

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

MICHAEL DRAGO, on behalf of himself and
all others similarly situated,

Plaintiff,

vs.

3M COMPANY, and
AEARO TECHNOLOGIES, LLC,

Defendants.

Case No. _____

**PLAINTIFF'S COMPLAINT
AND DEMAND FOR JURY TRIAL**

Plaintiff, Michael Drago (“Plaintiff” or “Drago”) hereby brings this action on behalf of himself and all other similarly situated individuals against Defendants, 3M Company (“3M” or “3M Company”) and Aearo Technologies, LLC, (collectively, “Defendants”) to recover damages for personal injuries and to enjoin the unfair, deceptive and unlawful practices complained of herein.

Plaintiff alleges that Defendants made false statements to the United States Government regarding its dangerously defective dual-ended Combat Arms™ earplugs. That said false statements lead to Defendants selling Combat Arms™ earplugs to the U.S. military for more than a decade.

The subject dual-ended Combat Arms™ earplugs were standard issue in certain branches of the U.S. military between 2003 and 2015.

Defendants falsely promised the Combat Arms™ earplugs would protect soldiers’ ears from dangerous impulse noises, despite internal testing which revealed that such promises were false. Because of the defects, thousands of soldiers have been exposed to and/or suffered significant hearing loss and tinnitus. The Defendants statements and practices were nothing short of a continuing fraud which

endangered the health and fitness of Drago and other U.S. service men and women that lasted more than a decade.

THE PARTIES

1. Plaintiff, Michael Drago, is a resident of Pembroke, Massachusetts.
2. Defendant, 3M Company, is a Foreign Corporation registered under the laws of Delaware, with a principal office in St. Paul, Minnesota. 3M Company maintains a registered agent in Massachusetts, specifically, Corporation Service Company, located at 84 State Street, Boston, MA 02109. At all times relevant hereto, 3M Company was in the business of manufacturing, sale and distribution of consumer goods throughout the Commonwealth of Massachusetts.¹
3. Defendant Aearo Technologies LLC is a Delaware limited liability company with its principal place of business in St Paul, Minnesota.²

JURISDICTION AND VENUE

4. This Court has personal jurisdiction over 3M as it maintains a registered agent in Boston, Massachusetts. This Court also has personal jurisdiction over 3M by virtue of its transactions, marketing, advertising and/or conducting trade/business throughout the Commonwealth at all times relevant hereto.
5. This Court has personal jurisdiction over Aearo Technologies LLC as it maintains a registered agent in Boston, Massachusetts. This Court also has personal jurisdiction over Aearo Technologies LLC by virtue of its transactions, marketing, advertising and/or conducting trade/business throughout the Commonwealth at all times relevant hereto.

¹ 3M is defined to also include its predecessors, subsidiaries, assignees and/or assigns. Further, this action is filed in relation to all of the acts and omissions (and liability therefore) of all of 3M's predecessors, subsidiaries, assignees and/or assigns.

² Aearo Technologies LLC is defined to also include its predecessors, subsidiaries, assignees and/or assigns. Further, this action is filed in relation to all of the acts and omissions (and liability therefore) of all of 3M's predecessors, subsidiaries, assignees and/or assigns.

6. Upon information and belief, this Court has jurisdiction over this action pursuant to the Class Action Fairness Act of 2005 (“CAFA”) and 28 U.S.C. § 1332(d)(2). The matters in controversy, exclusive of interest and costs, exceed the sum of \$5,000,000.00, and there is complete diversity of jurisdiction. This Court has supplemental jurisdiction over the subject of this action pursuant to 28 U.S.C. § 1367.
7. Venue is proper in this District, pursuant to 28 U.S.C. § 1391(b), because: (1) Drago resides in the District; (2) a substantial part of the events giving rise to this action occurred in this District, including discovery of the harm inflicted. Moreover, Venue is proper in this District, pursuant to 28 U.S.C. § 1391(d), because Defendants have registered agents located in the District.

**FACTUAL ALLEGATIONS RELATED TO DRAGO’S
PERTINENT MILITARY SERVICE**

8. Drago repeats and realleges the allegations as set forth above.
9. In January of 2011, Drago was a retired Army sergeant of the United States National Guard.
10. In January of 2011, Drago was informed that he would be deployed to Afghanistan in order to train soldiers on the Common Remotely Operated Weapon Station (“C.R.O.W.S.”).
11. From January of 2011 until March of 2011, Drago reported to pre-deployment training in Melrose, MA.
12. During Drago’s pre-deployment training in Melrose, MA, he had a hearing test performed and was determined to have no disability related to his hearing.
13. Drago was transferred from Melrose, MA to Indiana for further pre-deployment training between.
14. From April 2011 and May 2011, Drago was engaged in further pre-deployment training in Indiana.
15. During Drago’s pre-deployment training in Indiana, he had a hearing test performed and was determined to have no disability related to his hearing.
16. In June of 2011, Drago was deployed to Afghanistan.

17. Drago's responsibilities in Afghanistan included training soldiers on the C.R.O.W.S. by standing outside of the C.R.O.W.S. and directing the gunner inside the vehicle by radio.
18. Drago was issued a pair of standard-issue 3M dual-ended Combat Arms™ earplugs ("3M's Combat Arms™ earplugs"), pictured below.



19. Drago was exposed to loud impulse noises while training soldiers on the C.R.O.W.S., which used rapid fire 50 caliber bullets.
20. Drago was also exposed to loud impulse noises and explosions from grenade launches during his trainings.
21. Drago wore 3M's Combat Arms™ earplugs while conducting his training duties in Afghanistan.
22. Drago wore 3M's Combat Arms™ earplugs whenever he was exposed to loud impulse sounds or battlefield explosions.
23. Drago was instructed that 3M's Combat Arms™ earplugs blocked all noise at a certain decibel level which would prevent hearing loss.
24. Drago was never instructed to fold back the third flange on the opposite side of the use-end of 3M's Combat Arms™ earplugs.
25. Drago sustained hearing loss while using the Combat Arms™ earplugs.
26. Drago injured his Achilles on August 18, 2011, during an attack on the base.
27. In October of 2011, Drago was taken off mission due to a torn Achilles.

