

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

SHANNON WEAVER,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. _____
vs.	:	
	:	
3M COMPANY,	:	
	:	Jury Trial Demanded
Defendant.	:	
	:	
	:	

COMPLAINT

Plaintiff Shannon Weaver (“Plaintiff”), by and through the undersigned counsel, brings this Complaint seeking judgment against Defendant 3M Company (hereinafter referred to as “Defendant,” “3M” or “3M/Aearo”), for personal injuries incurred during his military service, 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 times relevant hereto, 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.

I. NATURE OF THE ACTION

1. This case arises from defective earplugs manufactured and sold by Defendant to the United States military for use by American soldiers. Plaintiff was issued and used the military earplugs and, as a result of their defective condition and Defendant’s misrepresentations, now suffers from partial hearing loss and tinnitus in both ears. Plaintiff used Defendant’s dangerously defective Dual-ended Combat Arms™ earplugs during his time on reserve duty and/or active duty in Iraq. 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). 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 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.

II. PARTIES, JURISDICTION, AND VENUE

2. Plaintiff is a citizen and resident of Lancaster County, Pennsylvania who initially served as a U.S. Marine sergeant and later served in the Army National Guard reserves.

3. Plaintiff was issued Defendant's defective earplugs and Plaintiff used them during his reserve and/or active duty to service the electronic systems of aircrafts.

4. Defendant 3M is a Delaware corporation with its principal place of business in Saint Paul, Minnesota.

5. 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.

6. The 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.

7. This Court has personal jurisdiction over Defendant because it maintains its principal place of business in Saint Paul, Minnesota, regularly conducts business in Minnesota, and has

sufficient minimum contacts with Minnesota. Defendant intentionally avails itself of this jurisdiction by marketing and selling products, including Combat Earplugs, from Minnesota. Defendant has a registered agent for service of process in Minnesota and therefore consented to be sued in Minnesota.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Defendant resides in this District and a substantial part of the events or omissions giving rise to the claims occurred in and/or emanated from this District.

III. FACTUAL ALLEGATIONS

9. Based upon information and belief, and in part upon the pleadings and allegations as contained in *United States ex rel. Moldex-Metric, Inc. v. 3M Co.*, Case No. 3:16-cv-01533-DCC (D.S.C. 2016), Plaintiff states as follows:

10. On July 26, 2018, Defendant 3M Company 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-million-resolve-allegations-it-supplied-united-states-defective-dual> (last visited Jan. 31, 2019).

11. Defendant's Dual-ended Combat Arms™ earplugs are non-linear, or selective attenuation, earplugs. Like all non-linear earplugs, Defendant designed its Dual-ended Combat Arms™ to provide soldiers with two different levels of sound attenuation depending upon how the soldier wears the plugs. Both sides of the dual-sided earplugs were purported to provide adequate protection for soldier's ears when worn.



12. If worn in the “closed” or “blocked” position (*i.e.*, olive-colored side in the user’s ear), then the earplugs are intended to act as a traditional earplug and block as much sound as possible.

13. If worn in the “open” or “unblocked” position (*i.e.*, yellow colored side in the user’s ear), then the earplugs are intended to reduce loud impulse sounds, such as battlefield explosions and artillery fire, while still allowing the user to hear quieter noises; for example, commands spoken by fellow soldiers or approaching enemy combatants.

14. Defendant’s standard fitting instructions direct the wearer to grasp the earplug by the stem and insert it into the ear canal.

15. The design of the earplug prevents a snug fit in the ear canal of the wearer, an inherent defect about which Defendant provided no adequate warning.

16. Inserting the earplugs according to Defendant’s standard fitting instructions, results in a loosening of the seal between the earplug and the wearer’s ear canals, thereby providing inadequate protection to the wearer.

17. Because the earplugs are symmetrical, the standard fitting instructions will result in a loosening of the seal regardless of which side the wearer inserted into his or her ear canal.

18. These earplugs were originally created by a company called Aearo Technologies ("Aearo" or "3M/Aearo").

19. Defendant 3M acquired Aearo in 2008, including Aearo's liabilities, and thus 3M is liable for Aearo's conduct as alleged herein.

20. Earplugs like the Dual-ended Combat Arms™ earplugs are sold with a stated Noise Reduction Rating ("NRR") that should accurately reflect the effectiveness of hearing protection.

