

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

IN RE: 3M COMBAT ARMS
EARPLUG PRODUCTS
LIABILITY LITIGATION

Case No. 3:19-MD-2885-MCR-GRJ

This Document Relates to:
Luke E. Estes, 7:20-cv-137
Stephen Hacker, 7:20-cv-131
Lewis Keefer, 7:20-cv-104

Judge M. Casey Rodgers
Magistrate Judge Gary R. Jones

DEFENDANTS' MOTION FOR MISTRIAL

Defendants 3M Company and Aearo respectfully move this Court for a mistrial. In support of this motion, Defendants rely upon the following memorandum of law.

MEMORANDUM OF LAW

I. INTRODUCTION

Defendants 3M Company and Aearo are entitled to a mistrial. After plaintiffs' counsel questioned Dr. Eric Fallon regarding his knowledge of the number of lawsuits filed regarding the CAEv2, the Court instructed the jury as follows:

Before Mr. Wasdin starts his redirect, ladies and gentlemen, let me give you an instruction with regard to the testimony you just heard and some testimony you heard I believe it was last week. Last week or at some point during the trial you heard testimony, it was a video deposition from Lt. Col. Leanne Battler, who is an audiologist, and in that testimony she testified that she fit -- or in

that deposition, excuse me, she testified that she fit thousands of soldiers with the CAEv2 and never had any complaints from any of those soldiers about fit or hearing problems and also she testified that she believed that the soldiers she fit would have told her if they had had any problems or fit issues with the plug.

Now, you did not hear from those soldiers that she fit with the plug who she said had a good experience with the plug.

You've now heard evidence through Dr. Fallon that there are a large number of soldiers who have made complaints about the CAEv2 and how it worked for them in terms of issues with fit and hearing related problems. But likewise, you will not hear from those individuals, those soldiers about their experience with the plug.

You can consider that there are soldiers who wore the CAEv2 without complaint about fit and that there are soldiers who wore the CAEv2 who have complaints about the fit with the plug. But ultimately your responsibility as jurors in this case in these three cases is not to decide whether the CAEv2 did or did not fit other people. Your responsibility is to decide whether the CAEv2 fit Mr. Estes, Mr. Keefer, and Mr. Hacker.

Defendants submit that this instruction was improper, and grounds for a mistrial, for three reasons.

First, the Court's characterization of Dr. Fallon's testimony was not accurate, and introduced a fact not in evidence—that a “large number” of individuals have filed lawsuits concerning the CAEv2. That evidence is inadmissible and highly prejudicial for several reasons detailed below.

Second, it is not correct that the question before the jury was whether the CAEv2 fit these plaintiffs. Instead, the question is whether the *alleged defects* in the

CAEv2 prevented the plaintiffs from getting a good fit. The mere fact that the CAEv2 did not fit a plaintiff would not make Defendants liable for any resulting injuries. No premolded earplug, defective or not, will fit everyone.

Third, the instruction equates the attempt to elicit testimony about complaints from Dr. Fallon with Lt. Col. Battler's testimony about *not* receiving complaints. But—unlike the complaints filed by non-parties in this MDL—Lt. Col. Battler's testimony was not hearsay because it did not rely upon (or relay) statements from out-of-court declarants. Instead, it relied upon silence, and “[s]ilence, at least where there is no showing of intentional silence on a particular occasion intended as an assertion when the silence was kept, is no longer within the hearsay realm.” *Wilson v. Clancy*, 747 F. Supp. 1154, 1158 (D. Md. 1990), *aff'd*, 940 F.2d 654 (4th Cir. 1991). Unlike the thousands of plaintiffs and claimants in this MDL, it is irrelevant that the soldiers who did *not* complain are not available to testify.

II. LEGAL STANDARD

A mistrial is warranted when the substantial right of party is detrimentally affected and that party makes a timely objection. *See Frederick v Kirby Tankships, Inc.*, 205 F.3d 1277, 1285 (11th Cir. 2000).

III. ARGUMENT

A. The Court's instruction regarding other individuals' claims the CAEv2 caused their hearing injuries was improper and highly prejudicial.

1. The Court's instruction introduced a fact not in evidence.

The Court incorrectly instructed the jury that Dr. Eric Fallon testified, “[T]here are a large number of soldiers who have made complaints about the CAEv2 and how it worked for them in terms of issues with fit and hearing related problems.” Dr. Fallon did not give that testimony. Plaintiffs’ counsel asked Dr. Fallon whether or not he knew if there were “tens of thousands if not hundreds of thousands of soldiers that are claiming hearing loss from the Combat Arms.” Dr. Fallon testified he did *not* know the number, although he had seen many advertisements. *See* Ex. 8 (4/28/20 Realtime Trial Tr.) (“I’ve never seen numbers, I have never had a discussion of how many people.”). Plaintiffs did not introduce any independent evidence of the number of claimants in this multi-district litigation. By telling the jury that “there are a large number of soldiers who have made complaints about the CAEv2” injected a fact that was otherwise not in evidence and, as explained below, is inadmissible and highly prejudicial.

2. Evidence of other lawsuits concerning the CAEv2 is inadmissible.

The Court’s rationale for admitting evidence of other claims rests on the premise that Defendants “opened the door” to such evidence through LTC Battler’s

testimony about her experience fitting soldiers with the CAEv2. But the introduction of admissible evidence, such as LTC Battler’s testimony, cannot justify the introduction of inadmissible evidence regarding other lawsuits about the CAEv2. The doctrine of curative admissibility, or “opening the door,” allows a party to introduce limited inadmissible evidence against an offending party that itself introduced inadmissible evidence. *See Bearint ex. rel. Bearint v. Dorell Juvenile Group, Inc.*, 389 F.3d 1339, 1349 (11th Cir. 2004) (“Under that doctrine, when a party offers *inadmissible evidence* before a jury, the court may in its discretion allow the opposing party to offer otherwise inadmissible evidence on the same matter to rebut any unfair prejudice created.”) (emphasis added). Admissible evidence does not open the door to inadmissible evidence. *United States v. Rea*, 958 F.2d 1206, 1225 (2d Cir. 1992).

If a party introduces inadmissible evidence, “[o]pening the door is one thing; [b]ut what comes through the door is another.” *United States v. Winston*, 447 F.2d 1236, 12490 (D.C. Cir. 1971). Thus, even in response to the introduction of another party’s inadmissible evidence, “[t]he Rules of Evidence do not simply evaporate when one party opens the door on an issue.” *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 784 (5th Cir. 2018) (internal quotations and citations excluded). “[T]he ‘opening the door’ doctrine is not so capacious as to allow the admission of *any* evidence made relevant by the opposing

party's strategy, without regard to the Federal Rules of Evidence.” *United States v. Sine*, 493 F.3d 1021, 1037 (9th Cir. 2007) (original emphasis).

Further, the curative evidence is “permitted only to the extent necessary to remove any unfair prejudice.” *Bearint*, 389 F.3d at 1349 (quoting *California Ins. Co. v. Allen*, 235 F.2d 178 (5th Cir. 1956)). As the United States Court of Appeals for the Seventh Circuit has observed, “[t]he gist of the [open-door] doctrine is proportionality and fairness” so that whatever evidence may be admitted after the door is open must be a “commensurate response.” *United States v. Jett*, 908 F.3d 252, 271 (7th Cir. 2018); *see also Sheets v. Commonwealth*, 495 S.W.3d 654, 678 (Ky. 2016) (noting that “the open door doctrine is supposed to prevent prejudice (not to introduce or exacerbate it)”).

The evidence of other individuals' claims that the CAEv2 caused them hearing injuries is inadmissible for multiple reasons.

First, the evidence that other individuals have alleged the CAEv2 caused their hearing injuries is wholly irrelevant. *See* Fed. R. Evid. 401. That there are other claimants offers zero probative value as to the claims of Messrs. Estes, Hacker and Keefer. It has absolutely no tendency to make any fact of consequence more or less probable. This utter lack of relevance warranted exclusion of the evidence. *See* Fed. R. Evid. 402.

Second, even if the evidence of other lawsuits had some minimal probative value, such value is substantially outweighed by the extreme prejudice against Defendants and by the fact that the evidence is grossly misleading. *See* Fed. R. Evid. 403; *McLeod v. Parsons Corp.*, 73 Fed. App'x 846, 854 (6th Cir. 2003) (upholding exclusion of evidence of other lawsuits under Rule 403); *In re Ethicon, Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, 2014 WL 505234, at *5-6 (S.D.W.V. Feb. 5, 2014) (excluding evidence of other lawsuits under Rule 403); *Park West Radiology v. CareCore Nat. LLC*, 675 F. Supp. 2d 314, 330 (S.D.N.Y. 2009) (same). No curative instruction can unring the bell of this improper evidence. The jury almost certainly will place great weight on this irrelevant evidence, prejudicing Defendants such that they are deprived of their right to a fair trial.

Third, as numerous courts have recognized, evidence of other litigants' claims constitutes rank hearsay. *See Steed v. EverHome Mortg. Co.*, 308 Fed. App'x 364, 369 n. 2 (11th Cir. 2009) (per curiam); *Johnson v. Ford Motor Co.*, 988 F.2d 573, 579 (5th Cir. 1993); *Gutierrez v. Galiano Enter. of Miami, Corp.*, 2019 WL 3302325, at *3-4 (S.D. Fla. July 23, 2019); *In re: Gen. Motors LLC Ignition Switch Litig.*, 2015 WL 776954, at *3 (S.D.N.Y. Nov. 30, 2015); *Smith v. E-backgroundchecks.com, Inc.*, 2015 WL 11233453, at *1 (N.D. Ga. June 4, 2015); *Tyree v. Boston Scientific Corp.*, 2014 WL 5445769, at *7-8 (S.D.W.V. Oct. 22, 2014); *Amegy Bank Nat. Ass'n v. DB Private Wealth Mortg., Ltd.*, 2014 WL 791505,

at *2 (M.D. Fla. Feb. 24, 2014); *In re Ethicon, Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, 2014 WL 505234, at *6; *Park West Radiology*, 675 F. Supp. 2d at 330. Nor can this evidence serve any non-hearsay purpose, such as notice or the effect on the listener. Instead, the allegations of others was presented to the jury as proof that the product must be defective because it did not fit a large number of soldiers.

Fourth, the evidence does not, and cannot, satisfy the requirements of “other similar incident” evidence. In the Eleventh Circuit, evidence of “prior occurrences or accidents...is only admissible if conditions substantially similar to the occurrence caused the prior accidents, and the prior incidents were not too remote in time,” and even then, the evidence can only be used for certain proper purposes, such as notice or ability to correct a known defect. *See Hessen ex rel. Allstate Ins. Co. v. Jaguar Cars, Inc.*, 915 F.2d 641, 650 (11th Cir. 1990). Here, there can be no showing that the other claimants had a “substantially similar” experience with the CAEv2 as Messrs Estes, Hacker and Keefer, without investigating the factual allegations of those claims. Nor can there be any showing that these other “incidents” were not too remote in time. The short-form complaints, for example, do not elicit any information on how or when claimants used the product or how or when they sustained their alleged injuries.

3. Defendants did not open the door.

Defendants respectfully disagree with the Court that they opened the door to the evidence of other claimants when they played LTC Battler's testimony that "not one" of the thousands of soldiers she fit with the CAEv2 complained that it "did not adequately protect their hearing," *see* Ex. 1 (09/10/2020 LTC Battler Dep. Tr.) at 97:11-18, or that she was unaware of any soldiers who used the CAEv2 have either hearing loss or tinnitus. *See id.* at 229:14-18.

First, LTC Battler's testimony, on its face, did not run afoul of the Court's March 22 Order because the testimony did not suggest or imply "that Plaintiffs' experiences with the CAEv2 are aberrational, isolated incidents." ECF 1716 at 12. All she said was that she personally fit thousands of soldiers and none of those soldiers *affirmatively* complained to her about the device. Ex. 2 (4/22/21 Trial Tr.) at 172:23-173:2. She also testified that she was not aware of soldiers returning from deployment with hearing loss or tinnitus after wearing the CAEv2, but qualified that testimony by noting that "[o]f the soldiers who came back with hearing loss and/or tinnitus, I am not sure how consistently they used the earplugs." *Id.* at 192:17-21. She also noted that her testimony about the CAEv2's effectiveness depended on "[i]f it was properly fitted, and if it was the right size." *Id.* at 178:16-17. Thus, LTC Battler's testimony did not suggest that there were *no* soldiers who experienced hearing issues after wearing the CAEv2, but only that no one complained *to her*

about it. So, her testimony—based entirely on her own personal experience—did not suggest that the experience of these Plaintiffs was “aberrational”—though it was directly relevant to rebut the repeated suggestion from the Plaintiffs during their own case that the CAEv2 was “dangerous for patients to use.” Ex. 3 (4/12/21 Trial Tr.) at 133:22.

Second, the Court already ruled on the admissibility of LTC Battler’s testimony. Specifically, Plaintiffs lodged 802, 404 and 403 objections to Defendants’ designation of lines 97:11 through 98:09 of the deposition transcript. *See* Keefer Dkt. 109-1 at 29. The Court sustained the objections to 97:19-98:09, but overruled the objections to 97:11-18. *See id.* Plaintiffs lodged a 402 objection to 229:14-19, which the Court also overruled. *See id.* at 76. The Court ruled on Plaintiffs’ objections to LTC Battler’s testimony *after* it issued its ruling on Defendants’ motion *in limine* to exclude this evidence. *See* MDL Dkt. 1716 (motion *in limine* ruling dated March 22, 2021); Keefer Dkt. 109 (Deposition Designations Order No. 6, dated March 23, 2021).

