THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity

Case No. 2017-001546

Nexstar Media Group, Inc. successor in interest to Media General, Inc. d/b/a WSPA and WYCW, Respondent(s)

v.

Davis Roofing Group, LLC and Mark Mahoney, Defendants,

Of which Davis Roofing Group, LLC is the Appellant

And Mark Mahoney is a Respondent

REPLY BRIEF OF APPELLANT

STRICKLAND LAW FIRM, LLC
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court err in refusing to deem Appellant's Request to Admit admitted when Respondent (Mahoney) failed to respond?

2. Did the Court err when it ignored the requirements for admissions and denials as set forth in Rule 36(a) SCRCP?

3. The Court failed to follow the requirements of Rule 36(b), SCRCP, in acting Sua Sponte allowing Mahoney to withdraw the admissions.

4. The court's ruling is inconsistent with the "form and substance" of Rule 36.

STATEMENT OF THE CASE

Respondent (Nexstar) engaged in a Contract for Services, signed by Respondent (Mahoney), to run advertisements for Appellant on May 9, 2012. A Summons and Complaint was filed on July 22, 2014 by Respondent (Nexstar), alleging Appellant has not paid for the advertisements that were run. An amended Summons and Complaint was filed by Respondent (Nexstar) on February 19, 2015, adding Respondent (Mahoney) to the litigation as a Co-Defendant. Appellant filed an Answer and Counterclaim against Respondents (Mahoney) on November 10, 2014, claiming that Respondent (Mahoney) was liable as he did not have the authority (apparent or actual) to sign contracts on behalf of the Appellant. Respondent (Mahoney) sent a letter (March 16, 2015) to Respondent (Nexstar) but not to Appellant or the Clerk of Court, nor did Respondent (Mahoney) file a response to Appellant's

Summons and Answer and Counterclaims which was personally served on Respondent (Mahoney) on June 15, 2015.

Appellant subsequently served Interrogatories and Requests to Produce and Requests to Admit on Respondent (Mahoney) on December 14, 2015. Respondent (Mahoney) never filed an answer or objections to the Request to Admit nor did he produce any documents or responses to the Interrogatories. A Notice and Motion for Default Judgment was filed by Appellant against Respondent (Mahoney), who was Pro Se and had been since the inception of this matter, on May 13, 2016. On May 23, 2016, Respondent (Mahoney) retained counsel who filed Notice of Appearance, Response to Plaintiff's Amended Complaint, and Response for Default Judgment. The Respondent (Mahoney)'s attorney did not seek permission from the Court to file an amended answer and the Court determined that the "Letter" sent by Respondent (Mahoney) when he was Pro Se would suffice as his answer and response to Appellant's Summons and Complaint. However, the Letter did not assert any affirmative defenses therefore they were waived.

This matter was referred to the Master in Equity on May 17, 2016. This matter was tried before the Master in Equity on March 13, 2017. Regarding Petitioner's Motion for Default, the Master determined that the "Letter" from the Respondent (Mahoney) would suffice as his answer to Petitioner's claims against him. The Master in Equity heard testimony and Motions regarding the Respondent's (Mahoney's) testimony that was inconsistent and contrary to his Admissions under SC Rule of Civil Procedure Rule 36 (due to lack of response to the Appellant's Request to Admit served him). The Master, determined that even though the Request to Admit were properly served he would not hold a Pro Se defendant to the strict result of a failure to admit or deny. And that the Appellant was obligated to re-serve the Respondent the Discovery requests and Requests to Admit upon his

obtaining Counsel. Judgement was entered for the Respondent (Nexstar) against Appellant.

Appellant filed a Motion to Reconsider, on April 13, 2017. This matter was heard by the Master in Equity on June 29, 2017. During this hearing the Master in Equity, determined that his ruling regarding SCRCP Rule 36 (Requests to Admit) would stand and that it was incumbent upon Appellant's counsel to re-serve Respondent (Mahoney) all discovery requests, including Requests to Admit, upon being informed that he had retained counsel. The Court issued their order denying Appellant's Motion to Reconsider on July 6, 2017.

Appellant filed Notice of Appeal from Spartanburg County Master in Equity on July 13, 2017.

STATEMENT OF THE FACTS

On May 9, 2012, Respondent (Mahoney) allegedly acting on behalf of Appellant, and Respondent (Nexstar) entered into a written agreement whereby Respondent (Nexstar) would run a series of television advertisements on behalf of Appellant. These advertisements were run for approximately four (4) months and bills from Respondent were sent to Appellant regarding the advertisements. After learning about the advertisements, Appellant contacted Respondent (Nexstar) and stated he had not agreed to the contract and demanded the ads cease running. Respondent (Nexstar) ceased running the ads but expected Appellant to pay for the ads that had been run. Respondent (Nexstar) stated that Respondent (Mahoney) had signed the contract in his capacity as "Marketing Director". Appellant stated there was only one (1) officer of the company and he was the sole officer and no other person had actual or apparent authority to sign contracts or obligate the company for services without prior approval of Appellant.

Respondent (Nexstar) filed suit against both Respondent (Mahoney) and Appellant. In its' lawsuit, Respondent (Nexstar) claimed that either Respondent (Mahoney) or Appellant owed the money for the ads that were run. That if Respondent (Mahoney) did not have the authority to run the ads then he was liable and that if Respondent did have the authority to run the ads then the Appellant was liable. (Amended Complaint)

Appellant's position was that Respondent did not have actual or apparent authority to sign contracts on behalf of or as an agent of Appellant. That as such, Respondent (Mahoney) should have been personally liable (Appellants Answer to Amended Complaint).

Respondent (Mahoney) stated that he was hired as Director of Marketing for the Appellant but could only produce a business card to support his position.

Appellant argues that Respondent (Mahoney) was served with Discovery requests on December 14, 2015 and that at the time, Respondent (Mahoney) was Pro Se. That Respondent never filed a response to the Request to admit and that therefore the Request to Admit were deemed admitted. Nor did Respondent (Mahoney) submit any of the Requested documents as demanded in the Discovery requests. Respondent (Mahoney) refused to respond to any discovery requests submitted by Appellant.

The Court found that as Respondent (Mahoney) was Pro Se at the time he was served he shouldn't be held to a strict standard in regards to the Request to Admit. Furthermore, the Court stated when the Pro Se Respondent (Mahoney) obtained counsel, Appellant should have re-served the Request to Admit on Respondent's (Mahoney) counsel.

Appellant also argued that Respondent (Mahoney) neglected to file a response to his Summons and Complaint. The Court stated that Respondent (Mahoney)'s "letter" would suffice as his Answer.

ARGUMENT

1. Whether the Lower Court erred in allowing testimony contrary to a party's admissions under Rule 36(b) by not responding to the Request to Admit

South Carolina Rule of Civil Procedure Rule 36:

*"**(a) Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. "*

***(b) Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose."*

In reviewing matters concerning Rule 36(a), Courts in South Carolina have consistently held that failure to respond to requests for admissions deems the matter(s) contained therein admitted for trial. In *Hatchell v Jackson, 290 S.C. 256, 349 S.E. 2d 407 (Ct. App 1986),* although Hatchell replied to Jackson's counterclaim, he failed to respond to Jackson's request for admissions. The Circuit Court granted summary judgment in favor of Jackson. The Court of Appeals found that "Hatchell

never responded to Jackson's request for admissions. Therefore under South Carolina Circuit Court Rule 89(a), which was then in effect and is not embodied in Rule 36(a) of the new South Carolina Rules of Civil Procedure, each matter of which Jackson sought an admission was deemed admitted".

The South Carolina Court of Appeals stated that admissions due to failure to respond to requests to admit were binding. In *Commerce Center of Greenville, Inc v W. Powers McElveen and Associates, 347 S.C. 545, 556 S.E. 2d 718 (2001),* the Court of Appeals determined that "admissions obtained via failure to respond to a request to admit were just as binding on a party as answers in pleadings or stipulations, absent the grant of an amendment to the admissions". In the case at hand, Respondent (Mahoney) never objected or responded to the Discovery Requests nor Request to Admit served upon him. Nor did he request an amendment or file a Motion for additional time to respond.

In *Scott v Greenville Housing Authority, 353 S.C. 639, 579 S.E. 2d 151,* the Court found that "the purpose of Rule 36 is to allow parties to narrow the issues and determine which facts do not need to be proven because they are admitted." The Court further found that "whether a request to admit alters the pleadings depends on the language of the particular request to admit. However, if the language of the request for admission specifically goes to an issue in the pleadings, the admission resulting from a party's failure to respond to the request may override the pleadings." In this case, Respondent (Mahoney) failed to respond to the Request to Admit and waiting until the Appellant filed a Motion for Default, to retain counsel. Even then, Respondent (Mahoney) failed to alert his attorney that he had been served a Summons and Counterclaims in addition to the Appellant's Discovery request including Request to Admit.

2. Did the Court err when it ignored the requirements for admissions and denials as set forth in Rule 36(a) SCRCP?

In the case at bar, the Master in Equity stated that it was incumbent upon Appellant to "re-serve" the new Counsel, the Discovery requests and to re-serve Request to Admit. In a search of case law to support this position, no case law was found that supported re-service of process. While Rule 36(b) finds that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." There was no motion presented to the Court and the Master in Equity allowed the withdrawal of the admission in the middle of the trial.

In *Scott*, the Court found that Rule 36 SCRCP allows "amendment of an admission in the discretion of the court when the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him". In the case at bar, the Court allowed the withdrawal *sua sponte*, without a motion being made by Respondent (Mahoney) and additionally Appellant could have shown prejudice by allowing the withdrawal.

This court took the position on the Requests to Admit, that the Respondent (Mahoney) was Pro Se at the time he was served the Requests to Admit and stated "I am not going to hold him to the strict result of a failure to admit or deny, but the Notice of Appearance of Mr. Craven (Respondent's Attorney) appeared on May 18, 2016, and I don't know that Mr. Craven was contacted relating to the Requests to Admit or any matters."

In *Commerce Center of Greenville, Inc. v W. Powers McElveen & Associates, Inc.. 347 S.C. 545 (2001)*, the Court found that "the efficacy of these admissions is akin to the doctrine of judicial estoppel: an admission precludes the admitting party from arguing facts at trial contrary to its responses to a request to admit, absent an amendment to or revocation of the admission". Appellant

made the argument that the Respondent in this matter should have been estopped from asserting facts in trial that were different that it's responses (or lack thereof) to Appellant's Requests to Admit.

3. Whether the Lower Court abused its discretion in allowing Mahoney to withdraw its admissions.

Rule 36(b) is unambiguous when it states that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal". But the trial Court may only "allow a party to amend or withdraw" under two conditions, (1) the presentation of the merits is furthered by the amendment; **and** (2) the party who obtained the admission cannot demonstrate prejudice because of the amendment. In this case at bar, the Court made the decision to excuse the failure of the Respondent (Mahoney) to respond admissions without considering the prejudice caused to the Appellant.

Appellant made certain, specific Requests to Admit that were potentially outcome determinative. (Trial Transcript pg 132 133 lns 19-25 and lns 1- 10) when asked the Respondent to Admit or Deny "he (Respondent) didn't have the apparent or actual authority to sign contracts on behalf of" Appellant. That "he (Respondent) admit or deny he did not have written permission to sign the contract with the Plaintiffs". That "he (Respondent) signed the contract of his own accord". And that "he (Respondent) didn't have the authority to grant himself a corporate title".

By excusing the Respondent (Mahoney) failure to respond, the Court severely prejudiced the Appellant party. Without considering the prejudice to Appellant the Court erred in granting the withdrawal.

In *Brook Village North Associates v. General Electric Company, United States Court of Appeals First Circuit, 686 F.2d 66 (1982)*, the Court determined, "the prejudice contemplated by the

Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case...because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions". This goes direct to the prejudice suffered by the Appellant due to the Court not adhering to Rule 36 or in determining that it was incumbent upon the Appellant to "re-serve" the Request to Admit to Respondent's new counsel.

4. Whether the Lower Court's ruling was inconsistent with the form and substance of Rule 36

The Judge in the case at bar ruled that as the Respondent (Mahoney) was Pro Se that upon his obtaining an Attorney he should have been afforded additional time (5 months) to respond to the Request to Admit and that it was incumbent upon the Appellant to resubmit all discovery requests to the Respondent (Mahoney). That, without any motions from the Respondent (Mahoney), the Court granted the Respondent (Mahoney) the luxury of withdrawing its admissions thus severely prejudicing the Appellant's case.

REPLY TO RESPONDENTS

As to Respondent's (Mahoney and Nexstar's) claim as to the timeliness of the Notice of Appeal in this matter. South Carolina Appellate Court Rules, Rule 203, states that a Notice of Appeal shall be served on all Respondents within thirty (30) days after receipt of written notice of the order.

In this matter the Appellant filed a Motion to Reconsider on April 13, 2017. This Motion was not heard until June 29, 2017. The Judge denied the Appellant's Motion to Reconsider in his written Motion on July 6, 2017. Appellant filed their Notice to Appeal on July 13, 2017.

Respondents seek to point to the Transcript of the Hearing for their objections as to the

why the Court denied the Motion to reconsider. However, the Order failed to mention any of the Respondent's objections and Denied the Motion for the same reasons he denied them during the trial. (Court Order Denying Motion to Reconsider).

The Motion to Reconsider was based on Rules 59 and Rule 60. South Carolina Rules of Civil Procedure, Rule 7(b)(1) states "the requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." The Motion to Reconsider was made in writing and properly served on all parties. No party filed any written objections prior to the hearing and only made their objections known at the start of the hearing.

Even if the motion was non-compliant as the Respondents plead, it was still timely filed and tolled the time to file the Notice of Appeal until a final order, or in this case the Order Denying the Motion to Reconsider was signed and served on July 6, 2017.

Finally, based solely upon the Order Denying the Motion to Reconsider it fails to mention any of their objections as to the Court's reason for denying the Motion to Reconsider, therefore the sole reason the Judge denied the Motion to reconsider was based on his decision that his ruling during the trial was the correct decision.

As Respondents cite *Camp,* the Court held that "when neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical reading of the rules does not serve the purpose of Rule 7(b)(1), SCRCP." The Court, in *Camp,* further cited *Andreas v Volkswagen of Am, Inc. 336 F.3d 789, 793* when they stated "the particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized". In the case at hand, the Court heard the arguments about the technicality and chose to issue their ruling ONLY as to the Appellant's reasons and grounds for the Motion.

There is no mention of the lack of requirement's of Rule 7 as to the Court's ruling in the Court's order.

As the Order fails to mention any failure or non-compliance with the Rules, the Respondent's objections fail as it was not part of the Order Denying the Motion to Reconsider and thereby the Court failed to consider that as the reason for Denying the Motion. Additionally, it may be of note that the Respondents drafted the Order Denying the Motion and that same order failed to mention any other reasons for Denying the Motion other than what was stated at trial that the Judge would not reconsider his decision regarding Rule 36.

The Respondent's cite *Crestwood* whereby the Master's decision regarding "refusing to deem admitted the requests for admission" were made due to lack of hard proof that a party actually received the requests. In the case at hand there was little to no dispute that the Respondent (Mahoney) was properly served with the Interrogatories, Request to Produce and Request to admit. He simply stated that he didn't remember receiving them that he "thought he was in the hospital at the time" but he offered no proof of that.

The Respondent cited *Collins Entertainment v White, 363 S.C. 546, 611 S.E. 2d 262 (Ct. App. 2005),* and the Judge's failure to deem admitted the lack of response to the Request to Admit. Again, in the case at hand it differs from Collins in that in Collins the Requests to admit were sent to the wrong location. In this case, the Requests to admit were sent to the home of the Pro Se Defendant (Respondent Mahoney).

In *Collins,* the Court cited that "an admission may be withdrawn upon application to the court" AND "the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits". In the case at

hand, Appellant demonstrated to the Court that by allowing the Respondent (Mahoney) to withdraw his Admissions would adversely prejudice the case, specifically in light of the fact that Respondent (Mahoney) had already testified adversely to his out of court admissions. And the fact that his attorney failed to make a motion until after the Appellant made his motion to have the Requests to Admit deemed admitted.

In the case at hand, it differs from *Collins* in that in *Collins* the "admission may be withdrawn upon application to the Court". The Respondent (Mahoney) never made the application to the Court, the Court took it upon themselves to withdraw the admissions. (Trial Transcript p 135 lns 5 – 8).

The Respondents Cite, *Commerce Center of Greenville v Mcelveen, 347 S.C. 545 (2001),* in *Commerce,* the Court held that a "trial court may allow a party to amend or withdraw its answers to a request to admit when: (1) the presentation of the merits is furthered by the amendment; and (2) the party who obtained the admission cannot demonstrate prejudice of the amendment." (Citing Rule 36). In the case at hand, the Respondent (Mahoney) failed to make any motion to amend or withdraw the request to admit. In this case, the Court took it upon themselves to determine that Appellant should have "re-served" the Respondent (Mahoney) upon his obtaining an attorney. In this case the Court sue sponte determined that the Respondent (Mahoney) would be given the opportunity to withdraw their admissions without any motion from the Respondent (Mahoney). As such, Appellant's position that the Court abused it's discretion by, in essence, assisting the Respondent (Mahoney) in altering, amending or withdrawing the Requests to Admit without a Motion being made from Respondent (Mahoney).

Respondent cites *Barber v Hobbs, 313 S.C. 319,* in that Dr. Hobbs admitted certain

requests for admission while at trial he testified to the contrary to the admissions. In the case at hand the Respondent (Mahoney) never responded but testified to the contrary to the Requests to admit that should have been deemed admitted. That case differs from our case in that the parties had received the Requests to Admit responses, whereas in our case Respondent (Mahoney) never responded. Similarly, in the *Toumey v McIntosh, 315, S.C. 189, 432 S.E. 2d 485(1993),* case the hospital admitted requests for admissions, then moved to amend its answers, which the motion was granted. On that we both agree was the case in *Toumey,* in the case at hand, no such motion was made, the Court took it upon themselves to allow the Respondent (Mahoney) to change his non-response. By doing so it prejudiced the case of the Appellant.

In the case at hand, allowing the Respondent to withdraw or amend his Requests to Admit severely prejudices the case in that those Admissions were contrary to the testimony presented by Respondent (Mahoney). In *Commerce,* the trial court allowed them to amend their responses due to the fact that in it's answers they "reserved its right to 'supplement this response to the extent further deficiencies are discovered'". (Commerce, 347 S.C. 545, 552, 2001). This differs from our case in that Respondent (Mahoney) never reserved any such rights.

CONCLUSION

Insofar as the allegations of non-compliance of Rule 7, the Court's order Denying the Motion to Reconsider, did not reflect any deficiencies of the Motion to Reconsider, and therefore the Motion stood on it's merits and was heard in full and denied. The Motion to Reconsider, was made in good faith and presented to the Court without objections, beforehand from any party. Additionally, the Judge's order denying the Motion to Reconsider, failed to cite any deficiencies in the Motion as a reason for denying the Motion to Reconsider. As such the time for filing the Notice of Appeal was based on that July 6, 2017 Order and did not date back to the Original Trial order.

Finally, Rule 36(a) and 36(b) are specific in their form and substance and do not draw a distinction between a Pro Se party or a Party that has representation. That "a matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection to the matter and signed by the party or its attorney" SCRCP 36(a). In part (a) it anticipates that a party may be Pro Se or represented by the statement "signed by the party or its attorney". SCRCP 36(b) states that any matter admitted under this rule is "conclusively admitted" unless the Court on motion permits withdrawal or amendment of the admission subject to the 2 conditions "the presentation of the merits is furthered by the amendment; **and** (2) the party who obtained the admission cannot demonstrate prejudice because of the amendment". The Respondent (Mahoney) made no motion, made no effort to respond in a timely fashion to the Discovery request or the Request to Admit. And that only when Appellant made the motion to strike the

Respondent's statements that were contrary to his admissions, did the Court *sua sponte*, allow the Respondent (Mahoney) to withdraw its admission without consideration given to the prejudice caused to the Appellant.

For all of the foregoing reasons, the Order of the Master in Equity should be reversed and Respondent's testimony that contradicts his Admission in the Request to admit be stricken from the record, and that, insofar as liability, the Respondent (Mahoney) be found liable to the Respondent (Nexstar) for the contractual amount owed.

Respectfully submitted,

By: _____

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ATTORNEY FOR APPELLANT

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Respondent(s)

v.

Davis Roofing Group, LLC and Mark Mahoney, Defendants,

Of which Davis Roofing Group, LLC is the Appellant

And Mark Mahoney is a Respondent

CERTIFICATE OF SERVICE

PROOF OF SERVICE

I certify that I served the Initial Reply Brief and Designation of Matter to be included in the Record of Appeal on Nexstar and Mahoney (Respondents) by depositing a copy of it in the United States Mail, postage paid, on April 6, 2018, addressed to their attorney of record, Craig Allen, Esq. 605 Pettigru Street, Greenville, SC 29601 (Nexstar) and James Stone Craven, Esq., 304 Pettigru Street, Greenville, SC 29601.

April 6, 2018

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THE LAW OFFICES OF
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April 6, 2018

Ms. Jenny Abbott Kitchings
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Re: Nexstar v Davis Roofing
Appellate Case No: 2017-001546
Reply Brief, Certificate of Service, Designation of Matter to be included in the Record on Appeal pursuant to Rules 208 and 209

Dear Ms. Kitchings,

Please find enclosed the Reply Brief of Appellant along with our Designation of Matter to be Included in the Record of Appeal and Proof of Service pursuant to Rules 2085 and 209 of the South Carolina Appellate Court Rules and the Certificate of Counsel and Certificate of Service.

If you have any questions or comments, please do not hesitate to contact us.

Respectfully,

John Strickland
Attorney

Cc: Craig Allen and Stone Craven

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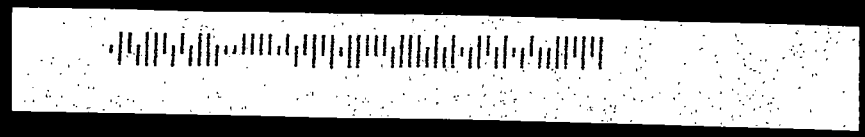

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