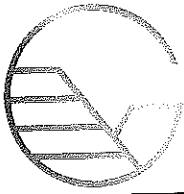


Human Resources Division  
Michigan County Human Resources  
301 W. Jefferson, Suite 240  
Phoenix, AZ 85003



# COPPER CANYON LAW

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March 2, 2020

## **Hand-Delivered**

Human Resources Director  
Maricopa County Human Resources  
301 W. Jefferson Street, Suite 240  
Phoenix, AZ 85003

***Re: Juan Martinez - Notice of Appeal***

Dear Sir or Madam:

This firm has been retained by Juan Martinez to represent him with respect to his dismissal from the Maricopa County Attorney's Office ("MCAO"). This is a written Notice of Appeal of the Notice and Decision to Dismiss Deputy County Attorney Juan Martinez dated February 21, 2020 ("Dismissal Letter"). As set forth below, there is no just cause for his termination.

## **I. MATERIAL FACTS AND BACKGROUND**

Mr. Martinez's personal integrity, professional excellence and distinguished 30-year career with the Maricopa County Attorney's Office ("MCAO") have been perhaps irreparably tarnished by a vendetta against him by Mr. Kenneth Vick and the MCAO. The dismissal appears to be motivated not by due process, but by internal and external political considerations and pressures. This can be seen in the Dismissal Letter from Chief Deputy County Attorney Kenneth N. Vick. (Copy of the Dismissal Letter is attached as **Exhibit 1**.) Mr. Vick had previously issued a Notice of Intent to Dismiss dated February 7, 2020 ("Notice of Intent"). (Copy of the Notice of Intent is attached as **Exhibit 2**.) Mr. Martinez responded to that Notice of Intent with a letter dated February 18, 2020, with detailed facts and case law ("Notice of Intent Response"). (Copy of the Notice of Intent Response is attached as **Exhibit 3**.) The MCAO and Mr. Vick somewhat toned down the Dismissal Letter, issued just three days after the Notice of Intent Response, but has explicitly or

impliedly held onto the misinformation and legal errors that were addressed and supported in the Notice of Intent Response. No investigation, no second-thoughts, no due process.<sup>1</sup>

This appeal seeks to right that irresponsible, untenable, and unacceptable wrong.

**a. The 2018 Office of Investigation Division Investigation and Report**

Based on the depositions, it was determined that allegations were made in 2017 that Mr. Martinez had engaged in a pattern of “engaging in misconduct involving the sexual harassment of several female MCAO law clerks and a female Deputy County Attorney from 2007 to 2017.” (MCAO Office of Investigations Division Management Findings Report Form, Case #2017-027, dated April 24, 2018, the “2018 OID Report,” p. 1 – copy attached as **Exhibit 4**). The 2018 Office of Investigation Division (“OID”) Report was the result of the OID’s investigation of complaints filed by Deputy County Attorney [REDACTED] in MCAO Division Inquiry D12017-027 (the “2017 OID Investigation”). Mr. Martinez was charged with violation of the following Maricopa County Employee Policies and Procedures:

- Maricopa County Internal Policy HR 2421.IV.B – Professional Conduct
- Maricopa County Employee Policies and Procedures 10.1.B – Code of Ethics
- Maricopa County Internal Policy HR 2416.V.A and V.B: Code of Conduct
- Maricopa County Internal Policy HR 2406.V.A., IV.D.3, VI.D.5: Prohibition against Discrimination, Harassment, and Retaliation
- Maricopa County Employee Merit Rules Section 15.A.13: Discourteous Treatment of the Public or Fellow Employees

(collectively, the “2017 Charges”). Although the allegations made against Mr. Martinez were later shown to be *false* in a separate proceeding (see below), the OID sustained them in its OID Report and recommended that disciplinary action be taken as follows: “Written reprimand. View AZ State Bar training on sexual harassment, May, 9, 2018 at 10 am, PST with Jon Elison and Mike McVey.” (2018 OID Report p.3).

The Maricopa County Merit System Employee Commission accepted and adopted the 2018 OID Report in its entirety (the “Commission’s Determination”). Based on his desire to put this all behind him, Mr. Martinez did not appeal the 2018 OID Report and the Commission’s Determination and chose to accept the Commission’s Determination and the recommended discipline it imposed. He received the written reprimand and attended the recommended sexual harassment training session. Mr. Martinez rightfully believed that

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<sup>1</sup> As explained below, if you strip away the legally impermissible aspects of the Dismissal Letter, it is, at best, a decision to terminate Mr. Martinez based on provably false allegations that he has at times been “discourteous” to fellow MCAO employees.

after accepting the discipline, he should be able to move forward with his distinguished career.

Mr. Vick was not happy. As he candidly states in his Notice of Intent, he still disagrees with the 2018 OID Report and the Commission's Determination. (See Ex. 2, Notice of Intent at 2: "I have reviewed the [2017 OID Investigation] and the reprimand that was issued, and I also believe the accounts of the various victims and witnesses in that investigation."). With all due respect to Mr. Vick, however, his personal belief or opinion is irrelevant and contrary to what the OID found and recommended in OID Report and what the Maricopa County Merit System Employee Commission found and determined in the Commission's Determination. Mr. Vick was not the factfinder in that process, and Mr. Martinez's due process rights demand that he cannot unilaterally and arbitrarily decide to "overrule" the decisions that have previously been made by the authorized factfinders in this matter.

#### **b. The 2018 State Bar Charge and Investigation**

Nevertheless, after Mr. Martinez's nightmare was finally over, he was essentially re-charged with the same conduct that was investigated and resolved by the 2018 OID Report and the Commission's Determination after a bar complaint was filed against him by the State Bar of Arizona, which charged him with "unprofessional conduct" in State Bar Complaint Nos. 17-0624 & 18-0693 (the "Bar Complaint"). The State Bar conducted its own independent investigation. Depositions of Mr. Martinez's accusers were taken and processed by the State Bar. As a result, the Bar Complaint was dismissed by presiding disciplinary Judge William J. O'Neil.

Mr. Vick is still not happy. Both his Notice of Intent and his Dismissal Letter make it clear beyond doubt that he still believes the claims of "the various victims and witnesses" in the 2017 OID Investigation, and, by extension, in the State Bar Complaint proceeding. (Ex. 2, Notice of Intent at 2). Again, however, Mr. Vick's personal belief or opinion is irrelevant and contrary to what these prior investigations have found and determined. In the Notice of Intent Response, we questioned whether Mr. Vick had even read the depositions of any of Mr. Martinez's accusers taken in the State Bar Complaint proceedings. (Notice of Intent Response at 2 & n.1). He did not claim that he had in his Dismissal Letter.<sup>2</sup>

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<sup>2</sup> We also question Mr. Vick's authority to take any action to terminate Mr. Martinez, given that he is not the County Attorney who is the MCAO elected official and Appointing Authority. See Maricopa County Employee Merit System Rules, Rule 1.04, which provides: the Appointing Authority is "[a]n elected official, single executive head of a department, or the designated representative authorized to act in this capacity." Rule 9.03(A) provides that only the Appointing Authority may take disciplinary action against a Merit System employee.

If he had read the depositions of Mr. Martinez's accusers taken in connection with the Bar Complaint, Mr. Vick would have known that the credibility of Mr. Martinez's accusers was deeply damaged by their own sworn deposition testimony. Deputy County Attorney [REDACTED] for example, was deposed on August 1, 2019. She admitted that, contrary to what Mr. Martinez was accused of in the OID investigation – that he allegedly told her he could guess the color of her underwear – was not true, that she had never said that to anyone. (See [REDACTED] Dep., p. 18, ll. 6-11, copy attached as Exhibit 5; compare [REDACTED] Dep., copy attached as Exhibit 6, p. 18, ll. 1-3); also compare [REDACTED] Dep., copy attached as Exhibit 7, p. 8, ll. 16-25; p. 9, ll. 1-2). Deputy County Attorney [REDACTED] for another example, was deposed on August 21, 2019. She testified that the MCAO Investigator pressured her to say what he wanted her to say. (See [REDACTED] Dep., p. 10, ll. 18-25 – p. 11, ll. 1-2, copy attached as Exhibit 8). This same tactic was confirmed by Deputy County Attorney [REDACTED] in her deposition. (See [REDACTED] Dep., copy attached as Exhibit 9, p. 9. Ll. 6-18: "A. I was read warnings that I could lose my job if I didn't answer questions fully and how – to the officer's satisfaction.").

### **c. Mr. Martinez's Termination**

Nevertheless, *nearly two years after* the conclusion of the 2017 OID Investigation that resulted in the 2018 OID Report and the Commission's Determination, and *immediately after* the State Bar dismissal orders, Mr. Vick and the MCAO decided to cast aside all of that, along with its accompanying due process, in order to make their own assessment and determination of Mr. Martinez's alleged conduct and the punishment he deserves. Without any investigation or re-investigation of his own, Mr. Vick has charged Mr. Martinez with essentially the *same code of conduct violations* that were previously charged, investigated and resolved by the 2017 OID Investigation and 2018 OID Report and re-charged, investigated and resolved by the State Bar Complaint proceedings. He now attempts to charge and punish Mr. Martinez *a third time* for *essentially the same conduct* he has been *twice accused of, charged with* and either punished by the Commission's Determination or exonerated by the State Bar. This is double, if not triple, jeopardy of the highest and most blatant Order.

The clear objective of Mr. Vick's Dismissal Letter is to "get" Mr. Martinez by any means, regardless of the prior investigations, proceedings and determinations and without any regard for the rule of law or Mr. Martinez's due process rights in the matter.

## **II. The Dismissal Letter Does Not Show Cause for Dismissal.**

There is nothing in the Dismissal Letter that comes close to demonstrating a level of conduct by Mr. Martinez necessary to show a violation of the identified sections of the

Maricopa County Employee Merit System Resolution. Additionally, dismissal, or any other discipline, cannot be based on the actions of Mr. Martinez prior to the Commission's Determination since discipline for those actions has already been proposed and applied. MCAO is bound by due process and cannot be overruled by requests from certain loud voices in the public or from those that have previously made claims against Mr. Martinez.

**a. Due Process Prohibits Dismissal Based on Actions by Mr. Martinez Prior to the Commission's Determination.**

In the Notice of Intent, Mr. Vick heavily and expressly relied on the OID investigation that resulted in the 2018 OID Report and imposed discipline. (Notice of Intent, Section II, pp. 2-5). Although much of the explicit reliance is removed from the Dismissal Letter, the remaining reasons for dismissal in the Dismissal Letter are pretextual and there is still substantial implicit reliance on the OID investigation and actions taken by Mr. Martinez prior to the Commission's Determination for which Mr. Martinez already received discipline. However, as a Merit System employee, Mr. Martinez has a due process property interest in his job, and his procedural and substantive due process rights cannot be trampled. *See Deuel v. Arizona State Sch. for Deaf & Blind*, 165 Ariz. 524, 526-27, 799 P.2d 865, 867-68 (App. 1990) (setting forth Merit System employee's due process rights); *see also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (setting forth minimum pre-termination requirements).

**Due Process – Double Jeopardy**

One such due process right that has been ignored is analogous to the freedom from "double jeopardy" provisions contained in the United States and Arizona Constitutions. In the employment context, this means that, as a matter of fundamental fairness, a state agency "may not reach a decision as to disciplinary action on one occasion, and then at a later date increase the disciplinary action so that the agency disciplines the employee twice for the same offense." *Dep't of Env'tl. Prot. v. Barker*, 654 So. 2d 594, 595 (Fla. App. 1995). To determine whether an employee has been subjected to such double jeopardy, "the question is whether the initial discipline was, in some sense, final." *Id.*; *see also Kingsford Mfg. Co.*, 126 Lab. Arb. (BNA) 1137, 2009 WL 2766786 (Smith 2009) (stating in the context of a labor arbitration: "Disciplining an employee twice for the same act constitutes double jeopardy and is a due process basis for invalidating the discipline.").

In *Zavala v. Arizona State Pers. Bd.*, 159 Ariz. 256, 766 P.2d 608 (App. 1987), the Arizona Court of Appeals found that an Arizona Department of Corrections employee had not been disciplined for the same conduct twice. The first disciplinary action taken against the employee, an unpaid suspension, was soon thereafter, within 80 days, rescinded, and he was reimbursed for the wages he had lost during the suspension. 159 Ariz. at 261, 766 P.2d at 613. The *Zavala* Court held, in *dictum*, that his subsequent dismissal was not a second

discipline, but a "substitution" for the first discipline. *Id.* As set forth below, however, the Court also held that the employee was nevertheless deprived of due process by being wrongly induced to forego his right to grieve and appeal the first disciplinary action. 159 Ariz. at 261-64, 766 P.2d at 613-16.

In Mr. Martinez's case, the disciplinary action recommended by the OID and imposed by the Maricopa County Merit System Employee Commission was clearly a final administrative decision that, *nearly two years later*, as a matter of fundamental fairness, cannot be reopened and re-determined a second time. The MCAO cannot possibly rescind the discipline that it has already imposed and that he accepted and completed at that time. It cannot undo the written reprimand in his personnel file or re-write Mr. Martinez's "does not meet" evaluation which resulted in his not receiving a raise that year, and he cannot "un-take" the sexual harassment training he took as his punishment. Due process must be meaningful *and* timely. *See Zavala*, 159 Ariz. at 264, 766 P.2d at 616 (noting that "[d]elay may in and of itself constitute a constitutional violation"), *citing Loudermill, supra*, 470 U.S. at 547. As the saying goes: Justice delayed is justice denied.

The Arizona *Zavala* case was explained in a recent Colorado Court of Appeals decision. In *Murr v. Civil Serv. Comm'n of City & Cty. of Denver*, P.3d , 2019 WL 1474323 (Colo. App. May 23, 2019), the Court reversed and remanded a Denver Civil Service Commission's decision to "reopen an investigation" into the prior conduct of two police officers and to "rescind" a prior disciplinary order based on that conduct.

