No. 11-16531

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHANIE RODRIGUEZ et al.,
Plaintiffs—Appellants,

v.

LOCKHEED MARTIN CORPORATION et al.,
Defendants,

and

GENERAL DYNAMICS ARMAMENT and TECHNICAL PRODUCTS,
Defendant—Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
SUSAN OKI MOLLWAY, DISTRICT JUDGE • CASE NO. 08-189

APPELLEE'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

General Dynamics Armament and Technical Products, Inc., is wholly owned by General Dynamics Corporation, a publicly held company (NYSE symbol: GD).

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JURISDICTIONAL STATEMENT

General Dynamics Armament and Technical Products, Inc. ("General Dynamics"), agrees with the statement of jurisdiction in the opening brief. *See* 9th Cir. R. 28-2.2.

STATEMENT OF THE CASE

Plaintiffs filed this action claiming that a mortar cartridge assembled for the Army by General Dynamics' predecessor-in-interest caused a tragic explosion. After a six-week trial, jurors found that the cartridge was not defective, and the district court entered judgment for General Dynamics.

Plaintiffs have appealed, but they do not challenge the sufficiency of the evidence to support the unanimous verdict. Nor do they claim the jury instructions were erroneous. Instead, they seek a new trial on the ground that portions of the testimony of one witness, Army investigator Phil Leong, amounted to expert testimony that should be have been excluded because Leong was not designated as an expert witness.

The district court properly admitted Leong's testimony under Federal Rule of Evidence 701. Without being designated as an expert, an investigator may testify about events he has investigated and findings he has reported when those events later give rise to litigation. This principle holds true even when the investigation requires specialized knowledge. Leong's investigation for the Army satisfies this rule.

Furthermore, plaintiffs have not established that any conceivable evidentiary error was prejudicial. Independent of Leong's testimony, the

evidence at trial pointed strongly to human error (soldiers accidentally double loading mortar cartridges into the gun tube) as the cause of the explosion, rather than a defective cartridge. Plaintiffs had deposed Leong and knew what he had to say, but they failed to marshal a compelling response. When plaintiffs objected that Leong had not been designated as an expert, the district court accommodated their concerns by confining Leong's trial testimony to his deposition testimony, and by allowing plaintiffs to introduce curative evidence the district court had previously excluded. In addition, Leong was qualified to testify as an expert witness, and he would have been designated to testify as an expert if the Army had permitted it. Thus, no undue prejudice resulted from lay testimony that Leong could properly have offered as an expert.

Finally, the undisputed evidence shows that the mortar cartridge was never placed in the "stream of commerce," so General Dynamics cannot be held liable under a strict products liability theory. The jury's verdict merely confirmed the result that was required as a matter of law.

This Court should affirm the judgment.

STATEMENT OF FACTS

A. Standard for considering the evidence at trial.

We generally recite the relevant facts in the light most favorable to the verdict. *See Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1189 (2011); *Larez v. City of Los Angeles*, 946 F.2d 630, 634 (9th Cir. 1991) (viewing the facts in a light favoring the verdict winner in an appeal claiming evidentiary error). Additional facts that place arguments about harmless error in context are discussed where pertinent below.

B. General Dynamics' predecessor-in-interest, Martin Marietta, assembled mortar cartridges for the government in a government plant, using parts made by other government contractors, while supervised by government inspectors.

Martin Marietta Aluminum Sales, Inc. ("Martin Marietta"), the predecessor-in-interest of General Dynamics, "was responsible for loading, assembling, and packaging mortar cartridges pursuant to the government's design and specifications." (SER 27.) Martin Marietta assembled cartridges from components (such as the shell casing and the explosive material inside) made by other contractors. (SER 108, 109-10.)

In 1982, Martin Marietta assembled a lot of 12,967 81-millimeter mortar cartridges at an Army ammunition plant in Milan, Tennessee.

(SER 30-31.) Government inspectors examined the cartridges under detailed requirements. (SER 30, 208.) The government also test-fired cartridges. (SER 208.) The government took possession of the lot of cartridges after it satisfied all testing protocols. (SER 31, 111-12.) For the next quarter-century, portions of the lot were stored in Arkansas, Alabama, Hawaii, Iraq, and Europe. (SER 32.)

The cartridges have "'no civilian counterpart and w[ere] loaded, assembled and packaged solely for use by the United States Government in training and combat operations.'" (SER 31.) (In this brief, we use the terms "cartridge," "shell," and "round" interchangeably to describe the ammunition fired from a mortar gun, or tube. (*E.g.*, SER 200.))

C. Plaintiffs are soldiers whose battalion attends a training session in Hawaii. They disregard some Army protocols and engage in horseplay.

In early 2006, an Army battalion based in Hawaii began preparing for a simulated combat mission lasting several weeks in the Pohakuloa Training Area on Hawaii. (SER 119, 122.) The battalion included a mortar gun squad of four soldiers: Eric Lampright, Julius Riggins, Samuel Oyola-Perez, and Wilfredo Dayandante. (SER 116, 120.) Lampright had arrived at the unit straight from basic training (SER 146), and Riggins had no

live-fire experience before the training session (SER 245). Their supervising sergeant was Oscar Rodriguez. (*See* SER 225.)

The training area is situated in a large, barren lava flow at about 5,000 feet in elevation. (SER 122-23.) Firing points surround the area, and units practice firing rounds into the desolate lava flow. (SER 123.) There are strong winds and cold, extreme weather in the valley. (SER 127.)

During the training session, soldiers ignored several Army regulations, and they engaged in horseplay (SER 172-73), which their captain described as "boys are being boys" (SER 153):

- A medic not certified to fire mortar cartridges was photographed dropping a round into a gun tube. (SER 152, 284.)
- In violation of Army regulations (SER 166-67), a soldier posed for a photo holding a mortar cartridge like a football (SER 153, 284).
- The gun that exploded was 111 days overdue for bore scoping and 485 days overdue for a pullover gauge test. (SER 157.)
- The captain did not inspect whether his soldiers wore ear buds for sound protection. (SER 153-54.)
- Soldiers did not always observe Army regulations in positioning themselves behind the mortar gun facing the firing direction. (SER 154-55, 280-83.)

(After the accident, the new captain and others developed new operating procedures for the unit. (SER 168.))

A mortar gun experienced a misfire during the training session. (SER 104, 126.) A misfire occurs when a round is dropped into the mortar

tube and it neither fires nor exits the tube. (SER 117-18.) A misfire is dangerous because the round sitting in the tube has been triggered—its safeties removed—and could explode. (*Id.*)

D. On the morning of the final day of training, plaintiffs' squad conducts a firing exercise. The unit is understaffed and the weather is miserable.

On the night before March 10, soldiers slept in the open, rather than in tents. (SER 180.) It had rained (SER 130), and one soldier said "it was pretty gross" (SER 180).

On the morning of March 10, there was a firing mission for four mortar guns. (SER 128-29.) It continued to rain (SER 130), and it was very windy (SER 165). The weather was cold and stormy with a thick mist of fog. (SER 148, 248.) Soldiers discussed how glad they would be to complete the session and leave the training area. (SER 249.)

The platoon sergeant was absent, and the unit was shorthanded. (SER 149-50, 225.) In violation of Army regulations (SER 157, 170), Rodriguez performed three jobs at once: platoon sergeant, range safety officer, and fire direction control officer (SER 150-51).

