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15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA

17 MICHAEL ALMY, JASON KNIGHT, and
 ANTHONY LOVERDE,

18 Plaintiffs,

19 v.

20 UNITED STATES DEPARTMENT OF
 21 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' OPPOSITION TO
 DEFENDANTS' MOTION TO
 TRANSFER ACTION TO UNITED
 STATES COURT OF FEDERAL
 CLAIMS, OR, IN THE
 ALTERNATIVE TO DISMISS
 ACTION**

Date: May 5, 2011
 Time: 1:30 p.m.
 Dept.: Courtroom 3

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Michael D. Almy, Jason D. Knight and Anthony J. Loverde (collectively,
4 “Plaintiffs”) want to serve their country. They were illegally discharged under Don’t Ask, Don’t
5 Tell (“DADT”) and filed their complaint asking the Court to reinstate them to active duty. In
6 their complaint they did not seek back pay or lost wages; they sought only the opportunity to
7 serve again. And if the Court were to grant Plaintiffs the honor to serve in the military again, they
8 also asked that the Court award them credit for time they would have served if they had not been
9 illegally discharged (“service credit”). This service credit would allow Plaintiffs to retire *if* they
10 complete twenty years of active service from the date of their original enlistment.

11 Defendants have not opposed the merits of Plaintiffs’ complaint, but instead have engaged
12 in a delay tactic by filing this motion to transfer, or in the alternative, dismiss (“Motion to
13 Transfer/Dismiss). Defendants premise their motion on their claim that Plaintiffs’ request for
14 service credit seeks “money damages”. As a result, Defendants contend, this Court should divest
15 itself of jurisdiction and transfer Plaintiffs’ claim to the Court of Federal Claims (“Court of
16 Claims”) or dismiss Plaintiffs’ complaint. Defendants continue to seek this extraordinary relief,
17 even in the face of Plaintiffs’ proposed amended complaint which eliminates the request for
18 service credits, the purported basis for Defendants’ motion. Defendants refused to stipulate that
19 Plaintiffs be permitted to file the amended complaint.

20 This Court should deny the motion to transfer because Defendants are wrong on the law.
21 The request for service credit is an equitable remedy which is not “money damages” under the
22 APA or Little Tucker Act. *See* Section III.A, *infra*. In addition, the Court cannot transfer this
23 case to the court of Claims because that court lacks jurisdiction to hear Plaintiffs’ reinstatement
24 claims. *See* Section III.B, *infra*. Finally, the Court will hear Plaintiffs’ motion to amend at the
25 same time as Defendants’ motion to transfer (Pltfs.’ Mot. For Leave to File First Amended
26 Complaint, ECF. No. 30), and there is no reason for the Court to deny that motion. *See* Section
27 III.C, *infra*.

1 Defendants' refusal to stipulate to Plaintiffs' filing an amended complaint and improper
2 attempt to transfer or dismiss Plaintiffs' case demonstrates that their goal is to delay the Court's
3 consideration of the merits of Plaintiffs' constitutional claims. As evidenced by their proposed
4 amended complaint, Plaintiffs' priority is to return to military service immediately. If the Court
5 grants Plaintiffs' motion for leave to file their amended complaint, the service credit (which is the
6 purported basis for Defendants' motion) will no longer be at issue and Defendants' motion to
7 transfer would be moot.

8 **II. STATEMENT OF FACTS**

9 Plaintiff Michael D. Almy was an officer in the United States Air Force for thirteen years.
10 (*See* Compl. ¶¶ 19-34.) Plaintiff Anthony J. Loverde served as a member of the Air Force for
11 seven years. (*See* Compl. ¶¶ 37-45.) Plaintiff Jason D. Knight served as a member of the United
12 States Navy for five years. (*See* Compl. ¶¶ 48-57.) During their terms of service, Plaintiffs each
13 received numerous military awards and accolades. (*See* Compl. ¶¶ 27, 39 and 53.) Despite their
14 distinguished service records, Plaintiffs were each discharged against their will under DADT.
15 (*See* Compl. ¶¶ 34, 45 and 57.)