28. Upon returning home in October of 2011, Drago discovered he had lost some of his hearing, particularly in the left ear.
29. At the Veteran's Affairs hospital ("VA") Drago was diagnosed with hearing loss and was given a 10% hearing disability by the VA.

FACTUAL ALLEGATIONS RELATED TO DEFENDANTS'
COMBAT ARMS EARPLUGS

30. Drago repeats and realleges the allegations as set forth above.
31. At all times relevant hereto, Defendants had a duty to manufacture, design, test, package, label, produce, market and distribute Combat Arms Earplugs with reasonable and due care for the health, safety and well-being of persons in the U.S. Military, including Plaintiff.
32. Defendants' Combat Arms™ earplugs were sold to the military beginning in late 2003 and continued to be sold directly and indirectly by 3M to the military until late 2015 when 3M discontinued the earplugs.
33. 3M's Combat Arms™ earplugs offered two options for use depending upon how the earplugs are worn.
34. 3M's Combat Arms™ earplugs, if worn in the "closed" or "blocked" position (olive end in the ear) are supposed to dampen all sound.
35. 3M's Combat Arms™ earplugs, if worn in the "open" or "unblocked" position (yellow end in the ear) are supposed to block specific sounds including loud impulse sounds of battlefield explosions, while still allowing the wearer to hear quieter noises such as commands from superior officers.
36. 3M's Combat Arms™ earplugs were originally created by a company called Aearo Technologies ("Aearo").
37. 3M acquired Aearo in 2008.

38. Defendants were the exclusive supplier of selective attenuation earplugs to the military between 2003 and 2012.
39. 3M's Combat Arms™ earplugs loosen in the wearer's ear.
40. 3M's Combat Arms™ earplugs loosen in the wearer's ear, oftentimes without the wearer noticing the movement.
41. 3M's Combat Arms™ earplugs loosen in the wearer's ear, because the basal edge of the third flange of the non-inserted end of the earplug is prone to press against some wearers' ear canals and fold back to its original shape, thereby loosening the seal in the ear canals.
42. When 3M's Combat Arms™ earplugs loosen in the wearer's ear, dangerous sounds can enter the wearer's ear.
43. When 3M's Combat Arms™ earplugs loosen in the wearer's ear, dangerous sounds cause damage to the wearer's ear.
44. 3M's Combat Arms™ earplugs have a stem which is too short.
45. 3M's Combat Arms™ earplugs are difficult to insert deeply into a wearer's ears.
46. Defendants knew that 3M's Combat Arms™ earplugs loosen in the wearer's ear allowing dangerous sound to enter the wearer's ear causing injury in 2000.

**FACTUAL ALLEGATIONS RELATED TO DEFENDANT'S SALE OF
COMBAT ARMS EARPLUGS TO THE U.S. MILITARY**

47. Drago repeats and realleges the allegations as set forth above.
48. Defendants submitted a bid in response to the U.S. military's Request for Proposal ("RFP") to supply large quantities of these 3M's Combat Arms™ earplugs in 2003.
49. Defendants entered into Indefinite-Quality Contracts ("IQC") in which they became the exclusive supplier of earplugs to the military in 2003.

50. Defendants certified to the U.S. Government that 3M's Combat Arms™ earplugs complied with the Salient Characteristics of Medical Procurement Item Description ("MPID").
51. 3M's Combat Arms™ earplugs did not comply with the Salient Characteristics of MPID.
52. At the time Defendants certified to the U.S. Government that 3M's Combat Arms™ earplugs complied with the Salient Characteristics of MPID, Defendants knew that 3M's Combat Arms™ earplugs did not comply with the Salient Characteristics of MPID.
53. Defendants requested numerous payments from the U.S. Government pursuant to the IQCs for sale of 3M's Combat Arms™ earplugs.
54. Defendants were required to certify that 3M's Combat Arms™ earplugs complied with the Salient Characteristics of the associated MPIDs when Defendants requested payments from the U.S. Government for 3M's Combat Arms™ earplugs.
55. Defendants were required to certify that Defendants were providing 3M's Combat Arms™ earplugs which conformed to the following Salient Characteristics of the associated MPIDs:

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....

56. 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) S3.191974. Additionally, 40 C.F.R. § 211.204-4(e) of the EPA regulations requires that 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.**

57. Each of Defendants' requests for payment from the U.S. Government for 3M's Combat Arms™ earplugs constitute a false claim to the U.S. Government, because 3M's Combat Arms™ earplugs did not comply with the Salient Characteristics of the associated MPIDs.
58. In or around January 2000, personnel of Defendants commenced Noise Reduction Rating ("NRR") testing of 3M's Combat Arms™ earplugs ("First Testing")
59. First Testing revealed the Noise Reduction Rating of 3M's Combat Arms™ earplugs, if worn in the "closed" or "blocked" position, was 10.9.
60. Defendants expected the First Testing to reveal the Noise Reduction Rating for 3M's Combat Arms™ earplugs, if worn in the "closed" or "blocked" position, to be 22.
61. The First Testing of the Noise Reduction Rating of 3M's Combat Arms™ earplugs was low due to their design defect.
62. First Testing for the Noise Reduction Rating of 3M's Combat Arms™ earplugs, if worn in the "open" position, was -2.
63. A Noise Reduction Rating of -2 means the earplugs would actually amplify sound, instead of dampening it
64. The First Testing -2 NRR test data that Defendants obtained on the open end of the earplug showed that multiple test subjects were not properly fitted with the open end, as required by ANSI S3.19-1974 Section 3.2.3

