

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

Civil Action No. 1:17-cv-998-PLF

**DECLARATION OF JENNIFER M. WOLLENBERG
IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEY'S FEES, EXPENSES, AND
COSTS PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

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I, Jennifer M. Wollenberg, declare as follows:

1. I am a partner of Morgan, Lewis & Bockius LLP (“Morgan Lewis”) resident in the firm’s Washington, D.C. office and a member of the Litigation Practice Group. I am a member in good standing of the bar of this Court, the U.S. Court of Appeals for the District of Columbia, the State of New York, and the bar of the District of Columbia. I have personal knowledge of the facts stated herein, except those stated on information and belief, and, if called upon, could and would testify competently to them. I submit this declaration in support of Plaintiffs’ Motions for Attorney’s Fees, Expenses, and Costs Pursuant to the Equal Access to Justice Act filed in the above-captioned case.

I. MORE THAN 2,000 MAVNI SOLDIERS HAVE BECOME U.S. CITIZENS AS A RESULT OF THE LITIGATION

2. On May 22, 2019, the Court granted partial summary judgment in Plaintiffs’ favor and vacated Defendant U.S. Citizenship and Immigration Services’ (“USCIS’s”) policy of not processing the naturalization application of MAVNI soldiers until Defendant U.S. Department of Defense (“DoD”) completed separate adjudications, including the Military Service Suitability Determination (“MSSD”). *Nio v. U.S. Dept. of Homeland Security*, 385 F. Supp. 3d 44, 68-69 (D.D.C. Aug. 20, 2020) (ECF 249).

3. A little over a year later, on August 20, 2020, Judge Huvelle entered Judgment in *Nio*, and converted her previously-issued preliminary injunction into a permanent injunction. *See Nio v. U.S. Dept. of Homeland Security*, 2020 WL 6266304 (D.D.C. Aug. 20, 2020) (ECF 307) (“*Nio V*”); *see also* ECF 74 (Oct. 27, 2017 order entering preliminary injunction for the reasons stated on the hearing record and set forth in *Kirwa v. U.S. Dept. of Defense*, 285 F. Supp. 3d 21 (D.D.C. 2017)). The Court permanently enjoined Defendants from (a) “implementing Section III of DOD’s October 13, 2017 Guidance” and from (b) “decertifying, rescinding, recalling, revoking,

or otherwise invalidating plaintiffs' or the class' existing and duly issued Form N-426s, except as related to the conduct of a class member and based on sufficient grounds generally applicable to members of the military for re-characterization of service." *Nio V*, 2020 WL 6266304 at *1.

4. As a direct result of Plaintiffs' success in the litigation and the Court's orders granting relief, more than 2,000 *Nio* class members have naturalized as U.S. citizens.

5. As I explain in detail below, Plaintiffs' seek an award of \$9,757,453 in attorney's fees based on 15,325.5 hours of work and \$34,147 recoverable costs and expenses, for a total requested award of \$9,791,600. Thus, Plaintiffs' counsel devoted an average of 7.7 hours to secure the rights of each *Nio* class member who has been naturalized to date, and seek fees of just under \$4,900 per class member who has been naturalized to date.

II. CLASS COUNSEL'S WORK ON BEHALF OF PLAINTIFFS AND THE CLASS

6. Since the original *Nio* Complaint was filed in May 2017, my partner Douglas W. Baruch and I have served as counsel-of-record for Plaintiffs in the case. *See* Complaint (ECF 1). When this case began, Mr. Baruch and I were with the firm Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank"), and we were assisted by a large team of Fried Frank attorneys and other legal professionals. Mr. Baruch and I joined Morgan Lewis on July 22, 2019 and, with the consent of Plaintiffs, we remained lead counsel in the matter and transitioned it from Fried Frank to Morgan Lewis. Several members of the Fried Frank case team joined Morgan Lewis shortly after Mr. Baruch and I, and they have continued to represent the *Nio* Plaintiffs and class. We have also been assisted by numerous additional Morgan Lewis partners and associates.

7. Petitioners' counsel have worked diligently from the inception of this litigation through the present to ensure that the Plaintiffs are able to seek naturalization as U.S. citizens, as they are entitled to do under Section 329 of the Immigration and Nationalization Act, 8 U.S.C. § 1440.

8. From May 2017 (when my colleagues and I began preparing the original Complaint) through October 2020 (when Defendants filed a now-dismissed appeal to the D.C. Circuit), Plaintiffs' attorneys were engaged in the following exemplary activities necessarily¹ and reasonably performed on behalf of the Plaintiffs and the class members:

- a) Preparing, filing, and serving the initial complaint (ECF 1, May 24, 2017) seeking declaratory and injunctive relief, including factual and legal investigation in support of claims;
- b) Preparing and arguing Plaintiffs' motion for preliminary injunction (ECF 17, June 28, 2017), including related supplemental briefing and extensive ongoing fact investigation;
- c) Preparing and filing an amended complaint (ECF 27, Aug. 4, 2017);
- d) Preparing and briefing Plaintiffs' motion for class certification and appointment of class counsel (ECF 30, Aug. 11, 2017);
- e) Notifying the Court that the case team had filed the closely related case *Kirwa v. Dept. of Defense* (concerning DoD's unlawful failure to provide MAVNI soldiers with form N-426 required for naturalization applications) (ECF 40, Sept. 1, 2017), which was subsequently the subject of several joint filings and hearings;
- f) Opposing Defendants' motion to dismiss the amended complaint (*see* ECF 49, Sept. 15, 2017; ECF 55);

¹ Such activities were necessary due to Defendants' unwillingness to remedy their unlawful conduct. Shortly after filing suit, Plaintiffs' counsel contacted Defendants' counsel seeking to work together to remedy the unlawful conduct that had placed a hold on Plaintiffs' naturalization applications. Not only did Defendants refuse to provide any relief, but they affirmatively and repeatedly denied that any such "hold" had been in place, a contention that the Court later rejected. Defendants even made an implicit admission to the Court, in a June 30, 2017 telephone conference, that its earlier policy was unlawful when stating that USCIS was in the process of developing a new policy and that *this new policy* would be lawful.

