

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.)	

DEFENDANTS’ RESPONSE TO PLAINTIFFS’ FIRST REQUEST FOR PRODUCTION

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants—the 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—hereby provide their objections and responses to Plaintiffs’ First Request for Production dated February 15, 2018.

OBJECTIONS TO DEFINITIONS, INSTRUCTIONS, AND TIME PLACE AND MANNER OF COMPLIANCE

1. Defendants object to Definition No. 2 as improper, unduly burdensome, and impractical to the extent it purport to include U.S. Department of Justice litigation counsel within the definition of “Defendants.”

2. Defendants object to Plaintiffs’ definition of the term “document” to the extent that it purports to expand the definition of “document” contained in Federal Rule of Civil Procedure 34. The scope of Rule 34 is limited to materials in Defendants’ possession, custody, or control. Defendants have no obligation to produce any materials not within its possession,

custody, or control. In particular, Defendants expressly disclaims any obligation to search for or provide documents maintained by the National Archives and Records Administration (NARA).

3. Defendants also object to Definition No. 4 as unduly burdensome and not proportional to the needs of this case in several respects:

a. Defendants object to Definition No. 4 to the extent that it calls upon Defendant to produce documents that are publicly available (such as books, federal regulations and government reports) and documents that are already in Plaintiffs' possession.

b. Defendants object to Definition No. 4 to the extent that it calls upon Defendants to produce "information stored in, or accessible through, computer or other information retrieval systems (including any computer archives or back-up systems), together with instructions and all other materials necessary to use or interpret such data compilations." It would not be proportional to the needs of this case for Defendants to collect and review back-up systems or archival files that are not currently used by Defendants. And Defendants decline to search for instructional documents regarding unspecified databases or other data compilations based on this general definition.

c. Defendants object to Definition No. 4 insofar as it purports to include "all drafts of a document and all copies that differ in any respect from the original, including any notation, underlining, marking, or information not on the original." It would be unduly burdensome for Defendants to produce all copies of duplicative documents that may be maintained by various offices, or to compare copies of such documents for minor differences. For example, copies of individual deceased personnel files (IDPFs), which have remained largely unchanged since the 1950s, were created by the U.S. Army for all

service branches during WWII and the originals are now maintained by NARA. A number of Defendants' offices have digital copies of these files in various paper and electronic formats. All of these WWII files can be requested by any family member through the Army's Casualty Office in Fort Knox, NY. No meaningful benefit would result from the undue burden of collecting and reviewing all copies of these IDPFs wherever they may be located. As described in the individual responses, Defendants will produce documents from certain locations and declines to search for duplicative documents in other locations.

d. Defendants object to Definition No. 4 to the extent its definition of "possession, custody, and control" purports to require Defendant to produce documents protected from disclosure by the deliberative process privilege, the attorney-client privilege or the attorney work product doctrine.

4. Defendants object to four definitions included within Definition No. 13 as imprecise insofar as they "include, but [are] not limited to" the listed persons, remains, or grave numbers. Defendants will interpret these definitions to include only the listed persons, remains, or grave numbers, except as follows:

a. For Definition No. 13(a):

i. One additional set of remains is relevant but was not listed:

Cabanatuan C759, Manila #2 X3079, Manila Maus X2450, currently buried at Manila American Cemetery grave N-8-151.

ii. One additional person is relevant but was not listed—William Eby, Service No. 19021222—whose remains have not been identified.

iii. Two of the listed persons are not relevant and will not be included:

Raymond C. Pheil and Verl J. Tipton

iv. Nelson Norman is incorrectly listed as “Not Identified,” when his remains were located in Cabanatuan Common Grave 1009, but will be included to the same extent as other identified remains.

b. For Definition No. 13(b):

i. Three factual discrepancies are corrected as follows, but the persons and remains will be included to the extent appropriate: (1) Manila American Cemetery grave H-12-110 is associated with Manila Maus X4551 not X4557, (2) the name associated with Service No. 6671009 is Henry J. Smith, not Harry, (3) the name associated with Service No. 19020998 is William E Calkins, not middle initial K.

c. For Definition No. 13(c):

i. Cabanatuan Grave 717 is not associated with Cabanatuan C273, C277, or C279; or Manila #2 X813, X817, or X819.

ii. Cabanatuan Grave 717 is associated with Manila American Cemetery grave A-12-195 not A-12-195 11.

iii. Defendants object to the characterization that “partial remains” for each of the fourteen listed service members are “stored at” the DPAA Laboratory; one grave has not yet been disinterred and Defendants do not know whether the remains currently in the possession of the DPAA Laboratory are associated with each of the listed servicemembers.

5. Defendants object to Instruction No. 1 insofar as Plaintiffs propose to conduct “destructive and/or consumptive testing” on documents and tangible things produced to Plaintiffs. Defendants will produce no original documents to Plaintiffs, making such testing irrelevant as to documents. Defendants object to production of any tangible things and to any destructive and/or consumptive testing of such tangible things. Defendants further object to the fourteen day notice period, and insist that notice of any proposed testing be provided at least thirty (30) days in advance.

6. Defendants object to Instruction No. 2 insofar as it requires electronically stored information (ESI) to be “forensically identical to the original including all metadata and dates of creation or modification” and produced in a format by which “no data or information is modified or lost.” This request is unduly burdensome insofar as it would require Defendants to prepare documents for production through an ESI vendor. Most of the relevant records are decades old and metadata regarding any PDF copies of those decades-only records is of no apparent relevance. Moreover, even for responsive records that originated in electronic form, such as emails and draft documents, the claims in this case do not justify the burden and expense of providing these documents in forensically identical form with all metadata preserved.

Defendants agree to take the following actions for DPAA network folders that Defendants agree to produce in response to specific requests: Defendants will copy the documents in a way that preserves folder organization, and U.S. Department of Justice’s litigation support unit will process the documents to add Bates numbers and preserve available metadata. Defendants are not yet certain about logistics for the production of other documents that may be responsive.

7. Defendants also generally object to Instruction No. 2 and Request Nos. 1-21 on the ground that it would be unduly burdensome and disproportionate to the subject matter and

needs of the case to require Defendants to conduct extensive searches for ESI, such as electronic keyword searches of email systems and computer or network drives. Plaintiffs' representations to the Court downplayed any role for ESI. *See* Suppl. Joint Rule 26(f) Report and Proposed Schedule at 10-11, ECF No. 22 (stating that Plaintiffs would seek discovery (1) "related to the burial of the remains at issue and the graves identified in the complaint," (2) "what steps, procedures and efforts have been made to identify the remains," (3) "documents related to the government's procedures and policies regarding disinterment," and (4) "examine and test certain remains . . . for identification"); *see also id.* at 15 ("If discovery were to proceed over the defendants' objection, the parties do not anticipate that electronically stored information will present any unique difficulties."); Joint Rule 26(f) Report and Proposed Schedule at 3, ECF No. 11 ("The parties do not believe that extensive discovery will be necessary in this case, and do not anticipate that electronically stored information will present any difficulties here."). Discovery proportionate to the subject matter and needs of the case can be conducted by collecting and producing the repositories of documents specific to these claims, such as the IDPFs, X-files, case summaries, and laboratory reports.

8. Defendants object to Instruction No. 3 insofar as it purports to include "things" within the usage of the term "document." This conflicts with Definition No 4 and with Federal Rule of Civil Procedure 34(a)(1), which treat these as distinct categories. Defendants will address tangible things only where they are specifically requested in Request Nos. 16, 17, and 22. Defendants also object to Instruction No. 3 insofar as it purports to require production of "each copy of an original that differs in any way from the original." This requirement is unduly cumulative, burdensome and unlikely to lead to the discovery of admissible evidence. It would require Defendants to produce numerous duplicative documents or conduct page by page and

line by line reviews to compare such documents. Defendants incorporate by reference their related objection to Definition No. 4.

