

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

----- X	:	
JON D. KATZENMEIER and	:	
JULIE KATZENMEIER,	:	
Husband and Wife,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Case No. 4:06-cv-00169
	:	
BLACKPOWDER PRODUCTS, INC.,	:	<u>TRIAL TRANSCRIPT</u>
a Corporation, d/b/a	:	
CONNECTICUT VALLEY ARMS;	:	Volume IV
and DIKAR S. COOP,	:	
	:	Testimony of Troy Cashdollar,
Defendants.	:	Eric Zenger, and
----- X	:	Aitor Belategi

Courtroom, Second Floor  
U.S. Courthouse  
123 East Walnut Street  
Des Moines, Iowa  
Monday, December 8, 2008  
9:00 a.m.

BEFORE: THE HONORABLE ROSS A. WALTERS, Magistrate Judge,  
and a Jury.

THERESA KENKEL - CERTIFIED SHORTHAND REPORTER

## APPEARANCES:

For the Plaintiffs:

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I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>REXCROSS</u>	<u>VOIR DIRE</u>
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For the Plaintiffs on an Offer of Proof:

Troy Cashdollar	425 (Eaton)	436 (Singer)			
Eric Zenger	451 (Eaton)	463 (Singer)	470 (Eaton)		

For the Plaintiffs:

Aitor Belategi (Via videotaped deposition)	483				
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For the Defendants:

Aitor Belategi	484 (Singer)	550 (Eaton)	613 (Singer)	621 (Eaton)	504 (Eaton)
			626 (Singer)		

E X H I B I T S

<u>PLAINTIFFS' EXHIBITS</u>	<u>OFFERED</u>	<u>RECEIVED</u>
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86 - CVA/BPI Eclipse rifle	436	
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DEFENDANTS' EXHIBITS

J-1 - Barrel drawings, Wolf	499	499
J-2 - Barrel drawings, Optima	499	499
J-3 - Barrel drawings, Apex	499	499
J-4 - Barrel drawings, Kodiak	499	499
K - Breech plug design drawings	500	500
L - Records of monthly testing	525	
S - October 2002 Dikar testing	531	531
T - Falling-block design documents	495	495
BB - Quality procedures for Dikar	537	
CC - Batch audit	541	
EE - Video of manufacturing process	505	505

1                   P R O C E E D I N G S

2                   (In open court, out of the presence of the jury.)

3                   THE COURT: We're outside the presence of the jury and  
4 it's my understanding that the plaintiff has two offers of proof  
5 to make with regard to two witnesses--is that right?

6                   MR. EATON: Yes, Your Honor.

7                   THE COURT: --that have to do with other incidents,  
8 and you may call those witnesses at this time.9                   MR. EATON: Your Honor, at this time the plaintiffs  
10 call Troy Cashdollar.

11                   THE CLERK: Raise your right hand and be sworn.

12 TROY CASHDOLLAR, PLAINTIFFS' WITNESS ON AN OFFER OF PROOF, SWORN

13                   THE CLERK: You may take the stand.

14                   THE COURT: Mr. Eaton?

15                   DIRECT EXAMINATION

16 BY MR. EATON:

17 Q. Would you state your full--you can turn your chair around,  
18 sir. That was me with the exhibit book, that's why it's turned  
19 around that way.20                   Would you state your full and correct name for our  
21 record, please.

22 A. Troy Cashdollar.

23 Q. Mr. Cashdollar, where do you live, sir, what city and state?

24 A. I live in Cooperstown, Pennsylvania.

25 Q. What is your occupation, profession, business, or

1 employment?