- g) Preparing and filing a second amended complaint (ECF 61, Oct. 20, 2017);
- h) Preparing and briefing Plaintiffs' amended motion for class certification and appointment of class counsel (ECF 62, Oct. 20, 2017);
- i) Preparing and briefing Plaintiffs' motion for a temporary restraining order (TRO) and preliminary injunction (PI) to address Defendants' efforts to revoke duly issued N-426 forms and prevent class members from naturalizing (ECF 63, Oct. 20, 2017);
- j) Opposing Defendants' motion to dismiss for failure to state a claim (*see* ECF 80, Nov. 17, 2017);
- k) Extensive efforts to enforce the Court's preliminary injunction (*see, e.g.,* ECF 91-1, Jan. 17, 2018; ECF 94, 105; May 22, May 31, and July 11, 2018 minute orders (citing correspondence)), and related factual investigations;
- l) Review and analysis of the administrative record, and extensive related supplemental information available in related cases, which the Court specifically recognized as pertinent in its rulings (*see, e.g., Nio v. U.S. Dept. of Homeland Security*, 385 F. Supp. 3d 44, 48 n.3 (noting that "DoD compiled a separately administrative record [in *Kirwa*] which contains useful background information"); *id.* at 59 ("This litigation, as well as the *Kirwa* case, has generated an extensive record beyond the *Nio* administrative record."));
- m) Reviewing and analyzing Defendants' answer (*see* ECF 100, Feb. 2, 2018);
- n) Opposing Defendants' motion for protective order (*see* ECF 114, Mar. 14, 2018; ECF 122), and addressing numerous additional protective order

- issues (*see, e.g.*, ECF 194, Oct. 2, 2018);
- o) Preparing a third amended complaint, and briefing a disputed motion for leave to file same (ECF 115, Mar. 14, 2018);
 - p) Opposing Defendants' motion to dismiss the second amended complaint (*see* ECF 116, Mar. 15, 2018; ECF 120);
 - q) Preparing and briefing Plaintiffs' motion for a TRO and PI to address Defendants' ongoing efforts to prevent class members from naturalizing (ECF 119, Mar. 16, 2018);
 - r) Preparing and briefing Plaintiffs' request for consideration of certain items supplemental to the administrative record (ECF 133, Apr. 10, 2018);
 - s) Preparing and briefing Plaintiffs' motion to compel (ECF 141, May 7, 2018), and related review of privilege log and efforts to address Defendants' attorney-client and deliberative privilege claims;
 - t) Notifying the Court that the case team had filed the related case *Calixto v. U.S. Dept. of the Army* (ECF 163, June 30, 2018), which was subsequently the subject of joint hearings;
 - u) Review and analysis of dozens of Court-ordered reports filed by Defendants, and extensive efforts to address reporting misstatements, omissions, flaws, and the need for supplementation, as well as efforts to ensure Defendants' compliance with their obligations;
 - v) Formulating information requests to DOJ/USCIS, communicating with the government concerning requests for additional relevant information, and addressing similar issues with the Court;

- w) Extensive factual investigation to identify misstatements or reporting omissions by Defendants, lack of compliance with Court orders or prior representations to the Court, and continued violations of class members' rights;
- x) Preparing and briefing Plaintiffs' motion for partial summary judgment (ECF 177, Aug. 13, 2018);
- y) Opposing Defendants' cross motion for summary judgment (*see* ECF 186, Sept. 14, 2018), including motion to strike (ECF 204, Oct. 19, 2018);
- z) Opposing Defendants' cross motion for summary judgment (*see* ECF 219, Nov. 30, 2018), including motion to strike in part (ECF 226, Dec. 21, 2021);
- aa) Responding to Defendants' repeated requests for *in camera* review of key evidence;
- bb) Addressing implementation of the Court's orders and injunctions, including among other things Defendant USCIS's continued refusal to process class members' applications until after DoD completed its "background checks" (*see, e.g.*, ECF 252, June 11, 2019; ECF 256, July 5, 2019; ECF 283, Nov. 15, 2019; Ex. 2);
- cc) Addressing Defendants' requests for decertification of the class (*see, e.g.*, ECF 265, Aug. 13, 2019);
- dd) Addressing issues related to the entry of judgment, including extensive communications with opposing counsel and the Court (ECF 307, Aug. 20, 2020);
- ee) Attention to Defendants' notice of appeal (ECF 311, Oct. 21, 2020) and

filing of notice of cross-appeal (ECF 313, Oct. 29, 2020) (both later dismissed);²

ff) Preparing for and participating in four settlement conferences conducted by Magistrate Judge Harvey;

gg) Participating in approximately five hearings before Magistrate Judge Meriweather; and

hh) Participating in approximately 21 hearings before Judge Huvelle.

