UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. SA-17-CV-467-XR
	§	
DEFENSE POW/MIA ACCOUNTING AGENCY, et al.,	§	
	§	
Defendants.	§	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF REMAINS, OR, IN THE ALTERNATIVE, FOR PHYSICAL EXAMINATION

It is difficult to imagine any situation where our government would actively fight against using DNA testing to help identity a victim or fallen soldier. Indeed, it would be considered gross negligence for an investigator to not use DNA testing when a person's identity is disputed. Nonetheless, that is the situation before the Court. The Families[1] are seeking to use a reliable and efficient discovery tool, which will elicit the truth and promote justice. In opposition, the Government[2] attempts to thwart any and all discovery efforts. As shown below, the Government's arguments are erroneous. Consequently, the Court should grant the Families' 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 the "Families."

[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 the "Government."

OBJECTIONS WAIVED BY GOVERNMENT

As an initial matter, the Government waived numerous objections to the Families' discovery request. "A party who has objected to a discovery request then must, in response to a motion to compel, urge and argue in support of its objection to a request, and, if it does not, it waives the objection." *Lechuga v. Magallanes*, MO16CV00269RAJDC, 2017 WL 8180781, at *6 (W.D. Tex. June 1, 2017) (quoting *Samsung Elecs. Am. Inc. v. Yang Kun "Michael" Chung*, 3:15-CV-4108-D, 2017 WL 896897, at *10 (N.D. Tex. Mar. 7, 2017)).

Here, several objections were listed by the Government in their response to the Families' Rule 34 request. *See* Doc. 28 at 8-10. In order to preserve these objections, the Government needed to urge and argue in support of each objection in its response. *See Lechuga*, 2017 WL 8180781, at *6. However, the Government did not urge and/or argue in support of the following objections:

- The court lacks jurisdiction and/or authority (Doc. 28-2 at 46-47) – The word "jurisdiction" does not appear in the Government's opposition brief. *See* Doc. 34. Similarly, no argument is made that the court lacks the authority to order disinterment.
- The requests are vague (Doc. 28-2 at 47) – The Government does not mention its vagueness objection. *See* Doc. 34. The word "vague" is not in the opposition brief.
- The requests are unreasonable (Doc. 28-2 at 48) – While the Government mentions in its Background section that it made an objection that the request was unreasonable, no specific argument is made to support it.

Thus, the Government's failure to urge and argue in support of these objections waived the objections. *See id.*

REPLY TO GOVERNMENT'S ARGUMENT

I. There Are Three Independent Grounds for this Discovery

The Government's response lobs multiple attacks against the Families' motion for many different reasons. Consequently, in order to provide clarity, the Families point out again that they have sought relief from the Court based on three independent legal grounds. First, the Families seek relief based on the Court's inherent power allowing it to order disinterment for discovery purposes. The Government recognizes in its response that the Court has this inherent power. Doc. 34 at 8, f. 3. Second, the Families seek relief under Federal Rules of Civil Procedure 34 and 37. Finally, the Families seek relief under Federal Rule of Civil Procedure 35. As shown in the motion and herein below, the Families are entitled to the relief sought in the motion on each basis.

II. The Presumption Against Disinterment Does Not Apply to Temporary Graves

The Government claims that there is a presumption against disinterment when bodies are "suitably buried." Doc. 34 at 14. Clearly, this presumption does not apply to temporary graves. *See Travelers Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936) ("[A] body once suitably buried ought to remain undisturbed except for necessary or laudable reasons."). The presumption only arises when remains are suitably buried. *Id.* Here, each grave is unmarked and temporary. The Government intends to disinter each grave so that families can later provide a suitable burial. Accordingly, there is no presumption against disinterment.

III. Even if there is a Presumption, the Fifth Circuit Only Requires a Showing that the Discovery is in the Interest of Justice

Even if a presumption is relevant, the Fifth Circuit authorizes disinterment for discovery purposes "for the promotion of truth in private litigation . . . ." *See Travelers Ins. Co.*, 82 F.2d at 801; *see also Painter v. U.S. Fid. & Guar. Co.*, 123 Md. 301, 91 A. 158, 160 (1914) ("[C]ourts have never hesitated to have a body exhumed where the application under the particular

circumstances appeared reasonable and was for the purpose of eliciting the truth in the promotion of justice."). It need only be shown that the discovery is in the interest of justice. *Travelers Ins. Co.*, 82 F.2d at 801 (court may lawfully order disinterment when it is "in the interest of public justice").

