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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' REPLY IN SUPPORT
 OF MOTION SEEKING LEAVE TO
 FILE FIRST AMENDED COMPLAINT**

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

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1 **INTRODUCTION**

2 There is no basis to deny Plaintiffs’ request for leave to amend their Complaint.
3 Defendants argue that Plaintiffs’ proposed amendment would cause unnecessary delay, would
4 prejudice Defendants and would fail to remedy what Defendants argue are jurisdictional defects
5 in the original Complaint. Defendants’ contention that *Plaintiffs’* motion would cause
6 unnecessary delay is ironic, at best. Defendants—via their motion to transfer this case to the
7 Court of Federal Claims—effectively seek to delay a hearing on the merits of Plaintiffs’ claims
8 for at least one year.¹ Plaintiffs’ Amended Complaint actually will simplify this case by deleting
9 a claim for relief, thereby facilitating, rather than delaying, resolution of this case.

10 Defendants’ remaining arguments either miss the point of Plaintiffs’ proposed amendment
11 or attempt to have this Court decide *today* questions that may never arise and, if they do, will
12 arise in another court. That the Court of Claims may have jurisdiction over a later case filed by
13 Plaintiffs (if they are successful here) for back pay is irrelevant to whether *this Court* has
14 jurisdiction over the claims pled in the proposed Amended Complaint. If Defendants believe a
15 second, future lawsuit in the Court of Claims would be improper, then they may raise those
16 arguments as a defense to that hypothetical second lawsuit in that forum.² Those arguments do
17 not defeat jurisdiction in this Court, and they certainly do not mandate denying Plaintiffs leave to
18 amend their Complaint.

19 Defendants argue that “Plaintiffs’ attempt to remedy the jurisdictional defects in their
20 complaint by simply deleting money claims that they fully intend to pursue is futile.” (Defs.’
21 Opp’n at 1.) They argue that Plaintiffs “can proceed in this Court only by (1) clearly and

22 ¹ Under 28 U.S.C. 1292(d)(4)(B), this case would be stayed for 60 days following this
23 Court’s ruling on defendants’ motion to transfer, and it would remain stayed until an appeal from
24 that order is decided by the Court of Appeals for the Federal Circuit.

25 ² The Amended Complaint cannot possibly prejudice Defendants, as it removes a request
26 for relief and streamlines this case. If Defendants fear that some future hypothetical action by
27 Plaintiffs would improperly subject them to duplicative litigation, they can raise that defense if
28 that situation ever arises. Asking this Court to decide this speculative issue now is inappropriate
and serves only to complicate and delay this case.

1 expressly waiving any money claims and proceeding under the terms of the [Administrative
2 Procedures Act, “APA”] or (2) waiving money claims over \$10,000 and proceeding under the
3 Little Tucker Act.” (*Id.* at 2.) These arguments are wrong on a number of levels. First, this
4 Court has subject matter jurisdiction over the original Complaint, but by dropping the request for
5 “service credit” (which is not a money-based claim), this Court’s subject matter jurisdiction is
6 even more clear.³ Second, although Plaintiffs are willing to “clearly and expressly waive” any
7 money claims and proceed under the APA, there is no requirement that Plaintiffs also waive any
8 future claims.⁴ Indeed, controlling law from the Ninth Circuit establishes that this is not required.

9 Amendment is appropriate here because it allows Plaintiffs to clarify and narrow the
10 issues before the Court, thus rendering moot Defendants’ current Motion to Transfer. Plaintiffs
11 should be permitted to amend their Complaint, and they should be allowed to do so without
12 waiving any rights that may result from the success of this suit.

13 ARGUMENT

14 I. ANY SUBSEQUENT ACTION REMAINS SPECULATIVE UNTIL 15 PLAINTIFFS ARE RETURNED TO ACTIVE DUTY SERVICE. 16 NONETHELESS, PLAINTIFFS ARE NOT REQUIRED TO WAIVE ANY 17 OF THEIR HYPOTHETICAL FUTURE RIGHTS IN ORDER TO PURSUE 18 THIS ACTION

19 When approached for consent to amend the Complaint, Defendants conditioned their
20 assent on an “express waiver” of Plaintiffs’ rights to bring a future action in the Court of Claims.
21 (*See* Pls.’ Mot. for Leave to Amend at 1.) Without precedential support for their request,
22 Defendants now ask the Court to condition any leave to amend on Plaintiffs’ waiver of rights they
23 might have that are outside this lawsuit. (*See* Defs.’ Opp’n at 7.) Consistent with the Federal
24 Rules’ mandate that leave to amend shall be freely granted, and consistent with the law of this

25 ³ Plaintiffs established in opposition to Defendants’ motion to transfer that the service
26 credit they sought was not a request for money damages that would defeat this Court’s
27 jurisdiction. Likewise, Plaintiffs established in opposing Defendants’ motion to transfer that the
28 Court of Claims does not have jurisdiction over Plaintiffs’ claim for equitable relief.

