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Filing date: **05/05/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061164
Party	Defendant Kleansmart Corporation
Correspondence Address	ALLISON R IMBER ALLEN DYER DOPPELT MILBRATH & GILCHRIST PA 255 SOUTH ORANGE AVENUE, PO BOX 3791 ORLANDO, FL 382802 UNITED STATES aimber@addmg.com, sluther@addmg.com
Submission	Motion to Strike Testimony
Filer's Name	Allison R. Imber, Esq.
Filer's e-mail	aimber@addmg.com
Signature	/Allison R. Imber/
Date	05/05/2016
Attachments	Motion to Strike.pdf(50600 bytes) KLEANSMART exhibits 1.pdf(3764833 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Cleansmart Cleaners, LLC,

Petitioner,

v.

Kleansmart Corporation,

Registrant.

Cancellation No.: 92061164

Registration No. 4,040,999

Mark: **KLEANSMART & Design**

**REGISTRANT’S MOTION TO STRIKE TRIAL TESTIMONY DEPOSITION AND
DOCUMENTS INTRODUCED THEREIN AND FOR DISMISSAL OF THE PETITION
TO CANCEL WITH PREJUDICE**

Registrant Kleansmart Corporation (“Registrant”) hereby moves to strike Petitioner Cleansmart Cleaners, LLC’s (“Petitioner”) trial testimony deposition for failure to disclose the witness and documents introduced therein during the discovery period pursuant to 37 C.F.R. §2.123(e)(3), for judgment under 37 C.F.R. §2.132(a), and to stay these proceedings pending the outcome of this motion pursuant to 37 C.F.R. §2.127(a), and in support thereof states as follows:

I. INTRODUCTION

Petitioner is attempting to prevail in this proceeding through trial by ambush. Petitioner did not comply with *any* of the Board’s Rules requiring voluntary disclosure of its witnesses and documents during the discovery period. Petitioner then unilaterally scheduled its sole trial testimony deposition of Mr. Nhon Ky Nguyen half-way across the country from Registrant on less than two days’ notice, introducing 25 exhibits that had only been sent to Registrant for the first time hours earlier. These tactics are exactly what the Board’s Rules are designed to prevent. Petitioner’s trial testimony deposition of Mr. Nhon Ky Nguyen should be stricken, as well as all

of the documents introduced therein, and the petition to cancel dismissed for Petitioner's failure to prove its case.¹

II. BACKGROUND

The subject Petition to Cancel was filed on March 26, 2015. To this date, Petitioner has not served Registrant with initial disclosures or discovery requests, nor did Petitioner identify any witnesses or documents that it intended to rely on to prove its case during the discovery period (which closed January 27, 2016).² Petitioner first identified Mr. Nguyen, who is purportedly the owner and manager of Petitioner, in its pretrial disclosures, which were served well-after the close of discovery on March 14, 2016. (Exhibit A, Petitioner's Pretrial Disclosures). Petitioner then waited until there was a week remaining in its testimony period to unilaterally set Mr. Nguyen's deposition in *Plano, Texas* on two days' notice, knowing full well that Registrant's counsel was located in Orlando, Florida. (Exhibit B, Petitioner's e-mail transmitting notice of deposition (redacted)).

Registrant promptly objected to the timing of the notice, in addition to the fact that this witness (or any witness for that matter) was not disclosed to Registrant during the discovery period. (Exhibit C, Registrant's e-mail (redacted)). However, Petitioner's counsel refused to provide any other dates during the testimony period, and instead demanded that Registrant agree to an extension of its testimony period otherwise Petitioner would move forward with the deposition as unilaterally scheduled. (Exhibit D, Petitioner's e-mail (redacted))

Because Petitioner refused to provide any other date absent an extension, another attorney at the undersigned's firm who was unfamiliar with the case was forced to appear by

¹ Petitioner did not file any notices of reliance.

² There were some settlement discussions between Registrant and Petitioner but no settlement agreement has been executed or agreed upon.

telephone at Petitioner's deposition under protest to represent Registrant's interests as best he could. Although the deposition was originally noticed for 3:00 p.m. E.D.T.³, the deposition did not begin until after 5:00 p.m. E.D.T., primarily because Petitioner did not finish sending Registrant its exhibits until 4:35 p.m. E.D.T. Notably, Petitioner did not send the 25 previously undisclosed exhibits until hours before the deposition began.⁴ As Petitioner did not serve initial disclosures, none of these documents were even identified to Registrant until after the close of discovery.⁵

III. ARGUMENT

A. The Testimony Should be Struck Because Petitioner Did Not Comply with the Discovery Rules

Each party to an inter partes proceeding must comply with Fed. R. Civ. P. 26(a)(1)(A), which provides, in pertinent part, as follows (emphasis added):

[A] party *must, without awaiting a discovery request*, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; . . .

³The Notice specified a start time of 2:00 p.m., which was presumably C.S.T. because Petitioner is located in Texas. Registrant and its counsel are in E.D.T.

⁴ The first 15 of Petitioner's exhibits were sent at 1:42 E.D.T. (a little over an hour before the deposition was supposed to start), and the remaining ten exhibits were sent at 4:35 E.D.T., less than an hour before the deposition began. (Composite Exhibit E, Petitioner's e-mails transmitting documents).

⁵ Little information was provided in Petitioner's pretrial disclosures, which contained a total of five conclusory sentences.

See also Trademark Rules 2.116(a) and 2.120(a)(2); TBMP §533.02(b). Parties are also required to supplement their respective initial disclosures “in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1)(A); Trademark Rules 2.116(a) and 2.120(a)(1); *see also Great Seats, Inc. v. Great Seats, Ltd.*, 100 USPQ2d 1323, 1326 (TTAB 2011); *Galaxy Metal Gear Inc. v. Direct Access Technology Inc.*, 91 USPQ2d 1859, 1861 (TTAB 2009). Although admittedly a party need not identify in its initial disclosures every witness that may be called at trial as potential “trial witnesses,” there is an obligation to identify individuals who have relevant knowledge of the proceedings. *Great Seats*, 100 USPQ2d at 1326 n.5 (“[i]f the identity of the witness is known when initial disclosures are made, and the relevant knowledge of the witness is known, then a party may have to disclose the identity of the witness when making initial disclosures, even if the party has no plans at that time to rely on testimony from the witness.”).

“Under the estoppel sanction, a party that fails to provide information via disclosure or appropriate response to a discovery request may, upon motion or objection by its adversary, be precluded from using that information or witness at trial, ‘unless the failure was substantially justified or is harmless.’” *Spier Wines (PTY) Ltd. v. Shepherd*, 2012 TTAB LEXIS 218, *10 (TTAB June 12, 2012) (precedential) (citing Fed. R. Civ. P. 37(c)(1); Trademark Rule 2.116(a); *Great Seats*, 100 USPQ2d at 1326-27)). To determine whether the failure to disclose a trial witness in its initial disclosures is substantially justified or harmless, the Board is guided by the following five-factor test:

- 1) the surprise to the party against whom the evidence would be offered;
- 2) the ability of that party to cure the surprise;

- 3) the extent to which allowing the testimony would disrupt the trial;
- 4) importance of the evidence; and
- 5) the non-disclosing party's explanation for its failure to disclose the evidence.

Spier Wines (PTY) Ltd., 2012 TTAB LEXIS 218 at *10 (citing *Great Seats*, 100 USPQ2d at 1327 (internal citations omitted)).

“Additionally, the Board has stated that, unless seasonably remedied, a party's failure to identify a witness in its initial disclosures deprives the adverse party of the opportunity to seek discovery of the identified witness, and this fact ‘must [be] consider[ed] ... as one of the relevant circumstances ... in determining whether to strike [the witness's] testimony deposition.’” *Spier Wines (PTY) Ltd.*, 2012 TTAB LEXIS 218 at *7-9 (citing *Jules Jurgensen/Rhapsody, Inc. v. Baumberger*, 91 USPQ2d 1443, 1444-45 (TTAB 2009) (precedential) (“[i]t is also surprising that Mr. Clayman was not identified in petitioner's initial disclosures, and we must consider this fact as one of the relevant circumstances to be considered in determining whether to strike Mr. Clayman's testimony deposition. That is, petitioner's failure to identify Mr. Clayman in its initial disclosures deprived respondent of the opportunity to seek discovery of Mr. Clayman.”)).

All of the foregoing factors favor Registrant. The first time Registrant heard of Mr. Nguyen and the exhibits used in his deposition was after the close of discovery, resulting in surprise to Registrant. *See Spier Wines (PTY) Ltd.*, 2012 TTAB LEXIS 218 at *19-20 ([i]n view of these particular circumstances, the Board finds that opposer's failure to identify Ms. Jell as a person having discoverable information earlier in these proceedings, as well as opposer's failure to supplement its initial disclosures once Ms. Barrows was no longer employed by opposer or at any time prior to serving its pretrial disclosures, resulted in surprise to applicant. Thus, the first factor applied in *Great Seats* strongly favors applicant. Further, the surprise to applicant was prejudicial, not harmless, because applicant was deprived of the opportunity to seek discovery of opposer's only subsequently-identified testimonial witness.”) (citing *Jules*

Jurgensen, 91 USPQ2d at 1444-45). This surprise was greatly prejudicial, as Registrant was unable to cure it because discovery had already closed at the time of the disclosure. *Spier Wines (PTY) Ltd.*, 2012 TTAB LEXIS 218 at *25 (“[w]ith respect to whether applicant can cure the surprise resulting from the identification of the witness, applicant’s ability to mitigate the missed opportunity to depose Ms. Jell during discovery is significantly diminished by the fact that the discovery period closed over one year ago and by limitations of the noticed testimonial deposition upon written questions. . . . Consequently, the Board finds that applicant has little, if any, ability to cure opposer’s failure to provide adequate notice of Ms. Jell as a person who is knowledgeable about the relevant issues to applicant. Therefore, the second factor discussed in *Great Seats* favors applicant.”) (citations omitted). Registrant was not afforded the opportunity to depose or request any information from Mr. Nguyen, nor to test the authenticity of any of the exhibits produced through discovery requests. Registrant was also not able to attend the deposition in person because of the short notice, and an attorney unfamiliar with the case was forced to appear on Registrant’s behalf. Because of these shortcomings, Registrant was unable to conduct a substantive cross-examination of Mr. Nguyen, and its ability to defend against the evidence and testimony presented was severely hampered.

Allowing Mr. Nguyen’s testimony would disrupt these proceedings significantly. If the testimony is allowed, the discovery period should be re-opened to allow Registrant to request discovery about Mr. Nguyen and then schedule and conduct a discovery deposition of him. *Spier Wines (PTY) Ltd.*, 2012 TTAB LEXIS 218 at *26 (“[r]egarding the extent to which allowing Ms. Jell’s testimony would disrupt the trial, reopening the discovery period to allow applicant to schedule and then conduct a discovery deposition upon written questions of Ms. Jell

would significantly disrupt these proceedings.”). This would reward Petitioner’s dilatory tactics at great expense to Registrant.

There is no reasonable explanation for Petitioner’s failure to identify Mr. Nguyen sooner, as Mr. Nguyen is allegedly the owner and manager of Petitioner and therefore presumably has been known by Petitioner since the inception of these proceedings. This is not a case where one witness becomes unavailable and another is substituted – this was a witness who has undoubtedly been known to Petitioner from the beginning. There is no excuse for Petitioner’s failure to identify him until after close of discovery.⁶ *Spier Wines (PTY) Ltd.*, 2012 TTAB LEXIS 218 at *27 (“given that Ms. Jell is now identified as opposer’s sole witness for trial, and thus evidently is thought by opposer to have not just discoverable information, but information that would aid opposer in carrying its burden of proof as plaintiff, the Board finds that opposer should have identified Ms. Jell as a person ‘likely to have discoverable information that the disclosing party may use to support its claims or defenses,’ earlier in this proceeding, well before the close of the discovery period.”) (citing *Byer California v. Clothing for Modern Times Ltd.*, 95 USPQ2d 1175, 1178 (TTAB 2010) (“[i]t would be curious for a trial witness not to have discoverable information”)).

In view of the foregoing, Mr. Nguyen’s testimony – and all exhibits introduced therein – should be struck. Petitioner’s identification of Mr. Nguyen in its pretrial disclosures does not require a different result. *Spier Wines (PTY) Ltd.*, 2012 TTAB LEXIS 218 at *27-28

⁶ Registrant is not required to have attempted to force Petitioner to comply with the voluntary disclosure rules – it was Petitioner’s duty to do so. See *Jules Jurgensen*, 91 USPQ2d at 1445 (“Petitioner’s arguments as to why Mr. Clayman’s testimony should now be considered are not persuasive. Petitioner failed to comply with the rules or to provide a satisfactory explanation as to why it did not comply with them. Petitioner’s contention that any prejudice to respondent was due to respondent’s own inaction, in that respondent failed to depose Mr. Clayman during discovery, and is not due to any action by petitioner, is not well-taken.”).

("[b]alancing all the foregoing facts and concerns, the Board concludes that opposer failed to timely identify Ms. Jell as a person knowledgeable about the issues involved in these proceedings, and that such failure was neither harmless nor substantially justified. Essentially, opposer treated the initial and pretrial disclosure requirements as unrelated events, rather than recognizing that disclosures and discovery responses should be viewed as a continuum of inter partes communication designed to avoid unfair surprise and to facilitate fair adjudication of the case on the merits. For all of these reasons, it is appropriate to apply the estoppel sanction and preclude the testimony of opposer's witness.").

