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

PLAINTIFFS' OPPOSITION TO DEFENDANTS'
"MOTION FOR LEAVE OF COURT TO RESPOND TO PLAINTIFFS' SUBMISSION NO LATER THAN OCTOBER 18, 2021"

Plaintiffs oppose Defendants' motion, ECF No. 74, which despite its odd styling is effectively a motion for a nearly seven-week extension of time to respond to Plaintiffs' Motion to Enforce Court Order, ECF No. 58. A more than three-fold extension of time over the relevant local rule (LCvR 7(b)) is not reasonable under these circumstances because Plaintiffs have made Defendants aware of every incident of non-compliance detailed in Plaintiffs' motion over the past eleven months, and Defendants have known about Plaintiffs' motion and the specific relief it seeks for more than eight weeks. In short, Defendants have *already had* the extended period of time they now seek to respond to Plaintiffs' motion. The Court should not excuse Defendants' inaction in rectifying their disobedience of this Court's August 25, 2020 Order (while punishing

Plaintiffs' extreme patience and subjecting class members to additional prejudice) by further delaying their substantive response to Plaintiffs' motion.[1]

Defendants' request, and the account it recites, are deeply misleading. Defendants represent that "Plaintiffs' filings suggest that they have been developing this record for nearly a year." ECF No. 74 ¶ 8. To be sure, Plaintiffs have been doing just that—and not by mere "suggestion." Defendants have received detailed notice of *every single example* of non-compliance described in Plaintiffs' motion throughout that time. As described in Plaintiffs' motion, for nine months (from September 2020 to June 2021), Defendants failed to redress the non-compliance Plaintiffs brought to their attention, ECF No. 58 at 17–23, and in fact, for over two months (from April 19 to June 22, 2021) ignored entirely Plaintiffs' communications regarding continued non-compliance, *id*. at 23. As Defendants know, their failure to respond *at all* to Plaintiffs' communications prompted Plaintiffs to prepare their motion to enforce—of which they provided notice to Defendants more than eight weeks ago, on June 25. *Id*. As Defendants also know, it was in response to Defendants' subsequent pressing request to postpone the filing of Plaintiffs' motion that Plaintiffs entered into a seven-week period of good-faith negotiations to resolve Defendants' non-compliance short of further litigation. *Id*. at 23–24. Finally, as Defendants know, it was Defendants' failure to resolve *any* of the systemic issues raised by Plaintiffs during the eleven months prior to Plaintiffs' filing of their motion to enforce—including during the extended meet-and-confer period—which compelled Plaintiffs to finally file their motion last week to avoid further delays resulting from Defendants' repeated empty promises and continued defiance of this Court's Order.

[1] As Plaintiffs indicated to Defendants, they consent to a ten-day extension of time, to September 10, 2021. ECF No. 74 ¶ 18.

* * *

First, Defendants' attempt to recast Plaintiffs' motion to enforce as some sort of amended pleading lacks any support. Defendants' lone authority for this argument is an out-of-context snippet from a treatise chapter addressing efforts to hold a party in contempt of court. ECF No. 74 ¶ 5 (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2960). Of course, Plaintiffs have not—at least yet—sought sanctions for Defendants' defiance of the Court's Order. They have sought instead to directly protect the class's rights under the Order by filing a motion to enforce, which this Court has described as "'the usual method for requesting a court to interpret its own judgment' and to compel compliance if necessary in light of that interpretation." *Anglers Conservation Network v. Ross*, 387 F. Supp. 3d 87, 93 (D.D.C. 2019) (quoting *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004)); *see* ECF No. 58 at 35 (explaining, with support, that contempt is one of several means by which a litigant can remedy a party's failure to obey a court order). Indeed, in related litigation, this Court previously resolved a similar motion to enforce by ordering relief nearly identical to what Plaintiffs seek here in response to non-compliance by Defendants—and without any procedural objection from Defendants. *See* ECF No. 58 at 24–25 (describing motion to enforce in *Kirwa v. U.S. Dep't of Def.*, No. 17-cv-1793 (D.D.C.)). As a result, any "analogy to Rule 8" of the Federal Rules of Civil Procedure, ECF No. 74 ¶ 5, is badly misplaced.[2] And, under the rules of this Court, Defendants have 14 days to respond to Plaintiffs' motion—until August 31. *See* LCvR 7(b).

