

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, in his official capacity as)
Secretary of the American Battle Monuments)
Commission,)

Defendants.)

**DEFENDANTS’ AMENDED ANSWER TO PLAINTIFFS’ FIRST AMENDED
COMPLAINT**

The U.S. Department of Defense (DOD), Defense POW/MIA Accounting Agency (DPAA), American Battle Monuments Commission (ABMC), and the heads of those agencies sued in their official capacities (collectively “Defendants”),¹ by and through undersigned counsel, hereby submit this amended answer to the First Amended Complaint, ECF No. 19,

¹ The undersigned counsel represents Defendants solely in their official capacities, and by this response 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.

pursuant to Federal Rule of Civil Procedure 15(a)(2) on the basis of Plaintiffs' written consent, and hereby answer as follows:

FIRST DEFENSE

This Court lacks jurisdiction in whole or in part over Plaintiffs' claims because they lack standing to bring these claims.

SECOND DEFENSE

This Court lacks jurisdiction in whole or in part over the Plaintiffs' claims because the sovereign immunity of the United States has not been waived.

THIRD DEFENSE

This Court lacks jurisdiction in whole or in part over the Plaintiffs' claims because of their failure to exhaust available administrative and/or judicial remedies.

FOURTH DEFENSE

The First Amended Complaint fails to state a claim upon which relief can be granted.

FIFTH DEFENSE

Plaintiffs' claims are barred in whole or in part because of their failure to bring this action within the applicable statutes of limitation.

SIXTH DEFENSE

Plaintiffs' claims are barred in whole or in part by the doctrine of laches because of their failure to bring this action within a reasonable period of time.

SEVENTH DEFENSE

Plaintiffs' claims are barred in whole or in part by the doctrines of res judicata and/or collateral estoppel.

EIGHTH DEFENSE

Plaintiffs' claims are barred in whole or in part because the actions they challenge are not final agency action within the meaning of the Administrative Procedure Act (APA).

NINTH DEFENSE

Plaintiffs' claims are barred in whole or in part because they actions they challenge are committed to agency discretion by law.

TENTH DEFENSE

Defendants answer the individually numbered paragraphs of the First Amended Complaint, using the same numbering and headings contained in the First Amended Complaint, as follows:

1. This paragraph contains plaintiffs' characterization of their action to which no response is required.

SUMMARY OF CASE

2. This paragraph contains plaintiffs' characterization of their action to which no response is required, but insofar as one is deemed required, denied.

RELATED LITIGATION

3. The first sentence is admitted. The second sentence is denied, except to admit that partial remains for Private Arthur Kelder (PVT Kelder) were identified in January 2015 after the disinterment of ten graves from Manila American Cemetery in August 2014. The third sentence is denied. The remaining sentences characterize a court order dated August 5, 2013, which order speaks for itself and the Court is respectfully referred thereto for the terms thereof.

4. The first sentence is admitted. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the second sentence.

PARTIES

5. This paragraph constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

6. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence, except to admit that First Lieutenant Nininger (1LT Nininger) was awarded the Medal of Honor. The second sentence is admitted, and Defendants further aver that the designation is based exclusively on relationships represented by the family and not on a genealogy test conducted by Defendants. The third, fourth, and fifth sentences constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the sixth sentence.

7. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence. The second sentence is admitted, and Defendants further aver that the designation is based exclusively on relationships represented by the family and not on a genealogy analysis conducted by Defendants. The third, fourth, and fifth sentences constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the sixth sentence.

8. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence. The second sentence is admitted, and Defendants further aver that the designation is based exclusively on relationships represented by the family and not on a genealogy analysis conducted by Defendants. The third, fourth, and fifth sentences constitutes conclusions of law to which no answer is required, but insofar as one is

deemed required, denied. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the sixth sentence.

9. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence. The second sentence is admitted, and Defendants further aver that the designation is based exclusively on relationships represented by the family and not on a genealogy analysis conducted by Defendants. The third, fourth, and fifth sentences constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the sixth and seventh sentences.

10. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence. The second sentence is admitted, and Defendants further aver that the designation is based exclusively on relationships represented by the family and not on a genealogy analysis conducted by Defendants. The third, fourth, and fifth sentences constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the sixth sentence.

11. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence. The second sentence is admitted, and Defendants further aver that the designation is based exclusively on relationships represented by the family and not on a genealogy analysis conducted by Defendants. The third, fourth, and fifth sentences constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the sixth and seventh sentences.

12. The first and second sentences are admitted. The third, fourth, and fifth sentences constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the sixth sentence.

13. The first sentence, including footnote 3, is denied except to admit that the DOD is headed by Secretary of Defense James Mattis, that the DPAA is headed by Director Kelly McKeague, and that the DPAA was established in 2015. Defendants further aver that the ABMC is headed by Secretary William Matz. The second sentence constitutes conclusions of law to which no answer is required. The third sentence constitutes Plaintiffs' characterization of their action, to which no response is required.

JURISDICTION AND VENUE

14-15. These paragraphs set forth Plaintiffs' assertion of jurisdiction and venue and thus constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

FACTUAL ALLEGATIONS

I. The "Unidentified Remains" Have Been and/or Can be Identified

16. As to the first sentence, Defendants admit that the seven service members identified in the Amended Complaint lost their lives serving honorably during World War II; for Plaintiffs' relationships to those service members, Defendants incorporate by reference their responses to paragraphs 6-12 above. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations that the remains of these seven service members were buried as "Unknowns" because it is also possible that their remains were not recovered or were mistakenly buried as the remains of another person. The third sentence is

denied. The fourth sentence constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

A. Alexander R. Nininger's Remains Have Been Located

17. Admitted.

18. The first sentence is denied, except to admit that several witnesses reported to U.S. Army investigators or 1LT Nininger's family that 1LT Nininger was buried in Abucay in the vicinity of the church, and that these witnesses provided several different and conflicting locations for the burial. *See, e.g.*, Ex. 5, Letter from Colonel George Clarke, Feb. 20, 1944 ("buried in grave No. 9 behind the south wall of the Abucay church"); Ex. 6, Letter from Herbert Maynard, Sept. 10, 1946 (quoting two different letters indicating that Nininger and several others were buried "in the Abucay Church Yard"); Ex. 7, Letter from Major Harold Imerman, Oct. 10, 1949 ("buried in the immediate vicinity of the church of Abucay, probably in the church yard"); Ex. 8, Letter from Lieutenant Colonel John Raulston, Nov. 5, 1949 ("[Chaplain Secina] established a little graveyard in the plot of the ground within the five foot wall around the church."); Ex. 9, Letter from Colonel Garnet Francis, Sept. 27, 1985 ("Col. Clarke . . . would be a very poor source of information." "The location of the grave sites was 150 feet west of the road and 50 feet south of the bank of the stream."). The second sentence is denied. Defendants further aver that records indicate the Army Graves Registration Service (AGRS) exhumed the remains later designated X-1130 Manila #2 Cemetery from Soldiers' Row in Abucay cemetery, which is south of the river and about half a mile away from the church. *See* Ex. 1, Report of Disinterment, Jan. 8, 1946; Ex. 4, Military Map of Abucay (undated); Ex. 19, Resume of Record, Oct. 5, 1950.

19. This paragraph is denied. Defendants aver that recommendations to identify remains X-1130 as 1LT Nininger were made on several occasions, *see, e.g.*, Exs. 10, 12, 15 (AGRS memoranda dated December 8, 1948, April 26, 1949, and March 7, 1950), and were deferred or denied for several reasons, including the discrepancy between the location remains X-1130 was recovered from and testimony regarding 1LT Nininger's burial location, *see, e.g.*, Exs. 11, 13, 14, 16 (Office of the Quartermaster General memoranda dated Feb. 17, 1949, Sept. 28, 1949, Nov. 28, 1949, and Mar. 24, 1950). Defendants further aver that in addition to January 1946 disinterment of remains from Abucay cemetery, AGRS disinterred a series of fourteen graves outside the walls of the church yard in May 1946, *see* Ex. 2, Reports of Disinterment, May 21, 1946; disinterred the entire area within the walls of the church yard not occupied by buildings or concrete memorials in May 1950, *see* Ex. 3, Memoranda Regarding Search and Recovery Mission, Abucay Church; and compared 1LT Nininger's dental records to all other remains recovered in the Abucay area, *see* Ex. 19, Resume of Record, Oct. 5, 1950; Ex. 17, AGRS memorandum, Sept. 12, 1950. Defendants further aver that ultimately, AGRS recommended and the Office of the Quartermaster General approved the classification of 1LT Nininger as nonrecoverable and remains X-1130 as unidentifiable. *See* Ex. 17, AGRS memorandum, Sept. 12, 1950; Ex. 18, Office of the Quartermaster General memorandum, Sept. 26, 1950; Ex. 20, Letter to Nininger Family, Aug. 13, 1951. Defendants further aver that the disposition of Plaintiff John Patterson's February 3, 2015 request likewise included several reasons why Defendants would not approve disinterment of remains X-1130 on the basis the available evidence. *See* Ex. 24, Decision of the Deputy Assistant Secretary of the Army for Military Personnel & Quality of Life, March 4, 2016; Ex. 23, DPAA Recommendation, Dec. 11, 2015. Defendants further aver that DPAA is engaged in a comprehensive review of all unknown

