

CT-2017-008

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended; and

IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: October 30, 2018
CT-2017-008

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

Applicant

-and -

OTTAWA, ONT.

77

HUDSON'S BAY COMPANY

Respondent

NOTICE OF MOTION

TAKE NOTICE that the Commissioner of Competition (“**Commissioner**”) will make a motion to the Competition Tribunal (“**Tribunal**”) on November 20, 2018, at 9:30 a.m., or as soon thereafter as the motion can be heard in Ottawa, Ontario.

THE MOTION IS FOR:

1. An Order compelling the Respondent, the Hudson's Bay Company ("**HBC**"), to provide to the Commissioner answers to questions posed at the examination for discovery of Christine Jelley, held on August 23 and 24, 2018, and for which answers have been refused by HBC, all within a period of ten (10) days following the hearing of this motion;
2. An Order compelling the representative of HBC, Christine Jelley, to re-attend an examination for discovery, at the expense of HBC, and provide answers to further questions the Commissioner may pose arising out of the answers that this Tribunal may compel pursuant to this motion;
3. The Commissioner's costs of this motion; and
4. Such further and other relief as this Tribunal deems just and reasonable.

THE GROUNDS FOR THE MOTION ARE:

1. HBC refuses to provide answers to certain questions posed by the Commissioner's representative during the examination for discovery of the company representative, Ms. Christine Jelley, (the "**Disputed Questions**") (see list attached as **Annex B**). The Disputed Questions are refused by HBC on the grounds the questions are either not relevant or on the grounds the principles of proportionality dictate the answers should not be provided. The Commissioner contends the answers to the Disputed Questions are relevant and necessary. In any event, HBC has not provided any evidence that answering the Disputed Questions would cause an undue burden on the company or that they are of marginal value;
2. The Commissioner has filed an Application before the Tribunal alleging HBC has engaged and continues to engage in reviewable conduct pursuant to the *Competition Act*, R.S.C. 1985, c. C-34 ("**Act**"). More specifically, the Commissioner alleges HBC has engaged and continues to engage in deceptive marketing practices by offering sleep sets at grossly

inflated regular prices and then advertising deep discounts off these deceptive regular prices in order to promote the sale of sleep sets to the public;

3. The Commissioner further alleges HBC engages in deceptive marketing practices when offering its sleep sets as part of inventory “clearance” or “end of line” promotions. A “clearance” or “end of line” sale implies the price has been permanently lowered with the object of selling any remaining on-hand inventory. Despite this, HBC continues to replenish from manufacturers by ordering new, factory fresh sleep sets during these sales;
4. Discovery of HBC’s representative, Ms. Christine Jelley, was held on August 23 and 24, 2018. During the course of examinations, the Commissioner’s representative posed a number of questions HBC refused to answer or, alternatively, took under advisement;
5. On October 3, 2018, HBC confirmed by letter that for 12 questions it maintained the refusal given at discovery. On October 15, HBC delivered answers to an additional 154 undertakings, under advisements and refusals. However, contrary to the Amended Scheduling Order, HBC failed to provide answers to an additional 19 outstanding questions. Instead for these 19 questions, HBC provided a response of either “To Follow” or provided a partial answer and stated it was “making enquiries”;
6. Answers to 11 of the 19 outstanding questions were provided late in the afternoon on October 29, one day before this Refusals Motion was required to be filed with the Tribunal. The Commissioner has been forced by HBC into the position of having to review HBC’s additional responses in less than a day. This notwithstanding the clear direction in the Amended Scheduling Order mandating a two week period between the delivery of the answers to discovery undertakings on October 15 and last day to file this motion on October 30;
7. Answers have still not been provided for eight questions. This even though HBC had two weeks longer than the Commissioner to fulfill answers to discovery undertakings by virtue of the fact its representative was discovered before the Commissioner’s representative;

8. In total, HBC has maintained its refusal or not provided answers to 49 questions (see list attached as **Annex A**). Of those, the Commissioner disputes only 14 questions that were refused, only partially answered or to which HBC answered “to follow” or “making enquiries”. Many of the Disputed Questions relate to HBC’s compliance efforts, the remedy sought by the Commissioner or to specific facts pled by the Respondent;
9. In its Amended Response, HBC argued it had exercised due diligence in preventing the alleged reviewable conduct from occurring. Specifically, HBC stated in paragraph 91 it, “has, and at all relevant times had, a strict comprehensive advertising compliance program” and “HBC’s compliance program demonstrates that it has a ‘clear, continuous and unequivocal commitment to compliance’ and exercised due diligence to prevent contraventions of section 74.01 of the Act from occurring”;
10. The Commissioner’s position, as stated at paragraph 18 of the Amended Reply, is HBC’s compliance architecture is not a sufficient exercise of due diligence to prevent reviewable conduct from occurring. Specifically, “HBC’s failure to adhere to an effective compliance program is illustrative of a corporate culture focused more on sales than on compliance”;
11. In addition, the remedy sought by the Commissioner in these proceedings includes an order prohibiting HBC from engaging in the reviewable conduct with respect to sleep sets and extends to substantially similar reviewable conduct for any product supplied by HBC. HBC’s compliance program applies to all products it offers for sale and is the means by which the company attempts to ensure compliance with the Act;
12. The Amended Application clearly provides that the type of promotional practices underlying HBC’s reviewable conduct with respect to sleep sets are also used to promote a broad range of products HBC offers for sale. An objective of Part VII.1 of the *Competition Act* is to remedy the harm caused by the deceptive marketing practices for the benefit of consumers and the Canadian economy. The Commissioner’s request for information in respect of the compliance program should come as no surprise to HBC;

13. The Commissioner is entitled to all evidence which will assist the Tribunal in fashioning an appropriate remedy;
14. To the extent HBC's "clear, continuous and unequivocal commitment to compliance", as detailed by HBC at Paragraph 91 of the Amended Response, is at issue, and to the extent HBC has engaged in substantially similar reviewable conduct for products other than sleep sets, the answers to the Disputed Questions are relevant and necessary;
15. HBC has refused to answer some of the Disputed Questions on the grounds answering these questions would impose an undue burden on the company which would violate the principles of proportionality. However, HBC offers no evidence in support of the undue burden answering the Disputed Questions would cause the company;
16. HBC has adopted a circumscribed approach to information it is prepared to disclose as it relates to the company's compliance efforts, both as it relates to sleep sets and other products and has refused a disproportionate number of questions concerning compliance. All evidence concerning HBC's compliance program is critical to assessing the conduct of the company and its exercise of due diligence in preventing contraventions of the Act;
17. The *Competition Tribunal Rules*, SOR/2008-141, ss. 64 and the *Federal Courts Rules*, SOR/98-106, ss. 240-243; and
18. Such further or other grounds as counsel may advise and the Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

1. The transcripts of the examination for discovery of Christine Jelley, dated August 23 and 24, 2018;

2. The pleadings and proceedings herein; and
3. Such further or other documents as counsel may advise and this Tribunal may permit.

DATED AT GATINEAU, QUÉBEC, this 30th day, October, 2018.

SIGNED BY:

"Original signed by Derek Leschinsky"

Alexander Gay
Derek Leschinsky
Katherine Rydel

Counsel to the Commissioner of Competition

ATTORNEY GENERAL OF CANADA

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Counsel to the Commissioner of Competition

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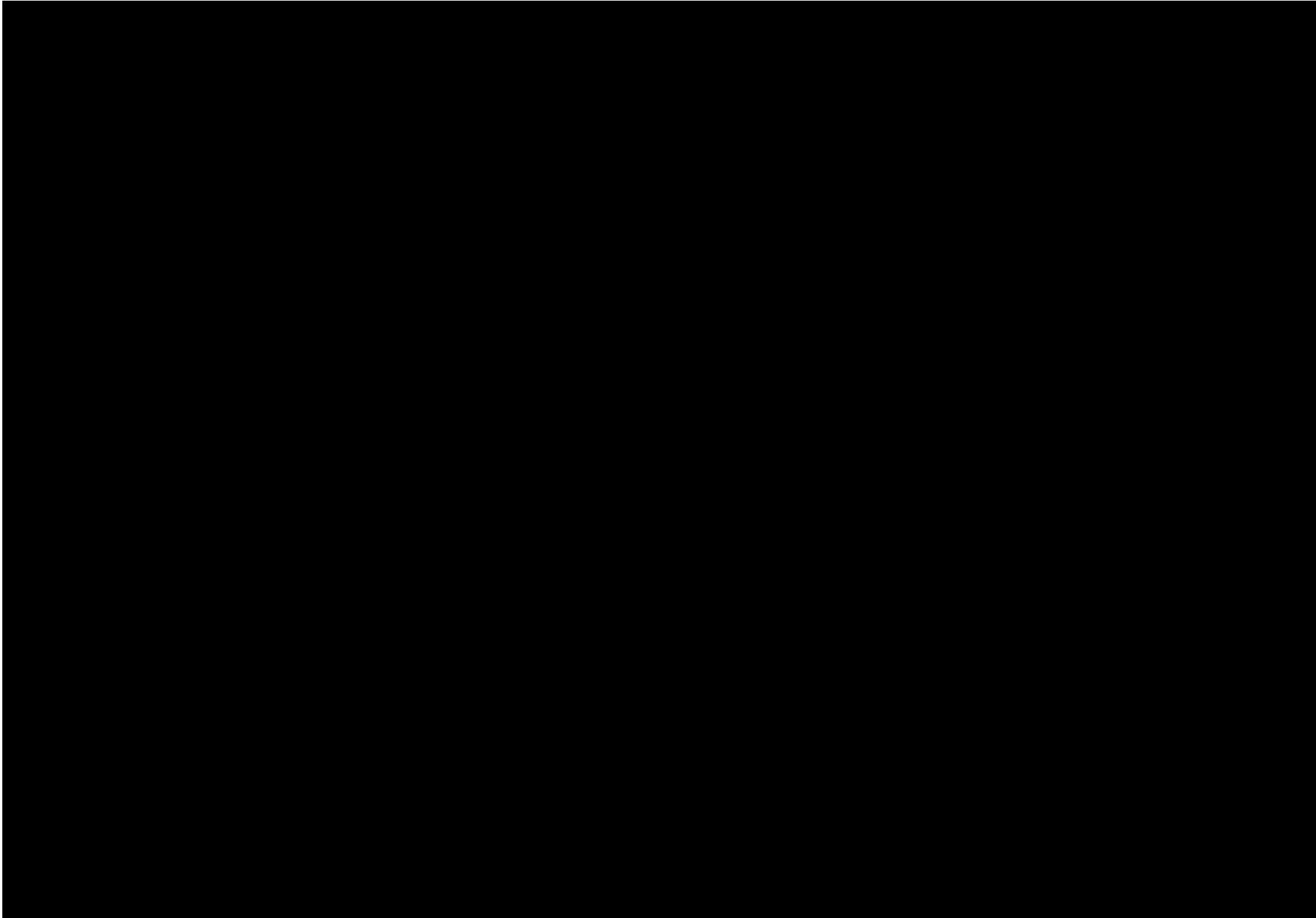
Eliot N. Kolers
Tel: (416) 869-5637
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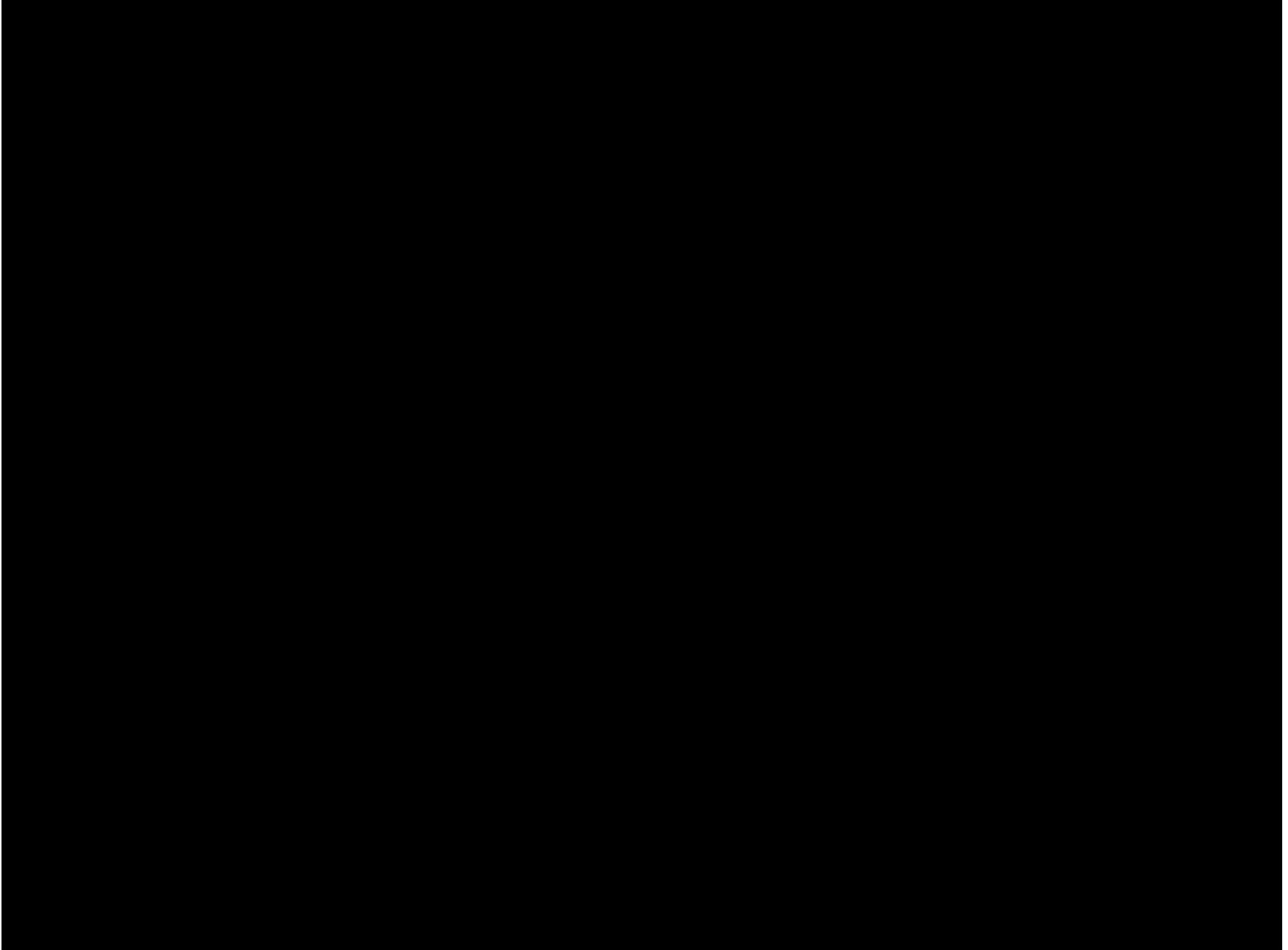
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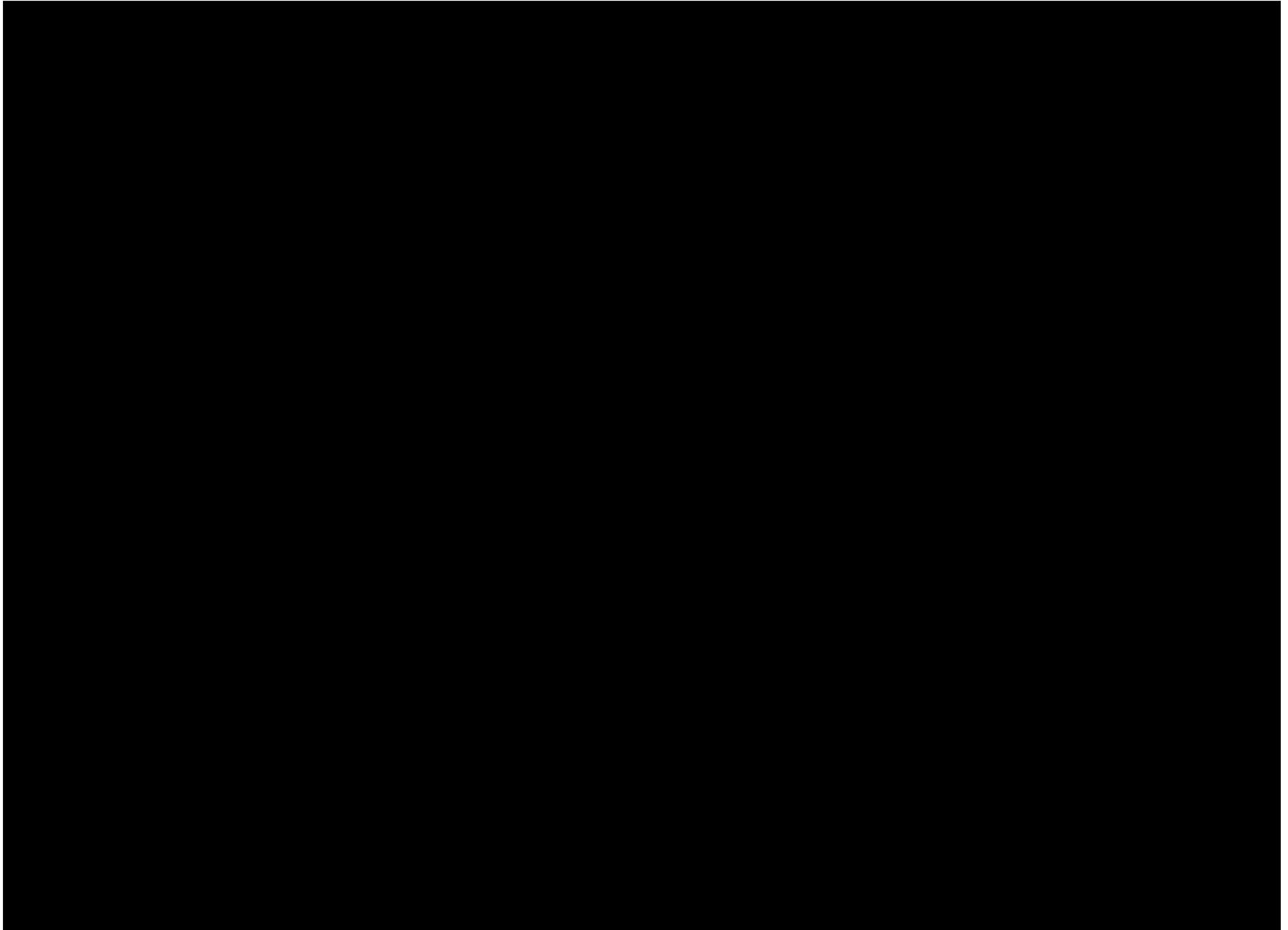
Counsel for the Respondent

