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

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| JOHN EAKIN<br>Plaintiff, | §<br>§<br>§ |
| | § CASE NUMBER: SA-12-CA-1002-FB-HJB |
| AMERICAN BATTLE MONUMENTS COMMISSION, MAX CLELAND, Secretary, American Battle Monuments Commission, U.S. DEPARTMENT OF DEFENSE, LEON E. PANETTA, Secretary of Defense, W. MONTAGUE WINFIELD, Deputy Assistant Secretary of Defense for POW/Missing Personnel Affairs, JOHNIE E. WEBB, Deputy to the Commander for External Relations and Legislative Affairs, Joint POW/MIA Accounting Command,<br>Defendants | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ |

**PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY**

Plaintiff submits this reply to Defendants' opposition to Plaintiff's Motion for Discovery and requests the motion be granted. Defendants' assertion that discovery is rarely necessary in a case such as this is without merit as it overlooks the U.S. Government's unbroken seventy (70) year history of bad faith demonstrated in this case. While Plaintiff has presented only five (5) specific examples of bad faith, including misrepresentations in this court, the actual history of bad faith extends to 1942 when the highest levels of the U.S. Government falsely and intentionally concealed from the American public information concerning the atrocities inflicted on U.S. Forces stationed in the Philippine Islands to allow pursuit of America's "Europe First" policy. (Attch. #1, Pl. Ex. 17) They then mislead the parents of Pvt Kelder in to believing that his remains had not been recovered. (Pl. Ex. 16F pg 6, 18, 25, 30)

The history of bad faith continued when the records of the recovery of Pvt Kelders' remains, despite having no military or strategic value, were classified and restricted as defense secrets for the sole purpose of preventing embarrassment to the government. (Pl. Ex. 15A thru 15J and 16F)

Most recently, Plaintiff's declaration, (Pl. Ex. 2 at 9), attests that Defendant Webb and Charles Henley, a senior executive of DPMO, misrepresented Defendant Webb as the sole decisionmaker with authority to advance or deny further investigation of Plaintiff's petition for consideration of new evidence, when 10 U.S.C. § 1509 actually requires that DPMO convene a status review board and appoint a Missing Persons Counsel to represent the interests of Pvt Arthur H. Kelder.

Indeed, Defendants demonstrated bad faith in related litigation in this court, attachment 2 (Pl. Ex. 18) is the Declaration of Dr. Cynthia A. Chambers[1] (*Eakin v. DoD*, SA-10-CA-0784-FB-NN, Doc. No. 25-3) which Defendants repeatedly relied upon to show that it was impossible to reproduce the documents which were the subject of *Eakin v. DoD*. Dr. Chambers asserted that some of the requested documents might be scanned in approximately three years and it might take six years to index those files (*id* at 16). She went on to state:

> "[Plaintiff's] request will reduce the ability of staff at the Washington National Records Center to respond to requests for any other [files]. Identification of WWII remains already in the lab or anticipated to be received as a result of excavation would also be hindered by fulfillment of this request, as the scientific staff would be unable to retrieve documents needed to substantiate identifications."

(*id* at 37)

[1] Decl. struck because it supported the government's unreasonableness argument which was dismissed.

Amazingly, less than 30 days after entry of final judgment, Defendants announced that they expected to complete scanning of X-files by the end of 2012. (Attachment 3, Pl. Ex. 19, pg 2 "*All X-Files To Be Digitized This Year*"). Further, the DPMO 2013 budget estimates contained a line item for "***continued***" scanning of Individual Deceased Personnel Files (IDPF). (Attachment 4[2], Pl. Ex. 20, pg 12)

Defendants were deliberately deceptive in describing the status of the documents in that earlier litigation which laid the foundation for the instant lawsuit. This prior example of concealment of documents in this case, even without consideration of the multiple other demonstrations of bad faith, is ample reason the Court should not rely solely on Defendants to file a complete administrative record without oversight.

Ironically, in her declaration Dr. Chambers further asserts that compliance with Plaintiff's document request would prevent DPMO from complying with 10 U.S.C. § 1509. (*id* at 35) Defendants' failure to comply with the 10 U.S.C. § 1509 requirements of convening a status review board and appointing a Missing Persons Counsel upon receipt of certain defined information is one of the very things complained of by Plaintiff in this lawsuit. This shows that Defendants were aware of the requirements of 10 U.S.C. § 1509, yet knowingly chose to ignore them.

The bad faith exception to the record rule has been recognized by every circuit, *See, e.g., Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1458-59 (1st Cir. 1992); Nat'l Nutritional Foods Ass'n v. Mathews, 557 F.2d 325, 332 (2d Cir. 1977); Greene/Guilford Envtl. Ass'n v. Wykle, 94 F. App'x 876, 878 (3d Cir. 2004); Franklin Sav. Ass'n v. Ryan, 922 F.2d 209,*

[2] http://comptroller.defense.gov/defbudget/fy2013/budget_justification/pdfs/01_Operation_and_Maintenance/O_M_VOL_1_PARTS/O_M_VOL_1_BASE_PARTS/DPMO_OP-5.pdf

*212 (4th Cir. 1991); In re Fed. Deposit Ins. Corp., 58 F.3d 1055, 1062 (5th Cir. 1995; Mount Clemens v. U.S. Envtl. Prot. Agency, 917 F.2d 908, 918 (6th Cir. 1990): Des Planes v. Metro. Sanitary Dist., 552 F.2d 736, 739-40 (7th Cir. 1977); Newton County Wildlife Ass'n. v. Rogers, 141 F.3d 803, 807 (8th Cir. 1998); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993): CF&I Steel Corp. v. Econ. Dev. Admin., 624 F.2d 136, 141 (10th Cir. 1980); Maritime Mgmt., Inc., v. United States, 242 F.3d 1326, 1335 (11th Cir. 2001); Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998)* in circumstances where the plaintiffs have sought to use discovery to shed light on the mental processes of the agency decision maker. *See, e.g., United States v. Morgan, 313 U.S. 409, 422 (1941)* (holding that, while it is emphatically not the role of the courts to "probe the mental processes" of the agency decision maker, courts have allowed such extrarecord examination precisely because of the clear language in *Overton Park*).

The Ninth Circuit Court of Appeals has explained, "where the so-called 'record' looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless." *Portland Audubon Soc'y v. Endangered Species Comm.,* 984 F.2d 1534, 1548. Based upon such a showing of bad faith, the court may allow extrarecord evidence to be presented.

The Fifth Circuit Court of Appeals has stated, "[d]espite the general "record rule," an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice." *Sierra Club v. Peterson,*

185 F.3d 349, 369 (5th Cir. 1999); *quoting National Audubon Soc'y v. Hoffman,* 132 F.3d 7 (2nd Cir. 1997)

Through discovery, Plaintiff will show that Defendants ignore applicable statutes not just in this case, but as a matter of routine in all MIA/POW cases involving "unknowns" and that these violations of law continue to the present. Only through discovery will Plaintiff have an opportunity to confirm that the administrative record is complete and presented in context and judicial economy will be furthered.

With Defendant's history of concealment of information in this case, it is incumbent on the court to insure that the administrative record is complete and presented in context. It will be impossible for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters. *ASARCO, INC., v. U. S. EPA,* 616 F.2d 1153, 1160; *see also Lands Council v. Powell,* 395 F.3d 1019, 1030 (9th Cir. 2005).

Defendants will suffer no prejudice or additional burden since any discovery requested now will not be due until after the administrative record is filed.

Respectfully submitted,

*/s/ John Eakin*
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of December, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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*/s/ John Eakin*
**John Eakin**, Plaintiff pro se