

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.)	

APPENDIX IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(c) and Local Rule CV-7(d)(1),
Defendants submit the following summary of facts in support of their Motion for Summary
Judgment.

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I. STATUTORY BACKGROUND

A. Army Graves Registration Service

1. During World War II, the Army Graves Registration Service (AGRS) was responsible for tracking graves from that war, and in 1946, it became responsible for recovering, identifying and repatriating World War II dead. Pub. L. No. 79-383, 60 Stat. 182 (May 16, 1946); Kupsky Decl. ¶ 13 & Ex. 2.

2. AGRS conducted searches and disinterred remains that might belong to U.S. servicemembers or Philippine Scouts, first with spot searches and then more systematically in 1947. Kupsky Decl. ¶¶ 14-15. In the Philippines, remains were immediately reburied at Manila No. 2 Cemetery, and later disinterred and processed at the Nichols Field Mausoleum in Manila. Kupsky Decl. ¶ 16.

3. For the identification stage, AGRS analysts at the Mausoleum reviewed biological and material evidence. Each time they reviewed remains, they created tooth and dental charts. Kupsky Decl. ¶ 17.

4. AGRS would propose an identification to an AGRS Board of Review consisting of three commissioned officers. If the Board signed off on the recommendation, AGRS Headquarters would forward the proposed identification to the Memorial Division of the Office of the Quartermaster General (OQMG). The OQMG had final authority to make an identification decision. OQMG could approve or disapprove a proposed identification, and determine a servicemember to be non-recoverable or an unknown remains to be unidentifiable. Kupsky Decl. ¶ 17.

5. The official OQMG history of the World War II recovery effort stated that “the Memorial Division often possessed important information, unavailable to overseas commands, which could establish identity,” or, by extension, refute a comparison. Kupsy Decl. ¶ 17 & Ex.

4.

6. The mission of the AGRS terminated on December 31, 1951, upon expiration of a statutory time limit. Pub. L. No. 80-368, 61 Stat. 779 (Aug. 5, 1947).

B. Permanent Military Cemeteries

7. The American Battle Monuments Commission (ABMC) was created in 1923 to construct monuments honoring American forces overseas. It later took over management and maintenance of the permanent military cemeteries in Europe from World War I. When AGRS's mission was terminated on December 31, 1951, the functions of the AGRS with respect to maintenance of national cemeteries overseas were transferred to the ABMC. Exec. Order No. 10057, 14 Fed. Reg. 2585 (May 14, 1949), *as amended* Exec. Order 10087, 14 Fed. Reg. 7287 (Dec. 3, 1949).

8. The operative statute governing the ABMC was recodified in 1998 as 36 U.S.C. § 2101, *et seq.* See Pub. L. No. 105-225, § 1, 112 Stat. 1253 (Aug. 12, 1998). The provision for “[m]ilitary cemeteries in foreign countries” provides in relevant part:

The Commission is solely responsible for the design and construction of the permanent cemeteries, and of all buildings, plantings, headstones, and other permanent improvements incidental to the cemeteries, except that— . . . (4) the Armed Forces have the right to re-enter a cemetery transferred to the Commission to exhume or re-inter a body if they decide it is necessary.

36 U.S.C. § 2104.

9. More than 3,700 servicemembers are buried as unknowns within the Manila American Cemetery that ABMC maintains pursuant to its statutory authority. See Exhibit I, Manila American Cemetery Visitor Brochure (Aug. 7, 2014) ([link](#)).

10. Manila American Cemetery is centered around a memorial tower containing a small devotional chapel and two hemicycles supported by limestone piers containing the “Wall

of the Missing”—engraved tablets containing the names of more than 36,000 who were missing at the time of the cemetery’s construction. Rosettes mark the names of those who have since been recovered identified. Exhibit I; ABMC, Manila American Cemetery, Overview, <https://www.abmc.gov/cemeteries-memorials/pacific/manila-american-cemetery>.

11. Eleven burial plots are arranged in concentric rings around the memorial, containing white marble headstones in the shape of Latin crosses or stars of David. Exhibit I.

12. ABMC also maintains the Cabanatuan Prisoner of War Camp Memorial at the site of the POW camp. Exhibit I.

13. Burials in overseas military cemeteries are permanent, and disinterments are conducted only with military approval. *See* Pub. L. No. 80-368 § 8 (provision for family decisions about burial expired at the end of 1951); Exhibit J, ABMC Policy No. 7.14 (“Interment of remains in overseas commemorative cemeteries administered by ABMC is considered permanent.”).

14. After the Deputy Secretary of Defense established a policy for disinterring unidentified remains for identification from permanent U.S. military cemeteries in April 2015, the ABMC began receiving regular DoD requests for disinterments from cemeteries administered by ABMC. Exhibit J.

15. After DoD has authorized disinterment of remains buried at an ABMC cemetery, the ABMC has approval authority regarding the time and manner of the disinterment. *See* Exhibit J; DoD Directive Type Memorandum (DTM)-16-003, Policy Guidance for the Disinterment of Unidentified Human Remains at 8 (July 10, 2018).

16. ABMC’s authority is focused on maintaining the integrity of the cemetery as a memorial, not the reasons for the disinterment. *See, e.g.*, 36 U.S.C. § 2104(4) (stating DoD’s

“right to re-enter”); Exhibit J.

C. The Missing Service Personnel Act

17. The Missing Service Personnel Act of 1995 (MSPA) was designed to “reform [DoD’s] procedures for determining whether members of the Armed Forces should be listed as missing or presumed dead.” 140 Cong. Rec. S12217, S12220, 1994 WL 449837 (Aug. 19, 1994); *see* Pub. L. No. 104-106, Div. A § 569, 110 Stat. 186 (Feb. 10, 1996) (codified at 10 U.S.C. §§ 1501 *et seq.*).

18. The law was intended “to ensure that any member of the Armed Forces . . . who becomes missing or unaccounted for is ultimately accounted for by the United States, and, as a general rule, is not declared dead solely because of the passage of time.” Pub. L. No. 104-106, Div. A. § 569(a).

19. During and after World War II, there had been no procedure for challenging the Service Secretary’s “finding of death,” which was relevant to certain benefits to families of missing servicemembers. *See* 56 Stat. 143 (1942); *McDonald v. Lucas*, 371 F. Supp. 831 (S.D.N.Y. 1974) (quoting 37 U.S.C. § 556(b) (1961)).

20. The MSPA is primarily focused on the procedures for determining the status of individuals who went missing after 1995. It provided for the initial assessment and recommendation by a commander upon receipt of information that a person may be missing, 10 U.S.C. § 1502; and for a series of boards of inquiry to determine and review the status of missing persons, *id.* §§ 1503-1505.

21. As originally passed, only § 1509 addressed procedures for persons unaccounted for from prior conflicts, and it only concerned the Korean War and subsequent conflicts. *See* Pub. L. No. 104-106 § 569(b).

22. In 2009, Congress rewrote § 1509 to establish a program addressing those

“unaccounted for” from specified conflicts back to World War II. Pub. L. No. 111-84, § 541, 123 Stat. 2190 (Oct. 28, 2009).

23. Section 1509 requires the Secretary to “implement a comprehensive, coordinated, integrated, and fully resourced program to account for [missing persons as defined by § 1513(1)] who are unaccounted for from” five specified conflicts, including World War II. *See* 10 U.S.C. § 1509(a).

24. Congress specified how “new information” should be handled. “New information” is defined as “credible” information that “may be related to one or more unaccounted for persons” and after November 18, 1997, is either “found or received . . . , by a United States intelligence agency, by a Department of Defense agency, or by a [primary next of kin, immediate family member, or previously designated person]” or “identified . . . in records of the United States as information that could be relevant to the case of one or more unaccounted for persons.” *Id.* § 1509(e)(1), (3).

25. Upon a determination that the information meets the statutory criteria, the section specifies three steps:

- “that information shall be provided to the Secretary of Defense,” § 1509(e)(1);
- the Secretary is to add the information to the missing servicemember’s case file and notify the next of kin of the new information, § 1509(e)(2)(A); *id.* § 1505(c)(2); and
- the Secretary “with the advice of the missing person’s counsel . . . , shall determine whether the information is significant enough to require a board review under [§ 1505].” § 1505(c)(3); *id.* § 1509(e)(2)(B).

26. In 2014, Congress further emphasized accounting for those missing from prior conflicts by revising § 1501(a) to require DoD to “designate a single organization . . . to have responsibility for Department matters relating to missing persons from past conflicts, including accounting for missing persons and persons whose remains have not been recovered from the

conflict in which they were lost.” Pub. L. No. 113-291, § 916(a), 128 Stat. 3292 (Dec. 19, 2014), *as amended by* Pub. L. No. 114-328, § 953, 130 Stat. 2000 (Dec. 23, 2016) (technical amendments).

27. Congress also provided that a medical examiner detailed from the Armed Forces Medical Examiner System would be the “scientific identification authority,” and “establish identification and laboratory policy.” *Id.* § 916(b)(1) (codified at 10 U.S.C. § 1509(b)(2)(C)).

28. Despite the 2009 and 2014 changes, Congress has retained the MSPA’s limited judicial review provision. Judicial review under the Act is only available to challenge a board finding “that a missing person is dead.” 10 U.S.C. § 1508(b).

29. Review is limited in three ways. First, suit can only be brought by the primary next of kin or previously designated person. *See id.* § 1508(a); 10 U.S.C. § 655 (providing for designated persons). Second, judicial review is available only for a finding by a board appointed under § 1504 or § 1505 that a missing person is dead, or a finding by a board appointed under § 1509 that confirms a previous finding of death. *Id.* § 1508(b). Third, the only permitted basis for challenging the board finding is that “information that could affect the status of the missing person’s case [] was not adequately considered during the administrative review process under this chapter.” *Id.* § 1508(a).

II. AGENCIES AND REGULATIONS

30. Accounting for servicemembers from past conflicts involves several different components of DoD, often with separate legal authorities and chains of command. Hamilton Decl. ¶¶ 3-34.

A. Defense POW/MIA Accounting Agency (DPAA)

31. Before 2015, DoD’s past conflict accounting efforts had been conducted by a series of interrelated entities, most recently the Defense POW Missing Personnel Office

(DPMO), created in 1996 to implement changes to 10 U.S.C. § 1501 calling for an office to provide planning, policy and oversight for all issues pertaining to personnel recovery and personnel accounting, and the Joint POW/MIA Accounting Command (JPAC), created in 2003, which oversaw the Central Identification Laboratory in Hawaii.

1. Creation of DPAA

32. DoD implemented § 1501(a)'s requirement that a single organization be responsible for "matters relating to persons missing from past conflicts" by creating the DPAA in January 2015. *See* DoD Directive 5110.10, Defense POW/MIA Accounting Agency (Jan. 13, 2017).

33. The DPAA has two missions—to "[l]ead the national effort to account for unaccounted for DoD personnel from past conflicts" and to provide family members "the available information concerning the loss incident, past and present search and recovery efforts of the remains, and current accounting status for unaccounted for DoD personnel." DoD Directive 5110.10 § 1.2.

34. DoD implemented the October 2009 changes to 10 U.S.C. § 1509 by establishing the DoD Past Conflict Personnel Accounting Program. *See* DoD Directive 2310.07 (Apr. 12, 2017). Under this directive, "[a]ccounting for DoD personnel and other covered personnel from past conflicts and other designated conflicts is of the highest national priority." *Id.* § 1.2(a). The directive assigns responsibilities to relevant DoD components, *id.* § 2, and establishes categories of unaccounted-for personnel, with priority for "those for which there exists sufficient information to justify research, investigation, disinterment, or recovery operations in the field." *Id.* § 3.3(a).

35. Until October 2009, DoD had no statutory obligation to account for missing personnel from World War II. Hamilton Decl. ¶ 12; National Defense Authorization Act for

Fiscal Year 2010, Pub. L. No. 111-84 § 541 (October 28, 2009).

36. DPAA actively reviews cases from numerous conflicts and must prioritize its efforts among more than 82,000 unaccounted-for servicemembers from past conflicts, of whom about 34,000 are believed to be recoverable. *See* Hamilton Decl. ¶¶ 13-19.

37. DPAA must balance both field operations to search for and recover remains that are not located in a cemetery with disinterment of unknowns who have been buried at U.S. military cemeteries for decades. Field operations related to the Vietnam War are a priority due to the risk of permanent loss of remains that are not recovered soon. Hamilton Decl. ¶ 16.

38. DPAA is also conducting a large-scale effort to disinter and identify 652 remains from the Korean War that are currently interred at the National Military Cemetery of the Pacific in Hawaii. Hamilton Decl. ¶ 18.

39. The Department has committed to providing resources sufficient to meet the Congressional goal of identifying at least 200 servicemembers per year. *See* DoD Directive 2310.07 § 1.2(f); Pub. L. No. 111-84, Div. A, Title V § 541(d).

40. In fiscal year 2018, DPAA identified 203 previously unaccounted for U.S. military personnel; conducted 95 field operations across the world and conducted 237 disinterments of unknown remains; accessioned at least 389 sets of remains into the DPAA Laboratory from field operations and cemetery disinterments; issued disinterment recommendation memoranda pertaining to 306 individual unknowns (both recommendations initiated by DPAA and those responding to family requests). Hamilton Decl. ¶ 17.

41. In fiscal year 2018, DPAA received 134 family member requests for disinterment. Hamilton Decl. ¶ 17.

42. DPAA is also responsible for establishing a program to disseminate appropriate

information on the status of missing persons from past conflicts to authorized family members and provide a means of communication between the DPAA and the family members. See 10 U.S.C. § 1501; DoD Directive 5110.10 § 2.t; Hamilton Decl. ¶ 20.

43. The DPAA regularly hosts Family Member Updates across the United States that allow family members of the missing to meet with DoD officials from DPAA and the Service Casualty Offices. At these events, the DPAA both provides general updates and meets individually with families who wish to do so, to address individual family needs and provide updates as to the status of DPAA's efforts to search for, locate, recover, and identify their missing servicemember. Hamilton Decl. ¶ 21; DPAA, Events, <https://www.dpaa.mil/Families/Family-Events/>.

44. For example, in February 2019, Plaintiff Janis Fort met with DPAA officials at the San Jose, California Family Member Update. Hamilton Decl. ¶ 21.

45. In fiscal year 2018, DPAA conducted seven family member updates that were attended by 1,298 individuals. DPAA has already conducted three family member updates in fiscal year 2019, and is scheduled to conduct five additional updates in fiscal year 2019. Hamilton Decl. ¶ 22.

2. Disinterment Recommendation Process

46. One aspect of DPAA's responsibilities involves compiling and weighing the evidence for disinterring unknown remains for further identification. Hamilton Decl. ¶ 15.

47. The Deputy Secretary of Defense established specific thresholds that must be met for a disinterment request to be approved. *See* Memorandum, Disinterment of Unknowns from the Nat'l Memorial Cemetery of the Pacific (Apr. 14, 2015); *see also* DTM-16-003 at 2 (implementing Deputy Secretary of Defense's memorandum).

48. For individually buried remains, DPAA research must "indicate[] that it is more

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

49. DPAA initiates its own recommendations, or family members or other interested parties may submit a disinterment request to a Service Casualty or Mortuary Office, which will forward the request to DPAA. *See* DTM-16-003 at 8 (issued May 5, 2016, revised June 15, 2017); DPAA Administrative Instruction (AI) 2310.01 (Feb. 10, 2017).

50. DPAA then reviews the request and provides a recommendation along with a “packet” of documentation to the Deputy Assistant Secretary of Defense for Military Community and Family Policy within the Office of the Under Secretary of Defense for Personnel and Readiness. DTM-16-003 at 8-9.

51. The Deputy Assistant Secretary of Defense in turn makes a recommendation to the Assistant Secretary of Defense for Manpower and Reserve Affairs (hereinafter “Assistant Secretary”), who may consent to or decline the request. DTM-16-003 at 9.

52. If a request is granted, DPAA will coordinate the “time, place, and manner of disinterment” with the cemetery responsible for the remains, such as the ABMC. *Id.* at 9-10.

53. DPAA’s estimate of the likelihood of identification is a “qualitative determination based on the totality of the evidence.” DPAA AI 2310.01 § 7.2. DPAA’s “Disinterment Criteria

Guide” sets forth 27 non-exhaustive factors to consider in making this determination. *Id.* § 7. It is also DPAA policy that all requests must be forwarded for a decision; “requests cannot be denied or permanently deferred by DPAA personnel.” *Id.* at 2.

54. DPAA’s standard procedure for disinterment research is to compile a “short list” of candidates for each unknown set of remains. Historians compile a candidate list, conducting historical analysis to identify possible candidates based on the location from which the remains were recovered, known circumstances of the loss, and information about how the remains were processed over the years. Kupsky Decl. ¶ 5.

55. DPAA forensic anthropologists and odontologists then go through the candidate list, comparing the personnel files and medical records of the candidates—if available—to the X-file. Scientific and medical records, such as dental records, are evidence that may rule out certain candidates. Kupsky Decl. ¶ 6.

56. The “short list” of final candidates based on historical analysis and scientific evidence is used by DPAA in making its recommendation for or against a specific disinterment, and it is also used to guide the Service Casualty Offices in requesting DNA family reference samples to support a disinterment. Kupsky Decl. ¶ 7.

57. Servicemembers who are mentioned in an X-file or other associated historical records are weighed seriously as potential candidates and are often prominent on the “short list.” Kupsky Decl. ¶ 8.

58. DPAA has conducted many disinterments in which an unknown was ultimately identified as someone other than the individual(s) mentioned in the file. Kupsky Decl. ¶ 8.

59. During AGRS’s recovery efforts after World War II, they often had less information at the time they were collecting remains and witness statements than could be later

gathered and assessed when proposed identifications were being reviewed. Kupsky Decl. ¶¶ 8, 17 & Exhibit 4 at 634.

60. In DPAA's identification program, and in forensic anthropology more generally, biological profile generation from the physical evidence (i.e., age, sex, stature, ancestry, individuating traits), has proven to be reliable for excluding implausible candidates for comparison to unidentified remains. Emanovsky Decl. ¶ 5.

61. Stature estimation is a reliable scientific method. Emanovsky Decl. ¶¶ 6-11.

62. DPAA currently uses the computer program *FORDISC 3: Computerized Forensic Discriminant Functions* (Jantz and Ousley 2005) for stature estimates. Emanovsky Decl. ¶ 8.

63. DPAA has found that, while Dr. Trotter's refinements and subsequent refinements have improved the accuracy of height estimation, the earlier methods used by AGRS were not wildly inaccurate, especially for Caucasian servicemembers. Emanovsky Decl. ¶ 9.

64. Forensic anthropology has developed reliable methods of distinguishing age, sex, and ancestry from ossified human remains. The methods employed by DoD anthropologists in the late 1940s and early 1950s are consistent with the methods in use today. Emanovsky Decl. ¶ 12.

65. Forensic odontology provides a scientific method to use dental records to identify unknown remains. Shiroma Decl. ¶¶ 7-13.

66. Unexplainable discrepancies between antemortem dental profiles from a servicemember's records and the postmortem dental profile of the unidentified remains render the servicemember an unlikely candidate for identification with the remains. Shiroma Decl. ¶ 8.

67. In order to determine whether discrepancies are explainable or unexplainable, the forensic odontologist relies on knowledge of clinical dentistry and knowledge of the historical

practices involved in the dental charts and records being used. Shiroma Decl. ¶ 9.

68. DPAA only recommends disinterment when it has a reliable list of candidates based on historical and scientific evidence and when DoD has received sufficient DNA family reference samples or other medical means of identification to support the identification effort once disinterment occurs. Kupsy Decl. ¶ 9.

3. Identification Process

69. After disinterment, the unidentified remains receive dignified transportation to the DPAA Laboratory in Hawaii, the “largest and most diverse skeletal identification laboratory in the world.” *See* DPAA Fact Sheet, DPAA Laboratory (Mar. 2, 2015) ([link](#)); *see also* DoD Instruction 1300.18, § 4.4, E2.25 (describing dignified transfer).

70. The remains are then examined by DPAA’s staff of forensic anthropologists and odontologists. Emanovsky Decl. ¶ 12; Shiroma Decl. ¶ 11.

71. Bone and tooth samples are submitted to the Armed Forces DNA Identification Laboratory (AFDIL) in Dover, Delaware for DNA testing. *See* Berg Decl. ¶ 16.

72. DPAA’s scientists incorporate the results of DNA testing into their further effort to identify as many of the remains as possible. Berg Decl. ¶ 13; Berran Decl. ¶ 11.

73. The association of one bone to an individual via a DNA test may permit multiple bones or teeth to be associated through follow-on anthropological or odontological analyses of pair matching, articulation, and associations across the multiple cases. Berg Decl. ¶ 13.

74. The medical examiner detailed from the Armed Forces Medical Examiner System (AFMES), who currently serves as the Science Director for the DPAA Laboratory, exercises scientific identification authority. 10 U.S.C. § 1509(b)(2); Berran Decl. ¶ 4.

75. The Science Director, a forensic pathologist, weighs all of the available information using a clear and convincing standard. Berran Decl. ¶¶ 5-8.

76. A servicemember is only identified if the historical evidence and laboratory-derived evidence agree with the known antemortem facts of the case, all reasonable alternatives are eliminated, and there are no unexplainable or irreconcilable discrepancies between the antemortem facts of the case and the postmortem evidence that would preclude the identification. Berran Decl. ¶ 6.

77. Proposed identifications are peer reviewed by the Armed Forces Medical Examiner, or his or her designee, before being finalized. Berran Decl. ¶ 9.

B. Armed Forces DNA Identification Laboratory (AFDIL)

78. AFDIL employs state of the art technologies in the forensic DNA field. McMahan Decl. ¶¶ 25-31.

79. AFDIL uses its available technologies for the Accounting Program, including two types of mitochondrial DNA (mtDNA) testing, Sanger and Next Generation Sequencing (NGS), and two types of nuclear DNA testing, Y-chromosomal Short Tandem Repeat DNA (Y-STR) and autosomal Short Tandem Repeat DNA (auSTR) testing. *See* McMahan Decl. ¶¶ 11, 16, 17, 41.

80. Rigorous methods are required for obtaining reliable results from antiquated remains. *See* McMahan Decl. ¶¶ 32-40.

81. The testing results are reported back to the DPAA Laboratory. In about 80% of identifications made by DPAA, AFDIL's DNA results are used to support the identification. *See* McMahan Dec. ¶ 40.

82. AFDIL maintains a collection of family reference samples to support comparison of DNA testing results from unidentified remains. Collection began in 1991, focused on family members associated with Vietnam losses, and in 1995 expanded to include family members associated with Korean War losses. After Congress provided additional funding to the service

casualty offices in 2010, DoD has engaged in a substantial push to gather all references for losses associated with World War II, Korean War, Vietnam War, and Cold War. Due to this collection effort, AFDIL currently has 92% coverage for Korean War missing service members; 85% for the Cold War, 85% for the Vietnam War, and 6% for World War II. McMahon Decl. ¶ 21.

C. U.S. Army's Past Conflict Repatriations Branch

83. Each military service operates a casualty office that seeks to support the next of kin and identified beneficiaries of deceased servicemembers. See DoD Directive 2310.07 § 2.6; DoD Instruction 1300.18 § 5.6; Hamilton Decl. ¶ 28.

84. For the U.S. Army, that office is the Army Casualty and Mortuary Affairs Operations Division. Within that division, the Past Conflict Repatriations Branch (PCRB) is responsible for contact with family members of servicemembers from prior conflicts. See Gardner Declaration ¶¶ 1, 3.

85. The PCRB's primary roles are (1) to maintain liaison with families of unaccounted-for DoD personnel, (2) maintain personnel files for each unaccounted-for Service Member, (3) conduct genealogy searches and outreach to identify and locate family members for the purpose of obtaining DNA family reference samples and identifying the Primary Next of Kin (PNOK), and (4) to manage and execute mortuary services for all identified Service Members from past conflicts. Gardner Decl. ¶ 3.

86. Disposition of remains from past conflicts cannot take place until remains are identified or determined to be unidentifiable by the Armed Forces Medical Examiner (AFME) and have been prepared for interment. See Gardner Decl. ¶ 4; DoD Instruction 5154.30, Armed Forces Medical Examiner System § 2.4 (Dec. 21, 2017).

87. After the AFME makes an individual identification, final or permanent

disposition, including burial or cremation, is directed by the person authorized to direct disposition (PADD). See Army Regulation 638-2 § 4-4, 4-6; Gardner Decl. ¶ 4.

88. The Army cannot identify the correct PADD unless the remains are identified, and therefore the PADD cannot direct the disposition of remains unless the remains are identified. See Gardner Decl. ¶ 4; Army Reg. 638-2 §§ 4-4, 4-9, 4-15; DoD Instruction 1300.18 §§ 6.1.4.4, E2.42.

89. Under the Accounting Program as currently structured, the military services cannot set policy for recovery, disinterment, or identification of remains from past conflicts. Hamilton Decl. ¶ 32.

90. In January 2014, the Army rescinded Army Tactics, Techniques, and Procedures (ATTP) 4-46.1, Processes to Support Identification of Deceased Personnel, on the ground that DoD Directive 1300.22e shifted responsibility for identifying deceased servicemembers to the AFME. Because the Army no longer performs scientific identifications, the issuance was rescinded to prevent conflicting guidance and confusion in the field. See Hamilton Decl. ¶ 32 & Ex. 12.

91. The statement in Army Regulation 638-2 that Army geographic commanders have authority to “search for, recover, and tentatively identify eligible deceased personnel” from “previous wars or incidents” Ch. 8, § 8-3(c), is no longer accurate and does not reflect DoD policy. See Hamilton Decl. ¶ 33; DoD Directive 1300.22, Enclosure 2 § 5(b)(1) (specifying that the military departments are not responsible for funding “[s]earch, recovery, identification, preparation, and transportation of remains” covered by the Accounting Program).

D. Joint Chiefs of Staff

92. The Joint Chiefs of Staff constitute the immediate military staff of the Secretary of Defense, and transmit orders from President and Secretary of Defense to the combatant

commands. Hamilton Decl. ¶ 32.

93. The Chairman of the Joint Chiefs of Staff has joint oversight, with the Office of the Secretary of Defense, of the defense agencies that are designated as combat support agencies pursuant to 10 U.S.C. § 193. DPAA is not a designated combat support agency. Hamilton Decl. ¶ 32.

94. The Joint Chiefs of Staff are called upon to [s]upport DPAA’s mission to locate, recover, and identify remains of DoD personnel . . . from past conflicts” and to coordinate operational implementation of the Accounting Program. DoD Directive 2310.07 § 2.7 (incorporating § 2.5). In addition, the Joint Chiefs of Staff are to ensure that its communications that pertain to the Accounting Program are coordinated with DPAA. See DoD Directive 5110.10 § 3.8; Hamilton Decl. ¶ 33.

95. The Joint Chiefs of Staff are not tasked with establishing DoD policy for the Accounting Program. Its issuances are focused on current joint military operations and do not apply to DPAA or the Accounting Program. See Hamilton Decl. ¶ 34; Joint Pub. 4-0, Joint Logistics, Preface § 3(a) (Feb. 4, 2019) (Exhibit 14) (specifying that it applies to the Joint Staff, combatant commands and their subordinate components, joint task forces, the military services, and combat support agencies).

III. CAMP CABANATUAN COMMON GRAVES

96. The four service members who were prisoners of war initially buried at Camp Cabanatuan are associated with common graves involving commingled remains. See Am. Compl. ¶¶ 34, 38, 42, 46.

97. The Cabanatuan burials pose significant identification challenges. Fellow POWs buried their comrades who died during roughly the same 24 hour period in a common grave. See Kupsy Decl. ¶ 18 & Ex. 5 at 6-9.

98. Efforts to document these burials were initially spotty and hindered by the Imperial Japanese. Kupsy Decl. ¶ 18 & Ex. 5 at 7-8.

99. After the war, in December 1945, AGRS began disinterring remains from the common graves and reintering those that were not immediately identified at U.S. Armed Forces Manila #2 Cemetery. Kupsy Decl. ¶ 19 & Ex. 5 at 9-10.

100. In the fall of 1947 the remains were disinterred again and moved to an AGRS Mausoleum for examination. Kupsy Decl. ¶ 19 & Ex. 5 at 11.

101. Many remains deteriorated from remaining in wet ground for several years and from being repeatedly handled. Kupsy Decl. ¶ 19 & Ex. 5 at 18.

102. A review conducted in 1951 concluded that the various well-intentioned identification efforts had left the remains “jumbled beyond belief.” Kupsy Decl. ¶ 19 & Ex. 5 at 18.

103. In January 1952, DoD concluded that the unknown remains were unidentifiable and should be buried at Manila American Cemetery. Kupsy Decl. ¶ 19 & Ex. 5 at 19.

104. DPAA has an ongoing project to account for the unidentified service members who died at Camp Cabanatuan. It began around 2004 with historical research and assessment of all available documentation. Kupsy Decl. ¶ 20 & Ex. 5 at 19-20.

105. The project seeks to disinter at one time all unidentified remains associated with one Cabanatuan grave, analyzing each grave in turn to synchronize with analytical and DNA collection efforts. Once the historical research is complete, and sufficient DNA reference samples have been received from the service members’ relatives, DPAA submits a recommendation under the process described above. Kupsy Decl. ¶ 20.

106. The remains associated with 25 common graves from Cabanatuan have been

disinterred and are being processed at the DPAA Laboratory. Kupsky Decl. ¶ 23.

107. DPAA's current identification effort must contend with numerous factors inhibiting identification. Among these are:

- The primary record regarding the original burials is Captain Robert Conn's "Death Report, Cabanatuan," which, especially for burials before August 1942, is incomplete and known to be inaccurate in certain respects.
- The initial AGRS disinterments may not have precisely conformed to the graves as they were originally dug.
- Early identifications by dog tags or other personal items (whether at the time of initial burial or at the initial disinterment) may have been inaccurate (e.g., because the service member was holding the item for someone else).
- Remains from a common grave were likely to be inherently commingled when initially recovered.
- Repeated handling before final burial in 1952 likely led to additional commingling, and may have caused commingling of remains drawn from different common graves.
- By 1952, remains had significantly deteriorated due to burial conditions and repeated handling; further deterioration over subsequent decades is expected.

Kupsky Decl. ¶ 21.

108. Deterioration of the remains and preservation methods used at the Mausoleum make DNA extraction significantly more difficult. McMahon Decl. ¶¶ 19, 25, 29.

A. Cabanatuan Common Grave 704

109. According to DoD records, Cabanatuan Common Grave 704 is the likely original location of the remains of ten service members, including Technician Lloyd Bruntmyer (TEC4 Bruntmyer). *See* Exhibit K.

110. Eight unknowns associated with this grave were interred in Manila American Cemetery. DPAA recommended disinterment of these unknowns on March 2, 2018, and received approval from the Assistant Secretary on June 29, 2018. *See* Exhibit K.

111. The unknowns associated with Common grave 704 were disinterred and transferred to the DPAA Laboratory in November 2018. Kupsy Decl. ¶ 23.

112. DPAA has begun processing the remains, including submitting initial samples to AFDIL for testing. Berg Decl. ¶¶ 14-16; McMahon Decl. ¶ 48.

B. Cabanatuan Common Grave 822

113. According to DoD records, Cabanatuan Common Grave 822 is the likely original location of the remains of five service members, including Private Robert Morgan (PVT Morgan). *See* Exhibit L.

114. Four unknowns associated with this grave were interred in Manila American Cemetery. *See* Exhibit L.

115. The unknowns associated with Common Grave 822 were disinterred and transferred to the DPAA Laboratory in November 2018. Kupsy Decl. ¶ 23.

116. DPAA has begun processing the remains, including submitting initial samples to AFDIL for testing. Berg Decl. ¶¶ 14-16; McMahon Decl. ¶ 48.

C. Cabanatuan Common Grave 407

117. According to DoD records, Cabanatuan Common Grave 407 is the likely original location of the remains of twenty-six service members, including Private First Class David Hansen (PFC Hansen). *See* Exhibit N.

118. DoD records indicate that nine unknowns are associated with this grave. *See* Exhibit N.

119. Until December 2018, DoD had received no viable reference samples from PFC Hansen's relatives. McMahon Decl. ¶ 23.

120. DPAA deferred finalizing its recommendation regarding disinterment of Common Grave 407 until it was notified that sufficient family reference samples had been received for the

servicemembers associated with this grave and is now finalizing its recommendation. Kupsky Decl. ¶ 23.

D. Cabanatuan Common Grave 717

121. According to DoD records, Cabanatuan Common Grave 717 is the likely original location of the remains of fourteen individuals, including Private Arthur Kelder (PVT Kelder).

See Berg Decl. ¶ 4.

122. Ten unknowns associated with this grave were disinterred from Manila American Cemetery in 2014. *See* Berg Decl. ¶ 5.

123. DPAA also arranged for the disinterment of three of the four “identified” sets of remains associated with Common Grave 717, and is awaiting receipt of the last set of those remains. Berg Decl. ¶ 9.

124. In 2015, DPAA concluded that bones from four of the ten graves disinterred from Manila American Cemetery were associated with Private Kelder by DNA testing; it provided the relevant remains to Plaintiff Douglas Kelder for burial. Berg Decl. ¶¶ 6-8 & Exs. 1, 2; Gardner Decl. ¶ 5 & Ex. 1.

125. AFDIL has conducted more than 350 tests on samples from remains associated with Common Grave 717. Testing remains ongoing. Berg Decl. ¶¶ 10, 11; McMahon Decl. ¶ 42.

126. DPAA is in the process of preparing additional portions of remains associated with Common Grave 717 for identification, and anticipates being able to finalize such identifications within the next 90 days. Berg Decl. ¶ 12.

127. AFDIL’s DNA results indicate that at least 18 distinct people are commingled among these remains. In addition, despite repeated sampling and DNA testing, one case yielded no useable DNA from bone samples; the only useable DNA for this set of remains came in

January 2019 from two teeth. Berg Decl. ¶ 11; McMahon Decl. ¶ 43.

128. Numerous factors contributed to the time the identification process has taken, including AFDIL's processing time and testing queues, the need to conduct subsequent sampling and testing, time for laboratory analysis, complications from the lack of some of the associated remains, the need to approach the assemblage as a whole to maximize identification, and the need to balance and maintain priorities across numerous cases. Berg Decl. ¶ 13.

IV. INDIVIDUAL CASES

A. Comparison of First Lieutenant Alexander Nininger to X-1130

129. On February 3, 2015, Plaintiff John Patterson submitted a request to disinter the remains designated X-1130 Manila #2 for comparison to First Lieutenant Alexander Nininger (1LT Nininger). Exhibit M.

130. On December 1, 2015, DPAA recommended against disinterment because “[b]ased on a comprehensive assessment of the available information, DPAA assesses a low likelihood that disinterment would lead to identification of the interred remains as this individual.” It relied on a research memo that concluded “there exists too much doubt as to the location of the burial and subsequent recovery area for these remains” and the “historic evidence is not strong enough to overcome the 4.5-inch discrepancy with the highest estimated stature of X-1130.” Exhibit M.

131. On March 4, 2016, the then-applicable disinterment authority, the Deputy Assistant Secretary of the Army for Military Personnel and Quality of Life, concurred with DPAA's recommendation and denied the request. Exhibit M.

132. 1LT Nininger died on January 12, 1942 near Abucay, on the Bataan peninsula. *See* Am. Compl. ¶ 17; Kupsky Decl. ¶ 24.f.

133. In December 1945 and January 1946, AGRS personnel disinterred at least 13

remains from the “Soldiers Row” of the Abucay village cemetery, including the remains designated X-1130. Kupsky Decl. ¶ 24.a

134. In December 1945, M/Sgt. Abie Abraham took the statement of a gravedigger who said that he helped bury five Americans at that cemetery in January 1942. See Kupsky Decl. ¶ 24.a & Exhibit 6.

135. In May and June 1946, AGRS disinterred 14 remains from “Army Personnel Row” outside the Abucay churchyard. Kupsky Decl. ¶ 24.b.

136. Eight of these 27 disinterments remain unidentified, and AGRS disinterred 43 additional remains from the Abucay town area that have not been identified, bringing the total of unidentified remains from the immediate Abucay area to 51. Kupsky Decl. ¶24.d.

137. Multiple witnesses who were present in Abucay, some of whom attended 1LT Nininger’s burial, asserted that 1LT Nininger was buried in or near the Abucay churchyard. Kupsky Decl. ¶ 25.c.

138. Some of the members of 1LT Nininger’s regiment who were killed in January 1942 were buried in U.S. Army cemeteries farther south, so it is possible 1LT Nininger’s remains were transferred to one of these locations. Kupsky Decl. ¶ 24.g.

139. On February 20, 1944, COL George Clarke, former 57th Infantry commander, wrote a letter to 1LT Nininger’s father at the request of the U.S. Army Adjutant General to answer questions the father had posed. A copy of the letter was retained by the Adjutant General. Kupsky Decl. ¶ 25 & Exhibits 10, 11, 15.

140. COL Clarke claimed that 1LT Nininger was buried “in grave No. 9 behind the South wall of the Abucay church.” Kupsky Decl. ¶ 25 & Exhibits 10, 15.

141. COL Clarke had departed Bataan before the burials occurred and has since been

shown to have given false information to other families. Kupsky Decl. ¶¶ 25.d, 27 & Exhibits 9, 33.

142. COL Clarke's letter and its specification of "grave No. 9" appears to be the sole or primary basis for the association between X-1130 and 1LT Nininger. Kupsky Decl. ¶ 25 & Exhibits 12-15.

143. Apart from COL Clarke's reference to a "Grave No. 9," nothing in the records indicates that there was any other reason for the association between 1LT Nininger and X-1130. Kupsky Decl. ¶ 25.d.

144. Beginning in December 1948, AGRS repeatedly sought identification of X-1130 as 1LT Nininger, relying primarily on COL Clarke's letter. Kupsky Decl. ¶ 26 & Exhibits 19, 21, 24.

145. The Office of the Quartermaster General (OQMG) was not satisfied and ultimately disapproved the proposed identification due to witness testimony suggesting that 1LT Nininger had been buried in the churchyard rather than outside the wall or in the village cemetery and the significant height discrepancy. In September 1950, OQMG approved X-1130 as unidentifiable and 1LT Nininger as unrecoverable. Kupsky Decl. ¶ 26 & Exhibits 19, 22-23, 25, 27, 30-32.

146. After concluding that 1LT Nininger could not be recovered, OQMG apparently tasked Captain Joseph Vogl with following up with COL Clarke and others to see if any additional leads could be developed. Kupsky Decl. ¶ 27.

147. On October 23, 1950, in a conversation with Lt. COL Franklin Anders, Captain Vogl first learned that COL Clarke might not be a reliable witness. And on October 24, 1950, in a conversation with Major John Olson, he first learned that 1LT Cheaney could not have been

recovered from the Abucay churchyard because he died after the area was lost to the Japanese. Kupsky Decl. ¶ 27.

148. There is no indication in the record that anyone at AGRS or OQMG was concerned about the identification of 1LT Cheaney before October 23, 1950. Kupsky Decl. ¶ 27.

149. Records indicated that 1LT Nininger's stature was 5 feet, 11 inches. Emanovsky Decl. ¶ 16; Shiroma Decl. Exhibit 6.

150. AGRS twice calculated the stature of X-1130 based on measurements of its long bones, arriving at estimates of 5 feet, 1 inch and 5 feet, 2.125 inches. Emanovsky Decl. ¶ 14.

151. The long bone measurements from September 1950 for X-1130 permit DPAA forensic anthropologists to recalculate the remains' stature using current methodology, which produce a 95% likelihood that the stature of the remains was no taller than 5 feet, 6.6 inches. Emanovsky Decl. ¶ 15.

152. The more than four inch difference in statures provide a reasonable basis to reject identification on this ground alone. Emanovsky Decl. ¶¶ 16-17.

B. Comparison of Colonel Loren Stewart to X-3629

153. Plaintiff John Boyt submitted a disinterment request for comparison of the remains designated X-3629 Manila No. 2 Cemetery to Colonel Loren Stewart (COL Stewart) in November 2017. See Exhibit Q.

154. Neither DPAA nor DoD have reached a final decision on this request. Kupsky Decl. ¶ 33.

155. In response to the request, DPAA created a short list of 21 officers who died in the area for comparison to X-3629, including COL Stewart and 1LT Nininger. Kupsky Decl. ¶ 33.

156. Analysis by DPAA's forensic anthropologist and odontologist led to exclusion of

all but two of the candidates. DPAA is pursuing family reference samples for these candidates so that it could recommend disinterment of the remains for comparison to those individuals.

Kupsky Decl. ¶ 33.

157. Colonel Loren Stewart died between January 12 and 13, 1942 defending the Abucay Line along the south side of the Balantay River. *See* Exhibit O.

158. The remains designated X-3629 were disinterred in 1946 near Abucay Hacienda, a historically possible location. *See* Kupsky Decl. ¶ 30.

159. Between 100 and 350 Americans and Philippine Scouts may have died along this battle line, along with an unknown number of Philippine Army enlisted men. Few of these servicemembers have been identified, leaving between 90 and 320 unresolved Americans and Philippine Scouts associated with this battle. Kupsky Decl. ¶ 32.

160. In December 1946, Ruben Caragay, resident of Abucay, told AGRS that he saw members of the Philippine Scouts' 57th Infantry Regiment "carrying [a] deceased American" and "they said the deceased is an American Colonel." *See* Kupsky Decl. ¶ 30 & Exhibit 36.

161. The disinterment report and other documents in the file associate the remains with "STUART, Colonel 57th Inf." Kupsky Decl. ¶ 30 & Exhibit 36.

162. The AGRS investigator, Master Sergeant Abie Abraham, explained in 1981 that he drew this association based on the fact that COL Stewart was the only Colonel missing near Abucay. Kupsky Decl. ¶ 30 & Exhibit 37.

163. While the name associated with X-3629 is spelled "Stuart" throughout the file, nothing in the record suggests that AGRS or OQMG were unaware of the association with COL Stewart. An AGRS compilation of "Known Officer Dead & Burial [sic] Locations" lists "Loren Stuart" as missing in the Abucay Hacienda area. *See* Kupsky Decl. ¶ 31 & Exhibit 38.

164. COL Stewart's stature was recorded five times as between 5 feet 7.25 inches and 5 feet 8.5 inches. Emanovsky Decl. ¶ 20.

165. The long bone measurements from August 1949 for X-3629 permit DPAA forensic anthropologists to recalculate the remains' stature using current methodology, which produce a 95% likelihood that the stature of the remains was no taller than 5 feet, 5.6 inches. Emanovsky Decl. ¶ 19.

166. The discrepancy between 5 feet, 5.6 inches and 5 feet, 7.25 inches is a reasonable scientific basis for excluding COL Stewart as a candidate. Emanovsky Decl. ¶ 20.

167. Records indicate that in four dental examinations between 1939 and 1941, COL Stewart was missing the same two teeth. Shiroma Decl. ¶ 18 & Ex. 10-11.

168. The dental remains for X-3629 were examined and charted on three occasions, and three different analysts concluded that only one tooth had been lost before death. Shiroma Decl. ¶ 16 & Ex. 7-9.

