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ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of: IMPAX LABORATORIES, INC., a corporation.	**Docket No. 9373**

RESPONDENT IMPAX LABORATORIES, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSES TO INTERROGATORY NOS. 2 & 3

I. INTRODUCTION

The Federal Trade Commission's Rules of Practice state that contention interrogatories "need not be answered until after designated discovery has been completed, but in no case later than 3 days before the final prehearing conference." 16 C.F.R. § 3.35(b)(2). Complaint Counsel has propounded a number of contention interrogatories, including the two at issue in its June 1, 2017 Motion to Compel ("Motion" or "Mot."), which seek information concerning the procompetitive effects of Impax's agreements with Endo. As permitted by Rule 3.35, Impax objects to answering these interrogatories before the close of discovery. Complaint Counsel asks the Court to disregard the Rule and order Impax to answer the interrogatories now, but does not provide any compelling reason for granting this request.

Complaint Counsel claims it needs responses now in order to "conduct meaningful discovery" (Mot. 1-2), but the truth is that Complaint Counsel ***already knows*** why the Impax/Endo agreements are procompetitive. In the course of Staff's two-year investigation, Impax explained the agreements' competitive benefits repeatedly and at length—in narrative CID responses, in white papers and letters, and in meetings with Staff, the acting Bureau Director, and five Commissioners. Impax again summarized these procompetitive benefits at the Initial Pretrial Conference. The notion that Complaint Counsel cannot conduct appropriate discovery without ***yet another*** explication of the agreements' benefits is disingenuous at best.

Because discovery is ongoing, any answers Impax provides would be incomplete and would require supplementation when discovery ends. Ordering multiple rounds of responses to the same interrogatories is unnecessary and inefficient.

The Court should deny Complaint Counsel's Motion.

II. FACTUAL BACKGROUND

In early 2014, the FTC served a CID on Impax seeking documents and information relating to two agreements with Endo: the Settlement & License Agreement ("SLA"), and the Development & Co-Promotion Agreement ("DCA") (together, "Agreements"). Among other things, the CID requested that Impax produce documents relating to the Agreements' market effects; explain why certain settlement terms were included; and identify "each competitive and consumer benefit" resulting from other settlement terms. Impax produced over 21,000 pages of documents and provided extensive narrative answers to the CID's Specifications.

Impax subsequently submitted a 44-page memorandum to Staff, which explained at length why the Agreements were procompetitive. (Ex. A.) Impax further articulated these benefits in a supplemental memorandum to Staff and in letters to the Commissioners (Exs. B, C), as well as at in-person meetings with Staff, the acting Bureau Director, and each of five Commissioners. Impax again highlighted the Agreements' procompetitive effects at the Initial Pretrial Conference. (Ini. Pretrial Conf. Tr. 69:20–70:01.)

Throughout this process, Impax has clearly and consistently explained that the SLA is procompetitive because it allowed Impax to begin selling a licensed version of generic Opana ER earlier than it otherwise could have. Unlike other settling generic companies, Impax negotiated license terms that allowed it to enter and stay on the market, even though Endo subsequently obtained several more patents. Endo has successfully enforced those patents against other generic companies. Today, Impax is the ***only*** company selling a generic version of Opana ER—and likely will be until the last of Endo's patents expires in 2029.

The instant Motion seeks yet another explanation for why the Agreements are procompetitive, in the form of responses to the following contention interrogatories:

2. Identify all procompetitive justifications and benefits to consumers and the public interest referenced in the Eighth Defense in Your Answer to the Complaint in this case, and explain the factual basis for Your answer to this Interrogatory, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

3. For each procompetitive justification and benefit identified in response to Interrogatory No. 2, explain how the No-AG Provision and the Endo Credit provision contained in the Opana ER Settlement and License Agreement were reasonably necessary to achieve that benefit, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

Impax objected that responding to contention interrogatories is not required until the close of discovery, but agreed to "supplement its response to [Interrogatory Nos. 2 and 3] in due course." (Compl. Counsel Ex. B at 7-8.)

III. ARGUMENT

Contention interrogatories ask a party "to state what it contends; to state whether it makes a specified contention; to state all the facts upon which it bases a contention; to take a position, and explain or defend that position, with respect to how the law applies to facts; or to state the legal or theoretical basis for a contention." *B. Braun Med. Inc. v. Abbott Labs.*, 155 F.R.D. 525, 527 (E.D. Pa. 1994). Courts widely recognize that "[t]he interests of judicial economy and efficiency for the litigants dictate that contention interrogatories are more appropriate after a substantial amount of discovery has been conducted." *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 95 (E.D. Pa. 1992) (quotation omitted).

This policy is reflected in Rule 3.35(b)(2), which states that contention interrogatories "***need not*** be answered until after designated discovery has been completed." 16 C.F.R. § 3.35(b)(2) (emphasis added). The Rule is intended to "conform Commission practice with federal court practice and consistently allow a party to delay answering a contention interrogatory until fact discovery is almost complete." 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009).

A. Impax Need Not Respond to Complaint Counsel's Interrogatory Nos. 2 and 3 Until the Close of Discovery.

Interrogatory Nos. 2 and 3 are classic contention interrogatories that ask Impax to "commit to a position and give factual specifics supporting its claims," *Ziemack v. Centel Corp.*, 1995 WL 729295, at *2 (N.D. Ill. Dec. 7, 1995). Indeed, the interrogatories invoke the rule of reason, requiring an "application of law to fact." 16 C.F.R. § 3.35(b)(2). Rule 3.35 permits Impax to defer responding until discovery concludes.

Complaint Counsel argues that different standards should apply because these interrogatories relate to Impax's defenses. According to the Motion, the fact that "Impax must already have [had] a good faith basis in fact and law" to plead procompetitive justifications in its Answer means Impax "must already know what it claims are the asserted procompetitive justifications and benefits and how the [alleged] payment provisions of the settlement agreement were reasonably necessary to achieve such benefits." (Mot. 5-6.) Moreover, Complaint Counsel says, Impax "has no need to conduct discovery on this issue" since the relevant information ostensibly resides with its own witnesses and documents. (*Id.* at 6.)[1]

These arguments don't hold water. To begin with, Complaint Counsel is wrong to suggest that all relevant facts are at Impax's fingertips. (Mot. 6.) Impax is still in the process of reviewing tens of thousands of documents in response to Complaint Counsel's requests for production, the most recent of which were served on May 30th. A dozen depositions of current and former Impax employees still remain, to say nothing of ongoing third-party depositions and document discovery. As of this filing, nine third-party depositions have been noticed (including of several Endo witnesses), but none have taken place. The claim that Impax "must already

[1] Complaint Counsel suggests, without authority, that the "logic" of the Rule governing initial disclosures applies to interrogatories. (Mot. 4.) Since the sufficiency of Impax's initial disclosures is not in dispute, Impax does not see how that Rule is relevant to the present Motion.

know" all it needs to answer the interrogatories, and that it "has no need to conduct discovery on this issue," is fundamentally untrue.

There is also no merit to Complaint Counsel's assertion that having a good faith basis to assert a claim or defense at the pleading stage subjects a party to early contention interrogatories. *See Carotek, Inc. v. Kobayashi Ventures, LLC*, 2010 WL 3291758, at *1 (S.D.N.Y. Aug. 9, 2010) ("while there must be a good faith basis for the filing of a pleading, the assertion of a claim need not wait until the claimant has fully developed an evidentiary record during discovery"); *Braun*, 155 F.R.D. at 527 & n.1 (refusing to compel defendants to "articulate theories of their case not yet fully developed" where interrogatories were directed at allegations in defendants' answer). Compelling a party to commit to a contention while the factual record is still in flux "would force an artificial narrowing of the issues, instead of an informed paring down"—which is contrary to the purpose of contention interrogatories. *In re Northfield Labs. Inc. Sec. Litig.*, 264 F.R.D. 407, 412 (N.D. Ill. 2009) (quotation omitted).

For this reason, courts routinely hold that contention interrogatories exploring a party's defenses need not be answered until the close of discovery. In *Novanta Corp. v. Iradion Laser, Inc.*, 2016 WL 4987110 (D. Del. Sept. 16, 2016), for example, the plaintiffs served interrogatories seeking the factual and legal basis for the defendant's affirmative defenses. *Id.* at *7. The court held that it was "premature" to require the defendant to "detail with specificity and finality the factual and legal bases" for its defenses. *Id.* at *8. Other decisions are in accord. *See, e.g., Dalmatia Import Grp., Inc. v. Foodmatch, Inc.*, 2016 WL 5721161, *2 (E.D. Pa. Oct. 3, 2016) (defendant not required to answer contention interrogatory regarding defenses until close of discovery); *Gorrell v. Sneath*, 292 F.R.D. 629, 636 (E.D. Cal. 2013) (requiring defendant to answer early contention interrogatory about defenses "would require speculation by

[defendant]"); *Scheffler v. Molin*, 2012 WL 3292894, at *6 (D. Minn. Aug. 10, 2012) (defendants not required to answer interrogatory asking for factual basis for defenses until "the close of fact discovery").

The cases cited by Complaint Counsel are not to the contrary. For example, while the court in *Dot Com Entm't Grp., Inc. v. Cyberbingo Corp.*, 237 F.R.D. 43 (W.D.N.Y. 2006), required the defendants to answer interrogatories relating to certain patent law defenses, its rationale was specific to those defenses. *Id.* at 45 ("contention interrogatories seeking the bases for Defendants' prior art and obviousness defenses are enforced, even at an early stage in such cases").[2] Subsequent decisions have recognized this limitation. *See United States v. Educ. Mgmt. LLC*, 2013 WL 3854458, at *25 (W.D. Pa. May 14, 2013) (noting that *Dot Com* enforced "contention interrogatories seeking the bases ***for a specific patent defense***," and "[l]aw that is specific to patent cases cannot be imputed to a case such as the one at hand").

In re POM Wonderful, 2011 FTC LEXIS 42 (F.T.C. Mar. 16, 2011), fares no better. There, the challenged interrogatory asked ***whether*** a party would make a certain contention—not the basis for a ***known*** contention. *Id.* at *8-9. Here, Impax has clearly and repeatedly disclosed its contention that the SLA was procompetitive because it allowed Impax to sell generic Opana ER earlier than would have otherwise been possible.

And though the court in *United States v. Blue Cross Blue Shield of Mich.*, 2012 WL 12930840 (E.D. Mich. May 30, 2012), held that an interrogatory relating to competitive effects was "not one that is best served at the end of discovery," *id.* at *5, substantial discovery had already taken place in that case at the time of decision. *See* Dkt. 67, No. 2:10-cv-14155 (E.D. Mich. Aug. 12, 2011) (scheduling order); *cf. Am. Needle, Inc. v. New Orleans*, 2012 WL

[2] *Intelligent Verification Sys., LLC v. Microsoft Corp.*, 2015 WL 846012 (E.D. Va. Feb. 24, 2015), likewise involved the prior art defense. *Id.* at *4.

4327395, at *1-2 (N.D. Ill. Aug. 17, 2012) (ordering defendants to answer interrogatories about procompetitive benefits where "[t]he end of fact discovery [was] near").

In short, the fact that Interrogatory Nos. 2 and 3 are directed to Impax's defenses provides no reason for straying from the requirements of Rule 3.35(b)(2).

B. Even as "Narrowed," Interrogatory Nos. 2 and 3 Are Premature Contention Interrogatories.

Complaint Counsel insists that Impax should at least be required to identify each procompetitive benefit and explain why certain settlement provisions were necessary to achieve those benefits. (Mot. 6-7.) Complaint Counsel asserts that because the "narrowed" interrogatories "simply seek[] the particularization of Impax's asserted affirmative defenses," they are "not contention interrogatories." (*Id.* at 7.)

This is a distinction without a difference. Plainly, asking Impax to "particularize" its defenses seeks a "contention that relates to fact." 16 C.F.R. § 3.35(b)(2); *see Ft. Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 110 (S.D.N.Y. 2013) ("contention interrogatories help the parties focus their arguments after discovery is complete and trial is near by asking them to identify each claim or defense clearly"); *Braun*, 155 F.R.D. at 527 (contention interrogatories ask a party to "state what it contends," "take a position," or "explain or defend [a] position"). Likewise, to "explain 'how' the reverse payments … were necessary to achieving the purported procompetitive benefits" (Mot. 7) is an "application of law to fact"—specifically, an application of the rule of reason to the facts of this case.

Even as "narrowed," Complaint Counsel's requests remain contention interrogatories that "need not be answered" until the close of discovery under Rule 3.35(b)(2).

C. Complaint Counsel Will Not Be Prejudiced If Impax Does Not Answer Interrogatory Nos. 2 and 3 Until the Close of Discovery.

Complaint Counsel is no ordinary litigant. It entered these proceedings with a wealth of prior disclosures from Impax. *See FTC v. Staples, Inc.*, 2016 WL 259642, at *5 (D.D.C. Jan. 21, 2016) (noting that FTC had "the benefit of completing a year-long investigation into the matter"). And yet the crux of Complaint Counsel's Motion is that without another explanation of why the Agreements are procompetitive, it will have to "seek[] discovery on every conceivable procompetitive justification" or forego discovery of competitive effects. (*Id.* at 5.) In light of Impax's CID responses, written submissions, and in-person meetings with FTC Staff and officials—not to mention Impax's presentation at the Initial Pretrial Conference—Complaint Counsel can hardly plead ignorance of Impax's reasons for contending that the SLA is procompetitive. It does not need immediate responses to Interrogatory Nos. 2 and 3 to conduct "appropriate discovery." (Mot. 7); *see In re N. Tex. Specialty Physicians*, 2004 WL 318270, at *2 (F.T.C. Jan. 22, 2004) (denying motion to compel responses to interrogatories that "ask[ed] Respondent to identify specific documents … that Respondent contends support certain contentions," since the interrogatories "d[id] not seek information that Complaint Counsel d[id] not already have from the documents").

D. Impax Will Be Prejudiced If Required to Respond to Interrogatory Nos. 2 and 3 Before the Close of Discovery.

As Complaint Counsel acknowledges, if Impax is required to respond to contention interrogatories now, it will inevitably have to supplement its responses at the close of fact discovery. (Mot. 6.) With over a dozen noticed depositions still to come, multiple sets of discovery requests outstanding, and tens of thousands of documents left to review, the factual record is far from complete. Requiring successive responses is inefficient and unduly burdensome, and Complaint Counsel has not shown a need for imposing those burdens.

IV. CONCLUSION

Impax respectfully requests that the Court deny the motion in full.

Dated: June 8, 2017

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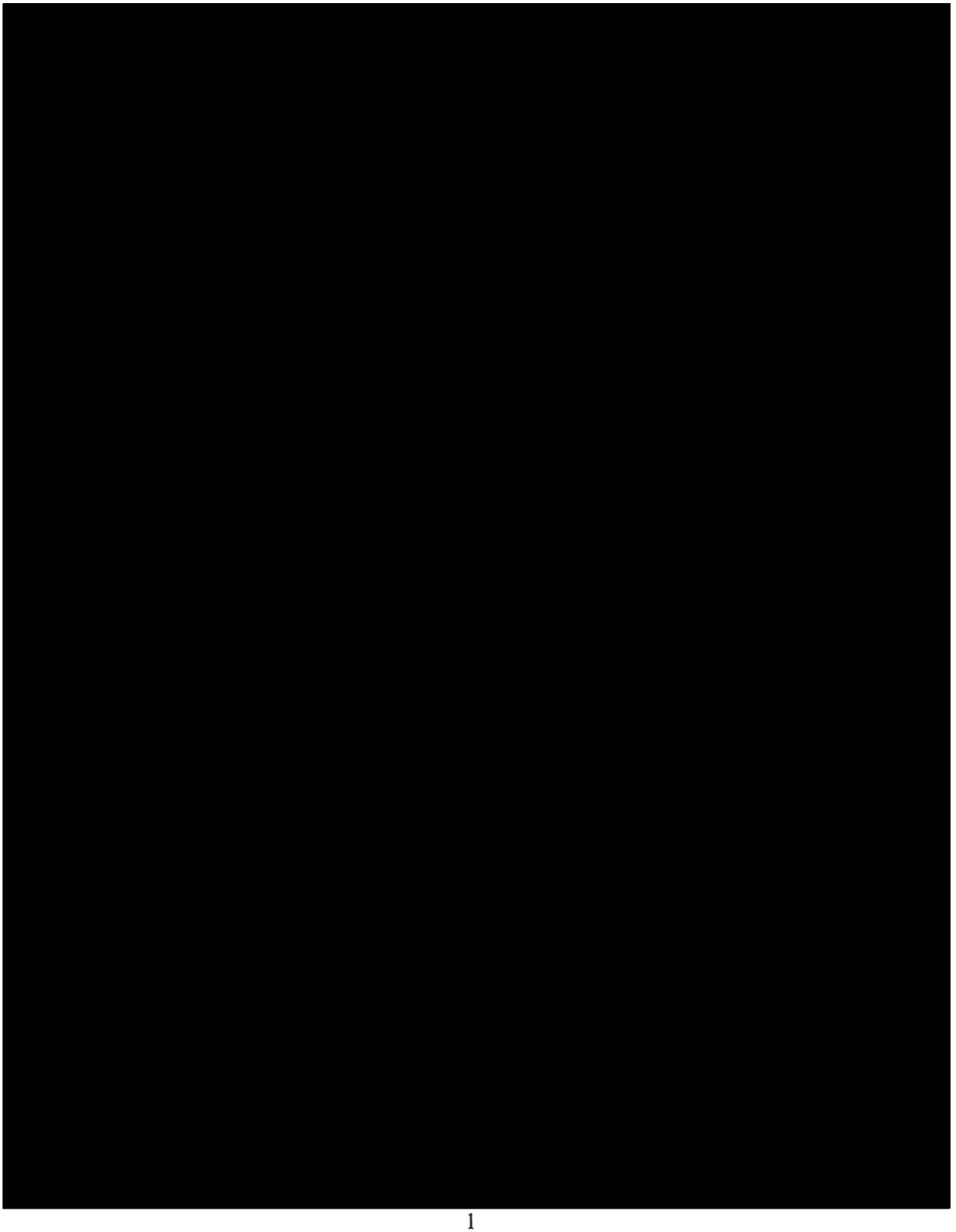
EXHIBIT A