2 A. I'm a steelworker.

3 Q. Who do you work for?

4 A. Electrola.

5 Q. Mr. Cashdollar, are you a muzzleloader shooter, or have you  
6 in the past been a muzzleloader shooter?

7 A. Yes.

8 Q. In the past have you owned muzzleloader firearms that were  
9 sold by a company called Blackpowder Products, Inc.?

10 A. Yes.

11 Q. When did you first acquire a Blackpowder, Inc., product,  
12 muzzleloader, that you can recall?

13 A. Actually I had two. The first one I got when I was about 13  
14 or 14 years old.

15 Q. And about how many years ago would that have been?

16 A. I'm 42 now. Math was never my friend.

17 Q. Twenty-nine years ago?

18 A. Okay.

19 Q. Twenty-eight, twenty-nine years ago?

20 A. Yeah.

21 Q. Do you remember the make or model of that particular  
22 firearm?

23 A. It was a CVA Blazer.

24 Q. Was it what's referred to as a sidelock-type model?

25 A. No.

1 Q. Was it what's referred to as an inline-type model?

2 A. Yeah. Yes.

3 Q. What kind of propellant did you typically use in that  
4 firearm?

5 A. I used granular black powder.

6 Q. Did you ever shoot smokeless powder in that firearm?

7 A. No.

8 Q. You say "no" with some emphasis. Why not?

9 A. Smokeless powder is more explosive and it causes pressure  
10 that's over the limit for a black powder barrel.

11 Q. How did you come to acquire that knowledge?

12 A. That's just common knowledge in the muzzleloader world.

13 Q. Learn it from other muzzleloader shooters?

14 A. Pardon me?

15 Q. Did you learn that from other muzzleloader shooters?

16 A. Yes, and from reading.

17 Q. What about the manual? Did the manual have an admonition?

18 A. Yes. The manual said never use smokeless powder.

19 Q. Follow that admonition as well as the information you got  
20 from other shooters?

21 A. Yes.

22 Q. Typically what kind of projectiles would you shoot with that  
23 granular black powder back with your first CVA muzzleloader when  
24 you were a teenager?

25 A. A patch and a lead round ball.

1 Q. Ultimately did you acquire another CVA muzzleloader firearm?

2 A. Yes.

3 Q. What make or model did you subsequently acquire?

4 A. It was a CVA Eclipse.

5 Q. Do you remember about when you acquired that firearm?

6 A. About '01.

7 Q. And did the Eclipse have a feature that included a removable  
8 breech plug?

9 A. Yes.

10 Q. You might look at Exhibit No. 20 in that book beside you,  
11 the bigger book. You can turn around there, if you want to.  
12 And under tab 20--that's in the other book, the bigger book.

13 A. Pardon me?

14 Q. Not that book. The bigger book has tab 20 in it. Turn to  
15 tab 20.

16 A. Okay.

17 Q. Take that plastic packet up from the page. It's got a paper  
18 clip on it. Now, does Exhibit No. 20 appear to be the breech  
19 plug that was used in your Eclipse, the type of breech plug used  
20 in your Eclipse model?

21 A. It's similar.

22 Q. It has a little different back end on it for the tool; is  
23 that correct?

24 A. Pardon me?

25 Q. It has a little different back end for the tool to tighten

1 it?

2 A. Yes.

3 Q. But the threaded area, does it appear to be the same as your  
4 muzzleloader?

5 A. Yeah.

6 Q. Did you become familiar with how to put that breech plug in  
7 and remove it for purposes of cleaning, and so forth?

8 A. Yes.

9 Q. Now, after you acquired that Eclipse in about 2001, was it  
10 involved in some kind of a failure incident when you shot it?

11 A. Yes.

12 Q. Do you remember when that failure incident occurred,  
13 approximately when?

14 A. Approximately two or three years later--approximately three  
15 years later.

16 Q. 2004?

17 A. Yes.

18 Q. Do you remember what month?

19 A. October.

20 Q. Were you out on a hunt when that failure occurred, or were  
21 you simply practicing with your gun?

22 A. I was sighting it in.

23 Q. Do you remember what sort of a load you had in it when the  
24 failure occurred?

25 A. I was using 95 grains of 2F.



1 Q. What is 2F?

2 A. Black powder.

3 Q. Granular black powder?

4 A. Yes, sir.

5 Q. That was your propellant charge?

6 A. Yes.

7 Q. What sort of a projectile were you using?

8 A. I was using a jacketed lead bullet with plastic sabot.

9 Q. And was that a load--in other words, a charge and a  
10 projectile--that was within the limits recommended and approved  
11 in the manual?

12 A. Yes.

13 Q. Had you fired that type, or a comparable load, from that  
14 Eclipse muzzleloader prior to the date of the failure?

