

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GEORGE DOOLEY,

Plaintiff,

v.

**3M COMPANY and AEARO
TECHNOLOGIES, LLC,**

Defendants.

Case No.: _____

COMPLAINT

JURY TRIAL DEMANDED

COMPLAINT

George Dooley (“Plaintiff”), through undersigned counsel, seeks judgment against Defendants 3M COMPANY and AEARO TECHNOLOGIES, LLC (“Defendant,” “Defendants,” “3M,” “Aearo,” or “3M/Aearo”) for personal injuries incurred while in training and/or on active military duty resulting from Defendants’ defective and unreasonably dangerous product, the Dual-ended Combat Arms™ earplugs (Version 2 CAEv2) (“Combat Arms Earplugs” or “Earplugs”). 3M and Aearo knew the Combat Arms Earplugs were defective prior to selling them, but falsified test results and misrepresented their performance to qualify for a multi-million dollar contract with the United States military. The military issued the Earplugs to Plaintiff for his work as an infantry officer, including in Iraq, and Plaintiff now suffers from hearing loss and tinnitus as a result of Defendants’ defective dual-ended Earplugs.

I. INTRODUCTION

1. Plaintiff George Dooley, a United States Army veteran, brings this suit to recover damages arising from personal injuries to his hearing sustained while in training and/or on active military duty domestically and abroad. 3M sold its Combat Arms Earplugs to the U.S. military

for more than a decade, and the Earplugs were standard issue in certain branches of the military (including Plaintiff's) between at least 2003 to at least 2015. However, 3M did not inform the military or Plaintiff that the Earplugs were defective, and failed to adequately warn the military or Plaintiff that the Earplugs did not in fact meet the military's sound attenuation requirements, despite 3M's promises otherwise. Plaintiff used 3M's dangerously defective Combat Arms Earplugs at gun ranges and in military vehicles for years, including while deployed in Iraq. Since then, Plaintiff has been diagnosed with hearing loss and tinnitus, after never before suffering from hearing injuries. 3M's Combat Arms Earplugs have likely caused thousands, if not millions, of soldiers to suffer significant hearing loss, tinnitus, and additional related injuries, like the Plaintiff here.

II. PARTIES, JURISDICTION, AND VENUE

2. Plaintiff George Dooley is a resident and citizen of Clarkesville, Tennessee. Mr. Dooley was a resident and citizen of Tennessee during the entire time he used the 3M Combat Arms Earplugs while on active duty.

3. Defendant 3M Company is a corporation organized and existing under the laws of Delaware with its principal place of business in St. Paul, Minnesota. Among other things, Defendant is in the business of designing, manufacturing, and selling worker safety products, including hearing protectors. Defendant has a dominant market share in virtually every safety product market, including hearing protection. Defendant is one of the largest companies in the country.

4. Defendant Aearo Technologies, LLC is a limited liability company organized and existing under the laws of Delaware with its principal place of business in Indianapolis, Indiana.

On information and belief, Aearo Technologies or its parent company is a wholly owned subsidiary of 3M Company.

5. The Court has subject matter jurisdiction pursuant 28 U.S.C. § 1332(a)(1). The amount in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and Plaintiff and Defendants are citizens of different states.

6. Personal jurisdiction over Defendants is proper because they have done business in the State of Tennessee, have committed a tort in whole or in part in the State of Tennessee, have substantial and continuing contact with the State of Tennessee, and derive substantial revenue from goods used and consumed within the State of Tennessee. In fact, there are over 30 military bases in Tennessee, which include serviceman from all four branches of the military, the Tennessee National Guard and Army Reserve, to which Defendants provided their products.

7. Plaintiff's claims arise out of Defendants' purposeful contacts with Tennessee and injuries he continues to suffer in Tennessee. Plaintiff receives ongoing medical care for the injuries he suffered from the defective Earplugs at the V.A. in Clarkesville, TN, which is within this district.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) as a substantial part of the events or omissions giving rise to the claim occurred in this District.

III. FACTUAL ALLEGATIONS

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

10. On July 26, 2018, Defendant 3M agreed to pay \$9.1 million to resolve allegations that it knowingly sold the Dual-ended Combat Arms™ Earplugs to the United States military

without disclosing defects that hampered the effectiveness of the hearing protection device. *See* United States Department of Justice, *3M Company Agrees to Pay \$9.1 Million to Resolve Allegations That it Supplied the United States With Defective Dual-Ended Combat Arms Earplugs* (Jul. 26, 2018), <https://www.justice.gov/opa/pr/3m-company-agrees-pay-91-million-resolve-allegations-it-supplied-united-states-defective-dual>.

