

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

IN RE: 3M COMBAT ARMS
EARPLUG PRODUCTS
LIABILITY LITIGATION

Case No. 3:19md2885

This Document Relates to:
Estes, 7:20cv137
Hacker, 7:20cv131
Keefer, 7:20cv104

Judge M. Casey Rodgers
Magistrate Judge Gary R. Jones

ORDER SETTING TRIAL AND PRETRIAL SCHEDULE

The above three cases have been consolidated for trial. The trial will begin **Monday, March 29, 2021, and conclude by Tuesday April 27, 2021.** Jury deliberations will begin no later than Wednesday, April 28, 2021.¹ The trial and all pretrial proceedings will be conducted at the United States District Court, One North Palafox Street, Courtroom 5, Pensacola, Florida. The following pretrial schedule and procedures for trial are hereby adopted:

I. JUROR QUESTIONNAIRES

A. The Court's jury administrator will send out a juror summons and questionnaire on availability and possible COVID-19 exposure to potential jurors

¹ Due to the need to conduct pretrial conferences in the McCombs and Baker cases in advance of those individual trials, the Court has decided to begin the consolidated trials on March 29 as opposed to April 5. This will give the Court sufficient time to conduct the pretrial conferences in the McCombs and Baker cases on Thursday, April 29 and Friday, April 30. In light of the Court's criminal dockets in May and June, a pretrial conference in those months is not possible.

on January 29, 2021.

B. The parties must provide the Court with a proposed confidential juror questionnaire no later than February 17, 2021. The Court will then finalize the questionnaire and the jury administrator will send it to the prospective jurors, with a return request date of March 23, 2021.

C. The Court will immediately provide the completed confidential juror questionnaires to the parties by a secure electronic link. On receiving the completed questionnaires and before the start of trial, the parties will be permitted to propose to the undersigned additional voir dire questions based on those questionnaires.

II. DATES FOR COMPLIANCE WITH PRETRIAL PROCEDURES

A. A pretrial conference will be held March 16-18, 2021, beginning at **8:30AM**. The attorney's conference required by paragraph III must be held no later than **February 19, 2021**.

B. The pretrial stipulation and other papers required by paragraphs IV and V shall be filed no later than **March 8, 2021**.

C. These dates and all other dates provided in this Order supersede all previously-set dates or deadlines.

III. CONFERENCE OF COUNSEL

Counsel for all parties must meet in person or virtually with Judge Herndon on or before the date specified in Paragraph II(A) for the following purposes:

- A. To stipulate to as many facts and issues as possible;
- B. To draft the pretrial stipulation in accordance with Paragraph IV of this Order;
- C. To examine all exhibits proposed to be offered or used at trial;
- D. To furnish opposing counsel the names and addresses of all witnesses, including possible rebuttal witnesses and experts;
- E. To discuss the question of damages, including matters of evidence and proof which either party proposes to present at trial and the applicable law;
- F. To finalize the time limits and parameters that will govern the parties' trial presentations; and
- G. To complete all other matters which may expedite both the pretrial and trial of this matter.

IV. PRETRIAL STIPULATION

The pretrial stipulation must be organized by case and contain:

- A. The basis of federal jurisdiction;
- B. A *concise* statement of the nature of the action to be read to the jury panel (this may be consolidated for all three cases);

C. A brief general statement of each party's case;

D. A list of all exhibits to be offered at the trial, noting any objections thereto and the grounds for each objection. *Any objections not listed will be deemed waived.*

E. A list of the names and addresses of *all* witnesses, including rebuttal and expert, intended to be called at the trial by each party, noting any objections thereto and the grounds for the objection. *Any objections not listed will be deemed waived.* Expert witnesses shall be labeled as such;

F. A list of any depositions to be offered at the trial, with specific reference to the pertinent page and line to be read, noting any objections thereto and the grounds for the objection. *Any objections not listed will be deemed waived.* The deposition excerpts should be filed as an attachment to the pretrial stipulation;

G. A concise statement of those facts which are admitted and will require no proof at trial, together with any reservations directed to such admissions;

H. A concise statement of those issues of law on which there is agreement;

I. A concise statement of those issues of fact which remain to be litigated;

J. A concise statement of those issues of law which remain for

determination by the Court;

K. A concise statement of any disagreement as to the application of rules of evidence or of the Federal Rules of Civil Procedure;

L. A list of all motions or other matters which require action by the Court; and

M. The signature of counsel for all parties.

V. PAPERS TO BE SUBMITTED

No later than the date specified in Paragraph II(B), the parties must file:

A. The pretrial stipulation prepared in accordance with Paragraph IV of this Order.

B. For each case, a trial brief or memorandum with citation of authorities and arguments in support of each side's position on all disputed issues of law, with copy to opposing counsel.