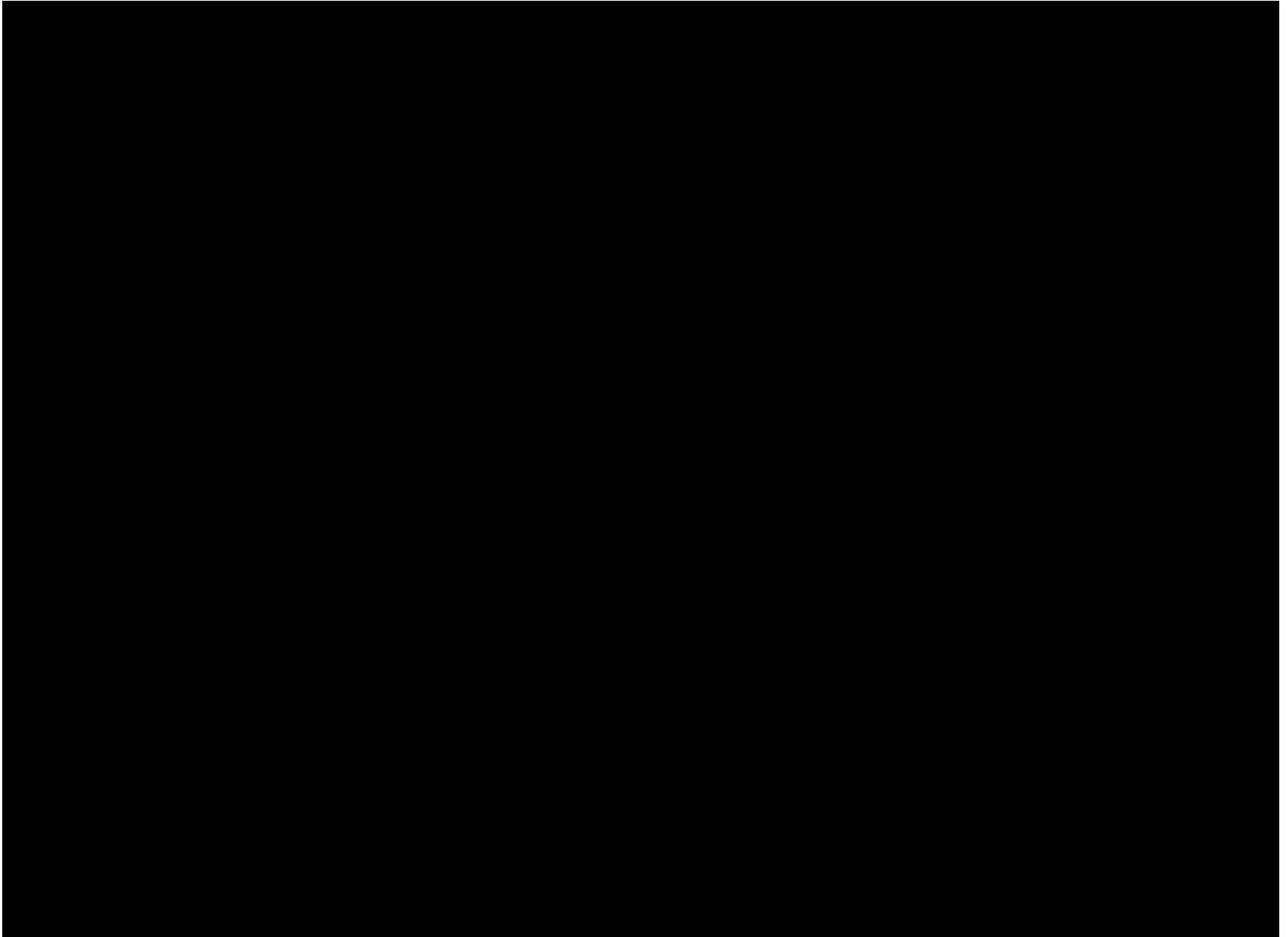
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Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 584