11. Defendant’s Dual-ended Combat Arms Earplugs are non-linear, or selective attenuation, earplugs designed to provide soldiers with two different options for hearing attenuation depending on how the plugs are worn. Both sides of the dual-sided Earplugs were purported to provide adequate protection for soldier’s ears when worn.



12. If worn in the “closed” or “blocked” position (olive end in user’s ear), the Earplugs are intended to act as a traditional earplug and block as much sound as possible.

13. If worn in the “open” or “unblocked” position (yellow side in user’s ear), the Earplugs are intended reduce loud impulse sounds, such as battlefield explosions and artillery fire, while allowing the user to hear quieter noises such as communication by fellow soldiers or enemy combatants.

14. Defendants' standard fitting instructions state that the wearer is to grasp the Earplug by the stem and insert it into the ear canal.

15. The design of the Earplugs prevents a snug fit in the ear canal of the wearer, an inherent defect about which 3M provided no adequate warning.

16. When inserted according to Defendant's standard fitting instructions, the edge of the third flange of the non-inserted end of the Earplug presses against the wearer's ear canal and folds back, thereby loosening the seal in the ear canal and providing inadequate protection.

17. Because the Earplugs are symmetrical, the standard fitting instructions will result in a loosening of the seal whether either side is inserted into the ear canal.

18. These Earplugs were originally designed, tested, manufactured, and sold by a company called Aearo Technologies ("Aearo" or "3M/Aearo").

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

20. Earplugs like the Combat Arms Earplugs are sold with a stated Noise Reduction Rating ("NRR")¹ that should accurately reflect the effectiveness of hearing protection.

21. The military likely purchased, at a minimum, one pair of 3M's Combat Arms Earplugs for each deployed soldier annually involved in certain foreign engagements between at least 2003 and at least 2015. *See* McIlwain, D. Scott et al., *Heritage of Army Audiology and the Road Ahead: The Army Hearing Program*, Am. J. Pub. Health, Vol. 98, No. 12 (Dec. 2008).

¹ Noise Reduction Rating (NRR) is a unit of measurement used to determine the effectiveness of hearing protection devices to decrease sound exposure within a given working environment. Classified by their potential to reduce noise in decibels (dB), a term used to categorize the power or density of sound, hearing protectors must be tested and approved by the American National Standards (ANSI) in accordance with the Occupational Safety & Health Administration (OSHA). The higher the NRR number associated with a hearing protector, the greater the potential for noise reduction.

22. 3M's/Aearo's Combat Arms Earplugs were sold to the military beginning in at least late 2003 and continued to be sold directly and indirectly by 3M to the military until at least late 2015, when Defendant discontinued the earplugs.

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

History of Testing

January 2000 Testing

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

25. 3M/Aearo chose to conduct the testing at its own laboratory rather than an outside, independent laboratory.

26. 3M/Aearo's employees personally selected ten test subjects (some of whom were also employees of 3M/Aearo) to test the Combat Arms Earplugs.

27. 3M/Aearo's employees intended to test: (1) the subject's hearing without an Earplug inserted; (2) the subject's hearing with the open/unblocked (yellow) end of the Earplug inserted; and (3) the subject's hearing with the closed/blocked (olive) end of the Earplug inserted. This testing was designed to provide data regarding the "NRR" of the Earplugs.

28. 3M/Aearo personnel monitored the results of each subject as the test was performed and could thus stop the test if the desired NRR results were not achieved.

29. Eight of the ten subjects were tested using both the open and closed end of the Earplugs.

30. Testing of the eight subjects suggested an average NRR of 10.9, which was far below the adequate NRR that 3M/Aearo personnel would and should have expected for the closed end.

31. 3M/Aearo prematurely terminated the January 2000 testing of the closed end of the Earplugs.

32. 3M/Aearo personnel determined that when the closed, olive end of the Earplug was inserted into the wearer's ear according to standard fitting instructions, the basal edge of the third flange of the open, yellow end would press against the wearer's ear and fold backwards. When the inward pressure on the Earplug was released, the yellow side flanges would return to their original shape and cause the Earplug to loosen, often imperceptible to the wearer.

