

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

Plaintiffs, §

v. §

Civil Action No. SA-17-CV-467-XR

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

Defendants. §

DECLARATION OF JOHN SMITHEE

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. My name is John Smithee. I am over 18 years of age. I reside at 2808 Parker in Amarillo, Texas. I am fully competent to make this declaration, and I have personal knowledge of the facts stated in this declaration. To my knowledge, all of the facts stated in this declaration are true and correct.

2. I am the attorney for Plaintiffs¹, the moving party. I make this declaration in support of the Motion to Compel Production of Remains, or, in the Alternative, for Physical Examination,

¹ John A. Patterson (“Patterson”), John Boyt (“Boyt”), Janis Fort (“Fort”), Ruby Alsbury (“Alsbury”), Raymond Bruntmyer (“Bruntmyer”), Judy Hensley (“Hensley”), and Douglas Kelder (“Kelder”) are referred herein collectively as “Plaintiffs.”

which seeks to compel Defendants² to submit several service members' remains to physical examination and postmortem DNA testing as specified in the motion papers.

3. The condition sought to be examined, the service members' identities and DNA, is a central issue in this lawsuit. Because of my conversations with opposing counsel, I know that the physical condition, identity, and DNA of the service members' remains are disputed and are the principal bases on which Plaintiffs seek to recover relief in this action.

4. In my professional opinion, there is good cause for this examination because it is essential that my clients be in a position to present independent evidence of the nature and extent of the condition in question. There is no source for this evidence other than the proposed examination. I have consulted with experts who have informed me that an examination of the service members' remains would be essential to a true understanding of the physical condition of the remains, the remains' identities, and the DNA that is in controversy. Further, I have been informed that it is likely that adequate DNA samples will be able to be extracted from the remains. This finding is partly based on previous results from similar cases and the records related to each set of remains. The disinterment and examination will establish the facts sought. Further, there are no other discovery tools available to obtain this information. Thus, the disinterment and examination is necessary.

5. Prior to bringing this motion, I attempted to secure the agreement of Galen Throp, the attorney for Defendants, to the examination sought by this motion. I spoke with him on the

² Defense POW/MIA Accounting Agency ("DPAA"), Director of the DPAA Kelly McKeague, United States Department of Defense, Secretary of Defense James Mattis, American Battle Monuments Commission ("ABMC"), and Secretary of the ABMC William Matz are referred herein collectively as "Defendants."

telephone on March 28, 2018. To date, Defendants have refused to submit to the requested examination, making this motion necessary.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 13th day of April, 2018.

/s/ John Smithee

John Smithee, Declarant