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P R O C E E D I N G S

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*(Call to Order of the Court.)*

07:38:17

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*(Parties present with counsel; jury not present.)*

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**THE COURT:** When I'm told that there are issues that need to be discussed, the time that we meet is 7:30. So that's -- I don't know about this 7:45. I don't know where that came from. 7:45, when we have a jury -- last day of trial, jury coming in at 8, when I'm expecting to give instructions at 8, we don't need to start discussing issues at 7:45.

Who is going to address the slide issue?

**MR. SEELEY:** I can, Your Honor.

**THE COURT:** Okay.

**MR. SEELEY:** And I understand the defendants are waiting on Mr. Beall.

**THE COURT:** I'm not waiting on Mr. Beall.

**MR. SEELEY:** That's fine. We actually haven't heard back from them since last night on any outstanding objections to our slides. I think we have basically two issues on three slides, and I can -- if someone wants to -- can I get the ELMO?

**THE COURT:** And just so -- one more thing to add to my rant this morning. When I find out through the evening that there are issues for the morning, my staff is alerted to be here at 7:30 ready to go, so that's why we're in here.

Go ahead.

**MR. SEELEY:** So, I don't know if this is on your

07:39:26 1 screen.

07:39:26 2 **THE COURT:** It is.

07:39:28 3 **MR. SEELEY:** The first issue is the Michael issue.

07:39:33 4 Obviously, this was admitted with experts in a certain light,  
07:39:37 5 but we think this slide basically says the NRR is 23. We think  
07:39:41 6 it's clear that this is being used for the truth which is --

07:39:44 7 **THE COURT:** It looks like it to me on this slide for  
07:39:46 8 sure.

07:39:48 9 Mr. Bhimani, are you prepared to discuss this?

07:39:51 10 **MR. BHIMANI:** I'm prepared, Your Honor. I was here at  
07:39:54 11 7:30. I can discuss this.

07:39:56 12 **THE COURT:** Because this definitely looks like this is  
07:39:59 13 hearsay, this is being used for the truth.

07:39:59 14 **MR. BHIMANI:** A few things about this slide. This was  
07:40:00 15 the chart that was shown to the jury. The dichotomy that's  
07:40:05 16 being drawn here is between direct and cross. I think Your  
07:40:07 17 Honor has already instructed the jury this document was not  
07:40:11 18 coming in for the truth but it may be considered for its impact  
07:40:14 19 on Mr. McKinley's opinion.

07:40:16 20 **THE COURT:** Here's the deal: If Ms. Branscome makes  
07:40:19 21 that clear in her closing that this is not being offered for  
07:40:22 22 the truth that the NRR was 23, then I'm fine with it. If not,  
07:40:26 23 it's not coming in.

07:40:28 24 **MR. BHIMANI:** Understood.

07:40:30 25 **THE COURT:** Okay. Next.

07:40:30 1           **MR. SEELEY:** The next two slides are sort of the same  
07:40:33 2 issue. And I know this came up with Mr. Bhimani on Mr.  
07:40:36 3 Crawford's testimony -- or Dr. Crawford's testimony yesterday,  
07:40:39 4 but I know there was a reference at a bench conference to no  
07:40:42 5 more mention of PAR or no suggestion of PAR.

07:40:48 6           **THE COURT:** Well, I mean, if Dr. Crawford was one of  
07:40:50 7 these witnesses, it certainly would be problematic. But Dr.  
07:40:50 8 Packer was asked about why he didn't do a personal attenuation  
07:40:50 9 rating. I don't see a problem with that.

07:40:50 10          **MR. SEELEY:** Understood.

07:40:59 11          **THE COURT:** I'm going to make a comment or two about  
07:41:02 12 Dr. Crawford in just a minute, but not in relation to your  
07:41:04 13 slide. So I don't have a problem with that. I mean, there's  
07:41:06 14 no expert in this case on the defense side who has said he  
07:41:10 15 should have had a personal attenuation rating. But the  
07:41:12 16 question was asked of Dr. Packer.

07:41:15 17           So, again, there's no Dr. House, for instance, who has  
07:41:21 18 said he had to have a -- or he should have had a personal  
07:41:23 19 attenuation rating. But I still think this is okay, if they  
07:41:26 20 want to make the point that Dr. Packer didn't do one.

07:41:29 21          **MR. SEELEY:** Understood, Your Honor. That was it.

07:41:31 22           There's actually another Michael's slide. It was the  
07:41:35 23 slide that was -- I believe it's the same demonstrative that  
07:41:38 24 was used on Dr. Casali's direct examination.

07:41:42 25          **THE COURT:** Well, here's the deal: Same thing with

07:41:44 1 the first slide, same ruling. If Ms. Branscome makes it clear  
07:41:50 2 to the jury that they cannot consider the NRR of 23 for the  
07:41:54 3 truth, then I'm okay with the slide. If not, I'm not okay with  
07:41:57 4 the slide, whether it's the first slide you showed me or some  
07:42:01 5 other slide.

07:42:01 6 **MR. SEELEY:** Understood.

07:42:02 7 **THE COURT:** I instructed the jury a couple of  
07:42:05 8 different times about this, and certainly in closing an  
07:42:07 9 attorney can't get up and suggest something misleading to the  
07:42:12 10 jury or different than what I instructed them and leave a  
07:42:16 11 misimpression.

07:42:17 12 **MR. SEELEY:** Thank you.

07:42:17 13 **THE COURT:** Mr. Bhimani, do you have objections to the  
07:42:19 14 plaintiff's slides?

07:42:20 15 **MR. BHIMANI:** Well, Your Honor, this is not an  
07:42:22 16 objection necessarily to a slide, but it is an issue that we  
07:42:25 17 wanted to preview with Your Honor just in case it comes up  
07:42:27 18 during the argument.

07:42:27 19 **THE COURT:** Okay.

07:42:28 20 **MR. BHIMANI:** There's a slide in their presentation  
07:42:30 21 that has the scales of justice on it. I don't know exactly  
07:42:33 22 what argument will be made. This case does not have punitives  
07:42:37 23 at issue. So we are mindful, if there are arguments about the  
07:42:40 24 jury, you know, doing its duty to send a message, things of  
07:42:43 25 that nature, that's not relevant here if it's not tied to the

07:42:47 1 injury that's being claimed by the plaintiff.

07:42:47 2 **THE COURT:** Well, if it has to do with burden of  
07:42:49 3 proof, there's no issue there.

07:42:50 4 **MR. BHIMANI:** Burden of proof is different, Your  
07:42:51 5 Honor. These really would be statements that are targeted --  
07:42:53 6 you know, things that we hear in punitive damages cases about  
07:42:56 7 the purpose of punishing a defendant, those sorts of arguments.

07:43:00 8 **THE COURT:** What -- I don't have that slide. That  
07:43:02 9 wasn't one that was given to us as being problematic.

07:43:05 10 **MR. BHIMANI:** Again, we don't have an objection  
07:43:07 11 necessarily to the graphic because I don't know what argument  
07:43:09 12 we made based on the graphic, and so I haven't raised the  
07:43:13 13 objection yet as the argument has been made, but it is  
07:43:16 14 something we just wanted to preview with Your Honor.

07:43:18 15 **MR. BUCHANAN:** Also, Your Honor, under Washington law,  
07:43:19 16 there is great latitude with regard to compensatory damages  
07:43:22 17 with regard to the argument in terms of there being a message.  
07:43:25 18 That's not the purpose of that slide, but that is appropriate  
07:43:27 19 under Washington law.

07:43:29 20 **THE COURT:** We had this issue, I think, pretrial. I  
07:43:33 21 allowed in the evidence on intent and motive, so you can't --  
07:43:37 22 certainly you can't argue punishment or -- I haven't looked at  
07:43:42 23 the law. I doubt you can even argue deterrence.

07:43:47 24 **MR. BUCHANAN:** Excuse me? Oh, deterrence, yes.

07:43:50 25 **THE COURT:** Deterrence. But I'm not expecting you to

07:43:52 1 make that argument.

07:43:53 2 **MR. BUCHANAN:** I don't anticipate that argument being  
07:43:55 3 made, Your Honor.

07:43:56 4 **THE COURT:** All right. Let me -- was there anything  
07:43:59 5 else?

07:44:00 6 **MR. BHIMANI:** Nothing else, Your Honor.

07:44:01 7 **THE COURT:** Let me address something that did come up  
07:44:04 8 yesterday with Dr. Crawford. And, Mr. Bhimani, he was your  
07:44:09 9 witness so you're very familiar with this.

07:44:12 10 Counsel came up to the bench. There were two main  
07:44:17 11 issues that I recall with Dr. Crawford; one was the Stryker  
07:44:22 12 vehicle testimony and the other was the personal attenuation  
07:44:25 13 rating. And I sustained both objections and for good reason.

07:44:31 14 There is nothing at all in Dr. Crawford's report that  
07:44:35 15 even touches on noise levels of military equipment or vehicles.  
07:44:42 16 Nothing.

07:44:43 17 And even if there had been, I don't know that this  
07:44:48 18 would have been proper because the question was prefaced with  
07:44:51 19 his own -- it was his own personal experience of riding in the  
07:44:57 20 Stryker vehicle that was being sort of relied upon as support  
07:45:00 21 for whatever opinion he was about to give. So, you know, not  
07:45:04 22 proper and properly sustained in terms of the objection.

07:45:07 23 The personal attenuation rating, although he did speak  
07:45:12 24 of a personal attenuation rating in his report in the context  
07:45:17 25 of the Army Hearing Conservation Program and his belief that,

07:45:23 1 as a matter of best practices or standards, that a personal  
07:45:27 2 attenuation rating should be required as part of the Army's  
07:45:31 3 overall program and guidelines. I excluded that from his  
07:45:38 4 opinions.

07:45:39 5 And so then yesterday the question was framed more in  
07:45:42 6 terms of his clinical practice and whether a personal  
07:45:46 7 attenuation rating is something he believes should be done --  
07:45:51 8 or that he does in his clinical practice.

07:45:53 9 There's no relevance to that because, first of all, he  
07:45:58 10 didn't give any opinion about what he does in his clinical  
07:46:02 11 practice. He talked about his Army practice but not his  
07:46:05 12 practice today in Idaho. And he has no specific causation  
07:46:10 13 opinion related to Mr. Baker at all. So both of those opinions  
07:46:17 14 were not proper in terms of eliciting from him.

07:46:20 15 Mr. Bhimani, you made the statement to me here at the  
07:46:25 16 bench that, well, other experts have been allowed to give new  
07:46:28 17 opinions.

07:46:30 18 Well, that's true, and it started in EHK with Dr.  
07:46:35 19 Flamme and Ms. Branscome bringing up the issue of the range  
07:46:39 20 tower in Mr. Estes's case. And what Ms. Branscome argued to me  
07:46:45 21 there was, yes, this wasn't anything -- she conceded, nothing  
07:46:49 22 that Dr. Flamme had put into his report, but yet he sat in  
07:46:55 23 testimony -- he sat in during the trial and heard testimony of  
07:46:59 24 Mr. Estes. And so she argued to me that it was entirely proper  
07:47:03 25 that he be able to offer an opinion on new evidence, new

07:47:09 1 factual evidence, and I let her do it. Dr. Flamme was allowed  
07:47:14 2 to give the opinion.

07:47:16 3 And then Dr. Flamme, in this trial, did the same  
07:47:20 4 thing. He gave an opinion based on either sitting in or  
07:47:24 5 reading Mr. Baker's testimony during this trial about the  
07:47:28 6 firing of the 240 Bravo machine gun in the urban warfare  
07:47:35 7 training exercise with the muzzle outside of the window of the  
07:47:39 8 concrete structure. And I let that come in.

07:47:41 9 And then Dr. Packer did something similar. He read  
07:47:46 10 Mr. Baker's testimony about -- or no, excuse me -- Mrs. Baker's  
07:47:53 11 testimony about noise sensitivity, and he was allowed to give  
07:47:55 12 an opinion, like Dr. Flamme had given in EHK and also gave  
07:48:00 13 here, based on new evidence elicited during this trial about  
07:48:07 14 the hyper-noise sensitivity.

07:48:12 15 Both of those -- or those examples with Packer and  
07:48:19 16 Flamme, those opinions were within the experience of those  
07:48:22 17 experts, within their qualifications and experience, and they  
07:48:28 18 differ significantly and materially from Dr. Crawford and what  
07:48:32 19 was happening yesterday with Dr. Crawford.

07:48:34 20 So I think they're different, and I disagree that I  
07:48:41 21 was treating Dr. Crawford differently than I've treated other  
07:48:45 22 experts.

07:48:46 23 So, this issue that I'm referring to about experts  
07:48:52 24 sitting in the trial and listening to testimony and -- new  
07:48:58 25 factual testimony and then coming in in their testimony and

07:49:01 1 giving new opinions, we're going to talk more about that before  
07:49:06 2 the next round of trials. I've let it in, beginning with EHK  
07:49:11 3 and Dr. Flamme, gave you two other examples here in this trial.  
07:49:15 4 I don't remember about McCombs. It may have come in in McCombs  
07:49:20 5 as well, something like this or similar. I'm not sure if it's  
07:49:24 6 proper. I just don't know.

07:49:26 7 I've certainly had experts sit in and listen to other  
07:49:31 8 experts' testimony and then comment in their testimony. I  
07:49:36 9 don't know that I've ever had the experience of an expert  
07:49:38 10 sitting in the trial and then opining in their testimony about  
07:49:42 11 new opinions based on new factual information without any  
07:49:46 12 disclosure whatsoever to the other side, even 12-hour  
07:49:52 13 disclosure, but nothing.

07:49:53 14 I did except the experts from the rule of  
07:50:03 15 sequestration, so they were permitted to be in the courtroom.  
07:50:07 16 So it may not be improper. I just have not had that experience  
07:50:11 17 other than in these 3M cases.

07:50:12 18 So, before the next round, like I said, in  
07:50:14 19 September/October, I'm probably going to ask for briefing on  
07:50:17 20 this issue just to make sure I'm applying the rule correctly.

07:50:22 21 Anything else we need to discuss before the jury comes  
07:50:27 22 in?

07:50:27 23 Are we straight on instructions, Mr. Beall?

07:50:31 24 **MR. BEALL:** The instructions and verdict form reflect  
07:50:35 25 your rulings previously. I did not catch any typographical

07:50:39 1 issues either.

07:50:39 2 **THE COURT:** What's that?

07:50:39 3 **MR. BEALL:** I did not catch any typographical issues  
07:50:39 4 either, but --

07:50:41 5 **THE COURT:** Okay.

07:50:41 6 **MR. SACCHET:** No objections, Your Honor.

07:50:42 7 **THE COURT:** Okay. We made one change on the verdict  
07:50:44 8 form. It's very minor. It had to do with referring them back  
07:50:47 9 to either page 4 or section 4. I just asked Ms. Williams to  
07:50:51 10 make the change to section 4. It's on the same page. But to  
07:50:55 11 be consistent with the other parts of the verdict form, we made  
07:50:59 12 that very minor change. That's the only change that's been  
07:51:02 13 made since the last draft you've received --

07:51:06 14 **MR. BEALL:** Understood.

07:51:07 15 **THE COURT:** -- which I'll call the final draft.

07:51:09 16 **MR. SACCHET:** Thank you.

07:51:10 17 **THE COURT:** Okay. Mr. Buchanan and Mr. Tracey, have  
07:51:13 18 you decided what your time allocation --

07:51:16 19 **MR. BUCHANAN:** Yes. Your Honor, I'd ask if you give  
07:51:18 20 me an alert at 55 minutes.

07:51:21 21 **THE COURT:** Okay, I will do that.

07:51:59 22 I apologize, I have to get a little bit organized  
07:52:03 23 before the jury comes in.

07:52:06 24 **MR. SACCHET:** May I ask one question?

07:52:08 25 **THE COURT:** Yes.

07:52:08 1           **MR. SACCHET:** In the event that we were to use a board  
07:52:12 2 reflecting the charge or the verdict form, given that nominal  
07:52:18 3 amendment that you just mentioned, is there any issue if our  
07:52:21 4 demonstrative did not actually have that change?

07:52:23 5           **THE COURT:** I don't believe so, but I can ask Ms.  
07:52:26 6 Williams to walk in in just a minute and show you exactly what  
07:52:29 7 was changed. I don't think the jury would -- it's so minor, I  
07:52:34 8 don't think the jury would pick up on it. But because -- the  
07:52:38 9 section 4 that I'm referring to is on page 4. It's just that I  
07:52:42 10 asked her to be more specific and consistent to say section 4.

07:52:47 11           **MR. SACCHET:** I'm not worried about it substantively.  
07:52:50 12 It was more just to make sure that it was okay with Your Honor  
07:52:52 13 that there was this nominal difference in something we'd be  
07:52:55 14 showing the jury versus what --

07:52:57 15           **THE COURT:** It's so minor and -- no, I don't have a  
07:53:01 16 problem with it.

07:53:02 17           And, Mr. Beall, I presume you don't either.

07:53:05 18           **MR. BEALL:** I don't, Your Honor.

07:53:12 19           **THE COURT:** And as I think I made clear -- it sounds  
07:53:15 20 like you all have gotten this word either in this trial or one  
07:53:19 21 of the prior trials, there is no problem with you discussing  
07:53:21 22 the verdict form. Obviously, I will not have done that.

07:53:23 23           So just so you know, when I instruct, if you recall, I  
07:53:27 24 will give instructions -- the first instructions that I give  
07:53:34 25 before your closings will be through page 43, which is

07:53:41 1 basically through the damages. That's the last instruction.  
07:53:44 2 Then I stop, you give your closings, and after closings, I give  
07:53:48 3 a final two instructions, one -- it starts with the duty to  
07:53:54 4 deliberate instruction on page 44 and then an explanation of  
07:53:58 5 the verdict form on page 45. But I don't go into the verdict  
07:54:04 6 form in great detail, but you're certainly free to do that.

07:54:09 7 You also may recall, because I am old and having a  
07:54:21 8 harder and harder time with font size, on my instructions I  
07:54:27 9 have this gargantuan font. So the page numbers that you have  
07:54:35 10 may not correspond exactly with mine, but that's the way it's  
07:54:39 11 got to be.

07:54:49 12 Okay. I'm going to step off the bench and the jury  
07:54:51 13 will be seated.

07:54:52 14 Do you need Ms. Williams to come in and show you this  
07:54:55 15 minor change just to have --

07:54:57 16 **MR. SACCHET:** We received an email from Ms. Dang, so  
07:55:00 17 we're aware of what the change is; it was just for  
07:55:03 18 clarification.

07:55:03 19 **MR. BEALL:** I think she actually has it right here.

07:55:06 20 **THE COURT:** Oh, I didn't see you, Annette, I'm sorry.

07:55:09 21 **MR. BEALL:** I'll take it. Thank you. Appreciate it.

07:55:13 22 **THE COURT:** All right. I will be back in when the  
07:55:18 23 jury is seated and we'll get started.

07:55:21 24 *(Recess taken 7:55 a.m. to 8:04 a.m.)*

08:04:19 25 *(Jury in the box.)*

08:04:19 1           **THE COURT:** Good morning. Happy Friday. Happy  
08:04:19 2 National Juneteenth Day and happy final day of trial.

08:04:19 3           So, ladies and gentlemen, in just a moment I'm going  
08:04:19 4 to give you your instructions on the law, but before I do, let  
08:04:19 5 me take just a minute to personally thank you for your service  
08:04:19 6 over the past two weeks. Two weeks out of your lives is no  
08:04:19 7 small sacrifice. But whether the trial lasts two days, two  
08:04:19 8 weeks, or two months, a juror's duty and the importance of that  
08:04:19 9 duty are the same.

08:04:19 10           It's been obvious to me and all those who participated  
08:04:19 11 in this trial that each of you have taken your duty very  
08:04:19 12 seriously and you'll continue to do so, and we appreciate that  
08:04:20 13 very much.

08:04:20 14           So each of you will have a copy of the Court's  
08:04:20 15 instructions on the law for your consideration during your  
08:04:21 16 deliberations. Obviously, there will only be one verdict form.  
08:04:23 17 But as far as the instructions, we will give each one of you,  
08:04:26 18 as I said, a copy.

08:04:28 19           I'm going to now read those instructions to you. They  
08:04:31 20 will also appear for you on your monitors, so you may follow  
08:04:35 21 along, if you like, on the monitor as I read them to you.

08:04:38 22           Members of the jury, it is now my duty to instruct you  
08:04:41 23 on the rules of law that you must follow and apply in deciding  
08:04:44 24 this case. When I have finished, you will go to the jury room  
08:04:47 25 and begin your discussions or what we call your deliberations.

08:04:51 1 Your decision in this case must be based only on the  
08:04:54 2 evidence presented in the courtroom during the trial, and you  
08:04:57 3 must not let your decision be influenced in any way by sympathy  
08:05:01 4 for or prejudice against anyone. You must follow and apply all  
08:05:06 5 of the law as I explain it to you whether you agree with that  
08:05:09 6 law or not, and you must follow all of my instructions as a  
08:05:13 7 whole. You must not single out or disregard any of my  
08:05:17 8 instructions on the law.

08:05:18 9 The fact that corporations are involved as parties  
08:05:22 10 must not affect your decision in any way. A corporation and  
08:05:26 11 all other persons stand equal before the law and must be dealt  
08:05:30 12 with as equals in a court of justice.

08:05:32 13 When a corporation is involved, of course, it may act  
08:05:35 14 only through people as its employees; and in general, a  
08:05:40 15 corporation is responsible under the law for the acts and  
08:05:42 16 statements of its employees that are made within the scope of  
08:05:45 17 their duties as employees.

08:05:47 18 As I said before, you should consider only the  
08:05:51 19 evidence; that is, the testimony of the witnesses and the  
08:05:54 20 exhibits admitted. Please remember that anything the lawyers  
08:05:57 21 say is not evidence and is not binding on you.

08:06:00 22 Also, this has been a fairly lengthy trial. We've  
08:06:05 23 been together in the courtroom a lot. You may have seen me at  
08:06:08 24 times appear frustrated with the pace of the trial or even with  
08:06:12 25 one or more of the attorneys. If so, I apologize.

08:06:14 1 During your deliberations, you must remember that I am  
08:06:17 2 totally neutral in this proceeding, and it is very important  
08:06:20 3 that you not assume from anything that I've said or done during  
08:06:23 4 the trial that I have any opinion about any factual issue in  
08:06:26 5 the case or what your verdict should be, because I assure you I  
08:06:30 6 do not.

08:06:31 7 Except for my instructions to you on the law, you  
08:06:34 8 should disregard anything that I may have said or done during  
08:06:37 9 the trial in arriving at your own decision concerning the  
08:06:41 10 facts.

08:06:41 11 It is solely the jury's responsibility to decide the  
08:06:44 12 facts, and your own recollection and interpretation of the  
08:06:48 13 evidence is what matters, no one else's.

08:06:52 14 As you consider the evidence, both direct and  
08:06:56 15 circumstantial, you may use reasoning and common sense to make  
08:06:59 16 deductions and reach conclusions. Direct evidence is the  
08:07:02 17 testimony of one who asserts actual knowledge of a fact, such  
08:07:05 18 as an eyewitness. Circumstantial evidence is proof of a chain  
08:07:09 19 of facts and circumstances tending to prove or disprove any  
08:07:13 20 fact in dispute.

08:07:15 21 However, you need not be concerned about whether the  
08:07:18 22 evidence is direct or circumstantial because the law makes no  
08:07:22 23 distinction between the weight you may give to either direct or  
08:07:26 24 circumstantial evidence.

08:07:27 25 Now, in saying that you must consider all of the

08:07:30 1 evidence, I do not mean that you must accept all of the  
08:07:33 2 evidence as true or accurate. You should decide whether you  
08:07:38 3 believe what each witness had to say and how important that  
08:07:40 4 testimony was. In making that decision, you may believe or  
08:07:43 5 disbelieve any witness in whole or in part. Also, the number  
08:07:48 6 of witnesses testifying concerning any particular dispute is  
08:07:52 7 not controlling.

08:07:54 8 In deciding whether you believe or do not believe any  
08:07:57 9 witness, I suggest that you ask yourself a few questions:

08:08:00 10 Did the witness impress you as one who was telling the  
08:08:04 11 truth?

08:08:04 12 Did the witness have any particular reason not to tell  
08:08:07 13 the truth?

08:08:07 14 Did the witness have a personal interest in the  
08:08:11 15 outcome of the case?

08:08:12 16 Did the witness seem to have a good memory?

08:08:16 17 Did the witness have the opportunity and the ability  
08:08:18 18 to observe accurately the things that he or she testified  
08:08:21 19 about?

08:08:21 20 Did the witness appear to understand the questions  
08:08:24 21 clearly and answer them directly?

08:08:26 22 Did the witness's testimony differ from other  
08:08:29 23 testimony or other evidence?

08:08:30 24 You should also ask yourself whether there was  
08:08:35 25 evidence tending to prove that a witness testified falsely

08:08:38 1 concerning some important fact or whether there was evidence  
08:08:42 2 that at some other time the witness said or did something or  
08:08:44 3 failed to say or do something that was different from the  
08:08:47 4 testimony the witness gave before you during the trial.

08:08:51 5 You should keep in mind, of course, that a simple  
08:08:55 6 mistake by a witness does not necessarily mean that the witness  
08:08:58 7 was not telling the truth as he or she remembers it, because  
08:09:01 8 people naturally tend to forget some things or to remember  
08:09:05 9 other things inaccurately.

08:09:06 10 So, if a witness has made a misstatement, you'll need  
08:09:09 11 to consider whether that misstatement was simply an innocent  
08:09:12 12 lapse of memory or an intentional falsehood, and the  
08:09:15 13 significance of that may depend on whether it has to do with an  
08:09:20 14 important fact or with only an unimportant detail.

08:09:23 15 When scientific, technical, or other specialized  
08:09:28 16 knowledge might be helpful, a person who has special training  
08:09:32 17 or experience in that field is permitted to state an opinion  
08:09:37 18 about the matter. We call this type of witness an "expert  
08:09:39 19 witness," and you heard from a number of them in this trial.

08:09:42 20 Merely because such a witness has expressed an  
08:09:46 21 opinion, however, does not mean that you must accept that  
08:09:48 22 opinion. The same as with any other witness, it is up to you  
08:09:51 23 to decide whether to rely on it.

08:09:54 24 Also, when a witness has been or will be paid for  
08:09:57 25 reviewing and testifying concerning the evidence, you may

08:09:59 1 consider the possibility that the witness may be biased in  
08:10:03 2 favor of the party who paid for the expert's services.

08:10:05 3 Further, to the extent an expert witness provides  
08:10:08 4 expert services and court testimony with regularity, or to the  
08:10:12 5 extent expert witness fees represent a significant portion of  
08:10:16 6 the expert witness's income, you should view the testimony with  
08:10:19 7 more caution.

08:10:20 8 As I instructed you at the beginning of this trial, a  
08:10:24 9 deposition is a witness's sworn testimony that is taken before  
08:10:26 10 the trial. During a deposition, the witness is under oath and  
08:10:31 11 swears to tell the truth, and the lawyers for each party may  
08:10:34 12 ask questions. A court reporter is present and records the  
08:10:37 13 questions and answers.

08:10:38 14 A number of depositions have been presented to you by  
08:10:42 15 video during the trial. Deposition testimony is entitled to  
08:10:45 16 the same consideration as live testimony, and you must judge it  
08:10:49 17 in the same way as if the witness was testifying in court.

08:10:52 18 You've been permitted to take notes during the course  
08:10:58 19 of the trial, and most of you, perhaps all of you, have taken  
08:11:02 20 advantage of that opportunity and have made notes from time to  
08:11:04 21 time.

08:11:04 22 You will have your notes available to you during your  
08:11:07 23 deliberations, but you should make use of them only as an aid  
08:11:10 24 to your own memory. In other words, you should not give your  
08:11:14 25 notes any precedence over your independent recollection of the

08:11:17 1 evidence or lack of evidence, and neither should you be unduly  
08:11:21 2 influenced by the notes of other jurors.

08:11:23 3 I emphasize to you that notes are not entitled to any  
08:11:26 4 greater weight than the memory or impression of each juror as  
08:11:29 5 to what the testimony may have been.

08:11:31 6 Charts and summaries have been prepared by each side  
08:11:38 7 and have been shown to you during the trial for the purpose of  
08:11:43 8 explaining facts that are allegedly contained in books,  
08:11:46 9 records, or other documents which are in evidence in the case.  
08:11:49 10 Some of the charts and summaries have been admitted into  
08:11:49 11 evidence.

08:11:52 12 You may consider the charts and summaries as you would  
08:11:56 13 any other evidence admitted during the trial and give them such  
08:12:01 14 weight or importance, if any, as you feel they deserve. To the  
08:12:05 15 extent you determine that the charts or summaries in whole or  
08:12:07 16 in part are not an accurate summary of evidence already in the  
08:12:07 17 record, you may disregard the charts or summaries in whole or  
08:12:11 18 in part.

08:12:11 19 This case involves multiple claims as well as several  
08:12:15 20 affirmative defenses, all of which I'll explain in detail in a  
08:12:18 21 moment.

08:12:19 22 It is the responsibility of the party bringing a claim  
08:12:21 23 or affirmative defense to prove every essential part of that  
08:12:24 24 claim or affirmative defense by a preponderance of the evidence  
08:12:28 25 or, for some claims, clear, cogent, and convincing evidence.

08:12:32 1 This is sometimes called the "burden of proof" or the "burden  
08:12:35 2 of persuasion."

08:12:41 3 A preponderance of the evidence simply means an amount  
08:12:42 4 of evidence that is enough to persuade you that the party's  
08:12:45 5 claim or affirmative defense is probably true -- is more  
08:12:47 6 probably true -- excuse me -- than not true.

08:12:49 7 Sometimes a party has the burden of proving a claim or  
08:12:54 8 defense by clear, cogent, and convincing evidence. Proof by  
08:12:57 9 clear, cogent, and convincing evidence means that the element  
08:13:01 10 must be proven by evidence that carries greater weight and is  
08:13:01 11 more convincing than a preponderance of evidence.

08:13:09 12 Clear, cogent, and convincing evidence exists when  
08:13:11 13 occurrence of the element has been shown by the evidence to be  
08:13:13 14 highly probable. However, it does not mean that the element  
08:13:15 15 must be proven by evidence that is convincing beyond a  
08:13:20 16 reasonable doubt. I will instruct you on when to apply this  
08:13:23 17 standard.

08:13:23 18 In deciding whether any fact has been proven by a  
08:13:27 19 preponderance of the evidence or by clear, cogent, and  
08:13:31 20 convincing evidence when that standard applies, you may  
08:13:34 21 consider the testimony of all of the witnesses, regardless of  
08:13:36 22 who may have called them, and all of the exhibits received in  
08:13:39 23 evidence, regardless of who may have produced them.

08:13:42 24 If the evidence fails to establish any essential part  
08:13:45 25 of a claim or affirmative defense by the applicable standard,

08:13:49 1 you should find against the party making the claim or  
08:13:52 2 affirmative defense. When more than one claim or affirmative  
08:13:55 3 defense is involved, you should consider each separately.

08:13:58 4 As you are aware, this trial involves a civil action  
08:14:03 5 brought by Plaintiff Lloyd Baker, a United States Army veteran,  
08:14:07 6 who alleges he suffered permanent hearing injuries including  
08:14:11 7 hearing loss and tinnitus, and that the Combat Arms Earplug  
08:14:16 8 Version 2, or the CAEv2, produced and sold by the defendants to  
08:14:19 9 the United States military, caused those injuries.

08:14:22 10 Mr. Baker raises the following separate legal claims  
08:14:25 11 against the defendants for which he seeks compensatory damages  
08:14:28 12 for his injuries:

08:14:29 13 Strict liability based on a design defect; strict  
08:14:34 14 liability based on failure to warn and/or instruct; negligent  
08:14:37 15 failure to warn and/or instruct after manufacture; fraudulent  
08:14:41 16 misrepresentation; and fraudulent concealment.

08:14:43 17 I will instruct you separately on each of these  
08:14:46 18 claims, and you must decide each claim separately.

08:14:49 19 To prevail, Mr. Baker must establish all of the  
08:14:53 20 elements of at least one of these claims by a preponderance of  
08:14:55 21 the evidence or, where I've instructed, by clear, cogent, and  
08:14:58 22 convincing evidence.

08:14:59 23 The defendants -- 3M Company, 3M Occupational Safety,  
08:15:03 24 LLC, Aearo Holding, LLC, Aearo Intermediate, LLC, Aearo LLC,  
08:15:10 25 and Aearo Technologies, LLC, which I will refer to collectively

08:15:13 1 as 3M -- deny the claims made by Mr. Baker and contend that  
08:15:17 2 their conduct did not cause Mr. Baker's hearing injuries.

08:15:20 3 Also, 3M asserts the following affirmative defenses on  
08:15:23 4 which it bears the burden of proof by a preponderance of the  
08:15:28 5 evidence:

08:15:28 6 Superseding cause as to all claims; and apportionment  
08:15:32 7 of fault as to the strict liability and negligence claims.

08:15:35 8 Mr. Baker denies the affirmative defenses.

08:15:37 9 During this trial, you've heard evidence regarding the  
08:15:43 10 United States Army. It is important to understand that the  
08:15:45 11 Army is not a party to this litigation and no one has sued the  
08:15:49 12 Army. However, under certain circumstances, a defendant may  
08:15:52 13 claim that a nonparty caused the plaintiff's injuries.

08:15:56 14 Here, for instance, 3M asserts that the Army's alleged  
08:16:00 15 failure to properly fit Mr. Baker and train him on how to use  
08:16:03 16 the CAEv2 caused Mr. Baker's injuries, which he denies. You  
08:16:07 17 will be asked to decide this issue.

08:16:09 18 But you are instructed that the United States Army has  
08:16:13 19 no legal responsibility for the design of the CAEv2 or the  
08:16:16 20 content of any warnings and/or instructions, and therefore you  
08:16:20 21 will not consider whether the Army is liable or at fault for  
08:16:24 22 the CAEv2's design or any failure to warn and/or instruct.

08:16:28 23 With that said, if supported by the evidence, you may  
08:16:31 24 take into account the Army's desire for an earplug with certain  
08:16:35 25 characteristics and features. Likewise, if supported by the

08:16:39 1 evidence, you may take into account any preferences expressed  
08:16:43 2 by the Army regarding user instructions.

08:16:45 3 Mr. Baker asserts a claim of strict liability based on  
08:16:50 4 a defect in 3M's design of the CAEv2. A manufacturer has a  
08:16:56 5 duty to design products that are reasonably safe as designed.  
08:16:59 6 There are two tests for determining whether a product is not  
08:17:02 7 reasonably safe as designed. The plaintiff may prove that the  
08:17:06 8 product was not reasonably safe at the time it left the  
08:17:10 9 manufacturer's control using either of these two tests.

08:17:13 10 The first test is a balancing test. Under that test,  
08:17:17 11 you should determine whether, at the time the product was  
08:17:21 12 manufactured:

08:17:22 13 (A) the likelihood that the product would cause injury  
08:17:26 14 or damage similar to that claimed by the plaintiff, and the  
08:17:29 15 seriousness of such injury or damage, outweighed the burden on  
08:17:33 16 the manufacturer to design a product that would have prevented  
08:17:35 17 the injury or damage; and

08:17:38 18 (B) the adverse effect that a practical and feasible  
08:17:42 19 alternative design would have had on the usefulness of the  
08:17:45 20 product.

08:17:46 21 The second test is whether the product is unsafe to  
08:17:49 22 the extent beyond that which would be contemplated by an  
08:17:53 23 ordinary user. In determining what an ordinary user would  
08:17:56 24 reasonably expect you should consider the following:

08:17:58 25 (A) the relative cost of the product; (b) the

08:18:02 1 seriousness of the potential harm from the claimed defect; (c)  
08:18:06 2 the cost and feasibility of eliminating or minimizing the risk;  
08:18:11 3 and, (d) such other factors as the nature of the product and  
08:18:14 4 the claimed defect indicate are appropriate.

08:18:17 5 A product can be not reasonably safe even though the  
08:18:20 6 risk that it would cause the plaintiff's harm or similar harms  
08:18:23 7 was not foreseeable by the manufacturer at the time the product  
08:18:26 8 left the manufacturer's control.

08:18:27 9 To prevail on this design defect claim, Mr. Baker has  
08:18:31 10 the burden of proving each of the following propositions by a  
08:18:36 11 preponderance of the evidence:

08:18:37 12 First, that 3M supplied a product that was not  
08:18:39 13 reasonably safe as designed at the time the product left 3M's  
08:18:45 14 control;

08:18:45 15 Second, that Mr. Baker was injured; and

08:18:49 16 Third, that the unsafe condition of the product was a  
08:18:52 17 proximate cause, as defined on page 32, of Mr. Baker's  
08:18:55 18 injuries.

08:18:55 19 If you find from your consideration of all of the  
08:18:58 20 evidence that each of these propositions have been proven and  
08:19:00 21 that 3M has not proven the affirmative defense of superseding  
08:19:04 22 cause, then 3M is at fault; your verdict should be for Mr.  
08:19:08 23 Baker on the strict liability design defect claim, and you  
08:19:11 24 should consider the issue of damages.