15 A. Numerous times.

16 MR. EATON: Your Honor, may I approach the witness  
17 with an exhibit?

18 THE COURT: You may.

19 BY MR. EATON:

20 Q. You can set this around beside, whatever is easiest for you  
21 to handle. I'm going to hand you what's been marked as  
22 Plaintiffs' Exhibit 86, and ask you if you can identify that,  
23 the contents of Exhibit 86, please.

24 A. That looks like the barrel of my rifle except it's had a  
25 piece cut out of it.

1 Q. Had a piece sawed out in the breech end?

2 A. It was sawed more near where the breech plug would screw  
3 into it.

4 Q. All right. Can you read the serial number off your gun?

5 A. 61-13-030288-01.

6 Q. All right. By the way, can you see a proofmark anywhere, or  
7 proof marks on that gun anywhere near the serial number?

8 A. Yes, sir, right here (indicating).

9 Q. Okay. Describe, if you would, for the record, what you see  
10 on that gun that you believe are proof marks?

11 A. It looks like three round balls, two on the bottom, one on  
12 the top in a triangle; and it looks like a lion's head sitting  
13 on a box with a cross underneath it.

14 Q. I'm going to ask you to take a look at what I'm going to  
15 publish here in a minute, what's previously been received into  
16 evidence as Plaintiffs' Exhibit 90. It should come up on that  
17 screen in front of you. Is it up on your screen?

18 A. It's up now.

19 Q. Are the marks on your gun the same marks that you see at the  
20 top of that page?

21 A. Yes, sir.

22 Q. All right. Thank you.

23 Now, Mr. Cashdollar--

24 A. Yes.

25 Q. --just describe for us, please, what happened about in 2004,

1 October 2004, when you fired your CVA or BPI Eclipse model and  
2 it failed. Tell us what happened.

3 A. I had put a new scope on the rifle, and I had to sight it in  
4 for the upcoming deer season. So I took it over to my father's  
5 house--we have a rifle range over there--and I shot and loaded  
6 it twice, loaded it and shot it.

7 And the third time I loaded it, I asked my nephew if  
8 he wanted to shoot it. He said no. He was going to go clean  
9 his rifle. So I sat down, I laid it on a sandbag, and when I  
10 fired it, the next thing I know, I was laying 180 degrees from  
11 the bench on my hands and knees looking down at a pool of blood.

12 Q. Now, you say you laid it on a sandbag, and then you said  
13 when you fired it. Did you pick it up from the sandbag,  
14 position it against your shoulder, and fire it downrange?

15 A. No, sir. I laid it on the sandbag because I was sighting  
16 the rifle in. I laid it on the sandbag for stability.

17 Q. You were using the sandbag like a shooting bench?

18 A. Yes.

19 Q. To steady your aim?

20 A. On my shooting bench I use a sandbag.

21 Q. All right. It sounded to me like it went off spontaneously  
22 when you first described it.

23 A. No. I'm sorry.

24 Q. You rested it on the sandbag--put it against your shoulder,  
25 rested it on the sandbag--

1 A. And--

2 Q. --and pulled the trigger?

3 A. --pulled the trigger.

4 Q. And the next thing you knew you'd been rolled backwards?

5 A. Right.

6 Q. And did you sustain some injuries to some parts of your  
7 body?

8 A. Yes, sir.

9 Q. What parts of your body?

10 A. My face, my nose, my check, and this part of my face here  
11 (indicating).

12 Q. I assume thereafter you got some medical attention and  
13 treatment; is that correct?

14 A. Yes, sir.

15 Q. Did you or any of your family or friends after the incident  
16 occurred gather up the firearm, any component parts of it that  
17 were in the vicinity?

18 A. Actually we found everything but the breech plug.

19 Q. Are those contents that were found in the box that's been  
20 marked as Plaintiffs' Exhibit 86 with your gun?

21 A. Yes, sir. Everything we found is in this bag (indicating).

22 Q. And you found--you and your family found everything but the  
23 breech plug; is that right?

24 A. Yes, sir.

25 Q. And at some time thereafter did you inspect your gun and

1 those components--well, let's just say--let's talk about the  
2 gun, the barrel and the receiver and the trigger apparatus. Did  
3 you inspect that?

