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	))))))	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING FUTURE OFFSETS**

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INTRODUCTION

The Camp Lejeune Justice Act (the "CLJA") provides for limited and specific offsets against awards made to an individual or his legal representative under the CLJA in certain circumstances (the "Offset Provision"). *See* Pub. L. No. 117-168, 136 Stat. 1759, 1802–04 § 804(e)(2). Under the CLJA, offsets are available only based on disability awards, payments, or benefits "provided" under "any program under the laws administered by the Secretary of Veterans Affairs," "the Medicare Program," and "the Medicaid Program" (collectively, the "Enumerated Programs"). *Id.* § 804(e)(2)(A).[1] As explained in Plaintiffs' pending motion *in limine* to exclude irrelevant evidence of offsets not permitted under the CLJA [D.E. 805-806], the text of the Offset Provision, particularly the use of the past tense "provided" and the meaning of the term "offset" itself, limits the offsets available to awards, payments, or benefits that were actually provided to plaintiffs as of the determination of their CLJA award. The pending motion *in limine* presents a pure question of statutory interpretation that does not depend on the factual record. *See* [D.E. 806] at 2. If the Court grants that motion as to future offsets, the instant motion for partial summary judgment would be moot.

Plaintiffs file this motion as an independent alternative ground for the same relief. Even assuming *arguendo* that the CLJA's text permits offsets for future benefits in principle, partial summary judgment is warranted on the factual record here. Discovery has confirmed — through Defendant's own agency officials and economic experts — that the future benefits Defendant

[1] The programs "under the laws administered by the Secretary of Veterans Affairs" for which Defendant has asserted offsets include the Veterans Benefits Administration ("VBA"), Veterans Health Administration ("VHA"), VA Community Care Network ("CCN"), and TriWest. CCN and TriWest operate within the VHA and are reimbursed by VHA for the care at issue; accordingly, the arguments below addressing VHA include those programs. As presented by Defendant, benefits received from Medicare and/or Medicaid are presented jointly as Centers for Medicare & Medicaid Services ("CMS").

seeks to offset are speculative.[2] There is no genuine dispute of material fact that Plaintiffs' potential future receipt of any awards, benefits, or payments under the Enumerated Programs (or TRICARE) is too uncertain to support an offset as a matter of law. Courts routinely decline to apply offsets based on speculative anticipated future awards, benefits, or payments. The Court should therefore grant partial summary judgment and deny Defendant's claimed offsets based on speculative future awards, benefits, or payments.[3]

BACKGROUND

This motion arises because Defendant has asserted that it may offset the Track 1 Plaintiffs' damages by collectively millions of dollars of speculative *future* benefits that Plaintiffs have not received and may never receive (on top of purported offsets for various past expenses and benefits).[4] These purported future offsets are not a sideshow—they constitute more than half of the total asserted offsets for many Plaintiffs. If applied, these speculative offsets would significantly reduce or eliminate plaintiffs' damages, without any evidence, much less a guarantee, that they offset benefits that will be actually received in the future.

Specifically, Defendant has asserted the following future offsets[5]:

[2] In support of this motion, Plaintiffs cite to testimony from Defendant's experts contained in Plaintiffs' Statement of Undisputed Material Facts ("SUMF"), which is being served simultaneously with this motion pursuant to Local Civil Rule 56.1(a)(1).
[3] To date, Defendant has asserted future offsets in 16 bellwether cases. *See infra*, Background. Because Defendant may yet assert future offsets in additional cases at or before trial, this motion applies to all Track 1 cases.
[4] Defendant also claims offsets for Plaintiffs' past medical care expenses and past VBA disability payments. This motion does not apply to those amounts.
[5] The numbers cited in the following table are the offsets calculated to present value as asserted in the expert reports of Defendant's experts Tosic, Yount, and Brod.

Plaintiff	Defendant Expert	Speculative Future VBA Disability Payments	Speculative Future VHA Medical Expenses[6]	Speculative Future CMS Medical Expenses	Percentage of Total Asserted Offsets
Cagiano [7]	Yount	$383,819			62%
Criswell [8]	Yount	$599,976			54%
Laramore [9]	Yount	$71,780	$4,168.00 to $15,664.00 [10]		66% to 69%
Downs [11]	Yount	$43,120			23%
Fancher [12]	Yount	$305,169			82%
Howard [13]	Yount	$631,798			82%

[6] All "Projected Future VHA Medical Expenses" identified in this column are based on Community Care Network ("CCN") reimbursement rates (i.e., amounts paid to outside providers), rather than the actual cost of care within VA facilities. Miller's numbers, upon which Tosic, Yount, and Brod rely, were based solely on CCN rates because Miller lacked access to internal VA cost data, although Miller admitted CCN rates may not reflect VA facility health care costs (the cost of care in the VA could be "higher or lower than the CCN rate, but we don't have the ability to determine that"). SUMF ¶ 357 (quoting Miller Dep. Tr. at 148:14-22 (JA Ex. 780, D.E. 841-11)). In direct contrast to Miller's methodology, Defendant's calculation of alleged *past* medical offsets for treatment received within VA facilities relies on an activity-based managerial cost accounting system that creates estimates based on costs assigned to clinical encounters and is very "variable" by VA facility, staffing, and timing. SUMF ¶¶ 350-353 (quoting Clarke Dep. Tr. at 38:12-38:20; 40:5-41:3; 94:14-94:15; 96:22-97:19 (Ex. A, attached hereto)). Defendant's witness, Daniel Clarke, further testified that "we don't utilize [CCN] data" when determining the cost of care within VA facilities. SUMF ¶ 354 (quoting Clarke Dep. Tr. at 82:11-22). Because future care may occur inside or outside the VA, and those settings rely on different cost measures, the actual cost of care within VA facilities cannot be reliably projected by Defendant's experts. This reliability defect is further addressed in Plaintiffs' contemporaneously filed Daubert motion to exclude certain opinions of Defendant's Phase III economic experts Tosic, Yount, and Brod.

[7] SUMF ¶ 1 (quoting Yount Rep. (Cagiano) at 2-3 (JA Ex. 719, D.E. 839-1)).

[8] SUMF ¶ 2 (quoting Yount Rep. (Criswell) at 3-4 (JA Ex. 720, D.E. 839-1)).

[9] SUMF ¶ 3 (quoting Yount Rep. (Laramore) at 3-4 (JA Ex. 725, D.E. 839-1)).

[10] This figure is presented as the amount "that would be paid by TriWest under the Department of Veterans Affairs, Community Care Network" with no distinction between which of these three entities would ultimately incur the expenses Defendant asserts as an offset. *See* Yount Rep. (Laramore) at 3.

[11] SUMF ¶ 4 (quoting Yount Rep. (Downs) at 2-3 (JA Ex. 721, D.E. 839-1)).

[12] SUMF ¶ 5 (quoting Yount Rep. (Fancher) at 3-4 (JA Ex. 723, D.E. 839-1)).

[13] SUMF ¶ 6 (quoting Yount Rep. (Howard) at 4-5 (JA Ex. 724, D.E. 839-1)).

