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' MOTION TO EXCLUDE THE PROFFERED EXPERT OPINIONS OF JOHN EAKIN AND RENEE RICHARDSON

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INTRODUCTION

Neither of Plaintiffs' designated expert witnesses satisfy the requirements of Federal Rule of Evidence 702, which permits only relevant and reliable testimony by qualified experts to be admitted into evidence. John Eakin, an aviation crash investigator, is not qualified by experience or otherwise to offer the opinions he presents, and his inscrutable methodology makes his conclusions unsound. Renee Richardson, a retired Naval intelligence officer who spent four years working for a component of the Department of Defense's past conflict accounting effort, has better qualifications, but strays beyond her expertise and employs a largely circular methodology that does not address the questions before the Court. Neither witness offers opinions that will assist the Court as trier of fact in this case. Mr. Eakin's methodology simply duplicates analysis that the Court itself can perform, and Ms. Richardson's opinions will not advance any of Plaintiffs' legal theories—indeed, she contradicts Plaintiffs' core contention that the relevant servicemembers' remains have already been identified. In exercise of the Court's gatekeeping function, as established by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), their testimony should be excluded both for summary judgment briefing and trial.

BACKGROUND

Defendants incorporate by reference the factual background set forth in the Motion for Judgment on the Pleadings, ECF No. 31, and merely reiterate here those facts most relevant to this motion.

I. Statutory and Regulatory Provisions

In 2009, Congress extended its call for accounting for unknown soldiers from past conflicts to include remains from World War II. *See* Pub. L. No. 111-84, § 541, 123 Stat. 2190 (Oct. 28, 2009) (amending 10 U.S.C. § 1509(a)). DoD created the DPAA pursuant to Congress' directive that a single agency oversee the past conflict accounting program. *See* Pub. L. No. 113-

291, § 916(a), 128 Stat. 3292 (Dec. 19, 2014) (amending 10 U.S.C. § 1501(a)). DPAA has two missions—to "[l]ead the national effort to account for unaccounted for DoD personnel from past conflicts" and to provide family members "the available information concerning the loss incident, past and present search and recovery efforts of the remains, and current accounting status for unaccounted for DoD personnel." DoD Directive 5110.10 § 1.2, Defense POW/MIA Accounting Agency (Jan. 13, 2017) (Ex. B). One aspect of DPAA's responsibilities involves compiling and weighing the evidence for disinterring unknown remains for further identification, incorporating the expertise of historians, anthropologists, and odontologists to apply thresholds set by the Deputy Secretary of Defense. *See* Memorandum, Disinterment of Unknowns from the Nat'l Memorial Cemetery of the Pacific (Apr. 14, 2015) (Ex. A); *see also* DoD Directive-type Memorandum (DTM)-16-003, Policy Guidance for the Disinterment of Unidentified Human Remains at 2 (July 10, 2018) (Ex. D) (implementing Deputy Secretary of Defense's memorandum). DPAA's recommendations are reviewed and ultimately decided upon by the Assistant Secretary of Defense for Manpower and Reserve Affairs (hereinafter "Assistant Secretary"). DTM-16-003 at 9.

For individually buried remains, DPAA research must "indicate[] that it is more likely than not that DoD can identify the remains." For commingled remains of unknowns, DPAA research must "indicate[] that at least 60 percent of the Service members associated with the group can be individually identified." DTM-16-003 at 2. This means that DPAA must have DNA family reference samples (or other medical means of identification) "for at least 60 percent of the potentially associated Service members (for commingled unknown remains)" or for at least 50 percent of the potentially associated Service members (for individual unknown remains), and "must conduct historical research to determine whether it is more likely than not that the

unknown remains can be identified." *Id.* DPAA's estimate of the likelihood of identification is a "qualitative determination based on the totality of the evidence." DPAA Administrative Instruction (AI) 2310.01 § 7.2 (Ex. E). DPAA's "Disinterment Criteria Guide" sets forth 27 non-exhaustive factors to consider in making this determination. *Id.* § 7.

II. Facts Relevant to Remains Selected by Plaintiffs

A. Camp Cabanatuan Disinterments

Four of the servicemembers at issue here are associated with common graves from Camp Cabanatuan, and DPAA is proceeding forward with disinterment, forensic analysis, and testing for each relevant common grave.

Cabanatuan common graves pose substantial identification problems due limitations in the POWs' recordkeeping efforts, commingling of remains, and defects in the post-war identification effort. *See* Declaration of Gregory Kupsky ("Kupsky Decl.") ¶ 17 (Ex. F); Subex. 2, Heather Harris & Lisa Beckinbaugh, Historical Report, U.S. Casualties and Burials at Cabanatuan POW Camp #1 at 6-9 (May 2017) (hereinafter "Harris & Beckinbaugh"). DPAA's ongoing project to account for the unidentified service members who died at Camp Cabanatuan began around 2004 with historical research and assessment of all available documentation. Kupsky Decl. ¶ 16. The project seeks to disinter all unidentified remains associated with one Cabanatuan common grave at one time, so that when each common grave is disinterred, the relevant historical analysis and family reference samples are available to support as many identifications as possible. *See id.* Once the historical research is complete, and sufficient DNA reference samples have been received from relatives of the potentially associated service members, DPAA submits a disinterment recommendation for decision by the Assistant Secretary. *See id.* In 2015, Private Arthur Kelder (PVT Kelder) was identified among remains associated with Common Grave 717, and forensic analysis and testing of residual remains

associated with that grave are ongoing. *See* Am. Answer ¶ 49, ECF No. 26. In November 2018, remains associated with Common Graves 704 and 822 were disinterred and forensic analysis and testing has begun. *See* Kupsky Decl. ¶ 19. DoD recently received sufficient family reference samples to support disinterment of remains associated with Common Grave 407, and DPAA is preparing a recommendation for those remains. *See id.* Accordingly, DPAA's efforts to identify remains that may include Technician Lloyd Bruntmyer (TEC4 Bruntmyer) (associated with Common Grave 704), Private First Class David Hansen (PFC Hansen) (associated with Common Grave 407), and Private Robert Morgan (PVT Morgan) (associated with Common Grave 822) are proceeding.