9. Defendants object to Instruction No. 4 insofar as it demands production of original documents absent certain waivers. This instruction requires more than Federal Rule of Civil Procedure 34(b)(2)(B) and Local Rule CV-26(d). Defendants agree that any documents they produce in the PDF format are authentic reproductions of each page of the underlying document that is produced, but Defendants do not stipulate that every such document is a complete copy of the underlying document and Defendants make no representation about whether the underlying document is a complete and accurate copy of any other document the underlying document purports to reproduce.

10. Defendants object to Instruction No. 6 insofar as it demands production of privileged material without redaction. Any responsive documents containing privileged information will be withheld in full or produced in part with redactions and described on a privilege log.

11. Defendants object to Instruction Nos. 7, 8, and 12 as calling upon Defendants to provide more information than is required by Federal Rule of Civil Procedure 34. *See* Fed. R. Civ. P. 34(b)(2)(E)(i).

12. Defendants object to Instruction No. 11 as calling upon Defendants to provide more information than is required by Federal Rule of Civil Procedure 26. *See* Fed. R. Civ. P. 26(b)(5)(A)(ii).

13. Defendants object to Instruction No. 13 to the extent that it exceeds the requirements of either Federal Rule of Civil Procedure 26 or 34, neither of which provides for the specific procedure Plaintiffs purport to require in this instruction.

14. Defendants object to Plaintiffs' Time, Place, and Manner for Compliance to the extent it exceeds the requirements of Federal Rule of Civil Procedure 34. Defendants object to the requirement that documents be produced within ten days after this response as unreasonable and unduly burdensome. Defendants will produce the responsive documents agreed to herein within 30 days of the date of this response. This is a reasonable period given the volume of information and the steps necessary to provide the Bates numbers and metadata agreed to in connection with Instruction No. 4. *See* Fed. R. Civ. P. 34(b)(2)(B). Defendants object to the requirement that the remains identified in Request No. 22 be produced on or before April 16, 2018. As described in the specific response to Request No. 22, Defendants object to any disinterment and/or transportation and/or testing of the remains as discovery. Defendants also object to the requirement that the remains be kept within 30 miles of San Antonio, Texas. Because DPAA does not maintain a facility in Texas, there would be significant cost and time involved in developing a suitable arrangement for maintaining the remains. Moreover, transporting the remains to Texas would involve significant additional costs, including for the escorts necessary to provide dignified transfer for the remains and security of the remains to maintain the chain of custody for eventual identification. Initial estimates suggest that the costs to Defendants would be hundreds of thousands of dollars. There would also be non-pecuniary burdens, as effectuating Plaintiffs' request would displace much of DPAA's scheduled work, delaying identification of other service members. Defendants will not make any such production absent a court order, and regardless, the logistics involved would require far more time than Plaintiffs have proposed.

RESERVATION OF OBJECTIONS

The forgoing objections to General Instructions and the following specific objections are based upon (a) Defendants' interpretation of the specific requests posed by Plaintiffs and (b)

information available to Defendants as of the date of this document. Defendants reserve the right to supplement these objections based upon (a) information that Plaintiffs purport to interpret the requests differently than Defendants and/or (b) the discovery of new information supporting additional objections. A statement that Defendants will produce documents in response to any of the Requests is not meant to imply that such documents exist, but only that Defendants will produce them if they do exist and are located, subject to any of the specific objections to the Requests.

RESPONSES TO SPECIFIC REQUESTS

REQUEST NO. 1. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Alexander R. Nininger, including his medical records;
- b. The remains designated as X-1130 by the U.S. Army Graves Registration; and
- c. Manila American Cemetery Grave J-7-20.

RESPONSE TO REQUEST NO. 1:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request to the extent it seeks documents other than those considered by Defendants' decisionmakers regarding 1LT Nininger's identification or proposals to disinter the remains designated X-1130. Because Plaintiffs' claims challenge agency action, the only relevant documents are those that form the administrative record. Accordingly Defendants object to this request to the extent it seeks draft documents, internal communications, and research materials that did not become part of DPAA's case summary regarding 1LT Nininger, the decisionmaking record for 1LT Nininger, or the decisionmaking record for proposals to disinter the remains designated X-1130. It would be unduly burdensome to search

for and produce such documents and would not be likely to lead to the production of relevant evidence.

Second, Defendants object to this request to the extent it seeks documents already in Plaintiffs' possession and documents Defendants have already filed in connection with this litigation. It would be unduly burdensome to require Defendants to collect and produce documents they have already provided to Plaintiffs. In particular, Defendants previously provided 1LT Nininger's IDPF to Plaintiff John Patterson in 2010, and Mr. Patterson brought a copy of the file for X-1130 to a family update meeting in 2012 that he said he received from John Eakin. Defendants also provided Mr. Patterson with the decision record regarding his 2015 disinterment request in March 2016 and filed it in this case with the Motion to Dismiss and with the Answer to the First Amended Complaint.

Third, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Some of the documents "relating to" these topics are the work product of the U.S. Department of Justice or Defendants' offices of general counsel. Such materials are not properly subject to discovery, and it would be unduly burdensome to collect and log such documents.

Fourth, Defendants object to this request to the extent it seeks documents from ABMC regarding Manila American Cemetery grave J-7-20. ABMC's current records regarding this grave consist of the ABMC Register and an entry on the ABMC website. The ABMC Register contains no information that is not contained on the ABMC website. ABMC previously transferred burial cards related to such graves to the National Archives and Records Administration (NARA), where they have been made publically available through Ancestry.com. See <https://search.ancestry.com/search/db.aspx?dbid=9170>. Because this information is

publically available, it would be unduly burdensome for ABMC to produce redundant information or to acquire information not in its possession.

Fifth, Defendants object to this request as unduly burdensome and not proportionate to the Plaintiffs' claims to the extent the request seeks an unlimited search for ESI throughout the three defendant agencies. Defendants specifically incorporate by reference their objection to Instruction No. 2 and their associated general objection regarding ESI.

Sixth, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of documents collected by DPAA and maintained in the network folders DPAA has agreed to produce in these responses. The burden of locating and producing redundant material wherever it might be located, such as archival electronic or paper files, at DPAA or other DoD components would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: DPAA's network folder for 1LT Nininger, DPAA's network folder for X-1130; the recommendation and decision documents for Plaintiff John Patterson's 2015 disinterment request.

REQUEST NO. 2. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Loren P. Stewart, including his medical records;
- b. The remains designated as X-3629 by the U.S. Army Graves Registration; and
- c. Manila American Cemetery Grave N-15-19.

RESPONSE TO REQUEST NO. 2:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request to the extent it seeks documents other than those considered by Defendants' decisionmakers regarding COL Stewart's identification or proposals to disinter the remains designated X-3629. Because Plaintiffs' claims challenge agency action, the only relevant documents are those that form the administrative record. Accordingly Defendants object to this request to the extent it seeks draft documents, internal communications, and research materials that did not become part of DPAA's case summary regarding COL Stewart, the decisionmaking record for COL Stewart, or the decisionmaking record for proposals to disinter the remains designated X-3629. It would be unduly burdensome to search for and produce such documents and would not be likely to lead to the production of relevant evidence.

Second, Defendants object to this request to the extent it seeks documents already in Plaintiffs' possession and documents Defendants have already filed in connection with this litigation. It would be unduly burdensome to require Defendants to collect and produce documents they have already provided to Plaintiffs. In particular, Defendants previously provided COL Stewart's IDPF to Plaintiff John Boyt in October 2012 and in July 2012 received an email from Mr. Boyt stating that John Eakin had provided him the file for X-3629.

Third, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Some of the documents "relating to" these topics are the work product of the U.S. Department of Justice or Defendants' offices of general counsel. Such materials are not properly subject to discovery, and it would be unduly burdensome to collect and log such documents. Plaintiff John Boyt's November 2017 disinterment request is currently being processed, and all research and drafts created in response to that request are predecisional drafts subject to the deliberative process privilege. Defendants will not collect documents from Defendants' office of general

counsel, documents created at the direction of counsel, or documents created or compiled for the purpose of the ongoing review of Mr. Boyt's disinterment request.