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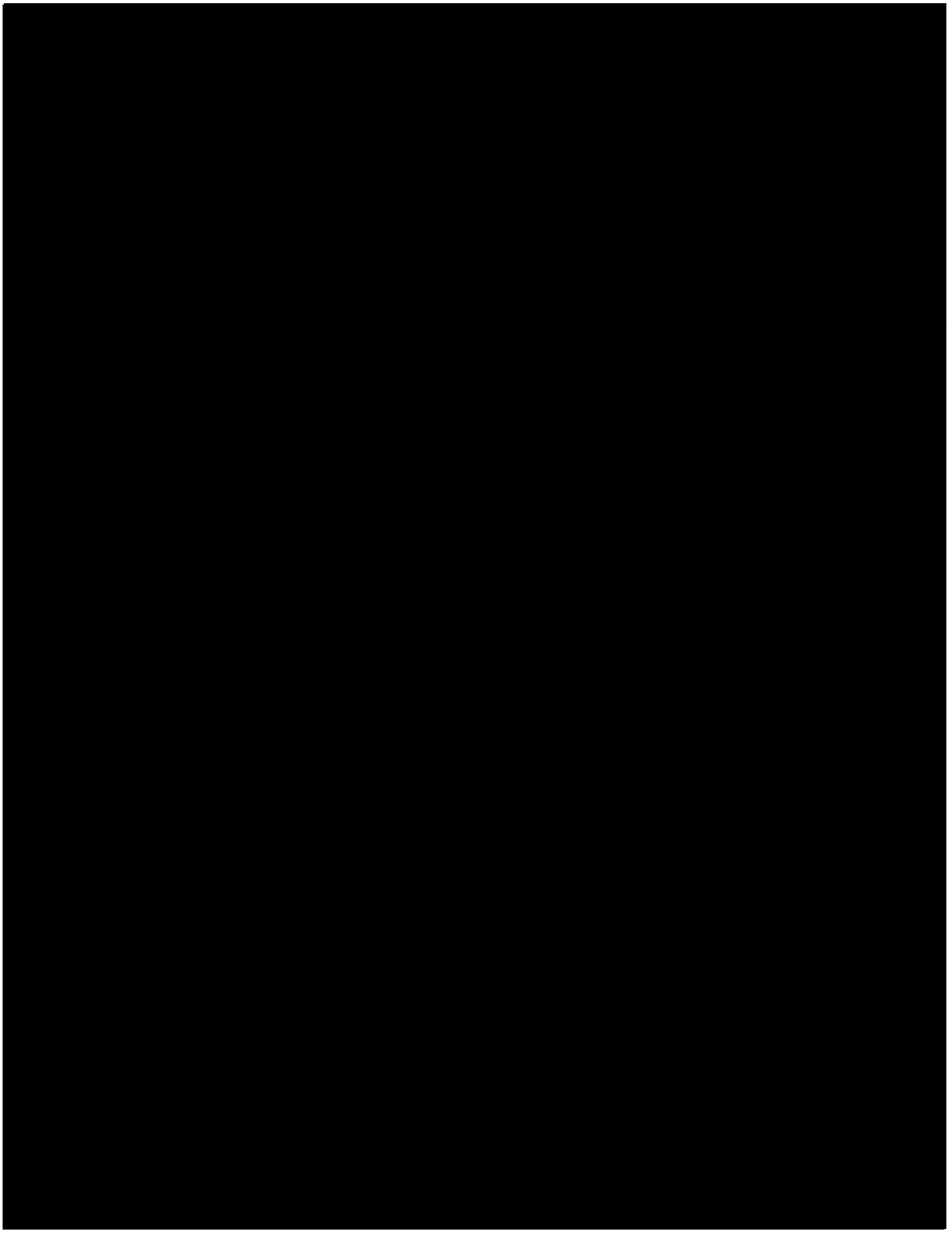
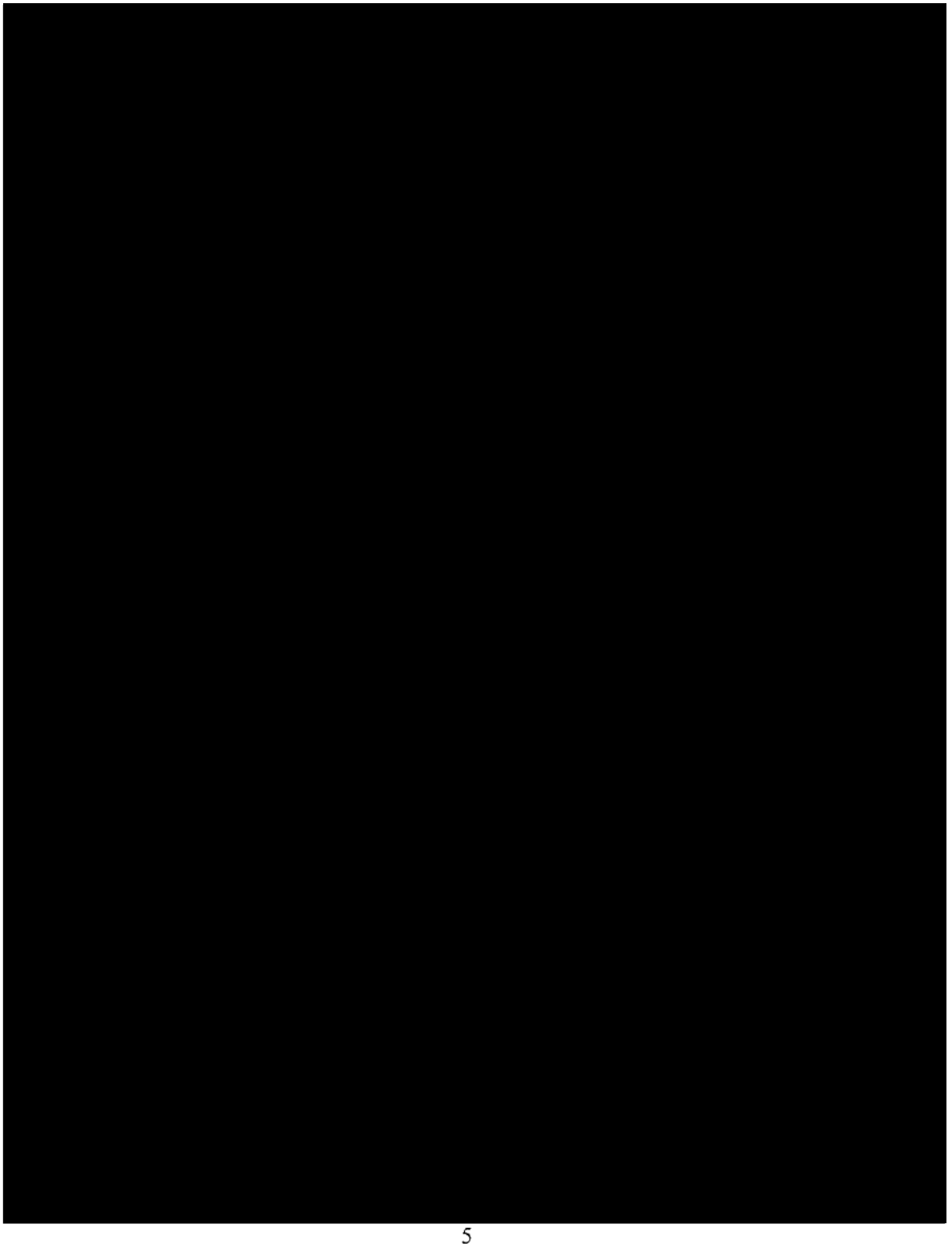
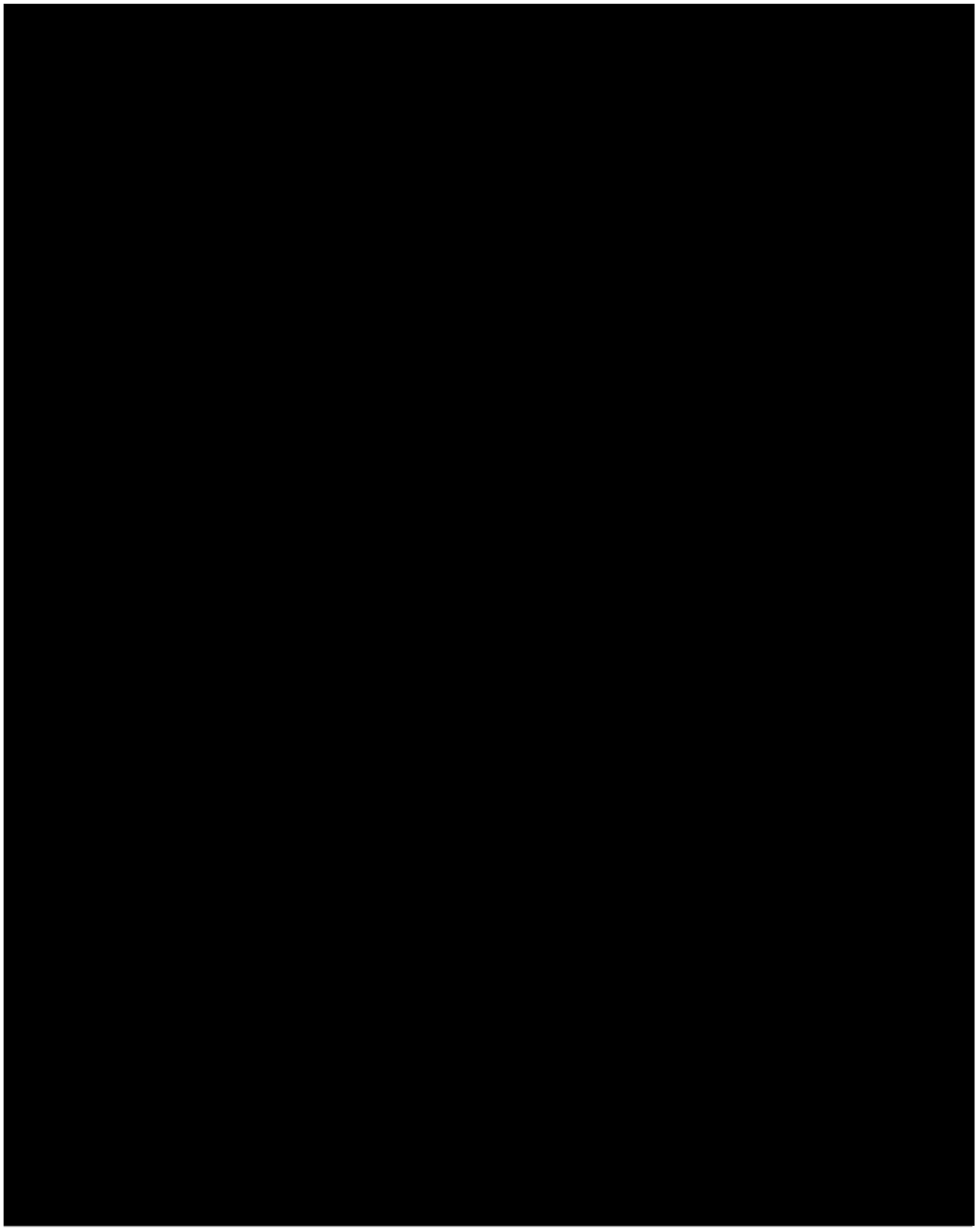
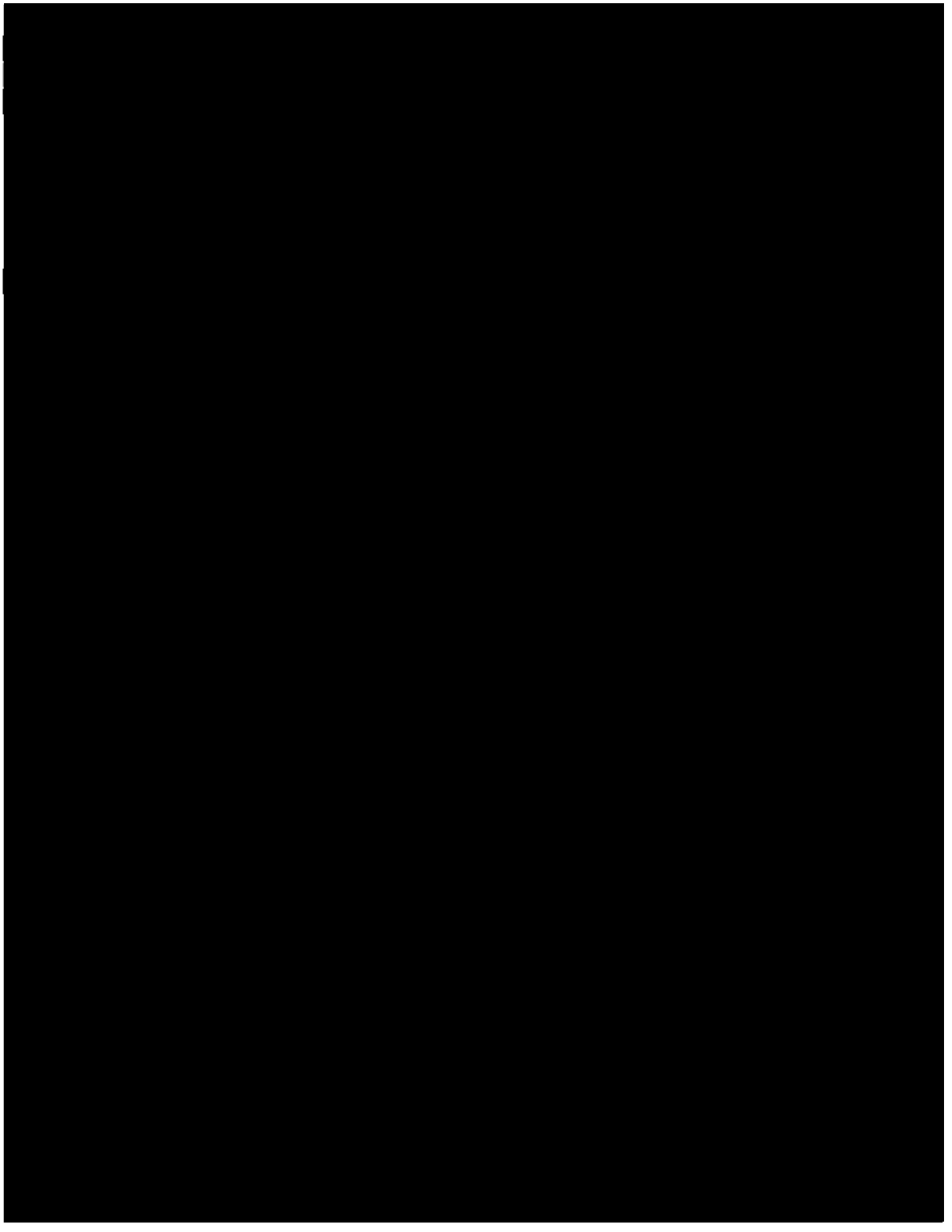
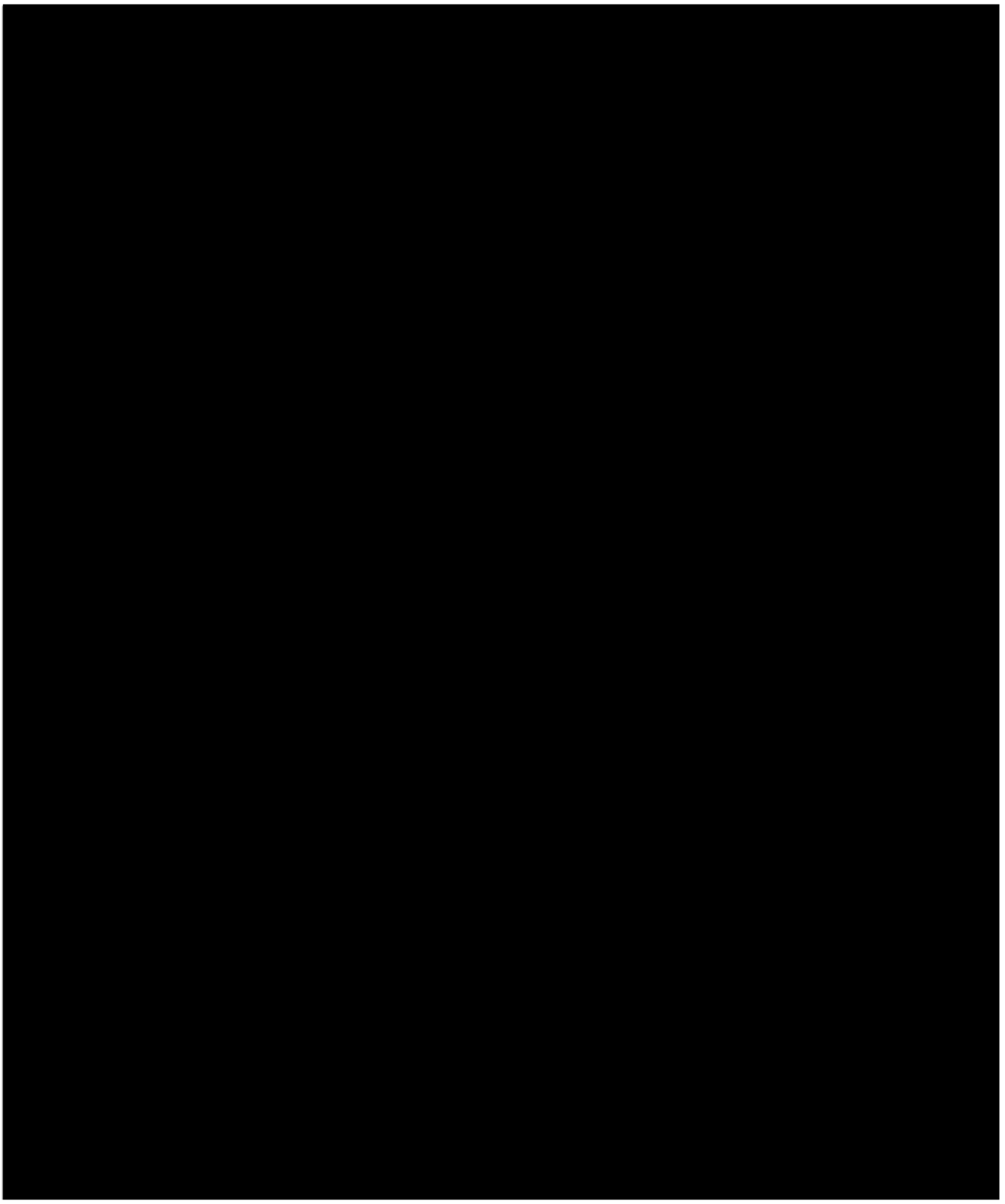
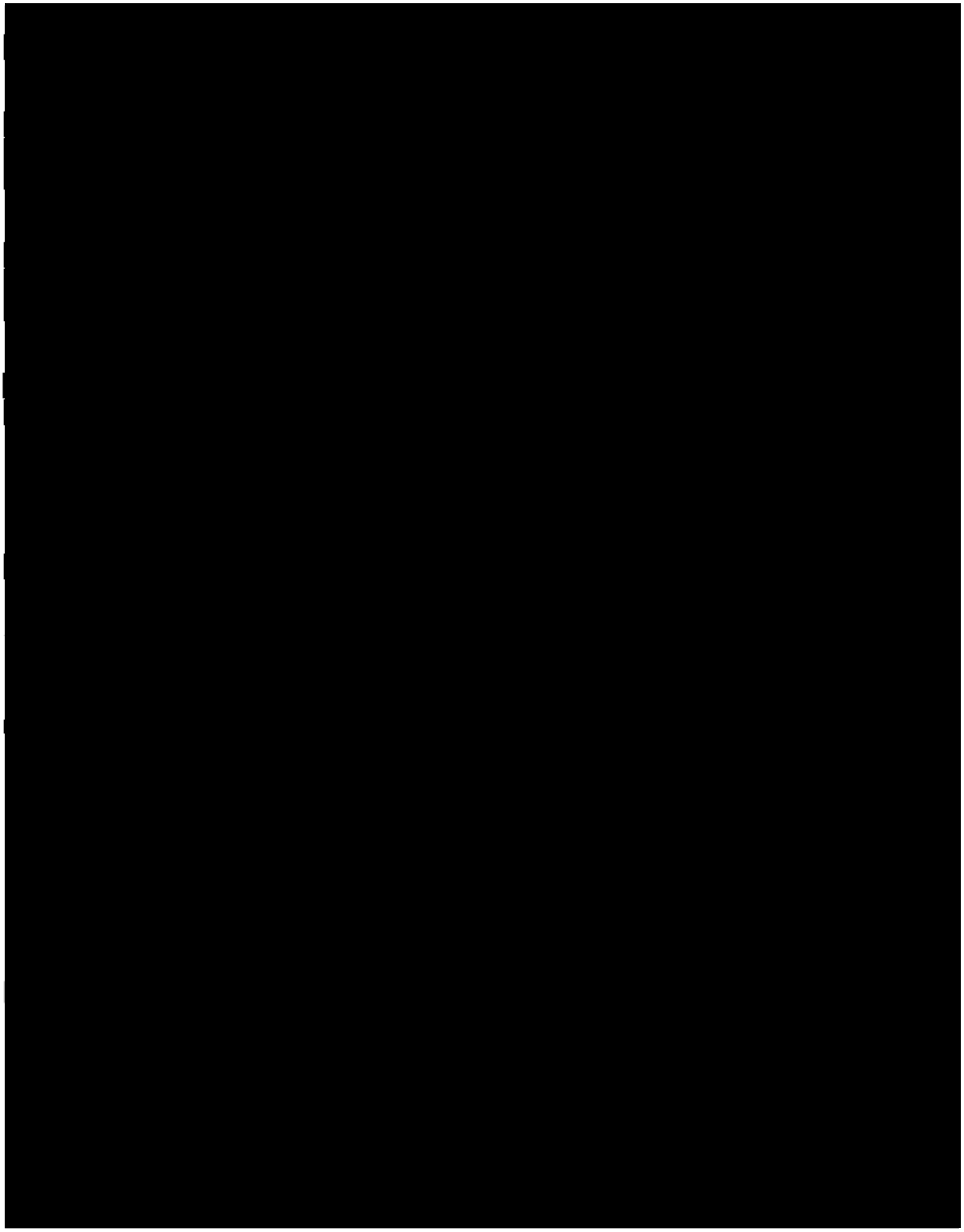


