UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHLON KIRWA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 1:17-cv-01793-ESH**
	)	
UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO REFER THE CASE TO THE MAGISTRATE JUDGE FOR CASE MANAGEMENT PURPOSES (DKT. 66)

Joseph J. LoBue (D.C. Bar No. 484097)
Douglas W. Baruch (D.C. Bar No. 414354)
Jennifer M. Wollenberg (D.C. Bar No. 494895)
Neaha P. Raol (D.C. Bar No. 1005816)
Shaun A. Gates (D.C. Bar No. 1034196)
Katherine L. St. Romain (D.C. Bar No. 1035008)
Webster R. M. Beary (D.C. Bar No. 1041653)
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, D.C. 20006
Telephone: (202) 639-7000
Facsimile: (202) 639-7003
Email: joseph.lobue@friedfrank.com
Email: douglas.baruch@friedfrank.com
Email: jennifer.wollenberg@friedfrank.com

Counsel for Plaintiffs and the Certified Class

INTRODUCTION

Plaintiffs, by and through their undersigned counsel, hereby file this Reply Memorandum in further support of their motion to refer this matter to Magistrate Judge Meriweather for certain case management purposes (Dkt. 66) ("Motion"). As set forth below, Defendants' Opposition Memorandum (Dkt. 67) merely reinforces the need for the requested referral, as it highlights the disparity between the reporting actually being done and the reporting needed to accurately reflect the N-426 process and progress for the class. Defendants' Opposition also demonstrates that hundreds of class members have experienced difficulties obtaining their N-426s due to systemic issues within the Department of Defense ("DoD") and that hundreds more may still not understand their right to obtain an N-426 and/or are currently experiencing difficulties in obtaining their certified N-426s. These problems need to be addressed, as the parties have not been able to resolve them, and they are precisely the type of matters that the Court indicated in the related *Nio* action would be best evaluated and addressed by the Magistrate Judge. For all of these reasons, Plaintiffs respectfully request that the Court grant this Motion and order the referral.

ARGUMENT

A. This Court Made Clear That The Types Of Reporting Issues Plaintiffs Have Raised Should Be Managed And Resolved By The Magistrate Judge

In their Motion, Plaintiffs explained how Defendants are not fulfilling their obligations under the preliminary injunction orders and they are not fully complying with Court-ordered reporting obligations. Plaintiffs did not ask this Court to resolve these issues via this Motion, as the Court indicated clearly, including at the January 23, 2018 conference in the *Nio* action, that disputes over such matters – which are a regular occurrence, often dealing with specific details about the N-426 requests of individual soldiers – could be better managed by the Magistrate Judge in the first instance. Defendants' opposition never challenges the contention that it would be

appropriate to refer such problems or disputes to the Magistrate, and instead relies on the contention that there are no problems or disputes to refer. But, as shown below, that simply is not the case. And even it were true in whole or in part, referral would still be proper to resolve future disputes and to better coordinate reporting between the *Kirwa* and *Nio* actions.

The types of reporting disputes Plaintiffs have identified are akin to those that the Court referred to the Magistrate Judge in *Nio* on the rationale that it would be more efficient for the Magistrate Judge to come up with a reporting system that met the Court's needs and a dispute resolution system that would obviate the need for the Court to address matters on the frequency and in the detail that they have arisen to date.[1]

Indeed, at that *Nio* hearing, the Court recognized that the same types of disputes were being raised in this action. Tr. 30:8-12 ("So what we really need to do is figure out a system so that if they have people giving misinformation, it is corrected. If they have people out there that are not giving the forms when they should be, it gets corrected."); Tr. 56:14-17 ("We did get the Kirwa people moving but even they have not all filed. Once again, I'm not going to be able to address -- there could be as many as a thousand Kirwa people."); Tr. 69:21-24 ("The other thing we want from the magistrate, if there is some way that a mechanism can be worked out. I thought I worked it out for Kirwa and now I find out it is not working out."). Given that the Court already referred the *Nio* action to Magistrate Judge Meriweather for comparable purposes, it would be most efficient to refer similar issues to Magistrate Judge Meriweather in this related case so that a