The two police officers were captured on video in a gross display of using excessive force to arrest someone. The facts were disputed. After the initial investigation, the Deputy Chief of Police and the Manager of Safety (hearing officer) recommended that one of the officers be docked three days of pay and that the second officer be suspended for three days. 2019 WL 1474323 at 1, ¶¶ 2-3. They did not choose to appeal that order. *Id.* at 2, ¶ 4. The local news media broadcast the story criticizing the City and bringing forth two new eyewitnesses. *Id.* ¶ 5. When the City saw this negative publicity, it reopened the prior investigation based on the "new evidence." *Id.* ¶ 6.

After a long battle up and down and through the City, the City Civil Service and the courts, the City Civil Service Commission affirmed the City's "implied right" to reopen the first investigation and rescind the prior discipline in order to issue the second disciplinary order terminating the police officers. 2019 WL 1474323 at 2-3, ¶¶ 7-16.

The *Murr* Court examined the Denver City Charter and policies to determine whether they gave the City the power to do that. Much like the Maricopa County Merit System Rules, Rule § 9.03, the City Charter provided that the police officers are "subject to reprimand, discharge, reduction in grade, fine and/or suspension" for violations of the rules and regulations. 2019 WL 147432, 5 ¶ 29. The Denver City Charter appeal provisions are also very much like the Arizona Merit System Rules appeal procedures. As in the Merit System Rules, the Court found that the Denver City Charter "[did] not expressly confer power on the [City appointing authority] to rescind a disciplinary order after the time for an appeal of an order has passed." *Id.* ¶ 33. Nor did the Court perceive an "implied power" to do so, stating: "It is not reasonable or necessary for the [Appointing Authority] to have the implied authority to modify his own order after the time to appeal has expired." *Id.* That

was required by the City Charter as well as principles of finality and jurisdiction. *Id.* at 6, ¶ 37; *see also* ¶¶ 43-56.<sup>3</sup>

The prior investigation and imposed discipline had become final "because [the City had] determined the matter in full, imposed legal consequences on the Officers, and left nothing further to be done to determine any party's rights." 2019 WL 147432, 6 ¶ 39. Absent a timely appeal within the prescribed time, the officers "became bound to accept their discipline," and "nothing in the Charter implicitly authorizes the [City appointing authority] to rescind or modify the order after that period passed." *Id.* The Court cited numerous cases that have reached the same result for various, but similar reasons. *Id.*, 7 r 44-45. And, as noted, the Court explained the *Zavala* case on the basis that, although the Arizona Court allowed the state to rescind and "supplement" the prior discipline, it ultimately found that the corrections officer had not received due process in the matter and reversed the second new discipline. *Id.*, 7 ¶ 49. *Zavala* is otherwise consistent with *Murr* in its assessment of what the disciplinary rules permit and what they don't permit.<sup>4</sup>

Mr. Martinez deserves no less due process and fundamental fairness from the MCAO.

### **Due Process and Estoppel**

The Arizona Court of Appeals in *Zavala* analyzed the alleged due process violations of the Arizona Department of Corrections from two perspectives. Its "double jeopardy" analysis was *dictum* because it was not essential to its ultimate conclusion that the employee had reasonably relied on the warden's advice "to accept his initial suspension without protest and thereby let the matter die." 159 Ariz. at 261, 766 P.2d at 613. The Court held that, because the employee had no prior notice that waiving his right to appeal and accepting the first discipline would not end the matter, and because he relied to his detriment on his reasonable belief that it could not do that, the state was thereby estopped to "rescind" and reopen the matter in order to impose the second discipline.

Though the [Arizona Department of Corrections (DOC)] offered Zavala an initial opportunity to contest suspension, its agents induced him to forego it. When Zavala weighed the risks and benefits of invoking the state's grievance procedure, he decided to accept suspension to bring the matter to an end. He lacked notice, however, that his acceptance of suspension would not bring it to an end; he lacked notice that, even after his own period to protest suspension had expired, the director reserved the right to heighten his sanction to dismissal; and he lacked the opportunity to weigh in his decision the risk that his failure to protest would be construed as a concession of the charges. Having induced Zavala to forego his opportunity to contest suspension, the [Department] changed his punishment to dismissal without providing notice,



a chance to contest the charges, and a chance to present reasons why dismissal should not be ordered. These acts were incompatible with due process of law.

159 Ariz. at 262, 766 P.2d at 614. Under those circumstances, the Court deemed it "unfair and inconsistent with due process" to permit the Department to "recommence dismissal proceedings, long after the fact, based upon the original allegations." 159 Ariz. at 264, 766 P.2d at 616. It ordered the Department to reinstate the employee with back pay and retroactive benefits. *Id.*

For these reasons as well, Mr. Martinez deserves no less due process and fundamental fairness from the MCAO.

### **Due Process Cannot be Ignored**

The MCAO should understand better than almost anyone the importance of due process, even when under pressure from public voices. However, the Dismissal Letter clearly ignores this principle and frequently refers to factors outside of due process. The Dismissal Letter references "public perception" and unquestioningly defers to demands by complainants, no matter how unreasonable the demands. The Commission's Directive considered the complainants when determining the appropriate level of discipline. The Commission's Directive was due process, even if Mr. Martinez did not agree with the outcome. The complainants are not entitled to endless demands for unreasonable discipline to be piled on to Mr. Martinez. The actions here by Mr. Vick and the MCAO strongly suggest that due process is being ignored in favor of internal and external political pressures and expediency. Since the Commission's Directive, Mr. Martinez has gone above and beyond what is required to ensure that he is far above compliance with the Maricopa County Employee Merit System Resolution.

**b. Since the Commission's Determination, Mr. Martinez has not Violated any Sections of the Maricopa County Employee Merit System Resolution.**

The MCAO dismissal letter is sparse on specific details supporting its decision warranting separation. The incidents cited are either so insignificant that there is no way they can provide a rational basis for dismissal, or they demonstrably did not happen as has been claimed.

### **There Was Absolutely Nothing Wrong with Mr. Martinez Being on Another Floor.**

According to the Dismissal Letter, in August and September 2019 another employee, believed by appellant to be [REDACTED] complained that Mr. Martinez was "on her floor with no business purpose". Dismissal Letter, page 2.

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<sup>3</sup> Both [REDACTED] and [REDACTED] were deposed in connection with the Bar Complaint, and their sworn testimony revealed credibility issues. Additionally, [REDACTED] and Ms. [REDACTED] have a history of aggressively confronting what they perceive as

There is no specific floor mentioned in the notice nor were the actual day or days specified on which Mr. Martinez was seen on "her" floor set out in the dismissal letter. The lack of detail indicates that a formal record of [REDACTED] complaint is either missing or was never created. This speaks to the frivolity of the allegation. It is also a naked attempt by the MCAO to short-shrift due process mandates which require that sufficient notice of the alleged violations be given. Maricopa County Employee Merit System Resolution § 15(D).

It is indisputable that Mr. Martinez had never been told previously that he was restricted to the floor where his office was located, in this case the 4th floor of the Maricopa County Administration Building. He also had not been warned that he was prohibited from going to other floors unless he had a "business purpose". No allegations have been made by [REDACTED] or the MCAO that Mr. Martinez acted inappropriately or made comments to [REDACTED] during the visit or visits to her floor. The complaint by [REDACTED] seems to indicate that she is offended merely by seeing Mr. Martinez in passing. It is outrageous to suggest that Mr. Martinez did something wrong by being on [REDACTED] floor when he was never told he could not be on that floor and there was not even an interaction with [REDACTED]

Additionally, the conclusion that Mr. Martinez had "no business purpose" on the floor is mere conjecture by the MCAO. He was never questioned regarding his reasons for being there so it is sheer sophistry to make that allegation. [REDACTED] made a frivolous allegation which was then adopted as fact by the MCAO without any investigation nor any effort to verify the truth of the allegation. It was simply assumed to be true.

[REDACTED] admitted during her deposition of July 19, 2019 that Mr. Martinez avoided her to the point of not even making eye contact. She testified under oath that "every time I pass him [Mr. Martinez] in the hallway it's been since the investigation, so he doesn't look at me, doesn't make eye contact." [REDACTED] deposition, July 19, 2019, page 12, lines 22-24. Under these circumstances, Mr. Martinez cannot be penalized for doing exactly what he was required to do in that situation.

That Mr. Martinez went to another floor within the same building as his office when he had never been prohibited from entering other floors does not come close to cause to terminate his employment. The extremely limited facts provided in the Dismissal Letter are certainly not sufficient to support any claims that Mr. Martinez's actions violated any section of the Maricopa County Employee Merit System Resolution.

Associated with this event is the complaint that Mr. Martinez filed against [REDACTED]. The Dismissal Letter suggests that somehow the fact that this complaint was filed supports Mr. Martinez's dismissal. However, Mr. Martinez had the right, and even the

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issues. In her deposition, [REDACTED] admitted that she and [REDACTED] harassed another MCAO employee, supervising law clerk [REDACTED] (See 8/21/19 [REDACTED] Dep., p. 46, 11. See 8/21/19 [REDACTED] Dep., p.46, 11. 7-25 to pp. 47-48, 11. 1-25 & p.49, 11. 1-22, attached as **Exhibit 7**). See also 7-19-19 [REDACTED] Dep. P. 67, 11. 5-25; p. 68, 11. 1-25; p. 69, 11. 1-3, attached as **Exhibit 8**).

obligation, to file a complaint against her pursuant to the Maricopa County Ethics Handbook p. 23 — Employee Concerns: "If an employee believes that the provisions of this Handbook are not being followed, he or she should report the concern to their supervisor." Filing a complaint through the proper channels does not support the decision in the Dismissal Letter.

**There was no Interaction Between Mr. Martinez and [REDACTED] at the Courthouse.**

The second reason listed in support of termination is that another employee, known to the appellant to be [REDACTED] complained on October 3, 2019 "about an interaction you had with her in the courthouse". Dismissal Letter, page 2. The termination letter is understandably short on the facts surrounding this supposed event because they prove the opposite, that there was no interaction between the two. As with the allegation made by [REDACTED] the MCAO chose not to proceed with even the simplest investigation regarding the "interaction" and again decided to base termination solely because a complaint was lodged.

Had the MCAO looked into the matter, it would have discovered that Mr. Martinez was not alone at the time of the supposed "interaction". He was with another employee, Deputy County Attorney [REDACTED], as they rode on the escalator going up from the first floor of the Central Court Building to the second-floor walkway that leads to the South Court Tower. [REDACTED] was on the escalator going down. Mr. Martinez and [REDACTED] passed each as they both stood on escalators travelling in opposite directions. There was no so-called "interaction" since the two merely passed by each other.

[REDACTED] was co-counselling the case of State v. Edward Littleton McCauley, CR 2014-155906, with Mr. Martinez and the two were on their way to trial that day. [REDACTED] is an independent witness who will verify that, contrary to [REDACTED] story, there was no interaction between her and Mr. Martinez. He will testify that there was nothing said by Mr. Martinez to [REDACTED]. There wasn't even a greeting between the two. He will also corroborate that he and Mr. Martinez were discussing trial issues throughout the ride on the escalator.

Mr. Martinez did not acknowledge [REDACTED] as they passed each other on the escalator much less have an "interaction" with her. At best, [REDACTED] complaint and claim are based on a misunderstanding of the situation. At worst, a story has been maliciously fabricated in order to harm Mr. Martinez. Fortunately, there are witnesses available to clarify what actually occurred. Mr. Martinez cannot be held accountable for something that never happened simply because one party misunderstood a situation. Additionally, the limited facts provided in the Dismissal Letter could not possibly support any claims that Mr. Martinez's actions violated any section of the Maricopa County Employee Merit System Resolution.

**No Other Incidents Listed Warrant Discipline, Much Less Dismissal.**

Mr. Vick also used against Mr. Martinez the fact that an employee who had accused Mr. Martinez in the 2018 OID investigation requested a transfer to anywhere other than "where he will be placed." (Notice of Intent at 3). This is a meaningless accusation as it doesn't identify any behavior since the Commissioner's Determination, much less behavior necessitating discipline. There is no reason included as to why the request as made. As with the previous incidents identified, the worst possible interpretation is assumed by Mr. Vick and no investigation is referenced nor has this been discussed with Mr. Martinez in order to increase understanding.

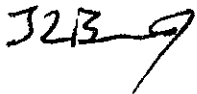
Finally, the Dismissal Letter refers to two reprimands in Mr. Martinez's personnel file. These reprimands are almost thirty years old. Additionally, these were considered in the Commission's Determination and the resulting discipline. These cannot be the basis for new discipline. The fact that these were mentioned only demonstrates how far Mr. Vick and the MCAO are willing to reach to achieve their goal of removing Mr. Martinez from his position with the MCAO.

**III. CONCLUSION**

Based on the Commission's Determination, Mr. Martinez received discipline for actions taken prior to that time. That discipline has been administered and is final. Since that time, Mr. Martinez has not taken actions in violation of any section of the Maricopa County Employee Merit System Resolution. The complete lack of any substantive actions in the Dismissal Letter confirms this.

Mr. Martinez requests that his dismissal be vacated and that he be reinstated to his position as deputy county attorney.

Sincerely,

A handwritten signature in black ink, appearing to read "JTB" followed by a stylized flourish.

Thomas Brown

[thomas@coppercanyonlaw.com](mailto:thomas@coppercanyonlaw.com)

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# Exhibit 1



## Maricopa County Attorney ALLISTER ADEL

February 21, 2020

VIA HAND DELIVERY

Juan Martinez  
[REDACTED]

Re: ***Dismissal***

Dear Mr. Martinez:

You received a Notice of Intent to Dismiss on February 7, 2020 and were provided the opportunity for a pre-determination hearing on February 18. On February 18, you provided a letter with attachments from your attorney, which I reviewed. After giving due consideration of the contents of that letter, I have decided to proceed with your dismissal.

This letter serves as official notice of your dismissal from your position as deputy county attorney with the Maricopa County Attorney's Office ("MCAO"). This action is authorized under Section 15 of the Maricopa County Employee Merit System Resolution.