65. After prematurely terminating the First Testing of the closed/blocked end of the earplug, Defendants' personnel immediately investigated the cause of the closed/blocked end's implied and unacceptably low NRR.
66. Defendants' personnel learned in the First Testing that, because the stem of the earplug was so short, it was difficult to insert the plug deeply into the subject's ear canals and obtain a proper fit.
67. Defendants' personnel learned in the First Testing that when the olive/ closed end of the earplug was inserted into the ear, the basal edge of the third flange of the yellow, open end of the earplug pressed against the subject's ear canal and folded backwards.
68. Defendants' personnel learned in the First Testing that when the olive/closed end of the earplug was inserted into the ear, the yellow, open end loosened.
69. 3M's Combat Arms™ earplugs are symmetrical.
70. In the First Testing Defendants' personnel learned that when using either end of 3M's Combat Arms™ earplugs, the opposite end would loosen, allowing dangerous sounds into the wearer's ears.
71. In the First Testing Defendants' personnel determined that in order for a test subject to obtain proper plug insertion, the flanges on the opposite, non-inserted end of the earplugs had to be folded back prior to insertion into the test subject's ear.
72. Defendants decided to re-test the olive/closed end of the earplug using "modified" fitting instructions after they had identified that the earplugs would loosen under the original fitting instructions ("Re-test").
73. During the Re-test of the closed end, Defendants' personnel folded back the yellow flanges on the open end of the earplug (essentially elongating the too-short defective stem) to obtain a proper fit.

74. During the Re-test of the closed end, the basal edge of the third flange of the yellow, open end of the earplug no longer pressed against the subject's ear canal, and thus did not cause the earplug to loosen during the testing.
75. On the Re-test, Defendants' personnel achieved a "22" NRR on the closed end of 3M's Combat Arms™ earplugs.
76. Defendants did not go back and retest the open end of the earplug using the "modified" fitting procedure.
77. Defendants wanted a very low NRR on the open end of 3M's Combat Arms™ earplug (like the rounded up "0" NRR Defendants previously obtained) so that the U.S. military would be more likely to buy it.
78. Defendants also knowingly used the Re-test of the closed end of the earplugs to sell 3M's Combat Arms™ earplugs to the military with a "22" NRR in the closed position.

DEFENDANTS' FALSE STATEMENTS

79. Drago repeats and realleges the allegations as set forth above.
80. Defendants included 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.
81. Defendants' standard instructions for "proper use" of its Combat Arms™ earplugs do not instruct wearers to fold back the flanges before inserting the plug into the ear.
82. Defendants improperly instructed wearers to simply insert the earplugs as-is into the ear canal in Defendants' standard instructions for "proper use" of its Combat Arms™ earplugs.
83. By failing to instruct wearers of 3M's Combat Arms™ earplug to fold back the flanges on the open/unblocked end of the plug before inserting the closed/blocked end of the plug into their ears (which is necessary to achieve the "22" NRR and avoid the defect associated with the short stem),

Defendants falsely overstated the amount of hearing protection provided by the closed end of the earplug.

84. Defendants knowingly failed to instruct wearers of 3M's Combat Arms™ earplug to fold back the flanges on the open/unblocked end of the plug before inserting the closed/blocked end of the plug into their ears (which is necessary to achieve the "22" NRR and avoid the defect associated with the short stem).
85. Defendants falsely overstated the amount of hearing protection provided by the closed end of the earplug.
86. Defendants' packaging and marketing of 3M's Combat Arms™ earplugs with a labeled NRR of "22" for the closed end misled the U.S. military.
87. Defendants' packaging and marketing of 3M's Combat Arms™ earplugs with a labeled NRR of "22" for the closed end misled Drago.
88. Defendants' packaging and marketing of 3M's Combat Arms™ earplugs with a labeled NRR of "22" for the closed end caused Drago to expose himself to risk of hearing loss and tinnitus.
89. Defendants' packaging and marketing of 3M's Combat Arms™ earplugs with a labeled NRR of "22" for the closed end caused Drago to suffer significant hearing loss and tinnitus.
90. After learning of the inaccuracy of the "0" NRR of the 3M's Combat Arms™ earplugs in the open position and with standard fitting instructions, Defendants continued to sell the earplugs to the military with a "0" NRR in the open position and with standard fitting instructions.
91. Defendants' packaging and marketing of 3M's Combat Arms™ earplugs with a labeled NRR of "0" in the open position misled the U.S. military.
92. Defendants' packaging and marketing of 3M's Combat Arms™ earplugs with a labeled NRR of "0" in the open position misled Drago.

93. Defendants' packaging and marketing of 3M's Combat Arms™ earplugs with a labeled NRR of "0" in the open position caused Drago to expose him to risk of hearing loss and tinnitus.
94. Defendants' packaging and marketing of 3M's Combat Arms™ earplugs with a labeled NRR of "0" in the open position caused Drago to suffer significant hearing loss and tinnitus.
95. Defendants were aware prior to selling 3M's Combat Arms™ earplugs to the military that testing procedures and fitting instructions were manipulated to obtain the NRRs Defendants wanted on both ends of 3M's Combat Arms™ earplugs.
96. Defendants continued to use inaccurate NRRs to market the earplugs to the military for more than ten years without disclosing the defect in the earplugs, which caused the earplugs to imperceptibly loosen in the wearer's ear.
97. The closed end provides a "22" NRR only if inserted using non-standard instructions for use that Defendants do not disclose to purchasers nor end user wearers.
98. Defendants overstated the noise protection offered by 3M's Combat Arms™ earplugs in violation of ANSI S3.19, EPA regulations, 40 C.F.R. § 211.201, *et seq.*, and the NCA, 42 U.S.C. § 4901, *et seq.*
99. The open end of 3M's Combat Arms™ earplugs received a "0" NRR based on facially unreliable test data derived from tests in which 3M's Combat Arms™ earplugs were not fitted properly in the subjects' ears.
100. When Defendants' first bid for the IQCs to supply 3M's Combat Arms™ earplugs to the military Defendants were aware that testing of the earplugs violated ANSI S3.19-1974.
101. When Defendants first bid for the IQCs to supply 3M's Combat Arms™ earplugs to the military Defendants certified to the military that the First Testing and Re-Test complied with the testing standard.

