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INDEX

	PAGE
Closing Argument by Mr. Esfandiari	19
Closing Argument by Ms. Cole	46
Rebuttal Closing Argument by Mr. Esfandiari	70
Jury Questions	73
Verdict	89

PLAINTIFF'S EXHIBITS (ADMITTED INTO EVIDENCE)

NO.	DESCRIPTION	PAGE
1	02/00/2013-2013 Thymatron System IV Instruction Manual (16th Edition)	12
3	11/15/2006-Email between Swartz/ Abrams re Warning Statements	12
27	Undated - Grain Bin Silo Photos	12
28	Undated-Thelen Family Home Photo	12
31	05/00/2009 - CHI Information Packet (#40424 v3 Rev 5/09)	12
36	08/02/2017-Hannappel Mark PhD Expert Report - Redacted	12
37	06/04/2020 - Hannappel Mark Ph.D. Neuropsychological Evaluation Summary - Redacted	12
40	07/12/2016 - CHI Progress Note signed by Imad Alsakaf, MD	12
41	07/27/2016 - CHI Progress Note signed by Arun Sharma, MD	12
42	4/24/2014 - Norfolk Community Health Care Clinic - Progress Note signed by Maria Gibson	12
43	5/2/2014 - Norfolk Community Health Care Clinic - Progress Note signed by Maria Gibson	12

PLAINTIFF'S EXHIBITS (ADMITTED INTO EVIDENCE)
(CONTINUED)

NO.	DESCRIPTION	PAGE
44	5/9/2014 - Norfolk Community Health Care Clinic - Progress Note signed by Maria Gibson	12
45	05/14/2014- Norfolk Community Health Care Clinic - Progress Note signed by Maria Gibson	12
46	Compilation of Thelen MADRS Ratings from Dr. Sharma's File	12
47	Compilation of Thelen Progress Notes from Dr. Sharma's File	12
49	7/27/2016 - MOCA Assessment signed by Arun Sharma, MD	12
50	5/16/2014-07/25/2016 - Compilation of Jeffrey Thelen's ECT Treatment Slips (#1-95)	12
52A	03/08/2021 Mark Hannappel PhD_Progress Notes	12
52B	06/22/2020 Mark Hannappel PhD Progress Notes	12
52C	03/29/2021 Mark Hannappel PhD Progress Notes	12
52D	06/15/2021 Mark Hannappel PhD Progress Notes	12
52E	07/20/2021 Mark Hannappel PhD_Progress Notes	12
54-1	11/9/2022 - 03/23/2023 - Faith Regional Records of Enas Al Zaghal, M.D.	12
54-2	11/9/2022 - 03/23/2023 - Faith Regional Records of Enas Al Zaghal, M.D.	12
54-3	11/9/2022 - 03/23/2023 - Faith Regional Records of Enas Al Zaghal, M.D.	12
54-4	11/9/2022 - 03/23/2023 - Faith Regional Records of Enas Al Zaghal, M.D.	12
54-5	11/9/2022 - 03/23/2023 - Faith Regional Records of Enas Al Zaghal, M.D.	12

**PLAINTIFF'S EXHIBITS (ADMITTED INTO EVIDENCE)
(CONTINUED)**

NO.	DESCRIPTION	PAGE
54-6	11/9/2022 - 03/23/2023 - Faith Regional Records of Enas Al Zaghal, M.D.	12
54-7	11/9/2022 - 03/23/2023 - Faith Regional Records of Enas Al Zaghal, M.D.	12
54-8	11/9/2022 - 03/23/2023 - Faith Regional Records of Enas Al Zaghal, M.D.	12
71-1	09/02/2021- Notebooks of Mr. Jeff Thelen September-December 2021, Vol 1 - Pages 1, 2, 3, 4, 6 only	12
71-2	09/02/2021- Notebooks of Mr. Jeff Thelen September-December 2021, Vol 1 - Pages 1, 2, 3, 4, 6 only	12
71-3	09/02/2021- Notebooks of Mr. Jeff Thelen September-December 2021, Vol 1 - Pages 1, 2, 3, 4, 6 only	12
71-4	09/02/2021- Notebooks of Mr. Jeff Thelen September-December 2021, Vol 1 - Pages 1, 2, 3, 4, 6 only	12
71-6	09/02/2021- Notebooks of Mr. Jeff Thelen September-December 2021, Vol 1 - Pages 1, 2, 3, 4, 6 only	12
75	09/26/2014- H&P Signed Progress Note Elizabeth Amney Rowan, PAC	12
76-2	Undated - Photographs of Jeffrey Thelen's Home	12
79	02/06/2015 - Earnings Statement	12
86	11/07/2014-H&P Signed Progress Note Elizabeth Amney Rowan, PAC	12
121	06/17/2017 Faith Regional Progress Note by Robert Langenfeld, MD	12
149	09/27/2018 Progress Note by Dr. Herman	12

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**PLAINTIFF'S EXHIBITS (ADMITTED INTO EVIDENCE)
(CONTINUED)**

NO.	DESCRIPTION	PAGE
150	12/15/2021 Worklife Probability Calculations	12
151	05/25/2023 Life Care Plan for Jeffrey Thelen	12
153-1	Undated - Family Photos of Jeffrey Thelen	12
153-3	Undated - Family Photos of Jeffrey Thelen	12
156	12/12/2006 Email Swartz to Lisanby	12
157	08/30/2017 Brief Assessment Report (BAR)	12
159	6/28/2018 EEG Interpretation by Dr. Duffy	12
160	07/23/2018 Initial TMS TX	12
164	06/10/2015 Progress Notes by Imad Alaskaf, MD	12
1099	3-28-22 Assessment	17

DEFENDANT'S EXHIBITS (ADMITTED INTO EVIDENCE)

NO.	DESCRIPTION	PAGE
1026	8/1/13 Office Visit Note by Raymond Heller, Notes 12 hour blackout episode prior day, plus history of head trauma with loss of consciousness	17
1027-1	(No Description Provided)	17
1030	2/11/13-6/5/14 Norfolk Community Health Care Clinic treatment and billing records Jeffrey Thelen	17
1046	Academic Transcript for Jeffrey Thelen, Stanton Senior High School	17
1067	6/7/15 Progress Note by Sierra Neuharth (Licensed Mental Health Practitioner)	17

DEFENDANT'S EXHIBITS (ADMITTED INTO EVIDENCE)
(CONTINUED)

NO.	DESCRIPTION	PAGE
1068	6/9/15 Progress Note by Alsakaf, notes memory problems and that Thelen doesn't agree to discontinue ECT	17
1071	7/10/16 Progress Notes by Lacey Hobus (MSW Therapist), Thelen and family want to get back on ECT because it helps	17
1072	7/12/16 Progress Note by Alsakaf, discusses ECT being discontinued due to spells where Thelen lost concentration; Alsakaf and mother agree that benefits outweigh risks	17
1089	American Psychiatric Association Task Force Report on the Practice of ECT, 2d Edition (2001)	17
1098	Letter of P. Thelen to "Whom it May Concern," regarding J. Thelen, dated 4/11/2014, as identified at 10/20/22 deposition of Dr. Raymond Heller	17

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21 **THE COURT:** All right. Bring the jury out, please.

22 **THE COURT SECURITY OFFICER:** All rise for the jury.

23 (Jury in at 8:51 a.m.)

24 **THE COURT:** Morning, everybody. Welcome back. Nice
25 to see you. We are ready to go. I know you're ready to go.

