

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. 17-0998 (PLF)

JOINT STATUS REPORT

Plaintiffs Kusuma Nio, *et al.*, on behalf of themselves and the certified class (collectively, “Plaintiffs”), and Defendants the United States Department of Homeland Security, *et al.* (collectively, “Defendants” and together with Plaintiffs, the “Parties”) respectfully submit this Joint Status Report in response to the Court’s March 14, 2022 Order.

On March 18, 2022, counsel for the Parties met and conferred regarding the Parties’ preferences for advancing this attorneys’ fees litigation, including the two mediation options identified in the Court’s Order: (1) referral to either Magistrate Judge G. Michael Harvey or Bankruptcy Judge S. Martin Teel, Jr., or (2) referral to the District Court Mediation Program.

As discussed below, given the relative availability of Judges Harvey and Teel, and in order to advance this dispute to resolution at the earliest opportunity, Plaintiffs believe that referral to Judge Teel would be preferable. Defendants would only be amenable to mediation before Judge Harvey.

Plaintiffs’ Position:

Plaintiffs are amenable to mediation overseen by either Judge Teel or Judge Harvey. Given Judge Teel’s greater availability, Plaintiffs believe that the most efficient way to

determine whether this fees dispute can be resolved by agreement would be for the Court to refer the matter to Judge Teel for mediation. Plaintiffs further believe that both parties would benefit from Judge Teel's familiarity with the underlying subject matter through his current service as mediator in the related case *Calixto v. U.S. Dep't of the Army*, No. 18-cv-1551-PLF (D.D.C.). Judge Harvey, of course, is also familiar with these issues, although less recently, through his mediation sessions in this matter and the related *Kirwa* matter two years ago. And Plaintiffs would be happy to have Judge Harvey serve as mediator, but for his very limited near-term availability.¹

Plaintiffs submit that Defendants' objection to Judge Teel serving as mediator is not well-grounded. While Judge Harvey has some factual background based on the 2019-20 mediation sessions, the dispute here is over attorneys' fees and there is no reason to believe that Judge Harvey is the *only* person capable of effectively aiding the parties in determining whether settlement is possible. Indeed, Plaintiffs suspect that judicial oversight over attorneys' fees applications is far more routine in the bankruptcy matters that Judge Teel regularly oversees. Moreover, Defendants' reference to classified information is off the mark. This is an attorneys' fees recovery dispute. It is not an opportunity for Defendants to relitigate the merits of the underlying dispute. And Judge Huvelle entered preliminary and permanent injunctions, granted summary judgment, and entered a final judgment in Plaintiffs' favor notwithstanding the supposed national security considerations Defendants raised. In fact, Judge Huvelle commented on this very topic more than once, as have other courts. *See, e.g., Nio v. Dept. of Homeland Security*, 385 F. Supp. 3d 44, 67 n.16 (D.D.C. 2019) ("[A]ny information that could bear on national security is collected before the MSSR/MSSD process and thus cannot justify the MSSD

¹ Plaintiffs also are amenable to exploring mediator options through the District Court Mediation Program in order to facilitate a prompt resolution, but Plaintiffs understand that Defendants will not accept that option.

requirement.”); *Kirwa v. Dept. of Defense*, 285 F. Supp. 3d 21, 39 (D.D.C. 2017) (“DOD has given no reasoned justification why certifying a form N-426 for immigration and naturalization purposes implicates our national security.”); *Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1166, n.21 (W.D. Wash. 2019) (rejecting testimony concerning purported MAVNI national security concerns because it was unpersuasive and raised credibility concerns). Moreover, as this Court is aware, the *Kirwa* parties were able to resolve the attorney’s fees claim without reference to classified information, and the *Calixto* mediation also is going forward without it. In any event, if Defendants want to rehash these points in mediation, there is no reason why they could not do so in front of Judge Teel.

Plaintiffs believe that the preferable course is timely mediation before Judge Teel, and Plaintiffs are prepared to mediate this attorneys’ fee dispute in good faith if the matter is referred to mediation.

Defendants’ Position:

Defendants are concerned that mediation will not be successful, as evidenced by the Parties’ opposing positions in this filing. Defendants’ preference is for this Court to decide Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Expenses Pursuant to the Equal Access to Justice Act on the merits. All of the issues are fully briefed and, as the arguments demonstrate, the Parties have thoroughly expressed their opposing positions in this matter. Moreover, Plaintiffs seek nearly 10 million dollars of taxpayer money when the government was more than justified in defending this litigation.

Defendants’ second preference is referral to Judge Harvey. As this Court noted, Judge Harvey’s experience with this case gives him a familiarity with the merits and issues presented by this litigation. While current litigation addresses attorneys’ fees, as Plaintiffs are well aware,

the threshold determination of whether the Government is liable for *any* fees is whether the Government's position was substantially justified in defending the merits litigation. 28 U.S.C. § 2412(d)(1)(A). Accordingly, knowledge of the merits analysis and determinations in this case will be necessary to mediate the attorneys' fees issues. **Additionally, because the issues in *Nio* are distinct from the issues in *Calixto*, the Parties will not benefit by referring this case to any other party as a mediator, including Judge Teel. And considering that time spent in mediation necessarily requires the Parties to expend additional resources to settle this matter, Judge Harvey's familiarity with the underlying issues will streamline this process. Thus, waiting for Judge Harvey reduces additional work for both Parties, given the lengthy and complicated history of this case, and the nature of the classified information that undergirds Defendants' position. Defendants are not willing to attempt mediation with another judge or court mediator.**

Dated: March 24, 2022

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