Fourth, Defendants object to this request to the extent it seeks documents from ABMC regarding Manila American Cemetery grave N-15-19. ABMC's current records regarding this grave consist of the ABMC Register and an entry on the ABMC website. The ABMC Register contains no information that is not contained on the ABMC website. ABMC previously transferred burial cards related to such graves to the National Archives and Records Administration (NARA), where they have been made publically available through Ancestry.com. See <https://search.ancestry.com/search/db.aspx?dbid=9170>. Because this information is publically available, it would be unduly burdensome for ABMC to produce redundant information or to acquire information not in its possession.

Fifth, Defendants object to this request as unduly burdensome and not proportionate to the Plaintiffs' claims to the extent the request seeks an unlimited search for ESI throughout the three defendant agencies. Defendants specifically incorporate by reference their objection to Instruction No. 2 and their associated general objection regarding ESI.

Sixth, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of documents collected by DPAA and maintained in the network folders DPAA has agreed to produce in these responses. The burden of locating and producing redundant material wherever it might be located, such as archival electronic or paper files, at DPAA or other DoD components would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: DPAA's network folder for COL Stewart; DPAA's network folder for X-3629. Defendants will also produce the recommendation

and decision documents for Mr. Boyt's November 2017 disinterment request once a decision has been finalized, to the extent the documents are not privileged.

REQUEST NO. 3. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Guy O. Fort, including his medical records;
- b. The remains designated as X-618 Leyte #1 Cemetery by the U.S. Army Graves Registration; and
- c. Manila American Cemetery Grave L-8-113.

RESPONSE TO REQUEST NO. 3:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request to the extent it seeks documents other than those considered by Defendants' decisionmakers regarding BG Fort's identification or proposals to disinter the remains designated X-618. Because Plaintiffs' claims challenge agency action, the only relevant documents are those that form the administrative record. Accordingly Defendants object to this request to the extent it seeks draft documents, internal communications, and research materials that did not become part of DPAA's case summary regarding BG Fort, the decisionmaking record for BG Fort, or the decisionmaking record for proposals to disinter the remains designated X-618. It would be unduly burdensome to search for and produce such documents and would not be likely to lead to the production of relevant evidence.

Second, Defendants object to this request to the extent it seeks documents already in Plaintiffs' possession and documents Defendants have already filed in connection with this litigation. It would be unduly burdensome to require Defendants to collect and produce documents they have already provided to Plaintiffs. In particular, Defendants previously provided BG Fort's IDPF to Plaintiff Janis Fort in May 2017, and in correspondence in

December 2017 she stated that she had materials from the file for X-618 Leyte #1 she received from a third party.

Third, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Some of the documents “relating to” these topics are the work product of the U.S. Department of Justice or Defendants’ offices of general counsel. Such materials are not properly subject to discovery, and it would be unduly burdensome to collect and log such documents. Plaintiff Janis Fort’s December 2017 disinterment request is currently being processed, and all research and drafts created in response to that request are predecisional drafts subject to the deliberative process privilege. Defendants will not collect documents from Defendants’ office of general counsel, documents created at the direction of counsel, or documents created or compiled for the purpose of the ongoing review of Ms. Fort’s disinterment request.

Fourth, Defendants object to this request to the extent it seeks documents from ABMC regarding Manila American Cemetery grave L-8-113. ABMC’s current records regarding this grave consist of the ABMC Register and an entry on the ABMC website. The ABMC Register contains no information that is not contained on the ABMC website. ABMC previously transferred burial cards related to such graves to the National Archives and Records Administration (NARA), where they have been made publically available through Ancestry.com. See <https://search.ancestry.com/search/db.aspx?dbid=9170>. Because this information is publically available, it would be unduly burdensome for ABMC to produce redundant information or to acquire information not in its possession.

Fifth, Defendants object to this request as unduly burdensome and not proportionate to the Plaintiffs’ claims to the extent the request seeks an unlimited search for ESI throughout the

three defendant agencies. Defendants specifically incorporate by reference their objection to Instruction No. 2 and their associated general objection regarding ESI.

Sixth, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of documents collected by DPAA and maintained in the network folders DPAA has agreed to produce in these responses. The burden of locating and producing redundant material wherever it might be located, such as archival electronic or paper files, at DPAA or other DoD components would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: DPAA's network folder for BG Fort; DPAA's network folder for X-618 and X-619 Leyte #1. Defendants will also produce the recommendation and decision documents for Ms. Fort's December 2017 disinterment request once a decision has been finalized, to the extent the documents are not privileged.

REQUEST NO. 4. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Robert R. Morgan, including his medical records;
- b. Cabanatuan Grave 822; and
- c. All remains buried in Manila American Cemetery Graves located at Plot 2, Row 15, Manila No. 2.

RESPONSE TO REQUEST NO. 4:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request to the extent it seeks documents other than those considered by Defendants' decisionmakers regarding PVT Morgan's identification or proposals to disinter the remains associated with Cabanatuan Common Grave 822. Because Plaintiffs' claims challenge agency action, the only relevant documents are those that form the

administrative record. Accordingly Defendants object to this request to the extent it seeks draft documents, internal communications, and research materials that did not become part of DPAA's case summary regarding PVT Morgan, the decisionmaking record for PVT Morgan, or the decisionmaking record for proposals to disinter the remains associated with Cabanatuan Common Grave 822. It would be unduly burdensome to search for and produce such documents and would not be likely to lead to the production of relevant evidence.

Second, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Some of the documents "relating to" these topics are the work product of the U.S. Department of Justice or Defendants' offices of general counsel. Such materials are not properly subject to discovery, and it would be unduly burdensome to collect and log such documents. DPAA's disinterment recommendation for Cabanatuan Common Grave 822 is currently being reviewed by the final decisionmaker, and all research and drafts created for the purpose of that recommendation are predecisional drafts subject to the deliberative process privilege. Defendants will not collect documents from Defendants' office of general counsel, documents created at the direction of counsel, or documents created or compiled for the purpose of the ongoing review of DPAA's disinterment recommendation.

Third, Defendants object to this request to the extent it seeks documents from ABMC regarding Manila American Cemetery graves C-12-83, N-6-187, N-13-187, and H-7-135. Although Plaintiffs' request refers to "Plot 2, Row 15, Manila No. 2," the remains are now buried in Manila American Cemetery at the graves identified in Plaintiffs' Instruction 13(d), and Defendants will construe the request to concern those graves. ABMC's current records regarding this grave consist of the ABMC Register and an entry on the ABMC website. The ABMC Register contains no information that is not contained on the ABMC website. ABMC previously

transferred burial cards related to such graves to the National Archives and Records Administration (NARA), where they have been made publically available through Ancestry.com. See <https://search.ancestry.com/search/db.aspx?dbid=9170>. Because this information is publically available, it would be unduly burdensome for ABMC to produce redundant information or to acquire information not in its possession.

Fourth, Defendants object to this request as unduly burdensome and not proportionate to the Plaintiffs' claims to the extent the request seeks an unlimited search for ESI throughout the three defendant agencies. Defendants specifically incorporate by reference their objection to Instruction No. 2 and their associated general objection regarding ESI.

Fifth, Defendants object to this request to the extent that it seeks personally identifiable information regarding persons other than the Plaintiffs themselves. Documents regarding common graves frequently include genetic information, genealogical information, and contact information about an individual or family other than Plaintiffs'. This is sensitive information and is often subject to protection under the Privacy Act or other legal protections. Defendants decline to produce such information to Plaintiffs without the consent of the individuals it concerns.

Sixth, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of documents collected by DPAA and maintained in the network folders DPAA has agreed to produce in these responses. The burden of locating and producing redundant material wherever it might be located, such as archival electronic or paper files, at DPAA or other DoD components would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: DPAA's network folder for PVT

Morgan; the X-files associated with Cabanatuan Common Grave 822; and the general material regarding Cabanatuan described in response to Request No. 9. Defendants will also produce the recommendation and decision documents for DPAA's January 2018 disinterment recommendation once a decision has been finalized, to the extent the documents are not privileged.