08:19:13 25 Otherwise, you should find for 3M on the claim.

08:19:15 1 Mr. Baker also asserts a claim of strict liability  
08:19:19 2 based on failure to warn and/or instruct; that is, that he was  
08:19:25 3 injured by 3M's failure to provide adequate product warnings  
08:19:28 4 and/or instructions with the CAEv2.

08:19:30 5 A manufacturer has a duty to supply products that are  
08:19:33 6 reasonably safe.

08:19:34 7 A product may not be reasonably safe because adequate  
08:19:38 8 warnings and/or instructions were not provided with the  
08:19:41 9 product.

08:19:41 10 There are two tests for determining whether a product  
08:19:44 11 is not reasonably safe because adequate warnings and/or  
08:19:48 12 instructions were not provided with the product.

08:19:49 13 The plaintiff may prove that the product was not  
08:19:53 14 reasonably safe because adequate warnings and/or instructions  
08:19:55 15 were not provided with the product using either of these two  
08:19:58 16 tests.

08:19:59 17 The first test is whether, at the time of manufacture:

08:20:03 18 (A) the likelihood that the product would cause injury  
08:20:08 19 or damage similar to that claimed by the plaintiff and the  
08:20:10 20 seriousness of such injury or damage rendered the warnings  
08:20:13 21 and/or instructions of the manufacturer inadequate; and

08:20:16 22 (B) the manufacturer could have provided adequate  
08:20:20 23 warning and/or instructions.

08:20:21 24 The second test to determine if warnings and/or  
08:20:25 25 instructions were adequate is whether the product is unsafe to

08:20:29 1 an extent beyond that which would be contemplated by an  
08:20:32 2 ordinary user. In determining what an ordinary user would  
08:20:36 3 reasonably expect you should consider the following:

08:20:39 4 (A) the relative cost of the product; (b) the  
08:20:42 5 seriousness of the potential harm from the claimed defect; (c)  
08:20:46 6 the cost and feasibility of eliminating or minimizing the risk;  
08:20:51 7 and (d) such other factors as the nature of the product and the  
08:20:54 8 claimed defect indicate are appropriate.

08:20:56 9 A product can be not reasonably safe even though the  
08:20:59 10 risk that it would cause the plaintiff's harm or similar harms  
08:21:02 11 was not foreseeable by the manufacturer at the time the product  
08:21:05 12 left the manufacturer's control.

08:21:07 13 To prevail on the strict liability failure to warn  
08:21:10 14 and/or instruct claim, Mr. Baker has the burden of proving each  
08:21:13 15 of the following propositions by a preponderance of the  
08:21:16 16 evidence:

08:21:17 17 First, that 3M supplied a product that was not  
08:21:20 18 reasonably safe because adequate warnings and/or instructions  
08:21:23 19 were not provided with the product;

08:21:27 20 Second, that Mr. Baker was injured; and

08:21:29 21 Third, that the unsafe condition of the product was a  
08:21:32 22 proximate cause, as defined on page 32, of Mr. Baker's  
08:21:35 23 injuries.

08:21:35 24 If you find from your consideration of all of the  
08:21:38 25 evidence that each of these propositions has been proven and

08:21:40 1 that 3M has not proven the affirmative defense of superseding  
08:21:44 2 cause, then 3M is at fault, your verdict should be for Mr.  
08:21:47 3 Baker on the strict liability failure to warn and/or instruct  
08:21:50 4 claim, and you should consider the issue of damages.

08:21:52 5 Otherwise, you should find for 3M on this claim.

08:21:56 6 Mr. Baker also asserts that he was injured by 3M's  
08:22:03 7 negligent failure to provide adequate warnings and/or  
08:22:06 8 instructions after the CAEv2 was manufactured.

08:22:09 9 Negligence is the failure to exercise ordinary care.  
08:22:13 10 It is the doing of some act that a reasonably careful person  
08:22:16 11 would not do under the same or similar circumstances, or the  
08:22:19 12 failure to do some act that a reasonably careful person would  
08:22:23 13 have done under the same or similar circumstances.

08:22:25 14 Ordinary care means the care a reasonably careful  
08:22:30 15 person would exercise under the same or similar circumstances.  
08:22:33 16 A manufacturer is held to the knowledge and skill of an expert  
08:22:36 17 in determining the dangers that may be inherent in its products  
08:22:40 18 and has a duty to keep abreast of research and knowledge in the  
08:22:43 19 field.

08:22:43 20 Again, a manufacturer has a duty to supply products  
08:22:47 21 that are reasonably safe.

08:22:49 22 A product may not be reasonably safe because adequate  
08:22:52 23 warnings and/or instructions were not provided after the  
08:22:55 24 product was manufactured.

08:22:57 25 A product is not reasonably safe because adequate

08:23:02 1 warnings and/or instructions were not provided after the  
08:23:05 2 product was manufactured if:

08:23:07 3 1. A manufacturer learned, or if a reasonably prudent  
08:23:12 4 manufacturer should have learned, about a danger connected with  
08:23:14 5 the product after it was manufactured;

08:23:19 6 2. Without adequate warnings and/or instructions, the  
08:23:21 7 product was unsafe to an extent beyond that which would be  
08:23:24 8 contemplated by an ordinary user; and

08:23:28 9 3. The manufacturer failed to issue warnings and/or  
08:23:30 10 instructions concerning the danger in the manner that a  
08:23:33 11 reasonably prudent manufacturer would act in the same or  
08:23:36 12 similar circumstances.

08:23:36 13 The duty to issue warnings and/or instructions is  
08:23:39 14 satisfied if the manufacturer exercises reasonable care to  
08:23:45 15 inform product users.

08:23:48 16 In determining whether a product was unsafe to an  
08:23:52 17 extent beyond that which would be contemplated by an ordinary  
08:23:54 18 user, you should consider the following:

08:23:56 19 The relative cost of the product; the seriousness of  
08:24:00 20 the potential harm from the claimed defect; the cost and  
08:24:03 21 feasibility of eliminating or minimizing the risk; and such  
08:24:07 22 other factors as the nature of the product and the claimed  
08:24:09 23 defect indicate are appropriate.

08:24:14 24 To prevail on the claim of negligent failure to  
08:24:14 25 provide adequate warnings and/or instructions after the CAEv2

08:24:17 1 was manufactured, Mr. Baker has the burden of proving each of  
08:24:20 2 following propositions:

08:24:22 3 First, that 3M was negligent in that the product was  
08:24:25 4 not reasonably safe because adequate warnings and/or  
08:24:30 5 instructions were not provided after the product was  
08:24:32 6 manufactured;

08:24:32 7 Second, that Mr. Baker was injured; and

08:24:34 8 Third, that the unsafe condition of the product was a  
08:24:37 9 proximate cause, as defined on page 32, of Mr. Baker's  
08:24:42 10 injuries.

08:24:42 11 If you find from your consideration of all of the  
08:24:45 12 evidence that each of these propositions has been proven and  
08:24:47 13 that 3M has not proven the affirmative defense of superseding  
08:24:51 14 cause, then 3M is at fault. Your verdict should be for Mr.  
08:24:56 15 Baker on the claim of negligent failure to provide adequate  
08:25:00 16 warnings and/or instructions after manufacture, and you should  
08:25:02 17 consider the issue of damages.

08:25:02 18 Otherwise, you should find for 3M on the claim.

08:25:05 19 Additionally, in determining whether Mr. Baker has  
08:25:09 20 proven his strict liability or negligence claims, you may  
08:25:12 21 consider that certain EPA regulations apply to the testing and  
08:25:16 22 labeling of all hearing protection devices sold commercially or  
08:25:19 23 to the military, including the CAEv2.

08:25:22 24 These regulations provide that certain information  
08:25:25 25 must have been included with every CAEv2, whether packaged

08:25:29 1 individually or in bulk, and require the value of sound  
08:25:34 2 attenuation to be used in the calculation of the noise  
08:25:37 3 reduction rating measured -- excuse me -- must be determined  
08:25:39 4 according to the method for the measurement of real-ear  
08:25:43 5 protection of hearing protectors and physical attenuation of  
08:25:47 6 earmuffs. This standard is approved as the American National  
08:25:50 7 Standards Institute Standard, ANSI Standard S3.19-1974, and  
08:25:56 8 that is under Title 40 of the Code of Federal Regulations,  
08:26:02 9 211.206-1(a).

08:26:04 10 All hearing protection devices must be labeled  
08:26:08 11 according to this subpart and must comply with the labeled  
08:26:11 12 values of mean attenuation. A manufacturer must take into  
08:26:15 13 account both product variability and test variability when  
08:26:23 14 labeling its devices. That is under Title 40, Code of federal  
08:26:26 15 Regulations, 211.211.

08:26:29 16 The information to appear on the primary label must  
08:26:32 17 state the value of the noise reduction rating, or NRR, in  
08:26:32 18 decibels for that model hearing protector. The value stated on  
08:26:36 19 the label must be no greater than the NRR value determined by  
08:26:40 20 using the ANSI S3.19-1974 computation method. This is under  
08:26:46 21 Title 40, Code of Federal Regulations, 211.204-1(b)(1).

08:26:57 22 The following minimum supporting information must  
08:26:59 23 accompany the device in a manner that ensures its availability  
08:27:04 24 to the prospective user instructions as to the proper insertion  
08:27:06 25 or placement of the device. That is according to Title 40,

08:27:08 1 Code of Federal Regulations, 211.204-4(e).

08:27:16 2 Mr. Baker claims that 3M violated the EPA regulations  
08:27:19 3 by, for example:

08:27:20 4 1. Failing to label the CAEv2 with an accurate noise  
08:27:24 5 reduction rating, or NRR, on either the individual or bulk  
08:27:28 6 package;

08:27:32 7 2. Failing to test the CAEv2 in conformance with the  
08:27:35 8 ANSI standard S3.19; and

08:27:39 9 3. Failing to provide instructions as to the proper  
08:27:42 10 insertion or placement of the CAEv2 on either the individual or  
08:27:44 11 bulk package.

08:27:45 12 The violation, if any, of a statute or regulation is  
08:27:49 13 not necessarily negligence but may be considered by you as  
08:27:52 14 evidence in determining strict liability and/or negligence.

08:27:55 15 Mr. Baker also asserts two claims based on fraud:  
08:28:01 16 first, fraudulent misrepresentation; and, second, fraudulent  
08:28:05 17 concealment.

08:28:05 18 A party who alleges a claim of fraud has the burden of  
08:28:09 19 proving each element by clear, cogent, and convincing evidence.  
08:28:14 20 All other claims of the parties must be proven by preponderance  
08:28:17 21 of the evidence as that term is more fully defined in other  
08:28:20 22 instructions.

08:28:20 23 As I instructed you earlier, proof by clear, cogent,  
08:28:24 24 and convincing evidence means that the element must be proven  
08:28:27 25 by evidence that carries greater weight as is more convincing

08:28:31 1 than a preponderance of the evidence.

08:28:32 2 Clear, cogent, and convincing evidence exists when  
08:28:34 3 occurrence of the element has been shown by the evidence to be  
08:28:38 4 highly probable; however, it does not mean that the element  
08:28:41 5 must be proven by evidence that is convincing beyond a  
08:28:44 6 reasonable doubt.

08:28:44 7 Mr. Baker asserts he was injured because 3M made a  
08:28:47 8 fraudulent misrepresentation in connection with the CAEv2.

08:28:50 9 To prevail on this claim, Mr. Baker has the burden to  
08:28:54 10 prove each of the following elements by clear, cogent, and  
08:28:57 11 convincing evidence:

08:28:58 12 1. That 3M made a representation of existing fact to  
08:29:02 13 Mr. Baker directly or indirectly through the United States  
08:29:07 14 Army;

08:29:09 15 2. That the fact represented was material;

08:29:11 16 3. That the representation was false;

08:29:14 17 4. That 3M knew the representation was false;

08:29:17 18 5. That Mr. Baker did not know that the  
08:29:18 19 representation was false;

08:29:21 20 6. That 3M intended that Mr. Baker would act on the  
08:29:23 21 representation;

08:29:25 22 7. That Mr. Baker has a right to rely on the truth of  
08:29:27 23 the representation; and

08:29:30 24 8. That Mr. Baker did rely on the truth of the  
08:29:32 25 representation; and

08:29:34 1 9. That Mr. Baker was damaged by reliance on the  
08:29:36 2 representation.

08:29:37 3 If you find from your consideration of all of the  
08:29:40 4 evidence that each of these elements has been proven and that  
08:29:43 5 3M has not proven the affirmative defense of superseding cause,  
08:29:47 6 your verdict should be for Mr. Baker on this claim, and you  
08:29:50 7 should consider the issue of damages.

08:29:52 8 Otherwise, you should find for 3M on the claim.

08:29:54 9 Mr. Baker also claims he was injured because 3M  
08:29:59 10 fraudulently concealed at least one material fact regarding the  
08:30:02 11 CAEv2. Mr. Baker has the burden of proving by clear, cogent,  
08:30:07 12 and convincing evidence each of the following elements on his  
08:30:09 13 claim of fraudulent concealment:

08:30:12 14 1. That Mr. Baker, or the United States Army, relied  
08:30:15 15 on the super -- I'm not sure what happened there.

08:30:28 16 I need to ask counsel, Mr. Sacchet and Mr. Beall, to  
08:30:33 17 come up here. I think we have some language missing.

08:30:44 18 *(Bench conference between the Court and counsel:)*

08:30:45 19 **THE COURT:** On page 31 we have some language missing.  
08:30:52 20 It's not in mine.

08:30:54 21 **MS. WILLIAMS:** What's not in yours?

08:30:58 22 **THE COURT:** Mr. Baker relied on the superior --  
08:31:01 23 there's no specialized knowledge. I don't know what that's  
08:31:04 24 going to do to my pagination.

08:31:06 25 **MS. WILLIAMS:** It doesn't matter, I think --

08:31:09 1 **THE COURT:** I no longer have a 31.

08:31:11 2 **MS. WILLIAMS:** If you need -- if you read this section  
08:31:14 3 and then go into -- I mean, this section and then go to your  
08:31:17 4 No. 2, sorry, it was something weird in the --

08:31:22 5 **THE COURT:** Obviously. You all agree?

08:31:30 6 **MR. BEALL:** I agree.

08:31:31 7 **THE COURT:** My copy had language missing from it.  
08:31:34 8 Does yours as well?

08:31:36 9 **MR. SACCHET:** Yes.

08:31:37 10 **THE COURT:** Yes. I apologize.

08:31:39 11 **MR. SACCHET:** It's okay.

08:31:43 12 *(Bench conference concluded.)*

08:31:44 13 **THE COURT:** Ladies and gentlemen, all is fine. There  
08:31:45 14 was a line or two missing from my copy of the instructions. So  
08:31:50 15 I've got that corrected, and I'm going to just reread this  
08:31:53 16 instruction to you from the beginning.

08:31:57 17 This is the fraudulent concealment instruction. I  
08:32:00 18 apologize for the interruption.

08:32:03 19 Mr. Baker also claims he was injured because 3M  
08:32:07 20 fraudulently concealed at least one material fact regarding the  
08:32:11 21 CAEv2.

08:32:11 22 Mr. Baker has the burden of proving by clear, cogent,  
08:32:14 23 and convincing evidence each of the following elements on his  
08:32:17 24 claim of fraudulent concealment:

08:32:20 25 First, that Mr. Baker or the United States Army relied

08:32:22 1 on the superior specialized knowledge and experience of 3M, or  
08:32:26 2 that Mr. Baker or the United States Army would reasonably  
08:32:29 3 expect 3M to disclose facts basic to the transaction consistent  
08:32:32 4 with 3M's duty to disclose or warn of dangerous conditions or a  
08:32:37 5 risk of harm;

08:32:38 6 2. That 3M failed to disclose to Mr. Baker or the  
08:32:41 7 United States Army material facts regarding a dangerous  
08:32:45 8 condition or risk of harm with respect to the CAEv2;

08:32:49 9 3. That Mr. Baker was unaware of those facts;

08:32:53 10 4. That had the disclosure been made, Mr. Baker would  
08:32:57 11 have acted differently with regard to the CAEv2; and

08:33:03 12 5. That 3M's failure to disclose resulted in Mr.  
08:33:05 13 Baker's injuries.

08:33:06 14 If you find from your consideration of all of the  
08:33:09 15 evidence that each of these elements has been proven and that  
08:33:12 16 3M has not proven the affirmative defense of superseding cause,  
08:33:16 17 your verdict should be for Mr. Baker on this claim, and you  
08:33:19 18 should consider the issue of damages.

08:33:20 19 Otherwise, you should find for 3M on the claim.

08:33:23 20 The term "proximate cause," as used in these  
08:33:30 21 instructions, means a cause which in a direct sequence,  
08:33:34 22 unbroken by any superseding cause, produces the injury  
08:33:38 23 complained of and without which such injury would not have  
08:33:41 24 happened. There may be more than one proximate cause of an  
08:33:43 25 injury.

08:33:44 1 If you find that 3M's conduct was a proximate cause of  
08:33:47 2 injury or damage to Mr. Baker, it is not a defense that some  
08:33:50 3 other cause or the act of some other person who is not a party  
08:33:53 4 to this lawsuit may have also been a proximate cause.

08:33:57 5 However, if you find that the sole proximate cause of  
08:34:00 6 injury or damage to Mr. Baker was some other cause, or that the  
08:34:04 7 act of some other person who is not a party to this lawsuit,  
08:34:07 8 then your verdict should be for 3M.

08:34:10 9 3M has raised affirmative defenses which you must  
08:34:15 10 consider if you find any of Mr. Baker's claims proven. More  
08:34:19 11 specifically, as to all claims, 3M asserts that its conduct was  
08:34:24 12 not a legal cause of Mr. Baker's injuries because an act of the  
08:34:28 13 United States Army was a superseding cause. And in particular,  
08:34:32 14 as to the strict liability claims and negligent failure to warn  
08:34:35 15 and/or instruct after manufacture claim, 3M asserts that Mr.  
08:34:40 16 Baker's own negligence should eliminate his claims or reduce  
08:34:44 17 his recovery, and that fault should be apportioned between 3M,  
08:34:48 18 Mr. Baker, and the United States Army.

08:34:50 19 An affirmative defense applies when a claim is proven  
08:34:54 20 but other facts are found that defeat a finding of liability or  
08:35:00 21 lessen a party's damages.

08:35:01 22 You must consider each affirmative defense separately.  
08:35:03 23 Although a defendant is not required to disprove the claim in  
08:35:07 24 order for the affirmative defense to apply, to prevail on any  
08:35:10 25 specific affirmative defense, the defendant, in this case 3M,

08:35:13 1 must prove the affirmative defense by a preponderance of the  
08:35:16 2 evidence.

08:35:16 3 3M asserts that it is not responsible for Mr. Baker's  
08:35:22 4 injuries because a later act or event was a superseding cause  
08:35:26 5 of the harm. More specifically, 3M contends that the United  
08:35:30 6 States Army's failure to fit the CAEv2 and/or failure to train  
08:35:36 7 Mr. Baker on its proper use was the sole cause of his injuries.

08:35:40 8 A superseding cause is a new independent cause that  
08:35:43 9 breaks the chain of proximate causation between a defendant's  
08:35:48 10 act or omission and an injury.

08:35:50 11 If you find that Mr. Baker proved his claims but that  
08:35:53 12 the sole proximate cause of the injuries was a later  
08:35:56 13 independent intervening act of the United States Army that 3M,  
08:36:00 14 in the exercise of ordinary care, could not reasonably have  
08:36:04 15 anticipated, then the act or omission of 3M is superseded and  
08:36:07 16 was not a proximate cause of the injuries.

08:36:08 17 If, however, you find that Mr. Baker proved his claims  
08:36:12 18 in connection with the CAEv2, and that in the exercise of  
08:36:16 19 ordinary care 3M should have reasonably anticipated the later  
08:36:21 20 independent intervening act of the United States Army, then  
08:36:24 21 that act does not supersede 3M's original act or omission, and  
08:36:28 22 you may find that 3M's act or omission was a proximate cause of  
08:36:33 23 Mr. Baker's injuries.

08:36:34 24 It is not necessary that the sequence of events or the  
08:36:37 25 particular resultant injuries be foreseeable. It is only

08:36:42 1 necessary that the resultant injuries fall within the general  
08:36:45 2 field of danger which 3M should reasonably have anticipated.  
08:36:49 3 If so, then 3M has not proven this defense.

08:36:53 4 You should consider this affirmative defense in  
08:36:56 5 connection with all claims, and if you find that 3M has proven  
08:36:59 6 its affirmative defense of superseding cause, then your verdict  
08:37:02 7 should be in favor of 3M.

08:37:04 8 3M also alleges that Mr. Baker's injuries resulted, in  
08:37:09 9 whole or in part, from his own negligence. You should consider  
08:37:12 10 Mr. Baker's negligence, if any, in connection with the strict  
08:37:16 11 liability claims and the negligent failure to warn or instruct  
08:37:20 12 after manufacture claim (not the fraud claims.)

08:37:23 13 Negligence on the part of a person claiming injury  
08:37:26 14 that is a proximate cause of the injury claimed is considered  
08:37:29 15 fault.

08:37:30 16 Negligence is the failure to exercise ordinary care.  
08:37:34 17 It is the doing of some act that a reasonably careful person  
08:37:38 18 would not do under the same or similar circumstances, or the  
08:37:41 19 failure to do some act that a reasonably careful person would  
08:37:44 20 have done under the same or similar circumstances.

08:37:46 21 Ordinary care means the care a reasonably careful  
08:37:50 22 person would exercise under the same or similar circumstances.

08:37:53 23 To find Mr. Baker at fault, 3M must prove by a  
08:37:58 24 preponderance of the evidence both of the following  
08:38:00 25 propositions:

08:38:01 1 First, that Mr. Baker acted or failed to act in one of  
08:38:06 2 the ways claimed by 3M and that, in so acting or failing to  
08:38:10 3 act, Mr. Baker was negligent; and

08:38:13 4 Second, that Mr. Baker's negligence was a proximate  
08:38:16 5 cause, as defined on page 32, of his own injuries.

08:38:19 6 If you find that 3M has proven both propositions, you  
08:38:22 7 will be instructed on the verdict form to determine the  
08:38:25 8 percentage of fault attributable to Mr. Baker's negligence.

08:38:29 9 3M asserts apportionment of fault as an affirmative  
08:38:33 10 defense. You should consider this affirmative defense in  
08:38:36 11 connection with the strict liability claims and the negligent  
08:38:39 12 failure to warn and/or instruct after manufacture claim (not  
08:38:42 13 the fraud claims), and you will consider this affirmative  
08:38:46 14 defense only if you first find 3M at fault for Mr. Baker's  
08:38:50 15 injuries. 3M bears the burden to prove by a preponderance of  
08:38:54 16 the evidence that another party is also at fault for Mr.  
08:38:57 17 Baker's injuries.

08:38:57 18 In rendering your verdict on damages, if you find that  
08:39:01 19 Mr. Baker's injury was caused in any part by the fault of  
08:39:04 20 either Mr. Baker himself or the United States Army in addition  
08:39:09 21 to 3M's fault, you must determine from the evidence what  
08:39:13 22 percentage of total fault, using 100 percent to represent the  
08:39:18 23 total fault, was attributable to Mr. Baker, the United States  
08:39:21 24 Army, if proven, and to 3M.

08:39:23 25 The percentage attributed may be zero percent, 100

08:39:31 1 percent, or any percentage in between so long as the total  
08:39:34 2 equals 100 percent.

08:39:36 3 In allocating fault, if you believe that Mr. Baker is  
08:39:39 4 entitled to recover and further find that he is to some degree  
08:39:45 5 responsible for his own injury or damages, you should not make  
08:39:48 6 any reduction in damages because of the negligence, if any, of  
08:39:51 7 Mr. Baker. Similarly, if you believe that Mr. Baker is  
08:39:53 8 entitled to recover and further find that the damages he  
08:39:56 9 sustained were caused by the United States Army, which is not a  
08:39:59 10 party, you must consider its fault. But in determining the  
08:40:04 11 total amount of damages, you should not make any reduction in  
08:40:06 12 damages because of the negligence, if any, of the United States  
08:40:08 13 Army.

08:40:08 14 The Court, in entering judgment, will take into  
08:40:11 15 account your allocation of fault among all persons or entities  
08:40:14 16 you find contributed to Mr. Baker's damages.

08:40:18 17 Each of the following is considered fault if proven:

08:40:21 18 3M supplying a product that is not reasonably safe  
08:40:24 19 because of inadequate warnings and/or instructions;

08:40:27 20 3M supplying a product that is not reasonably safe in  
08:40:30 21 its design;

08:40:32 22 3M negligently failing to warn and/or instruct after  
08:40:34 23 manufacture;

08:40:36 24 Mr. Baker negligently using the product; and

08:40:38 25 The United States Army negligently failing to fit

08:40:40 1 and/or train Mr. Baker on use of the product.

08:40:42 2 I will now instruct you on the law that applies to  
08:40:46 3 damages. It is the duty of the Court to instruct you as to the  
08:40:49 4 measure of damages. By instructing you on damages, the Court  
08:40:54 5 does not mean to suggest for which party your verdict should be  
08:40:58 6 rendered. If you find that Mr. Baker has not proven any of his  
08:41:00 7 claims, then you will not consider damages.

08:41:02 8 If you find that Mr. Baker has proven any claim and  
08:41:05 9 that 3M has not proven the affirmative defense of superseding  
08:41:08 10 cause, then you must determine the amount of money required to  
08:41:11 11 reasonably and fairly compensate him for the total amount of  
08:41:15 12 damages as you find were proximately caused by 3M.

08:41:19 13 You should consider the following noneconomic damages  
08:41:23 14 elements:

08:41:23 15 The nature and extent of the injuries;

08:41:26 16 The pain and suffering, both mental and physical,  
08:41:29 17 experienced, and with reasonable probability to be experienced  
08:41:32 18 in the future; and

08:41:34 19 The disability experienced and with reasonable  
08:41:36 20 probability to be experienced in the future.

08:41:39 21 The burden of proving damages rests on Mr. Baker. It  
08:41:42 22 is for you to determine, based on the evidence, whether any  
08:41:45 23 particular element has been proven by a preponderance of the  
08:41:47 24 evidence.

08:41:47 25 Your award must be based on evidence and not on

08:41:51 1 speculation, guess, or conjecture.

08:41:54 2 The law has not furnished us with any fixed standards  
08:41:57 3 by which to measure noneconomic damages. With reference to  
08:42:00 4 these matters, you must be governed by your own judgment, by  
08:42:04 5 the evidence in the case, and by these instructions.

08:42:06 6 As I have instructed you, you may decide it is  
08:42:10 7 reasonably probable that Mr. Baker will have some future losses  
08:42:14 8 resulting from his injuries. Noneconomic damages, such as pain  
08:42:18 9 and suffering and disability, are not reduced to present cash  
08:42:21 10 value. So in fixing an amount for future losses, you must  
08:42:24 11 disregard the fact that any amount you award Mr. Baker may be  
08:42:28 12 paid before the actual loss occurs. You must also disregard  
08:42:32 13 the fact that the value of money may change over time.

08:42:35 14 According to mortality tables, the average expectancy  
08:42:40 15 of life of a man aged 38 years is 40.5 more years, or 78.5  
08:42:47 16 years of age or old.

08:42:49 17 This one factor is not controlling but should be  
08:42:51 18 considered in connection with all the other evidence bearing on  
08:42:54 19 the same question, such as that pertaining to the health,  
08:42:58 20 habits, and activity of the person whose life expectancy is in  
08:43:03 21 question.

08:43:03 22 Whether or not a party has insurance or any other  
08:43:07 23 source of recovery available has no bearing on any issue that  
08:43:10 24 you must decide. You must not speculate about whether a party  
08:43:14 25 has insurance or other coverage or sources of available funds.

08:43:18 1 You are not to make or decline to make any award or increase or  
08:43:21 2 decrease any award because you believe that a party may have  
08:43:26 3 medical insurance, liability insurance, workers' compensation,  
08:43:30 4 veteran's disability compensation, or some other form of  
08:43:34 5 compensation available. Even if there is insurance or other  
08:43:37 6 funding available to a party, the question of who pays or who  
08:43:41 7 reimburses whom would be decided in a different proceeding.  
08:43:44 8 Therefore, in your deliberations, do not discuss any matters  
08:43:46 9 such as insurance coverage or other possible sources of funding  
08:43:50 10 for any party. You are to consider only those questions that  
08:43:53 11 are given to you to decide in this case.

08:43:56 12 Ladies and gentlemen, I'm going to stop now. I have  
08:44:01 13 two final instructions that I will give you after the attorneys  
08:44:05 14 have made their closing arguments to you. And of course, as I  
08:44:09 15 said earlier -- or I instructed you earlier, you must consider  
08:44:12 16 all of my instructions on the law as a whole at all times.

08:44:15 17 So now is the time for the attorneys to make their  
08:44:19 18 closing arguments to you. We will start with Mr. Baker's  
08:44:23 19 closing argument, as he is the plaintiff in the case, and also  
08:44:26 20 because he's the plaintiff in the case, he gets to go first and  
08:44:29 21 last. He's entitled to a rebuttal argument.

08:44:32 22 After Mr. Baker's closing argument is presented -- the  
08:44:38 23 initial closing argument, then 3M will present its closing  
08:44:42 24 argument, and then that will be followed by Mr. Baker's  
08:44:44 25 rebuttal closing argument.

08:44:46 1 Both sides have the same amount of time, however, for  
08:44:50 2 closing arguments. Mr. Baker's counsel has to decide how to  
08:44:55 3 use that time between the initial closing and the rebuttal  
08:45:02 4 closing.

08:45:02 5 So the closing arguments are an important part of the  
08:45:05 6 trial. This is the opportunity for the attorneys to argue to  
08:45:09 7 you their respective positions in the case based upon the  
08:45:13 8 claims and the evidence and the law that I have now given you.

08:45:19 9 They will do this based upon their recollection of the  
08:45:25 10 evidence that was presented during the trial. But you must  
08:45:29 11 remember at all times that it is your own independent  
08:45:32 12 recollection of the evidence that must control as you decide  
08:45:36 13 the verdict in this case.

08:45:38 14 You are certainly free to take notes during the  
08:45:42 15 closing arguments, if you'd like to do so. I would only ask  
08:45:45 16 that, if you do, that you make a notation to yourself on your  
08:45:49 17 notepad that this is the closing argument phase of the trial,  
08:45:52 18 in other words, this is the lawyers' presentation to you based  
08:45:58 19 upon their memory of the evidence.

08:45:59 20 We're going to get started now with Mr. Baker's  
08:46:04 21 closing.

08:46:05 22 Mr. Buchanan, you may proceed, sir.

08:46:07 23 **MR. BUCHANAN:** Thank you, Your Honor.

08:46:08 24 **THE COURT:** Ladies and gentlemen, I ask for your  
08:46:12 25 careful attention as Mr. Buchanan presents Mr. Baker's initial

08:46:16 1 closing argument.

08:46:20 2 **MR. BUCHANAN:** It will just take me a moment, Your  
08:46:22 3 Honor, to get set up.

08:46:24 4 **THE COURT:** Yes. I won't start the clock until you  
08:46:26 5 start to speak.

08:46:27 6 **MR. BUCHANAN:** I appreciate that. Thank you.  
08:46:47 7 Good morning. May I approach the easels?

08:47:08 8 **THE COURT:** Yes, certainly.

08:47:09 9 **MR. BUCHANAN:** I just want to find a location that  
08:47:12 10 doesn't block your view as well.

08:47:58 11 Are we still good, Your Honor? Can you see the jury?

08:48:02 12 **THE COURT:** I can't see Mr. [REDACTED]. I still can't  
08:48:11 13 see Ms. [REDACTED]. Can you move that one over to the left a little  
08:48:24 14 bit because the jurors -- their chairs can turn if they need to  
08:48:31 15 see it, and if you move that one now, that's the one -- I  
08:48:36 16 needed you to move that one. Right there, I'm good right  
08:48:41 17 there.

08:48:41 18 **MR. BUCHANAN:** Good morning, everybody. Thank you.  
08:48:49 19 Thank you for your time over the last two weeks. Serving on a  
08:48:55 20 jury is no small imposition on any of you. I'm sure when you  
08:48:59 21 came to court almost two weeks ago now to answer the call --

08:49:05 22 **THE COURT:** Wait just a minute. I'm sorry. You're  
08:49:07 23 going to have to have a mic. I can't hear you. I apologize.  
08:49:14 24 I'll restart the clock.

08:49:16 25 **MR. BUCHANAN:** All good now, Your Honor?

08:49:18 1 **THE COURT:** Much better.

08:49:19 2 **MR. BUCHANAN:** Thank you.

08:49:20 3 When you came in for jury service two weeks ago and  
08:49:23 4 answered that call, I'm sure you weren't quite sure what you'd  
08:49:29 5 be seeing, what you'd be hearing, what type of case that would  
08:49:32 6 be.

08:49:33 7 You've seen documents, you've seen testimony, you have  
08:49:37 8 facts; frankly, they were behind closed doors, in filing  
08:49:45 9 cabinets, in witnesses's minds, not public. Not public for the  
08:49:50 10 entire time this product, the Combat Arms Earplug, was marketed  
08:49:54 11 and sold. You know more than the military did. You know more  
08:50:02 12 than consumers did. You know more than Mr. Baker did.

08:50:11 13 When we started this two weeks ago almost, Mr. Tracey  
08:50:15 14 began with three truths.

08:50:17 15 Could you move forward, please, Zach.

08:50:20 16 Three truths: That 3M sold its new unusual Combat  
08:50:27 17 Arms Earplug without first testing it. First truth. When 3M  
08:50:33 18 finally did test, the tests showed its Combat Arms Earplug  
08:50:38 19 didn't work. And after that, 3M hid the truth for 15 years.  
08:50:49 20 For 15 years.

08:50:50 21 We thank you. We thank you for listening to this  
08:50:56 22 story, this story about what a company did and what it didn't  
08:51:01 23 do and the impact it had on Mr. Baker. Permanent progressive  
08:51:13 24 hearing loss, permanent tinnitus, every minute, every hour,  
08:51:18 25 every day for the rest of his life.

08:51:22 1 Why? It's interesting in a trial, you know, the  
08:51:27 2 evidence comes in in slices, with a witness here, with a  
08:51:31 3 witness there, with a deposition, sometimes you see a document,  
08:51:38 4 sometimes you see too many of the same document.

08:51:42 5 How does that story unfold? What does it mean with  
08:51:45 6 regard to its impact on a person?

08:51:47 7 What I'd like to do -- what I'd like to do is try and  
08:51:54 8 show what that story is now through the pieces you've seen from  
08:51:59 9 the various witnesses, the various documents, the various facts  
08:52:03 10 that this company kept inside in its filing cabinets, in its  
08:52:10 11 witnesses' minds, with its employees who you saw and you didn't  
08:52:15 12 see, for 15 years.

08:52:18 13 We thank you. We thank you for your service, for your  
08:52:22 14 commitment. I've been doing this a long time. I had a lot  
08:52:25 15 more hair when I started. And you have been an absolutely  
08:52:30 16 amazing jury, very attentive, very patient with us through  
08:52:35 17 times when people could justifiably be impatient. You've taken  
08:52:39 18 notes.

08:52:40 19 We feel very comfortable with whatever your verdict  
08:52:43 20 is. You've certainly considered the facts, and I'm confident  
08:52:48 21 you'll weigh them fully and fairly.

08:52:49 22 I imagine if somebody had showed this to me -- if  
08:52:56 23 somebody had showed this to me two weeks ago, and I hadn't been  
08:53:01 24 exposed to the documents, to the testimony in the case, I would  
08:53:05 25 have thought, surely, that can't be so. It can't be a company,

08:53:14 1 3M, Aearo, big companies selling personal protective equipment,  
08:53:23 2 not just to consumers, but to servicemembers by the thousands,  
08:53:33 3 by the thousands, without testing, without sharing the  
08:53:39 4 information they got when they tested. Unbelievable, you would  
08:53:48 5 think, until you saw the documents, until you saw the evidence.

08:53:53 6 And I'm going to work with some of my old fashioned  
08:53:57 7 tools that we used throughout this trial.

08:54:01 8 Testimony documented with Mr. Berger. Mr. Berger, the  
08:54:06 9 only corporate witness who spoke to you live through a pane of  
08:54:21 10 glass, sheltered by miles and probably some of your scrutiny.  
08:54:24 11 But I hope you can see how he responded to his words before.  
08:54:29 12 His words in writing when he thought nobody else would see  
08:54:33 13 them. His words in writing about, we just realized -- it just  
08:54:44 14 occurred to us that we have no data on the version of the plug  
08:54:48 15 that we have been selling.