Soldiers opened cartridge packaging and inspected the cartridges multiple times to ensure there were no irregularities. (SER 125, 158-59,

174.) Squads then fired high-explosive rounds. (SER 242, 243-44, 252-53.) The last part of the morning session was a "fire-for-effect" mission (SER 181), in which soldiers fired their remaining ammunition without having to adjust or recalibrate their guns after each shot. (SER 177.) Guns 1 and 2 competed to see how fast they could fire rounds in that situation. (SER 246.) The mortar guns could be fired as quickly as 30 rounds per minute. (SER 263-64.) The firing point wasn't large, so the guns were positioned close together (SER 145), as little as 20 feet apart (5 ER 693). When a mortar cartridge is fired, the blast and concussion can be felt "anywhere within a significant radius" of the system. (SER 163.)

According to the incoming captain, Riggins swabbed the tube of gun 2 at the end of the morning firing exercise. (SER 164.) But Lampright testified that Dayandante swabbed the tube. (SER 100n.) Other soldiers insisted that gun 2 was swabbed, but they did not know who did it or whose job it was to do so. (*E.g.*, SER 131, 156, 255.)

E. After a break, the unit is called back for an afternoon firing mission. Gun 2 explodes when the first cartridge is dropped.

The unit did not receive the call to begin the afternoon firing mission for several hours. (SER 132.) During that time, soldiers engaged in

horseplay under the tents (SER 182), and Rodriguez ordered them to clean up the site because they were "starting to play too much" (SER 250).

The afternoon firing exercise was the last one of the training session. (SER 251.) It continued to rain and, according to an Army report, "[t]he ammunition and associated propellant had been left exposed to the elements at the gun position" (SER 226). The exercise was nearly cancelled because of bad weather, rusting weapons, and concern for injured solders. (SER 254.) Soldiers could see just 100 meters in the thick fog, complicating the efforts of forward observers to report shells landing. (SER 256-57.)

When the afternoon mission began, Rodriguez gave the order to fire, and the round from gun 1 exited normally. (SER 133.) When the first round was dropped into gun 2, however, there was an explosion. (SER 133-34.) Rodriguez, Oyola-Perez, Riggins, Dayandante, and Lampright were wounded. (SER 135-37.)

F. Soldiers treat the wounded and clear shrapnel and debris. Injured soldiers are sent to hospitals, one of which records a report of a double-loading accident.

The captain called for medics and ordered soldiers to move everything from the firing point to allow medical helicopters to land. (SER 134-35, 138-39.) After wounded soldiers were evacuated to area hospitals

(SER 140-41), military police cordoned off the firing point (SER 143). Rodriguez later died from his wounds. (SER 141-42.)

Riggins' medical chart describes a double-loading scenario at the accident site:

> [Patient] is stationed at Schofield and was on a training mission on the island of Hawaii when the explosives they were working with went off incorrectly. The explosives reportedly were supposed to have shot out, but for some reason *two rounds exploded on the ground*.

(SER 279 (emphasis added); *see also* SER 88, 99-100, 144 (admitting this joint exhibit in evidence).)

G. The Army commences multiple investigations and disciplines soldiers supervising the training session. Officers visit Rodriguez's widow to explain their findings.

Four Army investigations began soon after the accident; each served a distinct purpose. (4 ER 535-36; 5 ER 908-11.) Phil Leong, of the Army's Armament Research Development and Engineering Center (ARDEC), began investigating the technical causes of the accident and whether ammunition had malfunctioned. (5 ER 668.) He investigated the accident scene for five days and later produced an official report of his findings. (5 ER 709, 739.) We describe his investigation below. (*Infra*, at 16-18.)

The Army ultimately reprimanded the captain, as well as some other officers and senior enlisted men. (SER 160, 169.)

Several Army officers later came to Stephanie Rodriguez's home to make a presentation. (SER 258-59, 269-71.) Officers gave her a 9-page paper PowerPoint presentation that they read with her. (6 ER 1025-33; SER 260, 269-70.) Officers told Stephanie that a crack in the mortar cartridge probably had caused the accident. (SER 272.) The presentation states that a "Board could not positively establish the cause of the accident," but it "suspects material failure based on elimination of other possibilities." (6 ER 1033.)

The PowerPoint presentation contains a glaring error—it describes the Milan plant as located in Kentucky, not Tennessee. (SER 273; 6 ER 1033.) And the last page of the presentation refers to an unidentified board's "Finding 1," but does not mention any other findings. (6 ER 1033.) Plaintiffs state "that the basis of the PowerPoint was the Ft. Rucker report" (Blue 18), but as the district court admonished (3 ER 231-32), there is no record evidence on this point.

H. Plaintiffs file this strict products liability action against General Dynamics and other defense contractors. The Army allows its investigator, Phil Leong, to be deposed, but does not permit the parties to designate him as an expert.

Stephanie Rodriguez decided to sue based on what she was told in the Army's PowerPoint presentation. (SER 274.) She joined with Oyola-Perez, Riggins, and Dayandante in filing this action. (6 ER 973-74.)

Plaintiffs sued General Dynamics as Martin Marietta's successor-in-interest. (6 ER 974.) They pleaded products liability and negligence claims (6 ER 977-1001), but later abandoned the negligence claims (SER 91-92).

General Dynamics sought to procure Leong's testimony as an expert witness, but the Army refused. (4 ER 530, 542.) The Army follows a policy of neutrality and generally refuses to allow its employees to be designated as expert witnesses in third-party litigation. (4 ER 528-29.) The district court also denied General Dynamics' request that Leong serve as a court-appointed expert under Fed. R. Evid. 706. (5 ER, tab 19; 6 ER 1085.)

The Army did permit Leong to testify as a Fed. R. Evid. 701 witness based on his report. (4 ER 529-30; SER 87a-c.) Leong was then deposed at length about his investigation and his conclusions. (5 ER, tab 18).

I. At trial, plaintiffs claim that a crack in the cartridge caused the accident. General Dynamics introduces evidence that soldiers' accidental double-loading of cartridges caused the accident.

General Dynamics was the sole defendant at trial. (SER 87.) The action was tried to a jury of nine persons for six weeks. (6 ER 1069-84.)

Plaintiffs contended that the explosion was caused by a defective cartridge—a crack in the metal shell casing. (SER 105.) Plaintiffs did not contend that the cartridge or its metal casing violated government manufacturing specifications, or that additional quality-control procedures could or should have been implemented. (SER 207, 209.)

In contrast, General Dynamics argued that the explosion was caused by human error—when soldiers mistakenly loaded the first cartridge of the afternoon firing mission into a gun tube still bearing the final, misfired cartridge from the morning firing mission. (SER 113-14.) "Double loading" occurs when a round is loaded into the tube while another round is already lodged in the tube, usually causing an explosion. (4 ER 504.)

The alternative explanations of a defective cartridge or double loading framed the trial. Plaintiff's counsel explained in his opening statement that "if you agree with and buy the double loading as they will talk to you about, then we don't win, we do not prevail." (SER 106-07.) He

repeated the point in closing argument: "both [sides] told you in opening statement that this case comes down to an either/or proposition: either the soldiers were at fault or the shell was defective. And there's no—nothing in between. It's one or the other." (SER 278.)

J. Plaintiffs' expert, John Nixon, initially testifies that a crack in the metal casing likely caused the explosion, but he concedes important elements of General Dynamics' double-loading theory under cross-examination.