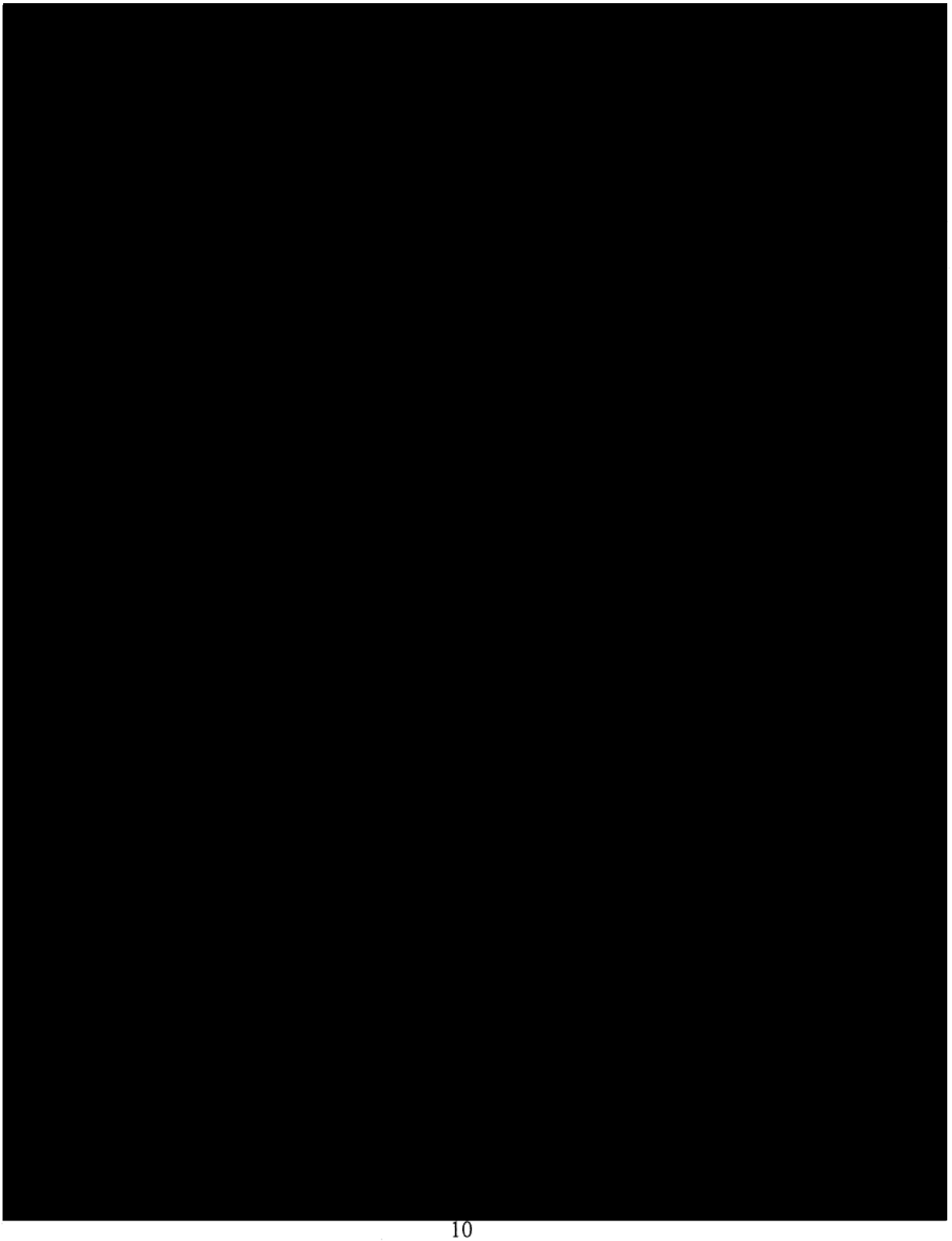


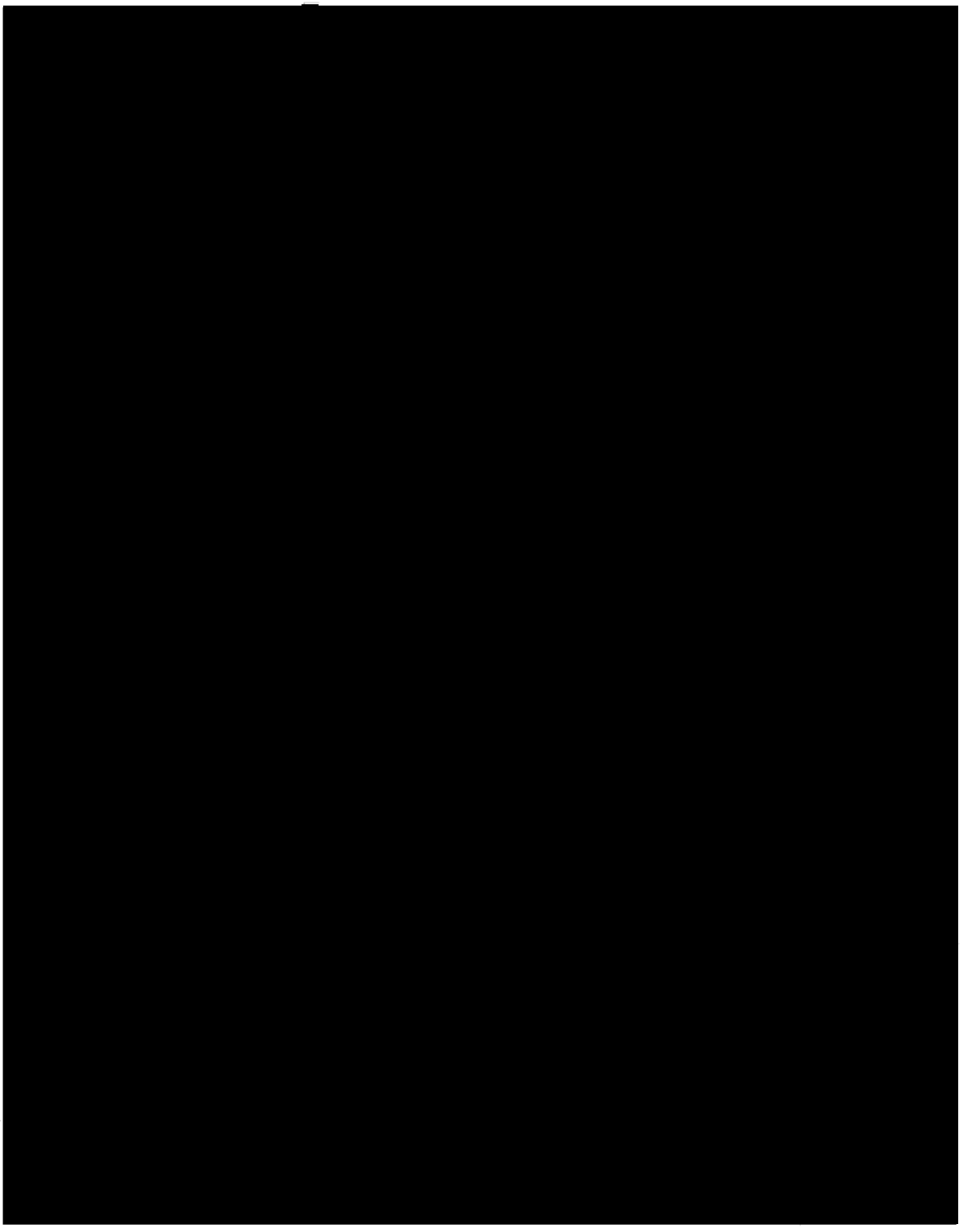


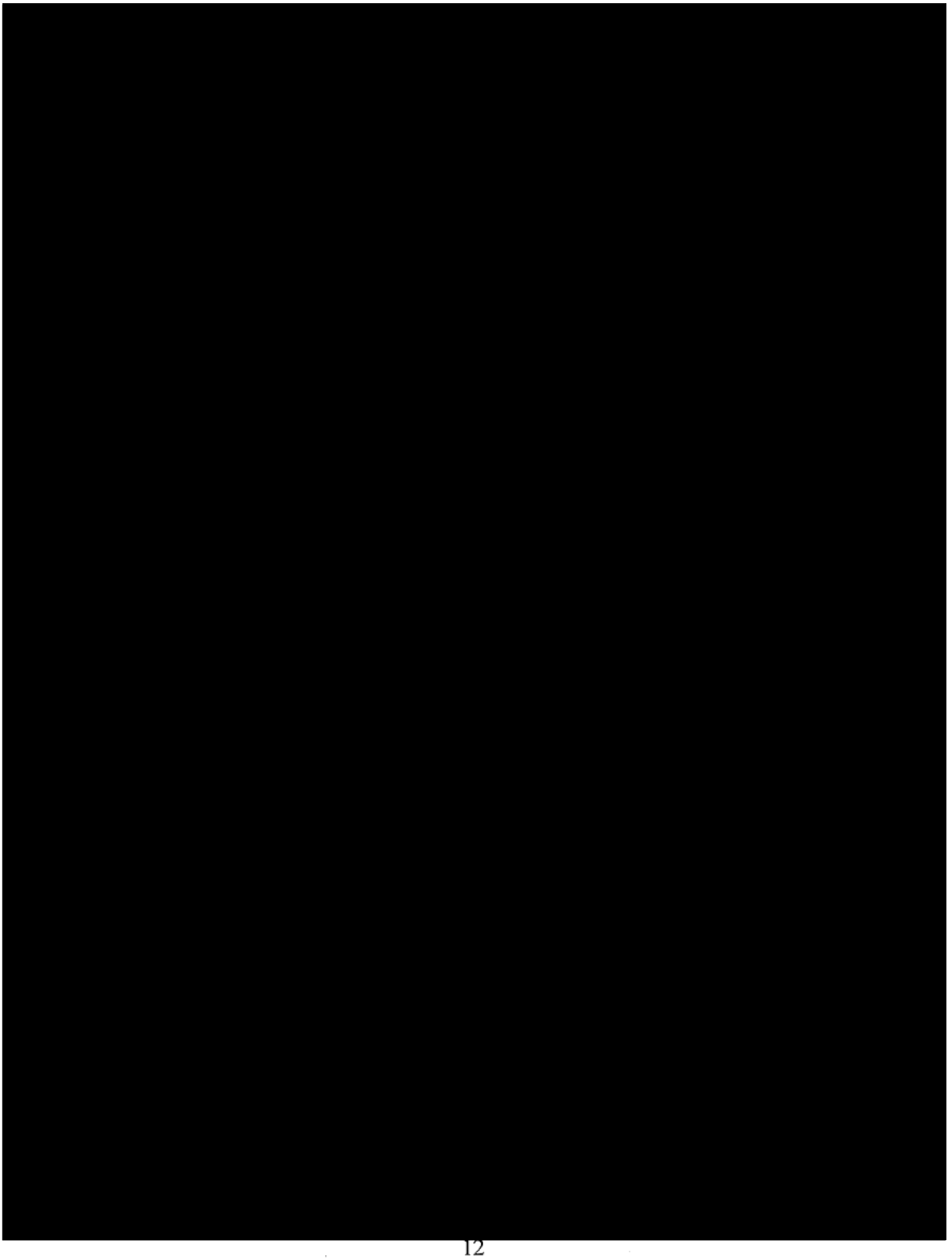


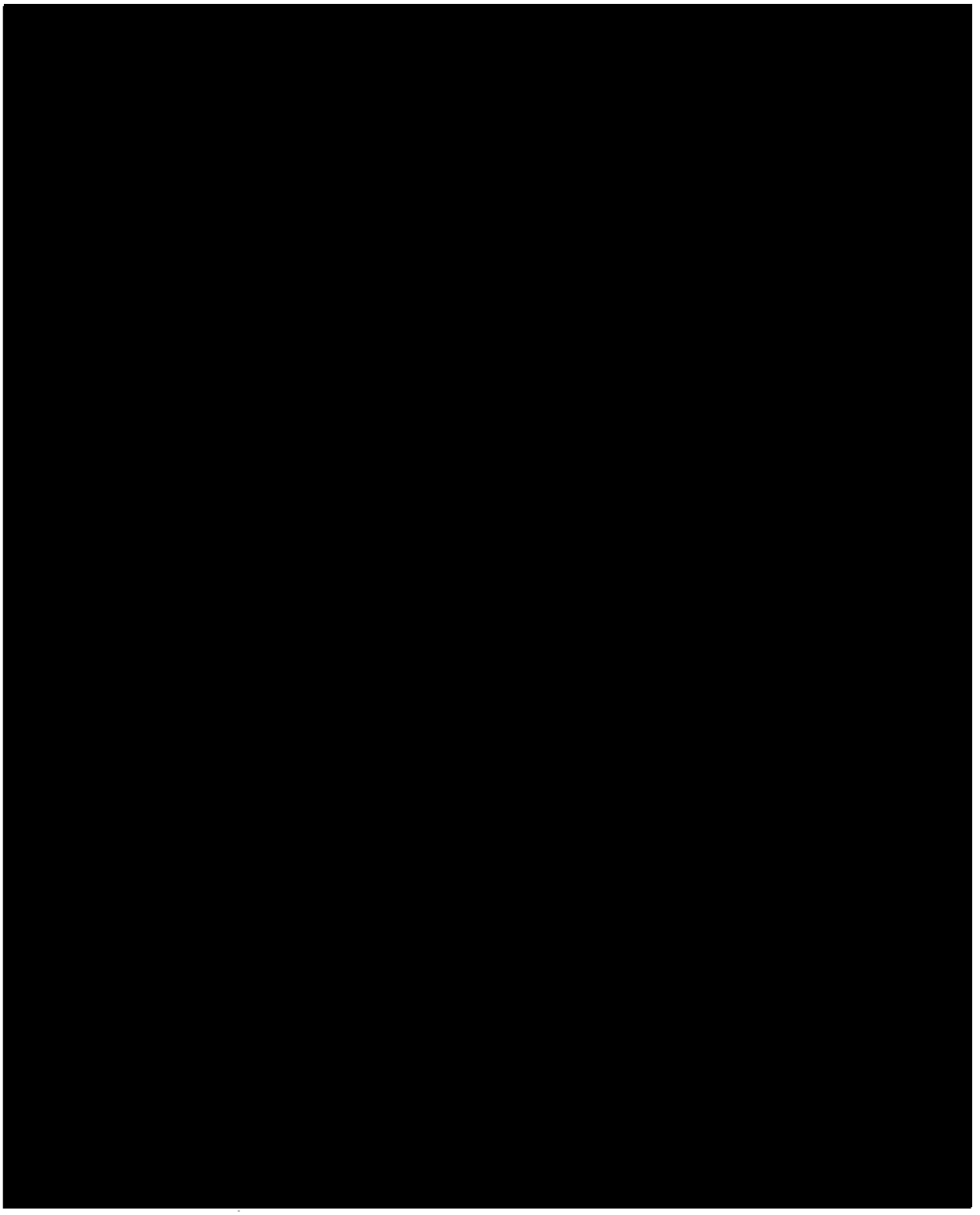


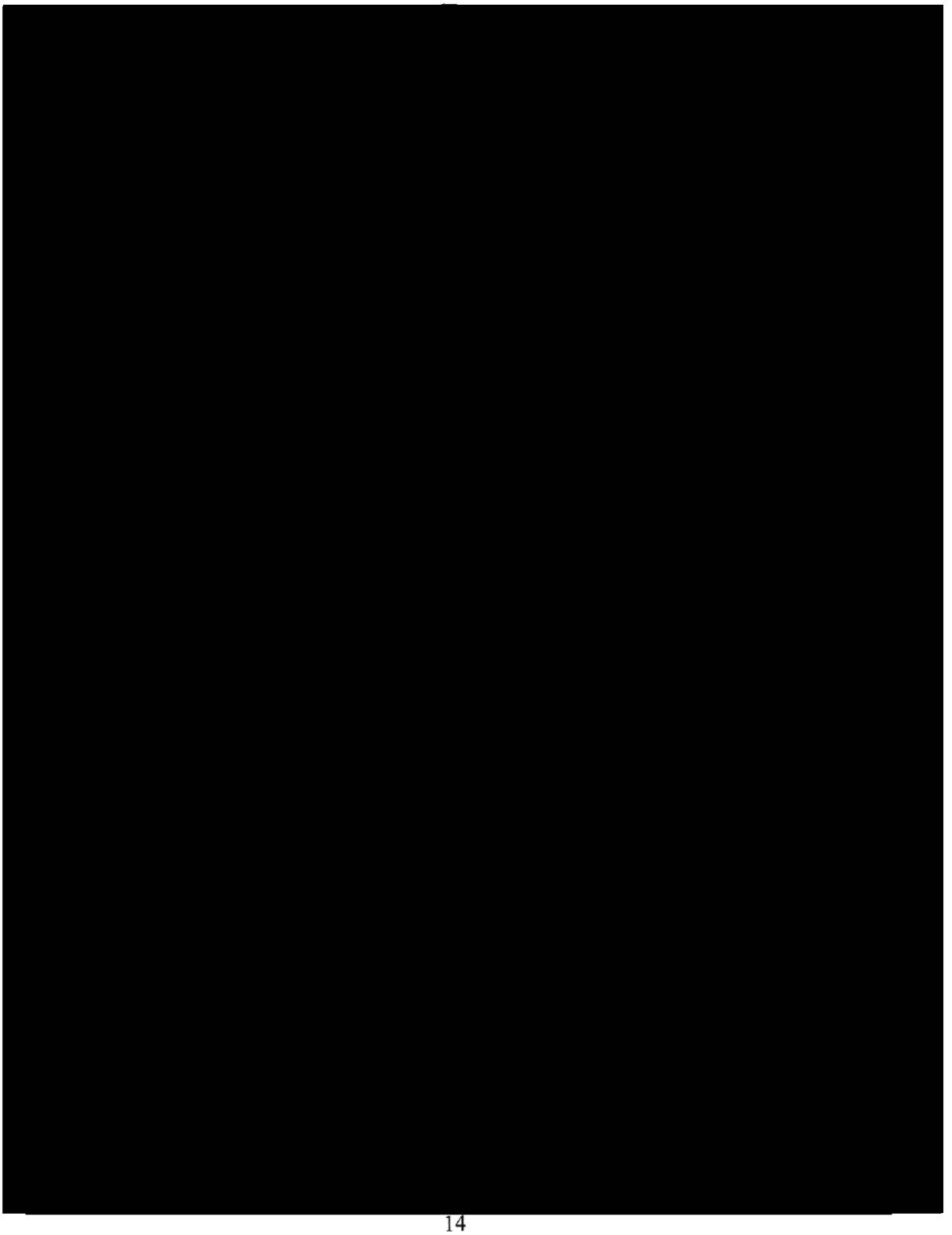


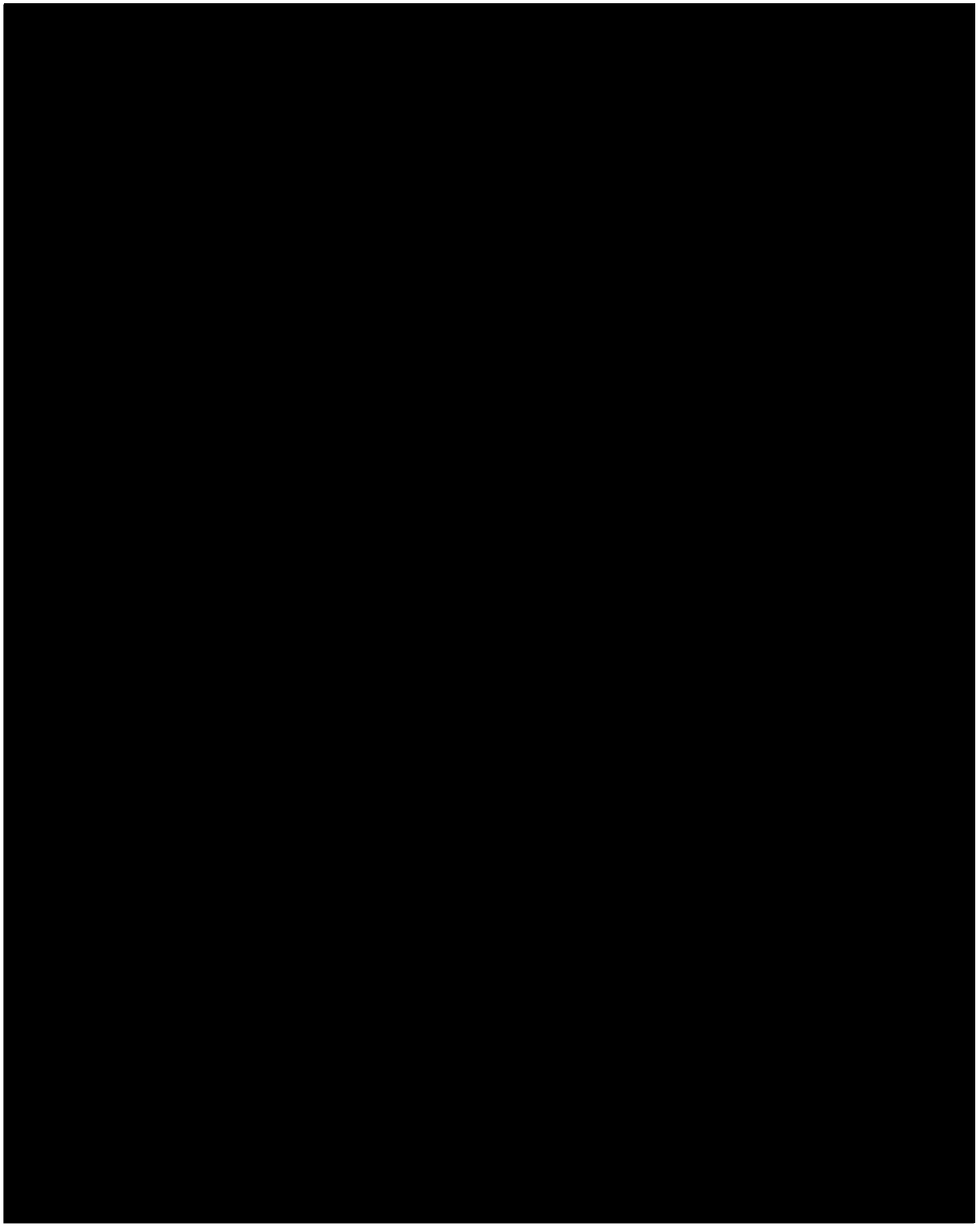


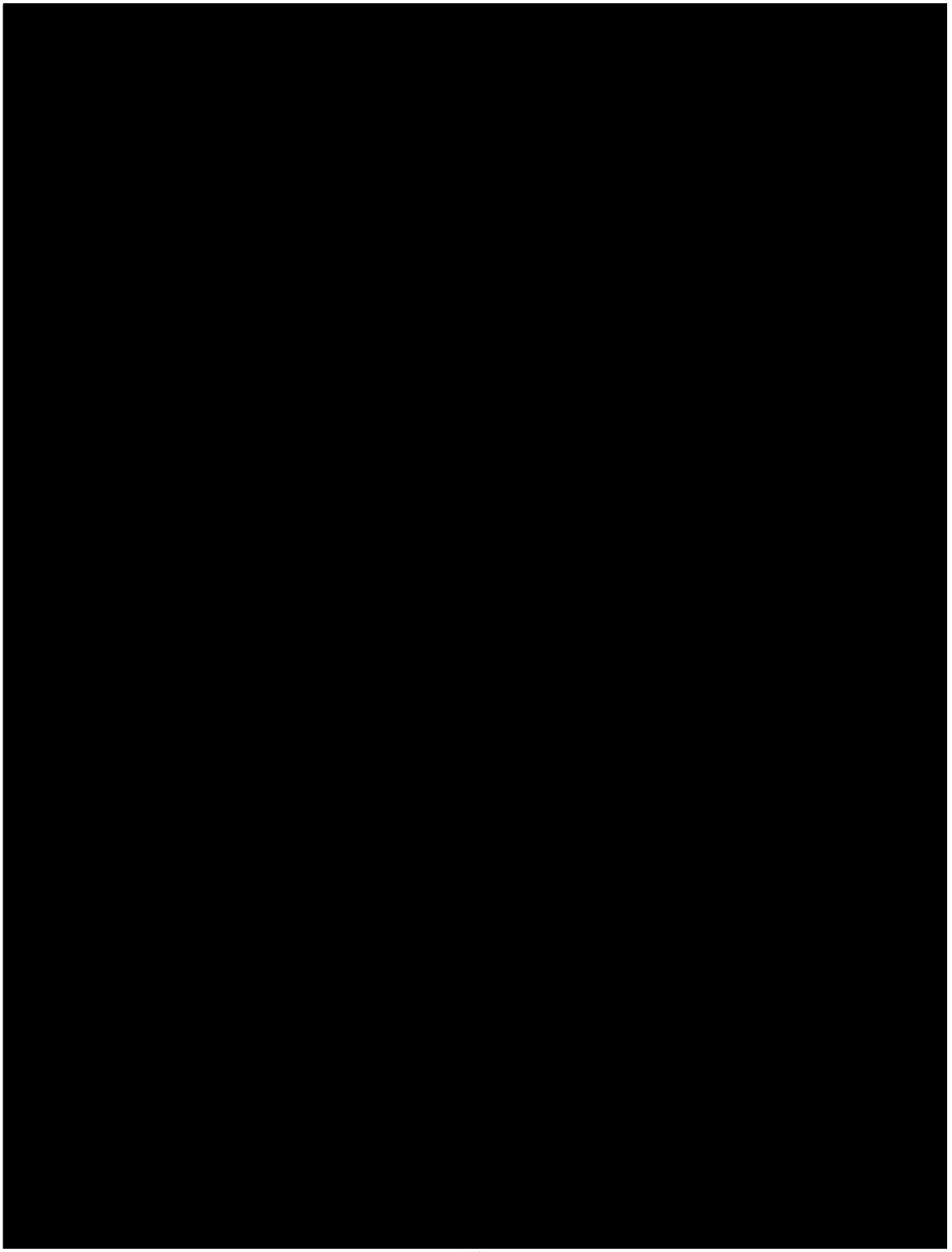