16 Plaintiffs' complaint alleges that Defendants violated each Plaintiff's substantive due
17 process rights under the Fifth Amendment, denied them equal protection under the Fifth
18 Amendment and violated their First Amendment rights. (*See* Compl. ¶¶ 59-102.) To discharge
19 any service member under DADT, the military must prove that the application of DADT in that
20 specific instance significantly furthers, and is necessary to further, the government's interest in
21 military morale, good order and discipline, and unit cohesion. Defendants did not meet their
22 burden. Had Plaintiffs not been discharged, they each would have remained on active duty and
23 continued to serve in the armed forces to this day. (*See* Compl. ¶¶ 35, 45, 58.) Through this
24 action, Plaintiffs do not seek lost wages or any other type of financial benefit associated with the
25 lost wages such as medical care reimbursement, housing credits and/or rations that they would
26 have received if they had not been discharged (collectively referred to as "back pay"). (*See*
27 Compl. ¶¶ 35, 45, 58; Defts' Mot. to Transfer at 2, ln. 11.) Instead, Plaintiffs seek declaratory
28 and injunctive relief and have requested only reinstatement to active duty and service credit for

1 time they would have served if they had not been discharged and, in the case of Plaintiff Almy,
2 the promotion to Lieutenant Colonel for which he had been recommended. (*See* Compl. at 19.)

3 **III. ARGUMENT**

4 Defendants' motion to transfer should be denied on its own merits for two reasons. First,
5 the cases make clear that this Court has jurisdiction to order that Plaintiffs receive the service
6 credits they seek in connection with their reinstatement into the armed forces. Second, the Court
7 of Federal Claims does not have jurisdiction to reinstate Plaintiffs, so this Court would retain
8 jurisdiction over Plaintiffs' main request for relief even if the service credit issue were
9 transferred. In addition, Plaintiffs' request to amend their complaint would eliminate the basis for
10 Defendants' transfer motion, making it moot.

11 **A. Defendants' Motion To Transfer/Dismiss Should Be Denied Because** 12 **the Court Has Jurisdiction.**

13 Defendants' motion to transfer is premised on their assertion that Plaintiffs here seek
14 "money damages". The complaint, however, seeks only equitable relief of the sort that this Court
15 may grant. Defendants do not dispute that this Court has jurisdiction to order that Plaintiffs be
16 reinstated, but argue that Plaintiffs' request for service credit is not equitable but rather a claim
17 for "money damages" which requires that the entire action be transferred to the Court of Claims.
18 The requested service credit is not money damages. Because that remedy is equitable in nature,
19 the waiver of sovereign immunity under the APA applies, and the Court has jurisdiction to grant
20 the requested relief.

21 **1. Service Credit Is An Equitable Remedy And Not "Money** 22 **Damages".**

23 Defendants erroneously argue that there has been no waiver of sovereign immunity
24 because Plaintiffs seek "money damages" via their request for service credit. The fact is, of
25 course, that Plaintiffs' complaint does not seek the payment of any money whatsoever. Even if it
26 did, however, the payment of money can be part of the sort of equitable relief as to which the
27 Defendants have waived sovereign immunity. Therefore, Plaintiffs' request for service credit is
28 certainly an equitable remedy subject to the APA's waiver of sovereign immunity.

1 Courts have acknowledged a clear distinction between an action at law for damages and
2 an equitable action for specific relief. In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the
3 Supreme Court held that the mere fact that a plaintiff has requested money does not mean that a
4 suit is an action for money damages to which the broad waiver of sovereign immunity set forth in
5 5 U.S.C. § 702 does not apply.

6 Our cases have long recognized the distinction between an action at law for
7 damages – which are intended to provide a victim with monetary compensation
8 for an injury to his person, property, or reputation – and an equitable action for
9 specific relief – *which may include an order providing for the reinstatement of an*
10 *employee with back pay The fact that a judicial remedy may require on party*
11 *to pay money to another is no sufficient reason to characterize the relief as*
12 *“money damages”.*

13 *Bowen*, 487 U.S. at 893 (emphasis added).