Nixon did not criticize the design of the cartridges (SER 198), nor the government's manufacturing or inspection practices (SER 203, 204-05). He acknowledged the absence of evidence that any element of those practices contributed to the accident. (SER 207, 238.)

Nixon rejected the possibility of double loading based on witnesses' denials and the failure to find debris from two cartridges. (SER 194.) He focused on three possible remaining causes: cavitations in the high-explosive material filling the shell, foreign bodies in that material, or a crack in the metal casing. (SER 189-92, 202.) He weeded out the least likely causes until he was left with what he believed to be the most likely cause—a metal crack. (SER 190, 195). Yet Nixon conceded the absence of affirmative evidence showing a defect in the metal shell casing. (SER 234.)

Nixon acknowledged that the explosion occurred in the upper portion of the gun tube. (SER 228a.) He knew about research and field reports indicating that explosions caused by a manufacturing defect occur in the bottom portion of the gun tube. (SER 229-31.) And he was familiar with reports stating that explosions resulting from double loading occur in the upper portion of the gun tube:

> Q . . . . Did you look at the malfunction investigation reports that were provided to you to see, when there was a finding of double loading, where it was generally that the detonation of the cartridge took place?
>
> A Yes.
>
> Q And is it correct to say that, generally speaking, the detonation of a cartridge in a double loading situation takes place in the upper portion of the tube?
>
> A I believe that's correct, yes.

(SER 233.)

Finally, Nixon agreed the explosion was a low-order detonation, and that double loading is a known cause of low-order detonations. (SER 237.)

K. Leong testifies about his ARDEC investigation and report. He concludes that double loading likely caused the explosion.

General Dynamics called Leong as a lay witness, not a retained expert. (5 ER 672.) In his 29 years at ARDEC, Leong had conducted many

mortar malfunction investigations, including in-bore mortar explosions, and he personally investigated this accident. (5 ER 668, 673-77.)

Leong's job was to observe the site, collect evidence and data, and produce an investigative report. (5 ER 690, 709, 739.) He photographed the site. (5 ER 685, 719-23.) He identified the damaged mortar tube. (5 ER 688-89.) He attended soldier interviews with another Army investigation team. (5 ER 690, 733-34.) He identified the placement of the four mortar guns and measured that they had been positioned 20 to 30 feet apart. (5 ER 691-94.) He tried to ascertain a firm round count, but could not obtain one. (3 ER 364; 4 ER 440-45.) And he combed the site for explosive residue, gun parts and fragments, and projectile components. (5 ER 709-13, 731.)

Fifty feet in front of the mortar gun, Leong discovered a fuse cap (which is supposed to be round) flattened out in pieces. (3 ER 382; 5 ER 731.) He also discovered a tail fin bearing two indentations, from which he deduced it had struck the firing pin twice. (3 ER 379, 384.) This physical evidence is consistent with a typical double-loading scenario in which the bottom of one round hits the top of another round. (3 ER 379, 383-84.)

Leong found that the gun tube was dirty, and that soldiers had not properly maintained the weapon. (5 ER 735-36, 738-39.) Leong noted that

its firing pin was loose where it was supposed to be tight (4 ER 618; 5 ER 764), something that would not be caused by ordinary use (SER 261-62). A loose firing pin may cause the primer not to engage, in which case a cartridge loaded into the tube could misfire. (4 ER 616-18.)

Leong tested the tube that exploded (5 ER 698-700), and noted that the explosion occurred in its upper portion (4 ER 500, 618; 5 ER 710). That type of damage is the "signature" for an explosion caused by double loading, which Leong has observed a number of times. (4 ER 455, 581.)

Leong examined the remaining ammunition at the training site and found it in good condition without defects. (5 ER 740-42.) He selected numerous rounds and sent them to the Yuma Proving Ground for further inspection and testing. (5 ER 742-44.) Visual and x-ray inspections and test-firing in Yuma uncovered no cracks, cavitations, or foreign bodies in those rounds. (5 ER 748, 754-58.) Yuma determined that the cartridges complied with Army specifications. (5 ER 761.)

Leong reviewed the ammunition testing records. (5 ER 744-47.) No defects had been reported for the lot of cartridges that included the exploded round, nor for the lots Martin Marietta had produced before and after that lot, a total of more than 46,000 rounds. (3 ER 338-39.)

Leong wrote a report for the Army. (4 ER 626.) The appellate record includes the report (5 ER 883-99), but the district court granted plaintiffs' motion to exclude it from the evidence at trial (SER 90).

In analyzing the evidence and preparing his report, Leong relied upon prior mortar accident investigations. (4 ER 478-79, 490.) The Army maintains a malfunction database of several hundred reports and Leong was familiar with them. (4 ER 609, 611-12.) Those reports assisted Leong in investigating this new case. (*Id.*) In most of the investigations, the likely cause was determined to be human error. (4 ER 625.)

Leong knows the history of mortar malfunction testing. (4 ER 489-90, 595.) Because an element of Leong's job is to match the evidence at an accident scene to a known explosion "signature" (4 ER 608-09), Leong has tested the signatures left by explosions caused by defective cartridges and those caused by double loading (4 ER 484-85, 500-01). For example, Leong has simulated cracks in cartridge bodies and found that resulting explosions occur in the lower portion of the gun tube. (4 ER 494-99.)

Leong's report stated "that the evidence and test data cannot identify the exact cause of the malfunction incident. However, reviewing prior malfunction history, testing data and the signature/evidence of the

malfunction's barrel, it is considered that a double loading scenario cannot be ruled out." (5 ER 891; *see* 3 ER 375-76.)

Leong testified that he could not state his conclusion more firmly in his report because the Army requires a 95% confidence level in pinpointing a cause. (3 ER 376.) Under the less stringent standard applicable in civil litigation, however, Leong could rule out the projectile body and conclude that the most likely cause of the explosion was double loading. (4 ER 615-16, 622; *see* 3 ER 376 ("[T]he most important thing is the detonation occur[ed] in the gun tube—upper section of the gun tube. It's a signature of a double loading.").)

L. The district court overrules plaintiffs' general objection that Leong is offering expert testimony. But the court confines Leong's trial testimony to his deposition answers, and allows plaintiffs to introduce previously-excluded evidence.

During Leong's testimony, plaintiffs raised numerous objections that he was offering expert testimony in violation of Fed. R. Evid. 701(c). The district court permitted a continuing objection to Leong's testimony about an explosion's "signature" (1 ER 24; 4 ER 476), but otherwise addressed only specific objections (4 ER 413-15). The district court overruled many of plaintiffs' objections on the basis that Leong was describing the job he had

done outside the litigation process. (*E.g.*, 4 ER 456 ("Any witness can talk about his job; so I'm going to let him do this.").) The Army endorsed this approach as well. (4 ER 531 (clarifying that Leong could answer questions beyond the scope of his report or deposition testimony).)

The district court recognized that the Army's restrictions had frustrated both plaintiffs and General Dynamics in presenting their cases to the jury. (4 ER 546-47 ("I'm just trying to balance everything here. The history of this—and this, you know, may not be any party's fault.").) The district court struck the following balance: (1) the court cabined Leong's testimony further than Rule 701 requires by confining him to answering specific questions from his deposition, and (2) the court allowed plaintiffs to introduce the PowerPoint presentation the Army furnished to Stephanie Rodriguez, which the court would not otherwise have admitted. (4 ER 565 ("Mr. Leong is limited to his deposition testimony. The physical report he prepared will not come in, but he can testify about whatever he testified to, in his deposition, unless there are other objections."); 575-76 (permitting plaintiffs to call Stephanie Rodriguez in rebuttal and introduce the PowerPoint presentation); *see generally id.* at 556-57, 561-62, 564-65; SER 90 (order excluding opinions and conclusions from Army reports).)

