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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **GRAY FINANCIAL GROUP, INC., LAURENCE O. GRAY, and ROBERT C. HUBBARD, IV,** **Respondents.**	**Administrative Proceeding** **File No. 3-16554**

RESPONDENTS' PRE-HEARING BRIEF

Respondents Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard ("Respondents") respectfully submit this Prehearing Brief pursuant to Rule 222 of the U.S. Securities and Exchange Commission (the "SEC" or "Commission") Rules of Practice, 17 C.F.R. § 201.222, and the October 5, 2016 Order Adopting Joint Proposed Scheduling Order.

I. PRELIMINARY STATEMENT

The evidence adduced during the hearing of this matter will demonstrate that Respondents, acting in their capacity as investment consultants to four Georgia-based public pension plans, did not violate Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 206 of the Investment Advisors Act in connection with an investment by the public pension plans in GrayCo Alternative Partners II, LP ("Gray Fund II"), for multiple reasons.

First, as Respondents' expert witness Professor Linda Jellum, a Georgia law professor and renowned expert in statutory interpretation, constitutional law and administrative law, will testify, the Georgia pension plans' investment in Gray Fund II

complied with O.C.G.A. § 47-20-87 ("O.C.G.A §§ 47-20-87 or the "Georgia Statute"). Professor Jellum's expert report is incorporated by reference herein as if restated in full. Professor Jellum will show that the hyper-technical and overly literal interpretation of the Georgia statute urged by the Division is simply wrong and leads to absurd and impractical results, frustrating rather than advancing the legislative intent and statutory purposes. Under the Division's interpretation, public retirement systems would find it very difficult if not impossible ever to invest in privately placed pooled investments, and investments made under the Division's interpretation could be at greater risk than the legislature likely ever intended. For example, under the Division's interpretation, pension plans could act consistently with Georgia Statute by making investments that have all of the outward characteristics of the Bernie Madoff Ponzi Scheme. As a result, the Division's alleged securities law violations premised on violations of the Georgia Statute are themselves by definition not actionable.

But even if Your Honor accepts the Division's interpretation of the Georgia Statute and finds a Georgia Statute violation by the public pension plans, the statute is so replete with ambiguities that the Division cannot hope to prove scheme liability or that Respondents acted with the requisite degree of scienter or even negligence, as it must for all of the violations alleged. Further, and separately, the evidence will also show that Respondents relied in good faith on the advice of their legal counsel, Seward & Kissel, with respect to the offer and sale of Gray Fund II to the Georgia-based public pension plans. The elements of an advice of counsel defense are that (1) Respondents made complete disclosure to counsel; (2) Respondents sought advice on the legality of the intended conduct; (3) Respondents received advice that the intended conduct was legal; and (4) Respondents relied in good faith on counsel's advice." *Sec. & Exch. Comm'n v. Savoy Industries, Inc.*, 665 F.2d 1310, 1315 n. 28 (D.C. Cir. 1981); *Markowski v.*

SEC, 34 F.3d 99, 105 (2d Cir. 1994). The evidence at hearing will show that Respondents more than sufficiently satisfy these elements and are entitled to the defense. To that end, Respondents expect to present the expert testimony of Mr. Philip Feigin, who is expected to testify about the duties owed by Seward & Kissel to all three Respondents and that Respondents reasonably relied upon their legal advice. Mr. Feigin's expert report is incorporated by reference herein as if restated in full. Regardless, the Division's inability to prove its primary claims against Respondents is fatal to its aiding, abetting and causing claims against Mr. Hubbard.

Finally, and as stated by Professor Jellum in her expert report, this administrative proceeding and specifically the SEC ALJs' appointment and removal processes violates the Article II of the United States Constitution. As inferior offices, the SEC ALJs must be appointed by the president, a court of law, or the head of a department. U.S. CONST. art. II § 2, cl. 2. The SEC ALJs are appointed by the head SEC ALJ. Because the SEC ALJs are inferior officers and because the SEC admits that its ALJs are not appointed as constitutionally required, the SEC ALJ appointment process violates the Constitution. Further, the SEC ALJs' multiple for-cause removal limitations violate the Constitution, as explained in Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U. S. 477 (2010).

For the above-stated reasons and as further explained below in this Pre-Hearing Brief, supported by the evidence at trial, Respondents respectfully request that Your Honor issue an Initial Decision dismissing the charges in their entirety and granting such other and further relief as is just and proper. The law and facts fully support such a result, and it is demonstrably in the public interest as well, especially where, as here, the challenged investment has performed well and none of the four Georgia-based public pension plans experienced any reported losses.

II. BACKGROUND FACTS

A. Gray & Co.

Gray & Co. ("Gray") is an SEC registered investment advisory firm (also doing business under the names of Gray & Co. and Gray & Company) with its principal place of business in Atlanta, Georgia. Gray was founded in 1994 by Laurence Gray and became registered with the SEC as an investment advisor on September 24, 1998. Gray has no adverse regulatory history.

Gray is minority owned and indeed, before the SEC began its investigation, which in turn generated adverse publicity, was believed to be the largest minority owned investment consulting firm serving public pension plans in any metropolitan city in the United States. During the period in question, Mr. Gray served as the company's Chief Executive Officer and Chief Investment Officer, and Mr. Hubbard served as the firm's Chief Operating Officer. Neither Mr. Gray nor Mr. Hubbard are lawyers or have any legal training. Like Gray, neither Mr. Gray, nor Mr. Hubbard has any adverse regulatory history of any kind.

Gray has remained a small, privately held registered investment advisor and has focused its business almost exclusively on consulting, and primarily to public and private pension plans both inside and outside of Georgia. In Georgia, Gray's consulting clients have included:

- Atlanta General Employees Benefit Plan ("Atlanta General");
- Atlanta Firefighters' Pension Fund ("Atlanta Fire");
- Atlanta Police Officers' Pension Fund ("Atlanta Police");
- Fulton County Schools Employees' Pension Fund ("Fulton Schools");
- Fulton-DeKalb Hospital Authority Employees' Retirement Fund ("FDHA"); and
- MARTA/ATU Local 732 Employees Retirement Plan ("MARTA").

Gray also consulted during the relevant period to public plans outside of Georgia, such as the New Haven Policemen & Firemen's Retirement Fund Board and the City of Pontiac General Employees Retirement System, in Connecticut and Michigan, respectively. Gray's relationship with these plans dates at least as far back as 1999. In the role of consultant, Gray typically assesses the investment objectives of a given plan and assists in developing governing investment policy statements and asset allocations. In its role as a consultant for the above plans, Gray was compensated on a fee basis, did not receive commissions on investments, and did not have custody of client accounts or investments. The vast majority of Gray's consulting business was on a non-discretionary basis.

Gray's public pension plan clients have been complimentary of Gray and the services it has provided over the years. This is not a situation of an investment advisor with a stream of complaints, lawsuits and the like. Gray has consistently delivered on its promises, and the investments it has consulted on have resulted in appropriate returns. That includes the investments at issue here, which have been profitable for each of the pension plans involved.

Gray's contractual duties and responsibilities as an investment consultant to its Georgia public pension plan clients, including the Atlanta General, Atlanta Fire, and Atlanta Police plans, are limited to those set forth in its respective consulting agreements with those plans' Boards of Trustees. For example, the Agreement for Investment Consulting Services[1] (the "Agreement") with the Atlanta General plan's Board of Trustees specifically limits Gray's duties to those stated in the Agreement. Nowhere in the Agreement does it state that Gray is to provide legal advice to

[1] *See* Agreement for Investment Consulting Services By and Between The Board of Trustees of City of Atlanta General Employees Pension Fund and Gray & Company (attached hereto as Exhibit 1).

the Boards or the Plans, and there is no course of conduct to suggest that any consulting client should expect Gray to provide such services.

Rather, the Agreement limits Gray's services to providing specific services under (1) "Performance Measurement and Evaluation" of investments; (2) "Research and Inquiry" from the Board; and (3) "Additional Consulting Services," none of which include legal advice. Gray's Agreements for Investment Consulting Services with the Atlanta Police and Atlanta Fire Boards of Trustees contain identical language; they do not include any duty for Gray to provide legal advice.

Each plan has its own Board of Trustees, and each Board and its corresponding Trustees all owe fiduciary duties to and are charged with all decision-making for the respective plans. The Board's responsibilities include evaluating investment options and making investment decisions that are appropriate for the plan. In doing so, the Boards have available to them dedicated legal counsel who attend Board meetings and are charged with the responsibility of interpreting legal matters for their respective plans. During the relevant time frame, these included Assistant City Attorney Kristen Denius (Atlanta General, Atlanta Fire, and Atlanta Police); Lewis C. Horne (Fulton Schools and FDHA); and Norman Slawsky (MARTA). In addition, the Boards are able to retain outside counsel on an as needed basis.

B. Gray Worked With Outside Counsel to Develop A Fund-of-Funds Alternative Investment For Public Pension Plans Outside Of Georgia

Allocating a portion of portfolio funds to alternative investments — such as private equity and hedge funds — is recognized as an appropriate and important investment technique to

reduce volatility and increase potential returns.[2] Such investment tools are nothing new; they have been available for decades and many of Gray's clients had before 2011 expressed great interest in adding such investments to their portfolios. But there were potentially two related problems: (1) such funds typically had minimum investment amounts that were above those considered prudent for public pension plans; and (2) such funds often offered less than desired levels of diversification. In an effort to meet this demand and overcome these challenges, Gray began considering how it might work toward developing a Fund-of-Funds that would hold ten to twelve private equity investments, hedge funds and similar permitted investments, but be able to meet the fund minimums through a pooling of assets.

Gray conceptualized a Fund-of-Funds to be named GrayCo Alternative Partners I, LP ("Gray Fund I") which Gray could offer to pension plans seeking access to alternative investments. Gray had expertise and experience with alternative investments, but it did not have the technical expertise or in-house personnel with legal training to prepare the necessary documentation to ensure compliance with governing legal and regulatory principles and standards.

Before proceeding with the concept, Gray, through Mr. Gray, sought recommendations to identify legal counsel who were considered to be highly experienced in creating alternative investments, were familiar with the corresponding legal challenges, and knew how to address them.[3] That led Gray to Seward & Kissel, a New York-based law firm which holds itself out as and is perceived by many to be "[o]ne of the most experienced and extensive legal practices

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[2] *See* IBBOTSON SBBI 2014 CLASSIC YEARBOOK: MARKET RESULTS FOR STOCKS, BONDS, BILLS, AND INFLATION 1926–2013 at 135 (Morningstar 2014); Douglas Cumming, et al., *Strategic Asset Allocation and the Role of Alternative Investments* (attached hereto as Exhibit 2).

[3] *See* L. Gray Tr., 90:6–8.

covering the private investment fund industry and consistently ranked as an industry leader."[4] To this end, Seward & Kissel dedicates a group of lawyers and staff to a "Private Funds Practice." It holds itself out as part of the team that invented the first hedge fund dating back to 1949. Today, it is one of the most experienced law firms in the private investment fund space and has the one of the most extensive legal practices covering the private investment fund industry. It claims to be able to leverage the firm's broad private investment fund-related expertise to provide its clients with full service guidance on virtually every imaginable legal issue and, indeed, numerous types of investment opportunities, including private equity, private debt and other business transactions. It boasts that private funds is a key practice area of the firm, with over 45 attorneys and 15 paralegals specializing in the investment management area *serving clients throughout the U.S. and overseas.*

Although Gray would come to work with a number of different lawyers at the firm, Gray's primary counsel at Seward & Kissel was initially senior partner Robert Van Grover, a lawyer with 30 years of experience who is co-chair of the firm's Investment Management Group (which appears to oversee the Private Funds practice). Mr. Van Grover held himself out as "specializ[ing] in the formation and representation of private funds" and as someone who can "advise[] clients on a wide variety of securities, tax and business law matters relating to the investment management business." Mr. Van Grover's primary go-to associate handling Gray's private funds legal needs and a constant contact for Respondents was Alexandra Segal, who also practices exclusively in the firm's Private Funds group.

[4] *See* http://www.sewkis.com/services/xprServiceDetailSymSewardKissel.aspx?xpST=ServiceDetail&service=21.

On July 15, 2011, Seward & Kissel sent Mr. Gray a letter to confirm the engagement. In that letter, Seward & Kissel broadly described the scope of engagement as follows:

> We will represent you in connection with the organization of one or more private investment funds. ... We will prepare a Fund's private offering memorandum, subscription agreement and other organizational documents. ... We will also provide legal advice in connection with the offering of interests and structuring and business advice in connection with the offering. On an ongoing basis, we will advise you on regulatory and other matters for which you request our assistance.[5]

Mr. Gray signed the letter.

For Gray Fund I, Seward & Kissel was primarily if not exclusively responsible for creating the structure of the offering *in addition to performing all legal work.* Seward & Kissel lawyers structured the investment as a Delaware limited partnership that would "invest in a diverse group of privately-held investment vehicles which may include, without limitation, venture capital funds, private equity funds, real estate funds and/or hedge funds."[6] To that end, Seward & Kissel drafted various offering documents to be used by Gray to offer Gray Fund I to clients — the confidential private offering memorandum, subscription agreement, and the limited partnership agreement. The offering documents addressed issues that Seward & Kissel had handled previously for other clients — indeed, the final product is similar in format to documents that Seward & Kissel had drafted previously for other clients. In addition, Seward & Kissel communicated with regulatory agencies, prepared formation documents for the legal entities associated with Gray Fund I and registering those entities, negotiated with counsel for the public

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[5] *See* July 15, 2011 correspondence from Robert B. Van Grover (Exhibit 3).

[6] *See* Subscription Agreement, Confidential Private Offering Memorandum, and Limited Partnership Agreement, (attached hereto as Exhibit 4).

pension plan investors, and otherwise provided ongoing counsel to Gray, Mr. Gray and Mr. Hubbard about the proposed offering and other matters.

Gray did not expressly limit the amount of time Seward & Kissel could invest or spend on any task or project, nor did Seward & Kissel have any associated budget. Instead, Seward & Kissel devoted the amount of time and attention in its discretion it believed it needed to complete its work in a thorough and professional manner.

Consistent with the July 15, 2011 engagement letter, Seward & Kissel served as an important advisor and counselor to Gray on both legal and business matters relating to private funds. The work Seward & Kissel was asked to perform by Gray, Mr. Gray and Mr. Hubbard extended well beyond handling the legal work for Fund I. It was also an engagement that was lucrative for the law firm. During the first full year of doing business together, Mr. Van Grover involved (and Gray came to rely upon) the expertise of no fewer than twenty individual Seward & Kissel professionals, some who charged Gray as much as $800 per hour for their legal expertise. During that first year, Seward & Kissel charged, and Gray or its affiliates paid, over $130,000 for the law firm's legal services, more than it paid any other law firm it was then using. Indeed, Seward & Kissel assumed the role of primary outside counsel for Gray, and the law firm that Gray, Mr. Gray and Mr. Hubbard would come to rely upon as a close legal advisor.

Indeed, as the Honorable Leigh Martin May, United States District Court Judge for the Northern District of Georgia, stressed in denying a motion to dismiss the malpractice case Gray, Mr. Gray and Mr. Hubbard filed against Seward & Kissel:

> The Court finds that, as pled, Defendant was actually aware that senior officers in Gray Financial, and specifically [that Mr. Gray and Mr. Hubbard] would rely on its legal advice. [Mr. Gray and Mr. Hubbard] were the ones who actually used the legal advice given to the corporate Plaintiff, and the representation letter did not otherwise limit the scope of S&K's representation to just the corporate Plaintiff [Gray Financial]. In fact, the

> representation letter never explicitly defines who "You," i.e. the client, is under the agreement. Therefore, the Court finds Gray and Hubbard may bring malpractice claims at this procedural posture.

See Order on Plaintiff's Motion to Dismiss, *Gray Financial Group, Inc. et al. v. Seward & Kissel LLP*, Civ. Action No. 1:16-CV-1956-LMM (N.D. Ga. Dec. 1, 2016) at 12, Exhibit 5. Mr. Feigin's expert opinion also is that all three Respondents were clients of Seward & Kissel.

C. Georgia Code Ann. § 47-20-87 and Gray Fund II

Prior to 2010, no public pension plan in Georgia could legally invest in alternative investments. Public pension plans in other states could invest in alternative investments, but not in Georgia. O.C.G.A §§ 47-20-87 and 47-7-127, which were enacted in 2010 and 2012 respectively, for the first time allowed eligible Georgia public retirement systems to invest in alternative investments subject to three specific limitations. Like many states, but unlike Congress, the Georgia Assembly does not maintain easily obtainable legislative history on state laws. While bill drafts and votes are available, committee reports and floor debates are not. In 2010, the General Assembly enacted O.C.G.A. § 47-7-127, which is virtually identical to O.C.G.A. § 47-20-87 except that it allows *only* the Firefighters' Pension Fund to invest in alternative investments. Two years after passing O.C.G.A. § 47-7-127, the General Assembly enacted O.C.G.A. § 47-20-87 in 2012, which allowed all large, public retirement systems, except for the Teachers' Retirement System of Georgia, to invest in alternative investments. O.C.G.A. § 47-20-87(a)(2). O.C.G.A. § 47-7-127 was not repealed. Thus, the Firefighters' Pension Fund is arguably subject to both statutes.

Respondent's expert witness, Professor Linda Jellum, will show that based on the meaning and reasonable interpretation and application of the Georgia Statute, investments made by Gray's Georgia-based public pension plan clients in Gray Fund II complied with the Georgia

Statute. Professor Jellum's Expert Report is incorporated into this Pre-Hearing Brief by reference. By way of background, Professor Jellum is one of the few experts in statutory interpretation and administrative law in the country. She is currently the Ellison Capers Palmer Sr. Professor of Law at the Mercer University School of Law in Macon, Georgia. Her responsibilities include teaching and researching in the field of statutory interpretation and administrative law, among other topics.

D. Relying on Advice of Counsel, Gray Offered Their Next Fund-of-Funds Alternative to Georgia Pension Clients

As a result of the passage of the Georgia Statute, Gray considered offering a Fund-of-Funds investment alternative to its Georgia pension plans. It was paramount, however, that it comply with the newly-passed and yet untested Georgia Statute. Because its experience with Gray Fund I had been successful, and because subsequent Fund-of-Funds were planned all along, Gray turned to the same Seward & Kissel legal and business advisory team to create what would become known as Gray Fund II and what would be largely based on the same structure of Gray Fund I that Seward & Kissel created. The Gray Fund II legal and business advisory team included Mr. Van Grover and Ms. Segal, in addition to other lawyers and staff Seward and Kissel deemed appropriate and necessary.[7] As with Fund I, Gray, Mr. Gray and Mr. Hubbard gave Seward & Kissel complete discretion to use its judgment in staffing and structuring the Fund II and overall strategy.

Specifically, on April 2, 2012, Ms. Segal "[d]iscussed [a] new private equity fund of funds" with Ms. Hubbard, *i.e.*, Gray Fund II; the very next day, April 3, 2012, Ms. Segal again

[7] The other non-substantive difference between Fund I and Fund II is that the Fund II offering documents eliminate several provisions that were specific to the seed investor for Fund I, the New Haven Police & Fire pension fund. *See* GRAYSEC00019546 (attached hereto as Exhibit 6).

"[d]iscussed separate portfolio structure . . . re: new PE fund II."[8] Then on June 8, 2012, Mr. Hubbard sent an email to Ms. Segal asking Seward & Kissel to begin drafting the offering documents for Gray Fund II, which Mr. Hubbard directed must "be eligible for GA Public Plans."[9] Significantly, he simultaneously sent Ms. Segal a copy of the Georgia Statute for reference so that it would be clear that he wanted Gray Fund II to be compliant with that particular Georgia law. Ms. Segal did not indicate that Seward & Kissel was incapable or unwilling to handle this Georgia-based work, nor did she or anyone at the law firm suggest that Gray, Mr. Gray and Mr. Hubbard would be better served if they hired a Georgia law firm to handle the work. Instead, Seward & Kissel jumped in and took complete ownership of the project. On June 8, 2012, according to Seward & Kissel's legal invoice to Gray, Ms. Segal "looked into GA ***statutes*** [plural in original] regarding ***restrictions*** [plural in original] on alternative investments by eligible large retirement systems." She also "discussed same with [Seward & Kissel partner Robert Van Grover]."[10] Mr. Van Grover likewise spent time reviewing Ms. Segal's research and discussing it with her, although unbeknownst to Mr. Hubbard at the time, the amount of time spent by Gray's lawyers on this important task was apparently minimal.

Several weeks after asking Seward & Kissel to prepare the needed documents for the Gray Fund II offering and to ensure compliance with the Georgia Statute, Mr. Hubbard advised Ms. Segal that he wanted to use the offering documents she was preparing to present Gray Fund II to two potential Georgia pension fund investors. Ms. Segal did not express any reservations

[8] S&K012798-12801 (attached hereto as Exhibit 7).
[9] S&K011945 (attached hereto as Exhibit 8).
[10] S&K012798-12801 (attached hereto as Exhibit 7).

about this plan. Nor did she in any way indicate that she had any questions about the nature of the offering, the investors who would be solicited and ultimately participating, those investors' asset allocation and portion of the investment to be devoted to Fund II or really anything at all. Instead, on July 9, 2012, Ms. Segal sent Mr. Hubbard the Gray Fund II subscription agreement, confidential private offering memorandum, and limited partnership agreement as he requested so Gray could use the materials to present the investment to the Georgia pension fund clients. At this point, Gray, Mr. Gray and Mr. Hubbard clearly and reasonably relied on Seward & Kissel opining that Fund II was legal under the new Georgia law and that their consulting clients could legally invest in it and they could legally recommend they do so without themselves being in violation of any law.

In addition to Gray's counsel, Gray provided the attorneys for the various plans with the opportunity to vet Gray Fund II and of course gave the Boards the opportunity to review and consider the investment before making an investment decision. In most cases, counsel for the plans attended the Board meetings during which Gray Fund II was discussed and approved by the Boards. The votes in most of the meetings were unanimous to approve the investment, and those voting against do not appear to have based their dissenting votes on an interpretation that a purchase of Gray Fund II violated the Georgia Statute.[11] Although the underlying investigation in this matter is believed to have been brought about largely as a result of a complaint of a single Board member from Atlanta General, Ms. Angela Green, and the corresponding media attention that it attracted, the plans themselves have not otherwise raised complaints to Gray about Gray

[11] *See* Atlanta Police Minutes, September 11, 2012 (attached hereto as Exhibit 10); Atlanta Fire Minutes, September 11, 2012 (attached hereto as Exhibit 11); Atlanta General Minutes, November 7, 2012 (attached hereto as Exhibit 12); Fulton Schools Minutes, November 8, 2012 (attached hereto as Exhibit 13); FDHA Investment Committee Minutes, November 13, 2012 (attached hereto as Exhibit 14); MARTA Minutes, November 30, 2012 (attached hereto as Exhibit 15).

Fund II.

E. Respondents Had No Duty to Provide Legal Advice with Respect to Investments in Gray Fund II

The Gray Fund II offering documents make clear that neither Respondents nor the Fund itself were offering legal advice to prospective investors regarding Gray Fund II's compliance with Georgia law or that they had any contractual obligation or other duty to do so. By way of example, the "Legal Considerations" section of the October 2012 Confidential Private Offering Memorandum prepared for the Atlanta General plan states in all capital letters that:

> PROSPECTIVE INVESTORS SHOULD NOT CONSTRUE THE CONTENTS OF THIS MEMORANDUM AS LEGAL, TAX, INVESTMENT, FINANCIAL OR OTHER ADVICE. EACH PROSPECTIVE INVESTOR SHOULD MAKE ITS OWN INQUIRIES AND CONSULT ITS OWN ADVISORS . . . AS TO THE LEGAL, TAX, FINANCIAL OR OTHER MATTERS RELEVANT TO AN INVESTMENT IN THE FUND. . . NEITHER THE FUND, THE MANAGER, THE GERNAL PARNTER OF THE FUND . . . MAKES ANY RECOMMENDATION AS TO THE MERITS OR SUITABILITY OF AN INVESTMENT IN THE FUND FOR ANY PARTICULAR PERSON OR ENTITY.

See pp. 4-5 of Confidential Private Offering Memorandum – GrayCo Alternative Partners II, LP, for Atlanta General attached hereto as Exhibit 9. Put another way, the Gray Fund II offering documents repeatedly advised all prospective investors in Gray Fund II to consult with independent legal counsel concerning the consequences of an investment in the Fund. In fact, the four Georgia public pension plans that invested in Gray Fund II also represented and warranted in their respective Subscription Agreements for Limited Partnership Interests in GrayCo Alternative Partners II, LP ("Subscription Agreements"), that "to the extent deemed

necessary, have consulted their own investment advisors and legal counsel regarding the investment in the Partnership."[12]

Even more significantly, by signing the Subscription Agreements, the Atlanta General, Atlanta Fire, Atlanta Police and Marta plans all represented and warranted that "the investment and investment program described in the Offering Memorandum are permitted under the laws, rules and documents governing the New Limited Partner."[13] Given that language, the Boards of Trustees of the Georgia public pension plans investing in Gray Fund II were obligated to ensure that their respective plans' investments in Gray Fund II complied with Georgia law, including the Georgia Statute. In contrast, Respondents had no obligation to render legal advice under the Gray Fund II offering documents or otherwise.

LEGAL ARGUMENT

The Division alleges that:

- Gray Financial and Mr. Gray willfully violated Section 17(a) of the Securities Act of 1933 (the "Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder;
- Mr. Hubbard willfully violated Sections 17(a)(1) and (3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;
- Mr. Hubbard willfully aided and abetted and caused Gray Financial and Gray's violations of Sections 17(a)(1) and (3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;
- Gray Financial and Mr. Gray willfully violated Sections 206(1), 206(2) and 206(4) of the Investment Advisors Act of 1940 (the "Investment Advisors Act"), and Rule 206(4)-8 promulgated thereunder; and

[12] *See* Subscription Agreement for Limited Partnership Interests in GrayCo Alternative Partners II, LP for the City of Atlanta General Employees' Pension Fund, at p. 20, attached hereto as Exhibit 16.
[13] *See* Exhibit 16, at pp. 19-20.

- Mr. Hubbard willfully aided and abetted and caused Gray Financial and Gray's violations of Sections 206(1), 206(2) and 206(4) of the Investment Advisors Act, and Rule 206(4)-8 promulgated thereunder.

See OIP at ¶¶ 26-27. The Division bears the burden of proof – by a preponderance of the evidence – on each element of every alleged cause of action. *See Sec. & Exch. Comm'n v. Ginsburg,* 362 F.3d 1292, 1298 (11th Cir.2004) (citing *Herman & MacLean v. Huddleston,* 459 U.S. 375, 390 & n. 30, 103 S. Ct. 683, 74 L.Ed.2d 548 (1983)). As discussed below, and will be shown at hearing, the Division cannot establish any of the elements required to prove the substantive violations alleged here. And if there are no primary violations, there can be no aiding and abetting or causing liability. *Woods v. Barnett Bank,* 765 F.2d 1004, 1009 (11th Cir. 1985). Accordingly, Your Honor should dismiss the Division's claims in their entirety.

I. RESPONDENTS DID NOT VIOLATE O.C.G.A. § 47-20-87

The Division contends that Respondents improperly recommended Gray Fund II to its Georgia public pension plan clients as a permissible alternative investment because Gray Fund II failed to meet certain limitations set forth in subsection (c) of the Georgia Statute. *See* OIP at ¶¶ 13-20, 23. As explained in further detail in Professor Linda Jellum's Expert Report, the Division's argument has no support under any reasonable interpretation of the Georgia Statute. The investments in Gray Fund II by the Georgia pension plans did not violate the Georgia Statute, and accordingly, any recommendations by Respondents to make such an investment were consistent with the Georgia Statute.

III. GRAY IS NOT LIABLE UNDER SECTION 10(B), RULE 10B-5, SECTION 17(A)(1) OF THE SECURITIES ACT, OR SECTION 206(1) OF THE INVESTMENT ADVISERS ACT

The Division cannot prevail on its claims for liability under 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(1) of the Investment Advisors Act, because it cannot establish any of the required elements. All three claims require a showing of a material misrepresentation or omission and scienter. First, the Division cannot prove a violation of Section 10(b) or Rule 10b-5 because it cannot "show (1) a material misrepresentation or a materially misleading omission; (2) in connection with the purchase or sale of a security; and (3) made with scienter."[14] *Sec. & Exch. Comm'n v. Morgan Keegan*, 678 F.3d 1233, 1244 (11th Cir. 2012) (citation omitted). Second, with respect to its Section 17(a)(1) claim, the Division cannot show "(1) a material misrepresentation or a materially misleading omission; (2) in connection with the offer or sale of a security; and (3) made with scienter."[15] *Id.* Finally, for violations of Section 206(1), the Division will be unable to establish (1) a material misrepresentation or omission; (2) a device, scheme, or artifice to defraud any client or prospective client; and (3) a showing of scienter.[16] *See Sec. & Exch. Comm'n v. Moran*, 922 F. Supp. 867, 896 (S.D.N.Y. 1996) (noting that the language of 206(1) is identical in all relevant respects to the language of Section 17(a)(1)); *see also Sec. & Exch. Comm'n v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992). The evidence herein and adduced at hearing will show that Respondents did not make any material statements, misrepresentations or

[14] *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.
[15] Section 17(a)(1) of the Securities Act makes it "unlawful for any person in the offer or sale of any securities to employ any device, scheme or artifice to defraud . . ." 15 U.S.C. § 77q(a).
[16] Section 206(1) of the Investment Advisers Act prohibits an investment advisor from employing any device, scheme or artifice to defraud any client or prospective client.

omissions, or act with any scienter in light of their reasonable interpretation of the Georgia Statute, lack of motivation, and good faith reliance on the advice of counsel.

A. The Division's Claims Involving Scheme Liability Fail Because It Cannot Establish Deceptive Conduct by Respondents

As an initial matter, the Division's claims under Section 10(b) and Rule 10b-5, Section 17(a)(1) and Section 206(1), which all involve scheme liability, fail because the Division cannot and will be unable to show deceptive conduct by Respondents. "Scheme liability applies to deceptive conduct, as opposed to deceptive statements." *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 643 n. 29 (3d Cir. 2011), abrogated on other grounds by *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 133 S.Ct. 1184 (2013). "Legitimate business transactions that do not have a deceptive purpose or effect cannot form the basis of scheme liability." *Sec. & Exch. Comm'n v. Quan*, 2013 WL 5566252, at *14 (D. Minn. Oct. 8, 2013); *see also Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1050 (9th Cir. 2006) ("Participation in a legitimate transaction, which does not have a deceptive purpose or effect, would not allow for a primary violation even if the defendant knew or intended that another party would manipulate the transaction to effectuate a fraud ."); *Sec. & Exch. Comm'n v. Lucent Techs, Inc.*, 610 F. Supp. 2d 342, 360 (D.N.J. 2009) (stating scheme liability is limited to conduct involving "sham" or "inherently deceptive transactions").

Given the overwhelming evidence that Gray Fund II was a completely legitimate investment fund with no deceptive purpose, there can be no scheme liability here and thus no primary violations of Sections 10(b)/Rule 10b-5, Section 17(a)(1) or Section 206(1). Even if the four Georgia public pension plans' investments in the Gray Fund II did not comply with the Georgia Statute, there is no evidence Gray Fund II was a sham or an inherently deceptive

transaction. And significantly, the Division has not made that claim here. Indeed, it is remarkable that the Division has even alleged scheme liability against Respondents without evidence that the Gray Fund II constitutes a deceptive scheme or a sham transaction.

B. Gray Did Not Make Any Material Misstatements or Misrepresentations

The Division has alleged that, during a November 7, 2012 meeting with the Board of Trustees for the Atlanta General plan, certain statements Mr. Gray made were either false or misleading. Specifically, the Division claims that Gray Financial and Mr. Gray made material misrepresentations concerning (a) Gray Fund II's compliance with Georgia law; and (b) the identities of other investors in Gray Fund II. OIP at ¶¶ 21-24. With respect to the Gray Fund II's compliance with Georgia law, as explained above, the Gray Fund II either was compliant with the Georgia statute and there was no misstatement or Mr. Gray reasonably believed that it was. Accordingly, any statements made by Mr. Gray concerning Gray Fund II's compliance were true or not knowingly false or recklessly made.

Even if Mr. Gray made any misstatements during the November 7, 2012 meeting, however, which Respondents deny, the Division's claims still fail because any such misrepresentations were not material. Materiality is a required element for all actions under Securities Act Section 17(a), Exchange Act Section 10(b), and Section 206 of the Investment Advisers Act.[17] "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding the matter before him," *i.e.*, in making an investment decision. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976). As set forth below and will be shown at the hearing, any purported misstatements that Mr. Gray is alleged to

[17] *Sec. & Exch. Comm'n v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1245 (11th Cir. 2012) (recognizing materiality requirement in SEC actions); *Sec. & Exch. Comm'n v. Wall St. Pub. Inst., Inc.*, 591 F. Supp. 1070, 1082–83 (D.D.C. 1984) (recognizing materiality as an element of Section 206 claim).

have made occurred after the Trustees voted to invest in Gray Fund II and thus were not material to the Trustees' decision.

Where misstatements or omissions are not material, courts and the Commission have not hesitated to dismiss claims brought by the Division. *See Sec. & Exch. Comm'n v. Mannion*, -- F. Supp. 2d --, 2014 WL 2957265 (N.D. Ga. July 1, 2014) (Duffey, J.) (reflecting grant of summary judgment on Section 206 for lack of materiality with respect to overvaluation of investment in NAV statement); *Russell W, Stein*, Initial Decision Release No. 150, 1999 WL 756083, at *9 (ALJ Sept. 27, 1999) (McEwen, J.) (dismissing claims asserted under Sections 206(1) and (2) because transactions that were not disclosed reflecting fees paid by third party to broker were "not material" and did not create a conflict of interest); *see also Brandt, Kelly & Simmons*, LLC, Initial Decision Release No. 289, 2005 WL 1584978, at *7 (ALJ June 30, 2005) (Foleak, J.) (finding "no scheme to defraud, no material misrepresentations or omissions, and [therefore] no violation of Sections 206(1) or 206(2) of the Advisers Act"). Here too, given that the statements at issue by Mr. Gray were either true or immaterial, all of the Division's claims in the OIP – which require a showing of materiality – should be dismissed.

C. Respondents Did Not Act with Scienter

The Division must satisfy a high burden to prove Respondents' scienter. In the Eleventh Circuit, a showing of intent or "severe recklessness" is needed to satisfy the scienter requirement. *McDonald v. Allen Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir. 1989). "Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known

to the defendant or is so obvious that the defendant must have been aware of it." *McDonald,* 863 F.2d at 814. This degree of recklessness "com[es] closer to being a lesser form of intent than merely a greater degree of ordinary negligence." *Malin v. Ivax Corp.,* 17 F. Supp. 2d 1345, 1361 (S.D. Fla.1998). While averments of motive and opportunity to commit fraud "may be relevant to a showing of severe recklessness ... ***such allegations, without more***, are not sufficient to demonstrate the requisite scienter." *Bryant v. Avado Brands, Inc.,* 187 F.3d 1271, 1285 (11th Cir.1999) (emphasis added).

This is not a close call. Nothing about Respondents' conduct or statements in connection with Gray Fund II evidence an extreme departure from standards of ordinary care, let alone simple negligence. *McDonald,* 863 F.2d at 814. Even if Your Honor ultimately were to disagree with Professor Jellum's interpretation of the Georgia Statute, Respondents maintain that any shortcoming in interpretation is a result of the numerous defects in the Georgia Statute and not the result of a willful or reckless intent to violate it on Respondents' part. Respondents' lack of intent is bolstered by its reliance on the advice of its outside counsel, Seward & Kissel, whom Respondents understood to have designed the Gray Fund II such that it would comply with the Georgia Statute.

Further, Respondents had no motivation to engage in the alleged misconduct, and even if they did, that alone is insufficient to establish scienter. *Bryant.,* 187 F.3d at 1285. Mr. Gray developed a successful consulting business during the past decade by providing trusted advice to its clients. It would serve no purpose for Gray & Co. to put its name on a private fund that it could recommend to investors that included Georgia public plans *knowing* that these plans would be unable to invest in it. Each of the plans has a Board of Trustees conducting due diligence and evaluating the appropriateness of each investment. Putting the adverse consequences of a

resulting regulatory action against Respondents aside, too many potential traps would exist for Respondents to lose credibility with their clients once just one of the Trustees on the Boards or its counsel concluded that an investment in Gray Fund II was not in compliance with the Georgia Statute. The theory that Respondents marketed the Gray Fund II knowing it was illegal or did so recklessly, is to suggest that Respondents was willing to destroy their own profitable consulting business for the sake of marketing an illegal investment.

D. Respondents Are Entitled to The Advice of Counsel Defense

The facts explained herein and to be adduced at hearing will show that Respondents are entitled to the advice of counsel defense for all of the violations alleged in the OIP. It is well established that an "advice of counsel" defense requires the party claiming it to show: "...(1) that he made complete disclosure to counsel; (2) that he sought advice on the legality of the intended conduct; (3) that he received advice that the intended conduct was legal; and (4) that he relied in good faith on counsel's advice." *Sec. & Exch. Comm'n v. Savoy Industries, Inc.*, 665 F.2d 1310, 1315 n. 28 (D.C. Cir. 1981); *Markowski v. SEC,* 34 F.3d 99, 105 (2d Cir. 1994). The advice of counsel defense is available in claims which require a showing of scienter.[18] *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004). For violations where scienter is not an element of liability, the advice of counsel defense may be a mitigating factor as to what sanctions are deemed to be in the public interest. *In re Joseph J. Fox*, S.E.C. Release 1004, 2016 WL

[18] The advice of counsel defense should apply to claims involving both *scienter* and negligence in this case. The Division has alleged that the Respondents *willfully* violated anti-fraud provisions of the Securities Act, the Exchange Act and Rule 10b-5 thereunder, and the Investment Advisers Act and Rule 206(4)-8(a)(2) thereunder. Whether particular provisions are viewed as requiring proof of *scienter* or negligence, violations must all be *willful* for the Division to prevail. Willfulness requires intentional doing of wrongful acts, and that intent constitutes a state of mind. *See Wonsover v. Sec. & Exch. Comm'n,*, 205 F.3d 408, 414 (D.C. Cir. 2000). Because reliance on the advice of counsel is a defense to the state of mind the Division must prove here, it should follow that the advice of counsel negates any claim that involves willfulness, including those requiring only a showing of negligence.

1624791, at *7 (Apr. 25, 2016) (noting advice of counsel defense may be mitigating factor in considering penalties for Rule 5 violation); see also *D.F. Bernheimer & Co., Inc.*, 41 S.E.C. 358, 364 n.7 (1963).

As long as the client discloses the primary facts needed to render legal advice to its attorney, that is sufficient to establish the advice of counsel defense; the client is not expected to know or tell his lawyer every single fact. Indeed, in *U.S. v. DeFries*, 129 F.3d 1293, 1308-09 (D.C. Cir. 1997), the court held that the failure to give advice-of-counsel instruction on an embezzlement count was reversible error where the defendant disclosed the primary facts needed to render legal advice to counsel. The court explained:

> "No client ever tells his or her lawyer every single fact that a good lawyer probes before giving advice. Indeed, clients do not typically even know which facts a lawyer might think relevant. (That is, in part, why they consult lawyers.) So long as the primary facts which a lawyer would think pertinent are disclosed, or the client knows the lawyer is aware of them, the predicate for an advice-of-counsel defense is laid.

DeFries, 129 F.3d at 1308-09. Similarly, the court in *S.E.C. v. Prince*, found that the defendant established the elements of the advice of counsel defense where "there was no evidence that at any time any employee of Integral failed to provide information requested by a Venable lawyer" even though not every relevant fact was disclosed. 942 F. Supp. 2d 108, 139-143 (D.D.C. 2013). *See also U.S. v. Kong*, 160 Fed. Appx. 195, 198-99, 2005 WL 3481517, at *3 (3rd Cir. 2005) (finding that it was proper to instruct jury on advice of accountant defense where defendant was relying on accountant to tell him which documents he needed to provide; "the jury could infer from his testimony that had his accountants provided Kong with more specific direction, he would not have violated the tax laws"); *Longoria v. C.I.R.*, 2009 WL 1905040, at *10-11 (U.S.Tax Ct., 2009); *F.D.I.C. v. O'Melveny & Myers*, 969 F.2d 744, 749 (9th Cir. 1992), *rev'd on other grounds O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994).

Here, Respondents acted in good faith in reliance on advice of counsel. First, the evidence demonstrates that Respondents made full disclosure to Seward & Kissel of the relevant facts needed for Seward & Kissel to render legal advice on the Gray II Fund and sought advice on Gray Fund II's compliance with the Georgia Statute. Significantly, *in one of the very first communications* concerning Fund II, Mr. Hubbard: (a) stated that Fund II would be sold to Georgia plans under the new Georgia Statute; (b) referenced the new Georgia Statute and attached a copy; and (c) specifically alerted Seward & Kissel that Gray would need guidance on issues raised in the Georgia Statute. In short, Mr. Hubbard stressed that the Georgia Statute — and compliance with it — was of paramount importance. Mr. Hubbard has testified that the directive to Seward & Kissel was that Gray "want[ed] Fund II to be eligible for Georgia public pension plans,"[19] and that meant that Seward & Kissel's job was to "ensure that it was going to be compliant with [the] Georgia Code."[20] Respondents not only provided all information requested by Seward & Kissel with respect to Fund II, they were relying on Seward & Kissel to ask what information was needed for the Fund to comply with the Georgia Statute. Given Respondents' extensive relationship with Seward & Kissel, this reliance was reasonable.

Second, the evidence will show that Respondents received advice from Seward & Kissel that its intended sale of Gray Fund II to Georgia plans was legal. With the knowledge that Mr. Hubbard would be presenting Seward & Kissel's work product to potential investors — and having reviewed the Georgia Statute and its "restrictions" — Ms. Segal provided the Fund II draft documents on July 9, 2012 without any caveat or reservation. It was therefore reasonable

[19] Hubbard Tr. 211:7-9.

[20] *Id.* at 209:15-17.

for Gray to conclude that Seward & Kissel had created Fund II in compliance with all Georgia and other applicable law, including the Georgia Statute.[21]

Third, Respondents relied in good faith on Seward & Kissel's advice. The record will show that Respondents sincerely believed Fund II was compliant with all aspects of the law and was ready to be offered to Georgia pension funds. Having communicated explicitly to Seward & Kissel that Fund II would be sold to Georgia pension plans, Gray and Mr. Hubbard had no reason to believe that Gray's lawyers would tender work product that would not meet the fundamental threshold requirement of their assignment. As such, Respondents clearly and justifiably relied on counsel's advice and actions in good faith.[22]

III. RESPONDENTS DID NOT VIOLATE SECTION 17(A)(3) OF THE SECURITIES ACT, OR SECTIONS 206(2), 206(4) OF THE INVESTMENT ADVISORS ACT OR RULE 206(4)-8 PROMULGATED THEREUNDER

A. Respondents Did Not Violate Section 17(a)(3)

The Division further alleges that Respondents willfully violated Section 17(a)(3) of the Securities Act, which makes it unlawful for any person in the offer or sale of any securities . . . "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit on the purchaser. 15 U.S.C. § 77q(a)(3). To prove that Respondents violated 17(a)(3), the Division must show that Respondents made (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, and (3) with negligence. *Sec. & Exch. Comm'n v. Merchant Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007). The Division cannot establish any of these elements.

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[21] Gray Tr., 371–72; Hubbard Tr., 257–58.

[22] To a lesser degree than Seward & Kissel, Respondents relied on the fact that each pension plan had its own counsel advising them as gatekeepers, charged with the typical responsibilities of any counsel for a public pension plan.

First, the Division cannot prove a 17(a)(3) course of business claim solely on misstatements. *See United States. v. Naftalin,* 441 U.S. 768, 774 (1979) (holding that each subsection of Section 17(a) proscribes a distinct category of misconduct"); *Sec. & Exch. Comm'n v. Patel*, U.S. Dist. LEXIS 90558, at *20-25, 65 (D.N.H. Sept. 30, 2009) (finding that the SEC failed to state a claim under 17(a)(3) solely based on misrepresentations). Under Rule 10b-5 or 17(a), a plaintiff may not hold a defendant liable for misleading statements under the scheme or course of business provisions by alleging only that "he or she was a participant in a scheme through which the statements were made." *In re Alstom SA Secs. Litig.*, 406 F. Supp. 2d 433, 475 (S.D.N.Y); *accord Patel,* 2009 U.S. Dist. LEXIS 90558, at *22. Accordingly, the Division cannot establish liability for Section 17(a)(3) unless it proves that Respondents made misrepresentations and "undertook a deceptive scheme or course of conduct that went beyond the misrepresentations." *Alstom*, 406 F. Supp. 2d at 475. The Division has failed to identify any deceptive course of business beyond the alleged misstatements at the November 7, 2012 meeting. For that reason alone, the Division's Section 17(a)(3) claim fails.

Second, even if the Division's Section 17(a)(3) claim is not barred given its failure to identify any deceptive course of business, it cannot show that any alleged misstatements by Respondents were material. For the same reasons detailed above, any misrepresentations or omissions by Respondents were not material. The standard of materiality is whether or not a reasonable investor or prospective investor would have considered the information important in deciding whether or not to invest. *See Sec. & Exch. Comm'n v. Steadman*, 967 F.2d at 643; *see also Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 240 (1988); *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

Third the Division also cannot prove that Respondents were negligent. To establish a negligence claim, the Division has to show that Respondents owed a duty and breached that duty. *See, e.g., Marquis Towers, Inc. v. Highland Group*, 593 S.E.2d 903, 906 (Ga. Ct. App. 2004) (stating that the elements of a negligence case are "a duty, or obligation, recognized by law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks; (2) a failure on his part to conform to the standard required; (3) a reasonable close causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of the other."). Respondents did not owe any duty to provide legal advice concerning compliance with the Georgia Statute under the terms of the offering documents or its consulting agreements with the Georgia public pension plans.

Further, to establish negligence, the Division must show that Respondents had no reasonable basis for their actions. "Negligence in this context is not a strict liability standard." *Sec. & Exch. Comm'n v. Morris*, 2007 WL 614210, at *3 (S.D. Tex. Feb. 26, 2007). As discussed extensively above and will be demonstrated at the hearing, Respondents had at least a reasonable basis to believe they were in compliance with the Georgia Statute – if not outright compliance.

B. The Division Cannot Prove Any Violation of Section 206(2) of the Investment Advisers Act

The Division further alleges that Respondents violated Section 206(2) of the Investment Advisers Act, which prohibits investment advisers from "engaging in any transaction, practice or course of business that would operate as a deceit on any client or prospective client" 15 U.S.C. 80(b)-6(2). The same elements necessary to prove a violation of Section 17(a)(3) will prove a violation of Section 206(2), except that Section 206(2) requires that the violation be committed by an investment advisor against a client or prospective client. *See Sec. & Exch. Comm'n v. Seghers*, 298 Fed. Appx. 319, 327-28 (5th Cir. 2008) (stating "[t]he language of the anti-fraud provisions of 206 of the Investment Advisers Act is drawn from 17(a)(1) and (3) of the Exchange Act and conduct falling within the analogous provisions of s206 when committed by an investment adviser against a client or prospective client."); *Sec. & Exch. Comm'n v. PIMCO Advisers Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 470 (S.D.N.Y 2004) (stating that Sections 206(1) and 206(2) of the Investment Advisors Act have been interpreted as substantively indistinguishable from Section 17(a) of the Securities Act).

Given that the Division must prove materiality and negligence here too, its claim under Section 206(2) also fails. Again, Respondent owed no duties to provide legal advice to the Georgia public pension plans, as reflected in the offering documents for the Gray Fund II and Consulting Agreements with the respective Boards of Trustees. Further, as discussed above, Gray had a reasonable basis for believing that Gray Fund II complied with the Georgia Statute. *See Morris*, 2007 WL 614210, at *3.

C. The Division's Claims under Section 206(4) of the Investment Advisors Act and Rule 206(4)-8 Also Fail

Finally, the Division alleges that Gray separately violated Section 206(4) of the Investment Advisors Act and Rule 206(4)-8.[2324] Section 206(4) prohibits any investment adviser, through the use of interstate commerce, from "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative," while Rule 206(4)-8 sets forth what constitutes an investment advisor violation of a pooled investment.[25] As with Section 17(a)(3) and Section 206(2) claims, the Division must establish that Respondents made material misstatements or omissions and were negligent with respect to the Gray Fund II's compliance with the Georgia Statute. *Sec. & Exch. Comm'n v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992) (noting that a showing of negligence establishes a violation of Section 206(4); *Anthony Fields*, 2012 WL 6042354, at *9, Initial Decision Release No. 474 (ALJ Dec. 5, 2012) (Foleak, J.) (stating that materiality standard for violations under Section 206 is whether or not a reasonable investor or prospective investor would have considered the information important in deciding whether or not to invest).

The Division fares no better with respect to these claimed violations: it cannot prove Respondents made any untrue statements or omissions or material fact, or that Respondents lacked a reasonable basis for their interpretation of the Georgia Statute. *See Steadman*, 967 F.2d at 643; *Morris*, 2007 WL 614210, at *3.

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[24] In Section 206(4), Congress directed the Commission to define the investor-directed conduct prohibited by the provision; Rule 206(4)-8 does so. Accordingly, while the OIP alleges separate violations of the provision and the rule, they are in fact coextensive.

[25] Rule 206(4)–8 states that an investment adviser to a pooled investment vehicle violates Section 206(4) by: (1) making "any untrue statement of a material fact or ... omit[ting] to state a material fact necessary to make the statements made ... not misleading, to any investor or prospective investor in the pooled investment vehicle;" or (2) otherwise engaging "in any act, practice or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle." 17 C.F.R. § 275.206(4)–8(a).

IV. THE DIVISION CANNOT PREVAIL ON ITS AIDING AND ABETTING OR CAUSING CLAIMS AGAINST MR. HUBBARD

A. The Division Cannot Establish That Mr. Hubbard Aided and Abetted Any Securities Violations by Gray Financial or Mr. Gray

The evidence will show that Mr. Hubbard did not willfully aid or abet in any of the alleged securities law violations. In order to impose liability for willfully aiding and abetting the violations alleged in the OIP, the Division must prove (1) a primary or independent securities law violation has been committed by another Respondent; (2) awareness or knowledge by Mr. Hubbard that his role was part of an overall activity that is improper; and (3) that Mr. Hubbard substantially assisted the conduct that allegedly constitutes the violation. *Woods v. Barnett Bank*, 765 F.2d 1004, 1009 (11th Cir. 1985); *Investors Research v. SEC*, 628 F.2d 168, 178 (D.C. Cir. 1980). While awareness or knowledge does not require the aider and abettor to know he is participating in a securities violation, there must be sufficient evidence to establish "conscious involvement in impropriety." *Sec. & Exch. Comm'n v. Slocum, Gordon & Co.*, 334 F. Supp. 2d 144, 184 (D.R.I. 2004) (quoting *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 799 (3d Cir.1978)). Moreover, stronger evidence of complicity is required for an alleged aider and abettor "who conducts what appears to be a transaction in the ordinary course of his business." *Woods*, 765 F.2d 1009 (quoting *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 96 (5th Cir. 1975).

The Division's aiding and abetting claims against Mr. Hubbard fail because, as extensively discussed herein and will be shown at the hearing, it cannot prove that Gray Financial or Mr. Gray committed any primary securities law violations. "There can be no liability for aiding and abetting without a primary violation." *Sec. & Exch. Comm'n v. Daifotis*,

874 F. Supp. 2d 870, 887 (N.D. Cal. 2012). For that reason alone, the Division's aiding and abetting claims against Mr. Hubbard should be dismissed.

Even if the Division were somehow able to show a primary violation against the other Respondents though (and it cannot), it will be unable to show that Mr. Hubbard had any awareness or knowledge that his role with respect to Gray Fund II was part of an overall activity that was improper. For example, in *Slocum, Gordon & Co.*, 334 F. Supp. 2d at 184, where the defendant accounting firm committed underlying technical violations of Sections 206(2) and 206(4), the court held the defendant accountants did not have requisite mental state required to impose aiding and abetting liability. According to the court, the evidence showed that because the accountants relied on the advice of counsel and there was no evidence they knew that the primary violator's account structure was improper or created a conflict of interest, there was no conscious awareness of improper activity. *Id.* Here too, the evidence will show that Mr. Hubbard, relying on the advice of counsel, had no conscious involvement in any alleged impropriety. Rather, Mr. Hubbard conducted transactions in the ordinary course of business with respect to developing the Gray Fund II. This requires the Division to show stronger evidence of complicity, a burden it cannot satisfy. *Woods*, 765 F.2d 1009. As such, the Division's aiding and abetting claims against Mr. Hubbard fail.

B. The Division Cannot Prove that Mr. Hubbard Caused any Alleged Securities Violations

To prove that Mr. Hubbard caused the violations alleged in the OIP, the Division must demonstrate (1) the existence of a primary violation of the securities laws; (2) that Mr. Hubbard was, through an action or omission, a cause of the primary violation; and (3) that Mr. Hubbard knew or should have known that his conduct would contribute to the primary violation.

Exchange Act Section 21C; Investment Advisors Act Section 203(i)(B). Where scienter is an element of a primary violation, the Division must show scienter rather than negligence to prove causing liability. *See Howard v. SEC*, 376 F.3d 1136, 1141 (D.C. Cir. 2004).

For the same reasons that the Division's aiding and abetting claims fail, its causing claims against Mr. Hubbard also fail. The Division cannot prove that Gray Financial or Mr. Gray committed any primary securities law violations. Nor is there evidence that Mr. Hubbard knew or should have known that his conduct in the ordinary course of business would contribute to the alleged primary violations, or that he had scienter.

V. THE COMMISSION SHOULD DEFER ANY INTERPRETATION OF THE GEORGIA STATUTE TO GEORGIA AUTHORITIES

By stepping in and making its own interpretation (of first impression no less) of the Georgia Statute, the Division is usurping the authority of the states to interpret their own laws. Indeed, the federal structure of the United States recognizes that issues of state law are principally matters of state concern, and the federal government has long deferred to states to interpret their own laws. Federalism thus counsels against the Commission taking action against Gray on these grounds. As a matter of public policy, the Commission should refrain from pushing a novel interpretation on a matter of state law, especially one of first impression.

VI. THE SEC'S APPOINTMENT AND REMOVAL PROCESSES FOR ADMINISTRATIVE LAW JUDGES VIOLATES THE UNITED STATES CONSTITUTION

Further, the SEC's appointment and removal processes for Administrative Law Judges ("ALJs") violate the United States Constitution. As inferior officers, the SEC ALJs must be appointed by the president, a court of law, or the head of a department. U.S.CONST. Art. II § 2, cl. 2. The SEC ALJs are appointed by the head SEC ALJ. Because the SEC ALJs are inferior

officers and because the SEC admits that its ALJs are not appointed as constitutionally required, the SEC ALJ appointment process violates the Constitution. Further, the SEC ALJs multiple for-cause removal limitations violate the Constitution, as explained in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U. S. 477 (2010).

VII. THE DIVISION CANNOT SHOW THAT SANCTIONING RESPONDENTS IS IN THE PUBLIC INTEREST

In an administrative proceeding, the Commission is only authorized to impose a sanction after it has determined that such sanction is necessary to protect the "public interest." *See, e.g.*, Section 15(b)(4) of the Exchange Act, 15 U.S.C. § 78o(b)(4); Sections 203(e) and (f) of the Investment Advisors Act, 15 U.S.C. § 80b-3(e)(4), 15 U.S.C. § 80b-3(f). In determining whether sanctions are in the public interest, the Fifth Circuit in *Steadman v. SEC* recognized that the following factors are critical:

> The egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

603 F.2d 1126, 1140 (5th Cir. 1979). Additional factors the Commission considers include the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *James A. Evans, Jr.*, 2016 WL 1721123, at *5, Initial Decision Release No. 1006 (ALJ Apr. 29, 2016) (Elliot, J.). Further, the Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. *Gary M. Kornman*, 2009 WL 367635, at *4, Exchange Act Release No. 2840 (Commission Opinion Feb. 13, 2009).

Courts have scrutinized SEC administrative sanctions to determine if they are truly in the public interest. For example, in *Steadman*, a case involving an investment adviser barred from industry, the Fifth Circuit remanded the case to the Commission for further consideration because the Commission failed to explain its reasoning in sufficient detail to assess whether the sanctions were in the public interest. 603 F.2d at 1142. Indeed, the court stated:

> We subscribe to the common-sense notion that the greater the sanction the Commission decides to impose, the greater is its burden of justification. Where, as here, the most potent weapon in the Commission's arsenal of flexible enforcement powers is used, the Commission has an obligation to explain why a less drastic remedy would not suffice.

Id. at 1139. Similarly, the Second Circuit found that the Commission's revocation sanction of a broker was an abuse of discretion and reduced the penalty to a one year suspension, where there was a three year lapse between the argument and the Commission's decision and a tremendous disparity between the sanctions invoked against the petitioner and other brokers whose violations were clearer. *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 184-185 (2d. Cir. 1976).

Applying these factors here, there is no public interest in sanctioning Respondents. First, any violations (which Respondents emphatically deny) were not egregious, as they involved interpretation of the ambiguous and poorly drafted Georgia Statute and legitimate rather than sham business transactions; sanctioning Respondents would not protect the public interest given that none of the Georgia legal authorities – the courts, legislature, and the Attorney General – have offered any interpretation of the Georgia Statute. It is truly an issue of first impression. Second, the Commission cannot show that Respondents had any degree of scienter, especially given Respondents' good faith reliance on the advice of counsel. Third, there has been no harm to investors in Gray Fund II, all of whom have enjoyed substantial returns, or to the marketplace. For these reasons, the Commission should not sanction Respondents.

CONCLUSION

In sum, the Division cannot meet its burden of proof on any of the violations alleged in the OIP. For all the reasons stated above, Respondents request that all of the Division's claims against them be dismissed.

Respectfully submitted this 23rd day of January, 2017.

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-and-

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Greenberg Traurig, LLP
MetLife Building
200 Park Avenue
New York, NY 10166
Telephone: (212) 801-6541
Facsimile: (212) 801-6400
E-mail: sullivang@gtlaw.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

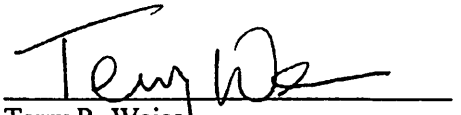
The undersigned counsel for Respondents Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV hereby certifies that he has served a copy of the foregoing **PRE-HEARING BRIEF** by electronic mail and by United Parcel Service, addressed as follows:

Secretary Brent J. Fields
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Honorable Cameron Elliot
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Kristin W. Murnahan
Attorney for the Division of Enforcement
Securities and Exchange Commission
950 East Paces Ferry Road, Suite 900
Atlanta, Georgia 30326

This 23rd day of January, 2017.