33. The symmetrical nature of the Earplug prevents a snug fit when worn either "open" or "closed" according to the standard fitting instructions.

34. 3M/Aearo personnel determined that a snug fit requires the flanges on the opposite, non-inserted end of the Earplug to be folded back prior to insertion.

35. 3M/Aearo personnel decided not to test the closed end of the Earplugs for two of the ten subjects because the results were well below the intended and desired NRR.

36. 3M/Aearo completed testing of all ten subjects with the open end of the Earplugs to obtain a facially invalid -2 NRR, which would indicate that the closed end of the earplug actually amplified sound.

37. 3M/Aearo represented the -2 NRR as a "0" NRR, which 3M/Aearo has displayed on its packaging since its launch.

38. 3M/Aearo falsely touts the "0" NRR as a benefit of the Combat Arms Earplugs, by suggesting that soldiers will be able to hear their fellow soldiers and enemies while still

providing some protection. However, the -2 NRR actually found in test results would in fact amplify sound and thereby expose the wearer to harm.

February 2000 Testing

39. Upon identifying the fit issue, 3M/Aearo re-tested the olive, closed end of the Combat Arms Earplug in February 2000 using different fitting instructions.

40. When testing the closed end, 3M/Aearo personnel folded back the yellow flanges on the open end of the Earplugs prior to insertion.

41. Using this “modified” fitting procedure, 3M/Aearo achieved a “22” NRR on the closed end of the Earplug.

42. 3M, however, never properly warned the United States or service-members that the only potential way to achieve this purported NRR was to modify the Earplug by folding back the yellow flanges on the opposite end.

43. 3M/Aearo did not retest the yellow, open end of the Earplugs using the “modified” fitting procedure.

Defendant’s Representations and Omissions

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

45. From 2003-2012, 3M/Aearo was the exclusive supplier of these type of earplugs to the U.S. military.

46. 3M/Aearo was aware of the design defect(s) alleged here as early as 2000.

47. Defendant thus knew that the Combat Arms Earplugs were defective years before 3M/Aearo became the exclusive provider of combat earplugs to the U.S. military.

48. 3M/Aearo knew at the time it bid for the initial IQC that the Combat Arms Earplugs had dangerous design defects as they would not adequately protect the users from loud sounds, and 3M did not adequately warn of the defects or adequately instruct users how to safely wear the Earplugs.

49. 3M/Aearo responded to the military's Requests for Proposal ("RFP") with express certifications that the Earplugs complied with the Salient Characteristics of Medical Procurement Item Description ("MPID") of Solicitation No. SP0200-06- R-4202.

50. 3M/Aearo knew at the time it made its certifications that the Earplugs did not comply with the MPID.

51. 3M/Aearo knew the design defects could cause the Earplugs to loosen in the wearer's ear, imperceptibly to the wearer and even to trained audiologists visually observing a wearer, thereby permitting damaging sounds to enter the ear canal by traveling around the outside of the Earplugs, while the user and/or audiologist would incorrectly believe that the Earplug is working as intended.

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

2.1.1 Ear plugs shall be designed to provide protection from the impulse noises created by military firearms, while allowing the wearer to clearly hear normal speech and other quieter sounds, such as voice commands, on the battlefield.

2.2.2. The sound attenuation of both ends of the ear plugs shall be tested in accordance with ANSI S3.19.

2.4 Workmanship. **The ear plugs shall be free from all defects**

that detract from their appearance or impair their serviceability.

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

Solicitation No. SP0200-06-R-4202 at 41-42 (emphasis added).

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

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

54. Additionally, 40 C.F.R. § 211.204-4(e) of the EPA regulations requires certain “supporting information” must accompany hearing protection devices sold in the United States:

The following minimum supporting information must accompany the device in a manner that insures its availability to the prospective user. In the case of bulk packaging and dispensing, such supporting information must be affixed to the bulk container or dispenser in the same manner as the label, and in a readily

visible location. . . . **Instructions as to the proper insertion or placement of the device.** (Emphasis added.)

55. 3M/Aearo knowingly used the deliberately flawed retest of the closed end of the Earplugs to sell them to the military with the representation that they possess a “22” NRR in the closed position.

