UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17676

In the Matter of

OTC GLOBAL PARTNERS, LLC
and RAIMUNDO DIAS,

Respondents.

RESPONDENT DIAS'S RESPONSE TO THE SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR SUMMARY DISPOSITION

Respondent Raimundo Dias, by and through undersigned counsel, hereby submits his Response to the Securities and Exchange Commission Division of Enforcement's (the "Commission") Motion for Summary Disposition Against Respondent Dias (the "Motion"), and states the following in support thereof:

INTRODUCTION

As a threshold matter, this case does not involve any allegations of fraud or other intentional misconduct. Instead, the Commission is seeking to impose an unprecedented lifetime penny stock bar against Mr. Dias based on a stand-alone violation of Section 5 i.e. selling unregistered securities without any applicable exemption. Indeed, such an extraordinary remedy is unwarranted here given Mr. Dias's extensive due diligence prior to concluding that his shares complied with the Rule 144 safe harbor. Accordingly, as discussed in more detail below, the Commission has failed to meet its high burden of demonstrating that the underlying facts of this case meet any of the *Steadman* factors, the test to determine whether a penny stock bar is warranted. For these reasons, the Commission's Motion must be denied.

FACTUAL BACKGROUND

Prior to purchasing the $50,000 portion of Note 2 from Shareholder A, Mr. Dias took extensive steps which led him to believe that he was in compliance with the federal securities laws, and, in particular, the Rule 144 safe harbor. Specifically, Mr. Dias:

- Reviewed Issuer A's filings with the Commission which stated that Shareholder A served as an officer of Issuer A from 2005 through December 9, 2011, when he resigned from the company. Thus, Mr. Dias believed that, as of his resignation date, Shareholder A was no longer an affiliate of Issuer A.

- Mr. Dias obtained legal opinions from Issuer A's counsel which were "intended to be relied on by...[Mr. Dias]," and specifically state that "the holding period for purposes of Rule 144(d) began on or before one year prior to the date hereof [December 9, 2013]" and that "more than one year has elapsed since the date the Shares were deemed acquired by the Shareholder [A]." See Exhibit A, attached; and

- Mr. Dias obtained an issuer representation letter wherein the Former CEO of Issuer A represented that: "the original Debt and related stock and conversion rights is **greater than 12 months old** and was owned and subject to assignment and transfer to you [Mr. Dias] by a **non-affiliate**..." (Emphasis added); See Exhibit B.

Mr. Dias has since learned that Issuer A's counsel, on whose opinions he relied, in part, has been charged with violating Section 5(a) and (c) of the Securities Exchange Act of 1933 and the Commission has obtained a default judgment against him.

ARGUMENT

Although 15 U.S.C. § 77t(g)(1) authorizes a court to prohibit a "person from participating in an offering of penny stock," a permanent penny stock bar "is without justification in fact unless the Commission **specifically articulates compelling reasons** for such a sanction." *S.E.C. v. BIH Corp.*, 2014 WL 7499053, at *6 (M.D. Fla. 2014) (Emphasis added) *citing Steadman v. SEC*, 603 F.2d 1126, 1140; 1143 (5th Cir.1979) ("[w]hen the Commission imposes **the most drastic sanctions at its disposal, it has a duty to articulate carefully the grounds for its decision**, including an explanation of why lesser sanctions will not suffice") (Emphasis added); *SEC v.*

Benger, 64 F. Supp. 3d 1136, 1138 (N.D. Ill. 2014) ("[a] lifetime bar is an extraordinary remedy, usually reserved for those defendants who intentionally engaged in prior securities violations under circumstances suggesting the likelihood of future violations").

As explained above, the *Steadman* factors are the standard for deciding when to impose a penny stock bar. These factors include:

(1) the "egregiousness" of the underlying securities law violation;

(2) the defendant's "repeat offender" status;

(3) the defendant's "role" or position when he engaged in the fraud;

(4) the defendant's degree of scienter;

(5) the defendant's economic stake in the violation; and

(6) the likelihood that misconduct will recur.

Steadman, 603 F.2d at 1140. "It is not a single factor, but rather the sum of the circumstances surrounding the defendant and his past conduct that governs whether to grant or deny injunctive relief." *Benger,* 64 F. Supp. 3d at 1139 *citing S.E.C. v. Zale Corp.*, 650 F.2d 718, 720 (5th Cir. 1981).

Importantly, as explained below, the Commission has not offered any cases similar to the present facts of this case, especially wherein, absent a scheme to violate the federal securities laws or any intentional misconduct, a respondent received a penny stock bar even though he conducted as much due diligence as Mr. Dias. The Commission has already obtained an agreement for monetary sanctions from Mr. Dias, which is equal to more than double what he profited – granting the Commission's request for a lifetime bar would be draconian, wholly unwarranted and, most importantly, unprecedented.

1. The Commission has Failed to Establish that Mr. Dias's Conduct was Egregious

In order to establish that Mr. Dias's conduct was egregious, the Commission provides a parenthetical quote from *In re Kirby,* an administrative proceeding. The Commission's reliance on this single administrative order, however, is insufficient to meet its burden to "specifically articulate compelling reasons" for a lifetime penny stock bar. *See Steadman*, 603 at 1140 ("permanent exclusion from the industry is 'without justification in fact' unless the Commission specifically articulates compelling reasons for such a sanction"). Indeed, a side-by-side comparison of the respondent's conduct in *Kirby* and Mr. Dias's conduct shows a clear divergence in the level of due diligence undertaken in these two cases:

Kirby[1]	**Mr. Dias**
Kirby did not make an effort to verify that the stock was free trading.	Reviewed Issuer A's filings with the Commission to determine that Shareholder A was not an affiliate. Obtained legal opinions from Issuer A's counsel to determine when the holding period began, for purposes of the Rule 144 safe harbor. Mr. Dias believed that the shares were in compliance with Rule 144 because the transfer agent, after conducting their own due diligence, issued Mr. Dias the shares without restriction. In an abundance of caution, Mr. Dias took the extra step of obtaining letters from the Former CEO of Issuer A to verify that Shareholder A was not an affiliate and when the Rule 144 holding period had begun.

[1] *In Re Kirby*, Release No. 8174 (Jan. 9, 2003).

Kirby never knew the identity of the seller.	Mr. Dias had spoken with the Former CEO and had conducted extensive research into Shareholder A.
Kirby gave a blank check for $25,000 because, according to Kirby, the individual who recommended he purchase the stock was "unclear as to who the seller was or who the check was to be made out to."	Mr. Dias wrote a check for $3,334 directly to Shareholder A, who assigned him a portion of his Note 2.
Contrary to his Firm's policies, Kirby admittedly failed to notify his Firm in advance that he was purchasing the underlying stock.	Mr. Dias was not registered with any firm and, therefore, did not violate any firm policies like *Kirby*.

Clearly, the respondent in *In re Kirby* failed to conduct any due diligence to determine whether he would be able to trade his shares in compliance with federal securities laws. Mr. Dias, on the other hand, was abundantly cautious in determining whether the shares he intended to trade met Rule 144's requirements. Indeed, Mr. Dias's conduct was not egregious.

2. Mr. Dias is Not a Repeat Offender

The Commission's Motion fails to address this factor, entirely, and for good reason. Since Mr. Dias entered the financial industry in 1997, he has maintained a pristine disciplinary record. The Commission's stand-alone Section 5 allegation against Mr. Dias is the first federal securities violation in his untainted 10 year history. Therefore, Mr. Dias is not a repeat offender and a lifetime penny stock bar is unwarranted. *See e.g. SEC v. Alliance Transcription Services, Inc.*, 2009 WL 5128565, at *10 (D. Ariz. Dec. 18, 2009)(defendant was not considered a "repeat offender" where the Commission failed to show that defendant had engaged in prior violations of federal securities laws).

