

**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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SA-12-CA-1002 FB (HJB)

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTION TO
DISMISS PLAINTIFF’S FIRST AMENDED COMPLAINT, OR, IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT**

Plaintiff opposes Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint, or, in the Alternative, for Summary Judgment. Defendants’ motion should be denied in all parts. The theories presented by Defendants which might support dismissal have previously been ruled upon by this Court in favor of Plaintiff. Defendants have presented defenses with contradictory arguments and matters outside the pleadings which would require discovery to allow Plaintiff to properly respond if considered by the Court.

I. Introduction

Defendants’ motion to dismiss consists of a seventeen (17) page preliminary statement containing mischaracterized facts and facts extrinsic to the pleadings. The balance of the motion argues that Plaintiff’s first amended complaint should be dismissed on sovereign immunity and standing grounds; these are issues previously addressed by this Court in favor of Plaintiff. Defendants’ motion then argues that Plaintiff’s right to

due process has not been violated and concludes that Plaintiff's amended declaratory judgment claim fails to state a claim, but provides no basis for such a conclusion.

Plaintiff filed his original complaint on October 18, 2012, seeking, *inter alia*, a declaration from this Court that certain remains at Manila American Cemetery are those of his family member, Private Arthur H. Kelder, and relief pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*, Missing Service Personnel Act, 10 U.S.C. § 1501 *et seq* and Mandamus Act, 28 U.S.C. § 1361.

Defendants filed their first motion to dismiss on February 19, 2013 and this Court on August 5, 2013 dismissed Plaintiff's complaint for lack of standing and subject matter jurisdiction and granted leave for Plaintiff to file an amended complaint. Plaintiff filed his First Amended Complaint on October 3, 2013.

Defendants now present claims virtually identical to those previously considered by this court.

II. Standard of Review

Motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure are disfavored and rarely granted. *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981). Rule 12(b)(6) allows dismissal only where the plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Put another way, a complaint should not be dismissed for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6) unless the complaint does not present a plausible claim. A claim has

facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). (citations omitted). Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Id.* at 679.

When the legal sufficiency of a complaint's allegations are tested with a motion under Rule 12(b)(6), the court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

As a general rule, the Court "may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). Rule 12(d) expressly provides that "when matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b)(6) (emphasis added).

III. Defendants' Motion Presents Facts Extrinsic to the Pleadings and Irrelevant to Their Claims

Defendants' motion presents matters outside the pleadings and which would require conversion to a motion for summary judgment if not excluded under Fed. R. Civ. P. 12(d). These matters outside the pleadings include both material facts which are

disputed and material facts that are unknown. Consideration of such would be premature without notice to Plaintiff and an opportunity for discovery.

Since the Court must accept all well pleaded facts as true and view them in the light most favorable to the plaintiff, *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, at 500 (5th Cir. 1982), *cert denied*, 464 U.S. 932 (1983), Plaintiff does not address each allegation contained in Defendants' Preliminary Statement. Rather, Plaintiff submits a review of selected issues raised by Defendants that Plaintiff believes merit response.

a. Defendants initially claim that they have, and then claim that they have not, made a decision on Plaintiff's request.

In February of 2012, prior to the commencement of this litigation, Plaintiff requested a meeting with the "decision makers" of Defendants JPAC and DPMO as well as the Chief of the Army Casualty Office. In this meeting, Defendant Webb adamantly and repeatedly asserted that he was the only person who could order further investigation or action concerning the identification of unknown remains X-816 as those of Pvt Arthur H. Kelder and that he had determined that no further action would be taken to identify the remains of Private Kelder. (Eakin Decl. ECF 15-2 ¶ 8)

Subsequently, in this litigation Defendants have made conflicting claims as to the status of Plaintiff's request that remains X816 be identified as those of his family member. DPMO and JPAC have asserted that the applicable policy is set forth in a May 13, 1999, memorandum, entitled "Disinterment Policy for the Purpose of Identification." (Supp. AR 003-004) (Mot. Dismiss ECF No. 47 at 12) This policy designates the Central Identification Laboratory (CIL) (Now a component part of Defendant JPAC) as the

decision authority on requests for the disinterment of remains for identification and designates the Deputy Assistant Secretary of Defense (DASD) as the appellate authority.

