

**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

**UNITED STATES' RESPONSE IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT
REGARDING FUTURE OFFSETS (D.E.
860)**

(Fed. R. Civ. P. 56; L. Civ. R. 7.1, 56.1)

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INTRODUCTION

Plaintiffs are again seeking to rewrite the Camp Lejeune Justice Act of 2022 (the “CLJA”). Plaintiffs’ Motion for Partial Summary Judgment Regarding Future Offsets (the “Motion”, D.E. 860) presumes that the Court denies its Motion *in Limine* seeking to exclude future offsets. In other words, it presumes—correctly, as the United States has already explained, *see* D.E. 813—that the CLJA requires the Court to offset any future disability and healthcare benefits related to Camp Lejeune from any awards. Even so, Plaintiffs seek to render that statutory language meaningless and ask this Court to hold that future offsets are “speculative” because there is “no guarantee” that future benefits will be received. Granting this Motion would be a reversible error and would award a windfall of billions of dollars to Plaintiffs and their counsel.

First, the Motion fails as a matter of law. It turns on the fiction that future benefits must be “guaranteed” to be unchanging for the remainder of a Plaintiff’s life or duration of care, or are otherwise “speculative.” But that is a false premise. The United States need not prove that future benefits are “guaranteed” or absolutely certain; reasonable certainty or probability suffices. The Motion flouts the CLJA’s plain language, analogous precedent in the Fourth Circuit, and fundamental legal principles of damages.

Second, the Motion ignores standard principles under Rule 56 of the Federal Rules of Civil Procedure. In large part, the Motion recites numerous hypothetical possibilities that could change anyone’s future benefits, without regard to how unlikely, fanciful, or untethered to reality those changes are for a specific Track 1 Trial Plaintiff. This approach ignores the abundant material facts supporting the reasonable certainty or probability of future benefits for the Track 1 Trial Plaintiffs here. Moreover, some of the Motion’s hypothetical possibilities turn on Plaintiffs’ intentions (i.e., whether to decline free healthcare). But “facts” that hinge on subjective intent generally cannot support summary judgment. Finally, the Motion asks the Court to issue an across-the-board ruling

to all Track 1 Plaintiffs, but many of its arguments must be raised in individual trials because they do not apply equally—if at all—to all Track 1 Trial Plaintiffs.

At bottom, the Motion is a closing argument masquerading as a motion for summary judgment under Rule 56. The Motion never asserts, for example, that the United States has offered no evidence in support of future offsets because Plaintiffs cannot make that argument. Instead, the Motion merely disagrees with the strength of the evidence that the United States has put forward and purports to identify alleged gaps in that evidence. The United States strongly disagrees and asserts the evidence will show a reasonable certainty or probability that the Track 1 Trial Plaintiffs will receive future healthcare and disability benefits, as the United States' experts demonstrate. But the determination of whether future damages or benefits are reasonably certain or probable is a determination for trial. Here, the Court need only decide whether the Motion shows that there is no genuine issue of material fact and that Plaintiffs are entitled to judgment as a matter of law. The Motion fails to meet this burden and must be denied.

BACKGROUND

I. The United States' Rule 26(a)(2)(C) Expert Witnesses Testified that the Programs and Benefits at Issue are Reasonably Certain or Probable to Continue.

In Plaintiffs' Statement of Material Facts (the "SOMF", D.E. 861), Plaintiffs selectively quote or paraphrase deposition testimony, but ignore testimony showing that the Track 1 Trial Plaintiffs are reasonably certain or probable to continue receiving healthcare benefits from the Veterans Health Administration ("VHA"), Medicare, and TRICARE and disability benefits from

the Veterans Benefits Administration (“VBA”).¹ The United States has responded to the SOMF under Local Civil Rule 56.1(a)(2). Below is a summary of relevant testimony, but the United States refers the Court to its Response to the SOMF for full information.

A. VHA

Ms. Heather Ford is the Chief Financial Officer (“CFO”) of VHA. Resp. SOMF 47 ¶ 10. Ms. Ford will testify at trial that “it is reasonable to project VHA will continue to provide healthcare to Veterans in the future” and that VHA’s “general scope of care and eligibility for care are unlikely to be significantly constricted in the future.” *Id.* 47 ¶ 11.

“Congress has not constricted eligibility for care through VHA since its establishment.” *Id.* 50 ¶ 27. In fact, VHA’s “budget has grown over time, not decreased. So the overall resources provided by Congress have – have only grown.” *Id.* 49 ¶ 24. For example, the PACT Act of 2022 itself provided new funding for healthcare services to veterans. *Id.* 49 ¶ 25. Congress provides sufficient funding to VHA to provide healthcare services for each fiscal year and even the next fiscal year as an “advance appropriation.” *Id.* 48 ¶¶ 16–18.

Plaintiffs asked Ms. Ford many questions concerning the VHA’s funding request for 2026. Ms. Ford summarized the VHA’s funding request process. *Id.* 47–48 ¶¶ 14–15. VHA has different accounts—for example, one for Medical Services, one for Medical Facilities, and others. *Id.* 48 ¶ 15. VHA makes annual requests to Congress for funding for each account. *Id.* 47 ¶ 14. The Medical

¹ The VBA and VHA are part of the Department of Veterans Affairs (“VA”). The VHA established the VA Community Care Network (“CCN”) to ensure veterans receive timely care. The network, which is organized into five smaller regional networks, was created to purchase care for veterans from community providers, helping to expand veteran access to healthcare services. TriWest Healthcare Alliance Corp. (“TriWest”) is a third-party administrator for regions 4 and 5 for the VA CCN. *See* Laramore Rep. (Miller) at 5-6 (JA Ex. 661, D.E. [838-1](#)). The Centers for Medicare & Medicaid Services (“CMS”) administers Medicare and the Defense Health Agency (“DHA”) administers TRICARE.

Services Account includes “health care within the VA system” and at VA facilities. *Id.* 48 ¶ 15. As Ms. Ford explained, for 2026, the VHA requested approximately \$57 billion dollars in *discretionary funding* from Congress for the Medical Services account. *Id.* 48 ¶ 19. Ms. Ford agreed that was a decrease compared to VHA’s prior year discretionary funding for the Medical Services Account. *Id.* However, the VHA requested approximately \$92.49 billion dollars from *all funding sources* for the Medical Services Account for 2026, including via the Costs of War Toxic Exposures Fund (which falls under mandatory funding). *Id.* 12 ¶ 65. As Ms. Ford explained: “the overall budget did increase from 2025 to 2026.” *Id.* 48 ¶ 19. In short, VHA medical coverage is expected to continue for the foreseeable future. *Id.* 68 ¶ 132.

Ms. Ford agreed that the Secretary of the VA, Doug Collins, is recommending that VA be restructured. *Id.* 51 ¶ 34. Ms. Ford explained the purpose of the proposed restructuring is to “gain efficiencies” and help “the veteran’s experience in their interaction with VHA.” *Id.* 51 ¶ 36. Ms. Ford dispelled the notion that the proposed restructuring would eliminate thousands of jobs at VA, explaining that those roles “have been vacant for some period of time” and “may have been on the books for many years without being filled.” *Id.* 51 ¶ 35. Indeed, Ms. Ford explained that, as far as she was aware, “there will be no reductions in the workforce as a result of reorganization.” *Id.* 51 ¶ 38. In fact, Ms. Ford did not anticipate significant adjustments to VHA’s budget in the future as a result of the proposed restructuring. *Id.* 51 ¶ 37. Ms. Ford confirmed the proposed restructuring remains in “discussions” and the “mechanics . . . have not begun.” *Id.* 51 ¶ 39. She also testified that whether VHA is fully staffed “depends on the facility.” *Id.* 50 ¶ 31.