[2] In any event, that analogy appears to be beside the point because in this Court, efforts to hold a party in contempt are initiated by motion, not by an amended or supplemental pleading. *See, e.g.*, *Damus v. Wolf*, No. 18-cv-578, 2020 WL 601629, at *2–3 (D.D.C. Feb. 7, 2020) (denying Plaintiffs' motion for contempt but mandating other measures to enforce injunction); *LaShawn A. ex rel. Moore v. Fenty*, 701 F. Supp. 2d 84, 89–90 (D.D.C. 2010) (granting Plaintiffs' renewed motion for contempt).

Second, Defendants' request for a lengthy extension is unreasonable. This Court's Order permanently enjoined Defendants from withholding class members' requests for certifications of honorable service based on a failure to meet certain durational and type-of-service requirements and ordered Defendants to process requests for certification within 30 days. ECF No. 47 at 2–3. Although Defendants filed a notice of appeal from that Order, they did not seek a stay in this Court or in the Court of Appeals, and have not prosecuted their appeal, first obtaining a series of extensions and then moving to hold the appeal in abeyance. ECF No. 58 at 6. Their ongoing obligation to comply with the permanent injunction is undisputed.

While Defendants' motion gives the impression that Plaintiffs, without warning or transparency, filed "455 pages of submissions" that require the resources needed to address "a complex motion for summary judgment," ECF No. 74 ¶ 7, virtually nothing of substance in Plaintiffs' filing comes as news to Defendants. While it is certainly true that the examples of Defendants' failure to obey the Court's Order are disconcertingly numerous, ECF No. 74 ¶¶ 7–8, those examples demonstrate the need for expedition, not delay. Plaintiffs have been providing Defendants with detailed information about these violations for many months. Indeed, Plaintiffs' motion arises from Defendants' continued non-compliance with this Court's Order for *nearly a year*—since September 2020—over the course of which Plaintiffs repeatedly brought cases of non-compliance to Defendants' attention, in an effort to resolve these issues without the Court's involvement. ECF No. 58 at 7–23, 31–34.[3] Had Defendants wished to investigate and resolve

[3] For example, the ten class member declarations submitted in support of Plaintiffs' motion describe non-compliance incidents that Plaintiffs brought to Defendants' attention in **September 2020**, Mayat Decl., ECF No. 59 ¶ 8; Kutovaya Decl., ECF No. 65 ¶¶ 7-9; **October 2020**, Mayat Decl., ECF No. 59 ¶ 18; Goo Decl., ECF No. 64 ¶¶ 10-17; **February 2021**, Mayat Decl., ECF No. 59 ¶¶ 29–30; Lee Decl., ECF No. 66 ¶¶ 11-12; Rinaldi Decl., ECF No. 69 ¶ 8; **April 2021**, Mayat Decl., ECF No. 59 ¶ 39; Lingamaneni Decl., ECF No. 67 ¶¶ 8-9; Yu Decl., ECF No. 71 ¶ 8; Zong Decl., ECF No. 73 ¶¶ 6-8; **May 2021**, Mayat Decl., ECF No. 59 ¶ 43; Yi Decl., ECF

these violations, the time to do so was when Plaintiffs called them to Defendants' attention. Their previous disinterest in curing their disobedience is not an excuse for further delay now.

Most pertinently to Defendants' motion, Plaintiffs informed Defendants on June 25, 2021—more than eight weeks ago—that they intended to file a motion to enforce the permanent injunction, and they then specifically detailed each mode of relief they would seek. *See* ECF No. 58 at 23–24. At Defendants' urgent request, and relying on Defendants' assurance that Plaintiffs' concerns would now receive attention at high levels of the Departments of Justice and Defense, Plaintiffs forbore filing their motion in order to allow Defendants a further opportunity to investigate and take the actions necessary to comply with the Court's Order. *See id*. For seven weeks, Plaintiffs engaged in a good-faith effort to obtain compliance without seeking the Court's assistance. However, as set out in the motion, Plaintiffs' patience was rewarded with *nothing*: Defendants rejected every reasonable measure Plaintiffs proposed and, instead, counter-proposed unrealistic and ineffective measures (*e.g.* that class members redress non-compliance by openly defying their chains of command). Aside from rectifying a handful of individual class members' cases, Defendants have done little else to redress persistent non-compliance across numerous Army installations. *See id*. at 24–34.[4]

