No. 22-2606

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: AEARO TECHNOLOGIES, LLC, et al.

AEARO TECHNOLOGIES, LLC, et al.,

Debtors-Appellants,

v.

THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT and JOHN & JANE DOES, 1-1000,

Appellees.

On Direct Appeal from the United States Bankruptcy Court
for the Southern District of Indiana
No. 22-2890, Adv. No. 22-50059

BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES AND TEN OTHER VETERANS SERVICE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

Thomas P. Cartmell
WAGSTAFF & CARTMELL
4740 Grand Ave., Suite 300
Kansas City, MO 64112
(816) 701-1100
tcartmell@wcllp.com

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

Robert Cowan
BAILEY COWAN HECKAMAN PLLC
1360 Post Oak Blvd., Suite 2300
Houston, TX 77056
(713) 425-7100
rcowan@bchlaw.com

P. Leigh O'Dell
BEASLEY ALLEN
218 Commerce St
Montgomery, AL 36104
(334) 269-2343
Leigh.ODell@BeasleyAllen.com

Attorneys for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2606

Short Caption: In re Aearo Technologies, LLC, et al. (Aearo Technologies, LLC v. Those Plaintiffs Listed on Appendix A)

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

The Debtors are wholly owned subsidiaries of non-Debtor 3M Company.

Attorney's Signature: s/Hyland Hunt Date: 2/1/2023

Attorney's Printed Name: Hyland Hunt

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 300 New Jersey Ave. NW, Suite 900

Washington, DC 20001

Phone Number: 202-868-6915 Fax Number: 202-609-8410

E-Mail Address: hhunt@deutschhunt.com

Appearance and Circuit Rule 26.1 Disclosure Statement

Continuation Sheet

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Veterans of Foreign Wars of the United States

Military Order of the Purple Heart

Chief Warrant and Warrant Officers Association, U.S. Coast Guard

Enlisted Association of the National Guard of the United States

National Guard Association of the United States

Military Officers Association of America

Naval Enlisted Reserve Association

Sea Service Family, Foundation

The Veterans of Foreign Wars of the United States, Department of Illinois

The Veterans of Foreign Wars of the United States, Department of Indiana

The Veterans of Foreign Wars of the United States, Department of Wisconsin

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

The Debtors are wholly owned subsidiaries of non-Debtor 3M Company.

Attorney's Signature: s/Ruthanne Deutsch Date: 2/1/2023

Attorney's Printed Name: Ruthanne Deutsch

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 300 New Jersey Ave. NW, Suite 900

Washington, DC 20001

Phone Number: 202-868-6915 Fax Number: 202-609-8410

E-Mail Address: rdeutsch@deutschhunt.com

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Attorney's Signature: s/Thomas P. Cartmell Date: 2/1/2023

Attorney's Printed Name: Thomas P. Cartmell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 4740 Grand Ave., Suite 300

Kansas City, MO 64112

Phone Number: 816-701-1100 Fax Number: 816-531-2372

E-Mail Address: tcartmell@wcllp.com

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Attorney's Signature: s/Robert Cowan Date: 2/1/2023

Attorney's Printed Name: Robert Cowan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 1360 Post Oak Blvd., Suite 2300

Houston, TX 77056

Phone Number: 713-425-7100 Fax Number: 713-425-7101

E-Mail Address: rcowan@bchlaw.com

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Attorney's Signature: s/P. Leigh O'Dell Date: 2/1/2023

Attorney's Printed Name: P. Leigh O'Dell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 218 Commerce St

Montgomery, AL 36104

Phone Number: 334-269-2343 Fax Number: 334-954-7555

E-Mail Address: Leigh.ODell@BeasleyAllen.com

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INTEREST OF *AMICI CURIAE*[1]

Amici are veterans service organizations that regularly file amicus briefs in cases, like this one, that raise issues of concern to the veteran community.

The Veterans of Foreign Wars of the United States (VFW) is a congressionally chartered veterans service organization established in 1899. Now, with its Auxiliary, it represents approximately 1.6 million members. The VFW was instrumental in establishing the Veterans Administration, creating the World War II GI Bill and the Post-9/11 GI Bill, and developing the national cemetery system. Assisting veterans who suffered injuries during their time in service is a core part of the VFW's mission. The VFW's advocacy was central in the fight for compensation for Vietnam veterans exposed to Agent Orange and for veterans diagnosed with Gulf War Syndrome. Today, the VFW has accredited more than 2,000 advisors across the country who help veterans access the benefits they have earned. In total, the VFW has helped veterans recoup more than $11 billion in disability and pension benefits.

The Military Order of the Purple Heart (the "Order"), established in 1932, is a 501(c)(3) non-profit that supports American veterans and their families. Over the past sixty years, the Order has funded programs and services to help veterans

[1] No counsel for any party authored this brief in whole or in part, no party or counsel for a party contributed money to fund preparing or submitting the brief, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4).

transition from the battlefield to the home front, including academic scholarships, grants for service dogs, medical research, and treatment for Post-Traumatic Stress Disorder and Traumatic Brain Injury. The Order has a compelling interest in the Court's resolution of this case because its members include combat-wounded veterans who suffered hearing loss and other injuries while using hearing protection provided by 3M.

The Chief Warrant and Warrant Officers Association, United States Coast Guard (CWOA) communicates with policymakers and the Coast Guard leadership on matters of concern to United States Coast Guard warrant and chief warrant officers (active, reserve and retired). As the only organization comprised exclusively of Coast Guard warrant officers, including approximately 80% of the Coast Guard's active duty warrant and chief warrant officers, the CWOA is dedicated to strengthening the Coast Guard and ensuring that Coast Guard members and veterans receive the help and assistance they need, especially if they are injured during service.

The Enlisted Association of the National Guard of the United States of America (EANGUS) and the National Guard Association of the United States (NGAUS) exclusively advocate for the over 450,000 National Guard Servicemembers. EANGUS and NGAUS promote the interests of National Guard Servicemembers, their families, and veterans of the National Guard.

The Military Officers Association of America (MOAA) is the nation's largest association of military officers, founded in 1929, with over 350,000 members from all branches of the uniformed services. It is an independent, nonprofit, politically nonpartisan organization dedicated to preserving a strong national defense that plays an active role in proposed legislation affecting the career force, the retired community, and veterans. MOAA advocates on Capitol Hill to ensure the earned benefits of current and former military members are protected and that all veterans receive fair and adequate compensation for injuries sustained in active military service.

The Naval Enlisted Reserve Association (NERA), founded in 1957, is a military and veterans' organization representing the enlisted Reservist members of the Navy, Marine Corps and Coast Guard. NERA's mission is to promote and maintain national security by ensuring a strong and well-trained Navy, Coast Guard and Marine Corps Reserve through protecting the benefits and privileges Sea Service Reservists have earned with their military service. NERA has been instrumental in gaining Congressional support for improvements in Reserve personnel strength and equipment, and is dedicated to fighting for service members in the Nation's capital, including advocating for promotions, increased pay, retirement benefits, and compensation for injured servicemembers.

Sea Service Family, Foundation (SSFF) is a non-partisan foundation

dedicated to being the unbiased voice of the military community. SSFF has provided dozens of testimonies to Congress on military- and veteran-related issues and provides direct assistance to servicemembers and their families in the form of scholarships, legal assistance, and advocacy.

The Department of Illinois, VFW (IL VFW) is a subordinate subdivision of the VFW. Chartered in 1920, it represents over 36,000 veteran members from all Posts, Districts, and other units in Illinois. Over the last 100 years, the IL VFW has fought for the rights and benefits of combat veterans and their families, advocating to right the wrongs that veterans have experienced through their service—whether through combat injuries, exposures to dangerous substances, or negligence of suppliers of military products. All of IL VFW's members are combat veterans and many of them have suffered hearing loss of some type or degree.

The VFW Department of Indiana (VFW-IN) is a subordinate entity of the VFW. For more than a century, the VFW-IN has been an active and diligent advocate for veterans and their families who call Indiana home. Our membership consists of those who wore our nation's uniform in hazard duty and imminent danger zones, and we are committed to assuring that these brave men and women receive the rights, protections, benefits, and care they deserve when they return home. When veterans are harmed in service, VFW-IN is there to assist them with understanding and filing for benefits and other protections they have under law.

The VFW, Department of Wisconsin now represents over 30,000 members in the State of Wisconsin. In support of its mission to assist veterans who suffered service-related injuries, the Wisconsin VFW has a full-time fully staffed service office to assist veterans and their survivors with benefit claims. The Wisconsin VFW also supports veterans in financial need with their Unmet Needs program, which has distributed over $250,000 in financial assistance.

Amici's strong interest in ensuring that veterans can obtain redress for injuries suffered in their service to the nation underpins this brief. Whether a financially solid, non-debtor corporation should be allowed to engage in formalistic "circular" transactions to claim the benefits of bankruptcy while dodging its burdens is no esoteric legal debate. At the heart of this case are hundreds of thousands of injured veterans seeking compensation for lifelong injuries through a well-functioning and fair multidistrict litigation (MDL) process that 3M now seeks to stop in its tracks.

Much ink has been spilled over the size of this litigation, but the fault lies at 3M's feet. Mass injuries are the predictable result of concealing known defects in protective gear for 15 years while selling millions of units to be used by servicemembers throughout two wars. Blessing 3M's legal maneuvering here will have implications beyond the many injured veteran plaintiffs in this case who have been diligently pursuing remedies for years. It will also create perverse incentives for the next manufacturer that provides the military with shoddy goods—and put

more roadblocks in the path of veterans seeking compensation for their injuries. A future defendant could simply follow 3M's roadmap to try an MDL first, and then jump ship to bankruptcy court when unhappy with the MDL results—without filing a bankruptcy petition or facing financial distress. The Bankruptcy Code should not be interpreted to permit such gamesmanship.

INTRODUCTION AND SUMMARY OF ARGUMENT

Servicemembers rarely have free choice in their tactical and protective gear—whether that's the helmet on their heads, the body armor on their backs, or the earplugs in their ears. If a unit or command buys a certain product, then that's what is issued, and that's what servicemembers use. So, what happens when a critical product that servicemembers depend upon to protect life, limb, sight, or hearing is defective? Hundreds upon thousands of servicemembers get hurt. Especially when the defective product is sold to the military for over a decade.