56. Defendant includes standard instructions for “proper use” of the Earplugs in the packaging for the Earplugs as required by the EPA, Noise Control Act, and the MPID.

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

58. Instead, Defendant improperly instructs wearers to simply insert the Earplugs into the ear canal.

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

60. 3M’s/Aearo’s packaging and marketing of the Earplugs with a labeled NRR of “22” thereby misleads the wearer and has likely caused thousands of soldiers to suffer significant hearing loss and tinnitus—including Plaintiff—in addition to exposing millions more to the risk caused by 3M/Aearo’s defective earplugs.

61. Despite knowing that its flawed testing involved steps to manipulate the fit of the earplug, 3M’s/Aearo’s standard instructions for use of the Earplugs do not instruct, and never have instructed, the wearer to fold back the flanges on the open end of the plug before inserting

the closed end of the plug into their ears (which is necessary to achieve the “22” NRR and avoid the defect associated with the short stem).

62. 3M/Aearo was aware prior to selling the Earplugs to the military that its testing procedures and fitting instructions were unlawfully manipulated to obtain the NRRs it wanted on both ends of the Dual-ended Combat Arms Earplug, and 3M/Aearo continued to use these inaccurate NRRs to market the earplugs to the military for more than ten years without disclosing the design defect(s) in the plugs.

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

Plaintiff George Dooley

64. Plaintiff George Dooley was an infantry soldier who was stationed in Germany until 2005 and was deployed to Iraq from 2006 to 2008, when he retired.

65. Prior to his use of 3M’s Dual-ended Combat Arms Earplugs, Dooley had never suffered from hearing loss or tinnitus.

66. At the time of Dooley’s deployment to Iraq and during his pre-deployment training, the Combat Arms Earplugs were standard-issue equipment for service members like Dooley.

67. The military provided the Combat Arms Earplugs to Dooley for individual use while Dooley was in Germany, while stationed in the United States, and when he was deployed to Iraq.

68. Dooley wore the earplugs in the United States, Germany, and Iraq while firing weapons and riding in military vehicles.

69. Dooley wore the Combat Arms Earplugs while in training and in the field during his deployment to Iraq.

70. Dooley was diagnosed with tinnitus when he retired from the military in 2008. Dooley also suffers from hearing loss.

71. Hearing loss and tinnitus have had a significant effect on Mr. Dooley's enjoyment of life. The constant ringing in his ears interferes with his everyday conversations and affects his sleep. Frequently he has to talk loudly, have the TV playing, or have other noise on so he can try to cope with his tinnitus. The hearing loss and tinnitus are incurable and are likely to progressively get devastatingly worse during the course of Mr. Dooley's life.

IV. CAUSES OF ACTION

First Cause of Action **Negligence**

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

73. At all times relevant to this action, Defendants had a duty to design, test, manufacture, package, market, promote, distribute, and sell the Dual-ended Combat Arms Earplugs with reasonable and due care for the safety and well-being of U.S. military service men and women, including Plaintiff, who used the Earplugs during their service with the U.S. military. Defendants breached this duty.

74. Defendants owed a duty of care to Plaintiff to design and sell earplugs that were fit for use in military service and safe when used for their intended purpose; i.e., when in the presence of loud impulse sounds. Defendants breached this duty.

75. Defendants had a duty to use their professional expertise and exercise that degree of skill and learning ordinarily used under the same or similar business by a person or entity in Defendants' business of designing, developing, testing, manufacturing, marketing, and distributing hearing protection devices. Defendants breached this duty.

76. Defendants further had a duty to comply with the certifications made to the U.S. government about the qualities and performance characteristics of the Combat Arms Earplugs. Plaintiff is among the class of persons designed to be protected by these regulations and certification standards. Defendants breached this duty.

77. Plaintiff was a foreseeable user of the Combat Arms Earplugs and Defendants knew that the Earplugs would be used by U.S. military service men and women, including Plaintiff.

78. The Combat Arms Earplugs are defective in that the design of the Earplugs causes them to loosen in the wearer's ear, thereby permitting damaging sounds to enter the ear canal by traveling around the outside of the plug while the user incorrectly believes that the Earplug is working as intended.

79. When the Earplugs are inserted into the ear according to 3M's standard fitting instructions, a proper seal is not formed with the ear canal and the Earplugs do not function as claimed by 3M.

