

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR BROWARD
COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: CACE 15-012973 (08)

SUPERIOR MOVING & STORAGE, INC., a Florida
corporation,

Plaintiff,

v.

ELYSSA SANDBRAND a/k/a ELYSSA KAPP and
RICHARD KAPP,

Defendants.

**DEFENDANTS ELYSSA SANDBRAND a/k/a ELYSSA KAPP and RICHARD KAPP
MOTION TO DISMISS**

Defendants, ELYSSA SANDBRAND a/k/a ELYSSA KAPP and RICHARD KAPP (Collectively, "Kapps"), by and through undersigned counsel and pursuant to Fla. R. Civ. P. 1.140(b), hereby requests this Court dismiss the Complaint in its entirety filed by Plaintiff SUPERIOR MOVING & STORAGE, INC., ("SMS"), with prejudice, and in support thereof, states as follows:

I. BACKGROUND FACTS

1. The Kapps contacted SMS for an estimate related to moving their personal property to their newly built home.

2. On or about April 2, 2015, a representative of SMS provided a partially typed and partially handwritten "Guaranteed/Binding Estimate" attached and incorporated hereto as

Exhibit "A".

3. SMS thereafter, through its agents, employees or contractors, moved the personal property of the Kapps on or about June 13, 2015 to its new location.

4. During the move, the personal property was not adequately protected from damage, and the agents, employees or contractors of SMS negligently caused damage.

5. After the Kapps began unpacking their personal property, they discovered that many items had been substantially damaged and/or destroyed. See Attached photographs, Composite Exhibit "B".

6. SMS was put on notice of the damages by the Kapps on or about June 15, 2015 when they spoke with a representative named Luis.

7. Further, on or about June 26, 2015, the Kapps filed a Claim Form for Damages/Losses, attached and incorporated hereto as Exhibit "C", in which they delineated the types of personal property damaged and the types of damages.

8. SMS avers that Defendant ELYSSA KAPP published statements about a mover being extremely disrespectful, chauvinistic, and uncaring. Compl. ¶ 10. Each of these statements, if proven, are opinions.

II. INCORPORATED MEMORANDUM OF LAW

Summary of Argument

Plaintiff's Complaint should be dismissed because SMS fails to state a cause of action for defamation. Under existing Florida law as set forth more fully below, a plaintiff must plead *actual damages* in order to state a claim for defamation. SMS has failed to identify that even

one customer was affected by the Yelp posting that is the subject matter of the instant case and thus has failed to state a cause of action for defamation.

The alleged defamatory statements at issue in this case are simply nonactionable opinions and truthful statements under basic Florida defamation law. This Honorable Court should put an immediate halt to Plaintiff's attempts to use expensive litigation to silence the free speech rights of the Kapps' as consumer advocates, and should readily dismiss this baseless action.

A. Applicable Standard and Role of the Court on Motion to Dismiss Defamation Claim

Truth is a complete defense to a libel action. Article I, § 4 of the Florida Constitution; Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3rd DCA 2000). It is the *plaintiff* who bears the burden of proving that the challenged statement is both defamatory and false, essential elements of any libel claim. Hammond v. Times Publishing Co., 162 So.2d 681, 682 (Fla. 2nd DCA 1964), citing, McCormick v. Miami Herald Publishing Co., 139 So.2d 197,200 (Fla. 2d DCA 1962). A defamatory statement is not actionable if the plaintiff cannot allege and prove it is false and thus not even "substantially true." McCormick v. Miami Herald Publishing Co., 139 So.2d at 200-201 (affirming dismissal of complaint); Linafelt v. Beverly Enterprises-Fl., Inc., 745 So.2d 386, 389 (Fla. 1st DCA 1999). Minor inaccuracies in reports of public records or statements are not actionable as defamation. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1107-1108 (Fla. 2008) (minor inaccuracies that do not affect the substance of a statement should be disregarded in determining whether a statement is defamatory).

Further, words are "defamatory" only if "they charge a person with an infamous crime or tend to subject one to hatred, distrust, ridicule, contempt or disgrace or tend to injure one in

one's business or profession." Seropian v. Forman, 652 So.2d 490,495 (Fla. 4thDCA 1995); Cooper v. Miami Herald Pub. Co., 31 So.2d 382, 384 (Fla. 1947) (accord). The trial court performs a "prominent function" in determining whether or not an allegedly false statement is defamatory. Byrd v. Hustler Magazine, Inc., 433 So.2d 593, 595 (Fla. 4thDCA 1983). The court is to closely review the allegedly false statement in the context in which it was published to decide whether a factfinder could reasonably determine the statement to be defamatory. Id. The statement is to be viewed in context and "not by extremes, but as the common mind would naturally understand it." Id. The trial court should dismiss the libel claim if the challenged statement "is not susceptible to a defamatory meaning." Smith v. Cuban American Nat. Foundation, 731 So.2d 702, 707 (Fla. 3rd DCA 1999); Keller v. Miami Herald, 778 F.2d 711, 714-15 (11th Cir. 1985).

