

FILED / PRODUIT
Date: January 7, 2026
CT- 2024-012

Kaitlin Fortier for / pour
REGISTRAR / REGISTRAIRE

CT-2024-012

OTTAWA, ONT.

134

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to s. 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS CANADA INC.

Respondent

**COMPENDIUM FOR ORAL ARGUMENT OF THE RESPONDENT,
ROGERS COMMUNICAITONS INC.**

**(Commissioner's Motion for Directions, and Cross-Motion by Rogers
returnable January 7, 2026)**

PUBLIC

January 7, 2026

**LAX O'SULLIVAN LISUS
GOTTLIEB LLP**

Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Jonathan Lisus LSO# 32952H
jlisus@lolg.ca
Tel: 416.598.7873

Crawford Smith LSO# 42131S
csmith@lolg.ca
Tel: 416 598 8648

Bradley Vermeersch LSO#
69004K bvermeersch@lolg.ca
Tel: 416 646 7997

John Carlo Mastrangelo LSO#
76002P jmastrangelo@lolg.ca
Tel: 416 956 0101

**DAVIES WARD PHILLIPS &
VINEBERG LLP**

40th Floor; 155 Wellington St. W
Toronto, ON M5V 3J7

Anita Banicevic LSO# 42793G
abanicevic@dwpv.com
Tel: 416 863 5523

Teraleigh Stevenson LSO#
82540E t Stevenson@dwpv.com
Tel: 416 367 7627

Counsel for the Respondent,
Rogers Communications Inc.

PUBLIC

TO: **THE COMMISSIONER OF COMPETITION**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

Jonathan Hood
jonathan.hood@cb-bc.gc.ca
Tel: 416 954 5925

Tanis Halpape
tanis.halpape@cb-bc.gc.ca
Tel: 613 979 8851

Irene Cybulsky
irene.cybulsky@cb-bc.gc.ca
Tel: 613 316 5034

Kendra Wilson
kendra.wilson@cb-bc.gc.ca
Tel: 613 799 9454

Counsel for the Applicant, The Commissioner of Competition

AND TO: **THE REGISTRAR**
COMPETITION TRIBUNAL
333 Laurier Avenue West
17th Floor
Ottawa, Ontario K1A 0G7

INDEX

Tab	Document	Source	Page
1	Tribunal’s Reasons for Order and Order partially granting Rogers Communications Inc.’s refusals motion, dated December 12, 2025, indexed as <i>Canada (Commissioner of Competition) v. Rogers Communications Inc.</i> , 2025 Comp. Trib. 23	Rogers’ Book of Authorities, Tab 3	7
2	Documents produced by the Commissioner of Competition on December 15, 2025, pursuant to the Tribunal’s Reasons for Order and Order partially granting Rogers’ refusals motion: <ul style="list-style-type: none">• Preliminary Case Assessment, dated June 25, 2020• Email chain with the subject line “PCA – Unlimited Cell Plans”, October 2020• Amended Preliminary Case Assessment, dated October 7, 2020• Case Selection Committee – Routing Slip	Affirmative Motion Record of the Commissioner of Competition dated December 23, 2025 (“AMR”), Tab 2, Exhibits B-E	17
3	Excerpts from the Examination Transcript of K. Phillipowsky, December 17, 2025	Responding Motion Record of Rogers dated January 6, 2026 (“RMR”), Tab 2, Exhibit D	63
4	Excerpts from the Examination Transcripts of K. Phillipowsky, September 3-5, 2025	RMR, Tab 2, Exhibit C	105
5	Tribunal’s Scheduling Order, dated March 26, 2025	RMR, Tab 6	129
6	Excerpts from the Affidavits of Laura Sonley (affirmed May 5, 2022); Andrew Kelly (affirmed June 29, 2021); and Andrew McAlpine (sworn September 1, 2011)	RMR, Tab 2, Exhibits F-H	136
7	██ ██ ██ ██ ██	RMR, Tab 2, Exhibit A-B	166

PUBLIC

Tab	Document	Source	Page
8	Tribunal’s Reasons for Order and Order on a motion for additional production, dated August 11, 2025, and indexed as <i>Canada (Commissioner of Competition) v. Rogers Communications Inc.</i> , 2025 Comp Trib 11	Rogers’ Book of Authorities, Tab 1	<u>174</u>
9	Tribunal’s Amended Reasons for Order and Order Partially Granting Rogers' Motion to Amend its Response, dated November 7, 2025, and indexed as <i>Canada (Commissioner of Competition) v Rogers Communications Inc.</i> , 2025 Comp Trib 21	Rogers’ Book of Authorities, Tab 2	<u>183</u>
10	Excerpt from <i>Mitchell v Candle Lake (Resort Village)</i> , 2021 SKCA 44	Rogers’ Book of Authorities, Tab 5	<u>193</u>
11	Excerpt from <i>Zelinski v The Queen</i> , [2002] 1 C.T.C. 2422, 2001 CanLII 406	Rogers’ Book of Authorities, Tab 6	<u>201</u>
12	Excerpt from <i>Lubrizol Corp. v. Imperial Oil Ltd.</i> , [1996] 3 F.C. 40 (C.A.).	Rogers’ Book of Authorities, Tab 7	<u>203</u>
13	Excerpt from <i>Turnagain Holdings Ltd. v. Environmental Appeal Board</i> , 2001 BCSC 795.	Rogers’ Book of Authorities, Tab 8	<u>213</u>
14	Excerpt from <i>R. v. Evans</i> , [1993] 3 S.C.R. 653	Rogers’ Book of Authorities, Tab 9	<u>223</u>
15	Excerpt from <i>Commissioner of Competition v. Vancouver Airport Authority</i> , 2019 Comp. Trib. 6		<u>226</u>
16	<i>Zeitler v. Inmet Mining Corp.</i> , 2001 CarswellOnt 4490		<u>229</u>
17	Rules 288 – 290 from the <i>Federal Courts Rules</i> , SOR/98-106		<u>235</u>
18	Pleadings Brief		<u>239</u>
19	Commissioner's Answers to Undertakings pursuant to the Tribunal's December 12, 2025 Order		<u>315</u>

PUBLIC

TAB 1

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2025 Comp Trib 23

File No.: CT-2024-012

Registry Document No.: 101

IN THE MATTER OF the *Competition Act*, RSC, 1985, c C-34 as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
(respondent)



Date of hearing by videoconference: November 7, 2025

Before: Madam Justice Jocelyne Gagné

Date of Reasons for Order and Order: 12 December 2025

ORDER AND REASONS PARTIALLY GRANTING ROGERS' REFUSALS MOTION

I. OVERVIEW

[1] Rogers Communications Inc. brings this motion for an order compelling the Commissioner of Competition to answer a series of questions refused and/or partly answered at the examination for discovery of the Commissioner’s representative, Ms. Kathleen Phillipowsky, held on September 3, 4, and 5, 2025, as set out in the chart of refusals attached hereto as Schedule “A” [the Refusals Motion].

[2] Out of the 94 questions posed to Ms. Phillipowsky that were refused, Rogers seeks to compel answers to 59 questions, organized into three categories:

- (a) questions related to the facts and conclusions reached regarding the Commissioner’s assessments in 2020 and 2021 of unlimited data representations, his investigation commenced in March 2022, and his inquiry commenced in April 2023; this category is divided into two sub-categories:
 - i. Assessment Questions (21 questions);
 - ii. Investigation and Inquiry Questions (24 questions);
- (b) questions related to the alleged breach of the deemed undertaking rule and a confidentiality order in the Rogers-Shaw litigation by the Commissioner (5 questions); and
- (c) questions related to other factual allegations pleaded by the Commissioner in his Notice of Application and Reply (9 questions).

[3] At the time the parties filed their Motion Record, the Tribunal had not yet issued its decision in respect of Rogers’ motion to amend its response. However, the Tribunal issued its order on the proposed amendments to Rogers’ response [the Response Amendment Order] prior to the hearing of the Refusals Motion. During the hearing of the Refusals Motion, Rogers argued that despite the fact it was *not* granted leave to amend its response to plead (i) a defense of estoppel and waiver, (ii) an alleged breach of the deemed undertaking rule by the Commissioner, and (iii) some additional facts pertaining to the remedies sought in the Notice of Application, this Refusals Motion should nevertheless be granted. According to Rogers, all categories of questions are relevant to the issues in dispute, not precluded by the Tribunal’s production order dated August 11, 2025 (the Production Order, which required the Commissioner to produce third-party records, but declined to compel the Commissioner to produce certain records relating to his investigation of unlimited plan representations), and not protected by any privilege.

II. THE NOTICE OF APPLICATION

[4] On December 23, 2024, the Commissioner filed a Notice of Application pursuant to section 74.1 of the *Competition Act* (RSC, 1985, c C-34 as amended), alleging that Rogers has previously engaged in and continues to engage in reviewable conduct contrary to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the Act.

[5] According to the Commissioner, Rogers misleads consumers by offering data plans that are said to be unlimited, but that, in fact, have limits [the Infinite plans]. The Commissioner argues

PUBLIC

that by advertising limited data plans as if they were unlimited, Rogers has made and continues to make representations to the Canadian public that are false or misleading in a material respect for the purpose of promoting the supply or use of wireless telecommunication services and related products, and its business interests more generally.

[6] The Commissioner seeks various forms of relief, including “a declaration that [Rogers] has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsections, 74.011(1) and 74.011(2) of the Act”; “an order prohibiting Rogers from engaging in the reviewable conduct or substantially similar reviewable conduct in Canada for a period of ten years from the date of such order”; “an order requiring Rogers to pay such an administrative monetary penalty as the Tribunal deems appropriate”, and “an order requiring Rogers to pay an amount, not exceeding the total amounts paid to Rogers for the products in respect of which the reviewable conduct was engaged in, to be distributed among those persons to whom the products were sold, in an amount and manner to be assessed by the Tribunal.”

III. PROCEDURAL BACKGROUND

[7] Rogers filed its Response to the Commissioner’s Application on February 6, 2025, denying any false and misleading representations relating to its Infinite plans. The Commissioner filed a Reply to Rogers’ Response on February 20, 2025.

[8] On July 7, 2025, Rogers brought a motion to compel further documentary production from the Commissioner. A videoconference hearing was held on July 14, 2025.

[9] On August 11, 2025, the Tribunal issued the Production Order.

[10] Examinations on discovery took place on August 27-29, 2025, and September 3-5, 2025. The parties exchanged answers to undertakings and further productions from September 19 to October 3, 2025.

[11] Rogers’ motion to amend its response was heard by videoconference on October 17, 2025. The Response Amendment Order was issued on November 5, 2025 (with a revised version issued on November 7 to fix non-material errors); among other things, it allowed Rogers to amend its response to file a constitutional challenge in respect of the administrative monetary penalty regime found in subparagraph 74.1(1)(c)(ii) of the Act.

[12] Examinations on the answers to undertakings and additional documents produced by the Commissioner were also scheduled to take place on December 1, 2, 4 and 5, 2025.

[13] The hearing on the merits is scheduled to commence on March 30, 2026.

IV. ISSUE TO BE DETERMINED

[14] The sole issue raised by the present motion is whether the Commissioner should be compelled to answer the questions listed in Schedule “A”.

V. ANALYSIS

[15] Rule 34(1) of the *Competition Tribunal Rules*, SOR/2008-141 provides that, if a question arises as to the practice or procedure to be followed in proceedings before the Tribunal that is not provided therein, the *Federal Court Rules*, SOR/98-106 [the FC Rules] may be applied. The Tribunal will therefore refer to the FC Rules in respect of this Refusals Motion.

[16] Rule 240 of the FC Rules provides that a person being examined for discovery must answer, to the best of the person’s knowledge, information, and belief, any question that is relevant to the unadmitted facts in the pleadings.

[17] In *Canada v Lehigh Cement Limited*, 2011 FCA 120, the Federal Court of Appeal articulated the test as follows:

[34] ... a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party’s case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute.

[18] The principle in *Lehigh Cement* is a flexible standard. Doubts as to relevance are to be resolved in favour of disclosure (*The Commissioner of Competition v Live Nation Entertainment, Inc*, 2019 Comp Trib 3 at para 8). Refusals motions are guided by the key objective of achieving a level of disclosure sufficient to allow each side to proceed fairly, efficiently, and effectively towards a hearing, with sufficient knowledge of the case each party must meet (*Live Nation* at para 6; *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2022 Comp Trib 3 at para 6).

A. Category #1: Questions related to the Commissioner’s Assessment, Investigation and Inquiry

[19] Rogers seeks to compel the Commissioner to answer questions related to the underlying facts and conclusions reached in respect of (i) the assessments in 2020 and 2021 into telecommunications carriers’ “unlimited” plan representations, and (ii) his investigation and inquiry into Rogers specifically.

[20] Rogers first argued in its written materials that these questions were relevant to the defenses of estoppel and waiver. To the extent that these defences were denied – which they ultimately were by virtue of the Response Amendment Orders – Rogers also asserted that these questions remain relevant to:

- (a) The Commissioner’s allegations and discovery evidence regarding the general impression created by and impact of the representations at issue (qq. 230, 231, 232, 330-331, 340, 342, 345, 400, 401 from September 3, 2025; and qq. 66-67, 68, 194, 195, 196-197, 201-204, 205, 222, 235-236, 237, 238, 239, 243, 319 from September 5, 2025);

PUBLIC

- (b) The Tribunal’s exercise of its discretion on remedies and the aggravating factors alleged by the Commissioner (qq. 230, 231, 232, 248, 275, 274-279, 322, 330-331, 332-333, 334, 335, 338, 340, 342, 345, 383, 385-386, 390, 392, 398, 400, 401 from September 3, 2025; and qq. 65, 66-67, 68, 69-70, 141, 142, 143, 144, 149-150, 192, 193, 194, 195, 196-197, 201-204, 205, 222, 235-236, 237, 238, 239, 243 from September 5, 2025); and
- (c) Whether costs should be awarded against the Commissioner, in the event Rogers is successful at trial (qq. 230, 231, 232, 248, 275, 274-279, 322, 330-331, 332-333, 334, 335, 338, 340, 342, 345, 383, 385-386, 390, 392, 398, 400, 401 from September 3, 2025; and qq. 65, 66-67, 68, 69-70, 141, 142, 143, 144, 149-150, 192, 193, 194, 195, 196-197, 201-204, 205, 222, 235-236, 237, 238, 239, 243 from September 5, 2025).

[21] The Commissioner’s position is that by using the word “unlimited” in relation to Rogers’ Infinite plans, consumers understand this to mean that it is offering unlimited high-speed data. This meaning is plain on the words and, accordingly, those representations are false or misleading on their face.

[22] I agree with Rogers that both the general impression of Rogers’ representations and whether they were material to consumers’ purchasing decisions must be tied to the relevant facts. While there is a “certain legal dimension” to the issue, the question is fundamentally what the relevant consumer understands the representations to mean (*Live Nation* at para 26). Similarly, whether a representation is “material” depends on whether it could affect the relevant consumer’s purchasing decision (*Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5 at para 418). These are the factual questions on which Ms. Phillipowsky gave evidence for the Commissioner.

[23] I also agree with Rogers that it is entitled to test and challenge the Commissioner’s evidence on the issue of general impression and materiality. Amongst the questions identified above, I am allowing those which, in my view, are directed to these issues (noting that some are refused due to their formulation).

[24] However, I disagree with Rogers that whether the Commissioner or any Bureau officer has previously found its representations questionable or problematic under the deceptive marketing practices provisions of the Act is likely to have an impact on the remedy or costs the Tribunal may impose or grant, should it find in favour of the Commissioner. The Tribunal’s decision will be based on the evidence gathered during the investigation and presented at trial, not on anybody’s past assessment of this evidence.

B. Category 2: Questions related to the Commissioner’s Alleged Breach of the Deemed Undertaking Rule

[25] Considering the terms of the Response Amendment Order, which denied leave to Rogers to amend its response and plead a breach of the deemed undertaking rule, the 5 questions in this category are refused.

C. Category 3: Questions related to other Factual Allegations Made by the Commissioner

[26] Rogers seeks to compel the Commissioner to answer questions allegedly related to specific factual allegations pleaded in his Notice of Application. These questions concern throttled speeds, identifying the representations challenged by the Commissioner, and representations made by Comwave Networks Inc. referred to in the Deceptive Marketing Digest Volume 3.

[27] In his Notice of Application, the Commissioner pleads:

[36] Many operations that could be done quickly before the throttling, become difficult or virtually impossible after data is throttled. This fundamentally impacts the functionality of any application that requires high-speed data, such as streaming, video calling or cloud gaming. For example, Rogers indicates that downloading an HD movie takes 1 to 4 minutes at 1 Gbps to 250 Mbps respectively, but this will take over a day to download at 512 kbps. Contrary to the general impression conveyed by Rogers' representations, once throttled, consumers can no longer do all that they want to do with their data.

[28] In my view, what is relevant to this allegation is the measurement of difficulty (or the outright impossibility) the Commissioner used in its assessment, not hypothetical questions as to what the Commissioner's opinion would be in different scenarios. In other words, what is relevant are the facts before the Tribunal, not an assessment of factual scenarios not before the Tribunal. I am therefore allowing what is, in my view, relevant.

[29] Based on the following allegation, Rogers wants the Commissioner to identify each of the representations made and alleged to be false or misleading:

[8] Specifically, Rogers has made, and continues to make, representations to the public that convey the materially false or misleading general impression that Rogers Infinite Unlimited Plans offer unlimited and infinite data, allowing consumers to use as much data as they want, free from data limits...

[18] Rogers made the impugned representations through various channels, including television, radio, social media, online banner advertisements, in billboards, in malls, in live events, and even on public transit wraps...

[30] The Commissioner states this was open on a motion for particulars, not on discovery. I would say if anything, it is the contrary.

[31] However, I agree with the Commissioner that being asked to identify all specific representations at issue and the general impression each of them conveyed is excessive. Compelling the Commissioner to undertake an individualized review of the over 20,000 records containing representations produced by Rogers would be disproportionate, unduly burdensome, and unnecessary to determine the issues.

[32] The Notice of Application already sets out the facts necessary to assess whether a representation is false or misleading. The Commissioner's case does not depend on the precise

PUBLIC

wording of each representation, but on the use of the term “infinite” or “unlimited”, the display of the Rogers infinity loop, or anything else that conveys that the data provided is “unlimited”. Those are the features that the Tribunal will need to assess and determine whether they are false or misleading. In my view, the Notice of Application offers sufficient examples of historic and ongoing representations to allow the Tribunal to make this assessment. These questions are therefore refused.

VI. CONCLUSION

[33] For the above reasons, Rogers’ Refusals Motion is granted in part, the specific of which being set in the attached Schedule “A”. Costs will be in the cause.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[34] Rogers’ Refusals Motion is granted in part.

[35] The Commissioner is compelled to answer the questions refused and/or partially answered at the examination for discovery of Ms. Kathleen Phillipowsky, held September 3, 4, and 5, 2025, which are marked “**Allowed**” in the chart of refusals attached hereto as Schedule “A”.

[36] As success on this motion is divided, costs shall be in the cause.

DATED at Ottawa, this 12 of December 2025.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) Jocelyne Gagné

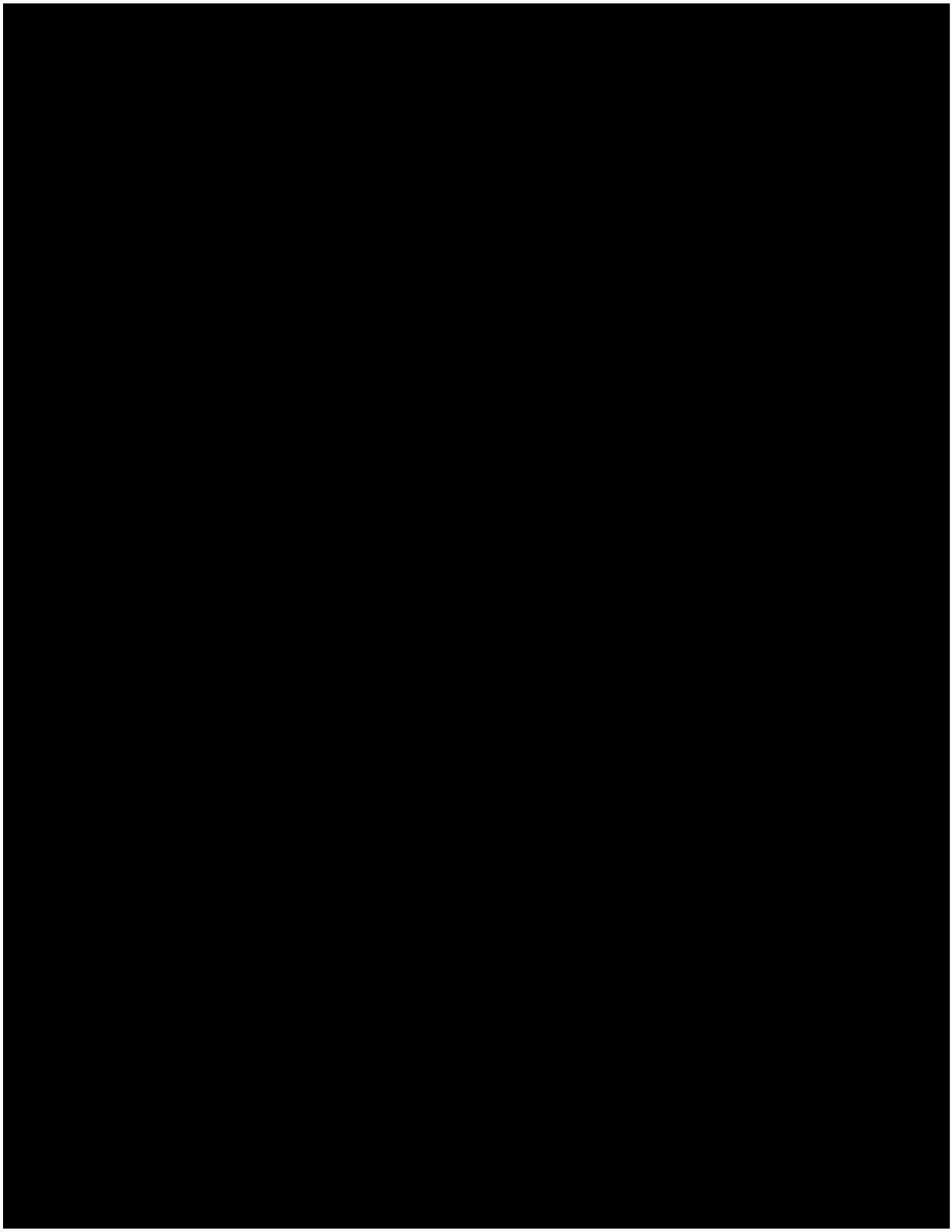
PUBLIC

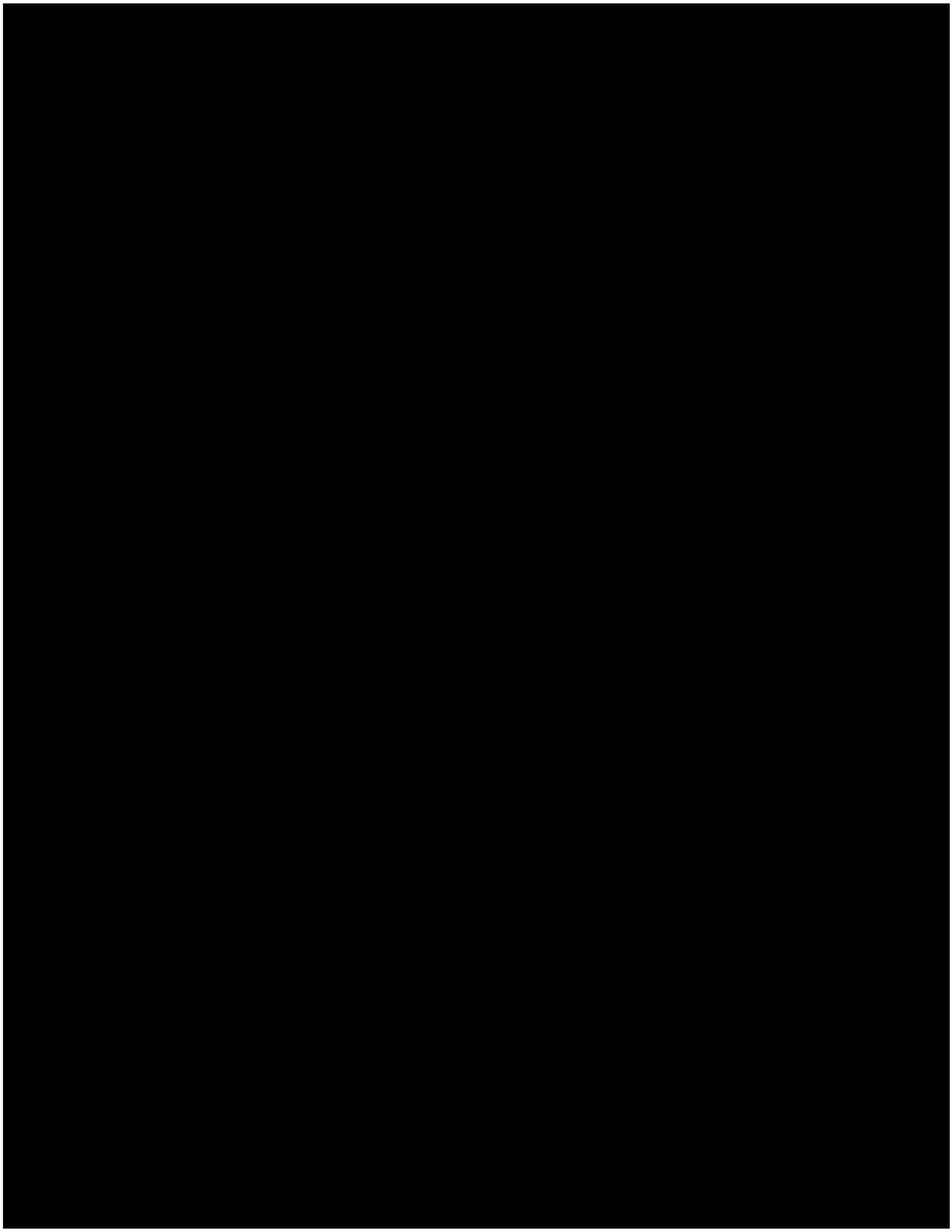
PUBLIC

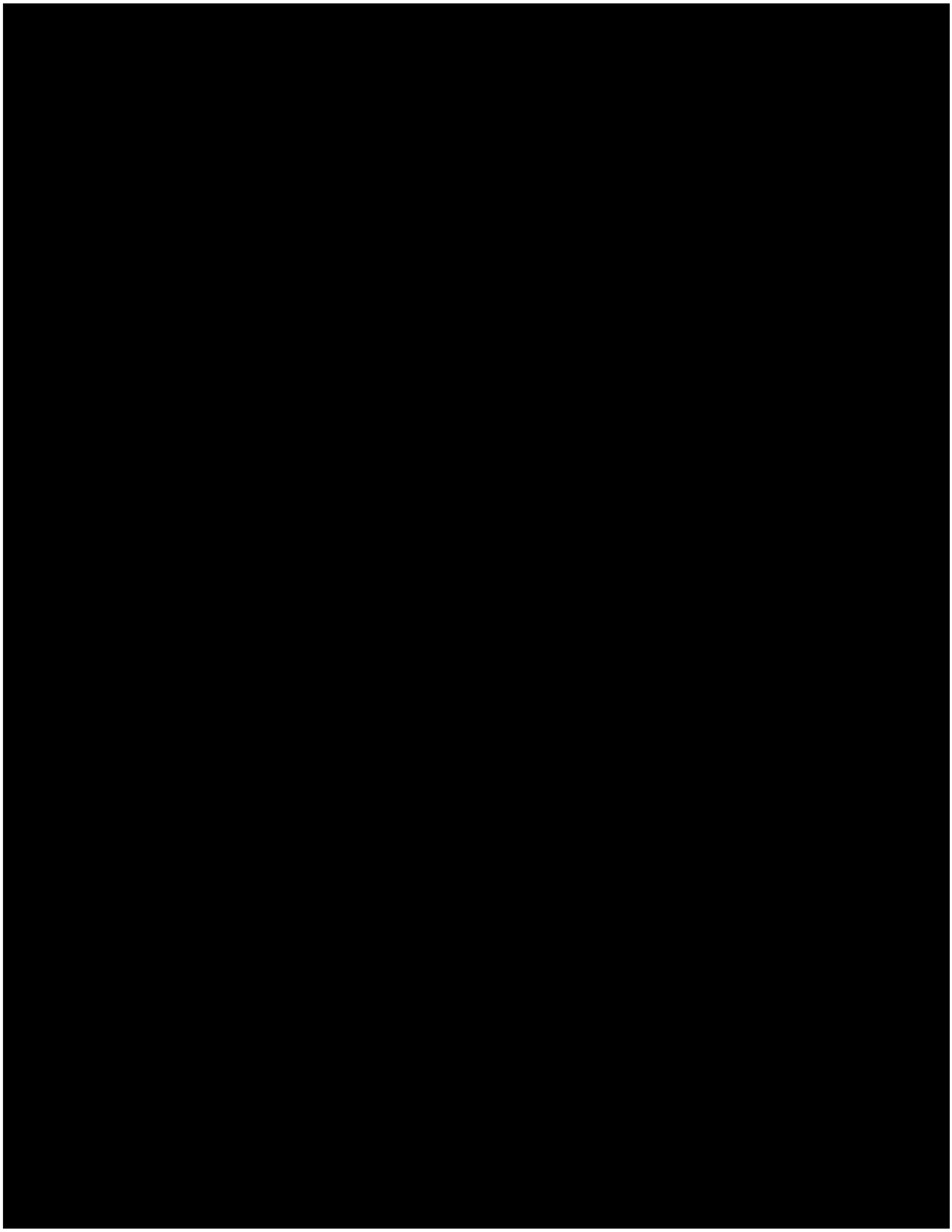
REFUSALS				
No.	Page	Ques.	Question	Justice Gagné's decision
11.	486	195	To advise whether there is a formal or informal communication that brings an assessment to a close.	Allowed
12.	486-487	196 – 197	To advise whether when this preliminary assessment ended or any preliminary assessment ends, whether there is a report by the individuals conducting the preliminary assessment to their superior advising them that they are closing the assessment or asking that they close the assessment.	Allowed
13.	488-489	201 – 204	To confirm that there was a recommendation that was made in 2020, and the recommendation that was made was to wrap up the preliminary assessment.	Allowed
14.	489	205	To provide a copy of the 2020 recommendation.	Allowed
15.	494	222	To advise if the Commissioner agrees that had Rogers sought an advisory opinion, it would have been advised by the Commissioner at the time that the conduct was not reviewable.	Refused
16.	496	235 - 236	To advise how Ms. Sonley first raised this issue of the marketing of unlimited wireless data plans.	Refused
17.	497	237	To advise why Ms. Sonley was raising the issue of the marketing of unlimited wireless data plans.	Refused
18.	497	238	To advise to whom Ms. Sonley raised the issue of the marketing of unlimited wireless data plans.	Refused
19.	497	239	To advise what steps, if any, were taken in relation to Ms. Sonley raising the issue of the marketing of unlimited wireless data plans.	Refused
20.	497-498	243	To advise whether the notes taken by Ms. Assad of the conference call where Ms. Sonley raised the issue of the marketing of unlimited wireless data plans bear on the allegations pleaded by the Commissioner in the Notice of Application.	Refused