Here, there has been a strong showing that the proposed discovery will promote justice and elicit the truth by providing additional evidence of the remains' identities, which is the primary factual dispute between the parties. *See* Devoren Decl. ¶ 7 ("testing will likely assist in the identification of the deceased service members' remains."). Based on similar cases in the past, as well as the medical records available, it is considerably likely that sufficient DNA samples can be obtained from the remains. *See* Devoren Decl. ¶ 7; Smithee Decl. ¶ 4. Again, the discovery will significantly assist in proving the accuracy of the Families' factual claims. Further, justice requires that the most effective tool available, which is DNA testing, should be used to assist the parties in ascertaining the facts in litigation. *See* 8 J. Wigmore, Evidence in Trials at Common Law § 2221, at 197-99 (McNaughton rev. ed. 1961) (Wigmore) ("The exhumation or the autopsy of a corpse, when useful to ascertain facts in litigation, should of course be performed."). Moreover, common sense tells us that the testing will help elicit the truth. Thus, the motion should be granted.

IV. In Addition to What is Required by the Fifth Circuit, the Families Have Shown that the Discovery is Necessary and Will Establish the Facts Sought

While the Fifth Circuit only requires a showing that the discovery is in the interest of justice, the Families' motion also shows that the discovery is necessary and will establish the facts sought.[3]

[3] As shown in the Motion, some courts outside the Fifth Circuit require a showing of necessity and a showing that the examination will establish the facts sought when ordering exhumation of a permanent grave. Here, the graves are temporary. Thus, there are no added requirements. However,

A. The Discovery is Necessary

The Government contends that the discovery is not necessary because the DNA testing is irrelevant to the Families' claims. This argument fails because the discovery is intertwined with the Families' factual claims, which form the basis of several causes of action. For example, the factual basis of the Families' Due Process claims is that the identity of the remains is known. In order to provide further independent evidence supporting this claim, the Families seek to conduct DNA testing, which is the most effective and efficient way to help validate their claims. The fact that there is existing evidence supporting the Families' factual claim that the identity and location of each set of remains is known does not preclude additional discovery that will support the claim.[4] Further, the Government repeatedly argues that no discovery in this case is relevant because only an administrative record can be considered. While parts of the Families' Administrative Procedure Act ("APA") claim is possibly limited to an existing agency record, the Families' other claims are certainly not. The Government cannot use one rule related to a single cause of action to eliminate all discovery related to acts violating the Constitution. Finally, the discovery is also necessary because there is no other way for the Families to obtain the information sought. If DNA testing had already been performed, and the results were recorded, then there would be alternative means to discover this information. However, that is not the case here. Consequently, the discovery is necessary because it is the only possible way to obtain the information sought.

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the Families address each of these requirements in the motion to show that, no matter what standard is applied, the discovery is proper.

[4] For example, the police may have significant evidence that a person committed a crime. The fact that this evidence exists would not prevent the police from conducting DNA testing to further establish certain facts in the case.

As for urgency, the Government argues, without any supporting authority or evidence, that the discovery is not urgent because some deterioration may have already occurred over time. On the other hand, the Families have offered proof that the testing should be conducted as soon as possible. *See* Devoren Decl. ¶ 7. Based on the information provided to the Court, as well as common sense, it is certainly reasonable to conclude that the passing of each day increases the risk that the information sought will be lost due to further deterioration or some other unforeseen event. Thus, the discovery is urgent.

Additionally, the Government claims that the discovery is "an alternative to proving their legal claims." Doc. 34 at 10. This argument fails because it contradicts the Government's other argument that the information sought is irrelevant. Nonetheless, the Families are seeking the discovery as part of proving their claims. That is why it is relevant and necessary. A purpose of discovery is to obtain information that can help either prove or disprove claims. The fact that certain discovery may be more significant than other discovery does not make it an improper "shortcut."

Finally, contrary to the Government's claim, disinterment has been used to help identify remains. For example, in *In re Percival's Estate*, a woman requested the disinterment of remains that she claimed were those of her relative. 101 S.C. 198, 85 S.E. 247 (1915). The woman said she could identify her relative through certain marks on the body. The court held that the remains were subject to examination by the woman because she claimed to be a relative. *Id.* at 206, 85 S.E. at 248. Similarly, here, the Families claim to be the next of kin to the deceased service members. Accordingly, they too should be given the opportunity to examine the remains.

