IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	)	**Chapter 11**
HEALTH DIAGNOSTIC LABORATORY, INC., *et al.*,	)	**Case No. 15-32919 (KRH)**
Debtors.	)	**(Jointly Administered)**
RICHARD ARROWSMITH, LIQUIDATING TRUSTEE OF THE HDL LIQUIDATING TRUST	)	
Plaintiff,	)	
v.	)	**Adv. Proc. No. 16-03271 (KRH)**
LATONYA MALLORY, G. RUSSELL WARNICK, JOSEPH P. MCCONNELL, SATYANARAIN RANGARAJAN, *et al*.	)	
Defendants.	)	

LATONYA S. MALLORY'S MOTION TO DISMISS

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INTRODUCTION

Richard Arrowsmith, the trustee and plaintiff (the "Trustee"), is the assignee of purported claims that he contends Health Diagnostic Laboratory, Inc. ("HDL" or the "Company") has against LaTonya S. Mallory ("Mallory") in her role as director, officer, and/or shareholder of HDL. In an apparent hindsight effort to re-write the history of HDL, the Trustee attempts to vilify Mallory and others for their pioneering efforts to improve healthcare. In doing so, the Trustee has concocted a Complaint replete with fictional allegations, half-truths, and misleading facts, many of which the Trustee and HDL have contradicted in other statements.

HDL's utilization of process and handling ("P&H") fees and other billing practices, which the Trustee now assails, form the primary factual predicate for many of the claims asserted against Mallory. What the Complaint tactically omits, however, is that long after Mallory departed HDL, the Company, in which shoes the Trustee stands, publically acknowledged that "[t]he payment of process and handling fees was a longstanding practice in the diagnostic laboratory industry." Similar to the instant lawsuit, the Company posited that "[t]he allegations were made against a number of companies operating in the clinical laboratory industry *by individuals who stand to profit by making these allegations.*" HDL also noted, consistent with statements by the government—but contrary to the Trustee's allegations—that it was not until June 2014 that the government issued guidance "for the first time" regarding the payment of such fees, and that Mallory caused the Company to cease such payments within 24 hours of the guidance being issued. Moreover, long after Mallory left her employment, HDL expressly denied in writing all allegations made by the United States against it, which the Trustee now embraces. Indeed, HDL is on record, well after Mallory's departure from HDL, as stating: "We have consistently sought to comply with all applicable legal and regulatory requirements . . . ."

Even more telling is that notwithstanding the Trustee obtaining a $20.3 million settlement from LeClairRyan P.C. ("LeClairRyan"), which provided legal advice to HDL, Mallory, and others during relevant time periods implicated by the Complaint, there is a remarkable absence from the Complaint of *any* facts relating to LeClairRyan's instrumental role with HDL and its management—presumably because the Trustee knew that including such facts would wholly undercut his claims asserted against Mallory and other directors and officers.

This absence of any reference to LeClairRyan's involvement is astonishing in that the Trustee, himself, has admitted with respect to P&H fees that "[redacted]"[1] Indeed, the Trustee previously acknowledged, but conveniently omitted from the Complaint, that "[redacted]" In his Complaint, the Trustee suggests that Mallory ignored concerns raised by healthcare providers ("HCPs"); yet, he previously conceded in writing that "[redacted]"

Despite the true facts known to the Trustee, he nevertheless seeks to place blame on Mallory by concocting a false narrative in which Mallory simply disregarded concerns brought

[1] Certain excerpts have been redacted in the version of this Motion filed publicly in light of the Trustee's Amended Motion to File Information Under Seal and to Restrict Public Access, related order granting such motion, and recent hearing on the Trustee's motion at Dkt. 1669. Simultaneously with the filing of this Motion, Mallory has filed a motion seeking relief consistent with the protections sought and obtained by the Trustee.

to her attention about P&H fees. The Trustee knows, however, as indicated above, that Mallory asked LeClairRyan "[redacted]" In sum, the Trustee has selectively disclosed only certain facts in an effort to paint a distorted picture whereby Mallory allegedly snubbed laws to blindly pursue personal gain. As a result of this lack of candor, and the legal standard upon which a motion to dismiss is based, the Complaint is not subject to dismissal in its entirety at this juncture; nevertheless, the Trustee has failed to state a claim with respect to several claims identified below.

STATEMENT OF FACTS

A. Formation of HDL

In 2005, Mallory was employed at Berkeley HeartLab ("Berkeley"), where she was tasked with establishing a lab in Richmond. When Berkeley was acquired, the Richmond lab project ended and Mallory left Berkeley in September 2008. Mallory then wrote a business plan for an enterprise that would become HDL, and hired Dennis Ryan ("Ryan") of LeClairRyan, a law firm that had represented Mallory in prior business and personal matters. Mallory's vision for HDL was to create a healthcare leader that offered unique, comprehensive test menus of risk factors and biomarkers for cardiovascular and related diseases. This novel testing approach identified factors contributing to diseases and provided for early diagnosis and treatment, allowing physicians to effectively manage patients. In November 2008, HDL was incorporated by LeClairRyan. LeClairRyan also participated in drafting, reviewing, and filing a Private Placement Memorandum ("PPM") related to HDL's business to attract investors. Mallory had both Ryan and a CPA, Stephen Carroll, who later joined HDL as its CFO, review the financials in the PPM, consistent with Mallory's inclination to utilize and rely upon experienced advisors.

B. Relationship with BlueWave

Contrary to the Trustee's revisionist history regarding Mallory's relationship with personnel of BlueWave Health Care Consultants, Inc. ("BlueWave") while at Berkeley, the PPM evidences that the independent sales force model was not part of the initial plan. In fact, Mallory did not meet the founders of BlueWave until late 2009, long after she left Berkeley. Prior to that, in June 2009, having exhausted 401K accounts, college savings accounts, bank accounts, and securing a second mortgage on her home, Mallory obtained the first outside funding for HDL from Tipton Golias ("Golias"). In July 2009, G. Russell Warnick ("Warnick") joined HDL as the Chief Medical Officer, and in October 2009, Joseph McConnell ("McConnell") joined HDL as its Chief Lab Officer. Mallory, McConnell, and Warnick constituted the Board of HDL.

At that time, HDL employed three sales representatives who were focused on the Virginia market. One of those HDL-employed representatives learned that Floyd Calhoun Dent, III ("Dent") was terminating his employment at Berkeley. Warnick approached Dent about joining HDL's sales team. Because of concern about a potential strategic and protective lawsuit by Berkeley if Dent and his colleague, Robert Bradford Johnson ("Johnson"), joined HDL, LeClairRyan, along with counsel for BlueWave and Golias, collectively developed the concept of HDL establishing an independent relationship with an entity created by Dent and Johnson, *i.e.* BlueWave, to put HDL one step removed from Dent and Johnson. As the Trustee acknowledges, LeClairRyan then prepared the BlueWave/HDL agreement (Compl. at ¶ 207), which was then reviewed by attorneys for Golias and BlueWave. Dent, Johnson and others left Berkeley in December 2009, joined BlueWave, and began selling tests for HDL in January 2010. As an outside sales department for HDL, BlueWave was responsible for all costs of sales, not HDL. Although the Trustee refers to a "commission" paid to BlueWave, the reality was that the amount

was to compensate BlueWave for both the commission on the sale and the typical cost of sales generally for HDL.

C. Process and Handling Fees

When HDL was formed, industry estimates were that Quest Diagnostics and LabCorp controlled as much as 80% of the diagnostic testing market, primarily using storefront draw sites to collect, process, and handle samples, as well as in-office phlebotomists. HDL, like many other labs, did not have storefront blood draw sites. Instead, HDL utilized: (i) HDL phlebotomists in physician offices, (ii) arrangements with other labs that had draw sites, and (iii) agreements with physicians to draw blood in the physicians' facilities. As part of the latter two arrangements, HDL, like many other blood labs, reimbursed the other labs and physicians a P&H amount for their services consistent with the longstanding practice in the field.[2] Notably, HDL paid a lesser amount for P&H per tube of blood than other competitor labs. Other industry participant labs that paid P&H fees include, but were not limited to, Singulex, Boston HeartLab Diagnostics, Atherotech Diagnostics Lab, Hunter Heart Lab, LipoScience, Cleveland HeartLab, and Berkeley HeartLab. Thus, the industry clearly was unaware of the position the government would later take with respect to P&H utilized extensively by market participants.

In adopting and administering the industry-standard practice of paying P&H fees, Mallory proactively and routinely sought advice. To be clear, P&H fees were reimbursement for services, not payment for tests ordered. Mallory and HDL made every effort to pay P&H fees properly, including conducting an independent fair market value assessment, described below.

[2] As an example, P&H fees were paid according to a written contract with set out, in advance work that had to be performed for a specific test ordered, which may include, but is not limited to, apportioning the specimen into multiple vials specific to whole blood, serum, plasma, and urine testing requirements; loading, spinning and unloading the vials in a blood centrifuge; maintaining specimen integrity by cooling and packaging the vials in specially designed bio-hazard shipping containers in proper sleeves; labeling the vials specific to the category of testing to be performed; labeling shipping forms with proper disclosure; and coordinating shipment pickup.

That the use of P&H fees could potentially be misinterpreted by others was the very reason that Mallory and HDL took steps to determine the fair market value for the services, and identify parameters and limitations in writing on when and how P&H fees could and would be paid. P&H fees were not only paid to physicians, but HDL also had agreements with third parties to act as draw sites, which performed both venipuncture and process and handling services. Thus, many of the entities performing P&H and receiving P&H fees could not refer tests to HDL, demonstrating that its purpose was not to induce referrals.

With respect to the P&H agreements, and conspicuously absent from the Complaint, in October 2009, Mallory discussed the P&H concept with Ryan and later asked that a P&H agreement be reviewed "[redacted]" Ryan involved another LeClairRyan lawyer who, based on his biography, was a "Legal Elite" for healthcare law and had extensive healthcare experience representing healthcare systems and other organizations engaged in the delivery of healthcare services and products in corporate, regulatory, and compliance matters, including in OIG, CMS, and other agency investigative matters such as Medicare billing and reimbursement issues.

That LeClairRyan healthcare lawyer wrote: "[redacted]" In connection with this review, Mallory provided LeClairRyan with an opinion Berkeley had obtained from a nationally renowned consultant in the healthcare billing industry indicating that the lab's payment of P&H fees was lawful if it was based on fair market value. Notably, these opinions were reached by these professionals well after the Trustee-cited OIG advisory in 2005. Indeed, in November 2009, LeClairRyan [redacted], provided Mallory with a P&H agreement for use at HDL, and HDL began processing blood samples.

Shortly thereafter, LeClairRyan provided edits to an "HDL Position Statement on Process and Handling Fees," which explained to healthcare providers the policy, fair market value, and HDL's position with respect to such fees. The document, which was written for the express purpose of dissemination to third parties, and was, in fact, distributed, contained the conclusion: "The process and handling fee arrangement described above ***is consistent with the 'arms length, fixed in advance, fair market value' requirements of the applicable Safe Harbor provisions of the federal Anti-kickback and the Stark Law.*** HDL will consistently evaluate this position and consult with external legal counsel as to ***its continued acceptability*** and we recommend all clients do the same." Emphasis added. Thus, Mallory and HDL were informed by experienced healthcare counsel that [redacted].

Consistent with the ongoing evaluation by external legal counsel, Mallory sought insight on specific procedures of the P&H fee billing process as it related to the documentation of draw logs by physicians: "[redacted]" Just days later, Ryan provided his "[redacted]" At the time HDL began operations, Mallory performed a "time and motion" study to assess the fair market value of the fee for the P&H portion of the service. Subsequently, HDL's project engineer completed an internal study and Mallory in 2011, through LeClairRyan, hired an independent, national scientific consulting firm, Exponent, to prepare an "Activity Based Costing of Specimen Collection, Processing and Shipping" report to independently assess the fair market value of the P&H fees paid by HDL. Exponent concluded that analysis in April 2012, [redacted]. The independent consultant concluded that "[redacted]

[redacted].

The Complaint, while intentionally avoiding any reference to the extensive involvement of LeClairRyan [redacted], suggests that certain providers questioned the legality of the P&H fees. The Trustee expressly wrote that "[redacted]" Compl. at ¶ 18. The Trustee, however, knows that Mallory did the exact opposite. For instance, in October 2010, HDL received an email from the Tennessee Medical Association questioning P&H fees. Mallory did not ignore the email; rather, the very same day she received the email, she forwarded it to Ryan at LeClairRyan and wrote: "[redacted]" The unequivocally clear response from Ryan was: [redacted]" The following month, in November 2010, Mallory forwarded an email from an HDL client wanting information on how HDL validated the P&H fee, and relayed that the client wanted to hear from HDL's lawyer on the issue. Ryan responds, "[redacted]"

In December 2010, Mallory received an email from the lawyer of a healthcare provider. Instead of ignoring the communication, Mallory connected the lawyer with Ryan and the other healthcare lawyer at LeClairRyan and asked that one of them contact the client's lawyer. Not surprisingly, because the truth directly contradicts the Trustee's recitation of the "facts," the Trustee failed to reveal that the client and his lawyer were apparently satisfied with the information they received from LeClairRyan because the physician signed the P&H agreement and continued to do business with HDL.

As another example of how Mallory consistently responded to inquiries, she received a call in February 2011 about a competitor's plan to report HDL to the OIG based on a specific sentence in the P&H Agreement. Rather than ignoring the call as the Trustee would have one believe, Mallory forwarded the document to LeClairRyan and [redacted], specifically directing: "[redacted]" Emphasis added. Once again, the complete facts reveal that Mallory was cognizant of and responsive to questions from the marketplace. A LeClairRyan lawyer called Mallory and informed her that [redacted].

In July 2011, LeClairRyan's healthcare expert assigned to HDL left LeClairRyan. In September 2011, LeClairRyan hired another healthcare lawyer and appointed him as the firm's healthcare practice chair. He was assigned to the HDL/Mallory client accounts. This new LeClairRyan lawyer also had extensive experience with the false claims act and anti-kickback statutes. He was previously Senior Trial Counsel in the U.S. Department of Justice and focused his practice on healthcare fraud and abuse, with specific experience in representation of healthcare providers and their directors and officers in matters relating to federal regulation and investigation. Upon the lawyer's arrival at LeClairRyan, Mallory sent him documents in use for his additional review, including [redacted]" Mallory then worked closely with the LeClairRyan lawyer to obtain the [redacted], and to have

LeClairRyan participate in a training session with third party BlueWave and its sales team on topics such as anti-kickback rules and billing policies.

In April 2012, LeClairRyan completed yet another assessment of the P&H fees, and provided an express written opinion to Mallory and HDL, concluding again: "[redacted]" Emphasis added.[3] The Trustee places great reliance on [redacted]

[3] This redaction was made in an abundance of caution in the absence of a determination of privilege by a court, even though the LeClairRyan opinion letter was publicly disseminated by HDL in 2012, and was also filed by the Trustee in unredacted form in HDL's bankruptcy case and by the DOJ in its motion to compel Mallory in the *qui tam* case. Thus, this redaction and others herein should not be interpreted as Mallory's position with respect to the existence or waiver of any privilege.

[redacted]

[redacted]”

As further evidence of Mallory's exercise of business judgment and her fiduciary duties, despite repeated and ongoing [redacted], Mallory and the Board nevertheless adopted a business plan to lessen any risk associated with the P&H fees, which included the employment of over 50 phlebotomists, a mobile phlebotomy station, and construction of "brick and mortar" lab draw sites. Indeed, in the summer of 2013, an HDL Executive Vice President was charged with meeting with potential investors to raise capital for this business plan. The Board subsequently interviewed investment bankers to assist with the capital raise, and hired Cain Brothers. Again, despite the Complaint's misleading depiction of Mallory and others' "ignoring" the purported risks inherent in any healthcare company's operations, Mallory repeatedly exercised business judgment at HDL and consulted routinely with advisors and other officers at HDL.

D. Co-Pay Waivers

Mallory is also accused of participating in the adoption of collection practices that the Trustee asserts in a conclusory fashion were unlawful. *See, e.g.* Compl. at ¶ 237. The Complaint generalizes by stating that Mallory and others routinely did not collect patient co-pays, co-insurance, and deductibles, "[redacted]" Compl. at ¶ 222. However, the Trustee knows from the Company's records in his possession that bills for co-pays and deductible amounts were, in fact, sent by HDL. In addition, HDL had a billing policy, titled Pricing Overview, which was reviewed by LeClairRyan on a repeated basis, that specifically indicated that patients would receive a bill if the patient had not met "patient contribution requirements, (*i.e.* deductibles, co-pays, etc.) for laboratory services."

The billing of patients also cannot be generalized as the Trustee has done in the Complaint. For instance, Medicare does not require any co-pays, deductibles, or co-insurance obligations for lab services—thus, there are none to collect. For private insurers, HDL was in-network with Anthem BCBS, and later many of the state BCBS affiliates and United Healthcare. For other independent payors, where HDL was not in-network or otherwise under a contract, HDL was not contractually bound to collect such payments, but still routinely sent patient invoices where state laws required HDL to send them. Where HDL received remittances from an insurer detailing the contribution required from a particular beneficiary, HDL's collection efforts for that amount depended upon factors such as the financial hardship to the beneficiary, the amount of the contribution sought from the beneficiary (particularly in comparison to the anticipated cost of collection), and any legal obligations to do so.[4] HDL further billed all miscellaneous federal payors such as Tricare and railroad and teachers' unions, as well as any private payors where state laws required it to do so.

With respect to HDL's supposed infirmity in not billing patients the full amount of charges levied by a private payor, as late as January 2014, LeClairRyan confirmed with Cigna's Associate Chief Counsel that Cigna's threats of fraud for HDL's billing related to its services for Cigna's insureds were misplaced, and that, like the Trustee's current characterization, the

> issue in dispute does not involve the waiver of co-payments, co-insurance, or deductibles. Contrary to Cigna's prior assertions . . . there is no rule of law that the waiver of patient responsibility amounts in private payor out-of-network situations is prohibited, unless there are specific state laws to the contrary. *See, e.g.*, *American Federation v. Bristol-Myers Squibb Co.*, __ F. Supp. 2d __, 2013 WL 2391999 (S.D.N.Y. 2013) (co-pay subsidy case citing *SmileCare* and *Kennedy* as resting on the foundation of contract and not creating any general rule that waiver of copays was fraud).

[4] In certain instances, HDL received requests to settle for less than billed price from third party administrators working on behalf of Cigna, Aetna and UHC and others. HDL settled for whatever they requested, and the settlement forms specifically stated that HDL could not balance bill the patients.

LeClairRyan further wrote: "We have found no support for the position that HDL is required to bill patients for the adjustment Cigna unilaterally makes." Moreover, in 2013, United Healthcare expressed concern about the member cost for lab services not being billed by HDL. Following a discussion with United Healthcare, HDL was asked in 2014 to go in-network, which it did.

E. Medical Necessity

The Trustee next suggests that HDL, a lab, was responsible for determining and vetoing a physicians' determination of medical necessity of specific tests for a patient. With respect to laboratory tests, the treating physician, not the laboratory, determines whether a test is necessary and useful for the care of his or her patient. *See* 42 C.F.R. § 410.32. The Trustee also suggests, without support or identifying the circumstances for any particular patient, that the HDL testing as a whole was medically unnecessary.

As evidenced by HDL and its outside lawyers' communications to the government and private payors, Medicare provides coverage for diagnostic tests "that are determined by a physician to be reasonable and necessary in the care and treatment of his/her patient, ordered by the physician, and used by the physician in the management of the patient's care." HDL is a blind provider, does not see patients or clinical charts, and testing is performed only pursuant to a physician order. HDL required that the physician order be supported by diagnostic information which indicates that the patient has a clinical condition for which federal health care programs and other payors provide coverage, but it is in no position to question the independent medical judgment of a physician. The test order reflects the physician's determination that the test is reasonable and necessary for the care and treatment of the patient. Thus, HDL was reliant on physicians to demonstrate the medical necessity of tests.

In this regard, HDL constantly educated physicians on how to use the HDL test results by developing extensive literature on the testing process and results, as well as their relation to disease. HDL also provided billing policies and annual notifications in accordance with internal compliance guidelines recommended by the OIG to remind the doctors of their responsibility to determine medical necessity. Contrary to the Trustee's allegations, HDL routinely informed physicians that payors "will only reimburse laboratory tests that are medically necessary for the treatment or diagnosis of a patient . . . ." HDL also made clear when receiving orders for testing that "[t]he tests in this panel must be medically necessary for us to obtain reimbursement for services." With respect to Medicare and Medicaid, HDL informed the physicians that "Medicare and Medicaid will only reimburse laboratory tests that meet the medical necessity requirements as defined within the National and Local Coverage Determination Policies" published by CMS, and that it was the expectation of HDL that the physician adhere to such policies. Moreover, physicians always had the option to order tests from a panel individually or to customize and tailor test panels to suit the needs of the patient.

With respect to the actual HDL tests, such tests were always supported by recognized clinical standards of care and practice, and many were, in fact, developed in response to the increased clinical demand for multiple biomarker testing. There was a wealth of authority evidencing the utility of HDL's tests. As for the CYP2C19 testing, referenced in the Complaint, the medical community determined that the CYP2C19 gene testing was critical to determining whether a patient will respond to clopidogrel (more commonly known by its tradename, Plavix) in light of a government-mandated warning on Plavix concerning its use in that regard. The physician referenced in the Complaint, like others, ordered testing for his patients presumably so he could know whether it was appropriate to prescribe medication in connection with heart or

blood vessel disease. The physician was paid no P&H fees for the testing since the blood was in storage, and the testing was independent of any prior testing for the patient. Simply put, the physician, not HDL, determined whether the tests ordered were medically necessary. HDL was not in a position to second-guess the medical necessity of a patient test ordered by a physician and supported by diagnosis codes. In fact, in its settlement with HDL, the government recognized that HDL's testing was medically necessary because it actually sought to recover as settlement payments, ongoing revenue HDL earned from its future testing.

F. 2012 Distribution

In the spring of 2012, LeClairRyan expanded its engagement with Mallory to include representation of her with respect to estate planning. BB&T Wealth Advisors also advised Mallory on estate and tax planning. As was commonly known in 2012, the federal estate, gift, and generation skipping tax provisions in place from 2010 through 2012 were set to expire on January 1, 2013, in what was generally referred to as the "fiscal cliff doomsday."[5] As a result, tax and estate professionals across the country advised clients to utilize trusts as an estate planning device. In this regard, LeClairRyan prepared Mallory's estate planning documents, and Mallory established a trust.

Tellingly missing from the Complaint is the fact that in a Board meeting held in November 2012, the HDL Board requested that Steve Carroll, HDL's CFO, perform a cash analysis to recommend an amount for distribution to shareholders to be completed in December. In the December 3, 2012 Board meeting, the Board reviewed the CFO's financial projections for the upcoming fiscal year and the CFO also provided the Board with an express written memorandum, which was reviewed by the Board as well as by Charles Sims, a lawyer at

[5] In a most unexpected fashion, the Senate passed the American Taxpayer Relief Act of 2012 in the early morning hours of January 1, 2013, which was signed into law by the President on January 2.

LeClairRyan. The memo from the CFO stated: "I am recommending a discretionary S Corporation distribution for 2012 of $43.5M to be paid on December 7, 2012." He further indicated: "The Company's cash position after the recommended distributions will be approximately $15M which is a reasonable balance on which to end 2012." Based on the recommendation and information provided by the CFO, and approval of shareholder Golias, the Board exercised its judgment and approved the distribution. Thereafter, the distribution was made to the shareholders, and the estate planning vehicles were funded.

The Trustee has suggested that HDL was insolvent when the 2012 distribution was made; however, the Audited Financial Statements for the fiscal year 2012 reflect more than $83 million in shareholder equity following the distributions. In addition, the Company was valued in the year following the distribution, after receipt of the DOJ subpoena, between $427 million and $455 million. Cain Brothers prepared a financial projections model which showed actual, not projected, shareholders' equity of $83.9 million as of December 31, 2012, and $93.8 million as of October 30, 2013, long after the government investigation became known. In 2014, also well after the DOJ investigation began, third parties provided indications of interest in investing in HDL with values of HDL expressed between $350 million to $511.9 million. Moreover, HDL had sufficient cash to continue its business and acquire other businesses post-distributions. In early 2014, BB&T extended a $30 million line of credit and even after HDL stopped paying P&H fees in the summer of 2014, a valuation of HDL revealed a nine-figure value. The Company also took a position on its financial wherewithal in the April 2015 settlement between HDL and the government, in which the Trustee's predecessor "warrant[ed] that it has reviewed the financial situation and that [HDL] is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(1) . . . ."

G. DOJ Subpoena

Prior to many of the above-mentioned valuations of HDL, in January 2013, the DOJ served a subpoena on HDL, notwithstanding the fact that there had been no prior indication of any investigation. HDL retained the law firm of Ropes & Gray to advise HDL. Later that year, HDL [redacted]. Further, HDL was told that even though [redacted]. In light of the newly-developed circumstances, Mallory and the other members of the Board continued to maximize value of the Company and persisted with efforts to implement a business plan to minimize risk associated with the well-established, industry-wide practices.

On June 25, 2014, the OIG issued a Special Fraud Alert which, ***for the first time***, provided guidance to laboratories on the practice of paying P&H fees. This new guidance came only after HDL repeatedly requested that the government provide direction in this area. Significantly, this new guidance addressed the P&H fees for six pages—the length alone demonstrating that this was new guidance. HDL immediately stopped paying P&H fees, as did certain other labs. Many competitors, however, did not stop paying P&H fees even after the OIG's new guidance. In September 2014, Mallory departed HDL. After her departure, the Board, including two new independent Board members, approved a settlement with the government, and, on behalf of the Company, denied any wrongful conduct by HDL.

STANDARD OF REVIEW

When ruling on a Rule 12 motion, a court need not accept plaintiff's legal conclusions or inferences that are unsupported by facts alleged in the complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Moore v. James*, 770 F. Supp. 2d 786, 789 (E.D. Va. 2011). The court also need not accept "unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). To survive a motion to dismiss, a plaintiff therefore must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Courts in this district have also consistently applied the *Twombly* and *Iqbal* standards to dismiss cases where the plaintiff did not set forth a factual basis to infer that the claims were plausible. *See Smith v. FCM-MTC Med., LLC*, No. 3:10-cv-352, 2011 WL 1085975, at *1 (E.D. Va. Mar. 21, 2011); *Amr v. Moore*, 2010 WL 3154576, at *7 (E.D. Va. June 21, 2010) (the court held that it could "draw no reasonable inference" that the defendant was "liable for tortious interference" under *Twombly*).[6]

ARGUMENT

A. Certain Claims Asserted in Counts 53-54, 56-57, and 61-64 are Exculpated

The Virginia Stock Corporation Act permits elimination of liability of directors and officers if such limitation is set forth in a corporation's articles of incorporation. Va. Code § 13.1-692.1(A)(1). In accordance with the Virginia Code, HDL adopted Articles of Incorporation that included such a provision limiting liability for its officers and directors in actions brought

[6] In addition to the complaint, the court may also examine "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *see also LandAmerica Fin. Group, Inc. v. Southern Ca. Edison Co.*, 525 B.R. 308 (E.D. Va. 2015).

by, or on behalf of, HDL. Specifically, Article Five of the HDL Articles of Incorporation, attached hereto as **Exhibit 1**, p. 2, states:

> In any proceeding brought by or in the right of the Corporation . . . , no director or officer of the Corporation shall be liable to the Corporation . . . for monetary damages with respect to any transaction, occurrence or course of conduct, . . . , except for liability resulting from that person's having engaged in willful misconduct or a knowing violation of the criminal law or any federal or state securities law.

