

Plaintiff brings this action seeking judgment against Defendant 3M COMPANY (hereinafter referred to as “Defendant” or “3M,”) for personal injuries incurred while in training and/or on active military duty, resulting from Defendant’s defective and unreasonably dangerous product, the Dual-ended Combat Arms™ earplugs (Version 2 CAEv.2) (“Dual-ended Combat Arms earplugs”). At all relevant times, the Dual-ended Combat Arms earplugs were manufactured, designed, formulated, tested, packaged, labeled, produced, created, made, constructed, assembled, marketed, advertised, promoted, distributed, and sold by Defendant. Plaintiff alleges the following based on information and belief, the investigation of counsel and personal knowledge:

1. This case arises from a defective earplug manufactured by Defendant and sold to the United States Army for use by American soldiers. Plaintiff was issued a set of Defendants' dual-ended Combat Arms Earplugs-Version 2 ("Combat Arms Earplugs").
2. Plaintiff, Ulrick T. John, used the earplugs and, as a result of its defective condition,

now suffers from hearing loss, tinnitus and requires the use of a hearing aid. Plaintiff, an Army Veteran, brings this suit to recover damages arising from personal injuries sustained while in training and/or on active military duty domestically and abroad. Plaintiff used Defendant's dangerously defective Dual-ended Combat Arms earplugs during tank firing, training firing, other live fire training, vehicle maintenance, and other training and combat exercises.

3. Defendant sold the Dual-ended Combat Arms earplugs to the U.S. military for more than a decade without the military and/or Plaintiff having any knowledge of the defect(s) and failed to adequately warn the military and/or Plaintiff of the defect(s).
4. Defendants knew the earplugs were defective. Defendants had this knowledge prior to selling these earplugs. In order to qualify for a multi-million dollar per-year contract with the United States, Defendants falsified test results and misrepresented the performance specifications of the Combat Arms Earplugs.
5. Defendant's Dual-ended Combat Arms earplugs were standard issue in certain branches of the military (including Plaintiff's) between at least 2003 to at least 2015. Thus, Defendant's Dual-ended Combat Arms earplugs have likely caused thousands, if not millions, of soldiers to suffer significant hearing loss, tinnitus, and additional injuries related to hearing loss, including but not limited to, pain and suffering and loss of the pleasures of life.

#### **PARTIES, JURISDICTION AND VENUE**

6. Plaintiff, an Army Veteran, is a citizen and resident of the state of Georgia.
7. Defendant is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in St. Paul, Minnesota. Among other things, Defendant is in the business of designing, manufacturing, and selling worker

safety products, including hearing protectors and respirators. Defendant has a dominant market share in virtually every safety product market, including hearing protection. Defendant is one of the largest companies in the country.

8. This Court has subject matter jurisdiction pursuant 28 U.S.C. § 1332(a)(1). The amount in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and Plaintiff and Defendant are citizens of different states.
9. Personal jurisdiction over Defendant is proper because it has done business in the state of Georgia. In fact, Fort Benning is a United States Army post straddling the Alabama–Georgia border next to Columbus, Georgia. Fort Benning supports more than 120,000 active-duty military, family members, reserve component soldiers, retirees, and civilian employees on a daily basis. Defendant supplied the Dual-ended Combat Arms earplugs to Fort Benning. Defendant has committed a tort in whole or in part in the state of Georgia, has substantial and continuing contact with the state of Georgia, and derives substantial revenue from goods used and consumed within the state of Georgia. Fort Benning is one of the Army’s largest military forts. There are over 13 military bases in Georgia, which include serviceman from all four branches of the military, to which Defendant has provided its products.
10. Plaintiff’s claims arise out of Defendant’s purposeful contacts with Georgia. Plaintiff was a citizen of Georgia at all relevant times. Plaintiff was issued Defendant’s Combat Arms Earplugs in Georgia and suffered injuries complained of herein as a result.
11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) as a substantial part of the events or omissions giving rise to the claim occurred in this District. Defendant supplied Fort Benning and Fort Stewart with the Combat Arms Earplugs. Plaintiff was

issued Defendant's Combat Arms Earplugs in Georgia. Defendant may be served with process on its registered agent, Corporation Service Company, at 40 Technology Parkway South, #300, Norcross, GA 30092.

### **FACTUAL ALLEGATIONS**

#### **Plaintiff's Military Service**

12. Plaintiff joined the military in January 1993 and was discharged in August 2013.
13. Before joining the military, Plaintiff had no signs or symptoms of hearing loss.
14. Plaintiff was trained and stationed at Fort Stewart and at Fort Benning, both of which are located in Georgia.
15. After enlisting, Plaintiff was deployed to active duty to Iraq from May 2008 to August 2009, and from November 2010 to November 2011.
16. At the time of Plaintiff's deployment and during his pre-deployment training, the 3M Dual-ended Combat Arms earplugs were standard issue, and were provided to Plaintiff in Georgia. Plaintiff wore the Dual-ended Combat Arms earplugs while in training and in the field.
17. Plaintiff wore the earplugs while serving in Iraq.
18. Plaintiff was never instructed to fold back the flanges on the opposite side of use of the earplug.
19. During his service, Plaintiff was exposed to loud impulse noises and explosions.
20. As part of his service in the Army, Plaintiff was issued a pair of standard-issue Combat Arms earplugs. Plaintiff continued to wear the Combat Arms Earplugs for the remainder of his service.
21. Plaintiff was diagnosed with hearing loss, tinnitus and required the use of a hearing aid following his return from deployment.

### **3M's Dual –ended Combat Arms Earplugs**

22. The United States Military supplies service members with, among other things, earplugs, to protect their hearing from damage. The government obtains those earplugs from private companies and its standards for military-use earplugs are, understandably, demanding. Service members must be able to perform their duties, in training and in combat, and so must be able to hear spoken commands and other important noises while also being protected from the damaging impulse sounds of explosions and gunfire.
23. In the early 2000s Aearo Technologies LLC developed its dual-ended Combat Arms Earplugs for sale to the military. (“Aearo/3M”).
24. Defendant 3M acquired Aearo in 2008, including Aearo’s liabilities, (and thus 3M is liable for Aearo’s conduct as alleged herein).
25. Defendant’s Dual-ended Combat Arms earplugs are non-linear, or selective attenuation, earplugs that were designed to provide soldiers with two different options for hearing attenuation depending upon how the plugs are worn. Both sides of the dual-sided earplugs were purported to provide adequate protection for soldier’s ears when worn.



26. The 3M Combat Arms earplugs were designed for the specific purpose of providing

servicemen and women a single set of earplugs that provide two options for hearing attenuation depending on how they are worn.