9. In order to effectively represent the Plaintiff class, class counsel also reasonably and necessarily performed a number of other types of activities, including:

a) Extensive communications with thousands of class members and potential class members on a host of issues, including the case status, the Court's orders and injunctions, updated rules and policies, continued obstructions to the naturalization application process, concerns and inquiries from the class members regarding immigration policy changes and case status updates including weekly reporting. The entire potential *Nio* class is approximately 2,600 soldiers, with soldiers joining the class when they apply for naturalization and "graduating" from the class when their naturalization applications are resolved. Understanding each of the class members' naturalization issues and identifying the class representatives was a complicated but critical task for the case team. The team conducted the

² Plaintiffs' records currently include entries related to these efforts through October 2020. However, upon completion of briefing, Plaintiffs will file a supplement regarding additional recoverable fees associated with the Motion and also will make appropriate adjustments by removing the *de minimis* amounts related to the appeal effort, per the parties' November 2020 agreement that each would be responsible for their own fees and costs of the appeal.

necessary communications via email, through a dedicated website, and through many, many calls, video conferences, and in person meetings. The dedicated email inbox set up for the use of the *Nio* class includes over 26,000 communications. My personal Fried Frank email folder for this case and the related MAVNI cases goes through June 2019 and contains more than 42,000 items;

- b) Attending regular conference calls to discuss and negotiate issues with DOJ/Defendants and communicating frequently with opposing counsel (including approximately 1,000 emails exchanged between class counsel and the “inquiries” mailbox that USCIS was forced to create in the face of repeated problems with its personnel complying with the Court’s preliminary injunction) regarding hearings, information requests, motions, judgments, case scheduling, compliance with reporting obligations, and compliance with the Court’s injunctions and other orders;
- c) Regular internal team member meetings to coordinate case work, keep the team informed of the case status and planning, and to formulate case strategies;
- d) Preparing class member interview questions, interview memos, and surveys for MAVNI soldiers in order to obtain information regarding Defendants’ compliance with Court orders and other obligations;
- e) Identifying representative class members out of approximately 2,600 MAVNI soldiers, interviewing over 200 class members and their counsel regarding their immigration issues, delays, and status, assessing irreparable

harm, and telephone conferences with class members regarding preparation of declarations;

- f) Reviewing and analyzing DoD and/or USCIS policy changes;
- g) Individually reviewing class members' and potential class members' immigration application status, addressing issues on an individual level including reviewing class members' records, reviewing immigration requests for evidence (RFEs), and meeting with class members regarding unfavorable background investigations and discharges and how those were or were not relevant to their naturalization applications;
- h) Additional fact investigation including reviewing Army memoranda, tracking form N-426 issues, analyzing N-426 revocation issues, reviewing N-445 issues, N-400 issues, FOIA requests, DACA policies, and CAF adjudications, reviewing DOD regulations and policies regarding characterization of discharges, and the like;
- i) Tracking the naturalization process for class members, including the timeliness of any adjudication, and communicating with Defendants concerning ongoing issues, including for example, a field office employee who repeatedly failed to comply with the Court's Order and made "mistakes" on four separate occasions with four different class members and referred to the *Nio* lawsuit as "frivolous" *after* the Court had granted relief to the class; and
- j) Consultation with experts and consultants.

10. Much of the foregoing work was necessitated by or lengthened by Defendants'

appalling behavior throughout the course of this litigation, including, for example:

- a) Refusing to provide MAVNI soldiers and their families with the protections of Deferred Action;
- b) Purposefully cutting off MAVNI sources of information, leaving soldiers in the dark about the status of their naturalization applications and the Army's actions and policies regarding MAVNIs;
- c) Attempting to discharge MAVNI soldiers—without due process—on multiple occasions and in such a way that, under current USCIS policy, they would be unable to naturalize on the basis of their military service;
- d) Providing Army recruiters with “loss forgiveness” but only with respect to MAVNIs—encouraging recruiters to try to find ways to drop MAVNIs from the service;
- e) Stopping naturalizing soldiers at basic training locations just as MAVNI soldiers—after months of delay by Defendants—again could have benefitted from that initiative;
- f) Seeking to convince MAVNIs, including those they knew were represented by counsel, to “waive” the very rights that they were pursuing against Defendants;
- g) Falsely characterizing MAVNI soldiers as bad actors when in fact their only “misbehavior” was weekend phone calls to their parents in a foreign country and similar behavior; and
- h) Retaliating against MAVNI soldiers for exercising their legal rights and suing Defendants.

11. Additional work has been necessary since entry of the Court's permanent injunction. Individual class members continue to need information about Defendants' policies and procedures, and the litigation team continues to monitor Defendants' compliance with the Court's orders. The following examples of ongoing "mistakes" would have resulted in eligible MAVNI soldiers failing to naturalize were it not for the extensive work and diligence of class counsel:

- a) Exhibit 1 is a true and correct copy of an email exchange between class counsel and the *Nio* Class Inquiries Team from March 13, 2020, about a soldier who was told his N-426 was invalid and he needed a "new updated and original N-426";
- b) Exhibit 2 is a true and correct copy of an email exchange between class counsel and the *Nio* Class Inquiries Team from November 13, 2019, about a soldier who reported that the USCIS officer who interviewed him refused to certify him without reviewing the soldier's MSSR, in clear contradiction to the Court's summary judgment Order;
- c) Exhibit 3 is a true and correct copy of an email exchange between class counsel and the *Nio* Class Inquiries Team from June 11, 2020, about a USCIS officer in the Houston Field Office who repeatedly ignored the Court's orders regarding processing of MAVNI naturalization applications; and
- d) Exhibit 4 is a true and correct copy of a Notice of Continuance, dated March 16, 2021, issued to a class member demanding he submit a new Form N-426 with the results of an Army security screening attached.³

This last example shows that, as recently as March of this year, three and a half years after the

³ The class member names and PII have been redacted from these exhibits as has been the practice throughout the litigation.