B. The Testimony Should be Struck Because Petitioner Did Not Provide Reasonable Notice for the Deposition

Trademark Rule 2.123(e)(3) states as follows (emphasis added):

Every adverse party shall have *full opportunity* to cross-examine each witness. If pretrial disclosures or *the notice of examination of witnesses* served pursuant to paragraph (c) of this section are improper or inadequate with respect to any witness, an adverse party may cross-examine that witness under protest while reserving the right to object to the receipt of the testimony in evidence. Promptly after the testimony is completed, the adverse party, to preserve the objection, shall move to strike the testimony from the record, which motion will be decided on the basis of all the relevant circumstances. A motion to strike the testimony of a witness for lack of proper or adequate pretrial disclosure may seek exclusion of the entire testimony, when there was no pretrial disclosure, or may seek exclusion of that portion of the testimony that was not adequately disclosed in accordance with § 2.121(e). A motion to strike the testimony of a witness for lack of proper or adequate notice of examination must request the exclusion of the entire testimony of that witness and not only a part of that testimony.

Similarly, Fed. R. Civ. P. 30(b)(1) states in relevant part that a "party who wants to depose a person by oral questions must give reasonable written notice to every other party." *See also* Trademark Rule 2.123(c); TBMP §703.01(d) and (e). "The Board's standard practice is to apply Rule 30(b)(1) together with Trademark Rule 2.123(c) in determining the reasonableness of notice in the case of testimony depositions" *Gaudreau v. Am. Promotional Events, Inc.*, 2007 TTAB LEXIS 24, *12 (TTAB Feb. 15, 2007) (precedential). If the notice is unreasonable,

then the testimony may be stricken. *Id.* at *16 (“[i]n view of the unreasonable notice of Mr. Gaudreau’s testimony deposition and opposers’ efforts to deny applicant a full opportunity to cross-examine Mr. Gaudreau during opposers’ testimony period-in-chief, we find that the appropriate remedy, under the circumstances herein, is to strike the transcript of Mr. Gaudreau’s testimony deposition and all exhibits thereto”).

“Whether notice is reasonable depends upon the individual circumstances of each case.” *Id.* at *12 (citing *Duke University v. Haggard Clothing Co.*, 54 USPQ2d 1443 (TTAB 2000) (two days’ notice unreasonable); *Elect. Indus. Ass’n v. Potega*, 50 USPQ2d 1775 (TTAB 1999) (precedential) (two days’ notice unreasonable); and *Jean Patou Inc. v. Theon Inc.*, 1990 TTAB LEXIS 64 (TTAB 1990) (twenty-four hours’ notice insufficient)). However, it is well-established that two days’ notice is not sufficient unless there is a compelling need presented *other than* the close of the testimony period. *See Gaudreau*, 2007 TTAB LEXIS 24 at *12-13 (“[t]he record herein indicates that opposers did not attempt to notify applicant that they wished to take Mr. Gaudreau’s testimony deposition until two days prior to the close of opposers’ testimony period. . . . We find that such notice was unreasonable. Given the more than adequate thirty-day period allowed for trial for each party in inter partes proceedings before the Board, there must be a compelling need to take testimony depositions on such short notice. . . . The mere fact that opposers’ testimony period was about to close does not constitute such a compelling need.”) (citations omitted); *Duke University v. Haggard Clothing Co.*, 54 USPQ2d 1443, 1444-45 (TTAB 2000) (“[g]iven the more than adequate thirty-day period allowed for trial for each party in inter partes proceedings before the Board, there must be a compelling need to require adverse counsel to prepare with such haste at the close of a party’s testimony period. There has been no showing made of any special need for the taking of the depositions in such haste, other than that

the testimony period was to close. Under the circumstances, the notices were not reasonable.”) (citation omitted); *Jean Patou Inc. v. Theon Inc.*, 1990 TTAB LEXIS 64, *6 (TTAB Dec. 14, 1990) (“[g]iven the more than adequate thirty-day period allowed for trial for each party in inter partes proceedings before the Board, there must be a compelling need to require adverse counsel to prepare with such haste. Opposer’s attorney’s failure to schedule the testimonial deposition of his client until less than two days prior to the close of his client's testimony period because of his attention to the logistical problems associated with his own move falls far short of the type of showing that would be needed to justify such haste.”).

There was no “compelling need” for the lack of notice except for Petitioner’s own delay in scheduling its trial testimony deposition. If Petitioner had timely contacted Registrant to schedule the deposition, Registrant would not have had any difficulty accommodating Petitioner. However, providing less than two days’ notice for a deposition half-way across the country and refusing to provide any additional dates unless Registrant agreed to an extension of time is unreasonable and does not constitute a “compelling need.” Petitioner had weeks to schedule the deposition at a mutually acceptable time and chose not to, instead waiting until the last minute to Registrant’s detriment. Registrant should not be penalized for Petitioner’s lack of planning. Accordingly, Registrant respectfully requests that Mr. Nguyen’s testimony – and all exhibits thereto – be struck from the record.

C. The Petition to Cancel Should Be Dismissed for Petitioner’s Failure to Prove Case

Pursuant to 37 C.F.R. §2.132(a), “[i]f the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff

to prosecute.” See also TBMP §534.02; *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710, 1712-13 (Fed. Cir. 1991) (Board did not abuse discretion in denying motion to reopen testimony and dismissing proceeding on motion to dismiss where plaintiff submitted no evidence and failed to make a prima facie case and stating “[w]hile it is true that the law favors judgments on the merits wherever possible, it is also true that the Patent and Trademark Office is justified in enforcing its procedural deadlines”); *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1862 (TTAB 2002) (Board is justified in enforcing procedural deadlines); *Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc.*, 61 USPQ2d 1542, 1544 (TTAB 2001) (motion to extend testimony period denied; motion to dismiss granted); *SFW Licensing Corp. and Shoppers Food Warehouse Corp. v. Di Pardo Packing Ltd.*, 60 USPQ2d 1372, 1374 (TTAB 2001) (same). Presuming Mr. Nguyen’s testimony and documents introduced therein are struck, Petitioner has no evidence with which to prove its case. Therefore, the petition to cancel should be dismissed with prejudice.

For the foregoing reasons, Registrant respectfully requests the Board strike Mr. Nguyen’s testimony and all documents introduced therein, and dismiss the petition to cancel with prejudice and enter final judgment against Petitioner pursuant to 37 C.F.R. §2.132(a) and TBMP §534.02. Because this motion is potentially dispositive, Registrant respectfully requests the proceedings be stayed pending the outcome pursuant to 37 C.F.R. §2.127(a).

Dated: May 5, 2016

Respectfully submitted,

/Allison R. Imber/

Allison R. Imber, Esq.
Stephen H. Luther, Esq.
Allen, Dyer, Doppelt, Milbrath
& Gilchrist, P.A.
255 South Orange Avenue
Post Office Box 3791
Orlando, FL 32802

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sluther@addmg.com

Attorneys for Registrant

Certificate of Service

The undersigned hereby certifies that on this 5th day of May, 2016, a copy of the foregoing was served via first class mail, postage prepaid, and e-mail on the following:

John M. Cone, Esq.
Ferguson, Braswell & Fraser, PC
2500 Dallas Parkway, Suite 501
Plano, Texas 75093
jcone@dallasbusinesslaw.com

/Christine Jensen/
Christine Jensen

Exhibit A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 4,040,999 KLEANSMART and Design

<u>CLEANSMART CLEANERS, LLC,</u>	§	
Petitioner,	§	
v.	§	Cancellation No. 92061164
<u>KLEANSMART CORPORATION,</u>	§	
Registrant.	§	

PETITIONER'S PRE-TRIAL DISCLOSURES UNDER RULE 2.121(e)

CLEANSMART CLEANERS, LLC ("CCL"), Petitioner serves these its Pre-Trial Disclosures in this proceeding.

Nhon Ky ("John") Nguyen, c/o John M. Cone

Mr. Nguyen, Owner and Manager of Petitioner, is expected to testify as to the use by Petitioner of the mark CLEANSMART CLEANERS, the date Petitioner started to use the mark and that use of the mark has been continuous since that time.

Mr. Nguyen is expected to testify as to the nature and extent of Petitioner's use of the mark CLEANSMART since the date of first use.

Mr. Nguyen is expected to testify as to the likelihood of confusion between use of the registered mark CLEANSMART for the services of Registration No. 4,040,999 and the use of CLEANSMART by Petitioner for its services

Mr. Nguyen is expected to testify that Petitioner filed trademark application No. 86/314,678 CLEANSMART and that in an office action of September 27, 2014, the Trademark Examining Attorney has refused the application on the basis of Section 2(d), citing Registration No. 4,040,999.

Mr. Nguyen will refer to and rely on documents evidencing Petitioner's use of the trademark CLEANSMART, the nature of the services provided under that mark and the filing and refusal of trademark application No. 86/314,678 CLEANSMART.

Dated: March 14, 2016

Respectfully submitted,

/s/ John M. Cone
John M. Cone
Ferguson, Braswell & Fraser, PC
2500 Dallas Parkway, Suite 501
Plano, Texas 75093
(972) 378-9111
(972) 378-9115 Fax
jccone@dallasbusinesslaw.com

ATTORNEY FOR PETITIONER
CLEANSMART CLEANERS, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March 2016, a true and correct copy of the foregoing document was served via U.S. First Class Mail, postage prepaid on Registrant's attorney of record at:

Allison R Imber
Allen Dyer Doppelt Milbrath & Gilchrist PA
255 South Orange Avenue, PO Box 3791
Orlando, FL 382802

/s/ John M. Cone

Exhibit B

Allison Imber

From: John Cone <jcone@dallasbusinesslaw.com>
Sent: Tuesday, April 19, 2016 3:42 PM
To: Allison Imber
Cc: Stephen Luther
Subject: RE: Cancellation No. 92061164 for the Trademark KLEANSMART & Design - Privileged Settlement Offer (Your File No. 0124134) Our File 5006.38544 (CSCL)
Attachments: 160419 Notice of Testimony Deposition.pdf

Dear Allison:

As I have not heard from you, I am proceeding with a testimony deposition of my client.

A copy of the Notice is attached.

My client is travelling from Austin to attend the deposition so please let me know immediately if you would like me to re-schedule.

If we do, it will have to be based on an extension of the testimony period because I am out of town April 23 through 27.