B. The Discovery Will Establish the Facts Sought

The Government misjudges what is required to show that discovery will establish the facts sought. It argues that the Families must essentially obtain a ruling on the merits of their claims before the discovery should be allowed. For example, the Government first argues that the Families can only conduct the discovery after proving that the remains are their relatives. Doc. 34 at 12. This argument fails. Contrary to the Government's position, the facts sought are the genetic profiles of the remains. This data will help validate the Families' factual claims concerning the identity of the remains. The information before the Court shows that the discovery, if permitted, will establish the genetic profile of the remains, which will then assist in the identification of the remains. *See* Devoren Decl. ¶ 7 (if testing is allowed, it "will likely assist in the identification of the deceased service members' remains.").[5]

The Government contends that "some" of the graves are unlikely to contain the relatives' remains. Doc. 34 at 12. Importantly, the Government uses the word "some" because the DPAA has agreed that several of the graves are the likely location of the Families' relatives. Nonetheless, this is a disputed issue of fact, which further shows the necessity for this discovery. Next, the Government argues that extracting DNA is challenging and that the Families have not explicitly stated which specific DNA test will be performed. Yes, DNA testing can be challenging, which is why the Families have obtained the services of a company that has been trusted by the federal government to conduct DNA testing for identification purposes. *See* Devoren Decl. ¶ 4. Bode processes more than 15,000 cases per year and has delivered more than 3.5 million DNA profiles

[5] The Government's reliance on *Brewer v. Am. Medical Alert Corp.*, is misplaced because that case concerned whether an autopsy was capable of being performed to determine a cause of death. No. 1:08- 0069, 2010 WL 280986, at *2 (M.D. Tenn. Jan. 20, 2010). This necessarily required that the body be preserved in a certain way that would allow the examination to be possible. Here, there is no dispute that the discovery can take place. While the testing may be challenging, it can be done.

to state and federal agencies. *Id.* As for the specific DNA test that will be used, that determination is made once the remains are presented. It would be improper to swear under oath that one specific test should be used at this time when the exact condition of the remains is uncertain. Different tests may be used depending on the condition of the remains.

The Government also argues that Bode does not have the necessary skill and experience to quickly and reliably perform the testing. Dox. 34 at 13. This argument is perplexing given Bode's history with federal agencies, along with its capabilities and resources. Bode operates an internationally recognized DNA laboratory, which utilizes numerous different DNA tests. As previously stated, Bode has tested more than 30,000 unidentified human remains for DNA, including remains from World War II. Devoren Decl. ¶ 5. State and federal agencies have routinely trusted Bode's services in this field. Moreover, Bode' services have been retained to identity victims of other wars, terrorism, crime, and natural disasters, including the 2001 attack on the World Trade Center. *Id.* at ¶ 4. The Government recognizes that Bode is accredited in DNA testing. Doc. 34 at 13. Further, the Government has previously accepted the identification of World War II remains based on DNA testing performed by Bode. Accordingly, it is clear that Bode is capable of performing the examination requested.

Finally, the Government argues that DNA testing alone will not identify the remains and that the Families have not shown that they are prepared to spend money. It is confusing that the Government argues that DNA testing is just a part of the identification process while also arguing that the testing would provide ultimate relief. Nonetheless, the facts sought are the DNA profiles of the remains. This information will provide further independent evidence supporting the Families' factual claims. As for the second argument, it is unclear why there must be a showing that the Families are prepared to expend financial resources. Such a showing is not required.

Nonetheless, the Families have requested the discovery, obtained Bode's services, and are prepared to conduct the examination.

V. The Discovery is Relevant – the Primary Issue of Fact in Dispute Between the Parties is the Identity and Location of the Remains

The Government surprisingly claims that the discovery sought is irrelevant.[6] This argument is apparently based on the contention that the Families only have a cause of action under the APA. The Government's attempt to limit discovery to only one of the Families' causes of action must fail. Indeed, the Families have asserted several other causes of action outside of the APA, and are entitled to conduct discovery related to those claims. While parts of the Families' APA claim alone could possibly be limited to the administrative record, the other causes of action certainly are not subject to the same limitations. No authority or statute supports such an extension of the record review rule.