4 A. Yes, I did.

5 Q. A gross inspection? Just an eyeball inspection?

6 A. Yeah, I looked at it. I put my finger down where the breech  
7 plug would screw in, and it was almost smooth. There were no  
8 threads left.

9 Q. Did that surprise you?

10 A. Yeah, a little.

11 Q. Other than finding a smooth area in the breech area, where  
12 the breech plug had been, did you observe anything else that you  
13 thought might be--obviously the gun was broken up into some  
14 pieces. Did you observe anything else about the components of  
15 the gun itself that suggested to you that it might have failed  
16 in some manner other than the breech plug stripping out of the  
17 barrel?

18 A. No. The breech plug stripped and everything came back. It  
19 broke the bolt in half.

20 Q. And how many times would you estimate or--pardon me.

21 Can you estimate approximately how many times you had  
22 fired that CVA/BPI Eclipse muzzleloader before the date that it  
23 failed?

24 A. I used to shoot it quite a bit. Probably a couple of  
25 hundred.

1 Q. And subsequently you turned that gun and those contents over  
2 to Mr. Sparks and I; is that correct?

3 A. Yes, sir.

4 Q. We undertook to represent you in a claim against CVA--is  
5 that correct?

6 A. Yes, sir.

7 Q. --Blackpowder Products, Inc.; is that correct?

8 A. Yes, sir.

9 Q. And that claim was ultimately resolved; correct?

10 A. Yes, sir.

11 Q. Now, since that time, that gun has been sectioned in the  
12 area of the breech plug; is that correct?

13 A. Yes, sir.

14 Q. And you've had occasion to observe that?

15 A. Uh-huh. Yes.

16 Q. Did your observations after the gun had been sectioned  
17 through the breech area, did those observations of that open  
18 breech area confirm what you had originally thought when you ran  
19 your finger down into that breech area where you say you felt  
20 like the threads had been stripped?

21 A. Yes, sir.

22 MR. EATON: Your Honor, we would move to offer  
23 Plaintiffs' Exhibit No. 86 into evidence, and we would proffer  
24 Mr. Cashdollar as a witness to provide evidence of substantially  
25 similar prior incidents. And with that we would pass the

1 witness for cross-examination.

2 (Plaintiffs' Exhibit 86 was offered  
3 in evidence.)

4 THE COURT: Mr. Singer, cross-examination?

5 CROSS-EXAMINATION

6 BY MR. SINGER:

7 Q. Mr. Cashdollar, you do not know the manufacturing process to  
8 form your gun, do you?

9 A. No, sir.

10 Q. You don't know the steel that it was made of, do you?

11 A. No, sir.

12 Q. You don't know the--as you've said, the breech plug that  
13 you've been shown by Plaintiff is not even the same kind of  
14 breech plug, is it?

15 A. No, sir.

16 Q. And doesn't have the same number of threads that yours did  
17 on it, did it?

18 A. Pardon me?

19 Q. Does not even have the same number of threads, does it?

20 A. I couldn't tell you that.

21 Q. Yours was a different length, wasn't it?

22 A. Pardon me?

23 Q. Yours was a different length?

24 A. A different length?

25 Q. Yeah.

1 A. To my best guess. I wouldn't be able to say yes or no.

2 Q. Now, the threads themselves, do you know whether they in  
3 fact were cut as opposed to rolled?

4 A. No, sir.

5 Q. Is this Plaintiffs' Exhibit 8--excuse me.

6 MR. SINGER: May I approach?

7 THE COURT: You may.

8 BY MR. SINGER:

9 Q. Is this Plaintiffs' Exhibit 86 your gun?

10 A. Yes, sir.

11 Q. And would you agree that if you look down straight into the  
12 cut section, where someone has cut your breech area out, the  
13 back of that area is actually tighter and a smaller hole than  
14 the front of the area, the muzzle end?

15 A. Yes, sir.

16 Q. And in this gun the breech plug screwed in where it's shown;  
17 correct?

18 A. It screwed in from this way, yes (indicating).

19 Q. You had to have a special tool, not a hex nut; right?

20 A. Correct.

21 Q. And you access the primer or the crushing cap by putting it  
22 through the slot on the side that is missing, that has been cut  
23 out?

24 A. Yes.

25 Q. Behind that--this was all, as far as you can see, a single



1 piece of metal, mono-block design for the entire barrel and  
2 receiver end?