27. If worn in the "closed" or "blocked" position (olive side in user's ear), the earplugs are intended to act as a traditional earplug and block as much sound as possible.
28. If worn in the "open" or "unblocked" position (yellow side in user's ear), the earplugs are intended reduce loud impulse sounds, such as battlefield explosions and artillery fire, while allowing the user to hear quieter noises; for example, commands spoken by fellow soldiers and approaching enemy combatants.
29. Defendant's standard fitting instructions state the wearer is to grasp the earplug by the stem and insert it into the ear canal.
30. The design of the earplug prevents a snug fit in the ear canal of the wearer, an inherent defect about which there was no adequate warning.
31. When inserted according to Defendant's standard fitting instructions, the edge of the third flange of the non-inserted end of the earplug presses against the wearers' ear canal and folds back to its original shape, thereby loosening the seal in their ear canals and providing inadequate protection.
32. Because the earplugs are symmetrical, following the standard fitting instructions will result in a loosening of the seal regardless of which side is inserted into the ear canal.
33. The dual-ended Combat Arms Earplugs were poorly designed. They could not be securely fit into the ear canal because, when one end was placed into the ear, the largest ring, or flange, of the opposite end would get in the way. As a result, the earplugs failed to prevent damage to servicemembers' hearing.
34. Aearo/3M was aware of this flaw. After the earplugs initially failed performance

testing, Aearo invented a work-around. The work-around involved folding back the offending flange to get it out of the way so the earplug could be inserted far enough into the ear. Only with the work-around could the earplugs perform well enough in testing to meet the military's exacting standards. Aearo used testing data obtained using the work-around to justify its statements to the military about the earplugs' performance and the similar statements on the products' packaging.

35. These dangerous design defects were known to Aearo in 2000 (and later 3M) when it completed testing of the dual-ended Combat Arms earplugs. Notwithstanding, Aearo submitted a bid in response to the military's Request for Proposal to supply large quantities of these defective earplugs and entered into a contract pursuant to which it became the exclusive supplier of earplugs to the military in approximately 2003.
36. Aearo sold thousands, perhaps millions, of these earplugs to the military. Each pair came with written instructions. Those instructions did not reveal the fold-back work-around. A servicemember who used the earplugs as instructed therefore thought that his or her hearing was being protected when, in fact, it was not.
37. The military likely purchased, at a minimum, one pair of 3M's Combat Arms earplugs for each deployed soldier annually involved in certain foreign engagements between at least 2003 and at least 2015. *See* McIlwain, D. Scott *et al.*, *Heritage of Army Audiology and the Road Ahead: The Army Hearing Program*, AMERICAN JOURNAL OF PUBLIC HEALTH, Vol. 98 No. 12 (Dec. 2008).
38. 3M's/Aearo's Dual-ended Combat Arms earplugs were sold to the military beginning in at least late 2003 and continued to be sold directly and indirectly by 3M to the military until at least late 2015, when Defendant discontinued the earplugs.

39. The defective earplugs have not been recalled and therefore are likely in continued use by service members.

**Testing Data is Falsified**

40. Employees from 3M/Aearo began testing the Dual-ended Combat Arms earplugs in approximately January 2000.

41. 3M/Aearo conducted the testing at its own laboratory rather than an outside, independent laboratory.

42. The purpose of the testing was to ascertain the NRR score of the earplugs. NRR stands for “Noise Reduction Rating,” which is a unit of measurement of the effectiveness of hearing protection devices. The higher the NRR, the greater the potential for noise reduction.

43. 3M/Aearo’s employees personally selected ten test subjects (some of whom were also employees of 3M/Aearo) to test the Dual-ended Combat Arms earplugs. Aearo personnel monitored the testing.

44. 3M/Aearo’s employees intended to test: (1) the subject's hearing without an earplug inserted; (2) the subject's hearing with the open/unblocked (yellow) end of the Dual-ended Combat Arms earplug inserted; and (3) the subject's hearing with the closed/blocked (olive) end of the Dual-ended Combat Arms earplug inserted. This testing was designed to provide data regarding the NRR of the Dual-ended Combat Arms earplugs.

45. After testing just 8 subjects with the olive end, Aearo stopped the test. The first 8 tests of the olive end suggested an NRR of 10.9, which was inadequate and below Aearo’s expectations and government standards.

46. Aearo did test the yellow end and arrived at a -2 NRR, indicating that the earplug amplified sound, rather than blocking it out. Aearo's later packaging misrepresented this value as 0.
47. 3M/Aero falsely touts the "0" NRR as a benefit of the Dual-ended Combat Arms earplug by suggesting that soldiers will be able to hear their fellow soldiers and enemies while still providing some protection. However, the "true" -2 NRR actually amplifies sound, thereby exposing the wearer to harm.
48. 3M/Aero personnel determined that when the closed, olive end of the earplug was inserted into the wearer's ear according to standard fitting instructions, the basal edge of the third flange of the open, yellow end would press against the wearer's ear and fold backwards. When the inward pressure on the earplug was released, the yellow side flanges would return to their original shape and cause the earplug to loosen, often imperceptibly to the wearer.
49. In connection with the January 2000 test, Aearo discovered the design flaw—that the largest ring or flange of the outward facing end of the plug prevented the inward facing end from fitting securely in the ear. It was at this point that Aearo developed the work-around, folding that flange back.
50. During this testing process, Defendant learned that the stem of the earplug was too short, and, as a result, it was difficult to insert the earplug deeply enough into the wearer's ear canal to obtain a proper fit as required by ANSI S3.19-1974, Section 3.2.3. *See* Acoustical Society of America Standard Method for the Measurement of Real-Ear Protection of Hearing Protectors and Physical Attenuation of Earmuffs (ASA STD 1-1975). Aearo manipulated the test protocol by instructing the test subjects to fold

the flanges on the yellow non-inserted end of the earplug back before inserting it into the ear. This information was not disclosed to end users or to Plaintiff.

51. Having discovered this work-around, Aearo retested the olive end of the earplugs a month later. Using the work-around, Aearo achieved the desired NRR scores.
52. Using this “modified” fitting procedure, 3M/Aero achieved a “22” NRR on the closed end of the Dual- ended Combat Arms earplug.
53. 3M never properly warned serviceman that the only potential way to achieve this purported NRR was to modify the Dual- ended Combat Arms earplug by folding the yellow flanges on the opposite end.
54. The yellow, open end of the Dual- ended Combat Arms earplug was not re-tested using the “modified” fitting procedure.

**Defendant Receives a Series of Indefinite-Quantity Contracts  
based on False Certifications and Omissions**

55. In 2003, Aearo submitted a bid in response to the U.S. military’s Request for Proposal (“RFP”) to supply large quantities of Combat Arms earplugs. The RFP required bidders to certify that the earplugs complied with the Salient Characteristics of Medical Procurement Item Description (“MPID”) of Solicitation No. SP0200-06-R-4202. In its bid, Aearo certified the Combat Arms earplugs complied with the MPID, even though Aearo knew that certification to be false.
56. The pertinent Salient Characteristics of MPID in each RFP, in relevant part, were:
  - 2.1.1. Ear plugs shall be designed to provide protection from the impulse noises created by military firearms, while allowing the wearer to clearly hear normal speech and other quieter sounds, such as voice commands, on the battlefield.
  - 2.2.2 The sound attenuation of both ends of the ear plugs shall be tested in accordance with ANSI S3.19....