Plaintiff	Defendant Expert	Speculative Future VBA Disability Payments	Speculative Future VHA Medical Expenses[6]	Speculative Future CMS Medical Expenses	Percentage of Total Asserted Offsets
Mousser [14]	Yount	$598,174	$1,613 to $537,466		66% to 79%
Tukes [15]	Yount			$110,100 to $406,338 [16]	40% to 71%
Gleesing [17]	Tosic	$663,358			63%
Hill [18]	Tosic	$279,227	$298,345 to $518,916	$84,969 to $316,870	52% to 68%
Davis [19]	Tosic	$327,082			77%
Keller [20]	Tosic	$506,582 to $823,058			62% to 71%
McElhiney [21]	Brod	$26,858 [22]	$532,501 to $1,372,014 [23]	$178,440 to $273,874 [24]	At least 86%

[14] SUMF ¶ 7 (quoting Yount Rep. (Mousser) at 4-6 (JA Ex. 726, D.E. 839-1)).
[15] SUMF ¶ 8 (quoting Yount Rep. (Tukes) at 4-5 (JA Ex. 727, D.E. 839-1)).
[16] This figure is presented as the amount "that would be paid by Medicare and TRICARE" with no distinction between how much of the purported amount would be covered by CMS or TRICARE, respectively. *See* Yount Rep. (Tukes) at 4-5.
[17] SUMF ¶ 9 (quoting Tosic Rep. (Gleesing) at 17-19 (JA Ex. 707, D.E. 839-1)).
[18] SUMF ¶ 10 (quoting Tosic Rep. (Hill) at 20-26 (JA Ex. 708, D.E. 839-1)).
[19] SUMF ¶ 11 (quoting Tosic Rep. (Davis) at 13-15 (JA Ex. 706, D.E. 839-1)).
[20] SUMF ¶ 12 (quoting Tosic Rep. (Keller) at 19-22 (JA Ex. 709, D.E. 839-1)).
[21] SUMF ¶ 13 (quoting Brod Rep. (McElhiney) at 4-9 (JA Ex. 641, D.E. 837-1)).
[22] This figure includes both past and future VBA amounts; Dr. Brod presents one figure representing the combined value from the date the benefits began until the end of the plaintiff's life expectancy with no distinction between past and future. *See* Brod Rep. (McElhiney) at 4-9.
[23] This figure is presented as VHA/CCN with no distinction between how much of the purported amount would be covered by VHA or CCN, respectively. *See* Brod Rep. (McElhiney) at 4-9.
[24] This figure is presented as CMS/TRICARE with no distinction between how much of the purported amount would be covered by CMS or TRICARE, respectively. *See* Brod Rep. (McElhiney) at 4-9.

Plaintiff	Defendant Expert	Speculative Future VBA Disability Payments	Speculative Future VHA Medical Expenses[6]	Speculative Future CMS Medical Expenses	Percentage of Total Asserted Offsets
Peterson [25]	Brod	$1,073,280 [26]	$398,577 to $1,167,169	$127,172 to $166,887	At least 30%
Rothchild [27]	Brod			$26,657 to $87,465	27% to 55%
Sparks [28]	Brod	$972,889 [29]	$333,205 to $1,549,332		At least 25%

Discovery on damages and offsets is closed. [D.E. 851] at 3. Plaintiffs deposed each of the experts Defendant designated on offsets, including Defendant's Enumerated Program and TRICARE experts[30] and Defendant's retained offset experts,[31] and additional fact witnesses from the VA, the Defense Health Agency, and TriWest.[32]

[25] SUMF ¶ 14 (quoting Brod Rep. (Peterson) at 4-7 (JA Ex. 642, D.E. 837-1)).
[26] This figure includes both past and future VBA amounts; Dr. Brod presents one figure representing the combined value from the date the benefits began until the end of the plaintiff's life expectancy with no distinction between past and future. *See* Brod Rep. (Peterson) at 4-7.
[27] SUMF ¶ 15 (quoting Brod Rep. (Rothchild) at 4-6 (JA Ex. 643, D.E. 837-1)).
[28] SUMF ¶ 16 (quoting Brod Rep. (Sparks) at 4-6 (JA Ex. 644, D.E. 837-1)).
[29] This figure includes both past and future VBA amounts; Dr. Brod presents one figure representing the combined value from the date the benefits began until the end of the plaintiff's life expectancy with no distinction between past and future. *See* Brod Rep. (Sparks) at 4-6.
[30] Andrew McIlroy, Deputy Assistant Secretary for Budget at the Department of Veterans Affairs (the "VA"); Heather Ford, Chief Financial Officer of the Veterans Health Administration (the "VHA"); Larry Young, Deputy Director and CFO of the Centers for Medicare & Medicaid Services ("CMS") Office of Financial Management; Jadine Piper, Acting Assistant Director for Policy at the VA; and Dr. Richard Ruck, Chief Medical Officer for the TRICARE Health Plan at the Defense Health Agency ("DHA") (collectively, the "government agency experts").
[31] Henry Miller, Tricia Yount, Andrew Brod, and Dubravka Tosic (collectively, the "economic experts").
[32] Acting Associate CFO for the VA Daniel Clarke, DHA Operations Research Analyst Diana Zakaryan, TriWest Director of Healthcare Analytics Kyle Westerlind, and TriWest Director of Claims Administration Kimberly Rivas.

LEGAL STANDARD

A motion for partial summary judgment "utilizes the same standards required for consideration of a full motion for summary judgment." *Pettengill v. United States*, 867 F. Supp. 380, 381 (E.D. Va. 1994) (citing *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985), *amended*, 788 F.2d 1042 (4th Cir. 1986), and Fed. R. Civ. P. 56(d)). Summary judgment should be granted where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

ARGUMENT

The CLJA's Offset Provision expressly limits offsets to awards, benefits, or payments actually "provided," not those that Defendant speculates a plaintiff may receive in the future. *See* [D.E. 806] (memorandum of law in support of Plaintiffs' pending motion *in limine*); [D.E. 819] (reply brief). The limits in the CLJA's text are in accord with how the common law generally treats offsets in other contexts, including the Federal Tort Claims Act (FTCA). Ample caselaw from within this Circuit and across the country holds that it is improperly speculative to offset awards based on potential future benefits when government programs and their funding may change, when plaintiffs' individual eligibility for benefits may change, when the amount of plaintiffs' future benefits (if any) may change, and when plaintiffs may choose private care for future medical needs. And in this case, there is no genuine dispute of material fact that all of these conditions apply here to render any future awards, benefits, or payments that plaintiffs may receive under the Enumerated Programs (or TRICARE) too speculative to support offsets under the CLJA. Therefore, partial summary judgment denying such speculative future offsets is appropriate.

I. Courts Do Not Permit Offsets for Speculative Future Benefits.

"An offset based on speculative benefits would be an injustice." *Lawson v. United States*, 454 F. Supp. 2d 373, 415 (D. Md. 2006). Accordingly, courts routinely decline to offset a plaintiff's award based on speculative future awards, payments, or benefits such as those Defendant claims here. As relevant here, caselaw holds that an anticipated future award, payment, or benefit is speculative when (1) the future of the program providing the benefit is uncertain; (2) the plaintiff's continued entitlement to the benefit or amount of the benefit is uncertain; and/or (3) the plaintiff may choose not to avail himself of the award, payment, or benefit. And as explained in Sections II-III, *infra*, there is no genuine dispute of material fact that all those are true in this case.

