UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. SA-12-CA-1002-FB(HJB)
	§	
AMERICAN BATTLE MONUMENTS COMMISSION, *et al*	§	
	§	
	§	
Defendants	§	

OPPOSED MOTION TO INTERVENE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24

1. Pursuant to Federal Rule of Civil Procedure 24(a), John A. Patterson, *pro se*, moves to intervene as of right as plaintiff-intervenor in the above-captioned action brought by Plaintiff John Eakin. In the alternative, these parties move to intervene permissively as plaintiffs pursuant to Rule 24(b).

INTRODUCTION

2. Plaintiff-Intervenor is the Nephew and primary next-of-kin of First Lieutenant Alexander R. Nininger, Jr., awarded posthumously the Medal of Honor ("MOH") as a result of his exploits on Bataan, January 12, 1942. He is currently interred as an Unknown in Grave J-7-20 near the former grave of Private Arthur H. "Bud" Kelder in the Manila American Cemetery operated by Defendant ABMC.

3. Intervener-Plaintiff has conferred with Plaintiff pro se and Counsel for Defendants. Plaintiff supports this motion to intervene. Counsel for Defendants objects to this motion.

BACKGROUND

4. Plaintiff originally petitioned for relief in the form of return of the remains of his family member, Arthur H. "Bud" Kelder, who was originally buried in Cabanatuan Grave 717 and subsequently interred as an Unknown in the Manila American Cemetery operated by Defendant ABMC. Plaintiff's First Amended Complaint also requested injunctive relief requiring Defendants to afford due process to all MIA families seeking the return of the remains of their deceased family members who died in military service.

5. Defendants concede that they have a duty to return remains to families for burial, but contend they have no duty to identify remains nor obligation to consider evidence of identity provided by others.

6. After service of discovery requests to produce both documents and the subject remains, Defendants peremptorily acted to exhume the remains of all ten Unknowns originally buried in Grave 717, including the remains identified by Plaintiff as his family member and nine other Unknowns not included in Plaintiff's lawsuit. Defendants' action avoided compliance with the pending discovery requests and allowed them to retain control of the remains and subsequent DNA testing. Defendants now contend that no controversy exists and Plaintiff's suit should be dismissed.

7. Additionally, Plaintiff has dismissed his appointed counsel, which precludes his representation of MIA families similarly situated.

8. The action is currently stayed and administratively closed pending either side's application for further relief within thirty days of the conclusion of the DNA testing and identification of the ten Unknowns.

9. Plaintiff-Intervenor's case is similar to the Kelder case in that Defendants have unreasonably failed to complete the identification of remains believed to those of Plaintiff-Intervenor's family member and refuse to allow independent testing by Plaintiff-Intervenor.

10. Plaintiff-Intervenor will be substantially impacted by the outcome of Plaintiff's lawsuit.

TIMELINESS

9. Whether leave to intervene is sought under section (a) or section (b) of Rule 24, the application must be timely. *United Air Lines, Inc. v. McDonald,* 432 U.S. 385, 97 S.Ct. 2464, 2466, 53 L.Ed.2d 423, 427 (1977); *NAACP v. New York,* 413 U.S. 345, 366, 93 S.Ct. 2591, 2602-03, 37 L.Ed.2d 648, 662 (1973); *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.,* 420 F.2d 1103, 1115 (5th Cir. 1970).

10. Intervenor's motion is timely. *NAACP v. New York,* 413 U.S. 345, 365, 93 S. Ct. 2591, 2602-03 (1973). Intervenors neither could have known nor reasonably should have known of their interest in the suit before filing this motion. *See John Doe #1 v. Glickman,* 256 F.3d 371, 376 (5th Cir. 2001). Further, the suit has progressed only to abbreviated document discovery and Defendants have not answered Plaintiff's Complaint. *See United States v. Washington,* 86 F.3d 1499, 1503 (9th Cir. 1996).

11. "'Timeliness,'" as was recognized in *McDonald v. E. J. Lavino Co.,* 430 F.2d 1065, 1074 (5th Cir. 1971), "is not a word of exactitude or of precisely measurable dimensions." Rule 24 fails to define it, and the Advisory Committee Note furnishes no clarification. As a result, the question whether an application for intervention is timely is largely committed to the discretion of the district court, and its determination will not be overturned on appeal unless an abuse of discretion is shown." *Stallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977) quoting

NAACP v. New York, 413 U.S. at 367, 93 S.Ct at 2603, 37 L.Ed.2d at 663; *United States v. United States Steel Corp.,* 548 F.2d 1232, 1235 (5th Cir. 1977); *McDonand v. E.J. Lavino Co.,* 430 F.2d at 1071.

12. In *McDonald v. E.J. Lavino Co.,* the Circuit Court set out four factors that must be considered in passing on the timeliness of a petition for leave to intervene.

13. Factor 1. The length of time during which the would be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.

14. Plaintiff sought only to recover the remains of his family member and he provided evidence that they were unidentified remains designated as X816 buried in Grave A-12-195. Defendants' actions in exhuming the nine additional remains in addition to those of Arthur H. "Bud" Kelder give rise to the interest in this case by the families of those Unknowns. These exhumations were completed on August 28, 2014.

15. Intervenors could not have been aware of their interest in this case because Defendants had improperly classified the necessary records as defense secrets and restricted them from public access. During the time prior to release of the records, Defendants had represented to families that the remains of their family member were "non-recoverable," a misleading and disingenuous description of the actual circumstances. Further, Defendants had represented to families of the missing that they would be notified if any additional information concerning the remains of their family members was obtained.