Regards,
John

JOHN M. CONE

Attorney

John M. Cone PC

FERGUSON, BRASWELL & FRASER, PC

2500 DALLAS PARKWAY, SUITE 501 | PLANO, TEXAS 75093

DIRECT (972) 826-4436

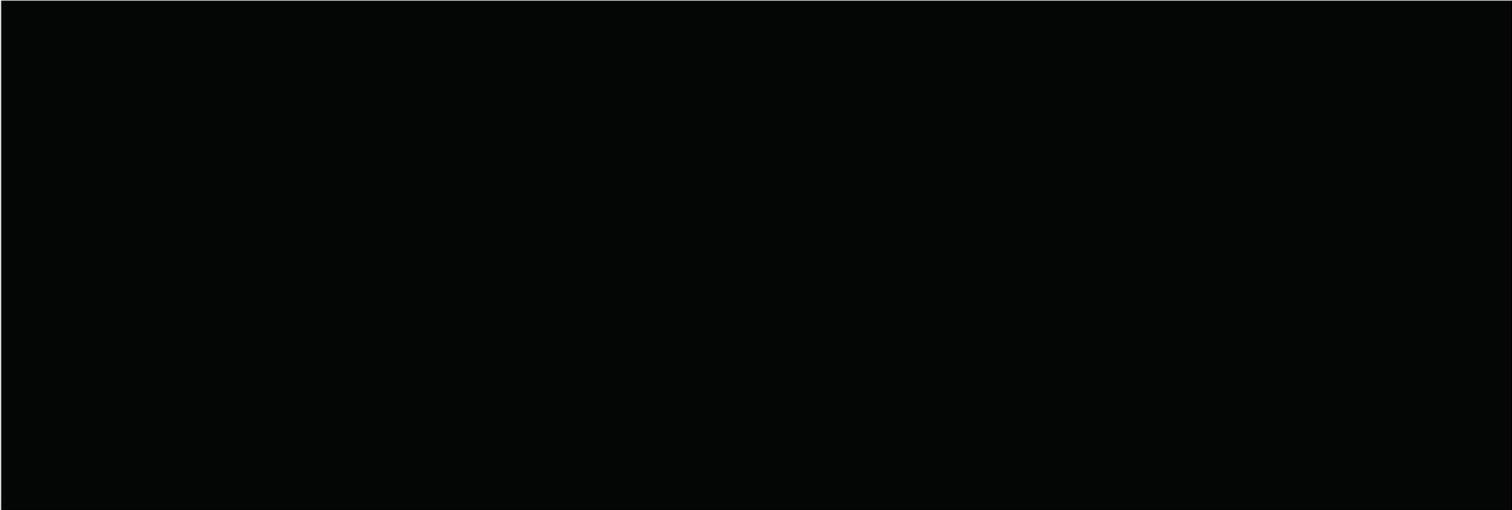
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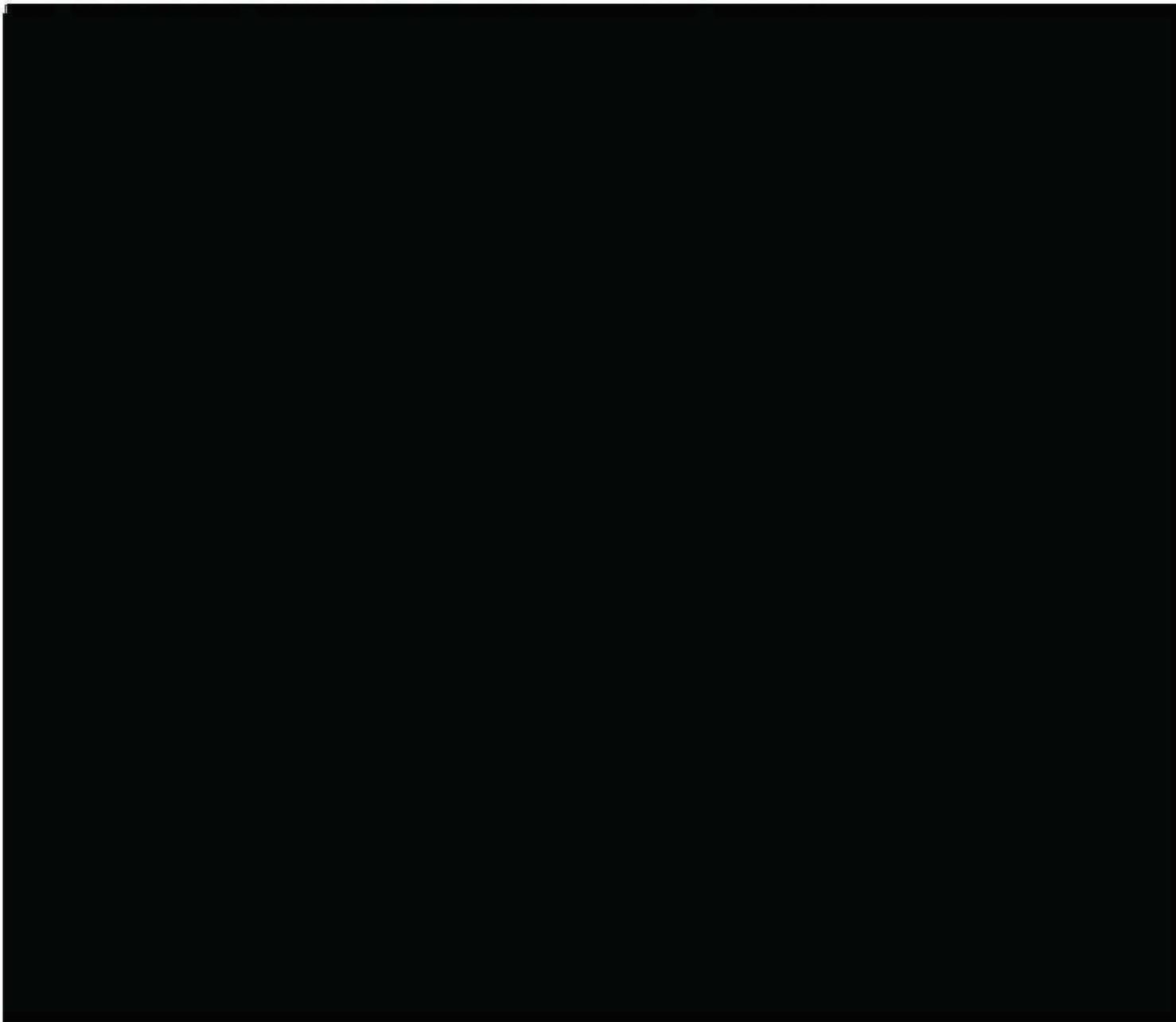
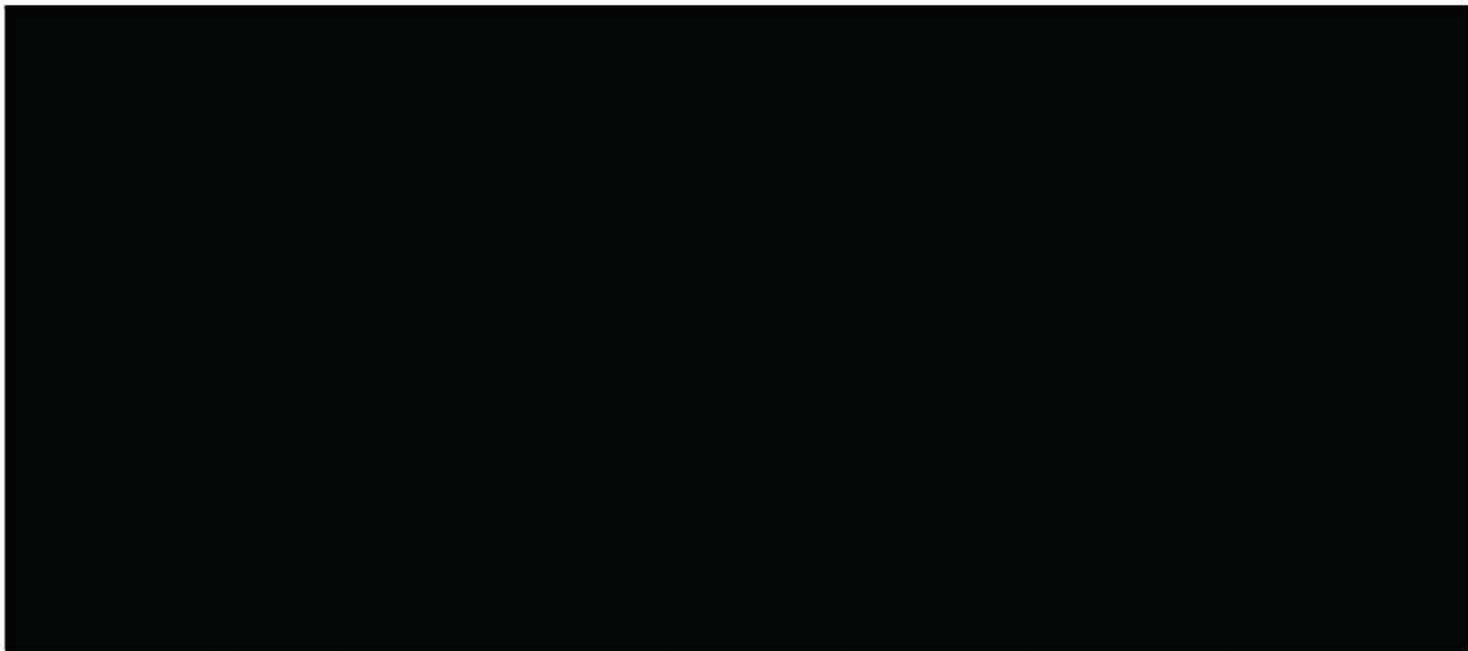
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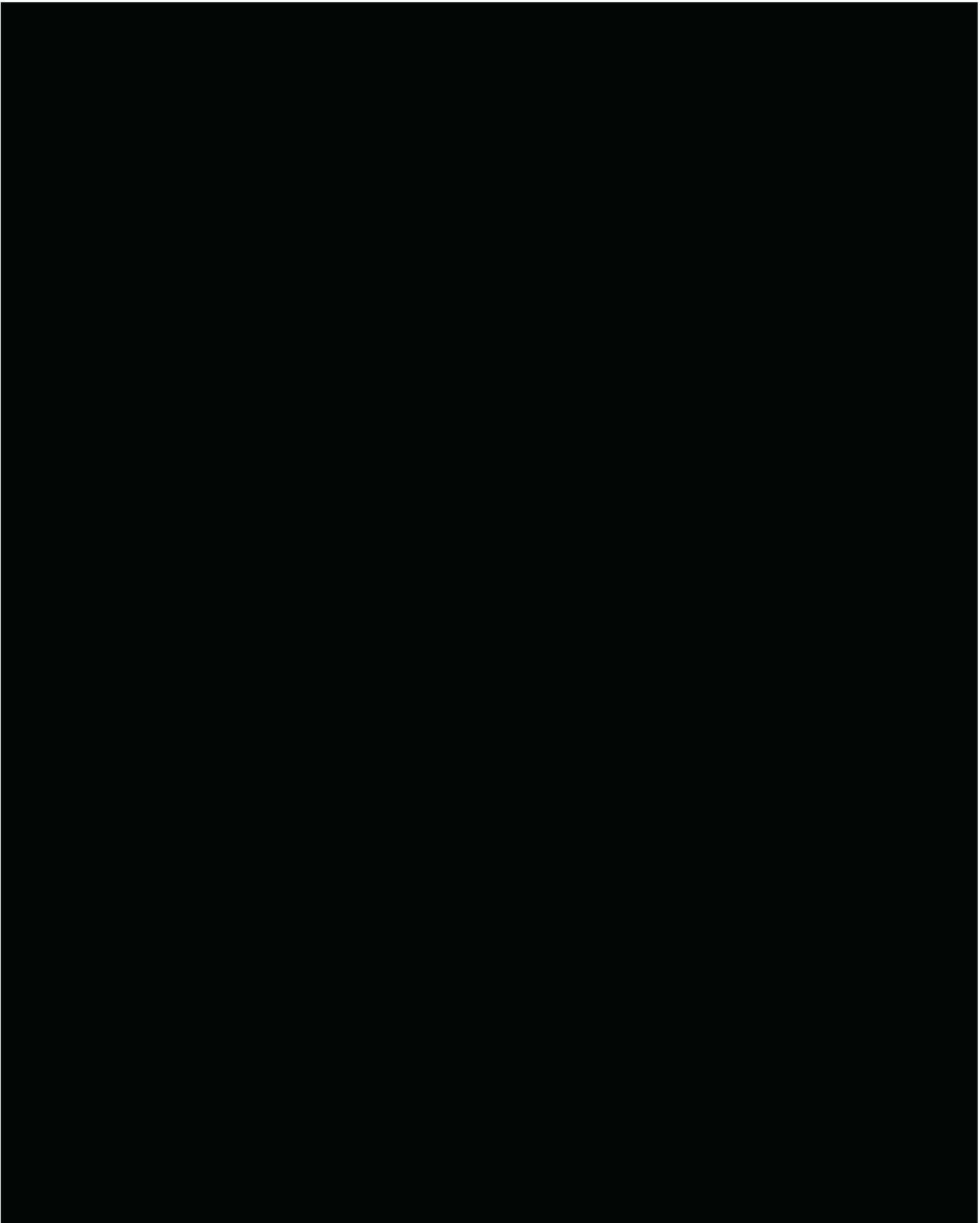
jcone@dallasbusinesslaw.com