A. No offsets are permitted when the future of the program providing the anticipated benefit is uncertain.

Courts decline to offset plaintiffs' awards based on "anticipated benefits that may never be received," such as when there "can be no assurance that the . . . program will continue for the balance of [the plaintiff's] life, nor that the benefit levels will never change." *Lawson*, 454 F. Supp. 2d at 415; *see also Roemen v. United States*, No. 4:19-CV-4006, 2023 WL 7386424, at *4-5 (D.S.D. Nov. 8, 2023) (holding government was "precluded from offering evidence of future TRICARE benefits" and court would "not off-set any potential future benefits from the damage award" because it was "speculative whether TRICARE benefits will continue to be available for [plaintiff's] lifetime"); *Feindt v. United States*, No. 22-00397, 2025 WL 1348465, at *54 (D. Haw. May 7, 2025) ("Reducing a damages award due to potential TRICARE coverage of future mental health treatment is too speculative because the TRICARE program may be subject to change in the future."); *Brown v. United States*, No. 3:17-CV-551, 2020 WL 6811121, at *11 (S.D. Miss. May 13, 2020) (finding "future Tricare benefits are too speculative to provide

the basis for any reduction of or offset against future medical expenses" because "there is no guarantee that the program will continue to exist, or that it will continue to exist in its current form, for the remainder of [the plaintiff's] life expectancy.").

The decisions above relate to offsets based on anticipated TRICARE benefits. Their reasoning applies with equal force to the Enumerated Programs in the CLJA as well.[33] As Defendant's experts testified, *see infra* Sections II-III, there is no dispute that the viability of the Enumerated Programs and future benefit levels are similarly speculative as those of TRICARE discussed above. Courts have recognized the same. *See Simms v. United States*, No. 3:11-0932, 2017 WL 3317417, at *6 (S.D.W.V. Aug. 3, 2017). In *Simms*, the court refused to offset the plaintiffs' award for future medical expenses based on anticipated future Medicaid payments due to uncertainty about the future of the Medicaid program, even though "the future benefits, if continued, can be readily reduced to a sum certain." *Id.* While the court agreed with Defendant that "the past federal administration expanded Medicaid to provide greater coverage and benefits to individuals," it explained that "there is a real concern that the extent of Medicaid coverage will shrink in the future, which will, in turn, cut benefits to the qualified citizens of the state. These concerns may not come to fruition, but the current political climate at least suggests that these benefits cannot be guaranteed to a reasonable degree of certainty in the future." *Id.* at *5.

[33] TRICARE is not an Enumerated Program, and thus offsets for TRICARE are not permitted under the CLJA. *See* [D.E. 806] at 9-10. Defendant explicitly declined to oppose Plaintiffs' motion *in limine* to exclude evidence of future offsets with respect to TRICARE. *See* [D.E. 813] at 2, 5 n.3. However, because Plaintiffs' motion *in limine* is still pending and Defendant has asserted future offsets based on anticipated TRICARE benefits, this motion seeks partial summary judgment to deny any future offsets based on speculative TRICARE benefits as well as those based on speculative benefits under the Enumerated Programs.

B. No offsets are permitted when it is uncertain whether a particular plaintiff will continue to receive and be able to use benefits.

Even assuming that a government program will continue to exist in its current form, courts frequently hold that offsets are unavailable because it is too speculative to presume that benefits under that program will be available to a given plaintiff, either because of changes in the plaintiff's eligibility or because the plaintiff may not be able to avail himself of the benefits to which he is entitled.

1. Future receipt of VA disability benefits is speculative.

Courts decline to presume that plaintiffs will continue to meet the necessary eligibility criteria for future government benefits, and with respect to VA disability benefits, courts have recognized that the payment and amount of future benefits is particularly uncertain. *See, e.g.*, *Poirier v. United States*, 745 F. Supp. 23, 33 (D. Me. 1990). The *Poirier* court explained that it was "hesitant to reduce plaintiffs' award in this case by any future benefits from the VA in light of the uncertainty of those benefits" because "[i]t is well known that Congress has the authority to change the level of VA benefits at anytime it may dictate, and the Veterans Administration has the right to adjust its determinations as to the percentage of benefits [plaintiff] is entitled to, again, at anytime." *Id.*; *see also Laskowski v. United States Dep't of Veterans Affairs*, 918 F. Supp. 2d 301, 330 (M.D. Pa. 2013) (holding that "[i]t is inappropriate to provide a set-off for non-guaranteed future benefits" such as VA benefits and explaining there was "no guarantee" benefits would continue after plaintiff's upcoming reevaluation); *Aretz v. United States*, 456 F. Supp. 397, 406 (S.D. Ga. 1978) (declining to set off VA disability payments made after the time of satisfaction of the judgment because "continued payment of disability benefits is highly speculative" due to eligibility requirements and plaintiff's life expectancy "and should not be considered").

2. Future coverage of medical expenses is uncertain.

Courts further decline to award offsets based on anticipated future medical expenses because the coverage and accessibility of necessary services is also uncertain.

First, even if a plaintiff is eligible for a government medical coverage program in general, it is speculative to assume the plaintiff's necessary future medical care will be covered under the program. *See, e.g.*, *Brown*, 2020 WL 6811121, at *11 (explaining that Medicare is a "complex system . . . in which coverage and amounts payable or ultimately paid depend on numerous factors, including but not limited to, the type of service provided; whether it is provided by a Medicare provider or an opt-out provider; and whether the provider has an assignment agreement with Medicare").

Second, even if a plaintiff is entitled to and receives approval for health care under a particular program, it is speculative to assume they will actually be able to avail themselves of such benefits. *See Feindt*, 2025 WL 1348465, at *55 (explaining that plaintiffs "may not be able to avail themselves to mental health care through TRICARE" where "[t]estimony was provided that there are not currently enough mental health providers available nationwide through TRICARE").

II. There is No Dispute of Material Fact in this Case that the Future and Funding of the Enumerated Programs and TRICARE Are Uncertain.

A. The future of the Enumerated Programs and TRICARE, and the benefits available under them, are subject to changes in law.

Defendant's government agency experts each testified that the future of the Enumerated Programs and TRICARE, as well as the benefits available under them, are subject to changes in law. Thus, as explained below, there "can be no assurance that" the Enumerated Programs and TRICARE "will continue for the balance of [Plaintiffs'] li[ves], nor that the benefit levels will never change." *Lawson*, 454 F. Supp. 2d at 415.

Veterans Benefits Administration: First, Mr. McIlroy confirmed that Congress has changed "eligibility criteria for VA benefits" in the past, SUMF ¶41 (quoting McIlroy Dep. Tr. at 98:19-98:21 (JA Ex. 779, D.E. 841-1)), could "change criteria for how ratings are to be applied to disability benefits," *id.* (quoting McIlroy Dep. Tr. at 98:22-98:24), could "change formulas for those benefits," *id.* (quoting McIlroy Dep. Tr. at 99:1-99:3), could "change how cost-of-living adjustments are applied to those benefits," *id.* (quoting McIlroy Dep. Tr. at 99:4-99:7), could "change dependency allowances that modify those benefits," *id.* (quoting McIlroy Dep. Tr. at 99:8-99:10), and could "change survivor benefits," *id.* (quoting McIlroy Dep. Tr. at 99:11-99:14). Furthermore, in making these changes, Congress could "enact changes to benefits that would otherwise be awarded retroactively." SUMF ¶ 49 (quoting McIlroy Dep. Tr. at 155:23-156:2).

Ms. Piper further confirmed that, in addition to Congress, "the secretary of the VA has the authority" to "make changes" or "updates" to the disability rating schedule. SUMF ¶ 201 (quoting Piper Dep. Tr. at 89:5-89:10 (JA Ex. 781, D.E. 841-1)). Indeed, she explained that "the rating schedule changed" during her tenure at the VBA, and that the VA has "been making updates." SUMF ¶ 202 (quoting Piper Dep. Tr. at 90:6-90:12). "[W]hen the schedule is updated," it can "change a veteran's [disability] evaluation." SUMF ¶ 205 (quoting Piper Dep. Tr. at 92:19-93:2).