Although the Trustee has pled in conclusory fashion that Mallory's conduct with respect to HDL's *billing practices* was willful misconduct, his *remaining claims* for breach of fiduciary duty under Counts 53, 54, 56 and 57, and unlawful distribution, corporate waste, negligence, and gross negligence in Counts 61 to 64, respectively, are barred because the Complaint makes no such allegations of, as there are no facts to support, any willful misconduct by Mallory relating to: 1) HDL's settlement of the Berkeley litigation (Compl. at ¶¶ 238-45); 2) funding of Global Genomics Group ("G3") and resulting "cash drain" (Compl. at ¶¶ 277-94); 3) the funding of "an unsuccessful company" Innovative Diagnostic Laboratory ("IDL") (Compl. at ¶¶ 295-311); 4) HDL's "investment in C3Nexus, LLC" ("C3") (Compl. at ¶¶ 312-35); 5) HDL's spending on sponsorships and charitable gifts (Compl. at ¶¶ 336-40); 6) the entry into executive agreements with "excessive" compensation (Compl. at ¶¶ 371-84), 7) Satyanarain Rangarajan's buyout (Compl. at ¶¶ 385-87); and 8) making of the Shareholder Distributions (Compl. at ¶¶ 364-70).

Each of these eight examples of business judgment transactions at HDL are now alleged to have been the result of a breach of fiduciary duties, corporate waste, negligence, gross negligence, and/or violation of the Virginia Code. Importantly, however, these business arrangements and judgments, as acknowledged by omission in the Complaint, are not the result of willful misconduct. *See In re LandAmerica Fin. Group, Inc.*, 470 B.R. 759, 787 (Bankr. E.D.

Va.) (citing Allen C. Goolsby, *Goolsby on Virginia Corporations* § 10.1 at 229 (4th ed. 2011) ("In the case of willful misconduct the perpetrator not only must have intentionally acted or failed to act, but also must have done so knowing that what he or she was doing was wrong."); *see also McPadden v. Sidhu*, 964 A.2d 1262, 1275 (Del. Ch. 2008) (granting dismissal because complaint failed to sufficiently allege non-exculpated conduct); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000) (dismissing claims not pled outside of exculpated conduct). In sum, the Trustee's allegations simply do not constitute the requisite willful misconduct for any of the eight above-identified categories of claims under Counts 53-54, 56-57, and 62-64, rendering such claims ripe for dismissal.

B. There is No Independent Cause of Action for Corporate Waste in Virginia

In Count 62, and sprinkled elsewhere throughout the allegations of the Complaint, the Trustee contends that Mallory and others "wasted valuable corporate assets." This Court has recognized in dismissing a corporate waste claim that "[n]o Virginia court has explicitly held that there exists an independent common law claim for corporate waste under Virginia law." *LandAmerica*, 470 B.R. at 803 (citing *In re James River Coal Co.*, 360 B.R. 139, 176 (Bankr. E.D. Va. 2007)). Therefore, Count 62 fails to state a claim and should be dismissed.

C. Negligence and Gross Negligence are Not Measures of D&O Conduct in Virginia

The Trustee rehashes its fiduciary duty claims against Mallory in Counts 63 and 64 under the guise of negligence and gross negligence claims. The Trustee alleges that Mallory owed the Debtors and their creditors a "duty of reasonable care."[7] However, "[i]n adopting § 13.1-690, the General Assembly rejected § 8.30 of the Revised Model Business Corporation Act

[7] "The issue of whether a legal duty in tort exists is a pure question of law." *Kellermann v. McDonough*, 278 Va. 478, 487 (2009). As a question of law, the Court does not accept conclusory allegations that a duty exists. *Julian v. Rigney*, 2014 U.S. Dist. LEXIS 38311 *55 (W.D. Va. 2014).

(RMBCA)." *Willard v. Moneta Bldg. Supply, Inc.*, 258 Va. 140, 151 (1999) (citing *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1185 (4th Cir. 1995), *cert. denied*, 516 U.S. 1117 (1996)). "That provision of the RMBCA requires a director to discharge the duties of the office in good faith, with the care that an ordinary prudent person in similar circumstances would exercise, and in a manner reasonably believed to be in the best interests of the corporation." *Id*. In Virginia, however, "a director's discharge of duties is not measured by what a reasonable person would do in similar circumstances or by the rationality of the ultimate decision,"[8] *id*., which is how negligence and gross negligence are measured. *See, e.g.*, *Griffin v. Shively*, 227 Va. 317, 321 (1984) (defining "ordinary or simple negligence as the failure to use 'that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another.'"); *Hartford Fire Ins. Co. v. Help U Move, LLC*, 2015 U.S. Dist. LEXIS 92500, *28 (W.D. Va. July 16, 2015) (citing *Griffin* and observing: "negligence is determined by an objective, not a subjective, standard: how would an ordinarily prudent person have acted under the same or similar circumstances?"); *A.H. v. Rockingham Publ'g Co.*, 255 Va. 216 (1998) (negligence is "premised upon the objective concept of what a reasonably prudent person in the exercise of reasonable care would have done in similar circumstances."); *Brown v. Mitchell*, 327 F. Supp. 2d 615, 647 (E.D. Va. 2004) ("Gross negligence requires an objective inquiry; thus, the defendant's behavior must be compared to that of a hypothetical similarly-situated 'reasonable' individual."). Because the determination of liability for negligence and gross negligence is implicated by standards of conduct rejected by the Virginia Supreme Court and General Assembly for evaluating director conduct, Counts 63 and 64 should be dismissed.

[8] This Court has recognized that officers owe the same duties as directors. *See LandAmerica*, 470 B.R. at 797 (citing *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009)).

D. Va. Code § 13.1-690 Bars Certain Claims in Counts 53-57 and 59-64

A director may not be held liable for any action taken so long as she complies with § 13.1-690, which codifies the standards of conduct for a director. *See* Va. Code § 13.1-690(C). A party alleging a violation of this standard of conduct has the burden of proving such a violation. *Id*. at § 13.1-690(D). In assessing conduct under the standard, Virginia law provides a safeguard for claims through reliance on officers, legal counsel, and others, and focuses upon whether a director resorted to an informed decision-making process, rather than assessing the merits of a substantive decision. *See id.* at § 13.1-690(B); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 493-94 (W.D. Va. 1994); *In re Gordon Props., LLC, and Condo. Servs., Inc.*, 515 B.R. 454, 475 (Bankr. E.D. Va. 2013) ("It is the reliance on the advice, unless reliance is unreasonable, that is the key. The quality or the correctness of the advice is not material."). In this regard, unless reliance is factually unwarranted, in discharging duties, section "13.1-690(C) provides a 'safe harbor' that shields a director from liability for any action taken as a director, and for failure to take action." *Willard*, 258 Va. at 151; *see also WLR Foods*, 65 F.3d at 1183.

In this case, as set forth in the Statement of Facts above, the facts will undoubtedly demonstrate that Mallory engaged in a reasonable and informed process in discharging her duties, consulting regularly with legal counsel adept in healthcare matters, officers, fellow Board members, and outside healthcare consultants. However, because the Trustee intentionally omitted from the Complaint the extensive actual facts involving the process Mallory engaged in with professionals and others to comply with her duties, the Trustee strategically has eliminated the right of Mallory to dismiss the majority of the claims in the Complaint at this stage. Notwithstanding his tactical omission of those allegations that are fatal to his Complaint, the

Trustee did include sufficient allegations to eliminate liability under Va. Code § 13.1-690(B) with respect to the December 2012 Shareholder Distributions in Counts 53-57 and 59-64.

The Complaint makes clear that "[a]ll distributions to HDL shareholders were approved by HDL's Board of Directors . . . ." Compl. at ¶ 364. The Complaint also recognizes, in citing to a meeting agenda attached hereto as **Exhibit 2**, that in a December 3, 2012 Board meeting, the Board "reviewed [a] revised memo from [the] CFO with outside counsel and decided to proceed with 57 distributions on Friday, December 7th." Compl. at ¶ 368. "The HDL Board of Directors soon thereafter approved the discretionary distribution to the Shareholder Defendants . . . ." *Id.* at ¶ 369. The memorandum written by the CFO, also included in **Exhibit 2**, specifically states: "I am recommending a discretionary S Corporation distribution for 2012 of $43.5M to be paid on December 7, 2012." The CFO further stated: "The Company's cash position after the recommended distributions will be approximately $15M which is a reasonable balance on which to end 2012." The making of the distribution was also expressly discussed with outside counsel from LeClairRyan, as conceded by the Trustee. Compl. at ¶ 368. There are no allegations that the CFO's information, report, and recommendation, as reviewed by outside counsel, were unwarranted. As such, this is the precise scenario that is protected by Va. Code § 13.1-690(B).

Given that the Complaint fails to allege facts sufficient to overcome the safe harbor provision of the Virginia business judgment rule with respect to the December 2012 Shareholder Distributions in the amount of $43,499,999, such claims in Counts 53-57 and 59-64 must be dismissed as a matter of law.

E. The Allegations Do Not Meet the Elements of Assumpsit and Unjust Enrichment

To state a claim for unjust enrichment (Count 66) under Virginia law, a plaintiff must allege that: (1) he conferred a benefit on the defendant; (2) the defendant knew of the benefit and

should reasonably have expected to repay the plaintiff; and (3) the defendant accepted or retained the benefit without paying for its value. *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008). "Claims for unjust enrichment are based on a theory of implied contract." *Syed v. Mohammad*, 2016 U.S. Dist. LEXIS 45611 *6 (E.D. Va. 2016) (citing *Kern v. Freed Co., Inc.*, 224 Va. 678 (1983). Importantly, "[o]ne may not recover under a theory of implied contract simply by showing a benefit to the defendant, without adducing other facts to raise an implication that the defendant *promised to pay the plaintiff for such benefit*." *See Nedrich v. Jones*, 245 Va. 465, 476 (1993) (emphasis added). Because the Trustee has failed to allege any facts to support an implied contract where goods or services were provided to Mallory *or* any benefit that was conferred upon Mallory *for which she promised to pay the Company*, Count 66 fails. *See, e.g., Syed*, 2016 U.S. Dist. LEXIS 45611 at *6; *Grenadier v. BWW Law Group*, 2015 U.S. Dist. LEXIS 11418 * 23-25 (E.D. Va. 2015) (dismissing claim because "plaintiff has failed to allege facts showing that she conferred a benefit on any of the defendants, that defendants knew of any such benefit and should reasonably have expected to repay plaintiff.").

Likewise, with respect to assumpsit, "'in order to sustain the action, it is necessary for the plaintiff to establish an express contract or facts and circumstances from which the law will raise an implication of a promise to pay.'" *Syed*, 2016 U.S. Dist. LEXIS 45611 at *6 (quoting *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 541 (1946)). Thus, under Virginia law, the plaintiff must allege either an express contract requiring payment by Mallory or an implied promise of Mallory to pay. As no such facts exist or are alleged by the Trustee, Count 65 should be dismissed.[9]

[9] Counts 65 and 66 also fail to the extent that the Shareholder Distributions, the D&O Compensation, or the Mallory Payment relate to the Company's shareholder agreement or Mallory's employment agreement because unjust enrichment and assumpsit are "inapplicable when an express contract exists between the parties." *Inman v. Klockner-Pentaplast of Am., Inc.*, 467 F. Supp. 2d 642, 655 (W.D. Va. 2006) (dismissing unjust enrichment claim related to employment contract).

F. The Claim for Unlawful Distributions Fails to Allege Actual Notice of Creditors

In Count 61, the Trustee argues that certain directors caused Shareholder Distributions to be made when HDL was unable to pay its debts as they came due in the usual course of business in violation of Va. Code §§ 13.1-653 and 13.1-690. Compl. at ¶¶ 980-83. As mentioned above, these claims are exculpated by statute and the HDL Articles of Incorporation because there was no wrongful misconduct associated with the alleged unlawful distributions, and those made in December 2012 fall within the safe harbor protection of Va. Code § 13.1-690. Count 61 should also be dismissed because the claim fails to allege that Mallory had *actual* notice of any claims of creditors, including the United States, when the distributions were made. Virginia law requires that the director have "actual notice" rather than, as the Complaint alleges, knowledge of facts that "should" cause an experienced individual to know of creditor claims. *See Luria v. Bd. of Dirs.*, 277 Va. 359, 366 (2009) (holding there was no liability for improper transfers made prior to actual knowledge of creditors' claims); *but see* Compl. at pg. 74 ("Should Have Known It Was Incurring Debts That It Lacked The Ability To Pay"). The absence of facts alleging that Mallory possessed actual knowledge of claims at the time of the Shareholder Distributions that caused the Company to be insolvent results in the Trustee failing to state a claim in Count 61.

G. Count 20 Fails to Comply With Rule 8 By Identifying Specific Transfers at Issue

Count 20 of the Complaint seeks to avoid HDL's transfer of the D&O Compensation to Mallory pursuant to provisions of Revised Code of Washington § 19.40.011 *et seq*. or Minnesota Statutes §§ 513.41 *et seq.* and Bankruptcy Code §§ 544(b) and 550. Compl. at ¶¶ 617, 625. The Trustee alleges that "*[c]ertain of the transfers of the D&O Compensation* were transferred to bank accounts in Washington and/or Minnesota." *Id*. at ¶ 624 (emphasis added). However, Mallory is unable to determine from the 5-page listing of transfers, which, if any, transfers

allegedly went to Minnesota or Washington. Rule 8(a)(2) of the Federal Rules of Civil Procedure mandates that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Where a plaintiff fails to state a claim upon which relief can be granted, or otherwise fails to meet the requirements of Rule 8(a)(2), dismissal of the claim is appropriate. *See In re Anderson & Strudwick, Inc.*, 2015 WL 1651146, *4 (Bankr. E.D. Va. Apr. 8, 2015). The Trustee does not identify any specific transfers made to Mallory that were sent to Washington and/or Minnesota, and therefore subject to those state laws. For these reasons, Count 20 must be dismissed as it fails to state a claim upon which relief can be granted.

H. Counts 19, 67 and 68 Fail to Comply with Rule 9

Pursuant to Fed. R. Civ. Proc. 10(c), Mallory incorporates the legal argument contained in the Memorandums of Defendants Leah Bouton *et al*. in Support of Their Motion to Dismiss. *See* Dkt. No. 33 at 5-12, 18-19 and Dkt. 79 at 17-21.

Fed. R. Civ. Proc. 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." "[T]he rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of . . . ." *James River Coal,* 360 B.R. at 162 (quoting *U.S. ex rel Harrison v. Westinghouse Savannah River Co.,* 352 F.3d 908, 921 (4th Cir. 2003)). The Fourth Circuit further explained that the rule's purpose is to "eliminate fraud actions in which all the facts are learned after discovery." *Westinghouse*, 352 F.3d at 921.

Counts 67 and 68 allege common law actual and constructive fraud, both of which must be, but are not, alleged with a heightened level of particularity in conformance with Rule 9. *See, e.g., Grenadier,* 2015 U.S. Dist. LEXIS 11418 at *26 (citing *Wolf v. Fed. Nat. Mortgage Ass'n,* 512 Fed. Appx. 336, 342 (4th Cir. 2013) ("[A]llegations of both common law and constructive

fraud must comply with Rule 9(b)'s heightened pleading standard by pleading with particularity "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby."). In Counts 67 and 68, the Trustee pleads generally that almost 100 defendants "made false representations of material fact, including without limitation . . ." various generalized categories of information. Compl. at ¶¶ 1017, 1023. These two Counts mimic the bare elements of the causes of action, but it is impossible to determine from the text, including the prior 1000 plus paragraphs, who specifically is alleged to have misrepresented what, to whom and when. Compounding the problem, the Trustee baldly suggests that the fraud was committed upon "Assigning Creditors," but such creditors are not identified in any way that would allow Mallory to respond to the broad, conclusory and general statement that she allegedly made some statement to unidentified entities at some unspecified time about some subject matter. *See Baker v. Elam*, 883 F. Supp. 2d 576, 580 (E.D. Va. 2012) ("Without particular details as to the dates and substance of the misrepresentations, this Court is bound to dismiss the plaintiff's claim for failure to satisfy the pleading requirements of Fed. R. Civ. Proc. 9(b). The Complaint's bald assertions are the type intended to be guarded against by the heightened pleading standard."); *Rash v. Stryker Corp.*, 589 F. Supp. 2d 733, 737 (W.D. Va. 2008) (dismissed fraud counts because they "fail to state when or where these representations were made or who made them."); *Goodrow v. Friedman & Macfadyen, P.A.*, 2012 U.S. Dist. LEXIS 182188 *42 (E.D. Va. 2012) (dismissed claim, in part, "because multiple defendants are involved, but the complaint does not clearly identify 'which Defendant played which role.'"). This manner of pleading is wholly inconsistent with Rule 9(b) and requires dismissal of Counts 67 and 68. *See, e.g., Hunt v. Calhoun County Bank, Inc.*, 8 F. Supp. 3d 720, 731 (E.D. Va. 2014) (dismissal for failure to "describe the contents of the

allegedly false statements or . . . when or where they occurred"); *Gammon v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 96216 at *9-10 (W.D. Va. 2016) (dismissing constructive fraud claim for failure to allege "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby."); *Grenadier*, 2015 U.S. Dist. LEXIS 11418 at *26.

Likewise, Count 19 of the Complaint seeks to avoid HDL's transfers of D&O Compensation to Mallory pursuant to provisions of Revised Code of Washington §§ 19.40.011 *et seq*. or Minnesota Statutes §§ 513.41 *et seq*. and Bankruptcy Code §§ 544(b) and 550. *See* Compl. at ¶¶ 606, 614. The Trustee alleges that "[t]he transfers of the D&O Compensation to Mallory . . . were made with actual intent to hinder, delay or defraud creditors of HDL, including without limitation, the Assigning Creditors." *Id*. at ¶ 607. The Trustee then merely alleges that "certain of the transfers" contained on a five-page listing of payments to Mallory were transferred to bank accounts in Washington *and/or* Minnesota (Compl. at ¶ 613), without identifying any specific transfers made to Mallory that were, in fact, sent to banks in Washington or Minnesota. Mallory is therefore unable to determine what transfers supposedly went to Washington and/or Minnesota, on what dates, in what amounts, and under what circumstances that support an actual fraud claim. Thus, the Trustee has also failed to comply with Rule 9(b) in alleging fraud with particularity in Count 19.

I. Counts 59-60 and 72-73 Fail to Allege a Conspiracy Under Virginia Law

In Counts 59-60 and 72-73, the Trustee contends generally in conclusory fashion that seven groups of people "acted in concert, agreed, associated, mutually undertook, or combined to accomplish" certain conduct. Compl. at ¶¶ 964, 970, 1049, 1055. The Trustee's slavish mirroring of the disjunctive elements giving rise to a conspiracy is the classic example of a

failure to adequately plead a claim. Under both common law and statutory conspiracy, "[t]he plaintiff must first allege that the defendants combined together to effect a preconceived plan and unity of design and purpose, for the common design is the essence of the conspiracy." *Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003) (quoting *Bull v. LogEtronics, Inc.*, 323 F. Supp. 115, 131 (E.D. Va. 1971)). This design must be for the purpose of accomplishing an unlawful purpose or a lawful purpose by unlawful means. "Consequently, in order to survive a motion to dismiss, Plaintiff must at least plead the requisite concert of action and unity of purpose in more than 'mere conclusory language.'" *Id.* "It is not enough for plaintiff merely to track the language of the conspiracy statute without alleging the fact that the alleged co-conspirators did, in fact, agree to do something" that is unlawful. *Johnson v. Kaugars*, 14 Va. Cir. 172, 176 (Cir. Ct. Richmond 1988) ("Mere conclusory language devoid of factual allegations is insufficient to state a cause of action for civil conspiracy. . . . [I]t is not merely enough to state that a conspiracy took place. There should be some details of time and place and the alleged effect of the conspiracy.") (citing *Bowman v. State Bank of Keysville*, 229 Va. 534, 541 (1985)).

Indeed, civil conspiracy in Virginia must be pled to conform with the heightened particularity pleading standard. *See Schlegel v. Bank of America*, 505 F. Supp. 2d 321, 328 (W.D. Va. 2007); *Feeley v. Total Realty Mgmt.*, 660 F. Supp. 2d 700, 712 (E.D. Va. 2009) (dismissing claim for failure to meet Rule 9 standard, in part, because the complaint grouped defendants "together with broad brush allegations instead of making specific factual allegations against individual defendants."); *Worthington v. Palmer*, 2015 U.S. Dist. LEXIS 159441 *34-35 (E.D. Va. 2015) (dismissing conspiracy count for failure to allege agreement with particularity);

O'Connor v. Sand Canyon Corp., 2014 U.S. Dist. LEXIS 142069 *13-14 (W.D. Va. 2014) (dismissing conspiracy count based on conclusory language of an agreement).

Here, the Complaint is devoid of any particularized factual allegations to support the requisite concert of action and agreement to effectuate a preconceived plan and unity of design and purpose for unlawful activity. There are no factual allegations *at all* relevant to any preconceived plan or agreement to effectuate unlawful conduct between Mallory and the Major Sales Contractor Defendants, Cobalt, Rangarajan, or the Doe Defendants to support a claim under Counts 59, 60 and 72. *See* Compl. at ¶¶ 964, 970. With respect to the BlueWave Defendants and the members of the group defined as the D&O Defendants, the Complaint merely states in conclusory form and without particularity that a "scheme was hatched," but it makes no factual allegations regarding any agreement among specific D&O Defendants and/or BlueWave to effectuate knowingly unlawful conduct, let alone particularized facts of such an agreement. Therefore, Counts 59, 60, and 72 fail in their entirety.

Moreover, Counts 60 and 73 also should be dismissed because there are no factual allegations of legal malice, which requires particularized factual support that *one of the purposes of the purported conspiracy was to injure the plaintiff's reputation, trade, or business.* The absence of facts regarding this illogical intentional or purposeful injury to HDL is fatal to Counts 60 and 73. *See Schlegel*, 505 F. Supp. 2d at 328 (conspiracy claim deficient where the required *mens rea* of intentionally and purposefully harming plaintiff was not alleged with particularity).

J. Counts 69 and 70 Fail to Allege the Requisite Elements of Tortious Interference

"The elements required for a prima facie showing of the tort are: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach

or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted." *T.G. Slater & Son v. Donald P. & Patricia A. Brennan LLC*, 385 F.3d 836, 844 (4th Cir. 2004). The Trustee has not properly alleged these elements. First, other than a vague reference to "Aetna and Cigna plan agreements with HCP's" and unspecified contracts between the Company and Assigning Creditors, there is no indication of who the HCP's and Assigning Creditors are, and therefore, no notice regarding what contracts with which Mallory allegedly interfered. As such, the Trustee cannot meet the second element of demonstrating knowledge of a *specific* contract (Count 69) or expectancy (Count 70). Next, in conclusory fashion, the Trustee simply states as to Count 69 that intentional interference caused the material breach of the unidentified contracts without providing any facts of what the interference was or, as the law requires, what the breach of contract was.

Likewise, as to Count 70, the Trustee repeats bare, conclusory allegations but merely adds "contractual expectancy, prospective business relationships and economic advantage," without ever providing notice of what they are. These claims, like the others, are improperly pled and ripe for dismissal. *See, e.g., Cornerstone Therapy Servs. v. Reliant Post Acute Care Solutions, LLC*, 2016 U.S. Dist. LEXIS 160931 at *18-20 (W.D. Va. 2016) (dismissing claim where no facts of interference or termination of contract were alleged and explaining plaintiff "will not be permitted to proceed to discovery with the hope of uncovering some evidence in support of its claim.").[10] Moreover, Virginia adds a fifth element for tortious interference with

[10] *See also Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619, 631-32 (W.D. Va. 2015) (dismissing claim where insufficient allegations of how defendants' actions induced a breach, or which provisions were breached); *Mirafuentes v. Estevez*, 2015 U.S. Dist. LEXIS 166157 at *15-16 (E.D. Va. 2015) ("Under Virginia law, a plaintiffs failure to allege a 'specific, existing contract or business expectancy' with which the defendant has allegedly interfered is 'fatal to the claim.'") (citing *Masco Contractor Servs. E., Inc. v. Beals*, 279 F. Supp. 2d 699, 709-10 (E.D. Va. 2003)); *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385, 391 (E.D. Va. 2002) ("Because plaintiffs do not identify the specific business relationships with which defendant has interfered, plaintiffs' tortious interference claim fails.").

business expectancy—that is, "a competitive relationship between the party interfered with and the interferor"—which is not alleged here. *See 17th St. Assocs., LLP v. Markel Int'l Ins. Co.*, 373 F. Supp. 2d 584, 600 (E.D. Va. 2005) (dismissing claim for lack of allegation of competitive relationship). Further, Counts 69 and 70 alleging interference by Mallory in HDL's contracts fail because of the well-established rule that an agent of a principal cannot interfere with the contract of its principal. *See, e.g., Cole v. Daoud*, 2016 U.S. Dist. LEXIS 39749 at *23 (E.D. Va. 2016) (citing *Wenzel v. Knight*, 2015 U.S. Dist. LEXIS 70536 at *8 June 1, 2015); *Neil v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 127049 at *2 (E.D. Va. Sept. 4, 2013), *vacated on other grounds*, 596 Fed. Appx. 194 (4th Cir. 2014)). Thus, Counts 69 and 70 should be dismissed.

K. Count 71 is Duplicative of a First-Filed Claim in Another Proceeding as to Mallory

In Count 71, the Trustee attempts to pursue the identical causes of action that are the subject of another lawsuit filed in the District Court for the Eastern District of Pennsylvania and transferred to this Court. Where concurrent federal proceedings exist, the first-to-file rule generally dictates which claim is operative. *See George Mason University Foundation, Inc. v. Morris*, 2013 WL 6449109, at * 4 (E.D. Va. Dec. 9, 2013). The purpose of this rule "is the avoidance of duplicative litigation and the conservation of judicial resources and to ensure judicial efficiency, consistency, and comity." *Ortiz v. Panera Bread Co.*, 2011 WL 3353432, at *2 (E.D. Va. Aug. 2, 2011). The Trustee may not proceed with both the complaint that was assigned to him and Count 71 of his Complaint that incorporates, solely by reference, the claims from the first-filed case. Doing so would multiply litigation, waste judicial resources, and potentially lead to inconsistent results. The Trustee should either be required to dismiss Count 71 as to Mallory or dismiss the transferred lawsuit.

