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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**

14	MICHAEL D. ALMY, ANTHONY J.)	Case No. 3:10-cv-5627 (RS)
15	LOVERDE, and JASON D. KNIGHT,)	
16)	FEDERAL DEFENDANTS'
17	Plaintiffs,)	OPPOSITION TO PLAINTIFFS'
18	v.)	MOTION SEEKING LEAVE TO FILE
19	UNITED STATES DEPARTMENT OF)	FIRST AMENDED COMPLAINT
20	DEFENSE, ROBERT M. GATES, Secretary of)	Hearing Date: May 5, 2011
21	Defense; DEPARTMENT OF THE AIR FORCE;)	Time: 1:30 P.M.
22	MICHAEL B. DONLEY, Secretary, Department)	Courtroom: San Francisco Courthouse,
23	of the Air Force; DEPARTMENT OF THE)	Courtroom 3 - 17th Floor 450 Golden
24	NAVY; and RAY MABUS, Secretary,)	Gate Avenue, San Francisco, CA 94102
25	Department of the Navy,)	
26	Defendants.)	

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12 **STATUTES**

13 28 U.S.C. § 1491(a)(2) *passim*

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1 **INTRODUCTION**

2 As explained in Defendants’ motion to transfer or, in the alternative, motion to dismiss
3 (Doc. 19), Plaintiffs must clearly and expressly waive all money claims that directly flow from
4 retroactive reinstatement and promotion, *e.g.*, back pay and health care allowances, to proceed
5 in this Court. Not only have Plaintiffs refused to provide such a clear and express waiver of any
6 money claim, they have specifically reserved their “right to commence a separate action in the
7 Court of Federal Claims to seek [money] relief.” *See* Doc. 30 at 3 n.2. Plaintiffs thus intend to
8 split their claims and have their equitable claims for reinstatement first heard in district court,
9 pursuant to the Administrative Procedure Act (APA), and then have their money claims heard in
10 the Court of Federal Claims, pursuant to the Tucker Act. The Court should reject Plaintiffs’
11 attempt to circumvent the exclusive jurisdiction of the Court of Federal Claims, and reject
12 Plaintiffs’ motion for leave to amend their complaint to delete any reference to the “back pay,
13 allowances, or benefits” (Doc. 30 at 4: 22-24) that they intend to pursue in the Court of Federal
14 Claims.

15 Although leave is to be freely given under Fed. R. Civ. P. 15(a)(2), that is only “when
16 justice so requires.” Justice would not be served by permitting Plaintiffs to circumvent the
17 Court of Federal Claims’ exclusive jurisdiction. As explained in Defendants’ motion (Doc. 19),
18 Congress specifically amended the Tucker Act, in 1972, and added 28 U.S.C. § 1491(a)(2), to
19 ensure that the equitable and money relief Plaintiffs seek could be adjudicated in *one*
20 proceeding before the Court of Federal Claims. Plaintiffs’ attempt to remedy the jurisdictional
21 defects in their complaint by simply deleting money claims that they fully intend to pursue is
22 futile. Creative pleading does not defeat exclusive Tucker Act jurisdiction.¹

23 _____
24 ¹ Should the Court permit Plaintiffs to proceed in this Court, Defendants would oppose any
25 subsequent attempt by Plaintiffs to bring a claim for money in the Court of Federal Claims based
26 on the same operative facts. Moreover, both in this Court and in the Court of Federal Claims,
27 Defendants believe there are substantial grounds for dispositive motions that would result in
28 dismissal of some or all of Plaintiffs’ claims in advance of trial. Accordingly, although
jurisdiction is appropriate only in the Court of Federal Claims and not in this Court, nothing in
this filing should be read to suggest that Plaintiffs’ claims would survive Defendants’ anticipated
Motion to Dismiss or a Motion for Summary Judgment in either forum.

1 should not be permitted and the motion should be denied.

2 **II. Plaintiffs’ Motion for Leave to Amend their Complaint Should Be Denied Because**
3 **Plaintiffs’ Attempt to Circumvent The Exclusive Tucker Act Jurisdiction**
4 **Congress Created in 28 U.S.C. § 1491(a)(2) Would Cause Unnecessary Delay,**
5 **Prejudice Defendants, and Fail to Remedy the Jurisdictional Defects in the**
6 **Complaint**

7 **A. Congress Enacted 28 U.S.C. § 1491(a)(2) to Provide the Relief Plaintiffs**
8 **Intend to Pursue for their Alleged Wrongful Discharge**

9 In 1972, Congress amended the Tucker Act to allow the Court of Federal Claims to
10 adjudicate wrongful military discharge cases, such as this case, in which Plaintiffs intend to
11 seek both equitable and monetary relief. Prior to the amendment, the jurisdiction of the Court
12 of Claims (now the Court of Federal Claims) was limited to actions for monetary relief. S. Rep.
13 No. 92-1066, at 1 (1972). To provide an “entire remedy,” the Court of Claims’ jurisdiction was
14 expanded to permit the award of equitable relief, including reinstatement, as an incident of and
15 collateral to any money judgment. *Id.*

16 To effectuate such wholesale relief, Congress amended the Tucker Act as follows:

17 “To provide an entire remedy and to complete the relief afforded by the
18 judgment, the [Court of Federal Claims] may, as an incident of and collateral to
19 any such judgment, issue orders directing restoration to office or position,
20 placement in appropriate duty or retirement status, and correction of applicable
21 records, and such orders may be issued to any appropriate official of the United
22 States.”

23 28 U.S.C. § 1491(a)(2) (emphasis added). In enacting Section 1491(a)(2), Congress intended to
24 have wrongful discharge cases involving both equitable relief and money damages exceeding
25 \$10,000 be resolved by “allowing persons having monetary claims within the jurisdiction of the
26 Court of Claims to obtain all necessary relief in *one* action.” S. Rep. No. 92-1066, at 1
27 (emphasis added). Congress revised the Tucker Act to improve the “administration of justice in
28 the Court of Claims by simplifying the procedure and reducing the costs incurred in
litigation[.]” *Id.*

29 **B. The Wholesale and Adequate Remedy Created in 28 U.S.C. § 1491(a)(2)**
30 **Cannot be Circumvented by Plaintiffs Through Creative Pleading**

31 Plaintiffs cannot skirt the exclusive jurisdiction Congress created over money claims in
32 the Tucker Act by artful pleading that simply omits any reference to the money relief they

1 intend to seek. Courts “will not tolerate a litigant’s attempt to artfully recast its complaint to
2 circumvent the jurisdiction of the Court of Federal Claims.” *Consol. Edison Co. v. U.S. Dep’t*
3 *of Energy*, 247 F.3d 1378, 1385 (Fed. Cir. 2001). “[T]he exclusive jurisdiction of the court of
4 claims over non-tort claims exceeding \$10,000 cannot be evaded or avoided by framing a
5 district court complaint to appear to seek only injunctive, mandatory or declaratory relief
6 against government officials or the government itself.” *Bakersfield City School Dist. of Kern*
7 *Cnty. v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979) (citations omitted). The Federal Circuit has
8 recognized that plaintiffs sometimes “craft suits, ultimately seeking money from the
9 Government, as suits for declaratory or injunctive relief without mentioning the money” so they
10 can stay in district court but has “cautioned litigants that dressing up a claim for money as one
11 for equitable relief” is not enough to negate the exclusive jurisdiction of the Court of Claims or
12 trigger the APA’s waiver of sovereign immunity. *Suburban Mortg. Assoc., Inc. v. U.S. Dep’t of*
13 *Hous. and Urban Dev.*, 480 F.3d 1116, 1124 (Fed. Cir. 2007). Where, as here, “the real effort
14 of the complaining party is to obtain money from the federal government[.]” *Bakersfield*, 610
15 F.2d at 628, the Tucker Act governs, and the case must proceed in the Court of Federal Claims.