Court first enjoined Defendants' N-426 revocation policy and nearly two years after the Court's summary judgment decision concerning USCIS's MSSR/MSSD policy, a *Nio* class member was told that his application may be denied unless he submits a new N-426 and one that includes the results of his DoD background checks. When this was raised to Defendants, they once again refused to explain how it happened or if anything will be done to prevent similar problems in the future.

12. In summary, *Nio* was a multifaceted class action litigation, requiring expertise of immigration law, military matters, administrative law, and complex class action litigation, that required a large commitment of time and resources by class counsel. The scope of the class action was further complicated by the military context, including the practical considerations around litigation between a servicemember and their command. As I explain below, the total time the Plaintiffs' attorneys devoted to *Nio* was reasonable, necessary, and in keeping with the many moving parts of this large and unusually complex case.

III. HOURS WORKED ON BEHALF OF PLAINTIFFS AND THE CLASS

13. As class counsel, the case team and I have committed to devote the time and resources necessary to litigate this case on behalf of Plaintiffs and the class. Plaintiffs' Motion seeks fees and costs only for counsel's work in the *Nio* case, but that is only one case among four related litigations undertaken by Plaintiffs' counsel related to the MAVNI soldiers. To date, Plaintiffs' counsel has devoted more than 24,000 hours to the related cases *Nio*, *Kirwa v. U.S. Dept. of Defense*, No. 17-cv-1793 (D.D.C.), *Calixto v. U.S. Dept. of the Army*, No. 18-cv-1551 (D.D.C.), and *Miriyeva v. U.S. Citizenship and Immigration Services*, No. 19-cv-3351 (D.D.C.). Other team members and I continue to work with *Nio* and *Kirwa* class members to enforce the Court's permanent injunctions, in addition to continuing to litigate *Calixto* (currently pending before this Court) and *Miriyeva* (currently pending before the D.C. Circuit).

14. As explained below, Plaintiffs' counsel have devoted 15,325.5 hours and \$34,147.22 in recoverable expenditures to the successful resolution of the *Nio* case. At class counsel's market-based standard billing rates, the total value of these time charges is more than \$13.6 million. *See* Ex. 11.

15. Plaintiffs do not seek fees for all of the time their counsel have, in fact, spent on the case, nor do they seek reimbursement for all of their actual costs. Plaintiffs have exercised billing judgment to reduce the amount of time for which they seek fees by approximately 1,320 hours (which is valued at approximately \$962,000 at counsel's standard rates), and do not seek reimbursement for over \$7,900 in costs actually incurred. Hours worked for which Plaintiffs do not seek fees and costs for which they do not seek reimbursement are not included in Exhibit 11 or the other documents submitted in support of the Motion.

16. In addition, the Motion and accompanying exhibits do not include Counsel's time or expenditures after October 2020, including time and expenditures related to this motion for fees and for ongoing work on behalf of the class. Plaintiffs reserve the right to seek fees and costs related to the preparation of their fees motion, and will supplement their motion to seek such fees at an appropriate time after completion of the briefing on the motion.

A. Morgan Lewis

17. From June 2019 to October 2020, a core team of five Morgan Lewis attorneys represented the *Nio* Plaintiffs and the class, four of whom also represented the class while at Fried Frank. Petitioners seek fees for 2,564.1 hours that Morgan Lewis attorneys have devoted to the matter through October 2020. At Morgan Lewis's market-based standard billing rates, the total value of these time charges is \$2,183,377. *See* Ex. 12 (Morgan Lewis summary).

18. Morgan Lewis's work on behalf of the *Nio* class to enforce the Court's permanent injunction and timely address violations of the injunction is ongoing. This ongoing work includes

communicating with and providing assistance to class members who face delays, or the threat of denial of their naturalization applications, from USCIS representatives who improperly question their military service or status as Army Reservists (for example, through requests for evidence, notices of continuance, and/or during their naturalization interviews) and working to resolve these issues so that they do not result in further delays in adjudicating class members' naturalization applications or improper denials by USCIS.

19. Exhibit 6 is an itemized statement showing, after the exercise of billing judgment, the hours and descriptions of the services rendered by Morgan Lewis attorneys for which Plaintiffs seek an award of attorney's fees. The entries were contemporaneously recorded in accordance with Morgan Lewis's customary time entry and billing practices, and this statement was generated from the Morgan Lewis computerized client billing system.

20. I have reviewed the itemized statement of services at Exhibit 6 in detail, and I am satisfied that it accurately reflects the work performed by Morgan Lewis attorneys.

21. As part of my detailed review, I exercised billing judgment, including considering whether to eliminate time as excessive, redundant, or for some other reason in the exercise of discretion. As a result of this process, Plaintiffs have significantly reduced the total hours included in the Motion and for which fees are sought. Plaintiffs have, for example, reduced the amount of Morgan Lewis time for which they seek compensation by approximately 200 hours, or 7% of the total hours recorded in the matter, and do not seek any compensation for the time of more than a dozen different Morgan Lewis attorneys and other professionals who worked on the case.

22. I certify that the time and services reflected in Exhibit 6 were reasonable and necessary to provide the Plaintiffs and class effective representation given the nature and circumstances of the case and our role as class counsel.

B. Fried Frank

23. From May 2017 through November 2019, a team of 21 different Fried Frank attorneys and other legal professionals worked on behalf of the *Nio* Plaintiffs and the class. Petitioners seek fees for 13,013.5 hours that Fried Frank personnel devoted to the matter. At Fried Frank's standard billing rates, the total value of these time charges is \$11,540,802. *See* Ex. 13 (Fried Frank summary).

