

**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	§	
	§	

**PLAINTIFFS’ RESPONSE TO DEFENDANTS’ SUGGESTION OF MOOTNESS AND
MOTION TO STAY DISCOVERY PENDING DECISION ON MOOTNESS
OR OTHER RESOLUTION**

Plaintiff, pro se, opposes Defendants’ Suggestion of Mootness and Motion to Stay Discovery Pending Decision on Mootness or Other Resolution as vague and premature. 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.

Plaintiff’s Motion to Compel Production is incorporated in this response as if set out in full.

I - Introduction

This is a discovery dispute presented to appear to moot Plaintiff’s entire complaint and to avoid disclosure of documents fatal to Defendants defense. Plaintiff filed a Motion to Compel Production (ECF No. 65-2) on the same day that Defendants filed their Suggestion of Mootness and Motion to Stay Discovery. (ECF No. 64).

Premature dismissal by acceptance of Defendants’ suggestion that complaint is mooted upon exhumation would deny Plaintiff any recourse to challenge the adequacy or integrity of the

exhumation and examination process. Defendants' proposed identification process will not withstand challenge concerning the integrity or timeliness of the examination and is deliberately vague.

Defendants previously asserted that they had no obligation to return remains until they were identified. Defendants now assert that the right of families to petition for the return of remains is terminated when Defendants issue a vague plan to perhaps identify the remains. Notwithstanding that the proposed plan will fail by design. There is a huge gap between Defendants plan and the actual accomplishment of the identification of remains which is when Defendants previously asserted that Plaintiff's right to the remains began.

Defendants have not responded to, nor objected to, Plaintiff's Requests for Production, yet now present a blanket objection to all requests. Plaintiff will file a revised Motion to Compel Discovery Responses concurrent with the filing of this response.

II - This is a Simple Discovery Dispute

This is a simple attempt to avoid disclosure of documents fatal to Defendants defense. Defendants, unable to show that Plaintiff's discovery requests are either burdensome or irrelevant, are using mootness as a ruse to avoid production. Plaintiff filed a Motion to Compel Production (ECF No. 65-2) on the same day that Defendants filed their Suggestion of Mootness and Motion to Stay Discovery. (ECF No. 64) Defendants' announcement of their plan for exhumation was made subsequent to service of Plaintiff's request that they produce the remains for DNA testing.

Defendants have neither responded to Plaintiff's Requests for Production of documents and remains, nor timely objected and now provide the vague and out-of-context boilerplate objections contained in their Suggestion of Mootness and Motion to Stay Discovery.

While Defendants may assert that they intended to exhume the remains all along, Plaintiff's Request for Production was served prior to Defendant's decision to exhume the remains. In fact, senior executives of Defendant JPAC had previously overruled at least three of their own investigators' recommendations to disinter (which were withheld from this Court). Defendant DPMO then took no action until sixteen months later after, coincidentally, this Court had granted permission for discovery to proceed.

As recently as February 21, 2014, Defendants stated in their objection to the conduct of alternate dispute resolution that they opposed disinterment of the remains. (ECF No. 57.)

During this time, Defendant JPAC had the authority to disinter the remains without referral to Defendant DPMO (Supp AR at 00003), but refused to do so. Defendants now claim that the commencement of discovery had nothing to do with their sudden decision to exhume these ten Unknowns.

Defendants have consistently asserted that the remains can not be identified through the use of mtDNA without additional circumstantial evidence. However, Defendants have no new evidence upon which to support identification except that presented to them by Plaintiff nearly five years ago. The only other alternative upon which to base identification is the use of nuclear DNA, as suggested by Plaintiff, yet, Defendant's plan for identification does not provide for the use of nuclear DNA testing.

Without additional circumstantial evidence or the use of nuclear DNA testing, Defendant's plan for identification is impossible and destined to fail.

IV - Nothing is Mooted by Defendant's Proposed Exhumation

Plaintiff asserts that nothing is mooted until the remains are identified as those of his family member or when Plaintiff's contention is disproven. A premature dismissal would deny

Plaintiff a hearing on any potential controversy or irregularity arising during exhumation or examination of the remains.

Defendants have previously asserted that no right to remains accrues until identification of the remains ("*Until the remains are identified, plaintiff has not [sic] concrete right to them....*") ECF No 47, page 31). Yet, Defendants now claim this litigation should be dismissed because they plan to, without oversight, exhume the remains and conduct an examination of the remains. An examination which is destined to fail because they have no additional circumstantial evidence and no plan for the use of nuclear DNA testing.

