

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION  
No. 7:23-cv-01368-BO-RJ

**GARY MCELHINEY, SR. and  
SIMMONE MCELHINEY**

*Plaintiff,*

v.

**UNITED STATES OF AMERICA,**

*Defendant.*

**PLAINTIFFS' MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR EXPEDITED TRIAL**

Undersigned counsel for the above-captioned Plaintiffs (the "Plaintiffs") respectfully requests that the Court grant Plaintiff Gary McElhiney's Motion for Expedited Trial.

**INTRODUCTION**

Gary McElhiney served his country as a Marine for more than 23 years. He voluntarily enlisted when he was 17 years old. He spent the majority of his time serving as an active duty reserve in the National Guard stationed at Camp Lejeune. Mr. McElhiney completed his military service, married his wife, raised five kids, and moved back to Fairview, Tennessee, where he had grown up. But what should have been many more years with his family, and eventually a well-deserved retirement, was taken from him six years ago: Mr. McElhiney was diagnosed with Parkinson's disease, which he alleges was caused by exposure to toxic water at Camp Lejeune. Mr. McElhiney now finds it difficult to breathe, speak, and even move his body every day.

Mr. McElhiney 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 or becomes unable to communicate, Mr. McElhiney 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. The Plaintiffs respectfully move this Court to expedite Mr. McElhiney's trial pursuant to Local Rule 40.1(d), Federal Rules of Civil Procedure 1 and 16, and 28 U.S.C. § 1657(a). These rules allow judges to expedite trial for selected cases if there is good cause. The Plaintiffs and the PLG can and will present Mr. McElhiney'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. McElhiney 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. McElhiney, 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.<sup>1</sup>

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Factual Background**

Gary McElhiney grew up on a pig farm in Fairview, Tennessee. McElhiney Depo., Ex. A ("McElhiney Depo.") at 33:4-34:2. In April 1972, while American service men were dying in Vietnam War, Mr. McElhiney voluntarily joined the Marines. *Id.* at 53:12-17. He was only seventeen years old when he made the choice to fight for his country. *Id.* He joined the Marines as an active duty reserve of the National Guard. *Id.* at 53:5-11. He trained and worked at Camp Lejeune cumulatively for approximately 15 years.

After he finished basic training, in July 1972, Mr. McElhiney was sent to Camp Lejeune. *Id.* at 62:9-20. He lived in the barracks at Hadnot Point while going through training. *Id.* at 63:5-21.

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<sup>1</sup> To that end, Mr. McElhiney 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. McElhiney 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.

During his time at Camp Lejeune, Mr. McElhiney was constantly exposed to the water. *Id.* at 64:5-19. He drank it, cooked with it, showered in it, brushed his teeth with it, and shaved with it. *Id.* When in the field, he drank water from water buffaloes. *Id.* at 70:20-23. Indeed, owing to the arduous training and hot days, he drank at least a gallon per day from canteens and five gallon water cans filled from water buffaloes, and bathed out of his helmet in water from the water buffaloes. *Id.* at 70:20-71:13. When in the barracks, he tried to shower for as long as possible, usually about fifteen minutes. *Id.* at 73:10-14. Mr. McElhiney served at Camp Lejeune cumulatively for 18 months, drinking, bathing, and using the toxic water. *Id.* at 87:1-14. In 1974, he deployed to Japan. *Id.* at 88:15-23.

In November 1975, Mr. McElhiney returned to Camp Lejeune. *Id.* at 90:6-8. During his return, he lived in base housing with his wife and kids for two years. *Id.* at 90:15-20. He remained a “big water drinker” during this time. *Id.* at 95:6-7. In 1980, he again returned to Camp Lejeune, where he alternated between living on base and living nearby in Jacksonville, North Carolina. *Id.* at 105:2-22. He worked seven days a week at Camp Lejeune. *Id.* at 110:7-11. He usually had lunch at the chow hall. *Id.* at 108:1-5. He sometimes took showers at base. *Id.* at 111:1-3. He regularly filled his canteen with water from the fountains at Camp Lejeune over the next two years. *Id.* at 114:13-24. In 1986, after another stint in Japan, Mr. McElhiney went back to Camp Lejeune again. *Id.* at 117:10-16. He remained there for a fourth time in the Marines until the end of his service in 1995. *Id.* at 120:24-121:12; *Id.* at 130:15-17.