3. The Commission has not Alleged any Fraud

The third factor does not apply in this case because the Commission has not alleged any fraud. Moreover, because the Commission has not alleged an underlying "scheme" in which Mr.

Dias partook, it is impossible to quantify what role, if any, Mr. Dias had such that a lifetime penny stock bar would be warranted.

4. Mr. Dias Lacks Scienter

Although scienter is not an element of Sections 5(a) and (c), it is important in establishing the need for a penny stock bar. *S.E.C. v. Elliot*, 2012 WL 2161647, at *7 (S.D.N.Y. June 12, 2012). However, the Commission offers little to no evidence of scienter to support such a relief. Instead, despite making no mention of scienter or intentional misconduct in its Order Instituting Proceedings, the Commission now argues that Mr. Dias possessed a level of scienter simply because he has experience with small-cap publicly traded companies and should have known to file a registration statement. Motion at p. 6. The Commission provides no legal support for this position, and such a conclusion does not follow. Moreover, the Commission also suggests that even if Mr. Dias was inexperienced, a penny stock bar is warranted in order to "deter future misconduct," and relies on *In re Kirby* for support. But, as explained above, the facts in *In re Kirby* are easily distinguishable from Mr. Dias's case. Indeed, in *In re Kirby*, the respondent **admitted** that he did not investigate the issuer other than a "quick technical analysis" into the stock price and trading activity. *In Re Kirby*, Release No. 8174 at *5. Moreover, the respondent **had no idea who the seller was** when he agreed to purchase the unregistered securities. *Id.* Clearly, the respondent in *In re Kirby* failed to meet even the most basic due diligence requirements set forth by the Commission in Release No. 4445[2].

[2] In SEC Release No. 4445, the Commission provides guidance concerning the expected standards of conduct when dealing with unregistered securities:

The remaining cases upon which the Commission relies are also distinguishable from the instant matter. *See Elliot*, 2012 WL 2161647 at *6.8.9 (court found that the defendants, who had a long history of legally trading penny stocks, acted with scienter when they abandoned prior practices and ignored red flags, including failure to act after learning from public filings that the issuer had been enjoined from engaging in the sale of unregistered securities); *SEC v. Convergex Global, Inc.*, 2006 WL 907567 (S.D. Fla. Mar. 10, 2006) (scienter imputed upon defendants who were charged with engaging in a scheme to defraud investors by releasing press releases containing material misrepresentations and omissions in violation of Section 10b and Rule 10b-5); and *part SEC v. Sky Way Global*, 2010 WL 3276461 (M.D. Fla. Aug. 18, 2010) (finding that defendant, who was also charged with violating Section 10b and Rule 10b-5 as well as other scienter-based violations, acted with scienter because he actively promoted investment in the company, actively solicited investors for securities transactions, evaded service of process, failed to appear in court, and attempted to conceal his violations of the law).

Mr. Dias, on the other hand, conducted extensive due diligence into Issuer A and Shareholder A in order to conclude that the underlying shares were in full compliance with the Rule 144 safe harbor (and, therefore, could be traded without being registered). A complete outline of the extensive due diligence Mr. Dias conducted is provided in the chart above. Indeed, Mr. Dias gathered a significant amount of evidence to show that Shareholder A was not an affiliate

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> [when a securities professional is] offered a substantial block of a little-known security, either by persons who appear reluctant to disclose exactly where the securities came from, or where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for.

In Re Kirby, Release No. 8174 at *5.

and that the underlying securities were in compliance with Rule 144's one (1) year holding period. Additionally, unlike the cases it relies on, the Commission has failed to establish any "red flags" which it believes should have put Mr. Dias on notice that the underlying shares should have been registered.

Also, the fact that Issuer A's counsel was found to have violated Section 5 in an unrelated federal court action brought by the Commission for, among other things, providing material misinformation in his legal opinions, strongly negates any scienter on Mr. Dias's part. *See SEC v. OTC Capital Partners, LLC, et al.*, Case No.: 16-cv-20270, DE 21 (S.D. Fla. May 31, 2016). Indeed, given Issuer A's counsel's misinformation, and the lack of any underlying scheme, Mr. Dias could not have reasonably been able to uncover red flags, if any, which could have led him to believe that his shares had to be registered. Accordingly, the Commission has failed to demonstrate the requisite scienter for the imposition of a penny stock bar.

5. Mr. Dias's Economic Stake was Minimal

Mr. Dias obtained $39,241 in profits from his trades during the relevant time period. Motion at p. 4. Although the Commission has not alleged any underlying scheme in which Mr. Dias's profits could be compared to the scheme's profits (as is the case in virtually every case involving Section 5 violations), the profit Mr. Dias obtained is a pittance when compared to the profits made in the cases relied on by the Commission in its Motion. *See e.g. Skyway Global*, 2010 WL 3276461 at *1 (defendant realized over $2 million in profits); *SEC v. Elliot*, 2012 WL 2161647, at *13 (S.D.N.Y. June 12, 2012) (defendants realized over $3 million in profits). Nonetheless, Mr. Dias has agreed to disgorge, and has disgorged, more than double the amount he obtained in profits to the Commission.

6. There is No Evidence that the Misconduct is Likely to Recur

According to the Commission, "Dias' continued ownership of Global Partners at the relatively young age of forty-five presents him the opportunity to continue to violate the securities laws relating to penny stocks." Motion at p. 6. This reasoning is totally insufficient to serve as a basis for a lifetime penny stock bar. Specifically, the Second Circuit in *SEC v. Patel* found that a general statement, such as the one advanced by the Commission here, is insufficient to show that future misconduct would occur. 61 F.3d 137, 141 (2d Cir. 1995). The court in *Patel* stated:

> The only findings that the district court made in this regard were that "Patel was a founder of Par and used his position as an officer and director to engage in misconduct." **This is merely a general statement of events and can in no way justify the prediction that future misconduct will occur.**

Id. (holding that "it was error for the district court to say that the likelihood of future misconduct based on the foregoing statement 'is sufficient to warrant the imposition'" of a penny stock bar)(Emphasis added); *see also Steadman,* 603 F.2d at 1140 ("[t]o say that past misconduct gives rise to an inference of future misconduct is not enough").

Moreover, given Mr. Dias's lack of any regulatory history, there is no indication from Mr. Dias's past that would suggest that future penny stock violations will occur. As a result, the Commission has failed to meeting the heighten standards for seeking a penny stock bar, and, therefore, its Motion must be dismissed.

CONCLUSION

A penny stock bar is unwarranted in a case such as this, where there are no allegations of fraud or scienter based violations. Unlike the defendants in the cases the Commission relies on, Mr. Dias exercised an abundance of caution and traded Issuer A's stock only after: (1) receiving assurances from Issuer A's filings with the Commission; (2) the legal opinions from Issuer A's

counsel; (3) the representations by Former CEO that his shares complied with the Rule 144 safe harbor; and (4) the transfer agent, after conducting its own due diligence, issued Mr. Dias the free trading shares . Notwithstanding his diligence, Mr. Dias has already agreed to pay the Commission more than double the profits he received as a penalty for any Section5 violations in which the Commission believes him to be involved. Indeed, the addition of a penny stock bar on top of the large monetary penalty Mr. Dias has already agreed to pay is draconian and unprecedented. Therefore, based on the foregoing, Mr. Dias respectfully requests that the Commission's Motion and request for a penny stock bar be denied in its entirety.

