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' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO EXCLUDE EXPERT OPINIONS

The Defendants in this lawsuit (hereinafter referred to as the "Government") have moved to limit the testimony of Plaintiffs' (hereinafter referred to as the "Families") experts, John Eakin and Renee Richardson. Despite the Government's claims, John Eakin and Renee Richardson are eminently qualified experts. They have dedicated years to studying issues related to the discovery of the location of remains of deceased service members, and have a wealth of knowledge respecting a variety of issues that may arise in this case. The Government's attempt to paint a contrary picture is misleading and should be rejected. Accordingly, the Government's Motion lacks merit, and should be denied in every respect.[1]

EXHIBITS[2]

Exhibit A – Declaration of John Eakin (March 28, 2019) and referenced documents

Exhibit B – DPAA Memorandum Recommending Disinterment for Common Grave 704

Exhibit C – DPAA Memorandum Recommending Disinterment for Common Grave 822

[1] By filing this Response, the Families are not waiving their right to call upon John Eakin or Renee Richardson as a fact witness.
[2] Other documents relied upon in this Response are already on file with the Court and are cited.

BACKGROUND

The Plaintiffs in this lawsuit are the next of kin of seven World War II service members. They simply want to provide their loved ones with a proper burial in accordance with their beliefs. The Families have spent years seeking relief from the Government, but have received resistance at every step. It still makes no sense why the Government will not allow the Families to at least conduct DNA testing on the remains at issue, as it is obvious that the results of DNA testing would satisfy the Government's concerns about the identity of the remains. Unfortunately, the Government refuses to provide the Families with a sufficient process to claim the remains of their loved ones, which is why this litigation is necessary.

The Families incorporate by reference the factual background set forth in their Response in Opposition to the Government's Motion for Judgment on the Pleadings, ECF No. 33, and provide the following information relevant to this motion.

I. The DPAA Has Disinterred Three of the Remains at Issue and Plans to Disinter Another

As of today, the DPAA has disinterred remains from three of the common graves at issue. The first remains that were disinterred were from Common Grave 717, which contained the remains of Private Arthur Kelder. The disinterment occurred in 2014. After nearly five years, the Government is reportedly still conducting testing on the remains from this grave and have failed to return all of Private Arthur Kelder's remains to his family. ECF No. 55 at 7-8.

In November of 2017, the DPAA recommend that the remains associated with Common Graves 704 and 822, which contained the remains of Technician Lloyd Bruntmyer and Private Robert Morgan, be disinterred. Ex. B; Ex. C. However, it was not until November of 2018 that this actually happened and the families have been left in the dark for months. ECF No. 55 at 8. The Government has given no indication of when its analysis of these remains will be completed or

whether it will return those service members' remains to their families.

Finally, the Government has stated in its latest filing that it will disinter Common Grave 407, which contains the remains of Private First Class David Hansen. ECF No. 55 at 7-8. This decision was made only after the Families, relying upon findings by their expert John Eakin, provided the Government with the relevant contact information of family members associated with that grave so that the Government could obtain family reference samples.

II. The Government Still Refuses to Disinter Three Individual Graves

The DPAA continues to refuse to disinter three graves at issue in this case. Obviously, the Families disagree with the Government's opinions and factual claims concerning the three remaining graves that it refuses to disinter. The Government, relying on much of the same data and information as the Families' experts, points to other graves as possible matches. In doing so, the Government decides to weigh certain evidence differently than the Families do. It picks and chooses certain data to support its conclusions and ignores other evidence. Unfortunately, the Families do not have the option to argue their case to the Government outside of this litigation because there is no process provided by the Government.

LAW GOVERNING ADMISSION OF EXPERT TESTIMONY

As this Court well knows, the Government's challenge to the admissibility of the Families' experts is governed by Federal Rule of Evidence 702, which incorporates the principles enunciated in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and its progeny. *See Black v. Food Lion, Inc.*, 171 F.3d 308, 310, 314 (5th Cir. 1999). "Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert testimony if it will 'help the trier of fact to understand the evidence or to determine a fact in issue.'" *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711, 727 (W.D. Tex. 2017) (citing Fed. R. Evid. 702). "Additionally,

the testimony must be 'based on sufficient facts or data' and be 'the product of reliable principles and methods' that the expert has 'reliably applied' to the facts of the case at hand." *Id.*

District courts act as "gatekeepers" to ensure that these requirements are met and enjoy wide discretion in deciding precisely how to make such a determination in a given case. *Kumho Tire Co v. Carmichael*, 526 U.S. 137, 142, 152 (1999). At the same time, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996). The *Daubert* analysis is not "a heightened threshold," but instead asks courts to merely avoid "subjective belief and unsupported speculation." *Ambrosini v. Labarraque*, 101 F.3d 129, 134 (D.C. Cir. 1996) (citing *Daubert*, 509 U.S. at 590) (internal quotation marks omitted). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. In general, "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *14.38 Acres of Land*, 80 F.3d at 1077; *see also Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987).

