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

JOHN EAKIN Plaintiff,	§ § §	
v.	§	CASE NUMBER: SA-12-CA-1002-FB(HJB)
AMERICAN BATTLE MONUMENTS COMMISSION, *et al* Defendants	§ § §	

PLAINTIFF'S MOTION TO COMPEL PRODUCTION

Plaintiff, pro se, pursuant to Rule 37 of the Federal Rules of Civil Procedure, moves the Court to compel Defendants to comply with their discovery obligations and produce responses to Plaintiff's First and Second Requests for Production.

This is a motion to compel Defendants to comply with Plaintiff's First and Second Requests for production and to ensure fair, appropriate and secure access to vital evidence by all parties.

Plaintiff has repeatedly urged his counsel to confer with counsel for Defendants, to which counsel has either refused outright or provided nonsense excuses to Plaintiff. If this Court grants Plaintiff's Motion to Vacate Appointment of Counsel, Plaintiff will immediately confer with opposing Counsel and notify the court of any agreement reached.

I. Factual History

On May 5, 2014, Plaintiff filed his First and Second Requests for Production (Attachment 1 & 2). The first request was exclusively for documents known to be in Defendant's possession. Plaintiff's Second Request for Production included the unidentified remains recovered from Cabanatuan Grave 717, relevant DNA reference samples, disinterment directives and any

proposed protocols for the conduct of exhumation, transportation, and DNA testing of the remains.

More than seven weeks later, on June 25, 2014, a member of Plaintiff's family was notified by Army Casualty that the ten sets of remains recovered from Cabanatuan Grave 717 would be exhumed and examined at the Defendant JPAC's Central Identification Laboratory in Honolulu, HI. This was subsequently confirmed by the Department of Defense Press Office and communication from Counsel for the Defendants.

Defendants have filed no response or objection to either of Plaintiff's requests for production.

I. Introduction

Plaintiff moves to compel Defendant to comply with his Requests for Production and objects to Defendant's unilateral decision to proceed with unsupervised and unobserved testing of the remains which Plaintiff has shown to be those of his family member. Defendants have rejected Plaintiff's offer to provide an observer at the exhumation and now propose to conduct consumptive testing at what is arguably the most inconvenient facility available. A facility which is not only inconvenient to Plaintiff's experts (if they were allowed to attend), but which has no DNA sequencing capability and which averages eleven years for each identification.

Plaintiff, having requested production of the remains in San Antonio, Texas nearly two months prior to Defendant's actions, now moves this Court for an order compelling production in accordance with Plaintiff's request and requiring appropriate safeguards to ensure the integrity of the process and ensure transparency, security and equal availability to both parties.

Defendants have waived any objection to production by failing to timely file their objection.

Nuclear DNA testing, as proposed by Plaintiff, is highly likely to conclusively determine within a few weeks that unidentified remains X816 are those of Arthur Kelder and will be dispositive of Plaintiff's cause of action number three. Conversely, Defendants propose to examine the remains in a laboratory which averages eleven years per identification and which has no demonstrated capability for nuclear DNA testing of WWII era remains. Defendants have proposed to conduct an examination which would be neither conclusive proof of identity nor dispositive.

Plaintiff is prepared to show that all alternatives to exhumation have been exhausted; is not burdensome; is actually required by U.S. Government policy and has been recommended by government employees and consultants who routinely conduct such investigations. However, Defendants efforts to exhume have mooted those issues or any objection to exhumation as requested by Plaintiff.

It should be noted that while Plaintiff seeks only to identify the remains of his family member, he has requested production of all of the ten unidentified remains recovered from Cabanatuan Grave 717. Production and testing of these additional remains is in accordance with the recommendation of the Chief of the US Army Human Resources Command, Past Conflicts Repatriation Branch and Army Regulation 638-2 which requires simultaneous examination of all remains recovered from a multiple fatality event. This is simply good practice, the absence of which during post-war processing of these remains is largely responsible for the current lack of official identification of these remains. Additionally, while Plaintiff is unaware of any evidence of commingling of these remains and Defendants' have provided no such evidence, Defendants have expressed concern that the remains recovered from Grave 717 have been commingled. Any such commingling will be easily detected and corrected during simultaneous examinations using

the nuclear DNA testing technique proposed by Plaintiff. Plaintiff is in full agreement with Defendant's decision to disinter and test all ten Unknowns concurrently.