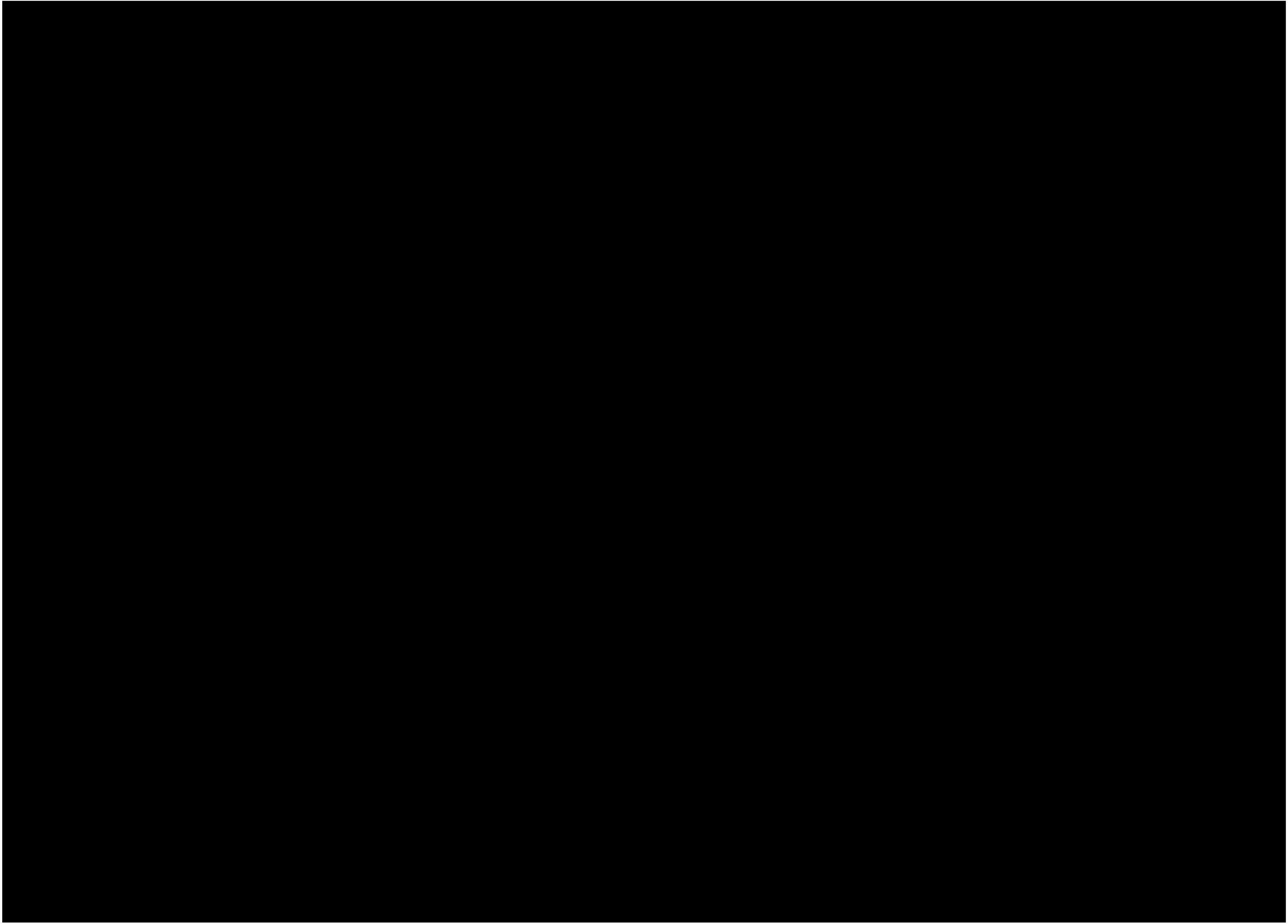
ANNEX A

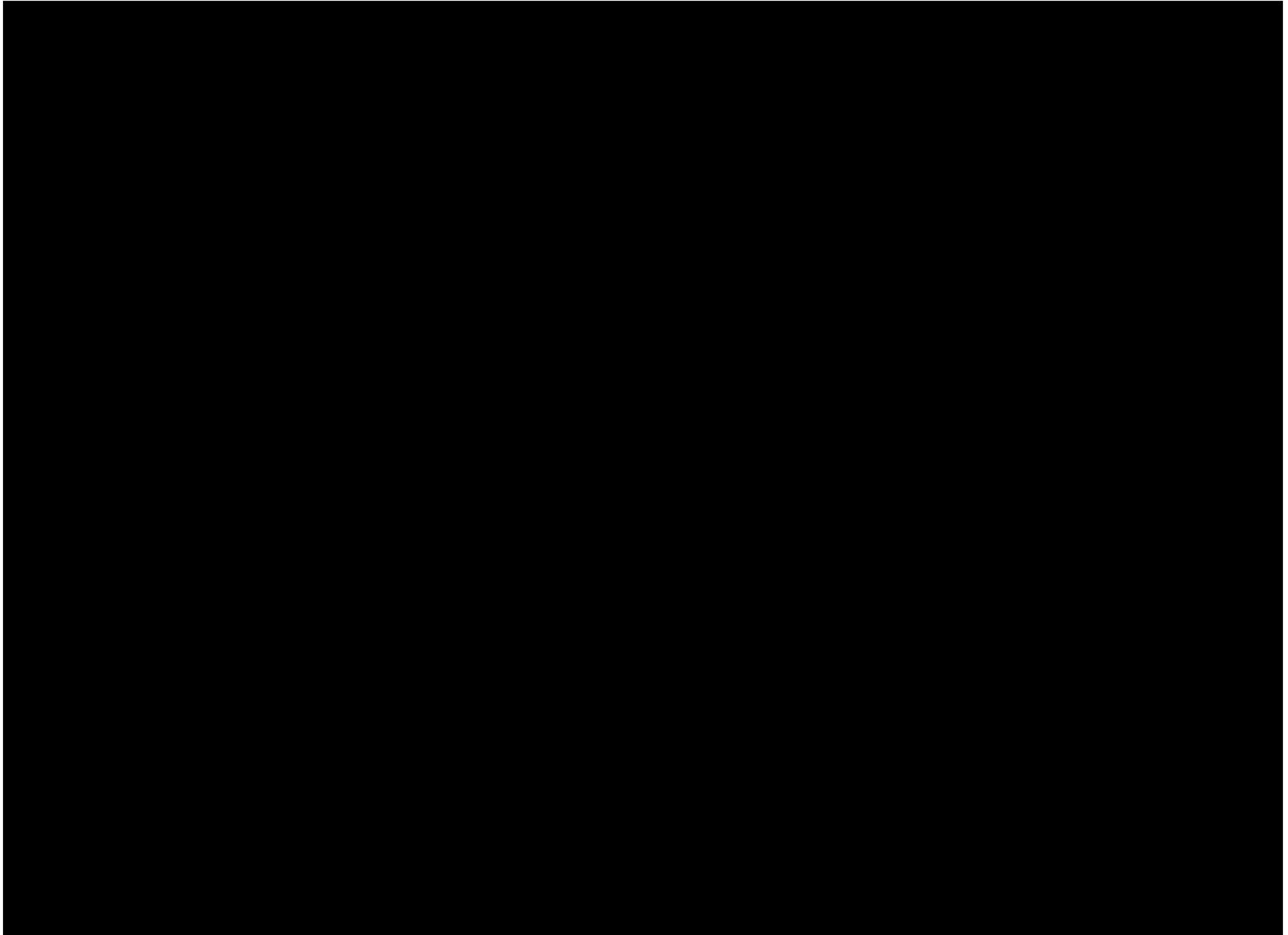


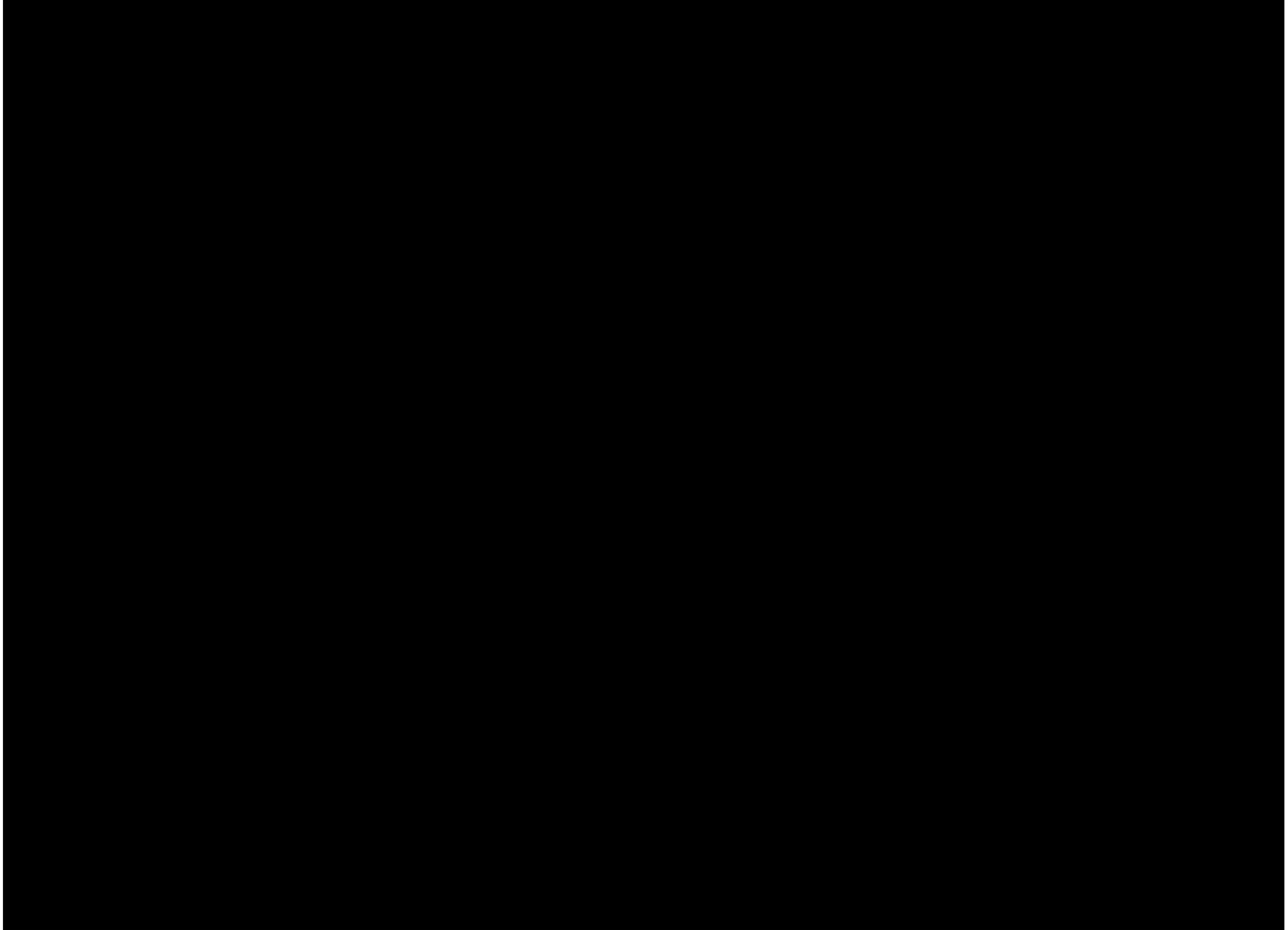


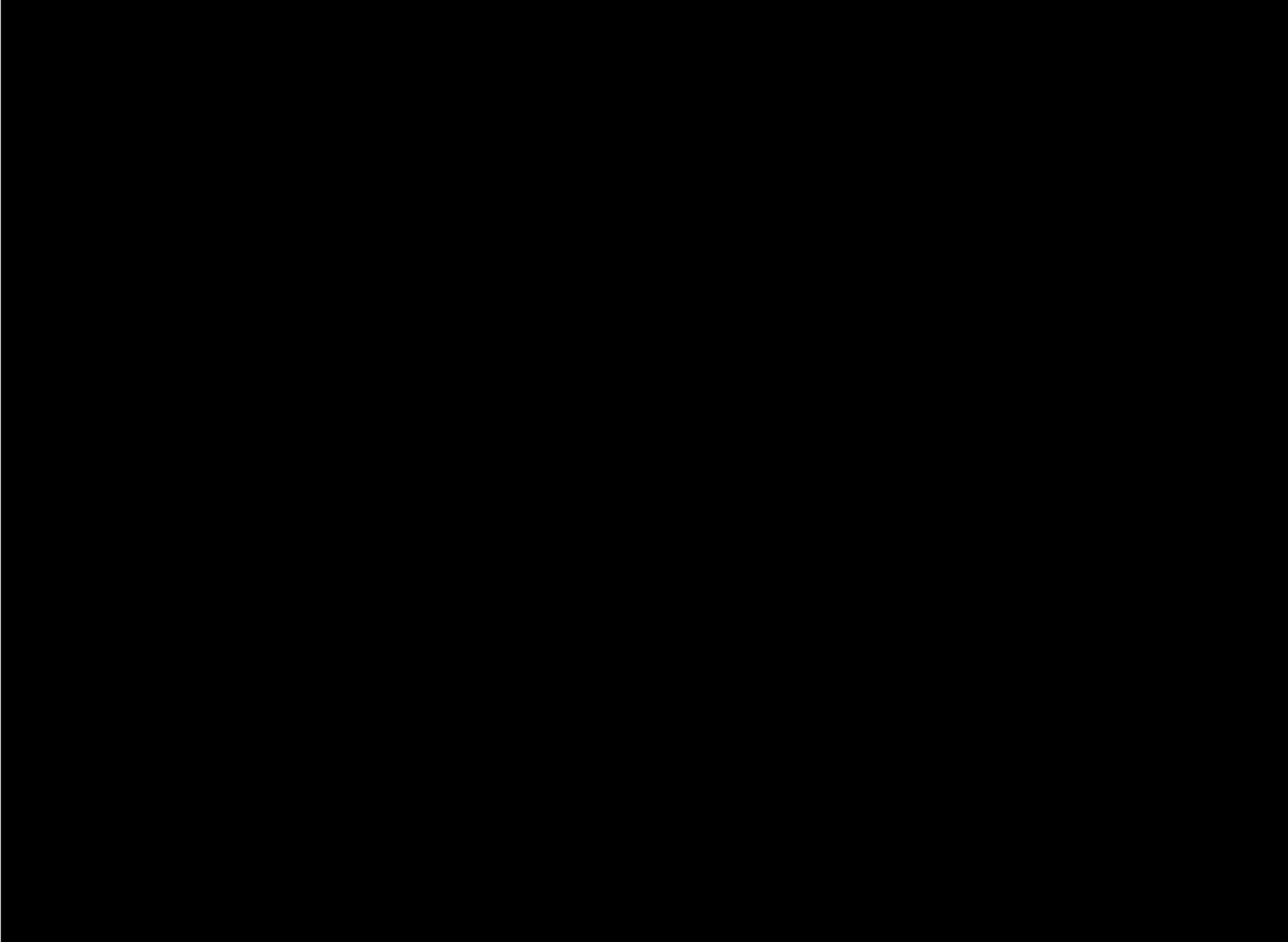


