

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

IN THE MATTER OF
BREATHOMETER, INC.

File No. 0023191

1623057



**BREATHOMETER, INC.'S AND CHARLES MICHAEL YIM'S
PETITION TO QUASH CIVIL INVESTIGATIVE DEMANDS**

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Attorneys for Petitioners

INTRODUCTION

Breathometer, Inc. (“Breathometer”) and Charles Michael Yim (collectively “Petitioners”) hereby petition the Federal Trade Commission (“FTC”), pursuant to 16 C.F.R. § 2.7(d) and 15 U.S.C. § 57b-1(f) to quash two CIDs issued by the FTC on July 13, 2016.

Petitioners have already produced a substantial quantity of documents responsive to the FTC’s investigation, pursuant to an earlier CID issued on March 9, 2016. The July 13, 2016 CIDs seek information that is largely duplicative of Petitioners’ earlier document production. Petitioners respectfully petition the FTC to quash the July 13, 2016 CIDs in their entirety, by eliminating the unreasonable and unduly burdensome CID specifications requiring:

- 1) Oral testimony by Breathometer, and its President and CEO Charles Michael Yim; and
- 2) Documents and information related to that testimony.

BACKGROUND FACTS

The facts underlying this Petition are set forth in two letters that Petitioners sent to Staff, and a presentation Breathometer and its counsel made to Staff, regarding the March 9, 2016 CID. These are attached to this Petition as Exhibits A, B, and C.¹

In short, Petitioners previously marketed two Breathometer products, the “Original” and the “Breeze.” Both are smartphone breath analyzers. Petitioners began marketing the Breeze in late 2014, at which time it ceased manufacturing the Original. Shortly thereafter, Petitioners received some complaints about the Breeze’s accuracy under certain conditions. Petitioners decided in early 2015 that Breathometer would cease selling the Breeze, and so informed Breathometer’s retail partners later that same year. At that time, Petitioners also offered to buy back remaining inventory of *both* the Breeze and the Original from [REDACTED], Breathometer’s two leading retail partners. Petitioner’s revenue stream from the Original and Breeze largely ceased in 2015. Petitioners have made no sales of the Breeze in 2016, and made only *de minimis* sales of the Original in early 2016. Sales of Original ceased entirely by the end of the first quarter of 2016.

Before receiving the initial CID, Petitioners had already voluntarily and completely ceased manufacturing and selling both the Original and the Breeze. Petitioners took this action before receiving notice from *any* federal, state, or local agency of any concerns about the claims for or safety of either the Original or Breeze products. Petitioners responded to the March 9, 2016 CID, with the production of many documents. Breathometer and its counsel also met with FTC staff, and on June 9, 2016 sent an email notice to all registered Breathometer Breeze customers advising them to discontinue use of the Breeze because of concerns about the product’s accuracy. *See* Exhibit A, Att. A. Yet, in spite of Petitioners’ substantial compliance with the earlier CID, its complete and voluntary halt of Breathometer’s manufacture and

¹ These exhibits contain highly confidential commercial information and should be treated as confidential pursuant to 16 C.F.R. § 4.9(c).

marketing of the subject products *prior* to receipt of the March 9, 2016 CID, and its subsequent notice to registered Breeze customers advising them to stop using that product the FTC issued the additional CIDs that are the subject of this Petition. These additional CIDs request Charles Michael Yim's and the company's oral testimony as well as documentation not already produced relating to the now-discontinued products, Breathometer's finances, and Petitioner's document production.

Breathometer is a small company that has no revenue from the Original and Breeze, and indeed, has no 2016 revenue from any other product. The company has no way to offset the costs of responding to the FTC's demands. Nevertheless, Petitioners conducted a reasonable search of Breathometer's files and provided the FTC with documents responsive to the March 9, 2016 CID. After receiving the July 13, 2016 CIDs, in light of their previous efforts responding to the FTC's inquiry, the discontinued status of the products, and Breathometer's limited resources, Petitioners asked Staff to terminate the FTC's investigation without their being required to comply with the July 13, 2016 CIDs. This reasonable request was denied, necessitating the present Petition.

