

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ANGE SAMMA *et al.*, on behalf of  
themselves and others similarly situated,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
DEFENSE, *et al.*,

Defendants.

No. 20-cv-01104-PLF

**DECLARATION OF SCARLET KIM**

I, Scarlet Kim, declare as follows:

1. I am a Staff Attorney with the American Civil Liberties Union and lead class counsel in this action. I submit this declaration in support of Plaintiffs' motion to enforce the Court's August 25, 2020 Order and Judgment ("Order").

**I. Communications between Class Counsel and Defendants' Counsel on June 29, 2021**

2. On June 29, 2021, I exchanged communications with Brian Boynton, Acting Assistant Attorney General for the Civil Division at the U.S. Department of Justice. Attached as Exhibit 21 is a true and correct copy of that email thread.

3. On June 29, 2021, Mr. Boynton emailed me to ask whether we could speak about this litigation. Later that day, I responded and proposed that we speak at 4:00 p.m. that day.

4. At 4:00 p.m., I spoke with Mr. Boynton. On that call were also two other class counsel, Brett Max Kaufman and Sana Mayat, as well as Brian Netter, Deputy Assistant Attorney General for the Federal Programs Branch. During the call, Mr. Boynton acknowledged Plaintiffs' longstanding efforts to bring issues of non-compliance with the Order to Defendants' attention

and to seek remediation of those issues. Mr. Boynton also stated that the non-compliance issues identified by Plaintiffs would now receive attention at high levels of the Departments of Justice and Defense. Mr. Boynton requested that Plaintiffs delay filing their motion to enforce and engage in additional discussion with Defendants regarding non-compliance. Class counsel stated that they would consider this request and respond later that day.

5. Later that same day at 6:22 p.m., I responded by email to Mr. Boynton. In that email, I stated that class counsel considered and took seriously Defendants' request for additional discussion, and that, given the persistent pattern of non-compliance with the Order stretching back months, class counsel felt that it was in the best interests of their clients to file the motion to enforce and that they planned to do so on June 30, 2021 at 10 a.m.

6. Later that same day at 9:52 p.m., I emailed Mr. Boynton and explained that, in light of further discussion with the Department of Justice, Plaintiffs would delay the filing of their motion to enforce the Court's Order until July 2, 2021 at 10 a.m., to allow time to meet and confer with Defendants. I also set out what Plaintiffs sought on behalf of the class to remediate ongoing non-compliance. Specifically, Plaintiffs sought a joint stipulation acknowledging Defendant's past non-compliance and agreeing to the following steps:

- a. Within five days of the stipulation, reporting to Plaintiffs their efforts to comply with the Order, including:
  - i. Copies of all instructions for effectuating the Order issued to military personnel and documentation of the transmission of all such communications;
  - ii. Copies of all communications issued to class members to explain the Order, and documentation of the transmission of all such communications;

- b. Within five days of the stipulation, issuing N-426 certifications to five class members whose inability to obtain their certifications class counsel had previously brought to Defendants' attention;
- c. Within ten days of the stipulation, identifying all class members whose N-426 certification requests have been pending for more than 30 days and, within five days of identifying such class members, issuing or denying N-426 certifications to those class members;
- d. Within five days of the stipulation, identifying a point of contact for each military service, with authority to take appropriate action, for class members who experience problems submitting their N-426 certifications to their commands or who have not received their N-426 certification within 30 days of submission to their commands;
- e. Within ten days of the stipulation, together with Plaintiffs, preparing a joint communication to be distributed to all class members, explaining class members' rights under the Order and informing them of the relevant points of contact;
- f. On a recurring monthly basis, distributing to new class members the joint communication explaining class members' rights under the Order and identifying the relevant points of contact;
- g. Within ten days of the stipulation, providing Plaintiffs with a list containing the names of all class members who have requested an N-426 certification, the dates they submitted their requests, and the dates (if any) on which they received their N-426 certifications; and
- h. Providing Plaintiffs with monthly status reports on their compliance with the Order, including a list containing the names of all class members who have requested an N-

426 certification since the previous report, the dates they submitted their requests, and the dates (if any) on which they received their N-426 certifications.