Veterans Health Administration[34]: Ms. Ford confirmed that "[t]he eligibility criteria for VHA enrollment is established by statute," SUMF ¶ 80 (quoting Ford Dep. Tr. at 102:22-103:1 (JA Ex. 773, D.E. 841-1)), and "Congress can modify eligibility categories in the future." *Id.*

[34] As noted previously, CCN and TriWest operate within and are reimbursed by VHA and are included within the arguments presented within this brief pertaining to VHA.

(quoting Ford Dep. Tr. at 103:2-103:5). Thus "anytime it wants to, Congress could reduce, modify, or increase eligibility for veterans." SUMF ¶ 130 (quoting Ford Dep. Tr. at 222:4-222:7). Ms. Ford acknowledged that "Congress has the authority to change" "the VA reimbursement methodology as it relates to the Community Care Network." SUMF ¶ 83 (quoting Ford Dep. Tr.at 103:15-103:23. Ms. Rivas likewise testified that the VA Community Care Network manual is updated quarterly, and updates can affect coverage for care. SUMF ¶ 340 (quoting Rivas Dep. Tr. at 128:20-128:23; 129:10130:15 (Ex. B, attached hereto)). Ms. Ford agreed that "there hasn't been a fully completed budget assessment done with regard to the reorganization [of the VHA" and testified that "[a] comprehensive budget review of impacts has not been completed" and that "discussions of the reorganization are occurring. However, the mechanics of reorganizing have not begun." SUMF ¶ 117 (quoting Ford Dep. Tr.at 199:12-200:2).

TRICARE: Dr. Ruck agreed that Congress can "make changes to cover services, either by improving covered services or by making certain services not available to claimants," SUMF ¶ 188 (quoting Ruck Dep. Tr. at 87:15-87:22 (JA Ex. 782, D.E. 841-1)), and that past changes to the TRICARE fee structure have increased costs to veterans in certain categories. SUMF ¶ 189 (quoting Ruck Dep. Tr. at 99:22-100:17). Indeed, TRICARE's predecessor, "the original CHAMPUS program did not have premium and enrollment fees" at all.[35] SUMF ¶ 191 (quoting Ruck Dep. Tr. at 104:4-104:13); *see also* SUMF ¶ 332 (quoting Zakaryan Dep. Tr. at 187:11-187:18 (Ex. C, attached hereto)) (Ms. Zakaryan testifying that coverage of TRICARE services has changed over time). Moreover, Dr. Ruck explained that "Congress has the ability to place

[35] As a telling example: if an offset such as those sought by Defendant here had been applied based on CHAMPUS coverage, it would have resulted in the plaintiff being undercompensated.

restrictions" on TRICARE coverage, providing the example that for "TRICARE For Life individuals, we're not allowed to pay for, at this point, GLP-1s for obesity management because it was specifically excluded by Congress." SUMF ¶ 185 (quoting Ruck Dep. Tr. at 84:2-9). Dr. Ruck acknowledged that the TRICARE policy manual has been subject to numerous changes historically and does not know how TRICARE cost fee schedules will change in the future. SUMF ¶¶ 175, 358 (quoting Ruck Dep. Tr. at 26:25-27:23, 90:11-91:8). Dr. Ruck testified that "[t]he cost fee schedules [for TRICARE] are determined by Congress." SUMF ¶ 175 (quoting Ruck Dep. Tr. at 27:5-27:6).

Medicare: Mr. Young agreed that "Congress has the authority to amend Medicare statutes, including the eligibility rules, the benefits and scope, and the payment methodologies." SUMF ¶ 144 (quoting Young Dep. Tr. at 60:10-60:16 (JA Ex. 788, D.E. 841-1)); *see also* SUMF ¶ 279 (quoting Miller Dep. Tr. at 125:14-126:24) (equivalent statement from Defendant's health care costs expert, Dr. Miller). Moreover, "Congress can enact changes that affect the future Medicare coverage and reimbursement levels . . . of Medicare beneficiaries." SUMF ¶ 145 (quoting Young Dep. Tr. at 60:18-60:25). Mr. Young testified that he "cannot speak to Medicare future payment rates or fee schedules" and that "future Medicare coverage and payment levels depend on decisions made by Congress and not necessarily CMS." SUMF ¶ 147 (quoting Young Dep. Tr. at 64:20-64:21 (JA Ex. 788, D.E. 841-1)) and SUMF ¶ 146 (quoting Young Dep. Tr. at 61:2-61:7 (JA Ex. 788, D.E. 841-1)).

Overall, each of Defendant's government agency experts testified that they could not guarantee that the Enumerated Programs and TRICARE, or the benefits available under them, would remain unchanged in the future. For example, Ms. Ford said she could "certainly not" "guarantee to a veteran that the scope of his care and his eligibility care is unlikely to be

constrained in the future." SUMF ¶ 121 (quoting Ford Dep. Tr. at 204:1-204:9); *see also* SUMF ¶ 171 (quoting Young Dep. Tr. at 153:2-153:8) (asked whether he had "any guarantee that Medicare benefits will remain unchanged in the future," Mr. Young testified "it's not possible for me to project what's going to happen in the future"); SUMF ¶ 171 (quoting McIlroy Dep. Tr. at 68:11-68:16) (asked whether he is "offering any opinion that current benefit laws will remain unchanged for the lifetime of any individual plaintiff," Mr. McIlroy responded he has "no ability to predict the future"); SUMF ¶ 35 (quoting Piper Dep. Tr. at 252:13-252:19) (Ms. Piper's testimony is "premised upon law and regulation as it exists today" and "Congress could amend some of those laws"); SUMF ¶ 234 (quoting Ruck Dep. Tr. at 85:8-85:14) (Dr. Ruck agreed Congress may "make changes to limit coverage").

Thus, for each of the Enumerated Programs and TRICARE, Defendant's government agency experts agree that "there is no guarantee that the program will continue to exist, or that it will continue to exist in its current form, for the remainder of [Plaintiffs'] life expectancy." *Brown*, 2020 WL 6811121, at *11. Offsets are impermissible in such speculative circumstances.

B. The future of the Enumerated Programs and TRICARE, as well as the benefits available under them, are subject to ongoing congressional appropriations decisions.

Even if the Court were to assume that there will be no substantive changes to the Enumerated Programs or the benefits generally available under them (contrary to the record and Defendant's experts' testimony), it is speculative that the Enumerated Programs will continue to maintain sufficient funding to pay all the benefits due under them.

Veterans Benefits Administration: Mr. McIlroy agreed that "even if Congress does not change the underlying benefits themselves," it "could fail to appropriate sufficient funds to pay all VA benefits." SUMF ¶ 50 (quoting McIlroy Dep. Tr. at 100:24-101:4). For example, the "primary driver" in VA's increasing mandatory spending is "compensation and pension" because

the number of veterans entitled to such benefits has increased, as has the average amount of benefits received, because "the average disability rating for veterans has increased." SUMF ¶¶ 29-30 (quoting McIlroy Dep. Tr. at 78:10-79:5). And while "[a]s more veterans receive benefits, the budget will grow," it "is still subject to annual congressional appropriations." SUMF ¶ 31 (quoting McIlroy Dep. Tr. at 80:7-80:11). VA "cannot spend beyond appropriated funds amounts." SUMF ¶ 52 (quoting McIlroy Dep. Tr. at 103:9-103:12). Thus, when there are more payments due than funding available, VA "would hold those payments until funding was received." SUMF ¶ 33 (quoting McIlroy Dep. Tr. at 85:8-85:15).

