IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN C. KLUGE for himself and on behalf of the PUTATIVE CLASS, 11413 Newport Mill Road, Silver Spring, MD, Plaintiff v. UNITED STATES GOVERNMENT Service of Process c/o U.S. Attorney for the District of Columbia 555 Fourth Street, NW, Washington D.C. 20530 Certified Copy to: U.S. Department of Justice, Attorney General 950 Pennsylvania Avenue, NW Washington, DC 20530, Defendant.	)	**Civil Action No. 19-cv-2618-DLF** CLASS ACTION AND COMPLAINT FOR DECLARATORY RELIEF

FIRST AMENDED

CLASS ACTION COMPLAINT

Plaintiff John Kluge, on behalf of himself and a class of similarly situated persons, hereby brings this class action, and files this First Amended Class Action Complaint prior to service of summons pursuant to FRCP 15, against Defendant the United States of America (the "Government") and alleges the following upon personal knowledge and information and belief.

This case is brought on behalf of Plaintiff and a Putative Class of United States military reserve personnel who are also federal civilian employees who volunteered to serve the Nation in wartime only to be unlawfully deprived of a differential benefit of employment found in 5 U.S.C.

5538 (hereinafter "Differential Pay Law").[1] Congress passed the Differential Pay Law over ten years ago with effective date of the first day of a federal pay period on or after 11 March 2009. Congress intended with this Statute to provide the same employment benefits that a large number of private sector, state, local, and foreign employers provide to U.S. activated reservists by making up the difference when their military pay and allowances is less than their civilian pay.

In implementing the law, the Office of Personnel Management (hereinafter "OPM") made an unlawful, arbitrary, capricious, and possibly prejudicial, decision to deny consideration of this employment benefit to those courageous and selfless civilian employees who had volunteered for wartime duty. This decision and application totally ignored express provisions of the Statute in question and violated basic principles of statutory construction that call for no such distinction. Tellingly, in that same year, OPM senior officials applied the exact opposite interpretation concerning that very same statutory provision when construing the meaning of qualifying military duty as it related to a benefit of employment found in the Family and Medical Leave Act (FMLA). *See* Exhibit A, OPM Fact Sheet at page 5 and Department of Labor FMLA Fact Sheet at page 1.

Both the FMLA and the Differential Pay Law refer to a provision of law in Title 10 for purposes of defining what constitutes qualifying military duty. OPM, however, created a false 'volunteer vs. conscript' distinction only applicable to the Differential Pay Law. In fact, key

[1] 5 U.S.C. 5538 (Section 751 of the Omnibus Appropriations Act of 2009, "NONREDUCTION IN PAY WHILE FEDERAL EMPLOYEE IS PERFORMING ACTIVE SERVICE IN THE UNIFORMED SERVICES OR NATIONAL GUARD" (Public Law 111-8, March 11, 2009) as amended by section 745 of the Consolidated

rulings by the Merit System Protection Board (MSPB) cited this obvious contradiction in decisions against OPM's interpretation of that very provision of law at issue in this case but limited to only those parties. *See* Exhibit B, Marquiz v Department of Defense, MSPB Docket SF-4324-15-0099-I-1 (2015), Initial Ruling by Judge Gutman at page 5.

Just last year, the U.S. Court of Appeals, Federal Circuit forcefully weighed in concerning the same application of that Statute and in direct opposition to OPM's continuing interpretation and application. http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-1223.Opinion.2-8-2018.1.PDF.

In that case, O'Farrell v. Department of Defense, 882 F.3d 1080 (2018), U.S. Court of Appeals, the Court addressed a similar federal employee benefit question making it unmistakably clear that OPM's interpretation and narrow view of what constitutes qualifying military duty is manifestly wrong. Yet in the intervening year or so since O'Farrell, OPM has shown no discernible willingness to correct their clear error by changing guidance or policies related to the various benefits they are responsible for managing at a programmatic, regulatory, or implementation level.