M. The jury returns a verdict for General Dynamics. The district court enters judgment and denies a new trial.

The jury found that the mortar cartridge was not defective. (2 ER 206.) That finding resolved the strict liability claims in favor of General Dynamics, and the district court entered judgment accordingly (2 ER 215).

Plaintiffs moved for a new trial, repeating their mid-trial argument that the district court erred by allowing Leong to testify as an expert. (2 ER 43-51.) The district court denied the motion. (1 ER 36.)

The district court rejected plaintiffs' Rule 701(a) argument, which posited that Leong lacked personal knowledge. (1 ER 25-26.) The court ruled that "all of this [investigative] testimony was drawn directly from Leong's experiences in this case and his personal experience conducting prior investigations." (1 ER 23.) The court also observed that plaintiffs never raised personal-knowledge objections to important elements of Leong's testimony (1 ER 7-9, 25-26), and that their own cross-examination elicited several of the harmful facts (1 ER 26-27). The district court distinguished admissible Rule 701 testimony from inadmissible Rule 702 testimony. (1 ER 21-25.) The court analogized Leong's testimony to that of a business owner estimating the value or projected profits of a business—testimony permissible under Rule 701. (1 ER 21-23.)

The district court also indicated several reasons for concluding that Leong's testimony did not unduly prejudice plaintiffs. First, the testimony from Nixon (on which plaintiffs relied to suggest the jury would have ruled in their favor, but for Leong's testimony) was unconvincing. Nixon lacked direct evidence of a defect in the cartridge, while other circumstantial evidence weighed against a defect; Nixon also made concessions supporting an inference that the shell was not defective. (1 ER 6, 18 (citing SER 215-19, 223, 233, 239).) Second, the district court allowed plaintiffs to mount a rebuttal case based on the PowerPoint presentation to ameliorate any concern that the jury would perceive Leong's testimony as the Army's official position. (1 ER 12 n.2, 25; *cf.* 1 ER 31 (plaintiffs rejected court's invitation to call Nixon to testify on rebuttal).) Third, soldiers themselves offered testimony that supported an inference of double loading. (1 ER 18-19.) Fourth, plaintiffs had deposed Leong, and his double-loading testimony at trial was consistent with his double-loading testimony at deposition, so plaintiffs were prepared to (and did) vigorously cross-examine Leong. (1 ER 29-30.)

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court properly admitted Leong's testimony. Rule 701 does generally prohibit lay witnesses from testifying about technical or specialized matters. But the drafters of the Rule softened the prohibition to permit witnesses to testify about particularized knowledge acquired by virtue of their positions or jobs. Courts have therefore admitted Rule 701 testimony from investigators who form opinions and prepare reports about underlying events independent from later litigation, even when the investigation requires expertise or specialized knowledge.

Leong's testimony about his own investigation was admissible under these authorities. Army regulations required Leong to visit the accident site, investigate and identify the likely cause of the explosion, and produce written findings. Leong properly testified about his investigation under Rule 701. The fact that Leong did not witness the explosion, and that he relied in part on others' records, does not change the result. Under Rule 701, the personal knowledge of a lay witness extends to knowledge of records and other experiences common to the trade or industry.

Moreover, after examining Leong's testimony in context, the district court properly concluded that any error in admitting Leong's testimony

was harmless. Plaintiffs bear the burden of establishing that Leong's testimony more likely than not tainted the outcome of the trial. The opening brief falls well short of carrying that burden.

Even without Leong's testimony, a reasonable jury would have found that plaintiffs failed to prove that a defective cartridge caused the explosion. Physical evidence, witness accounts (including plaintiff Riggins' report when seeking medical treatment immediately after the accident), and the cross-examination of plaintiffs' expert witness on munitions all pointed toward double loading as the likely cause. The district court permitted plaintiffs to introduce the PowerPoint presentation as curative evidence rebutting Leong's observations. And Leong was qualified to offer expert testimony in any event, so plaintiffs fared no worse when, as a lay witness, he rendered opinions he had substantially disclosed in deposition.

Finally, no conceivable evidentiary error was prejudicial because General Dynamics was entitled to judgment as a matter of law on the ground that the mortar cartridges produced by Martin Marietta were never placed into the "stream of commerce."

This Court should affirm the judgment.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ADMITTED LEONG'S TESTIMONY UNDER FED. R. EVID. 701.

A. Leong's testimony did not violate Rule 701(c), which permits investigators to testify—without being designated as experts—about their written findings made while investigating specialized matters.

Both experts and lay witnesses may offer opinion testimony. Federal Rule of Evidence 702 explains that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion." And Rule 701(c) states that a lay witness may testify to an opinion "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

The notes accompanying Rule 701(c), added in 2000, state that "any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702." Fed. R. Evid. 701 advisory committee's note. Plaintiffs seize on this language and argue that Leong's testimony "falls squarely within Rule 702" because it "was based on reasoning which can be mastered only by specialists in the field, not on a process of reasoning familiar in everyday life." (Blue 28.)

But this line of argument ignores a critical qualification in the Advisory Committee Notes. Rule 701 permits certain lay opinions ostensibly requiring "experience, training or specialized knowledge within the realm of an expert . . . because of the particularized knowledge that the witness has by virtue of his or her position . . . ." Fed. R. Evid. 701 advisory committee's note. One example is when "the owner or officer of a business [ ] testif[ies] to the value or projected profits of the business." *Id.* This example reflects the more general principle that a witness who is not retained by any party as an expert, but whose job happens to involve technical or specialized matters, may testify about his on-the-job duties and observations without having to be designated as an expert.

Numerous courts have applied this principle to investigators tasked (either by law or by contract) with reaching conclusions and preparing reports *independent of later litigation*. When lawsuits or prosecutions arise from the underlying events evaluated in the investigation, a non-retained investigator may testify about his investigation as a lay witness. "A witness's specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony 'expert' as long as it was based on his 'investigation and reflected his

investigatory findings and conclusions, and was not rooted exclusively in his expertise . . . .'" *United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007); *see United States v. McMillan*, 600 F.3d 434, 456-57 (5th Cir. 2010) (affirming the admission of a lay opinion from a former insurance regulator who had investigated possible recoveries of claims from Medicare, and whose testimony "generally concerned this investigation and the conclusions he reached"); *Allied Sys., Ltd. v. Teamsters*, 304 F.3d 785, 792 (8th Cir. 2002) (finding no error in allowing a company vice president to testify, under Rule 701, about "his firsthand knowledge, obtained as the bookkeeper and record-keeper . . . and from a field audit he conducted"); *United States v. Weaver*, 281 F.3d 228, 231 (D.C. Cir. 2002) (upholding the admission of lay opinion testimony by "a long-time member of the Postal Inspection Service specializing in revenue investigation [who] was a certified internal auditor," and who "was an active participant in the investigation . . . [whose] testimony rested on the personal knowledge he gained during the course of his examination"); *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1004-05 (8th Cir. 1986) (holding that a district court abused its discretion in excluding Rule 701 testimony from railroad executives: "[their] testimony, based on knowledge derived from

supervising railroad operations, years of experience in the industry, and review of employee accident reports prepared in the ordinary course of business, satisfies the foundation requirements for lay opinion testimony").