2.4. Workmanship. The ear plugs shall be free from all defects that detract from their appearance or impair their serviceability.

2.5. Instructions. Illustrated instructions explaining the proper use and handling of the ear plugs shall be supplied with each unit....

Solicitation No. SP0200-06-R-4202, at 41-42.

57. Aearo knew that its test protocol did not comply with ANSI S3.19 but nevertheless certified that its testing was fully compliant with the U.S. military's specifications.

58. The government's purchases were subject to Indefinite-Quantity Contracts awarded to Aearo and 3M via a request-for-proposal process.

59. As part of that process, Aearo and 3M had to continually certify that the earplugs complied with certain contract requirements, specifically the Salient Characteristics of Medical Procurement Item Description of Solicitation No. SP0200-06-R-4202.

60. Aearo and 3M knew that the earplugs did not meet those requirements and knew that their certifications were false.

61. Aearo also falsely certified that it provided accurate "instructions explaining the proper use and handling of the ear plugs." Aearo knew when it did so that its own testing had revealed a design defect that needed modified fitting instructions to ensure a proper fit that would deliver the promised NRR. At no time did Defendant disclose the modified fitting instructions to the U.S. military—even after winning the bid.

62. Aearo and 3M did not satisfy the requirements of the Salient Characteristics of Medical Procurement Item Description of Solicitation No. SP0200-06-R-4202 because the earplugs were defectively designed and the instructions the companies supplied did not explain the defect or the need to, and how to, fold back the opposing flange.

63. Further, the value and effectiveness of earplugs has been standardized under federal law

through a Noise Reduction Rating (“NRR”). The testing and labeling of earplugs— such as the Combat Arms earplugs—to achieve an NRR is governed by federal regulations promulgated by the Environmental Protection Agency (“EPA”) pursuant to the Noise Control Act, 42 U.S.C. §4901 et seq. Specifically, 40 C.F.R. §211.206-1 provides:

The value of sound attenuation to be used in the calculation of the Noise Reduction Rating must be determined according to the “Method for the Measurement of Real-Ear Protection of Hearing Protectors and Physical Attenuation of Earmuffs.” This standard is approved as the American National Standards Institute Standard (ANSI-STD) S3.19-1974.

64. The NRR is supposed to represent the amount of sound attenuation experienced by a test group under conditions specified by the federal Noise Control Act’s testing methodology.
65. Aearo’s own employees monitored the test results as the tests were performed, which allowed them to stop the testing at any point if they were not achieving the desired NRR. This violated the ANSI S3.19-1974 testing protocol.
66. In addition, the U.S. military may only purchase earplugs that meet the testing standards established by the U.S. Army Public Health Command, Army Hearing Program, or equivalent standards that may be established by other branches of the military. Any such standards are tied to the NRR achieved under the EPA regulations.
67. Further, 40 C.F.R. §211.204-4(e) requires that specific supporting information accompany hearing protection devices sold in the United States:

The following minimum supporting information must accompany the device in a manner that insures its availability to the prospective user. In the case of bulk packaging and dispensing, such supporting information must be affixed to the bulk container or dispenser in the same manner as the label, and in a readily visible location....**Instructions as to the proper insertion or placement of the device.** (Emphasis supplied.)
68. Defendant includes standard instructions for "proper use" of the earplugs in the

packaging for the earplugs as required by the EPA, Noise Control Act, and the MPID. Defendant did not disclose the modified fitting instructions to the U.S. military. The instructions the companies supplied did not explain the defect or the need to, and how to, fold back the opposing flange.

69. Defendant continued to sell the Combat Arms earplugs to the U.S. military until late 2015, at which time Defendant discontinued the earplug. However, Defendant did not recall the earplugs despite discontinuing them due to the design defect.
70. Defendant's misrepresentations about the benefits and protections provided by the Combat Arms earplugs caused Plaintiff and putative class members to suffer hearing loss.

**3M Settles a False Claims Act Case About the Earplugs for Millions of Dollars**

71. In July, 2018, Defendant agreed to pay \$9.1 million to resolve allegations that it knowingly sold the Dual-ended Combat Arms Earplugs to the United States military without disclosing defects that hampered the effectiveness of the hearing protection device. *See United States Department of Justice, 3M Company Agrees to Pay \$9.1 Million to Resolve Allegations That it Supplied the United States With Defective Dual-Ended Combat Arms Earplugs* (Jul. 26, 2018), available at <https://www.justice.gov/opa/pr/3m-company-agrees-pay-91-millionresolve-Allegations-it-supplied-united-states-defective-dual> (last visited January 23, 2019).
72. Until this settlement revealed 3M and Aearo's misconduct, injured servicemembers had no reason to suspect that their hearing loss or tinnitus could have been caused by 3M and Aearo's misconduct. Servicemembers simply used the earplugs as instructed, and assumed they were working.

**TOLLING OF STATUTES OF LIMITATIONS**

73. Plaintiff filed this lawsuit within the applicable limitations period of first suspecting that the Dual-ended Combat Arms earplugs caused his injuries. Plaintiff could not, by the exercise of reasonable diligence, have discovered the wrongful cause of the Dual-ended Combat Arms earplugs-induced injuries at an earlier time because, at the time of these injuries, the cause was unknown to Plaintiff.
74. Here, Plaintiff's claims are based on Defendant 3M's affirmative involvement in manipulating test results and misrepresenting to the United States government and users of the dual-ended Combat Arms earplugs, such as Plaintiff, of Defendant 3M's defective design, manufacture and marketing of the dual-ended Combat Arms earplugs. The nature of the defects was such that they were imperceptible to wearers of the dual-ended Combat Arms earplugs, such as Plaintiff, at the time of use.
75. Here, there is no evidence that Plaintiff knew or had reason to know of Defendant 3M's affirmative conduct until July 2018 when the United States Department of Justice released the terms of its settlement with 3M Company based on the same allegations of manipulation of test results and misrepresentation of defects in the dual-ended Combat Arms earplugs as those allegations made the basis of this lawsuit.
76. Plaintiff neither knew nor had reason to know that Defendant 3M was engaging in affirmative conduct whereby they manipulated test results and misrepresented to the United States government the quality and performance of the dual-ended Combat Arms earplugs.
77. If the United States government neither knew nor had reason to know of Defendant 3M's affirmative misconduct regarding its testing and the quality of the dual-ended

Combat Arms earplugs until first reported by a whistleblower, it goes without saying that Plaintiff himself would not know or have reason to know of this information until it became public in July 2018.