B. Plaintiff Fails to State a Cause of Action for Defamation Because Plaintiff Failed to Plead Actual Damages

Proof of "actual damage" is an essential element of a defamation action under Florida law. Edelstein v. WFTV, Inc., 798 So. 2d 797, 798 (Fla. 4th DCA 2001)(affirming trial court's dismissal of defamation action where plaintiff failed to plead actual injury); Anheuser-Busch, Inc. v. Philpot, 317 F.3d 1264, 1266 (11th Cir. 2003)(citing Miami Herald Publ'g Co. v. Ane, 423 So. 2d 376, 388 (Fla. 3d DCA 1982).

Kapp's actions caused no actual damage to Plaintiff. Plaintiff simply cannot plead nor prove otherwise. Plaintiff has not shown - and cannot show - any specific business arrangement that was negatively impacted as a result of Kapp's actions. In addition, Plaintiff cannot show that it lost any specific customers as a result of the alleged defamatory statements. Plaintiff did not suffer any damage or injury whatsoever from Kapp's posting,

which is among other postings that aver similar improper behavior on the part of SMS. Plaintiff's failure to plead actual damages as required by Florida law is plainly due to the fact that no damage actually occurred. Therefore, the defamation claim cannot stand as a matter of law and Count I of Plaintiffs Complaint must be dismissed.

C. Plaintiff Fails to State a Cause of Action for Defamation Because Kapps' Statements Involve Truthful and Opinion Statements

Truth is a complete defense to a libel action. Article I, § 4 of the Florida Constitution; Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3rd DCA 2000). Statements of pure opinion based on known facts do not give rise to defamation claims. Miami Child's World, Inc. v. Sunbeam Television Corp., 669 So. 2d 336, 336 (Fla. 3d DCA 1996).

Plaintiff was put on notice of the damages that occurred, by and through the actions and inactions of its agents, representatives, employees or contractors, when it was provided verbal and written notice of the damages. Any and all factual statements contained within the Yelp posting were truthful and posted to provide the uneducated consumer with one vantage point to view an experience from another consumer, the Kapps. Statements outlined in Plaintiff's complaint that related to one of SMS' employees, not directed to SMS as a whole, were opinion statements and not actionable under Florida law.

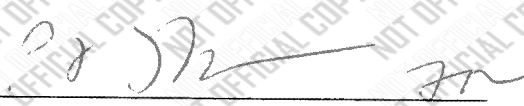
WHEREFORE, Defendants, RICHARD KAPP and ELYSSA KAPP, respectfully requests this Honorable Court to dismiss the Complaint, with prejudice, and to award such other and further relief as it may deem appropriate and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all parties listed on the following Service List in accordance with Florida Rule of Civil Procedure 1.080 (as amended effective September 1, 2012) and Florida Rule of Judicial Administration 2.516 (as enacted effective September 1, 2012) on this 17th day of September, 2015:

SERVICE LIST

Party Served	Method of Service
Michael B. Manes, Esq.	michael@maneslegal.com

<p>MURPHY & BROCATO Attorneys and Counselors at Law 6810 North State Road 7 Coconut Creek, FL 33073-4304 Phone: (954) 617-8133 Fax: (954) 697-0114 Primary Email Address: eservice@murphys-law.cc</p>	<p>By:  <input type="checkbox"/> PATRICK J. MURPHY, ESQ. Florida Bar No.: 562475 pmurphy@murphys-law.cc <input checked="" type="checkbox"/> CHAD E. BROCATO, SR. ESQ. Florida Bar No.: 110730 cbrocato@murphys-law.cc <input type="checkbox"/> NICOLE M. LOUGHLIN, ESQ. Florida Bar No.: 105337 nloughlin@murphys-law.cc</p> <p>CEB/mb/5642</p>
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STATE OVER 4492

MC 3370277

SUPERIOR

Florida Mover Reg No. 1M492
Broward Reg 32



MOVING & STORAGE
2055 BLOUNT ROAD • POMPANO, FL 33069
(954) 978-9999 • (561) 740-7120 • (800) 992-2978
Fax (954) 917-2645

AMSA
FMWA



Guaranteed / Binding Estimate

Visit us @ www.asuperiormove.com

Customer: RICH KAPP

Date: 5/14/15

Ref # MAILER

5/30/15

5/14

BASIC

Phone (home):

Fax:

Phone (work):

Cellular or Pager:

Moving From:



Truck Access: 75 FEET OR LESS

75 FEET OR LESS

Moving To:



Extra Pick Up / Delivery: NONE

Estimate Guaranteed based on attached survey: Yes No

★ AT NO COST! SUPERIOR MOVING WILL STRETCH/PLASTIC-WRAP ALL LARGE UPHOLSTERED FURNITURE. SUPERIOR MOVING WILL ALSO TRANSPORT ALL MATTRESSES IN A PREMIUM GRADE MATTRESS BAG.

Total Estimated Boxes: 50 - 55 (flat & sealed; packed by customer) Wardrobe Sales: _____ Rentals: 5

Optional Services:

No other charges are pending per [signature]

✓ Packing by Movers: NONE - CUSTOMER TO PACK ALL BOXES

SUPERIOR TO WRAP AND PAD ALL FURNITURE.

GAS, LABOR, TAPE, PADS AND ALL FEES ARE INCLUDED IN FLAT RATE.

★ LONG DISTANCE GUARANTEED PRICE BASED ON DIRECT SHIPMENT. NO STORAGE OR DELAYS.