Veterans Health Administration: Ms. Ford confirmed that "whether funding is discretionary or mandatory, continued payment at current levels depends on ongoing Congressional authorizations and appropriations." SUMF ¶ 87 (quoting Ford Dep. Tr. at 104:21-105:3). She agreed that "all VHA funding ultimately depends on federal statutes enacted by Congress," "that Congress has the authority to amend or repeal those federal statutes," "and that authority applies to both discretionary and mandatory funding statutes." SUMF ¶ 72 (quoting Ford Dep. Tr. at 100:21-101:8). Ms. Ford testified that she had "not seen a specific risk analysis involving the reorganization and its impacts to access to care" and agreed that "organizational restructuring can create transitional instability in some cases." SUMF ¶ 118 (quoting Ford Dep. Tr. at 200:16-200:22). When asked if she would be "able to state with certainty that the scope of VHA care and eligibility will remain... materially unchanged over the coming years," Ms. Ford stated "I can't say with certainty..." SUMF ¶ 119 (quoting Ford Dep. Tr. at 201:11-201:19).

TRICARE: Dr. Ruck indicated that TRICARE's funding is part "of the defense budget" and Congress has to "approve a budget every year" to "keep the TRICARE program operating."

SUMF ¶ 193 (quoting Ruck Dep. Tr. at 121:2-121:9). TRICARE coverage also relies on premiums and co-pays, and Dr. Ruck testified that "the cost fee schedules are determined by Congress." SUMF ¶ 175 (quoting Ruck Dep. Tr. at 27:5-6).

Medicare: These concerns are perhaps most salient with respect to Medicare. Mr. Young explained that "in the near future, Congress will need to make some changes to current law to ensure Medicare sustainability in the future." SUMF ¶ 158 (quoting Young. Dep. Tr. at 91:13-91:24). Mr. Young further testified that "the HI [Hospital Insurance] trust fund" is "facing several headwinds and challenges in terms of its being able to continue to be financially solvent" and that the trustees' "report indicated . . . the benefits would exceed the collections as early as 2027 and the fund could be depleted by 2033." SUMF ¶ 150 (quoting Young. Dep. Tr. at 71:8-71:15).[36] Defendant's health care costs expert, Dr. Miller, agreed that Medicare is "going to run out of money given the current circumstances." SUMF ¶ 280 (quoting Miller Dep. Tr. at 129:25-130:14). If no changes are made and Medicare "assets are depleted, one of the possibilities is that the full schedule of benefits would not be able to be paid under the program." SUMF ¶ 160 (quoting Young Dep. Tr. at 84:16-84:23). Another possibility is "a reduction in the services

[36] *See also* SUMF ¶ 152 (quoting Young Dep. Tr. at 73:7-73:13, 77:1-77:16) (When asked about projections indicating "Medicare still faces a substantial shortfall that needs to be addressed with further legislation," Mr. Young responded "you can speculate on different things that Congress at the time could elect to do" to fix the deficit.); SUMF ¶ 153 (quoting Young Dep. Tr. at 83:5-83:14) (Mr. Young further pointed out that "[t]here is substantial uncertainty in the economic, demographic, and healthcare projection factors for the HI trust fund expenditures and revenues"); SUMF ¶ 157 (quoting Young Dep. Tr. at 90:16-91:24) (Mr. Young further acknowledged that "Medicare's total expenditures and its dedicated financing sources is projected to exceed 45 percent of expenditures within seven years," which "triggers a Medicare funding warning" for the "ninth consecutive year" and will require "changes to current law to ensure Medicare sustainability in the future."); SUMF ¶ 159 (quoting Young Dep. Tr. at 92:1-92:7) (Mr. Young acknowledged a report that "Medicare's actual future costs are highly uncertain for reasons apart from the inherent challenges in projecting healthcare cost growth over time.").

offered under Medicare that are compensated." SUMF ¶ 287 (quoting Miller Dep. Tr. at 134:13-134:19). Critically, Dr. Miller agreed that "the funding issue affecting Medicare is a concern in the short term . . . meaning within the life expectancy of the plaintiffs in this litigation." SUMF ¶ 286 (quoting Miller Dep. Tr. at 134:6-134:12).

As it stands, CMS has already "had to apply sequestration, the sequestration of benefit payment dollars," SUMF ¶ 161 (quoting Young Dep. Tr. at 94:4-94:12), which "reduces the amount that's being paid to the provider by a percentage," *id.* (quoting Young Dep. Tr. at 95:1-95:5). One of the risks of this sequestration is that "a provider could stop accepting Medicare rates because they are too low to compensate them for their work," SUMF ¶ 163 (quoting Young Dep. Tr. at 96:25-97:7), because "payment adequacy" is "one variable a physician undoubtedly would consider" in deciding whether to accept Medicare, SUMF ¶ 165 (quoting Young Dep. Tr. at 107:19-108:2).

III. Defendant's Claimed Offsets Based on Future Benefits that May Be Provided Under the Enumerated Programs and TRICARE Are Speculative and Should Not Be Permitted.

As detailed above, the Enumerated Programs and TRICARE are each susceptible to changes in law and funding, rendering any future benefits that may be provided speculative and insufficiently reliable to justify offsets on that basis alone. However, Defendant's asserted offsets become additionally speculative when examined in light of plaintiff-specific eligibility and limitations specific to the CLJA, and contradict established public policy favoring choice of care.

A. It is uncertain whether Plaintiffs will maintain eligibility for and access to medical care under the Enumerated Programs and TRICARE.

1. It is uncertain whether Plaintiffs' future medical care will be covered and accessible.

In addition to the uncertainty regarding availability of future medical care under the Enumerated Programs and TRICARE generally, there is no dispute of fact that it is speculative to

assume that any given future health care service will be both covered and accessible for Plaintiffs.

First, Plaintiffs may require future medical care that is not covered, in whole or in part, under the Enumerated Programs and TRICARE. *See Brown*, 2020 WL 6811121, at *11 (explaining that Medicare is a "complex system . . . in which coverage and amounts payable or ultimately paid depend on numerous factors"). For example, Plaintiffs may be unable to make the necessary payments to retain coverage.[37] Plaintiffs may be denied coverage for services that the Enumerated Programs and TRICARE, in their discretion, deem unnecessary.[38] Certain providers may not accept Plaintiffs' coverage under the Enumerated Programs or TRICARE.[39] And for Plaintiffs that have primary insurance, that private insurance could be the primary payer

[37] *See* SUMF ¶ 169 (quoting Young Dep. Tr. at 127:7-127:10) (if a Medicare "recipient cannot afford to pay the premiums associated with their coverage," it is possible that they will lose their coverage); SUMF ¶ 266 (quoting Miller Dep. Tr. 103:21-103:23) (Medicare parts B and D have "premiums, deductibles, and co-pay"); SUMF ¶ 170 (quoting Young Dep. Tr. at 127:17-127:24) ("For Medicare, there is no guarantee that an individual will remain enrolled in the Part B and Part D program."); SUMF ¶ 179 (quoting Ruck Dep. Tr. at 73:9-73:13) (for TRICARE, "just active duty members are the ones that are not subject to copayments or patient payments of any kind").