3 A. Yes, sir.

4 Q. And the receiver end is, what would you say, four more  
5 inches behind the area of the breech plug?

6 A. Yes, sir.

7 Q. Still a part of the same steel that encompasses the breech  
8 area and the barrel?

9 A. Yes.

10 Q. In the back area of this there was a cap, a threaded cap  
11 that went inside?

12 A. Yes, sir. It's here.

13 Q. Right. And that threaded cap screwed into the threads in  
14 the rear of the barrel?

15 A. Yes, sir.

16 Q. And that cap you would take out and put back in every time  
17 you cleaned the gun, took out the bolt and cleaned it, and so  
18 forth?

19 A. Yes, sir.

20 Q. You would say you did that hundreds of times, taking out the  
21 end cap, taking out the breech plug?

22 A. Yes, sir.

23 MR. SINGER: That's all the cross of Mr. Cashdollar,  
24 Your Honor. Thank you.

25 THE COURT: Thank you.

1 MR. EATON: We have no direct--redirect on  
2 Mr. Cashdollar, Your Honor.

3 THE COURT: I do have a couple of questions myself.  
4 Maybe you know the answer, maybe you don't. One of the purposes  
5 for--in fact, the principal purpose for offering similar  
6 incidents is to establish notice to the manufacturer of the  
7 problem.

8 I note that, apparently, this firearm was purchased in  
9 October of 2004. Mr. Katzenmeier's--or the incident occurred in  
10 October of 2004. Mr. Katzenmeier's firearm was purchased in  
11 December, Christmastime, of 2004, was not used until about ten  
12 months later. Do we know the date of manufacture of the Kodiak  
13 Magnum involved in this case, A; and, B, Mr. Eaton, you say that  
14 your--you represented Mr. Cashdollar. Do we know when  
15 Blackpowder or Dikar received notice of the incident involving  
16 Mr. Cashdollar? I guess whoever can answer those questions, I'd  
17 like to know.

18 MR. EATON: I do not have Mr. Cashdollar's file with  
19 us. I'm trying to remember how long after his incident it was  
20 before he contacted us. It was clearly sometime after--after we  
21 were contacted by Mr. Katzenmeier, but I'm not sure of that. I  
22 can't answer that.

23 MR. SINGER: Your Honor, I can answer the question.  
24 The Kodiak was manufactured, this particular serial number gun  
25 was, in June of 2004, as set forth in discovery, which would

1 have been months before the failure, regardless of when the  
2 notice could possibly have been given.

3 THE COURT: Is it likely, Mr. Eaton, that Blackpowder  
4 or Dikar would have received notice of the incident involving  
5 Mr. Cashdollar after the purchase of the Kodiak by  
6 Mr. Katzenmeier's father?

7 MR. EATON: I'm looking here at a note we had about  
8 the contact with Mr. Cashdollar. It says that we were contacted  
9 on 10-11, 2004, with Mr.--by Mr. Cashdollar. So...

10 THE COURT: That would be within a week of the  
11 incident.

12 MR. EATON: It was a week after the Katzenmeier  
13 incident, and I don't think we were contacted by the  
14 Katzenmeiers until sometime in 2005, shortly after the first of  
15 the year in 2005.

16 THE COURT: I'm interested, if you know, and you told  
17 me you don't, but my question is when the defendants would have  
18 received notice of the incident involving Mr. Cashdollar.

19 MR. EATON: Well, it would have been after the  
20 manufacture of Mr. Katzenmeier's gun.

21 THE COURT: All right. Would it have been also--I  
22 guess my more specific question is would it have been after the  
23 purchase of the gun by the elder Mr. Katzenmeier, which I  
24 believe occurred early in December of 2004?

25 MR. EATON: I feel confident we first--we got notified

1 10 of '04. We gave notice of a potential claim. We never filed  
2 a lawsuit on behalf of Mr. Cashdollar, but I feel confident that  
3 we gave notice within probably--at least before the end of  
4 December in 2004. I can check later with our office, maybe get  
5 a better date on that, but we just don't have the Cashdollar  
6 file with us, and I just don't know.

7 THE COURT: I'll hear you in argument as it relates to  
8 the offer of proof. You want to argue the offer of proof any  
9 further for the record?

