APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
No. 18-15244 D.C. -
No. 2:16-cv-00255-TLN-CKD

BRYAN JAMES STROTHER,) **Filed: May 28, 2019**

Sgt., California Army National Guard,) **Molly C. Dwyer**
Plaintiff-Appellant,) **Clerk U.S. Court**
v.) **of Appeals Seattle**
DAVID S. BALDWIN,) **Washington**
Adjutant General,
State of California
National Guard;
MIKE MCCORD,
Pentagon Comptroller;
DEFENSE FINANCE
AND ACCOUNTING SERVICES;
UNITED STATES DEPARTMENT
OF DEFENSE,
Defendants-Appellees.

MEMORANDUM*
Appeal from the United States District Court for the Eastern District of California Troy L. Nunley, District Judge, Presiding . Argued and Submitted May 13, 2019 Seattle, Washington Before:

HAWKINS, W. FLETCHER, and BENNETT, Circuit Judges.

This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

In 2007, a recruiter promised Sergeant Bryan Strother a bonus and student loan repayment if he reenlisted in the California Army National Guard ("CA ARNG"). Strother reenlisted, received the bonus and part of the loan repayment, and was deployed to Iraq. Years later, the military determined that Strother was not entitled to his reenlistment incentives and began "recouping" them from his pay. Roughly 1,400 other CA ARNG members were subject to similar recoupment efforts. An additional 16,000 members were potentially subject to such efforts. In February 2016, Strother filed a class action complaint against the Adjutant1 General of CA ARNG (David Baldwin) and the Pentagon Comptroller (Michael McCord) (collectively "Defendants"), in their official and individual capacities. The complaint sought injunctive, declaratory, and monetary relief based on five claims: (I) "failure to train" pursuant to 42 U.S.C. § 1983; (II) "breach/impairment of contracts"; (III) "intentional misrepresentation"; (IV) "deceit or intentional fraud"; and (V) "concealment fraud."

After Strother filed his complaint, Congress passed legislation that resulted in the military ceasing its recoupment efforts and returning all previously recouped funds to Strother and most other CA ARNG members. Defendants moved to dismiss the action. The district court found that none of Strother's claims were moot but dismissed each claim on other grounds, as described below. The district court dismissed Strother's complaint with leave to amend all but the contract claim (Claim II). Strother chose not to amend the complaint and the district court entered final judgment

for Defendants. This appeal followed. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

A. Mootness

The district court found that none of Strother's causes of action is moot because there are possible nominal damages under Counts I and II and possible damages beyond the return of the recouped money under Counts III-V. We agree. Even nominal damages suffice to prevent dismissal for mootness. See *Jacobs v. Clark* Cty. Sch. Dist., 526 F.3d 419, 425-26 (9th Cir. 2008).

B. Claim I

"The first step in any [§ 1983] claim is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion). On appeal, Strother argues that his § 1983 claim (Claim I) alleges a due process violation of CA ARNG members' contractual right to the bonuses described in their reenlistment agreements. The district court found that Claim I does not clearly allege such a due process violation, and that even if it did, Strother's § 1983 claim would fail as a matter of law. We agree. Strother has failed to identify a constitutional right to which his § 1983 claim could attach because, as we discuss further in relation to Claim II, soldiers do not have a contractual right to their reenlistment bonuses.

C. Claim II

Claim II alleges that Defendants breached their contractual obligations to CAARNG members "by illegally recouping monies." The district court properly dismissed this claim under Rule 12(b)(6).

In *Bell v. United States*, 366 U.S. 393 (1961), the Supreme Court held that "common-law rules governing

private contracts have no place in the area of military pay." Id. at 401. The Supreme Court applied this principle to military bonuses in *United States v. Larionoff*, 431 U.S. 864 (1977). Larionoff represented a class of U.S. Navy members seeking payment of reenlistment bonuses under the Variable Re-Enlistment Bonus ("VRB") program as it existed at the time they reenlisted. Id. at 865. The Court held that Larionoff and the class were entitled to the bonuses. The Court based its holding solely on the statutes and regulations governing the VRB program. The Court did not hold that class members had a contractual right to their bonuses. In fact, the Court reaffirmed that "a soldier's entitlement to pay is dependent upon statutory right." Id. at 869 (quoting *Bell*, 366 U.S. at 401). As Strother confirmed at oral argument, he does not claim that his bonus was authorized by statute. Oral Argument at 10:59, *Strother v. Baldwin*, No. 4 Case: 18-15244, 05/28/2019, ID *Scott v. Donald*, 165 U.S. 58 (1897) . . . . . 35 : 11309940, DktEntry: 46-1, Page 4 of 5 (4 of 9 18-15244 (9th Cir. May 13, 2019). His contract claim (Claim II) was thus properly dismissed with prejudice under Bell and Larionoff.

D. Claims III-V

Strother's remaining three claims sound in fraud. To the extent that Strother brings Claims III-V against Defendants in their official capacities, he must identify an applicable waiver of sovereign immunity. The Federal Torts Claim Act ("FTCA") is the only relevant waiver and it does not apply because Strother has not satisfied the FTCA's administrative exhaustion requirement. See *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have

exhausted their administrative remedies.").

To the extent Strother brings Claims III-V against Defendants in their personal capacities, he must plead those claims with particularity under Federal Rule of Civil Procedure 9(b). Strother conceded at oral argument that he did not plead his claims with particularity with regard to Defendants Baldwin and McCord. Oral Argument at 11:54.
AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Bryan James Strother,		**(No: 2:16 -cv-00255-TLN-C**
	(	
Plaintiff	(	
v.	(	**ORDER**
	(	
David S. Baldwin, et, al		(
	(	
Defendants.	(	

This matter is before the Court pursuant to three motions. The first is Defendants David S. Baldwin and Michael McCord's ("Defendants") Motion to Dismiss.[1] (ECF No. 13.) Plaintiff Bryan James Strother ("Plaintiff") opposes the Motion to Dismiss.[1] (ECF No. 28.)[2] The

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[1] The complaint indicates this action is brought against Defendants Baldwin and McCord "both individually and in their official capacities." (ECF No. 1 at 1.) Defendant Baldwin is the Adjutant General of the California Army and Air National Guard. (See ECF No. 1; ECF No. 13-1 at 2. n.1) Defendant McCord is the Pentagon Comptroller. (ECF No. 1; ECF No. 13-1 at 2. n.1.) In the caption of the complaint, Defendant McCord's position was given as

second is Plaintiff's motion for a preliminary injunction and class certification ("Motion for Class Certification"). (ECF No. 15.) Defendants oppose the Motion for Class Certification. (ECF No. 16.) The third is Defendants' motion to strike statement of interest of amicus curiae ("Motion to Strike"). (ECF No. 36.) Plaintiff has not filed an opposition to the Motion to Strike. The Court has carefully considered the arguments raised by the parties. For the reasons set forth below, Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. This results in the dismissal of each of the causes of action set forth in the complaint. (ECF No. 1.) Because this leaves the instant action without an operative complaint, the Motion for Class Certification is DENIED as MOOT. Likewise, the Motion to Strike is DENIED without prejudice, subject to renewal if Plaintiff files an amended complaint.

I. INTRODUCTION AND BACKGROUND

The allegations contained in the complaint are sobering. In short, Plaintiff contends that he reenlisted in the California Army National Guard ("CANG") during a time

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"Pentagon Comptroller [sic] Department of Defense, Defense Finance and Accounting Service." (ECF No. 1 at 1.) This resulted in the docket erroneously indicating that Defense Finance and Accounting Services and United States Department of Defense are separate Defendants. The Clerk of the Court is ordered to update the docket accordingly.