✓ Mover's Dis/Re-Assemble Furniture -or- Customer Dis/Re-Assemble Furniture

✓ Storage (air conditioned) \$ N/A per month

Guaranteed Price \$ 1100.00 -FLAT RATE MOVE

Options: 70.00 DOLLARS EXTRA IF CUSTOMER WANTS 9 WARDROBE BOXES.

★ Our Blue Ribbon Service assures you that our courteous, professional moving personnel will pad-wrap all your furnishings for protection during transport and treat your valued possessions with care! Be an educated consumer when choosing a storage facility. We suggest you take the time to visit the facility, confirm that it is truly air conditioned, not just "climate controlled" - There is a big difference in our humid, South Florida climate. Superior Moving offers a fully air conditioned, secured storage facility to assure your items will remain safe and in good condition. We encourage and invite you to visit our facility at anytime. This estimate is valid for 90 days, unless authorized in writing by a company representative

NOTES: \$200.00 DEPOSIT / BALANCE \$ CASH ON MOVE DAY

Estimate Guaranteed Based On: Above information being accurate Pertains only to items / services listed above
All loose and/or miscellaneous items must be boxed & organized Elevators & loading area reserved for Mover's sole use

[Signature]
Customer's signature

LUIS OLIVE - TR. HOME INST.

Company Representative

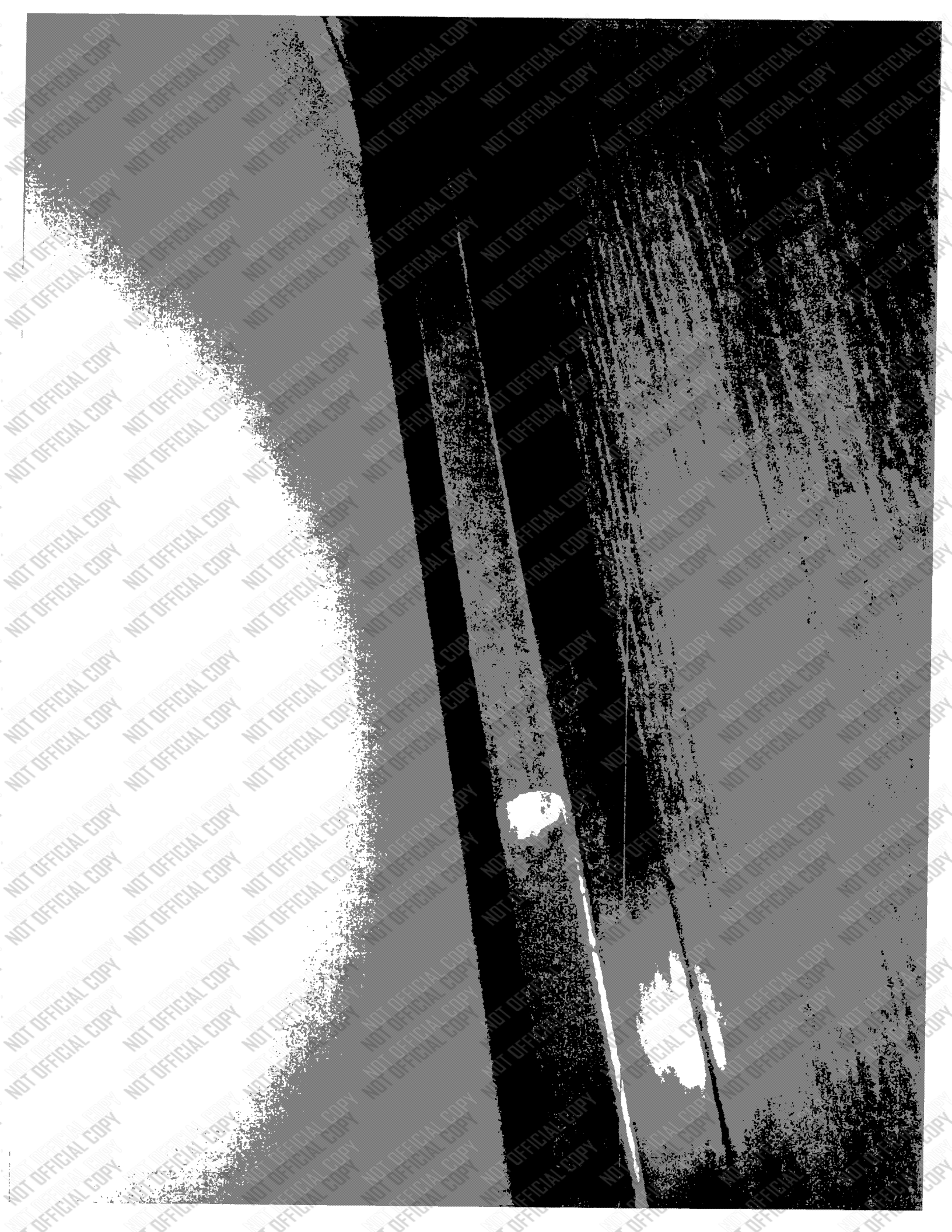
"A"
EXHIBIT

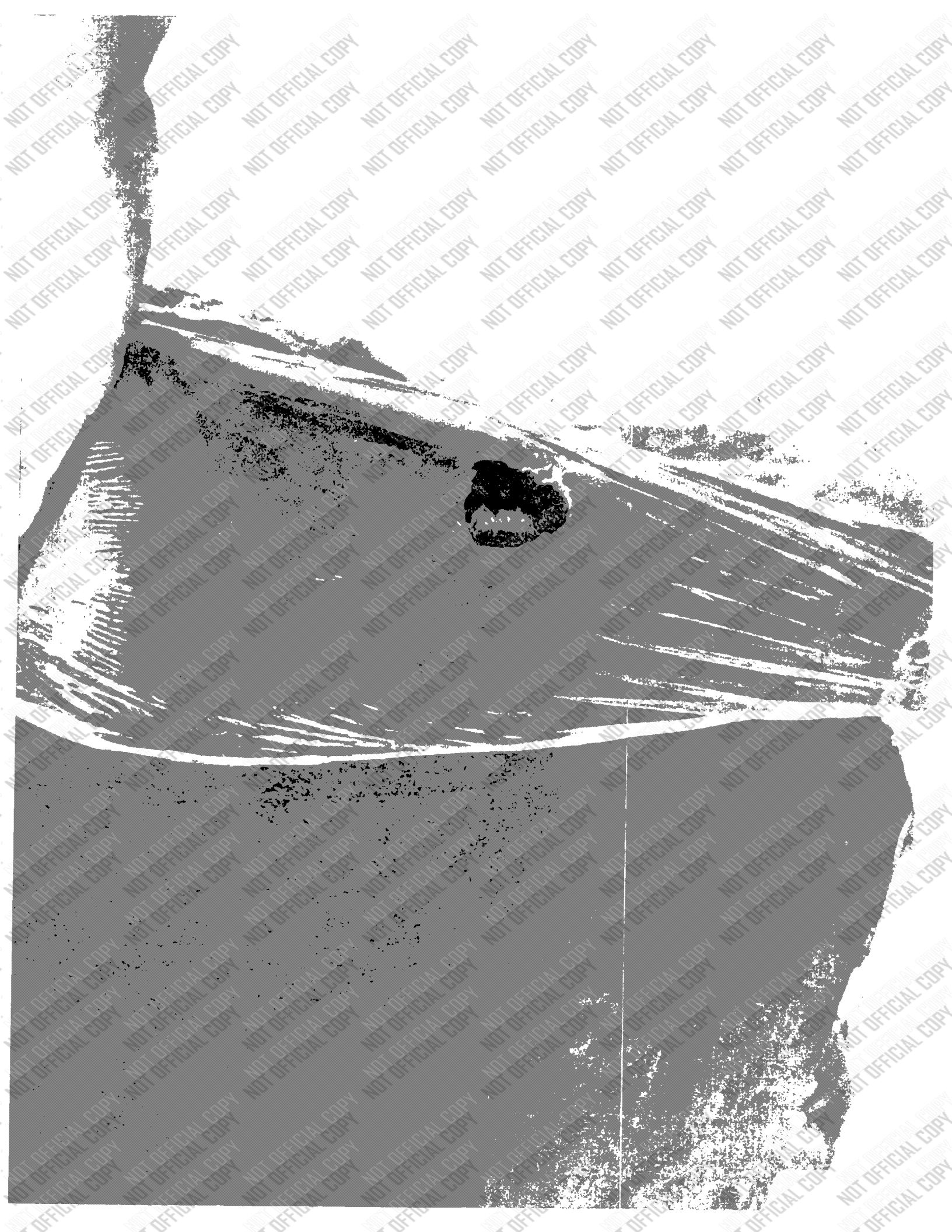
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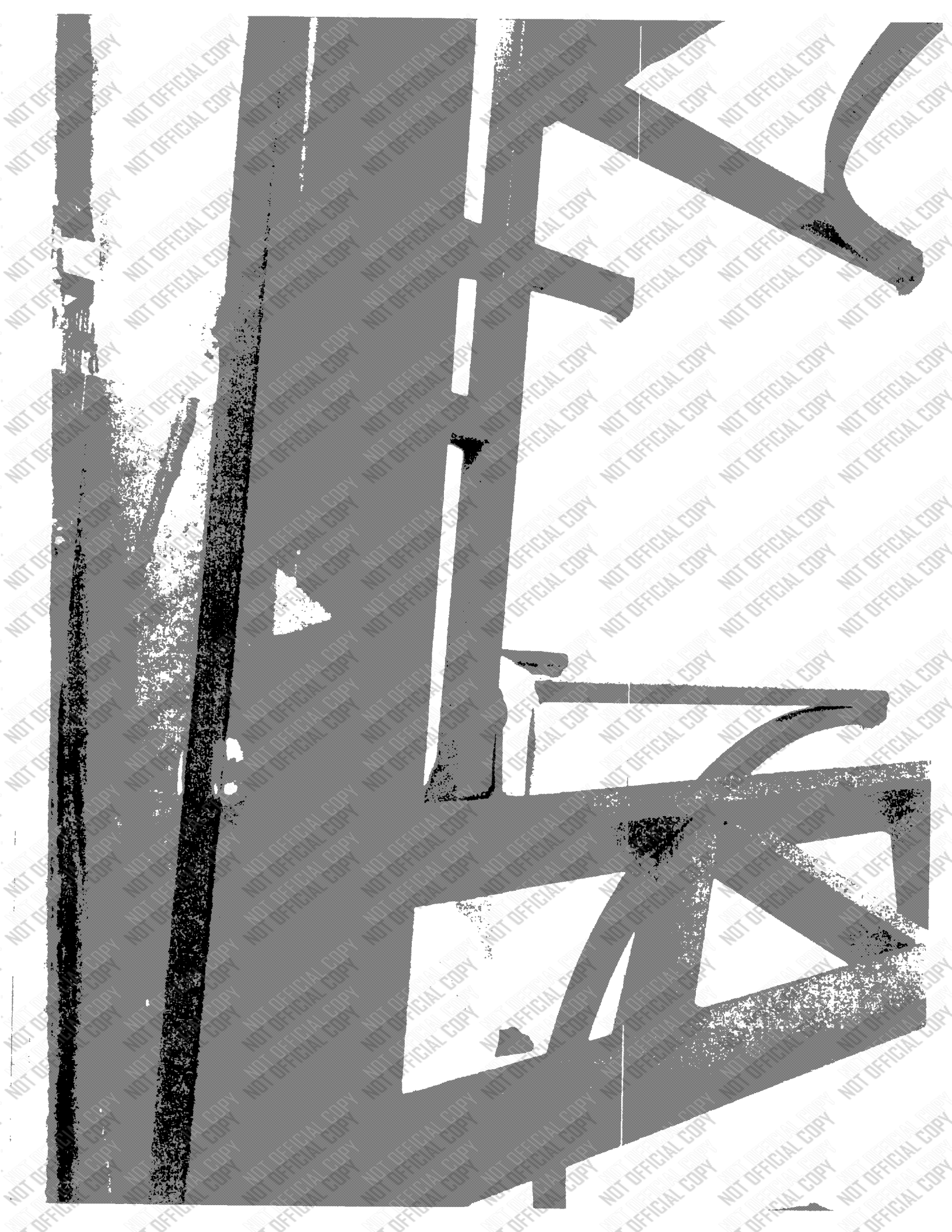
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"B"





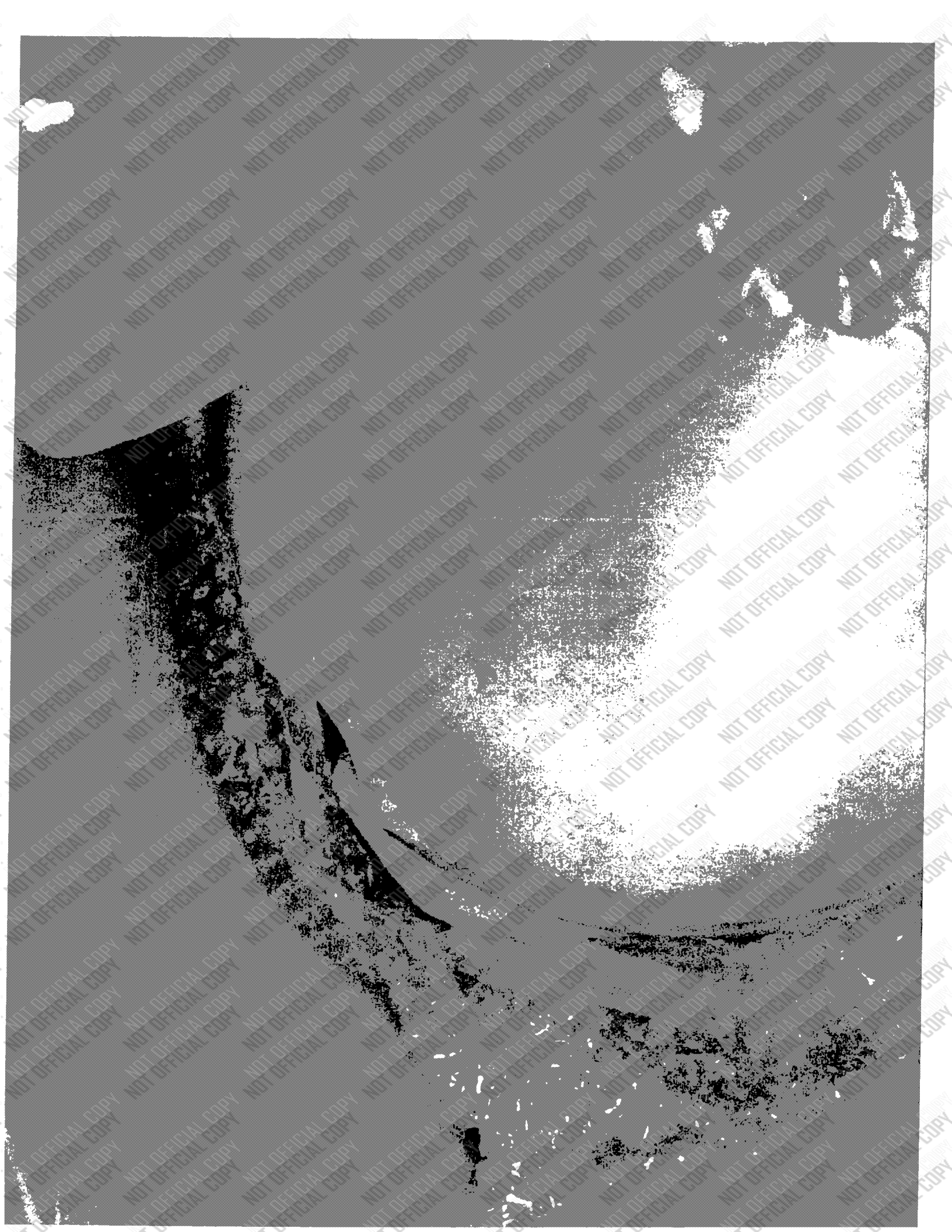




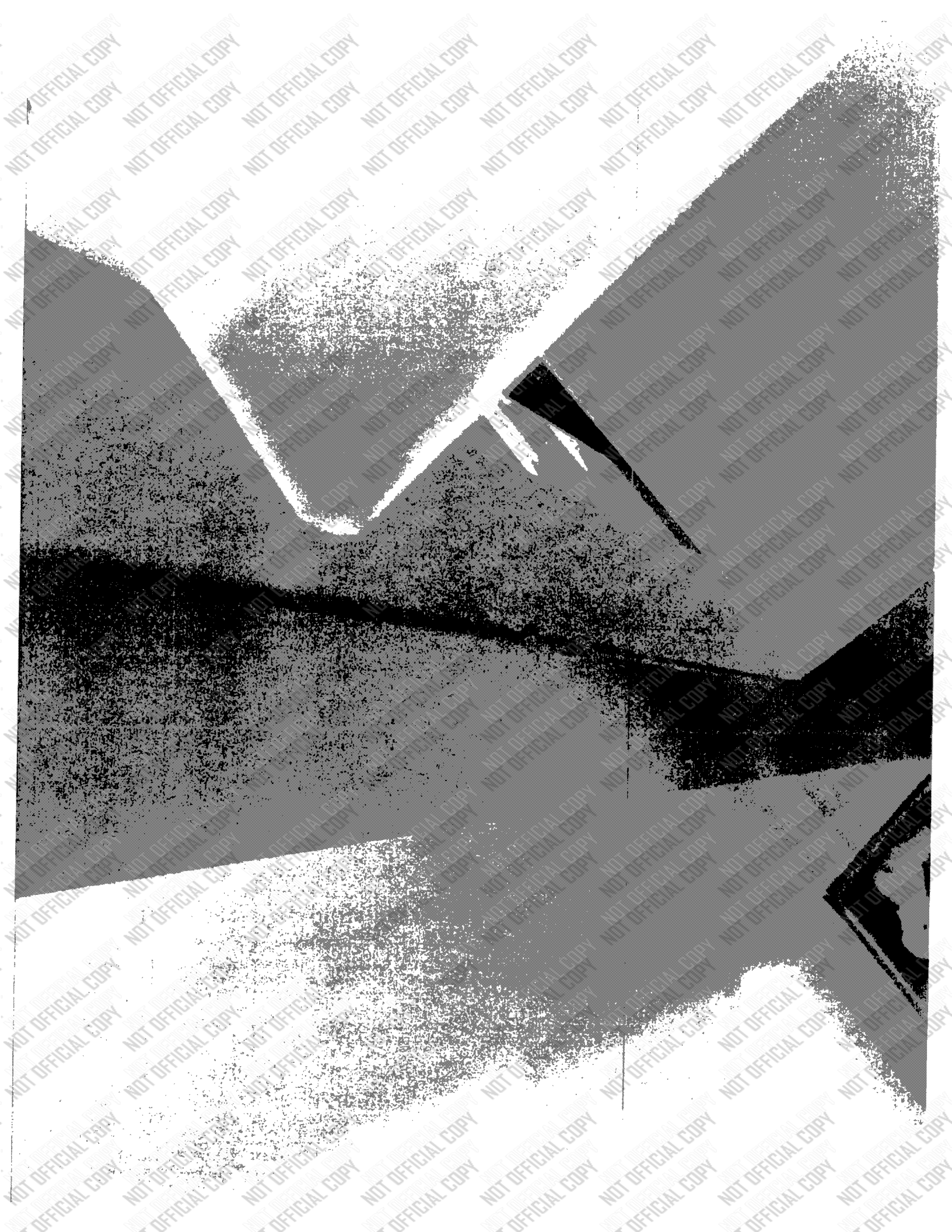
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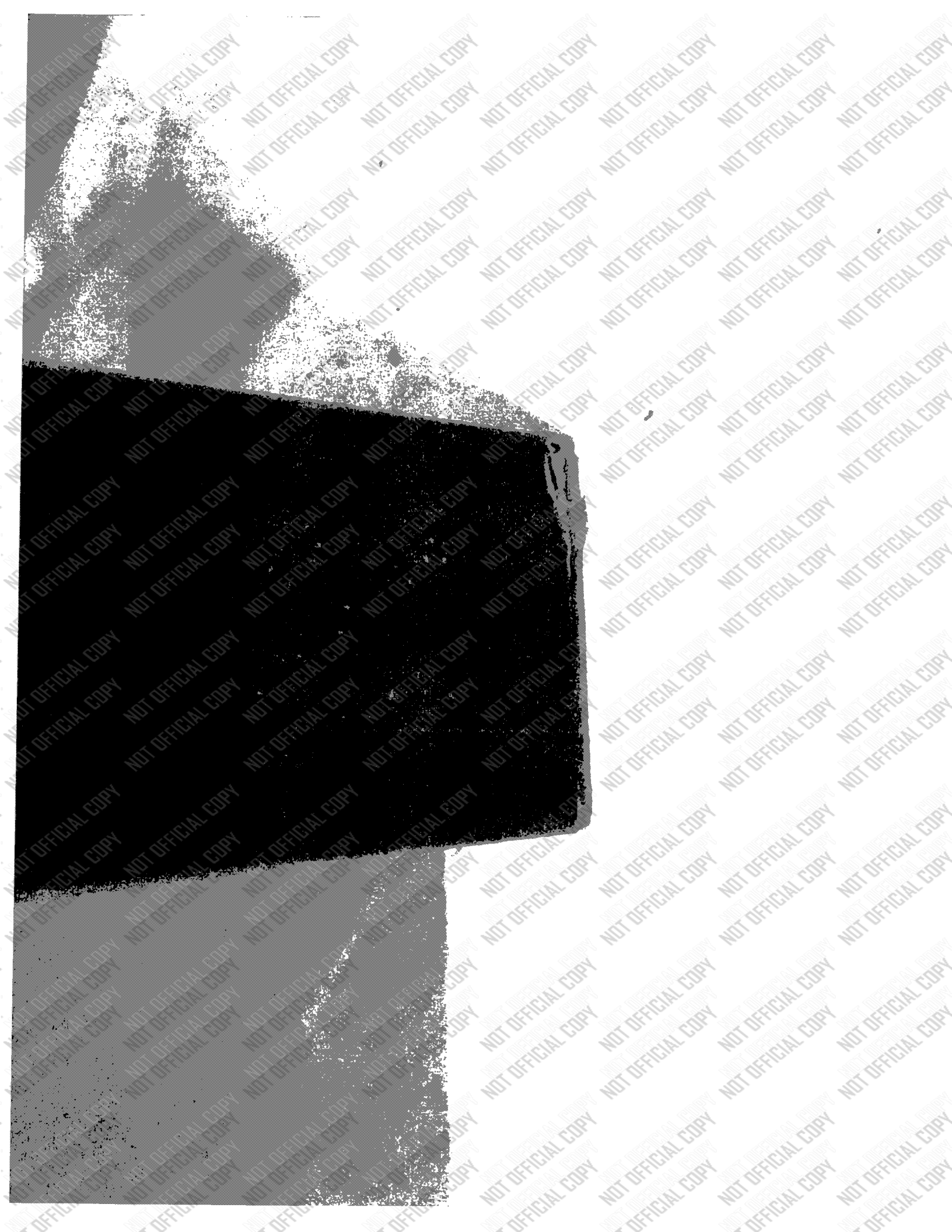












CLAIM FORM FOR DAMAGES/LOSS

CARRIER: SUPERIOR MOVING, INC. 2055 Blount Road, Pompano Beach, FL 33069

DATE OF MOVING SERVICES: 6/15/15 DATE OF CLAIM: 6/26/15

Discussed damage with Lewis on 6/15/15

Value of Shipment: _____ Type of Valuation: _____

CUSTOMER/SHIPPER NAME: Richard K...

PHONE NUMBER: [REDACTED]

PICK UP ADDRESS: [REDACTED]

CITY: Ocala

DELIVERY ADDRESS: [REDACTED]

CITY: Palmdale

PLEASE LIST ALL DAMAGES/LOSS BELOW: Be as specific as possible, listing type of furniture/Item, inventory# (inv#), and composition of furniture/Item, date of purchase as well as approximate value of item. If you have receipts for any items please enclose a copy. Please enclose pictures of damages and copy of paperwork.

1. INV # _____ ITEM DESCRIPTION: _____

DESCRIPTION OF DAMAGE/LOSS: _____

2. INV # _____ ITEM DESCRIPTION: _____

DESCRIPTION OF DAMAGE/LOSS: _____

3. INV # _____ ITEM DESCRIPTION: _____

DESCRIPTION OF DAMAGE/LOSS: _____

See attached listing. Unpacking not complete so the list will likely grow

* IF ADDITIONAL SPACE REQUIRED CHECK CONTINUED ON BACK YES CONTINUED ON BACK OR _____ NOTHING FOLLOWS.

Attached typed listing →

All Statements made in this statement of claim and any attached documents are true and correct to the best of my knowledge and belief and constitutes my complete and entire claim. No material information has been withheld.

Any person who knowingly and with intent to defraud any insurance company files a statement of claim containing any materialy false information, conceals for the purpose of misleading information concerning any fact material thereto, commits a fraudulent insurance act which is a crime.