Closing Argument by Mr. Esfandiari

1 The attorneys will now present their closing arguments. Keep
2 in mind that what you are about to hear is not evidence. You
3 have already heard all the evidence there is to hear in the
4 case. Each side has equal time, but the plaintiff is entitled
5 to split his time between an initial closing and then a
6 rebuttal after the defendant has completed their closing. When
7 the attorneys complete their closing arguments, I will have one
8 brief final instruction, and you will then begin your
9 deliberations.

10 The attorneys have a time limit of 45 minutes per
11 side. I have learned that when you know how long someone is
12 going to speak, you tend to pay attention more than it's just
13 an open-ended thing and you don't know if they're going to talk
14 for two or three hours. They're not. They're going to talk
15 for 45 minutes, so you know their remarks are contained within
16 that time frame. Most people can pay attention for that time
17 frame. So I think that's a good way to proceed.

18 Go ahead whenever you're ready.

CLOSING ARGUMENT BY MR. ESFANDIARI

19 **MR. ESFANDIARI:** Thank you, Your Honor.

20 Good morning, ladies and gentlemen. I, last night,
21 asked Jeff what it is that he wanted me to tell you guys. I
22 told him this is the final opportunity for me to speak with
23 you. And his only remark was he just wanted to thank you, he
24 said, you know, a number of strangers who don't know him from a
25

Closing Argument by Mr. Esfandiari

1 different state decided to take more than a week of their life
2 to come here every day on time, to listen to his story, and to
3 make a determination as to whether he was harmed as a result of
4 the ECT device, and whether that harm was as a result of
5 Somatics' failure to warn.

6 I, too, want to extend my thanks to you and to the
7 entire court staff that has made this trial very smooth and
8 very easy for us to present the evidence and finish it in a
9 timely fashion.

10 Abraham Lincoln said jury service is the greatest act
11 of citizenship that one can do. You may recall we started voir
12 dire with about 25 people. And of those 25, the eight of you
13 were chosen to decide this case. Collectively, you have
14 probably 350 years of life experience, and it's one of the
15 privileges of this country that allows regular citizens to
16 decide matters of this magnitude. In other places, it will
17 just be a judge or you have medical experts doing it. But here
18 we believe that the community decides the fates of other
19 members within its community.

20 Jury service goes back to Magna Carta when, back
21 then, the king used to go from town to town to tell people and
22 decide rulings and determine what the fate of others would be.
23 Finally, people get -- decided, no, we should determine our own
24 fate, and they wanted to have the community decide what the
25 grievances between the parties, how it should be resolved. And

Closing Argument by Mr. Esfandiari

1 it started in the courtyard and eventually moved into the
2 courtroom. Here we are, 800 years after that, and we still
3 decide our differences in this fashion.

4 The trial is a search for truth. At the end of the
5 case, you're going to be given a verdict that you fill out, and
6 verdict is Latin for to speak the truth. And the truth is not
7 afraid of trial.

8 The truth -- and I think this truth that has been
9 spoken in this case makes it evidently clear that Somatics'
10 Thymatron device causes brain injury, that ECT devices,
11 irrespective of the kind or the manner in the way it's
12 administered, have caused brain injury since initiation in the
13 1930s. This is something that they knew. Initially, medical
14 literature was littered. We went through them all, and we'll
15 go through them in the slides with these harms. And, yet, as
16 soon as Somatics entered the market, every reference to brain
17 injury is removed.

18 And every instance, there's a denial that it causes
19 this harm. Placing not only Mr. Thelen, but who knows how many
20 other people at risk who are given this procedure without
21 adequate warnings.

22 This is called closing argument, but it really is not
23 an argument, because if it was an argument, we'd have a
24 dialogue and a conversation. So this is simply what I plan to
25 do today is to go through the evidence that we've heard the

Closing Argument by Mr. Esfandiari

1 last week and to see how the pieces fit together, because
2 maybe, you know, it's -- it was fast-moving train, and maybe
3 you forgot one video that we saw the first day and what impact
4 it has on the other evidence that we saw.

5 So one of the most important things to keep in mind
6 is the burden of proof. Plaintiff in this failure to warn case
7 has the burden of proof from a preponderance of the evidence.
8 And you'll get these jury instructions from His Honor. He read
9 them to you yesterday. A preponderance of the evidence simply
10 means an amount of evidence that is enough to persuade you that
11 Thelen's claim is more likely true than not true.

12 Many attorneys refer to this as if this were the
13 scales of justice. A preponderance of the evidence simply
14 means that plaintiff's side has a feather more than the other
15 side. As long as we have just a feather more, we have met our
16 burden of proof.

17 I like to think of it as, if you're back in the jury
18 room, you're thinking does it cause it, does it not cause it?
19 I'm not sure, but I think so. If that thought crosses your
20 mind, we've met our burden of proof.

21 **MS. COLE:** Objection, Your Honor. Misstates the law.

22 **THE COURT:** Overruled.

23 **MR. ESFANDIARI:** I want you to keep the burden of
24 proof in mind. While there's only a feather that is required,
25 I believe in this case, we've put on bricks on our side of the

Closing Argument by Mr. Esfandiari

1 case, and we'll go through it in these slides. You saw the
2 study after study after study discussing brain damage, both in
3 the past and in the present.

4 These are going to be the instructions for failure to
5 warn. There are four elements that plaintiff needs to meet.

6 The first is that Somatics placed the ECT device on
7 the market. There is no dispute. There is no dispute. I
8 believe Ms. Cole, when she gets up there, she'll concede that
9 fact.

10 The second, at the time the ECT device left Somatics'
11 possession, it was not accompanied by adequate instructions or
12 warnings to the physicians who prescribed ECT treatment to
13 Thelen. We're going to spend some time on this element.

14 First, you may recall that His Honor read a
15 stipulation by the parties. That stipulation, which I believe
16 you'll get in the jury room, is that Somatics admits that the
17 manual that it gave to Dr. Sharma and the doctors at the
18 hospital in Nebraska did not contain the words brain damage or
19 brain injury. You'll find, you can go through it, those words
20 don't exist in there. So that fact is, for all intended
21 purposes, admitted.

22 Now, the question arises, does ECT cause brain
23 damage? Should they have warned of that fact? And here's
24 where the literature -- ECT, as you may recall, Dr. Read
25 testified, came to the states in the 1940s, shortly after the

Closing Argument by Mr. Esfandiari

1 first person was administered it in Italy in 1938.

2 Immediately, almost within a decade, doctors began to realize
3 it was causing brain injury. This study that Dr. Read talked
4 about and Dr. Swartz, we went through it with him was
5 examination of brain tissues that found brain damage.

6 And you'll see into the substance of the brain
7 produced the passage of current but also irreversible changes
8 in the nerve cells produced both directly and, as a result,
9 vascular changes and hemorrhages. Immediately, this is in the
10 '50s that they knew this was going to happen.

11 Then there was another study performed in the '70s.
12 This one by Goldman, found ECT causes irreversible brain
13 damage. Study was followed up by Dr. Templer who, likewise,
14 ECT patients, this is after giving a memory examination
15 performance, does suggest that ECT causes permanent brain
16 damage.

17 This is the Max Fink article. You may recall
18 Dr. Fink was a mentor to both of the owners of Somatics, to
19 both Dr. Abrams and Dr. Swartz. He was an authority in the
20 field of ECT. What are his comments and -- about ECT? The
21 principal complications of EST -- back then, it used to be
22 called electroshock therapy -- are death, brain damage, memory
23 impairment, and so forth. He goes on to say, these
24 complications are similar to those seen after head trauma,
25 which EST has been compared to.