102. Defendants certified to the U.S. Government that the testing of 3M's Combat Arms™ earplugs was done in accordance with ANSI S3.19-1974 numerous times.
103. The testing of 3M's Combat Arms™ earplugs was not done in accordance with ANSI S3.19-1974.
104. Each time Defendants certified to the U.S. Government that the testing of 3M's Combat Arms™ earplugs was done in accordance with ANSI S3.19-1974 constituted a false statement or record within the meaning of the False Claims Act.
105. In response to each RFP Defendants were required to certify that they provided accurate "instructions explaining the proper use and handling of the ear plugs" for 3M's Combat Arms™ earplugs.
106. In response to each RFP Defendants certified to the U.S. Government that they provided accurate "instructions explaining the proper use and handling of the ear plugs" for 3M's Combat Arms™.
107. Defendants provided standard fitting instructions for inserting the earplug on both ends.
108. Defendants provided false "instructions explaining the proper use and handling of the ear plugs" for 3M's Combat Arms™ because Defendants' instructions did not instruct 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 was necessary to achieve the "22" NRR and avoid the defect associated with the short stem).
109. Each time Defendants certified to the U.S. Government that the Defendants provided accurate "instructions explaining the proper use and handling of the ear plugs" for 3M's Combat Arms™ constituted a false statement or record within the meaning of the False Claims Act.
110. Defendants' instructions have caused Drago to suffer serious hearing impairment on the battlefield.
111. Pursuant to Section 2.4 of the MPID, when responding to the RFPs, Defendants were required to certify that "[t]he ear plugs shall be free from all defects that detract from their appearance or impair their serviceability."

112. Defendants knew as early as 2000 that 3M's Combat Arms™ earplugs were designed with a short a stem, which causes the plugs to imperceptibly loosen in the wearer's ear when the flanges are not rolled back.

113. Defendants marketed and sold the defective earplugs to the military over a period of more than a decade with fitting instructions that did not instruct the purchaser/wearer to roll back the flanges, during which period Defendants were required to certify that the earplugs were free of defects.

114. 3M agreed to pay \$9.1 million to settle a qui tam action related to 3M's Combat Arms™ earplugs in July 2018. See United States of America ex rel. Moldex-Metric, Inc. v. 3M Company, Case No. 3:16-133-MBS (D.S.C.), ECF No. 23-1.2 38.

115. Defendants knew that 3M's Combat Arms™ earplugs were dangerously defective and did not work in 2000, prior to becoming the exclusive supplier of selective attenuation earplugs to the U.S. Military.

116. At all times, 3M's Combat Arms™ earplugs had a dangerous design defect that caused them to imperceptibly loosen in the wearer's ear, thus allowing damaging sounds to enter the ear canal around the outside of the earplug. Specifically, the basal edge of the third flange of the non-inserted end of the earplug is prone to press against some wearers' ear canals and fold back to its original shape, thereby loosening the seal in their ear canals. Because the earplug is symmetrical, the defect exists regardless of which end is inserted into the ear.

117. Defendants were aware of the defects as early as 2000, years before Defendants became the exclusive provider of the earplugs to the military.

CLASS ALLEGATIONS

118. Drago repeats and re-alleges the allegations set forth above.

119. Drago brings this class action, on behalf of himself and all other similarly situated individuals in accordance with Federal Rule of Civil Procedure 23.

120. The class ("Class") shall be defined as:

All current or former U.S. Military personnel who were issued 3M's Combat Arms™ Ear Plugs.

121. The members of the Class are so numerous that joinder of all members would be impracticable.

122. Drago's claims are typical of the claims of other members of the Class, as all members of the Class have been similarly affected by Defendants' acts and practices as described herein.

123. Drago will fairly and adequately protect the interests of the Class and is represented by counsel experienced in complex class action litigation.

124. Common questions of law and fact exist and predominate over any questions of law or fact which may affect only individual Class members. Common questions of law and fact include:

- i. Whether 3M's Combat Arms™ earplugs were defective;
- ii. Whether the closed-end of 3M's Combat Arms™ earplugs was defective;
- iii. Whether the open-end 3M's Combat Arms™ earplugs was defective;
- iv. Defendants' duty of care to Plaintiff and Class Members;
- v. Whether Defendants had a duty to warn Plaintiff and Class Members about the defective design of 3M's Combat Arms™ earplugs;
- vi. Whether Defendants breached their duty to warn Plaintiff and Class Members about 3M's Combat Arms™ earplugs defective design;
- vii. Whether Defendants had a duty to instruct Plaintiff and Class Members how to properly use 3M's Combat Arms™ earplugs;
- viii. Whether Defendants breached their duty to instruct Plaintiff and Class Members how to properly use 3M's Combat Arms™ earplugs;
- ix. Whether Defendants made false representations to Plaintiff and Class Members about 3M's Combat Arms™ earplugs;
- x. Whether Plaintiff and Class Members reasonably relied on Defendants' false Representations;
- xi. Whether Defendants' conduct was willful, reckless and/or knowing;

- xii. Whether Defendants received monetary benefit as a result of the acts complained of herein;
- xiii. Whether the acts and practices of Defendants described herein constitute a defective design, the failure to warn, the failure to provide a post-sale warning, negligence, breach of the express warranty, breach of the implied warranty, fraud and/or negligent misrepresentation;
- xiv. The applicable statute of limitations;
- xv. Whether Defendants should be permanently enjoined from continuing the practices which are the subject matter of this civil action;
- xvi. Whether Defendants are subject to punitive damages; and
- xvii. Whether Drago and the Class are entitled to damages, and if so the proper measure of damages.

125. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, since:

- i. The financial harm suffered by individual Class Members is such that it would be economically unfeasible for them to individually litigate their claims;
- ii. The factual and legal issues common to all Class Members far outweigh any individual questions;
- iii. The prosecution of separate lawsuits by individual Class Members would entail the risk of inconsistent and conflicting adjudications;
- iv. Class Members are identifiable through military records; and
- v. There will be no unusual or extraordinary management difficulties in administering this case as a class action.