B. VBA

Jadine Piper is Acting Assistant Director of the Compensation Service Policy Staff at VBA. *Id.* 58 ¶ 78. Ms. Piper has worked with disability benefits throughout her career at the VBA. *Id.* Ms. Piper explained the Secretary of the VA, through VBA, adopts a disability ratings schedule to

be used to make disability benefits awards to veterans. *Id.* 58 ¶¶ 79–83. The Secretary of the VA has authority to alter or amend the ratings schedule. *Id.* 58 ¶ 79. A ratings specialist uses the ratings schedule and medical evidence to give a disability rating, which determines monthly compensation benefits for service-connected injuries. *Id.* 58-59 ¶¶ 80–83.

Ms. Piper testified that disability payments typically will remain the same for a majority of veterans for a 12-month period. *Id.* 59 ¶ 84. In fact, Ms. Piper explained that the VBA is able to create, in its systems, a “schedule of payments to be issued in the future.” *Id.* Thus, unless an initial rating indicates a future action for some reason, “there’s a highly probable chance that [a disability rating] will remain the same” *Id.* 59 ¶ 85. Cost of living adjustments (“COLA”) are typically applied annually and Ms. Piper agreed that it was reasonable to assume that these adjustments would continue. *Id.* 60 ¶ 88. Ms. Piper explained that, if an initial or subsequent rating indicated that a disability should improve, VBA would schedule a routine future exam. *Id.* 60 ¶ 87.

Relevant to the Track 1 Trial Plaintiffs (and likely nearly all of the CLJA veteran Plaintiffs), Ms. Piper stated if “a veteran is, for instance, 55 or older,” the VBA “would not request a routine future examination to look at the current state given the veteran’s age[,]” barring medical evidence a condition may be temporary. *Id.* 60 ¶ 89; *see also* 38 C.F.R. § 3.327(b)(2)(iv) (stating no periodic reexamination will be scheduled in “cases of veterans over 55 years of age, except under unusual circumstances”). Thus, Ms. Piper testified that it was “highly unlikely” that a disability rating for a veteran over age 55 would change. *Id.* 60 ¶ 89. Notably, all of the relevant Track 1 Trial Plaintiffs are over the age of 55. *Id.* 67 ¶ 129.

Plaintiffs disclosed Peter Rybolt, a freelance actor turned economist, as a mouthpiece for their arguments that disability ratings could potentially change over time.² Mr. Rybolt admitted

² On April 27, 2026, the United States moved to exclude Mr. Rybolt (D.E. 858).

that he did not know what defined “unusual circumstances” warranting a reexamination for veterans over age 55 under 38 C.F.R. § 3.327(b)(2)(iv). *Id.* 66 ¶ 124. He also was shown a VBA policy letter dated October 7, 2021, providing guidance on routine future examination requests. *Id.* 66 ¶ 125. In that letter, the VBA “analyzed data on all Veterans who had a [routine future examination] conducted in fiscal years 2018, 2019, and 2020. The analysis revealed that the majority (77%) of conditions reviewed were confirmed and continued.” *Id.* 66 ¶ 126. A mere 10% were reduced. *See id.* Tellingly, Mr. Rybolt could not identify any: (1) pending bills that would reduce the scope of veterans benefits; (2) veteran benefits that have changed since the current Administration took office; (3) likelihood of benefits changing in the future; or (4) workforce reductions at the VA. *Id.* 66 ¶ 123.

C. Medicare

Larry Young is the Deputy Director and CFO of the Office of Financial Management for CMS. *Id.* 21 ¶ 133. Mr. Young has worked on Medicare for his entire career with CMS, which spans 35 years. *Id.* 52 ¶¶ 40–41.

Medicare began in 1965. *Id.* 52 ¶ 42. Medicare’s “propensity is . . . to add benefits.” *Id.* 52 ¶ 43. In fact, to Mr. Young’s knowledge, Medicare coverage has never been decreased. *Id.* 52 ¶¶ 44–45. Medicare has not been eliminated or discounted. *Id.* 52 ¶ 45.

Mr. Young acknowledged the projected financial challenges facing Medicare Part A and the Medicare Trust. *See id.* 22–24 ¶¶ 150–61. However, he testified: “it’s very reasonable to expect that the [Medicare] program is going to continue into the future.” *Id.* 52 ¶¶ 46–47. After all, he explained, the “tendency is for the political leadership to accrue and accrete benefits and/or expand eligibility over time.” *Id.* 52 ¶ 47. Mr. Young noted that there are “different things” Congress “could elect to do” to address the Medicare Trust’s long-term financial outlook. *Id.* 23 ¶¶ 152, 154 (“to maintain . . . financial viability *in the long term* . . . something has to change” (emphasis

added)). Indeed, Congress has never allowed the Medicare Trust to become depleted. *Id.* 53 ¶ 49. And, while Mr. Young agreed that the 2025 Medicare Trust Fund Trustee’s Report to Congress projected that the Medicare Trust could have depleted funds by 2033, he noted there is “substantial uncertainty in the economic, demographic, and healthcare projection factors for the [Hospital Insurance (“HI”)] trust fund expenditures and revenues.” *Id.* 23 ¶ 153. Notably, the 2025 Medicare Trust Fund Trustee’s Report noted, even if the Medicare Trust became depleted in 2033, “HI revenues are projected to cover **89 percent** of incurred program costs.” *Id.* 53 ¶ 48 (emphasis added). In sum, Mr. Young testified Medicare “will continue into the future” based on his 35-year career at CMS. *Id.* 52 ¶ 47; *see also id.* 62 ¶ 98.

D. TRICARE

Richard Ruck, M.D., has been Chief Medical Officer (“CMO”) of TRICARE from 2022 to the present. *Id.* 53 ¶ 51.³ In the 1960s, Congress created the CHAMPUS program, which became TRICARE. *Id.* 54 ¶ 57. Dr. Ruck testified that TRICARE is reasonably likely to continue into the foreseeable future. *Id.* 54 ¶ 53. In support, Dr. Ruck stated, TRICARE has “just started an eight-year contract . . . and [is] already preparing for the next contract . . . after that” (i.e., that will be awarded after the current contract ends in approximately 2034). *Id.* 54 ¶ 54. Dr. Ruck testified that he did not anticipate that TRICARE benefits for any group would decrease. *Id.* Dr. Ruck explained, “there has been no political appetite to remove any benefits” *Id.* 54 ¶ 56. Dr. Ruck is not aware of any plans under consideration in Congress or elsewhere to eliminate TRICARE. *Id.* 55 ¶

³ The United States asserts future TRICARE benefits in only two cases (*Tukes v. United States* and *McElhiney v. United States*). *See id.* 67 ¶¶ 127-28. TRICARE is not expressly listed as an offset in Section 804(e)(2). But whether Plaintiffs can satisfy their burden of proof as to future damages where it is reasonably certain that TRICARE will cover future medical expenses is a separate issue. Thus, the United States addresses TRICARE in this Response as to Plaintiffs McElhiney and Tukes.

58. On the contrary, Dr. Ruck testified Department of War “higher-ups” issued “written guidance” to assume TRICARE will continue to have funding through 2034 and beyond. *Id.* 56 ¶ 69.

Retirees and their family members are eligible for TRICARE benefits. *Id.* 55 ¶ 60. Retirees include veterans who have completed 20 years of service honorably or have been medically retired. *Id.* For medical retirees, TRICARE does not require that the injury be service-connected. *Id.* 55 ¶ 61. Once someone enrolls, they need not reenroll annually. *Id.* 55 ¶ 62. If someone has health insurance, TRICARE is the secondary payor. *Id.* 55 ¶ 63. For those with Medicare and TRICARE for Life, TRICARE For Life pays for any charges Medicare does not cover. *Id.* 55 ¶ 64. Dr. Ruck explained that TRICARE For Life, although secondary to Medicare, is funded separately from Medicare and would not “shut down if Medicare were to cease to exist.” *Id.* 57 ¶ 74. TRICARE For Life requires veterans to enroll in Medicare Part B and pay those premiums. *Id.* 55 ¶ 65. While there are similarities between TRICARE and insurance programs, TRICARE is not an insurance program but a statutory health benefit. *Id.* 56 ¶ 68 (explaining differences).

Plaintiffs make much of the number of changes to the TRICARE Policy Manual, but Dr. Ruck explained that “any time that something is updated,” even if it is just “wording,” it is considered a “change.” *Id.* 56 ¶ 67. As Dr. Ruck explained: “We typically add more benefits . . . more robust disease management programs, more of a focus on alternate payment methods, bundlings, a great focus on quality of care outcomes versus fee for service[.]” *Id.* 57 ¶ 71. Similarly, Plaintiffs speculate that a veteran could decline TRICARE or live in a rural area with few providers in the TRICARE network. But Dr. Ruck testified “it speaks to the popularity of the plan by how many people choose to retain TRICARE as opposed to going to find their own health plan.” *Id.* 56 ¶ 70. As to rural areas, TRICARE seeks to “minimize . . . the cost” to veterans and to “utilize [non-network providers] as network providers,” although it costs more to TRICARE. *Id.* 57 ¶ 72.

II. The United States' Expert Economists Applied Standard Economic Principles in Projecting Future Conditions Based on the Present.

The United States disclosed three economists under Rule 26(a)(2)(B) to offer opinions on economic damages and offsets, including future offsets. These are: (i) Andrew Brod, Ph.D., for all Parkinson's disease cases; (ii) Patricia Yount, for all remaining bladder and kidney cancer cases; and (iii) Dubravka Tomic, Ph.D., for all remaining leukemia and NHL cases. In addition, the United States disclosed life care plans for several Track 1 Trial Plaintiffs; for those Plaintiffs, the United States disclosed reports from a fourth economist, Henry Miller, Ph.D.⁴

A. Henry Miller, Ph.D.

For those cases in which he disclosed reports, Dr. Miller took the competing life care plans from Plaintiffs' and the United States' life care planners and identified which costs to the United States would be covered under those plans. *Id.* 61 ¶¶ 93–94. Dr. Miller used publicly available data to determine the reimbursement rate for the applicable payor (i.e., Medicare, VHA, or TRICARE). *Id.* 61 ¶ 95. He used the most recent available rates and applied a conservative approach. *Id.* 61, 63 ¶¶ 96, 105 (“[w]hen there is an option we’re always assuming the lower rate”). Dr. Miller did not project future rates. *Id.* 34 ¶ 265.

Dr. Miller testified that he believes it is likely that Medicare “will” continue to cover health care for individuals age 65 and older. *Id.* 62 ¶ 98. In his reports, Dr. Miller noted Medicare funding is entrenched in U.S. tax law and support for Medicare is widespread across the political spectrum. *Id.* 62 ¶ 101. Further, while he acknowledged the Medicare Trust's projected financial problems, he testified that “based on past history—and the past history is substantial—it is likely that the

⁴ These cases are: *Hill v. United States*; *Rothchild v. United States*; *Peterson v. United States*; *Mousser v. United States*; *McElhiney v. United States*; *Tukes v. United States*; *Laramore v. United States*; and *Sparks v. United States*. *Id.* 61 ¶ 92.

Medicare program will continue to operate at least similarly to what it does now.” *Id.* 62 ¶ 102. He explained that the “issue that we’re facing now with shortfalls in Medicare . . . it has happened before and in fact, in all during my 50-year career there has been considered about the adequacy of Medicare funding . . . [and] the Medicare program has acted consistently.” *Id.* 35 ¶ 280. He also clarified “close to 95 percent” of providers accept Medicare. *Id.* 62 ¶ 100.

Dr. Miller explained Medicare rates “have increased” in the past and decreases are “rare.” *Id.* 62 ¶ 99. Dr. Miller also testified that Medicare rates “will definitely increase” in the future. *Id.* Plaintiffs also criticize Dr. Miller’s use of CCN reimbursement rates for some VHA-covered services. But Dr. Miller used CCN rates as a proxy because, when a veteran receives treatment at a VA facility under VHA, there are no bills. *Cf. id.* 62–63 ¶¶ 103-104. Using CCN rates as a proxy is “conservative” because the actual costs to VHA “most often are higher than the CCN rates.” *Id.* 63 ¶ 105. Dr. Miller used CCN rates for only a small number of services because “for most services VHA uses the Medicare rate.” *Id.* 63 ¶ 104.⁵

B. Dubravka Tosic, Ph.D.

Dr. Tosic is an economist who offers economic damages opinions—including calculation of future benefits—in the remaining leukemia and NHL cases. *Id.* 65 ¶ 116. Dr. Tosic was asked if her calculations of future VBA disability benefits for Plaintiff Davis would be inflated if he divorced or his spouse passed away (changing his benefits). *Id.* 65 ¶ 117. Dr. Tosic agreed such circumstances could change her calculations but testified that “the current calculations would not be updated based on some speculations about what could happen in the future.” *Id.* She also explained it “would be speculative not to assume” that Plaintiff Davis will remain married while

⁵ To clarify a point that the Motion obscures, *see* D.E. 861 at 3 n.6, managerial cost accounting is used at the VA to “provide cost accounting information for . . . decision-making” in budgetary matters. *Id.* 65 ¶ 121. It is not used at the VA to develop future medical costs. *Id.* 65 ¶ 119.

he receives VBA disability benefits based on the “information that we have currently” (such as the life expectancies of Plaintiff Davis and his spouse). *Id.* 65 ¶ 118.

C. Patricia Yount

Ms. Yount is a forensic economist/accountant who offers economic damages opinions in the bladder and kidney cancer cases. *Id.* 64 ¶ 111. Ms. Yount explained that she assumed, for purposes of her future VBA disability calculations, the disability ratings for those Plaintiffs would not change. *Id.* 64 ¶ 112. She explained that was a reasonable assumption because she had “no reason to assume that it would change, and it’s based on the facts [as] we sit here today.” *Id.* 64 ¶ 113. Ms. Yount explained further: “[M]y calculations . . . are based on what we have today. I cannot assume a change in the future unless there’s a specific medical – someone to tell me that it’s going to change.” *Id.* 65 ¶ 115; *see also id.* 64 ¶ 114 (“And if they receive additional ratings, you know, *their benefit may not change*. It may stay where it is We don’t know, as we sit here today; so we base it off what we know today” (emphasis added)).

D. Andrew Brod, Ph.D.

Dr. Brod is an economist who offers economic damages opinions in the Parkinson’s disease cases. *Id.* 63 ¶ 106. Dr. Brod has calculated future offsets many times in other cases. *Id.* 64 ¶ 109. He testified that he employed generally the same methodology in performing such calculations in the Parkinson’s disease bellwethers. *Id.* 64 ¶ 110.

Dr. Brod explained in detail how a forensic economist approaches future uncertainties: “Nothing we do when we project into the future provides 100 percent certainty.” *Id.* 63 ¶ 107. In fact, Dr. Brod stated, “[n]othing that anyone does in any field when the future is projected or estimated is 100 percent certain. The future is unknown, but that doesn’t mean . . . we can’t make reasonable projections about the future.” *Id.* Asked what he meant by “reasonable degree of certainty,” Dr. Brod explained: “Well, it means that it is as certain as I can achieve as a human

being and someone making projections into the future.” He testified: “It is not 100 percent certain because no projection into the future is 100 percent certain.” *Id.* 63 ¶ 108. “They are all of necessity . . . uncertainty to some degree. And so the key thing here is not the word ‘certainty’ but the phrase ‘reasonable degree of certainty.’” *Id.*

E. Chad Staller

Importantly, Plaintiffs’ own economist, Chad Staller, readily agreed with the United States’ experts concerning future uncertainties and rejected the Motion’s own standard. Mr. Staller flatly stated: “***We’re not here to guarantee with absolute certainty what will happen in the future. We can’t do that.***” *Id.* 45 ¶ 3 (emphasis added). Asked about his reliance on statistical life expectancies as part of his calculations of Plaintiffs’ future damages, Mr. Staller affirmed his methods and sources were reliable and “agreed upon by forensic economists and the government’s economists in this case.” *Id.* 45-46 ¶¶ 4-6. Asked about criticisms made by Plaintiffs’ expert Mr. Rybolt of the United States’ economists for using statistical life expectancies without accounting for possible “fluctuations,” Mr. Staller rejected the criticism and disagreed with Mr. Rybolt. *Id.* 45 ¶ 5.

In calculating Plaintiffs’ future damages, Mr. Staller assumed that a Plaintiff’s occupation would remain the same. *Id.* 46 ¶ 7 (“The job would remain the same industry through their work-life period, yes.”). Mr. Staller also assumed that a Plaintiff would live in the same geographic place during his or her work-life expectancy. *Id.* He readily conceded that, if a Plaintiff changed jobs or moved into a new industry or geographic location, “future wages may change.” *Id.* 46 ¶ 8. Asked if these possible future events rendered his calculations unreliable, he dismissed that notion:

[Y]eah, I mean, ***anything could happen, right, and that’s why I don’t testify to an absolute certainty, I testify to a reasonable degree of economic certainty.*** That’s the legal standard under the federal rules, almost every state rule, because ***we don’t have the crystal ball***

Id. (emphases added). Likewise, Mr. Staller explained, the fact that Plaintiffs may die before their statistical life expectancies did not render his future calculations unreliable because, he testified: “*I don’t have, Ms. Yount, Dr. Tosic, and Dr. Brod don’t have crystal balls.*” *Id.* 46 ¶ 6 (emphasis added). Rather, on “certain topics, we have to make certain assumptions . . . there are certain assumptions that we have to make into the future.” *Id.* 46 ¶ 9. Mr. Staller did not rebut or criticize the United States’ economists’ future-oriented opinions. Despite Mr. Staller’s testimony that no one can “guarantee with absolute certainty what will happen in the future,” *id.* 45 ¶ 3, the Motion criticizes the United States for precisely that, using the term “guarantee” a dozen times. *See generally* D.E. 861. In sum, and tellingly, not even Plaintiffs’ own expert economist supports the impossible standard that the Motion urges this Court to apply.

LEGAL STANDARD

Summary judgment is a “drastic . . . remedy[.]” *Ballinger v. N.C. Agr. Ext. Serv.*, 815 F.2d 1001, 1004–05 (4th Cir. 1987). It is appropriate when, after reviewing the record as a whole, the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A moving party must initially demonstrate the absence of a genuine issue of material fact or the absence of evidence to support the nonmoving party’s case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its burden, the nonmoving party “must come forward with specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis and quotation omitted). The Court must view all of the evidence and inferences drawn therefrom in the light most favorable to the United States, the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 378 (2007); *McPherson v. Emp. Source, Inc.*, --- F. Supp. 3d ---, 2026 WL 917514, at *5 (E.D.N.C. Mar. 31,

2026) (Dever, J.) (same); *Foushee v. R.T. Vanderbilt Holding Co.*, 507 F. Supp. 3d 654, 658–59 (E.D.N.C. 2020) (Myers, C.J.) (same), *aff'd*, 2023 WL 2888561 (4th Cir. 2023); *McNeil-Williams v. DePuy Ortho., Inc.*, 384 F. Supp. 3d 570, 573–74 (E.D.N.C. 2019) (Flanagan, J.) (similar); *Edwards v. PCS Phosphate Co.*, 812 F. Supp. 2d 689, 692–93 (E.D.N.C. 2011) (Boyle, J.) (same).

ARGUMENT

III. **The Motion Must Be Denied as a Matter of Law Because the United States Need Not Prove Future Benefits Are Guaranteed or Absolutely Certain.**

The Motion must be denied as a matter of law. Plaintiffs’ Motion turns on the fiction that the United States must prove future benefits are a “guarantee” or absolutely certain. *See* D.E. 861 at 6. That is wrong. The United States need not satisfy such an impossible standard; rather, it is sufficient if the United States proves future benefits, for offsets purposes, are reasonably certain or probable. The Motion’s “guarantee or speculation” false binary is contrary to the CLJA’s plain language, analogous Fourth Circuit precedent, and fundamental legal principles of damages.

A. **The Motion’s Absolute Certainty Standard Lacks Textual Basis in the CLJA.**

First, the Motion’s “guarantee” or absolute certainty standard lacks any textual basis at all in the CLJA’s plain language. The Motion refers to a “guarantee” a dozen times. *See* D.E. 861 at 2, 8, 9, 13, 14, 18, 20, 21. But it does not cite the CLJA’s text to support that standard and, in fact, relies only on Federal Tort Claims Act (“FTCA”) cases. *See id.* at 7–10. The CLJA states:

(2) HEALTH AND DISABILITY BENEFITS RELATING TO WATER EXPOSURE.—Any award made to an individual, or legal representative of an individual, under this section shall be offset by the amount of any disability award, payment, or benefit provided to the individual, or legal representative—

(A) under—

(i) any program under the laws administered by the Secretary of Veterans Affairs;

(ii) the Medicare program under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.); or

(iii) the Medicaid program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.); and

(B) in connection with health care or a disability relating to exposure to the water at Camp Lejeune.

CLJA § 804(e)(2). Nothing in Section 804(e)(2) states the standard of proof that governs the United States' future offsets—much less requires the United States to prove future benefits are guaranteed or absolutely certain to remain unchanged for a Plaintiff's remaining life expectancy. Rather, the CLJA mandates that offsets "shall" be applied to "any . . . award." *Id.*

The Motion is based on the correct premise that Section 804(e)(2) includes future offsets. Nevertheless, the Motion argues that, because Congress *can* change the programs or benefits at issue, future offsets are inherently "speculative" as a matter of law. But if Congress's preexisting Article I powers to change Medicare means that future Medicare benefits cannot be offset, the future offsets in the CLJA (as presumed by the Motion) would become a nullity from the outset. In mandating future offsets, Congress was aware that future offsets, like future damages, need not be established as a matter of absolute certainty. *See Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) ("Congress is aware of existing law when it passes legislation."); *United States v. Ballard*, 708 F. Supp. 3d 717, 732 (E.D.N.C. 2023) (Flanagan, J.) (same). Nor is it a persuasive answer to argue that the CLJA does not include future offsets; this Motion (correctly) assumes it does. Thus, the Motion's argument fails as a matter of statutory interpretation.

Similarly, the other hypotheticals recited in the Motion embrace a sweeping logic that has no limiting principle. Consider VBA disability benefits. Although the Motion does not emphasize it, Plaintiffs' SOMF cites testimony that a veteran who is incarcerated is entitled only to 10% of his or her disability benefits. SOMF ¶ 196. Applying the Motion's argument, the existence of the possibility of incarceration for any Plaintiff, no matter how remote that possibility is, renders future benefits speculative in all cases. Such logic cannot be cabined in any coherent fashion. By the

same token, it is possible that an asteroid could hit the United States, thus causing societal collapse and ending future benefits. That is farfetched on its face, yet under the Motion’s reasoning, because that event is possible, future offsets are speculative as a matter of law—no matter how unlikely that event may be. Because the Motion’s argument is based only on whether a hypothetical is *possible* in any case—not whether a hypothetical is *likely* for a Track 1 Trial Plaintiff—any number or manner of hypotheticals could be imagined to defeat future offsets (or future damages).

Such a position cannot be reconciled with the CLJA’s plain language. The Motion correctly presumes that the CLJA mandates future offsets, but its arguments eviscerate Section 804(e)(2), rendering the language requiring future offsets meaningless. Indeed, the Motion admits as much. *See* D.E. 861 at 1 (“Plaintiffs file this Motion as an independent alternative ground for the same relief” as the Motion *in Limine*). Thus, the Motion’s legal theory is a nonstarter.