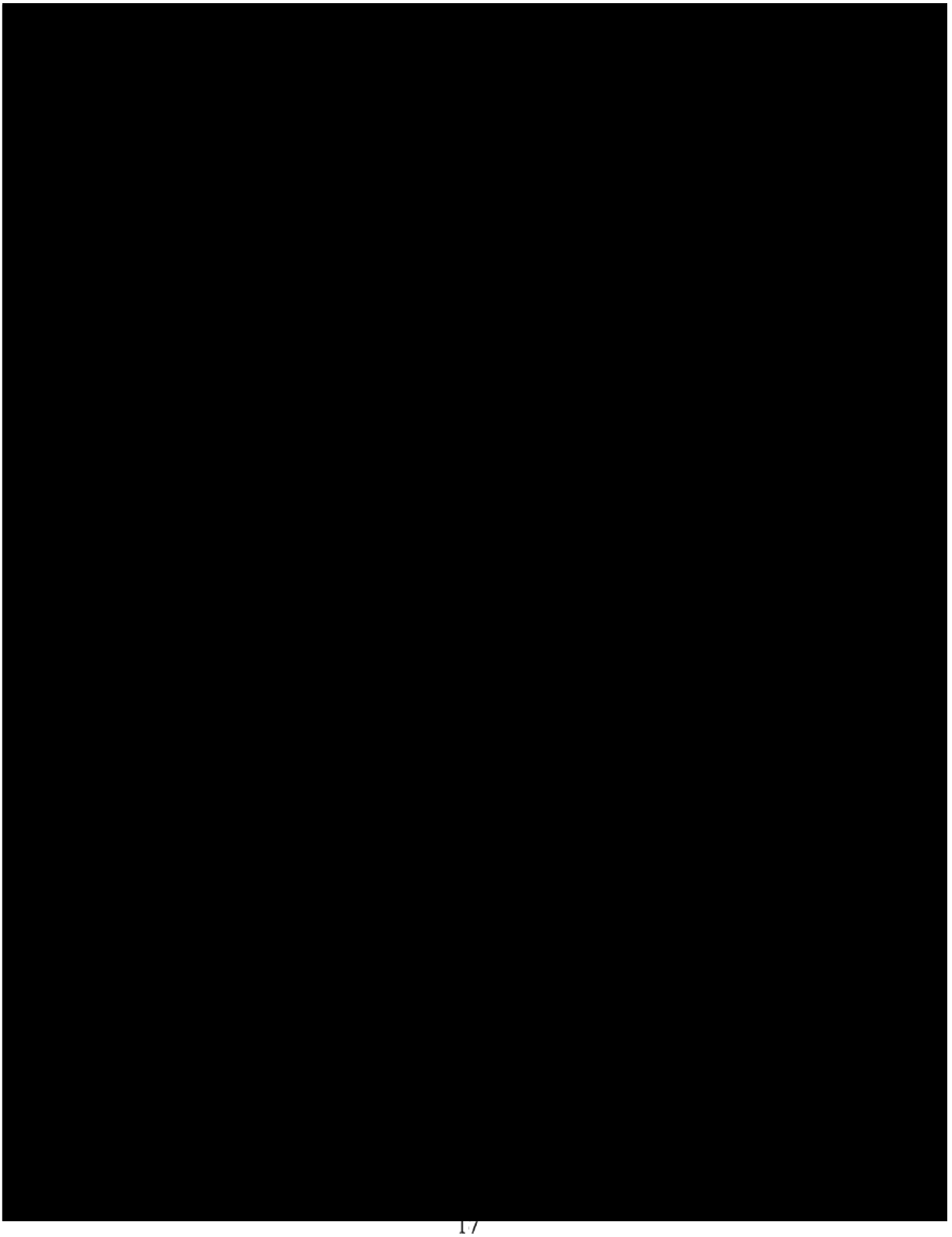


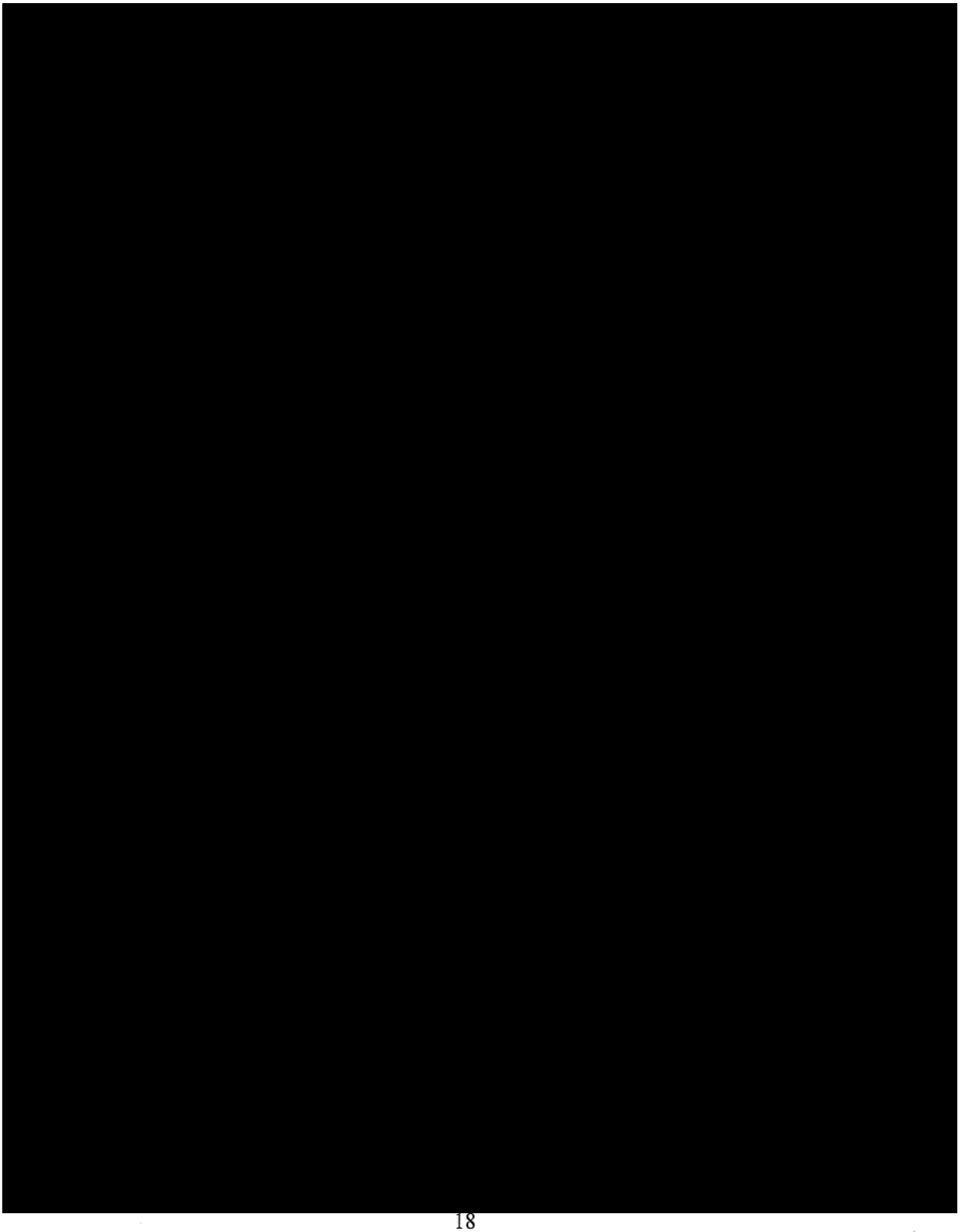


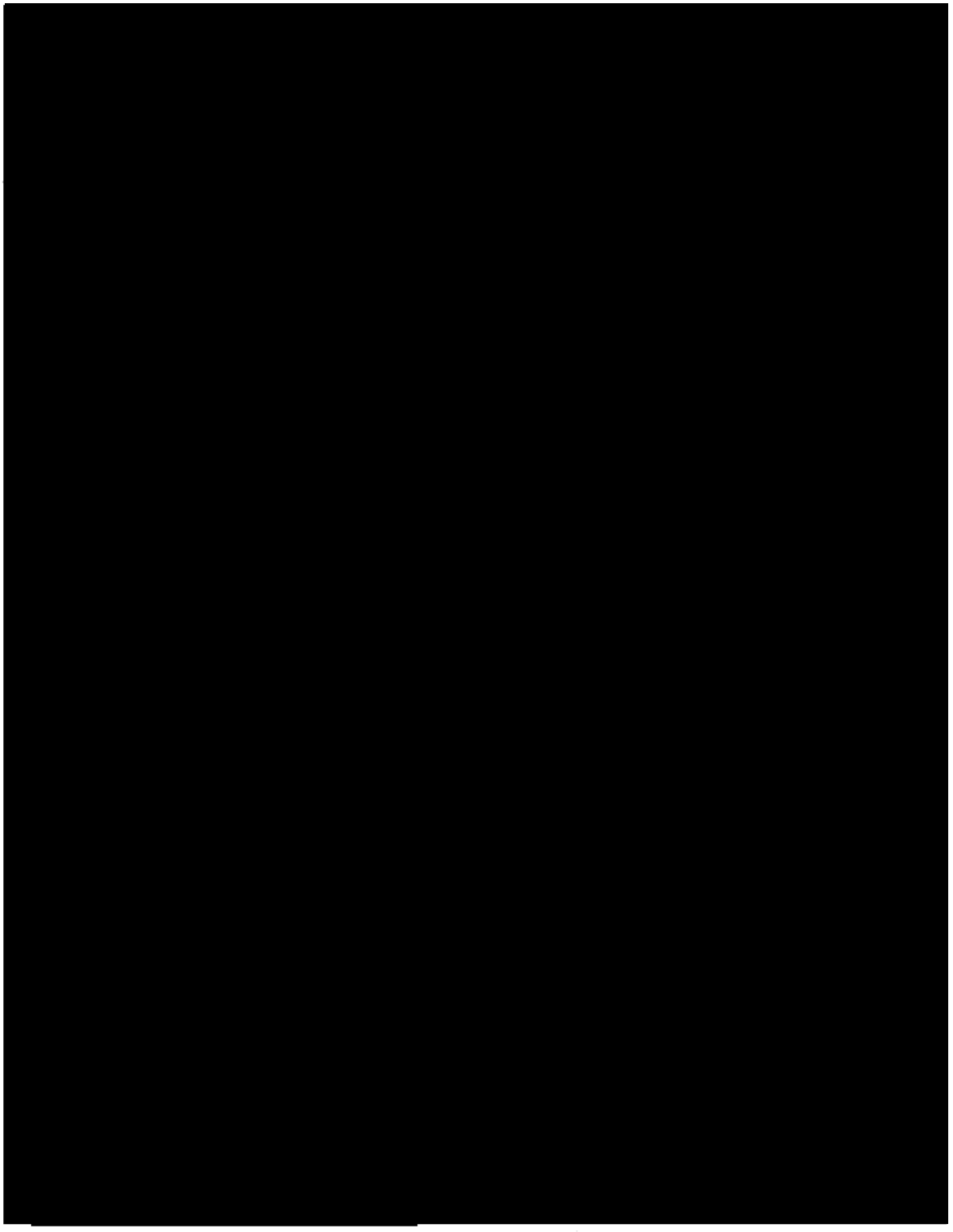


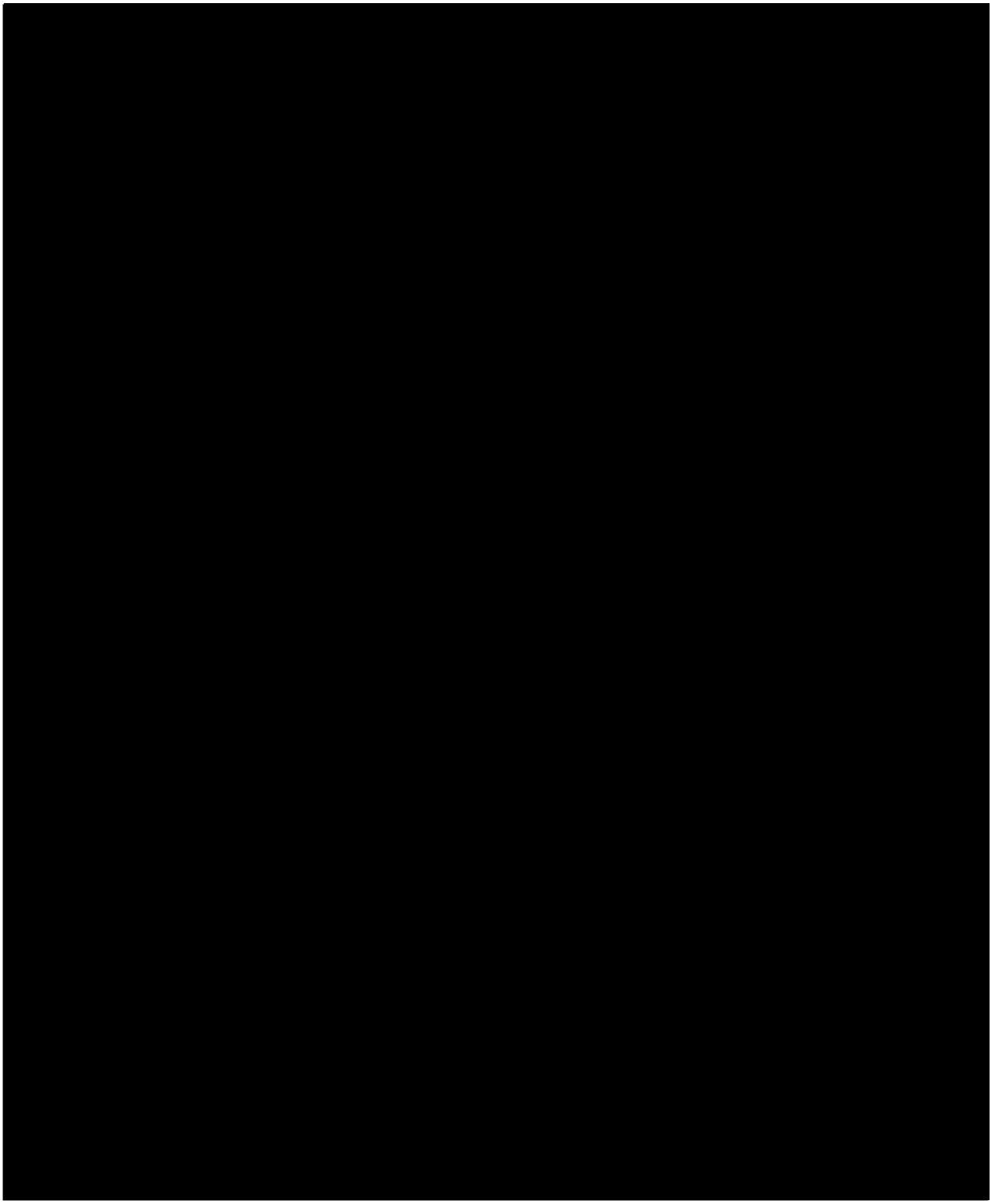


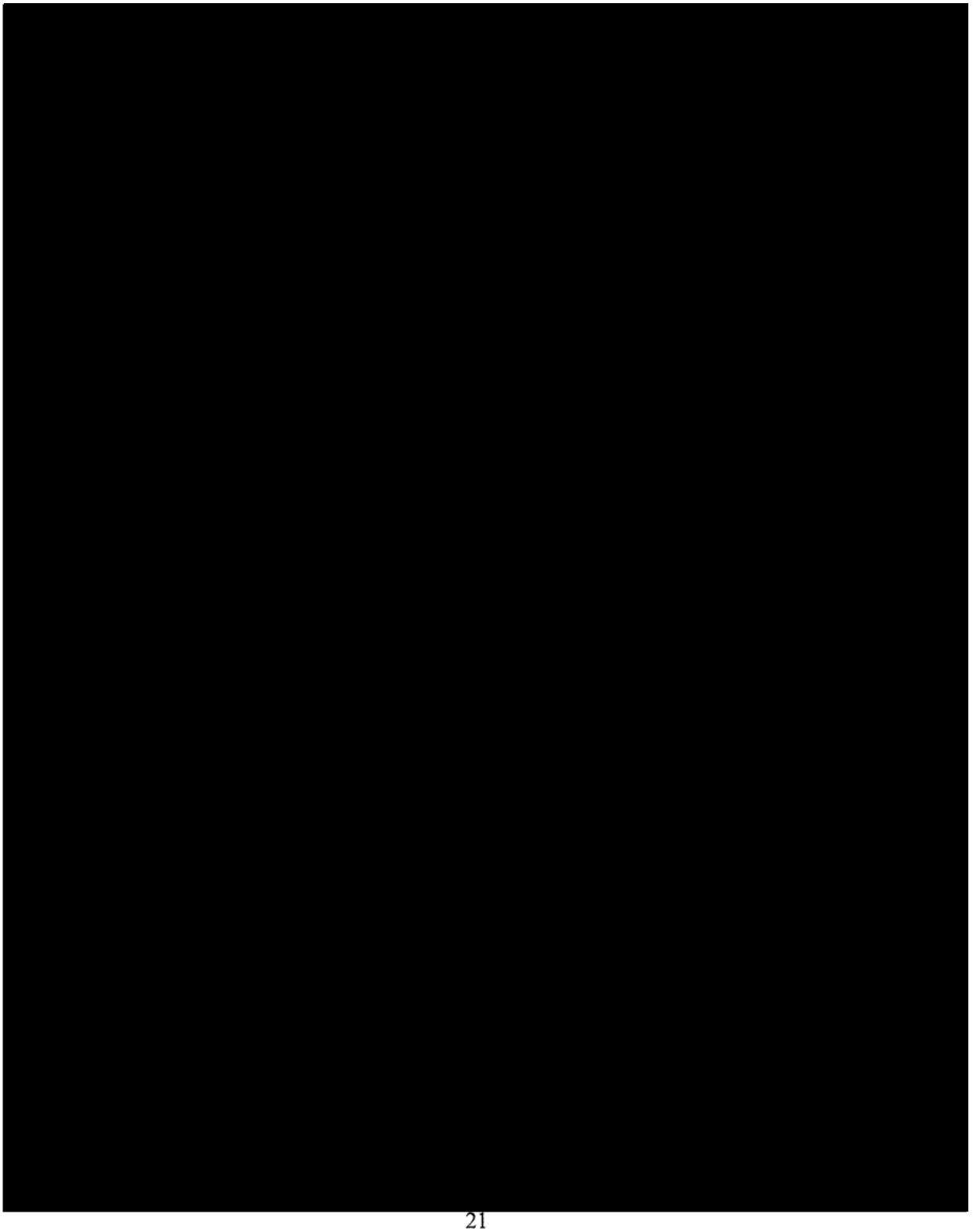


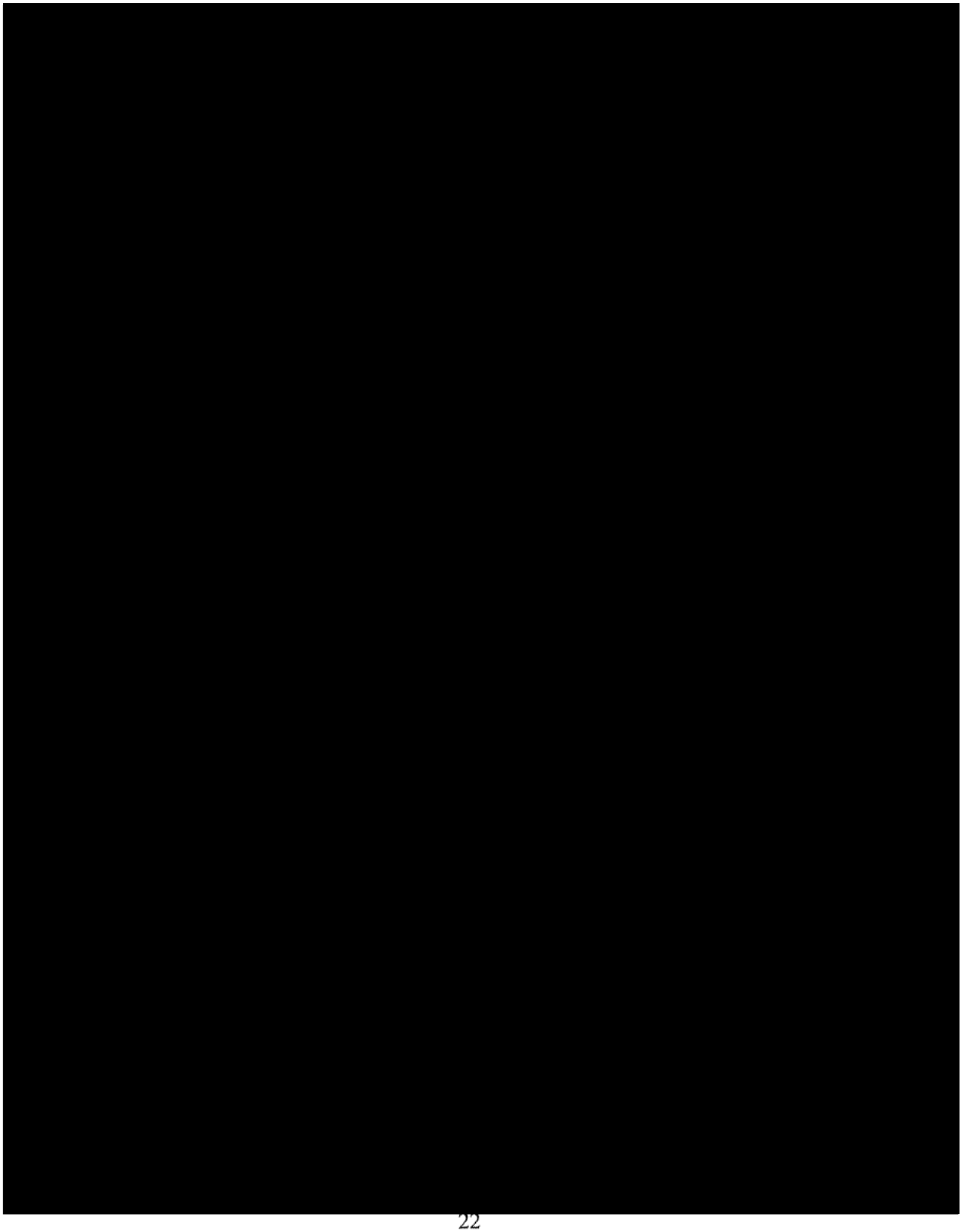


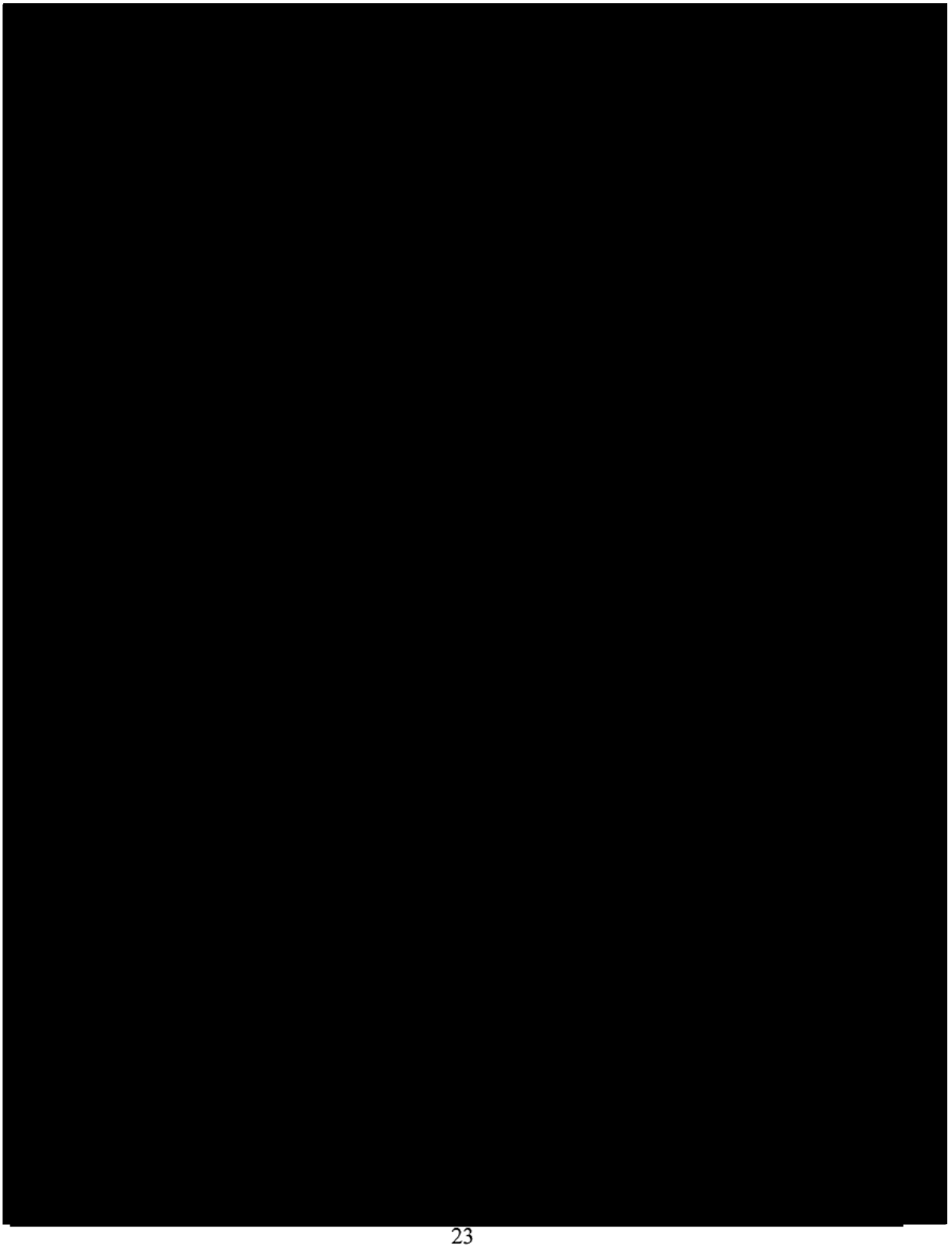


