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

JOHN A. PATTERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 5:17-CV-00467
	)	
DEFENSE POW/MIA ACCOUNTING AGENCY, et al.,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF DEFNDANTS' MOTION TO DISMSS

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INTRODUCTION

Plaintiffs have a worthy goal—the identification and repatriation of seven deceased servicemembers lost in the Philippines during World War II. But this lawsuit does not provide an appropriate means of furthering that goal. Plaintiffs depend entirely on the Mandamus Act for their cause of action, but they have failed to establish that the Government is currently violating any mandatory duty toward them, that they have a clear right to relief, and that there is no other adequate remedy. Accordingly, their claims should be dismissed for failure to state a claim, and much of the relief they request should be dismissed for lack of jurisdiction.

Plaintiffs no longer defend their claims for injunctive relief, which is not available under the Mandamus Act or Declaratory Judgment Act. And they clarify that the relief they seek under the Declaratory Judgment Act depends on the merits of their mandamus claims. Accordingly, they have conceded most of Defendants' jurisdictional points and the failure of their Mandamus Act claims disposes of the entire case. Plaintiffs' complaint should be dismissed with prejudice on all grounds.

ARGUMENT

I. Plaintiffs Have Failed to State a Claim Under the Mandamus Act.

Plaintiffs have failed to carry their burden to "plead enough facts to state a claim to relief that is plausible on its face." *Roberts v. Ochoa*, No. 14-0080, 2014 WL 4187180, at *4 (W.D. Tex. Aug. 21, 2014) (ultimately quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). They have not carried their burden to establish each element of a claim under the Mandamus Act:

> (1) the plaintiff has a clear right to relief,
> (2) the defendant a clear duty to act, and
> (3) no other adequate remedy exists.

Randall D. Wolcott, M.D., P.A. v. Sebellius, 635 F.3d 757, 768 (5th Cir. 2011).

Disregarding judicial reminders that mandamus is an "extraordinary" and "drastic" remedy, reserved for "the clearest and most compelling of cases," *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969); *Ramirez-Gomez v. Melendez*, No. 05-74, 2005 WL 3534463, at *1 (W.D. Tex. 2005), Plaintiffs do not organize their brief around the three elements of a mandamus claim or attempt to systematically show that they meet each element for each theory. Nor do they engage most of Defendants' arguments. Instead they rely on conclusory statements in the complaint and unsupported factual assertions by Plaintiffs' counsel in their brief. Accordingly, Plaintiffs have not asserted non-conclusory factual allegations that are sufficient "to raise a right to relief above the speculative level." *McBride v. Reynolds*, No. 17-120, 2017 WL 2817096, at *1 (W.D. Tex. June 29, 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). Plaintiffs' complaint must be dismissed for failure to state a claim.

A. Plaintiffs Have Neither Pled Any Nondiscretionary Duties Nor Established a Clear Right to the Relief Sought.

It is undisputed that Plaintiffs must carry a heavy burden to establish the first two prongs of a Mandamus Act claim. They "must demonstrate that a government officer owes the [Plaintiffs] a legal duty that is a specific, ministerial act, devoid of the exercise of judgment or discretion." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.2d 1283, 1288 (5th Cir. 1997); *see also id.* ("The legal duty must be set out in the Constitution or by statute, and its performance must be positively commanded and so plainly prescribed as to be free from doubt."). And the complaint must specifically plead facts showing that "there was a breach of the duty such that [plaintiff] is clearly entitled to relief in mandamus." *Randal D. Wolcott*, 635 F.3d at 772. Neither their complaint nor their opposition brief carries this burden.

Plaintiffs' complaint alleged two nondiscretionary duties for the Defense POW/MIA Accounting Agency ("DPAA"): a "ministerial duty to identify and recover [the relevant]

