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 14 and ANTHONY J. LOVERDE

15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17 MICHAEL ALMY, JASON KNIGHT, and
 18 ANTHONY LOVERDE,

19 Plaintiffs,

20 v.

21 UNITED STATES DEPARTMENT OF
 DEFENSE; ROBERT M. GATES, Secretary
 of Defense; DEPARTMENT OF THE AIR
 22 FORCE; MICHAEL B. DONLEY, Secretary,
 Department of the Air Force; DEPARTMENT
 23 OF THE NAVY; and RAY MABUS,
 Secretary, Department of the Navy,

24 Defendants.
 25

Case No. cv 10-5627 (RS)

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION SEEKING LEAVE TO
 FILE FIRST AMENDED
 COMPLAINT; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: May 5, 2011
 Time: 1:30 p.m.
 Place: Courtroom 3, 17th Floor
 Honorable Richard Seeborg

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NOTICE OF MOTION AND MOTION

TO THE UNITED STATES DEPARTMENT OF DEFENSE; ROBERT M. GATES,
Secretary of Defense; DEPARTMENT OF THE AIR FORCE; MICHAEL B. DONLEY,
Secretary, Department of the Air Force; DEPARTMENT OF THE NAVY; and RAY MABUS,
Secretary, Department of the Navy (“DEFENDANTS”) AND THEIR ATTORNEYS OF
RECORD:

PLEASE TAKE NOTICE THAT on May 5, 2011, in the Courtroom of the Honorable
Richard Seeborg, located at 450 Golden Gate Avenue, San Francisco, California, in the hour of
1:30 p.m., Plaintiffs MICHAEL ALMY, JASON KNIGHT, and ANTHONY LOVERDE, by and
through their counsel, will move and hereby do move, pursuant to Federal Rule of Civil
Procedure 15(a)(2) for leave to file their First Amended Complaint. This motion is based on the
accompanying Memorandum of Points and Authorities; the Declaration of M. Andrew
Woodmansee in Support of Plaintiffs’ Motion (“Woodmansee Decl.”); and on all of the
documents and records on file in this action and all matters judicially noticeable.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Twice having asked for the Defendants’ consent to amend their Complaint and twice
4 having been refused, Plaintiffs Michael D. Almy, Anthony J. Loverde, and Jason D. Knight now
5 seek the Court’s leave to file a First Amended Complaint under Federal Rule of Civil Procedure
6 15(a)(2). The purpose of the proposed First Amended Complaint is to limit the relief sought to
7 equitable relief that Defendants agree this Court can award. The proposed Amended Complaint
8 drops requests for relief that Defendants claim are beyond the Court’s jurisdiction and which,
9 Defendants argue, require that this action be transferred to the Court of Federal Claims pursuant
10 to 28 U.S.C. § 1631. (*See* Defs.’ Mot. to Transfer at 2, ECF. No. 19.)

11 Plaintiffs propose the amendment, not because they think it is necessary for jurisdictional
12 purposes, but for the practical purpose of removing any doubt the Defendants — or the Court —
13 may have regarding this Court’s jurisdiction to review and remedy the Defendants’ illegal
14 discharge of Plaintiffs from active duty. The amendment will render moot Defendants’ Motion to
15 Transfer and dissolve the automatic stay, thus expediting a hearing on Plaintiffs’ request to return
16 to active duty service in the military.¹ Defendants have refused to stipulate to the Amended
17 Complaint unless Plaintiffs also disavow all future suits in the Court of Federal Claims relating to
18 Plaintiffs’ potential claims for credit toward retirement for time they would have served on active
19 duty but for their discharges. Defendants maintain that such an “election of remedies” is
20 necessary, but this position is unsupported by the law, including cases cited by Defendants in
21 their Motion to Transfer. *See Witt v. Dep’t of the Air Force*, No. C06-5195 RBL, 2010 WL