10 MR. EATON: The only argument we'd make is, I think  
11 there may be one bit of evidence that is not yet before the  
12 Court that links Mr. Cashdollar's incident, as well as  
13 Mr. Zenger's incident, sufficiently to establish substantial  
14 similar conditions, and that is the testimony of Aitor Belategi,  
15 which will be presented next by videotape.

16 Mr. Belategi testified that the same thread form, the  
17 18-pitch, 5/8 UNF thread form had been used at least since 1993  
18 in all of their models of guns. And we think that's one more  
19 similarity that links Mr. Cashdollar's case--or claim, and  
20 Mr. Zenger's claim, to the Katzenmeier claim. They all have the  
21 same thread form common to all muzzleloaders manufactured by  
22 Dikar since 1993.

23 And we believe there has been enough substantial  
24 similarity to allow this evidence to go in. These are different  
25 models of guns, they are made by the same manufacturer, they

1 have the same thread form in the breech plug area, they all  
2 failed in substantially the same way, that is a catastrophic  
3 explosive failure which expelled the breech plug loose from the  
4 barrel, stripped threads along the way.

5 We offered evidence so far there is really two defects  
6 in the Katzenmeier gun. One is the formation of the threads in  
7 the barrel. The other is the tapering of the barrel which is  
8 another aspect of the defect in the barrel.

9 In this case Mr. Singer brought out on  
10 cross-examination that it appeared that there was more--or a  
11 greater diameter muzzleward than breechward in the Cashdollar  
12 case. We think that's a distinction without a difference. It's  
13 still a defective thread form that failed to contain the blast  
14 with the--in the face of a recommended projectile and a  
15 recommended propellant.

16 So we think that what we're talking about here is  
17 defective formation of the threads in the breech area of the  
18 barrel, whether it be the actual form of the thread itself not  
19 being complete or fully formed, and/or bell-mouthing. Those are  
20 both defects.

21 In Mr. Cashdollar's case, there may not have been  
22 bell-mouthing, but it appears there was a defective formation of  
23 the threads which failed to hold the breech plug in place under  
24 a load that was approved and recommended by the defendant.

25 So we think there is substantial similarity sufficient

1 to allow this testimony to go before the jury.

2 THE COURT: What would the similarly-situated incident  
3 involving Mr. Cashdollar, what would it be relevant to in this  
4 case?

5 MR. EATON: To show that these folks had been  
6 producing defective barrels apparently for some time. Not just  
7 to prove notice, but to prove common defects that had existed  
8 and persisted through their manufacturing process, at least back  
9 to the time when Mr. Cashdollar's gun was made in 2001.

10 So it's not just merely notice. We think that there's  
11 more--there's more bases for admission of this evidence than  
12 merely notice to the defendants.

13 THE COURT: Thank you.

14 Mr. Singer?

15 MR. SINGER: Thank you, Your Honor. Initially we  
16 would stand on each and every one of the grounds and the  
17 authority we set forth in our motion in limine, which sets forth  
18 very clear what the law is in this circuit on substantially-  
19 similar circumstances. It's very clear that there's no  
20 testimony from this witness that in any manner can either  
21 establish substantially similar in the design or the  
22 manufacture; but, in fact, has established it is different.

23 In addition to that, as we've set forth all along in  
24 the motion, not only did we put on proof that it was not the  
25 same, but they could not put on proof that it was, and they

1 haven't.

2           As Your Honor can see, and if you remember the  
3 testimony of Professor Tipton, their theory of this  
4 case--remember, we're talking about an object, a barrel  
5 manufactured in the Katzenmeier gun that is a piece of tubular  
6 steel. And at the very back edge is where the drill for the  
7 breech plug threads, and it's a whole form. And according to  
8 Professor Tipton, what happened is that that somehow was  
9 misaligned, or the tool was worn, or something happened, and it  
10 had become bell-mouthed at the back. Not that by itself, but,  
11 in fact, the fact of that in combination with the rolled threads  
12 made the threads too weak that were there to hold it. So it has  
13 to be the combination, according to Tipton. That's the only  
14 possible relevance of these rolled threads and the voids in the  
15 threads.

