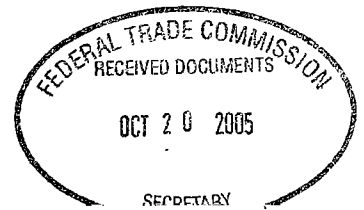


REPORT TO THE FEDERAL TRADE COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of )

BASIC RESEARCH, L.L.C., )  
A C WATERHOUSE L L C )





conducting satellite litigation on extraneous, collateral issues. Respondents' omnibus *Motion* should be denied.

## DISCUSSION

### I. The Factual Background, and Setting the Record Straight

#### A. Background of this Dispute

Last year, Complaint Counsel named, as one of its testifying medical experts, Dr. Steven B. Heymsfield, M.D.—a prominent scientist and medical doctor with extensive experience in scientific research pertinent to weight loss and related topics. Dr. Heymsfield presently holds the title of Executive Director of Clinical Sciences at Merck Laboratories and continues to be

affiliated with Columbia University. He previously served as Deputy Director of the New York

Ex. A (Heymfield CV).<sup>4</sup>

The above-written document occurred on November 9, 2004. On November 0th

Scheduling Order, and the *Dura Lube* case”).<sup>6</sup>

Complaint Counsel timely provided Respondents with copies of Dr. Heymsfield’s *Expert*

Report and Related Document. The Scheduling Order set the close of depositions for mid-February.

[REDACTED]

1915

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

research data. Dr. Darsee was not his employee and Dr. Heymsfield was not Darsee's supervisor.

did not supervise, evaluate, or grade him. *Id.* at 455-461. At Harvard, it was discovered that Dr.

Darsee had fabricated data in his academic career at Notre Dame, Emory, and Harvard.

data was in papers submitted to journals and subsequently retracted. *Id.* at 665-660; *see infra*

Section III (discussing and presenting record in full). Before August 30<sup>th</sup>, we were not aware that Dr. Darsee's fabricated data had been submitted or withdrawn from publication.

Respondents were aware of the Darsee papers before the deposition took place, however,

and had a four-hour opportunity to depose Dr. Hornsfield on the topics of their choice, including



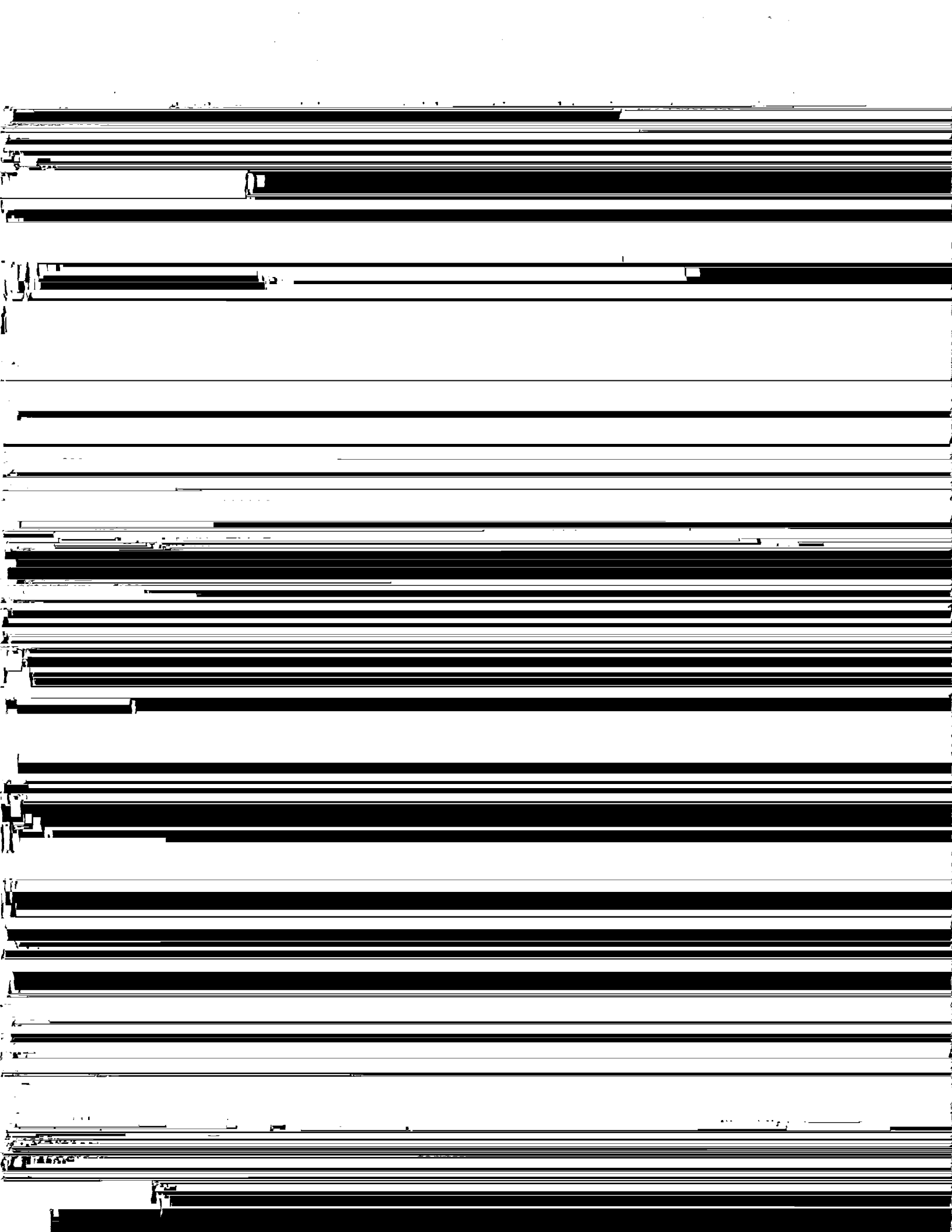
**B. Setting the Record Straight**

Respondents' Motion is a baseless attack on the integrity of counsel supporting the

To respond to Respondents' Motion, it is necessary to set the record straight

We discuss the next two sections of the deposition transcript below to confirm these

1411



withheld and the purposes of Rule 3.38(b)."