ARGUMENT

I. The Court Should Deny the Governments' Motion Because the Objectives of *Daubert* are Not Implicated

"The purpose of *Daubert* is 'to ensure that only reliable and relevant expert testimony is presented *to the jury*.'" *Harding v. County of Dallas, Texas*, 3:15-CV-0131-D, 2018 WL 1156561, at *1 (N.D. Tex. Mar. 5, 2018) (quoting *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 506 (5th Cir. 1999)). As explained by Judge Posner, "[t]he primary purpose of the *Daubert* filter is to protect juries from being bamboozled by technical evidence of dubious merit, as is implicit in the court's

insistence that the *Daubert* inquiry performs a 'gatekeeper' function." *SmithKline Beecham Corp. v. Apotex Corp.*, 247 F.Supp.2d 1011, 1042 (N.D. Ill. 2003) (internal citations omitted). Thus, "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also Whitehouse Hotel Ltd. P'ship v. Comm'r of Internal Revenue*, 615 F.3d 321, 330 (5th Cir. 2010) ("the importance of the trial court's gatekeeper role is significantly diminished in bench trials . . . because, there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence."); *Cox Operation, L.L.C. v. Settoon Towing, L.L.C.*, 2018 WL 3126965, *2 (E.D. La. 2018) ("many of the *Daubert* objectives are not implicated in a bench trial."). "*Daubert* requires a binary choice—admit or exclude—and a judge in a bench trial should have discretion to admit questionable technical evidence, though of course he must not give it more weight than it deserves." *Harding*, 2018 WL 1156561, at *1 (quoting *SmithKline Beecham Corp.*, 247 F.Supp.2d at 1042).

Given that this case will be tried to the Court rather than to a jury, the objectives of *Daubert* are not implicated. *See id.* Moreover, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. Probing the nitty gritty of experts' methodologies under *Daubert* to avoid misleading the court before trial is often not an efficient use of judicial or party resources, because the court can simply hear the testimony and give it the weight it deserves. *See Harding*, 2018 WL 1156561, at *1. Accordingly, the Families

respectfully request that the Court deny the Government's motion to the extent based on these grounds. *See id.*[3]

II. The Court Should Deny the Government's Motion Because the Experts' Opinions Will Assist the Court and are Reliable

The Government's motion should also be denied because John Eakin and Renee Richardson's expert opinions will assist the Court in understanding the evidence before it. Furthermore, their opinions are reliable and the result of years of study and research.

A. The Families' Experts are Well Qualified

As a preliminary matter, the Court must determine whether the proffered witnesses qualify as experts. *Graham*, 261 F. Supp. 3d at 727. "To qualify as an expert, 'the witness must have such knowledge or experience in [his] field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.'" *United States v. Hicks*, 389 F.3d 514, 524 (5th Cir. 2004) (quoting *United States v. Bourgeois*, 950 F.2d 980, 987 (5th Cir. 1992)). Rule 702 states that an expert may be qualified based on "knowledge, skill, experience, training, or education." *Id.*

Rule 702 embodies a liberal standard of admissibility for expert opinions, and specifically as such admissibility questions relate to the expert's qualifications. *Koenig v. Beekmans*, 515CV00822RCLRBF, 2017 WL 6033404, at *3 (W.D. Tex. Dec. 5, 2017). "Rule 702 does not mandate that an expert be highly qualified in order to testify about a given issue. Differences in

[3] *See also Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010) (in bench trial, the reliability and relevance determinations do not need to be made before evidence is presented); *Synqor, Inc. v. Artesyn Techs., Inc*, 2:11CV444, 2013 WL 12134198, at *3 (E.D. Tex. July 17, 2013) (court denied motion to exclude expert opinions after considering the fact that the District Judge would be sitting as the trier of fact); *Oilfield Equip. Mktg., Inc. v. New Tech Sys., Inc.*, CIV.A. MO-02-CA-183, 2004 WL 5499507, at *1 (W.D. Tex. Mar. 26, 2004), aff'd, 227 Fed. Appx. 925 (Fed. Cir. 2007) ("trial court has considerable leeway in evaluating the reliability and relevancy of expert testimony"); *SmithKline Beecham Corp.*, 247 F. Supp. 2d at 1042 ("In a bench trial it is an acceptable alternative to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled.").

expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility." *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009); *see also Daubert*, 509 U.S. at 596. An expert's lack of specialization similarly goes to the weight of evidence offered by that expert. *Vedros v. Northrop Grumman Shipbuilding, Inc.*, 119 F.Supp.3d. 556, 562 (5th Cir. 2015); *Holbrook v. Lykes Bros. S.S. Co., Inc.,* 80 F.3d 777, 782 (3d Cir.1996) (reasoning that "most arguments about an expert's qualifications relate more to the weight to be given the expert's testimony than to its admissibility"). So long as there is "some" reasonable indication of qualifications the court should admit the expert's testimony, and then the expert's qualifications become an issue for the trier of fact. *Rushing*, 185 F.3d at 507; *Kannankeril v. Terminix Int'l*, 128 F.3d 802, 809 (3d Cir. 1997) (As long as an "expert meets liberal minimum qualifications, then the level of the expert's expertise goes to credibility and weight, not admissibility."); *Graham*, 261 F. Supp. 3d at 727.[4]