7. In my 9:52 p.m. email, I stated that Plaintiffs believed these steps were necessary to enforce the Court's Order and to avoid exacerbating unacceptable delays to remediating non-compliance. I stated that Plaintiffs believed these steps to be reasonable, given that the Court previously ordered Defendants to undertake most of them in response to similar non-compliance with its preliminary injunction order in the related litigation of *Kirwa v. U.S. Department of Defense*, No. 17-cv-1793 (D.D.C.). Finally, I stated that if Defendants were not able to agree to the proposed joint stipulation by July 2 at 10 a.m., Plaintiffs intended to proceed with the filing of their motion to enforce the Court's Order.

8. Later that same day at 10:05 p.m., Mr. Boynton responded to my email. In that email, Mr. Boynton expressed appreciation for the additional time Plaintiffs had offered Defendants and indicated that the Department of Justice would review Plaintiffs' proposal with Defendants and respond promptly.

## **II. Communications between Class Counsel and Defendants' Counsel from July 2 to July 13, 2021**

9. Between July 2 and July 13, 2021, class counsel exchanged communications with Defendants' counsel regarding non-compliance with the Order. Attached as Exhibit 22 is a true and correct copy of that email thread.

10. On July 2, 2021, Mr. Netter sent me an email, which attached a letter addressed to class counsel. Attached as Exhibit 23 is a true and correct copy of that letter.

11. On July 2, 2021, I sent Mr. Netter an email, which attached a letter responding to Mr. Netter's July 2, 2021 letter. Attached as Exhibit 24 is a true and correct copy of that letter.

12. On July 7, 2021, Mr. Netter sent me an email, which attached a letter responding to my July 2, 2021 letter. In his email, Mr. Netter also proposed a conference for the following week. Attached as Exhibit 25 is a true and correct copy of that letter.

13. Later that same day, I emailed Mr. Netter to provide class counsel's availability for a conference.

14. On July 13, 2021, I sent Mr. Netter an email, which attached a letter documenting a new case of non-compliance. Attached as Exhibit 26 is a true and correct copy of that letter.

### **III. July 15, 2021 Conference between Class Counsel and Defendants' Counsel**

15. On July 15, 2021 at 12:00 p.m., I spoke with Mr. Netter for approximately one hour. On that call were also three other class counsel, Brett Max Kaufman, Sana Mayat, and Jennie Pasquarella, as well as three other counsel for Defendants, Tony Coppolino, Alex Haas, and Liam Holland.

16. During the call, Mr. Netter stated that he intended to bring class counsel up to speed on the particular issues class counsel had identified and to provide an update on the steps Defendants had taken to date to rectify those issues:

- a. **Individual N-426 Certifications:** Mr. Holland provided an update on class members who had received their N-426 certifications to date. He also provided an update on the status of outstanding N-426 certifications for several other class members. I agreed that Mr. Holland and I would follow up by email regarding the status of outstanding N-426 certifications.
- b. **Re-Issuance of the Army-Wide Guidance:** Mr. Netter stated that Defendants would re-issue the Army-wide guidance. I asked whether Defendants had already re-issued the Army-wide guidance. Mr. Netter stated that Defendants had not yet done so. I

then asked if Defendants' counsel could share a timeline for such re-issuance.

Defendants' counsel stated that they could not provide a timeline but that they expected this step to happen "very quickly." Defendants' counsel stated that they would confer with their clients and see what timeline they could propose.

- c. **O-6 Commander Confirmation of Receipt of Army-Wide Guidance:** Mr. Netter stated that, at Forts Jackson, Leonard Wood, and Benning, O-6 commanders would confirm that they understood their obligations under the Army-wide guidance and communicate with their company commanders to ensure they also understand their obligations.
- d. I asked Mr. Netter to clarify which officers below the O-6 commanders in their chains of command would confirm that they understood their obligations under the Army-wide guidance. I stated, as explained in our July 2, 2021 letter, that the O-6 commanders should require confirmation from officers all the way down their chains of command, including drill sergeants and first lieutenants, since those were the officers from whom class members typically request N-426 certifications. Mr. Netter stated that O-6 commanders would also confirm that their unit level leaders understood their obligations under the guidance. I asked for clarification on the rank of "unit level leaders" and another counsel for Defendants explained that those would be first lieutenants.
- e. I also asked Mr. Netter whether Defendants planned to require O-6 commander confirmation at installations other than Forts Jackson, Leonard Wood, and Benning, given the instances of non-compliance at other installations class counsel had brought