08:54:58 16 Ms. Branscome began this trial two weeks ago, and she  
08:55:01 17 said, oh, those were samples, those were evaluation copies.  
08:55:05 18 And then, if you will recall, we went forward and we showed,  
08:55:08 19 no, no, there were sales representatives with boots on the  
08:55:13 20 ground. Mr. McNamara, you heard his testimony, getting samples  
08:55:17 21 in January of 2000 out to military bases, getting first sales  
08:55:25 22 at points in time, folks, when nobody should have been selling  
08:55:31 23 this product.

08:55:33 24 This product should have been in redesign in January  
08:55:37 25 of 2000. This product, through a test -- you've got lots of

08:55:46 1 different versions of what happened in the retest. Did they  
08:55:49 2 fold the flanges back on everybody? Did they fold them back on  
08:55:52 3 some? Did they evaluate somebody first and then keep putting  
08:55:56 4 people back in?

08:56:01 5 They needed a number. They needed a number for this,  
08:56:10 6 for sales. They needed an NRR they could take to the market  
08:56:16 7 and, frankly, to save a relationship. They had been selling  
08:56:25 8 this product to the military not having tested it. Doug Ohlin  
08:56:29 9 had put his neck on the line, stepped forward, gotten  
08:56:35 10 preliminary approval for the product, gotten the product code  
08:56:38 11 for it because he thought this was just going to be an  
08:56:42 12 UltraFit. An UltraFit. It was going to have attenuation and  
08:56:45 13 protection like the other products he knew well. That's what  
08:56:49 14 he thought. That's what he thought.

08:56:52 15 The numbers came back. The most variable plug ever.  
08:57:03 16 The most variable plug ever. We'll go through a few documents  
08:57:06 17 in a moment, but I just want to talk about that.

08:57:09 18 This is a personal protective device. Protection that  
08:57:17 19 is variable is no protection. It's no protection. A mask that  
08:57:30 20 works sometimes and not others, brakes that work sometimes and  
08:57:30 21 not others. They stop at 50 feet one day and 150 feet the next  
08:57:39 22 day, same road conditions, same weather, same driving speed,  
08:57:41 23 sometimes they stop it's 50 feet, sometimes it's 150. You  
08:57:44 24 don't know what you're going to get. You don't know whether  
08:57:47 25 you're safe. The most variable plug ever.

08:57:52 1 Mr. Berger has been making plugs for a long time and  
08:57:58 2 testing plugs for a long time. How does a person, how does a  
08:58:06 3 company, how do the business people, Mr. Myers, keep that  
08:58:11 4 inside and push forward and not share? Not a single piece of  
08:58:23 5 paper. Nothing.

08:58:25 6 And I apologize if there were times when I was  
08:58:29 7 quarreling and trying to get the clear answer from witnesses  
08:58:32 8 throughout this trial. Because it just struck me as so  
08:58:35 9 incredible, I wanted to make sure you had that knowledge when  
08:58:38 10 you were deliberating.

08:58:40 11 Did you ever send a memo? Did you ever send an email?  
08:58:48 12 Did you ever send anything to the Army, to the government and  
08:58:55 13 tell them what happened?

08:59:03 14 This is news. This is big news. The most variable  
08:59:08 15 plug ever.

08:59:09 16 You heard the testimony from Elliott Berger. They  
08:59:13 17 tell you, he's an expert in the field, he's on committees.  
08:59:16 18 They brought various of his friends to come in and testify to  
08:59:20 19 that, how well respected he is.

08:59:26 20 I'd submit to you something else. The worst deeds,  
08:59:32 21 the worst acts are by the people who know what's right. He  
08:59:38 22 knew. He knew. He knew so much that he knew how to slip  
08:59:46 23 between the cracks. And that's what he did. Folding back the  
08:59:52 24 flanges, or not. Retesting people if they're variable, or not.  
09:00:02 25 He knew what the rules required. He knew what was supposed to

09:00:07 1 be done. He knew right from wrong.

09:00:14 2 Every trick in the book, remember that? Every trick  
09:00:21 3 in the book. Doug Ohlin commenting to Doug Moses in 2009 about  
09:00:29 4 Elliott Berger. Every trick in the book.

09:00:35 5 Well, I suppose that's fine if you might be in a  
09:00:38 6 different line of work. But when you are making earplugs for  
09:00:44 7 the U.S. military, hundreds and hundreds of thousands of them,  
09:00:54 8 every trick in the book? That's not right. That's not right.

09:01:04 9 And at the risk of presenting you with documents  
09:01:10 10 you've seen already, I do want to bring this together for you.  
09:01:13 11 I'd like you to see it in a sequence that makes sense.

09:01:21 12 So let's see, if I could, Zach, could you progress  
09:01:29 13 this forward.

09:01:31 14 Here we are. November 19, 1999, we have no data on a  
09:01:36 15 plug we're selling.

09:01:43 16 In what business could that be acceptable? Certainly  
09:01:47 17 not the business of making hearing protection devices.

09:01:52 18 Witness after witness for the defense came in and  
09:01:55 19 talked about how important hearing is, how important it is for  
09:01:59 20 situational awareness, how important it is for staying alive  
09:02:02 21 during service and keeping other people alive.

09:02:09 22 "It just occurred to us we have no data on the product  
09:02:13 23 we're selling."

09:02:17 24 The Court just read the charge to you. EPA label  
09:02:20 25 regulations require testing before selling. Violation.

09:02:27 1 Violation. We'll see more of those as we go through this.

09:02:35 2 Violation after violation. Every trick in the book.

09:02:38 3 And so, what the company knew when they were selling  
09:02:45 4 -- and there was some discussion yesterday with Dr. Stephenson  
09:02:48 5 about this, how the military does testing.

09:02:55 6 This is Doug Ohlin. You've heard his name a few  
09:02:58 7 times, the person who went from the military to 3M in 2007 or  
09:03:04 8 '08. He gets contacted by the company, says, "Doug, somebody  
09:03:09 9 from the Army is asking for some information on the plugs. Can  
09:03:13 10 you send us what you have?" That's Brian Myers. Doug says,  
09:03:19 11 "Me? I'm at something at a loss for what information I have.  
09:03:24 12 I don't have resources to do studies. We don't have resources  
09:03:27 13 to do studies."

09:03:28 14 You know what? That makes sense. Who was the  
09:03:32 15 manufacturer? Who was making this plug? Who was making the  
09:03:38 16 money? Who had the duties?

09:03:45 17 In the charge the Court read to you, it's clear, the  
09:03:52 18 duty was on the manufacturer to test, to label, to generate an  
09:03:57 19 NRR, to warn, and to do it all aboveboard, not with every trick  
09:04:08 20 in the book.

09:04:09 21 But what happens?

09:04:10 22 They start selling with no data. He reaches out to  
09:04:15 23 his colleague. Blowing through the first stop sign, not  
09:04:26 24 getting back to Dr. Ohlin and saying, oh, we didn't think we  
09:04:30 25 had to test it because you were the military, we thought you

09:04:34 1 had tests.

09:04:36 2 That's not what happens here. Mr. Berger scrambles to  
09:04:40 3 get some tests running. He gets the tests running. And what  
09:04:46 4 do we have? The gold standard testing, the testing that  
09:04:52 5 demonstrates whether or not you have a fit or a seal in the  
09:04:58 6 ear. An 11.

09:05:00 7 Now, I didn't know the way NRRs worked and decibels  
09:05:03 8 worked and other things like that. I imagine, ladies and  
09:05:08 9 gentlemen, you didn't either.

09:05:10 10 But an 11 is not just half of 22. It's 90 percent  
09:05:16 11 less protection than a 22. It's 90 percent less protection  
09:05:24 12 than what the Army thought they were getting. The Army thought  
09:05:29 13 they were getting UltraFit-like performance. Why didn't the  
09:05:35 14 Army ask for testing first? Because they thought it was an  
09:05:38 15 UltraFit. That's what Elliott Berger told them. They thought  
09:05:44 16 it was this -- (*indicating*). They expected performance like an  
09:05:51 17 UltraFit.

09:05:52 18 When you get results that are not that, do you keep  
09:05:57 19 them inside? Do you keep them to yourself? Is that the way  
09:06:04 20 it's supposed to work? No. No.

09:06:12 21 They have no data.

09:06:23 22 Excuse me. Zach, I'm having a hard time with this.  
09:06:30 23 Can you advance it, please. Thank you.

09:06:32 24 And so, in February 2000, we saw this document  
09:06:38 25 yesterday.

09:06:39 1           Could you go forward please, Zach. Thank you.

09:06:42 2           They stopped one test at eight subjects. They let the  
09:06:46 3 other one go forward.

09:06:52 4           That's interesting, isn't it? A symmetrical plug, a  
09:06:57 5 plug that is the same, from a fit perspective, on both sides.  
09:07:03 6 Even the witnesses who were very disagreeable in this courtroom  
09:07:06 7 with us agreed it is symmetrical on both sides from a fit  
09:07:12 8 perspective. The results from one side inform the fit for the  
09:07:18 9 other.

09:07:20 10           So how, then, is it -- how is it that a company allows  
09:07:30 11 the yellow end to go to conclusion but stop the green end?  
09:07:39 12 Well, they had a zero. They had a zero on the yellow end. And  
09:07:49 13 what that meant? Hear-through. Hear-through. Their marketing  
09:08:00 14 claim, a zero suggested no attenuation, no reduction in noise  
09:08:06 15 levels, and that would be good for business.

09:08:09 16           What was good for business, the yellow end, Mr. Berger  
09:08:16 17 reported to Mr. Myers, the business guy at that point in time,  
09:08:23 18 allowed that study to go to conclusion and stopped the solid  
09:08:27 19 end for the most variable plug ever.

09:08:31 20           They do what they do -- I've heard many versions of  
09:08:38 21 what they did in 017. Did they fold them back on everybody, on  
09:08:42 22 some people? What they were doing is trying to get a 22.

09:08:49 23           What do we have to do? Do we have to exclude somebody  
09:08:54 24 even after the plug falls out of their ear? Or do we keep them  
09:08:58 25 in after the plug falls out of their ear? Retest if they're

09:09:02 1 variable, fold them back or don't fold them back.

09:09:05 2 Lord, what kind of process and procedure is this when  
09:09:09 3 one side of a symmetrical plug gets tested one way and the  
09:09:13 4 other side gets tested a different way? What kind of science,  
09:09:18 5 what kind of search for the truth, what kind of search for  
09:09:22 6 information is that on a plug designed for servicemembers going  
09:09:24 7 to be exposed to impulse noise over and over and over again?  
09:09:30 8 What kind of practice is that?

09:09:34 9 Next slide, please.

09:09:35 10 And we know it's wrong to do exactly what they did,  
09:09:42 11 retesting the product.

09:09:44 12 This is the CEO of the company. The CEO. Mr. McLain.  
09:09:56 13 And that's not Mr. Warren who was the head of the North  
09:09:59 14 American operation. It's Mr. McLain, the big boss, the boss of  
09:10:03 15 the global enterprise, the CEO who cashed out big when Aearo  
09:10:10 16 was sold to 3M in 2008.

09:10:14 17 He writes, "You cannot even attempt a second test; it  
09:10:25 18 goes without saying that Aearo supports that multiple testing  
09:10:28 19 attempts" -- attempts -- "with the same product are not allowed  
09:10:34 20 because it is prohibited by the EPA."

09:10:43 21 Strike two.

09:10:45 22 NVLAP-certified lab. Remember all that discussion?  
09:10:50 23 The things they write in their procedure manual, the things  
09:10:54 24 they put in there that they allow others to see; and then the  
09:10:58 25 policies that they have that are off-book, the policies that

09:11:02 1 the inspectors don't see. That marketing decides when studies  
09:11:09 2 get stopped. That's what Mr. Berger told you through this pane  
09:11:19 3 of glass.

09:11:21 4 We hit May 12th, 2000. And, yes, indeed, it appears  
09:11:29 5 we have a problem. A problem. The first study was stopped,  
09:11:38 6 then it's retested through whatever they do. They got the 22.

09:11:45 7 But was it like the experts in this courtroom said for  
09:11:48 8 3M? Was it such that, oh, no, it was no big deal, he just  
09:11:53 9 folded it as necessary, that's perfectly reasonable? No.

09:11:58 10 "It looks like the existing product has problems  
09:12:04 11 unless the instructions are revised."

09:12:07 12 And we'll talk about how they do that, a little bit of  
09:12:15 13 a head fake, I'd say.

09:12:17 14 And it wasn't written down just in an email. It  
09:12:22 15 wasn't written down just in the flange report. It was written  
09:12:26 16 done -- and I'd suggest to you and feel free to write down  
09:12:29 17 these exhibit numbers and I'd encourage you to review them --  
09:12:33 18 April 17, 2000, before the study was completed, May 11, 2000,  
09:12:39 19 July 10, 2000. Three times, Mr. Berger and Mr. Kieper, the  
09:12:48 20 language is eerily similar. It reflects this problem clearly.  
09:12:54 21 Not one of these memos, not one, was shared with the military.

09:13:02 22 We weren't asking them to write a report and send it.  
09:13:16 23 They had written them. They had written already and kept them  
09:13:19 24 in the file cabinet. You know more than the U.S. military ever  
09:13:24 25 knew about what this company knew about this product.

09:13:27 1 And so, what did it reveal?

09:13:31 2 It revealed the plug doesn't work. A variable -- a  
09:13:36 3 most variable plug ever is not suitable for the application it  
09:13:43 4 was sold for. A plug that is sealed in one moment and unsealed  
09:13:47 5 the next, that's a problem. A plug that is too short for  
09:13:55 6 proper insertion, that's a quote.

09:13:57 7 "The purpose of this document is to document that this  
09:14:02 8 end is too short for proper insertion."

09:14:10 9 In their technical report by the person who did the  
09:14:13 10 testing. The person who did the testing on this plug, unlike  
09:14:26 11 some of the witnesses in this courtroom, a person who had done  
09:14:29 12 thousands of REAT tests. Ron Kieper. A person who had seated  
09:14:33 13 this plug in the ear of each person and checked the fitting  
09:14:36 14 three ways. Put it in, confirm that it felt good, asked  
09:14:42 15 whether the person could hear fitting noise, did you hear  
09:14:45 16 anything, do you feel the attenuation, checked it again before  
09:14:48 17 he left, and then starts the study. A guy who has done  
09:14:53 18 thousands of tests generating the data for the most variable  
09:14:59 19 plug ever.

09:15:04 20 It's too short, yes. It's too stiff, yes. It  
09:15:14 21 imperceptibly loosens, yes. It fails to achieve what they  
09:15:18 22 claimed it had, an NRR of 22, unless you jigger the test in  
09:15:29 23 ways they can't explain.

09:15:36 24 I don't know whether anyone was troubled. I was  
09:15:38 25 sitting there and thinking, what kind of scientific enterprise

09:15:42 1 is it that conducts a test and gets results and they have no  
09:15:46 2 idea what they did? None. I mean, the face of the document  
09:15:51 3 says they folded the flanges back on everybody. Their  
09:15:55 4 courtroom defense is one person or maybe three or we don't  
09:16:01 5 know.

09:16:02 6 What kind of science operation is this?  
09:16:08 7 NVLAP-certified lab? Or every trick in the book? I'd suggest  
09:16:15 8 the latter.

09:16:16 9 Mr. Berger knew they were looking for UltraFit-like  
09:16:21 10 performance. That's why this was a problem. An 11 is a big  
09:16:26 11 problem, because it's impossible to sell a plug with an 11.

09:16:33 12 As I said, don't take my version of his testimony. I  
09:16:37 13 think you'll recall it. I documented when it happened, it's  
09:16:41 14 documented over and over. You've taken many notes. I imagine  
09:16:45 15 you have this documented. It was your most variable solid plug  
09:16:49 16 ever.

09:16:50 17 Variable means unreliable. PPE that is variable,  
09:16:56 18 earplugs that are variable, do not protect. These were going  
09:17:04 19 to be worn every day.

09:17:06 20 You heard Mr. Baker, he wore them, he liked them, he  
09:17:12 21 liked them. He had trust in a product that was defective.

09:17:25 22 If you're driving in a car that had brakes that would  
09:17:29 23 sometimes work and sometimes not, you might realize that at  
09:17:32 24 some point in time.

09:17:34 25 If you're using an earplug that sometimes works and

09:17:37 1 sometimes doesn't, when you're wearing the hear-through end,  
09:17:41 2 the hear-through end, the yellow end, which is designed not to  
09:17:46 3 have sound be -- to alter the sound, you don't notice the  
09:17:51 4 variability. Incredible.

09:17:57 5 And so, after May 2000, what do they do? Nothing, but  
09:18:10 6 keep selling. Why? Because a redesign is not an option. A  
09:18:15 7 redesign is off the table. A longer plug or at least a longer  
09:18:21 8 plug is off the table. Doug Ohlin had already said a longer  
09:18:25 9 plug would be a show-stopper. They know that. They can't  
09:18:28 10 redesign to make this longer.

09:18:30 11 We looked at the business documents. They already had  
09:18:33 12 sales booked. We saw the license agreement from the CEO to  
09:18:37 13 license this technology, and we heard about what this company  
09:18:44 14 was doing from Mr. Gary Warren.

09:18:51 15 What this company was doing is, they were dressing  
09:18:56 16 themselves up, getting all prettied up for new suitors. Over  
09:19:06 17 and over again, investor comes in, try and cycle up the sales,  
09:19:14 18 generate new products, generate new sales, sell the company,  
09:19:18 19 make more money for the investors.

09:19:24 20 2004. Bear Stearns comes in. Pretty up the company.  
09:19:28 21 More sales. Sell the company.

09:19:31 22 2006, 2007. Permira comes in. Pretty up the company.  
09:19:39 23 Get a contract with the military for big purchases, indefinite  
09:19:48 24 quantities -- Combat Arms -- while keeping the information  
09:19:54 25 behind. Sell to 3M for big numbers.

09:20:02 1 That's what's happening. Sadly, that's what happened.

09:20:06 2 They knew it was unsafe. I mean, Mr. Berger, he's  
09:20:15 3 written textbooks, he's on committees. They knew. They knew  
09:20:18 4 what you need in an earplug.

09:20:20 5 Next slide, please, Zach.

09:20:20 6 They had been told by the inventor of the plug, ISL.  
09:20:26 7 Remember those French folks? The people who invented the  
09:20:31 8 double-end design who Aearo got permission to sell them, told  
09:20:38 9 them, the width of an earlier prototype was too wide, not going  
09:20:47 10 to work for most ears.

09:20:49 11 So, did they try and figure out a way to make it  
09:20:53 12 narrower? No. They pushed forward and sold it in a wider  
09:21:04 13 size. Too fat, too wide, or even fatter, even wider.

09:21:12 14 The experts who developed the plug in France said that  
09:21:16 15 size is not going to be suitable for most ears.

09:21:21 16 And then what else did they do?

09:21:24 17 It's got to have a flexible stem, right? Because it's  
09:21:27 18 got to conform to the ear. I don't know that I knew this  
09:21:32 19 before I started representing Mr. Baker, but the way our ear  
09:21:37 20 canals are shaped, I'm sure I had a sense of it, but they're  
09:21:40 21 not tubes like in those manikins. No. They twist and turn at  
09:21:48 22 various places. Put in Delrin, something as hard as steel that  
09:21:54 23 they make into ball bearings. Does anyone think that's going  
09:22:02 24 to conform to someone's ear?

09:22:06 25 And so, the company has this knowledge because they

09:22:11 1 did this development. This information, together with the  
09:22:19 2 tests they get that show an 11 before Mr. Berger stops the  
09:22:24 3 study, how does a company go through the red light? How? They  
09:22:34 4 have a defective product.

09:22:37 5 Because Mr. Berger writes, he doubted whether he read  
09:22:42 6 the email I just showed you from ISL, it's in his textbook, a  
09:22:48 7 chapter in his textbook. Premolded earplugs should surround a  
09:22:54 8 flexible stem.

09:22:55 9 You have these in bags. You've probably -- when we've  
09:22:59 10 tried your patience, I'm sure you've had a chance to fiddle  
09:23:03 11 with them and feel them. They're very hard.

09:23:09 12 They knew better.

09:23:10 13 And so we brought you Richard McKinley. We brought  
09:23:16 14 you Richard McKinley. Air Force Research Laboratory,  
09:23:25 15 distinguished history. And he told you, he told us that a plug  
09:23:29 16 that generates an 11 NRR is allowing ten times the noise to go  
09:23:35 17 to that cochlea area in the inner ear. Those hair cells -- and  
09:23:44 18 this is another interesting fact I learned when I started  
09:23:47 19 looking at this case for Mr. Baker -- we've got 30,000 of those  
09:23:53 20 hair cells our creator gives us, 30,000 from tip to tail in  
09:24:00 21 life, that's what you get. When they're gone, they're gone.  
09:24:07 22 You lose them at 3,000 hertz, you lose them at 4,000 hertz,  
09:24:12 23 high frequencies, music, birds, high-pitched voices,  
09:24:18 24 information to discern where things are. All gone. All gone.

09:24:21 25 So selling a plug that allows 10 times the noise

09:24:28 1 exposure to go to somebody's ear, that's not right.

09:24:37 2 We brought you Dr. Mark Packer from the Hearing Center  
09:24:44 3 of Excellence. The inaugural director, the first director,  
09:24:49 4 interim director, oversaw the Hearing Center of Excellence for  
09:24:56 5 DoD under a directive from Congress. He told you these  
09:25:00 6 earplugs are unreliable. Variable plugs are not reliable.

09:25:13 7 3M's internal testing identified the problems. They  
09:25:14 8 knew it. They had the information. It's in the evidence  
09:25:17 9 you're going to see. You'll have the documents. I'm sure  
09:25:20 10 you'll look at them.

09:25:20 11 It was too short, it was too stiff, it was too fat.  
09:25:29 12 Their testing demonstrated imperceptible loosening, wouldn't  
09:25:34 13 fit in most users, and most interestingly they had to  
09:25:39 14 manipulate the testing to achieve their claimed NRR.

09:25:43 15 I say that. I obviously represent Mr. Baker. Their  
09:25:52 16 global lab manager told you in this trial it was improper to do  
09:25:55 17 that. It was improper to test this plug with folded flanges.  
09:26:03 18 Mr. Hamer told you that.

09:26:07 19 I'm sure what I say will get challenged at some point  
09:26:10 20 by Ms. Branscome. Please remember what their witnesses said  
09:26:14 21 before there was this controversy in this courtroom.

09:26:17 22 Blow through another stop sign, another red light.  
09:26:26 23 And what do they do? Conceal, conceal the CAEv2's defects.

09:26:39 24 "Should I share it with Ohlin?"

09:26:42 25 In what company, in what corporate culture, in what

09:26:47 1 environment does that question have to be asked? Should I  
09:26:55 2 share this data with the Army?

09:27:01 3 Mr. Berger tells us he needed permission from his boss  
09:27:07 4 to share safety data on a plug that's going to hundreds of  
09:27:11 5 thousands of servicemembers. They had big plans for it, big  
09:27:16 6 plans.

09:27:16 7 If you have to ask that question, your company has a  
09:27:21 8 problem. And we know the answer never came; or if it did come,  
09:27:28 9 it didn't come in writing. And the answer that came, if it  
09:27:32 10 wasn't in writing, was absolutely none, because nothing was  
09:27:39 11 sent. Not that we just couldn't find copies of it, they told  
09:27:44 12 us that. We heard it on the stand. "I don't believe that was  
09:27:48 13 sent, I don't believe that was shared." They shared something  
09:27:54 14 else which we'll talk about in a moment.

09:27:56 15 Next slide.

09:27:56 16 Here we go, Mr. Berger's testimony before you in this  
09:28:00 17 trial. Did you send them 015? Why not, right? If it's all  
09:28:06 18 just as innocuous as they claim in this courtroom, why not have  
09:28:12 19 a dialogue about it? Have a scientific discussion, here is the  
09:28:17 20 data. We know you're going to be putting this into the ears of  
09:28:21 21 hundreds of thousands of servicemembers, and we know you care a  
09:28:23 22 lot about hearing and preservation of hearing, what do you  
09:28:29 23 think, Doug, what do you think? Why not have the scientific  
09:28:33 24 discussion of what this means? Marketing calling the shots.

09:28:44 25 What they do do, they send this head fake. Oh, we'll

09:28:53 1 give them a fit tip: Fitting may be improved if you fold the  
09:29:00 2 flange. Well, what does that mean? Where is the data that  
09:29:04 3 says, this is the most variable plug we've ever tested, might  
09:29:13 4 work some days, not work other days?

09:29:16 5 If you're comfortable with that kind of performance,  
09:29:19 6 hey, meet us at the register, we're happy to take your seven  
09:29:24 7 bucks. If you're comfortable with that, with the most variable  
09:29:27 8 plug ever, if you wear it in this configuration, we're happy to  
09:29:32 9 sell it to you.

09:29:34 10 But you know what? Share the information, let them  
09:29:39 11 make a choice, let them know what you know. Why not do that?

09:29:48 12 We all know the answer. What would the answer have  
09:29:52 13 been? No, thank you, I'll pass.

09:29:55 14 Telling the military everything they need to know.  
09:30:04 15 This wallet card. The head fake continues. "For very large  
09:30:10 16 ear canals, fold opposing plug back."

09:30:14 17 Very large ear canals. Remember, the flange report,  
09:30:19 18 it was medium and large, extra large, the whole way up.  
09:30:25 19 Encourage you to look at it. Nothing about the stem being too  
09:30:29 20 short, nothing about rigging the tests. Inquiry from Doug  
09:30:34 21 Ohlin: Do you have any comments on this? What a wonderful  
09:30:38 22 opportunity, what a wonderful opportunity to come back and say,  
09:30:42 23 oh, whoa, let me catch you up on what I thought you understood  
09:30:50 24 but you really don't; here's what our testing showed, here are  
09:30:55 25 the issues. Good opportunity to get square on things.

09:30:59 1 But some other things were happening in 2004. The  
09:31:05 2 company is dressing itself up, Bear Stearns stepping in, new  
09:31:10 3 investor, sell, sell, sell, leverage the Combat Arms.  
09:31:16 4 Next slide.  
09:31:16 5 Let's be clear, 3M never achieved an NRR of 22 again.  
09:31:25 6 We talk about 017 and 015. They got a 22 one time. One time.  
09:31:39 7 Got lucky? Or every trick in the book?  
09:31:46 8 An 11 on the one they terminated, a 15, a 16, a 4.4, a  
09:31:52 9 14, over and over and over again, results that you can't sell a  
09:31:58 10 product with.  
09:32:04 11 The largest study they did -- some of these were  
09:32:07 12 smaller studies. The largest study they did, NRR 4.4. 4.4.  
09:32:15 13 20 people. 2006.  
09:32:21 14 Never shared with the military, not one of them.  
09:32:26 15 Encourage you to look at those exhibits.  
09:32:29 16 Next slide.  
09:32:29 17 Why not share them? Having an NRR of 17 is bad, bad.  
09:32:46 18 Yeah. Mr. Berger knew that, the marketing folks knew that, the  
09:32:50 19 company knew that. You're not going to be able to leverage the  
09:32:53 20 success of the Combat Arms in the military with bad.  
09:32:58 21 So they didn't disclose again these facts, too short,  
09:33:04 22 too fat, too stiff, imperceptible loosening, they manipulated  
09:33:12 23 the testing, the 11, on and on and on. Kept in the filing  
09:33:16 24 cabinets, locked up for more than 15 years.  
09:33:19 25 Next slide.

09:33:19 1           There's this other issue, the yellow end. When we  
09:33:24 2 talk about those studies that I was just discussing, that's  
09:33:26 3 focusing on the variability of this dual-ended plug, does it  
09:33:32 4 seal and stay sealed. Those low numbers, they mean highly  
09:33:37 5 variable. That's what they mean. That variability was the  
09:33:42 6 yellow end and the green end. Not reliable.

09:33:44 7           Did the yellow end protect from impulse noise? We  
09:33:47 8 know they were marketing it that way. They marketed the yellow  
09:33:51 9 end for weapons fire, for the range. That's the way it was  
09:33:56 10 promoted.

09:33:59 11           They also claimed in agreements and representations to  
09:34:05 12 the government that it would provide that level of protection  
09:34:08 13 for up to 100 exposures at 190 dB peak. Real loud, lots of  
09:34:18 14 times.

09:34:18 15           What did the studies show?

09:34:20 16           Well, the Johnson Blast Study that they were  
09:34:22 17 referencing doesn't support that. And you learned yesterday  
09:34:25 18 that the plug that was tested in the Johnson Blast Study wasn't  
09:34:29 19 even the Combat Arms. It was a different plug. And even then,  
09:34:34 20 different plug, slightly different filter. We cannot recommend  
09:34:39 21 the general use of the two plugs tested in it.

09:34:42 22           And Elliott Berger gets ahold of this, as he's nearing  
09:34:48 23 retirement, and says, "Although this study is suggestive of the  
09:34:52 24 performance of the plug, I am unconvinced that it can support  
09:34:56 25 the statement that says has been tested on human subjects and

09:34:59 1 found to be protective at 190 dBP for at least hundred  
09:35:05 2 exposures." That's what they're claiming in their agreement  
09:35:10 3 with the military, protective for up to 100 exposures.

09:35:14 4 We saw this discussion: This Combat Arms -- Combat  
09:35:22 5 Arms -- the novel thing about it was this yellow end, selling  
09:35:25 6 it to the military and knowing internally that it's only good  
09:35:29 7 for infrequent gunshots. I wouldn't go to the range with it  
09:35:33 8 and fire a box of shells. It should only be used for  
09:35:40 9 infrequent gunshots.

09:35:43 10 That message never came over the transom to Mr. Baker.  
09:35:48 11 That didn't show up on a marketing advertisement. That didn't  
09:35:52 12 show up in Stars and Stripes when they were advertising this  
09:35:56 13 product. Oh, the occasional gunshot, you're okay. The  
09:36:02 14 occasional impulse noise, you should be protected.

09:36:08 15 "You protect us," they said, "We protect you." No,  
09:36:16 16 they didn't.

09:36:16 17 You see what they claim in their marketing. You have  
09:36:19 18 this in evidence. You can see their claims, claiming its use  
09:36:23 19 for impulse noise, weapons fire, et cetera, protection up to  
09:36:26 20 190 dB.

09:36:29 21 This came through quickly in one of the exams of Mr.  
09:36:35 22 Salon. It's called Operation Cobra. They were going to direct  
09:36:40 23 mail those advertisements. They did. Direct mail, 7,000 of  
09:36:43 24 them, to purchase and procurement agents around the company.  
09:36:50 25 They're going to give out samples. They're going to be going

09:36:54 1 to end users. Why do you go to end users when you're  
09:36:57 2 marketing? To drive demand. Drive demand. Get soldiers  
09:37:00 3 asking for these infrequent protection earplugs for use.

09:37:06 4 Mr. Baker loved them. Loved them. Thought they were  
09:37:09 5 great. Can't tell they're not sealing on the hear-through  
09:37:17 6 side. No warning. No mention, no anything about hear-through  
09:37:22 7 -- excuse me -- about infrequent gunshots or they're only  
09:37:28 8 protective for a few shots.

09:37:29 9 So they release the product that they were supposed to  
09:37:35 10 quality assure. Put this yellow end on a box and check to make  
09:37:40 11 sure it was protective by their own measurements, that's what  
09:37:45 12 they said they did, that's how they said they were going to  
09:37:47 13 determine if it was protective. Did they do that? Well, yeah,  
09:37:51 14 they did put it on the box. What happened when they did that?

09:37:56 15 80 percent defective. Releasing product under  
09:38:00 16 waivers. Shipping them out to servicemembers. The memo I just  
09:38:04 17 showed you said -- Mr. Berger said, no, we didn't ship  
09:38:09 18 anything. The memo from the person that was overseeing it  
09:38:12 19 said, releasing the product under quality waivers. You heard  
09:38:15 20 from Admiral Leslie what that meant.

09:38:17 21 Next slide.

09:38:17 22 3M had a chronic problem with this plug. It never met  
09:38:23 23 the specs. 80 percent failure rates. They couldn't assure any  
09:38:28 24 of the guarantees they were giving to the government. 100  
09:38:32 25 percent tested, they said. 100 percent. Tested. Failed.

09:38:41 1 Shipped. I guess it's true they tested it. They didn't tell  
09:38:47 2 them they were still going to ship it when it failed.

09:38:50 3 Next slide.

09:38:50 4 Mr. Berger told you they had a quality problem not  
09:38:53 5 just in 2003, 2004, 2005. In 2016, 2016 still a quality  
09:39:03 6 problem with these plugs on the yellow end that Mr. Baker wore.

09:39:07 7 Next slide.

09:39:07 8 Sampling for inspection of sound attenuation of  
09:39:13 9 level-dependent plugs shall be 100 percent. That was in the  
09:39:16 10 agreement.

09:39:17 11 Next slide.

09:39:17 12 I mentioned to you Admiral Leslie's opinions. If 3M  
09:39:23 13 had disclosed the information in the flange report and the  
09:39:26 14 quality problems, the contract would have never been awarded.  
09:39:30 15 She gave stronger statements and you heard her on the stand.  
09:39:35 16 Had she been the officer, she would have taken very strong  
09:39:39 17 measures with regard to 3M and Aearo.

09:39:41 18 Next slide.

09:39:41 19 Let's talk about what was on these labels. We brought  
09:39:44 20 in Mr. Brock, one of the largest distributors at various points  
09:39:48 21 in time for the product. He got his information on the product  
09:39:51 22 from the company. Nothing shared with him. The  
09:39:56 23 boots-on-the-ground distributor, the person dealing with the  
09:39:58 24 bases and other purchasing folks, nothing shared with him from  
09:40:03 25 this period of time. Nothing. Nothing. He said, had they, he

09:40:12 1 wouldn't have sold them. He didn't need this business that  
09:40:16 2 bad. At least one business had some integrity.

09:40:23 3 Next slide.

09:40:23 4 Here we are, this fitting tip. This was shown on  
09:40:29 5 several occasions. They show the suggestion in the fitting tip  
09:40:32 6 to fold back the flange to improve fit. I suggest a picture is  
09:40:42 7 worth a thousand words. Do you see it folded there?

09:40:48 8 They're going to say the fine print trumps the  
09:40:53 9 picture. You heard a lot of testimony from military folks who  
09:40:57 10 said, yeah, they heard something about folding the flanges  
09:41:00 11 back. I don't think you heard anybody say that they actually  
09:41:03 12 saw somebody walking around with them folded back like that.

09:41:07 13 Next slide.

09:41:07 14 And then in 2012, if this flange-folding tip was so  
09:41:12 15 important, why did they pull it out? Does it no longer improve  
09:41:17 16 fit in 2012? Does it no longer do that? Do you no longer need  
09:41:21 17 to do that to get the protection? No.

09:41:27 18 Next slide.

09:41:27 19 They failed to warn that it loosens imperceptibly,  
09:41:33 20 it's too short for proper insertion, it's too stiff for deep  
09:41:37 21 plug insertion, that it provides 90 percent less protection,  
09:41:42 22 that the labeled protection was as a result of manipulated  
09:41:46 23 tests, unsafe on ranges, should only be used with infrequent  
09:41:52 24 gunfire, and releasing it when it's failing quality tests.

09:41:52 25 Next slide.

09:41:53 1 To be clear, the Army relied on information from 3M on  
09:41:59 2 this product. There's a lot of discussion about Army studies,  
09:42:02 3 other studies, lots of manikin tests. But when folks in the  
09:42:06 4 Army, Doug Ohlin and others, wanted information, who did they  
09:42:10 5 reach out to in the company?

09:42:11 6 Doug Ohlin, after that early test that Dr. Stephenson  
09:42:15 7 talked about, reaches out to the company and says, I don't know  
09:42:18 8 about any studies. Dr. Ohlin was the point person for the  
09:42:23 9 product in the Army.

09:42:26 10 Next slide.

09:42:26 11 Moving forward, 2005 we looked at this. David  
09:42:31 12 Chandler reaching out with Doug Ohlin asking for information.  
09:42:34 13 What does Elliott Berger do? He sends back a 22. Here you go,  
09:42:40 14 NRR is 22, just like an UltraFit. That's what he told them.

09:42:44 15 Next slide.

09:42:44 16 Quick reference guide. We saw this yesterday. What  
09:42:47 17 is the Army putting in their quick reference guide for  
09:42:49 18 information on the attenuation of the product? The data from  
09:42:52 19 the company. Data from the company.

09:42:56 20 Next slide.

09:42:56 21 Why? Great question, right? Why?

09:43:03 22 By 2004, this product was turning into quite a  
09:43:07 23 business. By 2006, it's not just a business. What the company  
09:43:14 24 is doing in 2006, after Permira comes in, after Permira invests  
09:43:22 25 in the company, what they're doing is trying to leverage the

09:43:28 1 Combat Arms into more business. And this product is pretty  
09:43:32 2 clever. Pretty clever, right? Double-ended, very unique.  
09:43:38 3 Good door opener. Good door opener for other business with the  
09:43:42 4 military. Leverage the Combat Arms platform with their new  
09:43:50 5 investors to do what?

09:43:52 6 The \$150 million dream. \$150 million dream for  
09:44:00 7 further military business.