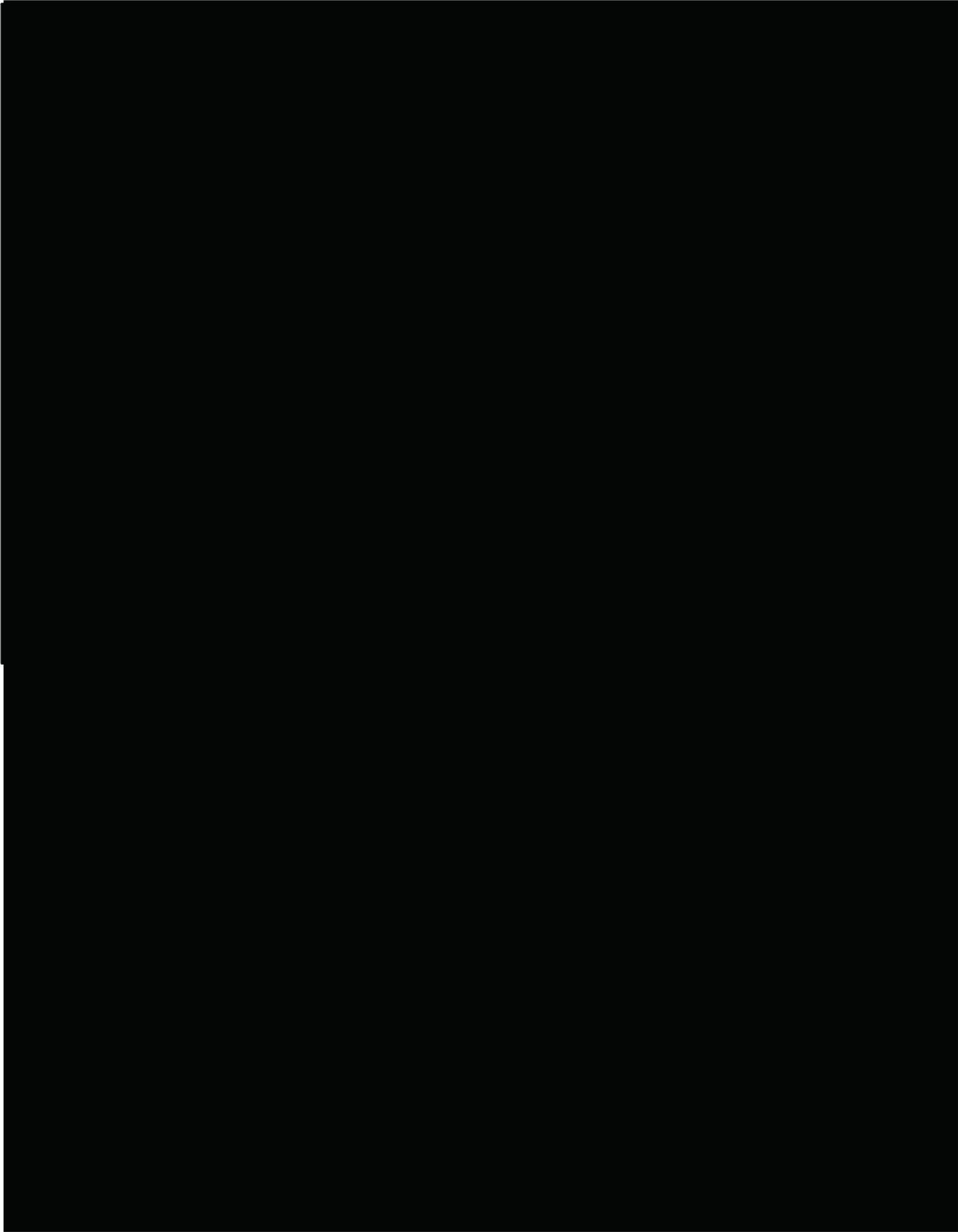
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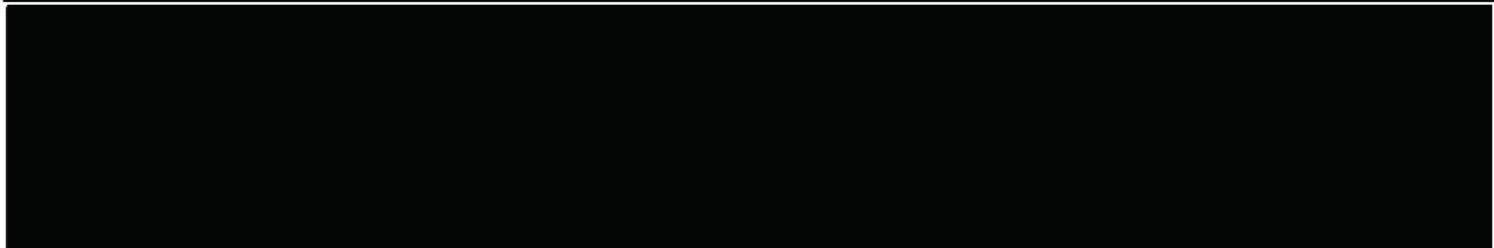
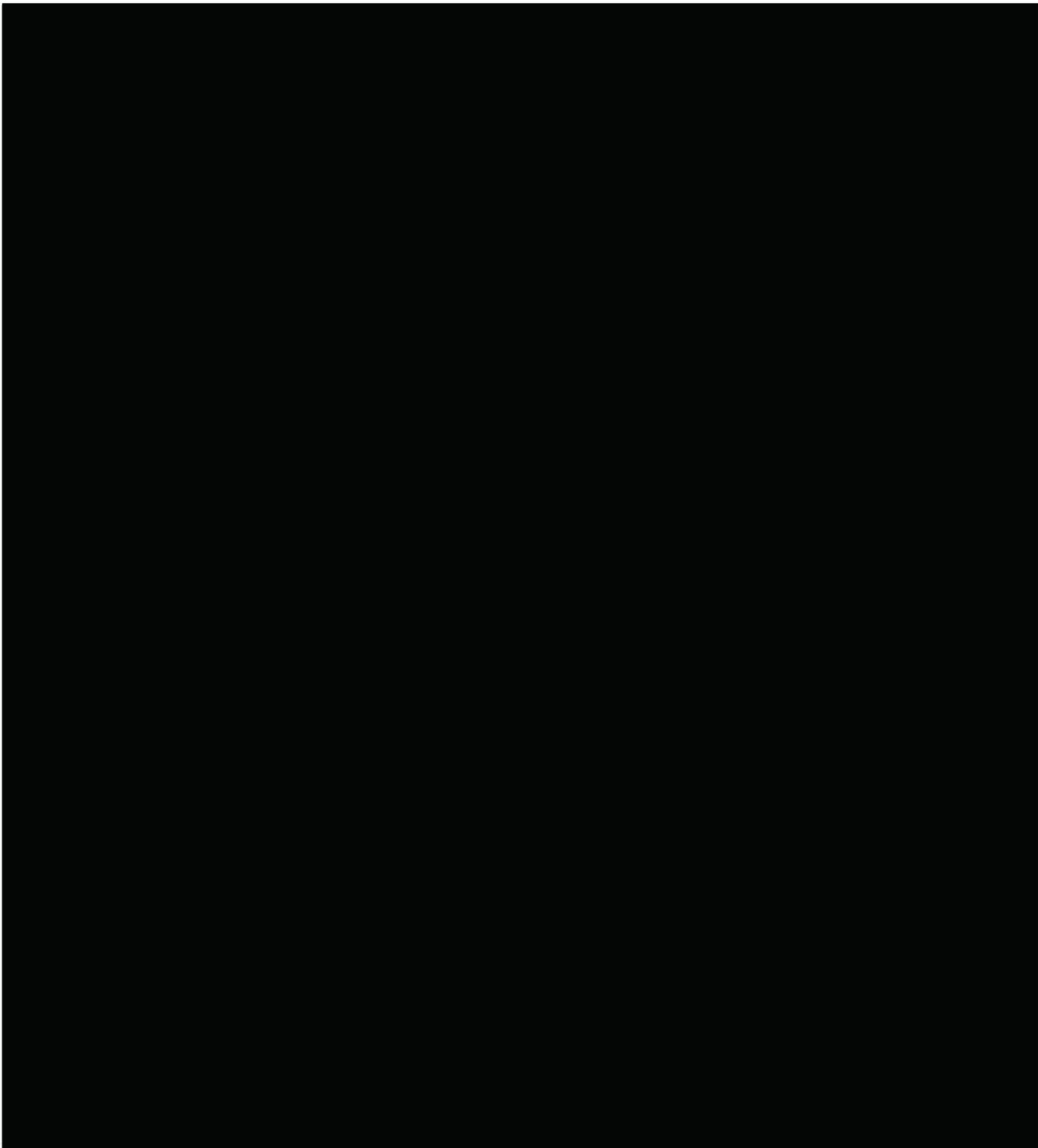
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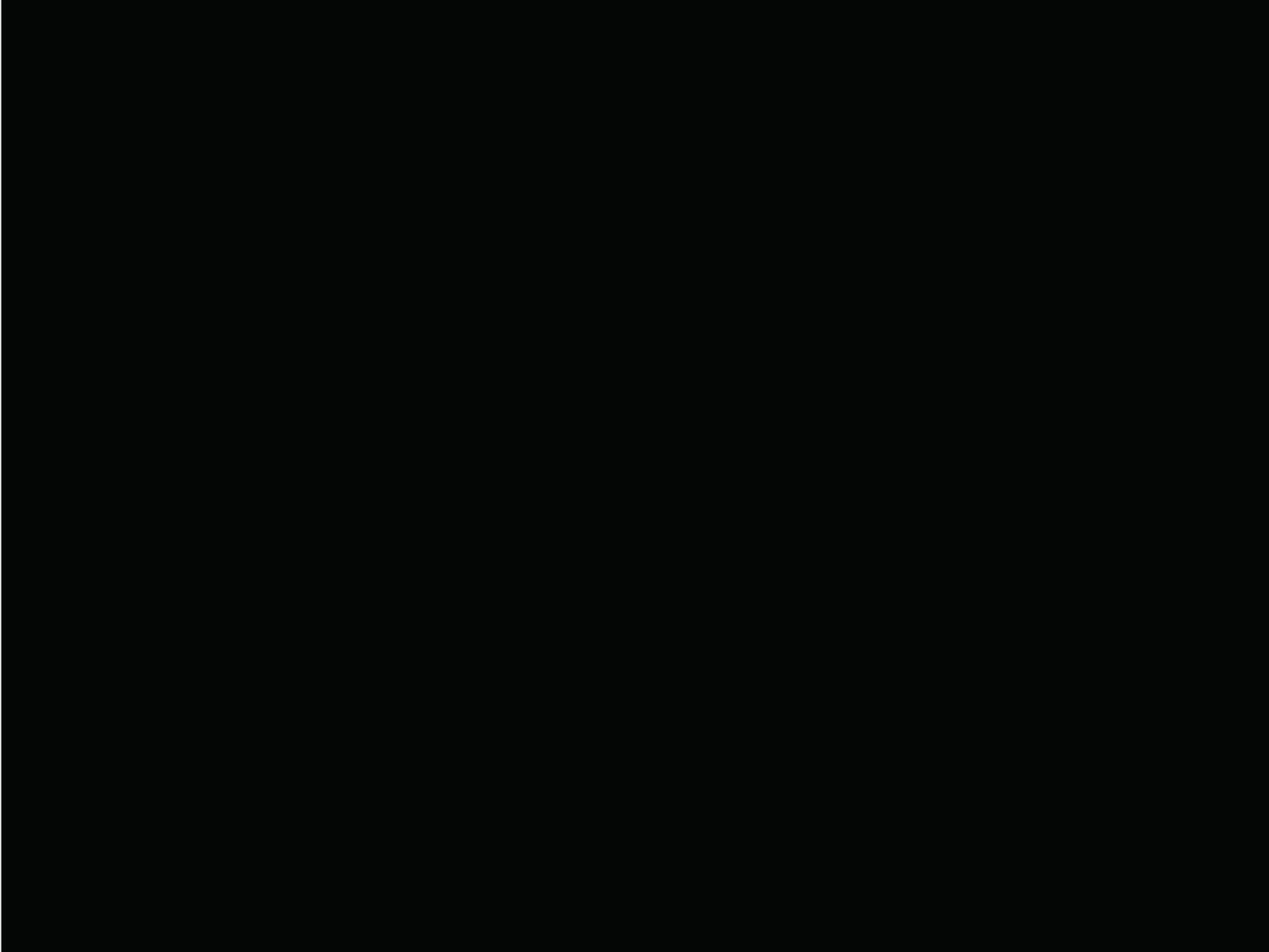
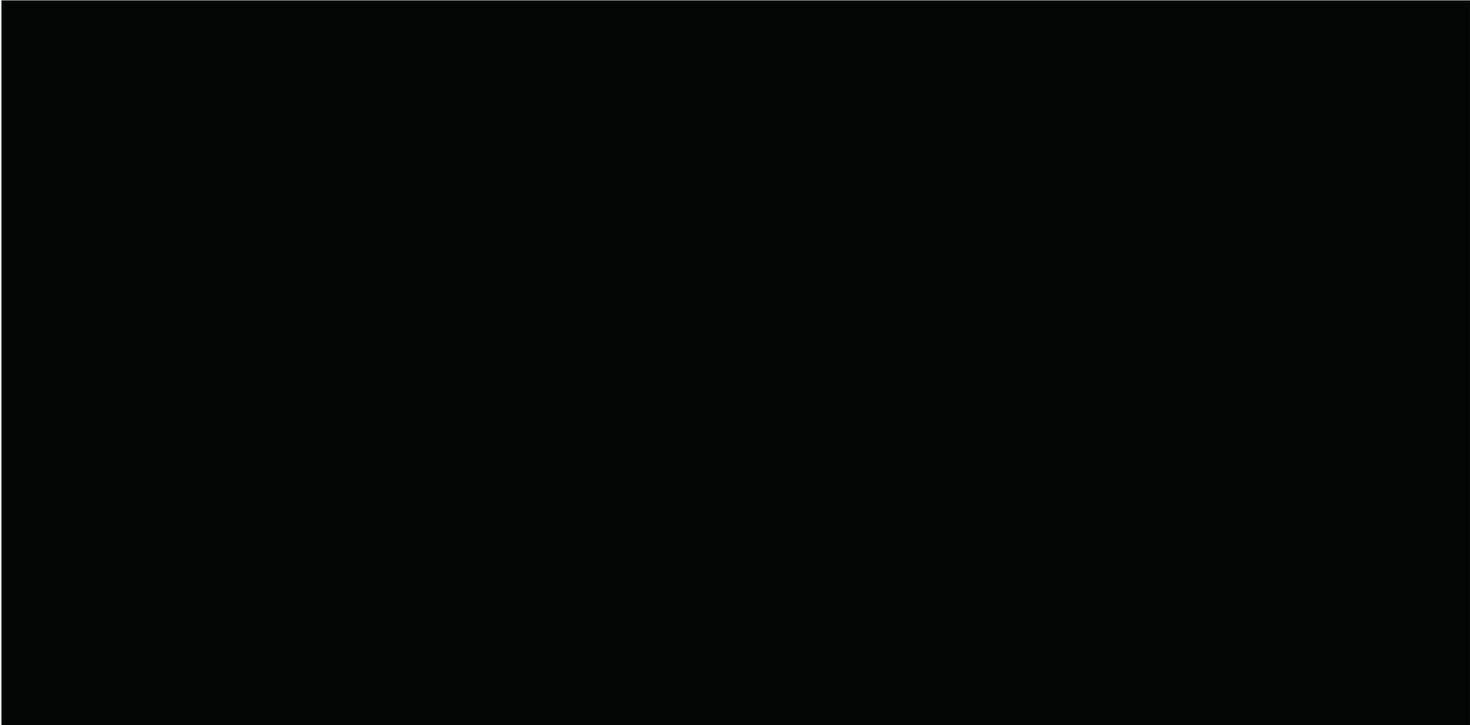












**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 4,040,999 KLEANSMART and Design

<u>CLEANSMART CLEANERS, LLC,</u> Petitioner,	§	
	§	
v.	§	Cancellation No. 92061164
	§	
<u>KLEANSMART CORPORATION,</u> Registrant.	§	
	§	

To: Allison R. Imber, ALLEN DYER DOPPELT MILBRATH & GILCHRIST PA, 255 South Orange Avenue, PO Box 3791, Orlando FL 382802

NOTICE OF TESTIMONY DEPOSITION OF NHON KY ("JOHN") NGUYEN

Petitioner CLEANSMART CLEANERS, LLC ("CCL") gives notice that pursuant to Trademark Rule 2.123 and Fed. R. Civ. P. 30, it will take the testimony deposition of NHON KY ("JOHN") NGUYEN on Thursday, April 21 beginning at 2:00 P.M. at the office of Ferguson Braswell & Fraser P.C., Suite 501, 2500 Dallas Parkway, Plano, Texas 75093

The deposition will be taken before a notary public or other officer authorized by law to administer oaths. The deposition will be recorded stenographically. You are invited to attend and to cross-examine the witness.