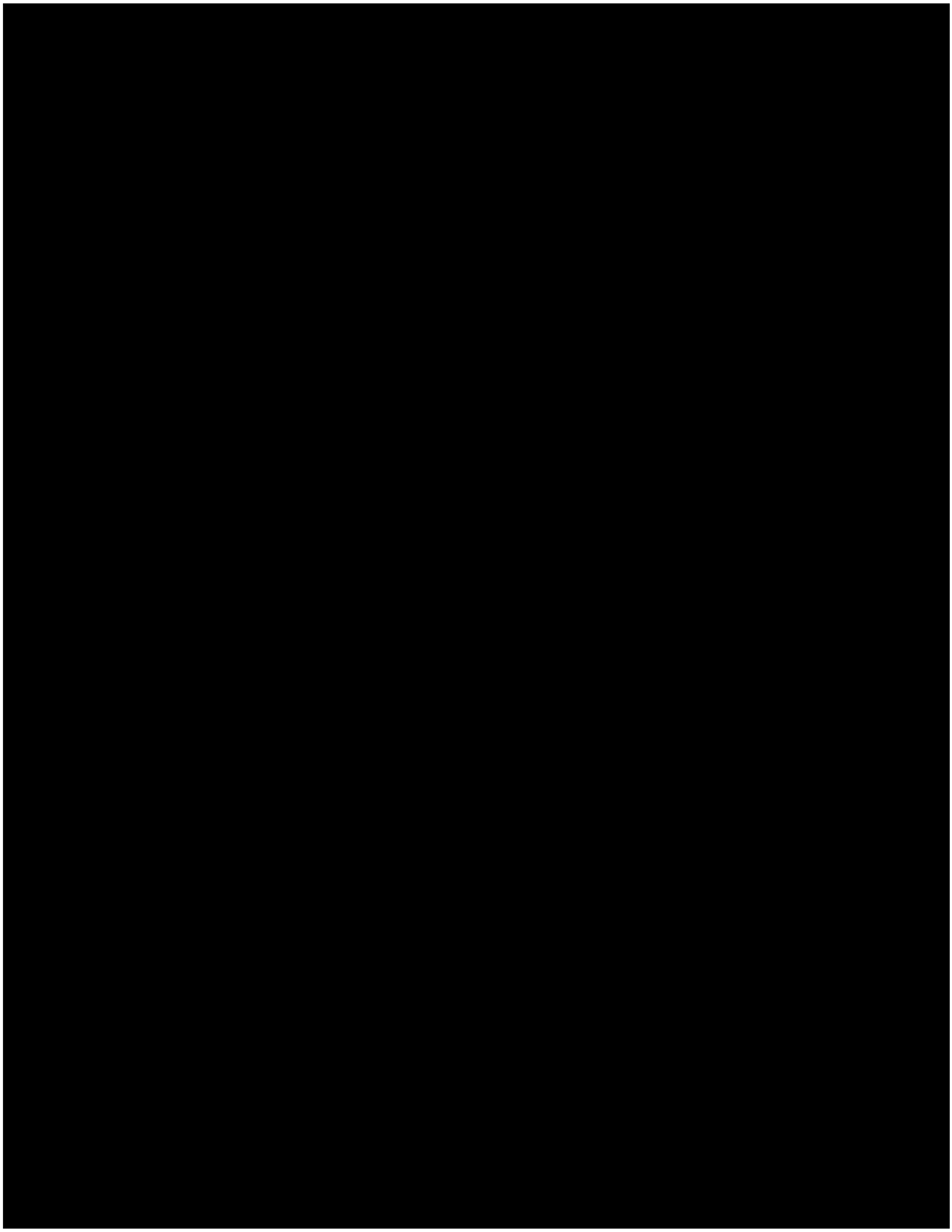
PUBLIC

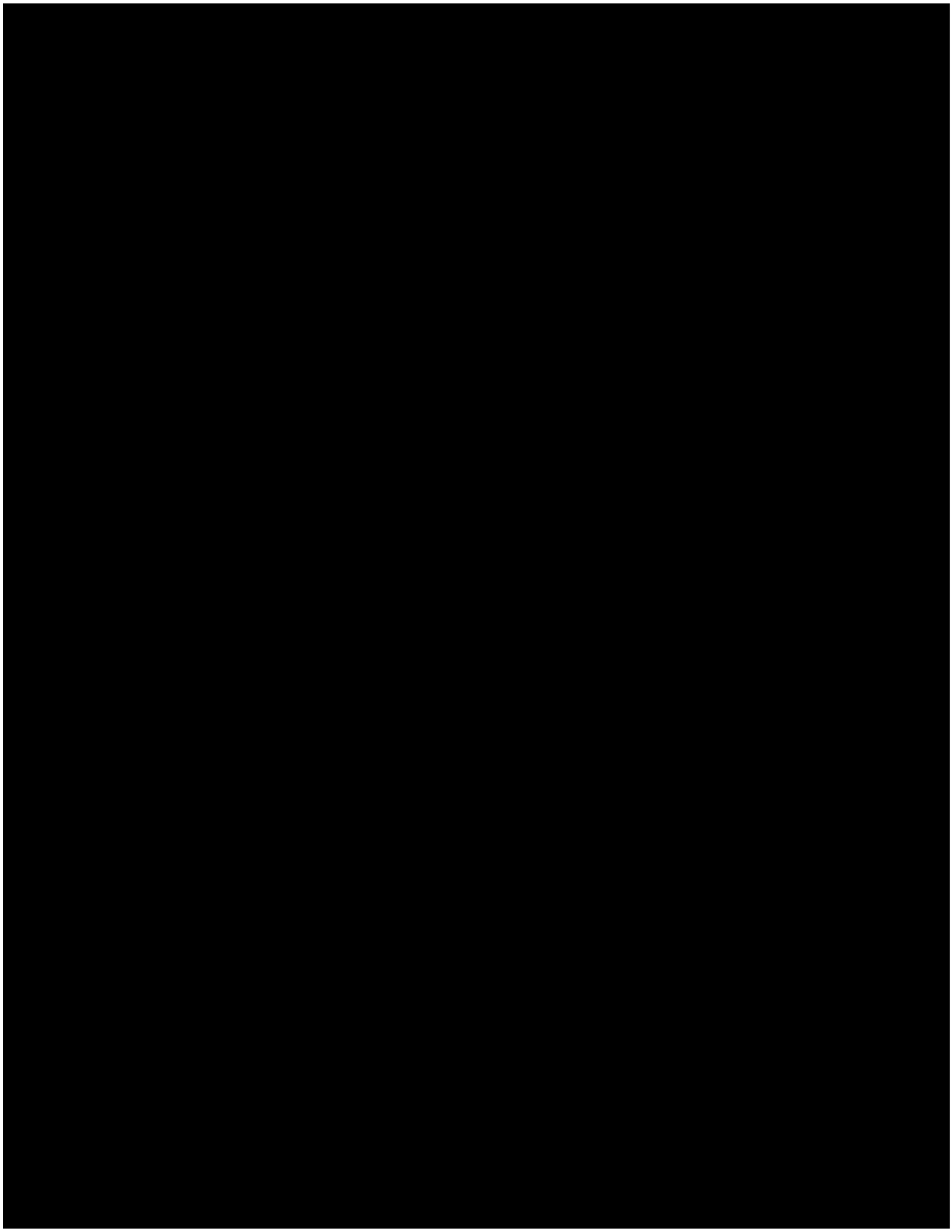
TAB 2

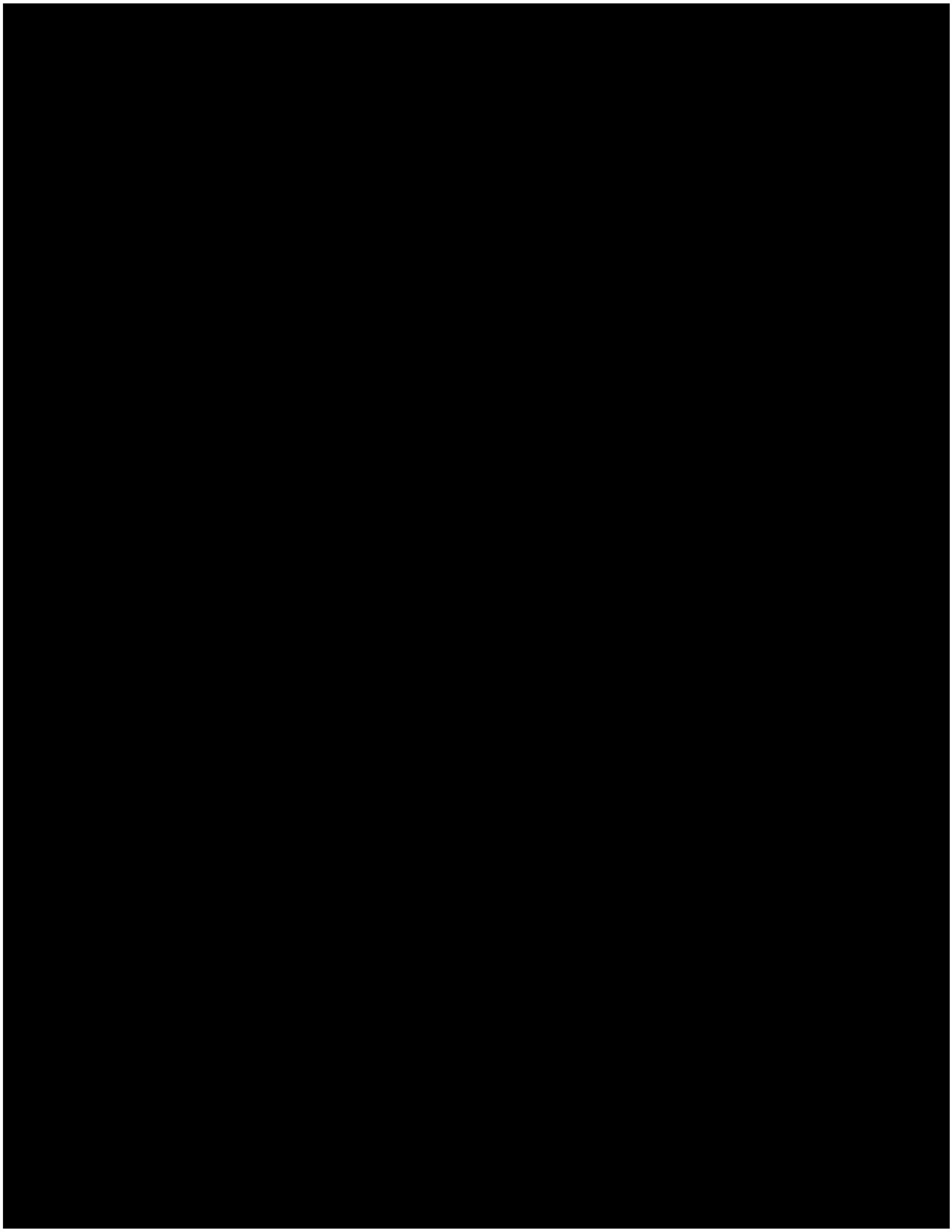


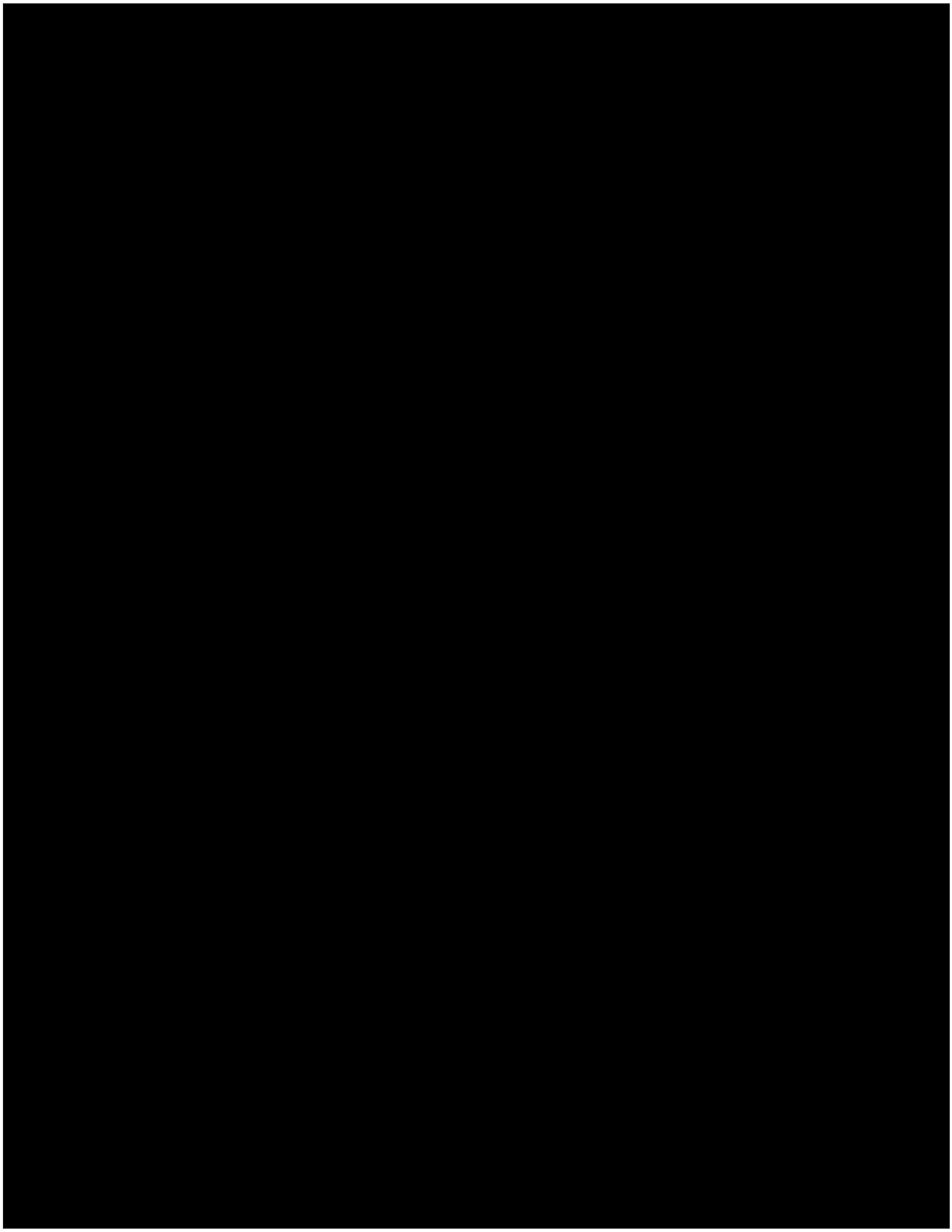


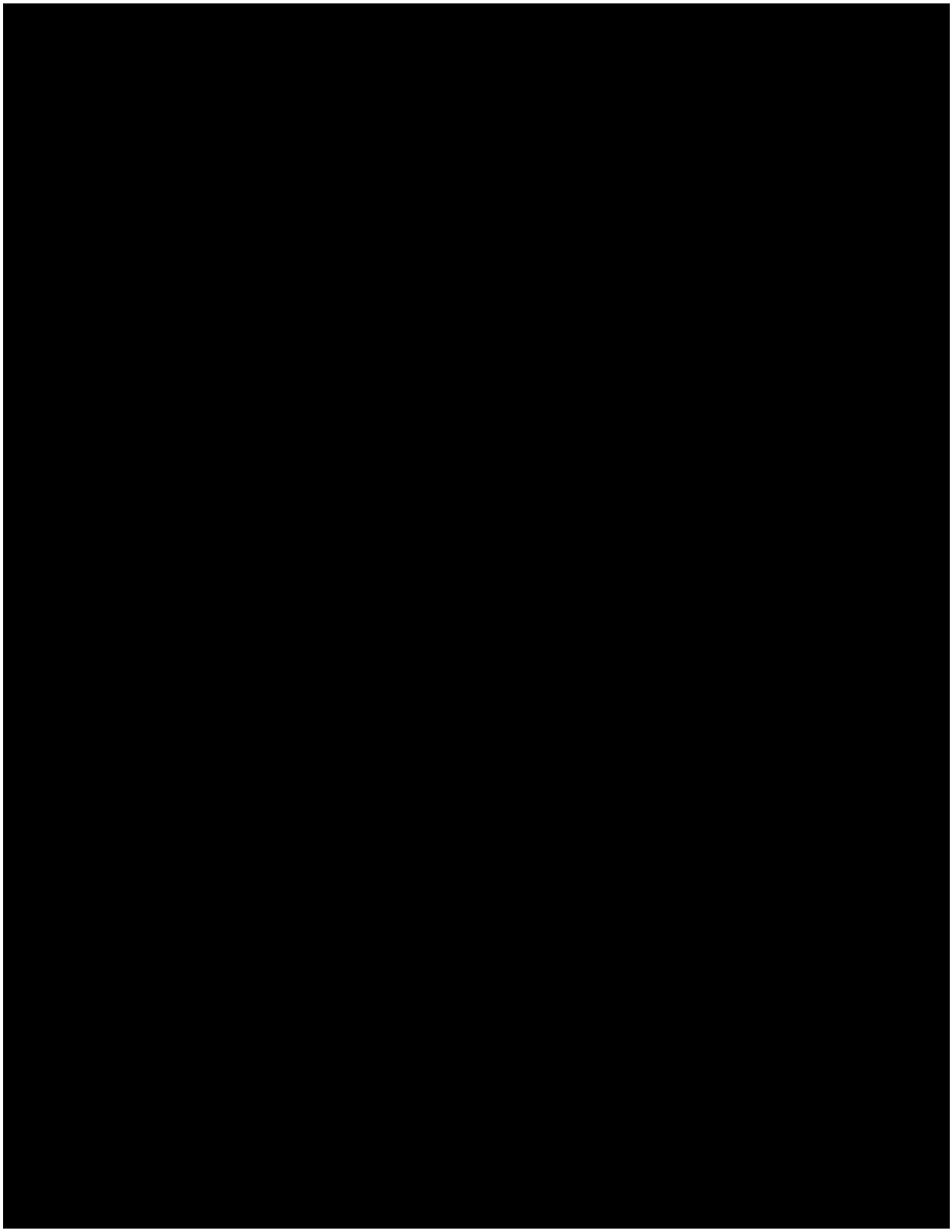


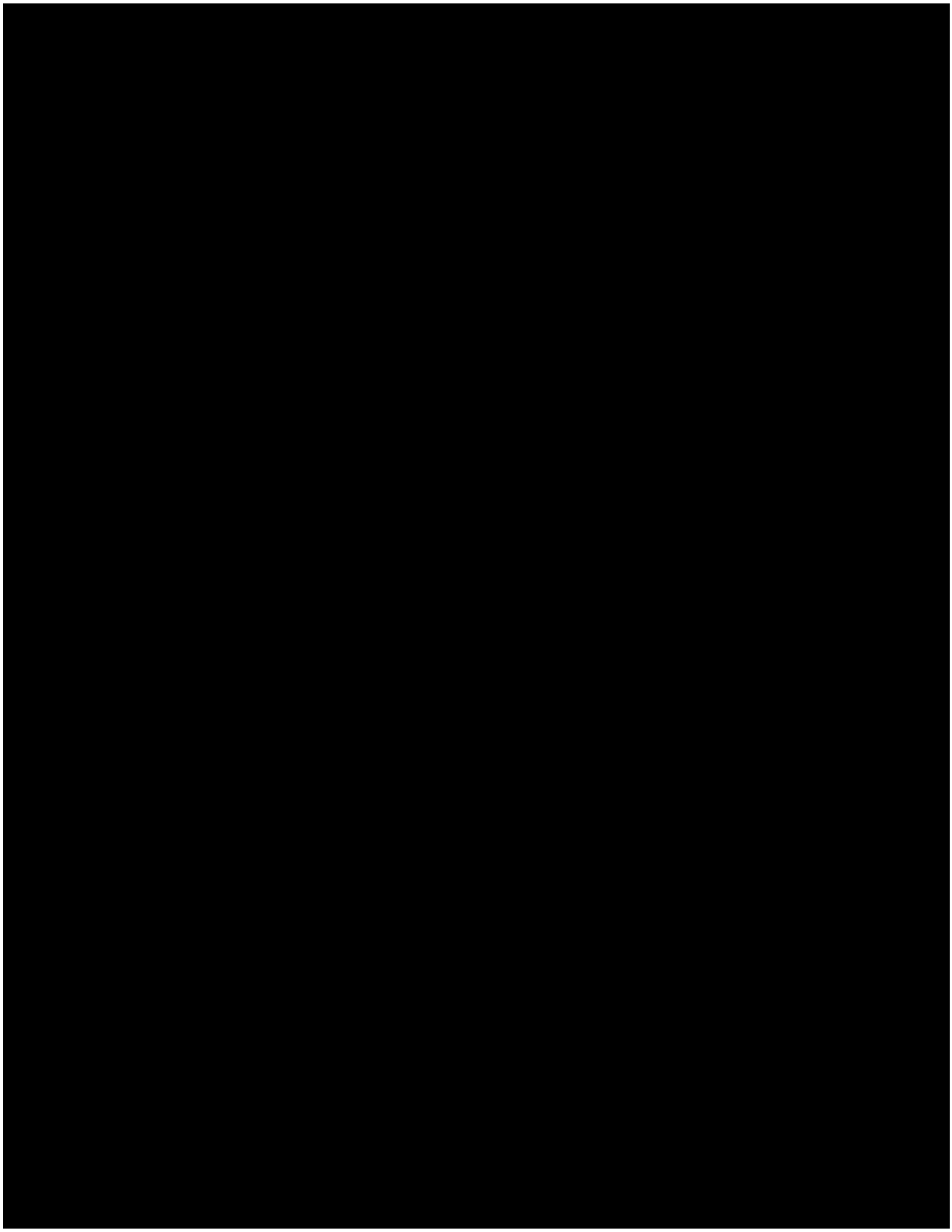


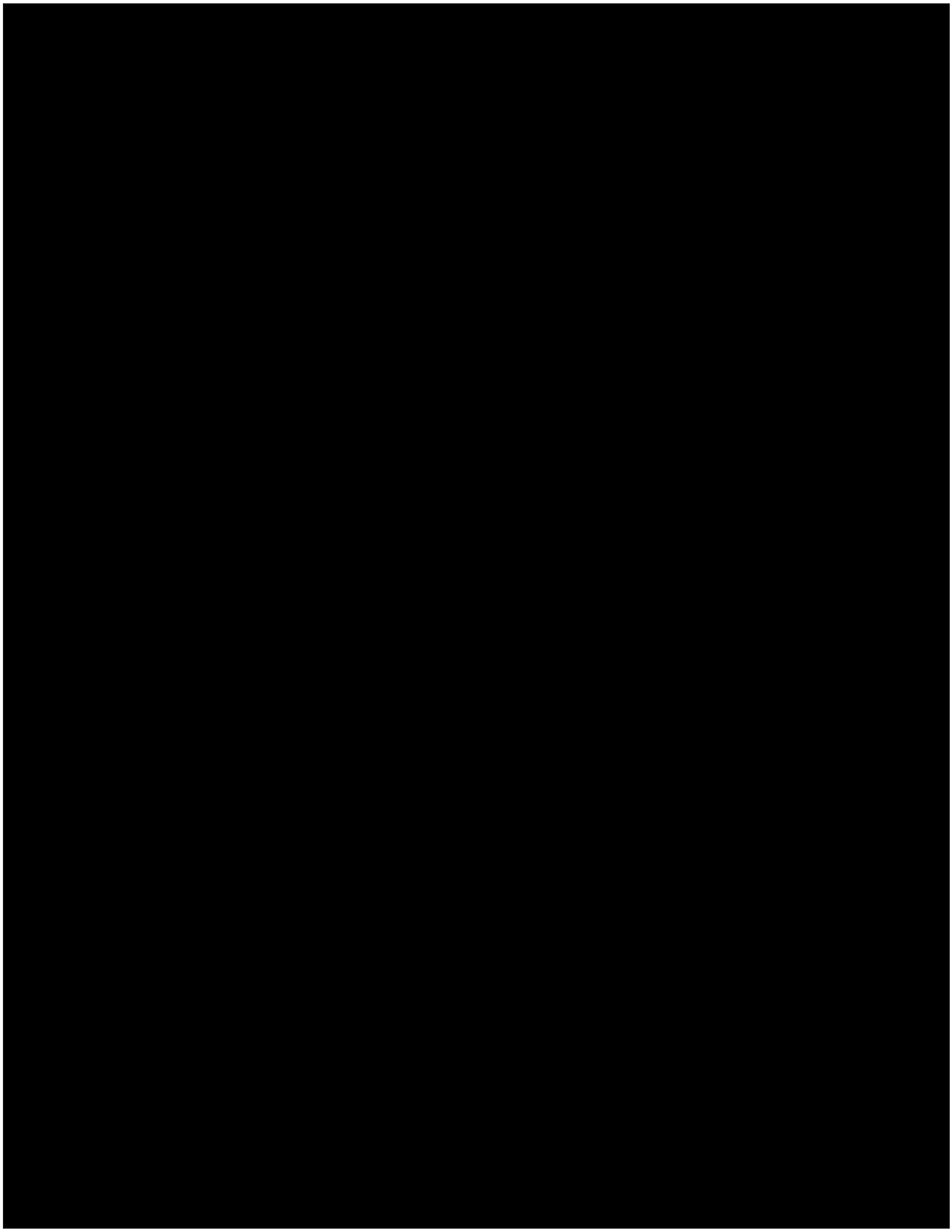


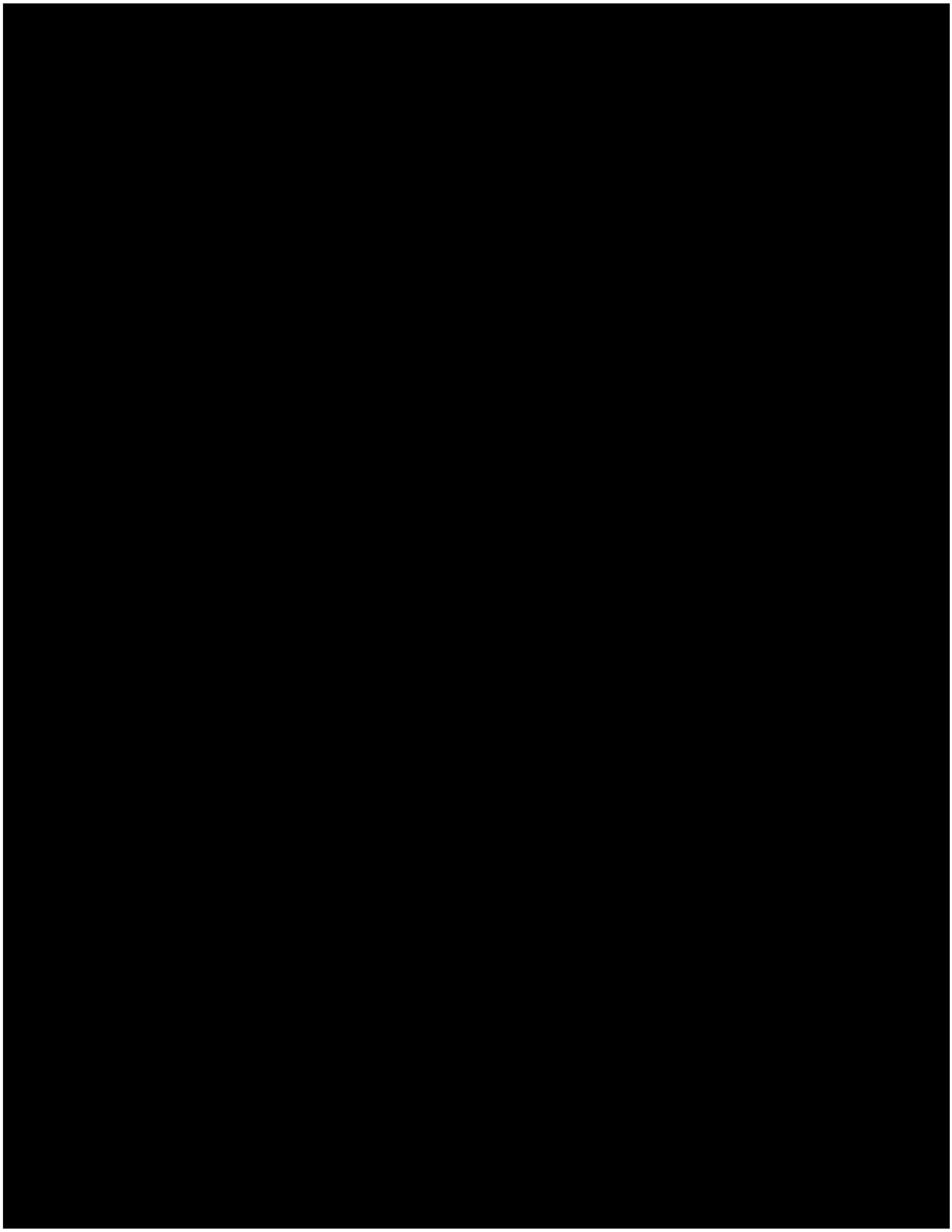


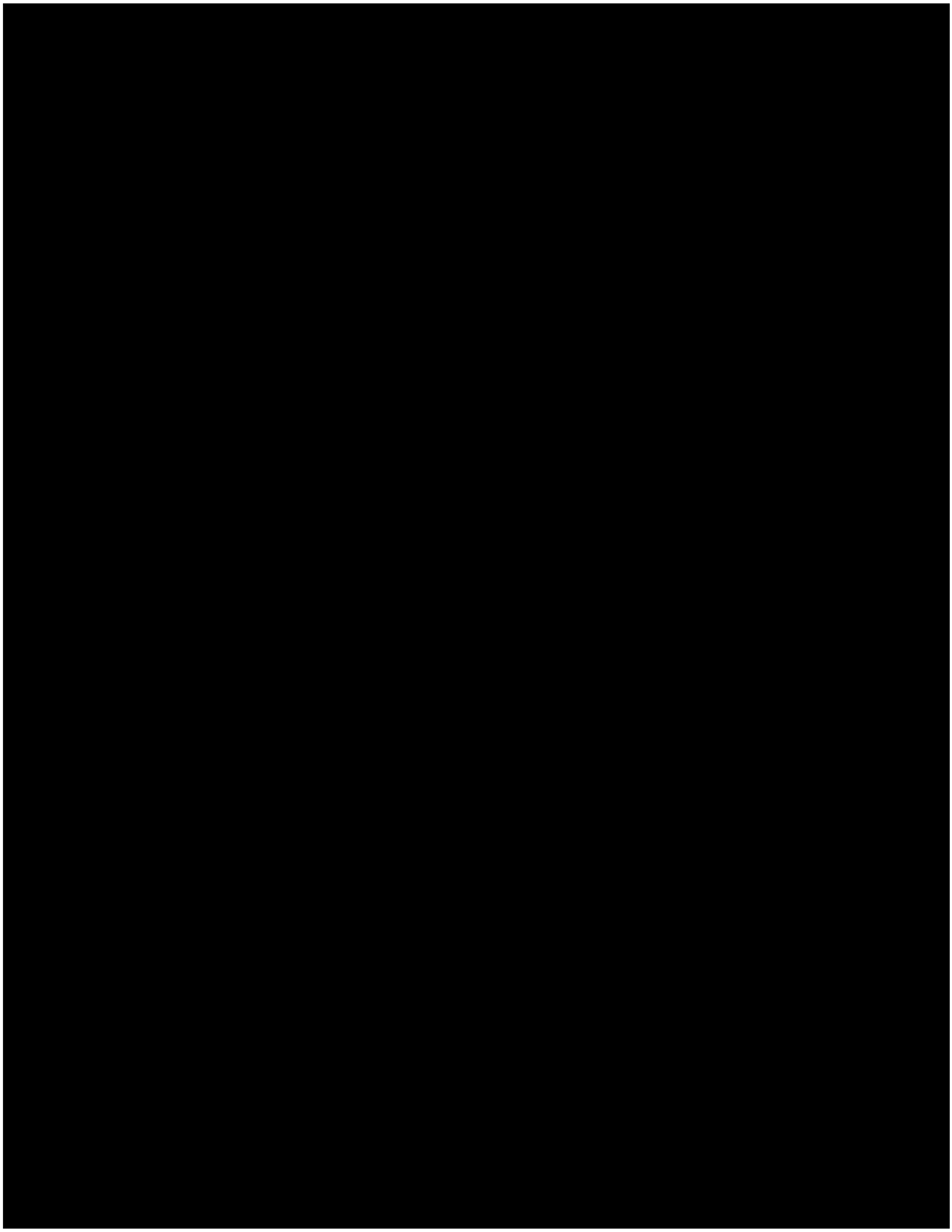


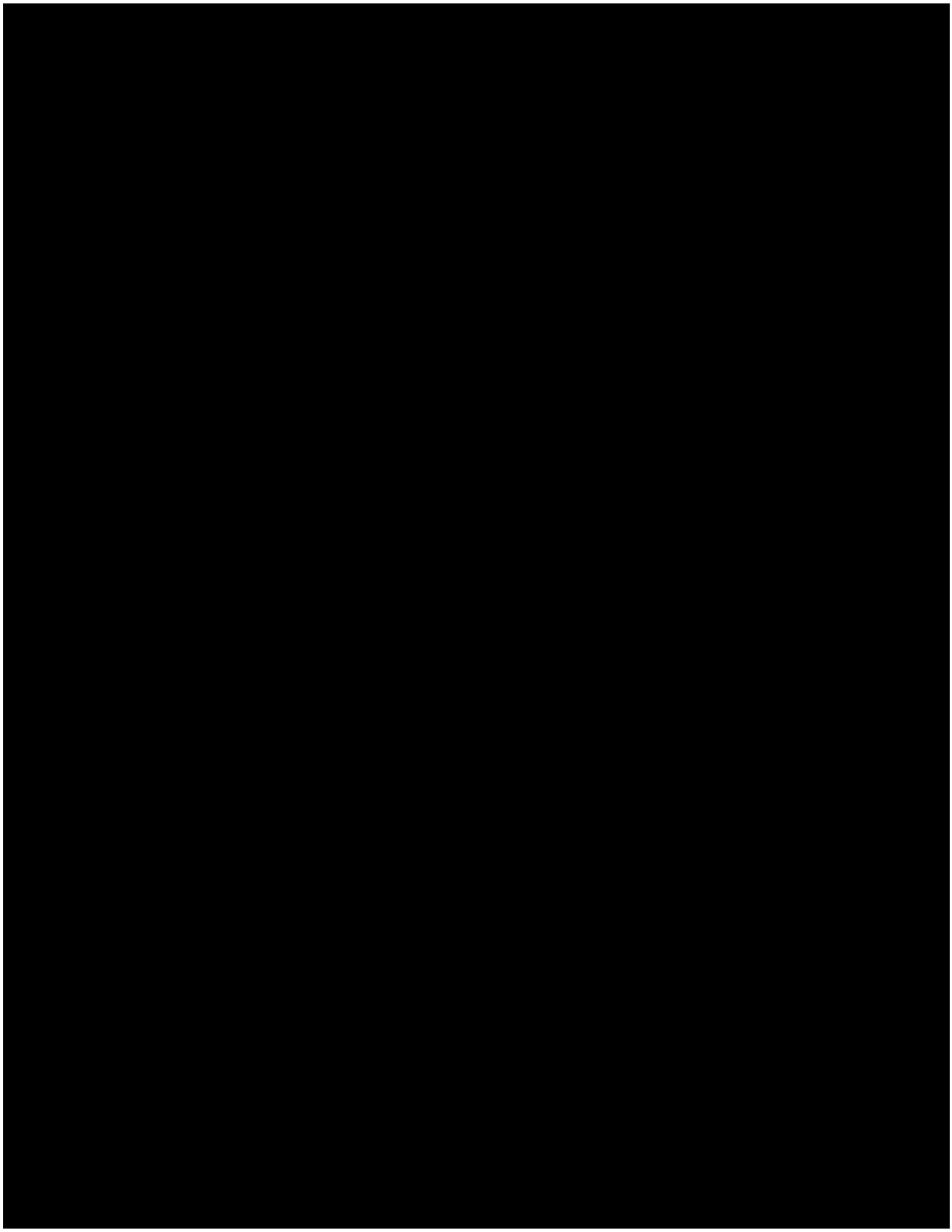


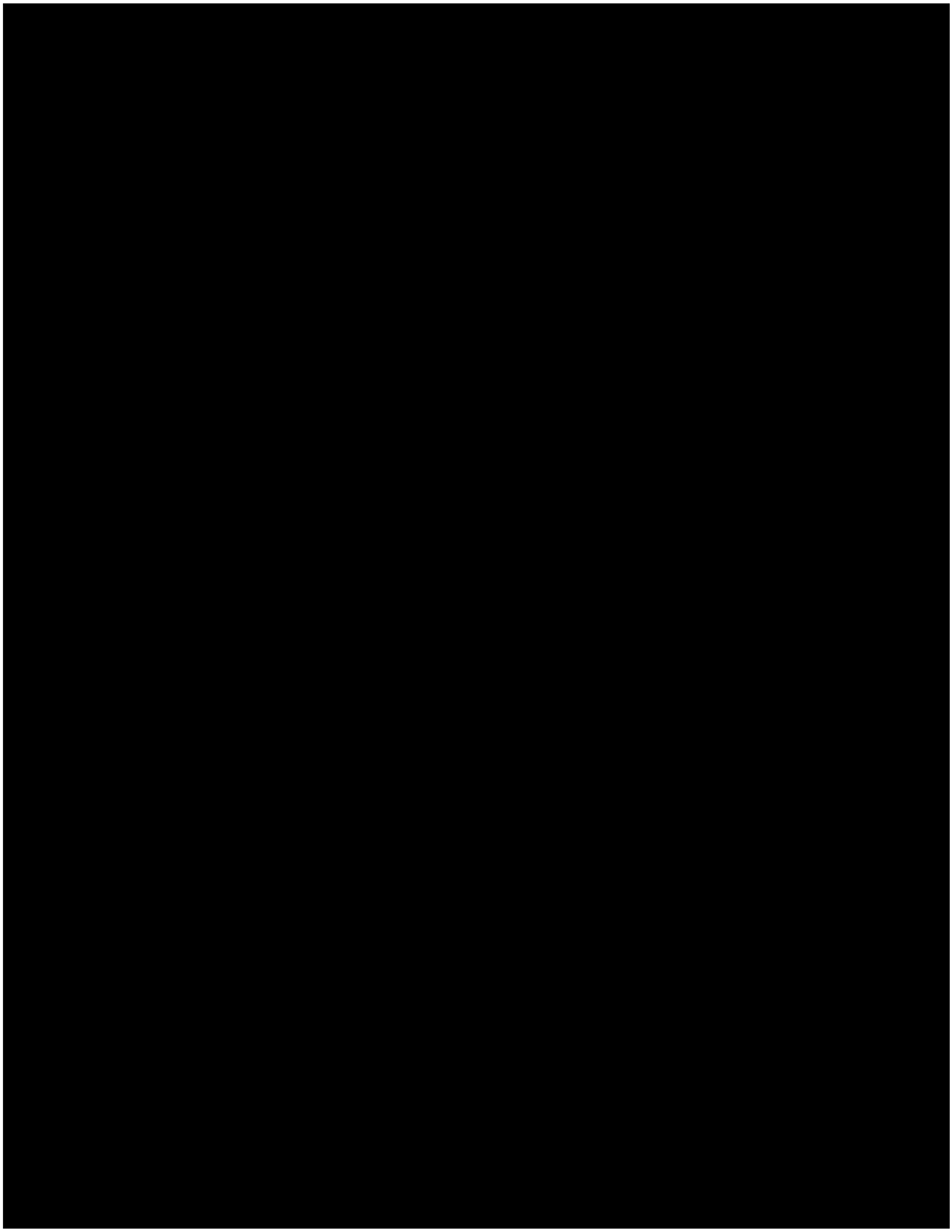


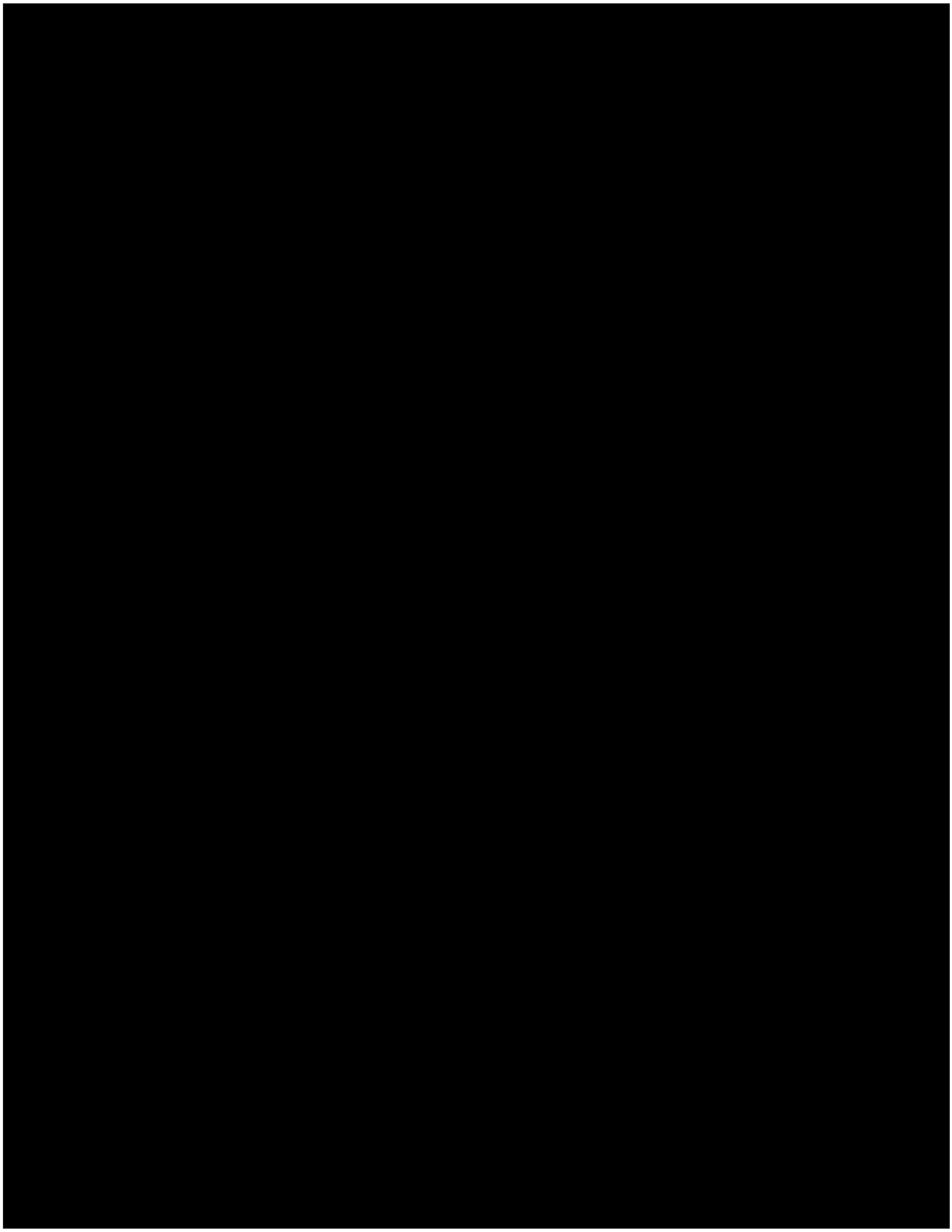


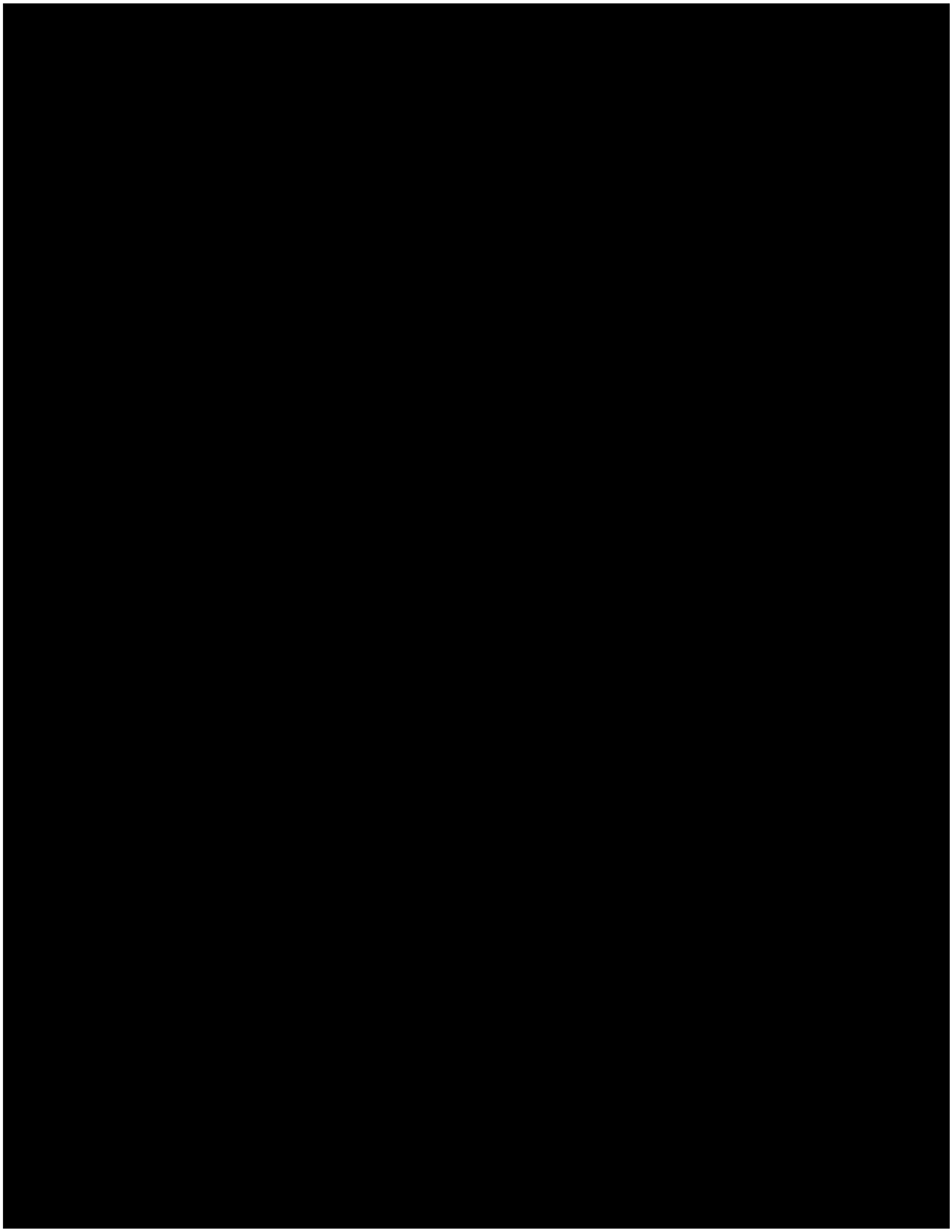


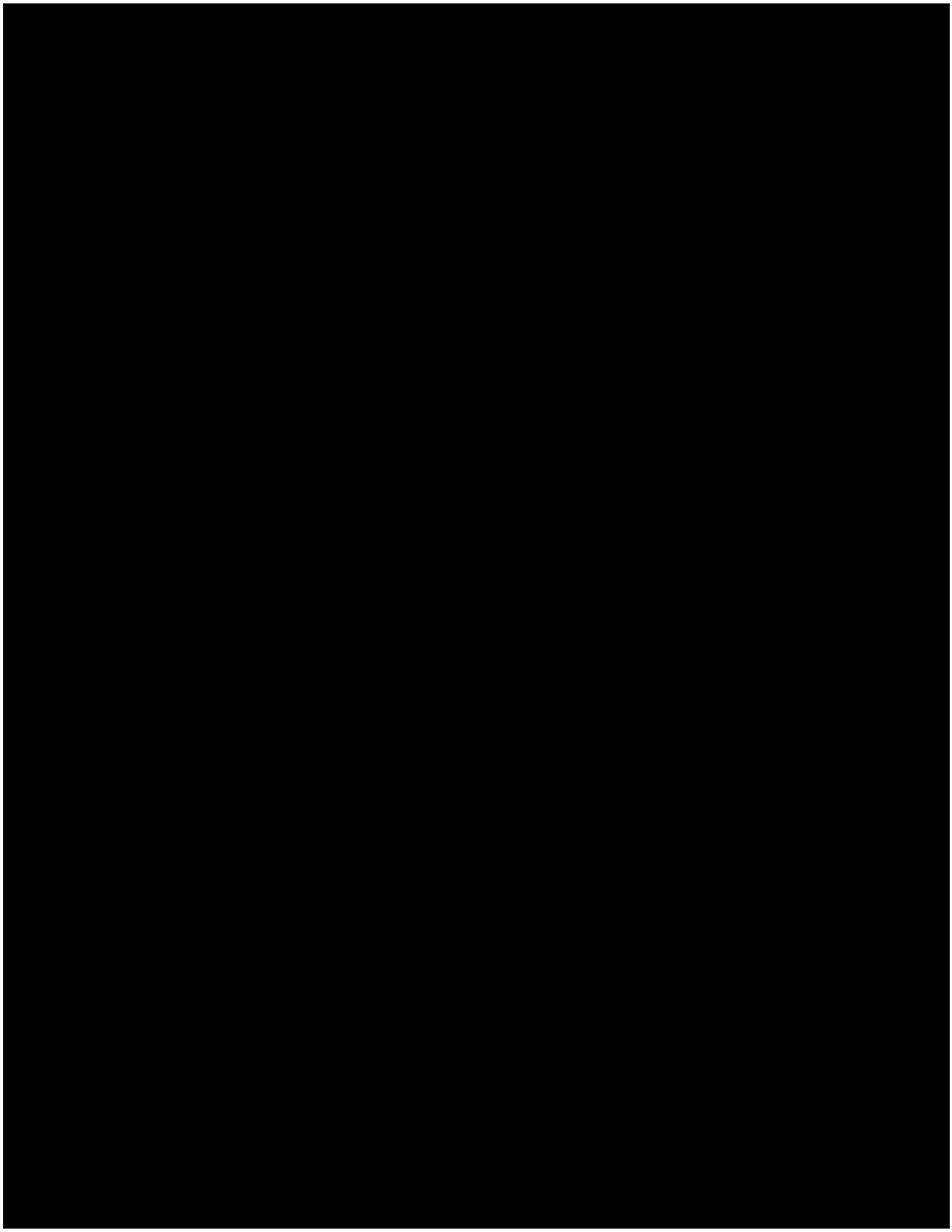


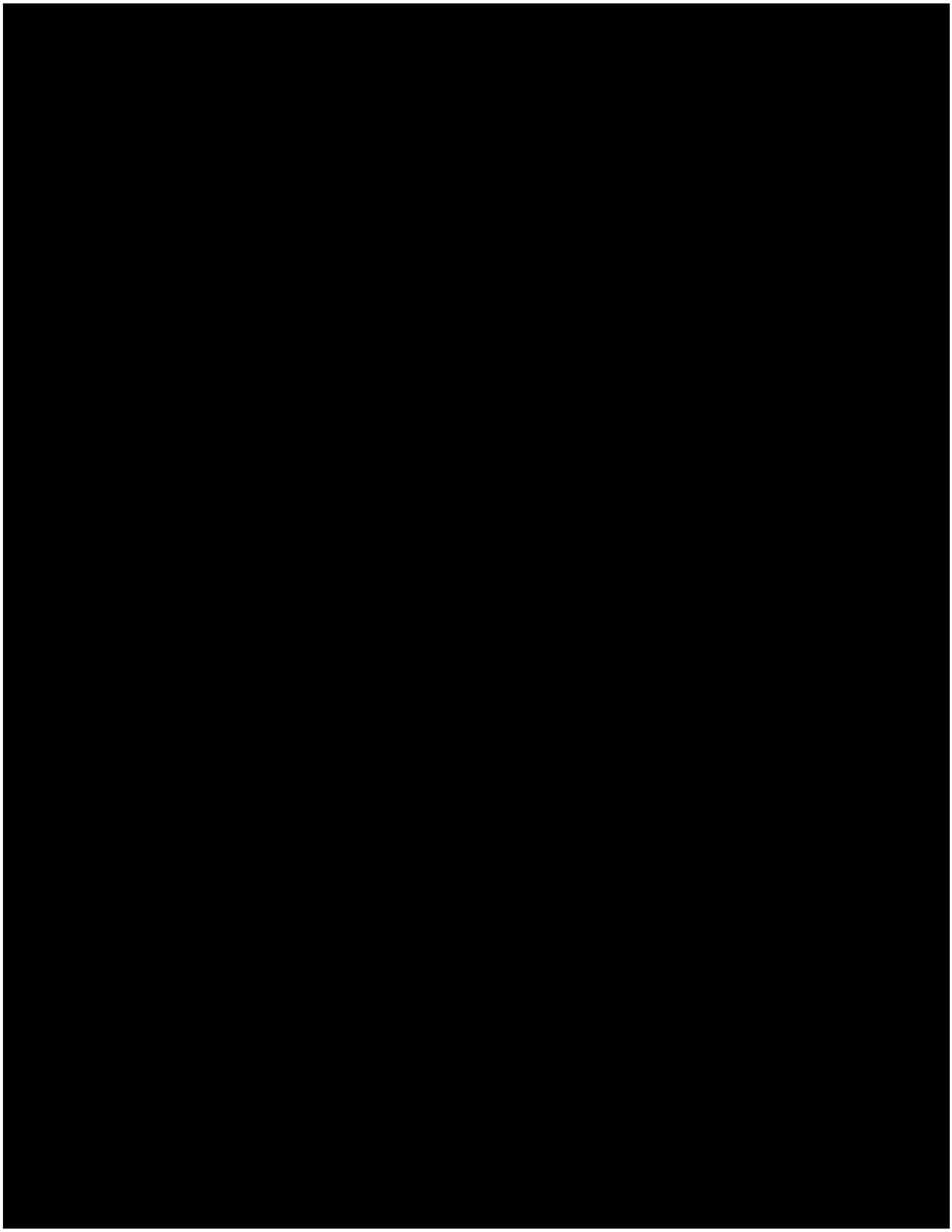


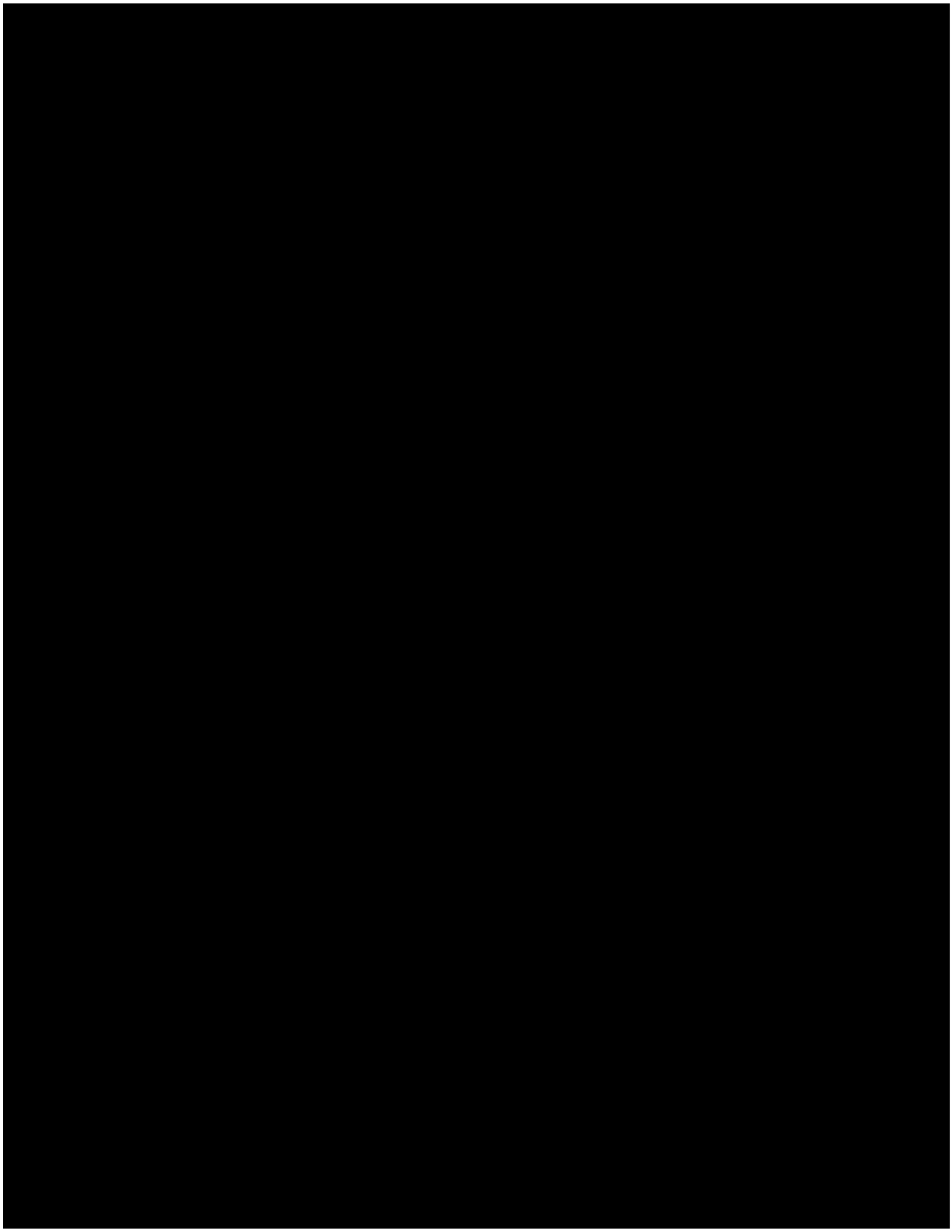


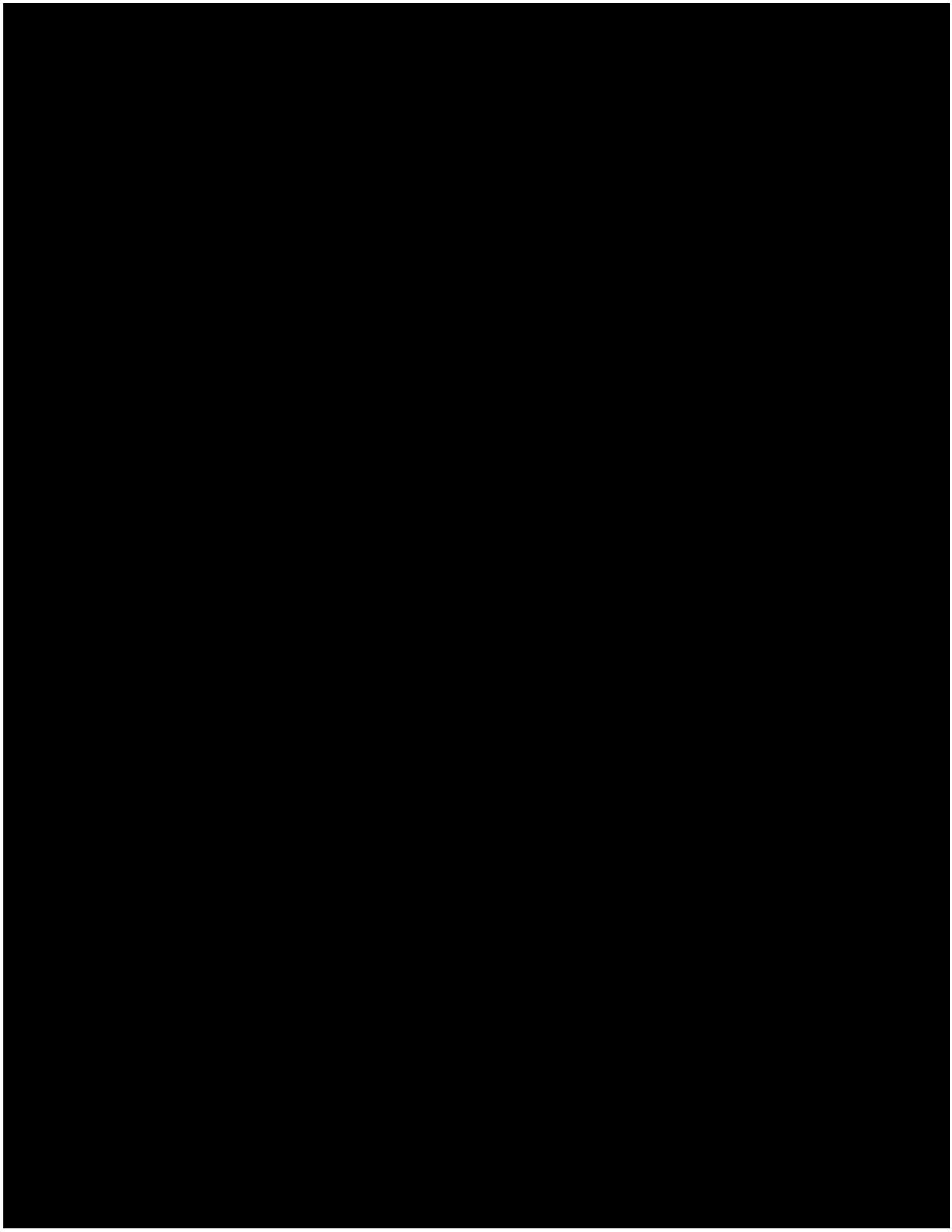


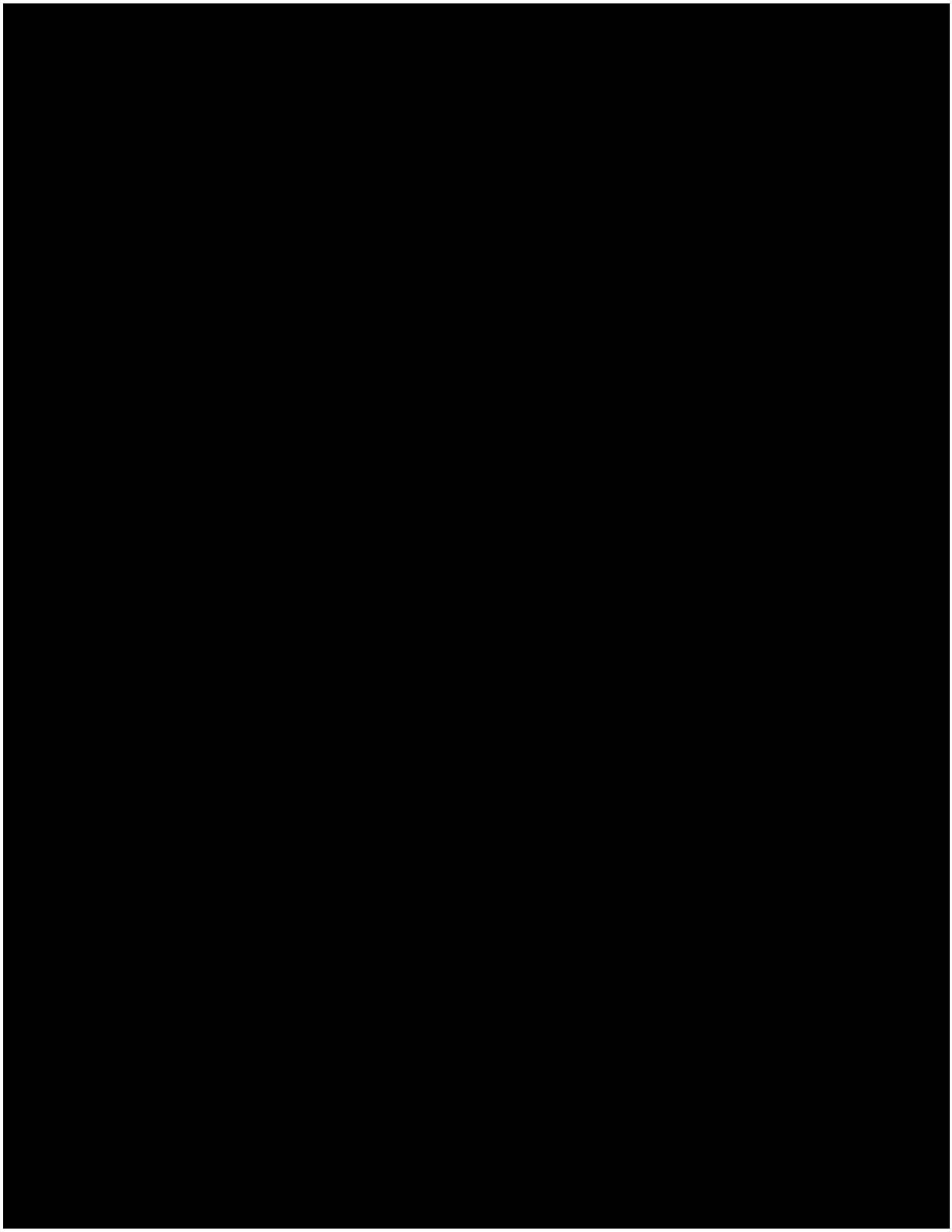


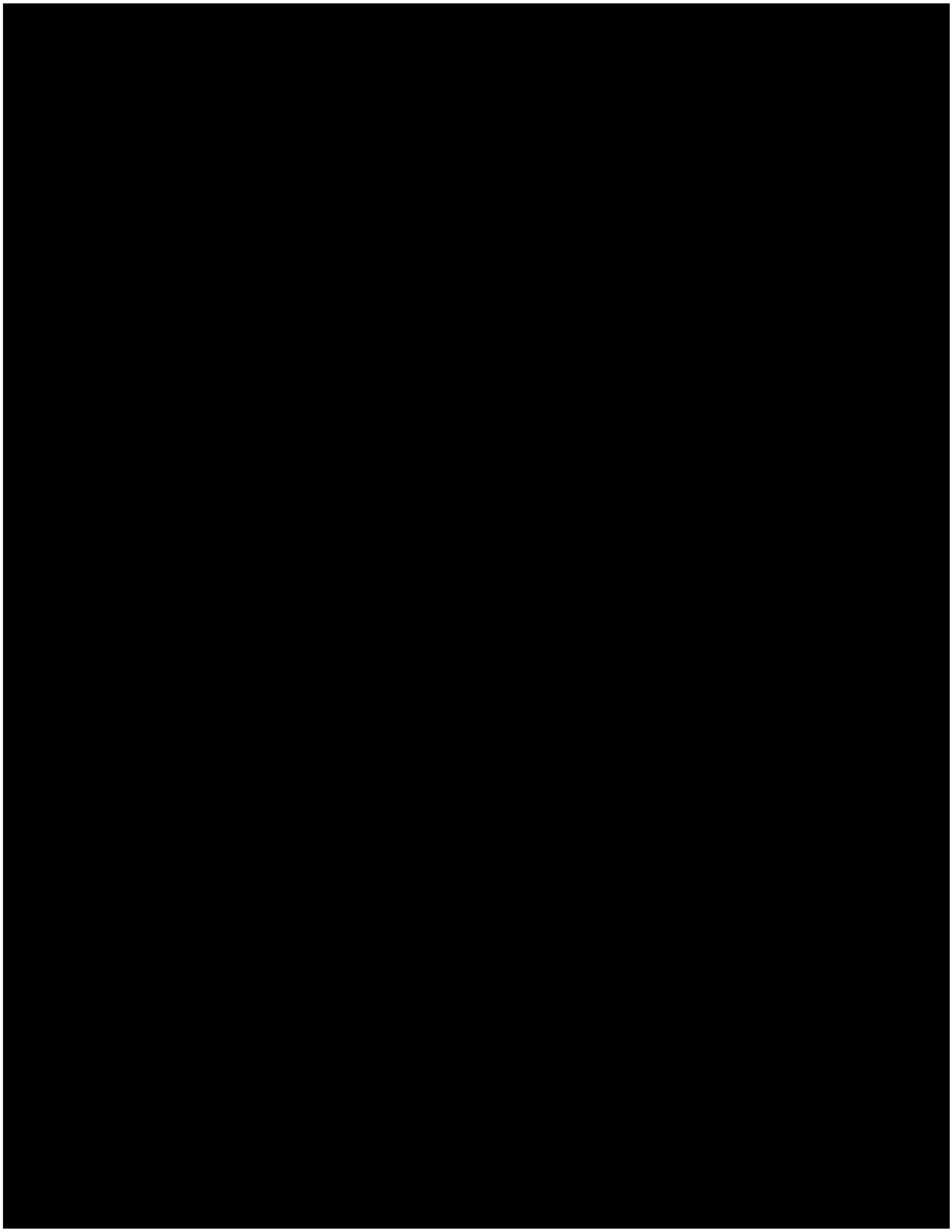


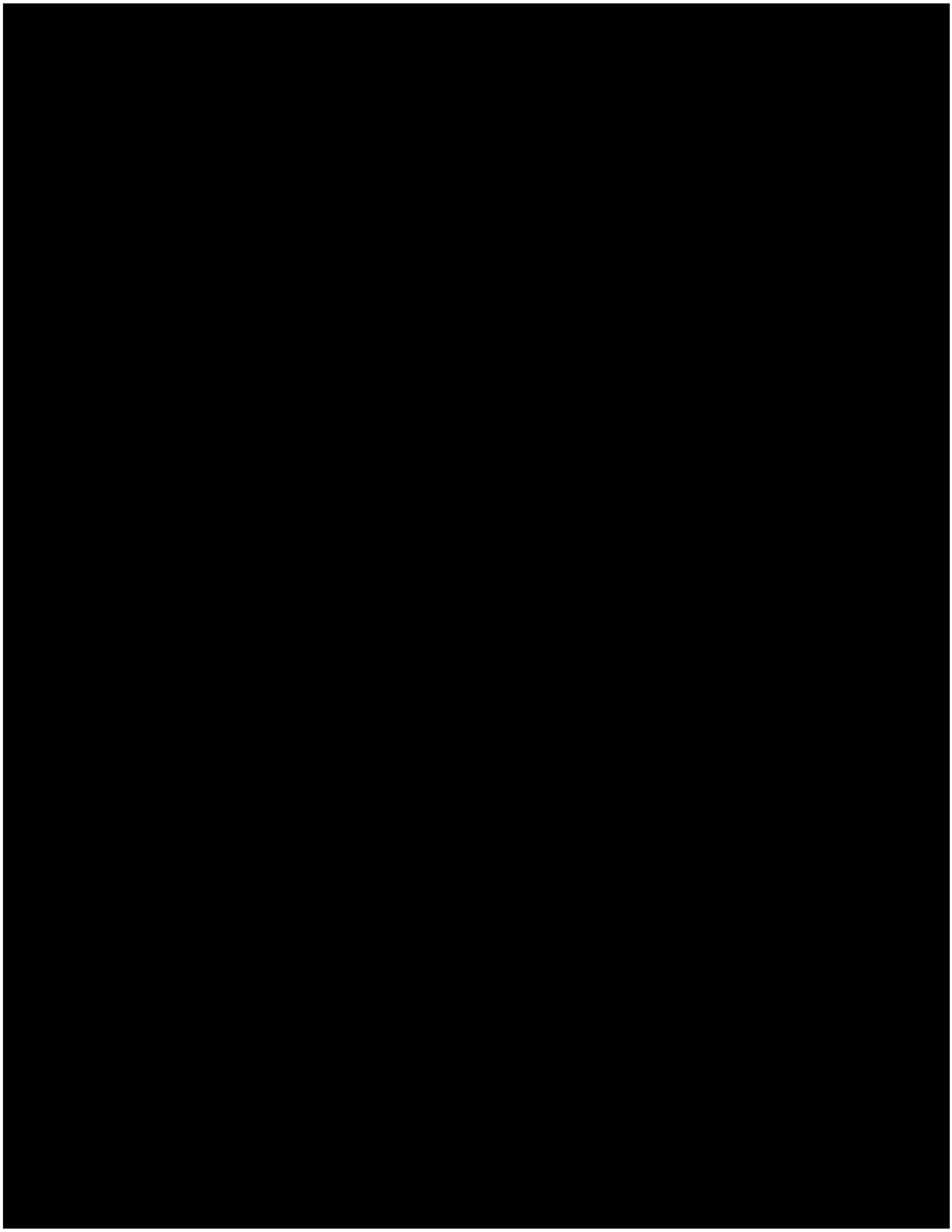


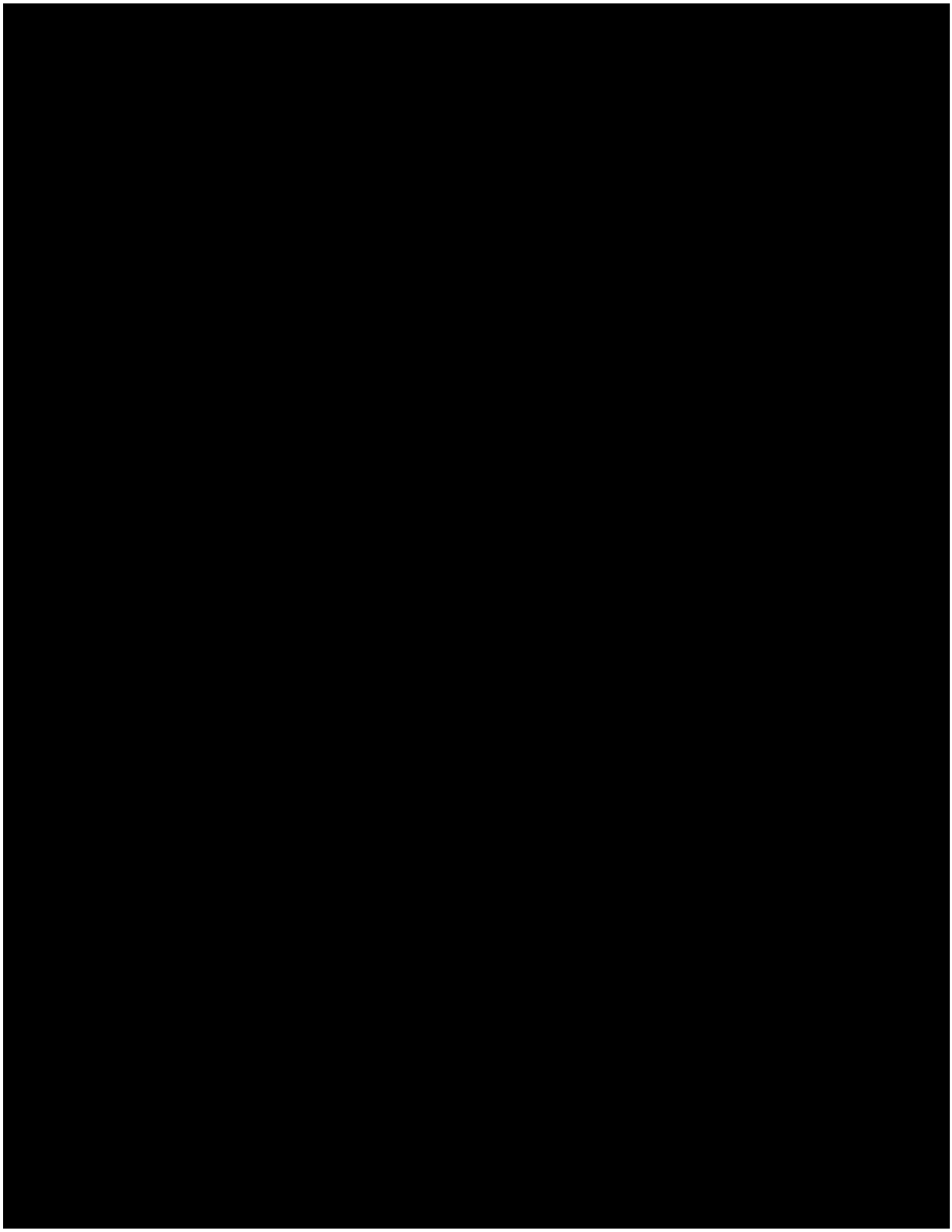


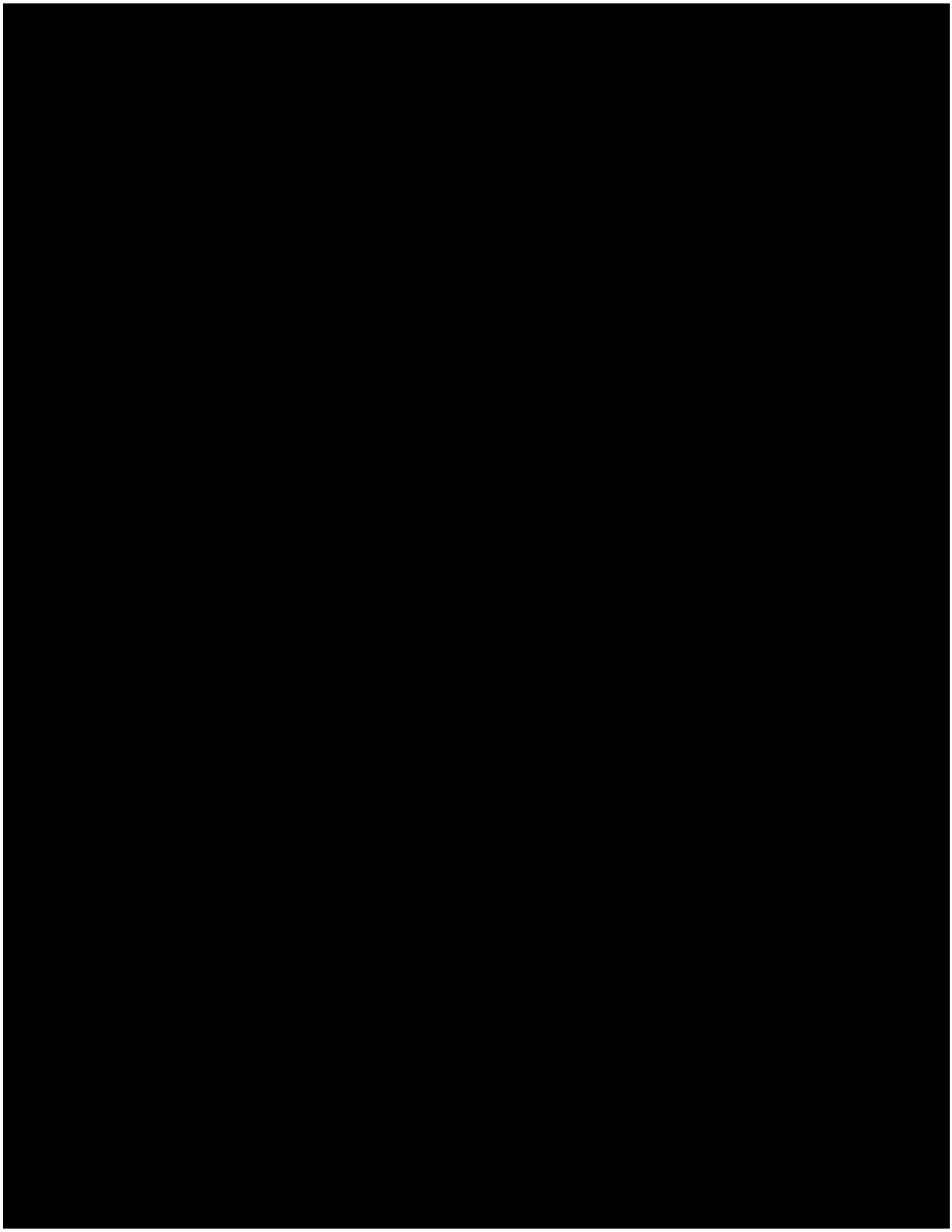


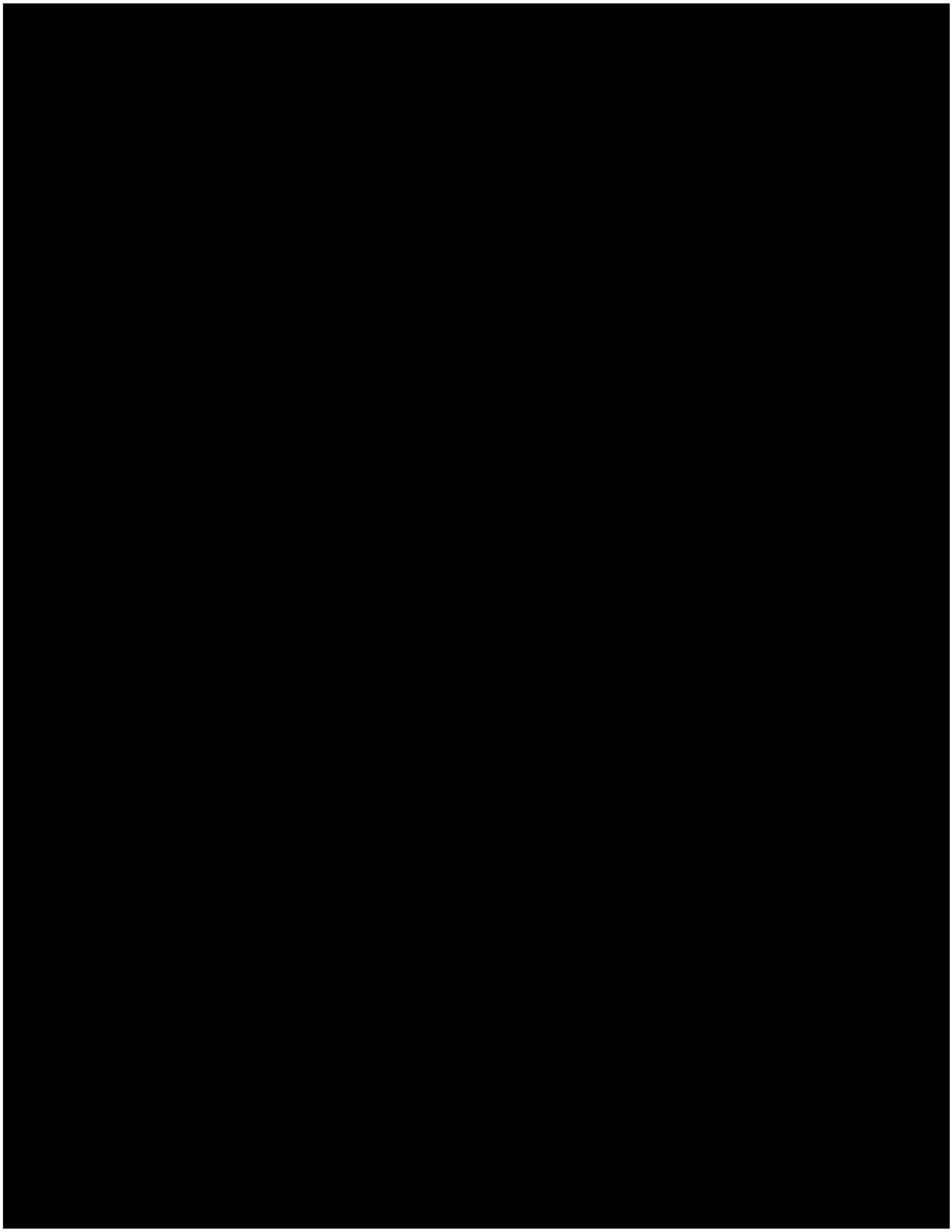


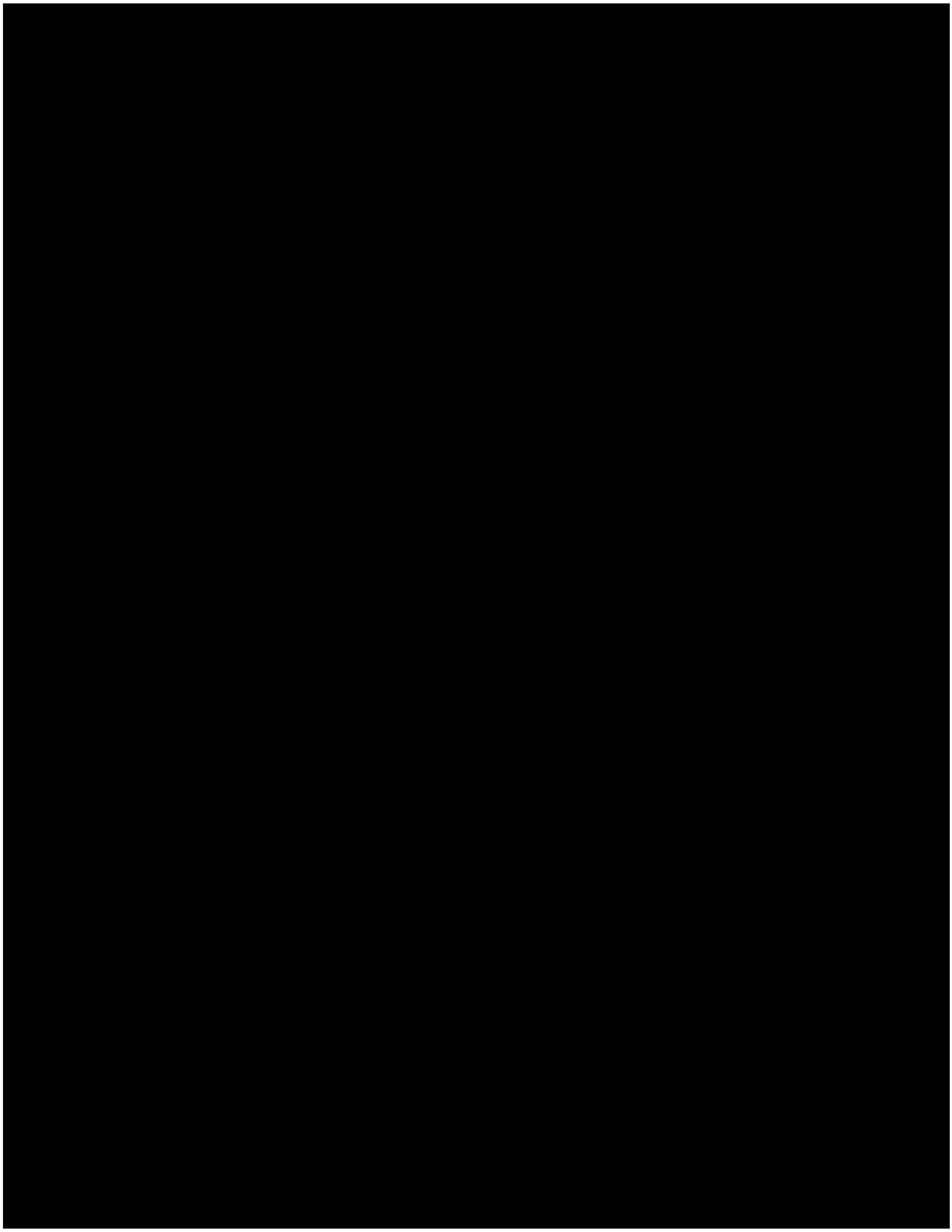


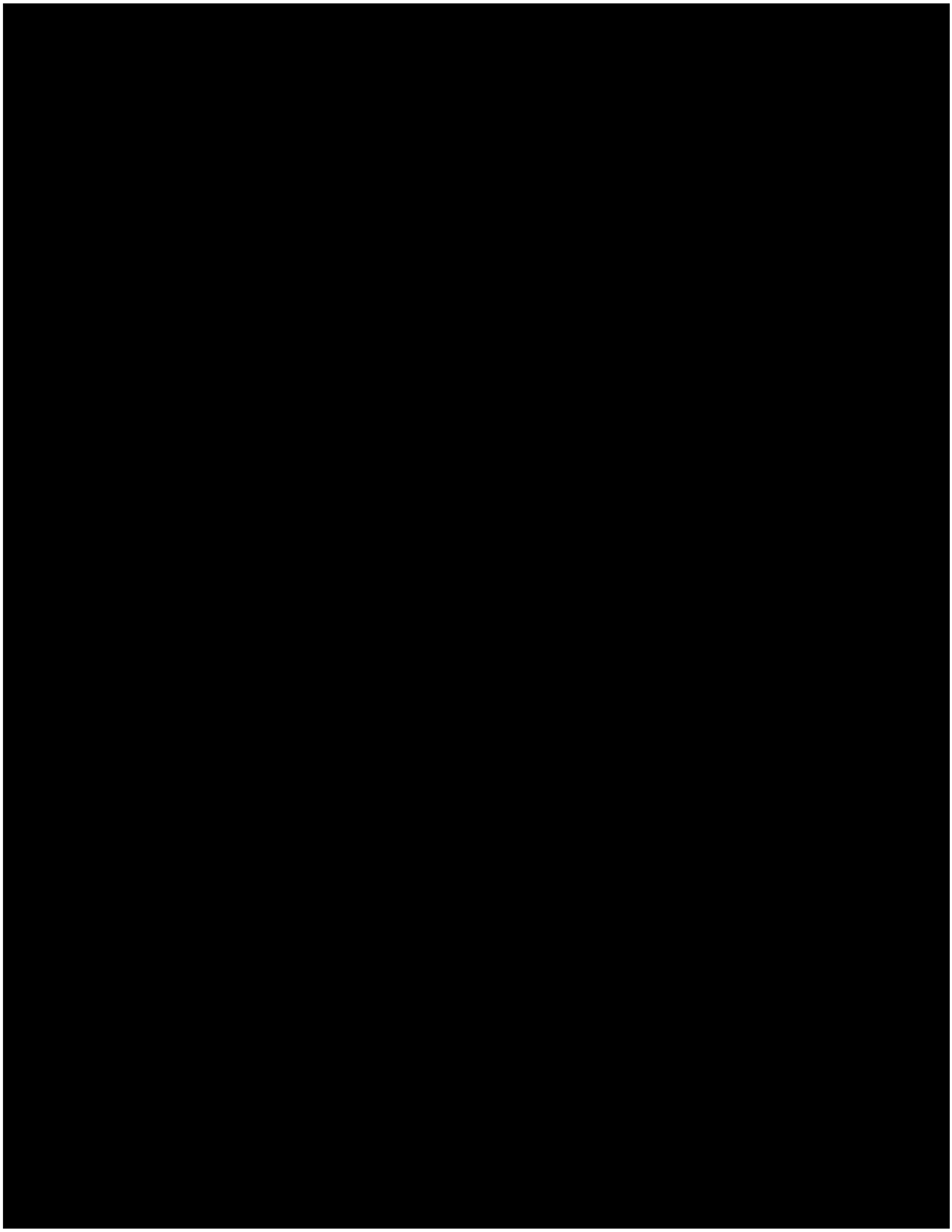


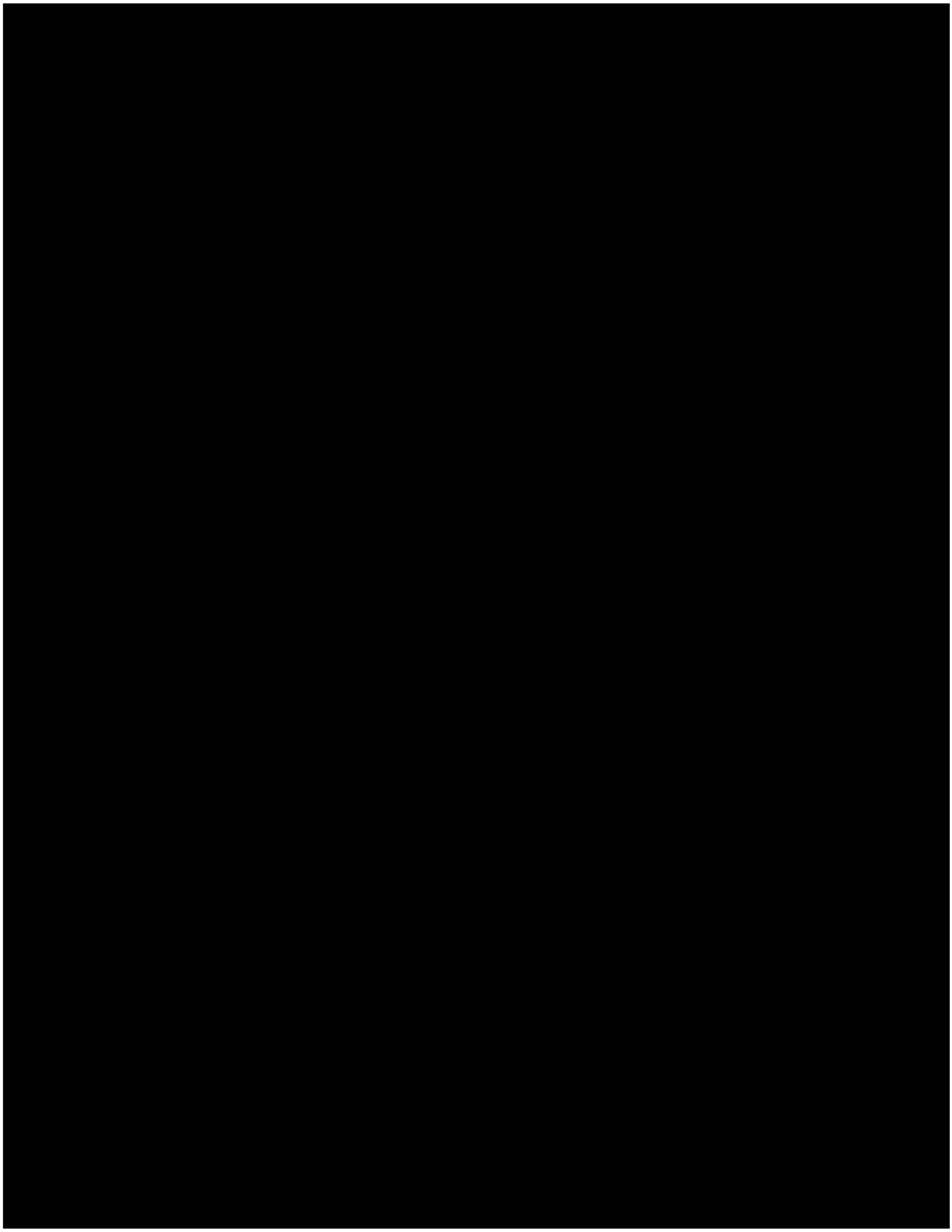


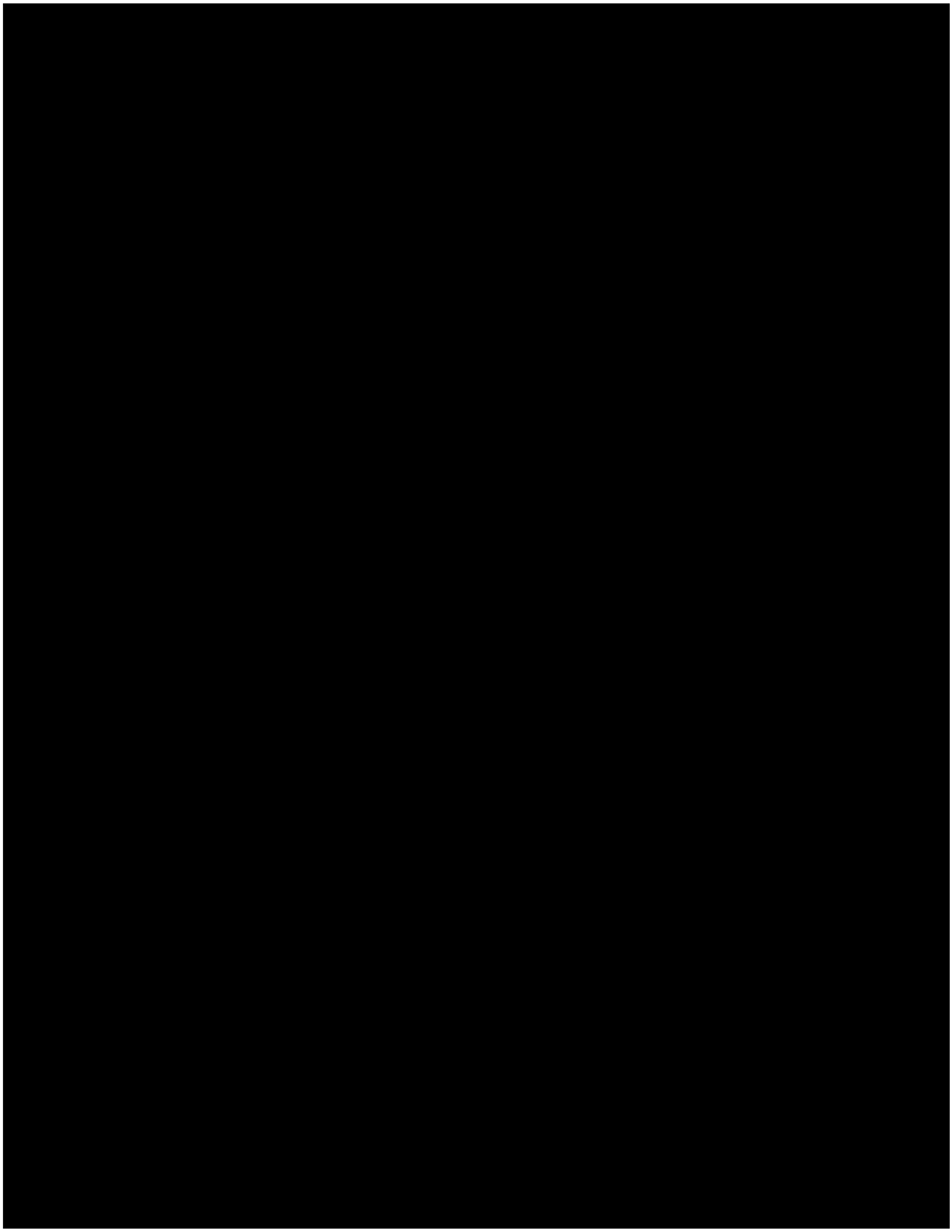


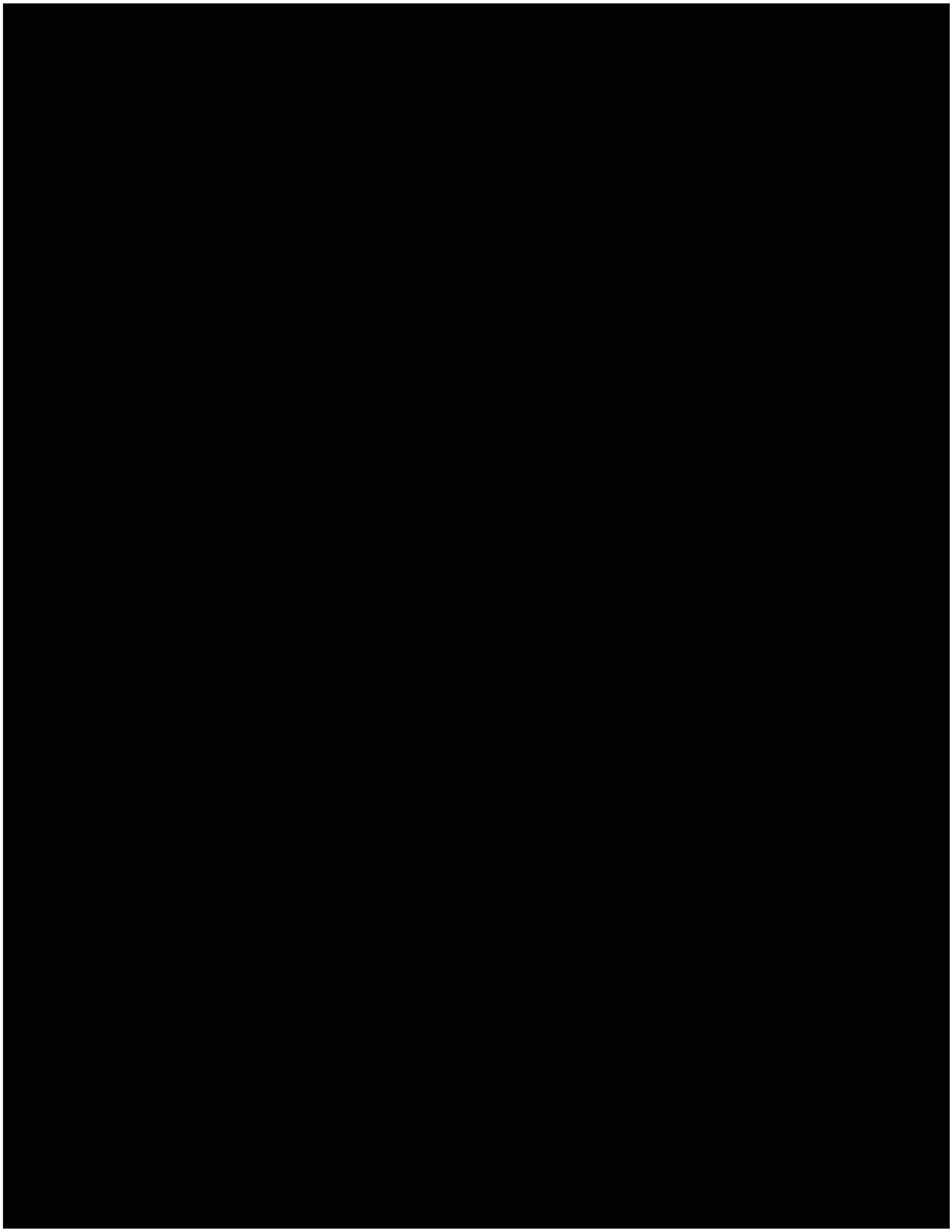


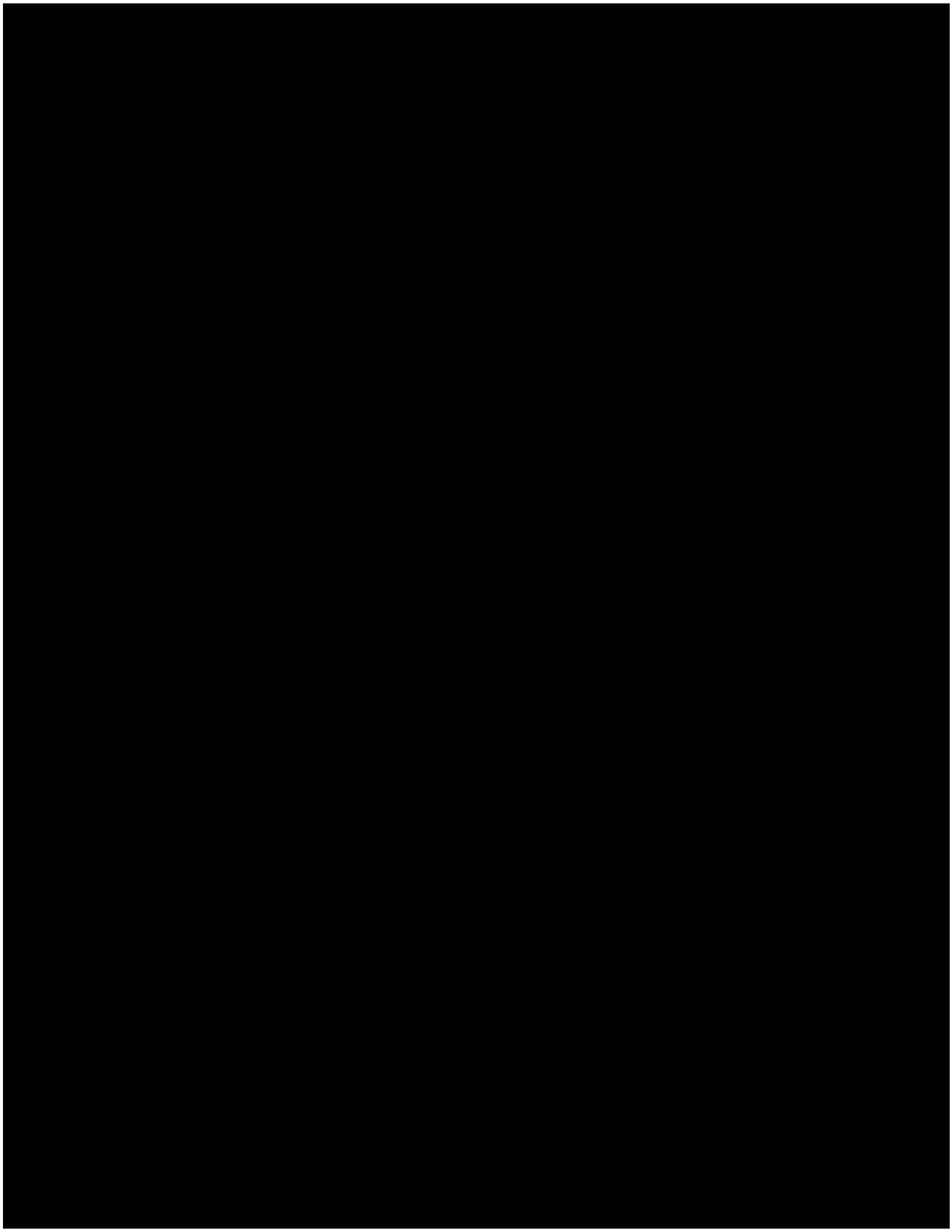


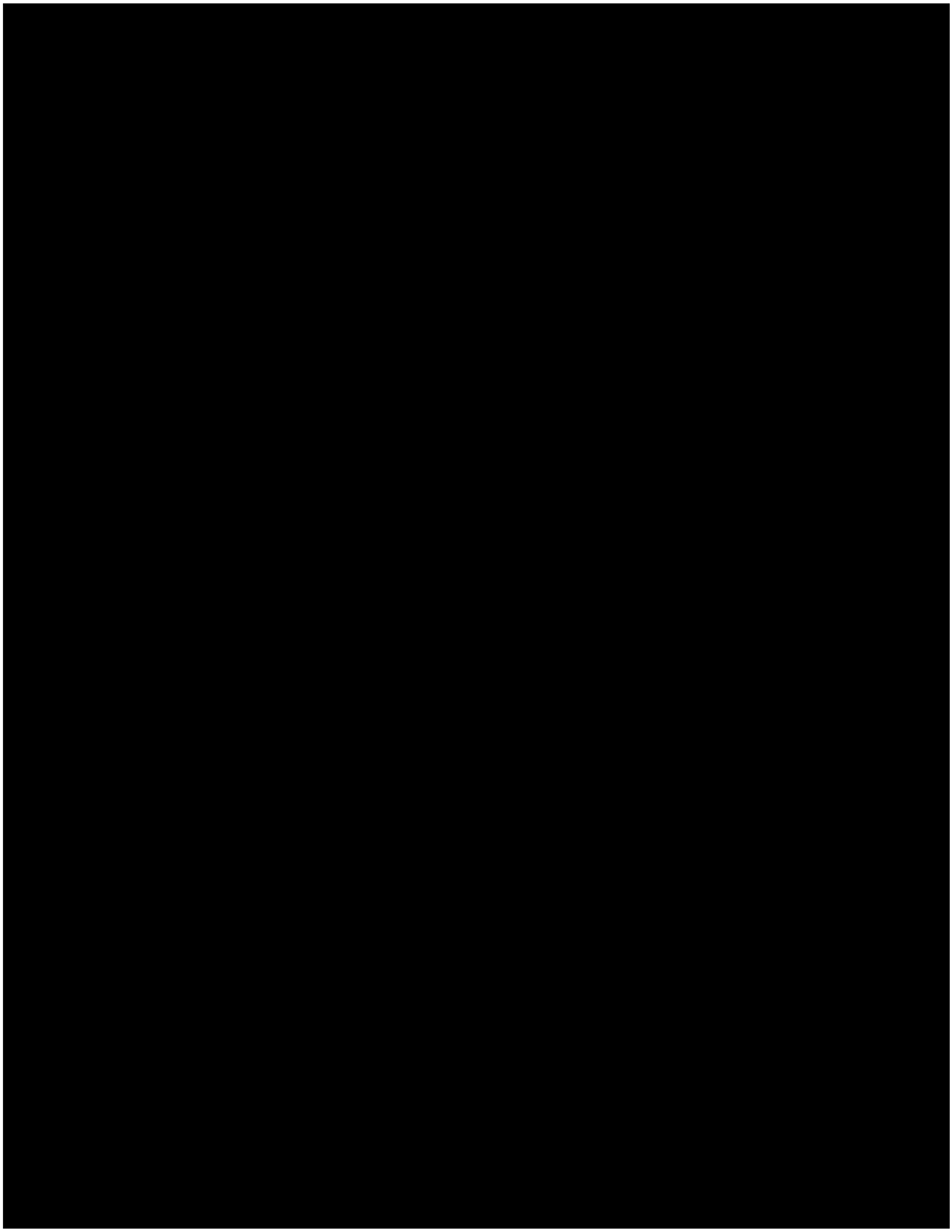


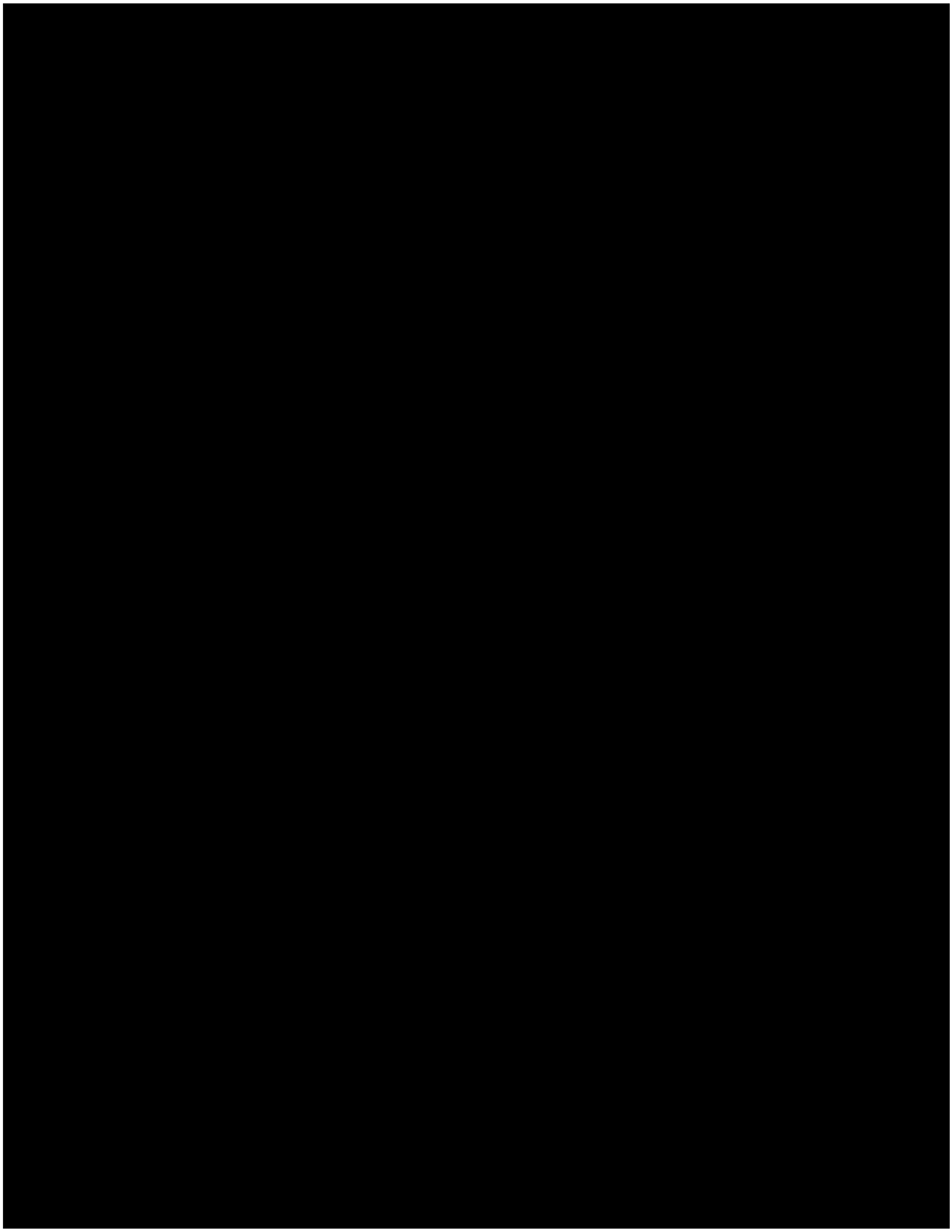


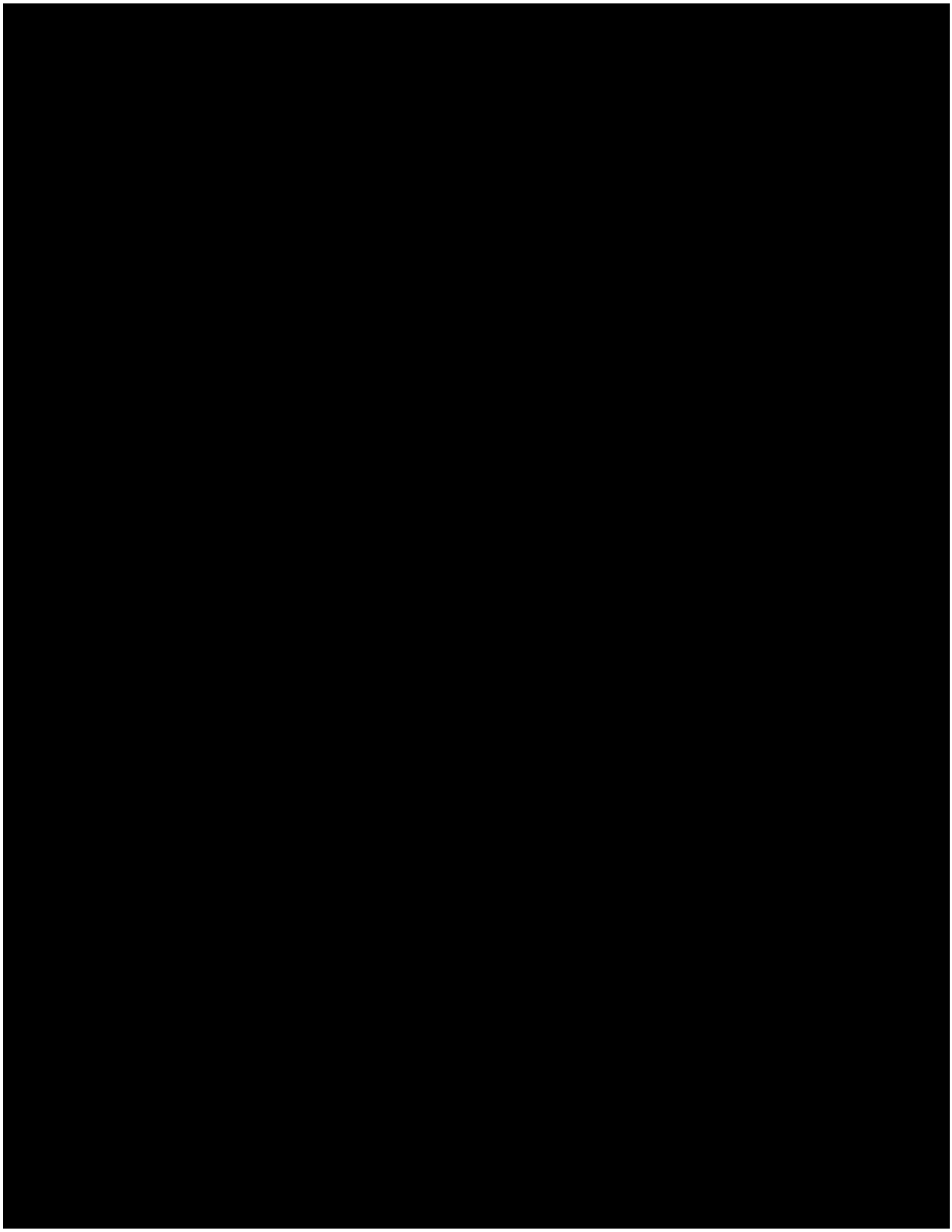


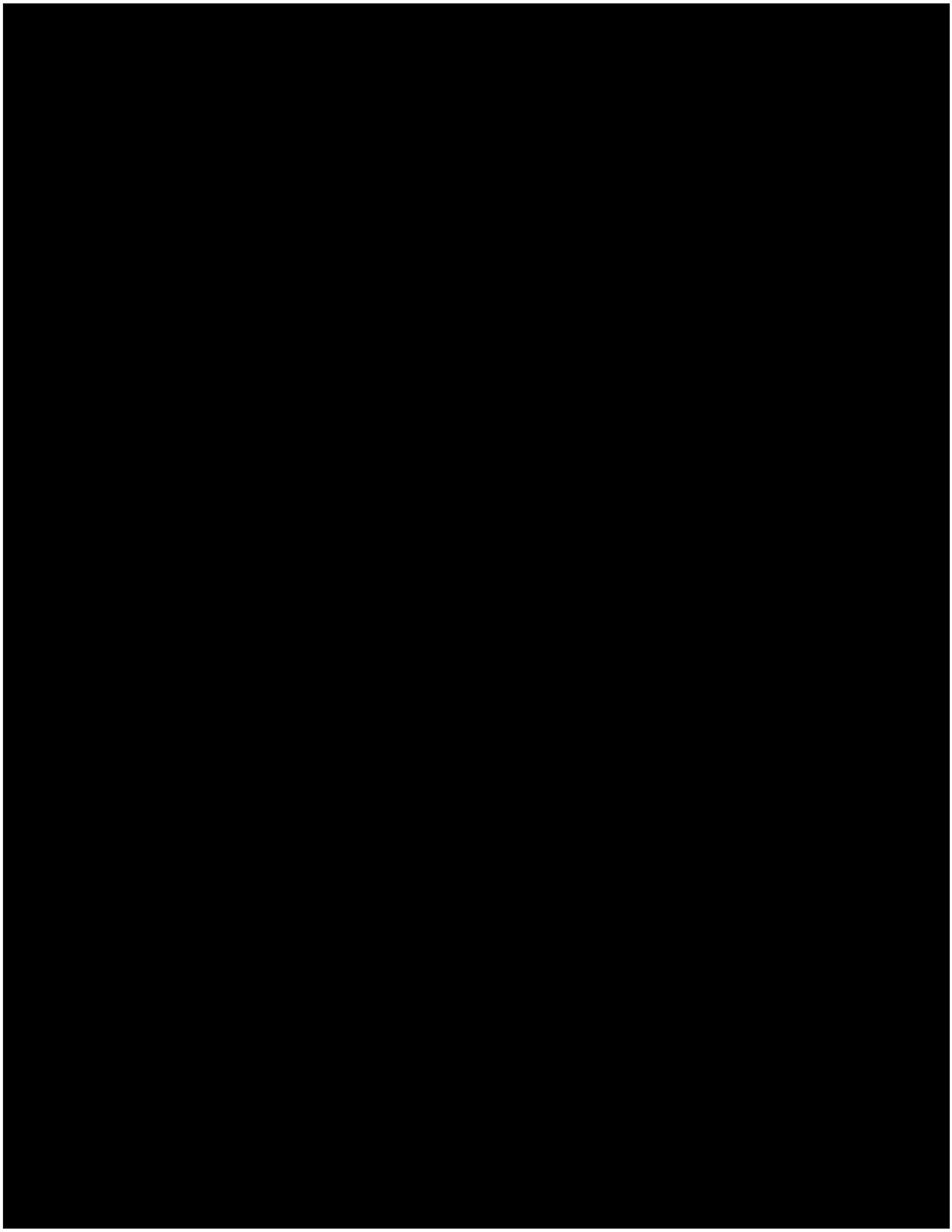


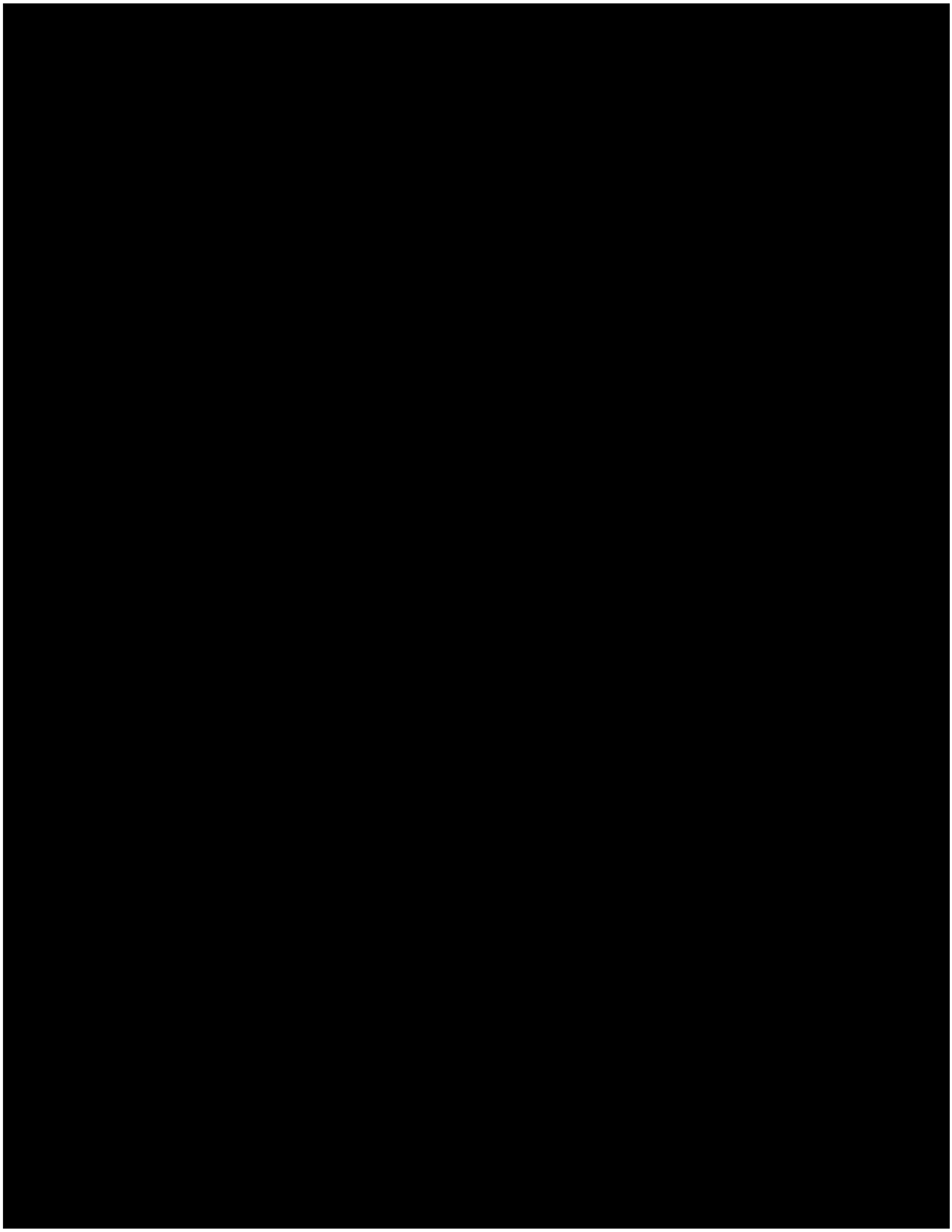


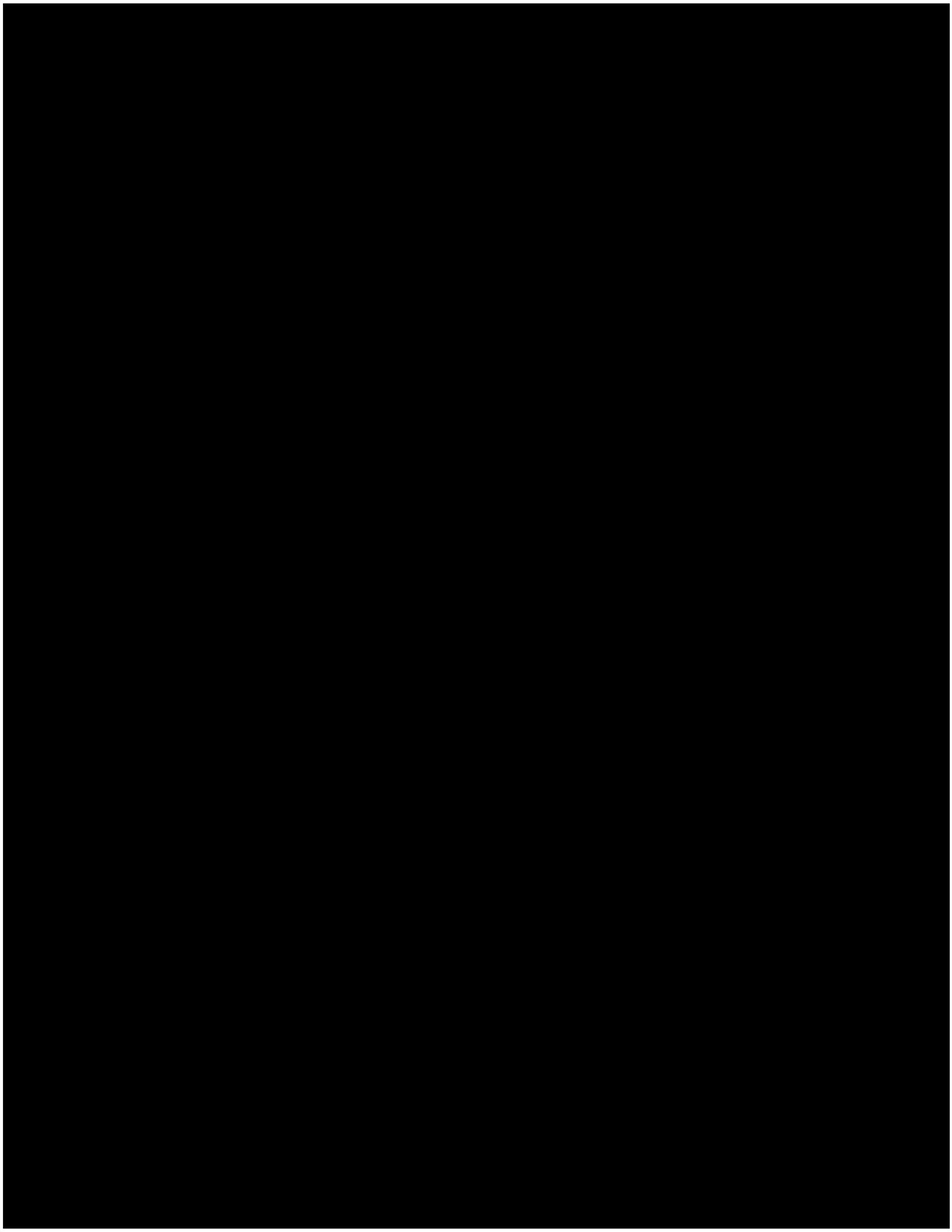


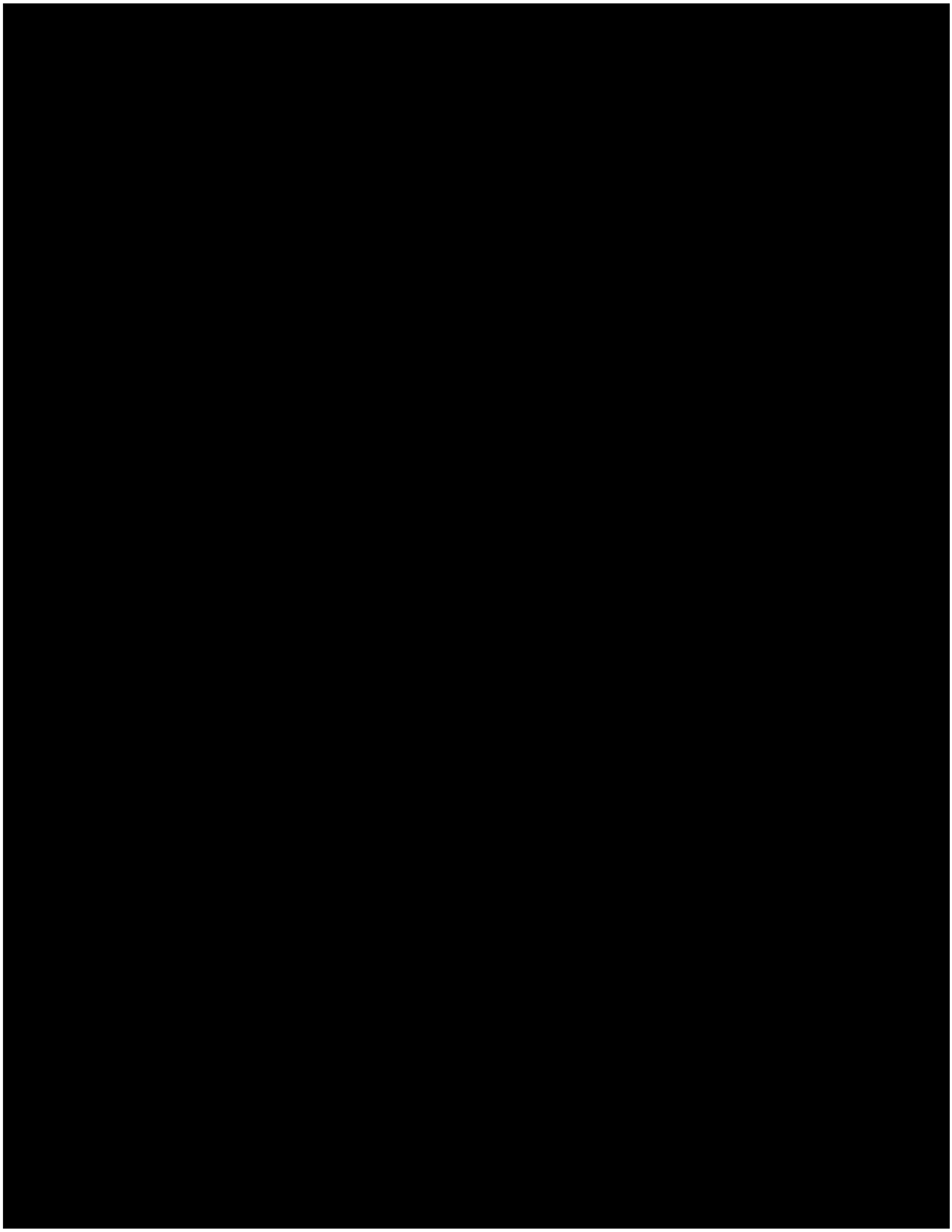


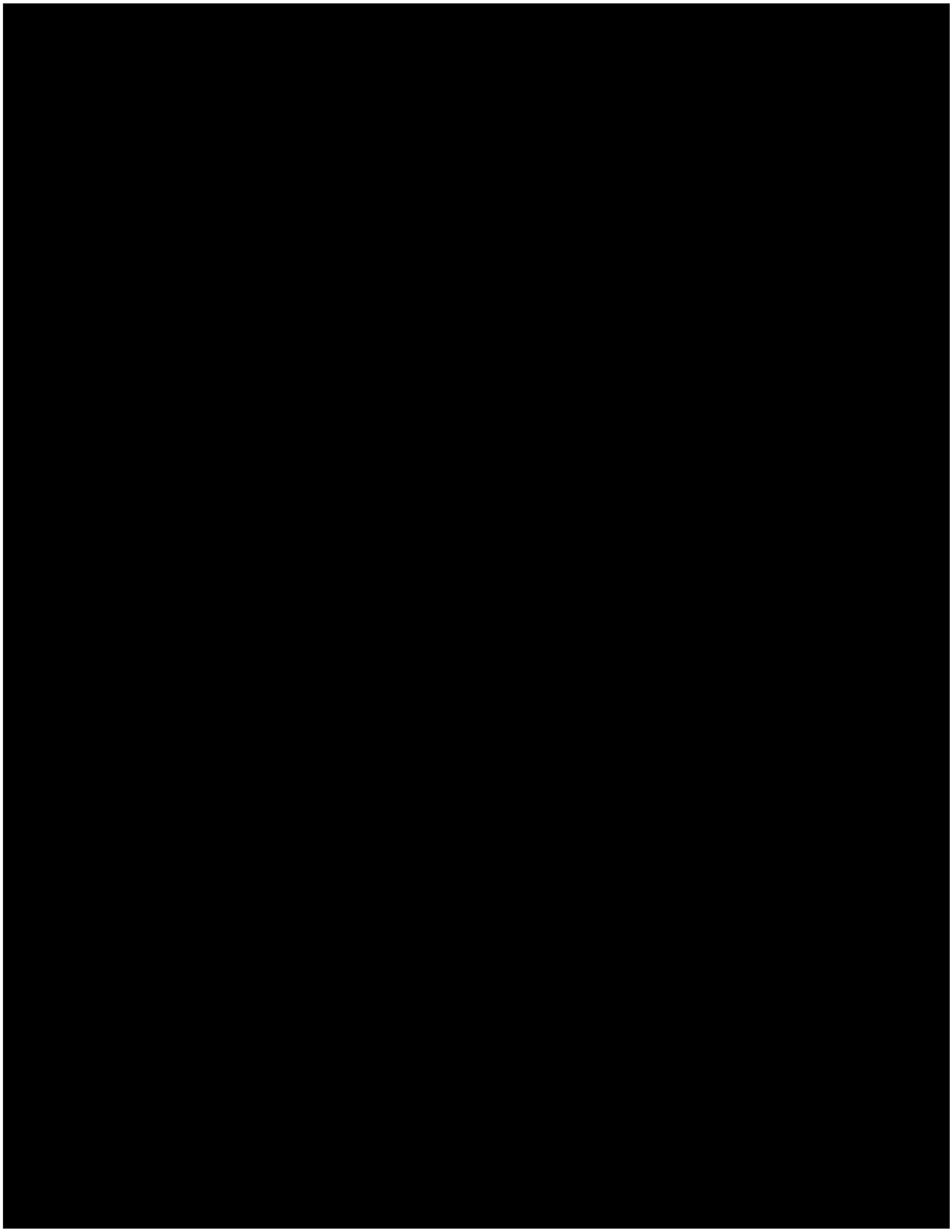


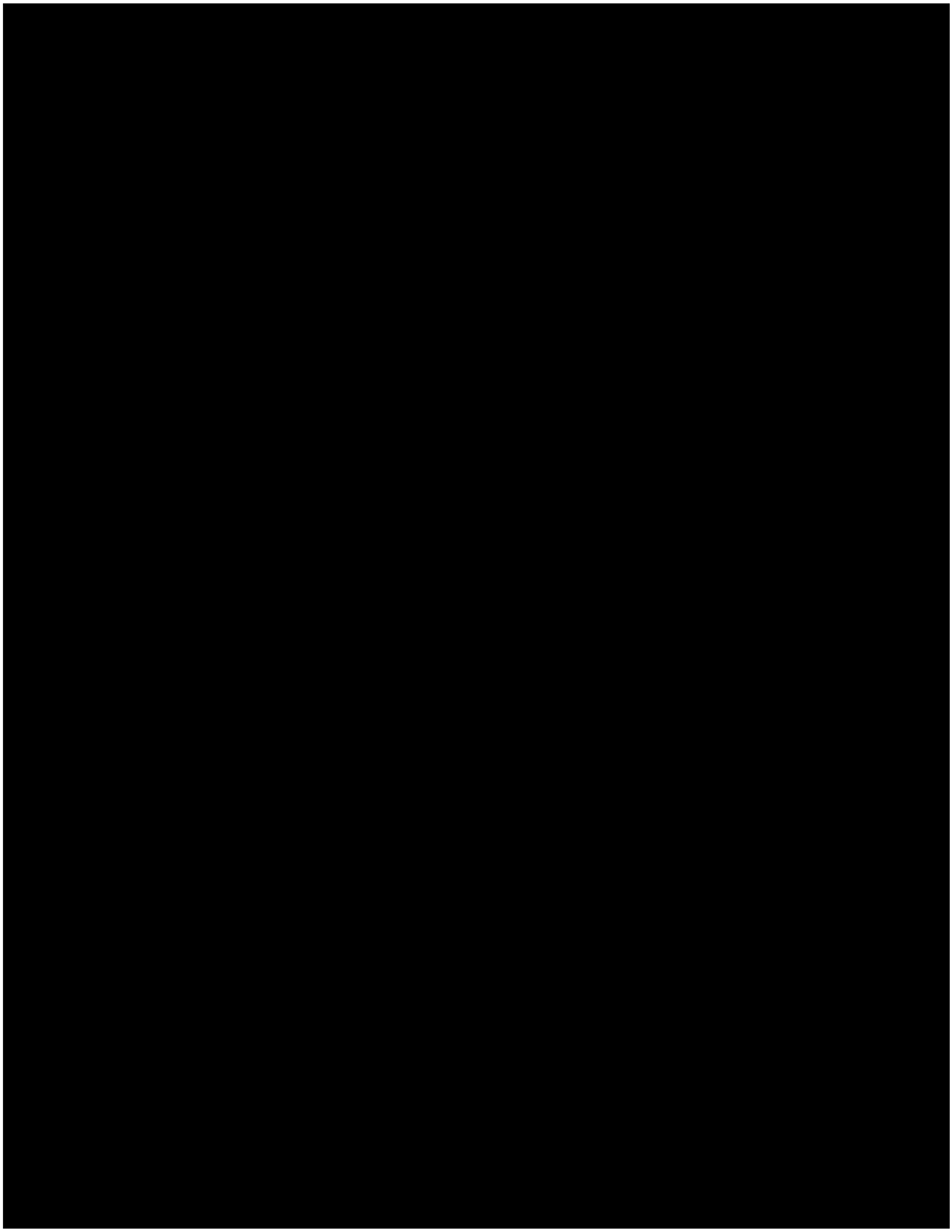


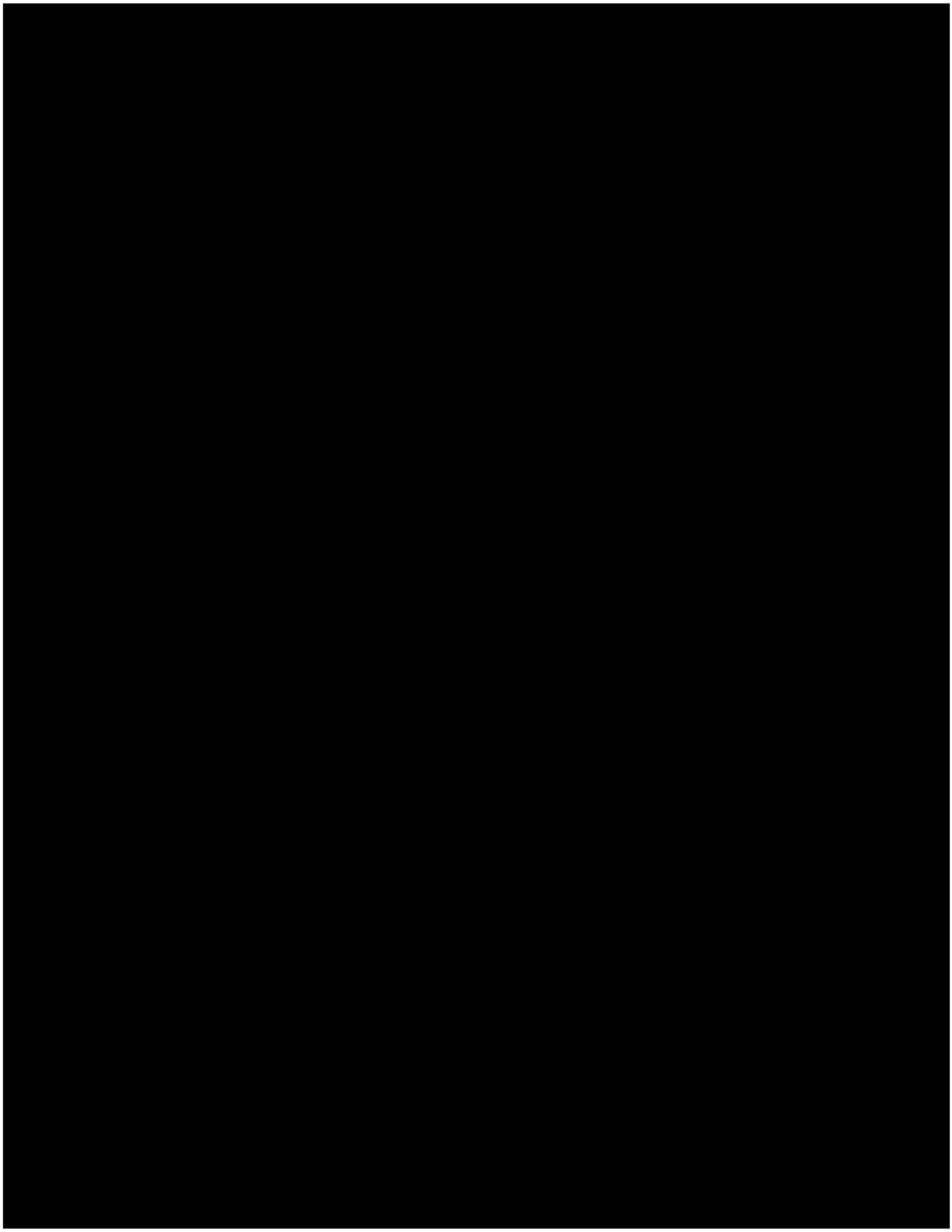


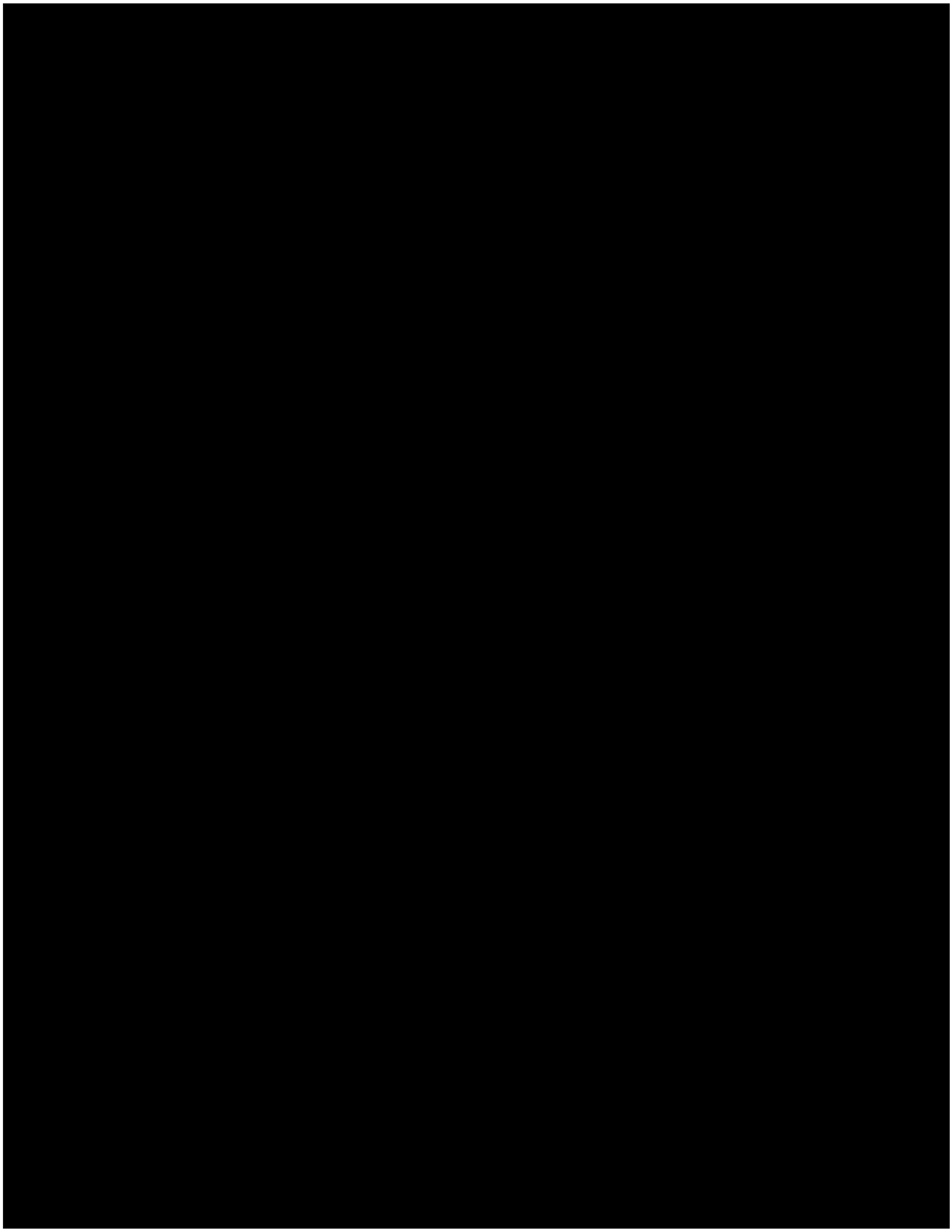


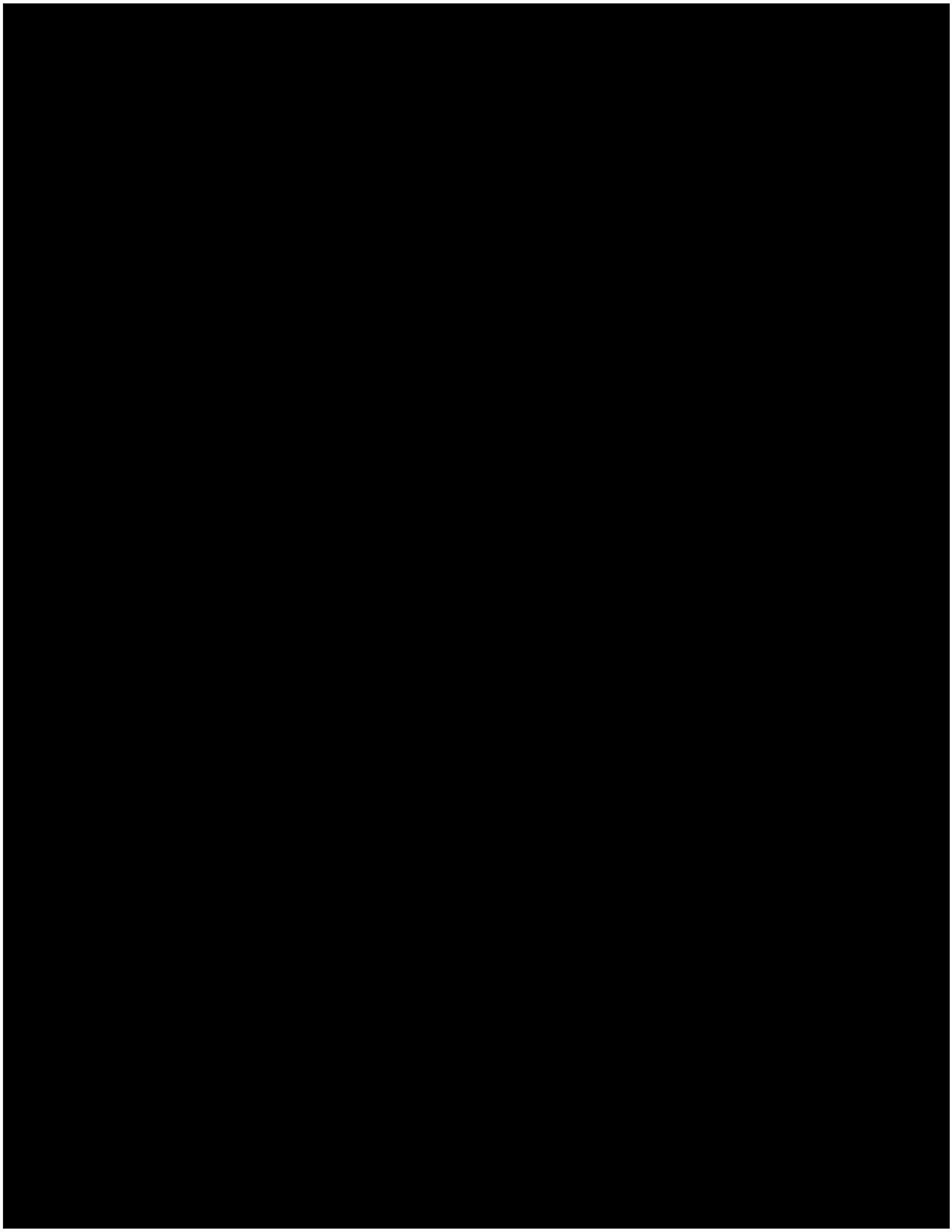


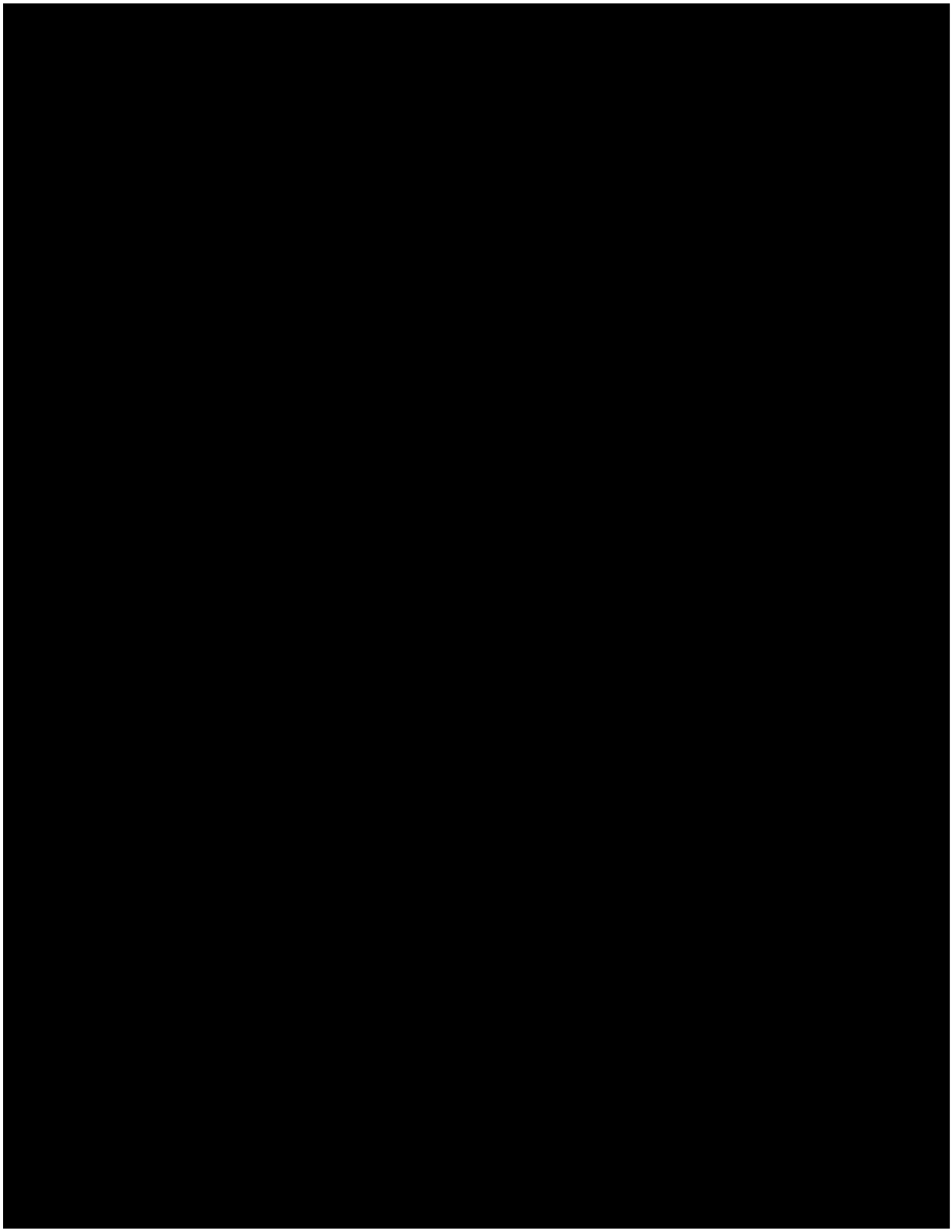






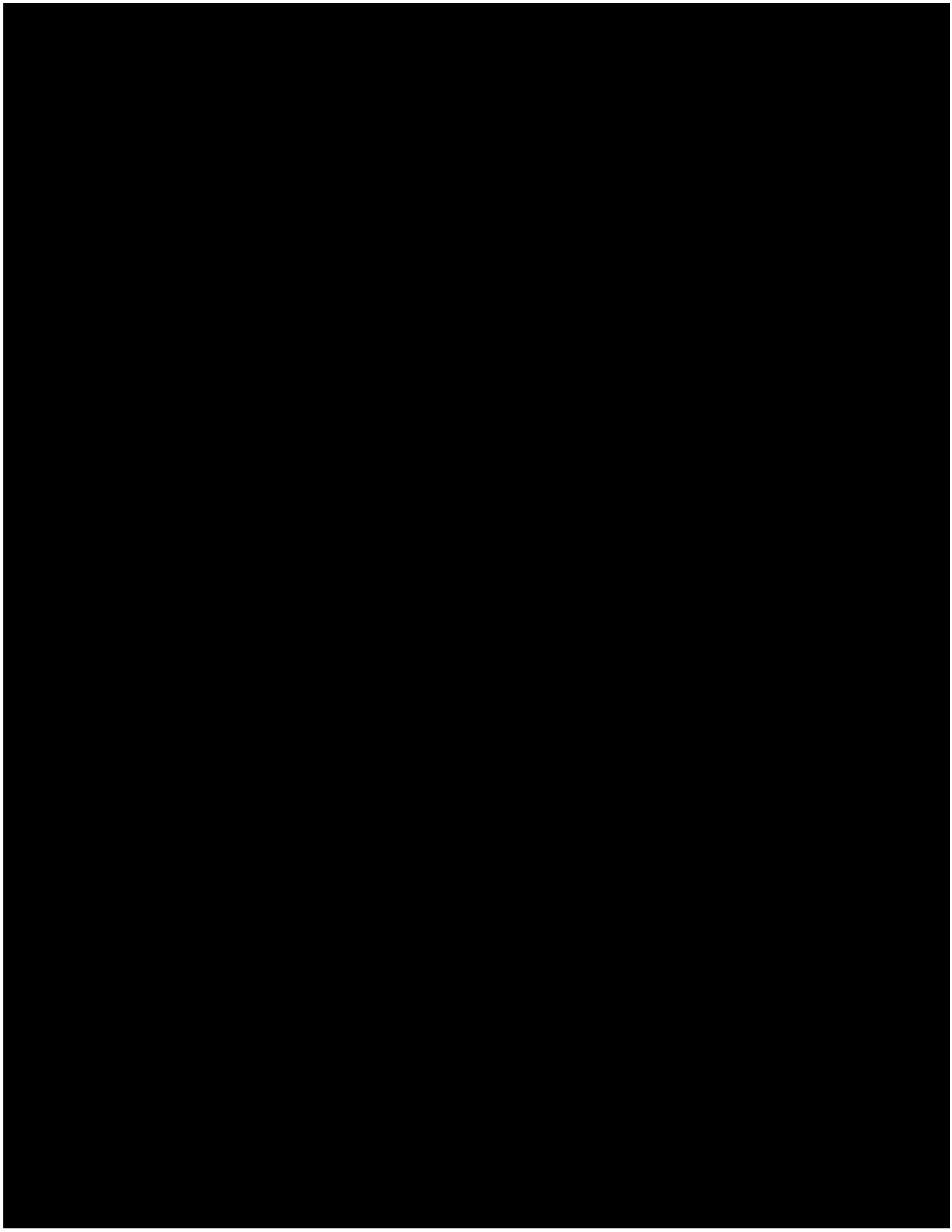


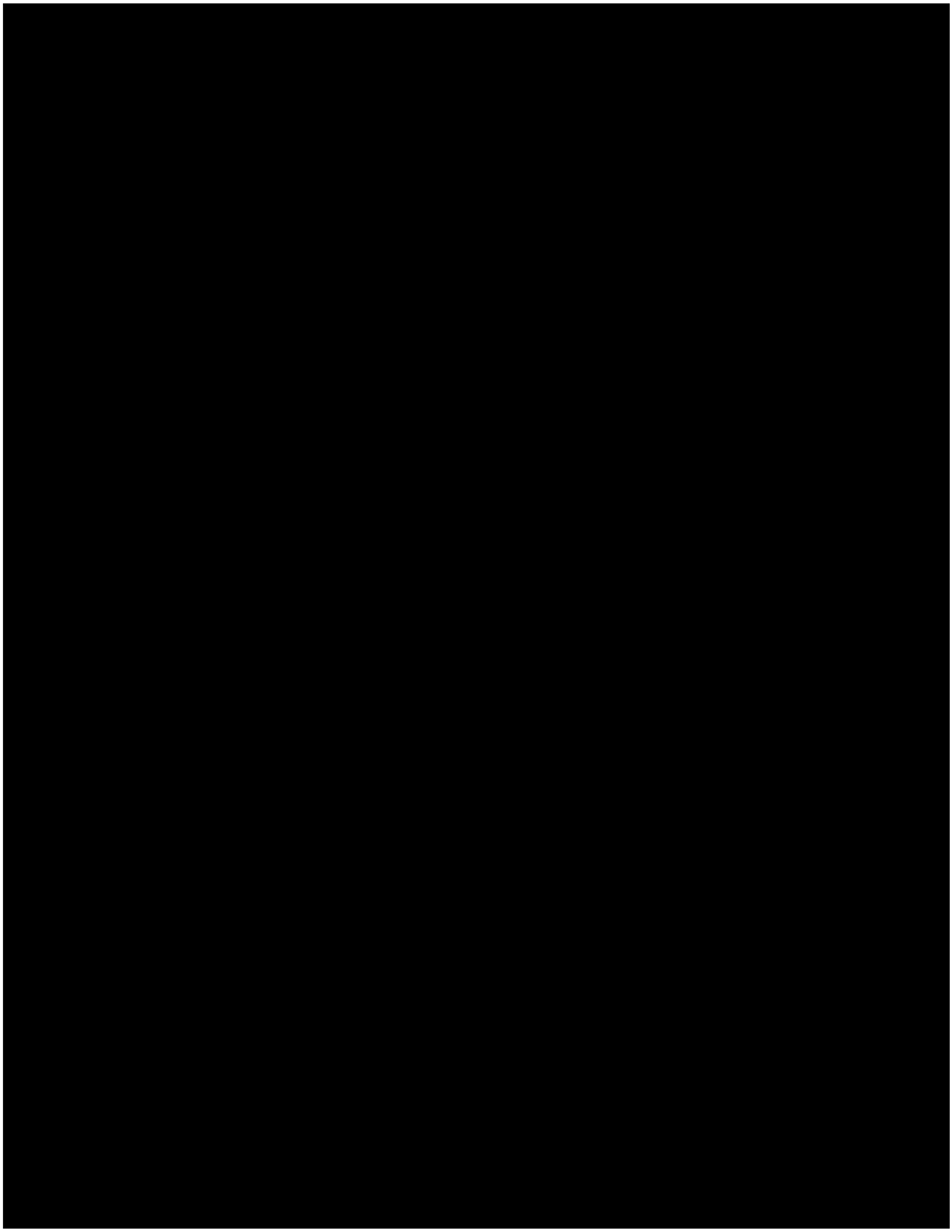


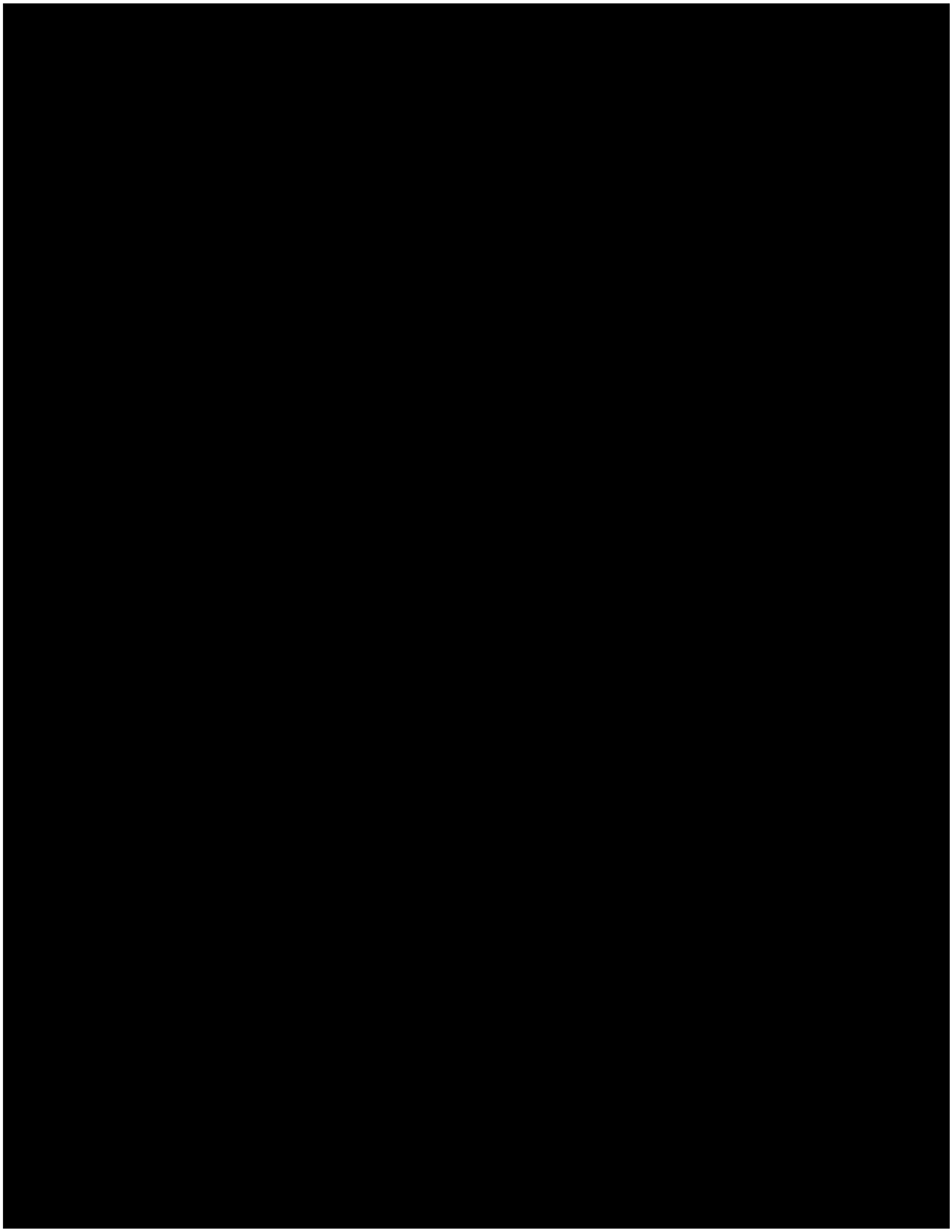


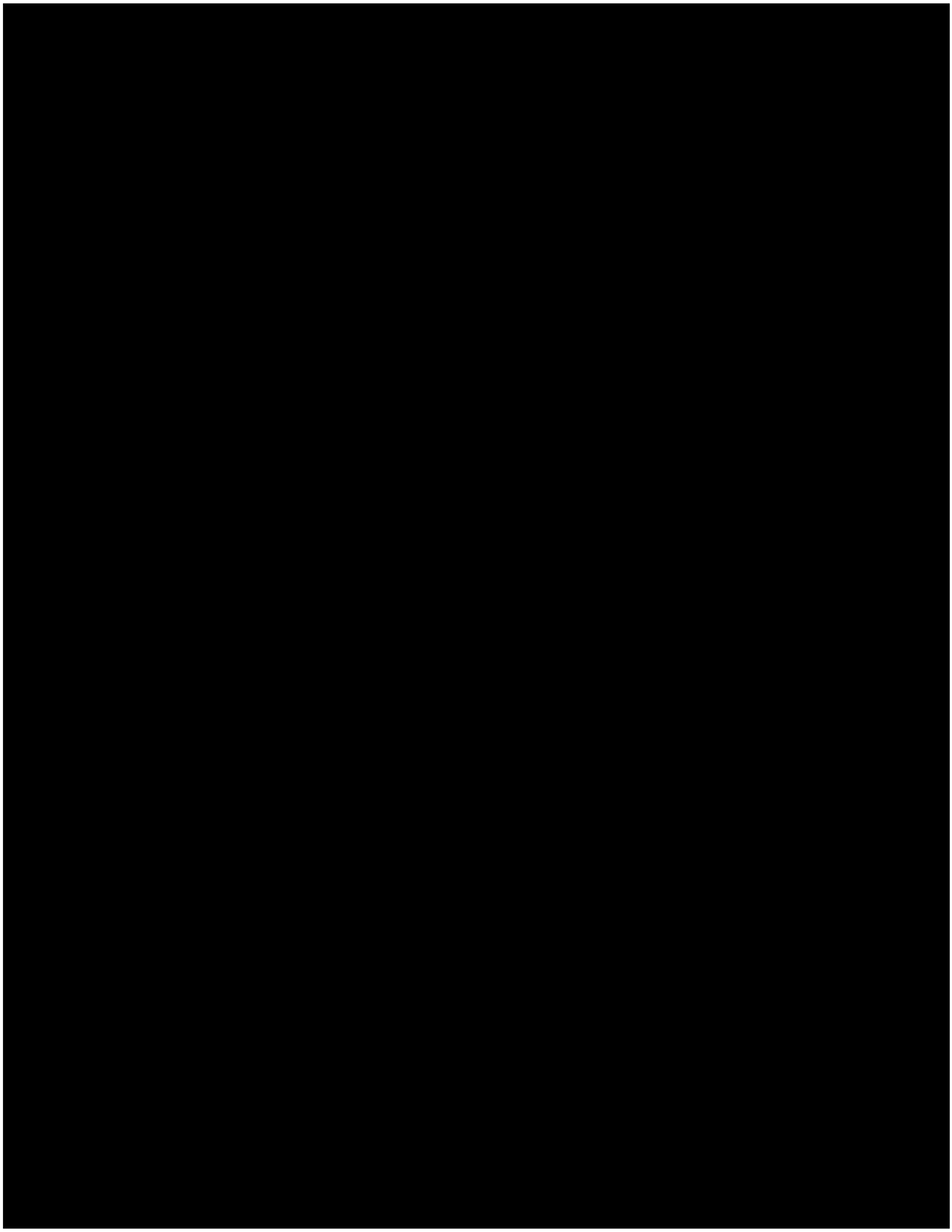
PUBLIC

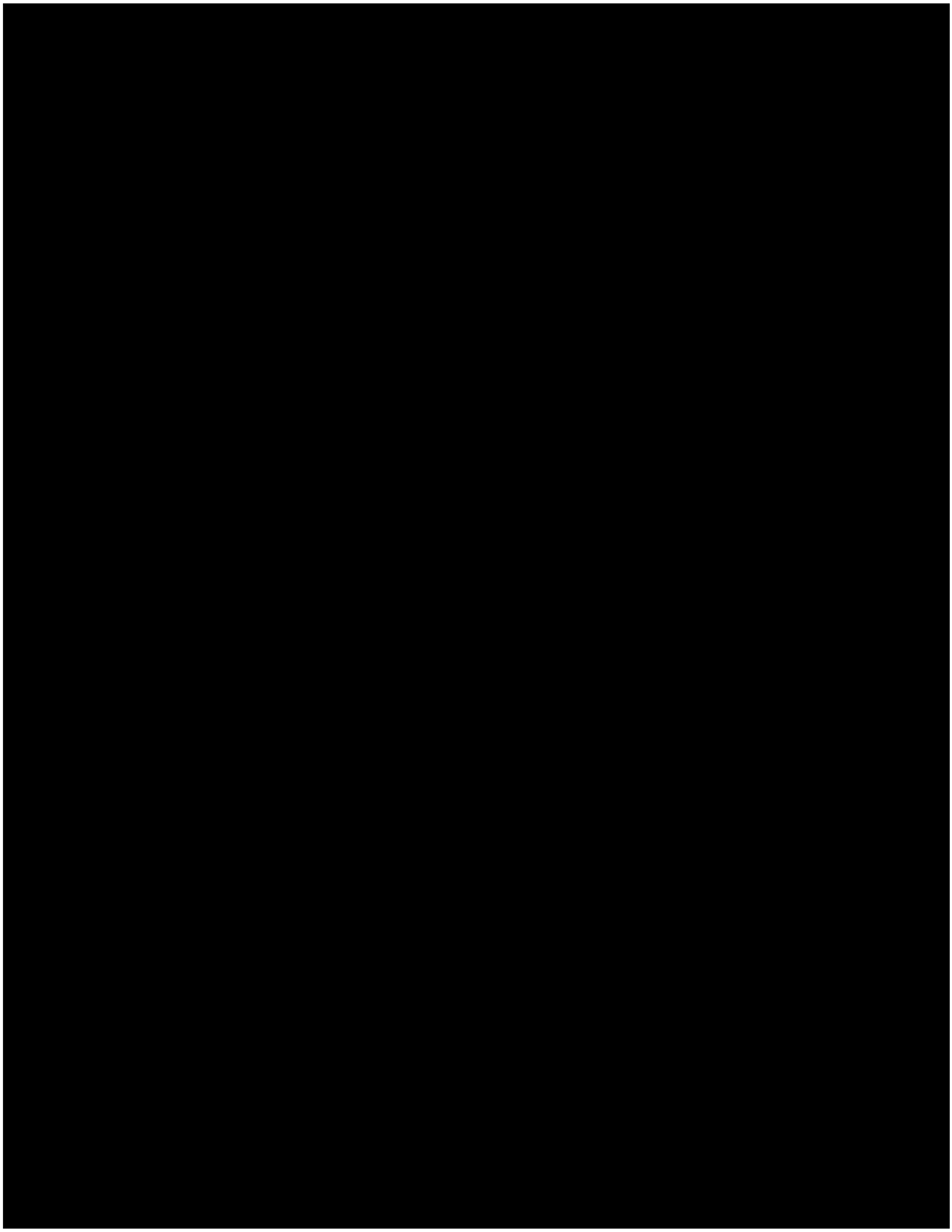
TAB 3

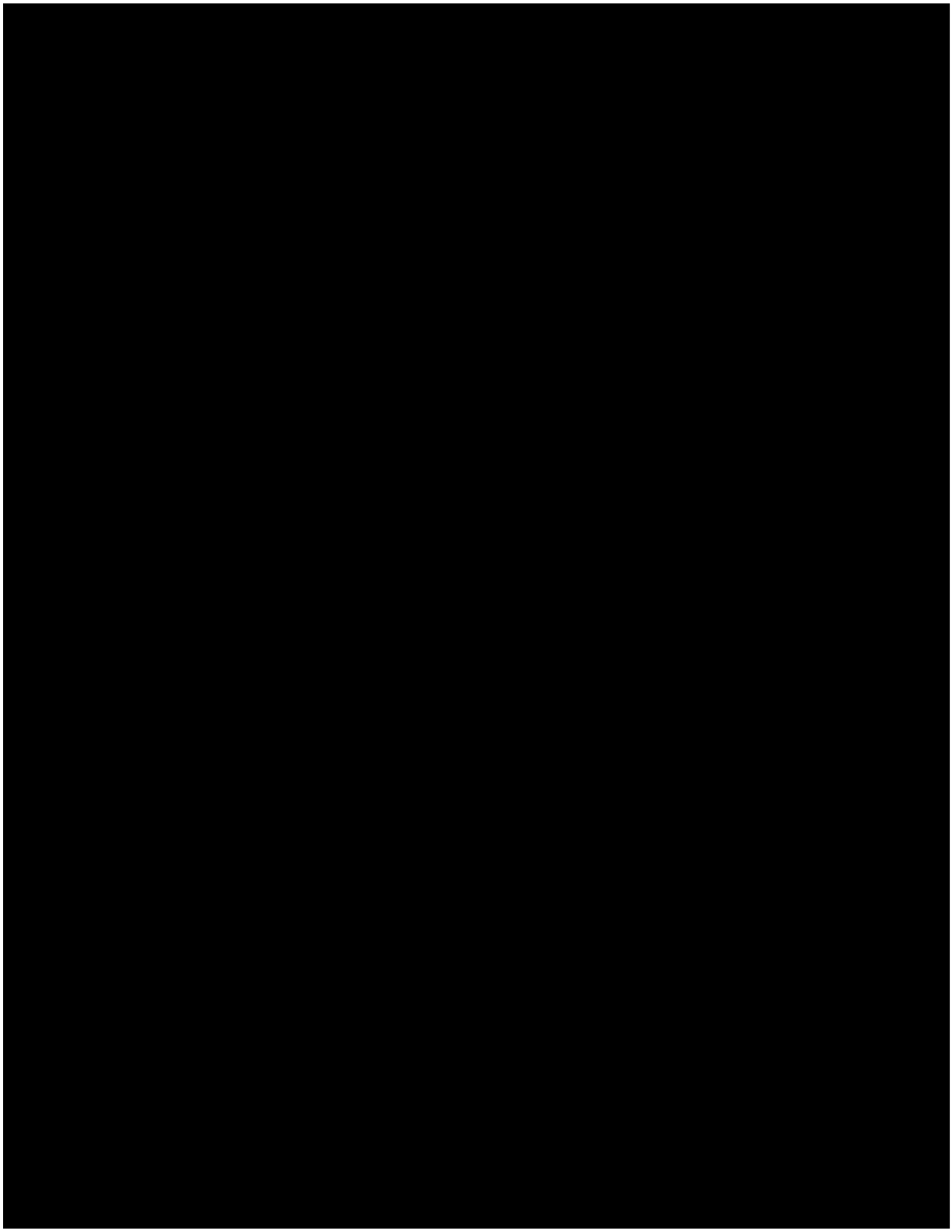


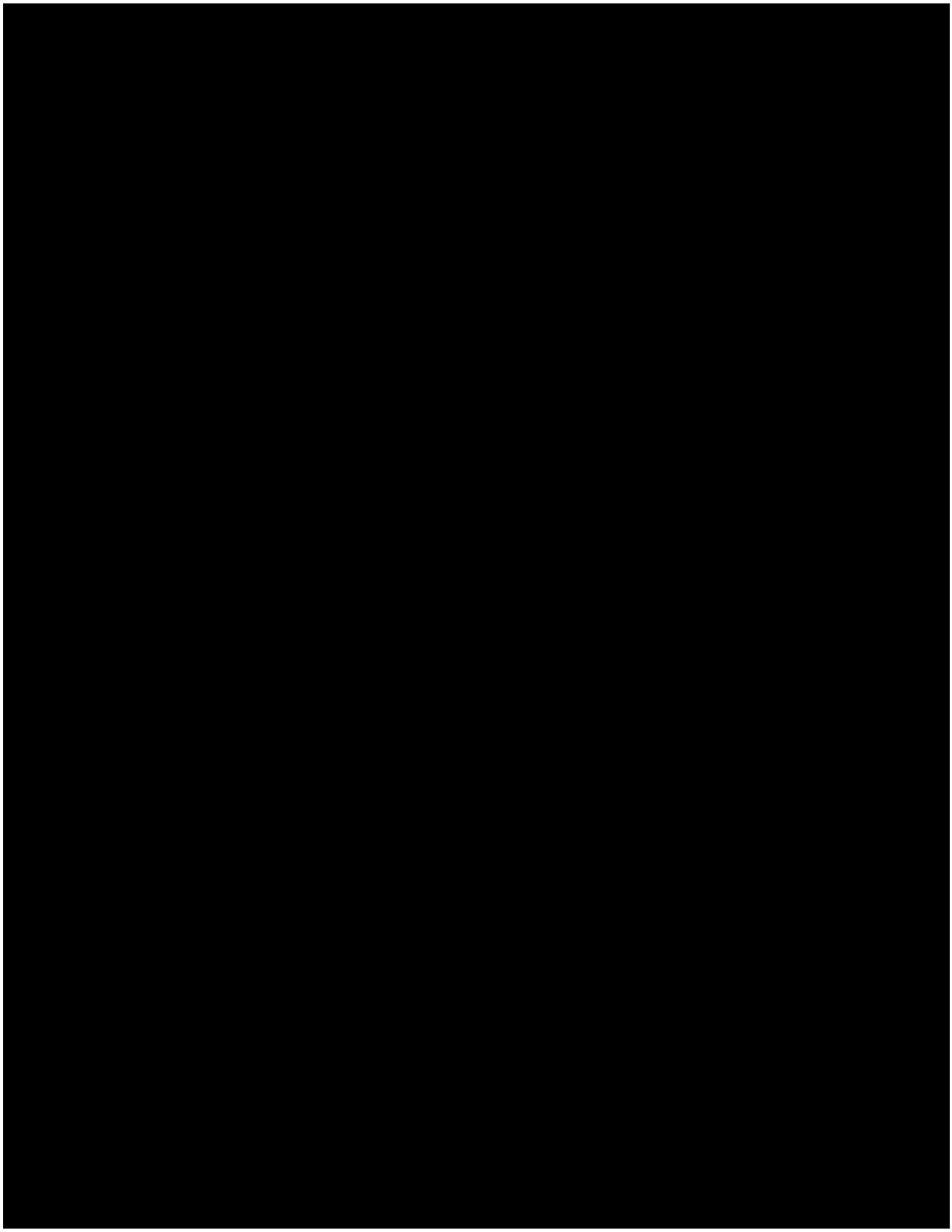


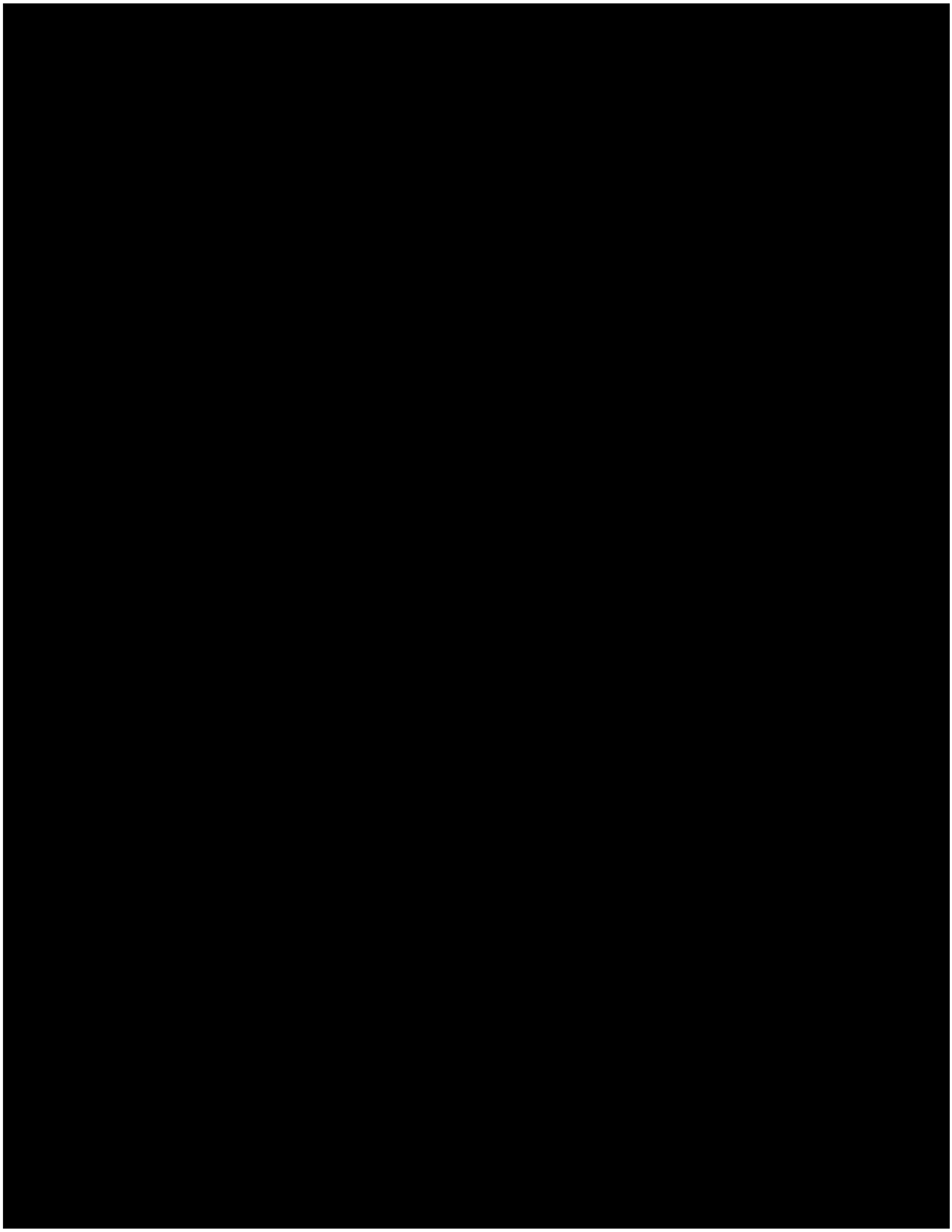


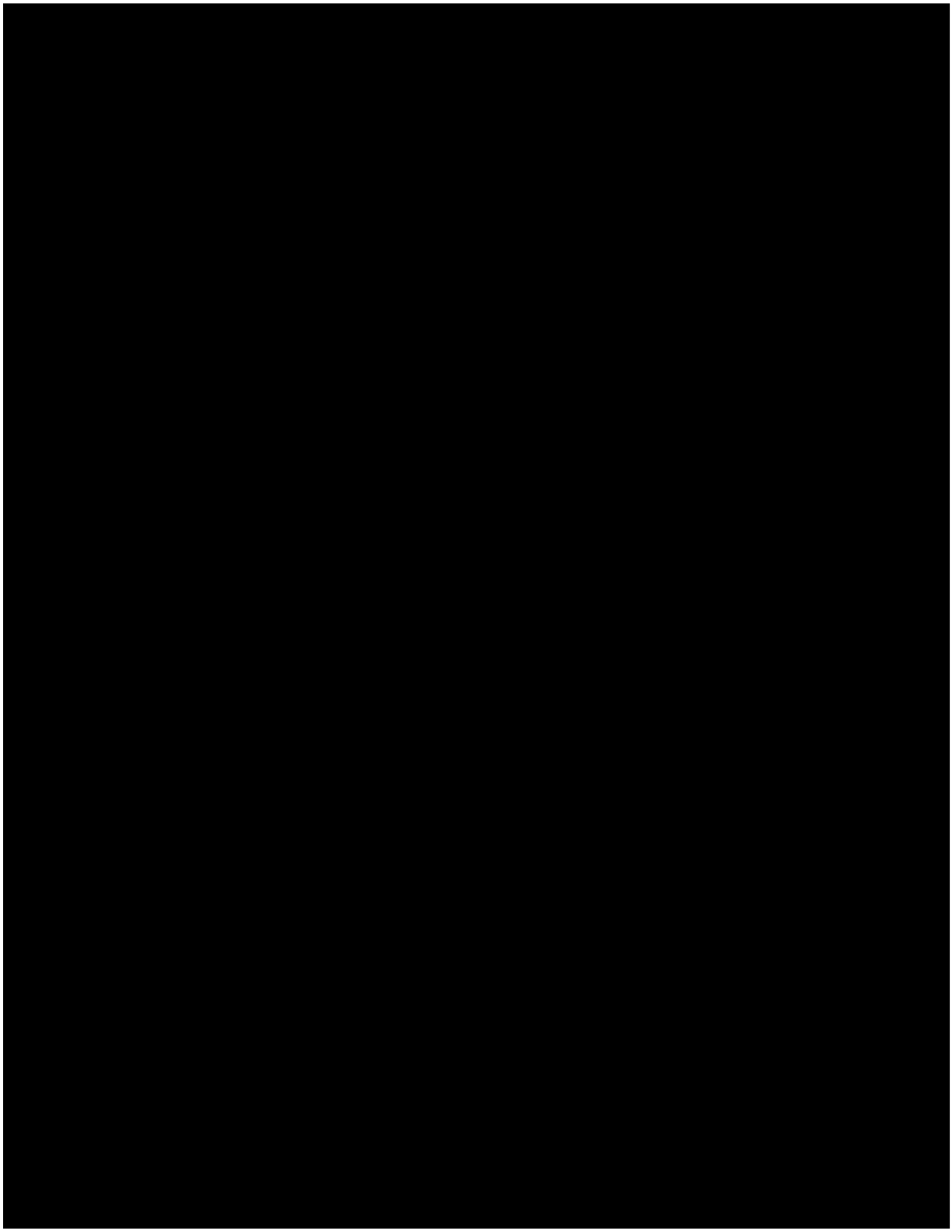


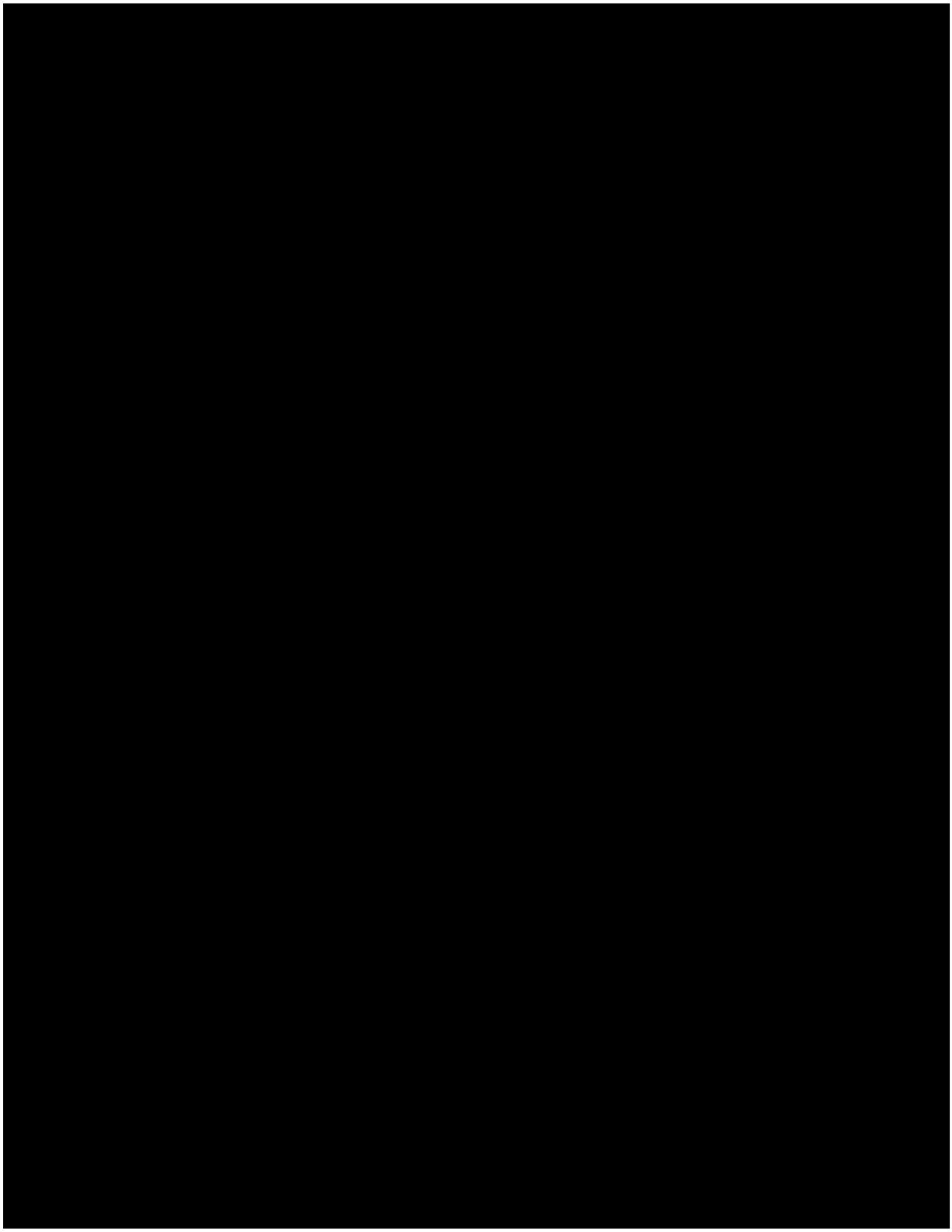


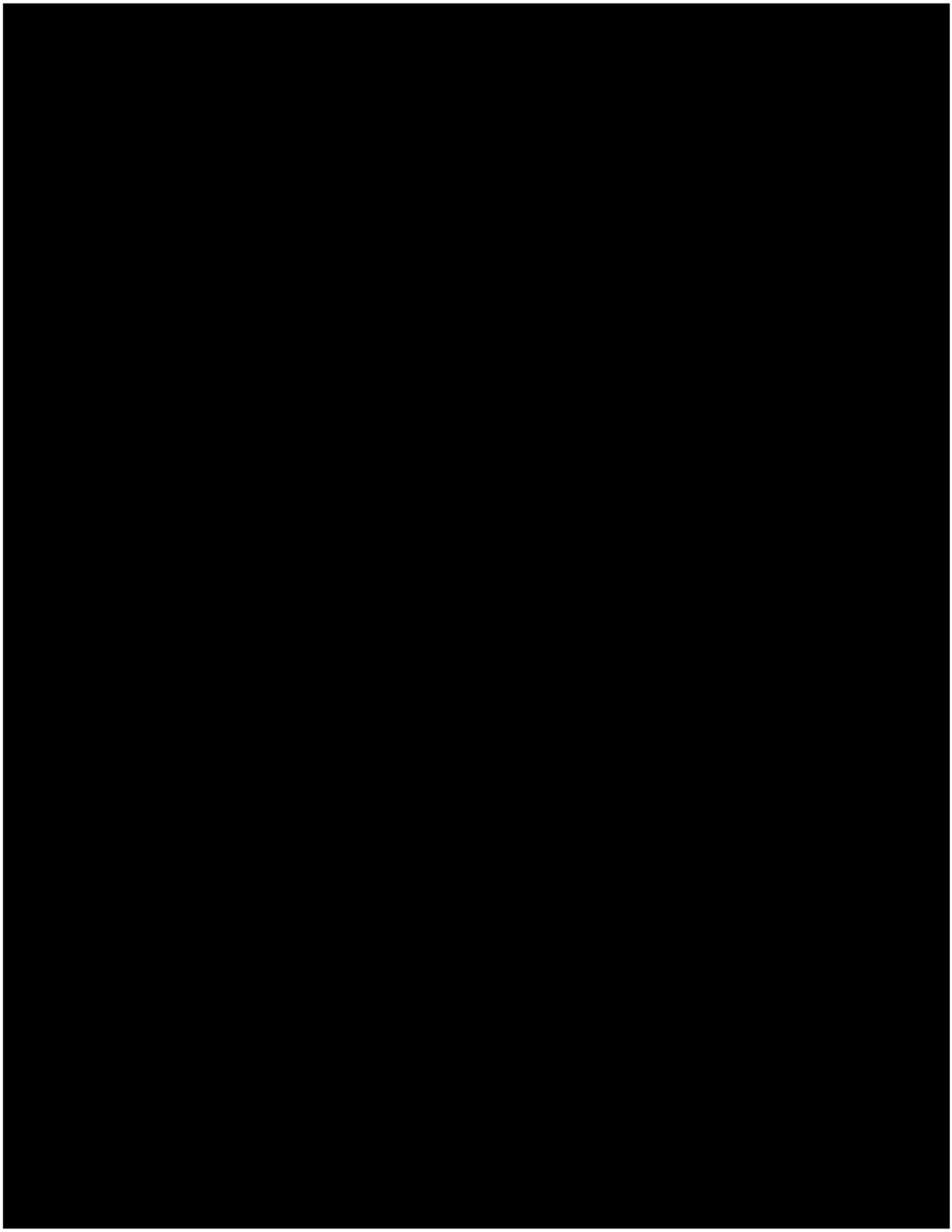


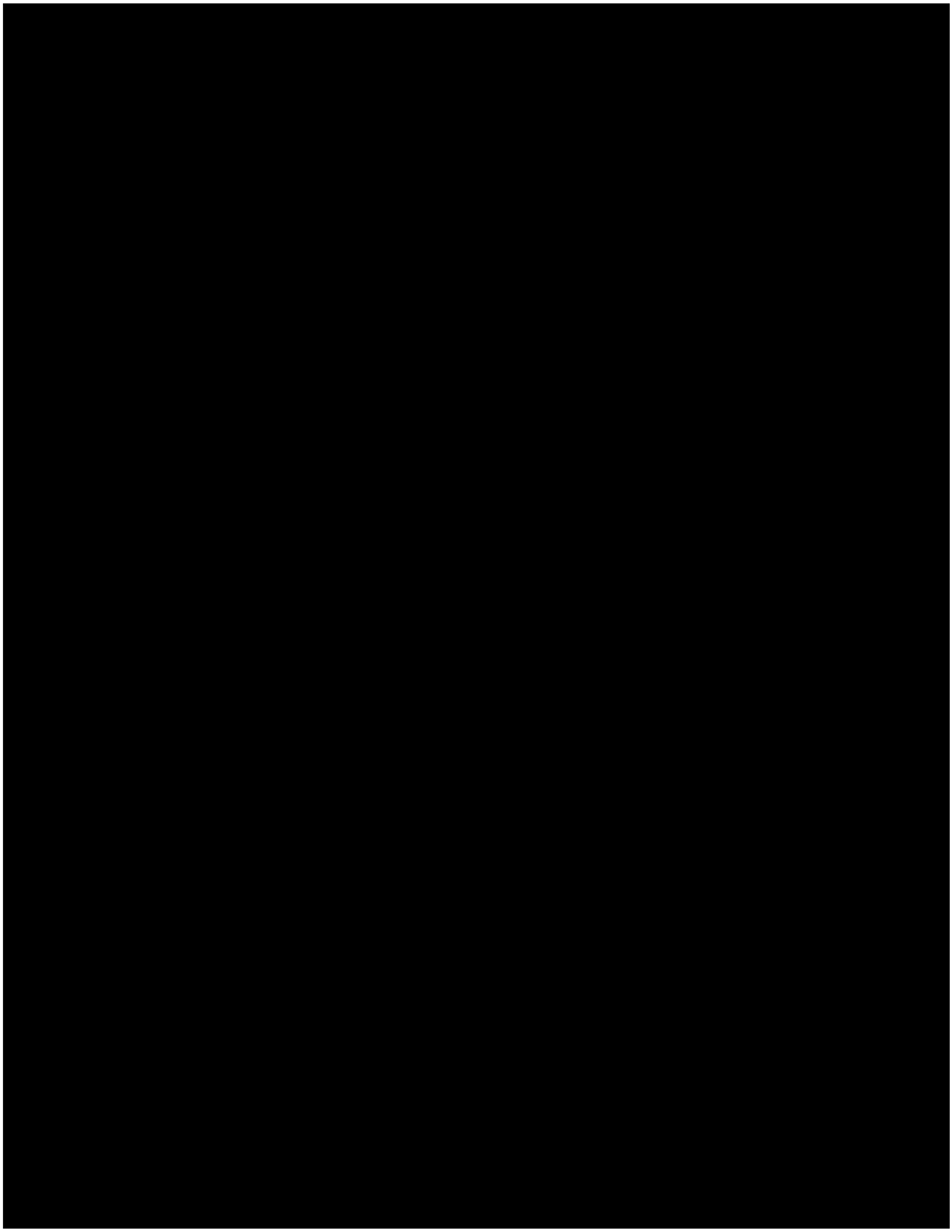


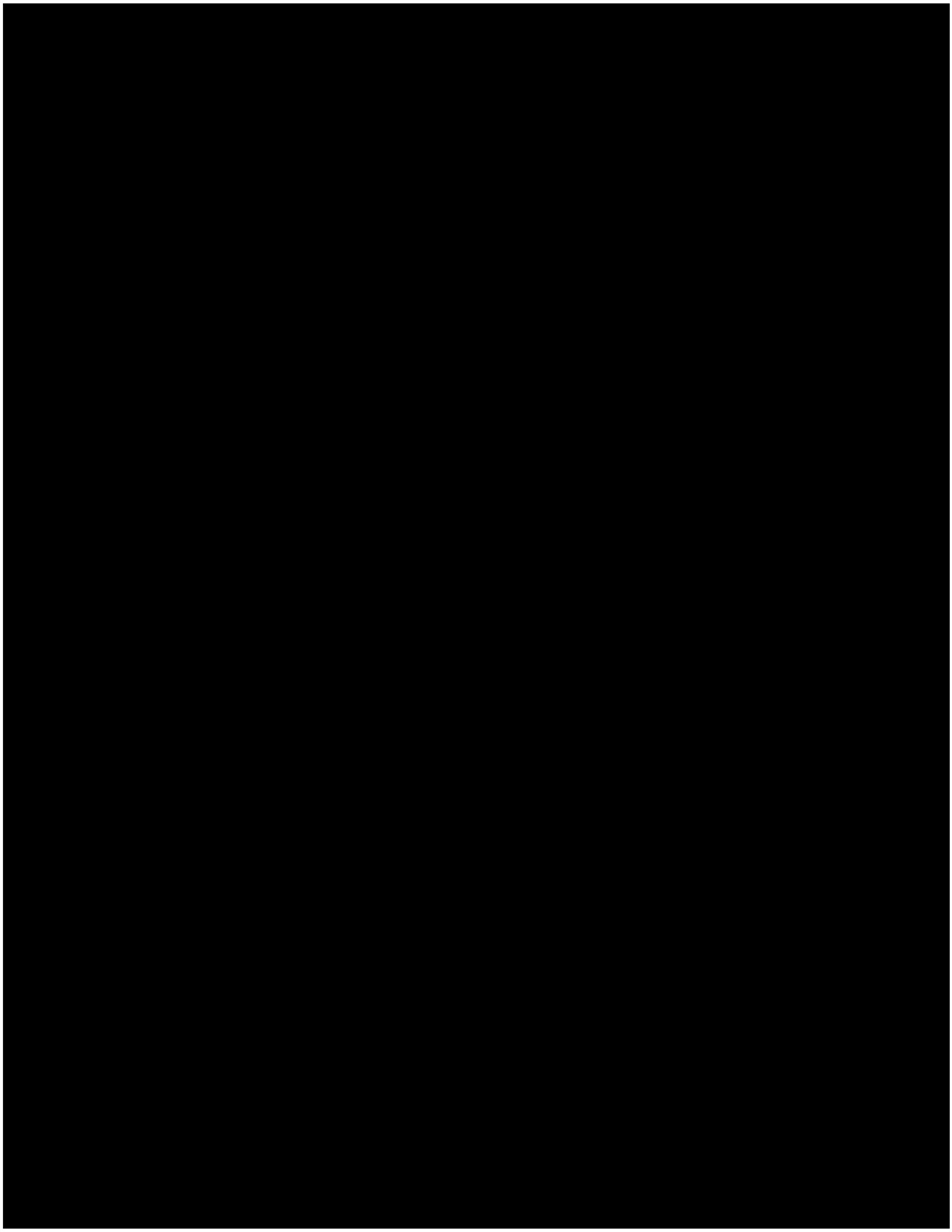


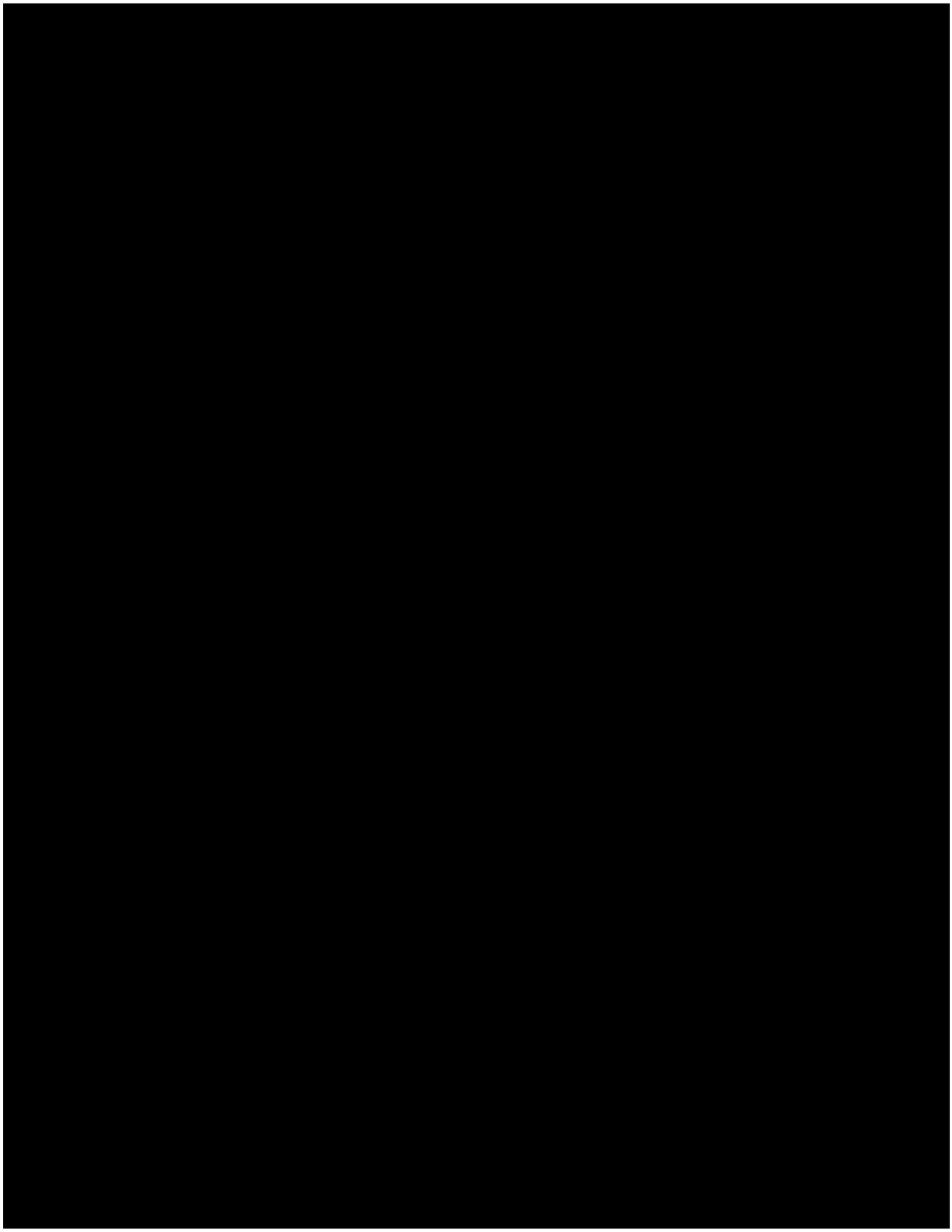


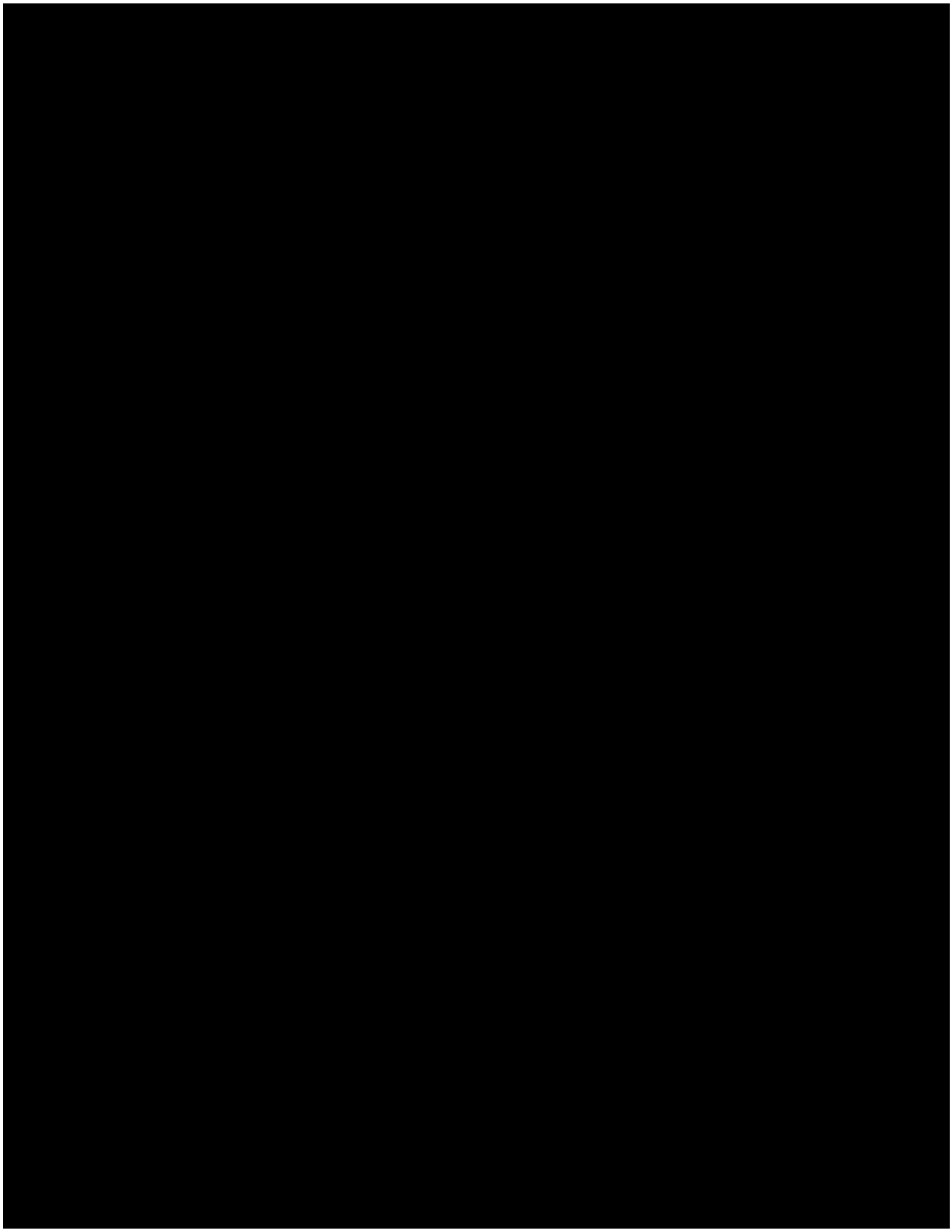


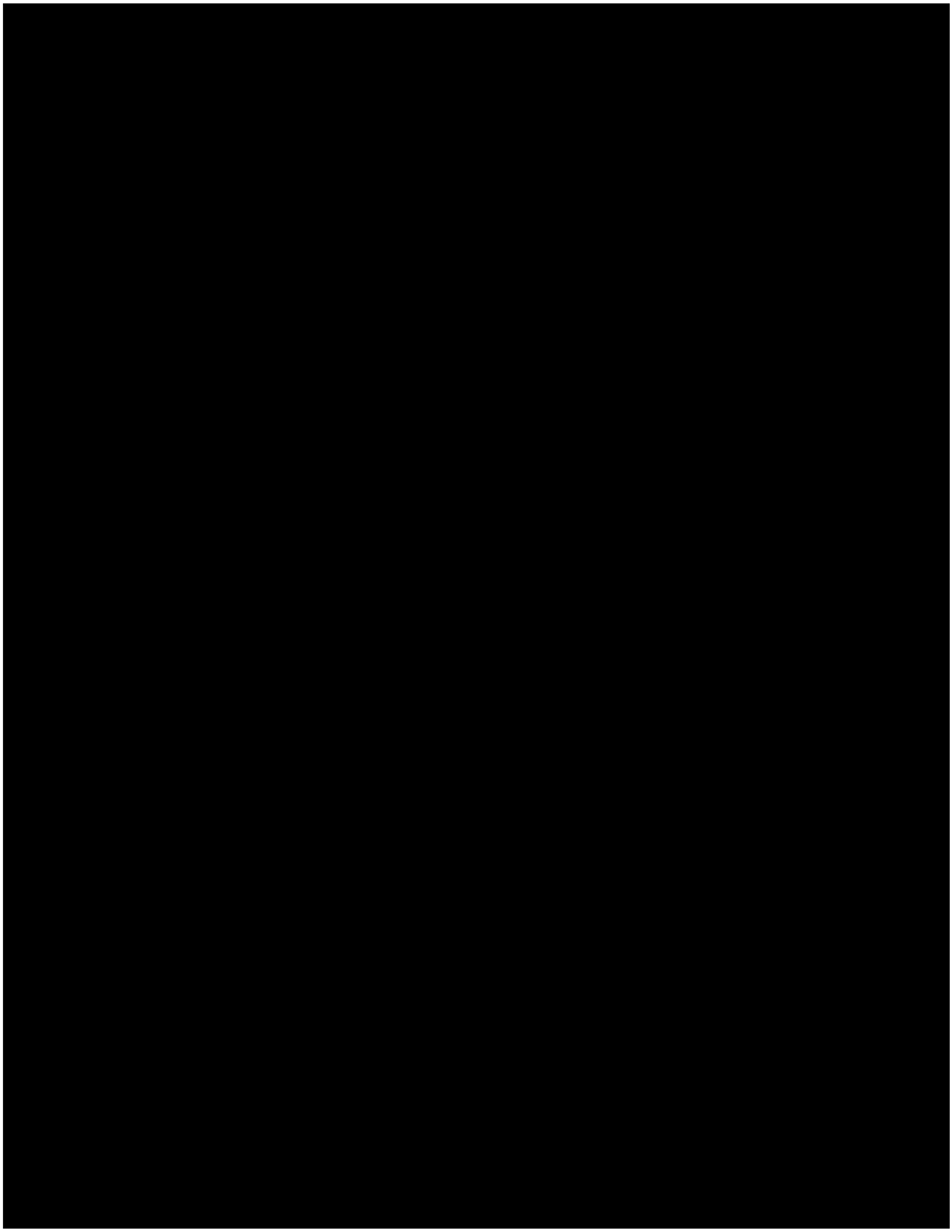


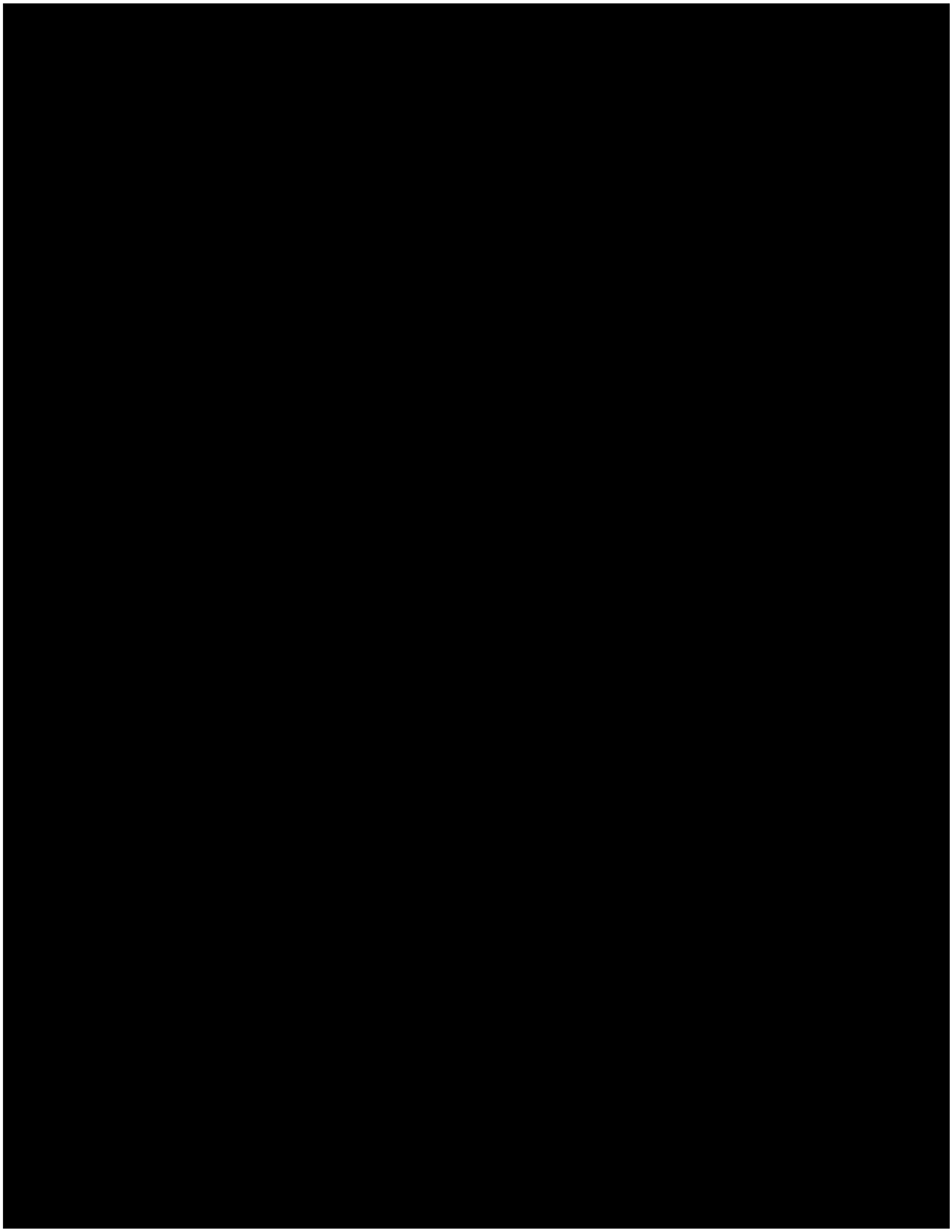


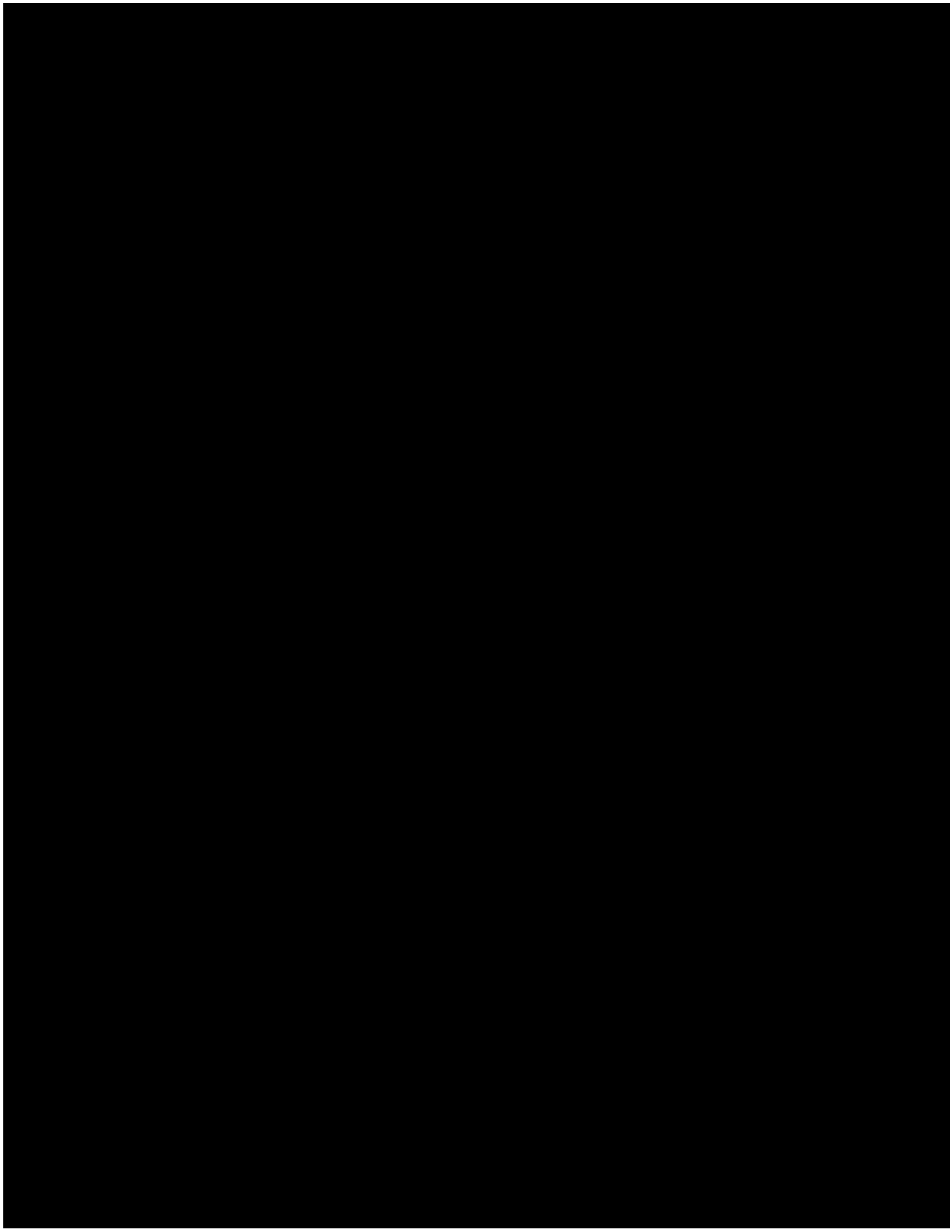


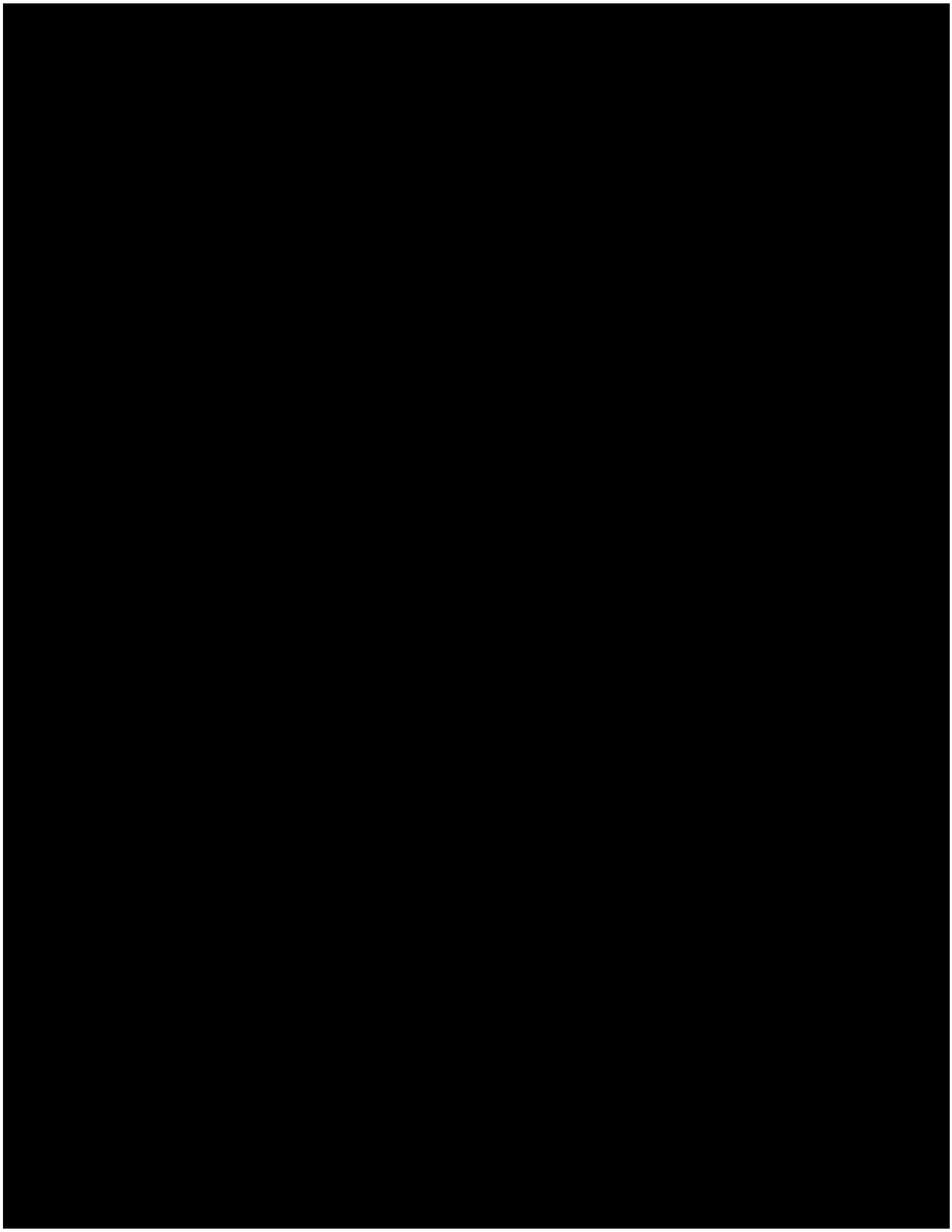


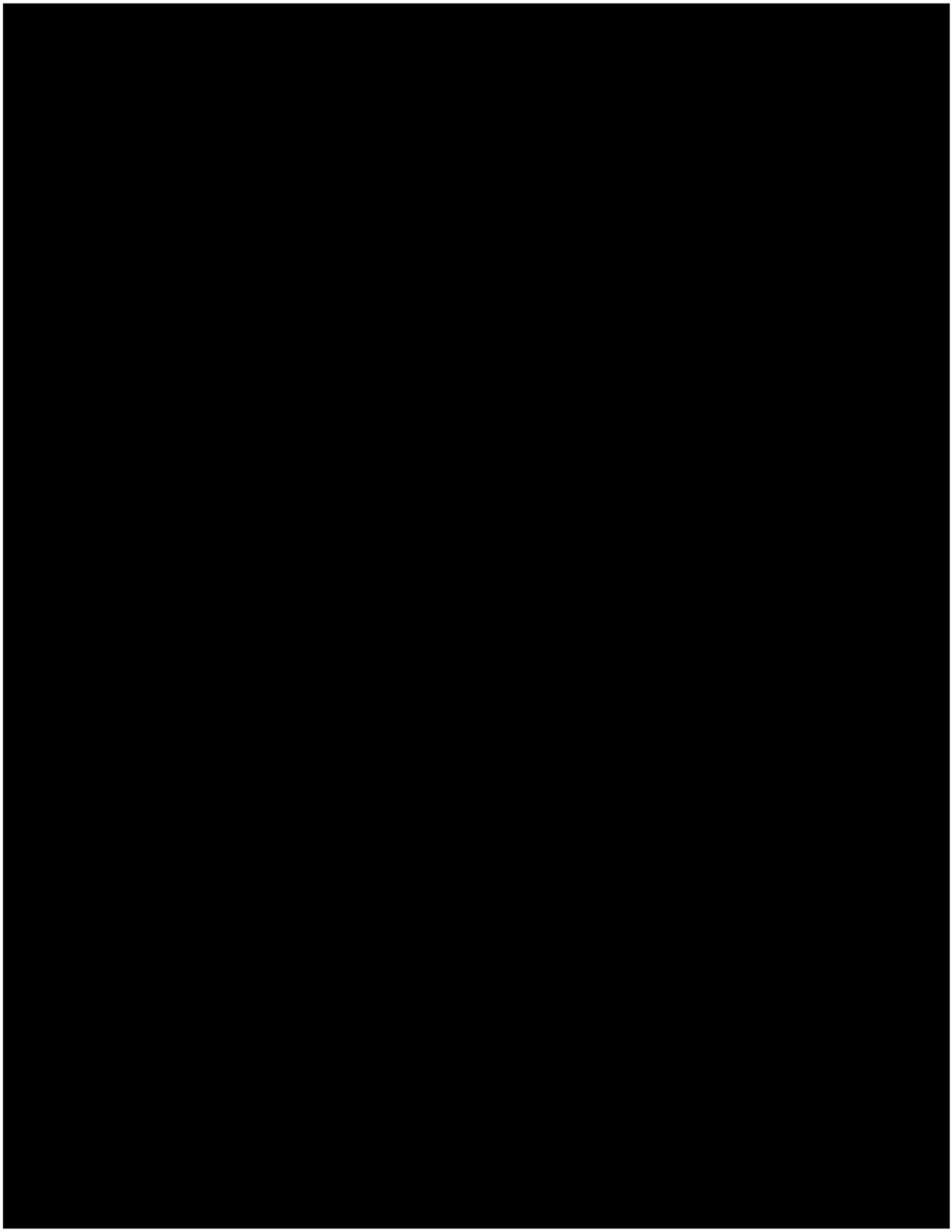


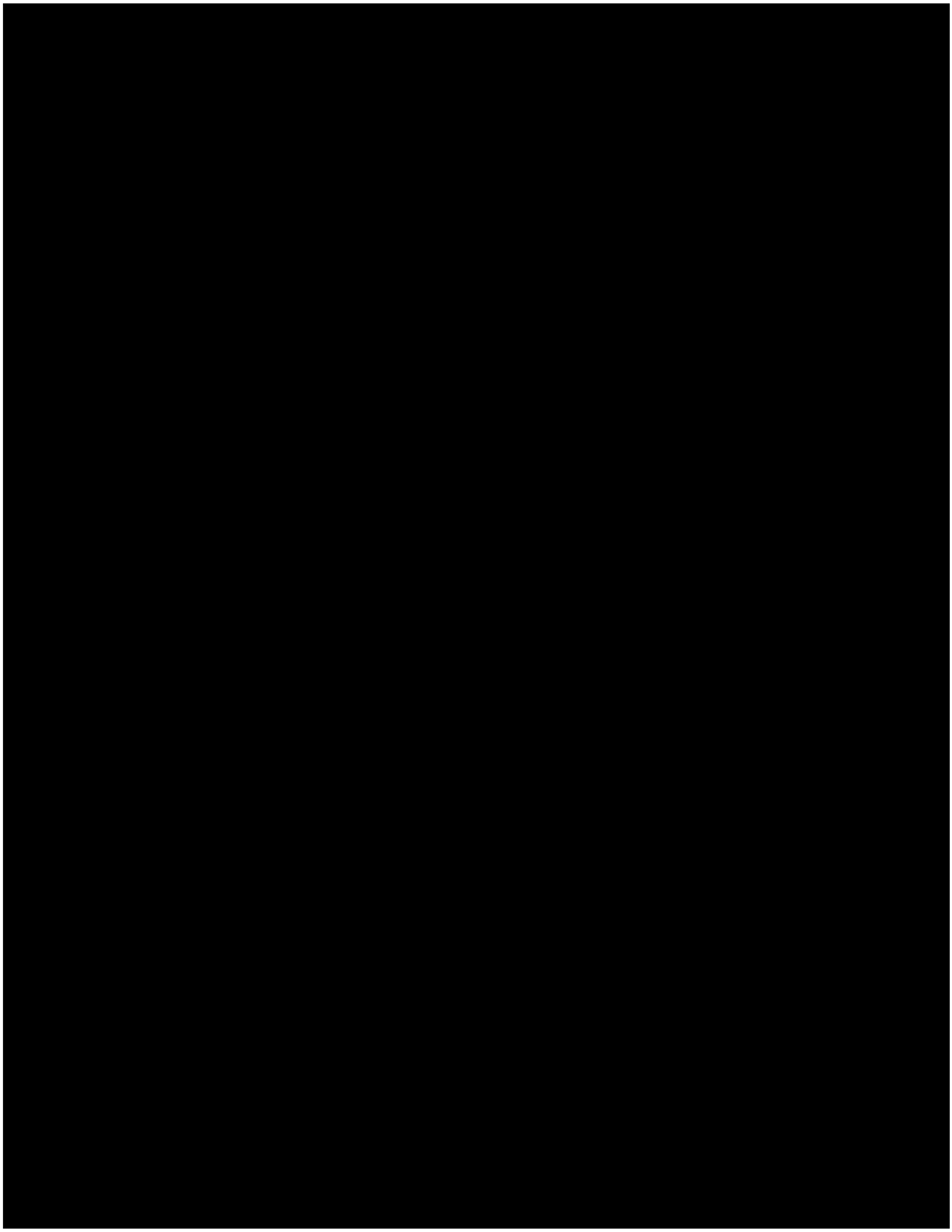


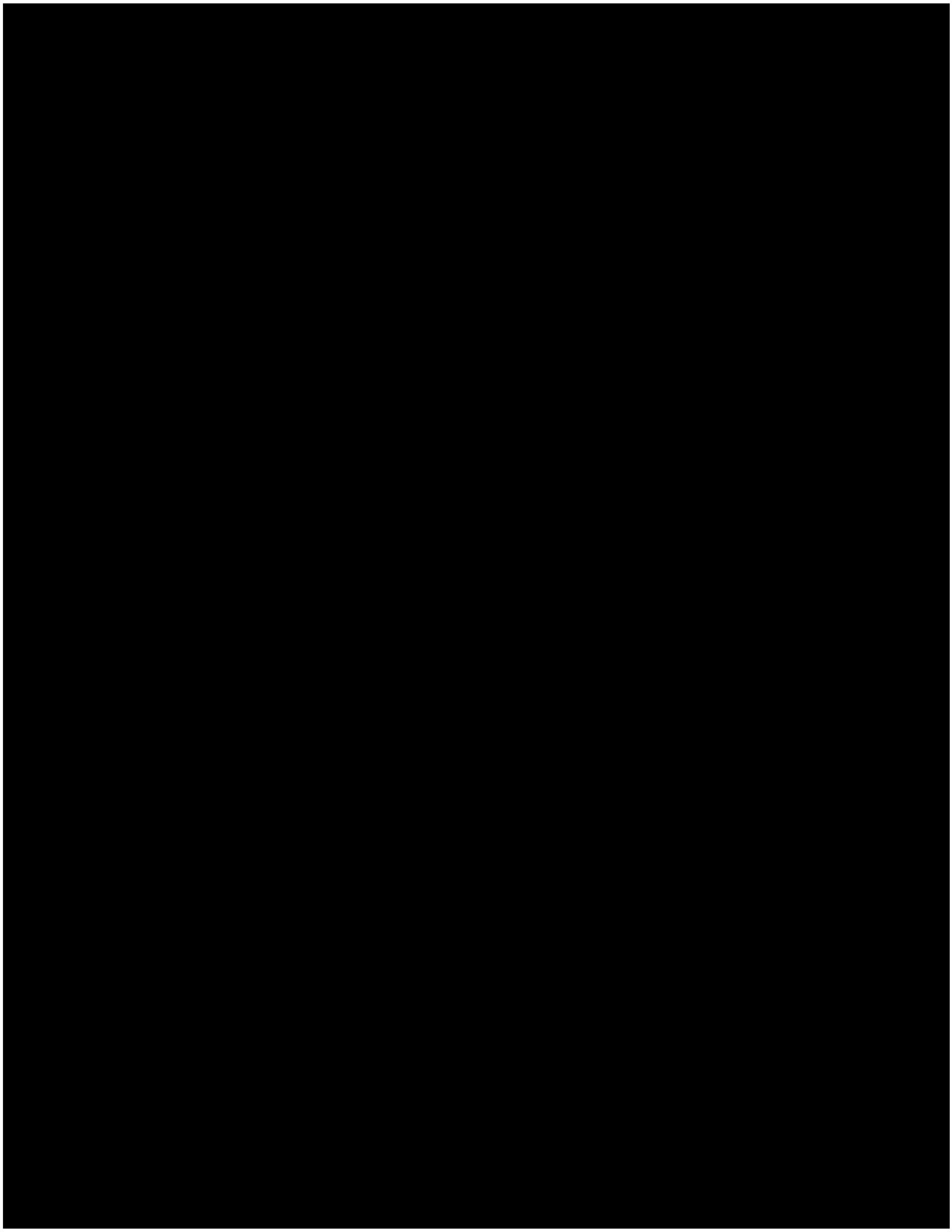


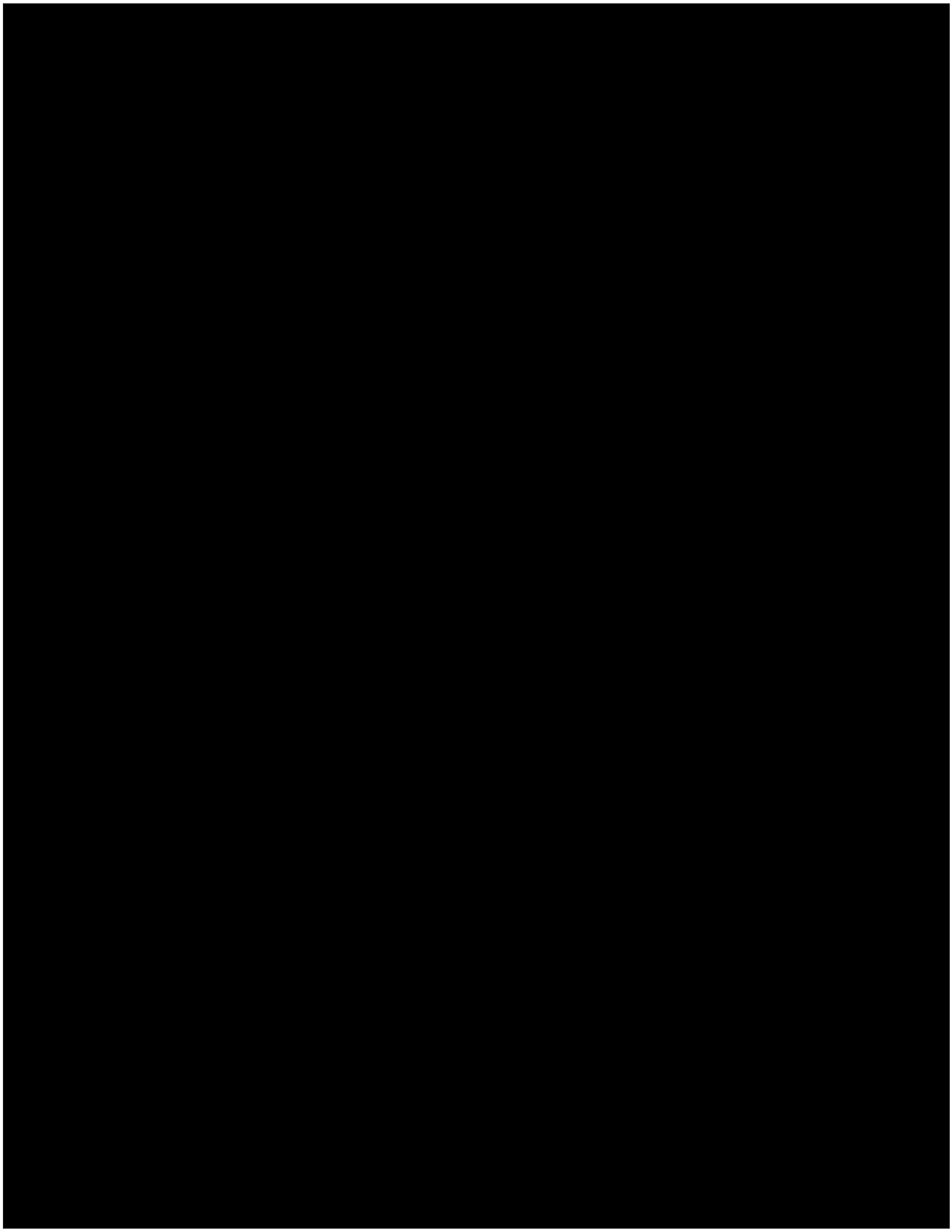


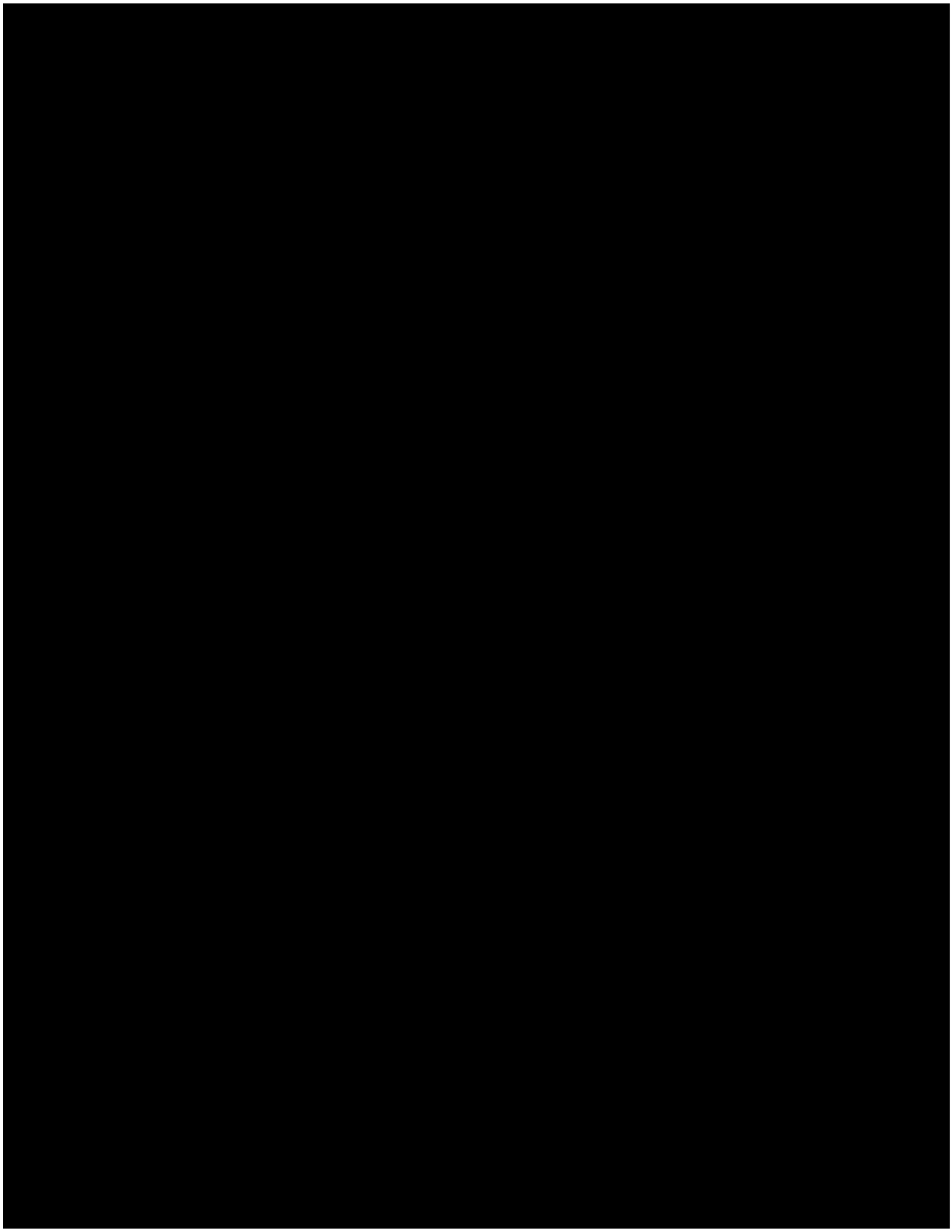


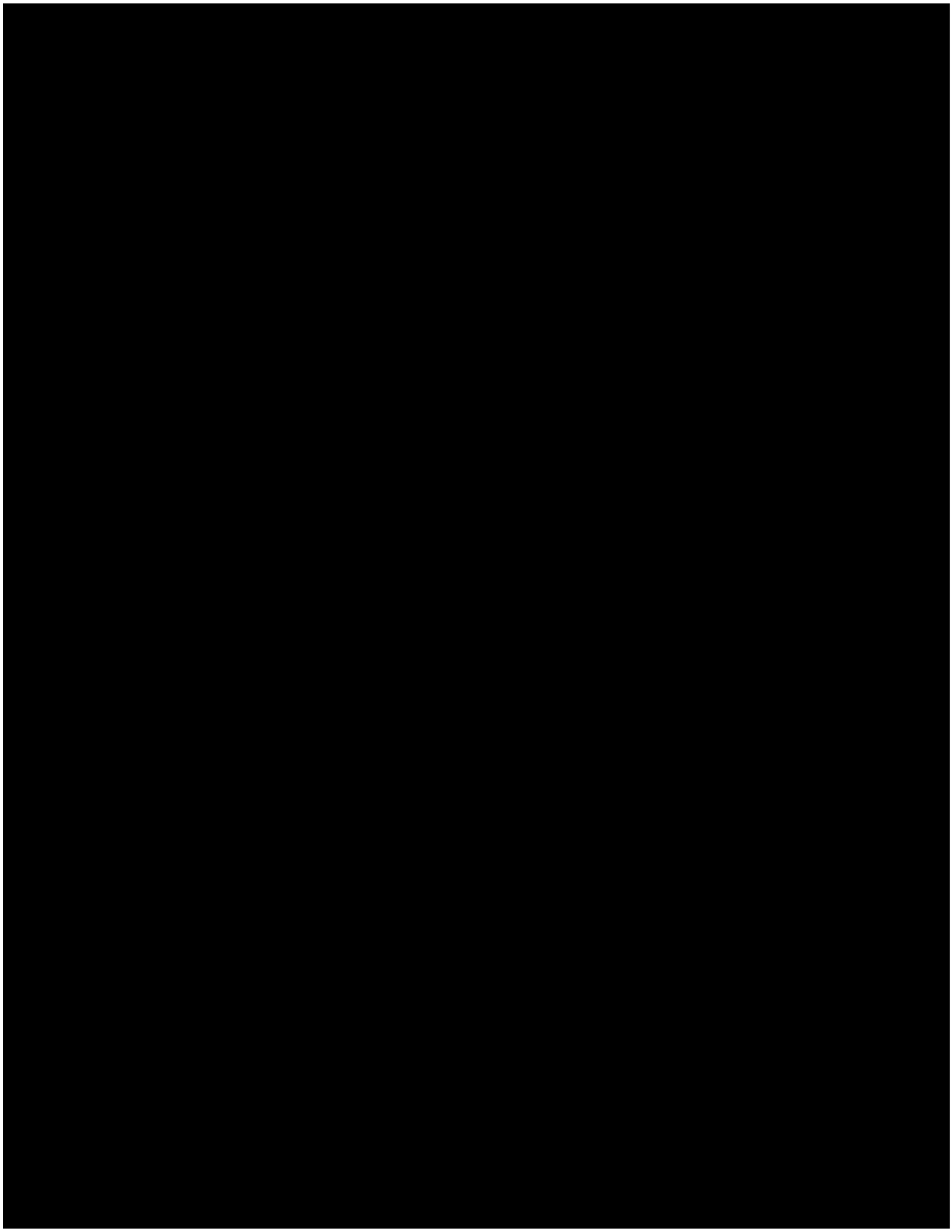


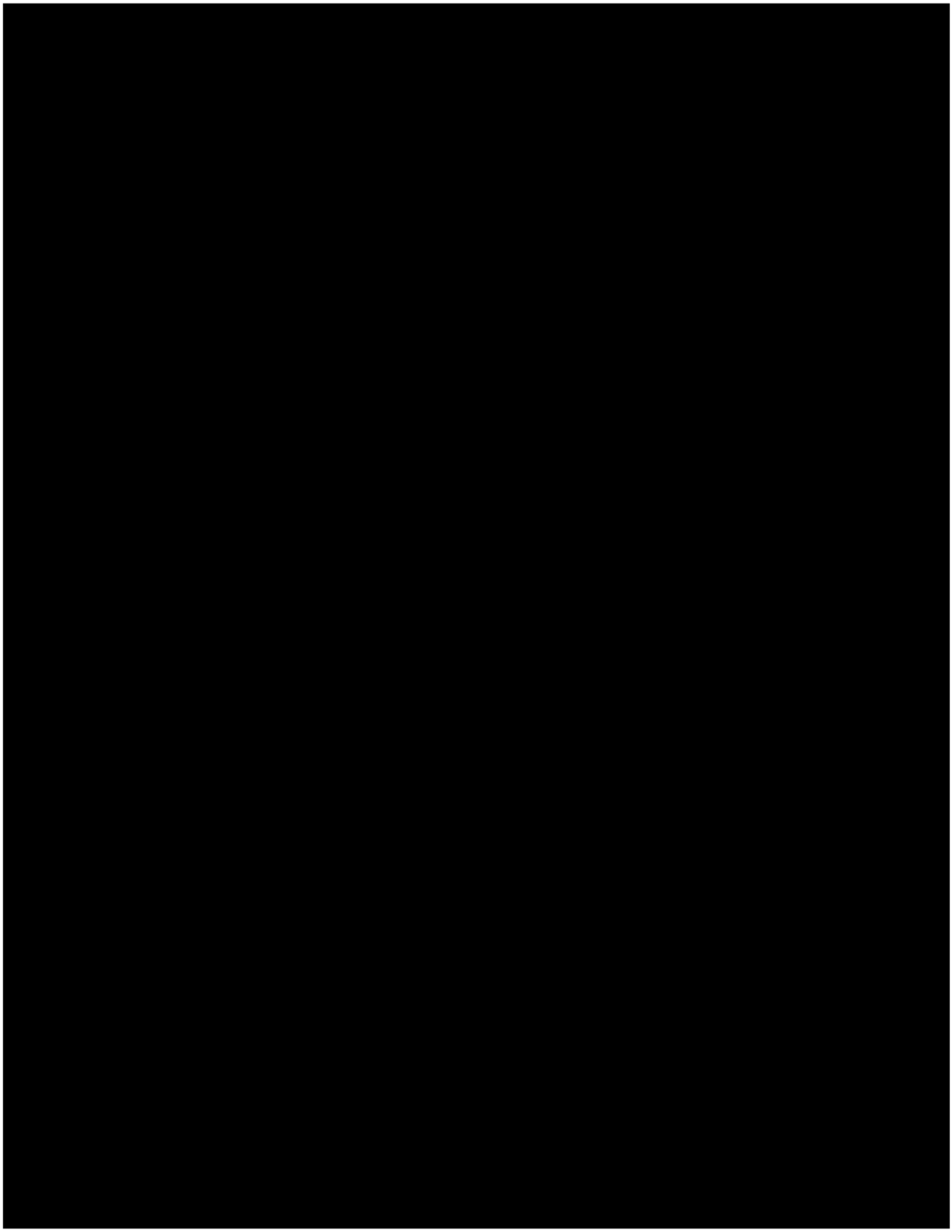