B. Individual Remains at Issue in This Case

In general, DPAA does not pursue its mission by comparing one servicemember to one set of remains because that would be inefficient and unproductive. *See* Kupsky Decl. ¶ 10. Instead, DPAA historians research the context for losses and recovery efforts in a particular area and then develop a list of all servicemembers whose remains could plausibly be found in a specific grave or set of graves based on the historical evidence. *Id.* ¶¶ 6, 9. That list is submitted to DPAA's forensic anthropologists and odontologists who winnow it down based on scientific analysis of the documented physical evidence that excludes certain candidates. *Id.* ¶ 7. If DPAA concludes that the proposed disinterment meets DTM-16-003's disinterment standard for the remaining candidates, including having sufficient family reference samples, it submits a recommendation for disinterment.

1. 1LT Nininger

DPAA is conducting a comprehensive study of remains recovered from the Abucay area, the temporary cemeteries on Bataan, and the missing individuals who may be associated. *Id.* ¶ 20. This effort is relevant to identifying 1st Lieutenant Alexander Nininger (1LT Nininger) and

Colonel Loren Stewart (COL Stewart), both of whom were lost in the Abucay area.

In 2015, DoD rejected Plaintiff John Patterson's request that the remains designated as Manila #2 Cemetery X-1130 be disinterred for identification as the remains of 1LT Nininger. *See* Am. Answer, Exs. 23, 24. While X-1130 has been associated with 1LT Nininger since shortly after it was originally disinterred, the Office of the Quartermaster General found the evidence made it unlikely that X-1130 was 1LT Nininger. *See* Kupsky Decl. ¶ 22. In 2015, DPAA reaffirmed that assessment, and the evidence has only grown stronger upon closer inspection. *See id.* ¶¶ 20-25. Although contemporary witnesses stated that Nininger was buried in the churchyard or immediately outside it, DPAA has confirmed that X-1130 was recovered from a different cemetery half a mile away. *See id.* ¶ 20. The stature estimates, using both 1940s and contemporary methodologies, indicate that the individual was much shorter than 1LT Nininger's 5 feet, 11 inches. Declaration of Paul Emanovsky ("Emanovsky Decl.") ¶¶ 11-12 (Ex. G). The only direct link between 1LT Nininger and X-1130 is Colonel Clarke's unreliable reference to "Grave No. 9." Kupsky Decl. ¶ 21. There are other possibilities, including the remains buried as 1LT Ira Cheaney at West Point, which were recovered from the Abucay churchyard in 1948 and appear to have been misidentified. *See id.* ¶ 24. The U.S. Army recently approved the Cheaney family's request for disinterment of those remains for testing. The remains will be sent to DPAA for forensic analysis and testing. *See id.*

2. COL Stewart

In November 2017, Plaintiff John Boyt requested disinterment of the remains designated as Manila #2 X-3629 for comparison to COL Stewart. *See* Am. Answer, Ex. 30. These remains were exhumed from a grave near the house of a Filipino civilian based on his 1946 report that he observed Philippine Scouts burying an individual that the Scouts stated was an American colonel. *See* Kupsky Decl. ¶ 26. These remains appear to have been associated with COL

Stewart since disinterment, although his last name was consistently misspelled "Stuart" in the X-file. *See id.* ¶¶ 26-27. They were ultimately found unidentifiable in 1950. *See id.* In conjunction with Plaintiff Boyt's request, DPAA historians prepared a short list of 21 candidates who were lost in the Abucay area for comparison to X-3629, including 1LT Nininger and COL Stewart. *See id.* ¶ 29. COL Stewart and most other candidates were ruled out by scientific analysis of the recorded physical evidence. *Id.* DPAA's formal recommendation regarding X-3629 will proceed once family reference samples are received for the remaining candidates. *Id.*

3. BG Fort

The available evidence indicates that Brigadier General Guy Fort (BG Fort) was executed by the Imperial Japanese in October 1942. *See id.* ¶ 32. In December 2017, Plaintiff Janis Fort requested disinterment of the remains designated Leyte #1 X-618 for comparison to BG Fort. Am. Answer ¶ 31. These remains were disinterred from the Ateneo de Cagayan school and turned over to AGRS in July 1947. See Kupsky Decl. ¶ 31. These remains have been associated with BG Fort since that time because provincial governor Ignacio Cruz reported second hand information suggesting that the execution and burial of BG Fort occurred in Cagayan. *See id.* However, several witnesses, including Japanese officers connected to the execution, stated that the execution and burial occurred 45 miles away in the town of Dansalan. *See id.* ¶ 32. DoD found the remains unidentifiable in September 1949, in part because the remains had two teeth present that BG Fort's records indicated had been extracted years earlier. *See id.* ¶ 33. On November 28, 2018, the Assistant Secretary denied Plaintiff Janis Fort's request. *See id.* ¶ 30. In addition to the location and dental discrepancies, the age, stature, and ancestry are not consistent with BG Fort. *Id.* ¶¶ 32-34. DPAA is pursuing disinterment of three graves located in the area where BG Fort and three other servicemembers were executed in 1942. *See* ¶ 35.

LEGAL FRAMEWORK

District courts are required "to act as 'gatekeepers' to ensure expert testimony meets [Federal Rule of Evidence] 702's standards." *Brightwell v. Bandera Cnty.*, No. 16-1216, 2017 WL 5346393, at *3 (W.D. Tex. Nov. 13, 2017) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)). Under Rule 702, "[e]xpert testimony is admissible only if it is both relevant and reliable." *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 775 (5th Cir. 2017) (quotation marks and citation omitted).[1]

To satisfy Rule 702, the Court need not "hold a formal *Daubert* hearing," but must "perform its gatekeeping function by performing some type of *Daubert* inquiry and by making findings about the witness's qualifications to give expert testimony." *Carlson v. Bioremedi Therapeutic Sys., Inc.*, 822 F.3d 194, 201 (5th Cir. 2016). Daubert decisions are often made in advance of or in conjunction with summary judgment briefing. *See, e.g.*, *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243 (5th Cir. 2002). In exercising this gatekeeping function, the Court must find that the proffered expert testimony satisfies six requirements: (1) the witness must be "qualified as an expert"; (2) the witness must be offering "scientific, technical, or other specialized knowledge"; (3) the testimony must "help the trier of fact to understand the evidence or to determine a fact in issue"; (4) the testimony is "based upon sufficient facts or data"; (5) the testimony is "the product of reliable principles and methods"; and (6) the witness has "applied the principles and methods reliably to the facts of the case." *See* Fed. R. Evid. 702; *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 818 (W.D. Tex. 2005).