[1] *See* January 23, 2018 Hearing Transcript ("Tr.") Tr. 30:5-7 ("The Court doesn't exist to say well, Mr. MAVNI here doesn't have this form. We have to do something about it."). Tr. 29:19-30:4 ("You wait and then you complain and your complaints, in some ways, are responded to but not sufficiently because you have this, I guess this backlog of people who are not getting through. So, you either have to come to some agreement on a system or we figure out some other person to deal with this because it can't be like this.").

reporting system can be implemented that provides this Court with critical information about soldiers' progress through the naturalization process, from the soldiers' submission of the N-426 request through final adjudication of the N-400.

Again, in their Opposition, Defendants never claim that referral would be inappropriate for such purposes. Instead, they rest their objection on the mistaken contention that referral is not needed because everything is going smoothly – *i.e.,* no reporting problems and no disputes. But, as summarized below, there is ample evidence to the contrary and, in any event, referral is appropriate to establish a process to timely address reporting problems and disputes that arise in the future.

B. The Parties' Respective Briefs Demonstrate The Existence Of Disputes Which Can Be Managed And Resolved By The Magistrate Judge

Plaintiffs have no interest in raising disputes for no reason. Their one goal all along in this action has been and remains to ensure that all eligible MAVNIs are able to obtain in a timely manner the N-426 certifications from Defendants that are the prerequisite to their submitting their N-400 applications for naturalization. As the Court is well aware, under 8 U.S.C. § 1440(a), all of the class members in *Kirwa* and *Nio* are enlisted soldiers in the Selected Reserve of the Ready Reserve and are eligible to naturalize by virtue of having honorably served in that status. The statute has no active duty requirement, no requirement that soldiers attend or successfully complete basic training, and no requirement that the Army issue a second military suitability determination by virtue of an enhanced background check or otherwise.

In this action, the record is replete with evidence that Defendants – by policy and practice – were denying certified N-426 forms to eligible soldiers. Indeed, this Court issued a preliminary injunction against Defendants' policy of withholding such certifications and the Court required Defendants to both notify eligible class members of their right to obtain N-426s and establish a

process for the swift completion and return of those certifications to class members. The Court separately ordered Defendants to report on the progress of class members with respect to their N-426 requests and certifications. If Defendants had fully complied with those Orders – issued months ago – all class members would have been promptly notified, all class members who wanted N-426s[2] would have submitted N-426 requests, and DoD already would have completed and returned the certified N-426 forms to the soldiers. But there is substantial evidence that the process is not working as the Court intended.

1. **Defendants' Reporting Is Incomplete And Does Not Account For Hundreds Of Class Members**

Plaintiffs contend that Defendants' reporting is incomplete and misleading because, *inter alia*, it neither (a) specifies the date that class members submit their N-426 requests, nor (b) accurately reflects the date when the completed N-426 is returned to the class member. Dkt. 66 at 3-4. Defendants do not seriously debate these contentions, but argue instead that they are not required to provide the first data point and have provided the second. Dkt. 67 at 2-3. Defendants are incorrect. More importantly, without these dates, the Court is not getting the information it ordered and needs to evaluate whether class members are obtaining their N-426s, much less in a timely fashion. This dispute over the scope and accuracy of Defendants' reporting is one that the Magistrate Judge can evaluate and resolve as necessary.

Defendants' reporting obligations are set forth in this Court's November 16, 2017 Order (Dkt. 37), which directs Defendants to report the following:

(1) **how many class members have applied for an N-426**;

[2] We are unaware of any reason why an eligible MAVNI soldier would not want to obtain an N-426 if the circumstances properly were explained to the soldier and there was no miscommunication regarding the soldier's rights. Indeed, as the Court has observed repeatedly, each class member's enlistment contract paperwork instructs the soldier to apply for naturalization at the earliest opportunity. They cannot do so without an N-426.