126. A class action will foster economies of time, effort and expense to ensure uniformity of decisions, presenting the most efficient manner of adjudicating the claims set forth herein.

COUNT I
STRICT PRODUCTS LIABILITY – DESIGN DEFECT

127. Drago repeats and realleges the allegations as set forth above.

128. Defendants had a duty to design and test the Combat Arms earplugs with due and reasonable care.

129. Defendants designed and sold 3M's Combat Arms™ earplugs.
130. Defendants designed and sold 3M's Combat Arms™ earplugs to the U.S. Military to provide soldiers hearing protection.
131. 3M's Combat Arms™ earplugs loosen in the wearer's ear, because the basal edge of the third flange of the non-inserted end of the earplug is prone to press against some wearers' ear canals and fold back to its original shape, thereby loosening the seal in their ear canals.
132. When 3M's Combat Arms™ earplugs loosen in the wearer's ear dangerous sounds can cause damage to the wearer's ear.
133. The ordinary and expected use of 3M's Combat Arms™ earplugs was to protect wearers' ears from damaging loud noises.
134. Drago and the Class faced substantial likelihood of harm when they used 3M's Combat Arms™ earplugs because they were exposed to dangerous noise due to the propensity of 3M's Combat Arms™ to loosen in ear canals.
135. 3M's Combat Arms™ earplugs posed a substantial likelihood of harm.
136. 3M's Combat Arms™ earplugs could have been designed to avoid the basal edge of the third flange of the non-inserted end of the earplug from loosening the seal in the wearer's ear canal.
137. 3M's Combat Arms™ earplugs could have been designed to better fit Drago and the Class' ear canals to avoid the propensity of 3M's Combat Arms™ earplugs to loosen in ear canals.
138. It was feasible for 3M's Combat Arms™ earplugs to be designed in a safer manner.
139. Drago did not have tinnitus or hearing loss prior to utilizing 3M's Combat Arms™ earplugs.
140. 3M's Combat Arms™ earplugs' design caused Drago to be exposed to dangerous noises and was a substantial factor in causing Drago's tinnitus and hearing loss.

141. Defendants failed to exercise reasonable and due care in designing and testing the Combat Arms earplugs.

142. As a result of 3M's Combat Arms™ earplugs' design defect, Drago and the Class suffered damages, including but not limited to exposure to dangerous noises and personal injuries.

WHEREFORE, Drago and the Class respectfully request that this Court enter Judgment against Defendants for damages to adequately compensate Drago and the Class, for all personal injuries and the continued expenses of medical monitoring and hearing testing.

COUNT II
STRICT PRODUCTS LIABILITY – FAILURE TO WARN

143. Drago repeats and realleges the allegations as set forth above.

144. Defendants had a duty to package, label, market, advertise, promote, warn and distribute the Combat Arms earplugs with due and reasonable care.

145. Defendants designed and sold 3M's Combat Arms™ earplugs.

146. Defendants designed and sold 3M's Combat Arms™ earplugs to the U.S. Military to provide soldiers hearing protection.

147. Defendants had a duty to exercise reasonable care to prevent injury to foreseeable users of 3M's Combat Arms™ earplugs if they knew 3M's Combat Arms™ earplugs were dangerous.

148. Drago and the Class were service members at the time of their receipt of Combat Arms™ earplugs.

149. Drago and the Class were the intended recipients of the Combat Arms™ earplugs.

150. It was foreseeable that Drago and the Class would use the Combat Arms™ earplugs as Defendants were the exclusive suppliers to the US Military.

151. Defendants provided Drago and the Class with standard instructions for "proper use" of the Combat Arms™ earplugs in the packaging for the earplugs.

152. Defendants' standard instructions for "proper use" of its Combat Arms™ earplugs do not instruct wearers to fold back the flanges before inserting the earplugs into the ears.
153. Defendants improperly instruct wearers to insert the earplugs as-is into the ear canals in Defendants' standard instructions for "proper use" of Defendants' Combat Arms™ earplugs.
154. By failing to instruct wearers of 3M's Combat Arms™ earplug to fold back the flanges on the open/unblocked end of the plug before inserting the closed/blocked end of the plug into the ear (which is necessary to achieve the "22" NRR and avoid the defect associated with the short stem), Defendants falsely overstated the amount of hearing protection provided by the closed end of the plug.
155. Defendants failed to give warnings of the dangers posed by the Combat Arms™ earplugs to Drago and Class Members.
156. Defendants failed to give warnings of the dangers posed by the Combat Arms™ earplugs to Drago and Class Members if wearers followed the standard instructions.
157. Defendants failed to give warnings of the dangers posed by the Combat Arms™ earplugs to Drago and Class Members if wearers did not 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 and avoid the defect associated with the short stem).
158. The Combat Arms™ earplugs failed to accurately instruct wearers as to how to ensure hearing protection equal to the "22" NRR.
159. The Combat Arms™ earplugs failed to accurately instruct wearers as to how to ensure hearing protection equal to the "22" NRR by folding back the flange on the open/unblocked end of the plug before inserting the closed/blocked end of the plug into the ear.
160. 3M's Combat Arms™ earplugs imperceptibly loosened in a wearer's ears so wearers could not know that dangerous sounds were able to enter the wearer's ear.

