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 DISCOVERY RESPONSES

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 and Plaintiff's First Set of Interrogatories.

Defendants have neither responded nor objected to Plaintiff's discovery requests.

On July 16, 2014, Plaintiff and Counsel for Defendants conferred briefly. Defendants were unwilling to identify exactly which requests they found to be burdensome or accept modification of the requests. Defendants' subsequent letter is included as Attachment 1 to this motion.

I - Factual History

On May 5, 2014, Plaintiff served Defendants with his First and Second Requests for Production (Attachments 2 & 3). 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.

On May 13, 2014, Plaintiff served Defendants with his first set of interrogatories. (Attachment 4)

Extensions of time to respond may have been extended by Plaintiff's prior counsel, but no later than June 20, 2014.

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 Defendant JPAC's Central Identification Laboratory in Honolulu, HI.

Defendants have filed no response or objection to either of Plaintiff's requests for production or his interrogatories. On July 8, 2014, Defendants filed their Suggestion of Mootness and Motion to Stay Discovery Pending Decision on Mootness or Other Resolution. (ECF Doc No. 64) At page 7, Defendants complain that Plaintiff's Requests for Production are "overbroad, vague, and duplicative" but provide no detailed objections.

II - Introduction

Plaintiff has reason to believe that Defendant's proposed exhumation and examination of unidentified remains X816 will be inconclusive and the process, by design, can not conclusively identify the remains as those of Plaintiff's family member. At best, the proposed examination will unreasonably delay the identification and permanent burial of Plaintiff's family member.

Defendants have unilaterally decided to exhume the ten unidentified remains originally buried in Cabanatuan Grave 717 in an effort to avoid responding to Plaintiff's valid discovery requests to produce documents and the ten (10) sets of remains. Defendants refuse to permit Plaintiff's representatives to observe at any stage of the process and have described an identification process unlikely to be successful.

Plaintiff moves to compel Defendant to comply with his discovery requests and objects to Defendant's decision to proceed with unsupervised and unobserved testing of the remains which

Plaintiff has already 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 on-site DNA testing capability and which averages eleven years to accomplish an 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 assure transparency, security and equal availability of the evidence 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 with a history of extended and often inconclusive examinations. A laboratory with no demonstrated capability for nuclear DNA testing of WWII era remains. Defendant's proposed examination would be neither conclusive proof of identity nor dispositive of this litigation.

Defendants Motion to Stay Discovery (ECF Doc No. 64) includes vague details of Defendants plans for exhumation, transportation and identification of these ten sets of remains. From this information it appears that Defendants plan to base their identification on only the low discrimination mitochondrial DNA testing. This type of testing will contribute little to the identification of the X816 remains for which extensive evidence of individual identity is currently

available and it is unlikely to result in the identification of the nine (9) unidentified remains other than X816. [1]

Plaintiff is in full agreement with Defendant's decision to disinter and test all ten (10) Unknowns concurrently, but believes mitochondrial DNA testing will be inconclusive and unnecessarily delay the identification of Plaintiff's family member.

Plaintiff asserts that the existing evidence of individual identities of the nine (9) remains other than X816 is insufficient to support identifications even with the use of mt DNA testing evidence and that they are highly unlikely to be identified without the use of the high discrimination nuclear DNA technique.

Plaintiff further states that, as explained below, the use of mtDNA for these identifications is likely to require at least one year and that two or more of the remains are highly likely to share identical mtDNA sequences. Testing using the highly discriminatory nuclear DNA may be completed in as little as seven (7) days and will be unique to each individual.

III - 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:

[1] 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. Simultaneous examinations are 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. Examination of all ten (10) remains and the use of nuclear DNA testing will allow for the correction of any possible commingling of the remains and likely allow for the identification and return to their families of the remains of all of the unidentified remains.

> 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.

IV - Defendants Have Failed to Timely Object to Production

Defendants failed to cooperate in discovery and have waived any objection to production by their failure to timely object, yet, they now present vague, boilerplate objections in their Motion to Stay Discovery.

Use of "boilerplate" objections such as: "the requested documents are neither relevant to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence," "the request is overbroad," and "the request is oppressive, burdensome, and harassing," are insufficient and "are textbook examples of what federal courts have routinely deemed to be improper objections." *St. Paul Reins. Co., Ltd. v. commercial Fin. Corp., 198 F.R.D. 508, 512 (N.D. Iowa 2000)*. Instead, the party resisting discovery must show specifically how each request is overly broad, oppressive, irrelevant or unduly burdensome, *Id*. (citing *Redland Soccer Club v. Dept't of Army*, 55 F.3d 827, 856 (3d Cir. 1995); *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990); *Paulsen v. Case Corp.,* 168 F.R.D. 285, 289 (C.D. Cal. 1996); *Burns v. Imagine Films Entert., Inc.,* 164 F.R.D. 589, 592-93 (W.D.N.Y. 1996). Indeed, "[g]eneral objections are not useful to the court ruling on a discovery motion. Nor does a general objection fulfill [a party's] burden to explain its objections." *Chubb Integrated Sys. Ltd v. Nat'l Bank of Wash.,* 103 F.R.D. 52, 58 (D.D.C. 1984). Defendants generalized, boilerplate objections are insufficient.

Defendants now complain that Plaintiff's Requests for Production are burdensome without giving Plaintiff an opportunity to modify or clarify his requests.

V - mtDNA Testing is Not Conclusive Evidence of Identification

"Generally speaking, every cell contains two types of DNA material: nuclear DNA and mitochondrial DNA. Nuclear DNA material is found in the nucleus of the cell, and the analysis of nuclear DNA is the traditional form of DNA analysis with which most people are now commonly

familiar. *See State v. Begley,* 956 S.W.2d 471, 473-74 (Tenn.1997) (generally discussing nuclear DNA analysis). With analysis of an individual's nuclear DNA profile, the possibility exists that each individual, with the exception of identical twins, has a unique profile with respect to anyone else in the world.

