

Original Complaint and Jury Demand against Defendants 3M COMPANY (“3M”) and AEARO TECHNOLOGIES LLC (“Aearo”) (both, “Defendants”) and respectfully state as follows:

I. INTRODUCTION

1. This is a products liability and negligence case brought by United States military veterans against the designers, manufacturers and marketers of defective combat safety earplugs. Defendants’ dual-ended Combat Arms™ earplugs, pictured below, were designed for military use and worn by thousands of service members who trained domestically or were deployed from 2003 to 2015.

Figure 1. 3M Dual-Ended Combat Arms™ Earplugs, Version 2 (CAEv2).



2. For 12 years, Defendants sold millions of dollars’ worth of dual-ended Combat Arms™ earplugs to the U.S. military without disclosing design defects that effectively rendered the product useless. Defendants knew their earplugs were too short to be properly inserted into a soldier’s ear and that the design defect caused the earplugs to imperceptibly loosen. As a result, thousands of military service members were unwittingly subjected to dangerous, high-decibel sounds of gunfire, aircraft, machinery, and explosions during training and in combat. Many service members, including Plaintiffs, sustained severe and permanent injuries, including partial or total hearing loss and tinnitus.

3. Tinnitus and hearing loss are the two most prevalent service-connected disabilities among veterans in the United States.¹ Tinnitus is an intermittent or persistent ringing in the ears, but it can also be a hissing, roaring, buzzing, or clicking sound. Tinnitus can be debilitating and life-altering—it can affect job performance, sleep, and contribute to psychological disorders such as depression, anxiety, and post-traumatic stress disorder.² The more than 1.7 million veterans currently seeking medical care for tinnitus face additional challenges because the condition is notoriously difficult to diagnose.

4. Defendants knew they were putting Plaintiffs at a high risk of permanent physical injury. Defendants knew about the defect in their dual-ended Combat Arms™ earplugs as early as 2000, when the earplugs failed to pass safety tests. And Defendants *certainly* knew about the defect years later, when they became the exclusive provider of earplugs to the U.S. military. However, Defendants said nothing. Instead, for over a decade they silently raked in millions of dollars as the men and women who risked their lives to protect us were left vulnerable and unprotected.

II. PARTIES

5. Plaintiff Joe William Contreras is a veteran of the United States Army and is a citizen and resident of Bexar County, Texas. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army in 2000 and served from 2000 to 2014. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended

¹ VETERANS BENEFITS ADMINISTRATION, U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL BENEFITS REPORT, FISCAL YEAR 2017, at p. 71, available at https://benefits.va.gov/REPORTS/abr/?_ga=2.205152144.1477833114.1552016905-1648364995.1518838902.

² Swan, A.A., *et al.*, *Prevalence of hearing loss and tinnitus in Iraq and Afghanistan Veterans: A Chronic Effects of Neurotrauma Consortium study*, 349 HEARING RESEARCH 4-12 (2017).

Combat Arms™ earplugs while training at Fort Hood, Texas and while deployed in Iraq and Afghanistan. Plaintiff now suffers from tinnitus.

6. Plaintiff Andres Alvarado is a veteran of the United States Navy and is a citizen and resident of Bexar County, Texas. Prior to joining the Navy, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Navy in 2000 and served from 2000 to 2016. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs during pre-deployment training and while deployed. Plaintiff now suffers from hearing-related injuries.

7. Plaintiff Michael Bolton is a veteran of the United States Air Force and is a citizen and resident of Bexar County, Texas. Prior to joining the Air Force, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Air Force in 1998 and served from 1998 to 2005. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while stationed at Edwards Air Force Base, CA, and Minot Air Force Base, ND. Plaintiff now suffers from tinnitus.

8. Plaintiff Oluseyi Fadojutimi is a veteran of the United States Navy and is a citizen and resident of Nueces County, Texas. Prior to joining the Navy, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Navy in 2004 and served from 2004 to 2007. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while stationed at Naval Station Ingleside, Texas. Plaintiff now suffers from tinnitus.

9. Plaintiff Edward Solis Garcia is a veteran of the United States Marine Corps, is a

citizen and resident of Nueces County, Texas. Prior to joining the Marines, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Marines in 1986 and served from 1986 to 2006. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs during pre-deployment training and while deployed. Plaintiff was diagnosed with tinnitus in 2006.

10. Plaintiff Carlos Hinojosa is a veteran of the United States Navy and is a citizen and resident of Bexar County, Texas. Prior to joining the Navy, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Navy in 1997 and served from 1997 to 2017. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while training, and while deployed. Plaintiff now suffers from hearing loss and tinnitus.

11. Plaintiff Sonya Jo Hoyer is a veteran of the United States Army and is a citizen and resident of Virginia Beach, Virginia. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army in 2009 and served from 2009 to 2011. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while training at Fort Bliss, Texas and while deployed in Afghanistan. Plaintiff now suffers from hearing loss and tinnitus.

12. Plaintiff Samantha Long is a veteran of the United States Army and is a citizen and resident of Nueces County, Texas. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army in 1997 and served from 1997 to 2004. During this time, Plaintiff was provided with the dual-ended

Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while training at Fort Hood, Texas and while deployed at Mannheim Germany. Plaintiff now suffers from hearing loss and tinnitus.

13. Plaintiff Justin Nowak is a veteran of the United States Army and is a citizen and resident of Fort Bend County, Texas. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army in 2009 and served from 2009 to 2012. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while training and while deployed in Afghanistan. Plaintiff now suffers from hearing loss and tinnitus.

14. Plaintiff Heath Osborn is a veteran of the United States Army and is a citizen and resident of Bexar County, Texas. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army in 1998 and served from 1998 to 2004. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while training at Fort Campbell, Kentucky and while deployed in Iraq. Plaintiff now suffers from hearing loss.

15. Plaintiff Daniel Romero is a veteran of the United States Army and is a citizen and resident of Nueces County, Texas. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army in 1984 and served from 1984 to 2005. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs during pre-deployment training and while deployed. Plaintiff now suffers from hearing related injuries.

16. Plaintiff John Anthony Trevino is a veteran of the United States Army and is a citizen and resident of Bexar County, Texas. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army in 2006 and served from 2006 to 2012. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while training at Fort Bliss, Texas and while deployed in Iraq. Plaintiff now suffers from hearing loss and tinnitus.

17. Plaintiff Jacob Windnagle is a veteran of the United States Coast Guard and is a citizen and resident of Nueces County, Texas. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Coast Guard in 2012 and served from 2012 to 2018. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while stationed at U.S. Coast Guard Station Buffalo, New York. Plaintiff now suffers from tinnitus.

18. Plaintiff William Bourne is a veteran of the United States Army National Guard and is a citizen and resident of Scottsdale, Arizona. Prior to joining the Army National Guard, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army National Guard in 2007 and served from 2007 to 2015. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while stationed and training stateside. Plaintiff now suffers from hearing loss and tinnitus.

19. Plaintiff Scott Lawrence is a veteran of the United States Navy Veteran and is a citizen and resident of Richton Park, Illinois. Prior to joining the Navy, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the

Navy in 2007 and served from 2007 to 2011. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while training at stateside and while deployed in Afghanistan and Iraq. Plaintiff now suffers from tinnitus.