22 ¹ When a motion to transfer an action to the United States Court of Federal Claims is filed
23 in district court, no further proceedings shall be taken in the district court until 60 days after the
24 court has ruled upon the motion. 28 U.S.C. 1292(d)(4)(B). Moreover, the statute entitles either
25 party to an interlocutory appeal of the district court’s ruling in the Court of Appeals for the
26 Federal Circuit. *Id.* 1292(d)(4)(A). If an appeal is taken, proceedings shall be further stayed until
27 the appeal has been decided by the Court of Appeals for the Federal Circuit. *Id.* 1292(d)(4)(B).
28 Thus, it is perfectly conceivable that Defendants’ motion will successfully delay any hearing on
the merits for by well over a year. The stay does not, however, prevent the Court from allowing
leave to amend. *See Consolidated Edison Co. v. United States*, No. 98 Civ. 4155 (WK), 1999
U.S. Dist. LEXIS 18561, at *3 (S.D.N.Y. Nov. 29, 1999) (granting motion for leave to amend
complaint where statutory stay was in place under 12 U.S.C. § 1292(d)(4)(B)).

1 3522519 (W.D. Wash. Sept. 7, 2010) (cited on pages 4 and 5 of Defendants’ Motion to Transfer,
2 and providing an example of a district court retaining jurisdiction of the claims involving
3 wrongful discharge and reinstatement, and noting that the other claims could be heard in the
4 Court of Federal Claims); (*see also* Defs. Mot. to Transfer at 4-5, ECF No. 19.)

5 **BACKGROUND**

6 Each of the Plaintiffs volunteered to serve in the United States military. Each of the
7 Plaintiffs deployed to the Middle East as part of this country’s “War on Terror.” Each of the
8 Plaintiffs earned exemplary records in the military. And each of the Plaintiffs was discharged
9 under DADT in violation of his constitutional rights. To remedy this, on December 13, 2010, the
10 Plaintiffs filed a Complaint in this Court seeking equitable relief enabling each of them to return
11 to active duty service. (*See generally* Compl.)

12 As filed, the Complaint made clear that the Plaintiffs did not seek monetary damages.
13 (*See* Compl. ¶¶ 35, 47, 58.) Rather the Complaint requested equitable relief in the form of a
14 mandatory injunction ordering the Defendants to reinstate Plaintiffs and give them the equitable
15 remedy of credit towards retirement for time they would have served if they had not been
16 involuntarily discharged. (*See id.*) Nonetheless, on February 11, 2011, the Defendants filed a
17 motion claiming that the Complaint sought “money damages” in excess of \$10,000, and that the
18 Tucker Act (28 U.S.C. § 1491) required that this case be heard in the Court of Federal Claims.
19 (*See* Mot. to Transfer at 2.)

20 Plaintiffs carefully considered whether they wished to continue with the lawsuit as filed,
21 or to drop the request for retirement credit at this time. Plaintiffs agreed that their priority is
22 returning to service immediately. Consequently, Plaintiffs wish to amend their Complaint so as
23 to achieve this goal as quickly as possible.²

24 ² Plaintiffs expressly reserve all rights they may have to petition for credit toward their
25 retirement for time they would have served on active duty but for their discharges under DADT,
26 and Plaintiff Almy expressly reserves his right to petition for a promotion to the rank of lieutenant
27 colonel (a promotion for which he was recommended while DADT discharge proceedings were
28 brought against him). Plaintiffs reserve the right to commence a separate action in the Court of
Federal Claims to seek this relief. *See Rowe v. United States*, 633 F.2d 799, 802 (9th Cir. 1980).
If Defendants believe they have valid defenses to such an action based on the Complaint in this
case, they can assert them at the appropriate time in the appropriate forum.

1 **LEAVE TO AMEND SHOULD BE GRANTED BECAUSE DEFENDANTS CANNOT**
2 **MAKE THE REQUISITE SHOWING**

3 “Four factors are commonly used to determine the propriety of a motion for leave to
4 amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of
5 amendment.” *Roth*, 942 F.2d at 628. None of these factors is present here, and Plaintiffs’ motion
6 for leave should be granted.