O'Farrell was a reservist working for DoD as a civilian when he volunteered to be mobilized to provide operational support vaguely defined (it may have been a 'volun-told' situation as the military parlance goes). O'Farrell was denied by DoD and OPM his request for an additional 22 days of annual leave, as authorized under to 5 U.S.C. 6323(b), since, he argued, his orders were in support of a contingency operation. While the case primarily dealt with whether or not a specific contingency operation must be designated on military orders to be

eligible for the extra leave benefit (held: OPM was wrong on that point too; was error for DoD/OPM to require it), the Court also held that OPM's interpretation and implementation denying consideration to those volunteering for active duty per 10 U.S.C. 12301(d) was clear error and unlawful. This latter holding is the exact same issue before the Court in this case.

In ruling against the Government and overturning MSPB related to the 22 day leave benefit, the Circuit Court Panel describes the correct interpretation of statutes that incorporate by reference 10 U.S.C. 101(a)(13)(B) for purposes of defining servicemembers' benefit eligibility. In fact, the Panel's decision expressly cites 5 U.S.C. 5538(a), the Differential Pay Law, as an example of such circumstance embodying that "Statutory Framework" affected by their decision. *Id*. at 1082. The Court expressly states:

> "Section 101(a)(13), in turn, defines what constitutes a "contingency operation" for purposes of § 6323(b). A contingency operation must be a "military operation,"[4] 10 U.S.C. § 101(a)(13), and the military operations that qualify as contingency operations include, as relevant here, those that "result[] in the call or order to, or retention on, active duty of members of the uniformed services under [certain listed statutory provisions], or any other provision of law ... during a national emergency declared by the President," id. § 101(a)(13)(B) (emphases added). Section 101(a)(13)(B) thus requires that service members be called to, or retained on, active duty pursuant to a "provision of law... during a national emergency." While § 101(a)(13)(B) lists specific statutory provisions under which a service member may be ordered to active duty, the subsection's use of the word "any" indicates that this list of statutory provisions is non-exhaustive and that "other provision[s] of law" should be interpreted broadly. See Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) ("Read naturally, the word `any' has an expansive meaning, that is, `one or some indiscriminately of whatever kind.'" (citation omitted)). Therefore, § 101(a)(13)(B) instructs that a service member may be called to active duty "in support of a contingency operation" pursuant to § 6323(b), even if the service member were ordered to active duty pursuant to a provision of law that is not explicitly listed in § 101(a)(13)(B)." O'Farrell v. Department of Defense, 882 F.3d 1080, 1085-6 (2018), U.S. Court of Appeals, Federal Circuit, http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-1223.Opinion.2-8-2018.1.PDF.

That Court goes on to state:

> "By the 1960s, Congress grew concerned that service members increasingly were being called to active duty in response to "civil disturbances," requiring them to "take annual leave or go on leave without pay," and that this caused substantial hardship for "enlisted men, who in private life may earn substantially more than their pay as Guardsmen or reservists." S. Rep. No. 90-1443, at 4289 (1968)… In addition, when Congress added a definition of "contingency operation" in § 101(a)(13) in 1991, it did so in response to, inter alia, its assessment that "[DOD]... was not sufficiently sensitive to the sacrifices made by reservists called or ordered to active duty *in connection with* the Persian Gulf conflict and by the families, employers, and communities of those reservists." National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub L. No. 102-190, § 555(a)(1), 105 Stat. 1290, 1372 (1991) (emphasis added). This legislative history indicates that Congress continually updated § 6323 and § 101(a)(13) to provide for increasing numbers of service members to receive additional compensation in response to the changing nature of military conflicts."[2] *Id.* at 1088.

Perhaps most telling and significant, the Court states the following, "[i]ndeed, the Order calling Mr. O'Farrell to active duty pursuant to [10 U.S.C.] §12301(d), which undoubtedly qualifies as a "provision of law," states that he will provide "operational *support*" for this mission [citation omitted]… and, as explained above, Mr. O'Farrell was called to active duty "in support of" a "contingency operation" pursuant to a "provision of law" and "during a national emergency," which is all the relevant statutory provisions require…" *Id.* at 1088.