14 Judicial relief for a service member who has been wrongfully discharged is premised on
15 the central principle of making the injured service member “whole.” *Dilley v. Alexander*, 627
16 F.2d 407, 413 (D.C. Cir. 1980). A court’s remedy must attempt to restore such successful
17 plaintiffs to the position they would have occupied “but for” their illegal release from duty. *See*
18 *id.* Here, but for their illegal discharge from duty under DADT, Plaintiffs would still be serving
19 in the military, and the Court’s remedy should recognize that fact.

20 The relief sought by Plaintiffs “is consistent with the general rule that a plaintiff is entitled
21 to receive the benefits of constructive active duty from the date of his erroneous release until the
22 date he is restored to active duty.” *Dilley*, 627 F.2d at 411. Like the plaintiffs in *Dilley*, these
23 Plaintiffs “have never been lawfully discharged, so in the eyes of the law, they remain in service.”
24 As the D.C. Circuit noted, “It would be a grave injustice to restrict relief in this case to a delayed
25 reinstatement of appellants without awarding them credit for constructive service,” precisely the
26 relief Plaintiffs in this case seek. “This relief is consistent with the general rule that a plaintiff is
27 entitled to receive the benefits of constructive active duty from the date of his erroneous release
28 until the date he is restored to active duty.” *Id.*; *see also Meinhold v. United States Dep’t of*
Defense, 34 F.3d 1469, 1480 (9th Cir. 1994) (reinstating wrongfully-discharged officer to the

1 Navy); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993) (ordering reinstatement with back
2 pay and benefits).

3 The District Court for the Eastern District of California discussed the distinction in *Poole*
4 *v. Rourke*:

5 Damages are given to the plaintiff to substitute for a suffered loss, whereas
6 specific remedies are not substitute remedies at all, but attempt to give the
7 plaintiff the very thing to which he was entitled. Thus, while in many instances an
8 award of money is an award of damages, occasionally a money award is also a
9 specie remedy.

10 779 F. Supp. 1546, 1555-56 (E.D. Ca. 1991). In *Poole*, the District Court granted summary
11 judgment in favor of discharged Air Force staff sergeant and ordered defendants to correct
12 plaintiff's service records to reflect constructive service during the time he had been improperly
13 discharged, to pay back pay and to retire plaintiff with full pay and benefits commensurate to his
14 years of service, among other remedies. *Id.* at 1553. Defendants challenged the court's order and
15 moved to transfer to the Court of Claims on the basis that the Little Tucker Act precluded the
16 Court from awarding this relief because it was money damages. The court denied defendants'
17 motion and held:

18 [T]he court concludes that plaintiff's claims are not for money damages. In his
19 original complaint, plaintiff sought only mandamus, prohibition and a preliminary
20 and permanent injunction, together with "such other relief as the court deems just
21 and proper," in order to effect rescission of the order discharging him from
22 service and to permit him to complete his current enlistment. Plaintiff has never
23 requested money; he merely wanted his job back. His assertion that 'the
24 injunctive and declaratory relief sought by and awarded to the plaintiff have value
25 far above and beyond the derivative pecuniary award entailed therefrom' is
26 compelling. As other courts have noted: It would be demeaning to justice and to
27 respect for the non-monetary concerns of former officers, for this court to hold
28 that plaintiff's claims for invalidity of his conviction and discharge are necessarily
masks for a subsequent claim of monetary relief. At least as important as back pay
are a man's career, his livelihood, his rights as a veteran, his status as a convicted
criminal, and his reputation.