⁴ Therefore, Plaintiffs continue to expressly reserve all rights they may have outside of
this action, including the right to commence a separate action in the Court of Federal Claims
based on the successful outcome of this action. (*See also* Pls.’ Mot. for Leave to Amend at 3 n.2.)

1 Circuit, the Court should permit Plaintiffs to amend their Complaint and reject Defendants’
2 attempts to extract concessions from Plaintiffs as a condition of such amendment.

3 In their Opposition to Plaintiffs’ Motion for Leave to Amend, Defendants cite *United*
4 *States v. Park Place Assoc., Ltd.*, 563 F.3d 907 (9th Cir. 2009) and *Waters v. Rumsfeld*, 320 F.3d
5 265 (D.C. 2003) in support of their desired “waiver requirement.”⁵ (See Defs.’ Opp’n at 7.)
6 These cases are inapposite, however, because they only stand for the proposition that plaintiffs
7 must waive the right to *money damages* in the *current case* to proceed under the APA. See *Park*
8 *Place Assoc.*, 563 F.3d at 927-28; *Waters*, 320 F.3d at 271-72. With regard to future waivers,
9 case law on point establishes that no prospective waiver is required. Indeed, the Supreme Court
10 has implicitly sanctioned a plaintiff’s ability to bring an action for equitable relief in the district
11 court without waiving a subsequent action for monetary relief in the Court of Claims. Compare
12 *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400 (1959) (reversing a district court’s denial of
13 declaratory judgment that plaintiff’s discharge from Navy was illegal) with *Greene v. United*
14 *States*, 376 U.S. 149, 84 S. Ct. 615 (1964) (reversing Court of Claims’ subsequent denial of back
15 pay). Moreover, the Ninth Circuit, and several of its sister circuits, have clearly held that district
16 court subject matter jurisdiction is not dependent on a plaintiff’s waiver of a future action in the
17 Court of Claims. See *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th Cir. 1981).

18
19 ⁵ Defendants also cite to the trial transcript of the *Witt* case. The *Witt* court had issued an
20 opinion maintaining jurisdiction over the equitable remedies and suggesting the remaining relief
21 could be sought in the Court of Claims. See *Witt v. Dep’t of the Air Force*, No. 06-5295, 2010
22 WL 3522519 (W.D. Wash. Sept. 7, 2010). In the transcript from just prior to the start of trial,
23 however, counsel for the defendants reiterated their position that the plaintiff needed to “elect a
24 remedy” in order for the district court to have jurisdiction over that case. (Transcript of
25 Proceeding, *Witt v. Dep’t of the Air Force*, 5:18-23 (Sept. 13, 2010).) In response, plaintiff’s
26 counsel withdrew any claim for monetary relief to make clear that plaintiff was proceeding in that
27 court under the APA. (*Id.* at 7:7-18.) Here, Defendants argue that Witt’s trial-time withdrawal of
28 claims for monetary damages supports their claim that the Army Plaintiffs must concede their
rights to a future suit. However, nothing in the transcript supports the proposition that Witt
waived her rights to bring a future claim for money damages. Moreover, the trial tactics of Witt’s
counsel, as recorded in the transcript, *do not* have any precedential weight here. Indeed, the most
relevant aspect of *Witt* is that the District Court ruled (before Major Witt’s election) that it *did*
have jurisdiction to adjudicate her equitable claim seeking reinstatement even without an
“election of remedies” that Defendants argue is required here. Moreover, if this were really
jurisdictional, as Defendants now claim, they presumably would not have waited until more than
six years into that case to raise it.

1 In *Laguna*, the plaintiffs obtained a declaratory judgment of contractual rights against the
2 United States. *Id.* at 1378. The United States appealed, claiming that the Court of Claims had
3 jurisdiction based on the Tucker Act. *Id.* at 1379. The Ninth Circuit rejected this argument. *Id.*
4 at 1380. Although the plaintiffs could potentially have brought one action for declaratory relief
5 and breach of contract damages in the Court of Claims, the Ninth Circuit noted that a “district
6 court does not lose jurisdiction over a claim for non-monetary relief simply because it may later
7 be the basis for a money judgment.” *Id.* at 1379. Other Circuit Courts have cited this reasoning
8 in denying attempts by the government to impose conditions on a plaintiff’s ability to seek
9 equitable relief in a federal district court.