Third, Defendants disclosed LTC Battler’s deposition video and/or CSV files to Plaintiffs four times, each time with Judge Herndon on the email, before playing the video in court. *See* Ex. 4 (4/18/2021, 6:28PM email from A. Neglia to Plaintiffs); Ex. 5 (4/19/2021, 11:45PM email from A. Neglia to Plaintiffs); Ex. 6 (4/20/2021, 6:28PM email from A. Neglia to Plaintiffs); Ex. 7 (4/20/2021, 8:26PM email from

T. DePaulo to Plaintiffs). Plaintiffs never made any additional objections to the testimony in controversy. Nor did they object to the testimony when it was played in court.

Finally, before the lunch break on April 22, Defendants brought the issue to the Court's attention prior to playing the video of LTC Battler's deposition after the lunch break. *See* Ex. 2 (4/22/2021 Trial Tr.) at 154:12-156:7. The Court, in response, stated, "I can't tell you that I won't consider that along with other testimony that you might put on about personal use in terms of how much of it there is and how impactful it is that it hasn't opened the door," and further stated that "I've allowed in her testimony, whatever it was in the depo. I didn't see that in isolation as opening the door. But I can't tell you that I won't consider it in looking at sort of the totality of the circumstances." *Id.* at 155:5-8; 155:24-156:2. Defendants would have modified the video had it known that thirteen lines of LTC Battler's testimony would open the door to such prejudicial evidence. However, based on the Court's previous deposition designation ruling, as well as the Court's statements that: (1) door opening depended in part on testimony that defendants "might put on" in the future after LTC Battler, and (2) testimony "in isolation" would not open the door, Defendants proceeded to play the video.

B. The Court’s instruction that the jury must decide whether the CAEv2 fit the plaintiffs was improper and highly prejudicial.

The Court also instructed the jury that “Your responsibility is to decide whether the CAEv2 fit Mr. Estes, Mr. Keefer, and Mr. Hacker.” But the jury’s task is not to decide whether the CAEv2 fit the plaintiffs. Instead, the question is whether the plaintiffs have presented evidence that one of the alleged defects in the CAEv2 prevented them from getting an adequate fit. The mere fact that the CAEv2 did not fit one of the plaintiffs would not, in itself, make Defendants liable for resulting injuries. No premolded earplug will fit everyone, and military documents indicate the Army was aware the CAEv2 would fit only 80% of soldiers. *See* D-Gen-1195 at 5. If the plaintiffs fell in that 20% of people who were never going to obtain a good fit with the CAEv2, defective or not, then they have not met their burden to trace their injuries to Defendants’ alleged negligence in designing the CAEv2.

IV. CONCLUSION

The jury has been invited to decide this case based on a factually and legally incorrect instruction, thereby denying Defendants of their right to a fair trial. The Court should grant Defendants’ present motion for a mistrial.

Dated: April 28, 2021

/s/ Charles F. Beall, Jr.

Larry Hill

Florida Bar No. 173908

lhill@mhw-law.com

Charles F. Beall, Jr.

Florida Bar No. 66494

cbeall@mhw-law.com

Haley J. VanFleteren

Florida Bar No. 1003674

hvanfleteren@mhw-law.com

MOORE, HILL & WESTMORELAND, P.A.

350 West Cedar Street

Maritime Place, Suite 100

Pensacola FL 32502

Telephone: (850) 434-3541

Respectfully submitted:

/s/ Robert C. "Mike" Brock

Robert C. "Mike" Brock

KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Telephone: (202) 389-5991

mike.brock@kirkland.com

Mark J. Nomellini

KIRKLAND & ELLIS LLP

300 North LaSalle

Chicago, Illinois 60654

Telephone: (312) 862-3254

mnomellini@kirkland.com

Kimberly Branscome

DECHERT LLP

633 W. 5th St., Suite 4900

Los Angeles, CA 90071

Telephone: (213) 808-5762

kimberly.branscome@dechert.com

*Counsel for Defendants 3M Company,
3M Occupational Safety LLC, Aearo
Technologies LLC, Aearo Holding,
LLC, Aearo Intermediate, LLC and
Aearo, LLC*

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

Pursuant to Local Rule 7.1(F) counsel for Defendants certify that this memorandum contains 2,789 words.

Dated: April 28, 2021

Respectfully submitted,

/s/ Robert C. Brock

Robert C. "Mike" Brock
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 389-5991
mike.brock@kirkland.com

*Counsel for Defendants 3M Company,
3M Occupational Safety LLC, Aearo
Technologies LLC, Aearo Holding,
LLC, Aearo Intermediate, LLC and
Aearo LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 28, 2021, a copy of the foregoing was filed on the Court's CM/ECF system, which will serve all counsel of record.

DATED: April 28, 2021

/s/ Robert C. Brock

Robert C. "Mike" Brock
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 389-5991
mike.brock@kirkland.com

*Counsel for Defendants 3M Company,
3M Occupational Safety LLC, Aearo
Technologies LLC, Aearo Holding,
LLC, Aearo Intermediate, LLC and
Aearo, LLC*

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NUMBER: 3:19-md-02885

Judge M. Casey Rodgers

Magistrate Judge Gary R. Jones

IN RE: 3M COMBAT ARMS EARPLUG
PRODUCTS LIABILITY LITIGATION

This Document Relates to All Cases

REMOTE ORAL AND VIDEOTAPED
DEPOSITION OF LTC LEANNE BATTLER
September 10, 2020

REPORTED BY: Angela S. McGalliard
Certified Realtime Reporter,
Registered Professional
Reporter and Notary Public

<p style="text-align: right;">Page 2</p> <p>1 S T I P U L A T I O N</p> <p>2 IT IS STIPULATED AND AGREED, by and</p> <p>3 between the parties, through their respective</p> <p>4 counsel, that the deposition of LTC Leanne</p> <p>5 Battler may be taken before Angela S.</p> <p>6 McGalliard, Commissioner, Certified Realtime</p> <p>7 Reporter, Registered Professional Reporter and</p> <p>8 Notary Public.</p> <p>9 That it shall not be necessary for</p> <p>10 any objections to be made by counsel to any</p> <p>11 questions, except as to form or leading</p> <p>12 questions, and that counsel for the parties may</p> <p>13 make objections and assign grounds at the time</p> <p>14 of trial, or at the time said deposition is</p> <p>15 offered in evidence, or prior thereto.</p> <p>16 Reading and signing by the witness is</p> <p>17 not waived.</p> <p>18 * * * * *</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 LC-011 - Questionnaire..... 188 12</p> <p>2 Plaintiff's Exhibit 19 - Marked P</p> <p>3 1272.2 - Army Earplug</p> <p>4 Reference..... 190 10</p> <p>5 Plaintiff's Exhibit 20 - Bates</p> <p>6 LC-003 - Email chain re:</p> <p>7 Debriefs..... 196 2</p> <p>8 Plaintiff's Exhibit 21 - Bates</p> <p>9 LC-19 - 12/14/09 email</p> <p>10 re: NSN's on 4th</p> <p>11 Generation Combat Arms</p> <p>12 Earplug and Skull Screws... 204 18</p> <p>13 Plaintiff's Exhibit 22 - Bates</p> <p>14 LC-23 - Attachment to</p> <p>15 email marked PX 21..... 205 15</p> <p>16 Plaintiff's Exhibit 23 - Bates</p> <p>17 LC-18 - Email re: 5th</p> <p>18 Generation Combat Arms</p> <p>19 Earplug..... 215 24</p> <p>20 Plaintiff's Exhibit 24 - Bates</p> <p>21 LC-026 - January 2011 GAO</p> <p>22 report re: Hearing Loss</p> <p>23 Prevention..... 230 17</p> <p>24 DEFENDANT'S EXHIBITS</p> <p>25 PAGE LINE</p>
<p style="text-align: right;">Page 3</p> <p>1 * * * * *</p> <p>2 I N D E X</p> <p>3 EXAMINATION</p> <p>4 PAGE LINE</p> <p>5 By Mr. Nomellini..... 11 2</p> <p>6 By Mr. Monsour..... 157 24</p> <p>7 EXAMINATION CONTINUED</p> <p>8 PAGE LINE</p> <p>9 By Mr. Nomellini..... 241 14</p> <p>10 By Mr. Monsour..... 253 7</p> <p>11 PLAINTIFF'S EXHIBITS</p> <p>12 PAGE LINE</p> <p>13 Plaintiff's Exhibit 14 - Bates</p> <p>14 19328 - Email from L.</p> <p>15 Battler to B. Myers,</p> <p>16 August 22, 2005 re:</p> <p>17 Questions regarding</p> <p>18 Combat Arms Earplugs..... 181 23</p> <p>19 Plaintiff's Exhibit 15 - Bates LC</p> <p>20 008 - Questionnaire..... 182 21</p> <p>21 Plaintiff's Exhibit 16 - Bates</p> <p>22 LC-009 - Questionnaire..... 184 21</p> <p>23 Plaintiff's Exhibit 17 - Bates</p> <p>24 LC-010 - Questionnaire..... 186 2</p> <p>25 Plaintiff's Exhibit 18 - Bates</p>	<p style="text-align: right;">Page 5</p> <p>1 Defendant's Exhibit 1 - Article in</p> <p>2 The United States Army</p> <p>3 Medical Department</p> <p>4 Journal titled: Fort</p> <p>5 Carson, An Army Hearing</p> <p>6 Program Success Story,</p> <p>7 LTC L. Battler..... 24 25</p> <p>8 Defendant's Exhibit 2 - Bates DoD</p> <p>9 167 - Email re:</p> <p>10 Additional info on CEPS,</p> <p>11 dated 5/11/2004..... 29 19</p> <p>12 Defendant's Exhibit 3 - Department</p> <p>13 of Defense Instruction</p> <p>14 6055.12 for the DoD</p> <p>15 Hearing Conservation</p> <p>16 Program..... 56 10</p> <p>17 Defendant's Exhibit 4 - DA PAM 40-501 65 9</p> <p>18 Defendant's Exhibit 5 - Bates</p> <p>19 478130 - Email dated July</p> <p>20 8, 2004 re: Good news on</p> <p>21 Combat Arms..... 75 9</p> <p>22 Defendant's Exhibit 6 - PowerPoint</p> <p>23 prepared by LTC Battler.... 89 24</p> <p>24 Defendant's Exhibit 7 - Joint</p> <p>25 Defense/Veterans</p>

<p style="text-align: right;">Page 94</p> <p>1 A. So --</p> <p>2 MR. MONSOUR: Objection. Form.</p> <p>3 Calls for an expert opinion. Beyond the scope.</p> <p>4 A. So I think right off the bat, one</p> <p>5 of the first questions in the survey was what</p> <p>6 kind of hearing protection did you use before,</p> <p>7 so what are you comparing the QuietPro to? And</p> <p>8 25 percent of the 79 respondents had used the</p> <p>9 -- compared it to the Combat Arms earplug.</p> <p>10 In terms of dismounted</p> <p>11 operations, 35 percent of that group felt they</p> <p>12 were equal. Mounted operations, speech clarity</p> <p>13 they felt was equal. Fatigue, seventy -- about</p> <p>14 70 percent felt that they were the same. In</p> <p>15 terms of generator -- around generator noise,</p> <p>16 43 percent felt they were the same.</p> <p>17 Situational awareness, 37 percent felt it was</p> <p>18 the same. And that was -- so I mean, not bad.</p> <p>19 Q. So your overall take-away, is it</p> <p>20 fair to say, that the seven-dollar Combat Arms,</p> <p>21 based on your personal experience, surveys of</p> <p>22 soldiers, performed approximately the same as</p> <p>23 the one thousand dollar QuietPro?</p> <p>24 MR. MONSOUR: Objection. Form.</p> <p>25 Calls for an expert opinion beyond the Touhy</p>	<p style="text-align: right;">Page 96</p> <p>1 And the QuietPro, is that something that the</p> <p>2 military was using for the general Army?</p> <p>3 MAJ WALD: Objection. I think</p> <p>4 that's outside the scope of the letter, sir.</p> <p>5 MR. NOMELLINI: Okay. Fair</p> <p>6 enough.</p> <p>7 Q. Okay. You said that at the level</p> <p>8 of deployment that both products were at in</p> <p>9 2008, you'd recommend to soldiers the Combat</p> <p>10 Arms Version 2 over the QuietPro. Why is that?</p> <p>11 A. Because it was more portable, it</p> <p>12 was easier to operate, the price point was a</p> <p>13 factor as well. Soldiers were afraid -- If a</p> <p>14 piece of -- If a high-value piece of equipment</p> <p>15 is lost, then oftentimes soldiers are</p> <p>16 responsible to replace it. And I know of</p> <p>17 several soldiers who said they would rather</p> <p>18 lose hearing than risk losing a high --</p> <p>19 high-value piece of equipment.</p> <p>20 So they'd rather use a</p> <p>21 seven-dollar piece, that if they have to buy it</p> <p>22 or have it repaired, then seven dollars is more</p> <p>23 affordable.</p> <p>24 Q. And based on your personal</p> <p>25 experience and your communication with</p>
<p style="text-align: right;">Page 95</p> <p>1 allowances.</p> <p>2 A. For a good portion of them. Not</p> <p>3 a majority, but a good portion, yes.</p> <p>4 Q. Okay. What was your personal</p> <p>5 take-away from your study on use of the</p> <p>6 QuietPro versus use of the Combat Arms?</p> <p>7 A. The QuietPro was kind of like a</p> <p>8 smartphone, you had -- you had to have a lot of</p> <p>9 practice with it before you could be</p> <p>10 proficient. The Combat Arms earplug was much</p> <p>11 more simple.</p> <p>12 Q. And based on -- Based on your</p> <p>13 experience, would you recommend to soldiers the</p> <p>14 Combat Arms versus the QuietPro?</p> <p>15 A. At the level -- At the level of</p> <p>16 development that both products were at in 2008,</p> <p>17 yes, I'd recommend the Combat Arms over the</p> <p>18 QuietPro.</p> <p>19 Q. And that's -- And that's not even</p> <p>20 taking into account the fact that the Combat</p> <p>21 Arms is seven dollars and the QuietPro was a</p> <p>22 thousand dollars; right?</p> <p>23 A. That was -- That would be part of</p> <p>24 the reason why I would say that.</p> <p>25 Q. And the TCAPS at the time, is --</p>	<p style="text-align: right;">Page 97</p> <p>1 soldiers, did the Combat Arms protect soldiers'</p> <p>2 hearing as well as the QuietPro as of that</p> <p>3 point in development?</p> <p>4 MR. MONSOUR: Object to form.</p> <p>5 Beyond scope of Touhy examination. No</p> <p>6 scientific basis.</p> <p>7 Q. Just limiting it to your personal</p> <p>8 experience and communication with soldiers.</p> <p>9 A. I think there's probably not</p> <p>10 enough data for me to say one way or the other.</p> <p>11 Q. Okay. You fit -- You fit</p> <p>12 thousands of soldiers with Combat Arms;</p> <p>13 correct?</p> <p>14 A. Yes.</p> <p>15 Q. And did any of them come back to</p> <p>16 you and complain that the Combat Arms did not</p> <p>17 adequately protect their hearing?</p> <p>18 A. Not one.</p> <p>19 Q. Did any of them come back to you</p> <p>20 and complain that they experienced tinnitus</p> <p>21 after using the Combat Arms?</p> <p>22 A. (Witness shakes head.)</p> <p>23 Q. Is that a no?</p> <p>24 A. No. I'm just -- I'm thinking.</p> <p>25 Some soldiers would exaggerate or</p>