20. Plaintiff Henry Palacios is a veteran of the United States Marine Corps and is a citizen and resident of Bellflower, California. Prior to joining the Marines, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Marine Corps in 2002 and served from 2002 to 2006. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while deployed in Iraq. Plaintiff now suffers from hearing loss and tinnitus.

21. Plaintiff Andrew Niccum is a veteran of the United States Army and is a citizen and resident of Alexandria, Indiana. Prior to joining the Army, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing-related issues. Plaintiff enlisted in the Army in 1996 and served from 1996 to 2017. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs while training at Fort Benning, Georgia. Plaintiff now suffers from tinnitus.

22. Plaintiff James Coveney is a veteran of the United States Army National Guard and is a citizen and resident of Plymouth, Massachusetts. Prior to joining the Army National Guard, Plaintiff had no signs or symptoms of hearing loss, tinnitus, or any other hearing related issues. Plaintiff enlisted in the Army National Guard in 1999 and served from 1999 to 2011. During this time, Plaintiff was provided with the dual-ended Combat Arms™ earplugs manufactured by Defendants. Plaintiff wore the dual-ended Combat Arms™ earplugs during pre-deployment training and while deployed to Iraq. Plaintiff now suffers from tinnitus.

23. Defendant 3M Company is corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 3M Center, Building 224-5N-40, St. Paul, Minnesota 55144. Defendant 3M Company is engaged in the business of designing, manufacturing, and selling safety products, including earplugs. Defendant is a multinational conglomerate with a dominant market share of hearing protection devices, which includes the dual-ended Combat Arms™ earplugs at issue in this suit. Defendant 3M Company is registered to transact business in Texas and may be served with process on its registered agent, Corporation Service Company d/b/a CSC-Lawyers Incorporating Service, 211 East 7th Street, Suite 620, Austin, Texas 78701.

24. Defendant Aearo Technologies LLC is a limited liability company formed in Delaware with its principal place of business located at 5457 West 79th Street, Indianapolis, Indiana 46268. Defendant Aearo is engaged in the business of designing, manufacturing, and selling safety products, including earplugs. In 2009, Defendant 3M acquired Defendant Aearo, then organized as Aearo Technologies Inc., and assumed its liabilities. Defendant Aearo is registered to transact business in Texas and may be served with process on its registered agent, Corporation Service Company d/b/a CSC-Lawyers Incorporating Service, 211 East 7th Street, Suite 620, Austin, Texas 78701.

III. JURISDICTION

25. This Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332(a)(1) because Plaintiffs and Defendants are citizens of different states and the amount in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs.

26. Personal jurisdiction over Defendants is proper because Defendants have, and continue to, engage in business in Texas. Defendants sold and distributed dual-ended Combat Arms™ earplugs to military bases throughout the State of Texas from 2003 to 2015.

27. Plaintiffs' claims arise out of Defendants' purposeful contacts with the State of Texas. Defendants marketed the earplugs in Texas as a safety device specifically designed to protect service members from hearing loss and the damaging impulse sounds of explosions and gunfire. The dual-ended Combat Arms™ earplugs were standard issue for active servicemen and women, such as Plaintiffs, who were stationed at military installations across Texas. In fact, Plaintiffs were first provided with the defective earplugs in Texas, wore the defective earplugs at various military installations in the State, and were diagnosed or treated with hearing issues in Texas.

IV. VENUE

28. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this claim occurred in the District. Specifically, Defendants distributed dual-ended Combat Arms™ earplugs to United States military installations in the District and this conduct relates to and is the cause of Plaintiffs' injuries.

V. CONDITIONS PRECEDENT

29. All conditions precedent to recovery have been performed, waived, or have occurred.

VI. FACTUAL ALLEGATIONS

30. On July 26, 2018, Defendants agreed to pay \$9.2 million to resolve allegations brought under the *qui tam* provisions of the False Claims Act that they knowingly sold defective earplugs to the U.S. military.³ The lawsuit revealed that hundreds of thousands of active and retired United States servicemen and women may have suffered significant hearing loss, tinnitus,

³ See *United States of America ex rel. Moldex-Metric, Inc. v. 3M Company*, in the United States District Court for the District of South Carolina, Columbia Division; Case No. 3:16-1533-MBS.

or other serious injuries from using these earplugs while serving.⁴

A. Defendants Won an Exclusive Government Contract by Falsely Certifying that their Dual-Ended Combat Arms Earplugs Complied with Federal Regulatory Standards

31. In the late 1990s, the U.S. military began to discuss the development of a new type of combat earplug that would have two insertable ends, with each end offering a different level of sound attenuation. The military was interested in this type of earplug because it would eliminate the need for soldiers to carry two sets of earplugs to get two different levels of noise protection. Defendants⁵ sought to become the exclusive supplier of earplugs to the military by developing dual-ended Combat Arms earplugs that met the military's specifications. In 2003, Defendants submitted a bid in response to the military's Request for Proposal ("RFP") and entered into an Indefinite Quantity Contract ("IQC") to become the exclusive supplier of earplugs to the military.

32. Before submitting a bid on the IQC for selective attenuation earplugs, the military required bidders to certify that their product met the performance and testing criteria established by federal regulations.

33. The level of noise protection provided by earplugs is measured by a standardized rating system, or a Noise Reduction Rating ("NRR"). NRR testing and labeling of earplugs is governed by federal regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to the Noise Control Act, 42 U.S.C. § 4901 *et seq.* Specifically, 40 C.F.R. § 211.206-1

⁴ As 3M explained in a press release trumpeting its sale of dual-ended Combat Arms™ earplugs to the military, "[t]innitus, often referred to as 'ringing in the ears,' and noise-induced hearing loss can be caused by a one-time exposure to hazardous impulse noise, or by repeated exposure to excessive noise over an extended period of time." Press Release, 3M Co., 3M Hearing & Prot. Device Now Added to the Fed. Procurement List (Aug. 30, 2012), available at <https://news.3m.com/press-release/3m-hearing-protection-devices-now-added-federal-procurement-list> (attached hereto and incorporated herein as **Plaintiffs' Exhibit 1**).

⁵ Defendant Aearo Technologies LLC, formerly known as Aearo Technologies, Inc., manufactures and sells hearing protection devices and other protective gear for both commercial and defense markets, including the United States military. The Combat Arms™ earplugs were first developed and sold by Aearo Technologies, Inc. In 2008, 3M acquired Aearo Technologies Inc. and assumed its liabilities.

provides:

The value of sound attenuation to be used in the calculation of the Noise Reduction Rating must be determined according to the Method for the Measurement of Real-Ear Protection of Hearing Protectors and Physical Attenuation of Earmuffs.” This standard is approved as the American National Standards Institute Standard (ANSI-STD) S3.19-1974.⁶

34. Further, 40 C.F.R. § 211.204-4(e) requires that specific “supporting information” accompany hearing protection devices sold in the United States:

“The following minimum supporting information must accompany the device in a manner that insures its availability to the prospective user...**Instructions as to the proper insertion or placement of the device.**”

35. The U.S. military may only purchase earplugs that meet the testing standards established by the U.S. Army Public Health Command, Army Hearing Program, or equivalent standards established by other branches of the military.

36. Since 2003, Defendants were awarded multiple IQCs in response to RFPs published by the military requesting bids to supply non-linear, selective attenuation earplugs. Each time, the U.S. military required all bidders to certify that the earplugs complied with the Salient Characteristics of Medical Procurement Item Descriptions (the “Salient Characteristics”) set forth in its RFPs.⁷ The relevant Salient Characteristics included the following:⁸

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.