On January 28 and 30, 2013, just two days before this Court's deadline to file the administrative record, the CIL Scientific Director and JPAC Commanding General, forwarded the Kelder file to the Deputy Assistant Secretary of Defense (DASD) for a decision rather than issuing a decision as required by this policy (Supp. AR 001-002). Defendants now argue (Mot. Dismiss ECF No. 47 at 4, n2) that no final decision has been made on whether to pursue the disinterment that plaintiff seeks. Elsewhere, Defendants state that they "*have* considered plaintiff's evidence, and they *have* determined that there is an insufficient likelihood of identification to support disinterment." (*Id* at 32)

b. Defendants have repeatedly disinterred the remains in question and allowed portions to be removed and now argue that Plaintiff's request for disinterment would violate the sanctity of the grave.

Defendants argue that disinterment for identification would somehow violate the sanctity of the grave, a belief they claim is enshrined in the common law but for which they provide no citation. (Mot. Dismiss ECF No. 47 at 5,6) However, Defendants fail to note that the government has re-buried unidentified remains X816 four different times strictly for the convenience of the government. Remains X816 were moved most recently simply to provide a more uniform appearance to the cemetery after a grave near the front of the plot was vacated. Prior to one of the burials and while in the custody and control of the U.S. Government, all teeth containing precious metals were stolen from the X816 remains.

c. Defendant's claim that disinterment would disturb other graves is inaccurate.

Defendants argue that disinterments “must be balanced against the wishes of other families whose loved ones or own lives may be disturbed by disinterment....” (Mot. Dismiss ECF No. Doc 47 at 5) This statement is inaccurate as Defendants are aware that unidentified remains X816 are buried in a single occupant casket in grave A-12-195. No other remains would be disturbed unless Defendants chose to do so. Further, Defendants have a moral and legal obligation to identify and return remains for burial as directed by their families and must not be allowed to arbitrarily and unilaterally decide which families' loved ones are returned and which are not returned.

d. Identification of Plaintiff's family member does not depend upon DNA testing.

Defendants incorrectly imply that identification of the remains of Arthur Kelder (unidentified remains X816) is dependent on the use of DNA testing. (Mot. Dismiss ECF No. 47 at 5 n3) While Plaintiff would not object to DNA testing by independent experts and Kelder family reference samples are available in Defendants' files, identification of remains X816 is not dependent on DNA testing. Plaintiff has submitted exactly the dental record evidence which Defendants negligently failed to obtain and which would have identified these remains more than sixty (60) years ago. (1st Amd Compl. Ex. 6A, 6B, 15D)

However, Plaintiff notes Defendant's admission that, “many of the unknowns of World War II, whose remains were recovered and interred, could be identified with the help of DNA testing.” Defendant also correctly states that, as Plaintiff contends, “PVT Kelder's remains are buried in a Memorial Cemetery.” (Mot. Dismiss ECF No. 47 at 5)

e. Defendants Ignore Expert Opinions.

Defendants argue that they are the “expert agency on the interpretation of facts” yet they fail to address the opinions of three experts, all of whom have previously worked for Defendants, and who support Plaintiff’s position. (Mot. Dismiss ECF No. 47 at 6) (1st Amd Compl. Ex 1,2,23)

f. Defendants Argue That They Have no Non-Discretionary Duty to Identify Unidentified Remains

While the Defendants do not deny their obligation to “account” for Private Kelder, Defendants aver that “accounting” does not include an obligation to identify remains and therefore they have no obligation to return any remains until they are identified. (Mot. Dismiss ECF No. 47 at 7)

Indeed, elsewhere, Defendants admit that, “[I]dentification of remains, [is] a necessary predicate to any return of such remains.” (Mot. Dismiss ECF No. 47 at 36)

Just as the officials in *Williamson* and *Bass* were charged with administering Department of Agriculture programs, federal defense officials are charged with administering programs for identifying the remains of deceased military personnel. *Williamson v. United States Dep’t of Agric.*, 815 F.2d 368, 381 (5th Cir. 1987) (quoting *Bass v. United States Dep’t of Agric.*, 737 F.2d 1408, 1415 (5th Cir. 1984)). (Mag Rpt&Rec ECF No. 30 at 15)

The term “accounted for”, with respect to a person in a missing status, means that—

(B) the remains of the person are recovered and, if not identifiable through visual means as those of the missing person, are identified as those of the missing person by a practitioner of an appropriate forensic science; or

10 USC § 1513(3) - Definitions

Treatment as Missing Persons.— Each unaccounted for person covered by subsection (a) shall be considered to be a missing person for purposes of the applicability of other provisions of this chapter to the person.