[38] *See, e.g.*, SUMF ¶ 142 (quoting Young Dep. Tr. at 49:25-50:5) (for Medicare, "an item of service can be denied . . . if an auditor or contractor deems that the service was not . . . medically reasonable and necessary"); SUMF ¶ 105 (quoting Ford Dep. Tr. 148:7-148:10) (agreeing that "the [VHA] program only provides reimbursement for certain qualifying medical expenses"); SUMF ¶ 184 (quoting Ruck Dep. Tr. at 82:20-83:1) (agreeing that "TRICARE does have a medical necessity requirement"); SUMF ¶ 334 (quoting Zakaryan Dep. Tr. at 39:15-39:18 (Ex. C, attached hereto)) (certain services not covered under TRICARE).

[39] *See, e.g.*, SUMF ¶ 261 (quoting Miller Dep. Tr. at 101:1-101:5) (agreeing that providers in rural areas may not accept payment through VHA and TRICARE); SUMF ¶ 177 (quoting Ruck Dep. Tr. at 55:10-55:21) ("[T]he VA system does not automatically treat everyone who is a veteran" and that veterans are categorized "based upon their service history, their medical conditions, et cetera. And depending on the VA in that area, you may or may not get care within the VA."); SUMF ¶ 163 (quoting Young Dep. Tr. at 96:25-97:7) (agreeing that "a provider could stop accepting Medicare rates because they are too low to compensate them for their work"); SUMF ¶ 284 (quoting Miller Dep. Tr. at 133:12-133:23) (access to care concerns due to low Medicare rates are "a key issue in healthcare"); SUMF ¶ 345 (quoting Westerlind Dep. Tr. at 105:24-107:5 (Ex. D, attached hereto)).

for some of Plaintiffs' future medical services. SUMF ¶ 245 (quoting Miller Dep. Tr. at 75:3-75:10).[40]

Second, covered Plaintiffs still may not be able to avail themselves of benefits they are entitled to under the Enumerated Programs or TRICARE. *See Feindt*, 2025 WL 1348465, at *55 (plaintiffs "may not be able to avail themselves to mental health care through TRICARE" based on testimony "that there are not currently enough mental health providers available nationwide through TRICARE"). For example, Mr. McIlroy testified that "doctors and care providers often find that VA facilities are not adequate to meet the care demands of today," resulting in "the estimated need for significant replacement or investment in facilities." SUMF ¶ 43 (quoting McIlroy Dep. Tr. at 45:23-46:3). To make matters worse, "[t]here is a gap . . . between what is needed and what is funded" for those projects. SUMF ¶ 24 (quoting McIlroy Dep. Tr. at 46:4-46:8).

Ms. Ford further confirmed that "[a] patient's access to care depends in the VHA program, not only on eligibility, but also on available funding and staffing." SUMF ¶ 84 (quoting Ford Dep. Tr. at 104:3-104:7). Currently, "there are staffing challenges throughout the department." SUMF ¶ 89 (quoting Ford Dep. Tr. at 106:23-107:1). For example, from "2025 into 2026," "in excess of 4,000 total people left" the VHA, which was a "significant loss." SUMF ¶ 91 (quoting Ford Dep. Tr. at 82:5-82:13). When a facility is not fully staffed, it "can have an impact on health care delivery." SUMF ¶ 97 (quoting Ford Dep. Tr. at 110:9-110:16). In particular, "staffing levels can directly affect appointment availability" SUMF ¶ 98 (quoting Ford Dep. Tr. at 185:20-185:22), which "can result in longer wait times." SUMF ¶ 100 (quoting

[40] *See also* SUMF ¶ 259 (quoting Miller Dep. Tr. at 99:11-99:16, 99:22-99:25).

Ford Dep. Tr. at 186:2-186:4). Longer wait times, in turn, "can delay diagnosis or treatment." SUMF ¶ 101 (quoting Ford Dep. Tr. at 186:5-186:8).

For these reasons, "being eligible for care does not necessarily mean that there is an available provider within a plaintiff's geographic area that can treat his medical needs at any given time," whether "a VA provider or a community provider." SUMF ¶ 124 (quoting Ford Dep. Tr. at 213:8-213:16). This is especially true for veterans in rural areas, as "some rural regions may disproportionately lack specialty providers under direct VHA facilities." SUMF ¶ 127 (quoting Ford Dep. Tr. at 218:13-218:19). Thus, "[b]eing eligible for VA care does not guarantee the veteran will receive timely medical treatment that he or she needs." SUMF ¶ 125 (quoting Ford Dep. Tr. at 213:22-214:1). In similar circumstances, courts have concluded it was speculative to assume plaintiffs would actually be able to access the benefits they were entitled to in the future. *See Feeley*, 337 F.2d at 935 (declining offset for future medical care, noting that "in the future because of over-crowded conditions [plaintiff] may not even be able to receive timely care").

2. Plaintiffs may lose eligibility for TRICARE.

Eligibility requirements for TRICARE are similarly complex and subject to change. Dr. Ruck agreed that "in order to qualify for TRICARE, you either have to be active duty or have achieved 20 or more years of service or be a family member of either," or "have been medically retired." SUMF ¶ 176 (quoting Ruck Dep. Tr. at 54:17-54:22). Dr. Ruck further agreed that "in some circumstances," "a life event such as a divorce, can end an individual's access to TRICARE coverage," SUMF ¶ 180 (quoting Ruck Dep. Tr. at 76:10-76:15), and that if "a qualifying military individual passes away and the surviving spouse remarries," TRICARE eligibility can "be terminated under the plan rules." SUMF ¶ 182 (quoting Ruck Dep. Tr. at

76:18-77:3). Moreover, "children's eligibility for TRICARE" can "be terminated" "[w]hen they reach certain ages." SUMF ¶ 183 (quoting Ruck Dep. Tr. at 77:5-77:7).

B. Plaintiffs may choose not to receive health care under an Enumerated Program or TRICARE in the future.

Finally, even assuming *arguendo* that a program will continue to exist and a plaintiff will continue to qualify for the same benefits under that program in perpetuity, courts nevertheless decline to offset a plaintiff's award for future medical costs because a plaintiff has "a right to select a doctor or private hospital of his own choice for his future medical needs." *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1084 (2d Cir. 1988); *see also Hester v. United States*, No. 8:10-cv-1565, 2012 WL 368269, at *1 (M.D. Fla. Feb. 3, 2012) ("The Government's argument in favor of setoff is based on its contention that Plaintiff will incur no expense in obtaining the future medical care for which he seeks compensation. The flaw in the Government's argument is that if Plaintiff *chooses* to get his medical care outside of the VA, he may have to pay for such care.") (emphasis in original). As Ms. Ford explained, "[b]eing eligible for VA care does not guarantee necessarily that the veteran receives medical care through the VHA," "because it's a veteran's choice as to whether to receive care from VA." SUMF ¶ 122 (quoting Ford Dep. Tr. at 212:4-212:15).

Recognizing this, courts routinely decline to permit offsets for future medical care because, a s the Third Circuit explained decades ago, "[t]o force a plaintiff to choose between accepting public aid or bearing the expense of rehabilitation himself is an unreasonable choice" because "[t]he plaintiff may not be satisfied with the public facilities; he may feel that a particular private physician is superior; in the future because of over-crowded conditions he may not even be able to receive timely care." *Feeley v. United States*, 337 F.2d 924, 935 (3d Cir. 1964); *see also Walsh v. United States*, No. 07-CV-568, 2009 WL 3755553, at *5 (N.D. Okla.