LEGAL OBJECTIONS

A federal agency's investigative subpoena is enforceable only if the information sought is "reasonably relevant," and not "unduly burdensome to produce." *FTC v. Texaco, Inc.*, 555 F.2d 862, 872, 881 (D.C. Cir. 1977) (en banc) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)). A CID demand is unduly burdensome where "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Id.* at 882 (citing *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975)).

The CID specifications that Petitioners challenge here would unduly burden Breathometer and disrupt its normal business operations. The burden presented by the FTC's demands is unreasonable, because those demands seek information that Petitioners have already substantially supplied.

1. The Challenged CID Specifications Demand Testimony and Documents That Are Unnecessary in Light of Information Already Provided By Petitioners.

As stated above, Petitioners have already provided a substantial number of documents to the FTC in response to its investigation, and provided information about the company and its activities to Staff regarding the same. *See* Exhibits A, B, C.

Petitioners conducted a reasonable search of Breathometer's files and produced (1) copies of advertisements for Breathometer brand breathalyzer products, (2) copies of documents Breathometer relied upon to substantiate claims for the breathalyzer products; (3) the owners' manuals for the Original and Breeze; (4) documents relating to any consumer complaints regarding the Original or Breeze; (5) documents relating to communications between Breathometer and the U.S. Patent Office; and (6) documents relating to the accuracy of the Original and Breeze in measuring blood alcohol concentration. Petitioners further responded to FTC interrogatories requesting website addresses, the dissemination of various advertisements,

sales data for the Breathometer products, and information regarding Breathometer's corporate structure, officers, and employees.

Moreover, in consultation with Staff, Petitioners attempted to notify all ultimate consumers of the Breathometer Breeze by email that they should no longer use the product. Petitioners determined that this email was received in the valid email accounts of registered Breathometer Breeze users. See Exhibit A, at 3 [REDACTED]

2. The Challenged CID Specifications Would Be Unduly Burdensome to Petitioners.

The FTC has demanded that Petitioners produce the testimony of Breathometer and its CEO Charles Michael Yim, as well as documents relating to that testimony. Petitioners do not have the resources to comply with these demands without completely disrupting Breathometer's business operations.

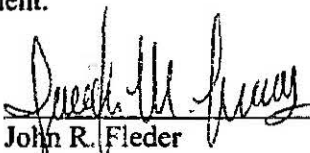
Compliance with the FTC's demands in the July 13, 2016 CIDs would divert Breathometer and Mr. Yim's limited time, energy, and financial resources, away from its research and development activities regarding unrelated products. [REDACTED]

CONCLUSION

For the aforementioned reasons, and those stated in Exhibits A, B, and C to this petition, Petitioners respectfully request that the FTC quash the July 13, 2016 CIDs.

CERTIFICATION

Pursuant to 16 C.F.R. § 2.7(k), counsel for Petitioners hereby certifies that counsel conferred with Staff in a good faith effort to resolve by agreement the issues set forth in this Petition, but the parties were unable to reach agreement.

(6) 
John R. Fleder
Jennifer M. Thomas

CERTIFICATE OF SERVICE

I certify that, on August 2, 2016, I caused the original and twelve (12) copies of Breathometer, Inc.'s and Charles Michael Yim's Petition to Modify or Quash Civil Investigative Demand to be delivered to the Secretary of the Federal Trade Commission at the following address:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
Constitution Center
400 Seventh Street, S.W.
Suite 5610
Washington, D.C. 20024

I further certify that, on August 2, 2016, I caused a copy of Breathometer, Inc.'s and Charles Michael Yim's Petition to Modify or Quash Civil Investigative Demand to be delivered to Commission Counsel Janet M. Evans at the following address:

Janet M. Evans
Division of Advertising Practices
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite CC-10528
Washington, D.C. 20580