remains from the Abucay area for comparison to the service members unaccounted for from that area.

20. Admitted.

21. Defendants are without sufficient knowledge or information to determine the truth or falsity of the claims in this paragraph. Defendants further aver that Plaintiff John Patterson has previously indicated that he viewed locations other than X-1130 to be the likely location for 1LT Nininger's burial. Ex. 21, Letter from John Patterson, Mar. 17, 1986; Ex. 22, John Patterson Notes on Visits to Bataan, Oct. 1, 1992.

B. Loren P. Stewart's Remains Have Been Located

22. Admitted.

23. The first sentence is admitted. Defendants are without sufficient knowledge or information to determine the truth or falsity of the claims in the second and third sentences that members of the 45th and 57th Philippine Scouts recovered Colonel Loren Stewart's (COL Stewart) remains or that those who recovered the remains knew COL Stewart. To the extent "[i]t is believed" refers to a conclusion by Defendants regarding these events, these second and third sentences are denied.

24. The first and second sentences are denied, except to admit that records indicate that Ruben Caragay, a Filipino civilian stated that "During the battle of Abucay, I went to the Hacienda to check on the things near my place. I saw Philippine Scouts carrying the deceased American. The Scouts did not talk much. They said the deceased in an American Colonel. I saw the Scouts bury the deceased. The Scouts were from the 57th Inf." Ex. 25, Interrogation of Ruben Caragay, Dec. 28, 1946; Ex. 29, Letter from Master Sergeant Abie Abraham, June 22, 1981. Defendants further aver that Mr. Caragay's statement did not identify COL Stewart by

name, and respectfully refer the Court thereto for the terms thereof. The third sentence is denied, except to admit that remains from a grave near Mr. Caragay's house were exhumed by the AGRS and designated X-3629 Manila #2 Cemetery. *See* Ex. 26, Record of Disinterment, Jan. 14, 1947.

25. Denied.

26. Admitted.

27. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in this paragraph. Defendants further aver that Plaintiff John Boyt submitted to the U.S. Army Casualty Office a request dated November 7, 2017, seeking disinterment of X-3629 for comparison to COL Stewart, *see* Ex. 30, Letter from John Boyt, Nov. 7, 2017, and that DPAA is in the process of preparing a recommendation in response to that request pursuant to DOD's and DPAA's established procedures, *see* Ex. 31, Letter to John Boyt, Nov. 28, 2017. Defendants further aver that DPAA is engaged in a comprehensive review of all unknown remains from the Abucay area for comparison to the service members unaccounted for from that area.

C. Guy O. Fort's Remains Have Been Located

28. The first sentence is denied, except to admit that except to admit that Brigadier General Guy Fort (BG Fort) commanded the 81st Division of the Philippine Army until his surrender to the Japanese on May 27, 1942, and to admit that a portion of the Moro Bolo Battalion (an auxiliary of the Philippine Army) transformed into a guerilla operation with BG Fort's blessing. The second sentence is denied, except to admit that evidence in the record suggests that BG Fort was executed by the Japanese, and to admit that Defendants are aware of no other American-born general executed by the Japanese on Mindanao.