These decisions demonstrate that the district court properly admitted Leong's testimony under Rule 701. Leong did, indeed, possess "scientific, technical [and] specialized knowledge," Fed. R. Evid. 701(c), yet his testimony "'was not rooted *exclusively* in his expertise,'" *Rigas*, 490 F.3d at 224 (emphasis added). Leong personally observed the accident site and drew upon his expertise as necessary to produce a report the Army required him to prepare. Leong was simply doing his job, and the fact that his job required some technical expertise did not bar him from testifying at the request of either party under Rule 701. (4 ER 467 ("[I]t's hard for me to say he cannot talk about what he does or what he's done in his job.").)

Leong stands in contrast to Nixon, who could not have testified under Rule 701 because he was retained specifically to testify in this action and performed his analysis solely in the context of this litigation. *Cf. Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) ("One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they

have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."). In the words of *Rigas*, "[Leong]'s specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony 'expert' as long as it was based on his 'investigation and reflected his investigatory findings and conclusions.'" 490 F.3d at 224.

Independent of this lawsuit, Army regulations required Leong to investigate the accident site and prepare a report with his findings. He visited the site, collected or photographed physical evidence, listened to witness accounts, reviewed pertinent ammunition and malfunction records, and later participated in testing to ascertain the explosion's cause. Leong then prepared the ARDEC report with his opinions and findings.

Leong was deposed based on the ARDEC report, and the scope of his deposition testimony demarcated the scope of his trial testimony. Leong offered several opinions at trial, including how double loading occurs and why it triggers an explosion; the unique "signatures" left by double loading and a defective cartridge respectively, why the physical evidence he collected is consistent with double loading, and why this explosion was likely caused by double loading. (*Supra*, at 16-19.) All of those opinions

were properly admitted under Rule 701 because Leong reached them in the course of performing his job as an investigator. Leong's opinions at trial either parroted the conclusions of his report, or were the natural outgrowth of the findings in his report. As Plaintiffs' counsel even conceded, "I agree with the Court he can say sometimes it blows up here, here are the things that we look for." (4 ER 452.)

Another way of explaining the essential difference between experts and lay witnesses is that experts may answer hypothetical questions. *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1202 n.16 (3d Cir. 1995) (cited approvingly in the 2000 Advisory Committee Notes to Rule 701). Leong steered clear of answering hypothetical questions, as instructed by General Dynamics' counsel. (5 ER 716.) When particular questions might have elicited hypothetical answers, or required pure expertise, the district court sustained plaintiffs' objections. (*E.g.*, 5 ER 732, 735-39, 764-69.) Thus, Leong did not testify as an expert, and the district court properly received his opinions under Rule 701.

Plaintiffs' authorities do not compel a different conclusion. Plaintiffs rely (Blue 24-25, 27) on *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1243 (9th Cir. 1997), which held it was error for a DEA agent to offer the

lay opinion that a defendant's conduct "conformed to the methods and techniques of experienced drug dealers." But that decision is inapposite because, unlike Leong, the DEA agent was not testifying from a separate report prepared independently from the case. Plaintiffs' remaining authorities do not assist the Court. (Blue 25-28.) Some do not involve testimony based upon an investigative report. *United States v. Corona*, 359 F. App'x 848, 851-52 (9th Cir. 2009); *United States v. Nelson*, 285 F. App'x 491, 493-94 (9th Cir. 2008). One addresses the very different situation where a lay witness testifies based upon *another person*'s technical expert report. *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1213-15 (10th Cir. 2011). And still others offer no guidance on Rule 701 because they address the admission of expert testimony under Rule 702. *Shalaby v. Newell Rubbermain, Inc.*, 379 F. App'x 620, 622-23 (9th Cir. 2010); *United States v. Cooks*, 589 F.3d 173, 179-80 (5th Cir. 2009).

B. Leong's testimony did not violate Rule 701(a) because his opinions were drawn from personal knowledge he gained while investigating the explosion.

A lay witness' "testimony in the form of an opinion is limited to one that is . . . rationally based on the witness's perception." Fed. R. Evid. 701(a). "[A] lay witness's testimony is rationally based within the meaning

of Rule 701 where it is 'based upon personal observation and recollection of concrete facts.'" *United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005).

Plaintiffs contend that Leong lacked personal knowledge because he "was not present at the time of the explosion and the scene had been significantly disturbed by the time he arrived." (Blue 30.) This contention misses the point. Leong never claimed that he witnessed the explosion. His testimony was limited to what he observed as an investigator, and he obviously had personal knowledge of those matters. He traveled to Hawaii and spent five days combing the accident site for evidence relevant to the investigation. It would be absurd to conclude that an investigator lacks personal knowledge (and so cannot testify) about his own investigation. That the accident site was disturbed could affect the accuracy of Leong's findings—and plaintiffs mined this subject on cross-examination (*see* Blue 19-20)—but it does not change the fact that Leong is competent to testify about his work as an investigator. *Cf.* Fed. R. Evid. 602 ("Evidence to prove personal knowledge may consist of the witness's own testimony.").

Plaintiffs also argue that Leong's "opinions were largely *drawn from* what unidentified others reportedly told him," specifically, "information secured after-the-fact, such as lab reports, testing, data records, etc." (Blue

30.) The district court correctly found that plaintiffs waived these arguments (1 ER 26), and they fail in any event, because the records, tests, and other data Leong reviewed count as part of his personal knowledge, *see Allied*, 304 F.3d at 792 ("'Personal knowledge or perception acquired through review of records prepared in the ordinary course of business, or perceptions based on industry experience is a sufficient foundation for lay opinion testimony.'"); *see also L. A. Times Commc'ns, LLC v. Dep't of the Army*, 442 F. Supp. 2d 880, 886-87 (C.D. Cal. 2006) ("[While] first-hand observation is the most common form of personal knowledge, first-hand observation is not the only basis for personal knowledge."). Because Leong's work involved testing munitions and reviewing a range of different types of reports about them, Rule 701 was no impediment to admitting Leong's testimony about such reports.

Finally, we observe that plaintiffs have forfeited any alternative argument that Leong's testimony about reports, tests, or what others told him was inadmissible hearsay. The word "hearsay" neither appears in this section of the opening brief (Blue 29-31) nor in any argument heading (Blue ii-iv), and plaintiffs have not cited a single case or rule addressing hearsay principles. Plaintiffs' post-argument table that itemizes scattered

hearsay objections made in the district court (Blue 43, 44, 45) does not preserve a hearsay argument for appeal. *See Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001) ("Issues raised in a brief which are not supported by argument are deemed abandoned.").

II. PLAINTIFFS HAVE FAILED TO ESTABLISH PREJUDICE FROM ANY ERROR IN ADMITTING LEONG'S TESTIMONY.

A. Harmless-error review requires plaintiffs to establish that an error more likely than not tainted the outcome of the trial.

"The federal 'harmless-error' statute, now codified at 28 U.S.C. § 2111, tells courts to review cases for errors of law 'without regard to errors' that do not affect the parties' 'substantial rights.'" *Shinseki v. Sanders*, 129 S. Ct. 1696, 1705 (2009); *see id.* at 1704 (explaining there is no "relevant distinction between the manner in which reviewing courts treat civil and administrative cases"). Under the harmless-error rule, the party claiming error "'carries the burden of showing that prejudice resulted." *Id.* at 1705. In other words, an appellant must establish that "it is more probable than not that an error, if any, tainted the outcome." *GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc.*, 650 F.3d 1257, 1262 (9th Cir. 2011).