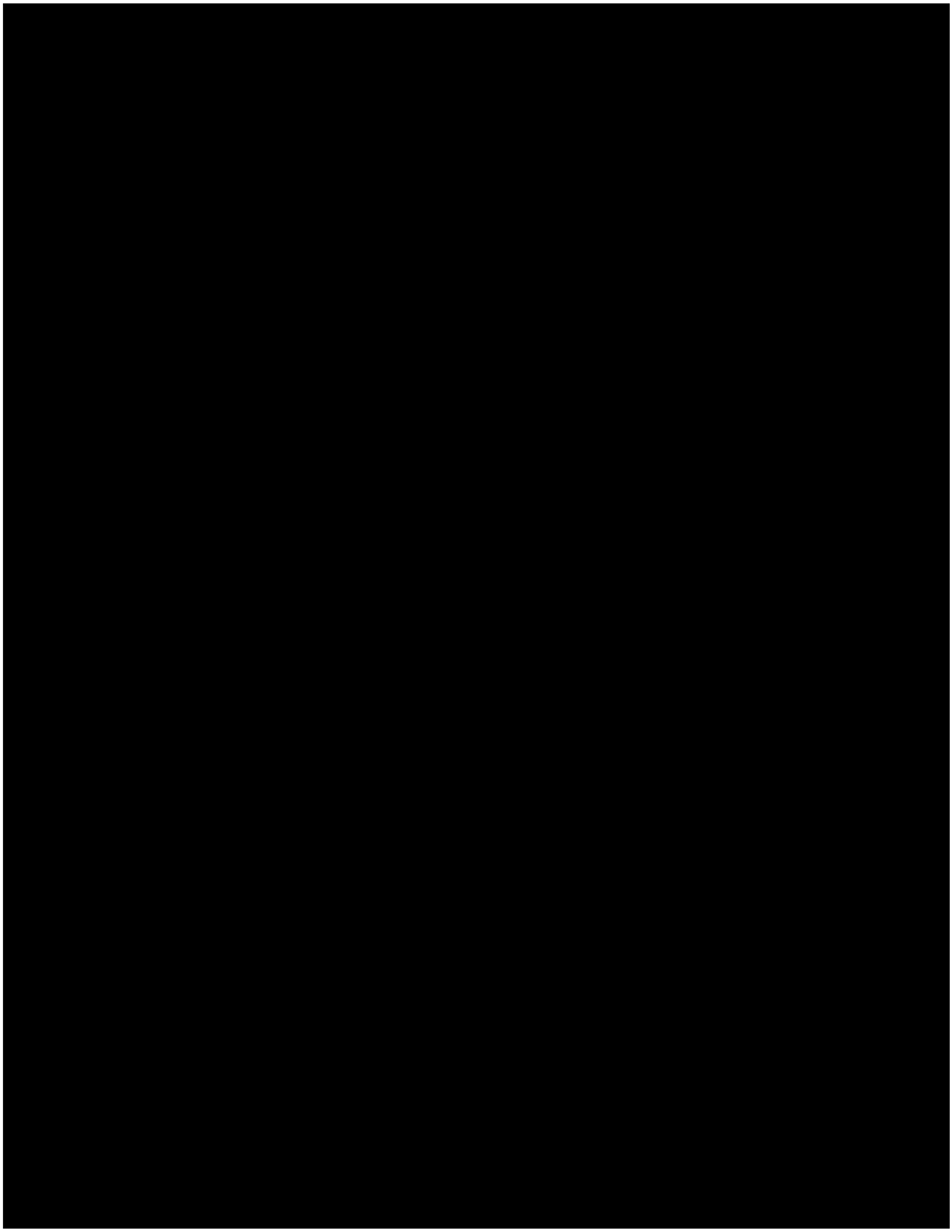


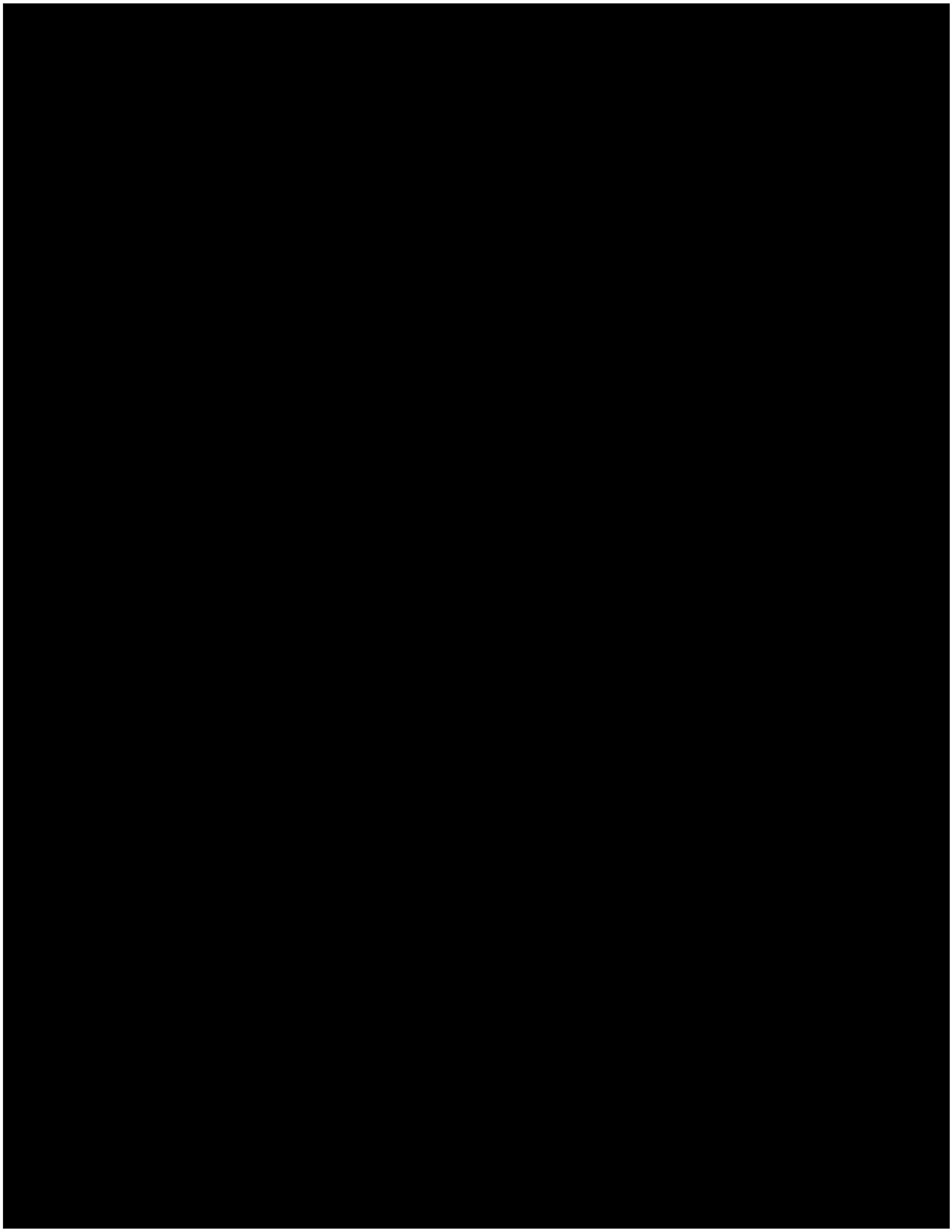


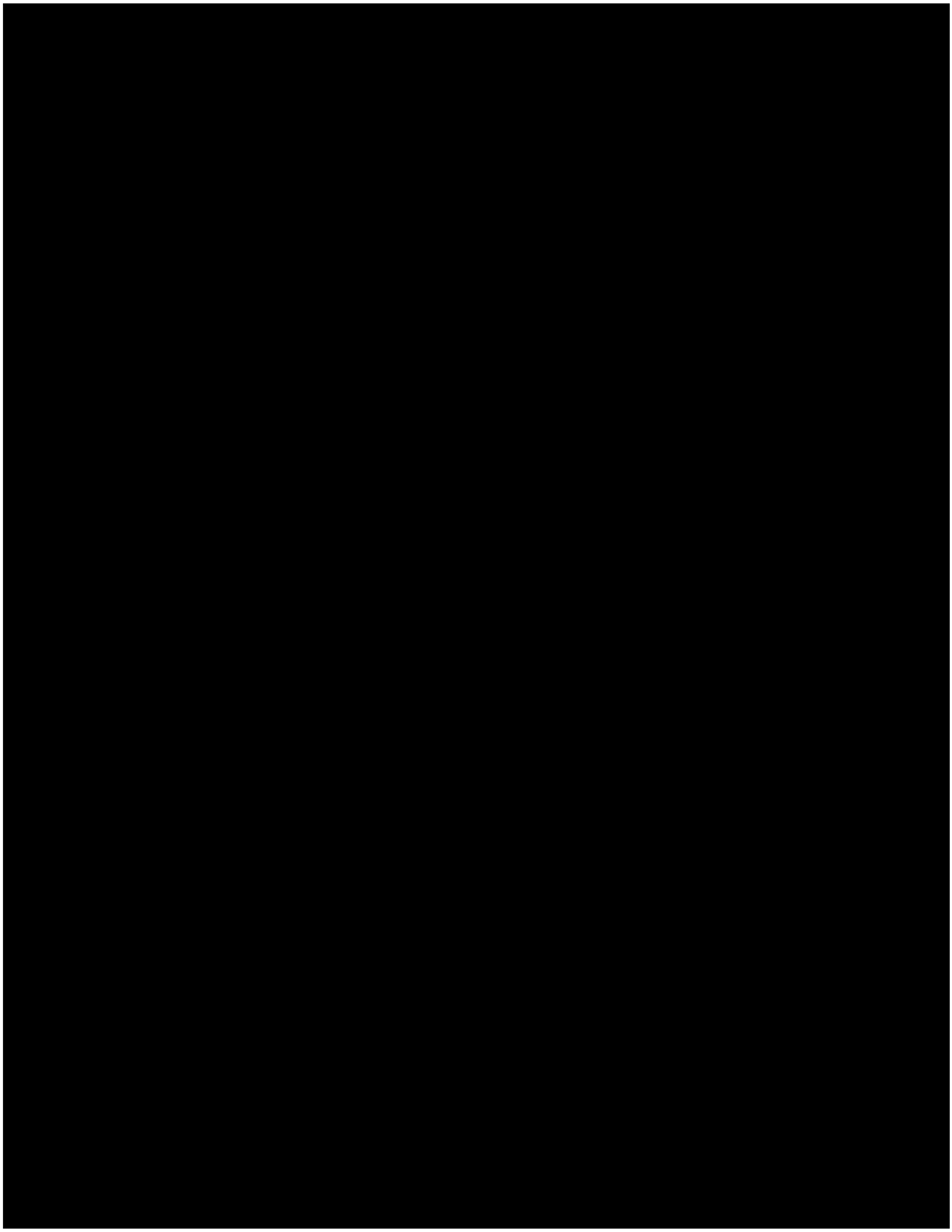


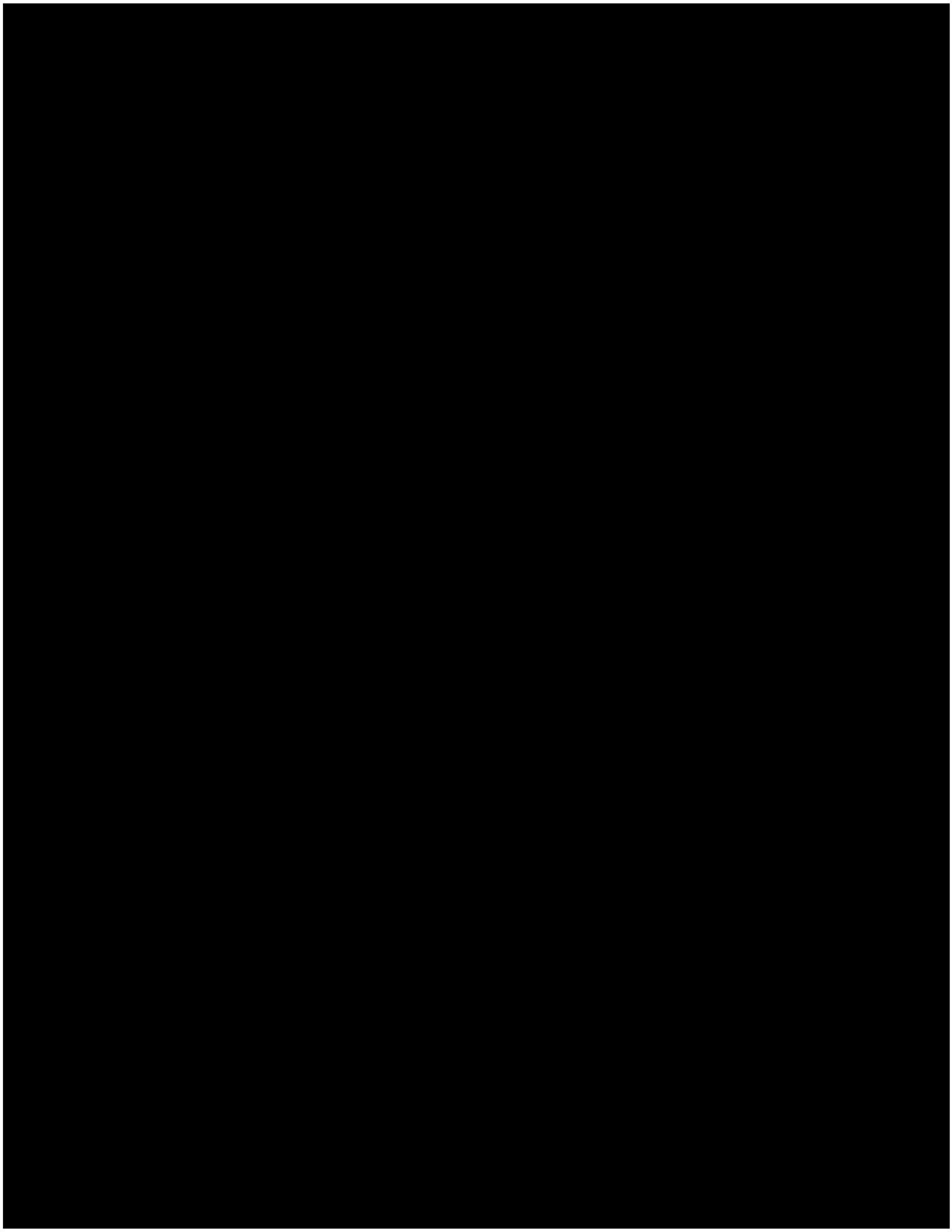


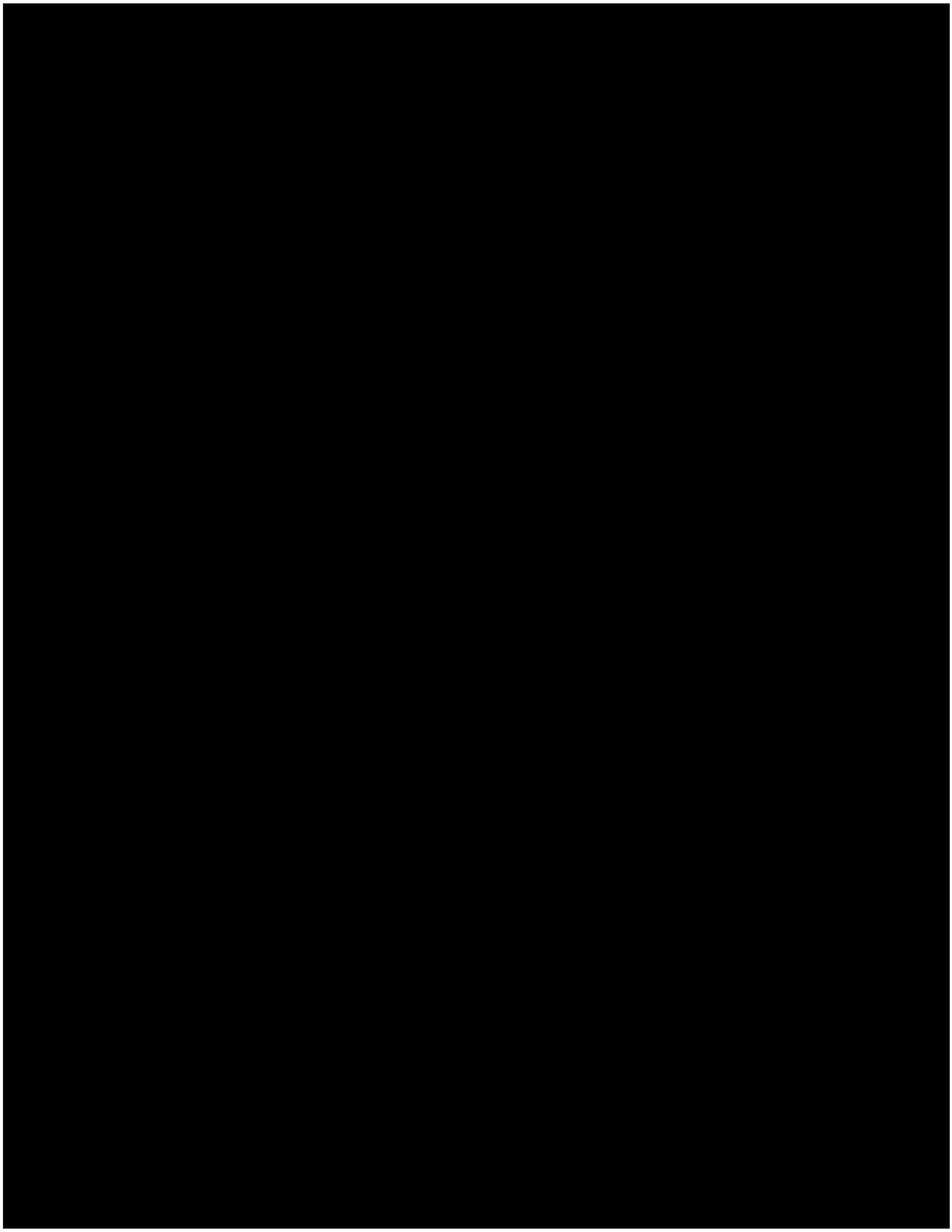


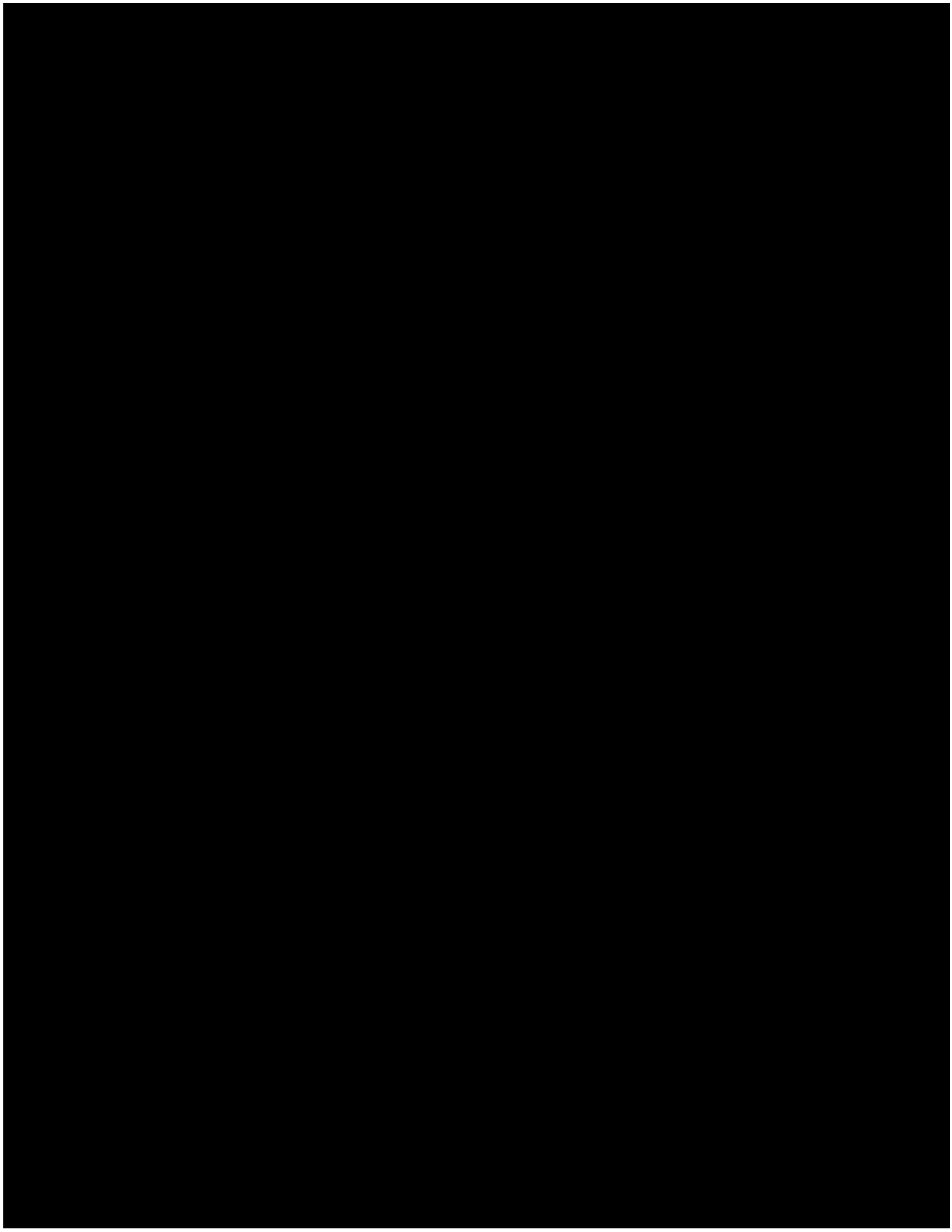


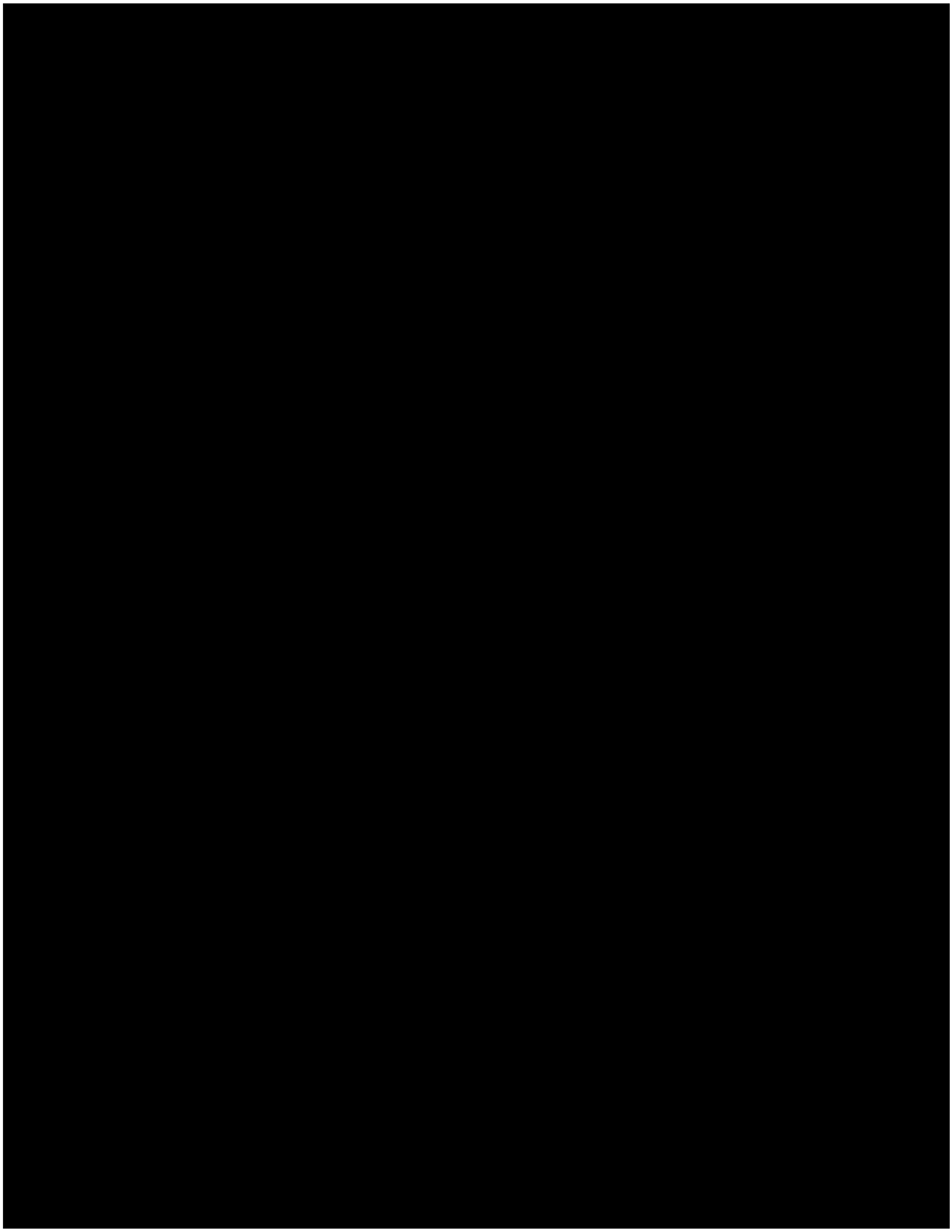


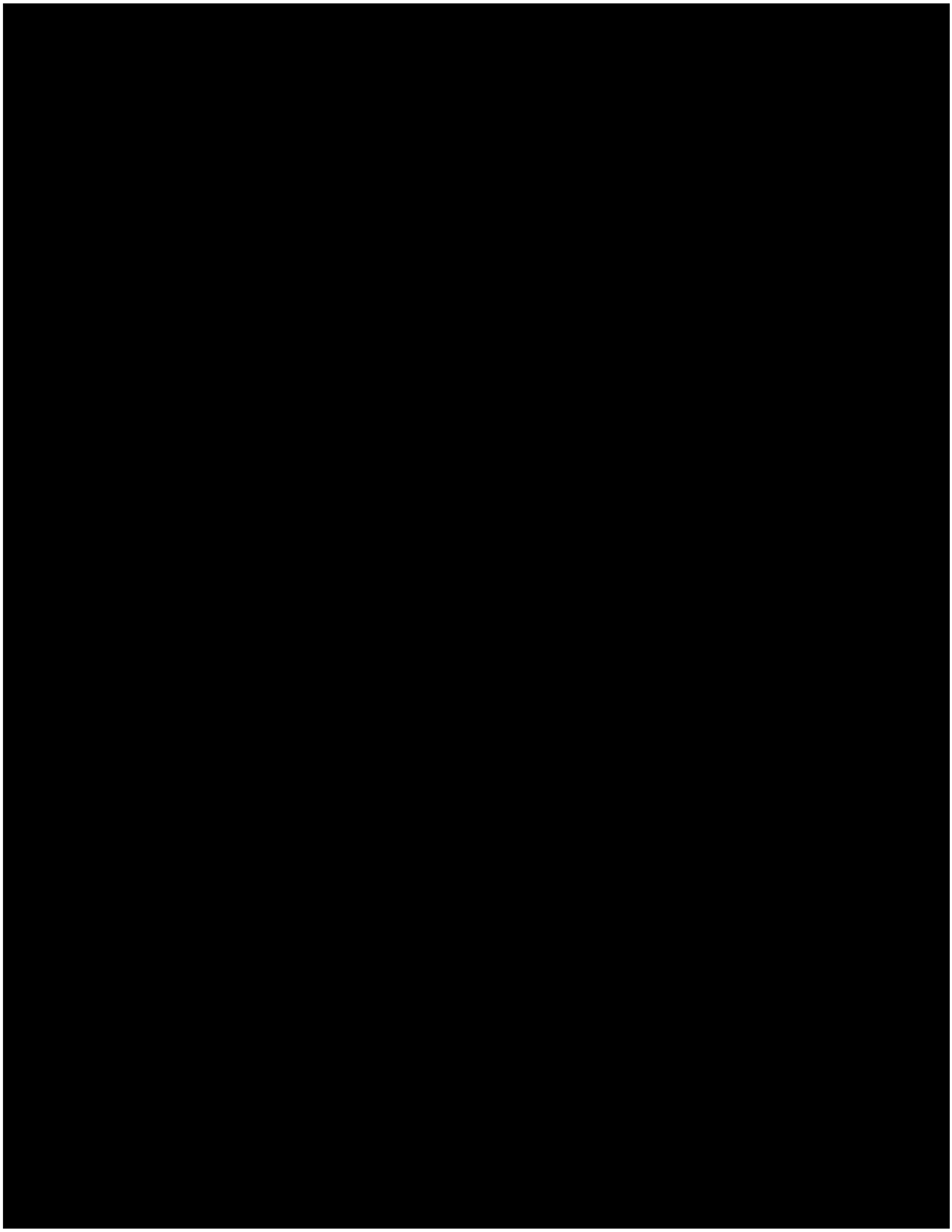


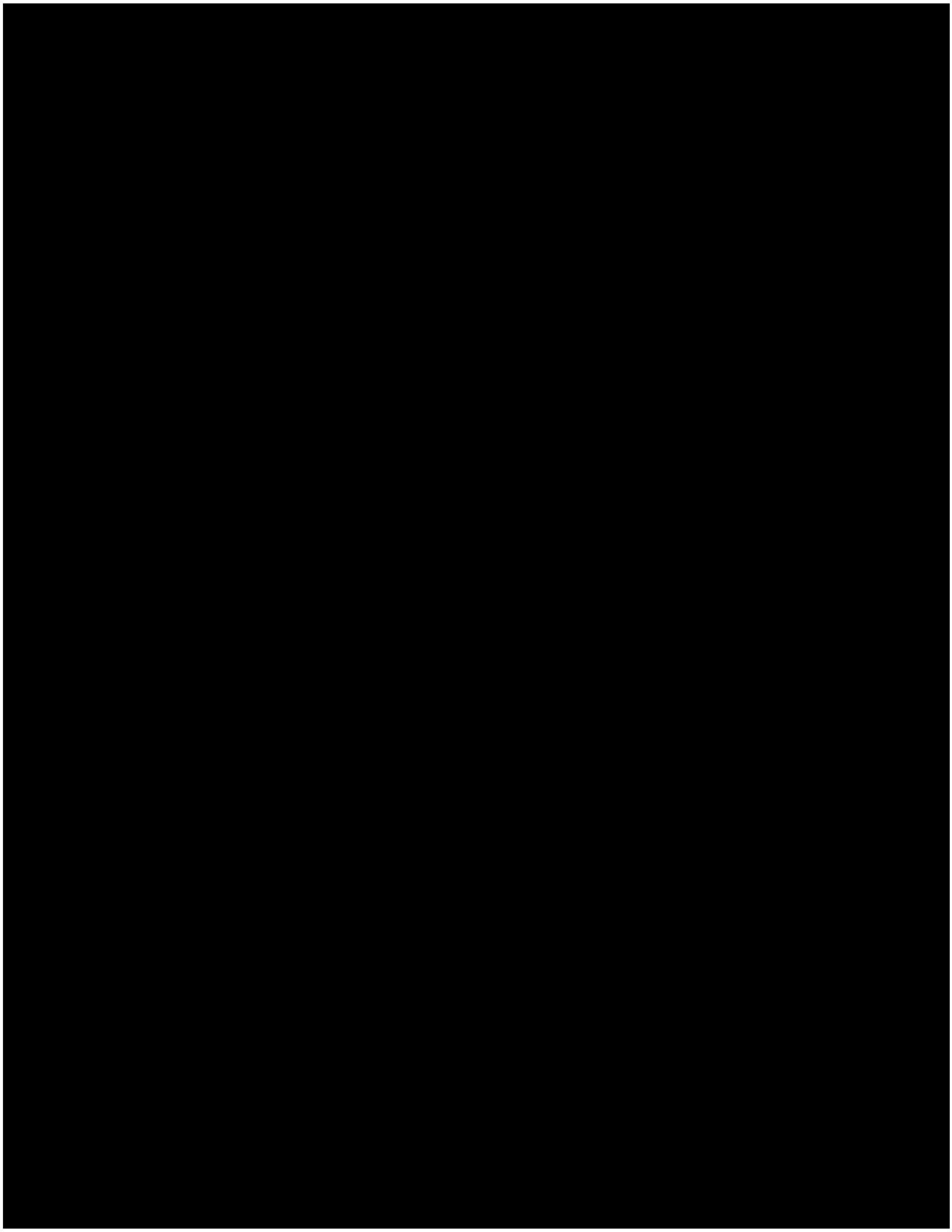


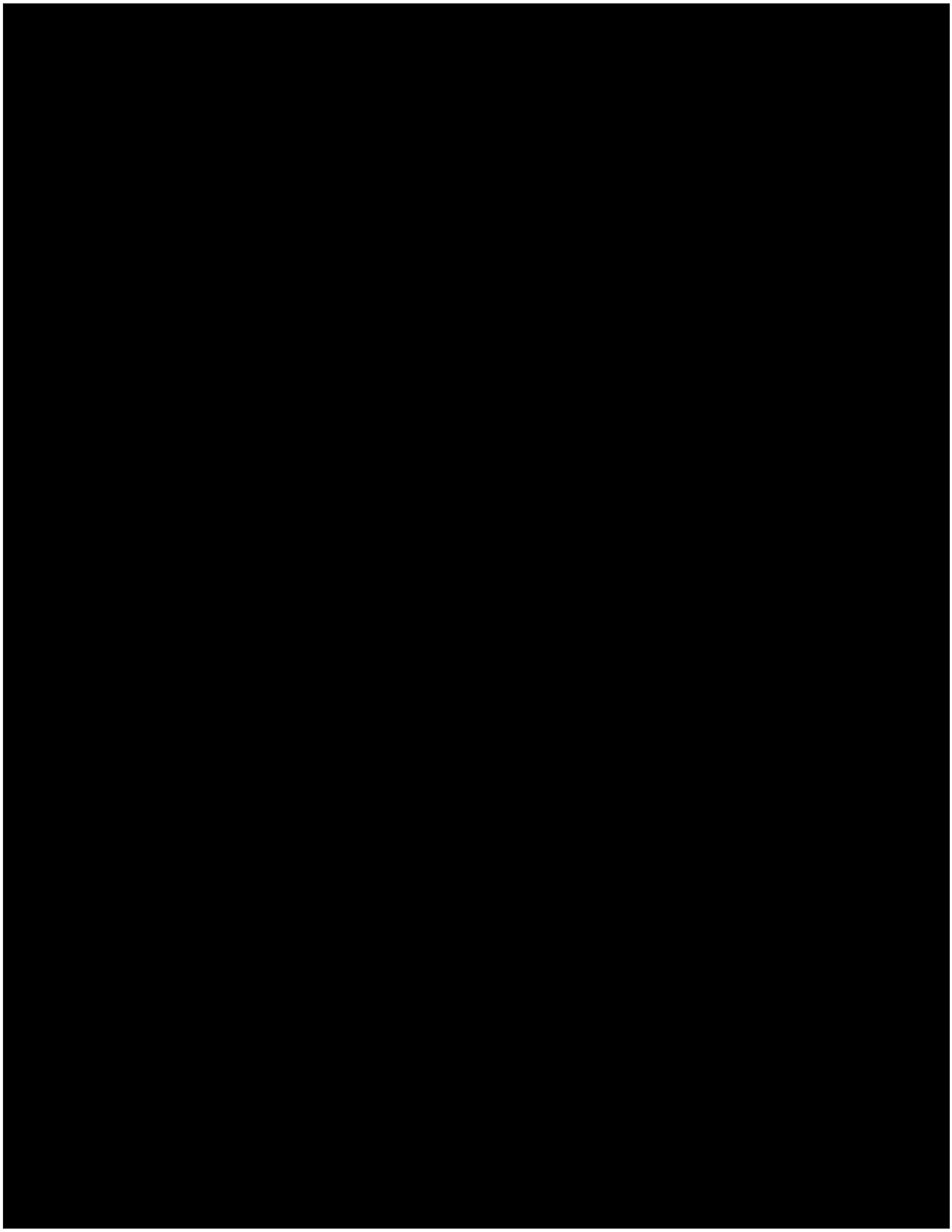


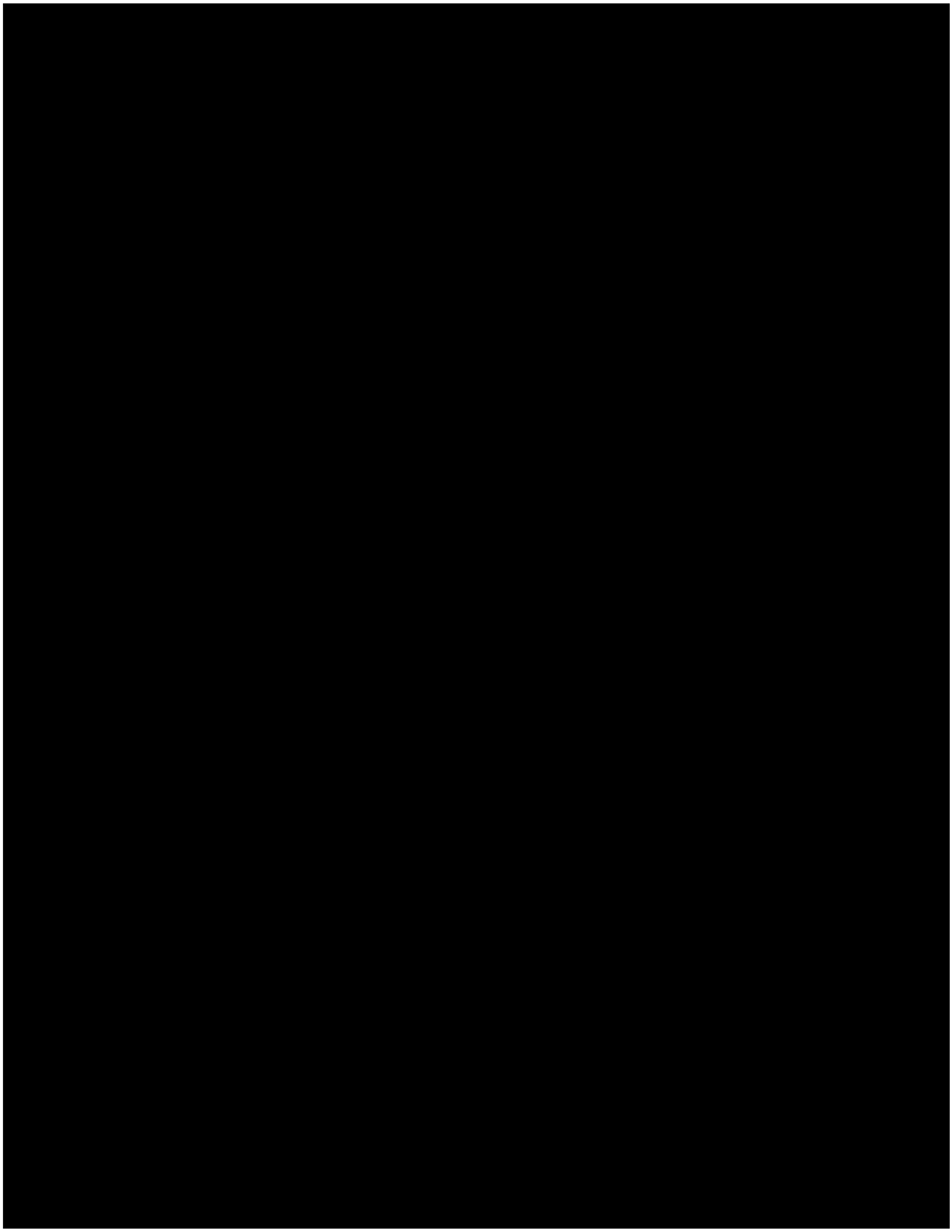


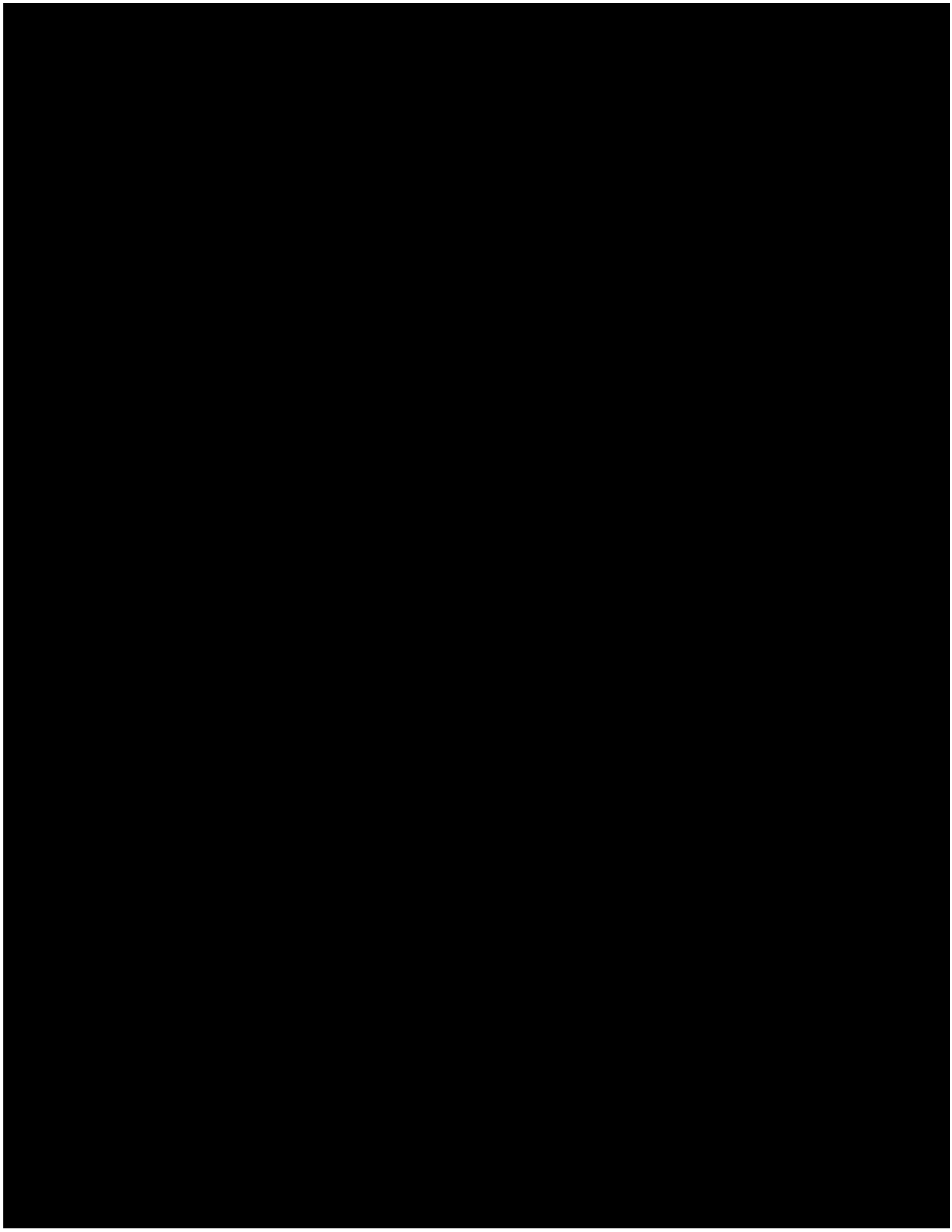


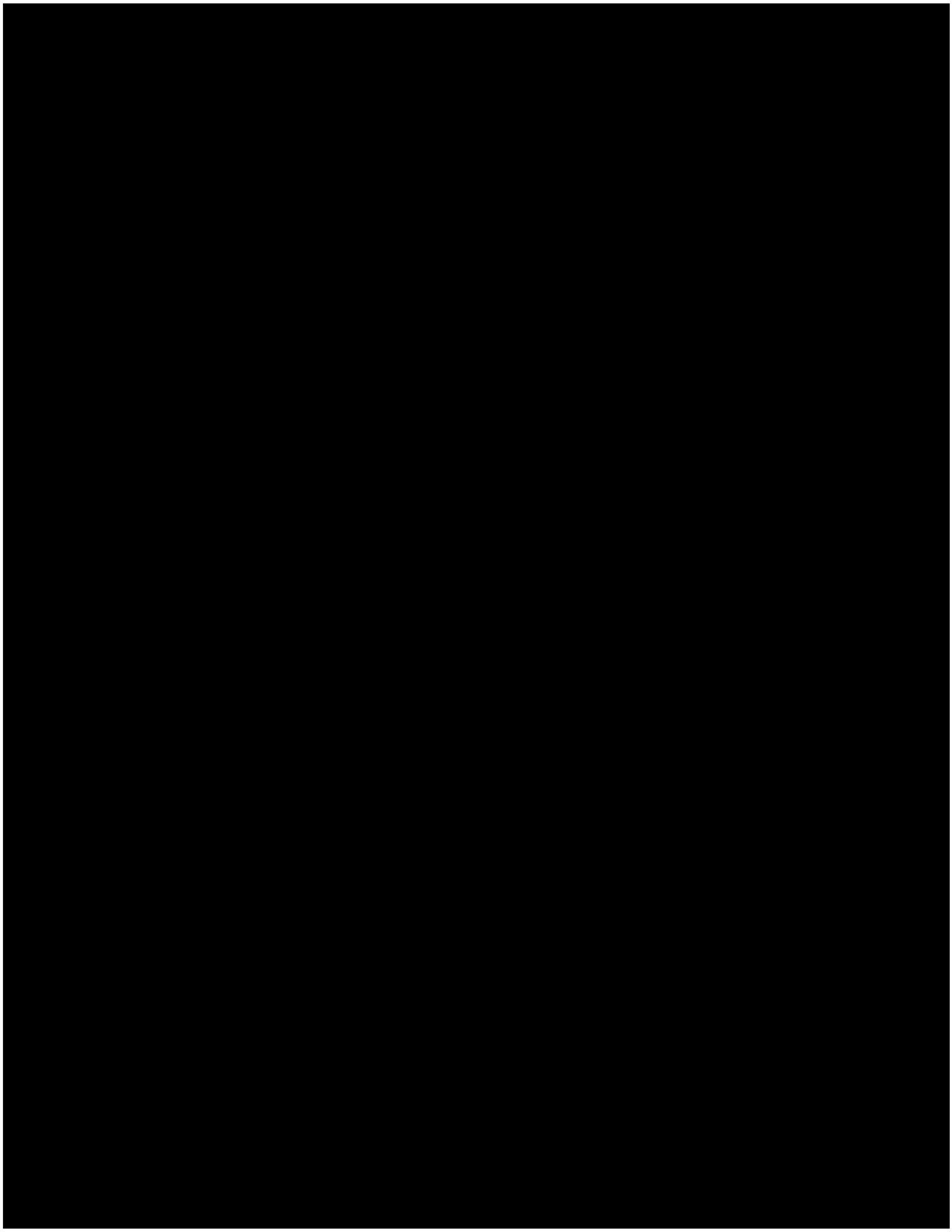


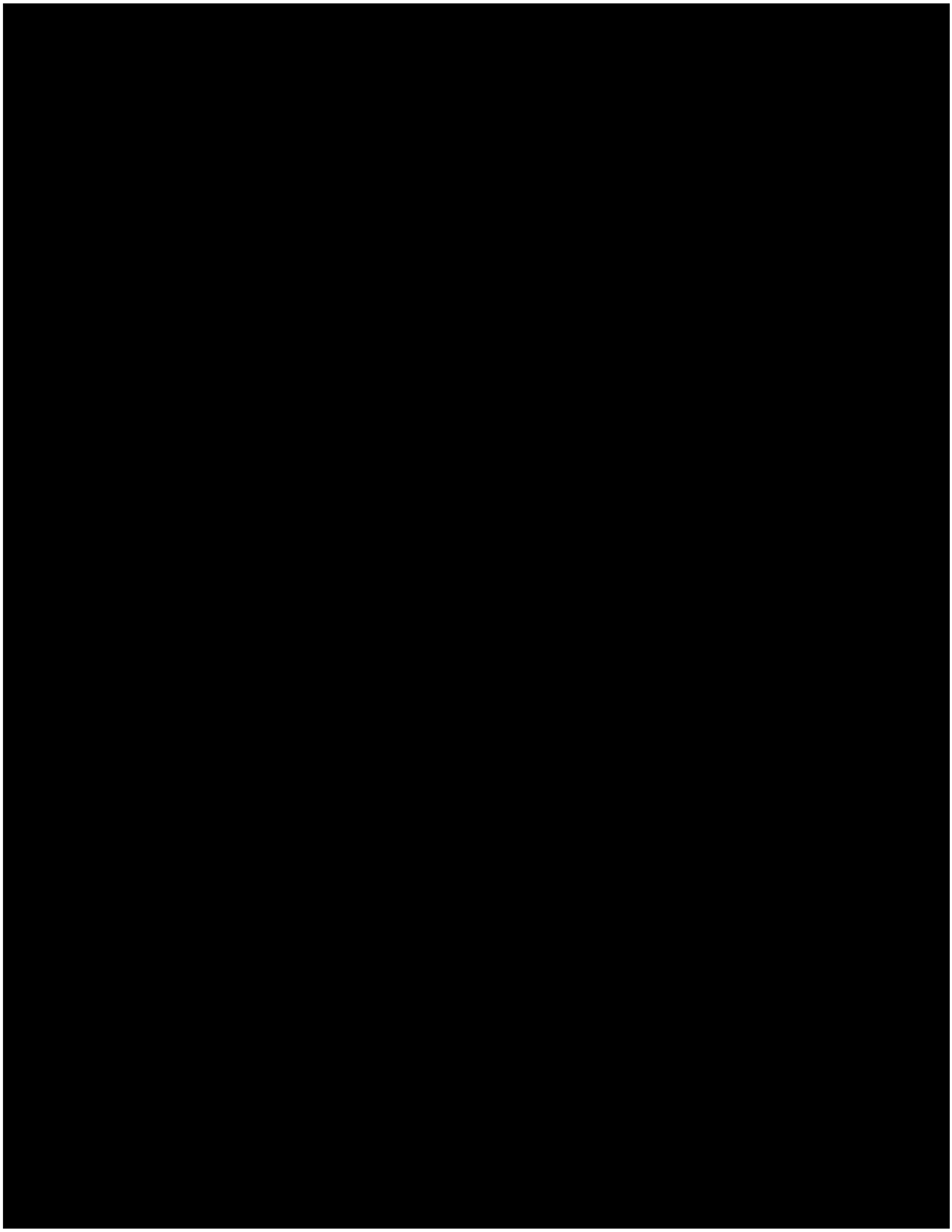


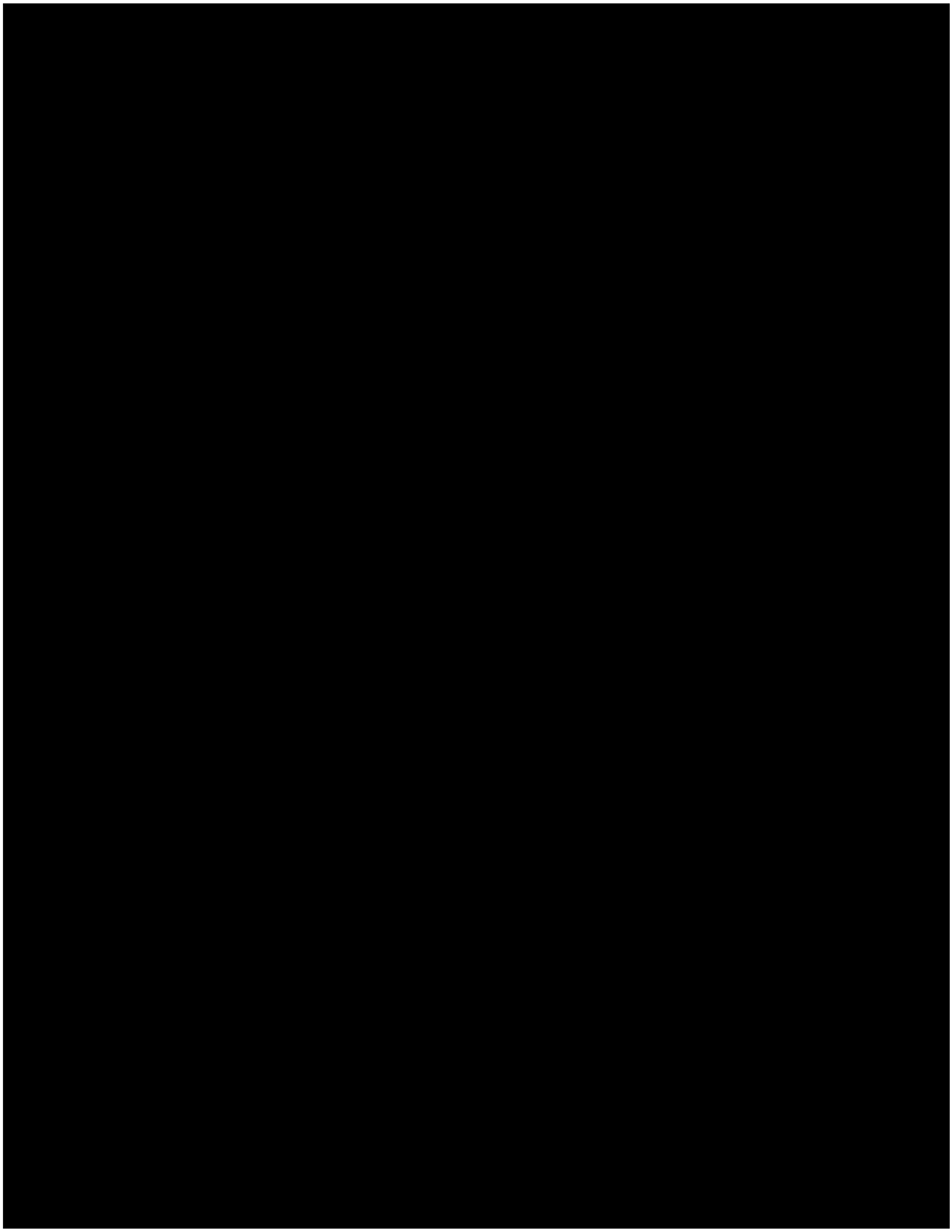






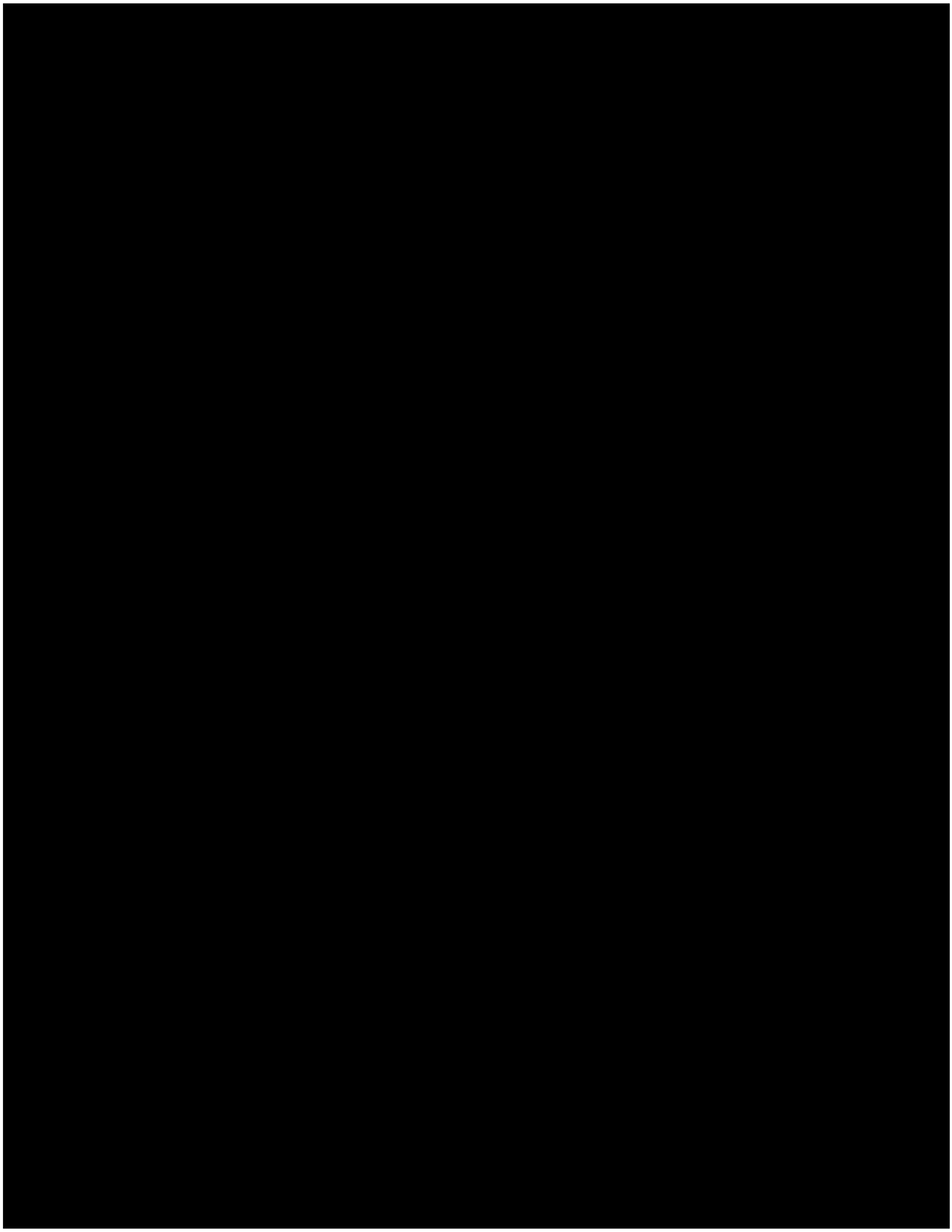


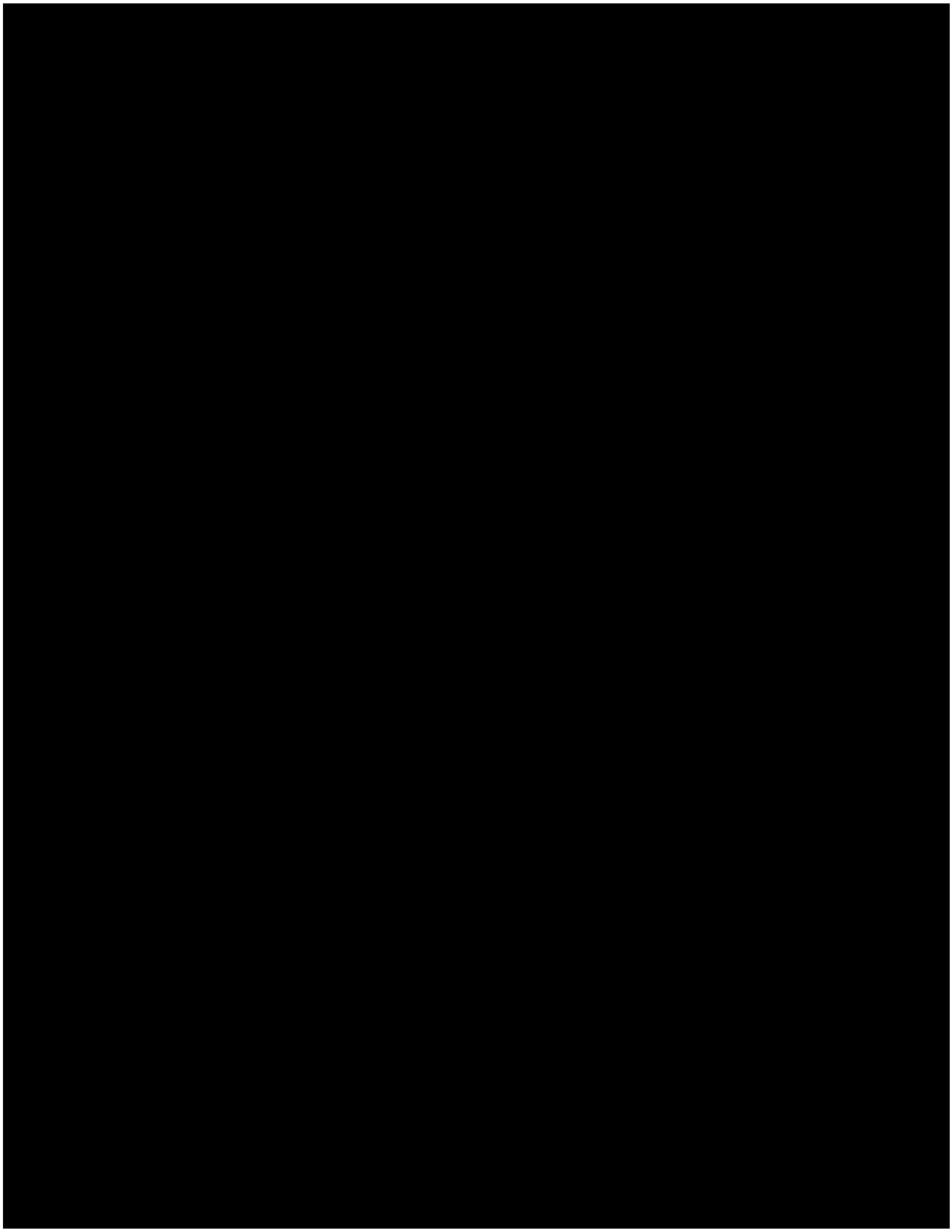


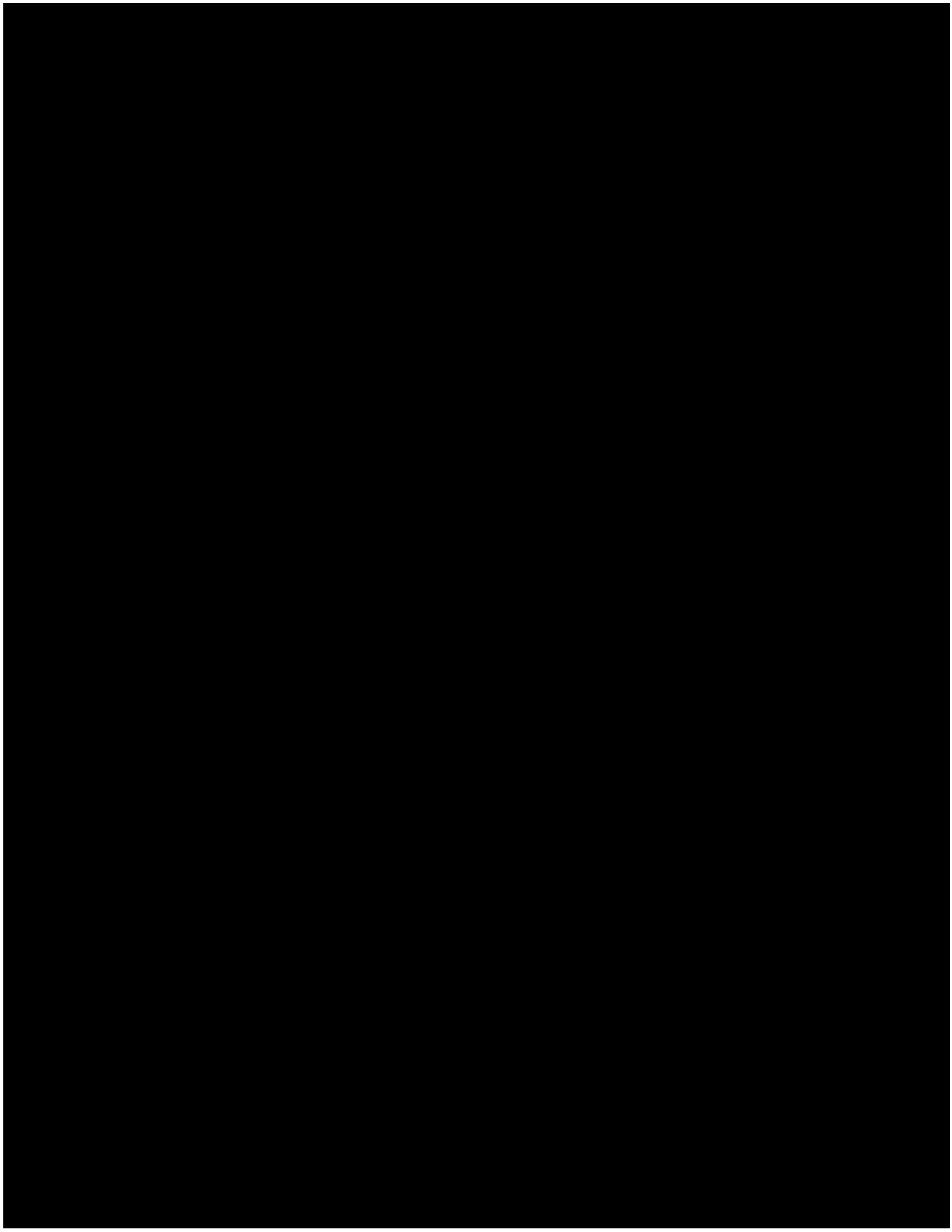


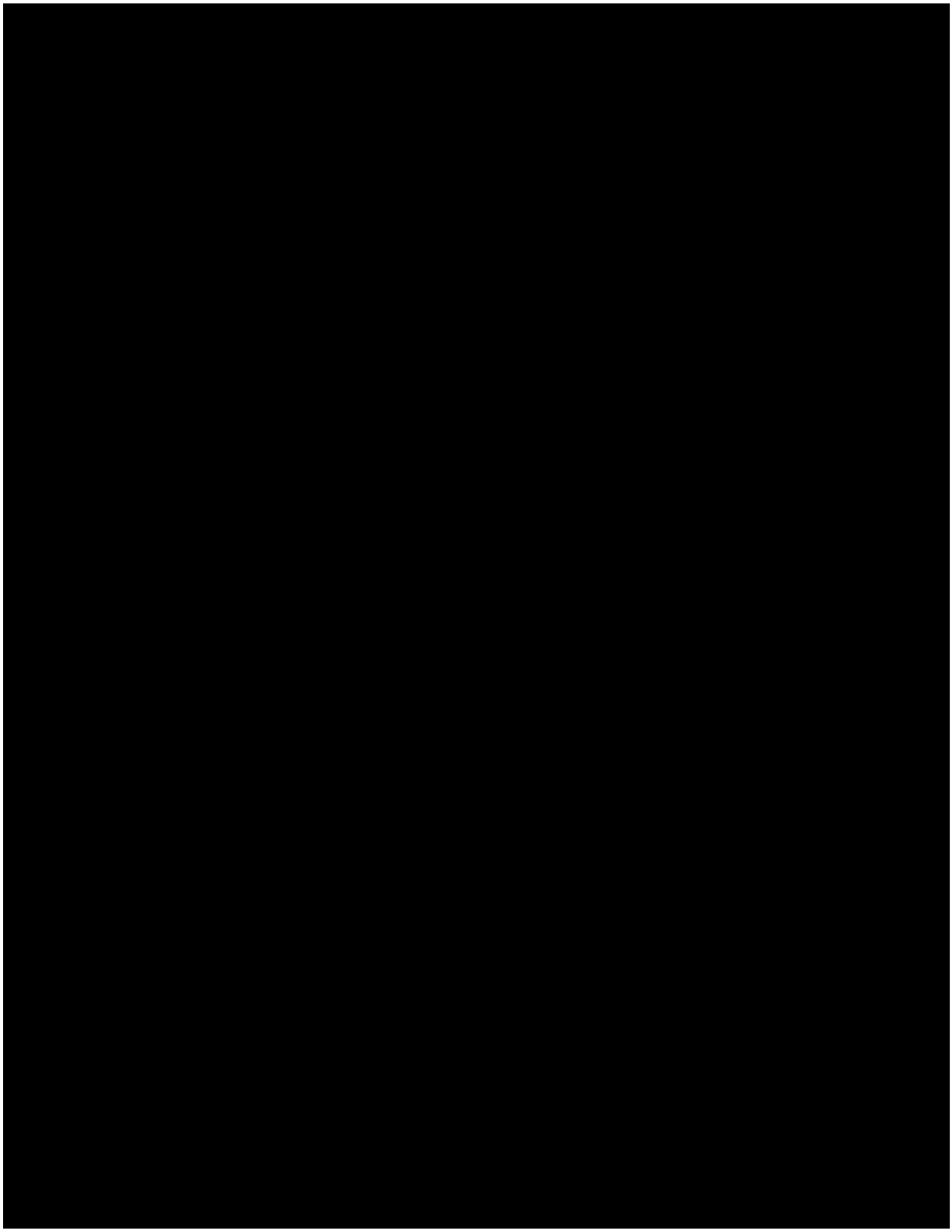
PUBLIC

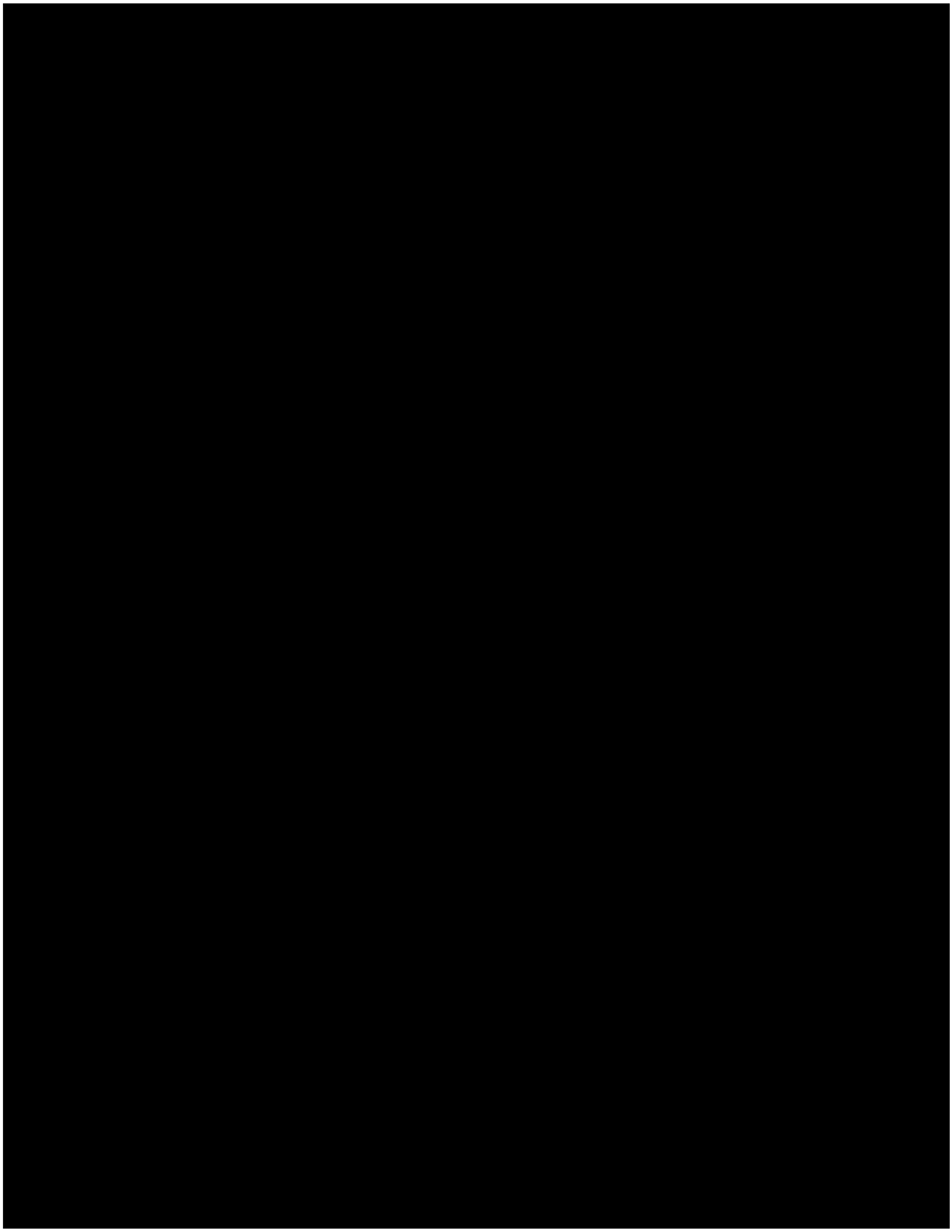
TAB 4

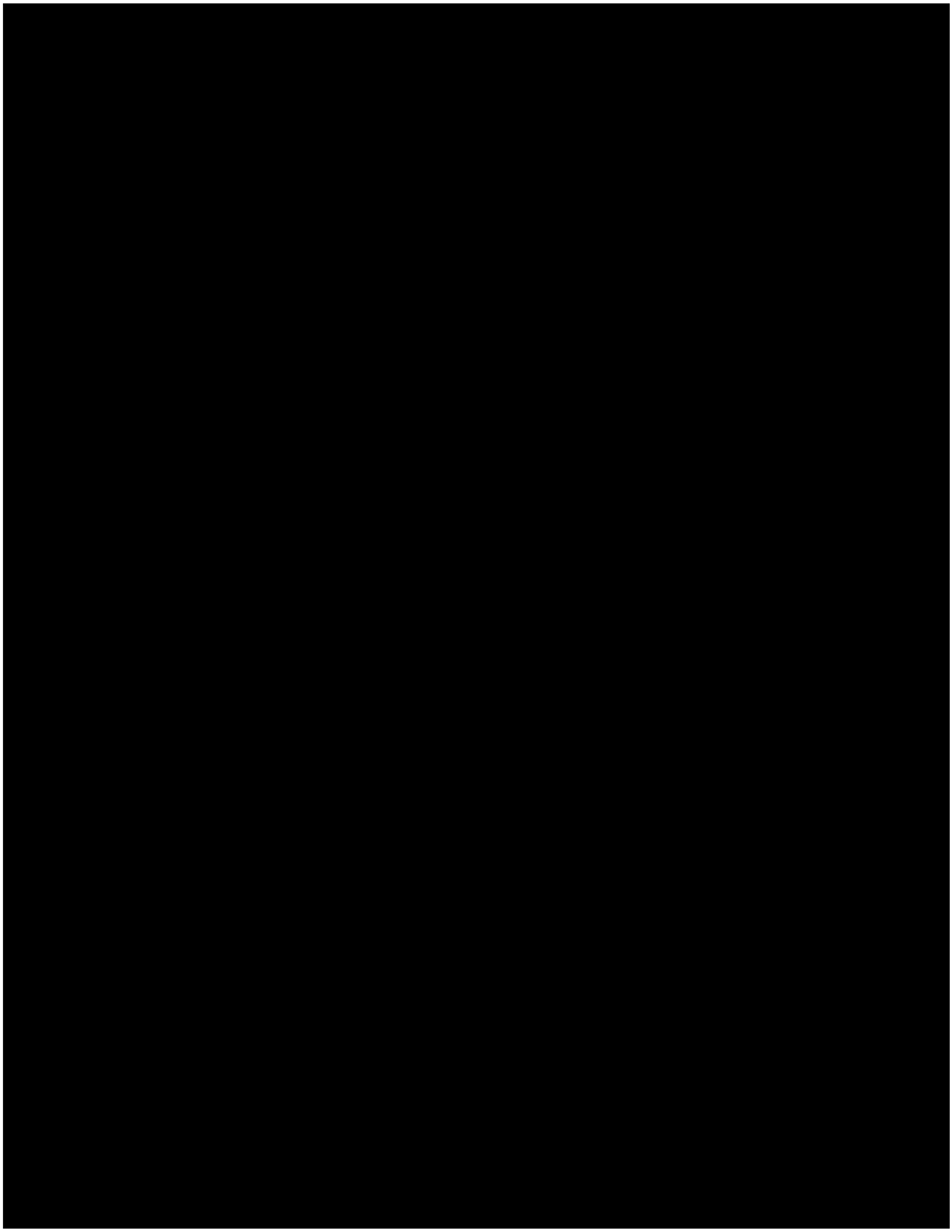


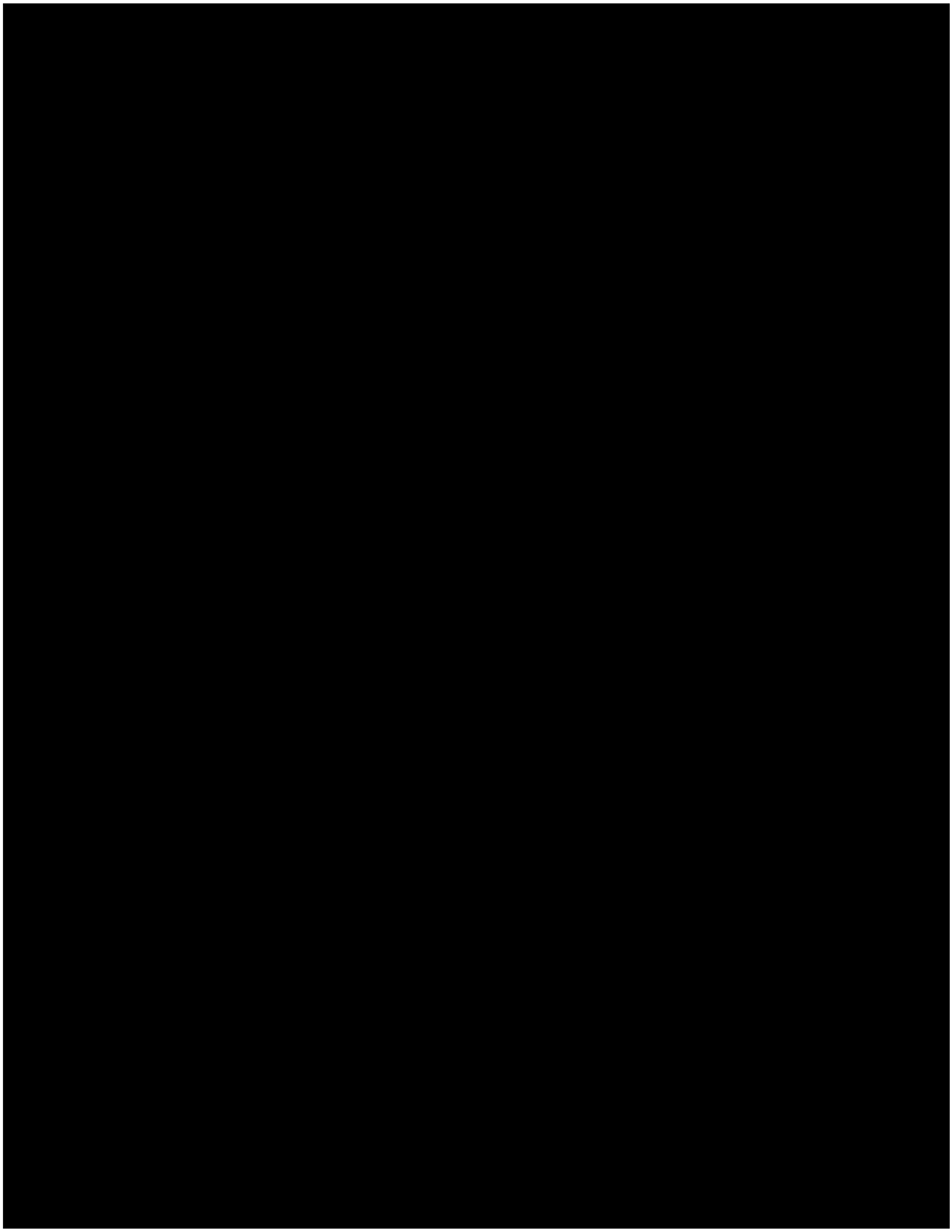


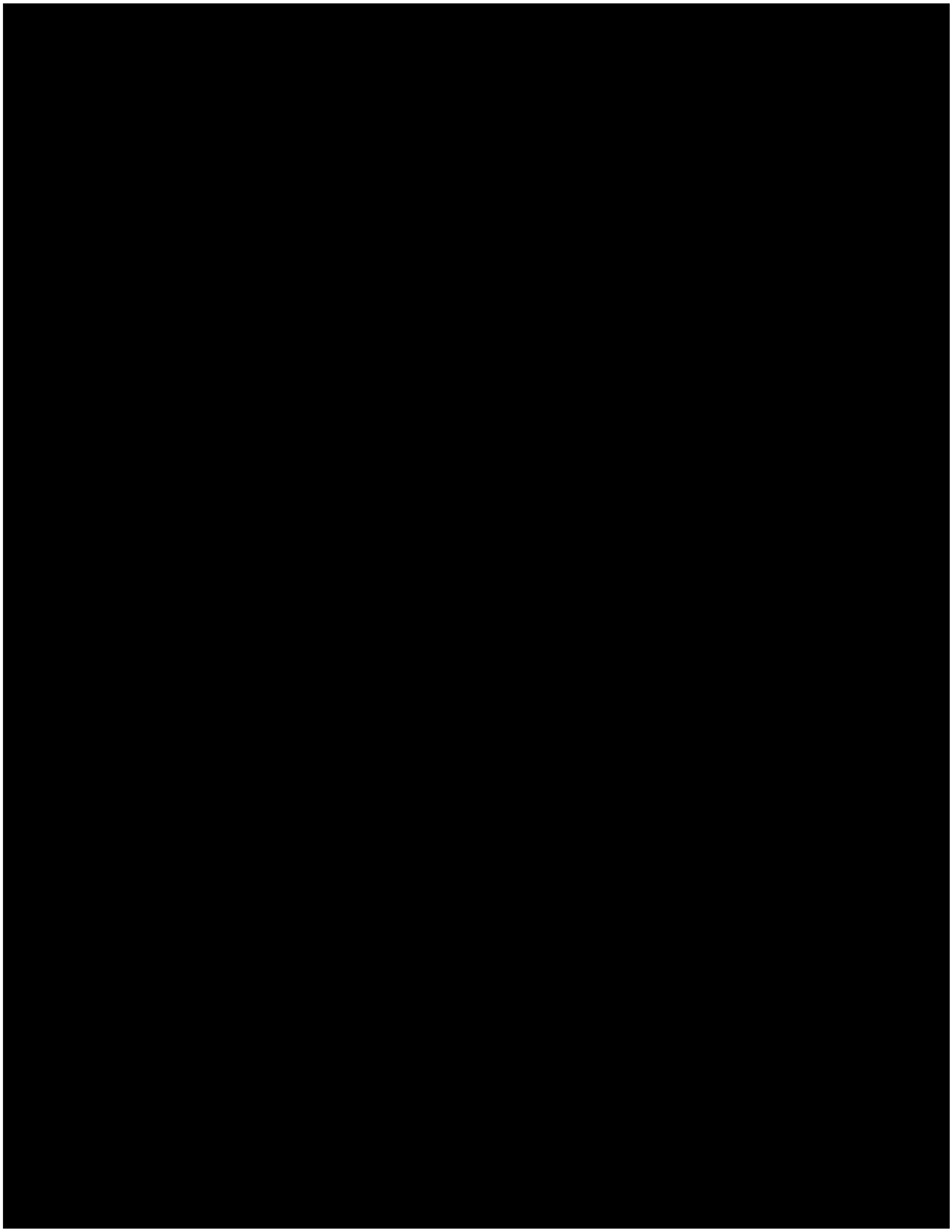


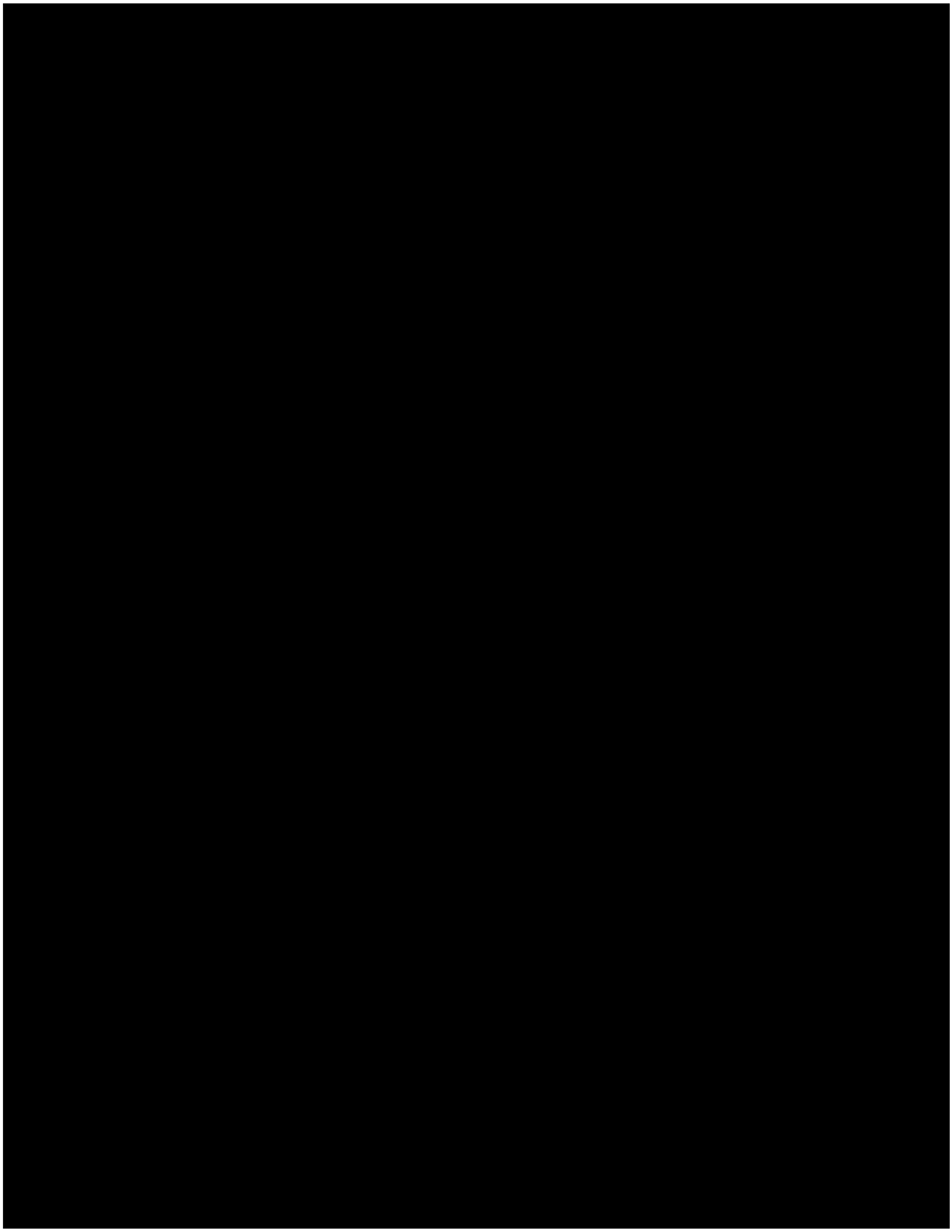


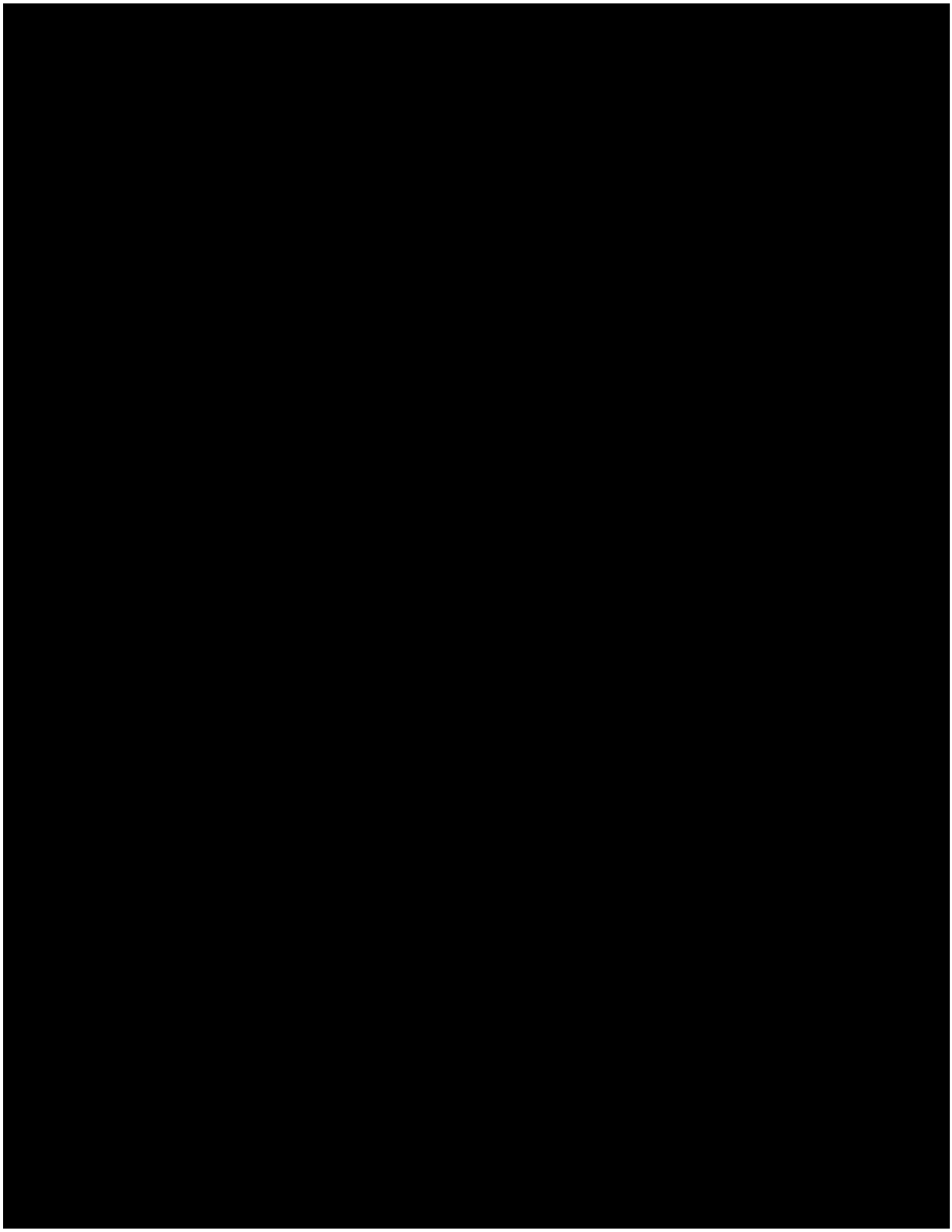


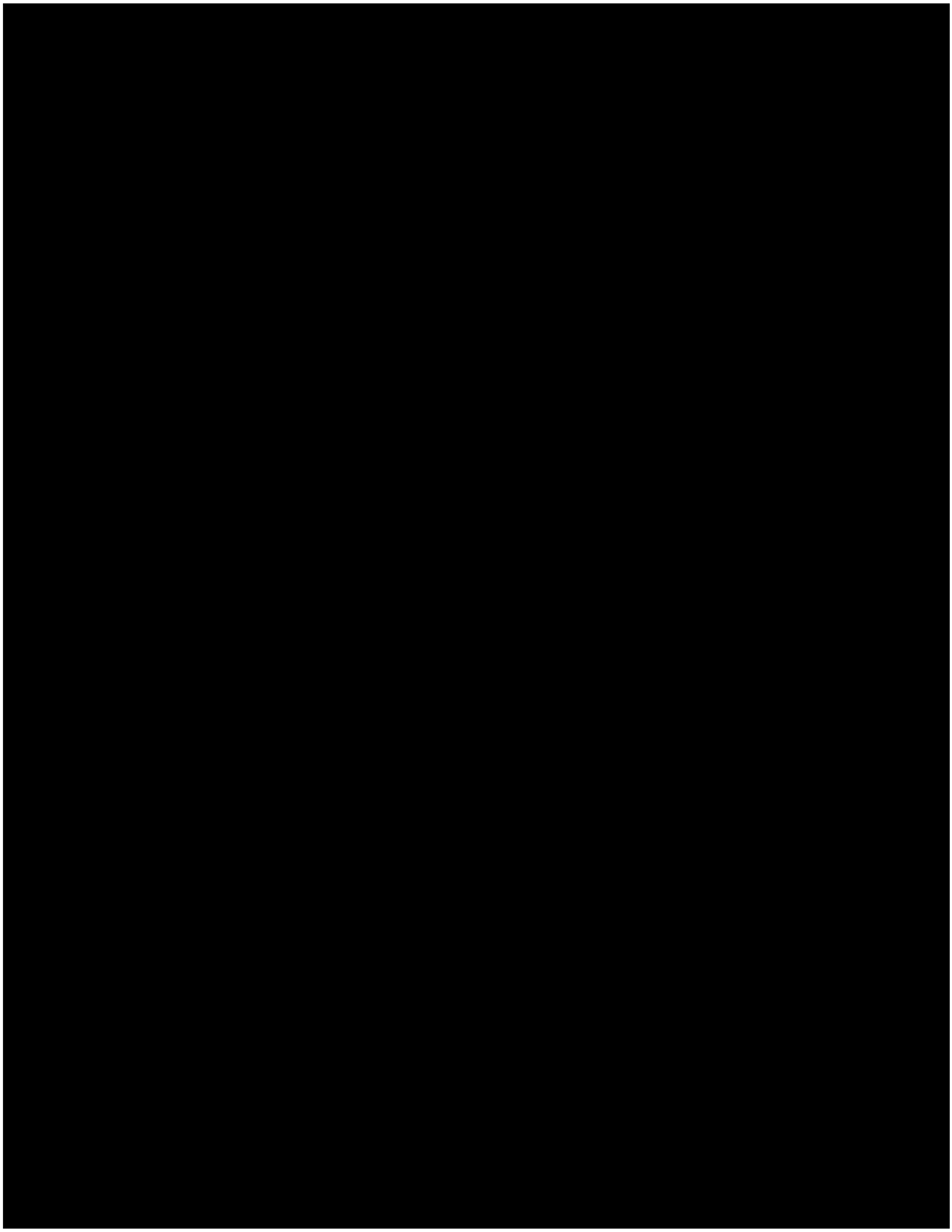


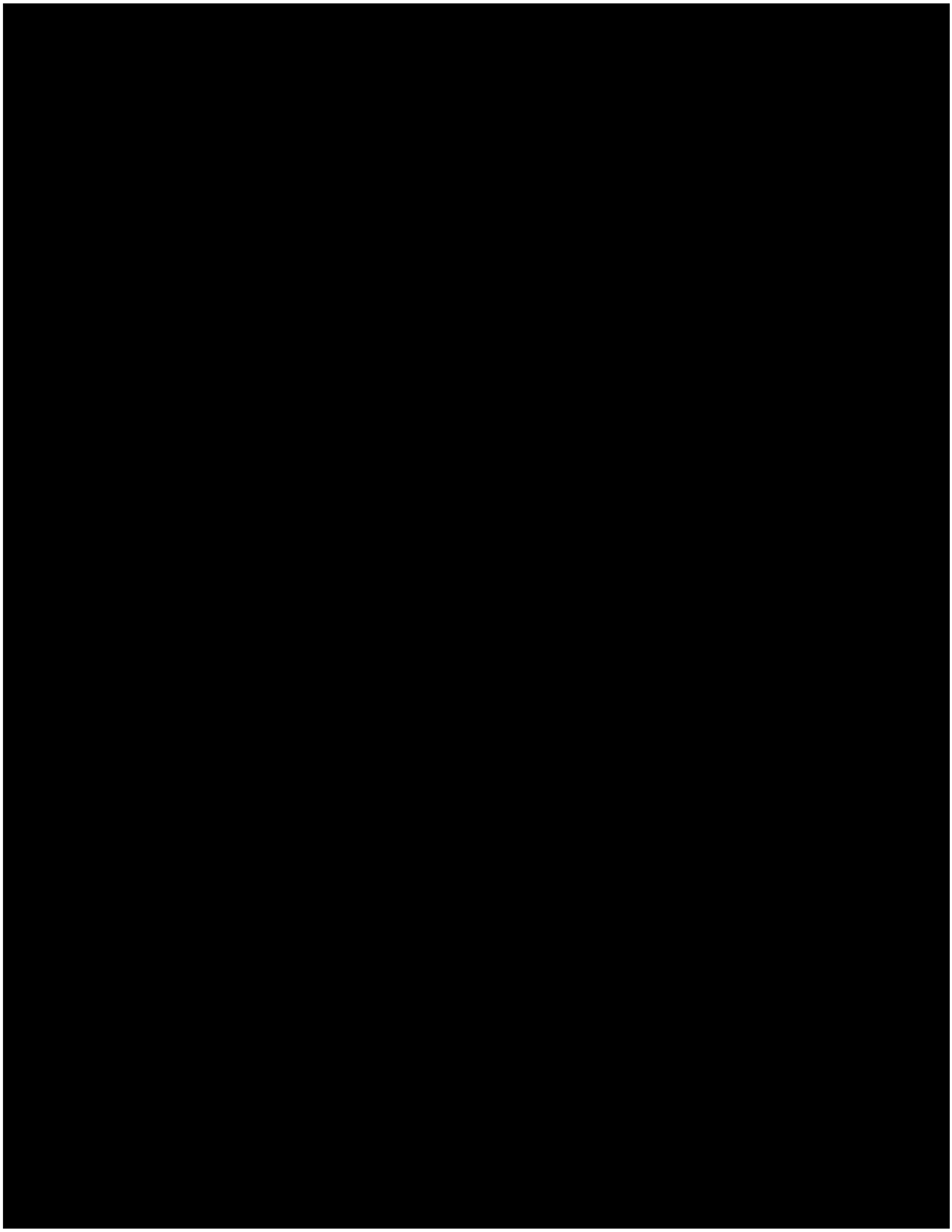


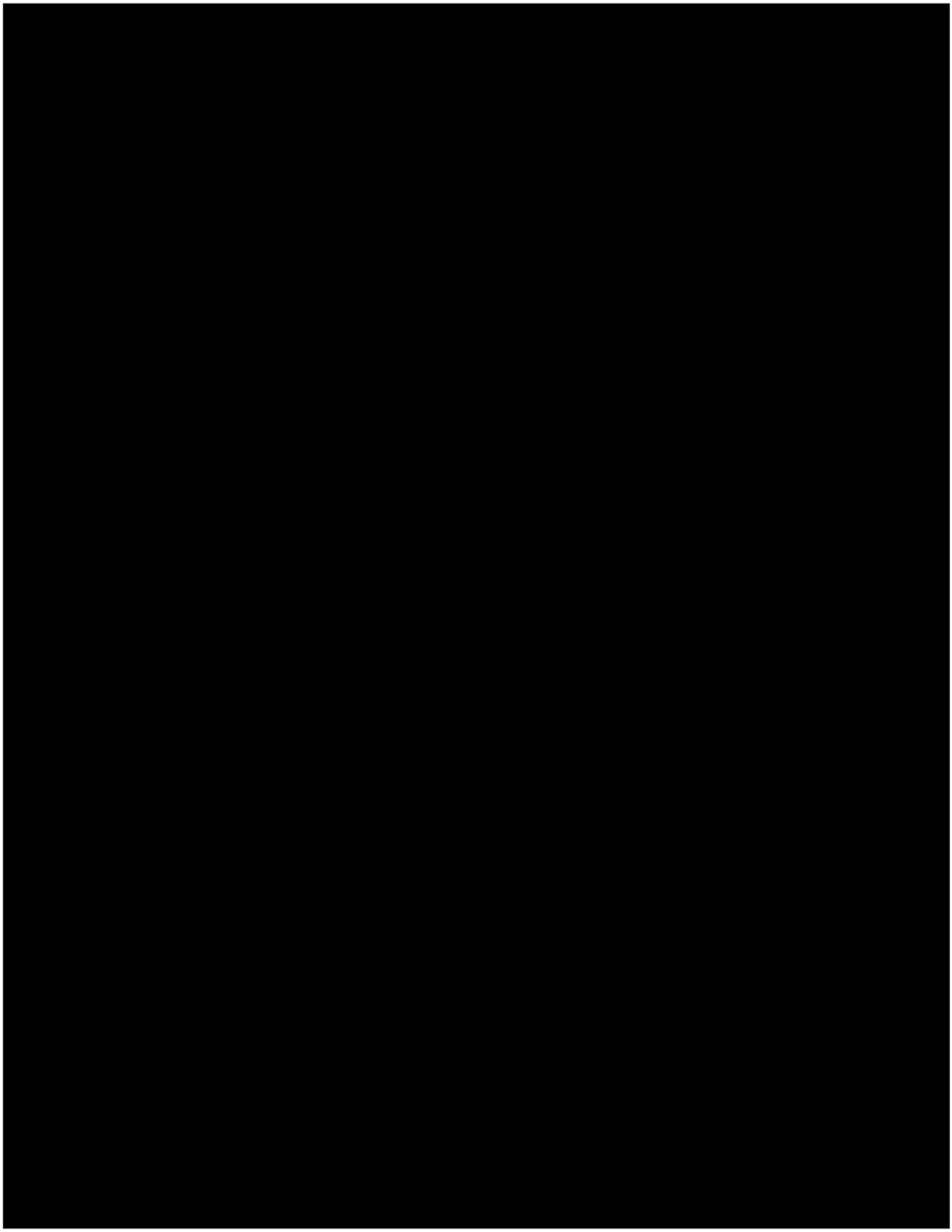


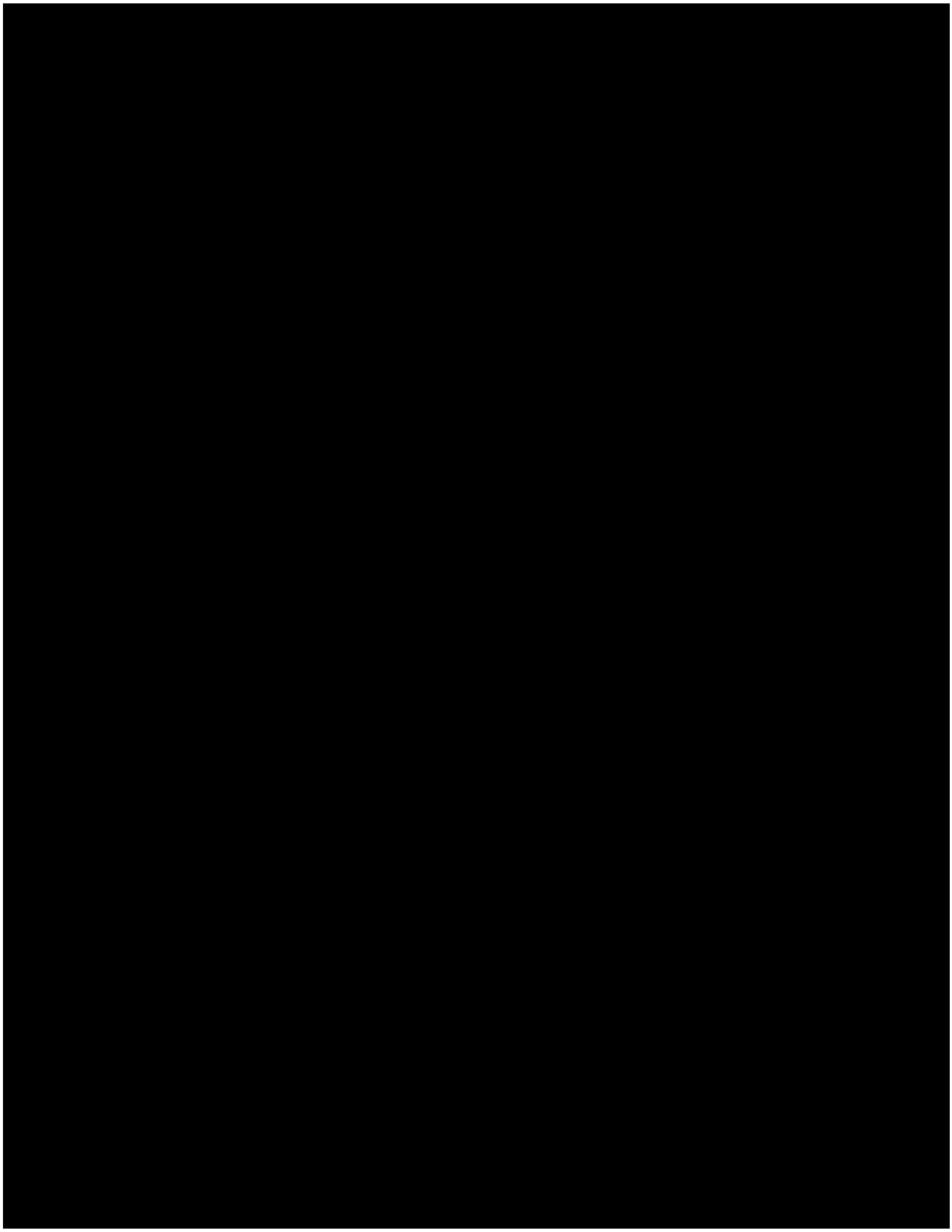


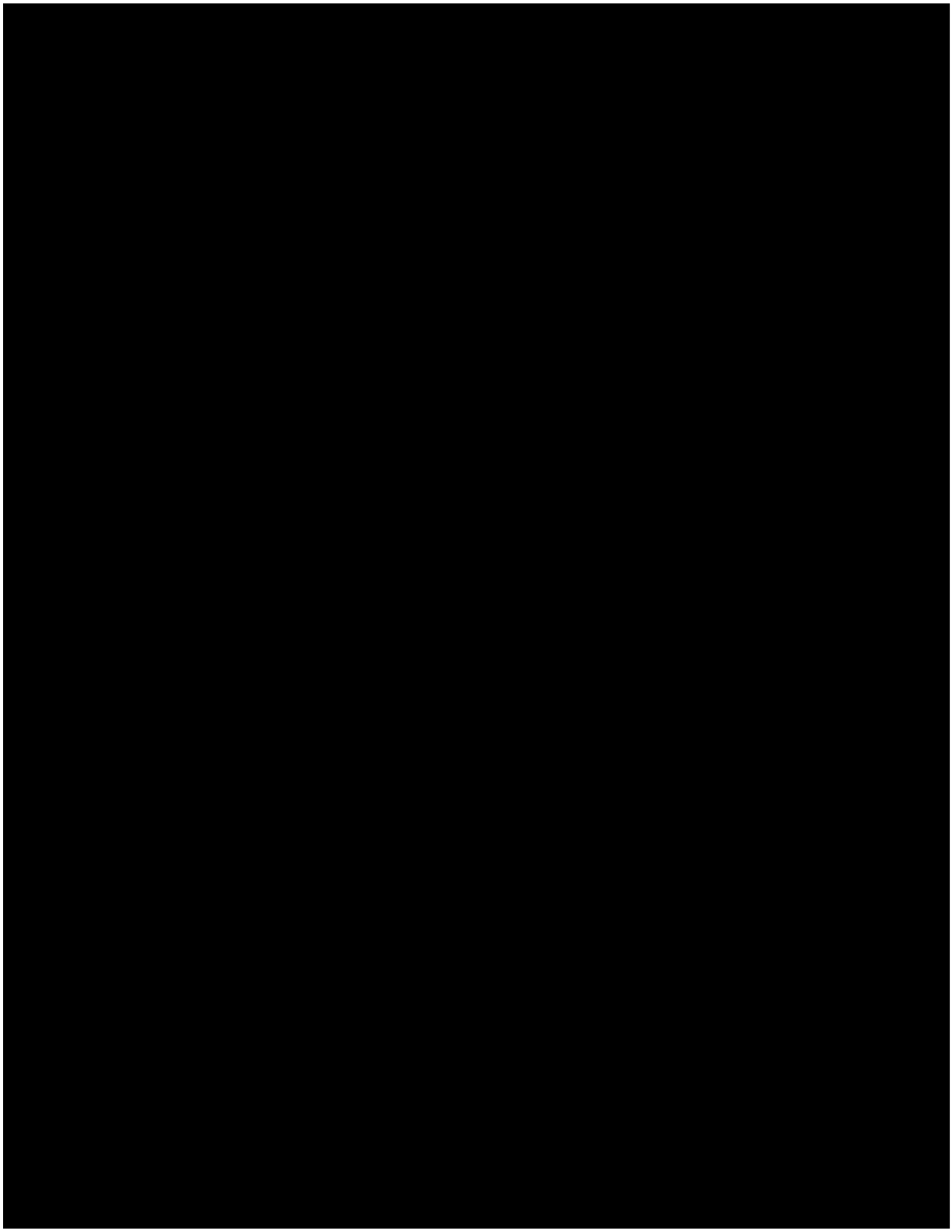


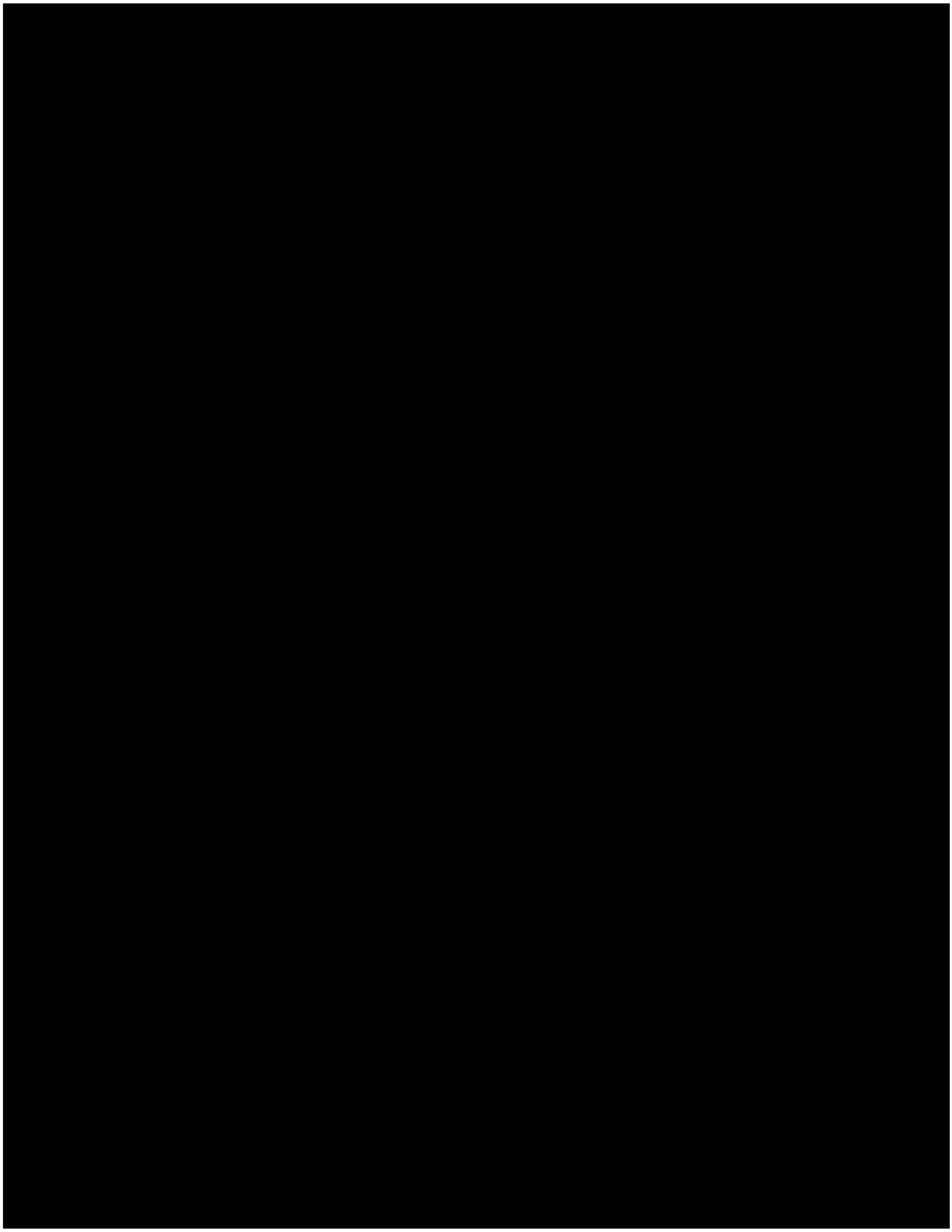


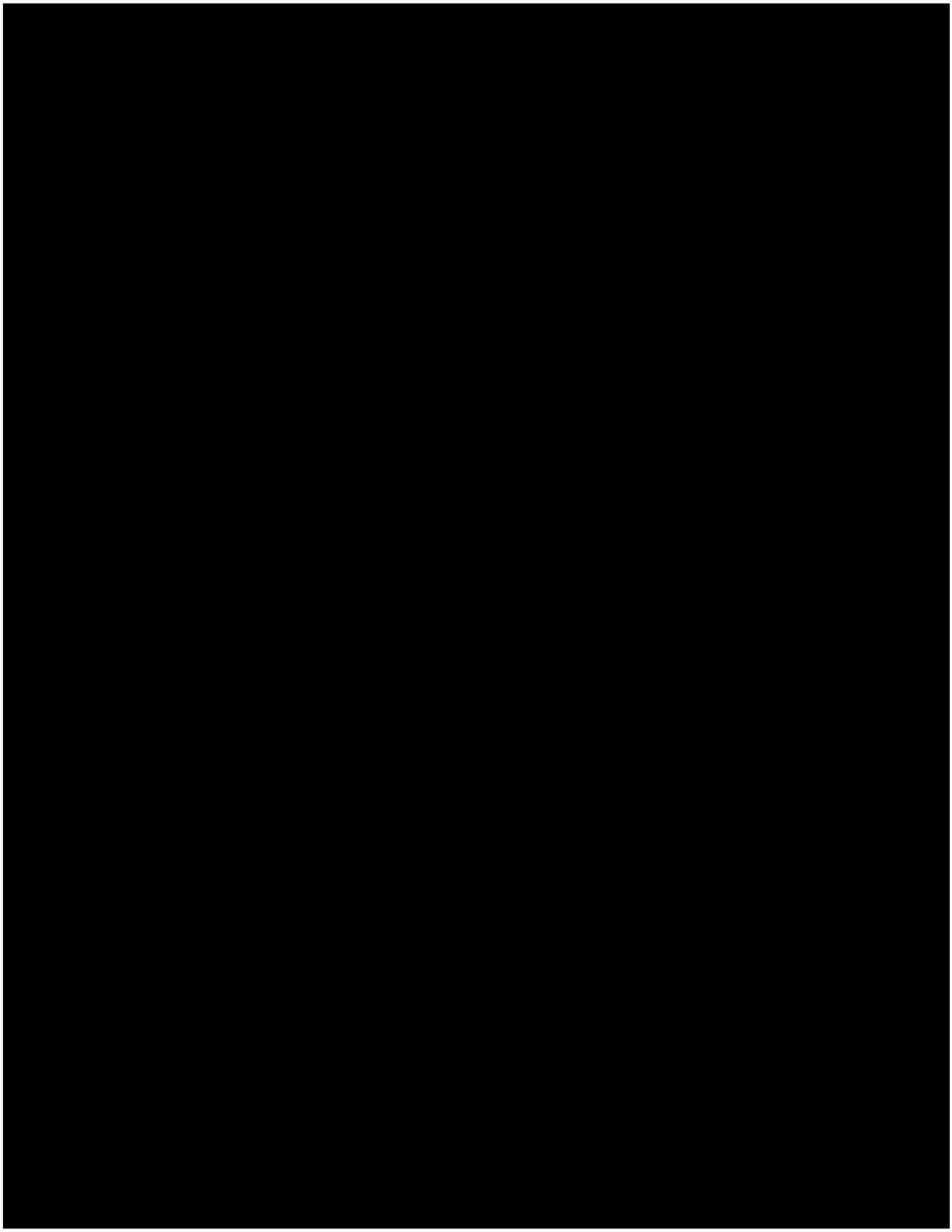


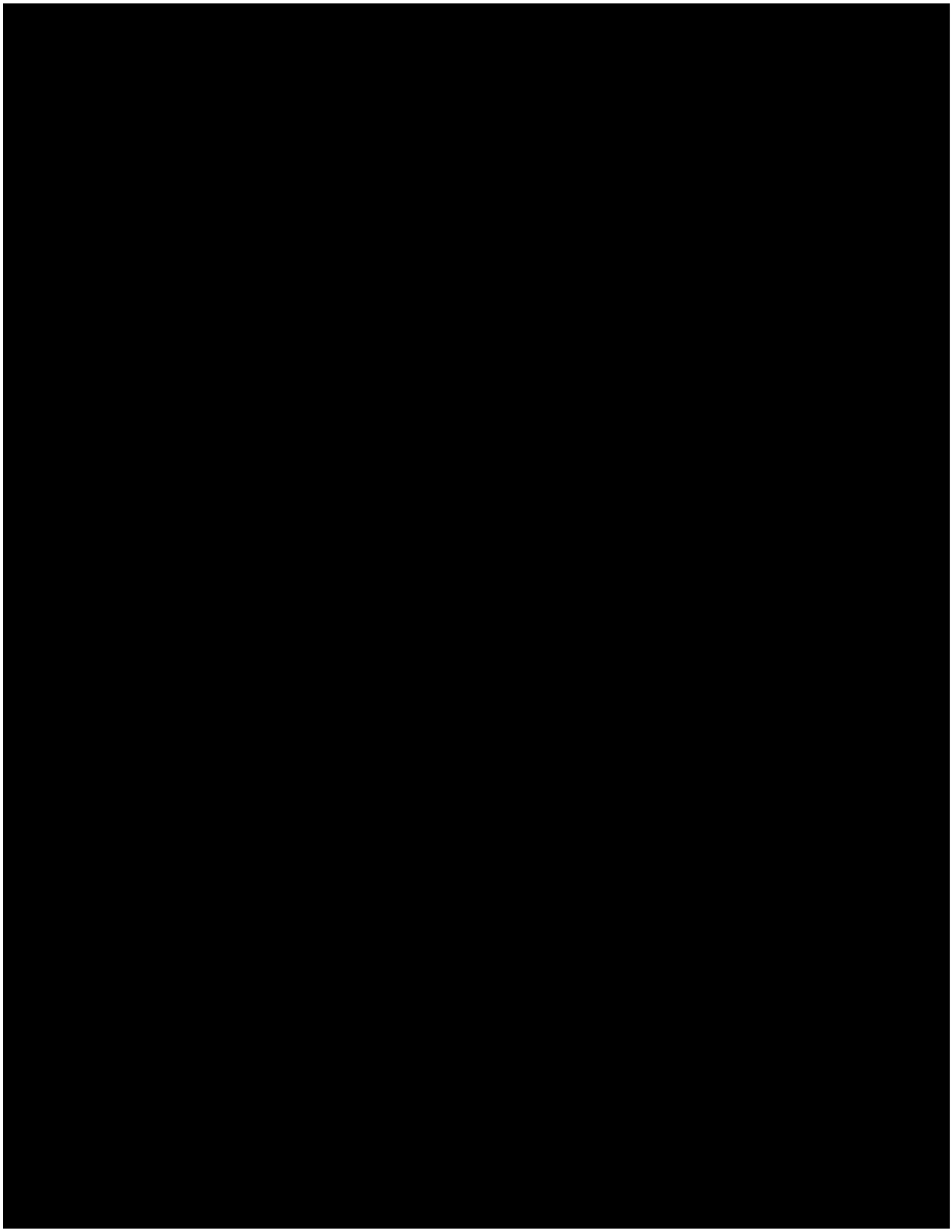


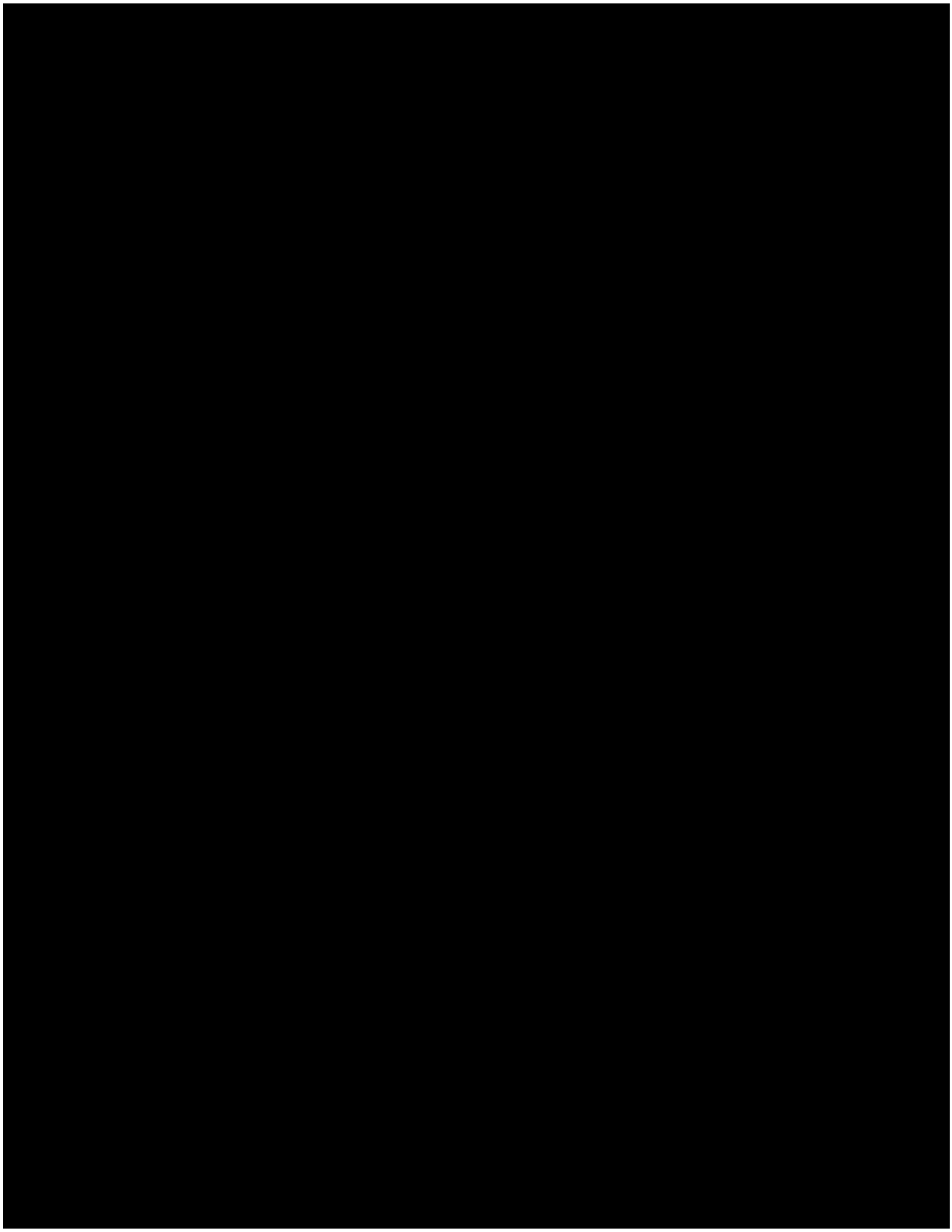


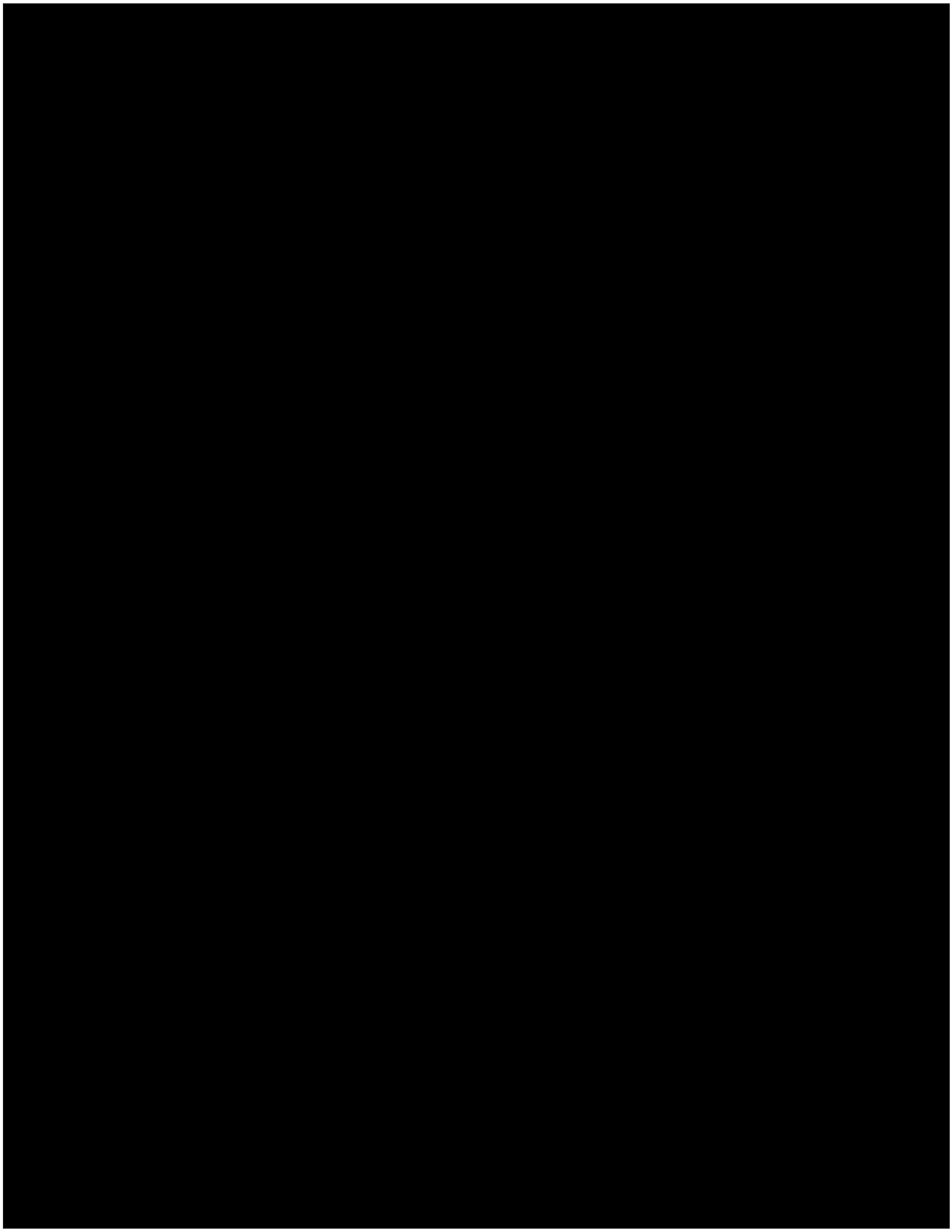


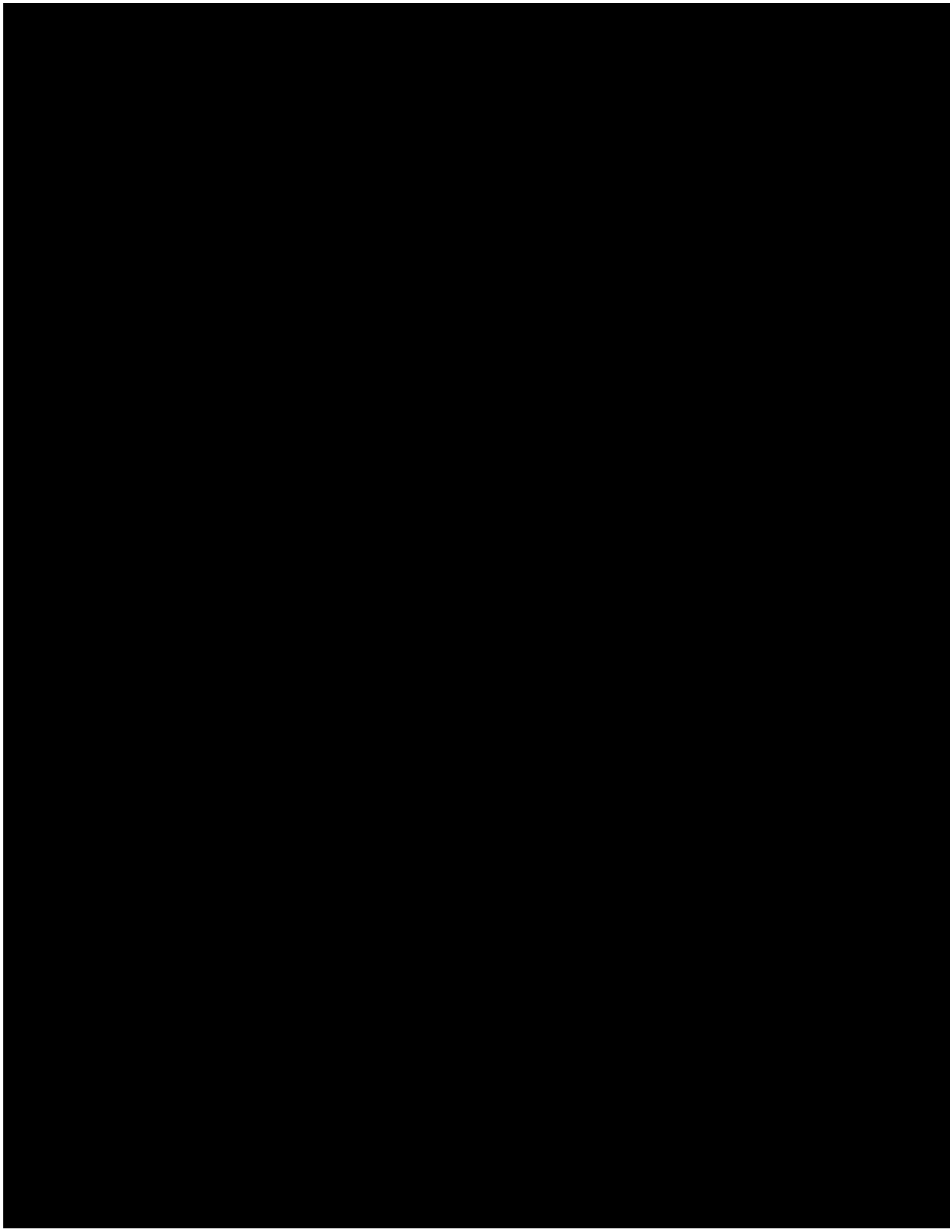


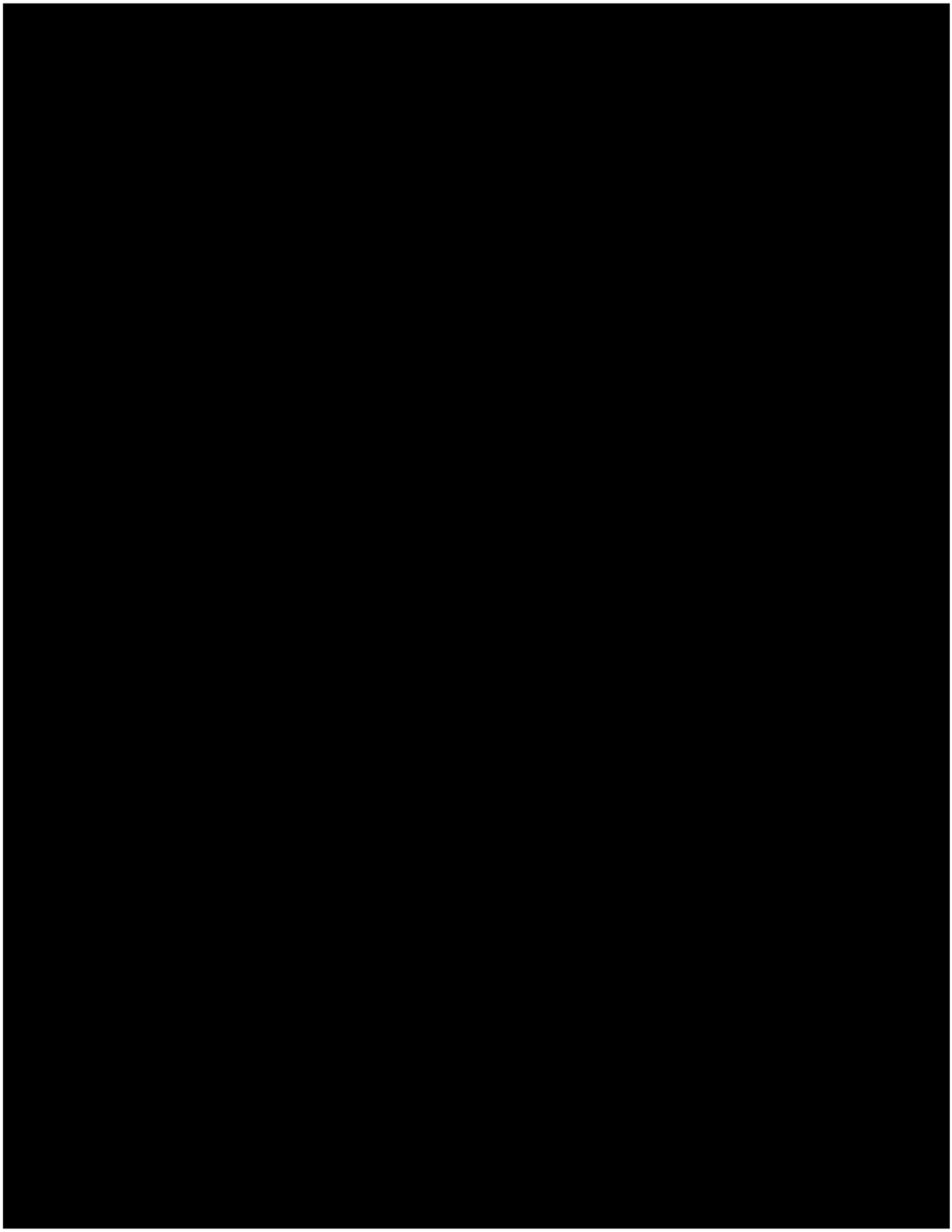


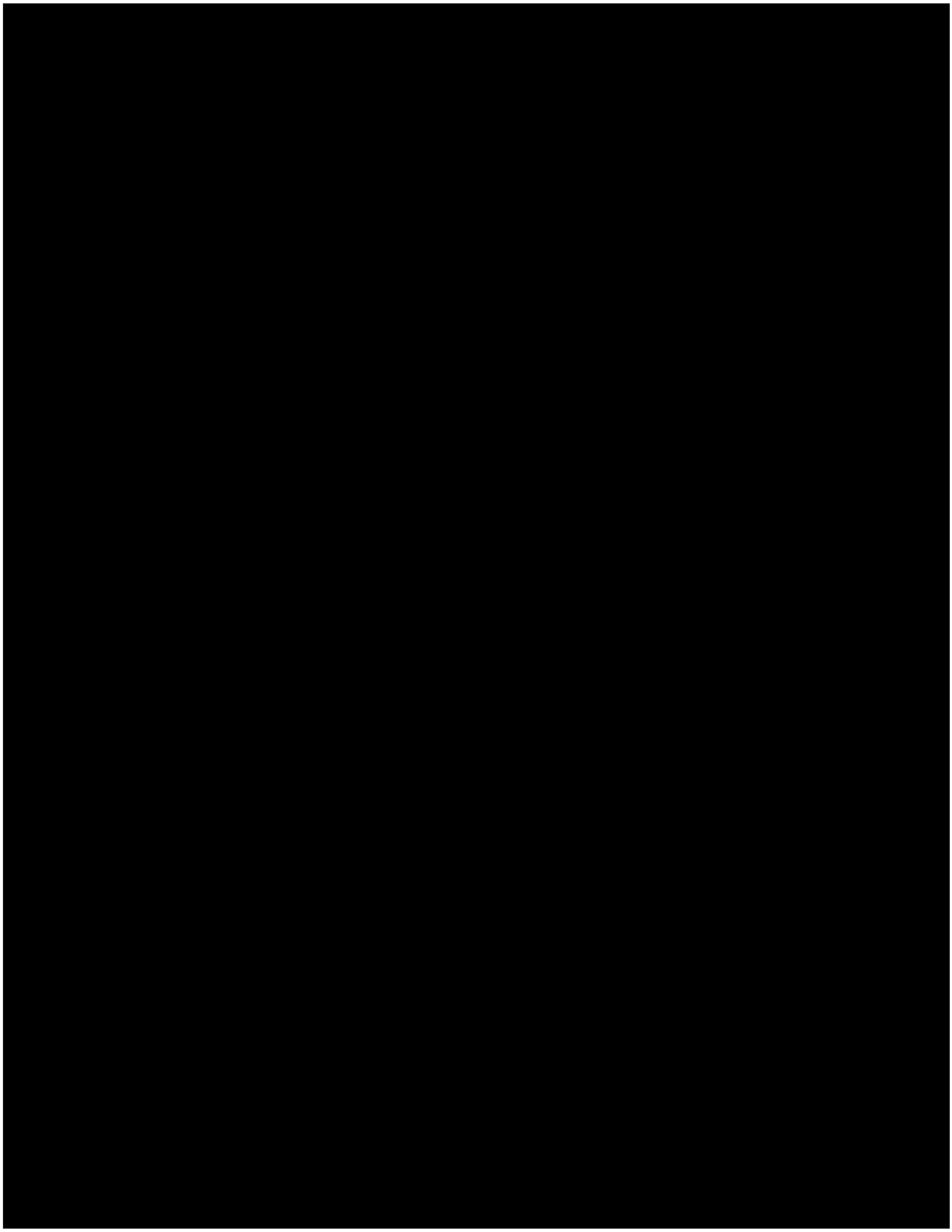












PUBLIC

TAB 5

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 2

File No.: CT-2024-012

Registry Document No.: 10

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders under section 74.1 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
(respondent)



Date of case management conference: March 11, 2025

Before: Madam Justice J. Gagné (Presiding Member)

Date of order: March 26, 2025

SCHEDULING ORDER

PUBLIC

[1] **FURTHER TO** an application filed by the Commissioner of Competition (the “**Applicant**”) on December 23, 2024, against Rogers Communications Inc. (the “**Respondent**”; collectively, the “**Parties**”), for an order pursuant to section 74.1 of the *Competition Act*, RSC, c C-34, as amended (the “**Application**”);

[2] **AND CONSIDERING** the Tribunal’s *Practice Direction Regarding Timelines and Scheduling for Proceedings before the Tribunal* (the “**Timelines Direction**”);

[3] **AND CONSIDERING** the Parties’ proposed schedules dated March 7, 2025, for the pre-hearing steps and the hearing of the Application; the discussions that took place during a Case Management Conference held on March 11, 2025; the Tribunal’s oral direction to the Parties to revise their proposals; the Parties’ revised, joint schedule dated March 20, 2025; and the Parties’ joint proposed edits to their revised schedule communicated by way of email to the Registry on March 25, 2025;