II. Legal Standard

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides for liberal discovery. *St. Paul Reins. Co., Ltd. V. Commercial Fin. Corp.,* 198 F.R.D. 508, 512 (N.D. Iowa 2000)(citations omitted). In part, it provides that:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.

Fed. R. Civ. P. 26(b)(1)

Courts have interpreted Rule 26 to provide for liberal discovery. *St. Paul Reins. Co.,* 198 F.R.D. at 511 (citing cases). *See also Liberty Mut. Fire Ins. Co. v. Centimark Corp.,* 08CV230-DJS, 2009 WI 539927, at *1 (E.D. Mo. Mar. 4, 2009)(holding that Rules 26(b) and 34 provide for broad discovery)(citations omitted). "Thus, as long as the parties request information or documents relevant to the claims at issue in the case, and such requests are tendered in good faith and are not unduly burdensome, discovery shall proceed." *St. Paul Reins. Co.,* 198 F.R.D. at 511 (citing M. *Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.,* 103 F.R.D. 635, 637 (D. Mass. 1984)). *See also Liberty Mut. Fire Ins.,* 2009 WL 539927, at *1 (holding that requesting party need only make a "threshold showing of relevance" under Rule 26(b)).

The party resisting production bears the burden of establishing lack of relevance or undue burden. *St. Paul Reins. Co.,* 198 F.R.D. at 511 (citations omitted). The objecting party "must demonstrate to the court 'that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed.R.Civ.P. 26(b)(1) or else are of such marginal relevance

that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.'" *Id.* (quoting *Burke v. New York City Police Dep't,* 115 F.R.D. 220, 224 (S.D.N.Y.1987)).

Defendants have filed no objection or response to Plaintiff's First or Second Requests for Production.

III. Defendant's Proposed Testing and Examination is Unacceptable

Instead of complying with Plaintiff's discovery request to produce the remains in San Antonio, Texas where this Court is located, Defendants have chosen the most inconvenient location possible, their laboratory in Honolulu, Hawaii. A laboratory which averages eleven (11) years to identify skeletal remains; a laboratory which has no organic DNA testing capability, and which has a backlog of nearly two thousand sets of unidentified remains stored in cardboard boxes.

While Plaintiff continues to assert that suitable military or civilian mortuary facilities are available in San Antonio, it should be noted that Defendants just this year opened a satellite identification laboratory in Omaha, Nebraska. Further, military mortuary facilities are available at Travis AFB, California, and Dover AFB, Dover, Delaware which is collocated with the Armed Forces Medical Examiner who is designated to oversee identifications of skeletal remains and also collocated with the Armed Forces DNA Identification Laboratory which is Defendant's only DNA identification laboratory.

Any of these facilities would be acceptable to Plaintiff if adequate security and testing protocols are in place to ensure the integrity of the process and use of nuclear DNA for identification of the remains.

a. Only Nuclear DNA Testing Can Provide Incontrovertible Evidence of Identity.

Mitochondrial DNA, as used by Defendants, is a useful investigative tool and not a means of conclusively proving identification.

Defendants have asserted for the last five (5) years that insufficient anthological or historical evidence was available to identify the remains of X816 as Arthur H. Kelder and that mitochondrial DNA (mtDNA) was not suitable for the task. Plaintiff takes them at their word and has requested that the accepted forensic standard of nuclear DNA (STR) be used to confirm the identification.

Rather than mtDNA, as proposed by Defendants, Plaintiff seeks to use the more highly discriminatory nuclear DNA, generally accepted as the gold standard for identification of human remains, to conclusively demonstrate that unidentified remains X816 are those of Arthur H. Kelder. While nuclear DNA extraction requires a more sophisticated laboratory with more experienced personnel, it provides a certainty of more than 99.995% when matched to an appropriate reference sample.