remains," Compl. § V(A), ¶¶ 7-8, and a "ministerial duty to communicate with Plaintiffs in a readily available manner." *Id.* ¶ 9. But in their opposition brief, Plaintiffs entirely abandon the communication theory and concede that decisions regarding disinterment involve the exercise of agency discretion. *See* Pls.' Opp'n at 8, ECF No. 10 (specifically admitting that "the outcome of a DPAA determination as it relates to disinterment requests is discretionary"); *id.* at 7 ("Plaintiffs agree with the Defendants" that "the DPAA has broad discretion in making a determination to proceed with the disinterment"). They similarly do not defend the five specific requests for mandamus relief set out in their complaint. *See* Defs.' Br. at 22-25 (addressing Compl. Prayer ¶¶ 1-5). Instead, Plaintiffs spend the bulk of their brief advancing novel duty theories that were not pled in their complaint. A party may not salvage its pleading by advancing new legal theories in response to a motion to dismiss. *See, e.g.*, *Davis v. DRRF Trust 2015-1*, No. 5:15-880, 2016 WL 8257126, at *3 (W.D. Tex. Jan. 6, 2016) (declining to consider argument not included in complaint but raised for first time in opposition to motion to dismiss). Accordingly, the Court should reject Plaintiffs' efforts to establish the elements of a duty to act and a breach of that duty.

Nor are Plaintiffs' new arguments—even if cognizable—any more persuasive than the claims they have abandoned. First, Plaintiffs claim that the DPAA has a ministerial duty "to act on [Plaintiffs'] disinterment requests." Pls.' Opp'n at 7; *id.* at 8 ("undertaking the analysis itself is not [discretionary]"). But Plaintiffs have not grounded this claim in any specific statutory requirement. As Defendants explained in their opening brief, there is nothing ministerial about the broad "[r]esponsibility for accounting for missing persons from past conflicts, including locating, recovering, and identifying missing persons from past conflicts or their remains after hostilities have ceased." 10 U.S.C. § 1501(a)(2)(B); *see* Defs.' Br. at 17-20. Nor does the statute set out a specific process for responding to disinterment requests. Instead—as Plaintiffs

concede, *see* Pls.' Opp'n at 7—the statute gives DPAA the discretion to determine whether any information brought to its attention is "new" and "credible," 10 U.S.C. § 1509(e)(3), and whether it "may be related to one or more unaccounted for persons," *id.* § 1509(e)(1), leading to a "determin[ation] whether the [new] information is significant enough to require a board review." *Id.* § 1505(c)(3) (incorporated by § 1509(e)(2)(B)). Accordingly, Plaintiffs have not carried their burden to show that what they seek involves a legal duty that is "positively commanded and so plainly prescribed as to be free from doubt." *Dunn-McCampbell*, 112 F.2d at 1288.

Equally important, Plaintiffs have not established that DPAA has failed to act on any Plaintiff's specific disinterment request. Their complaint relies on vague generalities about "compelling evidence provided by Plaintiffs." Compl. § V(A) ¶ 7. But they have not established any specific request on which the DPAA has failed to act. *See* Defs.' Br. at 22-23 (pointing out that only two of the plaintiffs "plead facts indicating contact with DPAA or its predecessor"). Plaintiffs concede that Plaintiff John Patterson received a detailed response to his 2015 disinterment request, *see* Pls.' Opp'n at 7-8; *see also* Defs.' Exs. G, H, ECF Nos. 7-7, 7-8, and that DPAA's predecessor disinterred remains relevant to Plaintiff Douglas Kelder. *See* Compl. § IV(G) ¶ 4. And they establish no other specific request.[1] *See Rodriguez v. Bexar County Hosp. Dist.*, No. SA-14-CA-861, 2015 WL 7760209, at *6 (W.D. Tex. Nov. 30, 2015 (holding that a complaint does not "suffice if it renders naked assertions devoid of further factual

[1] Plaintiffs' assertions in their opposition brief that "all of the Plaintiff[s] . . . have made frequent requests for disinterment, some spanning decades," Pls.' Opp'n at 7, and that "[a]ll of the [Plaintiffs] have provided multiple DNA samples for comparison to the disinterred remains" after 1997, *id.* at 10; *id.* at 7 n.15, are unsupported by the complaint or other evidence and are entitled to no weight. *See Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 707 n.10 (5th Cir. 2017) (rejecting "bald assertion" at motion-to-dismiss stage because plaintiffs offered "nothing to support" it); *McFatridge v. Bank of America, N.A.*, No. W-13-CV-032, 2013 WL 12120402, at *1 (W.D. Tex. May 9, 2013) ("An attorney's unsworn statements in a brief are not evidence.").

enhancement"). Plaintiff John Boyt's unsworn statement—which cannot remedy deficiencies in the complaint[2]—merely states that he provided information regarding Colonel Loren Stewart and another soldier in 2013. *See* ECF No. 10-4. He does not claim to have requested disinterment at that time, nor does his 1982 letter submitting information and his vague claim to have "repeated [his efforts] at periodic intervals" after 1982, *see id.*, plausibly support any current failure to perform a ministerial duty.[3] Accordingly, even if Plaintiffs could establish the duty they propose, they have not established any breach of that duty giving them a clear right to relief.