*Id.* at 449 (citing *In re Grand Union Co.*, 102 F.T.C. at 1087). Assuming that the expert

observed, however, discovery sought in a Commission proceeding must be “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the

Resp'ts' Add'l Def., Nov. 4, 2004 (citing RULE 3.31(c)(1) for same proposition and reminding

parties that defense allegations are “not an open invitation to needlessly confuse and compound

See Ex. A to Compl. Counsel's Opp'n to Mot. to Add Expert Witness (letter dated Sept. 22, 2004, requesting, *inter alia*, list of all publications). Dr. Heysfield gave to Complaint Counsel, and Complaint Counsel produced to Respondents, a lengthy and thorough list of his publications, which runs over 40 single-spaced pages. See Resp'ts' Mot. to Add Expert Witness, Ex. A (Heysfield CV). Additionally, the time scope of Dr. Heysfield's publication list provides

~~Unredacted copy of his efforts to comply with the Scheduling Order. The publication list~~

papers were clouded by suspicion and therefore, mainly withdrawn. Certainly the major ones

19.1 20 11 65 The [redacted] that Dr. [redacted] [redacted] that

[REDACTED]

against attorney or counsel. Similarly, Dr. Hornfield does not record names that have been

retracted and withdrawn from publication to be published studies. Names and units of associations





subsequently withdrawn from publication and his list of publications. We demonstrate this point

sentence—with our timely objections noted, not omitted.

**A. The Record Establishes that Complaint Counsel Were Not Aware  
of Dr. Darsee's Papers, and Did Not Withhold Them from Disclosure**

*Id.* at 655-56. This deposition testimony is correct, and it dispels Respondents' allegations that Complaint Counsel supposedly concealed or otherwise withheld discoverable information, or

\_\_\_\_\_ Respondents' complete knowledge contained in Dr. Harmsfield's denial

\_\_\_\_\_ supports their allegations.

\_\_\_\_\_ At the deposition, however, Corporate Respondents' drew a completely inaccurate

up in trials where attempts were made to discredit me one way or the

part of that. They are public record, you can go on to PubMed and find

MS. KAPIN: Objection, characterization as to "Darsee studies."

A. I informed the FTC *about Darsee in general*, but I can't remember specifically who that was. I've interacted with several people at the FTC

I don't remember exactly who that was.

*Id.* at 657-58 (emphasis added). Once more, we objected to Respondents' mischaracterization of

The rest of the cited testimony adds nothing further. At the final conclusion of the four-

hour deposition Respondents' counsel asked Dr. Haymesfield a set of questions using

was it before or after your expert report was prepared?

A I'm going by recollection and it's always when people first call me and ask

me to be an expert for them.

Q. All right. So it was when you were first retained in this case?

A. More than likely.

Q. Thank you, very much. One more question. This is what happens with multiple lawyers, I apologize?

MS. KAPIN: Actually your time is up.

The cited testimony from the conclusion of the four-hour deposition, the contents of

which are reproduced above, clearly do not support Respondents' assertion that Complaint

Counsel concealed or otherwise withheld discoverable information.

When reproduced in their entirety, the cited testimony does demonstrate that Complaint

**B. Complaint Counsel Were Not Required to Disclose  
Dr. Darsee's Papers Under RULE OF PRACTICE 3.31**

Additionally, there are no grounds for a finding that Complaint Counsel declined to

determine that papers withdrawn from publication are "publications" within the meaning of  
RULE 3.31. that RULE unambiguously provides that counsel is not obliged to supplement  
discovery responses that it does not know to be incomplete.

their demands for the imposition of sanctions against Complaint Counsel, the preclusion of Dr.

TT [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

placido en la vida. Descendientes han sido conculcados

[REDACTED]

[REDACTED]