To ascertain if an appellant has established prejudice from a claimed error, a court reviews the record "without the use of presumptions,"

Sanders, 129 S. Ct. at 1705, "ignor[ing] errors that do not affect the essential fairness of the trial," *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). A "[m]ere probability" of prejudice, or a "'borderline question,'" is insufficient to meet an appellant's burden of proving *reversible* error. *McLeod v. Astrue*, 640 F.3d 881, 888 (9th Cir. 2011). This ensures that courts will not "becom[e] impregnable citadels of technicality." *Sanders*, 129 S. Ct. at 1705 (quotation marks omitted).

Plaintiffs ask this Court to begin with an outdated "presumption of prejudice" shifting to General Dynamics the burden to show "'that it is more probable than not that the jury would have reached the same verdict.'" (Blue 23 (quoting *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005).) Since *Obrey* was decided, the Supreme Court has "warned against courts' determining whether an error is harmless through the use of mandatory presumptions," *Sanders* 129 S. Ct. at 1704-05, and has clarified that "the claimant has the 'burden' of showing that an error was harmful," *id.* at 1706. *Obrey* is no longer good law on this issue. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc) (panel opinions need not be followed if later Supreme Court decisions overrule them). The burden of establishing prejudice rests with plaintiffs.

B. For four reasons, plaintiffs cannot carry their burden of showing that Leong's testimony tainted the verdict.

1. Even without Leong's testimony, a reasonable jury would find that the mortar cartridge was not defective.

a. Physical evidence established that the explosion was caused by double loading.

Explosion location. The explosion damaged the upper portion of the mortar gun. (SER 228a.) Nixon conceded that a round detonates in the upper portion of the tube in a double-loading situation. (SER 232-33.) That is consistent with a double-loading scenario here, but is inconsistent with an explosion caused by defective cartridge, which typically occurs in the bottom portion of the tube (SER 229-31.) It was at worst harmless error to admit Leong's same conclusion relying in part on testing data plaintiffs deride as unreliable and unrelated. (Blue 38-40.)

Low-order detonation. Witnesses described the explosion as having an orange-colored flash, which is characteristic of a low-order detonation. (SER 187-88.) Nixon conceded that the explosion was a low-order detonation, and that double loading is a known cause of a low-order detonation. (SER 237.)

Cartridge fragments. The mortar gun's firing pin was loose (4 ER 618; 5 ER 764), which could cause the primer not to engage when a

cartridge is loaded into the tube, yielding a misfire (4 ER 616-18). If the last round of the morning firing exercise misfired, that would explain the presence of a round in the tube when soldiers dropped in the first round of the afternoon firing exercise. Cartridge fragments found at the scene seem to confirm that one round was dropped onto another: a fuse cap (at the top of a round) that is supposed to be round was found flattened out in pieces (3 ER 382), and a tail fin (at the bottom of a round) was discovered bearing two indentations from double-striking the firing pin (3 ER 379, 384).

The physical evidence demonstrated that double loading was the most likely cause of the explosion. Leong's testimony to the same effect was, at worst, harmless error.

b. Plaintiff Riggins reported that double loading occurred. Other soldiers' testimony is consistent.

Riggins' emergency room records state that "explosives reportedly were supposed to have shot out, but for some reason two rounds exploded on the ground." (Exh. 100-103, at 40.) The hospital staffer who wrote this note could not have possessed independent knowledge of the explosion, so an eyewitness, presumably Riggins himself, must have been the source of the note's information. And the note can only be understood as a report of

double loading. There is no scenario in which two rounds explode on the ground besides a double-loading scenario.

Of course, every soldier who testified at trial denied that double loading had occurred. This is no surprise. Soldiers would not consciously load multiple rounds into a gun tube; double loading always occurs by accident. (*Cf.* SER 206; 4 ER 625.) But it can occur, as Nixon acknowledged (SER 214), and it occurs enough to merit avoidance training (SER 178-79).

Here, many witnesses testified about conditions that were conducive to double loading because they distracted soldiers from their duties:

- Bad weather—thick fog, rain, wind, and cold.
- Soldiers had spent weeks at the desolate training area, and had spent the night before sleeping in the open.
- The accident occurred on the last day of training when soldiers were anxious to leave.
- Soldiers engaged in horseplay and ignored some regulations and standard procedures.
- The unit was understaffed; Rodriguez handled three jobs at once.
- Gun squads competed to fire rounds quickly, and could fire as many as 30 rounds per minute.
- Mortar guns had been moved as close as 20 feet to each other, increasing the chance that a squad would not detect a misfire (an undetonated round in the tube) because it would attribute a neighbor's blast as its own.

(*Supra*, at 5-9; SER 224 (Nixon authored an article asserting that "'[e]xtremes of climate'" and other "'stress[es]'" can exert "'a significant

negative impact upon a human's situational awareness and their ability to manipulate and operate a device safely and effectively.'").)

On this evidence, a reasonable jury would have little difficulty inferring that conditions were ripe for a double-loading accident.

c. Plaintiffs' expert, Nixon, lost credibility with the jury and lent credence to a double-loading theory.

When plaintiffs objected that Leong should not testify about the unique signatures left by mortar explosions, the district court observed that Nixon had already conveyed that information to the jury—"he's not adding anything new." (4 ER 452.) The district court was correct, and plaintiffs are therefore wrong to claim that "Leong was the only witness who supported General Dynamics' double loading theory." (Blue 32.)

Nixon's testimony established the scientific foundation for General Dynamics' double loading theory. His cross-examination did not merely detract from plaintiffs' case. It bolstered General Dynamics' case, convincing a reasonable juror to reject his opinions. That is why General Dynamics had no need to call its retained experts. (*See* Blue 31-32, 41.)

First, Nixon did not consider the fact that thousands of rounds from the lot of cartridges had been fired without incident. (SER 219-20 ("I don't

think that was a consideration that I would make.").) When pressed on the point that a manufacturing mishap occurring during assembly-line production would inevitably produce multiple defective shells, not just one, Nixon responded that "[t]here's always the possibility of a rogue shell." (SER 221-23.) But *possibilities* do not satisfy the preponderance-of-the-evidence burden of proof; plaintiffs needed to show that a defect was more likely than not the cause of the accident. (SER 221.) Nixon also suggested there *could* have been a problem with the cartridge materials, but he had to concede that no evidence supports that suggestion because those materials were destroyed in the explosion. (SER 222-23.)

Second, Nixon improperly ruled out double loading based on witness accounts and the absence of debris from two cartridges. (SER 194.) That suggests he was unaware of Riggins' report of double loading (*supra*, at 10), as well as discrepancies in other soldiers' accounts (*see supra*, at 8). A reasonable jury could well find the absence of significant cartridge debris was immaterial given the impassability of the lava field and the post-accident debris removal by soldiers before any investigation could be done. (4 ER 592-94; 5 ER 684.) In any event, debris consistent with two destroyed cartridges *was* found—the flattened fuse cap and indented tail

fins—and it supported a double-loading scenario. (*Supra*, at 16.) Moreover, Nixon purported to rule out double loading despite confusion as to "how many rounds had been fired." (SER 227; *see* SER 228 ("I certainly couldn't determine with certainty how many rounds were being fired.").) He could not properly have ruled out double loading without being certain on that point. It was also striking that Nixon would rely so heavily on soldiers' accounts after admitting that "technical evidence" is "more reliable" than eyewitness testimony. (SER 235.)