161. The danger of 3M's Combat Arms™ earplugs was not open and obvious.
162. The warnings and instructions contained with the Combat Arms™ earplugs failed to provide the ordinary user with adequate information to protect themselves from dangerous noises.
163. Defendants did not exercise reasonable care to prevent injury to Drago and the Class.
164. At the time Defendants sold 3M's Combat Arms™ earplugs Defendants knew 3M's Combat Arms™ earplugs loosen in the wearer's ear, because the basal edge of the third flange of the non-inserted end of the earplug is prone to press against some wearers' ear canals and fold back to its original shape, thereby loosening the seal in their ear canals.
165. At the time Defendants sold 3M's Combat Arms™ earplugs Defendants knew 3M's Combat Arms™ earplugs product was dangerous if the end-user used the standard fitting instructions.
166. Defendants' failure to warn Drago and the Class that they would not receive hearing protection equal to the "22" NRR if they used the standard fitting instructions was reasonably foreseeable to cause injury to Drago and the Class.
167. Defendants' failure to include warnings and instructions which advise end-users 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 and avoid the defect associated with the short stem), was reasonably foreseeable to cause injury to Drago and the Class.
168. Defendants breached their duty to exercise reasonable care to prevent injury to Drago and the Class because Defendants knew 3M's Combat Arms™ earplugs were dangerous.
169. Defendants failed to package, label, market, advertise, promote, warn and distribute the Combat Arms earplugs with due and reasonable care.
170. As a result of 3M's failure to warn of 3M's Combat Arms™ earplugs' design defect, Drago and the Class suffered damages, including but not limited to personal injuries.

WHEREFORE, Drago and the Class respectfully request that this Court enter Judgment against Defendants for damages to adequately compensate Drago and the Class, for all personal injuries and the continued expense of medical monitoring and hearing testing.

COUNT III
STRICT PRODUCTS LIABILITY – POST-SALE WARNING

171. Drago repeats and realleges the allegations as set forth above.
172. Defendants designed and sold 3M's Combat Arms™ earplugs.
173. Defendants designed and sold 3M's Combat Arms™ earplugs to the U.S. Military to provide soldiers hearing protection.
174. 3M's Combat Arms™ earplugs loosen in the wearer's ear, because the basal edge of the third flange of the non-inserted end of the earplug is prone to press against some wearers' ear canals and fold back to its original shape, thereby loosening the seal in their ear canals.
175. When 3M's Combat Arms™ earplugs loosen in the wearer's ear, dangerous sounds can cause damage to the wearer's ear.
176. The ordinary and expected use of 3M's Combat Arms™ earplugs was to protect against damaging loud noises.
177. 3M's Combat Arms™ earplugs were negligently designed when they were manufactured and sold.
178. 3M's Combat Arms™ earplugs were defective and unreasonably dangerous at the time they were manufactured and sold.
179. Defendants knew 3M's Combat Arms™ earplugs were defective and unreasonably dangerous at the time they were manufactured and sold.
180. 3M's Combat Arms™ earplugs did not contain warnings or correct instructions for use when they were manufactured and sold.

181. At the time Defendants designed and sold 3M's Combat Arms™ earplugs, Defendants failed to take reasonable steps to warn purchasers of the risk.
182. At the time Defendants designed and sold 3M's Combat Arms™ earplugs, Defendants failed to take reasonable steps to warn Drago and the Class of the risk.
183. At the time Defendants designed and sold 3M's Combat Arms™ earplugs the Defendants failed to take reasonable steps to warn purchasers of the risk that 3M's Combat Arms™ loosen in a wearer's ears allowing dangerous sounds to enter a wearer's ear.
184. At the time Defendants designed and sold 3M's Combat Arms™ earplugs, Defendants failed to take reasonable steps to warn Drago and the Class of the risk that 3M's Combat Arms™ loosen in a wearer's ears allowing dangerous sounds to enter a wearer's ears.
185. 3M's Combat Arms™ earplugs imperceptibly loosened in a wearer's ears so a wearer could not determine dangerous sounds were able to enter the wearer's ears.
186. The danger of 3M's Combat Arms™ earplugs was not open and obvious.
187. Defendants had a duty to provide a post-sale warning or instructions to foreseeable users of the danger of 3M's Combat Arms™ earplugs because Defendants could reasonably foresee that an injury could occur from use of 3M's Combat Arms™ earplugs.
188. Defendants did not issue a post-sale warning or instructions to foreseeable users of 3M's Combat Arms™ earplugs.
189. Defendants did not issue a post-sale warning to the purchaser of 3M's Combat Arms™ earplugs.
190. Defendants did not issue a post-sale warning or instructions to Drago and the Class for 3M's Combat Arms™ earplugs.
191. Defendants breached their duty to Drago and the Class by failing to provide a post-sale warning or instructions for 3M's Combat Arms™ earplugs.

192. Drago and the Class would have been able to avoid damage to their ears if they had been provided a post-sale warning or correct instructions for 3M's Combat Arms™ earplugs.

193. Drago and the Class were damaged by Defendants' failure to provide a post-sale warning or correct instructions for 3M's Combat Arms™ earplugs.

194. Drago and the Class were injured as a direct and proximate result of Defendants' failure to provide a proper post-sale warning or proper post-sale instructions for 3M's Combat Arms™ earplugs.

WHEREFORE, Drago and the Class respectfully request that this Court enter Judgment against Defendants for damages to adequately compensate Drago and the Class, for all personal injuries and the continued expense of medical monitoring and hearing testing.

COUNT IV
NEGLIGENCE

195. Drago repeats and realleges the allegations as set forth above.

196. Defendants had a duty to exercise reasonable care in the design, manufacture and package of 3M's Combat Arms™ earplugs.

197. Defendants had a duty to exercise reasonable care in providing warnings to the purchasers and end users of 3M's Combat Arms™ earplugs.

198. Defendants breached their duty to exercise reasonable care in the design, manufacture and package of 3M's Combat Arms™ earplugs by designing, manufacturing and packaging an earplug which loosened in a wearer's ear allowing dangerous sounds to enter a wearer's ear.

199. Defendants breached their duty to exercise reasonable care in providing instructions to the purchasers and end users of 3M's Combat Arms™ earplugs which failed to warn that the earplugs would loosen allowing dangerous sounds to enter a wearer's ear.

200. As a direct and proximate cause of Defendants' negligence, Plaintiff and the Class have suffered personal injuries, including tinnitus and hearing loss.

201. As a direct and proximate cause of Defendants' negligence, Plaintiff and the Class have been exposed to health risks, such as increased risk of tinnitus and hearing loss.

WHEREFORE, Drago and the Class respectfully request that this Court enter Judgment against Defendants for damages to adequately compensate Drago and the Class, for all personal injuries and the continued expense of medical monitoring and hearing testing.