<p style="text-align: right;">Page 98</p> <p>1 feign hearing loss or tinnitus or both on their 2 postdeployment hearing test. But I don't 3 recall anyone saying it was a direct result of 4 using X, Y, or Z hearing protection. 5 Q. Okay. You said some soldiers 6 would exaggerate or feign hearing loss or 7 tinnitus on their postdeployment hearing test, 8 is that based on your personal experience and 9 observation of those soldiers? 10 MR. MONSOUR: Objection. Form. 11 Beyond the scope. We're now talking about 12 soldiers lying. 13 A. That is -- That is my experience, 14 yes. 15 Q. And how were you able to 16 determine that? 17 A. We have -- Some of our tests 18 require no response from the patient. It's not 19 a matter of them pressing the button, their 20 brain will tell us how their hearing is. 21 Q. Okay. Can we go back to Tab 11, 22 which is Exhibit 5? 23 A. (Witness complies.) 24 Q. All right. Do you see the note 25 at the top it says: This note from Doug Ohlin</p>	<p style="text-align: right;">Page 100</p> <p>1 General. 2 MR. MONSOUR: I'm going to object 3 to the form. This -- She's not listed as the 4 author or recipient of this email, therefore, 5 beyond Touhy, so objection. 6 Q. Okay. So do you -- Do you recall 7 the date of when you deployed to Iraq for CAE 8 fitting? 9 A. It was in March 2008. 10 Q. Let me show you -- Let me scroll 11 down to this email. 12 MR. NOMELLINI: Could we 13 highlight the paragraph below, which starts 14 with the order additionally. 15 MR. MONSOUR: Objection. The 16 military letter of August 13 specifically says 17 Lieutenant Colonel Battler is not authorized to 18 testify about documents about which she lacks 19 personal knowledge, i.e., Lieutenant Colonel 20 Battler did not author, receive, or send the 21 document. Objection. Beyond the scope. 22 MR. NOMELLINI: I would just add 23 for completeness, the August 13, 2020, letter 24 also states: Counsel will be permitted to ask 25 preliminary questions to determine whether the</p>
<p style="text-align: right;">Page 99</p> <p>1 re: Combat Arms in Iraq, we are helping. And 2 that's from Elliott Berger. 3 Do you see that? 4 A. Yes. 5 Q. Have you met Elliott Berger? 6 A. Yes. 7 Q. And is it -- Is it your view that 8 he is competent in the field of hearing 9 protection, based on your interaction with him? 10 A. Yes. 11 Q. And do you agree that the Combat 12 Arms was helping in Iraq, based on your 13 personal experience? 14 A. Yes, I do. 15 (Whereupon, Defendant's 16 Exhibit 8 was marked for 17 identification purposes.) 18 Q. Let's go to Tab 6, and mark it as 19 the next exhibit, which is Exhibit Number 8. 20 This exhibit is an email from Kathy Gates to 21 Theresa Schultz and others, dated December 10, 22 2007. 23 Who is Kathy Gates? 24 A. Retired Colonel Dr. Kathy Gates 25 was our audiology consultant to the Surgeon</p>	<p style="text-align: right;">Page 101</p> <p>1 witness has personal knowledge of or whether 2 the witness' recollection has been refreshed by 3 a document. 4 So apparently somebody finds me 5 amusing, which is good. 6 Q. So it says: Leanne Cleveland, 7 audiologist at Fort Carson, serves as the 8 hearing expert and will deploy with the 9 division to continue to support this 10 initiative. Soldiers were provided 11 predeployment hearing service, parentheses 12 DOEHRs, audiogram, CAE fitting, health 13 education, and QP training/fitting. 14 My question is: Does that 15 refresh your recollection that you were 16 deployed in or around December 2007 to provide 17 CAE fitting and other predeployment hearing 18 services? 19 A. There were -- The planned process 20 was in motion for me to deploy in March, yeah. 21 Q. Okay. Okay. So you deployed 22 with the division to support this initiative in 23 2008? 24 A. I deployed after the division had 25 already left. I was an individual augmentee,</p>

<p style="text-align: right;">Page 226</p> <p>1 A. Yes.</p> <p>2 Q. Do you believe that this picture</p> <p>3 shows a good fit?</p> <p>4 A. Yes.</p> <p>5 Q. Does it appear to you that the</p> <p>6 outside flange in this picture is butting up</p> <p>7 against -- is flush against his tragus?</p> <p>8 A. It's flush, yes.</p> <p>9 Q. If that flange had a -- had</p> <p>10 enough tension on it to where it was pushing</p> <p>11 against the tragus and loosening the plug,</p> <p>12 would that be a problem?</p> <p>13 MR. NOMEILLINI: Object to the</p> <p>14 form and foundation.</p> <p>15 A. Say that one more time. Pushing</p> <p>16 against the --</p> <p>17 Q. Sure. If that flange -- As it</p> <p>18 was inserted, if that flange got tension on it</p> <p>19 because of the insertion, and as the flange</p> <p>20 kind of reverted to form, it pushed the earplug</p> <p>21 kind of out of the ear canal, would that be a</p> <p>22 problem for this plug?</p> <p>23 MR. NOMEILLINI: Object to the</p> <p>24 form and foundation.</p> <p>25 A. No. Because the yellow -- The</p>	<p style="text-align: right;">Page 228</p> <p>1 that was inserted in the canal.</p> <p>2 Q. Okay. But I guess here's my</p> <p>3 question: If a plug -- If the design of a plug</p> <p>4 caused it to loosen itself, that's a problem</p> <p>5 with the plug; true?</p> <p>6 MR. NOMEILLINI: Object to form</p> <p>7 and foundation. Hypothetical.</p> <p>8 A. Right. It's hypothetical. It's</p> <p>9 not a realistic question.</p> <p>10 Q. I'm asking about this plug that</p> <p>11 you used. I'm not talking about a hypothetical</p> <p>12 plug, I'm talking about a CAEv2. If the design</p> <p>13 of the plug caused the plug itself to loosen,</p> <p>14 that's a problem with the plug; right?</p> <p>15 MR. NOMEILLINI: Object to form</p> <p>16 and foundation.</p> <p>17 MAJ WALD: Ma'am, again, just</p> <p>18 rely on your personal knowledge and experience.</p> <p>19 Don't answer a hypothetical question. Just</p> <p>20 based on what you know.</p> <p>21 A. Yeah, it's hypothetical. It's</p> <p>22 hypothetical.</p> <p>23 The yellow portion of this</p> <p>24 earplug was seated perfectly. This was a</p> <p>25 perfect size medium earplug. The green -- The</p>
<p style="text-align: right;">Page 227</p> <p>1 yellow part was seated properly.</p> <p>2 Q. But what if that green flange was</p> <p>3 forcing the entire earplug to kind of pull out</p> <p>4 of the ear, would that be a problem with the</p> <p>5 plug?</p> <p>6 MR. NOMEILLINI: Objection. Form.</p> <p>7 Foundation.</p> <p>8 MAJ WALD: Objection. Ma'am,</p> <p>9 don't answer the hypothetical situation. If</p> <p>10 you have any personal experience with this</p> <p>11 happening, you can rely on that.</p> <p>12 A. I mean -- Yeah. Does it -- I</p> <p>13 don't know how it would -- how it would exert</p> <p>14 force against the tragus.</p> <p>15 Q. If such force against the tragus</p> <p>16 existed, though, and the plug did loosen, that</p> <p>17 would be a problem with this plug; true?</p> <p>18 MR. NOMEILLINI: Object to the</p> <p>19 form and foundation. Hypothetical.</p> <p>20 A. It grew arms and pushed itself</p> <p>21 out?</p> <p>22 If the yellow part is seated</p> <p>23 correctly, so it -- it -- the -- the -- I don't</p> <p>24 see -- I do not -- I cannot comprehend how the</p> <p>25 green portion would exert any force on the part</p>	<p style="text-align: right;">Page 229</p> <p>1 fact that the third flange is touching his</p> <p>2 tragus had no impact on how the yellow part</p> <p>3 remained seated.</p> <p>4 Q. When you are taking pictures of</p> <p>5 plugs like this, and examining them, did you</p> <p>6 seat the plug and then take the picture and</p> <p>7 then move on and do something else? Or did you</p> <p>8 seat the plug and come back an hour later and</p> <p>9 check it again?</p> <p>10 A. My husband put the earplug in; I</p> <p>11 did the tug test; and then he used it for</p> <p>12 several missions, four deployments, and came</p> <p>13 back with excellent hearing and no tinnitus.</p> <p>14 Q. Okay. Do you know any soldiers</p> <p>15 that have come back from serving our country</p> <p>16 that used the Combat Arms earplug and do have</p> <p>17 either hearing loss or tinnitus?</p> <p>18 A. No.</p> <p>19 Q. You don't know one soldier that</p> <p>20 used these plugs that has either hearing loss</p> <p>21 or tinnitus?</p> <p>22 A. I don't know -- Of the soldiers</p> <p>23 who came back with hearing loss and/or</p> <p>24 tinnitus, I am not sure how consistently they</p> <p>25 used the earplugs. I am -- I am a hundred</p>