L. Many of the Trustee's Claims in Counts 1-2, 13-14, 53-57, 61, 65-66 are Barred by the Statute of Limitations and Counts 53-55, 59-60, and 62-64 Assert Claims Against Mallory for Acts of Directors and Officers *After* She Left HDL

The Company's bankruptcy was filed on June 7, 2015 (the "Petition Date"). Many of the claims the Trustee brings were barred by the applicable statute of limitations as of the Petition Date and, thus, are ripe for dismissal. Although a Rule 12 analysis is "properly focused on the sufficiency of the complaint, and not the presence of potential defenses," it is well-established that if all facts necessary to apply the defense "appear on the face of the complaint," then dismissal on statute of limitations grounds is proper. *See Goodman v. Praxair, Inc*., 494 F.3d 458, 464 (4th Cir. 2007); *see also Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996); *Russell v. Gennari*, 2007 U.S. Dist. LEXIS 83771 (E.D. Va. November 8, 2007).

Specifically, Counts 1-2 and 13-14 seek to avoid HDL's transfers of Shareholder Distributions and D&O Compensation to or for the benefit of Mallory under Section 548 of the Bankruptcy Code during the time periods June 10, 2011 through May 15, 2015, and January 1, 2011 through May 29, 2015, respectively. *See* Compl. at ¶¶ 429, 434, 437, 444, 550, 555, 558, 565 & Exhibits B and C. Pursuant to Section 548(a)(1), the Trustee "may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition," in this case, June 7, 2013. Looking to the face of Exhibits B and C of the Complaint, the Trustee is attempting to avoid transfers that occurred before June 7, 2013. Those claims for avoidance of transfers that predate June 7, 2013 should be dismissed in Counts 1-2 and 13-14.

With respect to the fiduciary duty claims (Counts 53-54 and 56-57) and violation of the trust fund doctrine (Count 55), under Virginia law, the claims are governed by the state's "catch-all" two-year limitations period set forth in Va. Code § 8.01-248. *See also FDIC v. Cocke*, 7

F.3d 396, 402 (4th Cir. 1993). Virginia law makes clear that there is no "discovery rule" applicable to breach of fiduciary duty claims, such that a cause of action for breach of fiduciary duty **accrues at the time of breach**, not at the time the plaintiff allegedly discovers the breach. *See Jones v. Shooshan*, 855 F. Supp. 2d 594, 602-03 (E.D. Va. 2012); *Colgate v. The Disthene Group, Inc.*, 86 Va. Cir. 218 (2013). In the Complaint, the Trustee asserts breach of fiduciary duty, trust fund, negligence, and gross negligence claims for specific conduct in certain instances and generalized conduct in others. With respect to the specific conduct: entering into the BlueWave Agreement occurred in 2010 (Compl. at ¶ 210); the Berkeley Related Misconduct spanned the periods from January 2010 through January 2012 (Compl. at ¶¶ 238-44); the alleged Improper CYP2C19 Testing occurred in July 2010 (Compl. at ¶¶ 263-69); certain of the alleged wrongful conduct relating to the G3 Transactions took place more than two years prior to the Petition Date (Compl. at ¶¶ 277-80); the Personal GeneNews Stock Purchases took place in December 2012 (Compl. at ¶ 297); two of the three corporate Sponsorship agreements complained of were made in December 2011 and December 2012 (Compl. at ¶¶ 336-37); the majority in dollars of the Shareholder Distributions listed in Exhibit B of the Complaint were made prior to two years before the Petition Date (Compl. at ¶ 365, Exhibit B); the majority of the D&O Compensation payments occurred before the limitations period expired in June 2013 (Compl. at ¶ 382, Exhibit C); and the agreement giving rise to the Rangarajan Buyout Payments was made in February 2013 (Compl. at ¶ 385). With respect to Counts 56 and 57, the alleged usurpation of a corporate opportunity occurred in December 2012, also well-beyond the two-year limitations period on the face of the Complaint. Compl. at ¶ 945. Thus, these claims, based on the face of the Complaint, are barred by Va. Code § 8.01-248.

With respect to the generalized conduct underlying the P&H fees, BlueWave Agreement, waiver of co-pays, and medical necessity, the Trustee asserts that HDL began operations on an unspecified date in "October of 2009" relying upon these illicit practices that purportedly violated federal law from the **very outset of its operations.** Compl. at ¶ 341. The Trustee further claims that it was these practices that resulted in harm to the company and its creditors. Compl. at ¶¶ 7-16. Such practices, detailed *ad nauseum* in the Complaint, are the foundational allegations against Mallory supporting her purported breach of fiduciary duty. Given the Complaint's "October 2009" starting point as to when HDL's operations began, any breach of fiduciary duty claim or trust fund violation that occurred prior to June 7, 2013 is time barred.

The overwhelming majority of Shareholder Distributions that are termed "unlawful" by the Trustee in Count 61 are subject to Virginia's two-year limitations period. *See* Va. Code § 13.1-692(C). All of the Shareholder Distributions identified on the face of Exhibit B to the Complaint that occurred prior to June 7, 2013, may not be recovered from Mallory. Further, those Shareholder Distributions that occurred after November 6, 2014, also cannot be recovered from Mallory because, as the Complaint on its face makes clear, Mallory was no longer a director with authority to authorize such transactions. Compl. at ¶ 388.

With respect to unjust enrichment in Count 66, Va. Code § 8.01-246 governs, making the limitations period three years. *See Belcher v. Kirkwood*, 238 Va. 430, 433 (1989); *see also RMS Tech., Inc. v. TDY Indus., Inc.*, 64 Fed. Appx. 853, 858 (4th Cir. 2003); *Tao of Sys. Integration, Inc. v. Analytical Servs. & Mat., Inc.*, 299 F.Supp.2d 565, 576 (E.D. Va. 2004). "The statute of limitations for unjust enrichment begins to run at the time the unjust enrichment occurred . . . not when a party 'knew or should have known' of the unjust enrichment." *Tao*, 299 F. Supp. 2d at 576. The same limitations period applies to the assumpsit claim in Count 65. Va. Code § 8.01-

246. Thus, the claims for recovery of Shareholder Distributions and D&O Compensation that occurred prior to June 7, 2012 are barred by limitations.

In addition to claims being barred by limitations, the Trustee has included claims against Mallory for alleged misconduct that *post-dated* her departure from the Company. For instance, in Counts 53-55, 59-60, and 62-64, Mallory, as included as one of a larger group, is alleged to be responsible for engaging in the C3Nexus Transactions (defined to include all transactions involving C3Nexus and IGGBO), approving and executing the Mallory Separation Agreement, incurring the obligation for the Mallory Separation Amount, failing to obtain tolling agreements from individual LeClairRyan attorneys, and engaging in the IDL Transactions (defined to include funding of IDL and HDL's related transactions with IDL, GeneNews, and Cobalt). As each of these categories of conduct implicates corporate decision-making that could not on the face of the Complaint have involved Mallory, these claims should be dismissed as to Mallory.

M. Count 52 of the Complaint is Flawed as Mallory Was Not an Insider At All Times

Count 52 of the Complaint seeks to avoid transfers HDL made to Mallory between ninety days and one year before the Petition Date, as set forth in Exhibit E to the Complaint, pursuant to section 547(b) of the Bankruptcy Code. Compl. at ¶¶ 910, 916. The Trustee is seeking to recover transfers made to or for the benefit of Mallory, as an alleged insider, from June 13, 2014 through March 6, 2015. The Trustee alleges generally that Mallory was an "insider of the Debtors within the meaning of sections 101(31)(B) and 101(31)(E) of the Bankruptcy Code at the time of the transfers on Exhibit E (Compl. at ¶ 913); however, the Trustee clearly also alleges that Mallory owned 8.9048% of HDL's stock, Mallory served as Chief Executive Officer of HDL from its formation in 2008 through September 2014, and Mallory resigned her seat on the HDL Board of Directors on November 6, 2014. Compl. at ¶¶ 46, 388. Therefore, pursuant to

the Bankruptcy Code's definition of "insider" under 11 U.S.C. § 101(31), Mallory was no longer an insider as of November 6, 2014.[11] For these reasons, claims for avoidance of transfers after November 6, 2014 in Count 52 must be dismissed.

N. Counts 6, 14, 21, and 35-36 Fail Because Mallory Provided the Requisite Value

Counts 6 and 36 of the Complaint fail to state a claim to avoid Shareholder Distributions and the Mallory Payment for lack of consideration under Virginia law. Virginia has long followed the "peppercorn" theory of consideration, under which even a peppercorn suffices as consideration. *See Richmond Eng'g & Mfg. Corp. v. Loth*, 135 Va. 110, 156 (1923). A peppercorn has been equated with a cent. *See Whitney v. Stearns*, 16 Me. 394, 397 (1839). Under this theory, "[i]t matters not to what extent the promisor is benefited or how little the promisee may give for the promise." *Sager v. Basham*, 241 Va. 227, 229 (1991). Pertinent here, "[c]ourts, though they have long arms, cannot relieve one of the consequences of a contract merely because it was unwise." *Planters Nat'l Bank of Fredericksburg, Va. v. E. G. Heflin Co.*, 166 Va. 166, 173 (1936).

Here, HDL was obligated under a Shareholders Agreement (referenced at ¶ 248 of the Complaint and attached as **Exhibit 3** hereto) to make quarterly distributions to Mallory in an amount equal to the federal and state individual income taxes payable by Mallory and attributable to her allocable share of HDL's income tax for the current tax year. *See* Exh. 3 at § 12(b). HDL, in fact, made the majority of the Shareholder Distributions directly to taxing authorities for taxes that arose from the operation of the Company in exchange for the shareholders electing S corporation status and to satisfy the pass-through tax liability arising out

[11] An affiliate is defined as an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor." 11 U.S.C. § 101(2)(A). Even combining Mallory's stock with the stock owned by her spouse does not qualify her as an "affiliate." "Mallory and her husband Scott Mallory collectively owed approximately 14.91% of HDL's stock as of the Petition Date." Compl. at ¶ 49.

of the Shareholders Agreement. It is well-established that "[a] transfer of an interest in property to secure or pay antecedent indebtedness will normally be deemed to constitute reasonably equivalent value." *In re LandAmerica Fin. Group, Inc.*, 2014 WL 2069651, at *5 (Bankr. E.D. Va. May 19, 2014) (citing *In re Heilig-Meyers Co.*, 297 B.R. 46 (Bankr. E.D. Va. 2003)); *see also In re Trace Int'l Holdings, Inc.*, 287 B.R. 98, 110 (Bankr. S.D.N.Y. 2002) "Payment of antecedent debt . . . constitute[s] sufficient consideration. . . ."). Therefore, in addition to receiving the S corporation status and relieving it of its corporate income tax liability obligations, HDL also satisfied its obligation in the Shareholders Agreement through its payment of the Shareholder Distributions for payment of taxes. Thus, Count 6 should be dismissed. *See In re Kenrob Information Technology Solutions, Inc.*, 474 B.R. 799, 803 (Bankr. E.D. Va. 2012) ("The agreement between the shareholders and the corporation was valuable consideration to the corporation where the tax payments on behalf of the shareholders represented no more than the pass-through tax liability. The payment of the associated tax liability does not constitute a constructively fraudulent transaction.").

Likewise, in Count 36, HDL made the Mallory Payment in exchange for the dollar-for-dollar reduction in debt due under the February 4, 2014 Note. *See* Compl. at ¶¶ 353-55. Repayment of an antecedent debt in the form of a promissory note is value exceeding a cent or peppercorn. Count 36 fails as a matter of law on the face of the Complaint.

With respect to Counts 14, 21, and 35, section 548(a)(1)(B) of the Bankruptcy Code permits a trustee to avoid the transfer of property or the incurrence of an obligation by the debtor in the two years prior to the filing of the bankruptcy case if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation" and satisfies one of four other requirements outlined in § 548(a)(1)(B)(ii). Taking all of the factual allegations in the

Complaint as true, the Complaint demonstrates that HDL received reasonably equivalent value in exchange for the transfers and obligations in Counts 14, 21, and 35. This Court has stated:

> The purpose of § 548 is "to preserve the debtor's estate for the benefit of its unsecured creditors." *Ruby v. Ryan (In re Ryan)*, 472 B.R. 714, 724-25 (Bankr. E.D. Va. 2012) (citations omitted). Thus, so long as "the value of the benefit received by the debtor approximates the value of the property or obligation he has given up," the transfer was not fraudulent. *Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 991-92 (2nd Cir. 1981). In other words, the proper "focus is whether the net effect of the transaction has depleted the bankruptcy estate." *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 485 (4th Cir. 1992).

LandAmerica Fin. Group, Inc. v. Southern Cal. Edison Co., 525 B.R. 308, 314 (E.D. Va. 2015).

Section 548(d)(2)(A) provides that "'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor . . . ." 11 U.S.C. § 548(d)(2)(A); *see also*, *supra*. HDL obtained value in exchange for payment of the D&O Compensation (Counts 14 and 21) and the Mallory Payment (Count 35) because each of those payments satisfied antecedent debts owed by HDL to Mallory under the: (i) Shareholders Agreement; (ii) Mallory Employment Agreement (Counts 14 and 21); and (iii) the February 4, 2014 Note (Count 35).

With respect to the D&O Compensation in Counts 14 and 21, they, too, were paid to satisfy contractual debts HDL owed to Mallory. Both the Shareholder Agreement and Mallory Employment Agreement (referenced at ¶¶ 372, 376 of the Complaint and attached hereto as **Exhibit 4**) provided for a base salary, benefits, and bonuses. *See* Exh. 3 at § 6(f); Exh. 4 at ¶ 3. Therefore, the D&O Compensation, which is defined to include Mallory's base salary and bonuses (Compl. at ¶ 382), was paid in exchange for and reduced on a dollar-for-dollar basis HDL's obligation to pay such compensation pursuant to the terms of the Mallory Employment Agreement and Shareholders Agreement. The satisfaction of these debts on a dollar for dollar basis evidences reasonably equivalent value, and Counts 14 and 21 should be dismissed.

Count 35 of the Complaint seeks to avoid HDL's transfer of the Mallory Payment, which is defined in paragraph 355 of the Complaint as HDL's repayment of the February 4, 2014 Note to Mallory on February 25, 2014 in the amount of $3,506,041, to or for the benefit of Mallory and/or the Mallory Trust under Bankruptcy Code § 548 (¶¶ 758, 765). This transfer from HDL repaid the February 4, 2014 Note in full. As such, the Mallory Payment satisfied HDL's antecedent debt to Mallory arising out of the February 4, 2014 Note. As set forth above, "[a] payment made in satisfaction of an existing contractual obligation is, by definition, 'value' under Section 548(d)." *In re El-Atari*, 2012 LEXIS 4043 at * 3 (Bankr. E.D. Va. February 8, 2012). Count 35 should be dismissed.

INCORPORATION OF OTHER DEFENDANTS' MOTIONS TO DISMISS

Pursuant to Fed. R. Civ. Proc. 10(c), Defendants hereby incorporate motions of all other defendants in this case, as applicable to Mallory, including, but not limited to, dismissal of Counts 67-70 for violation of Va. Code § 8.01-26 and lack of standing in accordance with *Bogdan v. JKV Real Estate Servs.*, 414 F.3d 507 (4th Cir. 2005) as set forth in Dkt. 79.

CONCLUSION

For the foregoing reasons, Mallory respectfully requests that Counts 19-20 and 59-73 of the Complaint be dismissed in their entirety, and Counts 1-2, 6, 13-14, 21, 35-36, 52-57 be dismissed in part as set forth herein.

Dated: January 13, 2017

Respectfully submitted,

WHITEFORD, TAYLOR & PRESTON L.L.P.

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Counsel for LaTonya S. Mallory

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I caused a copy of the foregoing Motion to be served via first-class mail, postage prepaid or electronically via e-mail on all the following parties in accordance with the Court's *Order Establishing Omnibus Pretrial Protocol* entered on October 21, 2016 (Docket No. 18):

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Beyond Medicine LLC 333W 46th Ter Apt 523 Kansas City, MO 64112-1544 Beyond Medicine LLC 600 W Main Jefferson City, MO 65101	Advanced Medical Consulting 9700 N Virginia Ave Kansas City, MO 64155-2198
Labyrinth LLC 53 Belfast Rd Lutherville Timonium, MD 21093-4206	Lockhardt Consulting Inc. 322 Empress Ln League City, TX 77573-1928
Metta Consulting Inc. Davinder Hayre Khunkhun 2866 Fox Den Circle Lincoln, CA 94568 Metta Consulting Inc. 1865 Ellesmere Loop Roseville, CA 95747-5084	Lee Roberts 5806 Highcroft Dr Cary, NC 27519-5215 Lee Roberts 306 Lynden Valley Ct Cary, NC 27519
Paramount Medical Consultants Inc. Jeffrey Steadman 5363 S Cliffside Cir Idaho Falls, ID 83406-8361	Bio-Matrix Healthcare Consultants LLC Corporation Service Company 1703 Laurel St. Columbia, SC 29201
Southern Coast Consultants LLC 306 Lynden Valley Ct Cary, NC 27519 Southern Coast Consultants LLC Lee Roberts 5806 Highcroft Dr Cary, NC 27519-5215	Coffman Enterprises Inc. 109 Brown Ave Tusola, TX 79562-2235 Coffman Enterprises LLC Weldon L. Coffman 210 Brown Ave Tuscola, TX 79562-2236

/s/ Michael E. Hastings

ARTICLES OF INCORPORATION

OF

HEALTH DIAGNOSTIC LABORATORY, INC.

I.

The name of the corporation is Health Diagnostic Laboratory, Inc.

II.

The purpose for which the Corporation is formed is to transact any or all lawful business, not required to be specifically stated in these Articles, for which corporations may be incorporated under the Virginia Stock Corporation Act, as amended from time to time.

III.

The number of shares of common stock which the Corporation shall have authority to issue shall be 5,000 shares, without par value. No holder of shares of any class of the Corporation shall have any preemptive or preferential right to purchase or subscribe to (i) any shares of any class of the Corporation, whether now or hereafter authorized; (ii) any warrants, rights or options to purchase any such shares; or (iii) any securities or obligations convertible into any such shares or into warrants, rights or options to purchase any such shares.

IV.

The initial registered office shall be located at LeClairRyan, A Professional Corporation, Riverfront Plaza, East Tower, 951 East Byrd Street, City of Richmond, Virginia, 23219 and the initial registered agent shall be Dennis M. Ryan, who is a resident of Virginia and a member of the Virginia State Bar, and whose business address is the same as the address of the initial registered office.

V.

1. In this Article:

"applicant" means the person seeking indemnification pursuant to this Article.

"expenses" includes counsel fees.

"liability" means the obligation to pay a judgment, settlement, penalty, fine, including any excise tax assessed with respect to an employee benefit plan, or reasonable expenses incurred with respect to a proceeding.

"party" includes an individual who was, is or is threatened to be made a named defendant or respondent in a proceeding.

"proceeding" means any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative or investigative and whether formal or informal.

2. In any proceeding brought by or in the right of the Corporation or brought by or on behalf of shareholders of the Corporation, no director or officer of the Corporation shall be liable to the Corporation or its shareholders for monetary damages with respect to any transaction, occurrence or course of conduct, whether before or after the effective date of this Article, except for liability resulting from that person's having engaged in willful misconduct or a knowing violation of the criminal law or any federal or state securities law.

3. The Corporation shall indemnify (i) any person who was or is a party to any proceeding, including a proceeding brought by a shareholder in the right of the Corporation or brought by or on behalf of shareholders of the Corporation, by reason of the fact that the person is or was a director or officer of the Corporation, or (ii) any director or officer who is or was serving at the request of the Corporation as a director, trustee, partner or officer of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, against any liability incurred by that person in connection with the proceeding unless that person engaged in willful misconduct or a knowing violation of the criminal law. A person whose duties to the Corporation also impose duties on, or otherwise involve services by, that person to an employee benefit plan or to participants in or beneficiaries of the plan is considered to be serving the plan at the Corporation's request. The Board of Directors is hereby empowered, by a majority vote of a quorum of disinterested directors, to enter into a contract to indemnify any director or officer in respect of any proceedings arising from any act or omission, whether occurring before or after the execution of the contract.

4. No amendment or repeal of this Article shall affect the rights provided under this Article with respect to any act or omission occurring before the amendment or repeal. The Corporation shall promptly take all such actions, and make all such determinations, as shall be necessary or appropriate to comply with its obligation to make any indemnity under this Article and shall promptly pay or reimburse all reasonable expenses, including attorneys' fees, incurred by any such director, officer, employee or agent in connection with such actions and determinations or proceedings of any kind arising therefrom.

5. The termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not of itself create a presumption that the applicant did not meet the standard of conduct described in Section 2 or 3 of this Article.

6. Any indemnification under Section 3 of this Article (unless ordered by a court) shall be made by the Corporation only as authorized in the specific case upon a determination

that indemnification is proper in the circumstances because the applicant has met the standard of conduct set forth in Section 3.

The determination shall be made:

a. By the Board of Directors by a majority vote of a quorum consisting of directors not at the time parties to the proceeding;

b. If a quorum cannot be obtained under subsection (a) of this Section, by majority vote of a committee duly designated by the Board of Directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding;

c. By special legal counsel:

(1) Selected by the Board of Directors or its committee in the manner prescribed in Section 6(a) or 6(b); or

(2) If a quorum of the Board of Directors cannot be obtained under Section 6(a) and a committee cannot be designated under Section 6(b), selected by majority vote of the full Board of Directors, in which selection directors who are parties may participate; or

d. By the shareholders, but shares owned by or voted under the control of directors who are at the time parties to the proceeding may not be voted on the determination.

Any evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is appropriate, except that if the determination is made by special legal counsel, such evaluation as to reasonableness of expenses shall be made by those entitled under Section 6(c) to select counsel.

Notwithstanding the foregoing, if the composition of a majority of the Board of Directors has changed after the date of the alleged act or omission with respect to which indemnification is claimed, any determination with respect to any claim for indemnification or advancement of expenses made pursuant to this Article shall be made by special legal counsel agreed upon by the Board of Directors and applicant. If the Board of Directors and the applicant are unable to agree upon such special legal counsel, the Board of Directors and the applicant each shall select a nominee, and the nominees shall select such special legal counsel.

7. a. The Corporation shall pay for or reimburse the reasonable expenses incurred by any applicant who is a party to a proceeding in advance of final disposition of the proceeding or the making of any determination under Section 3 if the applicant furnishes the Corporation:

(1) a written statement of the applicant's good faith belief that he or she has met the standard of conduct described in Section 3; and

(2) a written undertaking, executed personally or on the applicant's behalf, to repay the advance if it is ultimately determined that the applicant did not meet such standard of conduct.

b. The undertaking required by Section 7(a)(2) shall be an unlimited general obligation of the applicant but need not be secured and may be accepted without reference to financial ability to make repayment.

c. Authorizations of payments under this Section shall be made by the persons specified in Section 6.

8. The Board of Directors is hereby empowered, by majority vote of a quorum consisting of disinterested directors, to cause the Corporation to indemnify or contract to indemnify any person not specified in Section 2 or 3 of this Article who was, is, or may become a party to any proceeding, by reason of the fact that the person is or was an employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, to the same extent as if that person were specified as one to whom indemnification is granted in Section 3. The provisions of Sections 4 through 7 of this Article shall be applicable to any indemnification provided hereafter pursuant to this Section 8.

9. The Corporation may purchase and maintain insurance to indemnify it against the whole or any portion of the liability assumed by it in accordance with this Article and may also procure insurance, in such amounts as the Board of Directors may determine, on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, against any liability asserted against or incurred in any such capacity or arising from the person's status as such, whether or not the Corporation would have power to indemnify that person against such liability under the provisions of this Article.

10. Every reference herein to directors, officers, employees, or agents shall include former directors, officers, employees and agents and their respective heirs, executors and administrators. The indemnification hereby provided and provided hereafter pursuant to the power hereby conferred by this Article on the Board of Directors shall not be exclusive of any other rights to which any other person may be entitled, including any right under policies of insurance that may be purchased and maintained by the Corporation or others, with respect to claims, issues or matters in relation to which the Corporation would not have the power to indemnify that person under the provisions of this Article. Such rights shall not prevent or restrict the power of the Corporation to make or provide for any future indemnity, or provisions for determining entitlement to indemnity, pursuant to one or more indemnification agreements, bylaws, or other arrangements (including, without limitation, creation of trust funds or security

interests funded by letters of credit or other means) approved by the Board of Directors (whether or not any of the directors of the Corporation shall be a party to or beneficiary of any such agreements, bylaws or arrangements); provided, however, that any provision of such agreements, bylaws or other arrangements shall not be effective if and to the extent that it is determined to be contrary to this Article or applicable laws of the Commonwealth of Virginia.

11. Each provision of this Article shall be severable, and an adverse determination as to any such provision shall in no way affect the validity or any other provision.

VI.

Unless these Articles of Incorporation provide otherwise or the Board of Directors conditions its submission of a particular matter on receipt of a greater vote or on any other basis permitted by applicable law, the vote of the holders of a majority of the outstanding shares of any series or class of stock voting as such series or class, or any series(es) and/or class(es) of stock voting together as a voting group, entitled to vote on the following matters required by applicable law to be submitted to such series(es), class(es) or voting group shall be required and sufficient for the adoption or approval thereof by such series(es), class(es) or voting group: (i) any amendment or restatement of the Articles of Incorporation of the Corporation, (ii) a plan of merger, (iii) a plan of share exchange, (iv) the sale, lease or exchange or other disposition of all or substantially all of the property of the Corporation other than in the usual and regular course of business, or (v) a proposal to dissolve the Corporation. The foregoing provisions of this Article VII shall not be construed to alter or modify in any respect the voting requirements prescribed by the Virginia Stock Corporation Act which would in the absence of such provisions be applicable to the approval of any affiliated transaction (as defined in said Act) or any amendment of the Articles of Incorporation relating to the vote required for such approval.

VII.

Except as otherwise provided in the bylaws, the Board of Directors shall have the power to make, amend, or repeal bylaws of the Corporation.

VIII.

Except as otherwise expressly provided herein, the creation or the issuance to directors, officers or employees of the Corporation or any subsidiary of the Corporation of rights, options or warrants for the purchase of Common Stock of the Corporation, where such rights, options or warrants are not issued or to be issued to shareholders of the Corporation generally, shall not require approval by the shareholders of the Corporation.

