IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:23-CV-897

IN RE:

CAMP LEJEUNE WATER LITIGATION

This Document Relates To:

ALL CASES

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO APPLY THE COURT'S JULY 22, 2025 ORDER TO ALL EXPERTS

INTRODUCTION

The Court issued its Order on July 22, 2025 (D.E. 444; "the Court's July 22 Order"), deciding the only issue presented—whether to grant the United States' motion to exclude portions of PLG's Phase III expert reports that contained new, untimely general causation opinions (D.E. 409; D.E. 410). PLG then waited six weeks—until just eight days before the parties' deadline for Phase II and Phase III *Daubert* and related motions—to file the present motion (D.E. 515). PLG now seeks to expand the Court's July 22 Order to apply to all experts, even though the Court properly ruled only on "Plaintiffs' Phase III experts" because that was the only issue before it at the time (*See* D.E. 444 at 8). PLG's motion should be denied for two reasons.

First, PLG inappropriately seeks to rely on Rules 16 and 60 of the Federal Rules of Civil Procedure to expand the scope of the Court's July 22 Order. Rule 60 applies to final judgments or orders, not interlocutory discovery rulings such as the Court's July 22 Order. Nor do the limited bases in Rule 60 for modifying an Order apply here. Rules 16(a) and 16(c)(2) concern case management; PLG cites no authority for the novel uses for which it seeks to use those provisions here. PLG ultimately appeals to the Court's inherent powers, but PLG "should not expect a court to do the work that it elected not to do." *Benbow v. Ingram*, 2024 WL 2964099, at *5 (E.D.N.C. May 8, 2024) (Jones, M.J.) (quotation omitted), *report and recommendation adopted*, 2024 WL

3073727 (E.D.N.C. June 20, 2024). PLG filed the wrong motion and has never filed a motion to strike. Thus, PLG's motion should be denied as procedurally defective.

Second, PLG's motion fails to expressly request exclusion of any of the United States' Phase III experts' opinions, much less show a violation of this Court's Scheduling Orders. Indeed, the only expert whom PLG specifically names is Dr. Lisa Bailey, but PLG misstates her reports to argue she offered new, independent general causation opinions.[1] Dr. Bailey performed *plaintiff-specific* risk assessments for all twenty-five (25) bellwether plaintiffs using individualized exposure calculations. PLG points to portions of Dr. Bailey's *plaintiff-specific* opinions in which she uses toxicity values or criteria to assess plaintiff-specific risks. Significantly, Dr. Bailey used risk assessment tools developed by the EPA and other government agencies; she did not offer new general causation opinions about whether any of the chemicals at issue could cause any Track 1 condition based on an independent review of epidemiological and toxicological literature.

Rather, Dr. Bailey used these agency toxicity values to conduct *plaintiff-specific* risk assessments that fall squarely within Phase III and the issue of specific causation. To the extent that Dr. Bailey considered whether the chemicals at issue could cause Track 1 diseases, she relied entirely on Dr. Julie Goodman, the United States' primary Phase II expert, as Dr. Bailey testified to multiple times in her deposition. Thus, the United States timely and properly disclosed Dr.

[1] Even though PLG does not expressly request exclusion of Dr. Bailey, the United States notes that this Opposition demonstrates that Dr. Bailey offered only plaintiff-specific risk assessment opinions that belong in Phase III. To the extent that the Court were to interpret any portions of her opinions differently, the United States respectfully requests the opportunity to fully brief that issue. The United States also notes that, on September 10, PLG moved to exclude Dr. Bailey under Rule 702 of the Federal Rules of Evidence (D.E. 624). The United States disputes and will respond to that motion in due course, but notes that PLG concedes that "Dr. Bailey purported to perform three analyses for *each Track 1 Plaintiff*." (D.E. 625, at 9 (emphasis added).) Likewise, PLG also agreed elsewhere that Dr. Bailey used "regulatory risk assessment for *her specific causation assessment* of the five kidney cancer Plaintiffs." (D.E. 600, at 23 (emphasis added).)