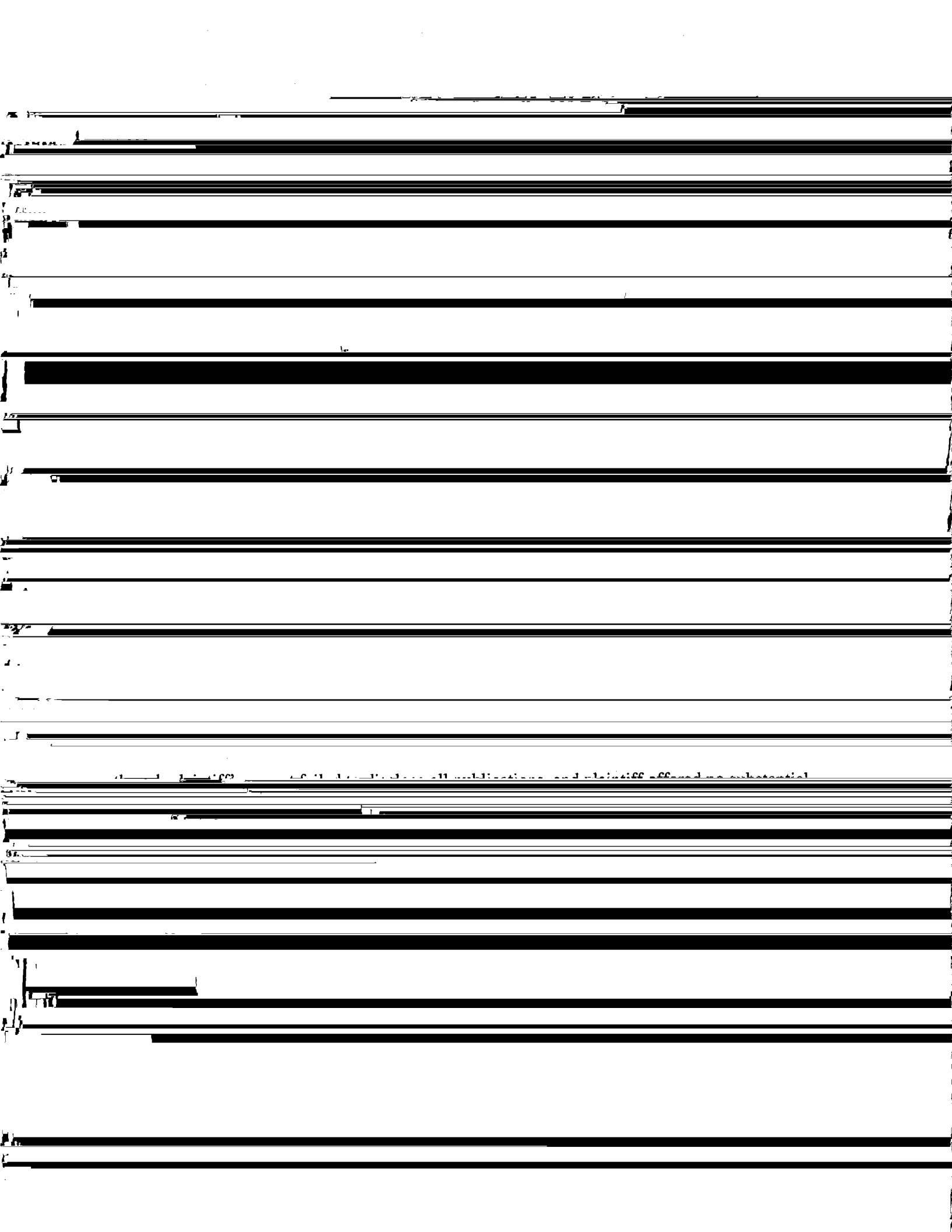


newly discovered facts.” *Id.* at 32. These assertions cannot allege actual, concrete prejudice for

Respondents from using the discovery mechanisms of the Commission to investigate subjects

unrelated to the parties’ claims and defenses, and the scope of relief. See *Diwan*, 2016 WL 2160111 (D. Minn. 2016).

Respondents are not entitled to use the Commission’s powers in aid of an investigation into



during that deposition. Defendant Cox's counsel produced a printed exhibit referencing De

Defendant's Exhibit 20 of 10/1/05. This exhibit is a printed exhibit referenced in the

print date of April 2, 2005—"4/02/05." See Ex. 20 to Heymsfield Dep (attached hereto at the

end of Ex. 1). This evidence casts serious doubt on Defendants' asserted and conflicting

timely disclose his own publication prior to the close of written discovery, because we learned of

such as finding here. Complaint Counsel asked Dr. Heymsfield for a list of all publications and

publication are not publications as Dr. Heymsfield uses and understands the term. Complaint



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

What is at stake here. What is at stake in the scope of these proceedings. Respondents' Motion

threatens an unreasonable and unwarranted reshaping of the hearing process itself—away from



**CERTIFICATION OF REVIEWING OFFICIAL**

I, \_\_\_\_\_, certify that I have reviewed the attached public filing, *Complaint Counsel's Opposition to*

*Respondents' Omnibus Motion to Exclude a Witness, Sanction Counsel, and Reopen Discovery*, prior to

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of October, 2005, I caused *Complaint Counsel's Opposition to Respondents' Omnibus Motion* to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:

**Donald S. Clark, Secretary**  
Federal Trade Commission  
600 Penn. Ave., N.W., Room H-135  
Washington, D.C. 20580

- (2) two (2) paper copies served by hand delivery to:

**The Honorable Stephen J. McGuire**  
Administrative Law Judge

600 Penn. Ave., N.W., Room H-104  
Washington, D.C. 20580

- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

**Stephen E. Nagin**  
Nagin Gallop Figuerdo P.A.  
3225 Aviation Ave.  
Salt Lake City, UT 84119

**Mitchell K. Friedlander**  
5742 West Harold Gatty Dr.  
Salt Lake City, UT 84116  
(801) 517-7000

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111 East Broadway

(305) 854-5353

(801) 517-7108 (fax)

Salt Lake City, UT 84111

(801) 517-7000

rlf55@... .llc

(801) 222-2002

# **EXHIBIT A**

1

1

HEYMSFIELD

RE: JAMES HEYMSFIELD

HEYMSFIELD

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before you. It's the one sticking out I think.

A. Okay.

Q. Before we get back to where we left off the last time, it's been a number of months since we met the last time.

Have you had any published -- papers published since the time we last met?