Terry R. Weiss
Stefanie Wayco
Greenberg Traurig, LLP
3333 Piedmont Road, NE
Terminus 200, Suite 2500
Atlanta, Georgia 30305
Telephone: (678) 553-2603
Facsimile: (678) 553-2604
E-mail: weisstr@gtlaw.com
Email: waycos@gtlaw.com

-and-

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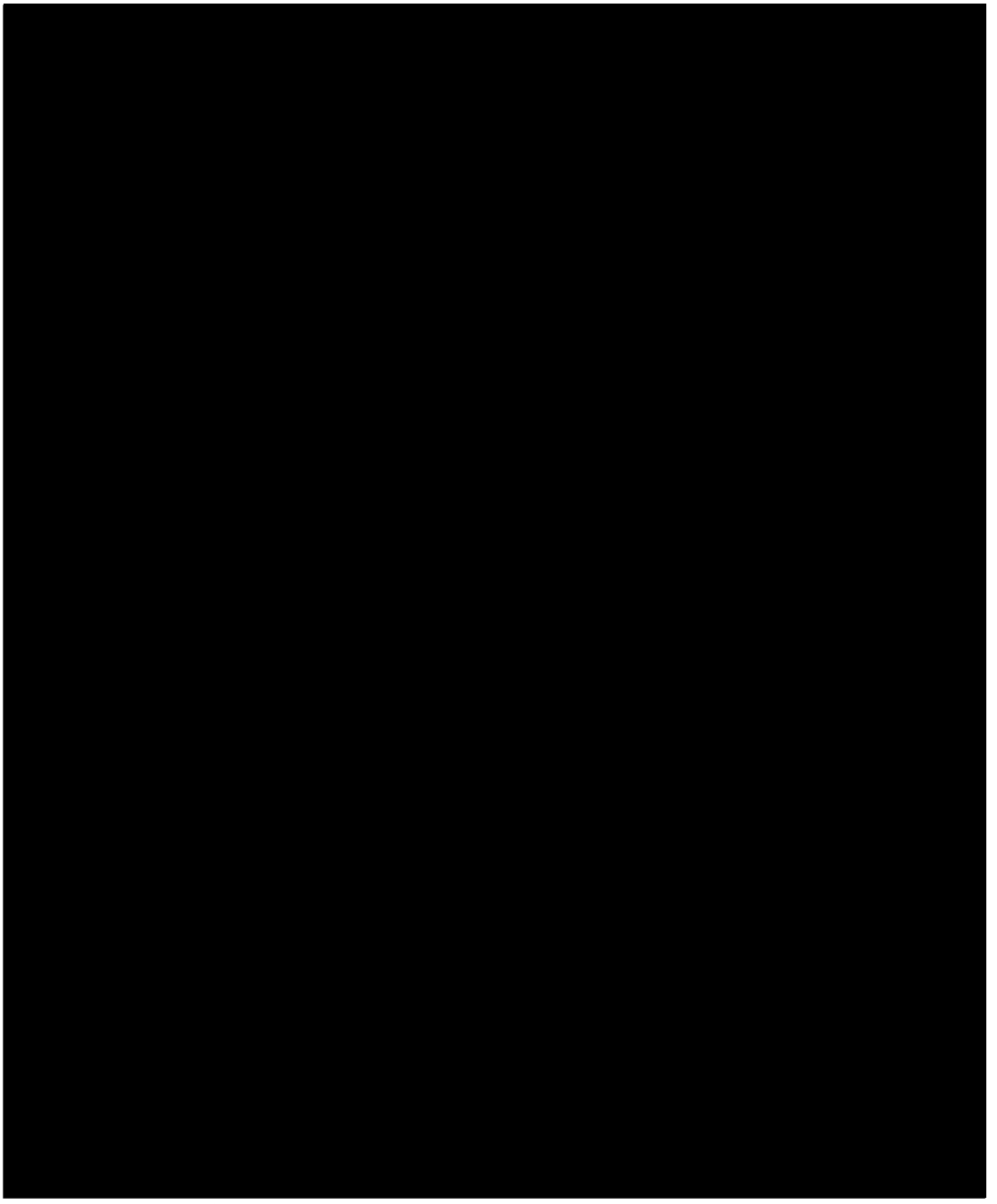
E-mail: sullivang@gtlaw.com

Attorneys for Respondents

EXHIBIT 1



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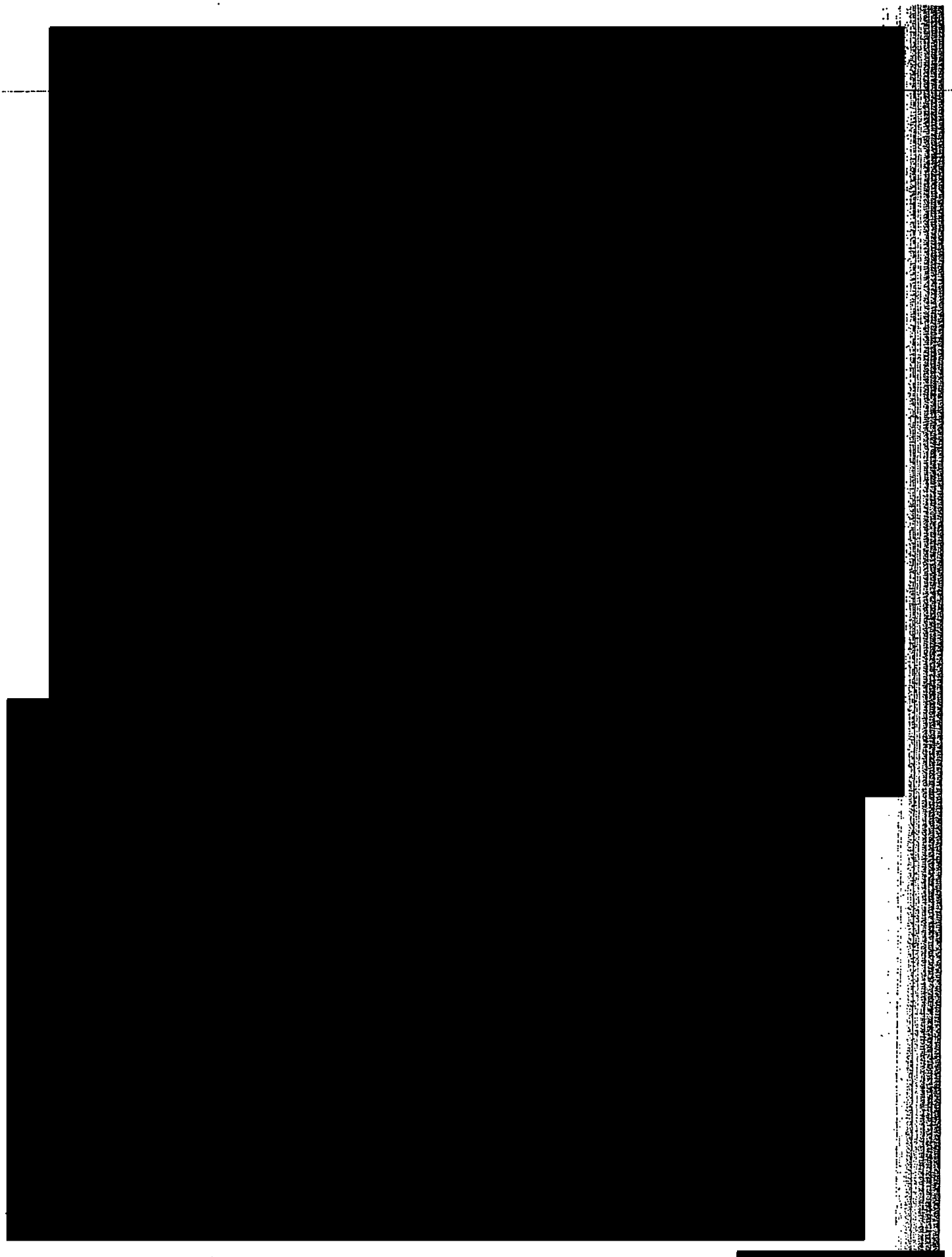

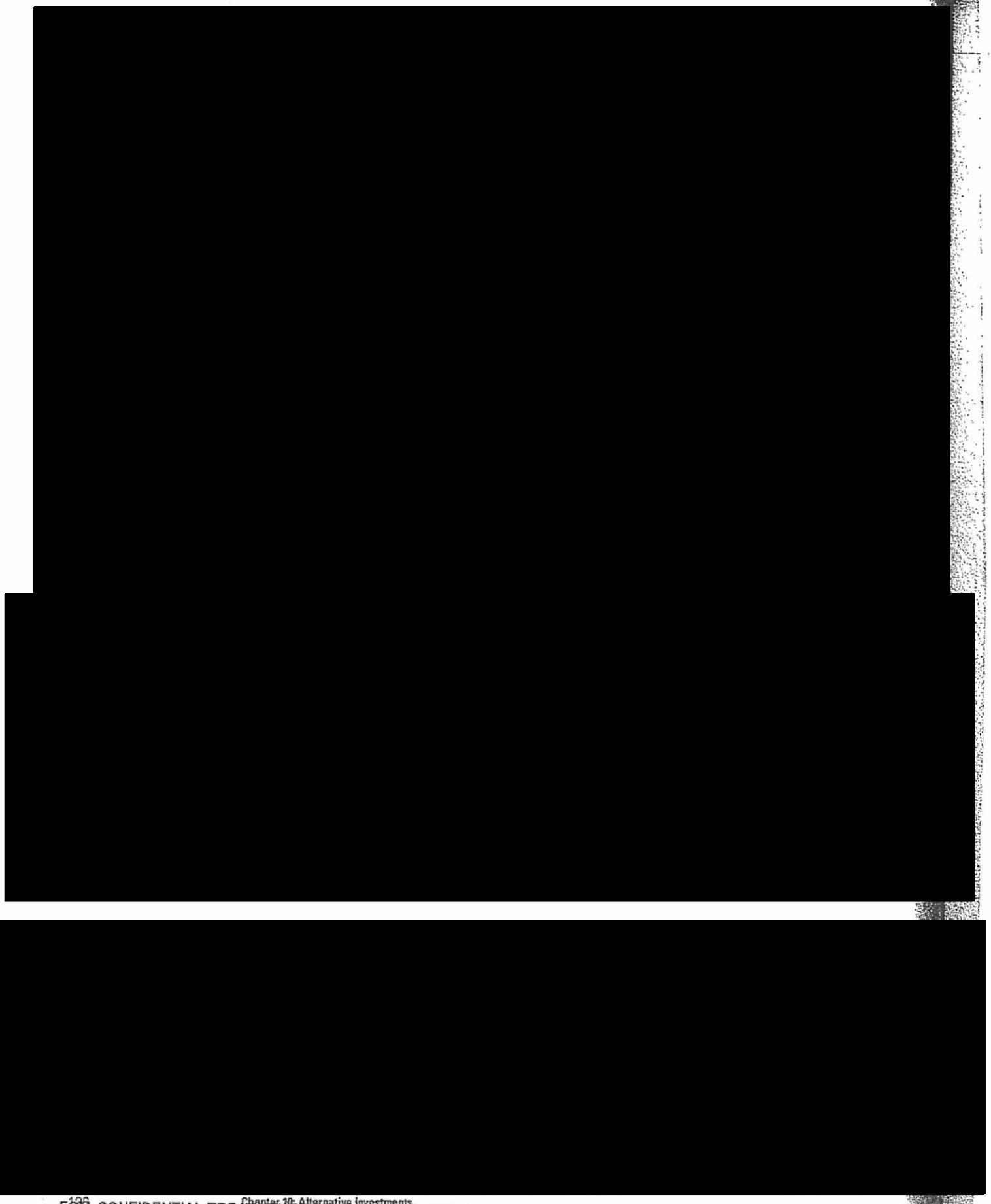

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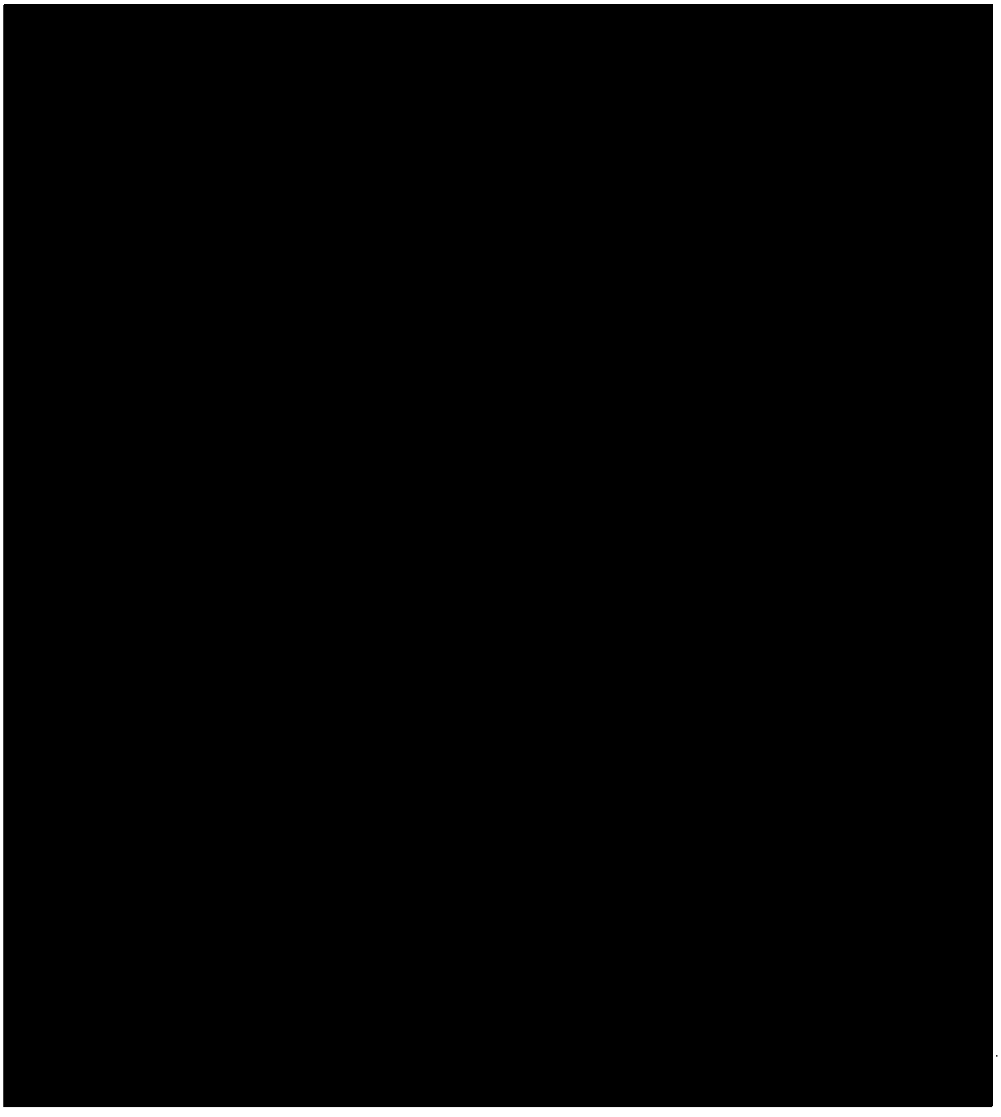

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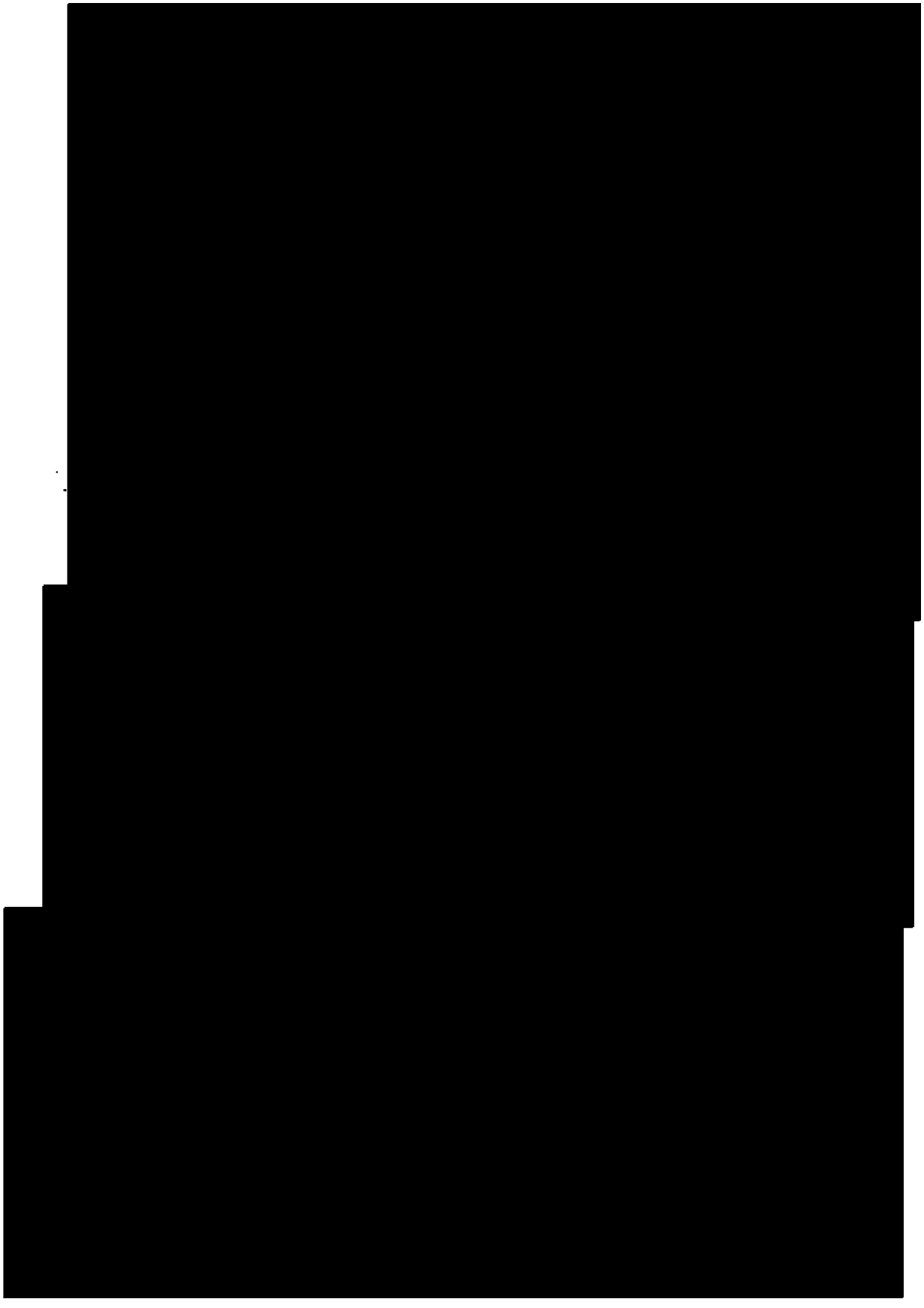

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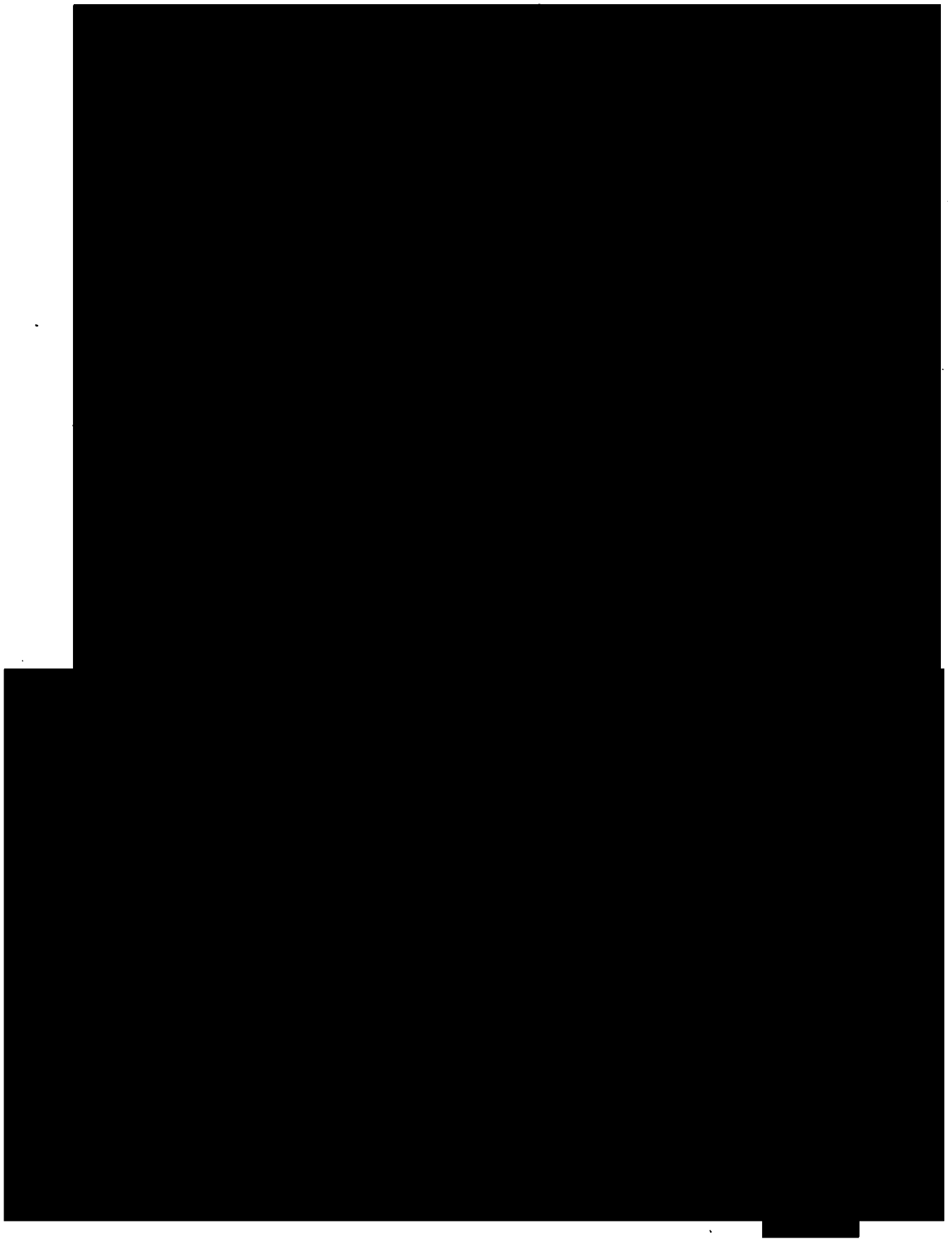

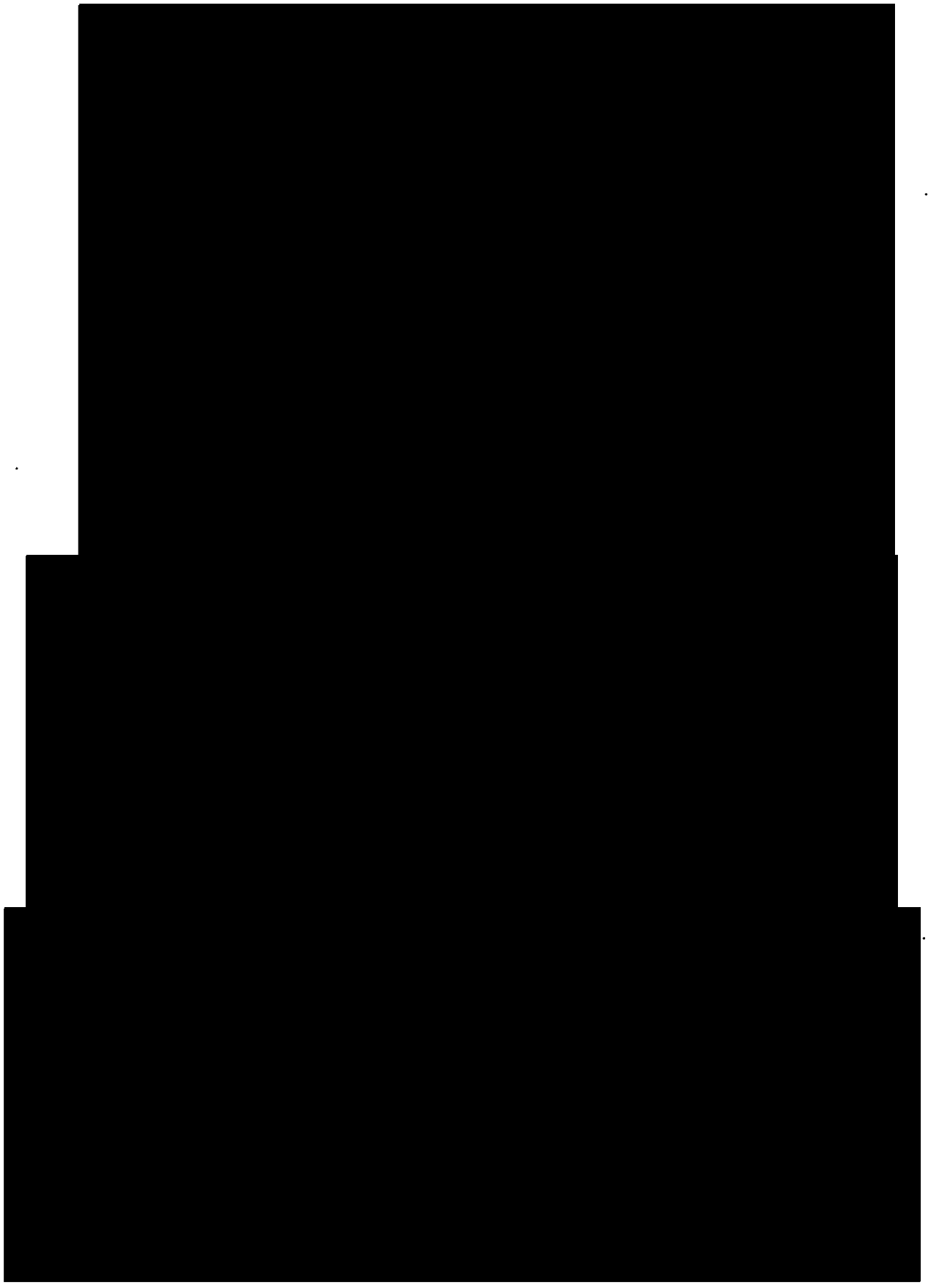

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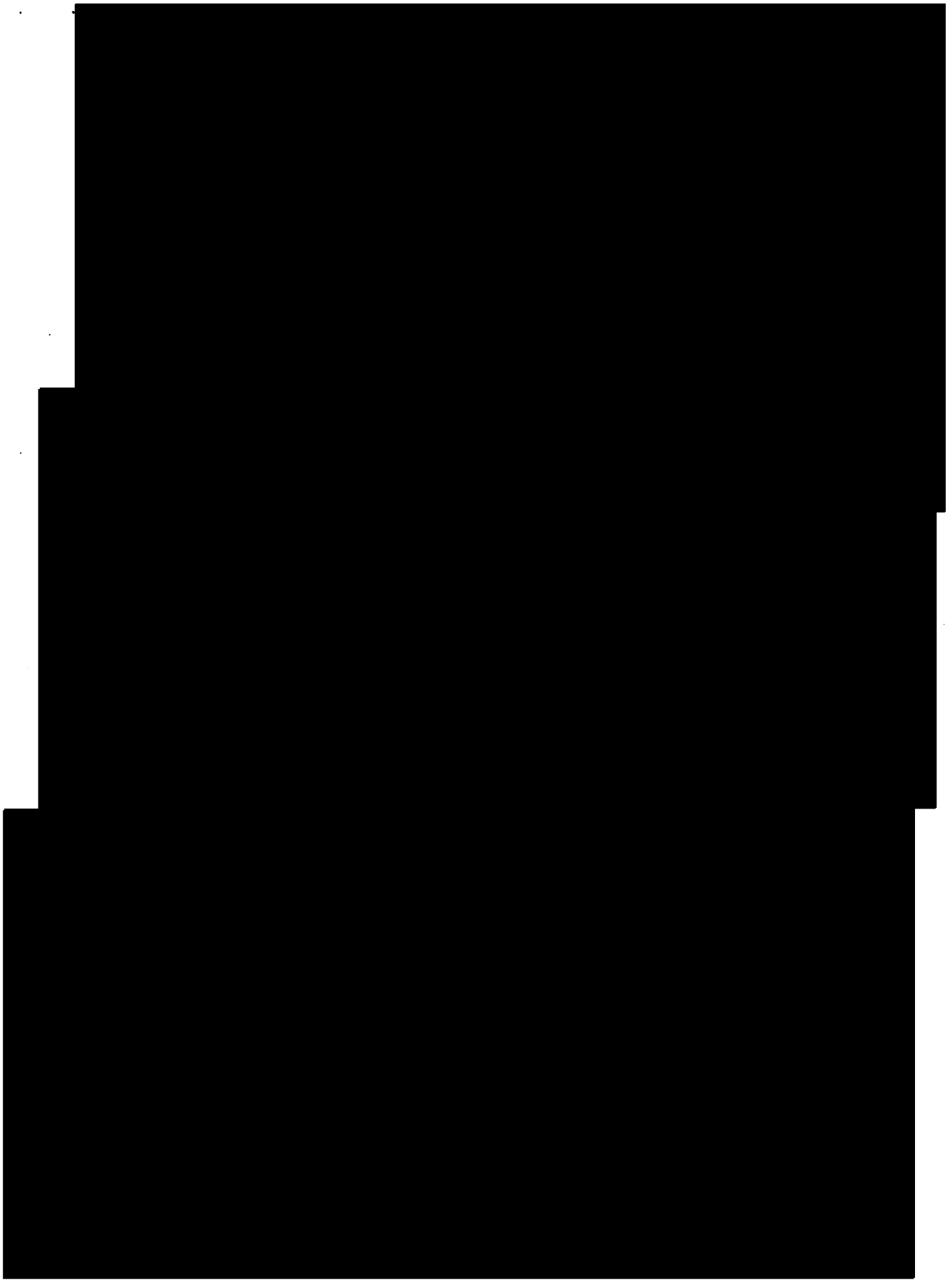

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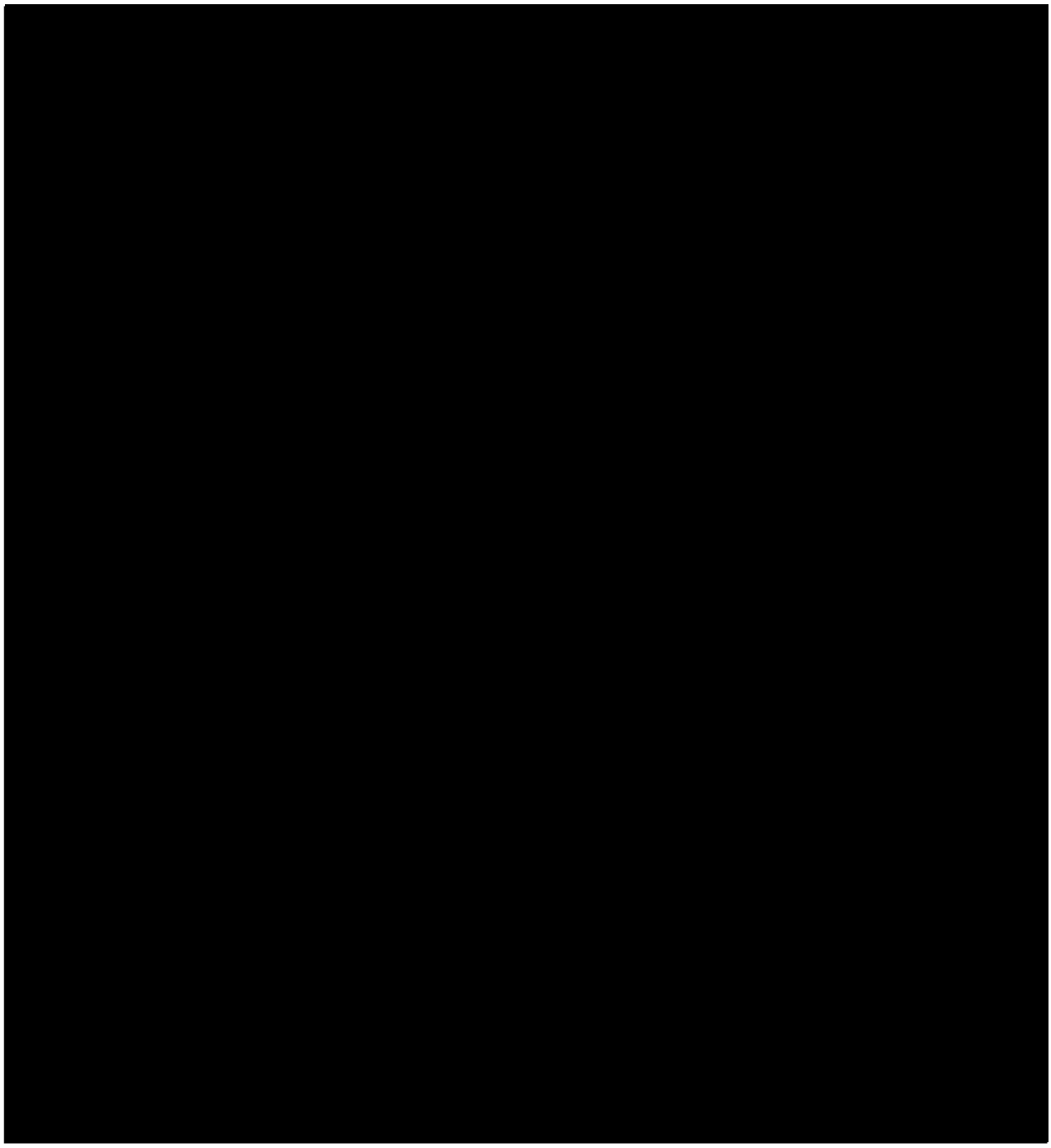

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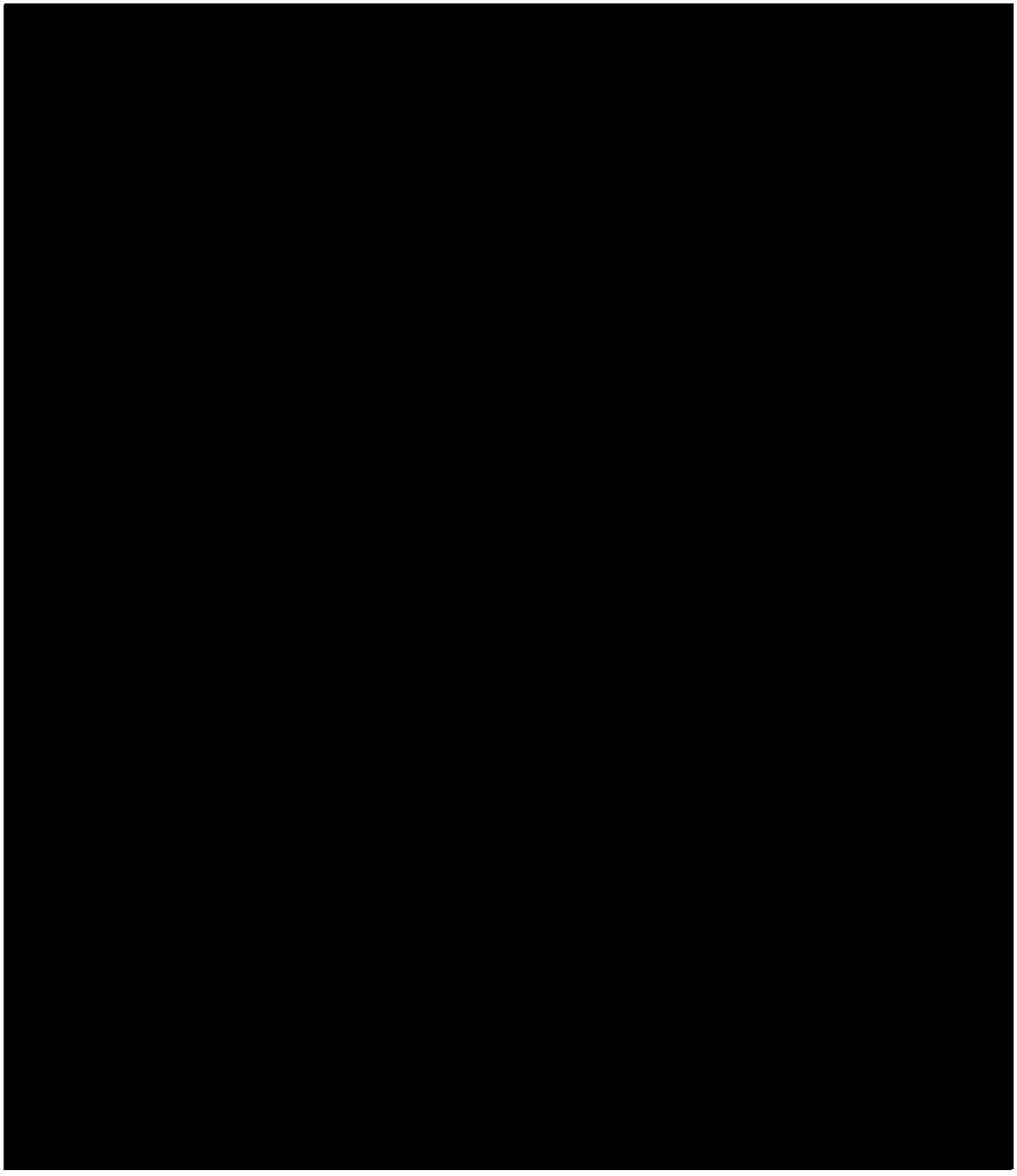

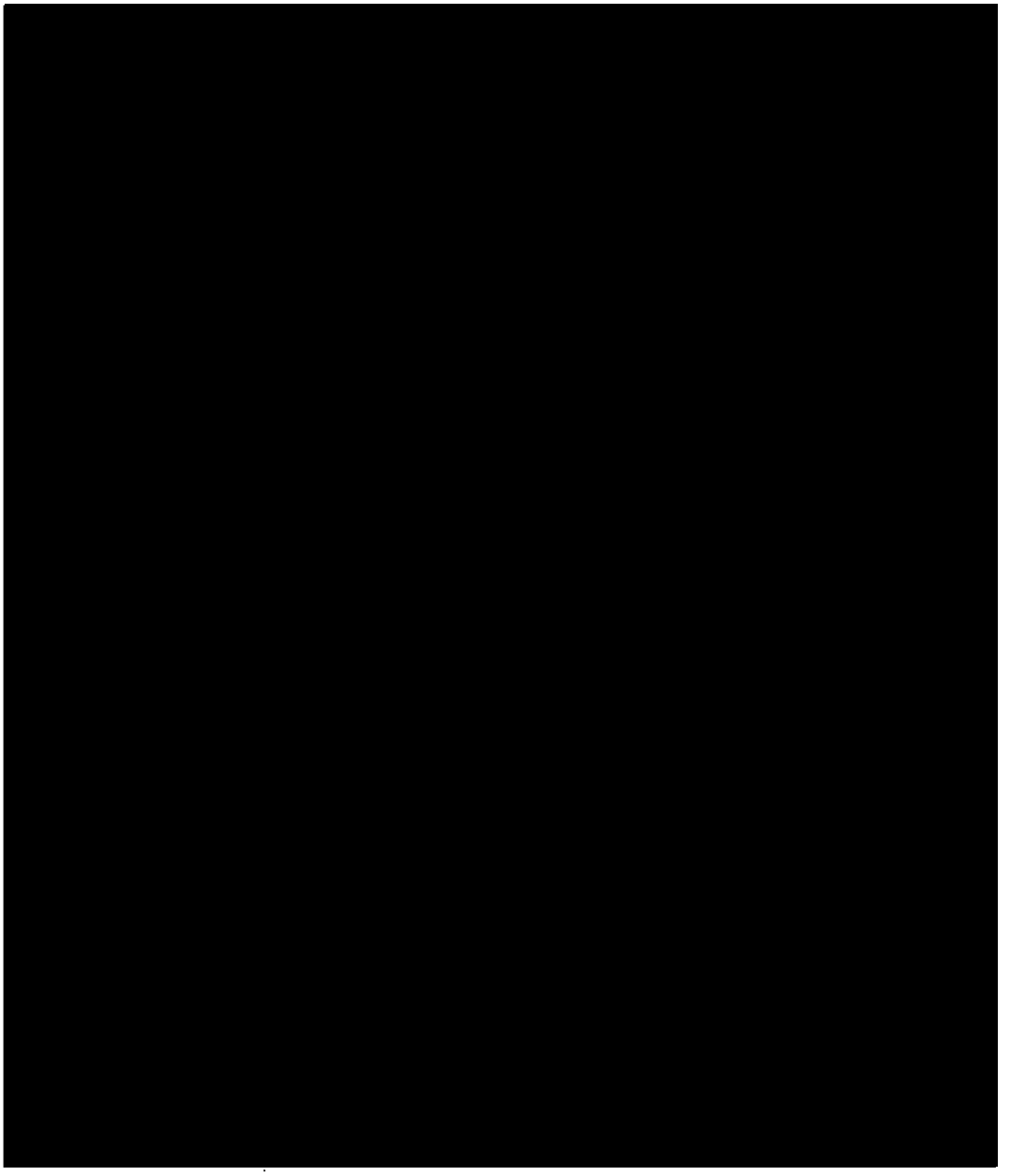

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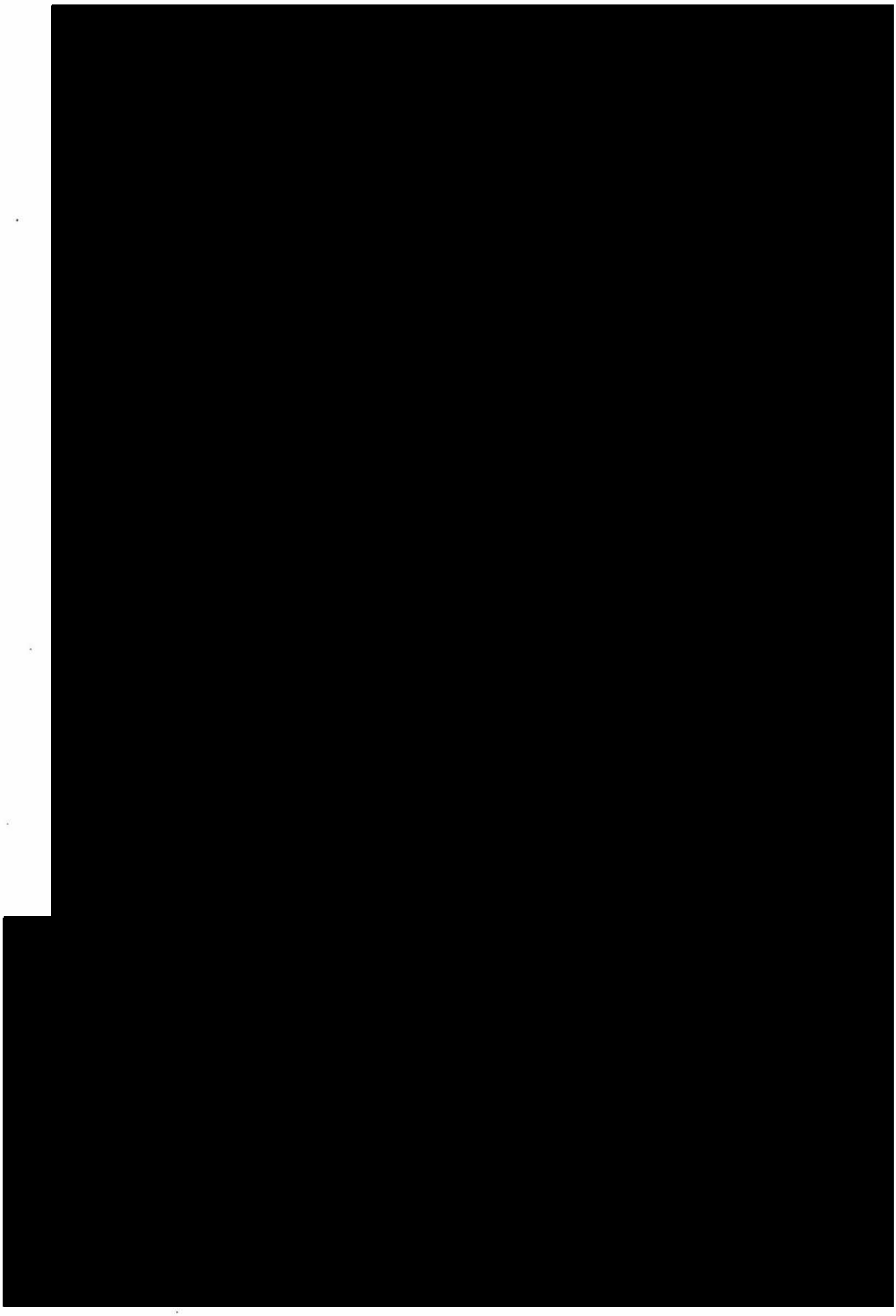

EXHIBIT 3

SEWARD & KISSEL LLP

ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004

TELEPHONE: (212) 574-1200
FACSIMILE: (212) 480-8421
WWW.SEWKIS.COM

1200 G STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE: (202) 737-8833
FACSIMILE: (202) 737-5184

ROBERT B. VAN GROVER
Partner
212-574-1205
vangrover@sewkis.com

July 15, 2011

VIA EMAIL
john.robinson@egrayco.com

John C. Robinson, CTP
Senior Managing Director
Gray & Company
7000 Peachtree-Dunwoody Road
Building 5
Atlanta, Georgia 30328

Re: Engagement Letter

Dear John:

We are pleased that you have agreed to retain our firm as your counsel. This letter is intended to notify you of the basic terms of our engagement as required by Part 1215 of Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York.

1. Description of Engagement. We will represent you in connection with the organization of one or more private investment funds (each a "Fund"). We will prepare a Fund's private offering memorandum, subscription agreement and other organizational documents. We will coordinate initial state blue sky filings for a Fund. We will also provide legal advice in connection with the offering of interests and structuring and business advice in connection with the offering. On an ongoing basis, we will advise you on regulatory and other matters for which you request our assistance.

2. Fee and Disbursement Policies and Billing Practices. Our standard fee and disbursement policies and billing practices are described in the Schedule hereto.

We request that you pay an advance retainer of $15,000 prior to our commencement of our work. We will generally bill you for legal fees and disbursements on a monthly basis.

3. Availability of Arbitration. You may have the right to have certain disputes regarding our fees arbitrated pursuant to Part 137 of the Rules of the Chief Administrator of the Appellate Divisions of the Supreme Court where that Part is applicable. Nothing in this letter is intended to alter our respective rights or obligations under Part 137.

4. Conflicts and Waiver. You understand that our firm represents Voyager Management, LLC. You understand that our firm will not provide legal services to you in connection with the negotiation of any agreement that it enters into with Voyager and Gray waives any conflict of interest of the firm in connection with the firm's representation of Voyager in such matter and related matters.

If you have any questions concerning the foregoing, please contact the undersigned.

Very truly yours,

Robert B. Van Grover

ACCEPTED AND AGREED TO BY:

Gray & Company

by: _____

Address: 7000 PEACHTREE DUNWOODY RD., Bldg 5
ATLANTA, GA 30328

Date: 08:16:2011, 2011

RVG:il

SCHEDULE

STANDARD FEE AND DISBURSEMENT POLICIES AND BILLING PRACTICES
EFFECTIVE 1/1/2011

1. Standard Hourly Rates. The Firm accounts for and generally bills the time recorded by its lawyers, paralegals and other time keepers at the standard hourly rates applicable to those time keepers. Effective January 1, 2011, hourly rates for partners generally range from $585 to $895; hourly rates for counsel generally range from $450 to $795; hourly rates for associates and senior attorneys generally range from $245 to $575 per hour and hourly rates for paralegals generally range from $105 to $305. The Firm seeks to staff our engagements with the appropriate personnel with a view to providing cost-effective services that meet the requirements of the particular engagement. A client may request information concerning the hourly rate of any time keeper assigned to the engagement from the attorney in charge or the Firm's Executive Director. The Firm typically adjusts its billing rates on an annual basis each January 1. However, the Firm reserves the right to change these rates prospectively at any time and to take other factors into account in determining the appropriate amount to bill for a particular engagement.

2. Disbursements. In addition to fees recorded by time keepers, the Firm also bills for certain other items in connection with the engagement, including: (a) all direct third party charges incurred including filing fees, court fees, corporate service firm fees, postage, courier charges, witness fees and the charges of outside service providers, including printing, duplicating or binding services, investigators, accountants, appraisers, correspondent counsel and other experts or professionals; (b) all travel and away from office food and lodging; (c) long distance phone use; (d) use of computerized research services; (e) domestic outgoing facsimile transmission at $1 for the first page and $.25 for each additional page; (f) international outgoing facsimile transmission at $1 for each page; (g) in office duplicating at $.20 per page and appropriate charges for in office document assembly, binding and delivery; and (h) an allowance or other reimbursement for food and home-bound taxi for personnel working outside of normal business hours in accordance with rules established by the Firm from time to time. The Firm reserves the right to change these disbursement policies prospectively at any time.

3. Billing Practices. The Firm encourages its lawyers to bill all recorded time and disbursements in connection with each engagement either monthly or quarterly, unless alternative arrangements are reflected in the engagement letter. Unless alternative arrangements are reflected in the engagement letter, all recorded time is expected to be billed at our standard hourly rates and all disbursements are to be billed in accordance with our standard disbursement policies unless the Firm determines that other factors warrant a different billing basis. Amounts shown due on our statements are due on receipt of those statements and should be paid promptly after receipt. The Firm expects its clients to raise any questions about its statements promptly on receipt of those statements. Any issues so raised that are not adequately and promptly addressed by the attorney in charge should be directed promptly in writing to the Firm, Attention: Executive Director.

4. [Optional] Wiring Instructions.

Citibank, N.A.
120 Broadway, New York, NY 10271
ABA # 021000089
Seward & Kissel Regular Account #371-19785

SK 99999 0010 1211578

SEWARD & KISSEL LLP

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ROBERT B. VAN GROVER
Partner
212-574-1205
vangrover@sewkis.com

July 15, 2011

VIA EMAIL
john.robinson@egrayco.com

John C. Robinson, CTP
Senior Managing Director
Gray & Company
7000 Peachtree-Dunwoody Road
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Very truly yours,

Robert Van Grover III

Robert B. Van Grover

ACCEPTED AND AGREED TO BY:

Gray & Company

by:_____

Address:_____

_____

Date:_____, 2011

RVG:il

SCHEDULE

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EXHIBIT 4

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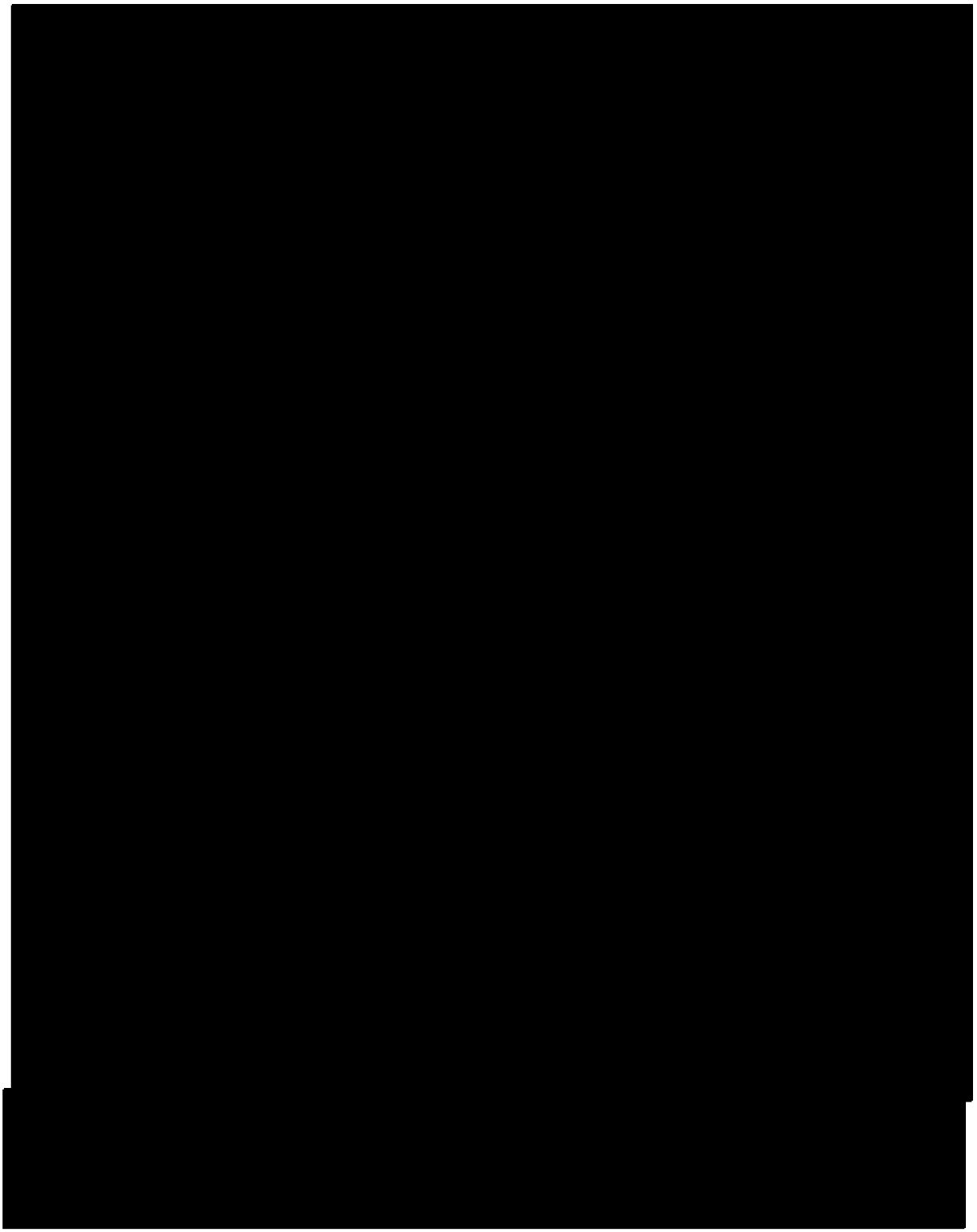