Defendants currently use only the minimally discriminatory and highly consumptive technique of mitochondrial DNA testing to support identifications based on observations by anthropologists. mtDNA, within certain ethnic and racial groups may be shared by more than twenty percent of the population.[1] While mtDNA is a useful tool to confirm other indicators of identity when nuclear DNA can not be extracted, it is far from conclusive proof of identity. Further, mtDNA testing is expensive and time consuming compared to most other forms of DNA testing. The sole advantage of mtDNA testing is that it is likely to be extracted from aged remains by a relatively basic laboratory using unsophisticated equipment.

[1] Cole, Paul M., PhD, JPAC's Information Value Chain; The identification of Missing Persons, Conclusions & Recommendations, 20 January 2012, page 12.

Employment of nuclear DNA for identification will not only conclusively identify the remains recovered from Cabanatuan Grave 717, but will also demonstrate a high probability that thousands of additional unidentified remains meet the standard for disinterment set out in existing U.S. Government policy and could be identified and buried as directed by their next of kin.

The National Alliance of Families for the Return of America's Missing Servicemen, a recognized authority on the recovery and identification of MIA's, supports suspension of the use of mtDNA testing and demands that the U.S. Government use what they term "the far superior" nuclear DNA testing.[2]

b. Defendants Have no Demonstrated Capability for Nuclear DNA Testing of WWII Era Remains nor the Laboratory Capacity to Perform Even the Inadequate Mitochondrial DNA Testing. Defendants have no demonstrated in-house capability for extraction and testing of nuclear DNA from WWII era remains and even if allowed, as they propose, to rely on use of inadequate mitrocondrial DNA, they do not have the laboratory capacity to timely process these remains.

Defendant DPMO advises on its webpage that while nuclear DNA is a more positive tool for identification than mitochondrial DNA, it is not useful because of the difficulty experienced by the Armed Forces DNA Identification Laboratory (AFDIL) in extracting nuclear DNA.

> **"Deoxyribonucleic Acid (DNA) Typing**
> The forensic scientists at the Armed Forces DNA Identification Laboratory (AFDIL) use the latest DNA typing methods to provide for the identification of remains or other biological evidence. For the identification of current casualties, nuclear DNA (nucDNA) provides a tool for positive identification, when other forensic techniques, such as a fingerprint or dental comparison is not possible. *Unfortunately, nucDNA is not a viable tool in older remains due to many environmental factors that cause the nucDNA to degrade.* These factors include such things as ultra-violet light from the sun, heat, and moisture. For older remains, however, recovered from the battlefields of Korea, the Cold

[2] Press Release, July 7, 2014, National Alliance of Families for the Return of America's Missing Servicemen.

> War, World War II, and Southeast Asia (SEA), mitochondrial DNA (mtDNA) has proved to be a useful investigative tool that adds additional detail towards a positive identification." [emphasis added]

http://www.dtic.mil/dpmo/dna_information/

Even if mitochondrial DNA testing were adequate to conclusively identify the remains recovered from Cabanatuan Grave 717, the Armed Forces DNA Identification Laboratory (AFDIL) is capacity constrained at 1,000 DNA sequences per annum. Each set of remains requires a minimum of three DNA samples, but may require up to twenty samples if a high degree of commingling is observed. It is conceivable that this project, as proposed by Defendants, could consume the entire annual capacity of the Armed Forces DNA Identification Laboratory for several years. *Id.* An inordinate delay in identification of the skeletal remains recovered from Cabanatuan Grave 717 is unacceptable to Plaintiff and would not promote judicial economy.

In addition to AFDIL's lack of capability of extracting nuclear DNA from WWII era bones and insufficient laboratory capacity to timely sequence these ten sets of unidentified remains plus the necessary family references samples, AFDIL's response time ranges between six and twenty-four months. *Id.*

So while Defendants have no demonstrated capability for identification of skeletal remains using advanced nuclear DNA testing technology. Plaintiff has available a team of professionals who have pioneered the technology and have successfully employed it in the identification of more than ten thousand cases. Most recently, in April of 2014, Bode Technology was able to confirm the identification of PFC Lawrence Gordon using nuclear DNA technology and the identification was unquestioned by Defendant DPMO.