⁶ ACOUSTICAL SOC’Y OF AM., ACOUSTICAL SOCIETY OF AMERICA STANDARD METHOD FOR THE MEASUREMENT OF REAL-EAR PROTECTION OF HEARING PROTECTORS AND PHYSICAL ATTENUATION OF EARMUFFS: STD-1-1975 (attached hereto and incorporated herein as **Plaintiffs’ Exhibit 2**).

⁷ Department of Defense, Form 1449, Solicitation/Contract/Order for Commercial Items, No. SP0200-06-R-4202 (4 Aug. 2006) (attached hereto and incorporated herein as **Plaintiffs’ Exhibit 3**).

⁸ On information and belief, the Salient Characteristics set forth in the attached Exhibit 3 were the same across all military RFPs for solicitation of non-linear, selective attenuation earplugs.

2.2 **Sound attenuation.** At each frequency listed below, each of the ear plug shall provide the level of sound attenuation as specified. Sound attenuation shall be measured in decibels (dB).

SOUND ATTENUATION OF THE CAMOUFLAGE GREEN END OF THE EAR PLUG		SOUND ATTENUATION OF THE YELLOW END OF THE EAR PLUG	
Sound Frequency, Hz	Minimum Mean Attenuation, dB	Sound Frequency, Hz	Minimum and Maximum Mean Attenuation, dB
125	25 dB	125	0 dB to 10 dB
250	25 dB	250	0 dB to 10 dB
500	25 dB	500	0 dB to 10 dB
1000	25 dB	1000	5 dB to 15 dB
2000	30 dB	2000	10 dB to 20 dB
4000	35 dB	4000	10 dB to 20 dB
8000	40 dB	8000	10 dB to 25 dB

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.⁹

4.5 Contractor Certification. The contractor shall certify that the product offered meets the salient characteristics of this document [...]

37. Defendants developed dual-ended Combat Arms™ earplugs and certified to the military that they met all Salient Characteristics listed in the RFP. According to Defendants, they had designed their earplugs to provide soldiers with two different options for hearing attenuation depending upon how the earplugs were worn. Defendants represented that both sides of the dual-ended earplugs would provide adequate protection for soldiers’ ears when worn.

38. If worn in the “closed” or “blocked” position (olive end in the user’s ear), Defendants stated that their dual-ended Combat Arms™ earplugs would act as a traditional earplug and block as much sound as possible. If worn in the “open” or “unblocked” position (yellow side

⁹ *Id.* at 42–43; see also **Plaintiffs’ Exhibit 2.**

in user's ear), the dual-ended Combat Arms™ earplugs would reduce loud impulse sounds, such as battlefield explosions and artillery fire, while allowing the user to hear quieter noises such as commands spoken by fellow soldiers and approaching enemy combatants.

39. Defendants knowingly and falsely certified that their dual-ended Combat Arms™ earplugs complied with each of the Salient Characteristics when submitting their bid to the military. Defendants were well-aware that their dual-ended Combat Arms™ earplugs had a dangerous design defect that could cause them to loosen in the wearer's ear and permit dangerous sounds to enter the ear canal while the user incorrectly believes the earplug is working as intended.

B. Defendants Concealed Early Test Results that Demonstrated a Dangerous Design Defect

40. Defendants were required by federal regulation and military standards to conduct NRR testing on both ends of the earplugs (and achieve certain NRR results) before it could sell them to the U.S. military.

41. Defendants were required to abide by the American National Standards Institute (ANSI-STD) S3.19-1974 testing protocol in determining the earplugs' NRR.¹⁰

42. In or around January 2000, Defendants began NRR testing on each end of the dual-ended Combat Arms™ earplugs in their own testing laboratory, rather than outsourcing to an independent testing lab that would yield unbiased results. During the testing, Defendants selected ten (10) test subjects, including some of its own employees. Defendants' test protocol involved testing: (1) each respective subject's hearing without an earplug; (2) each respective subject's hearing with the open/unblocked (yellow) end inserted; and (3) each respective subject's hearing with the closed/blocked (olive) end inserted. Defendants' employees monitored the test results as the tests were performed, allowing them to stop the testing at any point if they were not achieving

¹⁰ *See id.*

the desired NRR. This was done in violation of the ANSI S3.19-1974 testing protocol.¹¹

43. For the initial testing of the dual-ended Combat Arms™ earplugs, test subjects were asked to insert the olive (closed/blocked) end into their ears without folding back any of the non-inserted flanges. While Defendants expected to achieve an NRR of 22 with the olive end inserted into the ear, the testing of 8 of the 10 test subjects revealed that Defendants were only on target to receive a 10.9 NRR. After stopping the test, Defendants discovered that the stem of the earplug was so short that it was difficult to insert the earplug deep enough into the wearer's ear canal to obtain the proper fit. Defendants discovered that when the olive end was inserted into the ear canal using the standard fitting instructions, the basal edge of the third flange of the yellow end would press against the wearer's ear and fold backward. Thereafter, when the inward pressure on the earplug was released, the yellow flanges would return to their original shape, thereby loosening the earplug and compromising the efficacy of the earplug.

44. Due to the symmetrical structure of the dual-ended Combat Arms™ earplugs, the design defects that affected the fit during the insertion of the olive end would similarly affect the fit during the insertion of the yellow end.

45. Defendants determined that in order for a test subject to obtain the proper plug insertion with optimal protection, the flanges on the opposite, non-inserted end of the earplugs had to be folded back prior to insertion into the subject's ear.

46. Nonetheless, Defendants conducted the tests for the (open/unlocked) yellow end without the modified fitting instructions. The yellow end of the earplug was tested by inserting the yellow end directly into the subjects' ears without folding back the flanges on the opposite olive end. This method of plug insertion was used even though Defendants knew it could result in a loosening of the earplugs.

¹¹ See *id.* at 5.

47. All 10 test subjects completed the test with the yellow end inserted directly into the ear. As a result, Defendants achieved a low -2 NRR—a result that suggested the earplugs actually amplified sound. Based on what the researchers learned from testing the olive end of the earplugs, they knew that inserting the yellow end without modification would result in the same loosening effect that occurred with the olive end. Therefore, they knew that the initial testing of the yellow end was inaccurate and needed to be repeated; nevertheless, Defendants instead chose to self-servingly report the -2 NRR as a “0” NRR—the rating desired by the United States military for the open/unblocked end of the earplugs.

C. Defendants Manipulated their Product Testing and Presented Skewed Results to the U.S. Military

48. After completing the initial NRR tests, Defendants determined that to obtain the proper plug insertion with optimal protection, the flanges on the opposite, non-inserted end of the earplugs had to be folded back prior to insertion into the subject’s ear.

49. Consequently, Defendants retested the olive (closed/blocked) end of the dual-ended Combat Arms™ earplugs incorporating the modified insertion method. During this retest, Defendants folded back the yellow, non-inserted, flanges of the earplug to allow the test subject to insert the olive end of the earplug deeply into the ear to obtain a proper fit. As the yellow flanges were folded back during this retest, the basal edge of the third flange of the yellow end of the earplug no longer pressed against the subject’s ear canal, and thus did not cause the earplug to loosen during testing. Defendants then received a 22 NRR on the olive (closed/blocked) end of the earplug—the rating desired by the U.S. military for the closed/blocked end.