29. This paragraph is denied, except to admit that Defendants' records contain a statement by Ignacio S. Cruz, reporting second hand information suggesting that the execution and burial of BG Fort occurred in the town of Cagayan. *See* Ex. 40, Affidavit of Ignacio Cruz, July 14, 1947. Defendants further aver that several other witnesses, including Japanese officers connected to the execution, stated that the execution and burial occurred in the town of Dansalan, which is about 45 miles away from Cagayan. *See, e.g.*, Ex. 42, Report of Investigation Division, General Headquarters, Aug. 9, 1948 (including testimony from Yoshinari Tanaka, commander of a Japanese infantry battalion at Dansalan, Nobuhiko Jimbo, adjutant of garrison at Davao, and Hifumi Hiramatsu, intelligence officer at Dansalan); Ex. 39, Statement of Petronio Encabo, Nov. 11, 1946.

30. The first sentence is denied, except to admit that records indicate that two sets of remains were disinterred from the Ateneo de Cagayan school campus, and to admit that those remains were designated as Leyte #1 X-618 and X-619. *See* Exs. 33, 34 (Search and Recovery Reports); *see also* Ex. 41, Affidavit of Felipe Mabalos. The second sentence is denied, except to admit that the remains designated as Leyte #1 X-618 were ultimately buried as an Unknown in Grave L-8-113, Manila American Cemetery, and to further aver that the remains designated as Leyte #1 X-619 were ultimately buried as an Unknown in Grave D-12-216. Defendants further aver that (1) in June 1949 an AGRS Board of Review examined the available evidence and recommended that BG Fort be declared non-recoverable, *see* Ex. 43; (2) in September 1949, the Identification Section of the Memorial Division, Office of the Quartermaster General, U.S. Army, compared both remains X-618 and X-619 with BG Fort's dental records and found that neither set of remains had extractions of two teeth indicated in BG Fort's dental records, *see* Ex.

44; *see also* Exs. 32, 35, 36 (dental charts); and (3) in October 1949, the Office of the Quartermaster General upheld a finding of non-recoverability for BG Fort, *see* Ex. 45.

31. This paragraph is denied. Defendants further aver that on December 12, 2017, the U.S. Army Casualty Office received a request from Plaintiff Janis Fort to disinter Leyte #1 X-618 for comparison to BG Fort, and that DPAA is in the process of preparing a recommendation in response to that request pursuant to DOD's and DPAA's established procedures. *See* Ex. 46, Letter to Janis Fort, Dec. 20, 2017. Defendants further aver that DOD has received no eligible family reference samples that would permit DNA testing for comparison of any unknown remains to BG Fort.

D. Robert R. Morgan's Remains Have Been Located

32. Admitted.

33. Denied, except to admit that records indicate that five U.S. service members, including Private Robert Morgan (PVT Morgan) died on January 1, 1943, and that records indicate that they were buried in Common Grave 822. Defendants further aver that one of these service members, Private First Class Allen Wood, was recovered and identified from Common Grave 836. *See* Ex. 47, AGRS memorandum, Oct. 19, 1949.

34. This paragraph is denied, except to admit that AGRS exhumed remains from Camp Cabanatuan, that only four sets of remains were recorded as recovered from Grave 822, and that these remains were buried as Unknowns in Manila American Cemetery, graves C-12-83, N-6-187, N-13-187, H-7-135.

35. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in this paragraph. Defendants further aver that DPAA has an ongoing project to identify unknown remains from Camp Cabanatuan interred in the Manila

American Cemetery, and has been proposing the disinterment of Cabanatuan remains one common grave at a time (allowing for inconsistencies that sometimes require multiple graves or additional remains to be included), provided that the standards set forth in Directive-type Memorandum-16-003 (DTM-16-003) are met; it is DPAA's intention to disinter all Cabanatuan remains in turn. Defendants further aver that remains associated with eight common graves have been disinterred since 2014, that remains associated with seven additional common graves have been approved for disinterment, and that DPAA recommendations for disinterment of six additional common graves are currently under review by the Assistant Secretary of Defense for Manpower and Reserve Affairs. Defendants further aver that among those pending recommendations is DPAA's January 23, 2018 recommendation for disinterment of the graves associated with Common Grave 822.

E. Lloyd Bruntmyer's Remains Have Been Located

36. Admitted, except to aver that Lloyd Bruntmyer's rank was Technician Fourth Class (TEC4) rather than Private First Class.

37. Denied, except to admit that records indicate that TEC4 Bruntmyer was buried in Common Grave 704 along with nine other U.S. service members.