COUNT V
BREACH OF THE EXPRESS WARRANTY

202. Drago repeats and realleges the allegations as set forth above.

203. Defendants expressly warranted that the Combat Arms earplugs were safe and effective for their intended use and were designed and constructed to prevent harmful sounds from bypassing the earplugs to protect the users' hearing.

204. Drago and the Class were the intended users of 3M's Combat Arms™ earplugs.

205. Defendants expected Drago and the Class to use 3M's Combat Arms™ earplugs.

206. Defendants made express warranties about 3M's Combat Arms™ earplugs to the U.S. Government relating to the efficacy of 3M's Combat Arms™ earplugs.

207. Drago and the Class were third-party beneficiaries of 3M's express warranties about 3M's Combat Arms™ earplugs to the U.S. Government.

208. Defendants expressly warranted that 3M's Combat Arms™ earplugs provided protection from impulse noises on the battlefield.

209. Defendants expressly warranted that the closed end of 3M's Combat Arms™ earplugs reduced sound by 25-40 decibels.

210. Defendants expressly warranted that the closed end of 3M's Combat Arms™ earplugs were compliant with, and in accordance with ANSI S3.19.

211. Defendants expressly warranted that the closed end of 3M's Combat Arms™ earplugs were free from defects.
212. Defendants expressly warranted that the closed end of 3M's Combat Arms™ earplugs provided instant protection from high-level noises.
213. 3M's Combat Arms™ earplugs failed to provide protection from impulse noises on the battlefield.
214. The closed end of 3M's Combat Arms™ earplugs failed to reduce sound by 25-40 decibels.
215. 3M's Combat Arms™ earplugs failed to comply with ANSI S3.19.
216. 3M's Combat Arms™ earplugs failed to be free from defects.
217. 3M's Combat Arms™ earplugs failed to provide instant protection from high-level noises.
218. Defendants' warranties regarding 3M's Combat Arms™ earplugs were part of the basis of their bargain with the U.S. Government.
219. Defendants breached the express warranties made to Drago and the Class.
220. Drago and the Class were injured as a direct and proximate result of 3M's breach of these express warranties.

WHEREFORE, Drago and the Class respectfully request that this Court enter Judgment against Defendants for damages to adequately compensate Drago and the Class, for all personal injuries and the continued expense of medical monitoring and hearing testing.

COUNT VI
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

221. Drago repeats and realleges the allegations as set forth above.
222. Defendants impliedly warranted the Combat Arms earplugs would be fit for a particular purpose and warranted the earplugs as merchantable quality and effective for such use.
223. 3M is a merchant of 3M's Combat Arms™ earplugs and similar goods of that kind.
224. Drago and the Class were the intended users of 3M's Combat Arms™ earplugs.

225. Defendants expected Drago and the Class to use 3M's Combat Arms™ earplugs.
226. Defendants made an implied warranty about 3M's Combat Arms™ earplugs to the U.S. Government that they were merchantable.
227. Drago and the Class were third-party beneficiaries of 3M's implied warranty of merchantability for 3M's Combat Arms™ earplugs to the U.S. Government.
228. 3M's Combat Arms™ earplugs were not merchantable.
229. 3M's Combat Arms™ earplugs failed to pass without objection under the contract description.
230. 3M's Combat Arms™ earplugs are not of fair, average quality within their description.
231. 3M's Combat Arms™ earplugs are not fit for the ordinary purpose for which they are used.
232. 3M's Combat Arms™ earplugs do not run, within the variations permitted by the agreement, of even kind and quality within each unit and among all units involved.
233. 3M's Combat Arms™ earplugs are not adequately packaged and labeled.
234. 3M's Combat Arms™ earplugs do not conform to the promise(s) and/or affirmations of fact made on the container and/or label.
235. Defendants' implied warranty of merchantability regarding 3M's Combat Arms™ earplugs was part of the basis of their bargain.
236. Defendants breached the implied warranties to Plaintiff and the Class.
237. Drago and the Class were as injured as a direct and proximate result of 3M's breach of the implied warranty of merchantability.

WHEREFORE, Drago and the Class respectfully request that this Court enter Judgment against Defendants for damages to adequately compensate Drago and the Class, for all personal injuries and the continued expense of medical monitoring and hearing testing.

COUNT VII
FRAUD

238. Drago repeats and realleges the allegations as set forth above.

239. Defendants made misrepresentations and concealed facts to promote that 3M's Combat Arms™ Earplugs would protect wearers from loud impulse noises.

240. 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) S3.191974. Additionally, 40 C.F.R. § 211.204-4(e) of the EPA regulations requires that 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.**

241. Each of Defendants' requests for payment from the U.S. Government for 3M's Combat Arms™ earplugs constitute a false claim to the U.S. Government, because 3M's Combat Arms™ earplugs did not comply with the Salient Characteristics of the associated MPIDs.

242. 3M's Combat Arms™ Earplugs did not protect wearers from loud impulse noises because they loosened in wearers' ears.

243. Misrepresentations and concealed facts regarding the efficacy of 3M's Combat Arms™ earplugs by Defendants were material, as the purpose of 3M's Combat Arms™ earplugs was to protect wearers from dangerous noises.

244. Defendants knew 3M's Combat Arms™ earplugs would not protect wearers from loud impulse noises, because they loosened in wearers ears.

245. Defendants made misrepresentations and concealed facts regarding the efficacy of 3M's Combat Arms™ Earplugs in order to cause the U.S. Government to purchase 3M's Combat Arms™ earplugs.
246. Defendants intentionally manipulated testing of the Combat Arms earplugs resulting in false and misleading NRRs and improper fitting instructions.
247. Defendants made misrepresentations and concealed facts regarding the efficacy of 3M's Combat Arms™ Earplugs with the intent that Drago and the Class would utilize 3M's Combat Arms™ earplugs.
248. Drago and the Class were unaware of the defect which caused 3M's Combat Arms™ earplugs to imperceptibly loosen in a wearer's ear.
249. When Drago and the Class utilized 3M's Combat Arms™ earplugs they relied on Defendants' misrepresentations that the earplugs would protect wearers from loud impulse noises.
250. Drago and the Class were the intended end-users of 3M's Combat Arms™ earplugs.
251. Drago and the Class were injured as a direct and proximate result of Defendants' misrepresentations of fact and concealments of fact.