80. Defendants failed to exercise reasonable and due care under the circumstances and therefore breached their duties in the following ways:

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

b. Defendants failed to properly and thoroughly test the Combat Arms Earplugs;

c. Defendants failed to properly and thoroughly analyze the data resulting from testing of the Combat Arms Earplugs;

d. Defendants designed, manufactured, distributed, and sold the Combat Arms Earplugs without an adequate warning of the significant and dangerous risks of the earplugs;

e. Defendants designed, manufactured, distributed, and sold the ended Combat Arms Earplugs without providing proper instructions to avoid the harm which it could foresee would occur when users followed its standard fitting instructions;

f. Defendants failed to instruct wearers of the Earplugs to fold back the flanges on the open/unblocked end of the plug before inserting the closed/blocked end of the plug into their ears, even though Defendants knew that adjustment was necessary to achieve the NRR that Defendants claimed in express certifications to the military;

g. Defendants falsely overstated the amount of hearing protection provided by the Earplugs;

h. Defendants failed to meet the standard of care required of a reasonable and prudent manufacturer of hearing protection products, specifically including products such as the Combat Arms Earplugs; and

i. Defendants negligently continued to manufacture and distribute the Combat Arms Earplugs to the U.S. military after Defendants knew or should have known of the Earplugs' adverse effects and/or the availability of safer designs.

81. Defendants knew or should have known that the defective condition of the Combat Arms Earplugs made them unreasonably dangerous to the U.S. military service men and women who used the Earplugs.

82. The Combat Arms Earplugs were dangerous when used by ordinary U.S. military servicemen and women who used it with the knowledge common to the U.S. military as to the product's characteristics and common usage.

83. Defendants knew or should have known of the defective design at the time the Combat Arms Earplugs were used by Plaintiff.

84. At the time the Combat Arms Earplugs were used by Plaintiff and left the possession of Defendant, the Earplugs were in a condition which made it unreasonably dangerous to the ordinary U.S. military service member.

85. At all relevant times, Plaintiff used the Combat Arms Earplugs in the manner in which they were intended.

86. As designers, developers, manufacturers, inspectors, advertisers, distributors, and suppliers of the Combat Arms Earplugs, Defendants had superior knowledge of the Earplugs and owed a duty of care to Plaintiff.

87. It was reasonably foreseeable that Defendants' breaches of its duties—including actions, omissions, and misrepresentations—would lead to severe, permanent, and debilitating injuries to the Plaintiff.

88. The Combat Arms Earplugs were the proximate cause of Plaintiff's personal injuries. Specifically, the Earplugs proximately caused Plaintiff's sensorineural hearing loss and tinnitus.

89. Defendants' conduct was a substantial factor in bringing about the injuries sustained by Plaintiff because Defendants designed, tested, manufactured, sold, and distributed the Combat Arms Earplugs to the U.S. military.

90. As a direct and proximate result of 3M's negligence in designing the defective Combat Arms Earplugs, Plaintiff was caused to sufferer serious and dangerous injuries, including sensorineural hearing loss and tinnitus, and all further injuries and damages alleged herein and will be caused to suffer worsening and additional injuries over time.

91. Plaintiff has been caused to expend significant funds to care for himself in addition to what is offered as a U.S. Veteran, and those medical expenses are likely to continue far into the future.

92. Plaintiff has suffered physical as well as emotional damages and losses as a direct result of the use of the allegedly defective Earplugs, and those injuries and damages will extend far into the future.

93. Plaintiff has suffered damages in an amount not yet fully determined, but in excess of \$75,000, exclusive of costs and interest.

Second Cause of Action
Strict Liability for Defective Design under the
Tennessee Products Liability Act, T.C.A. § 29-28-101, et seq.

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

95. Defendants are the manufacturers and sellers of the defective Combat Arms Earplugs.

96. The Combat Arms Earplugs are defective and unreasonably dangerous in that the design of the earplug causes them to loosen in the wearer's ear, permitting damaging sounds to enter the ear canal by traveling around the outside of the Earplug while the user incorrectly believes that the Earplug is working as intended.

97. The Combat Arms Earplugs' defect renders them unsafe for normal or anticipatable handling.

98. The Combat Arms Earplugs' defect renders them dangerous to an extent beyond that which would be contemplated by ordinary military service members.

