

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

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIV. A. NO. SA-12-CA-1002-FB(HJB)
	§	
AMERICAN BATTLE MONUMENTS	§	
COMMISSION, et al	§	
	§	
<u>Defendants</u>	§	

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTION
TO REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE
JUDGE AND MOTION IN LIMINE

Plaintiff John Eakin, pro se, hereby files his reply to Defendants' Response to Plaintiff's Objection to Report and Recommendation of United States Magistrate Judge and Motion in Limine. Plaintiff respectfully asks this Court to deny the recommendations contained in the U.S. Magistrate Judge's Report and Recommendation as it was based on inaccurate and unsubstantiated information provided by Defendants.

Plaintiff was denied an opportunity to examine the remains by Defendants' preemptive exhumation, and their, ultimately unsuccessful, examination. Plaintiff re-urges his Motion to Compel Discovery Responses (ECF No. 72) and incorporates it in this filing as if set out in full.

I. INTRODUCTION

Defendants, having exhumed ten anatomically complete sets of human remains more than eight months ago, have been unable to identify more than an insubstantial portion and now propose to deliver only these incomplete remains to Plaintiff. Information contained in Defendants' Response, (ECF No. 115) in conjunction with information in the Kelder ID package, show that it is highly unlikely that Defendants' Central Identification Laboratory (CIL) and the

Armed Forces DNA Identification Laboratory AFDIL have the technical capability to successfully identify these remains now or in the foreseeable future.

The U.S. Magistrate Judge has provided a Report & Recommendation (ECF No. 103) to this court which recommends dismissal of this lawsuit. Plaintiff contends this recommendation is fatally flawed because it depends on unsubstantiated and knowingly incorrect information furnished by Defendants. Without substantiation of the identification of the remains of Private Kelder, there is no basis for the Magistrate Judge's Report and Recommendation other than Defendants' unsubstantiated averment. In response, Plaintiff has provided expert testimony detailing the inconsistencies and defects in the identification documents provided to Plaintiff by Defendants.

Defendants' sudden decision to preemptively exhume these remains allowed them to avoid compliance with the then existing discovery requests and further to argue that this lawsuit was moot simply because they had exhumed the remains in question. Their inability to identify these remains avoids disclosure of the government's embarrassing mis-identifications of related remains and their refusal to employ scientific techniques in common use elsewhere.

This is the second time Defendants have claimed that they have mooted this litigation, and Plaintiff again asserts that Defendants' claims are without basis in fact. This latest attempt at mooting curiously occurred contemporaneously with motions to intervene by additional MIA families. These interveners include the high-profile case of an Unknown who was awarded the Medal of Honor and which could be expected to draw extraordinary attention to Defendants' failures to account for many World War II missing.

Since Defendants are unable to identify the bulk of the remains of Private Arthur H. "Bud" Kelder or other remains recovered from Cabanatuan Grave 717 and later exhumed from the Manila American Cemetery, Plaintiff now seeks the resumption of discovery under

Fed.R.Civ.Proc. 26 and permission to conduct independent DNA testing in a modern DNA testing laboratory using identification techniques in common use everywhere except by Defendants. Defendants' have been allowed every opportunity to resolve these identifications and now, as forecast in Plaintiff's Motion to Compel (ECF No. 72), Defendants have failed to do what they said they could do.

Plaintiff disputes Defendants' contention that partial identification of remains relieves them of any further obligation to identify remains they admit are likely in their possession and that such partial identification moots this litigation. (ECF No. 115 at 9) Defendants are obligated to search for, recover and identify remains under Army Regulation 638-2 and other statutory and regulatory obligations.

II. PROCEDURAL HISTORY

On April 11, 2014, the Court allowed documentary discovery. (ECF No. 62) Plaintiff promptly served Defendants with interrogatories, requests for production and admissions which included production of the subject remains for DNA identification by Plaintiff's experts.