21. NRR is a unit of measurement the federal government uses to determine the effectiveness of hearing protection devices to decrease sound exposure within a given working environment. *See* 40 C.F.R. § 211.203(q). Classified by their potential to reduce noise in decibels (dB) – a term used to categorize the power or density of sound – hearing protectors must be tested and approved by the American National Standards (ANSI) in accordance with the Occupational Safety & Health Administration (OSHA). The higher the NRR number associated with a hearing protector, the greater the potential for noise reduction.

22. The military likely purchased, at a minimum, one pair of 3M/Aearo's Combat Arms™ earplugs for each deployed soldier annually 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).

23. 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/Aearo to the military until at least late 2015, when 3M/Aearo discontinued the earplugs.

24. The defective earplugs have not been recalled and therefore could very well be in continued use by soldiers and others.

History of Testing
January 2000 Testing

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

26. 3M/Aearo chose to conduct the testing at its own laboratory rather than an outside, independent laboratory.

27. 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.

28. 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. Defendant designed this testing to produce data regarding the "NRR" of the Dual-ended Combat Arms™ earplugs.

29. 3M/Aearo personnel monitored the results of each subject as the test transpired and could thus stop the test if the desired NRR results were not achieved.

30. Eight of the ten subjects were tested using both the open and closed end of the Dual-ended Combat Arms™ earplug.

31. Testing of the eight subjects revealed an average NRR of 10.9 for the closed end, a result far below the adequate NRR that 3M/Aearo personnel would and should have expected.

32. 3M/Aearo prematurely terminated the January 2000 testing of the closed end of the Dual-ended Combat Arms™ earplug.

33. 3M/Aearo 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.

34. The symmetrical nature of the earplug prevents a snug fit when worn either “open” or “closed” according to the standard fitting instructions.

35. 3M/Aearo personnel determined that to achieve a snug fit, a wearer would need to fold back the flanges of the opposite, non-inserted end of the earplug prior to insertion.

36. 3M/Aearo personnel decided not to test the closed end of the Dual-ended Combat Arms™ earplug for two of the ten subjects because the results were well below the intended and desired NRR.

37. 3M/Aearo completed testing of all ten subjects with the open end of the Dual-ended Combat Arms™ earplug to obtain a facially invalid -2 NRR, which would indicate that the closed end of the earplug actually amplified sound.

38. 3M/Aearo nonetheless represented the -2 NRR as a “0” NRR which 3M/Aearo has displayed on its packaging since its launch.

39. 3M/Aearo 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. As stated however, the “true” -2 NRR actually amplifies sound thereby exposing the wearer to harm.

February 2000 Testing

40. Upon identifying the fit issue, 3M/Aearo re-tested the olive, closed end of the Dual-ended Combat Arms™ earplug in February 2000 using different fitting instructions.

41. When testing the closed end, 3M/Aearo personnel folded back the yellow flanges on the open end of the Dual-ended Combat Arms™ earplug prior to insertion.

42. Using this “modified” fitting procedure, 3M/Aearo achieved a “22” NRR on the closed end of the Dual-ended Combat Arms™ earplug.

43. 3M, however, 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 prior to insertion of the olive end of the earplug.

44. The yellow, open end of the Dual-ended Combat Arms™ earplug was not re-tested using the “modified” fitting procedure.

Defendant’s Representations and Omissions

45. Since 2003, 3M/Aearo has been awarded multiple Indefinite-Quantity Contracts (“IQC”) from the U.S. military in response to Requests for Production (“RFP”).

46. From 2003-2012, 3M/Aearo was the exclusive supplier of non-linear or selective attenuation earplugs to the U.S. military.

47. 3M/Aearo was aware of the design defects alleged herein in as early as 2000.

48. Accordingly, the defects of the Dual-ended Combat Arms™ earplugs were known to Defendant many years before 3M/Aearo became the exclusive provider of non-linear or selective attenuation earplugs to the U.S. military.

49. 3M/Aearo knew at the time it bid for the initial IQC that the Dual-ended Combat Arms™ earplugs had dangerous design defects that would cause them to inadequately protect users from loud sounds, and 3M/Aearo failed to both warn of the defects and adequately instruct how to wear the earplugs.

50. 3M/Aearo responded to the military’s Requests for Proposal (“RFP”) with express certifications that it complied with the Salient Characteristics of Medical Procurement Item Description (“MPID”) of Solicitation No. SP0200-06-R-4202.

51. 3M/Aearo knew at the time it made its certifications that the earplugs did not comply with the MPID.

52. 3M/Aearo knew the design defects could cause the earplugs to imperceptibly loosen in the wearer's ear, thereby permitting damaging sounds to enter the ear canal by traveling around the outside of the earplug, while the user believes that the earplug is working as intended.