Third, Nixon was forced to admit to the jury a prior instance of false court testimony. Several years before, Nixon had been denied membership in a firearms trade association, and when a lawsuit arose because of his critical comments about that association, a federal judge concluded that Nixon had lied. (SER 211-13 (describing *Nixon v. Haag*, No. 08-648, 2010 WL 3023036, at *3 (S.D. Ind. July 29, 2010) ("the uncontradicted evidence demonstrates that Nixon testified falsely")).)

In sum, Nixon's analysis had holes and a reasonable jury would not have found his testimony credible. Since his testimony was plaintiffs' sole evidence that a defective cartridge caused the explosion, the admission of Leong's testimony made no difference to the outcome at trial.

2. The district court ameliorated any prejudice to plaintiffs by allowing them to admit the PowerPoint presentation and by restricting Leong's trial testimony.

The district court understood that the Army had taken positions that complicated all parties' litigation strategies. (4 ER 546-47.) The Army refused to allow Leong to be designated as an expert witness. (4 ER 528-29.) The Army also denied the parties access to an unredacted copy of the Fort Rucker Safety Accident Report. (SER 23-25.)

The district court charted a course in which no party could admit opinions or conclusions from any Army investigative report. (SER 90, 102; Blue 5.) But the court reconsidered that approach in the middle of Leong's testimony, when plaintiffs objected that Leong's oral testimony had already gone beyond the ARDEC report. (4 ER 523, 525-26, 540-41.) To alleviate any prejudice to plaintiffs, the district court allowed plaintiffs to introduce the PowerPoint presentation, the Army document presented to Rodriguez's widow that opined that a defective cartridge probably caused the accident. (4 ER 575 (Court: "I would not let [the PowerPoint] in if the Army were not permitting [Leong's] testimony to come in saying the Army does have a conclusion, and here it is."), 576 (Court: "I'm going to admit that [PowerPoint] when I have Mr. Leong's testimony about the Army's

different conclusion, because I think that's the only way to be fair.").) According to the district court, the PowerPoint presentation equipped plaintiffs to challenge Leong's views about causation and to place before the jury another view of the Army's position. (4 ER 574 ("[T]o be fair to the plaintiffs, I need to let them say that's not the Army's consistent position, and here we have the Army saying something else.").)

In fashioning these rulings, the district court enabled all parties to point to aspects of the Army's investigative output that suited their respective positions. The district court properly concluded that the PowerPoint presentation was plaintiffs' antidote to Leong's testimony:

> Mr. Leong is apparently prepared to say it was probably double loading. And if that's coming from the Army, then I think, to be fair to the plaintiffs, I need to let them say that's not the Army's consistent position, and here [in the PowerPoint presentation] we have the Army saying something else.

(4 ER 574; *see* 1 ER 30-31.)

The district court's exhaustive colloquy with counsel on this point—spanning dozens of transcript pages—belies plaintiffs' contention that "prejudice resulted from the false impression that the Army's official position was in line with General Dynamics' double loading theory." (Blue 32.) Nor is it true that "[w]hat we are left with is the appearance that the

Army sides with General Dynamics' theory of the case while keeping the favorable Ft. Rucker conclusions from the jury" (Blue 33).

Plaintiffs contend that the district court's balance was ineffective because, in closing argument, General Dynamics emphasized the absence of Army investigators testifying for plaintiffs. (Blue 35.) Not so. Plaintiffs' closing argument countered by emphasizing the Army's "conflicting" report to Stephanie Rodriguez that a defective cartridge may have caused the explosion. (SER 275-77.) Moreover, it was obvious to jurors that the Army's sympathy rested with plaintiffs. Jurors could not have missed the parade of current and former soldiers who testified for their comrades, including some who flew in from overseas. (SER 162, 171, 176, 183-84.) Plaintiffs had an equal or superior opportunity to General Dynamics to inform the jury about the Army's views of the case.

The district court took two additional steps to alleviate any prejudice to plaintiffs. First, the district court authorized plaintiffs to recall Nixon to offer additional rebuttal testimony, by video if necessary. (1 ER 31.) Second, the court confined Leong's trial testimony to his deposition testimony (4 ER 557, 556-57 ("[O]n balance, I think I need to put, you know, considerable restrictions on Mr. Leong."); 1 ER 28), even though the

Rules of Evidence do not measure the admissibility of a witness' trial testimony by his deposition testimony. A witness may change his testimony at trial from his deposition—doing so may expose him to probing cross-examination, but the change is no cause for exclusion. (1 ER 29 ("[T]he remedy for the adverse party is to cross-examine the witness on those inconsistencies.").) Thus, the district court went so far as to preclude General Dynamics from eliciting admissible evidence in an effort to ensure plaintiffs a level playing field. In sum, Leong was not a surprise witness, and plaintiffs had ample opportunity to plan their response to his testimony, having heard it before in deposition.

The district court's comprehensive balancing of the parties' interests renders any claim of error harmless.

3. Leong could have offered opinions as an expert witness (but for the Army's objection), so plaintiffs were no worse off when he rendered opinions as a lay witness.

In *Figueroa-Lopez*, this Court held that an error in admitting lay testimony under Rule 701 was harmless because the witness could have offered the same testimony as an expert under Rule 702. 125 F.3d 1241.

In that case, a law-enforcement agent involved in a drug-trafficking prosecution offered the lay opinion that Lopez's conduct "conformed to the

methods and techniques of experienced drug dealers." *Id.* at 1243. Despite holding it was error to admit this testimony under Rule 701, *id.* at 1246, the Court did not reverse because "the testimony in the instant case could have been admitted as *expert opinion* testimony," *id.* at 1245. "It appears virtually certain that had the Government opted to do so, [the agent] could have been formally qualified as an expert witness on the dispositive issue of whether Lopez's behavior suggested that he was an 'experienced'—as contrasted with a fledgling—drug trafficker." *Id.* The error "went to the heart of [Lopez's] entrapment defense," and it allowed the government to "rel[y] extensively on the opinion testimony in closing arguments," *id.* at 1247, but this Court nonetheless found the error harmless.

Figueroa-Lopez's harmless-error rationale applies here. Leong was well qualified "by knowledge, skill, experience, training, or education [to] testify" as an expert. Fed. R. Evid. 702. He had worked at ARDEC for nearly thirty years investigating mortar accidents. (5 ER 668-71.) He had performed testing on malfunctions and in-bore explosions, and was familiar with the government's database on such accidents. (4 ER 478-79, 484-85, 489-90, 494-501, 595, 609, 611-12.) He had also investigated the very accident in question and could "help the trier of fact to understand

the evidence." Fed. R. Evid. 702(a). Leong was certainly no less qualified than Nixon, who had never testified about mortar accidents. (SER 196-97.) Indeed, the district court stated it "was highly cognizant of the fact that Leong, although testifying as a lay witness, also had the ability to provide expert testimony." (1 ER 23.)

Only the Army's neutrality policy precluded Leong from being designated as an expert. (4 ER 529, 542.) General Dynamics even requested that Leong testify as a court-appointed expert under Rule 706. (5 ER, tab 19.) But the district court denied that motion, leaving General Dynamics no choice but to call Leong as a Rule 701 witness.

