UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN Plaintiff, v. AMERICAN BATTLE MONUMENTS COMMISSION, et al. Defendants.	§ § § § § § § § § § §	Civ. A. No. SA:12-cv-1002-FB-HJB

DEFENDANTS' MOTION TO STRIKE, OR, IN THE ALTERNATIVE, OPPOSITION TO MOTION TO INTERVENE FILED BY DEBBIE GERLICH CHRISTIAN

Defendants United States Department of Defense, et al. move to strike the Motion to Intervene filed by Debbie Gerlich Christian, as filed in violation of 28 U.S.C. § 1654, which prohibits non-lawyers from representing third parties in federal court. In the alternative, the motion should be denied for the reasons stated in the Magistrate's Report and Recommendations recommending dismissal of similar motions filed in this case, and because, as set forth below, Ms. Christian's motion fails to meet the standards for intervention under Fed. R. Civ. P. 24. Given the pending Recommendation to Dismiss, Ms. Christian's motion is untimely. She also lacks any legally-cognizable interest in this action, and her claim, which has not been presented to defendants as a request to disinter any particular remains, is unripe. Because consideration of her claim presents different facts and legal issues and would significantly delay the action before the Court, the motion should be denied.

I. Background and Status of Current Case

This case was filed on October 18, 2012 – over two years ago. The ECF docket reflects over 100 entries. On February 2, 2015, the Magistrate Judge recommended the dismissal of the First Amended Complaint, on the grounds that plaintiff's specific claims are moot following the identification of the remains of PVT Arthur H. Kelder (the subject of the First Amended Complaint), and that plaintiff lacked standing to bring facial challenges to defendants' identification procedures. ECF 103. The Magistrate Judge also recommended dismissal of motions to intervene filed by two family members of unrelated missing World War II servicemembers. Plaintiff has filed objections to the recommendations; defendants have not yet responded.

Ms. Christian's motion and complaint seeks the identification of PVT Robert R. Morgan, who, like PVT Kelder, perished in Cabanatuan prison camp. Ms. Christian's motion and complaint appear to be largely copied from Plaintiff's First Amended Complaint, however, and contain little specific information related to PVT Morgan or her contacts with defendants. While defendants have not attempted to compile an administrative record, it appears that Ms. Christian and defendants were first in contact in October 2014. In response to her contact, defendants have been conducting research on PVT Morgan's case, but the case report is not yet complete.

Unlike in the case of Mr. Eakin, Ms. Christian has not requested that defendants disinter a particular unknown, and she does not seek the disinterment of specific remains identified in the complaint. She also does not allege that she has presented new evidence for consideration. Ms. Christian apparently seeks the disinterment of the remains associated with the mass grave that was associated after the war with the prisoners who died on the same day as PVT Morgan. She,

therefore, appears to stand in a similar situation, factually, as would any relative of an unknown from the Cabanatuan cemetery who desires that defendants' disinter and attempt identification.

II. The Motion Should be Struck

Ms. Christian is not the primary next-of-kin of the servicemember who is the subject of her complaint. Rather, she seeks to bring this action on behalf of her mother, Gloria Mae Gerlich. As defendants have repeatedly pointed out with respect to Mr. Eakin, it is well-established that a non-attorney plaintiff cannot represent another person in federal court. *E.g.*, Simon, 546 F.3d at 664-65 (9th Cir. 2008) ("well-established that the privilege to represent oneself *pro se* provided by § 1654 is personal to the litigant and does not extend to other parties or entities. . . . courts have routinely adhered to the general rule prohibiting *pro se* plaintiffs from pursuing claims on behalf of others in a representative capacity.")

The rule cannot be circumvented by granting a power of attorney or assigning claims. As explained by the D.C. Circuit:

> We think the words 'the parties,' as used in the statute, mean the parties in interest- the real, beneficial owners of the claims asserted in the suite, and by implication that it excludes agents and attorneys in fact and confines the representation, where the party whose rights are actually involved does not appear in person, to attorneys and counselors at law. It cannot be doubted, we think, that an assignment of a claim against another, made solely for the purpose of permitting the assignee- not an attorney- to conduct the litigation in proper person, would be colorable only and, therefore, insufficient to accomplish the purpose; and this, for the reason that such an assignment would transfer only the naked legal title or, perhaps more accurately, no more than an agency- a power without an interest;- and in such case there would be lacking that element of personal interest which alone permits the management of an action at law in a court by someone other than an attorney at law.