REQUEST NO. 5. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Lloyd Bruntmyer, including his medical records; and
- b. Cabanatuan Grave 704.

RESPONSE TO REQUEST NO. 5:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request to the extent it seeks documents other than those considered by Defendants' decisionmakers regarding TEC4 Bruntmyer's identification or proposals to disinter the remains associated with Cabanatuan Common Grave 704. Because Plaintiffs' claims challenge agency action, the only relevant documents are those that form the administrative record. Accordingly Defendants object to this request to the extent it seeks draft documents, internal communications, and research materials that did not become part of DPAA's case summary regarding TEC4 Bruntmyer, the decisionmaking record for TEC4 Bruntmyer, or the decisionmaking record for proposals to disinter the remains associated with Common Grave 704. It would be unduly burdensome to search for and produce such documents and would not be likely to lead to the production of relevant evidence.

Second, Defendants object to this request to the extent it seeks documents already in Plaintiffs' possession and documents Defendants have already filed in connection with this

litigation. It would be unduly burdensome to require Defendants to collect and produce documents they have already provided to Plaintiffs. In particular, Defendants previously provided TEC4 Bruntmyer's IDPF to Plaintiff Raymond Bruntmyer in October 2011.

Third, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Some of the documents "relating to" these topics are the work product of the U.S. Department of Justice or Defendants' offices of general counsel. Such materials are not properly subject to discovery, and it would be unduly burdensome to collect and log such documents.

Fourth, Defendants object to this request to the extent it seeks documents from ABMC regarding Manila American Cemetery 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. ABMC's current records regarding this grave consist of the ABMC Register and an entry on the ABMC website. The ABMC Register contains no information that is not contained on the ABMC website. ABMC previously transferred burial cards related to such graves to the National Archives and Records Administration (NARA), where they have been made publically available through Ancestry.com. *See* <https://search.ancestry.com/search/db.aspx?dbid=9170>. Because this information is publically available, it would be unduly burdensome for ABMC to produce redundant information or to acquire information not in its possession.

Fifth, Defendants object to this request as unduly burdensome and not proportionate to the Plaintiffs' claims to the extent the request seeks an unlimited search for ESI throughout the three defendant agencies. Defendants specifically incorporate by reference their objection to Instruction No. 2 and their associated general objection regarding ESI.

Sixth, Defendants object to this request to the extent that it seeks personally identifiable information regarding persons other than the Plaintiffs themselves. Documents regarding common graves frequently include genetic information, genealogical information, and contact information about an individual or family other than Plaintiffs. This is sensitive information and is often subject to protection under the Privacy Act or other legal protections. Defendants decline to produce such information to Plaintiffs without the consent of the individuals it concerns.

Seventh, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of documents collected by DPAA and maintained in the network folders DPAA has agreed to produce in these responses. The burden of locating and producing redundant material wherever it might be located, such as archival electronic or paper files, at DPAA or other DoD components would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: DPAA's network folder for TEC4 Bruntmyer; the X-files associated with Cabanatuan Common Grave 704; and the general material regarding Cabanatuan described in response to Request No. 9.

REQUEST NO. 6. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of David Hansen, including his medical records; and
- b. Cabanatuan Grave 407.

RESPONSE TO REQUEST NO. 6:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request to the extent it seeks documents other than those considered by Defendants' decisionmakers regarding PFC Hansen's identification or proposals to disinter the remains associated with Cabanatuan Common Grave 407. Because Plaintiffs' claims challenge agency action, the only relevant documents are those that form the administrative record. Accordingly Defendants object to this request to the extent it seeks draft documents, internal communications, and research materials that did not become part of DPAA's case summary regarding PFC Hansen, the decisionmaking record for PFC Hansen, or the decisionmaking record for proposals to disinter the remains associated with Common Grave 407. It would be unduly burdensome to search for and produce such documents and would not be likely to lead to the production of relevant evidence.

Second, Defendants object to this request to the extent it seeks documents already in Plaintiffs' possession and documents Defendants have already filed in connection with this litigation. It would be unduly burdensome to require Defendants to collect and produce documents they have already provided to Plaintiffs. In particular, Defendants previously provided PFC Hansen's IDPF to Plaintiff Judy Hensley in November 2017.

Third, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Some of the documents "relating to" these topics are the work product of the U.S. Department of Justice or Defendants' offices of general counsel. Such materials are not properly subject to discovery, and it would be unduly burdensome to collect and log such documents.

Fourth, Defendants object to this request to the extent it seeks documents from ABMC regarding Manila American Cemetery 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. ABMC's current records regarding this grave consist of

the ABMC Register and an entry on the ABMC website. The ABMC Register contains no information that is not contained on the ABMC website. ABMC previously transferred burial cards related to such graves to the National Archives and Records Administration (NARA), where they have been made publically available through Ancestry.com. *See* <https://search.ancestry.com/search/db.aspx?dbid=9170>. Because this information is publically available, it would be unduly burdensome for ABMC to produce redundant information or to acquire information not in its possession.

Fifth, Defendants object to this request as unduly burdensome and not proportionate to the Plaintiffs' claims to the extent the request seeks an unlimited search for ESI throughout the three defendant agencies. Defendants specifically incorporate by reference their objection to Instruction No. 2 and their associated general objection regarding ESI.

Sixth, Defendants object to this request to the extent that it seeks personally identifiable information regarding persons other than the Plaintiffs themselves. Documents regarding common graves frequently include genetic information, genealogical information, and contact information about an individual or family other than Plaintiffs. This is sensitive information and is often subject to protection under the Privacy Act or other legal protections. Defendants decline to produce such information to Plaintiffs without the consent of the individuals it concerns.

Seventh, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of documents collected by DPAA and maintained in the network folders DPAA has agreed to produce in these responses. The burden of locating and producing redundant material wherever it might be located, such as archival electronic or paper files, at DPAA or other DoD components would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: DPAA's network folder for PFC Hansen; the X-files associated with Cabanatuan Common Grave 407; and the general material regarding Cabanatuan described in response to Request No. 9.

REQUEST NO. 7. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Arthur H. Kelder, including his medical records; and
- b. Cabanatuan Grave 717.

RESPONSE TO REQUEST NO. 7:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request to the extent it seeks documents other than those considered by Defendants' decisionmakers regarding PVT Kelder's identification, proposals to disinter the remains associated with Cabanatuan Common Grave 717, or Defendants' conclusions about the identification of recovered remains. Because Plaintiffs' claims challenge agency action, the only relevant documents are those that form the administrative record. Accordingly Defendants object to this request to the extent it seeks draft documents, internal communications, and research materials that did not become part of DPAA's case summary regarding PVT Kelder, the decisionmaking record for PVT Kelder, the decisionmaking record for proposals to disinter the remains associated with Common Grave 717, or decisions about the identification of recovered remains associated with Common Grave 717. It would be unduly burdensome to search for and produce such documents and would not be likely to lead to the production of relevant evidence.

Second, Defendants object to this request to the extent it seeks documents already in Plaintiffs' possession and documents Defendants have already filed in connection with this litigation. It would be unduly burdensome to require Defendants to collect and produce documents they have already provided to Plaintiffs. In particular, Defendants previously provided to Plaintiff Douglas Kelder the following documents related to PVT Kelder: his IDPF in 2011; documents in 2015 regarding the identification of PVT Kelder on the basis of DNA testing; numerous documents in the administrative record in the *Eakin* case that Mr. Kelder sought to join as a party.

Third, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Some of the documents "relating to" these topics are the work product of the U.S. Department of Justice or Defendants' offices of general counsel. Such materials are not properly subject to discovery, and it would be unduly burdensome to collect and log such documents.