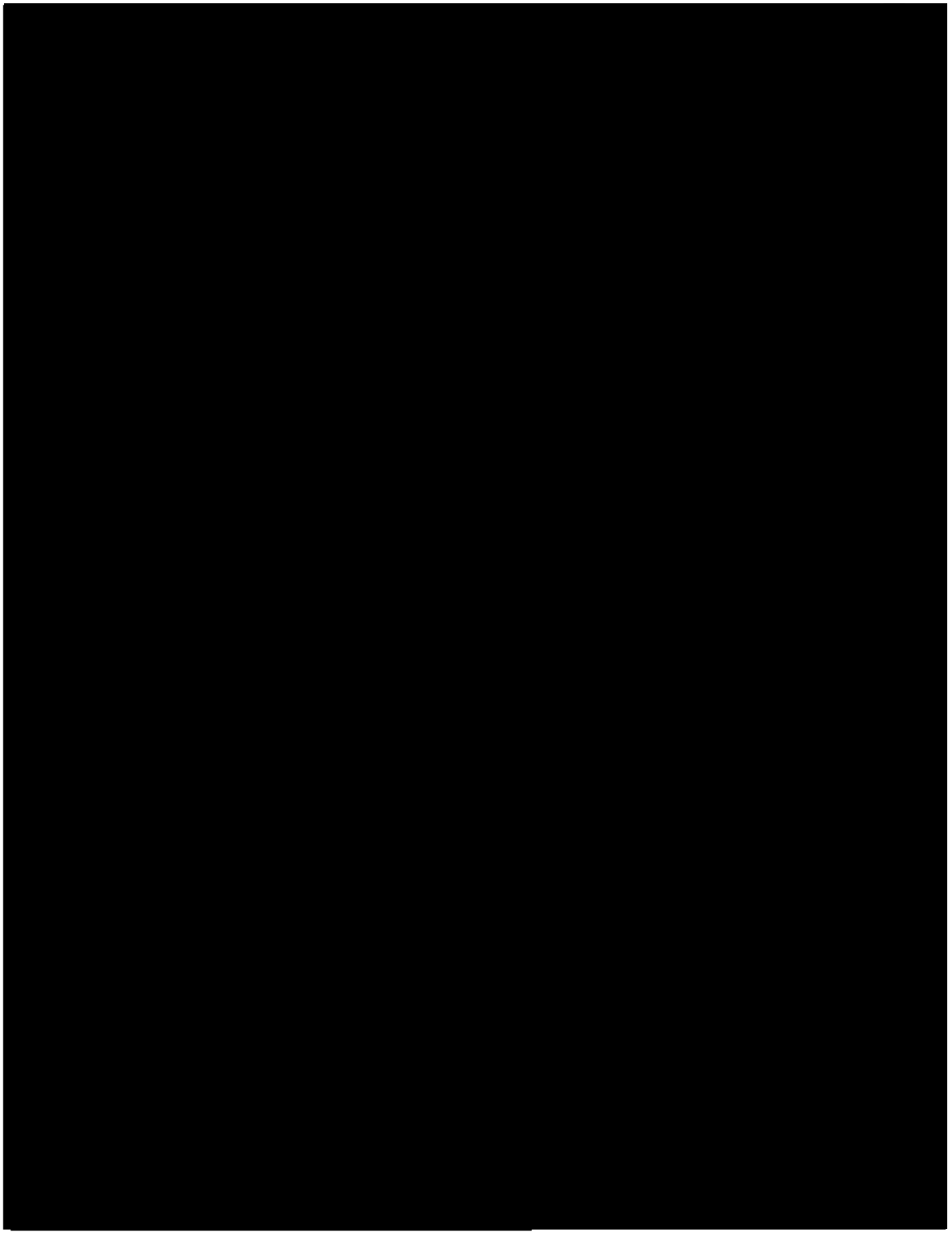


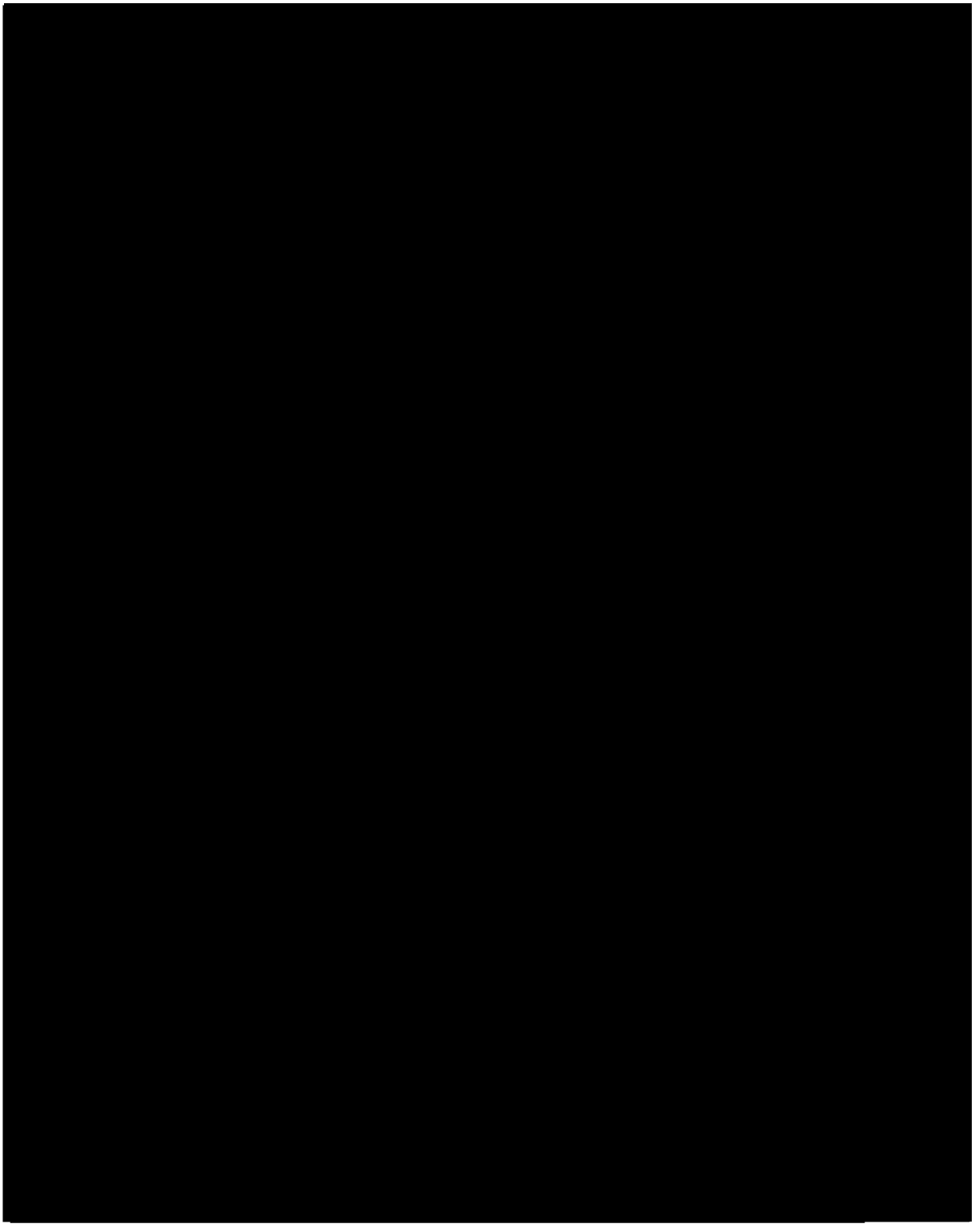


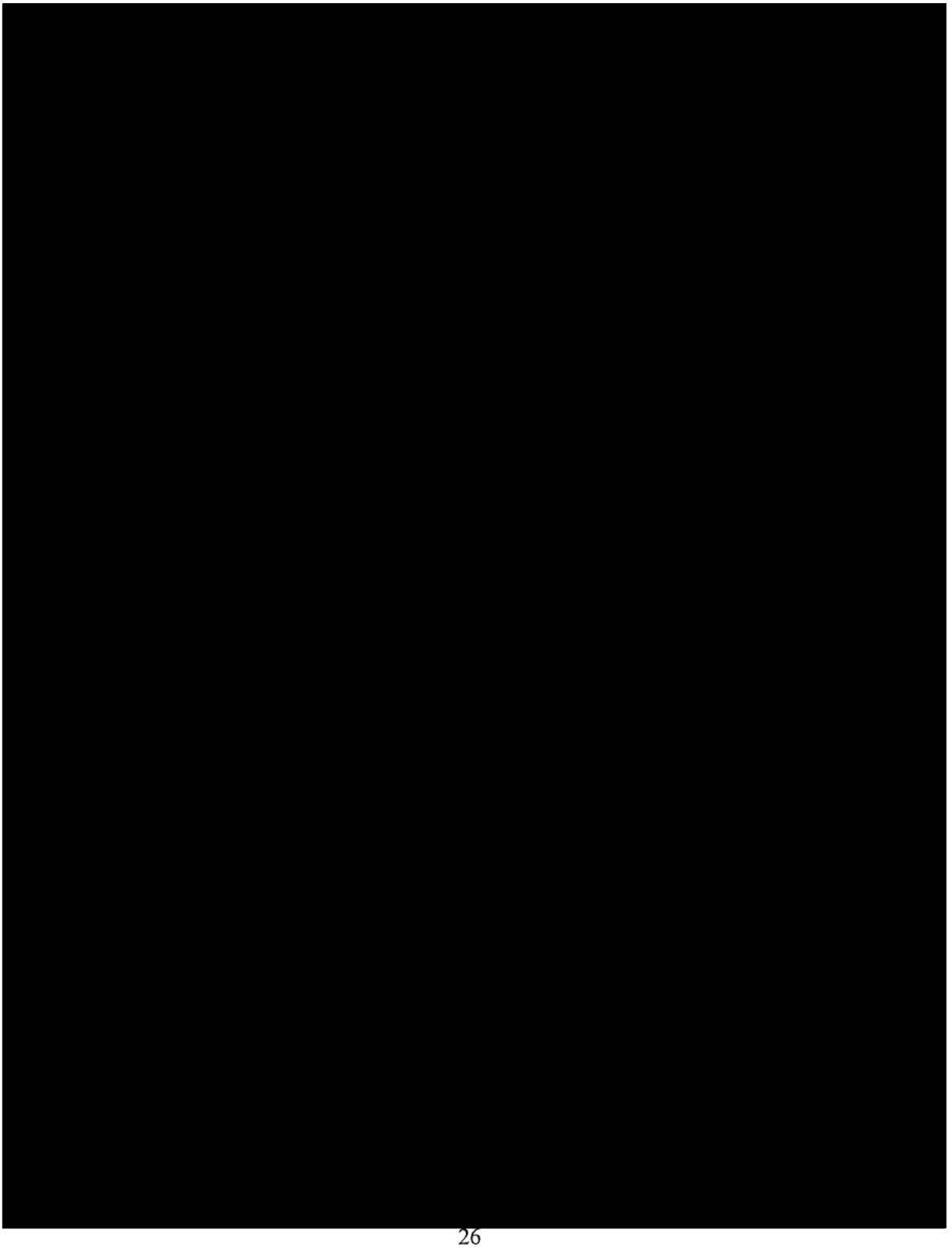


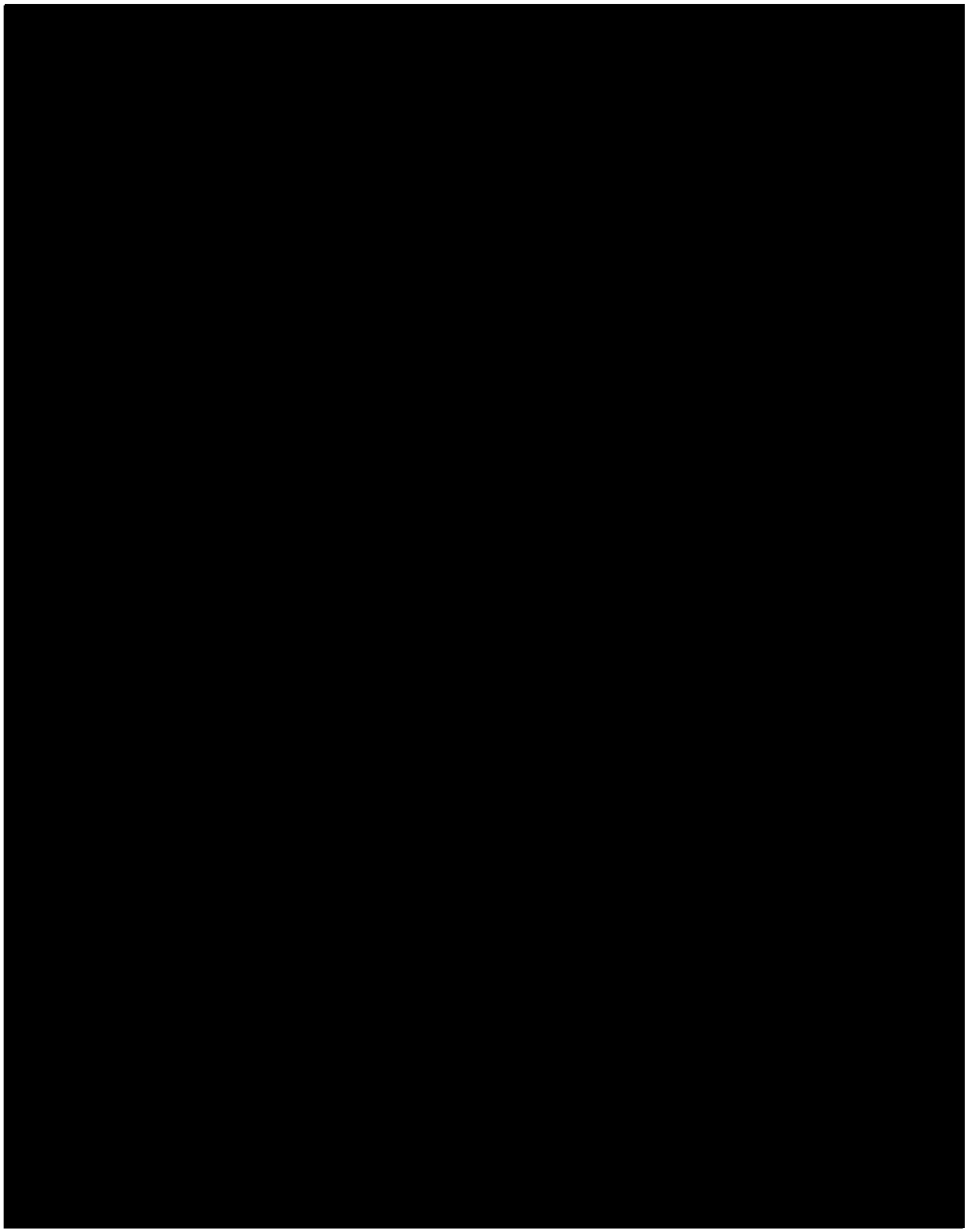


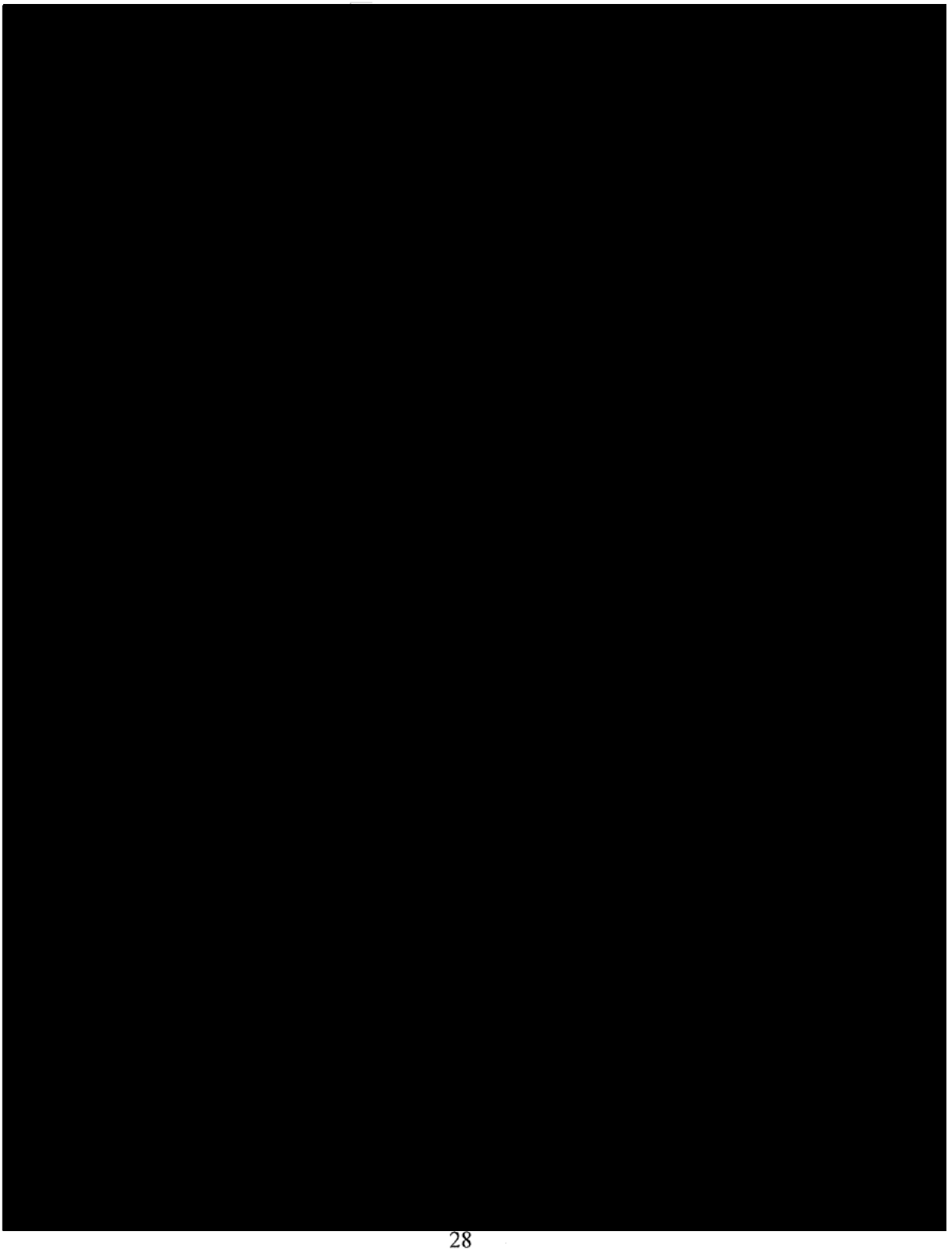


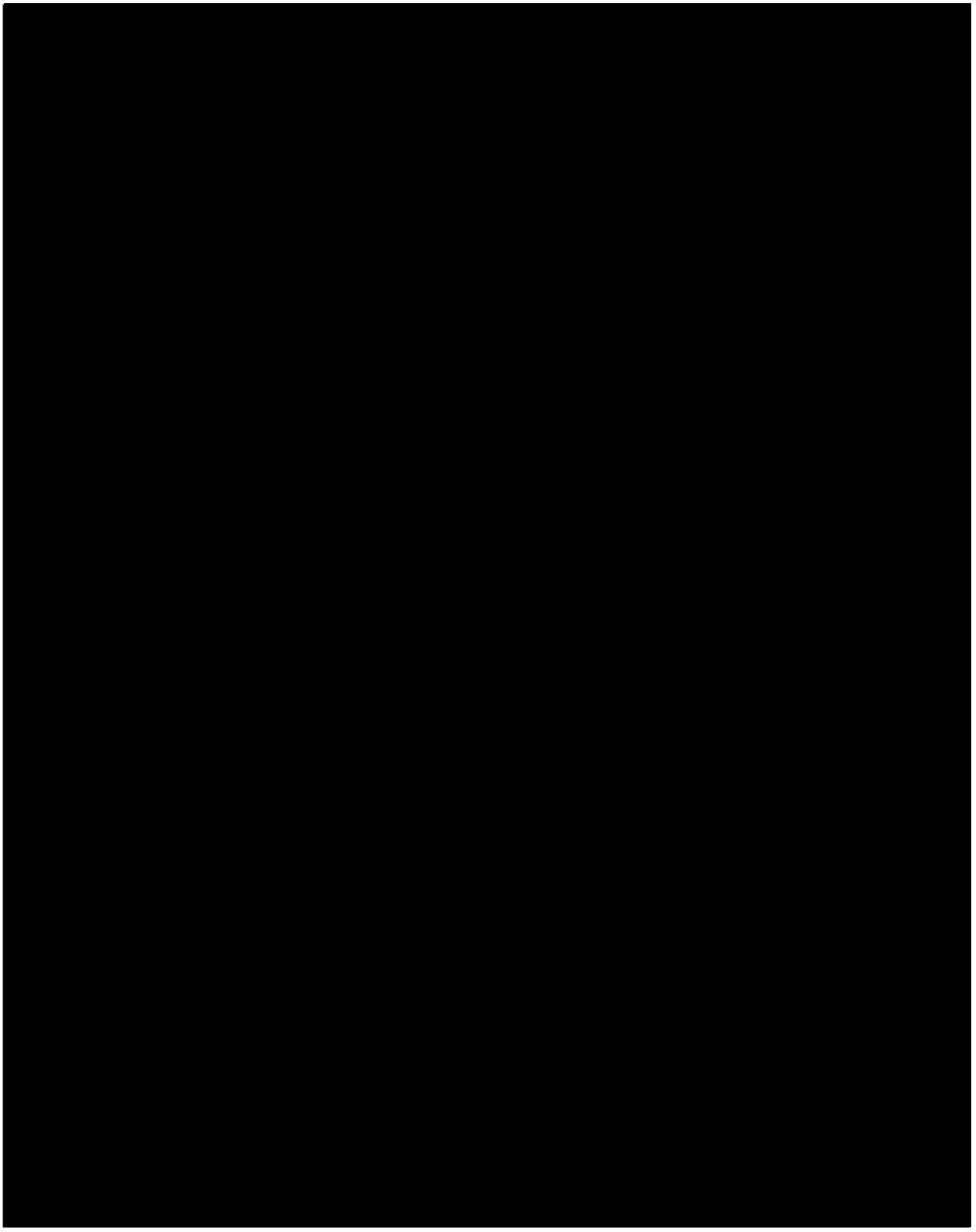


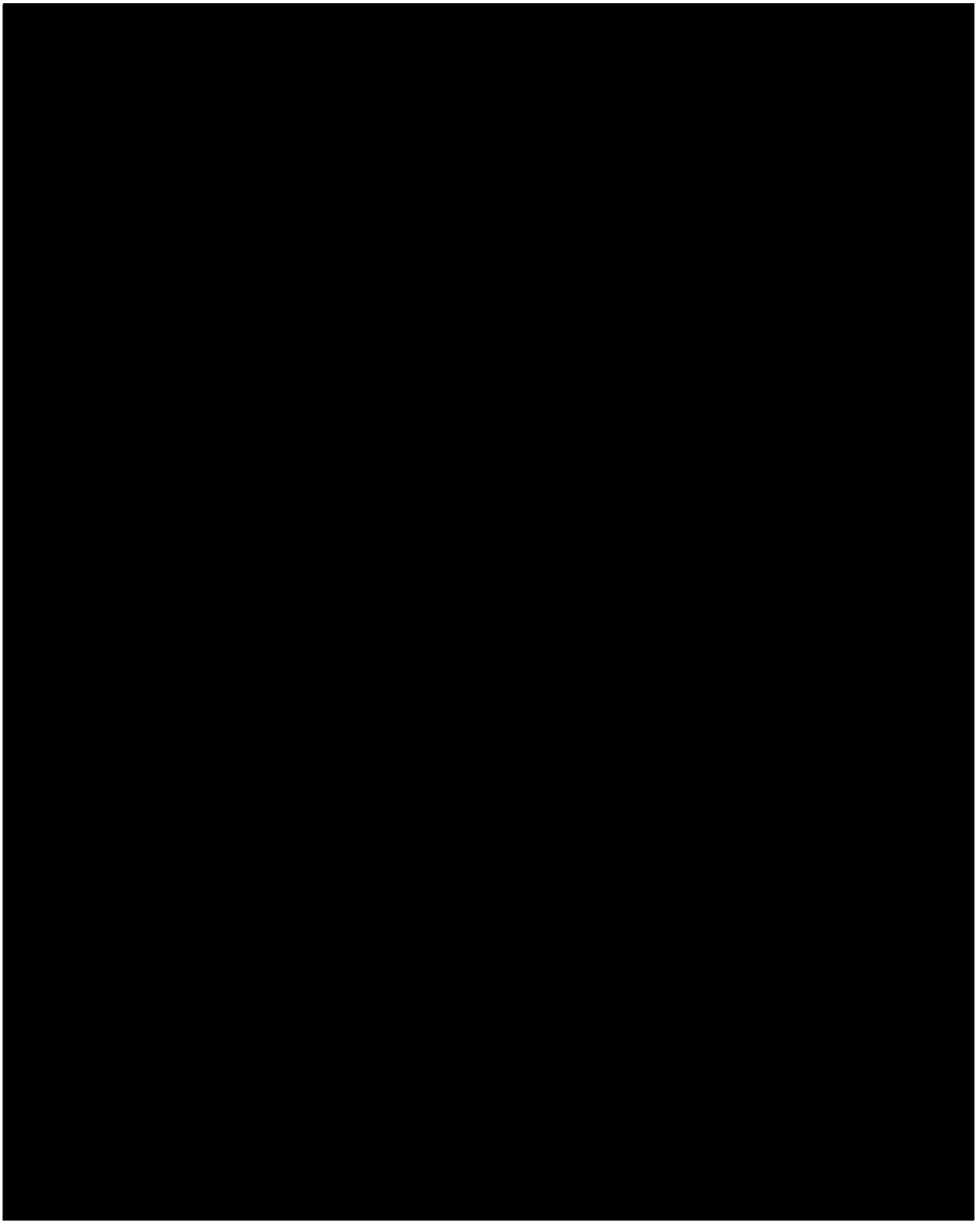