A. I've had papers published, but nothing related to this case that I'm aware of, but yes.

Q. Anything that's published?

HEYMSFIELD

1

2 error, but not to omit anything. If a paper,

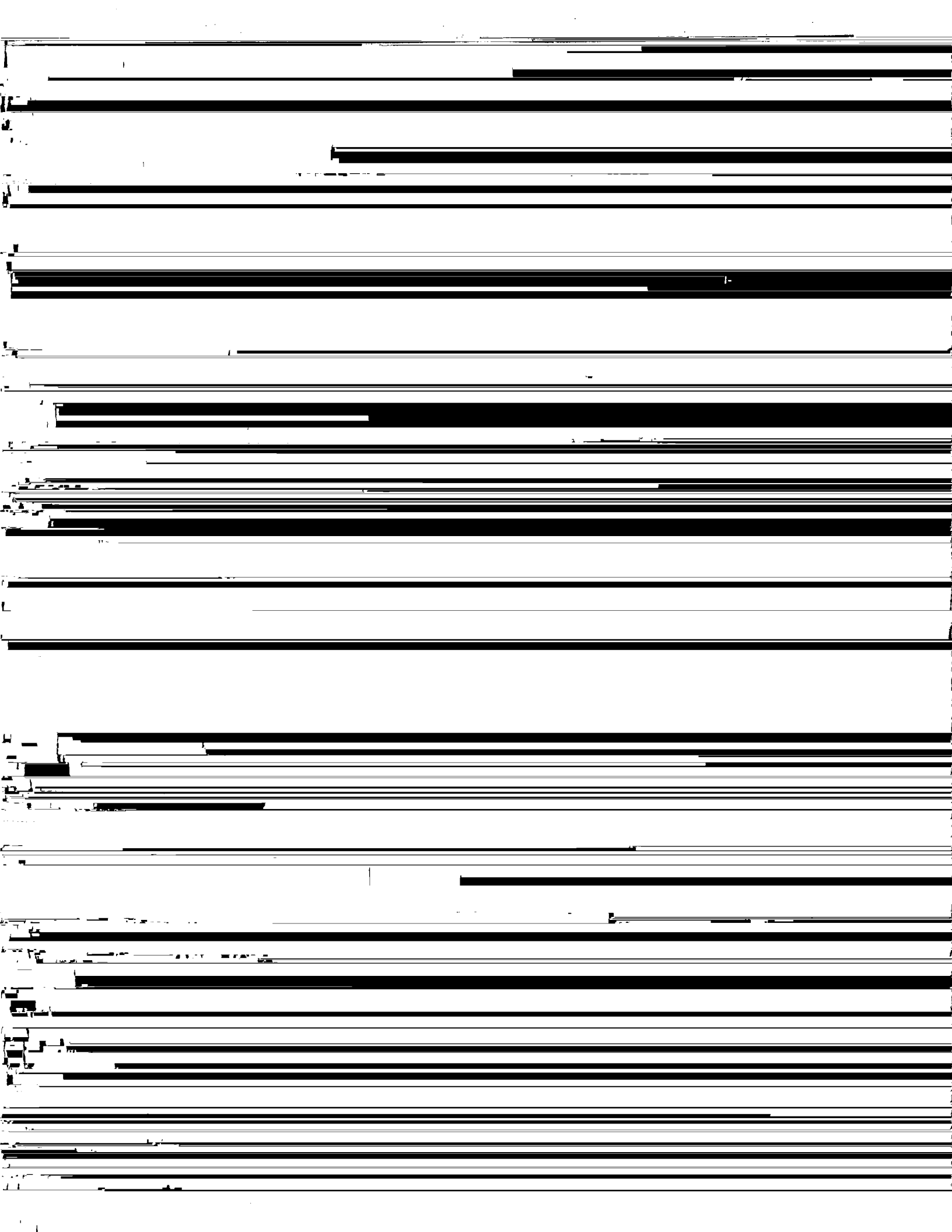
HEYMSFIELD

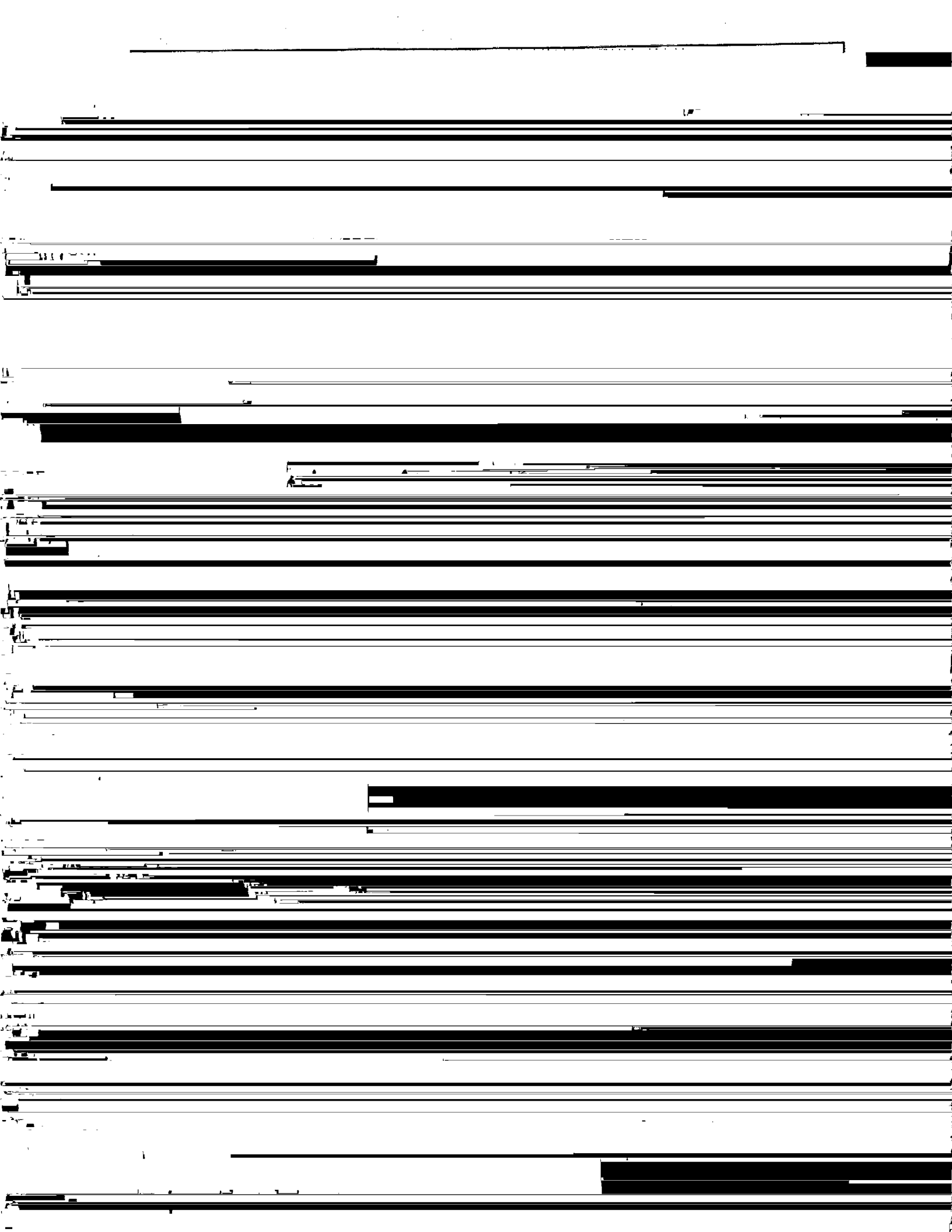
1

2 [REDACTED] that involved [REDACTED] fabrication [REDACTED]