"As a preliminary matter, the Court must determine whether the proffered witness qualifies as an expert." *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711, 727

[1] Hereinafter, internal citations, quotations and alterations are omitted unless otherwise indicated.

(W.D. Tex. 2017) "Before a district court may allow a witness to testify as an expert, it must be assured that the proffered witness is qualified to testify by virtue of his 'knowledge, skill, experience, training, or education.' " *United States v. Cooks*, 589 F.3d 173, 179 (5th Cir. 2009) (quoting FED. R. EVID. 702).

The reliability prong requires that an expert opinion "be grounded in the methods and procedures of science." *Johnson v. Arkema, Inc.*, 685 F.3d 452, 459 (5th Cir. 2012). "This requires some objective, independent validation of the expert's methodology." *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc). Put another way, "[o]verall, the trial court must strive to ensure that the expert, 'whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *United States v. Valencia*, 600 F.3d 389, 424 (5th Cir. 2010) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

Even where the expert is qualified and the methodology is reliable, an expert's opinion is still not admissible unless it is relevant. As the *Daubert* Court emphasized, Rule 702 requires that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." 509 U.S. at 590-91 (quoting Rule 702). Expert opinions that are not "sufficiently tied to the facts of the case at hand" are not relevant. *See id.* at 591; *see also United States v. Kuhrt*, 788 F.3d 403, 420 (5th Cir. 2015) ("The relevance prong requires the proponent to demonstrate that the expert's reasoning or methodology can be properly applied to the facts in issue."). Finally, Plaintiffs, as the party proposing to introduce expert opinion testimony, have the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002).

ARGUMENT

I. Mr. Eakin's Opinions Should Be Excluded Because They Are Speculative, Unreliable And Unhelpful to the Trier of Fact

Mr. Eakin proposes to offer several opinions about the current location of the remains of six unidentified servicemembers based on his review of military documentation from the 1940s and 1950s. He offers this testimony on the basis of his experience as an "investigator" doing "aviation accident analysis" and on the basis of his own project reviewing military files for unidentified World War II servicemembers over the last nine years. Eakin Dep. 6:4-23 (Ex. I). He instigated this lawsuit, handpicking what he viewed as the "best cases" and "put[ing] the people together," because he thought they were "excellent cases to resolve some of the . . . issues involving [DPAA's] MIA campaign." *Id.* at 20:24-21:9. As explained below, Mr. Eakin is not qualified to offer these opinions as an expert. Moreover, there are numerous critical flaws in his analyses which render his opinions unreliable and unhelpful to the trier of fact. Accordingly, Mr. Eakin's opinions should be excluded under Rule 702.

A. Mr. Eakin Is Not Qualified To Offer the Proffered Opinions

To be qualified as an expert, the witness must establish that they have the relevant expertise on the basis of "knowledge, skill, experience, training, or education." Rule 702. An expert "may [not] . . . go beyond the scope of his expertise in giving his opinion." *Goodman v. Harris Cnty.*, 571 F.3d 388, 399 (5th Cir. 2009). "A district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject." *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009).

Mr. Eakin explained that his "aviation expertise deals primarily with building and searching data bases to retrieve factual data on aircraft accidents." Eakin Dep. 7:9-11. He has applied those skills to documents regarding unaccounted-for World War II servicemembers,

receiving information in response to FOIA requests, and then going "through those files and catalog[ing] them so that [he] . . . can pull them up without going through several terabytes of data." *Id.* 8:2-6; *see also id.* at 9:19:21 ("Q: Part of what you've done is gotten a fast way to get to the right documents? A. Right."). While that enables Mr. Eakin to provide valuable assistance to families of World War II servicemembers, *see id.* at 36:3-37:8 (explaining that he searches his databases in response to "probably one inquiry a week from" families); *see also* Eakin Report at 3 (Ex. H) ("Over the years, I have been contacted by and shared research information with several hundred families of MIA's."), those skills are irrelevant to this case.[2] Each of the servicemembers at issue here has been associated with a specific set or sets of unidentified remains since the 1940s. *See supra* Background § III. Mr. Eakin has contributed no new associations between documents or between servicemembers and remains. Instead, the relevant question is whether those associations are warranted based on the totality of the evidence and so conclusive that the remains can be considered already identified.

Mr. Eakin's skill at correlating documents does not, however, provide expertise in

[2] Mr. Eakin's methods of database compilation are not essential to this motion and therefore not further explored. We simply note that his explanation of his methodology regarding use of the Cabanatuan death roster raises significant concerns. *See* Eakin Dep. at 32:16-24 ("And I transcribed all this data and used relational data bases to compare against other data bases, such as the ABMC data base[, NARA POW database, and NARA database of deaths] . . . . Anyhow I was able to compare and purify the data. And where it was either illegible or missing I could use some software tricks to bring out that data."). Not only is it unclear whether his methods most accurately reproduced the identities and data intended by the original source, but also they could not go beyond making pages more legible and correcting typographical and spelling errors. The Cabanatuan roster is known to have significant errors, many of which have since been discovered and corrected. *See* Kupsky Decl. ¶ 17 & Subex. 2, Harris & Beckinbaugh at 9-10, 13-17, 20-21. Yet Mr. Eakin disregarded the government's own effort to create more accurate records. *See id.* at 33:19-23 (commenting on a "Chronological listing of deceased by accountable burial period" and saying "I've never found 'em that useful. And I generally don't use 'em in my research."); *id.* at 34:20-23 ("I don't know that I've seen this particular roster, you know, but I've seen this form a number of times. And it's just not really useful to me anyhow.").

interpreting the documents themselves.[3] In seeking to serve as an expert here, Mr. Eakin claims to have such interpretive skills—that his experience as a crash investigator makes him skilled at "sorting out the good data from the not so good data." Eakin Dep. at 9:25-10:2; *see also id.* at 7:12-13 ("[T]here's a lot of data that's relevant and a lot of data that's not so relevant."); *id.* at 7:7-8 (asserting his skill is "peeling back the onion to get to the truth"). Yet he cannot establish that he has sufficient "specialized knowledge," Rule 702(a), to serve as an expert in this way here. Mr. Eakin posits that the expert must "compare [the data] with the known facts," Eakin Dep. at 10:4-5, and accepts the notion that if one "look[s] for the simplest solution without all of the facts, that could lead to erroneous conclusions," *id.* at 22:25-23:2. Yet he cannot establish that he has the requisite specialized knowledge necessary to determine what information is "irrelevant," *id.* at 7:14-17, 67:17-68:11, 70:2-10, and should be "discarded," *id.* at 23:18. Among other things, he lacks expertise as a historian, *id.* at 10:6-8; in forensic anthropology, *id.* at 11:23-25; in odontology, *id.* at 11:18-22; or in DNA testing, *id.* at 12:12-20. Thus he cannot employ what is necessary to serve as an expert—"a process of reasoning which can be mastered only by specialists in the field." *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) (quoting Fed. R. Evid. 701, Advisory Committee Notes to 2000 Amendments); *see also Villaje Del Rio, Ltd. v. Colina Del Rio, LP*, No. 07-947, 2009 WL 1606431, at *4 (W.D. Tex. June 8, 2009) (excluding expert who "does not argue or allege facts that would suggest that his testimony results from a process of reasoning which can be mastered only by specialists in any

[3] Because the proffered expert must have "'knowledge, skill, experience, training, or education' regarding *the specific issue before the court*," *White v. University Health Sys.*, No. 03-284-XR, 2004 WL 377545, at *3 (W.D. Tex. 2004) (emphasis added), courts look carefully at precisely what expertise is being employed. For example, another court determined a witness was not qualified because "treating someone for PTSD is an altogether different matter than diagnosing it." *Lee v. Nat'l R.R. Passenger Corp.*, No. 3:10-392, 2012 WL 92363, at *3 (S.D. Miss. Jan. 11, 2012). The gulf between correlating information and interpreting it is at least as great.

field").

It is highly significant whether Mr. Eakin has the expertise to discard information because he has narrowed the information that he considers relevant to an extraordinary degree. For example, he does not consider dental information, *see* Eakin Dep. at 120:18-19 ("I don't pay any attention to the dental information."); height estimates, *see id.* at 74:22 ("I disregarded the height estimate"); testimony of Japanese officers who admitted to the execution of General Fort, *see id.* at 114:18-115:2 ("I'm going to take the testimony of the provincial governor" against "evidence provided by these admitted war criminals"); or any rosters of Cabanatuan burials other than the 558-2 Death Report, *see id.* at 33:19-23 ("I've seen a number of different versions of these. . . . I've never found 'em that useful. And I generally don't use 'em in my research."). Moreover, in the case of 1LT Nininger, he has concluded that it is "irrelevant" both where the remains designated X-1130 were found and where witnesses reported that Nininger was buried. *See id.* at 67:25-68:11, 69:6-9, 70:4-10. Each of these decisions could only be justified if he had the relevant expertise to make such holistic assessments. Such expertise cannot be gained merely from reviewing thousands of files.[4] *See, e.g.*, Emanovsky Decl. ¶ 16. In fact, the information Mr. Eakin has discarded is relevant. *See, e.g.*, Kupsky Decl. ¶¶ 20-22, 32; Emanovsky Decl. ¶¶ 10-15. Because Mr. Eakin cannot demonstrate that he has the requisite expertise he should not be qualified as an expert in this case.[5]

[4] Even if his review of voluminous files has led him to develop theories about what information could be useful, he neither has the background in the relevant fields to draw those conclusions nor has tested those theories against actual results to confirm his hypotheses. Indeed, as discussed below, he does not believe that his methods can be measured. *See infra* Arg. § I.B.

[5] Mr. Eakin is also unqualified to offer the opinion that "Defendants' facilities and techniques are inadequate in capability and capacity to properly reassociate and timely return these remains to their families for burial." Eakin Report at 5; Eakin Dep. at 58:17-23. He acknowledges that he lacks expertise in fields relevant to such an assessment, including laboratory design, laboratory accreditation, organizational efficiency, and DNA methodology or analysis. *See* Eakin Dep. at

B. Mr. Eakin Lacks A Scientific Methodology

Even if Mr. Eakin had the relevant expertise, he should still be disqualified because his methodology is unreliable. *See* Fed. R. Evid. 702(c) (requiring that the testimony be "the product of reliable principles and methods"). The Fifth Circuit expressly requires "an objective, independent validation of the expert's methodology." *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 776 n.5 (5th Cir. 2017). The expert testimony "whether bas[ed] . . . on professional studies or personal experience" must employ "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Valencia*, 600 F.3d at 424. The Fifth Circuit has directed that courts should generally first "consider[] the *Daubert* factors" and then "consider whether other factors, not mentioned in *Daubert*, are relevant to the case at hand." *Black v. Food Lion, Inc.*, 171 F.3d 308, 311-12 (5th Cir. 1999).

Mr. Eakin explained his methodology as "Occam's razor," the "principle that . . . the simplest solution is usually the correct solution." Eakin Dep. at 22:2-11. He further explained that in "looking for the truth," his standard is "[w]hatever it takes to convince me." *Id.* at 24:12-14. This approach does not amount to a reliable methodology for "sorting out the good data from the not so good data," *id.* at 9:25-10:2, for several reasons.

Beginning with *Daubert*'s factors for evaluating reliability, it is readily apparent that Mr. Eakin's methodology does not satisfy that standard. Courts consider "(1) whether a theory or technique can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of

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12:4-20, 59:10-12. It is ambiguous whether he seeks to offer this opinion in an expert witness capacity, *see id.* at 59:1 ("You're going to have to decide where I'm an expert . . . ."), but to the extent he does, he cannot establish any of the requisite expertise nor has he made any attempt to do so.

standards and controls; and (5) general acceptance of the theory in the scientific or expert community." *Valencia*, 600 F.3d at 424 (citing *Daubert*, 509 U.S. at 593-95). Mr. Eakin admits that his approach is individualized and cannot be measured or evaluated by someone else. He views his approach "as much art as science and [] not something that lends itself to [error] rate evaluation." *Id.* at 24:1-6. His method is not amenable to a "quality control" review process by someone seeking to check its reliability and accuracy, but instead someone seeking to check his analysis would "have to start from scratch." *Id.* at 23:4-9. His only suggestion was that someone could "go through the data items that I've considered and those that I've discarded," stating that "you might come to the same conclusion, you might come to a different conclusion" but "I hope that you would come to the same conclusion when you look at the same data." *Id.* at 23:16-21. Mr. Eakin's methodology is thus revealed not to be an established scientific approach at all. *See Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 836 (W.D. Tex. 2005) (rejecting methodology that "has not been published or subjected to peer-review, nor does it appear to be a generally accepted methodology in the scientific community. Further, it has not been tested and [the expert] did not testify regarding any known rate of error.").

Nor can Mr. Eakin's methodology pass muster under its own standard. Mr. Eakin admits that his final criterion—the "simplest solution"—depends on assembling all of the relevant facts. *See* Eakin Dep. at 22:25-23:3 (agreeing that "looking for the simplest solution without all of the facts [] could lead to erroneous conclusions"); *id.* at 22:20-24 (agreeing that "[i]t sounds reasonable" that to "apply Occam's razor you need the relevant set of information"). But the Court cannot have any confidence that Mr. Eakin has assembled all of the relevant facts because Mr. Eakin does not specifically recall all of the facts he considered or discarded for each of these cases, *see, e.g.*, Eakin Dep. at 40:13-16, because the Mr. Eakin lacks any discernable criteria for

selecting relevant facts, and because Mr. Eakin has discarded plainly relevant facts, *see supra* Arg. § I.A.

In addition, in the absence of detailed explanation, Mr. Eakin's "simplest solution" appears indistinguishable from "a black box into which data is fed at one end and from which an answer emerges at the other." *Lawrence v. Raymond Corp.*, No. 09–1067, 2011 WL 3418324, at *7 (N.D. Ohio Aug. 4, 2011), *aff'd*, 501 F. App'x 515 (6th Cir. 2012). Courts "are not required 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Timoshuk v. Daimler Trucks N. Am., LLC*, No. 2014 WL 2533789, at *5 (W.D. Tex. June 4, 2014) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *see also Fail–Safe, L.L.C. v. A.O. Smith Corp.*, 744 F. Supp. 2d 870, 888 (E.D. Wis. 2010) (rejecting expert analysis that was "in a black box out of the view of the court" because "the court cannot simply take an expert's word for a specific proposition").

Finally, Mr. Eakin has failed to account for alternative explanations. *See* Fed. R. Evid. 702, advisory committee's note (2000) (noting that courts have considered "whether the expert has adequately accounted for obvious alternative explanations"); *Michaels v. Avitech, Inc.*, 202 F.3d 746, 753 (5th Cir. 2000) (stating that a "necessary ingredient" of expert testimony about causation "is the exclusion of alternative causes"). At his deposition, he acknowledged other possibilities when pressed but did not appear to systematically or scientifically rule out those other possibilities in reaching his ultimate opinions. *See, e.g.*, Eakin Dep. at 88:18-89:9 (stating that "I think it's a distinct possibility" that 1LT Nininger is buried at West Point, but remaining "convinced that 1130 is Nininger" because it is "more likely that [the West Point remains are] Maynard"); *see also id.* at 54:2-6 (responding to question regarding whether he "consider[ed] and rule[d] out the possibility that [the servicemember's] remains are not among" the nine sets of

unknowns he singled out, saying only "I'm convinced that they are.").[6] Similar flaws have led courts to reject expert testimony. For example, in *Sims v. Kia Motors of America, Inc.*, 839 F.3d 393 (5th Cir. 2016), the Fifth Circuit found unreliable an engineer's use of a "differential diagnosis approach" which "essentially involve[d] the process of elimination." *Id.* at 401. The Fifth Circuit explained that to use this approach, an expert must both "'rul[e] out' other possible explanations" and have "some scientific basis for 'ruling in' the phenomenon they allege." *Id.* at 401-02.

For all of these reasons, Mr. Eakin's opinions should be excluded as unreliable.

C. Mr. Eakin's Opinions Will Not Assist the Trier of Fact

Mr. Eakins' opinions should be excluded for an independent reason—they will not assist the court because his approach is not distinct from analysis that the Court itself could perform. *Cf. Facille v. Madere & Sons Towing, Inc.*, No. 13-6470, 2014 WL 12719079, at *4 (E.D. La. Nov. 26, 2014) (holding that expert's report and testimony would not "assist the fact-finder" where they "contain[] conclusions based on common sense"); 29 Charles Alan Wright & Victor

[6] During his deposition, Mr. Eakin acknowledged certain alternative possibilities but generally dismissed them out of hand on the ground that he did not view them as "probable." *See* Eakin Dep. at 79:9-80:9 (refusing to seriously consider possibility that difference of views regarding X-1130 between Philippine Command and Quartermaster General's Office involved the former's desire for closure and the latter's quality control because "[i]t's obvious" that the Philippine Command "had all the information"); *see also id.* at 44:23-45:3 (acknowledging possibility that servicemember did not die on day listed in Cabanatuan death roster); *id.* at 45:10-21 (acknowledging it "could have happened" that servicemember was not buried in common grave associated with that day's burials); *id.* at 49:7-14 (acknowledging possibility that AGRS did not precisely recover each common grave); *id.* at 50:19-51:2 (acknowledging possibility that servicemember's remains were misidentified and sent for burial as another person); *id.* at 51:19-52:2 (acknowledging possibility that servicemember's remains are not among the nine unknown remains associated with specific Cabanatuan common grave); *id.* at 112:8-14 (refusing to consider possibility that BG Fort was executed 45 miles away from where X-618 was recovered unless he considered that an "established" fact); *id.* at 116:14-117:10 (acknowledging possibility that caretaker misrecalled rank of officer reportedly buried as X-3629).

James Gold, *Federal Practice and Procedure* § 6265.2 (2d ed., Sept. 2018 update) ("[E]xpert testimony does not help where the jury has no need for an opinion because the jury can easily reach reliable conclusions based on . . . simple logic."). Courts are equally capable of weighing the simplest solution once all of the relevant evidence is gathered. *See, e.g.*, *Kelley v. Am. Heyer-Schulte Corp.*, 957 F. Supp. 873, 882 & n.12 (W.D. Tex. 1997) (using Occam's Razor in *Daubert* analysis); *see also Gonyea v. Irick Excavating, LLC*, No. 2:08-242, 2010 WL 11606974, at *5 (D. Vermont Aug. 12, 2010) (rejecting argument that expert's testimony "relates only to lay matters" that trier of fact "would be capable of understanding and deciding without an expert's help" only because expert's "opinion goes far beyond a proffered explanation grounded solely on Occam's Razor").

For each individual case, Mr. Eakin appears to have latched onto one piece of circumstantial evidence and given it conclusive weight. *See, e.g.*, Eakin Dep. at 61:9-17 & 72:4-12 (relying heavily on the association with 1LT Nininger made when X-1130 was disinterred, despite claiming "we're never going to know why association was made"); *id.* at 102:7-21 (relying exclusively on statement of provincial governor stating reasons X-618 might by BG Fort); *id.* at 110:19 (finding Cruz statement "completely credible"); *id.* at 115:17-23 & 116:10-117:6 (relying heavily on caretaker's recollection that Philippine Scouts said they were burying an American colonel to conclude that identification should be "[v]ery obvious"). Thus, his bottom line certainty that X-1130, X-618, and X-3629 are 1LT Nininger, BG Fort, and COL Stewart, respectively, simply short-circuit the process of weighing the totality of the evidence in each file, not to mention what is added by contemporary review of those files by DPAA experts. The Court is better able to weigh the probative value of the evidence itself rather than rely on Mr. Eakin's opaque reasoning.

For the foregoing reasons, Mr. Eakin's expert opinions should be excluded from this case.

II. Ms. Richardson's Opinions Should be Excluded Because They Are Unreliable and Unhelpful to the Trier of Fact

Ms. Richardson's testimony should be excluded in full. Certain of her opinions fall outside the scope of her expertise. Other opinions should be excluded because she has not employed a reasonable methodology or been provided with all of the relevant information. Moreover, several of her opinions should be excluded because they are irrelevant to any issue in this case.

A. Certain Portions of Ms. Richardson's Testimony Should Be Excluded for Lack of Qualifications

Ms. Richardson exceeds her expertise and is therefore not qualified to offer several of the opinions she seeks to present in this case. *See Goodman*, 571 F.3d at 399; *Huss*, 571 F.3d at 452. Her asserted expertise is based on the four years she spent working for the Defense POW Missing Personnel Office ("DPMO"), one of DPAA's predecessor organizations. *See* Richardson Dep. at 7:14-20 (Ex. K); Richardson CV (Defs.' Ex. L). A career Naval intelligence officer, she spent two years as a case analyst reviewing Vietnam War cases and then led DPMO's Resource Outreach Branch for its World War II Division, which involved building connections with non-governmental historians and researchers. *See* Richardson CV; Richardson Dep. at 9:8-10. She also went on one field recovery trip in Europe that examined several sites to determine whether future excavations to locate servicemember remains would be warranted. *See* Richardson Dep. at 7:21-8:1. She left DPMO in October 2011 and retired from the U.S. Navy in 2014. *See* Richardson CV.

Defendants do not dispute that Ms. Richardson is qualified by experience to generally address IDPFs and the World War II-era identification process for servicemembers, especially

how DPMO analyzed those documents. *See* Richardson Dep. at 7:14-20 (claiming "familiarity with the internal workings of [DPMO], specifically the World War II one"); *id.* at 11:14-16 ("I can't claim any knowledge of internal workings of DPAA. I can only speak to the past."). However, two sets of her opinions are far afield from her experience.

While Ms. Richardson repeatedly strayed into opining on DNA testing at her deposition—its methods, its efficacy, and DoD's DNA testing capabilities, *see, e.g.*, 19:16-20:20, 82:14-83:11, 84:13-85:20, 91:12-93:13, any opinions about this topic should be excluded because they do not appear in her expert report. *See id.* at 86:3-6 (admitting that no opinions about the capability of DNA testing were in her report); *In re Complaint of C.F. Bean LLC*, 841 F.3d 365, 371 (5th Cir. 2016) (holding that expert's Rule 26 report must be "full and complete"); *Koenig v. Beekmans*, No. 5:15-cv-00822-RCL-RBF, 2018 WL 297616, at *3 (W.D. Tex. Jan. 4, 2018) (holding that expert "cannot cure deficiencies in his report by supplementing the report with deposition testimony after the expert-designation deadline" and excluding the new opinions). Moreover, she admitted that she was not offering her views on DNA as an expert, *see id.* at 87:10-12 (Q. So, are you offering yourself as an expert on DNA, on these DNA issues in this lawsuit? A. No."); *see also id.* at 8:21-24, and and admitted that her views were not based on expertise but on "trust[ing] when a scientist tells me." *Id.* at 86:15-20; *see also id.* at 87:5-15.[7] This further confirms that she should not be permitted to testify as an expert regarding any aspect

[7] The fact that she would rely on the representations of DNA experts in her work, *see* Richardson Dep. at 94:9-24, does not qualify her to pass along second-hand opinions for which she herself lacks expertise. *See Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 581 (5th Cir. 1982) (finding expert testimony "speculative and unsupported" where it was merely based on "second hand statements repeated to him"); *Rodgers v. Hopkins Enterprises of Ms., LLC*, No. 17-6305, 2018 WL 3104288, at *6 (E.D. La. June 21, 2018) (excluding expert testimony where witness did not "independently verif[y]" another expert's diagnosis but instead provided "no more than a second-hand account" of the other expert's conclusions).

of DNA testing.

Second, the primary theme of her testimony is that DoD should employ an entirely different approach to identifying unknown remains and should employ a different disinterment standard. In her view, "the anthropologically-centric resolution methodology that [DoD] use[s] is flawed, and that it really should be moved to a DNA-centric resolution." Richardson Dep. at 16:1-3. She adopted this view from friends, including "one of the senior scientist[s] now at Bode Corporation for DNA testing" and from reading about the use of a DNA-centric approach in the Balkans. *Id.* at 16:20-17:17. Not only is this testimony irrelevant to Plaintiffs' claims in this case, *see infra* Arg. § II.C, but also Ms. Richardson lacks the expertise to offer such a far-reaching opinion. Her limited roles at DPMO—analyzing Vietnam War cases, conducting outreach to non-governmental specialists, attending Family Updates, and participating in one field investigation—did not give her expertise regarding such a policy judgment. She never participated either in the DoD disinterment recommendation or decision process, *see id.* at 29:1-2 ("I have not had to go through the U.S. process for disinterment."); or in DoD's identification process conducted by anthropologists and odontologists. *See id.* at 8:4-12, 21:17-22, 70:1-4 (relying on conversations with scientists involved in the Gordon case). She has identified no expertise in forensic anthropology or institutional design, and her lay knowledge of DNA testing is inadequate to permit her to identify and weigh all of the considerations involved in choosing among these alternative approaches.[8]

[8] Ms. Richardson specifically suggests that "all of the remains should be disinterred, DNA tested, cataloged, librariied, and set aside for when we can pull family records in, and then carefully placed back in containers that all of the ones that are in that container are the same." *Id.* at 40:7-11. Thus unknown servicemembers remains would reside at the laboratory until "potential family members come forward with reference samples" and after a positive DNA match "skeletal re-articulation could happen afterwards . . . as a confirmation." *Id.* at 19:17-20. To assist with the reference sample bottleneck, she proposes that the DoD service casualty offices

B. Ms. Richardson's Opinions About the Likelihood of Identifying Specific Servicemembers Are Unreliable

Ms. Richardson seeks to testify that "there are no other options for closure of [1LT Nininger's, BG Fort's, and COL Stewart's] case[s] except disinterment and DNA testing" of X-1130, X-618, and X-3629, which she concludes are "likely" those of the servicemembers. Richardson Report at 1 (Ex. J); Richardson Dep. at 13:12-14:1. She also opines that PFC Hansen's "remains were buried in the Cabanatuan Common Grave 407, and are currently buried in Manila American Cemetery" among the nine unidentified sets of remains associated with Grave 407. Richardson Dep. at 14:15-25, 35:14-20. These opinions are unreliable because Ms. Richardson was not provided all of the relevant information and because her conclusions were not based in a scientific methodology.

First, Ms. Richardson was given a very limited task by Plaintiffs: "to look at the IDPFs that I was provided and to read through them. And . . . to state whether or not it seemed reasonable for disinterment and DNA testing." Richardson Dep. at 22:10-15. Thus she looked only at one X-file for comparison to each servicemember—those that Mr. Eakin had himself determined were the most likely candidates. *See id.* at 23:23-24:3, 42:12-14, 43:2-5. This significantly undermines the reliability of her opinions. *Cf. Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1331 (10th Cir. 2004) (upholding exclusion of expert testimony based, in part, on concern about expert's "reliance on pre-selected evidence from interested parties, to the exclusion of reliable

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should employ "25 people per service reaching out and trying to find family members and get their family reference samples." *Id.* at 41:5-7. There is no need to address the many logistical difficulties that such an approach would present. It is sufficient to note that Ms. Richardson herself acknowledged that it can be cost prohibitive to do DNA testing on "all the individual viable pieces" of remains from a single commingled grave, *see id.* at 88:5-19 ("[I]t is obviously extremely difficult to test every bone."), let alone dig up and test thousands of unknowns in the hope that someday family reference samples will materialize. *See also id.* at 88:20-21 ("You also have families who will refuse to provide their reference samples.").

evidence"); *Johnson v. Big Lots Stores, Inc.*, Nos. 04-3201, 05-6627, 2008 WL 1930681, at *15 (E.D. La. Apr. 29, 2008) (holding expert testimony unreliable in part because "plaintiffs' counsel hand picked [and] prescreened the individuals" the expert interviewed). Moreover, she acknowledges that it would have been "useful" to review the files for other graves in the same area, *see id.* at 24:3-9, 53:11-24, 74:16-20, and the case summaries containing DPAA's current assessment of the servicemembers' cases. *See id.* at 23:4-7 ("[I]t would have been nice to have historian case notes because I do trust and value the opinions of my . . . former colleagues."). Because she could not review all of the relevant information, she lacks any basis for determining whether the hand-picked X-files are the most likely locations for the servicemembers or that there are no other options for locating the servicemembers' remains. *See, e.g.*, *id.* at 53:21-24 ("If [DPAA has] a particular grave that they believe is more likely to be Nininger, then it would be foolish not to disinter that one and test it before they did 1130.").[9]

Second, Ms. Richardson did not employ a reliable methodology. She describes an effort to "go through [the IDPF] chronologically . . . and basically try to build up an understanding of the circumstance" of the recovery effort. *Id.* at 26:3-6; *id.* at 26:22-25 ("break it out for yourself" by "making sure you have your timelines straight, making sure you look at all the annotations and notes"). But is merely the first step in the analytic process and not method of reaching conclusions. *See* Kupsky Decl. ¶ 13. She does not explain how she drew her conclusions or

[9] Ms. Richardson cannot bridge this gap by relying on the position Plaintiffs have adopted in this litigation. *See id.* at 44:4-25 (basing her opinion that "all other avenues for resolution have been exhausted" in part on her understanding that the "family has come to the conclusion that none of the other X-files could possibly be their lost loved one," which was based on the "court record" not conversations with the Plaintiffs). This simply assumes something that, as an expert, she would need a reasonable basis for concluding. *Cf. Stinson Air Ctr., LLC v. XL Speciality Ins. Co.*, No. 03-CA-61-FB, 2005 WL 5979096, at *3 (W.D. Tex. July 8, 2005) (granting motion to exclude expert testimony where expert based opinions on representations of interested party and not on independent review of ordinary sources of analysis).

what threshold she applied to declare a match "likely." For example, while she opines that X-1130 is "likely" 1LT Nininger, *id.* at 13:12-16, she also asserts "[i]t is as likely that he is not X-1130 and has already been recovered and buried as someone else as it is that this is him." *Id.* at 49:17-19; *see also id.* at 106:13-14 (explaining that she's not asserting "a 50 percent chance that it is them").

Nor did she seek a path through any contradictions in the files. *Cf.* Kupsky Decl. ¶ 13 ("Nor is it adequate to abandon historical evidence because of contradictions. Instead, the purpose of historical analysis is to gain as much knowledge as possible by analyzing and weighing the basis for the conflicting statements."). Ms. Richardson's overarching commitment to a "DNA-centric" model overshadowed her review of the files. *Cf. id.* at 15:23-25 (describing her proposal of the "binary solution" of DNA testing as "a general opinion rolling up all" her other opinions). Any hint of ambiguity or conflicting evidence caused her to repeat the idea that only DNA could provide certainty. *See, e.g.*, *id.* at 6:7-12, 12:4-14, 32:12-17, 39:18-24, 45:12-20, 48:16-21, 51:24-52:4, 53:3-10, 63:20-24, 66:17-20, 74:12-16, 75:9-10, 80:17-81:7. Indeed, she explained that she would recommend disinterment and testing regardless of the results of her analysis. *See id.* at 47:4-6 ("Q. So, you would recommend DNA testing no matter what the historical analysis show? A. Yes.").[10] This also caused her to disregard physical evidence. *See id.* at 68:24-69:23 (discounting the conflicting dental records by speculating that they used dental records from an "individual [who] was not the same Stewart"), *id.* at 64:13-66:1 (discounting anthropological evidence of non-Caucasian ethnicity and conflicting dental records). When confronted with factors in each file that would decrease the likelihood that the servicemember

[10] See also id. at 40:17-21 ("Q. Do you think DOD should be disinterring these remains even though they don't have a family reference sample for Hansen? A. I do because it might not be him. It might be someone else.").

was in the selected grave, Ms. Richardson generally acknowledged the factor but gave it no meaningful weight in her own analysis. *See, e.g.*, 37:14-39:19, 52:16-53:10, 54:8-22, 66:21-68:15, 73:8-74:8. Collectively, these issues demonstrate that Ms. Richardson was not applying any particular scientific methodology to reach her conclusions, let alone seriously considering alternative explanations, but instead simply circling back to her premise that all remains should be disinterred and tested.

C. Ms. Richardson's Opinions Will Not Assist the Trier of Fact

Ms. Richardson's testimony should be excluded because it will not assist the trier of fact "to understand the evidence or determine a fact in issue." Fed. R. Evid. 702(a). "[T]estimony that will not assist the trier of fact *by advancing an element of the plaintiff's case* should be excluded." *Cano*, 362 F. Supp. 2d at 822 (emphasis added).

First, Ms. Richardson's opinions are tied to her expectation that this litigation provides an opportunity to challenge DoD policies. *See, e.g.*, Richardson Dep. at 90:1-3 ("[T]hat's what, in essence, legal cases are is to push the policies and change them or reinforce and adhere to them."). But in fact, Plaintiffs here do not argue that any DoD policies violate APA standards. Instead, Plaintiffs attempt to argue that DPAA has not followed DoD's own standards. *See* Order at 14-15, ECF No. 51 (permitting Plaintiffs' APA claims to proceed on the theory that "the government violated many of its own directives and regulations"). Neither DoD's disinterment policy set by the Deputy Secretary of Defense nor DPAA's approach to identifying remains after disinterment are challenged here. Thus, Ms. Richardson's opinion that a DNA-centric approach would better serve the government and public interest advances no element of this case.[11]

[11] Ms. Richardson does acknowledge rational reasons for DoD's existing policies. *See id.* at 30:8-13 (acknowledging with regard to DoD and ABMC disinterment policies that "probably that difficulty is there for a reason" because "you are dealing with . . . other families' feelings" and "[i]t would be disturbing to just go around digging people up without good reason"); *id.* at

Second, Ms. Richardson's opinions that "there are no other options remaining for closure of" these cases apart from disinterment and DNA testing, Richardson Report at 1, are not relevant to the legal claims. None of Plaintiffs' constitutional or statutory legal theories gives rise to a governmental duty to locate lost remains to provide closure for families. *See* Defs. Mot. for Judgment on Pleadings at 16-48, ECF No. 31. Instead, Plaintiffs' legal theories generally depend on the contention that the servicemembers' remains have already been identified. *See, e.g.*, Order at 7, ECF No. 51 (relying on Plaintiffs' "alleg[ation] that the remains have been identified based on circumstantial, contemporary evidence from wartime records."); *id.* at 8 (relying on Plaintiffs' allegation that "the government's refusal to return allegedly identified remains to the appropriate families for burial 'shocks the conscience'"); *id.* at 16 (relying on allegation that "the government refuses to return the remains of their relatives"). And Ms. Richardson's testimony contradicts that key contention.[12] But even if Ms. Richardson had a basis to assert that there was no other way for Plaintiffs to locate their relatives—which she does

98:1-100.19 (explaining that historically, due to "limited resources" and families "push[ing] the whole accounting community towards recovery," the government "has leaned more toward the conservative approach that we continue to look for remains that have not yet been recovered rather than pursue identification of those [unknowns] that have already been recovered"); *id.* at 99:8-21 (explaining that "we have to remember that it was 2010 before World War II became an active mission" because until Congress changed the law it was not "an active outreaching mission . . . to the same extent that Vietnam and Korea were"); *id.* at 19:8-10 (not opining that DoD facilities and techniques are inadequate "because I think they are doing the best they can given the constraints of the anthropologic centric methodology"); *id.* at 23:6-9 ("I do trust and value the opinions of my colleagues, my former colleagues," including having "great respect for Heather Harris").

[12] Ms. Richardson readily acknowledges that nothing in these records indicates that they have already been identified. *See* Richardson Dep. at 98:11-14 ("[R]emains that are unknowns . . . . have not yet been identified, but they have been recovered."); *id.* at 18:24-19:1 ("I did not read anything in the IDPFs that were provided to me to suggest that those people had already been identified."). And does not claim a level of certainty that could be construed as identification. *See id.* at 106:3-14 (explaining that she is not claiming "a 50 percent chance that it is them"); id. at 49:17-19 ("It is as likely that he is not X-1130 and has already been recovered and buried as someone else as it is that this is [1LT Nininger].").

not, *see supra* Arg. § II.B—that would advance none of Plaintiffs' legal theories. It is simply not the case that the Constitution or any law entitles families to demand that their long-deceased relative be located.

Finally, Ms. Richardson's opinions that the specified remains are "likely" those of the relevant servicemembers plays no role in this litigation. Even ignoring the emptiness of what she means by "likely," *see supra* Arg. § II.B, Plaintiffs have identified no claim that turns on the mere likelihood of identification. Even if Plaintiffs contended DPAA was failing to follow its own policies because DoD's disinterment threshold has actually been met for these cases—which Plaintiffs do not appear to claim—Dr. Richardson's opinions would not help them. She acknowledges that her likelihood opinions do not rise to that threshold. *See* Richardson Dep. at 31:18-33:3 (explaining her disagreement with threshold set by DoD); *id.* at 74:16-20 (acknowledging that the government "need[s]" to show a "50 percent" likelihood of identification to disinter); *id.* at 106:3-14 (explaining that she is not claiming "a 50 percent chance that it is them").

In sum, none of Dr. Richardson's opinions advance an element of Plaintiffs' claims; therefore, they are not relevant and should not be admitted.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and exclude the proffered expert testimony of Mr. Eakin and Ms. Richardson.

Dated: March 16, 2019

Respectfully submitted,

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I hereby certify that on this 16th day of March, 2019, 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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