UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG PRODUCTS LIABILITY LITIGATION	)	Case No. 3:19-md-2885
This Document Relates to All Actions	)	Hon. Judge M. Casey Rodgers Magistrate Judge Gary R. Jones

PLAINTIFFS' MOTION TO COMPEL DISCOVERY AND MEMORANDUM OF LAW

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I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 26, 34, and 37, and Case Management Order No. 6, Plaintiffs submit this memorandum in support of their Motion to Compel Defendants 3M Company, 3M Occupational Safety LLC, Aearo Technologies LLC, Aearo Holdings, LLC, Aearo Intermediate, LLC, Aearo, LLC (collectively, "3M" or "Defendants") to produce nonlinear dual-ended Combat Arms Earplug version 2 ("CAEv2") products and/or nonlinear dual-ended ARC Earplug products, or other substantial equivalent of the CAEv2 Earplug product(s) along with the original product packaging and instructions, pursuant to Plaintiffs' Third Requests for Production.[1] *See* Ex. 1 at ¶ 12.

II. SUMMARY OF ISSUES

The efficacy, characteristics, labeling, and instructions for use of 3M's Combat Arms Earplug Version 2 (and its substantial equivalents) (collectively referred to as "CAEv2"), are of the most central importance in this case. On October 14, 2019, in response to Plaintiffs' Third Requests, Defendants **agreed** to "provide, to the extent available, an exemplar of each version of the Combat Arms Earplugs, and the sealed packaging and instructions that accompanied each exemplar…" Ex. 2

[1] Plaintiffs' Third Requests are attached as Exhibit 1; Defendants' Responses to Plaintiffs' Third Requests are attached as Exhibit 2; Ex. 1 at ¶ 12.

at 6 - 8. Defendants represented that they were "investigating whether and how many sealed exemplars of each version of the 3M Earplugs exist[ed]." *Id*.

Since then, Defendants have made no meaningful efforts towards production of these exemplar products despite their repeated representations that they are "investigating" the number of exemplars products in their possession, custody, or control.

Defendants manufactured and sold millions of pairs of CAEv2 earplugs over the course of approximately two decades – indeed, as of January 13, 2016, 3M possessed over 10,000 pairs of the CAEv2. REDACTED - FILED UNDER SEAL [redacted] As the CAEv2 had been discontinued in October 2015, it stands to reason that those exemplars, and potentially tens of thousands of others, still exist somewhere within 3M.

Defendants are obligated under the Federal Rules to produce the exemplars they possess for the following reasons. First, the exemplars sought are directly relevant not only to 3M's affirmative defenses, but also to Plaintiffs' claims that the CAEv2 was defectively designed and manufactured, improperly tested, and deceptively marketed and sold.

As demonstrated below, exemplar tangible products, like the ones sought here are routinely used at trial and through depositions to help establish or refute these points in products liability actions.

Second, the production is proportionate to the needs of the case. 3M, a massive, multi-national corporation that generates billions of dollars a year in net profit, is alleged to have promoted and sold these defective earplugs to the military and others for well over a decade, causing tens of thousands of service members to suffer serious hearing damage. Production of such exemplar products will not raise any unreasonable burden, as documents from its own files indicate that 3M maintained over 10,000 units of these products as of January 2016, and should have the requested exemplars readily available. Further, Plaintiffs' Counsel has offered to compensate 3M for the exemplars, and to return any unused products to 3M upon resolution of the matters at issue. Despite objecting in their response to Plaintiffs' requests based upon purported burden, Defendants have not presented any evidence supporting that claim. Conversely, Plaintiffs will be significantly prejudiced if not given exemplars to analyze and test the CAEv2 to further investigate its properties and alleged defects – access that would put Plaintiffs on more equal footing with 3M, which has had the opportunity to test this product at will for decades.

The exemplar products are highly relevant to all matters at issue in this case, and the burden on Defendants of producing them is minuscule in comparison to the

broader needs of the case.

Plaintiffs respectfully request this Court grant Plaintiffs' Motion to Compel, and Order Defendants to produce the exemplar products.

III. ARGUMENT

A. Legal Standard

Pursuant to Federal Rule of Civil Procedure 26, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). "Information within this scope of discovery need not be admissible in evidence to be discoverable," *id.*, and "[c]ourts construe relevancy 'broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.'" *Ford v. Gov't Employees Ins. Co.*, 2015 WL 11109373, at *1 (N.D. Fla. Apr. 3, 2015) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). Federal Rule of Civil Procedure 34(a) authorizes the inspection, sampling, or testing of any tangible thing within the scope of relevance.

"A party seeking discovery may move for an order compelling an answer, designation, production, or inspection," Fed. R. Civ. P. 37(a)(3)(B), and the Court has "broad discretion" to compel such discovery. *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1306 (11th Cir. 2011). The party resisting discovery

has the burden of proving that the requested discovery is either irrelevant, or of such marginal relevance that the potential harm occasioned by discovery outweighs the ordinary presumption in favor of broad disclosure. *See Vision Constr. Ent., Inc. v. Argos Ready Mix, LLC*, 2017 WL 10084359, at *2 (N.D. Fla. June 28, 2017).

Production of tangible exemplar products, such as those requested by Plaintiffs, is a common practice in personal injury and products liability litigation, and Plaintiffs now move to compel their production. Over the

B. Factual & Procedural Background

Plaintiffs' Third Requests for Production, served on September 12, 2019, included several requests sought production of exemplar versions of the CAEv2, including the sealed packaging and instructions that accompanied each commercial unit. Ex. 1 at ¶ 69-71. On October 14, 2019, Defendants **agreed** to "provide, to the extent available, an exemplar of each version of the Combat Arms Earplugs, and the sealed packaging and instructions that accompanied each exemplar," and claimed to be "investigating whether and how many sealed exemplars of each version of the 3M Earplugs exist." *Id.*

The Parties met and conferred on this issue on November 15, 2019, and on November 20, 2019, Plaintiffs reiterated the need for exemplars and modified their request (1) increasing to the volume sought to four boxes of fifty earplugs, for a total

of 200 individual pairs, and (2) offering to compensate Defendants for the cost of the earplugs.

At the Case Management Conference before this Court on November 22, 2019, Defense counsel represented that they had "located 15 pairs of the Version 2 earplugs," but that Defendants were "not willing to hand those over." *See* Transcript of Sixth Case Management Conference, Dkt. No 840. On November 25, 2019, this Court issued Case Management Order No. 6, which ordered Plaintiffs to file a Motion to Compel if the issue of exemplar products was not resolved. *See* Case Management Order No. 6, Dkt. 836. In the Parties' December 4, 2019 meet-and-confer, Defense Counsel represented that they had done no further investigation and had no additional updates concerning the status of exemplar products.

Most troublingly, at the Case Management Conference and in conversations since, 3M has inappropriately attempted to shift the burden of producing exemplars to individual Plaintiff servicemembers – which is plainly not an adequate solution. Most fundamentally, Defendants' have objected to Plaintiffs' use of Plaintiff-provided exemplars on chain-of-custody grounds. Indeed, 3M's own counsel and employees have challenged the providence of CAEv2s found outside of 3M's custody and control – highlighting the need for 3M to produce its own exemplars.

At the fact witness deposition of Douglas Moses, taken on the date this Motion was filed, Mr. Moses expressed concern that what appeared to be a CAEv2 earplug

brought to his deposition could have been one of many counterfeit plugs "made in China" and assembled using different plastics.[2] This testimony was preceded by a statement on the deposition record by 3M's counsel expressing similar doubts about the exemplar's sourcing.

Chain of custody issues aside, it is baffling that 3M is now attempting to deflect the preservation of exemplar CAEv2 products—a product that 3M itself manufactured, tested, and sold in mass quantities—onto Plaintiffs. Requiring Plaintiffs to produce individual CAEv2 presents an extraordinary burden on individual servicemembers and their counsel, while the burden on 3M of producing exemplars – to the extent it properly preserved those exemplars – is minimal. 3M's attempted deflection of this issue does not absolve 3M of its duty to preserve evidence that it knew or reasonably should have known was relevant to matters in litigation or where litigation was reasonably foreseeable.

Plaintiff leadership has also attempted to obtain these exemplars through third party discovery. Plaintiffs' counsel has made contact with New Dynamics, the company that manufactured the earplugs during the later years of the CAEv2's sales, and counsel for New Dynamics has represented that that entity has a *single pair* of the CAEv2 in unopened condition. Attempts have also been made to request

[2] As of the time of filing this Motion, the deposition of Doug Moses is ongoing, and accordingly, Plaintiffs do not have a final deposition transcript at this time. Plaintiffs will supplement this filing with the relevant excepts as soon as the transcript is produced.

exemplars from the Department of Defense, and the parties are awaiting information from the Department of Defense concerning the existence of any exemplar products. Plaintiffs are hopeful that additional investigation by the Defendants will lead to a resolution of this issue.

C. Exemplar CAEv2 Products are Relevant to this Litigation

The production of exemplar products is integral to the claims and defenses at issue in this case, and there is no substitute for them. The exemplars may reveal information that testimony may not, which is why plaintiffs are entitled to testimonial, document, and tangible discovery. *In re Traysol Prod. Liab. Litig.*, 2009 WL 936597, at *2 (S.D. Fla. Apr. 7, 2009) (citing *Southern Ry. Co. v. Lanham*, 403 F.2d 119 (5th Cir. 1968)).

"[T]he procedure for discovery in federal court, as evidenced by Rule 26(b)(1), is aimed at the broad and liberal discovery of all relevant facts to bring everything to light before the trier of fact." *Ward v. Estaleiro Itajai S/A*, 541 F. Supp. 2d 1344, 1355 (S.D. Fla. 2008); *see also Wrangen v. Penn. Lumbermans Mut. Ins. Co.*, 593 F. Supp. 2d 1273, 1278 (S.D. Fla. 2008) (all potentially relevant materials are discoverable "unless it is clear that the information sought has no possible bearing on the claims and defenses of the parties or otherwise on the subject matter of the action.").

The exemplars are highly relevant, and therefore should be produced unless

Defendants can show that doing so is disproportional to the needs of the case – which they cannot.

Production of exemplar products is routine in products liability litigation, including in the multi-district litigation context, as evidenced by the fact that the issue is rarely litigated, because such production is rarely challenged. Nonetheless, Plaintiffs have provided examples of Orders from various MDL and other courts requiring production of exemplar products. *See* Ex. 4.

3M has not offered, and cannot offer, any details substantiating their purported burden in producing exemplar products. The number of claimants and the scope of potential damages at issue in this case justify the minimal effort it should take to produce these exemplars, if properly preserved. *Holcombe v. Advanced Integration Tech.* 2018 WL 3819974, at *5 (E.D. Tex. Aug. 10, 2018) (granting discovery as claimed damages of $1,952,835 is "large," and burden of producing documents was "small, if not negligible" for large defendant). Additionally, Plaintiffs have offered to compensate Defendants for the exemplar products, to further ameliorate whatever financial burden Defendants perceive.

Production of the tangible exemplar products sought by Plaintiffs will be directly probative of the injuries cause by the expressly identified product, the 3M Earplugs. This production presents a minimal burden on Defendants, and Plaintiffs respectfully request that it be compelled by this Court.

IV. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that this Court enter an order compelling Defendants to produce four boxes of fifty exemplar products, complete with original sealed packaging and instructions, in accordance with Plaintiffs' Third Requests for Production.

Dated: December 5, 2019

{SIGNATURES ON FOLLOWING PAGE}

Respectfully submitted,

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2019, I caused the foregoing Motion to Compel Discovery to be filed with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Shelley V. Hutson

CERTIFICATE OF CONFERENCE

I certify that I have complied with the conference requirement pursuant to the Court's Local Rule 7.1(B). Through the course of the past several months, the parties have met and conferred on this matter on numerous occasions, including but not limited to: November 15, 2019; November 20, 2019; November 22, 2019; November 26, 2019; and December 4, 2019. Through the course of said meet and confers on this issue, Defense Counsel has confirmed their willingness to provide exemplars, and has continued to represent their need to investigate further as to the amount of exemplar products in 3M's possession, custody, or control. To date, as far as Plaintiffs are aware, said investigation has yet to commence.

CERTIFICATE OF WORD COUNT

I certify that this Plaintiffs' Memorandum to Plaintiffs' Motion to Compel contains 2,425 words per my word-processing system, and including all words exhibited within Plaintiffs' Certificates of Service, Conference, and Word Amount.

EXHIBIT
1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG PRODUCTS LIABILITY LITIGATION	))))	CASE NO. 3:19-MD-2885

PLAINTIFFS' THIRD REQUESTS FOR PRODUCTION

PLEASE TAKE NOTICE THAT pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiffs hereby request that Defendants produce for inspection and/or copying the documents and tangible things designated in these Requests for Production (the "Requests" and each a "Request") to Plaintiffs' ESI Liaison, in accordance with the Order for Production of Documents and Electronically Stored Information by 3M, within 30 days[1] from the date of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. As used herein, the terms "you," "your," or "yourself," refer to 3M Company, 3M Occupational Safety LLC, Aearo Technologies LLC, Aearo Holding LLC, Aearo Intermediate LLC, Aearo LLC, and any of their related or affiliated entities or individuals named as defendants in this proceeding (the "Defendants" and each a "Defendant"), their present and former officers, directors, executives, agents, representatives, employees, and/or attorneys.[2]

2. As used herein, the term "representative" means any and all agents, employees, servants, officers, directors, attorneys or other persons acting or purporting to act on behalf of any Defendant.

[1] *See* Definitions and Instructions at No. 17 regarding the modified production deadline for Witness Personnel Files.
[2] *See* Request No. 68 regarding the application of this definition to Plaintiffs' prior Requests for Production.

3. As used herein, the term "person" shall mean any natural person or any business, legal or governmental entity, or association.

4. As used herein, the term "document" is synonymous in meaning and equal in scope of the usage of this term in Fed. R. Civ. P. 34. A draft or non-identical copy is a separate document within the meaning of this term. The definition of Document shall include Communication as defined below.

5. As used herein, the term "communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise) and, with respect to oral communications, includes any document evidencing such oral communications. It includes the transmittal of information by any means, including email, SMS, MMS, or other "text" messages, messages on "social networking" sites (including, but not limited to, Facebook, Google+, and Twitter), shared applications from cell phones, or by any other means. "Communication" shall also include, without limitation, all originals and copies that are provided by you or to you by others.

6. As used herein, the word "or" appearing in a Request should not be read so as to eliminate any part of a Request but, whenever applicable, it should have the same meaning as the word "and." For example, a Request stating "support or refer" should be read as "support and refer" if any answer that does both can be made.

7. As used herein, the word "including" means "including but not limited to."

8. As used herein, the word "competing product" means a product targeting the same market segment, customers, users, non-user purchasers, or uses or types of uses, as the 3M Earplugs.

9. As used herein, the term "3M Earplugs" refers to the dual-ended Combat Arms earplugs (Version 2 CAEv.2) that were designed, manufactured and sold by Defendants to the U.S. military from the early 2000s through approximately 2015, together with any like-design earplugs marketed or sold by you for civilian use or non-military use, including the 3M E-A-R ARC Plug.

10. As used herein, the terms "tests" or "testing" include, without limitation, reports, presentations, articles, data compilations, data collections, analyses, evaluations, studies, experiments, scientific literature, and slide presentations, complete or incomplete, published or unpublished, finalized or unfinalized, peer reviewed or non-peer reviewed.

11. As used herein, the term "Tested HPDs" refers to the 3M Earplugs, any actual or contemplated predecessor or successor designs thereof, whether linear or non-linear (including the CAEv1, CAEv3, CAEv4, CAEv4.1, and UltraFit Earplugs, together with any like-design earplugs for civilian use or non-military use), together with any other non-linear or level-dependent passive hearing protection devices, whether developed by you or any other entity, on which you performed any testing.

12. As used herein, the term "Personnel Files" refers to documents generally maintained by an individual's supervisor or an individual's employer's human resource department, to include job performance evaluations, self-evaluations, salary and compensation information, and bonus and/or incentive information, relating to that individual's work on 3M Earplugs.

13. As to any document or information that would fall under the scope of any document request herein, but over which you claim a privilege or protection, including but not limited to attorney-client privilege, attorney work-product privilege, or joint defense privilege, such document shall be logged on a privilege log that accompanies the production of documents from which it was withheld. Defendants' privilege log shall (a) conform to Federal Rule of Civil Procedure 26 and the agreement of the Parties with regard to the information reflected thereon, (b) be cumulative (*i.e.*, to the extent documents are produced in waves, the privilege log shall be updated to incorporate documents withheld from production in subsequent waves); and (c) be delivered in Excel and PDF formats.

14. The Requests shall be continuing, and you are required to supplement your responses thereto by immediately producing for inspection and copying any requested document that comes

into your possession or subject to your custody or control subsequent to the date of this Request.

15. All documents and electronically stored information produced in response to these requests must be produced in accordance with the stipulated protocol for the production of electronically stored information.

16. In responding to the Requests, you shall designate the specific Request or Requests to which each document produced is responsive.

17. The Request below seeking the Personnel Files of deponents is continuing, and shall apply to hereafter-noticed depositions of any witness who is a former or current employee or agent of Defendants. Each of those witnesses' personnel files shall be produced ten (10) days prior to the date of that witness's deposition.

REQUESTS FOR PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS

Please produce true and correct copies of the following:

68. Any documents responsive to Plaintiffs' First Requests for Production served June 19, 2019 and Plaintiffs' Second Requests For Production, served August 8, 2019, when the revised definition of "you" provided herein[3] is applied to those Requests.

69. Ten (10) exemplars of each version of the 3M Earplugs, to include the dual-ended Combat Arms earplugs (Version 2 CAEv.2), the 3M E-A-R ARC Plug, and any like-design earplugs marketed or sold by you for any use, together with the sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version.

70. Ten (10) exemplars of each version of the Combat Arms Earplugs, including the CAEv1, CAEv3, CAEv4, and CAEv4.1, together with the sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version..

[3] *See* Definitions and Instructions at No. 1.

71. Ten (10) exemplars of all Tested HPDs, together with the sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version.

72. All documents concerning any royalty payments relating to the 3M Earplugs or any technology incorporated therein, including the non-linear filter and/or dual-tip design incorporated in the 3M Earplugs.

73. Any comparison between the features, testing, or performance of the 3M Earplugs or predecessor or successor designs thereof, and any active hearing protection device.

74. All documents governing, relating to, or constituting the results of any quality assurance testing conducted by you or any other person or entity regarding the 3M Earplugs.

75. All testing documentation retained and/or made in accordance with American National Standards Institute (ANSI) as S 3.19-1974 as required under CFR 40.

76. Any documents relating to analyses of HPD program effectiveness.

77. Any communications regarding 3M Earplugs and/or testing protocols between the Aearo Laboratory and/or E-A-RCal Lab located in Indianapolis, Indiana on the one hand, and any other laboratory that conducted any testing on any Tested HPDs on the other hand.

78. All Institutional Review Board review results with regard to the Aearo Laboratory and/or E-A-RCal Lab located in Indianapolis, Indiana.

79. All records of any sound measurements relating to the 3M Earplugs, including those to calibrate test-room background noise, to determine test signal levels, and to determine audiometer calibration and calibration of any other hearing testing devices.

80. Any documents relating to the fit of any Tested HPD, including documents relating to qualification of HPD fit selection, or reflecting real-ear testing data reflecting the acoustic seal created or not by any Tested HPD.

81. Any documents relating to threshold-shift testing, including audiometric test data gathered before and after noise exposure attenuated by any Tested HPD.

82. Any draft or final "Specification Sheet" relating to the 3M Earplugs, including any earlier or later drafts of the Specification Sheet produced by you in this action bearing Bates Number 3M_MDL000013929, together with any communications concerning any Specification Sheets.

83. The Personnel Files of any current or former 3M employee or agent who is noticed for deposition in these proceedings.

EXHIBIT
2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG PRODUCTS LIABILITY LITIGATION,	)	Case No. 3:19-md-02885
	)	Judge M. Casey Rodgers
	)	Magistrate Judge Gary R. Jones
This Document Relates to All Cases	)	

3M'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' THIRD REQUESTS FOR PRODUCTION

Defendants 3M Company ("3M"), 3M Occupational Safety LLC, Aearo Technologies LLC, Aearo Holdings, LLC, Aearo Intermediate, LLC, and Aearo, LLC (collectively "Defendants") serve their Answers and Objections to Plaintiffs' Third Requests for Production.

GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' Third Requests for Production to the extent that they call for information or seek discovery that Defendants have already produced, agreed to produce, or been ordered to produce in this federal MDL Proceeding, including but not limited to the following: (i) 3M's prior or ongoing productions resulting from the *Qui Tam* Action; and (ii) 3M's prior or ongoing productions from Moldex I and Moldex II consistent with the Parties' agreed-upon early production of documents as described in the Court's Pretrial Order No. 10

regarding Production of Documents and Electronically Stored Information (Dkt. 443).

2. Defendants object to Plaintiffs' Requests to the extent that they seek documents already in the possession of Plaintiffs or equally available to Plaintiffs from sources other than Defendants, including publicly available sources and documents received from the military and/or government.

3. Defendants object to Plaintiffs' requests for electronically stored information ("ESI") to the extent that they call for the production of ESI in any manner other than that required in the Court's Pretrial Order No. 10 regarding Production of Documents and Electronically Stored Information (Dkt. 443), and to the extent that they call for production of ESI with respect to technology assisted review ("TAR") in any manner other than that required under the Court's Pretrial Order No. 12 regarding the Protocol Relating to Use of Technology Assisted Review (Dkt. 472).

4. Defendants object to Plaintiffs' definitions of "you" and "your" because they improperly attempt to make Plaintiffs' requests applicable not only to the named Defendants, but to entities which are not parties to this litigation, including but not limited to "related or affiliated entities or individuals named as defendants in this proceeding, their present and former officers, directors, executives, agents, representatives, employees, and/or attorneys." Defendants will respond and produce documents on their own behalf.

5. Defendants object to Plaintiffs' definition of "document" and/or "documents" in Paragraph No. 4 of Plaintiffs' Definitions/Instructions, to the extent that it improperly seeks documents that may not have been kept in the ordinary course of business, may not be in a reasonably accessible and recoverable format, and/or may not be obtained after a good-faith and reasonable search.

6. Defendants object to Plaintiffs' definition of "3M Earplugs" as overly broad, vague, and ambiguous to the extent that it incorporates "any like-design earplugs marketed or sold by you for civilian use or non-military use."

7. Defendants object to Plaintiffs' Requests to the extent that they are unduly burdensome, duplicative, premature, oppressive, and/or overly broad, including without limitation, as to subject matter and/or time period, and where compliance with specific requests would be unreasonably difficult, as well as prohibitively expensive or time-consuming. Defendants further object to Plaintiffs' Requests to the extent that they seek documents and materials that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

8. Defendants object to each of Plaintiffs' Requests asking for "each," "every," "any," or "all" document(s), communication(s), person(s), or event(s) on the ground that such Requests are vague, ambiguous, overly broad, unduly burdensome, oppressive, and/or seek information that is not relevant. Subject to these objections, Defendants will diligently search for and produce, if located, responsive, non-

privileged documents. To the extent Defendants specifically identify documents in response to individual Requests, Defendants cannot and do not, however, represent that these documents represent "each," "every," "any," or "all" documents that may be responsive to Plaintiffs' Requests.

9. Defendants object to Plaintiffs' Requests to the extent that they seek documents or information protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

10. Defendants object to Plaintiffs' Requests to the extent that they call for documents or information not within Defendants' possession, custody, or control.

11. Defendants' production of any information or documents in response to Plaintiffs' Requests should not be construed as: (a) a stipulation that the material is relevant or admissible; (b) a waiver of Defendants' General Objections or any objections asserted in response to specific requests; (c) an agreement that requests for similar information will be treated in a similar manner; or (d) a waiver or forfeiture of any claim of applicable privilege or work product protection. Defendants expressly reserve the right to object to further discovery, to the subject matter of these Requests, and to the introduction into evidence of any documents that Defendants may produce in response to these Requests.

12. Defendants reserve the right to modify, amend, or supplement their responses, which are based upon Defendants' current knowledge, understanding, belief, and searches for information and documents. Defendants' investigation of facts and information relating to these Requests is continuing.

13. Notwithstanding their response to a particular Request, Defendants assert, and incorporate by reference, the foregoing General Objections into their responses to individual requests, including any definitions or instructions associated therewith. [1]

SPECIFIC OBJECTIONS TO REQUESTS FOR PRODUCTION 68 THROUGH 83

REQUEST NO. 68

Any documents responsive to Plaintiffs' First Requests for Production served June 19, 2019 and Plaintiffs' Second Requests For Production, served August 8, 2019, when the revised definition of "you" provided herein[2] is applied to those Requests.

RESPONSE TO REQUEST NO. 68

Subject to and without waiving their objections, including those objections asserted in response to Plaintiffs' First and Second Request for Production, Defendants will produce non-privileged documents relating to the 3M Earplugs

[1] Capitalized terms used but not defined herein have the meaning given to such terms in Plaintiffs' Third Request For Production.

[2] *See* Plaintiffs' Third Requests for Production, Definitions and Instructions at No. 1.

and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 69

Ten (10) exemplars of each version of the 3M Earplugs, to include the dual-ended Combat Arms earplugs (Version 2 CAEv.2), the 3M E-A-R ARC Plug, and any like-design earplugs marketed or sold by you for any use, together with the sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version.

RESPONSE TO REQUEST NO. 69

Defendants object to the phrase "any like-design" as overbroad, vague and ambiguous. Defendants further object to this Request as overbroad, unduly burdensome and disproportional to the needs of the case to the extent that it seeks ten exemplars of each version of the 3M Earplugs and the "sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version." Defendants are investigating whether and how many sealed exemplars of each version of the 3M Earplugs exist. To the extent that sealed exemplars of each version of the 3M Earplugs are available, Defendants further object to producing

them for reasons other than those contemplated by Federal Rule of Civil Procedure 34.

Subject to and without waiving their objections, Defendants will provide, to the extent available, an exemplar of each version of the 3M Earplugs, and the sealed packaging and instructions that accompanied each exemplar, at a mutually agreeable time and location for the reasons contemplated by Federal Rule of Civil Procedure 34, including inspection and/or testing, subject to an agreed-upon inspection protocol.

REQUEST NO. 70

Ten (10) exemplars of each version of the Combat Arms Earplugs, including the CAEv1, CAEv3, CAEv4, and CAEv4.1, together with the sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version.

RESPONSE TO REQUEST NO. 70

Defendants object to this Request as overbroad, unduly burdensome and disproportional to the needs of the case to the extent that it seeks ten exemplars of each version of the Combat Arms Earplugs and the "sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version." Defendants are investigating whether and how many sealed exemplars of

each version of the Combat Arms Earplugs exist. To the extent that sealed exemplars of each version of the Combat Arm Earplugs are available, Defendants further object to producing them for reasons other than those contemplated by Federal Rule of Civil Procedure 34.

Subject to and without waiving their objections, Defendants will provide, to the extent available, an exemplar of each version of the Combat Arms Earplugs, and the sealed packaging and instructions that accompanied each exemplar, at a mutually agreeable time and location for the reasons contemplated by Federal Rule of Civil Procedure 34, including inspection and/or testing, subject to an agreed-upon inspection protocol.

REQUEST NO. 71

Ten (10) exemplars of all Tested HPDs, together with the sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version.

RESPONSE TO REQUEST NO. 71

Defendants object to producing exemplars of all "Tested HPDs," and the "sealed packaging and instructions that contained and/or accompanied each commercial unit of each such version," as overly broad, unduly burdensome, disproportional to the needs of the case, and beyond the scope of discovery

contemplated by the Federal Rules of Civil Procedure, including because the Request seeks materials outside of Defendants' possession, custody or control. Defendants further object to this Request to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity. Defendants further object to producing exemplar products for reasons other than those contemplated by Federal Rule of Civil Procedure 34.

Subject to and without waiving their objections, Defendants will allow Plaintiffs to inspect, to the extent available, the earplugs used in connection with the tests listed below at a mutually agreeable time and location, subject to an agreed-upon inspection protocol.

1. January 25, 2000 REAT test (Test ID: 213015), EARCAL Laboratory, Indianapolis, Indiana. 8 test subjects.
2. January 25, 2000 REAT test (Test ID: 213016), EARCAL Laboratory, Indianapolis, Indiana. 10 test subjects.
3. May 9, 2000 REAT test (Test ID: 213017), EARCAL Laboratory, Indianapolis, Indiana. 10 Test subjects.

Defendants are investigating whether the earplugs used in connection with these tests are available for inspection, and are willing to meet and confer with Plaintiffs regarding the same.

REQUEST NO. 72

All documents concerning any royalty payments relating to the 3M Earplugs or any technology incorporated therein, including the non-linear filter and/or dual-tip design incorporated in the 3M Earplugs.

RESPONSE TO REQUEST NO. 72

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12. Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants. Defendants further object to this Request to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to the 3M Earplugs and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12,

to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 73

Any comparison between the features, testing, or performance of the 3M Earplugs or predecessor or successor designs thereof, and any active hearing protection device.

RESPONSE TO REQUEST NO. 73

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12. Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants. Defendants further object to this Request to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to the 3M Earplugs and responsive to this

Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 74

All documents governing, relating to, or constituting the results of any quality assurance testing conducted by you or any other person or entity regarding the 3M Earplugs.

RESPONSE TO REQUEST NO. 74

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12. Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants. Defendants further object to this Request to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to quality assurance testing conducted by Defendants on the 3M Earplugs and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 75

All testing documentation retained and/or made in accordance with American National Standards Institute (ANSI) as S 3.19-1974 as required under CFR 40.

RESPONSE TO REQUEST NO. 75

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12. Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants. Defendants further object to this Request to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the consulting

or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to the 3M Earplugs and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 76

Any documents relating to analyses of HPD program effectiveness.

RESPONSE TO REQUEST NO. 76

Defendants object to the phrase "analyses of HPD program effectiveness" as vague and ambiguous. Defendants are willing to meet and confer with Plaintiffs to discuss the nature of the materials Plaintiffs are seeking. Defendants reserve their right to object to this Request on other grounds after meeting and conferring with Plaintiffs.

REQUEST NO. 77

Any communications regarding 3M Earplugs and/or testing protocols between the Aearo Laboratory and/or E-A-RCal Lab located in Indianapolis,

Indiana on the one hand, and any other laboratory that conducted any testing on any Tested HPDs on the other hand.

RESPONSE TO REQUEST NO. 77

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12. Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to the 3M Earplugs and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 78

All Institutional Review Board review results with regard to the Aearo Laboratory and/or E-A-RCal Lab located in Indianapolis, Indiana.

RESPONSE TO REQUEST NO. 78

Defendants object to the term "[a]ll Institutional Review Board review results" as vague and ambiguous. Defendants are willing to meet and confer with Plaintiffs to discuss the nature of the materials Plaintiffs are seeking. Defendants reserve their right to object to this Request on other grounds after meeting and conferring with Plaintiffs.

REQUEST NO. 79

All records of any sound measurements relating to the 3M Earplugs, including those to calibrate test-room background noise, to determine test signal levels, and to determine audiometer calibration and calibration of any other hearing testing devices.

RESPONSE TO REQUEST NO. 79

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12. Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants. Defendants further object to this Request to the extent it seeks information

protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to the 3M Earplugs and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 80

Any documents relating to the fit of any Tested HPD, including documents relating to qualification of HPD fit selection, or reflecting real-ear testing data reflecting the acoustic seal created or not by any Tested HPD.

RESPONSE TO REQUEST NO. 80

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12. Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants.

Defendants further object to this Request to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to the 3M Earplugs and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 81

Any documents relating to threshold-shift testing, including audiometric test data gathered before and after noise exposure attenuated by any Tested HPD.

RESPONSE TO REQUEST NO. 81

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12. Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants.

Defendants further object to this Request to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to the 3M Earplugs and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 82

Any draft or final "Specification Sheet" relating to the 3M Earplugs, including any earlier or later drafts of the Specification Sheet produced by you in this action bearing Bates Number 3M_MDL000013929, together with any communications concerning any Specification Sheets.

RESPONSE TO REQUEST NO. 82

Defendants object to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, oppressive, seeks information that is not relevant, and/or imposes obligations beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure and Pretrial Order No. 12.

Defendants further object to this Request as redundant, duplicative, and/or cumulative of discovery previously taken of or provided by Defendants. Defendants further object to this Request to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the consulting or non-testifying expert privilege, or any other applicable privilege, exemption, or immunity.

Subject to and without waiving their objections, Defendants will produce non-privileged documents relating to the 3M Earplugs and responsive to this Request that are deemed relevant and responsive pursuant to Pretrial Order No. 12, to the extent that Defendants have not previously produced such documents pursuant to Pretrial Order No. 10.

REQUEST NO. 83

The Personnel Files of any current or former 3M employee or agent who is noticed for deposition in these proceedings.

RESPONSE TO REQUEST NO. 83

Defendants object to this Request on the grounds that it seeks irrelevant and highly sensitive information, is overly broad, unduly burdensome, and is disproportionate to the needs of the case. Personnel files contain private and highly sensitive information. Plaintiffs have made no showing that the requested

materials are relevant to their claims, or that the information therein cannot be obtained by less obtrusive means.

DATED: October 14, 2019

By: *Kimberly Branscome*

Kimberly Branscome
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Email: kimberly.branscome@kirkland.com

Attorney for Defendants 3M Company, Aearo Technologies LLC, Aearo Holdings, LLC, Aearo Intermediate, LLC, and Aearo, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 14, 2019, a true and correct copy of the foregoing:

3M'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' THIRD REQUESTS FOR PRODUCTION

was served as follows:

☒ **[E-Mail]** By causing the above documents to be sent via electronic mail to the parties at the email addresses listed below. I am aware that service is presumed invalid if the email transmission is returned as undeliverable.

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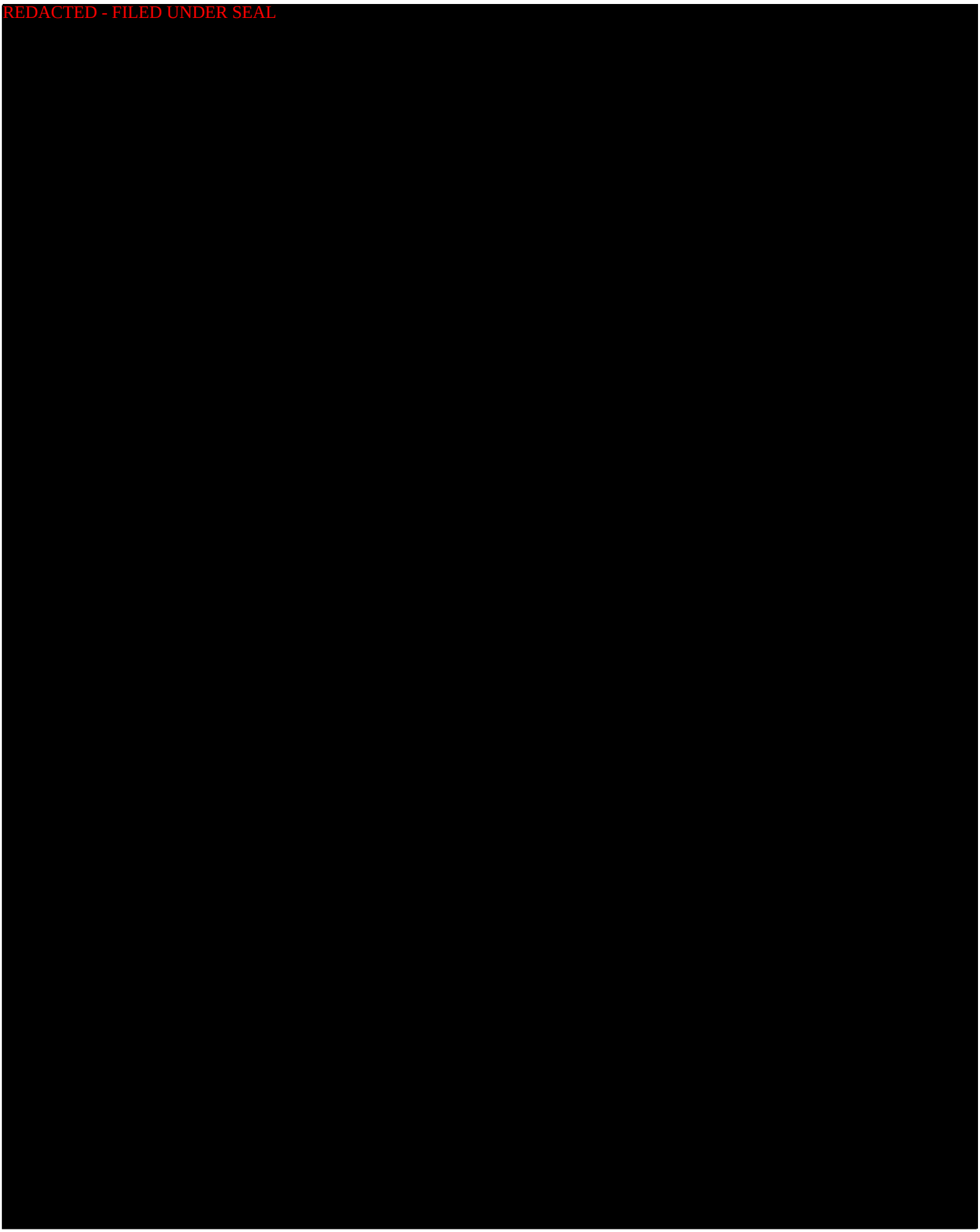
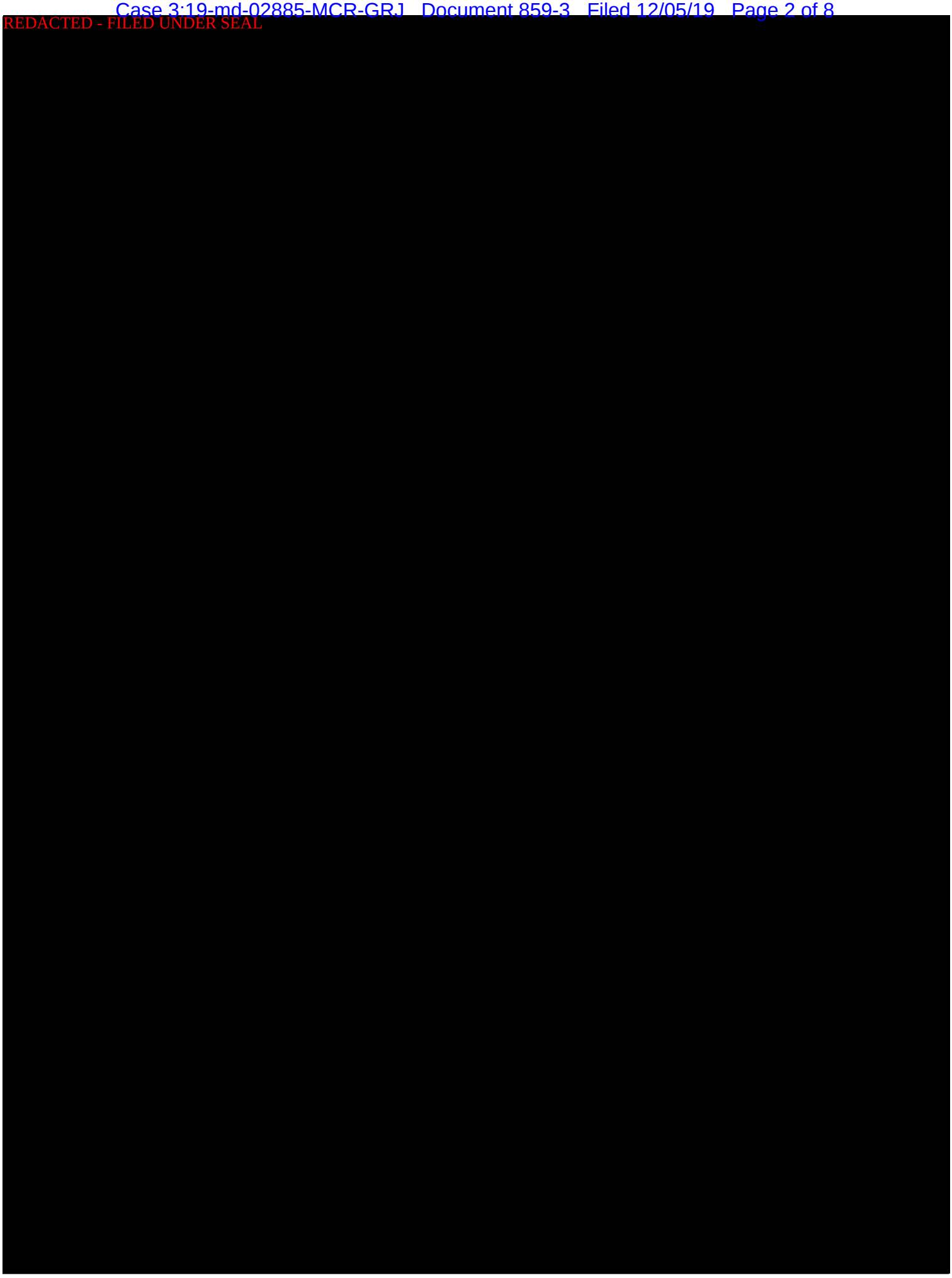
DATED: October 14, 2019

/s/ Kimberly Branscome
Kimberly Branscome

EXHIBIT
3

REDACTED - FILED UNDER SEAL





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THIS DOCUMENT WAS PROVIDED IN NATIVE FORMAT UPON REQUEST.

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[redacted]


EXHIBIT
4

EXHIBIT
4A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ETHICON PHYSIOMESH FLEXIBLE COMPOSITE HERNIA MESH PRODUCTS LIABILITY LITIGATION	MDL DOCKET NO. 2728 CIVIL ACTION NO. 1:17-md-02782-RWS
THIS DOCUMENT RELATES TO ALL CASES	

ORDER REGARDING PRODUCTION OF ETHICON PHYSIOMESH™ FLEXIBLE COMPOSITE MESH EXEMPLARS

WHEREAS, plaintiffs in the above-captioned MDL have made personal injury claims regarding Defendant Ethicon's PHYSIOMESH™ Flexible Composite Mesh ("PHYSIOMESH™") and have requested that Ethicon produce exemplars of PHYSIOMESH™ solely for use in this MDL;

WHEREAS, there are as of the date of this Agreed Order more than 1,500 plaintiffs who have filed lawsuits in this MDL involving PHYSIOMESH™;

WHEREAS, there is a limited number of exemplar PHYSIOMESH™ devices as PHYSIOMESH™ is no longer manufactured;

WHEREFORE, the parties hereby agree, and the Court ORDERS as follows:

IT IS AGREED AND ORDERED THAT Ethicon shall produce within thirty days of the entry of this Order to the MDL Plaintiffs' Steering Committee the following number of exemplar devices for the benefit of all plaintiffs in the MDL:

PHYSIOMESH™ Product Code	Number of Exemplars
PHY0715R	8
PHY1015V	8
PHY1515Q	8
PHY1520R	8
PHY1520V	8
PHY2025V	8
PHY2030R	8
PHY2535V	8
PHY3035R	8
PHY3050R	8

IT IS FURTHER AGREED AND ORDERED THAT Plaintiffs are permitted to conduct destructive testing of the PHYSIOMESH™ exemplars provided pursuant to this Order; however, because there are limited exemplars available to the litigants, Plaintiffs are expected to preserve some of these

exemplars so they can be used for other purposes, including at depositions, hearings, and trial.

IT IS FURTHER AGREED AND ORDERED THAT the exemplars provided pursuant to this order shall, at the sole discretion of the Plaintiffs' Steering Committee (or its designee(s)), be made available to individual plaintiff's counsel with cases in the MDL or in cases remanded from the MDL for use at depositions, hearings, trials or other purposes.

IT IS FURTHER AGREED AND ORDERED THAT the individual plaintiffs in the MDL shall not request exemplars from the Defendants and requests for additional exemplars in this MDL proceeding, if any, may be submitted only by the Plaintiffs' Steering Committee (or its designee(s)), except upon motion granted by the Court for good cause shown.

IT IS FURTHER AGREED AND ORDERED THAT the exemplars (and any remaining portions of exemplars that were subject to testing) will be returned to counsel for Ethicon at the conclusion of proceedings this MDL No. 2728.

IT IS FURTHER AGREED AND ORDERED THAT nothing in this order waives or impacts any parties' right to later seek a ruling from the Court concerning (1) production of additional exemplars, or (2) the use of any exemplar, including limits on the use of exemplars at trial.

SO ORDERED, this 18th day of Dec., 2018

RICHARD W. STORY
United States District Judge

EXHIBIT
4B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: STRYKER REJUVENATE AND ABG II HIP IMPLANT PRODUCTS LIABILITY LITIGATION	MDL No. 13-2441 (DWF/FLN)
This Document Relates to ALL ACTIONS	

JOINT REPORT AND AGENDA FOR JUNE 12, 2014 STATUS CONFERENCE

Pursuant to Pretrial Order No. 3, in advance of the June 12, 2014 Status Conference, the parties submit this Joint Status Conference Report, with a proposed Agenda attached hereto as **Exhibit A**.

1. Report on Filings, Judicial Contacts, and State Court Litigation

There are approximately 1,040 cases filed in or on their way to the MDL, 1,178 cases filed in the New Jersey coordinated proceedings, 61 cases filed in Florida, and approximately 23 additional cases filed in California, Indiana, Michigan, Oregon. Attached hereto as **Exhibit B** are summaries of the cases filed by law firm and venue.

2. Report on Discovery

a. PPDs and PFSs

HOC has brought a motion to compel compliance with PTO No. 8 with regard to deficient PFS in 242 of the 490 cases originally eligible for inclusion in the bellwether case pool. More broadly, approximately 699 cases were filed in or transferred to the MDL on or before April 4, 2014. PPDs are overdue without a requested extension in 29

of these cases. PFSs are overdue without a requested extension in 81 of these cases. Defense Counsel is reviewing served PPDs and PFSs to determine whether they are properly completed, and provide medical records and authorizations. The PLCC and Plaintiffs' Liaison Counsel are reviewing their records, comparing with information provided by Defendants, and also working with plaintiffs' counsel to promote compliance.

b. Custodian Files

The parties' agreed upon plan to complete production of custodian files for 26 people identified in HOC's organizational charts that were meaningfully involved with the products at issue in on pace to be completed by July 15, 2014.

c. **Exemplars**

The parties reached an agreement on the production of exemplars devices and HOC has completed the production of requested exemplars devices to both the PLCC and attorneys from the New Jersey MCL. PLCC requested voluntary production of an impaction instrument. At HOC's request, PLCC will serve a formal discovery request seeking the impacting instrument and any other additional surgical instruments it seeks.

d. Depositions

PLCC has noticed the following depositions:

1. Deposition of a certain HOC Senior Research Engineer
2. Deposition of a certain HOC Senior Project Engineer
3. 30(b)(6) Deposition Regarding Document Retention
4. 30(b)(6) Deposition Regarding FDA/510(k)

5. 30(b)(6) Deposition Regarding Marketing

6. 30(b)(6) Deposition Regarding Device Failure Reports

7. 30(b)(6) Deposition Regarding Post-Recall Investigation/Analysis

PLCC has filed these discovery requests in the MDL docket. The depositions are noticed for dates in June and July. The parties are conferring on a deposition protocol, along with scheduling and related issues.

e. Suspension of Certain PFS Deadlines

The Court entered stipulated Amended PTO No. 8, which suspends the fact sheet obligations in cases in which plaintiff has not undergone a revision surgery.

3. Report on ADR

The parties continue to have success resolving cases through mediation. In the MDL, the parties have mediated 11 cases, and have had near 100 percent success in resolving them. In the New Jersey MCL, the parties have achieved similar success.

4. Selected Disputed Issues

The parties have filed and briefed two motions to compel discovery. HOC has moved to compel compliance with PTO No. 8 regarding PFS, and PLCC has moved to compel reproduction of certain documents without redactions. The parties will be prepared to argue the motions at the June 12, 2014 Status Conference.

Defendants seek clarification of certain terms, obligations, and prohibitions in the Court's Order Establishing a Common Benefit Fee and Expense Fund (CBO). (*See* Doc. No. 327.) PLCC asserts the CBO does not need clarification, and the conferral process is

not complete. Defendants disagree and will submit a letter to the Court identifying the issues.

Dated: June 9, 2014

Lead Counsel Committee Chairperson

/s/ Peter J. Flowers
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EXHIBIT
4C

FILED
JUN 26 2017
RACHELLE L. HARZ
J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

CASE NO. 624
MASTER DOCKET
NO.: BER-L-____-____

IN RE STRYKER LFIT CoCr V40 FEMORAL HEADS HIP IMPLANT LITIGATION

CIVIL ACTION
CASE MANAGEMENT ORDER #1

All prior orders remain in full force and effect except as modified by this Order

This Matter having been assigned to the Honorable Rachelle L. Harz, J.S.C., pursuant to the Supreme Court's Order of May 16, 2017, designating this matter for Multicounty Litigation Status ("MCL") as Stryker LFIT CoCR V40 Femoral Heads Implant Litigation (hereinafter referred to as "Stryker LFIT") [*of note is the fact that the Federal Joint Panel on Multidistrict Litigation has assigned the MDL involving the same type of implants as this matter to Judge Indira Talwani in the District of Massachusetts*], and the Court having prepared the proposed agenda, and conducted an initial case management conference on June 21, 2017, counsel having appeared, and for good cause shown and the reasons set forth on the record,

IT IS on this 26th day of June 2017,

ORDERED,

I. ORGANIZATION OF COUNSEL

1. The Court having reviewed the Applications for Lead/liaison Counsel Appointments submitted to date pursuant to the prior June 2, 2017 Amended Initial Order

for Case Management, and a consensus having been noted, the following appointments are hereby made:

Plaintiffs' Liaison/Lead Counsel: Ellen Relkin, Weitz & Luxenberg, P.C. (NJ).

Plaintiffs' Executive Committee: Ellen Relkin, Weitz & Luxenberg, P.C. (NJ); Thomas Anapol, Anapol Weiss (PA); C. Calvin Warriner, Searcy Denney, et al. (FL); and Michael McGlamry of Pope McGlamry (GA).

Defense Liaison/Lead Counsel: Kim Catullo, Gibbons, P.C. (NJ)

Defense Executive Committee: Kim Catullo, Gibbons, P.C. (NJ); Gene Williams, Shook Hardy & Bacon, LLP (TX); and Heidi Hubbard, Williams & Connolly, LLP (DC).

2. The Court notes that should other Plaintiffs' counsel wish to seek a leadership position of some type in this litigation then they may contact Plaintiffs' Leadership as referenced above, or the Court. Also should the Court or counsel deem it appropriate to consider additional leadership committees then either counsel or the Court *sua sponte* may raise same.

II. COORDINATION WITH THE MULTIDISTRICT LITIGATION

1. The Court expects that counsel for the parties shall coordinate the MCL and MDL litigation activities. Additionally, the Court intends to coordinate the NJ-MCL litigation with Judge Talwani in the MDL.

III. CASE QUESTIONNAIRES

1. The Case Questionnaire referenced in the Court's prior June 2, 2017 Amended Initial Order for Case Management is hereby amended to update the case

caption to reflect the MCL Caption *(see attached, which shall be posted on the Court's official website also)*.

2. The deadline for submission of updated or new Case Questionnaires remains in effect as set forth in the June 2, 2017 Order – sixty (60) days from June 2, 2017 (*August 1, 2017*), or sixty (60) days from the filing of a responsive pleading for complaints filed subsequent to the June 2, 2017, whichever is later. Counsel are expected to comply with same.

3. The completed Case Questionnaire and attached documentation shall be sent to Lead/Liaison Counsel for the Parties as follows:

Plaintiffs' Liaison/Lead Counsel:

Ellen Relkin
Weitz & Luxenberg, P.C.
220 Lake Drive East, Suite 210
Cherry Hill, NJ 08002
Ph: 856-755-1115
Fax: 856-755-1995
Email: erelkin@weitzlux.com

Defense Liaison/Lead Counsel:

Kim Catullo
Gibbons P.C.
One Gateway Center
Newark, NJ 07102
Ph: 973-596-4815
Fax: 973-639-6280
Email: kcatullo@gibbonslaw.com

4. For those matters in which Case Questionnaires have previously been served on defense counsel pursuant to Judge Martinotti's January 7, 2016 Order, defense counsel shall provide copies to Plaintiffs' Liaison counsel prior to the next case management conference.

IV. CASE MANAGEMENT

1. The Court shall conduct a case management conference on July 31, 2017 at 2PM and thereafter monthly beginning in September 2017, unless otherwise ordered, Liaison/lead counsel and the Executive Committee members shall be present for each conference one hour before the scheduled time.

2. With the exception of Liaison/lead counsel for the parties, counsel is permitted to appear telephonically for purposes of the case management conference. Lead/liaison counsel will circulate a call in number to all counsel the day prior to the conference. In order to have an appearance noted on the record, it is counsel's responsibility to email the respective Liaison/lead counsel and the court reporter at least one hour before the proceeding with your name, firm, and the represented party(ies) and case docket number(s), indicating that you intend to appear by telephone. In addition, counsel must confirm your appearance with the respective Liaison/lead counsel immediately following the proceeding to confirm that you, in fact, did participate telephonically. Absent your compliance with all of the above, your appearance will not be noted in the record.

3. For purposes of the June 21, 2017 case management conference, the Court set the proposed agenda. However, for future case management conferences, the parties shall confer and provide a proposed agenda seven (7) days in advance of the scheduled conference so as to allow the Court ample time to prepare a draft Case Management Order, which will be finalized at the completion of the scheduled conference.

V. PROTECTIVE ORDER

1. Defendant liaison counsel shall provide a draft Protective Order to Plaintiffs' liaison counsel for use in the Stryker LFIT CoCR V40 Femoral Heads Implant Litigation by June 29, 2017. Counsel shall thereafter confer regarding same, and advise the Court of the status of the proposed Order in advance of the next scheduled case management conference.

2. For purposes of coordination, the Court expects that the parties will confer in good faith in an attempt to agree upon a Protective Order that is common to both the MCL and the MDL.

VI. DISCOVERY

1. Plaintiffs have indicated an intention to serve general written discovery requests on Defendant. Plaintiffs' Liaison/lead counsel shall send a copy of such requests to the Court with a copy to Defendants' Liaison/lead counsel and refrain from formal service of same until further direction from the Court.

2. The parties shall confer in good faith regarding the development of long/short form pleadings and Plaintiff and Defense Fact Sheets.

3. The preservation obligations previously set forth in the Court's prior June 2, 2017 Amended Initial Order for Case Management remain in effect and shall continue to remain in effect hereafter unless otherwise ordered. The parties were reminded of their continuing preservation obligations, including the obligation to secure and retain explanted LFIT V40 CoCr devices (and accompanying explanted components) in either parties' possession or control. Plaintiffs have also specifically raised a request for exemplars of the recalled product lots, and Defendant has stated their acknowledgement

of the preservation obligation to the extent recalled products exist. Plaintiffs also raised a request for representative exemplars of non-recalled products in the litigation. The Court has asked Defendant to provide an update regarding same at the next case management conference. Also, the parties are to continue to meet and confer regarding preservation of evidence, including but not limited to the preservation of exemplars, explanted devices, pathology, medical records and other discovery materials.

VII. MISCELLANEOUS

1. Defendant has proposed the concept of the parties conducting a "Product Day" for the Court's benefit early in the litigation. Plaintiffs have opposed it at this juncture. The Court will take this proposal under advisement and confer with the MDL Court in this regard.

2. The Court will provide Liaison/lead counsel with a list of the current cases included in this MCL at this time, and counsel shall review same and confer regarding the accuracy and completeness of the list in advance of the next case management conference.

3. A copy of this Order and any subsequent Orders of the Court will be posted on the official Judiciary Web Site.

Hon. Rachelle L. Harz, J.S.C.

EXHIBIT
4D

2019 WL 1763237
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Ocala Division.

Winston RAMKELAWAN et al., Plaintiffs,
v.
GLOBUS MEDICAL INC., et al., Defendants.

Case No: 5:18-cv-100-Oc-JSM-PRL
|
Signed 04/22/2019

Attorneys and Law Firms

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ORDER

PHILIP R. LAMMENS, United States Magistrate Judge

***1** In this products liability action, Plaintiffs bring suit for personal injuries that Plaintiff Winston Ramkelawan allegedly sustained after Defendants' artificial disc (the "SECURE-C") was implanted into his spine, as well as related claims on behalf of Plaintiff's wife. (Doc. 36). This case is currently before the Court for consideration of two discovery motions: (1) Defendants' motion to compel pre-suit communications and discovery with third parties relating to two prior lawsuits (Doc. 76); and (2) Plaintiffs' motion to compel production of exemplars and motion for sanctions (Doc. 78). Both motions are ripe for decision and, for the reasons explained below, both motions are due to be denied.

I. Defendants' Motion to Compel Pre-suit Communications and Discovery

The first motion before the Court is Defendants' motion to compel pre-suit communications and discovery. This discovery dispute arises from Defendants' requests for certain pre-suit documents created in two lawsuits filed by Plaintiffs prior to filing the instant product liability action. The two suits included Plaintiff's allegations of medical malpractice against Dr. Barry Kaplan and his practice relating to the implantation of the SECURE-C, as well as Plaintiff's allegations of nursing home negligence against Life Care Center of Ocala. Plaintiffs represent that both lawsuits were ultimately resolved.

During discovery in this case, Plaintiffs contend that, among other voluminous documents, they inadvertently disclosed the pre-suit deposition of Dr. Barry Kaplan, which is protected as privileged as pre-suit investigation materials under Florida law. Defendants, however, contend that they are entitled to Dr. Kaplan's deposition, as well as other pre-suit investigation documents in the two suits against Dr. Kaplan and Life Care Center of Ocala, and that the privilege asserted by Plaintiffs does not apply or was waived.

Plaintiffs have the initial burden of establishing that a privilege applies, after which Defendants have the burden of proving that the privilege was waived. *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 584 (S.D. Fla. 2013); *Hershey Co. v. Cadiz*, Case No. 05-60999-civ, 2006 WL 8431510, at *2 (S.D. Fla. Aug. 24, 2006).

1. Privilege

Plaintiffs submit that the documents that Defendants seek are protected as pre-suit investigation material under Florida statute sections 400.0233(5), 766.106(5), and 766.205(4). Defendants argue that they are not an "opposing party" under the statutes, and that therefore the pre-suit investigation material is discoverable to them. However, both the plain language of the statutes and their application by Florida courts indicate that Defendants are an opposing party under those statutes.

From the language of the statute, it seems clear that the legislature contemplated that an opposing party blocked from discovering pre-suit materials need not have been an opposing party at the time the pre-suit materials were generated. The statutes state that such pre-suit materials are not "discoverable or admissible in *any civil action* for any purpose by the opposing party." Fla. Stat. § 400.0233, 766.106, 766.205. The word *any* broadens the scope of the civil action in which the opposing party is not able to discover pre-suit materials. To reach Defendants' construction of the statutes would require the language to somehow limit the civil action to only those resulting from the pre-suit investigation, which the language in these statutes does not do.

***2** This reading of the statute is bolstered by Florida and Middle District of Florida case law applying the statutes. In *Variety Children's Hosp. v. Boice*, a hospital was served with a notice of intent to initiate litigation by the plaintiff in a different litigation against a doctor. 27 So. 3d 788, 789 (Fla. 3d DCA 2010). On the same day, the same plaintiff requested pre-suit investigation materials from the hospital. *Id.* The plaintiff argued, and the court agreed, that the hospital was a non-party to the plaintiff's litigation. *Id.* at 789–90. However, because the hospital was going to be made a party in the plaintiff's lawsuit, the court applied section 766.205(4) to bar the plaintiff from discovering the hospital's pre-suit materials. *Id.* In the instant case, Defendants' argument is even weaker than the plaintiff's argument in *Boice* because in this case, Defendants are currently an opposing party to Plaintiffs—whereas in *Boice*, the hospital was only a future opposing party to the plaintiff.

Defendants rely on *Adventist Health* for the argument that Plaintiffs' presuit material is discoverable because it was prepared in a different case. *Adventist Health Sys./Sunbelt, Inc. v. Watkins*, 675 So. 2d 1051 (Fla. 5th DCA 1996). However, *Adventist Health* is distinguishable from the instant case and suggests that the material Defendants seek is not discoverable. *Id.* In that case, the court determined the relationship of the parties based on the patient referred to in the pre-suit material. *Id.* at 1052. Because the patient in the pre-suit material was not the plaintiff—and was not otherwise a party in the case—the hospital was not an opposing party to the holder of the privilege. *Id.* Simply put, section 766.106(5) "only protects the respective parties' work product generated in their pre-suit screening process." *Id.* In the instant case, Plaintiffs are a party in the litigation and they are also the subject of the pre-suit investigation materials. That Plaintiffs settled with another party does not mean that their pre-suit material was generated in "an unrelated, separate medical malpractice case" under *Adventist Health*. *Id.*

This Court has also acknowledged that the statutes at issue protect pre-suit materials from discovery even where the pre-suit investigation resulted in a settlement with a party other than the current opposing party. *Bonilla v. United States*, Case No. 6:08-cv-1443, 2009 WL 10670016, at *2 (M.D. Fla. May 4, 2009) (reasoning that the settlement agreement itself would be discoverable, but not the "actual pre-suit 'statements, discussions, written documents, reports, or other work product' "). Thus, courts look at the ultimate relationship of the parties to determine whether they are "opposing" under the statutes, not the relationship of the parties at the time the pre-suit materials were created. With this understanding, the Court concludes that Defendants are an opposing party to Plaintiffs, and thus any material that Plaintiffs generated in its pre-suit investigation is privileged.

Defendants' remaining arguments on this point are unpersuasive. In arguing the significance of seeking the discovery of documents concerning completed settlements rather than documents concerning ongoing negotiations, Defendants rely upon a case which explicitly does not consider privilege. *U.S. v. Am. Soc. Of Composers, Authors, & Publishers*, Case No. civ. 13-95, 1996 WL 157523, at *1 (S.D.N.Y. Apr. 3, 1996). Also, Defendants cannot compel production under section 766.203(4) where the qualifications of the expert are not at issue. *See Morris v. Muniz*, 252 So. 3d 1143, 1158–59 (Fla. 2018).

2. Waiver

Defendants argue that even if the pre-suit investigation privilege applies to the documents they seek, Plaintiffs waived their privilege by producing the pre-suit deposition of Dr. Kaplan. First, Defendants suggest that Plaintiffs waived their privilege by failing to raise a timely and specific objection to Defendants' first request to produce. However, it is not clear that Defendants even asked for privileged material in their first request to produce. Furthermore, when Defendants did ask for privileged material in their October 26, 2018 email and in their November 5, 2018 third request to produce, it appears that Plaintiffs' December 11, 2018 response raised specific objections and was not untimely. [1]

***3** Further, Plaintiffs assert that their disclosure of Dr. Kaplan's pre-suit deposition was inadvertent, while Defendants argue that the disclosure was voluntary and waived any privilege. Florida courts consider five factors in determining whether a disclosure was inadvertent: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error. *Lightbourne v. McCollum*, 969 So. 2d 326, 333 n.6 (Fla. 2007); *Gen. Motors Corp. v. McGee*, 837 So. 2d 1010, 1040 (Fla. 4th DCA 2002).

Although Plaintiffs concede that they could have taken more precautions to prevent inadvertent disclosure, the remaining factors weigh in Plaintiffs' favor. Indeed, the number of inadvertent disclosures weighs strongly in favor of Plaintiffs, as they made only one inadvertent disclosure. The extent of the disclosure again weighs strongly in favor of Plaintiffs, as the disclosure consisted of a single 35-page document out of over 20,000 pages of documents that Plaintiffs produced. The delay and rectification factor overall weighs in Plaintiffs' favor, as their attorney swore in an affidavit that he emailed Defendants immediately upon learning the privileged nature of the document which had been disclosed.[2] *See Jenney v. Airdata Wiman, Inc.*, 846 So. 2d 664, 669 (Fla. 2d DCA 2003) ("Because the objections were made as soon as the confidential nature of the communication became apparent, Jenney did not waive the privilege."). And finally, the overriding interests of justice would be served by relieving Plaintiffs of their error because Defendants are not barred from discovering Plaintiffs' post-suit documents, which are generally considered to be more reliable than pre-suit documents. *See Cohen v. Dauphinee*, 739 So. 2d 68, 70–72 (Fla. 1999). Consideration of these factors weighs in favor of the conclusion that the disclosure was inadvertent and the privilege was not waived.

Furthermore, Defendants have not shown that the "sword and shield" doctrine applies here, as there is no indication that Plaintiffs raised a claim that will necessarily require proof by way of privileged documents. *See Allstate Ins. Co. v. Levesque*, 263 F.R.D. 663, 667 (M.D. Fla. 2010). And even if Plaintiffs had waived their privilege, the waiver would not have extended to the remainder of Plaintiffs' pre-suit investigation material, as "an inadvertent disclosure 'no longer carries with it the cruel cost of subject-matter waiver.' " *Poertner v. Gillette Co.*, Doc. No. 6:12-cv-803, 2013 WL 12149369, at *2 (M.D. Fla. Mar. 12, 2013). The remainder of Defendants' arguments assume that the documents are not privileged, and thus are not applicable. Thus, Defendants have failed to meet its burden of proving that Plaintiffs waived any privilege over the sought discovery. Consequently, Defendant's motion to compel pre-suit communications and discovery (Doc. 76) is due to be denied.

II. Plaintiff's Motion To Compel Exemplars

***4** Turning to the second pending discovery motion, Plaintiffs have moved to compel the production of exemplars of the subject "SECURE-C" cervical disk device. (Doc. 78). Specifically, Plaintiffs have moved to compel a SECURE-C Demo Kit, an exemplar SECURE-C of the same size as the subject SECURE-C, and an exemplar assembly block for the same size as the subject SECURE-C. (Doc. 78). Further, Plaintiffs concede that, during a meet and confer, Defendants recently offered that Plaintiffs could inspect an assembly block at Defendants' expert's offices, and the core and endplate assembly could be purchased for the list price of $10,000. Plaintiffs describe the price as "astronomical," and request that the Court compel Defendants to produce the exemplars for what it costs to actually manufacture the SECURE-C.

Fed. R. Civ. P. 34 governs discovery regarding tangible things. Under Rule 34(a)(1), the Rule contemplates requests "to produce and permit the requesting party or its representative to inspect, copy, test, or sample ... any designated tangible things." Rule 34 does not address the cost which should be charged for the production of a tangible thing or exemplar.

Here, although Defendants contend that Plaintiffs have failed to demonstrate good cause for the discovery of the requested exemplars, there is apparently no dispute that Defendants have offered to make exemplars available for purchase and inspection pursuant to Rule 34. Indeed, Defendants state that Plaintiffs' experts have already inspected, measured, photographed and CT scanned the subject Core, Inferior Endplate and Superior Endplate on three separate occasions, as well as performed a non-destructive test on the surface of the subject Core with a Fourier Transform Infrared spectrometer. (Doc. 79, p. 7). And, via email dated March 18, 2019, counsel for Defendants agreed "in the spirit of compromise," to provide exemplars "of the core (either a core from the same lot as the subject core which is expired or a core of the same size from another lot) and an endplate assembly of the same size as the subject endplate assembly," subject to several conditions. (Doc. 79-1). The conditions included that Plaintiffs compensate Defendants for the cost, that the components be marked "NOT FOR HUMAN USE," that the parties agreed to make arrangements for the physical transfer and Plaintiffs would bear the cost of transfer, that Plaintiffs would produce documentation and any results of testing in a timely fashion and prior to their expert reports, and that the core and endplate assembly be returned to Defendants at the end of the litigation or be destroyed. (Doc. 79-1). Defendants further offered that, "[t]o the extent plaintiffs' experts want an opportunity to inspect an assembly block, Globus will agree to provide an assembly block for inspection at Exponent's offices in Philadelphia." (Doc. 79-1). Notably, Defendant does not constrain its offer to an inspection at the time of trial.

There appears to be no dispute that Defendants are willing to produce exemplars for inspection as contemplated by Rule 34.

What Plaintiffs are specifically requesting in the instant motion, however, is not an inspection, but that Defendants be compelled to produce the exemplars "at cost" and with "reasonable transport costs." (Doc. 78). Plaintiffs offer no persuasive authority in support of this request. The cases cited by Plaintiffs in support of their motion, *Cannioto v. Louisville Ladder, Inc*. Case. No. 8:09-cv-1892-JSM-YBM (Doc. 36), and *Whynot v. Publix Supermarket, Inc.*, Case No. 2013-CA-007898-0, are easily distinguishable from this case, as they involve fairly ordinary products (ladders and shopping carts), as opposed to highly specialized medical devices. (Doc. 79-3). Further, in the cases cited by Plaintiffs, the plaintiffs agreed to pay the retail price of the exemplar product. While the undersigned acknowledges (as Defendants apparently also do) that Rule 34 contemplates that Defendants make the subject device or exemplars available for inspection, there is simply no basis or authority for the Court to require Defendants to provide the exemplars for purchase at Plaintiffs' preferred price, or "at cost." Plaintiffs' motion to compel production of exemplars and motion for sanctions (Doc. 78) is due to be denied.

III. Conclusion

***5** Accordingly, upon due consideration, and for the reasons explained above, it is ordered that:

(1) Defendant's motion to compel pre-suit communications and discovery (Doc. 76) is **DENIED** in all respects;

(2) Plaintiff's motion to compel production of exemplars and motion for sanctions (Doc. 78) is **DENIED** in all respects; and

(3) If an inspection of the exemplars is requested by Plaintiffs, the parties are directed to work together in good faith to reach mutually agreeable terms and to complete such an inspection as contemplated by Rule 34.

DONE and **ORDERED** in Ocala, Florida on April 22, 2019.

All Citations

Slip Copy, 2019 WL 1763237

Footnotes

1 The instant case is easily distinguishable from Defendants' case law on untimeliness, as in both of Defendants' cited cases, the untimely objections were essentially raised for the first time when the matter was before the court. *U.S. Fidelity & Guar. Co. v. Liberty Surplus Ins. Corp.*, 630 F. Supp. 2d 1332, 1135, 1340 (M.D. Fla. 2007); *Krewson v. City of Quincy*, 120 F.R.D. 6, 7 (D. Mass. 1988).

2 Although Defendants argue that their Exhibit H demonstrates that Plaintiffs may have gotten earlier notice of the disclosure, Defendant's email does not substantiate Plaintiffs' knowledge of the disclosure without a response from Plaintiffs. Ultimately, the sworn statement by Plaintiffs' attorney that he "immediately emailed Globus' counsel advising of the inadvertent disclosure and requesting the return of the privileged material" is uncontroverted. (Doc. 77-5, ¶ 10).