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This Court struck an earlier, overlong opposition filed by Plaintiff. (See ECF No. 26.) All references to Plaintiff's opposition with respect to the Motion to Dismiss are to ECF No. 28. Defendants had already filed a reply by the time the Court issued its order granting Defendants' Motion to Strike. Defendants subsequently indicated they were relying on their already-filed reply. (ECF No. 30) Consequently, all references to the reply are to ECF No. 21.

of war with the understanding he would receive certain reenlistment bonuses and incentive payments. (See ECF No. 1 at ¶¶ 7–8, 33–34, 36–39, 48, 86.) He did receive them and was subsequently sent to serve his country in Iraq. (See ECF No. 1 at ¶¶ 48, 53.) Nevertheless, years later, the military determined that he was not entitled to these bonuses and payments. (See ECF No. 1 at ¶ 53.) At the time of the filing of this action, the bonuses and payments he received were being "recouped" from his pay. (See ECF No. 1 at ¶¶ 19, 53–54.) According to Plaintiff, many of his fellow members of CANG similarly reenlisted with this same understanding and have suffered the same fate. (See ECF No. 1 at ¶¶ 4, 7, 19, 33–34, 37–38, 54.) For this reason, Plaintiff filed a complaint containing class allegations and currently seeks to certify this as a class action. (See generally ECF Nos. 1 & 15.)

During the pendency of this action, there have been significant developments. While the parties differ as to their legal consequences, the developments are not materially in dispute. They are as follows: On August 4, 2016, the Defense Office of Hearings and Appeals issued a decision waiving Plaintiff's alleged obligation to repay his $15,000 reenlistment bonus.[3] (ECF No. 41 at 2.) On August 15, 2016, the Defense Finance and Accounting Service refunded to Plaintiff $4,885.51 — the entire amount it had withheld from Plaintiff's pay in connection

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[3] Defendants throughout their submissions refer to "debts" or "obligations" of Plaintiff and others. This assumes the correctness of Defendants' legal position that Plaintiff and his fellow CANG members were legally obligated to return the bonus and other incentive payments they received or otherwise were in the government's debt. Obviously, the Court cannot proceed from this assumption. Consequently, the Court will use the descriptor "alleged" throughout this Order.

with the recoupment at issue in this case. (ECF No. 41 at 2.) On December 23, 2016, the National Defense Authorization Act of 2017 ("NDAA") was signed into law. (ECF No. 41 at 2.) The NDAA provided that "[t]he Secretary of Defense shall conduct a review of all bonus pays [and] student loan repayments . . . that were paid to members of the National Guard of the State of California during the period beginning on January 1, 2004, and ending on December 31, 2015." Pub. L. 114-328, § 671(c), Dec. 23, 2016, 130 Stat. 2000, 2174. The Department of Defense conducted a review of Plaintiff's incentive payments and waived the remainder of Plaintiff's alleged "debts."[4] (ECF No. 41 at 2.) Defendants assert that the Department of Defense reviewed incentive payments made to 17,485 CANG members and, after that review, all but 393 "received favorable determinations," similar to those received by Plaintiff.[5] (ECF No. 41 at 3.) (ECF No. 41 at 2.) On August 15, 2016, the Defense Finance and Accounting Service refunded to Plaintiff $4,885.51 — the entire amount it had withheld from Plaintiff's pay in connection with the recoupment at issue in this case. (ECF No. 41 at 2.) On December 23, 2016, the National Defense Authorization Act of 2017 ("NDAA") was signed into law. (ECF No. 41 at 2.) The NDAA provided that "[t]he Secretary of Defense shall conduct a review of all bonus pays [and] student loan repayments . . . that were paid to members of the

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[4] Defendants submit the Department of Defense waived a total $25,010.32. (ECF No. 41 at 2.) However, Defendants observe Plaintiff's submissions in this case have given the figure subject to recoupment as $20,010.32 in some places and $25,010.32 in another. (ECF No. 41 at 2 n.1.) Defendants contend this discrepancy is immaterial because the waiver would cover the higher of the two figures. This discrepancy is not addressed in Plaintiff's reply. In any event, the Court agrees this discrepancy is immaterial to the resolution of the Motion to Dismiss.

National Guard of the State of California during the period beginning on January 1, 2004, and ending on December 31, 2015." Pub. L. 114-328, § 671(c), Dec. 23, 2016, 130 Stat. 2000, 2174. The Department of Defense conducted a review of Plaintiff's incentive payments and waived the remainder of Plaintiff's alleged "debts."[5] (ECF No. 41 at 2.) Defendants assert that the Department of Defense reviewed incentive payments made to 17,485 CANG members and, after that review, all but 393 "received favorable determinations," similar to those received by Plaintiff (ECF No. 41 at 3.)

The Motion to Dismiss poses a series of complex legal questions, including with respect to the scope of this Court's jurisdiction in our constitutional system. These questions are measured under different legal standards and implicate different procedural mechanisms. For this reason, it would be inefficient to follow the Court's typical practice of setting out the standard of review immediately after this introductory section. Instead, the Court will proceed directly to its analysis of the Motion to Dismiss, setting out the relevant legal standard as appropriate.

II. ANALYSIS

The complaint contains the following five causes of

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[5] The precise relief received by these CANG members depended on whether their alleged "debt" had already been "established and certified for recoupment" and whether such recoupment had begun. (ECF No 41 at 3.) According to Defendants, where the alleged "debt" was "established," it was waived and any amounts recouped were refunded. (ECF No 41 at 3.) Where the alleged "debt" was not yet "established" a "determination" was made that "no debt would be established." (ECF No. 41 at 3.)

action: (i) "failure to train" pursuant to 42 U.S.C. § 1983; (ii) "breach/impairment of contracts"; (iii) "intentional misrepresentation"; (iv) "deceit or intentional fraud"; and (v) "concealment fraud". (ECF No. 1.) Defendants move to dismiss these claims for three separate reasons. (ECF Nos. 13 & 13-1.) First, Defendants argue the instant action must be dismissed for lack of Article III jurisdiction as developments since the commencement of this action have rendered each of these causes of action moot. (ECF No. 41.) Second, Defendants move to dismiss the third, fourth, and fifth causes of action for failure to comply with the Federal Tort Claim Act's ("FTCA") administrative exhaustion requirement. (ECF No. 13-1 at 11–12.) Third, Defendants argue that each of the causes of action should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. (ECF No. 13.)

As Defendants' mootness arguments challenge this Court's constitutional authority to reach the merits of Plaintiff's causes of action, the Court addresses them first. As discussed in more detail below, the Court finds as follows: none of the causes of action in the complaint are moot; Defendants' arguments relating to sovereign immunity and the FTCA require the dismissal of the third, fourth, and fifth causes of action insofar as they are brought against federal officials in their official capacities; and each of the causes of action fails to state a claim. The Court will analyze the parties' arguments in that order.

A. Mootness

Defendants contend that the entire "dispute has become moot and must be dismissed" for lack of subject

matter jurisdiction.[6] (ECF No. 41 at 1.) In Defendants' view, "[t]he complaint in this action seeks three types of relief: an order preventing any further recoupment in connection with [Plaintiff's] reenlistment bonus and [Student Loan Repayment Program ("SLRP")] payments, a refund of the amounts previously withheld, and declaratory relief." (ECF No. 41 at 4.) According to Defendants, since the commencement of this action, the Department of Defense has "stopped recouping [Plaintiff's] reenlistment bonus and SLRP payments[, ...] refunded all of the payments previously recouped [from Plaintiff], and waived the [alleged] debts at issue." (ECF No. 41 at 4–5.) Defendants state "there is no chance that the reenlistment bonus and SLRP payments will be recouped in the future." (ECF No. 41 at 4.) Consequently, Defendants assert "[t]his is the very definition of a moot case" as there is no meaningful relief that Plaintiff has requested which he has not already received. (ECF No. 41 at 4–5.)

Assuming their primary argument demonstrates Plaintiff's "individual claims are plainly moot," Defendants offer a preemptive argument "anticipat[ing]" — correctly — Plaintiff would argue that "the case as a whole is not moot because it is a

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[6] As an initial matter, this Court authorized the parties to file supplemental briefing on mootness on September 11, 2017. (ECF No. 40.) While the parties have denominated this briefing "supplemental," in reality this briefing completely supplants their original submissions on mootness. By that, the Court means the parties fully restate their previous arguments alongside their new ones. Consequently, for ease of reference, the Court will cite solely to the supplemental briefing throughout this Order when analyzing the parties' mootness arguments.

putative class action, and some potential relief can still be afforded to putative class members." (ECF No. 41 at 5–7.) In short, it is Defendants' contention that "Ninth Circuit precedents finding that putative class actions are not moot [in some circumstances], even after a named plaintiff's claims have become moot, do not apply here[.]" (ECF No. 41 at 6.)

