

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,

Plaintiffs,

v.

DEFENSE POW/MIA ACCOUNTING
AGENCY, et al.,

Defendants.

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

**PLAINTIFFS’ ADVISORY TO COURT CONCERNING
THE PRODUCTION AND EXAMINATION OF REMAINS**

The Plaintiffs submit the following information, documents, and materials in support of their Motion to Compel Production of Remains, or, in the Alternative, for Physical Examination. This filing should assist the Court with the current discovery dispute between the parties.¹ Specifically, it illustrates the appropriate process used to produce remains and perform an examination. While the Plaintiffs simply need access to the remains for examination and would like to enter into a reasonable arrangement with the Defendants to resolve this discovery dispute, the Defendants have repeatedly stated that they will refuse to work with the Plaintiffs. Accordingly, the Plaintiffs are prepared to perform each action required to disinter, transport, and

¹ This filing concerns the disinterment and inspection process that would be used for the following remains:

- X-1130 Manila #2 Manila American Cemetery Grave J-7-20 (Nininger)
- X-3629 Manila #2 Manila American Cemetery Grave N-15-19 (Stewart)
- X-618 Leyte #1 Manila American Cemetery Grave number L-8-113 (Fort)

A similar procedure and process discussed herein could be applied to the other remains at issue in this case.

examine (including DNA testing) the remains at issue in this case.² Pending the Court's approval and an order compelling Defendants to produce the subject remains, Plaintiffs are ready to enter in to binding agreements for the relevant services as soon as the Court approves.

I. PLAINTIFFS' CONSULTANTS

1. Plaintiffs have retained the services of the PFC Lawrence Gordon Foundation, a registered 501(c)3 charity, Kenyon International Emergency Services, a mortuary service company, and Bode Cellmark Forensics, an accredited DNA testing laboratory.

A. PFC LAWRENCE GORDON FOUNDATION

2. The PFC Lawrence Gordon Foundation is a registered 501(c)3 charity that is prepared to assist the Plaintiffs with the disinterment, transportation, and inspection of the remains. It has significant experience with the entire disinterment process and has worked to identify remains from World War II in the past. *See* Exhibit A (news release by government recognizing identification made by PFC Lawrence Gordon Foundation's President and Bode Cellmark Forensics).

B. KENYON INTERNATIONAL PROPOSAL

3. Kenyon International Emergency Services is a crisis and disaster management company that has been providing disaster and mortuary services for more than one-hundred years. It has personnel and resources spread across four regional offices worldwide. Attached as Exhibit B is a proposal prepared by Kenyon International Emergency Services. It assumes that the

² While it is impossible to accurately anticipate every possible contingency until work actually begins, preparation of this proposal has shown that numerous alternatives exist in every phase of this project. For example, Kenyon International Emergency Services, has more than 1,700 mortuary service professionals under contract and many of them are located near their headquarters in South Texas. Similarly, the U.S. Embassy in Manila lists multiple funeral homes capable of providing disinterment and transportation services.

Plaintiffs will be responsible for the disinterment, transportation, examination, and identification of the remains. It explains the disinterment and examination process in detail. Of course, some of the proposal may not apply should Defendants be ordered to disinter and produce the remains at an agreeable location. Nonetheless, Kenyon International Emergency Services is prepared to assist Plaintiffs with each step of the process that the Court finds Plaintiffs are responsible for.

C. BODE CELLMARK FORENSICS

4. As previously shown, Bode Cellmark Forensics is prepared to assist the Plaintiffs with DNA testing and analysis. It holds multiple accreditations from third-party agencies. *See Accreditations*, Bode Cellmark Forensics, <https://www.bodecellmark.com/pages/accreditations> (last visited July 12, 2018) (list and links to accreditations and certificates).

II. PROTOCOL FOR EXAMINATION AND DNA TESTING

5. In addition to the proposal prepared by Kenyon International Emergency Services, below is a description of the disinterment and examination process.

A. DISINTERMENT OF REMAINS

6. Should the Plaintiffs be responsible for disinterring the remains, upon this Court's order that the subject remains be produced to Plaintiffs, Defendants must provide a letter of authorization for the disinterment of the subject remains acceptable to Plaintiffs, Defendants and the American Battle Monuments Commission. Any necessary permit(s) for disinterment, international transportation, and/or customs clearance will be obtained from the Philippine Government.

7. Defendants will be given at least ten days notice prior to commencing disinterment operations or examination of the remains.

8. Alternatively, if Defendants wish to maintain custody and control of the subject remains, Plaintiffs are agreeable to disinterment and transportation to a mutually agreeable location in the Western District of Texas under the same general procedures set out herein.

9. Each party will be responsible for all expenses incurred by them and those expenses may be partially or totally offset by donations in-kind and/or grants. Upon successful identification of the subject remains or transfer to Defendant's identification laboratory, Plaintiffs expect to apply for reimbursement of expenses under 10 USC § 1481.

10. Defendants' standard operating procedures pertaining to chain of custody will be initiated by the servicing funeral director in Manila. Each shipping container will be sealed and each transfer of custody receipted for.

11. Upon arrival at the mutually agreed facility in the Western District of Texas, the remains will be secured by a Texas State licensed funeral director and access will be permitted only when designated representatives of both parties are present.

B. CASKETING BY PLAINTIFFS

12. Plaintiffs expect to engage Rizal Funeral Homes, the Manila funeral home contracted by the U.S. Government to conduct the ten Cabanatuan Grave 717 disinterments in 2014. The same Statement of Work previously used by Defendants will be required of the contractor who will be responsible for exhumation of the graves; opening the existing caskets; casketing, transportation and storage; thence, delivery to the appropriate common air carrier.

C. TRANSPORTATION BY PLAINTIFFS

13. Scheduled commercial airline service by U.S. flag carriers from Manila to San Antonio is available. All such carriers have extensive experience with the transportation of human

remains. DoD will be invited to provide a military escort and render appropriate military honors at points of transfer.

D. STORAGE AND EXAMINATION FACILITY

14. After transportation from Manila to San Antonio via commercial air carrier, the remains will be secured at a state licensed funeral home in San Antonio. The storage facility will be climate controlled and adequate for the preparation of DNA samples.

E. EXAMINATION BY PLAINTIFFS

15. Necessary DNA samples will be prepared by appropriate personnel. If applicable, the remains will be examined by an anthropologist and/or odontologist working with Plaintiffs' DNA expert for evaluation of the proper association and inventory of the remains.

16. Samples will be clearly labeled and shipped via overnight courier, signature service required, to the Bode Cellmark Forensics Laboratory.

F. FAMILY REFERENCE SAMPLES FOR COMPARISON BY PLAINTIFFS

17. DNA Family Reference Samples (FRS) and appropriate genealogical information will be obtained from the family of each subject.

G. PRODUCTION OF REPORTS

18. Certified copies of the DNA and FRS reports will be provided to Defendants and the Bexar County Medical Examiner with application for a Death Certificate. Chain of custody and IDPF documents will be included in the application.

H. REMARKS

19. Plaintiffs will consider all reasonable requests from Defendants to modify these procedures.

20. Plaintiffs will comply with appropriate standard operating procedures and best practices used by Defendants upon request by Defendants.

III. CONCLUSION

The process and services utilized by Plaintiffs necessarily depends on the Court's ruling on the Motion to Compel. Nonetheless, the entire process set forth within is reasonable and effective. Accordingly, the Court should consider this Report and grant the Families' Motion to Compel Production of Remains, or, in the Alternative, for Physical Examination.

Dated: July 12, 2018

Respectfully submitted,

/s/ John T. Smithee, Jr.

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of July 2018, a true and correct copy was delivered as follows:

<p>Galen Thorp U.S. Department of Justice Civil Division, Federal Programs Branch 950 Pennsylvania Ave., NW Washington, DC 20530 202-514-4781 Email: galen.thorp@usdoj.gov ATTORNEY FOR DEFENDANTS</p>	<p>Via Electronic Delivery: X Certified Mail, Return Receipt Requested: United States Regular Mail: Overnight Mail: Via Facsimile Transmission: Via Hand-Delivery:</p>
<p>Mary F. Kruger United States Attorneys Office 601 NW Loop 410, Suite 600 San Antonio, TX 78216 210-384-7300 Fax: 210/384-7322 Email: mary.kruger@usdoj.gov ATTORNEY FOR DEFENDANTS</p>	<p>Via Electronic Delivery: X Certified Mail, Return Receipt Requested: United States Regular Mail: Overnight Mail: Via Facsimile Transmission: Via Hand-Delivery:</p>

/s/ John T. Smithee, Jr.

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