[4] **AND WHEREAS** the Tribunal and the Parties agreed to reconvene by the end of the summer 2025 to revisit and confirm the dates where the hearing will take place;

[5] **AND BEING SATISFIED** that the schedule in this Order is appropriate and respects the principles found in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd supp), which direct the Tribunal to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit, as well as the Timelines Direction;

THE TRIBUNAL ORDERS THAT:

[6] The schedule for the discovery and pre-hearing disclosure steps of the Application shall be as follows:

Friday, June 13, 2025	Service of Affidavits of Documents and delivery of documents by both Parties
-----------------------	--

Monday, June 30, 2025	Deadline for filing any motions arising from Affidavits of Documents and/or productions, including motions challenging claims of privilege
-----------------------	--

Monday, July 14, 2025	Hearing of any motions arising from Affidavits of Documents, productions and/or claims of privilege
-----------------------	---

Monday, July 28, 2025	Deadline for delivery of any additional productions resulting from any Affidavits of Documents, productions and/or claims of privilege motions (or such other date as may be ordered by the Tribunal)
-----------------------	---

Monday, August 25, 2025 – Friday, September 5, 2025	Examinations for discovery according to a schedule to be settled between counsel
--	--

Counsel for each Party shall have a maximum of three days

PUBLIC

to conduct oral examination for discovery of a representative of the other Party

The Tribunal will have a judicial member available on dates and at times to be agreed to with counsel for the Parties to rule on objections arising during the examinations for discovery

Friday, September 19, 2025

Deadline for fulfilling answers to discovery undertakings

By Tuesday, September 30, 2025

Parties to attend a Case Management Conference to review availability for hearing dates

Friday, October 3, 2025

Deadline for filing any motions arising from examinations for discovery, answers to undertakings or refusals

Friday, October 17, 2025

Hearing of any motions arising from examination for discovery, answers to undertakings or refusals

Monday, October 20, 2025

Parties to exchange proposed Agreed Statements of Fact, if any

Friday, October 31, 2025

Last day for follow-up examinations for discovery arising from undertakings given

Friday, November 7, 2025

Deadline for Parties to exchange Mediation Briefs and to deliver them to the Mediator via the Tribunal Registry

Friday, November 14, 2025

Mediation

Friday, January 9, 2026

Applicant to serve documents relied upon and witness statements

Applicant to serve and file expert report(s), if any