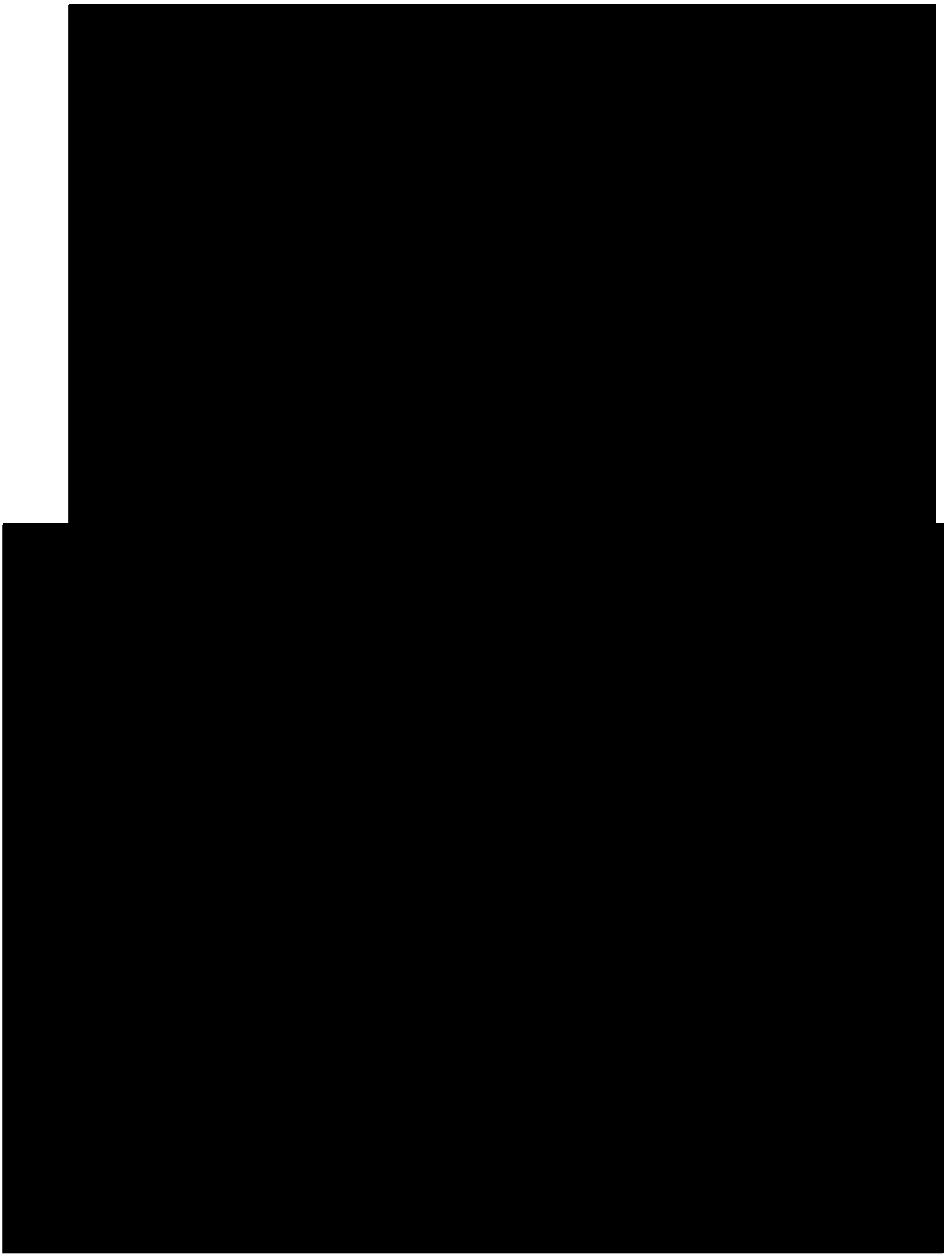

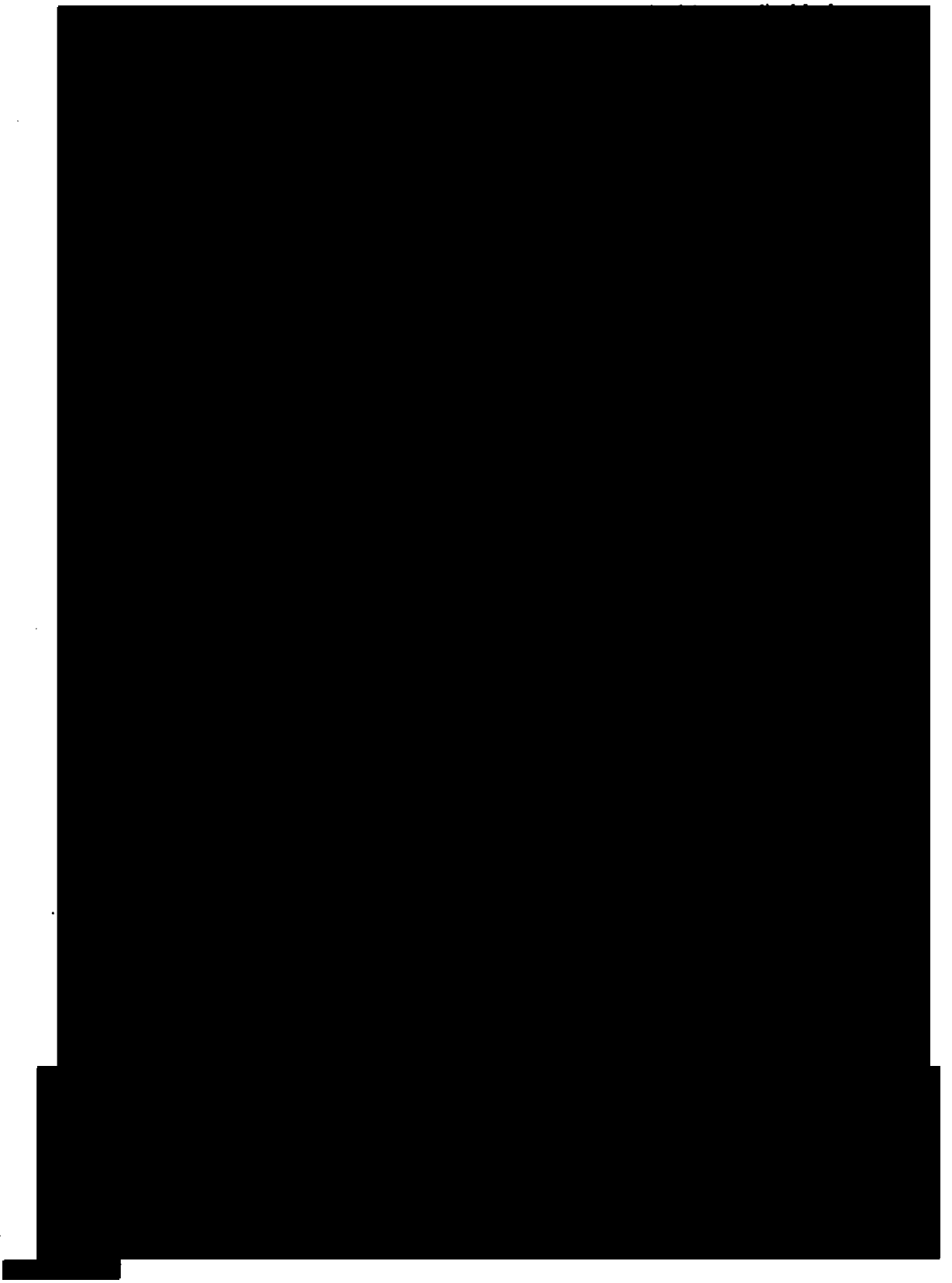

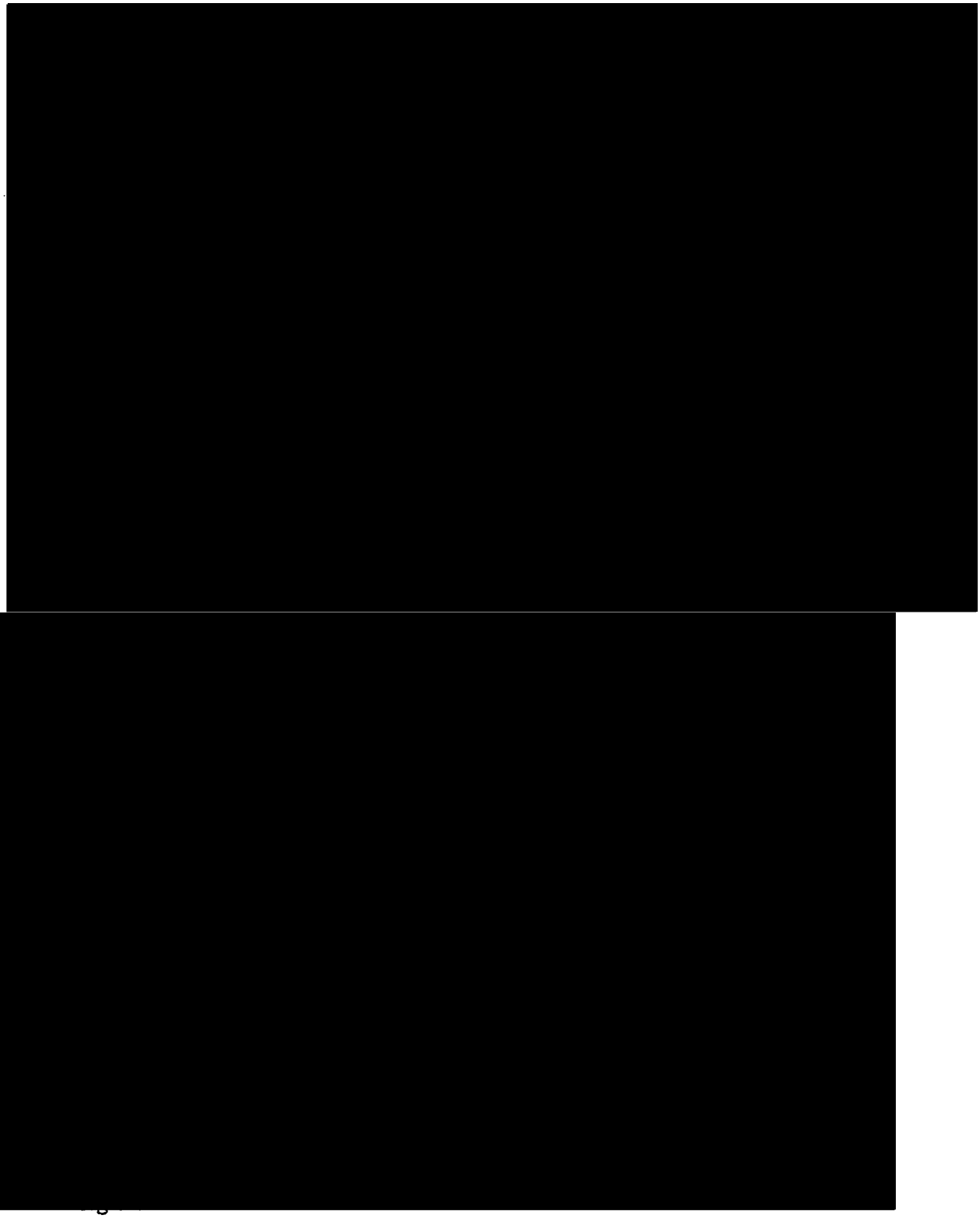

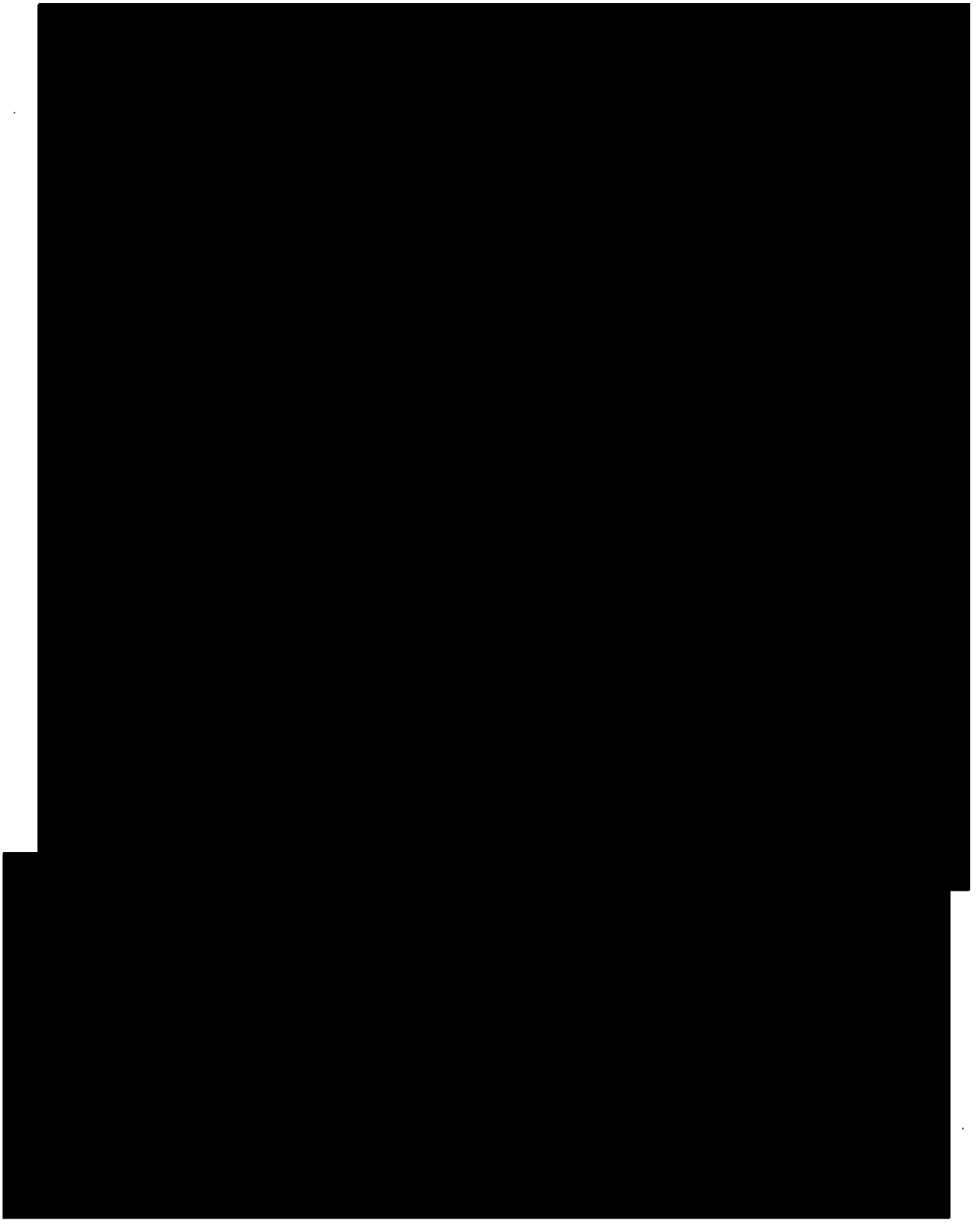

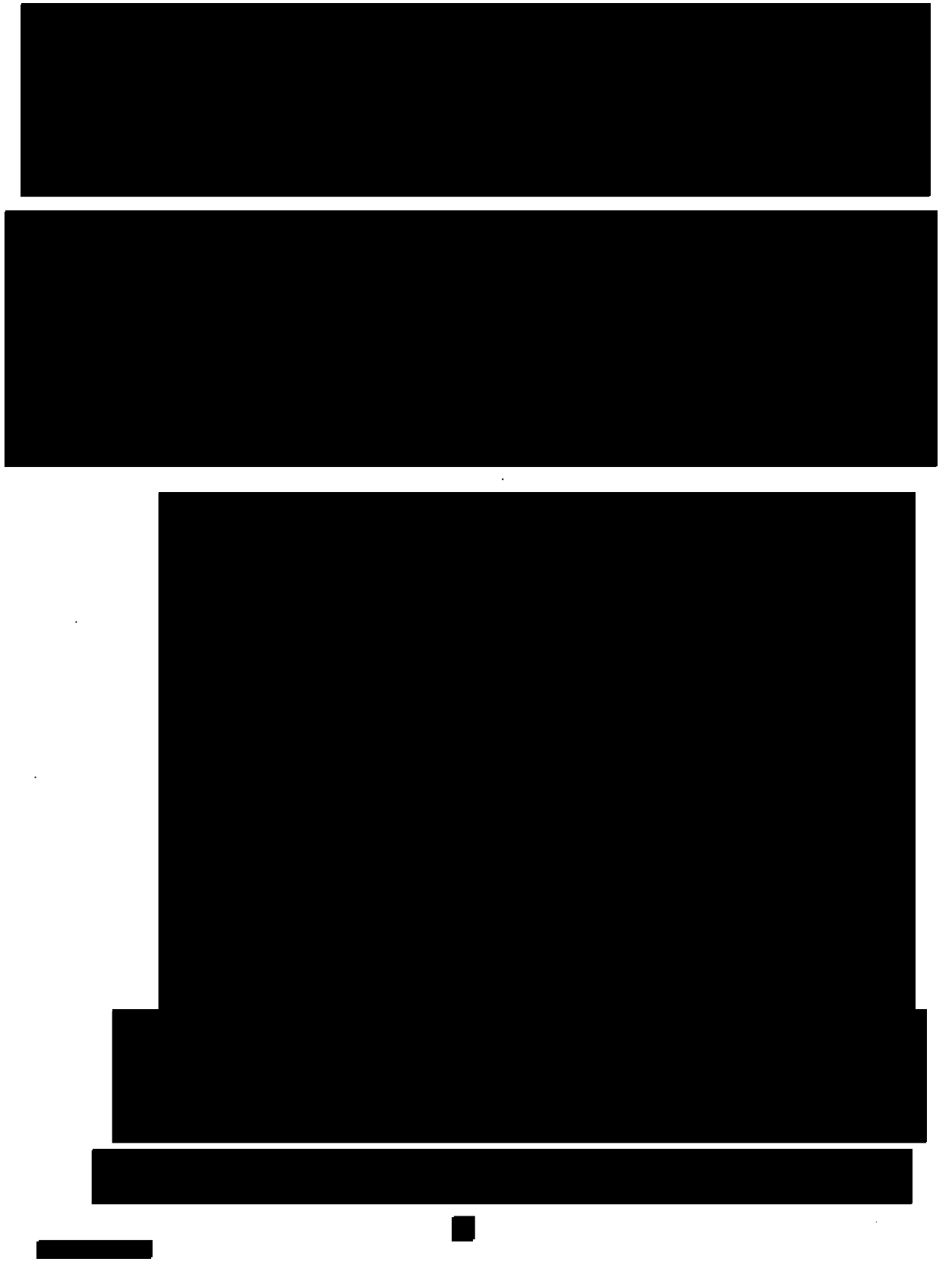

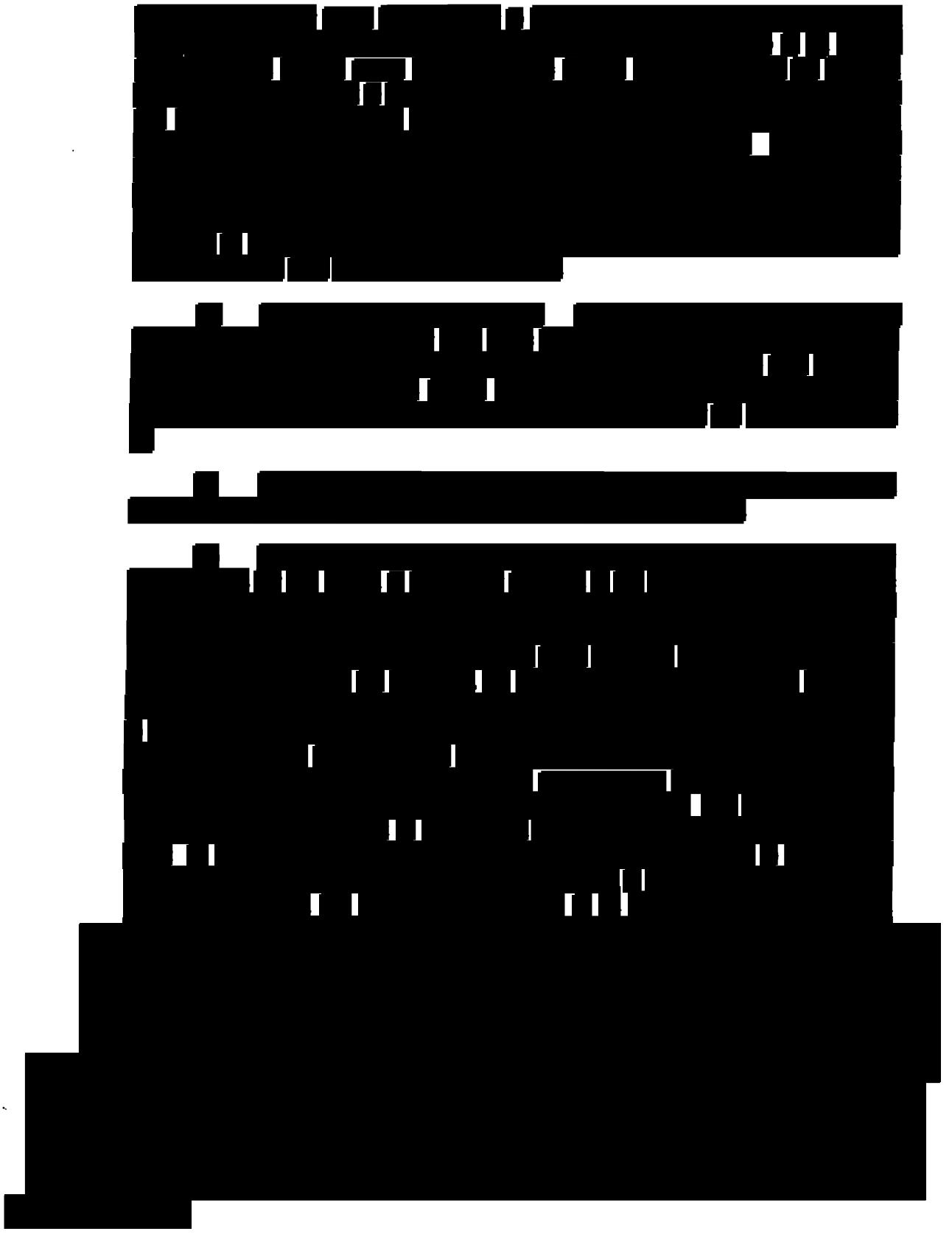

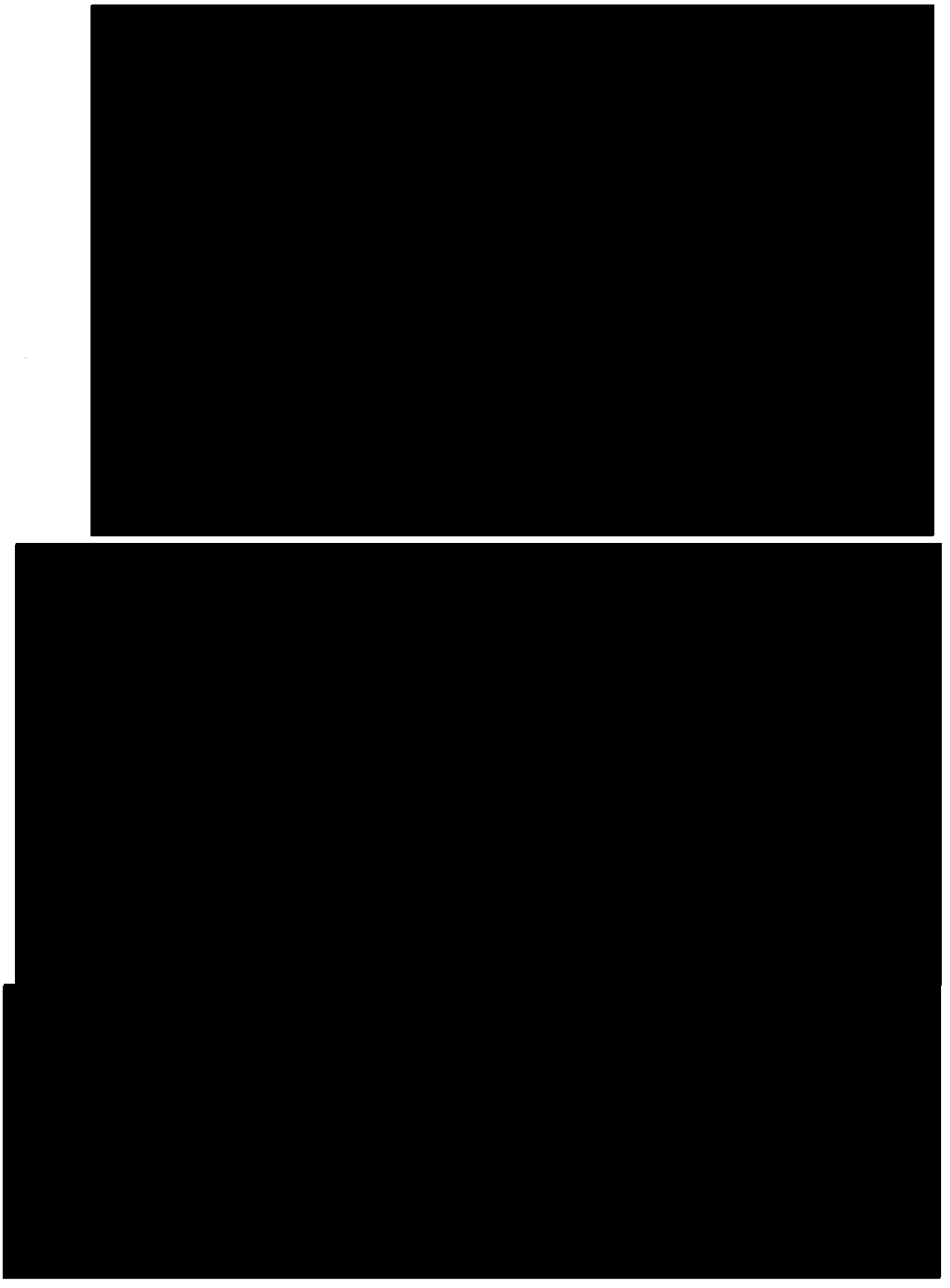

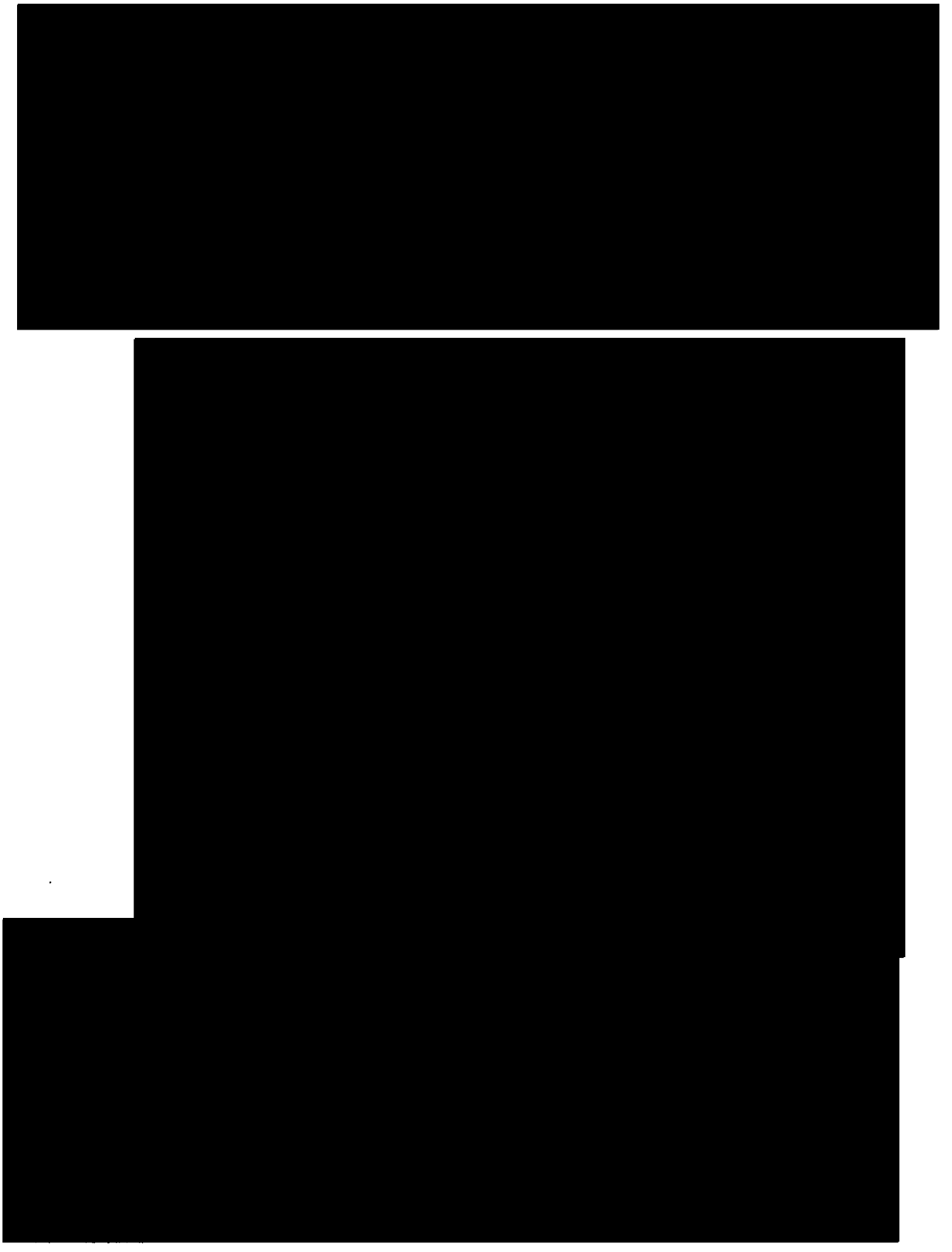

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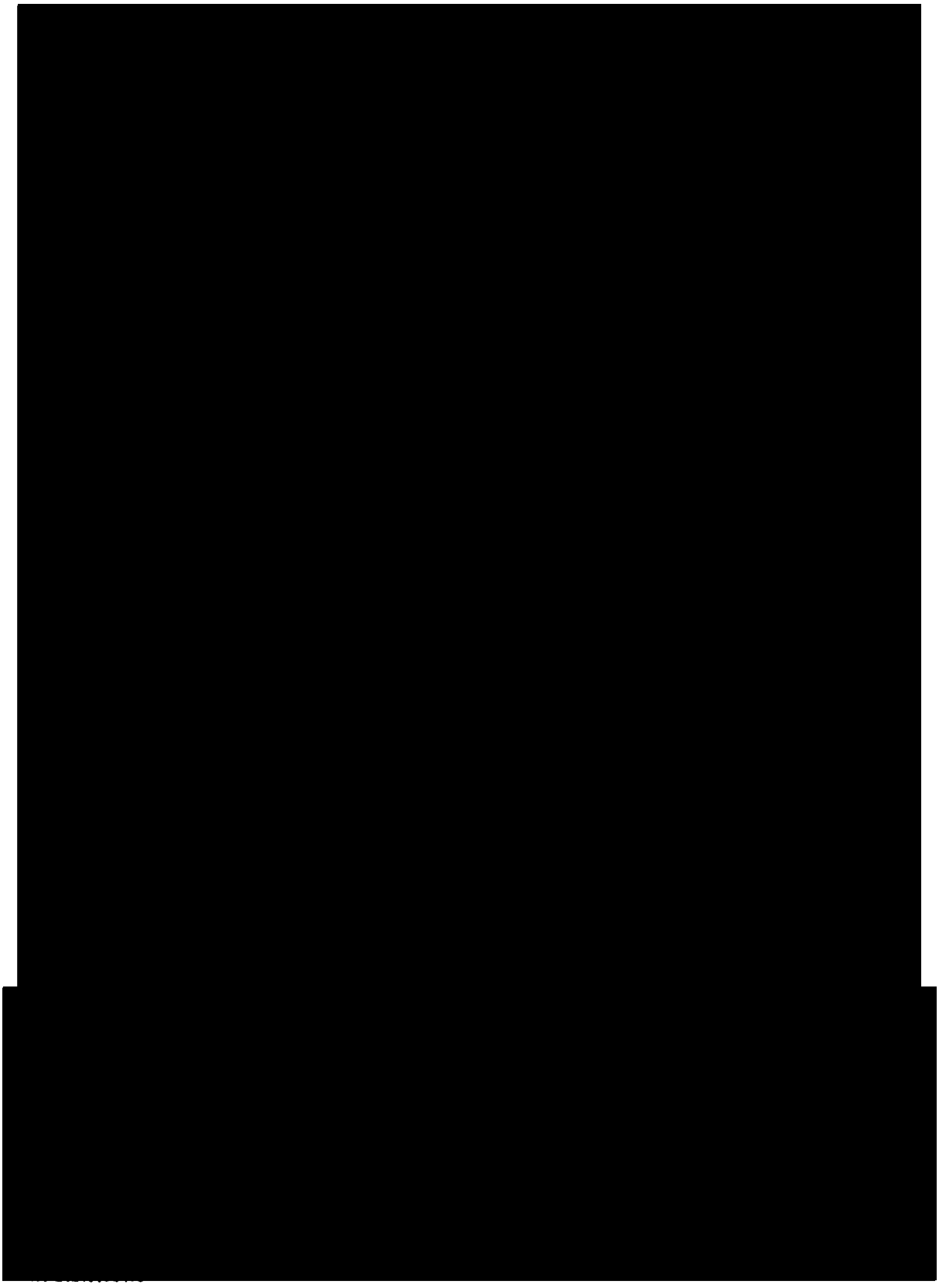

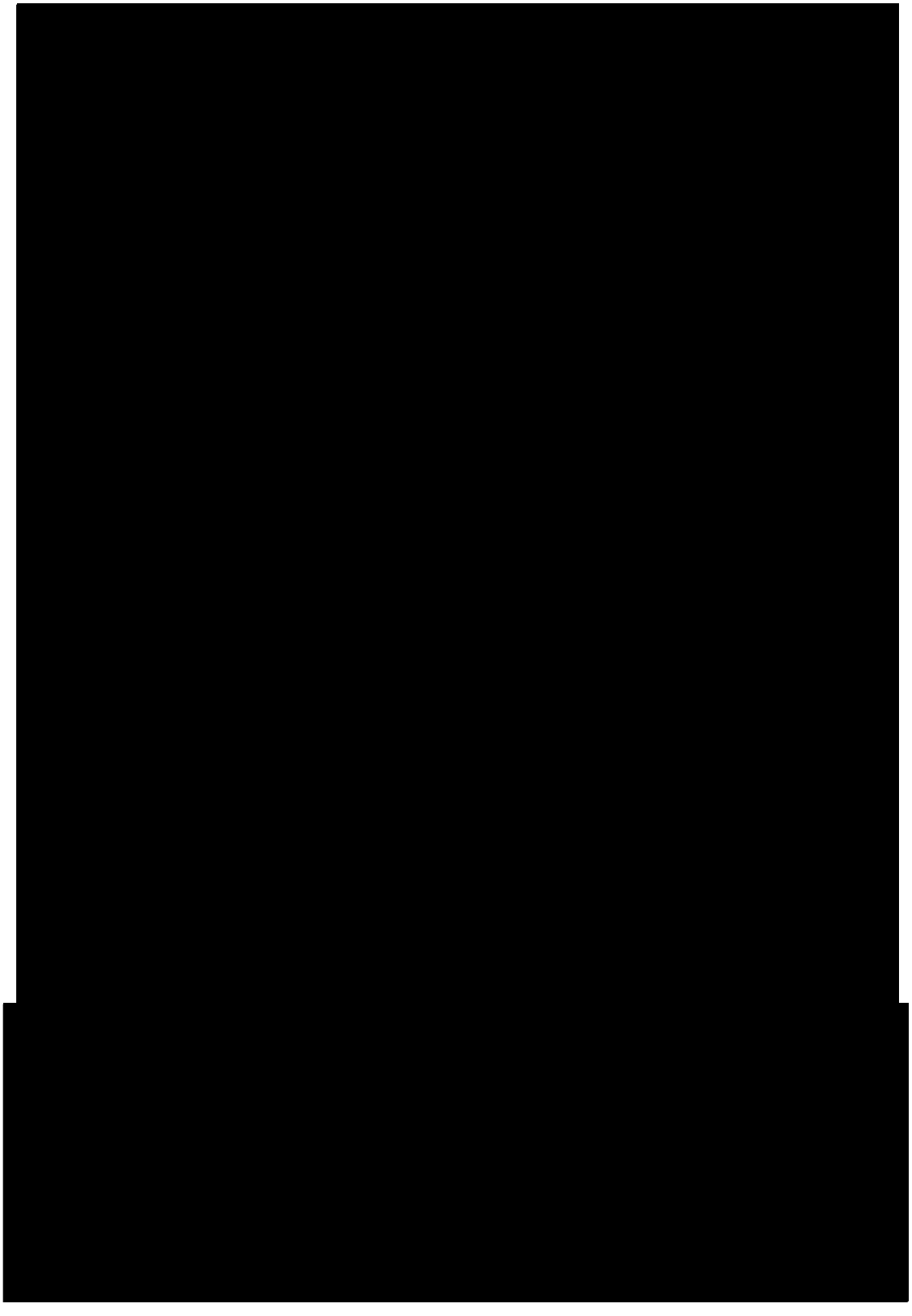

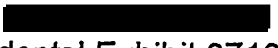

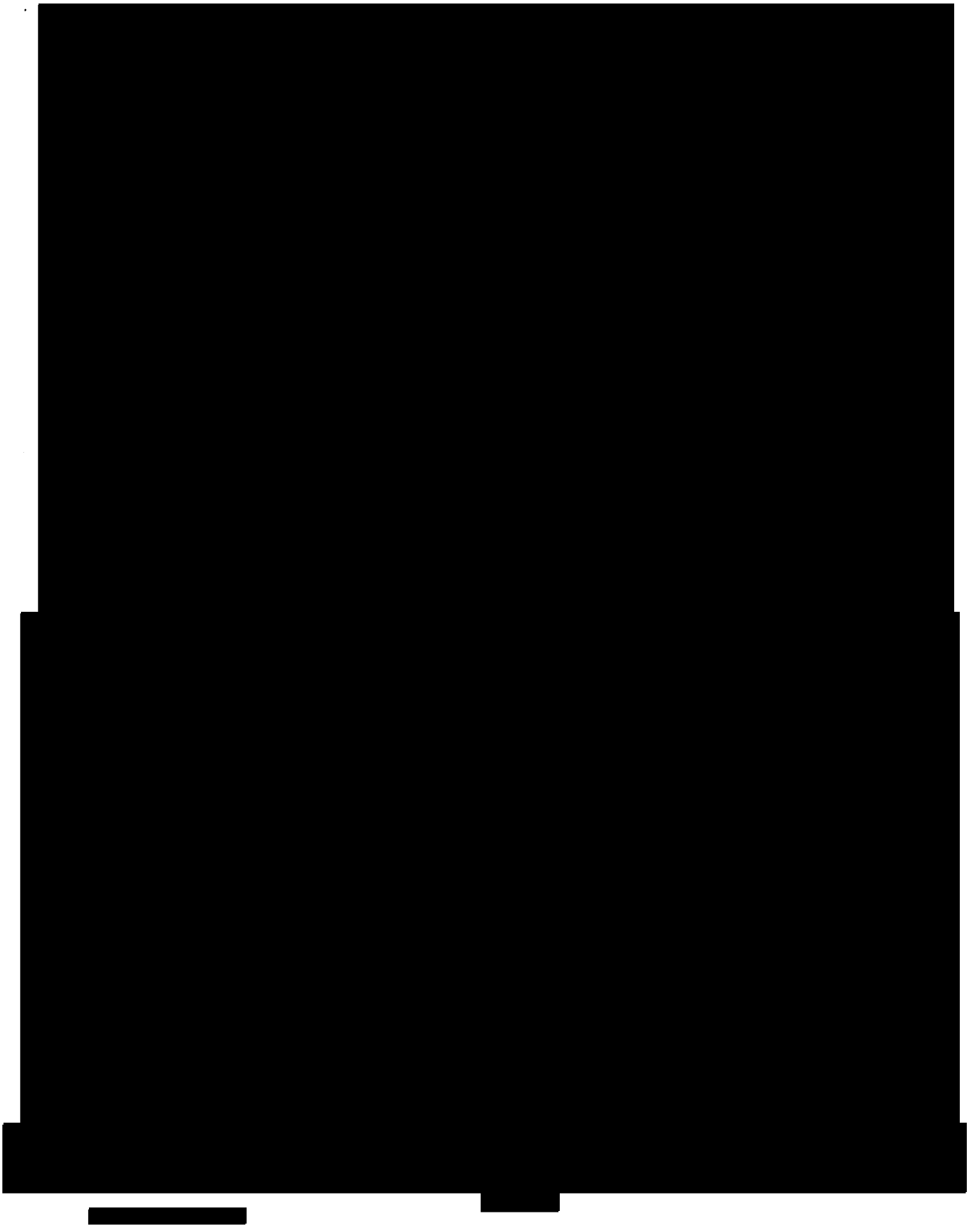

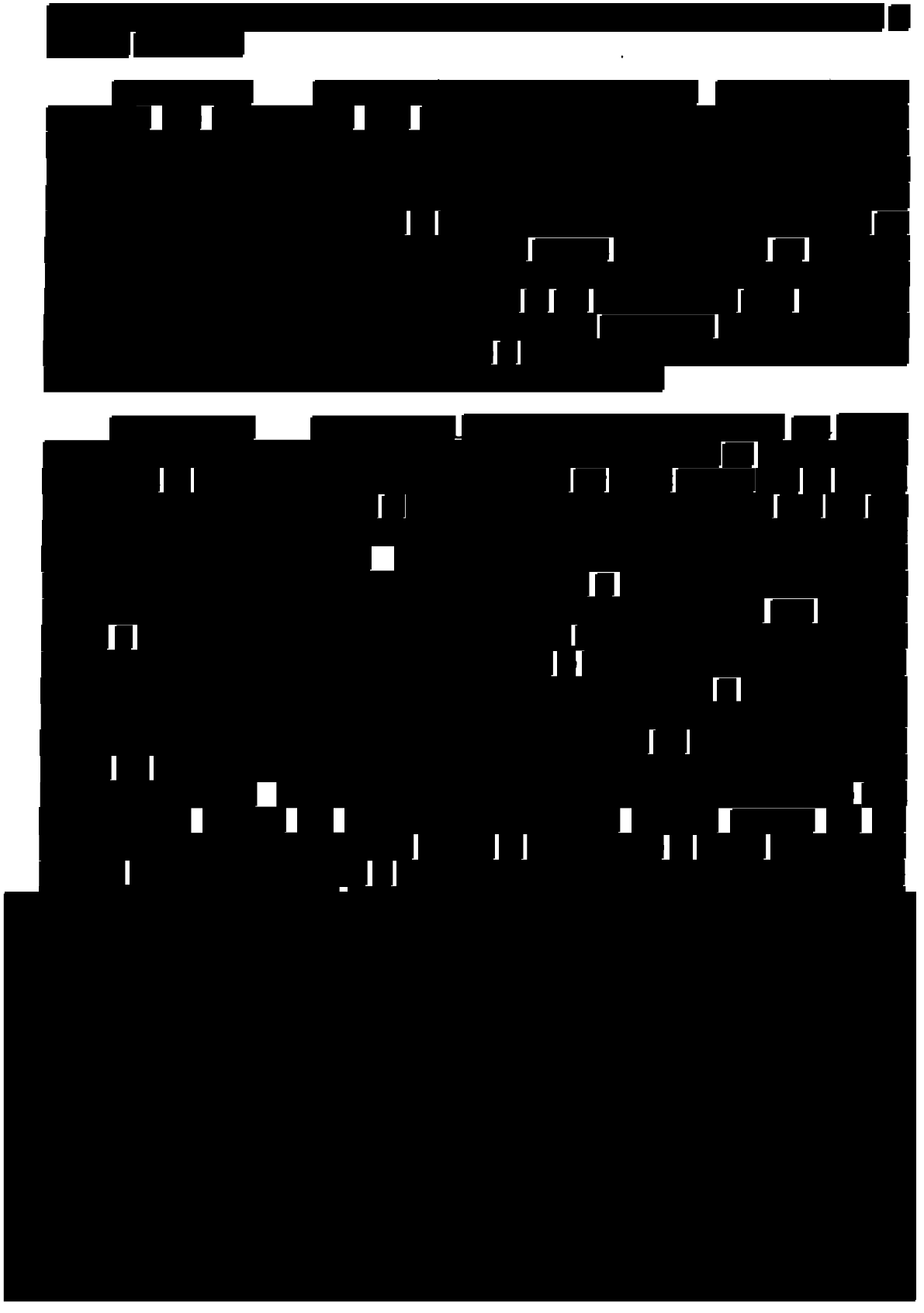

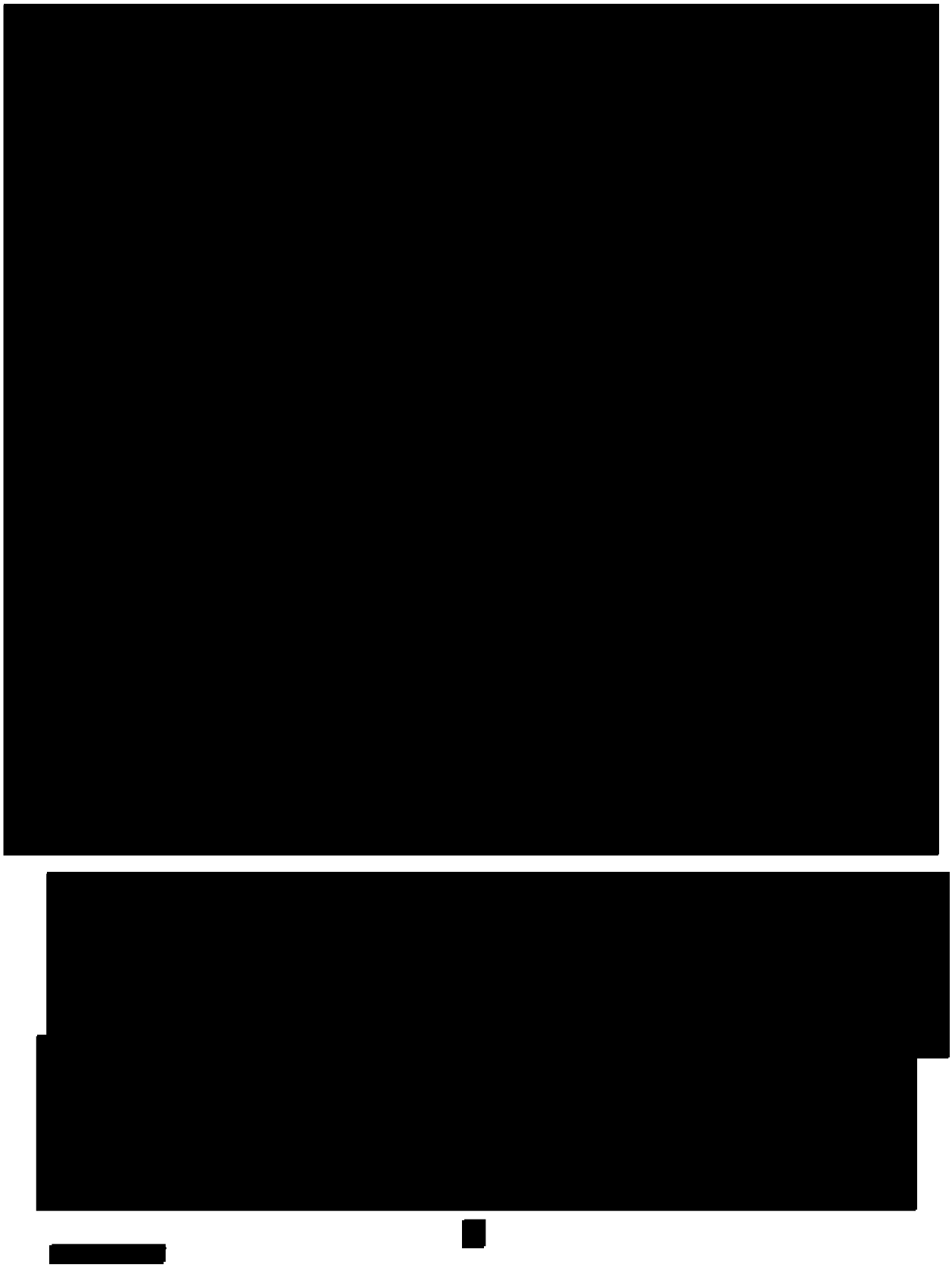

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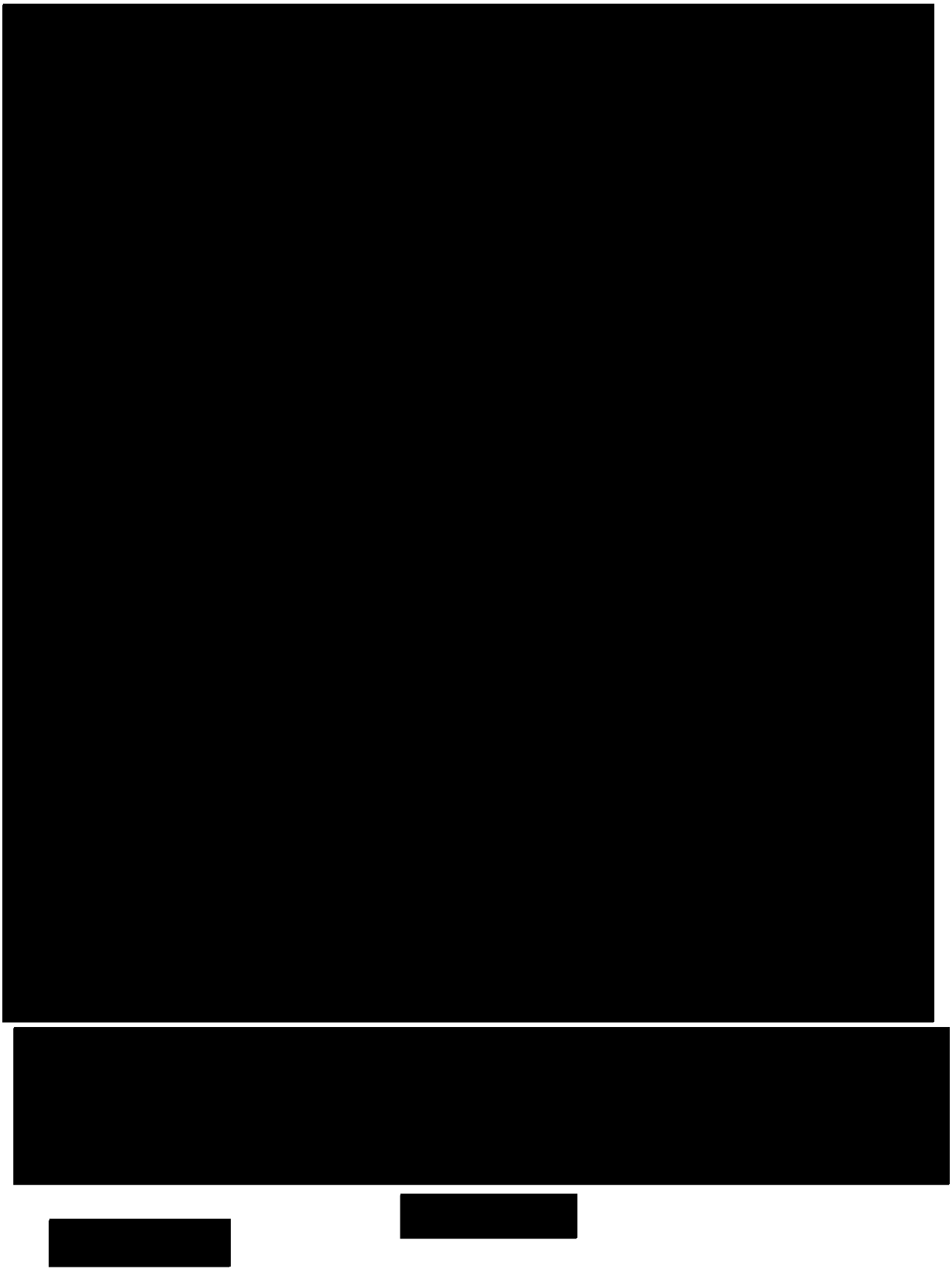
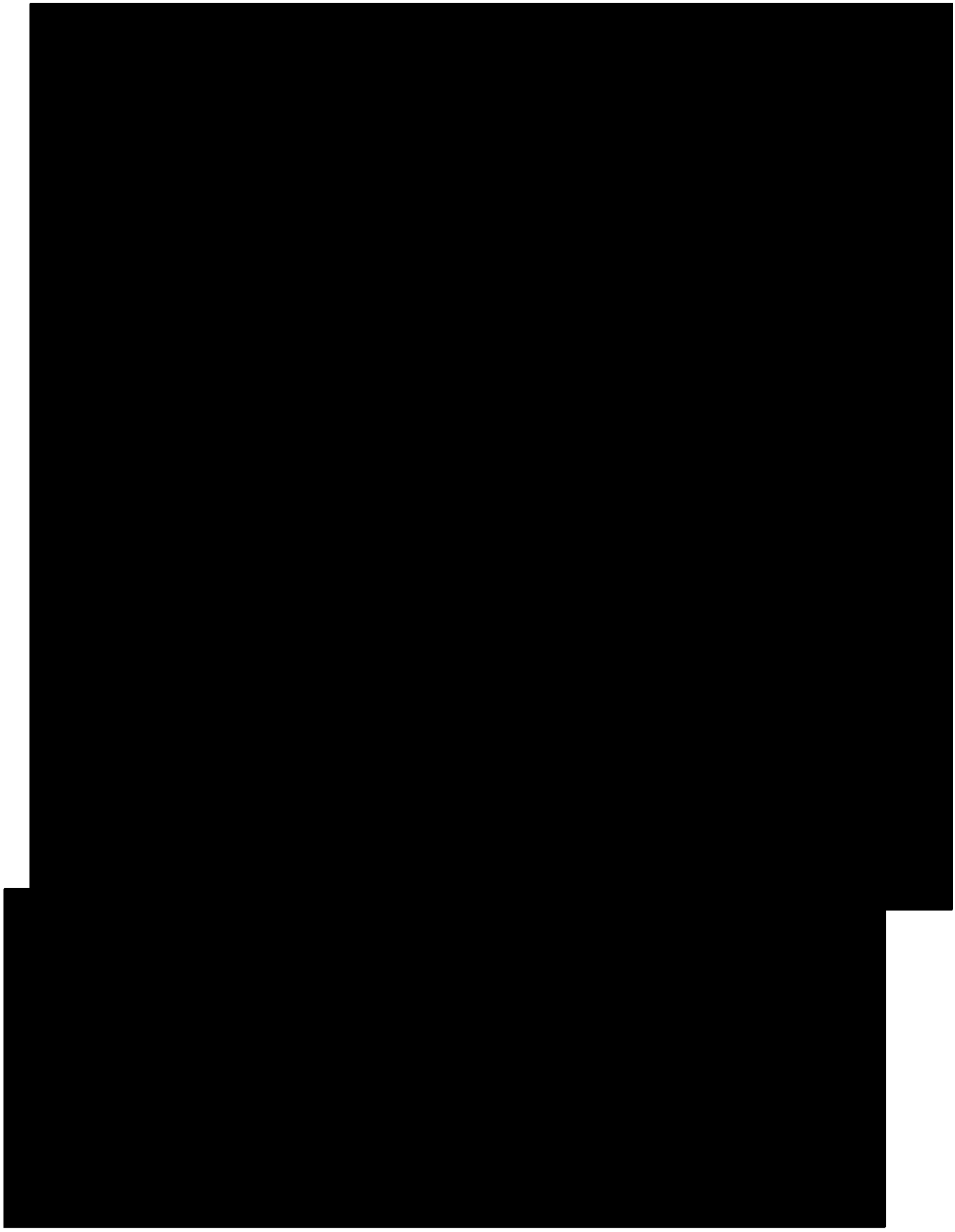
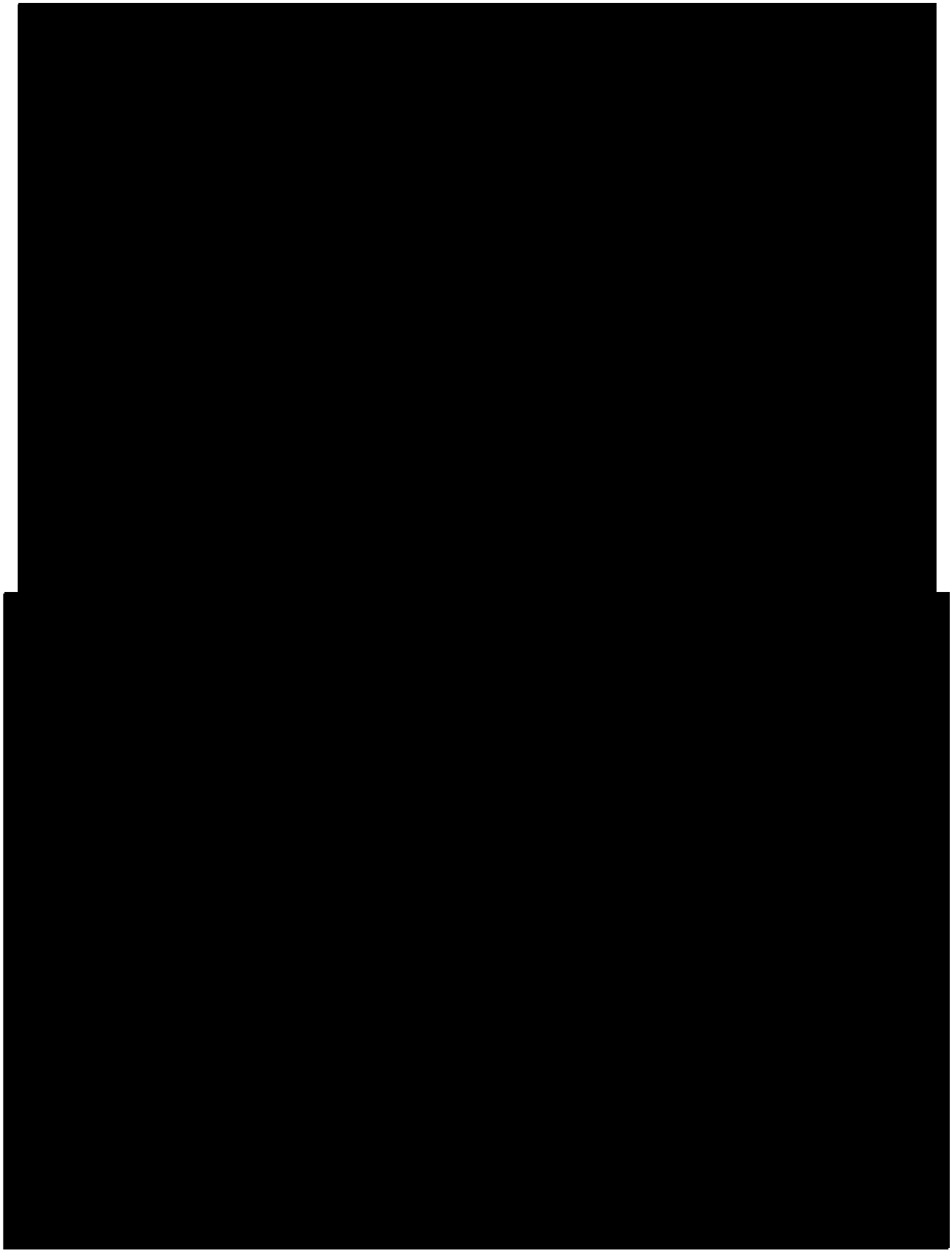
"**Initial Closing Date**" means the date of the Initial Closing.

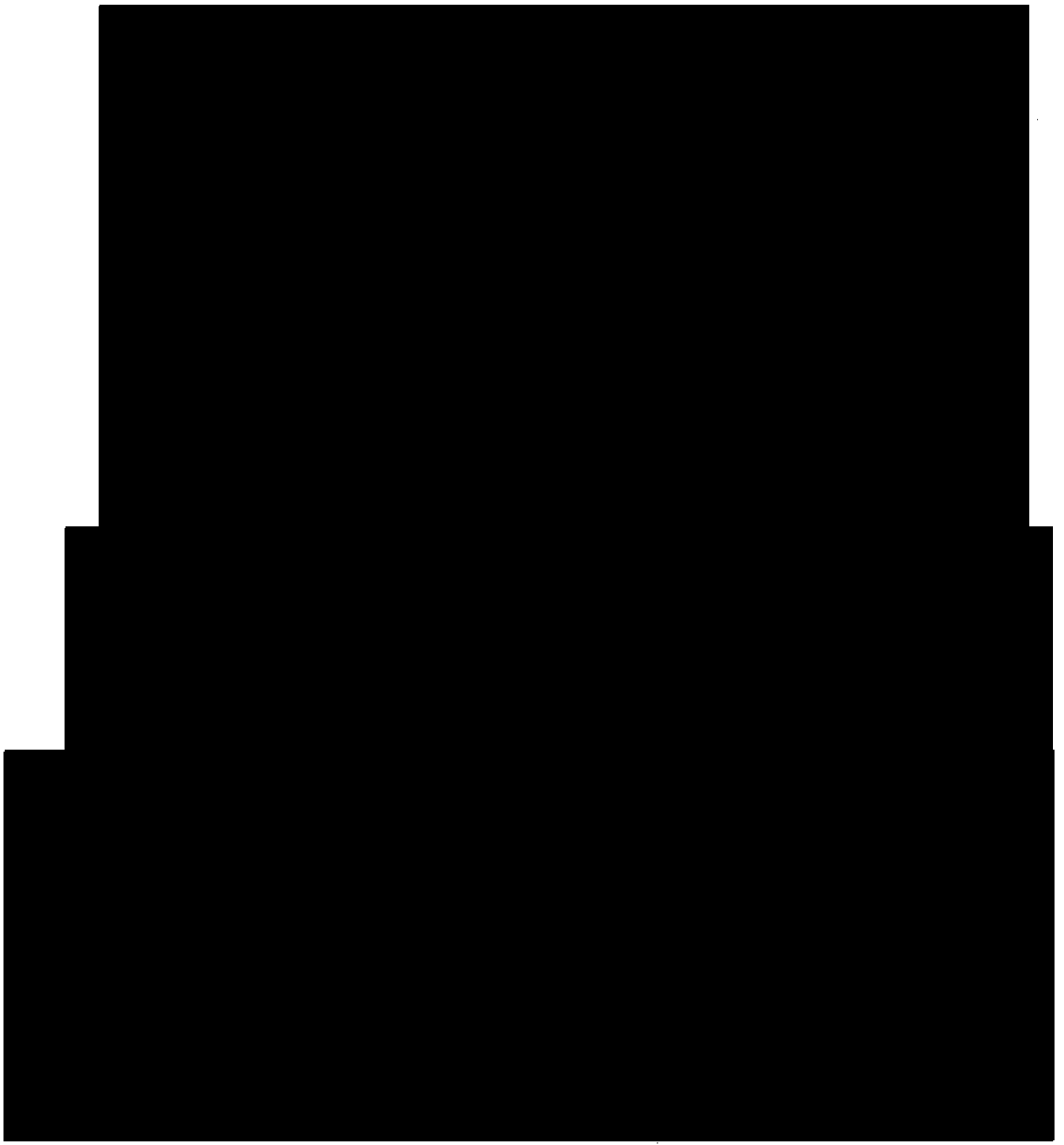
"**Interest Charges**" has the meaning set forth in Section 2.5(b).

"**Investment Company Act**" means the Investment Company Act of 1940, as amended from time to time.









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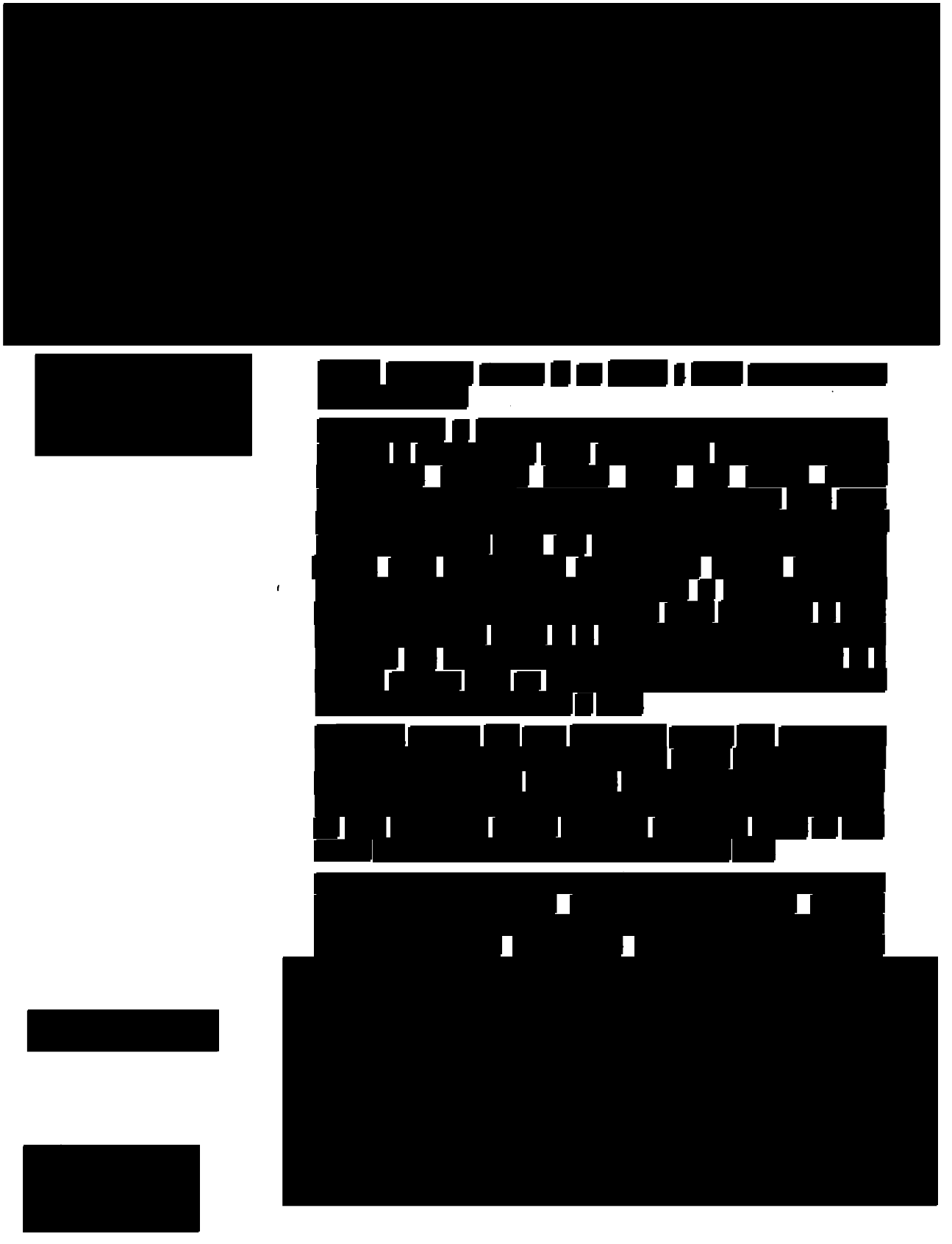

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Investment Committee

Capital Commitments

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Initial Closing

Subsequent Closings

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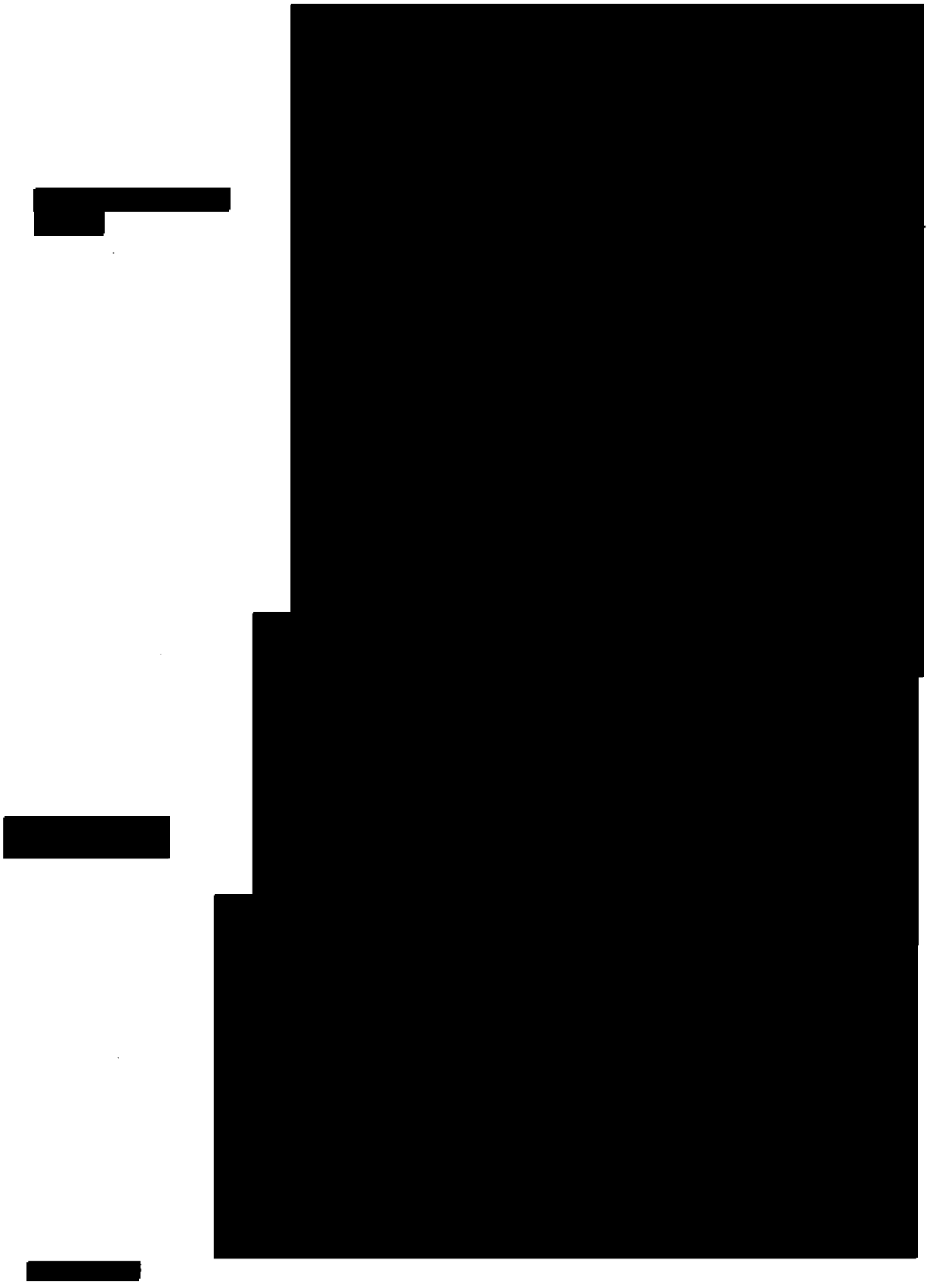

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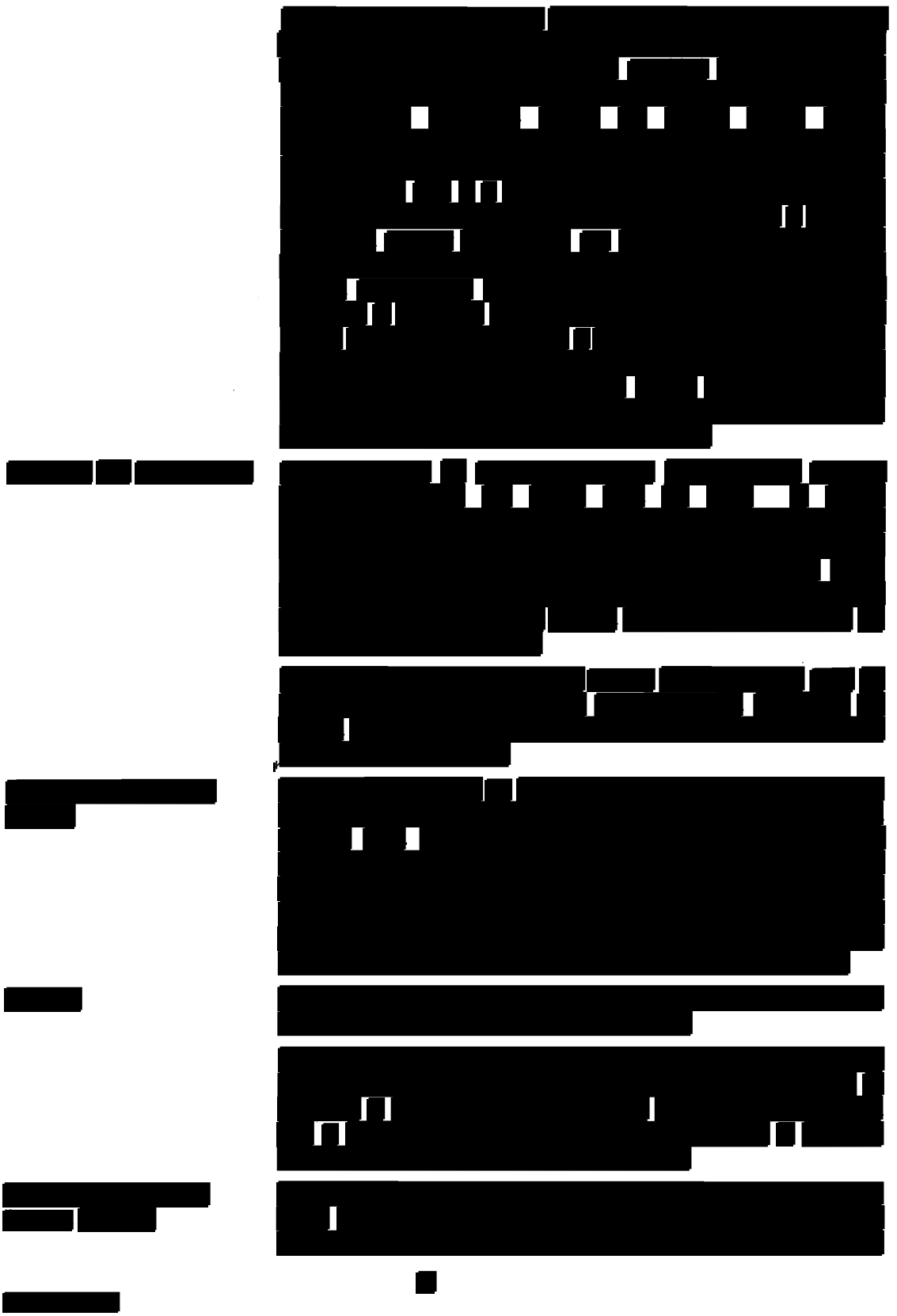

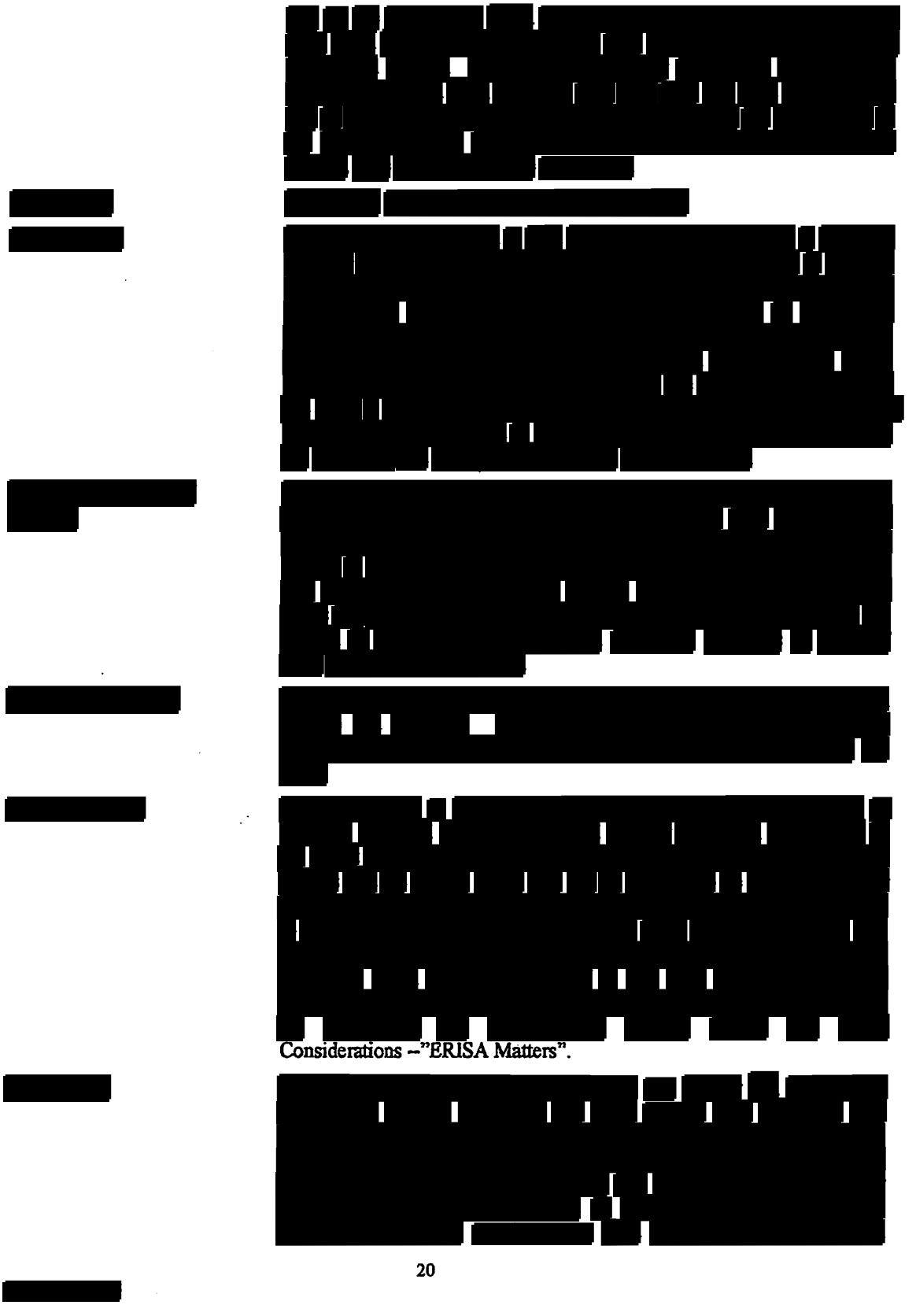

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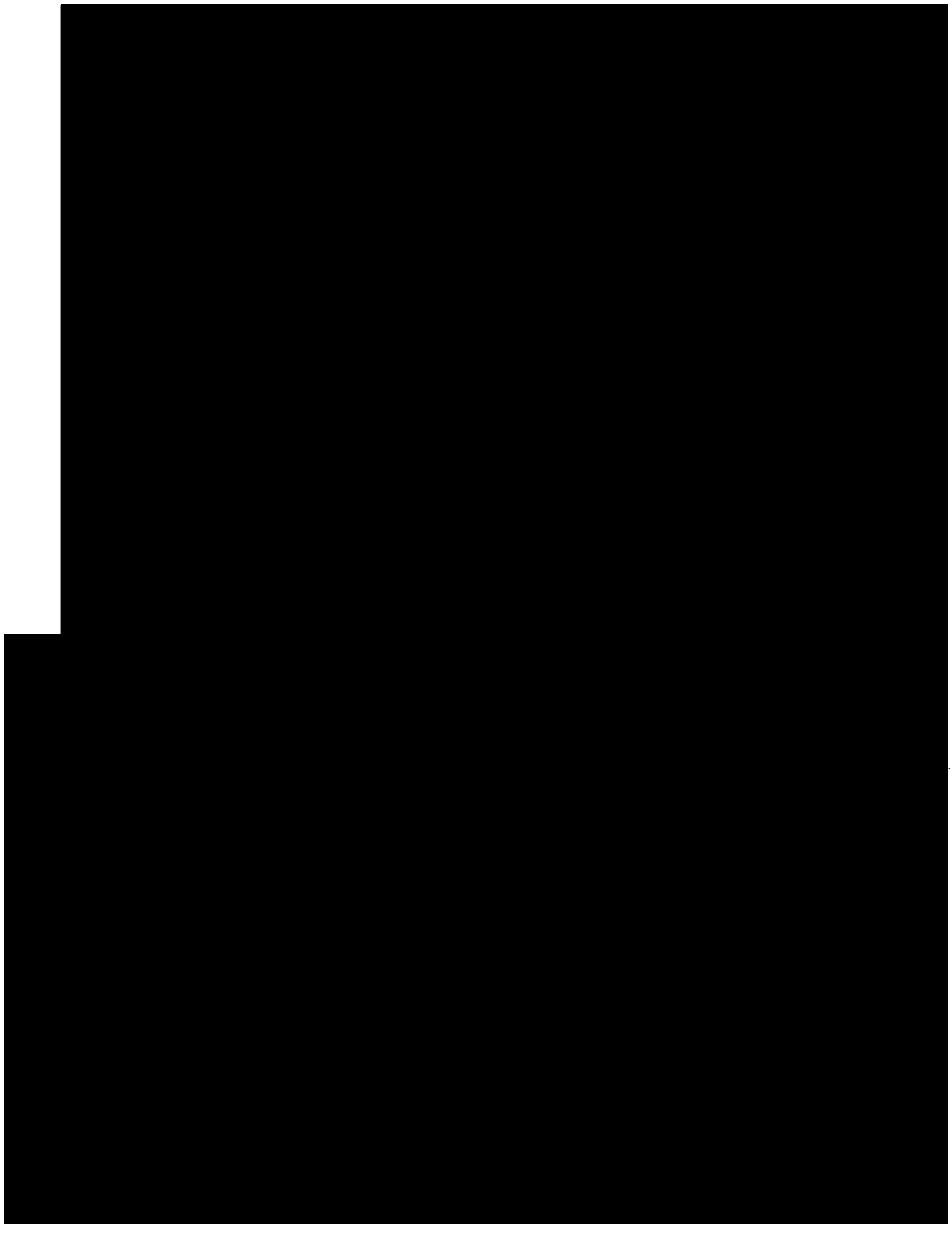

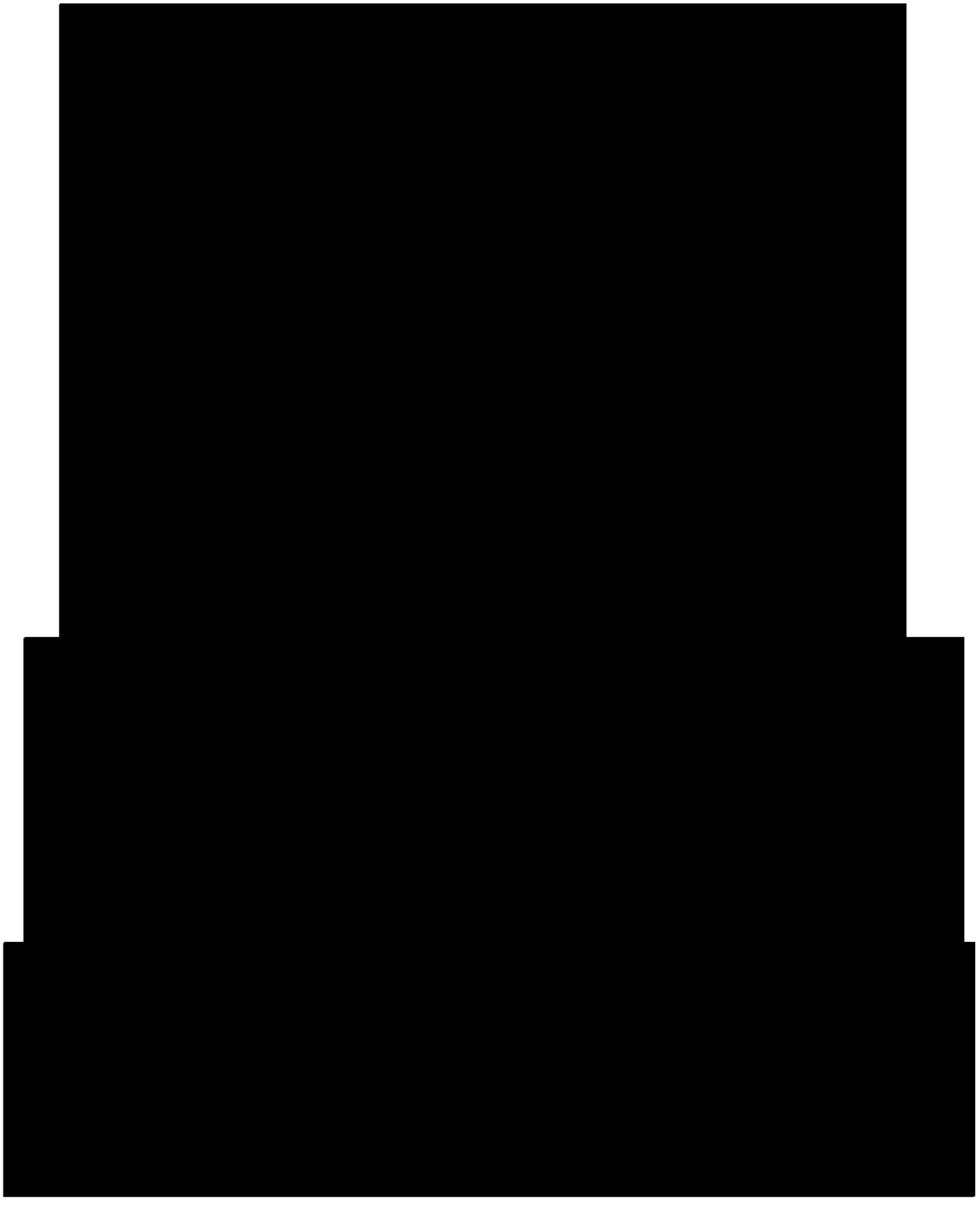

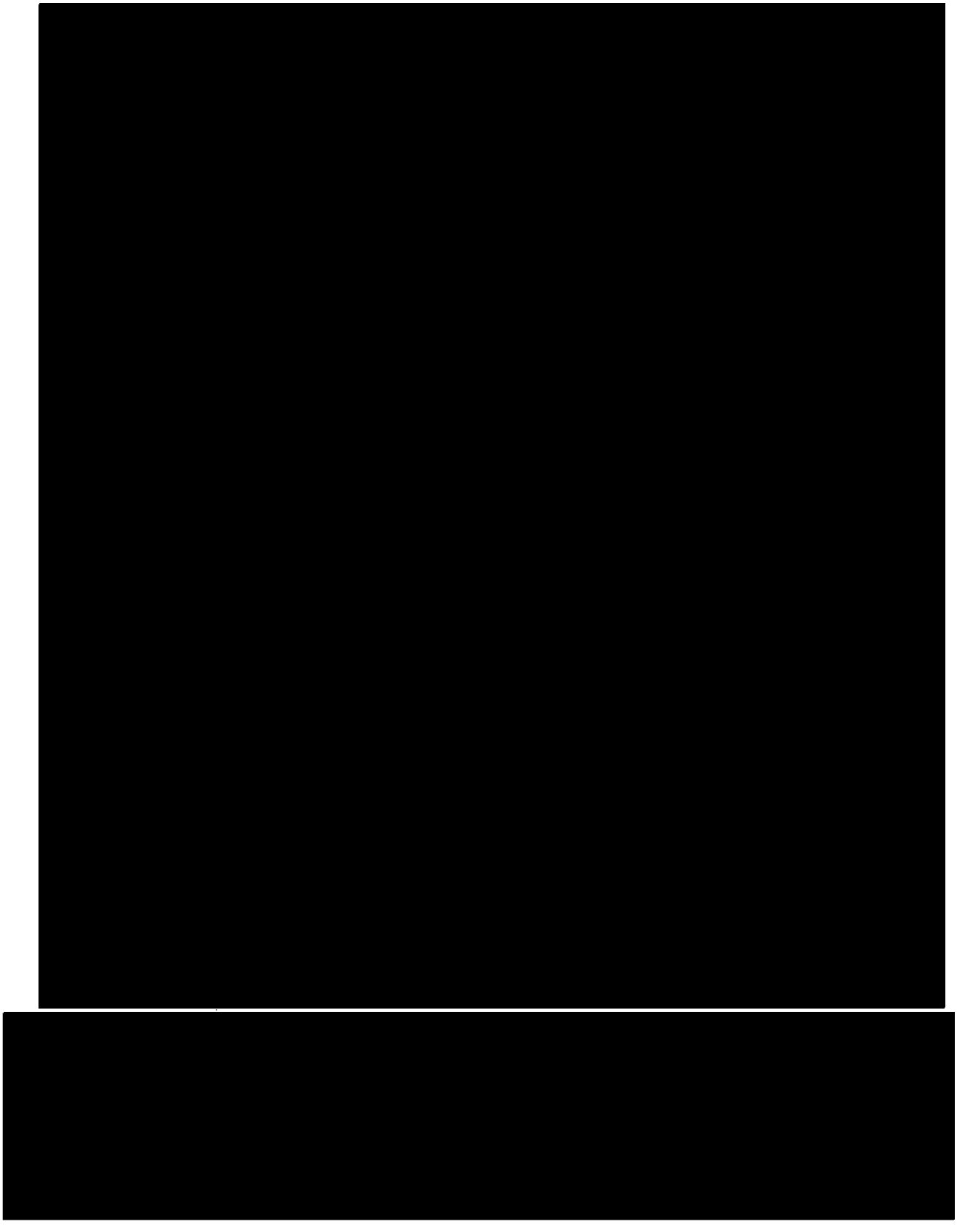

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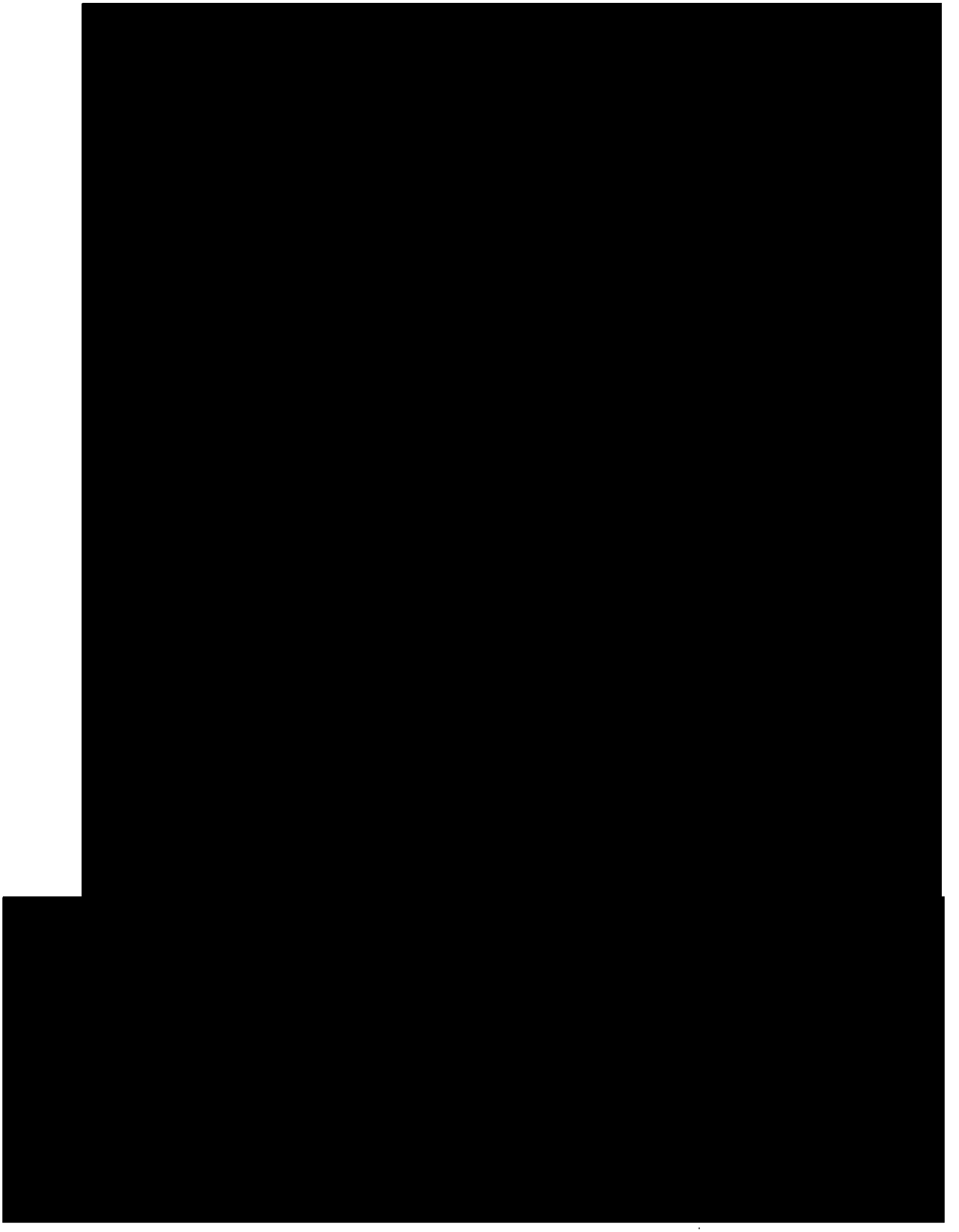

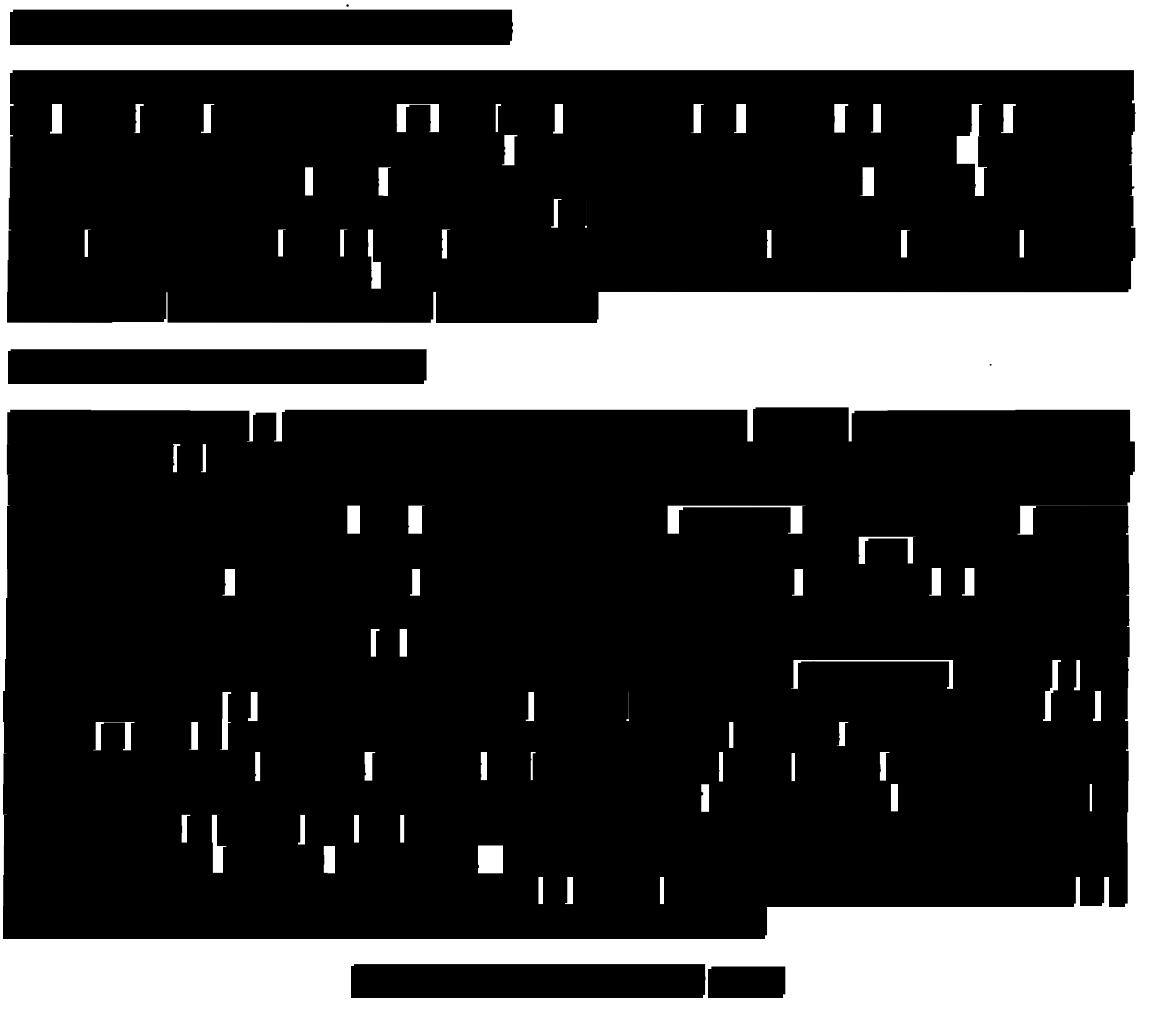

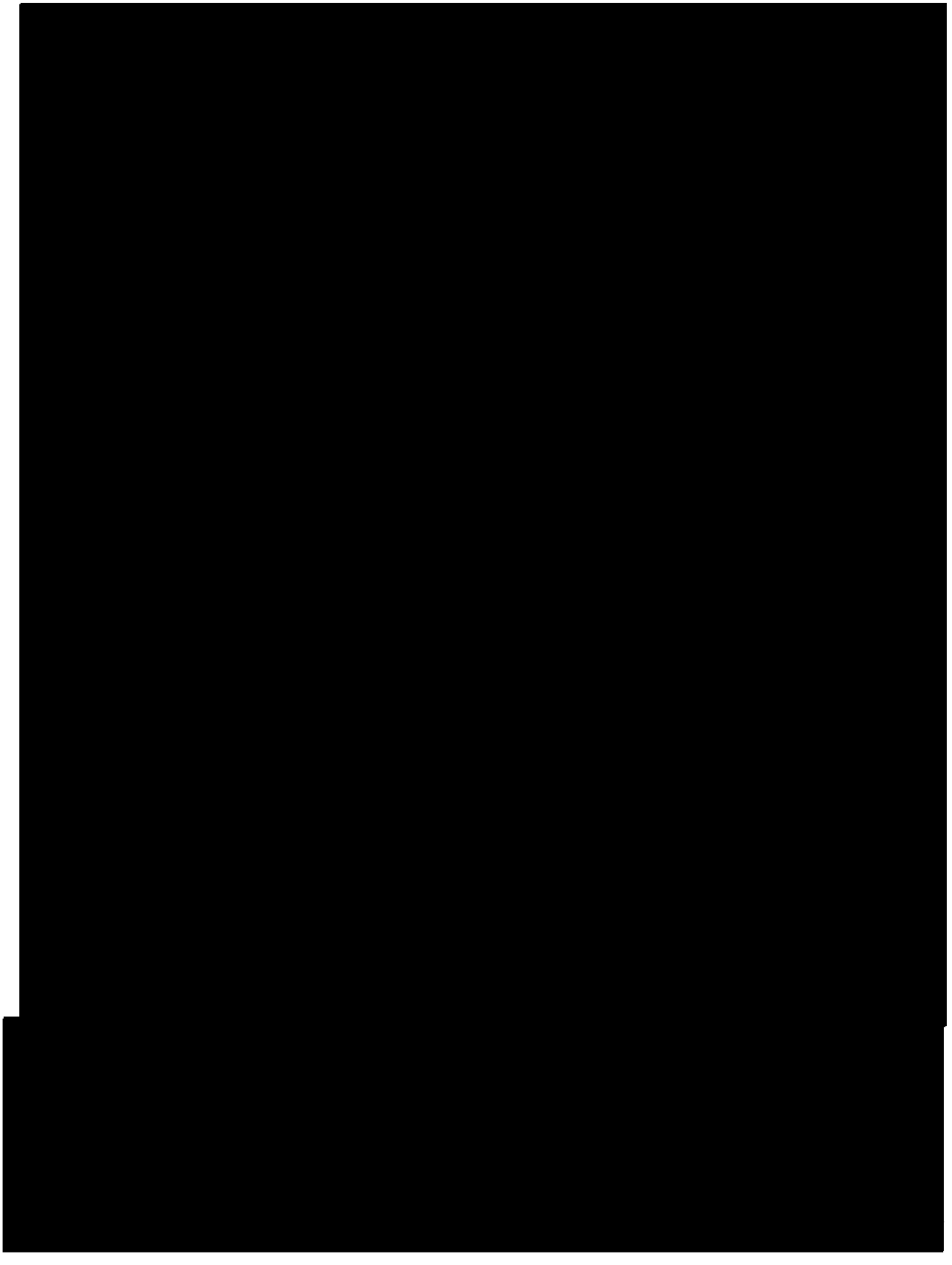

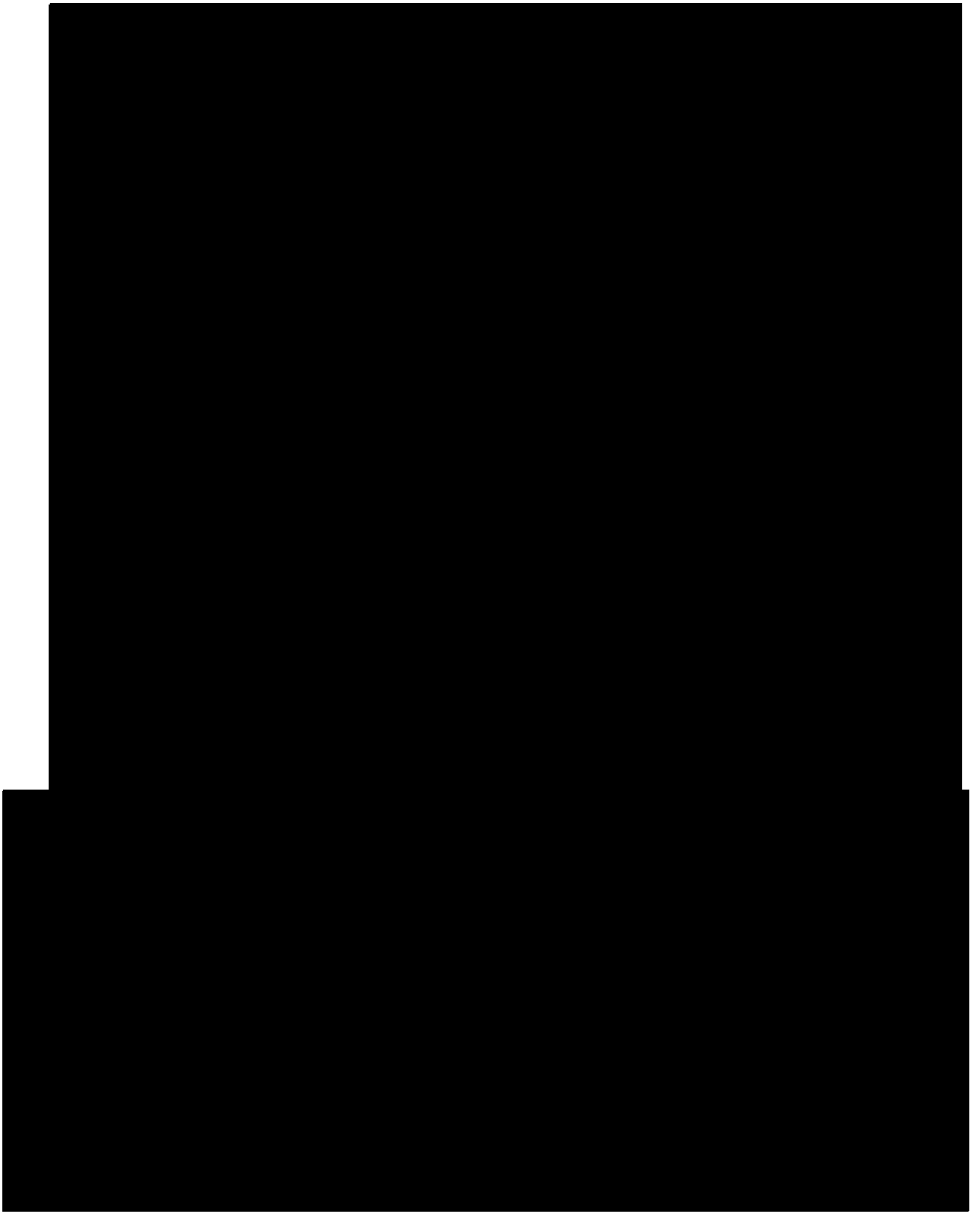

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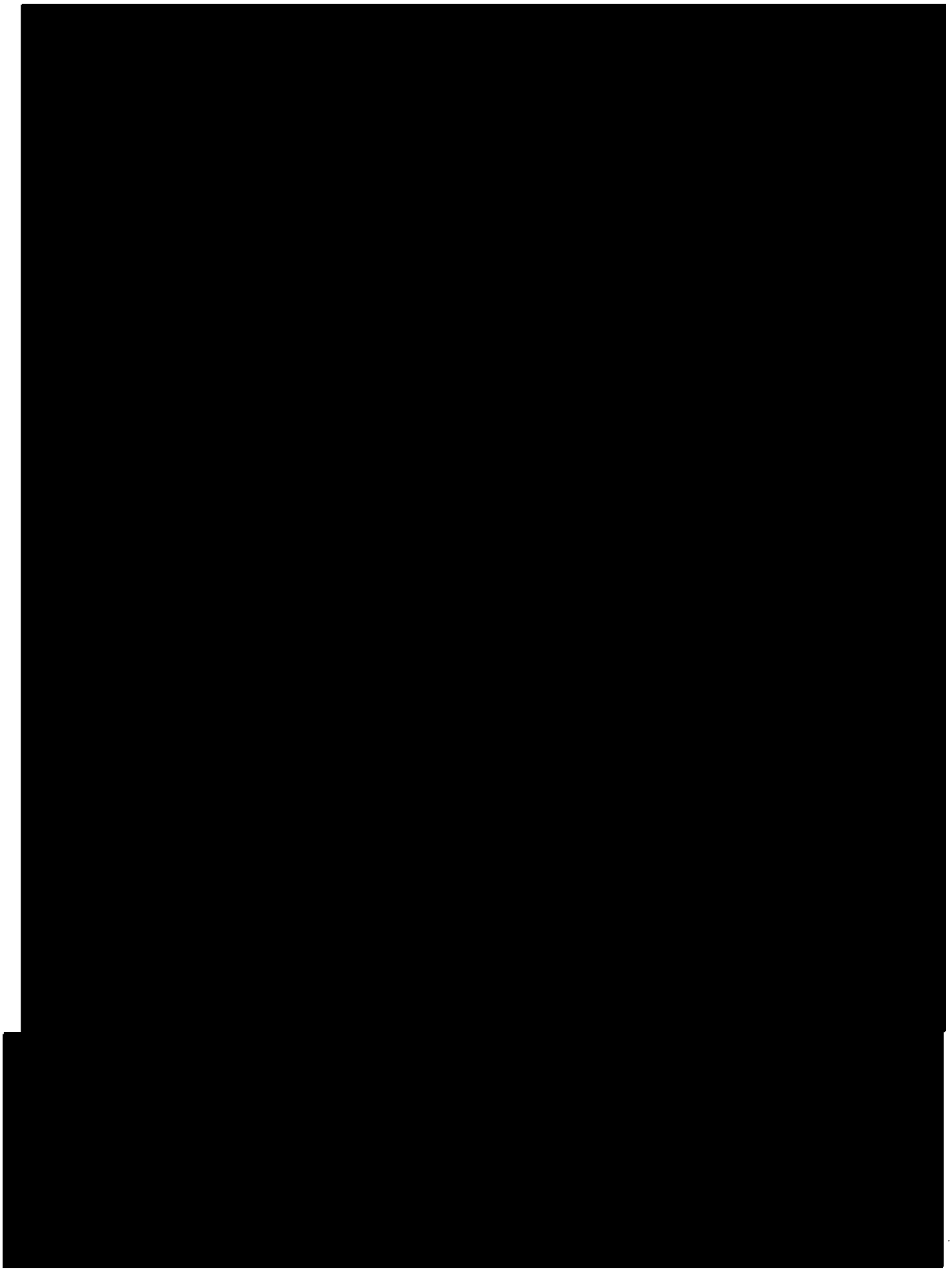

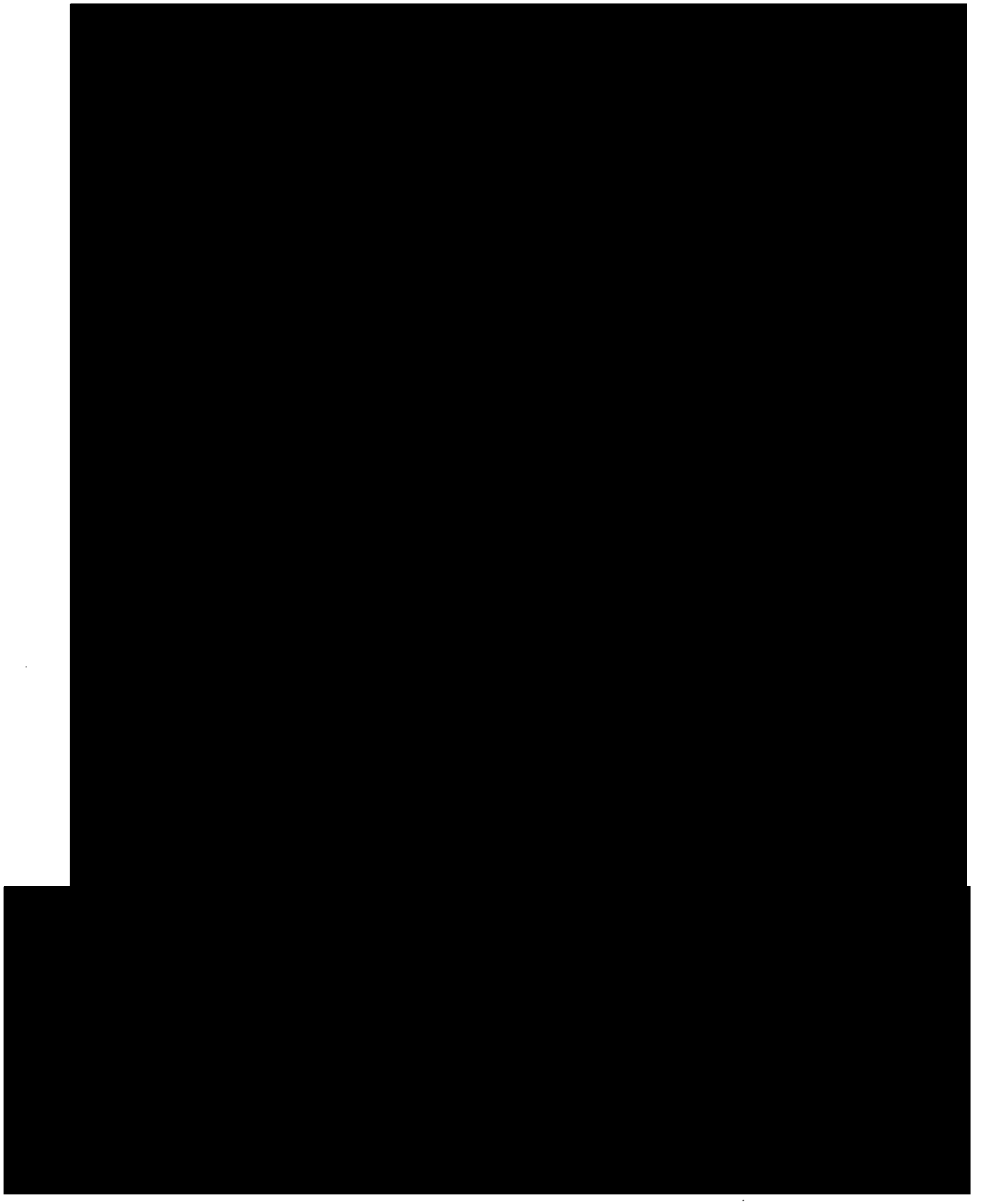

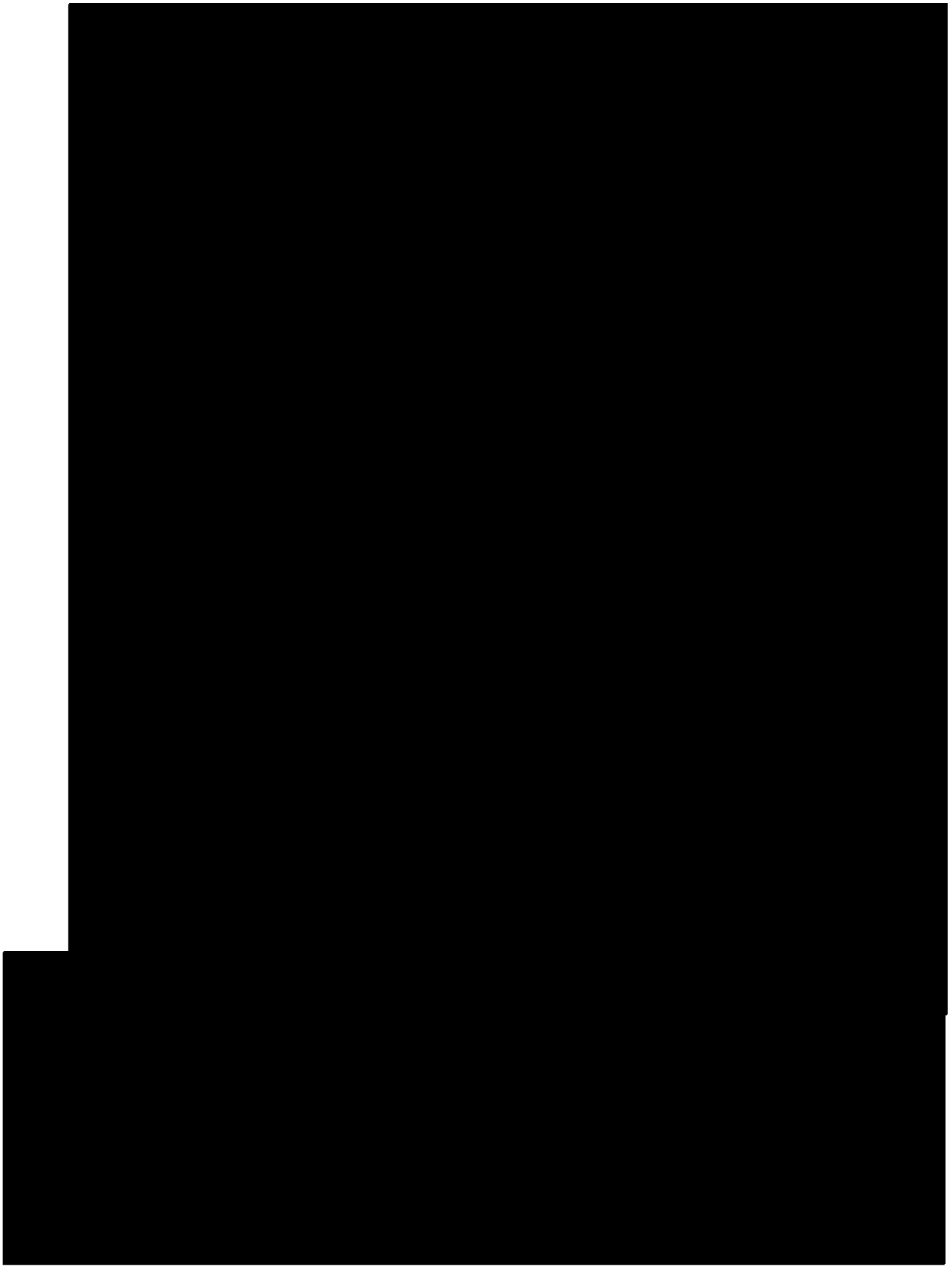

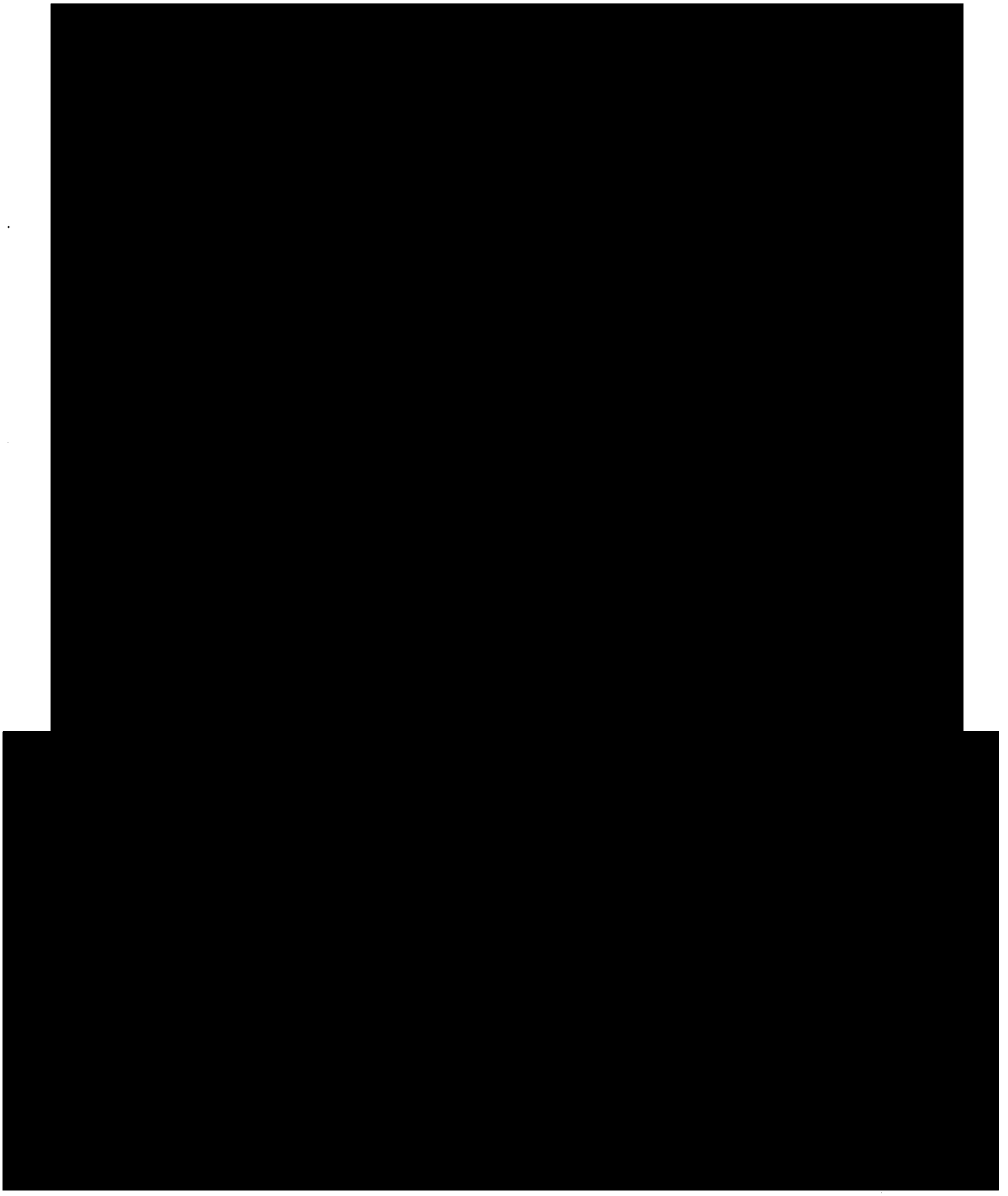

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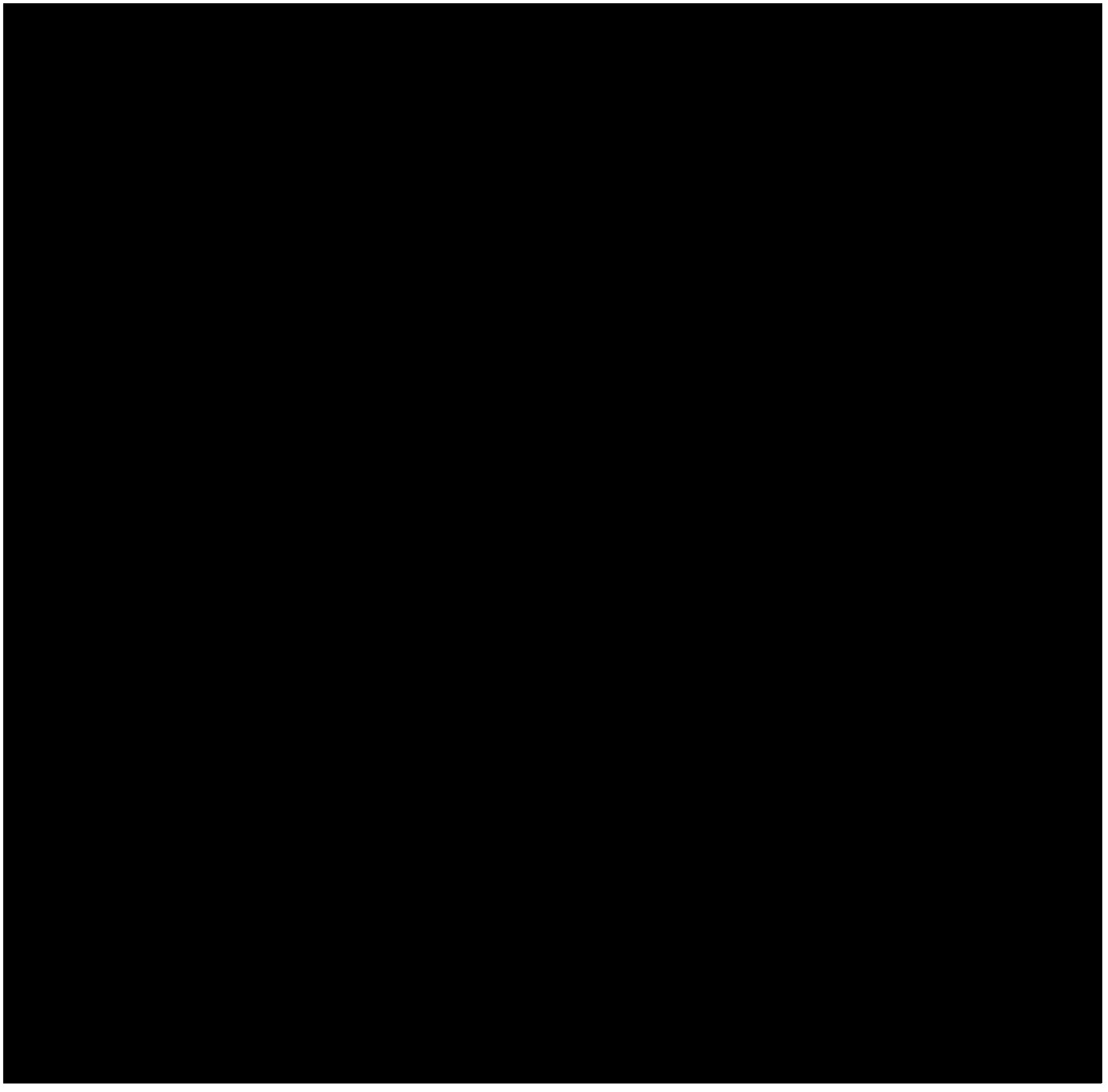

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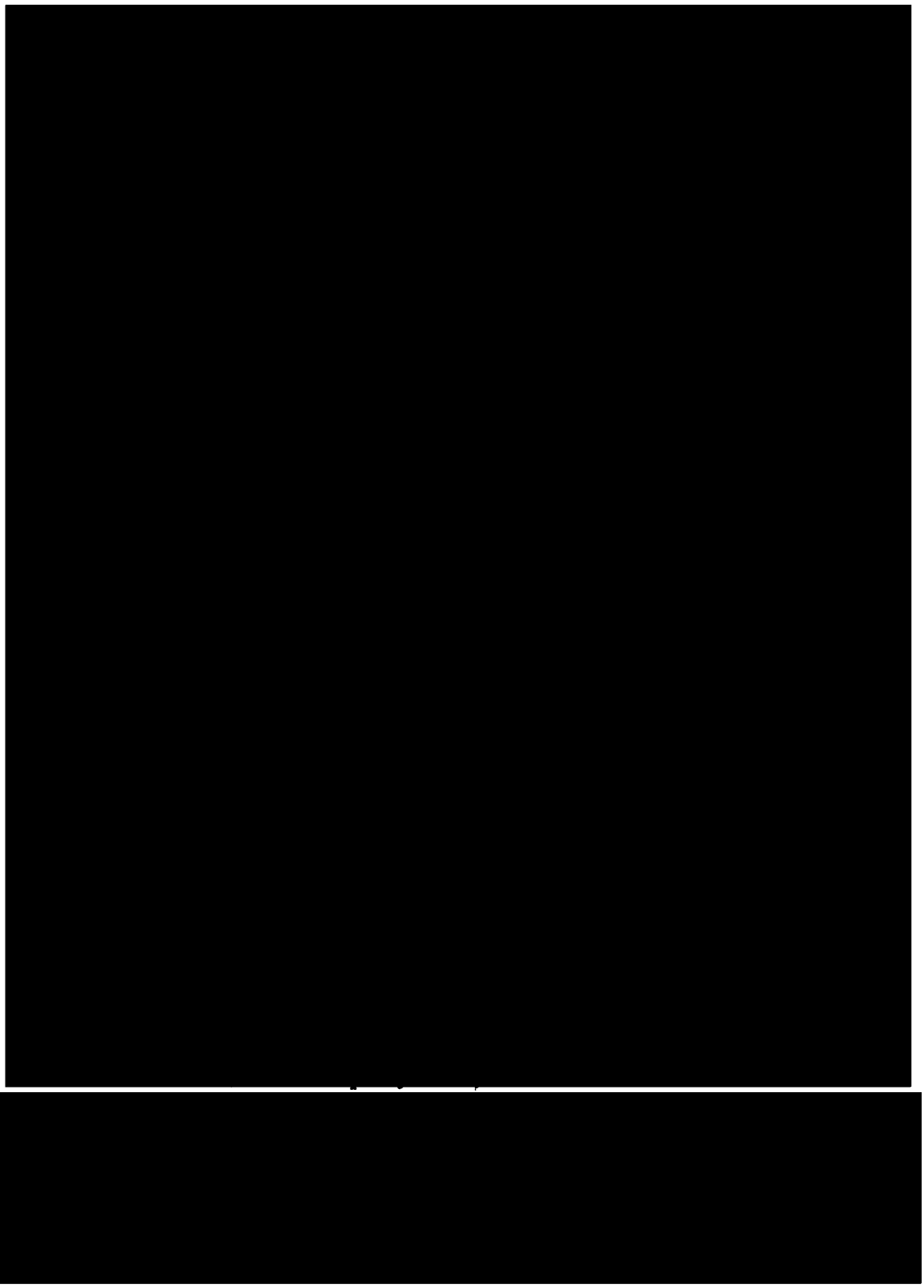

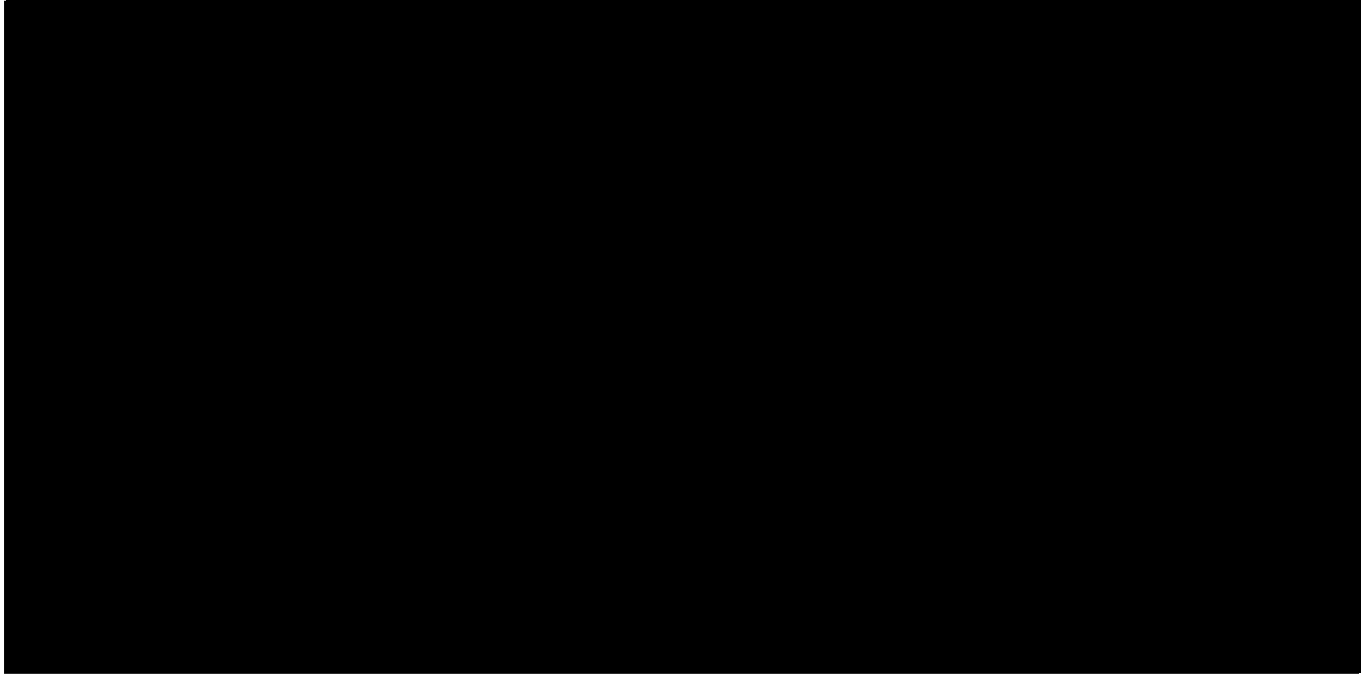

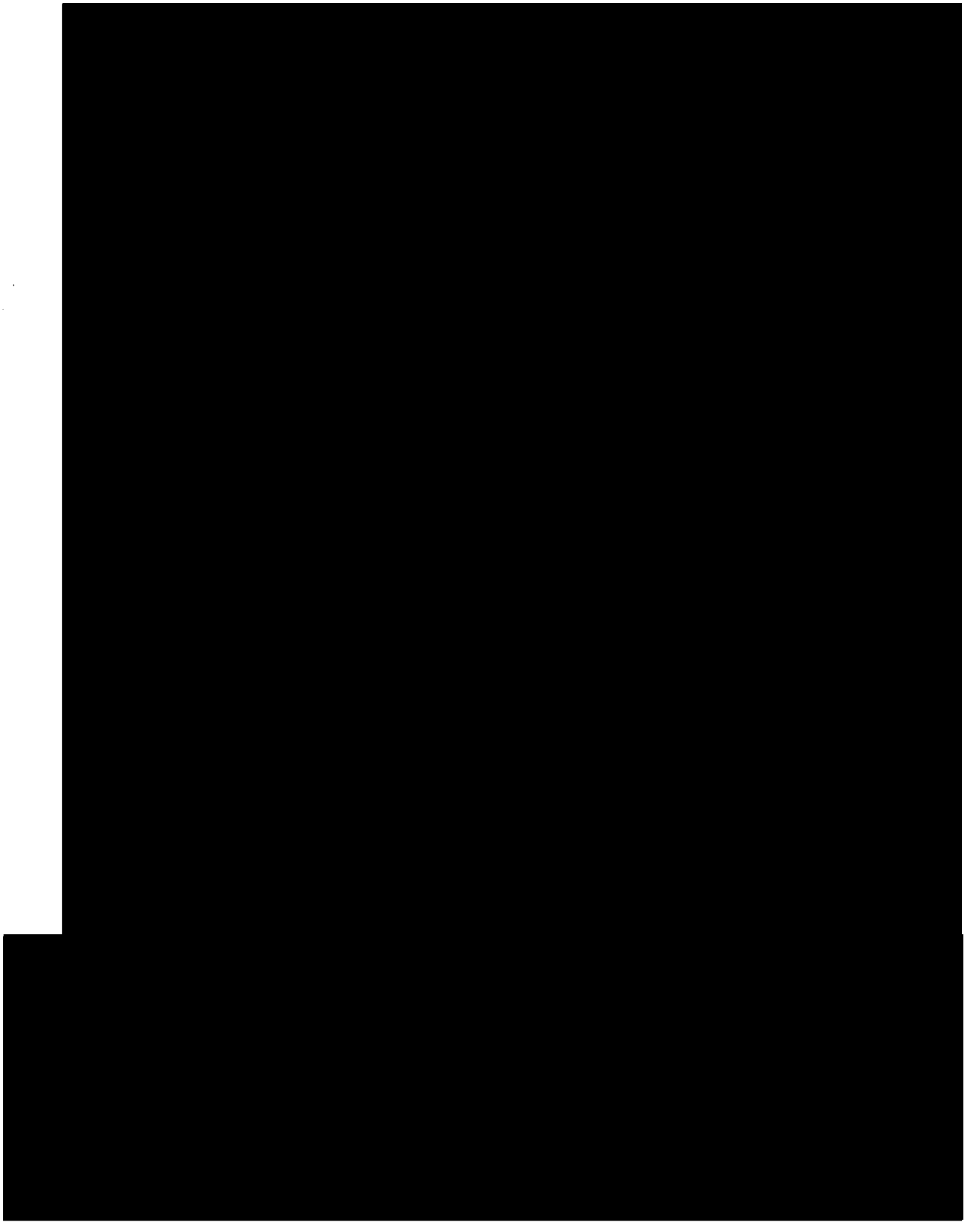

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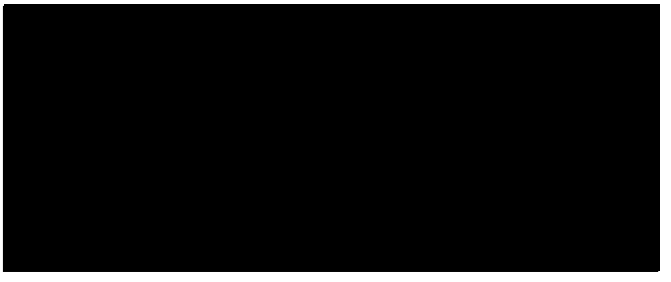

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GRAY FINANCIAL GROUP, INC., *et al.*,	:	
Plaintiffs,	:	
v.	:	
SEWARD & KISSEL LLP,	:	CIVIL ACTION NO. 1:16-CV-1956-LMM
Defendant.	:	

ORDER

This case comes before the Court on Defendant's Motion to Dismiss [6]. After a review of the record, a hearing, and due consideration, the Court enters the following Order:

I. Factual Background[1]

Plaintiff Gray Financial Group, Inc. ("Gray Financial") is a registered investment advisory firm. Plaintiffs Laurence O. Gray ("Gray") and Robert C. Hubbard, IV ("Hubbard"), during the relevant time period, have been advisory affiliates of Gray Financial, and Gray was an investment adviser representative of Gray Financial registered with the State of Georgia.