16 Like any waiver of sovereign immunity, the APA’s waiver of sovereign immunity must
17 be “unequivocally expressed in statutory text and will not be implied.” *Lane v. Pena*, 518 U.S.
18 187, 192 (1996) (citations omitted). As such, the APA’s “waiver of the Government’s
19 sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.”
20 *Id.* For the APA’s waiver of sovereign immunity to apply, the following three conditions must
21 be satisfied: (1) the claims are not for “money damages;” (2) an adequate remedy for the claims
22 is not available elsewhere; and (3) the claims do not seek relief expressly or impliedly forbidden
23 by another statute. *United States v. Park Place Assoc., Ltd.*, 563 F.3d 907, 929 (9th Cir. 2009);
24 *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir.1998).

25 Plaintiffs’ motion to amend makes clear that Plaintiffs intend to seek money damages
26 (Doc. 30 at 3 n.2), contrary to the first condition above, and explained that simply deleting
27 money claims from the complaint here does not alter Plaintiffs’ expressed intent to pursue such
28 relief, nor allow Plaintiffs to invoke APA jurisdiction and circumvent Tucker Act jurisdiction.

1 This is particularly so, given that Congress specifically enacted 28 U.S.C. § 1491(a)(2)
2 to provide a wholesale and adequate remedy for the violations Plaintiffs allege. Where such
3 relief exists, the second and third conditions for APA jurisdiction are absent. *See e.g.*,
4 *Suburban Mortg.*, 480 F.3d at 1126-1127 (adequate remedy under Tucker Act precludes
5 exercise of APA jurisdiction); *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1999) (same).
6 “When Congress enacted the APA to provide a general authorization for review of agency
7 action in the district courts, it did not intend that general grant of jurisdiction to duplicate . . .
8 established special statutory procedures” *Bowen v. Massachusetts*, 487 U.S. 879, 903
9 (1988).

10 The Ninth Circuit has examined both the text and legislative history of Section
11 1491(a)(1) and concluded that “Congress has expressly granted jurisdiction to the Court of
12 Claims” over wrongful discharge cases such as this where both equitable relief and damages
13 claims are sought. *Denton v. Schlesinger*, 605 F.2d 484, 486-87 (9th Cir. 1979). Section
14 1491(a)(2) controls this case and there is “no basis to refuse transferring both the monetary and
15 equitable claims to the Claims Court.” *Smith v. Orr*, 855 F.2d 1544, 1553 (Fed. Cir. 1988).

16 Plaintiffs may not attempt to split their cause of action, as they suggest. Allowing
17 Plaintiffs to litigate the same case in the district court and Court of Federal Claims would waste
18 valuable judicial resources. *See Williams v. Dep’t of the Army*, 715 F.2d 1485, 1489 (Fed. Cir.
19 1983) (recognizing that requiring district courts and courts of appeals to consider the same case
20 twice would be “tremendous waste of judicial resources.”). Plaintiffs must elect a forum
21 (district court or the Court of Federal Claims) and remedial scheme (APA or Tucker Act/Little
22 Tucker Act); they cannot pick and choose. *See Clark v. United States*, 19 Cl. Ct. 220 (1980)
23 (holding that party cannot first proceed in district court under one remedial statute (*e.g.*, the
24 Federal Tort Claims Act) and then proceed under the Tucker Act; party must instead make an
25 affirmative election of both forum and remedy).

26 *Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980), which Plaintiffs rely upon in their
27 motion (Doc. 30 at 3 n. 2) in purported support of a bifurcation of claims, does not support
28 Plaintiffs’ position. The court there recognized that attempts, like those made by Plaintiffs here,

1 to bifurcate equitable claims and money claims are to be disfavored. *Id.* at 802. The court also
2 recognized that the Court of Federal Claims’ exclusive “jurisdiction cannot be avoided by a
3 complaint that appears to seek only equitable relief when ‘the real effort of the complaining
4 party is to obtain money (in excess of \$10,000) from the federal government.’” *Id.* (quoting
5 *Bakersfield*, 610 F.2d at 628)).