B. The Motion’s Absolute Certainty Standard Lacks Support in Analogous Fourth Circuit Precedent Under the FTCA.

Tacitly conceding the CLJA’s plain language does not support the Motion’s “guarantee” or absolute certainty standard, Plaintiffs rely primarily on out-of-Circuit and non-binding cases that arose in the medical malpractice context under the FTCA. However, the Fourth Circuit has expressly rejected the Motion’s core argument:

It seems equally clear that the award should be diminished by the amount which he has received or is to receive from the government by way of disability benefits *We recognize that prospective disability payments are uncertain in that the government may withdraw or decrease them at any time, but the uncertainty here is no greater than that involved in many other matters affecting damages in personal injury cases*; and the trial court must deal with it as it deals with other uncertainties by using its best judgment after all the facts and circumstances of the case have been taken into consideration.

United States v. Brooks, 176 F.2d 482, 484 (4th Cir. 1949) (emphasis added). In *Brooks*, the Fourth Circuit vacated a judgment in plaintiff’s favor and remanded for the district court to make findings

of fact and conclusions of law concerning applicable offsets. *See id.* Rather than acknowledging this binding Fourth Circuit precedent, the Motion cites distinguishable and non-binding cases.

Moreover, other analogous cases under the FTCA have awarded offsets for future benefits too. *See, e.g., Joffrion v. United States*, No. 4:18-cv-035478-MGL, 2022 WL 1580471, at *22, 24, 31, 33 (D.S.C. May. 17, 2022) (applying offset for future disability benefits in FTCA case); *Harris-Reese v. United States*, 615 F. Supp. 3d 336, 377–78 (D. Md. 2022) (applying offset for future TRICARE benefits through the end of plaintiff’s military service where plaintiff testified at trial that he intended to stay in the military for the duration of his enlistment period); *Burke v. United States*, 605 F. Supp. 981, 994 (D. Md. 1985) (applying offset for future CHAMPUS benefits in FTCA case); *Dempsey ex. rel. Dempsey v. United States*, 32 F.3d 1490, 1495–96 (11th Cir. 1994) (affirming offset for future CHAMPUS benefits in part because CHAMPUS had covered past medical expenses); *Cole v. United States*, 861 F.2d 1261, 1266 (11th Cir. 1988) (“In addition, the court also must reduce the award by the present value of the expected future benefits [Plaintiff] will receive as a result of his increased disability.”); *United States v. Gray*, 199 F.2d 239, 244 (10th Cir. 1952) (present value of future payments can be offset); *Kennedy v. United States*, 750 F. Supp. 206, 213–14 (W.D. La. 1990); *MacDonald v. United States*, 900 F. Supp. 483, 487 (M.D. Ga. 1995) (“The United States’ motion to offset whatever CHAMPUS has paid *and/or will pay* for Mrs. MacDonald’s medical expenses is ... GRANTED.”) (emphasis added); *Lozada ex rel. Lozada v. United States*, 140 F.R.D. 404, 413 (D. Neb. 1991) (offsetting future CHAMPUS benefits), *aff’d*, 974 F.2d 986 (8th Cir. 1992). The Motion cites none of these cases either.

The primary rationale of these decisions is that awarding tort damages under the FTCA for losses that the United States has compensated or will compensate amounts to an “impermissible double recovery.” *Kennedy*, 750 F. Supp. at 213. And the United States need not “pay twice for

the same injury.” *Brooks v. United States*, 337 U.S. 49, 53 (1949). Here, the Motion asks the United States to do exactly that: once, through care and benefits that agencies of the United States will, to a reasonable certainty, provide directly to the Track 1 Trial Plaintiffs; and a second time, through an award of tort damages subject to attorneys’ fees. Applied to all CLJA Plaintiffs, that amounts to a windfall of billions of dollars—with the taxpayers footing the bill.⁶

In addition to ignoring the Fourth Circuit in *Brooks*, Plaintiffs rely on fourteen FTCA cases, most from outside the Fourth Circuit. These cases are distinguishable or unpersuasive. First, Plaintiffs cite only two federal district court cases from this Circuit: *Simms v. United States*, No. 3:11-0932, 2017 WL 3317417, at *5 (S.D. W. Va. Aug. 3, 2017) and *Lawson v. United States*, 454 F. Supp. 2d 373 (D. Md. 2006). Neither supports the Motion’s “guarantee” or absolute certainty standard for applying future offsets. *Lawson* declined to offset any TRICARE benefits primarily because Plaintiff’s husband had not yet served 20 years in the military, and thus, no TRICARE rights had vested. *See Lawson*, 454 F. Supp. 2d at 415. By contrast, the United States here asserts that only two cases involve future TRICARE benefits—Plaintiffs McElhiney and Tukes—and in both cases future TRICARE benefits are vested because Plaintiff McElhiney and Plaintiff Tukes’s husband served more than 20 years. Resp. SOMF 67 ¶¶ 127-28; *Harris-Reese*, 615 F. Supp. 3d at 377–78 (distinguishing *Lawson* where future TRICARE benefits were reasonably certain).

As for *Simms*, the portion of the court’s order on which the Motion relies is plainly dicta. *Simms* applied West Virginia law concerning damages, which required a three-part showing for

⁶ Ironically, Plaintiffs have argued—albeit without textual support—that the entire purpose of Section 804(e)(2) is to prevent a double recovery. *See* D.E. 806, at 1, 3, 4, 5. Yet now, for the third time, Plaintiffs ask this Court to interpret Section 804(e)(2) in a manner that would allow for a double recovery rather than prevent it. The United States does not agree that Section 804(e)(2) is limited to preventing a “double recovery,” but the important point here is the contradiction in Plaintiffs’ arguments as to offsets.

offsets by statute. *Simms*, 2017 WL 3317417, at *5–6. The second part of that framework required the United States to prove that Medicaid benefits would be paid to Plaintiff in the future to a reasonable degree of certainty. *Id.* at *5 (citing W. Va. Code § 55-7B-9a(b)). The court “doubt[ed]” whether the United States had satisfied the second requirement because of the “hostile political climate surrounding the future of Medicaid[.]” *Id.* But then *Simms* went on to explain that, under the West Virginia statute, it could not award an offset because Medicaid had a subrogation lien over Plaintiff. *See id.* at *6.⁷ That rendered the preceding discussion dicta. *See id.* at *5–6.

All of the remaining FTCA cases that the Motion cites arise from outside the Fourth Circuit. Those cases are not persuasive. Some reason that, because Congress can change the programs or benefits, there is “no guarantee” that such programs will continue to exist.⁸ But the Fourth Circuit rejected that argument long ago. *See Brooks*, 176 F.2d at 484. Others reason Plaintiffs should not be compelled to seek future care from a particular provider or a tortfeasor.⁹ But that is a “public

⁷ Of note, CMS has announced “DOJ views the CLJA as establishing an exclusive remedy for injuries resulting from Camp Lejeune contaminated water exposures, and therefore CMS determined that the Medicare fee-for-service program serves as the primary payer of health expenses related to CLJA injuries of Medicare fee-for-service beneficiaries. Consequently, CMS will not pursue recovery under the [Medicare Secondary Payer (MSP)] law, for Medicare fee-for-service benefits from CLJA Elective Option (EO) offer payments, nor will CMS recover under the MSP law for Medicare fee-for-service benefits from any CLJA judgments or settlements.” CMS Alert, Clarification of Medicare Secondary Payer (MSP) Recovery Against Awards Made Under the Camp Lejeune Justice Act (CLJA), August 1, 2024, available at <https://www.cms.gov/files/document/alert-clarification-medicare-secondary-payer-msp-recovery-against-awards-made-under-camp-lejeune.pdf>, last visited June 1, 2026.

⁸ *Brown v. United States*, No. 3:17CV551TSL-RHW, 2020 WL 6811121 (S.D. Miss. May 13, 2020); *see also Feindt v. United States*, No. 22-00397-LEK-KJM, 2025 WL 1348465, at *54 (D. Haw. May 7, 2025) (purporting to apply a reasonable certainty standard, but in effect requiring a guarantee), *appeal filed*, No. 25-7162 (9th Cir. Nov. 13, 2025); *Roemen v. United States*, No. 4:19-CV-4006-LLP, 2023 WL 7386424, at *4 (D.S.D. Nov. 8, 2023) (similar).