Heiskell v. Mozie, 82 F.2d 861, 863 (D.C. Cir. 1936); see Southwest Exp. Co., Inc. v. I.C.C., 670 F.2d 53 (5th Cir. 1982)(rejecting corporate assignment of interest in suit to president to permit president to continue case *pro se*); Capital Group, Inc. v. Gaston & Snow, 768 F.Supp. 264

(E.D.Wis.1991) (sole-member LLC cannot be represented by non-attorney owner, even where corporation assigned interest in lawsuit to owner).

Moreover, the rule against representation of third parties has been applied routinely regardless of the closeness of the plaintiff's affinity with the real party in interest. *E.g.*, Southwest Exp. Co., Inc., 670 F.2d 53 (president cannot represent corporation *pro se*); Lattanzio v. Comta, 481 F.3d 137 (2d Cir. 2007) (sole member and executive director of LLC cannot represent LLC *pro se*); Harris-Thomas v. Christina School Dist., 145 Fed.Appx. 714, 715, 2005 WL 1625234 (3rd Cir. 2005) (unpublished) (*pro se* parent cannot represent child; vacating judgment against child entered by district court); Lindstrom v. State of Ill., 632 F.Supp. 1535 (N.D.Ill.1986) (non-attorney cannot represent spouse); Silver v. D.C. Metropolitan Police Dept., 939 F.Supp. 2d 20 (*pro se* arrestee cannot bring claims on behalf of grandmother and uncle) (D.D.C. 2013). Finally, a right of non-attorneys to represent a party before an agency does not translate into such a right in federal court. Iannaccone v. Law, 142 F.3d 553, 558 (2d Cir. 1998).

As defendants have previously explained, substantive legal rights associated with the position of primary next-of-kin may not be "designated," assigned, or otherwise transferred.[1] See Defendants' Objection to Magistrate's Order Granting Plaintiff's Motion to Vacate Appointment of Pro Bono Counsel and Allowing Plaintiff Leave to File Motion to Compel Pro Se, ECF 78, at 11-15 (also noting that striking pleadings is appropriate remedy). Thus, while defendants may be sympathetic to Ms. Christian's desire to aid her mother, she may not do so by representing her in federal court.

[1] Ms. Christian states in her motion and complaint that her mother has designated her primary next-of-kin. Defendants are unaware of the form of this designation, and have not received a power of attorney.

III. Intervention Should Be Denied

A. Ms. Christian Lacks Standing

As the Magistrate Judge recognized, "when the claims in the main action have been dismissed . . . non-parties seeking intervention must show that they have standing under Article III of the Constitution." R&R, ECF 103 at 10, citing Newby v. Enron Corp., 443 F.3d 416, 422 (5th Cir. 2006). The Magistrate Judge recommended dismissal of the two then-pending motions to intervene on the grounds that the would-be intervenors, like Mr. Eakin, lacked standing to bring general due process claims. The same result should apply here.

Although the Magistrate Judge declined to rule on Mr. Eakin's standing to bring his specific claims relating to PVT Kelder, finding them moot, defendants contend that Ms. Christian lacks standing on the same grounds previously urged as to Mr. Eakin. These arguments have been thoroughly briefed in defendants' previous motions to dismiss and we incorporate those arguments by reference. To summarize:

1) Ms. Christian lacks standing, since, among other reasons, she is not the next-of-kin and Article III standing cannot be transferred or assigned by power of attorney. See (with respect to Mr. Eakin) ECF 47 at 27-30; ECF 54 (Reply to Response) at 2-4;

2) Even next-of-kin would lack standing since, among other reasons, the remains are unidentified (and therefore the claimed injury of the next-of-kin is speculative, as is causation and redressibility); and, finally,

3) There is no statutory or constitutional right at stake, and, without a legal right, there is no legally cognizable injury. ECF 47 at 30 n. 11, 31-32.

Since Ms. Christian lacks standing, her motion to intervene should be denied.

B. Intervention of Right Should be Denied

As applicable here, intervention as of right is proper when:

> (1) the motion to intervene is timely; (2) the potential intervener (sic) asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest

Ross v. Marshall, 426 F.3d 745, 753 (5th Cir. 2005); Fed. R. Civ. P. 24(a). "Failure to satisfy any one requirement precludes intervention of right." Haspel & Davis Milling & Planting Co. Ltd. v. Bd. of Levee Comm'rs, 493 F.3d 570, 578 (5th Cir. 2007).