24. Exhibit 7 is an itemized statement showing, after the exercise of billing judgment, the hours and descriptions of the services rendered by the Fried Frank attorneys and legal assistants for which the *Nio* Plaintiffs seek an award of attorney's fees.⁴ The entries were contemporaneously recorded in accordance with Fried Frank's customary time entry and billing practices, and this statement was generated from the Fried Frank computerized client billing system. I have reviewed the itemized statement of services at Exhibit 7 in detail, and I am satisfied that it accurately reflects the work performed by Fried Frank attorneys and other professionals.

25. Both Fried Frank partner Stephen Juris and I have reviewed the Fried Frank time records in detail and exercised billing judgment, including considering whether to eliminate time as excessive, redundant, or for some other reason in the exercise of discretion. As a result of this process, the *Nio* Plaintiffs have significantly reduced the total hours included in the Motion and for which fees are sought. Plaintiffs have, for example, reduced the amount of Fried Frank time for which they seek compensation by approximately 1,100 hours, or 8% of the total hours recorded in the matter, and do not seek any compensation for the time of 18 different Fried Frank attorneys and other professionals who worked on the case.

⁴ The information in Exhibits 6 and 7 was provided to Defendants in December 2020 when Plaintiffs provided copies of Morgan Lewis's and Fried Frank's billing records. Plaintiffs have exercised billing judgment to exclude from their fee request an additional 252.1 law clerk hours that had been included in the Fried Frank records previously provided to Defendants.

26. I certify that the time and services reflected in Exhibit 7 were reasonable and necessary to provide the Plaintiffs and class effective representation given the nature and circumstances of the case and our role as class counsel.

27. Exhibit 11 is a summary of Class Counsel's hours and standard rate fees from May 2017 to through October 2020 as reflected in Exhibits 6 and 7.

28. Exhibit 12 is a summary of Class Counsel's hours and standard rate fees for Morgan Lewis personnel as reflected in Exhibit 6.

29. Exhibit 13 is a summary of Class Counsel's hours and standard rate fees for Fried Frank personnel as reflected in Exhibit 7.

IV. PLAINTIFFS' REQUESTED HOURLY RATES

A. Class Counsel's Standard Rates and Fees

30. As discussed above and also shown in Exhibits 6 and 7, class counsel devoted 15,557.6 to the *Nio* case through October 2020. *See also* Ex. 5 (summary of class counsel's total hours through October 2020, after the exercise of billing discretion). At class counsel's standard rates, this time is valued at \$13,772,590. *See* Exhibit 11 (standard rate summary), 12 (Morgan Lewis detail), 13 (Fried Frank detail).

31. The hourly rates charged by Morgan Lewis and Fried Frank for the services of those attorneys who have represented Plaintiffs and the class are generally commensurate with the rates charged by other attorneys and firms in the Washington, D.C. area for attorneys of similar skill and experience. These actual market-driven rates are generally consistent with market rates for Washington, D.C.-based attorneys who practice complex commercial litigation. *See generally* Baruch Decl. ¶¶ 41-52; Exs. 14, 15, 16, 17, 18.

B. The LSI-Updated Laffey Matrix

32. Plaintiffs have calculated the requested fee award based on the LSI Laffey Matrix

developed by economist Dr. Michael Kavanaugh and available at www.laffeymatrix.com. See Exhibit 19; see also Baruch Decl. ¶¶ 33-39. The LSI Laffey Matrix is frequently used in this Circuit as a conservative measure of prevailing market rates for complex federal litigation in Washington, D.C. See Baruch Decl. ¶¶ 37-38 (citing cases).

1. **Methodology**

33. Exhibit 22 sets out the hourly rate under the LSI Laffey Matrix for each attorney or other professional who worked on the *Nio* case and for whom Plaintiffs seek attorney's fees. As explained at <http://www.laffeymatrix.com/see.html>, the LSI Laffey Matrix identifies an hourly rate based on the number of years an attorney is out of law school, calculating "years out of law school" from June 1 of each year. For each attorney, the relevant rate was therefore determined by identifying his or her year of law school graduation, calculating the number of years out of law school, and noting the associated rate in Exhibit 6. For legal assistants, Plaintiffs have used the LSI Laffey Matrix Paralegal/Law Clerk rate for the relevant year.

34. As shown in Exhibit 20, in most cases, the LSI Laffey Matrix rates are significantly lower than class counsel's true market rates.

35. Plaintiffs have calculated the requested fee award based on the LSI Laffey Matrix rates for all but one individual, Brendan McNamara, and in his case seek a lower hourly rate. From 2017 to 2019, Mr. McNamara's standard rate was \$295, \$315 and \$335, respectively; his LSI Laffey Matrix rates would be \$636, \$658, and \$661 for those same years. Because Mr. McNamara's true market rates are lower than the LSI Laffey Matrix rates for attorneys of his experience and seniority, Plaintiffs have calculated their requested award using these lower rates for Mr. McNamara.

36. In addition, it should be noted that Amber Fitzgerald is a 1998 law school graduate who is currently Staff Attorney at Fried Frank. In 2018 and 2019, Ms. Fitzgerald was working as

a Fried Frank Legal Assistant. Plaintiffs have therefore treated Ms. Fitzgerald for purposes of the Motion as a paralegal rather than an attorney, and accordingly have calculated her fees based on the LSI Laffey Matrix paralegal rates for the relevant time periods.

37. Exhibit 23 is a summary showing the number of hours worked each year by each attorney or other legal professional, the associated fees at applicable LSI Laffey Matrix rates, and Plaintiffs' total requested fees.