C. Written requests for instructions to the jury, together with proposed verdict forms. This may be organized by standard pattern instruction for all three cases with separate substantive instructions for each of the three cases. The proposed instructions and verdict forms should be filed with the Clerk of the Court, with an *editable copy* (in word processing format only, not .pdf) delivered by e-mail to chambers at flnd_rodgers@flnd.uscourts.gov. *With leave of court for good cause shown*, supplemental requests for instructions may be submitted at any

time prior to the final charge conference. Counsel are advised, however, that failure to timely submit proposed instructions will be grounds for the court to deny giving the instruction(s). All proposed instructions must be plainly marked with the name and number of the case, must contain citations of supporting authorities, must designate the party submitting the same, and in the case of multiple requests by a party, must be numbered in sequence. Requests for instructions taken verbatim from Pattern Jury Instructions may be made by reference; the requested instructions need not be set forth in full.²

VI. CONDUCT OF THE PRETRIAL CONFERENCE

A. Counsel who will conduct the trial are required to be present for the pretrial conference. They will be prepared to act with final authority in the resolution of all matters.

B. To the extent possible, the Court will dispose of all outstanding motions and other matters at issue at the pretrial conference. The Court will review all matters contained in the pretrial stipulation and consider any other matters which may be presented with a view towards simplifying the issues and bringing about a just, speedy and inexpensive determination of the matter.

² Per Case Management Order No. 19, the parties will provide the Court with an electronic copy of complete Pattern Jury Instructions for each Plaintiff's jurisdiction.

C. Counsel for each party in any case must arrange with the clerk for marking for identification, as nearly as possible in the sequence proposed to be offered, all exhibits intended to be offered by such party. Please see attached Exhibit A for instructions on marking exhibits for trial, guidelines for other trial procedures, and contact information for Susan Simms, the courtroom deputy clerk, should more specific guidance be needed.

VII. PRETRIAL ORDER

After the pretrial order is entered by the Court, the pleadings will be merged therein and the pretrial order will control the conduct of the trial and may not be amended except by order of the Court in the furtherance of justice.

VIII. NEWLY DISCOVERED EVIDENCE OR WITNESSES

Except as provided in this paragraph, witnesses (including witnesses testifying by deposition) not timely listed in the pretrial stipulation will not be allowed to testify at trial, and exhibits not timely listed in the pretrial stipulation will not be admitted into evidence. If any new witness is discovered after submission of the pretrial stipulation, the party desiring to call the witness must immediately file with the clerk and serve on all counsel notice of the witness's name and address and the substance of the witness's proposed testimony, together with the reason for the late discovery. (This includes a witness testifying by deposition.) If any new exhibit is discovered after submission of the pretrial

stipulation, the party desiring to use it must immediately disclose the exhibit to the court and all other counsel together with the reason for late discovery. Use of such newly-discovered witnesses or evidence is extraordinary and will be allowed only by order of the Court entered when justice so requires.

IX. VOIR DIRE

A. Voir dire will be conducted by the Court. To the extent the Court questions a panel member individually, the Court *may* permit brief follow-up questioning by counsel, but this is not a guarantee.

B. Counsel will select eight (8) jurors for this trial with no alternates. Plaintiffs will be permitted four (4) preemptory challenges among them and Defendants will be permitted the same. Back striking is not permitted.

C. The Court discussed the process for voir dire and jury selection with counsel at the 19th Case Management Conference.

X. TRIAL

A. Trial will begin as soon as jury selection is completed.

B. Each trial day will begin at 8:00AM with a court/counsel conference. The jury will be seated and presentations will begin at 8:30AM. The jury will be excused each day at 5:30PM. There will be two 20-minute jury recesses, the first in the morning around 10:15AM and the second in the afternoon around 3:15PM. Lunch is usually one hour.

XI. SPECIAL MATTERS

A. **Motions in limine regarding evidentiary matters known to counsel or those that should be reasonably anticipated must be filed no later than February 19, 2021, with responsive memoranda due within ten (10) calendar days thereafter.** No reply memoranda will be permitted. To the extent unanticipated evidentiary matters requiring the Court's attention arise after that time, counsel should make every effort to resolve the matter with Judge Herndon's assistance. Should those efforts fail, counsel must immediately notify the Court of the matter by filing the appropriate motion, which must include the reason for the late filing. Failure to timely file a motion in limine in accordance with this directive will be grounds for the Court to deny the motion.