[1] Unless otherwise indicated, all facts are drawn from the Complaint in the light most favorable to Plaintiffs consistent with the Court's task on a Motion to Dismiss.

Defendant Seward & Kissel ("S&K") is a law firm—principally located in New York—which specializes in securities and investment management, including the regulation of investment advisors. S&K represented Gray Financial for years and worked with the individual Plaintiffs directly. S&K partner Robert B. Van Grover—the co-head of S&K's Investment Management Group—was the relationship partner for Gray Financial, and he was responsible for providing or supervising all work for Plaintiffs. Van Grover holds himself out as a private fund specialist and regularly advises clients on compliance and regulatory matters. Alexandra Segal is a S&K Associate who holds herself out as a specialist in investment management, investment advisers, and private funds.

S&K advised Plaintiffs on Georgia law for many years. S&K was aware of Gray and Hubbard's roles at Gray Financial, and it knew its advice would directly and personally impact the individual Plaintiffs' ability to engage in the investment business. S&K knew that Gray Financial and the individual Plaintiffs could be subject to adverse regulatory consequences if it did not ensure its work complied with applicable state and federal laws.

In early 2011, Plaintiffs decided to create a fund of funds which would be marketed to pension funds and other large retirement systems. Plaintiffs employed S&K to handle the legal issues associated with the development of private investment funds and to assist with and advise on important business decisions.

On July 15, 2011, Gray Financial and S&K executed an Engagement Letter covering S&K's role in creating Gray Financial's new funds. The Letter was written to John C. Robinson, Gray Financial's Senior Managing Director, and stated in relevant part:

> 1. Description of Engagement. We will represent **you** in connection with the organization of one or more private investment funds (each a "Fund"). We will prepare a Fund's private offering memorandum, subscription agreement and other organizational documents. We will coordinate initial state blue sky filings for a Fund. We will also provide legal advice in connection with the offering of interests and structuring and business advice in connection with the offering. On an ongoing basis, we will advise you on regulatory and other matters for which you request our assistance.

Dkt. No. [1-1] at 40 (emphasis added). "You" is never defined in the letter, but the signature block states that agreement is to be "accepted and agreed to by: Gray & Company." Id. at 41.

In October 2011, Plaintiffs created a fund of funds known as "GrayCo Alternative Partners I, LP," or "Fund I." S&K drafted the private placement memorandum and other offering documents associated with Fund I.

In April 2012, Georgia changed its law to—for the first time—allow Georgia public pension plans to invest in "alternative investments." O.C.G.A. § 47-20-87. Because its experience with Fund I had been successful, Plaintiffs again turned to S&K for the development of a new alternative-investment fund for Georgia-based pension and large retirement systems—GrayCo Alternative Partners II, LP ("Fund II"). The July 2011 engagement letter between the parties also governed S&K's Fund II work.

In June and July 2012, Hubbard told S&K that Gray Financial wanted Fund II to be similar to Fund I except that Fund II would allow Georgia-based public pension plans to invest in compliance with O.C.G.A. § 47-20-87. On June 8, 2012, Plaintiffs directed S&K to draft the necessary offering documents and evaluate all related legal issues impacting the project. Plaintiffs also requested S&K review the new Georgia law and ensure that Fund II complied with it. S&K Associate Segal informed Plaintiffs that she would have Van Grover review the law and other issues related to Fund II.

Plaintiffs did not hear anything further from Van Grover regarding Fund II's compliance with Georgia law. While Plaintiffs believed Van Grover was supervising the Fund II work, in reality Van Grover devoted little to no time to the Fund II work and left Segal unsupervised.

On June 28 and July 9, 2012, Hubbard followed up with Segal, looking for the Fund II offering materials. Plaintiffs told Segal they needed the offering materials as soon as possible for upcoming marketing meetings with prospective pension fund investors. On July 9, 2012, Segal sent a Confidential Private Offering Memorandum, a Limited Partnership Agreement, and a Subscription Agreement with Instructions and Schedules (collectively, "Offering Documents").[2] Despite knowing that Hubbard intended to market Fund II using the Offering Documents, Segal did not inform Plaintiffs that the documents could

[2] Although not stated in the Complaint, it appears undisputed by the parties that these Offering Documents were marked "draft."

not be relied on as provided. Segal also failed to give any advice as to what marketing Plaintiffs could or could not do with the Offering Documents. Likewise, although being copied on Segal's email to Plaintiffs, Van Grover did not provide any advice regarding Fund II's marketing or adequately review the Offering Documents.

Based on the documents provided, Gray Financial marketed Fund II, believing that S&K would have advised Plaintiffs if their marketing plans were not compliant with state or federal laws. Problems arose based upon Plaintiffs' failure to include certain required notices and disclosures. S&K's failure to include Georgia-specific notices and disclosures left Plaintiffs unprotected in the event the Securities and Exchange Commission ("SEC") deemed Fund II noncompliant with Georgia law.

S&K also continued to advise Plaintiffs on legal issues related to Fund II's development, including the necessary steps to verify Fund II investors for Anti-Laundering purposes and whether Fund II could hold specific investments based on Plaintiffs' existing investments. S&K knew that Gray Financial was using the Offering Documents but failed to advise Plaintiffs regarding what they should do (or not do) to be compliant with all applicable laws.

Plaintiffs ultimately retained a subsequent law firm to handle issues related to Fund II, but they did not direct the new law firm to revisit the opinions and advice previously provided by S&K because Plaintiffs thought they were legally compliant.

In August 2013, the SEC advised Plaintiffs that it was conducting a confidential and non-public investigation into whether Fund II complied with applicable law. On May 21, 2015, the SEC instituted administrative proceedings against Plaintiffs via an Order Instituting Proceedings ("OIP"). The SEC contends that Plaintiffs violated federal securities laws because Fund II did not comply with O.C.G.A. § 47-20-87, the Georgia Public Pension Investment Law. Plaintiffs allege that the SEC's charges caused much of Plaintiffs' business to be destroyed. On February 19, 2015, Plaintiffs filed suit against the SEC, claiming that the SEC administrative proceeding was unconstitutional. Gray Financial Grp., Inc. v. SEC, Civ. A. No. 1:15-cv-0492-LMM (N.D. Ga. 2015).

On June 13, 2016, Plaintiffs filed this lawsuit, bringing claims against Defendant for (1) professional negligence; (2) breach of fiduciary duty; (3) simple negligence; (4) attorney fees; and (5) punitive damages. Defendant has moved to dismiss all the claims against it. Dkt. No. [6].

II. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While this pleading standard does not require "detailed factual allegations," the Supreme Court has held that "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

To withstand a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). A complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Id. (citing Twombly, 550 U.S. at 556).

At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." FindWhat Inv'r Grp. v. FindWhat.com, 658 F.3d 1282, 1296 (11th Cir. 2011) (quoting Garfield v. NDC Health Corp., 466 F.3d 1255, 1261 (11th Cir. 2006)). However, this principle does not apply to legal conclusions set forth in the complaint. Iqbal, 556 U.S. at 678.

III. Discussion

A. Consideration of Matters Outside the Pleadings

Defendant attached three classes of documents to its Motion which it contends this Court should consider: (1) Plaintiffs' Complaint against the SEC in another case before this Court; (2) the SEC's OIP against Plaintiffs; and (3) email communications between Plaintiffs and Defendant during the timeframe of the alleged malpractice. Plaintiffs do not object to this Court considering their allegations in the SEC Complaint or the OIP, but Plaintiffs do object to the Court's consideration of the emails. Pl. Resp., Dkt. No. [9] at 10-12.

When the Court considers matters outside the pleadings in a Rule 12(b)(6) motion, that motion is generally converted into a motion for summary judgment governed by Rule 56. Fed. R. Civ. P. 12(d). However, "[c]ourts may consider evidence extrinsic to the pleadings on a Rule 12(b)(6) motion to dismiss if (1) the documents are referred to in the complaint; (2) the evidence is central to the plaintiff's claim; and (3) the evidence's authenticity is not in question." U.S. ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., 906 F. Supp. 2d 1264, 1271 (N.D. Ga. 2012) (citing SFM Holdings, Ltd. v. Banc of America Sec., L.L.C., 600 F.3d 1334, 1337 (11th Cir. 2010), Brooks v. Blue Cross & Blue Shield, Inc., 116 F.3d 1364, 1368–69 (11th Cir. 1997)).

The Court finds that it would be inappropriate to consider these emails in this procedural posture. The emails only present a portion of the parties' communications, and it would be unfair and inappropriate to consider a one-sided presentation of evidence at the pleading stage. Therefore, the Court **STRIKES** Ex. B, Dkt. No. [6-3].[3]

B. Defendant's Motion to Dismiss

Defendant has moved to dismiss all of Plaintiffs' claims against it. The Court will consider each claim in turn.

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[3] Should the parties need to include the emails as exhibits to future documents—such as a motion for summary judgment—the Court will decide whether these emails are privileged at that juncture with the benefit of briefing on the subject. The parties should follow the Standing Order's process for sealing documents should either party elect to attach correspondence which Plaintiffs contend is privileged.

1. Legal Malpractice

To state a legal malpractice claim under Georgia law, a plaintiff must prove: "(1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff." Roberts v. Langdale, 363 S.E.2d 591, 592 (Ga. Ct. App. 1987) (quoting Rogers v. Novell, 330 S.E.2d 392, 396 (Ga. Ct. App. 1985)). Defendant moves to dismiss Plaintiffs' legal malpractice claim for three reasons: (1) Plaintiffs have not plausibly pled breach of a duty; (2) Plaintiffs have not plausibly pled causation; and (3) individual Plaintiffs Gray and Hubbard were not clients of S&K and thus cannot bring malpractice claims against them.

a. Plaintiffs have pled Defendant breached a duty.

Defendant first argues that Plaintiffs do not allege Defendant provided them any incorrect legal advice or that Plaintiffs were unaware of the three relevant sales requirements that are at issue. Dkt. No. [22-1] at 12. However, the Court finds that Plaintiffs have pled that Defendant breached a duty. Plaintiffs pled that Defendant was retained to assure Fund II complied with Georgia law, and the SEC contends that it did not. Further, Plaintiffs have pled that despite knowing Plaintiffs would market Fund II with the Offering Documents, Defendant did not advise Plaintiffs that the documents could not be relied upon as provided or give any advice regarding what marketing Plaintiffs *could* do with the documents provided.

The Court also does not find persuasive Defendant's argument that because Plaintiffs knew O.C.G.A. § 47-20-87 existed, Defendant is immunized from all potential malpractice regarding that statute's sales requirements. Plaintiffs are not attorneys; the mere fact they knew a statute existed does not *ipso facto* mean they had an understanding of its legal implications. In fact, that Plaintiffs pointed Defendant to the relevant statute at issue actually cuts in favor of Plaintiffs, as it was clear that Defendant was on notice of the legal advice Plaintiffs sought. Therefore, the Court finds Plaintiffs have plausibly pled that Defendant breached a duty to them.

b. Plaintiffs have pled Defendant's negligence caused some of their harm.

Defendant next argues that Plaintiffs have not pled that S&K's purported negligence caused the SEC to investigate Plaintiffs and thus their resultant damages. Specifically, Defendants argue that Plaintiffs were already aware of O.C.G.A. § 47-20-87's sales requirements notwithstanding S&K's involvement and the OIP's allegation that Gray made a factual misrepresentation cannot be causally related to its representation.

For the reasons stated above, the Court does not find that Plaintiffs' knowledge of the relevant statute relieves Defendant of liability, as knowing a statute exists is different from knowing what the statute means. As well, the Court finds that Plaintiffs have plausibly pled that their marketing efforts are tied to the advice—or lack of advice—Defendant provided them.

However, the Court does not find that Defendant would be liable for Plaintiff Gray making a material misrepresentation of fact, as the OIP alleges Gray falsely stated that other public pensions had already invested in Fund II when they had not. OIP, Dkt. No. [6-4] ¶ 24. This OIP allegation is untethered from any alleged legal advice and solely relates to a then-existing fact which Gray as a lay person would have known. Accordingly, Defendant's Motion is **GRANTED, in part** as to the OIP's allegation that Gray misrepresented facts regarding committed Fund II investors but **DENIED, in part** as to the remaining allegations.

c. Plaintiffs have plausibly pled that individual Plaintiffs Gray and Hubbard were Defendant's clients.

Finally, Defendant argues that Plaintiffs Gray and Hubbard were not its clients and thus cannot bring legal malpractice claims against it. Under Georgia law,

> one who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. But, crucially, such a duty extends only to those persons, or the limited class of persons who the **professional is actually aware will rely upon the information he prepared**, and thus professional liability for negligence of this kind does not extend to an unlimited class of persons whose presence is merely 'foreseeable.' This is true whether the claim is couched in terms of negligent misrepresentation, negligence, professional negligence, or professional malpractice . . . .

Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146, 1158 (11th Cir. 2011) (internal citations omitted) (applying Georgia law).

The Court finds that, as pled, Defendant was actually aware that senior officers in Gray Financial, and specifically the individual Plaintiffs, would rely on its legal advice. The individual Plaintiffs were the ones who actually *used* the legal advice given to the corporate Plaintiff, and the representation letter did not otherwise limit the scope of S&K's representation to just the corporate Plaintiff. In fact, the representation letter never explicitly defines who "You," i.e. the client, is under the agreement. Therefore, the Court finds Gray and Hubbard may bring malpractice claims at this procedural posture.

d. Plaintiffs may pursue their special damages.

Defendant next argues that Plaintiffs' reputational claims are barred by the statute of limitations, O.C.G.A. § 9-3-33, and are also otherwise unrecoverable in legal malpractice cases. O.C.G.A. § 9-3-33 provides that "injuries to the reputation" "shall be brought within one year after the right of action accrues." Citing Hamilton v. Powell, Goldstein, Frazer & Murphy, 306 S.E.2d 340 (Ga. Ct. App. 1983), Defendant claims that because Plaintiffs argue their damages flow from the bad publicity caused by the SEC investigation—and the resultant client loss—Plaintiffs' damages are barred by the statute of limitations as this action was filed on May 12, 2016, over one year after the SEC's investigation became public, and general reputational damages are barred in malpractice cases.

Plaintiffs do not dispute that their case was not filed within one year of the investigation's publication, but rather argue that they do not seek general damages for reputational harm, but rather special damages, which they argue are not barred by the one-year statute of limitations. In Hamilton, 306 S.E.2d at 340, the plaintiff—Hamilton—filed a legal malpractice lawsuit against his former law firm after he was indicted for securities fraud and later acquitted. Hamilton sought money damages for "injury to his reputation, for mental and physical strain, for humiliation, for decreased capacity to earn money, for attorney fees incurred in the defense of the criminal case and for other general damages." Id. at 341. At trial, the parties stipulated that Hamilton had incurred $38,206 in special damages—the cost of defending himself in the criminal action—and that any further damages awarded would be general damages. Defendant argued that all general damages should be barred because (1) all reputational damages were barred by a one-year statute of limitations, and (2) any remaining general damages were barred by a two-year statute of limitations. The jury returned a $1,000,000 verdict, and the trial court reduced the award to $38,206—or Hamilton's special damages.

On appeal, Hamilton argued that (1) the statute of limitation did not run on his general damages because it did not commence until he had suffered "actual, recoverable tort damages," and (2) general damages for reputational damage, mental and physical strain, humiliation, and a decreased capacity to earn money should be recoverable legal malpractice damages. The Court of Appeals first

found that O.C.G.A. § 9-3-33 would apply to legal malpractice actions, and thus any action for general reputational damages had to be filed within one year. But, the Court found that regardless of whether the statute of limitations applied,[4] plaintiff "was unable to recover general damages for damage to reputation, mental and physical strain, humiliation, or decreased earning capacity in this case due to the absence of allegations and proof of physical injury or wanton, voluntary or intentional misconduct." Id. at 344. However, Hamilton was able to recover his legal expenses, or his special damages. Id.

Here, Plaintiffs do not seek "general damages"[5] for reputational harm, but rather seek "concrete special damages[6] in the form of financial injury through lost clients, lost business value, and exposure to significant civil monetary liability." Dkt. No. [9] at 23; see also Compl., Dkt. No. [1] at ¶¶ 57-63. Special damages are appropriate even following Hamilton, and thus the Court will not limit Plaintiffs' damages at this time. However, the Court does remain mindful of Hamilton's

[4] The Court of Appeals did not hold when the cause of action would have accrued, but suggested that there was some authority which suggested it accrued when the malpractice itself occurred. Hamilton, 306 S.E.2d at 343.

[5] General damages are "Damages that the law presumes follow from the type of wrong complained of; specif., compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved." DAMAGES, Black's Law Dictionary (10th ed. 2014).

[6] Special damages are "Damages that are alleged to have been sustained in the circumstances of a particular wrong" and must be proved. DAMAGES, Black's Law Dictionary (10th ed. 2014).

holding, and thus Plaintiffs are cautioned that general reputational damages will not be allowed.

2. Plaintiffs' Alternative Claims.

Defendant next moves to dismiss Plaintiffs' breach of fiduciary duty and simple negligence claims as duplicative of their legal malpractice claim. Defendant further argues that Plaintiffs' simple negligence claim should be dismissed, as any evaluation of Defendant's conduct would necessary involve the Court to consider professional standards, and thus the simple negligence claim cannot stand.

Plaintiffs respond that their breach of fiduciary duty and simple negligence claims are *bona fide* alternative claims under Rule 8(d)(2). However, Plaintiffs do not respond to Defendant's argument that their simple negligence claim cannot stand because professional standards would dictate whether Defendant was negligent. See LR 7.1B, NDGa.

First, the Court finds that Plaintiffs' fiduciary duty claim is appropriate at this stage of the pleading, especially in light of the fact that it is disputed whether the individual Plaintiffs were Defendant's clients. See Fed. R. Civ. P. 8(d)(2); Both v. Frantz, 629 S.E.2d 427, 431 (Ga. Ct. App. 2006) (fiduciary duty claim not merely duplicative of legal malpractice in the event the jury finds no evidence of attorney-client relationship). However, the Court finds that Plaintiffs cannot bring simple negligence as an alternative claim because any assessment of Defendant's actions will require the Court to determine if Defendant met its

professional standard of care. Grady Gen. Hosp. v. King, 653 S.E.2d 367, 368 (Ga. Ct. App. 2007) ("If the professional's allegedly negligent action requires the actor to exercise professional skill and judgment to comply with a standard of conduct within the professional's area of expertise, the action is for professional negligence."). Defendant's Motion is thus **GRANTED, in part** as to Plaintiffs' simple negligence claim but **DENIED, in part** as to Plaintiffs' breach of fiduciary duty claim.

3. Attorney Fees and Punitive Damages.

Defendant next moves to dismiss Plaintiffs' attorney fees and punitive damages claims, arguing that these claims cannot stand if all other claims have been dismissed, and even if not, there is no evidence that Defendant was willful or wanton. At this stage of the litigation, the Court denies Defendant's request as whether Defendant acted in bad faith or was willful is a factual issue which is better resolved later in the proceeding. Arch Ins. Co. v. Bennett, CIV. A. 2:08-CV0075-RWS, 2009 WL 5175591, at *5 (N.D. Ga. Dec. 21, 2009) ("If Plaintiff is successful on any of the still surviving claims, it may be entitled to attorneys' fees."); Moore v. Federated Retail Holdings, Inc., 6:07-CV-1557-ORL-31GJK, 2008 WL 596109, at *2 (M.D. Fla. Feb. 29, 2008) ("Plaintiff's entitlement to punitive damages is a factual issue that need not be decided at [the motion to dismiss] stage of the litigation."). Accordingly, Defendant's Motion is **DENIED** as to attorney fees and punitive damages.

VI. Conclusion

Based on the foregoing, Defendant's Motion to Dismiss is **GRANTED, in part** and **DENIED, in part**. Plaintiffs' (1) legal malpractice claim based upon the OIP's allegation that Gray misrepresented facts regarding committed Fund II investors; and (2) simple negligence claim are **DISMISSED**. All other claims remain.[7]

IT IS SO ORDERED this 1st day of December, 2016.

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE

[7] Further, the Court **STRIKES** Ex. B, Dkt. No. [6-3], from the Record. Should the parties need to include the emails in future documents—such as a motion for summary judgment—the Court will decide whether these emails are privileged at that juncture with the benefit of briefing on the subject.

EXHIBIT 6

[redacted]

FOIA CONFIDENTIAL TREATMENT REQUESTED BY GRAY & CO. [redacted]

EXHIBIT 7

SEWARD & KISSEL LLP
ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004
(212) 574-1200

July 31, 2012

27491 Gray & Company

Gray & Company
3333 Piedmont Road, Suite 1250
Atlanta, Georgia 30305

For Professional Services Rendered Through June 30, 2012:

Matter Number	Matter Name	Fee Amount	Disbursement Amount	Total Amount
27491-0005	GrayCo Alternative Partners II, LP	$3,905.00	$0.00	$3,905.00

Invoice Date: 31-Jul-12
Invoice Number: 199669
Through 30-Jun-12

27491 Gray & Company
0005 GrayCo Alternative Partners II, LP

	Services	Atty	Hours
2-Apr-12	Discussed new private equity fund of funds with B. Hubbard.	AS	0.25
3-Apr-12	Discussed separate portfolio strucure (i.e., opt out mechanism) re: new PE fund II.	AS	0.25
8-Jun-12	Looked into GA statutes regarding restrictions on alternative investments by eligible large retirement systems; email correspondence with client; discussed with RVG.	AS	1.00
8-Jun-12	Conference with A. Segal re: limitation on government plan investment in fund; reviewed research re: same.	RVG	0.25
15-Jun-12	Drafted offering documents.	AS	2.50
28-Jun-12	Review draft of GrayCo II LPA and CPOM.	PEP	1.50
29-Jun-12	Drafted offering documents.	AS	0.75
29-Jun-12	Conference with Ms. Segal regarding exclusing certain LPs from hedge fund investments.	PEP	0.50
	Total Hours		7.00
	Total Services.....$		3,905.00

Disbursements Recorded Through June 30, 2012

Total Disbursements.....$	0.00
Total.....$	3,905.00

Invoice Date: 31-Jul-12
Invoice Number: 199669
Through 30-Jun-12

27491 Gray & Company
0005 GrayCo Alternative Partners II, LP

Atty No. / Init.	Class	Name	Hours	Rate	Value
0852 RVG	Partner	Robert Van Grover	0.25	850.00	212.50
0630 PEP	Counsel	Peter Pront	2.00	825.00	1,650.00
1628 AS	Associate	Alexandra Segal	4.75	430.00	2,042.50
			7.00		3,905.00

SEWARD & KISSEL LLP
ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004
(212) 574-1200

Invoice Date 31-Jul-12
Invoice Number 199669
Through 30-Jun-12

27491 Gray & Company
0005 GrayCo Alternative Partners II, LP

Total Billed..... 3,90[illegible].00

Payment of bill is d[illegible] upon receip[illegible]

Please return this page when making payment to ensure proper credit.

Wire transfer instructions:

Name of Bank: Citibank, N.A.
Address of Bank: 120 Broadway
New York, NY 10271
ABA Number: [redacted]
Name of Account: Seward & Kissel Regular Account
Account Number: [redacted]

TAX IDENTIFICATION NUMBER [redacted]

EXHIBIT 8

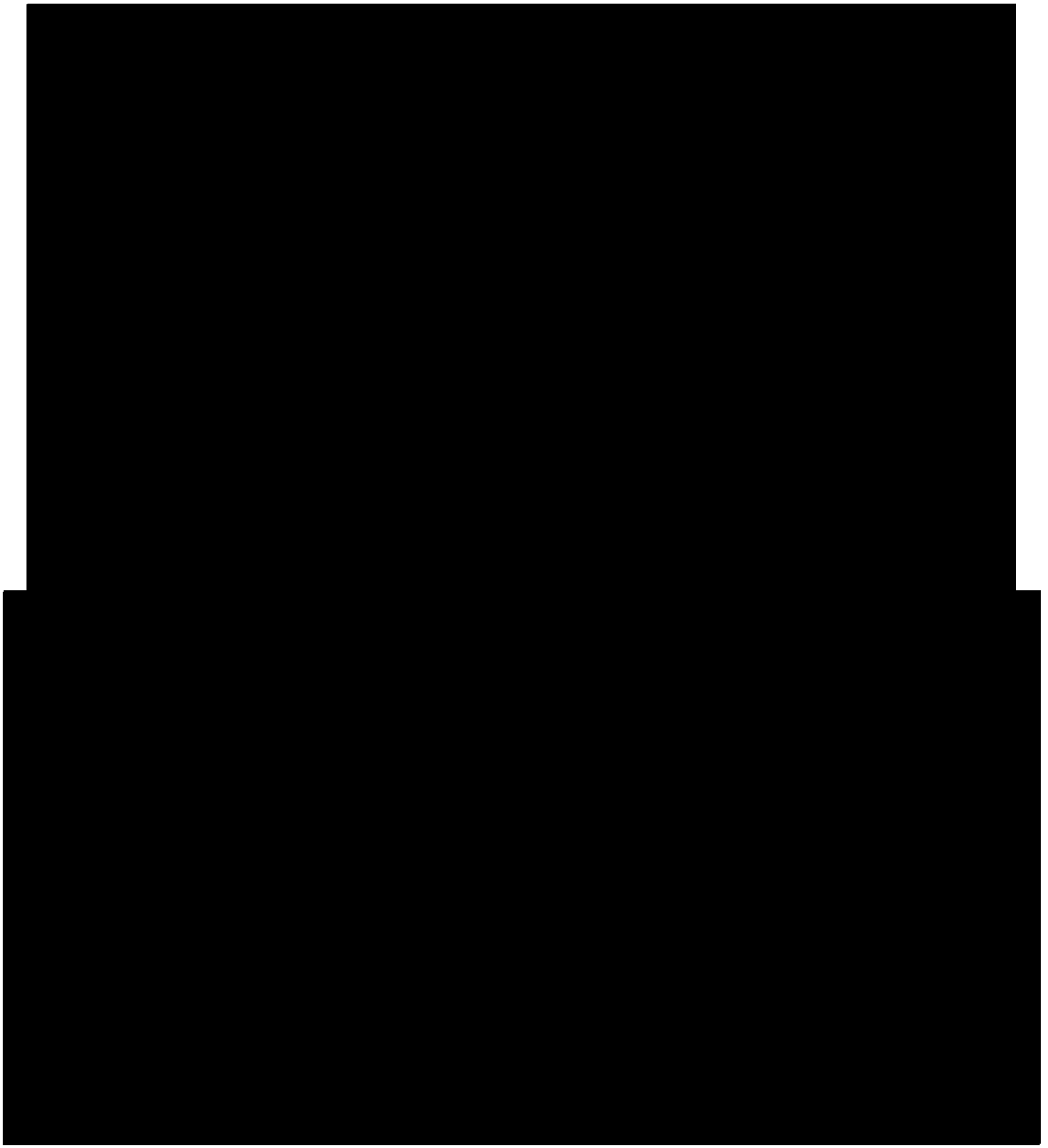

EXHIBIT 9

Copy Number 008

City of Atlanta General Employees' Pension Fund

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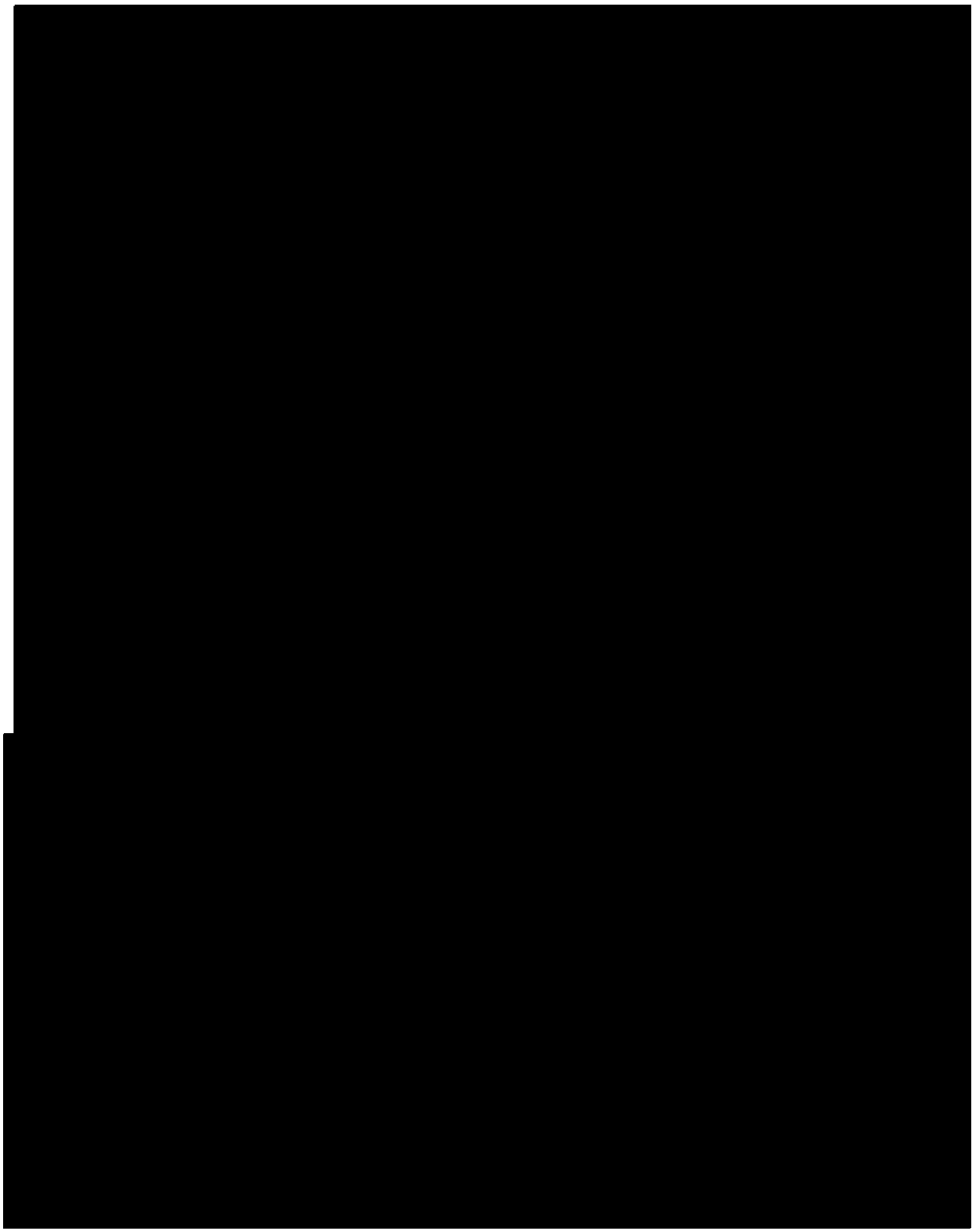

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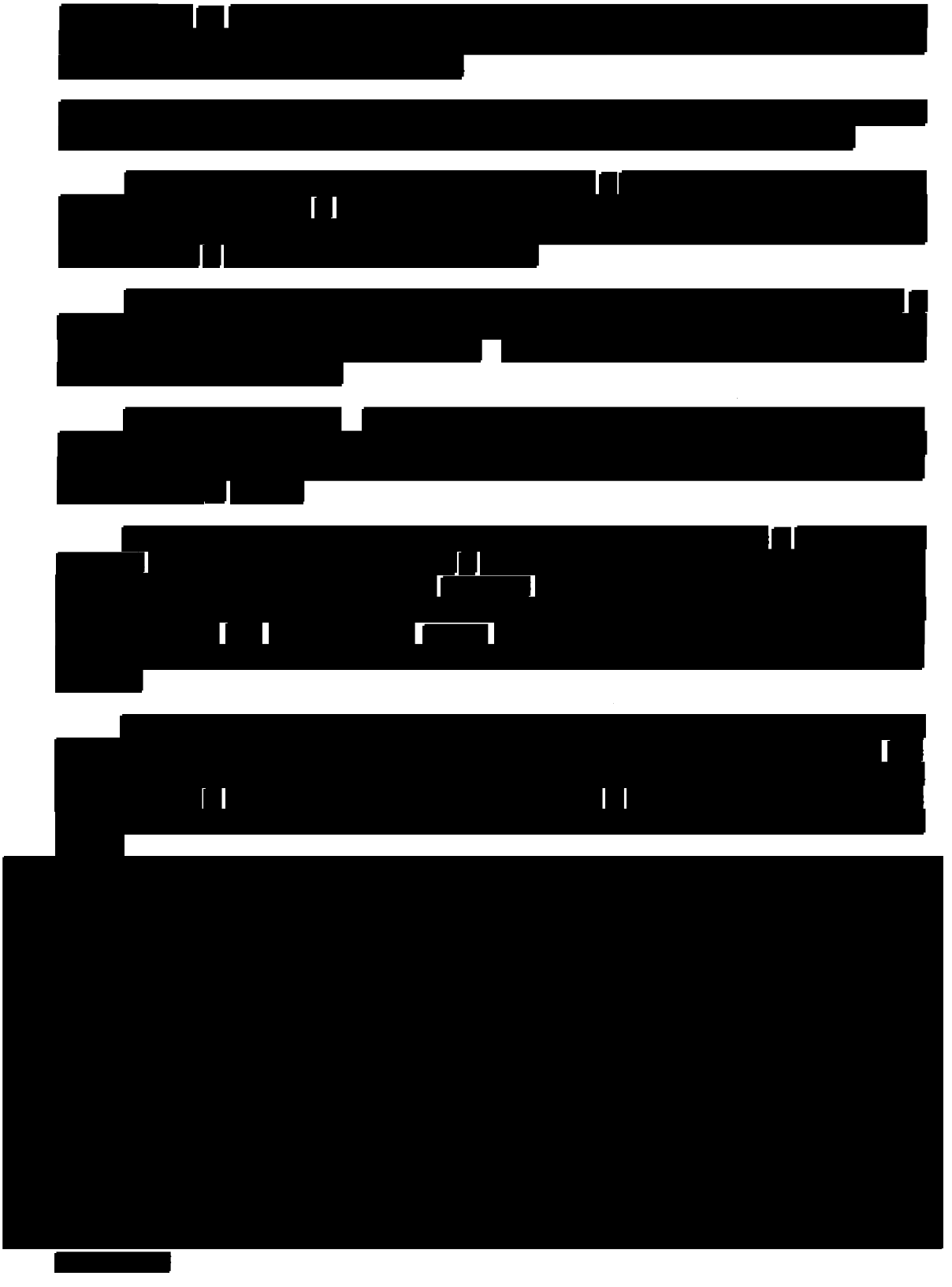

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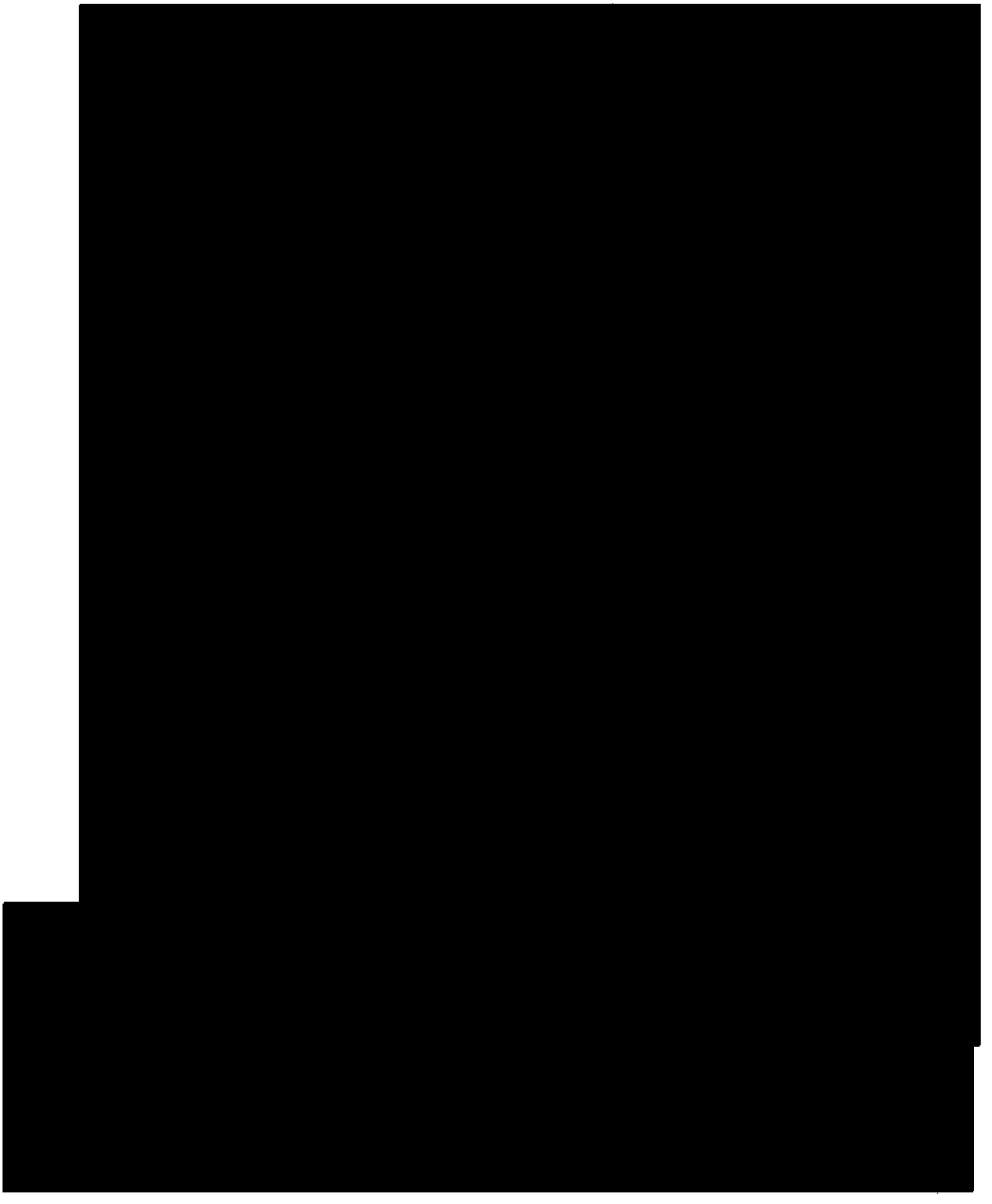

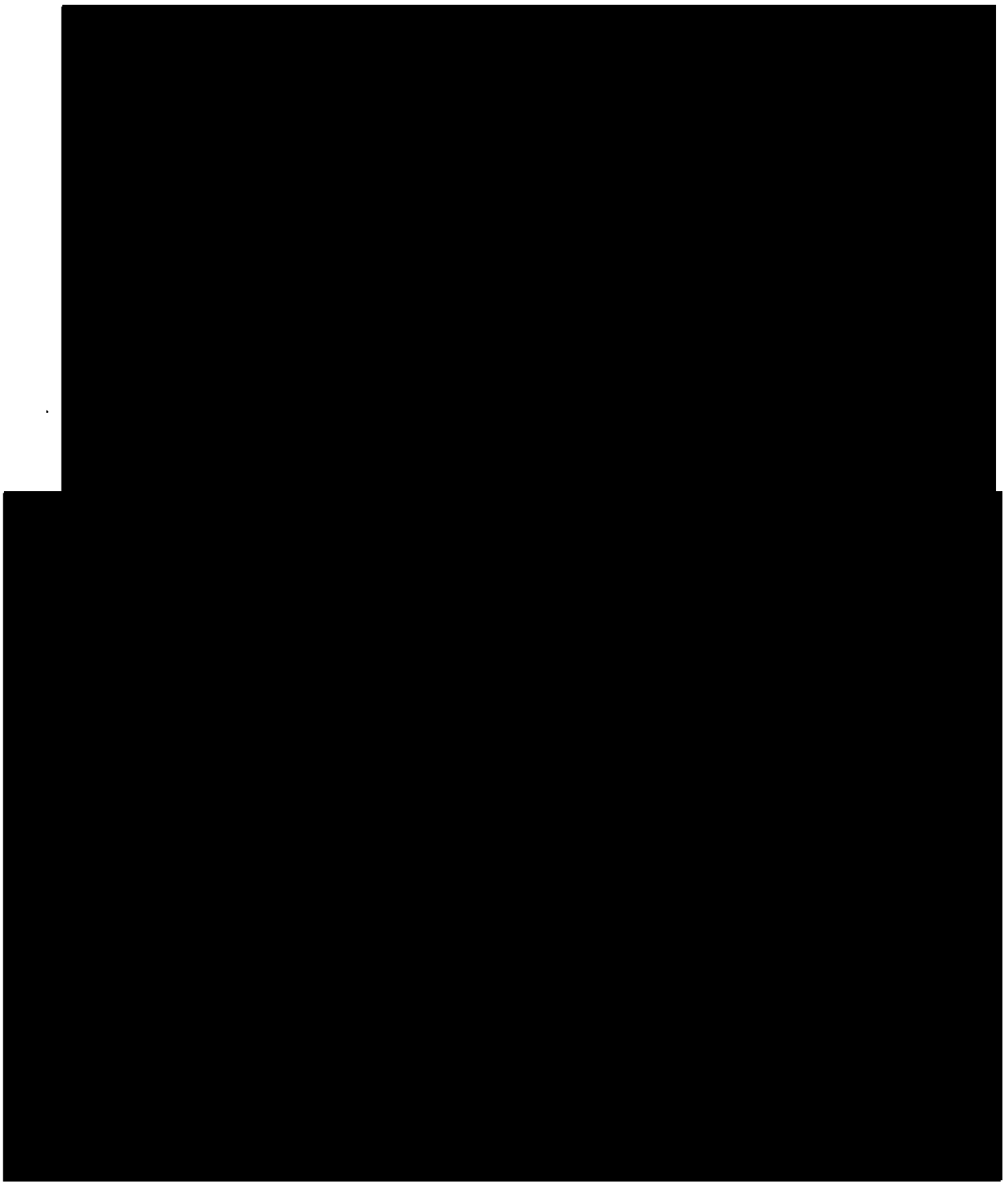

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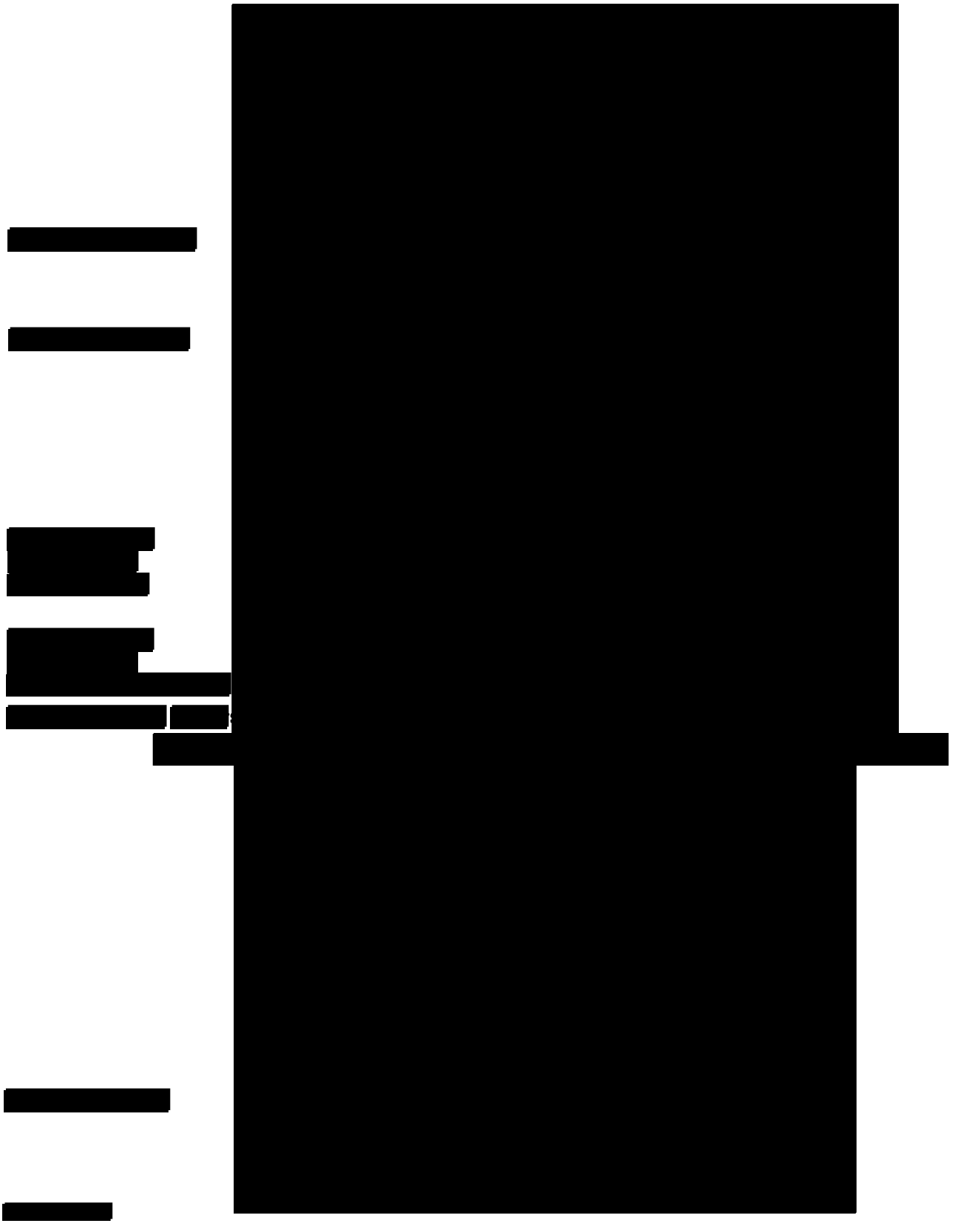