By way of contrast, mtDNA comes from mitochondria in cells, and analysis of mtDNA provides significantly less ability to discriminate among possible donors. For example, because mtDNA is only inherited from the mother, all maternal relatives will share the same mtDNA profile. The final result in mtDNA typing analysis is that the defendant is either excluded as a possible contributor of the genetic material or he or she is included within the class of possible contributors. Because it is not possible to achieve the extremely high level of exclusion provided by nuclear DNA, mtDNA typing has been said to be a test more of exclusion than one of identification." *U.S. v. Morrow,* 374 F.Supp.2d 42,49 (USDC DC 2005) (citing *State v. Scott,* 33 S.W.3d 746, 756) (Tenn.2000)[internal footnotes omitted]

Not only is mtDNA a low discrimination, non-conclusive investigative tool, it is time consuming to sequence and may require years to complete. Plaintiff submits that nuclear DNA testing would be conclusive and is likely to be completed in weeks rather than months or years.

VI - Only Nuclear DNA Testing Can Provide Incontrovertible Evidence of Identity.

Defendants have filed the declaration of Kelly E. Fletcher (ECF Doc No. 64-1) which describes their intended exhumation and examination of the ten (10) Unknowns recovered from Cabanatuan Grave 717. This declaration provides little detail of their proposed examination of the unidentified remains, however, it describes the use of only low discrimination mitochondrial DNA (mtDNA) testing rather than the conclusive nuclear DNA (nucDNA) testing which is the gold standard of forensic investigation.

If Defendants intended to use nuclear DNA as the basis for identification there would be no need for examination at the JPAC Central Identification Laboratory by an odontologist, anthropologist or archeologist. *Id at 10*. Nor would the DNA testing be expected to take "90 to 120 days" *Id at 11*. Nuclear DNA testing by experienced laboratories is typically completed in seven (7) to twenty-one (21) days.

Identification based primarily upon nuclear DNA would not require examination at Defendant's Central Identification Laboratory and could more quickly be performed at the site of the DNA testing laboratory which would also significantly reduce the mutilation of the remains.

Mitochondrial DNA, as used by Defendants, is a useful investigative tool and not a means of conclusively proving identification. It requires months to accomplish and, as performed by Defendant JPAC provides DNA evidence which may be shared by as much as twenty percent (20%) of the Caucasian population.[2] Conversely, nuclear DNA testing may be completed in as little as seven (7) days and provides 99.995% assurance of a match to a reference sample.

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 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 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.

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

VII - Nuclear DNA Testing is Not Routinely Used by Defendants

While the Armed Forces DNA Identification Laboratory (AFDIL) routinely uses nuclear DNA for identification of current samples (those from recent deaths), they have no demonstrated in-house capability for extraction and testing of nuclear DNA from WWII era remains. Extraction of nuclear DNA from aged remains is a much more difficult process, often described as more art than science.

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 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/

A July 19, 2014 correction of an earlier Stars & Stripes story stated that AFDIL uses both nuclear and mitochondrial DNA methods to test remains of U.S. servicemembers.[3] However, unless recently received, AFDIL is not accredited to perform nuclear DNA testing of aged remains from past conflicts.

[3] Stars & Stripes, July 19, 2014 http://www.stripes.com/news/pacific/fight-over-us-veterans-remains-in-philippine-graves-continues-1.291218

In addition to AFDIL's lack of demonstrated capability in extracting nuclear DNA from WWII era remains, AFDIL's response time ranges between six and twenty-four months.[4] Defendant's Central Identification Laboratory averages eleven (11) years to identify skeletal remains and has no organic DNA testing capability.

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 now 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. One could surmise that they propose to examine the remains in Hawaii to avoid observation by Plaintiff's experts.

X - Summary

Plaintiff has a right to inquire as to the reason for Defendant's sudden turn-about and decision to exhume these remains after resisting all prior efforts to do so. Plaintiff believes the requested documents will reveal evidence of a pattern of intentionally and unreasonably preventing the return of the remains of fallen American Servicemembers to their families for burial.

Plaintiff agrees that all ten (10) Unknowns from Cabanatuan Grave 717 should be examined simultaneously and, further asserts that the examination should be performed by an independent laboratory experienced in the use of nuclear DNA testing on WWII era remains. Basic fairness demands that both parties should be allowed to observe the process to assure the integrity of the process.

[4] Cole, Paul M., PhD, JPAC's Information Value Chain; The identification of Missing Persons, Conclusions & Recommendations, 20 January 2012, page 209.

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 use nuclear DNA testing 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.[5]

Defendants have failed after nearly seventy years to identify the remains of Plaintiff's family member and Plaintiff, now faced with further indefinite delay, should now be allowed to quickly and conclusively do the job.

Plaintiff opposes Defendants' Suggestion of Mootness and Motion to Stay Discovery Pending Decision on Mootness or Other Resolution and has filed an appropriate response. Defendants suggestion and motion is without merit and should be dismissed. Plaintiff's pending Motion to Compel Production provides a quick, equitable and conclusive alternative.

Respectfully submitted,

/s/

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[5] 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 20th 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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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

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 within ten (10) days produce to Plaintiff the documents described in Plaintiff's First and Second Requests for Production and respond to Plaintiff's First Set of Interrogatories.

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 thirty (30) days.

Signed this the _____day of _____, 2014.

_____
HENRY J. BEMPORAD
MAGISTRATE JUDGE