Closing Argument by Mr. Esfandiari

1 You may recall when we went -- and this is a 2005
2 mice study that looked in to determine what parts of the brain
3 are getting impacted. Due to the interest of time, I'm not
4 going to go through it. But in this study, they looked at the
5 hippocampus, which is a specific part of the brain, and they
6 found that cell death in the hippocampus.

7 You may recall both Dr. Abrams and Dr. Swartz
8 testified that the way ECT gets his efficacy is by impacting
9 the hippocampus, and that's somehow the theory of potentially
10 how ECT may work, though, to this day, after 80 years, nobody
11 knows how ECT purportedly works.

12 You may recall early on, Dr. Read testified that the
13 initial scientists believed that the way ECT worked was the
14 brain injury was indeed the mechanism of action, that somehow
15 by your brain losing its cells, losing those memories, that
16 helps depression. That theory, for all intents and purposes,
17 is what still these doctors believe today. Because every
18 study -- and Dr. Read talked about it, I went through it with
19 Dr. Swartz, every study that shows neuronal change in the
20 brain, Dr. Swartz said is a positive, when in reality it's a
21 negative, when in reality it's evidence of brain damage. And
22 the hippocampus, as Dr. Abrams acknowledged and admitted, is
23 where memory is stored.

24 During Dr. Abrams' deposition -- he's the one that we
25 did by video -- this, I think was one of the -- he was

Closing Argument by Mr. Esfandiari

1 responding to a comment by Dr. Peter Sterling, a neuroscientist
2 at the University of Pennsylvania, who wrote, one can be
3 sympathetic to psychiatry as I am and still imagine the passing
4 150 volts between the temples to evoke a grand mal seizure
5 might cause brain damage, especially when you realize that this
6 cure for depression requires -- requires this procedure to be
7 repeated 10 to 20 times over a week or so. And when you talk
8 to a friend who has been so treated and discover that a year
9 later, she is still experiencing huge gaps in recall of major
10 life events, you begin to worry. Finally, you discover that
11 ECT's benefit is only temporary, so that many psychiatrists
12 administer it chronically.

13 I asked Dr. Abrams, is Dr. Sterling the only person
14 who thinks that way? And he acknowledged, no, he's not.

15 They knew. They knew long ago that ECT causes brain
16 injury, yet they produced -- brought the device into the market
17 without conducting a single test, a single clinical trial, a
18 single analysis.

19 We asked him, "At any time has Somatics initiated any
20 studies or test with regard to this issue of long-term side
21 effects with ECT?

22 "No.

23 "Why not?

24 "That's not our business."

25 At this time, I'll skip this one. Again, we asked

Closing Argument by Mr. Esfandiari

1 him, in terms of the -- the fact that ECT had been associated
2 and compared to traumatic brain injury, why they hadn't studied
3 it.

4 Dr. Abrams' response, "Well, we're not in the
5 business of doing studies of traumatic brain injury. We sell
6 Thymatrons."

7 Are these the type of people you want producing
8 medical devices that enter the market -- as the conscience of
9 the community, is this how we're going to keep our community
10 safe --

11 **MS. COLE:** Objection, Your Honor.

12 **MR. ESFANDIARI:** -- by having.

13 **THE COURT:** Yes, that objection -- that objection is
14 sustained. Keep going, please.

15 **MR. ESFANDIARI:** Somatics, when it decided to enter
16 the business of selling Thymatron machines, carried with it a
17 responsibility to provide warnings. It's a responsibility that
18 all manufacturers bear that produce products. Yet they did not
19 take that responsibility seriously and put their head in the
20 sand concerning the risks that we talked about.

21 You heard from Dr. Read who discussed he reviewed all
22 the clinical studies involving ECT. In his opinion, to date,
23 nobody has been able to establish the efficacy of ECT. None of
24 the clinical trials that occurred in the past, and no clinical
25 trials have occurred since 1985, manage to establish efficacy.

Closing Argument by Mr. Esfandiari

1 So the manual for ECT, for Somatics, as they
2 admitted, did not contain anything about brain damage. And to
3 no surprise, Dr. Sharma, when he received -- when he got
4 consent to provide -- to provide consent to Mr. Thelen, never
5 warned him about brain damage.

6 However, as an excuse, Somatics claims, well, we
7 pointed the doctors to this 300-page APA Task Force that
8 Dr. Coffey and others wrote. And in that task force, it's
9 stated, "In light of the accumulated body of data dealing with
10 structural effects of ECT, 'brain damage' should not be
11 included as a potential risk of treatment."

12 So instead of warning doctors about the risk of ECT,
13 they took a step further and told them, you know what, doctors,
14 don't even warn your patients about brain damage.

15 Of course, the manual, APA manual, as you'll have a
16 copy of it with you, portions of it was prepared and consulted
17 with Somatics and MECTA Corporation, the two manufacturers of
18 ECT device.

19 Now, this very same manual that Somatics claims is
20 the latest and greatest involving ECT, we saw an e-mail from
21 Dr. Swartz, who wanted to write a new book, and he said one of
22 the competitors to his book would be the APA Task Force, and he
23 characterized the APA Task Force as this book is
24 psychiatrist-centered and apparently aims to make permissible
25 as much as possible. And then at the last sentence, this book

Closing Argument by Mr. Esfandiari

1 probably decreases litigation risks, because virtually
2 everything is permissible. Although this is nice for
3 clinicians, it provides virtually no guidance about how to
4 practice.

5 So basically what that means is that these guys got
6 together, and they realized that ECT is dangerous. They
7 realized that people are going to be harmed by ECT. They said
8 how are we going to protect our industry? How are we going to
9 make sure that if anybody tries to sue a doctor as a result of
10 brain damage or memory loss that they're protected? We're
11 going to write a guidance document that we're going to ask all
12 psychiatrists to follow, that this is going to be the standard
13 of care, and we're going to make -- as Dr. Swartz acknowledges,
14 aims to make permissible as much as possible, so that doctors
15 have free reign to do whatever they want, provide no warnings,
16 and under the guise that it's approved by the APA Task Force at
17 the recommendation of the manufacturer, Somatics.

18 The next excuse given by Somatics in this case as to
19 why their device doesn't cause brain damage was this discussion
20 about sine wave and brief pulse and how the ECT of old was
21 without anesthesia, without muscle relaxants, and that's no
22 longer the case.

23 But we heard testimony, anesthesia and muscle
24 relaxants came out in the '50s. They've been around for a long
25 time. And we saw literature from the '50s, '60s, '70s, '80s,

Closing Argument by Mr. Esfandiari

1 '90s, all talking about brain damage. So muscle relaxants and
2 anesthesia don't prevent anything with regards to brain injury.

3 The issue of sine wave and brief pulse, Dr. Castleman
4 and Dr. Read, they testified. You remember Dr. Castleman from
5 NASA, engineer, analyzed the data, talked about how much
6 electricity is generated by this machine. He said in terms of
7 electrical output, there is no difference between the sine wave
8 and what the Thymatron machine produces.

9 Yet, Somatics claims that the distinction between the
10 two somehow excuses it from providing any warnings about brain
11 injury and claims that any -- any data about brain injury that
12 was associated to sine wave doesn't apply to them. Yet, they
13 didn't do a single study to test that. They never did a
14 comparison analysis between the Thymatron machine and a sine
15 wave device to test their theory that their device is safer and
16 doesn't cause brain damage. They never did any such tests, yet
17 they went around and claimed that because theirs is a brief
18 pulse, there's no risk of injury.