WHEREFORE, Drago and the Class respectfully request that this Court enter Judgment against Defendants for damages to adequately compensate Drago and the Class, for all personal injuries and the continued expense of medical monitoring and hearing testing.

COUNT VIII
NEGLIGENT MISREPRESENTATION

252. Drago repeats and realleges the allegations as set forth above.
253. Defendants made representations that 3M's Combat Arms™ earplugs would protect wearers from loud impulse noises.
254. Defendants intentionally manipulated testing of the Combat Arms earplugs resulting in false and misleading NRRs and improper fitting instructions.

255. Defendants had no reasonable basis for believing 3M's Combat Arms™ earplugs would protect wearers from loud impulse noises.

256. Defendants intended for the U.S. Government to rely on Defendants' representations that 3M's Combat Arms™ earplugs would protect wearers from loud impulse noises.

257. Defendants intended the end users of 3M's Combat Arms™ earplugs to rely on Defendants' representations that 3M's Combat Arms™ earplugs would protect wearers from loud impulse noises.

258. Defendants intended Drago and the Class to rely on Defendants' representations that 3M's Combat Arms™ earplugs would protect wearers from loud impulse noises.

259. Drago and the Class reasonably relied on Defendants' representations that 3M's Combat Arms™ earplugs would protect wearers from loud impulse noises.

260. Drago and the Class were as injured as a direct and proximate result of Defendants' negligent misrepresentations of fact and concealments of fact.

WHEREFORE, Drago and the Class respectfully request that this Court enter Judgment against Defendants for damages to adequately compensate Drago and the Class, for all personal injuries and the continued expense of medical monitoring and hearing testing.

COUNT IX
DECLARATORY JUDGMENT

261. Drago repeats and realleges the allegations as set forth above.

262. There exists an actual controversy as to whether the acts and practices of Defendants described herein constitute design defect, the failure to warn, the failure to provide a post-sale warning, negligence, breach of the express warranty, breach of the implied warranty, fraud and/or negligent misrepresentation.

263. Drago and the Class are entitled to an order enjoining Defendants from continuing the practices which are the subject of the instant action.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, demand that this Honorable Court declare an issue judgment as follows:

- A. An order determining that this action is a proper class action and certifying Drago as representative of the putative class;
- B. An order appointing Drago's counsel as competent legal representatives of the putative class in this action;
- C. An order determining that the acts of Defendants as described above constitute any or all of the following: a design defect, the failure to warn, the failure to provide a post-sale warning, negligence, breach of the express warranty, breach of the implied warranty, fraud and/or negligent misrepresentation.
- D. An order awarding Drago and the Class damages, together with interest, costs, and reasonable attorneys' fees;
- E. An order determining the appropriate statute of limitations applicable to this action;
- F. An order permanently enjoining Defendants from continuing the unlawful practices which are the subject matter of this action;
- G. An order awarding Drago an appropriate stipend for acting as Class representative; and
- H. An order awarding Drago and the Class any further relief as may be just and appropriate.

JURY DEMAND

Plaintiff, on behalf of himself and all other similarly situated individuals, hereby demands trial by jury on all counts of this Complaint, which are triable by a jury.

Respectfully submitted,
Plaintiffs, by their Attorneys,

DATED: August 2, 2019

/s/ Kevin J. McCullough

Kevin J. McCullough, Esq. - BBO # 567507

kmccullough@forrestlamothe.com

Michael C. Forrest, Esq. - BBO # 681401

mforrest@forrestlamothe.com

David J. Relethford, Esq. - BBO# 691223

drelethford@forrestlamothe.com

Forrest, LaMothe, Mazow,
McCullough, Yasi & Yasi, P.C.

2 Salem Green, Suite 2

Salem, MA 01970

(617) 231-7829

(877) 599-8890

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Michael Drago, on behalf of himself and all others similarly situated,

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

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

Kevin McCullough, Forrest LaMothe Mazow McCullough Yasi & Yasi, P.C., 2 Salem Green, Salem, MA 01970 (p) 617-231-7829

DEFENDANTS

3M Company, Aereo Technologies, LLC

County of Residence of First Listed Defendant Suffolk (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location (Citizen of This State, Citizen of Another State, Foreign Nation, etc.)

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

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

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. s. 1332; 28 U.S.C. s. 1332(d)(2)
Brief description of cause: Product liability, design defect, failure to warn, personal injuries

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: X Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Judge M. Casey Rodgers DOCKET NUMBER 3:19md2885

DATE 08/02/2019 SIGNATURE OF ATTORNEY OF RECORD /s/ Kevin McCullough

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Michael Drago v. 3M Company

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

- I. 160, 400, 410, 441, 535, 830*, 835*, 850, 891, 893, R.23, REGARDLESS OF NATURE OF SUIT.
- II. 110, 130, 190, 196, 370, 375, 376, 440, 442, 443, 445, 446, 448, 470, 751, 820*, 840*, 895, 896, 899.
- III. 120, 140, 150, 151, 152, 153, 195, 210, 220, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 367, 368, 371, 380, 385, 422, 423, 430, 450, 460, 462, 463, 465, 480, 490, 510, 530, 540, 550, 555, 560, 625, 690, 710, 720, 740, 790, 791, 861-865, 870, 871, 890, 950.

*Also complete AO 120 or AO 121. for patent, trademark or copyright cases.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES NO

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES NO

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES NO

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES NO

7. Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).

YES NO

A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division Central Division Western Division

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division Central Division Western Division

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES NO

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Kevin McCullough

ADDRESS 2 Salem Green, Salem MA 01970

TELEPHONE NO. 617-231-7829