The procedural history confirms that plaintiffs were not prejudiced. An expert witness typically produces a report before trial, Fed. R. Civ. P. 26(a)(2), and is deposed upon the report, Fed. R. Civ. P. 26(b)(4). What transpired here was not materially different. Leong did not produce a Rule 26 report—because none is required for Rule 701 witnesses, *see* Fed. R. Civ. P. 26(a)(2)(A)—but his ARDEC report served the same function of explaining his investigative findings. Leong then submitted to a lengthy deposition, at which he answered questions going beyond his report, previewing the observations he later offered at trial. (4 ER 542; 5 ER 815-

16 (significance of location of explosion within gun tube), 817 (double loading is most likely cause), 822 (condition of gun tube was conducive to "stuck round," or misfire), 857 (ruling out every cause other than double loading).) Seven months before trial, General Dynamics listed Leong as a witness and identified the subject of his testimony. (5 ER 915.) This sequence of events eviscerates any claim of surprise or unfairness. (*See* Blue 35, 40.) As the district court pointed out, plaintiffs had no reason to believe the Army would *prevent* Leong from repeating at trial the opinions it *allowed* him to voice at deposition. (4 ER 549-51.)

Plaintiffs contend they were, in fact, harmed because Leong based portions of his testimony on materials and testing results he never produced, which may not have been substantially similar to the accident here. (Blue 35-38.) This contention fails for four independent reasons.

First, as a Rule 701 witness, Leong had no obligation to prepare a report describing such test results, *see* Fed. R. Civ. P. 26(a)(2)(A), nor was he obliged to show sufficient similarity between test results and the accident, as an expert would, *see* Fed. R. Evid. 703, 705. Any discrepancy was fodder for cross-examination.

Second, while Leong produced at trial certain materials he had not produced at deposition (*see* Blue 41-42), the district court properly found that General Dynamics was not responsible for, and could not control, Leong (1 ER 30; 4 ER 424; 5 ER 703). Plaintiffs had equal access to discuss the case with Leong, had they requested it. (4 ER 529 ("[Leong] has been provided to both parties, or at least accessible to both parties").)

Third, Leong answered questions about prior tests and test results at his deposition (5 ER 841-42, 855), yet plaintiffs elected not to follow up on his answers. Six months before trial, General Dynamics produced to plaintiffs photographs of the prior tests. (SER 100c, 100f.) And General Dynamics even suggested to plaintiffs that Leong could be deposed a second time. (SER 100g.) Plaintiffs therefore had an adequate opportunity to obtain information about Leong's tests in advance of trial.

Fourth, if Leong's testimony had been excluded, General Dynamics would simply have called its retained experts to testify. (*See* SER 3-4; 5-10; 11-16; 17-21.) General Dynamics had no cause to call them after Nixon's cross-examination and Leong's testimony, but the experts were available. Plaintiffs maintain they "were ready to attack the stated bases for the retained experts' conclusions." (Blue 41.) But they were just as ready to

attack Leong's testimony with his ARDEC report deposition transcript. Indeed, plaintiffs' counsel skillfully cross-examined Leong. (*Supra*, at 22.)

The district court properly found that plaintiffs were not prejudiced in these respects.

4. Undisputed evidence establishes that General Dynamics may not be held liable on a strict products liability theory (whether or not Leong testified). Because no trial was necessary, any evidentiary error was harmless.

The district court need never have held a trial to resolve plaintiffs' strict products liability claims because no such claims are cognizable here. As we now explain, the trial court should have dismissed the case before trial, so any evidentiary error at trial is harmless.

Hawaii law imposes strict liability for making defective products on those who "introduce the harmful product into the stream of commerce." *Acoba v. Gen. Tire, Inc.*, 986 P.2d 288, 305 (Haw. 1999); *see Kaneko v. Hilo Coast Processing*, 654 P.2d 343, 348 (Haw. 1982) ("[A] 'product' with an unreasonably dangerous condition may subject those responsible for placing it in the stream of commerce to strict liability in tort . . . ."); *Stewart v. Budget Rent-A-Car Corp.*, 470 P.2d 240, 243 (Haw. 1970) ("The leading arguments for the adoption of a rule of strict products liability

have been that . . . by placing the goods on the market the maker and those in the chain of distribution represent to the public that the products are suitable and safe for use . . . ."). It follows that manufacturers are not exposed to strict liability for products that are not, or cannot be, placed into the stream of commerce.

Army mortar cartridges may not be placed into the stream of commerce—there is no "market" for selling them. *See Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 511 (1950) (explaining that munitions produced by private contractors in government-owned plants are "not for sale or exchange," although plant workers are deemed to engage in "'commerce'" for the limited purposes of the Fair Labor Standards Act). In fact, federal law barred Martin Marietta from selling its cartridges. *See* 18 U.S.C. § 922(b)(4) (2006) ("It shall be unlawful for any . . . licensed manufacturer . . . to sell or deliver . . . to any person any destructive device . . . except as specifically authorized by the Attorney General consistent with public safety and necessity."). As the district court acknowledged, these cartridges have "'*no civilian counterpart* and w[ere] loaded, assembled and packaged *solely* for use by the United States Government in training and combat operations.'" (SER 31 (emphasis added); *cf.* SER

124 (soldier explaining that "it's absolutely not acceptable for there to be any risk of one of these rounds going missing or just kind of free-floating out there in society").) Hawaii products liability law was not intended to apply to the unique facts presented here. *Cf. McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 452 (9th Cir. 1983) ("[T]he government, the sole purchaser of most military equipment, has both the ability to recognize safety problems in military equipment and to negotiate with suppliers to remedy those problems. It constantly balances the safety of the article against the imperatives of national defense. Strict liability would no doubt increase defense costs but would do little not already being done to increase the use of safety features in military equipment.").

Martin Marietta's work can be analogized to a custom service provider, like a bespoke tailor, whose work is not subject to strict liability. *See, e.g., Hatch v. Trail King Indus., Inc.*, 656 F.3d 59, 69 (1st Cir. 2011) (collecting cases holding that manufacturers who build to buyers' specifications, rather than the public at large, are not subject to strict liability); *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 672 (Ohio 1995) ("This was a custom-made order, fashioned expressly at the request of GATX. Because we find that none of the

commonly accepted reasons supporting the imposition of strict liability applies to the TankTrain, we find relief based on strict liability in tort is not appropriate in this case."); *Pierson v. Sharp Mem'l Hosp., Inc.*, 216 Cal. App. 3d 340, 345 (1989) (collecting cases declining to impose strict products liability "upon those rendering services"). Plaintiffs introduced no evidence that Martin Marietta fabricated the cartridges' component parts. Martin Marietta assembled parts made by other government contractors tailored to government specifications. (SER 108, 109-10.) The government could have done that work itself, by deputizing additional Army personnel. Thus, Martin Marietta was unlike a manufacturer placing goods in the stream of commerce; it merely furnished a customized service to a client.

General Dynamics timely raised this point in the district court (SER 95-96, 97-98), though the court rejected it (SER 266-67). That preserves the point for this Court's consideration. *See Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992) ("A cross-appeal is unnecessary even where the argument being raised [by the appellee] has been explicitly rejected by the district court."). Should this Court find prejudicial evidentiary error, it should still affirm the judgment for General Dynamics because plaintiffs' product liability theory fails as a matter of law.

CONCLUSION

The Court should affirm the judgment of the district court.

December 14, 2011

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STATEMENT OF RELATED CASES

This action gave rise to an earlier appeal, *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259 (9th Cir. 2010), but that appeal concerned a different issue—a defense that was not presented at the trial that gives rise to this appeal.

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