53. The pertinent Salient Characteristics set forth in the MPID, which were uniform across all RFPs, in relevant part, are as follows:

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 (emphasis added).

54. The Environmental Protection Agency ("EPA") has also promulgated regulations pursuant to the Noise Control Act, 42 U.S.C. § 4901, *et seq.*, that govern the testing and attendant labeling of hearing protective devices like the Dual-ended Combat Arms™ earplugs. Specifically, 40 C.F.R. § 211.206-1 provides that:

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.

55. Additionally, 40 C.F.R. § 211.204-4(e), of the EPA regulations requires certain “supporting information” must 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 added).

56. 3M/Aearo knowingly used its deliberately flawed retest of the closed end of the earplugs to sell Dual-ended Combat Arms™ earplugs to the military with the false representation that they possess a “22” NRR in the closed position.

57. 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.

58. Defendant’s standard instructions for “proper use” of its Dual-ended Combat Arms™ earplugs do not instruct wearers to fold back the flanges of the opposite end before inserting the plug into the ear.

59. Instead, Defendant improperly instructs wearers to simply insert the earplugs into the ear canal.

60. By failing to instruct wearers of the Dual-ended Combat Arms™ earplug to fold back the flanges on the open/unblocked end of the plug before inserting the closed/blocked end of the plug into their ears (which is necessary to achieve the purported “22” NRR), 3M/Aearo falsely overstates the amount of hearing protection provided by the closed end of the plug.

61. 3M’s/Aearo’s packaging and marketing of such earplugs with a labeled NRR of “22” thereby misleads the wearer and has likely caused thousands of soldiers to suffer significant

hearing loss and tinnitus in addition to exposing millions more to the risk caused by 3M/Aearo's defective earplugs.

62. Despite knowing that its flawed testing involved steps to manipulate the fit of the earplug, 3M's/Aearo's standard instructions for use of the earplugs do not instruct, and never have instructed, the wearer to fold back the flanges on the open end of the plug before inserting the closed end of the plug into their ears (which is necessary to achieve the "22" NRR and avoid the defect associated with the short stem).

63. 3M's/Aearo's instructions, instead, have provided standard fitting instructions for inserting the earplug on both ends, which are facially inadequate.

64. 3M/Aearo was aware, prior to selling the earplugs to the military, that its testing procedures and fitting instructions were unlawfully manipulated to obtain the NRRs it wanted on both ends of the Dual-ended Combat Arms™ earplug, but 3M/Aearo nonetheless continued to use these inaccurate NRRs to market the earplugs to the military for more than ten years without disclosing the design defect in the plugs.

65. Plaintiff reserves the right to supplement these facts after discovery.

Plaintiff Shannon Weaver

66. Plaintiff joined the military in 1995 at the age of 20.

67. Prior to joining the military, Plaintiff had no signs or symptoms of hearing loss or tinnitus.

68. From 1995 to 1997, Plaintiff served in the United States Marine Corp reserve at the Willow Grove Naval Air Station, in Pennsylvania, where, among other things, he performed weather equipment repair work. Plaintiff continued his service in Willow Grove from 1997 to May of 2001, during which time the focus of his work became aircraft maintenance.

69. From May of 2001 to November 2007, Plaintiff served on reserve duty as part of the Army National Guard at Fort Indiantown Gap, Pennsylvania, during which time he was deployed to serve active duty in Iraq for an eighteen-month period (from approximately May 2004 to October 2005).

70. At the time of Plaintiff's deployment to Iraq, the 3M Dual-ended Combat Arms™ earplugs were standard issue.

71. The Dual-ended Combat Arms™ earplugs were provided to Plaintiff during his military service.

72. Plaintiff consistently wore the Dual-ended Combat Arms™ earplugs during his reserve and/or active duty in Iraq for a one to two-year period.

73. Specifically, Plaintiff wore the Dual-ended Combat Arms™ earplugs while, among other things, servicing the electronic systems within military helicopters, and regularly worked in close proximity to the loud, propeller-generated aircrafts.

74. Plaintiff was never instructed to fold back the flanges on the opposite side, non-inserted end of the Dual-ended Combat Arms™ earplugs prior to insertion.

75. Plaintiff was recently diagnosed with partial hearing loss and tinnitus in both ears and hearing aids were recommended by his treating physician at that time.

IV. CAUSES OF ACTION

First Cause of Action: Negligence

76. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

77. 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.

78. 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.