Fourth, Defendants object to this request to the extent it seeks documents from ABMC regarding Manila American Cemetery graves N-2-69, N-14-78, L-14-49, A-12-195, C-5-8, C-9-78, N-5-187, N-14-93, N-11-97, N-11-190. ABMC's current records regarding these graves consist of the ABMC Register and entries on the ABMC website. The ABMC Register contains no information that is not contained on the ABMC website. ABMC previously transferred burial cards related to such graves to the National Archives and Records Administration (NARA), where they have been made publically available through Ancestry.com. *See* <https://search.ancestry.com/search/db.aspx?dbid=9170>. Because this information is publically available, it would be unduly burdensome for ABMC to produce redundant information or to acquire information not in its possession.

Fifth, Defendants object to this request as unduly burdensome and not proportionate to the Plaintiffs' claims to the extent the request seeks an unlimited search for ESI throughout the three defendant agencies. Defendants specifically incorporate by reference their objection to Instruction No. 2 and their associated general objection regarding ESI.

Sixth, Defendants object to this request to the extent that it seeks personally identifiable information regarding persons other than the Plaintiffs themselves. Documents regarding common graves frequently include genetic information, genealogical information, and contact information about an individual or family other than Plaintiffs. This is sensitive information and is often subject to protection under the Privacy Act or other legal protections. Defendants decline to produce such information to Plaintiffs without the consent of the individuals it concerns.

Seventh, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of documents collected by DPAA and maintained in the network folders DPAA has agreed to produce in these responses. The burden of locating and producing redundant material wherever it might be located, such as archival electronic or paper files, at DPAA or other DoD components would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: DPAA's network folder for PVT Kelder; the X-files associated with Cabanatuan Common Grave 717; the decision documents for the disinterment request for Common Grave 717; the general material regarding Cabanatuan described in response to Request No. 9; and portions of the DPAA Laboratory network folder for Common Grave 717 that are relevant to PVT Kelder, except for documents and information involving personally identifiable information of persons unrelated to Plaintiff Douglas Kelder.

REQUEST NO. 8. All documents related to your current policies and/or rules concerning disinterment of unknown army service members.

RESPONSE TO REQUEST NO. 8:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request as overly broad, unduly burdensome and not likely to lead to the production of relevant evidence to the extent that it calls for all documents “related to” Defendants’ current policies and rules concerning disinterment of unknown service members. None of Plaintiffs’ claims challenge the process by which these policies were created, nor do they challenge the application of these policies to circumstances other than those of the service members and graves listed in Definition Nos. 12 and 13. Defendants decline to undertake a costly and burdensome search for and production of other documents “related to” those policies and rules.

Second, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Many of the documents “related to” those current policies would be privileged documents regarding the recommendation and adoption of the policies. The applicability of such privileges would make production of such irrelevant documents more burdensome and unproductive.

Third, Defendants object to this request as duplicative because the responsive policies had rules have already collected and filed in connection with Defendants’ Motion to Dismiss, ECF No. 7. However, Defendants are not withholding any documents responsive to this request on the ground that the request is duplicative.

Sixth, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of the policy documents Defendants produce in response to this request. The burden of locating and producing redundant material wherever it might be located would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce their current policies and rules concerning disinterment of service members, known or unknown.

REQUEST NO. 9. All documents related to and/or discussing the recovery and/or identification of human remains from the Cabanatuan prisoner-of-war camp cemetery. This includes burial rosters, work plans, logs, death rosters, planning documents, correspondence, reports, logs of recoveries, photographs, and any related documents.

RESPONSE TO REQUEST NO. 9:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request as extraordinary overbroad, unduly burdensome, and not likely to lead to the production of relevant evidence. More than 2,700 men were buried at the Cabanatuan prisoner of war camp cemeteries. The documentation effort began contemporaneously with the burials in 1942, and an extensive recovery and identification effort extended from 1945 to 1951. DPAA is engaged in a long-term project to review all of the Camp Cabanatuan common graves for additional identifications. The overwhelming majority of the documentation related to the initial and contemporary projects would not be relevant to the four common graves Plaintiffs have identified as relevant to this case. Collection and production of all of this documentation would be extraordinarily burdensome and disrupt Defendants' staff from performing the very tasks about which Plaintiffs allege delay. DPAA has collected relevant portions of Cabanatuan documentation into the network folders for each of the common graves at

issue here. Production of these already-collected documents should be sufficient to test the adequacy of Defendants' actions.

Second, Defendants object to this request to the extent it seeks documents already in Plaintiffs' possession and documents Defendants have already filed in connection with this litigation. It would be unduly burdensome to require Defendants to collect and produce documents they have already provided to Plaintiffs.

Third, Defendants object to this request to the extent it seeks documents protected by the deliberative process privilege, attorney client privilege, or attorney work product doctrine. Some of the documents "relating to" these topics are the work product of the U.S. Department of Justice or Defendants' offices of general counsel. Such materials are not properly subject to discovery, and it would be unduly burdensome to collect and log such documents.

Fourth, Defendants object to this request as redundant and unduly burdensome to the extent that it seeks additional copies of documents collected by DPAA and maintained in the network folders DPAA has agreed to produce in these responses. The burden of locating and producing redundant material wherever it might be located, such as archival electronic or paper files, at DPAA or other DoD components would far exceed any alleged benefit to Plaintiffs.

Subject to and without waiving the forgoing objections, and to the extent not already produced in this litigation, Defendants will produce non-privileged documents responsive to this request as follows: DPAA's reports regarding the burial, recovery, and identification efforts for the Cabanatuan POW Camps; the general documents contained in DPAA's network folder for its Cabanatuan project (excluding those relevant only to common graves other than 407, 704, 717 and 822); and the X-files for Cabanatuan Common Graves 407, 704, 717, and 822, as discussed under Request Nos. 1 through 7.

REQUEST NO. 10. All documents, written or recorded statements, and communications to and/or from any party to this suit since January 1, 2010, concerning and/or discussing Plaintiffs' claims against Defendants.

RESPONSE TO REQUEST NO. 10:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request as duplicative with Request No. 11 to the extent it seeks communications between Defendants and entities other than the Plaintiffs. Accordingly, Defendants will construe this request to exclusively concern documents and communications between Defendants and the Plaintiffs.

Second, Defendants object to this request as unduly burdensome because Plaintiffs can be expected to have copies of the documents they have submitted to Defendants since 2010, along with the originals of any documents they received from Defendants during that period. Discovery is not for the redundant production of material already in Plaintiffs' possession. Moreover, Plaintiffs are in the best position to know which offices they have corresponded with, and Defendants should not be required to canvas a wide swath of DoD offices to determine with whom Plaintiffs have corresponded.

Third, Defendants object to this request to the extent the term "communications" exceeds the definition of "documents" in Federal Rule of Civil Procedure 34. Verbal communications themselves are not documents, and Defendants decline to seek or produce any materials that were not committed to writing.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: All documents submitted by

Plaintiffs to DPAA, the Army Casualty Office, and the ABMC since January 1, 2010; and all documents sent from DPAA, the ABMC, and the Army Casualty Office to Plaintiffs since January 1, 2010 (to the extent copies have been retained).

REQUEST NO. 11. All documents written or recorded statements, and communications to and/or from any third-party since January 1, 2010, concerning and/or discussing Plaintiffs' claims against Defendants.

RESPONSE TO REQUEST NO. 11:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request as unduly burdensome to the extent it seeks correspondence between Defendants and John Eakin. Plaintiffs appear to rely extensively on material prepared by Mr. Eakin and thus appear to have access to any of his correspondence with Defendants which may be relevant to Plaintiffs' claims. Because Mr. Eakin's litigation against Defendants in this district also involved the search for the remains of Arthur Kelder, it appears that all of Defendants' correspondence with Mr. Eakin in the course of that litigation would be responsive to this request. Collection and production of that correspondence would be burdensome and not likely to lead to the production of relevant evidence not already in Plaintiffs' possession.