10 Citing *Laguna*, the Third Circuit in *Hahn v. United States*, held that “district court
11 jurisdiction over a suit for nonmonetary relief is not foreclosed by the fact that it may later be the
12 basis for an award of damages against the United States.” 757 F.2d 581, 589 (3d Cir. 1985). In
13 so holding, the Third Circuit rejected the government’s insistence that “a district court may not
14 exercise jurisdiction over the nonmonetary claims” where the same facts would give “rise to a
15 subsequent suit in the Claims Court for monetary damages.” *Id.* at 588-89. The Eighth Circuit
16 has been even more clear: “the Court of Claims’ exclusive jurisdiction over monetary damages
17 exceeding \$10,000 does not deprive a federal district court of jurisdiction over all equitable
18 claims asserted in a complaint; nor does it require a party to waive his claim for monetary
19 damages in excess of \$10,000.” *Giordano v. Roudebush*, 617 F.2d 511, 514 (8th Cir. 1980).

20 Plaintiffs here seek only equitable remedies. And, to the extent this is not clear enough
21 from the face of the Complaint and the proposed Amended Complaint, Plaintiffs expressly waive
22 any rights to monetary relief *in this lawsuit*. Case law is clear, however, that the Defendants’ fear
23 of a future claim for monetary damages does not deprive *this Court* of jurisdiction over Plaintiffs’
24 claim for reinstatement, a purely equitable remedy. *See Laguna*, 643 F.2d at 1379; *Giordano*,
25 617 F.2d at 514. Thus, leave to amend is appropriate because, as outlined below, the proposed
26 amendment should satisfy any doubts the Defendants—or this Court—may have regarding
27 subject matter jurisdiction of this case.
28

1 **II. AMENDMENT IS APPROPRIATE BECAUSE IT MAKES CLEAR THIS**
2 **COURT MAY RESOLVE THE CLAIMS IN THE PROPOSED AMENDED**
3 **COMPLAINT, AND THE COURT OF CLAIMS MAY NOT**

4 Plaintiffs recognize that to bring an action against Defendants, there must be a waiver of
5 sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994). The
6 APA provides such a waiver for the relief sought in the proposed Amended Complaint. *See* 5
7 U.S.C. § 702 (providing a waiver of immunity for those adversely affected or aggrieved by agency
8 action who seek relief other than money damages). As stated in the Defendants’ Opposition,
9 “[f]or the APA’s waiver of sovereign immunity to be satisfied: (1) the claims are not for “money
10 damages;” (2) an adequate remedy for the claims is not available elsewhere; and (3) the claims do
11 not seek relief expressly or impliedly forbidden by another statute.” (Defs.’ Opp’n at 4, citing
12 *Park Place Assoc.*, 563 F.3d at 929.) This Court has subject matter jurisdiction over the proposed
13 Amended Complaint because these requirements are all met as detailed below.⁶

14 **A. Plaintiffs Are Not Seeking Money Damages.**

15 To establish waiver of sovereign immunity under the APA, the remedy sought must be for
16 something other than “money damages.” *See* 5 U.S.C. § 702. Plaintiffs’ original Complaint was
17 explicit in stating that Plaintiffs did not seek “money damages.” (Compl. at ¶¶ 35, 47, 58.)
18 Nonetheless, in response to Defendants’ Motion to Transfer, Plaintiffs seek leave to file a
19 proposed Amended Complaint that deletes Plaintiffs’ requests for retirement credit in order to
20 prevent further delay of the proceedings. (*See* Pls.’ Mot. for Leave to Amend at 3.) Moreover, in
21 response to Defendants’ continued insistence that a “clear and express” waiver is needed for
22 subject matter jurisdiction in this Court, Plaintiffs state that they “seek *only* equitable remedies

23 _____
24 ⁶ Defendants have not suggested that the claims for reinstatement in the proposed
25 Amended Complaint violate the third prong of the APA waiver test by “seek[ing] relief expressly
26 or impliedly forbidden by another statute.” (*See* Defs.’ Mot. to Transfer; Defs.’ Opp’n.)
27 Presumably, Defendants decided not argue this point because the case law firmly supports the fact
28 that there is no such prohibition on the relief sought. *See Witt*, 2010 WL 3522519 (allowing
 claims for reinstatement to be heard in the District Court). Because Defendants implicitly
 recognize that the third element of the APA waiver test has been satisfied, Plaintiffs only address
 Defendants’ arguments regarding the first two prongs in this Reply.