Witness statements and experts reports to include confidentiality designations; confidentiality designations shall be supported by affidavit evidence justifying confidentiality designations, and the affidavit evidence shall be filed with the Tribunal

Wednesday, February 18, 2026

Respondent to serve documents relied upon and witness statements.

Respondent to serve and file expert report(s), if any, on all matters

PUBLIC

Witness statements and expert reports to include confidentiality designations; confidentiality designations shall be supported by affidavit evidence justifying confidentiality designations, and the affidavit evidence shall be filed with the Tribunal

Deadline to serve and file Requests to Admit

Wednesday, March 11, 2026

Applicant to serve reply documents relied upon and reply witness statements

Applicant to serve and file reply expert report(s), if any

Reply witness statements and expert reports to include confidentiality designations; confidentiality designations shall be supported by affidavit evidence justifying confidentiality designations, and the affidavit evidence shall be filed with the Tribunal

Applicant to serve list of documents proposed to be admitted without proof

Monday, March 16, 2026

Deadline for filing any motions related to the evidence (documents relied upon, witness statements and expert reports, and confidentiality designations)

Deadline to provide witness statements to the Tribunal

Thursday, March 19 2026 –
Friday, March 20, 2026

Hearing of any motions related to the evidence (documents relied upon, witness statements and expert reports, and confidentiality designations)

Pre-hearing Case Management Conference

Deadline to provide documents to the Tribunal for use at the hearing (e.g., Agreed Books of Documents and Joint Briefs of Authorities), including read-ins from examinations for discovery

The Tribunal will also hear Parties' submissions on their respective proposed confidentiality designations to determine whether they should be maintained

Deadline for delivering any Agreed Statement of Facts

[7] Unless the parties and the Tribunal agree otherwise, the Tribunal shall hear all motions virtually;

PUBLIC

[8] The evidentiary portion of the hearing of the Application shall commence at 10:00 am on Monday, March 30, 2026, and shall be held in-person in the Hearing Room of the Tribunal located at 600-90 Sparks Street, Ottawa, Ontario. The schedule shall be as follows:

Monday, March 30, 2026 – First week of hearing (4 days)
Thursday, April 2, 2026

Tuesday, April 7, 2026 – Second week of hearing (4 days)
Friday, April 10, 2026

Tuesday, April 14, 2026 – Third week of hearing (4 days)
Friday, April 17, 2026

[9] Parties will serve and file written argument as directed by the Tribunal (but no later than noon on Monday, April 27, 2026). The Tribunal will hear oral argument on Wednesday, April 29, 2026, and Thursday, April 30, 2026, in person in Ottawa, Ontario.

