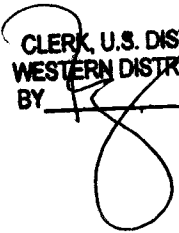


FILED

FEB 18 2015

CLERK, U.S. DISTRICT CLERK  
WESTERN DISTRICT OF TEXAS  
BY  DEPUTY

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

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS  
COMMISSION, *et al*

Defendants

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CIVIL ACTION NO. SA-12-CA-1002-FB(HJB)

**PLAINTIFF-INTERVENOR'S OBJECTION TO REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), Plaintiff-Intervenor objects to the Magistrate Judge's Report and Recommendation, entered February 2, 2015, specifically addressing (1) Plaintiff's Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process (Docket Entry 94); (2) Defendant's Motion to Strike Plaintiff's Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process, or in the Alternative, for an Extension of Time to File Opposition to Plaintiff's Motion for Partial Summary Judgment (Docket Entry 99); (3) Sally Hill Jones' Opposed Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24 (Docket Entry 90); (4) Sally Hill Jones' Motion for Leave to File Electronically (Docket Entry 91); and John Patterson's Opposed Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24 (Docket Entry 102).

Plaintiff-Intervenor respectfully objects to the Report and Recommendation for the following reasons. The Magistrate Judge's recommendation to dismiss Plaintiff's claims, and therefore Intervenor's motions, is founded on a flawed identification of only partial remains that

does not satisfy Private Kelder's family and fails to meet Defendants' own standards, those of the scientific community, and the Court's requirements. Secondly, denial of Plaintiff-Intervenor's motions precludes considerations of relief based on her general and specific claims as allowed by the Court to occur within thirty (30) days after the disinterment and testing process (Docket Entry 84). Since Plaintiff-Intervenor's circumstances are very similar to Plaintiff's, her motion to intervene should be considered despite any relief the Court believes Plaintiff has received and for judicial economy.

**I. MAGISTRATE JUDGE'S RECOMMENDATION IS BASED ON FAULTY AND MISLEADING INFORMATION**

The Magistrate Judge's recommendation is based on the Defendants' claim of identification of the remains of Private Kelder, as shown by the following statement:

"With positive identification of Private Kelder's remains, Plaintiff's claims concerning the identification and release of those remains are now moot."

Rpt & Rec, Docket Entry 103 at 6

However, the information regarding the identification provided to the Magistrate Judge by the Defendants was faulty and misleading in several respects. As outlined in Plaintiff's Objection (Docket Entry 110), Defendants' identification package revealed that a small percentage of Private Kelder's remains have been identified, with plans to return more as more are identified. Return of partial remains suggests that the identification was guided more by Defendants' motivation to conclude the lawsuit than it was by scientific or military protocol, much less by the needs of the family. Convenient, but suspect, identifications appear to be a pattern, as described by the Plaintiff's and Plaintiff-Intervenor's replies to Defendants' Opposition to Motion to Intervene (Docket Entry 97 and 100). Further, the scientific basis for this identification has

serious flaws, as outlined in Dr. Mark Leney's Declaration (Docket Entry 110 - 1), indicating that the identification was premature and insufficiently supported by the evidence. Finally, the proposed identification does not meet Defendants' standards (see military regulations outlined in Plaintiff's Objection, Docket Entry 110 ) or those of the Court, which required a full set of remains be identified and that they "use every available resource to complete the disinterment and DNA testing as quickly and efficiently as possible." (Docket Entry 84)

In addition, the claim of identification of Private Kelder's remains does not satisfy his family and has not been accepted by the family. As outlined in Plaintiff's Objection (Docket Entry 110) and Declaration (Docket Entry 110-10), Defendants attempted to manipulate family members, Doug Kelde, and Plaintiff, into accepting the identification before they could evaluate the identification package and timed their actions in such a way that unreasonably limited Plaintiff's options for legally disputing the identification.

**II. MOTION TO INTERVENE SHOULD BE CONSIDERED FOR FURTHER RELIEF**

Plaintiff-Intervenor believes her circumstances are very similar to Plaintiff's and therefore her claims deserve to be considered for further relief, as provided by Court Order (Docket Entry 84). The Magistrate Judge's recommendation to deny Plaintiff-Intervenor's Motion to Intervene was based entirely on the conclusion that Intervenor's standing was mooted by Plaintiff's relief of identification of his relative, Private Kelder. However, as noted above, this identification is questionable and not accepted by Private Kelder's family. Further, relief for Plaintiff-Intervenor's claims have not been addressed and can be considered, according to Court Order (Docket Entry 84). In addition to considering the serious flaws in this identification and manipulative timing of

Defendants' actions, Plaintiff-Intervenor's general and specific claims deserve to be considered and addressed.

### **III. CONCLUSION**

Plaintiff-Intervenor respectfully requests that the Magistrate Judge's recommendations be rejected, since these recommendations were based on the defective identification of Private Kelder that does not provide the relief to the Kelder family that the Court ordered. In addition, the Magistrate Judge's recommendations do not allow for consideration of Intervenor's general and specific claims for relief.

The only winners or losers in this legal battle are the men, and the families of the men, who paid such a high price for our country. As a way to honor these men, proper identification of their remains is a small request, given that the means is readily available. The identification of Private Kelder is insufficient and premature. The identification of Unknown Remains X-345 has not occurred after ten years of fighting by family members, and other Plaintiff-Intervenors have similar stories. Because families have no viable recourse except through the Courts, Plaintiff-Intervenor requests that the Court consider this request.

Respectfully submitted,



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*pro se*

**CERTIFICATE OF SERVICE**

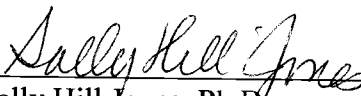
I hereby certify that on the 17 day of February, 2015, a true and correct copy of the foregoing was forwarded to Defendants, Plaintiff, and Plaintiff-Intervenors by First Class Mail at the following addresses:

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