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

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INTRODUCTION

This case turns on whether the documents in a handful of individual deceased personnel files (IDPFs) demonstrate that the remains Plaintiffs have selected are those of their deceased relative, i.e., that the records are enough to consider their relatives identified. In seeking to make that case, Plaintiffs are free to make all available arguments from the documents themselves. In this litigation, however, Plaintiffs seek to distance the Court from the documents themselves and instead rely on purported expert opinions about the meaning of those documents—John Eakin's interpretation, and to a lesser extent Renee Richardson's interpretation. Because these opinions are neither reliable nor relevant, they should not be admitted into evidence, let alone relied upon as authoritative interpretations of the historic record. Plaintiffs' experts should be excluded under Federal Rule of Evidence 702.

ARGUMENT

I. The Court Should Determine The Admissibility of Plaintiffs' Expert Opinions Now

Plaintiffs err in suggesting that the Court should defer until trial its assessment of whether their experts satisfy the requirements of Rule 702. *See* Pls.' Opp'n at 4-6, ECF No. 56. The analysis set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), stems from the text of Rule 702 itself, which determines the *admissibility* of expert testimony. *See SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 775 (5th Cir. 2017) (holding that under Rule 702, "[e]xpert testimony is admissible only if it is both relevant and reliable") (quotation marks and citation omitted).[1] And here, where the parties will shortly move for summary judgment, *see* Scheduling Order, ECF No. 50 (setting April 12 and May 3, 2019 as the deadlines for the parties' respective summary judgment motions), the admissibility of this evidence is an immediate issue.

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

"Evidence inadmissible at trial cannot be used to avoid summary judgment." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992) (excluding expert's affidavit because its "conclusory assertions" failed to satisfy Federal Rule of Evidence 702); *see also Patterson v. Celadon Trucking Servs., Inc.*, No. SA-09-CV-1-XR, 2010 WL 538263, at *5 (W.D. Tex. Feb. 4, 2010) ("Affidavits cannot preclude summary judgment unless they contain admissible evidence.").

Thus, this Court and others have repeatedly recognized the necessity of ruling on *Daubert* motions in conjunction with summary judgment. *See, e.g.*, *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711, 726 (W.D. Tex. 2017) ("[T]he Court will consider the [defendant's] two pending Daubert motions in order to define the scope of permissible summary judgment evidence; because a court on summary judgment should only consider admissible evidence, if Plaintiffs' experts are disqualified by the [defendant's] Daubert motions, it would be inappropriate to consider those experts at this stage.").[2]

Because a Rule 702 determination is needed for summary judgment, cases noting a diminished need to rule on a Rule 702 challenge *before* a bench trial are beside the point.[3]

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[2] *See also Bellitto v. Snipes*, 302 F. Supp. 3d 1335, 1347 n.12 (S.D. Fla. 2017) (holding that because "evidence inadmissible at trial cannot be used to avoid summary judgment" it is "both appropriate and necessary to consider [defendant's] *Daubert* Motion"); *A.H. ex rel. Holzmueller v. Ill. High Sch. Ass'n*, 263 F. Supp. 3d 705, 713 n.8 (N.D. Ill. 2017) (conducting Daubert analysis in conjunction with summary judgment decision because "[i]t is appropriate . . . for the Court to evaluate which portions of the summary judgment record are admissible and rely only on those portions in assessing the summary judgment motion"); *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 817 (W.D. Tex. 2005) (holding it necessary to grant summary judgment to defendant after plaintiff's sole expert on specific causation was excluded under Rule 702).

[3] While there is no need to shield a jury from improper testimony, *see Atlantic Specialty Ins. Co. v. Porter, Inc.*, 742 F. App'x 850, 852 n.4 (5th Cir. 2018) (noting that certain "safeguards provided for in *Daubert* are not as essential in the context of a bench trial"), Plaintiffs must nevertheless carry their burden to establish that their expert's testimony is admissible. *See League of United Latin Am. Citizens (Lulac) v. Edwards Aquifer Auth.*, No. SA-12-CA-620-OG, 2014 WL 10762935, at *1 (W.D. Tex. Sept. 30, 2014) (noting that even where a bench trial is concerned "[t]he Court cannot simply abandon its duty to scrutinize expert testimony under *Daubert*"). Indeed, the Fifth Circuit recently held that a district court appropriately excluded

Moreover, because this case can most appropriately be resolved on summary judgment, there would be no judicial economy in deferring a decision about the admissibility of Plaintiffs' expert testimony until a potential trial. This case is about the significance of documents from 70-year-old files rather than the credibility of fact witnesses. The significance of those documents for Plaintiffs' legal claims can and should be resolved as a matter of law.

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

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." Fed. R. Evid. 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), and should be excluded if "not qualified to testify in a particular field or on a given subject." *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009). Thus an expert witness can be admitted only if "some reasonable indication of qualifications is adduced." *Rushing v. Kansas City S. R.R. Co.*, 185 F.3d 496, 507 (5th Cir. 1999); *see also id.* ("[Q]ualifications remain important; rule 702 requires a qualified expert. A completely unqualified expert using the most reliable of tests should not be allowed to testify.").

Mr. Eakin is "completely unqualified," *Rushing*, 185 F.3d at 507, to offer the testimony he seeks to offer in this case, and his testimony should be excluded. Mr. Eakin has reviewed a large set of files and his database-building skills have led him to approach these files primarily through the lens of correlating names and information that appears in the file. *See, e.g.*, Eakin

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expert testimony before a bench trial. *See Atlantic Specialty*, 742 F. App'x at 852 n.4, 853-55 (stating "in the context of a bench trial, a trial judge may still exclude expert testimony that is either unreliable or irrelevant" and affirm a district court's exclusion of two experts before a bench trial).