Here, Ms. Christian's motion fails all prongs of that test. First, her motion is not timely. The Magistrate Judge has issued his Report and Recommendations, which, if adopted, will dispose of the pending matter. More importantly, even were the Court to find a statutory or constitutional basis for jurisdiction, either to continue Mr. Eakin's case or to allow Ms. Christians' motion, Ms. Christians' case is not ripe. As noted above, it appears that the first contact between Ms. Christian and defendants was in October of last year. Ms. Christian has made no specific disinterment request with respect to any unknown, and defendants are still compiling a case file on PVT Morgan. Assuming Ms. Christian intends to seek disinterment of multiple graves associated with a Cabanatuan mass grave, she has not made that request and defendants have neither agreed nor refused to do it. In this posture, granting the motion to intervene would likely result in significant delays in resolving the underlying case while defendants consider completely different facts relating to PVT Morgan.

To satisfy the second prong – to assert an interest that is related to the property or transaction at issue --:

> an applicant must point to an interest that is 'direct, substantial, [and] legally protectable.' This requires a showing of something more than a mere economic interest; rather, the interest must be 'one which the *substantive law* recognizes as belonging to or being owned by the applicant.' In addition, 'the intervenor should be the real party in interest regarding his claim.'

Id. at 757 (footnotes omitted). In New Orleans Public Service, Inc. v. United Gas Pipe Line Co. 732 F.2d 452 (5th Cir.1984), the Fifth Circuit discussed the "interest" requirement at length:

> The Supreme Court in *Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971), stated that the applicant's interest had to be 'a significantly protectable interest.' It is apparent that the Supreme Court in *Donaldson* used 'protectable' in the sense of legally protectable, and it is difficult to conceive of any other sense in which the Court might have been employing 'protectable in that context.
>
> By requiring that the applicant's interest be not only "direct" and "substantial," but also "legally protectable," it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant. This is reflected by the requirement that the claim the applicant seeks intervention in order to assert be a claim as to which the applicant is the real party in interest. The real party in interest requirement of Rule 17(a), Fed.R.Civ.P., "applies to intervenors as well as plaintiffs," as does also the rule that "a party has no standing to assert a right if it is not his own."

Id. at 464 (citations omitted).

Here, Ms. Christian has not identified a direct, substantial, and legally-protectable interest at all, and certainly not in the "property or transaction that forms the basis of the controversy in [this case]." Rule 24(a). Defendants have consistently denied that there is a legally-protected interest in unidentified human remains. However, even assuming, for sake of argument, that such an interest exists, the "property" at issue in the present case is the "property" consisting of the remains buried as X-816 (or more broadly, the remains of PVT Kelder, identified in X-816 and other graves). Ms. Christian's claim relates to other remains that have not been exhumed. She has no legally-protected interest in this action.

In any event, her motion also fails under the third prong. Disposal of Mr. Eakin's case cannot "as a practical matter impair or impede the movant's ability to protect [her] interest." Rule 24(a). Ms. Christian has no claim to remains at issue in the present action.

Last, "[t]he final criterion that a potential intervenor must satisfy in order to intervene as of right is that 'the existing parties do not adequately represent' his interest." Ross at 761. Here, like Dr. Jones in the previous motion to intervene, Ms. Christian contends that Mr. Eakin cannot represent her interests since he dismissed his counsel, and therefore cannot represent others. As explained in defendants' Opposition to Dr. Jones' motion, the issue is not one of legal representation, but whether the interests of the parties are sufficiently aligned. ECF 96 at 4-5. Here, at least as to the facial claims, the interests of the parties appear to be perfectly aligned, and fail on the identical issue of lack of jurisdiction, to include standing, no sovereign immunity and failure to state a claim, among other reasons. See ECF 47, 54. Mr. Eakin has already filed objections to the Magistrate's recommendation to dismiss those claims, and his position is perfectly aligned with Ms. Christian's. With respect to the specific claims, if the Court adopts the Magistrate's recommendation that Mr. Eakin's claims are moot, then Ms. Christian will not be prejudiced in filing her own claims once they are ripe. If the Court dismisses on other jurisdictional grounds, then, again, the threshold hurdles would be identical for Ms. Christian.

C. Permissive Intervention Should be Denied.

Rule 24(b) states that:

> On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.