169. Because X-3629 had two teeth present where COL Stewart was missing teeth, he should be excluded as a candidate for comparison to the remains. Shiroma Decl. ¶ 17.

C. Comparison of Brigadier General Guy Fort to X-618

170. Plaintiff Janis Fort submitted a disinterment request for comparison of the remains designated X-618 Leyte #1 to Brigadier General Guy Fort (Brig. Gen. Fort) in late 2017. See Exhibit R.

171. In August 2018, DPAA recommended against disinterment of X-618 on the ground that DTM-16-003's threshold was not met. See Kupsy Decl. ¶ 34 & Ex. 39-40.

172. On November 28, 2018, the Assistant Secretary of Defense for Manpower and Reserve Affairs concurred with DPAA's recommendation and denied the request. See Kupsy Decl. ¶ 34 & Ex. 41.

173. The available evidence indicates that Brig. Gen. Fort was executed by the Imperial Japanese several months after his surrender in May 1942. *See* Kupsky Decl. ¶ 36 & Ex. 39.

174. The remains designated X-618 Leyte #1 were provided to AGRS on July 14, 1947, along with the statement that they were disinterred from the grounds of a school near Cagayan on the island of Mindanao. Kupsky Decl. ¶ 35.

175. The association of X-618 to Brig Gen Fort rests on the secondhand testimony of Ignacio Cruz, governor of the province where the remains were recovered. Kupsky Decl. ¶ 35 & Exhibit 42.

176. Four Japanese officers testified that they participated in the execution of Brig Gen Fort in the vicinity of Dansalan, approximately 45 miles from Cagayan. Kupsky Decl. ¶ 36.

177. Guerrilla intelligence reports and a Filipino civilian also pointed to Dansalan as the site of the execution. *See* Kupsky Decl. ¶ 36 & Exhibit 43.

178. After the war crimes investigation, AGRS concluded in June 1949 that Brig Gen Fort “was executed by the Japanese on 11 November 1942 in or around the vicinity of the City of Dansalan.” *See* Kupsky Decl. ¶ 37 & Exhibit 44.

179. Records indicate that Brig. Gen. Fort was 63 or 64 in 1942, of European ancestry, with a stature of 5 feet, 8.5 inches, and had been missing a tooth in the upper right quadrant of his mouth since 1917. Emanovsky Decl. ¶¶ 22-23; Shiroma Decl. ¶ 20 & Ex. 15.

180. AGRS and DPAA both concluded that several aspects of the biological profile for X-618 were inconsistent with Brig. Gen. Fort. Kupsky Decl. ¶¶ 37-38; Emanovsky Decl. ¶¶ 21-23.

181. In March 1950, an assessment of the remains designated X-618 indicated an age

range of 23-28 years and an ancestry of “Mongoloid (Very Probably Filipino).” See Emanovsky Decl. ¶ 22 & Exhibit 7.

182. With the presence of a complete skull, it is not reasonable to expect that the remains of a 64 year old White male could be mistaken for the remains of a 25 year old Filipino using the methodology of the 1940s. Emanovsky Decl. ¶ 22.

183. The long bone measurements from March 1950 permit DPAA forensic anthropologists to recalculate the remains’ stature using current methodology, which produce a 95% likelihood that the stature of the remains was no taller than 5 feet, 6.4 inches. Emanovsky Decl. ¶ 23.

184. The discrepancy between 5 feet, 6.4 inches and 5 feet, 8.5 inches is a reasonable scientific basis for excluding Brig. Gen. Fort as a candidate. Emanovsky Decl. ¶ 23.

185. The remains designated X-618 were examined on three occasions by three different AGRS analysts, all of whom charted the presence of all teeth in the upper right quadrant of the remains’ mouth. Shiroma Decl. ¶ 19 & Exs. 12-14.

186. It is very unlikely that multiple AGRS analysts incorrectly charted the remains to record all teeth as present if that was not the case. Shiroma Decl. ¶ 19.

D. DPAA’s Additional Efforts to Identify These Servicemembers

187. Dr. Kupsky is conducting DPAA’s comprehensive study of remains recovered from the Abucay area, the temporary cemeteries on Bataan, and the missing individuals who may be associated. This requires the ordering and examination of thousands of personnel files to reconstruct Bataan cemetery maps. The goal is to determine burial patterns in those cemeteries to support the drafting of short lists for recovered unknowns. Kupsky Decl. ¶ 24.

188. Dr. Kupsky has reviewed a large collection of Individual Deceased Personnel Files (IDPFs), X-Files, AGRS records, maps, and documents from the Philippine Archive

Collection at the National Archives in College Park, Maryland. Kupsky Decl. ¶ 24.

189. Because there is evidence that 57th Infantry officers killed on the same date as 1LT Nininger were reburied in other temporary cemeteries, DPAA considers this the best avenue for finding the remains of 1LT Nininger and his fellow officers. Kupsky Decl. ¶ 29.

190. The comprehensive cemetery study also includes the reconstruction of the “Soldiers’ Row” of the Abucay village cemetery, from which X-1130 was recovered. Once complete, a plot map of that burial area will allow the creation of short lists to support the case for disinterment of associated unknowns, including X-1130. Kupsky Decl. ¶ 29.

191. DPAA’s comprehensive study of remains recovered from the Abucay area, the temporary cemeteries on Bataan, and the missing individuals who may be associated may lead to unknowns for which COL Stewart is a reasonable candidate. Kupsky Decl. ¶ 32.

192. DPAA sent a field forensic team to Abucay in October 2017 to see if they could develop any more leads in the vicinity of the Abucay churchyard. Exhibit P.

193. In April 2019, the U.S. Army disinterred the remains identified in 1948 as one of 1LT Nininger’s fellow officers, 1LT Ira Cheaney, after concluding that the remains had been misidentified. Gardner Decl. ¶ 6; Kupsky Decl. ¶ 28.

194. DPAA is analyzing the remains, and will compare them to 1LT Nininger and other servicemembers lost in the Abucay area. Kupsky Decl. ¶ 28.

195. DPAA is preparing a disinterment recommendation for three sets of remains from the Dansalan area for whom Brig. Gen. Fort and three other servicemembers are plausible candidates. The recommendation cannot be finalized until additional family reference samples are received for the other servicemembers. Kupsky Decl. ¶ 39.

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