1. John Eakin is Qualified to Testify as an Expert

Despite the Government's claims, Mr. Eakin is qualified to testify as an expert in this case. Mr. Eakin served in the military for nine years and participated in several overseas tours in West

[4] It should be noted that nothing in Rule 702 is intended to suggest that experience alone may not provide a sufficient foundation for expert testimony. "To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience." Fed. R. Evid. 702, 2000 Advisory Committee Note. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F.Supp. 1241, 1248 (M.D. La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

Germany and Vietnam. Defs. Ex. H at 1. Since retiring from the military, he has spent more than thirty years as an investigator. *Id.* Over the last ten years, he has diligently reviewed and analyzed over 4,000 files related to "identified" and "unidentified" remains of World War II service members. Declaration of John Eakin ("Eakin Decl.") ¶ 2-4. These files are known as Individual Deceased Personnel Files ("IDPFs") and X-files. *Id.* ¶ 4. His review of these files has revealed details of individual burials and common graves. *Id.* It has also informed him of the specific processes and procedures used during the time period when these X-files were created. *Id.* Mr. Eakin is now very familiar with the processes and procedures used by the American Graves Registration Service ("AGRS"), which has helped him evaluate the information available. *Id.* Mr. Eakin's knowledge and education on the practices and procedures used by the AGRS alone would be particularly helpful to the court and is beyond "some" reasonable indication of qualification.[5]

In addition to the IDPFs and X-files, Mr. Eakin has collected numerous other documents and data to further his education and knowledge on the subject at issue in this case. Eakin Decl. ¶ 4. He has obtained burial rosters and records that were maintained during and after the war. *Id.* Additionally, he has studied and reviewed literature on the subject matter. *Id.* (citing literature written by Abie Abraham, John E. Olson, and Mildred Trotter). For example, Mr. Eakin has spent significant time studying literature written by Mildred Trotter[6], who worked for the AGRS to help identify remains from World War II. *Id.*

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[5] If the Court would like to review all of the IDPFs and X-files that have been reviewed by Mr. Eakin, the Families can work with him to produce those documents. However, many of these X-files relevant to this case are on file with the Court already. *See* ECF Nos. 26-2 to ECF 26-7; ECF No. 55 (exhibits attached to Kupsky Declaration).

[6] Dr. Trotter is quoted or cited in many Bataan case memos produced by the DPAA. For example, a historical report prepared by the DPAA and filed in this case references her work, as well as work by Abie Abraham and John E. Olson. ECF 31-1 at 192, DPAA, Historical Report, U.S. Casualties and Burials at Cabanatuan POW Camp #1 (May 2017).

During recent years, hundreds of families have contacted Mr. Eakin for help locating the remains of their deceased relatives. Defs. Ex. H at 3. He receives no compensation for the work and information that he provides to these families. *Id.* Even the Government acknowledges that Mr. Eakin provides valuable assistance to families of World War II service members. *See* ECF No. 55 at 14. Moreover, Mr. Eakin has corresponded with and interviewed hundreds of other researchers and family members of deceased service members. His extensive knowledge about the burial and identification of deceased American service members who died during the Battle of Bataan and subsequent imprisonment as POWs has caused other civil researchers to routinely approach him to ask about the X-files and his experience on locating and identifying remains. Eakin Decl. ¶ 4. While Mr. Eakin's experience is similar to that of the DPAA's personnel, his specialized research on World War II era burials appears to cover a slightly longer period of time than the Government's expert. *Id.* ¶ 5. Further, his research is much more narrowly concentrated on identification and/or locating "unidentified" remains from World War II.

The Government argues that Mr. Eakin is not qualified because he is not enough of a "specialist" to interpret documents or determine what information is relevant. *See* ECF No. 55 at 15. The primary problem with this argument is that it attacks the weight to be assigned to Mr. Eakin's testimony, not his qualifications. *See Vedros*, 119 F.Supp.3d. at 562 (lack of specialization goes to the weight of evidence offered by expert). This argument is simply another way of saying that the Government disagrees with Mr. Eakin's opinions. It also confuses what is "relevant" with what Mr. Eakin believes is "reliable." The Government cites instances where Mr. Eakin suggested that certain evidence is typically not useful and uses this to argue that he is not qualified. ECF No. 55 at 16. However, Mr. Eakin's experience reviewing the X-files, IDPFs, and related literature has provided him with the knowledge and skill to reach opinions on what data is typically unreliable,

which is explained in more detail throughout the attached declaration for each specific case. Eakin Decl. ¶ 4. A disagreement about what data should be relied upon does not mean that Mr. Eakin is not qualified. It simply means that the Government has reached a different opinion from the available information and data. For purposes of this motion, the Court should defer to Mr. Eakin's opinion of what data he finds to be reasonably reliable. *See Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1432 (5th Cir. 1989) (trial courts "should defer to the expert's opinion of what data they find reasonably reliable.").