Mar. 31, 2009) (quoting *Feeley*, 337 F.2d at 934-35). Because the Enumerated Programs and TRICARE will not pay for any doctor a Plaintiff chooses, each Plaintiff's future care may not be paid for (at all or in full) by these programs depending on the Plaintiffs' choices.[41] Courts have refused to permit offsets in cases such as this, where an offset would "unduly limit and virtually pre-determine not only the kind of medical care necessary for the treatment of the plaintiff's condition, but also the source of such medical care." *Powers v. United States*, 589 F. Supp. 1084, 1108 (D. Conn. 1984).

Furthermore, courts are reluctant to require a plaintiff to seek health care from their tortfeasor. "[F]ederal law does not require an offset against a veteran's damages award for future medical care that could be provided at a VA facility" because it "disfavors an outcome whereby a litigant is 'obligated to seek medical care from the party whose negligence created his need for such care simply because that party offers it without charge.'" *Malmberg v. United States*, 816 F.3d 185, 192 (2d Cir. 2016) (quoting *Ulrich*, 853 F.2d at 1084).[42]

These principles hold true even where the plaintiff has previously received care through public facilities because "[t]he plaintiff's past use of the government facilities does not ensure his future use of them" as the plaintiff "will now have the funds available to him to enable him to seek private care." *Feeley*, 337 F.2d at 935; *see also Molzof v. United States*, 6 F.3d 461, 463,

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[41] *See, e.g.*, SUMF ¶ 104 (quoting Ford Dep. Tr. at 114:2-114:7) (the VHA program "is not a situation where the veteran can just go to any doctor he wishes" because "[t]here is a full process involved with [a veteran] seeking authorization to receive that care outside of the VA"); SUMF ¶ 192 (quoting Ruck Dep. Tr. at 105:17-105:21) (under TRICARE, veterans "can choose to go and see a provider who is not a network provider, but you will end up paying more as far as copays or point-of-service charges").

[42] While this principle originated in medical malpractice cases, it has been applied in a variety of circumstances. *See, e.g.*, *Feindt*, 2025 WL 1348465, at *1-2, *55 (in FTCA case involving personal injuries sustained from exposure to contaminated drinking water on military base, court rejected future offsets while awarding damages for certain future medical expenses); *Feeley*, 337 F.2d at 926 (plaintiff injured by United States Post Office truck).

467-68 (7th Cir. 1993) (declining to offset against plaintiff's award for future medical care based on the "speculative nature" of prospective future medical benefits and reluctance to "deny the plaintiff the freedom to choose his medical provider, and, in effect, to compel him to undergo treatment from his tortfeasor" even though plaintiff "generally had been satisfied with the care provided by the VA hospital" and there was no evidence that plaintiff "planned to leave the VA hospital for a private or other provider"); *Ulrich*, 853 F.2d at 1084 (explaining that "it is not relevant that [plaintiff[has sought treatment from VA hospitals in the past"); *Powers*, 589 F. Supp. at 1108.

C. It is speculative to assume that Plaintiffs' disability ratings will never again fluctuate and that no other changes will occur that reduce the benefits received by a Plaintiff for his or her Track 1 injury.

1. Plaintiffs may receive additional or increased disability ratings that reduce the share of benefits related to Camp Lejeune.

The CLJA provides for offsets only "in connection with health care or a disability relating to exposure to the water at Camp Lejeune." § 804(e)(2)(B). In order to ascertain the appropriate share of a plaintiff's VBA disability benefits to attribute accordingly, each of Defendant's economic experts (a) identified any ratings that do not relate to exposure to the water at Camp Lejeune, (b) identified the amount the plaintiff would receive if those were the only ratings, and (c) subtracted that amount from the total amount the plaintiff receives to find the variance allegedly attributable to the addition of the plaintiff's Camp Lejeune related ratings.[43]

[43] When asked "what does the variance represent?" Ms. Yount explained "It's the differential. The CLJA rate which includes all ratings minus the no CLJA rate." SUMF ¶ 320 (quoting Yount Dep. Tr. at 183:6-9); Dr. Tosic agreed that her methodology is to "take the total award and subtract the award that would be received if the plaintiff only had their unrelated injuries, and you identify the difference as the increased amount received due to the Camp Lejeune-related injuries." SUMF ¶ 328 (quoting Tosic Dep. Tr. at 216:9-13); Dr. Brod explained that "from the perspective of the VBA, Mr. McElhiney was 100 percent disabled even before he contracted"

The same experts calculate offsets for future VBA benefits by projecting this current ratio into the future. This methodology fails to account for the fact that any new or increased rating unrelated to Camp Lejeune would reduce the share appropriate to offset, and that the rating related to a Camp Lejeune injury also could change with the passage of time. There are numerous examples to illustrate the impact of this gap in analysis, and there is no dispute of fact that this ratio could very well change.

Plaintiff Cagiano's VBA disability ratings illustrate the problem. On February 23, 2018, Plaintiff Cagiano received a 100% VBA disability rating for bladder cancer status, a Track 1 disease. SUMF ¶ 17 (citing Yount Rep. (Cagiano) at Table 3 (JA Ex. 719, D.E. 839-1)). That rating was later reduced to 30% beginning on May 1, 2019, and increased to 60% on July 19, 2019. SUMF ¶ 18 (citing Yount Rep. (Cagiano) at Table 3). At this point, 100% of his VBA benefits were attributable to a Camp Lejeune injury, and Defendant's methodology would treat 100% as the share subject to offset. On August 10, 2022, Plaintiff Cagiano also received a 100% disability rating for prostate cancer, which is not a Track 1 disease.[44] SUMF ¶ 19 (citing Yount

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Parkinson's Disease, so the "related increment to his regular VBA disability benefit is zero" but the "related increment to his overall VBA disability benefit is the SMC-K benefit, which I assume he will continue to receive." SUMF ¶ 355 (quoting Brod Dep. Tr. at 147:23-25; 148:3-5; 148:19-21 (JA Ex. 770, D.E. 841-1)).

[44] As a separate methodological issue, in calculating the value of Plaintiff Cagiano's VBA offsets, Defense expert Yount relies on Defense expert Dr. Ji's determination that prostate cancer is a related condition for purposes of offset calculations. SUMF ¶ 360 (citing Yount Rep. (Cagiano) at 2); SUMF ¶ 359 (citing Ji Rep. at 9 (JA Ex. 653, D.E. 837-1)). Dr. Ji reaches this conclusion because the VBA rating decision indicated that it was granted due to exposure to the water at Camp Lejeune, but this ignores that CMO 12 required the Trial Plaintiffs to waive "any other illnesses or injuries besides Track 1 Illnesses (and those injuries or conditions stemming from a Track 1 Illness or its treatment)." Thus, for purposes of Plaintiff Cagiano's damages and related offsets, benefits received for prostate cancer are not "relating to exposure to the water at Camp Lejeune." CLJA § 804(e)(2)(B). Ms. Yount's inclusion of prostate cancer in calculating alleged offsets for VBA benefits inappropriately inflates the value of the offset. To the extent that Defendant believes it is entitled to assert offsets for benefits related to prostate cancer, notwithstanding plaintiffs' inability to recover damages for the same, the methodological issue of

Rep. (Cagiano) at Table 3). But VBA ratings cannot exceed 100% in the aggregate, no matter how many service-connected conditions a veteran has.[45] Cagiano therefore continues to receive benefits at the 100% level—the same total he received before the prostate diagnosis. What changed is the *attribution* of those benefits. Half of Cagiano's total disability rating is now for a non-Track 1 condition. The share of his future benefits properly subject to offset under § 804(e)(2)(B) shrinks accordingly—and additional 100% rating for any other unrelated condition could eliminate it altogether.