Decl. ¶ 4 (describing "consolidate[ing documents] in to electronic databases to allow correlation and retrieval"). But that is not the expertise he attempts to employ here. Instead, Plaintiffs want the Court to "defer to Mr. Eakin's opinion of what data he fines reliable." Pls.' Opp'n at 10; *see also* Eakin Decl. ¶ 35 (explaining that his methodology involves determining "which data is reliable" or "why certain data in a file is unreliable").[4] His review of documentation regarding DOD's historical effort to identify remains 70 years ago is an utterly inadequate basis to develop any expertise in reaching generalizable conclusions regarding what information in those files is reliable or unreliable. To be qualified to reach such conclusions Mr. Eakin would need some expertise in the various underlying subject matters—e.g., anthropology or odontology—or at least have experience actually demonstrating that certain types of information are contradicted by real world results. He has neither. *See* Eakin Dep. at 10:6-12:20 (admitting lack of expertise as a historian, in forensic anthropology, in odontology, or in DNA testing).[5] Nor can he gain such

[4] Plaintiffs mischaracterize the Fifth Circuit's observation that courts should "defer to the expert's opinion of what data they find reasonably reliable." *See* Pls.' Opp'n at 10, 13 (quoting *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1432 (5th Cir. 1989)). The Fifth Circuit was merely referring to Rule 703's standard, which currently reads "If *experts in the particular field would reasonably rely* on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." Fed. R. Evid. 703. This does not alter the *Daubert* inquiry. At any rate, Mr. Eakin should not be qualified as an expert in the first place and cannot show that other experts in his field find, for example, physical evidence entirely unreliable or initial AGRS associations reliable.

[5] Defendants are not arguing that Mr. Eakin "is not enough of a 'specialist'," Pls.' Opp'n at 9, because Mr. Eakin has acknowledged that he lacks *any* expertise in each of these fields. Thus, this is unlike a case finding a medical doctor qualified to testify regarding causation of a disease he treated for 30 years despite his "lack of specialization in epidemiology, pathology, and toxicology." *Vedros v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556, 562 (E.D. La. 2015). Instead, Mr. Eakin lacks general knowledge sufficient to be an expert in these fields and cannot acquire that knowledge simply by reviewing historical files, or a few academic articles. While "experts frequently *rely* on surveys and reports that they are not experts on," *Summit 6 LLC v. Research in Motion Corp.*, No. 3:11-367, 2013 WL 12124321, at *9 (N.D. Tex. June 26, 2013) (emphasis added), it is quite another thing for a witness to weigh the credibility of information without the expertise to do so.

expertise by reading a handful of academic articles. *See Newton v. Roche Labs., Inc.*, 243 F. Supp. 2d 672, 678 (W.D. Tex. 2002) ("[A]n individual's 'review of literature' in an area outside his field does not make him any more qualified to testify as an expert than a lay person who read the same articles."). Thus, because his opinions in this case depend on weighing the reliability of information in fields over which he lacks expertise, he is not qualified to render such speculative opinions. *Cf. Lee v. Nat'l R.R. Passenger Corp.*, No. 3:10-392, 2012 WL 92363, at *3 (S.D. Miss. Jan. 11, 2012) (excluding expert testimony because "treating someone for PTSD is an altogether different matter than diagnosing it."); *Childs v. Entergy Mississippi, Inc.*, No. 2:08-77, 2009 WL 2508128, at *3 (N.D. Miss. Aug. 13, 2009) (excluding an electrician as unqualified who "has no relevant expertise with high voltage electrical systems").[6]

In addition, Mr. Eakin is unqualified to identify remains. *See* Pls.' Opp'n at 22 (asserting that he would testify regarding "why the identity and/or location of the remains at issue is known"); Eakin Decl. ¶ 35 (purporting to "determine whether the evidence as a whole supports identification"). Identification of remains is an inherently governmental function that requires forensic training. *See, e.g.*, 10 U.S.C. 1513(a)(3)(B) (stating that a person is "accounted for" only once "the remains . . . are identified as those of the missing person by a practitioner of an appropriate forensic science").[7] It is beyond reasonable dispute that none of the remains at issue

[6] As discussed in the next subsection, *see infra* Arg. § I.B.1, Defendants have demonstrated how far from the mark Mr. Eakin's reliability determinations are. This showing highlights how incorrect Plaintiffs are in asserting that Mr. Eakin has gained "the knowledge and skill to reach opinions on what data is typically unreliable." Pls. Opp'n at 9-10. And because Mr. Eakin's conclusions depend upon an extreme narrowing of the available evidence, Plaintiffs must prove his qualifications before being permitted to narrow the evidence in this way. *See* Defs.' Mot. to Exclude Expert Opinions ("Defs.' Mot.") at 12, ECF No. 55.

[7] *See also id.* § 1501(a)(2)(B) (stating that DPAA has "[r]esponsibility for . . . identifying missing persons from past conflicts or their remains"); *id.* § 1509(b)(2)(C) (stating that the medical examiner assigned to DPAA "shall—(i) exercise scientific identification authority").

in this case have been identified. *See* Kupsky Decl. ¶¶ 18-19, 22-25, 28-29, 33-35; *cf.* Richardson Dep. at 98:11-14, ECF No. 55-15 ("[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."). Because Mr. Eakin lacks the qualifications to undermine or overturn this fact, admission of such testimony would be unwarranted.