10 USC § 1509(c)

This Court has previously addressed Defendant’s argument that they have no obligation to identify remains.

“For purposes of leave to amend, plaintiff has sufficiently alleged that the Deputy Assistant Secretary of Defense has a duty with regard to identifying the remains of unaccounted-for members of the armed forces from World War II and that, to the extent these duties are owed to private persons, he qualifies as acting primary next of kin.”

(Order ECF No. 34 at 17)

The jurisdictional, mandamus and sovereign immunity defects upon which Defendant’s motion to dismiss rely have either been previously ruled upon by this Court in Plaintiffs’ favor, or, have been repleaded to cure any defect as noted by this Court. And while Defendants selectively argue that the MSPA does not apply to the case of Private Kelder because he “is not in a missing status.” (Mot. Dismiss ECF No. 47 at 11), just two pages later they argue the MSPA *does* govern this dispute. (*Id.* at 13)

IV. Defendants Replead Arguments Previously Considered by This Court.

a. This Court has Previously Addressed Defendant’s Sovereign Immunity Arguments

Defendants again argue that sovereign immunity bars Plaintiff’s claims. (Mot. Dismiss ECF No. 47 at 21,22) This Court previously addressed this issue and stated:

Although the Declaratory Judgment Act, 28 U.S.C. §§ 1201-2202, provides the Court with no independent basis for jurisdiction, plaintiff’s amended complaint provides a basis for jurisdiction under *Bivens* and the Mandamus Act. Accordingly, plaintiff’s amended claim under the Declaratory Judgment Act states “a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act.” (R&R, docket no. 30, at 11).

(Order ECF No. 34 at 17)

b. Defendants Incorrectly Argue that The Mandamus Act Does not Waive Sovereign Immunity.

Defendants again argue that the Declaratory Judgment Act does not waive sovereign immunity. (Mot. Dismiss ECF No. 47 at 22) This Court previously addressed this issue and stated:

Accordingly, plaintiff's mandamus claim as amended states "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11). To this extent, plaintiff's request for leave to amend his complaint to replead his claim under the Mandamus Act shall be granted.

(Order ECF No. 34 at 17)

c. Defendants Incorrectly Argue that Plaintiff's Due Process Claim is Barred by Sovereign Immunity.

Defendants again argue that Plaintiff's due process claim is barred by sovereign immunity. (Mot. Dismiss ECF No. 47 at 26) This Court previously addressed this issue and stated:

For purposes of these limited proceedings, the Court is satisfied that plaintiff's amended claim states "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11). (Addressing Plaintiff's request to include a claim for violation of his due process rights under *Bivens*.)

(Order ECF No. 34 at 15)

d. Defendants Incorrectly Argue that the Court Lacks Jurisdiction Because Plaintiff Lacks Standing.

Defendants again argue that this Court lacks jurisdiction because Plaintiff lacks standing. (Mot. Dismiss ECF No. 47 at 27) This Court previously addressed this issue and stated:

Accordingly, plaintiff's mandamus claim as amended states "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11).

(Order ECF No. 34 at 16)

e. Defendants Argue that Plaintiff's Claims Under the Mandamus Act Fail to State a Claim.

In evaluating plaintiff's allegations under the Mandamus Act, the Magistrate Judge found that plaintiff had not established that any duty is owed to him because his designation as primary next-of-kin had lapsed. The Magistrates' Report & Recommendation explains:

"As noted above, [plaintiff] is Private Kelder's cousin. As defendants appear to concede, the MSPA places duties upon the Deputy Assistant Secretary of Defense with regard to identifying the remains of unaccounted-for members of the armed forces from World War II. (Docket Entry 18, at 12-14 (citing 10 U.S.C. §§ 1501, 1509)). But to the extent these duties are owed to private persons under the statute, they are owed to primary next of kin, immediate family members, or any other previously designated person of the person. See, e.g., 10 U.S.C. § 1502(l). Plaintiff does not qualify as any of these. [fn. 5]: Section 1501(d) indicates that the primary next of kin may designate another individual to act as primary next of kin under the MSPA. Plaintiff does not claim in his complaint to have been so designated in this case.] (R&R, docket no. 30, at 8)."

(Order ECF No. 34 at 9)

Subsequently, the lapse in Plaintiff's designation as primary next-of-kin was cured on June 19, 2013, when Plaintiff was again appointed as primary next of kin in accordance with 10 U.S.C. § 1501(d). (ECF No. Doc 31-3), (1st Amd Compl. Ex. 26)

Defendants then claim that Congress has not given them a duty to identify unaccounted for military personnel and Public Law 111-84 gave them a "goal" of 200 identifications per year. Actually, Congress mandated that Defendants increase identifications to *at least* 200 per year *minimum* by FY 2015. Defendants did not meet

the minimum goal and only identified fifty-five (55) deceased military personnel in FY 2013. (unpublished statistic)

ACCOUNTING FOR GOAL. - In implementing the program, the Secretary of Defense, in coordination with the officials specified in subsection (f)(1) of section 1509 of title 10, United States Code, shall provide such funds, personnel, and resources as the Secretary considers appropriate to increase significantly the capability and capacity of the Department of Defense, the Armed Forces, and commanders of the combatant commands to account for missing persons so that, beginning with fiscal year 2015, the POW/MIA accounting community has sufficient resources to ensure that at least 200 missing persons are accounted for under the program annually.

Pub. Law No. 111-84, § 541(d)(2) (2009) codified as 10 U.S.C. § 1509

(d)(3) DEFINITIONS.—In this subsection:

(A) The term “accounted for” has the meaning given such term in section 1513(3)(B) of title 10, United States Code.

Pub. Law No. 111-84, § 541 (2009)

The term “accounted for”, with respect to a person in a missing status, means that—

(A) the person is returned to United States control alive;

(B) the remains of the person are recovered and, *if not identifiable through visual means as those of the missing person, are identified as those of the missing person by a practitioner of an appropriate forensic science*; or [emphasis added]

(C) credible evidence exists to support another determination of the person’s status.

10 U.S.C. § 1513(3)

V. Defendants have violated Plaintiff’s right to due process.

Defendants have violated Plaintiff’s Fifth and Fourteenth Amendment rights to substantive due process by their arbitrary and inconsistent invocation of various, often unpublished and frequently conflicting policies. (1st Amd Compl. ECF No. 39 ¶¶ 87, 148, 151 *inter alia*)

Defendants have violated Plaintiff's Fifth and Fourteenth Amendment rights to procedural due process by their arbitrary refusal to grant Plaintiff's request for a hearing to consider Plaintiff's new evidence concerning the identity of remains X816 and by their refusal to allow Plaintiff to direct the manner of burial of his family member. Defendants have further abrogated Plaintiff's rights by their deprivation of the right to appeal their denial of his requests by submitting his petition directly to the appellate authority (DPMO) for an original decision. (1st Amd Compl. ECF No. 39 ¶¶ 87, 148, 151 *inter alia*)

The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty." Property interests have their source in state law and Arthur H. Kelder was at all times a resident of the State of Illinois. Under the common law of Illinois, family members have a right to possession of the remains of family members for burial. *Courtney v. St. Joseph Hospital*, 500 N.E. 2d 703, 149 Ill. App.3d 397 (1986); *Mensing v. O'Hara*, 189 Ill. App. 48 (1914).