Id. at 1556 (internal citations and quotations omitted). The court also found that the plaintiff's
claim would not have been cognizable in the Court of Claims, because, although the Court of

1 Claims may employ equitable doctrines, it may not hear a claim that requests only equitable
2 relief. *Id.* at 1556.

3 As *Poole* makes clear, where a plaintiff genuinely seeks equitable relief against the
4 military, *even where the equitable relief may lead to an award of money*, jurisdiction exists in
5 federal district court. *Id.* at 1557; *see also James v. Caldera*, No. C-1779-VRW, 1999 U.S. Dist.
6 LEXIS 18502, at *19 (N.D. Cal. Nov. 24, 1999) (ordering plaintiff’s record corrected to reflect
7 twenty years of active duty service so that he may receive retirement benefits). This same
8 rationale has been applied by the Ninth Circuit in *Beller v. Middendorf*, where plaintiff sought
9 back pay, as well as injunctive relief to prevent his discharge. 632 F.2d 788 (9th Cir. 1980),
10 *overruled on other grounds by*, 527 F.3d 806 (9th Cir. 2008). The *Beller* court rejected
11 defendants’ contention that the suit was barred by sovereign immunity and held that the APA
12 waived sovereign immunity as a bar to the plaintiff’s suit which was properly brought for a
13 violation of his Fifth Amendment rights.

14 Plaintiffs, like the plaintiffs in the cases discussed herein, have not requested any type of
15 money damages. Plaintiffs’ original complaint plainly states that they seek only equitable relief
16 in the form of reinstatement and credit towards retirement. This Court has jurisdiction under the
17 APA to decide Plaintiffs’ claims, and Defendants’ motion should be denied.

18 **2. Defendants’ Arguments Regarding Back Pay Are Without**
19 **Merit.**

20 Defendants’ motion is largely based on their flawed premise that Plaintiffs’ request for
21 service credit is equivalent to other remedies “plaintiffs typically seek” such as back pay,
22 allowances (housing credits and rations), and medical care reimbursement. (*See* Defts’ Mot. to
23 Transfer at 2, ln. 4-9.) But, as set forth in detail above, those remedies are not at issue. Plaintiffs’
24 original complaint expressly disclaimed back pay and did not seek allowances or medical care
25 reimbursement.

26 Moreover, none of the cases cited by Defendants dictate the outcome of Defendants’
27 motion. Each of these cases cited by Defendants is distinguishable because the plaintiff was
28 seeking back pay which, if awarded, would have a resulted in monetary payment by defendant.

1 See *Hubbard v. Administrator, EPA*, 982 F.2d 531, 532-33 (D.C. Cir. 1992) (plaintiff sought
2 instatement and back pay); *Witt v. United States Dep't of the Air Force*, No. 06-5195, 2010 WL
3 3522519, at *1 (W.D. Wash., Sept. 7, 2010) (plaintiff sought reinstatement, back pay and service
4 credits); *Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (plaintiff sought
5 back pay and benefits); *Larsen v. United States Navy*, 346 F. Supp. 2d 122, 128 (D.D.C. 2004)
6 (plaintiffs sought instatement, constructive credit for active duty, award of retirement pay and
7 back pay compensation).

8 Defendants, tellingly, cite no law in support of their proposition that a request *solely* for
9 “service credits” equates to a request for “money damages.” Plaintiffs have not, as Defendants
10 argue, “dress[ed] up a claim for money as one for equitable relief” (Defts’ Mot. to Transfer at 4).
11 Plaintiffs’ original complaint was clear in disclaiming past wages, and the prayer for relief did not
12 seek housing credits or medical reimbursement. Plaintiffs made clear that the only remedy they
13 sought — reinstatement on active duty — was equitable in nature. And cases from within the
14 Ninth Circuit and elsewhere make clear that service credits, which Plaintiffs also requested, are
15 equitable and not “monetary.” See, e.g., *Poole*, 779 F.Supp. at 1557; *Caldera*, 1999 US. Dist.
16 Lexis 18502 at * 19. For the avoidance of doubt, however, Plaintiffs have sought leave to file an
17 amended complaint to eliminate any concern the Court may have that service credit may be
18 construed as “monetary,” thus delaying their return to active duty.