The Government also claims that the parties are not actually disputing the identity of the remains, but instead whether agency action is required. Again, it is quite clear that there is a dispute between the parties concerning the identity and location of the remains. Additionally, this is another attempt to impose a limit on discovery related to the Families' non-APA causes of action. For example, the Families' Due Process claims do not depend on the agency record alone. Instead, the claims' success necessarily depends on whether the location of their relatives is known. The Government's imagined "theory" that the discovery will create a legal interest is nonsensical. This is not the Families' "theory." Rather, the Families are attempting to use a tool of discovery to provide further independent evidence that will support their factual claims in this case.

[6] The Government also argues that the Court should not allow discovery because the Government has filed a Rule 12(c) motion. The Standing Order in Civil Cases Assigned to Judge Xavier Rodriguez states that the filing of Rule 12(c) motions does not stay discovery or otherwise delay progress of a case. Thus, the Government's argument must be rejected.

Again, it is readily apparent that the discovery sought is relevant to the Families' claims. Still, it is not the Families' burden to prove that the discovery sought is relevant. *See McLeod, Alexander, Powel and Apffel, P.C. v. Quarles,* 894 F.2d 1482, 1485 (5th Cir.1990). Instead, "[t]he party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable." *Nerium Skincare, Inc. v. Olson*, No. 3:16-CV-1217-B, 2017 WL 277634, at *3 (N.D. Tex. Jan. 20, 2017) (citing *Quarles*, 894 F.2d at 1485); *see also Crum & Forster Specialty Ins. Co. v. Great W. Cas. Co.*, EP-15-CV-00325-DCG, 2016 WL 10459397, at *9 (W.D. Tex. Dec. 28, 2016) (party must "specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of proper discovery."); *Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 477 (N.D. Tex. 2005). The Government's objection failed to establish that the discovery is irrelevant. Accordingly, the Government's argument should be rejected.

VI. The Discovery is Proportional to the Needs of the Case

A party seeking to resist discovery on grounds that it is outside the scope permitted by Rule 26(b)(1) "bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by [Rule 26(b)] by coming forward with specific information to address [the proportionality factors] . . . ." *Nerium Skincare, Inc.*, 2017 WL 277634, at *3. The proportionality factors are: the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1). No single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional. *Capetillo v. Primecare Med., Inc.*, 2016 WL 3551625, at *2 (E.D. Pa. June 29, 2016). Proportionality is used to avoid wasteful discovery. It should not be used as an excuse to eliminate

all discovery in a case. As Chief Justice Roberts recently wrote "the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense . . . ." John G. Roberts, Jr. 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, p. 7 (2015), *available at* https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (emphasis added).

Here, the Government broadly states that the discovery is not proportional to the needs of the case. However, the Government does not focus its argument on addressing the proportionality factors.[7] Instead, the Government focuses its proportionality argument on several other grounds – (1) the discovery allegedly seeks "ultimate relief" and (2) the discovery allegedly intrudes on an unknown third-party's interest. As shown below, the Government's proportionality objection fails.

A. This Discovery is Not "Ultimate Relief"

Remarkably, the Government goes from claiming that the discovery is completely irrelevant to arguing that the discovery is the "ultimate relief" sought. It is unclear how something can be irrelevant to a case while at the same time be the ultimate relief. Assuming that such arguments can coexist, both are erroneous.

In furtherance of its argument, the Government again attempts to transform the relief sought by the Families. Contrary to the Government's assertion, the "ultimate relief" sought is for the Families to properly bury their relatives that were killed while fighting for their country during World War II. It is not to create a certain timetable that prioritizes certain cases over others. That is a mischaracterization of the Families' intentions. While disinterment is necessarily required in order for the Families to bury their relatives, it is not final relief.

[7] The only factor addressed is whether the burden of the proposed discovery outweighs its likely benefit. The argument related to this single factor is not persuasive.

The Government focuses on the Families' Mandamus Act claims, which request that the remains be properly buried or, in the alternative, tested by the Government. For the first request, the ultimate relief is for the remains to be properly buried. Disinterment is simply a prerequisite for the ultimate relief. Here, the remains could be produced for inspection then buried again by the Government until resolution of the case. Thus, there would not be any "ultimate relief." Likewise, the alternative request seeks a court order directing the Government to use its resources and capabilities to promptly identify the remains. Again, disinterment would be a prerequisite to the Government performing inspections and tests, which is the relief that is truly sought. Here, if this motion is granted, the Families are the ones conducting the inspection and/or testing, not the Government. Finally, the Government fails to show how the Families are doing an "end-run around the entire litigation process through misuse of the discovery tools." Such a broad and conclusory allegation is improper without any evidence or proof.