In sum, Mr. Eakin has spent the past decade studying the subject at issue. He has gained specialized knowledge and experience that makes him uniquely qualified to testify on the factual issues before the Court. *See* Eakin Decl. ¶ 2 - 6. While many of the facts in this case do not involve complex scientific or technical information, there are thousands of pages of documents that can be confusing without the guidance of an individual who has studied the relevant subject matter and issues related to these documents. Given Mr. Eakin's knowledge, experience, skill, and education, there is beyond "some" reasonable indication of qualification. *See Rushing*, 185 F.3d at 507. His declaration attached to this response shows the he has such knowledge and experience in his calling "to make it appear that his opinion or inference will probably aid the trier in his search for truth. *See Hicks*, 389 F.3d at 524.

2. Renee Richardson is Qualified to Testify as an Expert

Like Mr. Eakin, Ms. Richardson is also qualified to testify in this case. Ms. Richardson served in the military for many years and has been awarded numerous medals recognizing her service. Defs. Ex. L. During her military career, Ms. Richardson was assigned from 2008 to 2011 to the Defense Prisoner of War Missing Personnel Office ("DPMO"), which was the predecessor to the DPAA. Defs. Ex. J. The first two years she was there, she was responsible for analyzing and

reporting on missing personnel and interacted directly with families on specific cases. *Id.* As a Navy Commander, she served as a Branch Chief in the World War II Division of DPMO from 2010 to 2011. *Id.* That assignment provided her with intimate knowledge of the procedures and policies of the World War II Division, as well as in depth familiarity with the information contained in IDPFs. Additionally, Ms. Richardson served as part of the Joint DPMO Investigation Team in Europe in 2010 and gained an understanding of the investigation methodology used to locate, recover, and identify remains. *Id.*

From 2011 to 2014, Ms. Richardson advised on the recovery and identification of a World War II service member, which was made by a family member of the deceased service member.[7] *Id.* Her experience in that effort has provided insight into the contemporary errors made in the identification process, and the diligence and tenacity required for a family to reach resolution – especially in the face of Governmental reluctance to further explore options that include DNA testing. *See id.*; Defs. Ex. K at 6:19-7:7. Given that Ms. Richardson has spent years working in this field, she has significant experience relating to the identification efforts and procedures at issue. *See* Defs. Ex. K at 7:14-8:20; 9:10-10:14; 15:24-17:17; 47:13-48:22.

The Government does not dispute that Ms. Richardson is qualified to address IDPFs and World War II identification processes or how the Government has analyzed related documents. ECF No. 55 at 22-23. Instead, the Government claims she is not qualified to testify about DNA testing techniques. Ms. Richardson will not be testifying about results of DNA testing in this case or specialized DNA testing methods. Testimony about the Government's DNA testing capabilities

[7] The identification was eventually accepted by the DPAA. *See* Steven Verburg, *Middleton Man's Tireless Effort Outflanks Military to Bring Army Vet Home*, Wisconsin State Journal (May 25, 2014), https://madison.com/wsj/news/local/govt-and-politics/middleton-man-s-tireless-effort-outflanks-military-to-bring-army/article_a13818fd-3fe3-558a-a9f3-03f967373716.html.

would be based on her factual knowledge obtained after working for the Government and would not necessarily be expert testimony. Nonetheless, she does have the necessary expertise and/or knowledge based on her education and experience to testify about best practices for identification procedures and policies. *See* Defs. Ex. J; Defs. Ex. K at 7:14-8:20, 17:13-17, 20:4-20; Defs. Ex. L. Further, it was previously disclosed to the Government that Ms. Richardson may be called to testify about DNA testing on remains, it was discussed in her expert report, and the Government had the opportunity to depose Ms. Richardson on this issue. *See* ECF No. 42. It makes no difference that she has also relied on information provided by scientists and other experts to support her opinions. *See River House Partners, LLC v. Grandbridge Real Estate Capital LLC*, CV 15-00058-BAJ-RLB, 2017 WL 4269838, at *2 (M.D. La. Sept. 26, 2017), vacated, CV 15-00058-BAJ-RLB, 2018 WL 813903 (M.D. La. Feb. 9, 2018).

The Government also argues that Ms. Richardson is not qualified to testify about why the Government's policies and procedures are flawed. ECF No. 55 at 24. However, most testimony on this subject would most likely not be considered to be expert testimony. Even if it the testimony did fall under Rule 702, this is simply another attack on the weight that should be given Ms. Richardson's opinions, not its admissibility. Nonetheless, Ms. Richardson has the experience and knowledge, as discussed above, to support her opinions on the subject. She worked many years for the Government and assisted with its identification efforts. There is little doubt that she has learned enough through her experience, training, and research to qualify her to provide an opinion about what the most efficient and effective disinterment policy would be. Unfortunately, she has experienced first-hand what it is like for a family to try and claim the remains of a loved one. One does not need to be a forensic anthropologist to understand that a process or policy is failing.

In sum, Ms. Richardson's knowledge, skill, training, and experience working with the DPMO provides her with "some" reasonable indication of qualification.

B. The Families' Experts Are Reliable

The reliability inquiry focuses "on [experts'] principles and methodology, not on the conclusions that [experts] generate." *Daubert*, 509 U.S. at 594. "The proponent of expert testimony is not required to show that the testimony is correct, but rather show—by a preponderance of the evidence—that the testimony is sufficiently reliable." *Koenig*, 2017 WL 6033404, at *2 (citing *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998)). The expert may rely on literature review, witness interviews, or data analysis to show that his testimony is sufficiently reliable and the trial court "should defer to the expert's opinion of what data they find reasonably reliable." *Peteet*, 868 F.2d at 1432.[8] Additionally, Rule 703 provides that the facts or data supporting an expert's opinion "need not be admissible in evidence in order for the opinion or inference to be admitted" if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed. R. Evid. 703.

The Court has considerable leeway in deciding how to determine when a particular expert's testimony is reliable and how to establish reliability. *Graham*, 261 F. Supp. 3d at 727 ("The test for determining reliability is flexible and can adapt to the particular circumstances underlying the testimony at issue."). Of course, there are the *Daubert* factors that a court may consider, but they are not always appropriate. *See Black*, 171 F.3d at 311-12 ("In the vast majority of cases, the

[8] "The number of sources on which an expert may reasonably rely 'is virtually infinite,' and such sources include interviews, reports prepared by third parties, scientific theories or test results, clinical and other studies, technical publications, business, financial, and accounting records, economic statistics, opinions of other experts, and general knowledge or experience." *River House Partners, LLC*, 2017 WL 4269838, at *2 (citing Jack B. Weinstein and Margaret A. Berger, 4 Weinstein's Federal Evidence § 703.04[3], at 703-15 to 703-20 (2d ed. 2005)).

district court first should decide whether the factors mentioned in *Daubert* are appropriate."). Not all expert testimony is based on scientific or technical knowledge and there are unquestionably situations where an expert can rely on his specialized knowledge, experience, training, or personal observations in forming a reliable opinion. *See* Fed. R. Evid. 702; *Graham*, 261 F. Supp. 3d at 735; *see also Kumho Tire Co*, 526 U.S. at 156.[9] Consequently, there is no specific list of factors that a Court must use when determining whether an expert's opinions are reliable.

Nonetheless, courts both before and after *Daubert* have found several factors helpful in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include: (1) whether the experts propose to testify from matters that flow "naturally and directly" from research conducted outside the context of the litigation – i.e. "real world research;" (2) whether the expert unjustifiably has extrapolated from an accepted premise to a conclusion that cannot fairly be derived from it; (3) whether the expert adequately has taken into consideration and accounted for or ruled out alternative explanations inconsistent with the opinion expressed; (4) whether the expert is being as careful in the methodology used for testifying as she would be in her professional work unrelated to litigation; and (5) whether the field of expertise the expert claims is recognized for reaching reliable results for the type of opinion that the expert proposes to give at trial – i.e. the discipline itself is not lacking in reliability. Fed. R. Evid. 702, 2000 Advisory Committee Note.

[9] As explained in the Advisory Committee Notes to Fed. R. Evid. 702, "[s]ome types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise." Moreover, "[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." *Id.* In those situations, the witness should explain how that experience leads to the conclusions reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *See* Fed. R. Evid. 702; *U.S. ex rel. Jones v. Brigham & Women's Hosp.,* 678 F.3d 72, 94 (1st Cir. 2012).

1. Mr. Eakin's Opinions are Reliable

Here, Mr. Eakin's testimony is sufficiently reliable. While most of the *Daubert* factors are not appropriate in this case, there are factors showing that Mr. Eakin's testimony is reliable. First, Mr. Eakin's opinions are based on sufficient facts and data. Mr. Eakin's opinions are supported by the information and data found in the IDPFs, X-files, related literature, cases notes, and reports for each case at issue. The information contained in these resources, as a whole, have helped lead him to his opinions regarding the location of the remains at issue and the related subject matter. Eakin Decl. ¶ 34. His experience, education, and knowledge on the subject matter at issue is the result of nearly a decade of research and study. *Id.* ¶ 4. He is able to critically analyze each particular case based on his understanding of the AGRS' procedures and policies, as well as the recorded evidence available. Furthermore, other experts have agreed with at least some of his opinions and relied on the same information and data that he has. *See* DPAA Memorandums Recommending Disinterment of Common Graves 704 and 822, attached as Exhibits B and C.

Even if the DPAA's witnesses have reached a different conclusion using this same information and data, the Court should not exclude Mr. Eakin's opinions. Because experts can reach different conclusions based on competing versions of the facts, the Court should not exclude an expert's opinion simply because the Court believes another version of the facts or considers the evidence doubtful or tenuous. *See Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 249 (5th Cir. 2002). The factual basis of Mr. Eakin's opinion relates to the weight that should be given to his testimony, not to its admissibility. *See Primrose Oper. Co. v. National Am. Ins.*, 382 F.3d 546, 562 (5th Cir. 2004) (questions about bases and sources of expert's opinion generally affect weight to be assigned to that opinion rather than its admissibility and should be left to trier of fact's consideration).