B. If the case is settled, it is the responsibility of the parties to immediately notify the Court. If settlement is reached after 3:00PM central time on the Friday before jury selection Monday morning, counsel and/or the parties will jointly bear the administrative expense of jury selection.

C. Should a party or a party's attorney fail to appear at the pretrial conference or otherwise fail to comply with this Order, a judgment of dismissal or default or other appropriate judgment may be entered, and sanctions or other appropriate relief may be imposed.

D. Counsel, as used herein, includes any party who is appearing pro se.

E. Any counsel seeking to invoke The Rule of Witness Sequestration must so notify the Court at the time of trial or at any time during trial.

F. No later than February 28, 2021, counsel for each party in any case must arrange with the deputy clerk for a tutorial on the courtroom electronic presentation system and must advise of any electronic or technological needs at trial. Also, any special request for court reporter services, such as daily copy, must be submitted to the court reporter, Donna Boland, by the same date.

G. Counsel will be permitted to have electronic devices including cellular telephones in the courtroom during trial; however, all devices must be checked by the Court IT staff to ensure that recording features are disabled and that volume is off or muted. Should a device ring or otherwise make noise during the trial, the device is subject to seizure by court security and may be held by court security until the trial concludes. To the extent counsel cannot abide by this directive, they should leave their electronic devices in the attorney conference rooms.

H. No eating will be permitted in the courtroom during trial absent prior approval by the Court for good cause shown. Counsel and witnesses will be permitted to have bottled water in the courtroom; however, counsel must supply their own water and the water for their respective witnesses.

I. In preparing to present this case, all counsel must familiarize themselves with the requirements of the Addendum to the Local Rules of the

Northern District of Florida on Customary and Traditional Conduct and Decorum in the United States District Court, which the Court expects to be observed during the course of this trial.

XII. COVID-19 PRECAUTIONS AND PROCEDURES

A. The deputy clerk will disinfect the witness stand after each witness's testimony. Counsel is responsible for disinfecting the lectern after each use. Alcohol wipes will be provided.

B. Additional specific COVID-19 precautions and procedures will be discussed with the parties and adopted at a later date.

SO ORDERED, on this 25th day of January, 2021.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

Exhibit A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA
OFFICE OF THE CLERK

JESSICA J. LYUBLANOVITS
CLERK OF COURT
ONE NORTH PALAFOX STREET
PENSACOLA, FLORIDA 32502-5658
850.435.8440
850.433.5972 FAX

CHIEF DEPUTY CLERK
111 N. ADAMS STREET
TALLAHASSEE, FLORIDA 32301-7717
850.521.3501
850.521.3656 FAX

Visit our web site at www.flnd.uscourts.gov

Reply to: Pensacola Division

MEMORANDUM

To: Counsel of Record

Re: Evidence/Exhibit Preparation

Pursuant to pretrial requirements of the United States District Court for the Northern District of Florida, this letter provides guidelines for the preparation and handling of exhibits for evidentiary hearings, bench trials and jury trials in civil and criminal cases assigned to United States District Judge M. Casey Rodgers.

Marking and Numbering Exhibits

Counsel for each party in any case should, in advance of trial, mark each exhibit proposed to be offered in evidence or otherwise tendered to any witness during evidentiary hearings or trials. Exhibits will retain the same number throughout court proceedings whether identified, offered or admitted. To avoid confusion, it is preferred that like parties share exhibit numbers. If it is not practical for co-plaintiffs or co-defendants to share exhibit numbers, like parties may identify exhibits by placing the party's name or initials prior to the exhibit number on all exhibit stickers and exhibit lists (for example: Smith-1, XYZ-1, etc.).

The exhibits should be individually marked for identification with a secured sticker denoting the appropriate party, the case number and the exhibit number (see Attachment 1). If possible, it is preferred that exhibits be sequentially numbered in the order they are proposed to be offered. Composite exhibits should have identified sub-exhibits denoted by a letter following the exhibit number (example: Exhibit 1 is a medical file; documents from the file are marked 1a, 1b...1z, 1a-1, 1.1, etc.).