B. The Discovery Does Not Wrongfully Interfere with a Third-Party Interest

The Government appears to object to the discovery because disinterment could possibly "intrude" on a third-party's interest. This argument is meritless. First, no third-party is identified. Second, the DPAA has already disinterred Arthur Kelder's remains, but is withholding the balance of his remains. Third, the DPAA has recommended disinterment of Lloyd Bruntmyer and Robert Morgan. Fourth, the DPAA would recommend disinterment of David Hansen, but does not believe it has enough eligible family reference samples for DNA testing. Fifth, the remaining three remains involve only the respective Plaintiffs in this lawsuit. Finally, even if none of the above were true, the DPAA intends to disinter all of the remains. Accordingly, no third-party interest would be wrongfully "intruded."

Broad claims are also made that this discovery could "severely undercut" the Government's ability to perform. However, no evidence or specific information is provided showing that the discovery will harm the Government. Such conclusory allegations are insufficient to prevent discovery from taking place. Further, the Government claims that private information of other families is necessary. This is incorrect. Private information from other families is not required to perform the testing. Finally, no evidence is presented to the Court showing that the DPAA would be unable to perform similar testing after the Families have conducted their own testing. Just because the DPAA wishes for no discovery to take place does not make such discovery a "perversion."

C. The Benefits of the Discovery Outweigh the Alleged Burden

The Government claims that the discovery would impose costs on the Government, which are not counterbalanced by significant litigation benefits. This argument fails for several reasons as explained below. It must also be noted that this argument is based on the Government's belief that no evidence should be considered outside of the administrative record. As shown above, this belief is baseless.

1. The Government Failed to Provide any Evidence of any Alleged Burden

Critically, a claim of undue burden must be backed by evidence quantifying the difficulty or expense involved with the discovery. *Samsung Elecs. Am. Inc.*, 2017 WL 896897, at *9 ("A party resisting discovery must show how the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden."); *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 2016 WL 98603, at *3

(N.D. Tex. Jan 8, 2016) (same).[8] "Failing to do so, as a general matter, makes such an unsupported objection nothing more than unsustainable boilerplate." *Samsung Elecs. Am. Inc.*, 2017 WL 896897, at *9

Here, there is no specific evidence quantifying the expense involved with the discovery. The only document supporting the Government's claim of undue burden is a report filed over ten years ago, which does not address the type of disinterment at issue. It merely states a broad estimate of costs involved for disinterment in general. Additionally, the report is irrelevant because it is more than ten years old and does not address the specific cemetery at issue. Further, it is odd that the Government would rely upon a report from the Secretary of the Army when it has previously claimed that the Army has no authority on this matter. In all, there simply is no specific information or evidence provided to the Court showing that there is an unreasonable burden and cost. Accordingly, the Government's unsustainable boilerplate objection must be rejected.[9]

2. The Proportionality Factors Support the Use of the Discovery Sought

All discovery is inherently burdensome. Consequently, the question is whether that burden is undue in light of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, and the importance of the discovery in resolving the issues. *Orchestratehr, Inc. v. Trombetta*, 178 F. Supp. 3d 476, 506

[8] *See also Zoobuh, Inc. v. Better Broadcasting, LLC*, 2017 WL 1476135, at *4-5 (D. Utah Apr. 24, 2017) (defendant failed to provide "some quantification" and thus failed to establish undue burden); *Scott Hutchison Enter., Inc. v. Cranberry Pipeline Corp.*, 2016 WL 5219633, at *3 (S.D. W. Va. Sept. 20, 2016) (collection of cases that require specific proof).

[9] Even if there was an undue burden for the Government, which there is not, the Families are capable of using their own resources to disinter and transport the remains so that the DNA testing can be performed. Also, the Government's claim that the Families are attempting to shift costs based on a statute is incorrect. That is a part of the final relief requested in the Complaint, not the discovery motion.

(N.D. Tex. 2016); *Black v. Buffalo Meat Serv., Inc.*, No. 2016 WL 4363506, at *6 (W.D.N.Y. Aug. 16, 2016) ("In effect, the concept of undue burden that has been in Rule 26 for the last thirty plus years has been replaced by proportionality, with the burden as one factor to determine whether the discovery demand is proportionate to the case."). Considering each of these factors as a whole, the discovery does not impose an undue burden.