It bears emphasis that Defendants' framing of Plaintiffs' motion as an unanticipated bombshell, one that "abandon[s] the parties' collaborative out-of-court process," ECF No. 74

No. 70 ¶¶ 12-16; Zapata Saucedo Decl., ECF No. 72 ¶¶ 10-12; and **June 2021**, Mayat Decl., ECF No. 59 ¶ 54; Liu Decl., ECF No. 68 ¶¶ 13-15. Stunningly, Defendants cite to the declarations of class members Kutovaya and Goo, whom Plaintiffs first respectively brought to Defendants' attention in *September and October 2020*, as examples where Defendants need additional "time to address dated and extensive allegations." ECF No. 74 ¶ 8.

[4] Defendants claim that they have "worked with Plaintiffs to obtain a certified Form N-426 for each service member that Plaintiffs have identified as encountering a problem." ECF No. 74 ¶ 11. As described in Plaintiffs' motion, this assertion is false. ECF No. 58 at 17–19.

¶ 14, misrepresents this history. Defendants omit that Plaintiffs have regularly brought cases of non-compliance to their attention since September 2020. They omit that for over two months—from April to June 2021—Defendants failed entirely to respond to Plaintiffs' communications regarding non-compliance. They omit that beginning in late June, Plaintiffs engaged in a seven-week meet-and-confer process relying on Defendants' assurance that they would finally redress their months-long defiance of the Court Order. And they omit that during that meet-and-confer process, Plaintiffs specifically sought essentially the same relief they now seek in their motion.[5] Given this context, Defendants' representation that they "reasonably believed that they would be provided with more notice that Plaintiffs would . . . turn to legal process," ECF No. 74 ¶ 14, is preposterous.

Defendants have had substantially more than eight weeks to prepare for (or, better yet, render unnecessary) Plaintiffs' motion to enforce, all the while knowing full well—based on Plaintiffs' conditional willingness to postpone the filing of their motion to allow Defendants time to remedy their non-compliance—that Plaintiffs' motion might be forthcoming. Their apparent failure, during that time, to "exercise due diligence in preparing a defense," ECF No. 74 ¶ 8, or even "collect . . . their own evidence," *id.* ¶ 9—let alone attempt to promptly *remedy* their non-compliance—is their own fault.

Third, while Defendants casually dismiss as "unlikely" the chance that class members will suffer prejudice from Defendants' requested extension, *id.* ¶ 11, that position unfortunately

[5] Not only did Plaintiffs propose substantially similar measures throughout the meet-and-confer process, but Plaintiffs have requested certain specific measures, such as identifying a point of contact to assist class members experiencing non-compliance and facilitating notice of the Order, *since as early as September 2020*. *See* Mayat Decl., ECF No. 59 ¶¶ 3–13 & Ex. 1, ECF No. 59-1. As noted above, most of these measures are nearly identical to those this Court ordered Defendants to undertake in related litigation as a response to similar non-compliance. *See* ECF No. 58 at 24–25.

reflects Defendants' desultory approach to complying with the Court's Order rather than an honest assessment of the stakes. Defendants apparently believe that because they have eventually procured N-426 certifications in some individual cases brought to their attention by Plaintiffs, their continued and systemic non-compliance with this Court's order is beside the point. *Id.* To the contrary, for nearly a year, class counsel have emphasized, to no avail, that these individual cases reflect persistent and deep-seated non-compliance across multiple military installations. *See* ECF No. 58 at 17–18. Moreover, Defendants ignore that even in cases in which counsel on both sides have become involved, Defendants have taken substantially longer than the 30 days specified in the Court's order to process certification requests. *See* ECF No. 58 at 14–16. And Defendants fail to appreciate that the continued need for class counsel to seek redress for Defendants' failure to process N-426 certification requests by individual class members is the direct result of Defendants' refusal, for the last year, to implement reasonable measures to ensure global compliance with the Court's Order.