On July 8, 2014, Defendants announced (ECF No. 64) that they had suddenly decided to exhume the ten remains of Unknowns from Cabanatuan Grave 717. Defendants averred that they could conduct DNA testing in 90-120 days (ECF No. 64-1) and that this lawsuit was therefore moot. This Court did not dismiss this litigation as requested by Defendants. (ECF No. 77)

On July 20, 2014, Plaintiff filed a Motion to Compel Discovery Responses (ECF No. 72) arguing that Defendants' proposed examination would be inconclusive and their process, by design, could not conclusively identify the remains as those of Plaintiff's family member. *Id.* at 2 On July 28, 2014, discovery was stayed (Order ECF No. 77) in light of Defendants' decision to exhume the ten remains and their claim to be able to complete DNA testing in 90-120 days.

Presently, eight months after exhumation, Defendants have presented three bones as those of Plaintiff's family member (Sixth Status Report ECF No. 98) and demand that Plaintiff's family accept them as the complete remains or they will be disposed of administratively. (ECF No. 115 at 6) Defendants again argue that this lawsuit is moot because they have produced a token number of bones reputed to be those of Private Arthur H. "Bud" Kelder. Defendants have not identified the remains of any of the other thirteen men from grave 717 despite having recovered ten anatomically complete sets of remains.

Defendants have provided no substantiating evidence of identity to this Court and have informally provided to Plaintiff technical reports concerning the identification of three long bones, a skull and a few small bones. Plaintiff's experts have reviewed these reports and found them scientifically flawed and inadequate to support any identification. Defendants' demand to be allowed to deliver only a small portion of the subject remains when they have substantially more in their possession, simply for the purpose of litigation posturing by Defendants, is grossly unjust, disrespectful and shocks the conscience.

Defendants' partial identification and return of a small portion of only one member of a group without simultaneous identification or determination that other identifications are impossible violates Defendants' own regulations as well as any possibility that other remains of Plaintiff's family member will be identified by exclusion.

Defendants have now proven Plaintiff's claim that his family member was buried exactly where he told them five years ago. They further admit that they possess additional remains of Private Arthur H. "Bud" Kelder which they may or may not return at some indefinite time in the future. The identification documents furnished to Plaintiff by Defendants show that they were unable to obtain DNA results from seventy-two percent of the samples tested. The principal reason for their lack of success is the use of outdated and inadequate testing protocols.

III. DEFENDANTS' IDENTIFICATION OF REMAINS IS UNSUBSTANTIATED

Defendants have provided this Court with no evidence supporting their claim to have identified partial remains of Private Arthur H. "Bud" Kelder. (ECF No. 98)

Their demand that Plaintiff accept what they concede are incomplete remains, conflicts with their existing regulations and good forensic practice requiring simultaneous identification of multiple remains from a single event and other regulations prohibiting partial identifications when other remains are present and likely to be identified. (ECF No. 110)

Without proof that the subject remains have been properly identified, there is no factual basis for the Report and Recommendation of the United States Magistrate Judge. (ECF No. 103)

Plaintiff has provided testimony from Defendants' former JPAC DNA coordinator, Dr. Mark Leney, showing that Defendants' partial identification of the remains is suspect at best. (ECF No. 110-1)

Plaintiff now submits testimony from Edwin Huffine, a former manager of the AFDIL mtDNA section. Mr. Huffine testifies that the number of successful DNA tests conducted on the subject remains was far below acceptable levels and was likely due to the use of outdated and ineffective testing techniques and protocols. Mr. Huffine's declaration is attached as Exhibit 1.

IV. DEFENDANTS ARE UNABLE TO IDENTIFY THE REMAINS

Defendants originally informed this Court that they could identify the remains in 90 to 120 days. (ECF No. 64-1) After eight months of testing on ten (10) anatomically complete sets of skeletal remains, Defendants have identified one skull, three long bones and a handful of small bones as those of Arthur H. "Bud" Kelder. They have apparently been unable to identify the bulk of the Kelder remains, nor any portion of the other thirteen men from Grave 717.

Documents supplied to Plaintiff as part of the Kelder Identification Package indicate that seventy-two percent (72%) of Defendants' DNA tests were unsuccessful or inconclusive. These

documents also show that only mitochondrial and Y-STR DNA tests were conducted. These types of tests are exclusionary tools and cannot provide a conclusive match for identification and will not stand on their own.

Defendants now demand that Plaintiff accept these partial remains, and moot this litigation, or they will administratively dispose of the remains. The bulk of the exhumed remains, as yet unidentified, will presumably be placed in indefinite storage as is Defendants' practice.