38. Exhibit 24 is a summary showing the number of hours worked each year by each Morgan Lewis attorney, the relevant LSI Laffey Matrix rates for that attorney, and the associated fees at applicable LSI Laffey Matrix rates. Page 1 of the exhibit reports hours and fees on a calendar year basis. Page 2 of the exhibit provides additional detail and demonstrates that fees are calculated using the applicable LSI Laffey Matrix rate for each month, which change as of June 1 of each year.

39. Exhibit 25 is a summary showing the number of hours worked each year by each Fried Frank attorney or other legal professional, the relevant LSI Laffey Matrix rates for that individual, and the associated fees at applicable LSI Laffey Matrix rates (except in the case of Mr. McNamara who is listed at his standard rates as noted above). Page 1 of the exhibit reports hours and fees on a calendar year basis. Page 2 of the exhibit provides additional detail and demonstrates that fees are calculated using the applicable LSI Laffey Matrix rate for each month, which change as of June 1 of each year.

2. Requested Fee Award

40. Applying the LSI Laffey Matrix rates to the 15,325.5 hours worked, Plaintiffs seek a fee award of **\$9,757,453**. *See* Exs. 23 (summary), 24 (Morgan Lewis detail), and 25 (Fried Frank detail).

C. Plaintiffs' Alternative Request for EAJA Adjusted Hourly Rates

41. If the Court is not inclined to award attorney's fees calculated using a market-based hourly rate, in the alternative, Plaintiffs seek the award of attorney's fees calculated using the EAJA statutory rate after adjustment to account for cost of living increases between March 1996 (when the rate was set) and the time of the *Nio* litigation.

1. Methodology

42. Consistent with the practice within the D.C. Circuit, Plaintiffs have calculated the EAJA adjusted rate by multiplying the \$125 rate set out in 28 U.S.C. § 2412 (d)(2)(A) by the ratio of the Consumer Price Index (CPI-U) for the Washington, D.C. area in each of 2017 through 2020 to the CPI-U for the same area in March 1996, when the rate was set. *See, e.g., Haselwander v. McHugh*, 797 F.3d 1, 4 (D.C. Cir. 2015). Expressed as a mathematical formula, the calculation is:

$$\$125 \times \frac{\text{CPI-U (litigation year)}}{\text{CPI-U (Mar. 1996)}} = \text{EAJA Adjusted Rate}$$

43. A true and correct copy of CPI-U data published by the Bureau of Labor Statistics for the Washington-Arlington-Alexandria (DC-VA-MD-WV) region is attached as Exhibit 26 to the Motion. This document was generated from the Bureau of Labor Statistics website at https://data.bls.gov/timeseries/CUURS35ASA0?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true.

44. Based on the CPI-U data shown in Exhibit 26, the annual EAJA adjusted rate is \$202.19 for 2017; \$206.32 for 2018; \$208.95 for 2019 and \$209.88 for the first half of 2020 (the most recent time period for which data is available). These annual rates were calculated as follows:

Year	EAJA Cost-of-Living Adjusted Rate
2017	$\$125 \times \frac{256.221 \text{ (2017 annual)}}{158.4 \text{ (Mar. 1996)}} = \202.19
2018	$\$125 \times \frac{261.445 \text{ (2018 annual)}}{158.4 \text{ (Mar. 1996)}} = \206.32
2019	$\$125 \times \frac{264.777 \text{ (2019 annual)}}{158.4 \text{ (Mar. 1996)}} = \208.95
2020	$\$125 \times \frac{265.954 \text{ (2020 1st half)}}{158.4 \text{ (Mar. 1996)}} = \209.88

2. Alternative Requested Fee Award

45. Multiplying the annual 2017 – 2020 rates calculated above by the number of hours worked by each attorney, and using the actual rates of legal assistants, yields a total of \$3,181,632 in recoverable fees.

46. Exhibit 27 is a summary showing the number of *Nio* hours worked each year by each attorney or other legal professional, the associated fees at applicable EAJA rates, and Plaintiffs’ total alternative requested fees.

47. As shown in Exhibit 27, class counsel reasonably devoted 15,107.4 attorney hours to the case. At the applicable adjusted EAJA rate for each year, the fees for counsel’s time are \$3,114,816.

48. Class counsel were assisted by paralegals throughout the litigation. Fees for these legal professionals are not subject to the EAJA statutory cap, which applies only to attorney rates. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008) (“[A] prevailing party that satisfies [the] EAJA’s other requirements may recover its paralegal fees from the [g]overnment at prevailing market rates.”); *Conservation Force v. Salazar*, 916 F. Supp. 2d 15, 27 (D.D.C. 2013) (“Paralegal fees are not subject to the EAJA cap, and so may be recovered at prevailing market

rates.”).

49. Paralegals Amber Fitzgerald and H. Hinnant Coleman devoted 218.1 hours to *Nio*, collectively, which at their market-based standard rates is valued at \$66,816.50. *See* Exs. 27 (EAJA summary) & 13 (noting standard rates and standard value fees).

Timekeeper (Legal Asst.)	2017			2018			2019		
	Hrs.	Std. Rate	Std. Rate Fees	Hrs.	Std. Rate	Std. Rate Fees	Hrs.	Std. Rate	Std. Rate Fees
Fitzgerald, A.				24.4	\$350	\$8,540	62.2	\$370	\$23,014
Hinnant, H.C.	45.0	\$255	\$11,475	86.5	\$275	\$23,788			
Total	45.0		\$11,475	110.9		\$32,328	62.2		\$23,014

50. Thus, Plaintiffs seek, in the alternative, an award of \$3,181,632 in fees:

	Hours	EAJA Fees
Attorney time (EAJA adjusted rates)	15,107.4	\$3,114,816
Paralegal time (standard rates)	218.1	\$66,816
Total	15,325.5	\$3,181,632

V. PLAINTIFFS’ COSTS AND EXPENSES

51. Plaintiffs seek reimbursement of \$34,147.22 in costs and other expenses related to the *Nio* litigation.

52. Exhibit 28 is a summary of those costs for which Plaintiffs seek reimbursement, all of which are described in more detail in Exhibits 29 and 30.

