

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS  
COMMISSION, et al.

Defendants.

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Civ. A. No. SA:12-cv-1002-FB-HJB

**DEFENDANTS’MOTION TO STRIKE PLAINTIFF’S MOTION TO LIFT STAY AND  
FOR PARTIAL SUMMARY JUDGMENT ON ISSUE OF DUE PROCESS,  
OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME TO FILE OPPOSITION  
TO PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. MOTION TO STRIKE

Defendants United States Department of Defense, *et al.*, move to strike Plaintiff’s Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process. Defendants have previously objected to the plaintiff filing motions *pro se* in violation of 28 U.S.C. § 1654, which prohibits him from representing a third party, his cousin Douglas Kelder, in this Court. Plaintiff purports to be representing Mr. Kelder pursuant to a power of attorney. This issue was fully briefed in Defendants’ Objection to Magistrate’s Order Granting Plaintiff’ Motion to Vacate Appointment of Pro Bono Counsel and Allowing Plaintiff Leave to File Motion to Compel *Pro Se* (ECF 78). Defendants incorporate herein the arguments made in that Objection, and re-urge the Objection as necessary.

Defendants further move to strike the Motion because the case is administratively closed, and the plaintiff’s motion is not in accordance with the Court’s prior Order. In its Order closing

the case, the Court stayed the case “pending either side’s application for further relief within **thirty (30) days** of the conclusion of the disinterment and DNA testing of the ten sets of remains associated with Cabanatuan common grave 717, including the remains known as X-816 which are at issue in this case.” ECF 84.

Mr. Eakin’s motion for partial summary judgment was filed on January 8, 2015, prior to the event specified in the Court’s Order, specifically the identification of any remains. As set forth in Defendants’ Sixth Status Report, filed today January 22, 2015, the remains of PVT Kelder have been identified. Mr. Kelder and Mr. Eakin were so notified today. The Army Casualty Office is in the process of scheduling a briefing with plaintiff, which hopefully will occur in the next few weeks. However, following notification of the identification, Mr. Eakin informed undersigned counsel that he would not withdraw this motion.

Mr. Eakin’s motion to lift the stay predates the identification and is premised on his allegations of government delay. That claim is now moot. Plaintiff’s motion further re-urges the same due process grounds that have been addressed fully in defendants’ previous dispositive motions. See ECF 47, 54, 64, and 75, incorporated by reference herein. Plaintiff’s motion presumes the existence of a due process right, as well as plaintiff’s standing and jurisdiction, all of which have been and continue to be contested by defendants. Id. Requiring defendants to respond to this latest motion with yet another, cumulative, substantive pleading, including having to produce an appendix responding to plaintiff’s statement of material facts, is burdensome and will add nothing to the Court’s consideration of the issues in this case.

In accordance with the Court’s Order staying the case, defendants urge the Court to strike this pleading. In the event plaintiff rejects the identification of PVT Kelder’s remains or wishes

to pursue other claims, he may apply through counsel for further relief, in accordance with the Court's Order. ECF 84.

II. MOTION FOR EXTENSION OF TIME

In the alternative, should the Court deny defendants' motion to strike, defendants respectfully request a 30-day extension of time to respond to plaintiff's motion. Thirty days will hopefully allow the briefing to take place, and for plaintiff to have the identification analyzed by his consultants and decide whether to accept the identification. The undersigned also requests the additional time to consult with her clients on the procedures that are in effect once an identification has occurred, should the plaintiff not accept it. Given the developments that occurred only today, thirty days is not unreasonable. This time will hopefully allow both parties to consider what issues remain and to re-urge motions as necessary, and as contemplated by this Court's Order staying the case.<sup>1</sup>

Respectfully submitted,

**RICHARD L. DURBIN, JR.**  
Acting United States Attorney

*/s/ Susan Strawn*  
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**CERTIFICATE OF SERVICE**

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<sup>1</sup> Mr. Eakin does not oppose an extension.

I hereby certify that on the 22nd 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:

John Eakin  
Plaintiff *pro se*

And caused a copy to be sent, by certified U.S. Mail, to:

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

/s/ Susan Strawn  
SUSAN STRAWN  
Assistant United States Attorney