Plaintiffs' second novel claim also fails. They point to § 1509(d), which requires the Secretary of Defense to establish personnel files for unaccounted-for service members and to establish a "centralized database and case management system." *See* Pls.' Opp'n at 4-5 (quoting 10 U.S.C. § 1509(d)(1), (4)). Assuming that this provision could give rise to a ministerial duty, Plaintiffs have neither pled any facts plausibly indicating that Defendants are currently failing to comply with these requirements, nor demonstrated that Plaintiffs themselves have been injured by any such failure. Instead, they rely almost exclusively on reports from 2013 and 2014, *see* Pls.' Br. at 5, which merely provide information regarding the concerns that led Congress, in December 2014, to provide for creation of DPAA and led the Department of Defense ("DoD") to

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[2] To consider Plaintiff's unsworn affidavit, the Court would have to convert Defendants' motion to dismiss into a motion for summary judgment. *See Simmang v. Texas Bd. of Law Examiners*, 346 F. Supp. 2d 874, 890-91 (W.D. Tex. 2004) ("If the Court decides to accept matters outside the pleading, however, it must convert the motion to dismiss into one for summary judgment."). But because the affidavit does not include the attestation required by 28 U.S.C. § 1746, it cannot be considered under either the motion to dismiss or summary judgment standard. *See Steward v. Abbott*, 189 F. Supp. 3d 620, 627-28 (W.D. Tex. 2016) (upholding use of declarations at motion-to-dismiss stage because they complied with 28 U.S.C. § 1746); *Bazemore v. Castenada*, No. 10-403, 2011 WL 1675416, at *4 (W.D. Tex. Apr. 12, 2011) (statement must be made "under penalty of perjury" and verified as "true and correct" to be considered at summary judgment stage).

[3] Indeed, Mr. Boyt's statement does not even allege that he submitted a DNA sample in response to the Government's 2012 letter requesting that he do so. *See id.*

undertake the series of policy developments laid out in Defendants' opening brief. *See* Defs.' Br. at 6-11, ECF No. 7.[4] Such stale evidence cannot establish that DPAA, created in January 2015, has failed to perform any specific duty. This claim must be dismissed for lack of standing and for failure to state a claim.

Third, Plaintiffs allege that until May 5, 2016, DPAA failed to maintain an operative disinterment memorandum. Pls.' Opp'n at 5-6. But Plaintiffs identify no statutory requirement to maintain such a policy. And, even if Plaintiffs' understanding of DoD memoranda policy were correct,[5] there is no mandamus claim for an alleged agency failure that has since been remedied. *See, e.g.*, *In re Crystal Power Co.*, 641 F.3d 82, 85 n.9 (5th Cir. 2011) ("[P]ast delays, without more, do not speak to any *present* hardship Crystal Power now faces if deprived of mandamus review."). Current policy is set by the Deputy Secretary of Defense's April 14, 2015 memorandum, ECF No. 7-5, and DTM-16-003 (May 5, 2016, as amended June 15, 2017), ECF No. 7-13. These memoranda are published on public DoD websites. *See* DoD Issuances, http://www.esd.whs.mil/DD/DoD-Issuances/DTM/, (including all recent DTMs); DoD

[4] Plaintiffs also rely on news articles from 2013 and 2014. *See* Pls.' Opp'n at 1 n.2, *id.* at 5 n.9, *id.* at 8. The Court should not take judicial notice of disputable factual claims in news articles. *See* Fed. R. Evid. 201(b) (the fact to be judicially noticed must be "not subject to reasonable dispute" from "sources whose accuracy cannot reasonably be questioned"); *Patch v. Arpaio*, No. 08-0388, 2010 WL 432354, at *12 (D. Ariz. Feb. 2, 2010 ("[N]ewspaper articles, unsupported by corroborating evidence, are generally inadmissible hearsay."); *Baker v. Wade*, 106 F.R.D. 526, 528 n.8 (N.D. Tex. 1985) (declining to take judicial notice of "hearsay articles in newspapers and general news magazines" because it "is not proper for this Court to consider such hearsay").