19 Notably, Dr. Swartz, again, I had him read from his
20 own book concerning this distinction between --

21 **MS. COLE:** Your Honor, objection.

22 **THE COURT:** Objection is overruled.

23 **MR. ESFANDIARI:** Read from his own book about this
24 distinction between sine wave and brief pulse, and he read in
25 his own words, the report that brief pulse stimuli have milder

Closing Argument by Mr. Esfandiari

1 side effects and use less charge than sine wave stimuli is
2 well-known -- should say though is well-known, however, the
3 result was never proven as just stated.

4 He knew what they were telling doctors that sine wave
5 is more dangerous than brief pulse and brief pulse therefore
6 does not have any of the memory risks and brain damage risks,
7 has never been proven.

8 The next argument they brought forth is, well, ECT
9 doesn't cause structural brain damage, so therefore there's no
10 brain damage. Yet, we heard, first of all, we showed you
11 autopsies that showed irreversible brain damage, multiple
12 autopsies that had occurred, from the '50s on, including the
13 Calloway article that was introduced.

14 Secondly, and more importantly, is Dr. Read and
15 Dr. Omalu. Dr. Omalu, you may remember him, he was very
16 energetic, but he's done more than 10,000 autopsies, has
17 examined 30,000 brain tissue samples. What did he tell us? He
18 told us that brain injury in many cases appears on a cellular
19 level and sometimes on a subcellular level, so that you have
20 manifestations of the brain and symptoms of the brain injury,
21 but they do not appear on imaging studies. That's why people
22 do autopsies.

23 That's why, I don't know if you recall, NFL players,
24 when they had these problems, some of them would commit suicide
25 and would shoot themselves in the heart so that their brains

Closing Argument by Mr. Esfandiari

1 could get sent over, not only to Dr. Omalu, but to Boston
2 University to be tested so that people can determine at what
3 level and to what extent these brain injuries occur.

4 Yet, Somatics, knowing full well that a lot of these
5 brain injury cases will not appear on film, some do, majority
6 don't, use that negative imaging finding as a justification to
7 say that, well, see, we don't cause brain injury. But it was a
8 test that doesn't look for that harm. And it's difficult and a
9 problematic test to apply to determine whether brain injury is
10 caused.

11 It can only occur through autopsies, for the most
12 part. And every autopsy that -- for the most part that has
13 occurred, unbiased, we looked at one from Scotland, for
14 example, where the inquest was done, found that ECT caused
15 brain damage and caused the death.

16 This is the Calloway article. This found basically
17 atrophy, shrinkage of the brain, after ECT.

18 This -- going to the manual again. The third excuse
19 that Somatics provided was, well, we had a disclaimer that we
20 warned about various cognitive issues. Yet you recall that the
21 first page of the manual had the warnings. This disclaimer on
22 Page 6 is written in the negative. Please note that nothing in
23 this manual constitutes or should be construed as a claim by
24 Somatics that confusion and other harms are not a possibility.

25 That is not a warning. First of all, it doesn't warn

Closing Argument by Mr. Esfandiari

1 anything about brain damage, because it's not included in
2 there. Second of all, we heard it from Somatics' own mouth.

3 Dr. Swartz, when Dr. Abrams presented him with this
4 disclaimer, wrote an e-mail, and he said all warnings are
5 written as are stated in the form that "this product can or may
6 cause XX. We should conform to this. Cigarette companies
7 cannot use a statement such as nothing in this advertisement
8 should be regarded as a statement that cigarettes do not cause
9 cancer."

10 This is not a warning. That's Dr. Swartz discussing
11 contemporaneously the label and warning in his own manual and
12 saying this is not a warning. Yet Somatics comes to court and
13 asks you to make a determination that that was an adequate
14 warning when their own owner disavows it.

15 Next, the -- we talked a lot in this trial about the
16 2007 Sackheim article. This was an article Dr. Sackeim is a
17 proponent of ECT. He's actually one of the authors of the APA
18 Task Force. He did the very first long-term prospective study
19 to determine the cognitive effects of ECT. In the
20 peer-reviewed literature, Dr. Read talked about this. Excuse
21 me. And what were his findings? 12 percent -- more than
22 12 percent of patients ended up with having persistent
23 retrograde amnesia.

24 Yet, Somatics, in that disclaimer that Dr. Swartz
25 claimed wasn't a warning at all, what did they write? A few

Closing Argument by Mr. Esfandiari

1 patients have reported experiencing persistent loss of memories
2 or memory function after ECT. These are subjective symptoms
3 that have not been related to observable structural brain
4 changes.

5 First of all, I asked Dr. Swartz, is 12 percent just
6 a few? He acknowledged no. 12 percent is one in eight
7 patients, essentially, had persistent memory loss. I asked him
8 why didn't you then modify the label to warn that it's one in
9 eight, 12 percent, by a study that's done by someone who's
10 reputable in the field. He said, well, I disagreed with
11 Dr. Sackeim. I don't recall if you recall, he said I prefer
12 not to answer questions about Dr. Sackeim.

13 It's not his decision to make who gets warned and who
14 doesn't. They're putting a product out into the market that
15 bears a risk that others in the medical community, including
16 authoritative members of the medical community have deemed to
17 have a risk. Yet Dr. Swartz, for financial reasons, believes
18 that his device has no harm, causes no injuries, and makes a
19 decision for the rest of the patients and for the rest of
20 doctors that he's not going to give any warnings.

21 And also the statement where he said these have not
22 been structurally verified, the Calloway article, which I
23 previously discussed, demonstrated there was indeed studies
24 showing structural changes.

25 The next factor -- so I believe, onto the second

Closing Argument by Mr. Esfandiari

1 element, that the device was not accompanied with adequate
2 warnings. I think it's fair to say that, given the state of
3 the medical literature and what we know and the fact that they
4 acknowledge and admit that their device, the manual, did not
5 contain any warnings about brain injury and any adequate
6 warnings about memory loss, plaintiff has met the second
7 element.

8 The third element is causation, that basically that
9 these -- the lack of warning caused Mr. Thelen's injury. And
10 this is a two-prong analysis.

11 First of all, there was a reference to proximate
12 cause. And His Honor has given you instructions at what
13 proximate cause means. A proximate cause is a cause that
14 produces a result in a natural and continuous sequence and
15 without which the result would not have occurred. It need not
16 be the sole cause. It may be a substantial factor or
17 substantial contributing cause in bringing about the injury.

18 Secondly, we must demonstrate in the one that is in
19 red, that had Dr. -- Somatics issued warnings to Dr. Sharma,
20 that Dr. Sharma would have relayed those warnings, and armed
21 with those warnings, Mr. Thelen and his family would have
22 rejected ECT. Those facts have been established.

23 First, Dr. Sharma, we saw his videotaped deposition.
24 But he read the manual. He relied on the manual. He wants to
25 give good data to his patients. He's concerned about brain

Closing Argument by Mr. Esfandiari

1 injury, but he was asked -- he testified he did not believe ECT
2 causes brain damage. I don't believe that. He said we don't
3 talk to patients about brain damage.