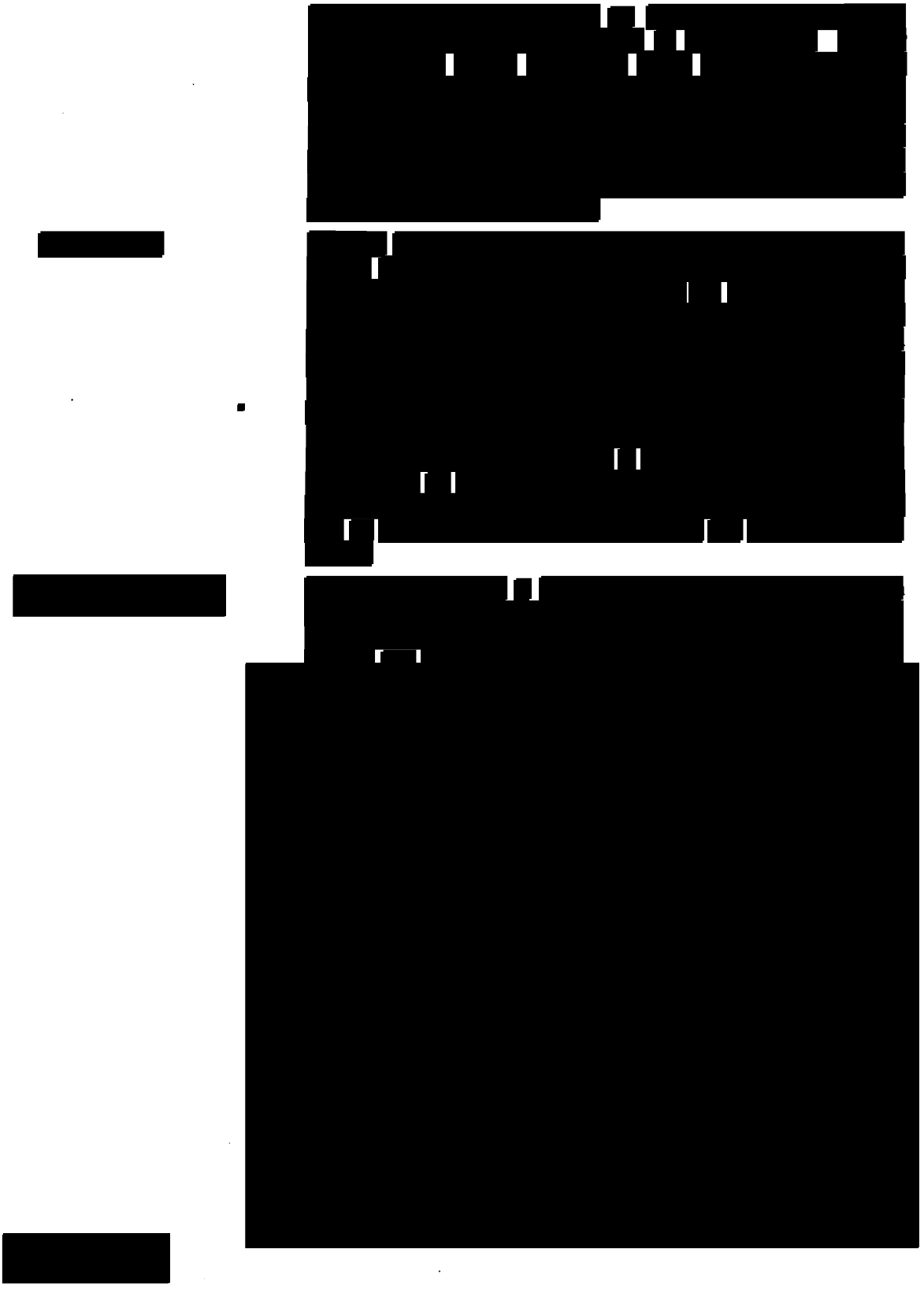

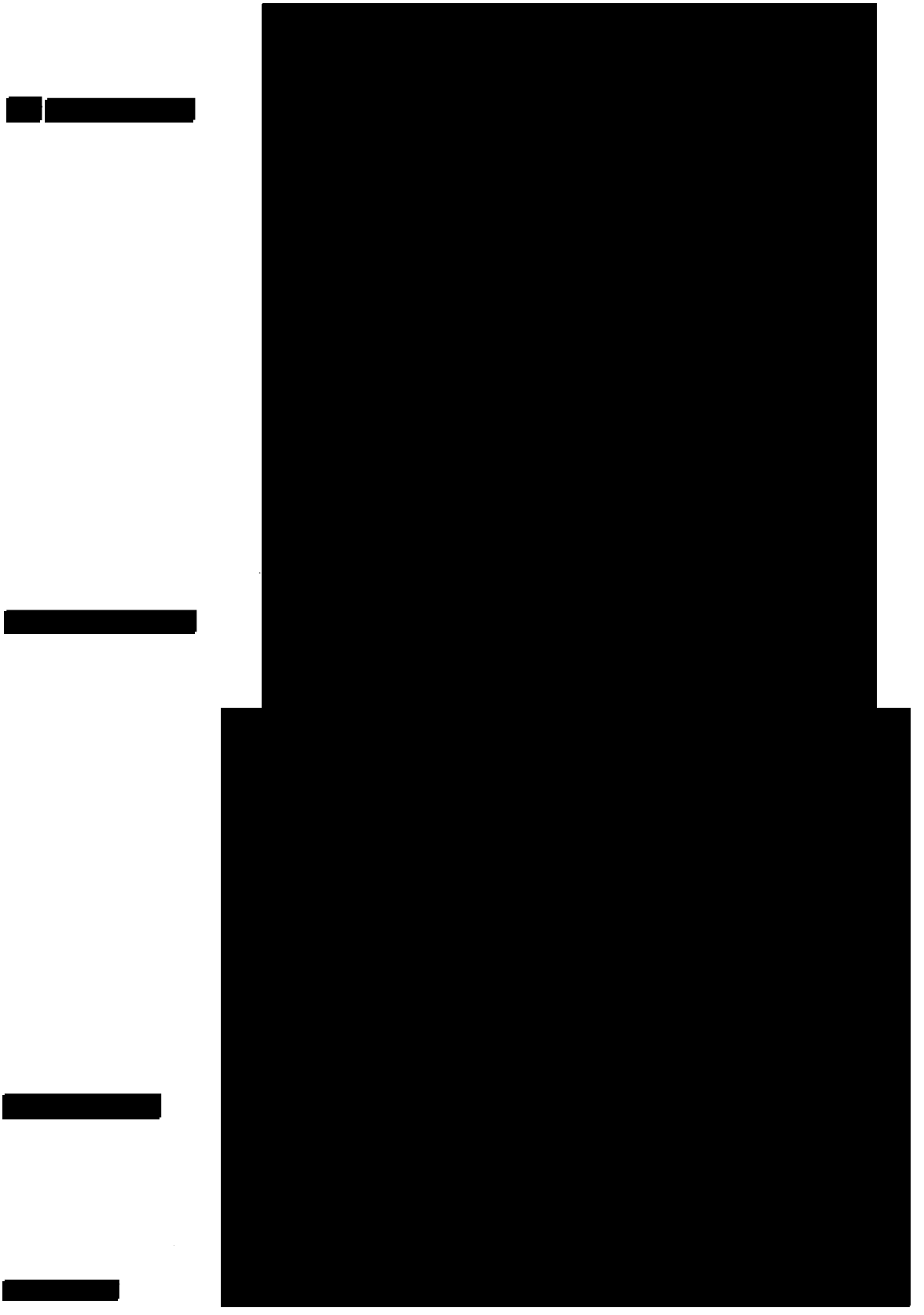

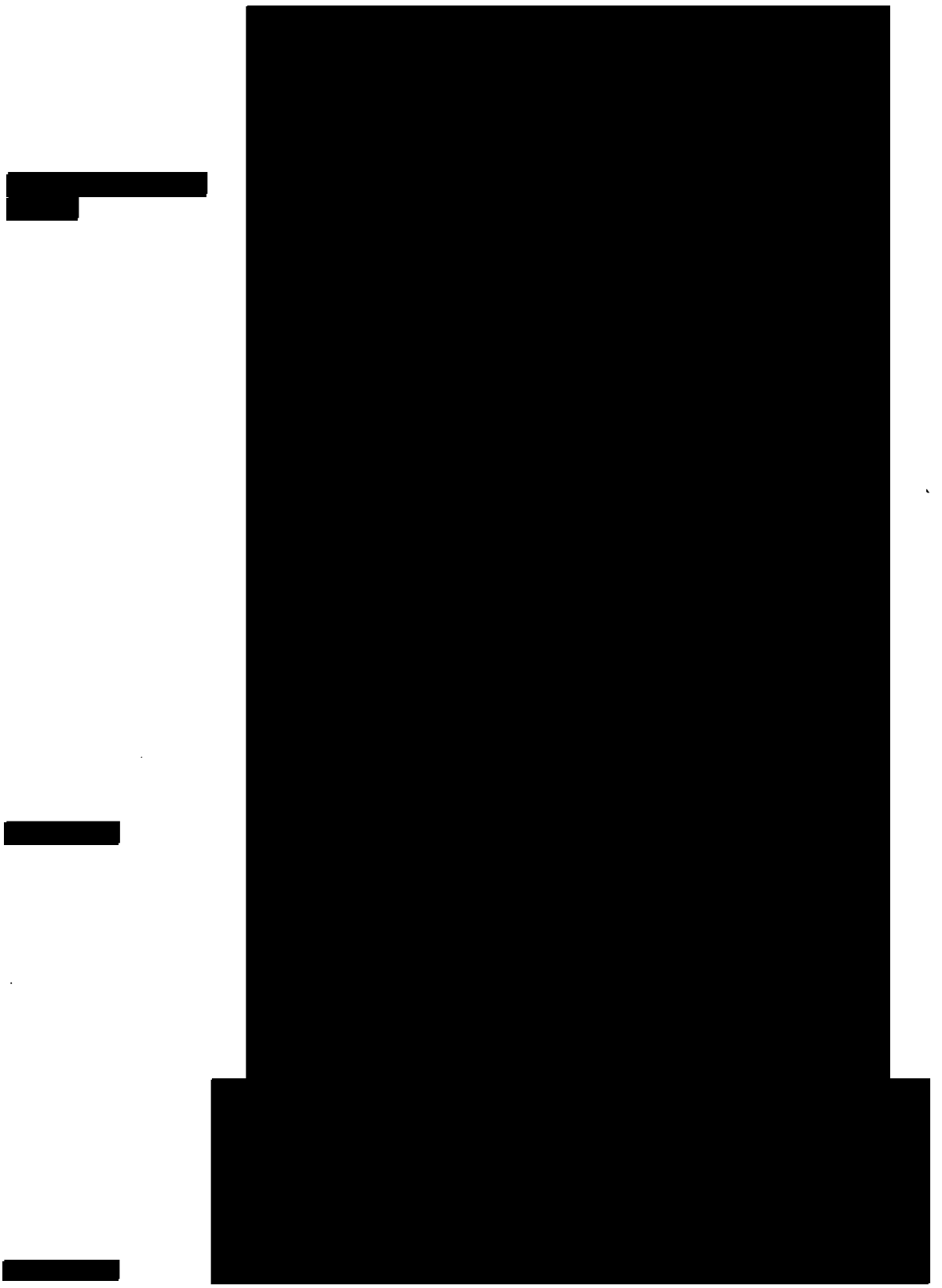

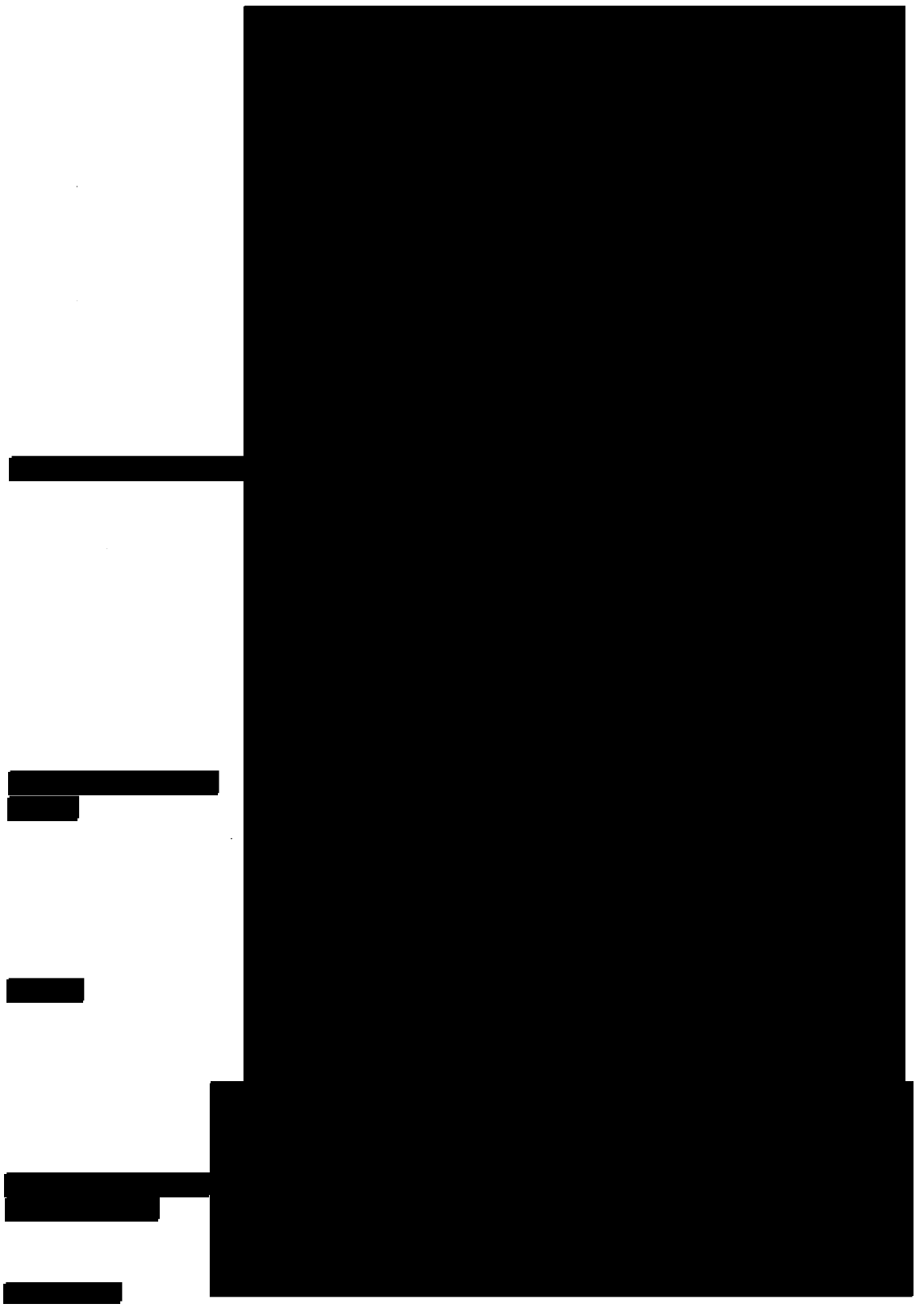

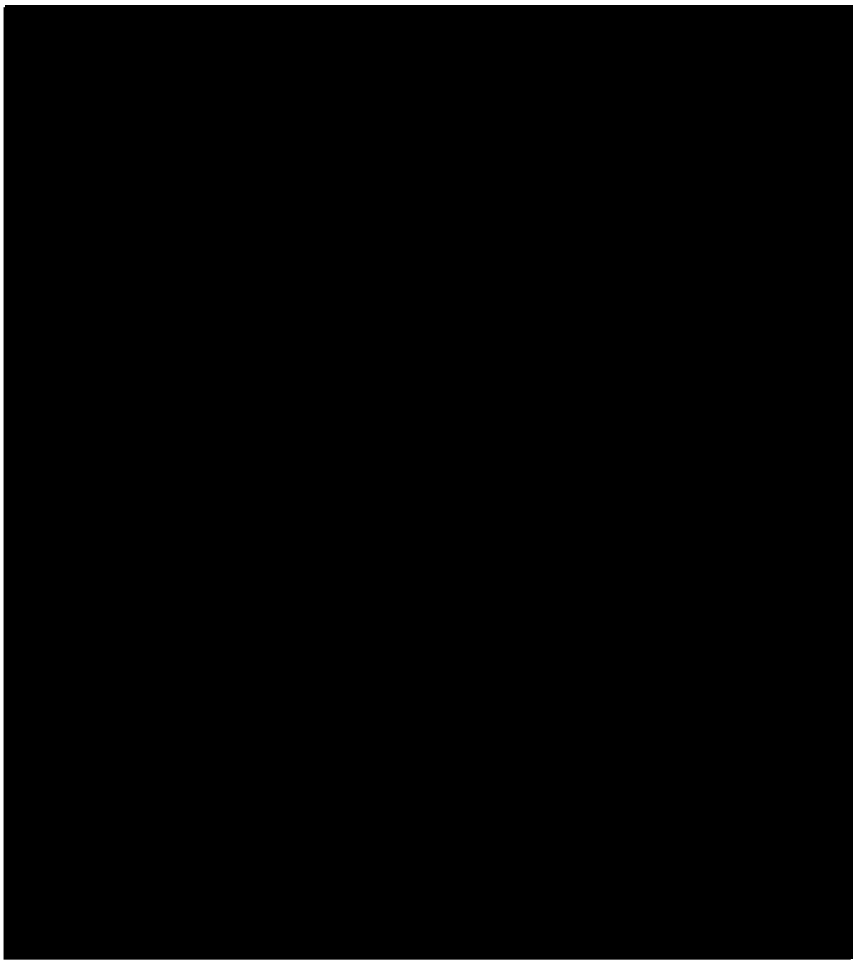

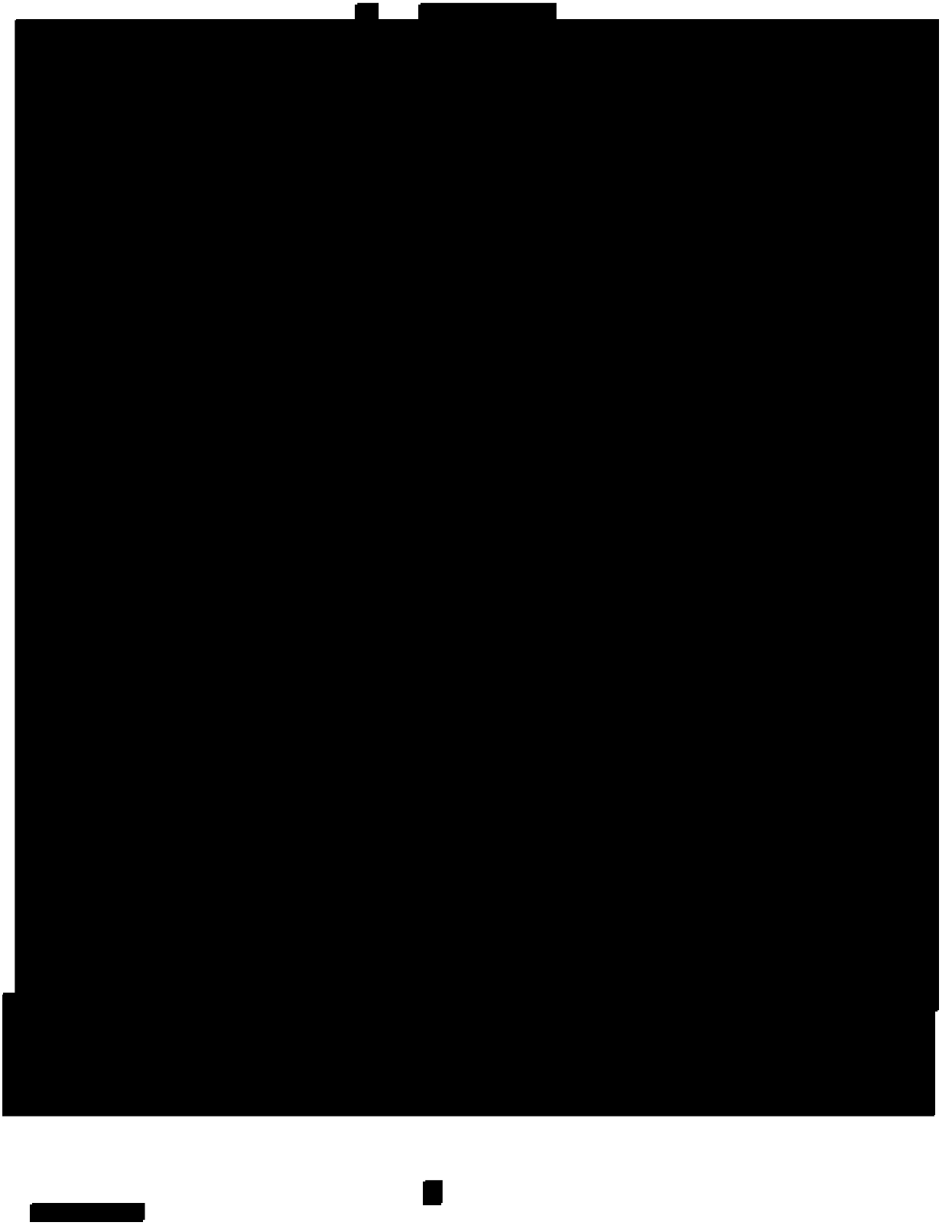

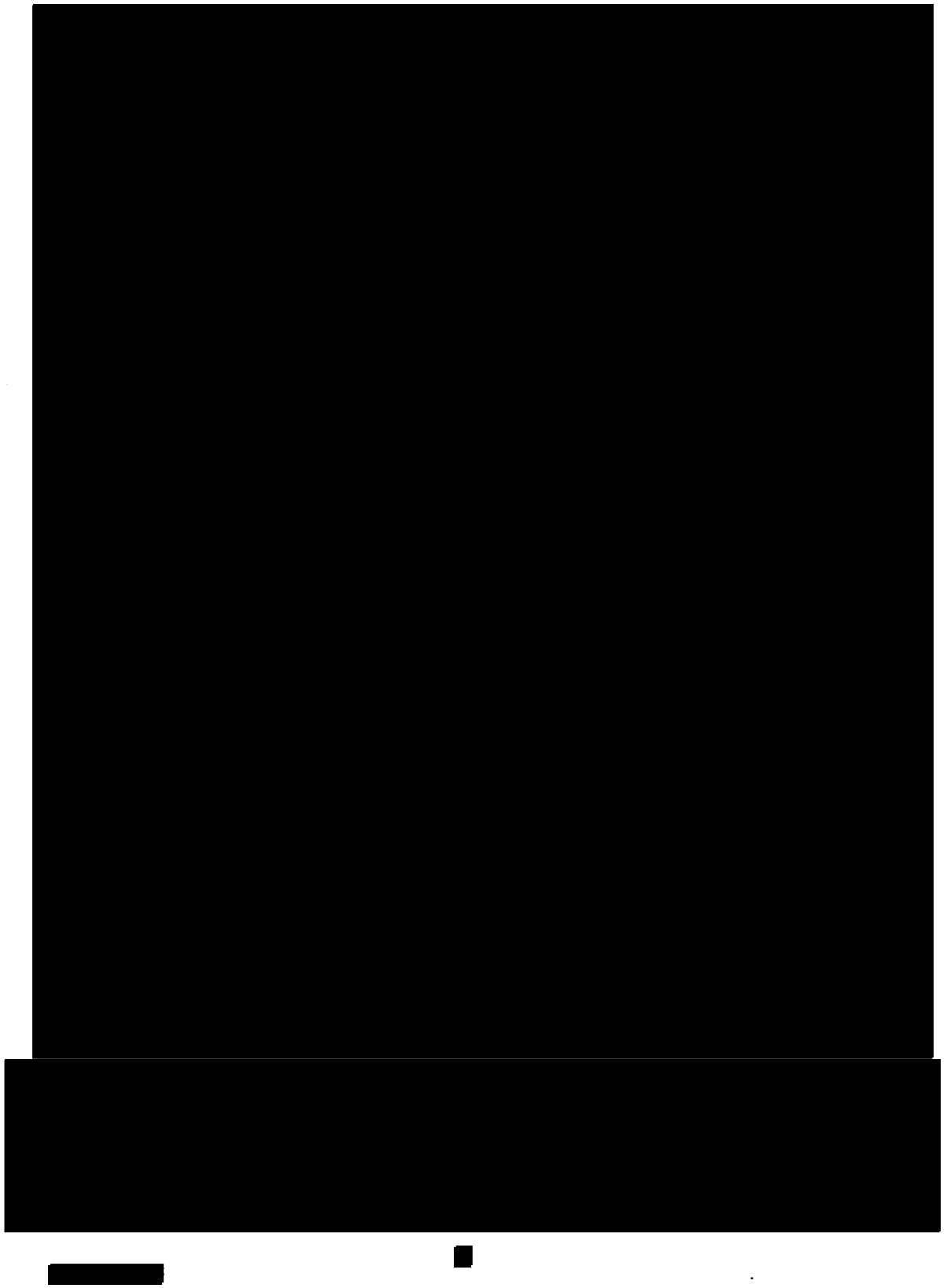

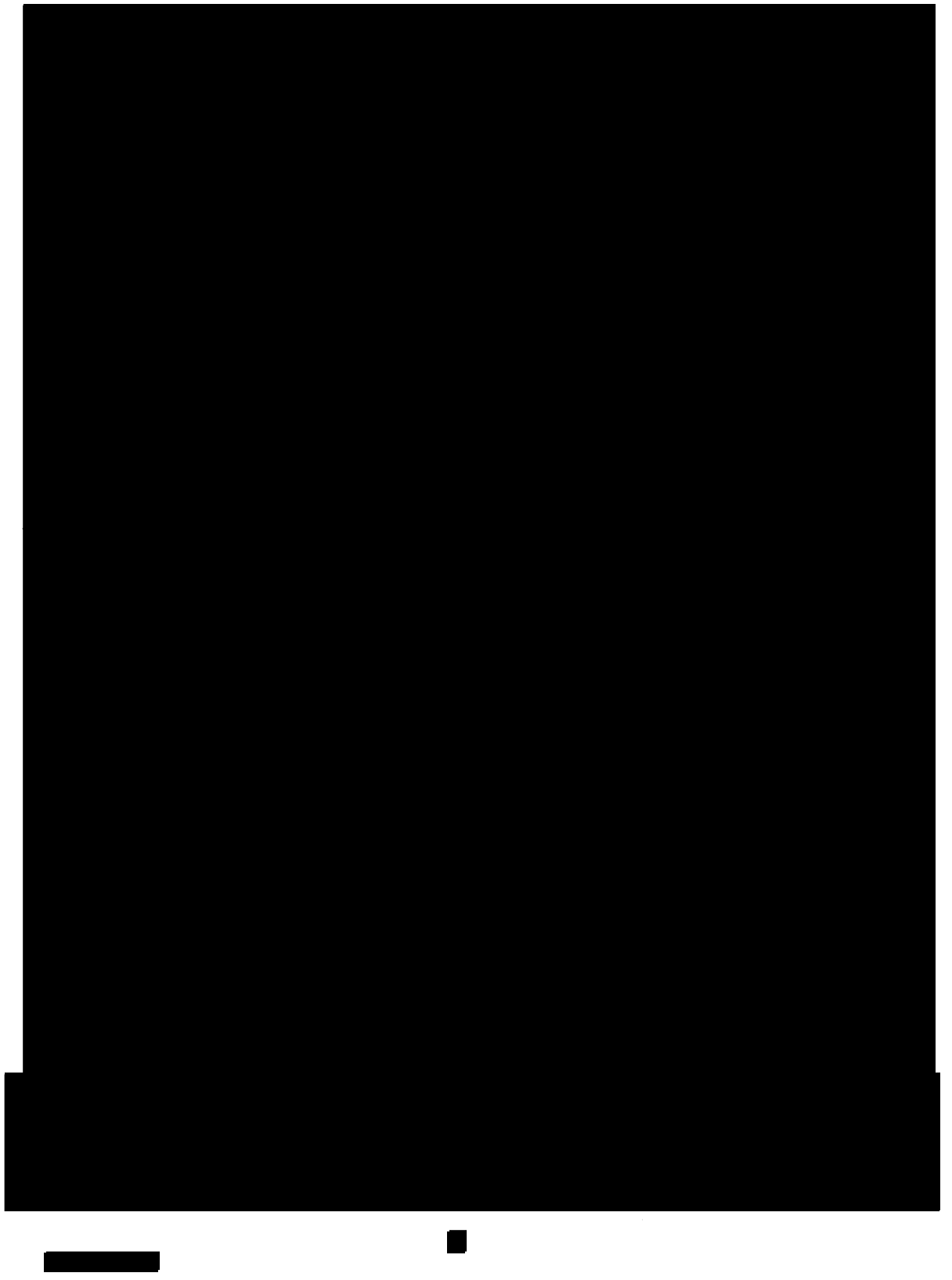

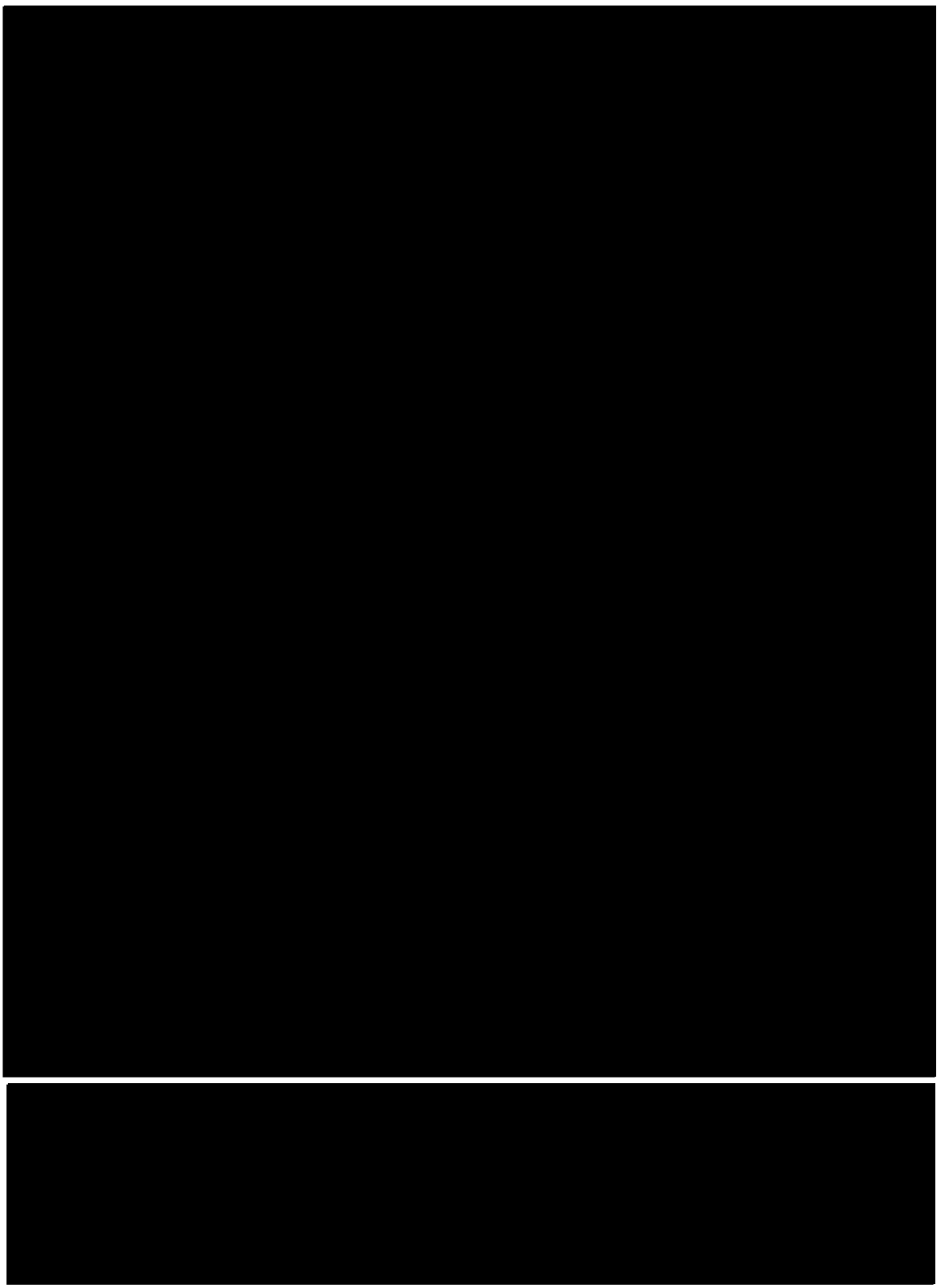

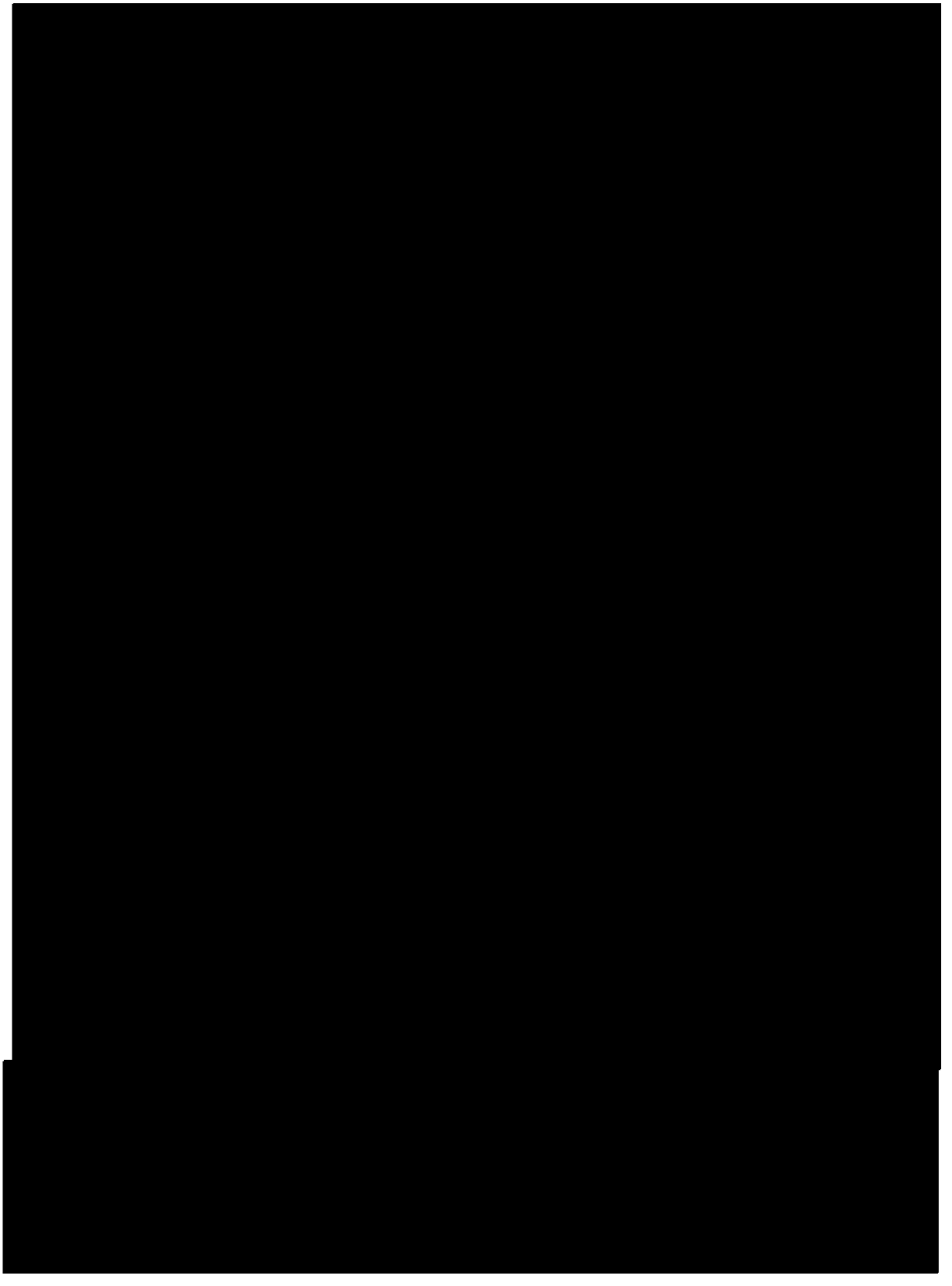

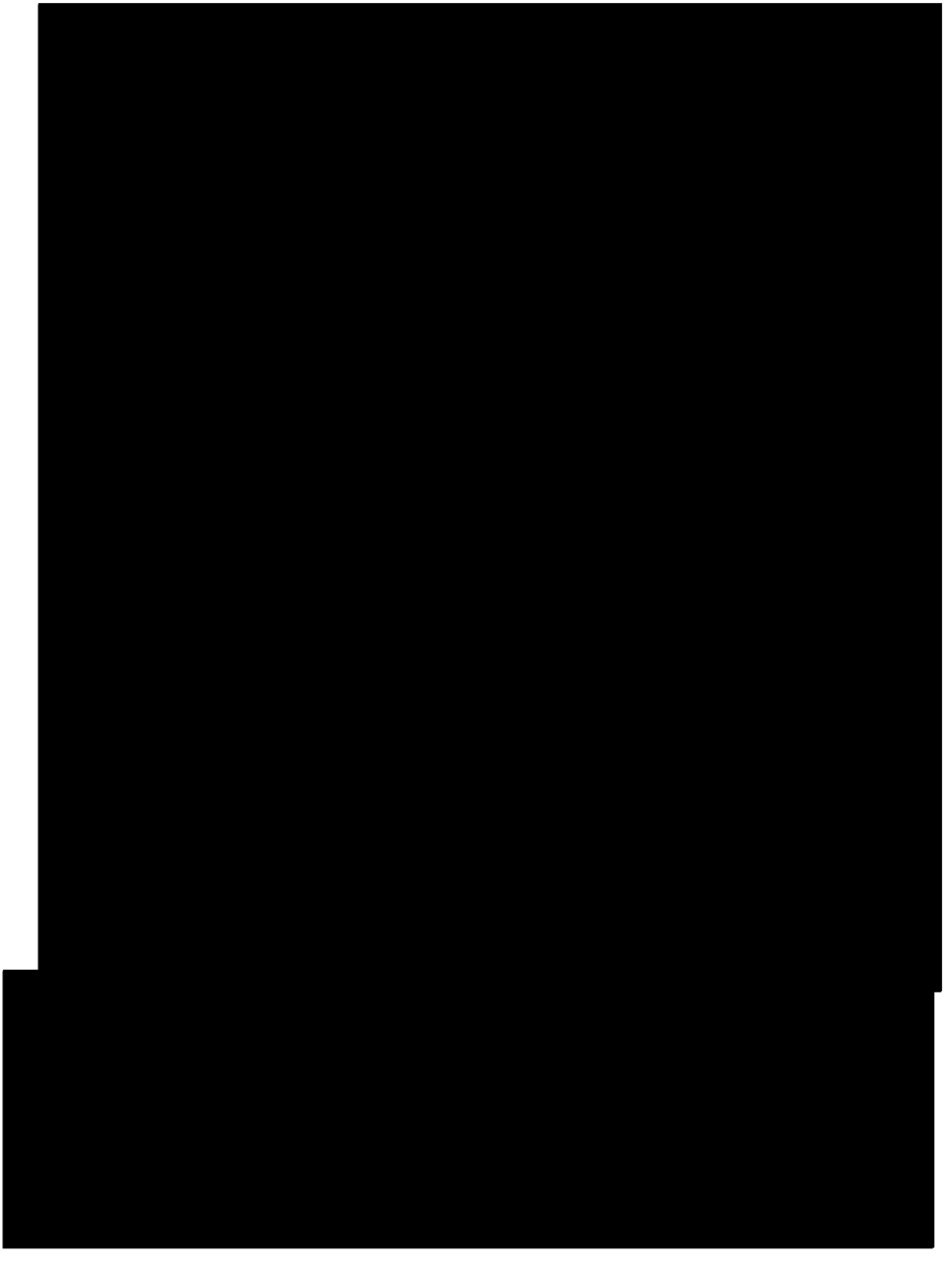

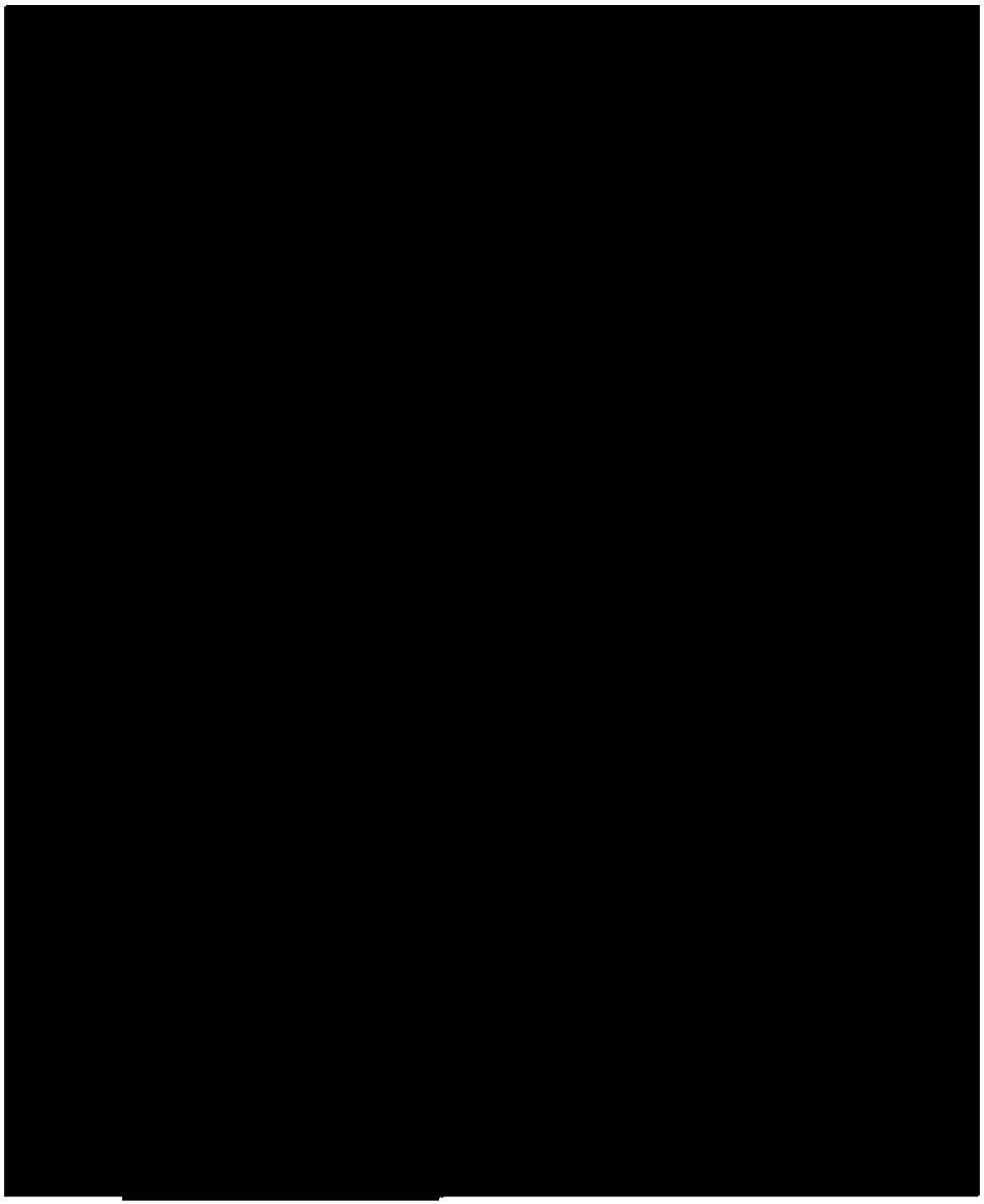

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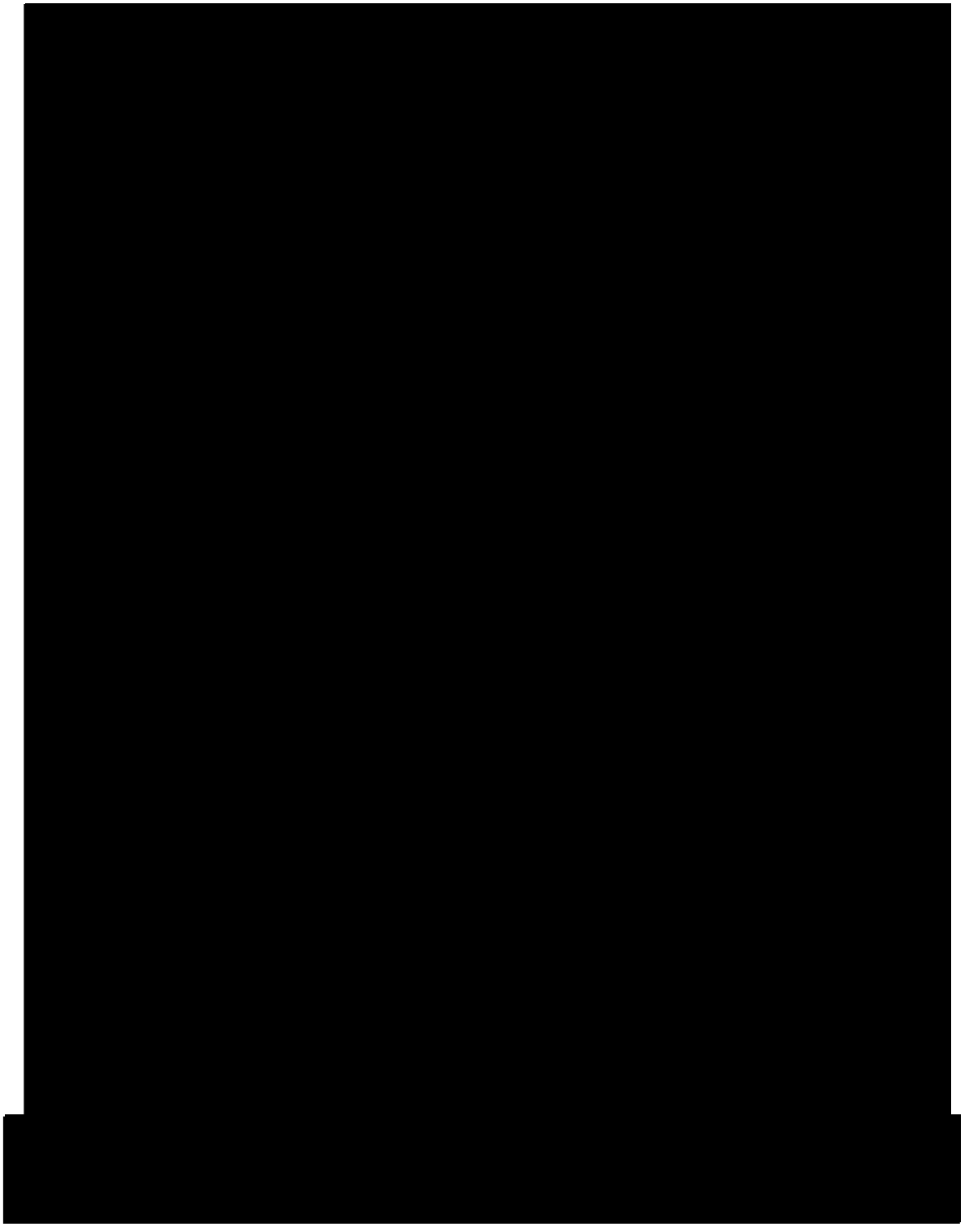

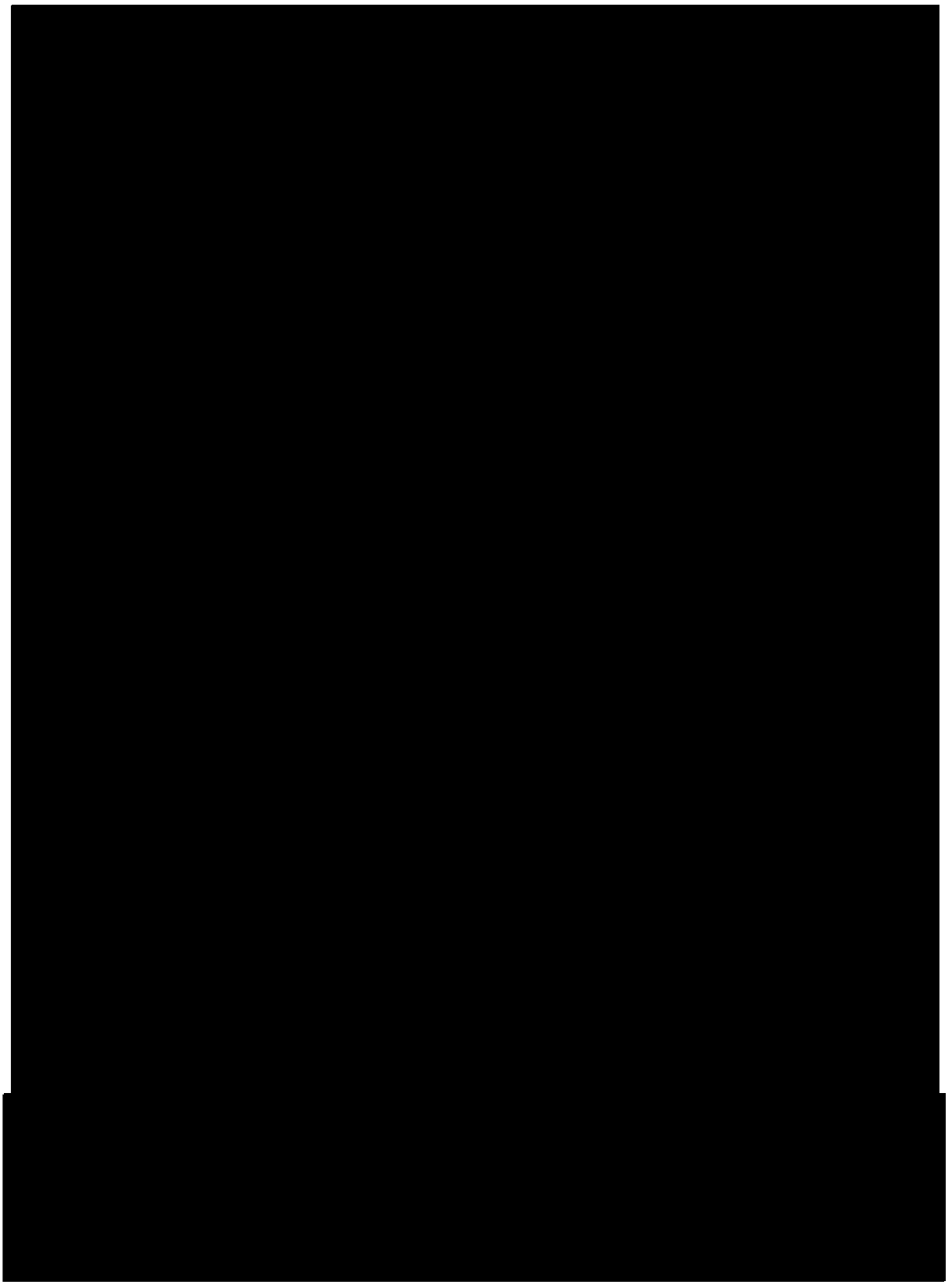

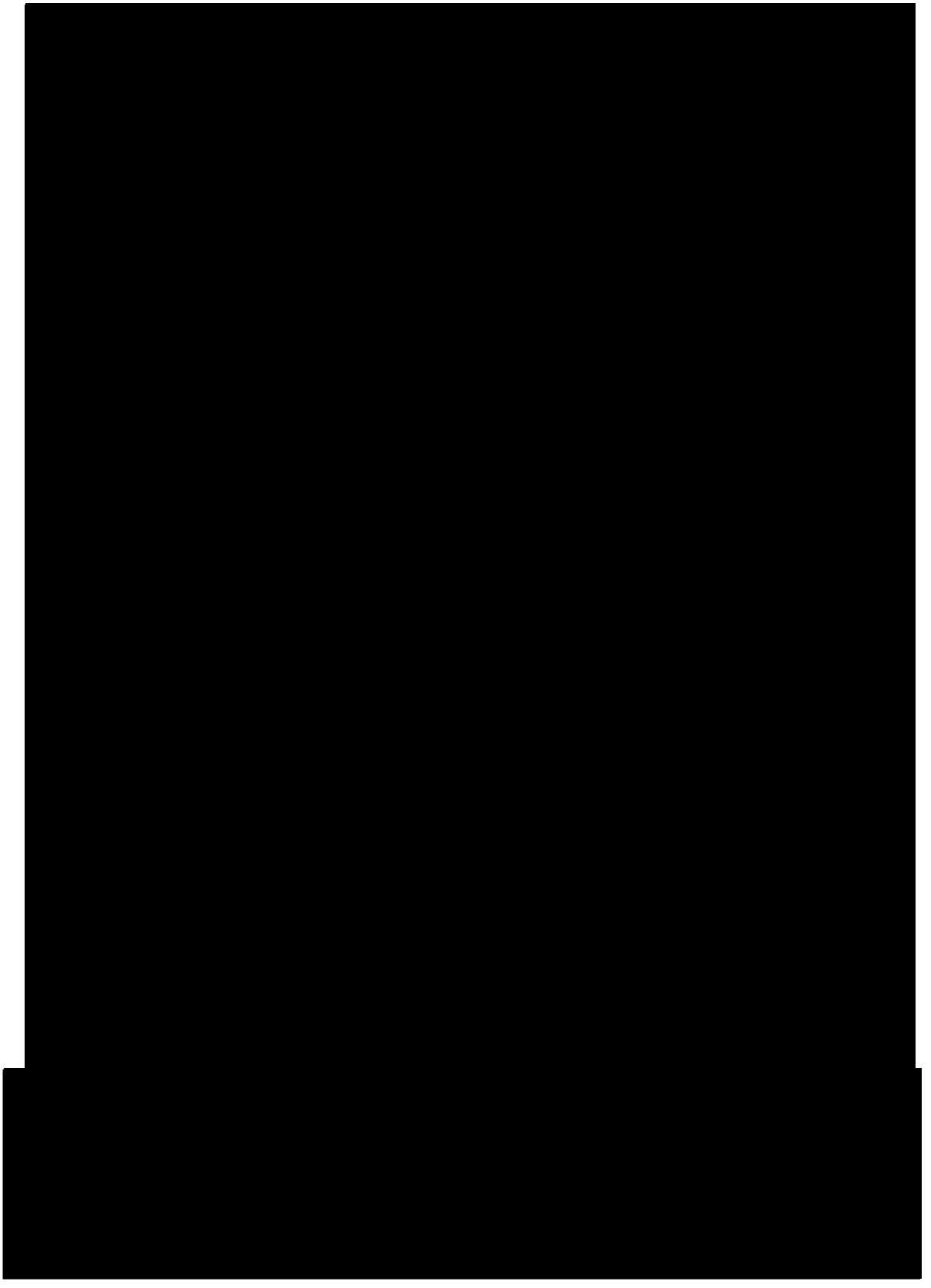

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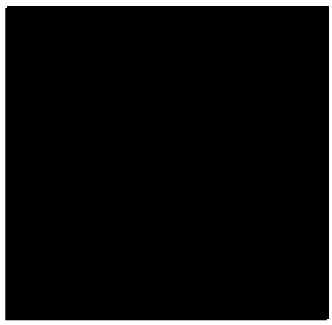
EXHIBIT 10



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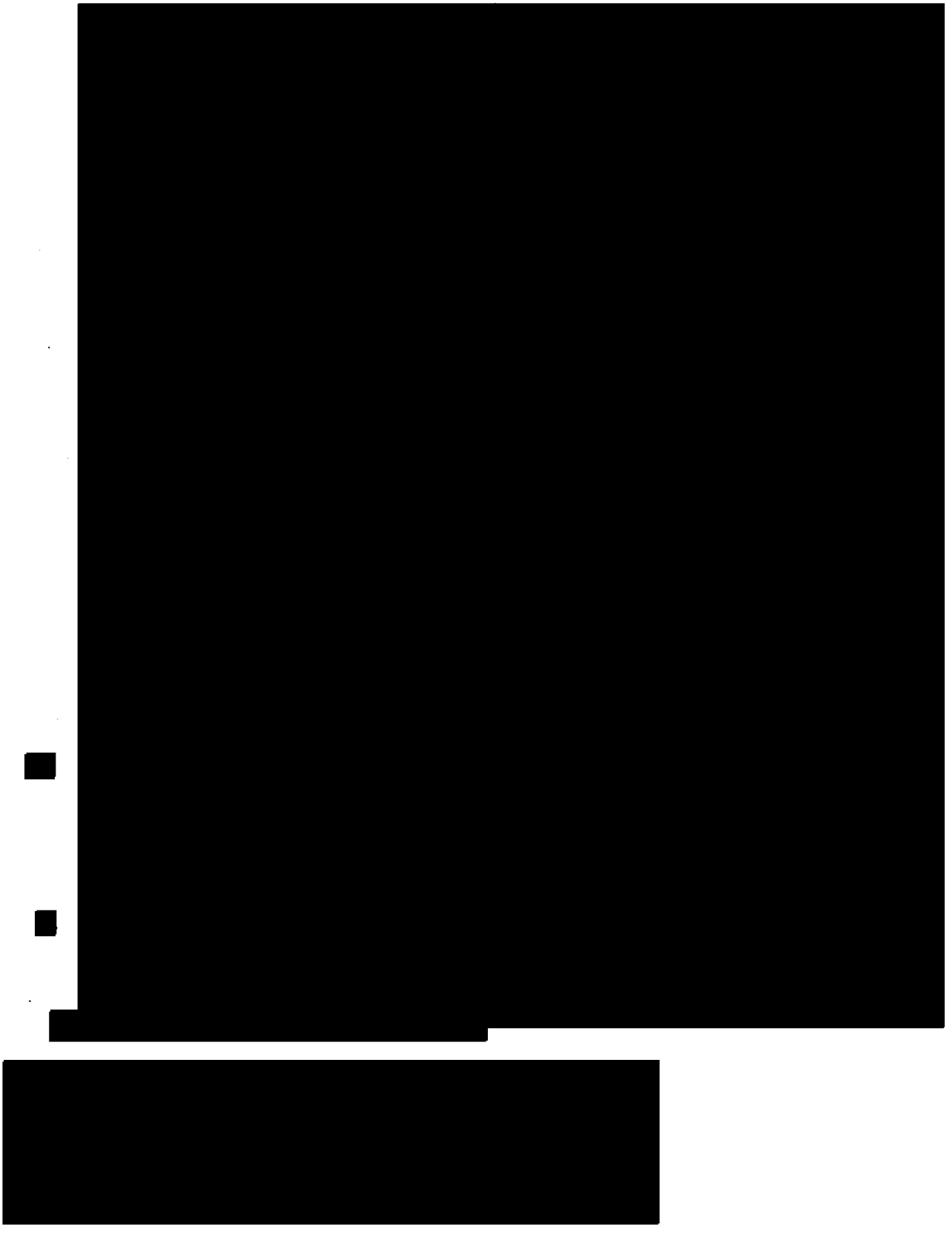

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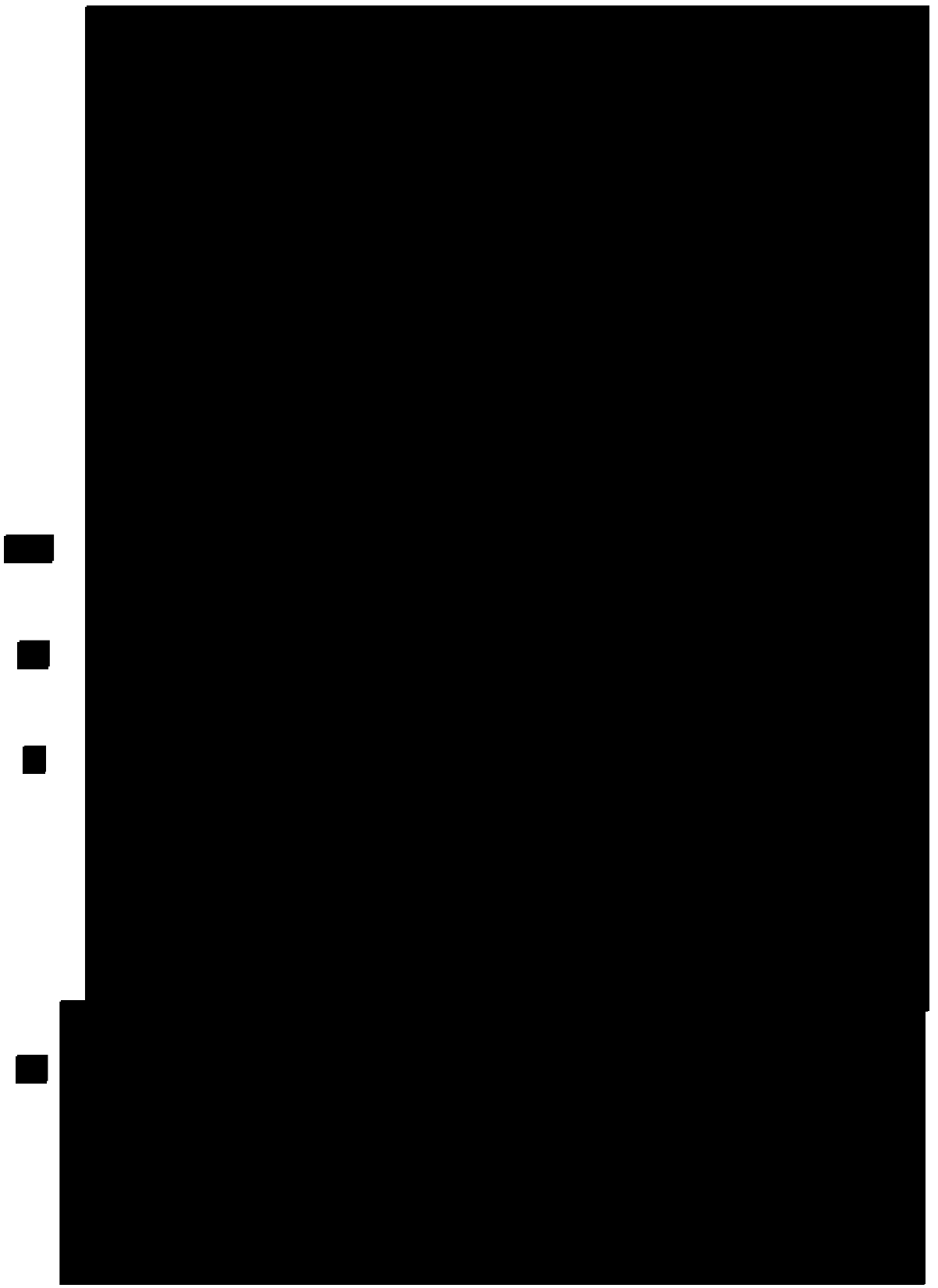

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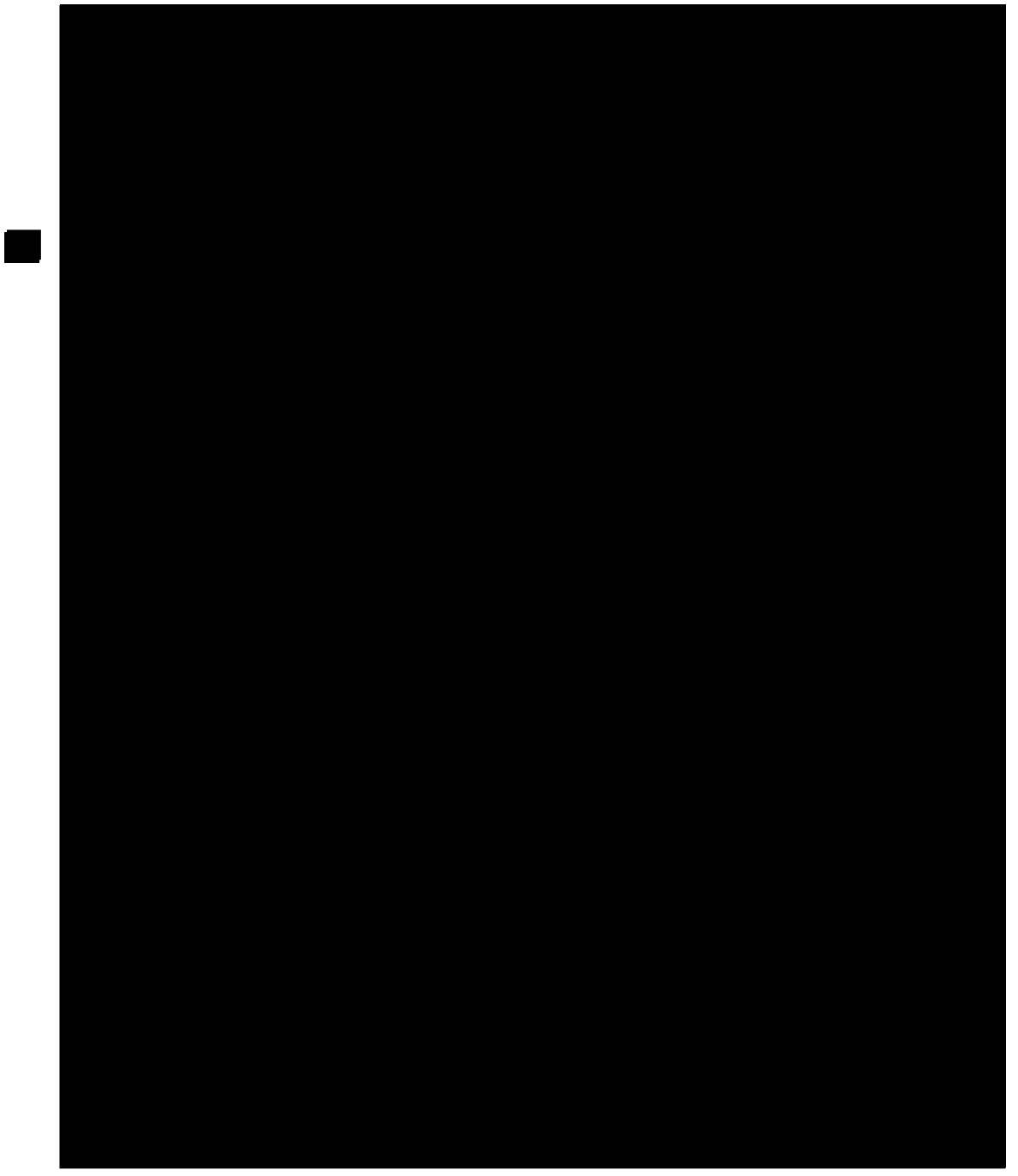

