

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

ANGE SAMMA *et al.*, on behalf of
themselves and others similarly situated,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
DEFENSE *et al.*,

Defendants.

No. 20-cv-1104-PLF

DECLARATION OF JENNIFER M. WOLLENBERG

I, Jennifer M. Wollenberg, declare as follows:

1. I am a litigation partner in the law firm Morgan, Lewis & Bockius LLP. I serve as class counsel in the related litigation of *Kirwa v. U.S. Department of Defense*, No. 17-cv-1793 (D.D.C.), also before this Court. 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 at the request of Plaintiffs' counsel in connection with Plaintiffs' Motion to Enforce the Court's August 25, 2020 Order and Judgment ("*Samma Order*").

2. 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.

3. In addition to serving as class counsel in the related *Kirwa* litigation, I have served on a pro bono basis as counsel to non-citizen soldiers, specifically those who enlisted through the Military Accessions Vital to the National Interest ("*MAVNI*") program, in two other matters involving the U.S. Army and the Department of Defense before this Court. I serve as class counsel in *Nio, et al. v. United States Department of Homeland Security, et al.*, No. 17-cv-0998, and as

plaintiffs' counsel in the putative class action *Calixto, et al. v. United States Department of the Army, et al.*, No. 18-cv-1551.

4. I have been deeply involved with the *Kirwa*, *Nio*, and *Calixto* litigations on behalf of MAVNI soldiers since their inception. My memory is that I have participated as lead counsel on behalf of MAVNI soldiers in every hearing, conference, and argument for those three cases, and I personally have been involved in every written submission to the Court in those three cases. Since 2017, I have spent hundreds of hours each year working on behalf of MAVNI soldiers.

A. Motion to Enforce in *Kirwa*

5. In *Kirwa*, this Court preliminarily enjoined the same Defendants as in this case from withholding N-426 certifications from a class of non-citizens serving in the military—service members in the Selected Reserve of the Ready Reserve (“Selected Reserve”) who enlisted through the MAVNI program. *Kirwa*, 285 F. Supp. 3d 21 (D.D.C. 2017). I understand that the *Samma* class comprises (1) service members serving active duty who enlisted through the MAVNI program and (2) service members who are lawful permanent residents (*i.e.* who did not enlist through the MAVNI program) serving either active duty or in the Selected Reserve.

6. In its Order granting the *Kirwa* plaintiffs' motion for preliminary injunction (“PI Order”), the Court ordered the following relief, among other items:

ORDERED that defendants are preliminarily enjoined from refusing to sign and issue Form N-426s to members of the Selected Reserve pursuant to Section II of DOD's October 13, 2017 Guidance; it is further

ORDERED that defendants are preliminarily enjoined from refusing to certify MAVNI enlistees who have served for one day or more in the Selected Reserve as having honorable service, except as related to the conduct of an individual plaintiff or class member as reflected in that soldier's service record and based on sufficient grounds generally applicable to all members of the military; it is further

ORDERED that, after members of the provisionally-certified class submit or resubmit N-426s to their military officer ranked O6 or higher, defendants should

use their best efforts to certify or deny Form N-426s . . . within two business days of receipt of the Form N-426

Amended Order, *Kirwa*, ECF No. 32 (Oct. 27, 2017). Attached as Exhibit A is a true and correct copy of this Order.

7. On November 15, 2017, the *Kirwa* plaintiffs filed a motion to enforce this Court's PI Order following Defendants' failure to comply with the PI Order, including by failing to appropriately communicate the PI Order to relevant command officials and class members and failing to issue N-426 certifications to eligible class members. Pls.' Mot. to Enforce Court Order, *Kirwa*, ECF No. 35 (Nov. 15, 2017). Attached as Exhibit B is a true and correct copy of this motion.

8. On November 16, 2017, the following day, the Court issued an order, which, among other things, required Defendants to provide the following no later than November 29, 2017 at 5:00 P.M.:

ORDERED that defendants shall inform the Court of its efforts to comply with the Court's Amended Preliminary Injunction Order including, but not limited to, the following:

- (1) all instructions for effectuating the Court's Order issued to command and reserve personnel, and documentation of all such communication; and
- (2) all efforts to communicate and explain the Court's Order issued to class members, and documentation of all such communication.