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

100. Defendant knew that the defective condition of the Combat Arms Earplugs made them unreasonably dangerous to the U.S. military service members who used the device.

101. No reasonably prudent manufacturer would design, distribute, and sell an earplug with the knowledge that Defendants had, namely that if inserted as instructed the earplug would often fail to guard against loud impulse noises and could cause hearing loss and tinnitus.

102. The Combat Arms Earplugs were dangerous when used by an ordinary user who used them as they were intended to be used.

103. The Combat Arms Earplugs were dangerous to an extent beyond which would be contemplated by the ordinary user who purchased the device because the design of the Combat Arms Earplugs allow for dangerous sounds to bypass the plug altogether, thereby posing a serious risk to a U.S military service members' hearing unbeknownst to him or her.

104. Plaintiff was a foreseeable user of the Combat Arms Earplugs.

105. Defendant knew of the defective design at the time the Combat Arms Earplugs were provided to Plaintiff.

106. The Combat Arms Earplugs were delivered to Plaintiff without any change in their defective condition.

107. At all relevant times, Plaintiff used the Combat Arms Earplugs in the manner intended.

108. The Combat Arms Earplugs were the proximate cause of Plaintiff's hearing loss and tinnitus because the design of the earplugs allow for dangerous sounds to bypass the plug.

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

110. As a direct and proximate result of Defendant's design defect, Plaintiff was caused to sufferer serious and dangerous injuries, including sensorineural hearing loss and tinnitus, and all further injuries and damages alleged herein.

111. Plaintiff has been caused to expend significant funds to care for himself in addition to what is offered as a U.S. Veteran, and those medical expenses are likely to continue far into the future.

112. Plaintiff has suffered physical as well as emotional damages and losses as a direct result of the use of the allegedly defective Earplugs, and those injuries and damages will extend far into the future.

113. Plaintiff has suffered damages in an amount not yet fully determined, but in excess of \$75,000, exclusive of costs and interest.

Third Cause of Action
Strict Liability for Failure to Warn under the
Tennessee Products Liability Act, T.C.A. § 29-28-101, et seq.

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

115. Defendants are the manufacturers and sellers of the defective Combat Arms Earplugs.

116. In addition to their design defect, the Combat Arms Earplugs are defective because Defendants manufactured, distributed, and sold them without adequate warnings, instructions, or labels.

117. When they left Defendants' control, the Combat Arms Earplugs contained no warnings, or in the alternative, inadequate warnings and/or instructions, as to the risk that the Combat Arms Earplugs would allow for dangerous sounds to bypass the plug altogether thereby posing a serious risk to Plaintiff's hearing unbeknownst to him.

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

119. Defendants failed to provide warnings or instructions for wearers of the Earplugs to insert them in the manner that would create the seal necessary to achieve the NRR that Defendants claimed in its express certifications to the military.

120. Had Plaintiff received a proper or adequate warning as to the risks associated with the Combat Arms Earplugs, he would not have used the Combat Arms Earplugs.

121. Alternatively, had Plaintiff received the correct fitting instructions that were used by Defendants during the testing, which were not disclosed to Plaintiff, Plaintiff would have followed the modified fitting instructions to ensure a proper seal to prevent damaging sounds from entering the ear canal.

122. Defendants had a duty to manufacture, design, and sell the Combat Arms Earplugs with reasonable and due care for the safety and well-being of wearers, including Plaintiff. Defendants breached that duty.

123. Defendants had a duty to provide adequate warnings and/or instructions to prevent the risks associated with the Combat Arms Earplugs when worn in the ordinary course. Defendants breached that duty.

124. Defendants had and continues to have a post-sale duty to warn of the above alleged product-related defects and risks because Defendants knew or reasonably should have known that the Combat Arms Earplugs posed a substantial risk of harm to servicemen, including Plaintiff; the service members who used the Combat Arms Earplugs can reasonably be assumed to have been unaware of the risk of harm caused by the above-alleged defects because said defects were imperceptible; a warning or instruction showing how to correctly and safely use the Earplugs could have been effectively communicated to and acted upon by the servicemen to whom a warning or instruction might be provided; and the risk of harm, including but not limited to hearing loss in servicemen, was sufficiently great to justify the slight burden of providing a warning or instruction. Defendants breached this duty by failing to provide a post-sale warning or instruction.