The Court finds that Defendants' primary argument fails with respect to each of Plaintiff's five causes of action. Consequently, the Court need only briefly discuss Defendants' argument relating to the claims of the putative class. However, the Court will first set out the legal standard for mootness, before analyzing these arguments.

i. Legal Standard

Mootness is properly raised in a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, as it pertains to a federal court's subject matter jurisdiction under Article III of the Constitution. *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000). "Article III of the Constitution limits the jurisdiction of the federal courts to 'Cases' or 'Controversies.'" *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011). The Supreme Court has "repeatedly held that an actual [case or] controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (internal quotation marks omitted). "A case becomes moot — and therefore no longer a 'Case' or 'Controversy' for purposes of Article III — when the issues presented are no longer live' or the parties lack a legally cognizable interest in the outcome." Id. at 91 (some internal quotation marks omitted).

The "central question" in determining mootness is "whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc). This basic question is asked separately for each cause of action. *Chew v. Gates*, 27 F.3d 1432, 1437 (9th Cir. 1994); see also *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144 (9th Cir. 2016) ("[A]n individual claim . . . becomes moot when a plaintiff actually receives all of the relief he or she could receive on the claim through further litigation.") (emphasis removed). A cause of action is not moot because the "primary and principal relief sought" is no longer available. *Powell v. McCormack*, 395 U.S. 486, 499 (1969) (internal quotation marks omitted). "The question is not whether the precise relief sought at the time the case was filed is still available[.]" *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017). Rather, the question is "whether there can be any effective relief." Id. "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

1. ii. Whether Plaintiff's case is moot?

At the outset, the Court observes that Defendants' primary mootness argument is fundamentally flawed. Simply put, it fails to engage in a cause-of-action-by-cause-of-action analysis of the relief presently available to Plaintiff in light of the changed circumstances that Defendants contend have mooted the instant action. (See, e.g., ECF No. 43 at 2.) However, the practical effect of this problem is limited by deficits in Plaintiff's reply brief. Despite being squarely challenged to do so,

Plaintiff failed to identify any form of declaratory or injunctive relief that he could receive with respect to his individual claims that he had not already received. (Compare generally ECF No. 44 with ECF No. 41 at 4–5.) Accordingly, with respect to each of the causes of action, the Court finds Plaintiff has conceded that his individual claims for declaratory and injunctive relief have become moot during the pendency of this action. See *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.").

While the parties' shortcomings in briefing mootness were unhelpful, contrary to Defendants' suggestion, the Court cannot proceed to Defendants' non-mootness arguments without resolving the mootness issues they raised. (See, e.g., ECF No. 43 at 5.) "Mootness is, of course, a threshold jurisdictional issue." *Sea-Land Serv., Inc. (Pac. Div.) v. Int'l Longshoremen's & Warehousemen's Union,* 939 F.2d 866, 870 (9th Cir. 1991). "In our system of government, courts have no business deciding legal disputes or expounding on law in the absence of such a case or controversy." *Already, LLC,* 568 U.S. at 90 (internal quotation marks omitted). Parties cannot confer Article III jurisdiction on a federal court by consenting to have that court resolve a moot legal controversy. See *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 469 n.3 (9th Cir. 1986) (citing *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985)). Likewise, the Court is not free to assume away a tricky question of mootness in order to reach what it may suspect is "an 'easy' merits question" on the other side of the jurisdictional hurdle. *See Steel*

Co. v. Citizens for a Better Env't, 523 U.S. 83, 99 (1998). With this is mind, the Court will engage in a systematic analysis of the relief still available to Plaintiff as an individual (as opposed to the putative class).

Plaintiff's first cause of action is not moot because at a minimum Plaintiff could receive nominal damages for the alleged violation of his constitutional rights brought pursuant to 42 U.S.C. § 1983. For purposes of analyzing mootness, the Court accepts Plaintiff's position that his § 1983 claim actually asserts his due process rights were violated.[7](See ECF No. 28 at 21.) It is well-settled that a plaintiff with a § 1983 claim differs from a typical tort plaintiff in that he can recover nominal damages. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[W]e believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury."); see also *Draper v. Coombs*, 792 F.2d 915, 922 (9th Cir. 1986) ("Even assuming that Draper did not suffer actual damages as a result of the unlawful extradition, his complaint stated valid section 1983 claims for

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[7] As Defendants correctly note, the complaint is not a "model of clarity." (ECF No. 13-1 at 2.) Indeed, the words "due process" never appear in the complaint. (See generally ECF No. 1.) However, the Court is not free to determine whether Plaintiff's first cause of action fails to state a claim under Rule 12(b)(6) before resolving the mootness question. While "[i]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss," *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1009 (N.D. Cal. 2014), an opposition can save a cause of action from dismissal for mootness if it demonstrates what relief is presently available with respect to a cause of action the non-movant contends is not moot. *See Bayer*, 861 F.3d at 869. Of course, that cause of action may very well fail to state a claim.

nominal damages."). Moreover, the Ninth Circuit has made it repeatedly made clear that "[a] live claim for nominal damages will prevent dismissal [of a cause of action] for mootness." *See, e.g., Bernhardt v. Cty. of Los Angeles,* 279 F.3d 862, 872 (9th Cir. 2002).

Plaintiff's second cause of action is not moot for much the same reason. While never clearly stated, the parties' arguments assume Plaintiff's breach of contract claim is governed by California law. (Compare ECF No. 1 at ¶ 76 (contending it was wrongful to recoup his bonus and other incentive payments after the expiration of California's statute of limitations) with ECF No. 43 at 4 (citing California authority regarding the non-availability of "[e]motional distress damages . . . under contract law").) For the purposes of resolving the question of mootness, the Court will assume this as well. California law allows a "[a] plaintiff . . . to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages." *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632 (1959) (internal citation omitted); *see also* Cal. Civ. Code § 3360 ("When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."). This is sufficient for purposes of Article III's case or controversy requirement. See *Bernhardt*, 279 F.3d at 872; *see also In re Facebook Privacy Litig.*, 192 F. Supp. 3d 1053, 1060–62 (N.D. Cal. 2016) (holding that Article III standing exists where a plaintiff seeks to "recover nominal damages for breach of contract even in the absence of actual damages") (quoting *Sweet*, 169 Cal. App. 2d at 632).

The Court will address Plaintiff's third, fourth, and fifth causes of action together, as the parties have done so. Defendants' arguments warrant only a brief response. In their opening brief, Defendants acknowledge that "in numerous places [Plaintiff] asks for repayment of amounts already recouped, *as well as other damages."* (ECF No. 13-1 at 4 (emphasis added).) In fact, Defendants provide pin-citations to the complaint on precisely this point, including with respect to the three causes of action at issue. (ECF No. 13-1 at 4.) However, when it came time to discuss mootness, Defendants suggested that Plaintiff has sought only "three types of relief" and that these did not include damages beyond the money recouped. (ECF No. 41 at 4.) When Plaintiff drew attention to this discrepancy, Defendants' two-sentence response did not contest that under California tort law Plaintiff could recover damages beyond the return of the recouped money. (See ECF No. 43 at 4.) For purposes of resolving the mootness question, the Court will accept this as true. Instead, Defendants argue these claims are barred by the FTCA. (ECF No. 43 at 4.) This, of course, has nothing to do with whether the claims at issue are moot.

For the foregoing reasons, the Court finds none of the five causes of action are moot as to Plaintiff as he continues to have a concrete interest in the outcome of this litigation with respect to each of them.

iii. Whether the claims of the putative class are moot?

Defendants' argument with respect to the putative class is premised on the theory that Plaintiff's "individual claims are plainly moot." (ECF No. 41 at 5.) For the reasons just discussed, this is not the case.