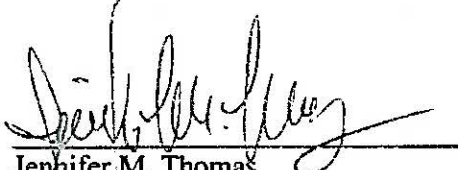
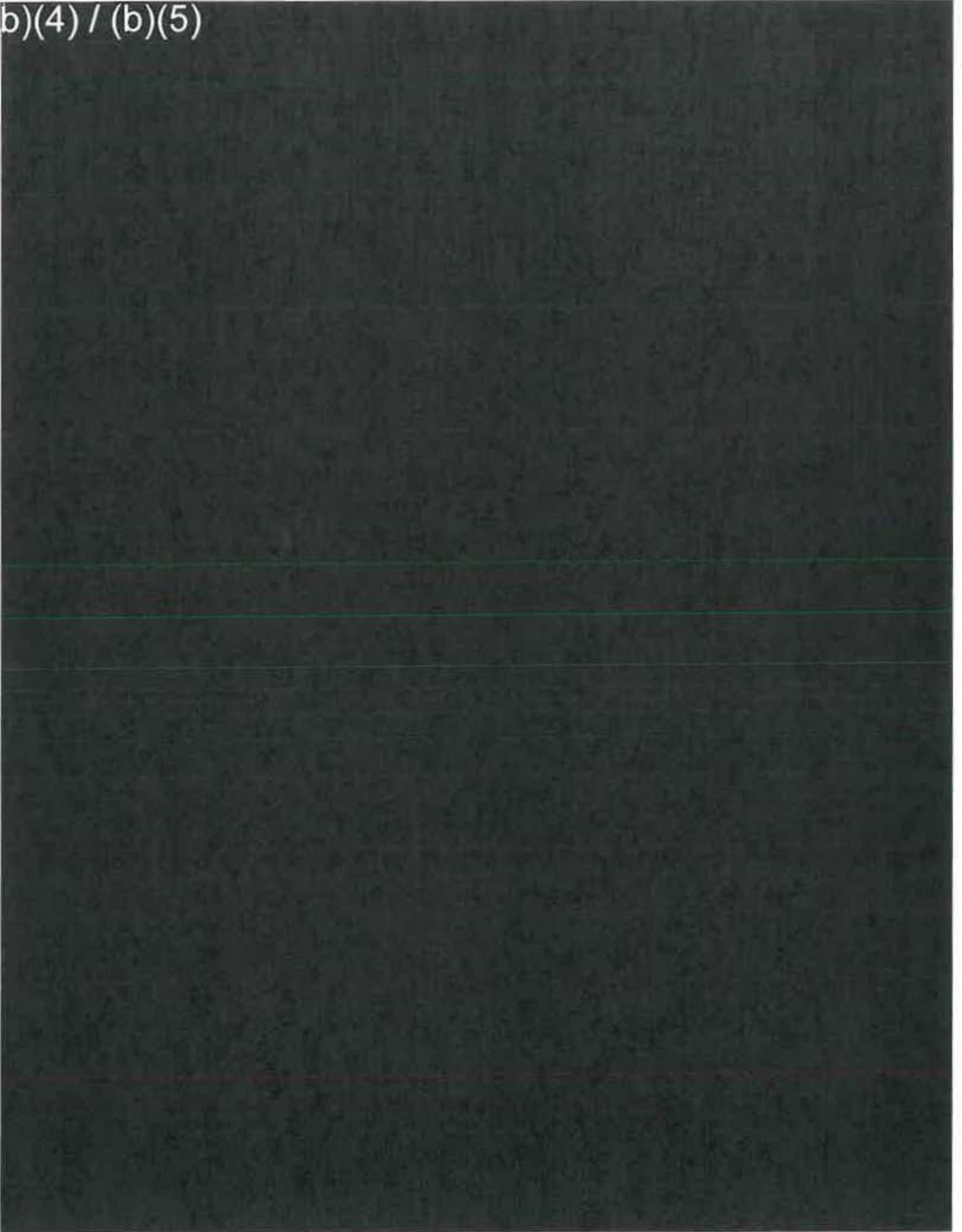