<p style="text-align: right;">Page 230</p> <p>1 percent certain that my ex-husband used them 2 with -- used them all the time. 3 Q. Okay. And he put them in 4 himself; correct? 5 A. Yes. 6 Q. Did he put them in as you trained 7 him to do? 8 A. Yes. 9 Q. And he does not have the flanges 10 folded back, the opposing flanges folded back; 11 true? 12 A. Correct. 13 Q. Are you familiar with the 14 Albuquerque studies, also known as the Blast 15 Overpressure Studies? 16 A. No. 17 (Whereupon, Plaintiff's 18 Exhibit 24 was marked for 19 identification purposes.) 20 MR. MONSOUR: Okay. If you can 21 pull up LC-026. We'll call this Exhibit 24. 22 Are we on Exhibit 24, Madam Court 23 Reporter? 24 VIDEOGRAPHER: Yes, this will be 25 24.</p>	<p style="text-align: right;">Page 232</p> <p>1 Q. Okay. So it came out in 2011, 2 and you just saw it for the first time two days 3 ago? 4 A. I never read the footnote before. 5 Q. Okay. And how did you come to 6 see this two days ago? 7 A. Major Wald told me to read it. 8 Q. Okay. Well, let's go through 9 what it says. 10 A. Uh-huh. 11 Q. Footnote 27, and this is -- This 12 is involving the study that you were talking 13 about earlier in your deposition; true? 14 A. Yes. 15 Q. And Mr. Nomellini asked you about 16 it, and then I asked you a few questions about 17 it; right? 18 A. Yes. 19 Q. And it says: Cleveland, Leanne, 20 Captain, quote, Fort Carson: An Army Hearing 21 Program Success Story. Army Department Medical 22 Journal, April-June 2009. 23 This study describes the effect 24 of the addition of a second audiologist at the 25 Army base in Fort Carson, Colorado. While the</p>
<p style="text-align: right;">Page 231</p> <p>1 COURT REPORTER: Yes, we are. 2 Q. Okay. Let's pull this up. 3 This is from the GAO. Is that 4 the General Accounting Office, or Government 5 Accountability Office? Do you see that? 6 A. Yes. GAO. 7 Q. It says: Report to congressional 8 committees, hearing loss prevention, from 9 January 2011. 10 Do you see that? 11 A. Yes. 12 Q. Have you ever seen this before? 13 A. Yes. 14 Q. In what context did you see it? 15 A. The GAO committee came to Fort 16 Carson to learn about my program. 17 Q. Okay. If you'll -- If we can go 18 to page twenty-five, and look at the footnote 19 at the bottom of the page. 20 MR. MONSOUR: There it is right 21 there. 22 Q. Have you ever seen this footnote 23 before? 24 A. I saw it two days ago for the 25 first time.</p>	<p style="text-align: right;">Page 233</p> <p>1 study proves that the addition of a second 2 audiologist would increase the number of 3 service members receiving testing and training, 4 it does not provide sufficient evidence to 5 support that an additional audiologist led to 6 reduced hearing loss. 7 For example, the study interprets 8 shifts in the hearing loss and readiness rates 9 as being directly attributable to the 10 availability of a second audiologist, but the 11 study does not consider other factors that 12 could have also have had effects, such as 13 overseas deployments, changes in equipment, and 14 changes in training. 15 Did I read that reasonably 16 carefully -- or accurately? 17 A. Yes. 18 Q. Do you believe that the points 19 that are made in this footnote are valid 20 points? 21 A. No. 22 Q. Okay. Do you think that whoever 23 -- Do you think that whoever was critical of 24 your study is just plain wrong? 25 MAJ WALD: Ma'am, again, you're</p>

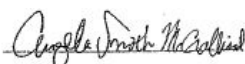
<p style="text-align: right;">Page 254</p> <p>1 one else any more questions; correct?</p> <p>2 MR. MONSOUR: That's correct.</p> <p>3 MR. NOMEILLINI: That's correct.</p> <p>4 VIDEOGRAPHER: This concludes the</p> <p>5 videotaped deposition. The time is 5:12 p.m.</p> <p>6 We're off the Record.</p> <p>7 (The deposition was concluded at 5:12 p.m.,</p> <p>8 September 10, 2020.)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 256</p> <p>1 To: Maj. Rob Wald</p> <p>2 Re: Signature of Deponent LTC Leanne Battler</p> <p>3 Date Errata due back at our offices: 10/16/2020</p> <p>4</p> <p>5 Greetings:</p> <p>6 This deposition has been requested for read and sign by</p> <p>7 the deponent. It is the deponent's responsibility to</p> <p>8 review the transcript, noting any changes or corrections</p> <p>9 on the attached PDF Errata. The deponent may fill</p> <p>10 out the Errata electronically or print and fill out</p> <p>11 manually.</p> <p>12 Once the Errata is signed by the deponent and notarized,</p> <p>13 please mail it to the offices of Veritext (below).</p> <p>14</p> <p>15 When the signed Errata is returned to us, we will seal</p> <p>16 and forward to the taking attorney to file with the</p> <p>17 original transcript. We will also send copies of the</p> <p>18 Errata to all ordering parties.</p> <p>19</p> <p>20 If the signed Errata is not returned within the time</p> <p>21 above, the original transcript may be filed with the</p> <p>22 court without the signature of the deponent.</p> <p>23</p> <p>24 Please Email the completed errata/witness cert page</p> <p>25 to readandsign@veritext.com</p> <p>or mail to</p> <p>Veritext Production Facility</p> <p>2031 Shady Crest Drive</p> <p>Hoover, AL 35216</p> <p>205-397-2397</p> <p></p> <p></p>
<p style="text-align: right;">Page 255</p> <p>1 REPORTER'S CERTIFICATE</p> <p>2 STATE OF ALABAMA,</p> <p>3 MONTGOMERY COUNTY,</p> <p>4 I, Angela Smith McGalliard, Registered</p> <p>5 Professional Reporter, Certified Realtime</p> <p>6 Reporter, Certified Court Reporter and</p> <p>7 Commissioner for the State of Alabama at Large,</p> <p>8 do hereby certify that the above and foregoing</p> <p>9 proceeding was taken down by me by stenographic</p> <p>10 means, and that the transcript was produced by</p> <p>11 computer aid under my supervision, and that the</p> <p>12 foregoing represents a true and correct</p> <p>13 transcript of the proceedings occurring on said</p> <p>14 date and at said time.</p> <p>15 I further certify that I am neither of</p> <p>16 kin nor of counsel to the parties to the</p> <p>17 action; nor in any manner interested in the</p> <p>18 result of said case.</p> <p>19 Signed the 15th day of September, 2020.</p> <p>20</p> <p>21 </p> <p>22 ANGELA SMITH MCGALLIARD, RPR, CRR, CCR</p> <p>23 AL CCR Lic. No. 98, Expires 9/30/20</p> <p>24 Notary Expiration 8/13/2023</p> <p>25</p>	<p style="text-align: right;">Page 257</p> <p>1 ERRATA for ASSIGNMENT #4249610</p> <p>2 I, the undersigned, do hereby certify that I have read the</p> <p>3 transcript of my testimony, and that</p> <p>4</p> <p>5 There are no changes noted.</p> <p>6 The following changes are noted:</p> <p>7 Pursuant to Civil Procedure, Rule 30. ALA. CODE § 5-30(e)</p> <p>8 (2017). Rule 30(e) states any changes in form or</p> <p>9 substance which you desire to make to your testimony shall</p> <p>10 be entered upon the deposition with a statement of the</p> <p>11 reasons given for making them. To assist you in making any</p> <p>12 such corrections, please use the form below. If additional</p> <p>13 pages are necessary, please furnish same and attach.</p> <p>14</p> <p>15 Page ____ Line ____ Change ____</p> <p>16</p> <p>17 Reason for change ____</p> <p>18 Page ____ Line ____ Change ____</p> <p>19</p> <p>20 Reason for change ____</p> <p>21 Page ____ Line ____ Change ____</p> <p>22</p> <p>23 Reason for change ____</p> <p>24 Page ____ Line ____ Change ____</p> <p>25</p>

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG) Case No. 3:19md2885
PRODUCTS LIABILITY LITIGATION,)
) Pensacola, Florida
) April 22, 2021
) 8:02 a.m.
)
_____)

VOLUME XVIII
(Pages 1 to 309)

TRANSCRIPT OF EIGHTEENTH DAY OF JURY TRIAL
BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE, and a jury

A P P E A R A N C E S

FOR THE PLAINTIFFS: Aylstock, Witkin, Kreis & Overholtz, PLLC
By: **BRYAN F. AYLSTOCK**
baylstock@awkolaw.com

NEIL D. OVERHOLTZ
noverholtz@awkolaw.com

JENNIFER HOEKSTRA
jhoekstra@awkolaw.com

17 E Main Street, Suite 200
Pensacola, Florida 32502

APPEARANCES: (Cont'd)

FOR THE PLAINTIFFS:

Laminack, Pirtle & Martines LLP

By: **THOMAS W. PIRTLE**

tomp@lmp-triallaw.com

5020 Montrose Blvd, 9th Floor

Houston, Texas 77006

Pulaski Kherkher, PLLC

By: **KATHERINE CORNELL**

2925 Richmond Avenue, Suite 1725

Houston, Texas 77098

FOR THE DEFENDANTS:

Kirkland & Ellis, LLP

By: **ROBERT C. BROCK**

mike.brock@kirkland.com

1301 Pennsylvania Avenue NW

Washington, D.C. 20004

Kirkland & Ellis, LLP

By: **NICHOLAS F. WASDIN**

nick.wasdin@kirkland.com

MARK J. NOMELLINI

mnomellini@kirkland.com

300 N Lasalle

Chicago, Illinois 60654

Dechert, LLP

By: **KIMBERLY BRANSCOME**

kimberly.branscome@dechert.com

633 W 5th Street, Suite 4900

Los Angeles, California 90071

Moore, Hill & Westmoreland, PA

By: **CHARLES F. BEALL, JR.**

cbeall@mhw-law.com

350 W Cedar Street, Suite 100

Pensacola, Florida 32502

12:09:00 1 **A.** Yes.

12:09:00 2 **Q.** And if you'll go down to what's Enclosure 6, can you tell

12:09:07 3 the jury what that enclosure references?

12:09:11 4 **A.** "Earplugs: General information poster."

12:09:16 5 **Q.** And have you seen from time to time in the audiology

12:09:18 6 community military posters used in training?

12:09:23 7 **A.** Yes.

12:09:23 8 **Q.** And if you'll turn over to page 25, is this the enclosure

12:09:31 9 that was referenced earlier, E6?

12:09:35 10 **A.** Yes.

12:09:35 11 **Q.** And does it provide general information about earplugs?

12:09:40 12 **A.** Yes.

12:09:40 13 **Q.** It's got a list of seven things that are common of general

12:09:45 14 information that the DoD is giving instruction about; is that

12:09:49 15 true?

12:09:49 16 **A.** Yes.

12:09:49 17 **Q.** And what does the Department of Defense say about earplugs

12:09:54 18 under Item No. 3?

12:09:56 19 **A.** Item No. 3 says, "Plugs tend to work loose as a result of

12:10:01 20 talking and chewing and must be reseated."

12:10:05 21 **Q.** Well, it was your knowledge that earplugs, as instructed by

12:10:08 22 the DoD, could loosen or slip even with things simply as

12:10:15 23 talking and chewing?

12:10:16 24 **A.** Yes, sir, according to the DoD.

12:10:21 25 (End of videotaped deposition.)

12:10:25 1 **THE COURT:** Does that complete it?

12:10:27 2 **MR. NOMELLINI:** Completed.

12:10:28 3 **THE COURT:** We're going to go ahead and take our lunch
12:10:31 4 recess now.

12:10:32 5 Ladies and gentlemen, we'll be in recess until one
12:10:34 6 o'clock. Please don't discuss the case during the recess.
12:10:37 7 Also, please don't begin to form any opinion about the merits.

12:10:40 8 Have a nice lunch, as short as it is, and we'll see
12:10:44 9 you back at one o'clock. Thank you.

12:10:46 10 *(Jury out.)*

12:11:05 11 What do you all have after lunch, Mr. Beall?

12:11:09 12 **MR. BEALL:** The current plan is to play Lt. Col.
12:11:12 13 Battler right after lunch. Before we do that, we wanted to
12:11:16 14 confirm something with the Court in light of the discussion
12:11:19 15 with Ms. Branscome yesterday.

12:11:22 16 We designated things and you overruled the plaintiffs'
12:11:26 17 objections consistent with your ruling on the motion in limine
12:11:29 18 on personal use that we've discussed at length yesterday, and I
12:11:32 19 think we don't want to discuss again necessarily. But you made
12:11:35 20 a comment yesterday that obviously about opening the door.

12:11:39 21 We understand, because you've already overruled their
12:11:41 22 objections to those designations, that by playing what is in
12:11:44 23 the can, essentially, that would not be opening the door,
12:11:47 24 because we're not putting the witness on the stand and asking
12:11:50 25 questions. But we want to make sure before we play that that

12:11:55 1 they don't jump up and say that this deposition you previously
12:11:57 2 approved would open the door.

12:11:59 3 **THE COURT:** I can't tell you that. All I can tell
12:12:01 4 you, Mr. Beall, is that I overruled the objections to the
12:12:04 5 testimony from Lt. Col. Battler. I can't tell you that I won't
12:12:09 6 consider that along with other testimony that you might put on
12:12:14 7 about personal use in terms of how much of it there is and how
12:12:18 8 impactful it is that it hasn't opened the door. So I'm not
12:12:21 9 telling you that I will never consider Lt. Col. Battler's
12:12:25 10 testimony about personal use in assessing whether you've opened
12:12:28 11 the door.

12:12:30 12 **MR. BEALL:** Do I understand that to be sort of a
12:12:32 13 cumulative situation, or is it in your -- and I know you're not
12:12:36 14 giving a hypothetical guidance ruling, but --

12:12:39 15 **THE COURT:** I've said what I've said in my ruling on
12:12:42 16 the motion in limine and that stands. I can't assess this in a
12:12:47 17 vacuum. I don't know what you're going to present, and I
12:12:50 18 assume you're not going to tell me.

12:12:52 19 **MR. BEALL:** It's already been presented to you, that's
12:12:56 20 the reason --

12:12:56 21 **THE COURT:** Is she the last one?

12:12:58 22 **MR. BEALL:** Is she the last person that's going to --
12:13:02 23 I don't have the answer to that question, Your Honor.

12:13:03 24 **THE COURT:** I've allowed in her testimony, whatever it
12:13:07 25 was in the depo. I didn't see that in isolation as opening the

12:13:13 1 door. But I can't tell you that I won't consider it in looking
12:13:17 2 at sort of the totality of the circumstances.