3 [REDACTED]  
4 [REDACTED] [REDACTED] from the medical journals







HEYMSFIELD

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2

Q. Okay.

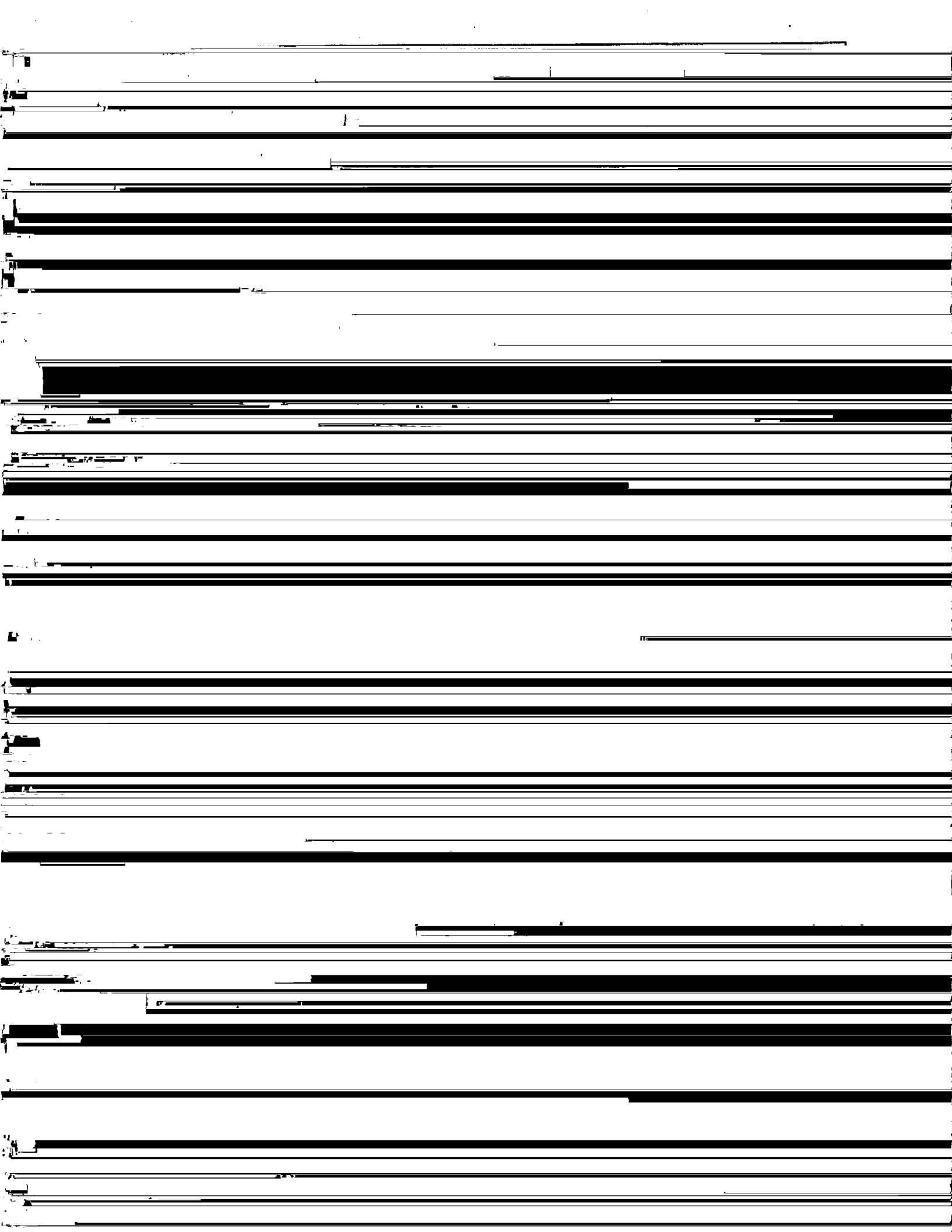
3

A. You know, co-authorship, as I

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mentioned, can be based on any set of





RYMCFIELD

HEYMSFIELD

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Darsee studies?

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A Yes

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HEYMSFIELD



RECEIVED

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HEYMSFIELD

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to put your name on it, even though you have

HEYMSFIELD

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there published standards that I can look to

3 publications you can find and I can tell you





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HEYMCFIELD





HEYMSFIELD

1.

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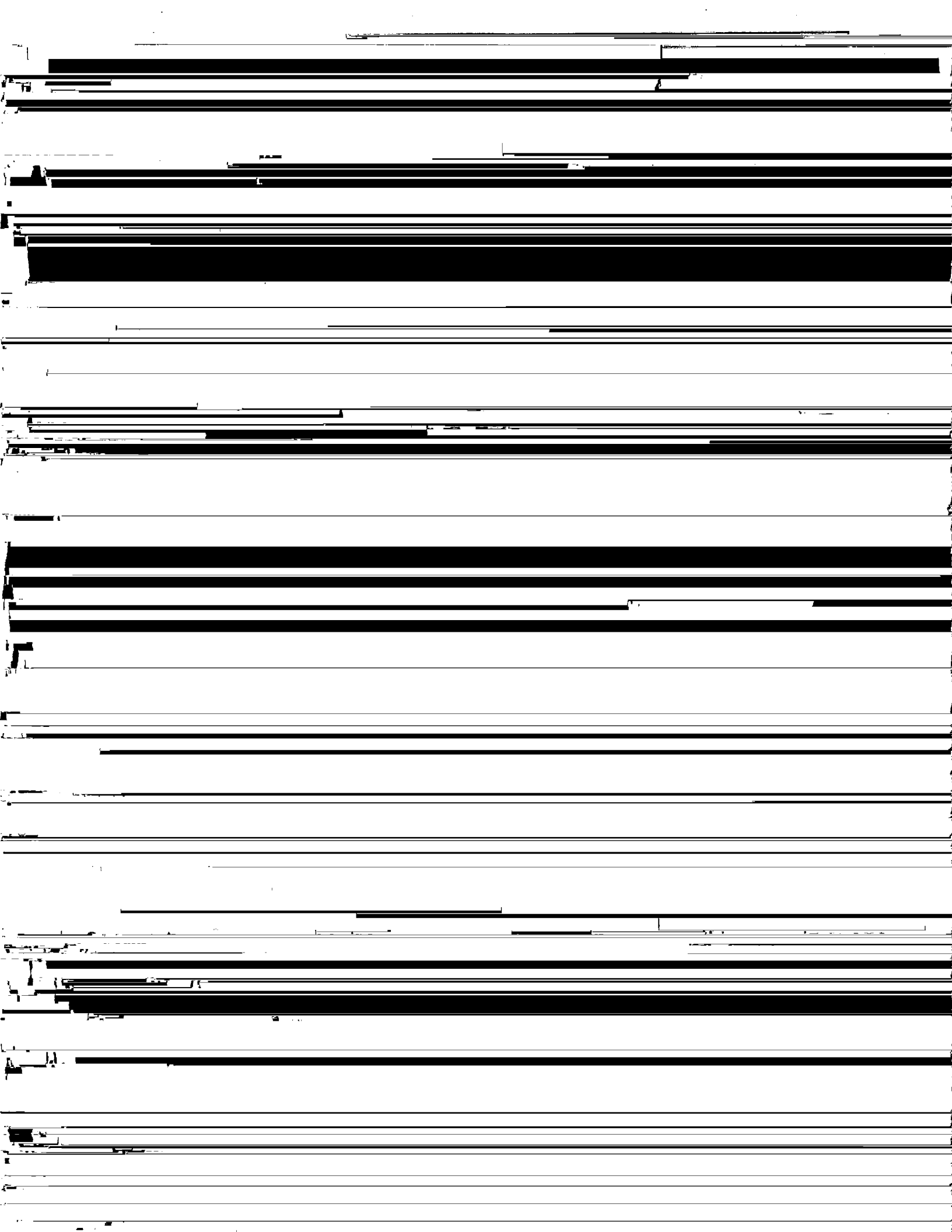
if you gave me New England Journal and I