(2) **when those class members applied for an N-426**;

(3) how many class members have approved N-426s;

(4) when those class members received their N-426 or confirmation that it had been uploaded to the soldier's Army Military Resource Record; and

(5) a list containing the names of the class members who submitted an N-426, **the dates they submitted their N-426s**, and **the date they received their N-426 or confirmation of approval**.

Dkt. 37 at 2 (emphases added).[3]

Defendants readily admit that their bi-weekly reporting does not provide these dates. By their own admission, Defendants are not "counting" any N-426 submissions unless and until they are received by the Office of the Chief of Army Reserves ("OCAR"). Dkt. 67 at 2. But, we know that this date can be days or weeks (and sometimes months) after the class member actually submits the request to his/her commander.[4] As such, the reporting does not capture any of the dozens or

[3] When the Court included the language regarding "confirmation that it had been uploaded to the soldier's Army Military Resource Record," Defendants had not revealed (1) that such confirmation was being sent to a soldier's military email address which a number of MAVNI soldiers have difficulty accessing and (2) that soldiers actually could not access the certified N-426 from the soldier's Military Resource Record until several weeks after the upload.

[4] Defendants are well aware of this gap, as it is evident within numerous emails received directly by Defendants. In the last 10 days alone, MAVNI soldiers have provided to Defendants the following examples of N-426 requests pending for over a month (note: the identifying information provided by the MAVNI soldiers has been omitted below but is available within Defendants' own emails). Because of the deficiencies in Defendants' reporting, not a single one of these soldiers' requests appear on the Defendants' reporting to date:

- "I enlisted as a Active reserves soldier through MAVNI program in March 2016 . . . . I have submitted the Form- N426 for certification . . . on January 08, 2018. Since then I have not received any update. I would be highly obliged if you can suggest a plan of action to address my situation."
- "I submitted my signed N-426 and DA4186 form on 19th of December, 2017 to my unit and haven't receive it back since then. Please let me know if there is something I need to do or a form I need to fill to get my N-426 back so I could go apply for my citizenship. Thank you so much for your audience."

hundreds of N-426 submissions that have been submitted but have not yet been processed by the Army to the point of having been received by OCAR (OCAR's involvement itself is an administrative obstacle that DoD added to the N-426 certification process following the Court's October 25, 2017 preliminary injunction order and one that has been proven to take much longer than the one-day turn-around promised by Defendants in the Court-approved Notice (Dkt. 54-1 at 4-5 ¶7).

Defendants seek to excuse this circumstance by contending that they reported the "OCAR date" in their first post-Order reporting and that the Court merely ordered them, on December 15, 2017 (Dkt. 55), to continue that reporting. Therefore, on Defendants' rationale, their continued reporting of the OCAR date as the date of N-426 submission by class members is entirely proper. Dkt. 67 at 2. But this *fait accompli* response does not mean that there is no dispute for the Magistrate Judge to resolve. To the contrary, Plaintiffs are challenging the OCAR date as non-compliant (or at a minimum inconsistent) with the November 16 Order, and in all events inadequate for reporting purposes because it does not account for class members who submitted N-426 requests but are not reflected in the reporting, and whose N-426 requests are languishing in limbo at some level below OCAR. In this regard, it also is worth noting that while the Court's

---

- "I have submitted request for N-426, when I received an email from [a] Human Resources Sergeant on 12/17/2017. I have not received N-426 yet. I have attended more than one army drill at my unit . . . *By this email, I am not being disrespectful to any one.*"
- "I hope this email finds you well. . . . On December 16, 2017, I submitted a Form N-426 and Form 4187 to my company's designee, per the court injunction dated December 14, 2017. However until today I still have not received a signed copy of the N-426. I was wondering about the state of it and can you please have a look at it for me. Thank you very much."
- "I am a MAVNI pre-basic soldier. I enlisted on March 16, 2016. I had submitted my N-426 to my command in December 2017, but I have not received my signed copy yet. If you could be of any assistance or would like more information about my case, please get back to me. My best point of contact would be my civilian email . . . ."