The principle is firmly established that while in the ordinary sense, there is no property right in a dead body, a right of possession of a decedent's remains devolves upon the next of kin in order to make appropriate disposition thereof, whether by burial or otherwise. (See *People v. Harvey*, 286 Ill. 593; *Palenzke v. Bruning*, 98 Ill. App. 644; *Mensing v. O'Hara*, 189 Ill. App. 48)

In *Mensing v. O'Hara*, the court said:

The decided weight of authority in this country supports the proposition that while a dead body is not considered as property, in the ordinary, technical sense in which that word is usually employed, yet the law does recognize a right, somewhat akin, perhaps, to a property right, arising out of the duty of the nearest relatives of the deceased to bury their dead, which authorizes and requires them to take possession and control of the

dead body for the purpose of giving it a decent burial. This right is an exclusive right to the custody and possession of the remains, and in the absence of any testamentary disposition, belongs to the surviving husband or wife, if any, or if there be none, then to the next of kin."

a. **Defendants claim Plaintiff Has Not Alleged a Property or Liberty Interest and That Defendants' Actions Have Not Deprived Plaintiff of any Current Property Interest and There is No Due Process Right to Affirmative Aid.**

Plaintiff, as the primary next of kin, has a right to direct the manner of burial of these remains which are in the possession of Defendants and Plaintiff has provided convincing evidence that unidentified remains X816 are those of Arthur H. Kelder, a member of Plaintiff's family.

Defendants negligently failed to identify the remains of Private Arthur H. Kelder. They buried the remains in an overseas cemetery from which only the Secretary of the Army can order disinterment, then classified and restricted access to all documents concerning the burial as defense secrets. (1st Amd Compl. Ex. 15D, 16F) Defendants' deliberate concealment of the remains and burial records has tolled any statute of limitations.

Plaintiff, having discovered the true identity of unidentified remains X816, petitioned Defendants for a board of officers under Army Regulation 638-2 to consider evidence of the identity of the remains which had not previously been considered. (1st Amd Compl. Ex. 9)

In response, Defendants changed/ignored the rules promulgated in Army Regulation 638-2 and claimed Plaintiff had no right to a board of officers to consider the new evidence he wished to submit. Defendants claimed that changes to the Missing Service Personnel Act (MSPA) had superseded Army Regulation 638-2, although that regulation remains in effect unchanged two years later. (1st Amd Compl. Ex. 10, 11)

Defendant DPMO then lost Plaintiff's request for consideration of the new evidence, but Defendant JPAC took it upon themselves to verbally deny it without hearing. (1st Amd Compl. Ex. 2 ¶ 9), (Chambers Decl. 1st Amd Compl. Ex. 14-2 ¶ 38-41)

Defendants have woven a web of conflicting and often unpublished policies and procedures from which they have selectively denied Plaintiff's right to due process. Defendant's policy (Supp. AR at 003-004) designated Defendant JPAC as the decision maker, but Defendant JPAC first argued that they *had not* made a decision on Plaintiff's request, (Mot. Dismiss ECF 47 at 4 n2) and now argue that they *have* made a decision. (*Id* at 32) Most recently, Defendants admit that Private Kelder is buried in the Memorial Cemetery (Mot. Dismiss ECF No. 47 at 5) as Plaintiff alleges, but that they have no obligation to identify the remains and therefore have no obligation to return unidentified remains. (*Id* at 31)

As this Court previously held and Defendants concede (Mot. Dismiss ECF No. 47 at 13), the Missing Service Personnel Act (MSPA), 10 U.S.C. §§ 1501, *et seq.*, governs the controversy here, as that statute is the sole legislative authority for defendants' accounting mission with respect to WWII remains.

Now, Defendants selectively argue that Plaintiff has no rights under MSPA (Mot. Dismiss ECF No. Doc 47 at 11) and it does not obligate them to identify the remains of deceased military personnel whom they are obligated to "account" for but not obligated to identify.

(B) the remains of the person are recovered and, if not identifiable through visual means as those of the missing person, are identified as those of the missing person by a practitioner of an appropriate forensic science; or

10 USC § 1513(3)

Had Private Kelder been timely identified and buried in a domestic cemetery under the control of the Departments of Defense or Veterans Affairs, disinterment could have been ordered by a state or federal court of competent jurisdiction in accordance with 32 CFR 553.19, 38 CFR 38.621 or 12 CFR 12.6. Alternatively, notarized statements by all close living relatives of the decedent would have sufficed to authorize the disinterment.