As if any further emphasis by the Court against OPM and DoD's position were needed, the Federal Circuit panel ended their reversal with the following thunderclap that should have finally caught OPM's attention and signaled that any ambiguities concerning benefits were to be decided in favor of servicemembers per U.S. Supreme Court and U.S. Circuit Court precedent:

[2] It is also necessary to keep in mind in this case that the broad holding in O'Farrell concerning what constitutes "in support of a contingency operation" will be critical in defining the Putative Class.

> "Third, the Government avers that …"the record does not show the necessary connection between Mr. O'Farrell's service and a military operation connected with a declared national emergency." Resp't's Br. 23. However, we concluded above that indirect support for contingency operations is sufficient under § 6323(b). *See supra* Section II. Moreover, although not necessary to our analysis, if there were any "interpretative doubt" as to whether § 6323(b) imposed the additional requirements sought by the Government, it would be "resolved in [Mr. O'Farrell]'s favor." *Kirkendall v. Dep't of the Army,* 479 F.3d 830, 846 (Fed. Cir. 2007) (en banc) (internal quotation marks and citation omitted); *see King v. St. Vincent's Hosp.,* 502 U.S. 215, 220 n.9, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) ("[P]rovisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." (citation omitted))." *Id*.

After a decade of various efforts to get OPM to right this blatant wrong, it is time for this Court to issue a declaratory judgment to put an end to this unlawful denial of benefits. While there is nothing in any rule of statutory construction or legislative history that in any way justifies this arbitrary and capricious policy, the dramatic narrowing of this law's application was consistent with vocal and public opposition by bureaucrats at DoD, perhaps also OPM, and official prejudicial statements by Pentagon spokesmen who had been mounting a lobbying campaign against this policy for a decade or more. *See* Exhibit C, *Wall Street Journal* article from 2002 quoting a DoD spokesperson opposing the Differential Pay Law as "harmful" to the force and as evidence of a decade of strong opposition and lobbying by active duty and full-time civilians at the Pentagon against the Reservist differential benefit.[3]

OPM policy and guidance on what constitutes qualifying service under the Differential Pay statute is binding or has been adopted as binding policy on federal pay offices throughout the

[3] While counterintuitive, there is a palpable and unwarranted prejudice in the military among too many active duty and full-time civilian personnel against reservists perhaps viewing them as interlopers and undeserving of the honors, benefits, and plaudits the active duty and full-time personnel view they alone deserve. Sadly, DoD has been a prolific violator of the Uniformed Services Employment and Reemployment Rights Act (USERRA), a law designed to protect reservists from punishment or prejudice in their civilian jobs due to military service.

Government.[4]

The same DoD that had taken the extraordinary step of publicly opposing this very law benefitting reservists prior to its passage were consulted by OPM in 2009, as statute required, related to the Differential Pay Law's interpretation and implementation. After losing their decades-long lobbying campaign against the Reserves, it appears senior leaders in DoD were influential in persuading OPM to capriciously withhold the rightful differential pay benefit to a very large swath, the Putative Class, of federal employees who left the ease and comforts of federal jobs to volunteer for wartime duty as activated reservists fighting (likely also dying or suffering debilitating injuries) in our nation's contingency operations over the past decade.

NATURE OF THE CASE

1. This class action is brought on behalf of all current and former employees of the Government who were otherwise qualified for the Differential Pay Law's benefit found at 5 U.S.C. 5538 *et. al*., but were denied, or not considered for the benefit, because the Government excluded from consideration those who volunteered, pursuant to 10 U.S.C. 12301(d), to fill critical active duty mobilization shortfalls or supported a contingency operation pursuant to another law not expressly enumerated in the statutory definition of "contingency operation."[5]

2. Pursuant to the Government's unlawful application and implementation of the Differential Pay Law, likely tens of thousands of veterans were refused the benefit primarily

[4] *5 U.S.C. 5538, et. seq.* has broad coverage among the federal workforce as it incorporates USERRA's, 38 U.S.C. 4301 *et. seq*., comprehensive reach that includes intelligence agencies and other, often exempted, entities.