ORDERED that . . . plaintiffs and defendants will propose a joint communication to be distributed to the class members explaining their rights under the Court's Amended Preliminary Injunction Order. The communication shall be sent by defendants, but if defendants would rather the plaintiffs send the communication, defendants must provide the names, addresses, and contact information for all class members who have not received their N-426; it is further

ORDERED that . . . defendants shall provide the following information:

- (1) how many class members have applied for 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 into the soldier's Army Military Human Resource Record; and
- (5) a list containing the names of class members who submitted an N-426, the dates they submitted their N-426s, and the dates they received their N-426 or confirmation of approval.

Order, *Kirwa*, ECF No. 37 (Nov. 16, 2017). Attached as Exhibit C is a true and correct copy of this Order.

9. On November 29, 2017, Defendants filed their response to the *Kirwa* plaintiffs' motion to enforce and provided much of the above-described information ordered by the Court in its November 16, 2017 Order. Defs.' Mem. in Opp. to Pls.' Mot. to Enforce Court Order, *Kirwa*, ECF No. 41 (Nov. 29, 2017). Attached as Exhibit D is a true and correct copy of this response.

10. On that same date, the parties filed the proposed "joint communication to be distributed to the class members explaining their rights under the Court's Amended Preliminary Injunction Order" pursuant to the Court's November 16, 2017 order. Proposed Joint Communication to Class Members, *Kirwa*, ECF No. 43 (Nov. 29, 2017). Attached as Exhibit E is a true and correct copy of this proposed communication.

11. On December 1, 2017, through a Minute Order, the Court "SUSPENDED until further notice" the *Kirwa* plaintiffs' deadline for filing a reply in support of their motion to enforce. Minute Order, *Kirwa*, (Dec. 1, 2017).

12. Ultimately, the Court did not provide a date for the *Kirwa* plaintiffs' reply but instead communicated to the parties, through a December 5, 2017 email, that the Court would require Defendants to disseminate a Court-approved notice to all class members and military personnel involved in processing N-426 forms. In that email, the Court instructed Defendants to provide a

number of points of contact, including “a point of contact in case an enlistee has not received a copy of his or her completed/signed Form N-426 within 7 business days of submission to the commander or his or her designee.” The Court further instructed that “[t]his may be a DOD attorney . . . who will be responsible for overseeing the process and the contact information should at least include a name, email, or phone number.” The Court informed the parties that “[o]nce this Order and Notice are issued, the Court intends to deny without prejudice the Motion to Enforce with the exception of requiring defendants to provide periodic updates so the Court can gauge defendants’ compliance with the PI.” Attached as Exhibit F is a true and correct copy of this email and attachments.

13. On December 14, 2017, the Court formally ordered the notice relief that it had previously communicated to the parties in its December 5, 2017 email. Order, *Kirwa*, ECF No. 54 (Dec. 14, 2017). Attached as Exhibit G is a true and correct copy of this Order and the attached notice.

14. On December 15, 2017, the Court formally ordered the reporting relief that it had previously communicated to the parties in its December 5, 2017 email:

ORDERED that . . . defendants shall file bi-weekly status reports . . . ; it is further

ORDERED that defendants shall provide the total number of new N-426s filed since the last bi-weekly report and the total number of new N-426s approved since the last bi-weekly report.

Order, *Kirwa*, ECF No. 55 (D.D.C. Dec. 15, 2017). Attached as Exhibit H is a true and correct copy of this Order.

15. Defendants state in their response to the *Samma* Plaintiffs’ motion to enforce that “[t]he *Kirwa* Class Notice was not issued as a remedy for noncompliance with an injunction, but under Rule 23.” ECF No. 80, at 35. I believe Defendants’ claim is incorrect for two reasons..