[10] Alternatively, the Tribunal has also reserved June 1 – 18, 2026, as alternative hearing dates in the event that Rogers' legal counsel remains unavailable for the hearing to take place in March/April 2026.

DATED at Ottawa this 26th day of March 2025

SIGNED on behalf of the Tribunal by the Presiding Member.

(s) Jocelyne Gagné

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Tanis Halpape
Irene Cybulsky
Kendra Wilson

PUBLIC

For the respondent:

Rogers Communications Inc.

Jonathan Liss
Crawford Smith
Bradley Vermeersch
John Carlo Mastrangelo
Anita Banicevic
Teraleigh Stevenson

PUBLIC

TAB 6

PUBLIC

CT-2022-

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.; and

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an interim order pursuant to section 104 of the *Competition Act*;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

**ROGERS COMMUNICATIONS INC. AND
SHAW COMMUNICATIONS INC.**

Respondents

**AFFIDAVIT OF LAURA SONLEY
(Affirmed May 5, 2022)**

PUBLIC

I, Laura Sonley, a Senior Competition Law Officer with the Competition Bureau (the “Bureau”), of the City of Ottawa, in the Province of Ontario, **AFFIRM AND SAY AS FOLLOWS:**

1. I make this affidavit in support of the Commissioner of Competition’s (the “**Commissioner**”) application for an Interim Order pursuant to section 104 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”).
2. I have been employed by the Bureau since January 2014. During my employment with the Bureau, I have been involved in the review of mergers and proposed mergers to determine whether grounds exist for the making of orders under Part VIII of the Act.
3. I lead the Bureau’s case team reviewing the proposed acquisition (“**Proposed Transaction**”) of Shaw Communications Inc. (“**Shaw**”) by Rogers Communications Inc. (“**Rogers**”). I have personal knowledge of the matters herein except where stated to be based on information and belief and where so stated, I verily believe it to be true.

I. THE PARTIES

4. Rogers is a publicly traded Canadian communications and media company headquartered in Toronto, Ontario that provides wireless services, cable wireline services and media products to Canadian consumers and businesses.¹ Attached as Exhibits 1 and 2 are Rogers’s 2020 Annual Report and 2021 Annual Report, respectively, which describe the services offered by Rogers as follows.
 - a. **Wireless:** Rogers offers mobile wireless services nationally. Rogers offers wireless services under the Rogers, Fido and, chatr and Cityfone brands. Rogers is the largest wireless services provider in Canada, with approximately 11.297 million subscribers and \$8.768 billion in annual

¹ Exhibit 2: “Rogers Communications Inc., 2021 Annual Report” (March 3, 2022) at 13 [Rogers 2021 Annual Report].

PUBLIC

revenue in 2021. In January 2020, Rogers was the first Canadian carrier to launch a network using the 5G standard. Rogers' 5G network is the largest in Canada reaching more than 70% of the Canadian population and is supported by the largest wireless spectrum position in the country.

- b. **Wireline:** Rogers offers wireline services for consumers and businesses in Ontario, New Brunswick, Nova Scotia and Newfoundland, including internet access, television distribution, pay-per-view television and video-on-demand services, telephony and smart home monitoring services.
- c. **Media:** Rogers offers a diverse portfolio of media properties, including sports media and entertainment, TV broadcasting (including conventional, specialty channels), radio broadcasting, multi-platform shopping and digital media.

5. Shaw is a publicly traded Canadian communications company headquartered in Calgary, Alberta that provides wireline and wireless telecommunication services, as well as television distribution.² Attached as Exhibit 3 is Shaw's 2021 Annual Report, which describes the services offered by Shaw as follows.

- a. **Wireless:** Shaw offers mobile wireless services under the Freedom Mobile and Shaw Mobile brands. In 2016, Shaw entered the Canadian wireless market with the purchase of Wind Mobile, soon after rebranded as Freedom Mobile. Freedom Mobile serves customers in Ontario, Alberta and British Columbia (the "**Overlap Provinces**"). Shaw is the fourth largest wireless services provider in Canada, with approximately \$1.32 billion in revenue in 2021 and [REDACTED] subscribers as of February 2022. In 2020, Shaw launched a second wireless brand, Shaw Mobile, which serves customers in Alberta and British Columbia. [REDACTED]

[REDACTED]
[REDACTED] in a

² Exhibit 3: "Shaw Communications Inc., 2021 Annual Report" (October 29, 2021) at 83 [Shaw 2021 Annual Report].

PUBLIC

response to a request for information from the Bureau, dated April 22, 2021 and attached as Exhibit 4.³

- b. **Wireline:** Shaw provides wireline services to consumers and businesses primarily in Western Canada and Northern Ontario.
 - i. **Consumer:** Shaw's wireline consumer division offers services to residential customers including broadband internet, Shaw Go WiFi, and video and telephone services for customers connected to Shaw's Fibre+ network. Shaw also offers direct-to-home satellite television services to consumers across Canada through Shaw Direct, as well as licensed video-on-demand and pay-per-view services. In 2021, Shaw's wireline consumer division generated total revenues of \$3.7 billion.
 - ii. **Business:** Shaw offers wireline services (such as voice, data and video connectivity services) to business customers of all sizes. In 2021, Shaw's wireline business division generated total revenues of \$584 million.

II. THE PROPOSED TRANSACTION

- 6. On March 13, 2021, Rogers agreed to purchase all of the issued and outstanding shares of Shaw under an arrangement agreement for approximately \$26 billion, inclusive of debt (the "**Proposed Transaction**"). The Proposed Transaction was detailed in a Material Change Report filed by Rogers on March 15, 2021 on the System for Electronic Document Analysis and Retrieval (SEDAR), attached as Exhibit 5.⁴

III. THE BUREAU'S REVIEW OF THE PROPOSED TRANSACTION

³ Exhibit 4: Shaw Responses to RFI Questions 2, 3 and 7 (April 22, 2022), at sheet "Q.3".

⁴ Exhibit 5: "Rogers Material Change Report, Form 51-102F3" (March 15, 2021).

PUBLIC

7. On April 13, 2021, the Respondents requested an advance ruling certificate (the “**ARC Request**”) from the Commissioner. Rogers and Shaw subsequently made certified pre-merger notification filings in respect of the Proposed Transaction on May 3, 2021 and May 4, 2021, respectively. The ARC Request is attached as Exhibit 6.⁵ Rogers’ Pre-Merger Notification Filing and Shaw’s Pre-Merger Notification Filing are also attached as Exhibit 7 and Exhibit 8, respectively.⁶
8. On June 18, 2021, the Commissioner commenced an inquiry into the proposed acquisition.
9. On June 3, 2021, the Commissioner issued supplementary information requests (“**SIRs**”) under subsection 114(2) of the Act to each Respondent. On August 16, 2021, the Respondents certified as complete their responses to the SIRs. Rogers provided the Bureau with over 678,000 documents and Shaw provided over 621,000 documents, totaling approximately 1.3 million documents. Rogers’ and Shaw’s certificates are attached as Exhibit 9 and Exhibit 10, respectively.⁷
10. The Commissioner obtained orders under section 11 of the Act for the production of records and written returns of information from Quebecor Inc. (“**Quebecor**”), Xplornet Communications Inc. (“**Xplornet**”), Xplore Mobile Inc. (“**Xplore Mobile**”), TELUS Corporation Inc. (“**Telus**”) and BCE Inc. (“**Bell**”). The orders were issued in July and August 2021. The certificates arising from those orders received in September and November, 2021 are attached as Exhibit 11.⁸

⁵ Exhibit 6: Letter, From Rogers Communications Inc. to Commissioner of Competition (April 13, 2021) re: Advance Ruling Certificates [Rogers/Shaw - ARC Request].

⁶ Exhibit 7: Rogers Communications Inc., Notifiable Transactions Form (PMN) (May 3, 2021); Exhibit 8: Shaw Communications Inc., Notifiable Transaction Form (PMN) (May 4, 2021).

⁷ Exhibit 9: Rogers Communications Inc., SIR Certificate, signed by Lisa Damiani (August 16, 2021) [Rogers SIR Certificate]; Exhibit 10: Shaw Communications Inc., SIR Certificate, signed by Peter A. Johnson (August 16, 2021) [Rogers SIR Certificate].

⁸ Exhibit 11: Sworn Certificate of Andrea Wood on behalf of Telus (November 29, 2021), Affidavit of Christina J. Prudham on behalf of Xplornet Communications Inc. (September 29, 2021), Sworn Certificate of Robert Malcolmson on behalf of BCE (November 29, 2021), Affidavit of Jonathan Hickey on behalf of Quebecor Media Inc (September 27, 2021).

PUBLIC

11. The Commissioner and the Respondents entered into an efficiencies timing agreement effective September 21, 2021 (“**ETA**”). The ETA is attached as Exhibit 12.⁹ A summary of the pertinent briefings and exchanges with the parties under the ETA is as follows:

- a. On September 24, 2021, pursuant to paragraph 5 of the ETA, the Bureau provided the Respondents with an update on its quantitative assessment respecting Wireless Services, including a description of the empirical methodology, model and preliminary findings.
- b. Following a request from counsel to the Respondents on October 6, 2021 to extend the date for receiving an update under paragraph 6 of the ETA to October 18, 2021, the Bureau provided the Respondents with an update on its assessment including its preliminary view of whether a remedy may be required in respect of Wireless Services and a preliminary quantification of the range of deadweight loss in respect of Wireless Services. At that time, I informed the Respondents that the Bureau was assessing whether the divestiture of the wireless business would be sufficient to remedy its concerns in respect of Wireless Services including whether a remedy buyer who operates a wireless only network would be capable of replicating the competition Shaw brought to the market to the point at which competition would not be substantially lessened. I stated that as a result, it would be helpful for the Respondents to analyze the efficiencies lost as a result of a full block of the transaction as well as a stand alone wireless remedy.
- c. On November 8, 2021, pursuant to paragraph 8 of the ETA the Respondents provided the Bureau with two expert reports respecting claimed efficiencies, consisting of a report by Andrew C. Harington of the Brattle Group and a report by Yair Eilat et al. of the firm Compass Lexecon. The report drafted by Mr. Harington noted that he was instructed to assess a full block as well as

⁹ Exhibit 12 - Executed Timing Agreement (September 21, 2021).

PUBLIC

scenarios relating to a divestiture order with respect to Shaw's wireless business.

- d. On November 22, 2021, the Bureau issued a request for information ("RFI") to the Respondents pursuant to paragraph 9 of the ETA. RFI responses were ultimately provided by the parties to the Bureau in several stages over the period March 4-17, 2022, and efficiencies examinations were held under para. 10 of the ETA on April 19-20, 2022.
 - e. On February 8, 2022 the Bureau sent a letter detailing its updated quantification of anticompetitive effects, identifying the remedy required, and providing its views on the substantiation of efficiencies pursuant to para. 11 of the ETA. The letter is attached as Exhibit 13.¹⁰
12. On March 25 and April 11, 2022, respectively the Respondents advised that they had [REDACTED] to sell Freedom Mobile Inc. to [REDACTED]. [REDACTED] provided the Bureau with copies of same and other material, and sought the Bureau's feedback on these proposed remedies.
 13. On April 27, 2022, a meeting took place in which the Bureau provided the parties an update addressing the matters in para. 11 of the ETA as well as feedback on the remedy proposals, indicating that [REDACTED] eliminated the Bureau's concerns in terms of impact of the proposed transaction on competition and that the Bureau's staff had recommended to the Commissioner that an application be filed with the Competition Tribunal.
 14. On April 29, 2022, a without prejudice meeting took place pursuant to para. 11 of the ETA, attended by the Commissioner and representatives of the parties.

¹⁰ Exhibit 13: Letter from the Competition Bureau to the Respondents (February 8, 2022).

PUBLIC

15. As of the date of this affidavit, the Bureau case team has conducted approximately 112 meetings with market contacts. Market contacts include customers, competitors, industry associations and consumer groups, among others.
16. My statements in this affidavit are informed by materials from the Commissioner's review of the Proposed Transaction, including:
 - a. the ARC Request, pre-merger notification filings and submissions provided by the Respondents described above;
 - b. the documents and information provided by the Respondents in response to the SIRs;
 - c. an analysis of the records and information provided to the Bureau by third parties pursuant to the orders under section 11 of the Act described above;
 - d. meetings with market contacts described above;
 - e. an analysis of documents and information voluntarily provided to the Bureau by third parties, including market participants;
 - f. public documents such as decisions and publications of Innovation, Science and Economic Development Canada, the title given to the Department of Industry ("ISED"), and the Canadian Radio-television and Telecommunications Commission (the "CRTC");
17. The documents attached as exhibits to this affidavit which are identified with a document number starting with the prefix "ROG" or "SJR-CCB" came from the possession, custody, or control of Rogers and Shaw, respectively. The Respondents certified that the information provided in response to the SIRs was correct and complete in all material respects and that the records supplied are certified true copies of the original records.¹¹

¹¹ Exhibit 9: Rogers SIR Certificate; Exhibit 10: Shaw SIR Certificate.

PUBLIC

18. The documents attached as exhibits to this affidavit which are identified with a document number starting with the prefix “RFI” came from the possession, custody, or control of Rogers or Shaw in response to requests for information by the Bureau.
19. Based on the sources of information described above, I prepared the glossary, included as Appendix A of this affidavit, which sets out what I understand to be the meaning of acronyms and industry terminology used in the documents referred to herein. Where a term in the glossary is used, I also include my understanding of its meaning in square brackets in the body of the text.
20. In the course of preparing this affidavit I have examined and have relied upon certain screen shots taken from the internet and provided to me by Kevin McWhinnie, Mathew McCarthy and Eric Widdowson, who are all employed by the Bureau as Competition Law Officers, and who have obtained this evidence in the course of their duties in examining this matter. I have discussed the circumstances of collection of same with them and the officers have confirmed that each screenshot is a copy of their screen as they visited the relevant website. As such I verily believe those screenshots to have been accurately obtained from the sources identified and where such information is relied on below in this affidavit, it is identified.

IV. INDUSTRY BACKGROUND

21. In 1983, Canada’s Department of Communications first issued licenses for mobile telephony when it awarded two cellular licenses, as shown in an Industry Canada document titled “A Brief History of Cellular and PCS Licensing”, attached as Exhibit 14.¹² Bell Canada was one such telecommunications licensee as shown in Telecom Decision CRTC 86-7 dated March 26, 1986, attached as Exhibit 15;¹³ Cantel Inc., (now Rogers Wireless Inc.) the other.¹⁴

¹² Exhibit 14: Industry Canada, “A Brief History of Cellular and PCS Licensing” (2004) at 1.

¹³ Exhibit 15: “Telecom Decision CRTC 86-7” (March 26, 1986).

¹⁴ Exhibit 14: Industry Canada, “A Brief History of Cellular and PCS Licensing” (2004) at 1.

PUBLIC

PUBLIC

CT-2021-

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the proposed acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an interim order pursuant to section 104 of the *Competition Act*;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

**SECURE ENERGY SERVICES INC.
TERVITA CORPORATION**

Respondents

**AFFIDAVIT OF ANDREW KELLY
(AFFIRMED JUNE 29 2021)**

PUBLIC

I, Andrew Kelly, a Senior Competition Law Officer with the Competition Bureau (the “**Bureau**”), of the City of Ottawa, in the Province of Ontario, **AFFIRM AND SAY AS FOLLOWS**:

1. I make this affidavit in support of the Commissioner of Competition’s (the “**Commissioner**”) application for an Interim Order pursuant to section 104 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended (the “**Act**”).
2. I have been employed as a Competition Law Officer with the Competition Bureau (the “**Bureau**”) since July 2014. During this time I have been involved in the review of mergers and proposed mergers to determine whether such transactions prevent or lessen or are likely to prevent or lessen competition substantially.
3. I am the lead officer on a case team working on a review of the proposed acquisition of Tervita Corporation (“**Tervita**”) by Secure Energy Services Inc. (“**Secure**”) (the “**Proposed Transaction**”). I, therefore, in my capacity as lead officer, have personal knowledge of the matters to which I hereinafter depose.
4. The Commissioner’s Notice of Application pursuant to section 92 of the Act (the “**92 Application**”) has been filed with the Competition Tribunal (the “**Tribunal**”). The Statement of Grounds and Material Facts in the 92 Application sets out the material facts for the Commissioner’s Application for an Interim Order. Unless otherwise specified, defined terms I use in my affidavit have the same meaning as terms defined in the 92 Application.

I. OVERVIEW

5. I begin by describing the Respondents and the Proposed Transaction which is the subject of the 92 Application, and the information collected during the Bureau’s review. I then describe the information from that review which indicates the product and geographic markets at issue in the 92 Application along with information collected on market shares.

PUBLIC

6. I touch briefly on information collected showing that the barriers to providing Waste Services are high. In the next section, I describe the information collected demonstrating the intense competitive rivalry between Secure and Tervita which will be eliminated as a result of the Proposed Transaction. I next describe the information collected showing that self-supply by oil and gas companies of Waste Services would not likely constrain an exercise of market power by Secure if it acquires Tervita. Finally, I describe the information collected which indicates that the Respondents bundle the provision of Waste Services with Environmental Services.

II. THE PARTIES

7. The Applicant, the Commissioner, is responsible for the administration and enforcement of the Act.
8. Secure is a publicly traded company headquartered in Calgary, Alberta and listed on the Toronto Stock Exchange (“**TSX**”). Secure owns and operates 18 full service terminals (“**FSTs**”), 6 landfills (as well as one it does not own but operates under contract), and 15 standalone water disposal wells in the WCSB. Secure also owns and operates assets in North Dakota. All of Secure’s FSTs, with the exception of Kakwa, are connected to a Class 1B Disposal Well for the disposal of produced and waste water. A copy of Secure’s Annual Information Form (“**AIF**”) for the year ended December 31, 2020 is attached to my affidavit as Exhibit 1.
9. Tervita is a publicly held company based in Calgary, Alberta. Its common shares are listed on the TSX. Tervita owns and operates 44 Treatment, Recovery and Disposal facilities (“**TRDs**”, which are functionally equivalent to Secure’s FSTs), 22 landfills (18 of which are owned sites, one of which is operated under contract, and three that Tervita markets under contract for other landfill operators), 3 cavern disposal facilities, and 8 standalone water disposal wells in the WCSB. A copy of Tervita’s 2020 Annual Report is attached to my affidavit as Exhibit 2.

PUBLIC

10. Tervita created a document that is a map of the facility locations of Secure, Tervita and other competitors that provide certain Waste Services. This map was sent via an e-mail on February 26, 2021 by Anil Aggarwala, Director Treasury and Investor Relations at Tervita, to [REDACTED]
[REDACTED] The email and the attached map are attached to my affidavit as Exhibit 3.

III. THE PROPOSED TRANSACTION

11. Pursuant to an Arrangement Agreement, dated March 8, 2021, Secure and Tervita will carry out an all-share transaction via a Plan of Arrangement. Under the Plan of Arrangement, Secure will acquire all of the issued and outstanding shares of Tervita. Upon completion of the transaction, Secure and Tervita shareholders will own approximately 52% and 48%, respectively, of the combined entity. A copy of the Arrangement Agreement is attached to my affidavit as Exhibit 4.

IV. THE BUREAU'S REVIEW OF THE PROPOSED TRANSACTION

12. On March 12, 2021, the Respondents submitted a request for an advance ruling certificate and pre-merger notification filing pursuant to Part IX of the Act in respect of the Proposed Transaction (the "**ARC Request**"). The ARC Request is attached as Exhibit 5 to my affidavit. Secure's Pre-Merger Notification Filing and Tervita's Pre-Merger Notification Form are also attached as Exhibit 6 and Exhibit 7, respectively, to my affidavit.
13. On March 30, 2021, the case team had a meeting via video-conference with the Respondents. At that meeting the Respondents presented a deck which is attached to my affidavit as Exhibit 8.
14. On April 9, 2021, the Commissioner issued a Supplementary Information Request ("**SIR**") to each Respondent.

PUBLIC

15. On May 28, 2021, the Commissioner commenced an inquiry pursuant to section 10 of the Act.
16. On May 31, 2021, the Respondents certified responses to the SIRs after providing the Bureau with approximately 396,000 documents. Tervita provided over 258,000 records while Secure provided over 138,000 records.
17. As of the date of this affidavit, the case team has conducted approximately 65 meetings with market contacts. Market contacts have included calls with 24 oil and gas producers, 6 provincial regulatory bodies, 17 operators of potentially competitive waste facilities, 7 Environmental Services companies, and 4 trucking companies. Many of these market contacts have indicated concerns that the Proposed Transaction removes one of the few competitive options for the purchase of Waste Services.
18. In certain parts of the WCSB, oil and gas producers will be left with no viable alternatives for the disposal of certain waste streams if Secure is permitted to acquire Tervita and shutters facilities. The majority of oil and gas firms in Canada are small businesses according to an analysis conducted by the Canadian Energy Centre attached to my affidavit as Exhibit 9.
19. For some market contacts, an e-mail was sent to the market contact outlining the facts the case team learned during the call. The market contact was asked whether the case team had accurately captured the facts and provided an opportunity to provide corrections or clarifications. A copy of these e-mail exchanges with each contact who confirmed or clarified the facts are attached to my affidavit as Exhibit 10. Where the team was unable to confirm the facts learned I have attached the notes from our calls as Exhibit 11 and any unanswered confirmation e-mails as Exhibit 12 to my affidavit.
20. With the SIR productions, the Respondents provided 14 letters from 13 oil and gas producers in support of the Proposed Transaction. The letters are attached to my affidavit as Exhibit 13. The letters are brief and, aside from non-specific references

PUBLIC

to efficiencies, do not provide facts that can be used to analyze the competitive impact of the Proposed Transaction. It appears that Secure's CEO actively solicited at least some of these letters as can be seen by the e-mail from René Amirault to [REDACTED] on March 29, 2021 attached to my affidavit as Exhibit 14.

21. By the time the Respondents provided the case team with these letters, the case team had conducted market contacts with 6 of the oil and gas producers who had provided letters of support. We subsequently contacted the other seven producers. [REDACTED] did not respond to our request to speak with them. My e-mail to [REDACTED] asking to speak with them is attached to my affidavit as Exhibit 15. Of the 13 oil and gas companies that wrote letters of support, seven subsequently described specific concerns about the impact on competition caused by the Proposed Transaction.
22. On June 3, 2021, Secure provided a submission regarding efficiencies. The report without its appendices is attached to my affidavit as Exhibit 16.
23. On June 23, 2021, the case team met via videoconference with the Respondents summarizing our analysis of the review and feedback on a without prejudice remedy proposal received on May 28, 2021. At the end of the meeting, counsel to the Commissioner asked for the parties' intentions with respect to closing the Proposed Transaction. Respondents' counsel said they would get back to us on that and requested a meeting with the Commissioner.
24. On June 24, 2021, we learned from a market contact who had recently spoken with a Tervita employee that Tervita had informed its employees that the Bureau's review was finished and that integration of the two companies would start on July 1, 2021. As a result, counsel to the Commissioner sent an email to the Respondents attached to my affidavit as Exhibit 17. Respondents' counsel's response on June 25, 2021, is attached to my affidavit as Exhibit 18.

PUBLIC

25. On June 25, 2021, counsel to the Respondents sent a letter attaching the 14 letters of support plus 15 additional letters of support from industry participants. This letter is attached as Exhibit 19. These letters of support were not produced in the Respondents' SIR productions. Like the letters of support discussed above, the letters are brief and, aside from non-specific references to efficiencies, do not provide facts that can be used to analyze the competitive impact of the Proposed Transaction.
26. On June 28, 2021, the Respondents met with the Commissioner by video conference. The Respondents provided their notice of intention to close by email at 11:15 pm that night.
27. On June 29, 2021, counsel to the Commissioner responded to the letter from Respondent's counsel dated June 25, 2021 described in paragraph 24 above. The letter is attached to my affidavit as Exhibit 20.
28. The Commissioner filed the 92 Application on June 29, 2021.
29. The Bureau's review of the Proposed Transaction, which informs my statements below, has included:
 - a. The ARC Request, pre-merger notification filings and submissions provided by the Respondents described above;
 - b. The documents and information provided by the Respondents in response to the SIRs;
 - c. Market contacts described above;
 - d. An analysis of documents and information voluntarily provided to the Bureau by various third parties, including market participants;
 - e. Material received from the Respondents from previous investigations, described in paragraphs 76 - 107 in more detail; and
 - f. The expert opinion evidence of Dr. Nathan Miller, which is filed in support of the Commissioner's application for an interim order pursuant to section 104 of the Act.

PUBLIC

PUBLIC

0016

Court File No.: CV-10-8993-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

CHATR WIRELESS INC.

and

ROGERS COMMUNICATIONS INC.

Respondents

**APPLICATION UNDER Section 74.1(1) of the *Competition Act*,
R.S.C. 1985, c. C-34, as amended and Rule 14.05(2) of the
*Rules of Civil Procedure***

AFFIDAVIT OF ANDREW McALPINE

I, Andrew McAlpine, of the City of Ottawa, in the Province of Ontario, MAKE OATH

AND SAY:

1. I am employed as a Senior Competition Law Officer with the Fair Business Practices Branch of the Competition Bureau (the "Bureau"). I am responsible for managing a team of case officers working on an inquiry into certain marketing practices of Chatr Wireless Inc. ("Chatr") and Rogers Communications Inc. ("Rogers") commenced by the Commissioner of Competition

(the "Commissioner") pursuant to section 10 of the *Competition Act* (the "Act") on September 27, 2010 (the "Inquiry"). As such, I have knowledge of the matters to which I hereinafter depose. Where the information I have set out is based on knowledge I have acquired from others, I have stated the source of that information and believe it to be true.

Personal Background

2. I have an Honours Bachelor of Arts degree in Economics from Carleton University and have been employed by the Bureau for 30 years. During this time, I have worked as an investigator on various types of cases in the Bureau, including conspiracy, abuse of dominance and deceptive business practices. Since 1997, I have been a Senior Competition Law Officer in the Fair Business Practices Branch and have been responsible for conducting numerous investigations under the deceptive marketing practices provisions of the Act. I have also held the position of Acting Assistant Deputy Commissioner in the Fair Business Practices Branch.

The Wireless Telecommunications Industry in Canada

3. Prior to the Auction of Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range (the "Spectrum Auction") in 2008, the Canadian wireless telecommunications industry was comprised of a small number of large players. Three national wireless service providers, Rogers, Bell Canada Enterprises Inc., and Telus Communications Co. ("Telus"), accounted for roughly 94% of subscribers and 95% of revenue. Attached as **Exhibit "1"** to this Affidavit is a copy of a news release and backgrounder prepared by Industry Canada that provides these figures. According to this news release and backgrounder, there was a consistent view that, at least as of 2007, prices charged in Canada for high-use wireless packages and data (Internet) services were relatively high compared to prices charged in other countries.

4. According to the news release and backgrounder attached as **Exhibit "1"**, on November 28, 2007, the Minister of Industry announced details on how the Advanced Wireless Services ("AWS") spectrum auction was to be held. This auction commenced on May 27, 2008. Spectrum refers to a range of radio frequencies over which wireless phones operate. A 105 MHz (megahertz) band of spectrum was to be made available in the auction, with 40 MHz of the spectrum being set aside exclusively for new entrants (the "set-aside").

5. According to the news release and backgrounder attached as **Exhibit "1"**, the objective of the set-aside was to give new entrants the opportunity to acquire spectrum to enter the wireless market. This was intended to increase competition in the wireless and other telecommunications markets in Canada which, in turn, would lower prices paid by consumers, improve service, increase consumer choice, and promote innovation.

6. The Spectrum Auction ended on July 21, 2008, according to an Industry Canada news release and backgrounder dated the same day. Among the new entrants who successfully acquired spectrum in this auction were Globalive Wireless Management Corp., carrying on business as Wind ("Wind Mobile"); Public Mobile Inc. ("Public Mobile"), formerly a numbered company; Data & Audio-Visual Enterprises Wireless Inc., carrying on business as Mobilicity ("Mobilicity"); and Videotron Ltd. ("Videotron"), through its former parent 9193-2962 Quebec Inc. (collectively referred to here as the "new wireless carriers"). Attached as **Exhibit "2"** is a copy of the list of licence winners, as announced by Industry Canada.

7. Prior to August 2008, none of the new wireless carriers, with the exception of Videotron, provided wireless telecommunication services in Canada. Videotron had been a reseller of wireless services in Quebec. Attached at **Exhibit "3"** to this Affidavit is a copy of a

Quebecor press release dated September 20, 2005. Following the AWS auction in 2008, the new wireless carriers began offering wireless services across the country:

- (a) Wind Mobile, in Toronto, as of December 16, 2009; in Calgary, as of December 18, 2009; in Edmonton, as of February 25, 2010; in Ottawa, as of March 26, 2010; and in Vancouver, as of June 3, 2010;
- (b) Mobilicity, in Toronto, as of May 15, 2010; in Edmonton, as of November 17, 2010; in Vancouver, as of November 18, 2010; and in Ottawa, as of November 19, 2010;
- (c) Public Mobile, in the Toronto area, as of May 26, 2010, and in the Montreal area, as of June 25, 2010; and
- (d) Videotron, on its own spectrum, in the Province of Quebec, as of September 9, 2010.

Rogers

8. Rogers is incorporated under the laws of British Columbia. Its registered office is located at 333 Bloor Street East, 10th Floor, Toronto, Ontario, M4W 1G9. Attached as **Exhibit "4"** is a true copy of the Corporate Profile Report, issued on November 10, 2010, obtained from BC Registry Services.

9. According to Rogers' *2010 Annual Report*, attached as **Exhibit "5"**, Rogers provided wireless communications service to approximately 9 million subscribers in 2010 (page 24), representing 36% of Canadian wireless subscribers (page 24). Rogers' wireless operating

revenue in 2010 was \$6.968 billion (page 22). Its adjusted wireless operating profit margin as a percentage of network revenue was 48.2% (page 26).

Rogers Creates the Chatr Brand

10. Chatr was incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, as 2217851 Ontario Inc. on September 16, 2009, and amended its corporate name to Chatr Wireless Inc. on July 5, 2010. Chatr's registered office is located at 181 Bay Street, Toronto, Ontario, M5J 2T7. Attached as **Exhibit "6"** is a true copy of the Corporate Profile Report obtained from the Ontario Ministry of Government Services on September 7, 2010.

11. On June 30, 2010, Rogers issued a press release introducing the Chatr brand. According to the press release, Chatr was to be a third brand of wireless services that would exist alongside Rogers' two existing wireless telecommunications services brands, Rogers and Fido. The press release indicated that Chatr would offer voice and text services only. Attached as **Exhibit "7"** is a copy of that press release.

12. According to Arnold Abramowitz, Vice President Wireless, Access Engineering and Operations at Rogers, Chatr is a division and a subsidiary of Rogers. This statement can be found at paragraph 4 of the affidavit of Arnold Abramowitz, sworn March 30, 2011, for use on a motion heard April 28, 2011, by the Commissioner for a Confidentiality Order.

13. According to Mr. Abramowitz, "...Chatr is a wholly owned part of Rogers" and "Chatr Wireless Inc. is supported on the same network." These statements can be found at lines 18-19 on page 8 and at lines 13-14 on page 4, respectively, of the transcript of the cross-examination of Arnold Abramowitz on his affidavit of March 30, 2011. This transcript is attached as **Exhibit "8"**.

14. According to a document called *Wireless Network Benchmarking – Rogers Network* dated September 15, 2010, which was voluntarily provided to the Bureau by Rogers, Chatr operates on Rogers' 2G network. A true copy of this document is attached as **Exhibit "9"**.

15. Chatr launched its services in Vancouver, Calgary, Edmonton, Toronto, and Ottawa on July 28, 2010. Attached as **Exhibit "10"** is a copy of the July 28, 2010 press release announcing the launch in these cities.

16. Chatr launched its services in Montreal on September 16, 2010. Attached as **Exhibit "11"** is a copy of Rogers' September 8, 2010 press release announcing this launch. For the purposes of this affidavit, the "relevant cities" are Vancouver, Calgary, Edmonton, Toronto, Ottawa and Montreal.

Complaints and Preliminary Examination by the Bureau

17. In August 2010, the Bureau began receiving complaints about certain marketing practices of Chatr, including a complaint made by Wind on August 24, 2010. The complaints alleged that the representations being made by Chatr, being that Chatr provides "fewer dropped calls than new wireless carriers", were false or misleading. A dropped call is a voice communication on a wireless network that is terminated as a result of a cause other than the deliberate termination of the call by one of the participants to the communication.

18. On September 2, 2010, the Bureau commenced an examination into this matter to determine whether these representations raised an issue under the deceptive marketing practices provisions of the Act. I am the Senior Competition Law Officer assigned to this matter. The examination focused on whether the representations were reviewable under paragraph 74.01(1)(a) of the Act, which prohibits making representations to the public that are false or

misleading in a material respect, for the purpose of promoting, directly or indirectly, any business interest, and under paragraph 74.01(1)(b) of the Act, which prohibits making representations to the public in the form of a statement, warranty or guarantee of the performance of a product that is not based on an adequate and proper test, the proof of which lies on the person making the representation. Subsection 74.03(5) of the Act specifies that both the literal meaning of representations and the general impression conveyed by the representations must be considered when determining whether the representations constitute reviewable conduct.

19. In the course of the Bureau's examination, I have reviewed the Bureau's enforcement policies relating to comparative advertising. The Bureau's online publication entitled "False or Misleading Representations", found on the Bureau's website under the heading *Ensuring Truth in Advertising*, states in section 2.2.1 that "[c]omparative data should not be used to imply the general superiority of a product unless such a claim is valid over a comprehensive range of normal conditions of use. If the superiority of the product is limited to a certain range of conditions, then any superiority claim should be clearly qualified to reflect that range." A copy of this policy is attached as Exhibit "12".

20. I have also reviewed policies and regulations of other government and self-regulated bodies that have adopted rules to regulate comparative advertising. I found that many of these rules specifically require that, when superiority claims are based on specific comparative differences between two competing products, the advertised differences must be "significant" or "discernible" to the consumer. For example:

- (a) Advertising Standards Canada's *Guidelines for the Use of Comparative Advertising* provide in section 3.1 that "...it would not meet the standard (...)

to suggest that a competitor's product is significantly smaller or less substantial when the difference is barely discernible to consumers." A copy of these guidelines is attached as **Exhibit "13"**;

(b) The Canadian Marketing Association's *Code of Ethics and Standards of Practice* states in section I12 that "[m]arketing communications should not stress insignificant differences designed to lead the consumer or business to draw a false conclusion." A copy of this code is attached as **Exhibit "14"**; and

(c) In the United Kingdom, the Advertising Standards Authority (the "ASA") enforces the *UK Code of Broadcast Advertising*, which states: "[t]he ASA will consider unqualified superlative claims as comparative claims against all competing products or services", and that "[t]he elements of the comparison must not be selected to give the advertiser an unrepresentative advantage." A copy of Section 3 of this code titled "Misleading advertising" is attached as **Exhibit "15"**.

21. I have also reviewed the Bureau's enforcement policies relating to performance claims. The Bureau's online publication entitled "Performance Representations not Based on Adequate and Proper Tests", found on the Bureau's website under the heading *Ensuring Truth in Advertising*, explains that "[t]he phrase 'adequate and proper test' has not been defined by the legislation in order to preserve flexibility in an increasingly complex and highly technical field of expertise." However, this policy provides the following guidelines:

The test must have been concluded before the representation is made. In other words, a subsequent substantiating test would not exempt an advertiser from liability under this provision.

...

If the performance claim is broad, the existence of adequate and proper test relevant to only one portion of the claim or under only one condition of use is insufficient.

...

Results must not only be significant but must be meaningful. For example, a representation that an air conditioner is quieter than another brand, where the difference cannot be detected by the human ear, should not be used.

A copy of this policy is attached as Exhibit "16".

Representations Made by Chatr to the Public

22. Chatr has made two different types of representations to the public, in both English and French, relating to dropped calls. Beginning with its launch on July 28, 2010, Chatr pursued a marketing campaign that included representations that Chatr offers its subscribers "fewer dropped calls than new wireless carriers" (the "Fewer Dropped Calls Representations"). Beginning on November 5, 2010, Chatr made representations that its subscribers have "no worries about dropped calls" (the "No Worries About Dropped Calls Representations").

23. The representations began on a nationwide basis on July 28, 2010, through social media and public relations channels. They were made through television, radio, digital, out-of-home, and print advertising, beginning on August 9, 2010, in Vancouver, Calgary, Edmonton, Toronto, Ottawa and in September 2010 in Montreal. Rogers provided information about its marketing campaign to the Bureau on September 21, 2010, in a document entitled *Additional Questions*

109. In November 2009, the British Columbia Supreme Court issued an injunction restraining Rogers from publishing or distributing advertising materials stating that Rogers provides “Canada’s Most Reliable Network” or from making other claims that create the impression that Rogers can provide more reliable wireless services. The application was founded on an allegation by Telus that Rogers had breached subsection 52(1) of the Act by representing in its wireless telecommunications advertising that Rogers provides Canada’s fastest and most reliable network. The Court concluded (at paragraph 39) that “Telus in fact has a very strong case against Rogers based on the allegation that Rogers has knowingly made a representation to the public that is misleading in a material respect.” The British Columbia Court of Appeal dismissed Rogers’ appeal. Copies of these decisions are attached as **Exhibit “69”**.

110. In May 2010, the New Brunswick Court of Queen’s Bench issued an injunction restraining Rogers from advertising itself as the fastest and most reliable internet service provider. The New Brunswick Court of Appeal dismissed Rogers’ application for leave to appeal. Copies of these decisions are attached as **Exhibit “70”**.

Conclusion

111. Since Chatr launched its wireless services, Rogers and Chatr have engaged in advertising campaigns that claim, or create the general impression, that new wireless carriers have higher dropped call rates than Chatr and that new wireless carriers have significant dropped call rates.

112. In fact, data showing actual dropped call rates shows that Chatr’s claims are false and misleading in both respects: Chatr’s claims about having fewer dropped calls than new wireless carriers are strictly false in Ottawa, Montreal, Toronto, and Edmonton on a significant number of

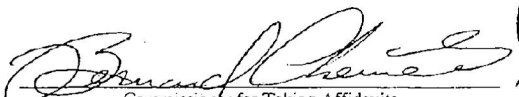
days; moreover, Chatr's claims are misleading in conveying the impression that new wireless carriers have significantly more dropped calls than Chatr. Virtually all calls placed on the new wireless carriers' networks are successfully completed, and the difference in dropped call rates between Chatr and new wireless carriers is indiscernible.

113. At the time Chatr started making its Fewer Dropped Calls Representations, it did not possess any tests to support those representations in Edmonton or Calgary, and the tests it possessed for the Greater Toronto Area did not include results for one of the new wireless carriers.

114. In addition and in any event, it appears that the drive tests conducted by or on behalf of Chatr do not constitute adequate and proper tests on which to make a comparison between the dropped calls experienced by Chatr's subscribers and the new wireless carriers' subscribers, and on which to base its representations.

115. I make this affidavit for no improper purpose.

SWORN BEFORE ME at the City of •, in
the Province of • this ...^{1st}... day of
September, 2011

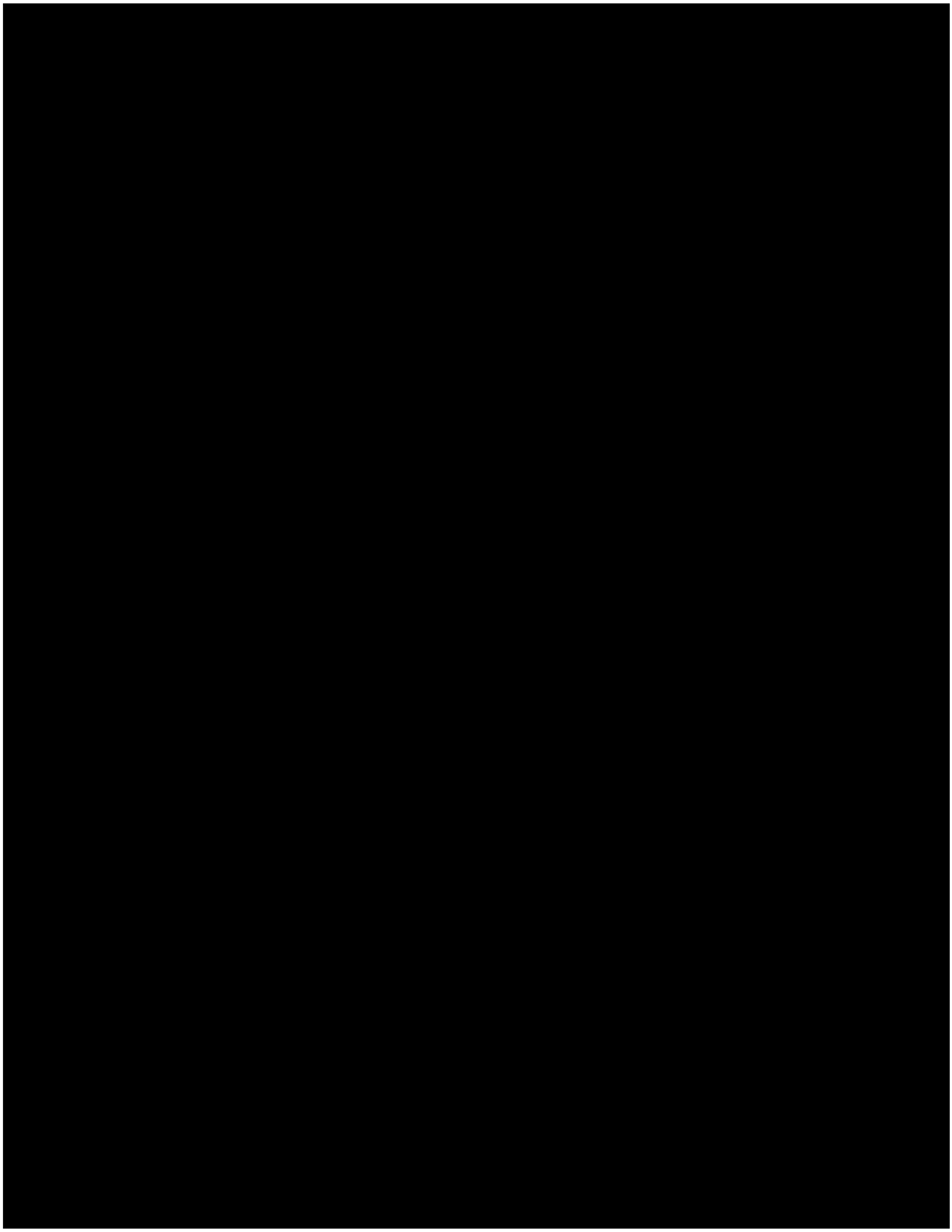

Commissioner for Taking Affidavits
(or as may be)

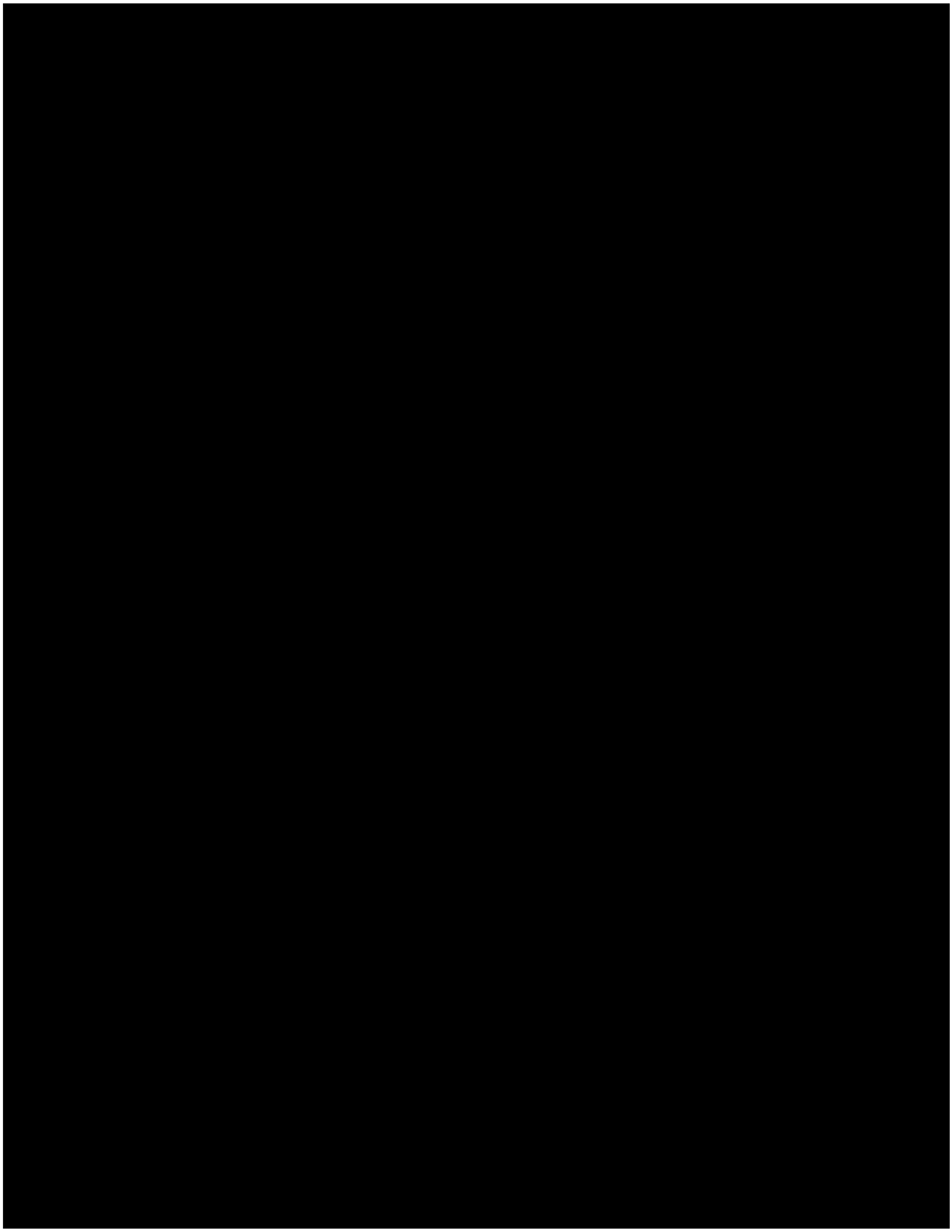

ANDREW McALPINE

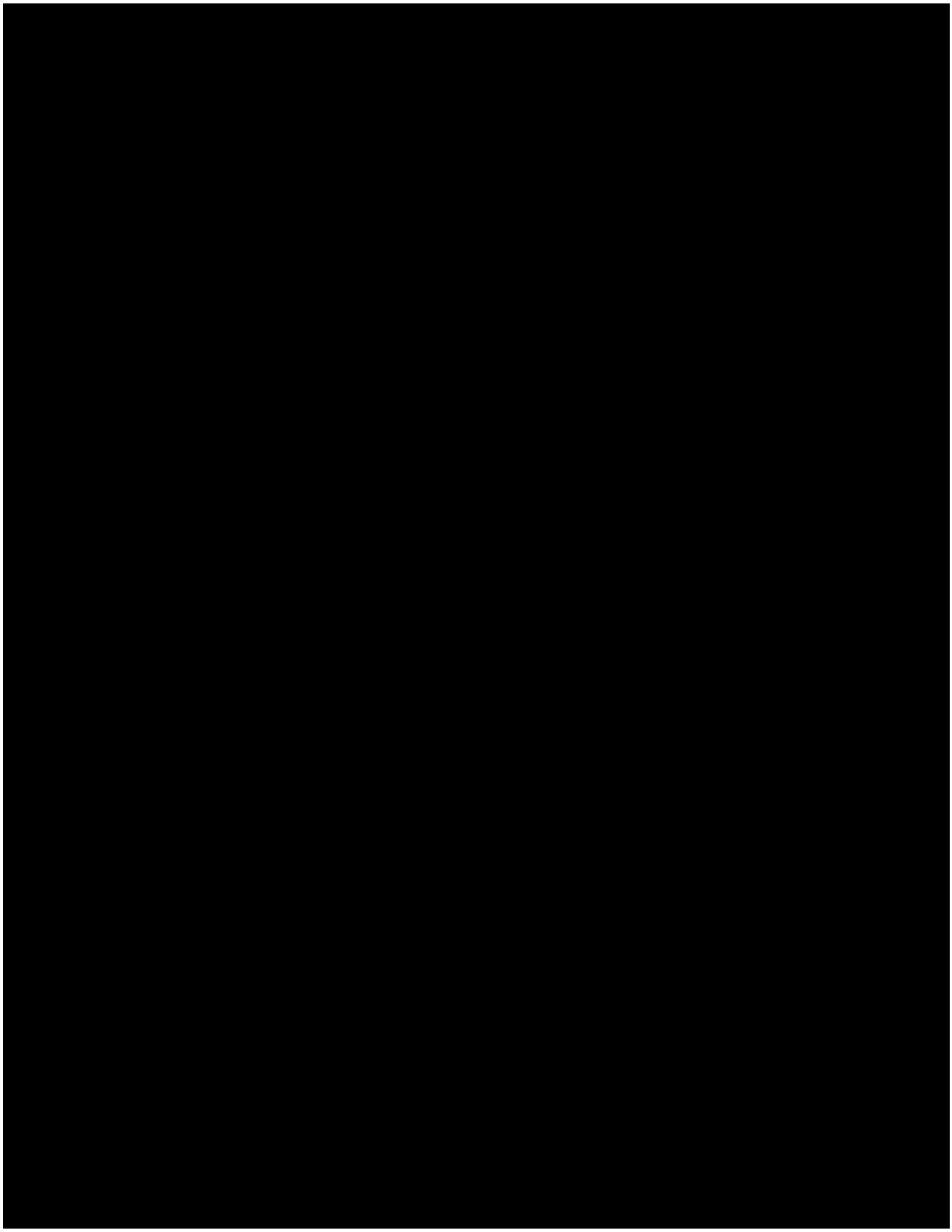
Bernard Chénier
Commissioner to take and administer
oaths in Canada. Commissaire pour recevoir
et administrer des serments au Canada.
P.C./C.P. 1992-1327

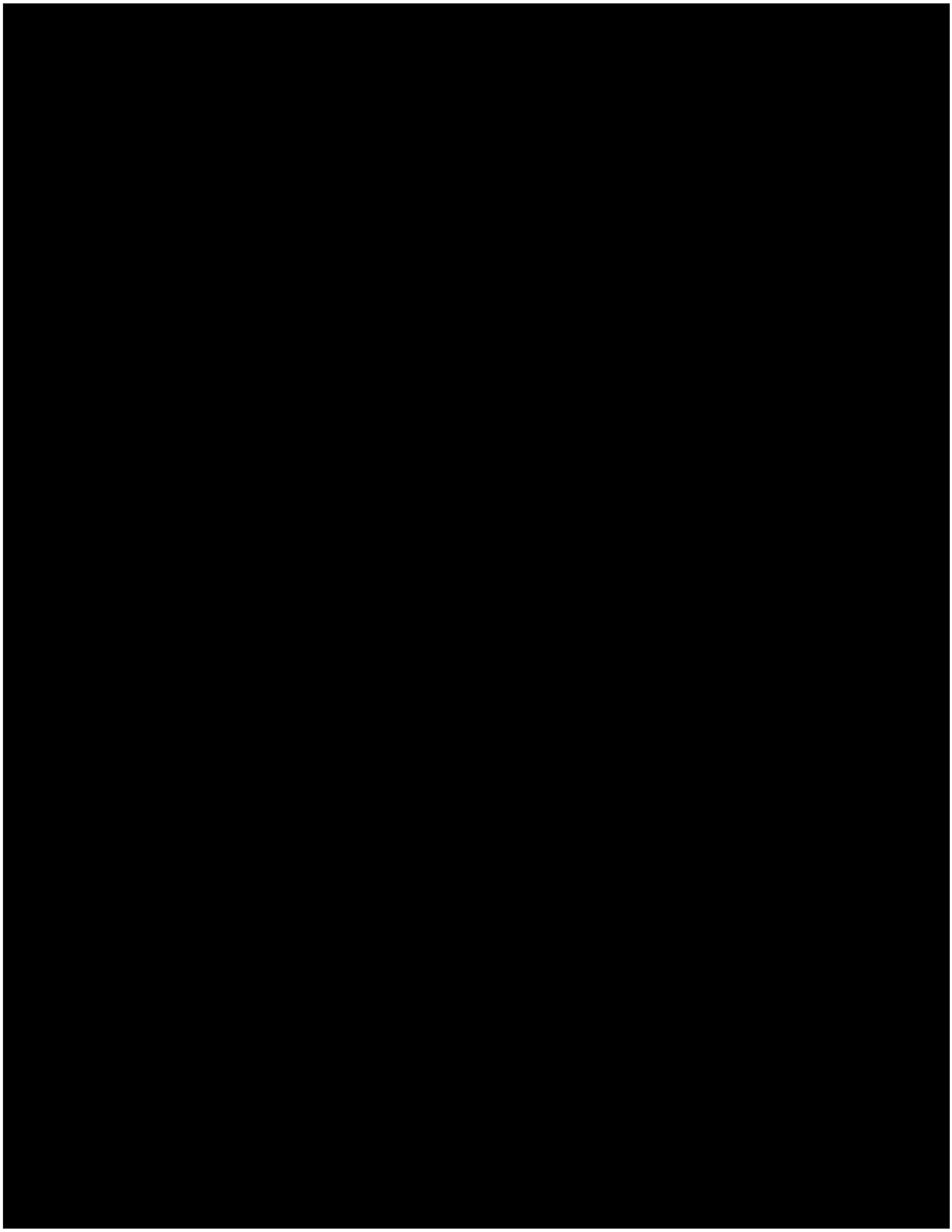
PUBLIC

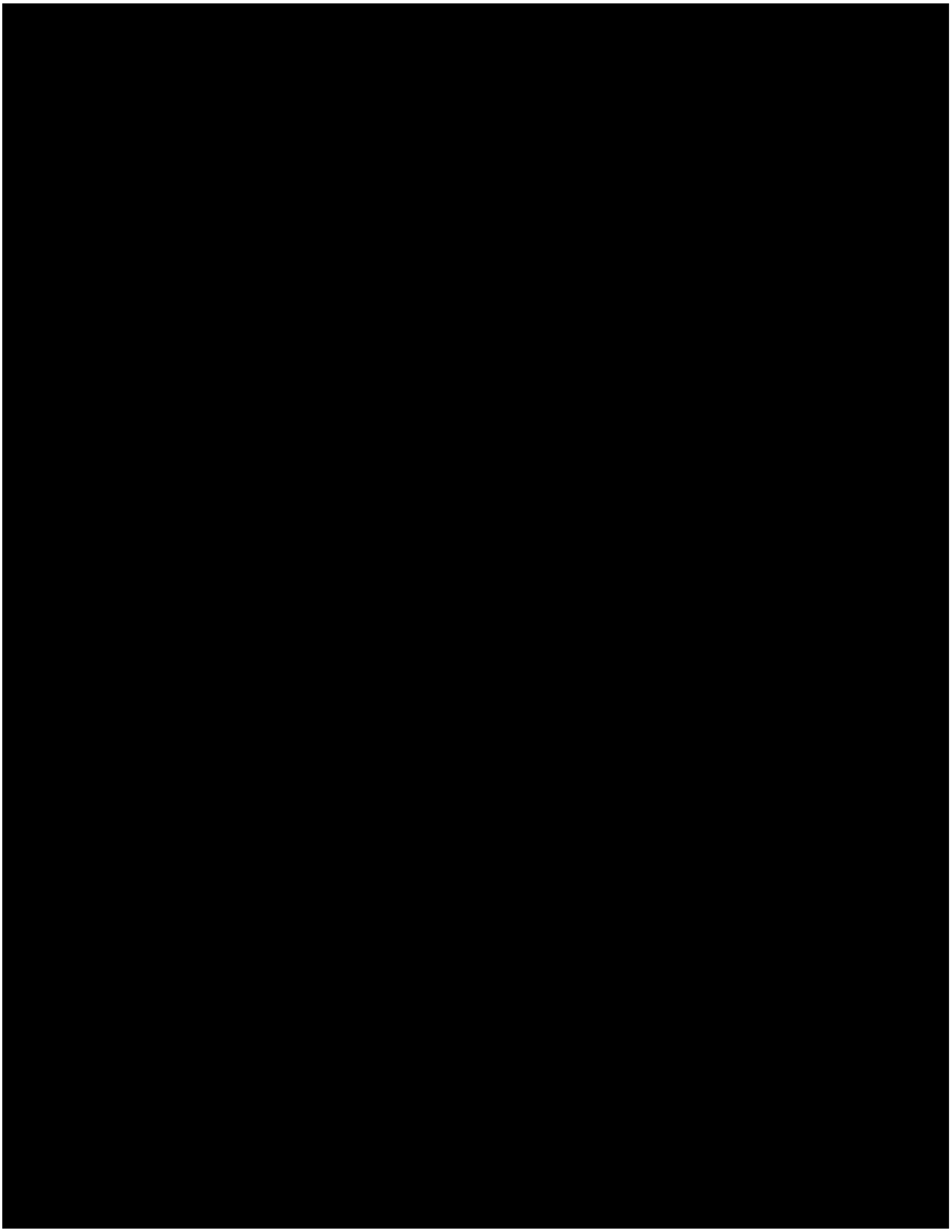
TAB 7

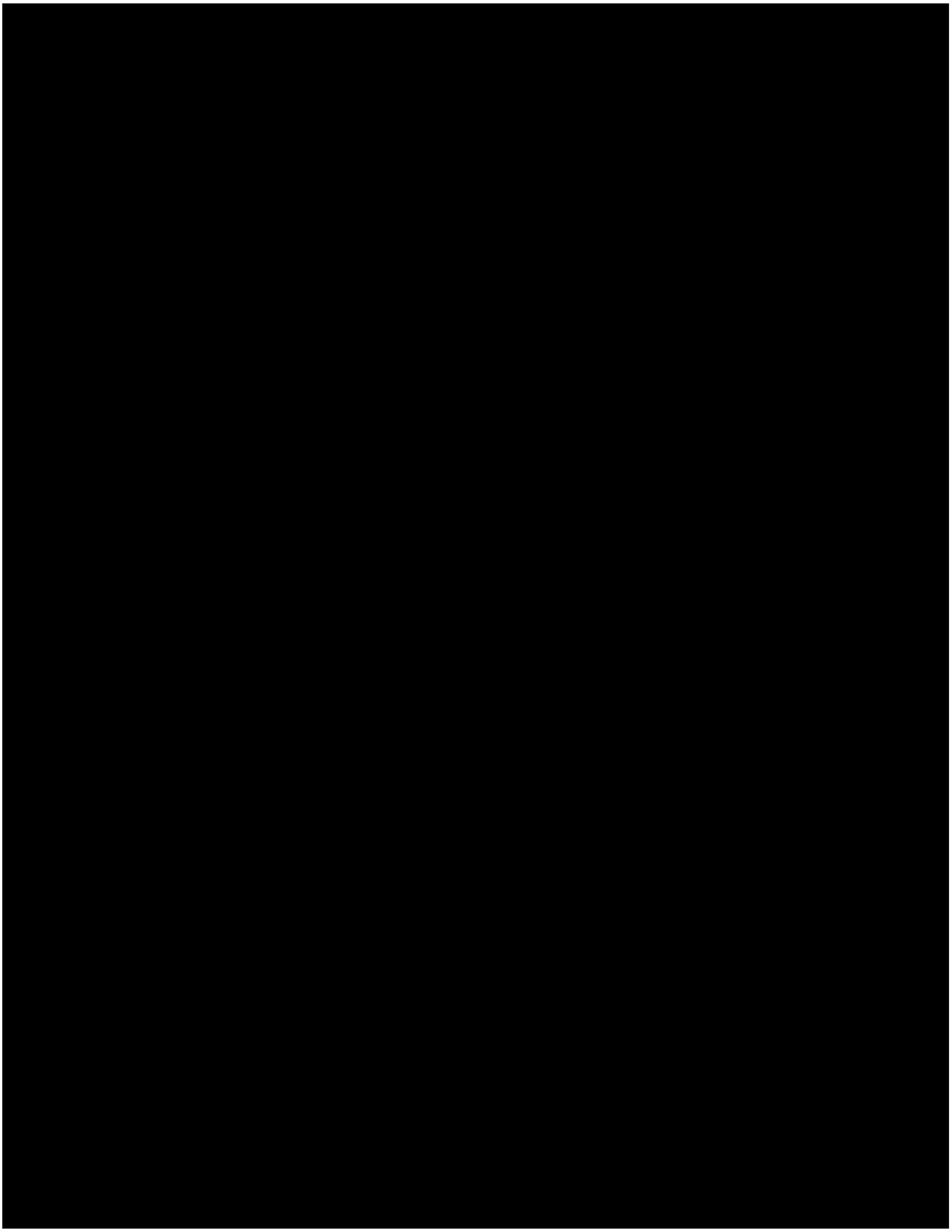


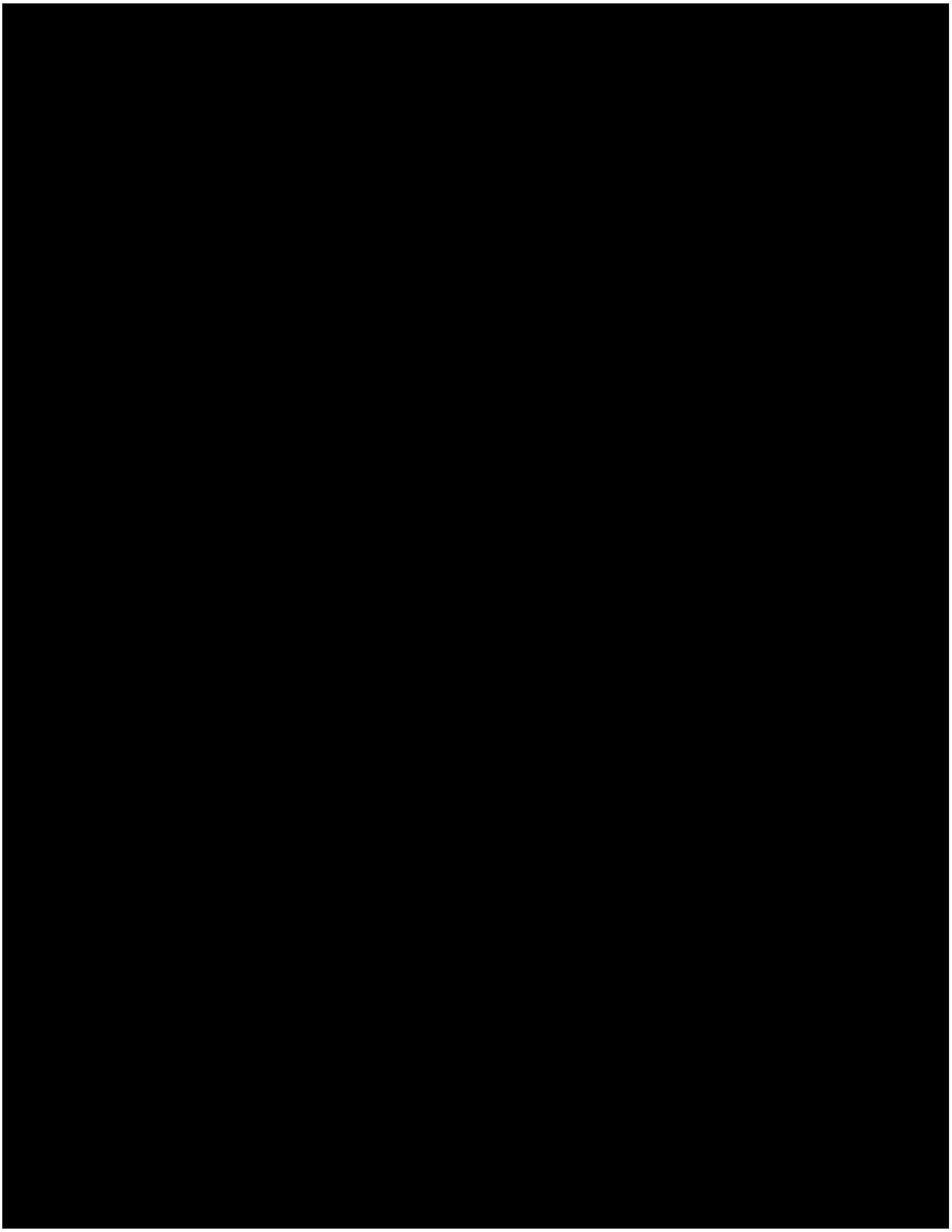












PUBLIC

TAB 8

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 11

File No.: CT-2024-012

Registry Document No.: 33

IN THE MATTER OF the *Competition Act*, RSC, 1985, c C-34 as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
(respondent)



Date of hearing by videoconference: July 14, 2025

Before: Madam Justice Jocelyne Gagné

Date of Reasons for Order and Order: August 11th, 2025

REASONS FOR ORDER AND ORDER PARTIALLY GRANTING A MOTION FOR ADDITIONAL PRODUCTION

I. OVERVIEW

[1] On March 26, 2025, the Tribunal issued a Scheduling Order directing the applicant, the Commissioner of Competition (“Commissioner”) and the respondent, Rogers Communications Inc. (“Rogers”), to provide the other party, by June 13, 2025, their affidavit of documents. On June 30, 2025, the parties requested, and the Tribunal granted, an extension to the deadline to file any motion arising from the affidavits of documents and/or productions, from June 30 to July 7, 2025.

[2] On July 7, 2025, Rogers filed an informal motion for an order to compel further documentary production from the Commissioner, that Rogers deems relevant. On July 10, 2025, the Commissioner opposed Rogers’ motion, and on July 11, 2025, Rogers filed a reply. The Tribunal heard the motion by videoconference on July 14, 2025.

II. THE NOTICE OF APPLICATION

[3] On December 23, 2024, the Commissioner filed a Notice of Application pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 (“Act”), alleging that Rogers has previously engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the Act.

[4] According to the Commissioner, Rogers misleads consumers by offering data plans that are said to be unlimited, but that, in fact, have limits. The Commissioner argues that by advertising limited data plans as if they were unlimited, Rogers has made and continues to make representations to the Canadian public that are false or misleading in a material respect for the purpose of promoting the supply or use of wireless telecommunication service and related products, and its business interests more generally (the “Impugned Representations”).

[5] The Commissioner seeks various forms of relief, including “a declaration that [Rogers] has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsections, 74.011(1) and 74.011(2) of the Act”; “an order prohibiting Rogers from engaging in the reviewable conduct or substantially similar reviewable conduct in Canada for a period of ten years from the date of such order”; “an order requiring Rogers to pay such an administrative monetary penalty as the Tribunal deems appropriate”, and “an order requiring Rogers to pay an amount, not exceeding the total amounts paid to Rogers for the products in respect of which the reviewable conduct was engaged in, to be distributed among those persons to whom the products were sold, in an amount and manner to be assessed by the Tribunal.”

III. DOCUMENT PRODUCTION

[6] Prior to the start of this proceeding and following an application by the Commissioner, the Federal Court issued an order on December 1, 2023, requiring Rogers to produce records and to provide written returns of information under paragraphs 11(1)(b) and (c) of the Act.

[7] Rogers now seeks an order to compel the Commissioner to produce the following two categories of records: (i) “All records related to the Commissioner’s consideration or investigation of telecommunications providers’ unlimited plan representations including prior to September 2021” (“Unlimited Plan Records”); and (ii) “All relevant records from Bell, Telus and any other

PUBLIC

third party received by the Bureau pursuant to any supplementary or voluntary information request or section 11 order related to their equivalent unlimited plans [...]” – including those obtained in the context of the Commissioner’s review and challenge of the Rogers/Shaw transaction (CT-2022-002) (“Third-Party Records”).

IV. ISSUES

[8] The present motion raises the following issues:

- (a) Are the two categories of records sought by Rogers relevant to the matters at issue in this proceeding?
- (b) If any such records are relevant, is Rogers’ request consistent with the principle of proportionality?

V. ANALYSIS

(1) **Unlimited Plan Records**

[9] Rogers seeks production of the Commissioner’s Unlimited Plan Records, including (i) the Commissioner’s analysis of other telecommunication providers’ unlimited plan representations; (ii) notes related to an internal conference call held on April 14, 2020 concerning unlimited plan representations; (iii) documents related to an alleged “pause” in the Commissioner’s review of unlimited plan representations across the industry between June 2020 and August 2021; and (iv) documents related to the Commissioner’s decision not to pursue other telecommunication providers with respect to their unlimited plan representations.

[10] Rogers argues that the documents it seeks are relevant to two parts of its defence as found in paragraphs 24 to 29 of its response to the Notice of Application. First, the Commissioner waited almost 4 years after Rogers started making the Impugned Representations before making Rogers aware of his concerns; and second, the Commissioner has unfairly targeted Rogers for conduct that is industry wide.

[11] According to Rogers, competing telecommunication providers advertise their unlimited plans in substantially the same way as Rogers does, and these similar representations are relevant to assessing consumer understanding in the wireless industry. Moreover, and in addition to competitors’ records being relevant to the Tribunal’s assessment of the Impugned Representations, not only has the Commissioner “improperly and unfairly singled out Rogers”, but Rogers argues that its offering in fact “spurred other major carriers to do the same, leading to a significant pro-consumer shift in the wireless industry.”

[12] In short, the Commissioner responds that the rationale or the motivation behind the timing of investigative steps, as well as Rogers’ claim that it was “unfairly targeted”, are irrelevant considerations. The Commissioner confirmed that he has produced “all the non-privileged evidence he has collected of unlimited representations made by other telecommunications companies” related to the present matter.

[13] The Tribunal agrees with the Commissioner.

PUBLIC

[14] As to the timelines of the Commissioner's investigation into Rogers' conduct and subsequent enforcement action, these issues are not part of the debate. There is no dispute that Rogers started making the Impugned Representations in 2019 and that it was not until 2023 that the Commissioner contacted Rogers with his concerns.

[15] In *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3, the respondents contended that an eight-year gap between a 2009 investigation and a 2017 application created an estoppel and should limit remedy. On discovery, Live Nation asked the Commissioner (i) why it took eight years to take enforcement action; and (ii) why the Commissioner did nothing with earlier complaints about Live Nation's conduct. The Tribunal refused to require the Commissioner to answer both questions for the following reason:

[18] What is relevant are the facts that the Commissioner apparently took eight years to raise the complaint with the Respondents and allegedly did not follow-up on complaints received in 2008, not the reasons or explanations behind those decisions of the Commissioner.

[16] The same can be said about the four year it took the Commissioner to advise Rogers of his concerns, after the launch of its unlimited plans. I agree with the Commissioner that while the legal significance of the timing can be debated at the hearing, the relevant dates that followed the launch of Rogers' unlimited plans, up until the filing of the Commissioner's application, are not in dispute.

[17] With respect to Rogers' allegation that it was improperly singled out, it is not a defence that is available in law. In *R v Miles of Music Ltd*, 74 OR (2d) 518, 1989 CanLII 255, a case that considered unfairness in abuse of process, the Ontario Court of Appeal found that:

It cannot be a defence to a speeding driver that the police did not prosecute all drivers who were speeding on the same highway at the same time. In any event, the absence of any evidence that, however prevalent the offensive practice may be, the police had reasonable grounds for prosecuting some other alleged offender, makes it impossible to say that the respondents were selected for prosecution on the basis of grounds relating to personal characteristics.

[18] The Act gives the Commissioner the power and discretion to investigate and enforce its provisions as it sees fit. It does not dictate how and when to do it, nor does it impose an industry wide approach to enforcement.

[19] Therefore, Rogers' requests for the Unlimited Plan Records, as defined in paragraph 9, is denied. The Unlimited Plan Records will not be produced.

[20] Given this conclusion, there is no need for the Tribunal to assess whether the request is consistent with the principle of proportionality.

(2) Third-Party Records

[21] Rogers also seeks production of Third-Party Records received by the Commissioner “pursuant to any supplementary or voluntary information request or section 11 order” since 2019, including in the context of the Rogers-Shaw matter (CT-2022-002). These include (i) marketing plans, reports, research and competitive assessment of unlimited wireless plans; (ii) assessment of the competitive impact of unlimited plans, and (iii) communications related to complaints regarding unlimited wireless plans.

[22] According to Rogers, given the nature of some specifications found in previous section 11 orders and in supplementary or voluntary information requests issued to various telecommunication providers, it is reasonable to expect that the Commissioner received records that are relevant to the present matter – especially since the Commissioner considers as an aggravating factor the fact that other providers such as Bell and Telus launched similar plans to Rogers.

[23] In response, the Commissioner’s position is essentially that such a request amounts to a disproportionate, “exorbitant” ask, while the odds that such an exercise yields any critical information are trivial.

[24] The Commissioner pleads at paragraph 46(f) of his Notice of Application that the launch by Bell and Telus of similar plans to Rogers’ is an aggravating factor. He also submits on this motion that other telecommunication providers “copied Rogers”. Through the material filed by the Commissioner in the present matter, Rogers was made aware that in the context of the review of the Rogers-Shaw transaction, the Commissioner gathered marketing documents from competing telecommunication providers, including about unlimited plans. Those documents informed the Commissioner’s inquiry, and the material that concerned Rogers has been produced in the present litigation as part of the Commissioner’s Notice of Application.

[25] Similar documents obtained from Bell and Telus through section 11 orders, also in the context of the review of the Roger-Shaw transaction, are similarly relevant for the following reasons:

1. They are likely to inform the Tribunal about consumer’s understanding and effect of the representations in the marketplace, and what Bell and Telus understood about the marketplace, including any market research they did about the plans;
2. They go to the Commissioner’s pleading of aggravating factors as pleaded in paragraph 46(f) of his Notice of Application.

[26] The Tribunal agrees with Rogers that records that may reveal whether competing telecommunication providers merely followed suit, or rather already planned to launch their own unlimited plan, are relevant to this issue.

[27] However, I do not find relevant the documents that may reveal whether other telecommunication providers unlimited plans were successful in attracting customers and reducing or eliminating any alleged “benefit” Rogers received from introducing its unlimited plans.

PUBLIC

[28] Turning to the question as to whether the production by the Commissioner of these records is consistent with the principle of proportionality (the main, if not only, basis for the Commissioner's position on this issue), the Tribunal considers that it is. Importantly, the Commissioner provided no evidence to sustain the allegation that to proceed with the production was overly burdensome. The Commissioner alleges that reviewing the Bell and Telus records for relevance to this Application would require reviewing over a million documents. In support of that allegation, the Commissioner refers the Tribunal to a 2023 affidavit sworn in a context of the section 11 application against Rogers whereby the affiant states that it took several months to review 22,000 records from the Rogers/Shaw Supplemental Information Request (RS SIR) for information that might overlap with the section 11 request. This evidence does not support the Commissioner's allegation in the present matter.

[29] In *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16, the Tribunal stated the following:

[35] I do not dispute that the proportionality rule applies to Tribunal proceedings. More specifically, on questions such as those raised in this Refusals Motion, the Tribunal must always take into account issues of proportionality (*The Commissioner of Competition v Reliance Comfort Limited Partnership*, 2014 Comp Trib 9 ("Reliance") at paras 25-27). However, the case law is clear: claims invoking the principle of proportionality must be supported by evidence (*Wesley First Nation (Stoney Nakoda First Nation) v Alberta*, 2013 ABQB 344 at paras 93-94; *Montana Band* at para 33). It is not sufficient to merely raise the argument that it would be too onerous to comply with a request to provide answers to questions on discovery. Some evidence must be offered to support the claim and to establish how a request could be disproportionate to its value.

[30] The Commissioner also alleges that the parties agreed that neither would be required to review or list the records produced in response to the RS SIR for relevance to this application. In support of that allegation, the Commissioner refers the Tribunal to his June 2025 affidavit of documents, where it is rather stated that this agreement covers the records produced by Rogers, not those produced by third parties such as Bell and Telus.

[31] I am therefore of the view that the Commissioner's argument on proportionality – or lack thereof – must fail.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[32] Rogers' motion for additional production is granted in part.

[33] The Commissioner is to file, and deliver to Rogers on or before August 18, 2025, a further affidavit of document inclusive of the following Third-Party Records:

- (a) Marketing plans, reports, research and competitive assessment of unlimited wireless plans;
- (b) Assessment of the competitive impact of unlimited plans (including Rogers); and

PUBLIC

(c) Communications related to complaints regarding unlimited wireless data plans.

[34] As success on this motion is divided, costs shall be in the cause.

DATED at Ottawa, this 11th day of August, 2025.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) Jocelyne Gagné

PUBLIC

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Irene Cybulsky
Kendra Wilson
Antoine Lippé

For the respondent:

Rogers Communications Inc.

Jonathan Lisus
Crawford Smith
John Carlo Mastrangelo
Joanna MacDonald
Brad Vermeersch
Anita Banicevic
Taraleigh Stevenson

PUBLIC

TAB 9

PUBLIC

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc.*,
2025 Comp Trib 21
File No.: CT-2024-012
Registry Document No.: 80

IN THE MATTER OF the *Competition Act*, RSC, 1985, c C-34 as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
(respondent)



Date of hearing by videoconference: October 17, 2025
Before: Madam Justice Jocelyne Gagné
Date of Reasons for Order and Order: November 7, 2025

AMENDED REASONS FOR ORDER AND ORDER PARTIALLY GRANTING ROGER'S MOTION TO AMEND ITS RESPONSE

I. OVERVIEW

[1] Rogers Communications Inc. brings this motion under rule 75(1) of the *Federal Court Rules*, SOR/98-106 [the FC Rules] for leave to amend its Response to the Notice of Application of the Commissioner of Competition. Rogers seeks to (i) bring a proposed constitutional challenge to section 74.1(1)(c)(ii) of the *Competition Act*, RSC 1985, c C-34 [the Act], along with proposed amendments relating to (ii) a defence of estoppel and waiver, (iii) an alleged breach of the deemed undertaking rule by the Commissioner, and (iv) some additional facts pertaining to the remedies sought in the Notice of Application. The Commissioner opposes these proposed amendments.

[2] Rogers is also seeking leave to make some minor corrections and revisions to its Response, which are not opposed by the Commissioner.

II. THE NOTICE OF APPLICATION

[3] On December 23, 2024, the Commissioner filed a Notice of Application pursuant to section 74.1 of the Act, alleging that Rogers has previously engaged in and continues to engage in reviewable conduct contrary to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the Act.

[4] According to the Commissioner, Rogers misleads consumers by offering data plans that are said to be unlimited, but that, in fact, have limits [Infinite plans]. The Commissioner argues that by advertising limited data plans as if they were unlimited, Rogers has made and continues to make representations to the Canadian public that are false or misleading in a material respect for the purpose of promoting the supply or use of wireless telecommunication services and related products, and its business interests more generally.

[5] The Commissioner seeks various forms of relief, including “a declaration that [Rogers] has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsections, 74.011(1) and 74.011(2) of the Act”; “an order prohibiting Rogers from engaging in the reviewable conduct or substantially similar reviewable conduct in Canada for a period of ten years from the date of such order”; “an order requiring Rogers to pay such an administrative monetary penalty as the Tribunal deems appropriate”, and “an order requiring Rogers to pay an amount, not exceeding the total amounts paid to Rogers for the products in respect of which the reviewable conduct was engaged in, to be distributed among those persons to whom the products were sold, in an amount and manner to be assessed by the Tribunal.”

III. PROCEDURAL BACKGROUND

[6] Rogers filed its Response on February 6, 2025, denying any false and misleading representations relating to its Infinite plans. The Commissioner filed a Reply to Rogers’ Response on February 20, 2025.

[7] The hearing is scheduled to commence on March 30, 2026. The Commissioner’s evidence is scheduled to be delivered January 9, 2026, and Rogers’ responding evidence is scheduled to be delivered February 18, 2026.

PUBLIC

[8] Examinations on discovery are ongoing and took place so far on August 27-29, 2025, and September 3-5, 2025. The parties have exchanged answers to undertakings and a Refusals Motion is scheduled to be heard on November 7, 2025. The parties are in the process of scheduling further examinations in respect of the answers to undertakings.

[9] Rogers delivered its proposed amendments to the Commissioner on its Response on September 26, 2025 and sought the Commissioner's consent. The Commissioner refused.

IV. ISSUES

[10] The present motion raises the issue as to whether Rogers should be granted leave to:

- (a) challenge the constitutionality of the administrative monetary penalty regime contained in section 74.1(1)(c)(ii) of the Act at this stage of the proceedings;
- (b) raise a defence of estoppel and waiver;
- (c) allege a breach of the deemed undertaking rule by the Commissioner; and
- (d) provide additional facts pertaining to the remedies sought in the application.

V. ANALYSIS

[11] Rule 34(1) of the *Competition Tribunal Rules*, SOR/2008-141 [the CT Rules] provides that, if a question arises as to the practice or procedure to be followed in proceedings before the Tribunal that is not provided therein, the FC Rules may be applied. Amendments to a document before the Tribunal fall under that category of procedures, and the Tribunal will therefore refer to the FC Rules.

[12] Rule 75 of the FC Rules states that “the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.” The threshold requirement on a motion to amend pleadings is that the proposed amendment must have a “reasonable prospect of success” (*Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 29-32). A proposed amendment will be refused if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action or defence (*McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at para 20).

[13] However, allowing an amendment should not result in an injustice to the other party not capable of being compensated by an award of costs, just as it should serve the interests of justice (*Canderel Ltd v Canada (CA)*, 1993 CanLII 2990 (FCA)).

A. **Proposed Constitutional Challenge**

[14] Rogers pleads the following with respect to its proposed constitutional challenge (paragraphs 74-77 of the Proposed Amended Response):

- a) The potential imposition of a financial penalty under section 74.1(1)(c)(ii) of the Act constitutes a true penal consequence;

PUBLIC

- b) As a result, it is incumbent on the Bureau, the Commissioner, and this Tribunal to respect and safeguard protections guaranteed to Rogers, including without limitation, rights guaranteed by the *Charter* and *Bill of Rights*;
- c) Rogers' rights under sections 7 and 8 and subsections 11(c), 11(d), 11(g) and 11(i) of the *Charter* as well as under subsection 2(e) of the *Bill of Rights* have been violated; and
- d) Rogers has served its Notice of Constitutional Question on the Commissioner.

[15] According to Rogers, it is not plain and obvious that Rogers' constitutional challenge is bound to fail. The Commissioner did not suggest otherwise.

[16] The Commissioner, however, argues that this proposed amendment would cause significant prejudice that cannot be remedied by costs or by modest adjustments to the procedural schedule.

[17] First, the Commissioner states that Rogers offers no explanation for why it waited until discoveries to bring its motion. Yet, Rule 75 specifically provides that an amendment can be made, with leave from the Court, "at any time", whereas notice regarding constitutional questions must be served at least ten days before the day on which the constitutional question is to be argued.

[18] Second, the Commissioner takes issue with the fact that Rogers' constitutional challenge is, in substance, a duplicate to that currently pending before the Tribunal in *Commissioner of Competition v Google Canada Corporation and Google LLC* (CT-2024-010). In that separate matter, Google challenged the constitutionality of a subset of the administrative monetary penalty regime under the abuse of dominance provisions of the Act, whereas Rogers here challenges a similarly worded subset of the administrative monetary penalty regime pertaining to the false and misleading representations provisions of the Act. According to the Commissioner, allowing Rogers' challenge would duplicate proceedings, evidence, and argument on a question that is already pending before the Tribunal and likely to be settled there (subject to appeal). Yet, the Commissioner relies on no authority for the proposition that similar constitutional issues, regarding different provisions of a same legislation, between different parties — necessarily involving different factual backgrounds — cannot be brought before a Court or Tribunal. But there is more. An issue that was argued over 4 days before a decision maker, as was the case in the Google challenge, can hardly be said to be bereft of any reasonable change of success, or to be frivolous.

[19] The Commissioner finally asserts that Rogers' proposed challenge could not be accommodated within the existing schedule issued by the Tribunal on March 26, 2025, after consultation with the parties. On the one hand, Rogers replies that the amendment in respect of the constitutional challenge fundamentally concerns a question of law that can be accommodated within the existing schedule. The Tribunal will hold Rogers to that statement. On the other hand, this legal issue was recently argued by the Commissioner in the Google matter, so he could arguably be said to have a head start as it concerns his material. The Tribunal also considers that a few days could be added to the hearing without causing significant prejudice to any party.