[5] Plaintiffs claim that the 1999 memorandum, ECF No. 7-1, was a "directive-type memorandum" that expired six months after it was issued. However, the 1999 memorandum does not indicate that it fell under this category, and even if it did, policy regarding whether or not "directive-type memoranda" expire has varied over the years. *Compare* DoD Directive 5025.1, DoD Directives System § 3.2 (July 14, 2004) (cancelled) (attached as Ex. N) (such memoranda "shall remain in effect until the information is incorporated into a permanent DoD issuance, which shall be issued as soon as practical"); *with* DoD Instruction 5025.01, DoD Issuances Program § 5.1(b) (Aug. 1, 2016, as amended Apr. 10, 2017) (attached as Ex. O) (such memoranda expire "12 months from the publication date" but may be extended upon request).

Publications website, https://www.defense.gov/News/Publications/ (including 2015 memorandums as hyperlink titled "DSD Memo Disinterment of Unknowns from the National Memorial Cemetery of the Pacific"). The publication of these operative policies moots Plaintiffs' complaint that DPAA Administrative Instruction ("AI") 2310.01, ECF No. 7-11, was not published on a public website.[6] *See* Pls.' Opp'n at 6-7. Moreover, Plaintiffs neither identify anything requiring that this internal guidance be published, nor explain how this alleged failure injured them. Nor are the specific disinterment thresholds set by the 2015 memorandum and DTM-16-003 ("more likely than not" and "at least 60 percent" of service members associated with commingled remains) rendered "confusing, shifting and contradictory," Pls.' Opp'n at 8, by Defendants' opening brief's comparison to the 1999 memorandum's "high probability" standard. *See* Defs.' Br. at 10 n.4. The specificity of current policy addresses any concern about vagueness in the 1999 standard, or the possibility for that standard to be applied too restrictively.

Finally, Plaintiffs claim that it is a "classic failure to perform a ministerial duty," Pls.' Opp'n at 11, for the DPAA to "not prioritize its cases." *Id.* at 9. Plaintiffs suggest that DPAA should "exclude" the approximately 50,000 cases deemed likely unrecoverable because they were "lost in deep water in aviation and shipping mishaps." *Id.* at 9. Even if a statute required such prioritization—and Plaintiffs cite none—Plaintiffs point to no evidence that such prioritization is not currently occurring. To the contrary, Defendants explained in their opening brief that DoD Directive 2310.07, DoD Past Conflict Personnel Accounting Program (Apr. 12, 2017), ECF No. 7-10, sets forth prioritization categories, *see* Defs. Br. at 7-8, and emphasized

[6] DTM-16-003 remains operative. It was not "superseded" by DPAA AI 2310.01 as Plaintiffs claim. *See* Pls.' Opp'n at 6. Because DTM-16-003 was issued by the Undersecretary for Defense, it is not a "DPAA memorandum" covered by AI 2310.01's supersession clause. *See* ECF No. 7-13. Indeed, DTM-16-003 was amended in June 2017, after AI 2310.01 was issued in February 2017. *See id.*; *see also* ECF No. 7-11.

that such prioritization is an inherent attribute of DPAA's mission, *see id.* at 9, 19.[7] Also contrary to Plaintiffs' assertion, the DPAA is on track to meet the congressional target of at least 200 identifications this year. *See* DPAA, Our Missing: Recently Accounted For (link) (listing more than 180 identifications made so far this calendar year).[8] In any event, any duty to set mission priorities inherently involves the exercise of discretion and cannot be the basis for a mandamus claim. *Cf. Newsome v. EEOC*, 301 F.3d 227, 231 (5th Cir. 2002); *Heily v. U.S. Dep't of Defense*, 896 F. Supp. 2d 25, 36 (D.D.C. 2012); *Hicks v. Brysch*, 989 F. Supp. 797, 817 (W.D. Tex. 1997); *Duchow v. United States*, No. 95-2121, 1995 WL 425037, at *3 (E.D. La. 1995), *aff'd* 114 F.3d 1181 (5th Cir. 1997) (per curiam).

B. Plaintiffs Have Not Shown That Available Remedies Are Inadequate or That Plaintiffs Can Overcome the Equitable Reasons Mandamus Should Be Denied.