In sum, Mr. Eakin's testimony should be excluded because he is not qualified as an expert to render the opinions he offers in this case. *Cf. Atlantic Specialty*, 742 F. App'x at 854-55 (excluding expert before bench trial because his opinion was unsupported by critical data and thus was "nothing more than a possibility rooted in speculation," and a court cannot be required to admit opinion evidence where "there is simply too great an analytical gap between the data and the opinion proffered." (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997))).[8]

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

[8] Nor should the court give credence to Mr. Eakin's self-serving and grandiose claims that his "knowledge of World War II era burials and recoveries in the Philippines is at least equal to that of anyone in the world" and that he is "at least as qualified . . . as the government's designated expert." Eakin Decl. ¶¶ 5-6. *Cf. George v. Morris*, 736 F.3d 829, 855 (9th Cir. 2013) (rejecting putative expert's "self-aggrandizing" statements); *In re FEMA Trailer Formaldehyde Prods. Liability Litig.*, MDL No. 07-1873, 2009 WL 7235894, at *4 (E.D. La. Sept. 24, 2009) (criticizing expert for inaccurate "self-aggrandizing statement"). The type of knowledge he has acquired does not make him qualified to offer the testimony he seeks to offer here.

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).

At his deposition, 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. Defendants have shown that 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. *See* Defs.' Mot. at 13-16. In his declaration, Mr. Eakin now advances a different explanation of his methodology. He states "I consider the IDPFs, X-files, case notes, historical research, and knowledge about the AGRS to determine whether the evidence as a whole supports identification." Eakin Decl. ¶ 35. In the process he determines "which data is reliable," and "why certain data in the file is unreliable." *Id.* But dressing up his methodology in such language cannot conceal the defects revealed at his deposition.

Plaintiffs do not dispute Defendants' showing that Mr. Eakin's methodology cannot satisfy the traditional *Daubert* factors. *See* Defs.' Mot. at 13-14; Pls.' Opp'n at 17-19. Instead, they argue that the nature of his testimony makes those factors irrelevant and that it should be assessed using four other factors—whether (1) the testimony is based on sufficient facts or data, (2) Defendants have validated and accepted Mr. Eakin's methodology, (3) the testimony flows naturally from his research, and (4) it accounts for alternative explanations. *See* Pls.' Opp'n at 15-17. Even if these factors were the most relevant here, they weigh against the reliability of Mr.

Eakin's testimony. Plaintiffs have failed to carry their burden to establish reliability.

1. Mr. Eakin's opinions are not base on sufficient facts or data

First, Mr. Eakin's opinions are not "based on sufficient facts or data." It is not adequate to claim that Defendants' experts have "relied on the same information and data that [Mr. Eakin] has." Pls.' Opp'n at 15. While this case turns on the interpretation of a limited set of files that Mr. Eakin asserts he has studied, that does not mean his opinions are *based on* sufficient facts. Instead, he has "unjustifiably extrapolated" from a few pieces of the record to unwarranted conclusions. *See* Fed. R. Evid. 702, 2000 Advisory Committee Note. Defendants have shown that in each case Mr. Eakin extrapolates from an early association of recovered remains with a specific servicemember (or group of servicemembers), to his own virtual certainty that the remains belong to that servicemember:

- With regard to the Cabanatuan common graves, he considers the initial burial roster to be highly accurate, and therefore considers anyone associated with a specific common grave to be essentially identified. *See* Eakin Decl. ¶ 14; Eakin Dep. at 39:10-21, 44:23-45:9. By contrast, DPAA does not simply accept the accuracy of the burial records, or conclude that any individual servicemember will definitively be found in a particular common grave, but instead weights the likelihood that 60% or more of the associated servicemembers can be identified. *See* Kupsky Decl. ¶¶ 16-18; DoD Directive-type Memorandum (DTM)-16-003 (July 10, 2018).

- As to 1LT Nininger, he gives conclusive weight to the early association between X-1130 and 1LT Nininger, which he attributes to some unknown information available to the AGRS recovery team. *See* Eakin Decl. ¶ 19; Eakin Dep. at 62:23-65:5 ("So if [SGT Abie Abraham] says that this was Nininger it's very likely that he had a good basis for that. And all we can do at this point is trust in what he was doing."). But DPAA has shown that the association was almost certainly based on COL Clarke's 1944 letter, *see* Kupksy Decl. ¶ 21 & Exs. 6-9, which Mr. Eakin himself acknowledges is unreliable, *see* Eakin Decl. ¶¶ 21-22.

- In his declaration, Mr. Eakin also gives great weight to AGRS board's initial recommendation to identify X-1130 as 1LT Nininger, on the expectation that the board "had access to all evidence, including information likely no longer available, as well as witnesses." Eakin Decl. ¶ 25. In fact, the AGRS Board relied expressly on the very information from COL Clarke that Mr. Eakin considers unreliable, *see* Kupsky Decl. ¶ 22.a & Ex. 11, and there is no indication that it considered any evidence that is not included in the file. Moreover, it was the Quartermaster

General's Office that repeatedly sought out additional witnesses, not the board. *See* Kupsky Decl. ¶¶ 22.d, 23.[9]

- He considers COL Stewart to be identified by giving conclusive weight to the statement of a local caretaker who recalled being told by Philippine Scouts that they were burying an American colonel. Eakin Decl. ¶ 30. But any number of servicemembers could have been buried at that location during the battle in January 1942, and there is no certainty that the caretaker accurately heard or recalled the rank of the servicemember being buried. *See* Kupsky Decl. ¶¶ 26-29.

- He considers BG Fort to be identified by giving conclusive weight to the statement of the provincial governor, which simply compiles second hand information regarding the possibility that BG Fort was executed in Cagayan. Eakin Decl. ¶ 32; *see also id.* ¶ 33 ("This case seemed so obvious[.]"). Even apart from substantial evidence that BG Fort was executed 45 miles away, *see* Kupsky Decl. ¶¶ 31-34, this statement does not provide anything close to certainty.

Mr. Eakin's methodology is unreliable because it is impossible to rationally reach his conclusions on the basis of these isolated fragments of the record, let alone in light of the countervailing evidence in these files. He unscientifically disregards all the uncertainty inherent in the recovery and identification process, to reach unjustifiable certainty.

Moreover, Mr. Eakin cannot claim to have based his opinions on sufficient data where he specifically disregards credible witness testimony and key records of physical evidence about the remains—dental charts and long bone measurements. *See* Eakin Decl. ¶¶ 15-17.

- First, Mr. Eakin's myopic reading of BG Fort's file disregards "[g]uerrilla intelligence reports and Filipino civilians" placing BG Fort's execution in Dansalan not Cagayan. *See* Kupsky Decl. ¶ 32. And Mr. Eakin's rejection of testimony by "war criminals" on the assumption that they are bent on "currying favor," Eakin Decl. ¶ 32, ignores the logic that multiple officers would not have admitted to the war crime of participating in the execution of the general unless it actually happened in the area in which they were located. *See* Kupsky Decl. ¶ 32. Mr. Eakin identifies nothing the

[9] Mr. Eakin impugns Dr. Gregory Kupsky for not counting the AGRS Board of Review's recommendations as a "direct link between 1LT Nininger and X-1130." Eakin Decl. ¶ 41 (quoting Kupsky Decl. ¶ 21). Because there is no indication that the board relied on information that was not included in its memoranda, the independent weight Mr. Eakin gives the board's recommendation depends on unwarranted speculation. The board's *reasoning* is what matters, and Dr. Kupsky has engaged with that while Mr. Eakin has not. *See* Kupsky Decl. ¶¶ 22.

Japanese officers stood to gain from lying about the location of the execution.

- Second, he dismisses height estimation on the basis of a misreading of two academic articles from the 1950s. *See* Eakin Decl. ¶¶ 4, 16. As a DPAA forensic anthropologist has explained, with illustrations from the case files at issue here, stature estimation is in no way "discredited," Eakin Decl. ¶ 39, and the efforts in the post-war era are broadly consistent with the results of current methods. *See* Emanovsky Decl. ¶¶ 6-14.

- Third, Mr. Eakin dismisses dental chart comparisons, claiming that the "rudimentary techniques and the untrained personnel doing the charting" made them unreliable. *See* Eakin Decl. ¶ 15. His only support for this position are two memoranda addressing efforts to identify commingled remains from Cabanatuan. *See id.* (citing memoranda attached to his Declaration as Exhibits 1 and 2, ECF Nos. 56-2 and 56-3). The problems specific to the Cabanatuan project, *see* ECF No. 56-2, Eakin Decl. Ex. 1 at DPAA0001130 (historian noting that discrepancies "may be related to the frequent handling and sorting by mortuary staff involved in the Cabanatuan remains identification project"), do not undermine all dental charting. Mr. Eakin himself relied on dental charting to associate PVT Arthur Kelder with a particular skull and jaw associated with Cabanatuan Common Grave 717.[10] It is surely significant when dental charts clearly cannot be reconciled—e.g., if remains had all teeth present, but a servicemember's records showed that multiple teeth had been extracted before the war. *See* Kupsky Decl. ¶¶ 33-34 (describing comparison of X-618 to BG Fort).

In addition, Mr. Eakin's explanations of his reasoning his report, deposition, and declaration remain vague. *Cf.* Eakin Dep. at 24:12-14 ("Whatever it takes to convince me."). To the extent his conclusion depends on more than the few facts he specifically addressed in his declaration, his "evidence as a whole" determination, Eakin Decl. ¶ 35, is 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). Such opinions are improperly "connected to existing

[10] *See* Eakin Decl. ¶ 3; 1st Am. Compl. ¶¶ 26-30, *Eakin v. ABMC*, No. SA-12-CA-10002-FB (Oct. 3, 2013) ("Out of the unknowns from Grave 717, there are only two tooth charts that match the tooth pattern of Arthur H. Kelder" and "The tooth charts of X-816 indicate the presence of gold dental inlays when disinterred[.]"). DNA testing showed that his proposed association was ultimately correct. *See* Identification of CIL 2014-125-I-01, § 2 (Jan. 17, 2015) (attached as Ex. M) (explaining that DNA testing showed that the skull and mandible from X-816 from CG 717 was PVT Kelder's).

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)).

2. Defendants have not validated Mr. Eakin's methods

Second, Defendants have not relied on Mr. Eakin's "principles, methodology, and approach" or "validated and accepted" his methods and techniques. Pls.' Opp'n at 16. While Mr. Eakin claims vindication because DPAA has disinterred and identified remains associated with numerous Cabanatuan common graves, *see* Eakin Decl. ¶¶ 6, 11, 12, 37, Defendants' actions do not support Mr. Eakin's methodology.

It has never been in doubt that the remains of most servicemembers who died at Camp Cabanatuan were recovered from the graves at that location. The difficulty is in identifying them due to the original commingling and the repeated processing in the late 1940s. While Mr. Eakin claims credit for jumpstarting DPAA's current process, *see* Eakin Decl. ¶ 11; Pls.' Opp'n at 16 n.10, the fact is that Defendants had been researching and assessing the Cabanatuan remains years before he pressed for action regarding Grave 717. *See* Kupsky Decl. ¶ 16 & Ex. 2. Moreover, Congress only made World War II recoveries an active mission at the end of 2009. *See* Pub. L. No. 111-84, § 541, 123 Stat. 2190 (Oct. 28, 2009). At any rate, DPAA's methodology differs substantially from Mr. Eakin's. Whereas Mr. Eakin's approach essentially begins and ends with the Cabanatuan burial roster, *see* Eakin Decl. ¶ 14; Eakin Dep. at 39:10-21, 44:23-45:9, DPAA takes the imperfect information in the burial roster as a starting point and weighs all other available information. *See* Kupsky Decl. ¶¶ 16-18. Due to the realistic possibility that an individual servicemember is not among the remaining unknowns associated with a particular common grave, DPAA does not consider any servicemember identified on the basis of the Death Report, but instead weighs the likelihood of identifying 60% of the servicemembers associated

with the common grave before recommending disinterment. *See id.* ¶¶ 18-19.[11]

With regard to the Cabanatuan common graves, he considers the initial burial roster to be highly accurate, and therefore considers anyone associated with a specific common grave to be essentially identified. *See* Eakin Decl. ¶ 14; Eakin Dep. at 39:10-21, 44:23-45:9. By contrast, DPAA does not simply accept the accuracy of the burial records, or conclude that any individual servicemember will definitively be found in a particular common grave, but instead weights the likelihood that 60% or more of the associated servicemembers can be identified. *See* Kupsky Decl. ¶¶ 16-18; DoD Directive-type Mem. (DTM)-16-003 (July 10, 2018), ECF No. 55-1.

Moreover, even if Mr. Eakin's reliance on the Death Report were appropriate, that would not support his methodology for attempting to identify the three individual servicemembers. Unlike the Cabanatuan burial roster, which was an effort to compile contemporaneous records of deaths and burials at a single location, *see* Kupsky Decl. Ex. 2 at 6-9, the broader AGRS recovery effort in the Philippines involved far greater uncertainty. The associations AGRS made between remains and servicemembers during its field recovery efforts were not definitive and often had to be reassessed in light of fuller evidence later on. *See* Kupsky Decl. ¶ 9. Mr. Eakin has never tested his theories about the appropriateness of relying primarily or exclusively on early associations for individual remains, and none of Defendants' actions validate his approach.

[11] Mr. Eakin's declaration mischaracterizes DPAA's processing of the disinterment request for graves associated with Cabanatuan Common Grave 407. DPAA did not "refuse to disinter" those graves, Eakin Decl. ¶ 13; instead it prepared a historical analysis and held that draft recommendation while family reference samples were collected by the Army Service Casualty Office. *See* Kupsky Decl. ¶ 19; *cf.* Defs.' Disclosure of Expert Testimony at 8, ECF No. 48. After undersigned counsel repeatedly pointed out that Plaintiff Judy Hensley's family had not submitted a viable reference sample, *see, e.g.*, Defs.' Rule 12(c) Mot. at 12, ECF No. 31, Mr. Eakin provided undersigned counsel a list of contact information for associated families, which was forwarded to the Army for use in its ongoing effort to solicit family reference samples. This episode does not support Mr. Eakin's methodology.

DPAA weighs early associations as one factor among many, which can be appropriately outweighed by other historical and physical evidence. *See* Kupksy Decl. ¶¶ 9, 29.

3. Mr. Eakin's pre-litigation research undermines his reliability

Third, Mr. Eakin's opinions do not gain reliability from his decade-long project. *See* Pls.' Opp'n at 16-17 (claiming that his opinions "flow naturally and directly" from his research). The 2000 Advisory Committee Note for Rule 702 noted that courts weighing reliability have considered whether experts "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." Fed. R. Evid. 702, 2000 Advisory Committee Note (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) ("*Daubert II*")). This reliability indicator does not merely examine whether the expert is a "hired gun," potentially biased by payment. Instead, the reliability of "legitimate, preexisting research" comes from the standards applicable to such research. *See Daubert II*, 43 F.3d at 1317 (weighing independent research because "it is conducted . . . in the usual course of business and must normally satisfy a variety of standards to attract funding and institutional support"); *see also Newton*, 243 F. Supp. 2d at 678 (excluding expert who "conducted no *serious scientific* research independent of this litigation" (emphasis added)). Mr. Eakin's personal research project has not been tested or authenticated in this way. Moreover, he is the instigator of this litigation, *see* Eakin Dep. at 20:24-21:9; and he has adopted conspiratorial assumptions that infect his analysis.[12] Because he sees bad faith at every turn, he cannot reliably and dispassionately weigh

[12] *See* Eakin Decl. ¶ 10 (claiming that Defendants' alleged failure to implement a 1995 Defense Science Board study is an example of "Defendants' deliberate obstruction of recovery and identification efforts"); *id.* ¶ 11 (stating his "susp[icion] that Defendants' lack of competence in the recovery process is deliberate and intended to discourage requests for disinterment"); *id.* ¶ 29 (claiming that the declassified annex to 1LT Cheaney's IDPF "casts doubt on all of [the Army's] actions in" 1LT Nininger's case—even though the misidentification of 1LT Cheaney was not

the evidence in each file or fairly consider Defendants' current assessment of the evidence. For all these reasons, the Court should not conclude that Mr. Eakin's decade-long personal project demonstrate that his opinions "comport[] with good science" or were "derived by the scientific method." *Daubert II*, 43 F.3d at 1317.

4. He has failed to account for alternative explanations

Finally, Mr. Eakin has dismissed rather than accounted for alternative explanations. *See* Fed. R. Evid. 702, 2000 Advisory Committee's Note (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"). Plaintiffs claim that Mr. Eakin's outright dismissal of key information such as "height or dental records" bolsters his reliability. *See* Pls.' Opp'n at 17. To the contrary, Plaintiffs have failed to engage with Defendants' showing that Mr. Eakin did not adequately consider alternatives to his narrow certainty that the remains he selected are those of the relevant servicemembers. *See* Defs.' Mot. at 15-16 & n.6. The numerous alternative possibilities had no effect on his ultimate conclusions. *See id.* This flaw goes far beyond the weight that can be given to his testimony, but instead demonstrates the unreliability of the methodology itself. *See, e.g.*, *Sims v. Kia Motors of America, Inc.*, 839 F.3d 393, 4901-02 (5th Cir. 2016); *see also Newton*, 243 F. Supp. 2d at 676 ("In making the reliability determination, the trial court should not require certainty, but the

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discovered until after X-1130 was ruled unlikely to be 1LT Nininger, *see* Kupsky Decl. ¶ 23); *id.* ¶ 39 (claiming that DPAA's continued use of dental comparisons and stature estimates "suggests an intention to deceive" and that "Defendants' processes and procedures are intended to support inaction rather than actual identification of remains"); *id.* ¶ 40 (claiming that AFDIL's "refusal to adopt modern scientific techniques . . . evidences an intention to limit the number of unidentified remains returned to their families for burial").

testimony must demonstrate that the opinions offered are *more than speculation*." (emphasis added)).

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

Plaintiffs argue that Mr. Eakin's opinions will "help the Court evaluate the weight that should be given" to "conflicting information and data in certain documents." Pls.' Opp'n at 23.[13] Defendants have shown, however, that Mr. Eakin's bottom line conclusions cannot help in that regard because he lacks the qualifications to weigh the reliability of such evidence and because his methodology is deeply flawed. Thus, the Court cannot rest on Mr. Eakin's opinions in order to evaluate the evidence in this case. Instead, the Court should "analyze . . . [the relevant] documents and reach its own conclusion." Pls.' Opp'n at 22. Mr. Eakin can assist Plaintiffs in selecting documents and crafting arguments, but the Court would gain nothing from permitting Mr. Eakin to substitute his own opinions in place of the weight of the documentary evidence itself. Mr. Eakin claims that "the facts of this case do not involve complex scientific or technical information," Eakin Decl. ¶ 43, and that "analysis of the data" does not give rise to "difficulty in resolving these cases," *id.* ¶ 34, and that only "an honest desire to resolve apparent conflicts in the available information" is needed, *id.* ¶ 38; *see also* Eakin Dep. at 22:2-11 (claiming that his methodology involves the simple logic of Occam's Razor). Accordingly, the Court itself can weigh the credibility and balance of the relevant evidence here. *Cf. Facille v. Madere & Sons Towing, Inc.*, No. 13-6470, 2014 WL 12719079, at *4 (E.D. La. Nov. 26, 2014); *Kelley v. Am.*

[13] Plaintiffs also claim that whether "it is more likely than not that the Government has possession of [Plaintiffs'] relative's remains" is a "fact at issue" with which Mr. Eakin's testimony would help. Pls.' Opp'n at 23. As Defendants will show in their summary judgment motion, such a fact is irrelevant to Plaintiffs' legal claims because they have no cognizable property interest in unidentified remains, and the generic likelihood that the servicemembers' remains are somewhere among several cemeteries with thousands of graves would not make their legal claims any more meritorious. *Cf.* Defs.' Rule 12(c) Mot. at 16-35.

Heyer-Schulte Corp., 957 F. Supp. 873, 882 & n.12 (W.D. Tex. 1997).

Finally, admitting Mr. Eakin's testimony as an expert would burden Defendants and the Court with addressing his numerous errors. For example, his declaration is littered with obvious errors:

- In *Eakin v. ABMC*, the court did not "order[] the government to produce the remains for identification." Eakin Decl. ¶ 7. Instead, the government voluntarily approved disinterment and the court denied Mr. Eakin's motion to compel. *See Order, Eakin v. ABMC*, No. 5:12-cv-01002-FB (July 28, 2014).

- It is not true that "DoD continues to refuse to employ [nuclear DNA] for WWII era losses." Eakin Decl. ¶ 10. *See* McMahon Decl. ¶ 10, ECF No. 34-3 ("AFDIL uses auSTR and Y-STR tests to analyze nuclear DNA, and mtDNA sequencing (Sanger and Next Generation) to analyze mitochondrial DNA."); Byrd Decl. ¶ 13, ECF No. 34-2 ("AFDIL conducts nuclear (nuDNA) and mitochondrial DNA (mtDNA) testing.").

- Nor is it true that in 1995 Defense Science Board recommended "shift[ing] to what it termed a DNA lead identification process." Eakin Decl. ¶ 10. That phrase never appears in the report. Instead, the Board recommended the collection of nuclear DNA and mtDNA from families to facilitate both types of testing once nuclear DNA testing was available. *See* ECF No. 36-1 at 43-44, 99 (using page numbers in blue header). And it recommended collection of family reference samples before attempting to conduct DNA testing on remains. *See id.* at 47. That is what Defendants are currently doing. *See* McMahon Decl. ¶¶ 20-26; Kupsky Decl. ¶ 16.

- It is not true that family reference samples are needed "only because Defendants refuse to invest in . . . modern DNA technology." Eakin Decl. ¶ 13. DNA testing depends on a viable family reference sample from each servicemember's family, *see* McMahon Decl. ¶¶ 34, 38-39; and AFDIL uses cutting edge technology, *see id.* ¶¶ 10-19.

- While SGT Abie Abraham took a statement on December 11, 1945, from a Filipino who dug five graves at Abucay cemetery in January 1942, *see* Kupsky Decl. Ex. 3, the records to not establish that SGT Abraham "directed" the disinterment of X-1130 or that SGT Abraham "immediately recorded" X-1130 as 1LT Nininger. Eakin Decl. ¶ 19. A different officer, SGT Thomas Corbett, signed the disinterment on January 8, 1946, *see* Kupsky Decl. Ex. 7, and it is unclear who added the notations about 1LT Nininger to the file or when. *See* Kupsky Decl. ¶ 21.

- It is not true that "Defendants' base their conclusion as to the location of Nininger's remains upon [MAJ Franklin Anders'] single discredited statement."

Eakin Decl. ¶ 24. The files contain statements from at least five other witnesses who were in Abucay at the time and located the burial in the vicinity of the churchyard. *See* Kupsky Decl. ¶ 21.c.[14] And Mr. Eakin is not correct in claiming that MAJ Anders' 1950 recollection "waffles" on the facts; instead it is specific and detailed. *See* Kupsky Decl. Ex. 5 at DPAA0004445-4447, DPAA0004450-4451; *cf.* Am. Answer, Ex. 6, ECF No. 25-2 (September 1946 letter quoting MAJ Anders' earlier letter stating "Father Scecina conducted Services at the graves of American Officers [including Nininger and five others] killed at Mabatang in the Abucay Church Yard").

- Defendants do not employ a "'more-likely-than-not' standard for identification." Eakin Decl. ¶ 38. Instead, DoD has implemented a standard for *disinterment* of certain unknown remains if it is more likely than not that the remains can be identified after disinterment. *See* DTM-16-003. Identification requires more than

- It is not true that the documents attached to Mr. Eakin's supplemental declaration show that "the location of the grave of Col. Stewart was well known to graves registration personnel." 2d Eakin Decl. ¶ 3, ECF No. 57-1. Instead the documents in that file merely record where COL Stewart was "Killed,-Died,-Last seen - Etc.," and specifically note that his remains were "not recovered" at the time the document was created. *See* 2d Kupsky Decl. ¶¶ 12-13 (attached as Exhibit N).

For all of these reasons, the Court should immediately exclude Mr. Eakin's proffered expert opinions under Rule 702.

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

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

Defendants have shown that Ms. Richardson exceeds her expertise and is therefore not

[14] *See* Kupsky Decl. Ex. 5 at DPAA0004447 (MAJ John Olson stating that "remembers Nininger's death and was informed that Nininger's as well as several other officer's remains were recovered and buried in or near the Abucay Church Yard"); *id.* at DPAA0004449 (MAJ Cecil Sanders stating that the "remains of Lt. Nininger were brought back to the Church Yard and turned over to Father Scecina who assumed charge of burying all remains" and that he was "quite certain that Maj. [Garnett] Francis attended the internments in Abucay Church Yard"). *See also* Am. Answer Ex. 7, ECF No. 25-2 (MAJ Harold Imerman stating "I do not think that Lieutenant Nininger was buried in the Abucay cemetery and I am quite certain that he was buried in the vicinity of the church yard."); *id.* Ex. 8 (Lt. COL John Raulston stating that the chaplain "established a little graveyard in the plot of ground within the five foot wall around the church" estimating that "about six burials were made there"); *id.* Ex. 9 (COL Garnett Francis stating that burial occurred immediately across the river from the church).

qualified to offer two types of opinions she seeks to present in this case. *See Goodman*, 571 F.3d at 399; *Huss*, 571 F.3d at 452. Her four years at the Defense POW Missing Personnel Office (DPMO) as a Vietnam War analyst and head of DPMO's Resource Outreach Branch, *see* Richardson CV, ECF No. 55-16; Richardson Dep. at 9:8-10, did not provide her with expertise to (1) opine on DNA testing methods, their efficacy, or DoD's DNA testing capabilities, or (2) opine on the superiority of alternative approaches to DPAA's mission. *See* Defs.' Mot. at 18-20.

Plaintiffs' response to these points is confusing. Both topics inherently involve opinion testimony, yet Plaintiffs suggest that she may attempt to testify about them as a fact witness. *See* Pls.' Opp'n at 11-12 (claiming that testifying about "why the Government's policies and procedures are flawed" would "not be considered to be expert testimony"). Her factual knowledge about DNA testing and DoD's capabilities is extremely limited and out of date. *See* Richardson Dep. at 20:13-23, 21:11-23 (relying on "walking through" AFDIL once in 2008). Similarly her factual knowledge about DoD's performance of its accounting mission ended in 2011, long before DPAA was created or processes for disinterment of unknowns from World War II cemeteries were established. *See id.* at 11:14-16, 32:2-7; Richardson CV.

To the extent Ms. Richardson seeks to present expert testimony on these topics, her lack of expertise with regard to DNA testing, forensic anthropology, and the resources required to conduct these activities render her entirely unqualified to opine on the relative merits of alternative approaches to identification of remains. She is not a forensic pathologist who makes identification decisions and has never participated in the DoD disinterment recommendation or decision process, *see* Richardson Dep. at 29:1-2, or the work of DoD's forensic anthropologists and odontologists examining remains, *see id.* at 8:4-12, 21:17-22, 70:1-4, or AFDIL's contemporary DNA testing regime, *see id.* at 20:13-23, 21:11-23. Indeed, her views are not

formed by her own expertise, but instead by simply adopting the views of others—principally a scientist at Bode Cellmark Forensics.[15] *See* Richardson Dep. at 16:20-17:17; *see also id.* at 86:15-20; 87:5-15. It is not legitimate 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).[16] Ms. Richardson simply lacks the basis to identify, let alone weigh, all of the considerations involved in choosing among alternative approaches to identifying large numbers of human remains from past conflicts, *see* Defs.' Mot. at 20 & n.8, and therefore cannot opine on "best practices" for such policies as an expert. *See* Pls.' Opp'n at 12.