16. First, Defendants suggest that because “[t]he Kirwa Class Notice order was issued on December 14, 2017, only thirteen days after the Court issued an order granting class certification,” the two are linked. ECF No. 80, at 35. I do not believe that linkage is justified. In fact, Defendants’ attempted linkage does not account for the fact that the Court actually ordered the *Kirwa* parties to craft a joint communication to class members on November 16, 2017—only one day after the *Kirwa* plaintiffs filed their motion to enforce but 15 days *before* class certification and 12 days *before* Defendants notified the Court that they would not be opposing class certification. *See* Order, *Kirwa*, ECF No. 48 (Dec. 1, 2017); Notice of Defs.’ Non-Opp. to Pls.’ Mot. for Class Certification, *Kirwa*, ECF No. 40 (Nov. 28, 2017). Attached as Exhibit I is a true and correct copy of the order granting class certification. Attached as Exhibit J is a true and correct copy of the notice of Defendants’ non-opposition to the motion for class certification.

17. Second, Defendants point to similarity between language in the Court’s order approving the joint communication and Federal Rule of Civil Procedure 23(c)(2). However, the language to which Defendants point is specifically contained in Rule 23(c)(2)(B) and relates to notice to 23(b)(3) classes: “the court must direct to class members the best notice that is practicable under the circumstances.” *Compare* with Exhibit G, at 1 (“The Court finds that the dissemination of the Notice under the terms and in the format provided for herein constitutes the best notice practicable under the circumstances”). The *Kirwa* class was not certified under Rule 23(b)(3). *See* Exhibit I, at 1 (“ORDERED that plaintiffs’ motion for class certification, ECF No. 12, is GRANTED pursuant to Rules 23(a), 23(b)(1)(A), and 23(b)(2) of the Federal Rules of Civil Procedure.”). Rule 23 requires notice only for classes certified under Rule 23(b)(3), and I also recall Judge Huvelle noting, with respect to the *Kirwa* class and/or *Nio* class, that because the class was not certified under Rule 23(b)(3), Rule 23 class notice was not required.

18. Defendants also state in their response to the *Samma* Plaintiffs’ motion to enforce that the reporting requirements ordered by this Court in *Kirwa* were a result of Defendants “voluntarily” deciding “to ‘go through the records DoD has in order to build a comprehensive list of potential class members’” and working with *Kirwa* class counsel to moot out the class. ECF No. 80, at 36–37. That statement is inconsistent with the record and my memory.

19. First, the Court’s Order regarding the reporting requirements emanated directly from its November 16, 2017 Order in response to the *Kirwa* plaintiffs’ motion to enforce, which ordered Defendants to provide “a list containing the names of 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.” Exhibit C, at 2. Further, on December 5, 2017, the Court informed the parties via email: “Once this [anticipated Class Notice] Order and Notice are issued, the Court intends to deny without prejudice the Motion to Enforce with the exception of requiring defendants to provide periodic updates so the Court can gauge defendants’ compliance with the PI.” See Exhibit F. The Court’s subsequent Order, on December 15, 2017, requiring Defendants to “file bi-weekly status reports” instructs Defendants to update the list in the November 16, 2017 Order and to “provide the total number of new N-426s filed since the last bi-weekly report and the total number of new N-426s approved since the last bi-weekly report.” See Exhibit H, at 1. As such, Defendants’ actions were in response to these Court actions and not “voluntary.”

20. Second, there is no connection between the Court’s 2017 orders and Defendants’ comments in 2019, cited by Defendants in their response to the *Samma* Plaintiffs’ motion to enforce, regarding a possible final resolution of the case. See ECF No. 80, at 36–37. In December 2017, Defendants were not working with class counsel to voluntarily moot the class. Instead, at that time, and for many months after, Defendants actively were seeking dismissal of the case and

modification/limitation to the class definition through a motion to dismiss/summary judgment motion, a motion for reconsideration of the Court's denial of the motion to dismiss, and a motion for clarification of the class. *See* Defs.' Mot. to Dismiss, *Kirwa*, ECF No. 39 (Nov. 17, 2017); Defs' Mot. for Reconsideration of Order Denying Defs.' Mot. to Dismiss, *Kirwa*, ECF No. 72 (Feb. 21, 2018); Defs.' Mot. to Clarify Class Cert. Order, *Kirwa*, ECF No. 83 (Apr. 6, 2018).