And that's what happened here. A few months *after* starting to sell an earplug to the military, Aearo decided to test it, only to learn that it did not work as advertised. Aearo and 3M then buried a report documenting the defects for 15 years. The consequences were wholly foreseeable, avoidable, and tragic: hundreds of thousands of veterans suffering hearing loss and tinnitus that the earplug should have prevented. The hearing loss suffered by those veterans should not be brushed off as mere inconvenience. It can have debilitating lifelong consequences. The experiences

of just a few veterans injured by 3M's defective earplugs illustrate the human fallout: disrupted family relationships, impaired employment prospects, and mental health struggles.

To redress those harms, servicemembers and veterans have filed lawsuits. Are there a lot of those suits? Yes. With defective earplugs distributed to millions of servicemembers during two wars, it is hardly surprising that the number of claims reflects the extent of the damage. Nonetheless, the lawsuits have been proceeding in a fair and orderly fashion, in an MDL process desired and shaped from the outset by 3M and plaintiffs alike. Discovery has been undertaken, tens of thousands of invalid claims have been screened out, and bellwether trials have produced useful results. In short, the process has been moving forward to secure recompense for veterans who were harmed by 3M's defective ear plugs, while affording 3M all requisite due process protections, with 3M defeating claims that bellwether juries found lacking. Until 3M pulled its bankruptcy maneuver to try to shut the whole thing down.

Reading the Bankruptcy Code to reward 3M's transparent attempt to forum shop is not only wrong on the law. It would also harm veterans who have already suffered enough from 3M's wrongdoing, only to find the courthouse doors closed after years of investment of time and effort to build their cases through the MDL process. The oft-repeated refrain that bankruptcy will somehow be better for 3M's victims is nothing more than a smokescreen for depriving veterans of important

procedural rights—not least of which is their Seventh Amendment right to try their cases to a jury if 3M offers an insufficient settlement. Worse still, a ruling blessing 3M's eleventh-hour attempt to escape the MDL will encourage the next corporate tortfeasor to follow the same playbook: litigate an MDL until the realization dawns that it just isn't going their way, and then dump hundreds of thousands of lawsuits into bankruptcy court where delay and limited leverage are the order of the day for plaintiffs. The veterans who are plaintiffs here—and those harmed by corporate wrongdoing in the future—deserve better.

ARGUMENT

Veterans Injured by Defective Military Gear Sold by Financially Healthy Corporations Should Not Be Shunted into Bankruptcy Court.

A. This Case Exemplifies the Widespread Harm that Defective Military Products Can Cause.

It would be difficult to overstate the scale of Department of Defense procurement. When a particular command, military service, or the Department chooses to buy a product, it tends to buy a lot of it, and to distribute it to a lot of servicemembers. In 2019, the Army alone spent $245 million on body armor and nearly $108 million for other individual equipment. Elizabeth Howe, *To US Army, Getting Women's Body Armor Quickly Is an Unfunded Priority*, Defense One (June 9, 2021), https://tinyurl.com/24ty65pw. The point of obtaining a National Stock Number—as was done for the earplugs at issue here—is "to identify items that are routinely purchased and stocked in large quantities." *In re 3M Combat Arms Earplug*

Prods. Liab. Litig., 474 F. Supp. 3d 1231, 1240 (N.D. Fla. 2020). An inherent aspect of producing protective equipment used in military training and combat, moreover, is that defects are likely to cause serious injuries. In other words, if a manufacturer chooses to make and sell protective gear to the military, and does not take care to ensure that the product actually works—or even worse, conceals known defects—widespread injuries are a given.

That is just what happened here. 3M hid defects in protective gear it sold to the military—and widely distributed to servicemembers—for more than a decade. Unsurprisingly, those defects injured countless veterans.

1. Military training and combat are loud: gunfire, helicopters, equipment engines, explosions. Hearing protection that simply blocks noise, however, can make it difficult for troops to verbally coordinate and understand orders over the din. *See* 474 F. Supp. 3d at 1246. Enter the Combat Arms Earplug (CAEv2), a two-sided earplug that Aearo designed in the late 1990s and first sold in July 1999. *Id.* at 1235–37. The olive-colored end is a traditional earplug meant to protect wearers from all noise. *Id.* at 1235. The yellow-colored end is a "non-linear" earplug, meaning it is intended to block loud noises like gunfire while not blocking lower-level sounds like speech. *Id.*

Aearo did not perform any noise attenuation testing on the "actual version" of the earplug before starting sales to the military. *Id.* at 1241. Testing of the product

didn't even begin until four months after the first sale. *See id.* And the results were not good. These initial results led an Aearo scientist to report that "the [CAEv2] ha[d] problems unless the user instructions [were] revised." *Id.* (alteration in original). One problem was that the "[olive] end" was "too short for proper insertion" in some users' ears (particularly those with medium or large ear canals). *Id.* And when users inserted the olive end, the earplug "sometimes loosened" in the ear, "often imperceptibly." *Id.* For these and other reasons, when servicemembers used the earplugs according to standard fitting instructions, the earplugs provided little to no hearing protection.

Aearo documented those problems in July 2000 in a report known as the Flange Report. *Id.* The Flange Report described alternative fitting instructions that achieved better test results. *Id.* But the design defects described in the Flange Report were never shared with the military—or anyone outside of Aearo and 3M—for the next 15 years. *Id.* All the while, CAEv2 sales proceeded apace, first in individual orders from units and commands in all military branches, and then under an open-ended indefinite-quantity procurement contract beginning in 2006. *Id.* at 1240. All told, millions of earplugs were sold to the military between 1999 and 2015. *See* SA.3-4; A.420. 3M acquired Aearo in 2008. SA.4.

The Flange Report was first revealed outside of 3M and Aearo in 2015, not to prevent further injury to service members, but during discovery in an unrelated

patent case brought by a competitor. 474 F. Supp. 3d at 1241. "Immediately following the release of the Flange Report in that litigation," 3M discontinued the CAEv2. *Id.*

2. Aearo and 3M's failure to report known defects in the CAEv2 inflicted lifelong injuries on hundreds of thousands of servicemembers and veterans. During the decade-plus that the CAEv2 was sold, millions of soldiers used it in training, in combat, and while working on heavy machinery. The results were predictable. As of 2013, about a year before 3M discontinued the CAEv2, more than 414,000 post-9/11 veterans had been diagnosed with hearing loss or tinnitus, or ringing in the ears. Kay Miller, *Hearing Loss Widespread Among Post-9/11 Veterans*, The Center for Public Integrity (Aug. 29, 2013), https://tinyurl.com/mrynpzjf. A set of Defense Occupational and Environmental Health Readiness System records has now been produced by the government for virtually every MDL claimant and analyzed by a neutral court-appointed expert. A.447-A.448 (MDL Order Staying Wave Process). The "data … demonstrate the fact of certain injuries based on hearing thresholds" in individual hearing tests, which are very accurate metrics. A.448 n.4.

Such hearing loss is not a mere inconvenience. It is a life-altering condition that impairs the ability to communicate and "can adversely affect relationships with family and friends and create difficulties in the workplace." Lisa L. Cunningham & Debara L. Tucci, *Hearing Loss in Adults*, 377 N. Engl. J. Med. 2465, 2465 (2017).

It "leads to social isolation and a reduced quality of life." *Id.* Adults with untreated hearing loss are at a greater risk of depression, and are more likely to be unemployed or underemployed. *Id.* These are serious consequences for anyone, with effects exacerbated for a veteran population that is already at high risk of depression, post-traumatic stress disorder, or other mental health conditions. *See* Simon B. Goldberg et al., *Mental Health Treatment Delay: A Comparison Among Civilians and Veterans of Different Service Eras*, 70 Psych. Servs. 358, 358 (2019).

The experiences of just three veterans with claims pending in the MDL who are members of *amicus* the Military Order of the Purple Heart illustrate the human cost of 3M and Aearo's decade-plus concealment of serious defects:

First Sergeant Richard Vendl enlisted in the Army at age 17, and deployed eight times over a 25-year career as a helicopter mechanic. Selected to join the elite 160th Special Operations Aviation Regiment, *see* U.S. Army Special Operations Command, *160th Special Operations Aviation Regiment (Airborne)*, https://tinyurl.com/yc772e96, he was wounded in Afghanistan when an armor-piercing round penetrated his helicopter. After his sixth deployment—this time to Iraq in 2008—he was diagnosed with hearing loss, despite having been issued the CAEv2. Throughout that deployment, despite diligent usage of the CAEv2, he began to lose his hearing gradually. By the time he took a pre-deployment hearing test in 2011 before his seventh deployment, he failed the test.

Facing a medical review board and the possible end to his military career, the Army ultimately prescribed him hearing aids for both ears. But the hearing aids are no panacea. Sergeant Vendl no longer eats out at restaurants because the aids amplify the background noise and make it impossible to hear people sitting across the table. He can't play with his grandchildren without either turning his hearing aids down (making it difficult to carry on a conversation) or leaving them at a setting that makes his grandchildren's normal tendency to play loudly difficult to bear. And without the aids, he cannot participate in any social or work-related conversations. In short, the CAEv2's defects, and resulting hearing loss, have deprived Sergeant Vendl of "so many of the little joys in life."

Staff Sergeant Marteze Ford also enlisted in the Army at a young age, to support his family when he learned he was going to be a father. Becoming a motor transport operator in the Army Reserve, Sergeant Ford deployed to Iraq in 2003. During a 15-month deployment, his unit conducted resupply convoys in Tikrit. Sergeant Ford was issued the CAEv2 during this deployment, and used it as required during missions; his unit nicknamed it the "bumblebee" because of its yellow and dark green color. In 2004, Sergeant Ford suffered shrapnel wounds and burns when his vehicle hit an improvised explosive device. He was wearing the CAEv2 as required, and continued to wear it for the next four years during monthly drills and annual training with his reserve unit. When his unit switched to a different earplug

in 2008, Sergeant Ford immediately noticed a difference in how the new earplug protected his hearing. But by then, the damage was done.

Soon after returning home from his Iraq deployment, Sergeant Ford experienced colleagues and family members frequently asking him to stop yelling, even though he thought he was speaking at a normal volume. He started hearing a "hollow whistling sound" at random intervals. He did not think he had suffered hearing loss, because he had diligently worn his issued earplugs—instead, he believed he was experiencing psychological issues. Eventually, he requested a medical evaluation from the Department of Veterans Affairs and was diagnosed with tinnitus and hearing impairment, affecting both his military and civilian careers. His diagnosis limited his career advancement in the Army Reserve, and he medically retired after a 21-year career. In his civilian job as an auto claims adjuster, he spends most of the day on the telephone and has difficulty regulating his volume in those conversations, particularly when his tinnitus symptoms flare. His co-workers have commented on his loud voice, but he is embarrassed to explain his disability to them and worries they would view him differently.

Like Sergeant Ford, Sergeant Joseph James conducted resupply missions in areas of intense insurgent activity over the course of his 12 years in the Army. He deployed to Iraq three times and to Afghanistan once, and he was issued and used the CAEv2 on each deployment. He recalls receiving a briefing from a medical unit

in Germany about the CAEv2 while awaiting transport to Iraq for his second deployment. The medical unit taught the soldiers how to insert the earplug and confirm that it was properly seated. A self-described "stickler" for rules, Sergeant James followed the instructions to the letter. On his final deployment, to Afghanistan, Sergeant James was providing convoy security when an improvised explosive device detonated next to his vehicle. He suffered lacerations to his leg and face, and experienced ringing in his ears after the blast, even though he was wearing the CAEv2 as he always did. Still, his ringing symptoms persisted—and continue to this day, years after his medical discharge from the Army. His tinnitus wakes him up at night and aggravates his migraines. The ringing in his ears, migraines, and loss of sleep combined often exacerbate his depression and post-traumatic stress disorder. Despite—or rather, because of—diligent use of the CAEv2, Sergeant James' quality of life is permanently diminished.

The MDL that 3M seeks to halt is filled with hundreds of thousands more stories like these: servicemembers who diligently used protective gear issued to them by the military, in accordance with the instructions they were given, only to discover that it did not work, and they will suffer lifelong injuries and disabilities as a result.

B. Multidistrict Litigations in General—and this MDL in Particular—Provide a Fair, Equitable Process for Veterans to Obtain Redress for Injuries Caused by Defective Military Gear.

1. After the concealed defects in the CAEv2 were revealed, veterans like

Sergeants Vendl, Ford, and James understandably began filing tort suits across the country seeking redress for their injuries. One of the plaintiffs moved to centralize the litigation under 28 U.S.C. § 1407, the multidistrict litigation statute. *In re 3M Combat Arms Earplug Prods. Liab. Litig*., 366 F. Supp. 3d 1368, 1369 (J.P.M.L. 2019). 3M actively supported centralization through the MDL process. *Id.* The Joint Panel on Multidistrict Litigation agreed with all parties that "centralization will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation," so the cases were transferred to the Northern District of Florida for coordinated pretrial proceedings. *Id.* at 1369-70.

"MDL has become the leading mechanism for resolving mass torts" for good reason. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. Pa. L. Rev. 831, 833 (2017). It "allow[s] for the efficient resolution of complex litigation" when the case does not meet the requirements for class certification. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 Tul. L. Rev. 2205, 2205, 2209 (2008) (describing MDL as achieving efficiencies of a class action within a "looser and more flexible structure"). It offers several benefits to victims injured by widely sold defective products—a descriptor that will generally cover veterans harmed by defective military gear.

For starters, the aggregation of cases for pretrial discovery and other pretrial

rulings permits plaintiffs to share costs and match the resources and expertise that large corporate defendants can bring to the table. *See* Andrew D. Bradt & D. Theodore Rave*, It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 94-96 (2019). Plaintiffs can share resources, moreover, without entirely giving up control over their claims, because MDL maintains a "split personality" between aggregate and individual litigation. *Id.* at 103-05. Although MDL provides a structure to facilitate global settlement—and about 97% of MDL cases are resolved without being remanded for trial—a plaintiff's individual consent is required to settle that plaintiff's case. *Id.* at 103-04. MDL plaintiffs thus gain the efficiency of addressing pretrial issues in a consolidated manner while preserving the right to their day in court to obtain compensation for their injuries.

2. As the bankruptcy court noted, the question before it—and before this Court—is not a "referendum on the MDL." SA.14. Nonetheless, 3M and its *amici* try to cast the MDL as failing, such that veterans need to be rescued by being swept against their will into bankruptcy court. Tellingly, not a single group of plaintiffs agrees. *See* SA.14. Veterans are neither "languishing" nor "stuck" in the MDL while they "waste years" litigating tort claims that they have chosen to bring (*contra* Chamber Br. 2-3, 11). To the extent the MDL is at a "standstill," it is because "[n]o Wave trials, no remands, no nothing can go forward until 3M's ruse is run up the

flagpole"—delay imposed by 3M's "design." *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2022 U.S. Dist. LEXIS 230132, at *17 (N.D. Fla. Dec. 22, 2022). Until 3M's bankruptcy ploy, the MDL process—shaped by all parties, including 3M—was moving forward, in a fair and transparent way, to vet and winnow claims, gather useful data from bellwether trials, decide common legal issues, and efficiently and effectively resolve veterans' claims.

a. From the beginning, 3M helped shape the MDL process, fully utilizing the tools provided by the MDL to obtain discovery about plaintiffs—including a "census" requirement. *See* Bolch Judicial Inst., *Guidelines and Best Practices for Large and Mass-Tort MDLs* 5, 10-11 (Duke Law School, 2d ed. 2018), https://tinyurl.com/w4spex57 (describing "initial fact sheets" as an MDL best practice) ("Bolch Guidelines").

Both sides "agree[d] that initial discovery (census) information w[ould] be necessary." *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2019 U.S. Dist. LEXIS 241363, *7 (N.D. Fla. Oct. 22, 2019). Under the MDL court's resulting order, all MDL plaintiffs had to answer a "census" questionnaire about what branches of the military they served in, their duty stations and specialties, why they used CAEv2, and the physical injuries they sustained as a result. *Id.* at *13. The order also required plaintiffs to produce certain substantiating documents, such as Veterans Affairs audiograms. *Id.* at *9-10, *13-14. If such documents were in the

government's possession, plaintiffs had to make a "*Touhy* request." *Id.* at *11.[2] Although temporarily suspended to address delays in obtaining military documents, the census requirement has since been reinstated. *See* Pretrial Order No. 81, No. 3:19md2885, Dkt. No. 1848, at 1 (N.D. Fla. July 28, 2021). The document production requirements have shifted over time, as new methods were identified for obtaining military service and medical records. *See* A.142-144 (Stipulated Facts ¶¶ 120-123).

In addition, because 3M was "clamoring for data about individual claimants at the time," the MDL court also created "a separate organizational tool—the administrative docket—to facilitate centralized vetting and an efficient *Touhy* process" for potential but as-yet inactive claims. *In re Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2022 U.S. Dist. LEXIS 130992, *6 (N.D. Fla. Apr. 6, 2022). This was done "in no small part for the benefit of Defendants," as it enabled Privacy Act records to be obtained from the federal government for these potential claimants. *See id.*; *see also* A.92-93 (Stipulated Facts ¶¶ 11-12); Pretrial Order No. 20 Inactive Administrative Docket, No. 3:19md2885, Dkt. No. 864, at 2 (N.D. Fla.

[2] A "*Touhy* request" is named after *Touhy v. Ragen*, 340 U.S. 462 (1951), which affirmed a federal employee's authority to refuse to produce documents in response to a subpoena when departmental regulations precluded the production. The term "*Touhy* request" thus refers to a request for production of federal government documents in litigation where the United States is not a party.

Dec. 6, 2019).[3]

The MDL court thus did not eliminate the need for plaintiffs to substantiate their claims, as 3M's *amici* would have it. *See* Chamber Br. 9-10. Rather, the MDL court adjusted the process to fit the context of a defective product that injured thousands upon thousands of servicemembers, where the federal government possesses virtually all of the important records related to plaintiffs' medical injuries and their military service and duties. A.100-01 (Stipulated Facts ¶ 25) ("Most of the medical and other relevant records related to these current and former servicemembers' claims are in the possession or control of the federal government," so the MDL court "with the [federal] agencies' agreement, has pursued an incremental approach to record collection from the government.") (quoting Pretrial Order No. 33). Such record collection is fully consistent with MDL best practices to

[3] The administrative docket also had the benefit of bringing the full number of claims to light. Although much has been made of the size of the 3M MDL, *see, e.g.*, Chamber Br. 8, it is not in fact an "order of magnitude," SA.6, larger than other MDLs involving widespread product injury. Rather, its claims are accurately countable due to the administrative docket. *See* 2022 U.S. Dist. LEXIS 130992, at *7. That is not always so. In the Roundup MDL, for example, many of the 160,000-plus claims were never filed. *See* Bayer, *Bayer announces agreements to resolve major legacy Monsanto litigation* (June 24, 2020), https://tinyurl.com/4ebfdy22 (reporting settlement of 125,000 "filed and unfiled" claims representing 75% of total claims). A transparent count of claims helps all the parties formulate a path forward—3M included. *See* 2022 U.S. Dist. LEXIS 130992, at *7 ("The body of individual claims associated with any MDL exists whether those claims are catalogued on an administrative/inactive docket" or "'parked' only in an electronic data platform," but "it is just harder to keep the former under wraps.").

"facilitate the efficient flow of information," Bolch Guidelines at 6—to the benefit of all parties. And it reflects the context-specific flexibility that is a useful feature of MDLs, not a flaw. *See* Bradt, *Radical Proposal*, *supra*, at 839 (MDL statute's drafters "believed that for their creation to work effectively, it needed to endow the judges … with the flexibility to innovate.").

With a process underway to obtain documents, the MDL court required potential claimants in the administrative docket to either transition their claims to the active docket (after vetting them and paying the filing fee) or to file a notice of dismissal. This process has worked—and is still working—to weed out invalid claims. Between the order setting deadlines for cases to transition to the active docket, discovery in the initial waves of cases, and the MDL court's efforts "to eliminate cases where plaintiffs did not fulfill various obligations," like "failure to timely submit census forms," 2022 U.S. Dist. LEXIS 130992, at *8-9, nearly 45,000 plaintiffs' claims have been dismissed as of July 2022, A.148-49 (Stipulated Facts ¶ 131). And the MDL court recently reiterated the point, ordering that any remaining plaintiffs who do not "submit a census form by February 8, 2023" will have their claims "dismissed with prejudice." Order, No. 3:19md2885, Dkt. No. 3626, at 2 (N.D. Fla. Jan. 18, 2023).

Still, most plaintiffs—over 80% in the first sets of transitioning cases—were able to transition their cases to the active docket. 2022 U.S. Dist. LEXIS 130992, at

*8. With substantiating military records rolling in, the detailed census questionnaire in place, and the majority of plaintiffs making a deliberate choice to transition their cases to the active docket, there is no reason to suppose that there is an "enormous" number of meritless claims, *contra* Nat'l Ass'n of Mfrs. (NAM) Br. 26. Only an enormous number of injured veterans.

b. Those veterans' claims are steadily moving to adjudication, moreover, through a series of procedural vehicles that the MDL makes possible, including bellwether trials and consolidated pretrial rulings on common issues. For example, the MDL court has overruled 3M's government contractor defense. 474 F. Supp. 3d at 1235. That 3M does not like this outcome and has filed an appeal is no reason to describe the MDL process as broken, or the bellwether trials as useless (*contra* Chamber Br. 10 & n.5). The bellwether process has been fair and yielded informative, useful results.

Bellwether trials are particularly useful when the bellwether plaintiffs are similarly situated to most plaintiffs. *See* Bolch Guidelines at 19. An exhaustive analysis assured that was the case here. A.449 ("Through collaboration and consensus, the parties and the Court together designed a selection process that resulted in a truly representative pool of bellwether cases.").

The MDL court appointed an independent expert to "develop a more complete and accurate picture of the full universe of cases in the MDL." A.101 (Stipulated

Facts ¶ 25) (quoting Pretrial Order No. 33). A series of "prevalence analyses" were conducted by this neutral third-party on all claimants with completed census forms, to identify the "characteristics that were most representative of the whole." A.101, 103 (Stipulated Facts ¶¶ 25, 29) (quoting Pretrial Order No. 23). That analysis "revealed that the most representative claimant is [1] between the ages of 30 and 49, [2] serves or served in the Army, and [3] alleges a combination of tinnitus and hearing loss." A.103 (Stipulated Facts ¶ 29). From a pool of randomly selected cases representing 1% of the MDL population, 175 cases matching the three representative criteria were identified as potential bellwether candidates. A.103-04. From that 175, the plaintiffs, defendants, and the court selected 27 bellwethers. A.104 (Stipulated Facts ¶ 30). Further analysis on additional data (including more than 220,000 completed census forms) has only confirmed the three key representative characteristics. A.450 n.6.

The bellwether process has worked well and yielded useful information for both sides. "No other MDL litigants in this country have obtained more objectively representative and reliable data points about individual claims, and the broader whole, in this timeframe, than the parties in this litigation." A.450.

Eight bellwethers were dismissed. A.106 (Stipulated Facts ¶ 34). Such dismissals are common in the bellwether process; "[m]any bellwether cases resolve themselves" before trial, but they "should not be regarded as failures." Bolch

Guidelines at 18. Instead, dismissals "can be important data points." *Id.* Of the cases that went to trial, 3M lost 10 trials against 13 plaintiffs, including every bellwether plaintiff randomly selected by the Court and all but one of the bellwether plaintiffs selected by the plaintiffs. A.106 (Stipulated Facts ¶ 37); Committee Br. 8. 3M also won six trials, five of which were bellwether plaintiffs it had selected. *Id*. Rather than demonstrating wild inconsistency as 3M's *amici* suppose (NAM Br. 19, 22), those results indicate that the parties understand the characteristics likely to equate to a successful claim, and the bellwethers have provided useful data for purposes of moving the cases forward.

C. The Bankruptcy Code Is Not a Litigation Escape-Hatch that Financially Healthy Corporations May Use to Force Veteran Plaintiffs into Bankruptcy Court.

After extensive pretrial proceedings and 16 bellwether trials—just as the first "wave" of veterans' cases were on the precipice of remand and trial—"the bottom fell out." 2022 U.S. Dist. LEXIS 230132, at *8. Only then, after "purposely engag[ing] in a nearly *four-year campaign* to establish itself as the sole responsible party" did 3M "abruptly reverse[] course" and assert that Aearo is "a separate entity with sole and complete responsibility for all CAEv2 liability." *Id.* at *11, *20-21. Why? "Not because any of the [Aearo or 3M] entities was facing a *bona fide* threat of financial distress." *Id.* at *9. Rather, 3M and Aearo "[n]ewly (and voluntarily) saddled" Aearo with all CAEv2 liability to make Aearo a bankruptcy candidate, so

that 3M could "evade dissatisfactory legal rulings" and "avoid potential future liability for [itself,] a *non-debtor*, … in the tort system." *Id.*

However important the Bankruptcy Code may be for resolving mass tort claims when companies are "financially struggling," NAM Br. 20, bankruptcy is not a button financially strong tortfeasors can push to seek an allegedly more expedient settlement process or to avoid liability. 3M is not financially struggling at all. SA.34. And due to the "circular arrangement" within the creative indemnity agreement—whereby Aearo indemnifies 3M with 3M's own money, SA.31—litigation against 3M will have no economic effect on Aearo's reorganization either, SA.35. As Appellees explain, reading the Bankruptcy Code to require that the automatic stay (or a § 105 injunction) be extended to 3M in these circumstances is flatly inconsistent with statutory text and purpose. *See* Committee Br. 22-24, 36-45. It would also wrongly deprive veterans—in this litigation and in future cases—of their hard-fought day in court whenever a defendant wants an MDL do-over.

The severe negative consequences of allowing defendants to easily invoke bankruptcy's shield without paying the price of entry—a bankruptcy petition—are amply illustrated by the havoc wreaked by 3M's "egregious gamesmanship" here. 2022 U.S. Dist. LEXIS 230132, at *22.

3M executed its maneuver only after helping to set the MDL rules of the game, just as the MDL pretrial phase was coming to a close for the first wave of veterans'

cases. While the first bellwether trials were ongoing, the MDL court required further cases "to [be] work[ed] up" for trial "simultaneously in waves" of "approximately 500 cases per wave." A.149 (alterations in original) (Stipulated Facts ¶ 135).

Just four days after the MDL court set a trial date in the Northern District of Florida for one of the "Wave 1" plaintiffs, Aearo filed for bankruptcy. A.152 (Stipulated Facts ¶¶ 140, 143). 3M then followed with an "abrupt[] revers[al]" in position within the MDL to attempt to shift all liability to Aearo. The upshot: the "waves" of veterans' trials are now stayed. 2022 U.S. Dist. LEXIS 230132, at *21, *23; A.446.[4]

Delaying the first wave cases on the eve of their trial or remand for trial is bad enough, but if 3M is successful with its bankruptcy maneuver, veterans harmed by 3M's defective gear will be deprived of their day in court. True, the bankruptcy process could in theory provide tort claimants a trial in district court, 28 U.S.C. § 157(b)(5)—but as the bankruptcy court explained, that is not the usual way, SA.15-16. Overall, the list of bankruptcy's "benefits" compiled by 3M's *amici* reads more like a list of rights the veterans will lose: no remand for individualized Article III jury trials in their home districts, no ability to decline to be bound by an insufficient settlement (if a bankruptcy plan is approved), and no ability to pursue claims in state

[4] Given 3M's responsibility for bringing the MDL to a screeching halt, its *amici*'s critique that "[f]ew trials have been held," NAM Br. 22, rings hollow.

court. *See* NAM Br. 13-15.

Even if 3M's bankruptcy ploy happened before the MDL process began, depriving injured veterans of their full panoply of rights to pursue redress against financially healthy defendants would be bad enough, and equally inconsistent with the Bankruptcy Code—as well as veterans' Seventh Amendment right to a jury trial. The rule "that resort to Chapter 11 is appropriate only for entities facing financial distress" is a "safeguard [that] ensures that claimants' pre-bankruptcy remedies—here, the chance to prove to a jury of their peers injuries claimed to be caused by a … product—are disrupted only when necessary." *In re LTL Mgmt., LLC*, __ F.4th ___, No. 22-2003, Slip. Op. at 58 (3d Cir. Jan. 30, 2023), *available at* https://tinyurl.com/5ejysv35. But approving 3M's bait-and-switch maneuver at this stage of the game makes it even worse, and would write a roadmap for defendants to turn multidistrict litigation into a "heads I win, tails you lose" system.

3M used the MDL process to engage in "[s]corched earth battle" for "more than 260 motions in limine, 109 *Daubert* challenges, 42 case-specific summary judgment motions, 47 choice of law disputes, and 21 post-trial motions." 2022 U.S. Dist. LEXIS 230132, at *8. Only after "uncomfortable lessons [were] learned from jury after jury," A.450, did it seek another bite at the apple in bankruptcy court. If its Potemkin bankruptcy is vindicated, future corporate defendants will likely be equally eager to take advantage of trying out MDL first, and concocting a bankruptcy

if things don't go well. Ruling in 3M's favor yields the perverse result that when plaintiffs' claims are more meritorious—when defendants are least happy with the MDL results—plaintiffs are most likely to be shunted into bankruptcy, regardless of defendants' financial health and without the primary tortfeasor filing bankruptcy and subjecting itself to the oversight and burdens of the bankruptcy process. Bankruptcy should not become a tool to shut the courthouse doors to victims of corporate wrongdoing like the veterans in this case.

CONCLUSION

The order of the bankruptcy court should be affirmed.

February 1, 2023

Respectfully submitted,

s/Hyland Hunt

Thomas P. Cartmell
WAGSTAFF & CARTMELL
4740 Grand Ave., Suite 300
Kansas City, MO 64112
(816) 701-1100
tcartmell@wcllp.com

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

Robert Cowan
BAILEY COWAN HECKAMAN PLLC
1360 Post Oak Blvd., Suite 2300
Houston, TX 77056
(713) 425-7100
rcowan@bchlaw.com

P. Leigh O'Dell
BEASLEY ALLEN
218 Commerce St
Montgomery, AL 36104
(334) 269-2343
Leigh.ODell@BeasleyAllen.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 6,798 words, and thus complies with the type-volume limitation set forth in Circuit Rule 29.

s/Hyland Hunt
Hyland Hunt

February 1, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on February 1, 2023, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

s/Hyland Hunt
Hyland Hunt