78. The running of any statute of limitations has been tolled by reason of Defendant's fraudulent concealment. Through their affirmative misrepresentations and omissions, Defendants actively concealed from Plaintiff the risks associated with the defects in the Dual-ended Combat Arms earplugs.
79. As a result of Defendant's actions, Plaintiff was unaware, and could not reasonably know or have learned through reasonable diligence, that the Plaintiff had been exposed to the defects and risks alleged herein and that those defects and risks were the direct and proximate result of Defendant's acts and omissions.
80. Through Defendant's affirmative misrepresentations and omissions pertaining to the safety and efficacy of the Dual-ended Combat Arms earplugs, Plaintiff was prevented from discovering this information sooner because Defendant herein misrepresented and continued to misrepresent the defective nature of the Dual-ended Combat Arms earplugs.
81. Therefore, the statute of limitations on Plaintiff's claims are tolled by fraudulent concealment and equitable tolling. Accordingly, Plaintiff's claims are timely.
82. Defendant 3M is equitably estopped from relying on the defense of limitations until the time that Plaintiff's right of action was, or in the exercise of reasonable diligence should have been, discovered.
83. Due to imperceptible defects in the dual-ended Combat Arms earplugs at issue, and in reliance on Defendant 3M's manipulation of test results and misrepresentations to the

United States government as to the quality and performance of the dual-ended Combat Arms earplugs, Plaintiff was unable to know of his injury at the time of its actual accrual.

84. Accordingly, the discovery rule in Georgia provides an exception to the statute of limitations as to Plaintiff's claims.

85. Further, under the Servicemembers Civil Relief Act, the period of Plaintiff's military service may not be included in computing any statute of limitations applicable herein. *See* 50 U.S.C. § 3936.

**THE GOVERNMENT CONTRACTOR DEFENSE IS NOT APPLICABLE**

86. The government contractor defense is inapplicable because the feature of the product claimed by Plaintiff to be defective—namely, the stem of the dual-ended Combat Arms earplugs that is too short to provide adequate noise reduction for users—was not manufactured, designed marketed, or sold in accordance with reasonably precise specifications approved by the United States, therefore not allowing the equipment to conform to such specifications. Further, and most egregiously, instead of warning the United States about the dangers in the use of the equipment it knew about, 3M instead manipulated its testing and marketing so as to conceal such dangers from the United States and from servicemembers, such as Plaintiff, who would ultimately use the product.

87. Accordingly, Defendant 3M Company should be held liable to Plaintiff.

**CAUSES OF ACTION**

**COUNT I**  
**DESIGN DEFECT – NEGLIGENCE**

88. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

89. At all times relevant to this action, Defendant had a duty to manufacture, design,

formulate, test, package, label, produce, create, make, construct, assemble, market, advertise, promote, and distribute, the Dual-ended Combat Arms with reasonable and due care for the safety and well-being of U.S. military service men and women, including Plaintiff, who were subject to and used the Dual-ended Combat Arms earplugs during their service with the U.S. military.

90. Plaintiff was a foreseeable user of the Dual-ended Combat Arms earplugs, and Defendant knew that the Dual-ended Combat Arms earplugs would be used by U.S. military service men and women, including Plaintiff.

91. The Dual-ended Combat Arms earplugs are defective in that the design of the earplug causes them to loosen in the wearer's ear, imperceptibly to the wearer, thereby permitting damaging sounds to enter the ear canal by traveling around the outside of the earplug while the user incorrectly believes that the earplug is working as intended.

92. When the Dual-ended Combat Arms is inserted into the ear according to standard fitting instructions provided by Defendants, a proper seal is not formed with the ear canal.

93. The defect has the same effect when either end is inserted because the earplugs are symmetrical. In either scenario, the effect is that the earplug may not maintain a tight seal in some wearers' ear canals such that dangerous sounds can bypass the plug altogether thereby posing serious risk to the wearer's hearing, unbeknownst to him or her.

94. Upon information and belief, Defendant failed to exercise reasonable and due care under the circumstances and therefore breached this duty in the following ways:

- a. Defendant failed to design the Dual-ended Combat Arms earplugs in a manner which would result in a NRR of "22" when used with the closed, olive end inserted, according to the standard fitting instructions provided by Defendant.

- b. Defendant failed to design the Dual-ended Combat Arms earplugs in a manner that would safely prevent against the injuries claimed by Plaintiff.
- c. Defendant failed to properly and thoroughly test the Dual-ended Combat Arms earplugs;
- d. Defendant failed to properly and thoroughly analyze the data resulting from testing of the Dual-ended Combat Arms earplugs;
- e. Defendant designed, manufactured, distributed, and sold the Dual-ended Combat Arms earplugs without an adequate warning of the significant and dangerous risks of the earplugs;
- f. Defendant designed, manufactured, distributed, and sold the Dual-ended Combat Arms earplugs without providing adequate or proper instructions to instructions to avoid the harm which could foreseeably occur because of using the earplugs in the manner the Defendant's standard fitting instructions directed;
- g. Defendant failed to fulfill the standard of care required of a reasonable and prudent manufacturer of hearing protection products, specifically including products such as the Dual-ended Combat Arms earplugs; and
- h. Defendant negligently continued to manufacture and distribute the Dual-ended Combat Arms earplugs to the U.S. military after Defendant knew or should have known of its adverse effects and/or the availability of safer designs.

95. Defendant knew or should have known that the defective condition of the Dual-ended Combat Arms earplugs made it unreasonably dangerous to the U.S. military service men and women using the earplugs.

96. The Dual-ended Combat Arms earplugs were dangerous when used by ordinary U.S. military service men and women who used it with the knowledge common to the U.S. military as to the product's characteristics and common usage.

97. The Dual-ended Combat Arms earplugs were dangerous when used by ordinary U.S. military service men and women who followed the instructions provided by Defendants.

98. Defendant knew or should have known of the defective design at the time the Dual-ended Combat Arms earplugs were used by Plaintiff.
99. At the time the Dual-ended Combat Arms earplugs left the possession of Defendant, the Dual-ended Combat Arms earplugs were in a condition which made them unreasonably dangerous to the ordinary U.S. military service member.
100. At the time the Dual-ended Combat Arms earplugs were used by Plaintiff, the Dual-ended Combat Arms earplugs were in a condition which made them unreasonably dangerous to the ordinary U.S. military service member.
101. At all relevant times, Plaintiff used the Dual-ended Combat Arms earplugs in the manner in which they were intended.
102. As designers, developers, manufacturers, inspectors, advertisers, distributors, and suppliers, of the Dual-ended Combat Arms earplugs, Defendant had superior knowledge of the Dual-ended Combat Arms earplugs and owed a duty of care to Plaintiff.
103. It was foreseeable that Defendant's actions, omissions, and misrepresentations would lead to severe, permanent, and debilitating injuries to the Plaintiff.
104. The Dual-ended Combat Arms earplugs were the proximate cause of Plaintiff's personal injuries – specifically Plaintiff's sensorineural hearing loss and tinnitus. Defendant's conduct was a substantial factor in bringing about the injuries sustained by Plaintiff because 3M designed, manufactured, tested, sold, and distributed the Dual-ended Combat Arms earplugs to the U.S. military.
105. As a direct and proximate result of Defendant's negligence in designing the defective Dual-ended Combat Arms earplugs, Plaintiff was caused to sufferer serious

and dangerous side effects, including sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT II**  
**DESIGN DEFECT – STRICT LIABILITY**

106. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.
107. Defendant is engaged in the business of designing, manufacturing, and selling the Dual-ended Combat Arms earplugs.
108. Plaintiff was a foreseeable user of the Dual-ended Combat Arms earplugs.
109. The Dual-ended Combat Arms earplugs are defective in that the design of the earplug causes them to loosen in the wearer's ear, imperceptibly to the wearer, thereby permitting damaging sounds to enter the ear canal by traveling around the outside of the earplug while the user incorrectly believes that the earplug is working as intended.
110. Defendant knew that the defective condition of the Dual-ended Combat Arms earplugs made it unreasonably dangerous to the U.S. military service members who used the device.
111. The Dual-ended Combat Arms earplugs were dangerous when used by an ordinary user who used it as it was intended to be used.
112. The Dual-ended Combat Arms earplugs were dangerous to an extent beyond which would be contemplated by the ordinary user who purchased and/or used the device because the design of the Dual-ended Combat Arms earplugs allow for dangerous

sounds to bypass the plug altogether, thereby posing a serious risk to a U.S military service member's hearing unbeknownst to him or her.

113. Defendant knew of the defective design at the time the Dual-ended Combat Arms earplugs were provided to Plaintiff.

114. At the time the Dual-ended Combat Arms earplugs left Defendant's possession, the Dual-ended Combat Arms earplugs were defective and were in a condition which made them unreasonably dangerous to the ordinary U.S. military service member who used them.

115. At the time the Dual-ended Combat Arms earplugs were used by Plaintiff, the Dual-ended Combat Arms earplugs were defective and were in a condition which made them unreasonably dangerous to the ordinary U.S. military service member who used them.

116. At all relevant times, Plaintiff used the Dual-ended Combat Arms earplugs in the manner in which they were intended.

117. The Dual-ended Combat Arms earplugs were the proximate cause of Plaintiff's hearing loss and tinnitus because the short -stem design of the earplugs allowed for dangerous sounds to bypass the plug altogether thereby posing a serious risk to Plaintiff's hearing unbeknownst to him or her.

118. Defendant's conduct was a substantial factor in bringing about Plaintiff's personal injuries because Defendant designed, tested, manufactured, sold, and distributed the Dual-ended Combat Arms earplugs that caused Plaintiff's hearing loss and tinnitus.

119. As a direct and proximate result of Defendant's design defect, Plaintiff was caused to suffer serious and dangerous side effects, including sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT III**  
**FAILURE TO WARN – NEGLIGENCE**

120. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.
121. At all times relevant to this action, Defendant had a duty to manufacture, design, formulate, test, package, label, produce, create, make, construct, assemble, market, advertise, promote, and distribute, the Dual-ended Combat Arms with reasonable and due care for the safety and wellbeing of U.S. military service men and women, including Plaintiff, who were subject to and used the Dual-ended Combat Arms earplugs during their service with the U.S. military.
122. Plaintiff was a foreseeable user of the Dual-ended Combat Arms earplugs.
123. The Dual-ended Combat Arms earplugs are defective, in part, in that the design of the earplug causes them to loosen in the wearer's ear, imperceptibly to the wearer, thereby permitting damaging sounds to enter the ear canal by traveling around the outside of the earplug while the user incorrectly believes that the earplug is working as intended.
124. The Dual-ended Combat Arms earplugs contained no warnings or instructions, or in the alternative, inadequate warnings or instructions, as to the risk that the Dual-ended Combat Arms earplugs would allow for dangerous sounds to bypass the plug altogether thereby posing a serious risk to Plaintiff's hearing unbeknownst to him or her.

125. The Dual-ended Combat Arms earplugs contained no warnings or instructions, or in the alternative, inadequate warnings or instructions, that subjects in testing did not follow Defendant's standard instructions for insertion, but rather the "modified" insertion method requiring the wearer to fold back the flanges of the opposite end before inserting the plug into the ear.
126. The Dual-ended Combat Arms earplugs contained no warnings or instructions, or in the alternative, inadequate warnings or instructions, that following Defendants standard instructions for insertion would not achieve the "22" NRR and would thereby pose a serious risk to Plaintiff's hearing unbeknownst to him or her.
127. The warnings and instructions that accompanied the Dual-ended Combat Arms earplugs failed to provide the level of information that an ordinary consumer would expect when using the Dual-ended Combat Arms earplugs in a manner reasonably foreseeable to Defendant.
128. Had Plaintiff received proper or adequate warnings or instructions as to the risks associated with the Dual-ended Combat Arms earplugs, including but not limited to instructing wearers to fold back the flanges on the open/unblocked end of the plug before inserting the closed/blocked end of the plug into the ear, Plaintiff would have heeded the warning and/or instructions.
129. The Dual-ended Combat Arms earplugs were the proximate cause of Plaintiff's hearing loss and tinnitus because design of the earplugs allows for dangerous sounds to bypass the plug altogether thereby posing a serious risk to Plaintiff's hearing unbeknownst to him or her.
130. As a direct and proximate result of Defendant's failure to warn, Plaintiff was

caused to sufferer serious and dangerous side effects, including sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT IV**  
**FAILURE TO WARN – STRICT LIABILITY**

131. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.
132. Defendant is engaged in the business of designing, manufacturing, and selling the Dual-ended Combat Arms earplugs.
133. Plaintiff was a foreseeable user of the Dual-ended Combat Arms earplugs.
134. The Dual-ended Combat Arms earplugs are defective in that the design of the earplug causes them to loosen in the wearer's ear, imperceptibly to the wearer, thereby permitting damaging sounds to enter the ear canal by traveling around the outside of the earplug while the user incorrectly believes that the earplug is working as intended.
135. The Dual-ended Combat Arms earplugs are defective and unreasonably dangerous even if Defendants exercised all proper care in the preparation and sale of the product.
136. Defendant knew that the defective condition of the Dual-ended Combat Arms earplugs made it unreasonably dangerous to the U.S. military service members who used the device.
137. The Dual-ended Combat Arms earplugs were dangerous when used by an ordinary user who used it as it was intended to be used.