Second, Defendants object to this request as overbroad and unduly burdensome to the extent it seeks correspondence between Defendants and the U.S. Department of Justice as litigation counsel. Such communications are generally subject to the attorney client privilege and/or the attorney work product doctrine and are not properly the subject of discovery. It would

be unduly burdensome to require Defendants to collect and log privileged communications regarding this litigation and regarding Mr. Eakin's litigation.

Third, Defendants object to this request as unduly burdensome and not likely to lead to the production of relevant evidence to the extent any other third-party correspondence exists. There is no meaningful connection between, for example, Defendants' response to a congressional inquiry, and the merits of Plaintiffs' claims. Accordingly, it would unduly burden Defendants to require them to canvas their offices for any third-party communications "concerning and/or discussing" Plaintiffs' claims.

Subject to and without waiving the forgoing objections, and to the extent not already produced in this litigation, Defendants will produce correspondence between Defendants and congressional offices regarding Plaintiffs and their claims.

REQUEST NO. 12. All documents related to any complaints you have received in the past five years regarding the identification of unknown remains and/or the failure to identify unknown remains.

RESPONSE TO REQUEST NO. 12:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request because "complaints" is vague. Defendants are not aware of what scope Plaintiffs intend for this term.

Second, Defendants object to this request as unduly burdensome and not likely to lead to the production of relevant evidence. "Complaints" from the public, Congress, or other entities about the broad topic of "the identification of unknown remains" would not be likely to be relevant to the merits of Plaintiffs' claims. Moreover, because the period Plaintiffs specify

includes events immediately before the creation of DPAA, this request, if broadly construed, would likely encompass a significant volume of correspondence related to the inquiries and congressional action that led to the creation of DPAA. Because this case involves specific graves and the efforts to identify specific servicemembers, documents regarding such a broad topic are overbroad and unduly burdensome.

Third, Defendants object to this request to the extent it seeks documents subject to the deliberative process privilege, attorney client privilege, or attorney work product doctrine and are not properly the subject of discovery. Seeking all documents “related to” any complaints would encompass Defendants’ deliberations regarding how to respond to such complaints and any consultations with counsel and legal advice received. Given how unlikely such information is to lead to admissible evidence, it would be unwarranted for Defendants to be required to collect and log such privileged information.

In sum, Defendants decline to search for documents that may be responsive to this request.

REQUEST NO. 13. All e-mails, written communications, or other documents since January 1, 2010, that discuss and/or concern any of the Plaintiffs, the Plaintiffs’ families, and/or the Plaintiffs’ claims in this lawsuit.

RESPONSE TO REQUEST NO. 13:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request as unduly burdensome and not relevant to the claims or defenses in this case. Correspondence to and from Plaintiffs is encompassed by Request No. 10, and Defendants do not construe this request to redundantly seek the same

information. It would be a significant burden to Defendants to search each agency for any emails or other documents for an eight year period that merely mention Plaintiffs or their claims. The agencies' actions are at issue in this case, not their subjective state of mind or intent. Therefore, whatever internal correspondence or discussions that may exist cannot reasonably be expected to be relevant to the claims or defenses.

Second, Defendants object to this request as overbroad to the extent it seeks documents subject to the deliberative process privilege, attorney client privilege, or attorney work product doctrine and are not properly the subject of discovery. Most documents prepared by U.S. Department of Justice litigation counsel and Defendants' general counsel offices in connection with this litigation appear to come within the scope of this request. And agency deliberations regarding how to respond to Plaintiffs' requests or legal claims are protected by the deliberative process privilege. Given how unlikely such information is to lead to admissible evidence, it would be unwarranted for Defendants to be required to collect and log such privileged information.

Third, Defendants object to this request as unduly burdensome and not proportionate to the Plaintiffs' claims to the extent the request seeks an unlimited search for ESI throughout the three defendant agencies. Defendants specifically incorporate by reference their objection to Instruction No. 2 and their associated general objection regarding ESI.

Subject to and without waiving the forgoing objections, Defendants will produce the same documents Defendants have agreed to produce in response to Request No. 10.

REQUEST NO. 14. If you contend that Plaintiffs have not already identified the location of the remains at issue in this lawsuit, produce all documents that you allege support your contention that the remains at issue have not been identified.

RESPONSE TO REQUEST NO. 14:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request because “remains at issue” is ambiguous. It is unclear whether Plaintiffs refer to the remains in the identified graves at Manila American Cemetery, to the remains of the seven servicemembers, or both. Defendants cannot fully respond to this request without clarification.

Second, Defendants object to this request because it depends on facts that Plaintiffs have not provided. Defendants, after an extensive effort in the late 1940s and early 1950s, concluded on the basis of the available evidence that the remains in Defendants’ possession could not be identified and buried them as unknowns. Plaintiffs have not submitted to Defendants and explained the evidence they believe justifies overturning those earlier conclusions. Plaintiffs simply assert that they are certain that specific graves contain their relatives’ remains. This inherently falls short of “already [having] identified” the remains. And while it appears that Plaintiffs largely rely on evidence considered more than 50 years ago and found inadequate, Defendants cannot fully respond to this request without being comprehensively informed of Plaintiffs’ factual contentions.

Third, Defendants object to this request to the extent it conflates circumstances in which a likely “location of the remains” is known with the conclusion that “the remains at issue have . . . been identified.” For example, with regard to the Cabanatuan common graves, Defendants long ago concluded that the burial rosters compiled by the prisoners of war are not sufficient to conclusively identify those recovered from common graves. But even if it could be assumed (1) that those burial rosters accurately identified the deceased and the graves in which they were

buried, (2) that the AGRS recovery teams accurately correlated remains they recovered to those graves, and (3) that remains from those graves were not inadvertently comingled with remains from other graves before ultimately being interred at Manila American Cemetery, this would merely lead to the conclusion that the remains of the individual service members from a specific common grave were likely to be in the graves at Manila American Cemetery associated with that common grave. It would not mean that an individual service member's remains had been identified. Individual remains cannot be identified without adequate supporting evidence, including family reference DNA samples.

Subject to and without waiving the forgoing objections, Defendants will produce the information they have agreed to produce in connection with Request Nos. 1-7 and 9, which demonstrates that Plaintiffs' assertion that the locations of the remains of the relevant service members have been conclusively identified is incorrect.

REQUEST NO. 15. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to the matter in controversy that you obtained from, or as a result of interviewing, any persons who purport to have knowledge of the matter in controversy.

RESPONSE TO REQUEST NO. 15:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request because documents "relating to the matter in controversy" is vague. To the extent this phrase refers to any efforts to identify the remains or service members, many of the documents Defendants have agreed to produce in response to Request Nos. 1-7 are responsive. To the extent this phrase refers instead to the litigation itself,

this request would primarily seek documents protected by the attorney work product doctrine and attorney client privilege.

Second, Defendants object to this request to the extent that it seeks documents prepared by counsel in connection with this litigation and their investigation of the underlying events, and correspondence with counsel regarding the subject matter of the litigation. Such documents are protected from disclosure by the work attorney product doctrine and/or attorney-client privilege.

Third, Defendants object to this request as overbroad and unduly burdensome to the extent that it seeks correspondence between U.S. Department of Justice counsel, Defendants' offices of general counsel, and Defendants' employees concerning the investigation of facts as a result of this litigation. Most such communications are privileged, and it would be burdensome, inefficient, and unproductive to require Defendants to collect and log such documents in order to ultimately produce whatever subset contained segregable nonprivileged information. Any nonprivileged information contained in such documents would merely reflect details of the underlying files that are being produced.

Subject to and without waiving the forgoing objections, Defendants will produce any formal statements signed by a witness that Defendants obtain as a result of their investigation of the claims in the litigation. Defendants are aware of no such document at this point.

REQUEST NO. 16. All documents, family reference samples, and/or tangible things pertaining to human DNA obtained from family members that may assist in the identification of the remains described in Request No. 22, which can be found below.