In addition to Plaintiffs' failure to establish both a mandatory duty and breach of that duty, there are two additional reasons to deny their mandamus claim. First, Plaintiffs offer no response to Defendants' showing that DPAA's administrative process and the Missing Service Personnel Act's judicial review procedures provide an adequate remedy. *See* Defs.' Br. at 25-26; *Randal D. Wolcott*, 635 F.3d at 768 (holding that "[t]he third element requires that there be no other adequate remedy available," whether a judicial or administrative remedy). *Cf.* Pls.' Opp'n

[7] Plaintiffs cite two mortuary affairs policies. *See* Pls.' Opp'n at 10 & n.24; DoD Directive 1300.22, Mortuary Affairs (Oct. 30, 2015), ECF No. 7-6; Joint Publication 4-06, Mortuary Affairs (Oct. 12, 2011), ECF No. 7-2. These policies, while relevant to the *disposition* of all remains, do not apply to the *recovery* and *identification* of remains from past conflicts. More recent regulations specific to the Past Conflict Personnel Accounting Program and the DPAA, as discussed in Defendants' opening brief, *see* Defs.' Br. at 7-11, provide the guidance relevant here.

[8] Defendants' opening brief was inadvertently incorrect in characterizing this webpage, *see* Defs.' Br. at 9—the webpage is organized by calendar year not fiscal year, and by the time the opening brief was filed, more than 155 identifications were listed for 2017.

at 11 (making no legal argument but merely averring that "Plaintiffs have sought relief through DPAA and its administrative process for decades"). Plaintiffs themselves acknowledge that they have an opportunity to seek disinterment through a recently-strengthened administrative process and that their requests would take "high priority" over third party requests, *see* Pls.' Opp'n at 10 (quoting AI 2310.01(3)(e)), but they have chosen to pursue litigation based on vague assertions about decades-old requests rather than employ the available administrative process. Neither the judicial review provisions crafted by Congress nor the Mandamus Act standard countenance such an inefficient approach. *See* Defs.' Br. at 25-26. Rather, Plaintiffs should employ the available administrative process—submitting whatever evidence leads them to believe they have identified the likely graves of their relatives to enable the Government to make a fully informed decision pursuant to the DoD's and DPAA's current policies.

Finally, Plaintiffs offer no response to Defendants' showing that even if the elements of a mandamus claim could be satisfied, "equitable principles" recommend against this exercise of "judicial discretion." *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969). A judicial requirement to prioritize identification of these Plaintiffs' relatives merely because they have filed a federal lawsuit would simply displace other identification efforts that are ongoing. And the Court is not well positioned to weigh Plaintiffs' claims against the appropriate scientific and factual standards, especially in the absence of a complete record developed by DPAA through the administrative process. *See* Defs.' Br. at 26-27.

In sum, Plaintiffs have failed to carry their burden to establish each element of a mandamus claim. Their complaint must be dismissed for failure to state a claim.

II. Plaintiffs Are Entitled to No Relief

In light of Defendants' showing that the Court lacks jurisdiction to grant injunctive relief, *see* Defs.' Br. at 27-28, Plaintiffs no longer press such claims. *See* Pls.' Opp'n at 11-12.

Similarly, in response to Defendants' arguments about the scope of the Declaratory Judgment Act, *see* Defs.' Br. at 28-30, Plaintiffs concede that the exclusive jurisdictional basis for their claims is the Mandamus Act. *See* Pls.' Opp'n at 12. Accordingly, because their Mandamus Act claims fail for all of the reasons discussed above, Plaintiffs are entitled to no relief, declaratory or otherwise.

Moreover, Plaintiffs offer no meaningful response to Defendants' specific arguments against each prayer for relief in Plaintiffs' complaint. *Compare* Def.' Br. at 28-30 *with* Pls.' Opp'n at 12-13. It is not sufficient for Plaintiffs to claim without citation that the relief they seek is "consistent with the elements Courts generally apply when determining" relief under the Declaratory Judgment Act. Pls.' Opp'n at 12. Not least, Plaintiffs have failed to "allege facts from which it appears there is a substantial likelihood that [they] will suffer injury in the future." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003).

Plaintiffs are entitled to none of the relief they seek and their claims should therefore be dismissed for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and dismiss the complaint with prejudice.

Dated: November 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2017, 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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