38. Denied, except to admit that except to admit that AGRS exhumed remains from Camp Cabanatuan and that eight sets of remains recorded as recovered from Grave 704 were buried as Unknowns in Manila American Cemetery—in graves H-8-146, H-10-129, H-10-130, H-11-134, H-11-144, H-11-146, H-11-147, H-12-110—and to admit that two sets of remains recorded as recovered from Grave 704 were provided to family members for burial after the war.

39. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in this paragraph. Defendants further aver that Plaintiff

Raymond Bruntmyer submitted a letter dated November 24, 2017 to the U.S. Army Casualty Office seeking disinterment of one grave associated with Common Grave 704 for comparison to TEC4 Bruntmyer. Defendants further aver that, pursuant to DPAA's longterm project to identify unknown remains from Camp Cabanatuan interred in the Manila American Cemetery, DPAA recommended disinterment of the graves associated with Common Grave 704 on March 2, 2018, and its recommendation is currently under review by the Assistant Secretary of Defense for Manpower and Reserve Affairs.

F. David Hansen's Remains Have Been Located

40. Admitted.

41. Denied, except to admit that Private First Class David Hansen (PFC Hansen) is recorded as buried in Common Grave 407 along with twenty-five other U.S. service members recorded as having died with the same 24-hour burial period. Defendants further aver that one individual recorded as buried in Grave 407 was identified among the remains recovered from Grave 1009, buried the following day.

42. Denied, except to admit that AGRS exhumed remains from Camp Cabanatuan. Defendants further aver that nine sets of remains recorded as recovered from Grave 407 were buried as Unknowns in Manila American Cemetery—in graves A-8-60, A-14-15, B-5-138, B-15-168, D-1-26, D-14-159, H-11-107, N-2-185, and N-8-151—and that sixteen sets of remains recorded as recovered from Grave 407 were identified after the war and buried in accordance with the wishes of the next of kin.

43. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in this paragraph. Defendants further aver that, pursuant to DPAA's longterm project to identify unknown remains from Camp Cabanatuan interred in the

Manila American Cemetery, DPAA has reviewed the circumstances of Common Grave 407 and prepared a draft disinterment recommendation that it is holding until DOD receives the requisite amount of family reference samples pursuant to DTM-16-003, and further aver that DOD has received an eligible family reference sample for only one of the nine unaccounted-for service members associated with Common Grave 407. Defendants further aver that the U.S. Army Casualty Office received an email dated November 21, 2017 from Jennifer Russell (understood to be Plaintiff Judy Hensley's daughter) requesting disinterment of the graves associated with Common Grave 407 for comparison to PFC Hansen, and further aver that the family reference samples submitted by Ms. Russell and Plaintiff Judy Hensley are insufficient to permit the relevant DNA testing for comparison to PFC Hansen due to these individual's place in PFC Hansen's family tree.

G. Arthur H. "Bud" Kelder's Partial Remains Are Being Withheld

44. Denied, except to admit records indicate that Private Arthur Kelder (PVT Kelder) served in the Medical Corps at General Hospital #2, that he was commandeered from General Hospital #2 to drive for the Japanese forces on April 11, 1942, that he was present in Camp Cabanatuan by June 2, 1942, and that he died there on November 19, 1942 from disease and malnutrition. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations that PVT Kelder participated in the Bataan Death March or imprisonment at Camp O'Donnell.

45. Denied, except to admit that thirteen U.S. service members and a U.S. civilian are recorded as buried in Common Grave 717, and that remains associated with this grave have been identified as belonging to PVT Kelder.

46. This paragraph is denied, except to admit that AGRS exhumed remains from Camp Cabanatuan and that the ten sets of remains from Common Grave 717 that were not identified were buried as Unknowns in the Manila American Cemetery.

47. Denied, except to admit that on June 13, 2014, the Deputy Assistant Secretary of the Army for Military Personnel approved disinterment of the ten graves in Manila American Cemetery associated with Common Grave 717, *see* Ex. 49; that in August 2014 personnel from a U.S. Army mortuary disinterred remains of the ten sets of remains associated Common Grave 717 that had been buried as Unknowns; that DPAA also arranged for disinterment of three of the four sets of identified remains associated with Common Grave 717 for further analysis; and that DPAA is seeking the disinterment of the fourth set of identified remains for further analysis. *See* Ex. 53, DPAA Misidentification Memorandum, Jan. 17, 2017.