1 and waive all other remedies *in this lawsuit* without waiving any future rights.” (See also Section
2 I, *supra*.)

3 In ordinary circumstances, such clear pleading and statements would end any debate as a
4 plaintiff “is [normally] absolute master of what jurisdiction he will appeal to,” and “[jurisdiction]
5 generally depends upon the case made and relief demanded by the plaintiff.” See *United States*
6 *v. Mottaz*, 476 U.S. 834, 850, 106 S. Ct. 2224, 2233 (1986). When it comes to the sovereign
7 immunity waivers in both the Tucker Act and the APA, however, courts look to the action’s true
8 nature. See *Hahn*, 757 F.2d 586. Defendants suggest to this Court that “the real effort of the
9 complaining part is to obtain money from the federal government,” and that Plaintiffs’ proposed
10 Amended Complaint is actually “artful pleading that simply omits any reference to the money
11 relief they intend to seek.” (See Defs.’ Opp’n at 3-4.) This is not so.

12 The proposed Amended Complaint is a classic case of “what you see, is what you get.”
13 From the very beginning, Plaintiffs made clear that they only seek equitable relief from this
14 lawsuit. (See Compl. at ¶¶ 35, 47, 58.) Plaintiffs continue in good faith to try to make this even
15 more clear now: Plaintiffs want back into the military, and that is the only relief that they seek
16 from this suit. It is true that some, if not all, of the Plaintiffs *may* decide to bring a second lawsuit
17 in the Court of Claims *if* this lawsuit is successful in getting them reinstated. As outlined above,
18 however, this is not grounds for denying the district court subject matter jurisdiction of *this suit*.
19 (See Section I, *supra*.) Moreover, if the Plaintiffs’ primary objective was anything other than the
20 speediest possible return to service, the proposed Amended Complaint lacks commonsense
21 because it exposes Plaintiffs to the extra costs and risks involved in bringing *two* lawsuits instead
22 of one.⁷

23 Based on (1) the face of the original Complaint; (2) Plaintiffs’ willingness to amend their
24 Complaint to drop the request for retirement credit; (3) the statements Plaintiffs’ made in their

25 ⁷ By amending the Complaint Plaintiffs eliminate any chance of getting retirement credit
26 in the same lawsuit in which they get reinstated. This means that Plaintiffs will have to decide
27 whether to bring a second lawsuit, with the associated emotional and financial costs of continuing
28 to litigate their rights. Furthermore, by delaying the date when such an action is deemed to have
been “brought,” Plaintiffs also face increased statute of limitations risks.

1 Motion for Leave to Amend; and (4) the statements made in this document, it is clear that the
2 “true intent” of Plaintiffs’ action is to seek equitable relief and not monetary damages. As a
3 result, the first requirement for a waiver of sovereign immunity under the APA is met.

4 **B. The Tucker Act Does Not Provide an Adequate Remedy Because the**
5 **Proposed Amended Complaint Would Be Dismissed From the Court**
6 **of Claims For Lack of Subject Matter Jurisdiction.**

7 Defendants claim that the Tucker Act provides an adequate remedy for Plaintiffs’ claims,
8 making the waiver of sovereign immunity under the APA inapplicable. (Def’s. Opp’n at 5.) This
9 is not the case. Indeed, if the Amended Complaint was filed in (or transferred to) the Court of
10 Claims, it would be dismissed for lack of subject matter jurisdiction. *See James v. Caldera*, 159
11 F.3d 573, 578 (Fed. Cir. 1998). The Federal Circuit recognized that “the Court of Federal Claims
12 has no power ‘to grant affirmative non-monetary relief unless it is tied and *subordinate to a*
13 *money judgment.*’” *Id.* at 580. (citations omitted) (emphasis added) It strains credibility for
14 Defendants to argue that Plaintiffs’ request to be reinstated on active duty as a remedy for
15 violations of their Substantive Due Process rights is somehow subordinate to a claim for money
16 damages.⁸ Without subject matter jurisdiction, the Court of Claims is clearly not able to provide
17 an “adequate remedy,” and the final disputed element of the APA’s sovereign immunity waiver
18 for subject matter jurisdiction in the district court is satisfied. *See id.*