50. While Defendants retested the insertion of the olive (closed/blocked) end into the ear with a slight modification, they did not conduct a retest with a similar modification of the insertion of the yellow (open/unblocked) end. This failure to retest came despite Defendants’ knowledge that: (1) an improper seal was formed during the initial in-ear testing of the yellow end;

and (2) test subjects in the initial test revealed large standard deviations when the yellow (open/unblocked) end was inserted, which artificially drove down the NRR to a -2 in the open position.

51. Again, due to the symmetrical structure of the earplugs, the design defects that affected the fit on the olive/closed end of the Earplug also impacted the fit on the yellow/open end. However, Defendants knew that if the test subjects used the same insertion method with the yellow end—folding back the olive flanges when inserting the yellow end into the ear—the results would have yielded an NRR greater than “0.” As the United States military desired an earplug that achieved a “0” NRR when the open end was inserted, Defendants did not repeat their tests and self-servingly reported that they had achieved the desired NRR.

D. Defendants’ Knowing and Willful Misrepresentations Caused Plaintiffs’ Injuries

52. The military’s RFP asked Defendants to certify that their earplugs met all Salient Characteristics, which required that: (1) earplugs provide protection from impulse noises, while allowing wearer to clearly hear normal speech; (2) sound attenuation of both ends be tested in accordance with American National Standards Institute standards; (3) earplugs be free from defects; and (4) instructions explaining the proper use and handling of earplugs be supplied with each unit. In responding to the military’s RFP, Defendants falsely certified that their Combat Arms™ earplugs achieved all Salient Characteristics.

53. Defendants’ product failed to meet the government’s Salient Characteristics in a number of ways. For one, Defendants’ earplugs failed to provide adequate protection from impulse noises when used as instructed.

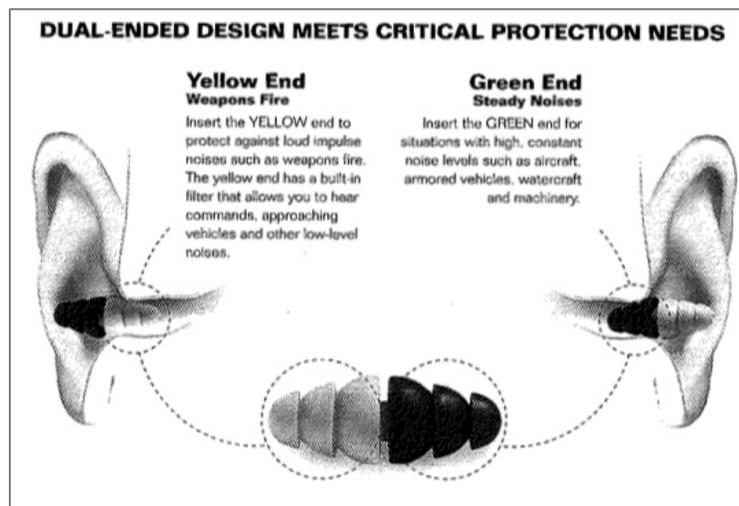
54. Second, Defendants failed to test their product in accordance with required federal regulations and military standards. In truth, Defendants used a faulty testing method that yielded

an inaccurate NRR for the open end of the earplug. Defendants never retested the yellow end of the earplug despite large deviations from the test subjects and knowledge that the earplugs did not fit into the ear properly.

55. Third, Defendants knew since the year 2000 that the earplugs were defective. Defendants manufactured earplugs that, when used as directed, permitted damaging, high-decibel sounds to enter the ear.

56. Lastly, Defendants certified that they provided accurate instructions and warnings that explained the proper use and handling of the dual-ended Combat Arms™ earplugs. However, Defendants' standard fitting instructions only directed users to insert the earplugs directly into the ear, even though a modified insertion instruction was required to achieve a proper fit and adequate hearing protection. *See* Figure 2.

Figure 2. Product instructions from 3M Co. to Dual-ended Combat Arms™ Earplugs.¹²



57. Defendants knew that modified fitting instructions were required to ensure a proper fit that would deliver the promised NRR—a 22 NRR when the olive end is inserted and a “0” NRR when the yellow end is inserted. Defendants also knew that the non-inserted flanges had to be

¹² Product instructions from 3M Co. to Dual-ended Combat Arms™ Earplugs purchasers (2006) (attached hereto and incorporated herein as **Plaintiffs' Exhibit 4**).

folded back prior to insertion. However, Defendants did not provide proper fitting instructions, and they failed to warn users of the risks associated with using their product as intended.

58. Defendants' misrepresentations and course of conduct induced the military to award them exclusive supplier contracts time and again. Had Defendants put the safety of Plaintiffs over their own financial interests, Plaintiffs would not have suffered significant and permanent hearing loss, tinnitus, and related trauma.

E. Defendants Marketed their Dual-Ended Combat Arms™ Earplugs in Texas and Military City USA®

59. The State of Texas “works to be a home to all military branches and military members as well as an integral part of the national defense network.”¹³ Indeed, there are approximately 171 Department of Defense (“DoD”) sites in Texas, including 15 active duty military installations.

60. The Western District of Texas alone is home to six of Texas’ fifteen active duty military installations, including: Fort Bliss (U.S. Army Ground Combat Maneuvering and Artillery Training), Fort Hood (U.S. Army Ground Combat Ready Force and Helicopter Training), Laughlin Air Force Base (U.S. Air Force Specialized Undergraduate Pilot Training), and Joint Base San Antonio (“JBSA”) which incorporates Fort Sam Houston (Military Medicine & Headquarters), Lackland Air Force Base (Air Force Basic Training and headquarters for Air Force Intelligence Agency), and Randolph Air Force Base (Instructor Pilot and Advanced Instrument Flight Training).

61. They say everything’s bigger in Texas, and military installations are no exception. Fort Hood is the largest active-duty armored post in the United States.¹⁴ Since 2003, Fort Hood has deployed and redeployed more than 852,000 soldiers in support of overseas military operations.¹⁵ Fort Bliss is the second largest military installation in the United States, with 1.12 million acres in Texas and New Mexico.¹⁶ Fort Bliss is considered the Army’s flagship for home

¹³ Texas Military Preparedness Commission Office of the Texas Governor, *Military Installations Across Texas 2018*, available at <https://gov.texas.gov/uploads/files/organization/military/2018ALL.pdf>.

¹⁴ TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, *Military Snapshot – Fort Hood*, available at http://www.hood.army.mil/facts/TX_Comptrollers_Fact_Sheet_Fort_Hood.pdf (last visited March 5, 2019).

