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

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIV. A. NO. SA-12-CA-1002-FB(HJB)
	§	
AMERICAN BATTLE MONUMENTS COMMISSION, *et al*	§	
	§	
	§	
Defendants	§	

PLAINTIFF' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO INTERVENE FILED BY SALLY HILL JONES

Plaintiff John Eakin, *pro se*, files this reply in support of Dr. Sally Hill Jones' Motion to Intervene.

I. Defendants' Prior Identification Claims Have Been Exaggerated

Defendants have previously assured this Court that they could provide a speedy resolution of the unidentified remains X816 that are at the heart of this case. To date they have not done so and appear no closer than they were. Their original projection of 90-120 days is long past. (Fletcher Decl ECF Doc. No. 64-1 at 5) After nearly six months, Defendants appear no closer than when they began.

Defendants now claim they know who X345 is NOT, but they admit that their non-identification is not scientifically valid. They project that their new testing technique will be scientifically validated in 2015. They make no claim as to the actual identity of X345, just who it is not. In 2003, Defendants informed one of the other possible families that X345 was not their

family member, but after more than twelve years they are still unable to determine whose remains they actually are.

II. Defendants Have Intentionally Delayed Identification of X816 and X345.

One consistent thread used to justify their delay in identification of both X816 and X345 is that the remains have been treated with an embalming compound which made extraction of DNA difficult. (Gardner Dec. ECF Doc. No. 96-1 ¶ 5, Tremaine Memo attach 1 ECF Doc. No. 96-1 ¶ 2, Second Status Report ECF Doc. No. 87 at 2e, Third Status Report ECF Doc. No. 88 at 2c, Fourth Status Report ECF Doc. No. 93 at 2, Fifth Status Report ECF Doc. No. 95 at 3)

However, Defendants have provided no evidence to support this claim. Nor have Defendants provided documentation of the Next Generation Sequencing they now claim to employ, despite this Court's Order that they do so. (Order ECF Doc. No. 77)

Plaintiff submits that such claims of chemical treatment of WWII era remains are unsupported by the facts and serve only to delay these proceedings. Even if these WWII era remains had been subjected to such treatment with embalming compounds, such use would have been readily apparent and alternate DNA extraction protocols were available to Defendants.

Attachment 1 is a scientific paper [1] dated 2007, which was co-authored by several of Defendants' employees. This paper examined certain Korean War remains, which had been processed through the Kokura, Japan mortuary facility and had been treated with embalming compounds and concluded that these treatments made it difficult to extract DNA from the remains. There was no inference that remains other than those recovered from the Korean War battlefield had received such treatment. The paper also stated that the treatment was "evidenced

[1] H.E.C. Koon, Diagnosing post-mortem treatments which inhibit DNA amplification from US MIAs buried at the Punchbowl, Forensic Sci Intl, (2007)

by a white powder found with the bones" and concluded that "differential scanning calorimetry (DSC)" successfully identified treated remains.

Attachment 2 is two pages from a PowerPoint handout prepared by AFDIL and given to Plaintiff at a family briefing in 2012. It is similar to the handout given Plaintiff at a 2010 family briefing. At the bottom of the first page is a slide referencing the Kokura treatment of remains. There is no inference that any WWII era remains received such treatment. At the top of the second page the slide indicates that semi-skeletal remains received treatment with cavity fluid/hardening compound. Further slides indicate that they were one hundred percent successful in obtaining DNA from treated remains when using the then newly developed demineralization protocol. At the bottom of the second page is a slide referencing what is presumably the same Next Generation Technology now referenced in the Tremaine Memo (Attachment 1 to ECF Doc. No. 96-1). Three years later, this Next Generation Technology appears no closer to being scientifically acceptable than it was then.

Attachment 3 is a history of Graves Registration [2] and recovery in the Korean War prepared by the U.S. Army Quartermaster Foundation. This paper describes the extensive use of embalming compounds necessary because, unlike the skeletal remains recovered after WWII, these Korean War remains consisted of primarily soft tissue requiring embalming treatment before they could be transported to the U.S. for burial. The WWII era skeletal remains at issue here required no embalming process for either sanitary or cosmetic purposes.

The obvious conclusions from these attachments are:

- WWII era remains such as X816 and X345 did not receive treatment with embalming compounds that might interfere with DNA testing for identification.

[2] Quartermaster Review-May/June 1954, *Homeward Bound*, *available at* http://www.qmfound.com/homeward_bound_korea.htm

- Chemically treated remains were readily identifiable either through the presence of white powder on the bones or DSC examination.
- DNA could be promptly and reliably extracted from remains which were identified as having received these chemical treatments

III. Plaintiff is Unable to Adequately Represent Other Parties

Plaintiff is flattered by Defendants' endorsement of his ability to represent both himself and the interests of others (Opp to Intervene ECF Doc. No. 96 at 2,6), but submits that it does not best serve the interests of Dr. Jones or the other MIA families who have expressed interest in joining this litigation. In other contexts, Defendants have argued against allowing Plaintiff to proceed *pro se*. (ECF 69, 78, & 82)

Plaintiff is all too aware of his shortcomings acting *pro se* in this case. Plaintiff is marginally competent to represent himself and absolutely not competent to represent the interests of others and would have significant potential conflicts if required to represent the interests of Intervenor(s).

IV. CONCLUSION

Plaintiff believes Defendants' claims of chemical treatment of the X816 and X345 remains are simply excuses for their out of date DNA testing processes and procedures and may, to some extent, explain Defendants' reluctance to disinter remains which could be identified in a modern laboratory. Regardless, the net result is that remains X816 and X345 likely could have been identified by using modern DNA testing protocols and equipment. Plaintiff would point at the May 2014 identification of PFC Lawrence Gordon where a non-DoD laboratory was able to report scientifically valid and accredited results in five days.

Plaintiff supports Dr. Jones' Motion to Intervene and likely will also support similar motions from other MIA family representatives who have expressed their desire to intervene.

Plaintiff notes Defendants' concession that his claims will be granted unless dismissed on threshold legal issues (which this Court has previously addressed) and suggests that resolution of his pending Motion for Summary Judgment on Due Process should be considered in order to advance resolution of this litigation.

For the above reasons and as stated in Dr. Jones' Motion to Intervene, the Court is urged to grant Intervenor's motion in the above styled case.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2015, I caused the foregoing to be electronically filed 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

I further caused a copy to be sent by First Class Mail to:

Sally Hill Jones, Ph.D
2661 Red Bud Way
New Braunfels, TX 78132

/s/
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