⁹ *See Malmberg v. United States*, 816 F.3d 185, 190 (2nd Cir. 2016); *Ulrich v. Veterans’ Admin. Hosp.*, 853 F.2d 1078, 1084 (2d Cir. 1988); *Feeley v. United States*, 337 F.2d 924, 934–35 (3d Cir. 1964); *Feindt*, 2025 WL 1348465, at *54; *Roemen*, 2023 WL 7386424, at *4; *Hester v.*

policy” concern that derives from medical malpractice cases and is misplaced here. *See* D.E. 861 at 17. And questions regarding a Plaintiff’s intent cannot be decided via summary judgment. *See infra* at 29. Finally, still other cases are dicta or involve unique circumstances not present here.¹⁰ In short, the Court should follow the Fourth Circuit’s reasoning in *Brooks*.

C. The Motion’s Absolute Certainty Standard Lacks Support in Fundamental Legal Principles of Damages.

Finally, the Motion’s “guarantee” or absolute certainty binary standard lacks support in fundamental principles of damages, which require only reasonable certainty or probability. *See, e.g., Lohrmann v. Pittsburg Corning Corp.*, 782 F.2d 1156, 1160 (4th Cir. 1986) (applying Maryland law) (stating that “recovery of damages based on future consequences of an injury may be had only if such consequences are reasonably probable or reasonably certain”); *Ray v. Lesniak*, 294 F. Supp. 3d 466, 484–485 (D.S.C. 2018) (applying South Carolina law) (similar); *Knowles v. United States*, No. 5:12-CT-3212-F, 2016 WL 8667806, at *2 (E.D.N.C. Feb. 11, 2016), *aff’d*, No. 16-6393, 2016 WL 7378160 (4th Cir. Dec. 20, 2016) (applying North Carolina law) (similar); *see also* Restatement (Second) of Torts §§ 912, 910 cmt. a (1979) (“The principal condition imposed on . . . damages for prospective harm is the requirement of reasonable certainty of proof.”).

“Absolute assurance” and “mathematical exactitude” are not required. *Mueller v. Hill*, 345 P.3d 998, 1004 (Idaho 2015); *see Vortex Sports & Ent., Inc. v. Ware*, 662 S.E.2d 444, 450–51

United States, No. 8:10-cv-1565-T-24, 2012 WL 368269, at *1 (M.D. Fla. Feb. 3, 2012); *Powers v. United States*, 589 F. Supp. 1084, 1107–08 (D. Conn. 1984).

¹⁰ *See, e.g., Molzof v. United States*, 6 F.3d 461, 462–68 (7th Cir. 1993) (concluding that Wisconsin law would deem future medical benefits to be a collateral source); *Ulrich*, 853 F.2d at 1083–84 (remanding because the district court did not explain denial of future medical expenses); *Poirier v. United States*, 745 F. Supp. 23, 32–34 (D. Me. 1990) (declining to offset award for plaintiff in FTCA case arising from medical malpractice because disability benefits arose from “entirely independent” injuries he suffered previously in Vietnam); *Aretz v. United States*, 456 F. Supp. 397, 405–06 (S.D. Ga. 1978) (concluding that future disability benefits were speculative given that award would make plaintiff too wealthy to receive benefits).

(S.C. Ct. App. 2008) (stating the law “does not require absolute certainty of lost profits but only reasonable certainty”). An overwhelming number of cases confirm this fundamental principle. *See, e.g., Joffrion*, 2022 WL 1580471, at *29 (under South Carolina law, “[a] party need not . . . prove future damages in a personal injury case to a mathematical certainty”); *Knowles*, 2016 WL 8667806, at *2 (under North Carolina law, “the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty”); *Cook v. Cook*, 216 W. Va. 353, 358, 607 S.E.2d 459, 464 (2004) (future damages must be proven to a reasonable degree of certainty); *Kwapien v. Starr*, 400 N.W.2d 179, 183 (Minn. 1987) (“Because future damages . . . are impossible to prove with absolute certainty, the rule is that recovery may be had if future damage is reasonably certain to occur.”); *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E.2d 342, 348–49 (1975) (noting damages “will usually defy any precise mathematical computation”); *Yaffee v. Skeen*, 106 Cal. App. 5th 1281, 1309, 328 Cal. Rptr. 3d 80, 103–04 (2024) (stating reasonable certainty is required); *Thibodeaux v. Gulfgate Constr., LLC*, 270 So.3d 721, 729 (La. App. 3 Cir. 2019) (stating that “future medical expenses must be established with some degree of certainty” but not “absolute certainty”); *Auto-Owners Ins. Co. v. Tompkins*, 651 So.2d 89, 90–91 (Fla. 1995) (“many other states allow a claimant to recover prospective economic damages where the future effects of the injury are reasonably certain.” (collecting cases)); *see also* Federal Judicial Center, *Reference Manual on Scientific Evidence* 461 (3d ed. 2011) (the general rule that a plaintiff may not recover damages beyond an amount proven with reasonable certainty “permits damages estimates that are not mathematically certain”). This includes North Carolina. *Wilkinson v. Dunbar*, 149 N.C. 20, 62 S.E. 748, 750 (1908) (“Absolute certainty . . . is not required, but [rather] . . . reasonable certainty.”).

The Track 1 Trial Plaintiffs' own cases prove the point. To support their claims for future economic damages, Plaintiffs retained Mr. Staller as an expert economist. But Mr. Staller conceded that he could not "guarantee with absolute certainty what will happen in the future." Resp. SOMF 45 ¶ 3. He assumed that Plaintiffs would remain in the same occupation, industry, and geographic region for purposes of certain future economic damages, but candidly admitted that those variables could change in a way that would change his calculations. *Id.* 46 ¶¶ 7–8. And he rejected the idea that he or the United States' economists had a "crystal ball" to predict the future. *Id.* 46 ¶ 6.

The same argument in the Motion, if applied to the Track 1 Trial Plaintiffs' future damages, would prevent Plaintiffs from proving future damages because they are not "guarantee[d]." New treatments might dramatically improve the quality of life for a Plaintiff with cancer or even cure them entirely. Or, to use the Motion's preferred hypothetical, Congress could just as easily change the CLJA as it could change Medicare, Medicaid, or any other government program. For instance, Congress could repeal the CLJA outright or change the measure of damages. All are possibilities, however unlikely, and so under the Motion's reasoning, the mere existence of those possibilities would defeat Plaintiffs' future damages.¹¹

In short, the Motion relies on an incorrect legal standard. Because Plaintiffs are not entitled to judgment as a matter of law, the Motion fails.

IV. The Motion Must Be Denied Because There Are Triable Issues of Fact Concerning Whether the Programs and Benefits Are Reasonably Certain to Continue.

Plaintiffs style the Motion as one for summary judgment under Rule 56, but in reality they cast that standard aside. Even aside from the Motion's incorrect legal standard, the Motion

¹¹ If the Court grants this Motion, the United States will move *in limine* to apply that standard to the Track 1 Trial Plaintiffs' future damages claims at the appropriate time. There is no plausible justification for applying the Motion's standard to future offsets but not future damages.

repeatedly ignores a tsunami of genuine issues of material fact. When *all* of the evidence bearing on future offsets is considered at trial, the United States anticipates that the Court will find that future offsets are reasonably certain. But that is for a different day, at trial, and upon a fuller record. It is not appropriate for summary judgment.

A. The Motion Does Not Argue That There Is a Complete Lack of Evidence as to Whether Future Benefits Are Reasonably Certain or Probable.