¹⁵ *Id.*

¹⁶ TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, *Military Snapshot –Fort Bliss*, available at https://search.comptroller.texas.gov/search?site=ctg_collection&client=ctg_frontend&proxystyle=ctg_frontend&output=xml_no_dtd&getfields=description&searchDropdown=ctg_collecti

station training in the areas of: close combat tactics, engagement skills, aviation combined arms tactics, simulations, mission training, medical support, and digital ranges.¹⁷ Joint Base San Antonio is the largest base organization in the DoD; it expands over 46,539 acres, and supports over 250,000 personnel.¹⁸

62. Within the District, the City of San Antonio, known fondly as “*Military City USA*®,” has an especially strong military presence and connection to this case. With JBSA, San Antonio is home to the largest base organization in the DoD; it expands over 46,539 acres and supports over 250,000 personnel.¹⁹ Located within JBSA, Brooke Army Medical Center (“BAMC”) at Fort Sam Houston is known as “the home of Army medicine,” and is the most robust and productive health care organization within the Military Health System. Additionally, the DoD Hearing Center of Excellence is also located in San Antonio at Lackland Air Force Base; the center was established by the DoD to focus on the prevention, diagnosis, mitigation, treatment, and rehabilitation of hearing loss and auditory injury.²⁰

63. Unsurprisingly, San Antonio has one of the nation’s largest active and retired military populations. San Antonio is the county seat for Bexar County, Texas, which is home to over 163,000 veterans, has the 6th largest county-level veteran population in the country, and is the most densely-populated veteran community in Texas. In fact, Bexar County’s veterans represent 11.8 percent of the adult population—the highest percentage of any county in Texas and

[on&q=%22fort+bliss%22&ie=UTF-8&ulang=en&access=p&sort=date:D:L:d1&entqr=3&entqrm=0&wc=200&wc_mc=1&oe=UTF-8&ud=1&&start=0](#) (last visited March 5, 2019).

¹⁷ *Id.*

¹⁸ Texas Military Preparedness Commission Office of the Texas Governor, *Joint Base San Antonio – San Antonio, TX 2018*, available at <https://gov.texas.gov/uploads/files/organization/military/2018JBSA.pdf> (last visited Feb. 20, 2019).

¹⁹ *Id.*

²⁰ DEPARTMENT OF DEFENSE HEARING CENTER OF EXCELLENCE, History, available at <https://hearing.health.mil/About-HCE/History>.

nearly 1.5 times the statewide average.

64. From 2003 to at least 2015, the dual-ended Combat Arms™ earplugs designed, manufactured, distributed, and/or sold by Defendants were standard issue for American servicemen and women, including Plaintiffs, that were stationed at the various Texas military bases and installations described here. Notably, Texas has the highest population in the nation of veterans who served during the relevant time period. There are approximately 262,736 veterans in Texas who served while the dual-ended Combat Arms™ earplugs were standard issue (from the Gulf War Era through Post 9/11).²¹ Thousands of U.S. servicemen and women wore the earplugs at Texas bases during their pre-deployment training and/or while deployed and were subsequently diagnosed and/or treated for their resulting hearing injuries at various military and VA facilities throughout Texas.

F. Defendants' Conduct Directly Resulted in Plaintiffs' Injuries and Damages

Plaintiff Joe William Contreras

65. Plaintiff Joe William Contreras joined the Army in 2000. During his fourteen years of service, Plaintiff Joe William Contreras spent approximately 10 years deployed overseas, including 39 months in combat. Throughout his military career, Plaintiff received several promotions and ultimately achieved the rank of Staff Sergeant. Plaintiff served with the 552nd Military Police Company which was stationed in Iraq from 2007-2008 and Schofield Barracks HI from 2008-2009. Thereafter, he served as a squad leader for combat support 64th Military Police Company, for the 205th Military Police Battalion in Afghanistan (2009-2010), and the 720th Military Police Battalion at Fort Hood, TX (2010-2011). Plaintiff then served as J3 Operations Non-Commissioned Officer for the Deputy Commander of Support Operations (DCOM-SPO) in

²¹ U.S. DEPARTMENT OF VETERANS AFFAIRS, NATIONAL CENTER FOR VETERANS ANALYSIS AND STATISTICS, Veteran Population – The States – Period Served, available at https://www.va.gov/vetdata/veteran_population.asp.

Kabul Afghanistan from 2011-2012.

66. Prior to joining the Army, Plaintiff Joe William Contreras had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

67. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army during Plaintiff's deployment and pre-deployment training.

68. Plaintiff was provided with the dual-ended Combat Arms™ earplugs during his pre-deployment training and while he was deployed. In fact, the dual-ended Combat Arms™ earplugs were part of Plaintiff's uniform as an inspection item. He was expected to carry the earplugs at all time he was in uniform.

69. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

70. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during pre-deployment training at Fort Hood, TX and while deployed in Iraq and Afghanistan—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

71. Plaintiff wore the dual-ended Combat Arms earplugs while training and in the field.

72. Plaintiff wore the earplugs while training at Fort Hood, Texas and while deployed in Iraq and Afghanistan. While he wore the earplugs, Plaintiff was exposed to loud impulse noises including those coming from weapons, tanks, and blasts.

73. Plaintiff now relies on hearing aids to correct his hearing.

74. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

75. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

76. Plaintiff now suffers from tinnitus, and he was diagnosed with the condition by an Army doctor.

77. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Andres Alvarado

78. Plaintiff Andres Alvarado joined the Navy in 2000. During his 16 years of military service, Plaintiff received several promotions and ultimately attained the position of Naval Counselor Petty Officer 1st Class (NC1)/ E-6.

79. Prior to joining the Navy, Plaintiff Andres Alvarado had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

80. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Navy during Plaintiff's deployment and pre-deployment training.

81. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

82. Per the dual-ended Combat Arms™ earplugs' instructions provided to Plaintiff, they were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

83. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during pre-deployment training and while deployed—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

84. Plaintiff wore the dual-ended Combat Arms earplugs while training and in the field.

85. Plaintiff wore the earplugs while training stateside, and while deployed. While he wore the earplugs, Plaintiff was exposed to loud impulse noises including those coming from military weapons and engines.

86. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

87. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

88. Plaintiff now suffers hearing related injuries.

89. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Michael Bolton

90. Plaintiff Michael Bolton joined the Air Force in 1998, where he maintained the position of Bioenvironmental Engineering Technician (4BOX1).

91. Prior to joining the Air Force, Plaintiff Michael Bolton had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

92. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Air Force during Plaintiff's training and service.

93. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

94. Per the dual-ended Combat Arms™ earplugs' instructions provided to Plaintiff, they were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

95. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during his service and training—he would insert the dual-

ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

96. Plaintiff wore the dual-ended Combat Arms earplugs during pre-deployment training, and while deployed.

97. Plaintiff wore the earplugs while training at Edwards Air Force Base CA, Minot Air Force Base, ND, and while deployed to Saudi Arabia as part of an Escort Security Detail. While he wore the earplugs, Plaintiff was exposed to loud impulse noises including those coming from Aircraft engines which were very loud during landing and takeoff. Plaintiff was exposed to these noises while training and while deployed providing flight line security on air fields.

98. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into his ears might have caused the earplugs to loosen.

99. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

100. Plaintiff now suffers from hearing loss and tinnitus.

101. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Oluseyi Fadojutimi

102. Plaintiff Oluseyi Fadojutimi joined the Navy in 2004, where he maintained the rank of Engine Man Fireman (ENFN)/E3.

103. Prior to joining the Navy, Plaintiff Oluseyi Fadojutimi had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

104. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Navy during Plaintiff's training and service.

105. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

106. Per the dual-ended Combat Arms™ earplugs' instructions provided to Plaintiff, they were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

107. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during his service and training—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

108. Plaintiff wore the dual-ended Combat Arms earplugs while training and in the field.

109. Plaintiff wore the earplugs while stationed at Naval Station Ingleside, TX. While he wore the earplugs, Plaintiff was exposed to loud impulse noises including those coming from ship engines and around the shipyard.

110. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

111. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

112. Plaintiff now suffers from tinnitus.

113. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Edward Solis Garcia

114. Plaintiff Edward Solis Garcia joined the United States Marine Corps in 1986. During his 20 years of service, Plaintiff received several promotions and ultimately achieved the rank of Staff Sergeant.