Bailey's opinions on April 8, 2025, with all of its other Phase III experts. Because the United States did not violate the Court's Scheduling Orders with respect to Dr. Bailey (or any other Phase III experts), PLG's motion should be denied.

For these reasons, and as further explained below, PLG's motion should be denied.

FACTUAL BACKGROUND

This Court has structured expert discovery in this litigation into three phases: Phase I (water contamination), Phase II (general causation), and Phase III (specific causation, damages, and residual issues). (*See* D.E. 270; D.E. 312; D.E. 414). PLG's Phase II general causation disclosures were due on December 9, 2024, and the United States' Phase II disclosures were due on February 7, 2025. PLG's Phase III disclosures were also due on February 7, 2025, while the United States' Phase III disclosures were due on April 8, 2025.

As expert discovery proceeded, disputes arose over whether particular PLG Phase III experts' reports contained untimely general causation opinions that should have been disclosed in Phase II. On June 23, 2025, the United States moved to exclude portions of some of PLG's Phase III experts' reports, as those reports contained untimely general causation opinions that should have been disclosed in Phase II. (*See* D.E. 409; D.E. 410).[2] Several weeks later, on July 14, 2025, PLG filed its opposition. (*See* D.E. 437). On July 22, 2025, the Court granted the United States' motion in part. (D.E. 444). In doing so, the Court ruled on the only issue before it and held that "Plaintiff's Phase III experts may not introduce new, independent general causation analyses,

[2] PLG describes the United States' motion as "seeking to exclude Phase III expert testimony that Defendant asserted addressed general causation (a Phase II topic)." (D.E. 515 at 1.) In fact, however, the United States' motion sought only "to exclude general causation opinions disclosed *by Plaintiffs*" after the applicable deadline. (D.E. 409, at 1 (emphasis added).)

including but not limited to fresh literature reviews, novel threshold calculations, or any general causation methodologies that were not timely disclosed in Phase II." *Id*. at 8.

In the six weeks that followed, PLG never sought relief to exclude any of the United States' experts, nor did PLG move for clarification or any comparable relief. The United States disclosed the opinions of Dr. Bailey (the only United States' expert who PLG specifically cites in its motion) on April 8, 2025, along with all of its other Phase III experts. PLG deposed Dr. Bailey on July 9, 2025. On July 14, 2025, PLG filed its response in opposition to the United States' motion to exclude PLG's untimely general causation opinions; however, PLG did not file a counter-motion under Rule 16(f) to exclude Dr. Bailey's opinions at that time. (*See* D.E. 437, at 4-6.) Even after the Court granted in part the United States' motion on July 22, 2025, PLG still waited six more weeks before identifying portions of Dr. Bailey's reports in the present motion (D.E. 515).

ARGUMENT

I. PLG's Reliance on Rules 16 and 60 is Misplaced and PLG's Motion Should Be Denied Summarily as Procedurally Defective.

PLG's motion should be denied as procedurally defective. PLG filed the wrong motion. Rather than moving to exclude under Fed. R. Civ. P. 16(f), PLG cursorily cited only the following: Rule 60(a), Rule 60(b)(6), Rule 16(a), and Rule 16(c)(2). None of these apply here.

As this Court has explained, "Rule 60 provides grounds for a court to relieve a party from a final judgment or order." *Polidi v. Boente*, No. 5:22-CV-00519-M, 2024 WL 3843055, at *1 (E.D.N.C Apr. 15, 2024). But that "Rule functions as 'a procedural device used to challenge final judgments or final orders,' not 'interlocutory order[s].'" *Id.* (quoting *Byrner v. Liquid Asphalt Sys., Inc.*, 250 F. Supp. 2d 84, 87 (E.D.N.Y. 2003)). "[A] discovery order ... is in no way a final judgment." *Id.* (quoting *Scott v. Chipotle Mexican Grill, Inc.*, 103 F. Supp. 3d 542, 545 (S.D.N.Y. 2015)). The Court's July 22 Order is an interlocutory discovery order. Indeed, this Court held as

much when PLG opposed the United States' June 23, 2025, motion on the ground that it was not a discovery motion—an argument the Court rejected. *See In re Camp Lejeune Water Litig.*, No. 7:23-cv-897, Text Order (E.D.N.C July 8, 2025) ("The [C]ourt has considered the parties' positions regarding the posture of Defendant's motion to exclude (Motion) [DE 409]. The [C]ourt finds that the Motion was properly filed pursuant to the Discovery Dispute Protocol in this Litigation..."). Thus, Rule 60 does not authorize the relief that PLG seeks.