January 23, 2017

Respectfully submitted,

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Certificate of Service

I hereby certify that an original and three (3) copies of the forgoing were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E. Washington D.C. 20549-9303, and that a true and correct copy of the forgoing has been served by Email and U.S. Mail on January 23, 2017, on the following persons entitled to notice:

Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Room 2557
Washington D.C. 20549
(also via email to alj@sec.gov)

Russell Koonin, Esq.
Attorney for Plaintiffs
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
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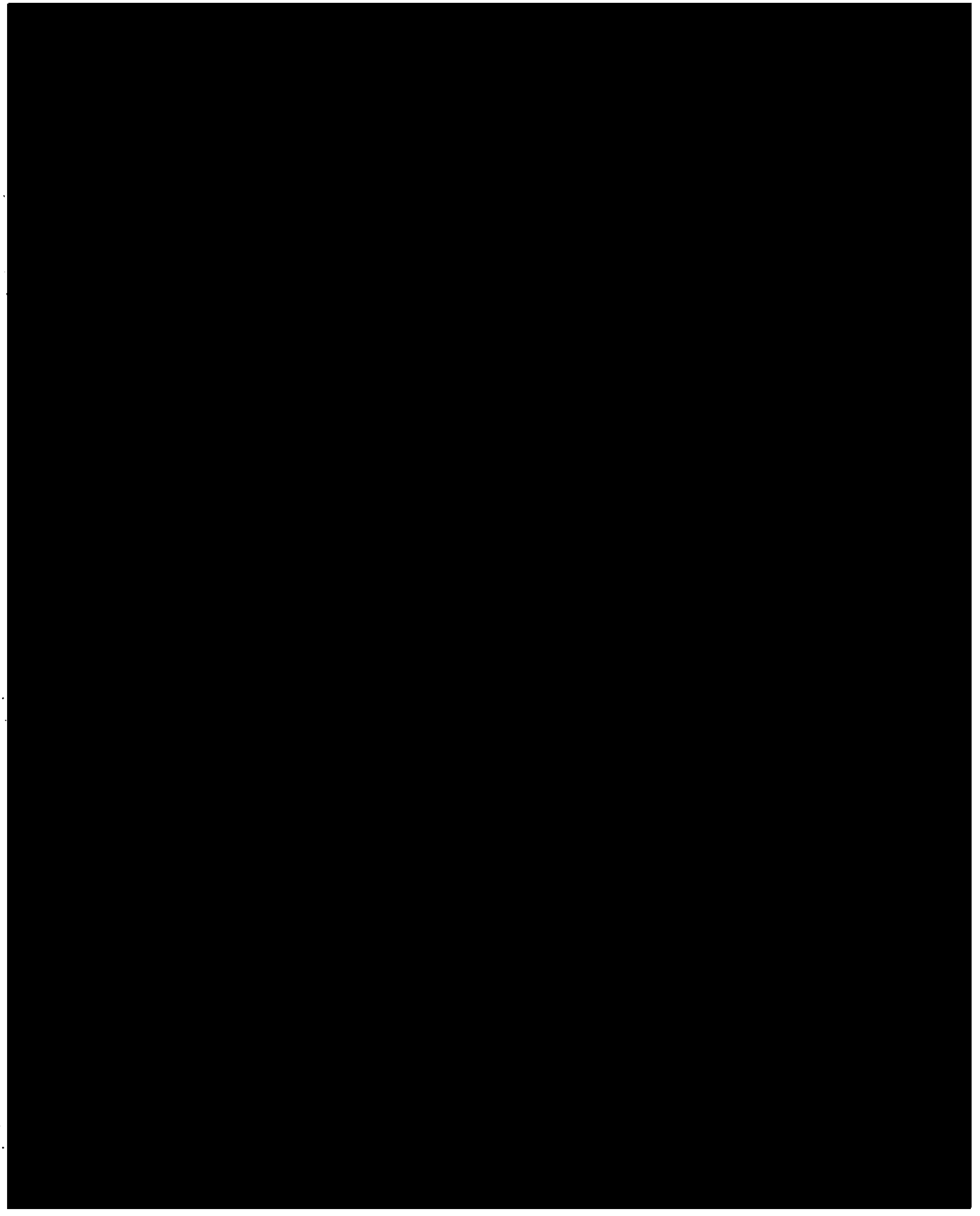
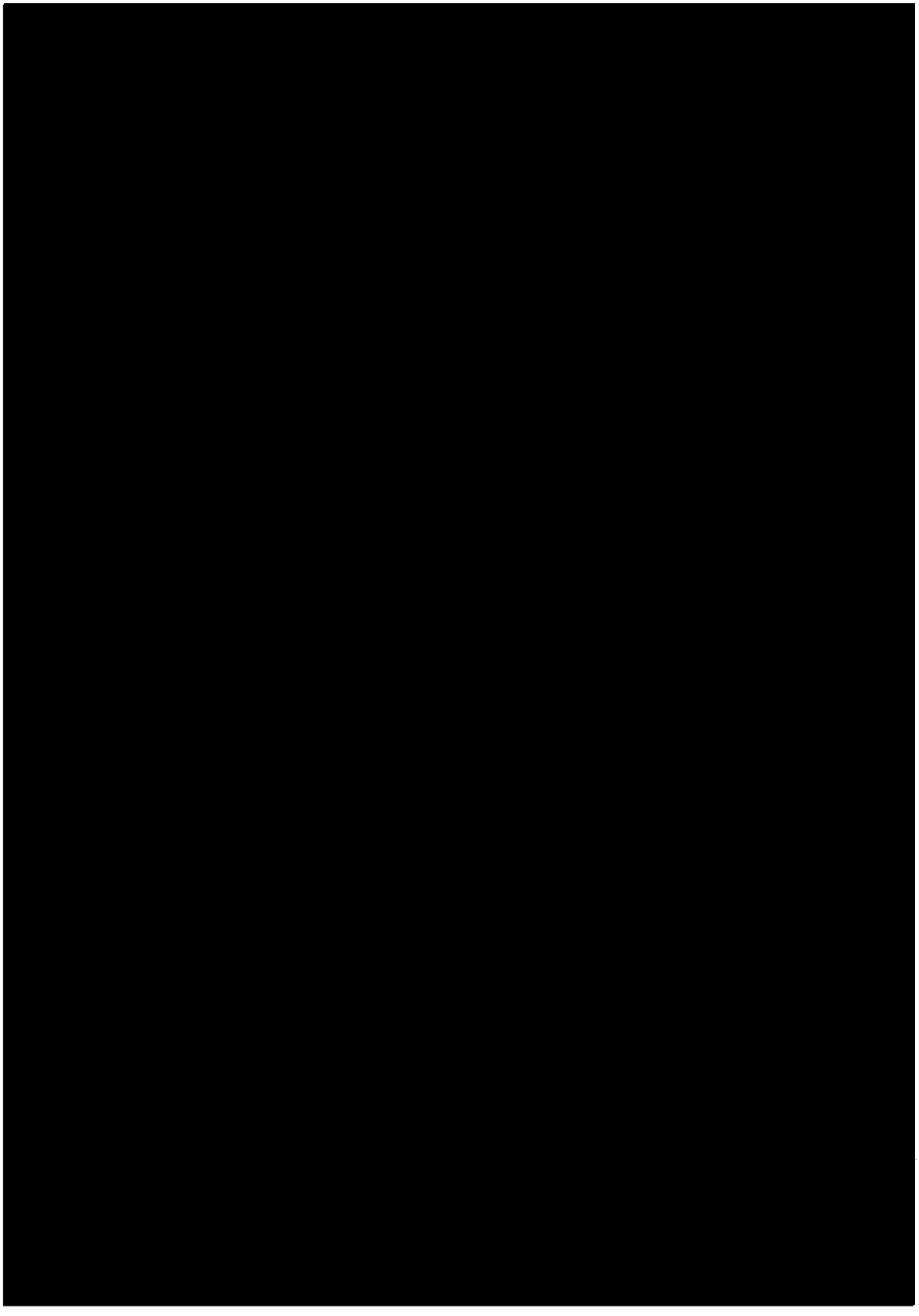
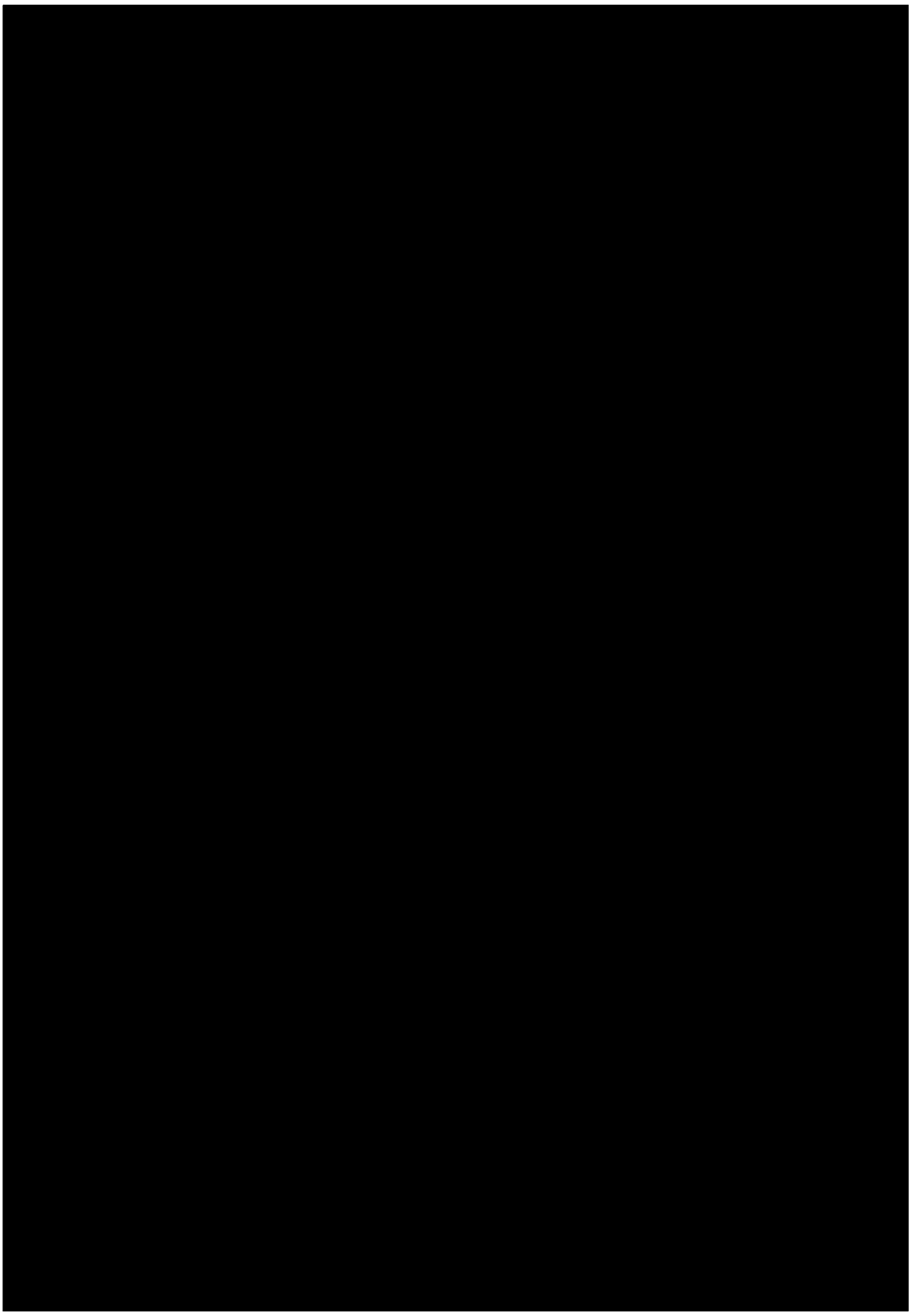
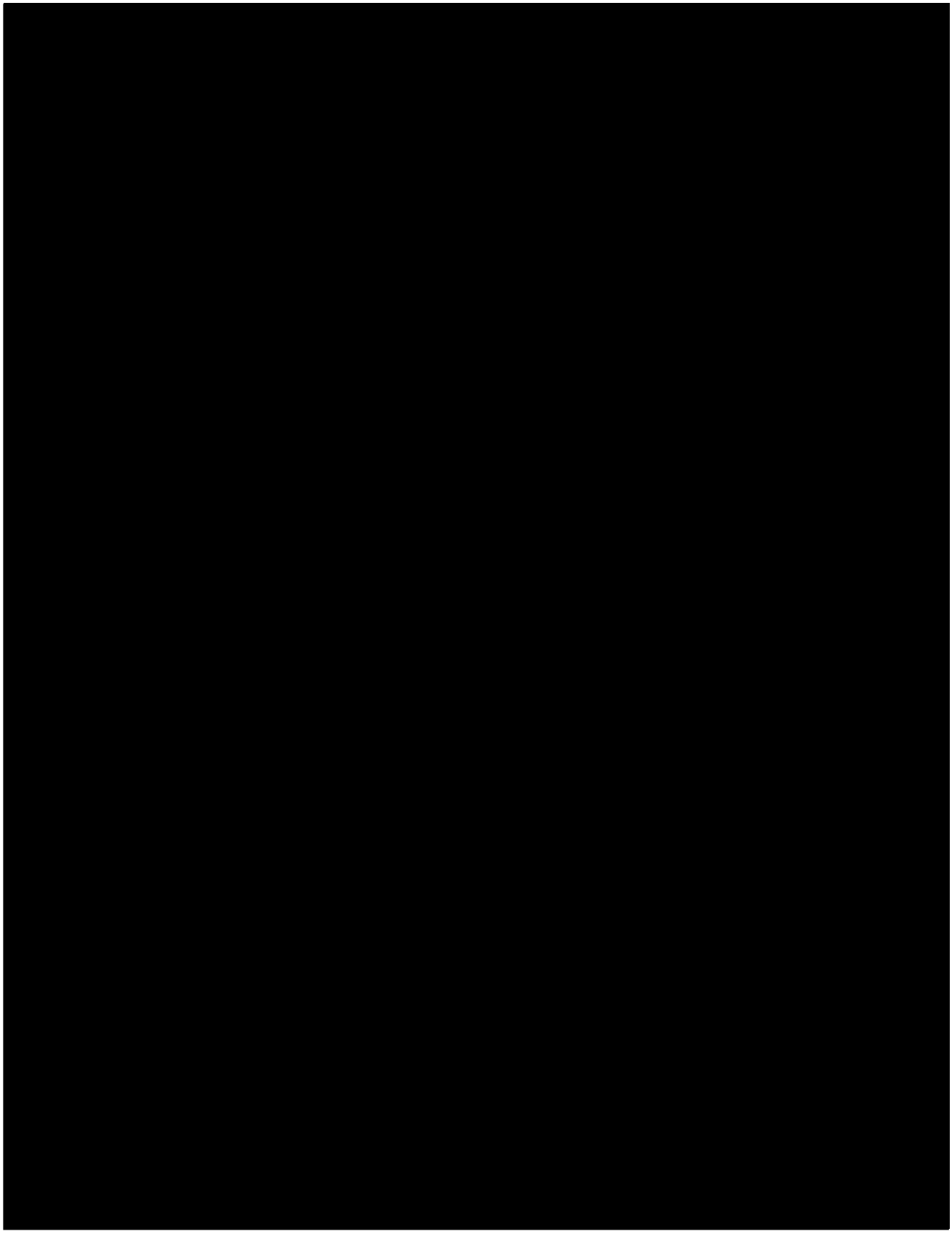
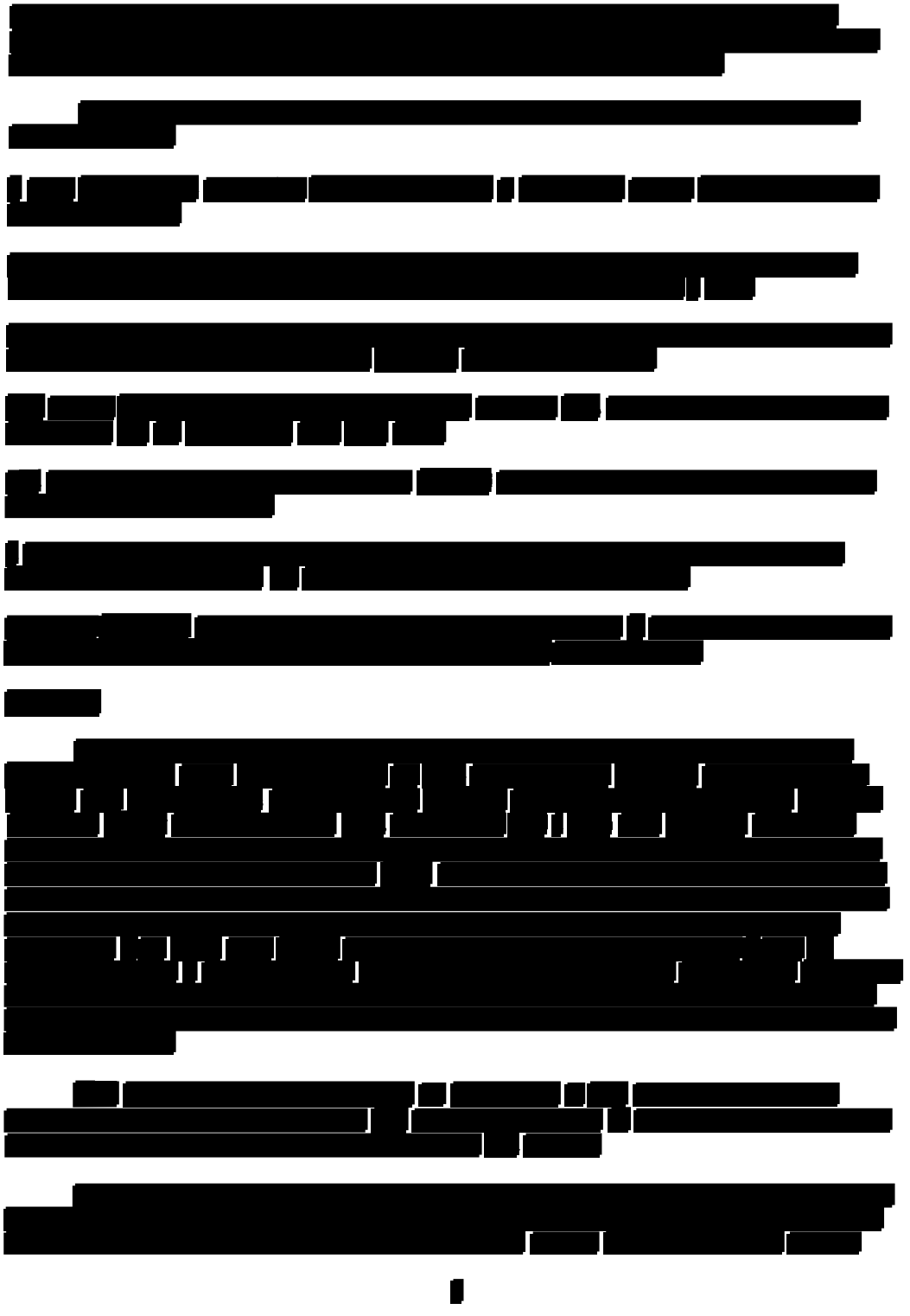
EXHIBIT A

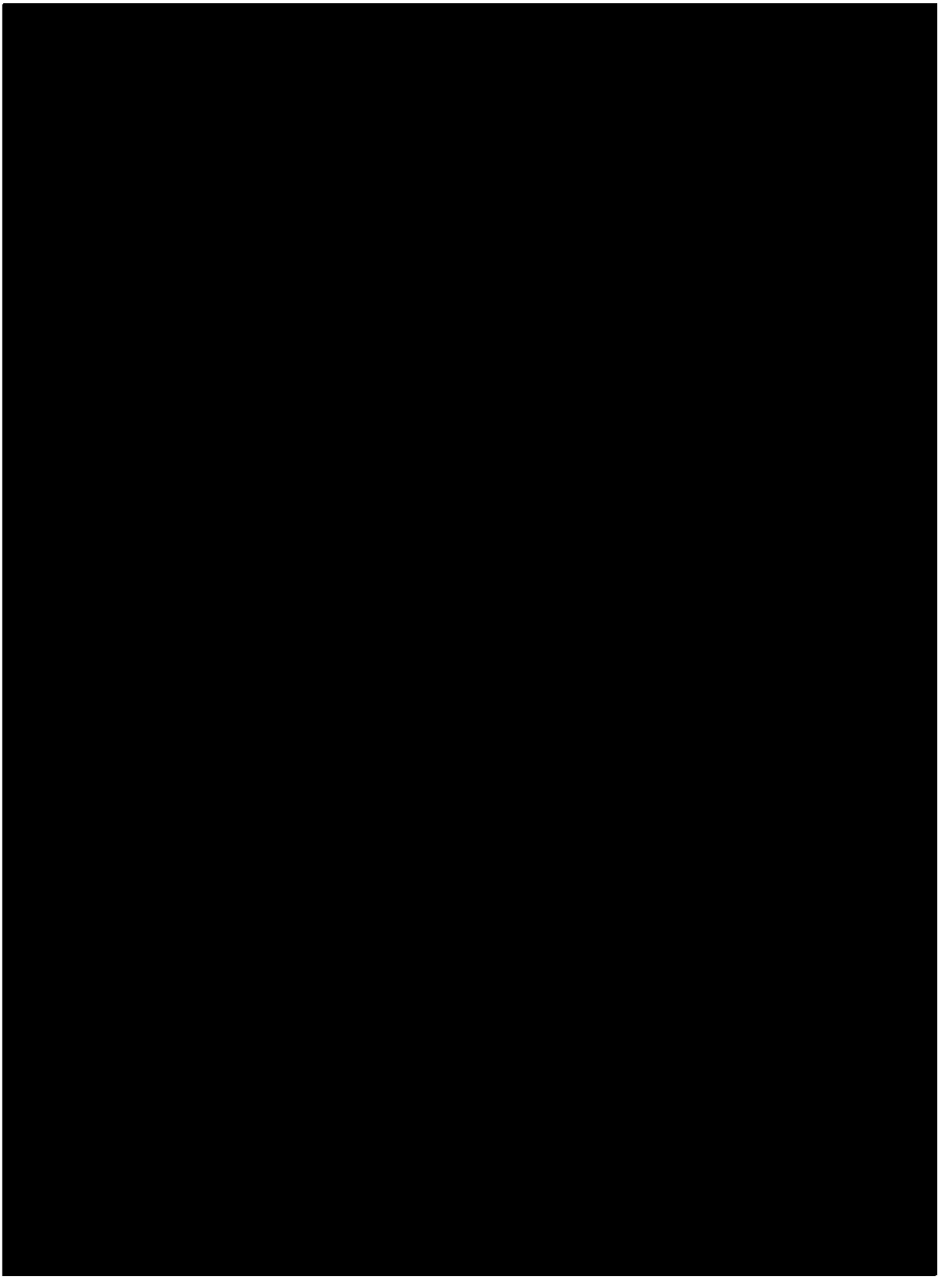


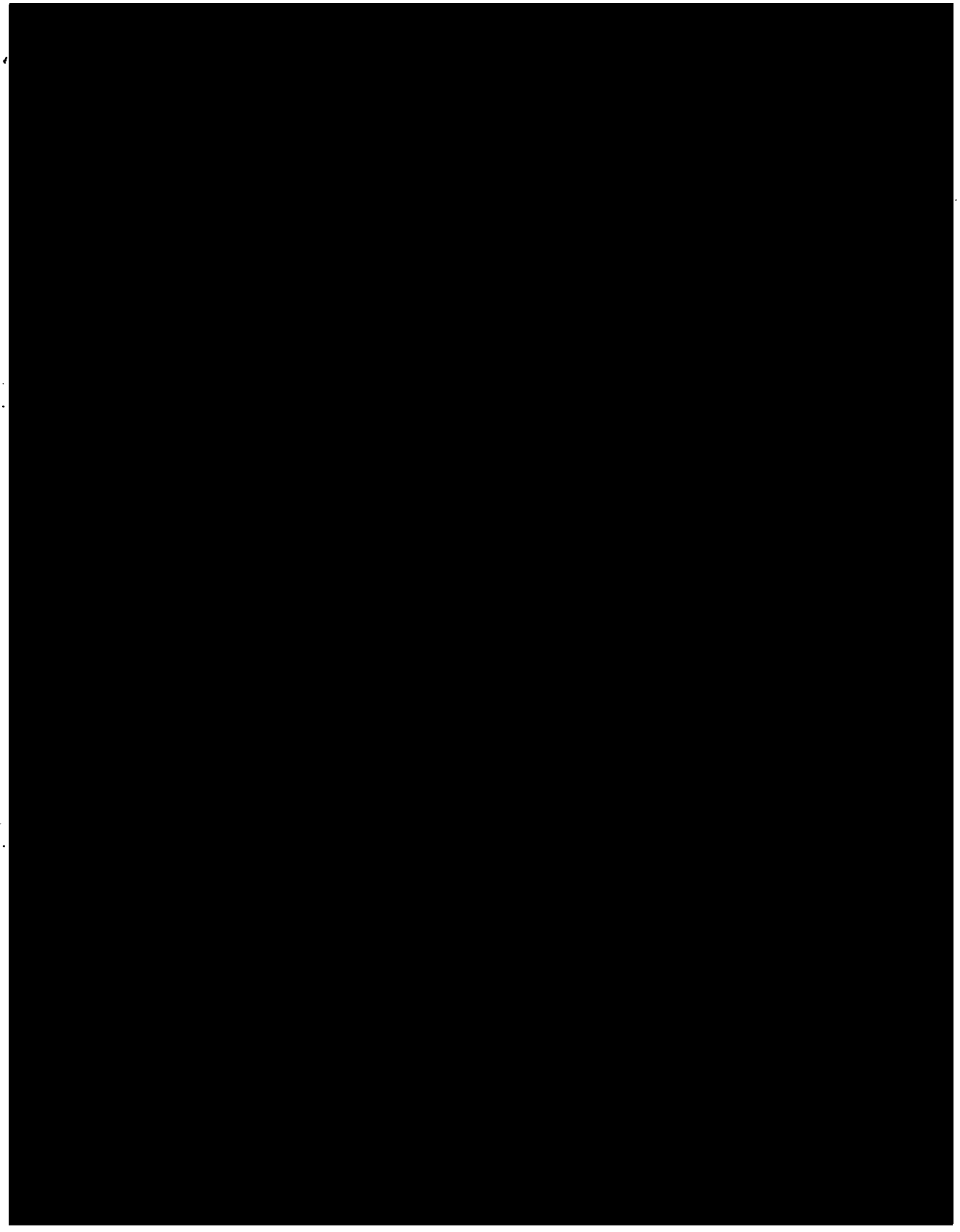


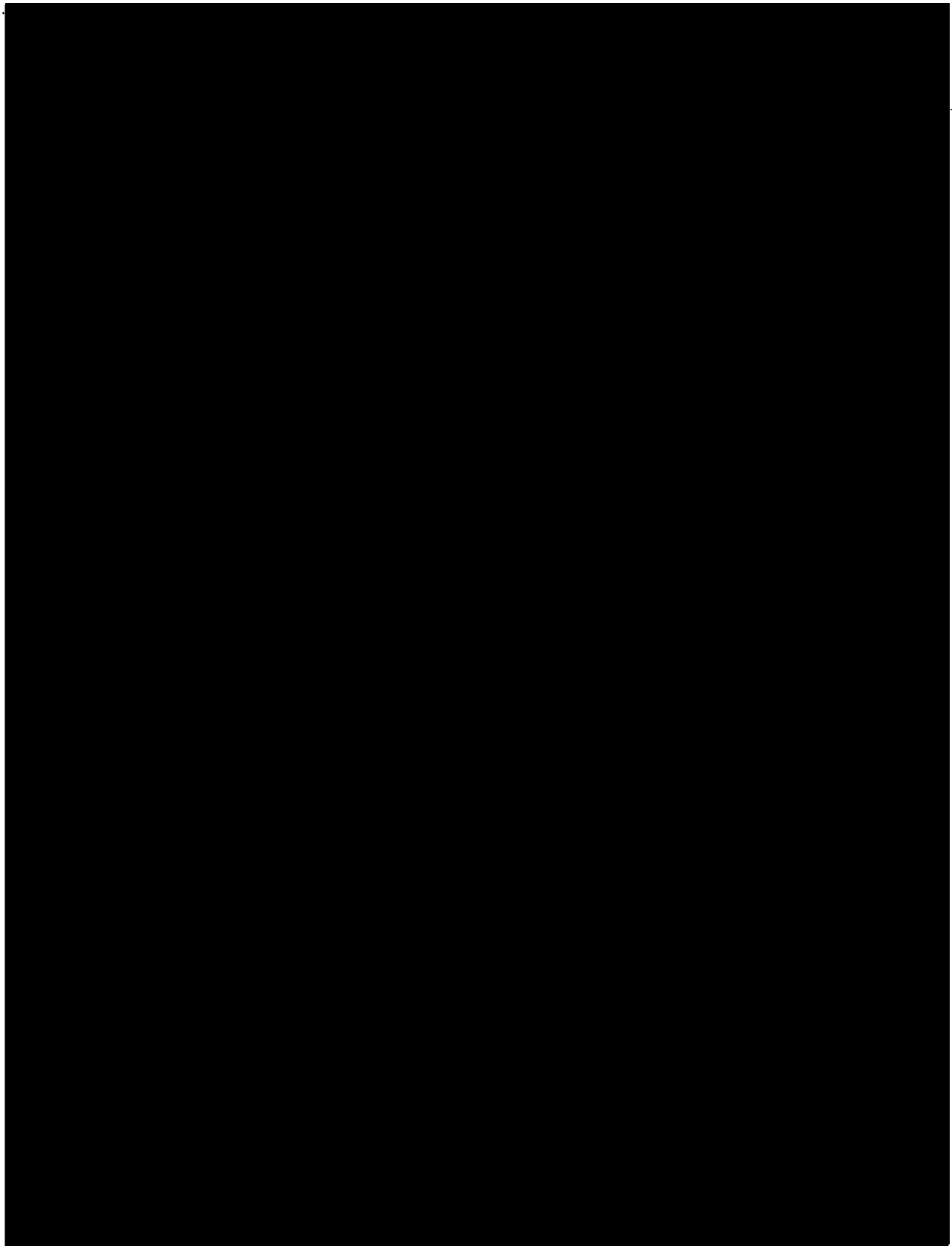


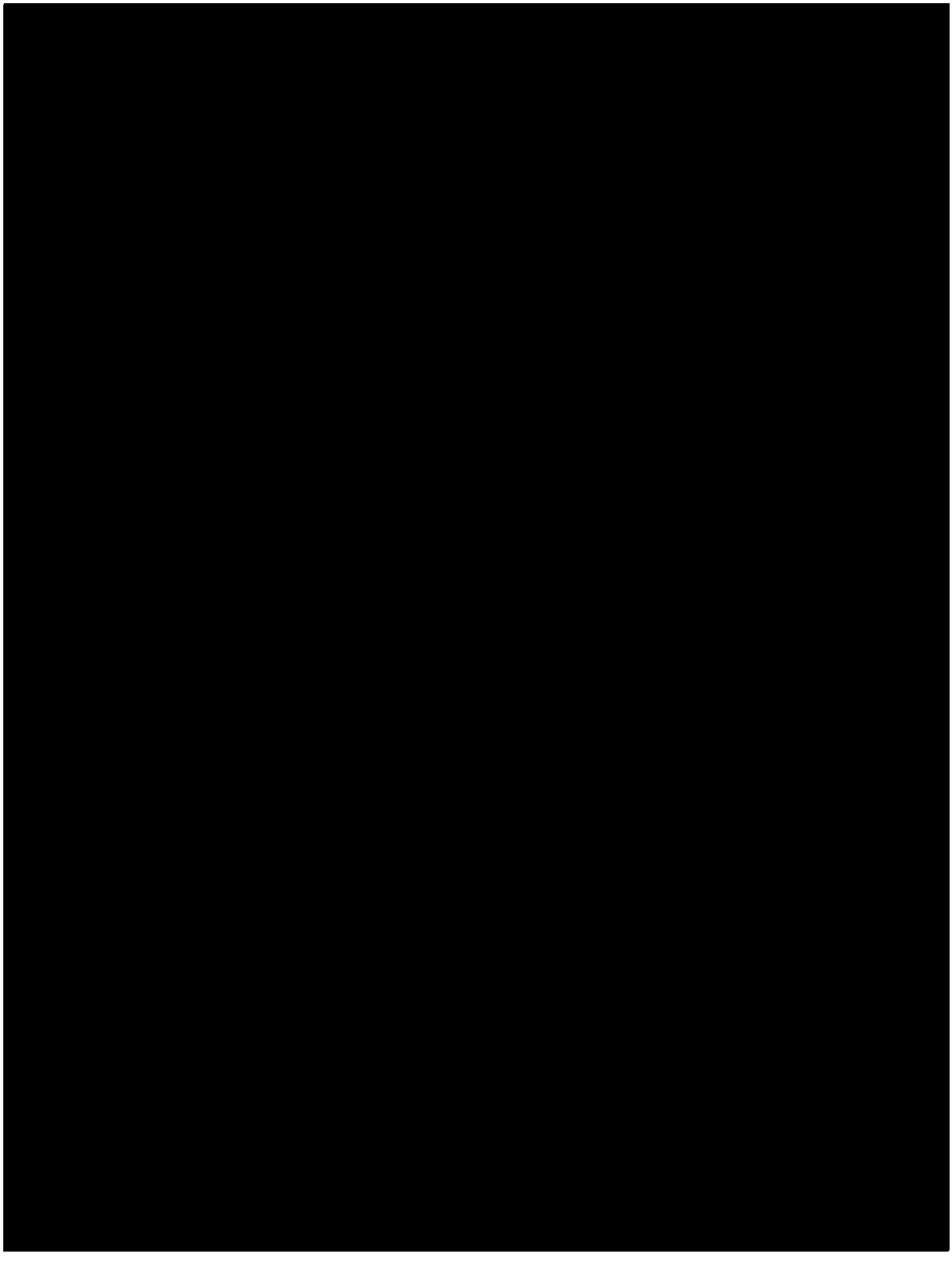


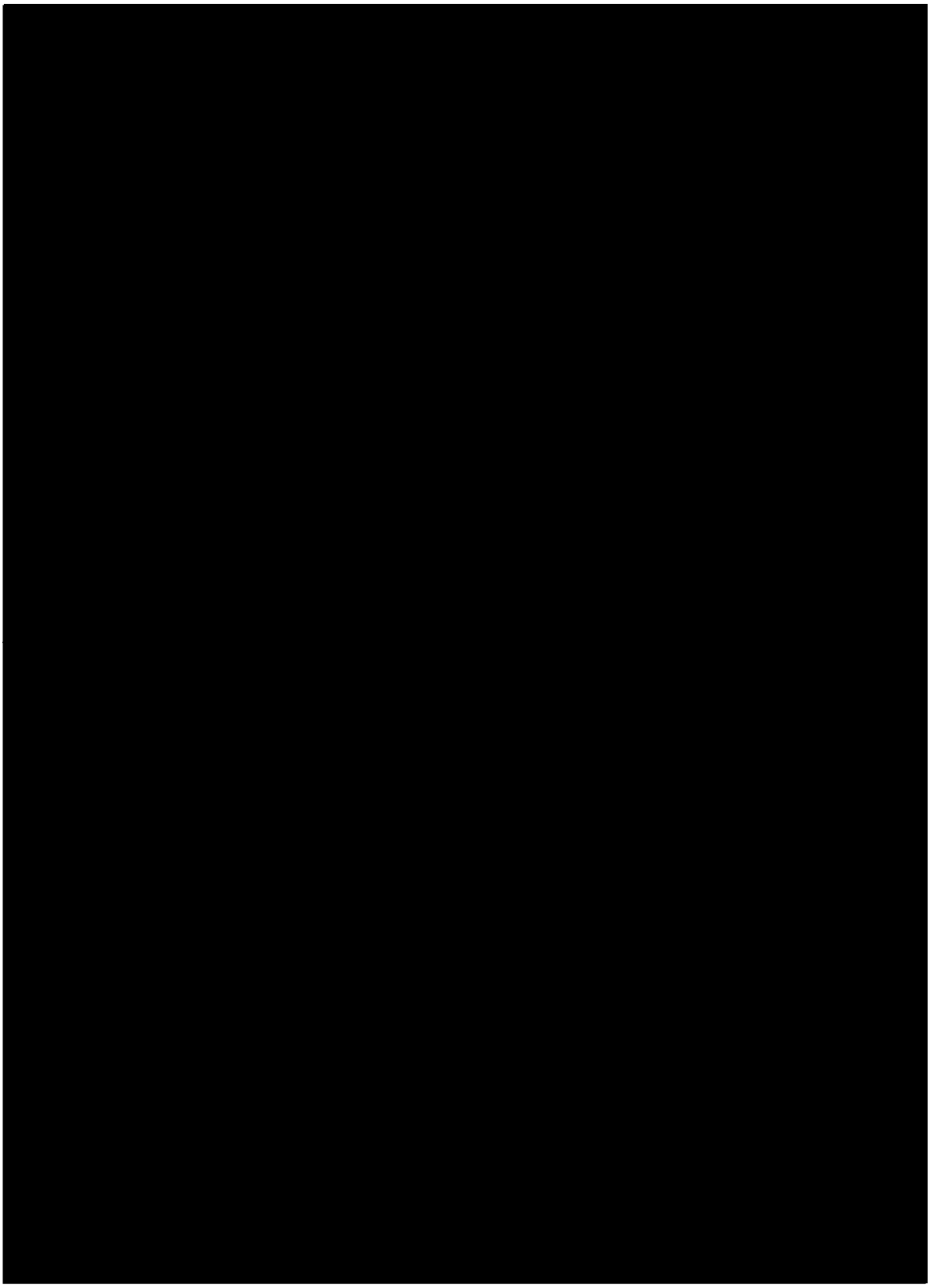