Consequently, a lengthy discussion is not required. *Cf. Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663, 672 (2016) ("While a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted") (internal citation omitted).

The Court will make two additional points before proceeding. First, each of the five causes of action presents a live controversy with respect to the entire class with respect to damages. The arguments in the preceding section apply with equal force with respect to nominal damages for the first two causes of action and damages beyond return of the recouped money for the remaining three. Second, Defendants acknowledge hundreds of members of the putative class have not had their alleged debts cancelled and are still subject to recoupment. Defendants have offered no argument that the requests for declaratory and injunctive relief have not been mooted for the putative class.

B. Sovereign Immunity/Federal Tort Claims Act

The Court now turns to Defendants' contention that the third, fourth, and fifth causes of action are barred for failure to comply with the FTCA's administrative exhaustion requirement to the extent they are brought against Defendants in their official capacities as federal officials. (ECF No. 13-1 at 11–12.) There is, however, a preliminary question: whether — and, if so, to what extent — the third, fourth, and fifth causes of action are made with respect to Defendant Baldwin in

his capacity as a federal official.[8]

i. Whether Defendant Baldwin was acting in a federal capacity?

What may have been a straightforward question has, unfortunately, been rendered insoluble for reasons the Court will now explain. As the Supreme Court has explained, "members of the State [National] Guard . . . .[,] [i]n a sense, . . . must keep three hats in their closets — a civilian hat, a state militia hat, and an army hat — only one of which is worn at any particular time." *Perpich v. Dep't of Def.*, 496 U.S. 334, 348 (1990). Defendants begin the relevant portion of their opening brief by acknowledging the existence of Perpich, along with the observation that Defendant Baldwin was "appointed by the Governor of California to command [CANG] as [t]he Adjutant General of California." (ECF No. 13-1 at 8.) Without explaining how this introduction supports their position, Defendants assert that "[b]ecause the allegations in the complaint relate exclusively to the administration of federal funds authorized pursuant to federal statutes governing military recruitment by a federally-recognized reserve component of the United States Army, [Defendant] Baldwin at all times was acting pursuant to federal, not State, law." (ECF No. 13-1 at 8.) Plaintiff responds that "Defendant Baldwin is the head of the [CANG]," Plaintiff's action is being brought "against the office[] [Defendant Baldwin] hold[s]," and that Defendant Baldwin is "[i]n every sense . . . a [s]tate [a]ctor appointed by the Governor of California." (ECF No. 28

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[8] Defendant McCord's status as a federal (rather than a state) official is not contested.

at 18.) In their reply, Defendants assert "[t]he allegations in the complaint . . . make clear that [Defendant] Baldwin was at all times acting in his federal capacity." (ECF No. 21 at 6.)

The Court accepts for purposes of resolving this preliminary question that *if "[t]he allegations in the complaint . . . ma[d]e clear* that [Defendant] Baldwin was at all times acting in his federal capacity" that Defendants' FTCA arguments would resolve the third, fourth, and fifth causes of action with respect to Defendant Baldwin in his official capacity. (ECF No. 21 at 6 (emphasis added).) The problem is that the complaint does nothing of the sort. That is presumably why Defendants do not cite to the complaint in support of that contention. As Defendants more accurately observe at the outset of their opening brief, the complaint "is not a model of clarity." (ECF No. 13-1 at 2.) Indeed, in connection with the three causes of action at issue here, Defendants accuse Plaintiff of *making no "effort to . . . specify the role* of each [Defendant] in the [allegedly] fraudulent scheme" and characterizing the complaint as *"provid[ing] no basis whatsoever for each [Defendant] to determine what their alleged individual role was[.]"* (ECF No. 21 at 9 (emphasis added).) The Court is no better situated than Defendants to make the complaint tell a coherent, comprehensible story that clarifies Defendant Baldwin's role in events. Simply put, the Court cannot accept Defendants' argument that it is clear that Defendant Baldwin is being sued for "acting in his federal capacity." (ECF No. 21 at 6.)

Perhaps realizing the rosier of their two characterizations of the complaint could not be taken seriously, Defendants raise in a single sentence in their reply brief that Defendant Baldwin, in his official

capacity, may be shielded by the Eleventh Amendment. (ECF No. 21 at 6.) However, the Court "need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). Likewise, the Court is not "required to address perfunctory and undeveloped arguments[.]" *Williams v. Eastside Lumberyard & Supply Co.*, 190 F. Supp. 2d 1104, 1114 (S.D. Ill. 2001). The Court is not inclined to do so here. This does not change because the single sentence offered by Defendants touches on the Eleventh Amendment. *See Wisconsin Dep't of Corr. v. Schacht,* 524 U.S. 381, 389 (1998) ("The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own.") (internal citation omitted). "[B]ecause of the importance of state law in analyzing Eleventh Amendment questions" and because "the parties have not briefed the issue," the Court declines to raise the issue sua sponte. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 515 n.19 (1982).

ii. Whether the third, fourth, and fifth causes of action are barred against federal officials in their official capacity?

The Court now turns to the substance of Defendants' primary FTCA argument.[9] Again, what should have

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9 Defendants, again in a single sentence, advert to what they likely intended to be an alternative argument. *Bartell v. JPMorgan Chase Bank, NA*, 607 F. App'x 731, 732 (9th Cir. 2015) ("Conclusory statements, tautologies and a couple of citations don't an argument make."). If a legal issue is not worth analyzing in a

been a straightforward point is complicated by the quality of the briefing — this time by Plaintiff's opposition. Consequently, a brief discussion of the concept of the sovereign immunity of the United States is necessary before summarizing Defendants' straightforward argument and explaining why the opposition is non-responsive.

It is well-settled that "the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell,* 445 U.S. 535, 538 (1980) (internal alterations omitted). "The FTCA, enacted in 1946, was designed primarily to remove the sovereign immunity of the United States from suits in tort." *Levin v. United States,* 568 U.S. 503, 506 (2013) (internal quotation marks omitted). The FTCA "gives federal district courts exclusive jurisdiction over claims against the United States for 'injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission' of federal employees acting within the scope of their employment." *Id.* (quoting 28 U.S.C. § 1346(b)(1)). "Substantively, the FTCA makes the United States liable 'to the same extent as a private individual under like circumstances,' § 2674, under the law of the place where the tort occurred, § 1346(b)(1), subject to enumerated exceptions to the immunity waiver, §§ 2680(a)–(n)." *Id.* at 506–07. "Of the FTCA's [enumerated] exceptions, none bars suits by service members against the federal government." *Johnson v.*

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brief, there is no need to "issue spot" it for the Court. Certainly, the Court does not have the time to do the parties research for them.

United States, 704 F.2d 1431, 1434 (9th Cir. 1983). However, one of the enumerated exceptions "withheld consent to be sued for '[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,'" *Costo v. United States,* 248 F.3d 863, 866 (9th Cir. 2001) (quoting § 2680(j)). "[T]his exception was broadened significantly by the Supreme Court, which held in *Feres v. United States[,* 340 U.S. 135, 146 (1950),] that the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id*. (internal quotation marks omitted). This judicially created exception is known as the "*Feres* doctrine." In short, if a claim that would otherwise come within the text of the FTCA's waiver of sovereign immunity but also falls within the scope of the *Feres* doctrine or one of the enumerated exceptions, "the court is without jurisdiction to hear the case." *Monaco v. United States,* 661 F.2d 129, 131 (9th Cir. 1981) (internal citation and quotation marks omitted). was broadened significantly by the Supreme Court, which held in *Feres v. United States*[, 340 U.S. 135, 146 (1950),] that the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. (internal quotation marks omitted). This judicially created exception is known as the "*Feres* doctrine." In short, if a claim that would otherwise come within the text of the FTCA's waiver of sovereign immunity but also falls within the scope of the *Feres* doctrine or one of the enumerated exceptions, "the court is without jurisdiction to hear the case." *Monaco v. United States,* 661 F.2d 129, 131 (9th Cir. 1981) (internal citation and quotation marks omitted).