Before addressing the arguments the Motion makes, it is important to highlight the ones it does *not* make. It is “*not* based on a complete lack of ... evidence but rather on [Plaintiffs’] characterization of the strength” of the United States’ future offsets evidence. *Swaney v. Doe*, 5:22-CV-01094-FB-RBF, 2025 WL 826532, at *7–8 (W.D. Tex. Feb. 27, 2025), *R&R adopted*, 2025 WL 823770 (Mar. 14, 2025) (denying defendant’s motion for summary judgment on plaintiff’s future damages) (emphasis added). In large part, the Motion “details facts” that Plaintiffs “believe dismantle [the United States’] assertion” that the Track 1 Trial Plaintiffs are reasonably certain to receive future benefits, “especially focusing on what [Plaintiffs] believe[] are holes” in the expert opinions that the United States disclosed. *Causey v. United States*, No. 8:21-cv-2046-AAS, 2024 WL 5169923, at *1–2 (M.D. Fla. Dec. 19, 2024) (denying defendant’s motion for partial summary judgment on plaintiff’s future damages).¹² For example, the Motion does not argue—because it cannot—that *no* evidence exists that the Track 1 Trial Plaintiffs receiving disability benefits are reasonably certain or probable to continue receiving such benefits in the future. Rather, the Motion recounts hypothetical ways in which such benefits might (or might not) change. Whether those hypotheticals are probable or farfetched must be determined by the factfinder based on witness testimony at trial; it cannot be resolved on a motion for summary judgment.

¹² To be sure, there are no “facts” in the future—merely inferences from currently available evidence, which must be drawn in the United States’ favor here. *See Scott*, 550 U.S. at 378.

B. The Motion Presents a Selective Picture and Ignores Abundant Evidence that the Track 1 Trial Plaintiffs Are Reasonably Certain to Continue Receiving the Benefits at Issue in the Future.

Much of the Motion and SOMF recites numerous hypotheticals that might or might not change anyone’s future benefits, however unlikely or fanciful. But the Motion repeatedly ignores evidence that supports the fact that those benefits and programs are reasonably certain to continue for the Track 1 Trial Plaintiffs. In so doing, the Motion violates the principle that the Court must draw all reasonable inferences in the United States’ favor. *Scott*, 550 U.S. at 378.

First, the Motion argues that the mere fact that the programs and benefits may be “subject to changes in law” means they are speculative. D.E. 861 at 10–14. This argument runs headlong into the legal hurdles stated above. *Brooks*, 176 F.2d at 484 (“prospective disability payments are uncertain in that the government may withdraw or decrease them at any time, but the uncertainty here is no greater than that involved in many other matters affecting damages”)

But even if it were legally viable, the argument still fails because, viewing the evidence in the light most favorable to the United States as the non-moving party, plentiful evidence supports the fact that these programs and benefits are reasonably certain to continue. *See, e.g.*, Resp. SOMF 47 ¶ 11 (VHA reasonably likely to continue), 60 ¶ 89 (testifying it is highly unlikely for an age 55 or over veteran’s disability rating to change), 52 ¶¶ 46-47 (“very reasonable to expect” Medicare “to continue into the future”), 54 ¶¶ 53-54 (TRICARE reasonably likely to continue into the future). For example, Plaintiffs point to Mr. Young’s testimony that he “cannot speak to Medicare future payment rates[.]” D.E. 861 at 13. But Plaintiffs ignore Dr. Miller’s testimony that Medicare rates “have increased,” rate decreases are “rare,” and rates “will definitely increase” in the future. Resp. SOMF 62 ¶ 99. Plaintiffs also ignore the fact that, if Medicare rates increase, an offset based on current rates would inevitably be *lower* and conservative. The Motion gets around this evidence

by ignoring it; but, under Rule 56, this Court must draw all reasonable inferences regarding what may happen in the future in the United States' favor. *Supra* at 23 n.12.

Second, the Motion targets future funding for these benefits programs. D.E. 861 at 14–17. This argument is the same as the first, but focused on Congress's funding decisions, rather than decisions about whether to change or eliminate programs or benefits. It is no more successful. Extensive testimony and evidence supports a finding that Congress is reasonably certain or probable to continue funding these programs and benefits. For example, Ms. Ford testified that: (1) Congress has increased VHA's budget over time; (2) Congress has provided sufficient funding to VHA for each fiscal year and an "advance appropriation" for the next fiscal year; and (3) it is not anticipated that there will be significant adjustments to VHA's budget from the proposed restructuring. *See* Resp. SOMF 48, 49, 51 ¶¶ 16–18, 24, 37. Ironically, Ms. Ford identified the PACT Act of 2022—which included the CLJA—as an example of *increased* funding for VHA. *Id.* 49 ¶ 25. Likewise, Congress has "always" funded VBA disability benefits. *Id.* 10 ¶¶ 50–51. As for TRICARE, it has recently started an eight-year contract and is already preparing for the next contract. *Id.* 54 ¶ 54.

The real target of the Motion's funding argument, however, is not the funding of VA or TRICARE, but Medicare. *See* D.E. 861 at 16–17. Plaintiffs' argument as to Medicare stems from the 2025 Trustees' Report and its projection that the Medicare Trust may be depleted in 2033. From that premise, Plaintiffs build up an attenuated chain of future possibilities: if the Medicare Trust becomes depleted in 2033 (or later), and if the Track 1 Trial Plaintiffs are still alive, and if Congress decides to reduce Medicare benefits or decrease reimbursement rates, and if one of the Track 1 Trial Plaintiffs' providers decides that he or she must decline Medicare, that might mean that future benefits are reduced to some degree. *See id.*

Viewing the evidence in the light most favorable to the United States, there is abundant evidence to support an inference that Medicare is reasonably certain to continue providing benefits to the Track 1 Trial Plaintiffs. Based on witness testimony in this litigation, Congress will likely act to avoid depletion of the Medicare Trust without reducing undefined benefits or provider reimbursement. For example, Dr. Miller testified that Congress could increase taxes. *Id.* 36 ¶ 287. Medicare is a well-established program that has existed for decades and is popular across the political spectrum, yet the Motion insists that, because Congress may choose a way to address the Medicare Trust that may in turn reduce benefits to the Track 1 Trial Plaintiffs, all such benefits are speculative. *Id.* 62 ¶ 101.¹³ A further problem for the Motion’s argument is that the Medicare Trust only partly finances Part A of Medicare; Parts B, C, and D are financed separately. *Id.* 21 ¶ 138, 53 ¶ 50. Even as to Medicare Part A, the 2025 Trustees’ Report noted that, even if the Medicare Trust is depleted in 2033 or later, tax revenues would still be able to pay for approximately **89%** of benefits. *See id.* 53 ¶ 48. Indeed, “Congress has never allowed the [Medicare Trust] to become depleted.” *Id.* 53 ¶ 49. The Motion ignores all this evidence and inferences from it.

Finally, the Motion addresses “plaintiff-specific eligibility” for the benefits at issue. D.E. 861 at 17–28. Notably, the Track 1 Trial Plaintiffs are currently eligible for—and are receiving—the benefits that the United States has asserted. That fact alone supports a finding that benefits will continue into the future for those Plaintiffs. And other evidence on that score is robust.

As for future healthcare benefits, the Motion offers up a range of hypothetical scenarios based on the complexity of modern healthcare. *See id.* at 18–21. For example, the Motion argues

¹³ A separate problem is that the Motion often relies on inadmissible testimony concerning the scope of Congress’s Article I powers. *See Brainchild Surgical Devs., LLC v. CPA Glob. Ltd.*, 144 F.4th 238, 253 (4th Cir. 2025); D.E. 859 at 9 (collecting citations). The United States has objected to such improper legal opinions in its Response to the SOMF. *See Fed. R. Civ. P.* 56(c).

that government payors may not cover future healthcare needs. But, the Parties have disclosed competing life care plans identifying likely future healthcare needs. Based on those plans, the United States' expert, Dr. Miller, opined whether Medicare, TRICARE, or the VHA would cover services in the competing life care plans for a Plaintiff through the government program(s) that Plaintiff had used for their alleged Track 1 disease. If so, Dr. Miller determined what the provider reimbursement rate would be (as the cost to the United States). In essence, Plaintiffs argue that Dr. Miller's opinion that Medicare, TRICARE, or the VHA will likely cover a specific service is wrong, but that is a factual disagreement about the strength of Dr. Miller's opinion weighed against contrary evidence, which is "not permitted" here. *Swink v. S. Health Partners Inc.*, 160 F.4th 438, 454 (4th Cir. 2025), *pet. cert. docketed*, No. 25-1091 (U.S. Mar. 17, 2026). Again, all of the Track 1 Trial Plaintiffs are eligible for and receiving the benefits that the United States asserted in that case. Plaintiffs also speculate about different scenarios under which the Track 1 Trial Plaintiffs could lose eligibility or coverage for Medicare, TRICARE, or VHA, without citing any evidence that any of those scenarios are likely to occur.