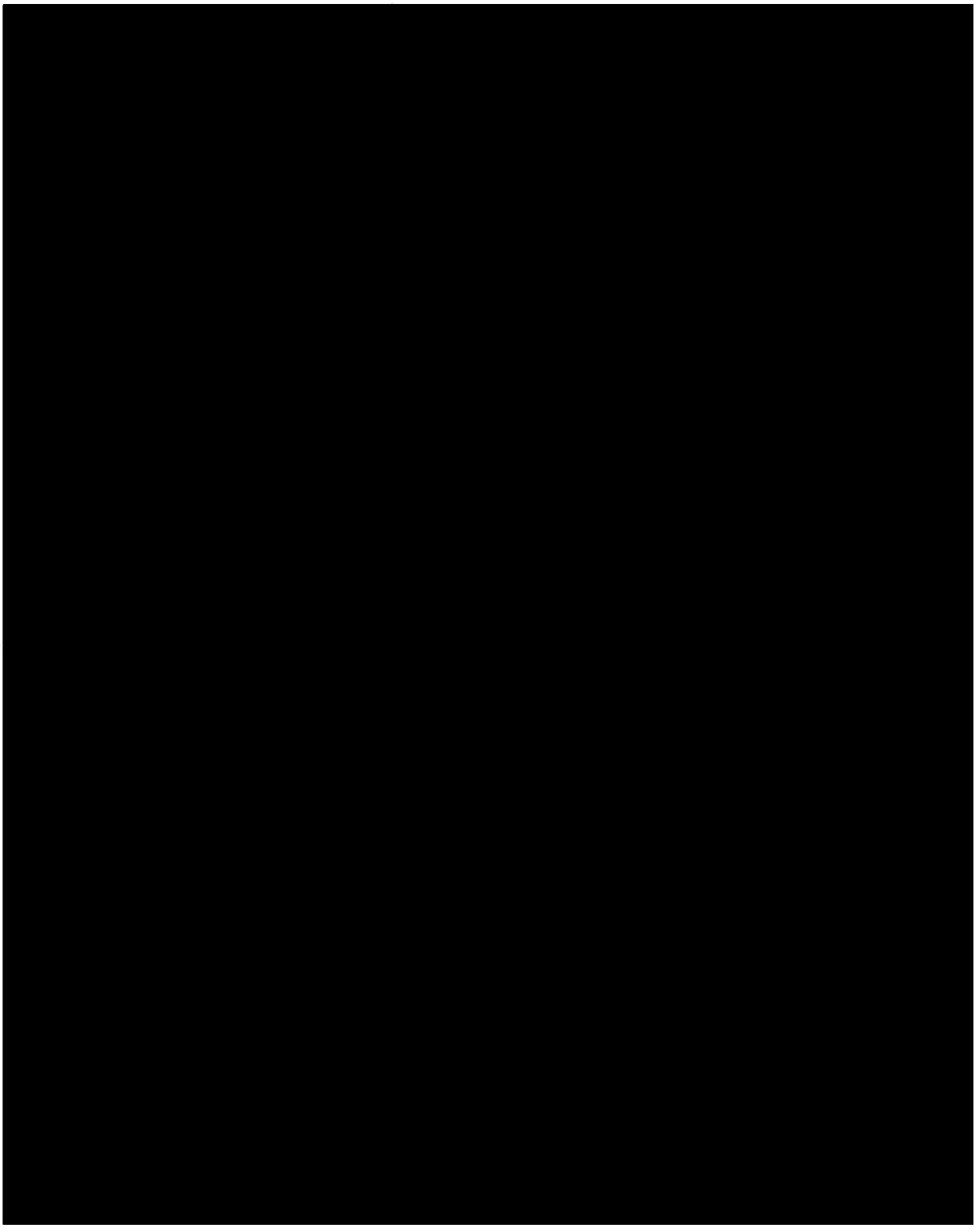


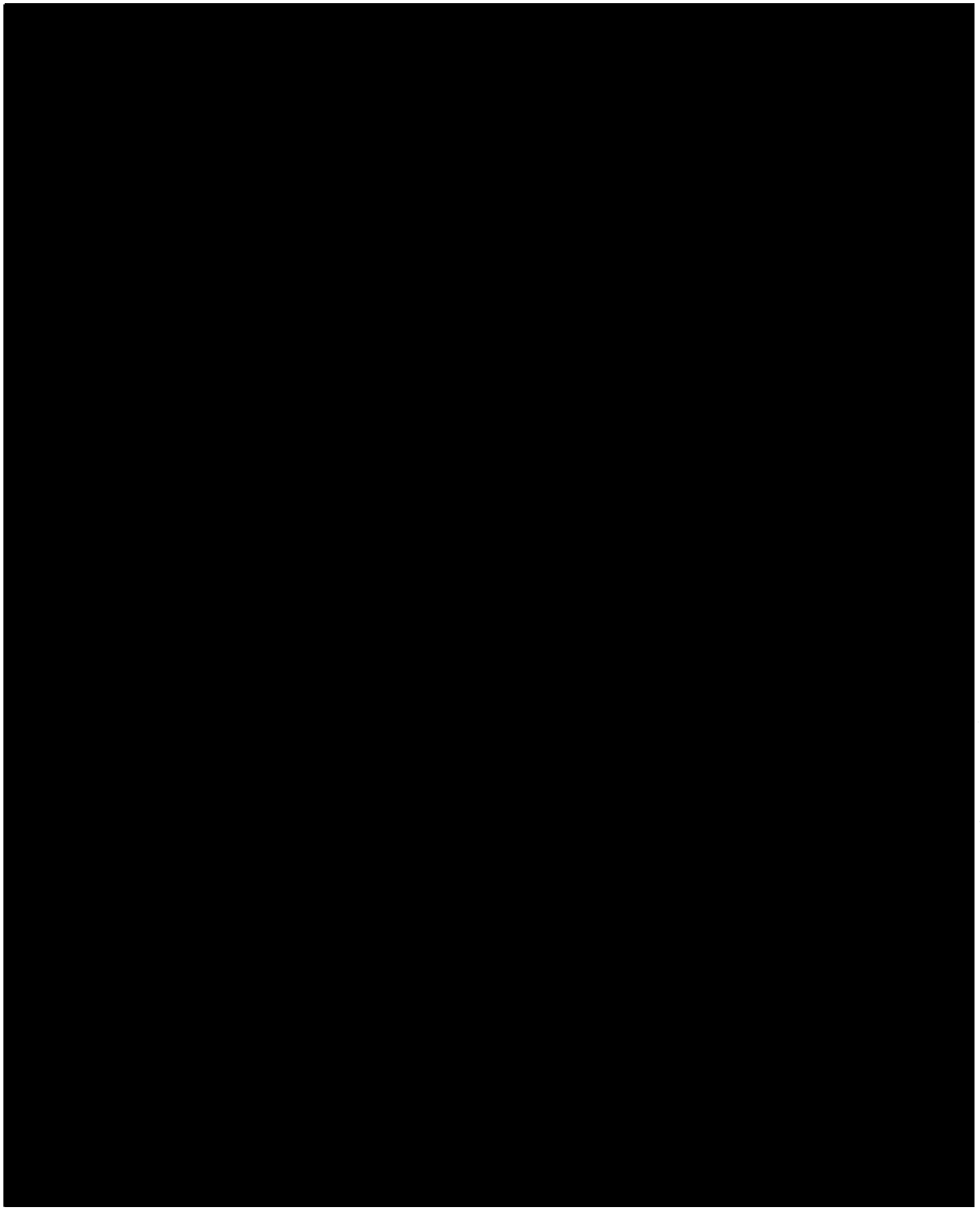


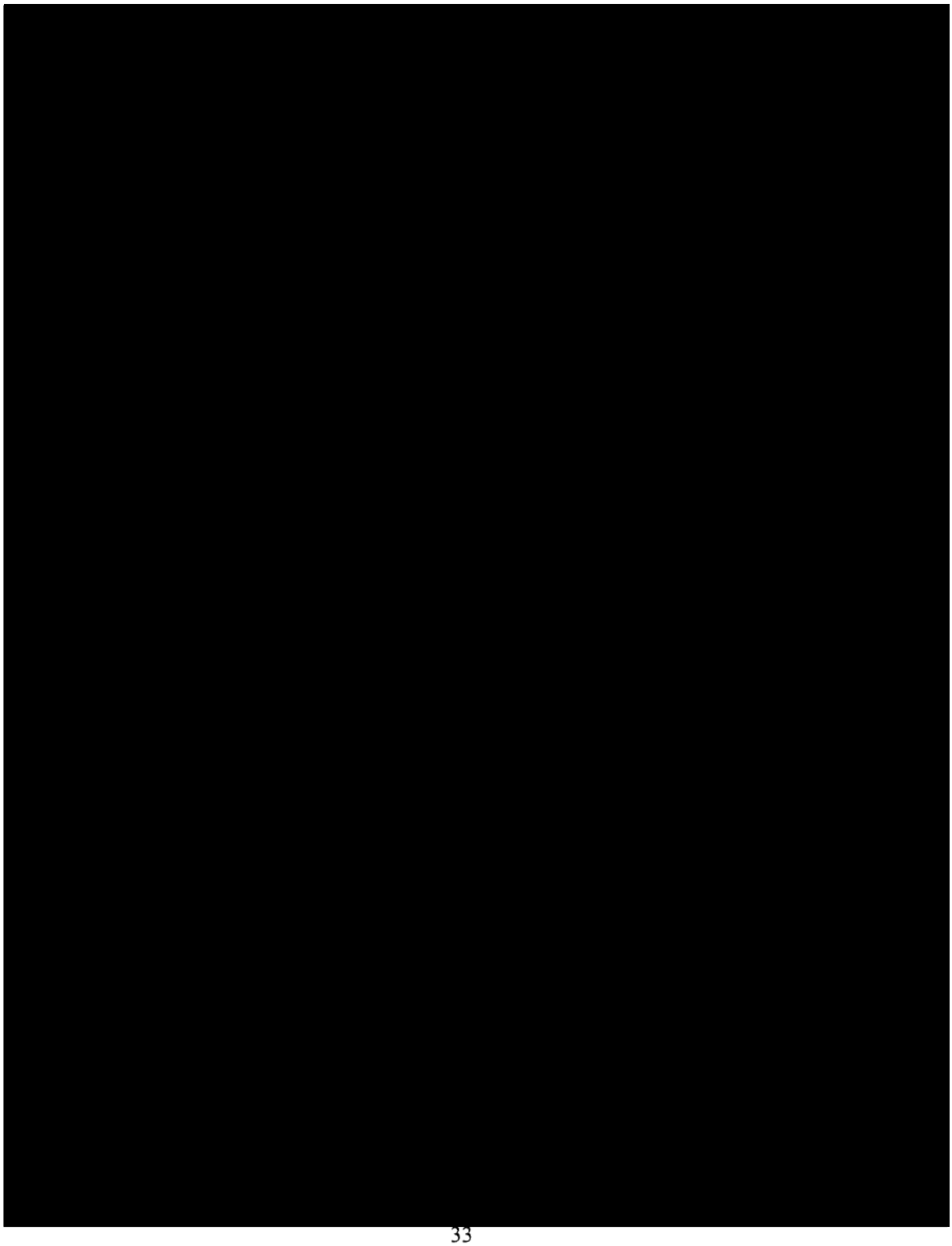


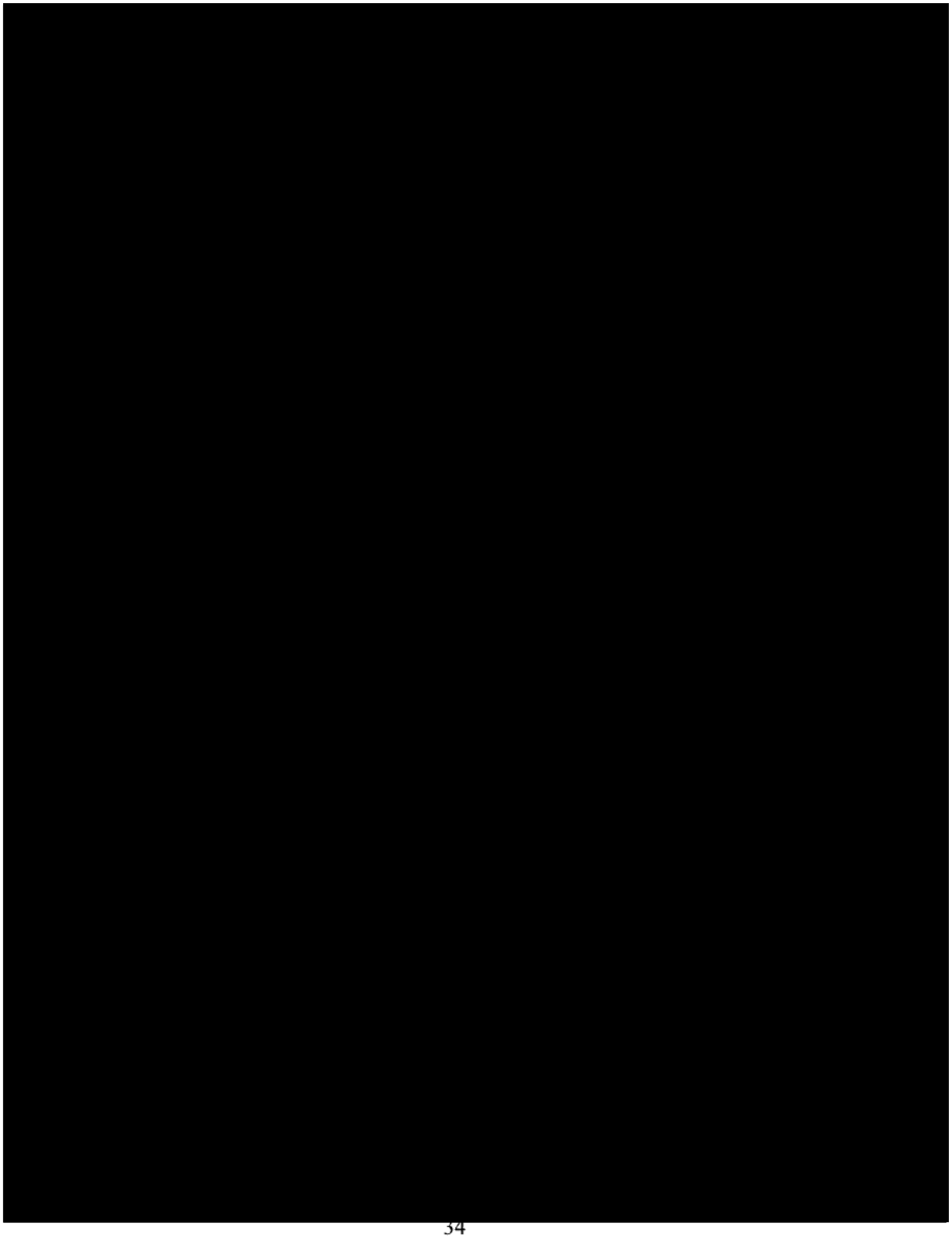


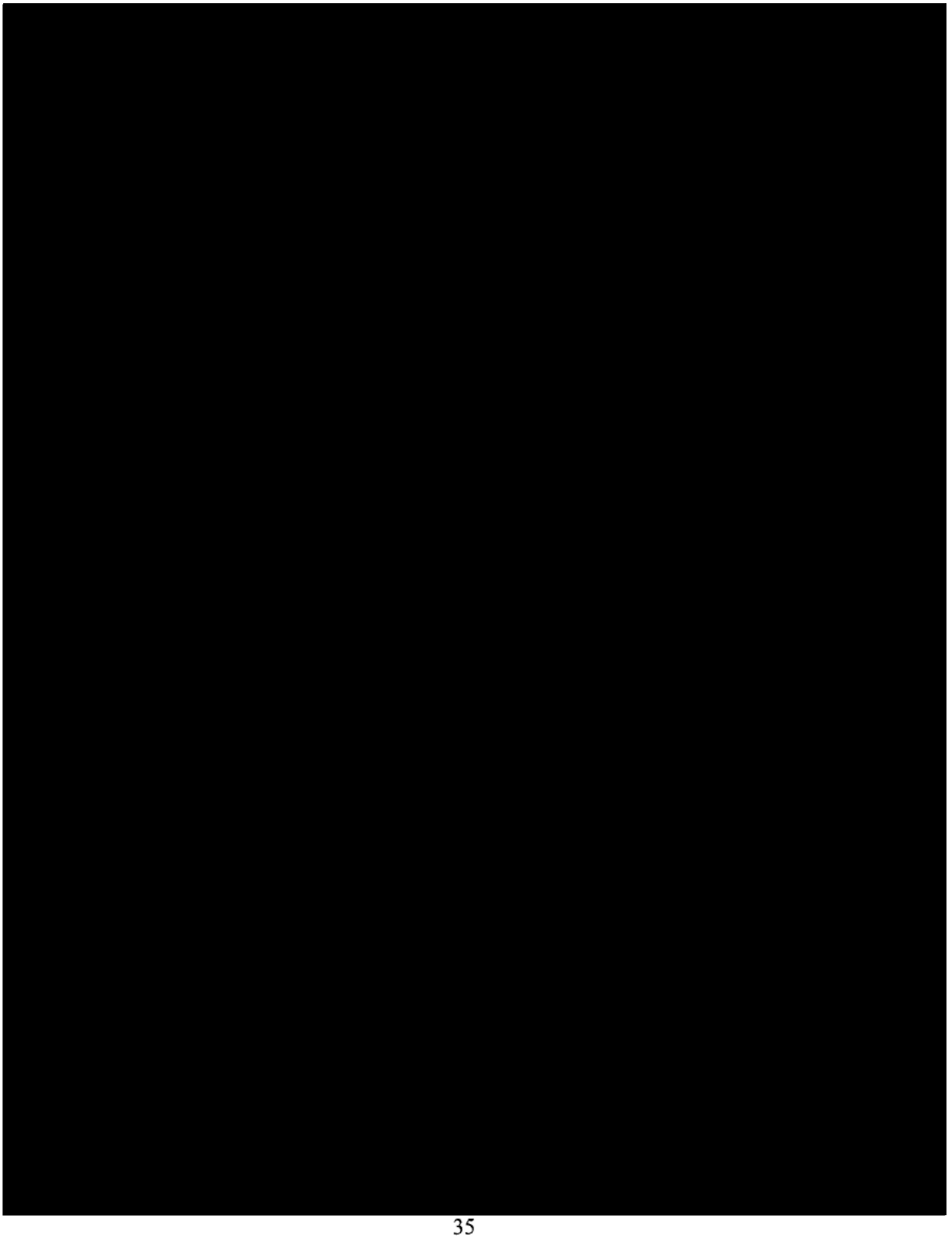


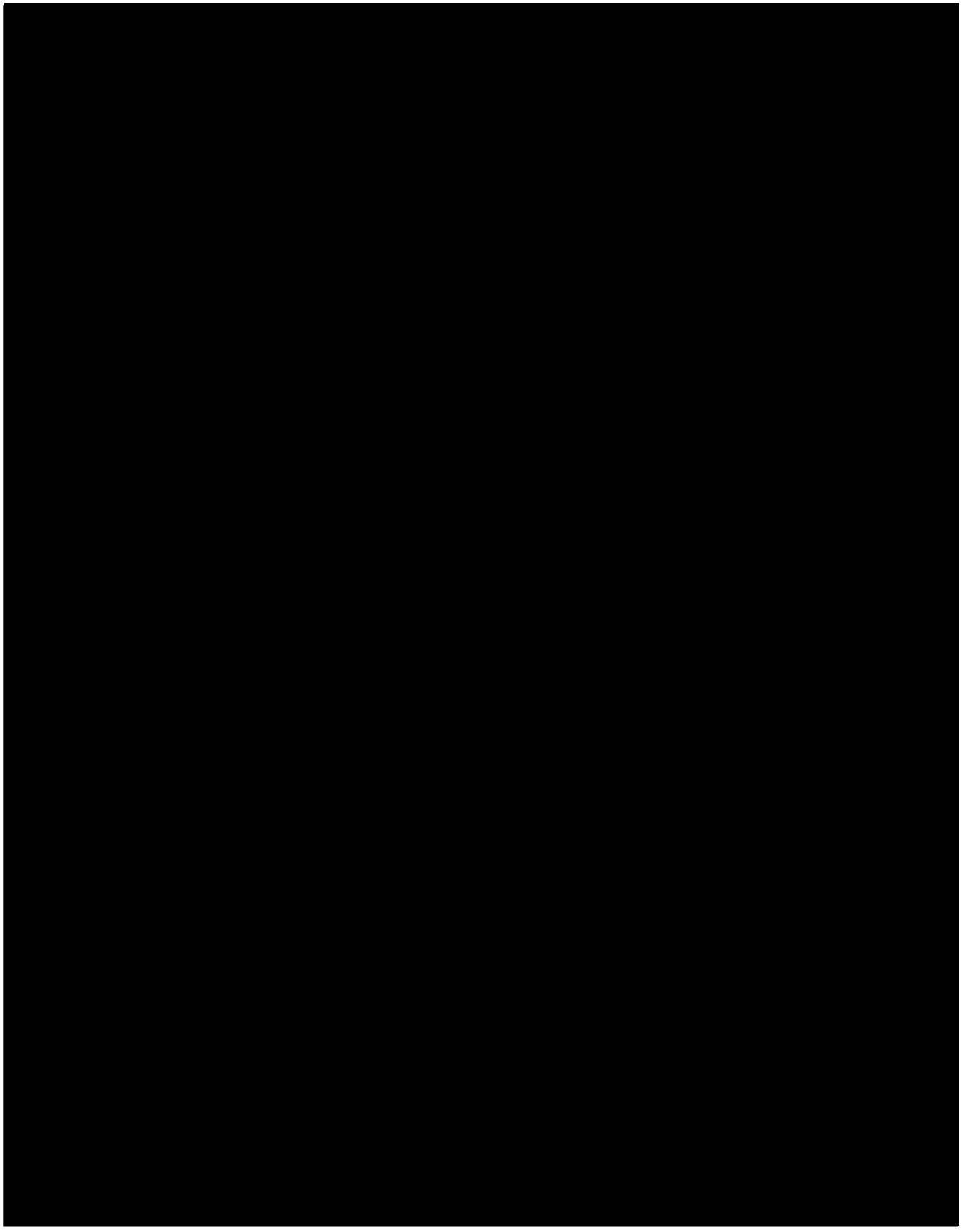


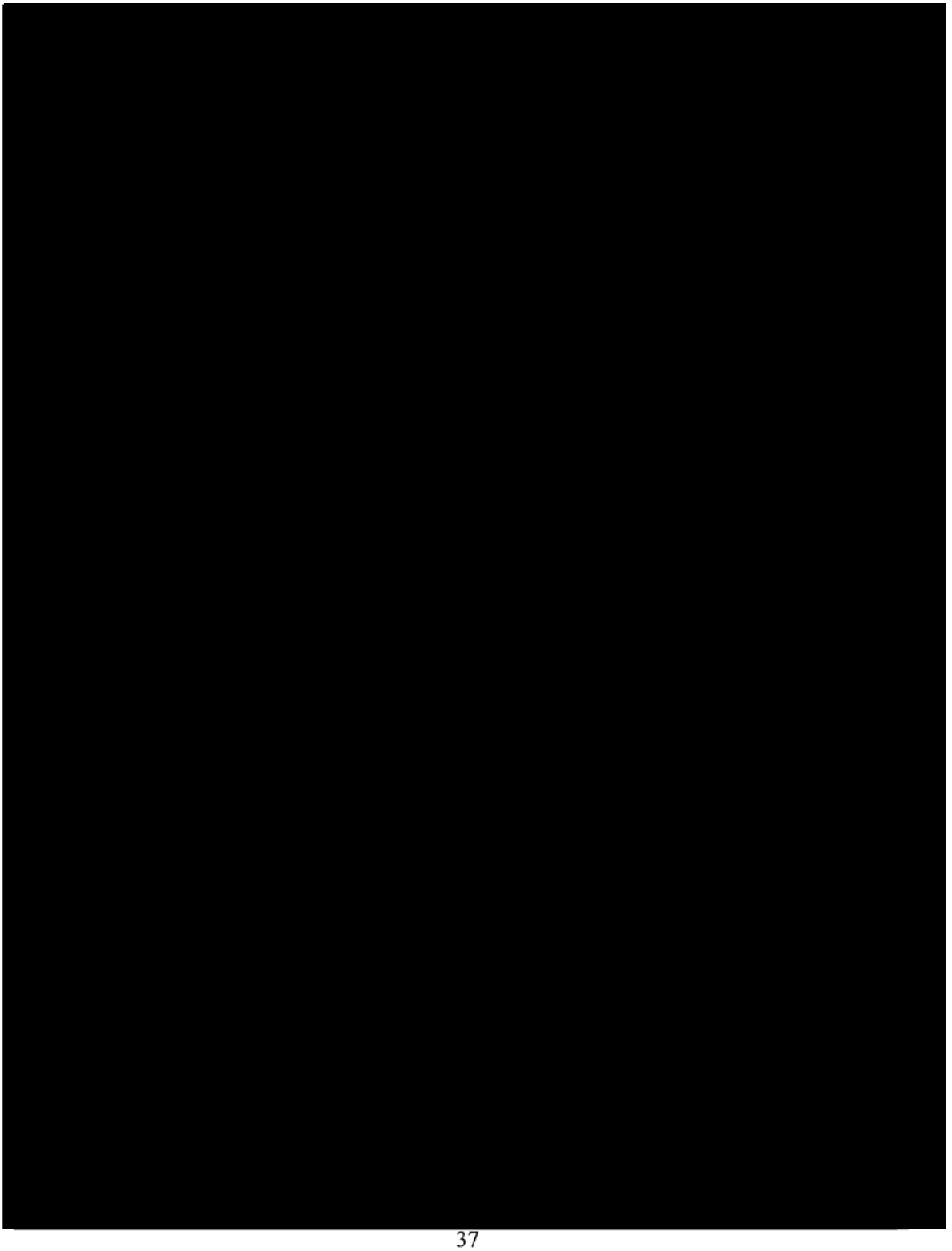


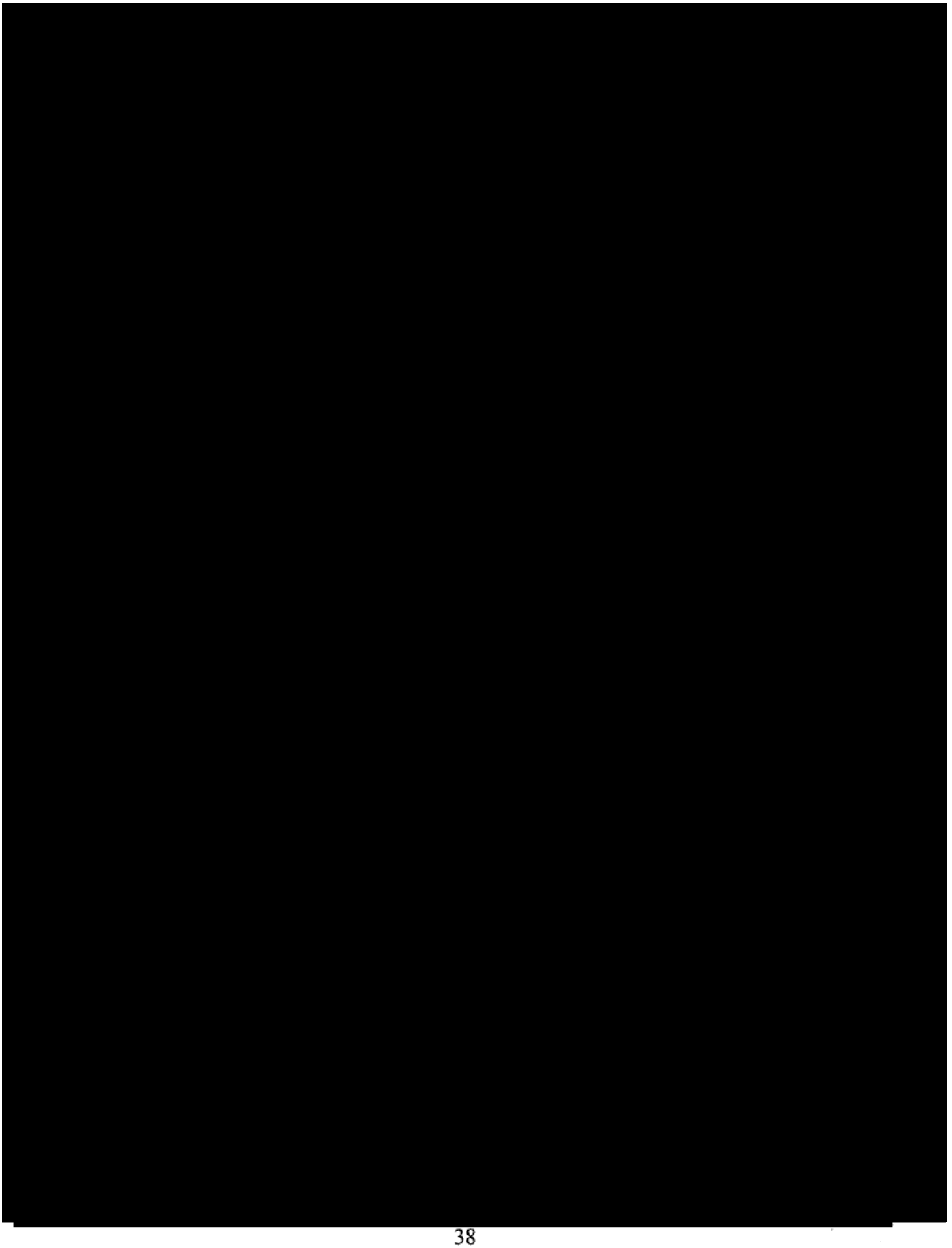