4 And then he was further asked, well, had you been
5 warned that ECT causes brain damage by Somatics, would you have
6 warned? And he responded, yes, I would. And that in terms of
7 who -- the consent process, he would have included it, and it's
8 always the patient's decision, after being armed with
9 appropriate information, whether to consent to a procedure or
10 not. Dr. Sharma would not do ECT without adequate -- without
11 the consent of Mr. Thelen. Here, in this case, Mr. Thelen's
12 consent was not fully given, because he was not fully informed
13 of a risk of brain injury.

14 And then the ECT device caused Mr. Thelen's brain
15 damage. From the outset in the opening, I acknowledged
16 Mr. Thelen had a difficult life. He began suffering from
17 depression pretty much since after high school. Yet
18 notwithstanding his depression, he was able to live a life, a
19 troubled life. There was instances where he self-harmed,
20 self-medicated to excess. Medications did not work. But he
21 was able to still get married and had a wife for six years. He
22 worked, albeit on and off. He was able to make it day by day.
23 He had his memories. He was able to do activities. There's
24 some of the pictures of Mr. Thelen pre ECT. We heard how he
25 loved to enjoy fishing, spending time with his dad. Here he

Closing Argument by Mr. Esfandiari

1 is, a picture in a newspaper at his job in the tree-trimming
2 business. He's the one handing the equipment forward.

3 And there's no -- no medical record providing that
4 Mr. Thelen had any memory loss issues pre ECT. We look at
5 multiple records, patient's recent and remote memory intact.
6 These are all pre ECT. You'll have all these into evidence.
7 In the interest of time, just going to jump forward.

8 Now, there was some evidence from reference in a
9 medical record that he may have experienced a head trauma. But
10 there's no emergency visit. There's no urgent-care visit.
11 There is no evidence that he was ever taken to the hospital or
12 to the doctor as a result of any head trauma. And you may
13 recall his father testified that he was close friends with the
14 two owners of the tree company that Mr. Thelen worked with.
15 And if Mr. Thelen had indeed suffered head trauma, he would
16 have been informed.

17 Now, after ECT, Mr. Thelen -- we went through the
18 records, and I don't need to go through them, but began to
19 experience memory loss. He was told by Dr. Sharma that this is
20 going to be short-term, that it would go away after ECT. And
21 so he continued his ECT treatment, continued it 95 times, going
22 under anesthesia each time, having the voltage increased each
23 time to the point that the last 40 sessions were at a
24 hundred percent of the 3 billion billion electrons that are
25 passed through this machine, in which go from one electrode to

Closing Argument by Mr. Esfandiari

1 the other, majority of them, and make contact with the brain,
2 the hippocampus.

3 After ECT, he thought, well, hopefully my brain, my
4 memory loss will come back. He went to multiple doctors,
5 seeking help. It was not until Dr. Hannappel, in August of
6 2017, did a neuropsych evaluation and found that Mr. Thelen
7 suffered from neurocognitive disorder. This was the first time
8 Mr. Thelen was informed by a doctor that he had brain jury,
9 what neurocognitive disorder is brain injury.

10 He then had an EEG, and Dr. Omalu explained to you
11 what an EEG is, that tests his brain activity. The EEG came
12 back as abnormal, including with abnormalities in working
13 memory and deficits in memory cognition. He saw a
14 psychiatrist, Dr. Herman, who diagnosed him with major
15 neurocognitive disorder, secondary to previous ECT. Diagnosed
16 by his own doctor. This was in 2018.

17 And then we heard from Dr. Omalu, one of the top
18 brain injury doctors in the world. People from all over the
19 world send brain tissue samples to Dr. Omalu to examine. He's
20 consulted on numerous brain injury cases. Does it both in the
21 criminal world, civil world. He did what's called a
22 differential diagnosis, which he explained to you, which is a
23 standard procedure for analyzing whether somebody has suffered
24 injury as a result of a foreign agent. And he analyzed
25 Mr. Thelen's full medical records [REDACTED]

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[REDACTED]

[REDACTED] He looked at the possibility of head trauma. Looked at the medical literature. And what did he conclude? That to a reasonable degree of medical certainty, the 95 ECT sessions were a substantial and significant factor of his brain damage. He looked at the whole universe of data, as well as the full experience of Mr. Thelen, to reach that conclusion.

Defendants did not bring anyone to challenge Dr. Omalu. They didn't bring a brain injury expert to counter him. And he further explained why some of the findings -- why MRIs and CT scans are not adequate enough to analyze brain injury, that this is something that you do through symptomology, and other means, and the EEG.

Now, so as far as the third factor is concerned, whether ECT caused Mr. Thelen's injuries, the evidence, Dr. Omalu's testimony, Mr. Thelen's own doctors confirmed that ECT did indeed cause his neurocognitive decline. Again, his own doctors, these are not people paid by us. Multiple of his own doctors confirmed that ECT is the cause of his brain injury. Yet, Somatics brought in two people, Dr. Bilder and Dr. Coffey, who had never laid eyes on Mr. Thelen, and claimed, no, his doctors are wrong, Mr. Thelen doesn't have any problems.

The next factor is damages. And I'll go through

1 these when we discuss the verdict form.

2 So what are defendant's defenses or alibis in this
3 case? Their primary defense is the statute of limitations.
4 Mr. Thelen filed this lawsuit July 24th, 2020, within 4 years
5 after his last ECT treatment. Statute of limitations is four
6 years. He filed it within four years of his last ECT
7 treatment. His ECT treatment was in July 25th, 2016. So
8 there's no doubt that we met the statute of limitations.

9 Yet, Somatics argues, well, no, no, no, even though
10 our product doesn't cause brain injury, and even though we deny
11 it causes brain injury, we've never warned about it,
12 Mr. Thelen, when he was undergoing ECT and was having those
13 memory problems, he should have known that he has permanent
14 brain injury at that point. Even though no doctor at that
15 point had diagnosed him, even though all of his doctors had
16 told him this is just a limited injury that is going to resolve
17 after the ECT has ended.

18 And so Mr. Thelen, based on that reliance, continued
19 his ECT treatment. And then after ECT, he waited for his
20 memories to return. They never returned. It wasn't until 2017
21 when he saw Dr. Hannappel that he was confirmed that he had
22 brain damage.

23 So in terms of the ECT defense, I think, it's -- and
24 also it's defendant's burden on the statute of limitations. So
25 they're the ones that have to prove that. But I think it's

Closing Argument by Mr. Esfandiari

1 pretty clear that they failed to do so.

2 And then who did Somatics bring in to defend their
3 conduct? They brought in Dr. Bilder who took the stand.
4 Again, never seen Mr. Thelen, never treated him. Didn't even
5 bother to go to Nebraska to do the examination. He had another
6 doctor do it. And sat there for an hour, basically, trying to
7 imply that Mr. Thelen is lying and he really doesn't have any
8 neurocognitive issues, and that Dr. Hannappel is wrong. Even
9 though he -- Dr. Bilder is getting paid generously by Somatics
10 to provide this testimony, Dr. Hannappel and the other
11 psychiatrists are simple treaters.

12 And then in response to the very first question that
13 Ms. Alarcon asked him, is Mr. Thelen faking his memory
14 complaints.

15 I don't think so.

16 He spent an hour throwing implications that
17 Mr. Thelen is faking it, and then on cross-examination, folded.

18 Who was the next guy? We saw Dr. Coffey yesterday.
19 He was my favorite witness. He took the stand, claimed he
20 looked at 12,000 medical records and was confident that none of
21 Mr. Thelen's doctors diagnosed him with neurocognitive
22 disorder.