21. Defendants' first proposal to *Kirwa* class counsel with a plan to "moot" the class that I was able to locate in my case records is from July 23, 2019. Moreover, in a Joint Status Report from August 2019, Defendants acknowledged that the first step of the parties potentially working together to "moot" the class would be identifying the potential class members. *See* Joint Status Report, *Kirwa*, ECF No. 177 (Aug. 30, 2019). Attached as Exhibit K is a true and correct copy of this joint status report. The parties would not still be discussing this possibility in mid-2019—and Defendants would not be characterizing it as a first step—if, in December 2017, Defendants already had started working with us to "moot" the class and the Court-ordered reporting was meant to facilitate that "mooting." Further, the parties never came to agreement on a "mooting" process and never worked together to effectuate "mooting" of the class, which ultimately led to the Court's issuance of the permanent injunction in *Kirwa* on September 2, 2020. *See* Judgment, *Kirwa*, ECF No. 235. Attached as Exhibit L is a true and correct copy of this Judgment.

22. Beyond the 18-month separation between the Court's 2017 orders and Defendants' comments in 2019, Defendants are mixing and matching concepts, as shown by their own words. As Defendants acknowledge, "mooting" the class would have involved "work[ing] with plaintiffs' counsel to identify those that have not yet submitted an N-426." ECF No. 80, at 37. The reporting ordered by the Court in December 2017 was not intended to identify MAVNI soldiers who had not yet submitted an N-426 certification request. Instead, it was intended to identify MAVNI

soldiers who *already* had submitted requests and track Defendants' compliance with the PI Order, which required that Defendants use best efforts to provide the class member with an N-426 certification in two days. *See* Exhibit H.

23. Defendants state in their response to the *Samma* Plaintiffs' motion to enforce that "[t]he *Kirwa* court did not adjudicate the *Kirwa* plaintiffs' motion to enforce the preliminary injunction in that case; it denied that motion as moot in light of its Class Notice Order." ECF No. 80, at 35. While it is technically accurate that the Court denied without prejudice the *Kirwa* plaintiffs' motion to enforce for mootness, it is inaccurate and misleading for Defendants to claim that the *Kirwa* plaintiffs' motion to enforce was not the impetus for the Court's Class Notice Order and to order on-going reporting from Defendants. Indeed, it was these very orders that made the motion to enforce moot.

24. It also is inaccurate for Defendants to suggest that Defendants' notification to class members and the reporting done by Defendants was completed voluntarily by Defendants; they were both Court-ordered obligations, required by the Court because of the *Kirwa* plaintiffs' motion to enforce.

B. Class Notice in *Kirwa*

25. The approved notice (1) explained the case; (2) described the class; (3) explained the Court's PI Order; (4) explained class members' rights pursuant to the Court's PI Order; and (5) explained who class members could contact with questions about the notice or regarding assistance with submitting an N-426 certification—this point of contact information included two Army officials, designated by the Department of Defense ("DOD"), as well as an email address provided for class counsel. *See* Exhibit G.

26. In my experience as *Kirwa* class counsel, the dissemination of this notice helped to ensure that *Kirwa* class members were aware of their rights under the Court's PI Order and were able to obtain their N-426 certifications in the manner specified by that Order. However, as class counsel in *Kirwa* and through my representation of non-citizen service members in the related *Nio* and *Calixto* cases, I have learned that the notice in *Kirwa* could have been more effective if DOD had made efforts to identify and use the most recent/best contact information in its records for service members, which may include their personal email addresses, when sending the notice.

27. In *Kirwa*, Defendants represented that identification of *Kirwa* class members was difficult because Defendants could not readily distinguish at that point in time which class members were eligible for an N-426 certification and had not already received one. The Court therefore instructed Defendants to send the notice to all *potential Kirwa* class members. This order was meant to ensure that (a) existing class members would receive the notice *and* (b) service members who entered the class at a later point in time would still be properly informed of their rights.

