

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

JOHN EAKIN

Plaintiff,

v.

**AMERICAN BATTLE MONUMENTS
COMMISSION, et al.**

Defendants.

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No. SA:12-cv-1002-FB-HJB

**PLAINTIFF’S REPLY TO DEFENDANTS’ RESPONSE TO HIS
MOTION TO VACATE JUDGMENT AND RESUME DISCOVERY**

Plaintiff respectfully files this reply to Defendants’ response to his Motion to Vacate Judgment and Resume Discovery. Defendants’ response confuses the actual timeline of this litigation and asserts that this, the first filed, case is precluded by subsequent litigation brought by a different individual asserting different issues. Defendants’ objections have either been previously addressed by this court or waived by Defendants failure to object contemporaneously.

Defendants’ response misstates the facts of this litigation as, “Plaintiff (proceeding under an updated power of attorney from Douglas Kelder)” (ECF No. 137 at 1) Defendants statement is false in that Mr. Kelder had refused the duties of primary next of kin. Mr. Eakin was acting on his own behalf after being designated as the primary next of kin (PNOK) and proceeding as provided for in Section 1501(d). As a party *pro se*, Mr. Eakin could

not and did not represent or assert the rights of any other person before this court. (*Order*, ECF No. 34 at 8, 10, *also see 1st Amd Complaint*, ECF No. 39) ¹

Mr. Kelder was represented by counsel in the *Patterson* case and Mr. Eakin was not a party in that later case. The two cases were decided on different and distinct grounds. Kelder's refusal of the duties of PNOK show that he had no interest, rights or responsibilities in this, the original case.

Defendants argue that the instant case, originally filed in 2012, is somehow precluded by a case filed in 2017. As Defendants admit, "Claim preclusion, or res judicata, bars the litigation of claims that have been litigated, or should have been raised in a prior suit. *Singh*, 428 F.3d at 571." (*Quoted by Defendant*, ECF No. 137 at 5) (see *Chicot County Drainage Dist. v. Baxter State Bank*, 308 US 371 (1940) at 375) The proper time for Defendants to argue Res Judicata would have been in *Patterson* and their objection has been waived

Plaintiffs' motion to vacate includes a photograph of the ten Cabanatuan Grave #717 Unknowns as disinterred. (*photo of remains* ECF No. 128-2) Each such set of remains is virtually anatomically complete. Defendants originally asserted that it possessed none of Private Kelder's remains and they had no duty to identify any remains even if they had them. (ECF No. 47 at 4, 6, 7) Then, after this court allowed Plaintiff to proceed with discovery, Defendants miraculously identified some of Private Kelder's remains and confirmed a duty to return identified remains by doing so (only if those partial remains were identified by Defendant). Now, Defendants again claim not to have any additional (identified) portions of Private Kelder's remains, but they fail to explain the disposition of the many additional and not insignificant

¹ An updated power of attorney deferring the duties of primary next of kin to Mr. Eakin was necessitated by the automatic termination of the original power of attorney upon Defendants' false claim to have identified the remains of Private Kelder.

portions of remains shown in the photograph of all the Cabanatuan Grave #717 remains that have not been returned to the Kelder family. The obvious conclusion is that Defendants have a considerable amount of Private Kelder's remains, but have not made any effort to identify them and now claim that they don't really have any because they didn't identify any.

On January 22, 2015, Defendants notified this court that the "Joint POW/MIA Accounting Command's Central Identification Laboratory (JPAC-CIL) has identified the remains of Private Arthur H. Kelder from the remains associated with Cabanatuan Grave #717 that were disinterred from the Manila American Cemetery and Memorial in the Philippines." (*Defendants' Sixth Status Report*, ECF No. 98 at 1) Defendants said there, without limitation, that they had identified the remains of Private Kelder, yet only returned token portions to the Kelder family.

Defendants' hasty and premature effort to moot this lawsuit by misstating their ability to properly reassociate and identify the remains of Private Kelder argues strongly for vacating the judgment which was predicated on identification of all of his remains in their possession.

Further, Plaintiff has shown (*anthropologists' memo* ECF No. 128-3) that Defendants practice was to disrespectfully and intentionally commingle all such remains and conceal unassociated remains as CIL portions buried in caskets filled to capacity with hundreds of other CIL portions. It is likely that some of Private Kelders' remains have been so concealed.