Order directs Defendants' to "update the chart," it also mandates that Defendants specify the "total number of new N-426s **filed** since the last bi-weekly report." Dkt. 55 (emphasis added). The Court's Order clearly contemplated that the reporting was capturing the date when the soldiers were submitting their requests, not some later date when the Army processed the request to the point of receipt by OCAR.[5]

Indeed, there is cause for concern that hundreds of MAVNIs either have not received the Notice[6] or have had their N-426s snagged in the pre-OCAR administrative process. As of their February 14, 2018 bi-weekly report, Defendants state that "1,309 N-426 requests have been submitted to date, and 1,240 of these requests have been granted." Dkt. 68-2. Given that Defendants have represented that there are approximately 2,500 soldiers in the MAVNI program who have not been naturalized, and that the original *Nio* class (those with N-426s) consisted of

[5] And, Defendants' excuses for using the OCAR date fall flat. First, the claim that DoD is waiting to verify the "soldier-provided" information on the N-426 at OCAR (Dkt. 67 at 2 n.2) ignores the language in the Notice meant to prevent this very type of problem: "**Your commander**, or his or her designee, **must verify the information on the Form N-426** and DA Form 4187 and complete their portion of the DA Form 4187 within one business day of receipt." (Dkt. 54-1 at 4-5 ¶7 (emphases added)). Defendants claim further that "[u]sing this date is also the most administratively feasible and accurate method to centrally manage and track requests for N-426 certification that are made at various local Army Reserve units dispersed across the country." Dkt. 67 at 2 n.2. Yet, commands have tracked N-426 requests, and OCAR knows that, as OCAR has received spreadsheets that include the following fields: "Date N-426 submitted to Command" and "Date forwarded to OCAR."

[6] In a January 12, 2017 email to Plaintiffs, Defendants admitted that the Army did not receive confirmation of receipt of the Notice from 141 MAVNI soldiers and that the "Army has faced challenges in contacting the remaining [141] soldiers for a variety of reasons. . . ." And, soldiers who were contacted by the Army may not have been provided the right instructions, as some soldiers have reported being provided the stale and superseded (by the very terms of the court-approved Notice) October 27, 2017 Army Memo rather than the Court-approved Notice, a number of soldiers received the Notice without Attachment A, and other soldiers – to their surprise and concern – received an extensive, unredacted spreadsheet of MAVNI soldier names, last known addresses, countries of origin, social security numbers, and other data in lieu of Attachment A.

approximately 500 soldiers,[7] this means that hundreds of MAVNIs remain unaccounted for in the N-426 pool. Moreover, Plaintiffs have concerns that the "1,240" N-426 grants identified by Defendants is overstated, since that number appears to include N-426s that were reissued to *Nio* class members (and even some already-naturalized MAVNIs) who were told by DoD or otherwise believed that they needed to obtain new N-426s following the Court's Orders and Notice.

And Plaintiffs have raised serious questions about the accuracy of the N-426 approval/provision dates being reported by Defendants. The operative date, from Plaintiffs' perspective, is when a MAVNI soldier has the completed N-426 in hand such that he/she can include it with his/her N-400 naturalization application submission. Defendants' reporting does not clearly provide that date for all class members. While Defendants contend that they currently are sending the completed N-426s to soldiers via the email addresses provided by the soldiers on the N-426 form,[8] it appears that nearly 200 N-426s were "approved" before that email procedure was put in place,[9] meaning that those soldiers may not yet have received their N-426s or even be aware that they have been approved.

