

**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 REPLY TO DEFENDANTS’ RESPONSE TO PLAINTIFF’S
MOTION TO COMPEL DISCOVERY RESPONSES**

Plaintiff, *pro se*, files his reply to Defendants' response to Plaintiff's Motion to Compel Discovery Responses.

Defendant's response cites spurious facts as a smokescreen to avoid compliance with Defendant's discovery obligations and their failure to file proper objections to Plaintiff's discovery requests.

I - Defendants Have Refused to File or Discuss Their Objections to Discovery Requests

Defendants contend that Plaintiff's Motion to Compel Discovery Responses (ECF Doc. No. 72) fails to comply with the requirements that the parties confer in good faith prior to filing a motion to compel. Plaintiff rejects Defendant's contention and states that he did, in as far as Defendants' Counsel would cooperate, attempt to confer and avoid the necessity of filing a motion to compel.

Plaintiff requested his former Counsel to either conduct discovery negotiations in writing or promptly memorialize them to avoid exactly this sort of situation. Plaintiff's former Counsel refused to do so and consequently, Plaintiff is unable to respond to Defendant's characterizations

of discovery discussions with Plaintiff's former Counsel. Plaintiff, however, rejects Defendants' statements that Plaintiff was unwilling to modify, clarify or amend his discovery requests to insure that they were not burdensome. Plaintiff has at all times been willing to consider modifications as necessary, but has received no specific requests for clarification/modification or objections to his discovery requests through his former Counsel or subsequently from Defendants.

At the conclusion of this Court's status hearing on July 16, 2014, Plaintiff attempted to confer with Defendant's Counsel and was rebuffed. Defendants were unwilling to identify exactly which requests they found to be burdensome or suggest modification of the requests. Defendant's Counsel told Plaintiff to "file your motion."

Plaintiff's Motion to Compel Discovery Responses (ECF Doc. No. 72 at 1) contains Plaintiff's certification that he attempted to confer with Counsel prior to filing his motion to compel. Further, Plaintiff's motion to compel included as attachment one a letter from Defendants which states that they "do not believe that it would be a fruitful use of time to meet with you regarding 120 document requests."

Any statement by Defendants that Plaintiff refused to meet and confer concerning any and all issues are false. Plaintiff is and always has been available to confer and would at any time welcome good faith discussions concerning all issues.

II - Plaintiff's Discovery Requests are not Burdensome

Rather than filing their misguided motion to dismiss, Defendants should simply have filed their objections to discovery under Federal Rule of Civil Procedure 26(b).

Defendants have not filed any response or objection to Plaintiff's requests for discovery and have refused to allow Plaintiff to offer modifications or clarifications of these discovery requests they find burdensome or irrelevant.

III - Plaintiff's Discovery Requests are not Restated FOIA Requests

Plaintiff's discovery requests are not simply restated FOIA requests, although had Defendants properly responded to Plaintiff's requests under FOIA, portions of the present discovery requests would not have been necessary.

Plaintiff's discovery requests comply with Federal Rule of Civil Procedure 26(b)(1) and Defendants have failed to file timely objections to the requests.

Assuming *arguendo*, that even if they are restated FOIA requests, they are no less relevant to the present litigation. Plaintiff's FOIA lawsuit was obviously in preparation for the current litigation and had Defendants' fully complied with their obligations to provide those documents at that time production of those documents would not be necessary now.

It should be noted that while the Court in that earlier litigation denied Plaintiff's request for a fee waiver, it made no finding that any requested document was exempt from release under FOIA. However, subsequent to the Court's judgment, Plaintiff found that, contrary to Defendant's averment, many of the requested documents existed in electronic format and the fee waiver was moot. Defendants had been disingenuous in charging a fee for the documents in the first place. Further, based on information gained in that lawsuit, Plaintiff has significantly narrowed the scope of the documents requested in discovery to insure that they were not burdensome and were relevant to the present litigation.

IV - Defendants Misstate Plaintiff's Complaint

However, the heart of the matter is that Defendants are attempting to avoid compliance with their discovery obligations by incorrectly stating the relief Plaintiff has requested and then claiming that Plaintiff's lawsuit is moot.

Plaintiff's First Amended Complaint placed four causes of action before this Court: (ECF Doc. No. 39, ¶¶ 118, 127, 137, 142)

1. Declaratory Judgment - Families have absolute right to possession of remains.
2. Mandamus Act - Identification and Return of Remains.
3. Declaratory Judgment - Identification of Unidentified Remains X-816 as those of Arthur H. Kelder.
4. Injunctive Relief - Due Process

Defendants now claim that by agreeing to exhume ten previously unidentified sets of remains they have somehow satisfied Plaintiff's request that remains X816 be identified as those of his family member, Arthur H. Kelder. This, prior to any attempt at identification of the remains by Defendants, an attempt at identification which Plaintiff has described as unlikely to succeed as proposed by Defendants.

Contrary to Defendants averment that Plaintiff has requested disinterment (ECF 64 at 3 "[D]efendants will exhume and seek to identify the remains This is exactly the relief plaintiff sought from defendants, and moots this case."), Plaintiff's first amended complaint contains no request for exhumation as Defendants contend. Rather, Plaintiff has described in his complaint and in his Motion for Declaratory Judgment (ECF Doc. No. 24) the evidence that unidentified remains X816 are those of Arthur H. Kelder and has requested this Court to so declare based on the evidence presented. Defendants have repeatedly rejected Plaintiff's evidence of identity until their recent revelation that this case meets the "high probability of positive identification" standard set out in the Slocombe Memo. (Supp AR at 000003) Now, simply by exhumation and

prior to identification of the remains, Defendants contend that they have complied with Plaintiff's request that the Court declare that unidentified remains X816 are those of Arthur H. Kelder and that Plaintiff's entire lawsuit is now moot.

Plaintiff believes that nuclear DNA testing of the X816 remains, as he has requested be conducted as part of the discovery process, would provide conclusive evidence of identity which he would then submit to this Court at trial or in a motion for summary judgment.

Defendant's misguided contention that exhumation of remains, especially prior to any attempt to identify the remains, would moot this lawsuit is ludicrous and would logically permit Defendants to moot the suit simply by exhumation of any random set of remains which they claimed could be those of Arthur H. Kelder. As ridiculous as this sounds, it is supported by Defendants' proposal to identify the ten sets of remains through the use of low discrimination mitochondrial DNA testing. As Plaintiff has previously set out, mitochondrial DNA is inadequate for identification without exactly the sort of additional circumstantial evidence provided by Plaintiff.

If Defendants wish to moot this portion of Plaintiff's complaint, they should stipulate to the identification of X816 as actually requested in Plaintiff's complaint rather than conduct a lengthy and inconclusive identification process which is unlikely to add to the available evidence.

V - 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 that Defendants intentionally and unreasonably

prevented the return of the remains of Arthur H. Kelder to his family for burial and denied due process to Plaintiff.

Further, 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 examine the remains as part of the discovery process as he has proposed. Defendants should not be allowed to drag out the process for even the 90 to 120 day best case scenario they describe when conclusive evidence could be available in weeks.

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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CERTIFICATE OF SERVICE

I hereby certify that on the 28th 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:

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/s/ _____
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