79. The Dual-ended Combat Arms™ earplugs were and 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.

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

81. 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 a wearer's 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.

82. 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™ 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 properly and thoroughly test the Dual-ended Combat Arms™ earplugs;

- c. Defendant failed to properly and thoroughly analyze the data resulting from testing of the Dual-ended Combat Arms™ earplugs;
- d. 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;
- e. Defendant designed, manufactured, distributed, and sold the Dual-ended Combat Arms™ earplugs without providing proper instructions to avoid the harm which could foreseeably occur because of using the earplugs in the manner the Defendant's standard fitting instructions directed;
- f. 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
- g. Defendant negligently continued to manufacture and distribute the Dual-ended Combat Arms™ earplugs (Version 2 CAEv.2) to the U.S. military after Defendant knew or should have known of its adverse effects and/or the availability of safer designs.

83. 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 who used the earplugs.

84. 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.

85. Defendant knew or should have known of the defective design at the time the Dual-ended Combat Arms™ earplugs were used by Plaintiff.

86. At the time the Dual-ended Combat Arms™ earplugs were used by Plaintiff and left the possession of Defendant, the Dual-ended Combat Arms™ earplugs were in a condition which made it unreasonably dangerous to the ordinary U.S. military service member.

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

88. 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.

89. It was foreseeable that Defendant's actions, omissions, and misrepresentations would lead to severe, permanent, and debilitating injuries to the Plaintiff.

90. The Dual-ended Combat Arms™ earplugs were the proximate cause of Plaintiff's personal injuries – specifically Plaintiff's 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.

91. As a direct and proximate result of Defendant's negligence in designing the defective Dual-ended Combat Arms™ earplugs, Plaintiff was caused to suffer serious and dangerous side effects, including 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.

Second Cause of Action: Design Defect- Strict Liability

92. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

93. Plaintiff was a foreseeable user of the Dual-ended Combat Arms™ earplugs.

94. 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.

95. 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.

96. The Dual-ended Combat Arms™ earplugs were dangerous when used by an ordinary user who used them as they were intended to be used.

97. The Dual-ended Combat Arms™ earplugs were dangerous to an extent beyond which would be contemplated by the ordinary user who purchased 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.

98. Such a risk of damage to hearing, upon normal use, makes the earplugs dangerous beyond the reasonable expectations of military personnel such as Plaintiff.

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

100. 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.

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

102. The Dual-ended Combat Arms™ earplugs were the proximate cause of Plaintiff's hearing loss and tinnitus because the flawed 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.

103. The probability and seriousness of harm caused by the Defendant's earplugs outweighs the burden or costs of taking precautions against such harm.

104. 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.

105. As a direct and proximate result of Defendant's design defect, Plaintiff was caused to suffer serious and dangerous side effects, including 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.

Third Cause of Action: Failure to Warn

106. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

107. 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.

108. Plaintiff was a foreseeable user of the Dual-ended Combat Arms™ earplugs.

109. 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.

110. 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.

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

112. Had Plaintiff received a proper or adequate warning as to the risks associated with the Dual-ended Combat Arms™ earplugs, he would not have used the Dual-ended Combat Arms™ earplugs.

113. 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.

114. As a direct and proximate result of Defendant's failure to warn, Plaintiff was caused to suffer serious and dangerous side effects, including 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.

Fourth Cause of Action: Breach of Express Warranty

115. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

116. 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.

117. 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.

118. 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).

119. 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.

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

121. 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 be made part of the record once Plaintiff is afforded the opportunity to conduct discovery.

122. As a direct and proximate result of Defendant's breach of the express warranties, Plaintiff was caused to suffer serious and dangerous side effects, including 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.

Fifth Cause of Action: Breach of Implied Warranties

123. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

124. 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 and 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.

125. 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 their intended use.

126. 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 their intended use.

127. 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.

128. As a direct and proximate result of Defendant's breach of implied warranties, Plaintiff was caused to suffer serious and dangerous side effects, including 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.

Sixth Cause of Action: Fraudulent Misrepresentation

129. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

130. 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.

131. Defendant intentionally manipulated testing of the Dual-ended Combat Arms™ earplugs, resulting in false and misleading NRRs and improper fitting instructions.

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

133. 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.

134. These representations were made by said 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 herein.

135. 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.

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

137. 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 instructions.

138. 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.

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

140. As a result of the foregoing acts and omissions, Plaintiff was caused to suffer serious and dangerous side effects, including 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.