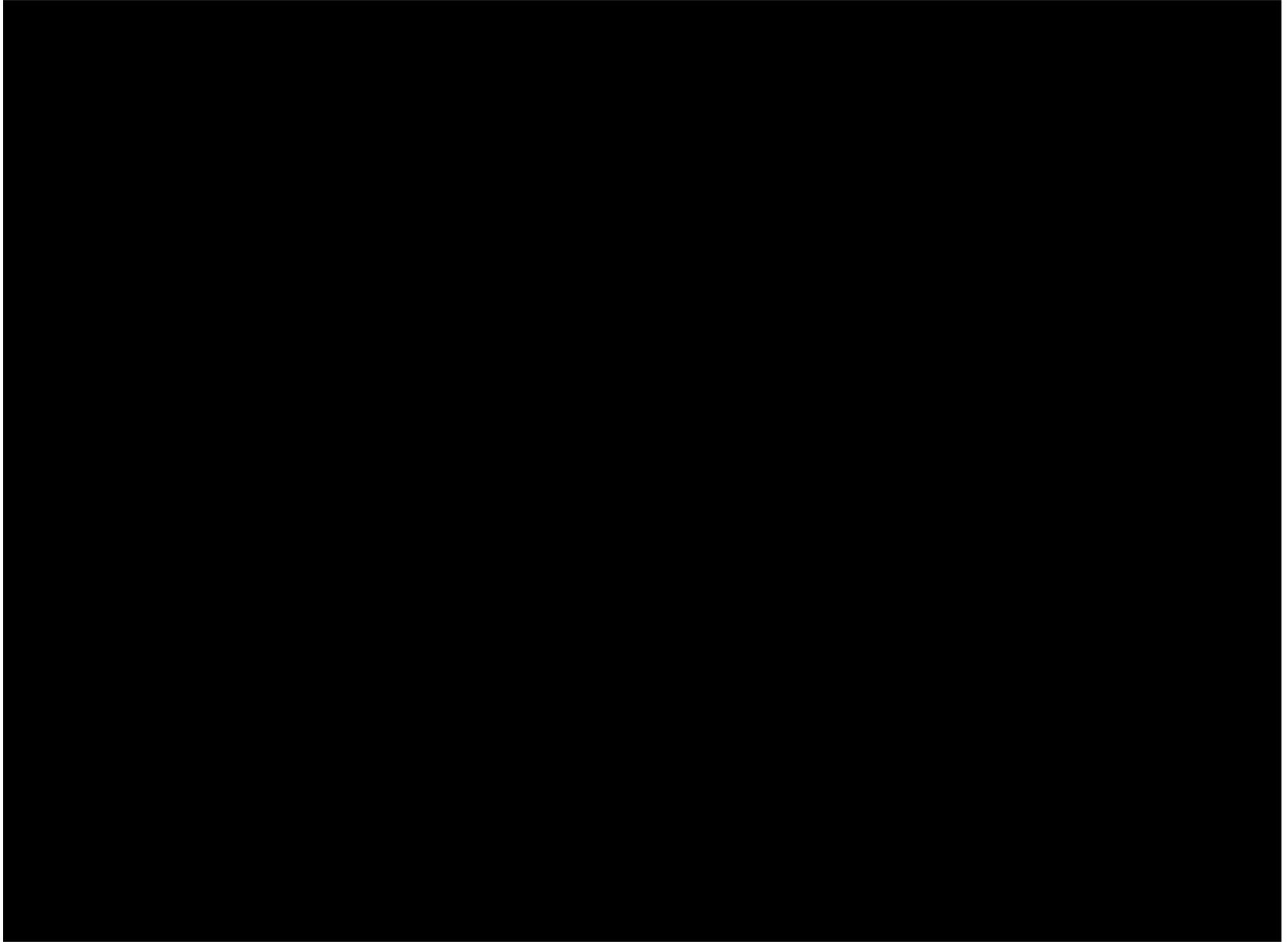




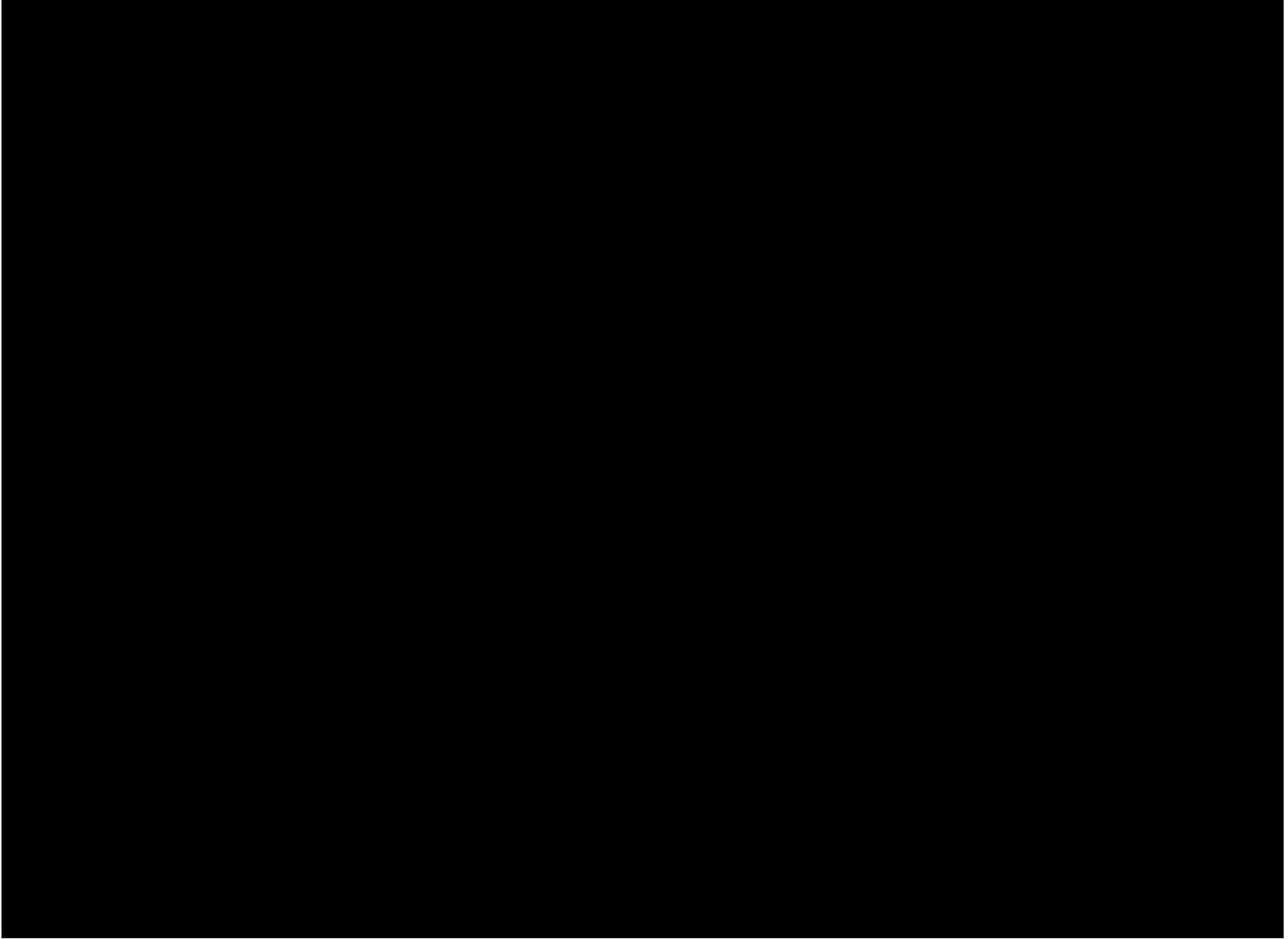


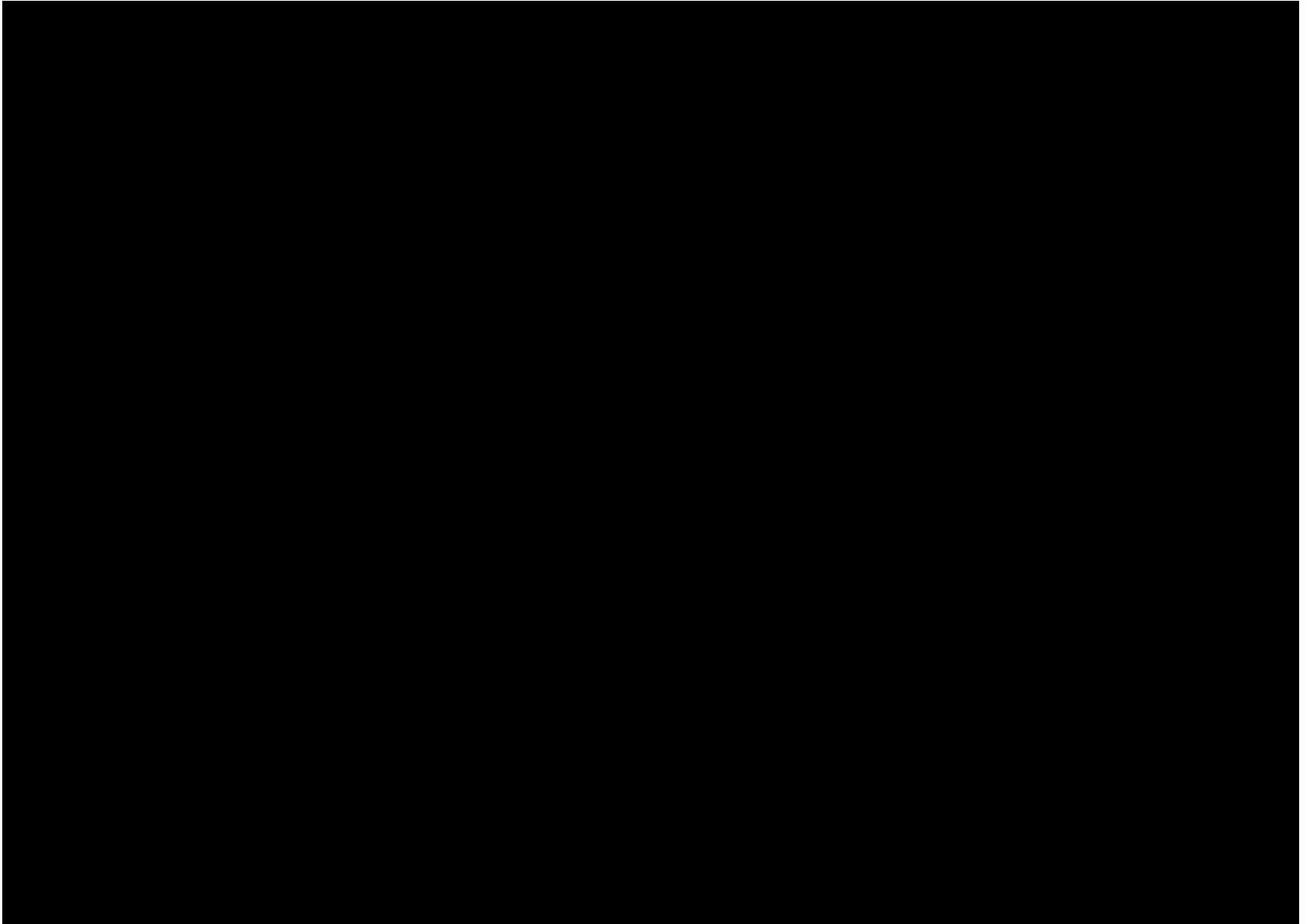




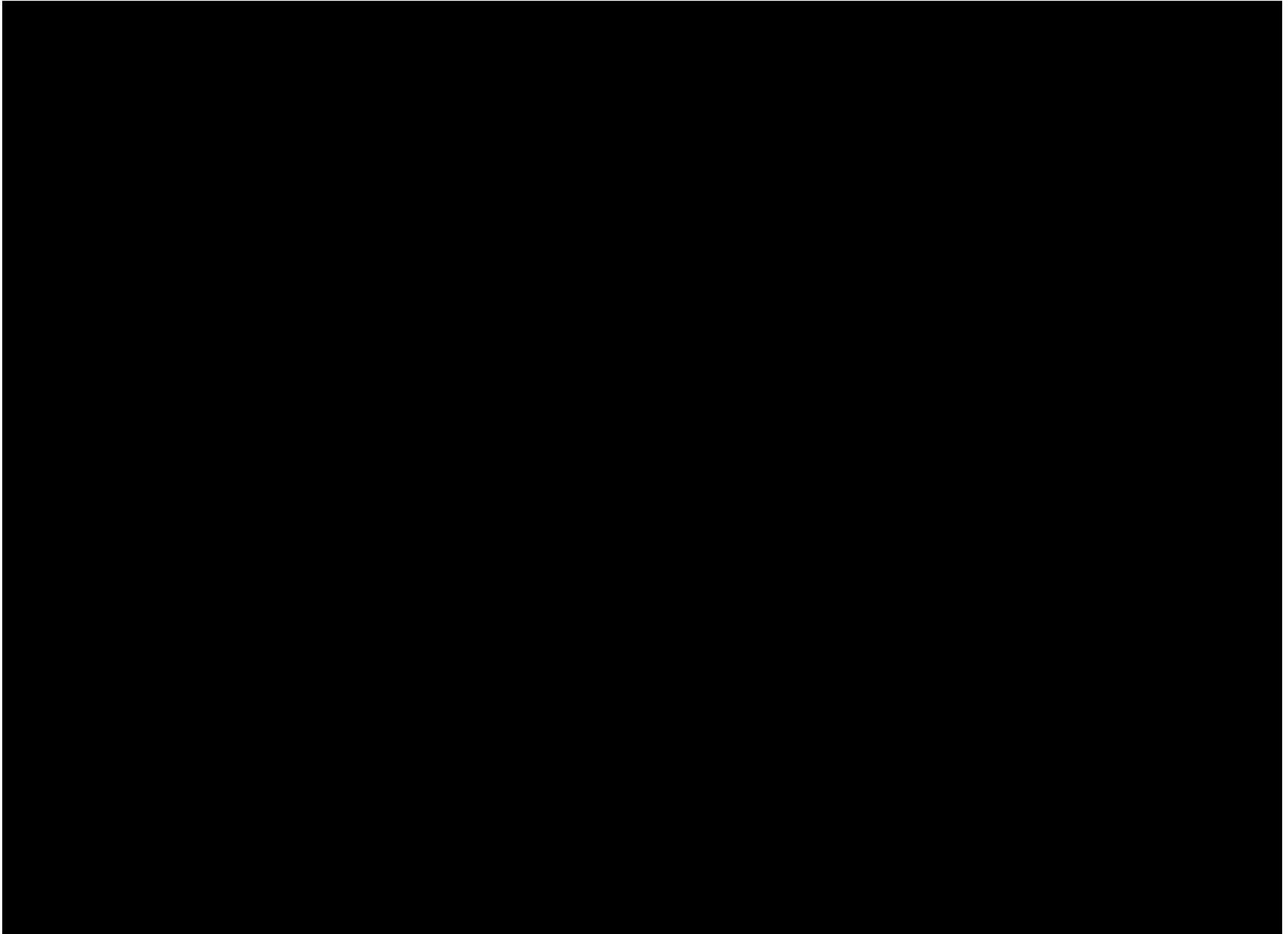