SIGNED: _____ DATE: _____

PRINT NAME: _____

Notary: _____ Notary Stamp: _____

Furniture damage **Item Description** **Description of Damage** **Estimated value**

All items	Not wrapped and padded in accordance with the contract. Couch was dragged on the pavement and ripped open. The couch was not padded and it was only wrapped in saran wrap with was ripped in the same exact spot as the couch rip.		\$ 2,500
Dark brown couch	Not wrapped or padded. Dirty from the moving truck, movers hands, etc. Needs to be professionally cleaned		\$ 1,000
White king size bed frame/headboard	Not wrapped or padded. Dirty from the moving truck, movers hands, etc. Needs to be professionally cleaned		\$ 2,000
12 large pieces of china	Box labeled fragile. It was dropped on one side, all pieces are broken on the same exact side		\$ 400
1 china platter	Box labeled fragile. It was dropped on one side, all pieces are broken on the same exact side as the above item		\$ 100
Kitchen table frame	Not wrapped or padded. Dragged on something and there's a large dent and the finish is completely removed		\$ 1,500
Kitchen table glass	Scatched		\$ 500
Entertainment unit	Not padded. Legs not wrapped or padded. Scraped legs.		\$ 1,500
Entertainment unit glass shelves	Many scratches on the shelves and one shelf is broken		\$ 300
Master bedroom night tables	Furniture not padded. Legs were not wrapped or padded. Scraped legs		\$ 500
Master bedroom dresser	Drawers broken in move; screws used to put mirror on punched thru the other side (wrong screws used??)		\$ 500
Master bedroom misc	Random screws leftover... no extra screws at the beginning of the move. Something not put together properly		N/A
Brown leather couches	Damage on pretty much every corner of the couches.		\$ 1,500
Bedframe - Bedroom 4 upstairs	Bed not put together in accordance with contract		N/A
Bedframe - Bedroom 1 upstairs	Bed not put together in accordance with contract		N/A
Bedframe - Bedroom 2 upstairs	Bed not put together in accordance with contract		N/A
Office bookshelf	Crack on office bookshelf		\$ 500
Boxes not moved	Approximately 15-20 boxes/pieces of furniture was dropped in our dining room instead of being moved to the room listed on the box/furniture		

New house damage

Stair rail	We were told the entire stair case would be padded. They scraped an entire piece of furniture along the stair rail removing the finish and the corner of the stair rail. When asked to pad and wrap the stair rail a fight ensued.		\$ 1,000
Door frame	Wide door and they carelessly damaged the front door, door frame, and weather stripping		\$ 5,000
Walls	Handprints on walls, bumps into walls etc		\$ 500

Outgoing house damage

Outgoing house - Walls	Chunks taken out of the walls, spacious hallways and the movers were carelessly running into the walls		\$ 500
Outgoing house - Front bedroom door	Damaged door and door frame. Removed door from door frame and refused to replace		
Outgoing house - Front door	Damaged door and door frame.		

LOST SECURITY DEPOSIT FOR DAMAGES

			\$ 500
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USDOT #837931
MC #370277

SUPERIOR

Florida Mover Reg No. IM492
Broward Reg# 22



2055 BLOUNT ROAD • POMPANO, FL 33069
(954) 978-9999 • (561) 740-7120 • (800) 992-2978
Fax (954) 917-2645



Guaranteed / Binding Estimate

Visit us @ www.asuperiormove.com

Customer: RICK CAPP

Date: 04/02/2015
S0023.100/00446

Ref by: MAILER D/Move: Time: AM PM D/Confirmed: Valuation Type: BASIC

Phone (home): [REDACTED] Fax: [REDACTED]
Phone (work): [REDACTED]

Moving From: [REDACTED]
Ap# [REDACTED] Bldg# [REDACTED] Complex/subdivision [REDACTED]

Truck Access: 75 FEET OR LESS 75 FEET OR LESS

Moving To: [REDACTED]
Ap# [REDACTED] Bldg# [REDACTED] Complex/subdivision [REDACTED]

Extra Pick Up / Delivery: NONE

Estimate Guaranteed based on attached survey: Yes No

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GAS, LABOR, TAPE, PADS AND ALL FEES ARE INCLUDED IN FLAT RATE.

★ LONG DISTANCE GUARANTEED PRICE BASED ON DIRECT SHIPMENT, NO STORAGE OR DELAYS.

Mover's Dis/Re-Assemble Furniture Customer Dis/Re-Assemble Furniture
 Storage (air conditioned) \$ N/A per month

Guaranteed Price \$ 1100.00 - FLAT RATE MOVE

Options: 70.00 DOLLARS EXTRA IF CUSTOMER WANTS 9 WARDROBE BOXES.

★ Our Blue Ribbon Service assures you that our courteous, professional moving personnel will pad-wrap all your furnishings for protection during transport and treat your valued possessions with care! Be an educated consumer when choosing a storage facility. We suggest you take the time to visit the facility, confirm that it is truly air conditioned, not just "climate controlled" - There is a big difference in our humid, South Florida climate. Superior Moving offers a fully air conditioned, secured storage facility to assure your items will remain safe and in good condition. We encourage and invite you to visit our facility at anytime. This estimate is valid for 60 days, unless authorized in writing by a company representative.

NOTES:

Estimate Guarantee Based On: Above information being accurate Pertains only to items / services listed above
All loose and/or miscellaneous items must be boxed & organized Elevators & loading areas reserved for Mover's sole use

Customer Signature

LUIS OLIVA - IN-HOME EST.
Carrier Representative