12:13:20 3 **MR. BEALL:** And that's very helpful. We appreciate
12:13:23 4 that. That may or may not affect our decision and when we play
12:13:27 5 that testimony. It could be Kara Cave and Dr. Jones will be
12:13:29 6 testifying this afternoon as well. So I don't know if we're
12:13:31 7 going to go to a --

12:13:34 8 **THE COURT:** Well, Dr. Jones is not going talk about
12:13:36 9 his use --

12:13:37 10 **MR. BEALL:** No, no, no. You asked about the order of
12:13:40 11 witnesses. So I'm switching back to logistical things at this
12:13:43 12 point. So those are the possibilities at this point.

12:13:46 13 **THE COURT:** You have I think Battler -- is it Battler
12:13:49 14 or Babeu?

12:13:50 15 **MR. BEALL:** It's Battler.

12:13:51 16 **THE COURT:** Isn't that about an hour-and-a-half?

12:13:53 17 **MR. BEALL:** A little less than that now. It's maybe
12:13:55 18 an hour as I recall.

12:13:57 19 **THE COURT:** And Kara Cave is about the same?

12:13:58 20 **MR. BEALL:** About the same.

12:14:00 21 **THE COURT:** You'll need more witnesses.

12:14:03 22 **MR. BEALL:** Dr. Jones will be here live. It's a
12:14:06 23 question of whether he'll take the stand at one o'clock or two
12:14:10 24 o'clock or three o'clock.

12:14:11 25 **THE COURT:** I understand. That tells me what I need

12:14:13 1 to know in terms of this afternoon.

12:14:16 2 Anything else from anybody?

12:14:17 3 *[No response.]*

12:14:18 4 We'll be in recess until one o'clock.

12:21:53 5 *(Luncheon recess taken 12:14 p.m. to 1:01 p.m.)*

01:01:43 6 *(Jury in the box.)*

01:01:45 7 **THE COURT:** Welcome back. Mr. Nomellini, who is your
01:01:50 8 next witness?

01:01:51 9 **MR. NOMELLINI:** Thank you, Your Honor. Defendants
01:01:54 10 call Lt. Col. Leanne Battler, also referred to sometimes by her
01:02:00 11 maiden name of Lt. Col. Leanne Cleveland. She is a current
01:02:05 12 military staff audiologist who previously served as the Army
01:02:09 13 hearing program manager at Fort Hood, Texas, and Fort Carson,
01:02:16 14 California.

01:02:16 15 **THE COURT:** Ladies and gentlemen, notwithstanding the
01:02:19 16 uniform that you see her wearing, she is not testifying on
01:02:23 17 behalf of the United States in any way, and this is not
01:02:27 18 official testimony on behalf of the government.

01:02:27 19 (Videotaped deposition of LEANNE MARIE BATTLER was
01:02:27 20 published to the jury as follows:)

01:02:38 21 EXAMINATION

01:02:38 22 **Q.** Good morning. Would you identify yourself for the jury,
01:02:41 23 please?

01:02:42 24 **A.** My name is Lt. Col. Leanne Marie Battler.

01:02:45 25 **Q.** And after that you attended SUNY Buffalo, where you

01:29:08 1 Lieutenant Colonel?

01:29:08 2 **A.** Yes.

01:29:08 3 **Q.** And if you look at Section 6.3, "Characteristics: For the
01:29:15 4 Combat Arms and other preformed earplugs, medically trained
01:29:21 5 personnel were required to fit and examine the earplugs at
01:29:24 6 least annually to ensure proper fit and condition." Correct?

01:29:28 7 **A.** Yes.

01:29:28 8 **Q.** Okay. So what you had mostly available for servicemembers
01:29:33 9 was a triple-flange earplug other than the Combat Arms?

01:29:37 10 **A.** Yes.

01:29:37 11 **Q.** And that's the first thing that you tried to fit the
01:29:41 12 servicemembers with, correct?

01:29:45 13 **A.** Yes.

01:29:45 14 **Q.** And approximately when did the Combat Arms first become
01:29:50 15 available in your clinic?

01:29:52 16 **A.** Probably 2004, yes, at Fort Hood, 2004.

01:30:10 17 **Q.** Okay. So you first tried to fit the servicemembers with a
01:30:14 18 triple-flange earplug other than the Combat Arms, correct?

01:30:16 19 **A.** Yes.

01:30:16 20 **Q.** And then sometimes the Combat Arms were available and
01:30:21 21 sometimes they were not, correct?

01:30:23 22 **A.** Yes.

01:30:23 23 **Q.** And if they were available, you'd try to fit the
01:30:26 24 servicemember with the Combat Arms, correct?

01:30:30 25 **A.** In addition to the linear triple-flange, yes.

01:30:34 1 Q. And sometimes the Combat Arms would fit and sometimes the
01:30:36 2 Combat Arms would not fit, correct?

01:30:39 3 A. Yes.

01:30:39 4 Q. And the Combat Arms were not a one-size-fits-all earplug,
01:30:46 5 they fit some people and not others, correct?

01:30:49 6 A. Yes.

01:30:49 7 Q. Did the servicemembers, based on your recollection, receive
01:30:54 8 anything other than the wallet card created by CHPPM when you
01:31:01 9 interacted with them in connection with the Combat Arms?

01:31:04 10 A. Well, there was our verbal instruction. And then, when we
01:31:12 11 did the hearing health education, we had PowerPoint slides.

01:31:18 12 Q. Did you ever ask the -- any representatives of the
01:31:28 13 manufacturer of the Combat Arms, either Aearo or 3M, to give
01:31:35 14 presentations to servicemembers relating to the Combat Arms?

01:31:41 15 A. I -- I did not, no.

01:31:46 16 Q. And based on -- based on your personal experience, you
01:31:51 17 would not have expected the manufacturer of the Combat Arms or
01:31:56 18 its representatives to come onto bases to give presentations to
01:32:03 19 servicemembers, correct?

01:32:05 20 A. No. That's correct. I believe that the earplug, the
01:32:16 21 Combat Arms Earplug Version 2, helped improve situational
01:32:23 22 awareness, survivability, and lethality.

01:32:32 23 Q. You've fit thousands of soldiers with Combat Arms, correct?

01:32:37 24 A. Yes.

01:32:37 25 Q. And did any of them come back to you and complain that the

01:32:40 1 Combat Arms did not adequately protect their hearing?

01:32:44 2 **A.** Not one.

01:32:46 3 **Q.** Do you see the note at the top, it says, "This note from
01:32:52 4 Doug Ohlin Re: Combat Arms in Iraq, we are helping." That's
01:32:58 5 from Elliott Berger. Do you see that?

01:33:01 6 **A.** Yes, sir.

01:33:01 7 **Q.** Have you met Elliott Berger?

01:33:03 8 **A.** Yes.

01:33:03 9 **Q.** And is it -- is it your view that he is competent in the
01:33:08 10 field of hearing protection, based on your interaction with
01:33:14 11 him?

01:33:14 12 **A.** Yes.

01:33:14 13 **Q.** And do you agree that the Combat Arms was helping in Iraq,
01:33:22 14 based on your personal experience?

01:33:28 15 **A.** Yes, I do.

01:33:29 16 **Q.** Let's go to Tab 6 and let's mark that as the next exhibit,
01:33:36 17 which is Exhibit No. 8.

01:33:39 18 This Exhibit 8 is an email from Kathy Gates to Theresa
01:33:47 19 Schultz, and others, dated December 10th, 2007. Who is Kathy
01:33:52 20 Gates?

01:33:54 21 **A.** Retired Colonel Dr. Kathy Gates was our audiology
01:34:01 22 consultant to the Surgeon General.

01:34:08 23 **Q.** It says, "Leanne Cleveland, audiologist at Fort Carson,
01:34:12 24 serves as the hearing expert and will deploy with the division
01:34:16 25 to continue to support this initiative. Soldiers were provided

01:34:20 1 pre-deployment hearing service (DOEHRS) audiogram, CAE fitting,
01:34:27 2 health education and QP training/fitting."

01:34:31 3 My question is: Does that refresh your recollection that
01:34:36 4 you were deployed in or around December 2007 to provide CAE
01:34:40 5 fitting and other pre-deployment hearing services?

01:34:45 6 **A.** There were -- the planned process was in motion for me to
01:34:58 7 deploy in March, yeah.

01:35:00 8 **Q.** And so you deployed with the division to support this
01:35:04 9 initiative in 2008?

01:35:08 10 **A.** I deployed after the division had already left. I was an
01:35:15 11 individual augmentee added later on.

01:35:23 12 **Q.** Comparing Combat Arms with other earplugs, in your personal
01:35:25 13 experience, you did not find that the Combat Arms Earplugs were
01:35:29 14 more likely to lose their seal than other earplugs, correct?

01:35:34 15 **A.** Not including electronic TCAPS, correct.

01:35:45 16 **Q.** So I'm correct that Combat Arms Earplugs were not more
01:35:49 17 likely to lose their seal than other earplugs, yes?

01:35:53 18 **A.** In my experience, yes.

01:35:54 19 **Q.** In the first bullet at the bottom, it says, "Check proper
01:36:00 20 fit by gently tugging on plugs for tension."

01:36:04 21 Do you agree with that, and is that the part of the
01:36:07 22 procedure that you used in the clinic to check the proper fit
01:36:12 23 of the Combat Arms Earplug?

01:36:18 24 **A.** Yes, that's -- I would call it the tug test.

01:36:21 25 **Q.** Okay. So, describe the tug test and who did it and how it

01:36:30 1 was done.

01:36:31 2 **A.** So, I or my technicians, we would, again, give the soldiers
01:36:44 3 the preformed, regular, nonlinear -- excuse me -- linear
01:36:51 4 triple-flange or quad-flange earplugs, the inexpensive version.
01:36:57 5 Rather than us physically putting them in, I said -- it's
01:37:01 6 important for the soldiers to know how to insert the hearing
01:37:05 7 protection themselves, because I would say, I'm not going to be
01:37:11 8 out there on the battlefield next to you to put your earplugs
01:37:15 9 in, you need to learn how to do this yourself.

01:37:18 10 So we would demonstrate and then make them do it
01:37:20 11 themselves. Reaching up and over with the opposite hand,
01:37:24 12 pulling the pinna up and back to straighten out the ear canal,
01:37:28 13 then pushing and twisting and turning until that last flange
01:37:35 14 was flush with the opening of the ear canal. Then letting go
01:37:38 15 of the ear and doing the tug test. And then we would do a tug
01:37:41 16 test on top of it to make sure that they had that suction or
01:37:45 17 resistance.

01:37:46 18 **Q.** And then there is -- it actually has a picture on the
01:37:52 19 wallet card with the flange folded back. Do you see that in
01:37:57 20 the lower right?

01:38:00 21 **A.** Yes, I do see that.

01:38:01 22 **Q.** Let's mark that fact sheet as Exhibit 10. It's Tab 2.
01:38:11 23 Have you seen this document before, Lt. Col. Battler?

01:38:13 24 **A.** Yes.

01:38:14 25 **Q.** If you come back from that callout back to the document and

01:38:24 1 go to the next page of this, do you see the part that says --
01:38:31 2 there is a graphic that says, "Detection of sound by --" can
01:38:38 3 you describe what that graphic shows and how it relates to
01:38:41 4 situational awareness?

01:38:44 5 **A.** Yes. So we use this in a lot of our hearing health
01:38:50 6 education briefings. And basically it's saying that, with an
01:38:59 7 un-occluded ear, so nothing in your ear canal at all, if you
01:39:02 8 have H1 hearing, then you have the ability to hear a rifle bolt
01:39:08 9 closing so that (*indicating*) sound at a distance of a thousand
01:39:14 10 meters, versus, if you are wearing the foam earplug, you don't
01:39:19 11 hear that same rifle bolt closing until the person making that
01:39:26 12 noise is 60 meters from your position. In other words, you're
01:39:30 13 a dead man.

01:39:33 14 Along comes the Combat Arms Earplug, not quite as good as
01:39:37 15 an un-occluded ear, but you can hear that rifle bolt closing
01:39:42 16 within 500 meters and would still give you some time to react
01:39:46 17 and survive.

01:39:49 18 **Q.** And so, was that an advantage of the Combat Arms Earplug
01:39:52 19 based on your personal experience and communications with
01:39:55 20 soldiers?

01:40:02 21 **A.** Yes.

01:40:02 22 **Q.** Okay. If you go to user tips in this document, where it
01:40:16 23 says in the second bullet point, "Like any earplug, it is
01:40:21 24 essential that the Combat Arms be properly inserted." Do you
01:40:30 25 agree with that?

01:40:30 1 **A.** Yes.

01:40:30 2 **Q.** And that's just as true for the Combat Arms as it is for

01:40:34 3 other earplugs, right?

01:40:35 4 **A.** Yes.

01:40:36 5 **Q.** Why do you think the Combat Arms is a great product based

01:40:41 6 on your experience?

01:40:43 7 **A.** I mean, on the firing ranges, for sure, but especially down

01:41:00 8 range. You know, I wore them and experienced that I felt

01:41:07 9 myself protected but not overly protected. I still had

01:41:14 10 situational awareness.

01:41:15 11 **Q.** And why is it important that with the Combat Arms you felt

01:41:19 12 protected but not overly protected?

01:41:24 13 **A.** So, if there was weapons fire or blasts, noise -- hazardous

01:41:35 14 noise exposure, then I knew that I would not have permanent

01:41:41 15 hearing loss.

01:41:46 16 **Q.** And based on your personal experience, did the Combat Arms,

01:41:50 17 in fact, protect your hearing?