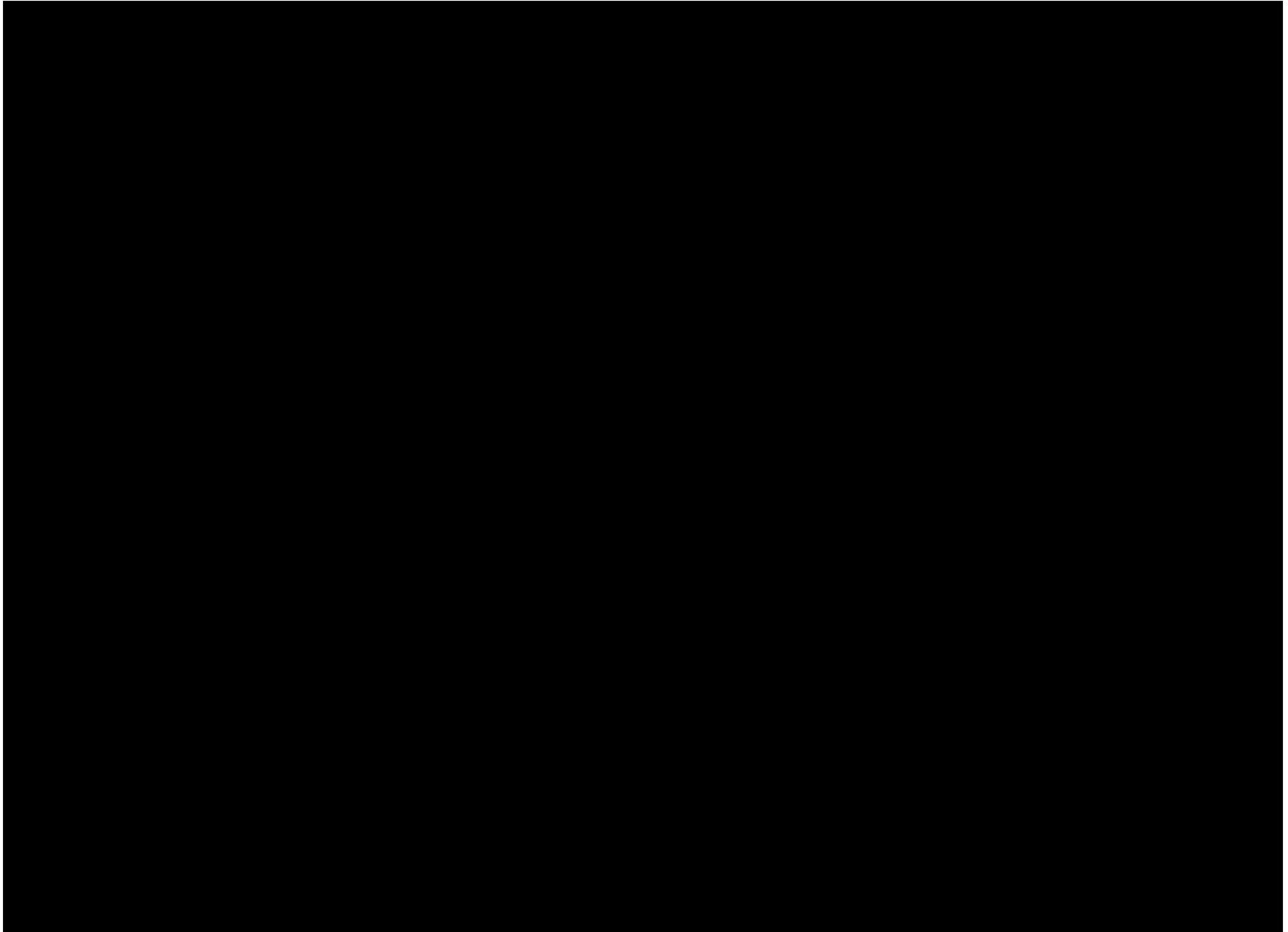


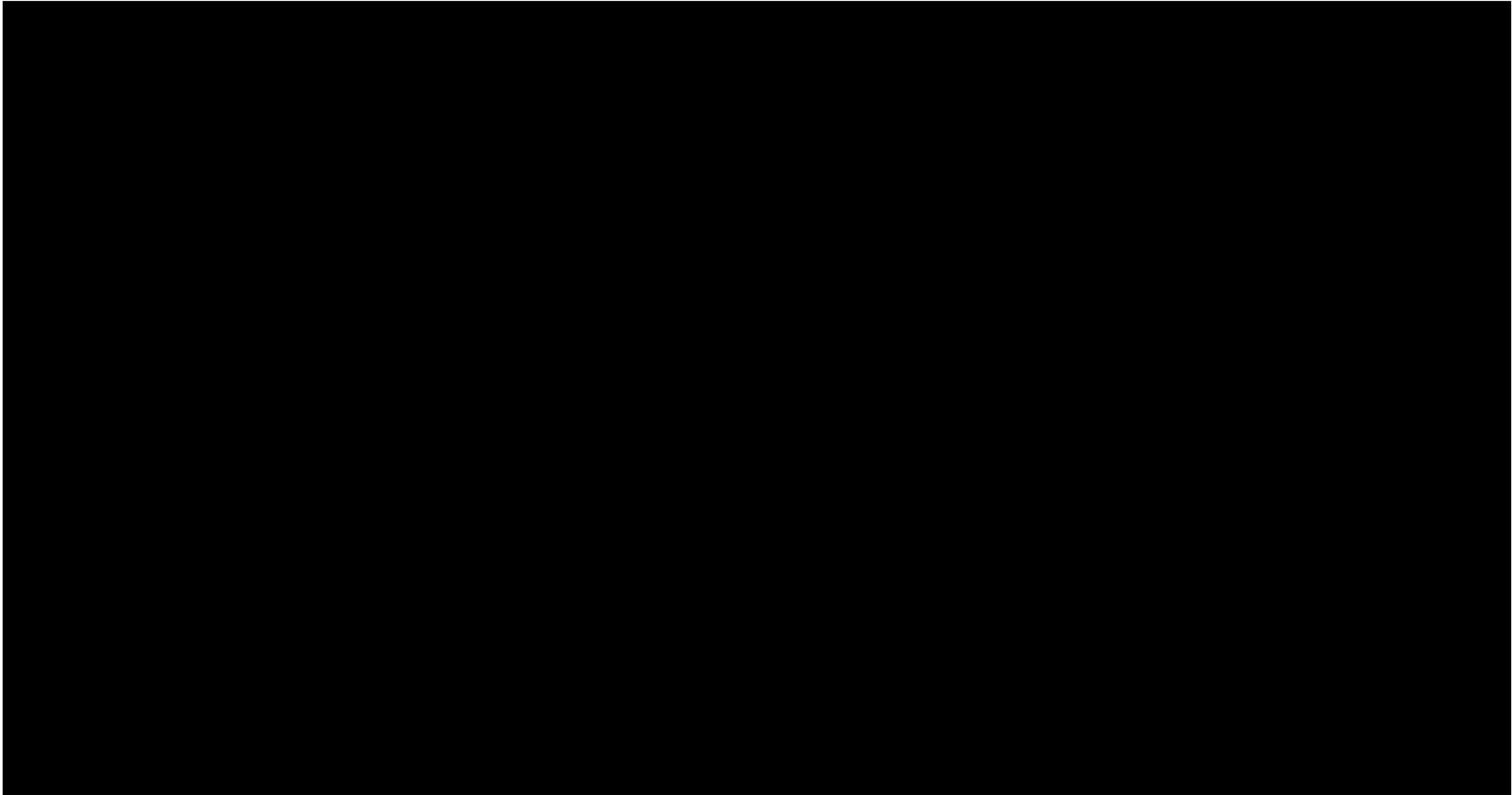




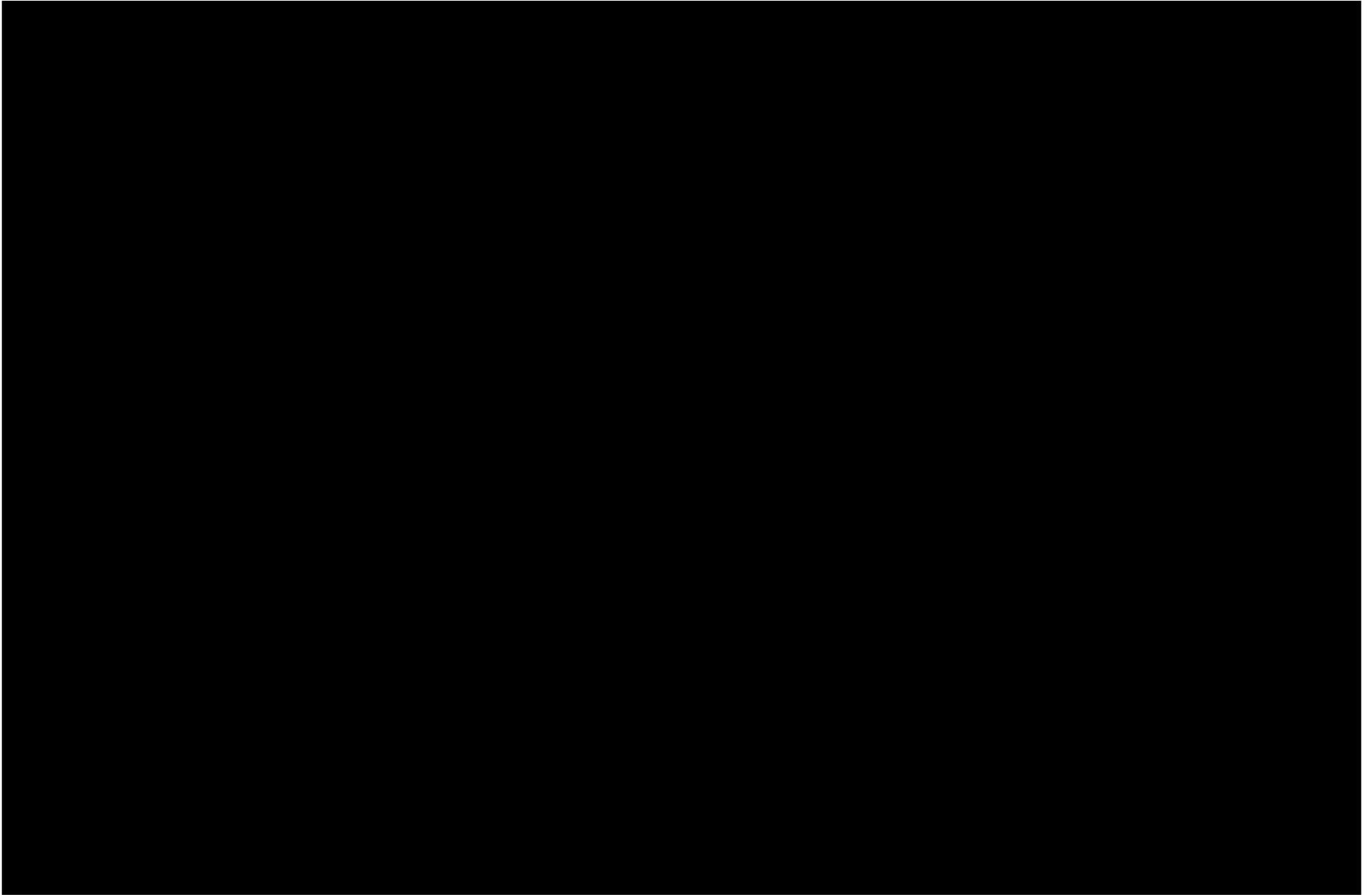


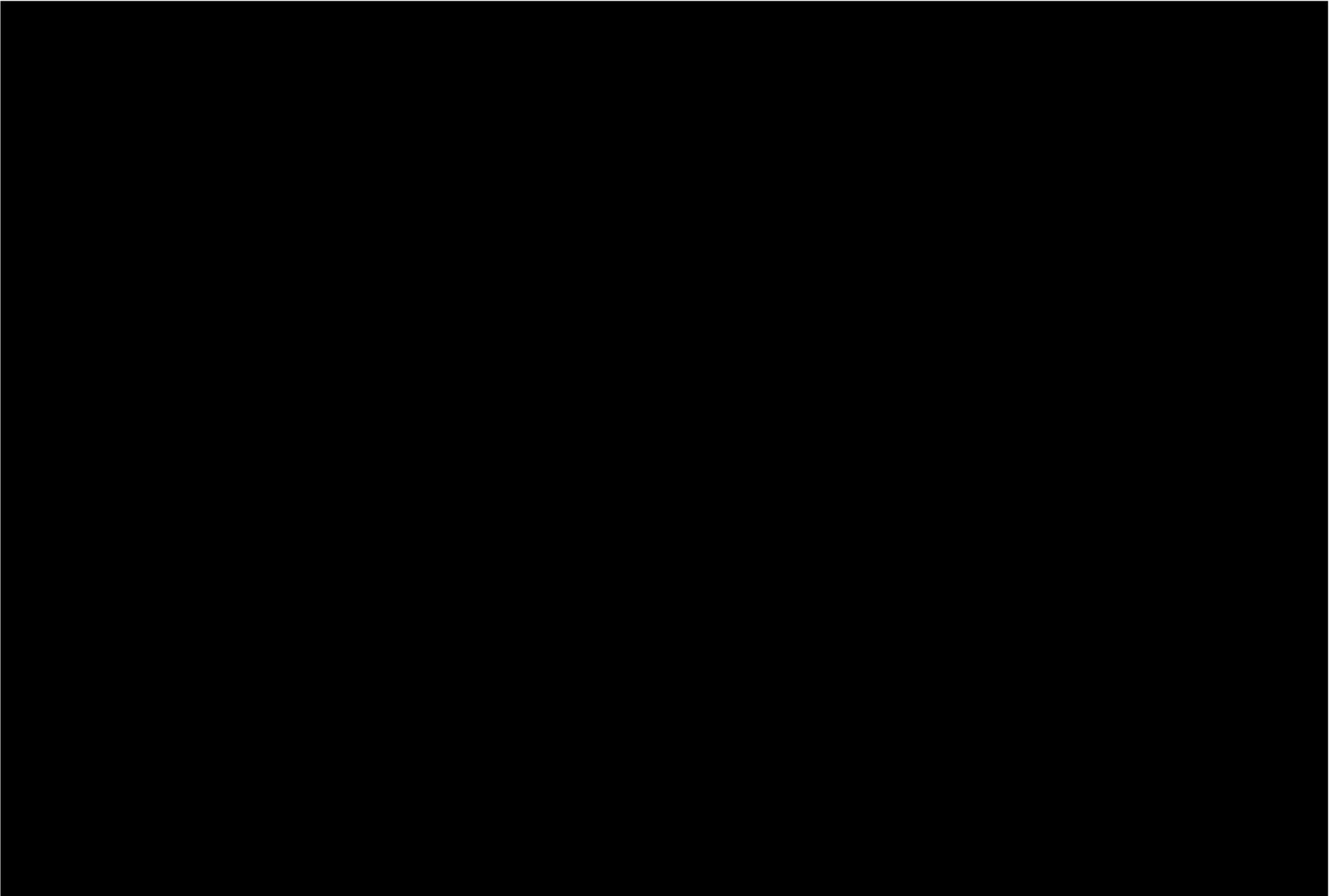