Seventh Cause of Action: Negligent Misrepresentation

141. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

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

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

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

145. Defendant failed to exercise ordinary care in the representation of the Dual-ended Combat Arms™ earplugs, while involved in their 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.

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

147. As a result of the foregoing acts and omissions, Plaintiff was caused to suffer serious and dangerous side effects, including 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.

V. TIMELINESS AND TOLLING OF STATUTES OF LIMITATIONS

148. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

149. At all times relevant, Defendant misrepresented the safety and efficacy of the Dual-ended Combat Arms™ earplugs for their intended use.

150. Defendant knew or was reckless in not knowing that its representations were false.

151. In representations to Plaintiff, Defendant fraudulently concealed and intentionally omitted the following material information:

- a. that testing of the Dual-ended Combat Arms™ earplugs were deliberately flawed;
- b. the amount of hearing protection provided by the Combat Arms™ earplugs;
- c. that Defendant was aware of the defects in the Dual-ended Combat Arms™ earplugs;
- d. that the Dual-ended Combat Arms™ earplugs were defective, and would cause dangerous side effects, including but not limited to hearing damage or impairment;
- e. that the Dual-ended Combat Arms™ earplugs were manufactured negligently;
- f. that the Dual-ended Combat Arms™ earplugs were manufactured defectively;
- g. that the Dual-ended Combat Arms™ earplugs were designed defectively;
- h. that the Dual-ended Combat Arms™ earplugs were designed negligently; and

- i. that the Dual-ended Combat Arms™ earplugs were designed improperly.

152. Defendant was under a duty to disclose to Plaintiff the defective nature of the dual-end Combat Arms™ earplugs.

153. 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, cause damage to persons who used the dual-end Combat Arms™ earplugs, including Plaintiff, in particular.

154. Defendant's concealment and omissions of material facts concerning, inter alia, the safety and efficacy of the Dual-end Combat Arms™ earplug 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 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™ earplug, as set forth herein.

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

156. 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. Plaintiff did not suspect, nor did Plaintiff have reason to suspect, the cause of these injuries, or the tortious nature of the conduct causing these injuries, until less than the applicable limitations period prior to the filing of this action.

157. Furthermore, the running of any statute of limitations has been tolled by reason of Defendant's fraudulent concealment. Through its affirmative misrepresentations and omissions, Defendant actively concealed from Plaintiff the risks associated with the defects in the Dual-ended Combat Arms™ earplugs.

158. 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.

159. 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.

160. Additionally, pursuant to the Service members 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.

VI. JURY DEMAND

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

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

- a. That process issue according to law;
- b. That Defendant be duly served and cited to appear and answer herein, and that after due proceedings are had, that there be judgment in favor of Plaintiff and against

Defendant for the compensatory damages set forth below, along with court costs, prejudgment and post-judgment interest at the legal rate;

- c. Pain and suffering (past and future);
- d. Wage loss (past and future);
- e. Loss of earnings and loss of earning capacity;
- f. Medical expenses (past and future);
- g. Loss of enjoyment of life (past and future);
- h. Mental anguish and distress (past and future);
- i. Disfigurement (past and future);
- j. Physical impairment (past and future);
- k. Attorneys' fees;
- l. Punitive or exemplary damages in such amounts as may be proven at trial by showing that Defendant has acted willfully, wantonly, with an evil motive, and recklessly in one or more of the following ways:
 - i. 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;
 - ii. 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;
 - iii. 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; and
- m. For all such other relief as to which Plaintiff may show himself justly entitled.

Dated: February 11, 2019

Respectfully Submitted,

/s/Daniel E. Gustafson

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Attorney for Plaintiff

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

Shannon Weaver

(b) County of Residence of First Listed Plaintiff Lancaster County, PA (EXCEPT IN U.S. PLAINTIFF CASES)

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

Daniel E. Gustafson, Gustafson Gluek PLLC, 120 South 6th Street, Suite 2600, Minneapolis, MN 55402; (612) 333-8844

DEFENDANTS

3M Company

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)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location (Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation).

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

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

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):

28 U.S.C. § 1332(a)(1)

Brief description of cause:

Individuals injured by defective product.

VII. REQUESTED IN COMPLAINT:

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

DEMAND \$ 5,000,000.00

CHECK YES only if demanded in complaint: JURY DEMAND: X Yes [] No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Honorable Eric C. Tostrud

DOCKET NUMBER 19-cv-194-ECT-DTS

DATE

02/11/2019

SIGNATURE OF ATTORNEY OF RECORD

s/Daniel E. Gustafson

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE