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 REPLY IN SUPPORT OF MOTION TO EXCLUDE MISSISSIPPI'S DESIGNATED DEPOSITION TESTIMONY

DAVID C. FREDERICK
JOSHUA D. BRANSON
T. DIETRICH HILL
GRACE W. KNOFCZYNSKI
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to Defendant State of Tennessee

LEO M. BEARMAN
Counsel of Record
DAVID L. BEARMAN
KRISTINE L. ROBERTS
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
(901) 526-2000
(lbearman@bakerdonelson.com)

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

December 7, 2018

(Additional Counsel Listed On Next Page)

HERBERT H. SLATERY III
Attorney General
ANDRÉE SOPHIA BLUMSTEIN
Solicitor General
BARRY TURNER
Deputy Attorney General
Counsel of Record
SOHNIA W. HONG
Senior Counsel
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3491
(barry.turner@ag.tn.gov)

Counsel for Defendant
State of Tennessee

CHERYL W. PATTERSON
CHARLOTTE KNIGHT GRIFFIN
MEMPHIS LIGHT, GAS & WATER
DIVISION
220 South Main Street
Memphis, Tennessee 38103

Counsel for Defendant
Memphis Light, Gas & Water
Division

BRUCE A. MCMULLEN
City Attorney
CITY OF MEMPHIS, TENNESSEE
125 North Main Street, Room 336
Memphis, Tennessee 38103

Counsel for Defendant
City of Memphis, Tennessee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

RULES

GLOSSARY

Aug. 2016 Op.	Memorandum of Decision on Tennessee's Motion to Dismiss, Memphis and Memphis Light, Gas & Water Division's Motion to Dismiss, and Mississippi's Motion to Exclude, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Aug. 12, 2016) (opinion of Special Master) (Dkt. No. 55)
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)
Miss. Br.	Plaintiff's Response to Defendants' Joint Motion to Exclude Mississippi's Designated Deposition Testimony (Nov. 20, 2018) (Dkt. No. 87)
MLGW	Memphis Light, Gas & Water Division

I. INTRODUCTION

The Special Master ordered an evidentiary hearing on the threshold issue of "whether the Aquifer is an interstate resource." Aug. 2016 Op. 36. In order to keep the hearing focused on this question and preserve the efficiencies the Special Master sought to create through the use of phased litigation, *see id.*, the parties have resolved two of Defendants' objections to Mississippi's initial deposition designations from the depositions of John van Brahana, Charles Branch, and Randall Gentry in *Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss 2008), *aff'd*, 570 F.3d 625 (5th Cir. 2009). Specifically, Defendants have agreed to withdraw their objections to Mississippi's affirmative deposition designations based on (1) the availability of the witnesses[1] and (2) the fact that Tennessee did not participate in or have notice of the depositions. Defendants reserve all other objections to Mississippi's designations and cross-designations. Mississippi has agreed that it will not call any witnesses besides

[1] Because Defendants withdraw their objection to Mississippi's deposition designations based on unavailability, they do not withdraw their designation of certain excerpts from the depositions of Charles Branch, Randall Gentry, Richard Spruill, and David Wiley. *See* Dkt. No. 80, at 4 n.4.

Richard Spruill, David Wiley, and Brian Waldron[2] live at the hearing (and, therefore, withdraws its request to subpoena John Van Brahana for trial).[3]

The parties have not resolved the portion of Defendants' motion to exclude Mississippi's cross-designations. The Special Master should exclude those cross-designations from the hearing as beyond the scope permitted under Federal Rule of Civil Procedure 32(a)(6). Rule 32(a)(6) authorizes two means of introducing deposition testimony that in fairness should be considered with the proffered designations. It is not a basis for the introduction of entirely unrelated and otherwise-inadmissible portions of the deposition.

II. ARGUMENT

Rule 32(a)(6) Only Authorizes Cross-Designations Compelled By The Rule Of Completeness

Mississippi does not defend its cross-designations as authorized by the rule of completeness. Instead, it claims (at 9) it need not comply with that rule and may instead cross-designate anything it wishes from the depositions that Defendants designated. Mississippi's reading of Rule 32(a)(6) is inaccurate. In its entirety, Rule 32(a)(6) provides: "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

[2] Tennessee is bringing Dr. Waldron live to the hearing as an expert witness and intends to present his testimony as part of its case-in-chief. Mississippi will have a full opportunity to elicit testimony from him on cross-examination.

[3] *See* Miss. Br. 6-7.

should be considered with the part introduced, and any party may itself introduce any *other parts*." (emphases added).

Mississippi misinterprets the phrase "any party may itself introduce any other parts" in Rule 32(a)(6). The final phrase "other parts" does not permit a party to introduce just any other portion of the deposition. *Id.* It instead refers back to "other parts that in fairness should be considered." *Id.* In other words, the rule gives a party two means of introducing testimony necessary to understand the other party's designations fully: (1) the party can "require the offeror to introduce" the parts, or (2) it can "itself introduce" the parts. It does not authorize the designation of otherwise-inadmissible testimony under the guise of a cross-designation.

This interpretation comports with the understanding of courts that Rule 32(a)(6) "represents an attempt to preclude the selective use of deposition testimony that might convey a misleading impression." *Farr Man Coffee Inc. v. Chester*, 1993 WL 248799, at *19 (S.D.N.Y. June 28, 1993), *aff'd*, 19 F.3d 9 (2d Cir. 1994). Courts long have recognized that the "rule provides a method for averting, so far as possible, any misimpressions from selective use of deposition testimony." *Westinghouse Elec. Corp. v. Wray Equip. Corp.*, 286 F.2d 491, 494 (1st Cir. 1961) (interpreting an earlier version of the rule).

Rule 32(a)(6), along with the related Federal Rule of Evidence 106,[4] contain a fairness element and codify "[t]he common-law 'rule of completeness.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988). The common law rule of completeness provides that a "second writing may be required to be read 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." *United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984). Rules 32(a)(6) and 106 "do not allow filing of the remainder of a document solely because an opponent so demands; the 'in fairness' requirement limits opposing parties' opportunity to do so." *Great Am. Ins. Co. v. Moye*, 2010 WL 2889665, at *2 (M.D. Fla. July 19, 2010); *see also In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & PMF Prod. Liab. Litig.*, 2011 WL 6740391, at *19 (S.D. Ill. Dec. 22, 2011) (holding that Rule 32(a)(6) limits the adverse party to introducing "only so much counter designation . . . as is necessary to allow for a fair reading of the testimony"). Mississippi does not cite any cases in support of its claim that Rule 32(a)(6) permits it to introduce entirely unrelated portions of a deposition simply because Defendants have designated some portion of the same deposition.

[4] 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."

Contrary to Mississippi's assertion (at 10), Section I(A)(3) of the Pre-Hearing Order does not provide that a party's cross-designations may be used as part of the party's case-in-chief. In the immediately prior subsection, the Pre-Hearing Order provides: "The parties will exchange exhibit lists and deposition designations for their cases in chief by September 14, 2018." Dkt. No. 69, § I(A)(2). The subsequent section references "deposition cross-designations for their cases-in-chief" because it provides the deadline for each party designating testimony needed to understand designations made as part of the other party's case-in-chief. *Id.* § I(A)(3).[5] The Order does not mean that a party will be permitted to offer testimony it cross-designated as affirmative evidence in its own case-in-chief. The reference to case-in-chief is necessary because cross-designations may be relevant at other times. For example, if a party introduces deposition testimony for impeachment purposes, the other party can invoke Rule 32(a)(6) to require the introduction of additional testimony necessary to understand the context of the offered designations.

[5] Further, Mississippi's understanding of the Pre-Hearing Order and Rule 32(a)(6) as permitting Mississippi to introduce cross-designations as part of their case-in-chief is illogical. Defendants' designation of portions of depositions does not mean they will affirmatively offer those designations into evidence. But, at that point, Mississippi already will have offered their case-in-chief – which in Mississippi's view would have included the cross-designations.

Mississippi makes no attempt to defend any of its cross-designations as permitted under the rule of completeness.[6] Nor could they. As Defendants explained (at 9), the cross-designations are clearly out-of-court statements by Mississippi's own witnesses that Mississippi is seeking to use affirmatively to support its position rather than to put Defendants' designations in context. Mississippi cross-designated huge swaths of its own witnesses' testimony in response to small discrete portions designated by Defendants. For example, Mississippi counter-designated 117 pages of Randall Gentry's deposition covering everything from MLGW's funding of the Ground Water Institute to how "older" water compares to "younger" water – all in response to Defendants' designation of a single question about water moving from Mississippi into Tennessee prior to any pumping of water out of the Aquifer. Such unrelated testimony is not proper cross-designation material.

Mississippi's cross-designations are impermissible because they are not necessary to understand testimony offered by Mississippi.

CONCLUSION

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

---

[6] In fact, Mississippi effectively concedes that its cross-designations do not comport with the rule of completeness. *See* Miss. Br. 10 ("Mississippi's cross-designations . . . do not have to be limited to 'fairness' or 'completeness' designations.").

Respectfully submitted this 7th day of December 2018,

s/ David C. Frederick
DAVID C. FREDERICK
JOSHUA D. BRANSON
T. DIETRICH HILL
GRACE W. KNOFCZYNSKI
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Special Counsel to Defendant
State of Tennessee

HERBERT H. SLATERY III
Attorney General
ANDRÉE SOPHIA BLUMSTEIN
Solicitor General
BARRY TURNER
Deputy Attorney General
Counsel of Record
SOHNIA W. HONG
Senior Counsel
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3491
(barry.turner@ag.tn.gov)
Counsel for Defendant
State of Tennessee

s/ Leo M. Bearman
LEO M. BEARMAN
Counsel of Record
DAVID L. BEARMAN
KRISTINE L. ROBERTS
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
(901) 526-2000
(lbearman@bakerdonelson.com)
Counsel for Defendants
City of Memphis, Tennessee, and
Memphis Light, Gas & Water
Division

CHERYL W. PATTERSON
CHARLOTTE KNIGHT GRIFFIN
MEMPHIS LIGHT, GAS & WATER
DIVISION
220 South Main Street
Memphis, Tennessee 38103
Counsel for Defendant
Memphis Light, Gas & Water
Division

BRUCE A. MCMULLEN
City Attorney
CITY OF MEMPHIS, TENNESSEE
125 North Main Street, Room 336
Memphis, Tennessee 38103
Counsel for Defendant
City of Memphis, Tennessee

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 7th day of December 2018.

/s/ *David C. Frederick*

David C. Frederick
Special Counsel to Defendant
State of Tennessee