstar, Inc.*, 2012 WL 5389727, at *2 (N.D. Ill. Nov. 2, 2012) (admitting deposition testimony from previous case where co-defendant chose not to re-depose witnesses because the co-defendant “should not be allowed to take advantage of a situation for which it is, in part, responsible.”).

Second, Defendants do not contend that the questioning of these witnesses in *Hood* would have been any different had Tennessee participated. Indeed, MLGW—whose interests are totally aligned with Tennessee’s—noticed and took Mr. Branch’s deposition. MLGW also extensively cross-examined both Dr. Gentry and Dr. Brahana at their depositions. *See* Def.’s Ex. 13 (excerpt of Gentry deposition showing MLGW examination); Def.’s Ex. 11 (excerpt of Brahana deposition showing MLGW examination).

In such circumstances, courts routinely allow depositions to be used against defendants not present in a prior action. As the Seventh Circuit has noted:

Although it is generally the rule that a deposition is not admissible as to one not having the opportunity to be represented at its taking, the presence of an adversary with the same motive to cross-examine the deponent and identity of issues in the case in which the deposition was taken with one in which it is sought to be used provide a well-recognized exception to the rule. In such case the purpose of [Rule 32(a)(1)(A)]—to ensure that the deposition is taken under adversarial circumstances—is substantially satisfied.

Ikerd v. Lapworth, 435 F.2d 197, 205 (7th Cir. 1970) (citations omitted).⁴ In *Ikerd*, a driver and passenger separately sued the seller of a vehicle. *Id.* at 200-201. Although the driver had not yet filed suit when depositions were taken in the

⁴ *See also Fullerform Continuous Pipe Corp. v. Am. Pipe & Const. Co.*, 44 F.R.D. 453, 456 (D. Ariz. 1968) (allowing depositions to be used against defendants not present in prior action because “[d]efendants common to both actions have the same primary interest”).

passenger's case, counsel for the passenger attended the depositions and there was substantial identity of factual and legal issues. *Id.* at 205-206. The passenger's counsel also took the lead role at trial for both plaintiffs. *Id.* at 206. The court thus rejected the driver's argument that he was prejudiced because he had not had an opportunity to have his own counsel present at the depositions. *Id.* This Court should do the same.

B. Mississippi's Cross-Designations Are Proper

Defendants next argue that Mississippi's cross-designations "are beyond the scope of Defendants' deposition designations" and should be excluded in their entirety. *See* Dkt. No. 80 at 6-10. This argument is entirely based on an incomplete (and therefore inaccurate) reading of Rule 32(a)(6).

Rule 32(a)(6) provides that 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 introduced, **and any party may itself introduce any other parts.**" Fed. R. Civ. P. 32 (emphases added). Defendants' argument ignores the latter (italicized) portion of this rule.

To be sure, the first portion of Rule 32(a)(6) contains a "fairness" provision under which "an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced" Fed. R. Civ. P. 32. Defendants' argument relies entirely on this portion of the Rule (as well as the

complementary provisions of Fed. R. Evid. 106). Defendants completely ignore, however, that offering only part of a deposition also triggers the right of “any party [to] itself introduce any other parts.” Fed. R. Civ. P. 32(a)(6).

As mentioned above, Defendants’ designations of portions of the Wiley, Spruill, Crawford, Hoffman, Mabry, Branch, and Gentry Depositions opened the door for Mississippi to introduce *any other parts* of those depositions—not just those “other parts that in fairness should be considered” Fed. R. Civ. P. 32(a)(6). Indeed, this Court’s Pre-Hearing Order is consistent with Rule 32(a)(6) and contemplates that a party’s cross-designations could (and would) be used for their case-in-chief. *See* Dkt. No. 69 at Section I(A)(3) (“Deposition cross-designations for their cases-in-chief shall be exchanged by October 5, 2018.”).

Mississippi fully recognizes that its cross-designations must consist of testimony that is relevant. Mississippi’s cross-designations, however, do not have to be limited to “fairness” or “completeness” designations. There simply is no basis for Defendants’ requested wholesale exclusion of Mississippi’s cross-designations. Mississippi’s cross-designations comply with the clear, unambiguous language of Rule 32(a)(6), as well as Section I(A)(3) of the Court’s Pre-hearing Order. The Court should deny Defendant’s Motion on these grounds.

IV. CONCLUSION

For the foregoing reasons, Mississippi's deposition designations and cross-designations are proper. The Court should deny Defendants' Joint Motion to Exclude Mississippi's Designated Deposition Testimony (Dkt. No. 80).

Dated: November 20, 2018

Respectfully submitted,

THE STATE OF MISSISSIPPI

/s/ C. Michael Ellingburg
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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 the 20th day of November, 2018.

/s/ C. Michael Ellingburg
C. Michael Ellingburg

Counsel for Plaintiff

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.