Jennifer M. Thomas

Exhibit A

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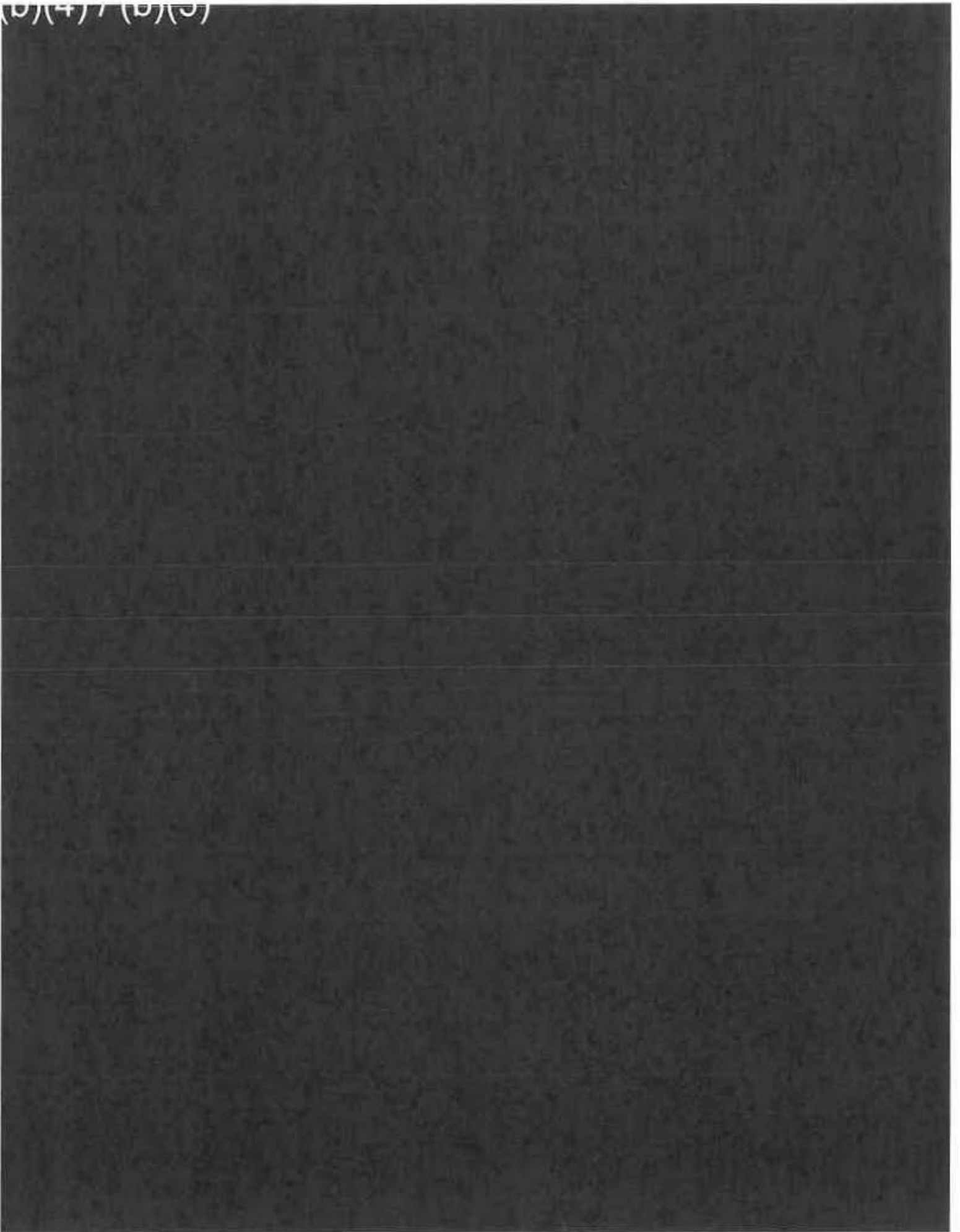