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

Defendants have shown that Ms. Richardson's opinion 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, ECF No. 55-14; Richardson Dep. at 13:12-14:1, are

[15] Observing academic researchers' efforts to rearticulate and conduct DNA testing on a single set of remains, *see id.* at 8:4-12, 21:17-22, 69:28-70:4, 86:7-13, does not give her expertise on something well beyond her own education, training, and experience.

[16] While an expert may rely on a "virtually infinite" number of sources of underlying data for their opinions, *see River House Partners, LLC v. Grandbridge Real Estate Capital LLC*, No. 15-00058, 2017 WL 4269838, at *2 (M.D. La. Sept. 26, 2017) (quoting 4 *Weinstein's Federal Evidence* § 703.04[3] (2d ed. 2005)), they must apply their own expertise to that data. Ms. Richardson's limited analyst and outreach experience does not give her relevant expertise.

unreliable because she did not have an adequate basis to make that determination. *See* Defs.' Mot. at 21-22. She explained that 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* Richardson Dep. at 23:23-24:3, 42:12-14, 43:2-5.[17] Thus, she was entirely in the dark regarding other unknown remains who could present better matches to the relevant servicemembers, or other servicemembers who could present better matches to the unknown remains she was reviewing. *See, e.g.*, ¶ 35 (identifying three sets of remains for which BG Fort is a candidate); *id.* ¶ 29 (explaining that two other servicemembers are better candidates for the remains Plainitffs claim is COL Stewart); *see also* Richardson Dep. at 53:21-24 (readily agreeing that if DPAA can identify "a particular grave that they believe is more likely . . . then it would be foolish not to disinter that one and test it before" the graves at issue in this case). Because Plaintiffs, through Mr. Eakin, have access to thousands of IDPFs, they cannot lay at Defendants' feet their own failure to provide Ms. Richardson with such additional material. *See* Pls.' Opp'n at 20; *cf.* Kupsky Decl. ¶¶ 28-29 (noting that 21 officers who have not been identified died in the Abucay area, and that a total of between 90 and 320 unresolved Americans and Philippine Scouts are associated with the battle in this area). Indeed, Plaintiffs did not even provide Ms. Richardson with DPAA's case summaries that were produced in discovery which provide DPAA's contemporary reasoning regarding the cases. *See* Richardson Dep. 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 such isolated information cannot support her "no other

[17] Plaintiffs now claim that "Ms. Richardson had access to all of the records on file in this lawsuit," but they do not support that assertion with any evidence other than counsel's assertion. Whatever access counsel provided does not alter the limited task she was given 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.

options" conclusion, those opinions must be excluded. *Cf. Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1331 (10th Cir. 2004); *Johnson v. Big Lots Stores, Inc.*, Nos. 04-3201, 05-6627, 2008 WL 1930681, at *15 (E.D. La. Apr. 29, 2008).

Second, Ms. Richardson did not employ a reliable methodology because her practical definition of "likely" is virtually meaningless and she did not seek a path through the contradictions in the files. *See* Defs.' Mot. at 22-24. For example, she asserts "[i]t is as likely that [1LT Nininger] is not X-1130 and has already been recovered and buried as someone else as it is that this is him." Richardson Dep. 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"). Thus, her "likely" opinions add up to nothing more than limited possibilities. And her overarching commitment to a "DNA-centric" model overshadowed her review of the files to the point that she explained that she would recommend disinterment and testing regardless of the results of her analysis. *See id.* at 40:17-21; 47:4-6. She also acknowledged but gave no meaningful weight to factors in each file that would decrease the likelihood that the servicemember was in the selected grave. *See, e.g.*, 37:14-39:19, 52:16-53:10, 54:8-22, 66:21-68:15, 73:8-74:8. While "Ms. Richardson may use her expertise and analysis to decide what is worth relying on more," Pls.' Opp'n at 21, that is *not* what she did. Instead she just threw up her hands and circled back to a solution in which she herself lacks expertise—disinterment and DNA testing regardless of the contents of the file. It is for this reason that the Court should find that Ms. Richardson was not applying any particular scientific methodology to reach her conclusions, let alone seriously considering alternative explanations.

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

Ms. Richardson's testimony should also 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). Ms. Richardson's opinions focus on an alleged need to change DoD overarching performance of its accounting mission, which is not at issue in this lawsuit. *See* Defs.' Mot. at 24. Plaintiffs cannot show how Ms. Richardson's opinion that a DNA-centric approach would better serve the government and public interest advances any element of this case. *See* Pls.' Opp'n at 24 (asserting only that "the heart of this case" is "what process [Plaintiffs] are owed"). And the Court cannot order such a dramatic shift in Defendants' performance of its accounting mission on the these Plaintiffs' requests for individual relief. Accordingly, such irrelevant evidence should not be introduced.

Plaintiffs also claim that Ms. Richardson's opinions are relevant to "whether the Families' have proved that it is more likely than not that the location of the remains of their relatives is known." Pls.' Opp'n at 24. Defendants have shown that Ms. Richardson's "no other options remaining for closure" opinions do not address that question. Defs.' Mot. at 25-26. And to the extent those opinions are somehow relevant, Ms. Richardson actually undermines Plaintiffs' position. *See, e.g.*, 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."). *Cf. Bogosian v. Mercedes Benz of N.A.*, 104 F.3d 472, 479 (1st Cir. 1996) (expert testimony on a theory that contradicted the plaintiff's own assertions about her case was properly excluded).

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.

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Respectfully submitted,

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I hereby certify that on this 5th day of April, 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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