Another factor weighing in Mr. Eakin's favor is the fact that the DPAA has agreed to disinter four out of the seven remains at issue in this case, which provides evidence that his principals and methods are reliable. ECF No. 55 at 8. The Government, apparently relying upon Mr. Eakin's same sources, data, principles, methodology, and approach, has disinterred and partially "identified" remains as those of Pvt. Kelder. Eakin Decl. ¶ 7–11. The Government has also disinterred the service members originally buried in Cabanatuan POW Camp cemetery communal graves 704 and 822 – which was recommended by Mr. Eakin more than a year ago after he researched and investigated the relevant IDPFs. *Id.* ¶ 12. It should also be noted that the Government initially refused to disinter the remains of service members associated with Cabanatuan POW Camp cemetery communal grave 407 on the grounds that they were unable to obtain sufficient family reference samples (DNA samples from family members). *Id.* ¶ 13. However, Mr. Eakin used his knowledge, experience, approach, and skill to analyze the relevant IDPFs and located contacts for each of the families for which family reference samples were required. *Id.* This information was shared with the Government by the Families, and now the Government has informed the Court that a recommendation, presumably for disinterment, will be finalized soon. The data, sources, methods, and techniques that Mr. Eakin uses have been validated and accepted by the Government, as shown by the decision to make additional Cabanatuan recoveries using Mr. Eakin's work as a model.[10]

Other factors that courts have considered also show that Mr. Eakin's testimony is sufficiently reliable. It is clear that Mr. Eakin proposes to testify from matters that flow "naturally

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[10] Until Mr. Eakin began his research on "unidentified" remains of service members located at Manila American Cemetery in 2009, it is believed that there was no effort to identify "unknown" remains there since approximately 1952. Today, the Assistant Secretary of Defense for Manpower and Reserve Affairs decides which graves are disinterred – not an expert from the DPAA. *See* ECF No. 55 at 6.

and directly" from his research that has been conducted during the past decade. As discussed above, he has reviewed and analyzed thousands of documents, articles, books, and reports detailing the burials of service members in the Philippines during World War II. *Id.* ¶ 4. He is familiar with the history and geography of the burials at issue in this case and has applied this knowledge to the facts of the case. *Id.* ¶ 4, 7-32. He has not unjustifiably extrapolated from an accepted premise to a conclusion that cannot fairly be derived from it. Indeed, as discussed above, the Government has agreed with many of his conclusions by disinterring the majority of the remains at issue in this case. Previous investigators have also agreed with at least some of Mr. Eakin's opinions. *Id.* ¶ 24, 29.

Moreover, Mr. Eakin has considered and accounted for alternative explanations that may be inconsistent with his opinion. For example, Mr. Eakin has considered alternative explanations for data that is presented in the IDPFs (i.e., height or dental records). *See id.* ¶ 16-17. Based on his research and knowledge of the AGRS, he has determined that some information is unreliable and should not be controlling or given much weight. Further, Mr. Eakin has been extremely careful in the methodology being used as he would for work unrelated to litigation. *Id.* ¶ 34. He is very passionate about bringing these "unidentified" service members home so that they can receive a proper burial. He would not sacrifice the quality of his work in this case. Finally, the field of study is not lacking in credibility. There is no proof that the methods used by Mr. Eakin is unreliable or that his field of study lacks credibility.

The Government's motion appears to want the Court to only consider the *Daubert* factors even though the subject of the testimony here is nothing like that found in *Daubert*. Again, not all of those factors are particularly helpful for this case. Two factors, (1) whether a theory or technique can be tested and (2) the known or potential rate of error, do not apply when an expert's testimony

relies upon his knowledge, experience, education, and training – even if his research of the available literature, data, and information leads him to a different conclusion than other experts. *See Pipitone*, 288 F.3d at 249 (rate of error and standards not particularly relevant when testimony derived mainly from observations and professional experience); *Lust v. Merrell Dow Pharms.*, 89 F.3d 594, 597 (9th Cir. 1996). Another factor, whether the theory or technique has been subjected to peer review and publication, is also not helpful because of the limited interest in this subject matter. This case involves a very limited set of remains from World War II and academic institutions and journals have not published papers addressing the opinions or methods at issue. Finally, the factor considering whether the technique or concept has gained acceptance by others is also not helpful due to the nature of the testimony. Even so, for the majority of the remains at issue, the only other individuals looking into these cases have agreed with Mr. Eakin's opinion that the remains should be disinterred and use much of the same data and information that Mr. Eakin uses. *See* Ex. B; Ex. C.

The Government also argues that Mr. Eakin's testimony is not reliable because he has not considered relevant evidence or alternative explanations. It further argues that his methods are not amenable to a "quality control" review process. These arguments do not show that Mr. Eakin's potential testimony is unreliable. The Government's first two arguments attack the weight of the expert's testimony, not its admissibility. A party questioning the methodology used by an expert goes to the weight of the expert's testimony, not its admissibility. *Emig v. Electrolux Home Prods. Inc.,* 2008 WL 4200988, at *9 (S.D.N.Y. Sept. 11, 2008). Likewise, "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *14.38 Acres of Land*, 80 F.3d at 1077; *see also Viterbo*, 826 F.2d at 422. So long as an expert's assumptions are not "so unrealistic

and contradictory as to suggest bad faith," arguments that the "assumptions are unfounded go to the weight, not the admissibility, of the testimony." *Boucher v. U.S. Suzuki Motor Corp.,* 73 F.3d 18, 21 (2d Cir. 1996) (internal citations and quotation marks omitted). As for the Government's other argument that Mr. Eakin's method is not amenable to a "quality control" review process, it is not persuasive or controlling. "To the extent that expert opinions are derived from literature review, witness interviews and data analysis, they are not automatically rendered unreliable by their non-susceptibility to empirical verification." *United States v. Levinson,* No. 10–80166–CR, 2011 WL 1467225, at *4 (S.D. Fla. Mar. 17, 2011) (citing *Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC,* 555 F.3d 1331, 1338 (11th Cir.2009)).

In sum, the test for determining reliability is flexible and "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702, 2000 Advisory Committee Note. Mr. Eakin's methodology – analyzing relevant IDPFs and burial records, together with other known facts and literature review – is reliable. Most importantly, he has considered sufficient facts and data, and his opinions have been shown to be accurate. *See* Eakin Decl. ¶ 11. Mr. Eakin's Declaration attached to this Response specifically addresses the facts and data that he has considered for each specific case at issue. Accordingly, the exception should not apply here, and Mr. Eakin's proffered testimony should not be excluded.

2. Ms. Richardson's Opinions are Reliable

The Government contends that some of Ms. Richardson's opinions are unreliable because she was not provided relevant information and because her conclusions were not based in a scientific methodology. These arguments fail.

First, the Government is not in a position to determine what information must be reviewed in order to form an opinion. Ms. Richardson reviewed the relevant IDPFs and used the same

methodology that she used while working for the DPMO. Defs. Ex. K at 24:23-27:19. Ms. Richardson had access to all of the records on file in this lawsuit, in addition to the countless documents and reports that she reviewed during the past decade while researching the subject matter at issue and working for the DPMO. Despite the Government's characterization of the documents she reviewed, she has never met or consulted with Mr. Eakin, and he did not pre-select what documents could be reviewed. *Id.* at 33:16-19. The Government has not shown that any other X-files would have changed her opinion. While it may have been "nice" or "useful" for her to have all of the Government's documents, the Government has refused to produce all of its reports and information. The Government complains about her not being able to review all of the information, but has caused information to be concealed. Nonetheless, Ms. Richardson's specialized knowledge on the subject matter at issue and her review of the relevant IDPFs provides her with a reasonable basis for reaching her opinions.

Second, Ms. Richardson applied sound principles and methods to reach her opinions. She applied methods that she was taught while working at the DPMO. *Id.* at 24:23-27:19. She analyzed and reviewed the IDPFs, carefully considering all the annotations and notes included. *Id.* She considered the processing method used by the AGRS and the history of the individual grave registration teams. *Id.* She has also considered alternatives to her opinions and taken into account conflicting data. This approach is very similar to the method used by the DPAA. *See* Ex. B; Ex. C.

The fact that Ms. Richardson would always recommend DNA testing regardless of historical research does not cast doubt on her opinions. Likewise, Ms. Richardson giving little weight to some evidence does not mean that her opinion is unreliable. Similarly, if she admits that there are other possibilities, that does not make her method unreliable. If there is contradicting data

or information in an IDPF or case note, then Ms. Richardson may use her expertise and analysis to decide what is worth relying more on. Again, that is something for the trier of fact to consider when determining how much weight to give her testimony. The Government's other arguments all focus why Ms. Richardson should have given certain data more weight when reaching her opinions. None of these arguments make her testimony inadmissible. Instead, it is something for the trier of fact to take into account when weighing her testimony.

Finally, just like with Mr. Eakin, Ms. Richardson's opinion that the remains from Cabanatuan Common Graves 704 and 822 should be disinterred has been accepted by the Government. Likewise, it appears that the Government will also soon disclose that it agrees with Ms. Richardson's recommendation that Cabanatuan Common Grave 407 be disinterred. This is simply further evidence that Ms. Richardson's principals and methods applied in this case are reliable.[11]

C. The Experts' Testimony Will Assist the Trier of Fact

Under Rule 702, expert testimony must assist the trier of fact to understand the evidence or determine a fact in issue. Fed. R. Evid. 702. Relevant evidence is evidence "which has 'any tendency to make any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Mathis v. Exxon Corp.*, 302 F.3d 448, 460 (5th Cir. 2002) (quoting Fed. R. Evid. 401).