Plaintiff recently received the following advice in an email from a Vice President of Bode Technology who did the PFC Gordon identification accepted by Defendant DPMO:

> "[I]t is CRITICAL that any nuclear DNA testing be performed by a laboratory that has extensive experience in this type of testing. Many labs believe they can do nuclear DNA testing on skeletal remains, only to fail miserably and then claim there is no DNA in the samples. I have seen this happen repeatedly (and Bode get full nuclear DNA profiles from the same samples). .... I have also seen this happen. Of course, I am biased here, but I believe the best chance for successfully DNA testing is with Bode."

Email from Ed Huffine, Bode Technology, VP, International Development, June 26, 2014

Besides being highly discriminatory, nuclear DNA is much quicker and significantly less expensive to sequence than mtDNA. The Bode Technology laboratory has demonstrated ability to extract nuclear DNA from aged remains and is fully accredited – including for use of nuclear DNA – by the Federal Bureau of Investigation, Texas Department of Public Safety and other recognized accreditation authorities. While the Armed Forces DNA Identification Laboratory is not accredited for, nor has experience in, extracting nuclear DNA from WWII era remains.

Defendants have had nearly seventy years to identify the remains of Plaintiff's family member and Plaintiff should now be allowed to quickly and conclusively do the job.

- mtDNA testing would not provide conclusive proof of the identity of unidentified remains X816.
- mtDNA testing would not be dispositive of this issue.
- mtDNA testing would require at least 12 months and could require several years to accomplish.
- Nuclear DNA testing could be completed in as little as seven days.
- Nuclear DNA testing would be dispositive of this issue.
- Defendants have previously accepted identifications of Unknowns based on only nuclear DNA.

c. **No Party Should Have Unsupervised Access to Evidence Susceptible to Spoliation.** It is inappropriate and would be highly questionable for either party in litigation to have completely unsupervised access to any evidence susceptible to spoliation. Such a process

would call in to question the integrity of the entire process and even the appearance of impropriety must be avoided.

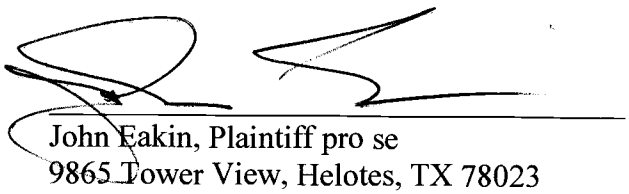
Plaintiff calls on the Court to require that whatever contractor or agency is selected to perform the exhumation, transportation and testing be independent of any party to this litigation and obligated to act in accordance with a protocol approved by this Court.

VIII. Summary

Plaintiff welcomes Defendant's recognition that X816 is highly probable to be identified as the remains of Arthur H. Kelder, but is dismayed by their attempt to avoid transparency in the process.

Plaintiff has available a team of experts who have successfully identified more than ten thousand unidentified remains and who have agreed to test the grave 717 remains, compare the DNA sequences to reference samples obtained from appropriate family members and report the results to this Court. The laboratory to be used is accredited by all relevant authorities including the Federal Bureau of Investigation and the Texas Department of Public Safety. Most recently, this team was able to conclusively identify the remains of PFC Lawrence Gordon, an American Soldier who died in 1944 and was buried as a German Unknown in a cemetery in France. Defendant DPMO accepted that identification without question.[3]

Respectfully submitted,



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[3] That case is distinguished from the instant case in that the remains were not under the control of the U.S. Government and were accessible through the cooperation of the French and German governments.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2014, a true and correct copy of the foregoing pleading was forwarded to all Counsel by First Class Mail at the following address:

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ORDER

On this day, came on for consideration Plaintiff's Motion to Compel Production. The Court having reviewed said Motion, finds that the Motion should be, and hereby is, GRANTED.

Defendants are hereby ordered to produce the documents and tangible things set out in Plaintiff's First and Second Requests for Production.

Parties will, within ten (10) days, submit to the Court a mutually acceptable protocol for disinterment, transportation and production for testing of the subject remains. The entire process is to be under the control of an independent organization or agency and afford all parties equal access to the remains. Nuclear DNA testing will be conducted by an accredited laboratory experienced in such testing of WWII era remains.

Subject remains are to be available for testing within forty (40) days.

Defendants will, within ten (10) days, produce to Plaintiff all requested documents, including disinterment directives.

Signed this the _____day of _____, 2014.

_____
HENRY J. BEMPORAD
MAGISTRATE JUDGE