115. Prior to joining the Marines, Plaintiff Edward Solis Garcia served for the United States Army. Prior to his service, Plaintiff had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

116. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Marines during Plaintiff's deployment and pre-deployment training.

117. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

118. Per the dual-ended Combat Arms™ earplugs' instructions provided to Plaintiff, they were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

119. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during his training and deployments—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

120. Plaintiff wore the dual-ended Combat Arms earplugs while training and in the field.

121. Plaintiff wore the earplugs during pre-deployment training and while deployed. While he wore the earplugs, Plaintiff was exposed to loud impulse noises including those coming from ship engines and around the shipyard.

122. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs

directly into the ear might have caused the earplugs to loosen.

123. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

124. Plaintiff now suffers from tinnitus; the VA diagnosed him with the condition in 2006.

125. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Carlos Hinojosa

126. Plaintiff Carlos Hinojosa joined the Navy in 1997, where he maintained the rank of Navy Counselor First Class (NC1).

127. Prior to joining the Navy, Plaintiff Carlos Hinojosa had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

128. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Navy during Plaintiff's training and service.

129. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

130. Per the dual-ended Combat Arms™ earplugs' instructions provided to Plaintiff, they were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

131. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms™ earplugs during pre-deployment during service and training—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

132. Plaintiff wore the dual-ended Combat Arms earplugs while training and in the field.

133. Plaintiff wore the earplugs while training and while aboard various ships, including the USS Theodore Roosevelt (CVN-71), when deployed to the middle east. While he wore the earplugs, Plaintiff was exposed to loud impulse noises including those coming aircraft and around the shipyard.

134. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

135. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

136. Plaintiff now suffers from hearing loss and tinnitus.

137. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Sonya Jo Hoyer

138. Plaintiff Sonya Jo Hoyer joined the Army in 2009, where she maintained the rank of Staff Sergeant/E-6.

139. Prior to joining the Army, Plaintiff Sonya Jo Hoyer had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

140. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army during Plaintiff's deployment and pre-deployment training.

141. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

142. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

143. Plaintiff followed the insertion instructions provided by Defendants when wearing

the dual-ended Combat Arms earplugs during pre-deployment training and while deployed—she would insert the dual-ended Combat Arms™ earplugs directly into her ears to achieve the desired hearing protection.

144. Plaintiff wore the dual-ended Combat Arms earplugs while training and in the field.

145. Plaintiff wore the earplugs while training at Fort Hood, Texas and while deployed in Afghanistan. While she wore the earplugs, Plaintiff was exposed to loud impulse noises including those coming from fight line weapons and blasts.

146. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

147. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into her ears.

148. Plaintiff now suffers from hearing loss and tinnitus.

149. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Samantha Long

150. Plaintiff Samantha Long joined the Army in 2009, where she maintained the position of Supply Sergeant/E-5.

151. Prior to joining the Army, Plaintiff Samantha Long had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

152. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army during Plaintiff's deployment and pre-deployment training.

153. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

154. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end

was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

155. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during pre-deployment and while deployed—she would insert the dual-ended Combat Arms™ earplugs directly into her ears to achieve the desired hearing protection.

156. Plaintiff wore the dual-ended Combat Arms earplugs while training and in the field.

157. Plaintiff wore the earplugs while training at Fort Hood, Texas, Camp Casey, South Korea, Fort Huachuca, Arizona, and while deployed to Mannheim Germany. While she wore the earplugs, Plaintiff was exposed to loud impulse noises including those coming from weapons at training ranges such as M16, M240, and M60 military rifles.

158. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

159. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into her ears.

160. Plaintiff now suffers from tinnitus, and hearing loss. She now hears echoed and muffled sounds.

161. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Justin Nowak

162. Plaintiff Justin Nowak joined the Army in 2009, where he maintained the rank of Specialist/E-4.

163. Prior to joining the Army, Plaintiff Justin Nowak had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

164. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army during Plaintiff's deployment and pre-deployment training.

165. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

166. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

167. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during pre-deployment training and while deployed—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

168. Plaintiff wore the dual-ended Combat Arms™ earplugs while training and in the field.

169. Plaintiff wore the earplugs during pre-deployment training and while deployed in Afghanistan. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from weapons.

170. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

171. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

172. Plaintiff now suffers from hearing loss and tinnitus.

173. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Heath Osborn

174. Plaintiff Heath Osborn joined the Army in 1998, where he maintained the position of Staff Sergeant.

175. Prior to joining the Army, Plaintiff Heath Osborn had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

176. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army during Plaintiff's deployment and pre-deployment training.

177. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

178. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

179. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during pre-deployment training and while deployed—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

180. Plaintiff wore the dual-ended Combat Arms™ earplugs while training and in the field.

181. Plaintiff wore the earplugs while training at Fort Campbell, Kentucky and while deployed in Iraq. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from helicopters and military weapons such as M4 rifles and M240 machine guns.

182. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

183. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

184. Plaintiff now suffers from hearing loss and tinnitus.

185. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Daniel Romero

186. Plaintiff Daniel Romero joined the Army in 1984. During his 21 years of military service, Plaintiff received several promotions and ultimately achieved the position of Sergeant First Class/ E-7.

187. Prior to joining the Army, Plaintiff Daniel Romero had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

188. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army during Plaintiff's deployment and pre-deployment training.

189. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

190. Per the dual-ended Combat Arms™ earplugs' instructions provided to Plaintiff, they were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

191. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during pre-deployment training and while deployed—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

192. Plaintiff wore the dual-ended Combat Arms™ earplugs during pre-deployment training and while deployed.

193. Plaintiff wore the earplugs while training at Fort Sill, Oklahoma and while deployed to foreign engagements, including Iraq during the Global War on Terrorism. While he wore the

earplugs, Plaintiff was exposed to loud impulse noises including those coming from military weapons.

194. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

195. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

196. Plaintiff now suffers from hearing related injuries.

197. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff John Anthony Trevino

198. Plaintiff John Anthony Trevino joined the Army in 2006, where he maintained the position of SPC/E-4 assisting in security operations.

199. Prior to joining the Army, Plaintiff John Trevino had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

200. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army during Plaintiff's deployment and pre-deployment training.

201. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

202. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

203. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during pre-deployment training and while deployed—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired

hearing protection.

204. Plaintiff wore the dual-ended Combat Arms™ earplugs while training and in the field.

205. Plaintiff wore the earplugs while training at Fort Bliss, Texas and while deployed in Iraq. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from weapons.

206. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

207. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

208. Plaintiff now suffers from hearing loss and tinnitus.

209. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Jacob Windnagle

210. Plaintiff Jacob Windnagle joined the U.S. Coast Guard in 2012, where he maintained the position of Electronics Technician Second Class (ET2).

211. Prior to joining the Coast Guard, Plaintiff Jacob Windnagle had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

212. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Coast Guard during Plaintiff's training and service.

213. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

214. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to

hear quieter noises when the yellow end was inserted.

215. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during service and training—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

216. Plaintiff wore the dual-ended Combat Arms™ earplugs while training and in the field.

217. Plaintiff wore the earplugs while serving at U.S. Coast Guard Station Buffalo, New York. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from law enforcement and training at the shooting range.

218. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

219. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

220. Plaintiff now suffers from tinnitus, and was diagnosed with the condition at a Veterans Affairs office in Corpus Christi, Texas in 2018. Plaintiff also suffers from Meniere's disease, a disorder of the inner that can lead to dizzy spells and hearing loss.

221. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff William Bourne

222. Plaintiff William Bourne joined the U.S. Army National Guard in 2007, where he maintained the position of Helicopter Equipment Repairer/ E-4.

223. Prior to joining the Army National Guard, Plaintiff William Bourne had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

224. The dual-ended Combat Arms™ earplugs manufactured by Defendants were

standard issue for the Army National Guard during Plaintiff's training and service.

225. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

226. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

227. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during service and training—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

228. Plaintiff wore the dual-ended Combat Arms™ earplugs while stationed stateside.

229. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from military weapons, including rifles, and military aircraft engines.

230. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

231. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

232. Plaintiff now suffers from hearing loss and tinnitus.

233. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Scott Lawrence

234. Plaintiff Scott Lawrence joined the U.S. Navy in 2007, where he maintained the position of Builder Petty Officer 2nd Class (BU2).

235. Prior to joining the Navy, Plaintiff Scott Lawrence had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

236. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Navy during Plaintiff's training and service.

237. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

238. Per the dual-ended Combat Arms™ earplugs' instructions provided to Plaintiff, they were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

239. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs while training stateside and while deployed in Iraq and Afghanistan—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

240. Plaintiff wore the dual-ended Combat Arms™ earplugs while training stateside and while deployed in Iraq and Afghanistan where he built U.S. bases.

241. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from weapons at firing ranges, and construction equipment used for building bases in Iraq and Afghanistan.

242. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

243. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

244. Plaintiff now suffers from hearing loss and tinnitus.

245. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Henry Palacios

246. Plaintiff Henry Palacios joined the U.S. Marine Corps in 2002, where he maintained the position of Sergeant and squad leader.

247. Prior to joining the Marine Corps, Plaintiff Henry Palacios had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

248. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Marine Corps during Plaintiff's training and service.

249. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

250. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

251. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during his pre-deployment training and while deployed in Iraq—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

252. Plaintiff wore the dual-ended Combat Arms™ earplugs while training stateside and while deployed in Iraq.

253. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from weapons, aircraft, and engine rooms.

254. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

255. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

256. Plaintiff now suffers from hearing loss and tinnitus.

257. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff Andrew Niccum

258. Plaintiff Andrew Niccum joined the United States Army in 1996, where he maintained the position of Sergeant First Class.

259. Prior to joining the Army, Plaintiff Andrew Niccum had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

260. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army during Plaintiff's training and service.

261. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

262. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

263. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during his pre-deployment training and while deployed—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

264. Plaintiff wore the dual-ended Combat Arms™ earplugs while training at Fort Benning, Georgia.

265. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from weapons, including M4 and M16 rifles, aircraft, and engine rooms.

266. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

267. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

268. Plaintiff now suffers from tinnitus.

269. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

Plaintiff James Coveney

270. Plaintiff James Coveney joined the United States Army National Guard in 1999, where he maintained the position of E-4.

271. Prior to joining the Army National Guard, Plaintiff James Coveney had no signs or symptoms of hearing loss, tinnitus, and/or any other hearing related issues.

272. The dual-ended Combat Arms™ earplugs manufactured by Defendants were standard issue for the Army National Guard during Plaintiff's training and service.

273. Plaintiff was provided with the dual-ended Combat Arms™ earplugs.

274. Per the instructions that Defendants provided to Plaintiff, the dual-ended Combat Arms™ earplugs were intended to: (1) block out as much sound as possible when the olive end was inserted into Plaintiff's ear; and (2) reduce loud impulse noises while allowing Plaintiff to hear quieter noises when the yellow end was inserted.

275. Plaintiff followed the insertion instructions provided by Defendants when wearing the dual-ended Combat Arms earplugs during his pre-deployment training and while deployed in Iraq—he would insert the dual-ended Combat Arms™ earplugs directly into his ear to achieve the desired hearing protection.

276. Plaintiff wore the dual-ended Combat Arms™ earplugs during his pre-deployment training and while deployed to Iraq.

277. While he wore the earplugs, Plaintiff was exposed to loud noises including those coming from weapons, motors, and generators.

278. Plaintiff was never warned that inserting the dual-ended Combat Arms™ earplugs directly into the ear might have caused the earplugs to loosen.

279. Plaintiff was never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into his ears.

280. Plaintiff now suffers from tinnitus.

281. Plaintiff's injuries and damages were a proximate result of using the defective dual-ended Combat Arms™ earplugs.

VII. CAUSES OF ACTION

COUNT 1: **PRODUCTS LIABILITY—DESIGN DEFECT**

282. Plaintiffs replead and incorporate by reference each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

283. At all relevant times, Defendants were engaged in the business of designing, manufacturing, distributing, and/or selling hearing protection devices, including the defective dual-ended Combat Arms™ earplugs at issue.

284. Defendants maintained exclusive and/or substantial control over the design, manufacturing, distribution, and/or selling of the defective dual-ended Combat Arms™ earplugs in question.

285. Defendants defectively designed the dual-ended Combat Arms™ earplugs in the following ways: (1) the stem of the dual-ended earplug is too short, and, therefore, it is difficult for users to insert the plug deeply into their ear canals and obtain a proper fit; and/or (2) the earplugs' defective design causes the earplug to loosen in the ear imperceptibly to the wearer, thereby permitting dangerous sounds to enter the ear canal.

286. Defendants knew that the ordinary and expected use of the dual-ended Combat Arms™ earplugs was to provide adequate and safe hearing attenuation on each side of the dual-ended earplugs, yet they designed the earplugs with these compromising and dangerous defects.

287. Furthermore, safer alternative designs existed other than the one used. These alternative designs: (1) would have prevented or significantly reduced the risk of Plaintiffs' hearing related injuries and/or other personal injuries; and (2) would be economical and feasible at the time

the dual-ended Combat Arms™ earplugs left Defendants' control. For example, because the primary design defect came from the earplug being too short, Defendants could have designed the dual-ended Combat Arms™ earplugs with a longer stem that would allow users to insert the plug deeper into their ear canals.

288. Defendants knew of the defects and design alternatives, yet Defendants still manufactured, distributed, and sold the defective dual-ended Combat Arms™ earplugs that were not reasonably safe for their ordinary and intended use.

289. Defendants' product was delivered to Plaintiffs in a defective condition. At the time that the dual-ended Combat Arms™ earplugs reached Plaintiffs, they were in the condition expected and intended by Defendants.

290. Plaintiffs used the dual-ended Combat Arms™ earplugs for their intended and foreseeable purpose and followed the instructions provided by Defendants.

291. Plaintiffs were never instructed to fold the flanges on the opposite, non-inserted end of the earplugs back prior to insertion into the subject's ear. As such, the defective dual-ended Combat Arms™ earplugs failed to function in a manner reasonably expected by an ordinary consumer.

292. As a proximate result of using the defective dual-ended Combat Arms™ earplugs, Plaintiffs suffered injuries and damages, including, but not limited to, hearing loss, tinnitus, and other hearing-related injuries.