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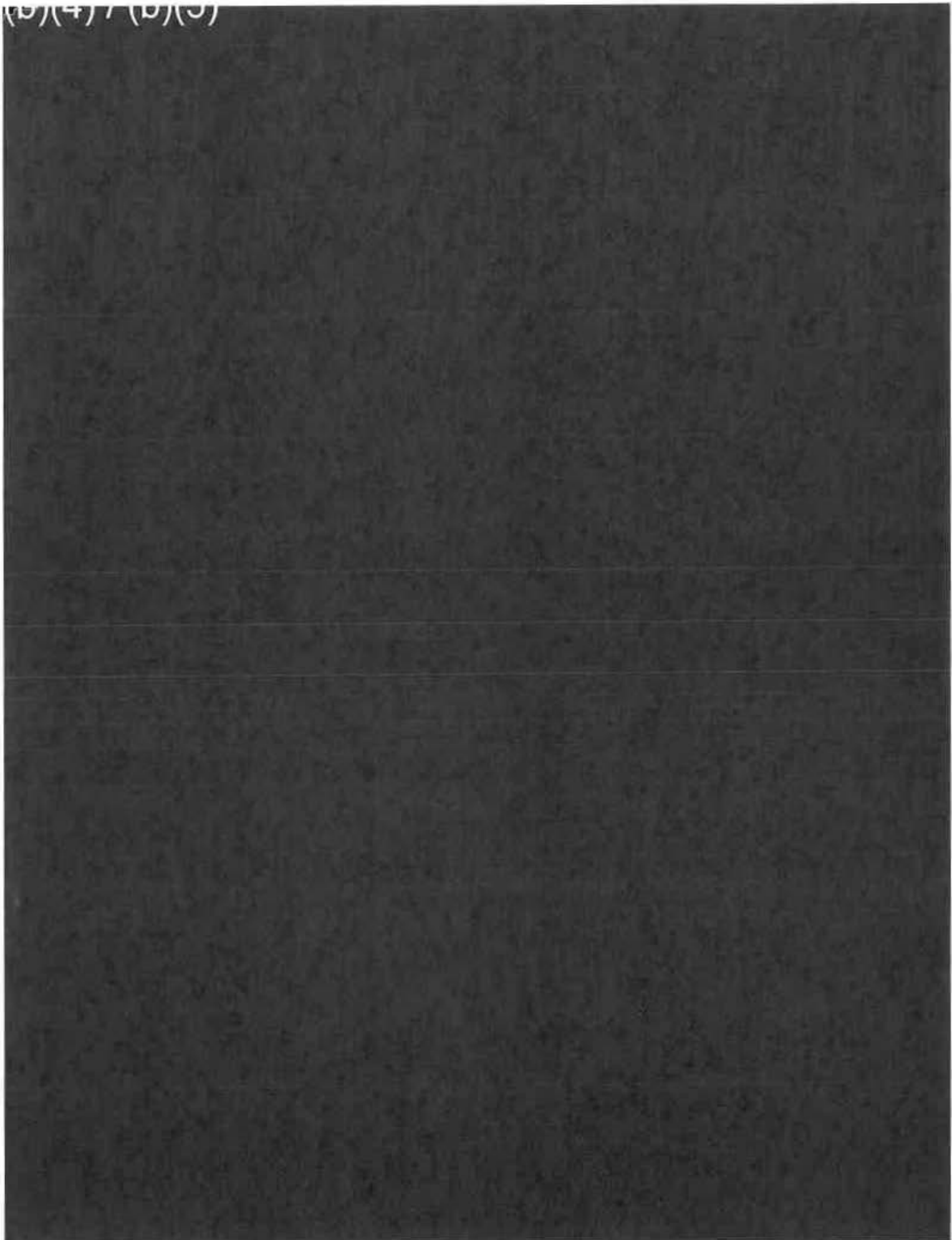
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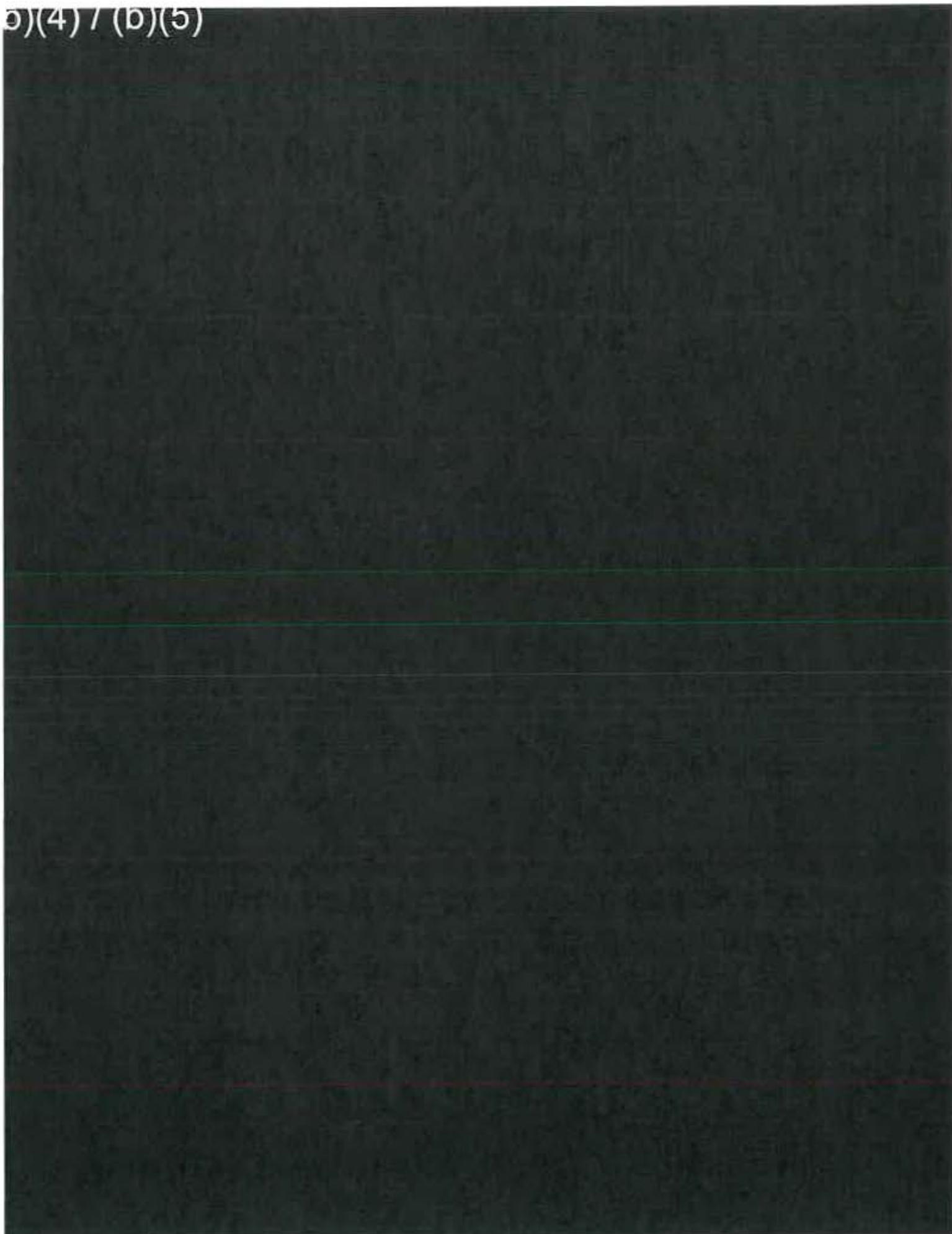
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Exhibit B