6 *Rowe* is also distinguishable because in that action the Tucker Act did not provide an
7 adequate remedy. There, a dissatisfied bidder sought to bring an APA action in district court
8 challenging a Department of Interior decision to award oil and gas leases to another bidder and
9 sought both contract damages exceeding \$10,000 and an order compelling the Secretary to
10 award the oil and gas leases to plaintiffs. *Id.* at 800-01. The Ninth Circuit found that plaintiffs
11 could proceed in district court for the injunction because the Court of Claims lacked the
12 authority to grant the equitable relief sought in the complaint that would “compel the Secretary
13 of the Interior to award the oil and gas leases to the plaintiffs, pursuant to their agency appeal.”
14 *Id.* at 802. It was thus the lack of an adequate remedy at law under the Tucker Act that
15 permitted plaintiffs to proceed in district court in *Rowe*. See *Cape Fox Corp. v. United States*,
16 646 F.2d 399, 402 (9th Cir. 1981) (distinguishing *Rowe* on that basis). That consideration is not
17 present here given that Congress specifically enacted 28 U.S.C. § 1491(a)(2) so that Plaintiffs
18 could obtain an adequate, wholesale remedy.

19 Plaintiffs are correct that the district court in *Witt v. Dept’ of the Air Force* observed
20 without deciding that the plaintiff there might be able seek damages in the Court of Federal
21 Claims at some later date. See No. 06-5195, 2010 WL 3522519 (W.D. Wash. Sept. 7, 2010).
22 The Government objected to that procedure in *Witt*. The matter soon became moot, however,
23 because the plaintiff in that case withdrew any claim for monetary relief. See Attachment,
24 September 13, 2010 Transcript, *Witt v. Dep’t of the Air Force*, 4:21 - 7:18. Unless and until
25 Plaintiffs make a similar clear and express waiver of their money claims, the Court should,
26 consistent with the principles discussed above, deny Plaintiffs’ motion for leave to amend their
27 complaint and either transfer or dismiss this action pursuant to Defendants’ motion.
28

1 **III. To the Extent Plaintiffs Wish to Proceed in this Court, They Must Expressly and**
2 **Clearly Waive Any Right to Money Relief Exceeding \$10,000**

3 Without such a clear and express waiver of money damages, the Tucker Act provides
4 exclusive jurisdiction and permits suit only in the Court of Federal Claims. “Parties may waive
5 their right to receive more than \$10,000 in order to satisfy the Little Tucker Act and obtain
6 jurisdiction in the district court.” *Park Place Assoc.*, 563 F.3d at 927. A party can also waive
7 all money damages, as the plaintiff did in *Witt*, but such a waiver “must be clearly and
8 adequately expressed.” *Waters v. Rumsfeld*, 320 F.3d 265, 271-72 (D.C. 2003) (internal
9 quotation omitted). Without a clear waiver of money damages, however, there is no waiver of
10 sovereign immunity under the APA nor a basis for jurisdiction in this Court. Under the Tucker
11 Act and Little Tucker Act, the waiver of sovereign immunity and grant of jurisdiction are a
12 “package deal,” and jurisdiction cannot lie in district court absent a clear and express waiver of
13 damages exceeding \$10,000. *Park Place Assoc.*, 563 F.3d at 927.

14 Under the Federal Rules, “the granting of leave to amend can be conditioned in order to
15 avoid prejudice to the opposing party.” *Local 783, Allied Indus. Workers v. General Elec. Co.*,
16 471 F.2d 751, 756 (6th Cir. 1973), *cert. denied*, 414 U.S. 822 (1973); *Mosley v. Cnty of Clark*,
17 1993 WL 230272, *3 (9th Cir. 1993) (unpublished decision) (quoting *Local 783*); *see also* 6
18 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1486 at
19 693 (2010) (“The statement in Rule 15(a)(2) that the court ‘should freely give leave when
20 justice so requires’ presupposes that the court may use its discretion to impose conditions on the
21 allowance of a proposed amendment...”). If the Court decides to grant Plaintiffs leave to
22 amend their complaint, it should condition leave on Plaintiffs waiving all money claims, as was
23 done in *Witt*. Otherwise, Plaintiffs’ request for leave to amend their complaint should be
24 denied, and this action should be transferred or dismissed pursuant to Defendants’ motion.

1 CONCLUSION

2 Plaintiffs' request for leave to amend their complaint should be denied, and the Court
3 should move to resolve Defendants' motion (Doc. 19) and either transfer or dismiss the action.

4
5 DATED: April 13, 2011

Respectfully submitted,

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