And even if Rule 60(a) could apply to interlocutory orders, PLG's claim that this Court somehow made a clerical error (*see* D.E. 515 at 7) is wrong—the Court's July 22 Order only applied to PLG's experts because the United States' motion only sought to exclude the untimely general causation opinions of PLG's experts. The Court decided just what was properly before it at that time. As for Rule 60(b)(6), it applies only upon a showing of "extraordinary circumstances." *See BLOM Bank SAL v. Honickman*, 145 S.Ct. 1612, 1619-21 (2025). PLG argues that the fact that the Court's July 22 Order only applies to its experts satisfies that demanding standard, but, again, only the United States' own motion was before the Court. In short, there are no extraordinary circumstances here. Thus, PLG's attempt to invoke Rule 60 fails.

PLG also reads Rule 16 out of context when it cites Rule 16(a) and (c)(2). Rule 16(a) simply authorizes the Court to direct the parties to appear "for one or more pretrial conferences" for specified purposes, and Rule 16(c)(2) enumerates the topics that the Court may address at such conferences. Those provisions are for managing pretrial procedure, not for expanding interlocutory

orders or deciding discovery disputes.[3] PLG fails to cite a single case in which Rule 16(a) and (c)(2) were used to support the relief they seek.

PLG also attempts to appeal to the Court's inherent powers to control litigation, but there is no reason to "expand" the Court's July 22 Order. The Order confirms in the first sentence that the motion the Court was deciding was "Defendant United States' motion to exclude portions of the *Plaintiffs' Leadership Group's* ("PLG" or "Plaintiffs") Phase III expert reports on the basis that *the reports* contain untimely general causation opinions in violation of the [C]ourt's scheduling orders..." (D.E. 444 at 1 (emphases added)). The expert reports challenged by the United States were squarely presented to the Court, as each excerpt at issue was filed as an exhibit. The Court no doubt understood which Party's opinions and experts were properly before it and ruled accordingly. Because PLG invokes inapplicable Rules, its motion is procedurally defective; that alone warrants denial, and the Court need go no further.

Rather than seeking to expand the Court's Order, PLG should have filed a separate motion for any specific relief PLG seeks. Regardless, as shown below, there is no basis to exclude any opinions of Dr. Lisa Bailey, the only expert PLG specifically cites in its motion, because the United States timely and properly disclosed her opinions in Phase III.

[3] At the end of its brief PLG cites two cases—*United States ex rel. Nicholson v. Medcom Carolinas, Inc.*, 42 F.4th 185 (4th Cir. 2022), and *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 404 F.3d 821 (4th Cir. 2005)—that are easily distinguishable. PLG invokes *Nicholson* for the proposition that a court's inherent power to manage its docket can be stretched to expand a previously decided issue. But *Nicholson* involved dismissal of a False Claims Act complaint with prejudice after repeated pleading failures and a finding of bad faith; it did not involve re-litigation of a narrow discovery ruling. PLG also cites *Thompson* to support their argument that equitable considerations warrant extending the Court's July 22 Order to all experts. But *Thompson* arose from a decades-long institutional reform case governed by a consent decree, where the Fourth Circuit affirmed the district court's authority to extend jurisdiction over the decree.

II. PLG's Motion Should Be Denied Because the United States Did Not Violate the Court's Scheduling Orders as to Any Phase III Expert.