However, "[p]ermissive intervention 'is wholly discretionary with the [district] court ... even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied.'" New Orleans Public Service, Inc. at 470-71 (citations omitted).

The Court in *New Orleans Public Service* further explained:

> In acting on a request for permissive intervention, it is proper to consider, among other things, "whether the intervenors' interests are adequately represented by other parties" and whether they "will significantly contribute to full development of the underlying factual issues in the suit." *See Spangler v. Pasadena City Bd. of Ed.,* 552 F.2d 1326, 1329 (9th Cir.1977); *United States Postal Service v. Brennan,* 579 F.2d 188, 191–92 (2d Cir.1978). *See also Hoots v. Commonwealth,* 672 F.2d 1133, 1136 (3d Cir.1982) (adequacy of representation).

Id. at 472. The Fifth Circuit noted that "[o]ther factors mentioned [relevant to permissive intervention] include the "nature and extent of intervenors' interest," *Spangler; Brennan,* and "their standing to raise relevant legal issues." *Spangler*"). Id. at n. 40.

In *New Orleans Public Service*, the Fifth Circuit upheld the District Court's denial of permissive intervention where the movants' interest was not a legally-protected one, and the movants did not have standing to raise relevant legal issues. The Court also noted that the plaintiff adequately represented the intervenors' interests:

> [plaintiff and intervenor] seek exactly the same relief, on exactly the same grounds, from and as against [defendant]. There is neither indication nor assertion that [plaintiff] has been or will be in any way remiss or inadequate in pursuing these claims against [defendant], or that there is any character of collusion between [plaintiff and defendant]. Under these circumstances, [plaintiff's] representation is presumed to be adequate.

Id. at 472 (footnote omitted).

As discussed above in the context of intervention by right, Mr. Eakin adequately represents Ms. Christian with respect to any facial claims; both seek "exactly the same relief, on exactly the same grounds." The Magistrate Judge has found that both Mr. Eakin and the other would-be intervenors lack standing to bring these general claims, and Mr. Eakin can certainly adequately challenge that recommended finding.

Likewise, Ms. Christian's specific claims face the same threshold legal hurdles as Mr. Eakin's. However, as discussed above, Ms. Christian's specific claims are not ripe. Disposition of Mr. Eakin's action on mootness grounds, as recommended by the Magistrate Judge, will not

impact any claim related to PVT Morgan. However, inclusion of these claims at this point in the litigation would substantially delay the resolution of this matter.

Fed. R. Civ. P. 24(b) requires that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Here, prejudice is apparent. This case was filed over two years ago. Although Ms. Christian argues that the defendants have not filed an answer, this is not the type of case where an answer is filed. Rather, defendants have filed an exhaustive administrative record, and multiple dispositive motions. Now, when the litigation is hopefully ending, with the Magistrate Judge recommending dismissal, granting this motion would require starting over again, with a new administrative record and more dispositive motions. That may be the case in any event, should Ms. Christian choose to file her own case before allowing defendants time to consider her request. However, it is possible that this outcome can be avoided, given that there do not appear to have been as yet any substantive contacts between defendants and Ms. Christian regarding PVT Morgan's case, or any specific requests made to defendants regarding disinterment.[2]

IV. Conclusion

For the reasons above, the Court should strike, or, in the alternative deny, the motion to intervene.

[2] Counsel for defendants also has had no contact with Ms. Christian and therefore has not discussed with her the status of her contacts with defendants. (Although Ms. Christian states that she consulted counsel regarding her motion, this language appears to have been copied over from previous motions and is not in fact the case).

Respectfully submitted,

RICHARD L. DURBIN, JR.
Acting United States Attorney

/s/ Susan Strawn
SUSAN STRAWN
Tex. Bar No. 19374330
Assistant United States Attorney
601 NW Loop 410, Ste 600
San Antonio, TX 78216
Attorneys for Defendants
Tel. (210) 384-7388
Fax (210)384-7312
SStrawn@usa.doj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2015, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

John Eakin
Plaintiff *pro se*

And caused a copy to be sent, by certified U.S. Mail, to:

Sally Hill Jones
2661 Red Bud Way
New Braunfels, TX 78132

Hon. John Alexander Patterson
721 North Quidnessett Road
North Kingston, RI 20852

Debbie Gerlich Christian
986 View Ridge
Pipe Creek, TX 78063

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney