IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:23-cv-01364

STEPHEN PETER DUNNING,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant	)

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR EXPEDITED TRIAL

The undersigned counsel for the Plaintiff Stephen Dunning (the "Plaintiff") respectfully requests that the Court grant the Motion for Expedited Trial.

INTRODUCTION

Stephen Dunning finished his high school credits early so that he could enlist in the Marines in time to walk across the stage of his high school graduation wearing a Marine Corps uniform. He wanted to serve his country. After graduation, Mr. Dunning headed to Camp Lejeune, where he would live, work, and play for five of the next six years. Over the next thirty years, Mr. Dunning completed his military service, married his best friend, raised two boys, and enjoyed a fulfilling sales career. But what should have been many more years with his family, and a well-deserved retirement, was taken from him five years ago: at age 58, he was diagnosed with an aggressive bladder cancer, which he alleges was caused by exposure to toxic water at Camp Lejeune. Two months ago, Mr. Dunning was given three to six months to live.

Mr. Dunning's first thought is not for himself. It is for the other Marines and their families who were lied to and left unprotected by the very country they signed up to serve. He seeks justice not for himself—it's quickly becoming too late for that—but to protect and vindicate the thousands of his other fellow Marines, their families, and the decades-spanning

community of those who served, lived, and worked at Camp Lejeune. Before he dies, Mr. Dunning wants to testify before this Court, to tell his story in his own words. This testimony would be his final act of service for his country. Plaintiff respectfully moves this Court to expedite Mr. Dunning's trial pursuant to Local Rule 40.1(d), Federal Rules of Civil Procedure 1 and 16, and 28 U.S.C. § 1657(a). The Plaintiff and Plaintiffs' Leadership Group (the "PLG") can and will present Mr. Dunning's case at a moment's notice, will simplify and streamline the presentation of exposure, causation, diagnosis, and damages evidence accordingly, and requests that the Court set it for trial within 120 days of this Motion.

The relief sought by this motion, as Mr. Dunning would wish and as all Camp Lejeune victims deserve, does not benefit one plaintiff only. Many others also are and will become similarly situated to Mr. Dunning, and the exercise of expediting his trial will also serve to provide an opportunity to adopt streamlined trial procedures that will lessen the time to and in trials, and accordingly reduce delay, for all parties and the Court.[1]

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Stephen Dunning joined the Marine Corps immediately upon completing his high school education. In fact, he finished his high school coursework early, enlisted, and spent the next three months at basic training at Parris Island. Dunning Deposition., Ex. A ("Dunning Depo.") at 89:16-25. In June of 1979, he walked across the stage of his high school graduation wearing his Marine Corps uniform, proud to serve his country. *Id.* at 89:22-25; 185:11. He spent five of the next six years at Camp Lejeune. *Id.* at 29:22-30:9. As he has testified, there was never "a time when you're at Lejeune when you're not exposed to water in some form." *Id.* at 207:5-7. He drank it, cooked with it, showered in it, and washed his clothes and sheets in it. *Id.* at 207:5-19. He spent his time off lounging at the pool. *Id.* All the while, Mr. Dunning was proud to be a

[1] To that end, Mr. Dunning is willing to go to trial before any judge in this District whose schedule could accommodate him. By filing this Motion, neither the PLG nor Mr. Dunning suggests his situation is unique. The need to expedite a trial will apply to many Camp Lejeune litigants given the nature of the claims and the client population. This Motion allows the Court an opportunity to advance the litigation for the benefit of all claimants.

Marine, living by the motto Semper Fi – always faithful. *Id.* at 182:7-14. Marines were honest, and looked out for each other. *Id.* After leaving Camp Lejeune, Mr. Dunning served for two years as a Reservist. *Id.* at 90:22-23.

Mr. Dunning then moved to Kansas, where he met his future wife. He also began a career in sales. He and his wife raised their two boys in a house they owned, and saved for their retirement. *Id.* at 261:18-262:11. In 2019, Mr. Dunning was 58 and three years into a fulfilling new job as a director of business development. *Id.* at 210:9-13. He was passionate about the job, and planned to work until he was 70. *Id.* at 174:16-22. Mr. Dunning lived an active life, regularly playing golf and pickleball with his friends. *Id.* at 246:20-247:14. He and his wife had discussed buying a second home in Florida, and also bought a motor home so they could travel the United States together. *Id.* at 215:25-216:17. He was "very, very content" with his life. *Id.* at 216:16.

All that changed in an instant on January 29, 2019, when Mr. Dunning was diagnosed with bladder cancer. *Id.* at 41:22-23. The cancer was aggressive, and Mr. Dunning began chemotherapy in February. *Id.* at 145:6-147:6. After months of chemo, the cancer was only coming back stronger. *Id.* Mr. Dunning had surgery to remove the cancer in February 2020. *Id.* at 149:8-12. The surgeon had to remove Mr. Dunning's bladder, prostate, "wires" to the prostate, all the lymph nodes in his waist, and 18 inches of intestine. *Id.* at 147:7-13. In August 2020, Mr. Dunning had another surgery to remove his inguinal muscle. *Id.* at 150:2-8.

After that surgery, his wife of nearly 25 years asked for a divorce. *Id.* at 120:22-121:18. She and the boys—now 22 and 25—continue to live in the family home. *Id.* at 84:18-23. As Mr. Dunning explained, "[E]verything that was important to me is gone. Living with my kids, my wife, my job, my friends, things I enjoy, my health, looking forward to a future, all of it, it's gone." *Id.* at 183:4-7. He is angry that the government knew about the contaminated water at Camp Lejeune, but did not tell the Marines that had lived there. *Id.* at 182:2-183:1. He would have been sure to have regular cancer screenings, his disease could have been discovered soon enough to save or prolong his life, and he would not have lost his life and his family. *Id.*

Instead, Mr. Dunning now lives alone in Missouri, where he continued this cycle of chemotherapy and surgeries. In February 2023, he had surgery to remove his left kidney, left ureter, and gallbladder, which were all filled with cancer. *Id.* at 151:11-152:4. Mr. Dunning then underwent four months of a double-dose of chemotherapy, taking 16 pills every morning and 14 pills every afternoon. *Id.* at 135:11-16; 153:14:154:7. He completed the chemotherapy in October 2023. The doctors made clear that if this round of chemo did not work, they would do their best to make him comfortable. As the surgeons put it, they were "running out of things to take out." *Id.* at 154:12-14. Mr. Dunning was told the likelihood of success was only 15%. *Id.* at 154:12-16.

Mr. Dunning had his final scan on February 17. Dunning Depo. at 154:10-12. Unfortunately, it did not go well. The cancer had progressed. The doctors informed Mr. Dunning that he has only three to six months left to live. Now, in addition to living with daily nausea, lymphedema, and aggravated sciatica, *id.* at 70:17-21, Mr. Dunning lives with the knowledge that he is going to die, soon. He is desperate to testify in front of the Court before that happens. *Id.* at 277:17-18. He wants to tell his story because, as he put it: "I'm not alone. I've got friends who are dying, friends who have died, because somebody kept their mouth shut." *Id.* at 183:10-13. As further evidenced in his Declaration, attached hereto as Ex. B, ("Dunning Decl."), Mr. Dunning states: "My bladder cancer has unfortunately given me a death sentence, but as I testified in my deposition, even before I knew of this deadly metastasis, I still very much want to testify and tell my entire story live, in-person, in court there in North Carolina, and I will make every effort to do so if given that opportunity." Dunning Decl., ¶ 15. Mr. Dunning wants his day in court to advance this litigation and find some measure of justice.

II. Procedural Background

Mr. Dunning filed an administrative claim with the Department of the Navy on January 27, 2023. He filed a complaint in the Eastern District of North Carolina on September 29, 2023, and a short-form complaint on November 5, 2023. Mr. Dunning was selected as a Track 1 Discovery Plaintiff pursuant to the Court's Track 1 Order on February 2, 2024. [D.E. 130].

ARGUMENT

I. The Court Has Ample Authority to Expedite This Trial Due to Mr. Dunning's Terminal Illness.

It is a fundamental tenet of our legal system that all people "must be given a meaningful opportunity to be heard." *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). In recognition of the importance of having one's "day in court," states across the country allow—or mandate—trial preferences for plaintiffs who are dying or elderly.[2] Such statutes were enacted to protect litigants' "substantive right to trial during their lifetime." *Koch-Ash v. Superior Ct.*, 180 Cal.App.3d 689, 694 (1986). In some cases, certain damages will not "survive plaintiff's pretrial death," *id.*, so the statutes ensure plaintiffs receive the recovery to which they are entitled. Importantly, these statutes also "prevent parties from pursuing delay tactics to try to outlast and elderly [or terminally ill] party or to coax out a more favorable settlement." *See* Josh Hanson, Note, *A Preference for Justice: Protecting the Rights of the Elderly Through Federal Application of State Trial-Preference Statutes*, 20 Elder L. J. 413, 425-426 (discussing Fla. Stat. Ann. § 415.1115).

While there is no corollary federal law requiring a trial preference for terminally ill plaintiffs, "[d]istrict courts have inherent power to manage their dockets with an eye toward speedy and efficient resolutions." *United States ex rel. Nicholson v. MedCom Carolinas*, Inc., 42 F.4th 185, 196 (4th Cir. 2022). This includes an "inherent power to accelerate [a] suit's trial

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[2] *See, e.g.*, California – Cal. Code Civ. Proc. § 36(c)(2)(d) (preference to set trial within 120 days for parties who are over 70 or unlikely to survive beyond six months); Colorado – Colo. Rev. Stat. § 13-1-129 (preference to set trial within 119 days for parties who are over 70 or unlikely to survive beyond one year); Connecticut – Conn. Gen. Stat. § 52-192 (trials for parties over 65 years have precedence); Florida – Fla. Stat. § 415.1115 (discretion to advance trial for parties of 65 years); Illinois – 735 Ill. Comp. Stat. 5/2-1007.1 (preference to set trial within 1 year for parties over 67 or with physical hardship); Louisiana – La. Code Civ. Proc. § 1573 (trial preference for parties over 70 or unlikely to survive beyond six months); Massachusetts – Mass. Gen. Laws ch. 231, § 59F (proceedings in which a party is over 65 must be advanced speedily); Nevada – Nev. Stat. 16.025 (preference to set trial within 120 for parties who are over 70 or unlikely to survive beyond six months); New York – N.Y. C.P.L.R. 3403 (trial preference for parties who are over 70 or terminally ill as a result of defendant's conduct); Rhode Island – R.I. Gen. Laws § 9-2-18 (trial shall be accelerated at the request of a party over 65); Washington – Wash. Rev. Code § 4.44.025 (trial priority to parties who are over 70 or terminally ill).

date" because a plaintiff is injured, ill, or elderly. *Cf. Orlando v. Gov. Emps. Ins. Co.*, No. 2:20-cv-01904-JAD-VCF, 2021 WL 1342521, at *2 (D. Nev. Apr. 9, 2021) (declining to exercise power); *see also Abbit v. ING USA Annuity*, No. 3:13-cv-02310-GPC-WVG, 2017 WL 449149, at *4 (S.D. Cal. Feb. 2, 2017) (expediting pretrial proceedings and setting jury trial for three months away given elderly and sick plaintiffs). Federal Rules of Civil Procedure 1 and 16 grant district courts the ability and impose upon them, and the parties to all civil actions, the duty to ensure "just, speedy, and inexpensive determination" of all actions, including and especially for actions brought by plaintiffs facing health issues. *Wakefield v. Glob. Fin. Priv. Cap., LLC*, No. 15CV0451 JM(JMA), 2015 WL 12699870, at *3 (S.D. Cal. Sept. 17, 2015) (quoting Fed. R. Civ. P. 1; citing Fed. R. Civ. P. 16) (granting plaintiff's request for trial preference given declining health). This Court also has discretion to expedite a case on "her own motion or on the motion of any party" under Local Rule 40.1(d).

Additionally, federal law mandates that a court "shall expedite the consideration of any action . . . if good cause therefor is shown" under 28 U.S.C. § 1657(a). The statute explains that "'good cause' is shown if a right under . . . a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." *Id.* Here, the Camp Lejeune Justice Act ("CLJA") is a federal statute that created a right "to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune." CLJA § 804. Given Mr. Dunning's status as a Track 1 Discovery Plaintiff and his desire to testify before the Court to support his CLJA claim—and potentially the claims of other victims—before his imminent death, the Court should expedite his trial.

II. Mr. Dunning Has Demonstrated Just and Good Cause to Schedule His Trial Within 120 Days.

The Court has directed the parties to be prepared to try cases this year. Mr. Dunning's should be one of them. This Court may use its authority under the rules and statutes described above to expedite Mr. Dunning's trial. When a plaintiff's health will "deteriorate" and his testimony is "relevant to the case," it is "fair, reasonable, and justified" to set an earlier trial date.

Wakefield, 2015 WL 12699870 at *3. These conditions are satisfied here. As described above, Mr. Dunning has only a matter of months to live, and his greatest desire is to use that time to testify in court to seek justice. As a Track 1 Discovery Plaintiff, his testimony is relevant for adjudicating bladder cancer claims. Allowing a case with a ready and willing plaintiff to move to trial will not only allow Mr. Dunning to have his day in court, but will serve the larger common interest in advancing this litigation. These circumstances also constitute good cause to expedite the trial under 28. U.S.C. § 1657(a), because Mr. Dunning will not realize his right to recover relief under the CLJA if he dies before trial.

The Track 1 Order made clear that each judge is responsible for "scheduling procedures for the actions assigned to that judge," and any individual judge's decision regarding "timing" on a plaintiff's docket will control. [D.E. 130, at p. 4]. Given Mr. Dunning's prognosis, the Plaintiff and PLG respectfully request the Court set the trial for within 120 days of this Motion. This timeline is consistent with state statutes that expedite trials for terminally ill plaintiffs. *See* Cal. Code Civ. Proc. § 36(c)(2)(d)); Colo. Rev. Stat. § 13-1-129; Nev. Stat. 16.025. As next described, this deadline is feasible for the parties given the extensive discovery already exchanged in this case.

III. Mr. Dunning's Case Is Ready for Trial and Expediting It Would Not Prejudice the Government.

The Court has already ordered the parties to "be prepared to commence trials for Track 1 Discovery Plaintiffs in 2024." [D.E. 130, at p. 4]. Mr. Dunning is a Track 1 Plaintiff, and expediting his trial would speed up this process by only a matter of months. Those months are inconsequential to counsel, but are everything to Mr. Dunning. The government will not be prejudiced if this trial is expedited.

Unlike cases in which the court denies as premature the motion to expedite because the discovery phase has not begun, *see Buckner v. Shumlin*, No. 1:12–cv–90–jgm, 2013 WL 809590, at *7 (D. Vt. Mar. 5, 2013), significant bellwether discovery has already been conducted. Mr. Dunning has provided the government with ample documentation of his medical conditions and

his time at Camp Lejeune. In January, Mr. Dunning sat for an all-day deposition, so the government has a strong understanding of his case. The Plaintiff and the PLG are likewise confident that it has obtained sufficient information from the government to litigate Mr. Dunning's case. Expediting this trial would not interfere with continued discovery efforts under the Track 1 Order for other Discovery Plaintiffs.