---

[7] *Nio*, Dkt. 17-8 (DoD May 2017 Memo) at 3; *Nio*, Dkt. 26 (DoD July 2017 Memo). And, of course, these numbers do not include any "holdover" MAVNIs or discharged MAVNIs who are included in the class, as these numbers reflected only the then members of the DTP.

[8] It is not clear that this emailing process is successfully occurring, even after Defendants acknowledged that the human resources record process was not working, as on the same date of this Reply filing (February 20, 2018), Major Hollywood (Defendants' declarant (Dkt. 67-2)) sent the following email to OCAR: "The status report I received on 14 FEB 2018 indicates that the N-426 for [MAVNI soldier's name] was certified on 29 JAN 2018. The Soldier contacted me to say he had not yet received a copy." Given Defendants' reporting, Plaintiffs (and the Court) cannot know how many other of the 1,049 MAVNIs reported as "done" by Defendants have not in fact received a copy of their N-426s.

[9] While conferring regarding the Notice before it was approved by the Court, Plaintiffs urged Defendants to email the completed N-426s to the MAVNI soldiers at the N-426 email addresses, given the known problems with the military email addresses and the human resources records. However, for the 172 MAVNI soldiers whose N-426s were approved prior to that Notice being issued on December 14, 2017, Plaintiffs do not know that those MAVNIs actually have received

Notably, Defendants' ultimate statement on this point illustrates the very problem. Defendants claim that there is no problem because "[t]he fact . . . that eighty-five percent of MAVNI soldiers who had requested N-426 certification as of January 30, 2018 had received it, plainly demonstrates that Defendants have been complying with the Court's preliminary injunction order." Dkt. 67 at 3. But, as already shown and discussed above, Defendants' self-assessment is unreliable and misleading since they have not been reporting numbers of MAVNI soldiers who have "requested" N-426 certification, nor have they been reporting numbers of MAVNI soldiers who have actually "received" N-426 certification.[10]

---

the signed/completed N-426s that would enable them to apply for naturalization. For example, the listing on the chart for one MAVNI soldier states that the soldier "applied" for the N-426 on November 2, the Army approved the N-426 on that same day, the Army uploaded the N-426 to the its human resources database on November 27, and the soldier was notified of the certification on November 7 (and Defendants now equate this "notification" column to receipt of the certified N-426 by email (Dkt. 67 at 3)). Defendants have direct knowledge that these entries are wrong, including the last column, because the soldier notified them of that fact by email on December 15, stating the following:

> I am emailing you to seek my certified N-426 form (or the official denial of such for cause). My request for N-426 form certification was made forty-five (46) days ago following the instruction of the old October 27, 2017 ASA(M&RA) memo, and I still have not received a certified N-426 form. My command have not received it either. I emailed my command on October 30, 2017, and on or about November 2, 2017, my command have emailed scanned copies of certified DA 4187 together with my N-426 to usarmy.usarc.ocar.mbx.g1-ops-taskers@mail.mil (pursuant to the old memo). They sent follow up emails on November 16, 2017 and December 4, 2017, but received no reply (even though the email was read). I have checked my AMHRR records. As of yesterday, no N-426 related document was uploaded to my account in iPERM or AKO document sections. Other than the class communication email yesterday, no N-426 related email was sent to my military email box. I was not notified of any N-426 form upload into my online human resource account either.

Ultimately, after a number of additional inquiries, the soldier received an N-426 by email on January 5 (more than two months after making the request and approximately two months later than reflected on Defendants' reporting chart), but it was signed by the Army on January 3 (not on November 2 as indicated on Defendants' reporting chart).

[10] Plaintiffs can provide dozens of examples of inaccuracies in the Defendants' reporting, including within the last column of the report, and can demonstrate that the inaccuracies are known

Plaintiffs are not asking this Court to resolve these disputes via this Motion, but rather are describing these issues here to show that material and urgent disputes remain and to support referral to the Magistrate Judge to sort them out and resolve them.