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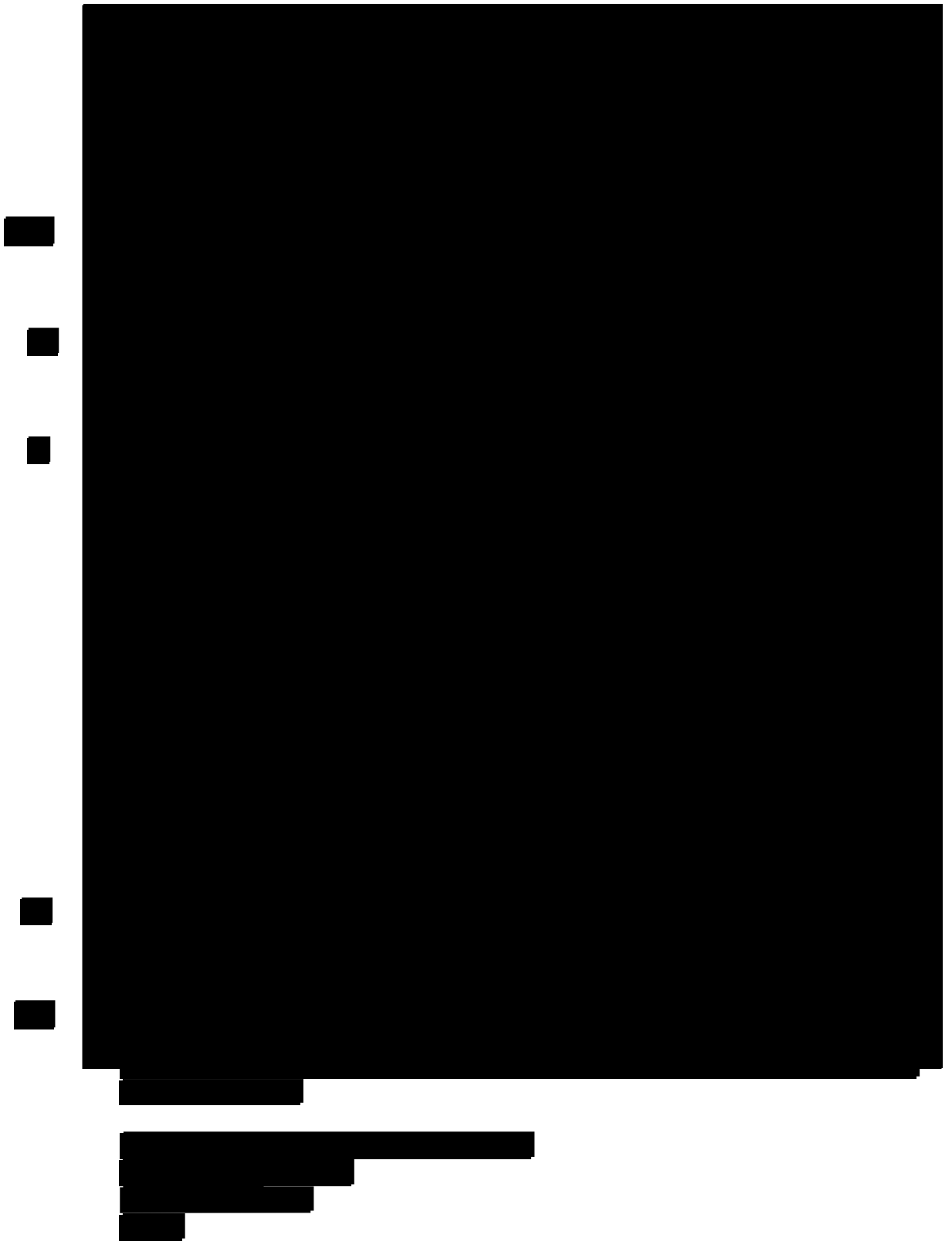

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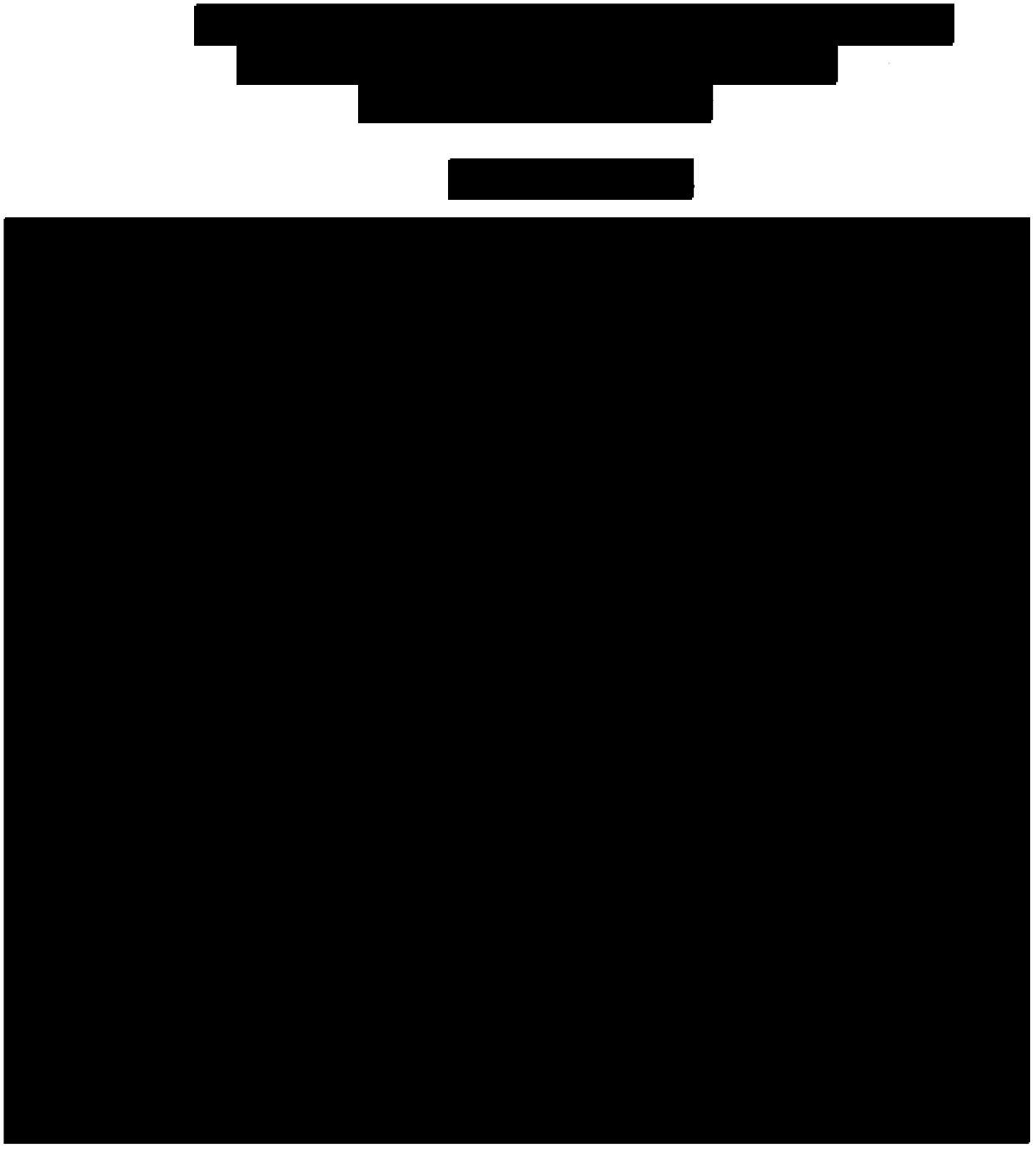

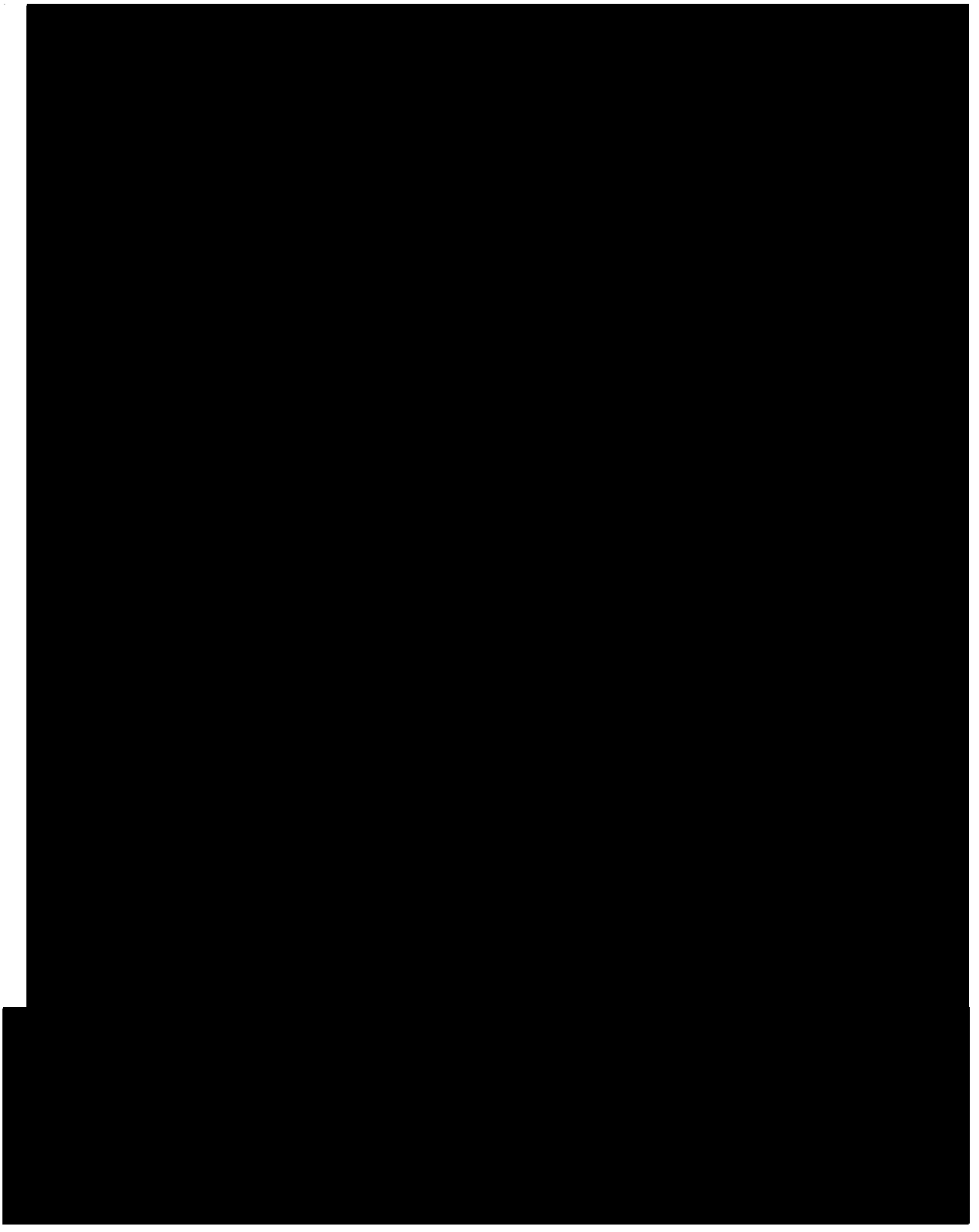

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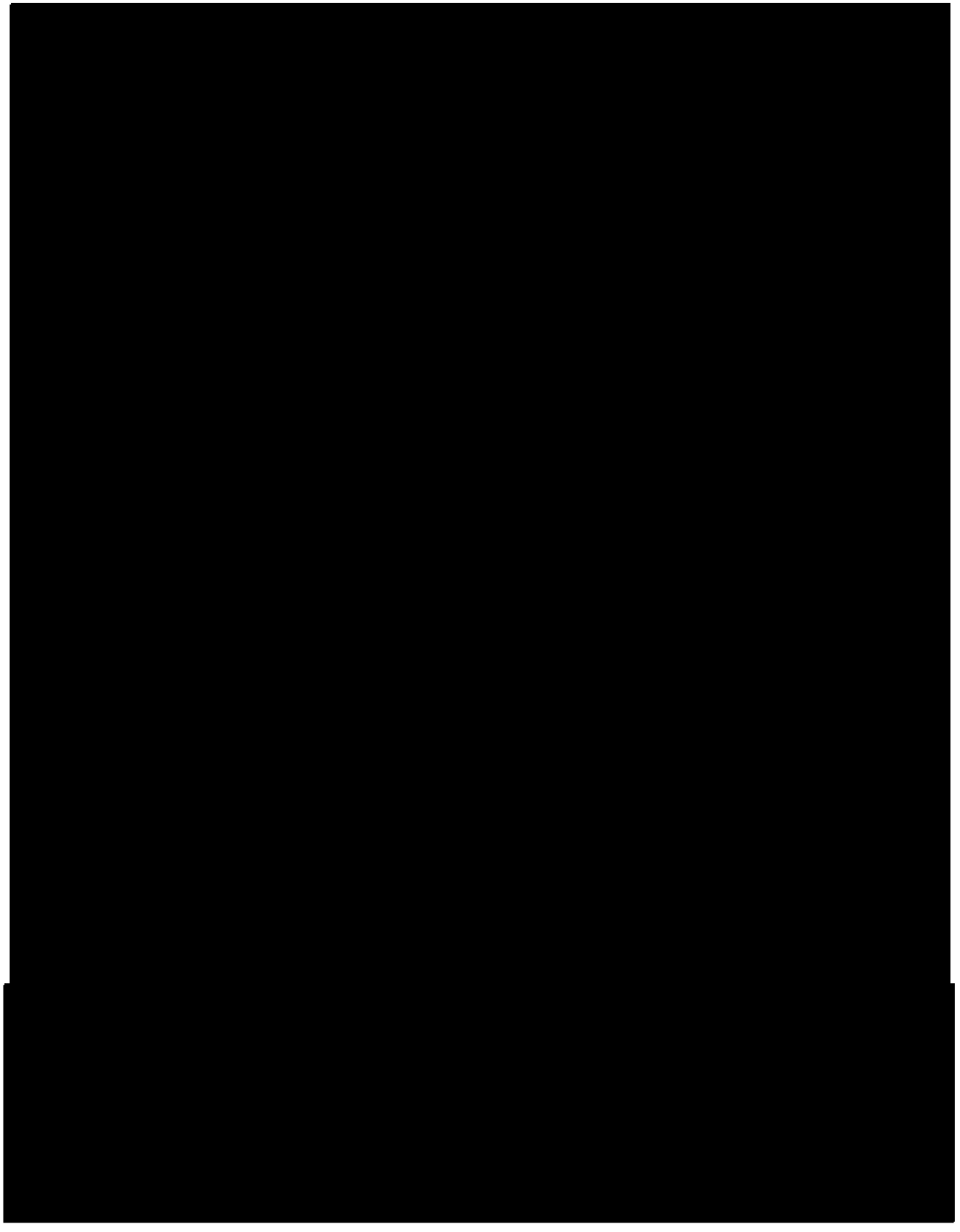

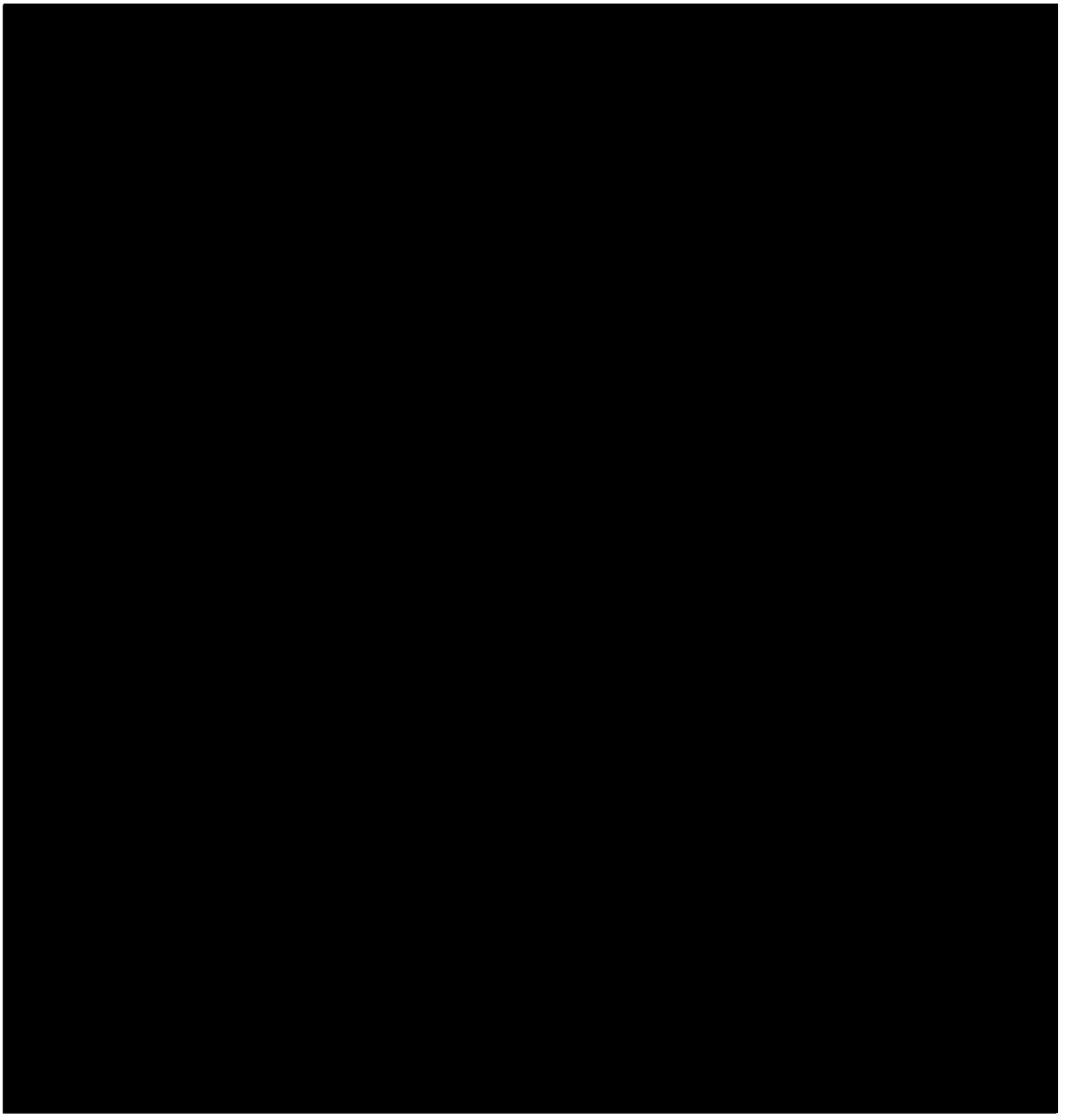

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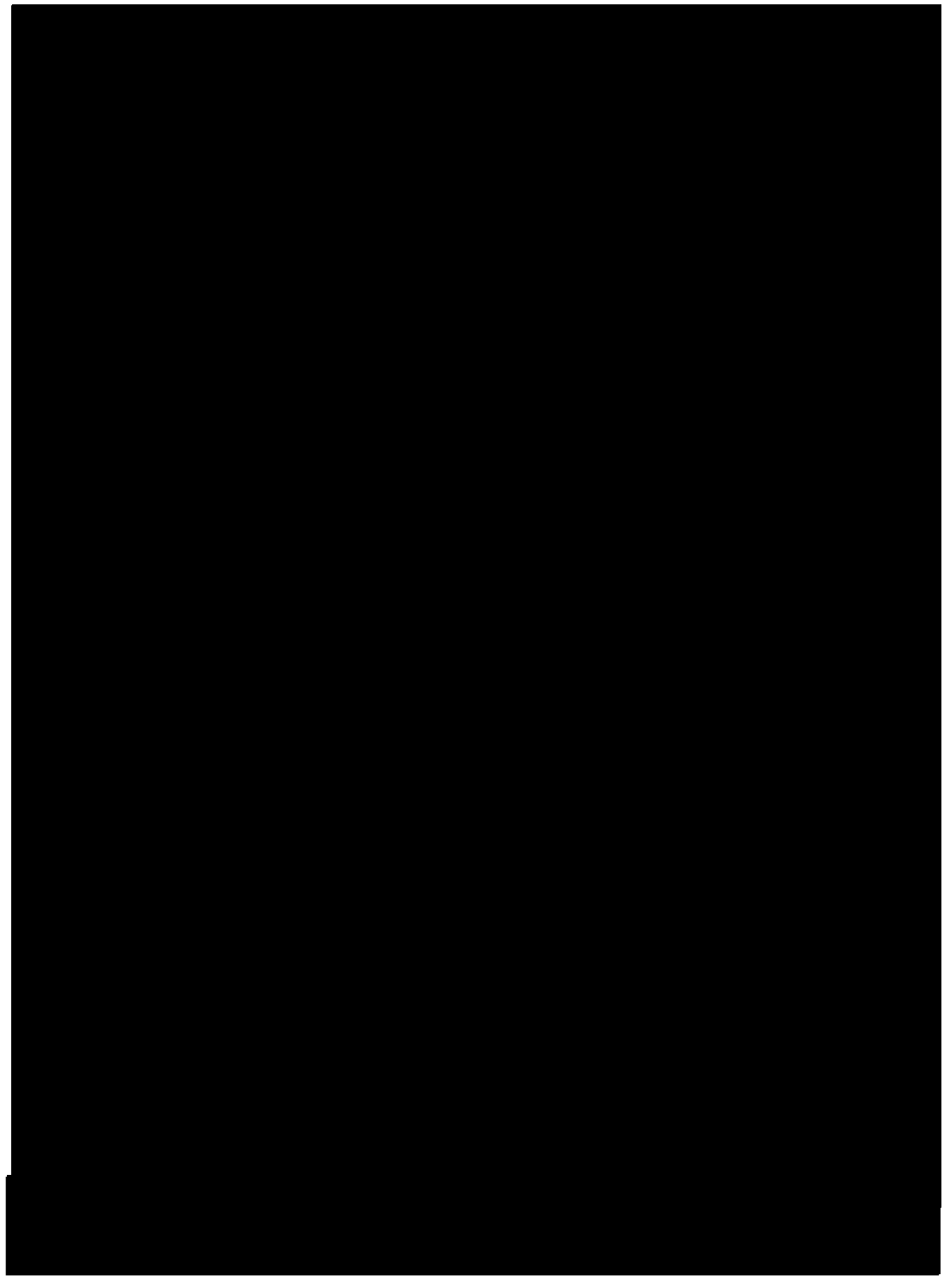

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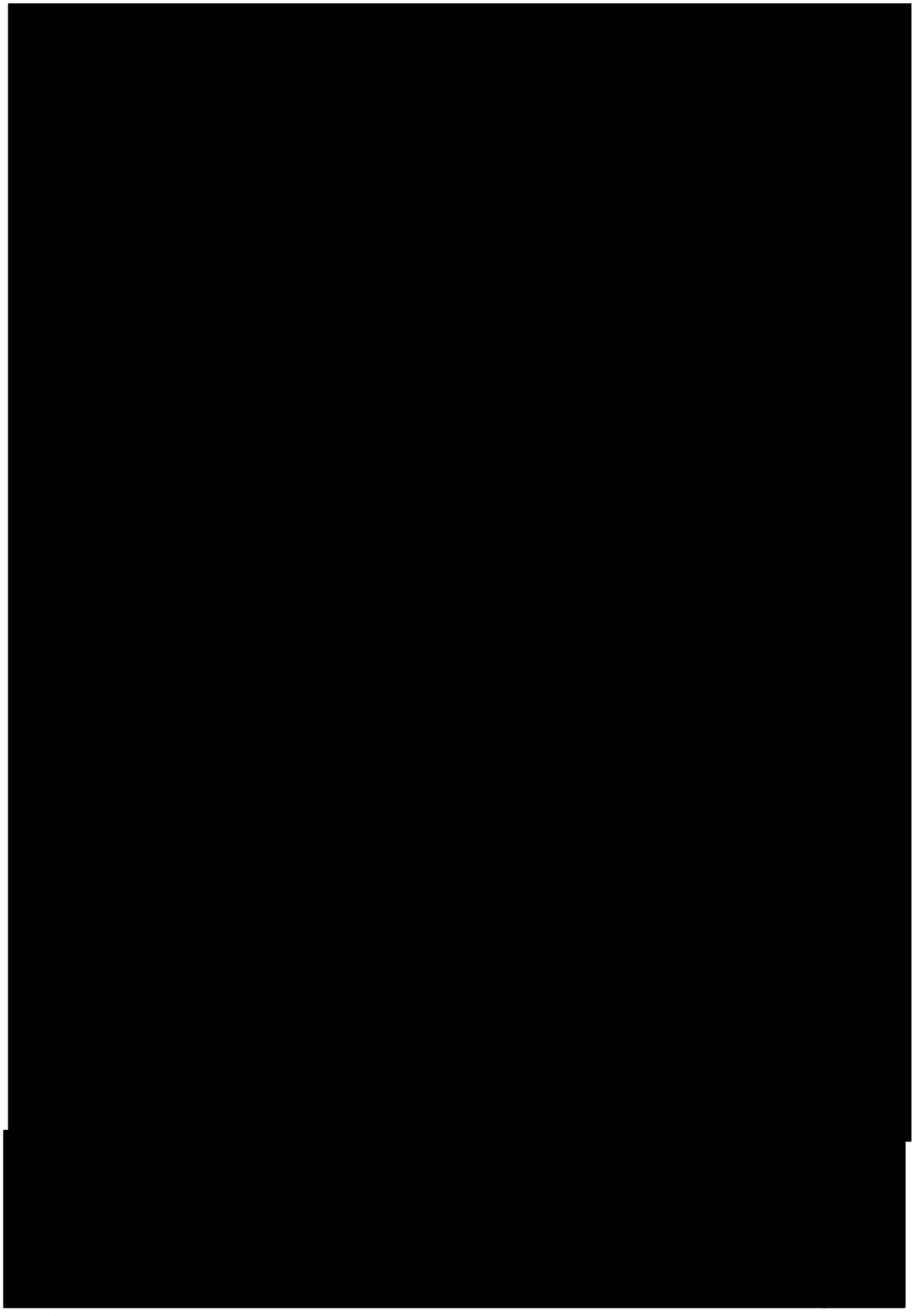

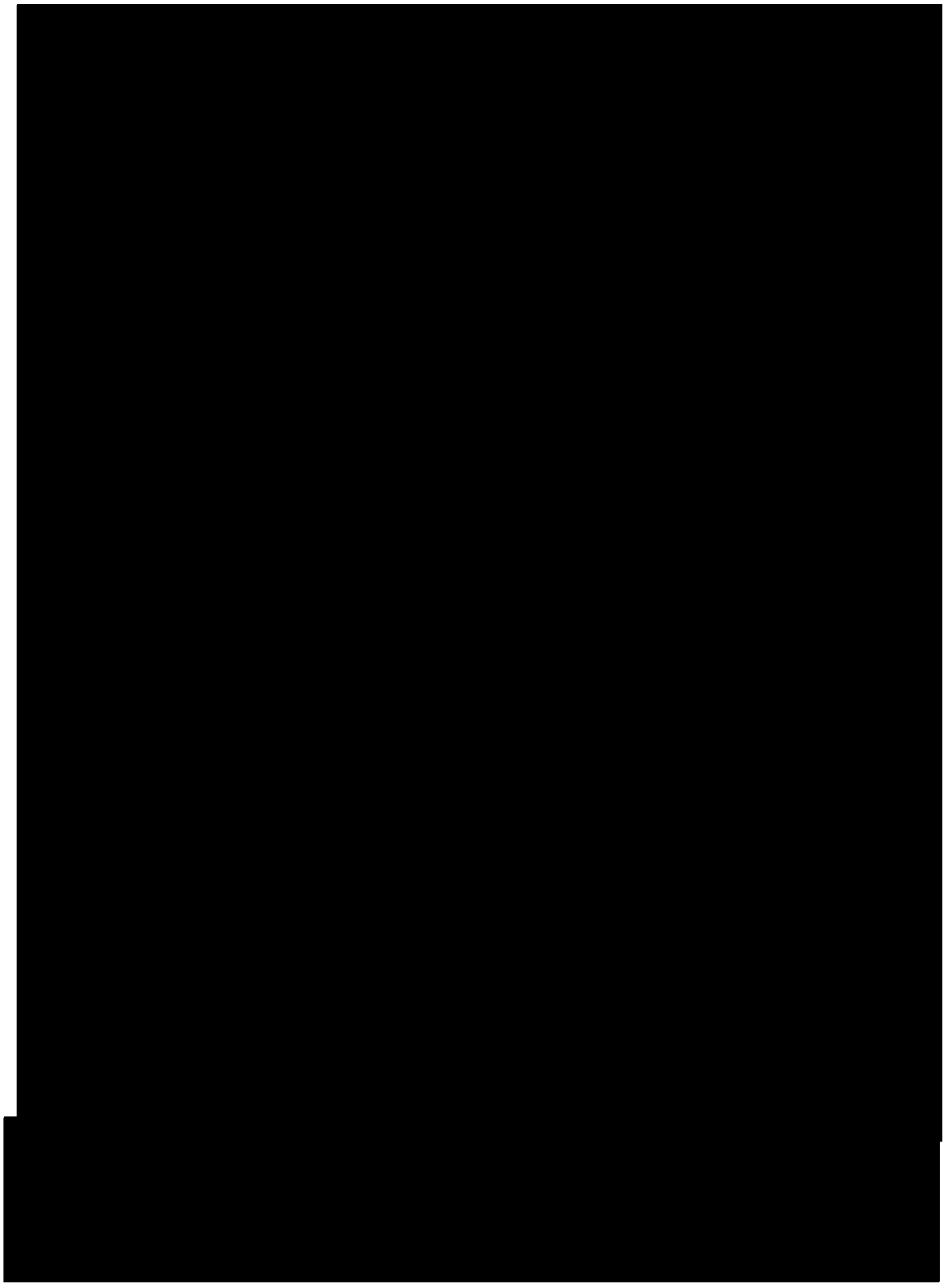

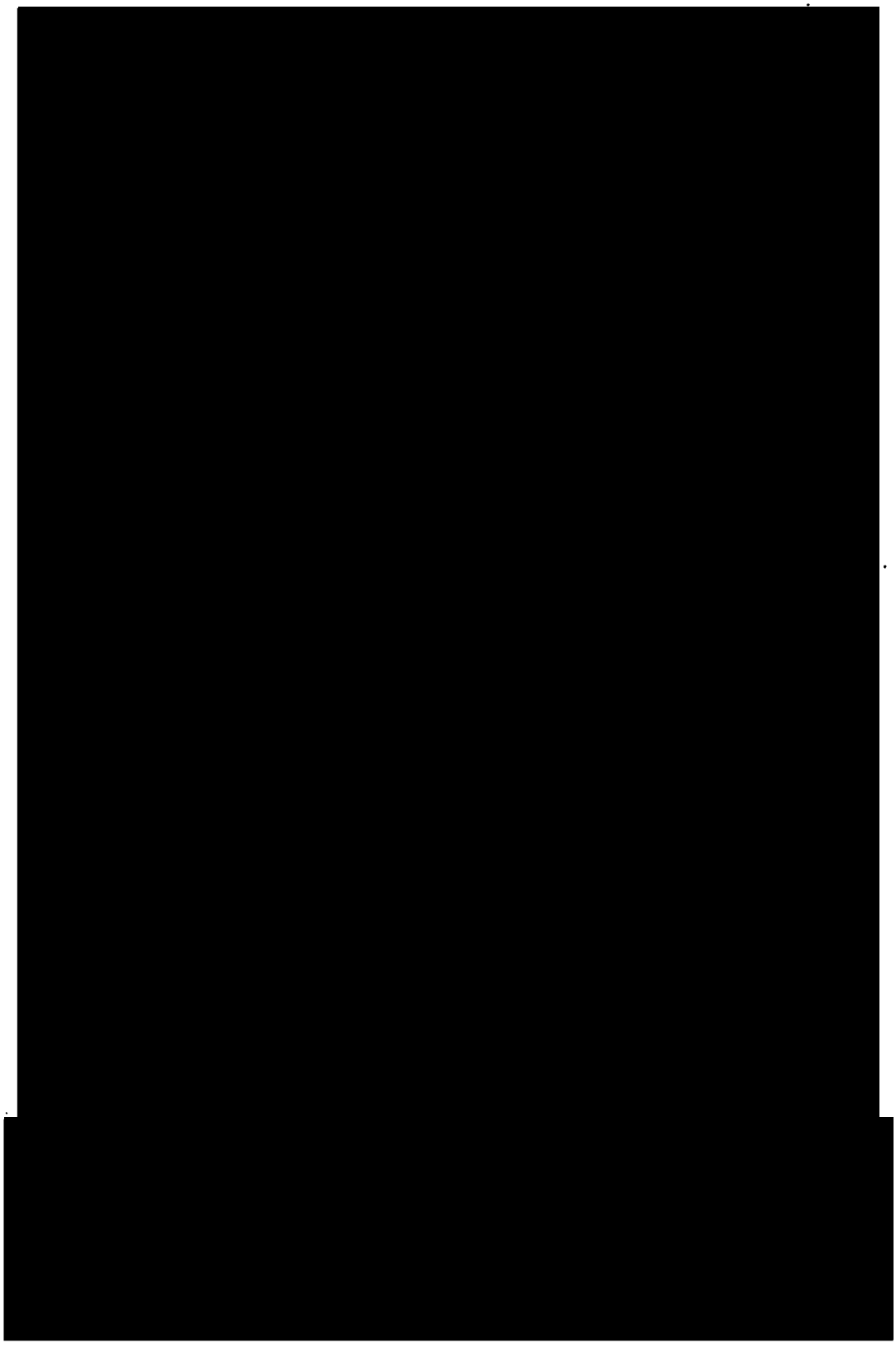

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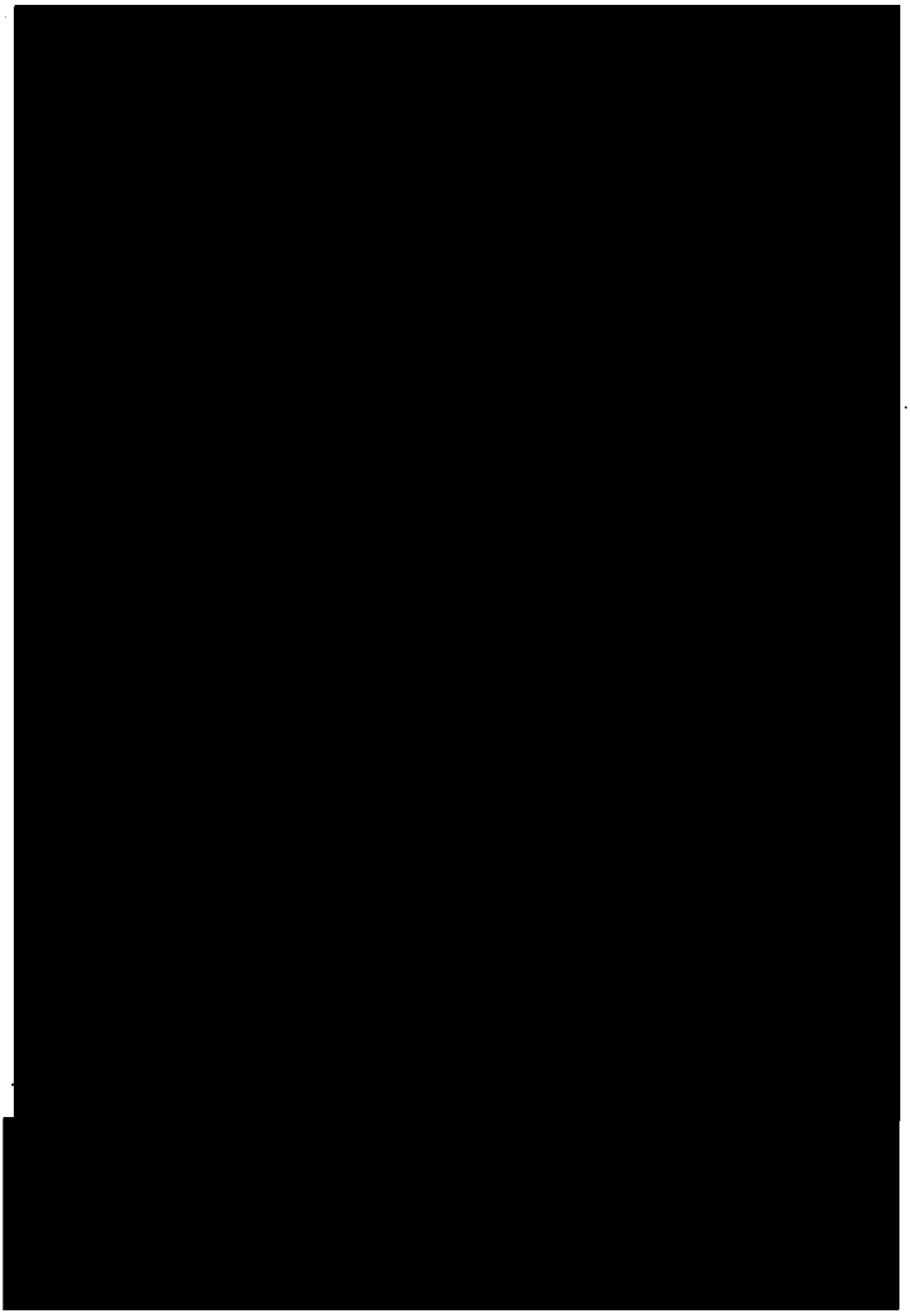
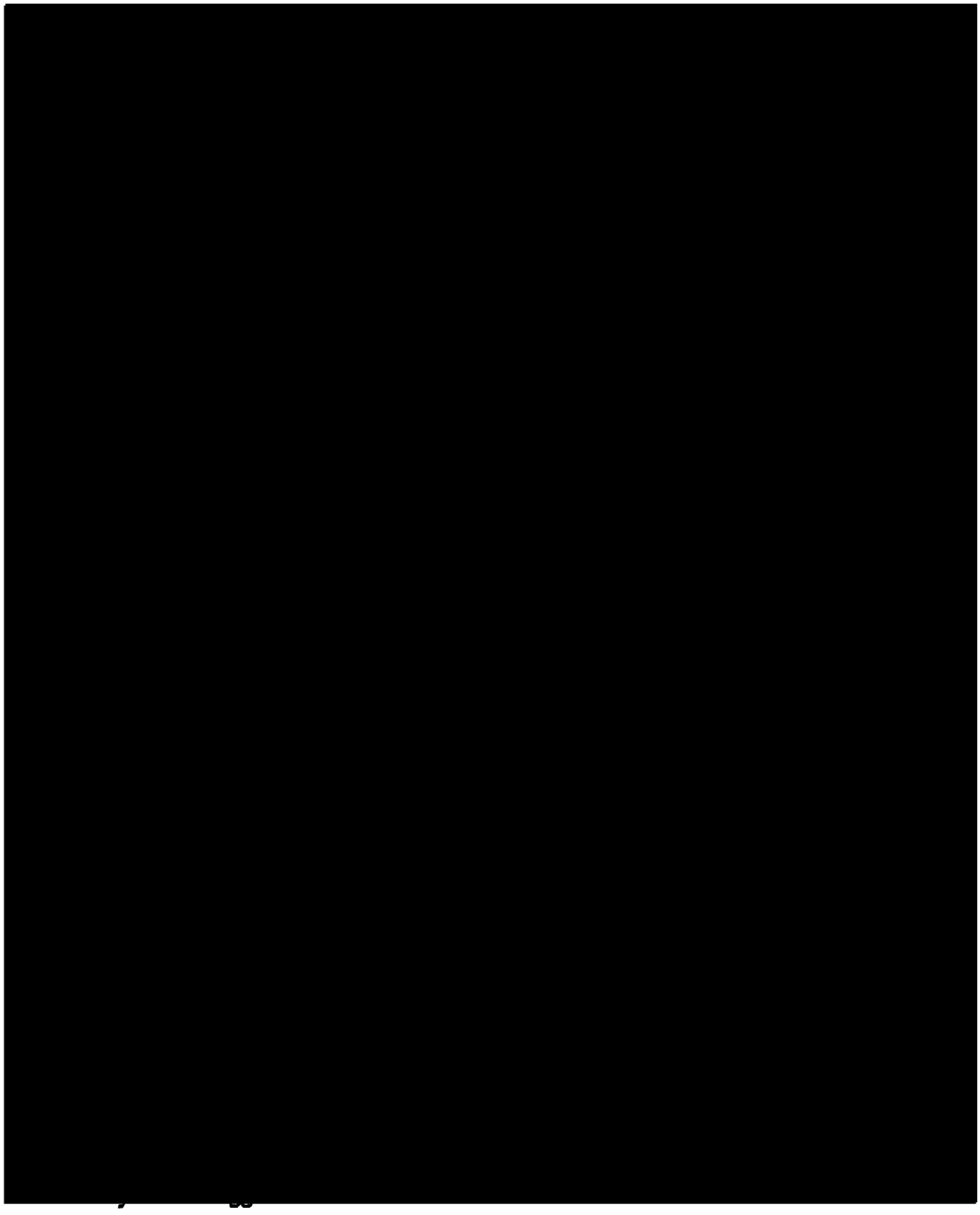
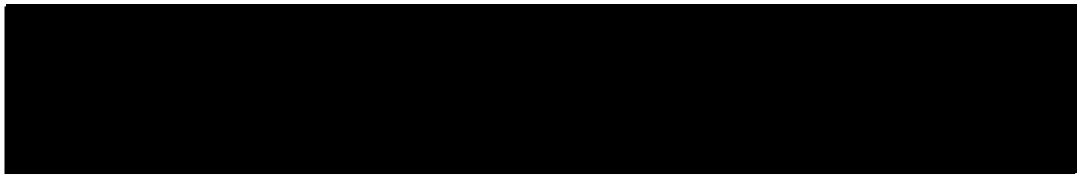
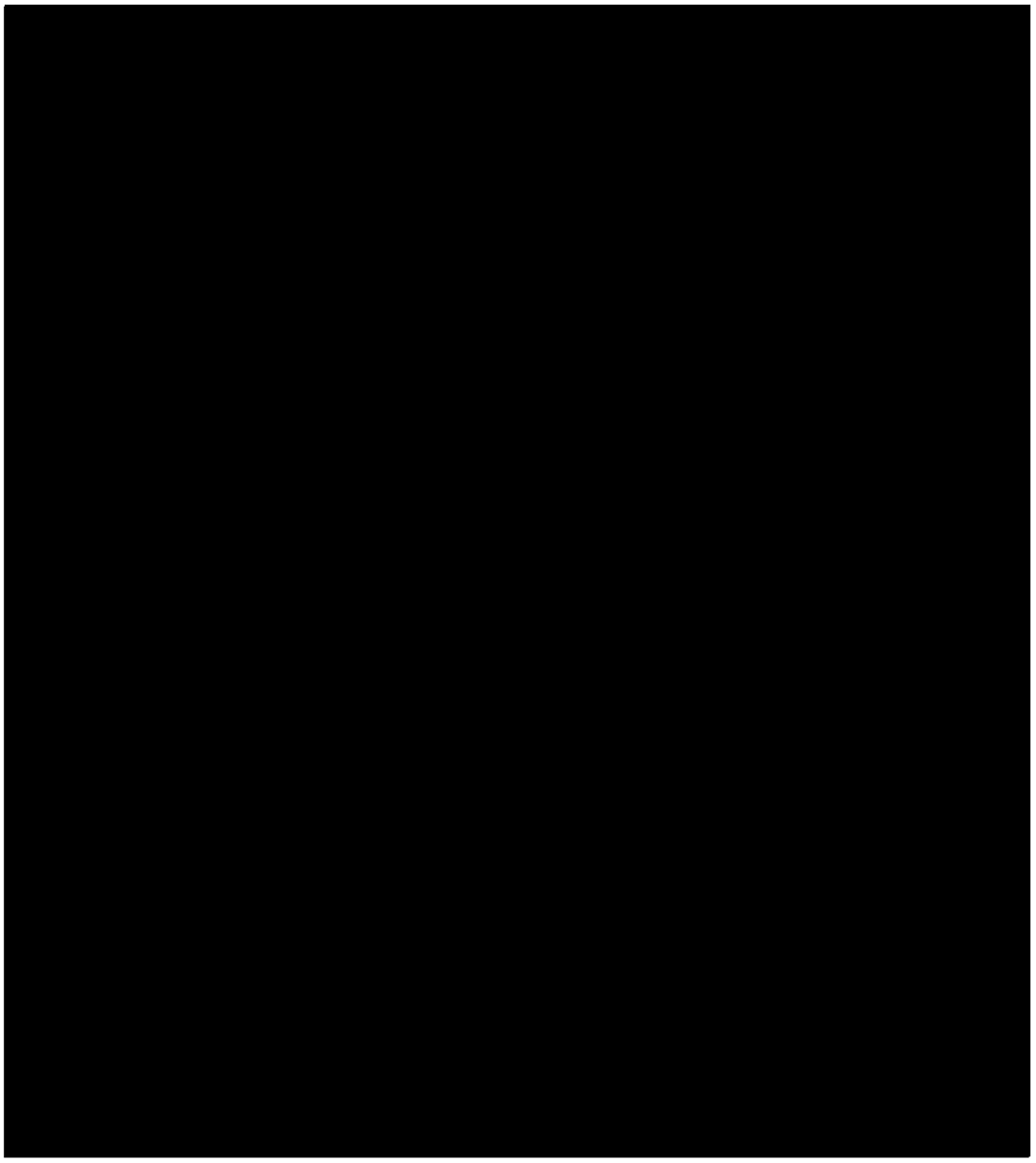
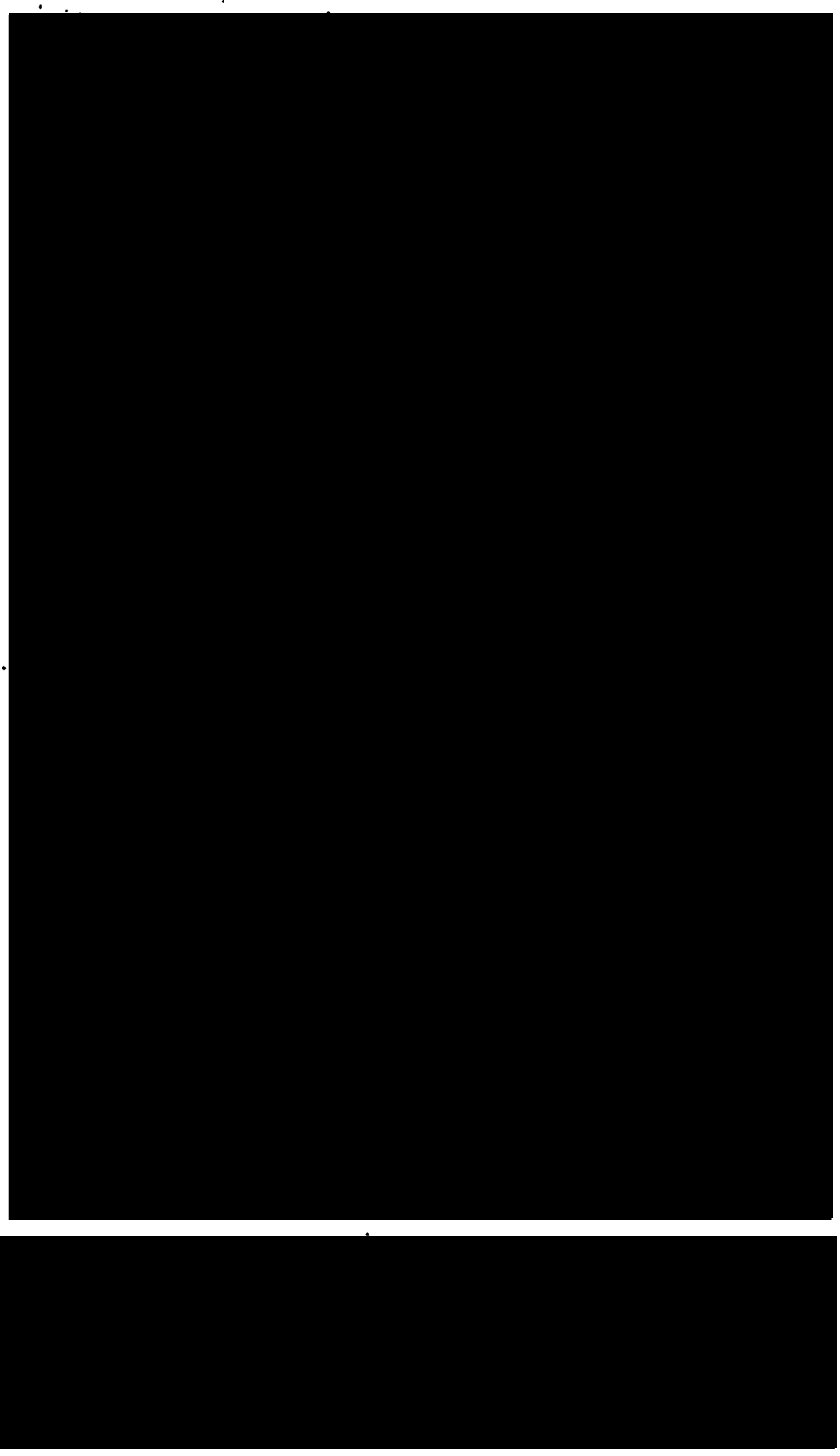


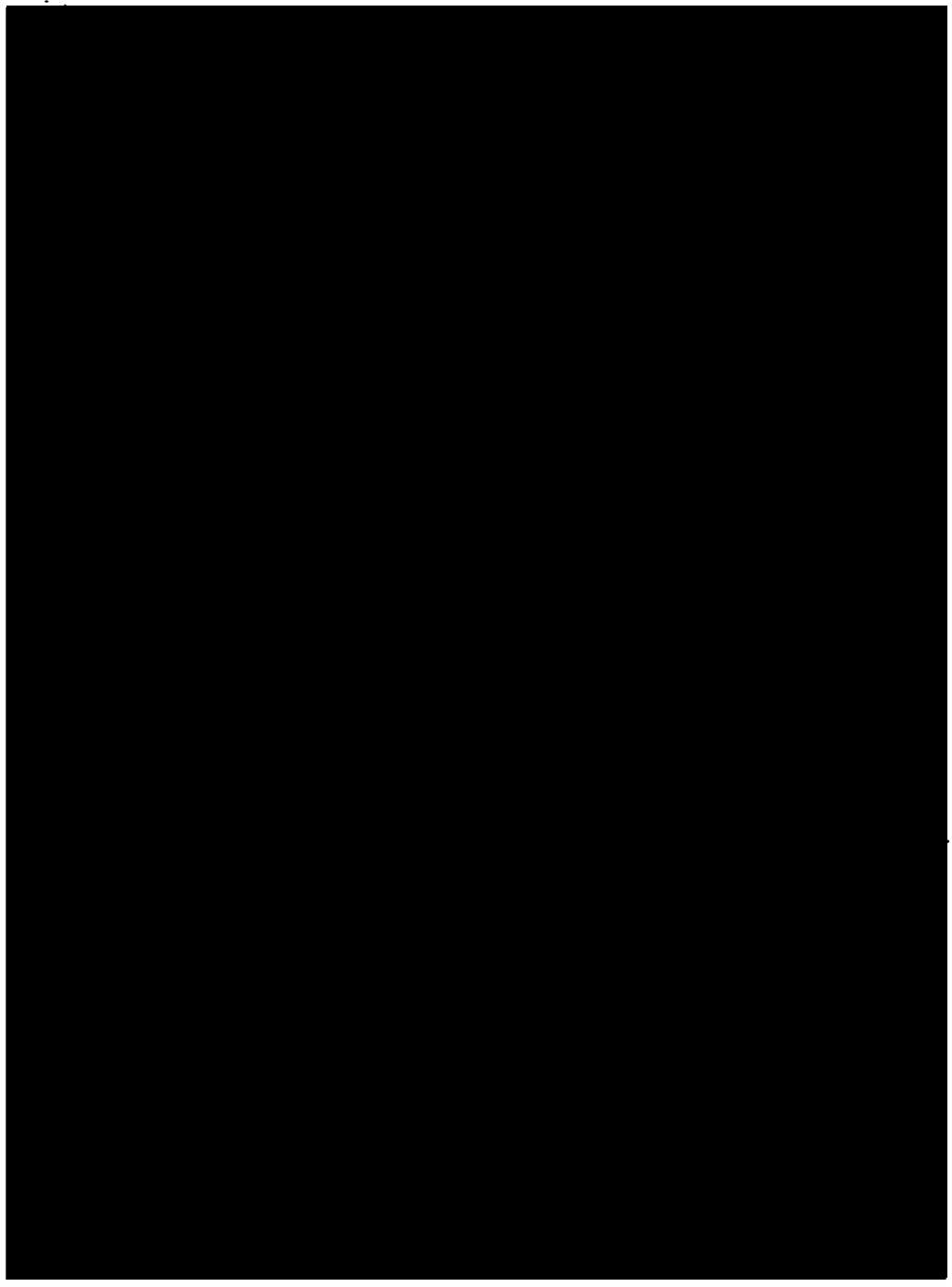








FOIA CONFIDENTIAL TREATMENT REQUESTED BY GRAY & CO.