Dated: November 20, 2008

DENNIS M. RYAN, Incorporator

BOD Meeting Agenda

Date: December 3, 2012
Attendees: Tonya Mallory, Russ Warnick, Joe McConnell
Invited guests: Charles Sims

Agenda:

1. Satya's employment
   [redacted] BOD conclusion was to terminate without cause.
   Charles will follow up with Satya's attorney.
2. Review financial projection for 2013
   2013 Projections accepted (copy attached)
3. S1 Distribution Review and Decision
   BOD reviewed memo from CFO with outside counsel and decided to proceed with S1 distributions on Friday, December 7th. Further consideration will be given before proceeding
4. Review/approve minutes of previous BOD mtg
   approved
5. Proposed changes in MAB/SAB
   Dr Dall is coordinating with Derek to restructure MAB agreements to reflect pay for performing with a better accounting of the duties the MAB members do for HDL.
   Dr Dall will take over MAB from Russ
6. Revised bonus program
   Decided to replace previous 1000 milestone bonuses with a program more proportional to compensation and tied to tenure and performance with a long term profit or equity related component
7. Decided to schedule a meeting with professional staff attending trade shows to improve presence at trade shows
8. Collaborations HDL and FHIT
   At attorneys recommendation FHIT will begin submitting proposals for educational programs to HDL

HealthDiagnosticLaboratoryInc.
beyond disease diagnosis

December 3, 2012

Private
To the Board of Directors
Richmond, Virginia

[redacted]

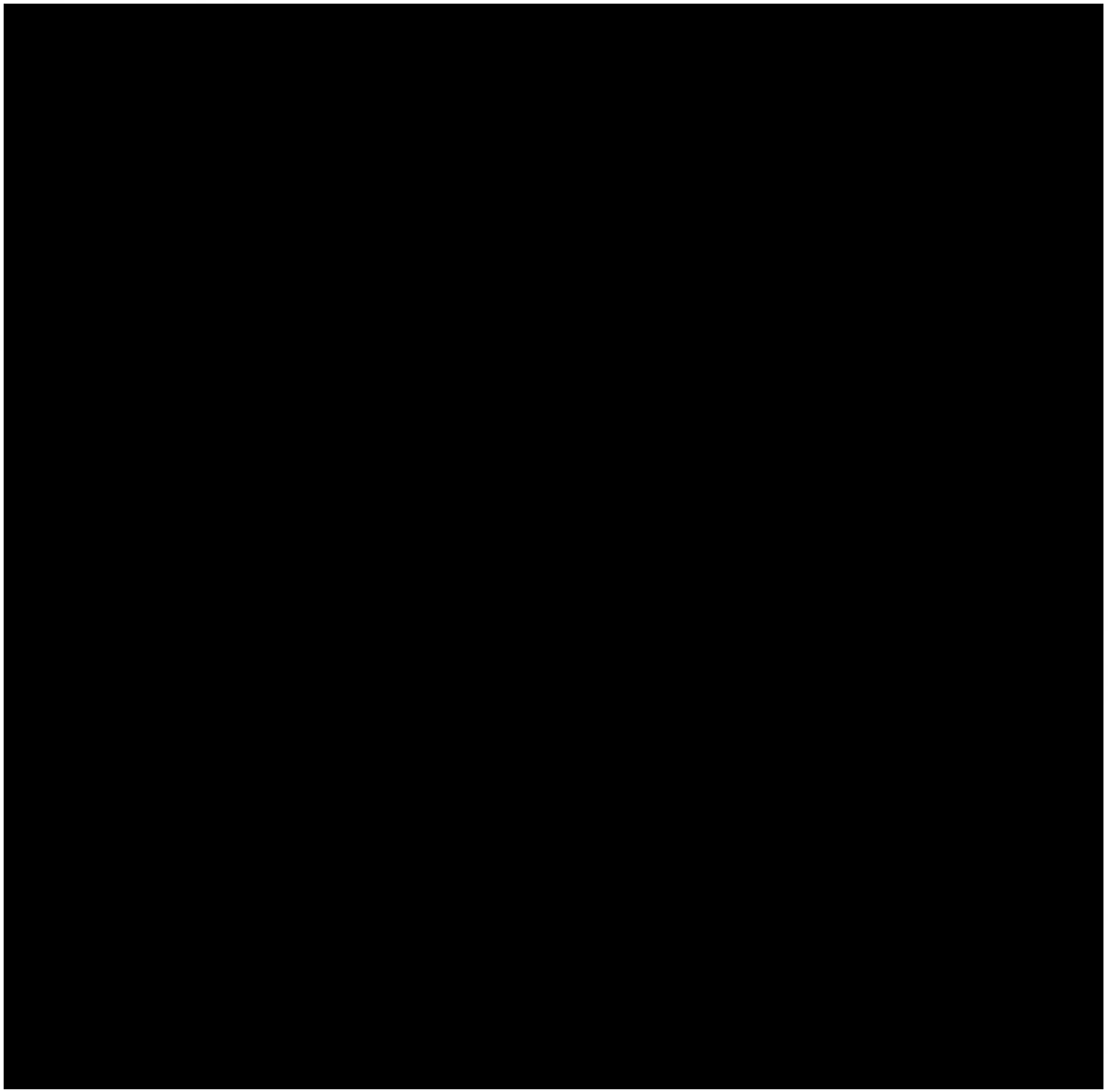
[redacted]

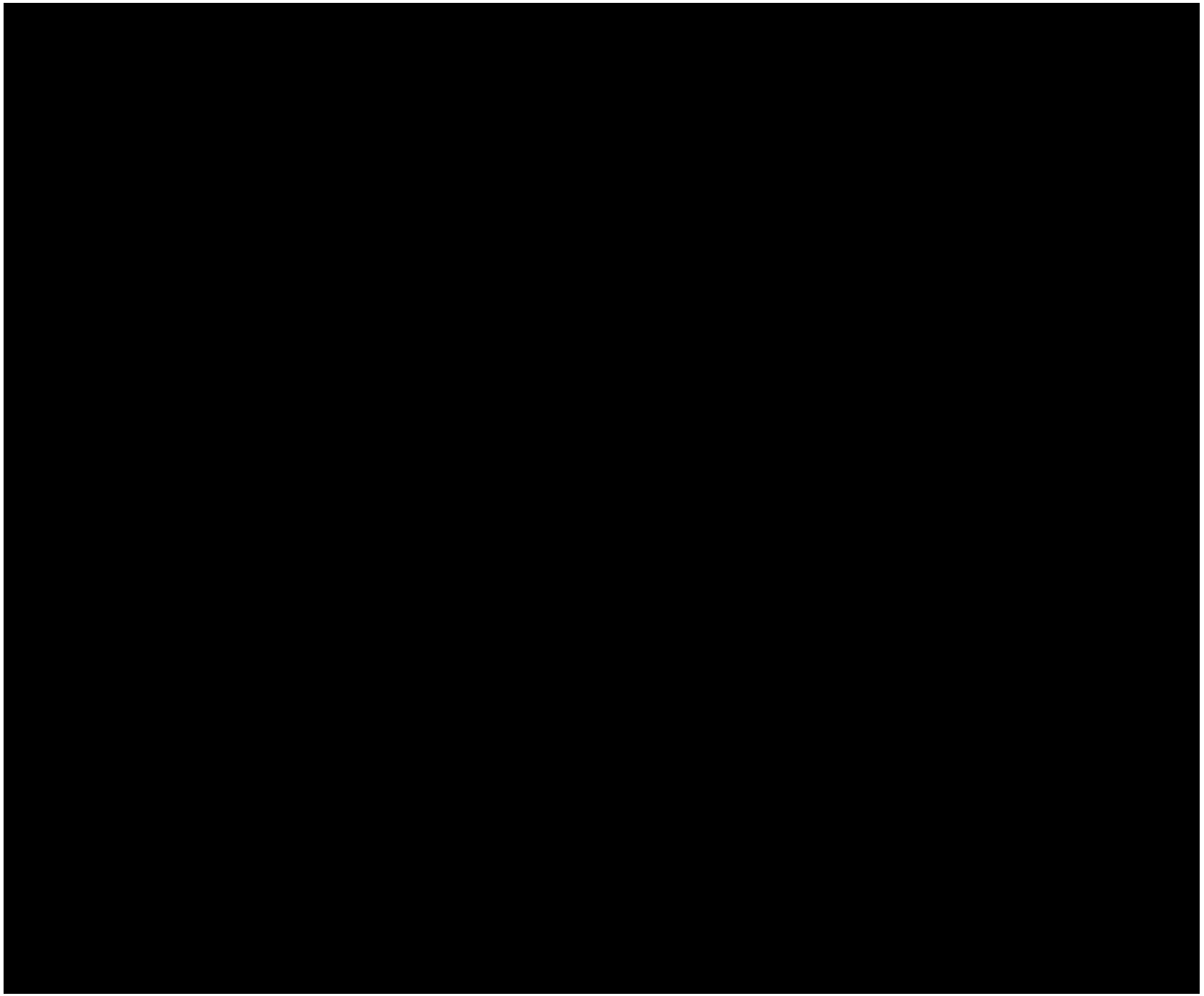
[redacted]

Sincerely,
Health Diagnostic Laboratory, Inc.

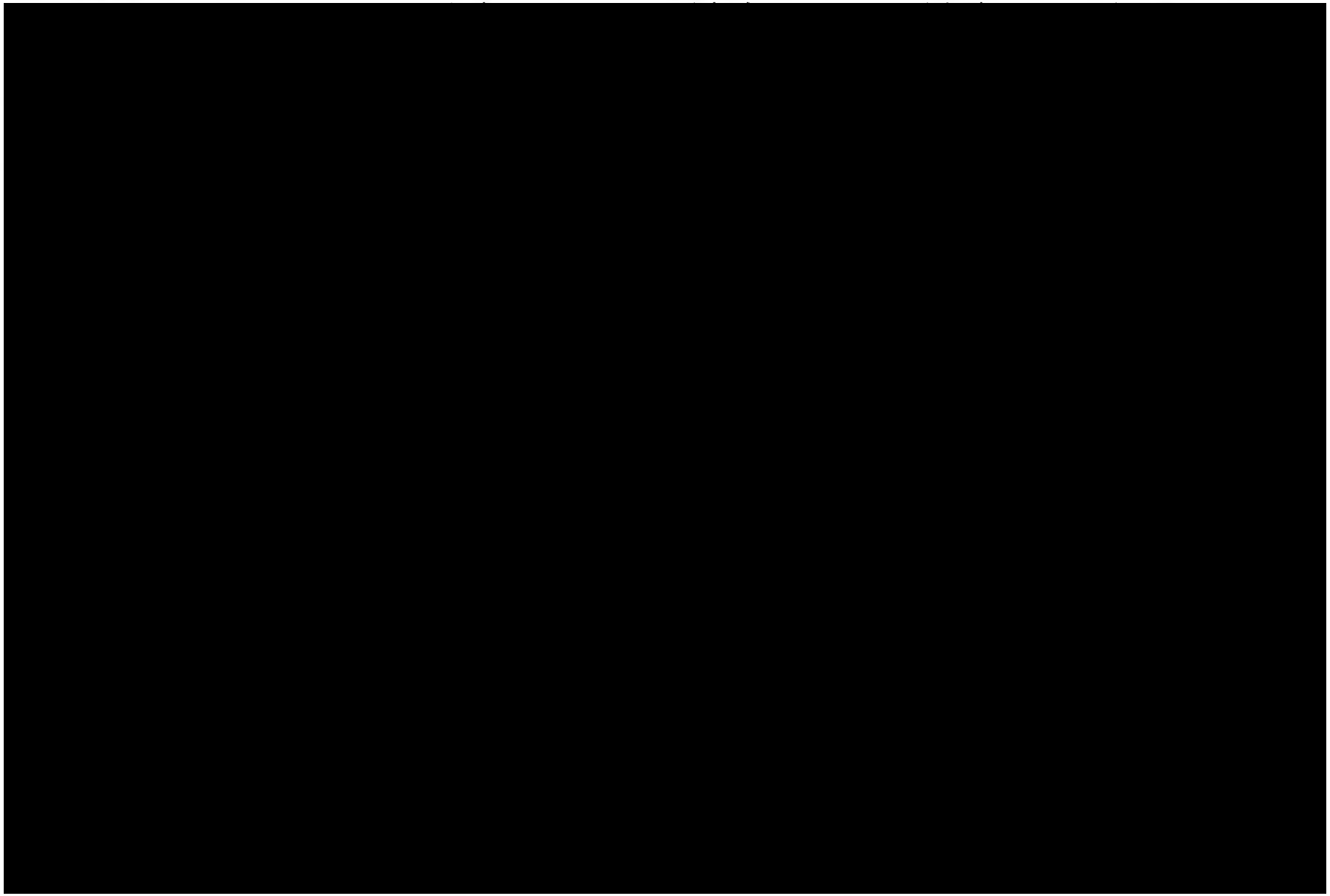
Stephen G. Carroll
Chief Financial Officer

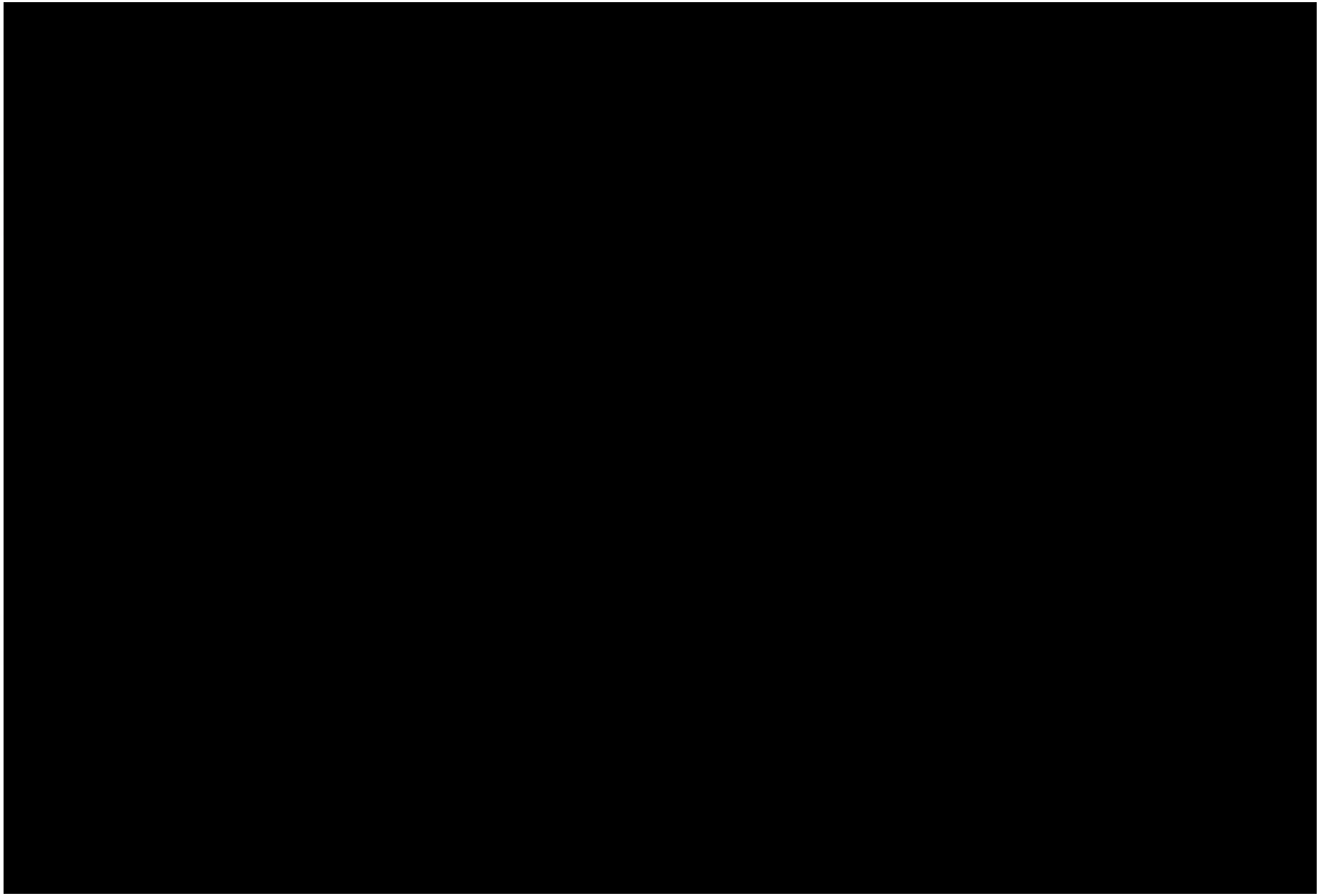
Health Diagnostic Laboratory, Inc.
Projected Balance Sheets
December 31, 2012 and 2013

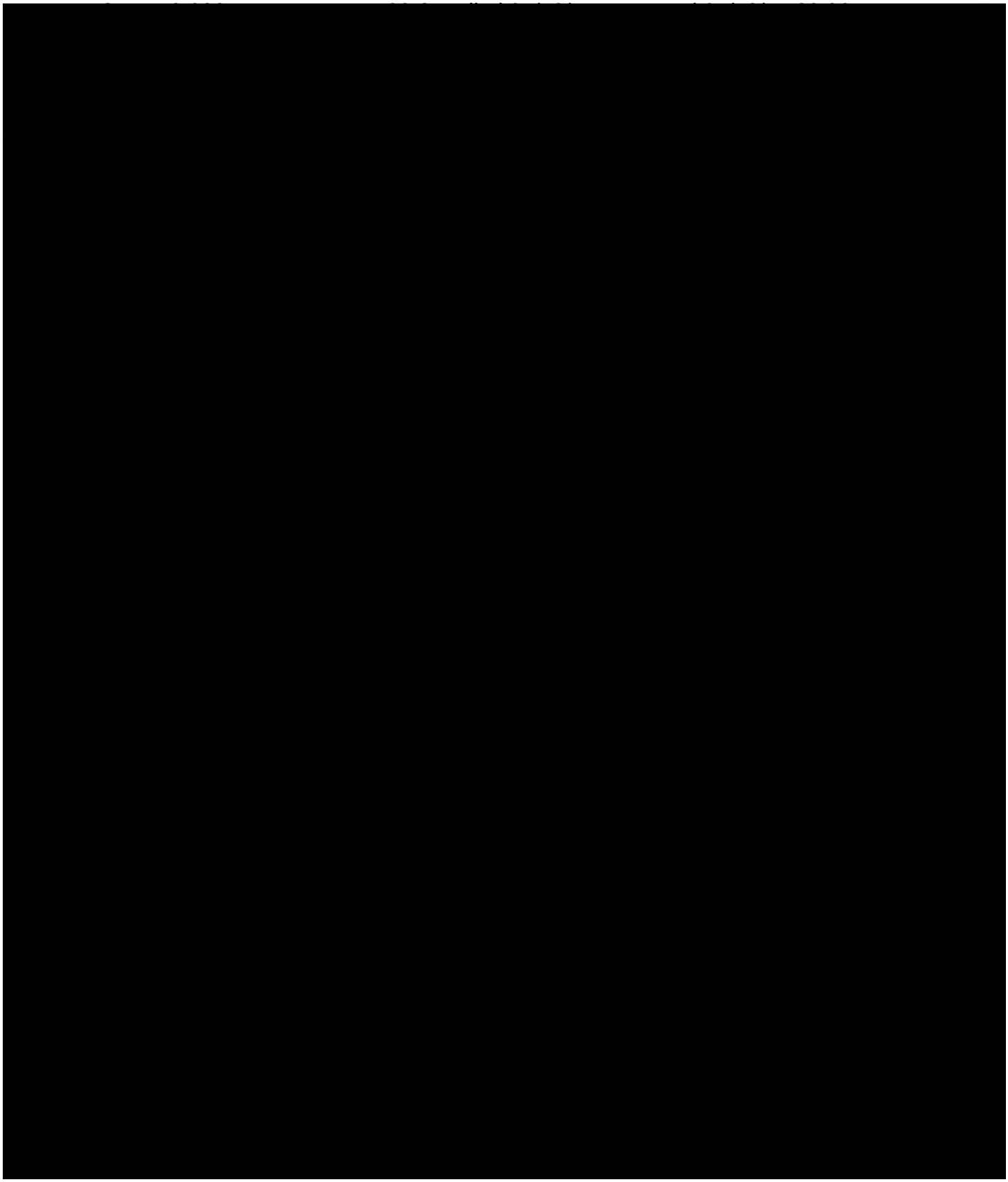


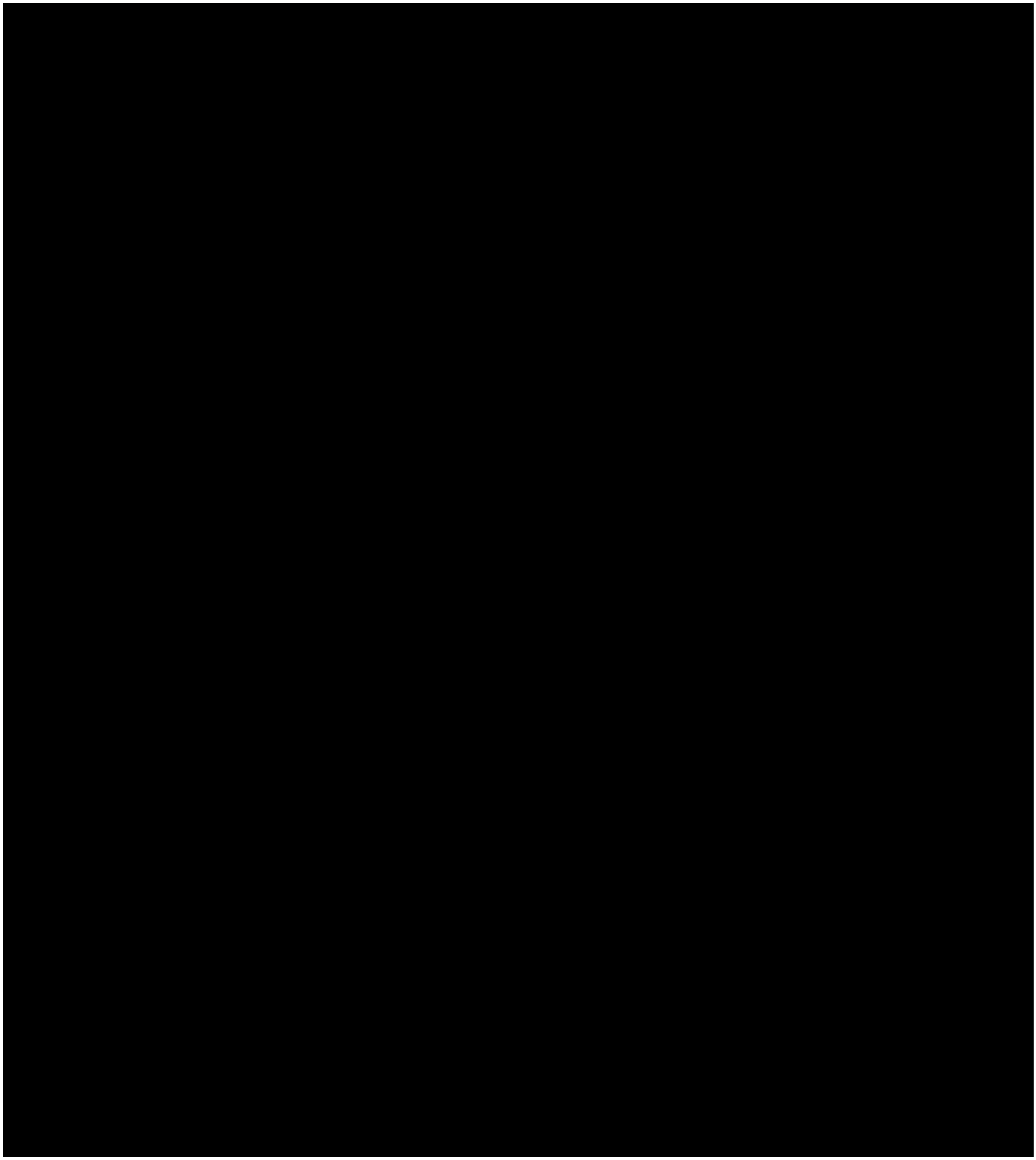


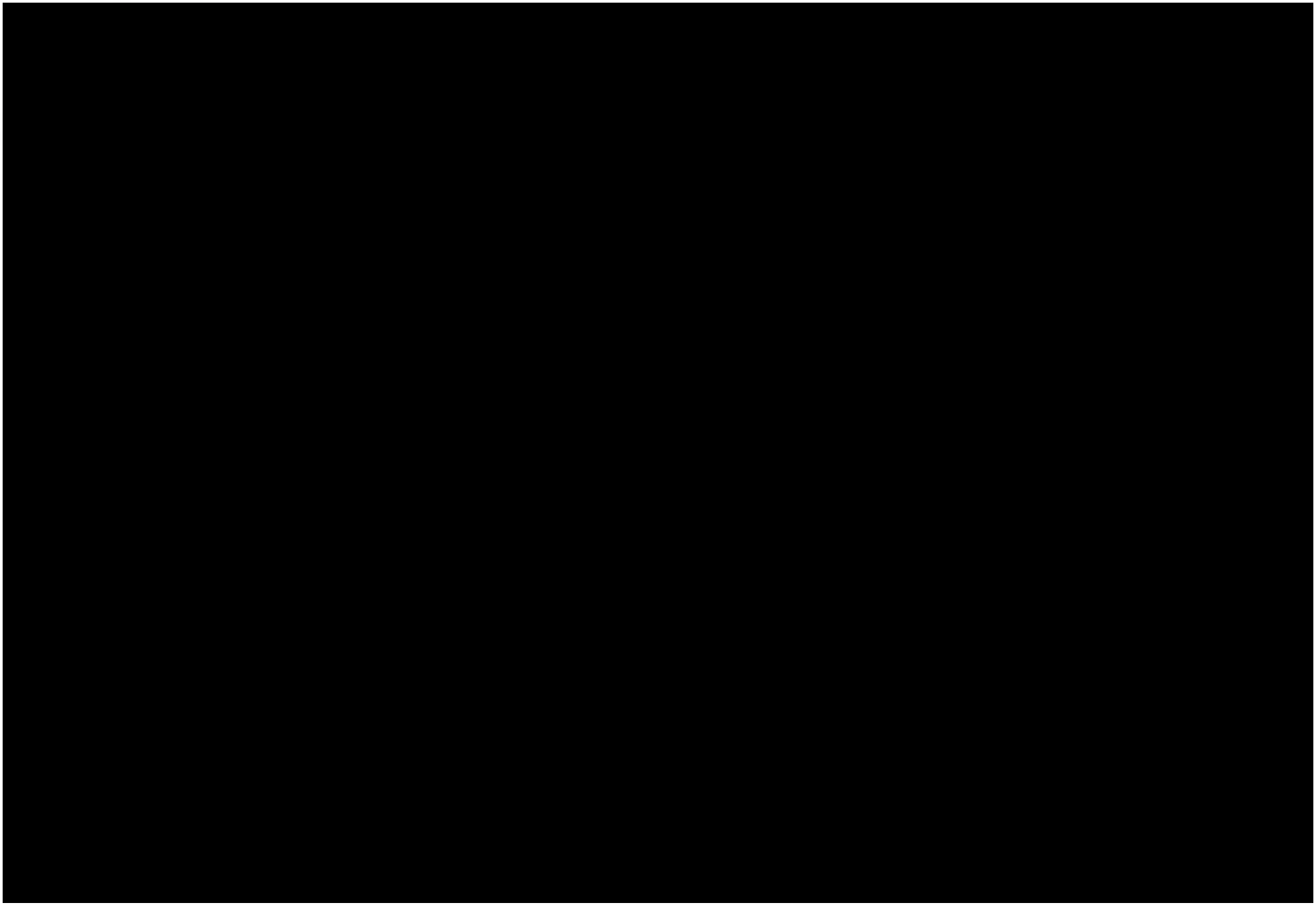
Health Diagnostic Laboratory, Inc.
Statement of Income and Cashflows
For the years ending December 31, 2012 and 2013
As of December 3, 2012