Plaintiff now presents testimony from a former manager of Defendants' DNA identification laboratory who states that the AFDIL laboratory is primitive by the current standards of the industry and unlikely to ever identify such highly commingled remains using the non-conclusive mitochondrial and Y-STR DNA technology they have employed in this case.

While Director of the Forensic Sciences Program for the International Commission on Missing Persons, Mr. Huffine pioneered the use of nuclear DNA for the identification of unidentified remains. This process is the primary tool now used by nearly all major identification laboratories around the world - except Defendants' Central Identification Laboratory.

Mr. Huffine has identified more than 15,000 unidentified remains. To put this in context, "[s]ince the early 1970s, DOD has identified the remains of and accounted for approximately 1,910 previously missing persons." ¹

¹ U.S. Government Accountability Office, Report GAO-13-619, DOD'S POW/MIA MISSION, Top-Level Leadership Attention Needed to Resolve Longstanding Challenges in Accounting for Missing Persons from Past Conflicts. Pg 11 <http://gao.gov/products/GAO-13-619> (Last visited March 1, 2015)

V. THE STAY OF DISCOVERY SHOULD BE LIFTED

Plaintiff reurges consideration of his motion to compel (ECF No. 72) in its entirety. Defendants have had unlimited time to conduct their examination of the remains and have been unsuccessful. Plaintiff's experts were precluded from participation in or observation of Defendants' examination. In light of Defendants' failure, Plaintiff should be allowed the same opportunity to examine the remains and conduct discovery.

Plaintiff proposes to examine the remains to show that nuclear STR DNA can be extracted. This type of DNA provides a conclusive and singular match to a reference sample. In addition, this type of testing opens the door to the use of related techniques which will allow proper reassociation of the commingled remains.

In lieu of full, unrestricted access to the remains and document discovery, if the Court desires a limited, phased approach to discovery, Plaintiff suggests initially testing only the samples already cut from the remains by Defendants and which have been previously tested by Defendants to compare the results obtained by the respective laboratories.

If independent testing is unsuccessful, Plaintiff will accept the proffered remains as proposed by Defendants. If successful, as Plaintiff believes certain, Plaintiff will request full access to all remains, reference samples and necessary documents.

No party will be prejudiced by this independent examination. Plaintiff simply asks for the same opportunity to examine the remains as that provided to Defendants.

Plaintiff's Motion to Compel Discovery Responses (ECF No. 72) forecast that Defendants' proposed exhumation and examination of the Grave 717 remains would be inconclusive and that their process, by design, could not conclusively identify the remains as those of Plaintiff's family member. *Id.* at 2 Defendants refused to allow Plaintiff's experts to participate in or observe the identification process. Defendants have failed miserably in their

attempt to identify any of these ten men who gave their lives in defense of freedom. Plaintiff should now have an equal opportunity to examine the remains.

VI. PLAINTIFF WILL BE IRREPARABLY HARMED IF NOT ALLOWED TO CONDUCT DISCOVERY.

Defendants state that Plaintiff can not challenge return of partial remains before the Armed Forces Identification Review Board. (AFIRB) (ECF No. 115 at 8) Without discovery, Plaintiff will be without recourse to recover the additional Kelder remains which Defendants acknowledge possession of. While Defendants admit that additional Kelder remains have yet to be identified, these remains will be placed in indefinite storage with the approximate 1,021 other "biologic accessions" at Defendants' Central Identification Laboratory (as of mid-March 2009).² These represent remains for which Defendants have no reasonable expectation of identification.

Defendants have repeatedly argued that they had no obligation to identify unidentified remains. They now admit to possession of the bulk of the remains of Private Arthur H. "Bud" Kelder, yet maintain their position that they have no obligation to identify these remains. Id.