### **I. Merit Resolution Violations**

Your conduct, detailed below, violated the following Sections of the Maricopa County Employee Merit System Resolution:

- 15.A.13 Discourteous Treatment of the Public or Fellow Employees
- 15.A.17 Violation of County or Departmental Policies or Procedures  
MCAO Policy & Procedure 5.2 – Workplace Professionalism: Avoiding Harassment and Discrimination

Maricopa County Policy HR 2406 – Prohibition against Discrimination, Harassment and Retaliation

15.A.18 Violation of Code of Ethics

**II. Facts Supporting the Violations**

Your interactions with your coworkers do not meet the professional standards required of employees of Maricopa County and particularly the MCAO. Following Division Inquiry in DI2017-027, MCAO issued you a written reprimand for your inappropriate behavior. Your reprimand required you to undergo harassment training and you received a "does not meet" on your annual evaluation.

Although you completed the harassment training, you still do not feel that your actions were particularly significant because you formally challenged the "does not meet" rating you received on your annual evaluation due to the misconduct found in the Division Inquiry. In your higher review request dated May 10, 2018, less than one month after your written reprimand and after you completed the harassment training, you categorize your unprofessional conduct as "inadvertent" and "unintentional." Your attempt to minimize your improper conduct to increase your annual evaluation demonstrates that you still do not understand the gravity of your offenses. The fact that you still do not appreciate the seriousness of your behavior reinforces my belief that we cannot create an appropriate and professional working environment at MCAO with you as an employee.

Your conduct has created an environment at MCAO that is now impossible to manage effectively. For example, we must work to keep you away from those you victimized. This fact makes it difficult to assign you to bureaus and even your physical location within the building presents challenges. Even if we could isolate you from your victims based on job assignment and work location, it is not possible to prevent contact with your victims.

My belief is supported by events that occurred in August and September 2019. One of your victims rightfully expressed a concern that you were on her floor with no business purpose. In response to that information, you were told to stop going to offices where you had no legitimate business need. Instead of understanding and respecting the decision of your superiors and the concerns of the co-worker involved, you filed a retaliatory and baseless complaint against that co-worker.

On October 3, 2019, another victim made a complaint to her Division Chief about an interaction you had with her in the courthouse that was, in her view, calculated to make her uncomfortable. The next day you sent an email to your supervisors "memorializing" that you saw this person

while talking with another co-worker and you were smiling, laughing, and "gesticulating" with your hands while making a point. Then, on October 16, 2019, you accused that same complainant of policy violations based on pure speculation of what she was doing as you passed each other in the courthouse hallway. In that email, you made it clear that your intent was to continue to document any incidents where she made you feel uncomfortable which included passing each other in the courthouse.

Based on your behaviors after receiving a written reprimand, it is now clear to me that it is impossible to protect the victims from further mistreatment, the appearance of harassment, the fear of harassment, or retaliation when they interact with you. I cannot tolerate a work environment where a victim feels they must work to avoid their harasser. It is impossible for MCAO to ensure that you will not interact with a victim going to and from court, while handling matters in court coverage, or performing any number of other routine duties. We cannot assign you to a position where you are regularly going to court and interacting with other employees who may be your previous victims. This fact alone makes it impossible for you to work in a position that is commensurate with your Prosecutor V title. Likewise, your inappropriate conduct towards these women and the resulting negative public perception leaves me unable to assign you the types of high profile and difficult cases a prosecutor with your experience should be handling. The Office will not continue to employ you when, because of your inappropriate and unprofessional behavior, the office is limited in the type of work you can be assigned.

Although discipline was previously issued for the conduct investigated in DI2017-027, that discipline has proven to be insufficient and the ongoing, unmanageable work environment that you have created makes it impossible for you to continue your employment at MCAO. In addition to the encounters described above, one of the attorneys who reported your misconduct in the investigation recently requested a transfer and she specifically indicated that the one place she did not want to be assigned was "Wherever Juan Martinez will be placed." This fact further highlights to me that it is not possible to simply manage this situation. This attorney should not have to make career choices based on where you might be assigned.

My decision in this matter is further bolstered by the fact that the events documented in the Division Inquiry are not the only instances of misconduct within the workplace at MCAO. There are two additional written reprimands in your personnel file. While they are old, both are from the early 1990s, they are significant particularly considering the more recent events. One involves dishonesty in the use of a carpool pass to obtain favorable parking when you were not actually carpooling. The other reflects the same type of behavior from the most recent investigation. In that event you were reprimanded due to a sexual remark made towards a fellow attorney after being counseled for inappropriate actions toward a female staff member the previous year. That reprimand stated, "Accordingly, it is now time that this behavior cease once and for all." That did not occur.



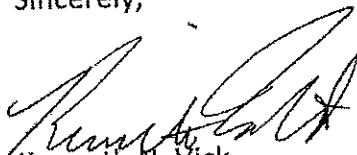
As reflected above, now that I have had the opportunity to review all the available information, I disagree with the level of discipline that was imposed in 2018. But this decision is based on the fact that your conduct has created an ongoing work environment that makes it irresponsible for me to continue your employment with MCAO. I will not accept a workplace environment where my employees are afraid that they might run into you in an elevator or a hallway. I will not accept a workplace environment where attorneys make career decisions based on where you might be assigned. Your history and the number of consistent reports in the Division Inquiry indicate that this matter is not an isolated event or comment. You have created an intolerable workplace for your victims through your inappropriate conduct and I will not ask the victims to simply do the best they can to work within that environment. Removing you from the workplace is the only responsible solution.

Your work in the courtroom over the years has been very successful and has brought many offenders to justice. It is unfortunate that your work within the office can no longer continue due to your mistreatment of your female colleagues and your unwillingness to correct the behavior that was brought to your attention many years ago. Accordingly, it is my intention to terminate your employment.

### III. Conclusion

Your dismissal is effective as of the issuance of this letter today. You have a right to appeal this dismissal to the Maricopa County Employee Merit System Commission. Any such appeal must be submitted in writing and received within ten calendar days of this notice. Your appeal must state the facts upon which it is based, and the action requested of the Commission. Address any appeal to the Human Resources Director, Maricopa County Human Resources, 301 West Jefferson, Suite 240, Phoenix, AZ 85003.

Sincerely,



Kenneth N. Vick  
Chief Deputy

cc: Department Personnel File  
Maricopa County Attorney, Civil Division  
Maricopa County Human Resources

# Exhibit 2



## Maricopa County Attorney ALLISTER ADEL

February 7, 2020

**VIA HAND DELIVERY**

Juan Martinez  
[REDACTED]

Re: ***Notice of Intent to Dismiss and Pre-Disciplinary Hearing***

Dear Mr. Martinez:

This letter serves as official notice of my intent to dismiss you from your position as deputy county attorney in the Special Victims Division of the Maricopa County Attorney's Office ("MCAO"). This action is authorized under Section 15 of the Maricopa County Employee Merit System Resolution.

### **I. Merit Resolution Violations**

Your conduct, detailed below, violated the following Sections of the Maricopa County Employee Merit System Resolution:

- 15.A.13 Discourteous Treatment of the Public or Fellow Employees
- 15.A.17 Violation of County or Departmental Policies or Procedures  
MCAO Policy & Procedure 5.2 – Workplace Professionalism: Avoiding Harassment and Discrimination  
Maricopa County Policy HR 2406 – Prohibition against Discrimination, Harassment and Retaliation
- 15.A.18 Violation of Code of Ethics

## II. Facts Supporting the Violations

Your interactions with your coworkers do not meet the professional standards required of employees of Maricopa County and particularly the MCAO. Following Division Inquiry in DI2017-027, MCAO issued you a written reprimand for your inappropriate behavior. The investigation and the reprimand demonstrate that the allegations and accounts of those reporting your misconduct were found to be true. I have reviewed that investigation and the reprimand that was issued, and I also believe the accounts of the various victims and witnesses in that investigation. My conclusion is based on the number of accounts, the consistency of those accounts, and the lack of any motive for any of those interviewed to lie about your conduct. In fact, those who described your inappropriate behavior were reluctant witnesses and had no desire to report your conduct, but they did because they were required to do so in the Division Inquiry.

Also, these employees did not initially report your conduct because they feared retaliation because they saw you as a nationally recognized trial attorney and they believed you were a valuable asset to MCAO. Inherent in their unwillingness to report your conduct is the fact that the victims believed nothing would be done to address their complaints due to your stature at MCAO. The discipline previously imposed did nothing but confirm those beliefs. Although you completed the harassment training your discipline required, you still do not feel that your actions were particularly significant because you formally challenged the "does not meet" rating you received on your annual evaluation that was based on the misconduct found in the Division Inquiry. In your higher review request dated May 10, 2018, less than one month after your written reprimand and after you completed the harassment training required by that reprimand, you categorize your unprofessional conduct as "inadvertent" and "unintentional." Your attempt to minimize your improper conduct to increase your annual evaluation demonstrates that you still do not understand the gravity of your offenses. The fact that you still do not appreciate the seriousness of your behavior reinforces my belief that we cannot create an appropriate and professional working environment at MCAO with you as an employee.

Your conduct has created an environment at MCAO that is now impossible to manage effectively. For example, we must work to keep you away from those you victimized. This fact makes it difficult to assign you to bureaus and even your physical location within the building presents challenges. Even if we could isolate you from your victims based on job assignment and work location, it is not possible to prevent contact with your victims.

My belief is supported by events that occurred in August and September 2019. One of your victims rightfully expressed concern that you were on her floor with no business purpose. In response to that information, you were told to stop going to offices where you had no legitimate business need. Instead of understanding and respecting the decision of your superiors and the

concerns of the co-worker involved, you filed a defamatory and baseless complaint against that co-worker.

On October 3, 2019, another victim made a complaint to her Division Chief about an interaction you had with her in the courthouse that was, in her view, calculated to make her uncomfortable. The next day you sent an email to your supervisors "memorializing" that you saw this person while talking with another co-worker and you were smiling, laughing, and "gesticulating" with your hands while making a point. Then, on October 16, 2019, you accused that same complainant of policy violations based on pure speculation of what she was doing as you passed each other in the courthouse hallway. In that email, you made it clear that your intent was to continue to document any incidents where she made you feel uncomfortable which included passing each other in the courthouse.

Based on your behaviors after receiving a written reprimand, it is now clear to me that it is impossible to protect the victims from further mistreatment, the appearance of harassment, the fear of harassment, or retaliation when they interact with you. I cannot tolerate a work environment where a victim feels they must work to avoid their harasser. It is impossible for MCAO to ensure that you will not interact with a victim going to and from court, while handling matters in court coverage, or performing any number of other routine duties. We cannot assign you to a position where you are regularly going to court and interacting with other employees who may be your previous victims. This fact alone makes it impossible for you to work in a position that is commensurate with your Prosecutor V title. Likewise, your inappropriate conduct towards these women and the resulting negative public perception leaves me unable to assign you the types of high profile and difficult cases a prosecutor with your experience should be handling. The Office will not continue to employ you when, because of your inappropriate and unprofessional behavior, the office is limited in the type of work you can be assigned.

Although discipline was previously issued for the conduct investigated in DI2017-027, that discipline has proven to be insufficient and the ongoing, unmanageable work environment that you have created makes it impossible for you to continue your employment at MCAO. In addition to the encounters described above, one of the attorneys who reported your misconduct in the investigation recently requested a transfer and she specifically indicated that the one place she did not want to be assigned was "Wherever Juan Martinez will be placed." This fact further highlights to me that it is not possible to simply manage this situation. This attorney should not have to make career choices based on where you might be assigned.

My decision in this matter is further bolstered by the fact that the events documented in the Division Inquiry are not the only instances of misconduct within the workplace at MCAO. There are two additional written reprimands in your personnel file. While they are old, both are from the early 1990s, they are significant particularly considering the more recent events. One

involves dishonesty in the use of a carpool pass to obtain favorable parking when you were not actually carpooling. The other reflects the same type of behavior from the most recent investigation. In that event you were reprimanded due to a sexual remark made towards a fellow attorney after being counseled for inappropriate actions toward a female staff member the previous year. That reprimand stated, "Accordingly, it is now time that this behavior cease once and for all." That did not occur.

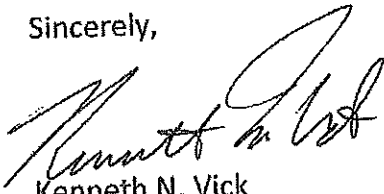
As reflected above, now that I have had the opportunity to review all the available information, I disagree with the level of discipline that was imposed in 2018. But this decision is based on the fact that your conduct has created an ongoing work environment that makes it irresponsible for me to continue your employment with MCAO, especially considering that you still do not appreciate the gravity of your misconduct. I will not accept a workplace environment where my employees are afraid that they might run into you in an elevator or a hallway. I will not accept a workplace environment where attorneys make career decisions based on where you might be assigned. Your history and the number of consistent reports in the Division Inquiry indicate that this matter is not an isolated event or comment. You have created an intolerable workplace for your victims through your inappropriate conduct and I will not ask the victims to simply do the best they can to work within that environment. Removing you from the workplace is the only responsible solution.

Your work in the courtroom over the years has been very successful and has brought many offenders to justice. It is unfortunate that your work within the office can no longer continue due to your mistreatment of your female colleagues and your unwillingness to correct the behavior that was brought to your attention many years ago. Accordingly, it is my intention to terminate your employment.

### **III. Conclusion**

You have the right to respond to these allegations. Accordingly, I have set up a time for you to meet with me on Tuesday, February 18, 2020 at 3:00 p.m. My office is located at 225 W. Madison, 6<sup>th</sup> Floor. At that time, you may present either orally or in writing, or both, your explanation or reasons why the proposed disciplinary action is not appropriate. If you intend to appear at that time, you must confirm the date and time with Deb Serrata at (602) 506-3800. If you choose not to appear, you may respond in writing by the above date and time. If you do not appear or reply in writing, you will be deemed to have waived your right to this pre-disciplinary hearing and I will make a determination on the record available to me.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth N. Vick". The signature is stylized with a large, sweeping initial "K" and a distinct "V".