Defendants represent that their "recent actions" make the possibility of prejudice "even less likely." ECF No. 74 ¶ 12. What Defendants are referring to is a single action, taken *three days after* Plaintiffs finally filed their motion to enforce. On August 20, the Army apparently issued an order—which Defendants have refused to share with Plaintiffs—directing officers to comply with the Court's Order. *See id.*; *see also* ECF No. 60-11 at 4 (Plaintiffs request Defendants share a copy of the order); ECF No. 60-15 at 1 (Defendants refuse Plaintiffs' request). It is not clear how different this order is from previous orders that have not resulted in

compliance. *See* ECF No. 58 at 6–7. In any event, Defendants' last-minute issuance of an undisclosed order is not a basis for delaying their response to Plaintiffs' pending motion.[6]

Finally, contrary to Defendants' self-serving assessment, and as Plaintiffs have made clear to Defendants over and over again, time is of the essence: new members are joining the class every day, as non-citizens enlist in the Army.[7] Those class members (as well as those already serving whose requests for certifications of honorable service Defendants have unlawfully delayed) are entitled to have Defendants comply with this Court's Order by processing their N-426 requests within 30 days. Yet Defendants seek a 47-day extension of time here. During the course of the parties' meet-and-confer period, Plaintiffs continued to bring to Defendants' attention a steady stream of new cases of non-compliance. *See* ECF Nos. 60-6; 60-9; 60-11; 60-12; 60-14; 60-16. And new violations continue to appear. Earlier this week, for example, Plaintiffs informed Defendants of two new violations emblematic of the non-compliance that has been ongoing for nearly a year. *See* Mayat Decl. ¶ 2 & Exs. 1-2. With each

[6] In a bid to shift responsibility for their own failure to comply with the Court's order, Defendants suggest that "Class Counsel has declined to provide information needed by the Department of Defense to investigate allegations of non-compliance." ECF No. 74 ¶ 13. In fact, Plaintiffs have provided specific information about each class member who experienced non-compliance—including their names, military service numbers, and locations where they experienced non-compliance—sufficient for Defendants to investigate and address these allegations. *See, e.g.* ECF Nos. 60-6; 60-9; 60-11; 60-12; 60-14; 60-16 (documenting class member's experiences of non-compliance and attaching class member N-426 forms, which include military service numbers, enlistment information, and contact information). To be sure, Plaintiffs declined to unearth and provide a lengthy list of questionably relevant information requested by Defendants, most of which was *already in Defendants' possession*, such as the names of class members' drill sergeants. *See* ECF No. 60-13. That *Defendants* demanded this information from *Plaintiffs* rather than initiating their own investigations of specific incidents of non-compliance illustrates why Plaintiffs have been forced to seek relief from this Court.

[7] Defendants have represented that approximately 7,000 lawful permanent residents (*i.e.* green card holders), who make up the majority of the class, enlist in the U.S. military every year. ECF No. 53-1 at 19.

day that Defendants resist compliance with the Order, class members experience further unlawful delays in exercising their right to seek U.S. citizenship.

CONCLUSION

For the reasons given above, the Court should deny Defendants' motion for leave to respond to Plaintiffs' Motion to Enforce by October 18, 2021.[8]

Dated: August 25, 2021

Respectfully submitted,

/s/ *Scarlet Kim*
Scarlet Kim (D.D.C. Bar No. NY0329)
Sana Mayat*
Brett Max Kaufman (D.D.C. Bar. No. NY0224)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
scarletk@aclu.org
smayat@aclu.org
bkaufman@aclu.org

Arthur B. Spitzer (D.D.C. Bar No. 235960)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street, NW, 2nd Floor
Washington, DC 20005
(202) 601-4266
aspitzer@acludc.org

Jennifer Pasquarella
American Civil Liberties Union Foundation
of Southern California
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-5236
jpasquarella@aclusocal.org

*Admitted *pro hac vice*

Counsel for Plaintiffs

[8] As noted above, Plaintiffs do not oppose an extension to September 10, 2021.