Dated: April 19, 2016

Respectfully submitted,

/s/ John M. Cone
John M. Cone
Ferguson, Braswell & Fraser, PC
2500 Dallas Parkway, Suite 501
Plano, Texas 75093
(972) 826-4436
(972) 378-9115 Fax
jccone@dallasbusinesslaw.com
ATTORNEY FOR PETITIONER
CLEANSMART CLEANERS, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 2016, a true and correct copy of the foregoing document was served via U.S. First Class Mail, postage prepaid on Registrant's attorney of record at:

Allison R Imber
Allen Dyer Doppelt Milbrath & Gilchrist PA
255 South Orange Avenue, PO Box 3791
Orlando, FL 382802

with a courtesy copy by email to aimber@addmg.com and sluther@addmg.com

/s/ John M. Cone

Exhibit C

Allison Imber

From: Allison Imber
Sent: Wednesday, April 20, 2016 3:13 PM
To: John Cone
Cc: Stephen Luther; Christine A. Jensen
Subject: RE: Cancellation No. 92061164 for the Trademark KLEANSMART & Design - Privileged Settlement Offer (Your File No. 0124134) Our File 5006.38544 (CSCL)

Dear John:

I am going to have to object to the unilateral notice of this out of state deposition on a day and a half's notice. Even if I could make it to Plano in that short a time frame, I have other obligations tomorrow that would prevent me from doing so. We will also have to object to a motion to extend your testimony period considering the first we heard of a deposition was not until there was less than a week left in your testimony period (and you are unavailable two of those days).

Moreover, to my knowledge, you did not disclose this witness to us during the discovery period, nor did you serve any initial disclosures or discovery. Therefore, we will likely be forced to strike his testimony, as well as any documents introduced during his deposition, should the deposition move forward.

Best regards,

Allison Imber
Shareholder and Registered Patent Attorney



Intellectual Property Attorneys

ALLEN, DYER, DOPPELT, MILBRATH & GILCHRIST, P.A.
255 South Orange Avenue ■ Suite 1401 ■ Orlando, FL 32801
tel-(407)-841-2330 x 111 ■ fax-(407)-841-2343

[website](#) | [bio](#) | [vCard](#) | [map](#) | [email](#)

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From: John Cone [mailto:jccone@dallasbusinesslaw.com]
Sent: Tuesday, April 19, 2016 3:42 PM
To: Allison Imber <aimber@addmg.com>
Cc: Stephen Luther <sluther@addmg.com>
Subject: RE: Cancellation No. 92061164 for the Trademark KLEANSMART & Design - Privileged Settlement Offer (Your File No. 0124134) Our File 5006.38544 (CSCL)

Dear Allison:

As I have not heard from you, I am proceeding with a testimony deposition of my client.

A copy of the Notice is attached.

My client is travelling from Austin to attend the deposition so please let me know immediately if you would like me to re-schedule.

If we do, it will have to be based on an extension of the testimony period because I am out of town April 23 through 27.

Regards,
John

JOHN M. CONE

Attorney

John M. Cone PC

FERGUSON, BRASWELL & FRASER, PC

2500 DALLAS PARKWAY, SUITE 501 | PLANO, TEXAS 75093

DIRECT (972) 826-4436

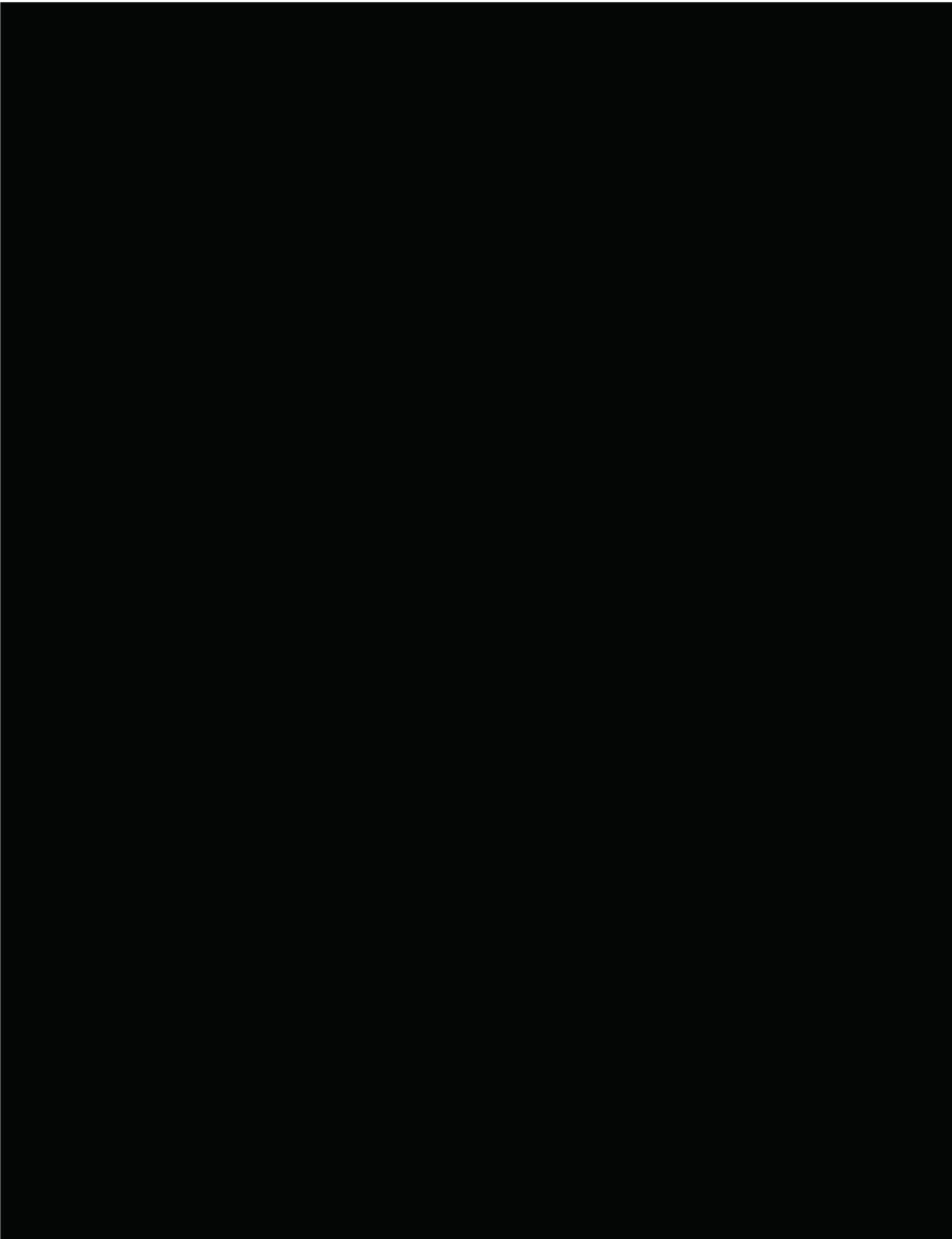
MAIN (972) 378-9111

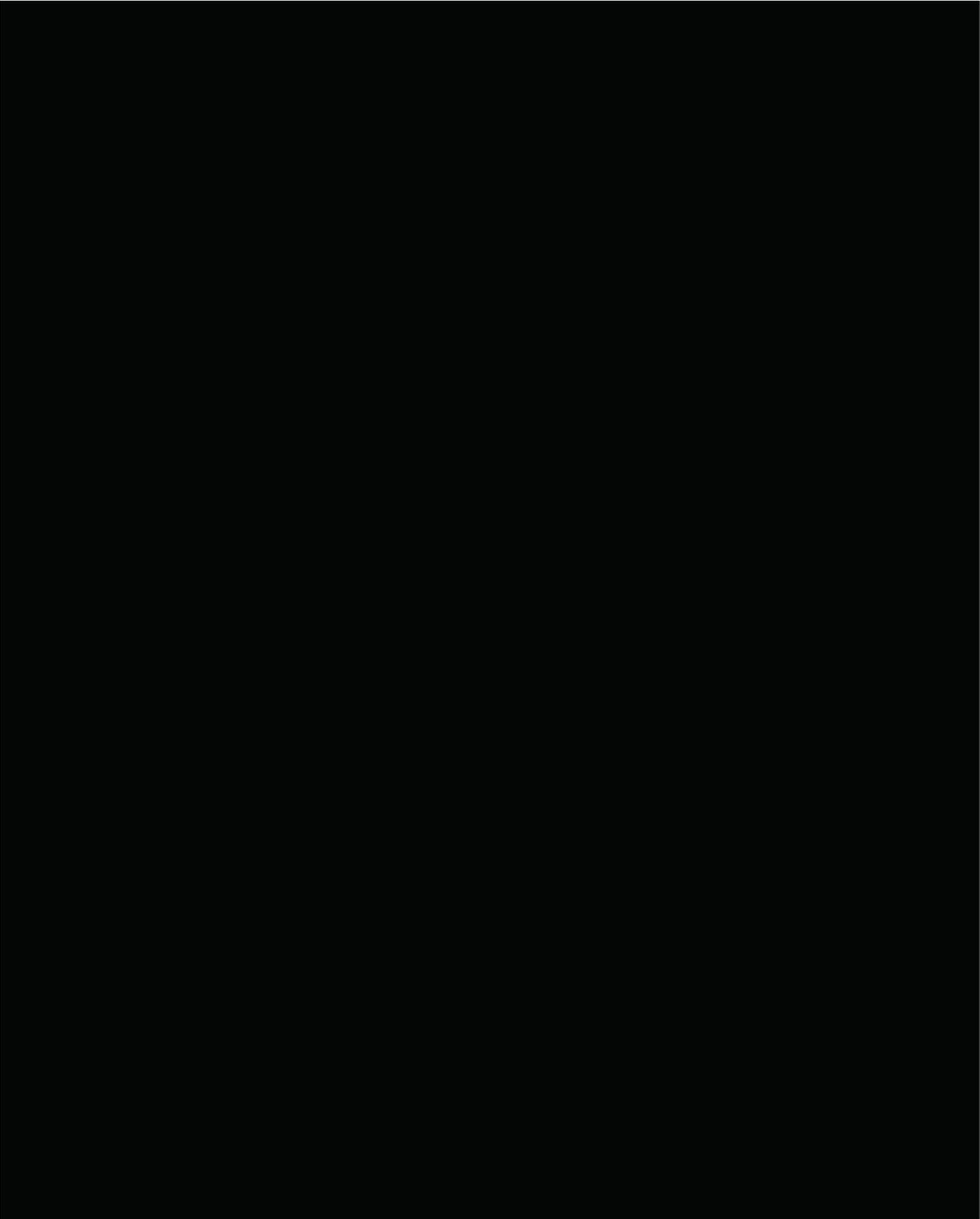
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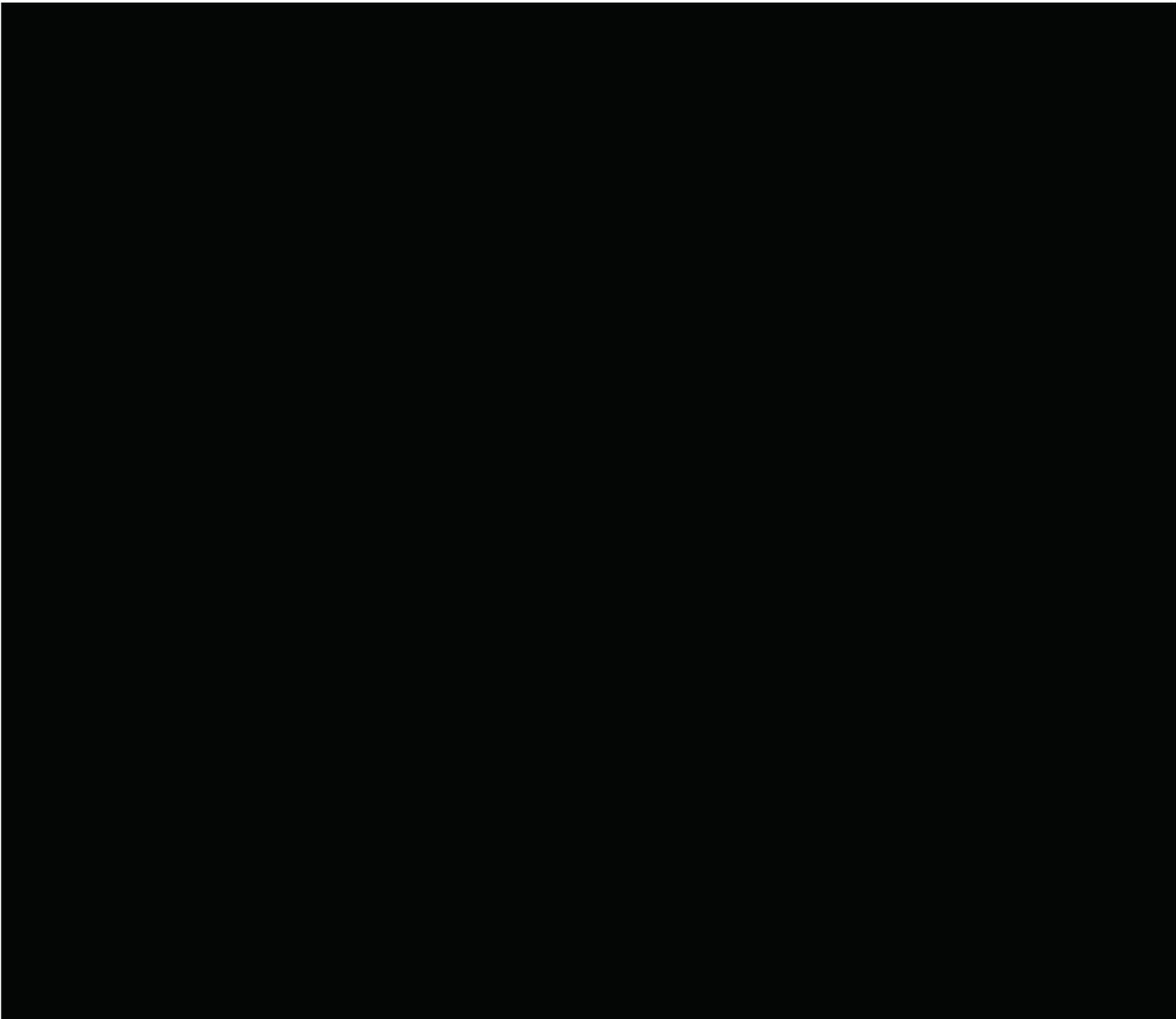


Exhibit D

Allison Imber

From: John Cone <jcone@dallasbusinesslaw.com>
Sent: Wednesday, April 20, 2016 4:44 PM
To: Allison Imber
Subject: Re: Cancellation No. 92061164 for the Trademark KLEANSMART & Design - Privileged Settlement Offer (Your File No. 0124134) Our File 5006.38544 (CSCL)

Allison

I will move the deposition to a later date if you agree to extend the deadline

Otherwise you leave me no choice but to proceed

JOHN M. CONE

Attorney

John M. Cone PC

FERGUSON, BRASWELL & FRASER, PC

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On Apr 20, 2016, at 2:12 PM, Allison Imber <aimber@addmg.com> wrote:

Dear John:

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Best regards,

Allison Imber

Shareholder and Registered Patent Attorney

<image006.jpg>

ALLEN, DYER, DOPPELT, MILBRATH & GILCHRIST, P.A.