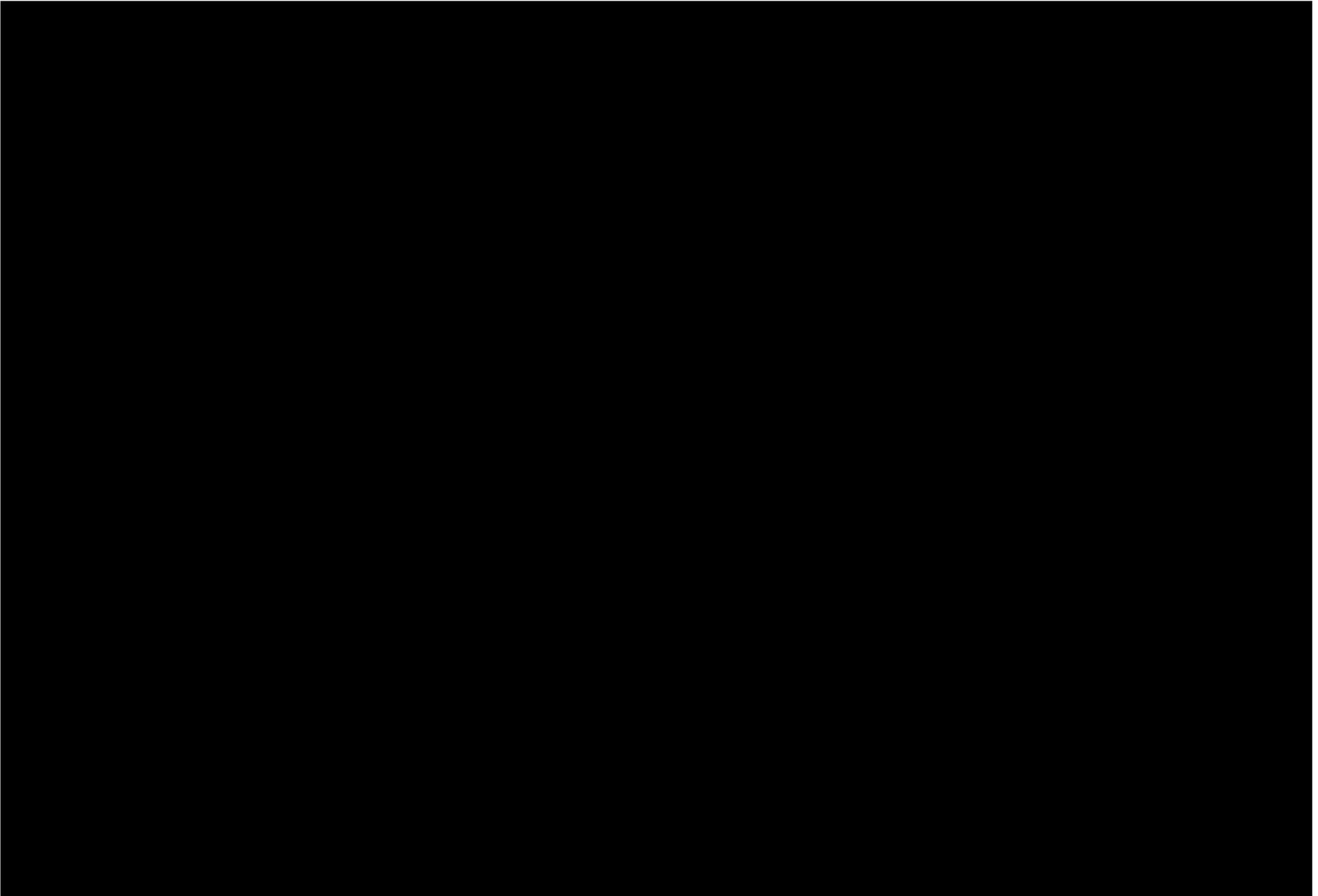


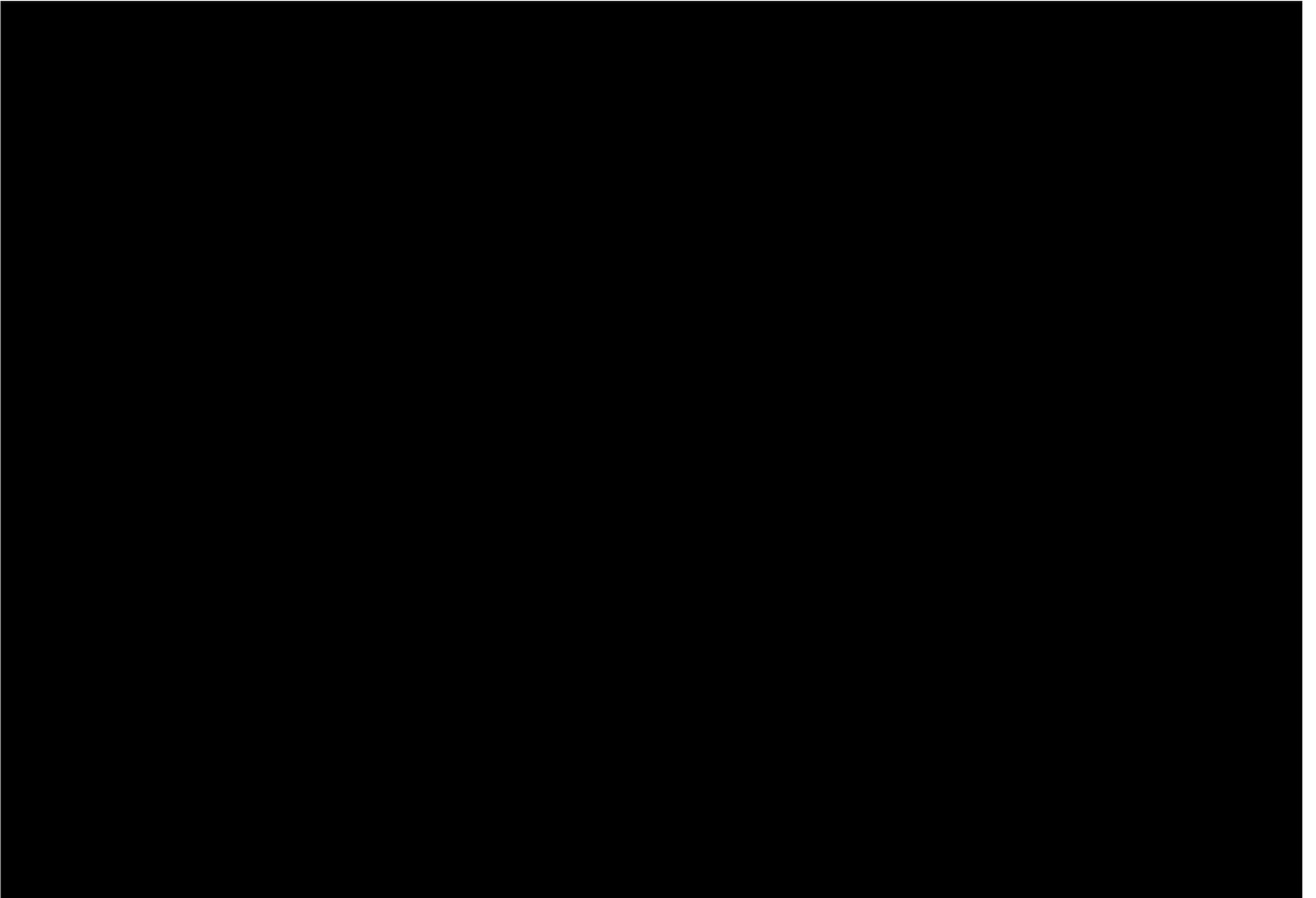


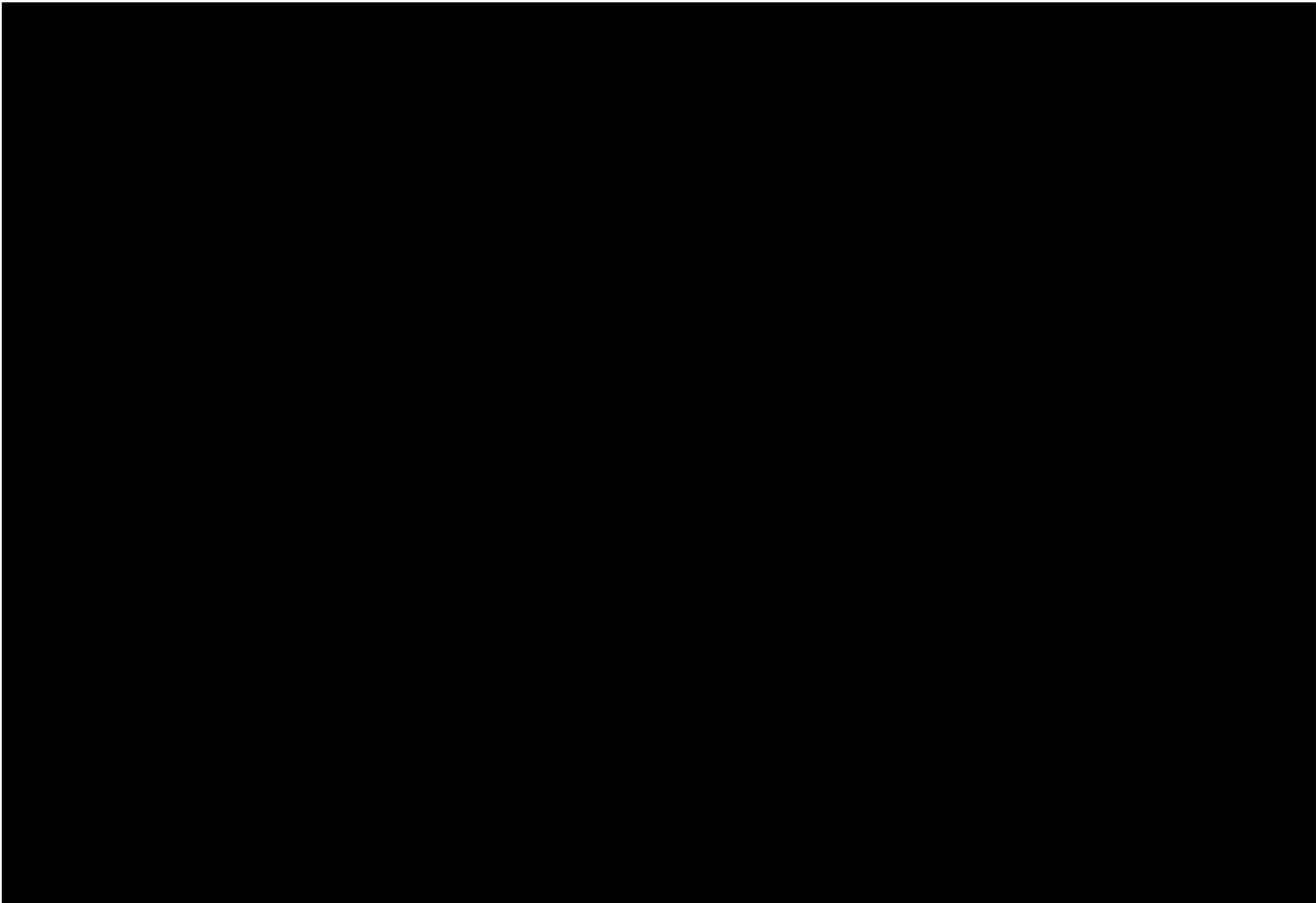
Annex B – [REDACTED]

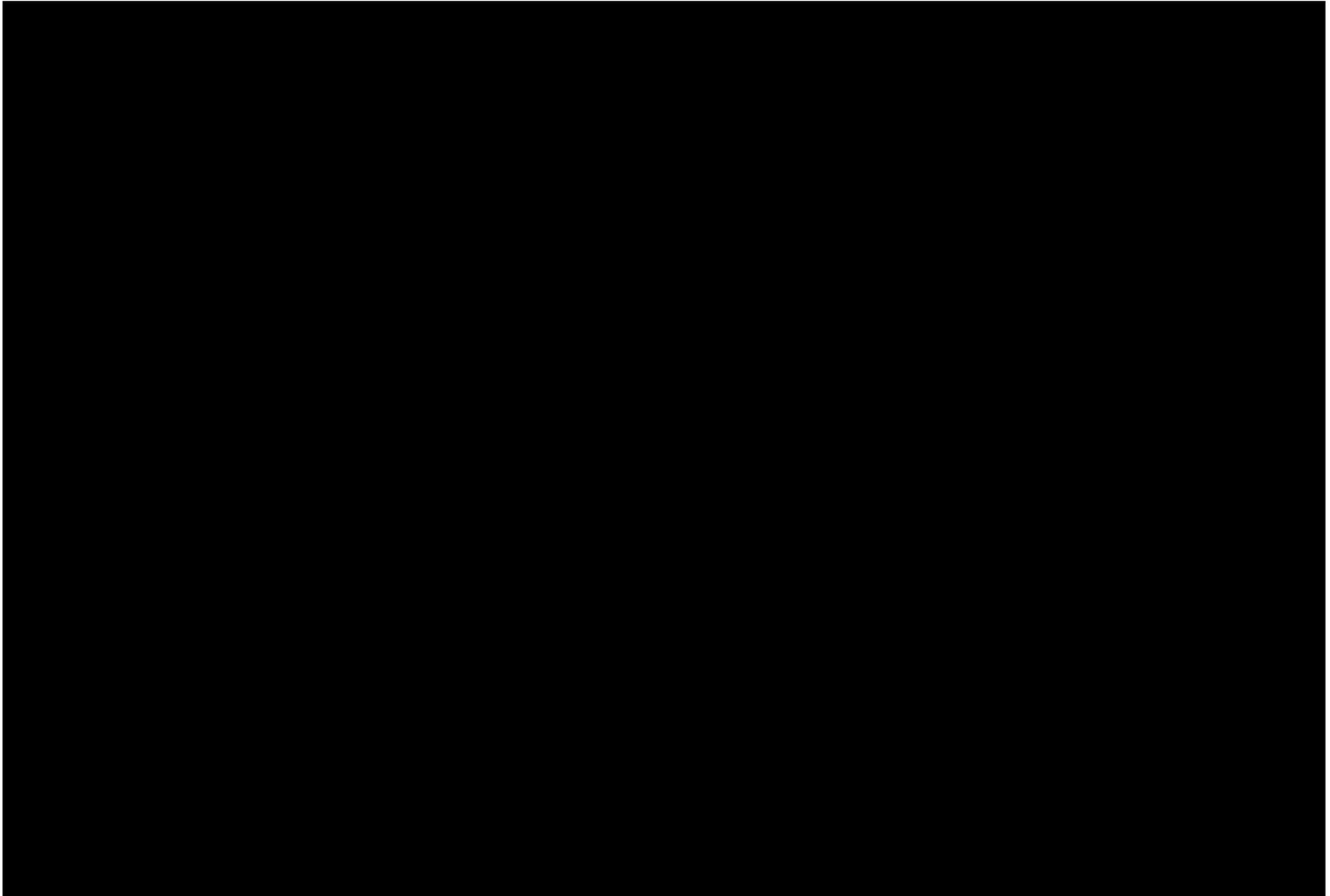






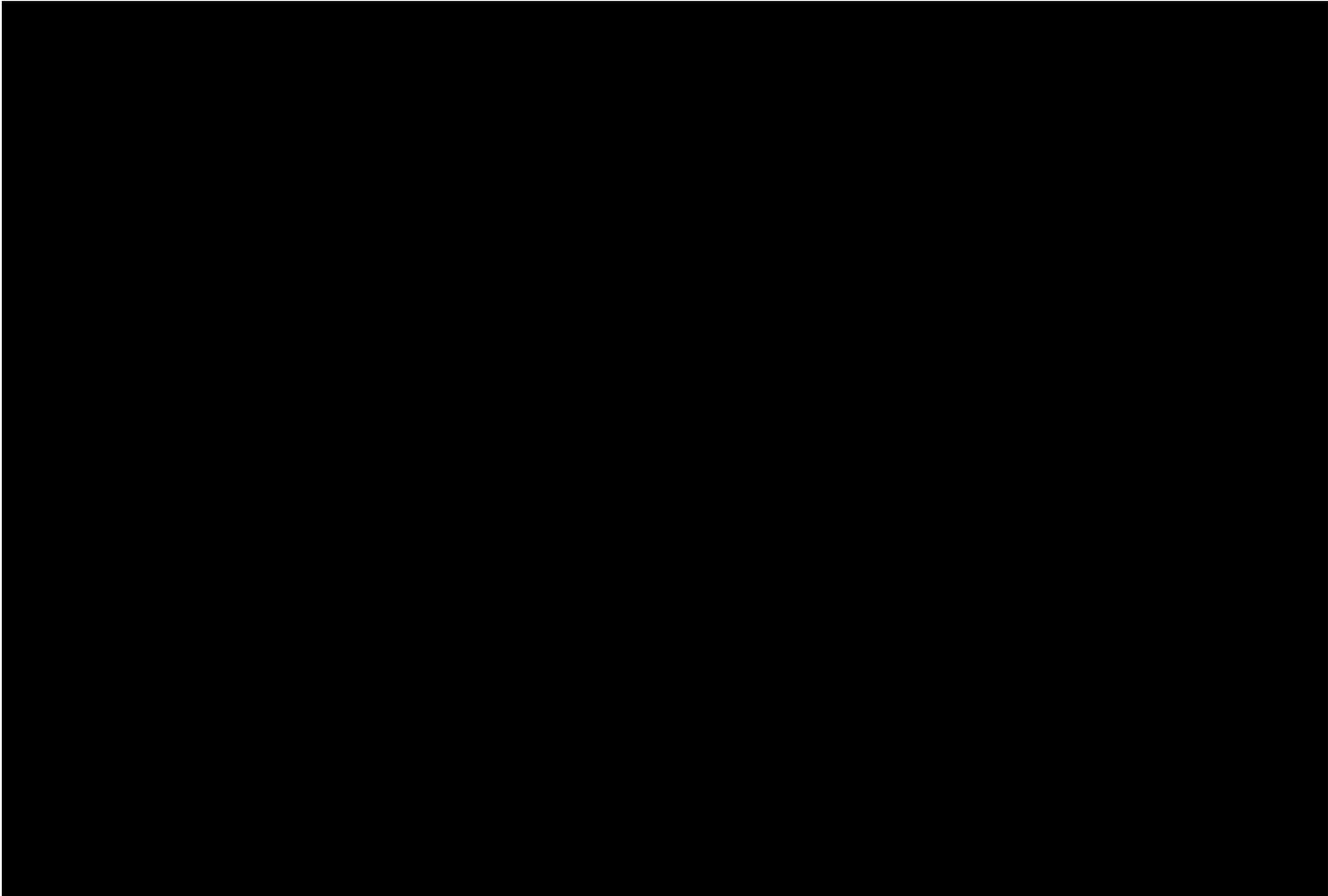


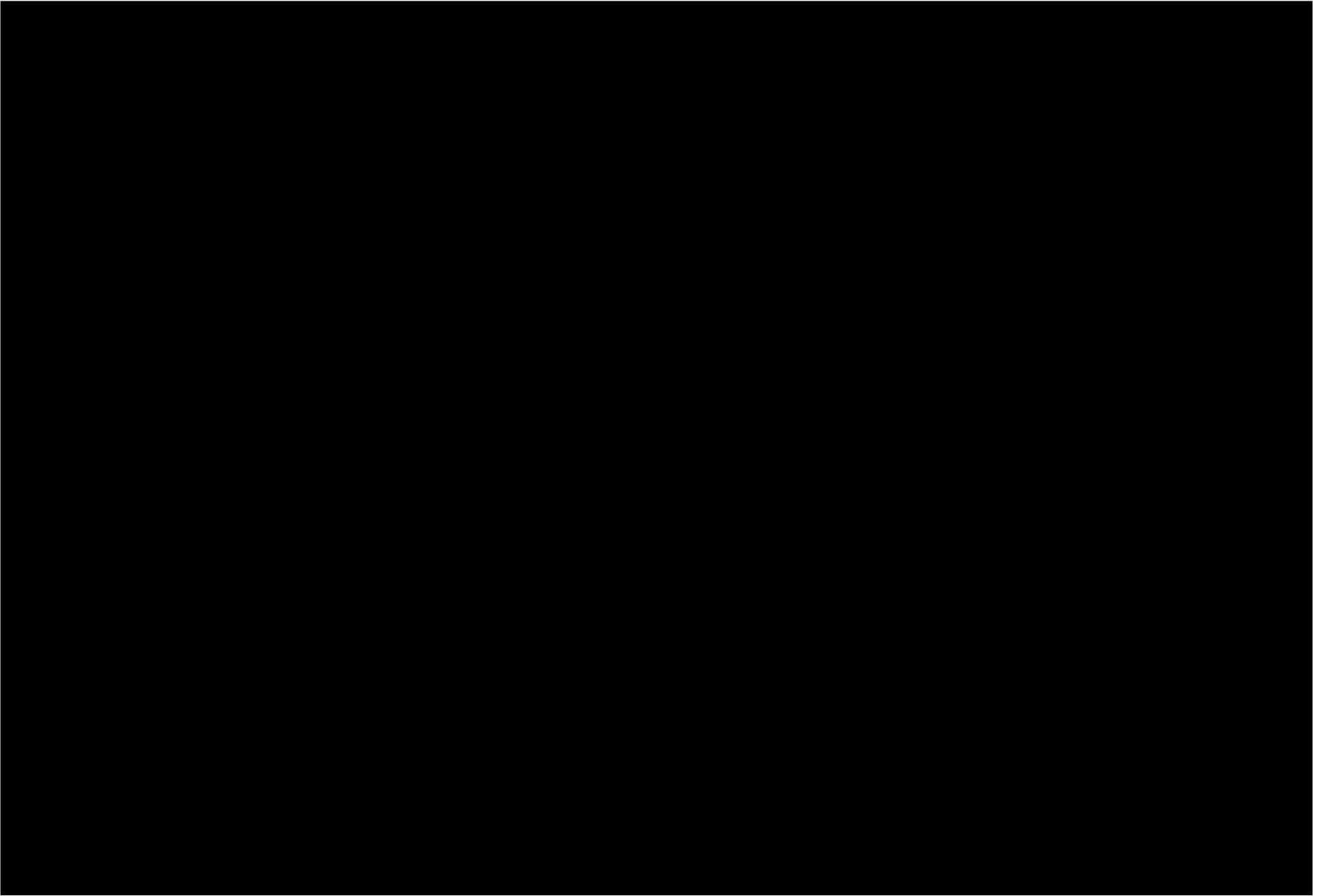


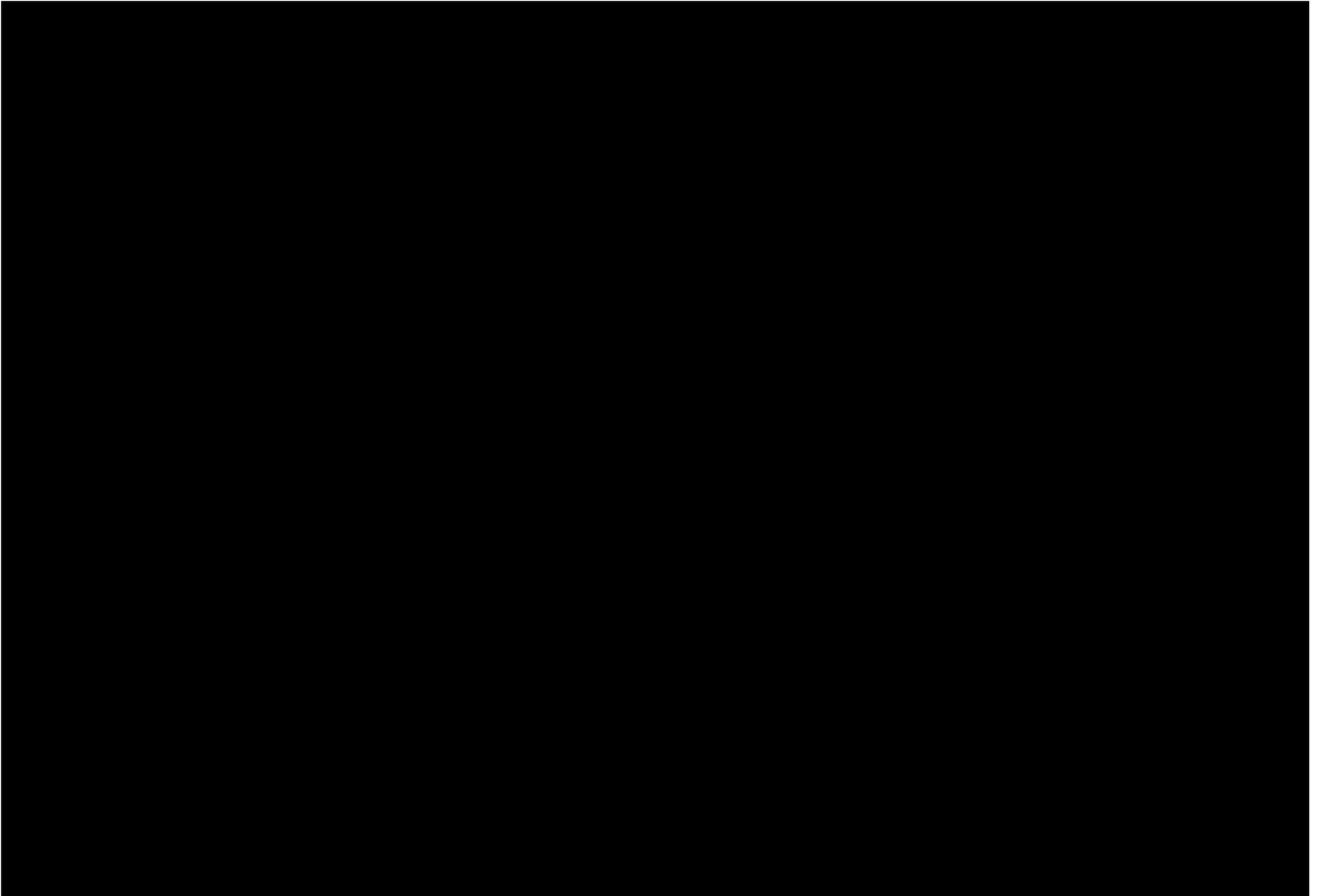


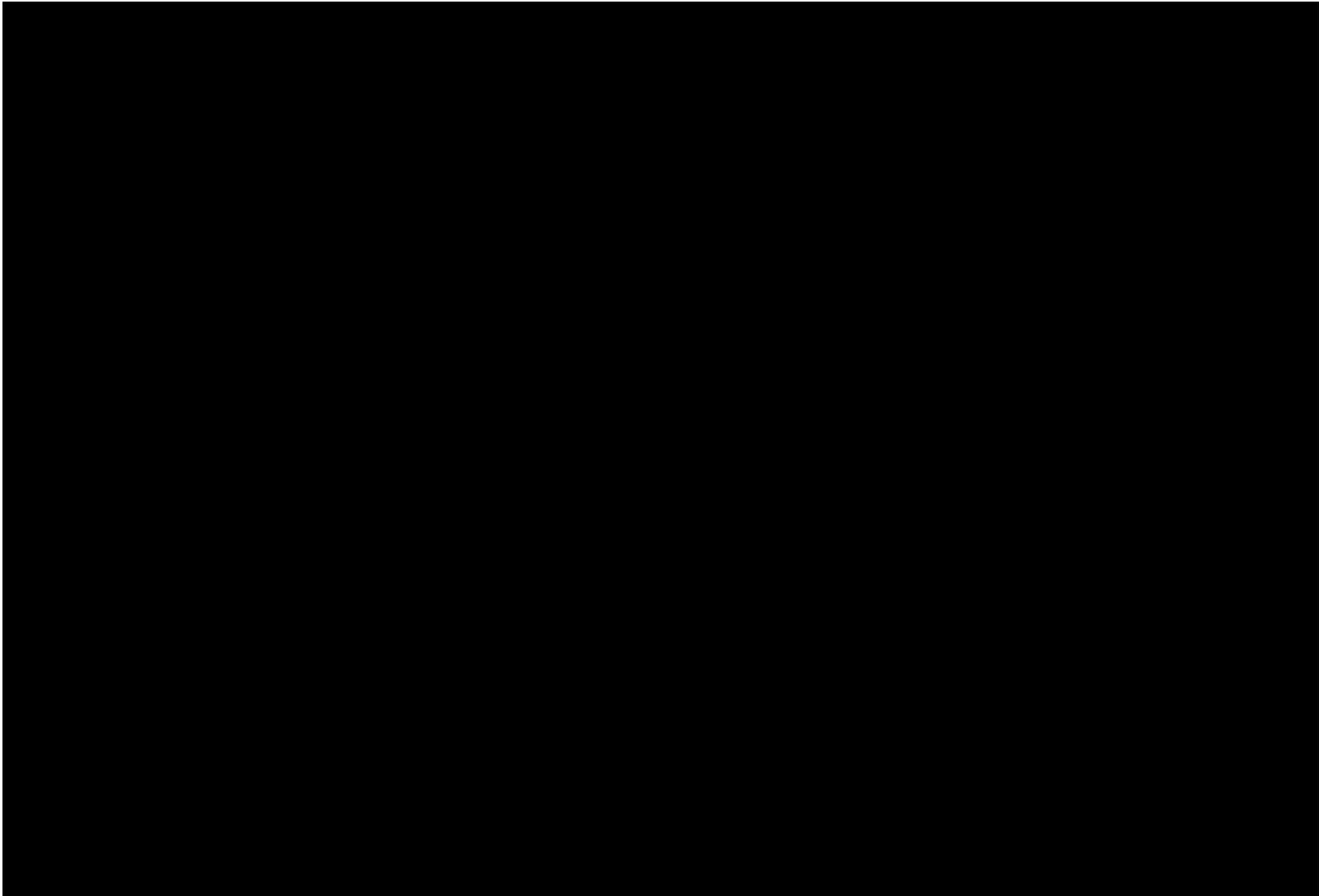