[20] Being satisfied that Rogers seeking leave to amend its Response to include a constitutional challenge meets the test in the FC Rules and as articulated in the caselaw, Rogers will be granted leave to bring the proposed constitutional challenge to section 74.1(1)(c)(ii) of the Act.

B. Proposed Defence of Estoppel and Waiver

[21] Rogers asserts having sufficiently pleaded the necessary elements of a promissory estoppel and waiver defence (paragraphs 24-38 of the Proposed Amended Response).

[22] Promissory estoppel is an equitable defence that requires a legal relationship between two parties, a promise that is intended to affect that relationship, and the reliance of this promise. It is typically invoked in situations involving parties to a contract, including insurance (*Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47; *Maracle v Travellers Indemnity Co. of Canada*, 1991 2 SCR 50) and real property (*Dunn v Vicars*, 2009 BCCA 477).

[23] In *Immeubles Jacques Robitaille inc. v Québec (City)*, 2014 SCC 34, the Supreme Court of Canada notes that public law promissory estoppel is like the ordinary, or “private law,” promissory estoppel, in requiring “[...] proof of a clear and unambiguous promise made to a citizen by a public authority in order to induce the citizen to perform certain acts. In addition, the citizen must have relied on the promise and acted on it by changing his or her conduct” (*Immeubles Jacques Robitaille* at para 19). However, the public law doctrine is distinguishable from “private law promissory estoppel” over-and-above the inclusion of a public authority, in that the doctrine has several important caveats. The doctrine: (i) can be set aside for an overriding public interest; (ii) cannot stop the application of an express legislative provision, and (iii) requires that the promises made by public authorities are not unlawful or otherwise inconsistent with statutory discretion (*Immeubles Jacques Robitaille* at paras 20-21).

[24] Rogers asserts that it reached out to the Commissioner both before and after launching its Infinite plans to notify the Commissioner of their features and marketing campaign. Rogers further offered to meet with the Commissioner to discuss the plans, but the Commissioner did not respond. The Commissioner does not challenge these facts. Mostly relying on the *Trial Lawyers* case, Rogers pleads that through the Commissioner’s conduct – in that he raised no issue or concerns with Rogers’s Infinite plans or proposed marketing campaign when he was made aware of them – the Commissioner effectively made representations to Rogers, and that Rogers acted in reliance on the Commissioner’s conduct by continuing to promote its Infinite plans in the same form.

[25] The major difference between the two positions held by the parties lies in the way they articulate the relationship between them. Rogers’ arguments suggest that the two parties’ relationship is akin to “ordinary” or “private law” promissory estoppel, based on reliance on *Trial Lawyers*. The Commissioner’s arguments fall more in line with a “public law” promissory estoppel, relying on *Immeubles Jacques Robitailles*.

[26] Promissory estoppel can be pled against a public authority but the test to be applied is narrower.

PUBLIC

[27] In this case, there is no clear and unambiguous promise made to Rogers, and had there been one, it could not be invoked to prevent the application of the Act. The Commissioner's silence cannot ground the public law promissory estoppel claim. The Commissioner was under no obligation to answer Rogers' requests, nor to meet with Rogers in advance of the launching of its Infinite plans.

[28] The Commissioner rightfully notes that the Act permits a party to request a binding written opinion on proposed conduct under its section 124.1. Using the Commissioner's silence to ground a promissory estoppel claim against the Commissioner would obviate the need for section 124.1 of the Act and put the Commissioner in an unbearable position.

[29] Same can be said about the defence of waiver. In *Trial Lawyers*, the Supreme Court of Canada held that the test for waiver is strict and requires "full knowledge of rights" and "an unequivocal and conscious intention to abandon them" (*Trial Lawyers* at para 75). Rogers' argument that the Commissioner's inaction communicated a clear intention that he intended to waive his right to bring an application in this matter cannot stand. It would essentially impose a time limit on the Commissioner's ability to bring an application under the Act. Yet, the Act does not dictate how or when the Commissioner should investigate and enforce the Act's provisions.

[30] Even if the facts pled by Rogers were true, they would not support a defence of promissory estoppel or waiver; those claims in the context of the Commissioner's application have no prospect of success and the proposed amendment will be denied.

C. Alleged Breach of the Deemed Undertaking Rule

[31] Rogers' proposed amendments invoking the deemed undertaking rule are found at paragraph 32 of the Proposed Amended Response. They are grounded on rule 62(2) of the CT Rules, which codifies the common law and provides that parties and their counsel "are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained".

[32] According to Rogers, the Commissioner breached the deemed undertaking rule by allowing Bureau officers conducting the investigation in this case to have unfettered access to documents produced pursuant to the discovery process in the Commissioner's application to block the Rogers-Shaw merger transaction (CT-2022-002).

[33] Counsel for Rogers candidly admitted at the hearing of this motion that they did not consider what information might emerge from this other matter and how it could be used in the current one. All they assert is that no protection was put in place within the Bureau to ensure the information collected in the Rogers-Shaw case would not be used in other cases. They claim to know that the officers had access to the information, yet they do not know whether it was accessed or used. Rogers has not pointed to any particular portion of the Commissioner's application that it considers ought to have been founded or based on such a breach. Nor has it alleged that the Commissioner has produced or relied on any information that ought to have been obtained through the alleged breach.

PUBLIC

[34] In my view, if there is no known reference or use of information from the Rogers-Shaw matter in the matter before me, there is no breach in the matter before me. If the information was not protected in the Roger-Shaw matter, the alleged breach of the deemed undertaking rule or the alleged breach of the confidentiality order would have occurred in that matter.

[35] Rogers' proposed amendment is not a proper pleading. Allowing it in the present context would amount to nothing more than a "fishing expedition". Leave to amend its Response to plead an alleged breach of the deemed undertaking rule will therefore be denied.

D. Remedies and Mitigating Factors

[36] At paragraph 81 of its Proposed Amended Response, Rogers seeks to reintroduce, through a different channel, its factual allegations in support of its estoppel and waiver defences. Rogers asserts that these facts are relevant for the assessment of the aggravating/mitigating factors enumerated in section 74.1(5) of the Act.

[37] Under some of the alleged mitigating factors, Rogers is proposing to add references to the Commissioner's alleged knowledge, understanding, analysis, or inaction in respect of Rogers' conduct. They are basically yet another attempt to put forward the Commissioner's thought process as it was investigating Rogers' Infinite plans and their compliance with the Act, and the Commissioner's previous analysis and conclusions.

[38] As was noted with respect to a previous motion brought by Rogers for an order to compel further documentary production, the motivation and thinking behind the Commissioner's timing in bringing the present application are not relevant. What may be relevant is solely the timing or the fact that it took the Commissioner five years to bring this application.

[39] The Commissioner's previous conclusions on whether Rogers' conduct was false or misleading is not relevant to the matter at hand, just as it has no bearing on whether the consumers in the relevant market were vulnerable, nor does it change the nature of the conduct.

[40] The fact that Rogers attempted to engage with the Commissioner prior to and after the launch of its Infinite plans, without more, cannot reasonably equate to a confirmation by the Commissioner of compliance with the Act.

[41] In sum, the proposed amendments are irrelevant, and leave will be denied.

E. Unopposed Amendments

[42] Finally, the Commissioner does not oppose the miscellaneous amendments proposed by Rogers at paragraphs 22 and 40 of the Proposed Amended Response and leave to amend those paragraphs will be granted to Rogers.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[43] Rogers' motion is granted in part.

PUBLIC

[44] Rogers is granted leave for the proposed amendments found at paragraphs ~~20~~ 22, 40, and ~~72~~ 74 to 77 of the Proposed Amended Response.

[45] Rogers is denied leave for the proposed amendments found at paragraphs 25 to 38, and 81 of the Proposed Amended Response.

[46] As success on this motion is divided, costs shall be in the cause.

DATED at Ottawa, this 6 of November 2025.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) Jocelyne Gagné

PUBLIC

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Irene Cybulsky
Kendra Wilson
Antoine Lippé

For the respondent:

Rogers Communications Inc.

Jonathan Lissus
Crawford Smith
John Carlo Mastrangelo
Joanna MacDonald
Brad Vermeersch
Anita Banicevic
Taraleigh Stevenson

PUBLIC

TAB 10

PUBLIC

Court of Appeal for Saskatchewan
Docket: CACV3664

Citation: *Mitchell v Candle Lake (Resort Village)*,
2021 SKCA 44

Date: 2021-03-24

Between:

Steven Mitchell and Steveco Construction Ltd.

*Appellants
(Plaintiffs)*

And

Resort Village of Candle Lake

*Respondent
(Defendant)*

Before: Schwann, Leurer and Kalmakoff JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Madam Justice Schwann
In concurrence: The Honourable Mr. Justice Leurer
The Honourable Mr. Justice Kalmakoff

On appeal from: QB 79 of 2020, Prince Albert
Appeal heard: December 15, 2020

Counsel: Peter A. Abrametz for the Appellants
Nicole Sawchuk for the Respondent

Schwann J.A.

I. INTRODUCTION

[1] This appeal concerns whether a person to whom an administrative order has been issued can collaterally attack the validity of that order in the context of subsequent administrative compliance proceedings. Steven Mitchell commenced the construction of a building in the Resort Village of Candle Lake [Village] without a building permit. The Village issued a stop work order under s. 17 of *The Uniform Building and Accessibility Standards Act*, SS 1983-84, c U-1.2 [Act], directing Mr. Mitchell to cease construction. When Mr. Mitchell failed to adhere to that order, the Village applied to the Court of Queen’s Bench under s. 23 of the Act for an order directing him to comply with the s. 17 directive by stopping further construction of the building until such time as he obtained a building permit from the Village.

[2] A judge of the Court of Queen’s Bench found that an order had been issued to Mr. Mitchell by the Village pursuant to s. 17 of the Act, and that, in the absence of an appeal from that order, it remained in effect. Having made those findings, the Chambers judge granted an order pursuant to s. 23 of the Act requiring Mr. Mitchell to comply with the earlier s. 17 order: *Candle Lake (Resort Village) v Mitchell* (23 June 2020) Prince Albert, QB 79 of 2020 (Sask) [Chambers Decision].

[3] Mr. Mitchell and his company, Steveco Construction Ltd. [Steveco], appeal from the *Chambers Decision*. For ease of reference, mention of Mr. Mitchell throughout my decision is intended to refer to both appellants.

[4] For the reasons expressed below, the appeal must be dismissed.

I. BACKGROUND

[5] Mr. Mitchell is a director and officer of Steveco, which is a Saskatchewan company involved in commercial, industrial and residential construction. Mr. Mitchell’s shop, from which his business operated, was destroyed by fire on April 3, 2019. Mr. Mitchell was determined to rebuild it. According to the affidavit of the Village administrator, Heather Scott, in a July 8, 2019,

a stop work order was made”. Mr. Mitchell did not appeal from this finding of fact; at least, not in a direct way.

[31] Second, the Chambers judge found as a fact that Mr. Mitchell had *not appealed* the Order under s. 18 of *Act*. This state of play caused the Chambers judge to conclude – as he put it – “the order stands”. Here, I understand the Chambers judge to have implicitly concluded that if Mr. Mitchell had harboured concern about the *vires* or validity of the Order, his recourse was to appeal it under s. 18(1) of the *Act*. However, having failed to do so, when the Village’s application for a s. 23 order came before him, the Chambers judge found that the Order – as it stood at the time of the Chambers application – was a properly issued s. 17 order. Although the Chambers judge did not refer to the doctrine of collateral attack by name, I take him to have invoked that principle in addressing Mr. Mitchell’s line of argument.

[32] With those introductory comments in mind, I turn to the applicable law.

3. Applicable law

[33] Mr. Mitchell’s appeal raises the doctrine against collateral attack. Collateral attack occurs when a party attempts to overturn an earlier decision within the context of subsequent proceedings, even though the prior order was either not appealed or unsuccessfully appealed: “This rule holds that ‘a court order, made by a court having jurisdiction to make it’, may not be attacked ‘in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment’” (*R v Litchfield*, [1993] 4 SCR 333 at 349 [*Litchfield*], quoting *R v Wilson*, [1983] 2 SCR 594 at 599). The underlying basis for this doctrine is found in the following oft-quoted passage from *Litchfield* (at 349):

The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, “the orderly and functional administration of justice” requires that court orders be considered final and binding unless they are reversed on appeal (*R. v. Pastro*, [(1988), 42 CCC (3d) 485 (Sask CA)], at p. 497).

[34] The purpose served by the doctrine against collateral attack is to protect the fairness and integrity of the administration of justice by preventing a multiplicity of proceedings. In *British Columbia (Workers’ Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422 [*Figliola*], the Supreme Court cast it in these terms:

[28] The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route ...

[35] This rule reflects, as noted in *R v Bird*, 2017 SKCA 32, [2017] 8 WWR 684, the underlying theory that “a court order may only be attacked in the proceedings with the specific object of doing just that” (at para 32). See also *R v Envirogun Ltd.*, 2018 SKCA 8 at para 39, [2018] 3 WWR 247 [*Envirogun*]).

[36] The Supreme Court decision in *R v Consolidated Maybrun Mines Ltd.*, [1998] 1 SCR 706 [*Maybrun*], is considered the leading authority on the question of whether the doctrine against collateral attack applies to administrative orders. By way of background, the appellant company had largely disregarded an environmental order that had been made under the *Environmental Protection Act*, RSO 1980, c 141 [*EPA*], with respect to an abandoned gold and copper mine. The company neither appealed the order to the Environmental Appeal Board nor sought judicial review. The appellant was subsequently charged under the *EPA* with failing to comply with the administrative order and sought to attack the validity of the underlying order in the course of the prosecution. When the matter came before the Ontario Court of Appeal, that court had little difficulty extending the principle of law set out in *Litchfield* to administrative orders.

[37] On further appeal to the Supreme Court, L’Heureux-Dubé J. began her analysis with some general observations about the increasing prevalence of regulatory intervention into a wide range of human activity. She discussed the need to strike a balance between, on the one hand, ensuring the efficacy and importance of administrative structures in a contemporary society and, on the other, protecting the rights of individuals who may be affected when government oversteps its boundaries:

[27] In order to ensure the integrity of these administrative structures, while at the same time seeking to protect the rights of individuals affected by government actions, the legislature is free to set up internal mechanisms and establish appropriate forums to enable such individuals to assert their rights. In considering the requirements resulting from the rule of law and the rights of a person accused of non-compliance with an administrative order, it is important not to isolate the penal proceedings from the whole of the process established by the legislature.

[38] In determining whether a person facing a penal charge for failing to comply with an administrative order can challenge the validity of the underlying order in those proceedings,

e. Penalty consequence

[74] The fifth and final factor in a *Maybrun* analysis is the penalty on conviction for failing to comply with the administrative order. The matter before the Chambers judge did not concern the imposition of fines or a prosecution, nor, unlike the situation in *Sarg Oils*, was Mr. Mitchell facing significant costs associated with obtaining a building permit. At best, I find this factor is neutral in the overall *Maybrun* analysis.

5. Conclusion on collateral attack

[75] The application of the *Maybrun* framework is ultimately an attempt to discern legislative intent with regard to the appropriate forum for an aggrieved person to challenge an administrative order. As discussed above, the *Maybrun* factors are not absolute: they are simply *clues* about legislative intent.

[76] By his own admission, Mr. Mitchell did not have a building permit when the Order was issued. He eschewed the appeal mechanism in an apparent standoff with the Village; yet, almost a year after he began the construction of his new building, chose to attack the validity of the Order in the context of the s. 23 proceedings. I see no tenable basis as to why Mr. Mitchell could not have resorted to the statutory appeal mechanism if he truly thought the Order was invalid.

[77] The appeal processes laid out in s. 18 of the *Act* is robust. That section creates an express, expeditious forum for an aggrieved owner to challenge a s. 17 order before the Appeal Board, with further recourse to the Court of Queen’s Bench on questions of law. A Queen’s Bench decision is final. Permitting Mr. Mitchell to attack the validity of a s. 17 order in the context of further enforcement proceedings would, in my view, undermine the integrity of the administrative system and allow him to circumvent the appropriate review mechanisms put in place by the Legislature. As discussed above, this could have serious ramifications for the local authority, the general public and the building owner alike.

[78] I find most of the factors weigh in favour of a conclusion that the Legislature did not intend for a person to be able to collaterally attack the validity of a s. 17 order in the context of subsequent proceedings to enforce compliance with it. As such, the Chambers judge did not commit an error

in law in his interpretation of the legislative scheme and did not err in refusing to allow Mr. Mitchell to collaterally attack the Order.

[79] In the end result, I am not persuaded by Mr. Mitchell’s argument.

B. Abuse of process

[80] Mr. Mitchell next submits that the Chambers judge failed to act judicially by not addressing his abuse of process argument. This argument is rooted in paragraph 5 of his brief of law that was filed in the Court of Queen’s Bench. It reads as follows: “The building inspector must either know or does not care that no accessibility or building standards have been contravened and Candle Lake is acting in a high-handed manner, has failed to be candid and forthright and their application is an abuse of process”.

[81] In my view, paragraph 5 appears, yet again, to be an attack on the underlying Order that had been issued by Mr. Gates, or on his failure to inspect Mr. Mitchell’s building. As discussed above, the Order was not appealed and, in any event, Mr. Mitchell concedes that he did not have a building permit on October 29, 2019, when it was issued. As I see it, the thrust of Mr. Mitchell’s argument seems to be that Mr. Gates knew or should have known that he lacked the statutory authority to make an order under s. 17 because no standards had been breached at that point in time. Accordingly, as the argument goes, the Village’s application to confirm the Order under s. 23 somehow amounts to an abuse of process.

[82] As constructed, this argument hinges on Mr. Gates’s actual knowledge or his reckless disregard as to whether he lacked the legal authority to issue a s. 17 order, yet proceeded nonetheless. Respectfully, this is speculation on the part of Mr. Mitchell. The evidentiary basis for this argument is thin, at best. I see nothing in Mr. Gates’s affidavit that lends itself to that line of thinking nor, for that matter, was he cross-examined on his affidavit with a view to ascertaining his motivation for issuing the order. I would not give effect to this argument.

C. Failure to sever the mandamus application

[83] The last argument concerns the Chambers judge’s failure to sever the mandamus application from the Village’s application. As framed, I understand Mr. Mitchell to argue that the

PUBLIC

TAB 11

PUBLIC

Date: 20011120
Docket: 1999-1746(IT)G

BETWEEN:

HELGA ZELINSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bowie J.

[1] There are two motions before me. One is brought by the Respondent for an Order striking out numerous paragraphs of the Amended Notice of Appeal. The other is brought by the Appellant for an Order permitting her to further amend the Notice of Appeal to add several more paragraphs.

[2] The Appellant was assessed under section 160 of the *Income Tax Act* (the *Act*). The Minister of National Revenue (the Minister) takes the position that one Herman Gebele (Herman), to whom the Appellant was married at one time, transferred real property to her for no, or inadequate, consideration, at a time when he was indebted to the Crown for unpaid income tax, and that Herman and the Appellant were not acting at arm's length at the time. The amount assessed is \$306,636.38. This appeal is from that assessment. A number of objections to the assessment were raised initially. With the consent of the Respondent an amended Notice of Appeal was filed. The Respondent's consent, it appears, was not to a specific proposed amended pleading. Confronted with the Amended Notice of Appeal, the Respondent now moves to strike out paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 27, 28 and 34, on the basis that they are frivolous, vexatious, and an abuse, and are likely to prejudice or delay the fair

hearing of the appeal. Although the motion is framed in the language of *Rule 58* of the *Tax Court of Canada Rules (General Procedure)* (the *Rules*), the real objection to these paragraphs is that they do not plead material facts.

[3] The Respondent having moved against the Amended Notice of Appeal, the Appellant now moves to add some 10 additional paragraphs or subparagraphs, falling into two categories. One group is intended to raise for the first time objections to the assessment based on sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The second seeks to invoke the *Principles of the Nuremberg Tribunal, 1950* (the *Nuremberg Principles*) and the *Charter of the United Nations* (the *U.N. Charter*). These further amendments are opposed by the Respondent, with the exception of a minor amendment to the prayer for relief.

[4] The purpose of pleadings is to define the issues in dispute between the parties for the purposes of production, discovery and trial. What is required of a party pleading is to set forth a concise statement of the material facts upon which she relies. Material facts are those facts which, if established at the trial, will tend to show that the party pleading is entitled to the relief sought. Amendments to pleadings should generally be permitted, so long as that can be done without causing prejudice to the opposing party that cannot be compensated by an award of costs or other terms, as the purpose of the *Rules* is to ensure, so far as possible, a fair trial of the real issues in dispute between the parties.

[5] The applicable principle is stated in *Holmsted and Watson*:¹

This is *the* rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

Applying these principles, I approach both motions on the basis that the test to be applied is whether the paragraphs in dispute, and those that the Appellant proposes to add, are proper pleadings of material facts. The Appellant's motion seeks to add two issues to those now pleaded. She should be permitted to do so, unless it is

¹ *Holmsted and Watson, Ontario Civil Procedure*, Vol. 3, pages 25-20 to 25-21.

A-535-94

A-535-94

**Imperial Oil Limited and its subdivision
Paramins (Appellant) (Respondent)**

**Compagnie Pétrolière Impériale Ltée et sa filiale
Paramins (appelante) (intimée)**

v.

c.

**The Lubrizol Corporation and Lubrizol Canada
Limited (Respondents) (Plaintiffs)**

**The Lubrizol Corporation et Lubrizol Canada
Limited (intimées) (demandereses)**

**INDEXED AS: LUBRIZOL CORP. v. IMPERIAL OIL LTD.
(C.A.)**

**RÉPERTORIÉ: LUBRIZOL CORP. c. IMPERIAL OIL LTD.
(C.A.)**

Court of Appeal, Stone, Linden and McDonald JJ.A.
—Toronto, February 12, 13; Ottawa, April 3, 1996.

Cour d'appel, juges Stone, Linden et McDonald,
J.C.A.—Toronto, 12 et 13 février; Ottawa, 3 avril
1996.

Damages — Non-compensatory — Exemplary — Appeal from exemplary damages award — Trial Judge awarding exemplary damages before reference to assess amount of compensatory award for patent infringement — Exemplary damages intended to punish, express outrage at egregious conduct, deter — Awarded only where combined general, aggravated damages insufficient to punish, deter — Court to assess exemplary damages only if deciding general damages awarded insufficient for punishment, deterrent purposes.

Domages-intérêts — Non compensatoires — Exemplaires — Appel du jugement accordant des dommages-intérêts exemplaires — Le juge de première instance a accordé des dommages-intérêts exemplaires avant la tenue d'une référence en vue de déterminer le montant des dommages-intérêts de nature compensatoire exigibles par suite de la contrefaçon du brevet — Les dommages-intérêts exemplaires visent à punir, à exprimer l'indignation que cause le comportement malveillant, à dissuader — Ils ne sont accordés que lorsque les dommages-intérêts généraux et majorés ne suffisent pas à punir et à dissuader — La Cour ne peut faire droit à une demande de dommages-intérêts exemplaires qu'après avoir déterminé que les dommages-intérêts généraux ne suffisent pas à punir et à dissuader.

Practice — Evidence — Appeal from order dismissing motion to adduce further evidence on continuance of trial of claim for exemplary damages — Claim for exemplary damages referred back to Trial Judge for continuance — Discretion conferred by R. 494 applied as trial still in progress — Discretionary decisions interfered with only if Trial Judge not giving sufficient weight to all relevant considerations — Trial Judge not giving sufficient weight to fact appellant permanently deprived of adequate opportunity to defend against serious claim — Justice requiring opportunity for appellant to adduce further evidence on claim for exemplary damages.

Pratique — Preuve — Appel d'une ordonnance rejetant la requête présentée afin de produire des éléments de preuve supplémentaires lors de la poursuite de l'instruction de la demande de dommages-intérêts exemplaires — Renvoi au juge de première instance de la demande de dommages-intérêts exemplaires aux fins de la poursuite de l'instruction — Le pouvoir discrétionnaire conféré par la Règle 494 a été exercé, car l'instruction se poursuivait toujours — La décision issue de l'exercice de ce pouvoir ne peut être modifiée que si le juge de première instance n'accorde pas suffisamment d'importance à toutes les considérations pertinentes — Le juge de première instance n'a pas accordé suffisamment d'importance au fait que l'appelante serait privée à jamais d'une possibilité raisonnable de contester une demande dont les répercussions étaient très graves — La justice exige que l'appelante soit autorisée à présenter d'autres éléments de preuve relativement à la demande de dommages-intérêts exemplaires.

Practice — Pleadings — Claim for exemplary damages referred back to Trial Judge for continuance — Claim not initially pleaded but added by amendment — Federal Court Rules not requiring exemplary damages claim be

Pratique — Plaidoiries — Renvoi au juge de première instance de la demande de dommages-intérêts exemplaires en vue de la poursuite de l'instruction — Demande non plaidée initialement mais ajoutée par voie de modification

PUBLIC

TAB 12

COUNSEL:

W. Ian C. Binnie, Q.C. and Jenny P. Stephenson for appellant (respondent). Donald J. Wright, Q.C., Donald H. MacOdrum and Peter E. J. Wells for respondents (plaintiffs).

SOLICITORS:

McCarthy Tétrault, Toronto, for appellant. Ridout & Maybee, Toronto, for respondents.

The following are the reasons for judgment rendered in English by

AVOCATS:

W. Ian C. Binnie, c.r. et Jenny P. Stephenson pour l'appelante (intimée). Donald J. Wright, c.r., Donald H. MacOdrum et Peter E. J. Wells pour les intimées (demandereses).

PROCUREURS:

McCarthy Tétrault, Toronto, pour l'appelante. Ridout & Maybee, Toronto, pour les intimées.

Ce qui suit est la version française des motifs du jugement rendus par

1 STONE AND LINDEN J.J.A.: This appeal is from an order of the Trial Division of October 4, 1994 [Lubrizol Corp. et al. v. Imperial Oil Ltd. et al. (1994), 84 F.T.R. 197] awarding the respondents \$15,000,000 in exemplary damages, and from its earlier order of April 25, 1994 [Lubrizol Corp. v. Imperial Oil Ltd. (1994), 55 C.P.R. (3d) 129 (F.C.T.D.)] dismissing with costs the appellant's motion to adduce further evidence on the continuance of the trial of the respondents' claim for exemplary damages.

1 LES JUGES STONE ET LINDEN, J.C.A.: Il s'agit en l'espèce d'un appel visant l'ordonnance de la Section de première instance datée du 4 octobre 1994 [Lubrizol Corp. et al. c. Imperial Oil Ltd. et al. (1994), 84 F.T.R. 197] accordant aux intimées la somme de 15 000 000 \$ à titre de dommages-intérêts exemplaires, ainsi que son ordonnance du 25 avril 1994 [Lubrizol Corp. c. Imperial Oil Ltd. (1994), 55 C.P.R. (3d) 129 (C.F. 1^{re} inst.)] rejetant avec dépens la requête de l'appelante présentée afin de produire des éléments de preuve supplémentaires lors de la poursuite de l'instruction de la demande de dommages-intérêts exemplaires des intimées.

BACKGROUND

RÉSUMÉ DES PROCÉDURES

2 The action was commenced March 16, 1987 for infringement and inducing infringement of Canadian patent No. 1,094,044. By order of January 12, 1989 [Lubrizol Corp. v. Imperial Oil Ltd. (1989), 23 C.I.P.R. 302 (F.C.T.D.)], Reed J. granted an interlocutory injunction in the action restraining the appellant,

2 L'action alléguant la contrefaçon et l'incitation à la contrefaçon du brevet canadien n° 1 094 044 a été intentée le 16 mars 1987. Par voie d'ordonnance datée du 12 janvier 1989 [Lubrizol Corp. c. Imperial Oil Ltd. (1989), 23 C.I.P.R. 302 (C.F. 1^{re} inst.)], le juge Reed a accordé une injonction interlocutoire enjoignant à l'appelante de s'abstenir de faire ce qui suit:

... from making, having made, using, selling or offering for sale, in Canada, any lubricating composition or lubricant additive containing the defendant's products ECA 10444 or ECA 11014, including its products Paranox 600 and Paranox 300, and from supplying in or from Canada any such composition or additive combination in a lubricating composition outside Canada.

[TRADUCTION] ... fabriquer, faire fabriquer, utiliser, vendre ou offrir en vente, au Canada, un lubrifiant ou un additif renfermant les produits ECA 10444 ou ECA 11014 de la défenderesse, y compris ses produits Paranox 600 et Paranox 300, et de fournir au Canada ou à l'étranger à partir du Canada un tel lubrifiant ou additif dans un composé lubrifiant.

An appeal against that order was allowed by this Court on September 22, 1989 [Lubrizol Corp. v.

L'appel interjeté à l'égard de cette ordonnance a été accueilli par la Cour le 22 septembre 1989 [Lubrizol

Imperial Oil Ltd. (1989), 27 C.I.P.R. 147 (F.C.A.)] but only to the extent of varying the award of costs made by Reed J.

Corp. c. Imperial Oil Ltd. (1989), 27 C.I.P.R. 147 (C.A.F.), mais seulement aux fins de modifier l'adjudication des dépens.

3 After a twenty-nine day trial which commenced May 7, 1990, by judgment of September 17, 1990 [*Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 1 (F.C.T.D.)], the learned Trial Judge found the patent to be valid and infringed. By the terms of that judgment, the respondents were awarded an election of being paid damages or profits made by the appellant, to be determined on a reference pursuant to the consent order of Associate Senior Prothonotary Giles of March 22, 1989. The respondents were awarded their costs. On February 23, 1995 the respondents filed an election for an account of the appellant's profits.

3 À l'issue d'un procès qui a commencé le 7 mai 1990 et duré 29 jours, le juge de première instance conclut, dans un jugement daté du 17 septembre 1990 [*Lubrizol Corp. c. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 1 (C.F. 1^{re} inst.)], que le brevet est valide et a été contrefait. Les intimées se voient accorder le droit de choisir entre des dommages-intérêts ou les profits réalisés par l'appelante, dont le montant doit être établi dans le cadre d'une référence aux termes de l'ordonnance par consentement du protonotaire adjoint Giles en date du 22 mars 1989. Les intimées ont également droit aux dépens. Le 23 février 1995, elles ont opté pour la comptabilisation des profits de l'appelante.

4 By judgment of April 14, 1993 [*Imperial Oil Ltd. v. Lubrizol Corp.* (1993), 48 C.P.R. (3d) 1 (F.C.A.)], this Court dismissed with costs the appellant's appeal from the judgment at trial but allowed the respondents' cross-appeal in the following terms:

4 Dans un jugement daté du 14 avril 1993 [*Imperial Oil Ltd. c. Lubrizol Corp.* (1993), 48 C.P.R. (3d) 1 (C.A.F.)], la Cour rejette avec dépens l'appel interjeté par l'appelante relativement au jugement de première instance, mais accueille l'appel incident des intimées en s'exprimant comme suit:

5. The cross-appeal is allowed. Pursuant to Section 52(b)(iii) of the *Federal Court Act*, the matter of the claim of the Respondents (Plaintiffs), the cross-appeal appellants, for exemplary damages is referred back to the Trial Judge for a continuance of the trial to deal with that claim.

[TRADUCTION] 5. L'appel incident est accueilli. Conformément au sous-alinéa 52b)(iii) de la *Loi sur la Cour fédérale*, la poursuite de l'instruction, par le juge de première instance, de la demande présentée par les intimées/demandereses (les appelantes aux fins de l'appel incident) en vue de l'obtention de dommages-intérêts exemplaires, est ordonnée.

This Court ordered the costs of the cross-appeal "to be in the event of the Trial Judge's disposition of the claim".

La Cour ordonne que les dépens afférents à l'appel incident soient adjugés suivant l'issue de la poursuite de l'instruction par le juge de première instance.

5 Leave to appeal from the judgment of this Court was dismissed by the Supreme Court of Canada [*Imperial Oil Ltd. v. Lubrizol Corporation*, [1993] 3 S.C.R. vii].

5 La Cour suprême du Canada a refusé l'autorisation d'en appeler du jugement de la Cour [*Imperial Oil Ltd. c. Lubrizol Corporation*, [1993] 3 S.C.R. vii].

6 By order of April 25, 1994, the Trial Judge dismissed the appellant's motion to adduce further evidence on the continuance of the trial with respect to the claim for exemplary damages. That order, too, was the subject of an appeal, which was dismissed with costs by this Court's judgment of June 1, 1994

6 Dans une ordonnance datée du 25 avril 1994, le juge de première instance rejette la requête présentée par l'appelante afin de produire des éléments de preuve supplémentaires lors de la poursuite de l'instruction de la demande de dommages-intérêts exemplaires. Cette ordonnance a également fait l'objet

[*Lubrizol Corp. v. Imperial Oil Ltd.* (1994), 55 C.P.R. (3d) 141] on the ground that it was a matter that could be raised on an appeal from the final judgment at trial. Finally, as already indicated, the Trial Judge by his judgment of October 4, 1994, awarded exemplary damages with costs on a solicitor and client basis “for motions, trial, appeal and continuance of the trial.”

d’un appel, qui a été rejeté avec dépens par la Cour dans un jugement daté du 1^{er} juin 1994 [*Lubrizol Corp. c. Imperial Oil Ltd.* (1994), 55 C.P.R. (3d) 141], pour le motif qu’il s’agissait d’une question qui pouvait être soulevée en appel du jugement final rendu à l’issue de l’instruction. Enfin, comme mentionné précédemment, dans son jugement du 4 octobre 1994, le juge de première instance accorde des dommages-intérêts exemplaires avec dépens sur la base procureur-client pour les requêtes, l’instruction, l’appel et la poursuite de l’instruction.

THE ISSUES

LES QUESTIONS EN LITIGE

7 The issues raised in this appeal are as follows:

7 Le présent appel soulève les questions en litige suivantes:

(1) Did the Trial Judge err in refusing to allow Imperial Oil to adduce evidence about the alleged contempt of the interlocutory injunction?

(1) Le juge de première instance a-t-il commis une erreur en refusant de permettre à la Compagnie Pétrolière Impériale de présenter des éléments de preuve concernant l’outrage au tribunal qui découlerait du non-respect de l’injonction interlocutoire?

(2) Was the factual finding by the Trial Judge that Imperial Oil knowingly breached¹ the interlocutory injunction a palpable and overriding error?

(2) La conclusion de fait tirée par le juge de première instance selon laquelle la Compagnie Pétrolière Impériale a sciemment désobéi¹ à l’injonction interlocutoire constitue-t-elle une erreur manifeste et dominante?

(3) Did the Trial Judge err in proceeding to award punitive damages before the Court assessed the amount of the compensatory award against Imperial Oil?

(3) Le juge de première instance a-t-il commis une erreur en accordant des dommages-intérêts punitifs avant que la Cour n’établisse le montant des dommages-intérêts de nature compensatoire exigibles de la Compagnie Pétrolière Impériale?

(4) Did the Trial Judge have jurisdiction to change the basis of the award of costs he had previously made (and which had been affirmed by this Court) from a party and party award to an award on a solicitor client basis, and further to amend the award of costs in the Federal Court of Appeal despite the order of this Court?

(4) Le juge de première instance avait-il compétence pour modifier la nature des dépens qu’il avait adjugés auparavant (et qui avaient été confirmés par la Cour) en remplaçant les dépens entre parties par des dépens entre procureur et client et, en outre, pour modifier l’adjudication des dépens en Cour d’appel fédérale malgré l’ordonnance de la Cour?

ANALYSIS

ANALYSE

Issue No. 1

Première question en litige

8 The appellant reduces this first issue to three sub-issues. These are whether the respondents had com-

8 L’appelante divise la première question en litige en trois sous-questions. Premièrement, les intimées

plied with relevant rules of pleading and particularly paragraphs 409(b) and 415(1)(a) of the *Federal Court Rules* [C.R.C., c. 663]; whether the Trial Judge correctly characterized the appellant's decision not to lead evidence on the claim for callous disregard of the interlocutory injunction as a "tactical decision" and, if so, whether the Court should punish the appellant by concluding on an incomplete record that it had so disregarded the interlocutory injunction; finally, whether the Trial Judge erred in applying the rules governing the introduction of fresh evidence on appeal in deciding to disallow any further evidence on the continuance. It is sufficient, in our view, that these sub-issues be dealt with in the overall context of the primary issue.

se sont-elles conformées aux règles pertinentes régissant les plaidoiries et, en particulier, aux alinéas 409b) et 415(1)a) des *Règles de la Cour fédérale* [C.R.C., ch. 663]? Deuxièmement, le juge de première instance a-t-il, à juste titre, qualifié de «tactique» la décision de l'appelante de ne pas présenter d'élément de preuve relativement à l'allégation de complète indifférence à l'égard de l'injonction interlocutoire et, le cas échéant, la Cour devrait-elle punir l'appelante en concluant, à partir d'un dossier incomplet, qu'elle a manifesté une telle indifférence à l'endroit de l'injonction interlocutoire? Troisièmement, le juge de première instance a-t-il appliqué de façon erronée les règles régissant la production d'éléments de preuve nouveaux en appel en refusant le dépôt de tout autre élément de preuve lors de la poursuite de l'instruction? Il suffit, selon nous, d'examiner ces sous-questions dans le cadre de l'examen global de la première question en litige.

1996 CanLII 4042 (FCA)

9 In the Court below, the appellant contended that it should have been permitted to adduce further evidence on the continuance with respect to the issue to be determined because such evidence would show (1) that its product ECA 10271 is neither the same nor equivalent to its product ECA 10444 which by the interlocutory injunction the appellant was restrained from making, having made, using, selling, or offering for sale, (2) the value of the offending product manufactured subsequent to the interlocutory injunction, (3) the steps taken by the appellant to comply with the injunction.

En première instance, l'appelante a prétendu qu'elle aurait dû être autorisée à présenter de nouveaux éléments de preuve, lors de la poursuite de l'instruction, concernant la question qui devait être tranchée, car cette preuve nouvelle aurait établi 1) que son produit ECA 10271 n'était ni identique ni équivalent à son produit ECA 10444 que l'injonction interlocutoire lui interdisait de fabriquer, de faire fabriquer, d'utiliser, de vendre ou d'offrir en vente, 2) la valeur du produit emportant contrefaçon fabriqué après le prononcé de l'injonction interlocutoire et 3) les mesures prises par elle pour se conformer à l'injonction. 9

10 Among the appellant's submissions on the motion for further evidence was that, as no issue of callous disregard of the injunction had been pleaded by the respondents at any stage of the proceedings, the issue was not properly before the Trial Judge. Therefore, it was argued that the appellant should not have been deprived of the opportunity of explaining its conduct on the continuance despite its failure to lead evidence on the issue at trial. The Trial Judge took the view that the claim was properly before him because, as he put it at page 140 of his reasons for the order of April 25, 1994:

L'appelante a notamment prétendu, relativement à la requête présentée en vue de produire de nouveaux éléments de preuve, qu'étant donné que la question de la complète indifférence à l'égard de l'injonction n'avait pas été plaidée par les intimées à une étape ou l'autre de la procédure, le juge de première instance n'en était pas dûment saisi. Elle a donc fait valoir qu'elle n'aurait pas dû être empêchée d'expliquer sa conduite, lors de la poursuite de l'instruction, même si elle n'avait pas produit de preuve relativement à la question au procès. Le juge de première instance a estimé qu'il était dûment saisi de la question. Voici ce qu'il dit à ce sujet à la page 10

The pleadings combined with counsel's arguments at trial made it clear what the issue was at trial.

11 In historical terms, the respondents' pleading did not include a claim of this kind for exemplary damages. Paragraph 16 of the further amended statement of claim contains an allegation that the appellant "knowingly appropriated the invention of and wilfully infringed the Patent" and that the appellant "persists in its wilful infringement in Canada by the continued manufacture, use and sale of infringing concentrates and lubricating compositions". The respondents' pleading was amended on April 29, 1989, by the addition of as paragraph 17(d) claiming "exemplary or punitive damages". In his opening at the commencement of the trial on May 7, 1990, as recorded in Vol. 1 of the transcript, at page 97, counsel for the respondents asserted that the appellant had manufactured and sold the product ECA 10271 and that it was "exactly the same thing we called 10444 . . . as if the interlocutory injunction never existed". Later in his opening, at page 131 of the transcript, Vol. 1, counsel made reference to the effect of the interlocutory injunction. At pages 165-166 of the same volume, he went on to submit that the appellant "came up with a new specification" for the same product covered by the interlocutory injunction which they "called 10271", and then continued:

They just continued on with that after the injunction order as if nothing had ever happened, and they continued right through to September 1989, to supply a product made according, presumably to that specification, to Shell in Canada, because Shell would not . . . I believe the reason was Shell would not accept 12819.

Counsel concluded his submission in the same vein when he alleged, at pages 167-168:

Following the injunction in Canada restraining it from manufacturing and selling 10444, [the defendant] simply

140 de ses motifs d'ordonnance datés du 25 avril 1994:

La question en litige à l'instruction ressortait clairement des plaidoiries écrites et des arguments que les avocats ont alors invoqués.

À l'origine, la plaidoirie des intimées ne comportait pas de demande de dommages-intérêts exemplaires. Le paragraphe 16 de la déclaration à nouveau modifiée renferme une allégation selon laquelle l'appelante [TRADUCTION] «a sciemment usurpé l'invention visée par le brevet et contrefait délibérément celui-ci» et que l'appelante [TRADUCTION] «persiste dans sa contrefaçon délibérée au Canada en se livrant sans discontinuer à la fabrication, à l'utilisation et à la vente de concentrés et de lubrifiants contrefaits». La plaidoirie des intimées a été modifiée le 29 avril 1989 par l'adjonction de l'alinéa 17d) où des [TRADUCTION] «dommages-intérêts exemplaires ou punitifs» sont demandés. Comme en fait foi le volume 1 de la transcription, à la page 97, l'avocat des intimées a tout d'abord fait valoir, dans les remarques préliminaires qu'il a faites au début de l'instruction, le 7 mai 1990, que l'appelante avait fabriqué et vendu le produit ECA 10271 et qu'il s'agissait [TRADUCTION] «exactement de la même chose que le produit 10444 . . . comme si l'injonction interlocutoire n'avait jamais existé». Plus loin, toujours dans ses remarques préliminaires, à la page 131 du volume 1 de la transcription, l'avocat renvoie aux effets de l'injonction interlocutoire. Puis, aux pages 165 et 166 du même volume, il ajoute que l'appelante [TRADUCTION] «a lancé une nouvelle formule» pour le produit visé par l'injonction interlocutoire, qu'elle désignait à l'aide des chiffres 10271, et il poursuit:

[TRADUCTION] Ils ont simplement poursuivi leurs activités en ce sens une fois l'injonction accordée, comme si de rien n'était, et ils ont continué jusqu'en septembre 1989 à fournir un produit fabriqué présumément en conformité avec cette formule, à Shell au Canada, parce que Shell n'aurait pas . . . je crois que la raison en était que Shell n'aurait pas accepté le produit 12819.

Dans le même ordre d'idées, l'avocat conclut en disant ce qui suit (aux pages 167 et 168):

[TRADUCTION] Après que l'injonction eut interdit la fabrication et la vente au Canada du produit 10444, [la

11
1996 CanLII 4042 (FCA)

it were, we would nonetheless conclude that it was sufficiently raised to permit its adjudication. The *Federal Court Rules* underscore the value and function of a pleading. Subsection 408(1) of the Rules requires that every pleading “contain a precise statement of the material facts on which the party pleading relies”. Paragraph 409(b) of the Rules requires that, in the types of cases exemplified, a party shall plead specifically any matter that “if not specifically pleaded, might take the opposite party by surprise”. Paragraph 415(1)(a) of the Rules lays down that “every pleading shall contain the necessary particulars of any allegation including . . . particulars of . . . wilful default”. The jurisprudence of this Court has equally emphasized the value of pleading. In *TRW Inc. v. Walbar of Canada Inc.*,⁴ this Court adopted the following views of Lord Normand in *Esso Petroleum Co. Ltd. v. Southport Corporation*:⁵

I wish to associate myself with the observations of my noble and learned friend, Lord Radcliffe, on the value of the pleadings. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

See also *Gulf Canada Limited v. The Tug Mary Mackin*⁶ and *Glisic v. Canada*.⁷

18 An objection based on a pleading may perhaps be seen as merely technical or formal. It is much more than that, in our view. In general, the Court expects parties to adhere to the rules of pleading so that each side will know the case the other is required to meet when it comes to trial. It may be said that it is the facts as pleaded and the issues as defined in the pleadings which determine the relevancy of evidence whether oral or documentary; and if the latter, whether a document must be produced before trial. At the same time, the *Federal Court Rules* do not require exemplary damages to be specifically pleaded.

jugement le 14 avril 1993. Si elle s'était posée, nous serions néanmoins arrivés à la conclusion que l'allégation avait été faite de façon suffisante pour que la Cour tranche la question. Les *Règles de la Cour fédérale* mettent en évidence la valeur et le rôle d'une plaidoirie. Le paragraphe 408(1) des Règles prévoit que chaque plaidoirie «doit obligatoirement contenir un exposé précis des faits essentiels sur lesquels se fonde la partie qui plaide». L'alinéa 409b) des Règles prévoit que, dans les cas indiqués, une partie doit plaider spécifiquement toute question qui, «si elle n'est pas spécifiquement plaidée, pourrait prendre la partie opposée par surprise». Pour sa part, l'alinéa 415(1)a) des Règles énonce que «toute plaidoirie doit fournir les détails nécessaires à toute allégation y compris . . . des détails des . . . manquements délibérés». La jurisprudence de la Cour fait également ressortir la valeur d'une plaidoirie. Dans *TRW Inc. c. Walbar of Canada Inc.*,⁴ la Cour adopte le point de vue suivant exprimé par lord Normand dans *Esso Petroleum Co. Ltd. v. Southport Corporation*⁵:

Je désire reprendre les observations de mon noble et savant collègue, lord Radcliffe, sur la valeur de la plaidoirie. La condamnation d'une partie pour un motif à l'égard duquel aucun avis équitable n'a été donné peut constituer un déni de justice aussi grave que sa condamnation pour un motif à l'égard duquel on a incorrectement exclu sa preuve.

Voir également *Gulf Canada Limited c. Le remorqueur Mary Mackin*⁶ et *Glisic c. Canada*.⁷

18 Une objection fondée sur une plaidoirie pourrait peut-être être considérée comme purement technique ou formelle. Or, elle revêt une importance beaucoup plus grande selon nous. En règle générale, la Cour s'attend à ce que les parties se conforment aux règles régissant les plaidoiries, de sorte que chacune d'entre elles connaisse la preuve que l'autre devra faire au procès. On pourrait dire que ce sont les faits plaidés et les questions circonscrites dans les plaidoiries qui permettent de déterminer la pertinence d'un témoignage ou d'une preuve documentaire, et dans ce dernier cas, si un document doit être déposé avant l'instruction. En même temps, les *Règles de la Cour fédérale* n'exigent pas que la demande de

dommages-intérêts exemplaires fasse spécifiquement l'objet d'une plaidoirie.

19 By contrast, in England, under Order 18, rule 8(1) of the *Rules of the Supreme Court 1965* [S.I. 1965/1776], such damages must be specifically pleaded. That rule negatives the ruling in *Broome v. Cassell & Co. Ltd.*,⁸ no doubt as a result of the action recommended by Lord Hailsham of St. Marylebone L.C. as a result of his speech on the appeal in that case to the House of Lords, [1972] A.C. 1027, at page 1083. The object of the proposed new rule, in Lord Hailsham's words, was to prevent a defendant from being "taken by surprise", despite the prevailing view that this is one of the principal objects of pleading.⁹ Because the County Court Rules in that country lay down no corresponding requirement, the "old practice" under which "exemplary damages can be awarded, even though not pleaded", continues to apply.¹⁰ This "old practice" obtains in Canada wherever rules of practice do not require a claim for exemplary damages to be specifically pleaded.¹¹ While paragraph 409(b) of the Rules lays down a general requirement that a party must plead in such a way as not to take another party by surprise,¹² the Rules of the Court as they now stand, by not expressly requiring exemplary damages to be specifically pleaded, evidently do not regard a failure to so plead as running afoul of that Rule. This is not to say, however, that a specific plea would not be preferable even though not strictly required by the *Federal Court Rules*.

20 This, however, does not end the matter. The appellant submits that, even if the claim for exemplary damages was properly before the Trial Judge, we should set aside his decision refusing further evidence to be adduced on the continuance as well as his decision on the continuance. We are not here dealing with a case involving either criminal or civil

À l'opposé, en Angleterre, aux termes de l'ordonnance 18, règle 8(1) des *Rules of the Supreme Court 1965* [S.I. 1965/1776], de tels dommages-intérêts doivent être expressément plaidés. Cette règle annule l'effet de la décision rendue dans *Broome v. Cassell & Co. Ltd.*⁸, ce qui résulte sans aucun doute de la mesure recommandée par lord Hailsham de St. Marylebone, lord chancelier, dans les propos qu'il a tenus en appel, dans cette affaire, devant la chambre des lords, [1972] A.C. 1027, à la page 1083. Selon les dires mêmes de lord Hailsham, l'objet de la nouvelle règle proposée était d'empêcher un défendeur d'être [TRADUCTION] «pris par surprise», malgré l'opinion prédominante selon laquelle il s'agit de l'un des principaux objets de la plaidoirie⁹. Comme, dans ce pays, les Règles de la Cour de comté ne prévoient aucune exigence correspondante, la [TRADUCTION] «vieille pratique» selon laquelle des [TRADUCTION] «dommages-intérêts exemplaires peuvent être accordés même s'ils n'ont pas été plaidés», continue de s'appliquer¹⁰. Cette [TRADUCTION] «vieille pratique» s'applique au Canada chaque fois que les règles de pratique n'exigent pas qu'une demande de dommages-intérêts soit expressément plaidée¹¹. Même si l'alinéa 409b) des Règles exige, de façon générale, qu'une partie plaide toute question de façon à ne pas prendre une autre partie par surprise¹², l'omission de plaider les dommages-intérêts exemplaires n'emporte évidemment pas la contravention aux Règles de la Cour qui, dans leur libellé actuel, n'exigent pas expressément que ces dommages soient spécifiquement plaidés. On ne saurait conclure, cependant, qu'une allégation spécifique n'est pas préférable même si les *Règles de la Cour fédérale* ne l'exigent pas à strictement parler.

Cela ne règle pas pour autant la question. L'appellante fait valoir que, même si le juge de première instance était dûment saisi de la demande de dommages-intérêts exemplaires, nous devrions annuler sa décision de refuser que d'autres éléments de preuve soient présentés à la poursuite de l'instruction, de même que la décision rendue à l'issue de

19

1996 CanLII 4042 (FCA)

20

PUBLIC

TAB 13

PUBLIC

Citatio on: Turnagain Holdings Ltd. v. Environmental Appeal Board et al.
2001 BCSC 795

Date: 20010601
Docket: L002934
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TURNAGAIN HOLDINGS LTD.

PETITIONER

AND:

**ENVIRONMENTAL APPEAL BOARD, W.T. MUNRO,
DEPUTY DIRECTOR OF WILDLIFE, MINISTRY OF THE
ENVIRONMENT, LANDS AND PARKS OF THE
PROVINCE OF BRITISH COLUMBIA and BYRON DALZIEL**

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COLE

(IN CHAMBERS)

Counsel for the Petitioner:

T.L. Robertson, Q.C.
P.M. McGowan

Counsel for the Respondents, W.T. Munro, Deputy Minister of Wildlife, and Ministry of Lands and Parks:

N.E. Brown

Date and Place of Hearing:

Vancouver, BC
April 23, 2001

INTRODUCTION

[1] The petitioner, Turnagain Holdings Ltd., applies pursuant to the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241 to quash a decision of the Environmental Appeal Board made July 9, 1993. The Environmental Appeal Board had dismissed the appeal from a hearing pursuant to s. 62 of the **Wildlife Act**, S.B.C. 1982, c.57 during which it was alleged that the Deputy Director of Wildlife denied the petitioner the right to be heard.

FACTS

[2] In May 1986 the petitioner purchased a guide outfitting territory, which is represented by guide outfitting Certificate No. 700478 (the "Certificate"). The territory comprises approximately 10,000 square miles located in northern British Columbia. Under s. 52 of the **Act**, a guide outfitter's licence can only be issued to a citizen or permanent resident of Canada. A guide outfitter's certificate can only be issued to an individual that holds a guide outfitter's licence. The regional manager under section 59 of the **Act** may issue a certificate granting the holder the privilege of acting as a guide in the area described in the certificate.

[3] In May 1986 the petitioner purchased the territory from a Mr. Callison by way of a trust agreement whereby the

Certificate was held in the name of Mr. Callison for the benefit of the petitioner. The purchase price was \$720,000 U.S. The Wildlife branch was aware of the purchase by the petitioner. The branch was also aware of this practice of limited companies, often owned by individuals resident outside of Canada, entering into such agreements with licensed guide outfitters who by way of a trust agreement held a certificate in the name of the guide outfitter for the benefit of the owners.

[4] When Mr. Callison was killed in a plane crash, the petitioner entered into a similar agreement with Mr. Cook and then later with Mr. Dalziel. The Wildlife branch approved the transfer of the Certificate in each case.

[5] The petitioner provided all the financing and made sizeable monetary contributions to the territory to improve the quality of the operations. The Certificate was the petitioner's most important and valuable asset and without it, no hunting could take place in the territory by foreign residents.

[6] The petitioner was responsible for the payment of royalties on all animals and all other expenses, including those relating to Mr. Dalziel who was treated as an employee.

[7] In June 1990, an agreement was reached between the petitioner and 10323 Holdings Ltd. (the "numbered company") to lease the area covered by the Certificate for a period of one year and to purchase the assets. Mr. Hansen, who had an interest in the numbered company, was hired as the territorial manager.

[8] In the spring of 1991, it became apparent that the numbered company would be unable to acquire the funds to complete the purchase. In 1992 a falling-out occurred between the petitioner and Mr. Dalziel and litigation between the parties was commenced in the Supreme Court of British Columbia.

[9] The petitioner became aware in August 1992 of complaints which had been forwarded to the regional manager, Mr. Zirul, that Mr. Dalziel had contravened ss. 49 and 55 of the **Act**. As a result of the allegations, Mr. Zirul convened a hearing under s. 62 of the **Act** and provided notice of that hearing to the petitioner. The Deputy Director, Mr. Monroe, undertook the hearing in Prince George on November 4-5, 1992.

[10] Mr. Seyl, a director and solicitor for the petitioner appeared on their behalf and Mr. Dalziel was represented by his solicitor, Mr. Wright. The petitioner requested that they be granted status as a party. Mr. Seyl made it clear that the petitioner had over one million dollars worth of investment in the Certificate and the territory covered by it. Counsel for Mr. Dalziel objected to cross-examination of his client by Mr. Seyl because of the outstanding civil action between the two parties. Deputy Director Monroe, after confirming that the petitioner did not hold or have any share in a certificate or licence, denied the petitioner's application, stating that "[w]hat we are looking at today is the licence and certificate and on that basis I am not willing to give standing as a party to your company at this hearing."

[11] Mr. Monroe offered the petitioner two choices: 1) appear with limited intervenor status and be permitted to make a

statement at the beginning of the proceedings, but not call evidence, cross-examine or sum up at the end; or 2) have the petitioner's representative appear as a witness and be called by the regional manager. The petitioner chose the second option and Mr. Seyl was called as a witness.

[12] In the opening comments of Mr. Zirul at the hearing, he made it very clear that the focus of this case was on the petitioner. After pointing out that Mr. Dalziel failed to meet his obligations under the **Act** and under his licence and certificate, he stated:

I believe, however, that his position of authority to deliver on these responsibilities was comprised by those persons who employed him and for whom he held the licence and certificate in trust.

I do not suggest that this lessens Mr. Dalziel's responsibility, only that it may be relevant to the sort of sanctions which should now be considered by the Ministry.

I intend to present testimony and evidence to demonstrate that there was a conspiracy to circumvent the **Wildlife Act**. Much of this may have been invisible to Mr. Dalziel but his signatures on the Guide Licences and reports enabled it.

He goes on to say:

I believe that I will be able to demonstrate that persons who are barred from guiding hunters in British Columbia have used Mr. Dalziel and that the privileges conferred in Mr. Dalziel's Guide Outfitter Certificate have been abused in such a manner that compromises wildlife management the assurance of fair economic return to the Crown and

resulted in a decision that cable distributors were entitled to install their own cable on B.C. Tel supporting structures. In effect, this took away work from the Union members, who had won the right from B.C. Tel to do such installation. The majority held that the Union was not entitled to notice of the hearing because its interest was indirect. That is, the interest of the Union was not relevant to the immediate purpose of the hearing, which was the resolution of issues of telecommunications policy.

[19] The majority of the court was also of the view that regulatory agencies would be paralysed if required to give notice to those who may have contractual relations indirectly affected by the agency's decision.

[20] That case is clearly distinguishable from the facts before us. Here, the petitioner was given notice of the s. 62 hearing. The Ministry was aware of the contractual arrangements between Dalziel and the petitioner and Dalziel was holding the Certificate in trust as agent for the petitioner. I am satisfied that the interest of the petitioner was not simply a contingent interest but one that was direct.

[21] I agree with the respondent that the duty of fairness varies with the circumstances of each case. In this case, the relationship between the petitioner and Mr. Dalziel was well-known and so was the significant investment made by the petitioner in the Certificate and the territory. It was also made clear that the consequences of any decision affecting the Certificate could be detrimental to the petitioner. The real

party facing punishment was the petitioner and that was made clear in Mr. Zirul's opening statement.

[22] In my view, by restricting the petitioner's involvement and failing to give it status as an intervenor with the right to call evidence and to cross-examine witnesses, I am satisfied that Deputy Director Monroe breached the rules of natural justice.

[23] In *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at 630-631, Dickson J. said, in a set of conclusions to his judgment:

7. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum. That is what emerges from the decision of this Court in *Nicholson*.

...

The content of the principles of natural justice and fairness in application to the individual cases will vary according to the circumstances of each case..

8. In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have

sought to answer in all the cases dealing with natural justice and with fairness.

[24] It has been held that a person authorized to conduct a hearing pursuant to s. 62 of the Wildlife Act is performing a judicial function: ***Hansen v. British Columbia (Ministry of Environment and Parks, Fish and Wildlife Branch, Northern Region)***, [1987] B.C.J. No 1676 (Q.L.) (S.C.).

[25] It is trite to say that it is a key component of natural justice and a duty of fairness that a party who may be potentially affected or prejudiced by a decision of an administrative tribunal has a right to be heard. Refusal to allow the petitioner to call and to cross-examine witnesses and make a final submission is in these circumstances tantamount to denying an interested party the right to make full answer and defence.

DELAY

[26] The respondent takes the position that to grant the relief requested by the petitioner would result in substantial prejudice or hardship to them because of the delay in bringing on the judicial review proceedings.

[27] The position taken by the petitioner is that between the decision of the Environmental Appeal Board on July 9, 1993, until October 12, 1999, they did not have the financial ability to seek a judicial review. The petitioner however has not convinced me that is in fact the case. According to the evidence of Mr. Seyl at the hearing before Deputy Director Monroe, the operation "was not being profitable at all and they were not worried about it being profitable." In

...

In my view, this chronology of events represents a concerted and sustained effort on the part of the Society to challenge the legality of the process followed by Alberta to build this dam and the acquiescence of the appellant Ministers. While these events were taking place, construction of the dam continued, despite ongoing legal proceedings, and as at the date of the hearing before this Court, counsel for Alberta advised that the dam had been substantially completed. I can find no evidence that Alberta has suffered any prejudice from any delay in taking this action...

[33] I am satisfied that the illness of Mr. Seyl was a reasonable explanation for the additional delay between October 12, 1999 and October 2000. However, there is no reasonable explanation for the delay prior to October 12, 1999. I am satisfied that delay is unreasonable and I am satisfied that substantial prejudice will result with respect to the treaty negotiations if this application is granted.

Conclusion

[34] I find that the Environmental Appeal Board erred in failing to find that the Deputy Director had breached a duty of fairness to the petitioner by failing to allow intervenor status with the right to call evidence and cross-examine witnesses. However, due to the extensive delay in commencing proceedings by the petitioner, I am satisfied that substantial prejudice would result if the relief sought in the petition was granted. The petition is therefore dismissed.

"F.W. Cole, J."

The Honourable Mr. Justice F.W. Cole

PUBLIC

TAB 14

ment was made, and the veracity, perception and memory of the witness relating the statement can be fully tested by cross-examination. Since the truth of the declarant's assertion is not in issue, deprivation of the right to cross-examine the declarant, on which rejection of hearsay is premised, is of no consequence.

la déclaration a été faite et qu'il est possible, grâce à un contre-interrogatoire, de vérifier la sincérité, la perception et les souvenirs du témoin rapportant la déclaration. Étant donné que la véracité de l'affirmation du déclarant n'est pas en cause, l'absence du droit de le contre-interroger, qui justifie le rejet de la preuve par ouï-dire, n'a aucune incidence.

2. Admissions

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in *McCormick on Evidence, supra*, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

b 2. Les aveux

L'admission des aveux ne repose pas sur les mêmes motifs que d'autres exceptions à la règle du ouï-dire. En fait, on peut se demander si la preuve constitue réellement du ouï-dire. L'effet pratique de cette distinction doctrinale est qu'au lieu de chercher des garanties circonstanciées indépendantes de fiabilité, il suffit de présenter la preuve contre une partie. L'admissibilité de cette preuve repose sur la théorie du système contradictoire voulant que les déclarations antérieures d'une partie peuvent être admises contre la partie qui ne peut se plaindre de la non-fiabilité de ses propres déclarations. Comme l'a dit Morgan, [TRADUCTION] «[u]ne partie peut difficilement faire valoir qu'elle n'a pas eu l'occasion de se contre-interroger ou qu'elle n'est pas digne de foi sauf lorsqu'elle s'exprime sous serment» (Morgan, «Basic Problems of Evidence» (1963), pp. 265 et 266, cité dans *McCormick on Evidence, op. cit.*, à la p. 140). La règle est la même en matière civile et en matière pénale sous réserve des règles particulières applicables aux confessions en matière pénale.

3. Procedure for Determining Admissibility

The general rule is that preliminary questions which are a condition of admissibility are for the trial judge in his or her capacity as the judge of the law rather than as the trier of fact. See *R. v. B. (K.G.)*, *supra*, at pp. 783-84. If factual questions must be resolved, a *voir dire* may be required. The applicable standard of proof in both civil and criminal cases is on a balance of probabilities: *R. v. B. (K.G.)*, at p. 800.

3. La procédure pour déterminer l'admissibilité

Suivant la règle générale, les questions préliminaires qui conditionnent l'admissibilité sont du ressort du juge du procès en sa capacité de juge du droit plutôt que de juge des faits. Voir l'arrêt *R. c. B. (K.G.)*, précité, aux pp. 783 et 784. Il peut être nécessaire de tenir un *voir-dire* lorsque des questions de fait doivent être tranchées. La norme de preuve applicable tant en matière civile que pénale est la prépondérance des probabilités: *R. c. B. (K.G.)*, à la p. 800.

A different view has been taken with respect to an issue as to the authenticity of a statement, with

Un point de vue différent a été adopté quant à l'authenticité d'une déclaration, écrite ou orale,

PUBLIC

TAB 15

PUBLIC

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6
File No.: CT-2016-015
Registry Document No.: 429

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)



Dates of hearing: October 2-5, 9-10, 15-17 and 30-31, November 1-2 and 13-15, 2018
Before: D. Gascon (Chairperson), P. Crampton C.J. and Dr. D. McFetridge
Date of Reasons for Order and Order: October 17, 2019

REASONS FOR ORDER AND ORDER

[144] In the case at hand, even considering and applying the ordinary civil rules of evidence governing lay opinion evidence and hearsay evidence, the Tribunal is satisfied that the evidence of Mss. Stewart and Bishop disputed by VAA is admissible.

b. Lay opinion evidence

[145] Turning first to VAA's argument on lay opinion evidence, the general rule is that a lay witness may not give opinion evidence but may only testify to facts within his or her knowledge, observation and experience (*White Burgess* at para 14; *TREB FCA* at para 78). The main rationale for excluding lay witness opinion evidence is that it is not helpful to the decision-maker and may be misleading (*White Burgess* at para 14). This principle is reflected in Rules 68(2) and 69(2) of the CT Rules, which both state that “[u]nless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents.”

[146] The SCC has however recognized that “[t]he line between ‘fact’ and ‘opinion’ is not clear” (*Graat v The Queen*, [1982] 2 SCR 819, 144 DLR (3d) 267 at p 835). The courts have thus developed greater freedom to receive lay witnesses' opinions when the witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions. In that respect, the FCA recently stated, again in the context of a Tribunal proceeding, that opinion from a lay witness is acceptable “where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts” (*TREB FCA* at para 79). As such, when a witness has personal knowledge of observed facts such as a company's relevant, real world, operations, its evidence may be accepted by a court or the Tribunal even if it is opinion evidence (*TREB FCA* at para 80; *Pfizer Canada* at paras 105-108).

[147] Furthermore, it has been recognized that lay witnesses can provide opinions about their own conduct and their own business (*TREB FCA* at paras 80-81). The FCA however specified that there are limits to such lay opinion evidence: “lay witnesses cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world” and they “are not in

a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they have the experiential competence” [emphasis in original] (*TREB FCA* at para 81).

[148] In other words, when a witness had “an opportunity for observation” and was “in a position to give the Court real help,” the evidence may be admissible and the real issue will be the assessment of weight (*Imperial Brush* at para 11). In the same vein, the SCC has stated, in the context of expert opinion evidence, that the lack of an evidentiary basis affects the weight to be given to an opinion, not its admissibility (*R v Molodowic*, 2000 SCC 16 at para 7; *R v Lavallée*, [1990] 1 SCR 852, 108 NR 321 at pp 896-897).

[149] In this case, the Tribunal is satisfied that both Mss. Stewart and Bishop had the required personal knowledge, observation and experience to testify on the issues challenged by VAA.

[150] Ms. Stewart was responsible for all procurement activities regarding in-flight catering at Air Transat from 2014 to 2017, including the Air Transat 2015 RFP process. She also set out the background information and testified about her role in this RFP process, and she notably stated that she had “personal knowledge of the matters” discussed in her evidence. In her testimony, it was clear that Ms. Stewart was testifying about Air Transat’s own business, that she was intimately involved in the RFP process, and that she had the experiential competence to help the panel.

[151] Turning to Ms. Bishop, she had day-to-day responsibility for the Jazz 2014 RFP process and provided strategic direction to the 2014 RFP process team. She also mentioned that she conducted monthly reviews to maintain targets and costs in all areas and oversaw the budget and billings for all in-flight catering. Furthermore, she provided some background information with respect to the missed savings and increased expenses allegedly incurred by Jazz at YVR. Like Ms. Stewart, Ms. Bishop also stated that she had “personal knowledge of the matters” discussed in her evidence.

[152] With regards to Ms. Bishop’s statements about the expected savings from switching away from Gate Gourmet, she had personal knowledge of the RFP bid evaluation and of the actual savings that would have resulted from switching away from Gate Gourmet at YVR. As the

director of in-flight catering services and on-board products at Jazz, she ran and oversaw the RFP process and supervised a team of people involved in the process. She attended meetings and calls with the bidders and reviewed all the supporting documentation. Her testimony demonstrated that the bid evaluation was prepared at her request and that she was familiar with how the bids were evaluated. More specifically, Exhibit 10 was prepared at her request by three persons directly reporting to her (i.e., Mr. Keith Lardner, Mr. Trevor Umlah and Ms. Pamela Craig), in order to evaluate the bids that were received and to determine who would be awarded the stations at stake. In her testimony before the Tribunal, Ms. Bishop was able to discuss the document. Similarly, Exhibit 13 was prepared by a person reporting to her (i.e., Ms. Craig), at her request, in order to determine the foregone in-flight catering cost savings or losses and to do the pricing analysis. While Ms. Bishop “did not get into the weeds” of the numbers, she was familiar enough with both Exhibits to testify extensively about their contents and to explain how the analyses contained in them were performed (Transcript, Conf. B, October 3, 2018, at p 128).

[153] The Tribunal acknowledges that Ms. Bishop confirmed that she did not prepare Exhibits 10 and 13 herself and did not directly perform the calculations that underlay the conclusions reached in those two Exhibits. However, the Tribunal considers that the fact that she could not reconcile many figures or explain the discrepancies with other numbers cited solely affects the weight to be given to the evidence, not its admissibility.

[154] Having heard the two witnesses, their examination by counsel for the Commissioner, their cross-examination by counsel for VAA and the questioning by the panel, the Tribunal is not persuaded that the evidence disputed by VAA was not within the respective knowledge, understanding, observation or experience of Mss. Stewart and Bishop, or that those witnesses did not observe the facts contained in their respective witness statements with respect to the disputed evidence. There is therefore no ground to declare any portion of their evidence inadmissible as improper lay opinion evidence.

c. Hearsay evidence

[155] VAA further argued that Ms. Bishop’s evidence concerning Exhibits 10 and 13 constitutes inadmissible hearsay.

PUBLIC

TAB 16

PUBLIC

COURT FILE NO.: 00-CV-200564

DATE: 20011219

02 002 079

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Dr. Klaus M. Zeitler

Applicant

- and -

Inmet Mining Corporation

Respondent

)
)
) Mahmud Jamal for the Applicant,
) responding on the motion;
)
)
)
)
)
) John Laskin and Crawford Smith for the
) Respondent, moving party.
)
)
)
)
)
) **HEARD:** September 21, 2001

Lane, J.:

[1] The respondent, Inmet, moves to strike out certain portions of an affidavit filed herein by the applicant, Dr. Zeitler. The main application asks for a declaration as to the proper interpretation of the language of a written contract and the affidavit contains statements as to the parties' subjective intentions in entering into the contract and also as to pre-contract negotiations and drafts. The motion is to strike out those portions of the affidavit as irrelevant and inadmissible because they violate the parol evidence rule.

[2] The applicant, Dr. Zeitler, raises an objection that the decision as to the admissibility of evidence should be left to the Judge hearing the application and not decided on interlocutory motion. Counsel for the applicant referred me to *876502 Ontario Inc. v I.F. Propco Holdings (Ontario) 10 Limited* (1997) 37 O.R. (3rd) 70 where Dambrot J. found that Rule 25.11 did not contemplate motions to obtain advance rulings on evidence for a motion to be heard later by another judicial officer. At page 77 he said:

Our system ordinarily reserves that function to the judicial officer hearing the merits of the matter. I view that as desirable for two reasons. First, such rulings are better left to the person charged with acquiring a full understanding of the matter, who is then best positioned to balance the competing arguments and rule wisely. Second, encouraging interlocutory rulings and appeals on admissibility can only serve to fragment proceedings and encourage delay, as evidenced by this case, without appreciably assisting the ultimate decider of the matter in his or her task.

[3] The above passage was quoted with approval by O’Leary J. in *Masters’ Association of Ontario v Ontario (Attorney General)* [2001] O.J. No. 1444 (Div. Ct.) as support for his view that the admissibility of evidence in an affidavit tendered for use on an application for judicial review should be decided by the panel and not by a Judge on a preliminary motion. He also referred to the decision of the Divisional Court in *Stanley v Davies* [1999] O.J. No. 634 where it was said:

While it cannot be said that it is never proper for the Master to strike portions of affidavits to be used on summary judgment applications, as a general rule motions to masters for such relief should be discouraged. The relief, if appropriate, can be granted by the judge hearing the summary judgment motion and to prevent unnecessary steps in the action should be so dealt with. The Master then was correct in refusing to strike out the paragraphs and leaving that issue for the Motions Court judge.

[4] Other cases were cited to me following the *Propco* decision: *Norlander v Norlander Estate* (1998) 31 C.P.C. (4th) 290 (O.C.G.D.); *King Estate v King* (1999) 26 E.T.R. (2nd) 199 (O.C.G.D.); *Mead Johnson Canada v Ontario (Ministry of Health)* (1999) 117 O.A.C. 121 (Div. Ct.); *Re X* (1998) 23 E.T.R. (2nd) 257 (O.C.G.D.) and *Peel (Regional Municipality) v Greater Toronto Airports Authority* [1999] O.J. No. 1921, where Pitt J. refused to strike out an affidavit for use on a motion saying that the court had decided on other occasions that the Judge hearing the underlying motion or the action will determine the admissibility of evidence.

[5] Mr. Laskin, for the respondent, moving party, submitted that these cases did not deal with a breach of a substantive rule of law, but only with the admissibility and relevance of evidence. I do not see that as a distinguishing feature, the parol evidence rule itself deals with the admissibility of evidence and calling it, rightly or wrongly, a substantive rule does not alter this basic characteristic.

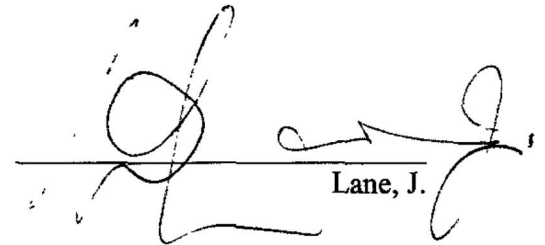
[6] He further submitted there was ample authority for the course he wished me to adopt. Passages had often been struck from affidavits. He referred me to *Noble China Inc. v Lei* (1998) 42 O.R.(3rd) 69 (O.C.G.D.) where Lax J. struck out the affidavit of one of three arbitrators because it breached the rule of adjudicative secrecy. As Lax J.’s analysis, beginning at page 76 of her reasons, makes clear, this rule is one of the hallmarks of judicial independence, is fundamental to the integrity of adjudication and applies to private consensual decision-making. In my view *Noble China* is a vastly different case from the present one, not only as to the nature of the contents of the affidavit, but also because of the harm that would occur to the adjudicative

process if it were allowed to stand. Similarly, in *Graphic Communications Union, Local 41M v Ottawa Citizen* (1999) 128 O.A.C. 208, also relied on by the moving party, the affidavit of one of three arbitrators was struck because it would be impossible to cross-examine without offending the policy on deliberative confidentiality (paragraph 18). In *Ontario Federation of Anglers and Hunters v Ontario (Minister of Natural Resources)* (2001) 143 O.A.C. 103 (Div. Ct.), Dunnet, J. sitting as a motions judge, struck out portions of affidavits because they were legal argument and conclusions of law disguised as opinion evidence. This case is quite different from our own in which what is deposed is essentially factual. *Canada Post Corp. v Smith* (1994) 20 O.R. (3rd) 173 (Div. Ct.) was decided on essentially the same point, the affidavit was legal argument suitable for a factum or a case brief.

[7] In my view, the *Propco* line of cases is persuasive. Rulings as to what evidence may be admitted in a case involving the interpretation of a contract ought to be made by the judicial officer charged with the resolution of the main issue. That judge will have all the facts and will be best placed to determine whether the language is ambiguous and whether to turn for help to one or more of the kinds of extrinsic evidence which may be available. Adopting this course means that the disputed evidence will be available in the affidavits for appellate review and will avoid the fragmentation, cost and delay of interlocutory proceedings and possible appeals. In the present case, where the application procedure has been adopted, there is some merit in the submission that the rules do not contemplate this kind of proceeding, but it is not necessary to decide the point.

[8] Nothing in these reasons is intended in any way to refer to the merits of the argument that much of Dr. Zeitler's affidavit is in fact irrelevant and inadmissible.

[9] The motion to strike parts of the affidavit of Dr. Zeitler is dismissed. Costs on a party and party basis will follow the event unless either party wishes to make submissions in writing for a different costs order.



Lane, J.

Released: December 19, 2001

3P

PUBLIC

TAB 17

PUBLIC



CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to December 2, 2025

À jour au 2 décembre 2025

Last amended on January 13, 2022

Dernière modification le 13 janvier 2022

Published by the Minister of Justice at the following address:
<http://laws-lois.justice.gc.ca>

Publié par le ministre de la Justice à l'adresse suivante :
<http://lois-laws.justice.gc.ca>

COMPENDIUM PAGE NO.235

is not due to any contrivance on the party's part, the Court may adjourn the hearing.

Avoidance of adjournment

(3) An adverse party may require a party seeking an adjournment under subsection (2) to declare, or to produce some other person to declare, under oath the facts that, in the opinion of the party seeking the adjournment, the defaulting witness would have stated, and may avoid the adjournment by admitting the truth of those facts or that the witness would have stated those facts.

Proof by affidavit

285 The Court may, at any time, order that any fact be proven by affidavit or that the affidavit of a witness be read at trial.

Order re giving evidence

286 The Court may, before trial, order that evidence of any fact be given at the trial in such a manner as may be specified in the order, including

- (a)** by statement on oath of information or belief;
- (b)** by the production of documents or other material;
- (c)** by the production of copies of documents; or
- (d)** in the case of a fact that is or was a matter of common knowledge either generally or in a particular district, by the production of a specified publication containing a statement of that fact.

Demonstrative Evidence

Admissibility

287 Except with leave of the Court, no plan, photograph, model or other demonstrative evidence prepared or obtained for use at trial is admissible in evidence at trial, other than in the course of cross-examination, unless at least 30 days before the commencement of the trial all other parties have been given an opportunity to inspect it and consent to its admission without further proof.

Use of Examination for Discovery at Trial

Reading in examination at trial

288 A party may introduce as its own evidence at trial any part of its examination for discovery of an adverse party or of a person examined on behalf of an adverse

son absence ne tient pas à une manœuvre de la partie, la Cour peut ajourner l'audience.

Ajournement évité

(3) Une partie adverse peut exiger de la partie qui demande l'ajournement de l'audience selon le paragraphe (2) qu'elle déclare ou produise une autre personne pour déclarer, sous serment, les faits qui, de l'avis de la partie demandant l'ajournement, auraient été énoncés par le témoin défaillant et elle peut éviter l'ajournement en admettant soit la véracité de ces faits, soit seulement que le témoin les aurait ainsi énoncés.

Preuve à établir par affidavit

285 La Cour peut ordonner qu'un fait particulier soit prouvé par affidavit ou que l'affidavit d'un témoin soit lu à l'instruction.

Manière de présenter la preuve

286 La Cour peut, avant l'instruction, ordonner que la preuve d'un fait particulier soit présentée à l'instruction de la manière précisée dans l'ordonnance, notamment :

- a)** par une déclaration sous serment de renseignements ou d'une croyance;
- b)** par la production de documents ou d'éléments matériels;
- c)** par la production de copies de documents;
- d)** dans le cas d'un fait notoire ou d'un fait connu dans un district particulier, par la production d'une publication particulière qui relate ce fait.

Éléments de preuve matériels

Admissibilité des plans, photographies et maquettes

287 Sauf avec l'autorisation de la Cour, les plans, photographies, maquettes ou autres éléments de preuve matériels ou documentaires établis ou obtenus pour être utilisés lors de l'instruction ne sont admissibles en preuve à l'instruction — sauf lors du contre-interrogatoire — que si, au moins 30 jours avant le début de l'instruction, les autres parties ont eu l'occasion de les examiner et se sont entendues sur leur admission sans autre justification.

Utilisation de l'interrogatoire préalable lors de l'instruction

Extrait des dépositions

288 Une partie peut, à l'instruction, présenter en preuve tout extrait des dépositions recueillies à l'interrogatoire préalable d'une partie adverse ou d'une personne

party, whether or not the adverse party or person has already testified.

Qualifying answers

289 The Court may order a party who uses part of an examination for discovery as its own evidence to introduce into evidence any other part of the examination for discovery that the Court considers is so related that it ought not to be omitted.

Unavailability of deponent

290 The Court may permit a party to use all or part of an examination for discovery of a person, other than a person examined under rule 238, as evidence at trial if

(a) the person is unable to testify at the trial because of his or her illness, infirmity or death or because the person cannot be compelled to attend; and

(b) his or her evidence cannot be obtained on commission.

Use of examination to impeach credibility at trial

291 A party may use any part of its examination for discovery of a person as evidence to impeach the credibility of that person as a witness at trial only if the party first puts to the person the questions asked in that part of the examination.

Simplified Action

Where mandatory

292 Unless the Court orders otherwise, rules 294 to 299 apply to any action in which

(a) each claim is exclusively for monetary relief in an amount not exceeding \$100,000, exclusive of interest and costs;

(b) in respect of an action *in rem* claiming monetary relief, no amount claimed, exclusive of interest and costs, exceeds \$50,000;

(c) the parties agree that the action is to be conducted as a simplified action; or

(d) on motion, the Court orders that the action be conducted as a simplified action.

SOR/2021-150, s. 7.

interrogée pour le compte de celle-ci, que la partie adverse ou cette personne ait déjà témoigné ou non.

Extraits pertinents

289 Lorsqu'une partie présente en preuve des extraits des dépositions recueillies à l'interrogatoire préalable, la Cour peut lui ordonner de produire tout autre extrait de ces dépositions qui, à son avis, est pertinent et ne devrait pas être omis.

Non-disponibilité d'un déposant

290 La Cour peut, à l'instruction, autoriser une partie à présenter en preuve tout ou partie d'une déposition recueillie à l'interrogatoire préalable, à l'exception de celle d'une personne interrogée aux termes de la règle 238, si les conditions suivantes sont réunies :

a) l'auteur de la déposition n'est pas en mesure de témoigner à l'instruction en raison d'une maladie, d'une infirmité ou de son décès, ou il ne peut être contraint à comparaître;

b) sa déposition ne peut être recueillie par voie de commission rogatoire.

Utilisation pour discréditer un témoin

291 Une partie peut, à l'instruction, invoquer en preuve tout extrait d'une déposition recueillie à l'interrogatoire préalable, afin d'attaquer la crédibilité de son auteur à titre de témoin, pourvu qu'elle lui pose d'abord les mêmes questions que celles posées à cet égard à l'interrogatoire préalable.

Action simplifiée

Application

292 Sauf ordonnance contraire de la Cour, les règles 294 à 299 s'appliquent à toute action dans laquelle :

a) chaque réclamation vise exclusivement une réparation pécuniaire d'au plus 100 000 \$, intérêts et dépens non compris;

b) s'il s'agit d'une action réelle visant en outre une réparation pécuniaire, chaque réclamation est d'au plus 50 000 \$, intérêts et dépens non compris;

c) les parties conviennent de procéder par voie d'action simplifiée;

d) la Cour, sur requête, ordonne de procéder par voie d'action simplifiée.

DORS/2021-150, art. 7.

PUBLIC

TAB 18

RECEIVED / REÇU

Date: December 23, 2024

CT- 2024-012

Badih Abboud for / pour
REGISTRAR / REGISTRAIRE

CT-2024-

OTTAWA, ONT.

1

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 by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC.

Respondent

NOTICE OF APPLICATION

TAKE NOTICE that the Commissioner of Competition (the “**Commissioner**”) will make an application (the “**Application**”) to the Competition Tribunal (the “**Tribunal**”) for an order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Act**”), in respect of conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the Act.

AND TAKE NOTICE that the Commissioner relies on the following Statement of Grounds and Material Facts in support of this Application and on such further or other material as counsel may advise and the Tribunal may permit.

PUBLIC

– 2 –

AND TAKE NOTICE that if you do not file a Response with the Registrar of the Tribunal within 45 days of the date upon which this Application is served upon you, the Tribunal may, upon application by the Commissioner and without further notice, make such order or orders as it may consider just, including the order sought in this Application.