255 South Orange Avenue ■ Suite 1401 ■ Orlando, FL 32801

tel-(407)-841-2330 x 111 ■ fax-(407)-841-2343

<image008.png>

[website](#) | [bio](#) | [vCard](#) | [map](#) | [email](#)

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From: John Cone [<mailto:jccone@dallasbusinesslaw.com>]
Sent: Tuesday, April 19, 2016 3:42 PM
To: Allison Imber <aimber@addmg.com>
Cc: Stephen Luther <sluther@addmg.com>
Subject: RE: Cancellation No. 92061164 for the Trademark KLEANSMART & Design - Privileged Settlement Offer (Your File No. 0124134) Our File 5006.38544 (CSCL)

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If we do, it will have to be based on an extension of the testimony period because I am out of town April 23 through 27.

Regards,
John

JOHN M. CONE

Attorney

John M. Cone PC

FERGUSON, BRASWELL & FRASER, PC

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DIRECT (972) 826-4436

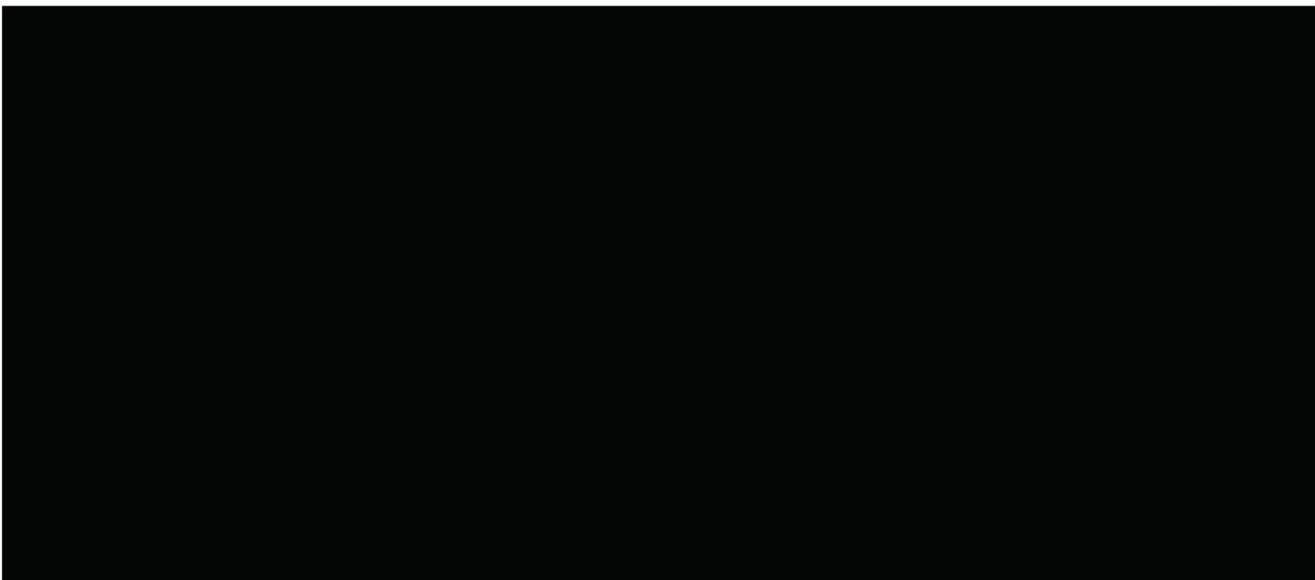
MAIN (972) 378-9111

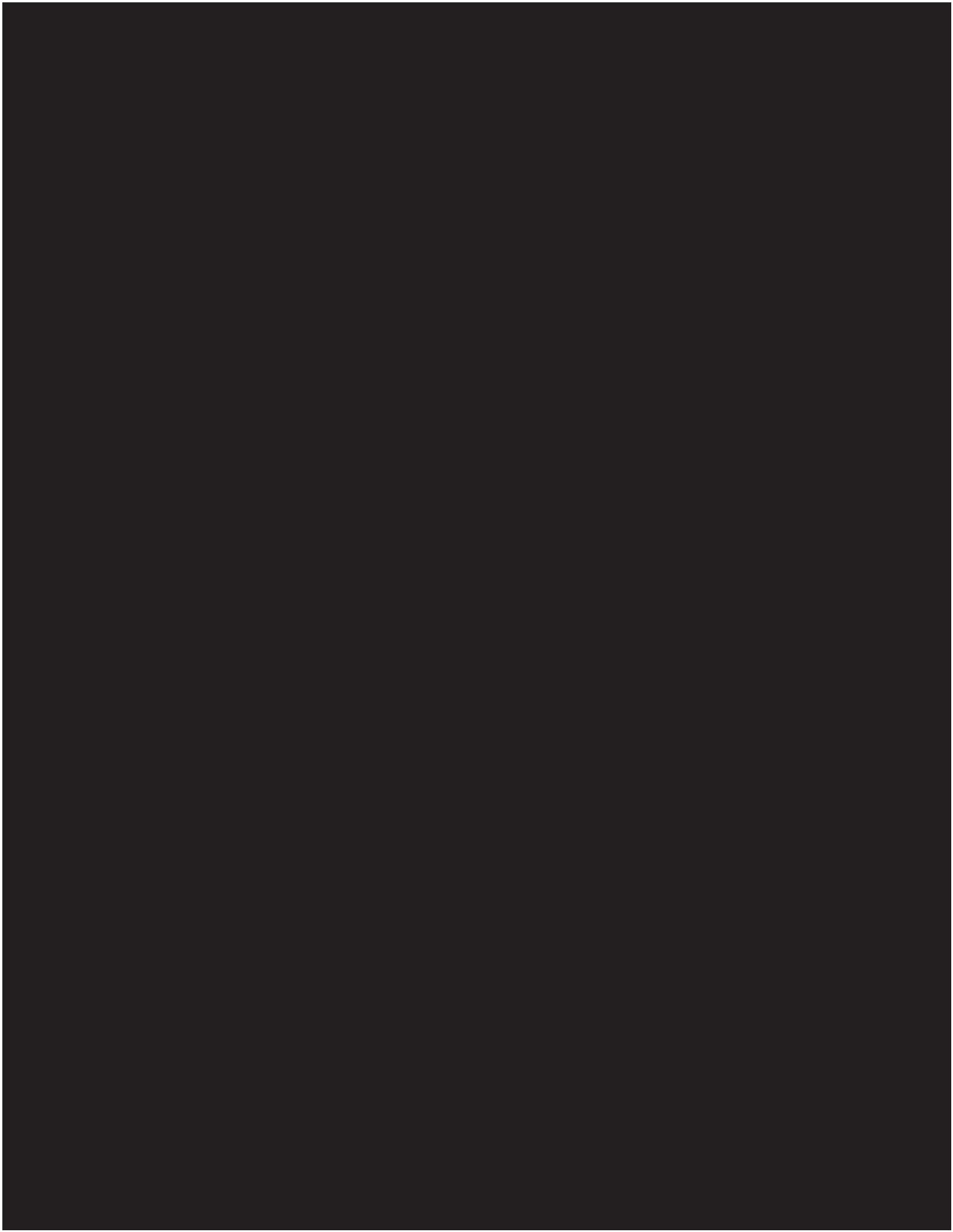
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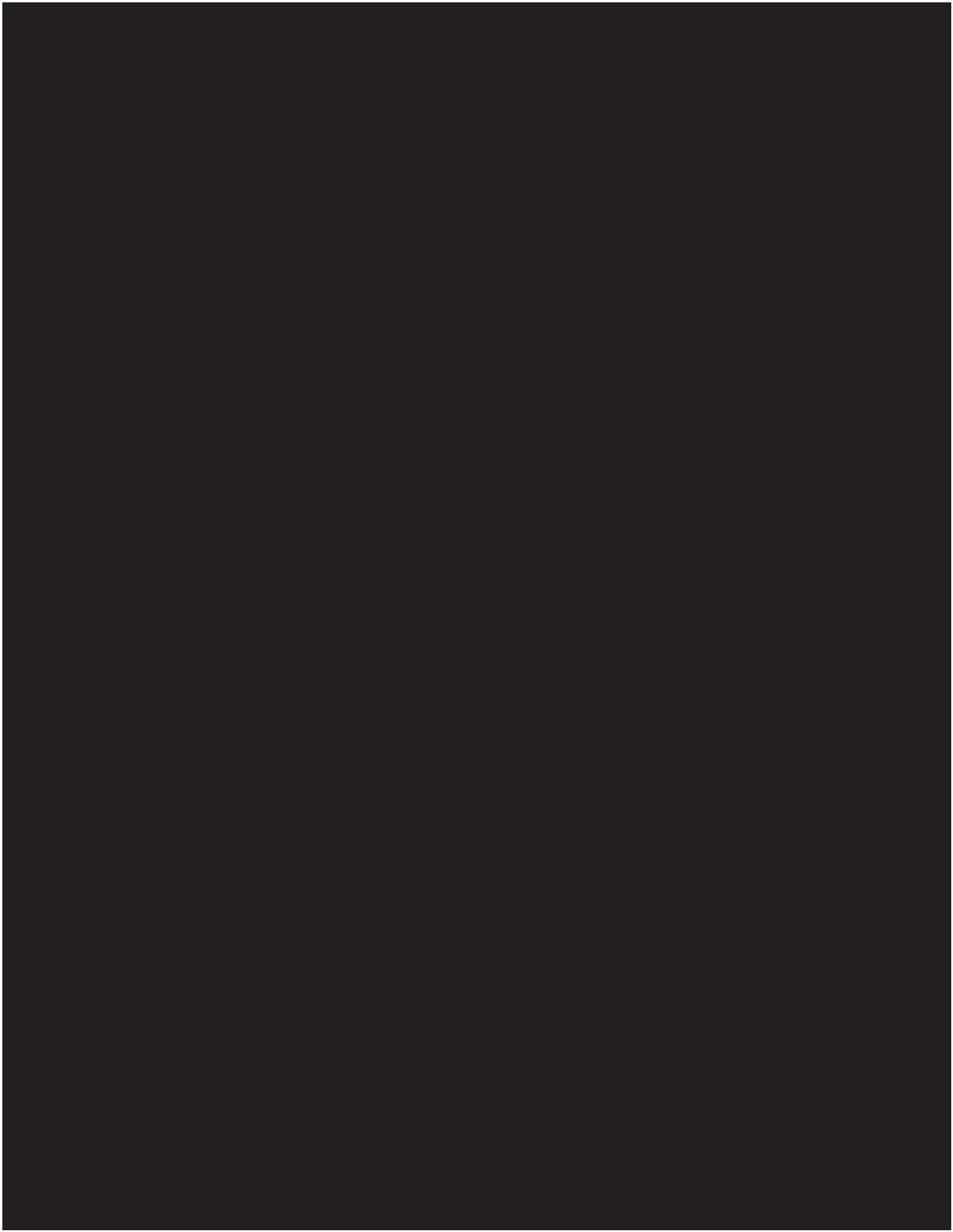
jccone@dallasbusinesslaw.com