[5] The differential pay benefit only applies in cases where military pay and allowances are less than civilian base pay.

based on the arbitrary, capricious, possibly prejudicial, and certainly incorrect basis that they were not entitled to it when volunteering under 10 U.S.C. 12301(d) or other provision not expressly enumerated in 10 U.S.C. 101(a)(13)(B). The provision of law allowing DoD to accept reservist volunteers, 10 U.S.C. 12301(d), is a vital tool that allows DoD to activate a reservist for a critical deployment position if the servicemember agrees to waive substantive rights protecting them from being inappropriately singled out for wartime deployment. It is essentially a waiver of those rights to individually volunteer for war. Generally, reservists are only activated as part of an entire unit mobilization, not individually. There are rarely used authorities to allow for individual involuntary mobilization, however, this is not the norm and involves justification based on unique skills and needs of the service. As a result, DoD heavily relies upon volunteering reservists to fill thousands of mobilization shortfalls during wartime.[6] These statutory limitations serve to protect individual reservists from being singularly targeted absent a narrow and quantifiable set of needs-based justifications. The military personnel in the Putative Class could have likely avoided wartime service altogether had they not volunteered.

3. Multiple adjudicative bodies and tribunals, when not constrained by OPM's policy and legal interpretation precedent, have agreed with Plaintiff in this matter and have awarded relief limited to the individual plaintiffs in those cases. *See* Exhibit B and http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-1223.Opinion.2-8-2018.1.PDF. This claim seeks to rectify this longstanding injustice to thousands of

[6] *See* Exhibit C, at page 3, estimating 120,000 civilian Government employees serve in the Reserves.

servicemembers who have been unlawfully deprived based on this clearly erroneous interpretation and application of law.[7]

4. Background: Legislative history demonstrates Congress wanted to provide a differential pay benefit comparable to what Fortune 500, even many foreign employers and small businesses, have been providing for decades. *See* Exhibit D. Plaintiff is unable to identify any single private employer making the inappropriate distinction of voluntary versus involuntary that is created by OPM's error. In fact, it is a fair argument that any such distinction would violate the Uniformed Services Employment and Reemployment Rights Act (hereinafter "USERRA") given that law's prohibition on any form of employment discrimination against servicemembers based on service regardless of whether it is voluntary or compelled.[8] Having overwhelmingly passed USERRA's discrimination provision, it would seem unlikely Congress would intend to include such a contradiction of USERRA when enacting the Differential Pay Law.

6. Plaintiff and the Class seek a declaratory judgment, appropriate relief, costs, and reasonable attorneys fees.

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[7] Interestingly, the only one publicly available contrarian view on this issue was penned in an official published opinion by the current General Counsel of OPM while he sat as a Board Member on the MSPB. In a split decision, the MSPB failed to overturn the lower judge's ruling against OPM's current, erroneous policy. But absent a quorum on the MSPB and in light of a split decision, the ruling in favor of volunteering reservists was not a binding holding beyond the four corners of that decision. A legitimate question arises whether a conflict of interest is presented should that former MSPB Board Member participate in this litigation for the Government as it so directly relates to, and professionally reflects upon, his published judicial ruling while serving at the head of that independent adjudicative body. The appearance of a conflict is certainly at play raising the issue of whether recusal is appropriate. This may be the subject of a motion at a later time should a voluntary recusal not be forthcoming.

[8] 38 U.S.C. 4311 (a): "**(a)** A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied…any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

JURISDICTION AND VENUE

7. Venue and jurisdiction are proper in this Court pursuant to 28 U.S.C. § 1331, § 1367, and 28 U.S.C. Section 2201 pursuant to a Declaratory Judgment of this Court.

8. This Court has expertise and jurisdiction over all aspects of federal law, particularly law pertaining to federal departments and agencies headquartered in Washington, D.C., unlike the multiple other potential adjudicative bodies with jurisdiction over one or another aspect of this case.