Preparing Exhibit Lists

Upon marking the exhibits, counsel should prepare a list of such exhibits, in sequence, with a descriptive notation sufficient to identify each separate numbered exhibit and should furnish copies of their Exhibit List (see Attachment 2) to the court at the commencement of the trial or evidentiary hearing. Counsel should inform the court of exhibits to which admission has been stipulated.

The mission of the Office of the Clerk of the Northern District of Florida is to provide superior service to the public and the Court.

Gainesville Division
401 SE 1st Avenue
Gainesville, Florida 32601
352.380.2400
352.380.2424 FAX

Pensacola Division
1 N. Palafox Street
Pensacola, Florida 32502-5658
850.435.8440
850.433.5972 FAX

Tallahassee Division
111 N. Adams Street
Tallahassee, Florida 32301-7717
850.521.3501
850.521.3656 FAX

Panama City Division
30 W. Government Street
Panama City, Florida 32401
850.769.4556
850.769.7528 FAX

Preparing Witness Lists

Counsel must prepare a list of the names of all witnesses, including rebuttal and expert, intended to be called at the trial or evidentiary hearing by each party. If the list is lengthy, the witnesses should be listed in alphabetical order. This list should not include any personal identifiers, such as street addresses or phone numbers. Counsel must provide a witness list (see Attachment 3) to the court at the commencement of jury selection, a bench trial or evidentiary hearing unless otherwise ordered by the court.

Stipulated Exhibits

Parties may agree on the admission of some exhibits in advance. In civil trials, counsel may provide a separate list of the Stipulated Exhibits before moving for their admission. In criminal trials, stipulated exhibits may be admitted individually as needed during the course of the trial.

Preparing Copies of Exhibits

The following procedure applies in both civil and criminal cases:

- **In all evidentiary hearings or bench trials, counsel are required to provide the court with two (2) copies of each exhibit prior to the commencement of that proceeding.** In cases, where voluminous paper exhibits are to be offered, counsel are required to place the exhibits in three-ring binders with a numbered tab index.
- **In all jury trials only one (1) copy of each exhibit, to be offered for admission, is required for the jury during deliberation.** Counsel may wish to have additional copies of documentary exhibits on hand for use in examining witnesses.

Medical or Technical Terms

Counsel must provide a list of medical or technical terms to the court reporter prior to the trial commencing.

Custody of Exhibits

The courtroom deputy clerk will retain custody of exhibits: (1) that have been admitted or (2) that have been identified but not admitted based upon a court ruling. During jury trials, admitted exhibits will be placed on the evidence table in front of the courtroom deputy clerk. All other exhibits tendered during a proceeding, for which admission was not sought or which were withdrawn by counsel will be returned. When examination of a witness is complete, it is the responsibility of counsel to return all exhibits used during the examination and intended for the record either to the evidence table or to the courtroom deputy.

Evidence Presentation Equipment

Judge Rodgers requires the use of evidence presentation equipment in the courtroom. Prior to the court proceeding counsel must schedule training on this equipment and test any presentation equipment (laptops, ipads/tablets, video tapes, cassette tapes, CD/DVDs, Power Point presentations) or any other media you plan to use during the trial or evidentiary hearing. If your laptop or device does not have HDMI or VGA output, you will need to provide an HDMI or VGA adapter in order to connect to our system. We also have a document camera (sometimes referred to as Elmo) which is used to display the image of hard copy paper exhibits on a large drop down screen in Courtroom 5. Please contact Susan Simms at (850/470-8125) or systems personnel at (850/435-8440) to schedule training/testing on our system.

Bench Conferencing Equipment Needed During COVID-19

During the COVID-19 pandemic, Judge Rodgers will not be conducting bench conferences from the judge's bench. Instead, you will participate from counsel tables in order to comply with the CDC's social distancing guidelines. Our primary method will be connecting to Zoom.gov from your personal electronic device. You will need to bring a headset or headphones with both audio and a microphone so that you may both listen and speak to Judge Rodgers as needed. Your device (laptop, cell phone, or tablet) will need to have Zoom capabilities and we have found that Google Chrome works best with Zoom. You will receive an email with the Zoom link. If you wish to test this connection, please contact Susan Simms at (850/470-8125) or systems personnel at (850/435-8440) to schedule testing. The secondary method for bench conferencing will be a telephone conference. The connection information will be emailed to you prior to trial. You will need a cell phone or other device with the ability to make phone calls for this method.