125. It was foreseeable to Defendants that the Combat Arms Earplugs would be unreasonably dangerous if distributed without the warnings regarding the risks of damage to the ear and without proper fitting instructions. Not only was it theoretically foreseeable, but Defendants in fact knew from testing that the Earplugs were dangerous when worn without proper fitting.

126. The Combat Arms Earplugs were the proximate cause of Plaintiff's hearing loss and tinnitus because the design of the Earplugs allows for dangerous sounds to bypass the plug.

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

128. Plaintiff has been caused to expend significant funds to care for himself in addition to what is offered as a U.S. Veteran, and those medical expenses are likely to continue far into the future.

129. Plaintiff has suffered physical as well as emotional damages and losses as a direct result of the use of the allegedly defective Earplugs, and those injuries and damages will extend far into the future.

130. Plaintiff has suffered damages in an amount not yet fully determined, but in excess of \$75,000, exclusive of costs and interest.

V. TIMELINESS AND TOLLING OF STATUTES OF LIMITATIONS

131. Plaintiff filed this lawsuit within the applicable limitations period of first suspecting that the defect alleged here in 3M's Combat Arms Earplugs caused his injuries. Plaintiff could not, by the exercise of reasonable diligence, have discovered the wrongful cause of the Combat Arms Earplugs-induced injuries at an earlier time, because, at the time of these injuries, the cause was unknown to Plaintiff. Plaintiff did not suspect, nor did Plaintiff have reason to suspect, the cause of these injuries, or the tortious nature of the conduct causing these injuries, until less than the applicable limitations period prior to the filing of this action.

132. Specifically, at the time of his military service, Plaintiff had no reason to suspect that 3M falsely certified the NRR of the Combat Arms Earplugs that it sold to the military and that the military provided to him, or that the NRR advertised on the labels/packaging/documentation was inaccurate. Nor did Plaintiff have any reason to suspect that

3M failed to provide instructions (and in fact provided false instructions) on how to safely wear the Earplugs. Plaintiff likewise had no reason to suspect that by inserting the Earplugs as instructed by 3M they would imperceptibly loosen and fail to protect him from dangerous noise levels.

133. Furthermore, the running of any statute of limitations has been tolled by reason of Defendants' fraudulent concealment. Defendants are sophisticated parties and as the manufacturers had exclusive knowledge of the defect and associated risks. Defendants was and are under a continuous duty to disclose to Plaintiff, the U.S. military, and all other service members and potential users the material facts about the Earplugs that Defendants knew through internal testing. Through their affirmative and knowing misrepresentations and omissions, Defendants actively concealed from Plaintiff the risks associated with the defects in the Combat Arms Earplugs.

134. The statute of limitations has also been tolled by fraudulent estoppel. Defendants were and are under a continuous duty to disclose to Plaintiff the true character, quality, and nature of risks and dangers of the Combat Arms Earplugs and the potential injuries that could be caused by using them as instructed. Defendants actively concealed the true character, quality, and nature of the risks and dangers and knowingly made misrepresentations about these characteristics, risks, and dangers. Plaintiff and the U.S. military reasonably relied upon Defendants' knowing and affirmative misrepresentations and active concealment of these facts. Defendants are thus estopped from relying on any statutes of limitation in defense of this action.

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

VI. JURY DEMAND

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

VII. PRAYER FOR RELIEF

137. Plaintiff requests that Defendants:

- a. jointly and severally pay monetary damages, including compensatory relief and all other monetary relief to which Plaintiff may be entitled, in an amount to be determined at trial but exceeding \$75,000, exclusive of costs and interest;
- b. jointly and severally pay court costs, pre-judgment and post-judgment interest, and other costs and attorneys' fees;
- c. commit to appropriate injunctive or equitable relief, including internal reforms aimed at (1) identifying the root causes of the multiple decisions that led Defendants to knowingly disregard the results of their internal testing, to falsely certify the Earplugs as safe and effective, to fail to provide adequate warnings or proper fitting instructions, and to conceal the risks associated with the Earplugs for over a decade, (2) identifying corrective actions and institutional culture changes to address those root causes; and (3) implementing and tracking those corrective actions to ensure these failures do not happen again;
- d. and provide all other relief to which Plaintiff may show himself justly entitled.

Dated: March 18, 2019

Respectfully submitted,

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