293. Plaintiffs' injuries and damages for this design defect are actionable pursuant to TEX. CIV. PRAC. & REM. CODE § 82.005.²²

²² Any potential defenses raised by Defendants pursuant to TEX. CIV. PRAC. & REM. CODE § 82.008 are inapplicable as: (1) any applicable standards or regulations promulgated by the federal government were inadequate to protect the public from unreasonable risks of injury or danger; and/or (2) Defendants misrepresented or withheld material from the government regarding the adequacy or safety of the earplugs at issue, and these actions proximately caused Plaintiffs'

COUNT 2:
PRODUCTS LIABILITY—MANUFACTURING DEFECT

294. Plaintiffs incorporate by reference each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

295. At all relevant times, Defendants were engaged in the business of designing, manufacturing, distributing, and/or selling hearing protection devices, including the defective dual-ended Combat Arms™ earplugs at issue.

296. At all relevant times, Defendants maintained exclusive and/or substantial control over the design, manufacturing, distribution, and/or selling of the defective dual-ended Combat Arms™ earplugs in question.

297. Plaintiffs used the dual-ended Combat Arms™ earplugs for their intended and foreseeable purpose and followed the insertion instructions provided by Defendants.

298. Defects in the manufacture of the dual-ended Combat Arms™ earplugs rendered them defective and unreasonably dangerous. Defendants manufactured earplugs that, when inserted into the ear, would loosen in the wearer's ear. This manufacturing defect is imperceptible to the wearer, as the dangerous sounds enter the ear canal by traveling around the outside of the earplug while the user incorrectly believes the earplug is working as intended. This manufacturing defect has likely caused thousands, if not millions of soldiers, including Plaintiffs, to suffer significant hearing loss, tinnitus, and additional hearing loss related injuries, including but not limited to pain and suffering and loss of the pleasures of life.

COUNT 3:
PRODUCTS LIABILITY—FAILURE TO WARN

299. Plaintiffs replead and incorporate by reference each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

injuries.

300. At all relevant times, Defendants were engaged in the business of designing, manufacturing, distributing, and/or selling hearing protection devices, including the defective dual-ended Combat Arms™ earplugs at issue.

301. At all relevant times, Defendants maintained exclusive and/or substantial control over the design, manufacturing, distribution, and/or selling of the defective dual-ended Combat Arms™ earplugs in question.

302. Defendants represented and marketed to Plaintiffs and others that the dual-ended Combat Arms™ earplugs would achieve proper hearing protection if inserted directly into the user's ear.

303. Defendants had a nondelegable duty to manufacture, design, distribute, and/or sell their products with reasonable care for the safety of their users—members of the United States military, including Plaintiffs, who would be exposed to loud impulse sounds on a regular basis.

304. Defendants had a duty to provide adequate warnings and/or instructions to prevent the foreseeable risks associated with Combat Arms™ earplugs when worn during their ordinary and intended use—moments where users would be exposed to loud and dangerous sounds such as artillery fire.

305. Defendants foresaw that the Combat Arms™ earplugs would be unreasonably dangerous if they failed to provide users with proper warnings when the earplugs were inserted directly into the ear. Furthermore, Defendants had a duty to provide users with the proper instructions to ensure that the earplugs would be inserted deep enough into the ear canal to offer the user proper protection. However, Defendants failed to provide these warnings and instructions.

306. Defendants' own pre-distribution testing revealed that Defendants knew that the stem of the Combat Arms™ earplugs was too short to insert the earplug deep enough into the wearer's ear canal to obtain the proper fit. Defendants also knew that this defect would be

imperceptible to the user. Therefore, Defendants knew that their failure to provide proper fitting instructions would subject any potential users to a high risk of harm. Notwithstanding this fact, Defendants never made any attempt to provide a proper warning to users, including Plaintiffs.

307. Defendants falsely represented to the United States military and users, including Plaintiffs, that they provided accurate instructions explaining the proper use and handling of the Combat Arms™ earplugs. In actuality, Defendants' standard fitting instructions were inadequate and failed to inform users that the non-inserted flanges had to be folded back prior to insertion for optimal protection. Defendants never gave this proper fitting instruction.

308. Consequently, Plaintiffs suffered injuries and damages including but not limited to, hearing loss, tinnitus, and/or other hearing related issues, when they utilized the dual-ended Combat Arms™ earplugs according to Defendants' fitting instructions. These injuries and damages were proximately caused by Defendants' failures to warn and/or provide adequate instructions regarding the dangerous conditions of the Combat Arms™ earplugs.

COUNT 4:
NEGLIGENCE

309. Plaintiffs replead and incorporate by reference each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

310. Defendants, individually and in concert with each other, have intentionally, recklessly, or negligently committed acts of omission and commission, which collectively and severally, have caused Plaintiffs' injuries. Defendants' acts of omission and commission constituting negligence include:

- a. Failing to properly design the dual-ended Combat Arms™ earplugs;
- b. Failing to properly manufacture the dual-ended Combat Arms™ earplugs;

- c. Failing to test the dual-ended Combat Arms™ earplugs in accordance with government regulations and standards—standards that were promulgated to protect a class of consumers that includes Plaintiffs;
- d. Failing to provide users with adequate instructions on how to use the dual-ended Combat Arms™ earplugs to protect them from injuries;
- e. Failing to properly market the dual-ended Combat Arms™ earplugs;
- f. Failing to properly warn users of the risks associated with the dual-ended Combat Arms™ earplugs;
- g. Failing to recall the dual-ended Combat Arms™ earplugs or, alternatively, to warn consumers of a known danger/defect in the dual-ended Combat Arms™ earplugs.

COUNT 5:
GROSS NEGLIGENCE

311. Plaintiffs plead and incorporate by reference each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein

312. Pursuant to TEX. CIV. PRAC. & REM. § 41.003 and the Texas Constitution, Plaintiffs hereby make a claim for punitive damages and exemplary damages for harms proximately caused by Defendants' gross negligence as previously stated herein. Consequently, Plaintiffs will not be prohibited from introducing evidence of actual damages.

313. Specifically, Defendants knowingly and deceptively misrepresented to the United States military that they complied with appropriate standards and regulations required of parties in the business of manufacturing hearing protection devices. Furthermore, Defendants knowingly misrepresented that they produced an earplug free from defects, despite clear evidence that the dual-ended Combat Arms™ earplugs were defective. Defendants' affirmative acts and omissions exposed American servicemen and women to an extreme degree of risk and caused serious injuries.

314. Defendants' conduct, when viewed objectively from Defendants' standpoint at the time it occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others.

315. Furthermore, Defendants had actual, subjective awareness of the risk(s) but proceeded with a conscious indifference to the rights, safety or welfare of others.

VIII. JURY DEMAND

316. Plaintiffs hereby request that all causes of action alleged herein be tried before a jury.

IX. PRAYER FOR RELIEF

317. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs pray that upon trial hereof, said Plaintiffs have and recover against Defendants the following:

- h. The amount of reasonable medical expenses necessarily incurred in the past, as well as those that will reasonably be incurred in the future;
- i. Past and future loss of wages;
- j. Past and future physical pain and suffering of Plaintiffs;
- k. Past and future physical disfigurement suffered by Plaintiffs;
- l. Past and future physical impairment suffered by Plaintiffs;
- m. Past and future mental anguish;
- n. Past loss of earnings and loss of future earning capacity;
- o. Reasonable costs of this suit;
- p. Punitive and exemplary damages in such amounts as may be proven at trial;
- q. Any and all other damages in which Plaintiffs may be justly entitled.

Dated: March 8, 2019

Respectfully submitted,

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