Appeal Exhibits

The Eleventh Circuit Court of Appeals has determined that documents of unusual bulk or weight and physical exhibits other than documents, or other parts of the record designated for omission will not be transmitted by the Clerk of this Court with the record on appeal unless directed to do so by a party or the circuit clerk (see FRAP 11 - 11th Circuit Rules). Accordingly, oversized exhibits, posters, and non-documentary exhibits may be used at trial for demonstrative purposes, but they will be returned to counsel at the conclusion of trial. This includes sensitive exhibits in criminal trials. If the court of appeals requests an exhibit retained by counsel, it is the responsibility of counsel to make arrangements for transportation and shipping of those exhibits to Atlanta, Georgia. Counsel should consider submitting file-size copies (8.5" x 11") of posters and/or photographs of non-documentary exhibits if they prefer these exhibits be considered for appeal purposes.

Retrieving Exhibits After the Litigation

Within 90 days after a case is closed and all appeals have been exhausted, the party who offered an exhibit must retrieve it from the Clerk. The Clerk may destroy an exhibit not timely retrieved. (See Local Rule 5.9 below.)

Rule 5.9 Trial And Hearing Exhibits

(A) **Tendering and Maintaining Exhibits.** An exhibit tendered or received in evidence during a trial or hearing must be delivered to the Clerk, and the Clerk must maintain custody of the exhibit, with these exceptions:

- (1) the Court may order otherwise;
- (2) a sensitive exhibit—such as a weapon, drug, cash, pornography, or thing of high value—may be retained by the law enforcement agency or party who offered it, and in that event the agency or party must maintain the integrity of the exhibit;
- (3) the Clerk may release an exhibit temporarily to an assigned judge, the judge's staff, or the court reporter.

(B) **Retrieving Exhibits After the Litigation.** Within 90 days after a case is closed and all appeals have been exhausted, the party who offered an exhibit must retrieve it from the Clerk. The Clerk may destroy an exhibit not timely retrieved.

Please direct any questions regarding exhibits to Susan Simms, courtroom deputy clerk for Judge Rodgers either via email: Susan_Simms@flnd.uscourts.gov or by phone: at 850/470-8125.

Attachment 1Examples of Exhibit Labels

The Clerk's Office has exhibit stickers available at the intake counter. Upon request, the clerk will provide these to counsel at no charge. The exhibit numbers need to be hand written on these labels. Therefore, counsel often prefer to print their own labels. The address labels (1" x 2 5/8") that come 30 to a sheet are commonly used for marking exhibits and are perfectly acceptable. Please ensure each exhibit label is clearly marked for the appropriate party. In cases with multiple parties, the party's name may be added to the label. Place the exhibit label on the first page of a multi-page exhibit.

GOVERNMENT
EXHIBIT
1
3:18cr##-DJ

PLAINTIFF'S
EXHIBIT
2.1
5:16cv##-DJ-MJ

DEFENDANT'S
EXHIBIT
3 A
4:15cv##-DJ-MJ

Plaintiff Doe
Exhibit #1a-1
3:15cv##-DJ-MJ

Defendant Smith
Exhibit #A-1
3:15cr###-DJ

Attachment 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN Q. DOE

v.

3:15cv999/Judges' initials

WILLIAM Z. SMITH and
THE CITY OF GOTHAM

Plaintiff's Trial Exhibit List (Example)

Pltf #	Date Identified	Date Admitted	Witness	Description
1	leave blank	leave blank	Paul Jones	Letter to John Doe from Paul Jones dated 3/1/95 re: salary review.
2a	leave these two columns blank - to be filled in during trial		Dr. David Brown	Audiotape of meeting on 5/1/95.
2b			" "	Transcript of pla exh 2a - audiotape
3		Stipulated	Sally Smith, Paul Jones	Poster - Map of USA (for demonstrative purposes only)
3a				File size copy of map pltf exh 3
4				Poster - enlargement of photos 4a-g for demo purposes
4a-c				Photos - 4" x 6" of: a - automobile b - tires c - etc.
5				Brown Leather Briefcase
5a				Photo of briefcase - pla exh 5

Attachment 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN Q. DOE

v.

3:15cv999/Judges' initials

WILLIAM Z. SMITH and
THE CITY OF GOTHAM

/

Plaintiff's Trial Witness List (Example)

1. John Doe
2. William Smith
3. Jane Doe
4. Dr. David Brown, Expert Witness
5. Paul Jones
6. Sally Smith
7. Records Custodian, City of Gotham