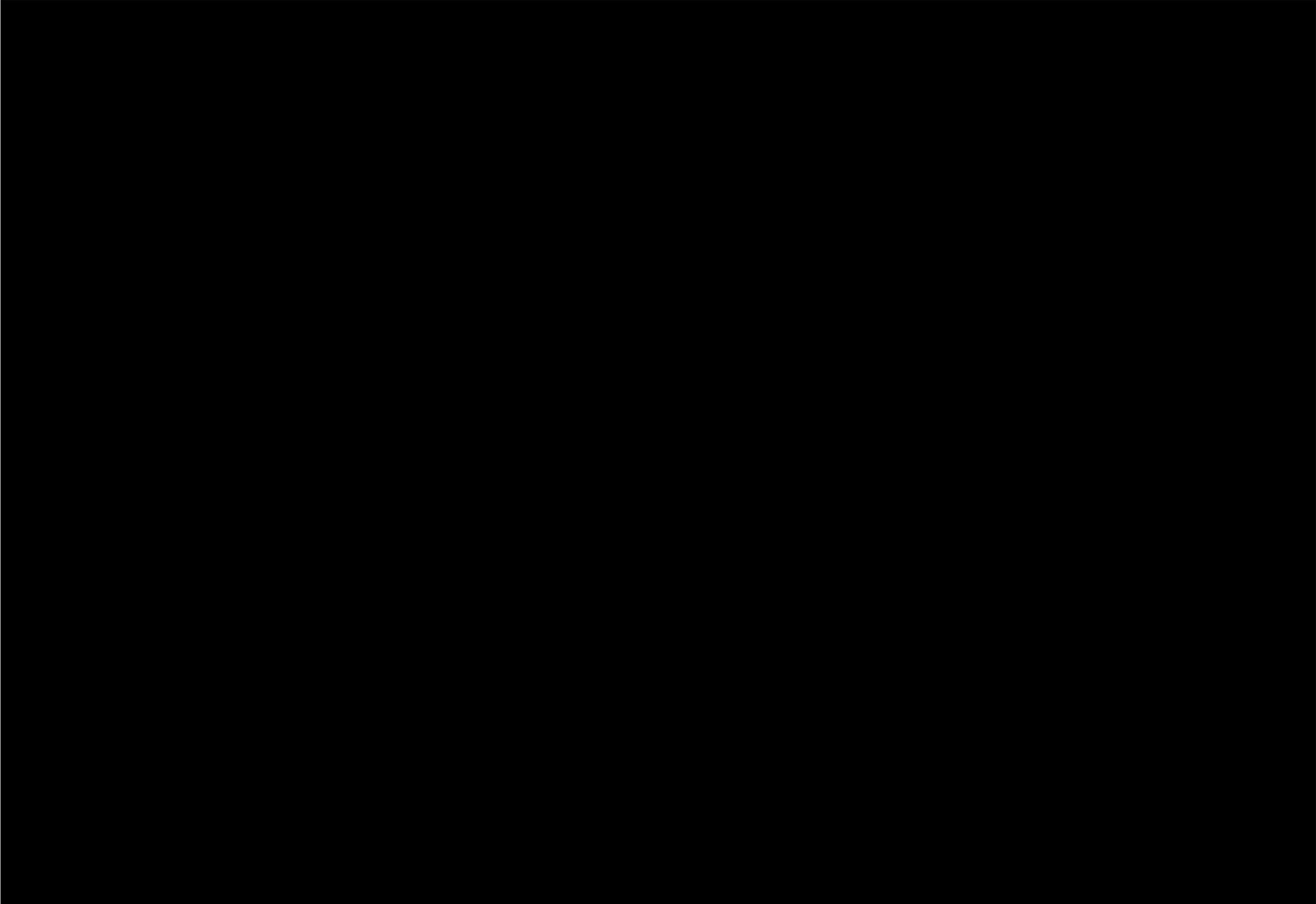


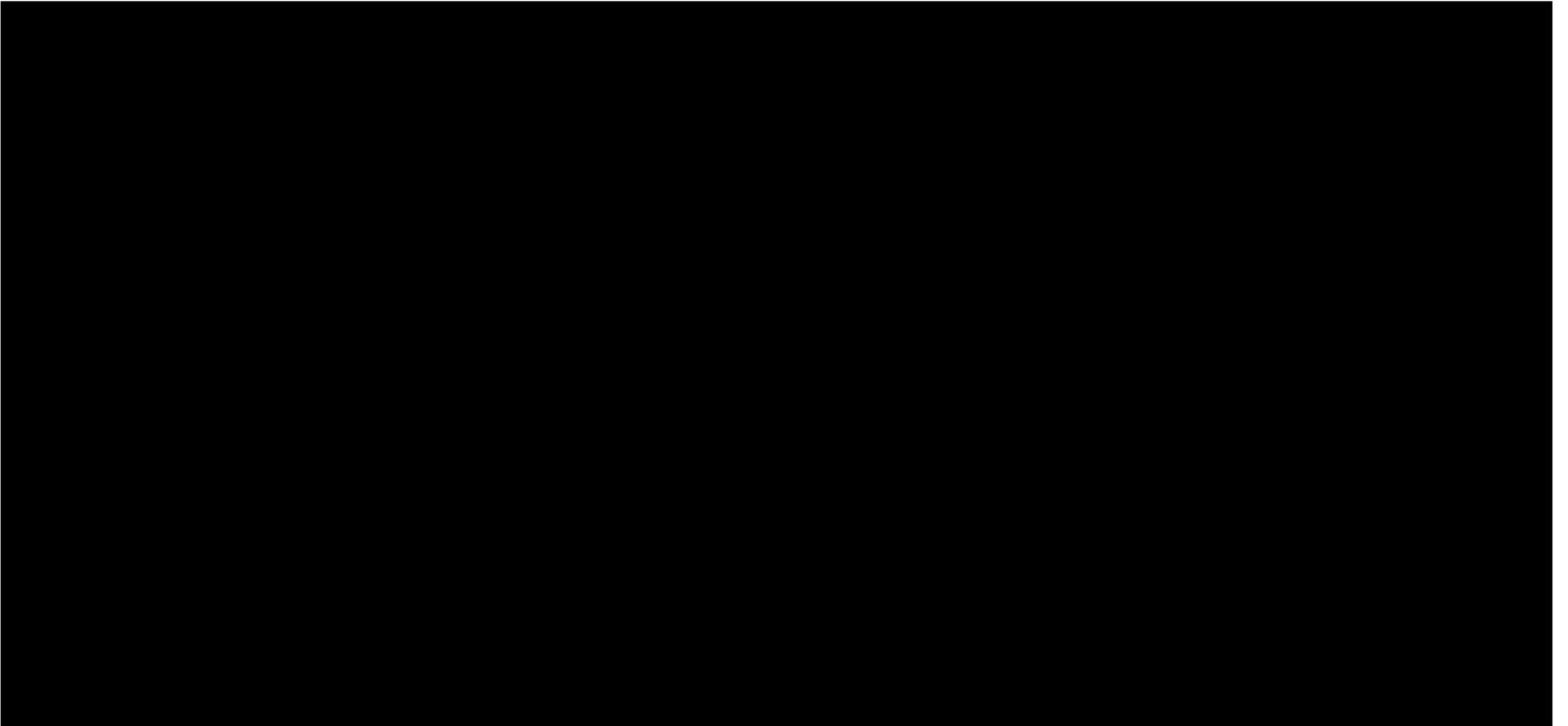












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-and-

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