01:41:51 18 **A.** I believe so.

01:41:55 19 **Q.** And you do not have permanent hearing loss today, correct?

01:42:04 20 **A.** I have excellent hearing.

01:42:08 21 **Q.** And you do not have tinnitus today, correct?

01:42:11 22 **A.** Not today.

01:42:13 23 **Q.** And how many times have you used the Combat Arms?

01:42:19 24 **A.** Every year for 17 years.

01:42:30 25 **Q.** Okay. So you've used the Combat Arms from approximately

01:42:38 1 2003 to the present, correct?

01:42:41 2 **A.** Yes.

01:42:41 3 **Q.** And they've protected your hearing throughout that time?

01:42:57 4 **A.** Yes.

01:42:57 5 **Q.** Do you agree that handing out earplugs, including the
01:43:00 6 Combat Arms, with only written instructions is not effective
01:43:03 7 and that people have to be shown how to wear earplugs?

01:43:09 8 **A.** Yes, I agree.

01:43:11 9 **Q.** And so you believe it's important to sort of work hands-on
01:43:19 10 with an individual soldier or military personnel to show them
01:43:23 11 how to use the plug and to make sure that it fits correctly as
01:43:29 12 opposed to using a written instruction, correct?

01:43:32 13 **A.** Exactly.

01:43:33 14 **Q.** Okay. And you'd say the same is true with respect to the
01:43:37 15 Combat Arms, it protected you, correct?

01:43:40 16 **A.** If it was properly fitted and if it was the right size, in
01:43:50 17 my experience, yes.

01:43:53 18 **Q.** And it has to be properly fitted by medically trained
01:43:58 19 personnel, correct?

01:43:59 20 **A.** It needed to be fitted by the soldier who was using it who
01:44:05 21 received adequate training from medically trained personnel,
01:44:09 22 yes.

01:44:09 23 **Q.** And am I correct that you did not rely on Aearo or 3M to
01:44:17 24 come by the installations to provide fitting on the Combat Arms
01:44:21 25 Earplug Version 2 to soldiers?

01:44:32 1 **A.** Correct.

01:44:32 2 **Q.** And am I correct that you did not invite Aearo or 3M to
01:44:35 3 come by the installations to provide fitting on Combat Arms
01:44:40 4 Version 2 to soldiers?

01:44:41 5 **A.** Correct.

01:44:41 6 **Q.** Am I also correct that you did not rely on Aearo or 3M to
01:44:46 7 provide any oral instructions to soldiers relating to the
01:44:52 8 Combat Arms Version?

01:44:56 9 **A.** Correct.

01:44:56 10 **Q.** And am I also correct that you did not rely on Aearo or 3M
01:45:01 11 to provide any written instructions to soldiers on the Combat
01:45:06 12 Arms Version?

01:45:07 13 **A.** Correct.

01:45:07 14 **Q.** And proper instruction is key for preformed hearing
01:45:14 15 protectors, like the Combat Arms Version 2, to work effectively
01:45:19 16 in your experience, correct?

01:45:21 17 **A.** In my experience, yes, that's correct.

01:45:22 18 **Q.** The Combat Arms Version 2 is a triple-flanged earplug,
01:45:27 19 correct?

01:45:28 20 **A.** Yes.

01:45:28 21 **Q.** And do you insert it the same way that you insert other
01:45:33 22 triple-flanged earplugs, you reach over, you pull behind the
01:45:37 23 ear, you stick it in the ear; is that right?

01:45:39 24 **A.** Yes.

01:45:39 25 **Q.** Same way, right?

02:03:15 1 Q. Do you believe that this picture shows a good fit?

02:03:20 2 A. Yes.

02:03:23 3 Q. Does it appear to you that the outside flange in this
02:03:30 4 picture is butting up against -- is flush against his tragus?

02:03:39 5 A. It's flush, yes.

02:03:42 6 Q. If that flange had a -- had enough tension on it to where
02:03:51 7 it was pushing against the tragus and loosening the plug, would
02:03:57 8 that be a problem?

02:03:59 9 A. Say that one more time. Pushing against the --

02:04:02 10 Q. Sure. If that flange -- as it was inserted, if that flange
02:04:06 11 got tension on it because of the insertion, and as the flange
02:04:14 12 kind of reverted to form, it pushed the earplug kind of out of
02:04:18 13 the ear canal, would that be a problem for this plug?

02:04:23 14 A. No, because the yellow -- the yellow part was seated
02:04:26 15 properly.

02:04:27 16 Q. But what if that green flange was forcing the entire
02:04:31 17 earplug to kind of pull out of the ear, would that be a problem
02:04:36 18 with the plug?

02:04:36 19 A. I mean -- yeah, does it -- I don't know how it would -- how
02:04:42 20 it would exert force against the tragus.

02:04:45 21 Q. If such force against the tragus existed, though, and the
02:04:53 22 plug did loosen, that would be a problem with this plug, true?

02:04:58 23 A. If it grew arms and pushed itself out? If the yellow part
02:05:07 24 is seated correctly, so it -- it -- the -- the -- I don't see
02:05:15 25 -- I do not -- I cannot comprehend how the green portion would

02:05:25 1 exert any force on the part that was inserted in the canal.

02:05:28 2 **Q.** Okay. But I guess here is my question: If a plug -- if
02:05:34 3 the design of a plug caused it to loosen itself, that's a
02:05:39 4 problem with the plug, true?

02:05:42 5 **A.** Right. It's hypothetical. It's not a realistic question.

02:05:45 6 **Q.** When you are taking pictures of plugs like this and
02:05:50 7 examining them, did you seat the plug and then take a picture
02:05:56 8 and then move on and do something else? Or did you seat the
02:05:59 9 plug and come back an hour later and check it again?

02:06:03 10 **A.** My husband put the earplug in. I did the tug test. And
02:06:21 11 then he used it for several missions, four deployments, and
02:06:27 12 came back with excellent hearing and no tinnitus.

02:06:37 13 **Q.** Okay. Do you know any soldiers that have come back from
02:06:40 14 serving our country that used the Combat Arms Earplug and do
02:06:43 15 have either hearing loss or tinnitus?

02:06:48 16 **A.** No.

02:06:56 17 **Q.** You don't know one soldier that used these plugs that has
02:07:01 18 either hearing loss or tinnitus?

02:07:05 19 **A.** I don't know -- of the soldiers who came back with hearing
02:07:11 20 loss and/or tinnitus, I am not sure how consistently they used
02:07:23 21 the earplugs. I am -- I am 100 percent certain that my
02:07:32 22 ex-husband used them with -- used them all the time.

02:07:38 23 **Q.** Okay. And he put those in himself, correct?

02:07:47 24 **A.** Yes.

02:07:47 25 **Q.** Did he put them in as you trained him to do?

02:07:51 1 **A.** Yes.

02:07:51 2 **Q.** And he does not have the flanges folded back, the opposing

02:07:59 3 flanges folded back, true?

02:08:02 4 **A.** Correct.

02:08:02 5 **Q.** Real quick. It appears -- we've gone through some emails

02:08:08 6 today where you were having a back and forth with Brian Myers

02:08:15 7 with Aearo -- we saw his email address. Do you remember that?

02:08:18 8 **A.** Uh-huh.

02:08:19 9 **Q.** Correct?

02:08:20 10 **A.** Yes, yes.

02:08:20 11 **Q.** And in those back-and-forths, you were talking about some

02:08:26 12 of the pros and cons of the CAEv2, true?

02:08:30 13 **A.** Yes.

02:08:32 14 **Q.** And I'm categorizing it as a back and forth. Do you think

02:08:37 15 that's a fair categorization?

02:08:41 16 **A.** As a quality assurance?

02:08:47 17 **Q.** Yes.

02:08:49 18 **A.** Yes.

02:08:49 19 **Q.** Okay. In those back-and-forth emails with Brian Myers, or

02:08:55 20 anyone else from Aearo, did any of them ever share any problems

02:09:01 21 that they might have had with the CAEv2 with you?

02:09:08 22 **A.** No. It was always, what can we do to help the soldier?

02:09:14 23 **Q.** Okay. But they never shared any of their internally-known

02:09:23 24 problems with the plug with you. True statement? Go ahead,

02:09:28 25 you can answer.

05:37:26 1 absolutely would have found or told you that that passage --
05:37:30 2 those two passages that Mr. Aylstock read and I listened to,
05:37:35 3 everybody else heard, including the jury, about thousands of
05:37:37 4 soldiers wearing that earplug with no problems or complaints,
05:37:40 5 that I would have told you that that would have opened the
05:37:42 6 door, and that's why you didn't give me enough notice. And
05:37:46 7 that's the impression I'm left with.

05:37:50 8 So the record is now hopefully clear on that as well.
05:37:56 9 Because if I had had sufficient notice and if you had
05:38:00 10 identified the passages for me that were clearly pushing the
05:38:05 11 envelope, I would not -- I would have told you, yes, you play
05:38:08 12 this, you're going to be opening the door. And I think you
05:38:11 13 knew that.

14 ***(Proceedings concluded at 5:38 p.m.)***

15 -----

16 *I certify that the foregoing is a correct transcript from the*
17 *record of proceedings in the above-entitled matter. Any*
18 *redaction of personal data identifiers pursuant to the Judicial*
19 *Conference Policy on Privacy are noted within the transcript.*

20 **s/Donna L. Boland**
Donna L. Boland, RPR, FCRR
21 ***Official Court Reporter***

4-22-2021
Date

22
23
24
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EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG) Case No. 3:19md2885
PRODUCTS LIABILITY LITIGATION,)
) Pensacola, Florida
) April 12, 2021
) 8:01 a.m.
)

VOLUME X
(Pages 1 to 346)

TRANSCRIPT OF TENTH DAY OF JURY TRIAL
BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE, and a jury

A P P E A R A N C E S

FOR THE PLAINTIFFS: Aylstock, Witkin, Kreis & Overholtz, PLLC
By: **BRYAN F. AYLSTOCK**
baylstock@awkolaw.com

NEIL D. OVERHOLTZ
noverholtz@awkolaw.com

JENNIFER HOEKSTRA
jhoekstra@awkolaw.com

17 E Main Street, Suite 200
Pensacola, Florida 32502

APPEARANCES: (Cont'd)

FOR THE PLAINTIFFS: Laminack, Pirtle & Martines LLP
By: **THOMAS W. PIRTLE**

tomp@lmp-triallaw.com
5020 Montrose Blvd, 9th Floor
Houston, Texas 77006

Pulaski Kherkher, PLLC
By: **KATHERINE CORNELL**
2925 Richmond Avenue, Suite 1725
Houston, Texas 77098

FOR THE DEFENDANTS: Kirkland & Ellis, LLP

By: **ROBERT C. BROCK**
mike.brock@kirkland.com

1301 Pennsylvania Avenue NW
Washington, D.C. 20004

Kirkland & Ellis, LLP
By: **NICHOLAS F. WASDIN**
nick.wasdin@kirkland.com

MARK J. NOMELLINI
mnomellini@kirkland.com
300 N Lasalle
Chicago, Illinois 60654

Dechert, LLP
By: **KIMBERLY BRANSCOME**
kimberly.branscome@dechert.com
633 W 5th Street, Suite 4900
Los Angeles, California 90071

Moore, Hill & Westmoreland, PA
By: **CHARLES F. BEALL, JR.**
cbeall@mhw-law.com
350 W Cedar Street, Suite 100
Pensacola, Florida 32502

11:22:41 1 **A.** Yes, sir.

11:22:41 2 **Q.** Anywhere in any of this labeling, does it say that they
11:22:45 3 folded back all the flanges on the subjects in the testing and
11:22:49 4 that's the way they got the 22?

11:22:51 5 **A.** No.

11:22:52 6 **Q.** Does it make it mandatory anywhere in this labeling that
11:22:57 7 was provided to the military and soldiers and others, does it
11:23:01 8 say, hey, you've got to fold back the flanges, you've got to
11:23:04 9 manipulate the plug to get the 22 NRR?

11:23:08 10 **A.** No.

11:23:09 11 **Q.** Does it mention anything about the eight-subject test that
11:23:12 12 only got the 10.9?

11:23:14 13 **A.** It does not.

11:23:20 14 **Q.** Now, I want to wrap up and ask you:

11:23:25 15 Was there anything that Ms. Branscome talked to you about
11:23:32 16 that changed your opinion in any way related to whether or not
11:23:36 17 this Combat Arms plug is defective?

11:23:38 18 **A.** No.

11:23:39 19 **MR. CARTMELL:** May I approach, Your Honor?

11:23:41 20 **THE COURT:** Yes.

11:23:41 21 **BY MR. CARTMELL:**

11:23:42 22 **Q.** You testified during direct exam that there were multiple
11:23:50 23 ways in which this earplug has problems and is defective and
11:23:56 24 does not fit and seal, correct?

11:23:59 25 **A.** Correct.

11:23:59 1 Q. Why don't you briefly --

11:24:01 2 THE COURT: Mr. Cartmell, will you go back to the
11:24:04 3 lectern, please.

11:24:06 4 MR. CARTMELL: Sorry.

11:24:07 5 BY MR. CARTMELL:

11:24:08 6 Q. Briefly restate that.

11:24:09 7 A. So this is the first ever double-ended earplug. And I
11:24:15 8 think the best way to know what the problems are is to look at
11:24:17 9 what they did when they took this thing off of the market.