1. Mr. Eakins' Testimony Will Assist the Trier of Fact

Mr. Eakin's testimony is entirely relevant to the issues in this case and his testimony will help the Court understand key evidence. Issues that the Court will receive evidence concern (1)

[11] The Government has only challenged the reliability of Ms. Richardson's opinion on the likelihood of identification of the remains at issue. As for Ms. Richardson's other opinions, the Government has not challenged their reliability.

the process and policies used by the DPAA to identify service members; (2) the deficiencies in DPAA's current methods used to identify service members; (3) why the identity and/or location of the remains at issue is known; (4) the information contained within any relevant IDPF; (5) the DPAA's inadequate capacity and capability to identify service members; and (6) other subjects or opinions referenced in the pleadings. As shown above, Mr. Eakin has spent years studying these matters and his testimony will assist the Court in understanding the evidence presented.

Mr. Eakin may also be called to testify to help the Court understand key evidence related to the Families' arguments that (1) the remains designated as X-1130, which are currently buried in Manila American Cemetery Grave J-7-20, are likely those of U.S. Army First Lieutenant Alexander R. Nininger; (2) the remains designated as X-618, which are currently buried in Manila American Cemetery Grave L-8-113, are likely those of U.S. Army Brigadier General Guy O. Fort; and (3) the remains designated as X-3629, which are currently buried in Manila American Cemetery Grave N-15-19, are likely those of U.S. Army Colonel Loren P. Stewart. Additionally, he may be called to testify regarding the DPAA's recommendation to disinter the remains associated with Cabanatuan Common Graves 704 and 822. Mr. Eakin may also testify that it is his opinion that Private First Class David Hansen's remains were buried in Cabanatuan Common Grave 407 and that the DPAA's policies and procedures require them to disinter the remains at issue and conduct DNA testing. All of these are issues that the Court may have to address in this case. Mr. Eakin's Declaration attached to this Response shows that his reasoning and methodology can be properly applied to the facts of this case and will assist the trier of fact.

The Government contends that Mr. Eakin's opinions will not assist the Court because the Court can perform all of the necessary analysis itself. It is true that the Court will be able to analyze many of these documents and reach its own conclusion on some information using common sense.

However, there is conflicting information and data in certain documents before the Court that the Government is attempting to rely on to dispute the Families' claims. Mr. Eakin's testimony will assist the Court in understanding the evidence before it and help the Court evaluate the weight that should be given to such evidence. Additionally, it will help the Court determine facts at issue – primarily whether the Families can prove that it is more likely than not that the Government has possession of their relative's remains. His testimony will include his analysis of the IDPFs and X-files related to the remains at issue. He will also be able to provide testimony concerning the history of the AGRS and previous identification efforts. His testimony will undoubtedly help the Court understand the evidence before it.

The Government also claims that Mr. Eakin's conclusions are incorrect and that he has not weighed enough evidence. Again, the Government's disagreement with Mr. Eakin's opinions and methods does not mean that his testimony will not assist the trier of fact. The Court should consider his testimony and reach its own conclusion after it has had the opportunity to review all of the evidence. The Government's argument goes towards the weight to be given to Mr. Eakin's testimony, not its admissibility.

2. Ms. Richardson's Testimony Will Assist the Trier of Fact

The Government claims that parts of Ms. Richardson's testimony will not assist the trier of fact because: (1) her opinions are tied to an expectation that litigation provides an opportunity to change DoD policies; (2) her opinion about options for closure of the cases are not relevant; and (3) her opinion that remains are "likely" those of certain service members plays no role in this litigation. Throughout this section of the Government's motion, it mischaracterizes the Families' claims in this lawsuit. Nonetheless, the Government's arguments fail.

First, Ms. Richardson's expectations are irrelevant. Even if Ms. Richardson has an expectation that this litigation may change DoD policies, that does not mean that her testimony is not relevant. As described above, Ms. Richardson's testimony will assist the Court's understanding of the evidence and the facts at issue. She has in-depth knowledge concerning the Government's procedures and policies. *See* Defs. Exs. J; L. She also has specialized knowledge concerning identification practices in general, as described above. Despite the Government's claim, the Government's policies and actions are at issue in this case. Testimony related to what procedures are being used, or could be used, are clearly relevant. A Due Process claim necessarily involves determining what procedures are provided or should be provided.

Second, her testimony about the options available to provide closure for families seeking possession of the remains of their relatives is relevant. At the heart of this case is the issue of what rights families have to recover the remains of their loved ones and what process they are owed. It is the Government's policies, decisions, and actions that are at issue in this case. Finally, another fact in question is whether the Families' have proved that it is more likely than not that the location of the remains of their relatives is known. This fact is key to any substantive due process claim. Accordingly, Ms. Richardson's testimony will assist the Court in understanding the evidence before it and in determining whether the Families have legitimate claims.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion and allow the proffered expert testimony of Mr. Eakin and Ms. Richardson.

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Respectfully submitted,

/s/ John T. Smithee, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of March 2019, a true and correct copy was delivered as follows:

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