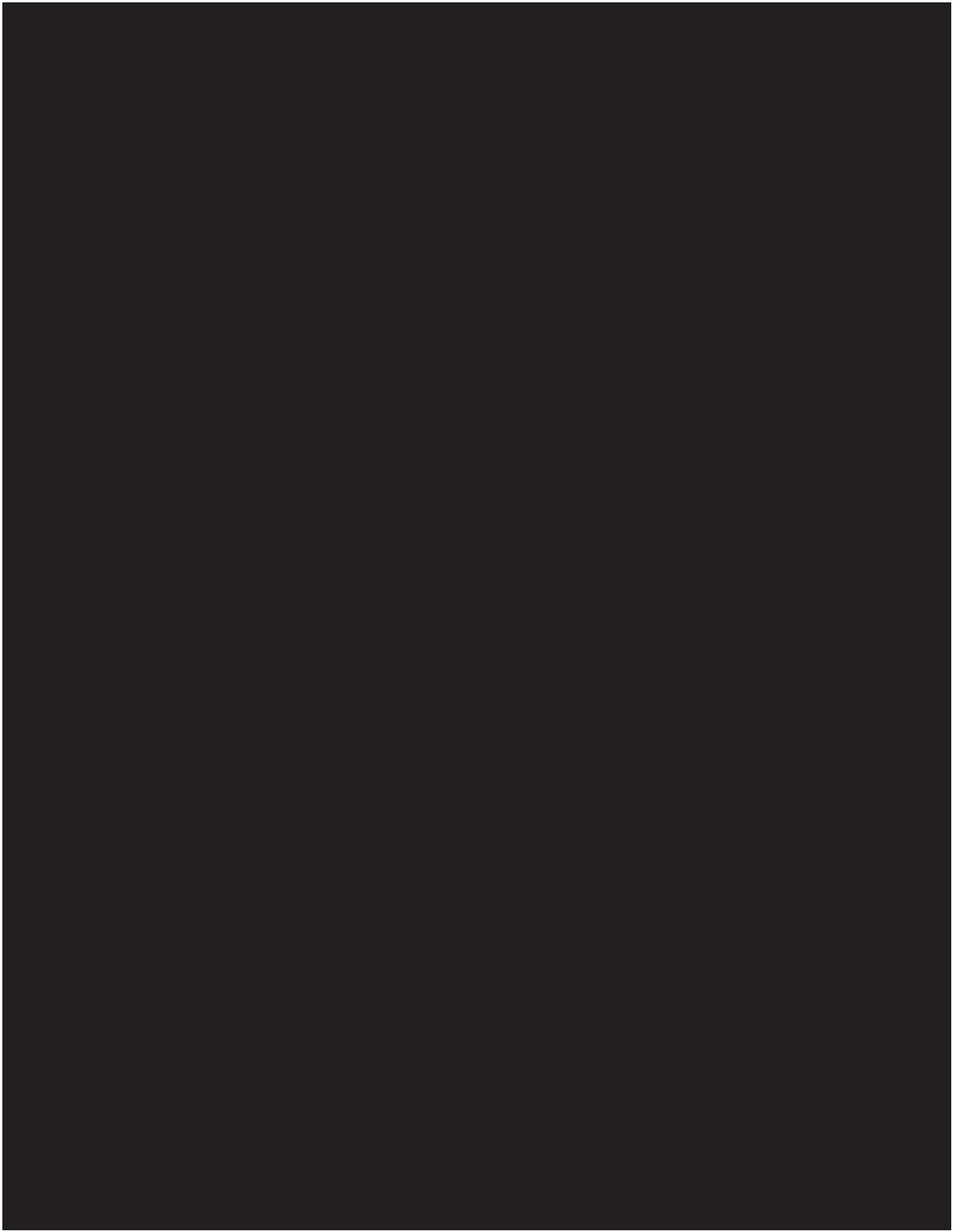
www.dallasbusinesslaw.com

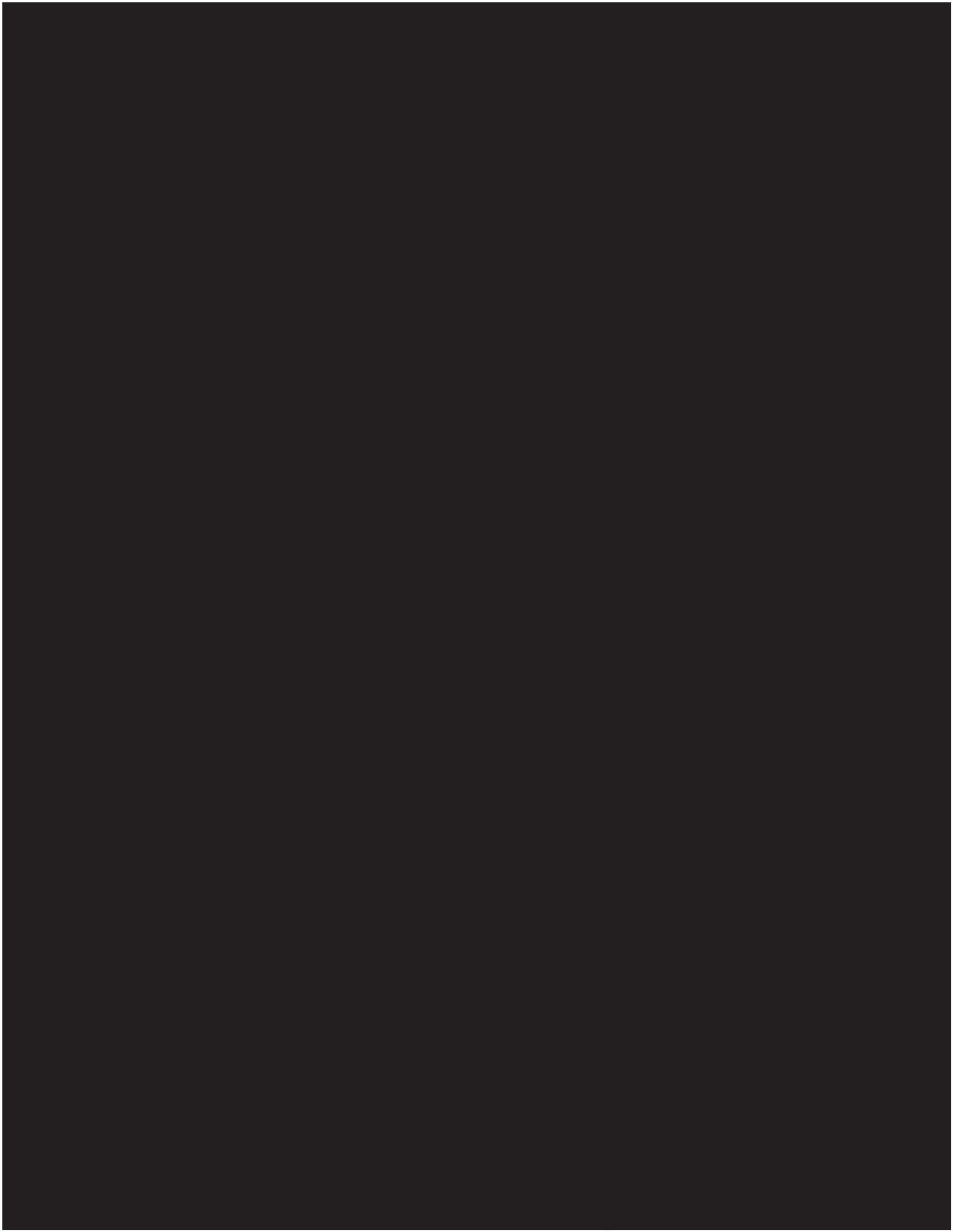
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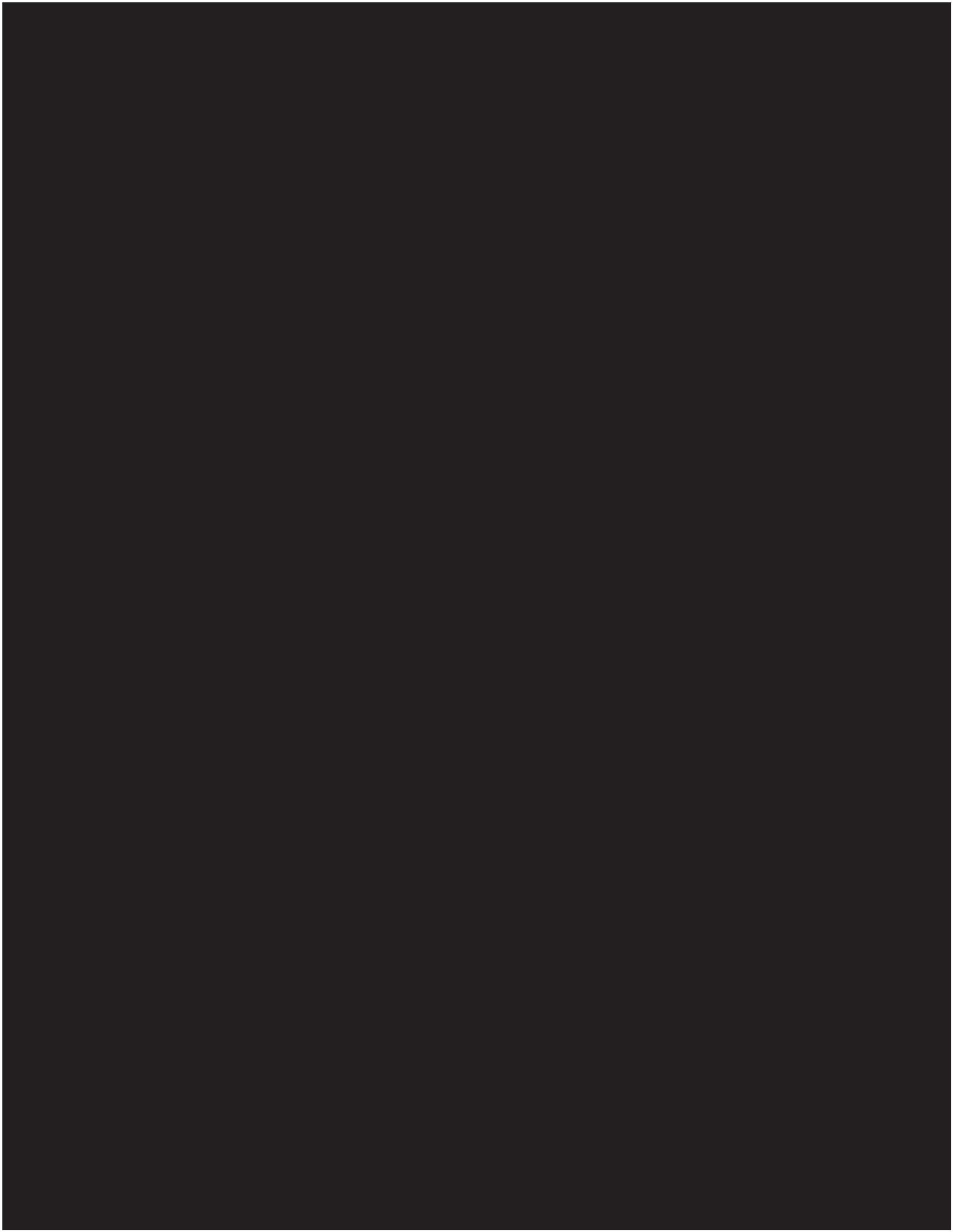