19 The Tucker Act, which is jurisdictional, only confers subject matter jurisdiction to the
20 Court of Claims when a request for injunctive relief is *subordinate to* a monetary claim. *See*
21 *Wilkins v. United States*, 279 F.3d 782, 786 (9th Cir. 2002). Plaintiffs’ proposed Amended
22 Complaint makes clear that reinstatement is the *only* remedy sought by Plaintiffs in *this* Court.
23 The requested mandatory injunction clearly is *not* “incident of and collateral to any...[money]
24 judgment.” *See* 28 U.S.C. § 1491(a)(2). Therefore, relief cannot be provided in the Court of
25 Claims. *See id.*

26 ⁸ The Federal Circuit has held that it is “well-established that the Court of Federal Claims
27 lacks jurisdiction over such [Due Process] claims” because it is not a “money-mandating
28 provision.” *James*, 159 F.3d at 581 (citing *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed.
Cir. 1995)).

1 The plaintiff in *James*, in opposing the defendants' motion to transfer, argued that the
2 Court of Claims would not have jurisdiction since his complaint only sought injunctive relief.
3 The United States District Court for the Northern District of California transferred the case to the
4 Court of Claims, stating that "'the flaw in [plaintiff's] logic' was that James could easily have
5 overcome the jurisdictional hurdle in the Court of Federal Claims 'by adding a claim for the back
6 pay and retirement benefits that would necessarily follow from a grant of injunctive relief.'" *James*,
7 159 F.3d at 578 (quoting district court's opinion below). After reviewing the claims pled
8 in plaintiff's complaint, the United States Court of Appeals for the Federal Circuit held that the
9 district court did have jurisdiction over plaintiff's claim seeking to reverse the Army's action
10 barring his reenlistment. The Federal Circuit remanded the case to the Northern District,
11 explaining:

12 those claims are not barred from consideration in the district court
13 by the mandate of 5 U.S.C. § 704 that APA review is available only
14 "if there is no other adequate remedy in a court." As far as those
15 claims are concerned, transfer to the Court of Federal Claims under
16 28 U.S.C. § 1631 is not available because § 1631 requires that the
17 transferee court be one "in which the action . . . could have been
18 brought at the time it was filed." An action with respect to those
19 claims could not have been brought in the Court of Federal Claims.

20 *Id.* at 583.⁹

21 The holding in *James* illustrates what would become of the Complaint if it were to be
22 transferred to the Court of Claims: it would be remanded back to this Court because the purely
23 equitable claims belong in *this* Court. *See id.* Moreover, *James* establishes that this action is not
24 barred from consideration under the APA because, as pled, the claims could not have been
25 brought in the Court of Claims. *See id.* It is true that, like *James*, the Plaintiffs could bring an
26 entirely different complaint in the Court of Claims than the one that they have pled here, but this

27 ⁹ On remand, Judge Walker entered summary judgment in favor of the plaintiff. The
28 Court ultimately entered *judgment* for the plaintiff pursuant to Rule 58 of the Federal Rules of
Civil Procedure. *See James v. Caldera*, No. C-96-1779-VRW, 1999 U.S. Dist. LEXIS 18502 at *
19-20 (N.D. Cal. Nov. 24, 1999). That final judgment was later vacated as a result of a settlement
between the parties. *See James v. Caldera*, No. C-76-1779-VRW, 2000 WL 970557 (N.D. Cal.
June 30, 2000). While that June 30, 2000 order did vacate the *judgment*, it did not vacate the
underlying opinion or order upon which the judgment was based.

1 is not required. *See id.* Because there is no adequate alternate remedy for the Amended
2 Complaint, the second requirement for APA immunity is also met.

3 This Court, therefore, has subject matter jurisdiction over the Amended Complaint under
4 the APA's waiver of sovereign immunity because Plaintiffs do not seek "money damages," an
5 adequate remedy for the equitable claims is not available elsewhere, and the claims do not seek
6 relief expressly or impliedly forbidden by another statute. *See Park Place Assoc.*, 563 F.3d at
7 929.

8 CONCLUSION

9 Plaintiffs respectfully request that the Court grant leave to amend their Complaint, and
10 that the Court deny as moot Defendants' pending motion to transfer or dismiss.

11
12 Dated: April 21, 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 21st day of April, 2011, with a copy of this document via the Court's CM/ECF system.

/s/ M. Andrew Woodmansee
M. Andrew Woodmansee