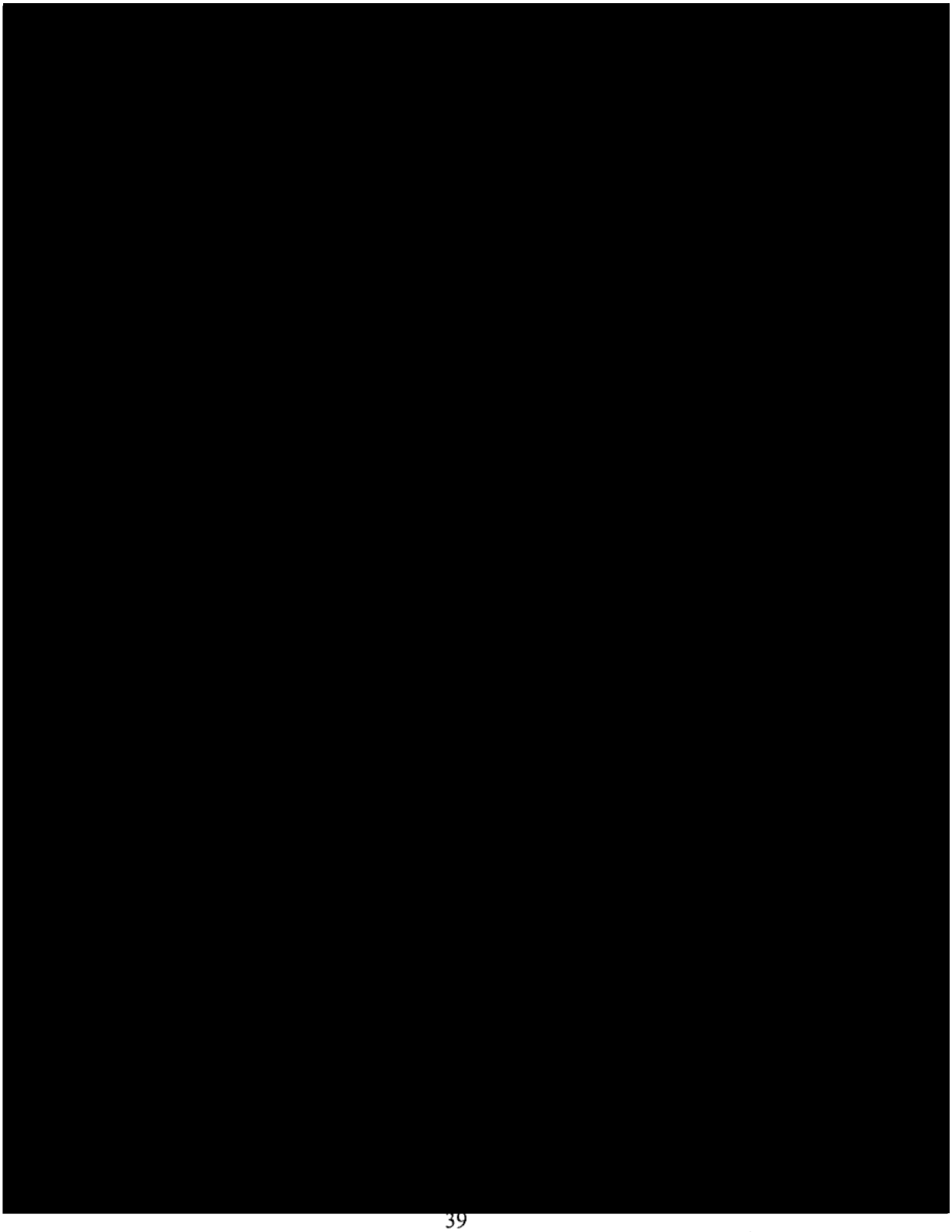


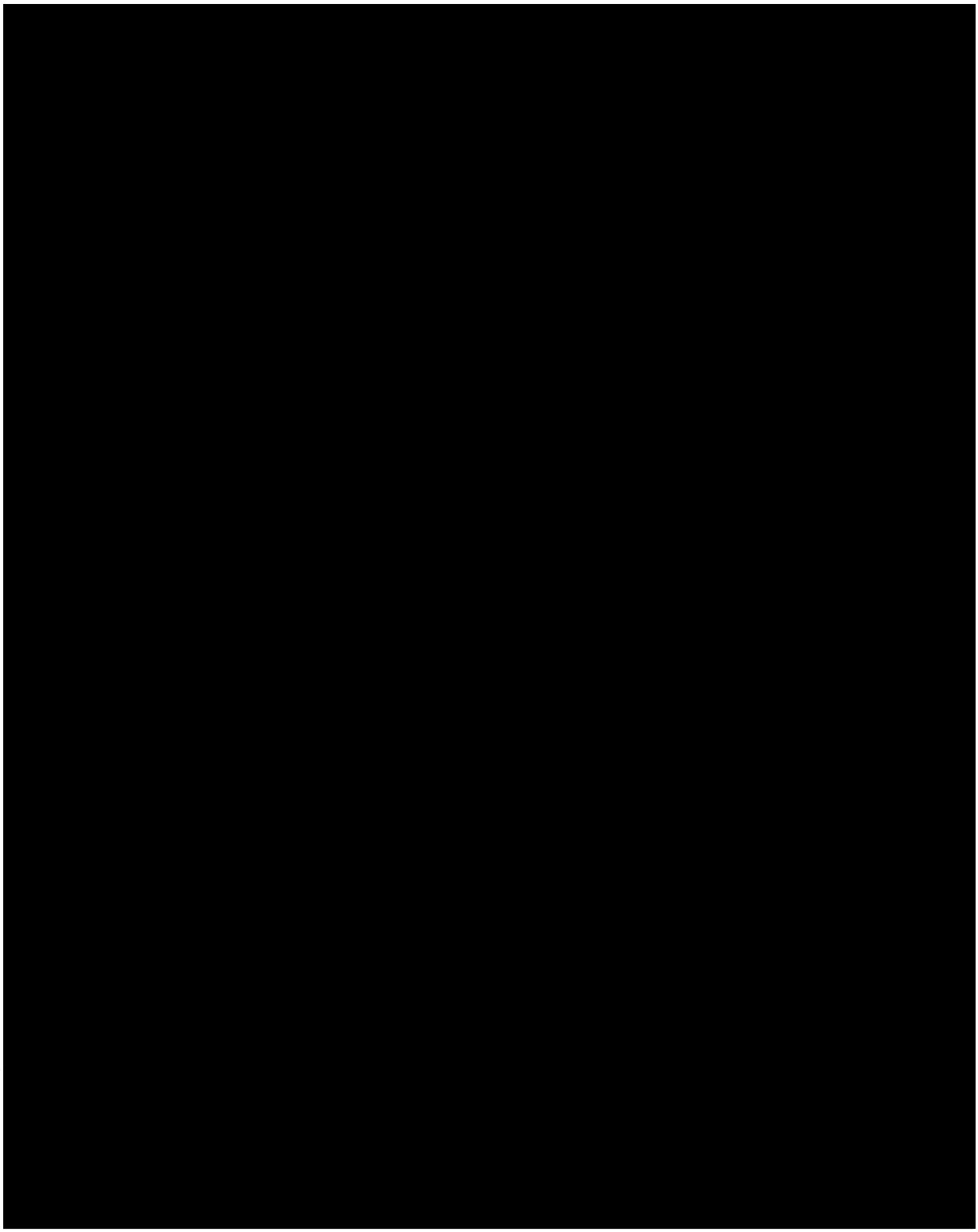


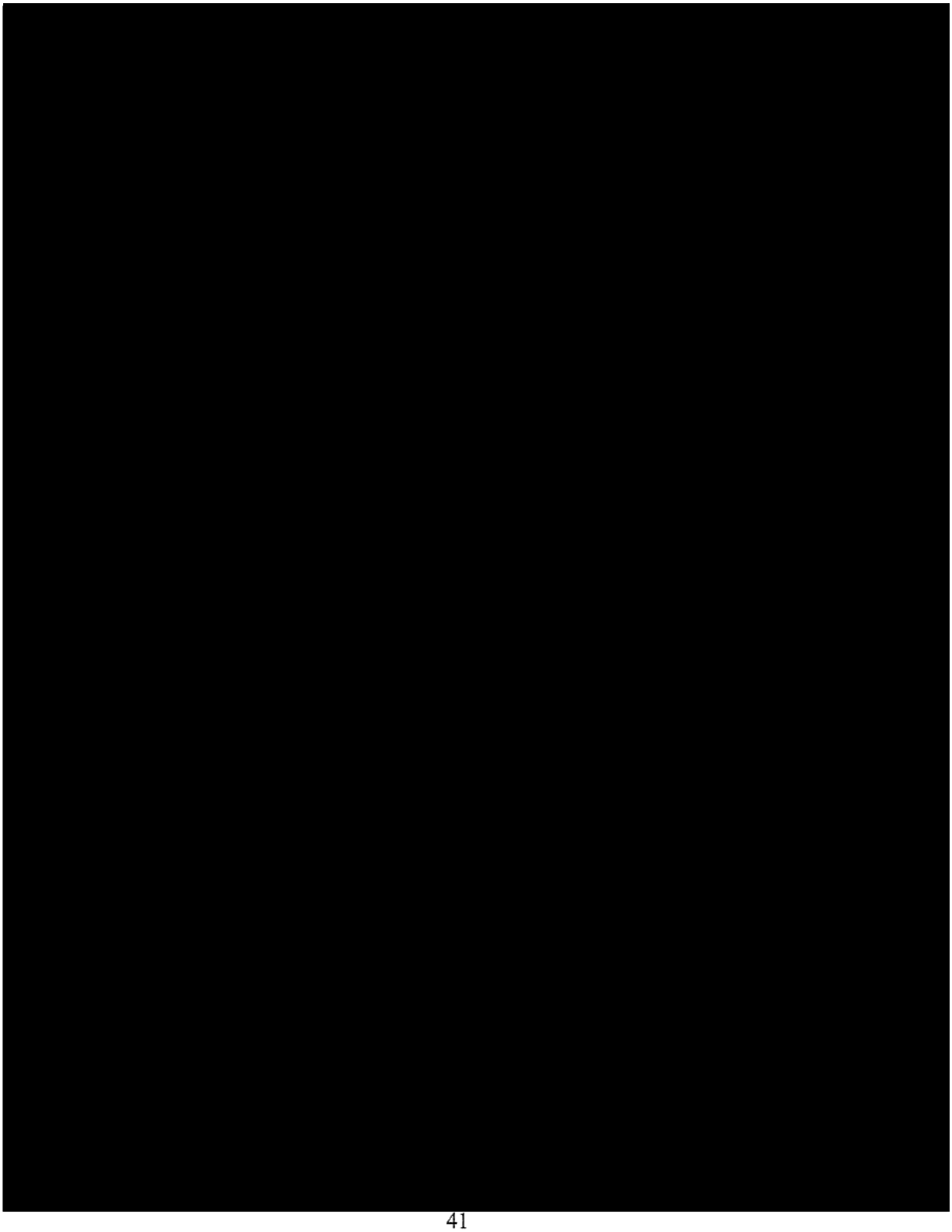


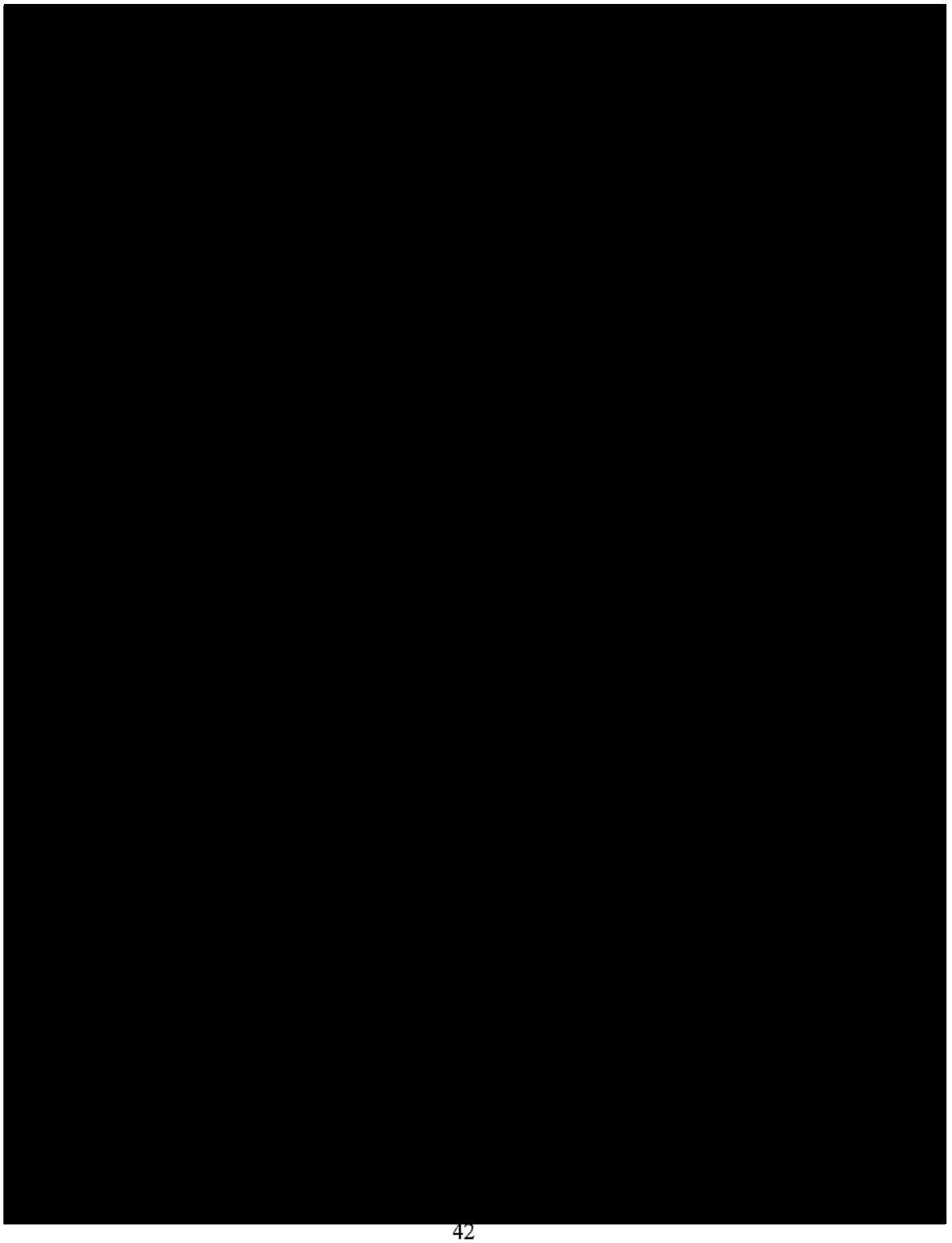


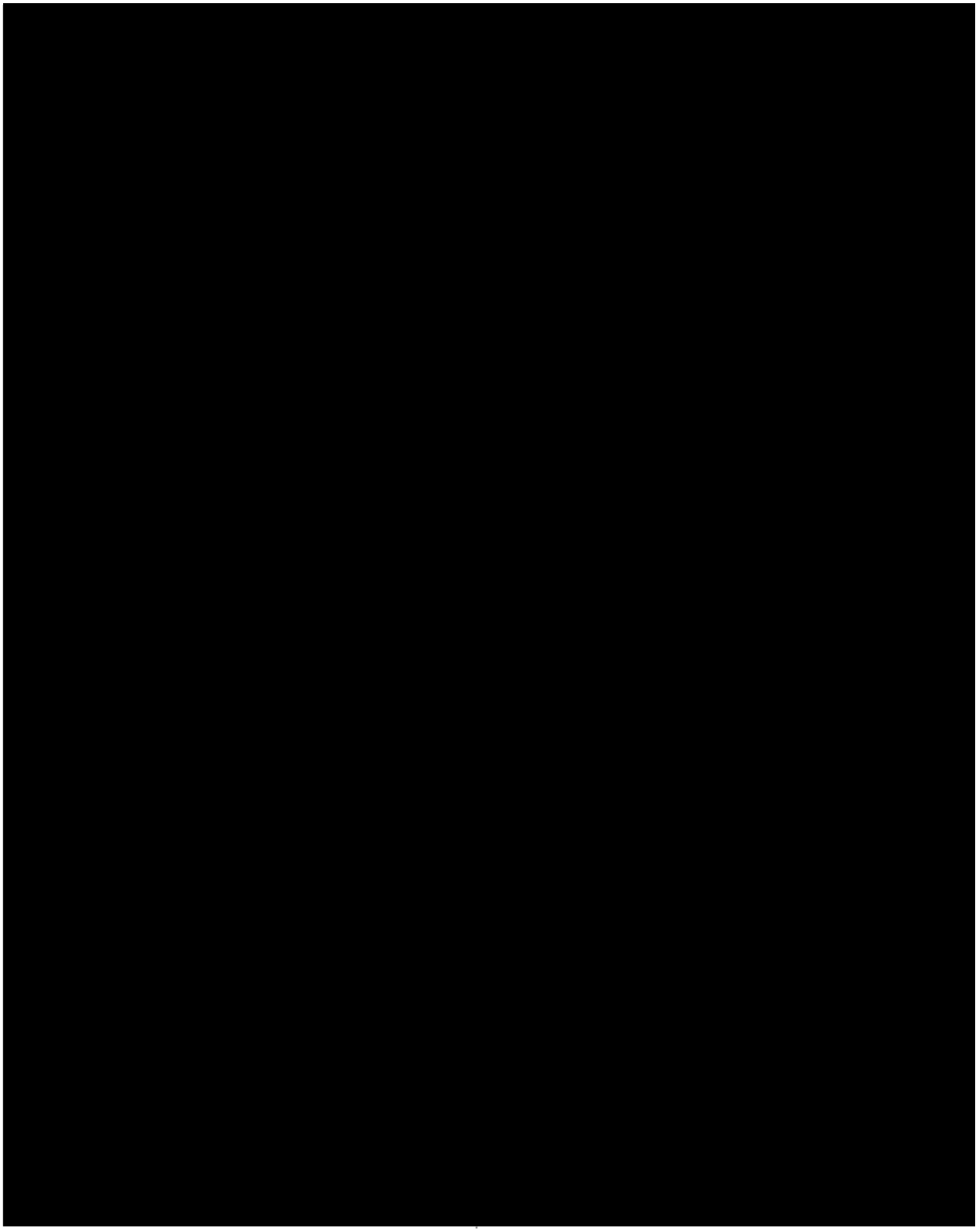












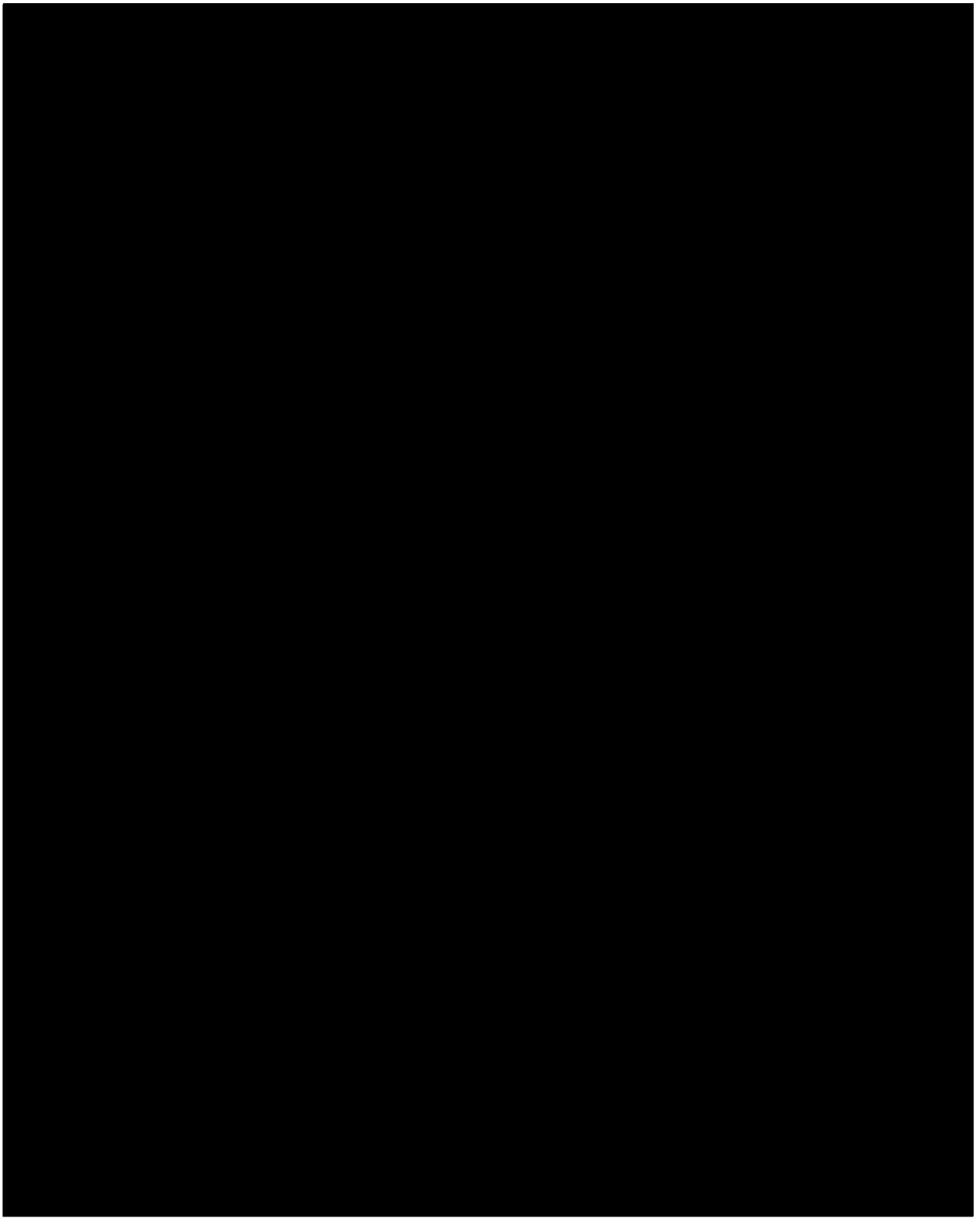
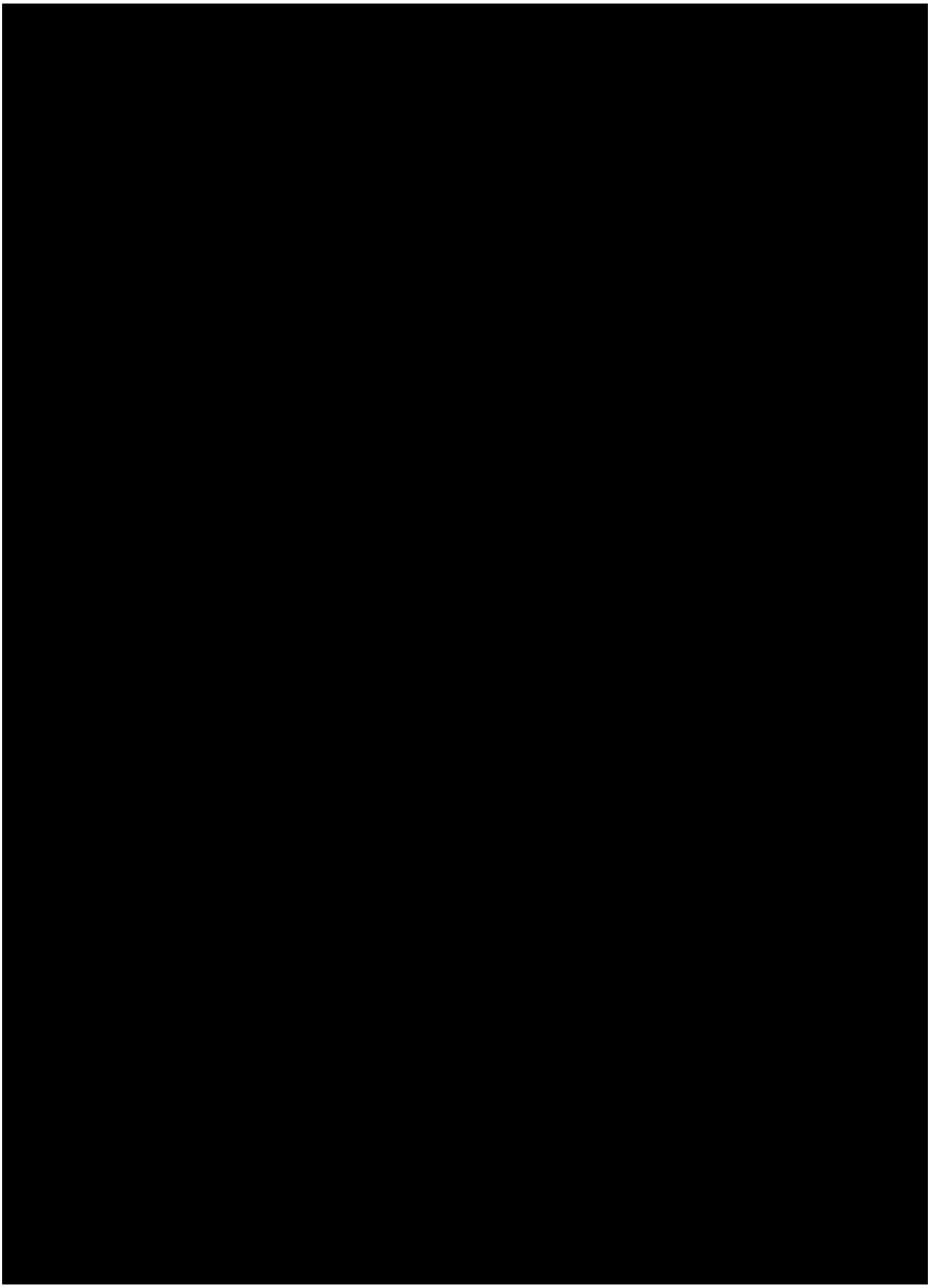