Defendants' inability to identify remains and their practice of placing them in indefinite storage is shown by the experience of Dr. Sally Hill Jones, who has moved to intervene in this case. The remains in question in that case, X-345, were exhumed in 2003. Defendants were unable to identify those remains and they were placed in storage for eleven years until December 2014 when Dr. Jones moved to participate in this litigation. Within days, Defendants informed her that they still could not identify X-345, but they were certain that they were not those of her family member. (ECF No. 96 at 1)

² Institute for Defense Analyses, Assessment of DoD's Central Identification Lab and the Feasibility of Increasing Identification Rates, IDA Paper P-4478, June 2009. http://bataanmissing.com/wp-content/uploads/ida_study_11-18-09-3.pdf (Last visited March 5, 2015)

VII. FACTUAL CLARIFICATIONS

a. Defendants argue that Plaintiff's Motion in Limine seeking to exclude the report of Dr. Thomas Holland should not be granted because this report has not been proffered to the Court, nor is it subject to judicial review. (ECF No. 115 at 12) Plaintiff agrees that Dr. Holland's report has not been proffered to the Court and that is exactly the problem. Defendants have provided absolutely no evidence in support of their claim to have identified the remains of Private Kelder. Further, Plaintiff does not seek judicial review of Dr. Holland's report, simply that it be excluded as unreliable as set out in Plaintiff's motion.

b. Defendants' claim that custody of remains passes to the state upon burial is false. (ECF No. 115 at 10, 14) Plaintiff submits the following references to federal regulatory authorities pertaining to requests by family members for exhumations from cemeteries operated by the U.S. Government:

- Arlington National Cemetery –32 CFR § 553.19 & Army Regulation 290-5, ¶ 2-10
- Army Post Cemeteries – Army Regulation 210-190, ¶ 2-14
- Department of the Interior, National Cemetery - 36 CFR § 12.6
- Department of Veterans Affairs, National Cemeteries – 38 CFR § 38.621

Plaintiff notes that all of the above references recognize each family's right to direct the exhumation of deceased members of their family.

c. Defendants assert that Plaintiff has no standing to complain about Defendants' failure to announce identifications of other remains. (ECF No. 115 at 8) This is false as the identification technique used by Defendants is based on exclusion and they claim the remains are highly commingled. Until Defendants have identified each bone they exhumed from the Manila American Cemetery, they can not exclude it as being that of Private Arthur H. "Bud" Kelder and Plaintiff has every right to inquire as to the status of these related identifications.

IIX. CONCLUSION

Over Plaintiff's objection and warning that Defendants' proposed method of identification would prove to be unsuccessful, discovery in this matter was stayed. Defendants now make the preposterous demand that Plaintiff accept the token portion of remains they claim are those of Private Arthur H. "Bud" Kelder and forego obtaining the majority of his remains for burial. Based on Defendants' unsubstantiated claim, the U.S. Magistrate Judge has found this litigation to be moot and recommended dismissal.

Plaintiff has submitted expert testimony casting doubt on the veracity of the identification of even the three bones which Defendants claim to be those of Plaintiff's family member. Defendants have submitted no evidence supporting their purported identification and admit that they have additional remains in their possession which are likely those of Private Kelder.

In FY 2013, Defendant DoD accounted for sixty missing personnel while expending approximately \$190 million.³ Defendants' deliberate refusal to employ the appropriate technology to identify missing American Servicemembers is a costly farce. Their averment that they have no obligation to identify unidentified remains a national scandal. (ECF No. 115 at 11)

As demonstrated in this case, Defendants' examination and identification process is a self-serving charade designed to deflect criticism for their failure to return American Heroes for burial by their families and avoid disclosure of their past deceptions. The technology exists to identify the subject remains and, if allowed to resume discovery, Plaintiff will demonstrate that Defendants' failures are deliberate in that they have knowingly avoided adoption of techniques proven to effectively identify unidentified remains.

³ Office of the Secretary of Defense, Cost Assessment and Program Evaluation, Final Report, Organizational Structure Review of the Personnel Accounting Community, March 28, 2014.

Plaintiff asks that the Magistrate Judge's recommendation be rejected and Plaintiff be allowed the same opportunity given Defendants to identify the remains of his family member.

Further, Defendants' demand that Plaintiff accept their admittedly incomplete identification and their statement that Plaintiff cannot challenge the delivery of incomplete remains before the Armed Forces Identification Review Board illustrates the need for immediate due process relief as requested in Plaintiff's pending Motion for Summary Judgment on the Due Process Issue.

Respectfully submitted,

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 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:

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I further caused a copy to be sent by First Class Mail to:

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