09:44:02 8 Didn't stop there. Once 3M got in, after they paid  
09:44:06 9 \$1.2 billion -- look at that, isn't that interesting? 2006,  
09:44:11 10 \$765 million is what Permira paid. Year-and-a-half later,  
09:44:11 11 after gussying up the company, prettying it up, leveraging the  
09:44:23 12 Combat Arms, \$1.2 billion by 3M.

09:44:24 13 **THE COURT:** Mr. Buchanan, 55 minutes.

09:44:28 14 **MR. BUCHANAN:** Thank you.

09:44:30 15 Go forward. Why? Because CAE paid the bills. You've  
09:44:36 16 seen this.

09:44:37 17 3M's priorities, you saw this, greed, design  
09:44:42 18 complacency have finally come home to roost. Money was now  
09:44:48 19 costing them. Greed and design complacency.

09:44:52 20 Next slide. Next slide. And again go forward. Play  
09:44:59 21 this.

09:44:59 22 2015 and beyond, you saw this. This all unwinds in  
09:45:17 23 2015. 2015, Mr. Hamer is deposed. He says it was improper to  
09:45:21 24 fold the flanges. He said it was improper to keep selling this  
09:45:25 25 product in its current state. It had to be redesigned back in

09:45:31 1 2000. Never done. So what do they do?

09:45:35 2 Cease distributing it with the current NRR.

09:45:39 3 Move forward. Again. Again.

09:45:43 4 Could not be distributed with that NRR. Investigation

09:45:47 5 conducted by the Air Force, by CID. Terminations are made.

09:45:53 6 You've seen the letters over and over and over again.

09:45:57 7 Please move forward.

09:45:59 8 The CAE was too short for proper insertion.

09:46:06 9 The Air Force, these are defective, get them out of

09:46:09 10 people's ears, get them out. Let us know that you've done it.

09:46:13 11 Get them off the shelves.

09:46:15 12 Brian Myers, when he testified, no notice to anybody

09:46:17 13 outside the company to get them back. No notice of the safety

09:46:20 14 problem outside the company.

09:46:22 15 Go forward, please. Next slide.

09:46:26 16 And here we are. The consequences, Mr. Baker. Mr.

09:46:31 17 Baker. Cindy Baker. Dylan and Gavin.

09:46:36 18 Go forward.

09:46:37 19 Enlists 2005. Serves honorably. 15 months in Iraq,

09:46:45 20 reserves after. Enters the military --

09:46:48 21 Please go forward.

09:46:49 22 -- with no hearing loss. None.

09:46:51 23 Next slide.

09:46:52 24 Serves at Fort Lewis. Extensive use of firearms.

09:47:01 25 Go forward.

09:47:02 1 Extensive use of firearms in Iraq.

09:47:05 2 Go forward.

09:47:05 3 Extensive use in training settings and others, but he

09:47:09 4 came in with clean hearing --

09:47:13 5 Go forward.

09:47:14 6 -- after three years, his left ear is declined while

09:47:18 7 still in the Army.

09:47:18 8 Go forward.

09:47:21 9 His right ear has declined, he has hearing loss.

09:47:21 10 Go forward.

09:47:26 11 2012, that's when he stops using the Combat Arms. He

09:47:30 12 has hearing loss.

09:47:31 13 Next slide.

09:47:32 14 And that's where he is today.

09:47:33 15 Go forward.

09:47:34 16 He's got noise-induced hearing loss and tinnitus

09:47:37 17 caused by the Combat Arms.

09:47:38 18 Mr. Baker has these conditions, and we have agreement

09:47:45 19 from -- I think you saw it happen yesterday and the day

09:47:48 20 before -- with Dr. Flamme and Dr. Packer. No hearing loss or

09:47:54 21 tinnitus. Suffered hearing loss during his military service --

09:47:58 22 excuse me -- no hearing loss or tinnitus before military

09:48:02 23 service, suffered it during his service, had it due to noise

09:48:05 24 exposure, and had it due to his noise exposure with the Combat

09:48:08 25 Arms.

09:48:08 1 Next slide.

09:48:08 2 To a reasonable degree of medical probability and  
09:48:12 3 certainty, his injuries were caused by the Combat Arms and the  
09:48:15 4 problems Dr. Packer discussed.

09:48:18 5 Mr. Baker today, in the bottom 5 to 10 percent of men  
09:48:22 6 his age hearing. He's got permanent tinnitus. He's got the  
09:48:25 7 hearing of a 60- to 70-year-old man.

09:48:28 8 These are his broader consequences. You heard them,  
09:48:31 9 Cindy's words, you heard them out of his mouth, you heard them  
09:48:35 10 from Dr. Packer. This is what happens. These are the  
09:48:37 11 struggles you have with the conditions he has. Difficulty  
09:48:41 12 hearing, constant tinnitus. In silence, when he can hear  
09:48:48 13 better, that's when the tinnitus arises, that's when it becomes  
09:48:51 14 the problem.

09:48:52 15 Next slide.

09:48:52 16 And in this case I'd say you heard a lot about 3M's  
09:48:57 17 ABCs. Anything but the Combat Arms. Anything but. Anything  
09:49:03 18 but the Combat Arms were the cause of Mr. Baker's hearing loss.

09:49:09 19 Could have been the foamies he used in basic; it could  
09:49:12 20 have been the foamies he used after. It was the Stryker  
09:49:15 21 vehicle that he rode in that Dr. Packer told you, when he was  
09:49:18 22 wearing that helmet, the active helmet for the 20- to 30-minute  
09:49:24 23 ride out and the 20- to 30-minute ride back, safe exposure.  
09:49:29 24 Indeed, he could have rode in that vehicle for 12 hours without  
09:49:33 25 any problems. That's what Dr. Packer told you.

09:49:36 1 Next slide.

09:49:36 2 He knew how to fit it. That's a picture from the Army  
09:49:43 3 training manual on the left. The picture on the right is him  
09:49:47 4 in his ear.

09:49:48 5 Next slide.

09:49:48 6 You heard from Dr. Crawford yesterday, the Army had a  
09:49:52 7 great hearing program. There's a question about superseding  
09:49:55 8 cause. No. No superseding cause. He knew how to fit it. The  
09:50:01 9 military took care in their Hearing Conservation Programs. The  
09:50:05 10 military is not responsible. Mr. Baker is not responsible.

09:50:08 11 Next slide.

09:50:08 12 The Army requires soldiers to wear nonlinear plugs in  
09:50:11 13 dismounted operations. Do you remember that discussion about  
09:50:14 14 him sitting in the back of the Stryker vehicle when he would  
09:50:17 15 wear the yellow end in his ear? The Army requires nonlinear  
09:50:21 16 earplugs in dismount operations. That's what you do when you  
09:50:25 17 go on patrol.

09:50:27 18 Next slide. Next slide. Go forward, again.

09:50:35 19 Dr. Flamme. That was an interesting exchange, right?  
09:50:40 20 What he wrote in his report, his injuries were due to his  
09:50:43 21 cumulative exposure to noise. Cumulative exposure to noise in  
09:50:49 22 the military, including impulse and continuous noise sources.  
09:50:53 23 That's what he said. Still, anything but Combat Arms. He was  
09:50:58 24 wearing his Combat Arms all the time when he was exposed to  
09:51:02 25 impulse noise in the military.

09:51:03 1 Next slide.

09:51:04 2 And look at these, these other products. All these  
09:51:08 3 other products available. There's one you can't get anymore.  
09:51:13 4 And when they talked about newer versions, they didn't talk  
09:51:16 5 about a newer double-ended version. That's a problem.

09:51:20 6 Next slide.

09:51:21 7 And so I'd like to talk to you briefly about the  
09:51:24 8 charge and the verdict form, because here in this case --

09:51:30 9 Could I have the ELMO, please.

09:51:47 10 There are several claims: Strict liability, design  
09:51:50 11 defect. You heard the evidence, you saw the evidence, we've  
09:51:53 12 recounted it here. This product was flawed. It was  
09:51:56 13 problematic from the start. It was defective.

09:52:00 14 Failure to warn or instruct. No communications to the  
09:52:12 15 Army, no communications to the military about these problems  
09:52:15 16 that we see in 2000. They failed to warn. They failed to  
09:52:19 17 warn. Not only the Army. They failed to warn Mr. Baker. They  
09:52:29 18 did it absolutely. They did it knowingly. They did it well  
09:52:33 19 beyond negligently.

09:52:34 20 They kept this information in their filing cabinets,  
09:52:37 21 they kept it in their minds. You're seeing it now only because  
09:52:42 22 it got produced in litigation. You know more than the Army  
09:52:45 23 ever knew about the characteristics of this plug.

09:52:52 24 Fraudulent misrepresentation. Protective on the  
09:52:56 25 range, protective in training, gunshots, impulse noises, et

09:53:01 1 cetera. How do you promote a product for impulse noise when  
09:53:05 2 internally you're concluding it should not be used for beyond  
09:53:11 3 infrequent gunshots?

09:53:13 4 Fraudulent concealment. All that knowledge they had,  
09:53:18 5 all that information they kept to themselves, that's  
09:53:22 6 concealment. Doing it knowingly? Well, yes, we know they  
09:53:27 7 knew. They did the studies, they had the information, they had  
09:53:30 8 the knowledge. And, by the way, with regard to motive, you  
09:53:33 9 know why they did it, you know why they did it.

09:53:38 10 These affirmative defenses of 3M's: Superseding  
09:53:46 11 cause. United States Army dropped the ball? Oh, okay, the  
09:53:54 12 Army failed its job, with information you never gave them?  
09:54:01 13 Walking into this courtroom and blaming the Army for not  
09:54:04 14 protecting Mr. Baker? We heard from the witnesses how  
09:54:08 15 seriously they take hearing conservation. Not proven.

09:54:11 16 Mr. Baker, apportionment of fault? For what?  
09:54:17 17 Information he never had? A decision and a choice he never got  
09:54:20 18 to make? No. No apportionment of fault for Mr. Baker.

09:54:25 19 And again, the United States Army, not proven.

09:54:31 20 So, I would submit, apportionment of fault 100  
09:54:42 21 percent. Let them know it's not right what they did 100  
09:54:46 22 percent. Tell them that. 100 percent wrong here, 100 percent  
09:54:52 23 wrong always. You are the conscience in this community and you  
09:55:00 24 decide it.

09:55:02 25 **MS. BRANSCOME:** I object, Your Honor. May we

09:55:04 1 approach?

09:55:06 2 **THE COURT:** Are you close to being finished?

09:55:11 3 **MR. BUCHANAN:** I am very close.

09:55:12 4 **THE COURT:** Overruled. Finish. And I'll hear you  
09:55:16 5 later, Ms. Branscome.

09:55:17 6 **MS. BRANSCOME:** Thank you, Your Honor.

09:55:18 7 **MR. BUCHANAN:** 100 percent for 3M, zero to the Army,  
09:55:23 8 zero percent to Mr. Baker. Let them know that in Minneapolis  
09:55:29 9 who is responsible for what happened here.

09:55:32 10 Now damages real quick.

09:55:34 11 Mr. Baker, he is 38 years old. 38. Diagnosed with  
09:55:39 12 hearing loss in 2009. 40 years left. 40 years left here.  
09:55:54 13 14,600 days. 350,000, we'll round it to that, hours. With  
09:56:03 14 tinnitus that he can't turn off.

09:56:06 15 You know, we try and stop things that bother us.  
09:56:15 16 Sometimes we leave a room when there's a smell or a noise if we  
09:56:18 17 don't have that, we can leave, we can walk away, we can  
09:56:21 18 separate ourselves. Please make it stop. Please step away.  
09:56:25 19 Please give me peace. Please make it stop. He can't. He  
09:56:35 20 can't.

09:56:37 21 They made choices, they made decisions, they sold a  
09:56:41 22 company for \$1.2 billion. There are consequences, and they're  
09:56:52 23 sitting in this courtroom, Mr. Baker.

09:56:54 24 **MS. BRANSCOME:** Objection, Your Honor.

09:56:56 25 **THE COURT:** Overruled.

09:56:57 1 **MR. BUCHANAN:** I'd submit to you, how do you value an  
09:57:00 2 hour, how do you value a day? That is your decision. The  
09:57:04 3 Court gave you no guide beyond your sound judgment.

09:57:08 4 We heard what Mr. Berger said, how he values,  
09:57:12 5 separating himself from the pleasures in his life, his  
09:57:16 6 retirement, to come to you through this screen, \$500 an hour to  
09:57:21 7 tell the facts that they kept in their filing drawers, his  
09:57:25 8 dirty tricks testing. \$500 an hour.

09:57:31 9 You decide. You decide the value of permanent  
09:57:37 10 tinnitus, progressive hearing loss. You heard it yesterday.  
09:57:41 11 The hearing of a 60- to 70-year-old man at age 38, and it's not  
09:57:46 12 getting better, not getting better. 30,000 hair cells for  
09:57:51 13 life. Whatever reserve he had is gone. As he ages, it's only  
09:57:58 14 getting worse.

09:58:01 15 I want to thank you. I want to thank you from the  
09:58:05 16 bottom of my heart. You guys have been an amazing jury.  
09:58:09 17 You've been attentive. For Mr. Baker and Mr. Tracey and Ms.  
09:58:17 18 Hutson, thank you very much. Mr. Tracey will have a few  
09:58:19 19 remarks after Ms. Branscome is done.

09:58:22 20 Thank you very much.

09:58:23 21 **THE COURT:** All right. Thank you.

09:58:26 22 Ladies and gentlemen, we're going to take a short  
09:58:27 23 recess and then we'll return. Ms. Branscome will present 3M's  
09:58:31 24 closing argument followed by Mr. Tracey with Mr. Baker's  
09:58:34 25 rebuttal, I'll give you two final instructions, and then you'll

09:58:37 1 retire to begin your deliberations.

09:58:39 2 Please, no discussions about the case at all during  
09:58:42 3 this recess. We'll be in recess for -- let's take 10 minutes.

09:59:07 4 *(Jury out.)*

09:59:08 5 **THE COURT:** Ms. Branscome, briefly, what's your  
09:59:10 6 objection?

09:59:11 7 **MS. BRANSCOME:** Yes, Your Honor. I believe that Mr.  
09:59:13 8 Buchanan strayed into argument that would only be appropriate  
09:59:15 9 if there are punitives in this case. He urged the jury to let  
09:59:20 10 them know it's not right what they did, 100 percent, tell them  
09:59:25 11 that. You are the conscience of this community, you decide it,  
09:59:33 12 let them know that in Minneapolis.

09:59:36 13 Those are words that are instigating the jury to  
09:59:38 14 punish. He explicitly did it after mentioning that the company  
09:59:41 15 had been sold for \$1.2 billion. These statements, while I may  
09:59:45 16 not agree with them in a case with punitives, are designed  
09:59:48 17 expressly when there is a punitive claim in the case. There is  
09:59:52 18 not one. We think that this is error. We would ask for  
09:59:55 19 instruction to the jury that they are not -- on the nature of  
09:59:59 20 compensatory damages versus punitive, I would defer to Your  
10:00:03 21 Honor how to construct that. But we think that Mr. Buchanan  
10:00:07 22 expressly urged them with their verdict to send a message and  
10:00:12 23 to punish.

10:00:15 24 **THE COURT:** The word "punish" was never used. The  
10:00:17 25 objection is overruled. You certainly can talk to the jury

10:00:19 1 yourself about the fact that punitive damages are not at issue  
10:00:23 2 in the case. Under Washington law, I do not find this to be  
10:00:26 3 error.

10:00:27 4 We'll be in recess for ten minutes.

10:00:27 5 *(Recess taken 10 a.m. to 10:12 a.m.)*

10:12:24 6 *(Jury in the box.)*

10:12:24 7 **THE COURT:** Ms. Branscome, before you get started, can  
10:12:25 8 I see you and Mr. Tracey for just a minute?

10:12:28 9 **MS. BRANSCOME:** Of course, Your Honor.

10:12:33 10 *(Bench conference between the Court and counsel:)*

10:12:35 11 **THE COURT:** So I overruled Ms. Branscome's objection  
10:12:39 12 just now to the closing argument portion by Mr. Buchanan about  
10:12:46 13 the jury being the conscience of the community and sending a  
10:12:52 14 message. That is not an invitation to go back into that in  
10:12:56 15 your rebuttal.

10:12:57 16 **MR. TRACEY:** I wasn't planning on it.

10:12:59 17 **THE COURT:** Very good.

10:13:00 18 *(Bench conference concluded.)*

10:13:07 19 **THE COURT:** Ms. Branscome, I don't know if you need a  
10:13:09 20 few minutes to get set up or if you've done that during the  
10:13:11 21 break.

10:13:11 22 **MS. BRANSCOME:** I am ready to go, Your Honor.

10:13:13 23 **THE COURT:** All right. Very good. You may proceed.

10:13:14 24 **MS. BRANSCOME:** Thank you.

10:13:15 25 Good morning, ladies and gentlemen. I know we've

10:13:21 1 spent the last two weeks sort of talking sideways at you, so  
10:13:25 2 it's nice to be able to stand here before you and speak to you  
10:13:30 3 directly about what's happening over the last two weeks and how  
10:13:34 4 we think it might be considered as you move forward into your  
10:13:37 5 deliberations.

10:13:38 6 Now, I began my opening statement two weeks ago now  
10:13:41 7 saying that this case fundamentally is about Mr. Baker, whether  
10:13:52 8 or not something went wrong with the Combat Arms Earplug  
10:13:57 9 Version 2 that caused Mr. Baker's injury.

10:13:59 10 And I would put forward that, as I listened to Mr.  
10:14:07 11 Buchanan's closing argument which lasted roughly over an hour,  
10:14:13 12 five minutes were spent on Mr. Baker's case and whether or not  
10:14:21 13 the evidence has been established that, for him, the Combat  
10:14:31 14 Arms Earplug Version 2 was defective.

10:14:32 15 Now, I'm going to address Mr. Buchanan's arguments  
10:14:37 16 about the safety of the product in general, and in fact I'm  
10:14:39 17 going to spend substantial time on it. But I wanted to start  
10:14:43 18 with that point because, although you will be asked questions  
10:14:48 19 on the verdict form --

10:14:50 20 And if I may have the ELMO, please?

10:14:52 21 **THE COURT:** Yes.

10:14:54 22 **MS. BRANSCOME:** -- and you will be asked to evaluate a  
10:15:01 23 number of different claims, one thing they have in common and  
10:15:07 24 that the Judge instructed you on this morning, and you'll be  
10:15:10 25 able to read in the instructions yourself, is that they have to

10:15:14 1 be tied to Mr. Baker.

10:15:18 2 You heard Mr. Buchanan say, well, you're the  
10:15:21 3 conscience of the community, you should send a message to  
10:15:24 4 Minnesota, and he put up a series of email after document after  
10:15:28 5 email, and he was critical of Mr. Berger, and he said send a  
10:15:32 6 message. But what he didn't do is show you evidence that this  
10:15:39 7 product caused Mr. Baker's injury. And if he didn't do that,  
10:15:46 8 then he didn't meet his burden.

10:15:49 9 So returning, if I may, to the presentation.

10:16:06 10 But let's talk about the product, because I'm not  
10:16:08 11 afraid of the arguments that were made by Mr. Buchanan about  
10:16:11 12 the product. We stand behind it. The company stands behind  
10:16:14 13 the product.

10:16:15 14 You heard from Mr. Berger, yes, you heard from him  
10:16:19 15 remotely. I would put forward that doesn't change anything  
10:16:23 16 about the credibility of his testimony. You heard from the  
10:16:25 17 Judge that sometimes you hear from witnesses via video or even  
10:16:30 18 video feed. He was here. He answered Mr. Buchanan's  
10:16:34 19 questions. He answered mine as well. And I hope it was  
10:16:37 20 informative to you. I hope you took away evidence from that.

10:16:41 21 But ultimately what I hope you took away is that he's  
10:16:45 22 proud of the Combat Arms Earplug Version 2. The company stands  
10:16:51 23 behind the product.

10:16:52 24 It was a valuable invention that gave the military  
10:16:57 25 capabilities it didn't have before, and that shouldn't get lost

10:17:01 1 because, as you evaluate whether there's a defect with the  
10:17:06 2 product, the value that it provided when it came on the scene  
10:17:11 3 is an important part of that consideration, and it's something  
10:17:16 4 that needs to be weighed against how strong really is the  
10:17:22 5 plaintiff's evidence that there's something fundamentally wrong  
10:17:27 6 with this plug.

10:17:29 7 And you heard from Lt. Col. Battler. She explained  
10:17:35 8 that the open ear, you could hear a rifle bolt closing from  
10:17:42 9 1,000 meters; but when soldiers put foam earplugs into their  
10:17:47 10 ears, you don't hear that same rifle bolt closing until the  
10:17:53 11 person making that noise is 60 meters from your position. In  
10:17:57 12 other words, you're a dead man.

10:18:00 13 That's uncontested evidence. The plaintiffs didn't  
10:18:06 14 bring anyone, any expert to say that's not true. That was what  
10:18:10 15 was going on before the Combat Arms was available. Either  
10:18:15 16 soldiers were choosing not to wear hearing protection and  
10:18:19 17 getting injured, or they were wearing it and they were running  
10:18:22 18 the risk that they couldn't hear valuable information that  
10:18:26 19 would protect their lives. And those aren't my words. Those  
10:18:30 20 are Lt. Col. Battler's. She has no interest in this case.

10:18:35 21 And I would put forward to you that it's important to  
10:18:39 22 remember what witnesses came and gave testimony that had  
10:18:43 23 absolutely no interest in the outcome. What did the people  
10:18:48 24 from the Army say who we just got to ask questions of?

10:18:55 25 This is what Lt. Col. Battler said about the product:

10:18:59 1 "Along came the Combat Arms Earplug. You can hear the  
10:19:05 2 rifle bolt closing within 500 meters and would still give you  
10:19:10 3 some time to react and survive."

10:19:13 4 It may sound silly. It's a little earplug. We've  
10:19:17 5 been handing them out, we've been looking at them, we've been  
10:19:21 6 squeezing, we've been pulling them apart, they're like six  
10:19:26 7 dollars. And so it might be hard to really factor in, how  
10:19:29 8 could this little product have that much benefit? But you're  
10:19:33 9 hearing the explanation of why, and it's not just her.

10:19:38 10 Witness after witness after witness, plaintiff's  
10:19:46 11 experts. Mr. Baker called it revolutionary. He talked about  
10:19:52 12 this would help prevent friendly fire.

10:19:58 13 Dr. Packer: "It was a disruptive technology." What  
10:20:03 14 does that mean? It changed things. It shook things up. It  
10:20:09 15 gave the military a tool it didn't have before.

10:20:19 16 And you don't have to just accept what people said  
10:20:22 17 about it. The product was tested.

10:20:26 18 And I find it interesting that Mr. Buchanan didn't  
10:20:28 19 engage with this science. You didn't hear why, you know, maybe  
10:20:36 20 NIOSH got it wrong or the Air Force Research Laboratory. They  
10:20:41 21 can't attack the science because it's good science. These are  
10:20:45 22 world-class laboratories that are testing this product in  
10:20:49 23 humans. They're testing the product on sophisticated manikins.  
10:20:53 24 They're putting people in giant spheres and having them figure  
10:21:00 25 out how well they can locate sound wearing the product. The

10:21:10 1 science supports that this product worked.

10:21:12 2 It was used for 15 years, and it ultimately was  
10:21:18 3 replaced with the later versions of the product. You heard  
10:21:21 4 even the plaintiff's experts had to concede that product  
10:21:24 5 development and innovation is what you want to see. But you  
10:21:28 6 know what happened even as the product was developed? They  
10:21:32 7 kept testing it against the Version 2 because the Version 2 was  
10:21:35 8 the benchmark.

10:21:39 9 Not only did all these laboratories test it in all  
10:21:43 10 these different ways, but they did it over an incredibly long  
10:21:49 11 period of time. They tested before Mr. Baker ever got his  
10:21:54 12 first pair, and they tested long after Mr. Baker accidentally  
10:21:58 13 left it at home and didn't take it with him to Afghanistan for  
10:22:03 14 Triple Canopy. And you see consistency across these studies  
10:22:10 15 and consistency is an important thing in science.

10:22:15 16 They tested against the products that the plaintiff's  
10:22:21 17 expert come in here and say are safe and effective.

10:22:24 18 Dr. Packer even went so far as to say that, if Mr.  
10:22:28 19 Baker had worn Version 4, he would have no injury today.

10:22:34 20 Interesting that the plaintiff's only case-specific  
10:22:39 21 expert who comes in here and says Version 4 would have  
10:22:42 22 protected Mr. Baker is complimenting a product made by the same  
10:22:47 23 company that Mr. Buchanan would like you to believe is  
10:22:54 24 fraudulent, is concealing things. Does that make sense?

10:22:59 25 Elliott Berger was in charge of the E-A-RCAL lab when

10:23:02 1 they developed 3 and 4. So if he's so terrible, why are the  
10:23:07 2 plaintiff's experts saying those are great products?

10:23:11 3 And the data shows that the Version 2 matches or  
10:23:21 4 exceeds the performance of the alternative products. And you  
10:23:26 5 have each of these exhibits to take a look at. They're a  
10:23:29 6 little dense. They're studies. We try to kind of highlight  
10:23:32 7 the key language. But please take a look at them, see that  
10:23:36 8 there's science and data behind this, not just isolated emails.

10:23:43 9 I opened by asking: What would a good scientist do?  
10:23:48 10 If you went to a scientist and you said, we think this product  
10:23:54 11 is defective, can you tell me if it is? That's an open-ended  
10:24:00 12 question. That's not: This product is defective, give me an  
10:24:08 13 expert opinion.

10:24:10 14 If you genuinely went to someone or a group of experts  
10:24:13 15 and you said: I want to know before I bring a lawsuit if  
10:24:16 16 there's something wrong with this product and this product hurt  
10:24:21 17 my client, what would you have them do? You'd probably have  
10:24:28 18 them test the product and see. If it's really defective, you'd  
10:24:36 19 probably get some evidence on that. You'd have the client put  
10:24:39 20 the earplug in their ear, and you'd see does it fit that  
10:24:43 21 person, does it protect that person.

10:24:46 22 If you thought there was something wrong with the  
10:24:49 23 product that made it fall out of ears or it was incompatible  
10:24:54 24 with the geometry of the ear canal, you'd have Mr. Baker wear  
10:25:00 25 the earplug and do some talking, some chewing, some running

10:25:04 1 around. You'd have him wear other products so that you could  
10:25:08 2 see, is it really something unique to the Combat Arms Earplug  
10:25:13 3 Version 2, or are things loosening because all earplugs loosen,  
10:25:19 4 because you'd want to make that comparison.

10:25:21 5 And if you're going to come in here and you're going  
10:25:23 6 to say that this product has an 80 percent defect rate because  
10:25:26 7 of some issues with acoustic resistance testing, which  
10:25:31 8 fundamentally just tells you is the filter in there and are the  
10:25:34 9 ends on the right sides, you'd probably take a look at Mr.  
10:25:38 10 Baker's earplugs to see if the filter is in there. Are they on  
10:25:42 11 the right side? He used it for 15 -- let's see how many years  
10:25:49 12 -- eight years, seven years. But you'd do that testing.

10:25:54 13 And the thing is they -- the plaintiffs brought you  
10:25:56 14 experts who are capable of this.

10:26:00 15 Mr. McKinley has spent most of his career doing REAT  
10:26:04 16 testing. Dr. Packer is absolutely qualified to do personal  
10:26:09 17 attenuation testing to see what protection that individual is  
10:26:13 18 getting. He said he was. You heard from Dr. Lustig that he  
10:26:18 19 can do fit testing. Dr. Packer could have had Mr. Baker, who  
10:26:22 20 he met with, try on other earplugs and see how they compared.

10:26:28 21 And then Admiral Leslie came here and talked to you  
10:26:31 22 about defect rates. Now, I would put forward she's not  
10:26:35 23 actually qualified to determine if the product is defective, so  
10:26:38 24 perhaps they should have found someone who is.

10:26:40 25 Did any of them do this testing? No.

10:26:47 1 And this isn't just us being nitpicky that they don't  
10:26:51 2 have one type of test versus another. The plaintiffs have the  
10:26:56 3 burden of proof. They're the ones asking you to award money to  
10:27:02 4 Mr. Baker because a product is defective. And you might ask  
10:27:06 5 yourself, if they're so sure of that, they're so sure that the  
10:27:12 6 proper NRR of the Combat Arms Earplug Version 2, green end, is  
10:27:17 7 11, why didn't they test it? If they're so sure it doesn't fit  
10:27:25 8 anyone, why didn't they test people? And if they're so sure  
10:27:32 9 this was the cause of Mr. Baker's injury, why didn't they  
10:27:38 10 measure it?

10:27:39 11 The only people who have said that Mr. Baker's injury  
10:27:47 12 was caused by the Combat Arms Earplug Version 2 are experts who  
10:27:52 13 were paid by the plaintiff's counsel. And what did those  
10:28:00 14 experts do? They read documents.

10:28:05 15 I thought this was a telling statement by Dr. Lustig,  
10:28:09 16 and these are his words. His words: "I'm just parroting the  
10:28:18 17 internal documents from 3M." Parroting. He's an expert. What  
10:28:24 18 work did he do? Is he just coming in here and reading  
10:28:28 19 documents to you that you can read for yourself, which we will  
10:28:31 20 address in a moment? He's just parroting documents.

10:28:37 21 Even the slide that Mr. Buchanan had in opening about  
10:28:42 22 Dr. Packer's opinion talked about what 3M's internal testing  
10:28:46 23 showed, not expert work that he had done. Why?

10:28:50 24 And I would put forth that, if you bring experts and  
10:28:54 25 other witnesses, and they only look at documents, they don't do

10:29:00 1 independent research, then they need to be credible, because  
10:29:07 2 you're basically just taking their word for it that they read a  
10:29:11 3 lot of documents and they reached the conclusion that the  
10:29:13 4 product is defective.

10:29:15 5 Mr. McKinley. He was hired by plaintiff's counsel in  
10:29:27 6 August 2020, less than -- I think we figured out maybe it was a  
10:29:33 7 little more than two months later he issues a report. He calls  
10:29:38 8 the Combat Arms Earplug Version 2 defective. A pretty serious  
10:29:40 9 accusation.

10:29:42 10 And then he comes into this courtroom on June 8th,  
10:29:46 11 2021, and again says the Combat Arms Earplug Version 2 is  
10:29:49 12 defective. This whole time he's being paid \$400 an hour, and  
10:29:56 13 he is a qualified expert who could do product testing. Does  
10:30:01 14 he? No. No testing.

10:30:04 15 And so, we asked him about testing he had done before  
10:30:09 16 when he was at the Air Force Research Laboratory. You all  
10:30:12 17 heard that that laboratory is one of the preeminent  
10:30:16 18 laboratories either in the country and potentially the world at  
10:30:20 19 testing these types of things.

10:30:22 20 You heard from Dr. Stephenson, any product that might  
10:30:25 21 test a human being in the military is being tested by either  
10:30:29 22 the Air Force Lab or the Army lab.

10:30:33 23 And they tested it in 2008, and they concluded in this  
10:30:37 24 report on which Mr. McKinley's name is listed, that it provides  
10:30:43 25 very good attenuation, and that it seems to work as advertised.

10:30:49 1 Okay. So Mr. McKinley tries to explain this one away  
10:30:59 2 and he says, well, I wasn't really the lead author; well, I'm  
10:31:02 3 not really sure I agree with everything, you know, that was a  
10:31:06 4 report looking at comparison products. He had explanation  
10:31:09 5 after explanation after explanation, but he does have to  
10:31:12 6 concede that even in that study, 66 to 75 percent of his test  
10:31:17 7 subjects were able to get a good fit. He does admit that. It  
10:31:24 8 doesn't seem like a product that doesn't fit anyone.

10:31:29 9 But then he tests it again in October 2014. And I  
10:31:34 10 don't know if you all remember this, but this was the  
10:31:38 11 presentation that Mr. Tracey asked Mr. McKinley about and he  
10:31:43 12 didn't show it. He just said, oh, did you test it in 2014 and  
10:31:50 13 asked: This was not about fit testing or REAT testing, and Mr.  
10:31:56 14 McKinley said, "Correct," and he didn't show you the testing.

10:32:01 15 And then on cross-examination, we had a chance to show  
10:32:06 16 this to you. And it says right on there that it involved REAT  
10:32:12 17 testing under two different ANSI standards, S12.6-2008 and --  
10:32:25 18 that should be 12.8-2007. Correct? And he had to say correct.

10:32:33 19 Why didn't they talk about that?

10:32:38 20 Because if you look at the data, Mr. McKinley had to  
10:32:41 21 concede that, when you look at the data, the Combat Arms green  
10:32:46 22 end was getting the highest or equal to attenuation as the  
10:32:50 23 other products at every single frequency. He agreed, it  
10:32:58 24 performed very well.

10:33:03 25 A qualified, well recognized testing expert has tested

10:33:08 1 the Combat Arms Earplug Version 2 on two separate occasions --  
10:33:14 2 one of them a two-year study -- and concluded that it had very  
10:33:19 3 good attenuation and it performed very well. That's  
10:33:25 4 significant evidence.

10:33:26 5 Then Dr. Lustig testified. And he said that folding  
10:33:30 6 back the flanges is a defect in and of itself. And he said, if  
10:33:35 7 you fold back the flanges, they might -- they might break, they  
10:33:39 8 might create another seal problem.

10:33:41 9 Well, you heard from Dr. Casali that folding back the  
10:33:44 10 flanges is something that was anticipated as far back as the  
10:33:47 11 patents, and it's something you do actually clean the earplug.

10:33:52 12 So what's the basis for Dr. Lustig coming in here and  
10:33:55 13 saying that, if you fold back the flanges, that's a problem, it  
10:33:59 14 shouldn't be manipulated?

10:34:01 15 Well, he showed you all two documents, and he pulled  
10:34:04 16 out highlights that said the product should not be manipulated  
10:34:07 17 in any way, and the other one talked about like manufacturing  
10:34:13 18 defects, like what they look for in the product when it's  
10:34:15 19 coming out the production line. And it said to look for, I  
10:34:21 20 think, maybe inverted flanges. All right. So that might sound  
10:34:24 21 compelling, if the company says don't fold the flanges or don't  
10:34:27 22 manipulate it, except here is the problem:

10:34:30 23 The documents that were shown to you were for  
10:34:33 24 different products and products that are not dual-ended. You  
10:34:36 25 wouldn't fold the flanges back on the Version 4 or on the

10:34:40 1 UltraFit. But you weren't told that until cross-examination.

10:34:47 2 And that's what cross-examination really is, it's  
10:34:50 3 subjecting opinions to scrutiny. It's seeing: Do those  
10:34:56 4 opinions hold up under closer examination? And so I would put  
10:35:01 5 to you that it's important to think about how well did some of  
10:35:04 6 these opinions hold up when they were asked questions about  
10:35:09 7 them and shown evidence.

10:35:11 8 Mr. Baker. And we're going to talk about Mr. Baker at  
10:35:16 9 length. But when you consider the credibility of Mr. Baker,  
10:35:20 10 which is a hugely important part of the evidence in this case,  
10:35:26 11 which we'll talk about why specifically, you should take into  
10:35:30 12 account whether changing stories happened.

10:35:34 13 It's something that the jury instructions mentioned  
10:35:37 14 this morning, the questions you should ask yourself, does  
10:35:41 15 someone's story change over time, it's part of evaluating  
10:35:45 16 credibility. And this was relating to how Mr. Baker got his  
10:35:48 17 first pair of Combat Arms Earplug Version 2.

10:35:52 18 And in four sworn -- well, in three sworn statements,  
10:35:58 19 a deposition and in his expert's report, he said he got them in  
10:36:01 20 basic training at Fort Benning. No equivocation, no  
10:36:05 21 hesitation, not "I don't remember." That was just a statement.

10:36:10 22 And it wasn't until we had a chance to ask questions  
10:36:13 23 of Lt. Col. Kevin Hannah, who again has no interest in this  
10:36:17 24 litigation one way or the other, about, you know, how were the  
10:36:21 25 purchasing decisions made at Fort Benning. And he said, we

10:36:26 1 | didn't buy them for basic training during 2004 to 2006. You  
10:36:30 2 | heard his testimony. And the very next day Mr. Baker changes  
10:36:36 3 | his sworn statement. And now he's not really sure how he got  
10:36:40 4 | his first pair.

10:36:41 5 |           Dr. Packer. Dr. Packer had Mr. Baker either fly or  
10:36:48 6 | drive, I actually don't know, from Laramie, Wyoming, to St.  
10:36:54 7 | Louis, Missouri, to meet with him.

10:36:56 8 |           He didn't do testing. He did have him put the earplug  
10:36:59 9 | in his ear and take a picture, but he wasn't doing testing,  
10:37:03 10 | which we'll talk about a little bit later, but he did know that  
10:37:06 11 | he was interviewing Mr. Baker, and Mr. Baker knew he was coming  
10:37:09 12 | to give important facts that would form the basis of Dr.  
10:37:14 13 | Packer's opinions. It was a conversation between Mr. Baker and  
10:37:17 14 | Dr. Packer, and Dr. Packer took notes. He took comprehensive  
10:37:21 15 | notes.