2. **Defendants' N-426 Process Continues To Impede Class Members**

Beyond resolving disputes about the adequacy of Defendants' reporting, referral to the Magistrate Judge is warranted to develop a dispute resolution mechanism for class members who are confronting roadblocks due to disinformation, misinformation, and confusion emanating from Defendants. Here again, Defendants pretend that there are no problems and, as a consequence, there is no need for any Court involvement at all, let alone oversight by the Magistrate Judge. But the facts demonstrate otherwise.

Defendants point to the declaration of Major Dana Hollywood, an Army administrative law attorney who, in addition to his regular duties, has been "designated" by Defendants as the point of contact for soldiers "who are experiencing difficulty obtaining a certified N-426." Dkt. 67-2 at ¶¶ 2, 3. Yet, Major Hollywood's declaration confirms the need for the relief Plaintiffs are seeking. Major Hollywood reports that in the roughly six-week period since his assignment, he has "personally assisted **more than 500 soldiers** with receiving certified N-426s." *Id.* at ¶ 3 (emphasis added). Although Major Hollywood did not describe the types of difficulties soldiers have encountered, nor did he specify how many of the several hundred soldiers he assisted were referred to him by undersigned class counsel, there is no escaping the fact that a substantial

by Defendants. Further, these inaccuracies will show that the misreporting is skewed in one direction – to make it appear as if the MAVNI soldiers' requested N-426s later in time than they did and received certified N-426s earlier in time than they did. But, Plaintiffs' primary concern is not with these numerous inaccuracies relating to those MAVNI soldiers who finally received certified N-426s, but rather with the lack of reporting and information about the MAVNI soldiers who still have not received N-426s allowing them to apply for naturalization and/or have not been informed properly of their right to request and receive an N-426.

percentage of the soldiers who obtained N-426s experienced some difficulties that required intervention by an Army lawyer. Thus, Major Hollywood's widespread involvement in the process only serves to prove the widespread nature of the problems.

As alarming as the "more than 500 soldiers" helped by Major Hollywood is, it is dwarfed by the number of class member inquiries and calls for help received by undersigned class counsel. As the Court is aware, Plaintiffs established a "*Kirwa* class counsel" email address and it was included in the Court-approved Notice. Dkt. 54-1 at 6-7. To date, Plaintiffs have received and sent well in excess of 1,500 emails regarding MAVNI soldiers who experienced (or are experiencing) difficulty obtaining their N-426s.[11] These communications are in addition to calls and other inquiries fielded by class counsel on the same topic. Plaintiffs do not raise these points to complain or to take issue with the efforts of Major Hollywood,[12] but instead to impart to the Court the magnitude of the challenges that class members are confronting in what should be rather simple and straightforward efforts to obtain their N-426s.

---

[11] Notably, Defendants still have not provided Plaintiffs with class member contact information, which is preventing Plaintiffs from ensuring that class members are aware of the Kirwa class counsel email address, the class action website address, or other means to accurately learn about their rights pursuant to the preliminary injunction order.

[12] Indeed, Plaintiffs are aware of several instances in which Major Hollywood has informed DoD personnel that their actions are not in accord with Defendants' obligations under the Court's PI Orders. For example, on January 5, 2018, Major Hollywood wrote the following (emphases added): "The Soldier has been unsuccessful in his numerous attempts to have his Command complete his DA Form 4187 so that he may request certification of his N-426. **The Command's failure to assist the Soldier is a clear violation of the attached notice from the District Court**. I respectfully request that [the soldier's] command immediately complete the Soldier's DA Form 4187. **Failure to do so could result in your Command being held in contempt of court**." And, two weeks ago, with respect to a different MAVNI's long-standing N-426 request, Major Hollywood instructed DoD personnel to "[p]lease send me the complete DA 4187 without delay. **The unit has two business days to process these forms and we are now at day 48**."