48. Denied.

49. The first sentence is denied, except to admit that on January 17, 2015, DPAA's predecessor JPAC concluded that bones from three different graves were attributable to PVT Kelder on the basis of mitochondrial DNA (mtDNA) and Y-chromosomal Short Tandem Repeat DNA (Y-STR) testing and circumstantial evidence, *see* Ex. 50; that on May 21, 2015, DPAA concluded that that additional bones from two of those graves and a fourth grave were attributable to PVT Kelder on the basis of the same types of DNA testing and circumstantial evidence, *see* Ex. 51; and that on May 26, 2015, Plaintiff Douglas Kelder agreed to accept the remains from the U.S. Army Human Resources Command, Casualty and Mortuary Affairs Operation Center, *see* Ex. 52, Notice of Intent. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the second sentence. Defendants further aver that testing of the remains is ongoing and will be completed after the

remains from the fourteenth grave have been analyzed. The third sentence is denied.

Defendants further aver that the Armed Forces DNA Identification Laboratory (AFDIL) employs state of the art technologies in the forensic DNA field, including "next generation sequencing" (NGS). Defendants further aver that AFDIL has conducted more than 350 tests on samples from remains associated with Common Grave 717, including mtDNA, Y-STR, NGS, and autosomal Short Tandem Repeat (auSTR) DNA testing.

50. Denied.

51. This paragraph characterizes Army Regulation 638-2, a written document which speaks for itself. The Court is respectfully referred thereto for the terms thereof.

52. Denied.

53. Denied, except to admit that Defendants are aware of instances in which AGRS misidentified remains or identified comingled remains as a single individual in the 1940s and early 1950s. *See* Ex. 53, Misidentification Memorandum, Jan. 17, 2017.

54-55. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in these paragraphs.

II. Defendants' Failure to Act Violates Plaintiffs' Constitutional Rights

56. Defendants incorporate herein by reference their responses to paragraphs 6-12.

57-58. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

59. This paragraph contains conclusions of law to which no answer is required, but insofar as one is deemed required, denied, except to admit that the 24 graves for which Plaintiffs seek disinterment—L-8-113 (seeking BG Fort), N-15-19 (seeking COL Stewart), J-7-20 (seeking 1LT Nininger), A-8-60, A-14-15, B-5-138, B-15-168, D-1-26, D-14-159, H-11-107, N-2-185, N-

8-151 (seeking PFC Hansen), H-8-146, H-10-129, H-10-130, H-11-134, H-11-144, H-11-146, H-11-147, H-12-110 (seeking TEC4 Bruntmyer), C-12-83, H-7-135, N-6-187, N-13-187 (seeking PVT Morgan)—are located in Manila American Cemetery, which falls under the authority of the ABMC, and to admit that remains from 13 of the 14 graves associated with Cabanatuan Common Grave 717 are being examined in the DPAA Laboratory, Hawaii. Defendants further aver that they will not approve disinterment until DOD standards for disinterment have been met.

60. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence. The second and third sentences are denied. The fourth sentence is denied, except to admit that in 2014 DPAA disinterred remains associated with Common Grave 717 and identified remains of U.S. service members previously categorized as unaccounted for. The fifth sentence is denied, except that Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations regarding the documents upon which Plaintiffs rely.

61. The first sentence is admitted, to the extent “remains at issue” refers to the specific graves at the Manila American Cemetery identified in the Amended Complaint; but to the extent “remains at issue” refers to the remains of the seven service members identified the Amended Complaint, Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence. The second sentence is admitted. The third sentence constitutes conclusions of law to which no answer is required.

62. The first sentence is denied, except to admit that the Department of Defense has not published regulations regarding exhumation in the Federal Register or Code of Federal Regulations. The second sentence constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. The third sentence is denied.

63-65. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

CAUSES OF ACTION

COUNT ONE - VIOLATION OF DUE PROCESS

66. Defendants incorporate herein by reference their responses to paragraphs 1-65.

67. This paragraph constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

68. This paragraph, including footnotes 5 and 6, constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

69. The first sentence is denied. The remaining sentences of this paragraph constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

70-74. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

75. The first sentence constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. The second sentence contains Plaintiffs' request for relief to which no answer is required, but insofar as one is deemed required, Defendants deny that Plaintiffs are entitled to the relief requested or to any relief whatsoever.

