

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:23-MC-1-D

ROBERT HOWARD SAUER and
GARY EDWARD JOHNSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

FILED
JAN 12 2023
PETER A. MOORE, JR., CLERK
US DISTRICT COURT, EDNC
BY PK DEP CLK

**VERIFIED PETITION FOR
DEPOSITIONS TO PERPETUATE TESTIMONY WITH
REGARD TO PROSPECTIVE CAUSES OF ACTION
UNDER THE CAMP LEJEUNE JUSTICE ACT**

The Petitioners, Robert Howard Sauer and Gary Edward Johnson, through counsel, pursuant to Rule 27 of the Federal Rules of Civil Procedure, hereby file the instant verified petition seeking the entry of an order authorizing the pre-suit depositions of Mr. Sauer and of Mr. Johnson,¹ in order to perpetuate their respective testimony, and respectfully show as follows:

1. Petitioner Robert Howard Sauer is a citizen and resident of Hilton Head, South Carolina, in Beaufort County. His street address is 10 South Forest Beach Drive Apartment 420, Hilton Head, South Carolina 29928.
2. Petitioner Gary Edward Johnson is a citizen and resident of Placerville, California, in Placer County. His street address is 2801 Clay Street Apartment 328, Placerville, California 95667.

¹ See, e.g., *Obalon Therapeutics, Inc. v. Polyzen, Inc.*, 321 F.R.D. 245, 249-250 (E.D.N.C. 2017) (after reviewing description of witness's health condition in petition, court found that petitioner alleged facts demonstrating immediate need for deposition to perpetuate testimony).

3. The Respondent herein is the United States of America.
4. This Court has subject matter jurisdiction with regard to this petition and/or with regard to the prospective cause of action under Fed. R. Civ. P. 27, 28 U.S.C. § 1331 and under the Camp Lejeune Justice Act of 2022 (“CLJA”) § 804(d), because this matter arises under and/or the prospective future merits causes of action arise under the Constitution and laws of the United States.
5. This Court has venue with regard to this petition and/or with regard to the prospective causes of action under Fed. R. Civ. P. 27, and CLJA § 804(b) and (d).
6. Pursuant to Fed. R. Civ. P. 27(a)(1)(A), the Petitioners show that Petitioners (or their Estate representatives) expect to be party Plaintiffs to actions cognizable in a United States Court, specifically, the instant District Court, but they cannot presently bring their merits claims or cause them to be brought. Specifically, Petitioners were each during the pertinent times military servicemembers who assert and state for the purposes of this Verified Petition, and will in due course allege in their prospective merits claims, that they were stationed in relevant areas at Camp Lejeune, were exposed to contaminated water at Camp Lejeune during relevant times, that they have since been diagnosed with relevant illnesses, and that they otherwise intend to allege merits claims under the CLJA in due course upon the appropriate exhaustion of the administrative pre- suit claims process that is now commenced or is shortly to commence for each of said servicemember Petitioners herein. However, Petitioners cannot bring such merits claims against the United States Respondent in Court at this time, due to the requirement under the CLJA with regard to first exhausting the pre-suit administrative claims process. *See* CLJA § 804(h). That pre-suit process has not yet been exhausted.

7. Pursuant to Fed. R. Civ. P. 27(a)(1)(B), the Petitioners show that the subject matter of the expected action is expected in due course to consist of a merits claim, brought by Petitioner Mr. Sauer on his own behalf and/or by his Estate; and likewise a merits claim, brought by Petitioner Mr. Johnson on his own behalf and/or on behalf of his Estate. Each claim is contemplated to consist of a claim for appropriate relief for harm that was allegedly caused by exposure to the water at Camp Lejeune, to be alleged in the form of a subsequent Lawsuit Complaint filing in this Court alleging the pertinent substantive elements of the cause of action provided for under the CLJA. The Petitioners' interest in the claim consists of the fact that Petitioner Mr. Sauer and Petitioner Mr. Johnson each assert, and plan to allege (or, in the event of their death, their respective spouses and/or Estate representatives plan to allege on their behalf) a claim for relief under the CLJA. Unfortunately, each of the Petitioners has been diagnosed with illness and medical conditions that have made their health precarious and are likely to lead to their death in the near future.
8. Petitioner Robert Howard Sauer is an 88-year-old veteran who suffers from multiple medical problems including bladder cancer, carcinoid (neuroendocrine) cancer, and skin cancer. In or around March 2022, his treating oncologist advised him that he has between six months and two years left to live and currently feels he is living on borrowed time.
9. Mr. Sauer was a commissioned officer in the United States Navy on active duty from in or around July 1964 to in or around June 1966, during which time he served as a medical doctor (psychiatrist) at the Naval Medical Center Camp Lejeune and achieved the rank of Lieutenant Commander. Mr. Sauer spent a total of 104 weeks (two years) at Camp Lejeune, providing medical care to Marines and sailors at the hospital, residing in the