9. To refuse jurisdiction would rupture the potential claims in this matter into various splinters of incomplete and disparate legal effect. For instance: (a) certain Title 5 federal Executive Branch employees would have to take the USERRA aspects of this claim to the Merit System Protection Board (MSPB) currently sitting impotent without a valid quorum, and with no apparent end in sight to the political deadlock, unable to render any binding relief or to resolve contradictions among their lower adjudicative offices; (b) while certain members of the Putative Class working in Executive Branch Intelligence Community federal civilian positions would be barred from this venue and instead have to bring those matters to the U.S. Court of Federal Claims or, potentially, to their agencies Office of Inspector General as a sort of quasi adjudicative venue; (c) Legislative and Judicial Branch employees would have to bring claims in the various U.S. District Courts across the nation depending on where they reside or work, or, possibly, the Comptroller's Office or internal federal court administrative review offices; (d) certain back pay money-mandating claims of federal employees could be brought in the U.S. District Court for the jurisdiction in which they reside or work (i.e. Little Tucker Act); (e) or they could file their claims in the U.S. Court of Federal Claims; (f) and, lastly, but by no

means the least significant, reservists denied this employment benefit through no fault of their own whose qualifying military service was between 2009 and 2013 would be barred by the six year jurisdictional and procedural statute of limitations of the U.S. Court of Federal Claims and arbitrarily denied any relief whatsoever from this errant OPM decision.

10. Thus, this Court with its plenary declaratory, equitable, and other means of relief is uniquely positioned to hear and act on this case, particularly when considering the profound judicial economy issues and other compelling implications in the interest of justice that it presents. This Court's broad jurisdictional reach and expertise is singularly able to hear and rule on this case in a manner that will universally cut through the jumble of cross-jurisdictional, half-measures and overlapping jurisdictions in a way that resolves it in one effective and comprehensive hearing.

11. Thus far, multiple and disparate venues have been asked to adjudicate individual claims on this exact issue from the MSPB to the Comptroller, to OPM's internal administrative appeals body, possibly others. This Court's expertise and particular charge over the Government's varied and widespread departments and agencies presents the only valid option for efficient and comprehensive resolution.

PARTIES

12. Plaintiff John Kluge is a resident of Fairfax, Virginia and was formerly a federal civilian employee of the federal Government at all times relevant to this claim. He is also a Commissioned Officer in the United States Army Reserves. While this law was in effect, Plaintiff served on active duty pursuant to 10 U.S.C. 12301(d); he volunteered for wartime duty.

As such, he should have received differential pay, as his civilian compensation was more than his military compensation during this period. Plaintiff was deprived of such differential pay due to the arbitrary and capricious interpretation and application of the Differential Pay Law as interpreted and applied by the OPM.

13. Defendant is the United States of America (the "Government"), a sovereign. Defendant is responsible for the actions of its various departments, agencies, and offices, such as OPM and DHS. OPM is an executive branch office and DHS is an executive department.

COUNT I

Defendant has Harmed Plaintiff and the Class Based on an Erroneous Interpretation and Implementation of 5 U.S.C. 5538 *et. al*. Resulting in the Unlawful Denial of Differential Pay to Otherwise Qualifying Reservists Called or Ordered to Active Duty Pursuant to 10 U.S.C. 12301(d) or Another Law Not Expressly Enumerated in 10 U.S.C. 101(a)(13)(B).

34. Plaintiff hereby incorporates by reference all paragraphs and citations as set forth herein.

35. Pursuant to federal statute, Plaintiff and the Class were entitled to differential pay benefits under 5 U.S.C. 5538 but were denied such benefits by Defendant.

36. Defendant's interpretation, policy, and/or application on which they base their denial, or lack of consideration, to Plaintiff and the Class is legally wrong and inconsistent with the plain meaning of the relevant statutes and the basic principles of statutory construction.

FACTUAL ALLEGATIONS

14. For nearly ten years, OPM and all Federal civilian employers have been unlawfully denying consideration to their civilian employees who serve in the military reserves the benefits of employment found in 5 U.S.C. 5538, *et. al*., if they volunteered for active duty pursuant to 10 U.S.C. 12301(d) or other law not expressly enumerated in 10 U.S.C. 101(a)(13)(B) in support of military Contingency Operations such as the war in Iraq, Afghanistan, or Syria. This decision was based on the Obama-era OPM's arbitrary and capricious guidance and implementation for 5 U.S.C. 5538 that read into the law a phantom exclusion for such volunteers. Allowing individuals to volunteer for wartime service under 10 U.S.C. 12301(d) is a well-established and common practice by DoD to provide servicemembers the ability to better plan and organize wartime deployments and to minimize disruptions to their civilian and family lives. It also gives DoD much-needed flexibility to individually augment military mobilizations and active duty critical shortfalls.