THE STATE OF MISSISSIPPI'S LIST OF FACT WITNESSES

COMES NOW, the State of Mississippi, by and through undersigned counsel, and produces the following list of fact witnesses whose testimony may be used at the evidentiary hearing pursuant to the Court's October 26, 2016, Case Management Plan, as follows:

MAY CALL LIVE OR BY DEPOSITION TRANSCRIPT

1. Charles Branch
759 Rocky Hill Rd.
Pickens, MS 38146
Phone: (662) 468-2640
Deposition Date: October 1, 2007
2. David L. Feldman
Professor, Planning, Policy & Design
School of Social Ecology
University of California, Irvine
202B Social Ecology 1
Mail Code: 7075
Irvine, CA 92697

Phone: (949) 824-4384
Deposition Date: October 24, 2007

3. Dr. Randall W. Gentry
Deputy Division Director, EVS
626 Cochrans Mill Road
P.O. Box 10940
Pittsburgh, PA 15236-0940
Phone: 412-386-4984
Deposition Date: August 7, 2006

4. Jim Hoffman
Office of Land and Water Resources
P.O. Box 2309
Jackson, MS 39225
Deposition Date: July 30, 2007

5. John G. Morgan
Former Comptroller of the Treasury
for the State of Tennessee
[Contact Information Unknown]

6. Dr. John Van Brahana
Department of Geosciences
20 Gearhart Hall
University of Arkansas
Fayetteville, AR 72701
Phone: (479) 575-2570
Deposition Date: November 5, 2007

7. Mr. Brian Waldron
Center for Applied Earth Science and Engineering, Director
110 Engineering Science Building
University of Memphis
Memphis, TN 38152
Phone: 901-678-3026
Deposition Date: May 30, 2007

8. Kay Whittington, PE, BCEE
Office of Land and Water Resources, Director MDEQ

P.O. Box 2309
Jackson, MS 39225

9. Federal Rule of Civil Procedure 30(b)(6) designees for any Party to this action; and any fact witnesses identified by those designees who have knowledge of facts relevant to the evidentiary hearing.

10. Any fact witness designated by Defendants Memphis/MLGW and Defendant State of Tennessee.

Discovery is still ongoing in this case, and therefore, Mississippi reserves the right to supplement its fact witness list as discovery unfolds.

This, the 1st day of May, 2017.

RESPECTFULLY SUBMITTED,

/s/ C. MICHAEL ELLINGBURG

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Counsel for the State of Mississippi

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.

/s/ C. Michael Ellingburg
C. Michael Ellingburg

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

**DEFENDANTS CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS
LIGHT, GAS & WATER DIVISION'S NOTICE OF FACT WITNESSES
WHO MAY BE CALLED AT TRIAL**

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*Counsel for Defendants City of
Memphis, Tennessee, and Memphis
Light, Gas & Water Division*

Defendants City of Memphis, Tennessee (“Memphis”) and Memphis Light, Gas & Water Division (“MLGW”) (collectively, “Memphis/MLGW”), by and through their counsel of record, and pursuant to Section 4(e) of the Case Management Plan (Dkt. No. 57), hereby identify the following fact witnesses whose testimony they may use at the evidentiary hearing in this matter:

MAY CALL LIVE

1. Odell Johnson. Mr. Johnson is an employee of MLGW and can only be contacted through MLGW's counsel for record.
2. Fed. R. Civ. P. 30(b)(6) designee for the State of Mississippi.
3. Any fact witness designated by Plaintiff State of Mississippi and/or Defendant State of Tennessee.

MAY CALL BY DEPOSITION TRANSCRIPT

1. Jamie Crawford. Deposition taken July 30, 2007.
2. Charles Branch. Deposition taken October 1, 2007.
3. Jim Hoffman. Deposition taken July 30, 2007.
4. Sam Mabry. Deposition taken July 30, 2007.

Memphis/MLGW note that some of the above witnesses may offer testimony that includes both fact and expert testimony.

Because depositions in this case have not been completed and discovery is ongoing, Memphis/MLGW reserve their rights to amend and/or supplement the above list as discovery progresses.

Memphis/MLGW reserve their rights to call any witness needed to impeach or rebut the testimony of other witnesses.

Respectfully submitted,

s/ Leo M. Bearman

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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 28th day of April, 2017.

/s/ Leo M. Bearman

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Tennessee and Memphis Light, Gas & Water
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In the Supreme Court of the United States

STATE OF MISSISSIPPI,
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v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,
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Defendants.

ON BILL OF COMPLAINT

TENNESSEE'S LIST OF FACT WITNESSES

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*Counsel for the
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Pursuant to paragraph 4(e) of the Case Management Plan entered on October 26, 2016, by the Special Master (Dkt. No. 57), Defendant State of Tennessee designates the fact witnesses whose testimony it may use at an evidentiary hearing as follows.

MAY CALL LIVE

1. Brian Waldron.
2. Greg Spradley. Mr. Spradley is employed at the Tennessee Comptroller of the Treasury, Division of State Audit, Suite 1500, James K. Polk State Office Building, 505 Deaderick Street, Nashville, TN 37243. As a State employee, Mr. Spradley should be contacted only through counsel for the State of Tennessee.
3. A Fed. R. Civ. P. 30(b)(6) designee for Plaintiff State of Mississippi.
4. Any fact witness designated by Defendant Memphis Light, Gas & Water Division, Defendant City of Memphis, or Plaintiff State of Mississippi.

MAY CALL BY DEPOSITION TRANSCRIPT

1. Jamie Crawford. Deposition taken July 30, 2007.
2. Jim Hoffman. Deposition taken July 30, 2007.
3. Sam Mabry. Deposition taken July 30, 2007.
4. Charles Branch. Deposition taken October 1, 2007.

Tennessee notes that some of the above witnesses may offer both fact and expert testimony. Tennessee also reserves its right to amend or supplement the above designations.

Respectfully submitted,

/s/ David C. Frederick

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April 28, 2017

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.

/s/ David C. Frederick

David C. Frederick
*Special Counsel to the
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April 28, 2017