hospital's nursing quarters immediately adjacent to the hospital, dining and socializing at the officer's club, and participating in sports and other activities on base. In or around November 2018, he was informed by his doctors that he has bladder cancer,² which was operated on in or around January 2019. He continues to suffer from lower abdominal pain and a lump in his groin suspected to be metastasis of his bladder (terminal cancer). His bladder cancer prognosis is complicated by concomitant diagnoses of carcinoid cancer³ in or around November 2021, which was also operated on in or around March 2022, and recurrent bouts of skin cancer⁴ since approximately 2017, for which he has undergone 30 rounds of radiation treatment. His condition continues to deteriorate daily.

10. Petitioner Gary Edward Johnson is an 80-year-old veteran who suffers from multiple medical problems including kidney cancer, adult leukemia, kidney disease, and hepatic steatosis (fatty liver disease). Mr. Johnson enlisted in the United States Marine Corps on active duty from in or around 1961 to in or around 1966, during which time he received advanced infantry training and achieved the rank of Sergeant in a critical operations/communications military occupation specialty (MOS). Mr. Johnson spent a total of 88 weeks (1.7 years) at Camp Lejeune, and also served overseas in Vietnam during the Vietnam War and in Okinawa, Japan. After Mr. Johnson left the Marine Corps, he served for over twenty years in black operations for the United States. In or around 2017, he was informed by his doctors that he has kidney cancer,⁵ which has grown over time and caused increasingly severe symptoms.⁶ His kidney cancer prognosis

² Specifically, papillary urothelial cell transitional carcinoma

³ Which affects his body's hormones and endocrine system

⁴ Specifically, basal cell carcinoma

⁵ Specifically, renal cell carcinoma

⁶ One of his doctors suggested that his atypical headaches may be a sign of metastasis (terminal cancer).

is complicated by concomitant diagnoses of another cancer, chronic myeloid leukemia,⁷ in or around 2021, irreversible chronic kidney disease⁸ in or around 2020, and hepatic steatosis⁹ in or around 2017. His condition continues to deteriorate daily. As of the date of this Petition, he is not expected to survive more than one (1) year.

11. Petitioners desire to effectuate the prompt preservation of their testimony for the record and for evidentiary purposes with regard to their foreseen future CLJA claims.

12. Pursuant to Fed. R. Civ. P. 27(a)(1)(C), the Petitioners show as follows with regard to the facts that the Petitioners want to establish by the proposed testimony and the reasons to perpetuate it:

- a. Petitioner Sauer wants to establish by his proposed testimony his facts and personal testimony with regard to his personal and family background; his career of military service; his relevant periods of time that were spent at Camp Lejeune for not less than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987; the facts to the best of his personal recollection with regard to his exposure to the water at Camp Lejeune during his time there; his own lay testimony as to his understanding of his medical history and his pertinent medical conditions and illness diagnoses; and his own lay testimony with regard to his allegations of harm, injury and damages caused by his relevant water exposure at Camp Lejeune. The reasons why he desires to have his testimony perpetuated are so that his claim is supported and evidenced to the maximum extent possible under the law and so that in the extent it is ultimately found and determined that there is liability and that damages and other appropriate relief is to be awarded, that he, or in the event of his likely death, his surviving spouse and relevant family members and his Estate, may benefit from any appropriate outcome and recovery.
- b. Petitioner Johnson wants to establish by his proposed testimony his facts and personal testimony with regard to his personal and family background; his career of military service; his relevant periods of time that were spent at Camp Lejeune for not less than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987; the facts to the best of his personal recollection

⁷ Pathology noted marked neutrophilic leukocytosis with rare blasts, basophilia, and left-shifted neutrophils.

⁸ His kidney function is less than half that of a healthy human being.

⁹ Which interferes with his liver's ability to metabolize toxins and waste

with regard to his exposure to the water at Camp Lejeune during his time there; his own lay testimony as to his understanding of his medical history and his pertinent medical conditions and illness diagnoses; and his own lay testimony with regard to his allegations of harm, injury and damages caused by his relevant water exposure at Camp Lejeune. The reasons why he desires to have his testimony perpetuated are so that his claim is supported and evidenced to the maximum extent possible under the law and so that in the event it is ultimately found and determined that there is liability and that damages and other appropriate relief is to be awarded, that he, or in the event of his likely death, his surviving spouse and relevant family members and his Estate, may benefit from any appropriate outcome and recovery.

13. Pursuant to Fed. R. Civ. P. 27(a)(1)(D), the Petitioners show as follows with regard to the names or a description of the persons whom the Petitioners expect to be adverse parties and their addresses, so far as known: under the CLJA, the sole adverse party is expected to be the United States, i.e. the Respondent herein.
14. Pursuant to Fed. R. Civ. P. 27(a)(1)(E), the Petitioners show as follows with regard to the name, address, and expected substance of the testimony of each deponent: As to names and addresses, please see paragraphs 1 and 2 above. As to the expected substance of the testimony, please see paragraphs 11(a) and (b) above.
15. Pursuant to Fed. R. Civ. P. 27(a)(2), the Petitioners show that they intend to serve the United States with the instant Petition and duly coordinate with counsel for the Respondent to ensure that any necessary hearing date with regard to this Petition is duly and timely requested.
16. Petitioners have provided a draft copy of this Petition to Respondent's counsel. Respondent's counsel have authorized this petition to represent that the United States neither opposes nor consents to the requests for preservation depositions. Although the petition meets the standards for preservation depositions,

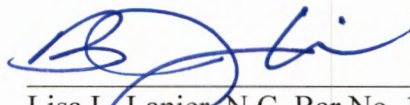
given the potentially large number of requests that may be made under the Camp Lejeune Justice Act, court management may be necessary.

WHEREFORE, the Petitioners herein respectfully request that the Court enter an Order granting their instant petition and request to perpetuate testimony and order as follows pursuant to Fed. R. Civ. P. 27(a)(3):

1. That the persons to be deposed are Mr. Sauer and Mr. Johnson;
2. That the subject matter of the examinations shall consist of the scope of subject matter outlined by the instant Petition, inclusive of all deposition topics that the Petitioners, or the Respondent, deem to be relevant for purposes of the prospective CLJA claims; and
3. That the depositions shall take place orally and be videotaped and transcribed.

Dated: January 10, 2023.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing Verified Petition for Depositions to Perpetuate Testimony with Regard to Prospective Causes of Action Under the Camp Lejeune Justice Act was served on the following parties to this action via: ☐ facsimile ☒ electronic mail ☐ hand delivery and ☒ by depositing a copy of the same in the United States Mail postage prepaid and addressed to:

Frederick Gaston Hall (Frederick.g.hall@usdoj.gov)
US Department of Justice
950 Pennsylvania Ave, NW
Washington DC 20530
Attorney for United States of America

This the 10th day of January, 2023.



Robert O. Jenkins

VERIFICATION AND DECLARATION UNDER PENALTY OF PERJURY

Pursuant to 28 U.S.C. § 1746, the undersigned Petitioner, Robert Howard Sauer, hereby states as follows:

1. With regard to the statements and facts asserted in the foregoing Petition, I hereby declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 21, 2022.

A handwritten signature in black ink that reads "ROBERT SAUER". The signature is written in a cursive, slightly stylized font. The first name "ROBERT" is written in all caps, and "SAUER" is also in all caps. There is a horizontal line drawn under the signature.

Robert Howard Sauer

VERIFICATION AND DECLARATION UNDER PENALTY OF PERJURY

Pursuant to 28 U.S.C. § 1746, the undersigned Petitioner, Gary Edward Johnson, hereby states as follows:

1. With regard to the statements and facts asserted in the foregoing Petition, I hereby declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 21, 2022.



Gary Edward Johnson