After his service, Mr. McElhiney and his family moved to Alabama, and then eventually settled down in Tennessee. *Id.* at 130:18-133:25. He worked as a maintenance supervisor, a handyman, a museum administrator, a truck driver, and a general contractor. *Id.* at 130:18-136:9. He took pride in his jobs, and was “going to work until it was no longer fun.” *Id.* at 139:7-11. But things took a turn when he began experiencing symptoms from Parkinson’s disease.

In 2016, Mr. McElhiney had to give up truck driving because he was experiencing chronic pain. *Id.* at 143:9-14. He “hurt all over, couldn’t move, couldn’t get up, couldn’t sit

down, couldn't lay down." *Id.* at 145:17-19. His balance started to go, then his sense of smell and taste. *Id.* at 146:5-10. After "two years of pain," he was diagnosed with Parkinson's disease. *Id.* at 146:11-17.

Parkinson's has destroyed Mr. McElhiney's life. He feels Parkinson's "stole" everything from him. *Id.* at 144:13-14. "It's robbery." *Id.* at 144:14. He stopped working. *Id.* at 143:9-21. He is no longer able to cut grass, repair his home, use an ATM machine, use a keyboard, or pick up silverware. *Id.* at 143:15-21. He requires a walking stick to walk long distances. *Id.* at 144:4-9. His entire body hurts, and his hands can no longer grip. *Id.* at 145:1-10. At the deposition, he struggled to put on a microphone. *Id.* at 143:18.

Mr. McElhiney urgently wants to tell his story before it's too late. He attributes his Parkinson's disease to his exposure to the water at Camp Lejeune. *Id.* at 20:20-21:4. Time is of the essence. Mr. McElhiney now struggles to communicate as his Parkinson's has gotten worse. He can't breathe. *Id.* at 143:25. He feels he permanently has something in his throat and he can't exhale. *Id.* at 144:1-2. He struggled to talk throughout the deposition, and said he felt like he was "choking to death" throughout the deposition. *Id.* at 144:2-3. The breathing problems make it hard for him to speak. *Id.* at 144:4-5. As he explains further in his Declaration, attached hereto as Exhibit B: "I was having trouble exhaling and swallowing, which required the deposition to stop. Unfortunately, this is a recurring problem I have, particularly the more I talk." McElhiney Decl., ¶ 13. Indeed, as he elaborated "[a]lthough I see a speech and swallowing therapist, I fear that as my condition continues to deteriorate, I will not be able to effectively provide testimony at all." *Id.* He wants to testify while he still can. Mr. McElhiney wants his day in court to advance this litigation and find some measure of justice.

## **II. Procedural Background**

Mr. McElhiney filed an administrative claim with the Department of the Navy on March 20, 2023. He filed a complaint in the Eastern District of North Carolina on October 3, 2023, and a short-form complaint on November 11, 2023. Mr. McElhiney 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 Because Mr. McElhiney Will Likely Soon Lose the Ability to Communicate.**

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 sick, elderly, or dying.<sup>2</sup> 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). Importantly, these statutes also “prevent parties from pursuing delay tactics to try to outlast and elderly 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 patients with Parkinson’s disease, “[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 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

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<sup>2</sup> *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).

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 “his or 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. McElhiney’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 illness takes away his ability to communicate, the Court should expedite his trial.