Defendants quoted their anthropologist, Dr. Mildred Trotter, as reporting that the Manila remains were badly commingled. (ECF No. 47 at 3) So even though Defendant knew that the Cabanatuan Grave #717 remains were commingled (*Id. at 4*, ECF No. 128-3) they were so desperate to moot this litigation that they falsely informed this court that they had identified and would produce the remains of Private Kelder. Defendants' false statement inferring that

they had completely identified the remains of Private Kelder caused this court to prematurely issue judgment and close this case over Plaintiff's objection. (ECF No. 110 and 119) ²

An unintended benefit of Defendants' misconduct and resultant delay has, as Defendants point out (ECF No. 137 at 10), allowed Plaintiff time to successfully conclude relevant FOIA litigation before Judge Lamberth, *Eakin v United States Dep't. of Def.*, 2022 WL 2657250 at *1, No. 5:16-cv-972-RCL (W.D. Tex., San Antonio, July 8, 2022). The government documents obtained through this FOIA suit have confirmed Plaintiff's belief that Private Kelder's remains were intentionally commingled with those of others and portions concealed as CIL portions buried as a single unrelated Unknown in a casket filled to capacity with remains. These documents detail substantial and disgusting misconduct by the government in the identification, mis-identification and concealment of the remains of missing American Servicemembers such as that detailed in Plaintiff's motion. (*Anthropologist's Memo*, ECF No. 128-3)

Eakin's FOIA cases retrieved multiple documents providing examples of government duplicity, deceit and concealment as well as intentional desecration of human remains. Granting Plaintiff's motion to vacate is in the public interest by providing transparency and restoring trust in government.

Defendant makes clear (ECF No. 137 at 9) that they consider Private Kelder's remains to have been identified and identification of additional remains is not a priority or even

² Defendants did later inform the Kelder family that additional portions of Private Kelder's remains might be produced and did, on two occasions, deliver additional remains. However, the last such delivery was five years ago and it has become clear by Defendants' response here that Defendants have neither the ability nor the desire to return even the majority, much less all, of Private Kelder's remains.

likely.³ Defendants failure to perform as they represented to this court argues against preclusion and for further discovery to properly honor Private Kelder and provide closure to his family. When additional remains are obviously present and can be identified, they belong to the family of the deceased and they have a duty to insure proper burial according to their religious and cultural beliefs. (*See Mo to Vacate* ECF No. 127 at 10 for discussion of property rights in bodies)

If allowed to resume the previously granted discovery, Plaintiff will not only show that the balance of Private Kelder's remains can be identified, but also that Defendant deliberately hinders such identification requests by families by intentionally employing an outdated and ineffective type of DNA technology. While the government's motive for such obstruction cannot be determined, such identification projects involve significant embarrassment to the government by revealing multiple erroneous identifications, desecration of human remains, and deliberate concealment of remains as has been found in multiple of the Cabanatuan Grave #717 cases.

Defendants were less than diligent in their efforts to identify the remains of these heroes and did not foresee the modern advances in identification technology when the subject remains were originally buried. Now, they coldly and with malice represent to the families that their loved ones had been given a dignified burial. Unfortunately for the government, modern technology has revealed their intentional disrespect of the dead and their misdeeds should not be rewarded.

³ Because they have not attempted to identify all the remains, Defendants equivocated on this point when Dr. Berg declared "[t]he DPAA Laboratory has in its possession no additional remains for which it can be said that they are likely those of PVT Kelder, rather than another servicemember." (ECF NO. 137 at 3 and Ex. 2, ¶ 8.)

Plaintiff submits that the real questions before the court are would the court have issued judgment had it known that Defendants had made no effort to identify the majority of Private Kelder's remains despite having in their possession the virtually anatomically complete remains recovered from Cabanatuan Grave #717? ⁴ And, since Defendants have proven that the balance of the remains of Private Kelder are among those recovered from Cabanatuan Grave #717, does the Kelder family have a right to possess and bury those remains?

Since Defendants have misrepresented their ability to identify the complete set of Private Kelder's remains, Plaintiff respectfully requests that Plaintiff's motion to vacate the judgment of 2015 (ECF No. 121) be granted and Plaintiff be allowed to resume discovery.

Respectfully submitted,

/s/ John Eakin

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties of record.

/s/ John Eakin

John Eakin, Plaintiff *pro se*

⁴ In addition to the ten Unknowns, the remains of four Knowns recovered from Cabanatuan Grave #717 who had been returned to their families for burial in the Continental U.S. were also disinterred and found to have also been mis-identified and substantially commingled with the remains of others.