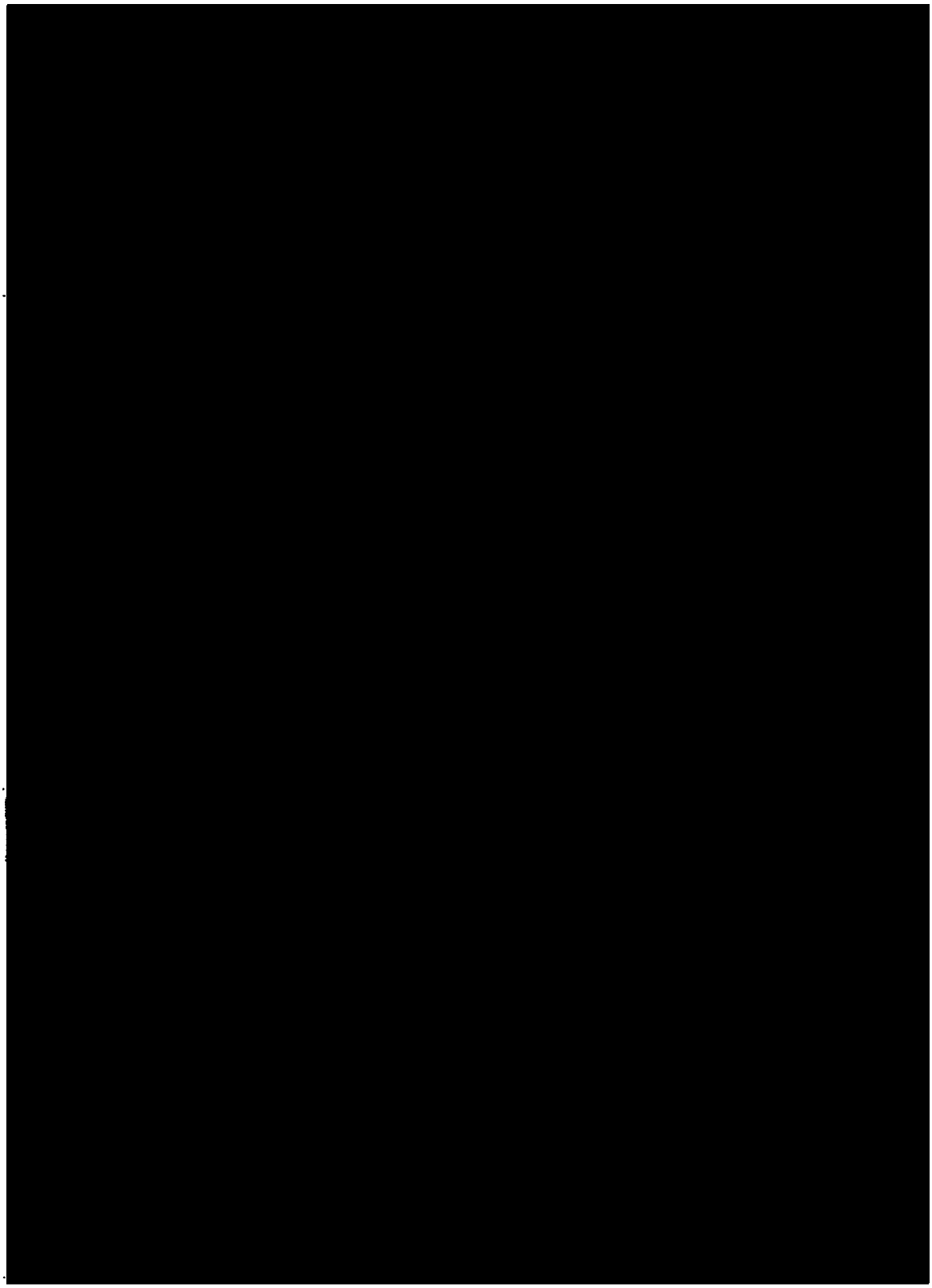












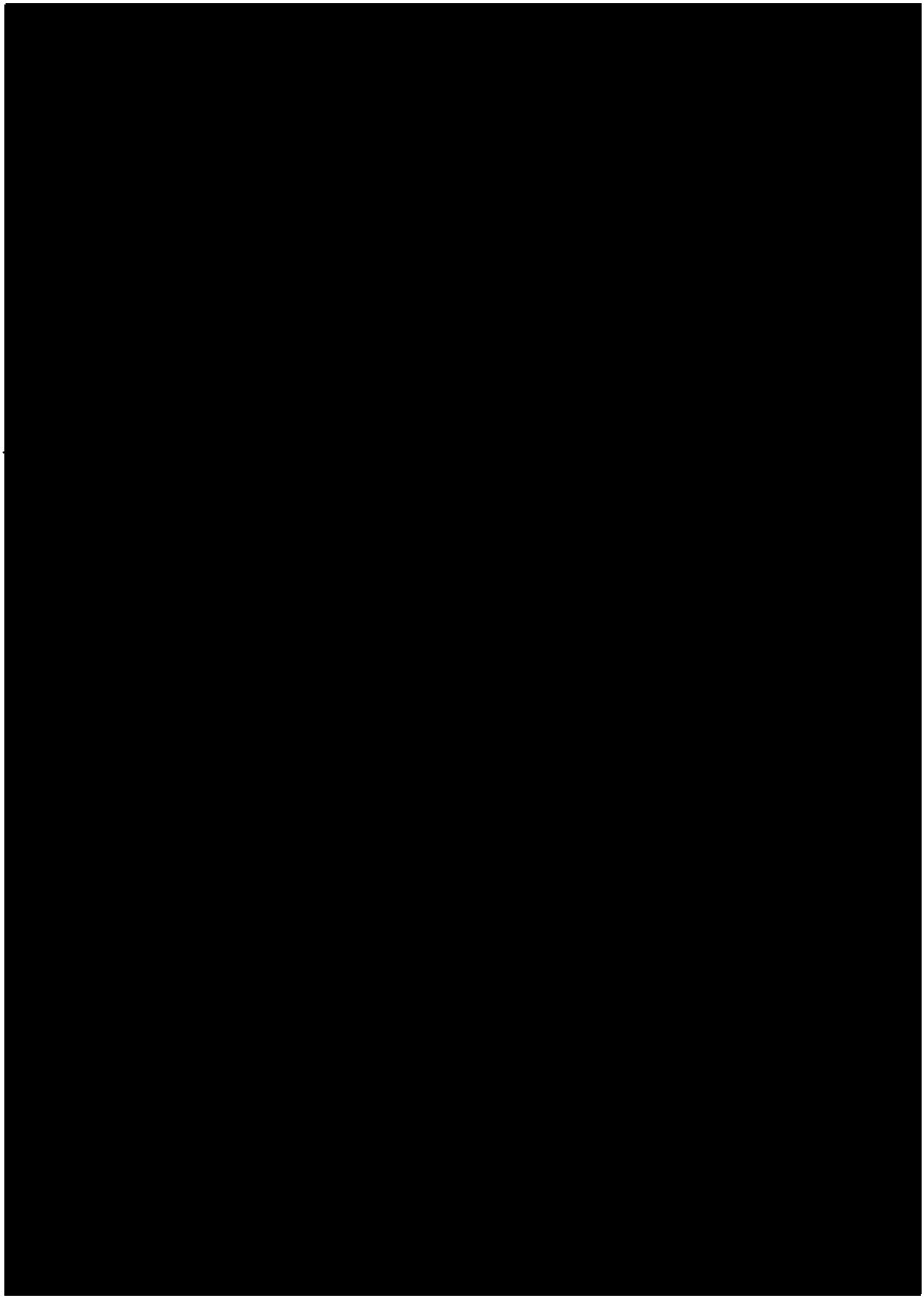


EXHIBIT B