16           The testimony from this witness certainly can't  
17 establish what those threads were. We set forth in the records  
18 from Mr. Belategi, beginning in the late summer, early fall of  
19 2002, they began making rolled threads, not cut threads. This  
20 was a cut thread back in 2001. That makes it substantially  
21 different, not substantially similar.

22           If Your Honor looks at the plaintiffs' exhibit, Your  
23 Honor will notice it is what's called, as we set forth in the  
24 briefing papers, a mono-block design, which means from a single  
25 piece of steel you have the barrel and then you have a receiver

1 that proceeds many inches rearward of the breech area. As the  
2 drill would go in to form that breech area, if, as Dr. Tipton  
3 testified, that it was bell-mouthed way four, six inches up  
4 inside the barrel, it would have been much more exaggerated and  
5 bell-mouthed to the back of it, such that that end cap can't go  
6 in and the threads there can't be properly formed. So that's  
7 another reason why this gun is clearly substantially different  
8 in design and manufacture. The testimony is clear it's not even  
9 the same breech plug.

10           And so, again, it's the plaintiffs' burden under the  
11 law, regardless of what the purpose is they want it in for,  
12 whether notice or defect, to prove a substantially similar  
13 design and manufacture. They can't do it. The proof is it is  
14 not.

15           Second--that's just the initial threshold. The  
16 initial purposes, as set forth in the briefing papers, is there  
17 must be proof that the defect existed in this other allegedly  
18 substantially similar incident, and the cause of that failure.  
19 There is zero competent proof under Daubert, or anything else,  
20 as to whether this gun, the breech threads, were improperly  
21 formed, or even an opinion that they were.

22           There is zero testimony that these breech plug  
23 threads, even today as sectioned, are out of tolerance. There's  
24 no measurement of them. There is no testimony whatsoever in  
25 this record. The plaintiff bears that burden, that the



1 allegedly substantially similar incident contained--or gun  
2 contained a substantially similar defect and which proximately  
3 caused a substantially similar method of failure, and in point  
4 and fact there is none.

5 I would also point out, as we set out in the briefing  
6 papers and also briefly in chambers the other day, most  
7 importantly, as well as all the above, is that, you know, we are  
8 here in Federal Court more than two years after this case has  
9 been filed. The plaintiffs answered mandatory discovery, they  
10 answered interrogatories, they answered--and none of this was  
11 set forth. They provided expert reports. None of this was set  
12 forth. There is not a single opinion that has been set forth in  
13 this case that Mr. Cashdollar's gun, or anybody else's gun, was  
14 similarly designed, or was similarly manufactured, or the method  
15 or mode of failure, and that is critical.

16 Not only do you have to have that proof, which they  
17 don't, but they've got to let us know about it in advance, and  
18 they didn't. And so that would be independent grounds to  
19 exclude it as well, on that basis.

20 For those reasons, as well as all the others, we  
21 object to it and move to exclude it.

22 THE COURT: Anything further, Mr. Eaton?

23 MR. EATON: Your Honor, just a very brief rebuttal.  
24 Your Honor, "substantially similar" does not mean identical.  
25 Mr. Singer focused on a lot of different features and

1 characteristics between these two models of firearms. What he  
2 fails to appreciate in his remarks, however, is that these guns  
3 failed in substantially similar ways; that is, in the connection  
4 of the breech plug and the barrel of the gun. That's the  
5 substantial similarity.

6           The Cashdollar gun was designed and manufactured in a  
7 substantially similar way, and it failed in a substantially  
8 similar way, stripping of threads in connection with the breech  
9 plug and barrel of the gun. That's sufficient.

10           Some of these other features that are distinctive,  
11 they're distinguishing, but they do not constitute a substantial  
12 difference in the mode of failure, and that's all that's  
13 required. Mr. Cashdollar's case--claim is certainly no surprise  
14 to these defendants. They chose not to litigate it. They chose  
15 to settle it and not get into the minutiae of his claim.

16           So we think that the burden has been met, particularly  
17 when Mr. Belategi's testimony is played, that will complete the  
18 link, and respectfully move the Court to allow this evidence in  
19 the trial of this case.