Most recently, Defendants denied Plaintiff's family's request to escort the remains from Manila saying that Plaintiff had no right to escort the remains until they were identified. Yet, Defendants now assert that Plaintiff's claims vanish merely because they plan to exhume the remains.

If this case is mooted prematurely, Plaintiff would have no recourse should grounds arise to challenge the propriety of the examination. Without this Court's continued oversight there is no assurance that these remains would be properly, much less timely, identified, if ever. In fact, Defendant's proposed examination, as Plaintiff shows below and in his Motion to Compel Discovery Response, will not and can not conclusively identify the remains.

VII - Defendant JPAC Has a History of Failing to Identify Remains

Attachment 1, the declaration of Sally Hill Jones, details how Defendant JPAC has handled a case similar to Plaintiff's except that these remains were disinterred more than nine (9) years ago and have still not been identified. Ms. Jones makes the point that while the X345 remains have not been identified nine (9) years after exhumation, she has no recourse available.

As of June 2009, the Central Identification Laboratory had 1,021 biological accessions (human remains) stored in their laboratory.¹ Unofficial estimates are currently that more than 1,600 sets of human remains are in storage at Defendant JPAC's Central Identification Laboratory.

The operations of Defendants JPAC and DPMO are in disarray and have been the object of investigations by multiple congressional committees, the Government Accounting Office, the DoD Inspector General and others who have been critical of their operations at all levels. The chairman of the Joint Chiefs of Staff, Gen. Martin E. Dempsey, was quoted by NBC News as saying the reports were "discouraging and moving rapidly toward disgraceful."

The Department of Defense Office of the Inspector General has recently concluded an investigation of Defendants JPAC and DPMO. The OIG final report is expected to be released the last week of July 2014. A recent media report was based on the draft report.

"The Defense Department's inspector general has drafted a stinging rebuke of the Pentagon's struggling effort to recover the remains of missing service members from past wars, concluding the mission lacks the most elemental building blocks for success.

According to a draft report of its investigation obtained by ProPublica, the mission lacks agreed upon goals, objectives and priorities. It lacks a strategic plan and up-to-date policies. It lacks standard operating procedures, a complete centralized database of the missing, and a disinterment plan, among other flaws."

ProPublica, Pentagon Report finds Litany of Problems with Effort to Recover MIA's, July 11, 2014. (also published in Stars & Stripes, July 12, 2014)
<http://www.propublica.org/article/pentagon-report-finds-litany-of-problems-with-effort-to-recover-mias>

A recent Government Accounting Office study found widespread problems with the MIA accounting process and stated in part:

¹ Institute for Defense Analyses, Assessment of DoD's Central Identification Lab and the Feasibility of Increasing Identification Rates. June 2009.
http://www.dtic.mil/dpmo/docs/ida_study_11-18-09.pdf

"Until the Secretary of Defense ensures that activities associated with the accounting mission are efficiently and effectively carried out, the inefficient and potentially avoidable overlap and disagreements among the community members may continue. Collectively, these weaknesses jeopardize DOD's capability and capacity to accomplish the statutory goals of accounting for missing persons, and to provide some measure of closure to those families whose loved ones are still missing as a result of their service to their country."

Government Accounting Office, Page 47, DOD's POW/MIA Mission: Top-Level Leadership Attention Needed to Resolve Longstanding Challenges in Accounting for Missing Persons from Past Conflicts, GAO-13-619: Published: Jul 17, 2013
<http://www.gao.gov/products/gao-13-619>

The fact that Plaintiff has been forced to seek judicial relief to recover the remains of a family member provides some indication of how dysfunctional the US Government's MIA accounting program is.

IIX - CONCLUSION

Plaintiff urges the Court to reject Defendant's Suggestion of Mootness and deny Defendant's Motion to Stay Discovery. Plaintiff's Motion to compel Discovery Responses should be granted to insure that all the remains are promptly and conclusively identified. Without continued oversight by this Court the identification of the Unknowns from Cabanatuan Grave 717 will not be timely completed and those remains are likely to spend eternity in a cardboard box in Defendant JPAC's warehouse.

Respectfully submitted,

/s/

John Eakin, Plaintiff pro se
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 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:

Susan Strawn, Assistant United States Attorney
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Sstrawn@usa.doj.gov

/s/ _____
John Eakin, Plaintiff pro se
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com

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Plaintiff,

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Defendants

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ORDER

On this day, came on for consideration Defendants’ Suggestion of Mootness and Motion to Stay Discovery Pending Decision on Mootness or Other Resolution. The Court having reviewed the evidence, finds that the Motion should be, and hereby is, DENIED.

Signed this the _____ day of _____, 2014.

HENRY J. BEMPORAD
MAGISTRATE JUDGE