Further, Defendants claim there are no disputes to be addressed because "[c]ounsel for Defendants have responded promptly to Plaintiffs' inquiries and have addressed the issues raised to their best of their abilities, despite the lack of detail provided by Plaintiffs' counsel." Dkt. 67 at 5. First, Plaintiffs would note (and have explained to Defendants on multiple occasions) that every detail regarding these issues are in Defendants' own possession and were brought to Defendants' attention, in many instances, directly by MAVNI soldiers. But, beyond that attempt by Defendants to deflect responsibility, the statement also is inaccurate and unpersuasive because counsel for Defendants have not promptly responded to Plaintiffs' inquiries and have not addressed the issues raised by Plaintiffs. Further, simply sending a response to the email, but not resolving the underlying dispute, does not make the dispute or underlying concern disappear. Below are a few examples of the problems that remain and/or how a "response" from counsel for Defendants has not resolved the issue:

a) On January 30, 2018, counsel for the Defendants emailed Plaintiffs' counsel the following: "You have requested the names and contact information for Kirwa class members. The Army has agreed to provide this information, which we will do shortly." When Defendants did not respond, Plaintiffs reminded Defendants' counsel of this promise on February 15, 2018. Defendants' most recent response on this topic states that the Army is still working on preparing a class list but that even when it is complete, Defendants will still need a Court order to govern its production. These responses are hard to reconcile with (1) Defendants' agreement several weeks ago to provide the contact information "promptly," (2) Defendants' independent obligation, pursuant to the Court order, to have gathered the information in order to disseminate the court-

approved Notice in December,[13] and (3) Defendants' claim that they recently have emailed certified N-426s to over 1,000 of the class members (Dkt. 67 at 3).

b) Defendants claim that there are no problems or disputes here, including because Major Hollywood "has also assisted with other issues, including ensuring that MAVNI soldiers are able to complete and submit naturalization applications while at basic combat training." Dkt. 67 at 4. Yet, Defendants know that statement is inaccurate. Just by reviewing Major Hollywood's declaration, one can see that he (correctly) admits to having helped *only one* such MAVNI soldier. Dkt. 67-2 at 3. In fact, Major Hollywood told Plaintiffs on February 1 that "WRT putting in place a process to ensure MAVNI enlistees are allowed to apply for naturalization as soon as they arrive upon arrival at BCT, DOJ will follow up on that with you." And, when Defendants' Department of Justice counsel did not follow-up with Plaintiffs as promised, one week later in response to Plaintiffs' inquiry, Major Hollywood emailed the following: "WRT identifying the larger population impacted, DOJ has indicated that they will be engaging on that issue. I'm happy to assist on a micro-level (i.e. assisting individual Soldiers) but DOJ will be the action officers for programmatic/policy issues. I am CC'ing Nate Swinton so he can take appropriate action." To date, Plaintiffs have not heard from Defendants' Justice Department counsel on this issue, which remains a concern because class members are shipping to basic training before receiving their N-426s and there needs to be a process in place to ensure that they are allowed to apply for naturalization as soon as they arrive at basic training (where they are restricted from using email, the Internet, and telephones and are surprised to discover that neither DoD nor USCIS are

[13] In a December 5, 2017 email to the parties, the Court wrote the following: "Upon receipt of the Court's signed Notice, defendants should disseminate the Notice to all class members and all military personnel involved in processing the N-426s. DOD should begin collecting names and contact information for all recipients immediately."

providing the regular naturalization at basic training initiative assistance that was provided to thousands of MAVNIs in the past and is still touted by Defendants in materials for MAVNIs) in order to avoid even more delays with respect to their naturalization.