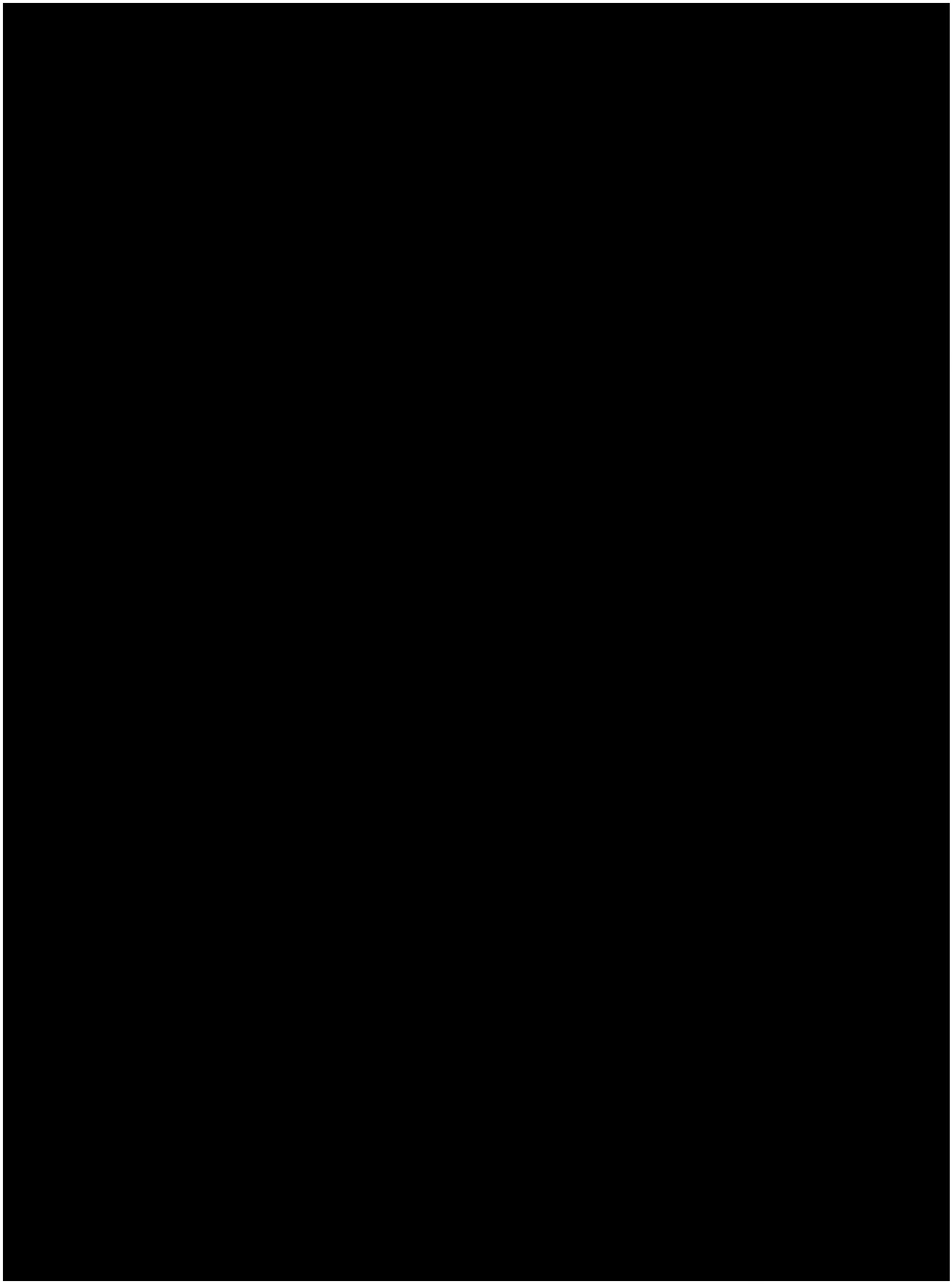




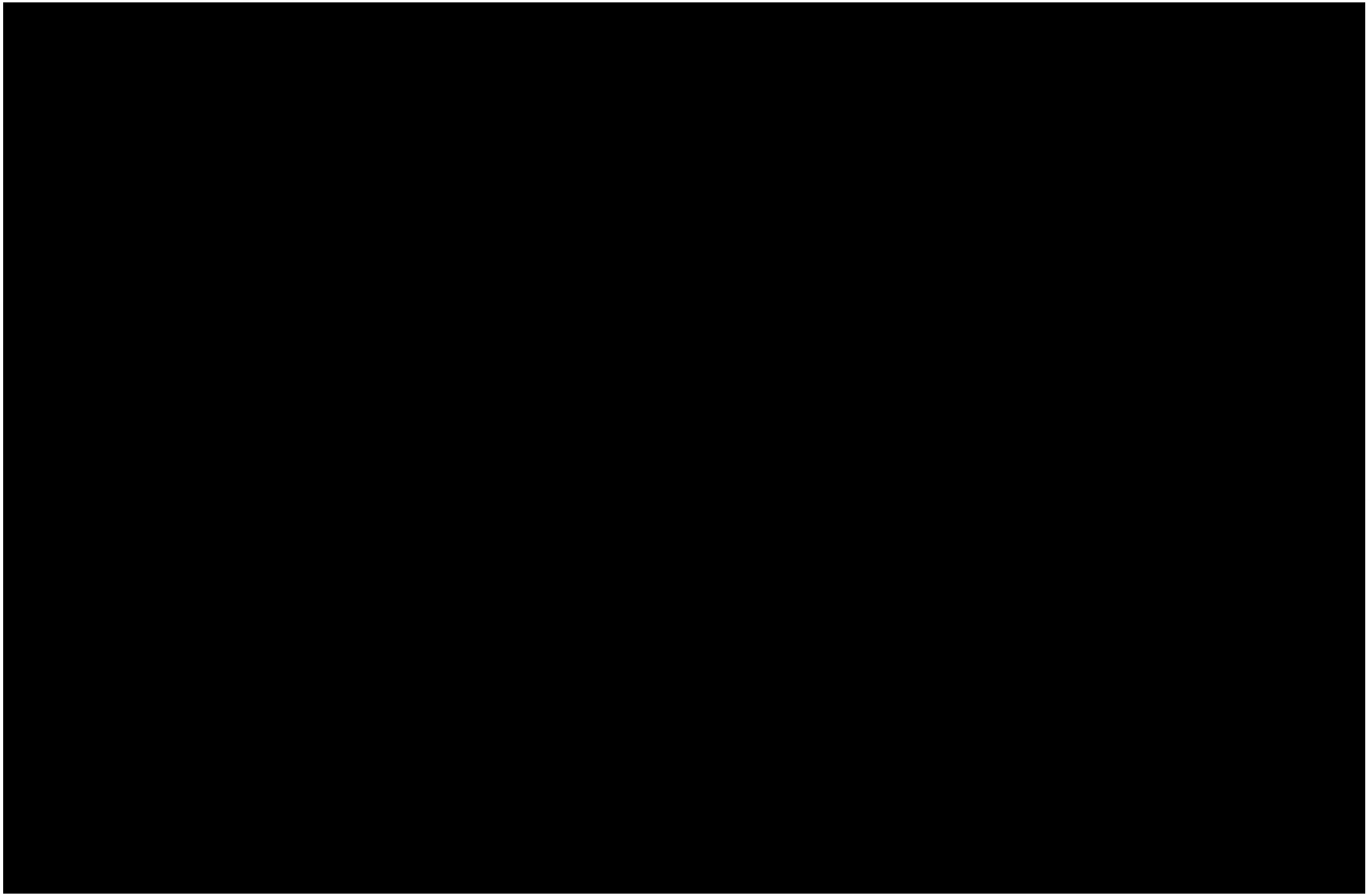




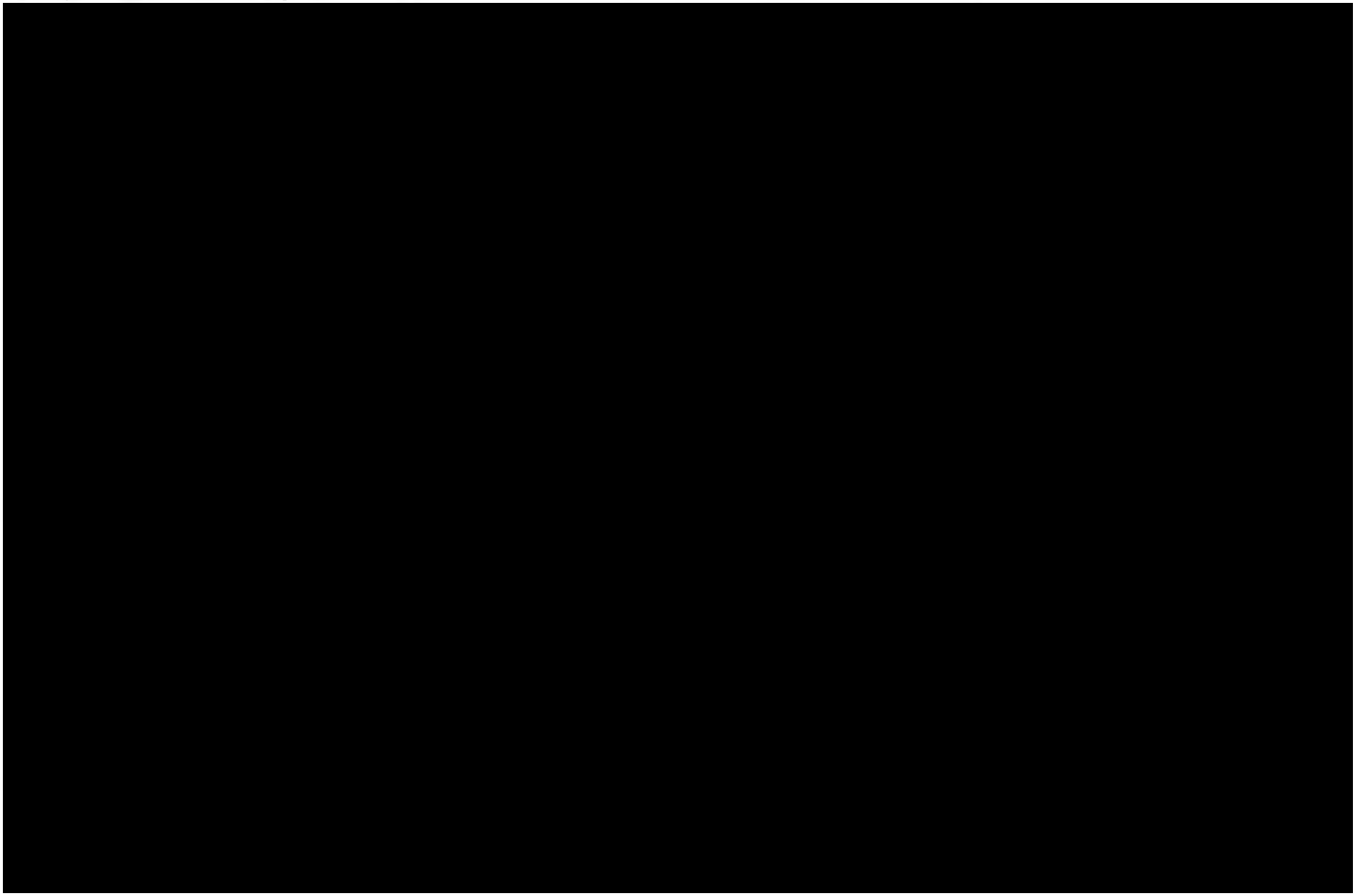


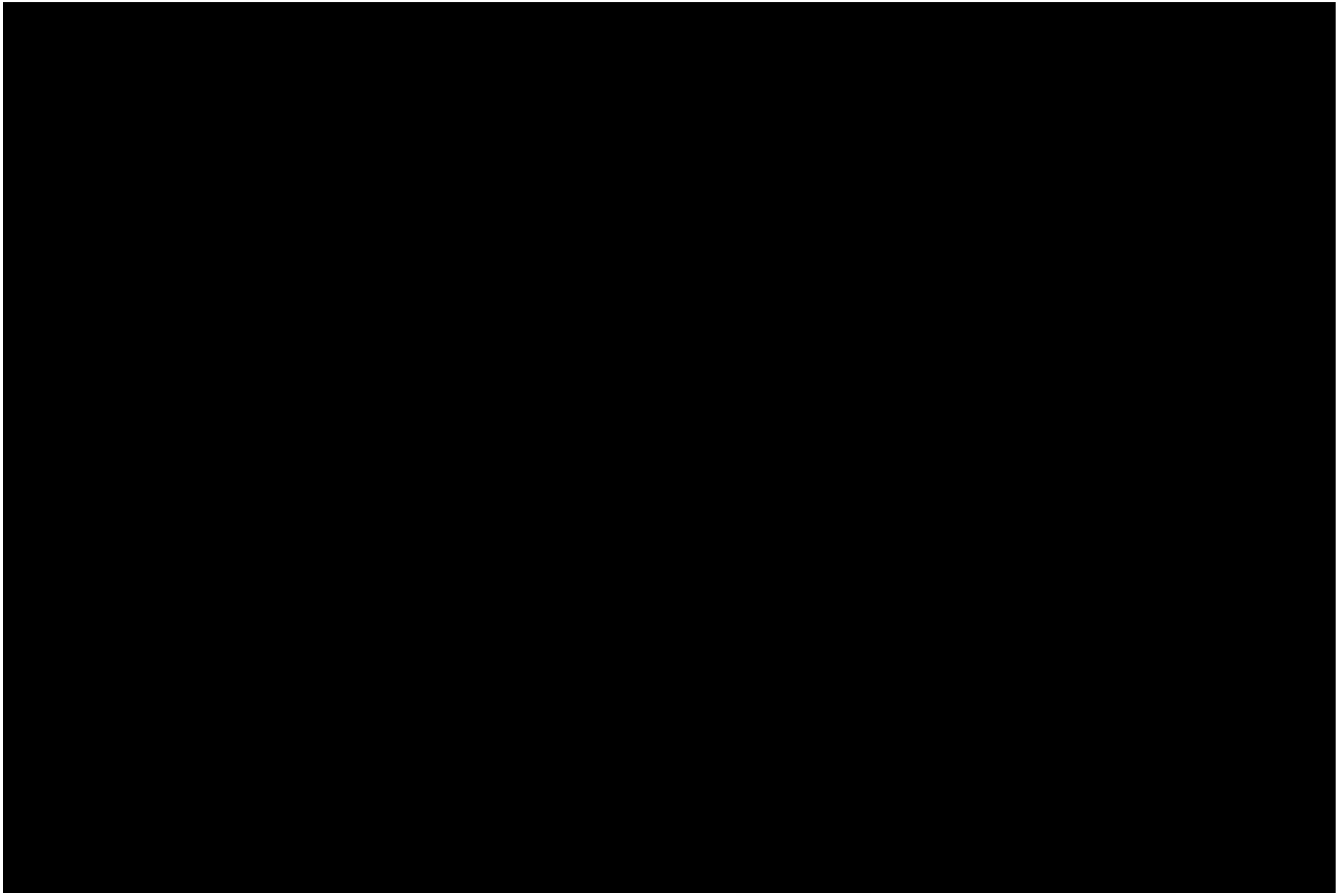


Health Diagnostic Laboratory, Inc.
Projected Balance Sheets
December 31, 2012, 2013, 2014, 2015 and 2016



Health Diagnostic Laboratory, Inc.
Statement of Income and Cashflows
For the years ending December 31, 2012 through 2015

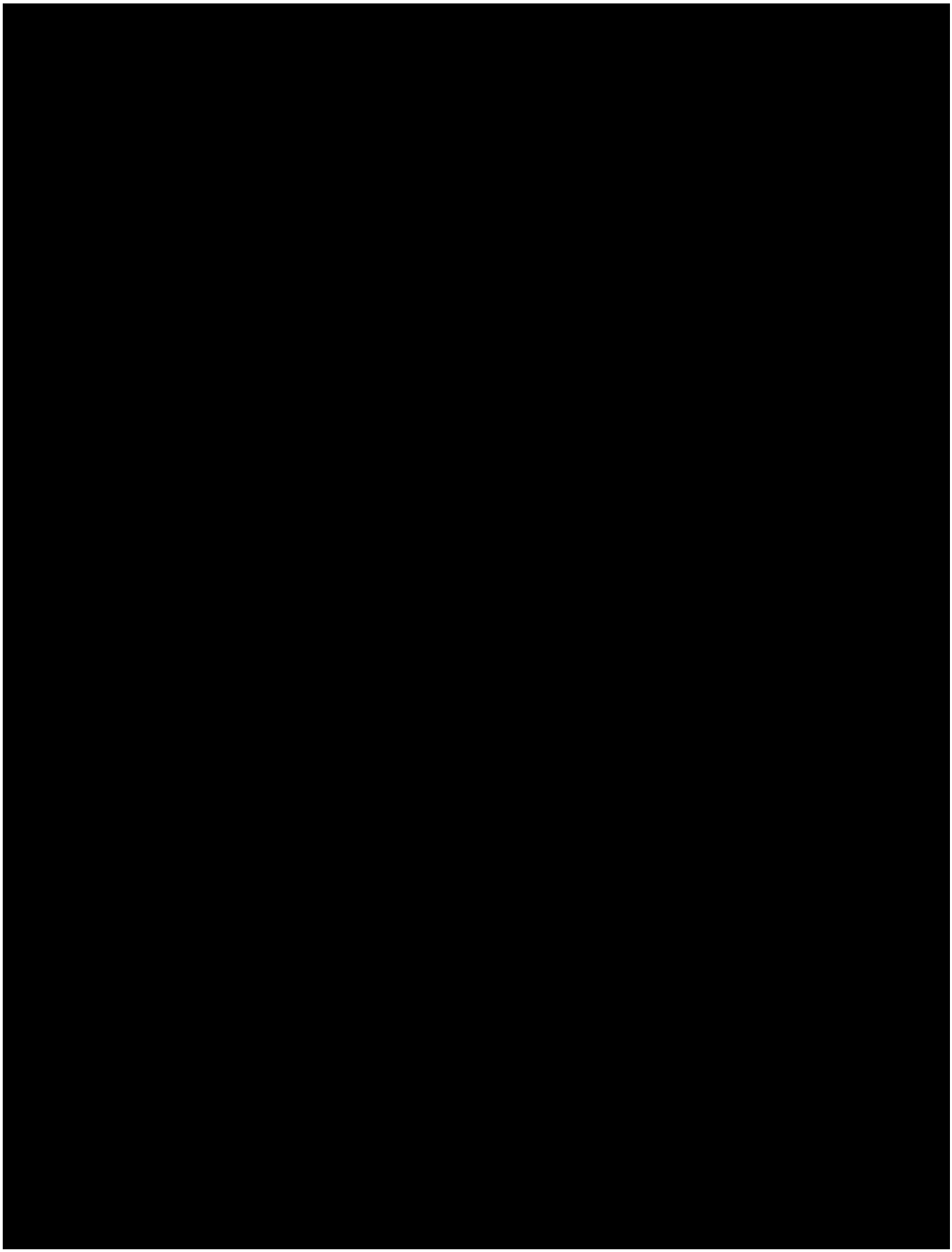




SHAREHOLDERS AGREEMENT
OF
HEALTH DIAGNOSTIC LABORATORY, INC.

[redacted]

6/23/09



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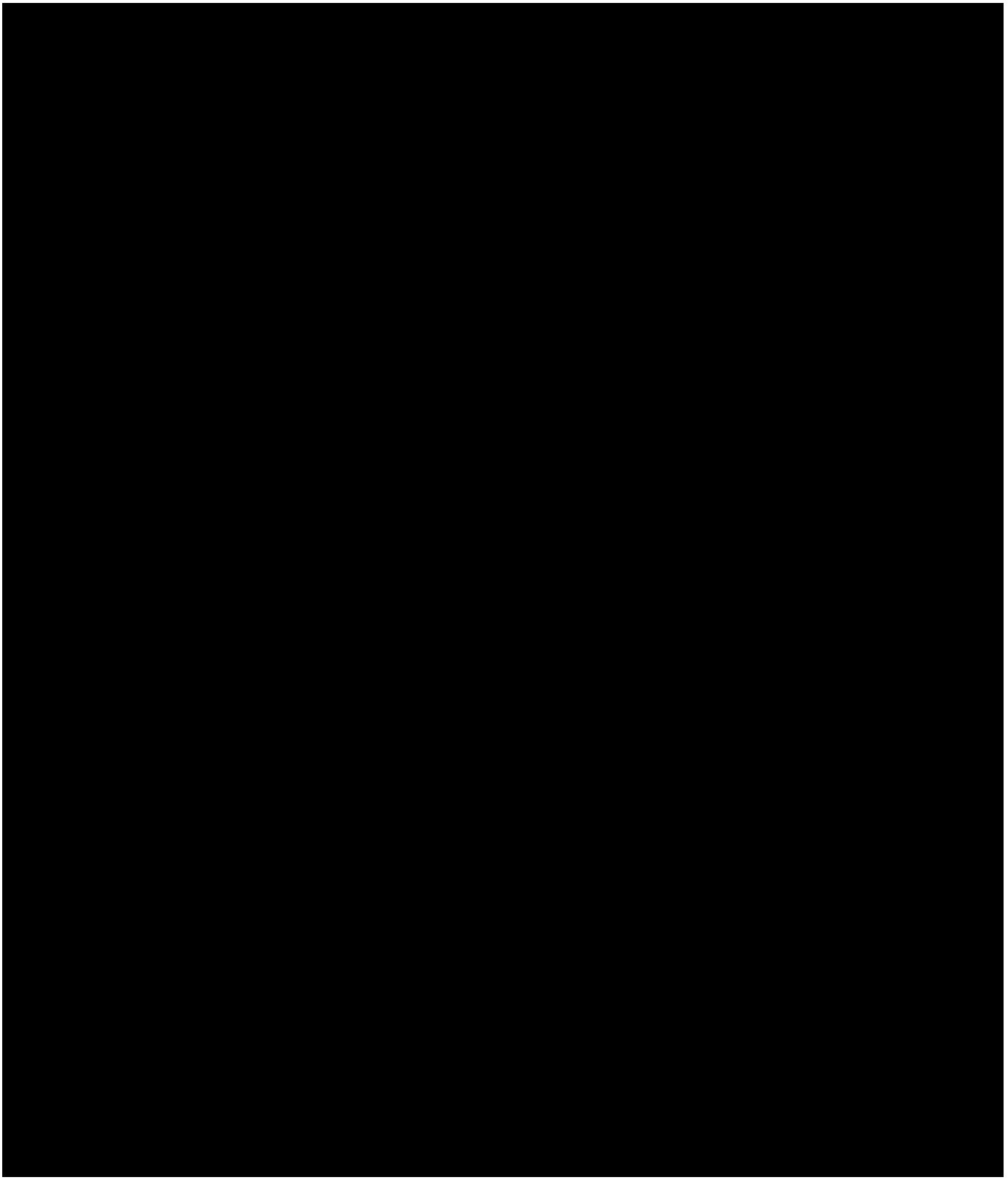

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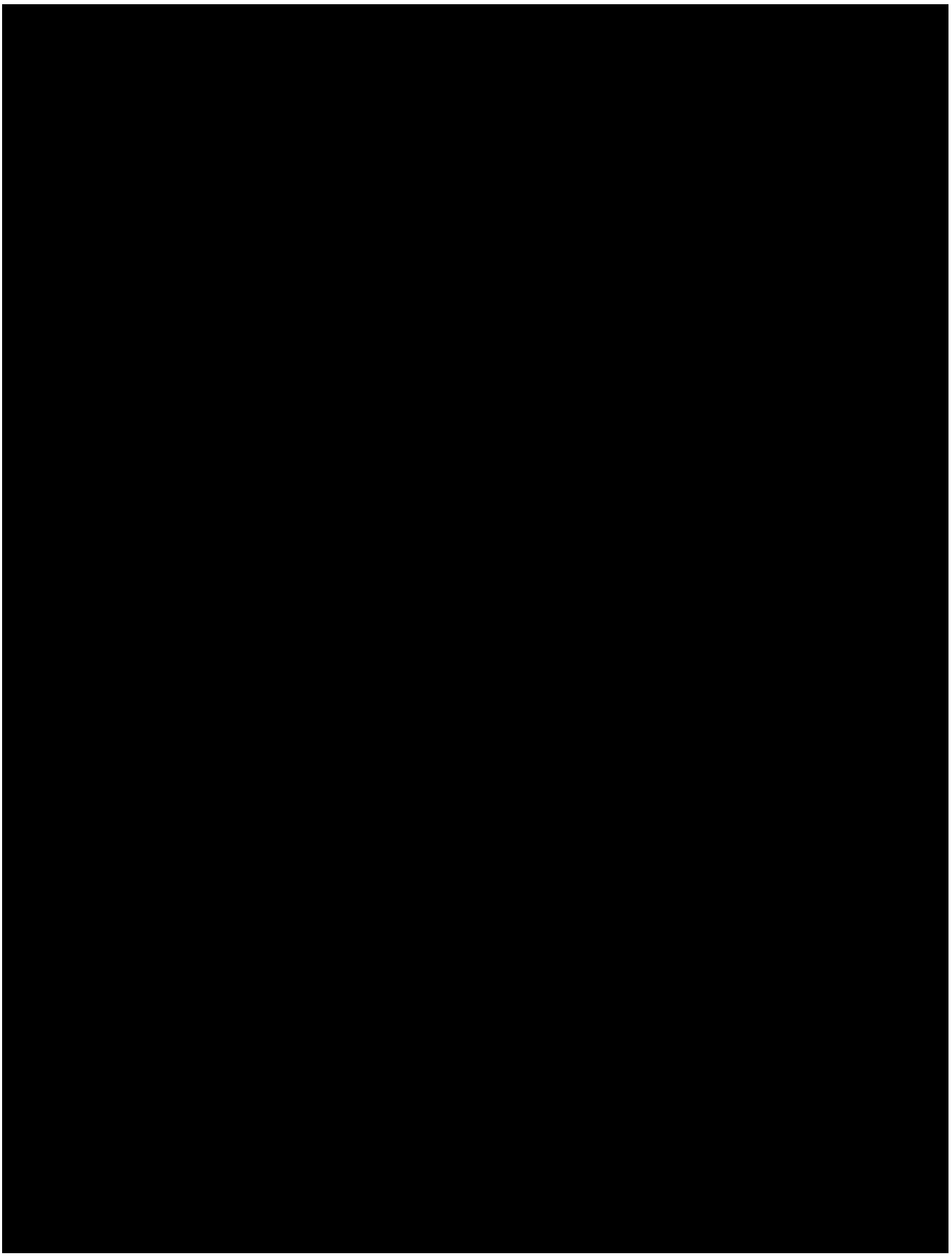