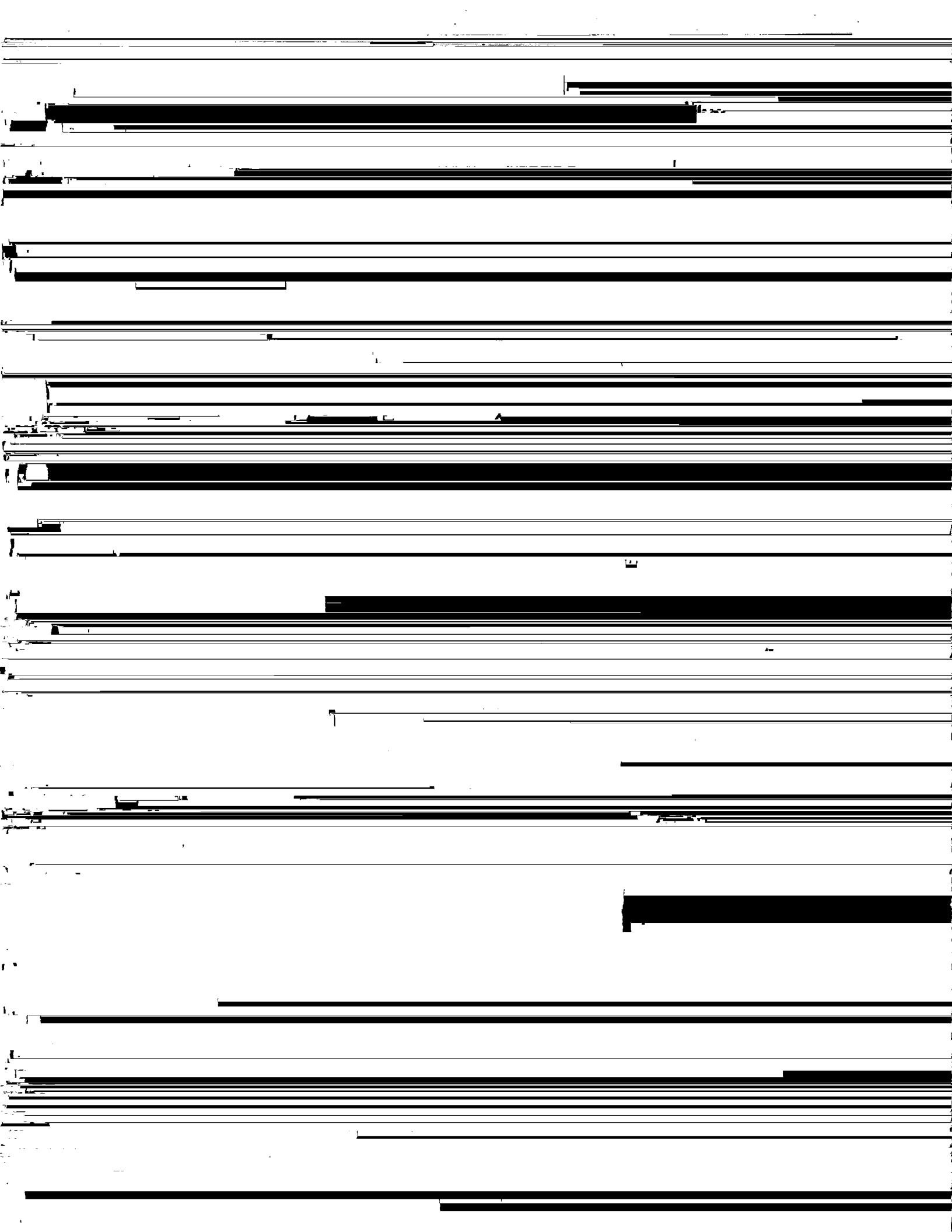
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would see their signature page then I could









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HEYMSFIELD

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considered me an eyesore I was set







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HEYMSFIELD

know that Emory never asked me to leave.

Q. As you sit here today and you are under oath, can you deny that you said what this reporter quotes?

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HEYMSFIELD

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Q. Based on the fact that your

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HEYMSFIELD

That was my question.

A. I can't answer that specifically  
because I've always had a flow of grants.

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HEYMSFIELD

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A. Supports some weight loss with

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timeframes, also no studies longer than six

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HEYMSFIELD

which you have submitted a article for

published in the



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HEYMSFIELD

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consent to its publication as a co-author;

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isn't that correct?

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HEYMSFIELD

2

A. Did I fail to consent, in other

3

words, I know the article existed and I said



HEYMSFIELD

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2 correct?