138. The Dual-ended Combat Arms earplugs were dangerous to an extent beyond which would be contemplated by the ordinary user who purchased and/or used the device because the design of the Dual-ended Combat Arms earplugs allow for dangerous sounds to bypass the plug altogether, thereby posing a serious risk to a U.S military service members' hearing unbeknownst to him or her.
139. Defendant knew of the defective design at the time the Dual-ended Combat Arms earplugs were provided to Plaintiff.
140. At the time the Dual-ended Combat Arms earplugs left Defendant's possession, the Dual-ended Combat Arms earplugs were defective and were in a condition which made them unreasonably dangerous to the ordinary U.S. military service member who used them.
141. At the time the Dual-ended Combat Arms earplugs were used by Plaintiff, the Dual-ended Combat Arms earplugs were defective and were in a condition which made them unreasonably dangerous to the ordinary U.S. military service member who used them.
142. At all relevant times, Plaintiff used the Dual-ended Combat Arms earplugs in the manner in which they were intended.
143. The Dual-ended Combat Arms earplugs contained no warnings, or in the alternative, inadequate warnings and/or instructions, as to the risk that the Dual-ended Combat Arms earplugs would allow for dangerous sounds to bypass the plug altogether thereby posing a serious risk to Plaintiff's hearing unbeknownst to him or her.
144. The Dual-ended Combat Arms earplugs contained no warnings or instructions, or in the alternative, inadequate warnings or instructions, that subjects in testing did not follow Defendant's standard instructions for insertion, but rather the "modified"

insertion method requiring the wearer to fold back the flanges of the opposite end before inserting the plug into the ear.

145. The Dual-ended Combat Arms earplugs contained no warnings or instructions, or in the alternative, inadequate warnings or instructions, that following Defendants standard instructions for insertion would not achieve the “22” NRR and would thereby pose a serious risk to Plaintiff’s hearing unbeknownst to him or her.

146. The warnings and instructions that accompanied the Dual-ended Combat Arms earplugs failed to provide the level of information that an ordinary consumer would expect when using the Dual-ended Combat Arms earplugs in a manner reasonably foreseeable to Defendant.

147. Had Plaintiff received proper or adequate warnings or instructions as to the risks associated with the Dual-ended Combat Arms earplugs, including but not limited to instructing wearers to fold back the flanges on the open/unblocked end of the plug before inserting the closed/blocked end of the plug into the ear, Plaintiff would have heeded the warning and/or instructions.

148. The Dual-ended Combat Arms earplugs were the proximate cause of Plaintiff’s hearing loss and tinnitus because the short -stem design of the earplugs allowed for dangerous sounds to bypass the plug altogether thereby posing a serious risk to Plaintiff’s hearing unbeknownst to him or her.

149. Defendant’s conduct was a substantial factor in bringing about Plaintiff’s personal injuries because Defendant designed, tested, manufactured, sold, and distributed the Dual-ended Combat Arms earplugs that caused Plaintiff’s hearing loss and tinnitus.

150. As a direct and proximate result of Defendant’s design defect, Plaintiff was caused to suffer serious and dangerous side effects, including sensorineural hearing loss

and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT V**  
**BREACH OF EXPRESS WARRANTY**

151. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

152. Through Defendant's public statements, descriptions of the Dual-ended Combat Arms earplugs, and promises relating to the Dual-ended Combat Arms earplugs, Defendant expressly warranted, among other things, that the Dual-ended Combat Arms earplugs were safe and effective for their intended use, and were designed and constructed to prevent harmful sounds from bypassing the earplugs to protect the user's hearing.

153. These warranties came in one or more of the following forms: (i) publicly made written and verbal assurances of safety; (ii) press releases and dissemination via the media, or uniform promotional information that was intended to create a demand for the Dual-ended Combat Arms earplugs (but which contained material misrepresentations and utterly failed to warn of the risks of the Dual-ended Combat Arms earplugs); (iii) verbal assurances made by Defendant's consumer relations personnel about the safety of the Dual-ended Combat Arms earplugs which also downplayed the risks associated with the Dual-ended Combat Arms earplugs; and (iv) false and misleading written information and packaging supplied by Defendant.

154. When Defendant made these express warranties, it knew the purpose(s) for which

the Dual-ended Combat Arms earplugs were to be used and warranted it to be in all respects safe and proper for such purpose(s).

155. Defendant drafted the documents and/or made statements upon which these warranty claims are based and, in doing so, defined the terms of those warranties.

156. The Dual-ended Combat Arms earplugs do not conform to Defendant's promises, descriptions, or affirmation of fact, and were not adequately packaged, labeled, promoted, and/or fit for the ordinary purposes for which such earplugs are used.

157. Plaintiff further alleges that all of the aforementioned written materials are known to Defendant and in its possession, and it is Plaintiff's reasonable belief that these materials shall be produced by Defendant and made part of the record once Plaintiff is afforded the opportunity to conduct discovery.

158. As a direct and proximate result of Defendant's breach of the express warranties, Plaintiff was caused to sufferer serious and dangerous side effects, including sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT VI**  
**BREACH OF IMPLIED WARRANTIES**

159. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

160. At all times material, Defendant was a merchant with respect to the Dual-Ended Combat Arms earplugs.

161. As a service member, Plaintiff was a foreseeable user of the Dual-ended Combat Arms earplugs.
162. At the time Defendant marketed, sold, and distributed the Dual-ended Combat Arms earplugs, Defendant knew of the use for which the Dual-ended Combat Arms earplugs were intended, impliedly warranted the Dual-ended Combat Arms earplugs to be fit for a particular purpose, and warranted that the Dual-ended Combat Arms earplugs were of merchantable quality and effective for such use.
163. Defendant knew, or had reason to know, that Plaintiff would rely on Defendant's judgment and skill in providing the Dual-ended Combat Arms earplugs for its intended use.
164. Plaintiff reasonably relied upon the skill and judgment of Defendant as to whether the Dual-ended Combat Arms earplugs were of merchantable quality, safe, and effective for its intended use.
165. Contrary to such implied warranties, the Dual-ended Combat Arms earplugs were neither of merchantable quality, nor safe or effective for its intended use, because the Dual-ended Combat Arms earplugs were, and are, unreasonably dangerous, defective, unfit and ineffective for the ordinary purposes for which the Dual-ended Combat Arms earplugs were used.
166. The Dual-ended Combat Arms earplug was defectively designed and manufactured, and was distributed and sold without the provision of reasonable instructions or warnings regarding the foreseeable risk of harm posed by the Dual-ended Combat Arms earplugs to service members, including Plaintiff.
167. As a direct and proximate result of Defendant's breach of implied warranties,

Plaintiff was caused to sufferer serious and dangerous side effects, including sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT VII**  
**FRAUDULENT MISREPRESENTATION**

168. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.
169. Defendant falsely and fraudulently represented to Plaintiff, and/or the public in general, that the Dual-ended Combat Arms earplugs had been properly tested and were free from all defects.
170. Defendant intentionally manipulated testing of the Dual-ended Combat Arms earplugs, resulting in false and misleading NRRs and improper fitting instructions.
171. The representations made by Defendant were, in fact, false.
172. When said representations were made by Defendant, it knew those representations to be false and it willfully, wantonly and recklessly disregarded whether the representations were true.
173. These representations were made by Defendant with the intent of defrauding and deceiving Plaintiff and the public in general, and were made with the intent of inducing Plaintiff and the public in general, to recommend, purchase, and/or use the Dual-ended Combat Arms earplugs, all of which evinced a callous, reckless, willful, depraved indifference to the health, safety and welfare of Plaintiff.