7 In considering whether leave to amend has been sought in bad faith, courts typically
8 examine the purpose of the amendment. *See Owens*, 244 F.3d at 712 (considering whether the
9 defendant provided a credible reason for amending its answer). Here, Plaintiffs seek to amend for
10 the sole purpose of eliminating a request for relief to resolve the purported basis for Defendants’
11 Motion to Transfer. The amendment would have the effect of rendering Defendants’ motion
12 moot, expediting resolution of this matter, narrowing the issues before the Court and limiting the
13 requested remedy.

14 Because the proposed amendment will streamline the case rather than expand it,
15 Defendants cannot plausibly accuse Plaintiffs of seeking to amend for the purpose of causing
16 “undue delay”. *See id.* In fact, Plaintiffs offer the amendment to obviate the need for the Court to
17 hear Defendants’ Motion to Transfer and to dissolve the stay under 28 U.S.C. § 1292(d)(4)(B).
18 Defendants cannot establish either of the first two factors necessary to defeat Plaintiffs’ motion
19 for leave to amend.

20 As to the third factor, Defendants might wrongly argue that any amendment in which
21 Plaintiffs do not disclaim all future claims for retirement credits or other remedies is improper and
22 prejudicial. First, Defendants’ argument that a plaintiff may not maintain a reinstatement case in
23 the district court while retaining the right to bring a claim for retirement credits in the Court of
24 Federal Claims is belied by one of the cases Defendants have cited in their own Motion to
25 Transfer. *See Witt*, No. 06-5195, 2010 WL 3522519, at *2. Second, any purported “prejudice”
26 that Defendants will allegedly suffer is highly speculative. Not only would Defendants’ argument
27 of “prejudice” presuppose that Plaintiffs will be successful in their quest for reinstatement, the
28 argument also assumes that Plaintiffs will then decide to commence an action in the Court of

1 Claims.³ Moreover, any “prejudice” to Defendants (defending a subsequent proceeding seeking a
2 different remedy in the Court of Claims) is insubstantial, especially when compared to the
3 prejudice Plaintiffs will suffer if they are forced to wait another year or two before this Court can
4 reach the merits of their claims and reinstate them to active duty service. If Defendants are
5 correct in asserting that Plaintiffs may not bring a separate action for retirement credit,
6 Defendants can raise that as a defense in the court hearing that case; it is not a question this Court
7 needs to resolve now.

8 Finally, permitting Plaintiffs to amend their Complaint is not futile. When considering
9 whether to grant a motion for leave to amend a complaint, Courts generally consider whether
10 plaintiffs can state a claim likely to survive summary judgment. *See Roth*, 942 F.2d at 628-29
11 (noting that an amendment is futile when plaintiff cannot allege a contract in a breach of contract
12 case). Defendants cannot point to any defect in the proposed amended pleading that is certain to
13 result in summary judgment in favor of Defendants. Defendants cannot make a showing of
14 futility—or any of the four factors for that matter—necessary to defeat Plaintiffs’ motion for
15 leave to amend.

16 Allowing Plaintiffs to amend their Complaint under Rule 15(a), which counsels that courts
17 should allow amendments freely, is consistent with the purpose of the Federal Rules. Rule 1 of
18 the Federal Rules states that all the rules should be “construed and administered to secure the just,
19 speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. Here,
20 the amendment will expedite resolution of this case and reduce costs to the parties and the Court
21 by narrowing the issues in this case solely to the Plaintiffs’ request for reinstatement on active
22 duty service. The amendment will further reduce the burden on the Court and parties by
23 rendering the need for a decision on Defendants’ Motion to Transfer (and subsequent
24 interlocutory appeal of any decision) moot.

25
26 ³ Defendants’ claim of “prejudice” also seemingly concedes the fact that Plaintiffs do have
27 a right to bring this second suit, or else their “prejudice” of having to litigate this second “bite at
28 the apple” would not exist. That is, in fact, consistent with the law from the Ninth Circuit. *See*,
e.g., *Rowe*, 633 F2d at 802.

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CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs leave to file their First Amended Complaint, which is attached to the Declaration of counsel, filed concurrently with this Motion.

Dated: March 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service, are being served this 16th day of March, 2011, with a copy of this document via the Court's CM/ECF system.

/s/ M. Andrew Woodmansee
M. Andrew Woodmansee