c) During the gap in time when DoD was not certifying N-426s pursuant to the Court's preliminary injunction order and was seeking to justify its delay by claiming that its time was spent sending the Notice to the class,[14] DoD developed the following language to add to Part 7 of Form N-426 (where derogatory information is to be described to USCIS if the soldier's service has been determined to be not honorable by the military branch) of virtually every MAVNI N-426 certified after January 1, 2018 (including those N-426s that DoD claims in its reporting were actually certified before January 1, 2018): "The Army is gathering and processing information in a security screening of the Soldier incident to service in the United States Army. It is possible information gathered in this screening will be found to be derogatory for purposes of continued military service. The Army's security screening is ongoing." Plaintiffs remain concerned about Defendants' inclusion of this language remain because (1) it is unclear whether USCIS is processing MAVNI naturalization applications at all (even "pre-processing") given this language, and (2) this language is being included in MAVNI N-426s that are certified *after* the MAVNI has received a "favorable"

[14] *See* Dkt. 56 at 1 ("Although none of these 686 N-426 requests for certification of honorable service [submitted since November 29] have been granted, the Army anticipates that 'a high percentage' of the pending requests will be completed and returned to the requester this week. . . . The Army has recently experienced reduced personnel staffing during the holiday leave period and has further devoted a significant amount of its resources to distributing the notice to class members authorized by the Court on December 14, 2017." This statement is belied, not only by the fact that that DoD obviously had the time available to develop the language it added to the N-426s that DoD delayed certifying until after January 1, 2018, but also by the fact that, on January 12, 2018, counsel for Defendants touted in an email to Plaintiffs that approximately 95% of the 2,654 MAVNI soldiers in the Army had received the notice by December 20, 2017 – four business days after the Court entered the Order.

adjudication of all of their DoD background checks (and has been notified of a basic training ship date), putting in question the care with which this language is being added to the N-426s.

d) DoD has been issuing contradictory information to MAVNIs regarding N-426s. For example, the two declarants for Defendants' Opposition have been providing contradictory instructions to MAVNIs, to the detriment of the MAVNIs. On December 15, 2017, Lin St. Clair posted the following to a well-known MAVNI social media page (emphasis added): "USAR MAVNIs in the Delayed Training Program. If you have not yet submitted your N-426 to the Office of the Chief, Army Reserve – contact your unit administrator immediately. You can find their name on the attached. The District Court of DC has issued the attached Notice informing you how you can apply to have your N-426 signed. You are entitled to this. **There is no requirement to have attended drill.** You'll notice that I'm the POC on all the Army memos you read. Please stop listening to your friend who can only guess." Yet, when MAVNIs have relied on this post (or have relied on recruiter and other Army personnel instructions that they do not need to attend drills or even should not attend drills), DoD has refused to provide the MAVNIs with an N-426. And, when Mr. St. Clair's social media post was brought to the attention of Defendants, Major Hollywood stated, among other things, the following: "I spoke to Susan Sutherland, Associate Deputy General Counsel (Operations and Personnel), about this after confirming with Mr. St. Clair that he did in fact make the post. Ms. Sutherland's view is it is inaccurate." Plaintiffs are not aware of any attempts by Defendants to address the contradictory messages being provided to MAVNIs, including this one, other than to acknowledge (to Plaintiffs' counsel only) that information being disseminated is wrong.

The reality is that multiple issues remain unresolved and Plaintiffs submit that the most efficient way to have them resolved would be to refer them in the first instance to Magistrate Judge Meriweather.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Motion be granted.

February 20, 2018

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP

/s/ Joseph J. LoBue
Joseph J. LoBue (D.C. Bar No. 484097)
Douglas W. Baruch (D.C. Bar No. 414354)
Jennifer M. Wollenberg (D.C. Bar No. 494895)
Neaha P. Raol (D.C. Bar No. 1005816)
Webster R. M. Beary (D.C. Bar No. 1041653)
Shaun A. Gates (D.C. Bar No. 1034196)
Katherine L. St. Romain (D.C. Bar No. 1035008)
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, D.C. 20006
Telephone: (202) 639-7000
Facsimile: (202) 639-7003
E-mail: joseph.lobue@friedfrank.com
Email: douglas.baruch@friedfrank.com
Email: jennifer.wollenberg@friedfrank.com

Counsel for Plaintiffs