RESPONSE TO REQUEST NO. 16:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request on the ground that the documents requested are not relevant to any claim or defense. Documents and tangible things pertaining to human DNA obtained from family members is not relevant to determining whether Defendants have violated any of the legal standards raised in this litigation. Instead, these documents and tangible things are relevant only if Plaintiffs themselves are permitted to take over the identification effort for these remains, as Request No. 22 seeks to do. As discussed below, Request No. 22 improperly seeks relief beyond the scope of Federal Rule of Civil Procedure 34 and beyond the scope of the Court's authority in this litigation. Because these documents and tangible things are relevant only if the Court grants the ultimate relief Plaintiffs seek, Defendants will not produce them in discovery.

Second, Defendants object to this request because "family members" is vague. It could refer to family members of the Plaintiffs, or to family members of any of the service members associated with the common graves Plaintiffs have identified, or to family members of any service member from World War II who have provided DNA samples to Defendants. Defendants cannot fully respond to this request without knowing what Plaintiffs mean.

Third, Defendants object to this request to the extent that it seeks personally identifiable information regarding persons other than the Plaintiffs themselves. Genetic information about an individual or family is sensitive information and is subject to protection under the Privacy Act and other legal protections. Defendants decline to produce such information to Plaintiffs without the consent of the individuals it concerns.

Fourth, Defendants object to this request to the extent that it seeks documents already in Plaintiffs' possession. Plaintiffs likely possess copies of documents they themselves submitted to Defendants and documents Defendants provided to Plaintiffs in connection with DNA

samples. It would be unduly burdensome to require Defendants to produce this information back to Plaintiffs.

Fifth, Defendants object to this request as overbroad and unduly burdensome because collecting and producing documents and tangible things regarding dozens or hundreds of other families would not be proportional to the scope of the claims in this litigation.

In sum, Defendants decline to search for or produce any documents that may be responsive to this request.

REQUEST NO. 17. Produce all documents and/or tangible things that include contact and/or genealogical information pertaining to relatives of each of the remains described in Request No. 22, below, or who can reasonably be associated with those remains.

RESPONSE TO REQUEST NO. 17:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request on the ground that the documents requested are not relevant to any claim or defense. Documents and tangible things pertaining to contact information and genealogical information for “relatives” is not relevant to determining whether Defendants have violated any of the legal standards raised in this litigation. Instead, these documents and tangible things are relevant only if Plaintiffs themselves are permitted to take over the identification effort for these remains, as Request No. 22 seeks to do. As discussed below, Request No. 22 improperly seeks relief beyond the scope of Federal Rule of Civil Procedure 34 and beyond the scope of the Court’s authority in this litigation. Because these documents and tangible things are relevant only if the Court grants the ultimate relief Plaintiffs seek, Defendants will not produce them in discovery.

Second, Defendants object to this request because “relatives of each of the remains” is vague. It could refer to family members of any of the service members associated with the common graves Plaintiffs have identified, or to family members of any service member or civilian who could possibly be associated with the remains. Defendants cannot fully respond to this request without knowing what Plaintiffs mean.

Third, Defendants object to this request to the extent that it seeks personally identifiable information regarding persons other than the Plaintiffs themselves. Genetic information about an individual or family is sensitive information and is often subject to protection under the Privacy Act or other legal protections. Defendants decline to produce such information to Plaintiffs without the consent of the individuals it concerns.

Fourth, Defendants object to this request as overbroad and unduly burdensome because collecting and producing documents regarding dozens or hundreds of other families would not be proportional to the scope of the claims in this litigation.

Fifth, Defendants object to this request to the extent that it seeks documents or information already in Plaintiffs’ possession. Plaintiffs likely possess the contact information and genealogical information for their own families. It would be unduly burdensome to require Defendants to produce this information back to Plaintiffs.

In sum, Defendants decline to search for or produce any documents that may be responsive to this request.

REQUEST NO. 18. All documents prepared by any person in connection with your response to these document requests.

RESPONSE TO REQUEST NO. 18:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request because the documents it seeks are protected from disclosure by the attorney work product doctrine and/or attorney-client privilege.

Second, Defendants object to this request as overbroad and unduly burdensome. Any documents prepared in connection with this litigation, including correspondence between U.S. Department of Justice counsel, Defendants' offices of general counsel, and Defendants' employees concerning this litigation, are properly subject to privilege. Even if some portions of such documents were not entirely privileged, it would be burdensome, inefficient, and unproductive to require Defendants to collect and log such documents in order to ultimately produce whatever subset contained segregable nonprivileged information. Any nonprivileged information contained in such documents would merely reflect details of the underlying files that are being produced.

Subject to and without waiving the forgoing objections, Defendants will produce the same documents it has agreed to produce in response to Request No. 15.

REQUEST NO. 19. Each document index you prepared in responding to these document requests.

RESPONSE TO REQUEST NO. 19:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request because “document index” is vague. For purpose of this response, Defendants construe it to mean a document created during the process of responding to these requests that lists certain other documents, such as those contained in a given location or those responsive to a specified request.

Second, Defendants object to this request because the documents it seeks are protected from disclosure by the attorney work product doctrine and/or attorney-client privilege.

Third, Defendants object to this request as overbroad and unduly burdensome. Most—if not all—documents responsive to this request would be privileged, and it would be burdensome, inefficient, and unproductive to require Defendants to collect and log such documents in order to ultimately produce whatever subset contained segregable nonprivileged information. Any nonprivileged information contained in such documents would merely reflect details of the underlying files that are being produced.

In sum, Defendants decline to search for or produce any documents that may be responsive to this request.

REQUEST NO. 20. All documents related to the recovery, identification, and/or disinterment of unknown remains from Manilla American Cemetery since January 1, 2017. You must supplement production to this request should new information becomes available.

RESPONSE TO REQUEST NO. 20:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request as not relevant to any claim or defense. The recovery, identification, and disinterment of remains not associated with the graves or service members identified in Definition Nos. 12 and 13 are irrelevant to Plaintiffs’ claims.

Second, Defendants object to this request as overbroad and unduly burdensome to the extent it concerns remains not associated with the graves or service members identified in Definition Nos. 12 and 13. There have been about 90 disinterments from Manila American Cemetery during the period indicated, and at least 16 additional graves are scheduled to be disinterred within the next three months. In addition, the identification effort continues for many remains disinterred from Manila American Cemetery prior to January 1, 2017. The documents regarding these efforts are voluminous and it would be unduly burdensome to require Defendants to collect, process, and produce these irrelevant documents.

Third, Defendants object to this request as overbroad and unduly burdensome to the extent it seeks all documents related to the 2014 disinterment of remains associated with Cabanatuan Common Grave 717. The disinterment of those remains is not challenged in this case, but merely alleged delays in the identification effort. Accordingly, underlying documents regarding the disinterment are not relevant to Plaintiffs' claims. Collection of these documents would be unduly burdensome given their irrelevance.

Fourth, Defendants object to this request to the extent that it seeks personally identifiable information regarding persons other than the Plaintiffs themselves. Documents regarding other identification and disinterment efforts frequently includes genetic information, genealogical information, and contact information about an individual or family other than Plaintiffs. This is sensitive information and is often subject to protection under the Privacy Act or other legal protections. Defendants decline to produce such information to Plaintiffs without the consent of the individuals it concerns.

Fifth, Defendants object to this request to the extent that it seeks documents already in Plaintiffs' possession. Plaintiffs likely possess copies of many documents regarding the

recovery, identification, and disinterment process for graves associated with Cabanatuan Common Grave 717. It would be redundant and unduly burdensome to require Defendants to produce these documents back to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce non-privileged documents responsive to this request as follows: The DPAA Laboratory documents regarding the identification effort for remains associated with Cabanatuan Common Grave 717 that Defendants have agreed to provide in response to Request No. 7.

REQUEST NO. 21. All personnel files, including those described by 10 U.S.C. § 1506, concerning and/or related to the following persons or remains:

- a. Alexander R. Nininger;
- b. Loren P. Stewart;
- c. Guy O. Fort;
- d. Remains recovered from Cabanatuan Grave 822, including Robert R. Morgan;
- e. Remains recovered from Cabanatuan Grave 704, including Lloyd R. Bruntmyer;
- f. Remains recovered from Cabanatuan Grave 407, including David C. Hansen; and
- g. Remains recovered from Cabanatuan Grave 717, including Arthur H. Kelder.