174. At the time the aforesaid representations were made by Defendant, and at the time Plaintiff used the Dual-ended Combat Arms earplugs, Plaintiff was unaware of the falsity of said representations and reasonably believed them to be true.

175. In reliance upon said representations, Plaintiff was induced to and did use Dual-ended Combat Arms earplugs, thereby sustaining severe and permanent personal injuries.

176. Defendant knew and was aware, or should have been aware, that the Dual-ended Combat Arms earplugs had not been sufficiently tested, were defective in nature, and/or that they lacked adequate and/or sufficient warnings and instructions.

177. Defendant knew or should have known that the Dual-ended Combat Arms earplugs had a potential to, could, and would cause severe and grievous injury to the users of said product.

178. Defendant brought the Dual-ended Combat Arms earplugs to the market and acted fraudulently, wantonly and maliciously to the detriment of Plaintiff.

179. As a result of the foregoing acts and omissions, Plaintiff was caused to suffer serious and dangerous side effects, including sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT VIII**  
**FRAUDULENT CONCEALMENT**

180. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

181. At all times relevant, Defendant misrepresented the safety and efficacy of the Dual-ended Combat Arms earplugs for their intended use.
182. Defendants knew or were reckless in not knowing that their representations were false.
183. In representations to Plaintiff, Defendant fraudulently concealed and intentionally omitted the following material information:
- a. that testing of the Dual-ended Combat Arms earplug was deliberately flawed;
  - b. the amount of hearing protection provided by the Combat Arms earplug;
  - c. that Defendant was aware of the defects in the Dual-ended Combat Arms earplug;
  - d. that the Dual-ended Combat Arms earplug was defective, and would cause dangerous side effects, including but not limited to hearing damage or impairment;
  - e. that the Dual-ended Combat Arms earplug was manufactured negligently;
  - f. that the Dual-ended Combat Arms earplug was manufactured defectively;
  - g. that the Dual-ended Combat Arms earplug was designed defectively;
  - h. that the Dual-ended Combat Arms earplug was designed negligently; and,
  - i. that the Dual-ended Combat Arms earplug was designed improperly.
184. Defendant was under a duty to disclose to Plaintiff the defective nature of the dual-end Combat Arms earplugs.
185. Defendant had sole access to material facts concerning the defective nature of the product and its propensity to cause serious and dangerous side effects, and hence, caused damage to persons who used the dual-end Combat Arms earplugs, including Plaintiff.

186. Defendant's concealment and omissions of material facts concerning, inter alia, the safety and efficacy of the Dual-end Combat Arms earplugs was made purposefully, willfully, wantonly, and/or recklessly, to mislead Plaintiff into reliance, continued use of the dual-end Combat Arms earplug, and actions thereon, and to cause him or her to purchase and/or use the product. Defendant knew that Plaintiff had no way to determine the truth behind Defendant's concealment and omissions, and that these included material omissions of facts surrounding the Dual-end Combat Arms earplugs, as set forth herein.

187. Plaintiff reasonably relied on facts revealed which negligently, fraudulently and/or purposefully did not include facts that were concealed and/or omitted by Defendant.

188. By reason of the foregoing, Plaintiff was caused to sufferer serious and dangerous side effects, including sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT IX**  
**NEGLIGENT MISREPRESENTATION**

189. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

190. Defendant had a duty to represent to Plaintiff and the public in general that the Dual-ended Combat Arms earplugs had been properly tested and found to be effective.

191. Defendant was aware its testing procedures and fitting instructions were unlawfully

manipulated.

192. The representations made by Defendant were, in fact, false.

193. Defendant failed to exercise ordinary care in the representation of the Dual-ended Combat Arms earplugs, while involved in its manufacture, sale, testing, quality assurance, quality control, and/or distribution into interstate commerce, in that Defendant negligently misrepresented the Dual-ended Combat Arms earplugs' safety and efficacy.

194. Defendant breached its duty in representing the Dual-ended Combat Arms earplugs' serious defects to Plaintiff.

195. As a result of the foregoing acts and omissions, Plaintiff was caused to suffer serious and dangerous side effects including, sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT X**  
**FRAUD AND DECEIT**

196. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

197. Defendant conducted unlawful and improper testing on the Dual-ended Combat Arms earplugs.

198. As a result of Defendant's unlawful and improper testing, Defendant blatantly and intentionally distributed false information which overstated the amount of hearing protection provided by the Dual-ended Combat Arms earplugs.

199. As a result of Defendant's unlawful and improper testing, Defendant intentionally omitted and misrepresented certain test results to Plaintiff.
200. Defendant had a duty when disseminating information to the public to disseminate truthful information and a parallel duty not to deceive the public and Plaintiff.
201. The information distributed to Plaintiff by Defendant contained material representations of fact and/or omissions concerning the hearing protection provided by the Dual-ended Combat Arms earplugs.
202. These representations were all false and misleading.
203. Upon information and belief, Defendant intentionally suppressed and/or manipulated test results to falsely overstate the amount of hearing protection provided by the Dual-ended Combat Arms earplugs.
204. It was the purpose of Defendant in making these representations to deceive and defraud the public and/or Plaintiff, to gain the confidence of the public and/or Plaintiff, to falsely ensure the quality and fitness for use of the Dual-ended Combat Arms earplug and induce the public and/or Plaintiff to purchase, request, dispense, recommend, and/or continue to use the Dual-ended Combat Arms earplugs.
205. Defendant made the aforementioned false claims and false representations with the intent of convincing the public and/or Plaintiff that the Dual-ended Combat Arms earplugs were fit and safe for use.
206. These representations and others made by Defendant were false when made, and/or were made with a pretense of actual knowledge when knowledge did not actually exist, and/or were made recklessly and without regard to the actual facts.
207. These representations and others made by Defendant were made with the

intention of deceiving and defrauding Plaintiff, were made to induce Plaintiff to rely upon misrepresentations, and caused Plaintiff to purchase, use, rely on, request, dispense, and/or recommend the Dual-ended Combat Arms earplugs.

208. Defendant, recklessly and intentionally falsely represented the dangerous and serious health and/or safety concerns of the Dual-ended Combat Arms earplugs to the public at large, and Plaintiff in particular, for the purpose of influencing the marketing of a product known to be dangerous and defective and/or not as safe as other alternatives.