The parties are both also fully capable of naming experts and exchanging reports quickly. The current deadline to disclose experts is only five months away, [D.E. 130, at p. 4], and both parties have been thinking about these issues for two years. As discussed in the PLG's Rule 16 Letter, delivered to the Clerk of the Court on March 20, 2024, there are many ways to feasibly expedite this trial. For example, the parties could—and should—stipulate to the admissibility of experts and agree to provide some testimony in written form. As soon as the Court determines the requisite elements of causation under the CLJA, the PLG's experts will be prepared to testify. If the parties are required to demonstrate that the water at Camp Lejeune was indeed toxic, the government's agencies have already prepared gold-standard reports on the topic. It is possible to hold these trials now, and the parties should not prevent these veterans from having their day in court just because it may be more work for counsel in the short term.

In the Track 1 Order, the Court made clear that the Court and the parties "shall discuss the selection of certain Track 1 Discovery Plaintiffs for a Bellwether trial or trials" at "the appropriate time." [D.E. 130, at p. 4]. The Plaintiff and the PLG posit that the appropriate time is now. Mr. Dunning is ready, willing, and able to present his case for trial. But he only has three to six months to do so.

IV. Response to the Government's Position on Expediting Trial.

The government objects to an expedited trial, taking the position that the Court's case management orders provide a methodical procedure for the discovery and trial of these cases, and that an expedited trial would not allow time for fact and expert discovery. The government offers not to object to a trial preservation deposition—a second deposition for Mr. Dunning. The Plaintiff and the PLG deeply appreciates this Court's proactive management of this litigation,

and appreciates the government's trial deposition offer as well. But time is something Mr. Dunning no longer has, and he would wish to speak at trial live rather than as a posthumous recording.

The exercise of accelerating discovery for an expedited trial will demonstrate the speed with which all trials can be prepared, especially given the simplicity of the proposed trial plan below, designed to conform to what is—and is not—required for proof under the CLJA's new and unique federal cause of action.

V. The Plaintiff's and the PLG's Proposed Plan to Expedite Trial

While the specifics of trial will be more fully addressed at a Rule 16 pretrial conference, the Plaintiff and the PLG submit that the CLJA's statutory proof requirements are streamlined and, accordingly, for Mr. Dunning's trial would include only two expert witnesses—an oncologist and a damages expert—and require approximately two trial days.

The CLJA is premised on the fact that the water at Camp Lejeune was contaminated for the period 1953-1987 and that the water caused Marines and their families to contract diseases, including bladder cancer. Mr. Dunning was at Camp Lejeune from 1979 to 1985; he was exposed to the water at Camp Lejeune that the CLJA deems contaminated. Indeed, the statute is premised on the extensive water modeling conducted by the United States, through the Agency for Toxic Substances and Disease Registry (ATSDR),[3] and acknowledges by its very terms the presence of contaminants in the water at Camp Lejeune during the period of time that Mr. Dunning was stationed at Camp Lejeune.

As stated above, in January 2019, Mr. Dunning was diagnosed with bladder cancer, a disease that the United States, again through its agency the ATSDR,[4] admitted as early as 2017,

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[3] ATSDR, *Water Modeling* (last reviewed Sept. 26, 2019), https://www.atsdr.cdc.gov/sites/lejeune/Water-Modeling.html; ATSDR, *Tarawa Terrace Reports* (last reviewed Jan. 16, 2014), https://www.atsdr.cdc.gov/sites/lejeune/tarawaterrace.html; ATSDR, *Hadnot Point-Holcomb Boulevard Reports* (last reviewed Jan. 16, 2014), https://www.atsdr.cdc.gov/sites/lejeune/hadnotpoint.html.

[4] The ATSDR "is a federal public health agency of the U.S. Department of Health and Human Services" which "protects communities from harmful health effects related to exposure to natural and man-made hazardous substances" by "responding to environmental health emergencies;

Footnote continued on next page

before the passage of the CLJA, is a disease that can be caused by the Camp Lejeune water.[5] Mr. Dunning, therefore, need not prove that the water at Camp Lejeune is capable of causing bladder cancer because the United States already concluded that. As a result, as to Mr. Dunning's disease, there is no dispute as to general causation, *i.e.,* whether exposure to the water at Camp Lejeune can cause bladder cancer. At trial, therefore, the only expert testimony that Mr. Dunning will have to present to prove his case is a medical causation expert witness[6] and a damages expert witness.