10:37:27 16 |           We don't have those notes. We know almost by accident  
10:37:33 17 | that they exist, and we only found out because Dr. Packer said  
10:37:36 18 | he had a typo in the notes that he typed up and included in his  
10:37:40 19 | expert report. And when we asked how do you know it's a typo,  
10:37:45 20 | he said, well, my handwritten notes said a different date.  
10:37:49 21 | What do you mean, your handwritten notes? I got rid of those.  
10:37:53 22 | Well, I didn't say I destroyed them. I just threw them away.  
10:37:58 23 | As if there's a meaningful distinction between those two  
10:38:03 24 | things.

10:38:03 25 |           Mr. Brock. Mr. Brock came in here. He was a

10:38:06 1 distributor. Don't need to quibble about whether one, two,  
10:38:13 2 three, how big his role was. He was a distributor for a period  
10:38:16 3 of time. He is not an expert. His role as a distributor was  
10:38:20 4 to receive the product and send it back out. He in some  
10:38:23 5 instances didn't even receive the product. It just went  
10:38:26 6 through his company as a middleman.

10:38:28 7 But he came in here and he said he's so troubled by  
10:38:33 8 what he's learned about this product that he would give back  
10:38:36 9 his profits. But when Mr. Bhimani asked him, well, what is  
10:38:41 10 that based on? Do you have any information that the product is  
10:38:45 11 actually defective? He said, no, I don't have any knowledge,  
10:38:50 12 and I haven't looked at any other documents. I looked at the  
10:38:53 13 documents that the plaintiff's lawyer had showed me during my  
10:38:56 14 deposition.

10:38:57 15 And then Admiral Leslie, who has had a very impressive  
10:39:02 16 career. I mean, I am -- what she's done is very impressive. I  
10:39:07 17 don't take that away from her. But she came in here and made  
10:39:11 18 really serious accusations of the company. I mean, she said  
10:39:14 19 the company should be debarred, I mean, 3M can't do any  
10:39:19 20 dealings with the government. No one else has said that, by  
10:39:21 21 the way, no one has ever suggested that. She just threw that  
10:39:26 22 out here sitting on the stand. That's serious.

10:39:28 23 And we're going to talk about the substance of her  
10:39:31 24 opinion, but I think it's really important that she showed you  
10:39:34 25 all a spreadsheet as evidence that there was a problem with the

10:39:38 1 earplugs and that there was a high rate of defect, except she  
10:39:44 2 didn't show you all the one that had the footnote that  
10:39:49 3 explained they went digging through the inventory to find  
10:39:56 4 out-of-spec plugs because they were testing the calibration  
10:40:02 5 equipment. So they wanted to find plugs that had measured  
10:40:06 6 outside of the range, and in fact, the footnote notes that they  
10:40:10 7 couldn't even find ones that were on the low side.

10:40:15 8 And what, you know, import that has in your evaluation  
10:40:20 9 of whether there is a problem with the plug, I don't know. But  
10:40:24 10 the fact that you weren't shown that I would suggest is  
10:40:29 11 significant.

10:40:32 12 Consistency. Were Mr. Baker and his witnesses  
10:40:35 13 consistent in their testimony? And this comes out of the jury  
10:40:38 14 instruction itself. Did the witness's testimony differ from  
10:40:43 15 other testimony or other evidence?

10:40:47 16 Mr. McKinley. He was asked: Was there any study in  
10:40:53 17 the world done using the EPA labeling standard on the Combat  
10:41:02 18 Arms Earplug Version 2? And he said, oh, oh, yes, actually  
10:41:06 19 there was.

10:41:08 20 And Mr. Tracey said we'll come back to that. They  
10:41:12 21 didn't. They didn't even come back to it during Mr. McKinley's  
10:41:19 22 testimony. And why? Because that evidence is inconsistent  
10:41:24 23 with his opinion. An independent laboratory tested the Combat  
10:41:30 24 Arms Earplug Version 2 using the exact same method as the 015  
10:41:34 25 and the 017 tests and it got an NRR of 23.

10:41:38 1 The plaintiffs are saying that an NRR of 22 is fraud.  
10:41:43 2 That's the claim, it's fraud, that's what they're saying. And  
10:41:48 3 an independent laboratory got a 23.

10:41:52 4 You saw a slide from Mr. Buchanan that the 22 has  
10:41:56 5 never been replicated. Those are the different ones up there  
10:42:00 6 actually using different test methods. But it has been  
10:42:03 7 replicated. It was replicated by another laboratory that you  
10:42:08 8 heard from Dr. Casali tests the vast majority of commercial  
10:42:14 9 hearing protection devices in the United States, and that's  
10:42:16 10 when the attacks on Kevin Michael began. Not Mr. McKinley  
10:42:22 11 showed this to you, talked to you about it, explained why he  
10:42:26 12 didn't place much stock in it. He didn't show it to you at  
10:42:30 13 all.

10:42:30 14 And it was only when we brought it out on  
10:42:33 15 cross-examination that now suddenly he has all these criticisms  
10:42:37 16 about a scientist who served with him on an ANSI working group  
10:42:43 17 and who runs a major laboratory that is certified by a national  
10:42:48 18 standards organization.

10:42:50 19 And he says, well, the NRRs are always just -- they're  
10:42:53 20 jacked up really high; that's what Michael & Associates is  
10:42:57 21 famous for. Except they were hired by 3M's competitor. And  
10:43:03 22 you heard a lot about ongoing litigation between 3M and Moldex  
10:43:09 23 related to patents and business disputes. He was hired by a  
10:43:13 24 competitor.

10:43:13 25 And just use your common sense. Do you think a

10:43:17 1 competitor hired Michael & Associates to get a high NRR on a  
10:43:21 2 competitor's product?

10:43:26 3 **THE COURT:** Ms. Branscome, I need you to come up here,  
10:43:28 4 please. I don't care, Mr. Buchanan or Mr. Tracey, can join  
10:43:36 5 you.

10:43:42 6 *(Bench conference between the Court and counsel:)*

10:43:44 7 **THE COURT:** Did Mr. Bhimani not discuss with you our  
10:43:48 8 discussion this morning before you came into the courtroom  
10:43:50 9 about this slide?

10:43:51 10 **MS. BRANSCOME:** He said that I needed to frame it in  
10:43:53 11 terms of the reliance on it, which is why this is all in the  
10:43:57 12 context of Mr. McKinley.

10:43:58 13 **THE COURT:** I told him you had to tell the jury they  
10:44:01 14 could not consider this for the truth.

10:44:03 15 **MS. BRANSCOME:** Oh, I can do that.

10:44:04 16 **THE COURT:** No. You, in talking about it in terms of  
10:44:06 17 the truth, you said they had an NRR of 23. You didn't connect  
10:44:09 18 that to Mr. McKinley. The slide is up there, but you're also  
10:44:13 19 talking -- so you're going to have to clear this up to my  
10:44:15 20 satisfaction or I'm going to clear it up. They need to know  
10:44:18 21 they cannot consider the 23 for the truth of the results of  
10:44:21 22 that test.

10:44:22 23 **MS. BRANSCOME:** This is in my credibility section,  
10:44:24 24 Your Honor. If that hasn't been clear, Your Honor, I'll clear  
10:44:26 25 it up.

10:44:27 1 **THE COURT:** It's not. And I know you weren't in here  
10:44:29 2 with my discussion with Mr. Bhimani, but I --

10:44:31 3 **MS. BRANSCOME:** That's fine.

10:44:32 4 *(Bench conference concluded.)*

10:44:41 5 **THE COURT:** If you'll go back to the former slide,  
10:44:43 6 please.

10:44:45 7 **MS. BRANSCOME:** Certainly. Are we all right, Your  
10:44:50 8 Honor?

10:44:50 9 **THE COURT:** I'll let you know.

10:44:52 10 **MS. BRANSCOME:** I just meant, may I proceed?

10:44:54 11 **THE COURT:** Yes.

10:44:56 12 **MS. BRANSCOME:** All right.

10:44:57 13 You heard from Judge Rodgers that the testing from  
10:45:00 14 Michael & Associates falls into a unique evidence category;  
10:45:05 15 it's called hearsay. And what that means is you can consider  
10:45:09 16 it not for the truth of the testing but for the credibility  
10:45:17 17 that it has to the plaintiff's case on whether their experts  
10:45:21 18 relied on it, whether they told you about it. And then you can  
10:45:26 19 do the same with our case and did our experts, were they  
10:45:32 20 reasonable in relying on it in coming to their ultimate  
10:45:35 21 conclusions.

10:45:36 22 And so, how does that fit in the framework if you're  
10:45:40 23 evaluating Mr. McKinley?

10:45:42 24 It comes into play if you ask yourself, if he reached  
10:45:45 25 the opinion that the Combat Arms Earplug Version 2 was

10:45:49 1 defective but he didn't tell you about evidence that's contrary  
10:45:54 2 to that opinion, does that call into question the basis for his  
10:46:00 3 conclusion.

10:46:02 4 **THE COURT:** Ladies and gentlemen, Ms. Branscome is  
10:46:04 5 absolutely correct in the way she's described that to you, but  
10:46:07 6 I want to make sure you understand. You may not consider the  
10:46:10 7 NRR of 23 on the Michael study for the truth.

10:46:16 8 **MS. BRANSCOME:** Thank you, Your Honor.

10:46:18 9 We also had disagreements between experts. Dr.  
10:46:24 10 Lustig, who did not specifically examine or look at Mr. Baker's  
10:46:29 11 case. There's nothing wrong with that, but he didn't. He said  
10:46:32 12 in court that a personal attenuation rating would be able to  
10:46:35 13 tell you the level of attenuation a specific person was  
10:46:40 14 obtaining from a hearing protection device. It sounds like  
10:46:44 15 pretty important information to have if you're saying that a  
10:46:47 16 device doesn't protect someone.

10:46:50 17 So Dr. Lustig, who wasn't looking at Mr. Baker  
10:46:54 18 specifically and wasn't going to be cross-examined about the  
10:46:58 19 conclusions he drew, says, yes, a personal attenuation rating  
10:47:03 20 would give you information about whether that product is  
10:47:06 21 working.

10:47:08 22 So then we got to ask Dr. Packer, who is the person  
10:47:11 23 who had the opportunity to do that testing. And he had to  
10:47:16 24 admit right away, no, I didn't do it, I had him at my office,  
10:47:21 25 which is part of a large medical complex and I can do testing,

10:47:25 1 but I didn't do it.

10:47:27 2 And what's his explanation? His explanation is that  
10:47:30 3 it just wouldn't tell you a whole lot.

10:47:39 4 Mr. Baker on direct said that he was told to wear the  
10:47:44 5 yellow end of the Combat Arms. The first time I had heard  
10:47:47 6 that. Got up on cross-examination: Did someone tell you to  
10:47:53 7 wear the yellow end of the Combat Arms in the Stryker?

10:47:56 8 No, no one with the military told me to wear the  
10:47:58 9 yellow end of the Combat Arms in the Stryker.

10:48:01 10 Nothing changed except the person asking the question.

10:48:07 11 Dr. Packer, on direct, he talked about his  
10:48:16 12 differential diagnosis, he had a long list of things that he  
10:48:20 13 ruled out. And when he was asked, what does ruled out mean;  
10:48:22 14 explain your methodology; what are you doing; he said, it means  
10:48:25 15 it's excluded from possibility.

10:48:28 16 So that long list of things, which included  
10:48:30 17 unprotected exposure to firearms in Iraq and noise exposures in  
10:48:34 18 the Stryker, he said, nope, I ruled them out, and my definition  
10:48:38 19 means it's excluded from possibility.

10:48:41 20 Except when we had a chance to ask questions of Dr.  
10:48:44 21 Packer about how he could rule out unprotected exposure to  
10:48:51 22 gunfire, he said, well, ruling out doesn't really mean that; it  
10:49:01 23 doesn't mean that's completely off the table. And instead, not  
10:49:05 24 only does it not mean it's completely off the table, he said it  
10:49:10 25 can contribute to Mr. Baker's hearing loss.

10:49:17 1 So on direct he said he's ruled it out, excluded it  
10:49:22 2 from all possibility, but when he's challenged on whether that  
10:49:26 3 makes any sense, to rule out unprotected gunfire when someone  
10:49:29 4 has muffled hearing in their left ear afterwards, he has to  
10:49:33 5 admit that it can contribute.

10:49:36 6 Again, the only difference is the person asking the  
10:49:39 7 question.

10:49:39 8 Mr. Brock. He has real concern about the product when  
10:49:49 9 Mr. Buchanan is asking him questions. But when he's asked  
10:49:53 10 questions by Mr. Bhimani about those concerns, he says, "I do  
10:49:59 11 not have any knowledge."

10:50:02 12 Admiral Leslie. 80 percent of those items were  
10:50:13 13 defective. That's the statement she made. When asked on  
10:50:18 14 cross-examination: Well, what does that mean? Do you know  
10:50:20 15 anything about what that means on that document?

10:50:23 16 I don't know what the defect was. I don't think I  
10:50:25 17 need to get into that level of technical expertise because I  
10:50:31 18 don't have it.

10:50:41 19 So if a witness will come in here and look at you and  
10:50:45 20 say, 80 percent of the items were defective, ask yourself  
10:50:49 21 whether they should know that before they say it.

10:50:51 22 Now, let's look at the contents, the core of the  
10:51:02 23 opinions. Three truths:

10:51:03 24 Mr. Tracey stood up in his opening statement and said:  
10:51:06 25 These are my promises, I will prove these, I will come back to

10:51:10 1 you and they will be proven. And Mr. Buchanan stood up and  
10:51:13 2 walked through some documents. So I want to take these head on  
10:51:18 3 to see if they were actually proven.

10:51:20 4 The first one, just to orient: It sold its new,  
10:51:29 5 unusual Combat Arms Earplug without first testing it.

10:51:33 6 Is it an accurate statement that some product was sold  
10:51:37 7 before the NRR label was in place? Yes, that is accurate. But  
10:51:44 8 the question is: What is the significance of it? Does it  
10:51:48 9 matter or is it just an attempt to make you think that the  
10:51:53 10 company has bad motives, bad intentions? Because you need to  
10:52:01 11 look at, did it make a difference and certainly did it make a  
10:52:05 12 difference for Mr. Baker.

10:52:06 13 Mr. Berger explained that, prior to the communications  
10:52:10 14 that he was having about we don't have data and he was sending  
10:52:13 15 the plugs to ISL and the communications back and forth, had the  
10:52:19 16 military ever asked the company to do REAT testing before they  
10:52:23 17 placed those initial orders? And if you remember, those were  
10:52:26 18 orders by Doug Ohlin, who certainly was involved and knew about  
10:52:30 19 the product; and John King, who wanted to use it for C-TAC, and  
10:52:38 20 they each wanted a thousand pairs. And the question was: Did  
10:52:42 21 they ask you for test data? Did they ask for an NRR? Did they  
10:52:47 22 ask for impulse noise testing? And the answer was, no,  
10:52:52 23 because, as Mr. Berger had explained, the military had been  
10:52:55 24 trying to develop this technology for years, and they wanted to  
10:52:59 25 get their hands on it, and they wanted to get their hands on it

10:53:03 1 to start testing it.

10:53:04 2 This is from June 1999. This is the study that you  
10:53:12 3 all heard about that was for the urban warfare training, and  
10:53:15 4 they were trying to figure out how much the earplug could  
10:53:19 5 withstand. And you heard from the plaintiff that the yellow  
10:53:22 6 end can only be a few shots. And I'd ask you to read that  
10:53:26 7 email by Ted Madison. What he's saying is that a person being  
10:53:30 8 exposed to someone firing an entire box of rounds, they might  
10:53:38 9 be better off wearing double hearing protection. It's not  
10:53:42 10 anything unique to the Combat Arms Earplug Version 2. It was  
10:53:45 11 an audiologist saying, taking a gunshot from 160 down to 140,  
10:53:53 12 you still might want to be extra cautious. So take a look at  
10:53:58 13 the email. There's nothing about the Combat Arms specifically.  
10:54:01 14 It was just being cautious around gunfire. And in fact, the  
10:54:05 15 evidence about the performance of the product under worst-case  
10:54:08 16 scenarios was 276 rounds in a reverberant environment.

10:54:14 17 And Mr. Berger explained the context for what was  
10:54:22 18 going on in those early days: How did the product come to be,  
10:54:27 19 what was the need that the military was looking to satisfy, who  
10:54:34 20 all is testing the product, why it got shortened. And then  
10:54:42 21 eventually the company decides it wants to sell the product  
10:54:46 22 commercially, and so they begin REAT testing. And then  
10:54:50 23 eventually they release the consumer version, and all of that  
10:54:53 24 information gets sent to Mark Little.

10:54:55 25 Second, when 3M did finally test, the tests showed its

10:55:00 1 Combat Arms Earplug, CAEv2 earplug, didn't work.

10:55:06 2 And for this, plaintiff rely on the 015 -- really, the  
10:55:14 3 015 test. Fundamentally, that's the evidence that the  
10:55:18 4 plaintiffs have that the plug doesn't work. Not studies, not  
10:55:22 5 papers, not even testing by their own experts. It's that one  
10:55:25 6 test. But even their own expert had to admit that all of the  
10:55:29 7 REAT testing done by the company -- 015, 016, and 017 -- met  
10:55:34 8 the military's requirements.

10:55:37 9 The issue was, if you added the option of folding back  
10:55:41 10 flanges on some people, could you reduce variability. That's  
10:55:49 11 the difference between 015 and 017. And they found, when they  
10:55:54 12 could fold back the flanges on someone, if they needed it, the  
10:55:57 13 NRR was a 22, and so they packaged it accordingly.

10:56:02 14 That's not evidence that there's a defect with this  
10:56:05 15 product. It just means it might not fit some people. And you  
10:56:11 16 all heard over and over again that earplugs don't fit everyone.  
10:56:16 17 A single earplug doesn't fit everyone and that doesn't mean  
10:56:19 18 that something is wrong with it.

10:56:21 19 The NRR of 22, they're not even quibbling. That's  
10:56:26 20 where it should have been. That's in the range of competitor  
10:56:29 21 products. But we went beyond that, and we actually had experts  
10:56:38 22 who either had tested the Combat Arms Earplug Version 2 in the  
10:56:40 23 past or we asked them to test it in this case.

10:56:47 24 Dr. Casali had done a field study in which -- I think  
10:56:52 25 they were recruits, ROTC recruits at Virginia Tech, did a field

10:56:57 1 study where they wore the Combat Arms Earplug Version 2 and two  
10:57:01 2 other devices that Dr. Casali explained were much more  
10:57:05 3 expensive. They were electronic devices which have their own  
10:57:10 4 issues. And then the earplug. And they went and they ran  
10:57:13 5 around the woods, and they did all kinds of strenuous physical  
10:57:16 6 activity, and the product performed well. Does that sound like  
10:57:22 7 a product that doesn't fit anyone? No.

10:57:25 8 Dr. Stephenson, he did that large scale study on  
10:57:29 9 construction workers. It's a NIOSH study. That's actually  
10:57:32 10 published. He was able to get good fit with the Combat Arms  
10:57:41 11 Earplug Version 2 and people were willing to wear it. And Dr.  
10:57:44 12 Stephenson said that was part of the study, was to actually get  
10:57:47 13 people who otherwise wouldn't wear hearing protection to wear  
10:57:51 14 hearing protection, because in the construction industry, they  
10:57:54 15 also have concerns about being aware of your surroundings so  
10:57:58 16 you don't get hit by a large piece of equipment backing up. It  
10:58:03 17 was an important advancement, and it was tested in a field  
10:58:06 18 study and found it performed well.

10:58:09 19 And then Dr. Flamme, I found it interesting that he  
10:58:12 20 was criticized that his testing was done for litigation, and he  
10:58:16 21 seemed a little puzzled by that question. I have to admit, I  
10:58:20 22 am as well. Because, if you hire an expert to find out if a  
10:58:23 23 product is defective, it would make sense that they would want  
10:58:26 24 to test the product to find out if it was defective. And it  
10:58:32 25 wasn't like Dr. Flamme had no experience with the Combat Arms.

10:58:35 1 He had just tested the later version. So he applied the same  
10:58:40 2 method to Version 2 to see how they performed.

10:58:43 3 The biggest criticism of the Combat Arms, at least as  
10:58:51 4 I understand it in plaintiff's case, is that it doesn't fit.

10:58:54 5 Dr. Casali explained, and you saw an animation about  
10:58:57 6 how he actually looked at whether or not this criticism of the  
10:59:02 7 stiff stem being too fat and stiff made a difference, and he  
10:59:07 8 explained to you all that he looked in the small ear, it  
10:59:11 9 doesn't get far enough in to matter, and in a large ear it can  
10:59:15 10 get into the beginning of the ear canal but the ear canal is  
10:59:19 11 large enough that it doesn't matter. The plaintiffs didn't  
10:59:22 12 show you anything contrary to that. They just said it was  
10:59:25 13 stiff. And then they showed some documents that say typically  
10:59:30 14 preformed earplugs have flexible stems.

10:59:33 15 But you heard from Dr. Casali, there's all kinds of  
10:59:36 16 earplugs that have stiff stems. There's nothing inherently  
10:59:39 17 wrong with it. But the plaintiffs didn't bring someone to show  
10:59:43 18 how that would specifically affect someone, and certainly not  
10:59:47 19 Mr. Baker.

10:59:48 20 The product works in the field. This is Dr. Casali's  
10:59:55 21 study. And it's consistent with a study that was done by the  
10:59:58 22 Army that also involved a field study, running around, shooting  
11:00:04 23 weapons from a variety of positions. And they determined that  
11:00:08 24 it ranked second out of all of the devices in every category,  
11:00:12 25 including expensive electronic devices.

11:00:15 1 This was Dr. Stephenson's study. Again, it's a  
11:00:20 2 published piece of literature. It was a study done by NIOSH.

11:00:25 3 And then Dr. Flamme's testing, and he showed you the  
11:00:35 4 results.

11:00:35 5 Now, Mr. McKinley said, if you want to understand how  
11:00:38 6 a hearing protection device performs, you'd want to look at  
11:00:42 7 both REAT testing and manikin testing, which is what the  
11:00:46 8 government has been doing for a very long period of time, and  
11:00:50 9 our experts did as well.

11:00:51 10 Dr. Casali concluded that it was important to him that  
11:00:59 11 an independent laboratory had found results consistent with  
11:01:05 12 E-A-RCAL's lab. Dr. Flamme did his own testing, and he showed  
11:01:13 13 how incredibly the yellow end of the plug performed to reduce  
11:01:19 14 the noise exposure from a gunshot. Exactly what it was  
11:01:28 15 intended to do.

11:01:29 16 And so they came in, and they offered their opinions  
11:01:31 17 and they explained to you the bases for those opinions, and all  
11:01:36 18 the different evidence that they had looked at, the scientific  
11:01:40 19 data, and they were largely cross-examined on the amount of  
11:01:45 20 money they had been paid and bias and shown company documents.

11:01:51 21 And your notes or your memory will tell you what you  
11:01:57 22 saw happen during those cross-examinations, but I would suggest  
11:02:02 23 they weren't really challenged on the substance.

11:02:05 24 Dr. Casali wasn't asked a lot of questions about, you  
11:02:07 25 know, how he came to the conclusion that the stiff stem

11:02:11 1 wouldn't either make it into the ear canal or it would have  
11:02:15 2 plenty of space. And on his field study, he was shown part of  
11:02:21 3 the conclusion of the article somehow suggesting that what he  
11:02:24 4 had said in court was not consistent with his own conclusions,  
11:02:28 5 and he asked to show the other part where he said it performed  
11:02:32 6 well, and Mr. Tracey said, no, your counsel can do that. And I  
11:02:37 7 got up and you all got to see what he said in his article was  
11:02:40 8 that it did well.

11:02:41 9           And Dr. Flamme, an enormous amount of his  
11:02:48 10 cross-examination was spent on the amount of time he had  
11:02:50 11 invested and the amount of money that the company had been  
11:02:53 12 paid. And you know what? I think it's a good thing that they  
11:02:57 13 invested that much time. Dr. Flamme and Dr. Stephenson didn't  
11:03:01 14 come in here and tell you that the product works without making  
11:03:06 15 sure. And that involved looking at the documents, but it  
11:03:11 16 involved looking at the scientific data and it involved  
11:03:15 17 actually testing the product. That's good science. That's  
11:03:19 18 what you'd want an expert to do. Did they dig in, did they  
11:03:23 19 really look at it and come to you ready to explain their  
11:03:27 20 opinions.

11:03:31 21           Third: 3M hid the truth about its Combat Arms Earplug  
11:03:36 22 for 15 years. That's the accusation. That's the basis for the  
11:03:42 23 fraud claims. That's really the core of the plaintiff's case,  
11:03:46 24 is that they say 3M hid information. Well, let's look at that.

11:03:55 25           The flange report. Plaintiffs say it stands for too

11:04:01 1 short, too fat, too stiff, and it loosens. First of all, we  
11:04:06 2 disagree with that characterization of what the flange report  
11:04:09 3 says.

11:04:10 4 Armand Dancer, you heard from Mr. McKinley, one of the  
11:04:13 5 smartest guys I know. Mr. Berger explained, even through all  
11:04:17 6 of their back and forth about the development of the product,  
11:04:22 7 Dr. Dancer never said it was defective or that there was a  
11:04:25 8 problem with it being too fat or too stiff.

11:04:30 9 Loosening. All earplugs loosen. You heard that from  
11:04:36 10 almost every witness including Mr. Baker.

11:04:39 11 So then the next theory is that it's imperceptible.  
11:04:44 12 And there was some discussion of whether hypothetically that  
11:04:47 13 might be able to happen in a laboratory where you have no sound  
11:04:50 14 to tell you if there's been a change, if you're in an  
11:04:54 15 absolutely silent room, you might not be able to detect it. It  
11:05:00 16 was a hypothesis. But you heard from witnesses that, in the  
11:05:03 17 real world, you'd be able to tell the difference if an earplug  
11:05:07 18 loosened.

11:05:08 19 But even the data itself isn't consistent with the  
11:05:12 20 idea that the plug was loosening during the tests. And Dr.  
11:05:19 21 Casali explained that the low frequency sound used in the REAT  
11:05:24 22 testing, the 125 hertz, that's the sound that finds the leaks.  
11:05:31 23 And so, if you were having loosening that made any difference  
11:05:34 24 in the performance of the plug during the ten minutes of the  
11:05:39 25 test, you'd see different numbers between the first test and

11:05:42 1 the last test. And when you look at the data, the data that  
11:05:47 2 the plaintiffs say proves that this product loosens, it doesn't  
11:05:51 3 support that. You didn't hear a response from plaintiffs on  
11:05:55 4 that.

11:05:56 5 But now let's talk about whether or not it was a  
11:05:59 6 secret.

11:06:00 7 You may remember I walked through the flange report  
11:06:03 8 with Mr. McKinley sort of conclusion by conclusion to see  
11:06:09 9 whether it's actually a secret.

11:06:10 10 So the fact that it was shortened, that wasn't a  
11:06:13 11 secret. The fact that it might be difficult to get the Combat  
11:06:20 12 Arms Earplug into some people's ears, you could just test that  
11:06:25 13 if you wanted to know. You just fit a group of people with the  
11:06:29 14 earplug. We're not hiding anything there.

11:06:31 15 Too stiff. Well, anyone with a pair of earplugs could  
11:06:35 16 tell that it's stiff. That's certainly not a secret.

11:06:37 17 And the phenomenon of an earplug loosening in the ear,  
11:06:42 18 that's been known forever. That was in that EPA document.

11:06:45 19 Nothing about the content of the flange report was a  
11:06:49 20 secret.

11:06:52 21 So then the only thing that remains is the idea that  
11:06:55 22 you might get better performance from the earplug if for some  
11:07:00 23 people you fold the flange back. That's really what it stands  
11:07:03 24 for.

11:07:06 25 So ask yourself was that information communicated.

11:07:09 1 Was the military and were customers told that fit might be  
11:07:17 2 improved for some people if they fold the flanges back because  
11:07:21 3 fundamentally that's what the flange report stands for.

11:07:24 4 And Elliott Berger just told you, "I told Doug Ohlin  
11:07:29 5 about this, and Doug is the kind of guy who would have asked  
11:07:33 6 questions, and we would have discussed the basis. Do I have a  
11:07:37 7 document for it? No. But I told him."

11:07:40 8 Okay. Mr. Buchanan went very hard after Mr. Berger  
11:07:44 9 and his credibility. Mr. Buchanan has the right to do that  
11:07:46 10 just like we did with their witnesses. So I'll leave it to you  
11:07:50 11 whether you found Mr. Berger credible or not. He doesn't have  
11:07:54 12 documents to support it. But you can also look to see, is  
11:07:58 13 there other evidence that corroborates Mr. Berger's story.

11:08:07 14 And before I play this clip, I want to pause for a  
11:08:10 15 moment.

11:08:11 16 This is Lt. Col. Merkley, chief of the Army hearing  
11:08:16 17 program. He's not a party to this case. He doesn't work for  
11:08:19 18 either side. He has no interest in this litigation whatsoever.

11:08:23 19 The plaintiffs found him credible and informative  
11:08:27 20 enough to play part of his testimony during their case, and we  
11:08:38 21 had an opportunity to play the rest.

11:08:40 22 And when you come into this courtroom and you say  
11:08:42 23 Elliott Berger is lying, he's not telling the truth about  
11:08:49 24 having told Doug Ohlin about folding back the flanges, the  
11:08:56 25 plaintiffs had this entire deposition, they had the transcript,

11:09:02 1 they had the video. They knew what Lt. Col. Merkley had said  
11:09:08 2 under oath, but they didn't play this portion for you.

11:09:14 3 (Excerpt of videotaped deposition published as  
11:09:15 4 follows:)

11:09:15 5 **Q.** Did you ever discuss whether or not to fold the flanges  
11:09:19 6 back on the opposite end of the plug with Doug Ohlin?

11:09:23 7 **A.** I remember Doug Ohlin giving that instruction on how to fit  
11:09:28 8 the earplug.

11:09:30 9 **Q.** What did he say?

11:09:31 10 **A.** And he said if you have -- well, I don't remember his exact  
11:09:34 11 words, but I remember, you know, if you needed to, you could  
11:09:37 12 fold back the flange on the earplug to get a good fit.

11:09:42 13 **Q.** And so, Doug Ohlin was telling the program managers at the  
11:09:46 14 various installations in the country that, if they needed to  
11:09:50 15 fold back the flanges on one side of the plug, they could do so  
11:09:54 16 to get a good fit?

11:09:55 17 **A.** Yes.

11:09:55 18 **Q.** And those conversations I think you said were happening in  
11:09:57 19 the '01 to '05 time period?

11:10:01 20 **A.** Right.

11:10:01 21 **Q.** And was the point of that conversation in the group setting  
11:10:03 22 that the program managers at the various installations would  
11:10:07 23 then take that information and go back to their particular  
11:10:11 24 facility and implement it?

11:10:11 25 **A.** Yes.

11:10:16 1 (End of videotaped deposition excerpt.)

11:10:16 2 Mr. Buchanan was at that deposition.

11:10:25 3 Doug Ohlin knew that fit could be improved in some  
11:10:30 4 people if the flanges were folded back on the Combat Arms  
11:10:34 5 Earplug. Not only did he know it, but he shared it with the  
11:10:38 6 audiologists in the Army, and then those audiologists went off  
11:10:44 7 to their bases, and they shared it at their bases. And all of  
11:10:50 8 this communication happened before Mr. Baker got his first pair  
11:10:54 9 of Combat Arms Earplug Version 2.

11:10:58 10 How did Doug Ohlin know about this if this was some  
11:11:02 11 secret locked in a cabinet for 15 years?

11:11:12 12 And significantly, in this case, that information went  
11:11:17 13 from Lt. Col. John Merkley and trickled down in the  
11:11:23 14 communications system within the United States Army and it  
11:11:26 15 landed squarely at Fort Lewis.

11:11:37 16 You heard from Col. Crawford. He was the chief  
11:11:42 17 otologist and neurologist at Fort Lewis. He knew about the  
11:11:45 18 flange fold.

11:11:47 19 You heard from Mark van Densen who was an audiologist  
11:11:51 20 at Fort Lewis, he was a technician. He knew about the flange  
11:11:54 21 fold.

11:11:55 22 And Lt. Col. Dan Ohama, who is the Hearing  
11:12:01 23 Conservation Program manager at Fort Lewis, at Fort Lewis where  
11:12:04 24 Mr. Baker was allegedly given his Combat Arms Version 2, at  
11:12:12 25 least his second pair, we're not totally sure about his first,

11:12:15 1 and was supposedly injured, everyone at that base knew about  
11:12:23 2 the flange fold.

11:12:24 3 It doesn't sound like a pretty good secret if the  
11:12:28 4 company was trying to hide something.

11:12:30 5 And then beyond that, if you want to talk about what's  
11:12:32 6 the evidence about whether Elliott Berger was hiding things,  
11:12:34 7 because a suggestion has been made that Mr. Berger was trying  
11:12:36 8 to conceal information, look at what he communicated  
11:12:42 9 personally.

11:12:42 10 He sent a letter to Major Mark little, who was on  
11:12:44 11 detail from the U.S. Army to NIOSH, giving him the 017 test  
11:12:52 12 results which say on the face of the test that flanges were  
11:12:59 13 folded back, and the fitting tip for the commercial product  
11:13:02 14 which says that fit could be improved if the sealing rings of  
11:13:05 15 the outward directed plug are rolled back upon themselves.

11:13:09 16 And we know that Major Mark Little read the  
11:13:16 17 information because he followed up with Mr. Berger and asked  
11:13:22 18 him questions and Mr. Berger responded.

11:13:24 19 That doesn't sound like something that's been under  
11:13:27 20 lock and key for 15 years.

11:13:30 21 And then we have the wallet card. Dr. Lustig came in  
11:13:35 22 here and said all this information was concealed, it was a  
11:13:41 23 defective product, the defects were concealed. But when he was  
11:13:44 24 confronted with the fact that individual soldiers get wallet  
11:13:48 25 cards, and those wallet cards have a big CHPPM logo on them.

11:13:54 1 You may remember Dr. Lustig said, oh, I don't think you can  
11:14:04 2 tell from this how to fold the flange back; I don't think it's  
11:14:09 3 obvious.

11:14:11 4 I don't know if he missed the picture or if it was  
11:14:15 5 intentional. I don't know. But this wallet card has a picture  
11:14:26 6 of the flange fold. And if you listened carefully, the  
11:14:29 7 question that the plaintiff's lawyers always asked everyone is:  
11:14:33 8 Is there a photo of the flanges folded back in someone's ear?  
11:14:37 9 They need that qualifier because there is a photo of the  
11:14:41 10 product with the flanges folded back on the wallet card that's  
11:14:45 11 handed out with them. And you might ask yourself does it make  
11:14:50 12 a difference whether a human head is attached to the yellow end  
11:14:55 13 or not.

11:14:57 14 Admiral Leslie. She came in here and she talked about  
11:15:02 15 this issue that came up in Mexico. And we spoke about this in  
11:15:05 16 opening, and then you heard Mr. Berger explain what was going  
11:15:08 17 on. And this is this whole issue with the 80 percent defect  
11:15:12 18 rate. And if you remember -- I know it was a while back -- Mr.  
11:15:16 19 Berger explained that what was going on is that their  
11:15:20 20 calibration equipment -- or their equipment for testing  
11:15:24 21 acoustic resistance was having calibration problems. And so it  
11:15:28 22 was spitting out numbers that were showing that the product was  
11:15:31 23 outside of range, but it was such a high percentage of product  
11:15:36 24 that it raised questions, is something wrong with the product  
11:15:39 25 or is something wrong with the machines testing the product.

11:15:43 1 And for anyone who has used some type of test  
11:15:46 2 equipment, the idea of recalibration or improper calibration,  
11:15:51 3 there's nothing nefarious about that. And so the company  
11:15:55 4 investigated because they wanted to know is something actually  
11:15:58 5 wrong with the product or with the actual boxes.

11:16:00 6 They figured out something was wrong with the boxes  
11:16:02 7 that related to the altitude difference between where the  
11:16:06 8 facility was in Mexico and where they had originally been  
11:16:09 9 tested in Indianapolis. And so, when they figured out that it  
11:16:15 10 was a calibration issue, they issued an internal waiver that  
11:16:23 11 essentially corrected the calibration range. So they knew the  
11:16:26 12 boxes were measuring at a number that wasn't accurate. Like  
11:16:28 13 standing on a scale, and it always starting at one pound  
11:16:32 14 instead of zero, you would just adjust, you know that that's an  
11:16:37 15 extra pound, and you think to yourself, I've got to shave a  
11:16:40 16 pound off. But that relates to the calibration, it doesn't  
11:16:43 17 relate to something being wrong with the product.

11:16:45 18 And Admiral Leslie had to acknowledge, there's nothing  
11:16:49 19 wrong with internal waivers. She admitted that easily.