COUNT TWO – BIVENS ACTION

76. Defendants incorporate herein by reference their responses to paragraphs 1-75.

77. This paragraph constitutes conclusions of law to which no answer is required, but insofar as Defendants incorporate herein by reference their responses to paragraphs as one is deemed required, denied.

78. This paragraph is denied, except to admit that the Secretary of Defense is charged with appointing a single agency to be responsible for the past conflicts accounting program, and to admit that the Director of the DPAA is charged with administering the past conflicts accounting program.

79-80. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

COUNT THREE – MANDAMUS RELIEF FOR RECOVERY OF REMAINS

81. Defendants incorporate herein by reference their responses to paragraphs 1-80.

82-86. These paragraphs, including footnote 7, constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied. As to the allegations in paragraph 84, Defendants further deny that the location of any of the relevant U.S. service members' remains has been conclusively identified.

87. This paragraph contains Plaintiffs' request for relief to which no answer is required, but insofar as one is deemed required, Defendants deny that Plaintiffs are entitled to the relief requested or to any relief whatsoever.

COUNT FOUR - MANDAMUS RELIEF FOR IDENTIFICATION OF REMAINS AND FURTHER EFFORTS

88. Defendants incorporate herein by reference their responses to paragraphs 1-87.

89-93. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

94. Denied.

95-96. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

97. This paragraph contains Plaintiffs' request for relief to which no answer is required, but insofar as one is deemed required, Defendants deny that Plaintiffs are entitled to the relief requested or to any relief whatsoever

COUNT FIVE – VIOLATION OF ADMINISTRATIVE PROCEDURE ACT

98. Defendants incorporate herein by reference their responses to paragraphs 1-97.

99-105. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

COUNT SIX – DECLARATORY JUDGMENT FINDING PLAINTIFFS HAVE RIGHT TO POSSESS REMAINS

106. Defendants incorporate herein by reference their responses to paragraphs 1-105.

107-114. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

COUNT SEVEN – DECLARATORY JUDGMENT RETURNING REMAINS TO PLAINTIFFS

116. Defendants incorporate herein by reference their responses to paragraphs 1-115.

117. The first and second sentences are denied. The remaining sentences of this paragraph constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

118-121. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

122. This paragraph contains Plaintiffs' request for relief to which no answer is required, but insofar as one is deemed required, Defendants deny that Plaintiffs are entitled to the relief requested or to any relief whatsoever.

COUNT EIGHT – DECLARATORY JUDGMENT FINDING THAT DEFENDANTS HAVE VIOLATED PLAINTIFFS’ FIRST, FOURTH, AND FIFTH AMENDMENT RIGHTS

123. Defendants incorporate herein by reference their responses to paragraphs 1-122.

124-129. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

130. This paragraph contains Plaintiffs’ request for relief to which no answer is required, but insofar as one is deemed required, Defendants deny that Plaintiffs are entitled to the relief requested or to any relief whatsoever.

COUNT NINE – VIOLATION OF FREE EXERCISE CLAUSE

131. Defendants incorporate herein by reference their responses to paragraphs 1-129.

132-133. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

134. The first sentence constitutes conclusions of law to which no answer is required, but insofar as one is deemed required, denied. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the second and fourth sentences. The remaining sentences of the paragraph characterize the Bible, to which the Court is respectfully referred for the terms thereof.

135-136. These paragraphs constitute conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

137. This paragraph contains Plaintiffs’ request for relief to which no answer is required, but insofar as one is deemed required, Defendants deny that Plaintiffs are entitled to the relief requested or to any relief whatsoever.

PRAYER FOR RELIEF

The remainder of the First Amended Complaint sets forth Plaintiffs' prayer for relief to which no answer is required, but insofar as an answer is deemed required, Defendant denies that Plaintiffs are entitled to the relief requested or to any relief whatsoever.

Wherefore, having fully answered, Defendants respectfully requests that the Court enter judgment dismissing the First Amended Complaint with prejudice, and awarding Defendants their costs and attorney's fees and other such relief as the Court deems just and proper.

Dated: April 6, 2018

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 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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