Plaintiff submits that by their failure to adhere to existing statutes and Department of Defense policies, Defendants have wrongfully deprived him of his right to possess the remains of his family member for the purpose of burial. Further, Defendants have systematically and deliberately infringed the due process rights of Plaintiff and others by their refusal to consider new evidence, concealment of records and the presentation of incomplete and false documents to this Court. (Plf. Mot. Complete Admin Rec ECF No. 15, 23)

Plaintiff has attempted to comply with Defendant's policies concerning disinterment for identification and has been rebuffed by Defendant's unpublished, inconsistent and constantly changing policies and process.

b. The Process Offered Plaintiff Does Not Satisfy Constitutional Requirements

Defendant argues again that they have no obligation to identify remains and further that it would somehow overlap or interfere with the rights of other families. Defendant's argument is disingenuous in that their own records provide no indication of commingling of remains, all the remains are currently buried in individual caskets, and Plaintiff has identified a single grave and casket which contains the remains of his family

member and has submitted evidence showing a “high probability of positive identification” as required by Defendant’s policy. (Supp. AR 003-004)

Defendant’s concern is more probably due to the possibility that review of their prior identifications will reveal prior misidentifications and misdeeds by government personnel. While Plaintiff is not unsympathetic to the possibility, that is Defendant’s issue to contend with and in no way relieves Defendant of its obligation to return the remains of Arthur Kelder to his family for burial.

Defendant further alludes to the difficulties in recovering the remains of Plaintiff’s family member and cites the need to “plan recovery operations far in advance to ensure that the needed personnel and equipment can be assembled, transported and lodged at remote locations, a process which must take into account weather challenges in the pertinent location, the need to take personnel from other units, and other considerations that vary greatly and that change over time.” However the reality is that the remains of Plaintiff’s family member are interred in a large, modern, beautifully landscaped cemetery in the center of a modern city and in the custody of Defendants ABMC at all times. All the necessary personnel and equipment are either available from the cemetery authority or local contractors. In fact, Plaintiff would object to direct participation in exhumation by Defendant agencies without adequate provision for protocols to prevent spoliation.

VI. Plaintiff’s Declaratory Judgment Claims are Valid

Under the Declaratory Judgment Act, broad injunctive relief directed against a defendant government agency or official to remedy an ongoing violation of federal law even in the absence of a certified class is not overbroad. An injunction issued to correct a

defendant's policy or practice which is unlawful, not only as to the named plaintiff, but also as to others is reasonable. See, *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996); *Bresgal v. Brock*, 843 F.2d 1163, 1770 (9th Cir. 1988); *Soto-Lopez v. N.Y. City Civil Serv. Comm'n*, 840 F.2d 162, 168 (2d Cir. 1988); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981); *Galvin v. Levine*, 490 F.2d 1255, 1261 (2d Cir.), *cert. denied*, 417 U.S. 936 (1974).

Fifth Circuit rulings support this broad reasoning under 28 USC Section 2202 where it states: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." See *United Teacher Assoc. v. Union Labor Life Ins.*, 414 F.3d 558, 570 (5th Cir. 2005); *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 537 (5th Cir.1978); *see also Nat'l Fire Ins. Co. of Hartford v. Bd. of Pub. Instruction of Madison County, Fla.*, 239 F.2d 370, 376 & n. 11 (5th Cir.1956) (citing § 2202 for the proposition that "[t]he Federal Declaratory Judgment Act contemplates that all necessary or proper relief based on the declaratory judgment should be granted").

VII. Conclusion

Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment fails on its merits and raises substantial questions as to the veracity and intent of Defendant's defenses. In addition to stale claims previously decided in favor of Plaintiff, Defendants have presented evidence extrinsic to the pleadings and which Fed. R. Civ. P. 12(d) would require conversion to a motion for summary judgment if considered by the

Court. However, in the present case, there are both material facts which are disputed and material facts that are unknown and consideration as a motion for summary judgment would be premature without discovery. Defendants' Motion to Dismiss is without merit and should be denied in its entirety.

Plaintiff seeks no monetary damages or even an apology for Defendants' sixty year history of no identity of the remains. Plaintiff has shown beyond a doubt that remains X816 are those of his family member and he now seeks simply to bury them according to his family's wishes and religious ceremony.

Respectfully submitted,

/S/ _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2014 , 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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