As for future disability benefits, the Motion argues that disability ratings can change in the future, and in turn, change the amount of future disability benefits attributed to Camp Lejeune for purposes of offsets. *See* D.E. 861 at 23–28. There are many problems with this argument. First, it targets the wrong issue. The question is not whether the United States' economists have calculated the *amount* of future benefits to a mathematical precision; the law does not require such impossible feats. *See supra* at 20-21; *Brooks*, 176 F.2d at 484 (holding the Court must use its best judgment in light of all the facts and circumstances to address the uncertainty of future disability benefits for offset purposes); *Dempsey*, 32 F.3d at 1496 n.13 ("some degree of ambiguity and imprecision is inevitable when calculating aspects of an award for future damages"). The Motion also improperly

weighs the strength of the evidence that the United States has offered. *Swink*, 160 F.4th at 454. In particular, the Motion assumes that a ratings change necessarily can or will cause a change in the amount of disability benefits, but that is not true. A ratings change may have no or only a nominal effect. *See* Resp. SOMF 64 ¶ 114. Nobody disagrees that disability ratings can and do change, and especially for more treatable diseases.¹⁴ But that is not dispositive, as the Motion assumes.

Second, the United States has offered abundant evidence that the Track 1 Trial Plaintiffs are reasonably certain or probable to receive future disability benefits attributed to Camp Lejeune. The relevant Track 1 Trial Plaintiffs are over age 55. Resp. SOMF 67 ¶ 129. By regulation, the VBA does not schedule periodic reexaminations for veterans over age 55 unless there are unusual circumstances. 38 C.F.R. § 3.327(b)(2)(iv). Plaintiffs' expert, Mr. Rybolt, admitted that he did not know what defines "unusual circumstances" under that regulation. *Id.* 66 ¶ 124. He admitted that, in 2021, the VBA analyzed data over a three-year period and found 77% of conditions reviewed were confirmed and continued. *See id.* 66 ¶¶ 125-26. And many of the Track 1 Trial Plaintiffs at issue have had the same ratings for years. *Id.* 67 ¶ 130. In short, as Ms. Piper testified, while ratings can and do change, it is unlikely in this age group and does not necessarily reduce (or, much less, terminate) future disability benefits for the Track 1 Trial Plaintiffs. *Id.* 60 ¶ 89. All of this evidence must be viewed in the light most favorable to the United States at this stage. *Scott*, 550 U.S. at 378. The Motion ignores that principle at every possible turn.

¹⁴ If ratings change before trial, the United States' experts can simply supplement their opinions if needed. *See* Fed. R. Civ. P. 26(e). For instance, Plaintiff Cagiano's prostate cancer disability rating recently decreased. Thus, the United States continues to analyze whether that ratings change (or any others) requires supplementation of any reports.

C. The Motion Repeatedly Makes Arguments That Rely on the Intentions of Individual Plaintiffs.

Next, the Motion makes several arguments that rely on the supposed intentions of Track 1 Trial Plaintiffs. Such issues should be tested at trial. *See, e.g., Clemmons Farming, Inc. v. Silveus Se., LLC*, No. 7:21-CV-126-FL, 2024 WL 314983, at *9 (E.D.N.C. Jan. 24, 2024) (Flanagan, J.); *Busch v. Ohio Nat'l Life Assur. Corp.*, No. 5:09-CV-355-D, 2011 WL 902298, at *4-5 (E.D.N.C. Mar. 14, 2011) (Dever, J.); *Edwards*, 812 F. Supp. 2d at 695 (Boyle, J.).

For instance, the Motion argues that Plaintiffs have a right to choose private care that is not paid for by the United States. D.E. 861 at 21–23. Whether or not any Track 1 Trial Plaintiff intends to seek private medical care rests on subjective intentions, which cannot be resolved at this time. Moreover, the Motion simply discounts evidence supporting reasonable inferences that the Track 1 Trial Plaintiffs will continue to receive healthcare from the VA or providers who accept Medicare (which Dr. Miller testified is approximately 95% of providers). The fact that Plaintiffs have been receiving such care and are continuing to do so alone raises a genuine issue of material fact. Indeed, Plaintiff Mousser testified that he “love[s] the VA and what they did for [him]” as to healthcare. Resp. SOMF 66 ¶ 122; *see also* Resp. SOMF 68 ¶ 133 (Dr. Miller’s testimony that he assumes everyone will behave rationally in an economic sense and not pursue private healthcare that will cost them more than government healthcare benefits).

D. The Motion Repeatedly Recites Hypothetical Possibilities Untethered to the Track 1 Trial Plaintiffs.

Finally, the Motion repeatedly recites hypothetical possibilities that do not apply equally, if at all, to all of the Track 1 Trial Plaintiffs. Such arguments must be raised in the context of an individual case at trial. Yet, the Motion seeks summary judgment across the board, in effect for all Plaintiffs, not just the Track 1 Trial Plaintiffs. *See* D.E. 861 at 2 n.3 (stating the Motion applies to

“all Track 1 Plaintiffs” because the United States may assert future offsets in other cases at or before trial). *But see id.* at 5 (acknowledging damages and offsets discovery is closed).

First, the Motion makes arguments that do not appear connected to any of the Track 1 Trial Plaintiffs. For example, the Motion hypothesizes a veteran in a “rural area” far from VA facilities may not be able to “access” healthcare there. But there is no evidence that any of the Track 1 Trial Plaintiffs for whom the United States has asserted future VA healthcare benefits live in “rural areas” and so cannot “access” healthcare at VA facilities. Indeed, the United States has asserted offsets for future VA healthcare benefits for those Track 1 Trial Plaintiffs who have already been receiving VA healthcare benefits. Similarly, Plaintiffs point out that disability benefits can change if a recipient’s eligibility is based on being a military spouse and the recipient divorces or remarries or if a veteran is imprisoned. Plaintiffs cite no evidence that any of the Track 1 Trial Plaintiffs’ eligibility is likely to be affected by these circumstances. But at issue is whether the future benefits asserted *for the relevant Track 1 Trial Plaintiffs* are reasonably certain or probable. The Motion asks a different and irrelevant question—whether anyone’s benefits may change for any reason in any way. *See, e.g.*, D.E. 861 at 21 (referencing TRICARE eligibility for children).

Second, the Motion also makes arguments that do not apply equally (if at all) to all Track 1 Trial Plaintiffs. For example, as to disability ratings, the Motion focuses on Plaintiff Cagiano, a Track 1 Trial Plaintiff whose disability ratings have fluctuated. D.E. 861 at 24–25. By contrast, Plaintiff Hill—who has chronic lymphocytic leukemia—has had the same rating for over a decade. That Plaintiff *Cagiano’s* ratings have fluctuated does not suggest that Plaintiff *Hill’s* ratings are likely to change in the future. Such individual issues should be decided in individual trials.

CONCLUSION

Granting the Motion (D.E. 860) would be reversible error. It must be denied.

Dated: June 2, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2026, I electronically filed the foregoing using the Court's Electronic Case Filing system, which will send notice to all counsel of record.

/s/ David R. Ortiz
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