20           THE COURT: Thank you. Thank you both. Because there  
21 appears to be no dispute that Mr. Katzenmeier's firearm was  
22 manufactured prior to the incident involving Mr. Cashdollar, and  
23 in all probability, although I guess it's not completely clear,  
24 Mr. Katzenmeier's firearm had reached the Ace Hardware store  
25 even before the defendants had any knowledge of the incident,

1 even if the incident involving Mr. Cashdollar was substantially  
2 similar, it would not be evidence either of notice or, in  
3 addition to that, the defendants' appreciation of the risk of  
4 harm if the barrel is not threaded properly. It's offered  
5 really at this point only as additional evidence that there  
6 was--that manufacturing defects had occurred in other firearms.  
7 I'm less certain that that's an appropriate basis to admit it,  
8 although I'm not--I'm going to take a look at that one more  
9 time.

10           As to whether or not there are substantially similar  
11 defects, alleged in this case are the improper rolled taps that  
12 created the threads. And Mr. Cashdollar's threads, as far as  
13 the record indicates, were done by a cutting process rather than  
14 rolled taps. So that part of the defect is different.

15           The more I understand the plaintiffs' case, I think  
16 their focus is primarily on the bell-mouthing. Here, we have  
17 kind of the reverse of bell-mouthing, sort of, if I can continue  
18 the analogy, of bell-firthing, it was wider at the other end,  
19 toward the muzzle end. That may or may not be a distinction  
20 without a difference, I'm not sure the Court could tell in the  
21 absence of expert testimony, but those are two circumstances.

22           In addition to the other things that Mr. Singer  
23 mentioned, and some of them I indicated in my limited ruling I  
24 didn't think were particularly germane, although this firearm  
25 had had a lot more use than Mr. Katzenmeier's, I'm not convinced

1 at this point that they're, A, substantially similar to be  
2 admitted; and because this particular incident is no evidence of  
3 notice, nor is it evidence of appreciation of the danger on the  
4 part of the defendants, I can't receive it for that purpose.  
5 And I'm reluctant to receive it only to indicate that--as  
6 further proof that something wrong had happened before in the  
7 forming of these threads.

8 I'm going to adhere to my ruling for now, the evidence  
9 will be excluded with these caveats: I'm going to take a look  
10 at the proffered reasons again that Mr. Eaton has raised, and  
11 while I think I'm going to probably end up to continue to  
12 exclude it, I might change my mind on that.

13 And, also, one purpose that this evidence could be  
14 admissible for would be for impeachment, if the defendants offer  
15 evidence of this idea of a breech plug being expelled is a  
16 strange and unusual thing that they never heard of before. I  
17 don't care if it's just in reference to the Kodiak rifle because  
18 I think that is an untrue impression. So the door can be opened  
19 to Mr. Cashdollar's testimony.

20 And I'm inclined, also, to direct that I would think  
21 any argument to the jury that there had been no evidence of any  
22 other breech plug being expelled would be improper argument in  
23 view of the offer of proof that has been made. So I would not  
24 permit an argument along those lines.

25 So this evidence could become admissible, but it is

1 not yet, in my judgment, and it is not admissible for the usual  
2 purposes for which similarly-situated incidents are received.  
3 So we're not going to receive the testimony at this time.

4           Shall we go ahead with Mr. Zenger?

5           MR. EATON: Yes, Your Honor. May this witness be  
6 excused?

7           THE COURT: Yes. Mr. Cashdollar, you've come a long  
8 way. Thank you for coming today. The Court appreciates your  
9 testimony. There are certain legal issues that are concerning,  
10 which I've outlined. Your testimony has been helpful in  
11 highlighting this.

12           THE WITNESS: Thanks.

13           MR. SPARKS: Your Honor, would the Court entertain  
14 Mr. Cashdollar sitting in back to watch the rest of the  
15 proceedings?

16           THE COURT: Any problem? In open court can he sit in  
17 the back?

18           MR. SINGER: To the extent that the Court has  
19 indicated some possibility of his testimony being admissible, it  
20 seems--

21           THE COURT: He's already testified. If he testified  
22 different--I think it's fine, though I'm not sure he wants to.

23           MR. EATON: I asked him to wait out there for a  
24 minute. Mr. Wise can tell him to come back in when he gets  
25 Mr. Zenger. We're ready to present Mr. Zenger now, Judge.