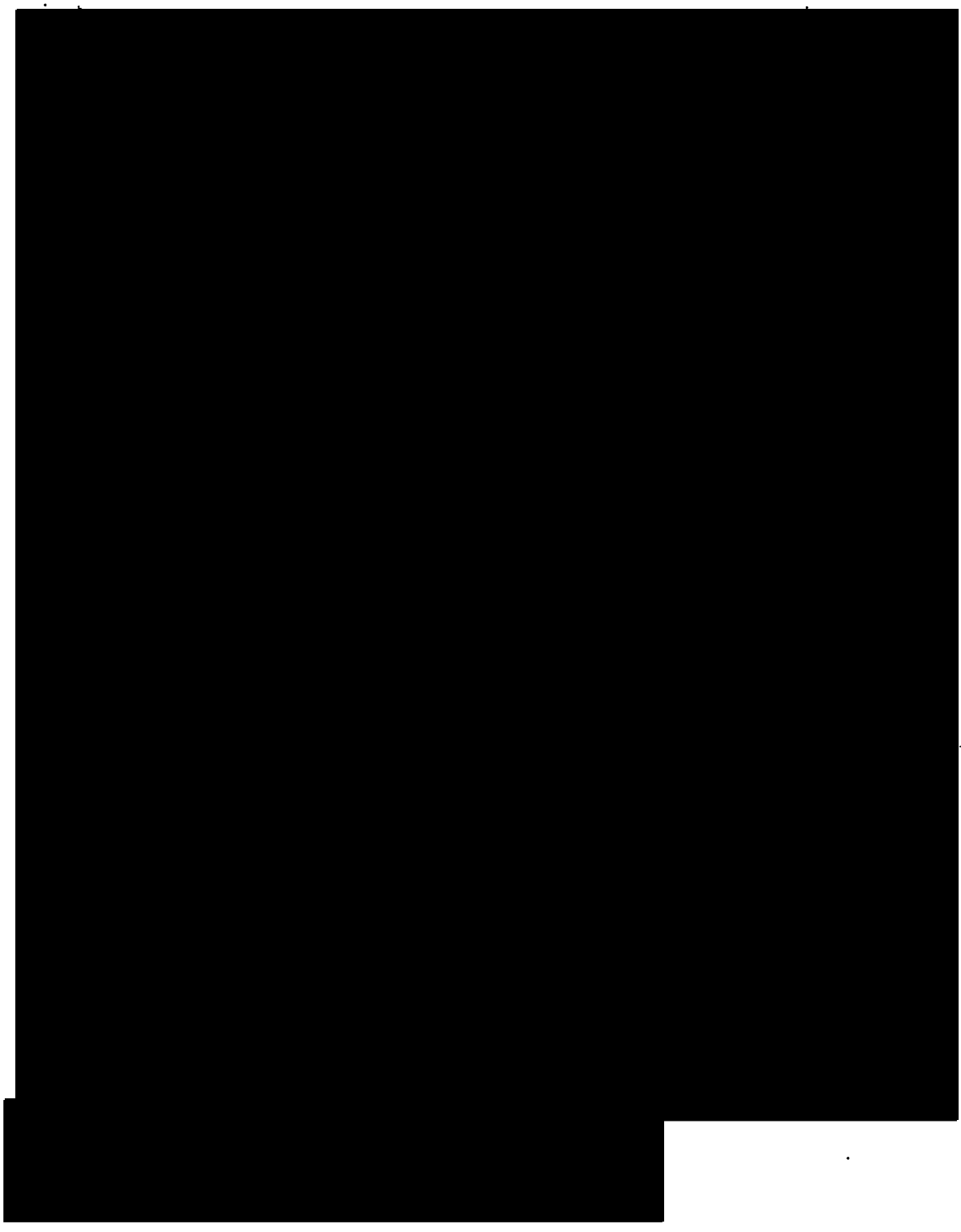


EXHIBIT 14

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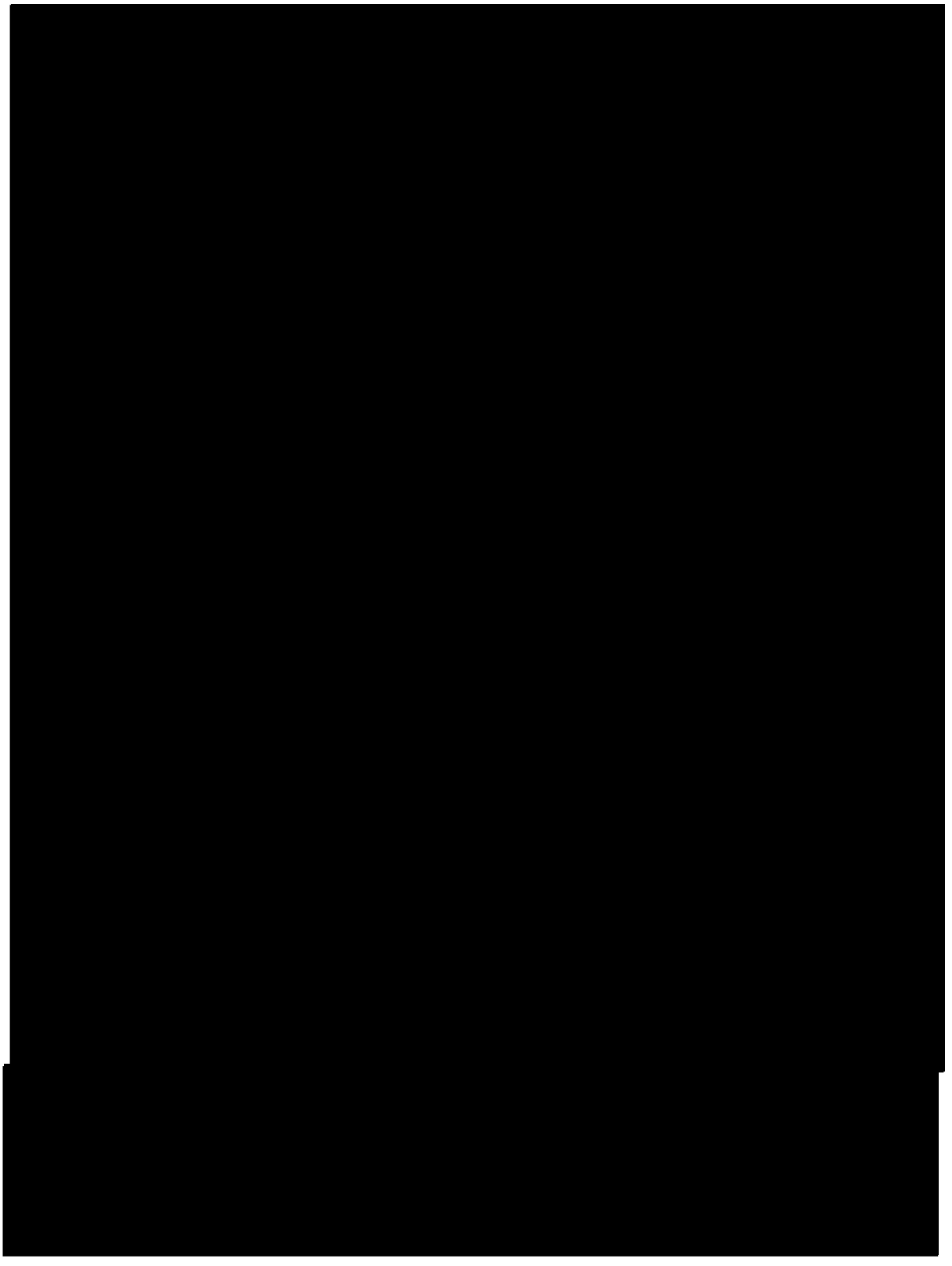

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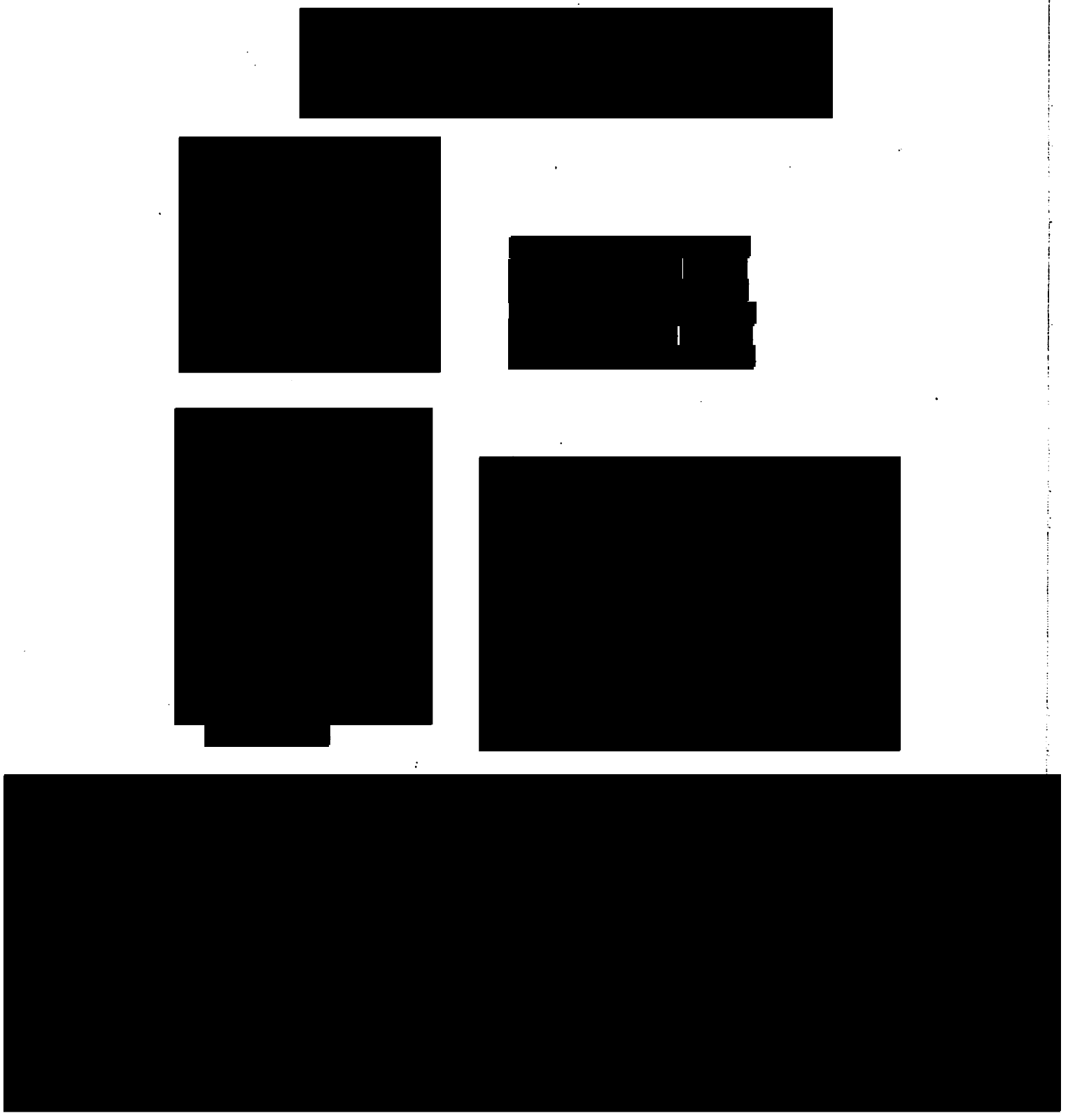

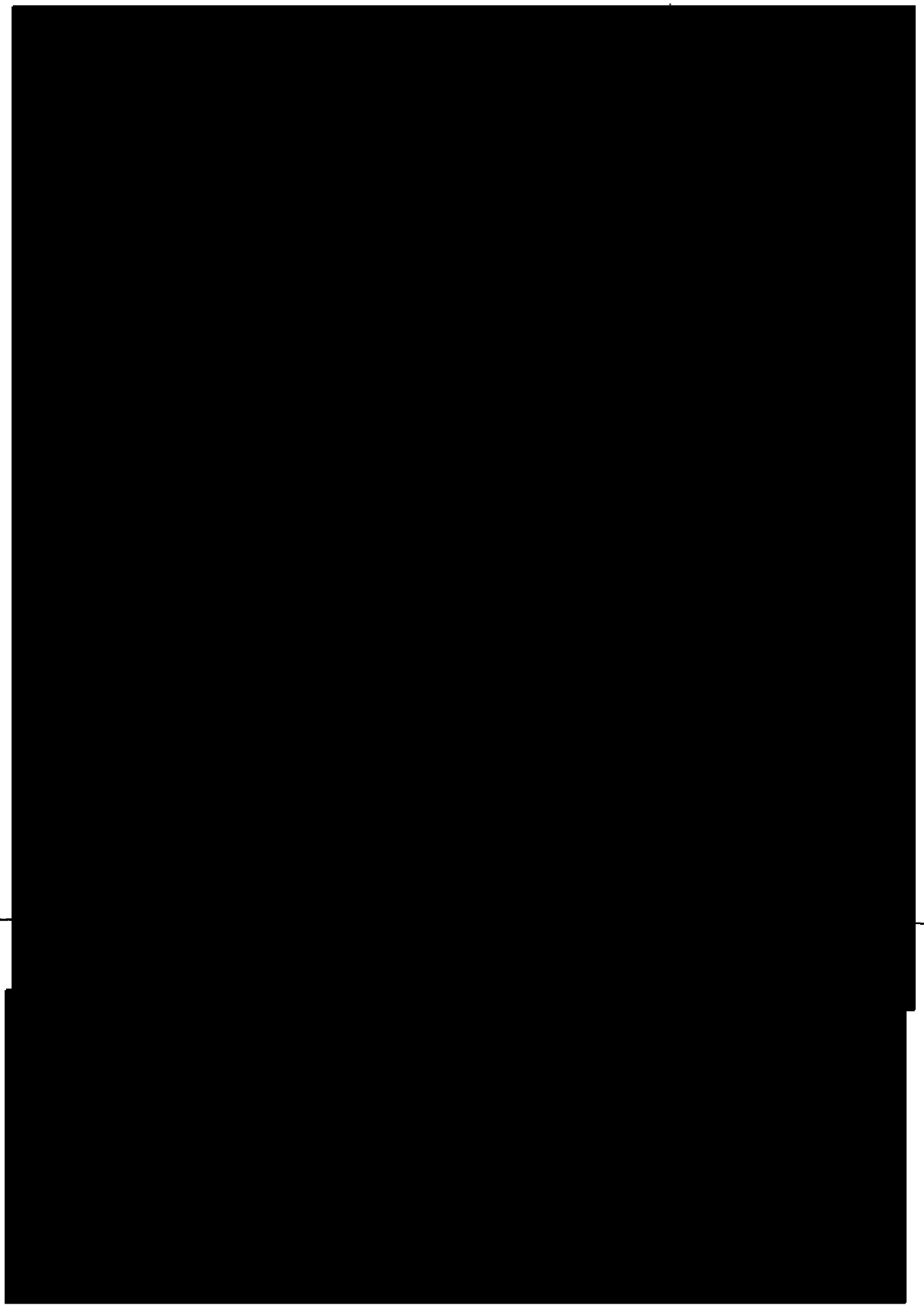

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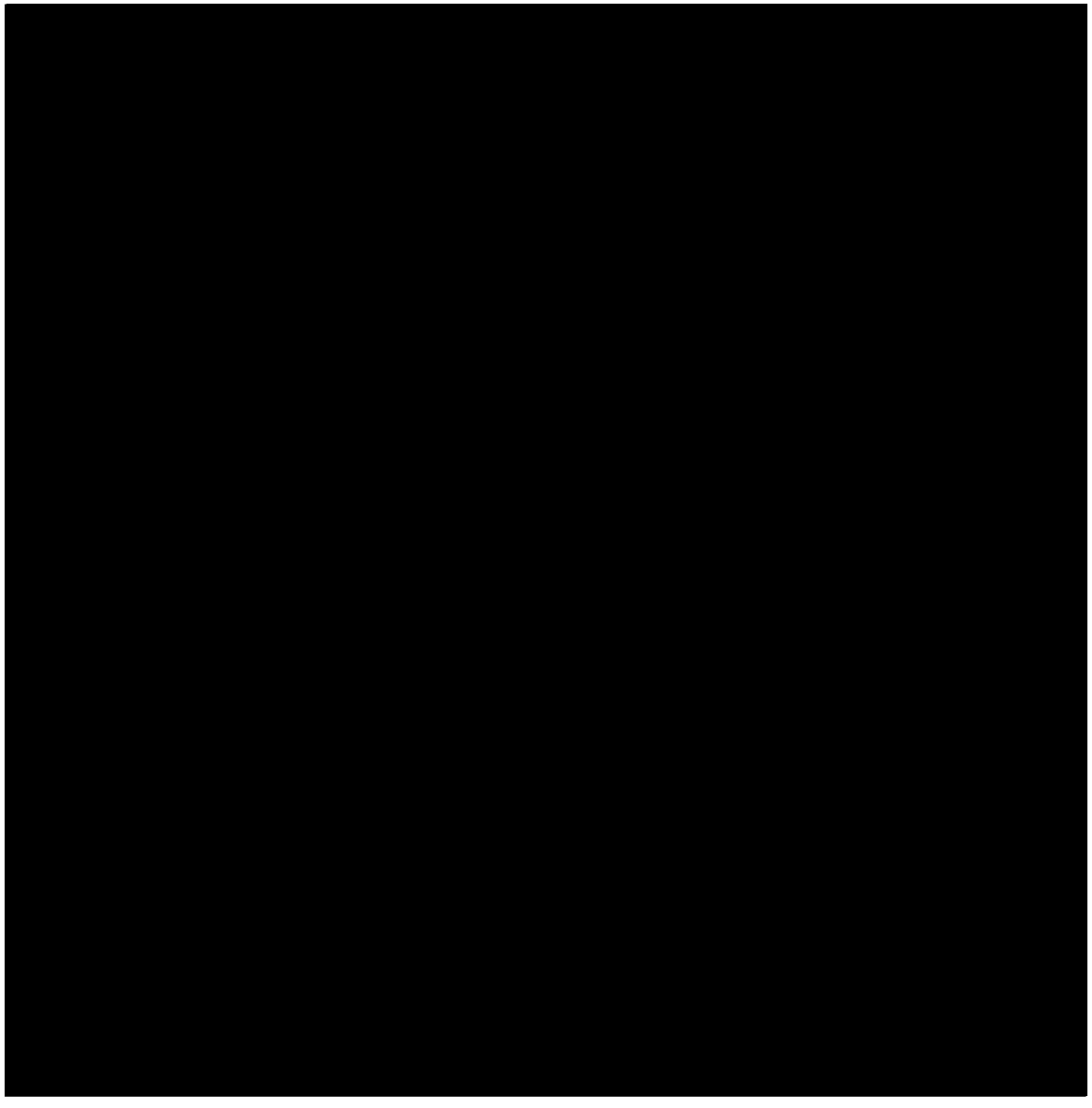

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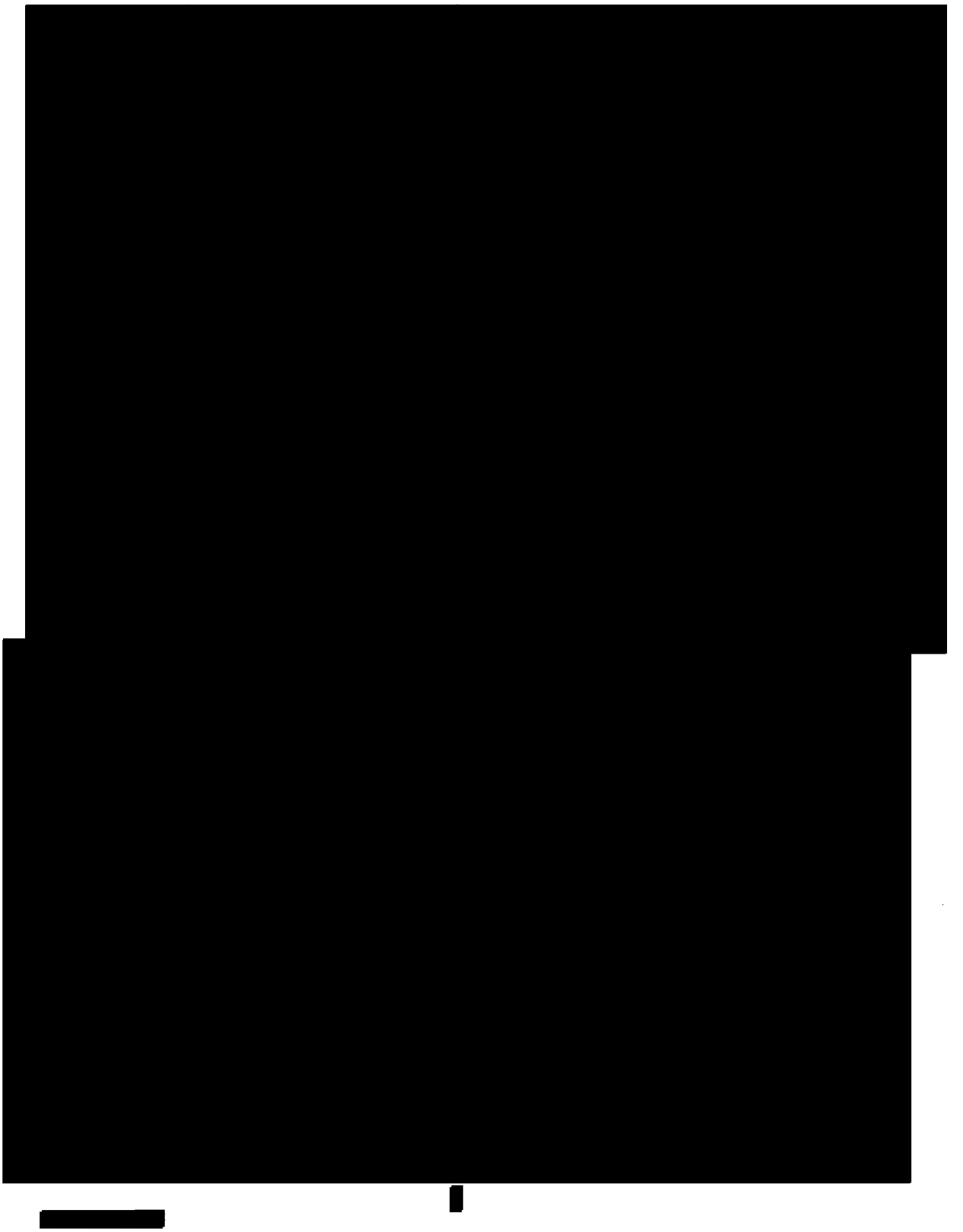

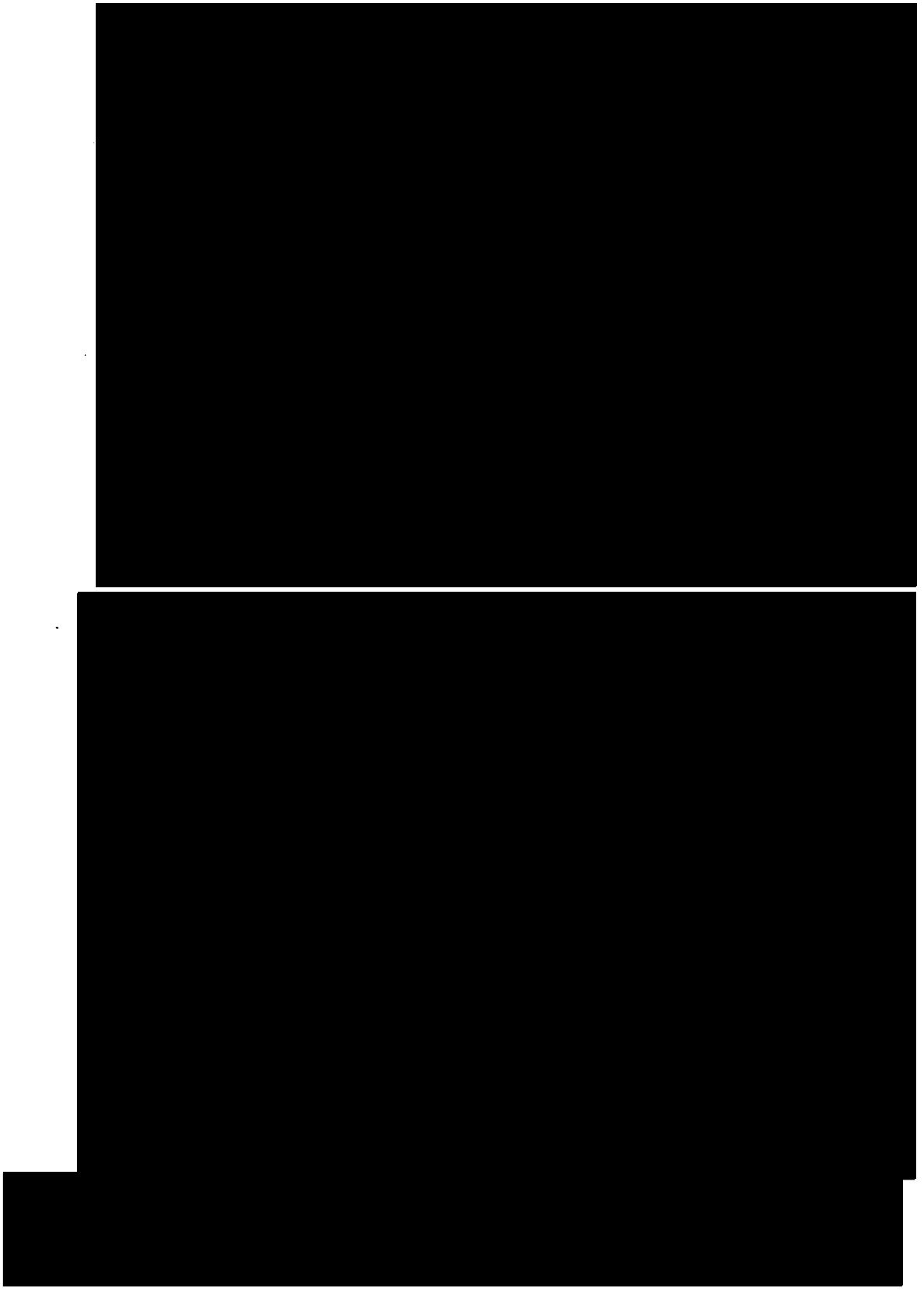

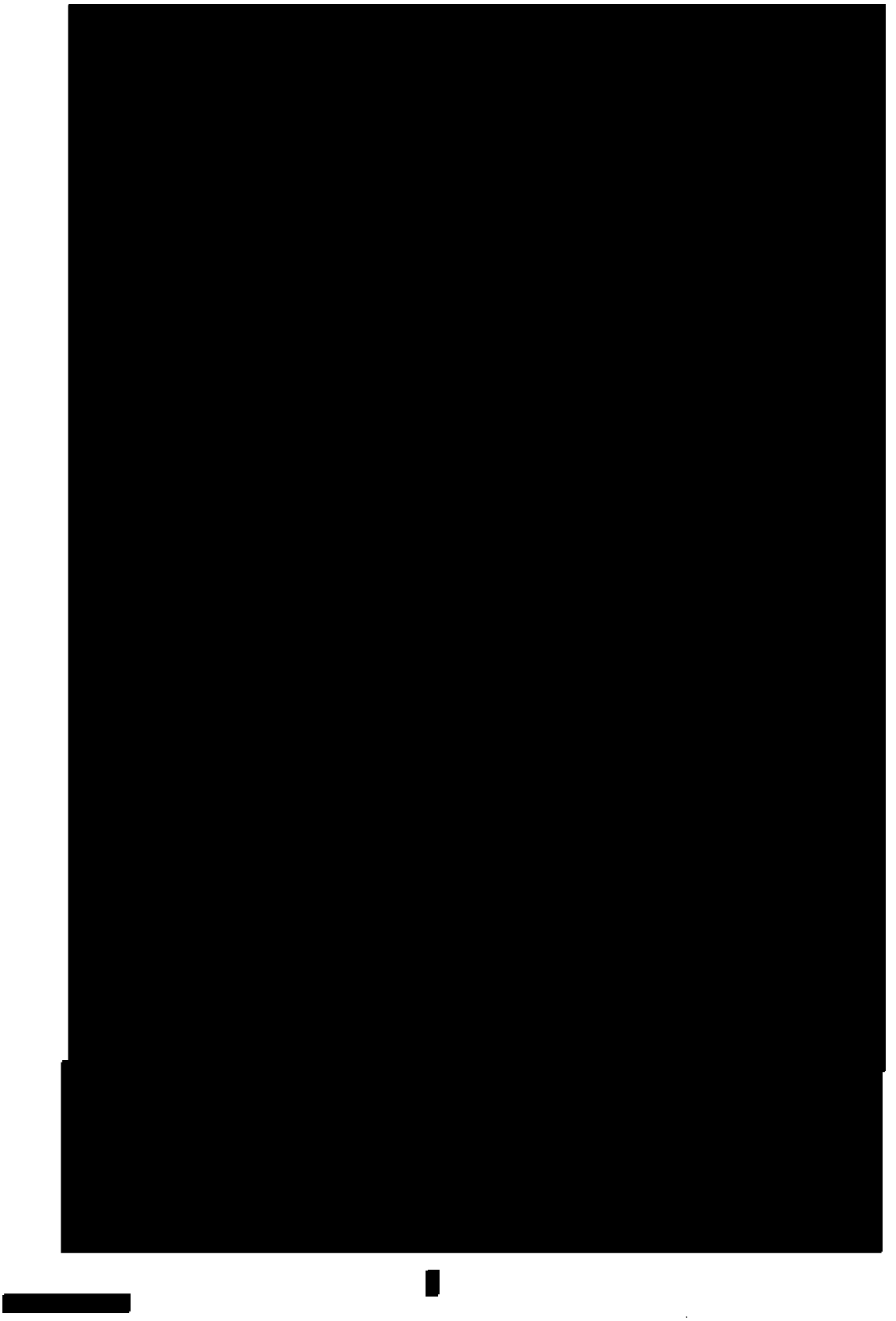

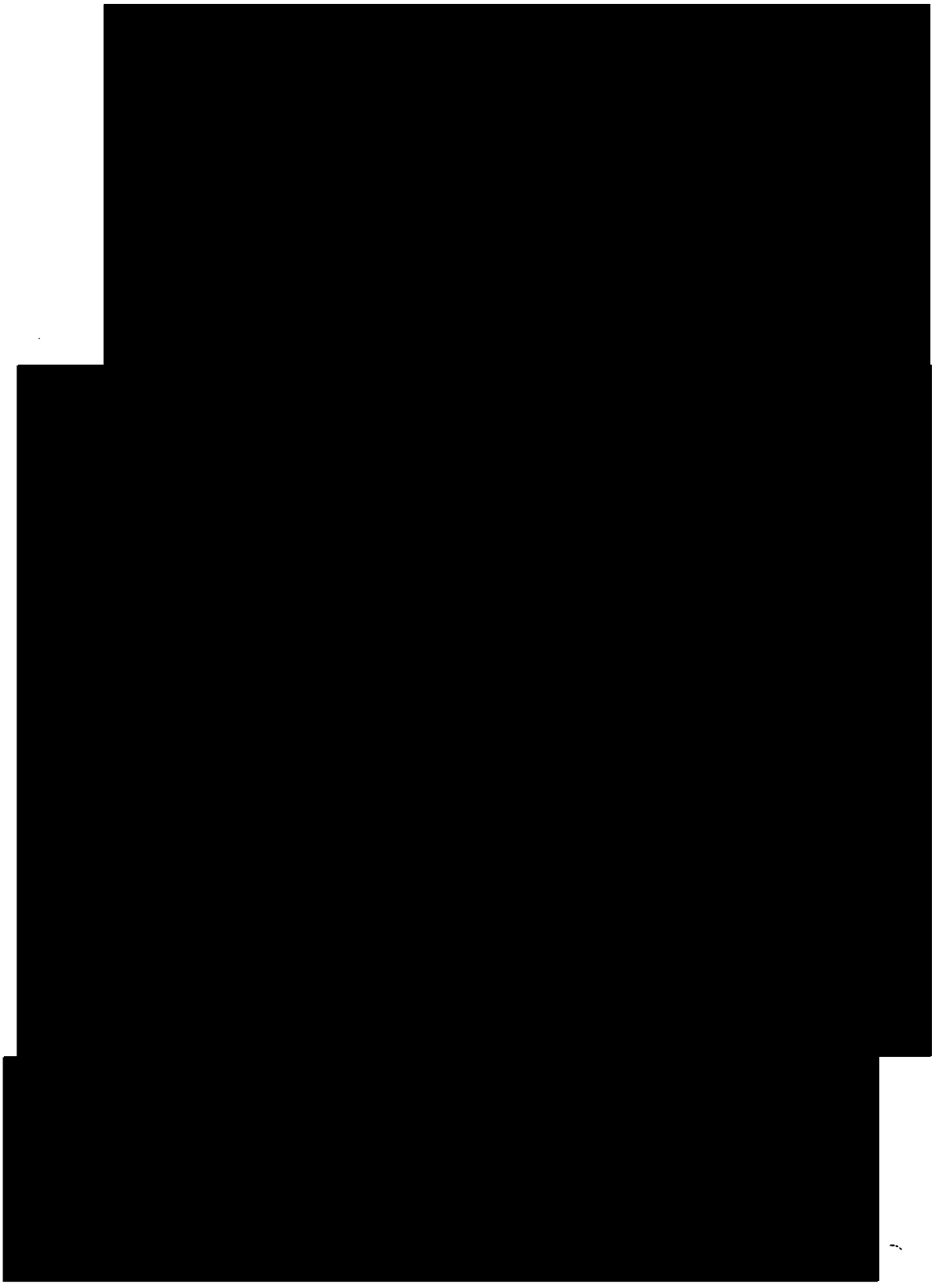

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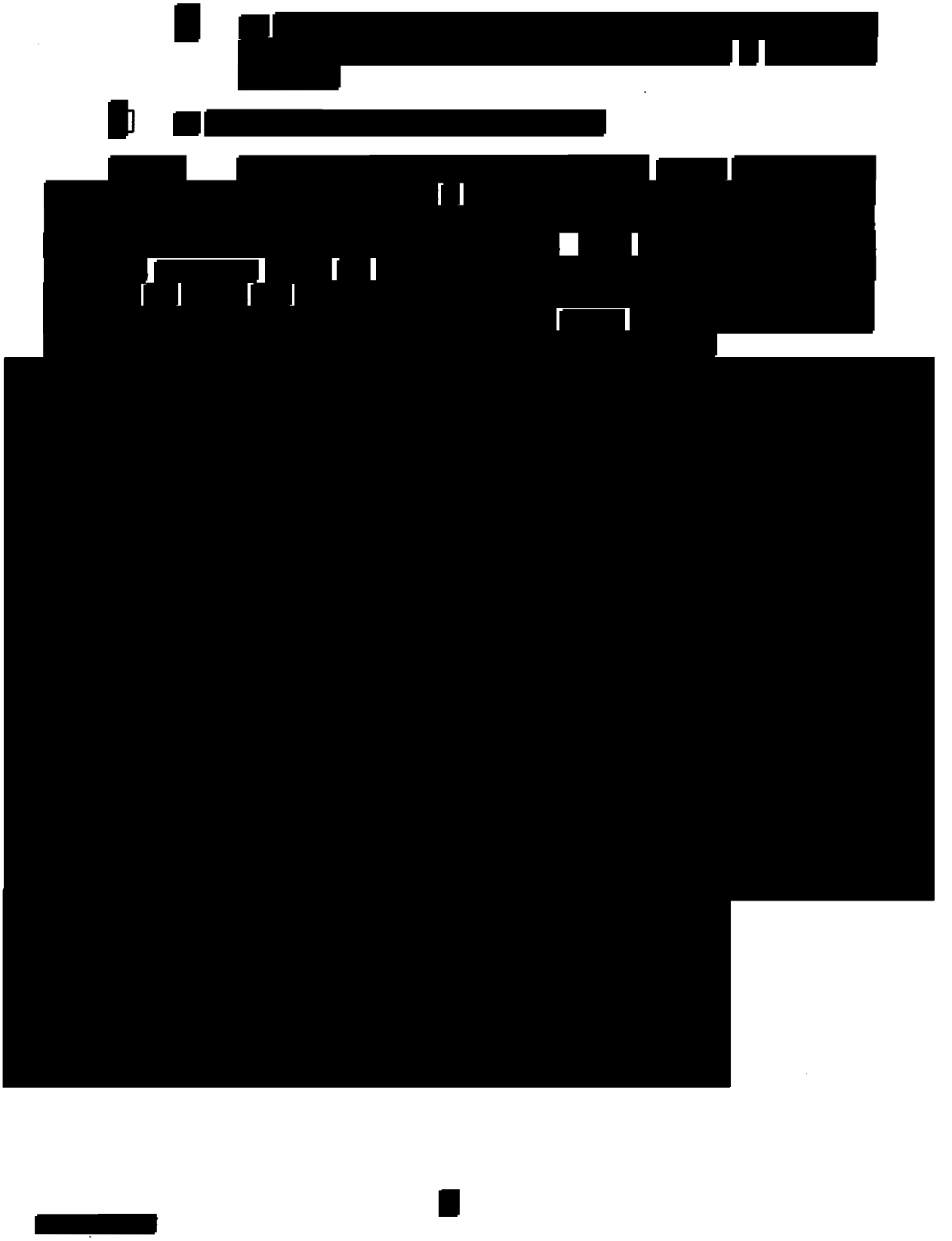

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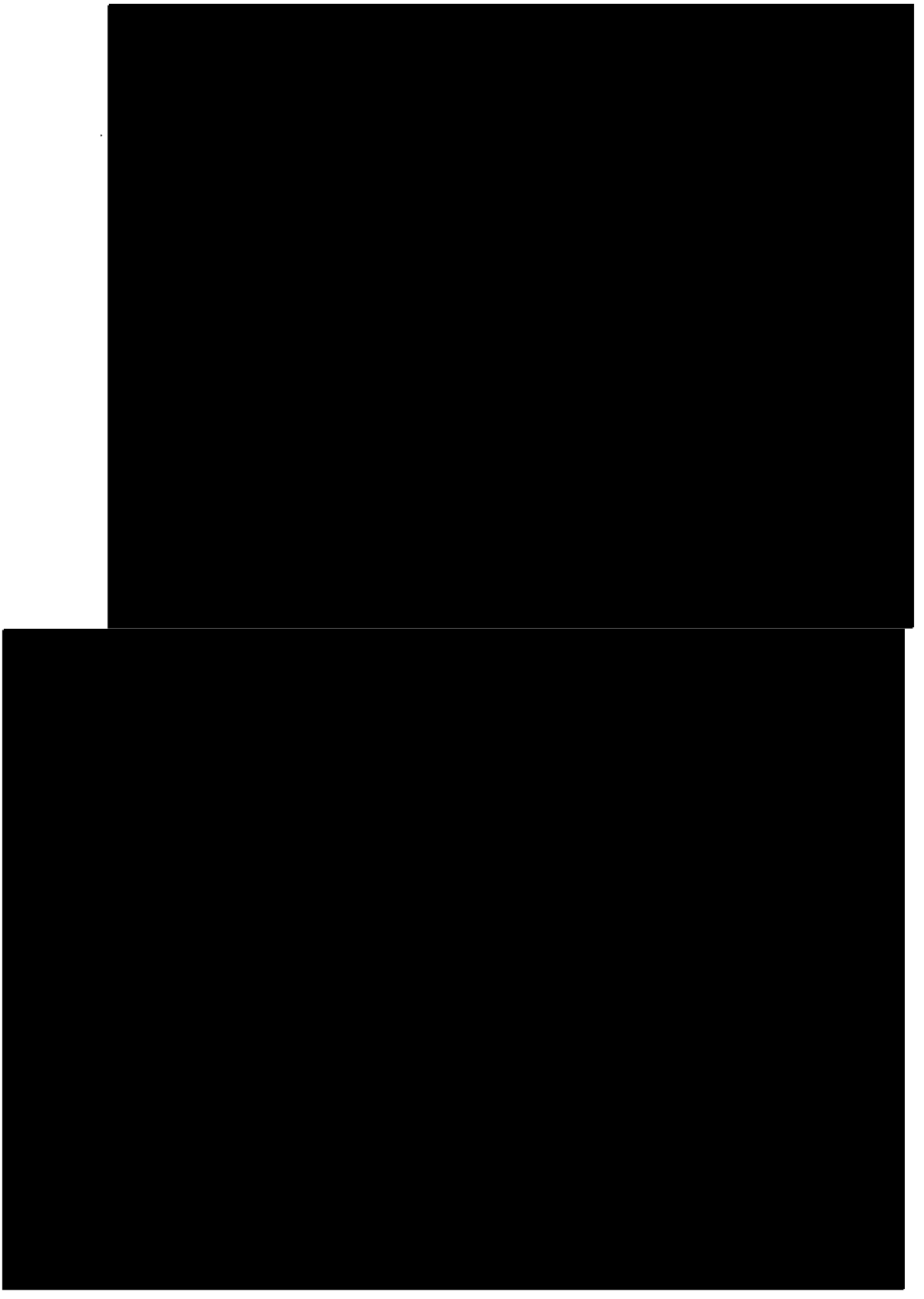

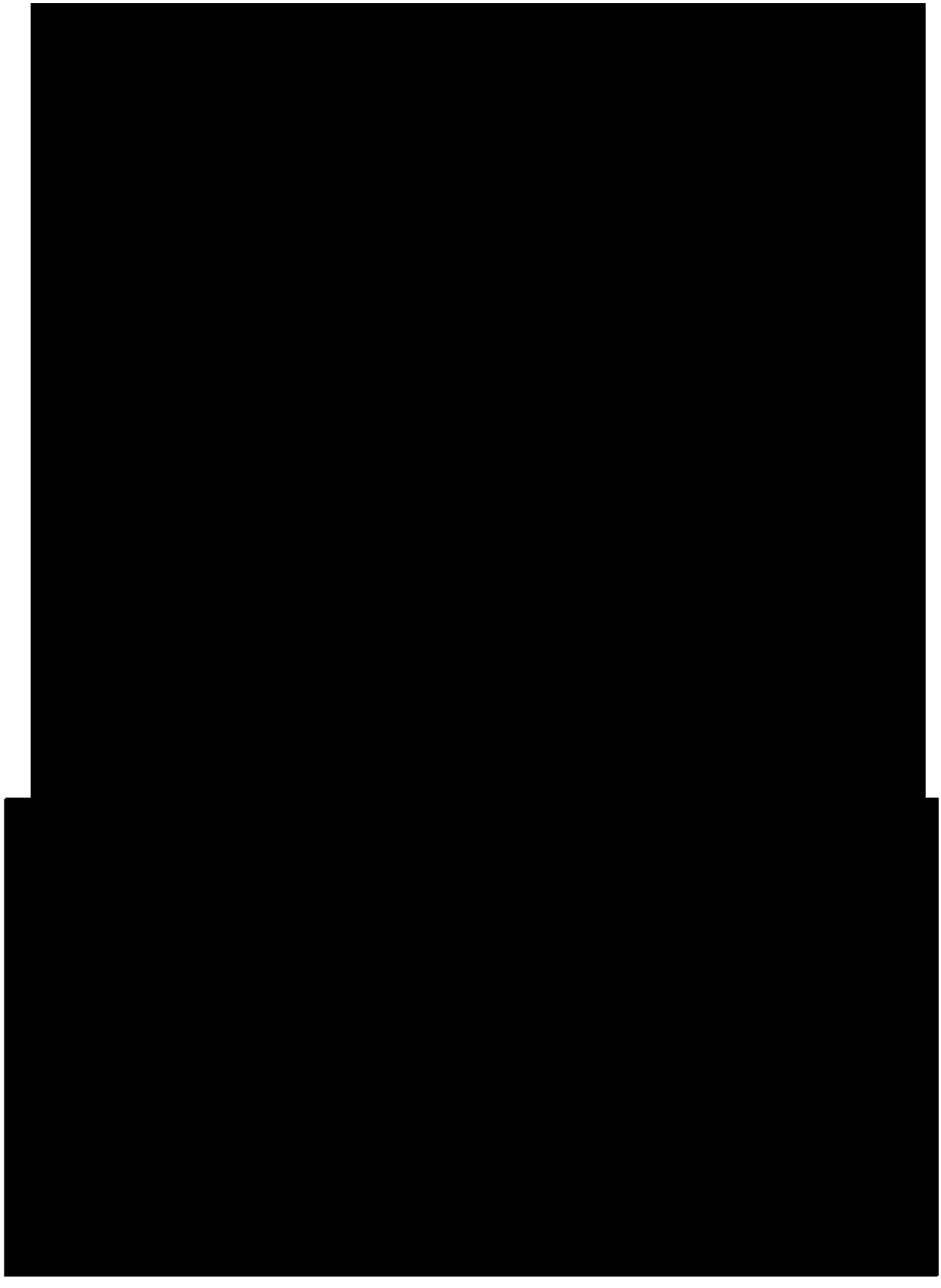

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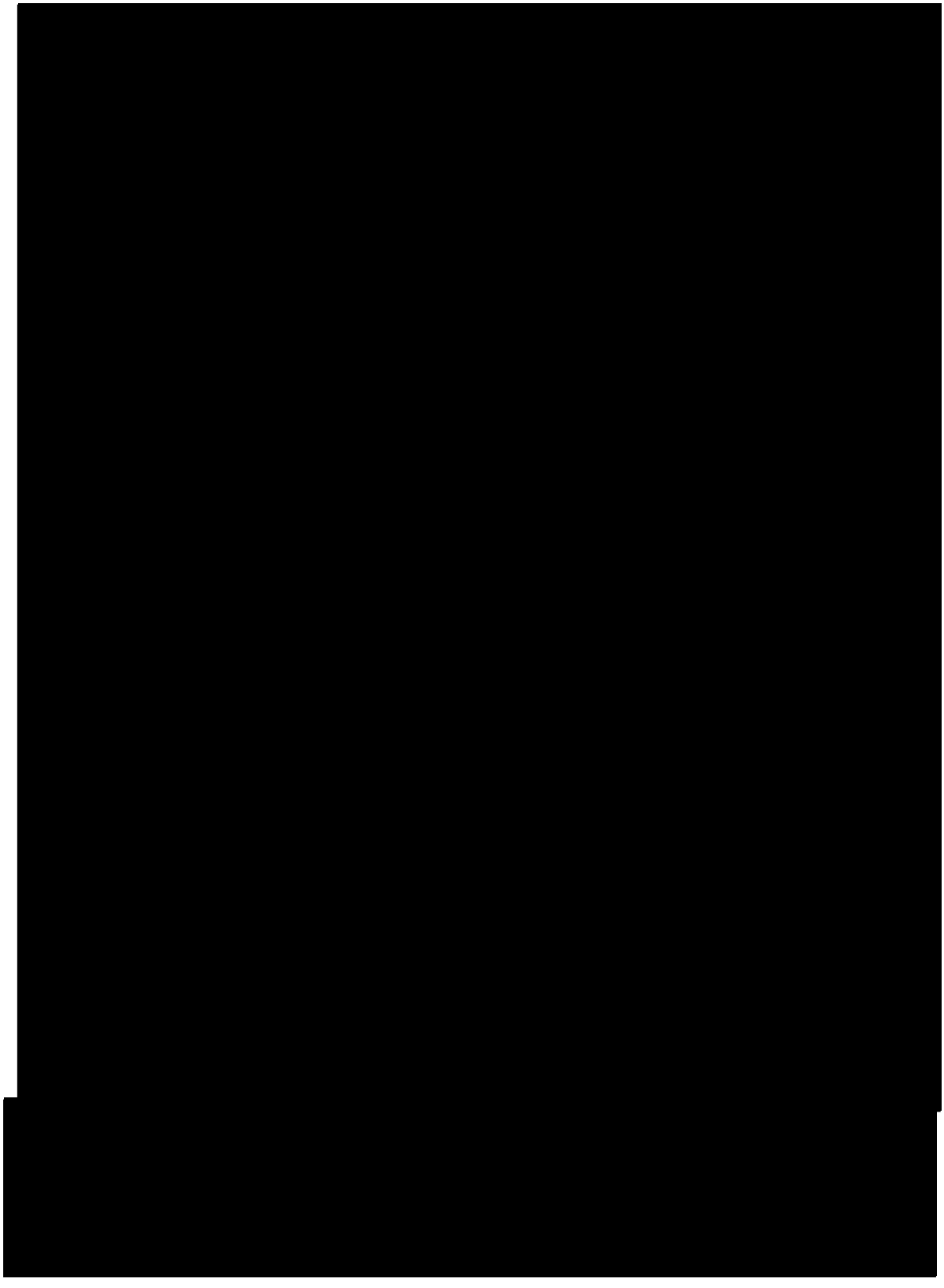

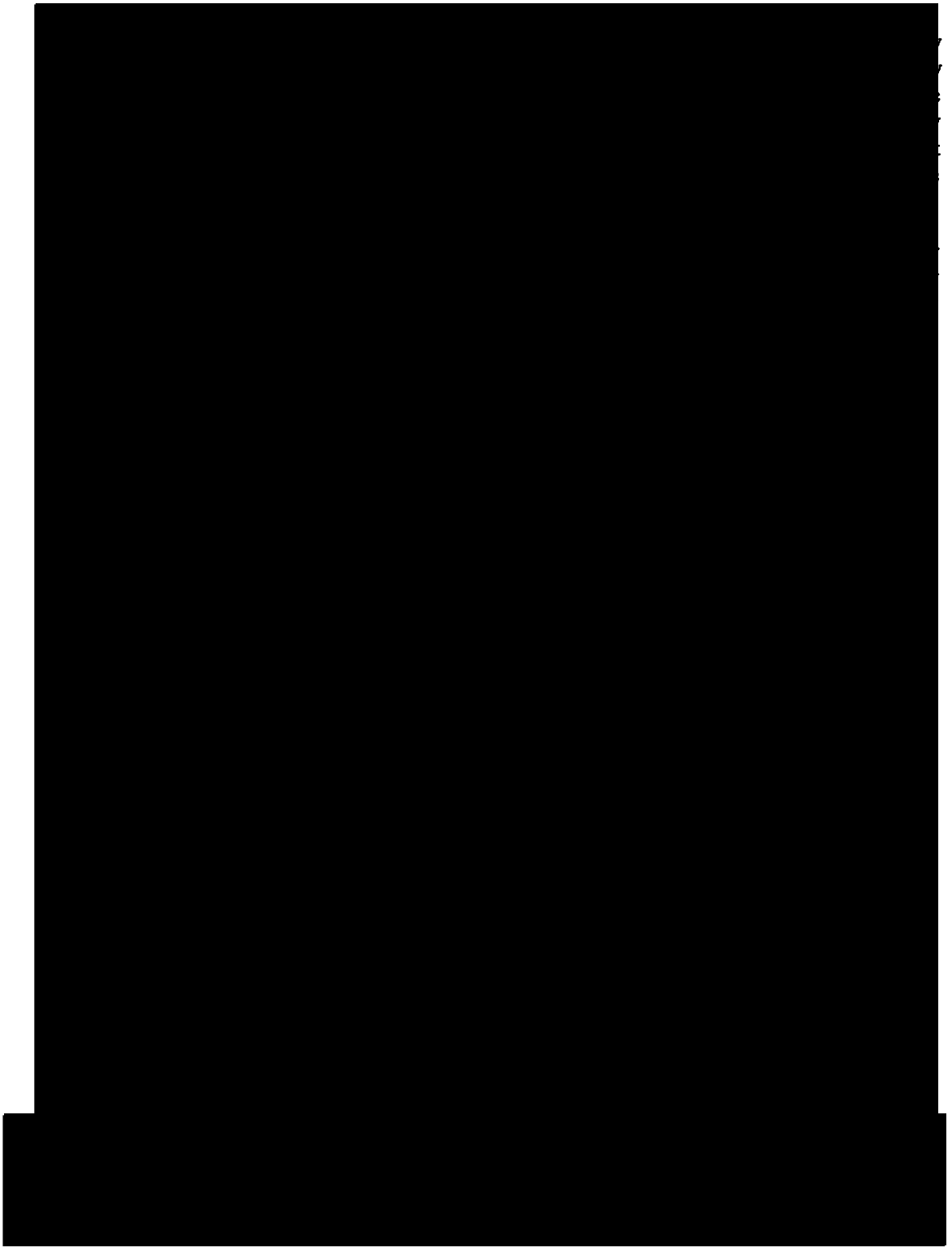

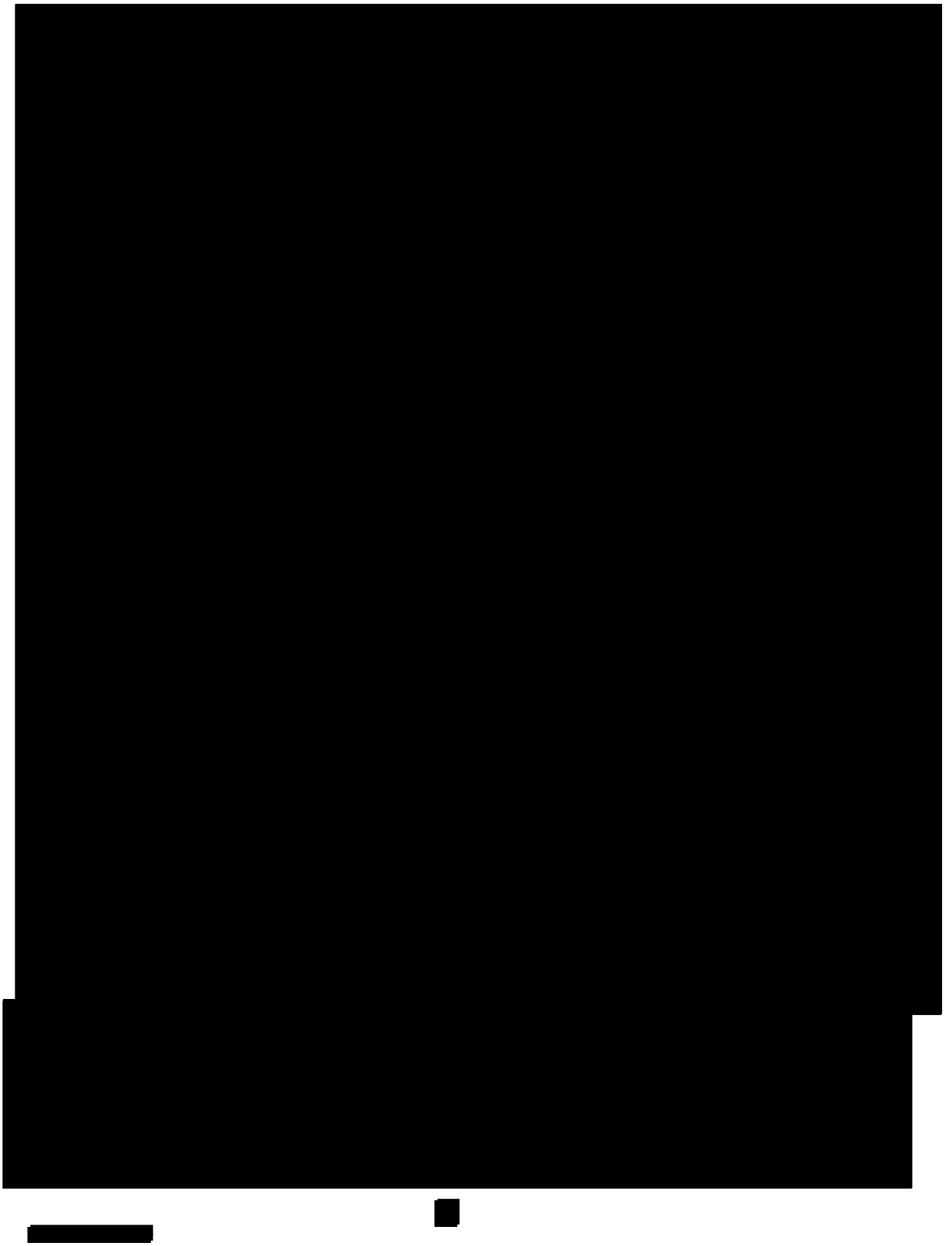

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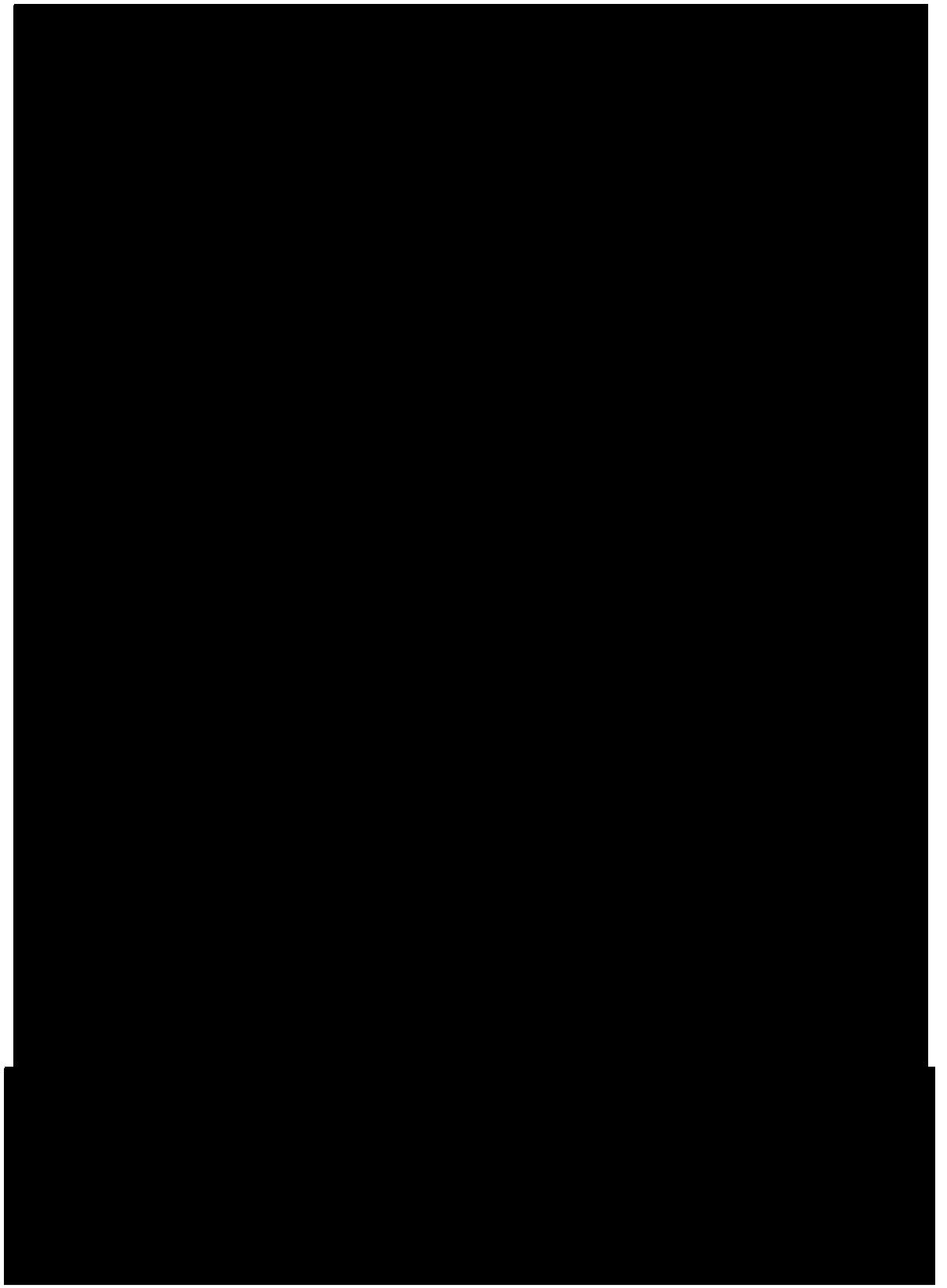

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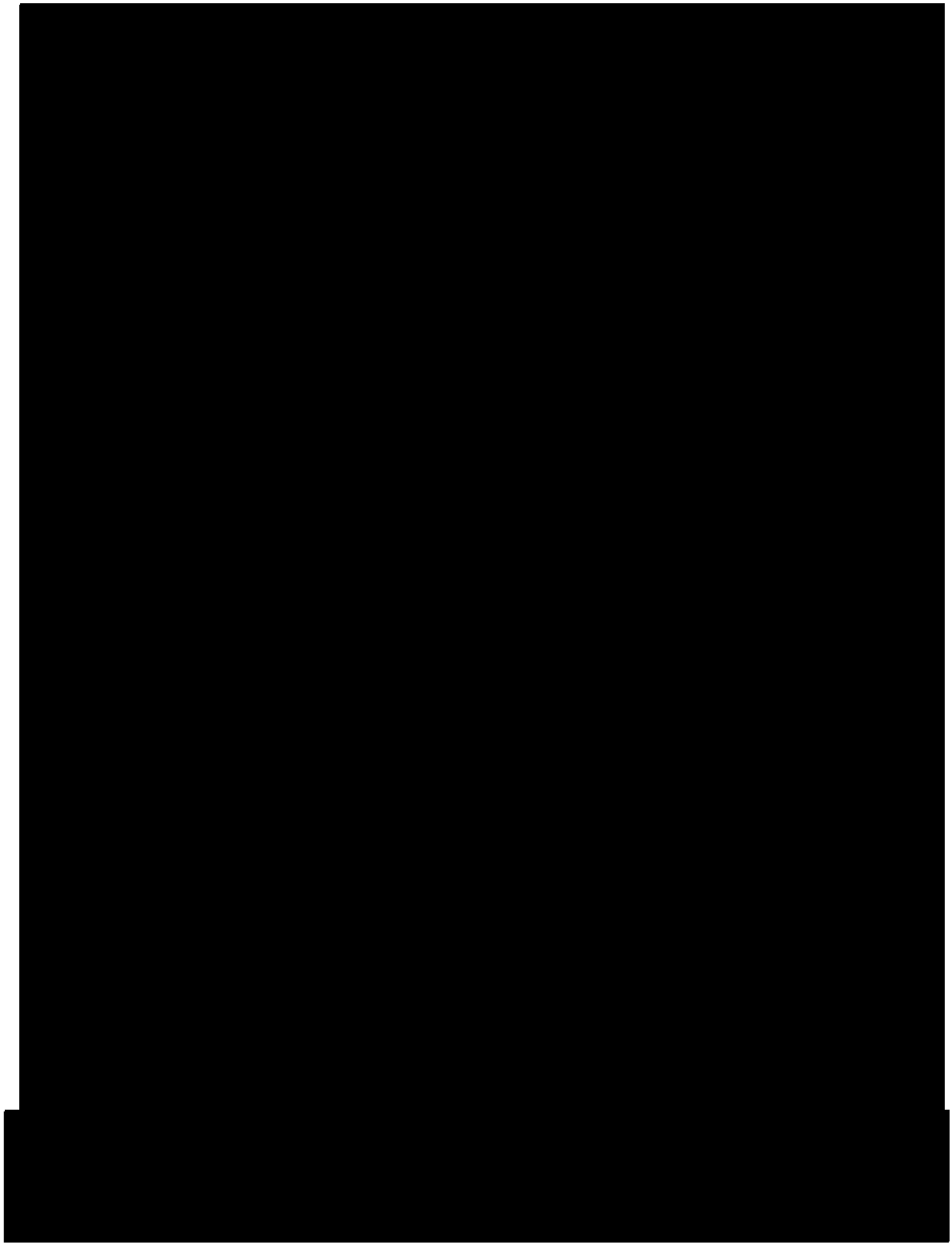

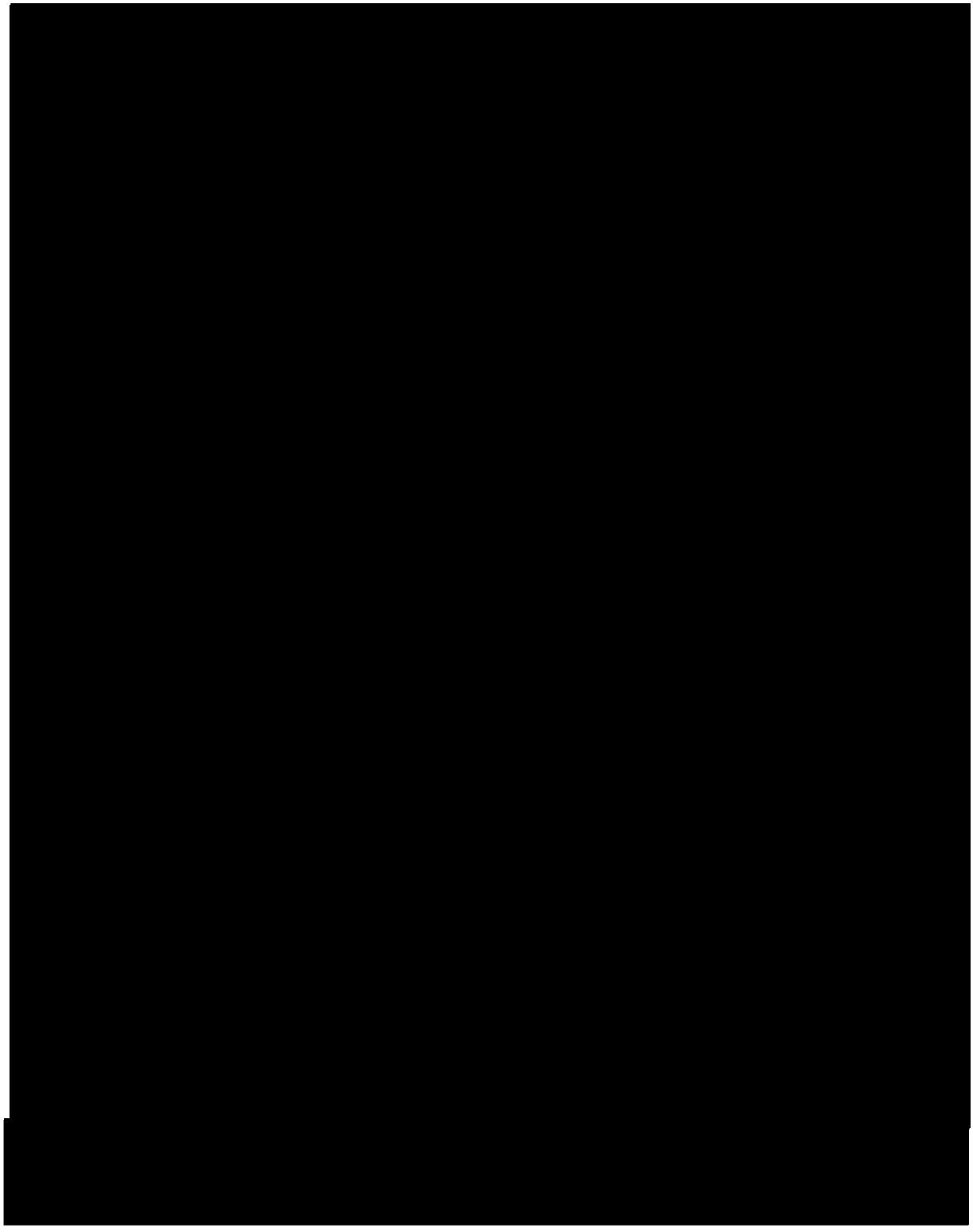

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