23 We showed him the records. You saw his reaction.
24 That's who they brought to tell Mr. Thelen that you're lying,
25 you don't have any problems, you're making this up. Testified

Closing Argument by Mr. Esfandiari

1 have any of Mr. Thelen's doctors diagnosed him with major
2 neurocognitive disorder secondary to ECT, again, he said, no,
3 absolutely not, they didn't. Again, we saw that that was
4 false. We showed him multiple records to the contrary. And he
5 claimed, well, I didn't receive those records.

6 And then he went on to say, well, Mr. Thelen really
7 wasn't articulating his memory loss to anybody. How many
8 records did we go with through how many providers, I don't need
9 to remind you of yesterday, where Mr. Thelen was complaining to
10 anyone who would listen about his memory harms. And his
11 doctors, what did they do? Test that -- provided tests, the
12 neurocognitive tests, the EEG, and eventually prescribed him
13 Alzheimer's medication.

14 **THE COURTROOM DEPUTY:** Counsel, 40 minutes.

15 **MR. ESFANDIARI:** Thank you.

16 So this is the verdict form, ladies and gentlemen.
17 Asks a number of questions. The first, did Somatics -- did
18 Somatics -- did we establish that Somatics failed to warn,
19 basically? The answer to that is yes.

20 The next is the causation issue, was the absence of
21 warning a cause of Mr. Thelen's injuries? We established that
22 through Mr. Thelen's own doctors, Dr. Omalu, and others who
23 testified, that the answer to that question is yes.

24 Finally, as to Mr. -- as Somatics' statute of
25 limitations defense, you're asked whether, you know, that it

Closing Argument by Mr. Esfandiari

1 was filed longer than four years, the answer to that question
2 is no. Mr. Thelen filed his complaint within four years of his
3 last ECT treatment.

4 And then we get to the issue of damages. A debt has
5 been created, ladies and gentlemen. When you destroy someone's
6 property, you're responsible. When you destroy their
7 livelihood and rob them of their memories, you're equally if
8 not more liable.

9 Testimony in this case, in terms of the damages that
10 are available are for future medical care, you heard from
11 Dr. Witty who put the range at 949,000 to 2 million. She
12 relied upon national averages for Nebraska, the averages for
13 Nebraska, as that is what's common in the industry. Somatics
14 did not bring any expert to challenge her methodology or how
15 she did the calculations.

16 Now, there was discussion, well, you should have used
17 some discounted rate and so forth, but in their industry, the
18 standard practice is to use the national average, because
19 you're never assured that these coupons and so forth are going
20 to exist in the future.

21 I remember a time when Pan Am and TWA were the
22 greatest airlines. They don't exist anymore. Who's to say RX,
23 GoodRx is going to be around in a few years, and so we need to
24 judge all of our -- Mr. Thelen's 35 years of medical and
25 treatment, including we saw that his insurance wasn't even

Closing Argument by Mr. Esfandiari

1 covering his dementia medication, based on what GoodRx may or
2 may not provide. The range is between 949 and 2 million. It's
3 your decision.

4 The economic harm for loss of income, Dr. Thomas
5 described that at 375,000.

6 Finally, we get to the last item, pain and suffering.
7 There's no physical pain here. So you don't need to make any
8 awards for that. But there is mental suffering, inconvenience,
9 humiliation, injury to reputation, loss of society and
10 companionship. I'm out of time, unfortunately.

11 I don't know what one puts on the loss of memories.
12 Mr. Thelen lost his memories as a result of ECT, essentially,
13 from 2016, and we heard that he's going to have another 35
14 years of life. That's 42 years. 42 years times 365 days is
15 over 15,000 days where Mr. Thelen will no longer have memories
16 that he shared with his family. He's isolated, alone, people
17 think he's crazy.

18 Brain injury is what's called an invisible injury,
19 because there's no wheelchair, there's no crutches. People see
20 you and think he's retarded, he's dumb. Somatics brought
21 people in here to say he's faking it. What price do you put on
22 that?

23 Many lawyers, there are five elements of
24 noneconomic -- mental suffering, inconvenience, humiliation,
25 injury to reputation, and loss of society, would say let's

Closing Argument by Mr. Esfandiari

1 award him a hundred dollars for each one of those, so \$500 a
2 day for the 1,500 -- 15,000 days that he's going to have to
3 live with without his memories. I'll let you do the
4 calculation of what that comes out to.

5 But if a -- when I think of things that are
6 invaluable, and I think memories are, can't put a number on it,
7 that they're beyond value. They're precious. I think of
8 expensive art work, Rembrandts, van Gogh, that if it's lost,
9 it's irreplaceable.

10 **MS. COLE:** Objection, Your Honor.

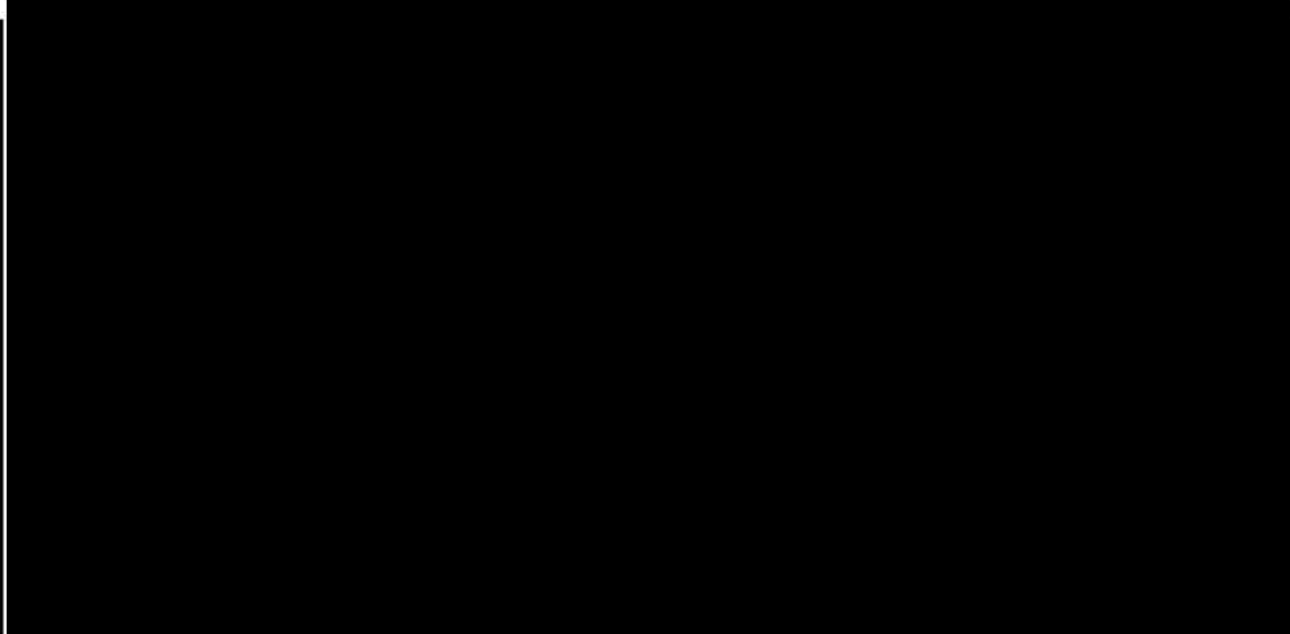
11 **MR. ESFANDIARI:** What price do you put on those?

12 **THE COURT:** Overruled.

13 **MR. ESFANDIARI:** Van Goghs, we know what they go for.
14 What price do we put on them? That burden is on you, ladies
15 and gentlemen. I thank you for your time. And Mr. Thelen
16 likewise thanks you.