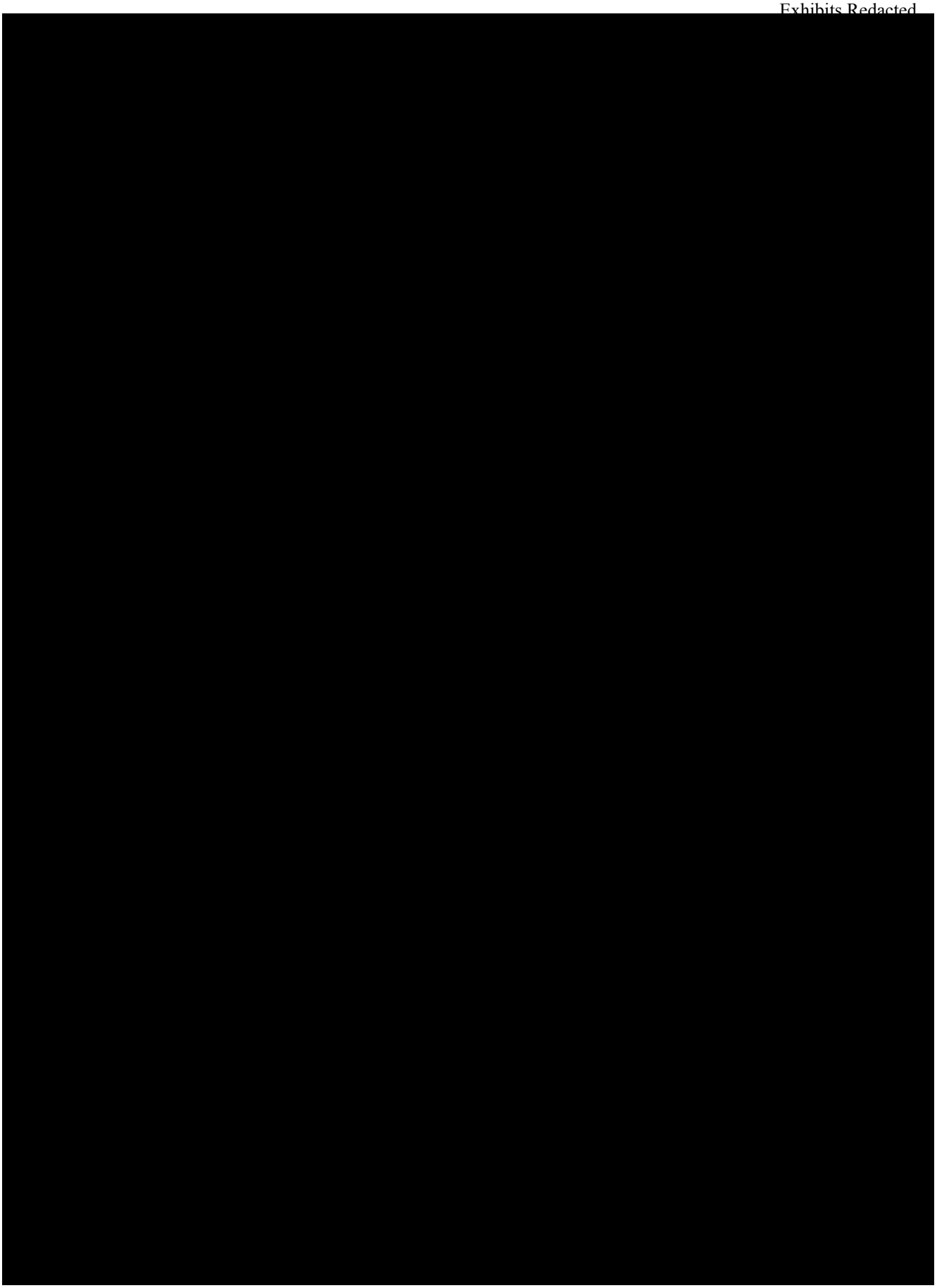
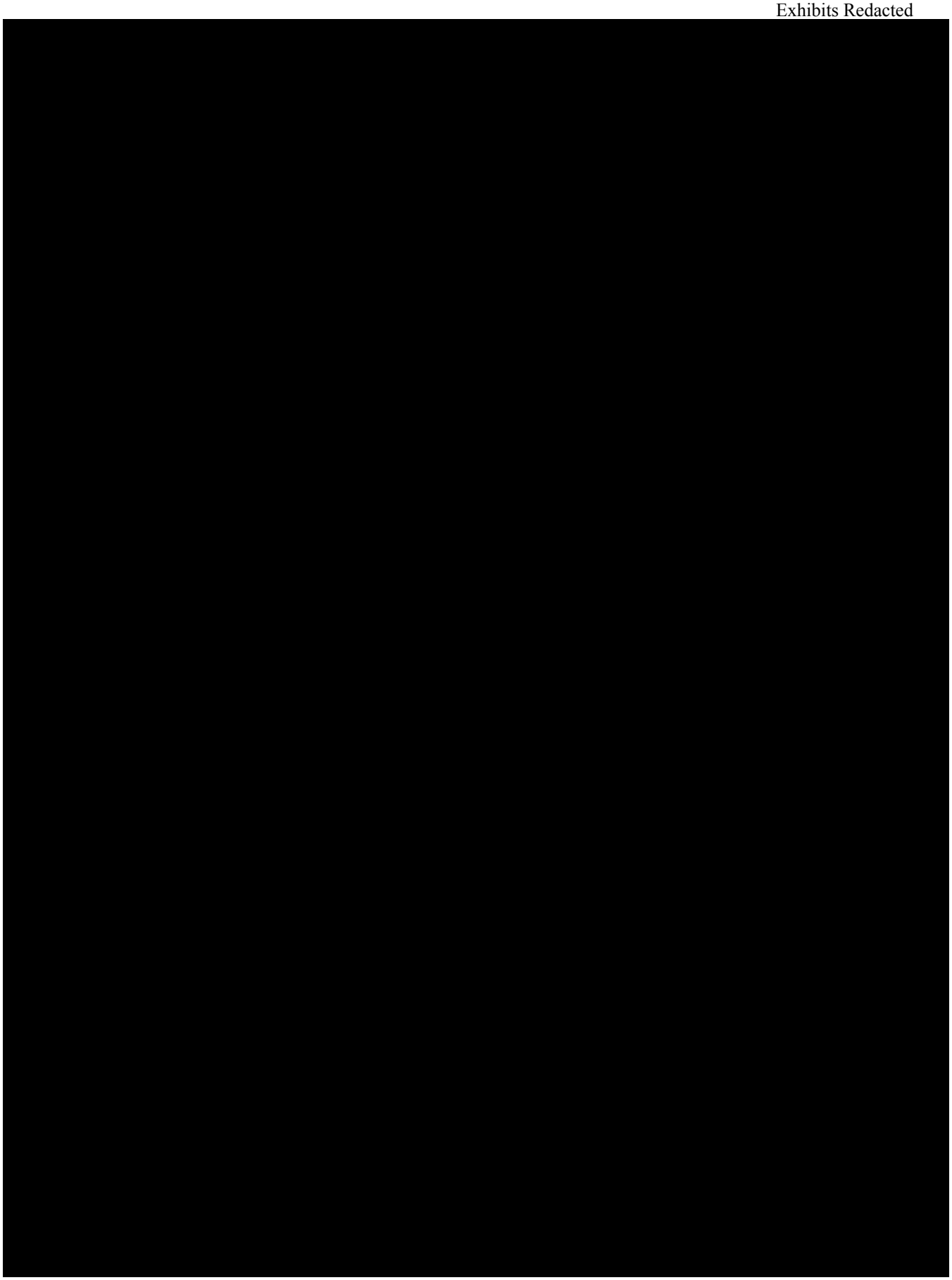
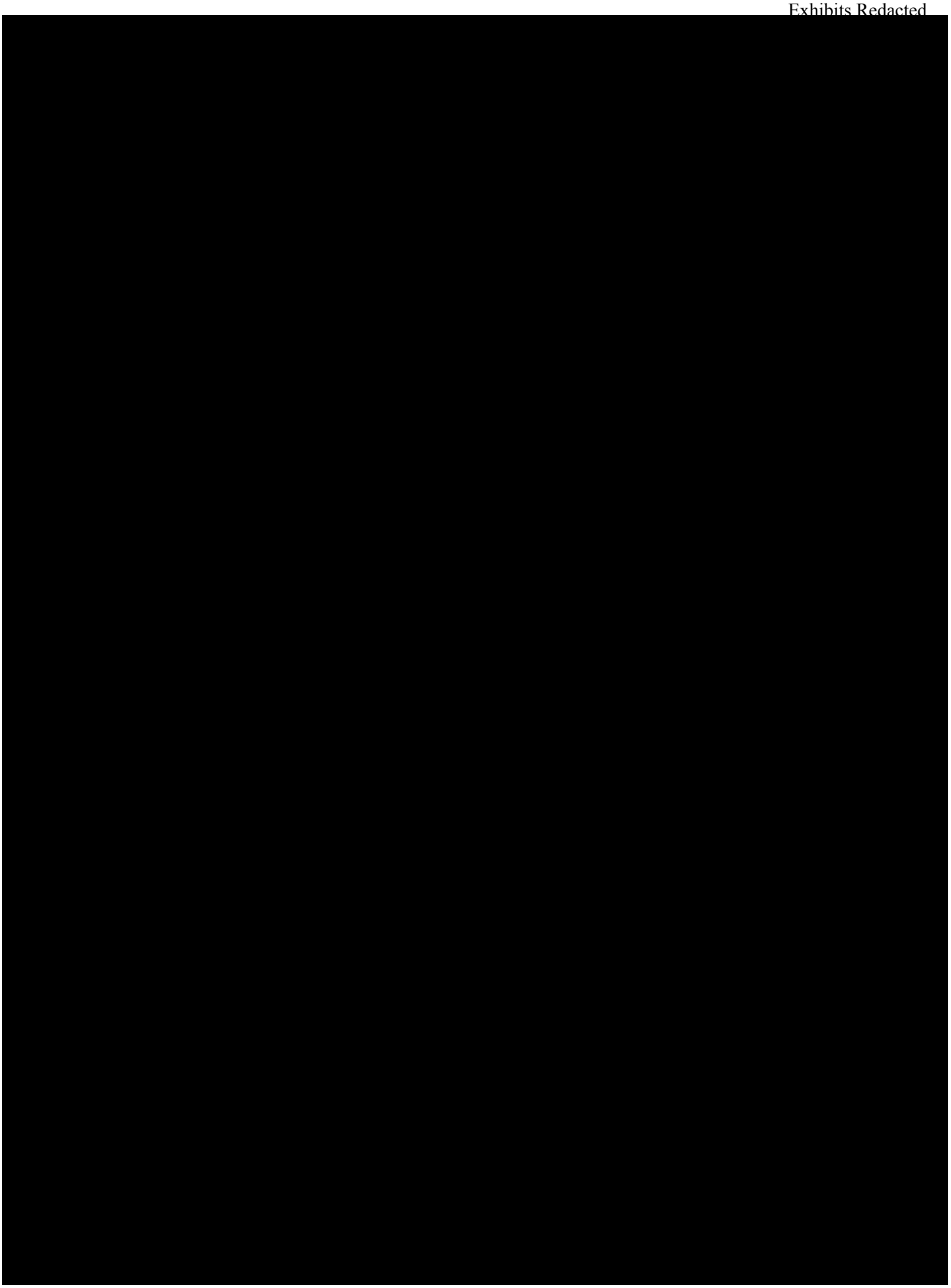


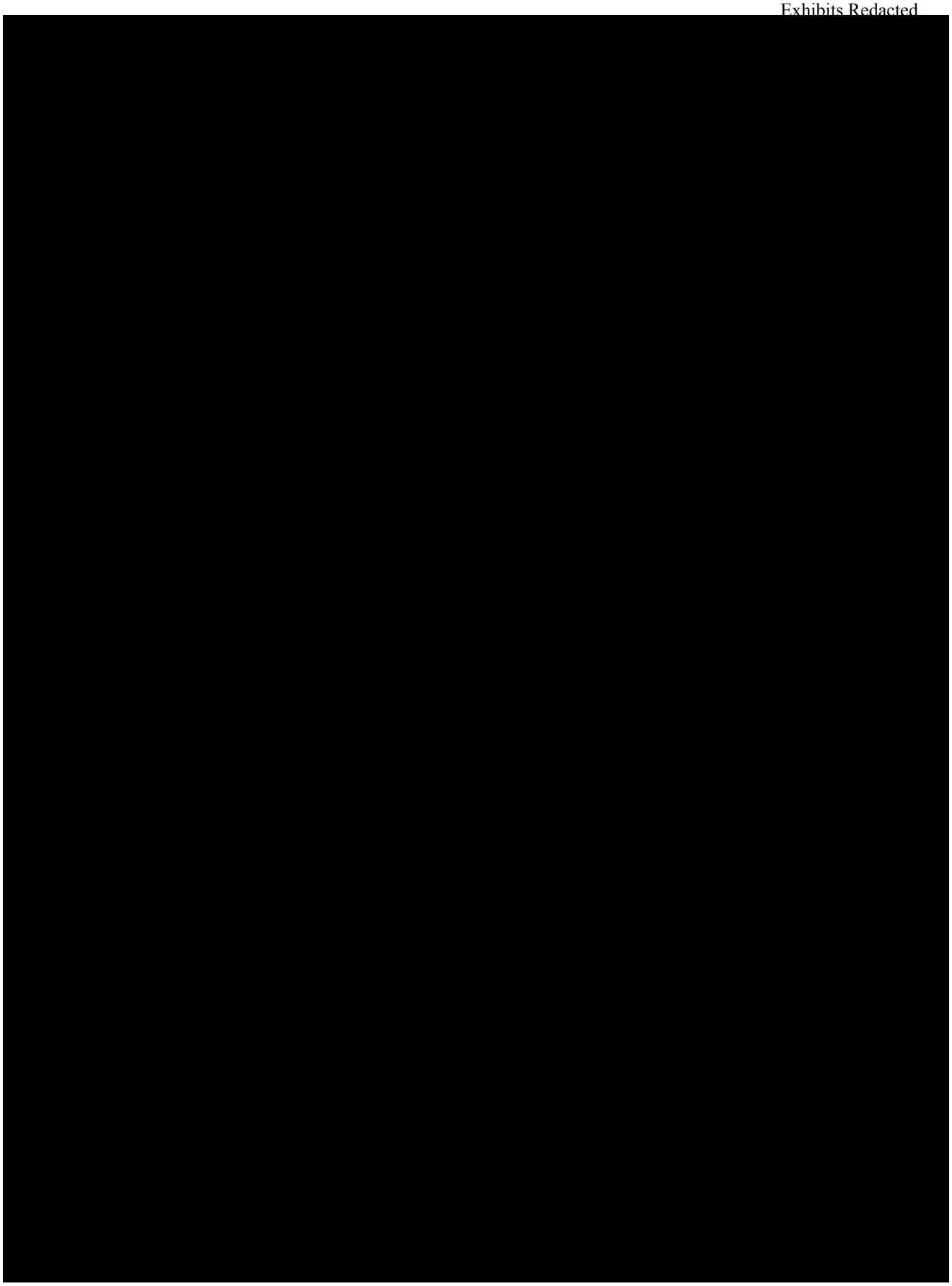
EXHIBIT B











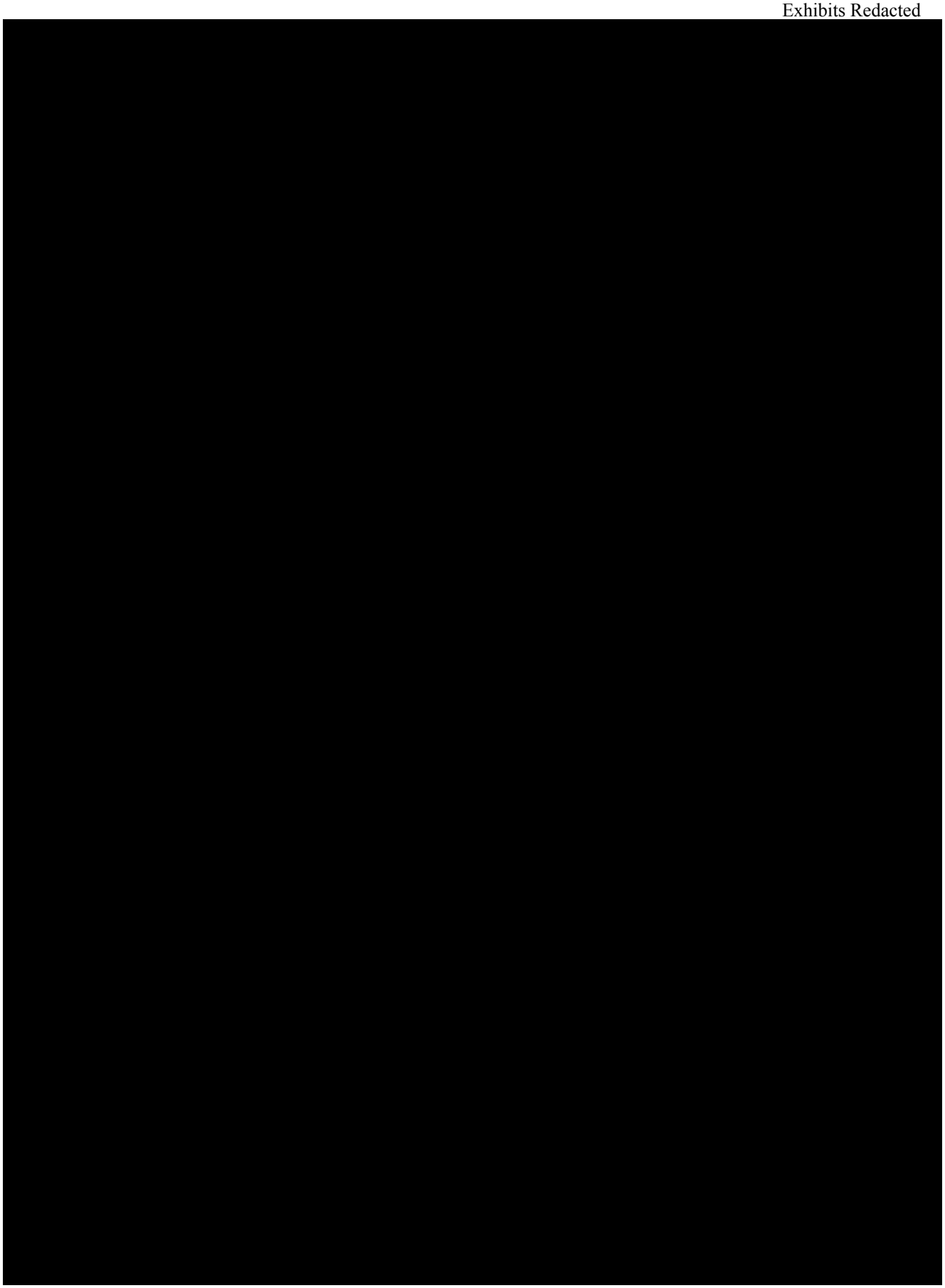


EXHIBIT C

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