53. Exhibit 29 is a report generated from Morgan Lewis’s financial systems setting forth the costs and expenses incurred and contemporaneously recorded by Morgan Lewis for which Plaintiffs seek reimbursement, annotated to identify the relevant cost category for each expense.

54. Exhibit 30 is a report generated from Fried Frank’s financial systems setting forth the costs and expenses incurred and contemporaneously recorded by Fried Frank for which Plaintiffs seek reimbursement.

55. Plaintiffs seek reimbursement of \$621.12 in costs related to the domain and hosting of the “MAVNI Federal Class Action Litigation” website at <https://dcfederalcourtmavniclasslitigation.org/>, as well as costs for the use of WordPress, the software used to modify and maintain the website. True and correct copies of invoices related to these website costs are attached as Exhibit 31 to the Motion. Plaintiffs’ counsel has used, and continues to use, this website as a critical tool to communicate with Plaintiffs, class members, and potential class members in the MAVNI class actions.

56. Class counsel also incurred \$13,574.28 in expenses related to the monitoring of several relevant co-pending cases involving MAVNI soldiers or related issues. *See* Exs. 29 & 30. These costs (which are categorized as “Data Research – Mng Atty” in Fried Frank’s financial systems) related to the monitoring of relevant contemporaneous cases involving class members, citizenship issues, or other relevant issues. This monitoring was in direct support of counsel’s work in the litigation, and in fact proved quite valuable as it enabled counsel to identify certain positions taken by the government before Judge Huvelle as inconsistent with its positions in these other matters.

57. The charges identified in Exhibits 28 – 30 for electronic research, docket monitoring, copying, and teleconferencing are of the same type and at the same rate that counsel charge to their clients in the normal course of business. In addition, counsel regularly charge their clients for their actual courier, postage, court reporting, and filing fee costs, as well as the actual cost of special projects such as the MAVNI website, in the normal course of business.

VI. PLAINTIFFS’ TOTAL REQUESTED FEES, COSTS AND EXPENSES

58. In sum, Plaintiffs seek an award of \$9,757,453 in attorney’s fees and \$34,147 recoverable costs and expenses, for a total requested award of \$9,791,600.

VII. ADDITIONAL EVIDENCE

59. Exhibit 8 consists of true and correct copies of professional biographies for Morgan Lewis attorneys Douglas W. Baruch, Kayla S. Kaplan, Melis Kiziltay Carter, Neaha Raol, and myself.

60. Exhibit 10 is a true and correct copy of Lorelei Laird, *When things go wrong, immigrants serving in the military look to Margaret Stock*, ABA J. (Jan. 1, 2019), https://www.abajournal.com/magazine/article/immigrants_military_margaret_stock_mavni.

61. Exhibit 32 is a true and correct copy of the declaration of Plaintiff Kusuma Nio.

62. Exhibit 33 is a true and correct copy of the declaration of Plaintiff Ye Liu.

63. Exhibit 34 is a true and correct copy of the declaration of Plaintiff Emeka Udeigwe.

64. Exhibit 35 is a true and correct copy of the declaration of Plaintiff Jae Seong Park.

65. Exhibit 36 is a true and correct copy of the declaration of Plaintiff Wanjing Li.

66. Exhibit 37 is a true and correct copy of the declaration of Plaintiff Haendel Crist Calisto Alves de Almeida.

67. Exhibit 38 is a true and correct copy of the declaration of Plaintiff Shu Cheng.

68. Exhibit 39 is a true and correct copy of the declaration of Plaintiff Seung Joo Hong.

69. Exhibit 40 is a true and correct copy of the declaration of Plaintiff Lucas Calixto.

70. Exhibit 41 is a true and correct copy of the declaration of Plaintiff Prashanth Batchu.

71. Exhibit 42 is a true and correct copy of a press release dated June 11, 2018 titled “AILA Presents the MAVNI Litigation Team of Fried, Frank, Harris, Shriver, & Jacobson LLP with the 2018 Jack Wasserman Memorial Award.”

72. Exhibit 43 is a true and correct copy of Alex Horton, *The Pentagon promised citizenship to immigrants who served. Now it might help deport them.*, Wash. Post (June 26, 2017),

available at <https://www.washingtonpost.com/news/checkpoint/wp/2017/06/26/the-pentagon-promised-citizenship-to-immigrants-who-served-now-it-might-help-deport-them/>.

73. Exhibit 44 is a true and correct copy of Alex Horton, *Army Abandons legal effort to expel an immigrant soldier on Path to Citizenship*, Wash. Post (July 17, 2018), available at <https://www.washingtonpost.com/news/checkpoint/wp/2018/07/17/army-abandons-legal-effort-to-expel-an-immigrant-soldier-on-path-to-citizenship/?noredirect=on>.

74. Exhibit 45 is a true and correct copy of Alex Horton, *The Army is trying to find criminal conduct among immigrant recruits, email shows*, Wash. Post (Sept. 19, 2018), available at <https://www.washingtonpost.com/national-security/2018/09/19/army-is-trying-find-criminal-conduct-among-immigrant-recruits-email-shows/>.

75. Exhibit 46 is a true and correct copy of Dave Philipps, *The Army Stopped Expelling Immigrant Recruits. But an Email Suggests It's Still Trying.*, NY Times (Sept 18, 2019), available at <https://www.nytimes.com/2018/09/19/us/army-mavni-immigrant.html>.

