

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

JOHN A. PATTERSON, JOHN BOYT, JANIS )  
FORT, RUBY ALSBURY, RAYMOND )  
BRUNTMYER, JUDY HENSLEY, and )  
DOUGLAS KELDER, )

Plaintiffs, )

v. )

No. 5:17-CV-00467

DEFENSE POW/MIA ACCOUNTING )  
AGENCY; KELLY MCKEAGUE, in his )  
official capacity as Director of the DPAA; U.S. )  
DEPARTMENT OF DEFENSE; JAMES )  
MATTIS, in his official capacity as Secretary of )  
Defense; AMERICAN BATTLE )  
MONUMENTS COMMISSION; and )  
WILLIAM MATZ,<sup>1</sup> in his official capacity as )  
Secretary of the American Battle Monuments )  
Commission, )

Defendants. )

**DEFENDANTS’ CONSENT MOTION FOR LEAVE TO FILE ANSWER TO FIRST  
AMENDED COMPLAINT**

Pursuant to Rule 6(b)(1) of the Federal Rules of Civil Procedure and the Court’s inherent authority to manage its docket, the U.S. Department of Defense, Defense POW/MIA Accounting Agency, American Battle Monuments Commission, and the heads of those agencies sued in their official capacities (collectively “Defendants”), respectfully request leave of Court to file their

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<sup>1</sup> On January 9, 2018, retired Major General William Matz was sworn in as Secretary of the American Battle Monuments Commission. Accordingly, pursuant to Fed. R. Civ. P. 25(d), Mr. Matz is substituted for former Acting Secretary Robert Dalessandro.

attached Proposed Answer to Plaintiffs' Amended Complaint.<sup>2</sup> In support of this motion, Defendants show as follows:

1. On November 20, 2017, the Court dismissed Plaintiffs' original Complaint without prejudice, and allowed Plaintiffs to file an amended complaint on or before December 4, 2017. *See* ECF No. 14. Upon Plaintiffs' request, the Court extended the deadline for an amended complaint until January 4, 2018. *See* Minute Order, Dec. 4, 2017.

2. On January 4, 2018, Plaintiffs filed their First Amended Complaint alleging nine counts under not only the Mandamus Act and Declaratory Judgment Act but also under various constitutional provisions, the Administrative Procedure Act, and Religious Freedom Restoration Act. *See* 1st Am. Compl., ECF No. 19.

3. On January 8, 2018, the Court contacted the parties by email to request that the parties file a Joint Proposed Scheduling Order, and accepted undersigned counsel's request that the parties be permitted to make the joint filing on January 17, 2018.

4. On January 17, 2018, the parties submitted a Joint Proposed Scheduling Order setting out an agreed schedule for Defendants to respond to the First Amended Complaint on or before March 2, 2018, and proposing that the Court defer entry of a Rule 16 scheduling order until after ruling on Defendants' renewed motion to dismiss. *See* ECF No. 21.

5. On January 18, 2018, the Court contacted the parties by telephone to request that they submit a full Joint Proposed Scheduling Order as soon as possible. The Court did not rule on the parties' proposed briefing schedule for a motion to dismiss.

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<sup>2</sup> The undersigned counsel represents Defendants solely in their official capacities, and by this proposed Answer does not make or waive any argument or defense on behalf of any defendant purportedly sued in their personal capacity, and also does not waive any other right, claim, or defense these individuals may have, including as to proper service of process.

6. After the parties met and conferred on January 22, 2018 regarding the subjects required by Rules 16 and 26 and exchanged drafts of the filing, the parties submitted a Supplemental Joint Rule 26(f) Report and Proposed Schedule on February 2, 2018. The parties again jointly proposed that Defendants' response to the First Amended Complaint be due on or before March 2, 2018. *See* ECF No. 22 at 17.

7. On February 5, 2018, the Court adopted a Scheduling Order for the case, but did not address the schedule for Defendants to file an Answer or otherwise respond to the First Amended Complaint. *See* ECF No 23.

8. The Federal Rules provide a party only fourteen days from service of an amended pleading to file a response. *See* Fed. R. Civ. P. 15(a)(3). Before that period expired on January 18, 2018, the parties jointly sought leave of Court for Defendants' to file a response on March 2, 2018. *See* ECF No. 21 (Jan. 17, 2018); *see also* ECF No. 22 (Feb. 2, 2018) (renewing request).

9. There is good cause to grant Defendants leave to file their Answer now. *See* Fed. R. Civ. P. 6(b)(1)(A) (“[T]he court may, for good cause, extend the time: (A) With, or without motion . . . if a request is made[] before the original time . . . expires[.]”). The First Amended Complaint, containing 137 number paragraphs and nine counts, is substantially different from the original complaint both in its organization and in the facts alleged and the legal claims advanced. The fourteen day period provided by Rule 15(a)(3) was not sufficient for undersigned counsel to obtain from the agency the information necessary to prepare a response, research the claims and potential defenses, and prepare a response, especially in light of undersigned counsel's obligations in other matters. Undersigned counsel had numerous significant deadlines during January and February, including two briefs and a summary judgment hearing in three

consolidated cases in the U.S. District Court for the Southern District of California. The Parties also spent substantial time negotiating the Joint Proposed Briefing Schedule.

10. Plaintiffs, having jointly proposed a briefing schedule for Defendants' Renewed Motion to Dismiss beginning on March 2, 2018, will not be prejudiced by Defendants' filing of an Answer on that date. Closure of the pleadings at this time serves the interests of all parties.

11. For all these reasons, Defendants respectfully request that the Court grant this motion, and that it allow Defendant until March 2, 2018 to move or plead in response to Plaintiff's First Amended Complaint. Granting Defendants this time to respond will not require any change to the current Scheduling Order. The Proposed Answer is attached as Exhibit A, and a proposed Order is attached for the Court's review and entry.

**CERTIFICATION OF GOOD FAITH CONFERENCE**

The undersigned hereby certifies that he conferred with John Smithee and Ron Sprague, counsel for Plaintiff, on March 2, 2018 for the purpose of seeking Plaintiffs' agreement with this motion, and Plaintiffs' counsel notified the undersigned that Plaintiffs consent to Defendant's request for an extension of time through March 2, 2018.

Dated: March 2, 2018

Respectfully submitted,

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Acting Assistant Attorney General

JOHN F. BASH  
United States Attorney

ANTHONY J. COPPOLINO  
Deputy Director  
Civil Division, Federal Programs Branch

/s/ Galen N. Thorp  
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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of March, 2018, 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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