

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

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LUCAS CALIXTO, <i>et al.</i> ,)	
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PLAINTIFFS,)	
)	
v.)	Case No. 1:18-cv-01551-ESH
)	
UNITED STATES DEPARTMENT OF THE)	
ARMY, <i>et al.</i> ,)	
)	
DEFENDANTS.)	
)	

**STATUS REPORT REGARDING NEEDED CLASS DISCOVERY, CLASS
CERTIFICATION PROPOSAL, AND RESULTS OF REVIEW OF 13 FILES**

Plaintiffs respectfully submit the following in response to the Court’s July 23, 2019 Order (Dkt. 119), in which the Court directed Plaintiffs to file “a status report that sets forth exactly what discovery, if any, is needed regarding proposed sub-class 2, a proposal for how they intend to proceed with class certification, and confirmation of whether the 13 files produced in discovery contain evidence of any individual receiving notice prior to discharge.” The Order follows the recent revelation that, during the past year of this litigation, Defendants had been misrepresenting in this litigation that hundreds of MAVNI soldiers, who are being treated as having been discharged from the Army, not only had received adequate process under Army regulations but also actually had been discharged from the military. When directed to provide evidence of the notices and discharges, however, Defendants were compelled to admit that, contrary to their prior assurances (including in sworn declarations), no such notice had been given to soldiers and, in fact, most of the soldiers had never been discharged at all. Because Plaintiffs and the Court were proceeding on the mistaken assumption that Defendants’ prior representations were accurate with

respect to soldier discharge status and notice, adjustments need to be made to account for the changed circumstances.

At its core, Plaintiffs' class action complaint remains sound because the key elements that bind the proposed class together have not changed: MAVNI soldiers who want to continue serving in the Army and have been or are being subjected to non-characterized discharge actions without adequate due process are seeking relief from the Court. However, as discussed below, in order to proceed with class certification, Plaintiffs need certain information from Defendants about the circumstances of the putative class members and named plaintiffs/class representatives (current and potential additions).

I. Plaintiffs' Class Discovery Inquiries

Plaintiffs need the following information in order to determine who within the proposed class falls within each proposed sub-class and whether Plaintiffs' sub-class 2 needs to be further divided:¹

1. How many DEP, DTP, and other MAVNIs who could receive a non-characterized discharge are subject to the procedures outlined in the October 26 Memo?
 - a. For these soldiers, produce names and last known contact information, including telephone numbers and personal email addresses.
2. How many DEP, DTP, and other MAVNIs who the Army considers to be currently serving and who could receive a non-characterized discharge are not subject to the procedures outlined in the October 26 Memo?

¹ Plaintiffs are prepared to serve these requests on Defendants in more traditional discovery format, such as requests for production, interrogatories, and Rule 30(b)(6) deposition topics.

- a. For each soldier, why will he/she not be afforded the procedures outlined in the October 26 Memo?
 - b. For these soldiers, produce names and last known contact information, including telephone numbers and personal email addresses, for these soldiers.
3. With respect to the soldiers identified in response to Questions 1 and 2 above, identify by soldier each of the following:
 - a. what specific discharge actions have been taken by the Army with respect to that soldier to date (*e.g.*, USAREC “discharge” order, USAR discharge order, revocation of any orders regarding discharge, reinstatement offer, adverse MSSR notification);
 - b. whether the soldier currently is being restricted from drilling if assigned to a unit;
 - c. whether the soldier has unresolved TRICARE or other service-related insurance coverage issues due to discharge actions taken by the Army;
 - d. whether the soldier has unresolved DFAS invoices due to discharge actions taken by the Army; and
 - e. whether USCIS has been informed that the soldier is currently serving in the Army and when USCIS was provided that information.
4. How many DEP, DTP, and other (*e.g.*, discharged from BCT or AIT and did not receive a characterized discharge) putative class members does the Army consider to currently be discharged from the Army?
5. How many of those discharges (identified in response to Question 4) are attributed by the Army to MSSD reasons?

- a. Produce discharge documentation for these soldiers, including any Chapter 3 notice, Form UF 602-210.21, USAREC “discharge” order, USAR discharge order, and correspondence with the soldier concerning his/her discharge.
 - b. For these soldiers, produce reinstatement offers, any related documentation/correspondence, and last known contact information.
6. How many of those discharges (identified in response to Question 4) are attributed by the Army to non-MSSD reasons?
- a. Produce discharge documentation for these soldiers, including any Chapter 3 notice, Form UF 602-210.1, USAREC “discharge” order, USAR discharge order, and correspondence with the soldier concerning his/her discharge.
 - b. Identify the soldiers, if any, the Army will be offering reinstatement.
 - i. Identify what reinstatement will entail if offered and accepted (*e.g.*, the issues noted in Question 3 above) and which, if any, of these reinstated soldiers will be subject to the procedures of the October 26 Memo.
 - c. Produce last known contact information, including telephone numbers and personal email addresses, for these soldiers.

II. Proposal for Proceeding with Class Certification

Plaintiffs respectfully propose that the Court order the above-requested discovery and then grant Plaintiffs leave to amend their complaint, primarily to account for the class information learned through discovery (including whether additional sub-classes are warranted), allow for named plaintiffs and class representatives to be removed and added to the complaint as appropriate,

and to update the allegations to reflect the discharge information only recently revealed by Defendants.

If the Court does not order the discovery identified above, Plaintiffs request that the Court order Defendants to provide information concerning potential named plaintiffs/class representatives, including their true discharge status, discharge documentation and correspondence, and whether the Army plans to reinstate the soldiers and/or revoke their discharges. This would be similar to the process ordered by the Court in late 2018 prior to Plaintiffs' submission of their Second Amended Complaint.

Following complaint amendment, the parties would provide supplements (of ten pages or less) to their class certification briefing as necessary.

III. No Notice in 13-File Production

Plaintiffs have reviewed the 13 files produced by Defendants on July 19, 2019 and can confirm that no AR 135-178 Chapter 3 notices or UF 601-210.21 forms are within that production. Further, on July 19, 2019, Plaintiffs asked Defendants by email if Chapter 3 notices exist for those 13 discharges (but were not included in the production for some reason), and Defendants' counsel confirmed that Chapter 3 notices do not exist for these individuals.

Dated: July 26, 2019

Respectfully submitted,

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