11:24:20 10 So it's a double-ended plug. There is not another
11:24:24 11 double-ended plug. It is too short so the newer ones are
11:24:28 12 longer so that you can get it in. And really the newer ones
11:24:32 13 are like the older ones. That study that showed before this
11:24:35 14 plug came out that those other plugs were doing better. It's
11:24:40 15 too wide and so it's uncomfortable and hard to get in, and it's
11:24:43 16 too stiff and it's hard to get in in that way.

11:24:47 17 And then the flanges from the other side touch against the
11:24:51 18 tragus. And even when an expert fitter is putting it in in
11:24:58 19 like that 017 study that we just looked at those handwritten
11:25:01 20 notes, it either loosens or in one patient fell out.

11:25:06 21 So those are the problems I see with the plug making it
11:25:11 22 dangerous for patients to use.

11:25:12 23 Q. That reminded me. Do you remember when Ms. Branscome
11:25:15 24 talked to you about Lt. Col. Battler?

11:25:22 25 A. Yes.

11:25:22 1 Q. And she said something like, well, Lt. Col. Battler's did
11:25:25 2 well with this plug. Do you remember that?

11:25:27 3 A. Yes.

11:25:27 4 Q. Have you seen testimony in this case telling you anything
11:25:30 5 about whether or not Lt. Col. Battler was given a good talking
11:25:35 6 to or reprimanded for playing favoritism towards the Combat
11:25:43 7 Arms Earplugs?

11:25:43 8 MS. BRANSCOME: Objection. Foundation, argumentative,
11:25:45 9 and leading.

11:25:46 10 MR. CARTMELL: I'm asking if he saw that testimony.

11:25:48 11 THE WITNESS: I did.

11:25:49 12 THE COURT: Overruled.

11:25:50 13 THE WITNESS: From Col. Tuten's there's testimony
11:25:54 14 regarding discussions with Colonel -- I forget her rank, but --
11:25:58 15 Col. Battler about favoritism towards the Combat Arms plug.

11:26:05 16 BY MR. CARTMELL:

11:26:06 17 Q. Real quick. I want to make sure that those defects that
11:26:09 18 you identified, your opinion is those were the cause of Mr.
11:26:12 19 Hacker's tinnitus that he's claiming in this case, right?

11:26:15 20 A. Correct.

11:26:15 21 Q. And you've looked at his ear canal, and what size ear canal
11:26:19 22 did he have?

11:26:20 23 A. He's got a normal sized ear canal.

11:26:21 24 Q. Was his ear canal the type that the defects in the Combat
11:26:27 25 Arms Earplug didn't fit and seal appropriately?

05:40:08 1 **THE COURT:** But if there is another statement within
05:40:12 2 that document that you believe does impact in a negative way on
05:40:18 3 their credibility, aside from just the context within which
05:40:21 4 that one statement was made in the document, I would certainly
05:40:25 5 consider allowing you to recross on that. I hope that's clear.

05:40:31 6 **MR. BEALL:** It is. Thank you, Your Honor.

05:40:32 7 **THE COURT:** Anything else?

05:40:34 8 **MR. AYLSTOCK:** No, Your Honor.

05:40:35 9 **MS. BRANSCOME:** No, Your Honor.

05:40:36 10 **THE COURT:** I'll see you all at eight in the morning.
05:40:39 11 Thank you.

12 *(Proceedings concluded at 5:40 p.m.)*

13 -----

14 *I certify that the foregoing is a correct transcript from the*
15 *record of proceedings in the above-entitled matter. Any*
16 *redaction of personal data identifiers pursuant to the Judicial*
17 *Conference Policy on Privacy are noted within the transcript.*

18 *s/Donna L. Boland*
19 *Donna L. Boland, RPR, FCRR*
20 *Official Court Reporter*

4-12-2021
Date

21
22
23
24
25

EXHIBIT 4

From: [Neglia, Ashley](#)
To: [Michael A. Sacchet](#); *cbeall@mhw-law.com; [3M Earplugs Dechert](#); [Brock, Mike](#);
*Kimberly.branscome@dechert.com; [Nomellini, Mark J.](#); [Wasdin, Nick](#)
Cc: [Bryan Aylstock](#); tomp@lpm-triallaw.com; [Neil Overholtz](#); [Tom P. Cartmell](#); [Brian Barr \(External\)](#); [Jennifer Hoekstra](#); [Katherine Cornell](#); [Judge David R. Herndon](#)
Subject: RE: EHK Trial - Tuesday Witnesses
Date: Sunday, April 18, 2021 6:28:00 PM
Attachments: [E. Berger Defense Demonstratives 4.18.21.pdf](#)
[Battler, Leanne DA_PC.csv](#)
[Hobbs, Brian DA_PC.csv](#)
[Merkley, John DA_PC.csv](#)
[Cave, Kara DA_PC.csv](#)

Counsel,

Defendants may call Mr. Berger and Dr. LaBorde on Tuesday and may play video from Kara Cave, Leanne Battler, Brian Hobbs, and John Merkley.

Attached are .csv files for Cave, Battler, Hobbs, and Merkley. Where Defendants' affirmative testimony has been cut, we have removed Plaintiffs' corresponding counter designations. Please let us know if you have any issues.

Finally, attached are demonstratives for Defendants' examination of Mr. Berger tomorrow.

Best,
Ashley

Ashley Neglia

*** KIRKLAND & ELLIS LLP ***
KIRKLAND & ELLIS LLP
555 South Flower Street, Los Angeles, CA 90071
T +1 213 680 8114
F +1 213 680 8500

*** KIRKLAND & ELLIS LLP ***
Ashley.Neglia@kirkland.com

EXHIBIT 5

Best,
Ashley

KIRKLAND & ELLIS LLP
555 South Flower Street, Los Angeles, CA 90071
T +1 213 680 8114
F +1 213 680 8500

Ashley.Neglia@kirkland.com

From: Neglia, Ashley

Sent: Monday, April 19, 2021 4:20 PM

To: 'Michael A. Sacchet' <MAS@ciresiconlin.com>; *cbeall@mhw-law.com <cbeall@mhw-law.com>; '3M Earplugs Dechert' <3MEarplugsDechert@dechert.com>; Brock, Mike <mike.brock@kirkland.com>; *Kimberly.branscome@dechert.com <Kimberly.branscome@dechert.com>; Nomellini, Mark J. <mnomellini@kirkland.com>; Wasdin, Nick <nick.wasdin@kirkland.com>

Cc: 'Bryan Aylstock' <BAylstock@awkolaw.com>; 'tomp@lpm-triallaw.com' <tomp@lpm-triallaw.com>; 'Neil Overholtz' <NOverholtz@awkolaw.com>; 'Tom P. Cartmell' <tcartmell@wcllp.com>; 'Brian Barr (External)' <bbarr@levinlaw.com>; 'Jennifer Hoekstra' <JHoekstra@awkolaw.com>; 'Katherine Cornell' <kcornell@pulasakilawfirm.com>; 'Judge David R. Herndon' <dave@herndonresolution.com>

Subject: RE: EHK Trial - Wednesday Witnesses

In addition to any previously disclosed witnesses and videos, Defendants may call Dr. Crawford on Wednesday.

Additionally, attached are demonstratives that may be used with Mr. Berger and Dr. LaBorde.

Best,
Ashley

Ashley Neglia

KIRKLAND & ELLIS LLP

555 South Flower Street, Los Angeles, CA 90071

T +1 213 680 8114

F +1 213 680 8500

Ashley.Neglia@kirkland.com

EXHIBIT 6

From: Neglia, Ashley
To: Michael A. Sacchet; *cbeall@mhw-law.com; 3M Earplugs Dechert; Brock, Mike; *Kimberly.branscome@dechert.com; Nomellini, Mark J.; Wasdin, Nick
Cc: Bryan Aylstock; tomp@lpm-triallaw.com; Neil Overholtz; Tom P. Cartmell; Brian Barr (External); Jennifer Hoekstra; Katherine Cornell; Judge David R. Herndon; #3M-EarplugsKEAttys
Subject: RE: EHK Trial - Thursday Witnesses
Date: Tuesday, April 20, 2021 6:28:00 PM

Counsel,

In addition to any previously disclosed witnesses and videos, Defendants may call Dr. Jones on Thursday and may play video from Paul Estes and Jesus Medina.

Additionally, attached via LFT are demonstratives that may be used with Dr. LaBorde and Dr. Crawford.

Finally, an updated .csv file for Leanne Battler is attached.

Best,
Ashley

Ashley Neglia

.....
KIRKLAND & ELLIS LLP
555 South Flower Street, Los Angeles, CA 90071
T +1 213 680 8114
F +1 213 680 8500
.....

Ashley.Neglia@kirkland.com

The files listed below are now available on the Kirkland Large File Transfer System.

File Access & Expiration

- Use the below link to access the files.

[https://transfer.kirkland.com/human.aspx?
OrgID=6269&Arg12=message&Arg06=761025573&Arg08=](https://transfer.kirkland.com/human.aspx?OrgID=6269&Arg12=message&Arg06=761025573&Arg08=)

- **Important: After 14 days, the delivered files will be deleted and unrecoverable from the file transfer system.** To retain access, you must download the files.

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- **First Time Logging In?** You will receive a separate email with login instructions.

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<https://transfer.kirkland.com/human.aspx?arg12=passchangerequest>

- **Kirkland User?** Use Single Sign On or your network credentials to login.

Kirkland Technology Support
filetransfer@kirkland.com

+1-212-446-6400 (US Direct)

Attachments:

04 Quick Signal In Noise List 2.mp3

Crawford Direct Deck FINAL.pdf

wavTones.com.unregistred.sin_3000Hz_-6dBFS_3s.wav

LaBorde Deck_Disclosure Version_PDF.pdf

wavTones.com.unregistred.sin_6000Hz_-6dBFS_3s.wav

Medina, Jesus DA_PC (v5).csv

wavTones.com.unregistred.sin_8000Hz_-6dBFS_3s.wav

W-22 A 1 TRK EDIT.wav

Estes, Paul PA_DC (v3).csv

LaBorde Boards v8.pdf

wavTones.com.unregistred.sin_4000Hz_-6dBFS_3s.wav

wavTones.com.unregistred.sin_2000Hz_-6dBFS_3s.wav

wavTones.com.unregistred.sin_1000Hz_-6dBFS_3s.wav

Battler, Leanne DA_PC (v7).csv

wavTones.com.unregistred.sin_500Hz_-6dBFS_3s.wav

wavTones.com.unregistred.sin_250Hz_-6dBFS_3s.wav

EXHIBIT 7

From: De Paulo, Tabitha J.
To: Jennifer Hoekstra; Neglia, Ashley; Michael A. Sacchet; *cbeall@mhw-law.com; 3M Earplugs Dechert; Brock, Mike; *Kimberly.branscome@dechert.com; Nomellini, Mark J.; Wasdin, Nick
Cc: Bryan Aylstock; tomp@lpm-triallaw.com; Neil Overholtz; Tom P. Cartmell; Brian Barr (External); Katherine Cornell; Judge David R. Herndon; #3M-EarplugsKEAttys
Subject: RE: EHK Trial - Wednesday Witnesses
Date: Tuesday, April 20, 2021 8:25:57 PM
Attachments: V2ePIP Battler, Leanne DA PC (v8).csv
V2ePIP - Battler, Leanne DA PC (v8).pdf

Jennifer,

Attached is a revised run report and CSV for Battler. An updated video can be found at the link below. We removed lines from defendants' designations (57:01-11; 57:14-58:01; 58:10-22; 59:03-07; 190:10-15) and lines from plaintiffs' designations which are not clarifying (171:02-24; 172:19-23; 173:03-16; 190:16-20; 191:13-192:23).

https://www.dropbox.com/sh/8e7rxq7h5ghbm3u/AAA1KqzDgSLGaLAoDL0-Ns9a/Battler?dl=0&subfolder_nav_tracking=1

Best,
Tabitha

Tabitha De Paulo

*** KIRKLAND & ELLIS LLP ***
KIRKLAND & ELLIS LLP
609 Main Street, Houston, TX 77002
T +1 713 836 3361 M +1 312 772 9011
F +1 713 836 3601

*** tabitha.depaulo@kirkland.com ***
tabitha.depaulo@kirkland.com

From: De Paulo, Tabitha J.
Sent: Tuesday, April 20, 2021 3:14 PM
To: 'Jennifer Hoekstra' <JHoekstra@awkolaw.com>; Neglia, Ashley <ashley.neglia@kirkland.com>; Michael A. Sacchet <MAS@ciresiconlin.com>; *cbeall@mhw-law.com <cbeall@mhw-law.com>; 3M Earplugs Dechert <3MEarplugsDechert@dechert.com>; Brock, Mike <mike.brock@kirkland.com>; *Kimberly.branscome@dechert.com <Kimberly.branscome@dechert.com>; Nomellini, Mark J. <mnomellini@kirkland.com>; Wasdin, Nick <nick.wasdin@kirkland.com>
Cc: Bryan Aylstock <BAylstock@awkolaw.com>; tomp@lpm-triallaw.com; Neil Overholtz <NOverholtz@awkolaw.com>; Tom P. Cartmell <tcartmell@wcllp.com>; Brian Barr (External) <bbarr@levinlaw.com>; Katherine Cornell <kcornell@pulaskilawfirm.com>; Judge David R. Herndon <dave@herndonresolution.com>; #3M-EarplugsKEAttys <3M_earplugslitig@kirkland.com>
Subject: RE: EHK Trial - Wednesday Witnesses

Jennifer,

Thanks. We are ok using P-GEN-02883 instead of D-GEN-378. Confirmed that D-GEN-122 (Ex. 1) is for demonstrative purposes only. D-GEN-174 includes the same article as D-GEN-122. We do not

believe D-GEN-191 is discussed in the clip we sent you. We believe the scrolling text reflects the official transcript, but we will update the scrolling text at the lines you indicated and send you a revised version, although on 26:16 and 68:2 we do not see an issue and if you see one you will need to be more specific. We are also making some other cuts and will send you those as well.