15. OPM has completely disregarded critical language in the statute and the overall context and purpose of the Differential Pay Law's plain meaning as passed by Congress and signed by the President. OPM's official Guidelines on their website reads:

> *"**Qualifying active duty** means … active duty that qualifies for coverage under section 5538 is active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B)—i.e., the following specific provisions in title 10 of the United States Code: sections 688, 12301(a), 12302, 12304, 12304a, 12305, and 12406 and chapter 15… **Thus, qualifying active duty does not include voluntary active duty under 10 U.S.C. 12301(d**) or annual training duty under 10 U.S.C. 10147 or 12301(b).)," Emphasis added.* OPM Policy

Guidance on Reservist Differential under 5 U.S.C. 5538. Original Issuance Date: December 8, 2009 Revision Date: June 23, 2015, OPM.[9]

16. Yet the defining section a federal law cited in both the Differential Pay Law above, and the FMLA provision cited previously, actually states the following:

"(13) ***The term 'contingency operation' means*** *a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force;* ***or results in the call or order to, or retention on, active duty*** *of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, section 712 of title 14,* ***or any other provision of law during a war or during a national emergency declared by the President*** *or Congress*." 10 U.S.C. 101(a)(13), emphasis added.

17. It defies explanation how OPM could view "voluntary active duty under 10 U.S.C. 12301(d)" in support of Contingency Operations in the war zones of Iraq, Afghanistan, or Syria as somehow not constituting service under "any other provision of law during a war or during a national emergency declared by the President…" *Id*.

18. The simple fact is that each successive President of the United States in bipartisan and continuous fashion has formally continued the declaration of national emergency based on

[9] OPM's Guidance is followed by all federal employers.

the terrorist attacks of September 11, 2001 all the way up to the present day.[10] Furthermore, those contingency operations undertaken and authorized by the Department of Defense have been directly related to the terrorist attacks of 9/11 and pursuant to a Presidential declaration of national emergency in response: Global War on Terrorism, Operation Enduring Freedom (Afghanistan), Operation Iraqi Freedom, as well as more recent missions such as Operation Freedom's Sentinel and Operation Inherent Resolve in Iraq/Syria, among others.

19. For years, Congress debated and eventually passed 5 U.S.C. 5538, a provision of law intended to provide military reserve personnel sacrificing in our Nation's conflicts with the same benefits of employment found in differential pay being provided by many private sector employers. None of these employers, nor Congress, made any distinction between voluntary and involuntary service. In fact, reason would dictate that those volunteering would have been in the forefront of those for which the benefit was intended. *See* Exhibits C and D for contemporaneous press reporting on the subject.

20. As such a federal Differential Pay statute was signed and went into effect March 11, 2009, mandating Federal civilian differential pay for qualifying military service.

21. OPM and federal bureaucracies have refused to give effect to this clear statutory benefit to those who volunteer or are mobilized under a provision of law not expressly enumerated in 10 U.S.C. 101(a)(13)(B). This is against both Congressional intent and the established cannons of statutory construction to give effect to all statutory language so as to not

[10] https://www.whitehouse.gov/briefings-statements/text-notice-continuation-national-emergency-respect-certain-terrorist-attacks/

render relevant statutory language superfluous.

22. The specific clause in question is found within the statutory definition of military "contingency operations" incorporated by reference in the Differential Pay Law. It is clear that the drafters intended to both limit eligibility for the Differential Pay Law to circumstances in which federal employees were absent from work pursuant to active duty service for contingency operations and that they simply wanted that existing provision of law to define the parameters of eligibility. *See* 10 U.S.C. 101(a)(13), definition of contingency operation.

23. 10 U.S.C. 101(a)(13) unambiguously cites several independent triggers that invoke the differential pay employment benefit; and also statutorily defines what is and is not a "contingency operation." The plain meaning requires the differential pay to be afforded to service in support of contingency operations under any provision of law during a period of a Presidential declaration of national emergency for which military contingency operations were undertaken.