Even if PLG's motion were procedurally valid, the Court should deny the motion because the United States did not violate the Court's Scheduling Orders. While PLG generally references the United States' Phase III experts, it names only Dr. Bailey, who conducted *plaintiff-specific* risk assessments for all twenty-five (25) bellwether plaintiffs. In fact, PLG's motion only appears to concern limited portions of Dr. Bailey's risk assessments, i.e., her use of regulatory toxicity values or criteria in conducting plaintiff-specific risk assessments in Sections 5, 6, and 7 of her reports. But, Dr. Bailey's use of toxicity criteria in her calculations underlying her individualized risk assessments falls squarely in Phase III.

Dr. Bailey conducted plaintiff-specific risk assessments for all bellwether plaintiffs to provide opinions, based on her expertise in risk assessment, on (i) the extent of the increased risk for each plaintiff based on an individual exposure assessment and regulatory toxicity criteria and values, and (ii) as a result of that assessment, whether each plaintiff's specific exposures are causally associated with that plaintiff's Track 1 disease. Those are quintessentially plaintiff-specific opinions that fall squarely within Phase III. Indeed, the phrase "general causation" appears only once in Dr. Bailey's reports, and Dr. Bailey uses that phrase in reference to her reliance on Dr. Goodman's Phase II reports, which were properly disclosed in Phase II. This stands in stark contrast to some of PLG's Phase III experts, who included entire sections that were titled, "General Causation." To perform the plaintiff-specific risk assessments, Dr. Bailey used EPA's toxicity values or criteria in her calculations. She explained the methodology for toxicity values (Section 5.2 of her reports), used those values in her plaintiff-specific risk evaluations (Section 6), and used them again in her plaintiff-specific margins of exposure analyses (Section 7). (*E.g.* Bailey Rep. (Amsler), JA Ex. 468, D.E. 497-1, at 35-42, 43-46, 47.)

Dr. Bailey did *not* use the toxicity values to express her own opinions about "whether an environmental exposure can cause a given disease in the abstract"—i.e., to provide a new, independent general causation opinion or analysis. (D.E. 444, at 6); *see also* Federal Judicial Center, *Reference Guide on Epidemiology*, at 552 (3d ed. 2011) (noting that to define general causation, one should ask "is the agent capable of causing disease?" and for specific causation "did it cause disease in a particular individual?") (collecting cases recognizing this distinction)). Instead, Dr. Bailey used those toxicity values to express opinions about the specific risks to each individual plaintiff, incorporating exposure information she obtained from another expert, Dr. Judy LaKind. Moreover, while Dr. Bailey cited certain EPA documents setting out those toxicity values, she did not use these values to determine threshold exposure levels for any of the chemicals in relation to particular health outcomes in support of a new general causation opinion. (*See* D.E. 444, at 5 ("to the extent Phase III experts offer *new, independent general causation analyses*, *such as* fresh literature reviews, novel threshold calculations, or independent causation models not previously disclosed, those opinions violate the court's scheduling orders" (emphases added)). Instead, Dr. Bailey used those values to calculate an individual plaintiff's risk using individual exposure data provided by Dr. LaKind. The Court did not bar Phase III experts from referencing new literature to support *specific causation opinions*, but only to support untimely new and independent *general causation opinions*.

Dr. Bailey did not formulate any new general causation opinions; for example, she did not opine on whether, in light of relevant epidemiological studies, exposure to TCE can cause kidney cancer, and, if so, at what level kidney cancer occurs. (*See* Bailey Dep. Tr. at 217:20-23 (JA Ex. 618, D.E. 510-7)). Throughout her deposition, Dr. Bailey emphasized that she was relying on Dr. Goodman's systematic literature review for whether a causal relationship exists between a given

chemical and health effect. For example, when asked about the threshold for kidney cancer and TCE, she testified:

> Q. Now where in Charbotel does it suggest that exposures below 335 parts per million don't increase the risk of kidney cancer?
>
> A. So that is something that I relied on from Dr. Goodman's report and her interpretation of this study. So I'm not going to say where it says 335 PPM year in this study. But her evaluation of the study and those exposure estimates are the basis of that cutoff point.