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Exhibit C

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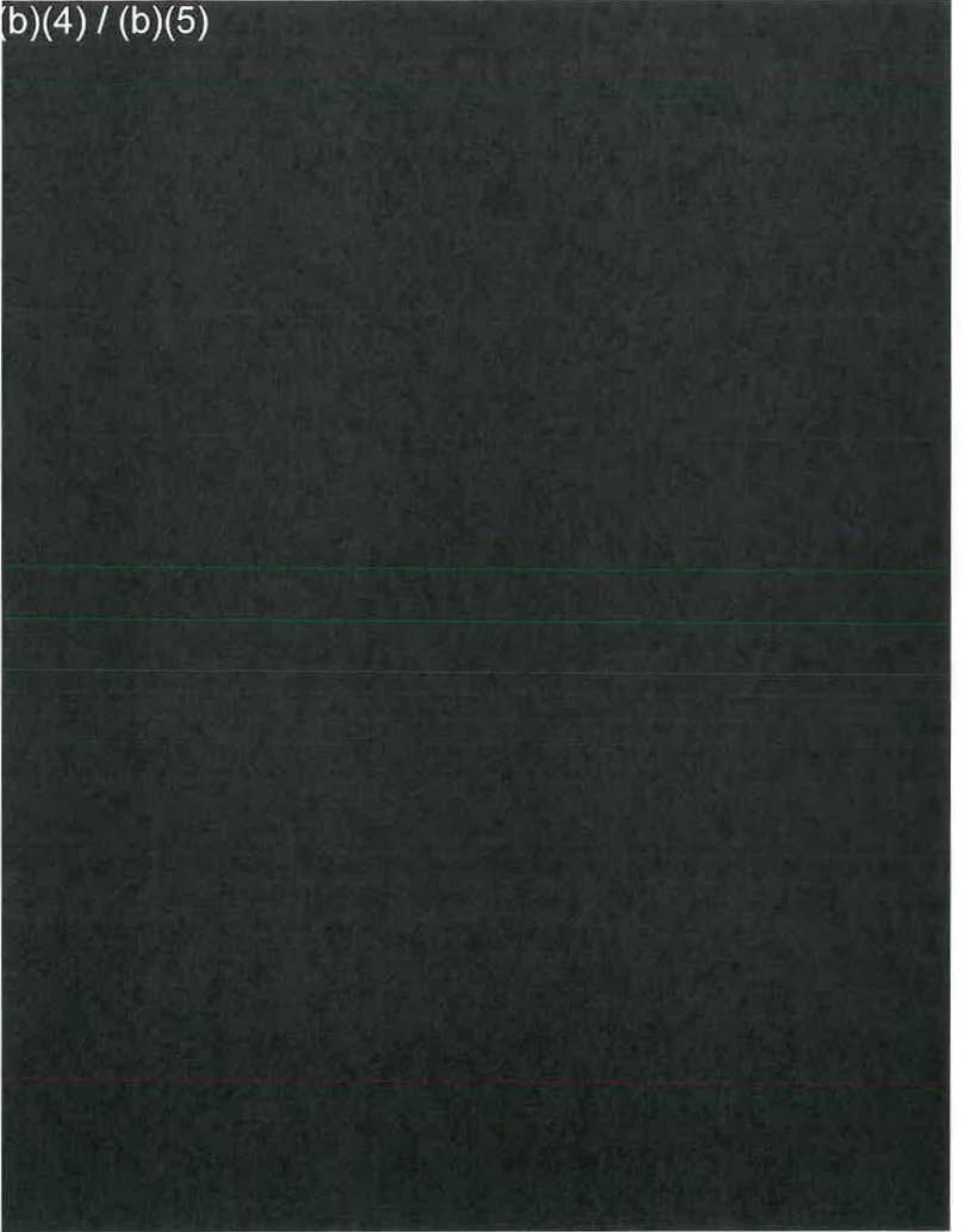