209. Defendant willfully and intentionally failed to disclose the material facts regarding the dangerous and serious safety concerns of Dual-ended Combat Arms earplugs by concealing and suppressing material facts regarding the dangerous and serious health and/or safety concerns of Dual-ended Combat Arms earplug.

210. Defendant willfully and intentionally failed to disclose the truth, failed to disclose material facts, and made false representations with the purpose and design of deceiving and lulling Plaintiff into a sense of security so that Plaintiff would rely on the representations made by Defendant and purchase, use, and rely on the Dual-ended Combat Arms earplugs.

211. Plaintiff did in fact rely on and believe the Defendant's representations to be true at the time they were made and relied upon the representations and was thereby induced to use and rely on the Dual-ended Combat Arms earplugs.

212. At the time the representations were made, Plaintiff did not know the truth regarding the dangerous and serious safety concerns of the Dual-ended Combat Arms earplugs.

213. Plaintiff did not discover the true facts with respect to the dangerous and serious health and/or safety concerns, and the false representations of Defendants, nor could Plaintiff with reasonable diligence have discovered the true facts.

214. Had Plaintiff known the true facts with respect to the dangerous and serious health and/or safety concerns of Dual-ended Combat Arms earplugs, Plaintiff would not have used and/or relied on the Dual-ended Combat Arms earplugs.

215. Defendant's aforementioned conduct constitutes fraud and deceit and was committed and/or perpetrated willfully, wantonly and/or purposefully on Plaintiff.

216. As a result of the foregoing acts and omissions, Plaintiff was caused to suffer serious and dangerous side effects including, sensorineural hearing loss and tinnitus, and has further suffered the injuries and damages as alleged herein.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**COUNT XI**  
**GROSS NEGLIGENCE**

217. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

218. The wrongs committed by Defendant were aggravated by the kind of malice, fraud, and grossly negligent disregard for the rights of others, the public, and Plaintiff, for which the law would allow the imposition of punitive damages (and which Plaintiff seeks, as set forth below).

219. Such punitive damages are appropriate given Defendant's conduct, as further alleged herein, which includes the failure to comply with applicable guidelines and

standards, including but not limited to ANSI, OSHA, EPA, and MPID guidelines and standards, which recklessly caused substantial injuries to Plaintiff (or, when viewed objectively from Defendant's standpoint at the time of the conduct, involved an extreme degree of risk considering the probability and magnitude of the potential harm to others), of which Defendant was actually, subjectively aware of the risks involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others, or included a material representation that was false, with Defendant knowing that it was false or with reckless disregard as to its truth and as a positive assertion, with the intent that the representation is acted on by Plaintiff.

220. Plaintiff relied on the representations and suffered injuries as a proximate result of this reliance.

221. Plaintiff seeks to assert claims for punitive damages in an amount within the jurisdictional limits of the Court, as set forth below.

222. Plaintiff also alleges that the acts and omissions of the Defendant, whether taken singularly or in combination with others, constitute gross negligence that proximately caused the injuries to Plaintiff. In that regard, Plaintiff seeks punitive damages in amounts that would punish Defendant for its conduct and which would deter other manufacturers from engaging in such misconduct in the future.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

### **PUNITIVE DAMAGES**

223. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

224. Defendant has acted willfully, wantonly, with an evil motive, and recklessly in one or more of the following ways:

- a. By failing to disclose material facts regarding the dangerous and serious safety concerns of Dual-ended Combat Arms earplugs by concealing and suppressing material facts regarding the dangerous and serious health and/or safety concerns of Dual-ended Combat Arms earplugs;
- b. By failing to disclose the truth and making false representations with the purpose and design of deceiving and lulling Plaintiffs, and others, so that they would use and rely upon the Dual-ended Combat Arms earplugs;
- c. By falsely representing the dangerous and serious health and/or safety concerns of the Dual-ended Combat Arms earplugs to the public at large, and Plaintiff in particular.

WHEREFORE, Plaintiff demands judgment against Defendant and requests compensatory damages, punitive damages, together with interest, costs of suit, attorneys' fees, and such further relief as the Court deems equitable and just.

**ATTORNEY FEES, COSTS AND EXPENSES O.C.G.A. § 13-6-11**

225. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

226. Under O.C.G.A. § 13-6-11, attorney fees may be recovered by Plaintiff if Defendant has acted in bad faith, or has been stubbornly litigious, or has caused the Plaintiff unnecessary trouble and expense; and, it is only necessary to the Plaintiff's recovery that he show any one of these three conditions exists.

227. Defendant has acted in bad faith and has caused the Plaintiff unnecessary trouble and expense.

228. Plaintiff seeks attorney fees, costs and expenses pursuant to O.C.G.A. § 13-6-11 for

having to bring this action.

**JURY DEMAND**

Plaintiff hereby demands a trial by jury as to all claims in this action.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays as follows:

- i. That process issue according to law;
- ii. Award monetary damages, including compensatory relief, to which Plaintiff is entitled in an amount to be proven at trial;
- iii. For punitive damages in an amount to be proven at trial;
- iv. For attorney fees, expenses and costs pursuant to O.C.G.A. § 13-6-11;
- v. For pre and post judgment interest if allowable; and
- vi. Award Plaintiff such other and further relief as may be just and proper.

Respectfully submitted this 8<sup>th</sup> day of February 2019.

THE FINLEY FIRM, P.C.

/s/ MaryBeth V. Gibson  
MARYBETH V. GIBSON  
Georgia Bar No.: 725843  
[mgibson@thefinleyfirm.com](mailto:mgibson@thefinleyfirm.com)  
J. BENJAMIN FINLEY  
Georgia Bar No.: 261504  
[bfinley@thefinleyfirm.com](mailto:bfinley@thefinleyfirm.com)

*Counsel for Plaintiff*

Piedmont Center  
3535 Piedmont Road  
Building 14, Suite 230  
Atlanta, GA 30305  
T: 404-320-9979  
F: 404-320-9978

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

(b) County of Residence of First Listed Plaintiff \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

**DEFENDANTS**

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question  
(U.S. Government Not a Party)
- ☐ 4 Diversity  
(Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutional of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education <b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding    ☐ 2 Removed from State Court    ☐ 3 Remanded from Appellate Court    ☐ 4 Reinstated or Reopened    ☐ 5 Transferred from Another District (specify)    ☐ 6 Multidistrict Litigation - Transfer    ☐ 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

**FOR OFFICE USE ONLY**

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.  
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.  
**PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.

\_\_\_\_\_ District of \_\_\_\_\_

Plaintiff(s)

V.

Civil Action No.

Defendant(s)

# SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: \_\_\_\_\_

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_ .

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_ , a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_ , and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_ , who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

☐ I returned the summons unexecuted because \_\_\_\_\_ ; or

☐ Other *(specify)*: \_\_\_\_\_ .

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: