

1 THE CLERK: Please step forward and raise your right  
2 hand.

3 ERIC ZENGER, PLAINTIFFS' WITNESS ON AN OFFER OF PROOF, SWORN

4 THE CLERK: You may take the stand.

5 DIRECT EXAMINATION

6 BY MR. EATON:

7 Q. Mr. Zenger, you can turn your chair around to face us.

8 Would you state your full and correct name for the  
9 record, please, sir.

10 A. Eric Steven Zenger.

11 Q. Mr. Zenger, where do you live, what city and town,  
12 please--city and state?

13 A. I currently live in American Fork, Utah.

14 Q. How long have you lived in Utah, sir?

15 A. For about 14 years now.

16 Q. What is your occupation, profession, business, or  
17 employment, sir?

18 A. I am a physician's assistant in dermatology.

19 Q. And how long have you worked at that profession?

20 A. About a year.

21 Q. What did you do before you became a physician's assistant?

22 A. I sold real estate and did real estate development in Park  
23 City and Deer Valley Utah.

24 Q. How old a man are you, sir?

25 A. I am 41.

1 Q. Are you a muzzle--in the past have you been a muzzleloader  
2 shooter?

3 A. Yes.

4 Q. About how many years ago did you first take up muzzleloader  
5 shooting, if you can recall?

6 A. The first time I shot a muzzleloader was when I was 14 out  
7 at Scout camp.

8 Q. And over the years have you owned muzzleloader firearms?

9 A. Yes, I've owned several.

10 Q. Have you been a participant-- Do you remember what the  
11 first muzzleloader firearm you owned was, what make and model?

12 A. I don't recall the exact make and model, but it was a kit  
13 that I sanded down the barrel and built the gun.

14 Q. During your tenure as a muzzleloader shooter, did you ever  
15 attend any firearms courses that were focused upon muzzleloader  
16 shooting as opposed to other types of firearms?

17 A. No. We--only at that Scout camp that had the--they had a  
18 guy that was a police officer that taught us all about black  
19 powder, how to shoot them, et cetera.

20 Q. Is that when you were a teenager?

21 A. Yeah.

22 Q. Other than that instruction, did you ever receive any other  
23 formal instruction on firearms that included instructions  
24 regarding muzzleloader firearms?

25 A. No.

1 Q. Did you ever own any CVA or BPI muzzleloader firearms?

2 A. I did.

3 Q. Do you remember how many CVA or BPI firearms you've owned in  
4 your lifetime?

5 A. One.

6 Q. Do you remember what year or approximately what year you  
7 acquired that firearm?

8 A. I believe it was in 1999.

9 Q. 1999?

10 A. Yes.

11 Q. Did you buy that firearm new?

12 A. I bought it used at a gun shop, but they had said it had  
13 never been fired, but it was secondhand.

14 Q. Secondhand, but never fired?

15 A. Yes.

16 Q. All right. Do you remember the name of the gun shop?

17 A. American Fork Gun and Sport, I believe is what it was.

18 Q. When you looked at that gun, did it appear to you to be new?

19 A. It did in fact.

20 Q. Was it in a box that looked like it was new, or it hadn't  
21 been taken out of the box?

22 A. When I originally saw it, it was in a gun case with all the  
23 other new guns, and it wasn't until I decided to buy it that he  
24 informed me that he had taken it on trade, or something, and  
25 that he had the box in the back.

1 Q. So when you made the purchase, you got the gun and the box;  
2 is that correct?

3 A. Yes. Yes.

4 Q. Did it have an instruction manual with it?

5 A. It did not at the time.

6 Q. Did you seek to obtain an instruction manual for that  
7 particular model?

8 A. We did. I downloaded one off of the internet, I believe.

9 Q. Is that from the BPI or CVA website?

10 A. Yeah.

11 Q. So you got the gun which appeared to be new, was represented  
12 to be new, you got the box that it came in. And then from a  
13 subsequent source you got the manual; correct?

14 A. Uh-huh.

15 Q. Is that yes?

16 A. Yes.

17 Q. And ultimately you were involved in an incident where that  
18 gun failed and you were injured, but did you shoot it for a  
19 time--a number--several times before the failure incident?

20 A. I did. I probably shot it somewhere over 20. Maybe 30  
21 times before the failure.

22 Q. By the way, what model was that gun of yours?

23 A. It was a Pro Hunter.

24 THE COURT: I'm sorry? I didn't hear.

25 THE WITNESS: Pro Hunter.

1 THE COURT: Pro?

2 THE WITNESS: Pro Hunter.

3 BY MR. EATON:

4 Q. So you shot it 20 or 30 times before the failure incident;  
5 is that correct?

6 A. Yes.

7 Q. Do you remember the date, month, or the year of the failure  
8 incident?

9 A. November 4th, 2001.

10 Q. 11-4 what?

11 A. 2001.

12 Q. Prior to that incident, had you hunted with that gun?

13 A. Yes.

14 Q. Had you taken any game with that gun?

15 A. I tried. I don't think--I don't believe I ever got  
16 anything.

17 Q. At least 20 or 30 times you fired it before the failure  
18 incident. What kind of propellant did you use?

19 A. The pellets, 50-grain pellet.

20 Q. Do you remember what brand or make of pellets, who's the  
21 manufacturer?

22 A. Not exactly. I'm sure there were probably different brands  
23 that we used over the course of the years.

24 Q. You used a pelletized form of black powder substitute; is  
25 that correct?

1 A. Yes.

2 Q. Did you consult your manual about using that form of  
3 propellant?

4 A. I did, and I also talked extensively with the owner of a  
5 separate gun shop that sells black powder rifles.

6 Q. At the time the gun failed, do you remember what your load  
7 was that was shot through that gun when it failed?

8 A. We were using two 50-grain pellets.

9 Q. Two 50-grain pellets?

10 A. So 100 grains total.

11 Q. Do you remember the projectile?

12 A. I don't remember exactly, I just know that it was--it came  
13 with, I guess, a polyurethane sabot, and the projectile sat  
14 inside of it.

15 Q. Had you fired that same load through that gun on prior  
16 occasions?

17 A. Yes.

18 Q. Had you ever had any adverse consequences as a result of  
19 firing that load through that gun on prior occasions?

20 A. No.

21 Q. Were you alone when the injury incident occurred, or did you  
22 have people with you?

23 A. I was with my younger brother at the time.

24 Q. What's your brother's name?

25 A. Michael Paul Zenger.

1 Q. Had Michael been a muzzleloader shooter?

2 A. Yes.

3 Q. And I believe you said you were sighting it in?

4 A. We were at a target range just sighting the rifle in.

5 Q. Just describe for us, if you could, please, your perception  
6 of the incident, how it occurred. And you might just start with  
7 loading of the gun, and then whatever position you may have  
8 taken, and then what happened.

9 A. Yes. We were at a shooting range, and there was actually a  
10 table that was there for that particular use, for sighting in  
11 rifles. And my brother actually had shot the gun seven times.  
12 We were trying to get it sighted in. He told me his arm was a  
13 little bit sore and asked me if I would take the next couple  
14 shots.

15 I sat down at the table, and we had our sandbags  
16 there, and I sighted in on the target, and I pulled the trigger,  
17 and nothing happened. I had forgotten to take the safety off.  
18 He kind of made fun of me and we laughed about it.

19 I took the safety off, sighted it again, pulled the  
20 trigger. And the next thing I knew, I woke up laying on the  
21 ground about five minutes later, I guess, and there were people  
22 around me, and I could hear my brother in the background  
23 screaming on the phone to a family member that he thought I was  
24 dead. And I heard people saying an ambulance is on the way.  
25 Another man said he couldn't find a pulse.

1           And it was about at that time that I moved, I said  
2 something, and they realized that I, in fact, wasn't dead. And  
3 then I blacked out again. I came to when I was in the ambulance  
4 on the way to the hospital, and that was kind of the beginning  
5 of the whole thing.

6 Q. After this incident occurred--I think you were injured quite  
7 badly and down for a while. Did anyone gather up your gun and  
8 any component parts of it, that you're aware of?

9 A. Other than myself or my brother?

10 Q. Your brother, or any of those other folks that might have  
11 been at this shooting range.

12 A. Yeah. Well, it was actually a day or two after I had the  
13 accident I received an interesting phone call from a gentleman  
14 by the name of Mark Marvin, I believe, who said he had seen a  
15 story on the news about me being injured, and his son had  
16 suffered the same injury, and wanted to know what type of gun I  
17 was using. I told him, and he said that was--"That's the exact  
18 gun my son was using." He proceeded to tell me there was a  
19 history of failure, and that I needed to go and find all the  
20 parts of the gun that we could because we would probably need it  
21 eventually if this was to turn into an issue.

22 Q. When you had that phone call, were you back at your home?

23 A. I was.

24 Q. And did you and/or your brother and perhaps others make an  
25 effort to gather up the gun and as much of the components of the

1 gun as you could?

2 A. Absolutely.

3 Q. Do you know who took possession of the gun immediately after  
4 the incident?

5 A. I believe the police had it for a brief period, and I don't  
6 know whether that was an hour or two, or whether it was a day or  
7 two. I kind of left that to my brother while I was home  
8 convalescing.

9 Q. Are you telling us your brother was the one who rounded up  
10 the gun?

11 A. Yes. Yes. They spent a considerable amount of time up at  
12 the shooting range to try to find the different pieces.

13 Q. Do you know if any other pieces were found?

14 A. They found the bolt--they found the bolt because it was in  
15 my face. They found the little black cap, a piece of it. They  
16 did not find the breech plug, which is what they were actually  
17 looking for.

18 MR. EATON: May I approach the witness, Judge?

19 THE COURT: Yes.

20 BY MR. EATON:

21 Q. Mr. Zenger, I'm going to proffer to you Exhibit No. 87. I'm  
22 going to proffer to you Plaintiffs' Exhibit No. 87, and ask you  
23 if you can identify Plaintiffs' Exhibit No. 87?

24 A. That is my gun. That's the gun I was shooting.

25 Q. If you would, please, look at it and read off of it the

1 serial number into the record.

2 A. It is 61-13-013872-96.

3 Q. By the way, can you see any little proofmarks on there  
4 anywhere, what you understand to be proofmarks near the serial  
5 number?

6 A. Yeah. I guess there are some right there at the edge.

7 Q. Can you just describe those for the record, please, what you  
8 see?

9 A. There's three little circles that form kind of a triangular  
10 shape, and then--I didn't think I was so old that I needed  
11 glasses, but this is tiny enough--maybe it looks like a little  
12 shield, or something, next to it.

13 Q. Do you recognize those two images you described as  
14 proofmarks?

15 A. I do now.

16 Q. Before you fired this gun, did you know anything--and you  
17 were hurt--did you know anything about proofmarks?

18 A. No.

19 Q. Now, once you recovered enough from your injuries to take a  
20 look at this gun, after the incident occurred, take a look at  
21 this gun, did you notice anything about it that seemed unusual  
22 to you? Did you inspect it close enough to discern anything  
23 unusual?

24 A. Well, at the time I was a little surprised to see that  
25 the--what I had understood to be the breech plug, that it was

1 missing completely. I noticed, of course, that the side of the  
2 gun, there's a part that the steel is bent and twisted, and that  
3 was kind of--those were the two things that kind of struck me at  
4 the time.

5 Q. Now, you ultimately retained legal counsel; is that correct?

6 A. I did.

7 Q. Filed a lawsuit?

8 A. I did.

9 Q. And went pretty much all the way through the legal process,  
10 as I understand it, got down close to trial?

11 A. I believe so. I don't know what that whole process is to  
12 know where we were in it, but, yeah, at some point in time we--

13 Q. Do you have a recollection of sitting for a deposition in  
14 your case?

15 A. Yes.

16 Q. Did you attend any other depositions in your case?

17 A. If I recall, I believe it was just the one time.

18 Q. All right. Any other depositions of any other witnesses  
19 besides you?

20 A. I didn't.

21 Q. Did not?

22 A. Did not.

23 Q. Now, did you ever, after this incident occurred, and during  
24 the course of that litigation, inspect the breech area of that  
25 barrel any closer than what you just told us about?

1 A. I certainly on several occasions, as we were preparing the  
2 case--we had a couple of expert witnesses that had the gun and  
3 looked at it, and since then I've had other people look at it  
4 and tell me that the failure was a failure of the breech plug,  
5 the way that it was put in there and the threads and everything.

6 MR. SINGER: Your Honor, object and move to strike as  
7 hearsay, even for the offer, as to what other people say.

8 THE COURT: I note the objection. If I were to allow  
9 it to go to the jury, I would exclude it. But this is an offer  
10 of proof. We'll see what he has to say.

11 BY MR. EATON:

12 Q. When you say the breech plug and threads, are you talking  
13 about the connection of the breech plug to the barrel?

14 A. Yes.

15 Q. After you were advised of that, became somewhat aware of  
16 that, did you inspect it closer yourself to see if you could see  
17 any evidence of stripping of the threads in the barrel?

18 A. I did.

19 Q. Did you observe such a stripping of threads in the barrel?

20 A. I don't know what I'm looking for, what I'm looking at. To  
21 be honest with you, I don't like spending a lot of time with my  
22 gun, so I just don't look at it much.

23 Q. I understand. And you said a search was made, or at least  
24 to your understanding a search was made. No one ever found the  
25 breech plug?

1 A. No, it was not ever found.

2 MR. EATON: Your Honor, we pass the witness for  
3 cross-examination.

4 THE COURT: Cross-examination?

5 CROSS-EXAMINATION

6 BY MR. SINGER:

7 Q. Good morning, Mr. Zenger. Good to see you again, even  
8 though it's not under the best of circumstances.

9 Let me ask you a couple things. You knew that--let me  
10 back up.

11 When you bought the gun in 1999 at American Fork Gun,  
12 you didn't know that a recall had been called on that gun in  
13 1997, did you?

14 A. I did not.

15 Q. In fact, that was one of the things you learned when, I  
16 think, Mr. Marvin's father called you?

17 A. Yes.

18 Q. And you know now, not only from your lawyer and your  
19 experts, that this gun was recalled beginning in 1997?

20 A. Yes.

21 Q. And let me ask about a couple of things.

22 A. Okay.

23 Q. You--first of all, if you will pick up the gun--

24 MR. SINGER: May I approach, Your Honor?

25 THE COURT: You may.

1 BY MR. SINGER:

2 Q. I know you don't know exactly what you're looking at, but if  
3 we can turn it over and look right down inside the area where  
4 the breech used to be--

5 A. Yes.

6 Q. --you will see that there's a perfectly kind of circular  
7 rust mark and the whole barrel is gone, isn't it?

8 A. Okay.

9 Q. Would you agree with that?

10 A. Where I can see, is that what you're saying?

11 Q. Yes.

12 A. Yeah. I don't know what you're asking, I'm sorry. The  
13 whole barrel is gone? The barrel is right here.

14 MR. SINGER: May I approach again?

15 THE COURT: Yes.

16 BY MR. SINGER:

17 Q. If you look at the gun--and I'll hold it up so Your Honor  
18 can see it as well--you see where the scope is mounted on here,  
19 there's a rear portion that's the same substance as the gun,  
20 that appears metal, that's much bigger and sits in a different  
21 cavity in the stock than the barrel itself; right?

22 A. Okay.

23 Q. And you see when you look down inside it, that this barrel  
24 is a separate piece from this receiver? Do you see that?

25 A. When I look down inside of--

1 Q. Yes. In other words, when you see where the barrel itself--  
2 trace it from the muzzle past the rear sight, before you get to  
3 the scope, you will see the receiver begins?

4 A. Okay.

5 Q. Do you see that?

6 A. I'm assuming--it looks like it's one piece, but you're  
7 saying it's two pieces here?

8 Q. What I'm asking you here is do you not see, when you look in  
9 there, the seam?

10 A. It looks like that's just all one piece.

11 Q. Okay. Let's turn it and look this way. When you look  
12 inside it, you will see that the rear receiver area where the  
13 breech plug used to be is completely--is not as thick as the  
14 barrel, is it?

15 A. Okay. I see what you're asking.

16 Q. See what I'm saying?

17 A. Okay. I see that.

18 Q. You would agree with me on that; right?

19 A. Uh-huh.

20 Q. Now, you got a lawyer, found a lawyer in Salt Lake; right?

21 A. I did.

22 Q. And you were aware that one of the lawyers who had one of  
23 the first cases, filed before the recall began, involving a 1996  
24 gun, was a lawyer named Peter Perlman in Kentucky; correct?

25 A. Yes.

1 Q. And he had going around about 2003, or so, a lawsuit  
2 involving a Mr. Timothy Neal; correct?

3 A. Yes.

4 Q. And Mr. Neal was also injured well after the recall on a  
5 recalled gun; correct?

6 A. I believe so, yes.

7 Q. And you gave a video deposition where your lawyer, Mr. King,  
8 actually questioned you for the Neal case in Kentucky?

9 A. Okay.

10 Q. Do you remember that? I attended by phone?

11 A. Yes, vaguely, now that you mention it.

12 Q. And isn't it true that the reason your lawyer in Salt Lake  
13 took a deposition for use at trial of you in a case pending in  
14 Kentucky was to show that your 1996 gun and its failure were the  
15 same as Mr. Neal's 1996 gun and failure?

16 A. I don't know. I just--what I recall is that Mr. King asked  
17 me to testify, or do this deposition for this other guy, this  
18 other individual.

19 Q. Let me show you a letter from your lawyer dated September  
20 11th, 2003, to myself, and others, and copied to you.

21 MR. SINGER: May I approach, Your Honor?

22 THE COURT: Yes.

23 BY MR. SINGER:

24 Q. I'd just ask if that refreshes your recollection and appears  
25 to be a letter sent to me from your lawyer, September 11, 2003,

1 signed by Colin King and copied to you in dealing with  
2 settlement issues in the case that you had filed?

3 A. Okay.

4 Q. Is it, sir?

5 A. It's cc'd to me, yes.

6 Q. And do you--look at page 2 of that. And it is represented  
7 by your lawyer, and was in fact represented by your lawyer in  
8 that case, that Mr. Lucien Haag and Mr. Timothy LaFrance were  
9 experts retained by you and your lawyer to analyze the failure  
10 in your gun?

11 A. Yes.

12 Q. And isn't it true that, as that letter reflects to me, in an  
13 effort to discuss settlement, your position on liability was as  
14 Timothy La France and Lucien Haag had testified before, that the  
15 failure in this gun was the scope hole in the rear was drilled  
16 too deep into the receiver that it impinged into the barrel and  
17 created a fracture point; and that over time stress fractures  
18 happen and the barrel itself broke?

19 A. And it says that here somewhere?

20 Q. No. No. I just showed you the letter to refresh your  
21 recollection that your lawyer, on your behalf, and with your  
22 understanding, knowledge, and consent, asked us to settle the  
23 case based upon the representation that that was the failure?

24 MR. EATON: Your Honor, I'd object to the form of the  
25 question. It assumes facts not in evidence.

1 THE COURT: He can testify, if he knows.

2 BY MR. SINGER:

3 Q. Go ahead.

4 A. I guess the answer to that is my attorney certainly did a  
5 lot of things on my behalf. I don't believe I ever received a  
6 copy of this in the mail, or that was handed to me. Perhaps it  
7 went into a file that was given to me at a later date. So I  
8 don't know what his assumptions were through this.

9 Q. All right. Let me back up and ask it a different way.

10 A. Okay.

11 Q. We attended mediation, you and I?

12 A. Yes.

13 Q. You had a lawyer?

14 A. Yes.

15 Q. And Mr. Hickey was there on behalf of DC 1980, which was  
16 formerly Connecticut Valley Arms back in 1996; correct?

17 A. Yes.

18 Q. Isn't it true, because you said you were dealing with  
19 experts, isn't it true that Mr. Timothy La France and Mr. Lucien  
20 Haag's opinion on why your gun failed and what kind of a defect  
21 it had in it was that a scope hole was drilled too deep into the  
22 receiver, that it impinged in the barrel, and that it caused the  
23 barrel to have stress fractures and break with fatigue over  
24 time?

25 A. That is definitely one of the things that they discussed,

1 yes.

2 Q. Isn't it also true, as you understand it, their opinion was  
3 that in addition to that--because somehow the silver solder that  
4 soldered the rear of the barrel into the back of that receiver,  
5 in the area where the breech plug was, that silver solder  
6 additionally failed allowing the barrel chunk with the breech  
7 plug in it to move rearward?

8 A. I don't recall that, but perhaps.

9 Q. You don't disagree with that, do you?

10 A. I don't know.

11 Q. You don't know anything about the mechanism of failure, do  
12 you, other than what your experts said, as you've just said?

13 A. Yes.

14 Q. Your brother shot it probably more than you did before the  
15 failure?

16 A. No.

17 Q. He shot it a number of times, 30, 40, too?

18 A. He shot it a number of times, but I believe I shot it the  
19 most. The day of the accident he shot it seven times prior to  
20 the one time that I shot it.

21 MR. SINGER: Just a moment, Your Honor.

22 Nothing further of Mr. Zenger.

23 MR. EATON: Just very briefly, Judge.

24

25

1 REDIRECT EXAMINATION

2 BY MR. EATON:

3 Q. Now, Mr. Zenger, this barrel never came apart, did it?

4 A. It's right there. It's whole.

5 Q. In other words, you don't know of any repairs that were made  
6 to the barrel after this incident occurred, do you?

7 A. No.

8 Q. What you do know is the breech plug and certain other  
9 components came loose from the barrel; is that correct?

10 A. Yes.

11 Q. Came out of the barrel?

12 A. Yes.

13 MR. EATON: Nothing further, Judge.

14 THE COURT: Anything further, Mr. Singer? Anything  
15 further?

16 MR. SINGER: No, Your Honor.

17 THE COURT: Any further argument with regard to this  
18 witness?

19 MR. EATON: Your Honor, we'd just adopt the same  
20 arguments with Mr. Zenger that we adopted--or that we put forth  
21 with Mr. Cashdollar for substantial similarity.

22 In Mr. Zenger's case, however, we would add the one  
23 argument that the defendant certainly had notice of this mode of  
24 failure, that is the breech plug blowing out of the barrel,  
25 stripping threads out of the barrel. So the additional purpose

1 here would be to provide notice of defects in breech plug/barrel  
2 connection.

3 THE COURT: Thank you.

4 Mr. Singer?

5 MR. SINGER: Your Honor, we echo what's in our papers,  
6 as well as what's in the argument we just made with respect to  
7 Mr. Cashdollar. Independently, though, as set forth in the  
8 briefing papers, the affidavit of Mr. Hickey, who has seen these  
9 failures--and the Court can actually see, if you look in the  
10 barrel yourself, or in the receiver, the back of the barrel's  
11 gone that contained the breech plug.

12 So not only--this was the same mechanism of failure  
13 that Mr. Hickey has seen, I personally have seen in other cases  
14 of guns subject to the recall. It's not the failure of the  
15 breech plug. In fact, it's the opposite. The breech plug, in  
16 fact, retained its integrity in this gun, that the barrel  
17 actually broke and a whole piece of it, including the breech  
18 plug, came out the back. There is affirmative evidence in the  
19 affidavit of Mr. Hickey. There is zero evidence to the  
20 contrary.

21 In addition to that, as set forth in the briefing  
22 papers, this is so not substantially similar. It is a two-piece  
23 design with a barrel silver-soldered inside the receiver, cut  
24 threads way back there, and a lot of different things that make  
25 it substantially not similar.

1 I would also point out to the Court that as Mr. Zenger  
2 admitted, of having discussions with his expert--and I can state  
3 the place--we settled this case in part based upon the  
4 plaintiff's attorney representation to me as set forth in the  
5 letter--and I can mark it and tender it to the Court--that  
6 Lucien Haag and Timothy LaFrance had the same opinion that they  
7 had in other recall cases. I had deposed them in other recall  
8 cases, I know what their opinions are. And as set forth, the  
9 opinion is that the alleged defect deals with the silver solder  
10 containing the barrel, and the allegation of a problem with the  
11 scope hole depth on certain models impinging into the barrel and  
12 creating a stress fracture over time, which is radically  
13 different.

14 With that being said, even if the Court doesn't  
15 accept my statement in place, there's no proof by the plaintiff  
16 under the law of substantially similar in design or  
17 substantially similar mechanism of failure, if there were.  
18 Thank you.

19 THE COURT: Thank you both.

20 Based on the record, I find that the circumstances  
21 concerning the failure of Mr. Zenger's gun were not  
22 substantially similar to those involved in this case. I find  
23 also that the defects that were alleged in his gun, as far as  
24 the record indicates, were different than the defects alleged  
25 with regard to Mr. Katzenmeier's gun. The firearm was also of a

1 different manufacturer, which appears to have contributed to the  
2 failure--a different kind of design, rather, which appears to  
3 have contributed to the failure.

4           And also as it relates to notice, apparently this was  
5 a firearm that had been subject to a recall. So evidently  
6 the--I've excluded the evidence as it relates to that recall  
7 because it does not involve the defects as alleged with regard  
8 to Mr. Katzenmeier's gun. But the recall indicates that  
9 apparently the defendants had notice that there was some problem  
10 with this gun, so this evidence is also not particularly  
11 relevant.

12           For all those reasons, and the rulings previously made  
13 to the motion in limine, Mr. Zenger's testimony is excluded.

14           MR. EATON: Your Honor, just for the record, if I  
15 didn't make a formal offer of proof in the Zenger matter, I do  
16 now. It's already been overruled, I just want to make sure, for  
17 the record, I actually said those magic words.

18           THE COURT: I understood you to have done so.

19           MR. EATON: Is Mr. Zenger excused?

20           THE COURT: Yes. He may step down. Thank you.

21           (Witness excused.)

22           MR. EATON: May I box up the exhibit?

23           THE COURT: You may.

24           MR. EATON: Your Honor, that concludes the two offers  
25 of proof by the plaintiff with regard to Mr. Cashdollar and

1 Mr. Zenger.

2 THE COURT: Thank you. Who is our next witness?