24. OPM has steadfastly stuck to its too narrow and unlawful application of this law by somehow holding that the Differential Pay Law only applies to contingency operational support performed involuntarily. This refusal fails to give effect to the words in the statute "*or any other provision of law during a war or during a national emergency declared by the President or Congress*" and, thus, rendering those words superfluous. 10 U.S.C. 101(a)(13)(B).[11]

[11] *See* John R. Sands, *et. al*, v. United States, 552 U.S. 130 (2008):"A statute should be construed so that every word has some operative effect. TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001), quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)."

CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure and the Rules of this Court on behalf of himself and the following class:

> **Class: All current and former employees of the Government who were otherwise qualified for the Differential Pay Law's benefit found at 5 U.S.C. 5538 *et. al*., but were denied, or not considered for the benefit, because the Government erroneously excluded from consideration those who volunteered, pursuant to 10 U.S.C. 12301(d), to fill critical active duty mobilization shortfalls or supported a contingency operation pursuant to another law not expressly enumerated in the statutory definition of a "contingency operation."**

26. The Class likely includes tens of thousands of individuals, making joinder impractical, in satisfaction of the requirements of FRCP 23(a)(1). The exact size of the Class and the identities of the individual members thereof are ascertainable only through Defendant's records. For purposes of LCvR 23.1(c) all notice shall be made to Counsel for Plaintiff.

27. The claims of Plaintiff are typical of the claims of all of the other members of the Class. The claims of the Plaintiff and the Class are based on the same legal theories and arise from the same erroneous Government action and policy, resulting in the same injury to the Plaintiffs and the Class. The Class has a well-defined community of interest. The Defendant has acted and failed to act on grounds generally applicable, if not specifically applicable, to the

Plaintiff and the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class.

28. There are questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect individual Class members within the meaning of FRCP 23(a)(2) and 23(b)(2).

29. Common questions of fact and law affecting members of the Class include, but are not limited to, the following:

a. Whether Defendant's conduct in barring consideration of employment benefits to otherwise qualified employees because they volunteered for wartime duty pursuant to 10 U.S.C. 12301(d) was authorized under law and whether any erroneous decisions or policies by the Government warrant relief to the Class and injunctive relief requiring future payment of differential pay to reservists called or ordered to military active duty for a contingency operation under "any other provision of law" during a time of a Presidential declaration of national emergency;

b. Whether Defendant was motivated in part by inappropriate factors or prejudice and whether that conduct was willful;

c. Whether Plaintiffs and the Class are entitled to specific relief whether equitable, as a matter of law, or otherwise, interest, costs and/or attorney's fees.

30. Plaintiff will fairly and adequately represent and protect the interests of the Class.

31. Plaintiff has retained counsel with substantial experience in complex claims, as well as, substantial experience in military and federal civilian employment law matters. To deny the putative Class or representation and require individuals bring separate claims would be substantially prohibitive and will result in an ineffective and incomplete resolution of the issue. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication.

32. Absent a class action, most class members would find the cost of litigating their interests to be prohibitive and likely not worth it. Plaintiff and their counsel will zealously pursue the claims on behalf of the Class and have the resources to do so. Plaintiff has no interest adverse to those of other Class members.

33. Plaintiff's counsel does not have an interest adverse to those of other Class members but would likely qualify for differential pay should the case prevail related to a period of active duty in support of a contingency operation in 2010 to 2011. Plaintiff is willing to disclaim this interest if the Court views it as conflicting with other Class members.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Class, pray for the following relief:

A. An order certifying the Class;

B. An order appointing Plaintiff as representatives of the Class and Plaintiff's counsel as counsel for the Class;

C. A declaratory judgment for Plaintiff and the Class on the question of law presented to the Court herein concerning their eligibility and entitlement to differential pay pursuant to 5 U.S.C. 5538; and all other relief the Court deems appropriate given its vast authorities to direct relief and make parties whole;

E. Payment of Plaintiff's and the Class' costs and reasonable attorneys' fees; and any further relief the Court deems proper.

Dated: November 19, 2019

Respectfully submitted,

_____/James Renne/___

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