Tabitha

Tabitha De Paulo

KIRKLAND & ELLIS LLP

609 Main Street, Houston, TX 77002
T +1 713 836 3361 M +1 312 772 9011
F +1 713 836 3601

tabitha.depaulo@kirkland.com

From: Jennifer Hoekstra <JHoekstra@awkolaw.com>

Sent: Tuesday, April 20, 2021 2:25 PM

To: Neglia, Ashley <ashley.neglia@kirkland.com>; Michael A. Sacchet <MAS@ciresiconlin.com>;
*cbeall@mhw-law.com <cbeall@mhw-law.com>; 3M Earplugs Dechert
<3MEarplugsDechert@dechert.com>; Brock, Mike <mike.brock@kirkland.com>;
*Kimberly.branscome@dechert.com <Kimberly.branscome@dechert.com>; Nomellini, Mark J.
<mnomellini@kirkland.com>; Wasdin, Nick <nick.wasdin@kirkland.com>

Cc: Bryan Aylstock <BAylstock@awkolaw.com>; tomp@lpm-triallaw.com; Neil Overholtz
<NOverholtz@awkolaw.com>; Tom P. Cartmell <tcartmell@wcllp.com>; Brian Barr (External)
<bbarr@levinlaw.com>; Katherine Cornell <kcornell@pulaskilawfirm.com>; Judge David R. Herndon
<dave@herndonresolution.com>; #3M-EarplugsKEAttys <3M_earplugslitig@kirkland.com>

Subject: RE: EHK Trial - Wednesday Witnesses



Ashley,

Regarding the Battler video play, there are several instances where the transcript incorrectly states what is being said and Plaintiffs' would object to the scrolling text being used at these points:

- 26:16
- 39:5
- 68.2
- 113:25 [the answer is completely missing from this video play]
- 125:1

Also, can you please confirm that the only documents shown and intended to be admitted during the Battler deposition are the following:

S-GEN-71
D-GEN-125
D-GEN-283
D-GEN-375

D-GEN-376

D-GEN-378

D-GEN-1174

It appears that D-GEN-374 and D-GEN-191 were included in the video but are not on the list you provided. Please advise if you are moving to admit those or removing them from the video play.

It also appears that D-GEN-122 (Ex. 1) is shown on the screen but is not going to be admitted; please confirm that is for demonstrative purposes only.

D-GEN-378 is the same as P-GEN-02883 which is already in evidence. Please note this for the Court or use the exhibit already in evidence.

Best Regards,

Jennifer M. Hoekstra
Partner
Aylstock, Witkin, Kreis & Overholtz
17 E. Main Street, Suite 200
Pensacola, FL 32502
Phone: (850) 202-1010
Cell: (504) 321-4789
Toll Free: (888) 255-AWKO (2956)
Facsimile: (850) 916-7449
Email: jhoekstra@awkolaw.com

From: Neglia, Ashley <ashley.neglia@kirkland.com>

Sent: Monday, April 19, 2021 11:45 PM

To: Michael A. Sacchet <MAS@ciresiconlin.com>; *cbeall@mhw-law.com <cbeall@mhw-law.com>;
3M Earplugs Dechert <3MEarplugsDechert@dechert.com>; Brock, Mike
<mike.brock@kirkland.com>; *Kimberly.branscome@dechert.com
<Kimberly.branscome@dechert.com>; Nomellini, Mark J. <mnomellini@kirkland.com>; Wasdin, Nick
<nick.wasdin@kirkland.com>

Cc: Bryan Aylstock <BAylstock@awkolaw.com>; tomp@lpm-triallaw.com; Neil Overholtz
<NOverholtz@awkolaw.com>; Tom P. Cartmell <tcartmell@wcllp.com>; Brian Barr (External)
<bbarr@levinlaw.com>; Jennifer Hoekstra <JHoekstra@awkolaw.com>; Katherine Cornell
<kcornell@pulaskilawfirm.com>; Judge David R. Herndon <dave@herndonresolution.com>; #3M-
EarplugsKEAttys <3M_earplugslitig@kirkland.com>

Subject: RE: EHK Trial - Wednesday Witnesses

Counsel,

Please find via the following link the video file for the Battler and Hobbs deposition clips:

<https://www.dropbox.com/sh/8e7rxq7h5ghbm3u/AADoDBQbCoMj3OoanvkC4abCa?dl=0>

Best,
Ashley

Ashley Neglia

KIRKLAND & ELLIS LLP
555 South Flower Street, Los Angeles, CA 90071
T +1 213 680 8114
F +1 213 680 8500

Ashley.Neglia@kirkland.com

From: Neglia, Ashley
Sent: Monday, April 19, 2021 4:20 PM
To: 'Michael A. Sacchet' <MAS@ciresiconlin.com>; *cbeall@mhw-law.com <cbeall@mhw-law.com>;
'3M Earplugs Dechert' <3MEarplugsDechert@dechert.com>; Brock, Mike
<mike.brock@kirkland.com>; *Kimberly.branscome@dechert.com
<Kimberly.branscome@dechert.com>; Nomellini, Mark J. <mnomellini@kirkland.com>; Wasdin, Nick
<nick.wasdin@kirkland.com>
Cc: 'Bryan Aylstock' <BAylstock@awkolaw.com>; 'tomp@lpm-triallaw.com' <tomp@lpm-triallaw.com>; 'Neil Overholtz' <NOverholtz@awkolaw.com>; 'Tom P. Cartmell'
<tcartmell@wcllp.com>; 'Brian Barr (External)' <bbarr@levinlaw.com>; 'Jennifer Hoekstra'
<JHoekstra@awkolaw.com>; 'Katherine Cornell' <kcornell@pulaskilawfirm.com>; 'Judge David R.
Herndon' <dave@herndonresolution.com>
Subject: RE: EHK Trial - Wednesday Witnesses

Counsel,

In addition to any previously disclosed witnesses and videos, Defendants may call Dr. Crawford on Wednesday.

Additionally, attached are demonstratives that may be used with Mr. Berger and Dr. LaBorde.

Best,
Ashley

Ashley Neglia

KIRKLAND & ELLIS LLP
555 South Flower Street, Los Angeles, CA 90071
T +1 213 680 8114
F +1 213 680 8500

Ashley.Neglia@kirkland.com

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EXHIBIT 8

Transcript-2021-04-28.txt
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG) Case No. 3:19md2885
PRODUCTS LIABILITY LITIGATION,)
) Pensacola, Florida
) April 28, 2021
) 7:17 a.m.
)

VOLUME XXII
(Pages 1 to xxx)

TRANSCRIPT OF TWENTY-SECOND DAY OF JURY TRIAL
BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE, and a jury

A P P E A R A N C E S

FOR THE PLAINTIFFS: Aylstock, Witkin, Kreis & Overholtz, PLLC

Transcript-2021-04-28.txt

By: BRYAN F. AYLSTOCK
baylstock@awkolaw.com

NEIL D. OVERHOLTZ
noverholtz@awkolaw.com

JENNIFER HOEKSTRA
jhoekstra@awkolaw.com

17 E Main Street, Suite 200
Pensacola, Florida 32502

APPEARANCES: (Cont'd)

FOR THE PLAINTIFFS: Laminack, Pirtle & Martines LLP

By: THOMAS W. PIRTLE
tomp@lmp-triallaw.com
5020 Montrose Blvd, 9th Floor
Houston, Texas 77006

Pulaski Kherkher, PLLC
By: KATHERINE CORNELL
2925 Richmond Avenue, Suite 1725
Houston, Texas 77098

FOR THE DEFENDANTS: Kirkland & Ellis, LLP

By: ROBERT C. BROCK
mike.brock@kirkland.com
1301 Pennsylvania Avenue NW

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Washington, D.C. 20004

Kirkland & Ellis, LLP
By: NICHOLAS F. WASDIN
nick.wasdin@kirkland.com

MARK J. NOMEILLINI
mnomellini@kirkland.com
300 N Lasalle
Chicago, Illinois 60654

Dechert, LLP
By: KIMBERLY BRANSCOME
kimberly.branscome@dechert.com
633 W 5th Street, Suite 4900
Los Angeles, California 90071

Moore, Hill & Westmoreland, PA
By: CHARLES F. BEALL, JR.
cbeall@mhw-law.com
350 W Cedar Street, Suite 100
Pensacola, Florida 32502

PROCEEDINGS

(Call to Order of the Court.)

(Parties present; jury not present.) Now

THE COURT: Back again. So Mr. Sacchet and Mr. Carter will be speaking on the Kentucky instructions for Mr. Hacker.

As we left off last night with the Georgia instructions, same format for going over these. I'll just go page by page and hear from you regarding your comments. I assume there is no objection to page 1.

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Q. And you don't know anything about these three soldiers, do you?

A. No, sir, I do not.

Q. Now, one thing you do know, because you were asked in your deposition about it, is that they're not alone? You know that, right?

A. Do you mean not alone in the sense that military members -- there is a lot of hearing loss in the military? I'm not sure.

Q. What I mean, sir, is that they are not alone in filing a lawsuit in this case? You know that to be true, right?

MR. WASDIN: Objection. May we approach?

THE COURT: No. Overruled.

MR. WASDIN: I'll restate all of our prior objections.

THE COURT: I'm aware of them, all of them, and overruled.

THE WITNESS: Just to make sure, you're asking me if I know that there are more than three plaintiffs in the case?

BY MR. AYLSTOCK:

Q. Let me back up a little bit, because if anybody were to come in here and suggest to this jury that their condition of having hearing loss and tinnitus is somehow -- and their assertion that it's related to the Combat Arms is somehow an aberration or they're the three only ones, that would not be true, and you know that, right?

A. You mean that they're claiming that the Combat Arms Earplug was the cause of their hearing impairment?

Q. Yes, sir.

A. I want to make sure because hearing loss in the military is longstanding.

Given the fact that I personally have received numerous emails asking me if I wanted to participate, my wife has received emails, I've seen TV ads, I've heard radio ads, I get links on my Facebook asking me if I want to join, so I'm not

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surprised -- if you're asking me if there is more than three plaintiffs, given the bombardment that I just individually have experienced, I would not be surprised that there is more than three plaintiffs, if that's the question.

Q. You know in fact there's tens of thousands, if not hundreds of thousands, of soldiers that are claiming hearing loss from the Combat Arms. You know that to be true, don't you?

A. I do not --

MR. WASDIN: Same objections.

THE COURT: Overruled. You can answer.

THE WITNESS: I've never seen numbers. I have never had a discussion of how many people. But again, I feel like me and my family have been bombarded with CAE ads, so I would not be surprised that it's a large number.

BY MR. AYLSTOCK:

Q. Can you go to your deposition that I've put up there for you from 12/22/20, sir?

A. Uh-huh.

Q. On page 24 --

A. Page 24?

Q. Yes, sir, at the bottom.

MR. WASDIN: Bryan, will you give me a second to get there?

MR. AYLSTOCK: Sure.

MR. WASDIN: 24 what?

MR. AYLSTOCK: 24, line 24.

THE WITNESS: I'm on what says page 24 at the bottom, it looks like there's a P number, so --

BY MR. AYLSTOCK:

Q. There is a question --

THE COURT: Mr. Aylstock, just ask him the question that -- ask him a question about the answer he gave, and then see what he says here today, and then you maybe can go further

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with it.

MR. AYLSTOCK: Okay.

BY MR. AYLSTOCK:

Q. You understand that in this case that there is actually -- in this multidistrict litigation there's actually groups of plaintiffs that are set for trial?

A. Are you asking me to follow something in here, or is that just a question?

Q. Right now I'm just asking you a question.

MR. WASDIN: Your Honor, may I have a standing objection to all of this?

THE COURT: Yes.

THE WITNESS: I don't recall what I may have heard about -- did you say different categories?

BY MR. AYLSTOCK:

Q. Let me ask you this: You're familiar generally that there is a very large number of servicemembers that have filed lawsuits in this court claiming damages, hearing damage from the Combat Arms Earplug?

A. I don't know what that number is. If I've seen what that number is, I don't recall it. But my assumption was, like I said earlier, from how much I've been bombarded that there was a number. I just don't know -- I don't recall what that number is if I was told it before.

MR. AYLSTOCK: Can we put up P-GEN-09023 just for the witness and the Judge.

THE COURT: Mr. Aylstock, you can't ask him about this. You can ask him about his deposition testimony, but you can't ask him about this.

MR. AYLSTOCK: Fair enough, Your Honor.

Those are all my questions. Thank you, sir.

THE COURT: All right. Before Mr. Wasdin starts his redirect, ladies and gentlemen, let me give you an instruction