17 **THE COURT:** All right. We'll take a short break so
18 the attorneys can move the computer stuff around and have that
19 go smoothly. Just leave your tablets on the chair, please.

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MR. ESFANDIARI: All right. Ms. Cole talked about the hard lifting of boxes she had to do to give them to her experts. Apparently, they were so hard and so heavy that they neglected to give the primary expert the record from Dr. Herman who diagnosed Mr. Thelen with major neurocognitive disorder secondary to previous ECT. Ask yourself, of all the records that failed to make it to Dr. Coffey and Dr. Bilder, this is the record they chose not to give to their experts.

She got up here and started talking about the mechanism of action of ECT and gets the synapses firing and the drugs working. Her own client admitted under oath that, to this date, nobody knows how ECT works. Yet, suddenly, Ms. Cole was able to come up with the mechanism of action for how it works. There is no mechanism of action.

Then she questions the EEG studies that our client had that showed he has brain injury --

THE COURT: A minute goes quite quickly.

1 **MR. ESFANDIARI:** It went?

2 **THE COURT:** It's over. Thank you.

3 **MR. ESFANDIARI:** Thank you.

4 Thank you, Your Honor.

5 **THE COURT:** All right. Members of the jury,
6 thank you for your attention during this trial. We have now
7 reached the final stage of the proceedings.

8 When you get to the jury room, the first thing you
9 should do is choose one of your members to act as a foreperson.
10 The foreperson will direct your deliberations and will speak
11 for you in court. When you've all agreed on a verdict, your
12 foreperson must fill in the form, sign it, and date it. Then
13 you'll return to the courtroom.

14 Your verdict must be unanimous. In other words, you
15 must all agree. Your deliberations are secret, and you'll
16 never have to explain your verdict to anyone. Each of you must
17 decide the case for yourself, but only after fully considering
18 the evidence with the other jurors. So you must discuss the
19 case with one another and try to reach an agreement.

20 While you're discussing the case, don't hesitate to
21 reexamine your own opinion and change your mind if you become
22 convinced that you were wrong, but don't give up your honest
23 beliefs just because others think differently or because you
24 simply want to get the case over with.

25 If you wish to communicate with me at any time,

1 please write down your message or question and give it to the
2 bailiff. The bailiff will bring it to me, and I'll respond as
3 promptly as possible, either in writing or by talking to you in
4 the courtroom. But I caution you, do not tell me how many
5 jurors have voted one way or the other at that time. If you do
6 have questions, I am required to reconvene court and talk with
7 the attorneys before I answer. This process may take some
8 time. So you may continue your deliberations while you wait
9 for my answer.

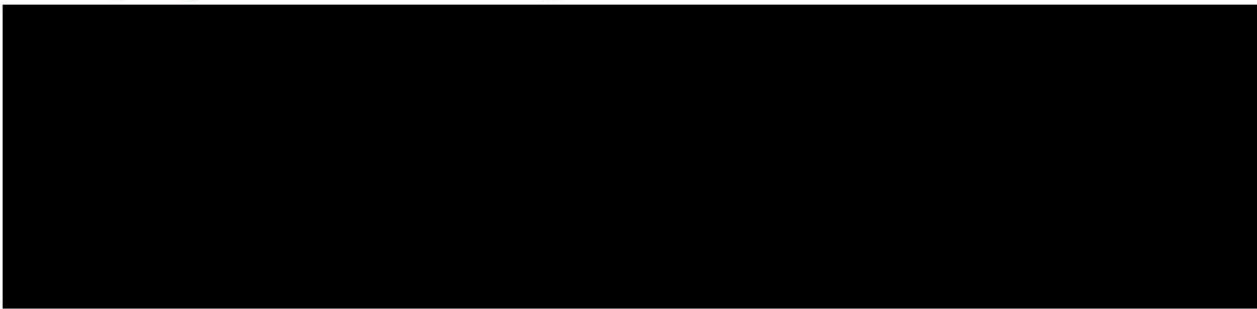
10 Thank you again for your attention. In closing,
11 remember, that in a very real way, you're judges, judges of the
12 facts. Your only interest is to seek the truth from the
13 evidence in the case.

14 You may now retire to the jury room to begin your
15 deliberations. Momentarily, we will bring all of the evidence
16 and these jury instructions in to the jury room for you. Until
17 that time, you are directed to go to the room and begin
18 deliberating.

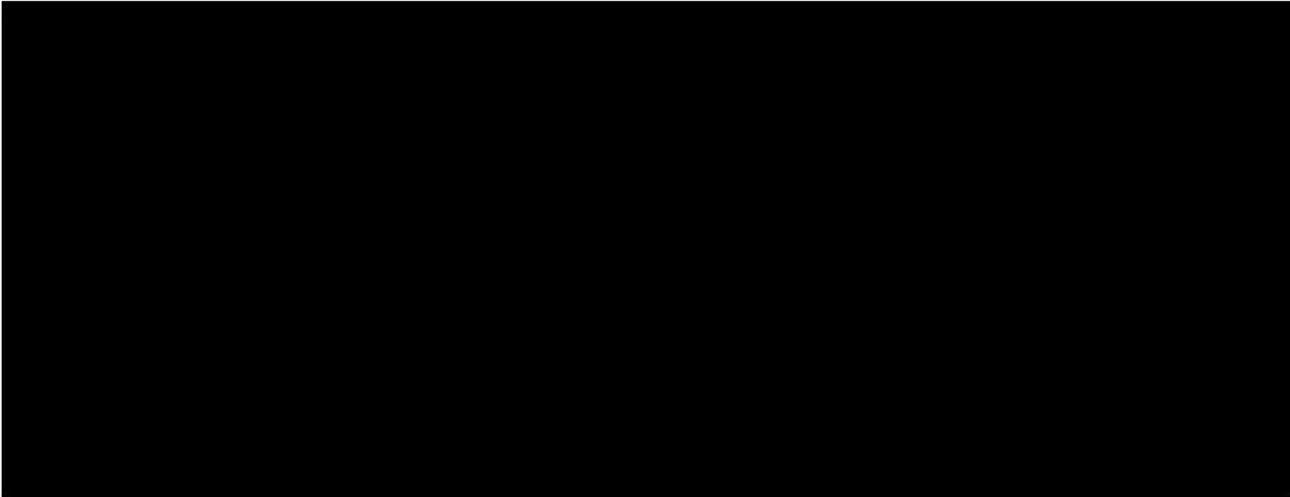
19 Thank you.

20 **THE COURT SECURITY OFFICER:** All rise for the jury.

21 (Jury out at 10:36 a.m.)
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THE COURT: Already. Have a seat, everybody.

Members of the jury, I put your -- you submitted three questions, I put them up on the Elmo. I numbered them one, two, and three. In the event you have further questions, please start numbering them, four, five, six, next whatever, if there are more. That way, we can keep track of them.

As to Question Number 1, Are we able to review Dr. Sharma's testimony either by video or transcript?

We have the ability to do that technologically. I'm not clear if you're asking to -- what you cannot do is get a copy and take it back in the jury room and go through it on your own. If it's reviewed, it's reviewed here in open court and would be played on a video. All right?

Now, I'm not inclined to replay the entire testimony of that witness for you in open court. If you have something more specific that you think you can articulate in a question, feel free to do that, and we'll consider it. I'm not saying yes, and I'm not saying no. I'm leaving that open.