RESPONSE TO REQUEST NO. 21:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request because “related to the following . . . remains” is vague. Defendants construe it to request the personnel files of the more than 50 individuals listed by name in Definition Nos. 12 and 13. Defendants incorporate by reference their objections to Definition Nos. 12 and 13.

Second, Defendants object to this request because “personnel files” is vague. Defendants construe it to mean the service member’s official military personnel file (OMPF) and IDPF. Defendants note that they no longer have OMPFs for most Army service members from

World War II. As previously discussed with some of the Plaintiffs, most OMPFs for Army World War II service members were destroyed in a 1973 fire at the National Personnel Records Center, a NARA facility in St. Louis. *See* NARA, The 1973 Fire, National Personnel Records Center, <https://www.archives.gov/st-louis/military-personnel/fire-1973.html>.

Third, Defendants object to subsections (d) through (g) of this request as not relevant to Plaintiffs' claims to the extent it seeks personnel files for individuals other than Plaintiffs' relatives. The records of such non-relative service members who are associated with these Cabanatuan common graves have no apparent relevance to any of Plaintiffs' challenges to Defendants' actions. Instead, these documents would only be potentially relevant only if Plaintiffs themselves are permitted to take over the identification effort for these remains, as Request No. 22 seeks to do. As discussed below, Request No. 22 improperly seeks relief beyond the scope of Federal Rule of Civil Procedure 34 and beyond the scope of the Court's authority in this litigation. Because these documents are relevant only if the Court grants the ultimate relief Plaintiffs seek, Defendants will not produce them in discovery.

Fifth, Defendants object to this request as overbroad and unduly burdensome because collection of IDPFs and OMPFs for more than 50 service members who died in 1942 and 1943 would require significant efforts. These records are available to the public through NARA. Given the limited relevance of this material, it would be unduly burdensome for Defendants to collect and produce these documents from NARA that Plaintiffs themselves can obtain.

Sixth, Defendants object to this request to the extent it seeks documents already in Plaintiffs' possession. It would be unduly burdensome to require Defendants to collect and produce documents they have already provided to Plaintiffs. As discussed above in response to Request Nos. 1-7, Defendants have already produced many of these documents to Plaintiffs.

Subject to and without waiving the forgoing objections, Defendants will produce the IDPFs for the seven service members who are Plaintiffs' relatives as part of its response to Request Nos. 1 through 7. Defendants will also produce each OMPF for those seven service members that is in DPAA's possession and will request from NARA OMPFs for the remainder of those seven service members to the extent records indicate that the OMPFs survived the 1973 fire or have been reconstructed.

REQUEST NO. 22. You are requested to produce and permit Plaintiffs to inspect, examine, test (this includes DNA testing), and/or sample the following remains:

- a. The remains designated as Manila #2 X-1130, Manila Maus X4685, Manila American Cemetery Grave J-7-20 or believed to be those of Nininger, Alexander R., O23761, 1st Lieutenant.
- b. The remains designated as Manila #2 X-3629, Manila Maus X1298, Manila American Cemetery Grave N-15-19 or believed to be those of Stewart, Loren P., O5881, Colonel.
- c. The remains designated as Leyte #1 X618, Manila Maus X2322, Manila American Cemetery Grave L-8-113 or believed to be those of Fort, Guy O., O1005, Brigadier General.
- d. Any remains recovered from Cabanatuan Grave 822 that you claim have not been identified.
- e. Any remains recovered from Cabanatuan Grave 704 that you claim have not been identified.
- f. Any remains recovered from Cabanatuan Grave 407 that you claim have not been identified.
- g. Any remains recovered from Cabanatuan Grave 717 that you claim have not been identified.
- h. Any remains recovered from Cabanatuan Grave 717 that are being held in storage at an identification laboratory by Defendants or that have not been returned to their respective next-of-kin.

RESPONSE TO REQUEST NO. 22:

Defendants incorporate by reference the forgoing objections to instructions, definitions, and time, place and manner of compliance. Defendants specifically object to this request as follows:

First, Defendants object to this request because the Court lacks jurisdiction under any of the legal authorities relied on by Plaintiffs in this action to order Defendants to disinter dozens of graves in the Philippines or the United States and to turn over to Plaintiffs for destructive testing

the remains of individuals who may not be Plaintiffs' relatives. By statute, Defendants have discretionary authority over the identification process for unknown remains and unidentified service members from World War II. Because the Court lacks authority to direct the performance of that discretionary authority it also lacks the authority to order the privatization of that effort. In addition, Plaintiffs have no property interest cognizable under the Due Process Clause in unidentified remains. And the Court's equitable authority does not extend to the requested actions involving the international disinterment and transportation of human remains and, potentially, disinterment of remains buried in various states and subject to a host of state and local laws.

Second, Defendants object to subsections (a), (b), and (c) of this request because the phrase "or believed to be those of [the three listed individuals]" is vague. Defendants are unaware of whose belief Plaintiffs refer to. To the extent Plaintiffs refer to Defendants' "belief" about whether any set of remains is that of one of the three listed individuals, the request is nonsensical. The Defendants do not form "beliefs" and under Defendants' policies what is relevant to a disinterment decision is the probability based on the totality of the circumstances that a given set of remains can be identified. Defendants have not determined that any specific set of remains meets this standard for likely identification as one of the three listed individuals.

Third, Defendants object to subsections (d), (e), and (f) of this request because the phrase "that you claim have not been identified" is vague. It could mean those remains designated "unknown" in contrast with those for which an identification has been made; or it could also include remains for which an identification was made but which Defendants have withdrawn or are considering withdrawing due to likely misidentification.

Fourth, Defendants object to this request because it exceeds the scope of Federal Rules of Civil Procedure 26(b)(1) and 34. What Plaintiffs request constitutes ultimate relief that could be awarded, if at all, only after granting judgment to Plaintiffs. This request does not seek material relevant to the claims or defenses in this case because even if Plaintiffs conducted the testing they proposed, it would not make Plaintiffs more or less likely to succeed on the merits of their challenges to Defendants' actions.

Fifth, Defendants object to this request as unreasonable, unduly burdensome, and entirely disproportionate to the needs of this case. Even if testing of the remains could somehow inform the merits of Plaintiffs' claims, the extraordinary and unreasonable burden that disinterment and appropriately respectful transportation and preservation of so many remains would entail renders it clearly improper discovery in this case. In addition, complying with this request would displace many of DPAA's ongoing efforts with regard to disinterment and identification of other remains under proper legal authority and would impose extraordinary and improper burdens on Defendants. Neither the issues at stake in this litigation nor the very limited role of discovery in resolving those issues justify imposing this extraordinary burden on Defendants.

Sixth, Defendants object to this request because, even if the requested actions were otherwise lawful discovery (which they are not), it would place in Plaintiffs' control remains for which many other people have an equal or greater legal claim than plaintiffs and personally identifiable information regarding dozens of persons other than the Plaintiffs themselves. Plaintiffs' interests lie primarily in identification of their own relatives, not in the appropriate identification and respectful treatment of the remains of dozens of other service members. Accordingly, they cannot be relied upon to appropriately select portions of remains and methods for testing that balance all of the relevant factors. Destructive testing of remains exclusively for

comparison to Plaintiffs' own DNA would harm the interests of many other families. Nor should genetic information, genealogical information, contact information, and other personally identifiable information about an individual or family other than Plaintiffs be turned over in discovery to resolve this case. This is sensitive information and is often subject to protection under the Privacy Act or other legal protections. Plaintiffs cannot be relied upon to appropriately steward the remains or the information of unrelated persons.

In sum, Defendants decline to search for or produce any documents or tangible things that may be responsive to this request.

Dated: March 21, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st 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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