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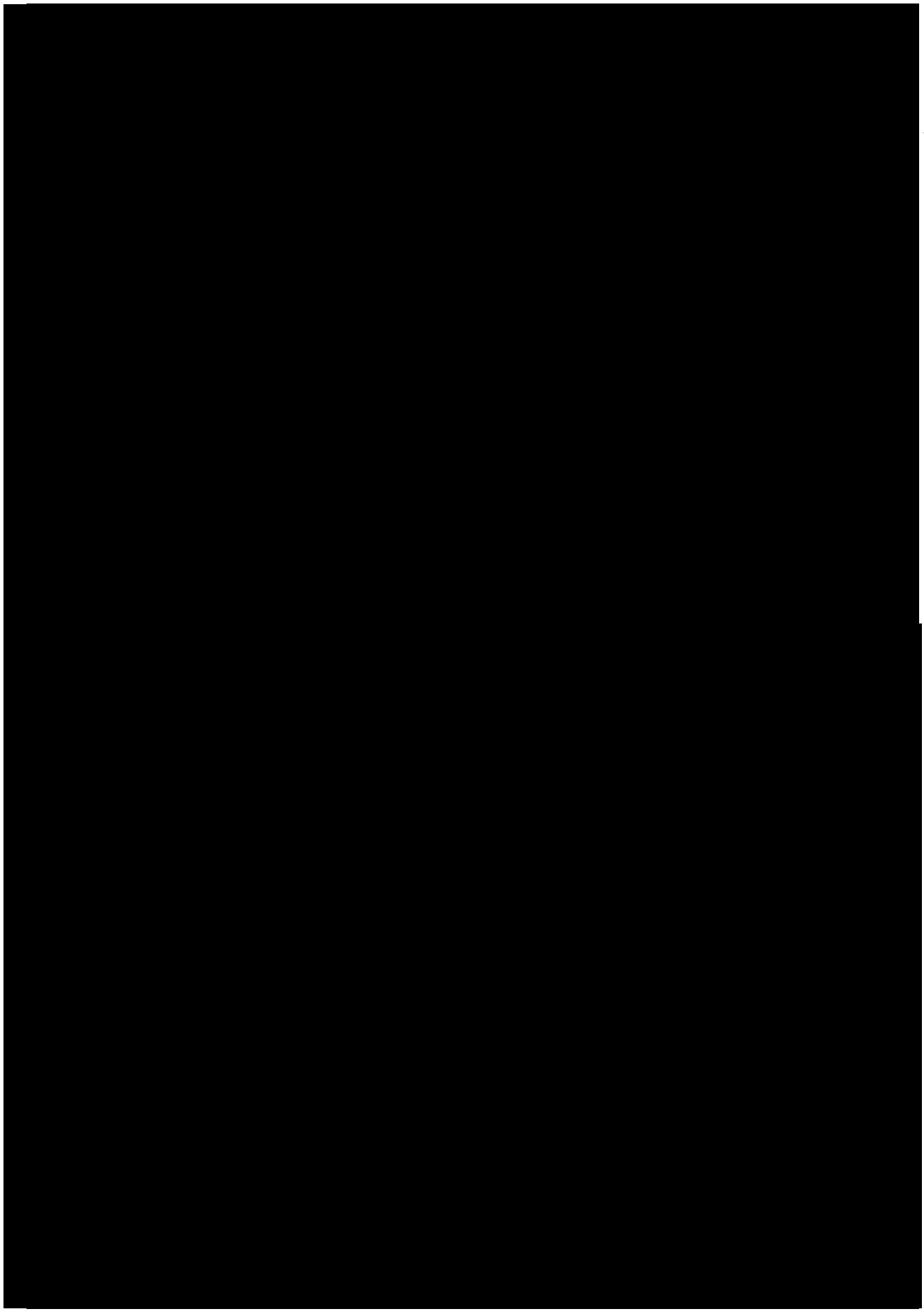

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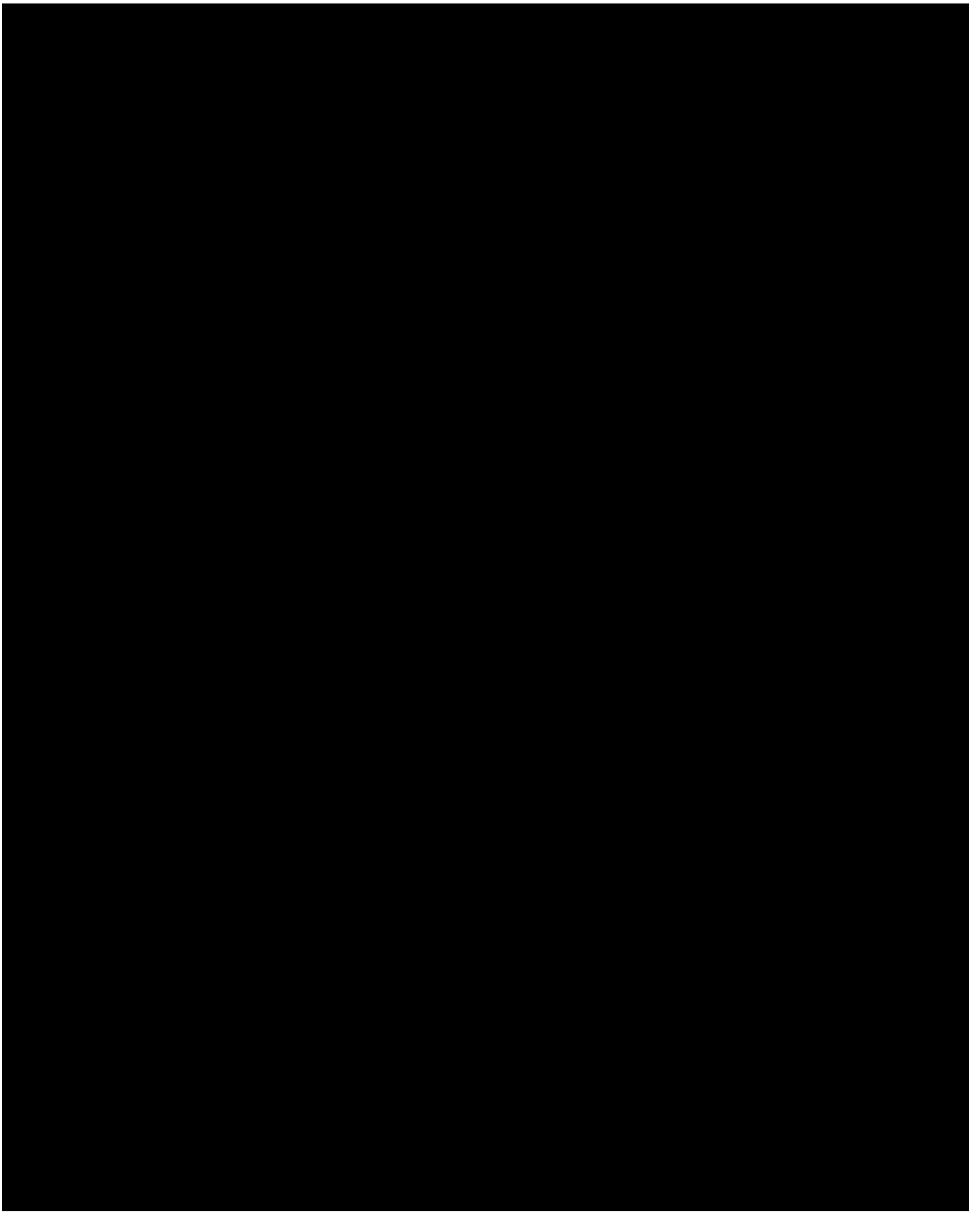

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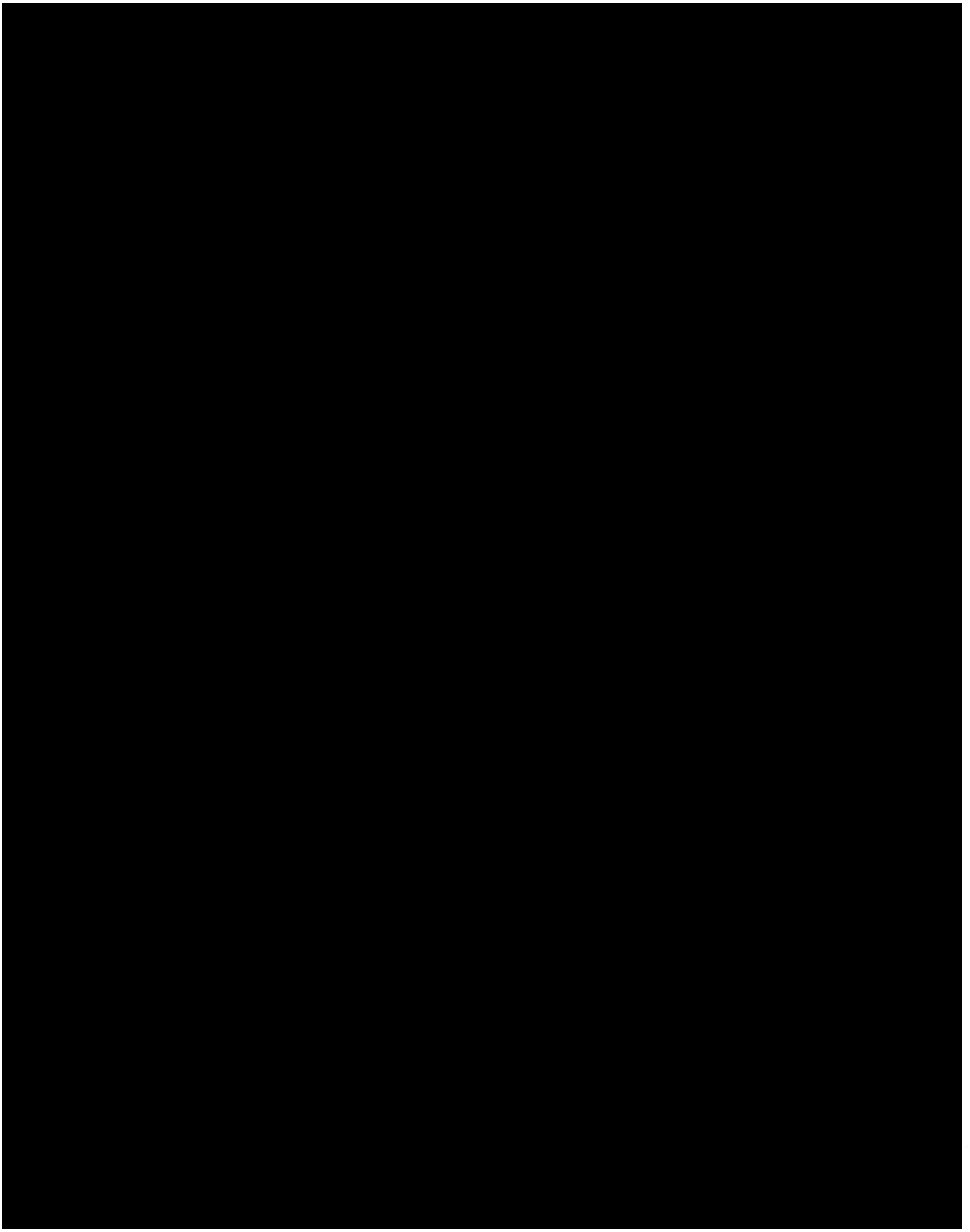

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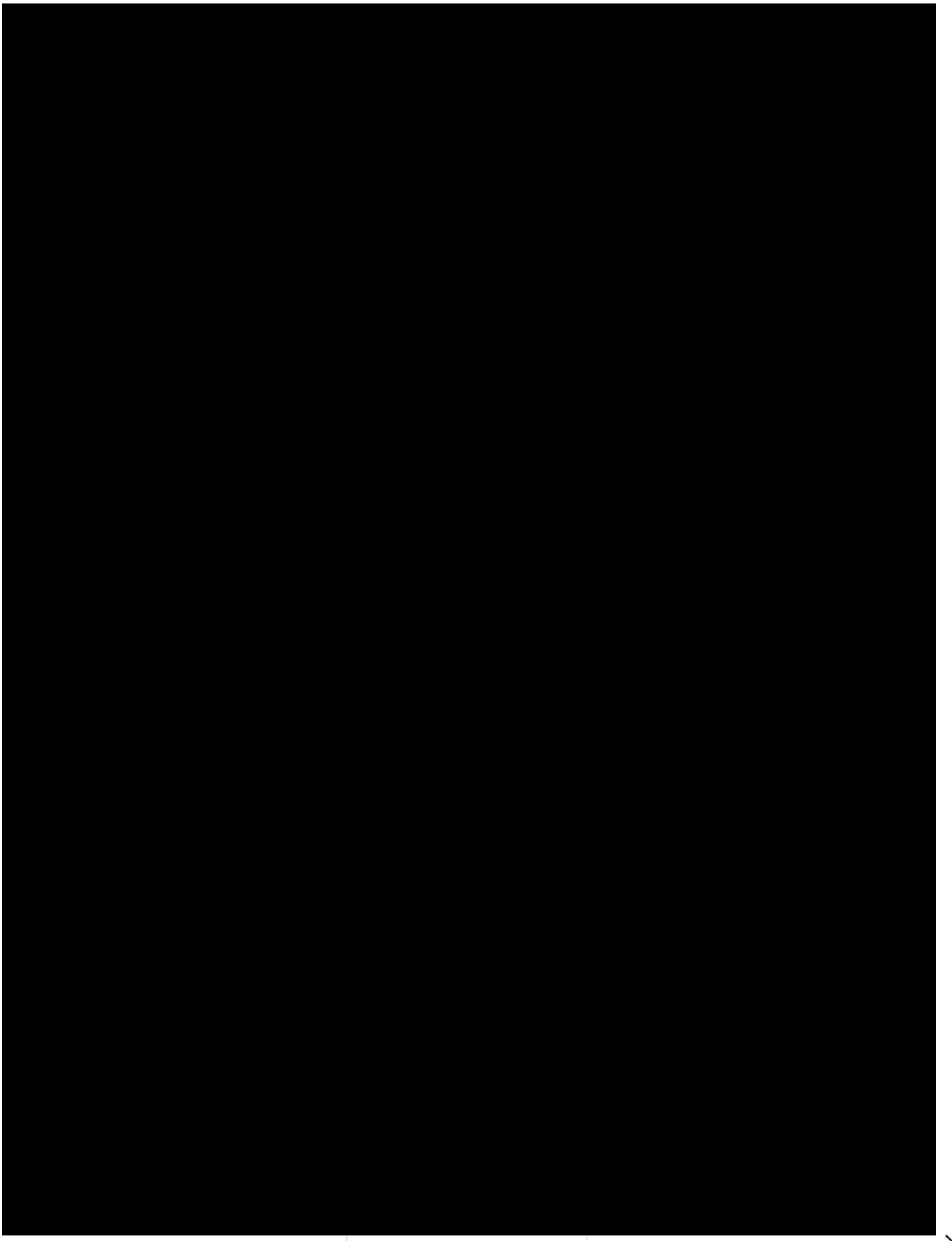

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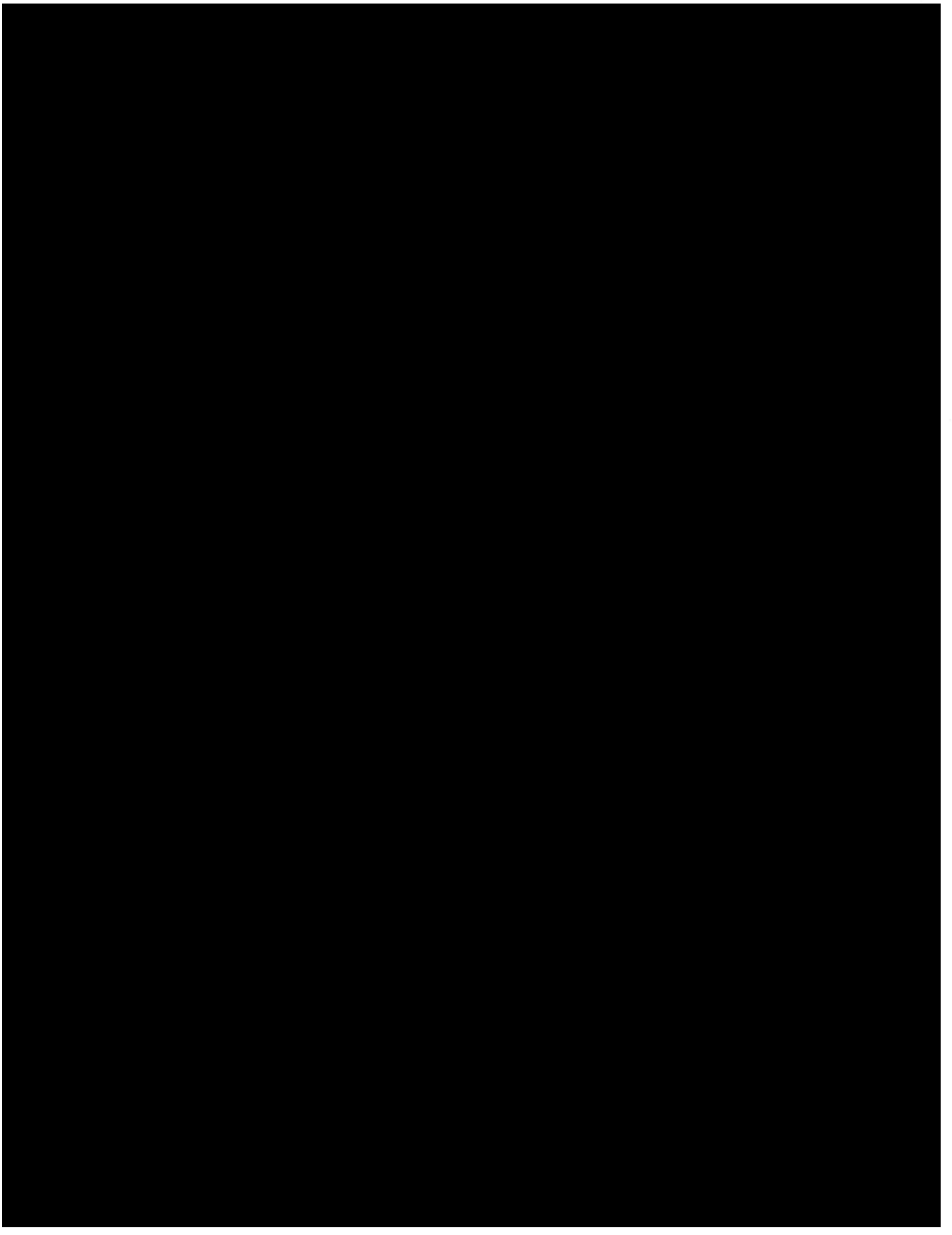

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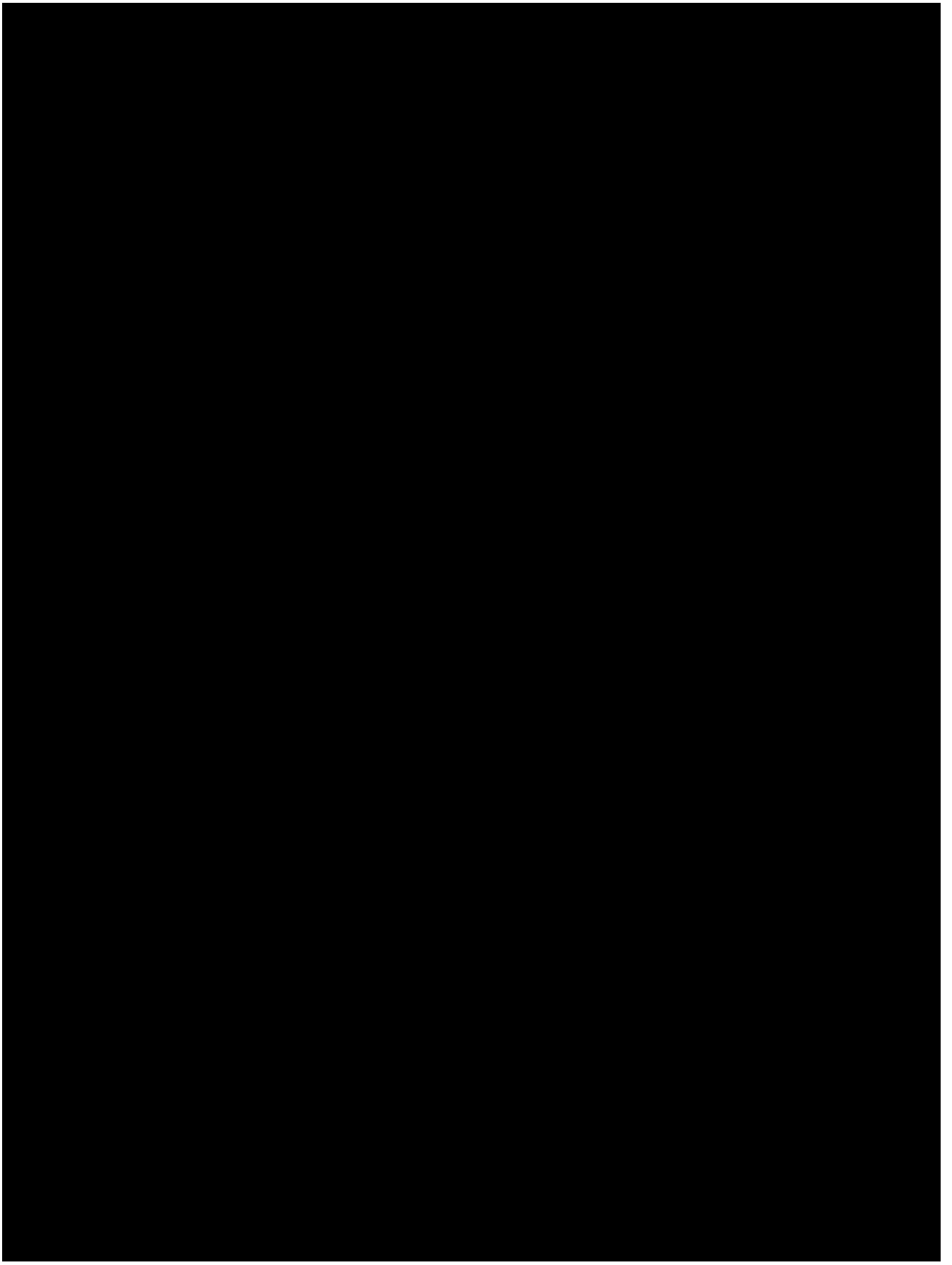

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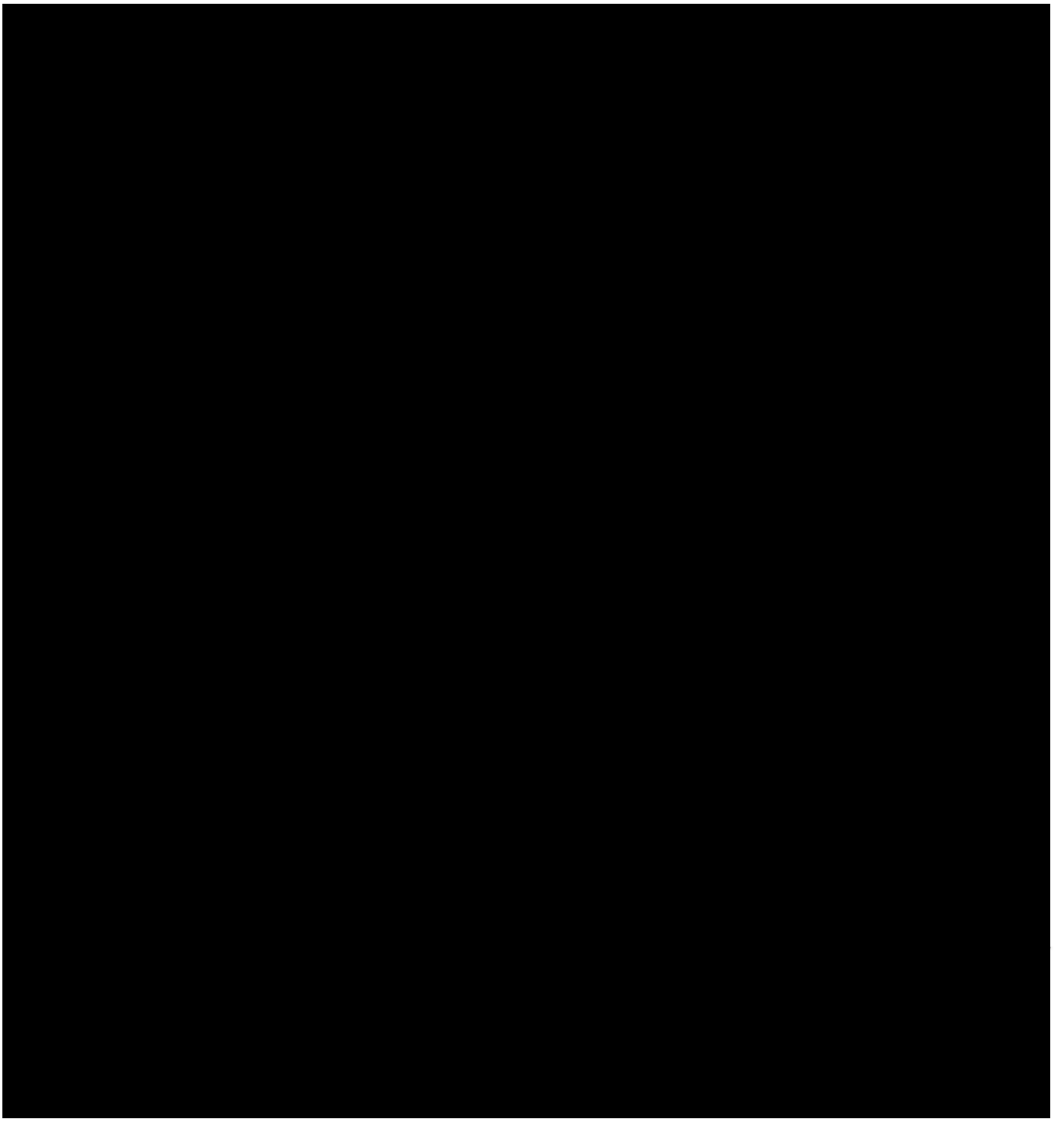