Now, as to Questions 2 and 3, my answer is as

Jury Questions

1 follows:

2 We cannot answer these questions other than to inform
3 you that you must rely on the evidence that has been presented
4 and the instructions on the law you have been given.

5 All right? Please retire to continue your
6 deliberations. You want those questions back? You need those
7 back?

8 **JUROR:** Yeah.

9 **THE COURT:** You want them back? Okay. We'll give
10 them back. But don't write on them or anything. If you have
11 something else, make it a new question. All right? Thank you.

12 **THE COURT SECURITY OFFICER:** All rise for the jury.

13 **THE COURT:** As a matter of fact, we'll make a
14 photocopy and give you a copy. We'll keep these as the
15 original.

16 (Jury out at 1:32 p.m.)

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Jury Questions

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So just bring them out.

THE COURT SECURITY OFFICER: All rise for the jury.

(Jury in at 2:20 p.m.)

THE COURT: Okay. Have a seat, everyone.

Members of the jury, you have Question 4 up there on the Elmo, which you wrote. I won't repeat.

I've been visiting with the lawyers, and we have tried to figure out something that would assist you, but at this time, I will inform you that you must rely on your recollection of the evidence, and we will not be playing any additional parts of the Dr. Sharma's testimony for you in that regard. All right?

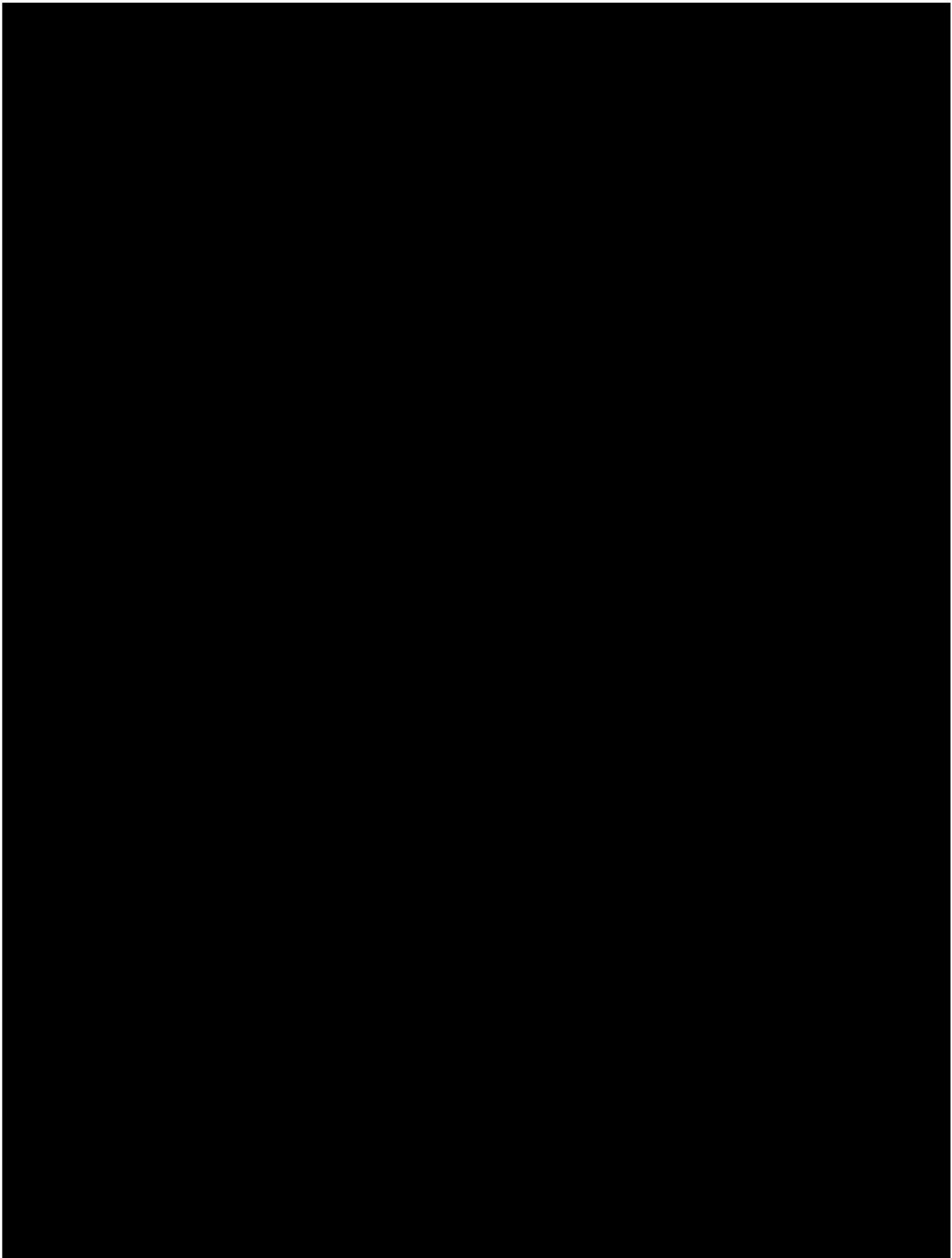
Thank you. Please retire to continue deliberating.

THE COURT SECURITY OFFICER: All rise for the jury.

Jury Questions

(Jury out at 2:21 p.m.)

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THE COURT SECURITY OFFICER: All rise for the jury.

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(Jury in at 3:28 p.m.)

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THE COURT: All right. Have a seat, everybody. The jury has a verdict, yes.

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JURY FOREPERSON: Yes.

Verdict

1 **THE COURT:** Go ahead and hand that to the bailiff,
2 please, and have a seat.

3 All right. In the case of Jeffrey Thelen versus
4 Somatics, Verdict Form.

5 Do you find from a preponderance of the evidence,
6 one, that Somatics placed the ECT device on the market without
7 adequate instructions or warnings to the physician who
8 prescribed ECT treatment to Thelen?

9 Answer, yes.

10 That the absence of adequate instructions or warnings
11 was a proximate cause of damage to Thelen?

12 No.

13 And so say we all, this 8th day of June 2023, and
14 it's signed by the foreperson.

15 Pursuant to my instructions, the jury has not
16 answered the other questions.

17 There has been a request to poll the jury. So at
18 this time, I'll just ask each one of you, "Is that your
19 verdict?"

20 And I'll just start with the lady in the front.

21 Is that your verdict?

22 **JUROR:** Yes.

23 **THE COURT:** Is that your verdict?

24 **JUROR:** Yes.

25 **THE COURT:** Is that your verdict?

Verdict

1 JUROR: Yes.

2 THE COURT: Is that your verdict?

3 JUROR: Yes.

4 THE COURT: Is that your verdict?

5 JUROR: Yes.

6 THE COURT: Is that your verdict?

7 JUROR: Yes, Your Honor.

8 THE COURT: Is that your verdict?

9 JUROR: Yes, Your Honor.

10 THE COURT: Is that your verdict?

11 JUROR: Yes, sir.

12 THE COURT: All right. Very good.

13 So, members of the jury, thank you one more time for
14 your service. I have to say something to the lawyers briefly,
15 and then I'm going to visit with you in the jury room in just a
16 moment before you go. But just in -- publicly here, on behalf
17 of all the lawyers in this case, all the participants in this
18 case, and the entire legal system, we do thank you for giving
19 us over a week of your time hearing this case, and you've paid
20 careful attention, which I know everyone appreciates.

21 So thank you again, and I'll visit with you
22 momentarily. All right? Thank you.

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