19 Defendants’ citation to *Witt* also does not support their request to transfer this case in its
20 entirety. First, the plaintiff in *Witt* specifically requested *back pay*. But Plaintiffs here
21 specifically disclaimed any claim for back pay in their original complaint. That the district court
22 in *Witt* determined a request which included back pay should be heard in the Court of Claims
23 does not control whether Plaintiffs’ request here solely for service credits must be transferred to
24 the Court of Claims. Second, while the defendants are correct in stating that the district court in
25 *Witt* concluded that her request for back pay *and* retirement credits was a form of money
26 damages, the district court did *not* transfer Major Witt’s case to the Court of Claims. Rather, the
27 district court retained jurisdiction over, and proceeded to resolve, Witt’s claim for reinstatement,
28 observing that claims for *back pay* and service credits could be heard by the Court of Claims.

1 Finally, Defendants’ citation (Mot. at 5:7-16) to other cases purporting to hold that
2 “service credits” are money damages do not stand for that proposition at all. Defendants’ brief
3 attempts to blur the distinction between service credits (credit towards retirement for time they
4 would have served *but for* their illegal discharges) and back pay. Defendants’ citations at page 5
5 of their opening brief to *Weber* and *Hubbard* are inapposite. Those cases explicitly refer to “back
6 pay as a claim for money damages.” None of the courts in cases cited by Defendants discussed at
7 all whether *only* “service credits” are “money damages.”

8 **B. The Court Of Claims Does Not Have Jurisdiction Over Plaintiffs’**
9 **Equitable Reinstatement Claim.**

10 Even if the Court determines that service credits are monetary damages subject to the
11 Court of Claims jurisdiction, this entire action cannot be transferred to that court. (*See* Defts’
12 Mot. to Transfer at 5-6.) Rather, Plaintiffs’ equitable claims for reinstatement would remain in
13 this Court and only Plaintiffs’ alleged monetary claim for service credits would be dismissed
14 and/or transferred to the Court of Claims. *See Rowe v. United States*, 633 F.2d 799, 802 (9th Cir.
15 1980) (the district court retained jurisdiction over plaintiffs equitable’ claim and dismissed
16 plaintiffs’ claim for monetary damages for lack of jurisdiction or to be transferred to the Court of
17 Claims).

18 In arguing that the Court of Claims can provide an adequate remedy for the entire action,
19 defendants ignore the heart of Plaintiffs’ complaint — their request for reinstatement so they may
20 serve their county again — and the Court of Claims’ limited jurisdiction. The Court of Claims
21 can grant non-monetary relief, such as Plaintiffs’ request for reinstatement, only when that relief
22 is “incident of and collateral to any . . . judgment.” 28 U.S.C. § 1491(a)(2). The Ninth Circuit
23 has held that this language allows “the court [of claims] [to] grant injunctive relief when it is
24 associated with and subordinate to a monetary claim, but it has no jurisdiction over claims where
25 the monetary claim is incidental to a claim for affirmative non-monetary relief.” *See Wilkins v.*
26 *United States*, 279 F.3d 782, 786 (9th Cir. 2002) (internal citations removed) (the Court of Claims
27 did not have jurisdiction over non-monetary claims, including claim for reinstatement, even when
28 claim for back pay was subject to Court of Claims jurisdiction.)