## **II. Mr. McElhiney 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. McElhiney’s should be one of them. This Court may use its authority under the rules and statutes described above to expedite Mr. McElhiney’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. McElhiney’s condition has continued to deteriorate, and he struggles to speak. McElhiney Depo at 143:25-144:4. As a Track 1 Discovery Plaintiff, his testimony is relevant for

adjudicating Parkinson’s disease claims. Allowing a case with a ready and willing plaintiff to move to trial will not only allow Mr. McElhiney 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. McElhiney will not realize his right to recover relief under the CLJA if he is unable to communicate or 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. McElhiney’s prognosis, the Plaintiffs and the PLG respectfully request the Court set the trial for within 120 days of this Motion. As next described, this deadline is feasible for the parties given the extensive discovery already exchanged in this case.

### **III. Mr. McElhiney’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. McElhiney 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. McElhiney. 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. McElhiney has provided the government with ample documentation of his medical conditions and his time at Camp Lejeune. In February, Mr. McElhiney sat for an exhausting all-day deposition, where he struggled repeatedly with his voice and needed multiple breaks, so the government has a strong understanding of his case. McElhiney Depo at 143:25-144:4. The Plaintiffs and the PLG are likewise confident that it has obtained sufficient information from the government to litigate Mr. McElhiney’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 Plaintiffs and the PLG posit that the appropriate time is now. Mr. McElhiney is ready, willing, and able to present his case for trial. But his window may close very soon.

#### **IV. The Plaintiffs' 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 Plaintiffs and the PLG submit that the CLJA's statutory proof requirements are streamlined and, accordingly, for Mr. McElhiney's trial would include only two expert witnesses—a medical expert 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 Parkinson's disease. Mr. McElhiney was at Camp Lejeune from 1972-74, 1975-77, and on and off after 1980, 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),<sup>3</sup> and acknowledges by its very terms the presence of contaminants in the water at Camp Lejeune during the period of time that Mr. McElhiney was stationed at Camp Lejeune.

As stated above, in 2018, Mr. McElhiney was diagnosed with Parkinson's disease, a disease that the United States, again through its agency the ATSDR,<sup>4</sup> admitted as early as 2017, *before* the passage of the CLJA, is a disease that can be caused by the Camp Lejeune water.<sup>5</sup> Mr. McElhiney, therefore, need not prove that the water at Camp Lejeune is capable of causing Parkinson's disease because the United States already concluded that. As a result, as to Mr. McElhiney's disease, there is no dispute as to general causation, *i.e.*, whether exposure to the water at Camp Lejeune can cause Parkinson's disease. At trial, therefore, the only expert testimony that Mr. McElhiney will have to present to prove his case is a medical causation expert

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<sup>3</sup> 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>.

<sup>4</sup> 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; 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.>

<sup>5</sup> *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](https://www.atsdr.cdc.gov/sites/lejeune/docs/atsdr_summary_of_the_evidence_for_causality_tce_pce-508.pdf).

witness<sup>6</sup> and a damages expert witness.

As to causation, Mr. McElhiney will need to call a medical expert to testify about the cause of Mr. McElhiney's Parkinson's disease, often referred to as a "specific causation." In other words, Mr. McElhiney will call an oncologist who will testify that it is at least as likely as not that his Parkinson's disease was caused by Camp Lejeune water. As to economic damage, Mr. McElhiney will call an expert who will testify about the economic losses that he has suffered as a result of his Parkinson's disease. Together with the plaintiff and family members, the Plaintiff's case in chief will likely 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 Parkinson's disease, and perhaps even the economic loss expert's testimony, would in large measure be the same for other Track 1 Parkinson's disease cases as it would be for Mr. McElhiney, converting Mr. McElhiney's trial into a multi-plaintiff trial for additional Parkinson's disease plaintiffs before this Court, who could be prepared for trial in the same time frame as Mr. McElhiney'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 Plaintiffs request that the Court grant the present motion.

*Signatures on Following Page*

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<sup>6</sup> 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 McElhiney includes a medical causation expert witness as part of his anticipated proof at trial.

DATED this 1<sup>st</sup> day of May, 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 1st day of May, 2024.

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