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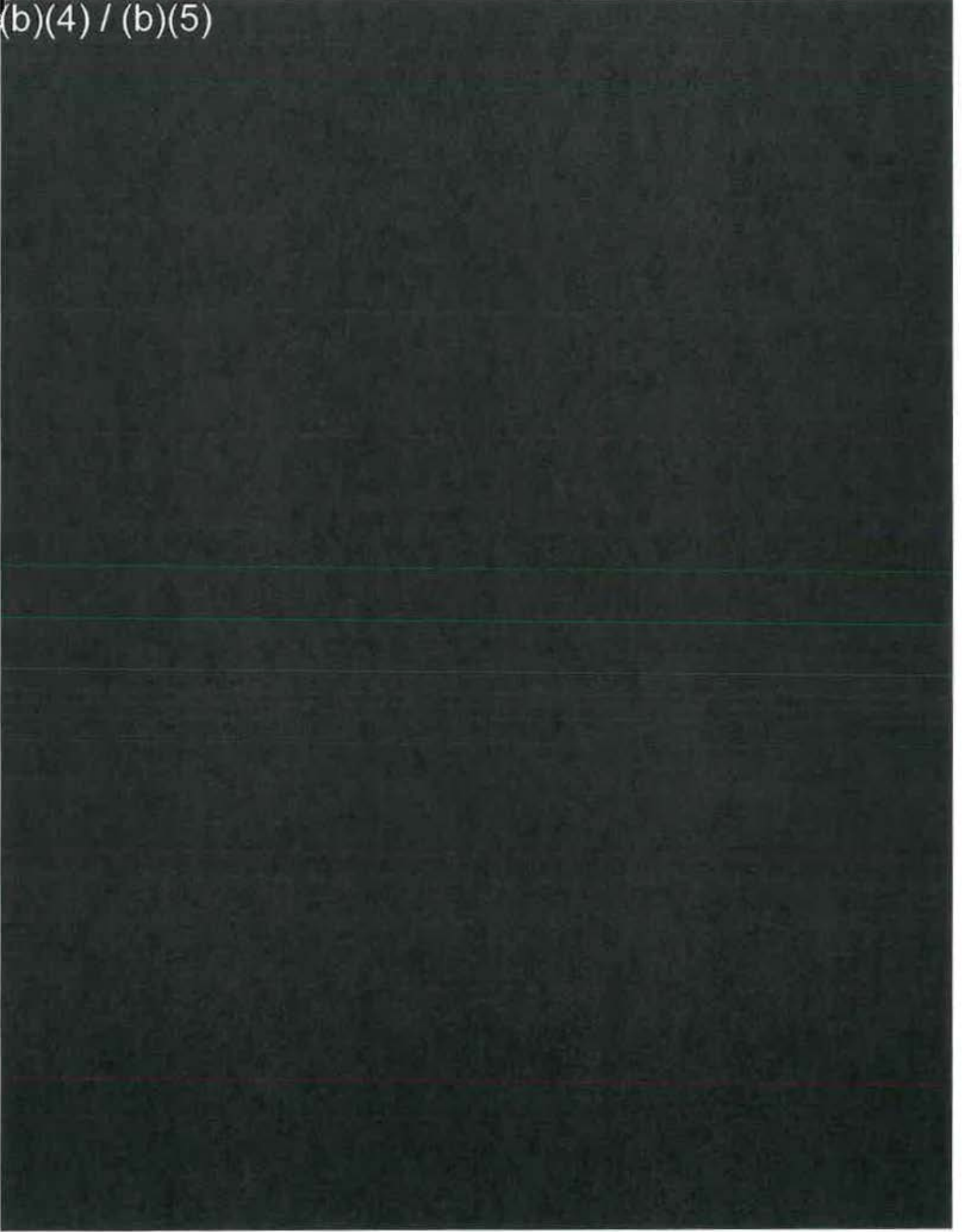
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