Kenneth N. Vick  
Chief Deputy

cc: Department Personnel File  
Maricopa County Attorney, Civil Division  
Maricopa County Human Resources

# Exhibit 3





3200 N. Central Avenue, 20th Floor, Phoenix, AZ 85012

jaburgwilk.com

Kraig J. Marton

kjm@jaburgwilk.com  
602.248.1017 - Direct Phone  
602.248.0522 - Main Fax

February 18, 2020

Hand-Delivered

Kenneth N. Vick  
Chief Deputy  
Maricopa County Attorney's Office  
301 W. Jefferson Street, 8th Floor  
Phoenix, AZ 85003

*Re: Juan Martinez; Response to Notice of Intent to Dismiss and Pre-Disciplinary Hearing*

Dear Mr. Vick:

We have been retained by Juan Martinez to represent him in the above matter. Please consider this letter as a response to your Notice of Intent to Dismiss and Pre-Disciplinary Hearing ("Notice of Intent") issued on behalf of the Maricopa County Attorney's Office ("MCAO"). The reasons you cite for dismissing Mr. Martinez in your Notice of Intent are both factually and legally insufficient, and even illegal, to warrant his dismissal for any or all of the following reasons:

A. Mr. Martinez's Alleged Conduct Has Been Reviewed, and an Appropriate Discipline Has Been Determined and Imposed, in a Prior Disciplinary Proceeding.

A complaint was made in 2017 that Mr. Martinez had engaged in a pattern of "engaging in misconduct involving the sexual harassment of several female MCAO law clerks and a female Deputy County Attorney from 2007 to 2017." (MCAO Office of Investigations Division Management Findings Report Form, Case #2017-027, dated April 24, 2018, the "2018 OID Report," p. 1 - copy attached as Exhibit 1). The 2018 OID Report was the result of the OID's investigation of a complaint made by Deputy County Attorney [REDACTED] in MCAO Division Inquiry D12017-027 (the "Investigation"). After other employees were interviewed, it was alleged that Mr. Martinez violated the following Maricopa County Employee Policies and Procedures:

- Maricopa County Internal Policy HR 2421.IV.B - Professional Conduct
- Maricopa County Employee Policies and Procedures 10.1.B - Code of Ethics
- Maricopa County Internal Policy HR 2416.V.A and V.B: Code of Conduct
- Maricopa County Internal Policy HR 2406.V.A., IV.D.3, VLD.5: Prohibition against Discrimination, Harassment, and Retaliation
- Maricopa County Employee Merit Rules Section 15.A.13: Discourteous Treatment of the Public or Fellow Employees

(collectively, the "2017 Charges"). Although the allegations made against Mr. Martinez were later shown to be *false* in a separate proceeding (see below), the OID sustained them in its OID Report and recommended that disciplinary action be taken as follows: "Written reprimand. View AZ State Bar training on sexual harassment, May, 9, 2018 at 10 am, PST with Jon Elison and Mike McVey." (2018 OID Report at 3).

The Maricopa County Merit System Employee Commission accepted and adopted the 2018 OID Report in its entirety. Mr. Martinez did not appeal the 2018 OID Report and accepted the recommended discipline. He received the written reprimand and attended the recommended sexual harassment training session.

That was not enough. The State Bar of Arizona then sought to extract its pound of flesh by further pursuing an unprofessional conduct complaint, State Bar Nos. 17-0624 & 18-0693 (the "Bar Complaint") based on the same allegations that the OID had investigated, reviewed and determined warranted a reprimand and training class. The State Bar conducted its own independent investigation. Depositions of Mr. Martinez's accusers were taken. As a result, the Bar Complaint has been dismissed by presiding disciplinary Judge William J. O'Neil.

You claim in your Notice of Intent that you have read Mr. Martinez's file and that you "believe the accounts of the various victims, and witnesses in the [previous OID] investigation." (Notice of Intent, p. 2).<sup>1</sup> Your own personal belief or opinion, however, is contrary to what the OID found in its 2018 OID Report and the resolution of the Bar Complaint filed against him. And, in any event, it is irrelevant to your current decision to dismiss Mr. Martinez. You are not the fact finder in these matters, and Mr. Martinez's due process rights demand that you cannot unilaterally and arbitrarily decide to "overrule" the decisions that have previously been made by the authorized fact finder in this matter.<sup>2</sup>

Furthermore, as you may know, the credibility of Mr. Martinez's accusers has been deeply damaged by their sworn deposition testimony taken in connection with the Bar Complaint. [REDACTED] for example, was deposed on August 1, 2019. She admitted that, contrary to what Mr. Martinez was accused of in the OID investigation – that he allegedly told her he could guess the color of her underwear – was not true, that she had never said that to anyone. (See [REDACTED] Dep., p. 18, ll. 6-11, copy attached as Exhibit 2; compare [REDACTED] Dep., copy attached as Exhibit 3, p. 18, ll. 1-3); also compare [REDACTED] Dep., copy attached as

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<sup>1</sup> We question whether you have even reviewed any of their depositions taken in the Bar Complaint proceedings. You do not say that you have.

<sup>2</sup> We also question your authority to take any action to terminate Mr. Martinez, given that you are not the County Attorney who is the MCAO elected official and Appointing Authority. See Maricopa County Employee Merit System Rules, Rule 1.04: the Appointing Authority is "[a]n elected official, single executive head of a department, or the designated representative authorized to act in this capacity." Rule 9.03(A) provides that only the Appointing Authority may take disciplinary action against a Merit System employee.

Exhibit 4, p. 8, ll. 16-25; p. 9, ll. 1-2). Deputy County Attorney [REDACTED] was deposed on August 21, 2019. She testified that the MCAO Investigator pressured her to say what they wanted her to say. (See [REDACTED] Dep., p. 10, ll. 18-25 – p. 11, ll. 1-2, copy attached as Exhibit 5). This same tactic was confirmed by Deputy County Attorney [REDACTED] in her deposition. ([REDACTED] Dep., copy attached as Exhibit 6, p. 9. Ll. 6-18: “A. I was read warnings that I could lose my job if I didn’t answer questions fully and how – to the officer’s satisfaction.”).

Nevertheless, *nearly two years later*, you have unilaterally decided to cast all of this aside to make your own re-assessment of Mr. Martinez’s alleged conduct and to pursue and punish him *a third time* for essentially the *same conduct* he was accused of in the OID investigation and the Bar Complaint. In fact, your Notice of Intent sets forth charges that are virtually identical to the violations of the Maricopa County Employee Policies and Procedures that Mr. Martinez was accused of in the OID investigation that resulted in the OID Report and imposed discipline. (Notice of Intent, p. 1). The clear objective of your Notice of Intent is to “get” Mr. Martinez by hook or by crook. You cannot do that as a matter of law for a number of reasons.

#### 1. Due Process Violations

In your Notice of Intent, you heavily and expressly rely on the OID investigation that resulted in the 2018 OID Report and imposed discipline. (Notice of Intent, Section II, pp. 2-5). As you know, however, as a Merit System employee, Mr. Martinez has a due process property interest in his job, and his procedural and substantive due process rights cannot be trampled by you or anyone else at the MCAO. See *Deuel v. Arizona State Sch. for Deaf & Blind*, 165 Ariz. 524, 526-27, 799 P.2d 865, 867-68 (App. 1990) (setting forth Merit System employee’s due process rights); see also *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (setting forth minimum pre-termination requirements).

One such due process right that you are attempting to trample is analogous to the freedom from “double jeopardy” provisions contained in the United States and Arizona Constitutions. In the employment context, this means that, as a matter of fundamental fairness, a state agency “may not reach a decision as to disciplinary action on one occasion, and then at a later date increase the disciplinary action so that the agency disciplines the employee twice for the same offense.” *Dep’t of Envtl. Prot. v. Barker*, 654 So. 2d 594, 595 (Fla. App. 1995). To determine whether an employee has been subjected to such double jeopardy, “the question is whether the initial discipline was, in some sense, final.” *Id.*; see also *Kingsford Mfg. Co.*, 126 Lab. Arb. (BNA) 1137, 2009 WL 2766786 (Smith 2009) (stating in the context of a labor arbitration: “Disciplining an employee twice for the same act constitutes double jeopardy and is a due process basis for invalidating the discipline.”).

In *Zavala v. Arizona State Pers. Bd.*, 159 Ariz. 256, 766 P.2d 608 (App. 1987), the Arizona Court of Appeals found that an Arizona Department of Corrections employee had not been disciplined for the same conduct twice. The first disciplinary action taken against the employee, an unpaid suspension, was soon thereafter, within 80 days, rescinded, and he was

reimbursed for the wages he had lost during the suspension. 159 Ariz. at 261, 766 P.2d at 613. The *Zavala* Court held, in *dictum*, that his subsequent dismissal was not a second discipline, but a "substitution" for the first discipline. *Id.* As set forth below, however, the Court also held that the employee was nevertheless deprived of due process by being wrongly induced to forego his right to grieve and appeal the first disciplinary action. 159 Ariz. at 261-64, 766 P.2d at 613-16.

In Mr. Martinez's case, the disciplinary action recommended by the OID and imposed by the Maricopa County Merit System Employee Commission was clearly a final administrative decision that, *nearly two years later*, as a matter of fundamental fairness, cannot be reopened and re-determined a second time. The MCAO cannot possibly rescind the discipline that it has already imposed and that he accepted and completed at that time. It cannot undo the written reprimand in his personnel file or re-write Mr. Martinez's "does not meet" evaluation which resulted in his not receiving a raise that year, and he cannot "un-take" the sexual harassment training he took as his punishment. Due process must be meaningful *and* timely. *See Zavala*, 159 Ariz. at 264, 766 P.2d at 616 (noting that "[d]elay may in and of itself constitute a constitutional violation"), *citing Loudermill, supra*, 470 U.S. at 547. As the saying goes: Justice delayed is justice denied.

The Arizona *Zavala* case was explained in a recent Colorado Court of Appeals decision. In *Murr v. Civil Serv. Comm'n of City & Cty. of Denver*, \_\_\_ P.3d \_\_\_, 2019 WL 1474323 (Colo. App. May 23, 2019), the Court reversed and remanded a Denver Civil Service Commission's decision to "reopen an investigation" into the prior conduct of two police officers and to "rescind" a prior disciplinary order based on that conduct.

The two police officers were captured on video in a gross display of using excessive force to arrest someone. The facts were disputed. After the initial investigation, the Deputy Chief of Police and the Manager of Safety (hearing officer) recommended that one of the officers be docked three days of pay and that the second officer be suspended for three days. 2019 WL 1474323 at 1, ¶¶ 2-3. They did not choose to appeal that order. *Id.* at 2, ¶ 4. The local news media had a fit. It broadcast the story criticizing the City and bringing forth two new eye witnesses. *Id.* ¶ 5. When the City saw this negative publicity, it reopened the prior investigation based on the "new evidence." *Id.* ¶ 6.

After a long battle up and down and through the City, the City Civil Service and the courts, the City Civil Service Commission affirmed the City's "implied right" to reopen the first investigation and rescind the prior discipline in order to issue the second disciplinary order terminating the police officers. 2019 WL 1474323 at 2-3, ¶¶ 7-16.

The *Murr* Court examined the Denver City Charter and policies to determine whether they gave the City the power to do that. Much like the Maricopa County Merit System Rules, Rule § 9.03, the City Charter provided that the police officers are "subject to reprimand, discharge, reduction in grade, fine and/or suspension" for violations of the rules and regulations. 2019 WL 147432; 5 ¶ 29. The Denver City Charter appeal provisions are also very much like the Arizona Merit System Rules appeal procedures. As in the Merit System Rules, the Court

found that the Denver City Charter “[did] not expressly confer power on the [City appointing authority] to rescind a disciplinary order after the time for an appeal of an order has passed.” *Id.* ¶ 33. Nor did the Court perceive an “implied power” to do so, stating: “It is not reasonable or necessary for the [Appointing Authority] to have the implied authority to modify his own order after the time to appeal has expired.” *Id.* That was required by the City Charter as well as principles of finality and jurisdiction. *Id.* at 6, ¶ 37; see also ¶¶ 43-56.<sup>3</sup>

The prior investigation and imposed discipline had become final “because [the City had] determined the matter in full, imposed legal consequences on the Officers, and left nothing further to be done to determine any party’s rights.” 2019 WL 147432, 6 ¶ 39. Absent a timely appeal within the prescribed time, the officers “became bound to accept their discipline,” and “nothing in the Charter implicitly authorizes the [City appointing authority] to rescind or modify the order after that period passed.” *Id.* The Court cited numerous cases that have reached the same result for various, but similar reasons. *Id.*, 7 ¶¶ 44-45. And, as noted, the Court explained the *Zavala* case on the basis that, although the Arizona Court allowed the state to rescind and “supplement” the prior discipline, it ultimately found that the corrections officer had not received due process in the matter and reversed the second the new discipline. *Id.*, 7 ¶ 49. *Zavala* is otherwise consistent with *Murr* in its assessment of what the disciplinary rules permit and what they don’t permit.<sup>4</sup>

Mr. Martinez deserves no less due process and fundamental fairness from the MCAO.

## 2. Due Process and Estoppel Principles

The Arizona Court of Appeals in *Zavala* analyzed the alleged due process violations of the Arizona Department of Corrections from two perspectives. Its “double jeopardy” analysis was *dictum* because it was not essential to its ultimate conclusion that the employee had reasonably relied on the warden’s advice “to accept his initial suspension without protest and thereby let the matter die.” 159 Ariz. at 261, 766 P.2d at 613. The Court held that, because the employee had no prior notice that waiving his right to appeal and accepting the first discipline would not end the matter, and because he relied to his detriment on his reasonable belief that it

<sup>3</sup> Maricopa County Merit System Rule § 9.03(A) similarly provides on that: “The appointing authority may suspend, involuntarily demote or dismiss a regular employee only for cause as provided in the Resolution.” The referenced Resolution provides: “An appointing authority may discipline, suspend, demote or dismiss a regular employee only for cause.” Like the Denver City Charter, there is nothing to alert a Merit System employee that the Appointing Authority could reopen a prior determination and impose a second, harsher penalty long after that determination is made.

<sup>4</sup> The *Zavala* Court likewise noted that the applicable state personnel rules did not give the aggrieved employee “notice that the director could substitute dismissal for his designee’s order of suspension where the employee accepted the suspension and permitted the grievance period allotted by the rules to pass.” 159 Ariz. at 262, 766 P.2d at 614.

could not do that, the state was thereby estopped to "rescind" and reopen the matter in order to impose the second discipline.

Though the [Arizona Department of Corrections (DOC)] offered Zavala an initial opportunity to contest suspension, its agents induced him to forego it. When Zavala weighed the risks and benefits of invoking the state's grievance procedure, he decided to accept suspension to bring the matter to an end. He lacked notice, however, that his acceptance of suspension would not bring it to an end; he lacked notice that, even after his own period to protest suspension had expired, the director reserved the right to heighten his sanction to dismissal; and he lacked the opportunity to weigh in his decision the risk that his failure to protest would be construed as a concession of the charges. Having induced Zavala to forego his opportunity to contest suspension, the [Department] changed his punishment to dismissal without providing notice, a chance to contest the charges, and a chance to present reasons why dismissal should not be ordered. These acts were incompatible with due process of law.

159 Ariz. at 262, 766 P.2d at 614. Under those circumstances, the Court deemed it "unfair and inconsistent with due process" to permit the Department to "recommence dismissal proceedings, long after the fact, based upon the original allegations." 159 Ariz. at 264, 766 P.2d at 616. It ordered the Department to reinstate the employee with back pay and retroactive benefits. *Id.*

For these reasons as well, Mr. Martinez deserves no less due process and fundamental fairness from the MCAO.

B. The Subsequent Incidents You Cite are Insufficient to Revive the Prior Determination and Discipline Imposed by the County and Accepted by Mr. Martinez.

It is evident from your Notice of Intent that you are aware of the due process deficiencies of your effort to dismiss Mr. Martinez for alleged past transgressions that have long ago been determined and punished. You go on to cite several further alleged incidents concerning him that you claim, without any apparent basis in investigation or fact, have created "an environment at MCAO that is now impossible to manage effectively." (Notice of Intent at 2).

Specifically, you speculate, again without any apparent basis in investigation or fact, that nearly two years after the matters involving his alleged sexual harassment were determined, Mr. Martinez supposedly "still [does] not feel that [his] actions were particularly significant because [he] formally challenged the 'does not meet' rating [he] received on [his] annual evaluation that was based on the misconduct found in the [prior disciplinary] inquiry." (Notice of Intent at 2). You chastise him for exercising his absolute right to dispute the annual evaluation by stating that his alleged misconduct was both inadvertent and unintentional. (*Id.*). Your belief is that this somehow minimizes the gravity of the charge, leading you to conclude that you cannot create "an appropriate professional working environment at MCAO with [him] as an employee." (*Id.*). With all due respect, Sir, your baseless, subjective analysis of Mr. Martinez's psyche, without facts, is meaningless and, by the way, entirely inaccurate.

First, and even if your personal belief were anywhere near accurate, Mr. Martinez has no obligation to accept the contents of his annual evaluation as accurate. He had the right to contest and appeal that evaluation to a higher authority pursuant to Maricopa County Employee Policies and Procedures. Second, he has a First Amendment right of free speech to continue to defend himself from the accusations made against him in the evaluation and anywhere else, regardless of what you believe. See *McLeod v. Chilton*, 132 Ariz. 9, 19 n. 9, 643 P.2d 712, 722 n. 9 (App. 1981) (constitutionally impermissible reasons for discharging a state employee include because of the employee's exercise of First Amendment free speech rights), citing *Dixon v. Osman*, 22 Ariz. App. 430, 432, 528 P.2d 181, 183 (1974); see also *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 568 (1968); *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004) ("[a] government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment"). Mr. Martinez has accepted the findings and conclusion of the 2018 OID Report, but you apparently have not.<sup>5</sup>

Third, we are informed that, as the result of his annual evaluation, Mr. Martinez was demoted in September 2019, from prosecuting capital murders to prosecuting auto theft cases. We are also informed that the demotion was imposed without cause, as required by Maricopa County Merit System Rule § 8.03(A), thus violating his procedural and substantive due process rights. It is clear to us that his demotion is a continuation of the vendetta you and the MCAO have carried against him since the inception of the 2018 OID investigation. Your Notice of Intent is just another illegal step in pursuit of that vendetta despite all of the evidence and the prior determinations made in the OID Report and the Bar Complaint proceedings.

You also cite, again without any apparent basis in investigation or fact, several "events" that you claim support your subjective, speculative belief that Mr. Martinez continues to harass female MCAO employees. One such "event" is what you claim is a complaint made by [REDACTED] who has said that Mr. Martinez was on the sixth floor ("her floor") of the MCAO building with "no legitimate business need" to be there. (Notice of Intent at 2-3). You seem to be offended that he has filed a complaint against her for making the false report. (Id.). First, as you know, Mr. Martinez had the right, and even the obligation, to file a complaint against her pursuant to the Maricopa County Ethics Handbook p. 23 – Employee Concerns: "If an employee believes that the provisions of this Handbook are not being followed, he or she should report the concern to their supervisor."

Second, as you also know, Mr. Martinez had a legitimate right to be on the sixth floor of the MCAO building at that time – he was visiting a colleague and paid no attention to [REDACTED]. He had a perfectly legitimate, First Amendment right of association to be there, he did nothing wrong or inappropriate, and he cannot be punished for exercising his right to be anywhere he needs to be or wants to be on the MCAO premises. *McLeod, supra*, 132 Ariz. at 19 n. 9, 643 P.2d at 722 n. 9.

<sup>5</sup> We should not have to remind you that, as set forth above, the credibility of his accusers in that matter has been thoroughly and devastatingly impeached by their sworn deposition testimony.

Another such "event" you cite is that, on October 3, 2019, a female MCAO employee, [REDACTED] complained about an incident with Mr. Martinez at the courthouse, where she claimed that he made her "feel uncomfortable." (Notice of Intent at 3). This incident occurred as Mr. Martinez was going to court for trial. [REDACTED] claims he gave her a "bad look" as they passed by each other on the courthouse escalator.<sup>6</sup> First, that did not happen. Mr. Martinez has a witness standing next to him, who will confirm that the two of them were discussing a trial.

Second, an even more importantly, you and the MCAO know that Mr. Martinez suffers from severe glaucoma, and, as the result of a surgery in 2014, he has practically no peripheral vision so that he has to look directly at something or someone up or down or side to side in order to see with clarity. He did not see [REDACTED] at all as she went by him on the courthouse escalator. He had no idea who she was as she descended from the top of the escalator. From a legal standpoint, your citation of this or any other "bad look" incident as a reason to terminate him violates his rights under the Americans with Disabilities Act of 1990, 42, U.S.C. § 12112, as amended, prohibiting discriminatory actions against him based on his known disability.

You also seem concerned that Mr. Martinez kept contemporaneous notes of the incident, something that appears to especially bother you, but that is common practice among attorneys when, as in this case, [REDACTED] has falsely accused him of inappropriate behavior before. Furthermore, and again, Mr. Martinez did nothing wrong or inappropriate, and he cannot be punished for exercising his First Amendment right to be anywhere he needs to be such as, e.g. attending trial, or wants to be or talk to or not talk to anyone he needs or wants to talk to. *McLeod, supra*, 132 Ariz. at 19 n. 9, 643 P.2d at 722 n. 9.

The one other "event" you cite is that a female employee who had accused Mr. Martinez in the 2018 OID investigation and is not currently working for or with Mr. Martinez requested a transfer to anywhere other than "where he will be placed." (Notice of Intent at 3). That is a particularly disturbing and meaningless accusation, as it does not pertain to any inappropriate conduct on the part of Mr. Martinez at all. And it certainly has no bearing at all on whether he should be terminated for any misconduct of any kind.

Finally, the very old "events" you rely on from the early 1990s have even less bearing on whether Mr. Martinez should be terminated for any misconduct of any kind. (Notice of Intent at 3-4). Neither involved anything like what you are now, *nearly 30 years later*, accusing him of.

<sup>6</sup> Both [REDACTED] and [REDACTED] were deposed in connection with the Bar Complaint, and their sworn testimony revealed they have no credibility whatsoever. [REDACTED] admitted to a pattern of harassing and bullying other MCAO employees, like supervising a law clerk, [REDACTED] (See 8/21/19 [REDACTED] Dep., p. 46, ll. 7-25 to pp. 47-48, ll. 1-25 & p. 49, ll. 1-22, attached as Exhibit 7). [REDACTED] was present during those events, but did not report the bullying. She even failed to name [REDACTED] when responding to questions about the episode in her deposition. (See 7/19/19 [REDACTED] Dep., p. 67, ll. 5-25; p. 68, ll. 1-25; p. 69, ll. 1-3, attached as Exhibit 8).



JABURG|WILK  
Attorneys at Law  
Kenneth N. Vick  
February 17, 2020  
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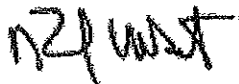
One involved his alleged use of a car pass, and the other involved someone who he was dating at the time. Your intent to "get" Mr. Martinez is nowhere more obvious than it is here.

CONCLUSION

We urge you to refrain from terminating Mr. Martinez for the reasons you state in your Notice of Intent or for any other reason. As outlined in this response, your doing so would be contrary to law and the constitutional rights granted to him as a valuable and permanent Merit System employee who, if nothing else, has earned the right to be left alone by his accusers, who now appear to include you. We can assure you that our client will fight hard for his rights for as long as it takes.

Sincerely,

JABURG & WILK, P.C.