First, there are significant constitutional issues at stake in this action. This case involves the First, Fourth, and Fifth Amendment, as well as several other related federal statutes. Most importantly, however, is the fact that this case is centered on whether families have the right to bury the remains of their loved ones that made the ultimate sacrifice for their country. As the Government has recognized in its filings before the Court, it is of the highest national priority to bring these service members home for proper burial. Any suggestion that returning service members back home for proper burial is not of the upmost importance is groundless.

Second, the discovery is in the sole possession of the Government. Where relevant evidence is in the sole possession of the defendant, discovery is generally proportionate to the needs of the case. *See Albritton v. CVS Caremakr Corp.*, 2016 WL 3580790, at *4 (W.D. Ky. June 28, 2016) ("Here, proportionality favors the Plaintiff. It is highly unlikely that Plaintiff could discovery similar information from another source or in another manner."). Here, the Government "holds all the cards" on the discovery sought and has the only access to the discovery.

Third, the Government has an incredible amount of resources available. The Government has billions of dollars allocated to it by Congress. The DPAA alone receives over one hundred million in funding every year. This discovery is not meant to "coerce" the Government or wage a war of attrition. That is a battle that the Families could never win or sustain.

Finally, this discovery is incredibly important in resolving the issues in this case. To satisfy the "importance" factor, the discovery must only be "more than tangentially related to the issues that are actually at stake in the litigation." *Flynn v. Square One Distribution, Inc.*, No. 6:16-MC-25-ORL-37TBS, 2016 WL 2997673, at *4 (M.D. Fla. May 26, 2016). Even where the cost is considerable, the importance factor is satisfied where "the probative value of the sought after discovery is potentially substantial because it may be relevant to factual issues at the heart of [plaintiff's claim]." *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, No. 13-MD-2445, 2016 WL 3519618, at *7 (E.D. Pa. June 28, 2016) (emphasis added). Here, the factual issue at the heart of this litigation is the identity of the remains. This discovery is the only additional independent evidence, outside of government records, that can be obtained to help prove the validity of the Families' factual claims. DNA testing is the primary tool used to assist in the identification process. It is also the most efficient and effective tool available to obtain the information sought. This discovery will be the most significant step taken towards resolving the issues in this case.

In sum, the Government has failed to meet its burden of proving that the discovery is not proportional to the needs of the case. It has chosen to rigorously defend this action, which has placed the Families in a position of needing to do more to properly present their case at trial. *See Vay v. Huston*, 2016 WL 1408116, at *6 (W.D. Pa. April. 11, 2016). Accordingly, the Government's proportionality objections must be denied.

VII. Rule 35's Requirements Have Been Met

The Government oddly argues that the identity of the remains is not "in controversy." It is the Families' understanding that the Government maintains that the identity of the remains is not known. This is the primary factual dispute between the parties. The fact that the remains have been

identified and located is the underlying basis of the Families' Due Process claims. This is yet another time the Government ignores the Families' non-APA causes of action. As previously shown in the motion and above, the physical condition of the remains, along with their blood group, is the primary controversy in this case. It is the factual issue at the heart of this litigation.

Additionally, as shown above, there is good cause for this discovery. The discovery is relevant, necessary, and proportional to the needs of the case. It will also elicit the truth and promote justice. It is essential that the litigating parties be in a position to present independent evidence of the identity of the remains. *See* Smithee Decl. Further, there is no source for this evidence other than the proposed examination. Accordingly, there is good cause for the Rule 35 motion.

VIII. The Court Should Permit this Discovery to Elicit the Truth and Promote Justice

As shown above, this discovery will elicit the truth and promote justice. This is the only discovery available that can provide the information sought. There is no unfair prejudice to anyone. The remains will be disinterred – that is certain. It is not a matter of if DNA testing will be performed, but when. The time is now for this discovery to take place so that the litigating parties can ascertain the facts at issue. This discovery is the most efficient way to help resolve the factual disputes in this case. Accordingly, the Court should grant the Families' Motion to Compel.

CONCLUSION

For the foregoing reasons, the Court should overrule and reject the Government's objections, and the Families' Motion to Compel Production of Remains, or, in the Alternative, for Physical Examination should be granted.

Dated: June 1, 2018

Respectfully submitted,

/s/ John T. Smithee, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of June 2018, a true and correct copy was delivered as follows:

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