1 As evidenced by Plaintiffs' motion for leave and Plaintiffs' willingness to limit their
2 remedy to reinstatement, this is not an ordinary wrongful military discharge case where the
3 monetary damages are at the forefront of the case.¹ (*See* Defts' Mot. to Transfer at 6.) The crux
4 of Plaintiffs' case is their First and Fifth Amendment constitutional challenges to DADT. (*See*
5 Compl. ¶¶ 59-107.) These claims cannot be shoehorned into the statutory extension of the Court
6 of Claims jurisdiction as "incident of and collateral to [a] judgment", when the requested service
7 credits are clearly secondary to Plaintiffs' challenge to DADT and requested reinstatement. 28
8 U.S.C. § 1491(a)(2). "It would be demeaning to justice and to respect for the non-monetary
9 concerns of former officers, for this court to hold that plaintiff's claims for invalidity of his
10 conviction and discharge are necessarily masks for a subsequent claim of monetary relief. At least
11 as important as back pay are a man's career, his livelihood, his rights as a veteran, his status as a
12 convicted criminal, and his reputation." *Poole*, 779 F. Supp. at 1556. If the Court declines to
13 permit Plaintiffs' leave to amend and if the Court is inclined to view service credits as money
14 damages, the court should, as the district court in *Witt* did, retain jurisdiction of Plaintiffs'
15 reinstatement claims and transfer only the claims for any alleged monetary damages. *See Witt*,
16 2010 WL 3522519, at *4 (cited on pages 4 and 5 of defendants' Mot. to Transfer and holding that
17 the district court retained jurisdiction of the claims involving wrongful discharge and
18 reinstatement, and noting that the other claims could be heard in the Court of Claims).

19 **C. Defendants' Motion To Transfer/Dismiss Is Moot As Plaintiffs Have**
20 **Filed A Motion For Leave To File An Amended Complaint.**

21 Plaintiffs' motion for leave to file an amended complaint requests the Court allow
22 Plaintiffs to more explicitly limit their requested remedy solely to reinstatement. (*See* Decl. of M.
23 Andrew Woodmansee in support of Pltfs.' Mot. For Leave to Amend at Exh. 2, ECF. No. 30.)
24 The proposed amended complaint eliminates the request for service credits and the promotion for

25 ¹ Plaintiffs expressly reserve all rights they may have to file a separate action in the Court
26 of Claims to petition for credit toward their retirement for any time they would have served on
27 active duty but for their discharges under DADT, and Plaintiff Almy expressly reserves his right
28 to petition for a promotion to the rank of lieutenant colonel. 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 Plaintiff Almy which Defendants claim are beyond this Court’s jurisdiction and require that this
2 action be transferred. (*See* Defts’ Mot. to Transfer at 2, ECF No. 19.) By amending their
3 complaint to not seek any remedy beyond reinstatement, Plaintiffs can overcome any purported
4 sovereign immunity bar. As demonstrated above, Plaintiffs do not propose this amendment
5 because they think it is necessary for jurisdictional purposes, but rather for the purpose of
6 removing any doubt Defendants or the Court may have regarding this Court’s jurisdiction to
7 review and remedy Defendants’ illegal discharge of Plaintiffs from active duty. If the Court
8 grants Plaintiffs’ motion for leave, then the amendment will render moot defendants’ Motion to
9 Transfer/Dismiss.²

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23 ²If the Court denies Plaintiffs’ motion for leave to amend and the Court finds it lacks
24 jurisdiction based on the original pleading, Plaintiffs respectfully request that the Court make
25 clear in its dismissal order that Plaintiffs may amend their complaint to cure the jurisdictional
26 deficiency by not seeking credit toward retirement for the time Plaintiffs would have served if
27 they had not been discharged. *See Breier v. Northern California Bowling Proprietors’ Ass’n*, 316
28 F.2d 787, 789 (9th Cir. 1963) (if no responsive pleading has been filed, then “an order of
dismissal denying leave to amend at that stage is improper, and a motion for leave to amend
(though unnecessary) must be granted if filed”); *Richardson v. United States*, 336 F.2d 265, 266
(9th Cir. 1964) (plaintiff has a “right to amend” once as a matter of course after “an order
granting . . . a motion to dismiss”).

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IV. CONCLUSION

For the reasons stated, Plaintiffs respectfully submit that defendants’ motion to transfer, or in the alternative, dismiss should be denied. If the Court is inclined to grant Defendants’ motion, the Court should either (1) permit Plaintiffs to amend their complaint or (2) retain jurisdiction and proceed without delay on the merits as to Plaintiffs’ equitable claim seeking reinstatement on active duty.

Dated: April 14, 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 14th day of April, 2011, with a copy of this document via the Court's CM/ECF system.

/s/ M. Andrew Woodmansee
M. Andrew Woodmansee