Defendants' argument can be briefly summarized as follows: Claims against federal officials in their official capacities are suits against the United States that are barred by sovereign immunity unless the United States has waived its immunity. (See ECF No. 13-1 at 11–12.) Defendants contend the only relevant waiver arguably applicable here is the FTCA and that the FTCA has an administrative exhaustion requirement. (ECF No. 13-1 at 11.) Citing Ninth Circuit authority, Defendants argue Plaintiff is obligated to allege compliance with that requirement in order avoid dismissal of those claims. (ECF No. 13-1 at 11–12.) Defendants argue Plaintiff's third, fourth, and fifth causes of action must be dismissed for failing to "allege . . . he submitted an administrative claim for the alleged frauds[.]" (ECF No. 13-1 at 11–12.)

The Court finds that Plaintiff concedes this point by failing to address its substance in his opposition. [10] See

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[10] Plaintiff acknowledges the FTCA with a pair of block quotations to § 1346(b)(1) and § 2680. (ECF No. 28 at 26.) This is followed by an acknowledgement of the *Feres* doctrine. (ECF No. 28 at 27 & n.13.) Plaintiff then block quotes the Ninth Circuit's opinion from *Jackson v. Tate,* 648 F.3d 719 (9th Cir. 2011). Without bothering to explain why it follows from his series of citations, Plaintiff states "[t]he FTCA is not applicable to this matter at all." (ECF No. 28 at 27.) It seems most likely that this was meant to say "the **Feres doctrine** does not apply to this matter at all." That statement would have the benefit of advancing his cause to some degree. It would not, however, in anyway address Defendants' exhaustion requirement argument. If, on the other hand, Plaintiff meant to be taken literally, he would then be *outside of the only waiver of sovereign immunity* identified as arguably applicable without coming forward with another source of waiver. Either way, Plaintiff's response is wholly inadequate.

Additionally, for the sake of completeness, the Court notes that

Stichting Pensioenfonds ABP, 802 F. Supp. 2d at 1132. That is, these claims are dismissed with respect to Defendant McCord in his official capacity and Defendant Baldwin in his official capacity insofar as he is being sued in his capacity as a federal official. However, this dismissal is with leave to amend as the Court cannot conclude that Plaintiff is unable to plead exhaustion if given the opportunity. Because these claims are not barred with respect to either of Defendants in their individual capacities (or Defendant Baldwin to the extent he is sued in his official capacity as a non-federal official), this leave is granted subject to the Court's analysis of these claims below with respect to Defendants' motion pursuant to Rule 12(b)(6).

C. Rule 12(b)(6)

Having concluded that none of Plaintiff's causes of actions are moot and that Defendants' sovereign immunity arguments require dismissal of the third, fourth, and fifth causes of action as they apply to Defendants in the official capacities as federal officials, the Court must now examine Defendants' Rule 12(b)(6) arguments. For the reasons set forth below, the Court concludes that each of the causes of action fails to state a claim for which relief can be granted. The Court will analyze the causes of action in order, again analyzing the state law causes of action together. Before doing so the Court will briefly set out the relevant legal standard.

Plaintiff seems to be requesting the *Feres* doctrine "be revised if not overruled." (ECF No. 28 at 27 n.13.) If this indeed a request of this Court (rather than a musing), obviously, it must be denied. Suffice it to say that the Supreme Court sits in review of this Court and not the other way around.

i. Legal Standard

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Rule 8(a) of the Federal Rules of Civil Procedure requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim . . . is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

Nevertheless, a court "need not assume the truth of

legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose,* 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal,* 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555; *see also Iqbal,* 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 526 (1983).

If a complaint fails to state a plausible claim, "'[a] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (quoting Doe v. United States,* 58 F.3d 484, 497 (9th Cir. 1995)); see also *Gardner v. Marino,* 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in denying leave to amend when amendment would be futile). Although a district court should freely give leave to amend when justice so requires under Rule 15(a)(2) of the Federal Rules of Civil Procedure, "the court's discretion to deny such leave is 'particularly broad' where the plaintiff has previously amended its complaint[.]" *Ecological Rights Found. v. Pac. Gas & Elec. Co.,* 713 F.3d 502, 520 (9th Cir. 2013) *(quoting Miller v. Yokohama Tire*

Corp., 358 F.3d 616, 622 (9th Cir. 2004)).

ii. First Cause of Action: "42 U.S.C. [§] 1983 Failure to Train"

Plaintiff's conceptualization of his first cause of action is a bit of a moving target. This is immediately obvious when paragraph 20 of the complaint is compared with Plaintiff's opposition to the Motion to Dismiss as a whole. Paragraph 20 provides that "[t]he basic thrust of Plaintiffs [sic] Complaint is 42 U.S.C. [§] 1983 failure to train." (ECF No. 1 at ¶ 20.) Surprisingly, the phrase "failure to train" appears nowhere in the twenty pages of Plaintiff's opposition. (*See generally* ECF No. 28.) Only after a close read of the opposition does one learn that the first cause of action seemingly was intended to allege a violation of the Due Process Clause of the Fourteenth Amendment. Conspicuous by its absence from the complaint is the phrase "due process." (*See generally* ECF No. 1.) Not surprisingly, Defendants were able to assemble a series of arguments as to why Plaintiff's first cause of action should be dismissed. Equally unsurprising, the Court need not address some of these arguments in detail (if at all) as they were directed toward a theory of the case that Plaintiff has seemingly abandoned altogether.

Instead, the Court will briefly explain why the first cause of action plainly fails. The Supreme Court has "said many times, § 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Graham v. Connor,* 490 U.S. 386, 393–94 (1989) (internal quotation marks omitted). Therefore, "one cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against

anything." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). Put another way, the "first step in any [§ 1983] claim is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver,* 510 U.S. 266, 271 (1994) (plurality opinion). As Plaintiff has failed to take this basic step, the first cause of action must be dismissed for failure to state a claim. Obviously, this deficiency can be cured, so the Court will grant Plaintiff leave to amend. However, the Court will also briefly address a few additional points raised by the briefing to conserve judicial resources should Plaintiff attempt to amend his complaint.

First, it is apparent that if given the opportunity to amend Plaintiff would do so in a way that also fails as a matter of law. Plaintiff's position is that he and his fellow CANG members have been deprived of a "property interest" without due process in violation of the Fourteenth Amendment. (See ECF No. 28 at 21, 27.) In Plaintiff's view, the "property interest" in question is a contractual right to receive "bonus monies" per the terms of their respective enlistment agreements. (See, e.g., ECF No. 28 at 21.) However, as Defendants correctly observe, it is settled that this is not the law. "A soldier's entitlement to pay is dependent upon statutory right." *Bell v. United States*, 366 U.S. 393, 401 (1961). Simply put, "common-law rules governing private contracts have no place in the area of military pay." Id. "This is true even though recruiter and recruit may each sign an enlistment contract agreeing to its contents; the recruit's entitlement to basic pay is simply not governed by this contract, but by statute." *Schism v. United States,* 316 F.3d 1259, 1271 (Fed. Cir. 2002) (en banc). The situation is no different when a soldier's entitlement to an enlistment bonus is at issue. *United States v.*

Larionoff, 431 U.S. 864, 869 (1977).

This does not necessarily render amendment of the first cause of action altogether futile. When it comes to the entitlement to bonuses, "the rights of the affected service members must be determined by reference to the statutes and regulations" governing the bonus program at issue. *Id.* Plaintiff's complaint seems to take the position that (i) he was eligible for his bonuses and incentive payments under applicable law in place at the time of his reenlistment (independent of the terms of his enlistment agreement), (ii) he maintained that eligibility throughout the time he performed his service, (iii) CANG and the Department of Defense "falsely contend[ed]" he was ineligible under applicable law, including 37 U.S.C. § 331, and (iv) the military began recouping his bonuses, despite the falsity of their contentions. (See ECF No. 1 at ¶¶ 39–55.) Defendants make no effort to explain why Plaintiff would be foreclosed from bringing a constitutional claim in those circumstances. As the Ninth Circuit, sitting en banc, stated nearly forty years ago, "[a]s to vested rights, the distinction between earned military pay and that to be earned in the future has long been recognized." *Costello v. United States,* 587 F.2d 424, 425 (9th Cir. 1978) (en banc). It did so citing *Larionoff. Id. In Larionoff,* the Supreme Court observed that "[n]o one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn." *Larionoff,* 431 U.S. at 879. However, it would raise "serious constitutional questions" for "Congress to deprive a service member of pay due for services already performed, but still owing." Id. The Court declines to wade further into this thicket due to the failure of the parties to analyze this

topic, except to conclude that the Court is not persuaded granting leave to amend would be a futile enterprise.

With that being said, a second topic warrants brief discussion. Defendants correctly observe that "by its very terms, § 1983 precludes liability in federal government actors." *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997) (noting "the fact that similar standards are used in analyzing the prerequisites of § 1983 and *Bivens* causes of action does not mean that the claims are interchangeable"). Thus, if Plaintiff intends to bring a federal constitutional claim against a federal government actor, Plaintiff must choose a proper vehicle. However, since CANG members are federal government actors at times and state government actors at others, Plaintiff may plead in the alternative, as necessary.

Lastly, in their opening brief, Defendants state the "gravamen of the first cause of action appears to be that the defendants failed to properly train the military personnel who were responsible for administering the reenlistment incentive programs." (ECF No. 13-1 at 6.) Citing *Feres*, Defendants argue that the Court "lacks jurisdiction over any claim seeking to dictate how federal military units must be trained." (ECF No. 13-1 at 6.) As previously noted, Plaintiff makes no mention of "failure to train" in his opposition, let alone attempting to address this argument. Consequently, the Court deems Plaintiff to have conceded this argument. See *Stichting Pensioenfonds ABP,* 802 F. Supp. 2d at 1132.

iii. Second Cause of Action: "Breach/Impairment of Contracts"

As Defendants correctly observe, Plaintiff's second cause of action proceeds with the understanding that he and his fellow CANG members have a contractual right to their enlistment bonuses and incentive payments. (ECF No. 13-1 at 5–6.) The Court has already explained why this argument is foreclosed by binding precedent. Therefore, the second cause of action must be dismissed without leave to amend, as an amendment would clearly be futile.

iv. Third, Fourth, and Fifth Causes of Action

The Court will analyze Defendants' arguments with respect to the third, fourth, and fifth causes of action together, as the parties have done so. Defendants contend — and Plaintiff does not dispute — each of these causes of action are a species of fraud within the meaning of Rule 9(b) and, therefore, are subject to its heightened pleading standard. (Compare ECF No. 13-1 at 12 *with* ECF No. 28 at 28.) Defendants argue that Plaintiff fails not only to meet that standard but falls short of the "more relaxed notice pleading standard under Rule 8." (ECF No. 13-1 at 12–13.) Plaintiff's opposition "admits each claim is short laying out the . . . elements for each claim, but the first paragraph of every count in Plaintiff's complaint states . . . [that it] incorporates by reference all preceding and following paragraphs." (ECF No. 28 at 28 (emphasis removed).) Plaintiff observes that the complaint contains "103 total numbered paragraphs" and collectively these satisfy Rules 8 and 9. (ECF No. 28 at 28.) Plaintiff states this is "conclusively" demonstrated by Defendants ability to "identity [sic] the nature of all claims, the parties involved and the facts[.]" (ECF No. 28 at 28.)

The Court will first address Defendants' Rule 9 argument. In relevant part, Rule 9(b) provides "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010). "To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false." *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks omitted).

With this in mind, it is clear that none of these three causes of action meet the Rule 9(b) standard. As an initial matter, it impossible for a person reviewing the complaint to determine which Defendants each cause of action is brought against. This is easily illustrated by examining three factual allegations from the complaint. With respect to the third cause of action, paragraph 86 of the complaint provides as follows: "Defendant made intentional misrepresentations of material fact to Plaintiff, Defendant represented to Plaintiff the [sic] he was eligible for reenlistment bonuses." (ECF No. 1 at ¶ 86.) With respect to the fourth cause of action, paragraph 93 provides: "Defendant's [sic] intentionally took false actions, made false statements, misrepresentations, false representations, engaged in concealment, and/or non-

disclosure."[11] (ECF No. 1 at ¶ 93.) With respect to the fifth cause of action, paragraph 99 provides: "Defendant concealed or suppressed a material fact[.]" (ECF No. 1 at ¶ 99.) The use of the singular "Defendant" without giving his name or any information that would enable a person reviewing the complaint to discern which Defendant each cause of action is being brought against falls short of Rule 9(b)'s particularity standard.[12]

So there is no confusion, the problem is not Plaintiff's attempt to incorporate by reference. There are no factual allegations *anywhere in the complaint* that describe Defendant McCord doing anything of any sort — literally none. He is mentioned in the first numbered paragraph under the heading "Jurisdiction and Venue," never appears again in the 102 numbered paragraphs that follow, and inexplicably reappears

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The use of "Defendant's" is obviously a typo. In context, it is apparent that "Defendant" was intended rather than "Defendants." In any event, for the reasons discussed in this section of the Order, the Rule 9(b) deficiencies go much deeper than this and the standard would not be met even if "Defendants" were intended in this one instance.

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For completeness's sake, the Court notes that footnote 23 of the complaint identifies one instance, under the heading "Request for Relief," where "Defendant as used here applies to both Defendants." (ECF No. 1 at 18 n.23.) There is no indication this is meant as a general statement applicable to the complaint beyond the "Request for Relief." However, even if it were, it would not change things. "Rule 9(b) does not allow a complaint to . . . lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant." *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011) (internal quotation marks omitted). "'[E]veryone did everything' allegations" are properly dismissed. Id.

under "Request for Relief." (See ECF No. 1 at ¶ 1.) The treatment of Defendant Baldwin is similar, except that he appears in a single numbered paragraph. That paragraph recounts remarks allegedly made by Defendant Baldwin to the effect that CANG faced "monumental" problems, had "lost its way, ethically and morally," and was in need of a change of culture. (ECF No. 1 at ¶ 69.) The reality is that the complaint — in 103 *paragraphs* — manages to say nothing meaningful about either Defendant, let alone the "the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false" required by Rule 9(b). *Cafasso*, 637 F.3d at 1055.

As each of the causes of action fails under Rule 9(b), the Court need not discuss Defendants' Rule 8(a) argument in detail. If a reader can walk away having read a complaint without having the slightest clue whether a cause of action is brought against him at all, he surely is not on the "fair notice" required by Rule 8(a)(2). *Twombly*, 550 U.S. at 555.

One more item requires mention, as Plaintiff will be given leave to amend with respect to these three causes of action. There are three paragraphs that may have been an attempt to give the "who, what, when, where, and how" required by Rule 9(b) with respect to *someone*. *Cafasso,* 637 F.3d at 1055. They provide as follows:

> In March 2006 Plaintiff Sgt. Byran [sic] James Strother and other [CANG] members were by Order of the Adjunct [sic] General ordered to go to a retention seminar. At the above mentioned retention seminar [CANG] members were

> put into an assembly line were [sic] they signed contracts to stay in [CANG]. Acting "Under Color of Law" [CANG] members were given advice and counsel by superiors to extend their time in the guard. [CANG] members then signed the contracts acting in good-faith in reliance from [CANG] superiors in attendance.

(ECF No. 1 at ¶¶ 36–38.) Assuming that the superiors in question are Defendants (or someone else whom these causes of action could be brought against), and further assuming that it satisfies the "who, . . . when, where, and how" of the Rule 9(b) requirement, Rule 9(b) would still not be satisfied. A person reviewing the complaint can only speculate what was said when CANG members allegedly received "advice and counsel . . . to extend their time" in the military. (ECF No. 1 at ¶ 38.) A person reviewing the complaint is left with no idea about what "is false or misleading about [any] purportedly fraudulent statement[s], and why [they are] false," as Rule 9(b) requires. *Cafasso,* 637 F.3d at 1055 (original alterations omitted).

III. CONCLUSION

In summary, for the reasons set forth above, (i) none of the causes of action in the complaint are moot, (ii) Defendants' arguments relating to sovereign immunity and the FTCA require the dismissal of the third, fourth, and fifth causes of action insofar as they are brought against federal officials in their official capacities, (iii) each of the causes of action must be dismissed for failure to state a claim, (iv) the second cause of action is dismissed with prejudice, and (v) the first, third, fourth, and fifth causes of action are dismissed with leave to amend. Accordingly, IT IS

HEREBY ORDERED as follows:

1. The Motion to Dismiss is GRANTED in part and DENIED in part, as set forth above;
2. The complaint (ECF No. 1) is dismissed, as set forth above;
3. Plaintiff may file an amended complaint in conformity with this Order within 30 days of the date this Order is filed;
4. The Motion for Class Certification (ECF No. 15) is DENIED as MOOT; and
5. The Motion to Strike is DENIED without prejudice, subject to renewal if Plaintiff files an amended complaint.

IT IS SO ORDERED.
Dated: December 4, 2017
Troy L. Nunley
United States District Judge

40 MINUTE ORDER
issued by Courtroom Deputy M. Krueger for District Judge Troy L. Nunley on September 11, 2017: The Court does not require additional briefing on Defendants' motion to dismiss as it relates to Defendants arguments pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Additionally, the Court does not require additional briefing on Plaintiffs' motion for preliminary injunction (ECF No. 15 .) However, the Court understands there may be factual developments relating to the reimbursement of members of the putative class. If that is the case, the Court will consider a supplemental brief from each side in connection with Defendants' motion to dismiss as it relates to Defendants' mootness arguments pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Such supplemental briefing shall not exceed ten (10)

pages. It shall be filed no later Monday, September 18, 2017 at 5:00 PM. Each side may file a response not to exceed five (5) pages no later than Friday, September 22, 2017 at 5:00 PM. (TEXT ONLY ENTRY) (Krueger, M) (Entered: 09/11/2017)

45 ORDER
signed by District Judge Troy L. Nunley on 12/4/2017 GRANTING in PART and DENYING in PART 13 Motion to Dismiss; The 1 complaint is DISMISSED, as set forth above; Plaintiff may file an amended complaint in conformity with this Order within 30 days of the date this Order is filed; DENYING 15 Motion for Preliminary Injunction; DENYING 36 Motion to Strike without prejudice, subject to renewal if Plaintiff files an amended complaint. (Washington, S) (Entered: 12/05/2017)

47 NOTICE of APPEAL
by Bryan James Strother as to 45 Order,, Order on Motion to Strike,, Order on Motion to Dismiss,, Order on Motion for Preliminary Injunction,. (Filing fee $ 505, receipt number 0972-7483470) (Willman, Daniel) (Entered: 01/31/2018)

48 JUDGMENT
dated *1/30/2018* in favor of Defendants against Plaintiff pursuant to order signed by District Judge Troy L. Nunley on 1/30/2018. (Donati, J) (Entered: 01/31/2018) 01/31/2018 47 NOTICE of APPEAL by Bryan James Strother as to 45 Order,, Order on Motion to Strike,, Order on Motion to Dismiss,, Order on Motion for Preliminary Injunction,. (Filing fee $ 505, receipt number 0972-7483470) (Willman, Daniel) (Entered:

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III Sec.1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III Sec. 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;— to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

CONSTITUTIONAL AND STATUTORY PROVISIONS-Continued

5th (V) Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th (XIV) Amendment

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1346(b)(1) Federal Tort Claims Act (FTCA)

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or

CONSTITUTIONAL AND STATUTORY PROVISIONS-Continued

personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680

The provisions of this chapter and section 1346(b) of this title shall not apply to:
(j) Any claim arising out of the combatant activities of the military . . . or naval
forces, or the Coast Guard, during time of war.
(k) Any claim arising in a foreign country.

42 U.S.C. § 1983

§ 1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of

CONSTITUTIONAL AND STATUTORY PROVISIONS-Continued

Columbia shall be considered to be a statute of the District of Columbia.

Pub. L. No. 114-328
§ 671. Recovery of Amounts Owed to the United States by Members of the Uniformed Services
(a) Statute of Limitations.—Section 1007(c)(3) of title 37, United States Code, is amended by adding at the end the following new subparagraphs:

``(C)(i) In accordance with clause (ii), if the indebtedness of a member of the uniformed services to the United States occurs, through no fault of the member, as a result of the overpayment of pay or allowances to the member or upon the settlement of the member's accounts, the Secretary concerned may not recover the indebtedness from the member, including a retired or former member, using deductions from the pay of the member, deductions from retired or separation pay, or any other collection method unless recovery of the indebtedness commences before the end of the 10-year period beginning on the date on which the indebtedness was incurred.

FEDERAL RULES OF CIVIL PROCEDURE

F.R.C.P. Rule 8. General Rules of Pleading
(a) Claim for Relief. A pleading that states a claim for relief must contain:
(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

CONSTITUTIONAL AND STATUTORY PROVISIONS, F.R.C.P.-Continued

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

F.R.C.P. Rule 9. Pleading Special Matters
(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.
(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.
(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

F.R.C.P. Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing
(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
(1) lack of subject-matter jurisdiction;
(6) failure to state a claim upon which relief can be granted;

AFFADAVIT
ROBERT RICHMOND

Robert Richmond
4334 Saint Paul Ave.
Lincoln, NE. 68504

October 4, 2016

To whom it may concern:

I was contemplating re-enlisting in 2006 and asked my unit retention Non Commissioned officer (NCO) if I was eligible for a bonus. The requirements for the bonus change frequently depending on the military's needs and criteria is often very vague. Therefore, I wasn't sure. I was told that because I held a critical job skill (Special Forces) I was eligible for a $15,000 bonus if I enlisted for a 6-year term.

As a Special Forces Soldier, a 6-year re-enlistment all but guaranteed another deployment, but for financial reasons I decided to take that risk for the contractual promise of the bonus. I re-enlisted on November 23, 2006. Just months after re-enlisting our unit was activated and sent to Iraq from 2007-2008. As green berets, our team was sent on some of the most dangerous missions. We conducted more than 100 raids likened to the Navy SEAL raid on the Osama bin Laden compound, and my team alone captured well over 1,000 suspected terrorists during that deployment.

I detrimentally relied on that contract as I was subjected to more than 30 enemy attacks, some of which resulted in multiple friendly causalities. I was personally injured in a vehicle crash during one

mission, and knocked unconscious in a separate mission when my vehicle was struck by an IED (roadside bomb). I woke to enemy gunfire ricocheting off my vehicle and RPG rockets bursting to either side of the vehicle. I suffered injuries to my back, both shoulders, and a traumatic brain injury in that conflict. I was later diagnosed with PTSD. I struggled so bad with my memory from the blast, that I couldn't find my way home when I returned to the US. Although it seems to have improved, I continue to struggle with memory issues every day.

In November of 2012 I honorably completed my contract.

On May 29, 2014 I received a letter from the Department of the Defense (DOD) stating they are recouping my bonus because it was made in violation of Federal law and National Guard Bureau (NGB) policy, and that my bonus would be forwarded for debt collection action. I was stunned at first, thinking there was some kind of mistake. My confusion soon turned to a feeling of betrayal, and the more I thought about it, it did not seem legal. My wife and I along with our newborn son were already struggling financially at the time. I immediately called the number provided on the letter. I don't recall who I spoke to, but they suggested I do not pay the debt, but contact JAG and/or follow the instructions on the letter to request an exemption to policy. That individual then sent me a copy of the California Army National Guard (CAANG) audit which suggested I was not eligible for the bonus based on the amount of time I had in service when the contract was signed.

I called the number provided on the letter for JAG.

The JAG officer told me, I was right to call them first and have them work on it rather than do the exemption of policy. He told me to send them an email explaining my situation along with a copy of everything I had and they would take care of it. After not hearing anything for nearly a year and a half, I thought the issue was resolved.