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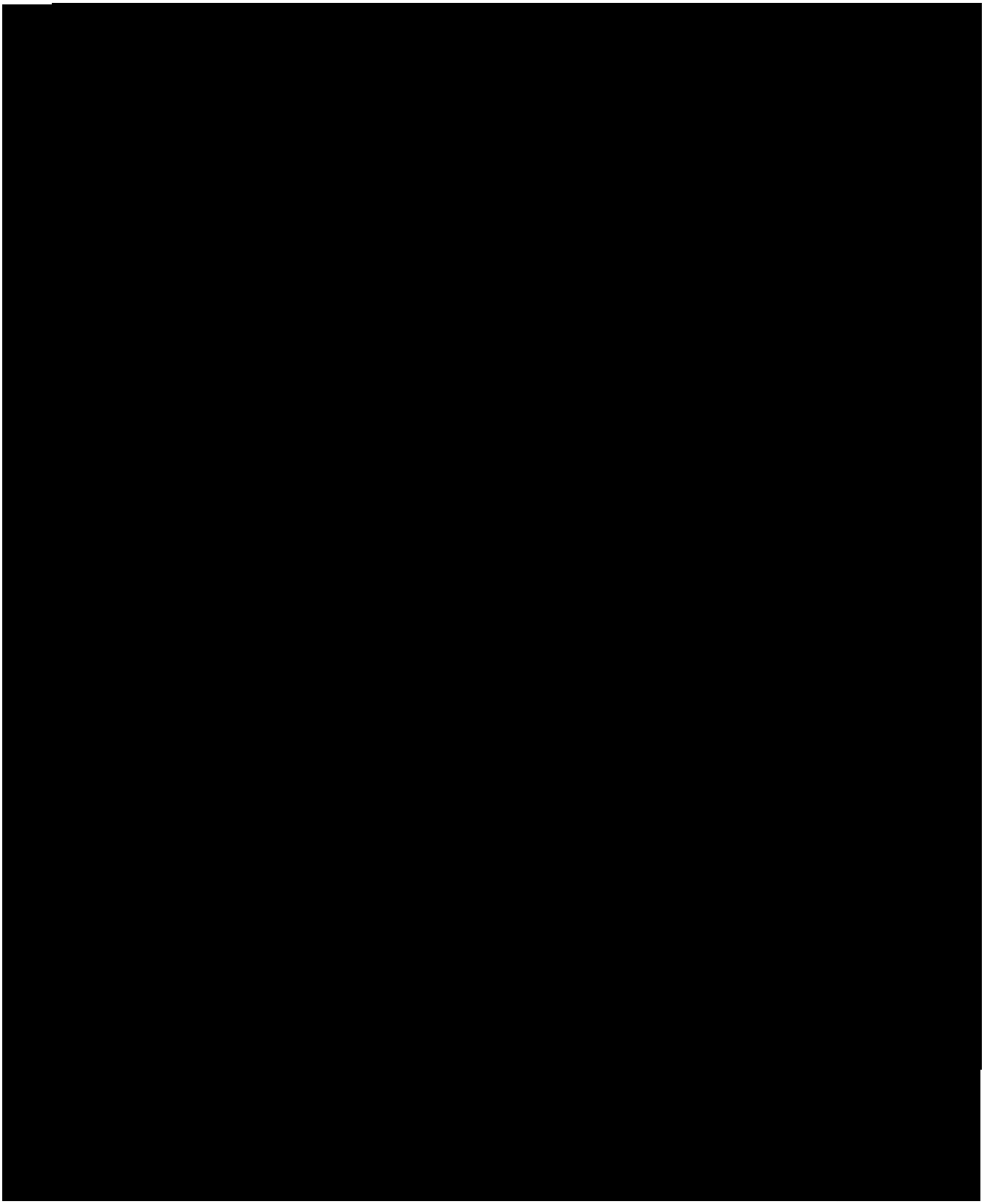
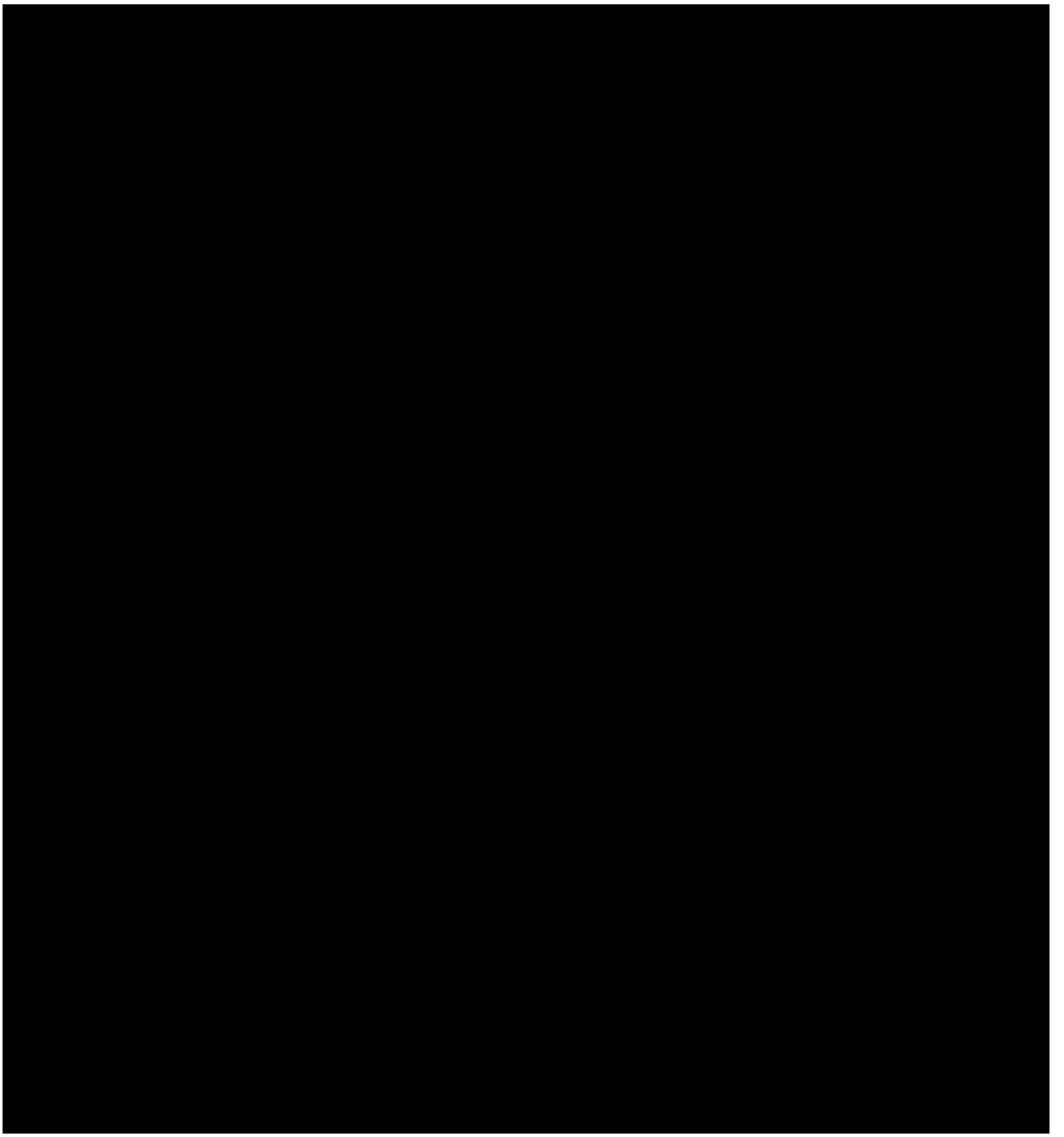


6/23/09

6/23/09
CSH



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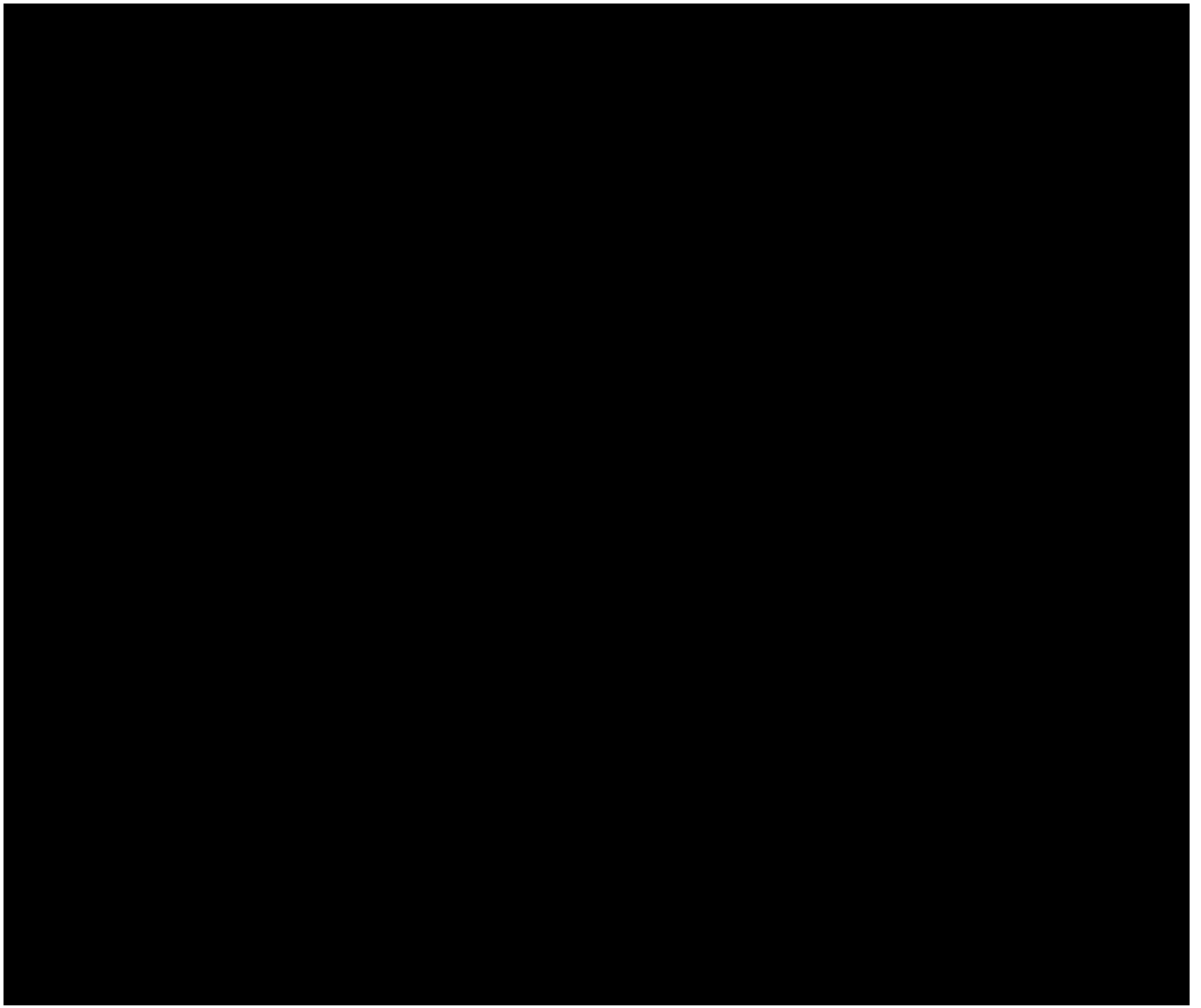

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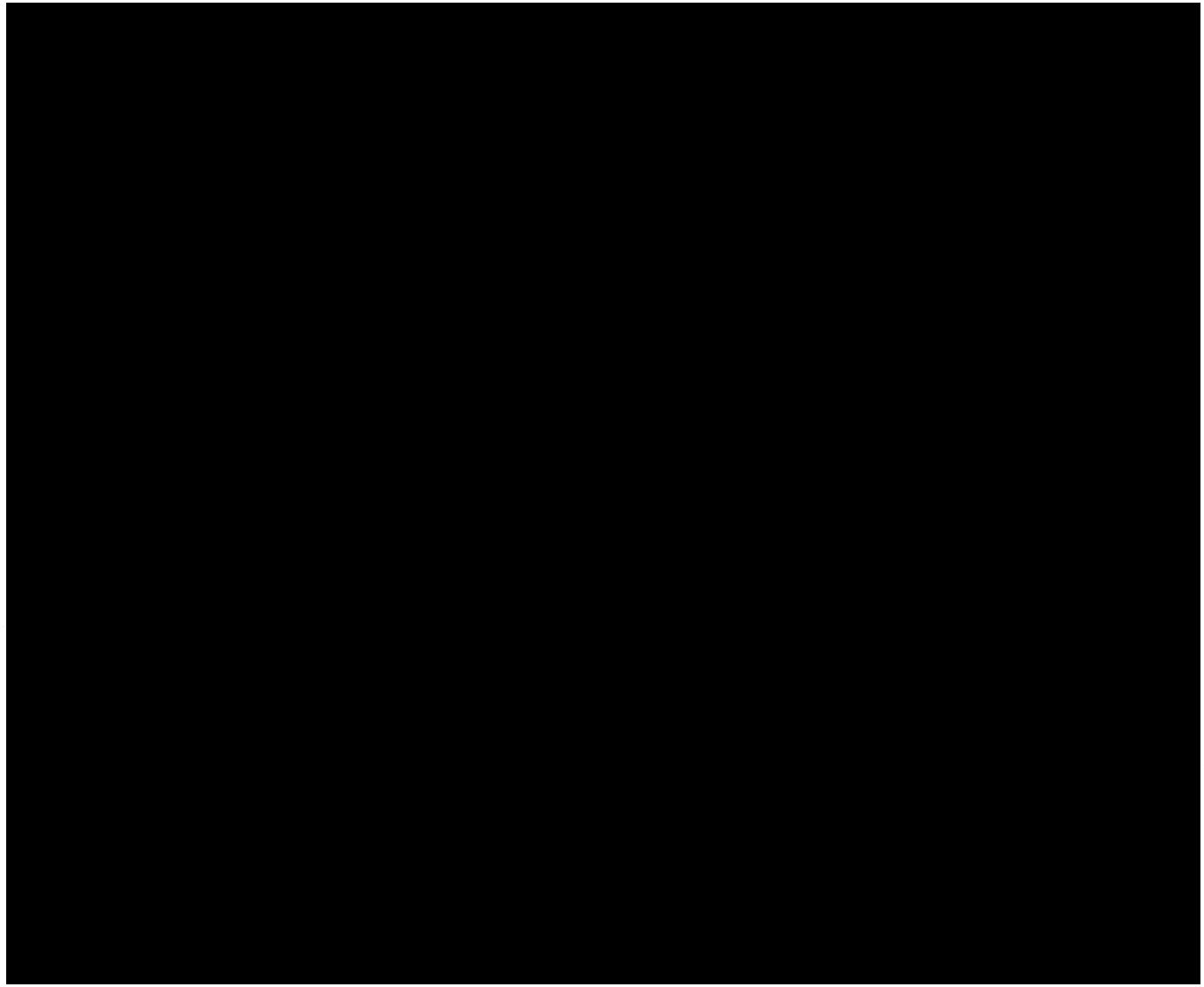

6/23/09 USA

6/23/09
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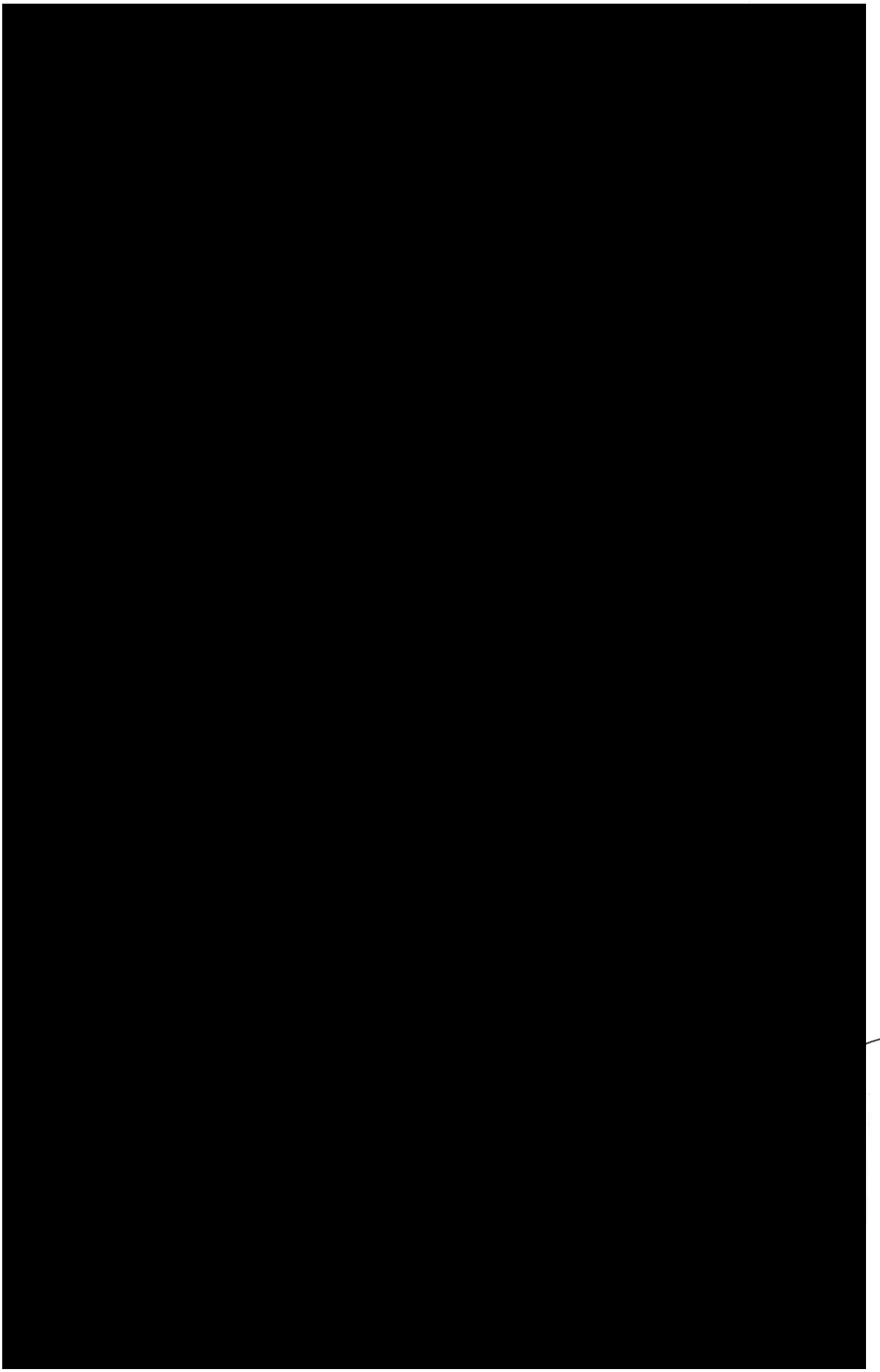
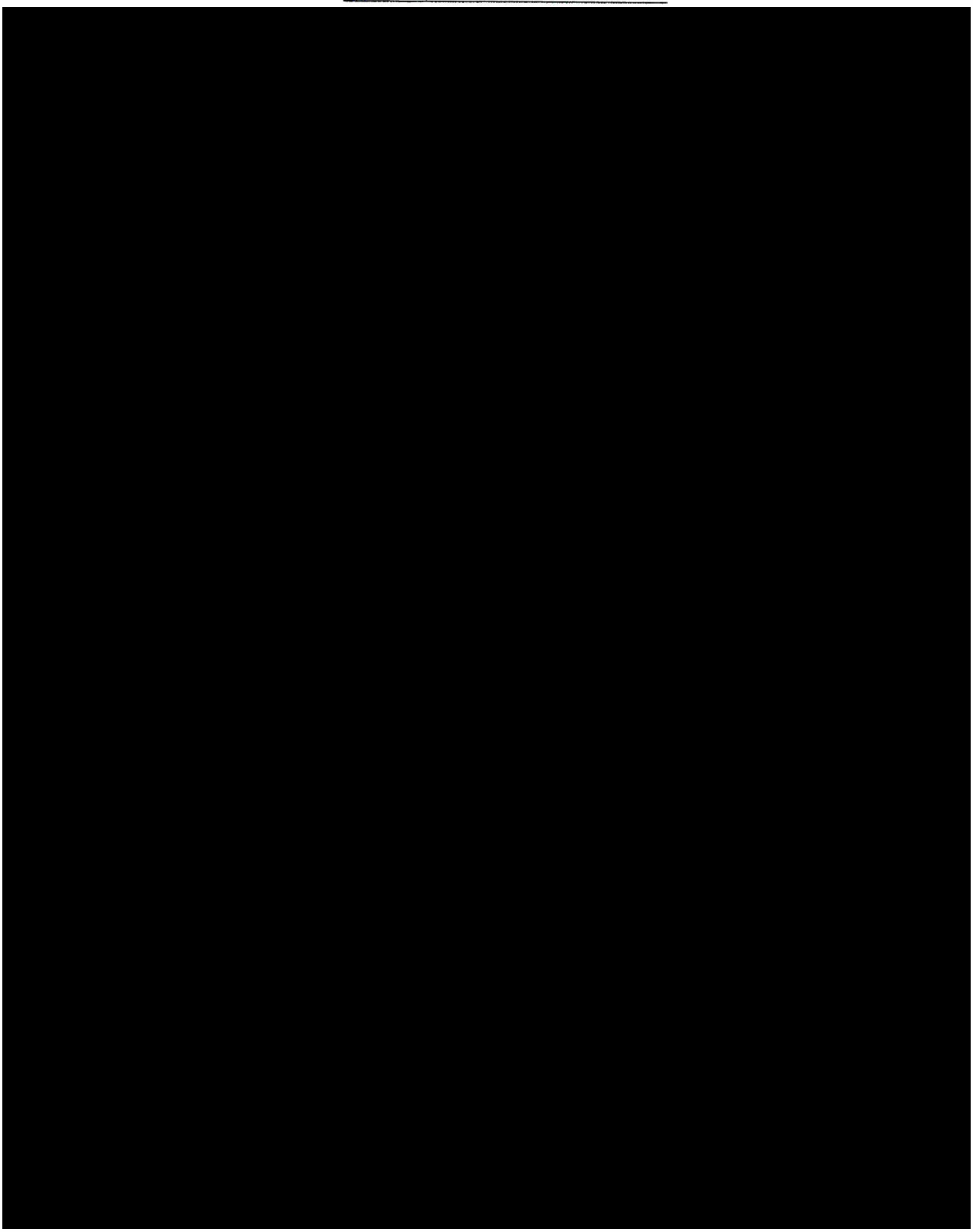
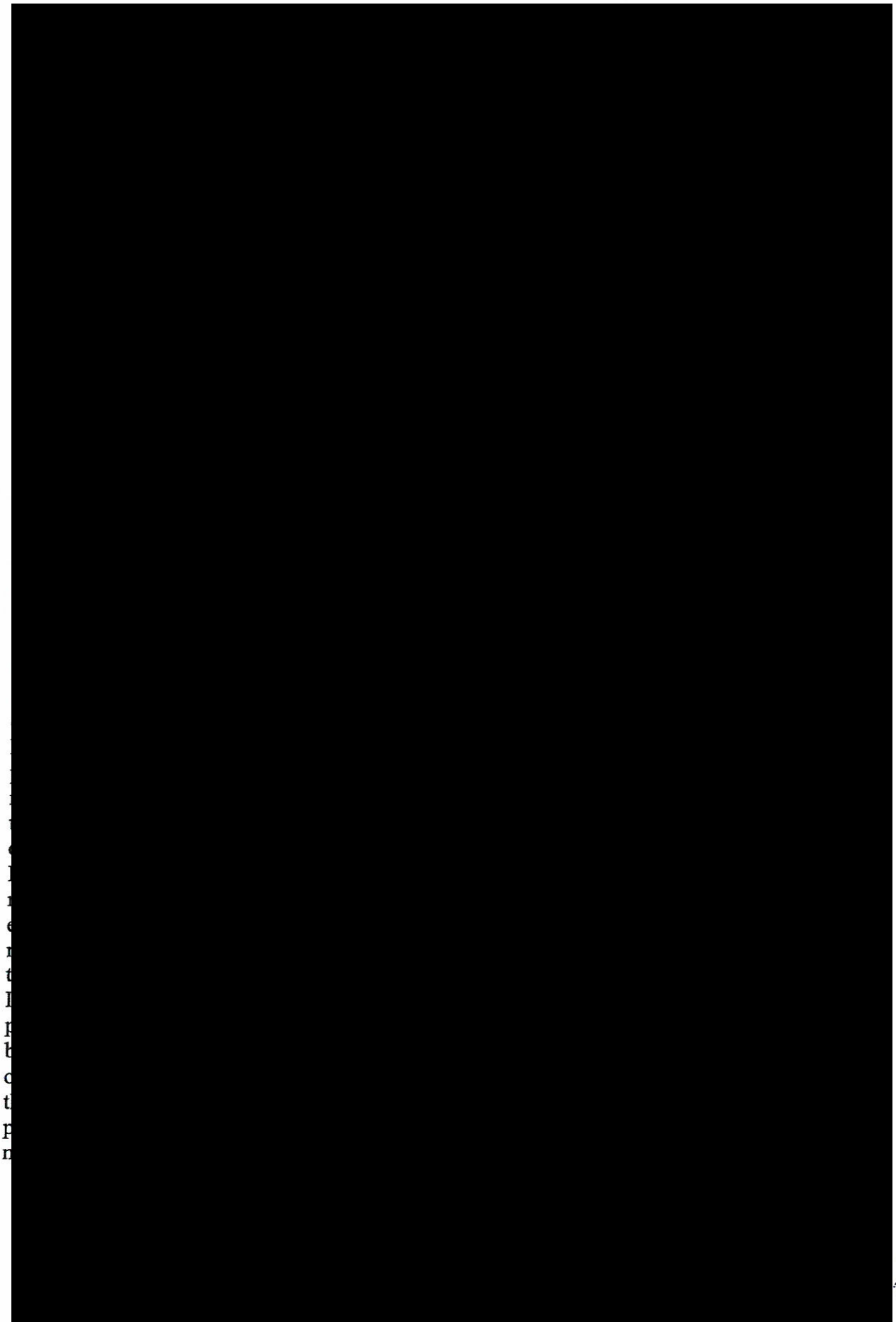
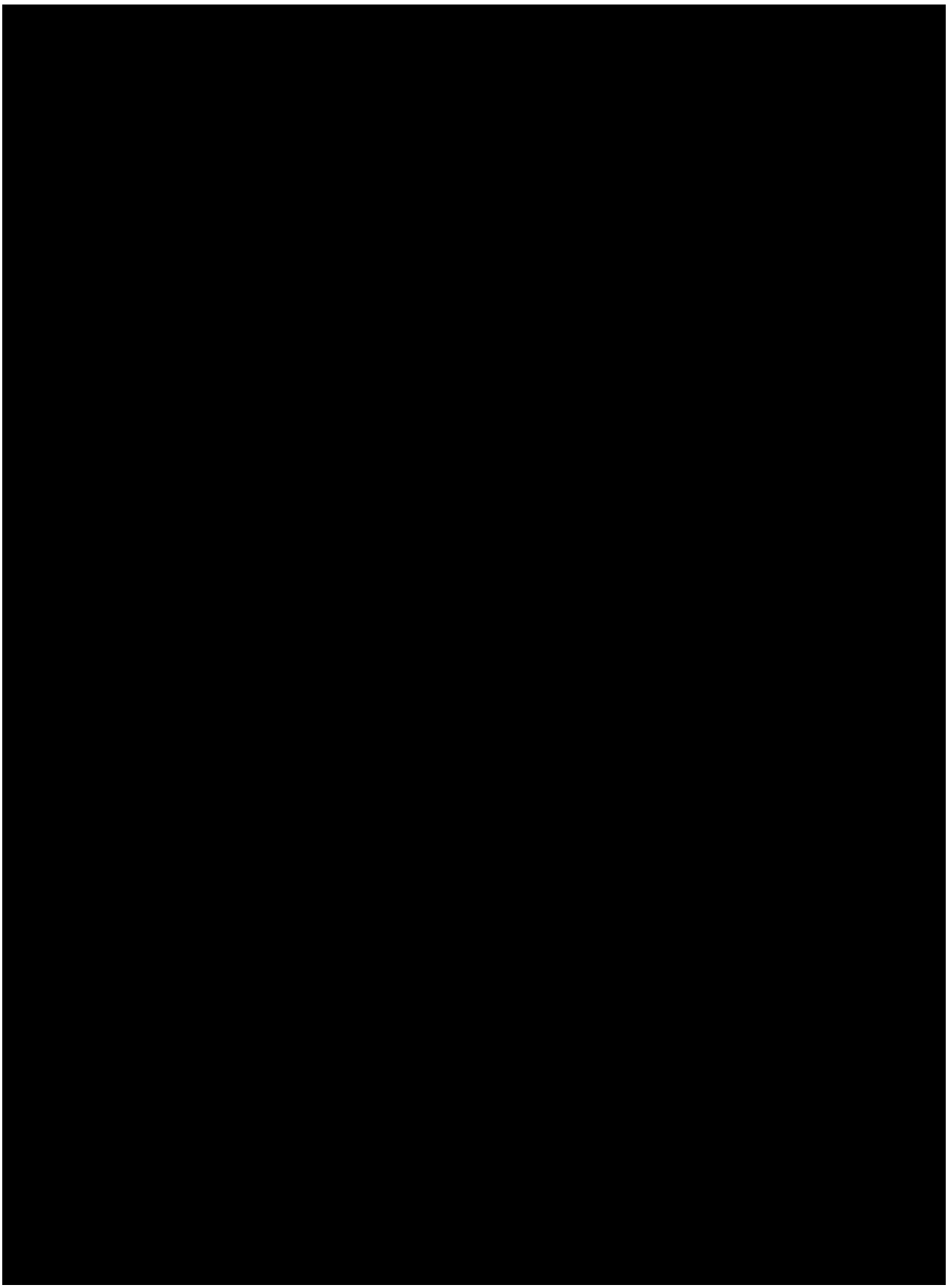