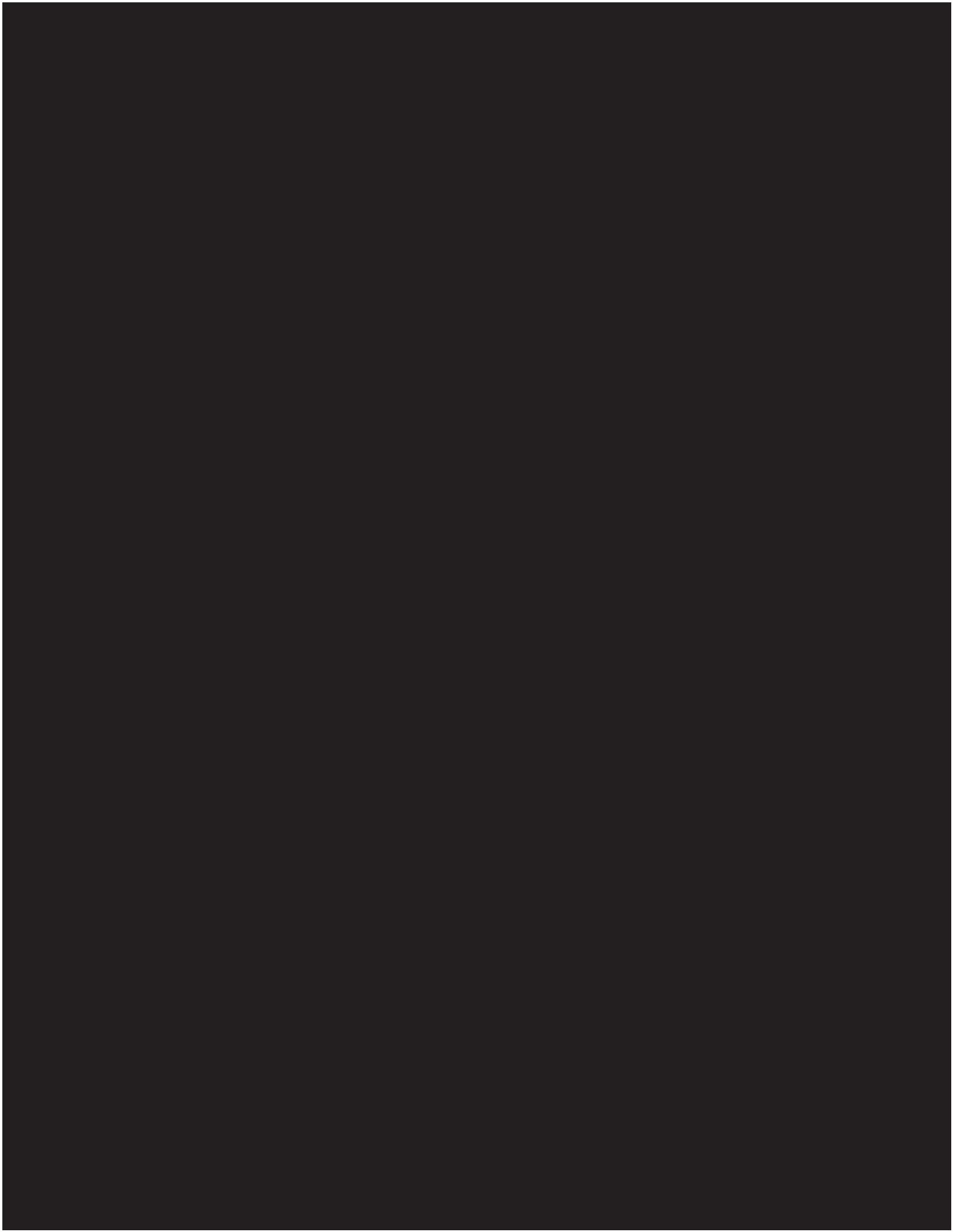


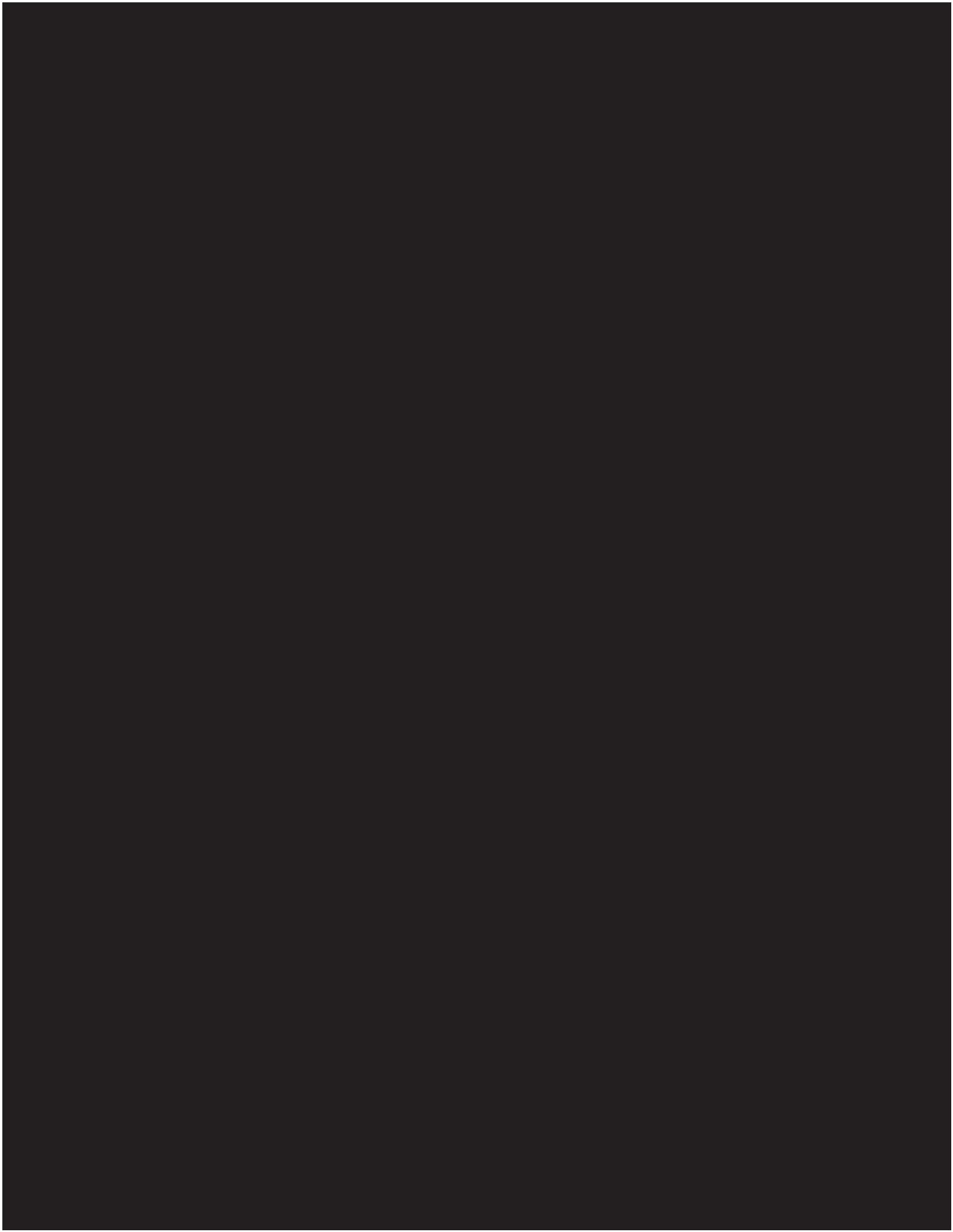


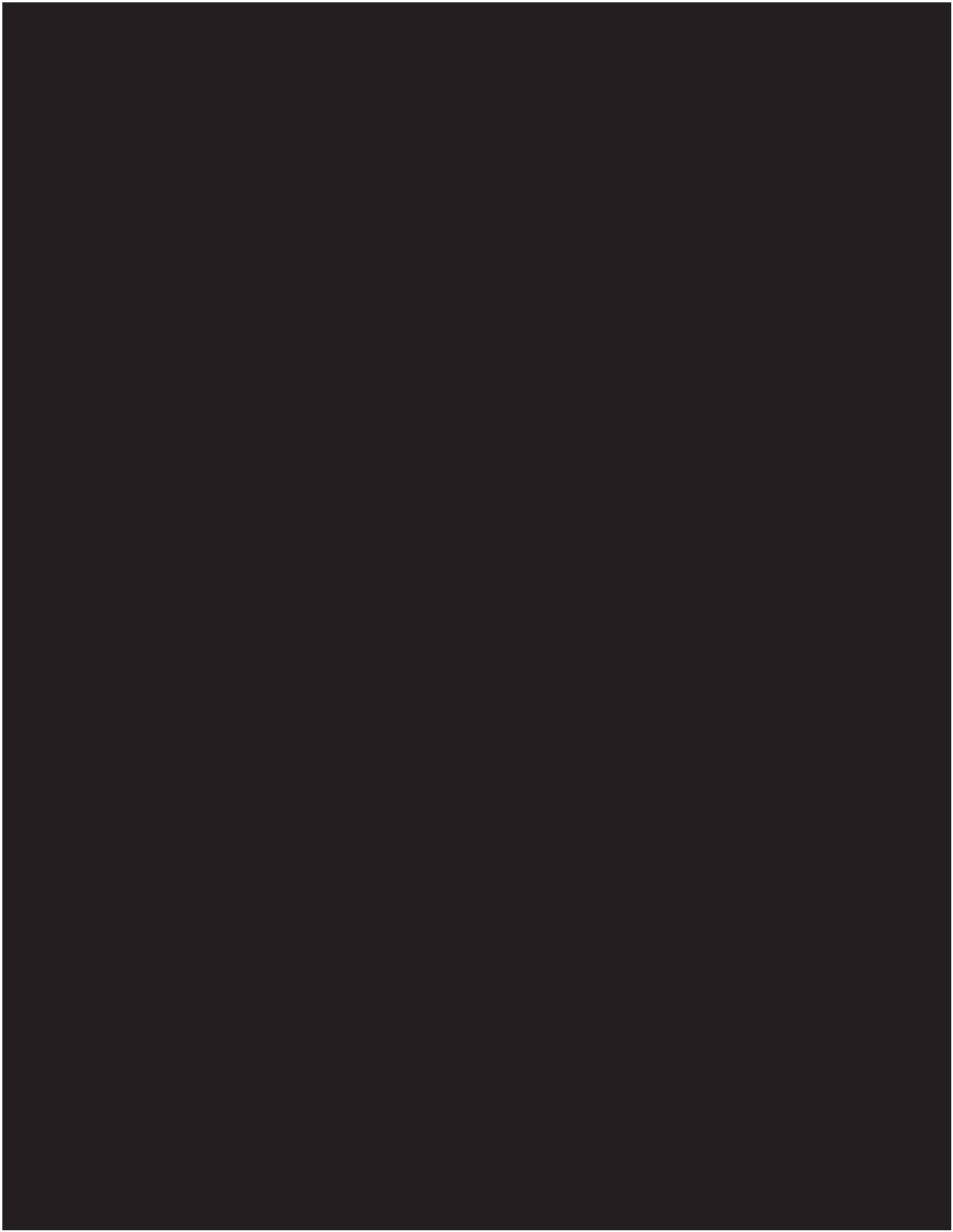












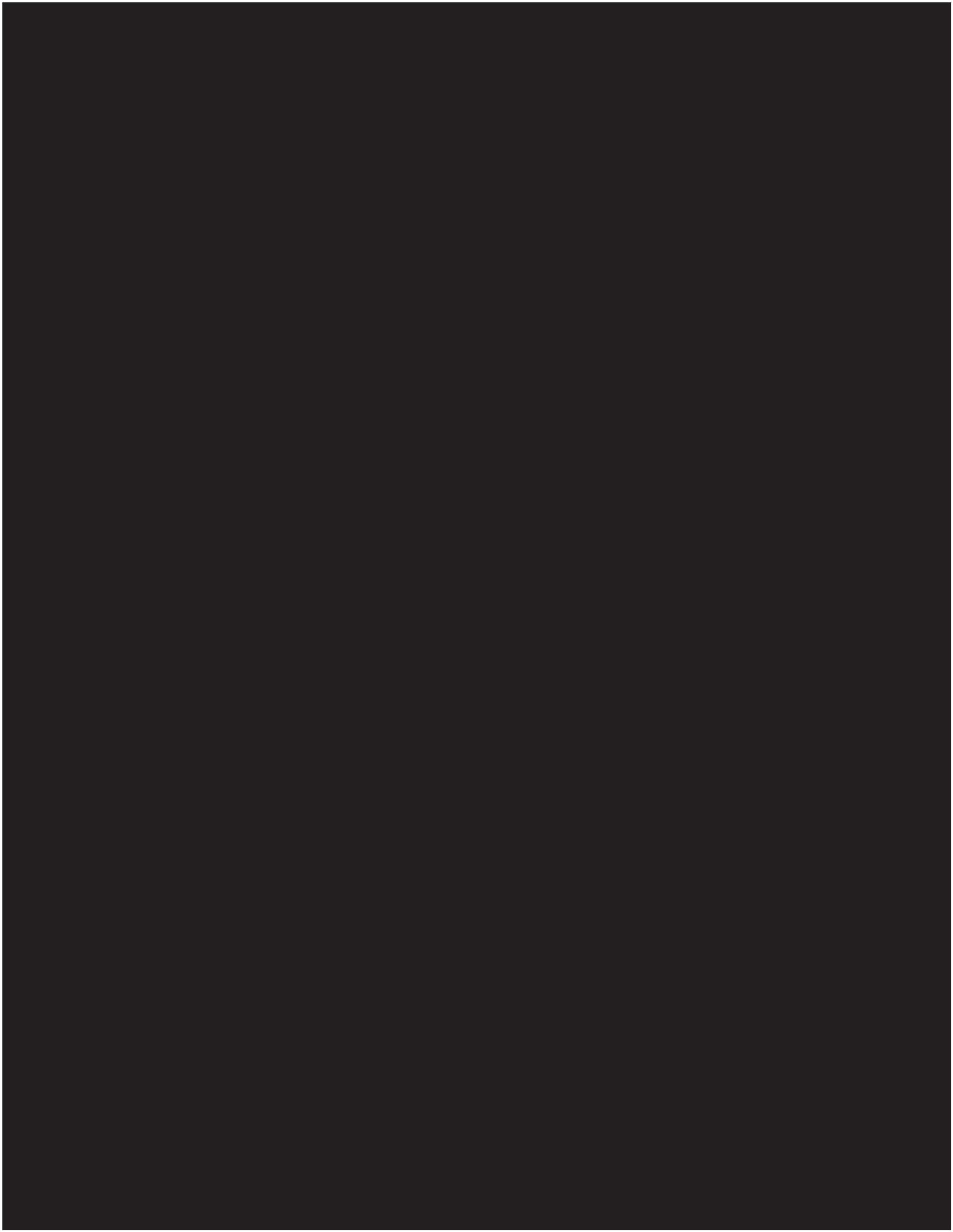


Exhibit E

Gina Chiappini

From: John Cone <jcone@dallasbusinesslaw.com>
Sent: Thursday, April 21, 2016 1:42 PM
To: Stephen Luther
Subject: Deposition Exhibits
Attachments: Exhibit 1.pdf; Exhibit 2.pdf; Exhibit 3.pdf; Exhibit 4.pdf; Exhibit 5.pdf; Exhibit 6.pdf; Exhibit 7.pdf; Exhibit 8.pdf; Exhibit 9.pdf; Exhibit 10.pdf; Exhibit 11.pdf; Exhibit 15.pdf

Dear Stephen:
Here are most of the exhibits for the deposition of Mr. Nguyen.
If he brings additional materials I will send you copies as soon as I can.
Regards,
John.

JOHN M. CONE
Attorney
John M. Cone PC
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Allison Imber

From: Jamie Araiza <jaraiza@dallasbusinesslaw.com>
Sent: Thursday, April 21, 2016 4:35 PM
To: Stephen Luther
Cc: John Cone
Subject: RE: Deposition Exhibits
Attachments: Exhibit 12.pdf; Exhibit 13.pdf; Exhibit 14.pdf; Exhibit 16.pdf; Exhibit 17.pdf; Exhibit 18.pdf; Exhibit 19.pdf; Exhibit 20.pdf; Exhibit 21.pdf; Exhibit 22.pdf; Exhibit 23.pdf; Exhibit 24.pdf; Exhibit 25.pdf

Dear Mr. Luther:

Attached are the remaining exhibits. Please let us know how much time you need to review.

Regards,
Jamie

JAMIE LEE ARAIZA

Legal Assistant

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From: John Cone

Sent: Thursday, April 21, 2016 12:42 PM

To: Stephen Luther <sluther@addmg.com>

Subject: Deposition Exhibits

Dear Stephen:

Here are most of the exhibits for the deposition of Mr. Nguyen.

If he brings additional materials I will send you copies as soon as I can.

Regards,
John.

JOHN M. CONE

Attorney

John M. Cone PC

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Allison Imber

From: Stephen Luther
Sent: Thursday, April 21, 2016 5:00 PM
To: John Cone
Cc: Allison Imber; Gina Chiappini
Subject: RE: Deposition

We haven't had sufficient time to review the exhibits, but we need to start right away if we are going to be able to do the deposition today.

From: John Cone [mailto:jccone@dallasbusinesslaw.com]
Sent: Thursday, April 21, 2016 4:58 PM
To: Stephen Luther
Subject: Deposition

Let me know when you are ready to start

JOHN M. CONE
Attorney
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