Defendant's expert agreed this scenario changes her calculation. Ms. Yount agreed that "if a veteran that [she had] calculated future disability benefits for were to contract an illness that is service related but not the illness for which they're seeking recovery in the Camp Lejeune litigation, it would change [her] future calculation." SUMF ¶ 321 (quoting Yount Dep. Tr. at 196:2-7 (JA Ex. 790, D.E. 841-1)).

Likewise, if an existing rating that is not related to exposure to the water at Camp Lejeune were to be increased, it would have a similar effect. As an example, Mr. Downs received a 10% disability rating for lumbar spine with degenerative changes beginning on August 18, 2011.[46] SUMF ¶ 20 (citing Yount Rep. (Downs) at Table 3 (JA Ex. 721, D.E. 839-1)). But this rating was increased to 20% beginning on November 28, 2016. SUMF ¶ 20 (citing Yount Rep.

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failing to consider the impacts of new or increased ratings in the future applies equally to other conditions unrelated to Camp Lejeune.

[45] It is "possible for one veteran to have a 100 percent rating for one injury and a 50 percent for another at the same time" but if one veteran "had one disability that's rated at 100, another one rated at 50, and then someone else just has 100," with "both people being at 100 percent, the rate that they're paid would be the same no matter how many disabilities they have." SUMF ¶¶ 199-200 (quoting Piper Dep. Tr. at 88:2-24).

[46] According to Defendant's expert Ji, this rating is not related to Mr. Downs' claimed condition of kidney cancer. SUMF ¶ 356 (citing Ji Rep. at 16).

(Downs) at Table 3). If this rating were later increased again, it could reduce the portion of Mr. Downs's VBA benefits that are currently received only due to injuries relating to exposure to the water at Camp Lejeune. Moreover, this is a rating for an explicitly *degenerative* condition, meaning it is expected to worsen over time.

Here, we have ageing plaintiffs with ongoing medical diagnoses, conditions and treatment. It is a demonstrated fact that new or changing conditions and diagnoses can have an impact on a plaintiffs' disability rating and impact the relatedness of the benefits received to the Track 1 Camp Lejeune injury. Ms. Piper was asked if she was "generally familiar with a veteran having a rating for a condition and later receiving a different rating for the same condition" and she responded "Yeah. That's normal. So that's basically what happens with most people over time due to age like things get worse." SUMF ¶ 208 (quoting Piper Dep. Tr. at 105:11-20).

2. Plaintiffs' eligibility for and amount of VBA disability benefits are subject to change.

Due to the complex eligibility requirements and benefit schedules for VBA benefits, "it would be imprudent and speculative for the Court to presume" that Plaintiffs will continue to qualify for the same benefits and in the same amounts in the future. *See Lawson*, 454 F. Supp. 2d at 415.

Defendant's experts agree. For one thing, "the total amount of disability compensation a veteran receives will be impacted by how long the veteran lives." SUMF ¶ 58 (quoting McIlroy Dep. Tr. at 175:21-176:1). This is because "when a veteran dies . . . disability payments stop." SUMF ¶ 56 (quoting McIlroy Dep. Tr. at 174:21-174:23). And while "if there is a surviving spouse, depending on the criteria, they may or may not be awarded that benefit," the benefit "wouldn't be the same amount that a veteran receives." SUMF ¶ 214 (quoting Piper Dep. Tr. at 112:23-113:4).

Furthermore, "benefits can also be stopped or reduced while the veteran is alive." SUMF ¶ 59 (quoting McIlroy Dep. Tr. at 176:8-176:12). For example, "the Veterans Administration has the right to adjust its determinations as to the percentage of benefits [Plaintiffs are] entitled to . . . at anytime." *See Laskowski*, 918 F. Supp. 2d at 330. As Mr. McIlroy confirmed, a veteran's benefits could change "[i]f the VA reevaluates the veteran's condition and reduces the rating," SUMF ¶ 60 (quoting McIlroy Dep. Tr. at 176:13-176:16), or "[i]f subsequent medical documentation led the VA to conclude that an injury is not service connected," SUMF ¶ 60 (quoting McIlroy Dep. Tr. at 176:17-176:22). Indeed, "ratings for nonstatic conditions are periodically reevaluated as part of VA's normal process." SUMF ¶ 230 (quoting Piper Dep. Tr. at 252:9-252:12). For example, for a condition such as "active cancer," the VA will "automatically schedule some type of routine future examination." SUMF ¶ 224 (quoting Piper Dep. Tr. at 243:15-244:7). And "whenever the VA schedules a reexamination, there is a possibility that it could result in a rating change." SUMF ¶ 232 (quoting Piper Dep. Tr. at 252:4-252:8). Courts routinely decline to offset anticipated future disability benefits in light of these uncertainties. *See, e.g.*, *Poirier*, 745 F. Supp. at 33; *Laskowski*, 918 F. Supp. 2d at 330.

Benefits may also change due to changes in the status of Plaintiffs' claims. For example, "if the veteran filed a new claim, that could be another thing that could cause a change" in their benefit. SUMF ¶ 217 (quoting Piper Dep. Tr. at 134:24-135:2). If a veteran is successful in an appeal" of a claim decision, "[i]t could potentially change their ratings" or "change the effective date" of the benefit. SUMF ¶¶ 221-222 (quoting Piper Dep. Tr. at 218:10-218:16). Claims or appeals could even lead to retroactive changes to awards. SUMF ¶ 223 (quoting Piper Dep. Tr. at 218:20-218:22).

Moreover, "a change in dependent status," such as "adding a dependent, removing a dependent," "would cause a change whether positive or negative." SUMF ¶ 213 (quoting Piper Dep. Tr. at 112:11-112:20); *see also* SUMF ¶ 331 (quoting Tosic Dep. Tr. at 235:24-238:15 (JA Ex. 787, D.E. 841-1)) (Dr. Tosic agreed that "holding everything else constant," if a plaintiff were to get divorced, "his [VBA] benefits may be reduced"). For these reasons articulated by Defendant's experts, "continued payment of disability benefits is highly speculative." *See Aretz*, 456 F. Supp. at 406.

Finally, it is important to note that the VA Schedule for Rating Disabilities will soon receive "a full comprehensive update" for the first time since the Schedule was first created in 1945. SUMF ¶ 203 (quoting Piper Dep. Tr. at 90:6-91:21). This Schedule is the bedrock of all disability ratings and benefits provided by the VBA. In contrast to other limited updates that have been issued over the last 80 years, in the forthcoming update, Ms. Piper described that "one iteration would involve all of the disability benefits," noting that such an update "has never happened" but that the VBA is "close to completing it." SUMF ¶ 204 (quoting Piper Dep. Tr. at 90:21-25). Ms. Piper further agreed that "when the schedule is updated, that may cause changes to individual veterans' ratings." SUMF ¶ 205 (quoting Piper Dep. Tr. at 92:19-93:2).

Defendant's experts' testimony affirms the undisputed fact that the limit placed by the CLJA's text itself, and by offset caselaw in relevant contexts: potential future benefits from government programs are too speculative to support offsets.

CONCLUSION

Because there is no genuine dispute of material fact that Defendant's claimed future offsets are inappropriately speculative, this Court should grant Plaintiffs' motion for partial summary judgment and deny Defendant's claimed future offsets.

Dated: April 27, 2026.

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