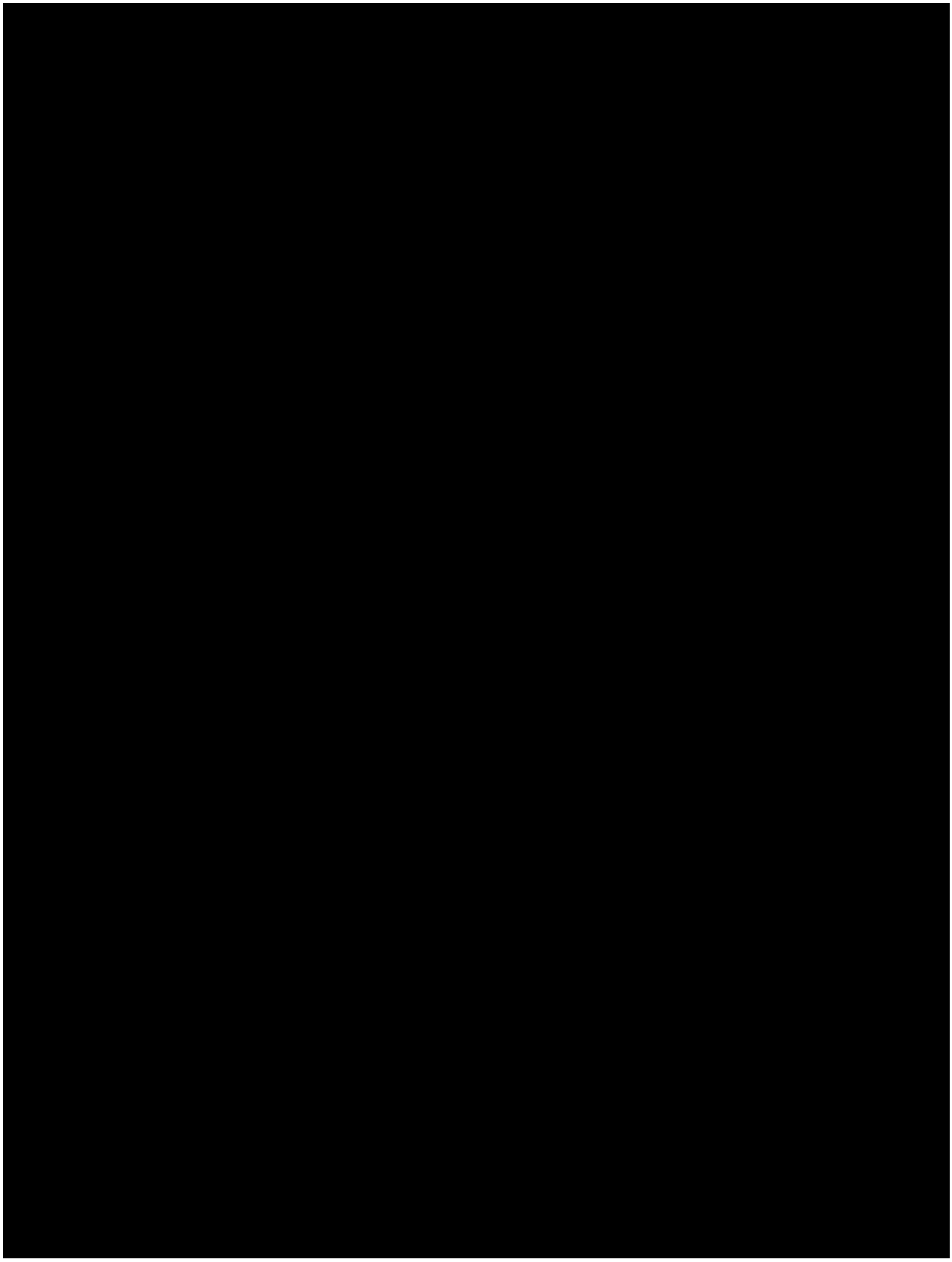
6/23/09

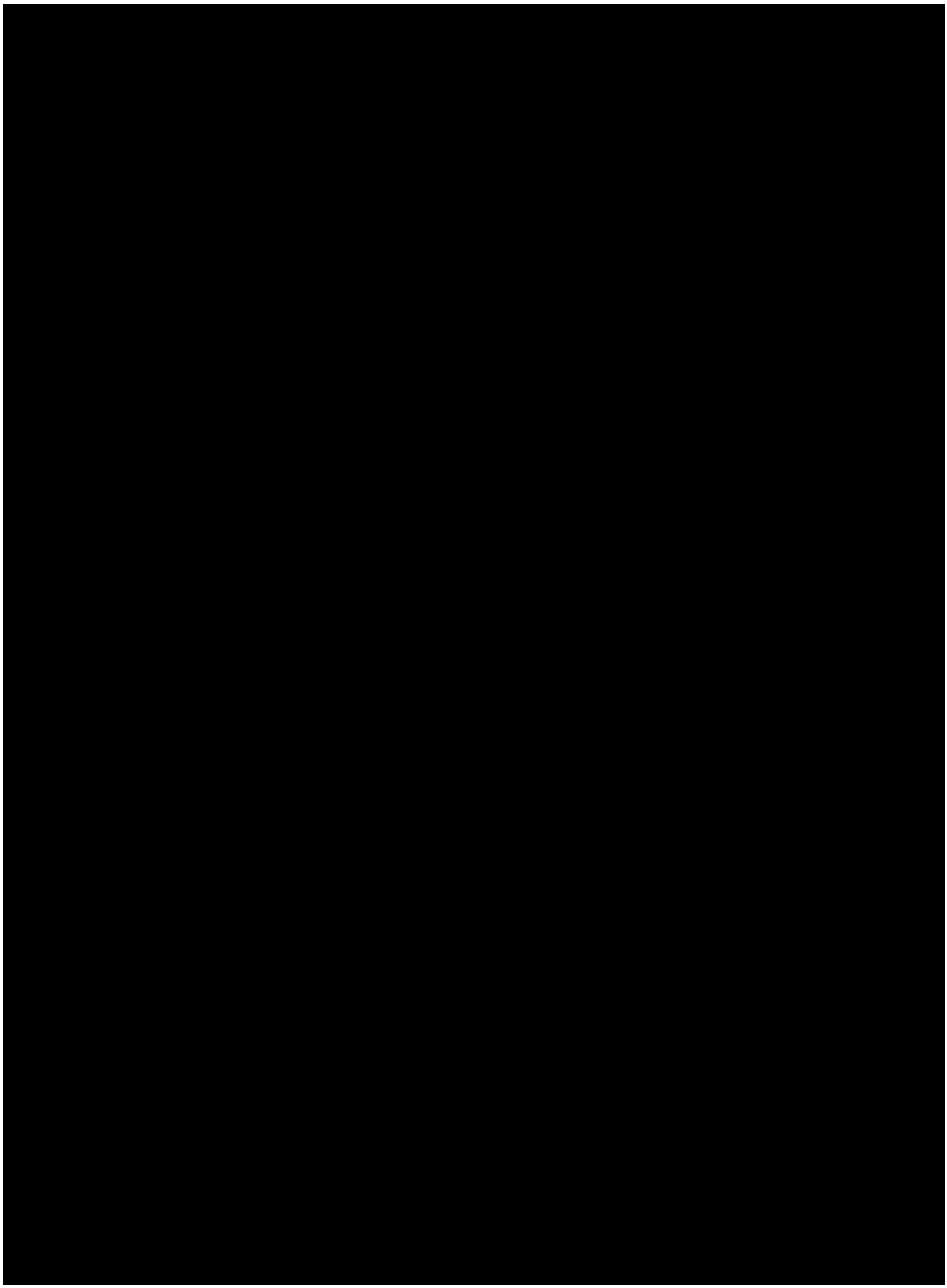
AMENDED AND RESTATED EMPLOYMENT AGREEMENT

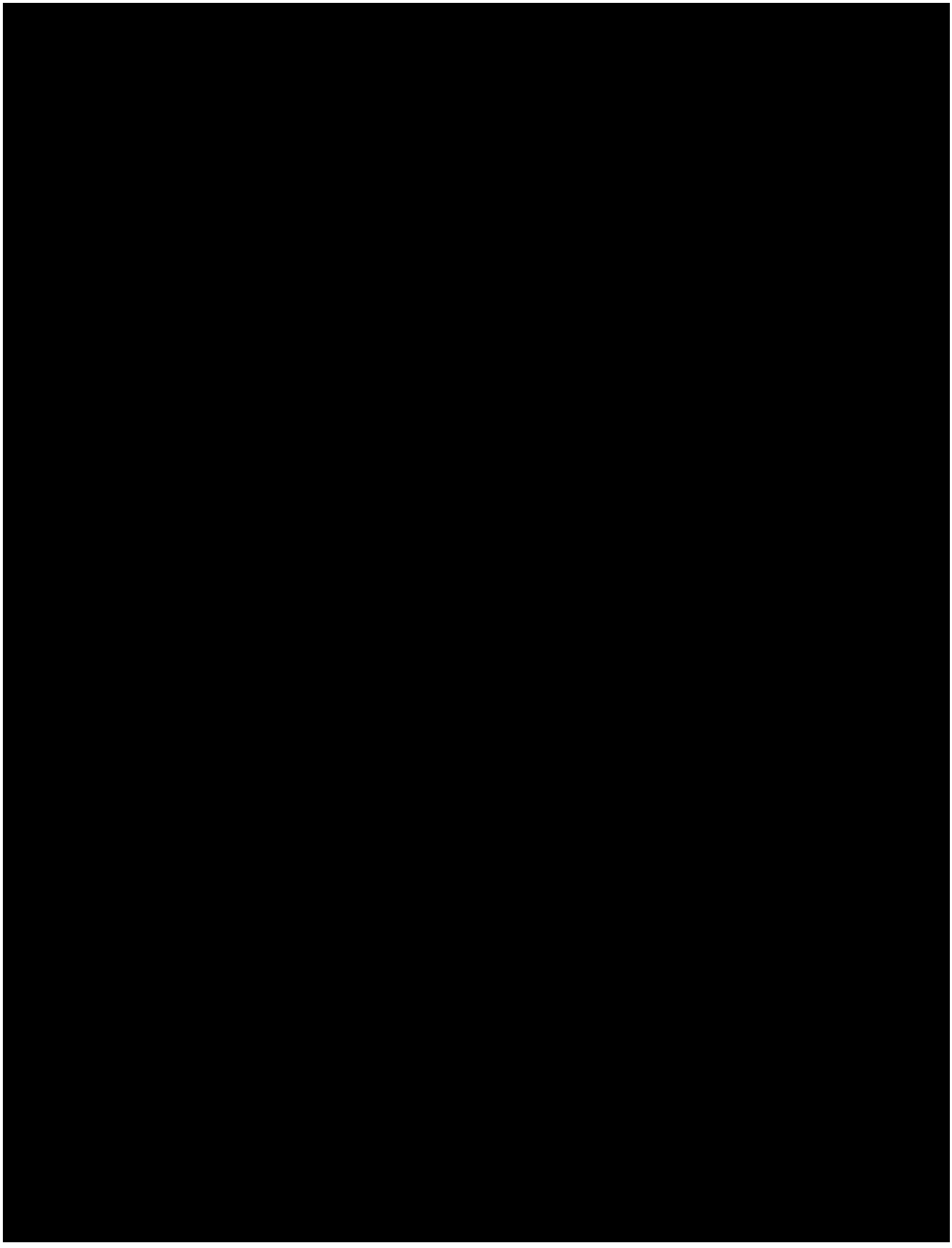


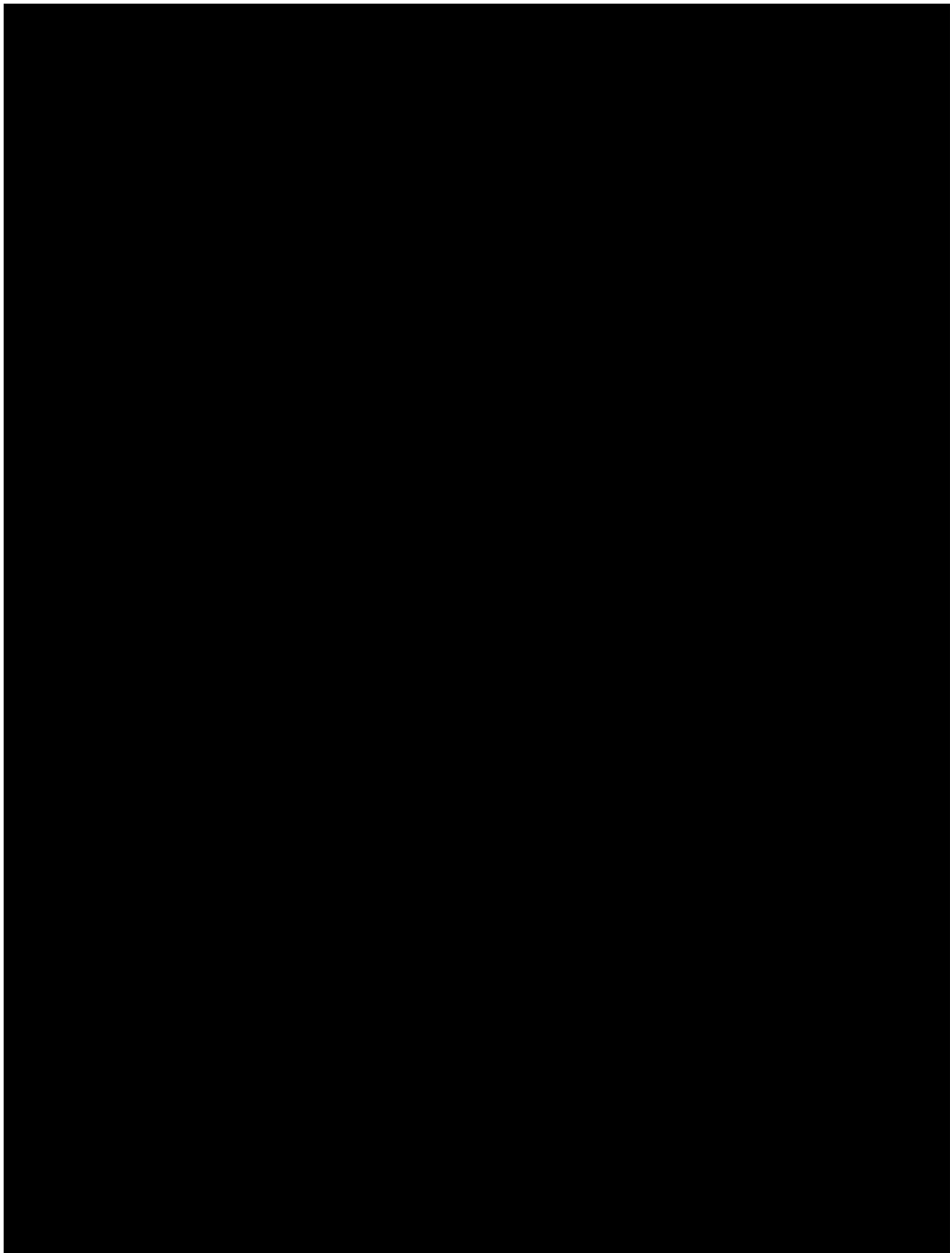


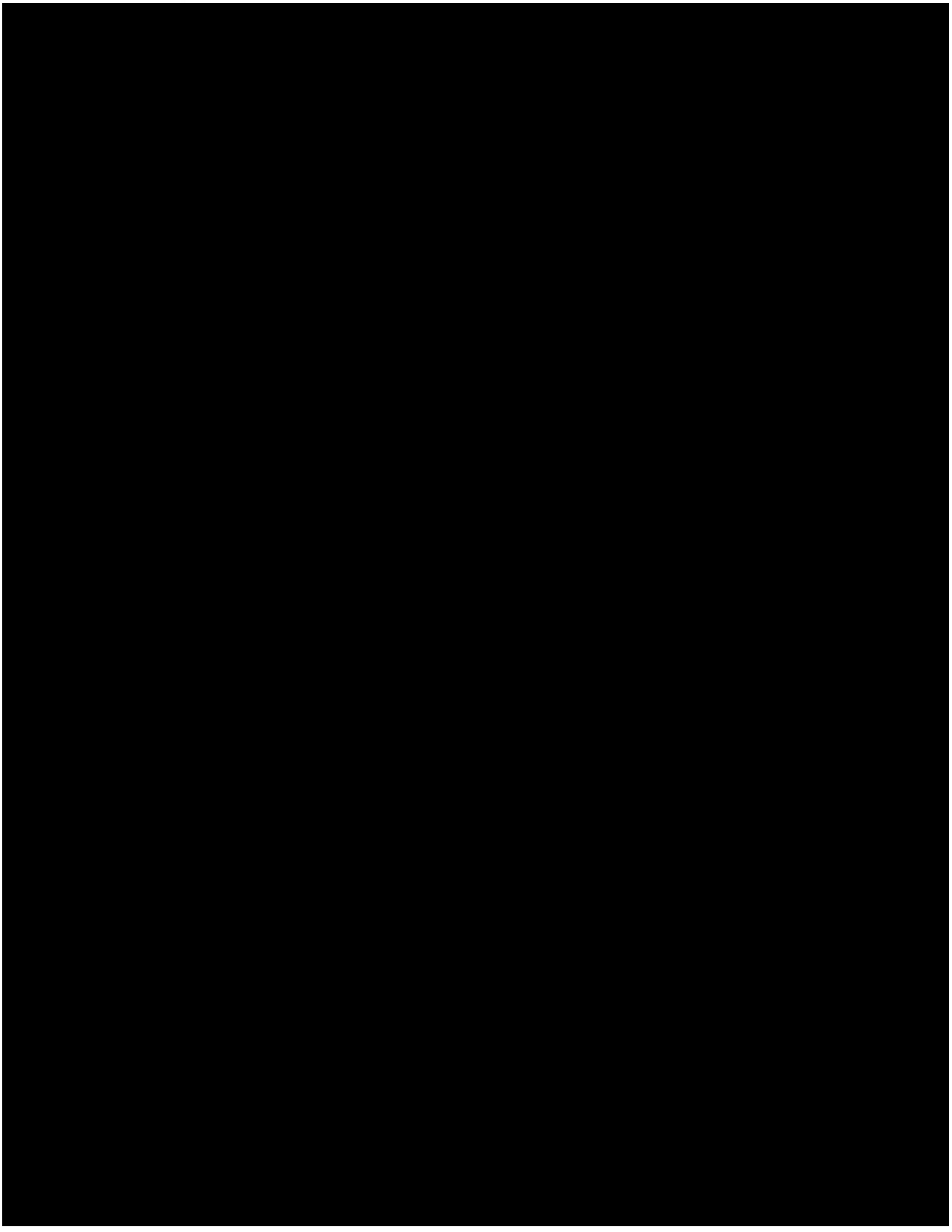


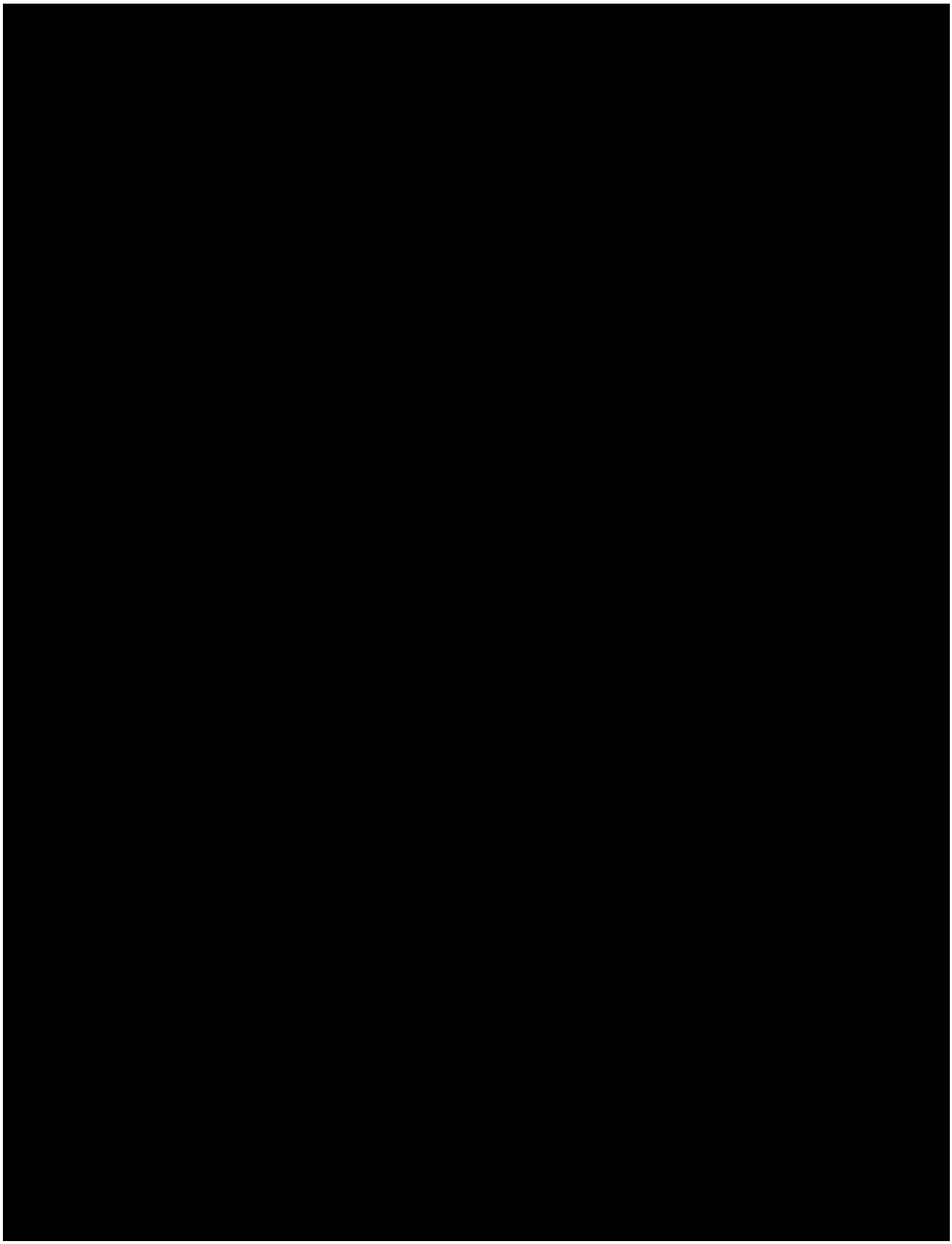












IN WITNESS WHEREOF, the Company has caused this Agreement to be duly executed, and Employee has hereunto set her hand, on the day and year first above written.

HEALTH DIAGNOSTIC LABORATORY, INC.

By: _____
Name: Tonya Mallory
Title: President & CEO

By: _____
Name:
Title: VP, Chief Medical Officer

By: _____
Name:
Title: VP, Chief Scientific Officer

_____
LaTonya S Mallory, Employee