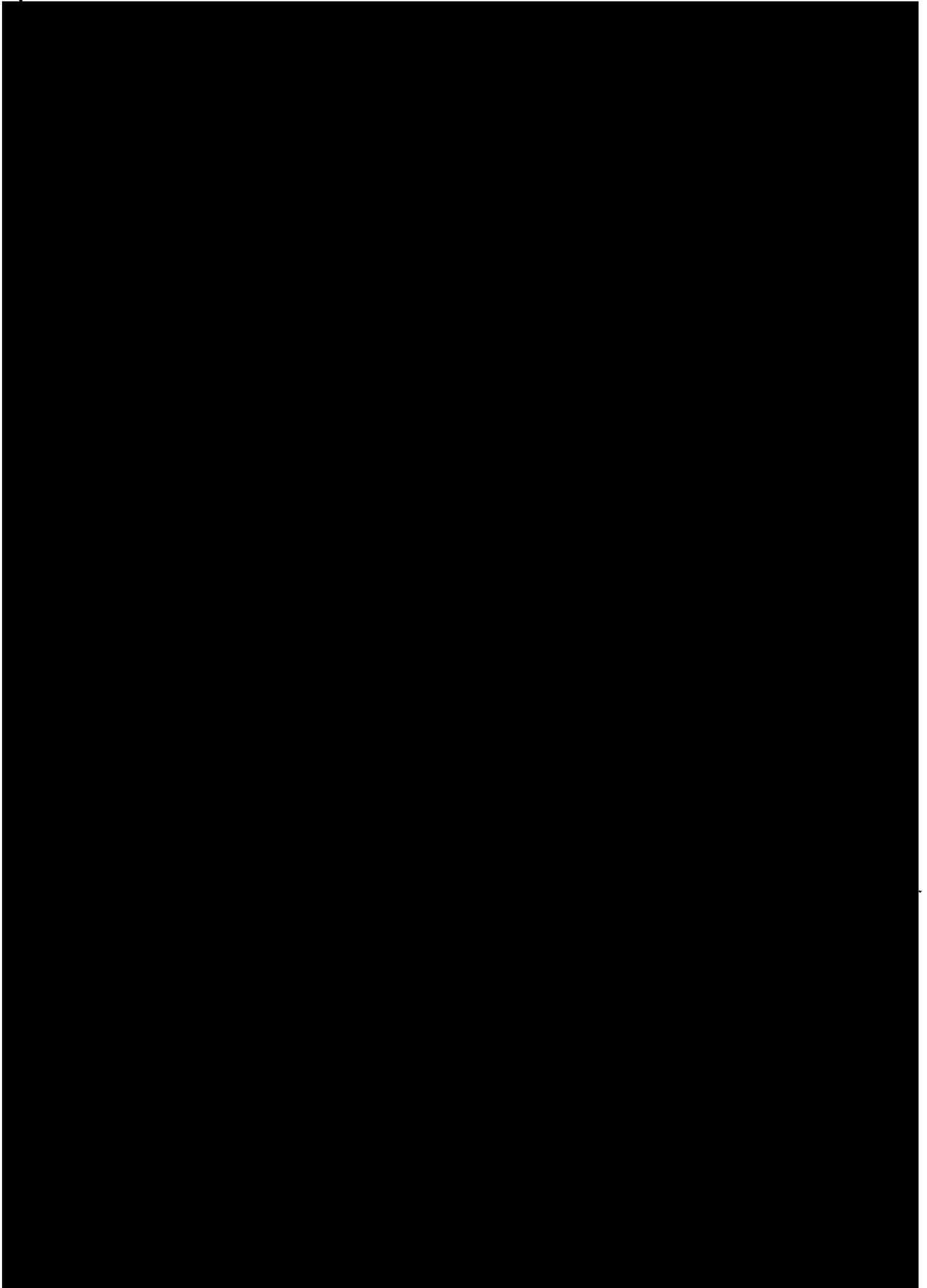


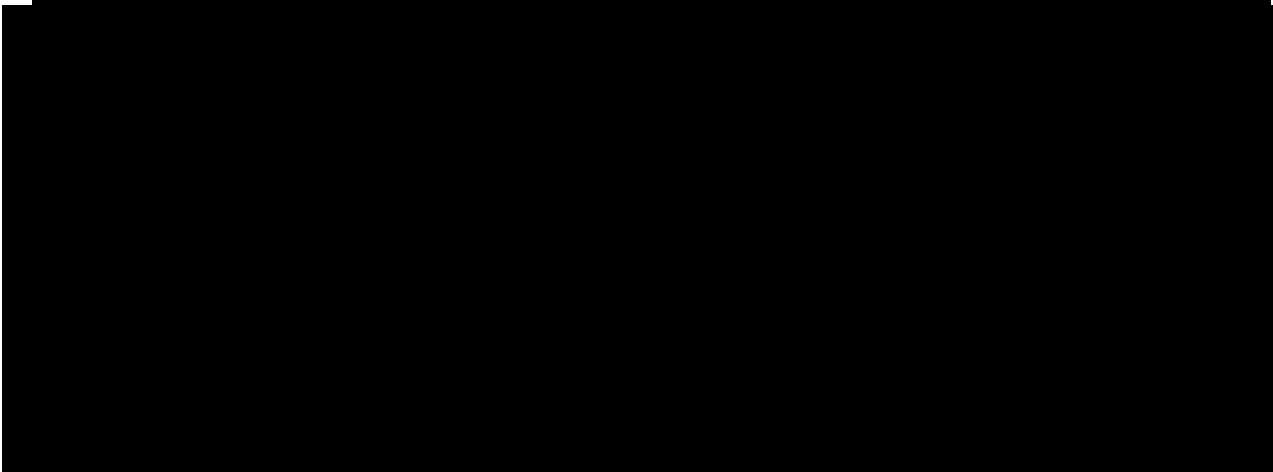
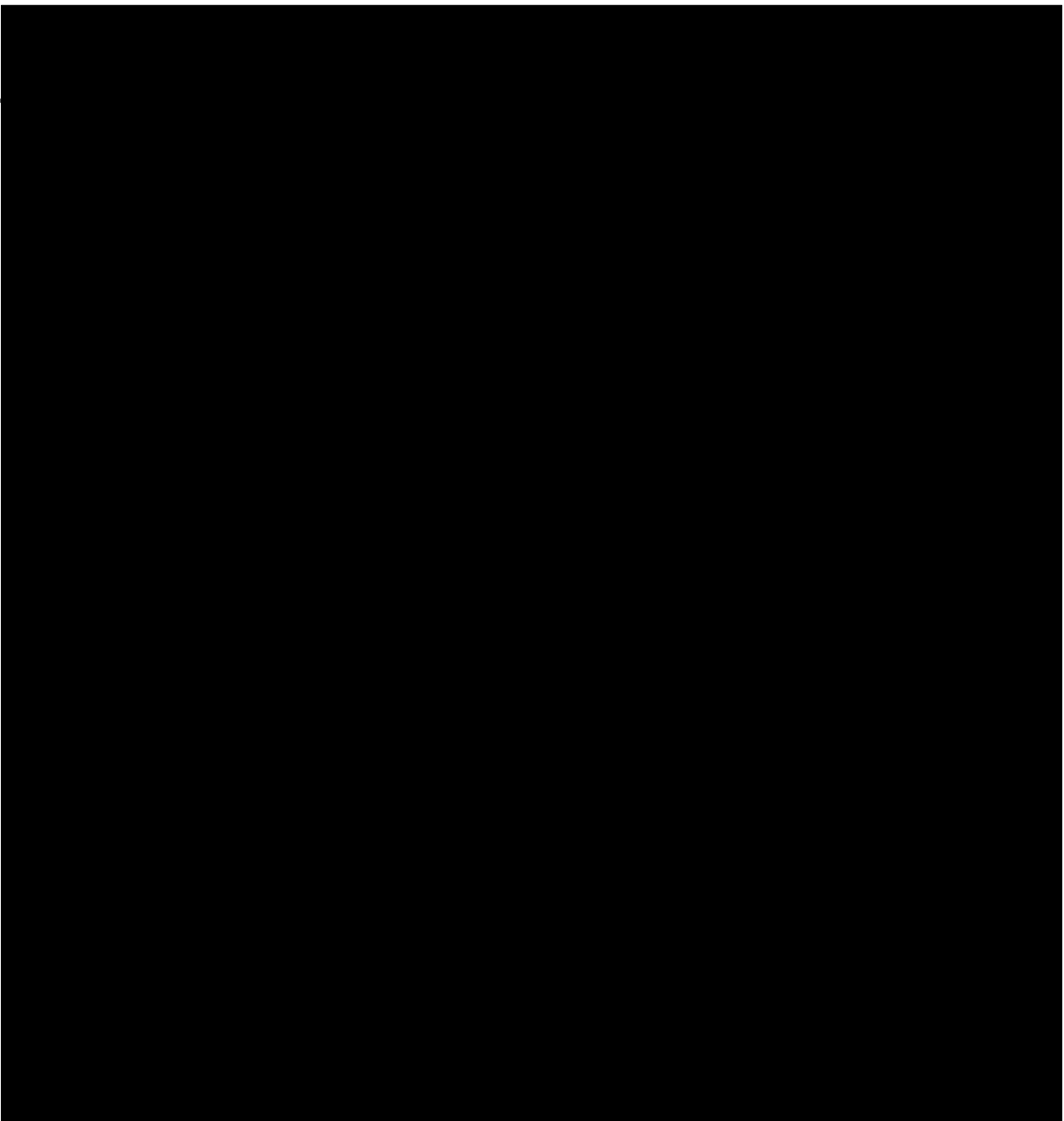
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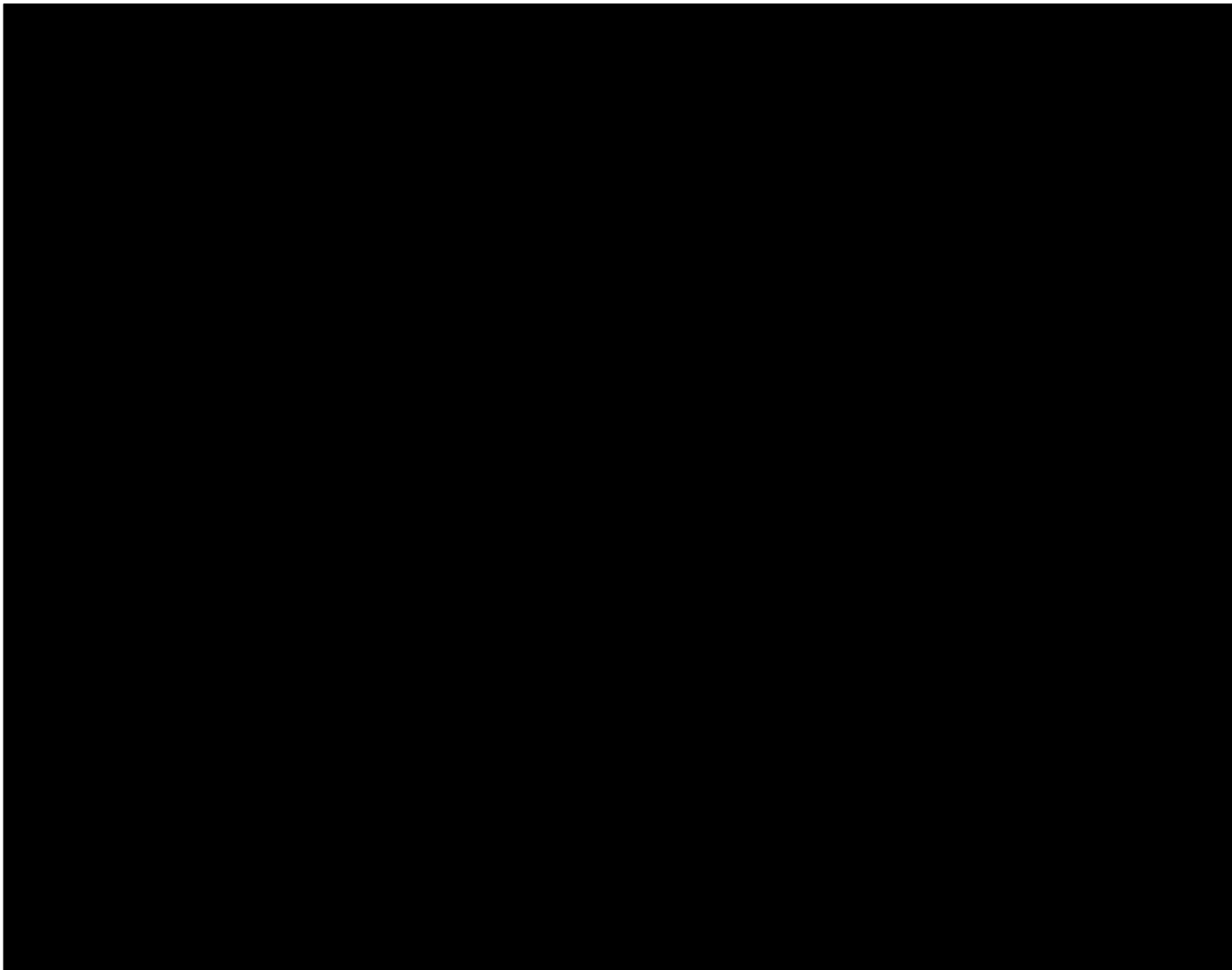
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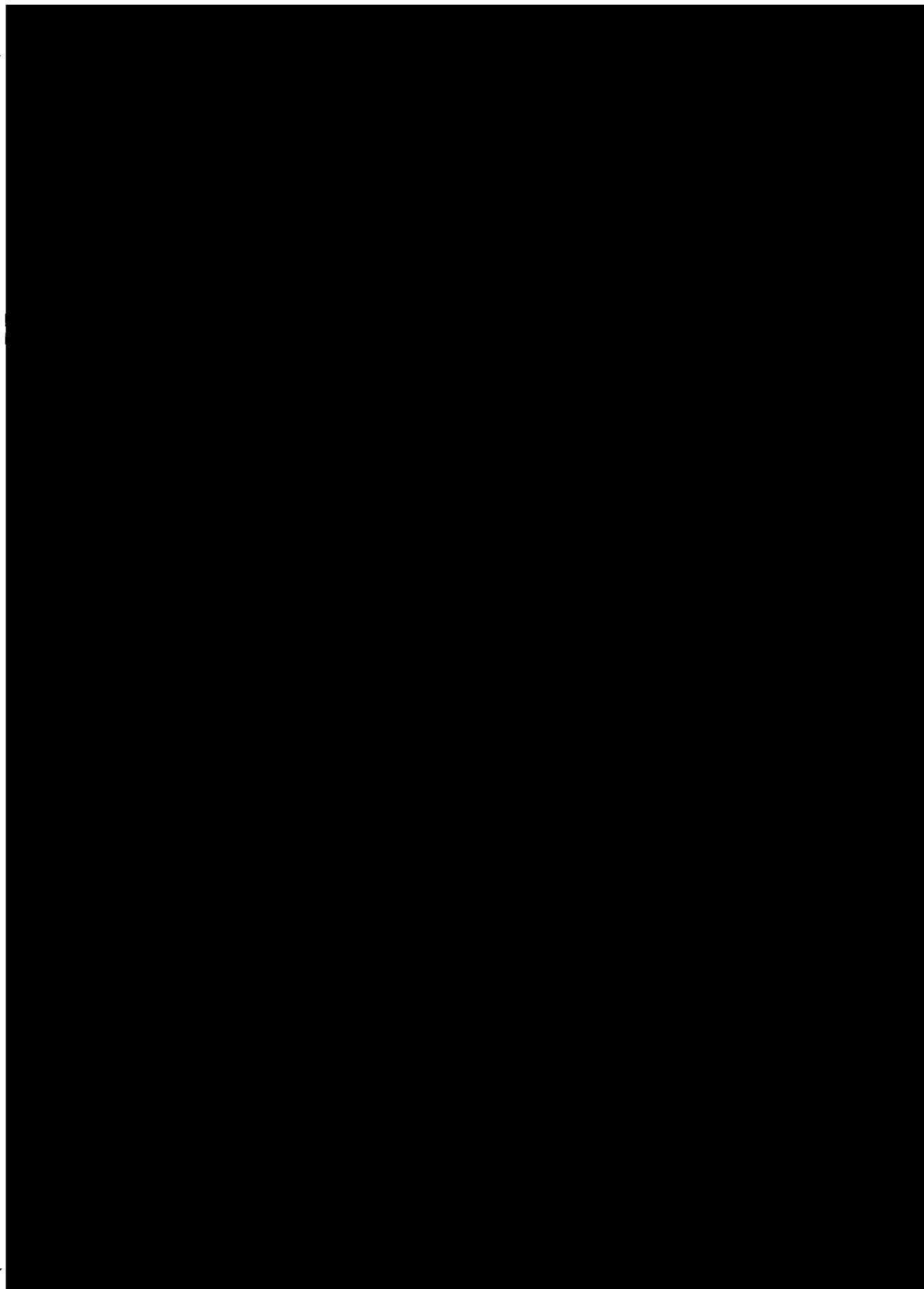
cc: David N. Farren  
Client

# Exhibit 4





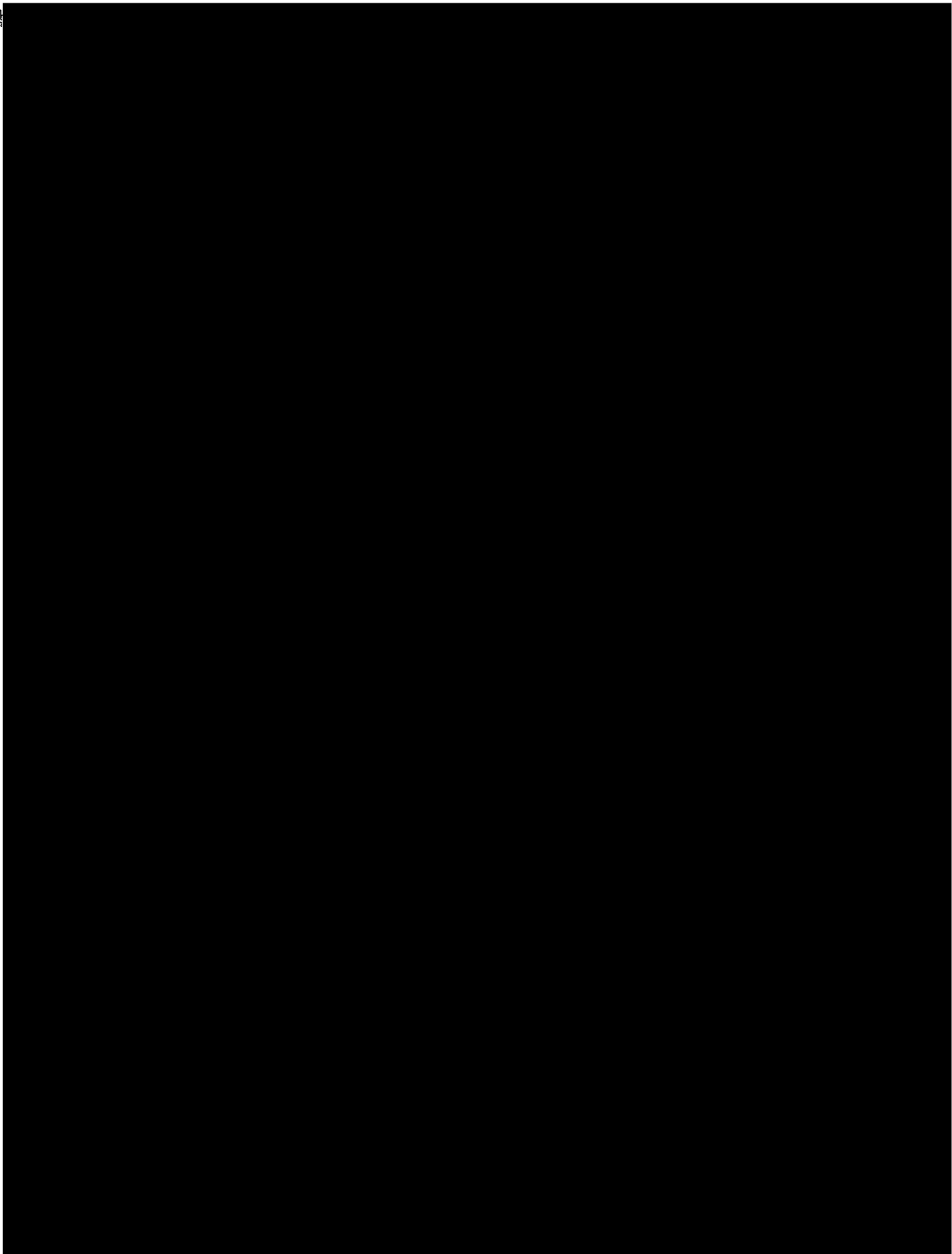


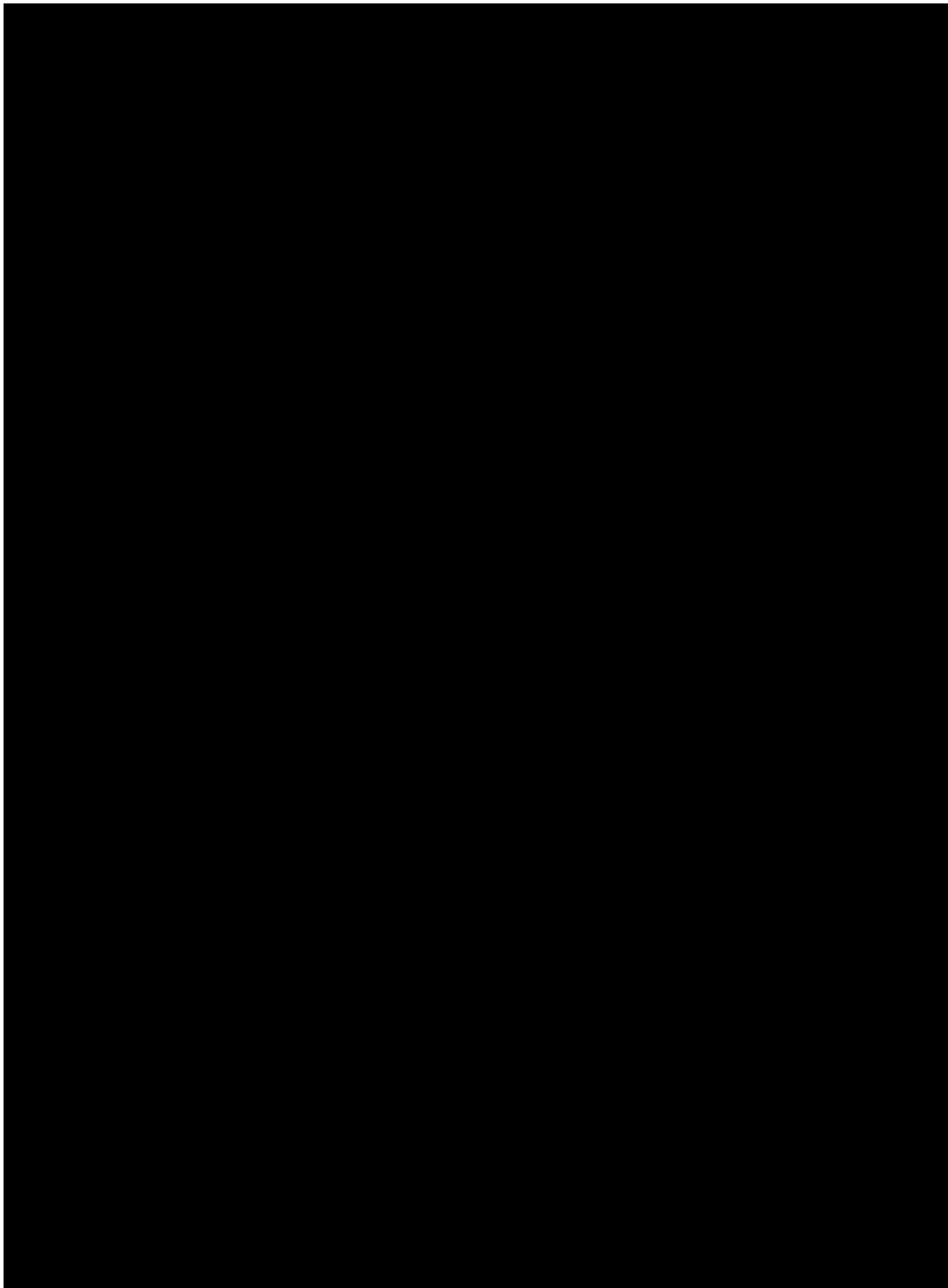




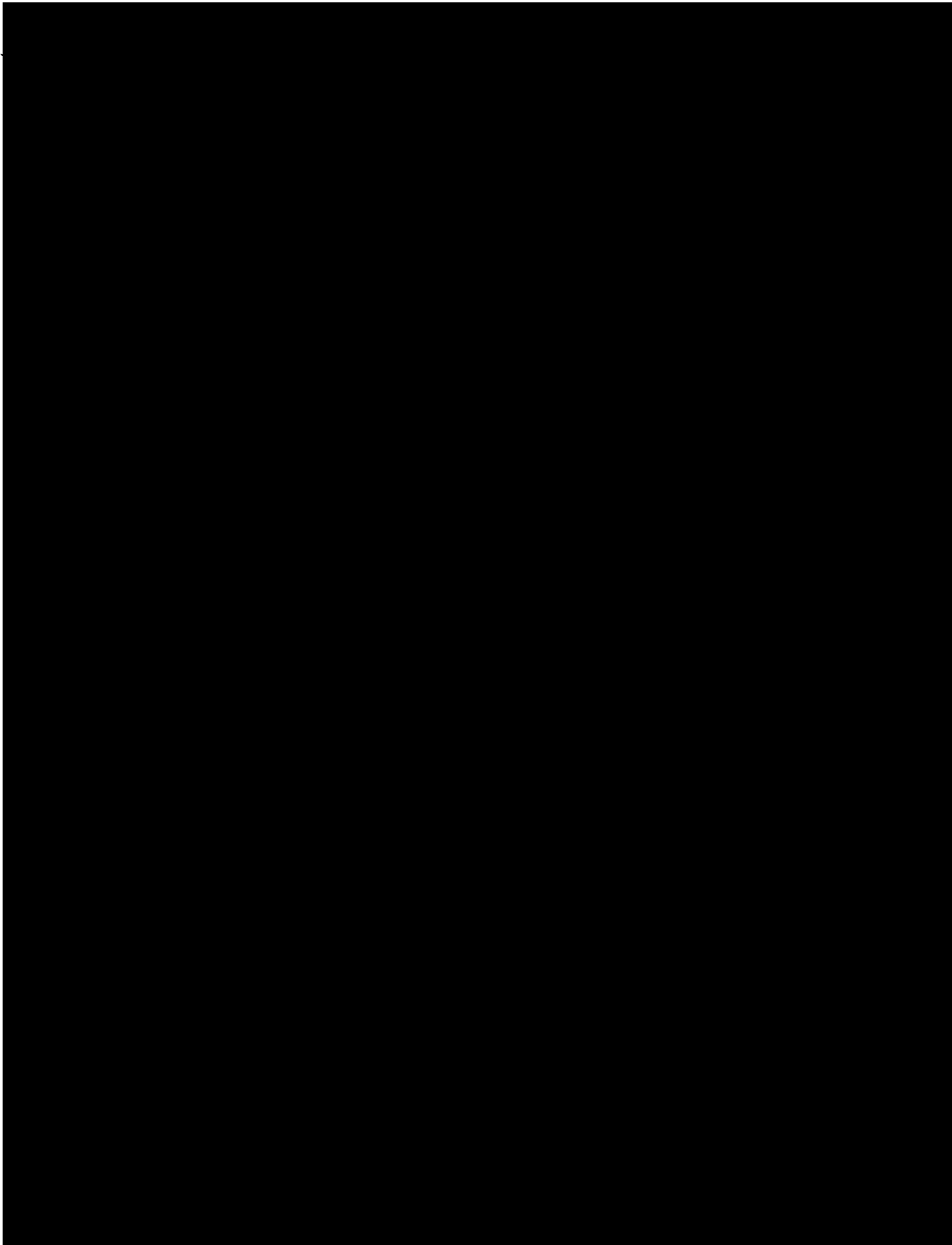
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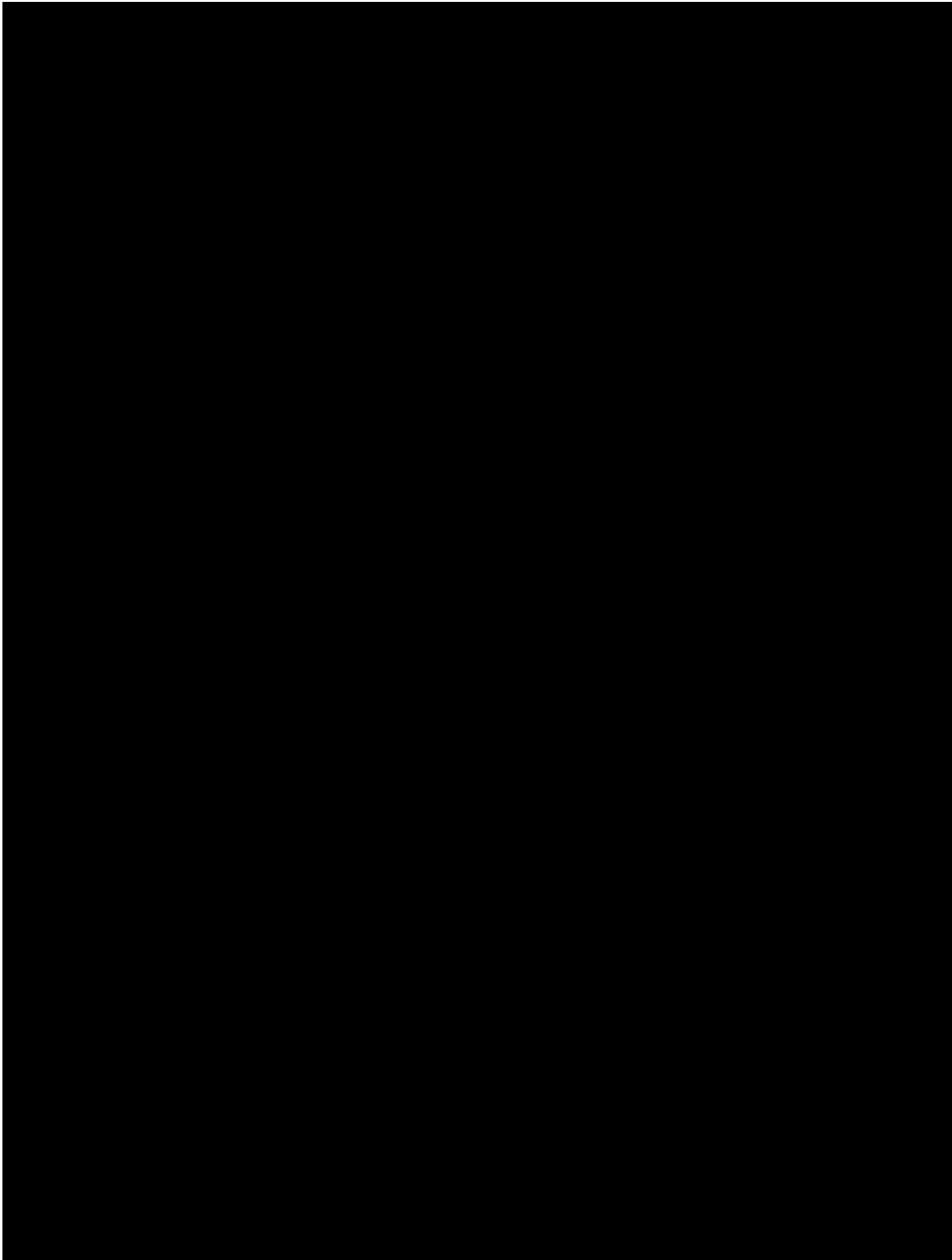




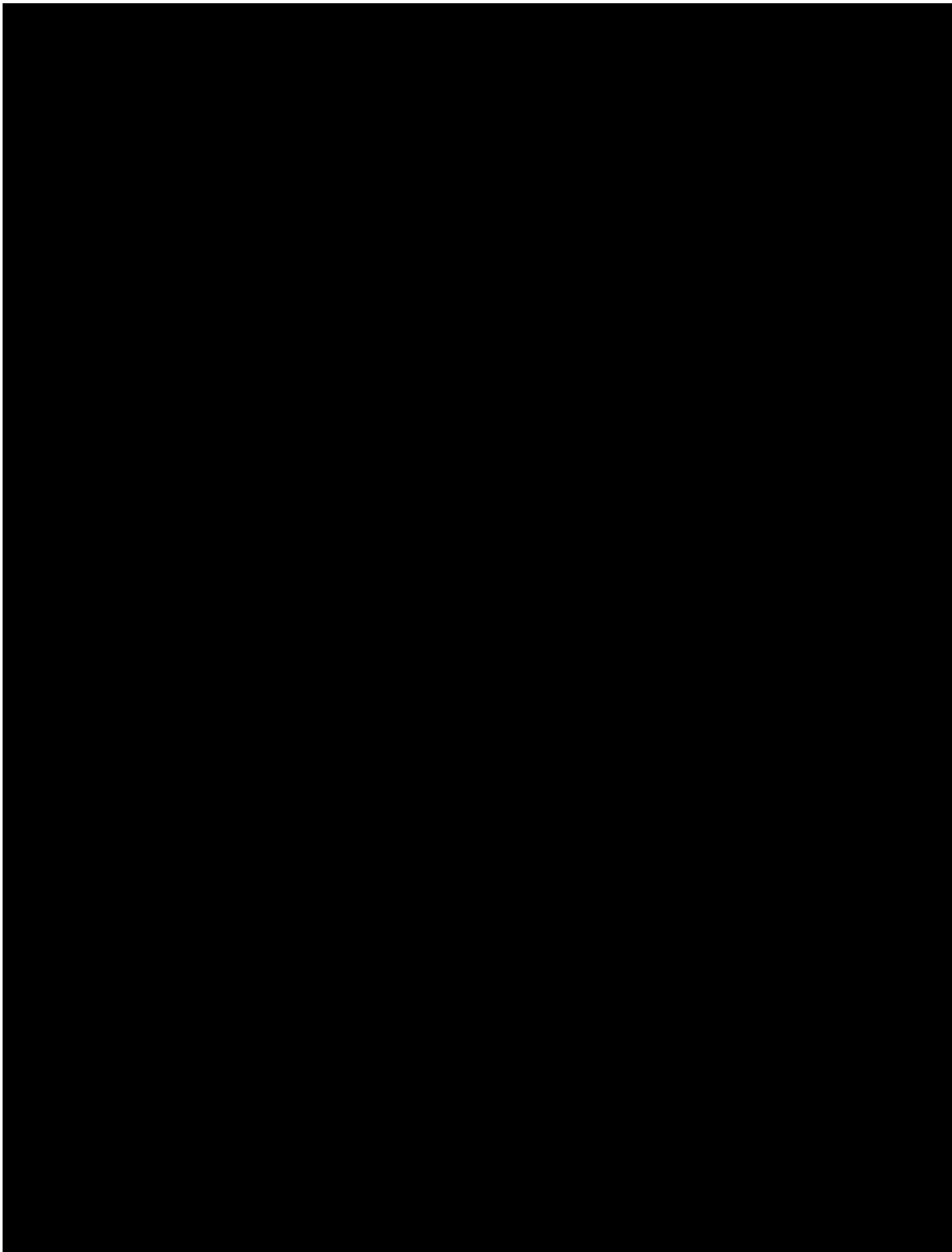


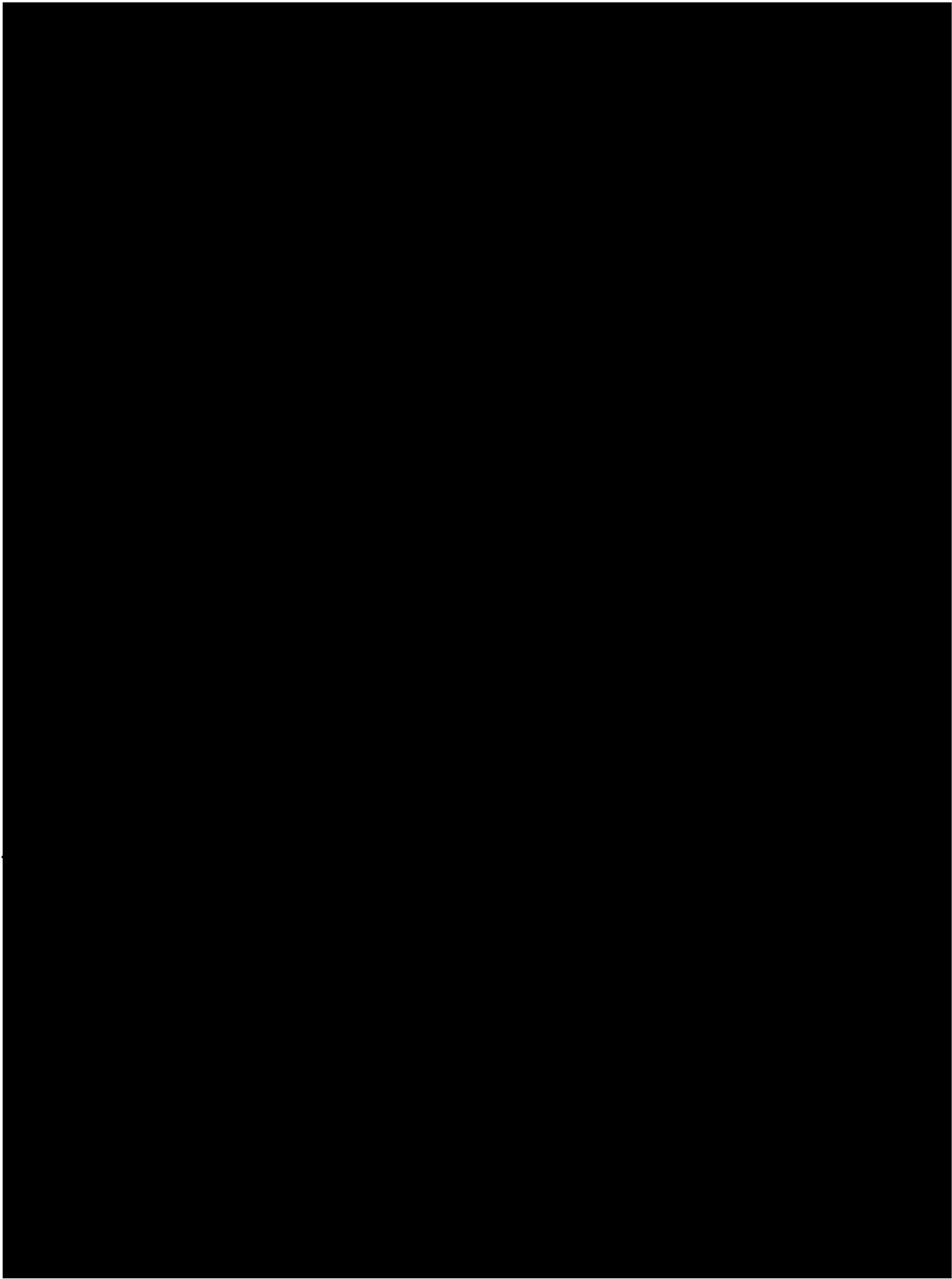
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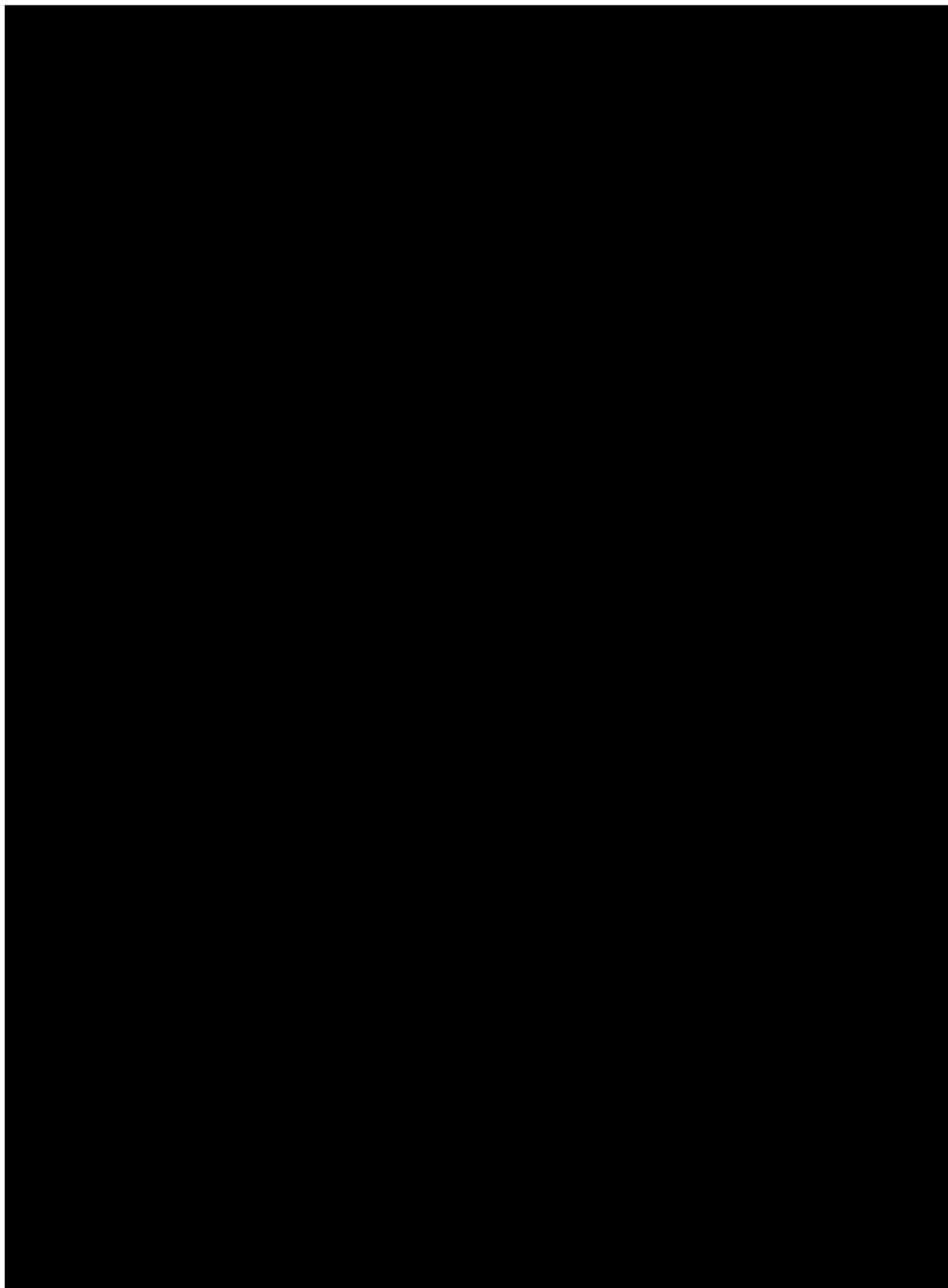
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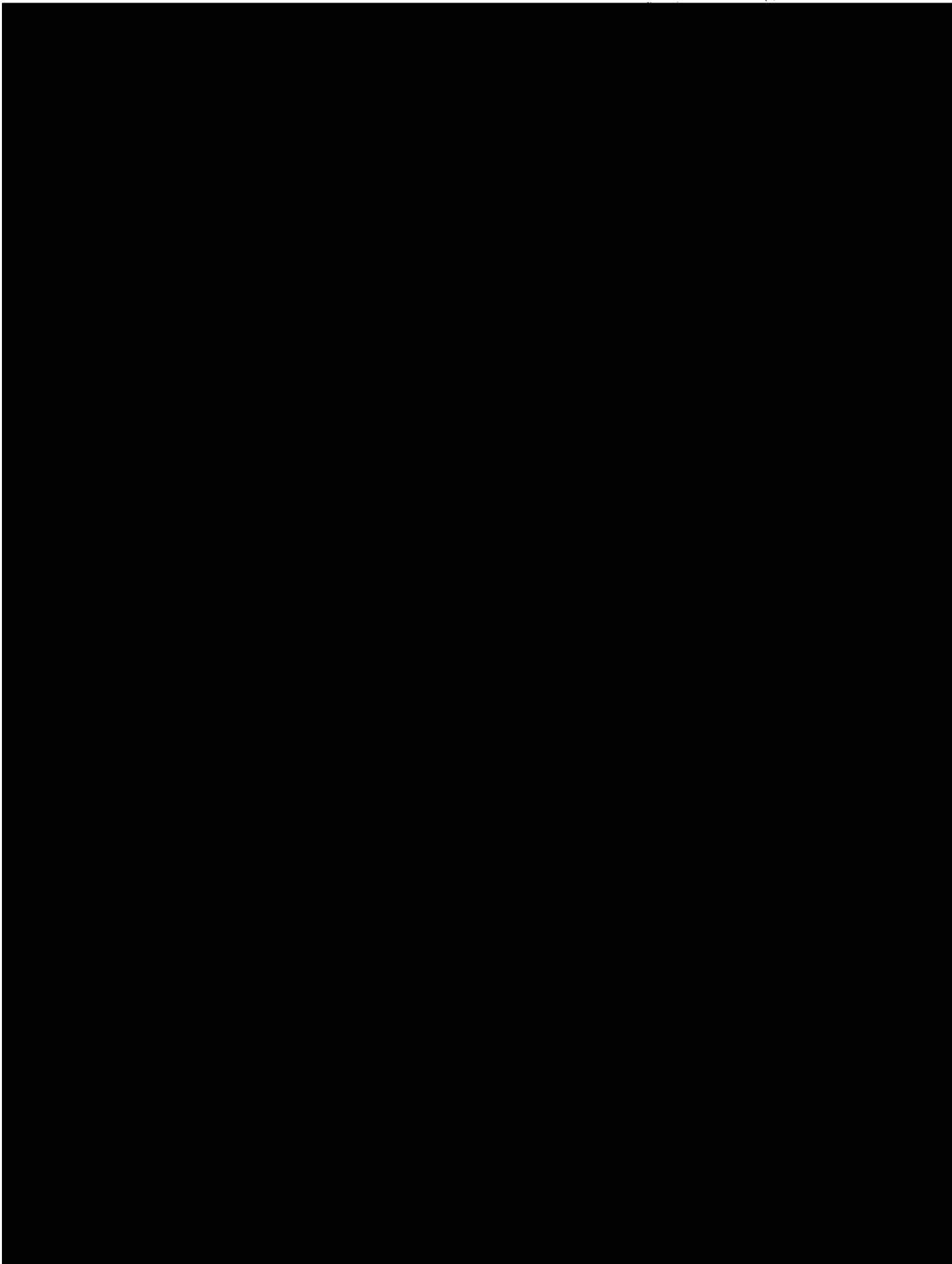






# Exhibit 8





# Exhibit 9