Then, on October 25, 2015, I received a collection letter from Defense Finance Accounting Service (DFAS), stating I had to pay $15,000 in full by November 15, 2015 or sign an agreement letter, stating I received the payment in error, and make installment payments of $423.12 with interest. I did not receive the payment in error; I was promised the payment in a legally binding contract that I signed in good faith and fulfilled. The letter stated my bonus was now being recouped because my unit reported I served "00 years of my contract" (contrary to the audit paperwork stating it was because of the amount of time in-service I had). The letter came from DFAS, the payroll department -- they have all of the payroll and tax records that show for a fact I completed my contract. The letter stated if I didn't think the information was accurate I needed to contact my unit. This didn't make sense, because in my 30 years of service at the time, I was not aware of any unit reporting system, other than for pay. My unit obviously reported me present for pay, because I was paid, and I would assume they would want more than just my bonus.

Per their instructions, I called my unit several times and left several messages, with no response. I know they have been extremely preparing for upcoming missions and did not time to focus on this situation.
On November 5, 2015, after being unable to make

contact with my unit, I reached out to a contact in the incentives task force. I connected with SSG Hernandez, who works for the task force in charge of handling collections. I informed her that I turned in my paperwork to JAG, but apparently, the guy, who no longer worked there dropped the ball, and now my only course of action at this point was file a claim with the Army Board of Military Corrections (ABCMR). She added that my case should be a no brainer as far as having my correction approved. She then wrote that she was annoyed because someone could have initiated the paperwork on my behalf, and that they didn't really need me to personally request it.

On November 13, 2015, after many unanswered calls, I emailed the unit Operations NCO. After several more phone calls and no response, I called the unit Sergeant Major, and left messages on his cell phone.

On November 18, 2015, having not heard back from my unit, I mailed out the required paperwork to ABCMR via certified mail. ABCMR stated on their website that they are backed up for over a year and that I should not expect a reply before then.

On November 23, 2015, I emailed the Sergeant Major, and informed him I was unable to get in contact with anyone from the unit. I then called the unit again.

On November 30, 2015, I emailed the company operations NCO again.

On December 3, 2015, after getting nowhere contacting my unit as instructed, I wrote a letter to DFAS, explaining nobody had returned my calls or emails, and provided them with evidence that I completed my

entire commitment. With this letter, I included my DD214s, my Retirement points statement, and the pay records they already had. I did not receive a response.

I was finally contacted by the unit operations NCO in early December. They were as confused as I was about this bogus reporting system, regarding having completed my contract or not. They merely report me present for pay, which I was. In fact, I not only completed my required one weekend a month and two weekends a year, I actually served approximately four years on active duty for the CAANG. Again, DFAS is the payroll department, therefore they have records. It seemed very apparent they had no intention of resolving the issue.

It wasn't until later that I learned this was happening to nearly 17,000 soldiers. After getting nowhere with the CAARNG and DFAS I stayed awake at night, spending countless hours writing several letters to local congressmen and senators begging them to take action and defend our right to the legal due process protected by the 5th Amendment, and consider the statute of limitations. DFAS wrote back stating they are only the collection agency, so my debt must be addressed with the National Guard. I spent countless more hours writing congressmen and senators asking them to hold the National Guard to the law. I took an oath to defend the Constitution against all enemies foreign and domestic, as did the leaders who initiated this collection.

As the economy took a turn for the worse, I was laid off by my current job at the railroad. I found a temporary job, and used my savings to buy an investment property I could flip while I was waiting on the

railroad to call me back. I had near perfect credit, 800 score last time I checked. So I paid cash for a building, then planned to borrow a small sum to work on it. Everything was in order and I had a loan application submitted. They pulled my credit to find DFAS had reported I had an unpaid debt of $15,000. It crippled my credit score!

I was a man who worked hard to provide for my wife and babies, and they crippled my ability to provide for my family. What did I do? I signed a contract that I literally risked my life to fulfill. The National Guard did have a form I could have filled out. All I had to do was say the payment they made to me was erroneous, and provide them with all of my banking information. I couldn't trust them to do the contract right, I couldn't trust them with their aggressive, illegal collection actions, I certainly was not going to trust them with my bank account information. They didn't seem to care about the law. They were above it, and it broke my family down. My wife would weep night after night. I couldn't sleep. This was so wrong. We weren't sure we could take care of our son and newborn daughter because my medical benefits had just ended with the railroad. We even contemplated getting divorced solely so she could qualify for medical coverage for my babies, without having to sell our house. My mental health deteriorated rapidly, I lost sleep writing letter after letter. I wasn't even thinking rationally, I felt so betrayed. My wife cried night after night. She said she knew of people who took complete advantage of the system and the government just gave them money, and she could not believe what the Army was doing to me after 30 years of loyal service to my country. All I could tell myself was there are people who are worse off than me, and I would get through

this.

On April 5, 2016, as if things couldn't get worse, I received a collection letter from the Treasury Department stating they added an additional 33% penalty to the debt, and it would continue to increase if I did not pay it immediately. I did everything they asked me to do. Why did they keep pushing me and pushing me, pouring salt into the wound? I have never felt so betrayed in my life, and if I felt this way, how did every other soldier feel? I have since requested a hearing with the Treasury Department.

On April 14, 2016, I was notified by my old company commander that Colonel Piazzoni, the very person who sent the original bonus recoupment letter, requested an exemption to policy on my behalf.

On April 24, 2016, my old company commander explained to me, that the packet I sent to ABCMR nearly six months prior, will not be processed until the NGB sends me a denial letter. He stated they were going to submit an exception to policy packet into a system called GIMS, and we have to wait for GIMS to automatically deny my packet, since they lost the copy of my bonus addendum. Once GIMS automatically denies my packet, I will be able to re-apply to ABCMR, then wait another year for a response.

On June 19, 2016, I followed up with my old company commander to find out if my packet had been processed through GIMS.

On June 22, 2016, I learned my packet had still not been processed.

On September 26, 2016, after receiving my denial letter from the NGB. I resubmitted my packet with ABCMR and will now have to wait approximately one more year for a response.

In the meantime, I found a new job out-of-state and have to move to the third state in two years, chasing work to support my family. But my credit score went from almost 800 points to just over 600 points; too low to get a home loan, let alone a VA loan, which is something I am entitled to as part of my service, and yet cannot use.

This is the typical Army mentality. Rather than doing their due diligence and investigating each case, to determine if there was any fraudulent intent on the part of the soldiers, in typical Army fashion, the leadership punished the masses and called them all guilty until proven innocent. They have the most incredible and efficient procedure for collections, and reporting unpaid debt to credit bureaus and the Treasury department, but have intentionally created an over-burdensome process designed to feed on the stress of soldiers who have PTSD, and get them to comply because they don't have the mental stamina to continue to stand up to them.

Even my therapist, assigned to me by the VA, has begged me to comply and pay them, because she sees how this has consumed and affected my life. She stated the stress from this has deteriorated my mental health and told me if I didn't just drop it, I was literally going to die. She said this has shaved years off my life.

I'm so tired of tossing and turning at night, every time

I receive a collection letter; only to wake up in the middle of the night, to write a congressmen or senator. I'm tired of watching my wife cry each and every time.

I know that only a few have the stamina to stand up to the Government and fight for what is right. I know there are 17,000 soldiers going through the same thing, and they must feel there is nothing they can do. They must feel helpless and feel they have no place to turn. Which is exactly how I felt. I have complied with every instruction, and yet they have caused me so much mental anguish and financial loss. I have tried to use the remedy they have provided and as long as I continue to do so, they will only continue to ruin my livelihood for one more year.

I have gone from a proud veteran, who served for over 30 years, in nearly a dozen countries, and multiple combat zones, to an utterly disappointed man. The lack of honor and loyalty shown by military leaders who made mistakes, failed to do their jobs, and have refused to take responsibility is beyond appalling. They have placed the burden onto the shoulders of soldiers who have already risked and gave all to serve their country. I beg of you, please, give soldiers who have lost all hope, the legal due process they deserve.

Sincerely,

Robert J. Richmond
Sergeant First Class
US Army Special Forces