- to Defendants' attention. Defendants' counsel stated that Defendants did not currently plan to undertake such efforts at additional installations.
- f. Finally, I asked whether Defendants had begun requiring O-6 Commanders at the three installations to confirm receipt of the Army-wide guidance. Mr. Netter stated that Defendants had not yet done so. I then asked if Defendants' counsel could share a timeline for doing so. Defendants' counsel stated that they could not provide such a timeline.
- g. **Legal Assistance Offices:** Mr. Netter acknowledged that where class members experience problems seeking their N-426 certifications, there should be an avenue of redress. He explained that such service members should go to a legal assistance office. He explained that lawyers in these offices have an attorney-client relationship with service members. He also explained the process that should occur when a service member goes to a legal assistance office: a paralegal assistant performs an intake, checks for conflicts, and communicates with the attorneys to facilitate N-426 certification. Mr. Netter stated that a legal assistance attorney should be able to "run the traps" to get the issue resolved.
- h. Mr. Netter acknowledged class counsel's July 13, 2021 letter documenting the Fort Leonard Wood legal assistance office's failure to assist class members. He stated that he did not know why that office was unable to assist class members. He stated that the Army would be issuing a practice note to legal assistance offices to explain the policy and procedure for assisting service members who come to them with an N-426 certification problem.

- i. I asked Mr. Netter to clarify which legal assistance offices would receive the practice note. Mr. Netter stated there was no resistance to disseminating the practice note to legal assistance offices across the Army.
- j. Finally, I asked whether Defendants could share a timeline for issuing the practice note. Defendants' counsel stated that they could not provide such a timeline.

17. During the call, I also sought clarification on Defendants' position on several of the steps class counsel had proposed in their June 29, 2021 email:

- a. **Points of Contact:** I requested clarification on Defendants' position regarding centralized points of contact to assist class members who encounter non-compliance with N-426 certification. Mr. Netter stated that there had been many discussions about whether it would be feasible to establish a centralized point of contact. He stated that some hindrances had been identified and that there was not a crisp answer on this point.
- b. I explained that the burden should not be on class members to pursue avenues to redress non-compliance and noted that a centralized point of contact was established to assist class members in *Kirwa*. Mr. Netter stated that the point of contact established in *Kirwa* was an O-6 commander who was taken off other assignments and that the point of contact therefore took resources away from other Army objectives. Mr. Netter stated that class members should use currently available processes to resolve non-compliance.
- c. I reminded Defendants' counsel of the current processes' failures and reiterated the success of the centralized points of contact in *Kirwa*. Mr. Holland stated that the *Samma* class is bigger than the *Kirwa* class, which makes the proposed point of



contact less feasible and more burdensome. I stated that the larger size of the *Samma* class would underscore the need for points of contact to vindicate the rights of a larger number of individuals.

- d. I also inquired about the status of the email address that Defendants had previously stated a subset of class members in the Selected Reserve could write to when encountering issues with their N-426 certification. I asked whether these class members could at least continue to use this email address. Mr. Holland stated that this email address was no longer active and class members could not obtain relief using the address.
- e. **Reporting N-426 Certifications:** I requested clarification on Defendants' position regarding tracking class members' N-426 certification requests and reporting them to class counsel, similar to the reporting Defendants were ordered to undertake in *Kirwa*. Mr. Netter stated that there was no centralized system in the Army that already has this information and reporting would require tracking this information on a local level. Mr. Holland stated that the *Samma* and *Kirwa* classes are "drastically different", making this requested relief less feasible. He stated that there is no way to know who has requested N-426 certifications because of this decentralized system.
- f. I asked why reporting might not be feasible across a subset of Army installations, such as the Army's five basic training bases. I also noted that Fort Jackson trains approximately 50% of all incoming Army recruits. Mr. Netter stated that he did not know whether there could be a focus on a subset of installations but that Defendants' counsel could ask Defendants.