3 A. I can't recall specifics, but I was

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HEYMSFIELD

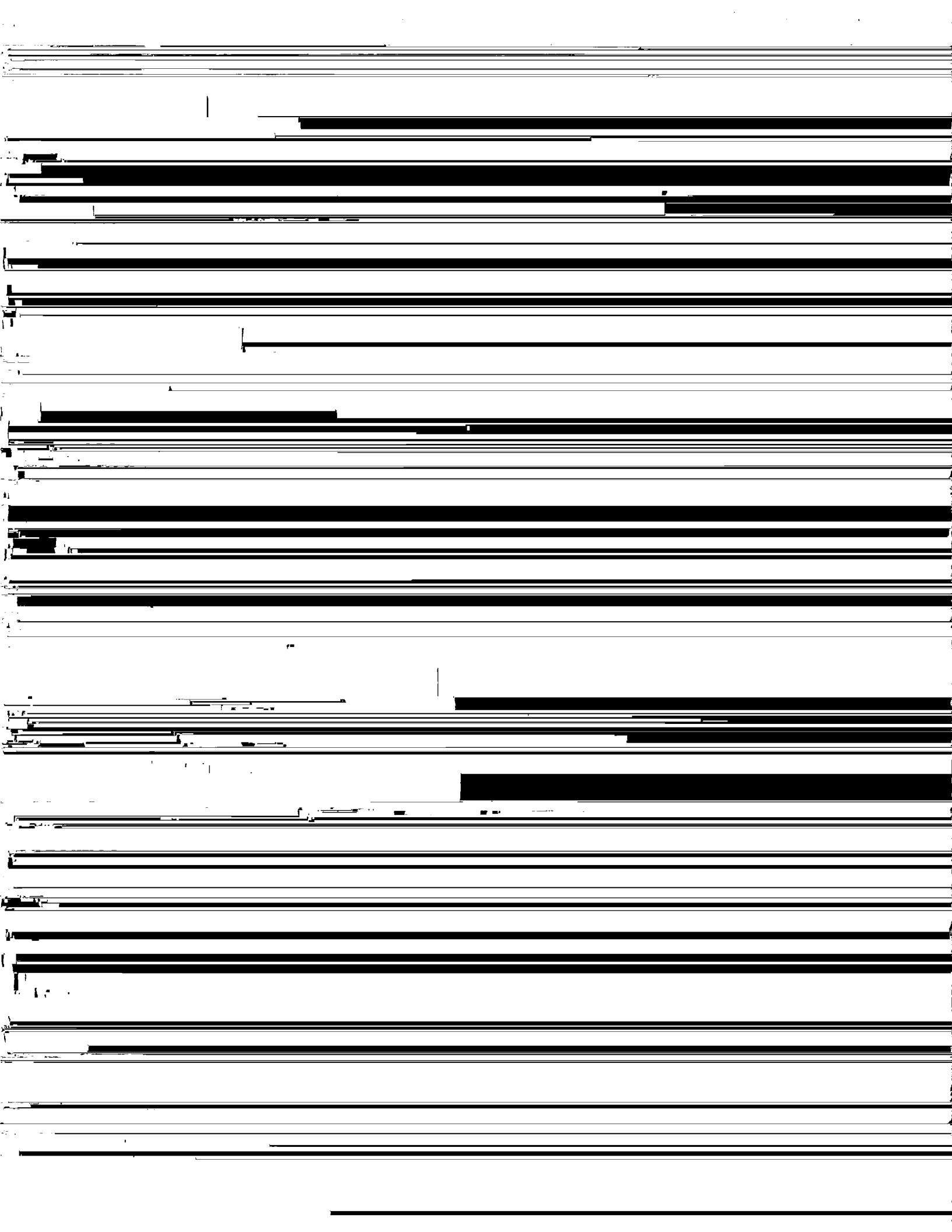
2

conduct weight loss trials.

3

Q. Returning to a moment to your CV.





1

HEYMSFIELD

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a piece, Mitch.

3

MS. VIDEOGRAPHER: The time is 1:58

4

and we've reached the end of the number

1

HEYMSFIELD

2 it's been oh, over a year.

HEYMSFIELD

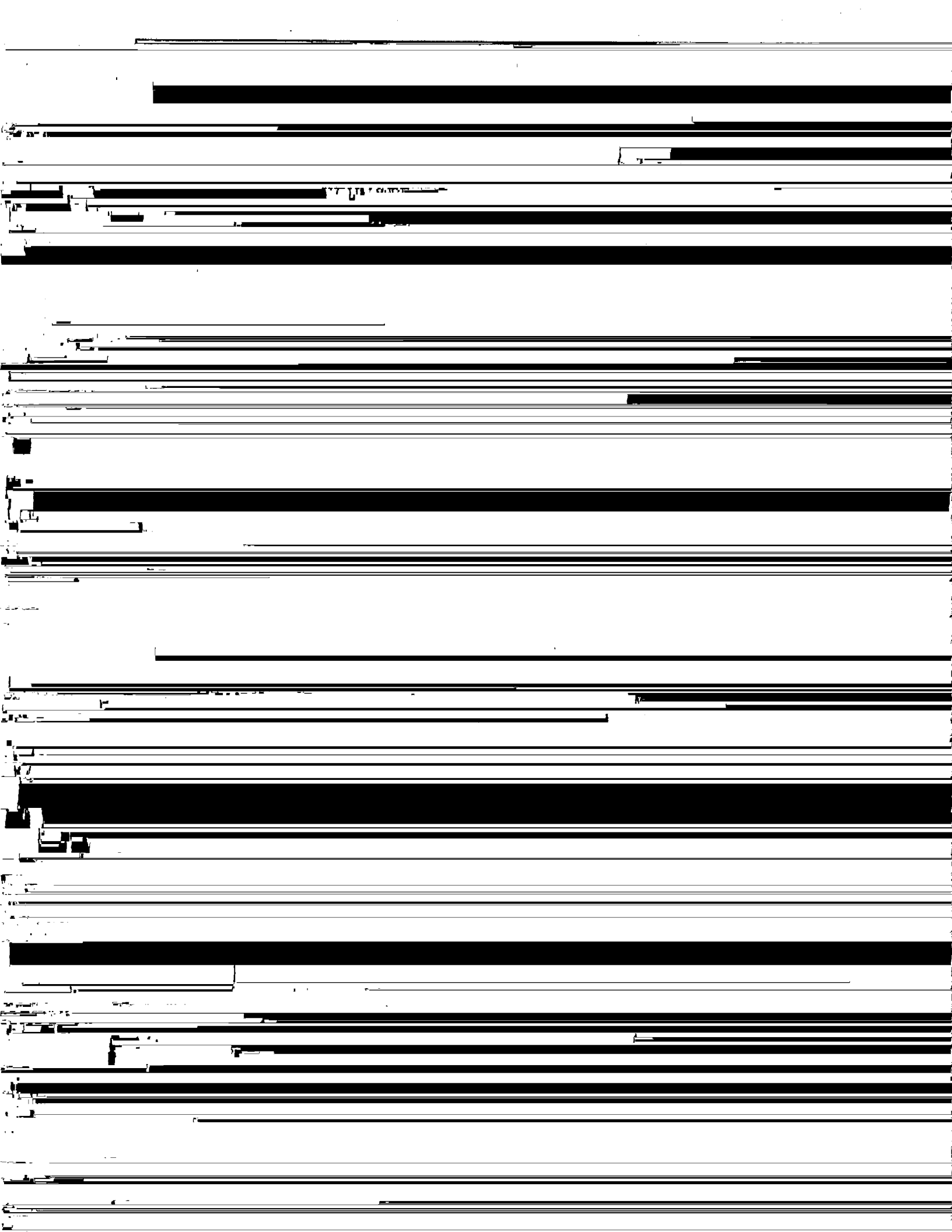
1  
2  
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6  
7

always when people first call me and ask me  
to be an expert for them.