76. Exhibit 47 is a true and correct copy of RJ Vogt, *Discharged In The Dark: Immigrant GIs Fight For Due Process*, Law360 (Feb. 24, 2019), available at <https://www.law360.com/articles/1131011/discharged-in-the-dark-immigrant-gis-fight-for-due-process>.

77. Exhibit 48 is a true and correct copy of Daniel Wilson, *Judge Scratches USCIS Policy For Foreign Military Recruits*, Law360 (May 23, 2019), available at <https://www.law360.com/articles/1162461/judge-scratches-uscis-policy-for-foreign-military-recruits>.

78. Exhibit 49 is a true and correct copy of Bernie Pazanowski, *Citizenship Hurdle for Foreign Nationals in U.S. Military Tossed*, Bloomberg Law News (May 23, 2019),

available at <https://www.friedfrank.com/files/PressHighlights/Citizenship%20Hurdle%20for%20Foreign%20~.pdf>.

79. For the Court's convenience, Attachment A to this Declaration is an Index of Exhibits accompanying the Motion.

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

Dated: April 9, 2021



Jennifer M. Wollenberg

Nio v. U.S. Dept. of Homeland Security, No. 1:17-cv-998 (D.D.C.)

**Index of Exhibits to Plaintiffs' Motion for Fees, Expenses, and Costs
Pursuant to the Equal Access to Justice Act**

Exhibit	Description
1	Email from Nio Class Inquiries Team (Michelle Wong) to Neaha Raol, et al. (Mar. 13, 2020)
2	Email from Nio Class Inquiries Team (Michelle Wong) to Neaha Raol, et al. (Nov. 13, 2019)
3	Email from Nio Class Inquiries Team to Neaha Raol, et al. (June 11, 2020)
4	Notice of Continuance (Mar. 16, 2021)
5	Class Counsel's Hours
6	Morgan Lewis Timesheets
7	Fried Frank Timesheets
8	Morgan Lewis attorney biographies
9	Other attorney biographies
10	Lorelei Laird, <i>When things go wrong, immigrants serving in the military look to Margaret Stock</i> , ABA J. (Jan. 1, 2019), https://www.abajournal.com/magazine/article/immigrants_military_margaret_stock_mavni
11	Class Counsel's hours and standard rate fees (all counsel)
12	Morgan Lewis Standard Rate Fees
13	Fried Frank Standard Rate Fees
14	Peer Monitor (Nov. 2019 – Dec. 2020)
15	Class Counsel's 2020 Standard Rates & applicable LSI Laffey Matrix Fees Compared to Peer Monitor (Am Law 100)
16	2018 Real Rate Report
17	2020 Real Rate Report
18	Class Counsel's Standard Rates Compared to Real Rate Report
19	LSI <i>Laffey</i> Matrix
20	Class Counsel's Standard Rates Compared to LSI <i>Laffey</i> Matrix Rates
21	LSI <i>Laffey</i> Matrix Rates Compared to Real Rate Report
22	Class Counsel's Hourly Rates – LSI <i>Laffey</i> Matrix
23	Class Counsel's Hours and LSI <i>Laffey</i> Matrix Fees
24	Morgan Lewis LSI <i>Laffey</i> Matrix Rates and Fees
25	Fried Frank LSI <i>Laffey</i> Matrix Rates and Fees
26	CPI-U for Washington, D.C. area
27	Class Counsel's EAJA Adjusted Rates and Fees
28	Summary of Costs and Expenses

Exhibit	Description
29	Morgan Lewis cost detail
30	Fried Frank cost detail
31	GoDaddy.com Invoices
32	Declaration of Plaintiff Kusuma Nio
33	Declaration of Plaintiff Ye Liu
34	Declaration of Plaintiff Emeka Udeigwe
35	Declaration of Plaintiff Jae Seong Park
36	Declaration of Plaintiff Wanjing Lee
37	Declaration of Plaintiff Haendel Crist Calisto Alves de Almeida
38	Declaration of Plaintiff Shu Cheng
39	Declaration of Plaintiff Seung joo Hong
40	Declaration of Plaintiff Lucas Calixto
41	Declaration of Plaintiff Prashanth Batchu
42	American Immigration Lawyers Association, "AILA Presents the MAVNI Litigation Team of Fried, Frank, Harris, Shriver, & Jacobson LLP with the 2018 Jack Wasserman Memorial Award," Press Release (June 11, 2018)
43	Alex Horton, <i>The Pentagon promised citizenship to immigrants who served. Now it might help deport them.</i> , Wash. Post (June 26, 2017), available at https://www.washingtonpost.com/news/checkpoint/wp/2017/06/26/the-pentagon-promised-citizenship-to-immigrants-who-served-now-it-might-help-deport-them/
44	Alex Horton, <i>Army Abandons legal effort to expel an immigrant soldier on Path to Citizenship</i> , Wash. Post (July 17, 2018), available at https://www.washingtonpost.com/news/checkpoint/wp/2018/07/17/army-abandons-legal-effort-to-expel-an-immigrant-soldier-on-path-to-citizenship/?noredirect=on
45	Alex Horton, <i>The Army is trying to find criminal conduct among immigrant recruits, email shows</i> , Wash. Post (Sept. 19, 2018), available at https://www.washingtonpost.com/national-security/2018/09/19/army-is-trying-find-criminal-conduct-among-immigrant-recruits-email-shows/ .
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50	Martha Mendoza & Garance Burke, <i>US Army quietly discharging immigrant recruits</i> , AP (July 6, 2018), https://apnews.com/article/38334c4d061e493fb108bd975b5a1a5d