- g. I also asked whether reporting in *Kirwa* turned on the fact that class members were recruited through the Military Accessions Vital to the National Interest (“MAVNI”) program and noted that a subset of the *Samma* class was also recruited through that program. Mr. Netter said he did not have an answer to this question but that Defendants’ counsel could also ask Defendants.
- h. **Notice to Class Members:** I asked Defendants’ counsel for an update on providing notice to service members in light of Defendants’ counsel’s statement in their July 2, 2021 letter that Defendants were “exploring various methods to further disseminate information such as by using Army’s social media channels.” Mr. Holland stated that younger service members use social media and that it therefore tends to be a more effective way of reaching them and that the Army was excited to use this avenue to disseminate information.
- i. I asked whether Defendants had begun disseminating information about N-426 certification on their social media channels and Defendants’ counsel answered in the negative. I asked whether Defendants’ counsel could provide a timeline for such dissemination and Defendants’ counsel also answered in the negative.

18. **Next Steps:** Mr. Netter stated that Defendants’ counsel would update class counsel with a timeline regarding Defendants’ proposed steps as soon as possible. I expressed surprise and disappointment both in the nature of the steps proposed and the lack of urgency from Defendants, namely the failure to undertake any of the steps proposed in Defendants’ counsel’s July 2, 2021 letter. I stated that Plaintiffs would have to give further thought as to whether Court involvement would be necessary to resolve non-compliance. Mr. Netter stated that Defendants wanted to reinforce that they have been giving class counsel’s letters their attention and that

beyond individual N-426 certifications, they are looking for concrete steps to resolve the issues raised by Plaintiffs.

**IV. Communications between Class Counsel and Defendants' Counsel from July 16 to August 16, 2021**

19. Between July 16 and August 16, 2021, class counsel exchanged communications with Defendants' counsel regarding non-compliance with the Order. Attached as Exhibit 27 is a true and correct copy of that email thread.

20. On July 16, 2021, I sent Mr. Netter an email, attaching a letter, which memorialized and followed up on the July 15, 2021 conference. Attached as Exhibit 28 is a true and correct copy of that letter.

21. On July 23, 2021, I sent Mr. Netter an email, which attached a letter documenting three new cases of non-compliance. Attached as Exhibit 29 is a true and correct copy of that letter.

22. Later that same day, Mr. Netter sent me an email, which attached a letter responding to class counsel's July 16, 2021 letter. Attached as Exhibit 30 is a true and correct copy of that letter.

23. On July 28, 2021, I sent Mr. Netter an email, which attached a letter responding to Mr. Netter's July 23, 2021 letter. Attached as Exhibit 31 is a true and correct copy of that letter.

24. Later that same day at 7:58 p.m., I sent Mr. Netter another email, which attached a letter describing a new case of non-compliance. Attached as Exhibit 32 is a true and correct copy of that letter.

25. Later that same day at 9:35 p.m., Mr. Holland sent me an email, which attached a letter responding to my July 23, 2021 letter. In that email, Mr. Holland also confirmed receipt of my two letters from earlier that day. Attached as Exhibit 33 is a true and correct copy of the letter attached to the email.

26. On July 30, 2021, Mr. Holland sent me an email, which confirmed receipt of my two July 28 letters and stated that Defendants were reviewing those letters and would be in a position to respond the following week.

27. On August 2, 2021, Ms. Mayat sent Mr. Holland an email, which attached a letter responding to Mr. Holland's July 28, 2021 letter. Attached as Exhibit 34 is a true and correct copy of that letter.

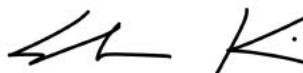
28. On August 6, 2021, Mr. Holland sent me an email, which attached a letter responding to my two letters on July 28, 2021. Attached as Exhibit 35 is a true and correct copy of that letter.

29. On August 12, 2021, Ms. Mayat sent Mr. Holland an email, which attached a letter describing two new cases of non-compliance. Attached as Exhibit 36 is a true and correct copy of that letter.

30. On August 16, 2021, Mr. Holland sent me an email, attaching class member Lichao Li's N-426 certification.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 17, 2021

A handwritten signature in black ink, appearing to be 'SK' followed by a stylized 'K' with a period.

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Scarlet Kim