11:16:51 20 And then when Mr. Bhimani tried to ask her questions  
11:16:55 21 about the substance of the defect, to engage with her on do you  
11:16:58 22 understand that this was a calibration issue, do you understand  
11:17:01 23 the consequences of it, what it meant for the performance of  
11:17:05 24 the product because it was out of spec, she just said, no,  
11:17:10 25 that's not my area of expertise, I don't know anything about

11:17:13 1 it, I'm not a technical person.

11:17:15 2 So they didn't bring you a technical person to say  
11:17:18 3 that this made a difference. And oh, by the way, the problem  
11:17:23 4 was resolved by 2004 before Mr. Baker ever got a Combat Arms  
11:17:31 5 Earplug Version 2. So you might also ask yourself, why is this  
11:17:33 6 relevant to Mr. Baker.

11:17:34 7 But even beyond that, Mr. Bhimani at least asked her,  
11:17:39 8 do you know if any of the products that measured out of spec  
11:17:43 9 were ever sold, did they get shipped anywhere, and she said,  
11:17:48 10 no, I don't know. And certainly no one came in here and told  
11:17:54 11 you that some product that was out of spec ever made it to Mr.  
11:17:58 12 Baker.

11:17:58 13 Okay. The CID report. Now, Mr. Buchanan sort of  
11:18:04 14 skipped over this or breezed through it during his closing  
11:18:07 15 argument. But you all have seen this a lot. And I can  
11:18:11 16 understand that hearing that there was a civil fraud  
11:18:16 17 investigation of the company related to this product might  
11:18:20 18 raise some questions. And I get that. But I'd ask you to just  
11:18:24 19 actually read the document and what it says in the document and  
11:18:28 20 what it doesn't say.

11:18:30 21 The conclusion is that, if there had been an issue  
11:18:39 22 with the product, then some people may not have purchased it.

11:18:45 23 "Interviews of U.S. Government personnel confirmed  
11:18:47 24 that, had they known about the February 2000 test results;  
11:18:51 25 i.e., that the CAE was too short for proper insertion in users'

11:19:01 1 ears and therefore did not perform well in certain individuals  
11:19:05 2 on the CAE, they may not have purchased the items."

11:19:07 3 And I would note that the plaintiffs have made a point  
11:19:10 4 over and over and over again that the company didn't recall the  
11:19:13 5 product. No, the company didn't recall the product, nor have  
11:19:17 6 they been ordered to recall the product. The conclusion of the  
11:19:21 7 investigation is written in the document that you have. I  
11:19:24 8 would just suggest that you read it.

11:19:25 9 But more importantly, I would suggest that you listen  
11:19:29 10 to a fact witness from the government when he was questioned  
11:19:35 11 about the importance of that conclusion.

11:19:38 12 (Videotaped deposition published as follows:)

11:19:41 13 **Q.** Did you ever know during any of your time in the military  
11:19:44 14 that, when the double-ended earplug was tested in 2000, they  
11:19:49 15 were having difficulty getting a proper fit because they  
11:19:52 16 couldn't get deep insertion of the double-sided plug?

11:19:57 17 **A.** I don't recall it being specific to the double-sided  
11:20:02 18 earplug. It was with any earplug. If you couldn't get a  
11:20:06 19 proper seal and fit, we would change -- switch it out for a  
11:20:11 20 different size.

11:20:14 21 **Q.** If you had been aware that 3M, when they tested the  
11:20:18 22 double-sided earplug, found that it often imperceptibly  
11:20:23 23 loosened, would you have used a different earplug for  
11:20:28 24 servicemembers other than the double-sided earplug?

11:20:31 25 **A.** I'm not sure. I mean, it was the same for any other

11:20:35 1 earplug. Again, it doesn't matter what earplug we used, if we  
11:20:40 2 weren't able to obtain a proper fit, we would have switched it  
11:20:44 3 out for them, changed to a different earplug, different size or  
11:20:49 4 different type.

11:20:51 5 (End of videotaped deposition excerpt.)

11:20:55 6 That's testimony from Dr. Ohama who was at Fort Lewis  
11:20:59 7 about the significance of those issues to him. You don't have  
11:21:03 8 to take our word for it. We just suggest that you listen to  
11:21:06 9 the fact witnesses and think about who played their testimony  
11:21:09 10 for you.

11:21:11 11 And last, the Air Force letter. I started in my  
11:21:16 12 opening statement by saying that we would be asking some  
11:21:19 13 questions about this letter which has played a prominent role  
11:21:24 14 in this trial. I believe nearly every witness has been asked  
11:21:28 15 about this letter.

11:21:30 16 We've learned that Col. Vietas is not an audiologist,  
11:21:35 17 he's not in the hearing conservation community. That's not his  
11:21:39 18 area of specialty.

11:21:40 19 You heard from Dr. Stephenson, some of the limitations  
11:21:44 20 of the role that he's in, that he's not speaking on behalf of  
11:21:48 21 the entire Air Force when he wrote this letter.

11:21:51 22 There's no scientific data, there's no scientific  
11:21:55 23 study attached to it. And the fact that the Air Force had  
11:21:59 24 actually stopped buying the product in 2016 and most of the  
11:22:02 25 bases where they checked didn't even have inventory left, which

11:22:06 1 at that point had aged three years or so.

11:22:13 2 But I would also note that the plaintiff's experts  
11:22:16 3 showed this document to maybe every witness, nearly every  
11:22:21 4 witness, except Dr. Packer.

11:22:27 5 Dr. Packer, who was with the Air Force and who was at  
11:22:33 6 the Hearing Center of Excellence and would be quite familiar  
11:22:35 7 with the chain of command at the Air Force, they didn't ask Dr.  
11:22:44 8 Packer about this document. I don't know why. But I find that  
11:22:47 9 interesting.

11:22:51 10 Did Mr. Baker's case withstand scrutiny? And what do  
11:22:58 11 I mean by that?

11:22:59 12 I said in opening statement that it was our hope that  
11:23:02 13 you all would be skeptics, you would be critical viewers of the  
11:23:05 14 evidence. And that's important. And you should be critical of  
11:23:08 15 the evidence that we presented. We believe it does withstand  
11:23:11 16 scrutiny. But if it doesn't, that's for you to decide.

11:23:15 17 Because at the end of the day, the plaintiffs bear the  
11:23:18 18 burden of proof. And it might be tempting to think, well, Mr.  
11:23:24 19 Baker served his country, and we respect that he did, he served  
11:23:28 20 it honorably. And he has a young family. You heard from his  
11:23:32 21 wife, Ms. Baker, about some of the struggles that they've had.  
11:23:36 22 He's injured. You might even think 3M has a lot of money. Mr.  
11:23:42 23 Buchanan spent considerable time establishing that fact. So  
11:23:45 24 maybe it wouldn't be so bad to just find for him and give some  
11:23:51 25 money.

11:23:53 1 But we would ask that you follow your oath as jurors  
11:23:58 2 and apply the law to the facts as you see them and determine  
11:24:07 3 whether Mr. Baker proved his case.

11:24:16 4 Sometimes saying no is hard. But we say, if you look  
11:24:20 5 at this evidence, they haven't met their burden with respect to  
11:24:24 6 Mr. Baker. So let's take a look.

11:24:27 7 Mr. McKinley. He acknowledged that 66 to 75 percent  
11:24:37 8 of the subjects that he attempted to fit with the Combat Arms  
11:24:43 9 Earplug Version 2 could get a good enough fit that he had them  
11:24:47 10 go forward into additional testing. So we start with the  
11:24:52 11 premise, because the plaintiff's experts have conceded it, that  
11:24:56 12 this plug can fit two-thirds to three-quarters of people.

11:25:05 13 One, I would say that really kind of ends the defect  
11:25:08 14 claim with respect to fit issues. But specifically with  
11:25:11 15 respect to Mr. Baker, it's an acknowledgment that there are  
11:25:13 16 people even under the plaintiff's theory that can get a good  
11:25:17 17 fit and get good attenuation values, very good I believe are  
11:25:23 18 the words that Mr. McKinley used.

11:25:24 19 All right. So what do we know about the fit of this  
11:25:28 20 earplug for Mr. Baker?

11:25:29 21 We know for Mr. Baker that he says he got a good seal.  
11:25:32 22 It always seemed to sit well in his ears, and it was  
11:25:37 23 comfortable enough that he could wear it on a 12-hour patrol.  
11:25:41 24 So a defect where the earplug couldn't fit in his ear canal  
11:25:46 25 geometry seems to be off the table. I would say, if the stem

11:25:50 1 is too fat, how could he comfortably wear it for 12 hours. And  
11:25:56 2 if it's too stiff, that's probably something that would bother  
11:25:59 3 him or it would be coming out all the time. But he didn't  
11:26:03 4 report that.

11:26:04 5 And even Dr. Packer, who watched Mr. Baker put in the  
11:26:09 6 earplug, he said it was an adequate fit. He wouldn't give me  
11:26:14 7 good. Okay. But it was adequate and it was a deep fit.

11:26:20 8 And you heard from Dr. Casali that what matters is --  
11:26:24 9 remember the contact patch? You want the silicone on the  
11:26:28 10 Combat Arms Earplug Version 2 to make contact with the surface  
11:26:31 11 of the ear canal. That's what protects against leaks.

11:26:34 12 And Mr. Baker is getting a deep fit of the Combat  
11:26:40 13 Arms, which means he had the opportunity for all three flanges  
11:26:44 14 to make that seal.

11:26:51 15 So if two-thirds to three-quarters of the population  
11:26:54 16 can get a good fit, all of the descriptive evidence of Mr.  
11:26:59 17 Baker is that he got a good fit, if you're going to come in  
11:27:03 18 here and say it didn't protect him, wouldn't it be worth  
11:27:07 19 testing? Have him measure sound with no earplug in, see what  
11:27:13 20 he gets, and then put the earplug in and test again. If it's  
11:27:18 21 incapable of fitting him, you'd see problems.

11:27:21 22 Well, Dr. Packer said, well, that would only tell you  
11:27:24 23 about the fit in that moment. Okay. Why not have him put it  
11:27:29 24 in, take the measurements, and go for a jog, and come back and  
11:27:33 25 take the measurement? He didn't have a good answer for why he

11:27:39 1 wouldn't do that. Or if they say that this product is  
11:27:42 2 defective such that if you start talking and chewing it comes  
11:27:46 3 loose, have Mr. Baker put the earplug in and have a  
11:27:49 4 conversation and test him afterwards.

11:27:51 5 They didn't do it. So they don't have proof that this  
11:27:58 6 earplug didn't fit Mr. Baker. There's no proof of that in this  
11:28:01 7 case. None. Mr. Baker wasn't a subject of the 015 test. So  
11:28:08 8 even the evidence that they point to that some people didn't  
11:28:12 9 get good fits, well, Mr. Baker wasn't one of those eight  
11:28:16 10 subjects. He's his own person, and ear canals are individual.  
11:28:19 11 There is no proof in this case, none, that the earplug didn't  
11:28:26 12 fit Mr. Baker.

11:28:28 13 And even if it didn't, which we don't concede, we  
11:28:35 14 think it did fit him well, Lt. Col. Battler explains that  
11:28:39 15 there's no such thing as a one-size-fits-all earplug. And so,  
11:28:43 16 if this really didn't fit Mr. Baker, you'd go to another one.

11:28:49 17 And this is where the role of the Army comes into  
11:28:52 18 play. The role of the Army comes into play because, by its own  
11:28:57 19 regulations, it's required to fit each soldier with a preformed  
11:29:05 20 earplug and check on that fit every year.

11:29:08 21 Now, from our standpoint, we think the Combat Arms  
11:29:11 22 Earplug Version 2 worked for Mr. Baker. But if you all, as a  
11:29:16 23 jury, determine that it didn't fit him, that's something that  
11:29:21 24 should have been checked by the Army. And if this was the  
11:29:27 25 wrong earplug for Mr. Baker, he would have been offered

11:29:31 1 something else.

11:29:33 2 And Mark van Densen, who is actually the audiology  
11:29:37 3 technician at Fort Lewis, said that, if he saw someone who  
11:29:42 4 wasn't getting a good seal or a good fit with the Combat Arms,  
11:29:45 5 he would actually try the flange fold first, and if that  
11:29:48 6 worked, they'd be good to go; and if it didn't work, they would  
11:29:53 7 try a different earplug.

11:29:54 8 That process didn't happen for Mr. Baker. That  
11:29:56 9 doesn't mean that he wasn't able to get a good fit on his own.  
11:29:59 10 But if he didn't get a good fit, that was the responsibility of  
11:30:03 11 the Army, and Mr. Baker was not individually fit by a  
11:30:08 12 medically-trained personnel.

11:30:10 13 All right. This is one of the most important issues  
11:30:16 14 in Mr. Baker's case. Did Mr. Baker use the Combat Arms Earplug  
11:30:23 15 Version 2 properly?

11:30:26 16 Why is this relevant? Well, it's relevant for some  
11:30:30 17 legal issues which you heard in the jury instructions this  
11:30:33 18 morning. But I would put to you that it's also relevant  
11:30:37 19 because there's an explanation for Mr. Baker's injury that  
11:30:44 20 doesn't involve a defective product.

11:30:49 21 Under the Army regulations, individuals who are  
11:30:55 22 exposed to noise are required to correctly wear approved and  
11:31:02 23 properly fitted hearing protectors when exposed to hazardous  
11:31:07 24 noise. You heard a lot about the Soldiers Creed, you heard a  
11:31:11 25 lot about, you know, Mr. Baker followed directions, he followed

11:31:15 1 orders. This was something Mr. Baker was required to do under  
11:31:18 2 the regulations. He had to correctly wear approved and  
11:31:22 3 properly fitted hearing protectors when exposed to hazardous  
11:31:26 4 noise.

11:31:27 5 And then, if you'll recall, when we looked at this  
11:31:29 6 document, there's actually the definition of hazardous noise,  
11:31:33 7 and that's where it talks about steady-state noise above 85 and  
11:31:37 8 certain types of impulse noise.

11:31:39 9 Not only was he required to wear hearing protection  
11:31:44 10 devices, he was also required to report if he had any issues  
11:31:48 11 with them or if he experienced problems. Those were the things  
11:31:53 12 that Mr. Baker was required to do.

11:31:55 13 Now, you heard from Mr. Buchanan briefly in his  
11:31:59 14 closing that dismounted soldiers were supposed to wear  
11:32:04 15 nonlinear hearing protection devices, meaning the yellow end;  
11:32:07 16 and that is true when Mr. Baker were to exit the Stryker. But  
11:32:13 17 when he's in continuous noise, he has to wear a hearing  
11:32:18 18 protection device that protects against continuous noise.

11:32:22 19 This is from a government document. It's actually the  
11:32:29 20 -- the red box, it's actually from the document that has the  
11:32:33 21 picture of the earplug that the plaintiffs -- they show a lot.  
11:32:35 22 So I'd ask you to take a look at this, this is D-GEN-378.  
11:32:40 23 Giant red box.

11:32:42 24 "The yellow tip of the earplug, green showing,  
11:32:49 25 provides inadequate protection for most steady-state noise

11:32:55 1 conditions."

11:32:57 2 That's in a military document. It's also in the  
11:33:01 3 Special Text, which is where the plaintiffs get the point  
11:33:05 4 about, you know, they wear the yellow end for dismounted  
11:33:09 5 operations, meaning out of the vehicle. In the Special Text  
11:33:13 6 itself, you can take a look at this one as well, D-GEN-1157,  
11:33:21 7 the yellow side will not provide protection against  
11:33:24 8 steady-state noise such as generator, vehicle, and aircraft  
11:33:27 9 noise.

11:33:27 10 But even beyond that, Mr. Baker had that information  
11:33:31 11 directly from 3M. So when you are asked to decide whether 3M  
11:33:38 12 warned Mr. Baker about information, remember that Mr. Baker's  
11:33:45 13 second pair came in a blister pack. It had information on the  
11:33:49 14 outside and the inside.

11:33:51 15 Now, there was a bit of confusion -- you may remember  
11:33:55 16 this -- that plaintiff's counsel, Ms. Hutson, showed a slide in  
11:33:59 17 opening that said that this was the information that Mr. Baker  
11:34:02 18 got, and then we got a chance to ask him and he said, no,  
11:34:05 19 that's not accurate, I got a white piece of paper. So then we  
11:34:09 20 went and we found the white piece of paper and Mr. Baker  
11:34:20 21 testified.

11:34:20 22 "And so that statement which is the caution statement  
11:34:23 23 would have been on the instruction sheet that you reviewed  
11:34:25 24 before you wore the yellow end of the earplug in the Stryker?

11:34:33 25 "Correct."

11:34:34 1 And what does the caution statement say? It says:  
11:34:38 2 "Inserting the yellow tip under conditions of  
11:34:42 3 continuous hazardous noise can result in underprotection and  
11:34:47 4 hearing loss."

11:34:48 5 And it's not only on the information sheet that was  
11:34:53 6 tucked inside the blister pack, it was on the back of the  
11:34:59 7 packaging itself. There's no question about this, and it's  
11:35:02 8 undisputed. No expert came in here to tell you that the yellow  
11:35:08 9 end would protect against hazardous noise because it's not  
11:35:11 10 designed to if it's steady-state.

11:35:13 11 And Mr. Baker was clear as day. This is his  
11:35:18 12 testimony:

11:35:21 13 **QUESTION:** So no one with the military told you to  
11:35:23 14 wear the yellow end, you made that decision on your own; is  
11:35:27 15 that correct?

11:35:28 16 **ANSWER:** That is correct.

11:35:29 17 **QUESTION:** And having read the instructions, correct?

11:35:34 18 **ANSWER:** Yes.

11:35:34 19 **QUESTION:** And you understood that it was important to  
11:35:36 20 follow the instructions for use to get a proper fit, correct?

11:35:40 21 **ANSWER:** Correct.

11:35:40 22 **QUESTION:** Well, more specifically then, even in the  
11:35:42 23 wrong environment, did you have an understanding that, if you  
11:35:45 24 put the yellow end in and you were in hazardous continuous  
11:35:50 25 noise, that could lead to hearing loss?

11:35:54 1 **ANSWER:** I assume so.

11:36:00 2 And so, what caused Mr. Baker's injury.

11:36:02 3 Now, with burden of proof, as defendants, we don't  
11:36:05 4 actually have the burden to come in and establish what caused  
11:36:08 5 it, but I think it may be helpful information to you as you're  
11:36:12 6 evaluating whether or not the plaintiffs have proven that it  
11:36:16 7 was a defect. Because if there's an explanation for Mr.  
11:36:19 8 Baker's injury that has nothing to do with a defect in the  
11:36:23 9 product, that could be important to your decision-making.

11:36:26 10 Now, Mr. Baker initially attributed his injury to an  
11:36:31 11 urban warfare training exercise. I wasn't entirely clear by  
11:36:36 12 the end of this trial what the plaintiff's theory was, but  
11:36:40 13 that's where it started.

11:36:47 14 Mr. Baker never told anyone about this event. He  
11:36:50 15 didn't tell the military, he didn't tell his wife, he didn't  
11:36:54 16 tell any physicians. In fact he said, after this event, that  
11:36:57 17 he had no health concerns.

11:36:58 18 Col. Crawford explained that, if a soldier has a  
11:37:05 19 change in their hearing, they're instructed to report it. And  
11:37:08 20 so, if Mr. Baker is someone who follows the rules, the fact  
11:37:12 21 that he didn't report any injury after some type of training  
11:37:17 22 incident is relevant.

11:37:18 23 And then we talked with Dr. Flamme after we got the  
11:37:23 24 description of what happened in the urban warfare training  
11:37:29 25 exercise that it was very different than what Dr. Packer

11:37:36 1 thought was going on when he reached his conclusion that that  
11:37:40 2 was the cause of Mr. Baker's injury. Instead of being live  
11:37:43 3 fire in a concrete structure in hallways, Mr. Baker was firing  
11:37:49 4 blanks from a treeline and with the muzzle of his weapon  
11:37:54 5 outside of a window. Those are important differences in  
11:37:58 6 whether or not this could cause injury.

11:38:00 7 And really the biggest one, in addition to the  
11:38:04 8 sporadic fire, is the fact that there were blanks. And Dr.  
11:38:10 9 Packer said blanks oftentimes do not even exceed the hazardous  
11:38:18 10 noise limit; and certainly, if he had the Combat Arms Earplug  
11:38:22 11 Version 2, he would have been protected.

11:38:24 12 And Dr. Packer had to concede that impulse noise less  
11:38:34 13 than 140 dBs is not hazardous.

11:38:37 14 So ask yourself -- this is plaintiff's theory of how a  
11:38:41 15 defect in the Combat Arms Earplug injured Mr. Baker. One, you  
11:38:49 16 might ask, well, what is the defect? Did it loosen? Was it  
11:38:53 17 too fat? Was it incompatible with his ear canals? Because I  
11:38:58 18 haven't heard explanation about what the defect was. We just  
11:39:02 19 keep hearing it's defective. But we don't know what happened  
11:39:05 20 to Mr. Baker.

11:39:06 21 And then ask yourself: Does the evidence support that  
11:39:09 22 he was injured at this training exercise; or, instead, is the  
11:39:13 23 evidence consistent that Mr. Baker, as a member of a Stryker  
11:39:18 24 battalion who spent significant time inside of an armored  
11:39:24 25 vehicle wearing the wrong hearing protection, that that might

11:39:30 1 be the explanation for his injury? What makes more sense?

11:39:38 2 He said he spent 24 hours in the vehicle sometimes.

11:39:42 3 And Mr. Buchanan addressed this very briefly in his closing --

11:39:47 4 **THE COURT:** Ms. Branscome, you have five minutes.

11:39:50 5 **MS. BRANSCOME:** Yes.

11:39:53 6 -- when he said that he wore the helmet and the helmet  
11:39:57 7 would have protected him, but I didn't hear Mr. Buchanan say  
11:40:00 8 anything about the half of the time that Mr. Baker spent in the  
11:40:03 9 Stryker wearing the yellow end.

11:40:06 10 Yes, the CVC helmet may have protected Mr. Baker when  
11:40:09 11 he was the driver or the commander, but what about when he  
11:40:14 12 wasn't?

11:40:15 13 And Dr. Packer, who tried to say the Stryker was a  
11:40:18 14 quiet vehicle, it wasn't even hazardous, you didn't even need  
11:40:22 15 to wear hearing protection in it if you were in it for a  
11:40:26 16 30-minute period of time, when acknowledged on a military  
11:40:32 17 document recommending engineering controls on the Stryker to  
11:40:35 18 reduce noise levels that said, wheeled vehicles, you shouldn't  
11:40:39 19 be in them without hearing protection for more than 57 seconds.

11:40:43 20 And Dr. Packer tried to say, well, that's not the  
11:40:46 21 Stryker, and I had to point him to the fact that the Stryker  
11:40:50 22 was included.

11:40:50 23 The incident in Iraq. It is undisputed that Mr. Baker  
11:40:59 24 was exposed to gunshots without a hearing protection device in  
11:41:05 25 his left ear. That is a hazardous noise exposure, it is

11:41:09 1 undisputed, and it's undisputed that that can cause hearing  
11:41:15 2 loss.

11:41:19 3 And not only was he exposed to gunfire, but Dr. Flamme  
11:41:24 4 explained that he had arrived at the site in the Stryker with  
11:41:28 5 hazardous continuous noise, he would have been exposed to  
11:41:32 6 hazardous impulse noise, and they would have left in the  
11:41:34 7 Stryker with more continuous hazardous noise. That type of  
11:41:39 8 injury to the human ear would compromise Mr. Baker's hearing.

11:41:42 9 And what you see is that he reported muffled hearing  
11:41:46 10 in his left ear after that event. And when he has his  
11:41:51 11 audiogram after he gets back from Iraq, you see a drop in  
11:41:57 12 hearing in the left ear where he didn't have the protection.  
11:42:01 13 And he's reporting ringing in the ears, unlike the urban  
11:42:05 14 warfare incident where there's no documentation, he himself is  
11:42:11 15 reporting symptoms following Iraq.

11:42:14 16 And before he got involved in this litigation, he told  
11:42:18 17 his doctors that his hearing loss started when he got back from  
11:42:23 18 Iraq, noise-induced 2007 to 2008; he told a potential employer,  
11:42:30 19 it was from Iraq 2007, 2008; he told his wife that the Stryker  
11:42:37 20 was extremely loud; and he told in a form that he thought was  
11:42:41 21 only going to his lawyers that he first noticed his hearing  
11:42:45 22 problem sometime in 2007 to -- while he was in Iraq.

11:42:51 23 His hearing then remains stable as he continued to use  
11:42:59 24 the Combat Arms. And then, when he stopped, he said his  
11:43:03 25 hearing loss was minor and only in his left ear. And then

11:43:08 1 after that, he continued to be exposed to noise, but this time  
11:43:15 2 wearing other hearing protection devices. And in standing at  
11:43:21 3 the roadside security checkpoint with large vehicles coming  
11:43:25 4 through, no hearing protection.

11:43:27 5 And so what happens to Mr. Baker's hearing after he  
11:43:31 6 switches to other hearing protection devices? A huge shift in  
11:43:38 7 the right ear.

11:43:40 8 The Combat Arms Earplug Version 2 worked for Mr.  
11:43:45 9 Baker.

11:43:49 10 And then today, Mr. Baker is doing well. He has  
11:43:57 11 denied concerns repeatedly over the years. He doesn't use  
11:44:03 12 hearing aids. He says he does pretty well without. We're  
11:44:07 13 glad.

11:44:07 14 But to come in here and ask you all to award money  
11:44:12 15 because he was exposed to a defective product, we suggest he  
11:44:18 16 needed more evidence, and not more in terms of volume but in  
11:44:23 17 terms of strength. Because here is -- here is what we  
11:44:30 18 brought --

11:44:30 19 **THE COURT:** Your time is up, Ms. Branscome.

11:44:33 20 **MS. BRANSCOME:** I thought I had ten seconds.

11:44:35 21 **THE COURT:** Not according to my clock.

11:44:37 22 **MS. BRANSCOME:** All right. Well, I got the hook.

11:44:38 23 Thank you, ladies and gentlemen.

11:44:39 24 **THE COURT:** Thank you.

11:44:41 25 Mr. Tracey, I believe you have 21 minutes remaining in

11:44:48 1 Mr. Baker's time.

11:45:01 2 **MR. TRACEY:** May it please the Court?

11:45:11 3 **THE COURT:** Yes, sir.

11:45:12 4 **MR. TRACEY:** Good late morning.

11:45:19 5 So after 128 slides and an hour-and-a-half of  
11:45:26 6 argument, there's something they cannot escape. It's something  
11:45:30 7 that, in spite of everything they said, they can't escape.  
11:45:35 8 They're in a box. They're trapped. And they're trapped by the  
11:45:41 9 U.S. Attorney's Office and the Department of the Army's  
11:45:43 10 investigation and the Air Force investigation.

11:45:48 11 Every single thing that she said, every single thing  
11:45:53 12 they knew, the Army knew when they were investigating, the Air  
11:45:56 13 Force knew, they knew there was a fit tip, they knew there was  
11:46:00 14 a wallet card, they went and talked to Brian Hobbs, the author  
11:46:05 15 of the WHISPr study. They knew every single thing that she  
11:46:09 16 used to defend her case when they found they committed fraud.  
11:46:15 17 Every single thing. Every one.

11:46:17 18 **MS. BRANSCOME:** Objection, Your Honor, may we  
11:46:19 19 approach?

11:46:19 20 **THE COURT:** All right.

11:46:24 21 *(Bench conference between the Court and counsel:)*

11:46:26 22 **MS. BRANSCOME:** I object, and I think that needs to be  
11:46:32 23 stricken. They did not find that we committed fraud. That was  
11:46:37 24 enormously prejudicial.

11:46:39 25 **THE COURT:** I disagree. You just need to restate that

11:46:42 1 argument and frame it in terms of what the Army knew; that, had  
11:46:45 2 they known, they would not have bought the plug. You need to  
11:46:50 3 restate that.

11:46:52 4 **MS. BRANSCOME:** I think it needs to be clarified there  
11:46:55 5 was not a determination of fraud.

11:46:56 6 **THE COURT:** I disagree. In your closing you brought  
11:46:59 7 up the fact nothing else happened --

11:47:03 8 **MS. BRANSCOME:** I said there was no recall.

11:47:04 9 **THE COURT:** You said there was no action taken by the  
11:47:07 10 order.

11:47:07 11 **MS. BRANSCOME:** I did not say that.

11:47:09 12 **THE COURT:** You said there was no order.

11:47:10 13 **MS. BRANSCOME:** To recall the product. That was  
11:47:12 14 accurate.

11:47:12 15 **THE COURT:** The characterization to the jury was that  
11:47:15 16 the military did nothing after the investigation, which, if  
11:47:17 17 that had come into the trial, you would have opened the door to  
11:47:22 18 the settlement.

11:47:22 19 I'm telling you, move on. It's overruled.

11:47:27 20 *(Bench conference concluded.)*

11:47:29 21 **MR. TRACEY:** May I proceed, Your Honor?

11:47:32 22 **THE COURT:** Yes, with that instruction.

11:47:37 23 **MR. TRACEY:** The U.S. Attorney's Office spoke to 16,  
11:47:41 24 17 witnesses, including the author of the WHISPr study who  
11:47:44 25 they're -- and they're so proud of that study. Rich McKinley,

11:47:49 1 they said we didn't bring you anybody that studied the product.  
11:47:52 2 We brought you the author of the WHISPr study.

11:47:55 3 And so the problem that they can't escape the box that  
11:47:58 4 they're in is that the Army and the Air Force already looked at  
11:48:02 5 all of this when they concluded this was a defective product.  
11:48:06 6 Every single fact that she spent 128 slides talking to you  
11:48:10 7 about was known. So that's the box they're in.

11:48:16 8 It's funny, I was sitting here listening to this.  
11:48:19 9 I've been -- I've been doing this a long time, maybe too long.  
11:48:25 10 And there was a time when a defendant had been -- if they had  
11:48:32 11 been investigated, if they had been investigated by the U.S.  
11:48:36 12 Attorney's Office, if they had been previously investigated and  
11:48:38 13 fined by the EPA, if other governmental bodies had made  
11:48:43 14 findings about their products, if you had evidence like we do  
11:48:47 15 that the company actually knew this product was defective in  
11:48:52 16 2015 when Brian Myers, internally at least, said we can't  
11:48:57 17 distribute the product -- once the flange report was  
11:49:01 18 discovered, Brian Myers said internally, before any lawyers  
11:49:05 19 were hired, before there was a jury in the box, before they had  
11:49:12 20 law firms and experts making a million bucks, before any of  
11:49:16 21 that happened, Brian Myers told us what we needed to know. And  
11:49:19 22 here is what he said:

11:49:34 23 "Either way, as I explained to you, we can't -- cannot  
11:49:41 24 distribute this product with the current NRR."

11:49:45 25 That is a deafening admission. They know this. They

11:49:49 1 know this. They know what the Feds found. They know what the  
11:49:53 2 Air Force found. They know what they internally concluded  
11:49:56 3 about their product and they thought they had gotten away with  
11:50:00 4 it.

11:50:00 5           Somebody much smarter than me said that the moral arc  
11:50:05 6 of the universe is long but it bends towards justice.

11:50:09 7           They have been running from this case for two decades.  
11:50:12 8 They thought they escaped. They thought they got away with it.  
11:50:16 9 They really did.

11:50:17 10           And so, that's their problem. Their problem is  
11:50:21 11 they're in a box of their own creation. Brian Myers, the Feds,  
11:50:26 12 the Air Force. And so this is the trap they're in.

11:50:32 13           And I said I've been doing this a long time. There  
11:50:34 14 was a time, in the face of that evidence, a defendant would  
11:50:38 15 come in and get on their knees and say, I can't believe I've  
11:50:41 16 done this. They would apologize to Lloyd Baker. They would  
11:50:46 17 have looked him in the eye and said, "I'm sorry for what I've  
11:50:49 18 done."

11:50:50 19           Under this record it's unbelievable to me that they  
11:50:52 20 have come in here, and they pointed fingers at Lloyd Baker and  
11:50:57 21 Rich McKinley and Mark Packer, honorable men who served our  
11:51:03 22 country, and they had the gall, the gumption to point fingers  
11:51:09 23 everywhere but in the mirror.

11:51:15 24           Can we play the Merkley clip, please.

11:51:15 25           (Excerpt of videotaped deposition published as

11:51:15 1 follows:)

11:51:27 2 **Q.** Prior to your involvement with the litigation, you had no  
11:51:29 3 awareness that the company folded back the flanges on the  
11:51:32 4 yellow end when it was trying to get high attenuations for the  
11:51:36 5 green end, correct?

11:51:38 6 **A.** No, correct.

11:51:40 7 **Q.** I think you told me just a moment ago, sir, there had been  
11:51:43 8 -- you didn't find any communications from the company or  
11:51:46 9 others to Doug Ohlin that there were problems with the plug,  
11:51:49 10 correct?

11:51:50 11 **A.** Correct.

11:51:50 12 **Q.** If the Combat Arms had a particular problem sealing or  
11:51:53 13 maintaining a seal, would that be something important to know?

11:51:59 14 **A.** Yes.

11:51:59 15 **Q.** If there were particular features about the Combat Arms  
11:52:02 16 that made it stiff or unable to conform to the geometry of ear  
11:52:08 17 canals such that it would loosen in a way that users didn't  
11:52:13 18 know, would that be important to know?

11:52:16 19 **A.** Yes.

11:52:16 20 **Q.** If the company had manipulated testing for the Combat Arms,  
11:52:20 21 is that something you'd want to know?

11:52:22 22 **A.** Yes.

11:52:22 23 **Q.** And you'd want to know early enough to make a difference in  
11:52:26 24 a decision to use it, right?

11:52:29 25 **A.** Yes.

11:52:29 1 Q. Not 16 years later or 19 years later, fair?

11:52:34 2 A. Sure, fair.

11:52:38 3 (End of videotaped deposition excerpt.)

11:52:38 4 They didn't know. That's why the Feds did what they  
11:52:46 5 did. That's why the Air Force did what they did.

11:52:50 6 This comical argument of this fitting tip, it's almost  
11:52:55 7 the most insidious thing they did was create this -- it's  
11:52:59 8 almost like they knew one day there was going to be a jury  
11:53:02 9 sitting in judgment, and we have to have some escape hatch from  
11:53:05 10 this disaster we've created. Who did we roll the flanges back  
11:53:10 11 in? We don't know. How am I supposed to know if I'm the guy?  
11:53:15 12 We don't know. Did you tell everybody that you folded it back  
11:53:19 13 one way but not the other? No.

11:53:21 14 What do you do with that? And then you call it a  
11:53:23 15 fitting tip, you don't call it an instruction, you don't say  
11:53:28 16 it's mandatory. What kind of gobbledegook is that?

11:53:34 17 And this case is not that complicated. It doesn't  
11:53:37 18 take 128 slides to explain this case. This case is about a guy  
11:53:41 19 that had no hearing loss when he entered the military. He wore  
11:53:43 20 their product. He has hearing loss after he leaves the  
11:53:46 21 military, and it continued progressing, as Dr. Packer told you  
11:53:49 22 and Dr. Crawford yesterday, hearing loss progresses.

11:54:06 23 I'm going to read or I'm going to put on the ELMO what  
11:54:10 24 Mr. Flamme said because he inadvertently told us the truth. He  
11:54:10 25 said:

11:54:15 1           **QUESTION:** Your conclusion, sir, your report was that  
11:54:17 2 it was Mr. Baker's cumulative exposure to all of these impulse  
11:54:21 3 noises, all of the impulse noises that he was exposed to during  
11:54:24 4 his military career together, with whatever continuous noise he  
11:54:29 5 may have been exposed to, that are the cause of noise-induced  
11:54:34 6 hearing loss. That was your opinion. That was what you shared  
11:54:34 7 with us.

11:54:40 8           **ANSWER:** Yes.

11:54:40 9           So the only thing we're really fighting about is,  
11:54:43 10 okay, was it some Stryker exposure where Mark Packer said he  
11:54:47 11 wasn't required to wear it because of the amount of time that  
11:54:50 12 he was in the back made it unnecessary? That's what this comes  
11:54:54 13 down to.

11:54:55 14           This is an easy case. It doesn't take 128 slides to  
11:54:58 15 explain it. It doesn't take an hour-and-a-half. He went in  
11:55:01 16 without injury, he came out with injury, and everybody agrees  
11:55:05 17 that Lloyd Baker wore the product.

11:55:13 18           One other thing. Ms. Branscome represented in her  
11:55:19 19 closing argument that this infrequent gunshot evidence didn't  
11:55:27 20 apply to Combat Arms. She told you it was some other  
11:55:30 21 discussion about hearing protection generally. But you have  
11:55:34 22 this document. It's in evidence, and it's specifically talking  
11:55:38 23 about the yellow end of the Combat Arms that Lloyd wore. They  
11:55:44 24 knew internally he can't wear this, that it's for infrequent  
11:55:50 25 gunfire. We've been laughing to ourselves: Is this the

11:55:53 1 occasional Combat Arms Earplug? Is it the once in a while?

11:55:59 2 How do you keep that information internal for a

11:56:02 3 decade-and-a-half when you're sending this guy to the range and

11:56:05 4 to Iraq and to Afghanistan? How do you keep that to yourself?

11:56:09 5 How do you have an internal conversation and then say, Nay,

11:56:18 6 Nay, nobody needs to know that.

11:56:21 7 This was always about money. In 2000 it was about

11:56:25 8 making money. Today it's about keeping money. It's always

11:56:29 9 been about money.

11:56:33 10 Your Honor, how much time do I have?

11:56:36 11 **THE COURT:** You've been 10 minutes. So 11 more

11:56:40 12 minutes, give or take a few seconds.

11:56:42 13 **MR. TRACEY:** Thank you.

11:56:44 14 This case, one of the ways you can evaluate damages,

11:56:50 15 I'm going to suggest, with Lloyd Baker, who everybody agrees --

11:56:59 16 every scientist -- maybe not every lawyer -- every scientist

11:57:04 17 that's looked at his records agrees he has profound hearing

11:57:08 18 loss, the hearing of a 60- or 70-year-old man. Everybody

11:57:13 19 agrees he has tinnitus bilaterally. Tinnitus, Dr. Crawford

11:57:18 20 told you, he inadvertently said, probably to their chagrin,

11:57:24 21 that if he had a cure for tinnitus, he'd be very wealthy, and

11:57:29 22 he said because everybody knows it's incurable, it's

11:57:33 23 relentless, you can't treat it, and it never goes away, ever.

11:57:38 24 It is what it is. That is his life.

11:57:42 25 He's got 40 years of that minute by minute, hour by

11:57:46 1 hour, day by day. And if you think about it, okay, well,  
11:57:50 2 what's the value of that? How much money -- how much money  
11:57:54 3 does 3M think this case is worth?

11:57:56 4 And I suggest that maybe you should think about how  
11:58:00 5 much they spent defending it with their experts.

11:58:02 6 **MS. BRANSCOME:** Your Honor, I object.

11:58:04 7 **THE COURT:** Overruled.

11:58:05 8 **MR. TRACEY:** Think about a company that will write a  
11:58:09 9 check for a million bucks. Put Flamme and Stephenson on their  
11:58:15 10 payroll. Literally, Dr. Flamme works full time for them, 30  
11:58:19 11 hours a week, 30 hours a week he works on this case. It's  
11:58:23 12 astonishing. And he brought in a cartoon to you. He didn't  
11:58:26 13 bring in to you a test that he filmed that we could see. He  
11:58:30 14 brought in a cartoon. Casali brought in a cartoon.

11:58:37 15 And they spent a million bucks, a million bucks on  
11:58:41 16 just those experts, 4-, 5-, 6-, \$650 an hour. What do you  
11:58:50 17 think that they think about the value of this case?

11:58:52 18 I'm going to suggest that, when you get back there and  
11:58:55 19 you think about how much, it's totally your call, 100 percent.  
11:59:04 20 The great thing about the jury system is that it's your call.  
11:59:09 21 You decide the facts, you decide the credibility of the  
11:59:11 22 witnesses, you decide the money. Not up to me. Not up to  
11:59:16 23 them. You decide it.

11:59:20 24 Another metric maybe you can use when you think about  
11:59:27 25 -- about his damages -- apparently Lloyd doesn't complain

11:59:33 1 enough for their liking, apparently they like plaintiffs who  
11:59:37 2 complain more, that go to the doctor more, that whine to their  
11:59:42 3 wife or their employers. Well, that's not what he's made of.  
11:59:47 4 He didn't complain.

11:59:49 5 He didn't know 15 years ago that they were committing  
11:59:53 6 fraud on him, and he better have his ducks in a row so that one  
11:59:56 7 day when this law firm came and challenged his credibility, he  
12:00:00 8 had it altogether. He didn't know that. They knew it. He  
12:00:03 9 didn't.

12:00:05 10 But think about it. Think about what it's worth per  
12:00:09 11 hour or per minute or per day to have what he has and think  
12:00:14 12 about what they're willing to spend. They're paying 500 bucks  
12:00:18 13 an hour, \$650 an hour, 400, 500 bucks an hour to have people  
12:00:29 14 come down here and testify, to look at documents and make  
12:00:31 15 cartoons. That seems like a fair metric, that seems like a  
12:00:35 16 fair measure of damages. Why don't we pay what they pay? Why  
12:00:38 17 don't we pay Lloyd Baker what they're paying their experts?  
12:00:42 18 Totally up to you. Totally your call.

12:00:46 19 I do want to say something about the burden of proof  
12:00:48 20 which has been -- nobody has commented about it in this case,  
12:00:55 21 and it's my fault.

12:00:58 22 One of the most important things in the jury charge is  
12:01:01 23 the burden of proof. The burden of proof in a civil case is  
12:01:04 24 more likely than not. Two weeks ago the Judge told you, I  
12:01:08 25 think she gave you the example of 51 percent. Sometimes we

12:01:12 1 like to use the scales of justice.

12:01:14 2 Each and every question in the charge that you look  
12:01:18 3 at, except fraud, the burden of proof is more likely than not.  
12:01:21 4 That means, if you picture the scales of justice, and I put one  
12:01:25 5 piece of paper on my side of the scale, we win. We win on  
12:01:32 6 product defect, on warning, on the whole shebang. That's the  
12:01:37 7 way it works in the civil case.

12:01:45 8 On the fraud that I questioned, the burden is slightly  
12:01:45 9 higher.

12:01:49 10 So when you're weighing the evidence, when you're  
12:01:50 11 looking at the documents, when you're thinking about the  
12:01:52 12 credibility of the witnesses, that is our burden of proof.

12:01:55 13 I do want to talk about credibility. The other great  
12:02:08 14 thing about the American jury trial, enshrined in the Seventh  
12:02:15 15 Amendment to the U.S. Constitution, because the founding  
12:02:18 16 fathers knew that we had to have regular people decide cases,  
12:02:22 17 or the rich and powerful would run over us all. They knew  
12:02:27 18 that. And the founding fathers knew that there is no  
12:02:30 19 replacement, there is no substitute for eight ordinary people  
12:02:33 20 staring at witnesses, looking them in the eye, and making  
12:02:37 21 credibility calls. Not me, not the Judge, not 3M. You get to  
12:02:41 22 make the call, you decide if Mark Packer and Rich Merkley rang  
12:02:50 23 of the truth or not. You decide that. Not me.

12:02:52 24 When they testified, when people spoke, did they speak  
12:02:55 25 with confidence? Were they hesitant? What kind of financial

12:02:58 1 interests did they have? How long had they been friends with  
12:03:01 2 the parties? How much money have they made? How much money do  
12:03:06 3 they stand to make?

12:03:07 4 What was the motivation of Mark Packer and Richard  
12:03:15 5 McKinley who spent their entire careers trying to protect Lloyd  
12:03:16 6 Baker from exactly what happened to him, what would be the  
12:03:18 7 motivation for them? Do they have something against 3M, do you  
12:03:21 8 think? People out to get 3M?

12:03:23 9 These are the kind of things you can consider and you  
12:03:26 10 should consider.

12:03:30 11 I am -- I'm almost done. And what I have done all I  
12:03:43 12 know how to do, that's the God's honest truth. I can't think  
12:03:47 13 of anything else I could have done. I'm sure I will ten  
12:03:50 14 minutes after I sit down. But the truth is, I did all I could.  
12:03:55 15 So did Dave and Shelley and Mike Sacchet. We did everything we  
12:04:01 16 know how to do. And what we've been doing the past two years,  
12:04:05 17 the burden we've been carrying is soon going to be your burden.  
12:04:08 18 You all get to decide what happens to Lloyd Baker. You get to  
12:04:14 19 decide what happens.

12:04:20 20 I probably will never represent Lloyd Baker again. I  
12:04:27 21 hope so. I hope I don't. I like Lloyd, but I hope he doesn't  
12:04:31 22 need me ever again.

12:04:32 23 I'm going to go home, you're going to go home, you're  
12:04:37 24 going to go back to your lives, your family, your hobbies. But  
12:04:43 25 this is it, this is it. Lloyd Baker is going to go home, and

12:04:51 1 this isn't changing. This is it, this is his one shot.  
12:04:54 2 There's no coming back. There's no do-overs. It's right here,  
12:04:58 3 right now.

12:05:01 4 And I would be remiss if I didn't thank you. I know  
12:05:07 5 we're repetitive. Believe me, that I know that. But the  
12:05:11 6 greatest fear of a lawyer, at least this lawyer, is that I  
12:05:17 7 failed in some way; that I didn't ask the right question, I  
12:05:21 8 didn't use the right document, I forgot to do something, and so  
12:05:24 9 we repeat ourselves, and I know that, I know that. And I  
12:05:27 10 apologize if -- if you hold that against anybody, hold it  
12:05:32 11 against me, not Lloyd.

12:05:37 12 Okay. I think I've said enough. Thank you very much.

12:05:40 13 **THE COURT:** All right. Mr. Tracey, thank you.

12:05:43 14 Ladies and gentlemen, I have a reminder instruction  
12:05:50 15 before I get back to my final instructions on the law. I have  
12:05:53 16 a reminder instruction for you about P-GEN-9, which is the Army  
12:05:59 17 Criminal Investigate Division report that you've heard quite a  
12:06:06 18 bit about, to remind you the conclusion of that investigation,  
12:06:09 19 which again was done by the Criminal Investigate Command of the  
12:06:16 20 Army and the Department of Justice, was that had the military  
12:06:19 21 known about the problems identified in the flange report, that  
12:06:25 22 the military may not have bought the product. This was an  
12:06:28 23 investigation, as you've heard, into civil fraud. It was not a  
12:06:32 24 criminal investigation.

12:06:33 25 But the important thing I want you to hear from me

12:06:36 1 right now is there is no evidence before you in this trial  
12:06:40 2 record about anything that happened following this  
12:06:44 3 investigation, and therefore in the jury room you must not  
12:06:47 4 speculate about what resulted or didn't result from that  
12:06:53 5 investigation.

12:06:54 6 All right. Back to the instructions. And please  
12:06:59 7 remember again at all times you must consider all of my  
12:07:02 8 instructions as a whole.

12:07:03 9 Ladies and gentlemen, any verdict that you reach in  
12:07:06 10 the jury room must be agreed to by all jurors. In other words,  
12:07:11 11 to return a verdict, eight of you must agree. Your  
12:07:14 12 deliberations will be secret. You will never have to explain  
12:07:17 13 your verdict to anyone.

12:07:18 14 It is your duty, as jurors, to discuss the case with  
12:07:22 15 one another in an effort to reach an agreement, if you can do  
12:07:25 16 so. Each of you must decide the case for yourself but only  
12:07:29 17 after full consideration of the evidence with the other members  
12:07:33 18 of the jury.

12:07:33 19 While you're discussing the case, do not hesitate to  
12:07:37 20 reexamine your own opinion and to change your mind if you  
12:07:41 21 become convinced that you were wrong, but do not give up your  
12:07:45 22 honest beliefs solely because the others think differently or  
12:07:48 23 merely to get the case over with. Remember, that in a very  
12:07:52 24 real way, you are judges, you are the judges of the facts in  
12:07:55 25 this case. Your only interest is to seek the truth from the

12:07:59 1 evidence in the case.

12:08:00 2 Now, when you go into the jury room, the first thing  
12:08:04 3 I'd ask you to do, even before you eat lunch, the first thing  
12:08:08 4 that I would ask you to do is to please select one of your  
12:08:11 5 members to act as your foreperson.

12:08:15 6 Your foreperson will preside over your deliberations  
12:08:17 7 in the jury room and will also speak for the jury here in open  
12:08:21 8 court.

12:08:22 9 The foreperson will also be the one who will fill out  
12:08:25 10 the verdict form based upon your unanimous decisions. And  
12:08:31 11 every question that you are asked to answer on this verdict  
12:08:34 12 form must be a unanimous decision. In other words, it must be  
12:08:39 13 a decision that you have all agreed to.

12:08:41 14 There is one verdict form. You will only have one in  
12:08:45 15 the jury room. It is -- it contains four separate sections  
12:08:51 16 over four pages, so it's four pages long with four sections.  
12:08:56 17 The sections are broken out into Mr. Baker's claims, followed  
12:09:00 18 by 3M's affirmative defenses, followed by compensatory damages,  
12:09:10 19 followed by apportionment of fault. And throughout the verdict  
12:09:12 20 form, you are directed how to proceed based upon your unanimous  
12:09:16 21 decisions as to the specific questions. So there are very  
12:09:19 22 detailed instructions for you to guide you through this verdict  
12:09:22 23 form as you consider each matter that you have to determine as  
12:09:26 24 part of your verdict in this case.

12:09:28 25 If at any time you become confused or have a question

12:09:33 1 for me, just notify the court security officer of that. He  
12:09:37 2 will bring it to my attention, and I will respond to you as  
12:09:40 3 promptly as I can. I'll respond in one of two ways. Most  
12:09:46 4 likely I'll respond to you in writing -- and your communication  
12:09:49 5 to me should be in writing. I will respond to you back in  
12:09:52 6 writing most likely, or I can have you returned here to the  
12:09:55 7 courtroom where I address you orally here in open court.

12:09:58 8 One matter with respect to any communication that the  
12:10:02 9 jury may send out of the jury room, please don't ever indicate,  
12:10:06 10 if there is a division on the jury, please don't ever indicate  
12:10:09 11 what that numerical division is. We don't need to know whether  
12:10:14 12 you all are divided four to four, five to three, or seven to  
12:10:18 13 one. We do not need to know about any numerical division.

12:10:23 14 Counsel, let me ask first, plaintiffs, if there are  
12:10:26 15 any objections to the instructions as delivered?

12:10:29 16 **MR. TRACEY:** No, Your Honor.

12:10:30 17 **THE COURT:** For 3M, any objections to the instructions  
12:10:33 18 as delivered?

12:10:34 19 **MS. BRANSCOME:** No, Your Honor.

12:10:35 20 **THE COURT:** Thank you.

12:10:36 21 Ladies and gentlemen, out of respect for the very  
12:10:40 22 serious responsibility that you are all about to undertake, I'm  
12:10:44 23 going to stand and direct that all those present in the  
12:10:48 24 courtroom rise with me, as you now retire to consider your  
12:10:51 25 verdict.

12:10:52 1 And you may take your pads with you. One other  
12:10:55 2 instruction. Do not take earplugs with you. Mr. Baker's set  
12:11:00 3 of earplugs are in evidence, you will have those for your  
12:11:04 4 consideration, but I ask that you please not put them in your  
12:11:07 5 ears.

12:11:07 6 You're excused to the jury room.

12:11:09 7 *(Jury out.)*

12:11:23 8 I have something I need to discuss. One of the  
12:11:40 9 central issues in this litigation, if not the central issue, is  
12:11:45 10 the ANSI Standard 3.19-74 testing. The MPID required it, and  
12:11:54 11 we certainly know about the controversy sounding test 213015  
12:11:59 12 and 213017.

12:12:02 13 The only -- I stress only -- other ANSI S3.19-74  
12:12:09 14 testing ever done on the CAEv2 was done by the Michael's lab,  
12:12:14 15 and it's reflected in the Michael's study. That has been the  
12:12:19 16 subject of considerable dispute between the parties throughout  
12:12:23 17 this litigation, not just this case, and it's been the subject  
12:12:26 18 of considerable argument before the Court over the course of  
12:12:31 19 all three bellwether trials, including this trial, in which,  
12:12:37 20 prior to trial, there was a motion in limine filed by the  
12:12:42 21 plaintiffs, which I granted. The motion in limine was to  
12:12:47 22 exclude the Michael study based on hearsay.

12:12:50 23 I entered an order on that motion in limine agreeing  
12:12:53 24 and finding that the study was hearsay, and I entered an order  
12:12:59 25 making that finding and deciding that the document -- the study

12:13:04 1 was inadmissible hearsay in this trial. But I noted in that  
12:13:10 2 order that the document could be used with an expert to support  
12:13:14 3 or discredit the expert's opinion.

12:13:20 4 During this trial the study was used with one or more  
12:13:25 5 experts, and I gave a limiting instruction consistent with my  
12:13:29 6 order on the motion in limine in that regard, in which I told  
12:13:32 7 the jury that they could not consider the NRR of 23 or the  
12:13:38 8 Michael study test data for the truth because it was hearsay,  
12:13:45 9 but they could consider it in their evaluation of whatever  
12:13:48 10 expert was being questioned about the study, they could  
12:13:51 11 consider it in evaluation of that expert's opinion.

12:13:53 12 This morning I came into court to address some  
12:13:56 13 objections that came up during the evening in regards to slides  
12:14:01 14 that were intended to be used by the parties in closing.

12:14:06 15 The first objection I heard was from the plaintiffs,  
12:14:09 16 and it had to do with a slide that the defendants wished to use  
12:14:15 17 in their closing argument that referenced the Michael study.  
12:14:19 18 And it was in fact used by Ms. Branscome because I allowed it  
12:14:24 19 to be used.

12:14:26 20 We had a discussion here in the courtroom on the  
12:14:31 21 record, and Mr. Bhimani was present in which -- let me find my  
12:14:43 22 realtime -- in which Mr. Bhimani said:

12:14:45 23 "Your Honor, I'm prepared -- I can discuss this."

12:14:49 24 This was after Mr. Seeley raised the objection. Mr.  
12:14:52 25 Seeley had said, "The first issue is the Michael issue. This

12:14:56 1 was admitted with experts in a certain light, but we think this  
12:14:59 2 slide basically says that the NRR is 23, and we think it's  
12:15:02 3 clear that this slide is being used for the truth."

12:15:05 4 And I said, "It sure looks like it to me based on this  
12:15:12 5 slide." And I said, "Mr. Bhimani, are you prepared to discuss  
12:15:15 6 this?"

12:15:15 7 And I'm reading verbatim from the realtime.

12:15:19 8 Mr. Bhimani said, "I am prepared, Your Honor. I was  
12:15:22 9 here at 7:30. I can discuss this."

12:15:24 10 And I said, "Because this definitely looks like this  
12:15:27 11 is hearsay, that it is being used for the truth."

12:15:29 12 And Mr. Bhimani said, "A few things about this slide.  
12:15:31 13 This was the chart that was shown to the jury."

12:15:33 14 This is the chart from the study report.

12:15:37 15 "The dichotomy that's being drawn here is between  
12:15:41 16 direct and cross. I think Your Honor has already instructed  
12:15:44 17 the jury that this document was not coming in for the truth but  
12:15:46 18 it may be considered for impact on Mr. McKinley's opinion."

12:15:51 19 My response was: "Here's the deal: If Ms. Branscome  
12:15:55 20 makes clear in her closing that this is not being offered for  
12:15:58 21 the truth that the NRR was 23, then I'm fine with it. If not,  
12:16:03 22 it is not coming in."

12:16:06 23 Mr. Bhimani's response was: "Understood."

12:16:11 24 I said, "Okay. Next."

12:16:14 25 So, Mr. Bhimani, I am going to ask you, as an officer

12:16:17 1 of this court, what you said to Ms. Branscome in relaying my  
12:16:23 2 very clear, very specific instruction in regards to that slide.

12:16:27 3 **MR. BHIMANI:** Your Honor, I conveyed what Your Honor's  
12:16:31 4 ruling was, at least my understanding of Your Honor's ruling,  
12:16:34 5 which was the closing argument should make clear that it's  
12:16:39 6 being offered in the context of challenging the credibility of  
12:16:42 7 the witness --

12:16:42 8 **THE COURT:** Did you tell Ms. Branscome that I said she  
12:16:44 9 had to explain to the jury that it was not being offered for  
12:16:47 10 the truth or else the slide did not come in?

12:16:51 11 **MR. BHIMANI:** I don't remember the exact words I used,  
12:16:54 12 in all truth, Your Honor.

12:16:55 13 **THE COURT:** Okay. Well, then, let me turn to Ms.  
12:16:56 14 Branscome, as an officer of this court.

12:16:58 15 What were you told by Mr. Bhimani -- and you can tell  
12:17:02 16 I am very upset about this.

12:17:03 17 What were you told, as an officer of this court, by  
12:17:07 18 Mr. Bhimani about my ruling this morning before closing  
12:17:11 19 arguments?

12:17:11 20 **MS. BRANSCOME:** I was told that the plaintiffs had  
12:17:13 21 raised the objection; that they believed that this was being  
12:17:16 22 used as improper hearsay; and that Your Honor was concerned  
12:17:20 23 that the jury would have the impression that it was in fact  
12:17:22 24 being offered for the truth. And Mr. Bhimani and I discussed  
12:17:27 25 that the implication -- I mean, the point --

12:17:32 1 **THE COURT:** Were you ever told by Mr. Bhimani that you  
12:17:34 2 had to -- that, as a condition of using this slide, you had to  
12:17:38 3 tell the jury that this NRR of 23 was not being offered for the  
12:17:43 4 truth, as an officer of this court?

12:17:46 5 **MS. BRANSCOME:** You don't need to remind me, Your  
12:17:49 6 Honor --

12:17:49 7 **THE COURT:** I'll remind you as many times as I feel I  
12:17:52 8 need to remind you so that it's very clear.

12:17:55 9 **MS. BRANSCOME:** I understand, Your Honor. I don't  
12:17:57 10 remember verbatim the words that Mr. Bhimani used.

12:17:58 11 **THE COURT:** All right.

12:17:59 12 **MS. BRANSCOME:** My understanding of the ruling, Your  
12:18:01 13 Honor, was that the jury needed to understand this was being  
12:18:04 14 done as an attack on Mr. McKinley's credibility.

12:18:07 15 **THE COURT:** Well, then my ruling was not adequately  
12:18:08 16 conveyed to you, it doesn't sound like. I'm assuming you  
12:18:16 17 didn't read the realtime.

12:18:17 18 **MS. BRANSCOME:** No. But I have to say, Your Honor,  
12:18:19 19 even hearing you read the realtime, I would have interpreted it  
12:18:24 20 the same.

12:18:24 21 **THE COURT:** Disagree. Disagree. You may sit down.

12:18:27 22 Now, my reaction to this, when it happened, I waited  
12:18:30 23 until you got through, Ms. Branscome, with your discussion of  
12:18:33 24 that slide, because I was hoping that my ruling, my order, my  
12:18:36 25 directive would have been followed, and you would have made it

12:18:39 1 clear to the jury, as I made it very specific and very clear to  
12:18:43 2 Mr. Bhimani.

12:18:44 3 And I'll ask others who were present in the courtroom  
12:18:46 4 if they had a different understanding. But I'm reading the  
12:18:49 5 transcript, I know what I said, it's supported in the  
12:18:52 6 transcript, and I know what my intent was, and it's clearly  
12:18:57 7 reflected: You either make that clear or the slide doesn't  
12:19:00 8 come in.

12:19:00 9 And you didn't. And I waited, again, until you moved  
12:19:02 10 past the slide -- excuse me, do not interrupt me.

12:19:05 11 I waited until you moved past the slide, and then the  
12:19:10 12 proceedings had to be disrupted. I had to call you up to the  
12:19:14 13 bench and ask you questions about why you did not make it clear  
12:19:19 14 to the jury. It wasn't made clear, in my opinion, again. You  
12:19:26 15 never said that it wasn't offered for the truth, that the NRR  
12:19:29 16 of 23 was not offered for the truth, so then I had to tell the  
12:19:33 17 jury that it wasn't --

12:19:34 18 **MS. BRANSCOME:** I did say that.

12:19:35 19 **THE COURT:** Excuse me -- that it was not offered for  
12:19:37 20 the truth.

12:19:38 21 And I will look back at what you said, but I know at  
12:19:41 22 the time listening to it, I felt like it was not clear enough,  
12:19:44 23 and that's why I needed to make it clear.

12:19:46 24 So, my options at that point were to give the  
12:19:49 25 instruction I gave or to strike your closing argument about the

12:19:56 1 slide and strike the slide. But I don't want to do that  
12:20:00 2 because your client had nothing to do with this, and I don't  
12:20:03 3 want to punish your client for a very serious violation of my  
12:20:09 4 order that you all made. So I didn't do that.

12:20:13 5 I feel like the clarification that was made between  
12:20:16 6 you and I, Ms. Branscome, was sufficient to ameliorate the  
12:20:22 7 misleading impression that may have been left with the jury  
12:20:27 8 about the truth of the Michael's NRR of 23. But what is not  
12:20:33 9 accomplished through that action is the willful violation of my  
12:20:36 10 order.

12:20:36 11 And so there will be sanctions, most likely in the  
12:20:40 12 form of monetary sanctions.

12:20:42 13 **MS. BRANSCOME:** Your Honor, may I be heard?

12:20:43 14 **THE COURT:** Not right now, no, you may not, not at  
12:20:46 15 this moment, no, you may not.

12:20:48 16 You weren't even here, Ms. Branscome, and so -- you  
12:20:51 17 were not here. You should have been here, frankly, but you  
12:20:54 18 weren't, and so you weren't even a party to this discussion.

12:20:57 19 I asked you what Mr. Bhimani told you -- and this is  
12:21:02 20 happening in front of me, directly in front of me. It's not  
12:21:06 21 something -- I know the facts. I don't need to hear from you  
12:21:09 22 about the facts. I know what happened. I was here. It was my  
12:21:12 23 ruling, and it was clearly conveyed.

12:21:15 24 So I will perhaps hear from you later about this, but  
12:21:19 25 right now my intent is to enter monetary sanctions against one

12:21:24 1 or both of you for this violation of my court order which was  
12:21:27 2 clear, very specific, and directly in front of me resulted in a  
12:21:33 3 disruption of the judicial proceedings and potentially very  
12:21:36 4 misleading to the jury.

12:21:38 5 So that's where I stand right now. And like I said,  
12:21:41 6 if I decide that I want to hear from you, I'll give you that  
12:21:45 7 opportunity.

12:21:45 8 **MS. BRANSCOME:** Your Honor, may I just say, though,  
12:21:46 9 that you also instructed plaintiff's counsel to return and  
12:21:49 10 clear up the fact that he told the jury that we had been found  
12:21:52 11 -- that we had committed fraud.

12:21:54 12 **THE COURT:** That was not a violation of my order, Ms.  
12:21:54 13 Branscome.

12:21:56 14 **MS. BRANSCOME:** And he didn't --

12:21:56 15 **THE COURT:** That was not a violation of a specific  
12:21:59 16 directive that I gave to an attorney on your team this morning.  
12:22:02 17 I had not spoken with Mr. Tracey about that. I gave a very  
12:22:07 18 clear instruction following his closing arguments about that,  
12:22:10 19 and I feel that is sufficient.

12:22:12 20 What is not sufficient here, in terms of my trying to  
12:22:16 21 address the NRR of 23, and it not being made clear to the jury  
12:22:23 22 that that was not to be offered for the truth, is a violation  
12:22:26 23 of my order. My instructions to the jury have nothing to do  
12:22:30 24 with that.

12:22:31 25 **MS. BRANSCOME:** I'm just saying, Your Honor --

12:22:33 1 **THE COURT:** There's nothing that I can do to  
12:22:36 2 ameliorate that; and, frankly, there's nothing you can do to  
12:22:39 3 ameliorate it.

12:22:40 4 **MS. BRANSCOME:** Well, but, Your Honor, I would say  
12:22:41 5 there are other pieces of evidence in this litigation that have  
12:22:45 6 been admitted only for hearsay, like, for instance, the Air  
12:22:47 7 Force letter, and yet the plaintiffs repeatedly will say  
12:22:49 8 there's a finding of defect --

12:22:49 9 **THE COURT:** Ms. Branscome, you are missing the point.

12:22:51 10 **MS. BRANSCOME:** This was not a willful violation.

12:22:53 11 **THE COURT:** Yes, it was. And you don't make that  
12:22:55 12 finding, Ms. Branscome. I do. And then you take it up on  
12:22:59 13 appeal if you think you should. This was a direct violation.

12:23:02 14 And the deal was this morning -- and I used that term,  
12:23:06 15 "the deal is" -- you either -- Ms. Branscome gives that  
12:23:08 16 instruction to the jury in her closing, she makes that clear in  
12:23:12 17 her closing, or the slide doesn't come in. That was it, and it  
12:23:16 18 could not have been more clear.

12:23:18 19 **MS. BRANSCOME:** Your Honor, I'm not permitted to  
12:23:20 20 instruct the jury on the law. So my understanding --

12:23:20 21 **THE COURT:** Oh, I'm done.

12:23:22 22 **MS. BRANSCOME:** -- was I needed to keep it in  
12:23:24 23 context --

12:23:24 24 **THE COURT:** We're in recess awaiting the jury's  
12:23:29 25 verdict.

01:27:52 1 (Recess taken 12:23 p.m. to 7:40 p.m.)

07:40:52 2 **THE COURT:** We do not have a verdict yet nor do we  
07:40:57 3 have a communication from the jury. But I am going to excuse  
07:41:02 4 the jury around eight o'clock if we do not have a verdict,  
07:41:07 5 given the deteriorating weather conditions. It looks like it's  
07:41:12 6 let up a little bit over the last hour or so, but earlier it  
07:41:17 7 was -- the conditions were very bad, and my review of the radar  
07:41:21 8 indicates that they're only going to get worse as time goes on.  
07:41:25 9 And we have a couple of jurors that have a great distance to  
07:41:30 10 travel, 85 miles one way.

07:41:32 11 So I wanted to take the time, between now and eight  
07:41:36 12 o'clock, to hear from Ms. Branscome and Mr. Bhimani, give you  
07:41:41 13 an opportunity to address the Court on why sanctions shouldn't  
07:41:44 14 be imposed for what happened this morning.

07:41:47 15 So, Ms. Branscome, I'll start with you.

07:41:49 16 **MS. BRANSCOME:** Thank you, Your Honor. I apologize, I  
07:41:51 17 don't have my materials with me. I thought we were hearing  
07:41:53 18 from the jury.

07:41:54 19 But I have reviewed the transcript. I also reviewed  
07:41:58 20 the transcript of Your Honor's statement this morning. From my  
07:42:03 21 perspective -- and I'm saying this as an officer of the Court  
07:42:05 22 -- I do believe Mr. Bhimani communicated what Your Honor had  
07:42:09 23 conveyed. I can't speak for Mr. Bhimani of his understanding  
07:42:13 24 of it, but my understanding both of what he had communicated  
07:42:17 25 and even when I read the transcript was not that I was supposed

07:42:22 1 to instruct the jury on hearsay or its legal implications.  
07:42:30 2 Your Honor had given those instructions before. I genuinely  
07:42:33 3 did not feel it was my place to instruct the jury on the law.  
07:42:37 4 I thought that what I was supposed to do was make clear that  
07:42:41 5 the attack was a credibility one on Mr. McKinley in his failure  
07:42:47 6 to even present the evidence to the jury.

07:42:49 7 I do think the transcript reflects that. It was in a  
07:42:53 8 section called "Credibility." My discussion of it was all  
07:42:58 9 about Mr. McKinley and the fact that he had answered Mr.  
07:43:01 10 Tracey's question on direct that in fact there was a study  
07:43:04 11 under that standard, Mr. Tracey had said we would come back to  
07:43:09 12 it, they did not, and it was only on cross-examination when I  
07:43:13 13 questioned Mr. McKinley about not even presenting the data to  
07:43:17 14 the jury that we heard a response about credibility issues with  
07:43:21 15 Michael & Associates and that, in our view, that was not  
07:43:28 16 credible given that he had been hired by Moldex and was NVLAP  
07:43:33 17 certified. Those are facts that are all explicitly on the page  
07:43:38 18 of the exhibit that was shown to the jury.

07:43:39 19 And so I had the intention of making clear that my use  
07:43:43 20 of the Michael's testing was in fact a credibility attack on  
07:43:47 21 Mr. McKinley. I actually returned to the Michael testing later  
07:43:50 22 with respect to John Casali's opinions and the fact that he had  
07:43:54 23 actually found that the 017 testing was consistent with other  
07:43:58 24 testing and that was something on which he relied.

07:44:01 25 When Your Honor brought us to the bench, I understood

07:44:05 1 that Your Honor wanted me to make it more explicitly clear. I  
07:44:10 2 have reviewed that transcript. I did go back to the jury and  
07:44:15 3 articulate that that evidence was hearsay, meaning that it was  
07:44:19 4 not to be considered for the truth of the evidence but rather  
07:44:23 5 the role that it played in Mr. McKinley's expert opinions and  
07:44:26 6 the fact that he chose not to share that evidence with the jury  
07:44:30 7 and they could consider whether or not that was something that  
07:44:34 8 was important to them with respect to Mr. McKinley's  
07:44:37 9 credibility.

07:44:38 10 And so, I can only just say, Your Honor, I certainly  
07:44:42 11 intended to abide by the order. My understanding of the term  
07:44:47 12 "make it clear," which, honestly, Mr. Bhimani may have said  
07:44:51 13 word for word. I don't have a recollection of the exact words.  
07:44:56 14 But I read the transcript from this morning, Your Honor, and  
07:44:59 15 the word was "make it clear" to the jury that this is not being  
07:45:03 16 used for the truth --

07:45:04 17 **THE COURT:** What's not being used for the truth?

07:45:07 18 **MS. BRANSCOME:** The Michael testing.

07:45:09 19 **THE COURT:** No, no. It was the NRR of 23. That was  
07:45:13 20 very clear.

07:45:15 21 **MS. BRANSCOME:** I'm afraid, Your Honor, I don't see  
07:45:17 22 the distinction there.

07:45:19 23 **THE COURT:** That's fine. Go ahead and finish up,  
07:45:21 24 please. We only have a few more minutes. I need to hear from  
07:45:25 25 Mr. Bhimani.

07:45:26 1 **MS. BRANSCOME:** Certainly. So, I mean, from my  
07:45:28 2 perspective, in terms of some sort of willful violation of an  
07:45:30 3 order, it was information passed along to me my co-counsel. I  
07:45:34 4 believe he passed it on accurately.

07:45:36 5 **THE COURT:** Did you not read the real-time transcript  
07:45:39 6 when you got into court this morning? You've been very, very  
07:45:42 7 careful about reading it throughout the trial. It's right in  
07:45:45 8 front of you. Did you not look at that to review the  
07:45:48 9 transcript of the conference this morning, since you weren't  
07:45:50 10 here, and you were the one making the closing argument?

07:45:52 11 **MS. BRANSCOME:** I did not, Your Honor. And in fact,  
07:45:54 12 other counsel have been handling objections to slides. I knew  
07:45:57 13 what objections were pending. Mr. Bhimani is my trial partner.  
07:46:00 14 I trusted him. We came into court, I was here on time to give  
07:46:05 15 the jury -- if I had understood that trial counsel were ordered  
07:46:08 16 to be here at 7:30, I certainly would have. I was not the one  
07:46:12 17 who handled the meet-and-confer on the objections. I had  
07:46:15 18 conveyed -- Mr. Bhimani was here to handle all of it. We were  
07:46:19 19 dealing with last minute finalization of closing argument this  
07:46:23 20 morning. Obviously, if I had understood that Your Honor had an  
07:46:28 21 expectation that both trial counsel would be here at 7:30 --

07:46:33 22 **THE COURT:** No, I did not have an expectation that you  
07:46:36 23 would be here. You were not ordered to be here. My  
07:46:38 24 expectation was only that you understood clearly what my ruling  
07:46:41 25 was from the conference.

07:46:43 1 **MS. BRANSCOME:** And from my perspective, Your Honor, I  
07:46:44 2 thought that I did. And even going back and reading the  
07:46:46 3 transcript, that's how I would have interpreted it. So that's  
07:46:49 4 all I can say. Your Honor has said that you will find a  
07:46:53 5 willful violation. I think that involves intent. It wasn't a  
07:46:55 6 written order that's been in place for months or we've debated  
07:46:59 7 or discussed. It was an objection to a slide. Everything I  
07:47:02 8 said to the jury is consistent with the examinations that have  
07:47:05 9 occurred during the trial.

07:47:06 10 **THE COURT:** If what is in the verbatim transcript had  
07:47:12 11 been reduced to a written order, would you be making a  
07:47:16 12 different argument to me? If somehow -- I mean, I have it in  
07:47:18 13 writing and it was an order.

07:47:21 14 Does it need to have an ECF number on it for it to be  
07:47:25 15 clear to you?

07:47:25 16 **MS. BRANSCOME:** No. But I do think if you have a  
07:47:28 17 hearing on an issue and it's solidified into a written order  
07:47:31 18 and I hadn't understood it, perhaps I would have asked for  
07:47:34 19 clarification.

07:47:34 20 What I'm just saying is it's not that Your Honor's  
07:47:38 21 words have less impact in a transcript.

07:47:39 22 **THE COURT:** Well, that's what it sounds like is that  
07:47:40 23 my words have less impact from the bench because they're just  
07:47:44 24 oral and not in writing and entered into the ECF, you know, our  
07:47:48 25 electronic filing system.

07:47:49 1 **MS. BRANSCOME:** But I think that's relevant if you're  
07:47:51 2 looking at something like sanctions or a willful violation.  
07:47:54 3 Because I got information conveyed to me a few minutes before  
07:47:57 4 we started closing arguments. I thought I understood the  
07:48:00 5 instruction. I can't speak for Mr. Bhimani, but I think he  
07:48:03 6 understood it. And even when I went back, Your Honor, and read  
07:48:06 7 the real-time transcript, that's how I would have understood  
07:48:10 8 it.

07:48:10 9 **THE COURT:** All right. I need to hear from Mr.  
07:48:13 10 Bhimani. Thank you.

07:48:13 11 Mr. Bhimani?

07:48:14 12 **MR. BHIMANI:** Your Honor, it's -- my understanding is  
07:48:17 13 very consistent with what Ms. Branscome just said. My  
07:48:21 14 understanding of Your Honor's ruling on the slide when Your  
07:48:25 15 Honor had said to make it clear to the jury that it's not being  
07:48:27 16 offered for the truth --

07:48:28 17 **THE COURT:** What's not being offered -- what did you  
07:48:30 18 hear me say had to be made clear to the jury that wasn't being  
07:48:34 19 offered for the truth?

07:48:35 20 **MR. BHIMANI:** The Kevin Michael exhibit and the data  
07:48:37 21 within it, Your Honor.

07:48:38 22 **THE COURT:** You did not hear me say the NRR of 23?

07:48:41 23 **MR. BHIMANI:** I would include that within the exhibit  
07:48:44 24 and the data within the exhibit.

07:48:45 25 **THE COURT:** That's the only thing I discussed.

07:48:45 1 **MR. BHIMANI:** Correct.

07:48:47 2 **THE COURT:** I discussed nothing else. I didn't  
07:48:49 3 discuss testing data, testing results, testing -- and the  
07:48:53 4 reason I did, Mr. Bhimani, was because the slide, as you heard  
07:48:55 5 me express this morning, was so prominent in its display of the  
07:49:00 6 NRR of 23.

07:49:01 7 And frankly, it didn't just say NRR equals 23, which  
07:49:05 8 is what, actually, if you had verbatim pulled it out of the  
07:49:08 9 chart, which you did, you pulled the language out of the chart  
07:49:12 10 and emboldened it and enlarged it, you wrote on your slide "NRR  
07:49:20 11 is 23." And so, that was a neon sign for me when I -- and I'm  
07:49:28 12 sure for the plaintiffs, too, and that's why they raised the  
07:49:32 13 objection, when I was discussing the slide with you this  
07:49:34 14 morning. And that was my focus. And I cannot believe that  
07:49:37 15 anyone that was present in this courtroom at that time would  
07:49:39 16 have thought anything differently.

07:49:41 17 **MR. BHIMANI:** And, Your Honor, respectfully, my  
07:49:43 18 understanding of the ruling and what I -- I don't remember the  
07:49:45 19 exact words that I used, but what I would have conveyed to Ms.  
07:49:49 20 Branscome is that she could not convey that those were  
07:49:51 21 accurate.

07:49:52 22 My understanding -- and I had an understanding  
07:49:54 23 about --

07:49:54 24 **THE COURT:** No, Mr. Bhimani, there is no way that any  
07:49:57 25 reasonable lawyer could have construed what I said as what you

07:50:00 1 just described. My instructions to you were that it had to be  
07:50:03 2 conveyed to the jury that it was not being offered or argued  
07:50:09 3 for the truth. That's what had to be conveyed, that it was  
07:50:13 4 not.

07:50:14 5 **MR. BHIMANI:** I have reviewed the transcript. I  
07:50:16 6 didn't remember the exact language Your Honor used. But in  
07:50:19 7 reviewing the transcript, it reminded me that Your Honor did  
07:50:23 8 say to make it clear to the jury, which, in my understanding,  
07:50:26 9 meant we could not convey to the jury that this was offered for  
07:50:29 10 the truth.

07:50:29 11 **THE COURT:** That is not what I said. That is not what  
07:50:30 12 I said, Mr. Bhimani. So I hear what you're saying.

07:50:33 13 We have a question from the jury, so I need to go  
07:50:35 14 ahead and make my findings on the record in regards to this  
07:50:40 15 issue.

07:50:40 16 So, for everyone, you may or may not know, I've been  
07:50:46 17 on the bench a long time, just past my nineteenth year as a  
07:50:51 18 judge on the federal bench. And in that time, I have had the  
07:50:55 19 unfortunate need to sanction lawyers on occasion for discovery  
07:51:00 20 abuses, misleading arguments in legal briefings, and even  
07:51:04 21 criminal contempt of court for deceitful and dishonest  
07:51:08 22 practices before the Court that were injurious to clients as  
07:51:12 23 well as the Court.

07:51:13 24 But in 19 years on the bench, I have never summarily  
07:51:17 25 sanctioned any lawyer for a willful disregard of one of the

07:51:21 1 Court's orders in the courtroom during a proceeding, much less  
07:51:25 2 a trial.

07:51:26 3 I can assure you that I take no pleasure in doing so  
07:51:30 4 now. No judge, including this one, ever enjoys being in this  
07:51:35 5 position. But every judge, including this one, has the duty to  
07:51:40 6 manage his or her courtroom in such a manner as to protect and  
07:51:44 7 preserve the integrity of judicial proceedings and the judicial  
07:51:48 8 process as a whole.

07:51:49 9 Today these proceedings and the integrity of the Court  
07:51:53 10 were degraded, they were disrespected by the willful violation  
07:51:58 11 of my orders by 3M's counsel.

07:52:00 12 I spoke to this earlier today, but the background  
07:52:05 13 bears repeating. This morning I held an attorney conference to  
07:52:10 14 discuss outstanding objections to demonstratives that were to  
07:52:12 15 be used for closing. One of the disputes involved --

07:52:16 16 Ms. Branscome, please get off your phone.

07:52:19 17 **MS. BRANSCOME:** I was being asked if there was a  
07:52:22 18 verdict. I apologize.

07:52:24 19 **THE COURT:** You have more important things to listen  
07:52:26 20 to.

07:52:26 21 So I was asked to appear at a conference to deal with  
07:52:29 22 a dispute about outstanding objections to demonstratives that  
07:52:33 23 were to be used for closings. One of the disputes involved a  
07:52:35 24 slide that was disclosed late last night; it was Slide No. 1,  
07:52:39 25 as I understood it. It was a slide involving Mr. McKinley and

07:52:43 1 the Michael's lab test results.

07:52:46 2 Again, I spoke previously about this this morning of  
07:52:50 3 how contentious this issue has been, how contentious the  
07:52:57 4 testing by the Michael's lab has been in this litigation.

07:53:01 5 At the time, Mr. Bhimani represented that he was  
07:53:03 6 prepared to discuss the objection with the Court. Mr. Beall  
07:53:07 7 was to be here momentarily; he wasn't here at the time. Mr.  
07:53:13 8 Bhimani took on the role and assured me he was prepared to  
07:53:13 9 speak.

07:53:16 10 Initially I commented to Mr. Bhimani and plaintiff's  
07:53:18 11 counsel as well that the slide -- and I'm quoting --  
07:53:21 12 "definitely looked like hearsay and that it was being used for  
07:53:24 13 the truth."

07:53:26 14 My concern -- and again, I don't think anyone in the  
07:53:29 15 courtroom would have misunderstood this. My concern was  
07:53:32 16 focused on the language that the NRR is 23. That wording was  
07:53:40 17 actually pulled out of the slide and enlarged and bolded. And  
07:53:44 18 I certainly had a concern about the prejudice to the plaintiffs  
07:53:47 19 given the significance of the ANSI S3.19-74 testing.

07:53:52 20 After hearing from you, Mr. Bhimani, and considering  
07:53:55 21 how liberal I have been with both sides on slides during all  
07:54:04 22 three of these trials, slides in openings and closings, I  
07:54:08 23 decided, probably against my better judgment, to allow 3M, more  
07:54:11 24 specifically Ms. Branscome, to use this slide in her closing,  
07:54:14 25 but there was a very specific condition that was expressed

07:54:20 1 regarding 3M's use of this slide, and it was very clear that  
07:54:24 2 she could use it only if she made clear to the jury that it was  
07:54:28 3 not being offered for the truth; that is, the slide was not  
07:54:32 4 being offered in support of the fact that the NRR for the CAEv2  
07:54:39 5 was actually 23, which is consistent with the instruction that  
07:54:42 6 I gave to the jury during the trial.

07:54:45 7 And I said to you, Mr. Bhimani, and everyone else in  
07:54:49 8 the courtroom, in no uncertain terms, that, if Ms. Branscome  
07:54:53 9 did not make that fact clear to the jury, that is that the NRR  
07:54:57 10 of 23 was not being presented for the truth, then the slide  
07:55:01 11 could not be used.

07:55:04 12 I thought I was doing you all a favor by letting you  
07:55:07 13 use the slide. It was clearly an arguable prejudice for the  
07:55:11 14 plaintiff to allow you to use that slide in closing. But, you  
07:55:16 15 know, I erred on the side of caution of trying to be fair and,  
07:55:20 16 again, liberal as I've been with both sides, and I allowed you  
07:55:24 17 to use it. But I put that condition on your use of it, and I  
07:55:28 18 did that so as to avoid any prejudice to the plaintiffs.

07:55:33 19 Also, I gave you the opportunity to make the statement  
07:55:38 20 to the jury instead of me injecting myself into your closing  
07:55:44 21 argument, Ms. Branscome, and commenting to the jury about your  
07:55:48 22 presentation. I gave you all the opportunity to do that. But  
07:55:52 23 I certainly expected, when I did that, that you would convey  
07:55:55 24 accurately and specifically what my directive was.

07:55:59 25 There can be no doubt by anyone who was present in the

07:56:02 1 courtroom at the time -- and I recognize you weren't there, Ms.  
07:56:06 2 Branscome -- that my concern and focus was on the enlarged,  
07:56:10 3 emboldened reference in the slide to the NRR as 23 and the  
07:56:15 4 prejudice that could have resulted to the plaintiffs from that.

07:56:18 5 And then a minute later, or maybe it was seconds  
07:56:21 6 later, I repeated my concern again in the context of a  
07:56:25 7 discussion about another slide that you all were contemplating  
07:56:29 8 using depicting the Michael's test results again.

07:56:33 9 I reiterated the same thing, my concern that the  
07:56:37 10 closing argument using the slide that we had been discussing  
07:56:40 11 not leave the jury with the misimpression about how they could  
07:56:45 12 consider evidence of the test results, specifically the NRR.

07:56:50 13 And I stressed that to you, Mr. Bhimani. My directive  
07:56:54 14 was simple, it was clear, and it allowed no room for  
07:56:57 15 interpretation.

07:56:58 16 Ms. Branscome, during your closing argument, you  
07:57:02 17 violated my rulings, both the motion in limine ruling and the  
07:57:05 18 ruling that I gave you this morning here in the courtroom that  
07:57:08 19 I certainly expected would be conveyed to you, and believe was,  
07:57:12 20 and then also a directive that I gave you from the bench.

07:57:15 21 You offered the Michael's test results -- and I stress  
07:57:21 22 "results," the NRR results for the truth during your closing,  
07:57:27 23 you offered it to prove that the NRR for the CAEv2 was 23.

07:57:31 24 These are your words: "An independent laboratory  
07:57:34 25 tested the CAEv2 using the exact same method as the 015 and the

07:57:39 1 017 tests and it got an NRR of 23."

07:57:44 2 You then referred to the plaintiffs, not Mr. McKinley,  
07:57:49 3 in saying that the plaintiffs' position was that the NRR of 22  
07:57:53 4 is fraud. You said, "That's the claim, it's fraud. That's  
07:57:58 5 what they're saying," not Mr. McKinley, "That's what they're  
07:58:02 6 saying."

07:58:03 7 And then you said an independent laboratory got a 23.  
07:58:06 8 You said, "You saw a slide from Mr. Buchanan that the 22 has  
07:58:10 9 never been replicated, but it has been replicated."

07:58:15 10 How could that be anything other than offered and  
07:58:19 11 argued for the truth? "It was replicated by another  
07:58:22 12 laboratory."

07:58:22 13 Showing the jury a slide with Mr. McKinley's picture  
07:58:25 14 on it and some, you know, dichotomy, as Mr. Bhimani described  
07:58:31 15 it, between a direct and a cross-examination does not change  
07:58:34 16 the fact that the argument was made.

07:58:36 17 And again, I allowed this slide showing the NRR of 23  
07:58:42 18 only, only if the jury was reminded by Ms. Branscome that they  
07:58:48 19 could not consider the results -- not just the testing vaguely  
07:58:53 20 -- the results, the NRR of 23 for the truth.

07:58:57 21 Second, Ms. Branscome, you never once told the jury  
07:59:01 22 that you weren't arguing the NRR of 23 for the truth. Frankly,  
07:59:06 23 I was shocked when you did not make that clear. I was shocked  
07:59:09 24 that Mr. Bhimani --

07:59:10 25 Frankly, I was shocked, Mr. Bhimani, that you didn't

07:59:13 1 do anything during the closing presentation when you knew Ms.  
07:59:17 2 Branscome had not done what I instructed had to be done in  
07:59:21 3 order for 3M to use this slide in closing.

07:59:25 4 Now, I waited for Ms. Branscome to move past the slide  
07:59:29 5 before I did anything because I was just confident that you  
07:59:33 6 were going to convey to this jury specifically what I had said  
07:59:36 7 had to be conveyed.

07:59:38 8 But when that wasn't done, as you know, I called  
07:59:41 9 counsel to the bench. At the bench, I reiterated my ruling.  
07:59:48 10 When, Ms. Branscome, you gave me some explanation that was  
07:59:51 11 inconsistent with what my ruling had been, I reiterated to you  
07:59:55 12 what I had told Mr. Bhimani, and I told you you had to tell the  
08:00:00 13 jury that they could not consider the NRR of 23 as true.

08:00:04 14 This was my second time telling 3M counsel that they  
08:00:07 15 had to tell the jury in closing that the NRR of 23, again,  
08:00:14 16 prominently displayed on the slide, was not being argued as  
08:00:18 17 true. And you assured me, Ms. Branscome, that you would do  
08:00:21 18 that and that you would fix this, and inexplicably, you did not  
08:00:28 19 do so.

08:00:29 20 My directive was, again, simple, clear -- no, ma'am --  
08:00:33 21 allowed no room for interpretation.

08:00:35 22 Instead, you proceeded back to the jury and you gave  
08:00:38 23 an explanation about hearsay. I didn't say anything up here at  
08:00:42 24 the bench about hearsay. All I told you, again, very specific,  
08:00:47 25 very clear, was to go back and tell this jury that they could

08:00:51 1 not consider and you were not arguing the NRR of 23 as the  
08:00:56 2 truth.

08:00:56 3 Now, you say, "Well, I'm not allowed to instruct the  
08:00:59 4 jury." Well, you actually went right back and gave them a very  
08:01:02 5 long explanation about hearsay.

08:01:04 6 So, my intent was clear. Whether you gave an  
08:01:09 7 instruction or whether you reminded them of my instruction or  
08:01:13 8 whether you said, "I'm not arguing on behalf of 3M the results  
08:01:19 9 of this NRR as 23 for the truth," it doesn't matter to me how  
08:01:23 10 you conveyed it; but that had to be conveyed, and it wasn't.

08:01:26 11 Instead, you vaguely and very ambiguously told the  
08:01:31 12 jury that the Michael's testing -- not testing results, just  
08:01:34 13 the testing -- you didn't use the word "result" and you  
08:01:37 14 definitely did not mention the NRR -- could not be considered  
08:01:41 15 for the truth.

08:01:42 16 This did nothing to address the glaring language on  
08:01:45 17 the slide that was my concern at 7:40 this morning that the NRR  
08:01:50 18 is 23. But more importantly, it is not what I told you to do,  
08:01:55 19 from the bench just minutes before and what I told Mr. Bhimani  
08:02:00 20 to do just a couple of hours before, that it had to be done if  
08:02:04 21 you wanted to use this controversial slide.

08:02:08 22 And the fact that I instructed the jury immediately as  
08:02:14 23 soon as you finished with this slide, Ms. Branscome, after you  
08:02:17 24 had been at the bench and you assured me you were going to go  
08:02:22 25 tell them that you were not arguing this for the truth of the

08:02:26 1 NRR of 23, immediately after you finished, I instructed the  
08:02:29 2 jury, because I told you up here you had to give -- you had to  
08:02:32 3 tell them and give them a statement that satisfied me. I told  
08:02:36 4 you that, it has to satisfy my concern. And so, as soon as you  
08:02:40 5 finished and you hadn't, then I gave that instruction.

08:02:46 6 So, in my mind, that is a clear indication that, at  
08:02:50 7 that moment in time, you had not done what I directed you to do  
08:02:53 8 from the bench.

08:02:55 9 My orders and directives in regards to this slide,  
08:02:58 10 again, were clear, they were specific, they were unambiguous,  
08:03:02 11 and they were repeated. And there is no reasonable lawyer who  
08:03:07 12 could have construed them in any way other than as a specific  
08:03:10 13 directive to advise the jury in closing argument, if you were  
08:03:13 14 going to use this slide --

08:03:14 15 Please don't go back in there.

08:03:16 16 -- if you were going to use this slide, that you were  
08:03:22 17 not arguing that the NRR of 23 was true. This was not done.  
08:03:26 18 It was not done once. It was done twice.

08:03:31 19 And everything -- I mean, Mr. Bhimani and Ms.  
08:03:34 20 Branscome, in my mind, you did everything you could do to avoid  
08:03:38 21 doing the very simple thing, very clear directive that I gave  
08:03:43 22 you to do.

08:03:46 23 So, in consideration of the totality of all of the  
08:03:49 24 circumstances that I've just outlined, I do find that your  
08:03:53 25 actions, Ms. Branscome, as well as Mr. Bhimani's actions,

08:03:56 1 although to a lesser degree, were willful, they were  
08:04:00 2 disruptive, and they were in direct contravention of a clear  
08:04:04 3 court order from me, and sanctions are warranted.

08:04:07 4 This is a summary imposition of sanctions, again,  
08:04:10 5 something I've never done before. They were not imposed at the  
08:04:13 6 very moment of the conduct because the jury was in the jury  
08:04:17 7 box, Ms. Branscome was in the midst of presenting 3M's closing  
08:04:21 8 argument.

08:04:21 9 I made my intentions clear immediately following the  
08:04:24 10 jury being excused for deliberations. I then checked the  
08:04:28 11 real-time transcript to confirm what I believed to have been  
08:04:31 12 the case. The weather has been terrible today, as we know. So  
08:04:36 13 my decision was to wait until the attorneys were called back to  
08:04:39 14 court either for a verdict or to excuse the jury for the  
08:04:44 15 weekend in order to hear from you both and to make my findings.

08:04:48 16 So, Ms. Branscome, you are ordered by this Court to  
08:04:51 17 pay a monetary sanction in the amount of \$10,000 for your  
08:04:55 18 willful disregard of my directive.

08:04:56 19 And, Mr. Bhimani, you appeared, again, on behalf of 3M  
08:05:01 20 at the conference this morning, you indicated you were prepared  
08:05:05 21 to handle the argument on the slides. You told the Court that  
08:05:08 22 you understood my ruling. No doubt, you had the knowledge and  
08:05:13 23 the understanding that you were to convey that specific ruling  
08:05:16 24 to Ms. Branscome. This was, obviously, according to both of  
08:05:21 25 you, not done. So you are ordered to pay a sanction in the

08:05:24 1 amount of \$2,000 for your part.

08:05:27 2 Both of these payments must be deposited into the  
08:05:30 3 registry of the Court within 30 days, and that is hereby  
08:05:35 4 ordered and entered into the record of this Court.

08:05:38 5 **MS. BRANSCOME:** May I make one comment, Your Honor?

08:05:41 6 **THE COURT:** You can.

08:05:42 7 **MS. BRANSCOME:** I understand your order. I never  
08:05:44 8 understood the distinction of the NRR equals 23 as being  
08:05:48 9 separate from the Michael's testing. The objections that were  
08:05:51 10 raised by plaintiff's counsel that led to this discussion was  
08:05:55 11 all about displaying the Kevin Michael testing. In my mind, I  
08:06:01 12 equate that with their finding of 23. It was the document on  
08:06:04 13 the screen. There was never a specific focus on the language  
08:06:08 14 of NRR of either equals --

08:06:11 15 **THE COURT:** There was. There was. Ms. Branscome,  
08:06:13 16 I've heard from you. The transcript speaks for itself. You  
08:06:16 17 may appeal this to the Eleventh Circuit. The Eleventh Circuit  
08:06:18 18 will have the transcript. Obviously, they don't have the  
08:06:20 19 context of being here sitting in the courtroom, but they'll  
08:06:24 20 have the cold transcript.

08:06:27 21 **MS. BRANSCOME:** I'm just conveying to you, Your Honor,  
08:06:30 22 I genuinely thought I went back and did exactly what you asked  
08:06:33 23 me to do. I did not --

08:06:34 24 **THE COURT:** Well, you didn't, you didn't. And, you  
08:06:36 25 know, this might be different if this had been a ten-page order

08:06:38 1 with multiple directives and, you know, twists and turns.

08:06:42 2 This couldn't have been more simple. I mean, it just  
08:06:46 3 couldn't have been more simple.

08:06:47 4 I never discussed hearsay. I never discussed testing.  
08:06:51 5 I conveyed one simple directive, to make sure that this jury  
08:06:56 6 understood you were not arguing that the NRR of 23 was true.  
08:07:01 7 That's all I ever said. I said it to Mr. Bhimani this morning,  
08:07:04 8 I said it to you at the bench. And that never got conveyed to  
08:07:07 9 this jury by anyone but me, which I tried to avoid doing.

08:07:12 10 **MS. BRANSCOME:** I, actually, thought -- my intention,  
08:07:14 11 Your Honor, was I actually thought I was giving a more thorough  
08:07:17 12 -- I was trying to repeat what your instruction has been to the  
08:07:19 13 jury, which is that it was hearsay and it couldn't be conveyed  
08:07:23 14 -- it couldn't be used for the truth of it. I even explained  
08:07:26 15 the context of it being used for the credibility --

08:07:29 16 **THE COURT:** I know you gave quite a bit of instruction  
08:07:32 17 on the jury on --

08:07:33 18 **MS. BRANSCOME:** I thought that's what you wanted me to  
08:07:35 19 do.

08:07:36 20 **THE COURT:** No. I told you what I wanted you to do.

08:07:38 21 **MS. BRANSCOME:** I didn't understand the distinction  
08:07:40 22 between the 23 versus the Kevin Michael --

08:07:40 23 **THE COURT:** I couldn't have been more clear. Ms.  
08:07:42 24 Branscome, I couldn't have been more clear. And if I thought  
08:07:45 25 there was some ambiguity in what I had asked you all to do, I'd

08:07:50 1 be right there listening to you and accepting your position.

08:07:53 2 But it could not have been more clear or more simple.

08:07:58 3 **MS. BRANSCOME:** I'm just telling Your Honor I equated  
08:08:01 4 the two of them in my mind, I just didn't --

08:08:04 5 **THE COURT:** Well, I'm sorry, Ms. Branscome -- I mean  
08:08:06 6 I'm not sorry. I'm sorry that this is happening. I said just  
08:08:10 7 a minute ago this is not a pleasurable for me. This is not a  
08:08:13 8 position I want to be in.

08:08:15 9 **MS. BRANSCOME:** I'm not suggesting that it is, and  
08:08:17 10 I'll deal with this procedurally. I just -- what I'm saying  
08:08:20 11 is, when Your Honor told me to go clear it up, I genuinely  
08:08:23 12 thought --

08:08:23 13 **THE COURT:** I didn't say go clear it up. I told you  
08:08:26 14 how to clear it up. I gave you a specific direction on how I  
08:08:29 15 wanted you to clear it up.

08:08:30 16 **MS. BRANSCOME:** And I think, Your Honor -- I  
08:08:33 17 understand you've reviewed the transcript. I went straight to  
08:08:35 18 the jury and I said it's not being offered for the truth. And  
08:08:38 19 I understand --

08:08:39 20 **THE COURT:** You said the testing, a very vague  
08:08:42 21 reference to the testing.

08:08:44 22 **MS. BRANSCOME:** I said the Kevin Michael testing. I  
08:08:46 23 don't -- that only stands for an NRR of 23. I wasn't trying to  
08:08:51 24 hide the ball. I genuinely thought I was conveying exactly  
08:08:54 25 what you had asked me to convey.

08:08:56 1           **THE COURT:** Ms. Branscome, I understand that that's  
08:08:57 2 your position.

08:08:57 3           I need to get whatever communication it is we have  
08:09:00 4 from the jury, please, Mr. Thomas.

08:09:04 5           This is not a verdict. This is a communication of  
08:09:07 6 some sort, a question.

08:09:17 7           The communication is, "Please expand on the first  
08:09:21 8 paragraph of page 32, proximate cause, particularly the quote,"  
08:09:26 9 and this is in quotes, "without which such injury would not  
08:09:30 10 have happened."

08:09:33 11           I'll read it one more time. "Please expand on the  
08:09:36 12 first paragraph of page 32, "proximate cause," which is also in  
08:09:42 13 quotes, "particularly, 'without which such injury would not  
08:09:46 14 have happened.'"

08:09:50 15           So we are after eight o'clock, which was for me the  
08:09:54 16 time that I was going to excuse the jury, given the hour and  
08:10:01 17 given weather conditions. I can go ahead and respond and give  
08:10:07 18 them another few minutes to see if they reach a verdict, and  
08:10:13 19 maybe that's the best thing to do.

08:10:15 20           What is the plaintiff's position on the response?

08:10:18 21           **MR. TRACEY:** We agree, Your Honor.

08:10:20 22           **THE COURT:** Well, how would you like me to respond?

08:10:23 23           **MR. TRACEY:** Well --

08:10:25 24           **THE COURT:** They're asking me to expand, in other  
08:10:31 25 words, they want a better definition of "without which such

08:10:34 1 injury would not have happened." It's a "but for," but that  
08:10:38 2 wasn't what was given. This is the pattern instruction on  
08:10:41 3 proximate cause.

08:10:42 4 **MR. TRACEY:** I don't know that there's a way around  
08:10:44 5 simply reiterating the instruction. I don't know that we can  
08:10:49 6 stray from it without creating error.

08:10:51 7 **THE COURT:** Ms. Branscome or Mr. Beall?

08:10:54 8 **MS. BRANSCOME:** I would agree with that, Your Honor, I  
08:10:56 9 don't think we can expand on it.

08:11:20 10 **THE COURT:** All right. I think I simply just have to  
08:11:23 11 say, "The Court is unable to" -- I'll use their term -- "expand  
08:11:27 12 on the instructions."

08:12:28 13 I would say I'll give them another few minutes, and if  
08:12:35 14 they haven't reached a verdict, I'm going to excuse them for  
08:12:39 15 the weekend.

08:12:40 16 We'll be in recess.

08:12:42 17 *(Recess taken 8:12 p.m. to 8:55 p.m.)*

08:55:50 18 **THE COURT:** We've been advised that the jury has  
08:55:52 19 reached a verdict.

08:55:53 20 And of course, we don't ever know what the verdict is,  
08:55:56 21 this case being no exception. One thing we do know for sure,  
08:56:01 22 given the nature of our adversarial system, is that one side is  
08:56:05 23 likely to be happy or pleased with the verdict and one side is  
08:56:08 24 likely to be very disappointed with the verdict. That's  
08:56:11 25 understandable, given the time, energy, emotion, resources put

08:56:17 1 into this trial.

08:56:18 2 But, regardless of how you personally feel about the  
08:56:20 3 verdict, I want to make sure that everyone understands my  
08:56:23 4 instructions that there should be no display or showing of  
08:56:28 5 emotion one way or the other in approval of or disapproval of  
08:56:33 6 the jury's verdict, whatever it may be.

08:56:35 7 These jurors are not here voluntarily. They do the  
08:56:38 8 best they can do with what we give to them. You give them the  
08:56:42 9 facts, I give them the law, and again, they do the best that  
08:56:45 10 they can do, and I don't want them to be made to feel poorly in  
08:56:48 11 any way about the decision that they've reached in this case,  
08:56:51 12 no matter what it is.

08:56:52 13 So, please ask yourself -- examine your own conscience  
08:56:59 14 and decide if you can sit here quietly as the verdict is read  
08:57:03 15 by the courtroom deputy. If you don't think you can do that,  
08:57:07 16 that is be quiet and respectful as the verdict is read, then  
08:57:11 17 I'd ask that you leave the courtroom now, and you're certainly  
08:57:13 18 free to return to the courtroom after the jury has been  
08:57:17 19 excused.

08:57:17 20 All right, Mr. Thomas, if you'd bring them in, please.

08:58:24 21 *(Jury in the box.)*

08:58:25 22 Ladies and gentlemen, has the jury reached a verdict?

08:58:31 23 **THE FOREPERSON:** Yes, Your Honor.

08:58:32 24 **THE COURT:** Thank you. If you would, please, pass the  
08:58:34 25 envelope to Mr. Thomas. Thank you.

08:59:07 1 All right. Ms. Cawby, if you would publish the jury's  
08:59:14 2 verdict.

08:59:14 3 **MADAM CLERK CAWBY:** United States District Court,  
08:59:18 4 Northern District of Florida, Pensacola Division. Lloyd Baker,  
08:59:20 5 Plaintiff, vs. 3M Company, 3M Occupational Safety, LLC, Aearo  
08:59:26 6 Holding, LLC, Aearo Intermediate LLC, Aearo LLC, and Aearo  
08:59:32 7 Technologies LLC, Defendants. Case No. 7:20CV39MCR/GRJ.

08:59:41 8 Verdict Form. We, the jury in the above entitled and  
08:59:44 9 numbered case, unanimously find as follows on Plaintiff Lloyd  
08:59:50 10 Baker's claims and 3M's affirmative defenses based on the  
08:59:56 11 Court's instructions on the law and evidence.

08:59:57 12 Plaintiff's Claims.

08:59:59 13 Strict liability design defect: Not proven.

09:00:03 14 Strict liability failure to warn and/or instruct:  
09:00:09 15 Proven.

09:00:09 16 Negligent failure to warn and/or instruct after  
09:00:13 17 manufacture: Not proven.

09:00:15 18 Fraudulent misrepresentation: Not proven.

09:00:18 19 Fraudulent concealment: Not proven.

09:00:22 20 3M's Affirmative Defenses.

09:00:26 21 Superseding cause based on conduct of the United  
09:00:30 22 States Army: Not proven.

09:00:32 23 Apportionment of fault as to Mr. Baker: Proven.

09:00:38 24 United States Army: Not proven.

09:00:46 25 Compensatory Damages.

09:00:48 1 If you have found in favor of Mr. Baker on any of his  
09:00:51 2 claims, state the total damages, if any, you find for past and  
09:00:54 3 future noneconomic damages, pain and suffering, and disability.

09:00:58 4 \$1,700,000.

09:01:02 5 Apportionment of Fault.

09:01:04 6 Defendants: 62 percent.

09:01:08 7 United States Army: 0 percent.

09:01:08 8 Mr. Baker: 38 percent.

09:01:09 9 So say we all this 18th day of June 2021. Signed by  
09:01:16 10 the foreperson.

09:01:17 11 **THE COURT:** All right. Thank you.

09:01:18 12 Ladies and gentlemen, I have one final question for  
09:01:20 13 each of you and that is whether the verdict that you've heard  
09:01:24 14 read by the clerk is your verdict individually as well as the  
09:01:27 15 verdict of the jury as a whole.

09:01:29 16 So, when I call you by your juror number, you just  
09:01:32 17 need to answer yes or no to that question, again, whether the  
09:01:37 18 verdict that you've heard read just now is your verdict  
09:01:40 19 individually as well as the verdict of the jury as a whole.

09:01:43 20 So, No. 1, just yes or no?

09:01:43 21 **JUROR NO. 1:** Yes.

09:01:46 22 **THE COURT:** Thank you. No. 2?

09:01:46 23 **JUROR NO. 2:** Yes.

09:01:47 24 **THE COURT:** No. 3?

25 **JUROR NO. 3:** Yes.

1           **THE COURT:** 4?

2           **JUROR NO. 4:** Yes.

3           **THE COURT:** 5?

4           **JUROR NO. 5:** Yes.

5           **THE COURT:** 6?

6           **JUROR NO. 6:** Yes.

7           **THE COURT:** 7?

8           **JUROR NO. 7:** Yes.

9           **THE COURT:** And 8?

10          **JUROR NO. 8:** Yes, Your Honor.

09:01:56 11          **THE COURT:** Thank you.

09:01:57 12                   Ladies and gentlemen, there will be a judgment entered  
09:01:59 13 by the Court consistent with the jury's unanimous verdict.

09:02:04 14                   I realize it's late, but I want to take just a moment  
09:02:06 15 to thank you all one final time for your time and your  
09:02:10 16 participation and your service here as jurors in this case.

09:02:14 17                   I also want to advise you of certain privileges that  
09:02:17 18 are enjoyed by jurors in our system. One of those is that no  
09:02:21 19 juror can ever be required to talk about the discussions that  
09:02:24 20 took place in the jury room except by way of a court order.  
09:02:28 21 And it would be a very rare occasion on which I would ever  
09:02:31 22 enter such an order requiring a juror to speak about his or her  
09:02:35 23 participation as a juror.

09:02:36 24                   We've always recognized that, in order for our system,  
09:02:40 25 our jury system to operate as it's intended, the jury's

09:02:44 1 deliberations should remain the private affair of the jury so  
09:02:48 2 long as the jurors wish it to remain so. And therefore, the  
09:02:50 3 law gives you the unique privilege of refusing to speak to  
09:02:53 4 anyone about your own work here as a juror during this trial.

09:02:58 5 On the other hand, our Constitution certainly does  
09:03:01 6 provide for the freedom of speech. And if you wish to talk  
09:03:04 7 about your own personal participation as a juror, you are  
09:03:08 8 certainly free to do that and to do that with anyone you wish  
09:03:11 9 to speak to about it. But I would ask that, if you do speak to  
09:03:15 10 others about your own personal participation or what took place  
09:03:19 11 in the jury room, that you please respect the confidences and  
09:03:22 12 the privacies of your fellow jurors in that regard.

09:03:26 13 Also, another privilege. Because of your service here  
09:03:30 14 over the past two weeks, you'll be excused from further federal  
09:03:33 15 jury duty in this court for the next two years. That doesn't  
09:03:37 16 mean you won't be summoned to return because that's done at  
09:03:41 17 random by a big computer we don't have any control over.

09:03:44 18 But if you are summoned to return for jury duty in the  
09:03:47 19 United States District Court for the Northern District of  
09:03:49 20 Florida and you wish not to return, all you have to do is  
09:03:52 21 contact the clerk's office -- the notice will appear on your  
09:03:54 22 form -- give them your name. We'll have a record of your  
09:03:57 23 service here in this trial, and you'll be excused no questions  
09:04:00 24 asked.

09:04:00 25 Now, that doesn't mean we don't want you back. So, if

09:04:04 1 you're summoned to return at some point within the next two  
09:04:07 2 years and you would like to return for jury duty, it would  
09:04:10 3 certainly be our pleasure to have you back, and if it's in my  
09:04:14 4 courtroom, it would be my privilege to have you back. You all  
09:04:17 5 have been a terrific jury.

09:04:19 6 So, again, with my thanks and I know the thanks of all  
09:04:21 7 those who have participated in the trial, you'll be excused at  
09:04:24 8 this time, actually dismissed at this time. I'll ask you to  
09:04:28 9 step into the jury room for some final instructions and then  
09:04:31 10 you'll be on your way. Thank you very much.

09:04:51 11 *(Jury out.)*

09:04:52 12 **THE COURT:** Is there anything we need to discuss from  
09:04:54 13 everyone?

09:04:55 14 **MR. BUCHANAN:** I assume, Your Honor, given the hour,  
09:04:56 15 that the jurors are being dismissed, that you're not going  
09:04:58 16 to --

09:04:58 17 **THE COURT:** I'm going to go in and talk to them. I'll  
09:05:02 18 be happy to relay to you what they've said. But given the hour  
09:05:04 19 and the weather, I'm not going to ask them to stay and speak to  
09:05:07 20 you all.

09:05:08 21 **MR. BUCHANAN:** Understood. Thank you, Your Honor.

09:05:09 22 **THE COURT:** It's just too late. I'm sorry for that.  
09:05:11 23 Anything else?

09:05:13 24 *[No response.]*

09:05:13 25 We're adjourned.

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***(Proceedings concluded at 9:05 p.m.)***

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

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

***6-18-2021***  
***Date***

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INDEX

PAGE

JURY INSTRUCTIONS	15
CLOSING ARGUMENT BY MR. BUCHANAN FOR THE PLAINTIFF	47
CLOSING ARGUMENT BY MS. BRANSCOME FOR THE DEFENDANTS	84
REBUTTAL CLOSING BY MR. TRACEY FOR THE PLAINTIFF	137
FINAL JURY INSTRUCTIONS	149
VERDICT	185

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