As to causation, Mr. Dunning will need to call a medical expert to testify about the cause of Mr. Dunning's bladder cancer, often referred to as a "specific causation." In other words, Mr. Dunning will call an oncologist who will testify that it is at least as likely as not that his bladder cancer was caused by Camp Lejeune water. As to economic damage, Mr. Dunning will call an expert who will testify about the economic losses that he has suffered as a result of his bladder cancer. Together with the plaintiff and family members, the Plaintiff's case in chief will likely

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Footnote continued from previous page
investigating emerging environmental health threats; conducting research on the health impacts of hazardous waste sites; and building capabilities of and providing actionable guidance to state and local health partners. ATSDR, *Agency for Toxic Substances and Disease Registry* (last reviewed Jan. 22, 2024), https://www.atsdr.cdc.gov/. Since 1989, when the U.S. Environmental Protection Agency (EPA) listed U.S. Marine Corps Base Camp Lejeune as a Superfund site and added it to the National Priorities List (NPL), the ATSDR has conducted numerous studies evaluating the contaminated water at Camp Lejeune and its related health effects. Indeed, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund Act), the ATSDR is the "***lead agency*** within the Public Health Service for implementing the health-related provisions of CERCLA" and is "charged under the Superfund Act to assess the presence and nature of health hazards at specific Superfund sites, to help prevent or reduce further exposure and the illnesses that result from such exposures, and to expand the knowledge base about health effects from exposure to hazardous substances." *Agency for Toxic Substances and Disease Registry*, FEDERAL REGISTER (last visited Nov. 21, 2023), https://www.federalregister.gov/agencies/agency-for-toxic-substances-and-disease-registry#:~:text=As%20the%20lead%20Agency%20within%20the%20Public%20Health,about%20health%20effects%20from%20exposure%20to%20hazardous%20substances.

[5] *ATSDR Assessment of the Evidence for the Drinking Water Contaminants at Camp Lejeune and Specific Cancers and Other Diseases* (Jan. 13, 2017), https://www.atsdr.cdc.gov/sites/lejeune/docs/atsdr_summary_of_the_evidence_for_causality_tce_pce-508.pdf.

[6] Plaintiffs contend that the CLJA dispenses with the need to establish what is traditionally referred to as specific causation, and the PLG filed a motion for partial summary judgment on that issue. [D.E. 110]. However, until that motion is decided, Plaintiff Dunning includes a medical causation expert witness as part of his anticipated proof at trial.

be approximately eight hours of trial time. This is the type of trial that the Judges of this District have contemplated on more than one occasion. *See, e.g,* D.E. 125 at 24:22-25:8 (Judge Boyle discussing trying two to three cases in a week); D.E. 9 at 19:3-14 (Judge Dever discussing one-day trials). And, because the testimony relating to bladder cancer, and perhaps even the economic loss expert's testimony, would in large measure be the same for other Track 1 bladder cancer cases as it would be for Mr. Dunning, converting Mr. Dunning's trial into a multi-plaintiff trial for additional bladder cancer plaintiffs before this Court, who could be prepared for trial in the same time frame as Mr. Dunning's case, would promote the just, speedy and inexpensive determination of CLJA cases in accordance with Rule 1 of the Federal Rules.

CONCLUSION

For the foregoing reasons, the Plaintiff requests that the Court grant the present motion.
DATED this 30th day of April, 2024.

/s/ J. Edward Bell, III
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CERTIFICATE OF SERVICE

I, J. Edward Bell, III, hereby certify that the foregoing document was electronically filed on the Court's CM/ECF system on this date, and that all counsel of record will be served with notice of the said filing via the CM/ECF system.

This the 30h day of April, 2024.

/s/ J. Edward Bell, III
J. Edward Bell, III