28. Based on my experience from *Kirwa*, I believe that a class notice to *Samma* class members would similarly help to ensure that *Samma* class members are aware of their rights under the *Samma* Order and are able to obtain their N-426 certifications in the manner specified by that Order.

29. It is my understanding, however, that issuing notice to service members who enter the *Samma* class at a later point in time may have to be addressed in a different manner than in *Kirwa* because the *Kirwa* class (comprising service members in the Selected Reserve recruited through the MAVNI program) was fixed (since Defendants foreclosed further enlistments through the MAVNI Program after September 30, 2016) while other non-citizens, such as green card holders, can still enlist in the Army and the other military branches. It is therefore my belief that

dissemination of this class notice on a monthly basis to new *Samma* class members would help to ensure that new class members are aware of their rights under the *Samma* Order and are able to obtain their N-426 certifications in the manner specified by the *Samma* Order.

C. Centralized Points of Contact in *Kirwa*

30. The class notice identified two specific and centralized points of contact for *Kirwa* class members who had “not received a copy of [their] completed/signed Form N-426 . . . within 7 business days of submission to [their] commander, or his or her designee.” As explained above, the Court instructed the *Kirwa* parties to include these points of contact in its email of December 5, 2020. *See* Exhibit F. In particular, the notice directed class members to contact MAJ Dana M. Hollywood or MSG Rosa V. Fale, both with the U.S. Army Reserve Command legal office, and provided their email addresses. *See* Exhibit G.

31. In my experience as *Kirwa* class counsel, the two specific and centralized points of contact (and their replacement(s) following retirement, etc.) were especially effective in resolving difficulties *Kirwa* class members experienced in requesting their N-426 certifications, including encountering failure by their chains of command to understand and comply with the Court’s PI Order. As *Kirwa* class counsel, we engaged regularly with the centralized points of contact to resolve *Kirwa* class member N-426 certification issues. In general, the centralized points of contact responded to inquiries within a few days and acted as the liaison to other Army officials who were not familiar with the N-426 certification process or the Court’s PI Order. Without those centralized points of contact, I believe that many *Kirwa* class members would have faced unwarranted and lengthy delays in obtaining their N-426 certifications (and citizenship as a result).

32. I believe that establishing centralized points of contact for *Samma* class members would similarly help resolve difficulties the *Samma* class members experience in requesting and receiving

their N-426 certifications, including encountering failure by their chains of command to comply with the *Samma* Order. One possibility for improving the point of contact process is to have the military points of contact use a shared email address specific to this task so that if any individual point of contact retires or is re-assigned, his/her replacement can step in using the same contact information that has been provided in the notice to the class members.

D. Tracking *Kirwa* Class Members' N-426 Requests

33. This Court ordered Defendants in the *Kirwa* case to provide the Court with certain information regarding N-426 certifications, including “a list containing the names of 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,” in direct response to the *Kirwa* plaintiffs’ motion to enforce. *See* Exhibit C.

34. This Court also subsequently ordered Defendants to “file bi-weekly status reports,” which “provide the total number of N-426s filed since the last bi-weekly report and the total number of new N-426s approved” and attach a list containing names of class members who submitted an N-426 certification request, the dates they submitted their requests, and the dates they received their N-426 certification or confirmation of approval since the last bi-weekly report. *See* Exhibit H.

35. From January 3, 2018 to July 24, 2020, Defendants filed the status reports ordered by this Court. *See, e.g.*, Defs.’ Status Report, *Kirwa*, ECF No. 56 (Jan. 3, 2018); Defs.’ Status Report, *Kirwa*, ECF No. 138 (Jan. 29, 2019); Defs.’ Status Report, *Kirwa*, ECF No. 201 (Jan. 2, 2020); Defs.’ Status Report, *Kirwa*, ECF No. 230 (Jul. 24, 2020). Attached as Exhibit M are true and correct copies of example status reports filed by Defendants in *Kirwa* dated January 3, 2018; January 29, 2019; January 2, 2020; and July 24, 2020.