16. Clearly, Defendants failed to do so as the documents showing the actual facts of the burials were concealed until Plaintiff obtained them in a Freedom of Information action in

this Court. Any delays in proposing this intervention were due to Defendant's concealment of records and failure to communicate with families as they had promised.

17. Additionally, even if intervenors had known of Plaintiff's lawsuit, they could have reasonably believed that their interests would be protected since Plaintiff's First Amended Complaint sought to protect the interests of those "similarly situated." It was not until Plaintiff's Counsel was dismissed and Defendants objected to Plaintiff's pro se reference to other similar Unknowns that their interests were threatened and it became necessary for them to intervene.

18. The need for participation by Intervenors has been due to Defendant's actions in the concealment of the remains, the documents and by unilaterally exhuming remains beyond those originally complained of in this litigation. Any opposition by Defendants based on timeliness would be disingenuous.

19. Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.

20. Neither Plaintiff nor Defendants will be prejudiced by Intervenors participation at this stage. Intervenors have substantially the same facts and questions of law as presented by Plaintiff Eakin. Defendants' investigations of these cases should have been completed years ago in the routine course of their business. Intervenors do not foresee the need for extensive discovery beyond that proposed by Plaintiff. Defendants have not yet answered Plaintiff's First Amended Complaint.

21. Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.

22. Plaintiff's Mandamus claims are grounded in the "Slocombe Memo" issued in 1999. This policy only became known to Plaintiff and available through litigation. Defendants are reasonably expected to cancel this policy at their first opportunity, thereby forever foreclosing any future possibility that Plaintiff-Intervenors will ever recover the remains of their family members. Plaintiff's request for injunctive relief to provide a similar route for families to recover the remains of their missing is at the heart of this effort to intervene.

23. Defendants have refused to provide detailed protocols for the identification of the remains exhumed on August 28, 2014. However, Intervenors have become aware that Defendants intend to use only the low selectivity mitochondrial DNA (mtDNA) technique in identification of the ten Grave 717 remains exhumed on August 28, 2014. Defendants are resisting the use of the more precise nuclear DNA techniques which would allow thousands of MIA families to challenge their past identifications and demand that all unidentified remains be identified. This, in itself, is a national scandal. However, with regard to this litigation, the families of those Unknowns exhumed on August 28, 2014 will be substantially impacted by Defendant's inconclusive or incorrect identifications. As will those families who may in the future request exhumation of the remains of other Unknowns.

24. Magistrate Judge Bemporad announced from the bench that this is a case of first impression. Considering the importance of the questions raised by this litigation it is essential that all interested parties be allowed to participate and insure that all arguments are properly considered.

25. Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

26. Defendants have been aware that other parties wished to intervene. At a July 16, 2014 hearing before Magistrate Judge Bemporad, Plaintiff was advised by the Court that he would be unable to represent the interests of other MIA families if he proceeded pro se. Plaintiff then advised the Court that other MIA families had expressed interest in intervening to insure their families were properly represented. With this knowledge of the probable participation of other parties, Defendants proceeded with the unilateral exhumation of the remains of Plaintiff's family member and nine others. Defendants should have reasonably anticipated that their action would cause other families to intervene in this litigation.

27. Subsequently, a number of non-parties, including intervenors, contacted this Court seeking to make the Court aware of their concerns. In response, this Court issued its Order Regarding Letters to the Court from Non-Parties (ECF Doc. No. 86) on September 18, 2014. In this order, the Court advised them to timely file their complaint.

28. Since becoming aware of the need to intervene in this litigation, Intervenor has diligently attempted to obtain counsel.

INTERVENTION AS OF RIGHT

31. Under Rule 24(a)(2) an individual is entitled to intervention as of right [1] when he claims an interest relating to the property or transaction which is the subject of the action and [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, [3] unless his interest is adequately represented by existing parties. *Stallworth v. Monsanto*, 558 F.2d 257, 268 (5th Cir. 1977)

PERMISSIVE INTERVENTION

34. Determining whether an individual should be permitted to intervene is a two-stage process. First, the district court must decide whether "the applicant's claim or defense and the

main action have a question of law or fact in common." Fed.R.Civ.P. 24(b)(2). If this threshold requirement is met, then the district court must exercise its discretion in deciding whether intervention should be allowed. *Id* at 269. In the cases which intervenors seek to present, both the facts and questions of law are nearly identical with those of the original complaint.

35. "[T]he rights asserted by two groups … should be adjudicated in one action rather than in two. 'With little strain on the court's time and no prejudice to the litigants, the controversy can be stilled and justice completely done' if the [parties] are granted permission to intervene." *Id* at 270 quoting *McDonald v. E.J. Lavino Corp.,* 430 F.2d at 1074.

CONCLUSION

36. Intervenor has standing identical to that of Plaintiff and which this Court has determined is proper for this action. Should Intervenors be forced to bring a new law suit, if that is even possible, it is probable that he would be faced with the same procedural challenges and delay as was Plaintiff. Granting Intervenor's Motion to Intervene will avoid relitigation of an already decided issue, promote judicial economy and insure a fair and just outcome.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 2015, a true and correct copy of the foregoing was forwarded to each party by First Class Mail at the following addresses:

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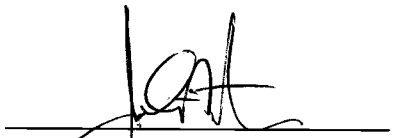

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