(*Id*. at 229:8-16.) This is the type of "threshold calculation" relevant to general causation that the Court referred to in its Order, not the plaintiff-specific analyses performed by Dr. Bailey. In fact, Dr. Bailey testified on numerous occasions that she relied on Dr. Goodman's Phase II reports concerning general causation and the relevant epidemiological literature. (*See*, *e.g.*, *id.* at 38:4-6 (testifying that she relied on Dr. Goodman's evaluation of relevant epidemiology); 84:18-25 (testifying that she did not perform her own independent literature review of epidemiological literature, but relied on Dr. Goodman); 217:20-23 (testifying that she was deferring to Dr. Goodman's opinion that TCE can cause kidney cancer at high doses); 287:2-19 (testifying that she relied on Dr. Goodman's "systematic review of the available information for [the] possible relationship" between TCE and NHL).) Dr. Bailey's reliance on the general causation opinions of Dr. Goodman and agency toxicity criteria to develop risk assessment opinions on *each individual plaintiff's specific exposure calculations and disease* falls squarely within Phase III of expert discovery under this Court's Scheduling Orders.

Indeed, until recently, PLG evidently had the same view. The United States disclosed all twenty-five of Dr. Bailey's reports ***five months ago*** on April 8, 2025. PLG did not raise any concerns about the timeliness or propriety of that disclosure. PLG disclosed three rebuttal reports and, on July 9, deposed Dr. Bailey at length concerning her methodologies, including her use of

the toxicity values from the EPA. At her deposition, Dr. Bailey testified repeatedly that she had relied on Dr. Goodman's Phase II reports concerning the relevant epidemiological studies and literature review. (*See supra* at 9 (collecting citations).) Again, this differs starkly from PLG's Phase III experts, some of whom candidly admitted at deposition that they were in fact offering independent general causation opinions. (*See*, *e.g.*, Hoppe Dep. Tr., at 42:17-24 (JA Ex. 591, D.E. 507-12) (admitting that "certainly a lot of it [i.e., general causation] was my own" and "based on my own review of the materials").)

In short, while PLG does not expressly request exclusion of Dr. Bailey's opinions making use of toxicity values in Sections 6 and 7 of her reports, those opinions were timely disclosed in Phase III of expert discovery because they are *plaintiff-specific* analyses, as PLG concedes in its recent filings (D.E. 625, at 9; D.E. 600, at 23). Because the United States timely disclosed those opinions in Phase III, the United States did not violate any of the Court's Scheduling Orders.

CONCLUSION

The United States respectfully asks this Court to deny PLG's motion (D.E. 515) because: (i) PLG's motion is procedurally deficient on its face; and (ii) the United States did not violate the Court's Scheduling Orders, including as to Dr. Bailey, whose plaintiff-specific risk assessments fall squarely in Phase III and were timely disclosed on April 8, five months ago.

Dated: September 12, 2025

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General,
Civil Division

JONATHAN D. GUYNN
Deputy Assistant Attorney General,
Torts Branch

BRIDGET BAILEY LIPSCOMB
Chief, Camp Lejeune Justice Act Section

ADAM BAIN
Special Litigation Counsel

JOSHUA G. CARPENITO
DAVID R. ORTIZ
ANNA E. ELLISON
KAILEY M. SILVERSTEIN
Trial Attorneys

/s/ Joshua G. Carpenito
Joshua G. Carpenito
NC Bar No. 60801
Trial Attorney
United States Department of Justice
Civil Division, Torts Branch
Camp Lejeune Justice Act Section
310 New Bern Ave
Raleigh, NC 27601
(202) 880-1518
Joshua.g.carpenito@usdoj.gov

Attorney inquiries to DOJ regarding CLJA:
(202) 353-4426

Attorneys for Defendant,
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2025, I electronically filed the foregoing using the Court's Electronic Case Filing system, which will send notice to all counsel of record.

/s/ Joshua G Carpenito
Joshua G. Carpenito