36. Defendants filed their first status report on January 3, 2018. In their report, Defendants stated that to date, Defendants had received a total of 871 requests for N-426 certification and granted 172 of these requests. *See* Exhibit M at 1.

37. In their report, Defendants attached a Declaration from Linden St. Clair, the Assistant Deputy for Recruiting, Office of the Assistant Secretary for the Army (Manpower & Reserve Affairs). In his declaration, Mr. St. Clair attested to the number of N-426 certifications received and issued to date. *See* Exhibit M, at 3-4.

38. In his declaration, Mr. St. Clair attached a chart to the report, entitled “N-426 Certification Status,” which provided the names of class members who submitted their N-426 certification requests, the dates of their N-426 certification requests, the dates their requests were approved, the dates their N-426 certifications were uploaded into the Army Military Human Resource Record (“AMHRR”), and the dates the class members were notified of their N-426 certification. The public version of the chart redacts the names of individual class members (but the Court instructed Defendants to provide the non-redacted version of these charts to class counsel). *See* Exhibit M, at 5.

39. Defendants’ subsequent status reports similarly provided the total number of N-426s filed and approved since the last report. They also included a declaration attesting to these numbers and an updated chart containing the names of class members who submitted their N-426 certification requests, the dates of their N-426 certification requests, the dates their requests were approved, the dates their N-426 certifications were uploaded into the AMHRR, and the dates the class members were notified of their N-426 certification. *See* Exhibit M.

40. In my experience as *Kirwa* class counsel, Defendants’ bi-weekly status reports were effective in ensuring that Defendants complied with the Court’s PI Order. While Defendants’

reports frequently contained errors, particularly with respect to the dates that a *Kirwa* class member requested an N-426 certification and when the class member received a copy of their N-426 certification, they served an important purpose of having Defendants be regularly accountable to the Court and class counsel for certifying class members' N-426 certifications upon request.

41. It is my opinion that requiring Defendants to produce similar status reports in *Samma* would similarly ensure Defendants comply with the *Samma* Order.

42. Defendants state that Judge Huvelle was not “pleased with the implications of the system that developed in *Kirwa*.” ECF No. 80, at 37. While Defendants selectively quote from two 2018 transcripts as support for their characterization of Judge Huvelle’s feelings, the Court did not discontinue Defendants’ reporting obligations until mid-2020 (and only after verifying through the reporting done in the *Nio* case that approximately 2000 class members had received their N-426 certifications and naturalized as U.S. citizens). Order, *Kirwa*, ECF No. 229 (June 8, 2020). Attached as Exhibit N is a true and correct copy of this Order.

E. Defendants’ Assertions that *Kirwa* Class Members Utilize “Existing Army Mechanisms” to Resolve Non-Compliance

43. I understand that, in *Samma*, Defendants have asserted that where *Samma* class members encounter non-compliance by their chains of command, they must utilize a number of different avenues to seek redress, including contacting legal assistance attorneys, using the “open door” policy, or contacting the Inspector General.

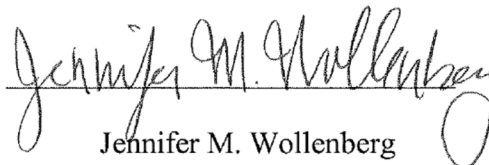
44. Defendants made similar assertions in *Kirwa* in response to the plaintiffs’ motion to enforce the Court’s PI Order. In particular, Defendants stated that *Kirwa* class members should “avail themselves of Army’s ‘open door’ policies which permit a soldier to contact a commander’s superior” and can also “contact their command Inspector General, legal assistance attorneys, and

the listed point of contact on a particular policy if they have concerns about misinformation or miscommunications.” *See* Exhibit D, at 15.

45. As demonstrated by the Court’s Orders and instructions regarding notice, designated points of contact, and regular reporting to the Court, the Court did not find these arguments from Defendants to be particularly persuasive.

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

Executed on October 31, 2021.


Jennifer M. Wollenberg