Q. All right. So it was when you were  
first retained in this case?

A. More than likely.

Q. Thank you, very much. One more





DEFENDANT'S  
EXHIBIT  
Heymsfield 20  
T.A. 8-30-05

Volume 1 | Issue 13 | 1 | May, 18, 1987

[return to webpage](#)

## Fraudulent Papers Stain Co-Authors

By Rex Dalton

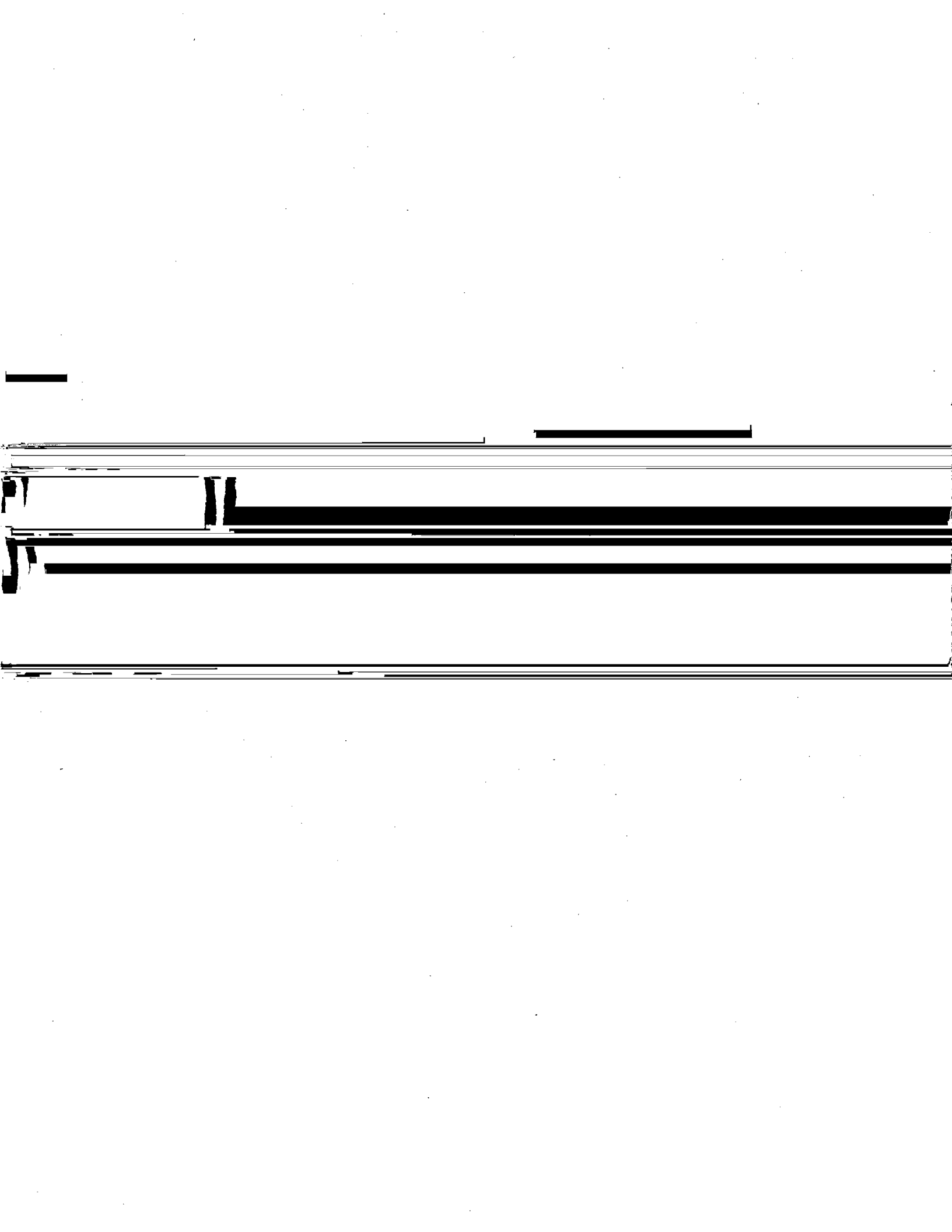
SAN DIEGO—Young scientists unwittingly caught up in scandals over fraudulent research have found the experience to be a drain on their emotions and a stain on their professional careers.

"If I don't get it," Heymsfield said, "there will be one reason: Darsee."

John Mancini also knows the anguish of being associated with a researcher whose work has been questioned. "It has been a soul-wrenching experience for those of us who were junior researchers," said Mancini, 34, now a cardiologist at the Veterans Administration Medical Center in Ann Arbor, Mich. "Basically, three years of effort were wiped out. It has an effect on my brain, my psyche and my soul."

Mancini says he is not a scientist.

called them until this case is closed on. This backfired that I didn't do anything more as I still don't know what he did.



### Declaration of Steven B. Heymsfield, M.D.

1. I have reviewed the 2004 ILC O. Repeal Act 1746 that to the best

of my recollection, the following is true and correct:

1. My name is Steven B. Heymsfield, M.D. Since November 1, 2004, I have served as

8. While at Emory, I submitted my CV to the Dean of the Emory medical school every year

# **EXHIBIT C**

---

**DECLARATION OF LAUREEN KAPIN**

I, LAUREEN KAPIN, hereby declare:

1. I am a Senior Attorney in the Division of Enforcement, Bureau of Customs and Protection

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



10. I have been advised that none of the individuals mentioned in paragraph 2 recall any other communications with Dr. Heymsfield on the Darsee matter. Moreover, none of these

published papers, that he was listed as one of several co-authors of these papers, or that these papers were subsequently withdrawn from publication or his CV. They also did not