THE ADDRESSES FOR SERVICE ARE:

For Rogers Communications Inc.:

Lax O'Sullivan Lissus Gottlieb
Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada
T 416 598 8648 F 416 598 3730
E csmith@lolg.ca

Attention: Crawford Smith

For the Commissioner:

Attorney General of Canada
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor Gatineau, QC K1A 0C9
Tel: (647) 625-6782 Fax: (819) 953-9267

Attention: Jonathan Hood
Tanis Halpape
Irene Cybulsky
Kendra Wilson

APPLICATION

1. The Commissioner makes this Application pursuant to section 74.1 of the *Competition Act* (the “**Act**”) for:
 - a. A declaration that the Respondent, Rogers Communications Inc. (“**Rogers**”), has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsections, 74.011(1) and 74.011(2) of the Act;
 - b. an order prohibiting Rogers from engaging in the reviewable conduct or substantially similar reviewable conduct in Canada for a period of ten years from the date of such order;
 - c. an order requiring Rogers to publish or otherwise disseminate notices of determinations made herein pursuant to paragraph 74.1(1)(b) of the Act in such manner and at such times as the Commissioner may advise and this Tribunal may permit;
 - d. an order requiring Rogers to pay such an administrative monetary penalty as the Tribunal deems appropriate;
 - e. an order requiring Rogers to pay an amount, not exceeding the total amounts paid to Rogers for the products in respect of which the reviewable conduct was engaged in, to be distributed among those persons to whom the products were sold, in an amount and manner to be assessed by the Tribunal;
 - f. costs; and
 - g. such further and other relief as the Commissioner may advise and this Tribunal may permit.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW

1. Rogers has extensively promoted unlimited and infinite mobile data plans to millions of Canadians across Canada through advertising in a wide variety of marketing channels. In these representations, Rogers has made, and continues to make promises to consumers that their data will be unlimited, providing them with infinite possibilities.
2. Many of Rogers' representations promoting its infinite plans include representations that explain the benefits that consumers would enjoy by having data that is free from any limits. For example, from a Rogers video advertisement, internally titled "It's Big" we hear:

"Because we don't want to stream just one movie... We need every movie"

"And we're not just catching the game... We're sharing every goal, trade and stat"

"Because we like our data, like our tacos... All you can eat!"

"Rogers Infinite: it's data that goes on and on!"

"Infinite data for unlimited possibilities".

3. Rogers is misleading consumers by offering data plans that appear to be unlimited but actually have limits. The data is limited by a data cap. If customers reach the data cap, their high-speed data disappears for the rest of the month, and what remains is data whose speed is reduced by over 99%. When this happens, downloading a high-definition movie, which used to take minutes, will take hours.
4. By advertising limited data plans as if they were actually unlimited, Rogers has made, and is continuing to make representations to the public that are false or misleading in a material respect.

II. THE PARTIES

5. The Commissioner is an officer appointed by the Governor in Council under section 7 of the Act and is responsible for the administration and enforcement of the Act.
6. Rogers is a publicly traded Canadian communications and media company headquartered in Toronto, Ontario, that provides, among other services, wireless services. Wireless services are those services provided over a radio network permitting both voice and data communication.

III. ROGERS' DECEPTIVE MARKETING PRACTICES

7. Rogers has made, and continues to make, materially false or misleading representations to the Canadian public for the purposes of promoting the supply or use of wireless telecommunication services that offer “unlimited” or “infinite” data (“**Rogers Infinite Unlimited Plans**”) and related products, and its business interests more generally, contrary to paragraph 74.01(1)(a) as well as subsections 74.011(1) and 74.011(2) of the Act.
8. Specifically, Rogers has made, and continues to make, representations to the public that convey the materially false or misleading general impression that Rogers Infinite Unlimited Plans offer unlimited and infinite data, allowing consumers to use as much data as they want, free from data limits (“**Unlimited Data Representations**”). In fact, Rogers is providing plans whose high-speed data is limited to a defined amount (“**Data Cap**”) and thereafter data speeds reduced by over 99% (“**throttled**”).

The lead-up to the launch of Rogers Infinite Unlimited Plans

9. Prior to the introduction of Rogers Infinite Unlimited Plans, Rogers offered wireless plans with a Data Cap. After a consumer hit their Data Cap their data speed was not limited, however Rogers would charge them an

additional fee for any data used beyond their Data Cap (an “**Overage**”). Consumers who wanted to avoid being charged an Overage could, as they approached their Data Cap, purchase a data top up, which would allow them to continue to use a defined amount of data.

10. However, Rogers found that many consumers were restricting their wireless data usage. For instance, consumers were seeking and switching to wi-fi when possible to avoid “punitive” additional charges on top of their monthly plan costs. This affected Roger’s ability to earn more revenue from the sale of additional data or from the sale of upgraded wireless plans.
11. In or about 2019, Rogers started to look at the possibility of replacing its data plans with a different model. It considered various options, before ultimately settling on the approach of offering set amounts of data each month (which Rogers refers to internally as data buckets), and then throttling that data after the data bucket is empty.
12. However, rather than marketing the plans as involving data buckets and throttling, Rogers marketed these plans to Canadians as being “unlimited” plans offering “infinite data”. Rogers named the plans “Rogers Infinite”, and adopted an infinity loop as the logo of the plans.
13. At this time Canadians were familiar with other telecom offerings that were indeed unlimited, including those from Rogers, such as unlimited home internet and unlimited wireless talk and text.

Rogers Infinite Unlimited Plans

Representations to the public

14. Starting in June of 2019, Rogers launched an aggressive “high impact, high reach” multi-phase advertising campaign to promote its Rogers Infinite Unlimited Plans across Canada.

15. The campaign sought to establish at the outset the concept of “infinite data”, with a main message of “unlimited data is here”. The ads leaned heavily into the terms “unlimited” and “infinite”, as well as the infinity loop.



Figure 1: Star Metro Toronto Newspaper

16. Rogers went on to “blanket the country” with advertisements promising “unlimited data for infinite possibilities”. Representations were made using an array of different channels. Impressions, which indicate how many times consumers are exposed to a representation, were in the hundreds of millions. Rogers’ objective of the ads was to “sear it into people’s brains” and to “own” the concept of unlimited data.



Figure 2: Yonge and Dundas Square in Toronto

17. After the initial launch, representations were added to the advertisements that spoke about the benefits that consumers would get from having unlimited data. These representations reinforced the unlimited nature of the offering, and often encouraged greater data use. Representations include:
 - a. “ENTER A WORLD OF INFINITE DATA”, “WHERE MUSIC GOES ON AND ON”, “CONNECTIONS GO ON AND ON”, “MOVIES GO ON AND ON”, “SPORTS GO ON AND ON”, “ANYWHERE YOU GO”, “INTRODUCING UNLIMITED DATA FOR INFINITE POSSIBILITIES” “ROGERS Infinite”;
 - b. “Shop Rogers Infinite plans with infinite data”, “Data without limits”, “Enjoy infinite data on any 5G device. No limits, no restrictions, and no overages”;

- c. “Enjoy lightning fast streaming, gaming and sharing with a connection that keeps up with you, so you’ll never miss a beat while you’re on the go”; and
 - d. “Unlimited data that goes on and on and on and on and on and on and on”.
18. Rogers made the impugned representations through various channels, including television, radio, social media, online banner advertisements, in billboards, in malls, in live events, and even on public transit wraps. A few examples of the myriad representations include:



Figure 3: Edmonton LRT Transit Wrap

PUBLIC

- 10 -

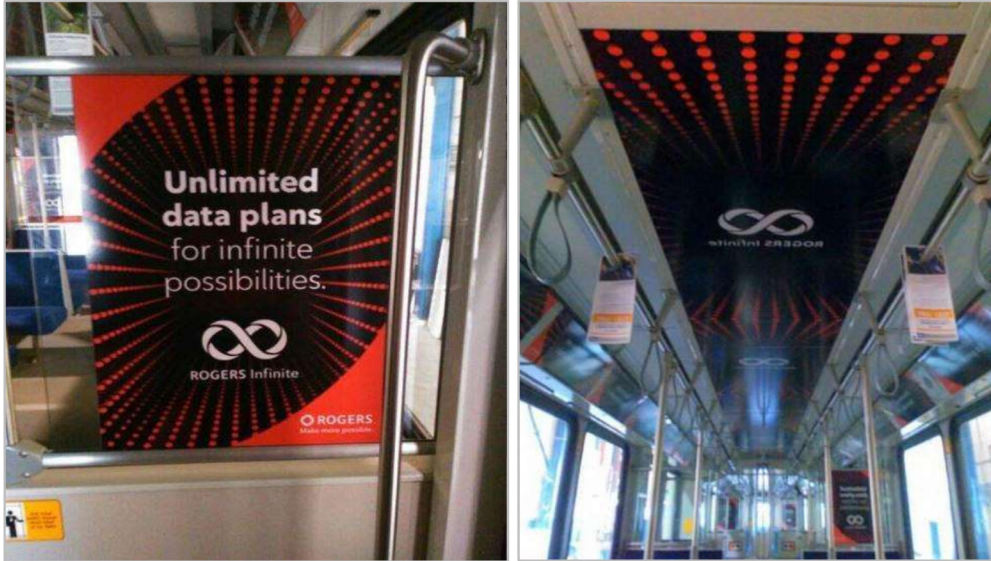
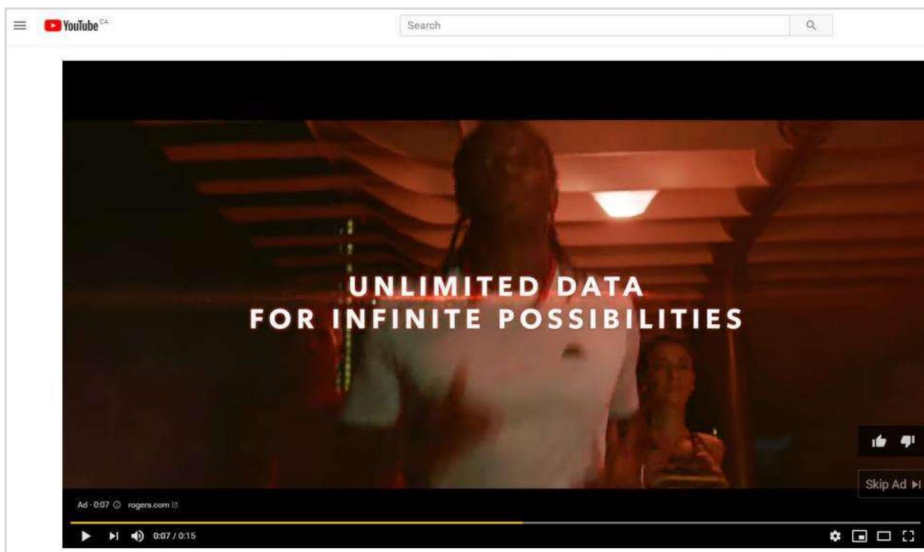


Figure 4: Edmonton LRT Transit



Figure 5: Mall Banners



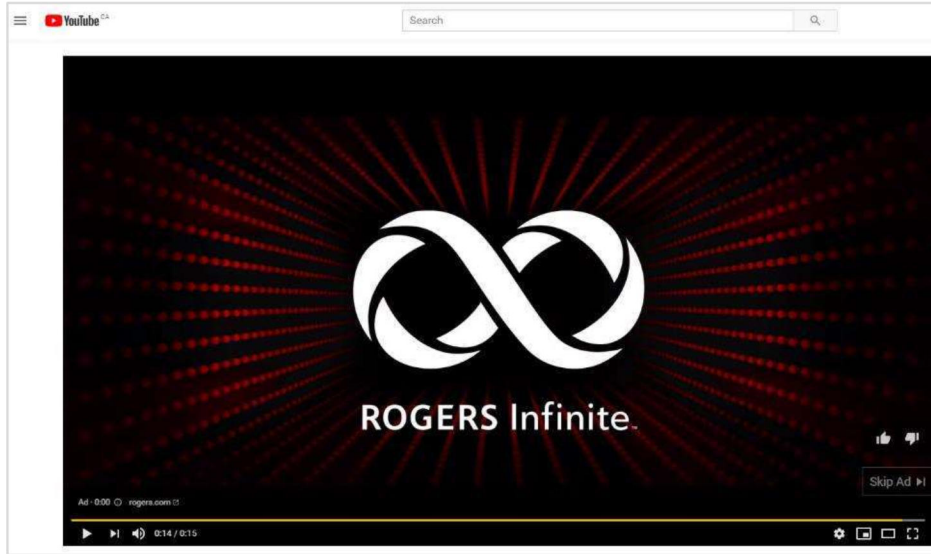


Figure 6: Two still images of a YouTube video advertisement



Figure 7: Transit Shelter Advertising in Toronto

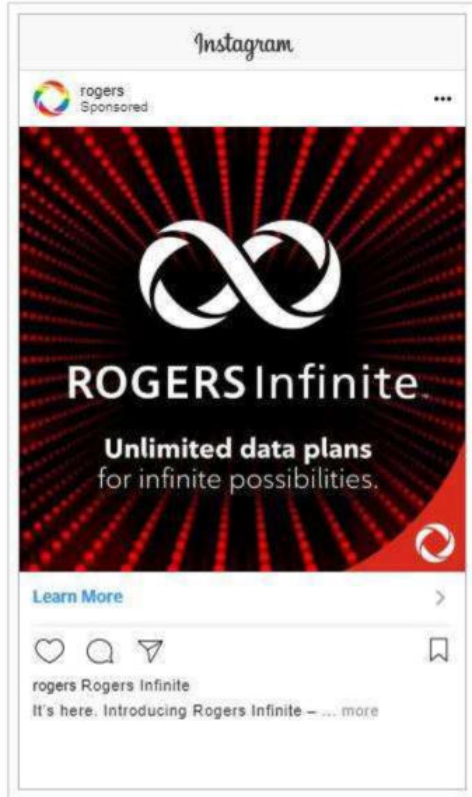


Figure 8: Instagram Advertisement

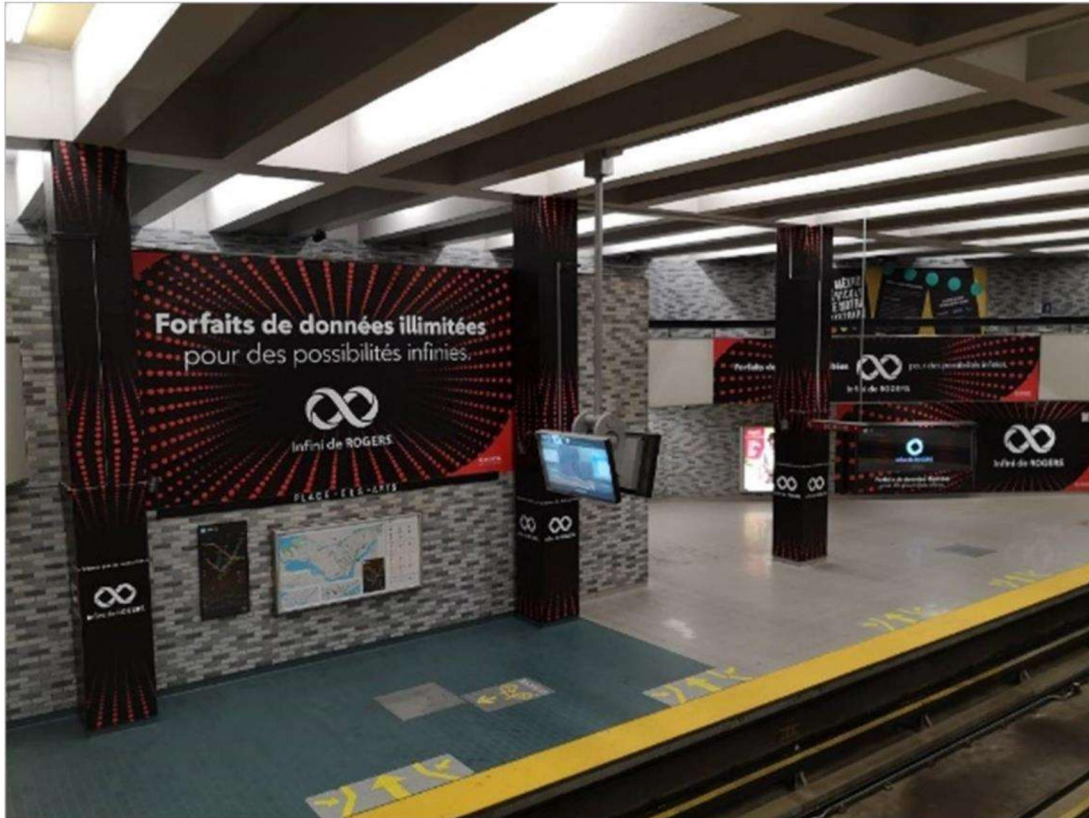


Figure 9: Place-des-Arts, Montreal




Figure 10: Screen Capture from Rogers Infinite advertisement during hockey game with audio “Say goodbye to data overages. Introducing Rogers Infinite. Unlimited data plans for infinite possibilities”.

19. Rogers made similar representations in both the subject line and body of promotional emails sent to consumers. For example, one email subject line read: “[Redacted Name], get Rogers Infinite and say bye to data Top Ups”. In another example, shown in Figure 11 below, the email states “Introducing ROGERS Infinite. Unlimited data plans for infinite possibilities. [Redacted Name] you’ve told us you want more data and less worrying about overage fees, and we’ve listened. With unlimited plans starting at \$75/mo, get ready to stream more, share more, and stay connected without ever worrying about overages again”. Rogers has sent many other emails that contain similar representations.

Unlimited data plans are now available at Rogers. [View online](#)

Introducing



ROGERS Infinite.

Unlimited data plans for infinite possibilities.


...we've told us you want more data and less worrying about overage fees, and we've listened.


With unlimited plans starting at \$75/mo, get ready to stream more, share more, and stay connected without ever worrying about overages again. Plus, save \$10/mo. on each additional line you add to your Infinite plan.


Switch your plan today.


[Learn more](#)


Why Rogers?

 **Built for Sharing**
Rogers Infinite plans are built for more connections. Each line you add comes with a minimum 10GB of max speed data that can be shared across all of your lines - and with data that goes on and on, you'll never have to worry about overages again.


 **Upfront Edge.**
Get the latest phones at the lowest upfront costs with the new Upfront Edge Program.





 **Canada's most trusted network**
The Rogers network covers 97% of Canadians, with Extended Coverage to give you confidence to stay connected in even more places across Canada.

 **Roam Like Home**
Talk, text and use your plan's data just as you do at home for only \$7/day in the US and \$12/day in over 125 eligible international destinations.

 **ROGERS.**
Make more possible.

[MyRogers](#) ▶ | [Get support](#) ▶

 [Community Forums](#) ▶

[Contact Us](#) | [Unsubscribe](#) | [Privacy Policy](#) | [Store Locator](#) | [rogers.com](#)
Rogers Communications | One Mount Pleasant Road Toronto ON M4Y 2Y5
© 2019 Rogers Communications

[See full details](#)

Figure 11: Email representation

Advertisements on Rogers' website

20. Rogers has also made numerous similar representations in advertisements on its website, rogers.com (the “**Website**”). For example, the following representations appeared on the Website:

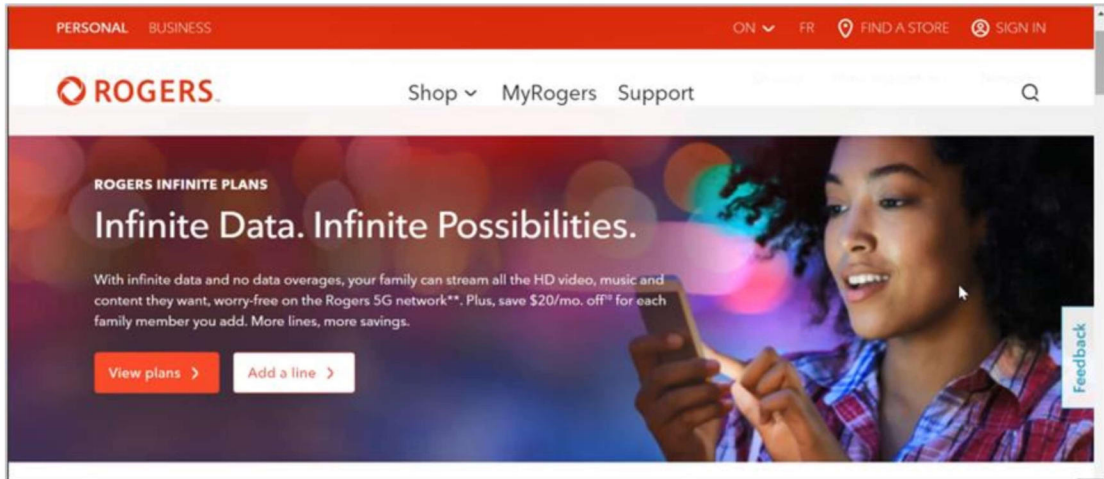


Figure 12: Still image of video capture of Rogers webpage (October 26, 2022)

21. Below the heading “ROGERS INFINITE PLANS”, the advertisement says in large text: “Infinite Data. Infinite Possibilities.” This is followed by further content including the sentence “With infinite data and no data overages, your family can stream all the HD video, music and content they want, worry-free on the Rogers 5G network**” (the asterisks are explained in paragraph 23 below). These representations reinforce the general impression that there are no limits and consumers can use as much data as they want.
22. If, rather than clicking on the “View plans” or “Add a line” links, a consumer chooses to scroll down on the page, they would encounter additional related representations as pictured in Figure 13. Under a graphic and a heading “Unlimited data”, the consumer sees “Rogers Infinite™ plans come with unlimited data and no data overages so you can stream worry-free...”. It is notable that the term “unlimited” appears side-by-side here in

two contexts - “Unlimited Data” and “Unlimited Calls & Texts”. On one hand, in the context of calls and texts users could make as many calls or texts as they like without limit, while on the other hand, in respect of data, the “unlimited data” is subject to a data limit.

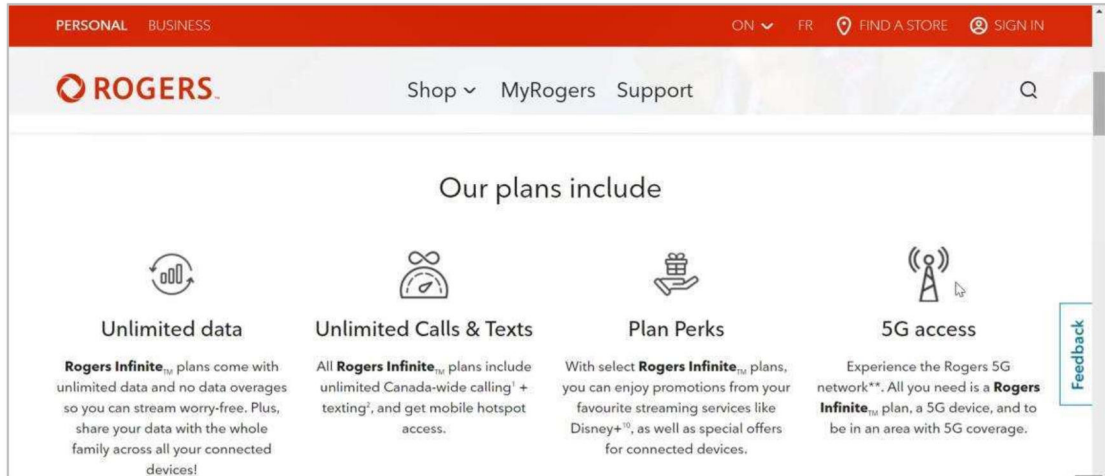


Figure 13: Still image of video capture of Rogers webpage, continued with scroll (October 26, 2022)

23. The asterisks in Figure 12 and paragraph 21 above do not go to anywhere that is immediately visible on the page. If a consumer scrolls past Figure 13 down to the bottom of this webpage on the Website and clicks a collapsed ribbon that reads “See full details” (Figure 14), the Website reveals a section of terms and conditions (the “**Terms and Conditions**”). The Terms and Conditions on the Website varied over time. The ones that were in effect at the time of the representations reproduced in Figure 12 and 13 are in Figure 15 below:



Figure 14: Still image of video capture of bottom of Rogers webpage, before “See full details” clicked and expanded (October 26, 2022)

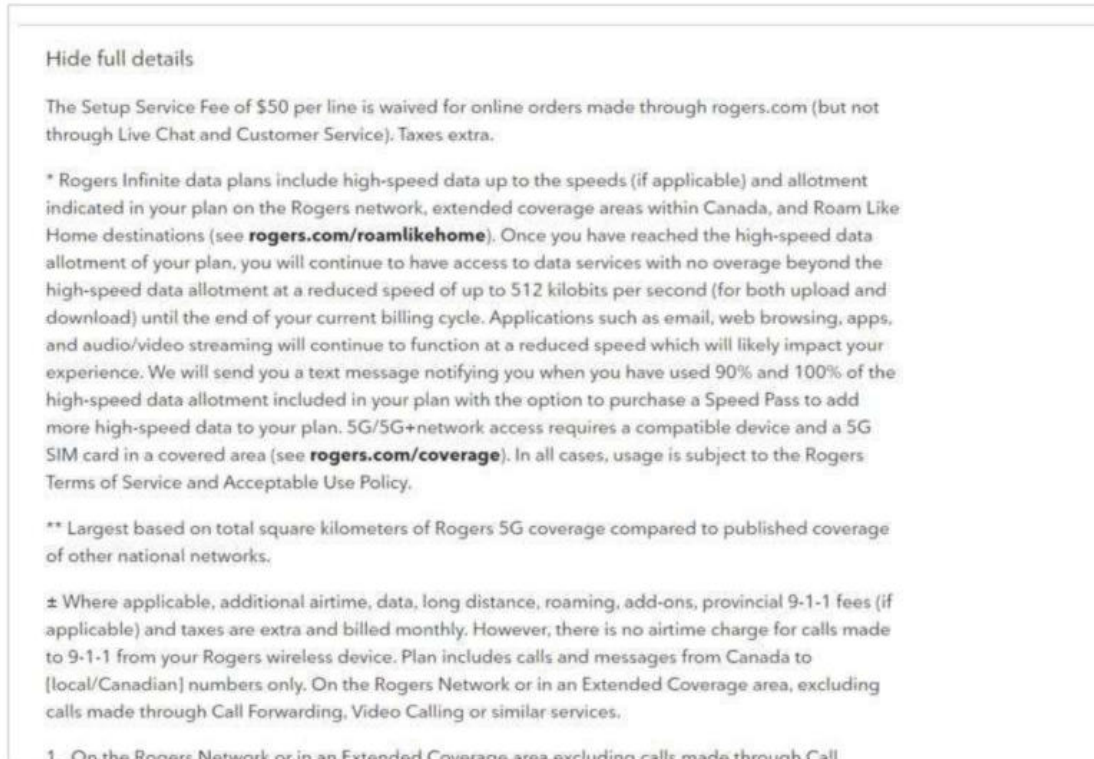


Figure 15: Excerpt of video capture of bottom of Rogers webpage, after “See full details” clicked and expanded (October 26, 2022)

Rogers Infinite Unlimited Plan Offerings on the Website

24. On the Website, Rogers makes a series of Unlimited Data Representations in relation to Rogers Infinite Unlimited Plans. These are in summarized tiles (“**Plan Tiles**”). An example is shown below this paragraph. The name of each plan (“**Plan Name(s)**”) is prominent at the top of the Plan Tile, and associated details of what is included are below the title in smaller font. Although the Plan Names have changed over time, they have always been anchored with the word “infinite” or “unlimited”. The Plan Names have included over time: “Unlimited data”, “Rogers Infinite”, “Infinite 25 GB”, “Infinite Extra” and “5G Infinite Essential”.

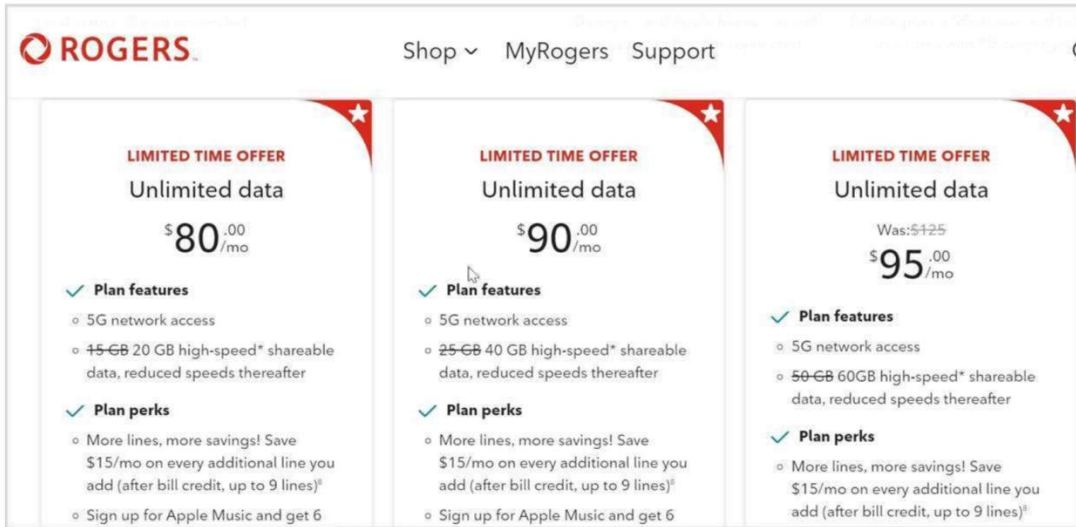


Figure 16: Still images of video capture of Rogers webpage (November 2, 2021)

25. The figure above shows an example of Plan Tiles on the Website. In the example above, the Plan Name is “Unlimited data”, below which is the plan price. In smaller font, under the bold heading “Plan features” are bullet points. The first bullet point refers to 5G network access, the second includes language regarding the “unlimited data” of the plan. Together, they indicate that the plan features 5G network access, with 20GB high-speed shareable data, reduced speed thereafter. The asterisk again does not go to anywhere that is immediately visible on the page, but is referencing the Terms and Conditions, visible only as described above, through scrolling to the bottom of the page and expanding the “See full details” ribbon.
26. Since at least the fall of 2022, Rogers has chosen to de-emphasize the Data Cap limitation by moving away from including a number of GBs in the title of the plans (e.g. Infinite 15 GB), to Plan Names such as “Infinite Essential”, “Infinite Extra” and “Infinite Lite”, as can be seen in the example below. In the small font bullets in each Plan Tile, the representation in this example has changed to say “75 GB at speeds up to 1 Gbps. Unlimited data at reduced speeds thereafter*”.

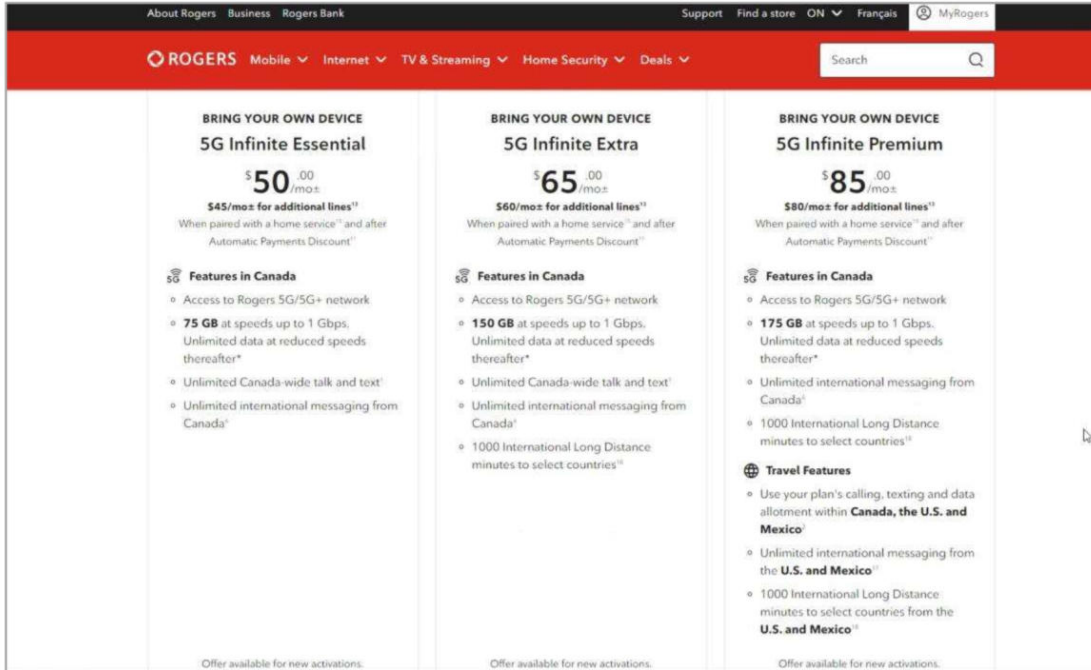


Figure 17: Still images of video capture of a more recent Rogers webpage, [rogers.com/plans](https://www.rogers.com/plans) (September 27, 2024)

27. While Rogers is fully aware of the extent to which the plans are throttled, nowhere in the Plan Tiles does it disclose the magnitude of the throttling. For example, the Plan Tiles do not disclose that the 5G/5G+ speeds will be reduced to speeds between roughly 500 to 2,000 times slower for plans with speeds of 250 Megabit per second (“Mbps”) and 1 Gigabit per second (“Gbps”) respectively, or that 1 Gbps would be throttled down to 0.000512 Gbps (512 Kilobits per second (“Kbps”)).
28. Similarly, should consumers note the language indicating that speeds will be reduced, they will not find an explanation in the Plan Tiles of the effect of the “reduced speeds” on the consumers’ experience, only that it will be impacted.
29. Rogers’ own internal records consider various speeds and associated functions. They show that speeds up to nearly six times higher than the throttled speed of 512 Kbps are considered useful only for “essential connectivity” and that significantly faster speeds are needed for activities

such as high-definition (“**HD**”) video streaming, video calling, cloud gaming or downloading large files, such as movies.

30. While there are asterisks on the Plan Tiles, they do not go to anywhere that is immediately visible on the page. As was the case for Figure 12, the consumer must scroll to the bottom of the webpage and click a collapsed ribbon that reads “*See full details*”, which then reveals a section of Terms and Conditions in fine print, within which the asterisks are eventually explained.
31. Consumers who read through the dense text can discover that, upon using up their plan’s Data Cap, their data speed will be reduced to a maximum of 512 Kbps (the “**Throttle Speed**”) until the end of the billing cycle, and that “*Applications such as email, web browsing, apps, and audio/video streaming will continue to function at a reduced speed which will likely impact your experience*”.

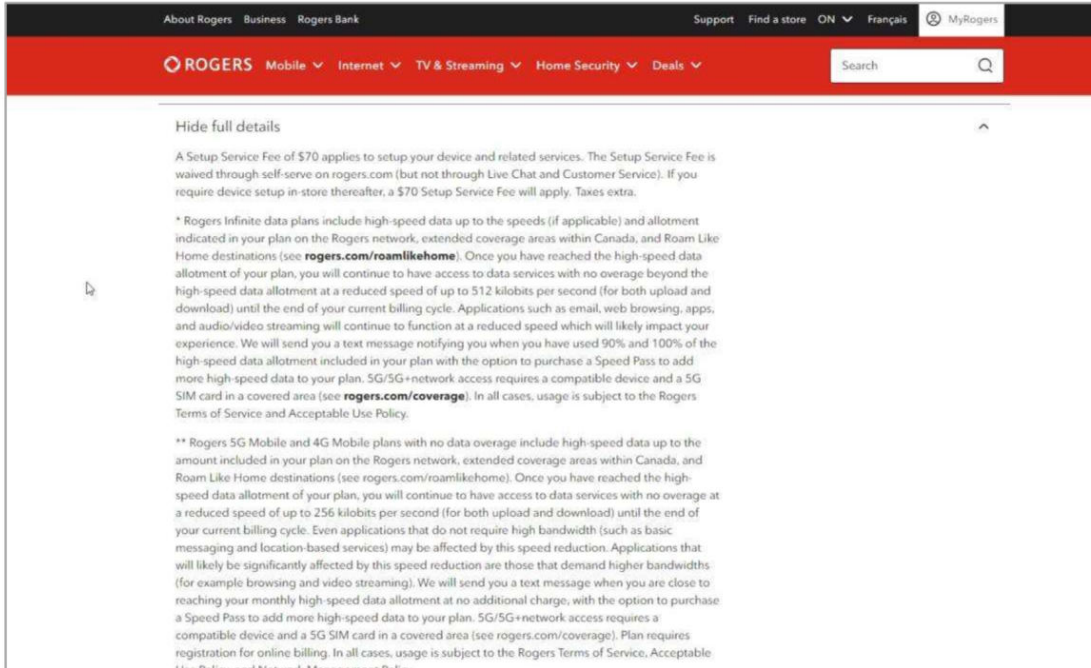


Figure 18: Still image of video capture of Rogers webpage, continued with scroll: bottom of webpage following clicking the ribbon called “See full details” (September 27, 2024)

32. These disclaimers are inadequate to alter the general impression conveyed by the representations promising unlimited and infinite data. To the extent that they are even noticed and read, they do not convey the extent or magnitude of the effect that this reduction has on a consumer’s experience.

Rogers Unlimited Data Representations are false or misleading

33. The literal meaning and the general impression conveyed by the word “unlimited” is very straightforward and aligns with the dictionary meaning: something that is not limited in any way or restricted in terms of number, quantity, or extent; infinite. The literal meaning and general impression of the word “infinite” is equally straightforward: limitless, endless in space, extent or size; impossible to measure. The fact that consumers understand these terms in much the same way when it comes to data was made known to Rogers in consumer research that it commissioned.

34. Rogers Infinite Unlimited Plans are not, and never have been unlimited or infinite. Instead, the data included with the plans is limited and finite in terms of quantity and quality by Roger's Data Caps and throttling.
35. Initially, Rogers restricted the trickle of throttled data to speeds of no more than 256 Kbps (or 0.000256 Gbps). It was later increased by Rogers to 512 Kbps (or 0.000512 Gbps) in response to competitive pressures. These speeds can be upwards of 2,000 times slower than the speeds available before being throttled.
36. Many operations that could be done quickly before the throttling, become difficult or virtually impossible after data is throttled. This fundamentally impacts the functionality of any application that requires high-speed data, such as streaming, video calling or cloud gaming. For example, Rogers indicates that downloading an HD movie takes 1 to 4 minutes at 1 Gbps to 250 Mbps respectively, but this will take over a day to download at 512 kbps. Contrary to the general impression conveyed by Rogers' representations, once throttled, consumers can no longer do all that they want to do with their data.

Promoting Rogers' business interests by stimulating use of data to drive upsells

37. Rogers made false or misleading representations to the public in order to promote the supply and use of its Rogers Infinite Unlimited Plans.
38. Roger's objectives for the creation of Rogers Infinite Unlimited Plans also included the goal of increasing the monetization of data by selling more of it to its customers. Rogers' representations often encouraged consumers to use more data, while at the same time telling customers not to worry about data Overage charges or data top-ups. In moving to the Rogers Infinite Unlimited Plans, Rogers capitalized on this sentiment, for example, it told consumers to "[...] stop eyeing your data usage and start

streaming more, surfing more, and sharing more, without any overages on an exclusive Rogers Infinite unlimited data plan. [...]”. This can result in consumers using up their data buckets and then receiving throttled data.

39. Rogers decided on the Throttle Speed for its Rogers Infinite Unlimited Plans to ensure that it would create a “painful” experience for consumers. Rogers expected this to encourage consumers to either buy more high-speed data for the rest of the month by purchasing what Rogers markets as a “**Speed Pass**”, or upgrade to a plan with a bigger data bucket.
40. To this end, Rogers sends notifications to Infinite customers who are approaching their Data Cap encouraging them to purchase a Speed Pass and/or suggesting that they upgrade to a Rogers Infinite Unlimited Plan with a larger data bucket. Consumers unable or unwilling to pay for more data have to wait until the beginning of their next billing cycle to get full functionality back in a way that allows them to do all that they want to do with their data.
41. Since the introduction of the Rogers Infinite Unlimited Plans, Rogers has sold millions of dollars worth of Speed Passes to Canadian consumers, and generated billions in revenues.

Disclaimers or other disclosures are insufficient to cure the false or misleading general impression

42. Rogers has made countless materially false or misleading representations to Canadians regarding Rogers Infinite Unlimited Plans that contained no disclaimers or disclosures of any kind.
43. As described above, there are limited disclosures about data amounts and reduced speeds in certain representations, such as Plan Tiles, as well as in disclaimers in the Terms and Conditions available at the bottom of the webpage containing the Plan Tiles on the Website. Rogers’ own

internal records indicate that most website visitors do not scroll to, and therefore read, the Terms and Conditions. Even if consumers do read the fine print, either on Rogers' Website, or in any other representation, it is inadequate to alter the general impression conveyed by the various representations promising infinite data.

The Unlimited Data Representations are Material

44. The Unlimited Data Representations had and continue to have a material influence on consumers' decisions to purchase Rogers Infinite Unlimited Plans. The representations provide consumers with comfort that they will have continual access to all the data they want so that they never have to worry about running out of data or having to pay for more.

IV. AGGRAVATING FACTORS

45. In May 2017, the Competition Bureau published the Deceptive Marketing Practices Digest Volume 3, which reminded telecommunication companies to avoid using the term "unlimited" if their products are restricted, limited or qualified in some way, and warned that disclaimers are often ineffective at altering or limiting the plain meaning of the representations, especially when used in a digital medium. Two years later, Rogers forged ahead with the exact strategy that the industry was warned not to use: marketing data as unlimited, even though it is limited, and relying on disclaimers on its Website to cure the deception.
46. The deceptive conduct described herein is aggravated by the factors referred to in subsection 74.1(5) of the Act, including (but not limited to) the following:
 - a. the **reach of the conduct within the relevant geographic market**: The Unlimited Data Representations were made across Canada on several platforms, accessible by all Canadians.

Rogers data shows that the representations made hundreds of millions of impressions.

- b. the **frequency and duration of the conduct**: Rogers has made, and continues to make, the Unlimited Data Representations on a daily basis from June 2019 to present, for a total of 5 years and 6 months.
- c. the **vulnerability of the class of persons likely to be adversely affected by the conduct**: Rogers was aware that most website visitors do not scroll to, and therefore few consumers would read the fine print containing pertinent details of the plan. In addition, Rogers targeted newcomers to Canada with advertising on a website geared to this cohort. Finally, at the time of launch, consumers had an understanding of unlimited services being unlimited, and were vulnerable to services masquerading as unlimited.
- d. the **materiality of any representation**: unlimited data is ranked as the feature with the highest stated interest and value amongst customers, therefore misrepresentation of a highly relevant aspect of a plan would have a meaningful impact on consumer behaviour.
- e. the **likelihood of self-correction in the relevant geographic market**: after the Competition Bureau's 2017 warning to the telecommunications industry about unlimited claims that are not unlimited, and despite testing that Rogers had commissioned that indicated consumer understanding did not match the reality of the plans, as well as executives' concerns about the public's perception that they are engaging in false advertising, Rogers nevertheless went ahead and began making the Unlimited Data Representations. After becoming aware of the Commissioner's

inquiry, Rogers made modest adjustments to its representations, but has not addressed the issue at the core of this matter – referring to data inappropriately as “unlimited” or “infinite” when in fact it is subject to limitations.

- f. **the effect on competition in the relevant market:** Rogers’ launch of the Rogers Infinite Unlimited Plans and Unlimited Data Representations was quickly followed by their competitors launching similar plans with representations about ‘unlimited’ data.
- g. **the gross revenue from sales affected by the conduct:** the gross revenue generated from the sales affected by the conduct is high. Not only was revenue derived from the sales of plans but also from Speed Pass sales, and plan upsell. As of the end of 2023, there were over 2.5 million consumers subscribed to Rogers Infinite Unlimited Plans, and Rogers has generated billions in revenue from those plans.
- h. **the financial position of the person against whom the order is made:** Rogers has a strong financial position, with consolidated total revenues of \$19.3 billion in 2023, \$15.4 billion in 2022, and \$14.7 billion in 2021.
- i. **the history of compliance with this Act by the person against whom the order is made:** Rogers has been the subject of two different inquiries under the Deceptive Marketing Practices provisions of the Act, one with a finding that Rogers (Chatr) made unsubstantiated performance claims contrary to paragraph 74.01(1)(b) of the Act and another inquiry that resulted in a registered consent agreement relating to premium text messaging conduct the Commissioner concluded was contrary to paragraph 74.01(1)(a) of the Act.

- j. **any other relevant factor:** Rogers was aware that the Unlimited Data Representations were misleading but nevertheless made and continued to make the representations.

V. RELIEF SOUGHT

47. The Commissioner claims the relief set out in paragraph 1, above.

VI. PROCEDURAL MATTERS

48. The Commissioner requests that this proceeding be conducted in English.
49. The Commissioner requests that this Application be heard in the City of Ottawa.

DATED AT Ottawa, this 22nd day of December 2024.

**Boswell,
Matthew**

Digitally signed by
Boswell, Matthew
Date: 2024.12.22
21:42:45 -05'00'

Matthew Boswell
Commissioner of Competition

PUBLIC

– 29 –

For the purposes of the Application, service of all documents on the Commissioner may be served on:

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Jonathan Hood

Tel: 416-954-5925
Jonathan.Hood@cb-bc.gc.ca

Tanis Halpape

Tel: 613-979-8851
Tanis.Halpape@cb-bc.gc.ca

Irene Cybulsky

Tel: 613-316-5034
Irene.Cybulsky@cb-bc.gc.ca

Kendra Wilson

Tel: 613-799-9454
Kendra.Wilson@cb-bc.gc.ca

Counsel to the Commissioner
Competition

PUBLIC

– 30 –

AND COPIES

TO: **Crawford Smith**
Lax O'Sullivan Lissus Gottlieb
Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada
T 416 598 8648 F 416 598 3730
E csmith@lolg.ca

AND TO : **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 584

PUBLIC

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to s. 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

AMENDED RESPONSE OF ROGERS COMMUNICATIONS INC.

A. Overview

1. The Commissioner’s Application singles out Rogers for allegedly misleading advertising related to its approach to advertising unlimited wireless data plans, an approach that has been commonplace throughout the industry since 2019. In the more than five years before the Bureau brought this proceeding, Bell, Telus, SaskTel, and other Canadian carriers have marketed their wireless plans as having “unlimited data” in the same way Rogers has, and many of them still do so today.

2. The Commissioner's Application ignores Rogers' ubiquitous disclosure of key plan features, ignores widespread consumer understanding of unlimited wireless data plans, presents a highly selective and misleading collection of advertisements, and unreasonably targets Rogers for an industry-wide practice. The Bureau attacks not only Rogers' advertising but the industry's entire approach to unlimited wireless data plans. Its position is out of step with the market reality, with the Canadian Radio and Television Commission's (CRTC) Wireless Code, and with a common-sense approach to what the ordinary consumer of Infinite plans understood about the service they were buying.

3. Rogers introduced its Infinite wireless plans in June 2019, spurring a significant pro-competitive shift in the Canadian market for high-data users. These plans were intended to address consumer frustration at being forced either to automatically pay overage fees or be cut off from data access. Rogers addressed these concerns by increasing the size of data buckets, eliminating overage fees, and allowing customers to decide for themselves whether to purchase additional high-speed data or continue using unlimited data at a reduced speed.

4. These new Infinite plans significantly reduced Rogers' revenues from overage fees, but were unequivocally beneficial to consumers, as the Competition Bureau has recognized. In submissions to the CRTC in July 2020, the Bureau concluded that the launch of unlimited data plans resulted in an effective 25% decrease in plan prices from the major carriers and released "pent up demand for higher data usage" that consumers were avoiding because of "high penalties if they used more than their plan limit".

5. Rogers' advertising of its Infinite plans has never been false or misleading, much less in a material respect. The Bureau selectively focuses on isolated ads from brand campaigns, while

ignoring the repeated, clear, and conspicuous disclosures that accompanied Rogers' promotion of its plans.

6. These disclosures unambiguously told consumers that they would have high-speed data up to a certain amount based on the plan they chose, with unlimited data at reduced speeds thereafter. This was made clear in Rogers' advertising, on its website, in the description of its wireless plans, and in the plan summaries provided to customers at the time of purchase.

7. Rogers at all times complied with the legal and regulatory requirements to market wireless plans as having unlimited data. In 2013, six years before Rogers launched its Infinite Plans, the CRTC—which regulates the wireless industry in the public interest—specifically addressed the marketing of unlimited wireless plans. The CRTC's mandatory Wireless Code allows carriers to describe wireless plans as offering unlimited data, so long as they disclose any restrictions on the speed or quality of that data. This is precisely what Rogers does.

8. Rogers fully complied with these requirements in designing, launching, and marketing its Infinite plans. In the more than five years since their launch, the CRTC has never taken action against Infinite plans, nor, as far as Rogers is aware, against any other carrier's unlimited plans.

9. With the larger data buckets that Rogers introduced as part of its Infinite plans, only a small percentage of customers exceeded their high-speed data buckets and experienced reduced speeds, and that percentage has steadily declined over the last five years as data buckets have grown larger and larger. As a result, the vast majority of Infinite customers experience unlimited high-speed data.

10. Rogers opposes the Commissioner's Application, denies all of the allegations set out in his Notice of Application, and asks that the relief he seeks be denied in its entirety, with costs payable to Rogers.

B. Rogers Launches "Infinite" Plans in 2019

11. Rogers launched its new Infinite plans in June of 2019. Prior to this, carriers sold plans with a set monthly allocation of data, known as a "data bucket". If customers exceeded their bucket before the end of the month, they were either automatically charged overage fees or cut off from access to data entirely.

12. This had been a significant source of consumer complaints. Consumers wanted certainty over the amount they would pay each month, and to be able to use their phones without fear of going over their data allocation or being cut off.

13. Rogers' Infinite plans addressed these concerns. They offered customers significantly larger "max speed" data buckets and eliminated overage fees entirely. Even after customers exceeded their data bucket for the month, they could continue to use unlimited data at a reduced speed with no additional cost. If customers chose, they could purchase additional high-speed data with a "Speed Pass", for which customers were never automatically charged.

14. Infinite plans were developed for and marketed to sophisticated, high-use wireless data consumers. These were the customers who most often exceeded their monthly data allowance and most often incurred overage charges as a result. They wanted larger data buckets, control over their spending, and to use their data without having to worry about exceeding their monthly allowance and paying data overages. Rogers' Infinite plans delivered these benefits.

15. Promotional materials at and following the launch of Infinite plans emphasize the elimination of overage fees and clearly disclose the amount of high-speed data provided for the advertised price (see, e.g., Figure 1, Figure 2 and Figure 3 below).

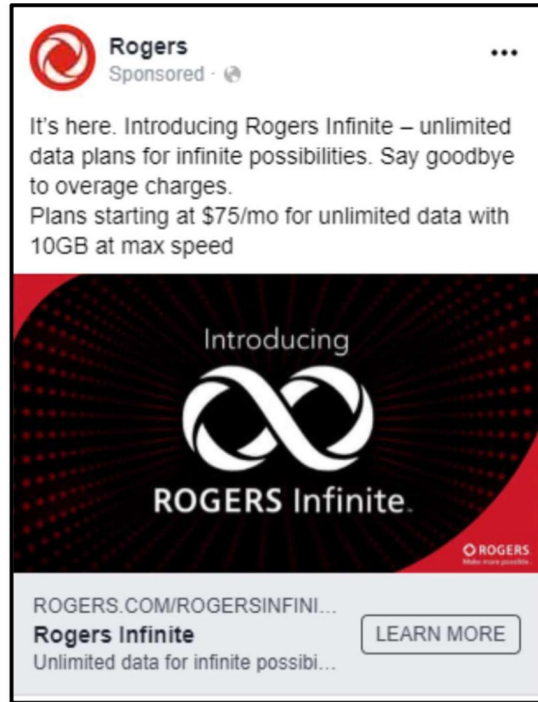


Figure 1: Facebook Advertisement from July 2019

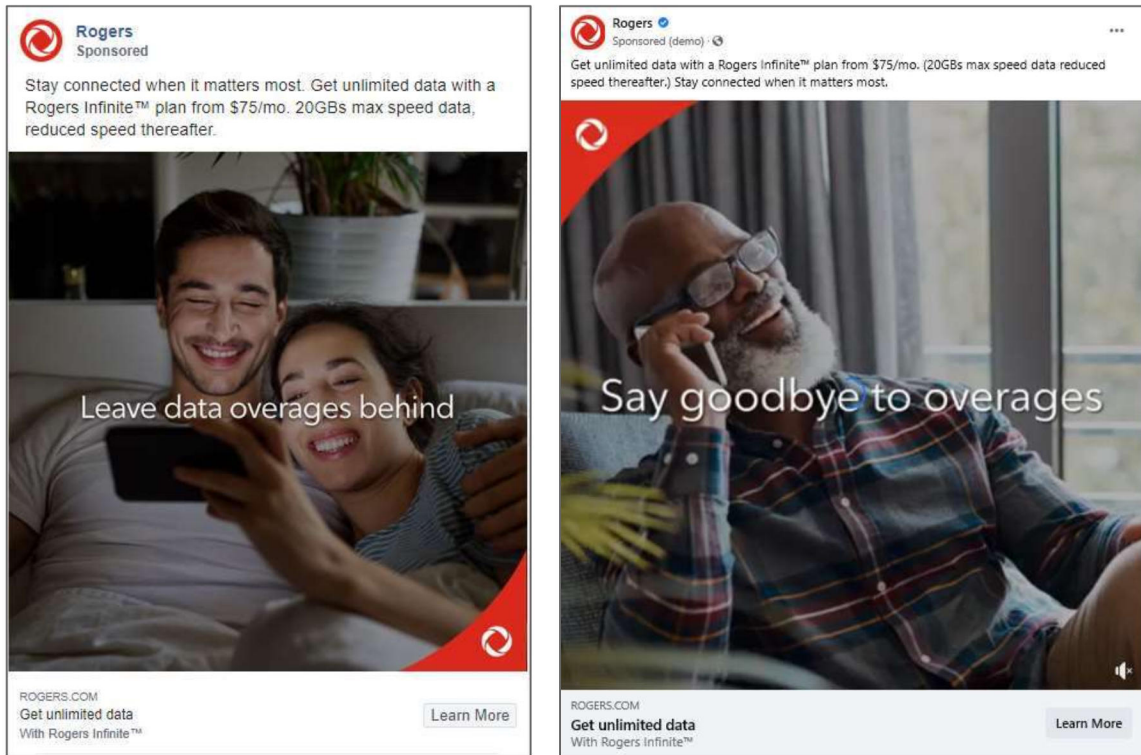


Figure 2: Social Media Advertisements from May 2020

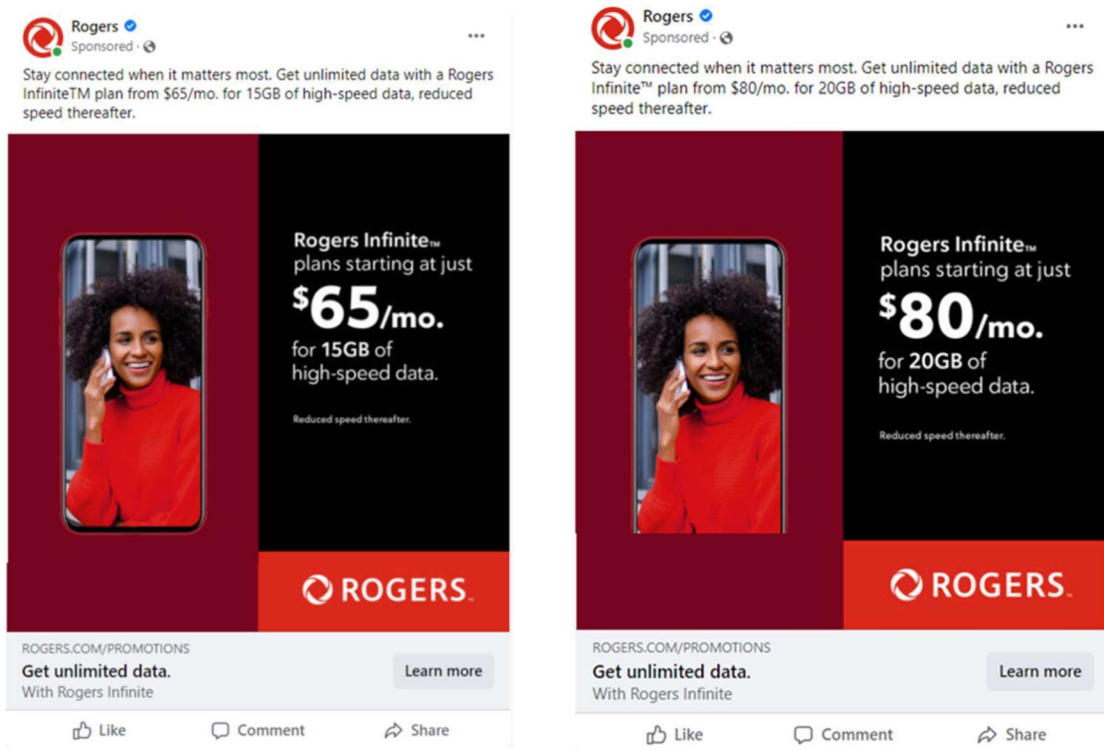


Figure 3: Examples of Infinite Advertisements (January-April 2022)

16. Customers are offered different amounts of high-speed data at different prices and choose the plan that best fits their needs. Plans with smaller high-speed data buckets cost less, and plans with larger high-speed data buckets cost more. The bucket sizes and plan prices are prominently displayed both on Rogers’ website and in store (see Figure 4 for the online plan tiles).



Figure 4: Screenshot from Rogers Mobility Website at Launch

17. Rogers clearly and conspicuously disclosed to every customer who was considering purchasing an Infinite plan that they would receive a certain amount of high-speed data—as chosen by them—and would have “unlimited data at reduced speeds thereafter”. This same disclosure is repeated multiple times during the purchasing process.

18. At the time of launch in 2019, the smallest Infinite high-speed data bucket was 10GB—more than three times the monthly usage of an average wireless data subscriber at the time. Rogers also offered 20GB and 50GB plans for customers seeking even larger high-speed data buckets. Since then, data buckets have steadily grown in size while the cost of plans has come down dramatically. The smallest Infinite plan now offers 100GB of data and the cost per gigabyte has decreased significantly.

19. The Bureau asserts that Infinite plans were designed to increase revenues from the sale of additional data. In fact, the opposite is true and Rogers knew from the outset that these revenues would drop significantly. Rogers nevertheless introduced Infinite plans to address consumer frustrations with overage fees. In the third quarter of 2019—the first full quarter following the introduction of Infinite plans—revenues from overage fees fell by over \$50 million compared to the same quarter in 2018 and have significantly decreased since.

20. The Bureau’s repeated allegations that Rogers introduced Infinite plans as a way to drive increased consumer spending on data is false. It was not Rogers’ intention and it was not the result, as is plainly evident. Rogers introduced these plans to address significant consumer concerns, not because they would increase Rogers’ data revenues.

21. Shortly after launch, the Competition Bureau acknowledged the positive impact that unlimited data plans had on wireless data plan prices and consumer choice more generally. In submissions to the CRTC, the Bureau noted that “the launch of ‘unlimited plans’ arguably amounted to a decrease of approximately 25% in the Big 3’s plan prices in most markets ... as compared with previous equivalent plans”.

22. Rogers’ introduction of its no-overage-fee Infinite plans ~~spurred~~ was quickly followed by the launch of unlimited data plans by other major carriers to do the same such as Bell and Telus, leading to a significant pro-consumer shift in the wireless industry. Over the past five years, Bell, Telus, SaskTel, and other carriers have offered plans with no overage fees, large high-speed data buckets, and unlimited usage at reduced speeds thereafter. They have also marketed these unlimited data plans in substantially the same way as Rogers on their websites and in promotional materials (see, for example, Figure 5 and Figure 6).

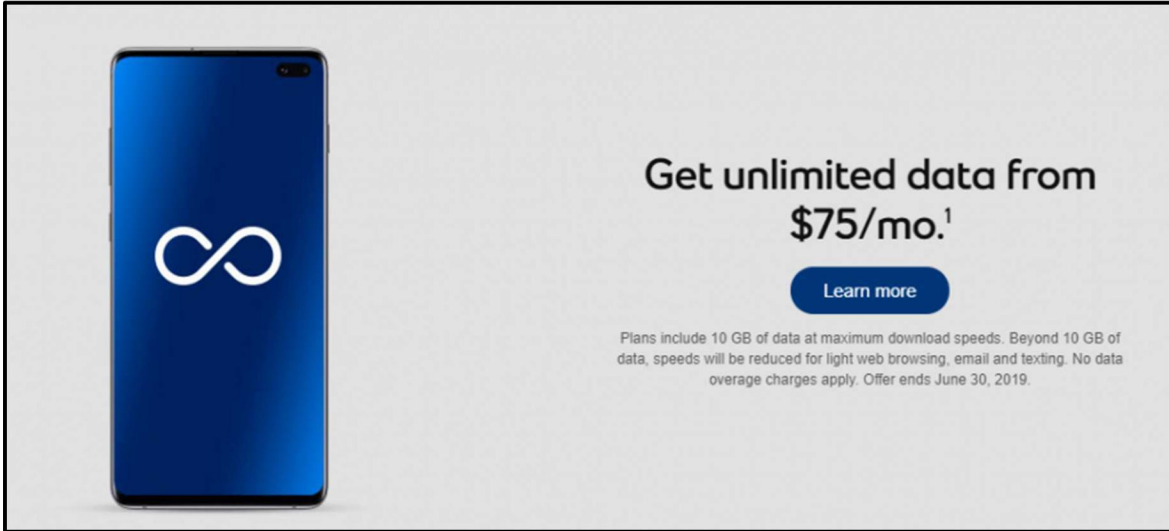


Figure 5: Bell Facebook Ad, 2019

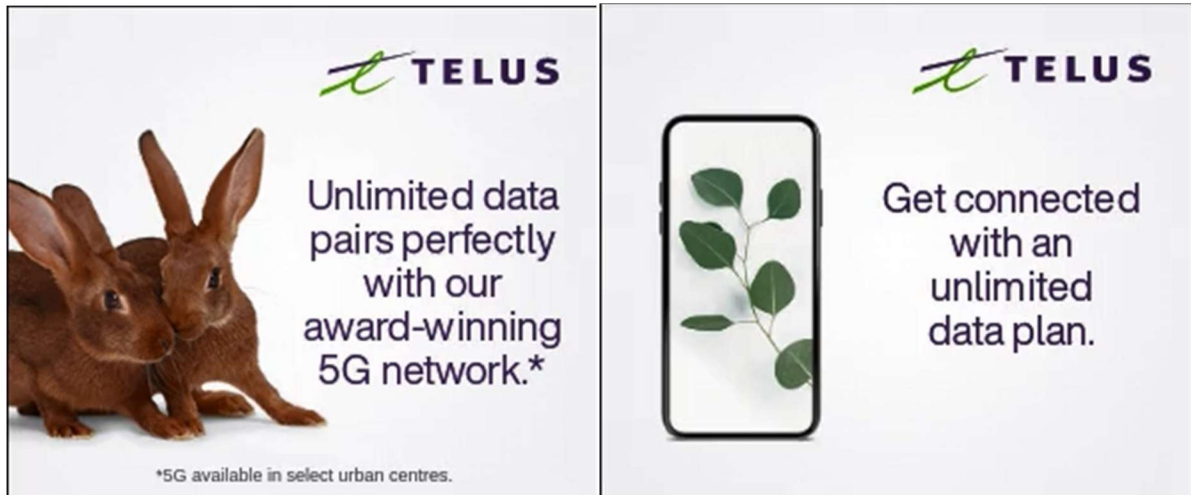


Figure 6: Screenshots from Telus Digital Ad, December 3, 2022

23. The ubiquitous presence of these plans in the market over the last five years, together with carriers' consistent marketing of them, are important context for the Bureau's allegations. The messaging from other carriers reinforces Rogers' own messaging and thus informs how the ordinary consumer would understand these plans, the features they offer, and their limits on high-speed data usage.

C. Competition Bureau Pursues Rogers Years After Infinite Launch

24. In the four years following Rogers’ launch of its Infinite plans and the industry’s widespread adoption of “unlimited” data offerings, the Bureau never took enforcement action related to the promotion of these plans. It issued no guidance, sent no warning letters, and commenced no enforcement proceedings against Rogers or against any other carrier. Similarly, the CRTC has not taken any action against any carrier, under the Wireless Code or otherwise.

25. According to materials the Commissioner filed in the Federal Court in connection with its investigation of Rogers, the Competition Bureau began reviewing representations from Canadian wireless providers in September 2021, “to assess whether wireless products were being marketed as ‘unlimited’ when usage was restricted, limited, or qualified in some way”. The Bureau did not advise Rogers of its investigation at that time.

26. In March 2022, the Competition Bureau opened an investigation into Rogers regarding the promotion of its Infinite plans. Again, the Bureau did not notify Rogers of this investigation. On April 6, 2023, three days after Rogers closed its acquisition of Shaw Communications, the Commissioner opened an inquiry, only into Rogers, under s. 10(1)(b)(ii) of the *Competition Act*. The Bureau first notified Rogers of the inquiry by letter dated June 2, 2023, two months after opening the inquiry, more than a year after it commenced its investigation, and four years after the launch of Rogers’ Infinite plans.

27. The Bureau’s significant delay in opening its inquiry—four years following Rogers’ introduction of Infinite plans—has materially prejudiced Rogers’ ability to answer the Bureau’s case. Since Rogers only became aware of the Bureau’s investigation in June 2023, Rogers had no reason to preserve documents relevant to its defence going back to 2019. Rogers’ marketing of

its Infinite plans, and the key features of those plans, have been clear and conspicuous since their launch in 2019. This unexplained delay also casts doubt on the harm the Bureau is alleging and the merits of the Commissioner's Application.

28. The Bureau has improperly and unfairly singled out Rogers in this Application for longstanding representations that have been industry-wide for years. No other carrier has been subject to enforcement action for its promotion of "unlimited" data plans over the past five years, despite having made substantially identical representations to those at issue in this Application.

29. The Bureau's use of its significant enforcement powers to selectively target Rogers and not to address its concerns on an industry-wide basis creates the unfair and harmful impression that it is only Rogers whose practices are at issue. It subjects Rogers to reputational damage, and unfairly tilts the competitive landscape to the material prejudice of Rogers and material advantage of its competitors.

D. Rogers' Infinite Representations are Neither False nor Misleading

30. The Bureau's allegations rest on an incomplete, highly curated, and materially misleading selection of materials. They present a distorted view of the representations Rogers made to consumers and misstate the general impression such representations are likely to create.

31. Viewed from the perspective of the ordinary consumer of unlimited wireless data services, Rogers' representations convey the general impression that Infinite plans give customers (i) a monthly *high-speed* data bucket of their choosing, and (ii) access to unlimited amounts of data *at reduced speeds* if they exceed that bucket, with no overage fees. This is the general impression based on Rogers' promotional materials and multiple disclosures throughout the purchasing process.

32. The Bureau relies on selective marketing materials, taken in isolation and divorced from the broader context in which they were made and understood in the market. The Bureau focuses on “brand” marketing and ignores ads promoting specific plans and prices, such as those in Figures 1, 2, and 3, above. The Bureau also ignores the repeated, clear, and conspicuous disclosures made during the purchasing process, discussed in more detail below.

33. None of the representations excerpted at paragraphs 14-19 of the Commissioner’s Notice of Application fairly provide a sense of the general impression conveyed by Rogers’ Infinite representations, either as a whole or individually. The ordinary consumer does not experience individual billboards, excerpts from social media posts, and still-frames from YouTube advertisements in a vacuum, without the benefit of the additional information provided as part of the full context of the Infinite representations and during the purchasing process, or without regard to the broader market context in which Rogers’ Infinite plans were launched.

34. Nor is the general impression conveyed by Rogers’ representations materially impacted by the brand name “Infinite” or the “infinity loop”. Ordinary consumers do not view this branding as exhaustively describing plan features, which are identified and explained clearly in promotional materials and during the purchasing process. Other businesses have used similar branding, both in the telecommunications and other markets. For example, Bell has used the “infinity loop” to promote its version of unlimited plans (see Figure 5 above), and Visa has used the “Infinite” brand for its premium credit card—all without any apparent issue from the Bureau.

35. Ordinary consumers of Infinite plans are highly knowledgeable about wireless services. They know that plans always come with different features and a variety of terms and conditions, beyond those disclosed on billboards or space constrained advertisements. They would not view

isolated representations as intending to reflect or describe all the features of any specific plan. That information is prominently and repeatedly disclosed to consumers during the purchasing process, as discussed below.

36. Taking, as it must do, the perspective of the ordinary consumer of unlimited data plans, the Bureau cannot meet its burden to establish that Rogers' representations were false or misleading. Nor can the Bureau meet its burden to show that the isolated, incomplete examples it has chosen were material to the ordinary consumer's purchasing decision.

E. Rogers Clearly and Conspicuously Disclosed Plan Features

37. The general impression conveyed by Rogers' promotional representations is reinforced by clear, conspicuous, and repeated disclosures throughout the purchasing process. It is impossible for any consumer to purchase an Infinite plan without:

- (a) Learning that different plans offer different amounts of *high-speed* data at different prices;
- (b) Learning that they will have access to unlimited data *at reduced speeds* thereafter, with no overage fees; and
- (c) Choosing the amount of high-speed data that suits their needs.

38. Each of these points is reinforced multiple times throughout the purchasing process. And even after a purchase is made, customers are given the opportunity to cancel their service if they change their mind.

39. For customers subscribing online, Rogers’ website prominently identifies, in bold font, the amount of high-speed data available with each plan. This is followed by clear disclosure that there is “Unlimited data at reduced speeds thereafter” (see, e.g., Figure 7).

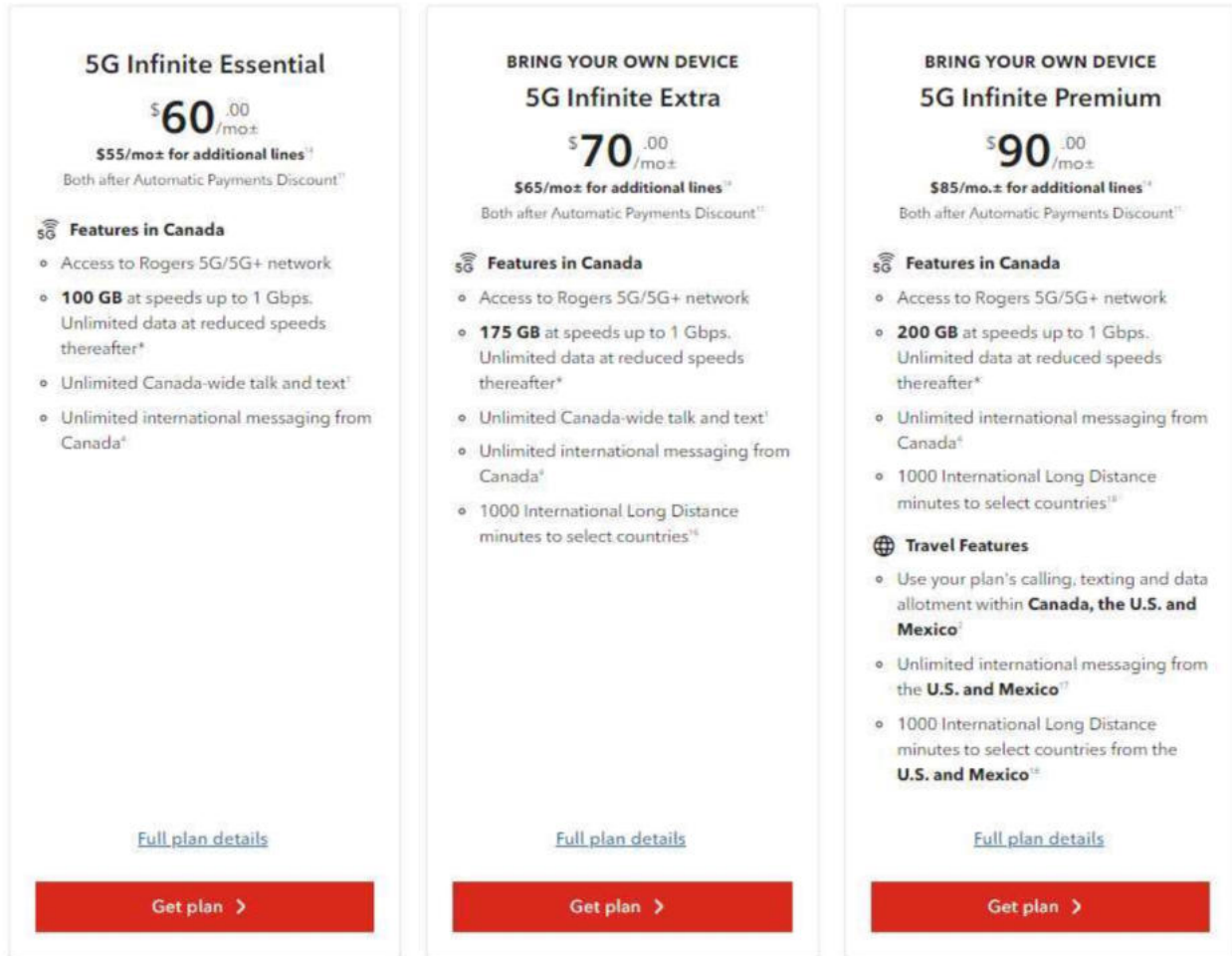


Figure 7: Screenshot from Rogers Website, taken February 5, 2025

40. Once customers select the red “Get plan” button at the bottom of the plan tiles, they are brought to a web page titled “Build Your Plan”. They are presented with the different plans available and choose the one that best suits their needs. Each option discloses the amount of high-speed data available per month, and again states “Unlimited data usage at reduced speeds beyond [the bucket size selected]” (see Figure 8).

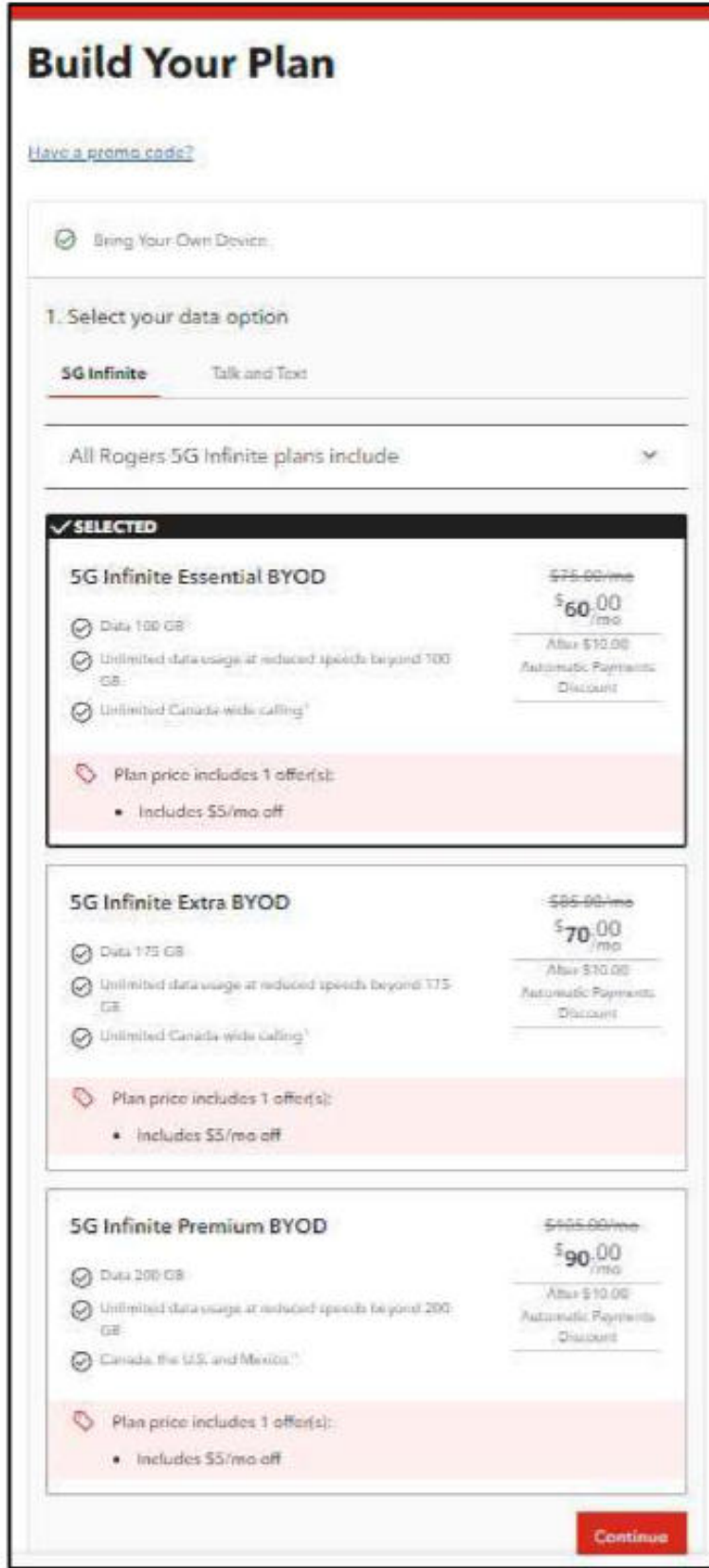


Figure 8: Screenshot from Rogers' "Build Your Plan" Page, taken February 5, 2025

41. If a customer wishes to know more about the reduced speed after they exceed their monthly bucket, both the asterisk on the initial plan page (Figure 7) and the “See Full Details” drop-down on the second page (Figure 8), lead to a more detailed description that explains: (i) that they have a bucket of data at high-speed; (ii) that they will have access to unlimited data at a reduced speed of 512kbps thereafter with no overage fees; and (iii) that applications such as email and web browsing will continue to function, but the reduced speed “will likely impact your experience” (see Figure 9).



Figure 9: Screenshot from “Full Details” page on Rogers Website, taken February 5, 2025

42. Once a customer selects their high-speed data bucket size, they are prompted to review their order and given a copy of their Wireless Service Agreement, which again sets out how much high-speed data their plan offers each month, with “unlimited data at reduced speeds thereafter” (Figure 10).

The screenshot shows a 'Plan Details' section for a '5G Infinite Essential' plan. The plan is effective from January 06, 2025, and has a monthly fee of \$55.00. The plan category is 'Financing Consumer Lite' and the service agreement term is 'Month-to-Month'. The plan description includes: 80GB shared data at speeds up to 1Gbps, unlimited data at reduced speeds thereafter; unlimited Canada-wide calling, text, and video messages; call and name display; voicemail; 2500 call forwarding minutes; conference calling; call waiting; 5G/5G+ network access (requires 5G/5G+ device & coverage); and auto pay discount eligibility.

5G Infinite Essential	Effective: January 06, 2025	Monthly Fee: \$55.00
Plan category: Financing Consumer Lite		
Service Agreement Term: Month-to-Month		
Plan description:		
- 80GB shared data at speeds up to 1Gbps, unlimited data at reduced speeds thereafter. See rogers.com/terms for Data Policy		
- Unlimited Canada-Wide Calling		
- Unlimited Canada-Wide Sent & Received Text, Picture & Video Messages		
- Call & Name Display		
- Voicemail		
- 2500 Call Frwd Mins		
- Conference Calling		
- Call Waiting		
- 5G/5G+ network access (requires 5G/5G+ device & coverage)		
- Auto Pay Discount Eligible		

Figure 10: Excerpt from an Infinite customer’s Wireless Services Agreement

43. Customers are required to confirm acceptance of their Wireless Service Agreement by clicking a checkbox at the time of purchase. Once the transaction is complete, Rogers sends them a copy of their Wireless Service Agreement, along with a “Critical Information Summary”. The Critical Information Summary describes key plan features in plain terms, highlighting the size of the data bucket the customer has chosen and reiterating the disclosure that data speed will be reduced beyond that bucket (Figure 11).

ROGERS

Critical Information Summary

This Critical Information Summary outlines the most important elements of your recent transaction for wireless services.

Name: [REDACTED] Telephone Number: [REDACTED]
Account Number: [REDACTED] Date of Agreement: January 06, 2025

Wireless Services

Plan Details

Plan Name	5G Infinite Essential
Plan Category	Financing Consumer Lite
Plan Monthly Service Fee	\$55.00
Service Agreement Term	Month-to-Month
Plan Includes	<ul style="list-style-type: none">- 80GB shared data at speeds up to 1Gbps, unlimited data at reduced speeds thereafter. See rogers.com/terms for Data Policy- Unlimited Canada-Wide Calling- Unlimited Canada-Wide Sent & Received Text, Picture & Video Messages- Call & Name Display- Voicemail- 2500 Call Fwd Miss- Conference Calling- Call Waiting- 5G/5G+ network access (requires 5G/5G+ device & coverage)- Auto Pay Discount Eligible

When using your services, including any unlimited services, please remember that you are subject to our Acceptable Use Policy, provided to you and posted at rogers.com/terms.

Summary of Fees

Monthly Fees for Wireless Service	
Monthly Fees - Plan	\$55.00
Total Monthly Fees for Wireless Service (before applicable taxes and discounts)	\$55.00

Contacting Rogers and the CCTS

To contact Rogers about your wireless service, reach out to us in any of the ways listed at rogers.com/contactus or call us at 1 888 ROGERS1 (764-3771).

If you have a concern that isn't resolved to your satisfaction after contacting us through the above options, we invite you to share your concern in detail by submitting it to us at rogers.com/concern or writing to us at Office of the President, 333 Bloor St. East, Toronto ON M4W 1G9.

Finally, you can also write to the Commission for Complaints for Telecom-television Services (CCTS) at www.ccts-spcst.ca, or call them at 1 888 221-1687.

Figure 11: Excerpt from an Infinite customer's Critical Information Summary

44. Both the Wireless Service Agreement and the Critical Information Summary direct customers to Rogers' "Data Policy" (available at rogers.com/terms and excerpted in Figure 12)

for additional details on high-speed data allocations and speed reductions. This Policy again provides the information available to consumers during the purchase process under “See full details”.

Rogers mobile plans data policy ✉

Rogers Infinite Plans Data Policy

Rogers Infinite plans include high-speed data up to the amount included in your plan on the Rogers network, extended coverage areas within Canada, and Roam Like Home destinations (visit rogers.com/roamlikehome). Once you have used all of the high-speed data included in your plan, you will continue to have access to data services with no overage at a reduced speed of up to 512 kilobits per second (for both upload and download) until the end of your current billing cycle. Applications such as email, web browsing, apps, and audio/video streaming will continue to function at a reduced speed, which will likely impact your experience. We will send you a text message notifying you when you have used 90% and 100% of the high-speed allotment included in your plan with the option to purchase a Speed Pass to add more high-speed data to your plan. In all cases, usage is subject to the Rogers Terms of Service, Acceptable Use Policy and Network Management Policy.

Figure 12: Excerpt from Rogers’ Mobile Plans Data Policy, available at rogers.com/terms, taken January 12, 2025

45. While the appearance and layout of Rogers’ website has evolved since Infinite plans were launched in June 2019, the online purchase process has always clearly disclosed to prospective customers: (i) the amount of high-speed data available with each plan; and (ii) that unlimited data is available “*at reduced speeds thereafter*”.

46. Rogers makes the same disclosure to prospective Infinite customers subscribing in-store or by phone. Training materials provided to customer service representatives and partner retailers at the time of launch identified the key features of Infinite plans, which were to be communicated to consumers. These materials explain that Infinite plans include unlimited data with no overage charges, with a bucket of data at “max speeds” and access above that data allotment at reduced speeds.

47. Customers purchasing their Infinite plan in-store or by telephone are also provided their Wireless Service Agreements and Critical Information Summaries (referenced above). And if customers are dissatisfied with the terms of their plan after reviewing these documents, they can cancel their services without penalty. Those who purchased an Infinite plan without a device can cancel their services at any time. Those who purchased an Infinite plan with a device can cancel their services within fifteen days provided they return their device.

48. Whether online, in store, or over the phone, Rogers clearly, conspicuously, and repeatedly discloses the key features of its Infinite plans. Every subscriber to an Infinite plan necessarily understands that different plans have different amounts of high-speed data. They are told repeatedly and in plain language that they will have access to unlimited data *at reduced speeds* if they go over their high-speed bucket. And they are presented with different plans at different price points so they can choose the amount of high-speed data that best suits their needs.

49. The ordinary consumer of Infinite plans understands these choices are not meaningless. They understand that they can choose to pay a lower amount for a smaller bucket or a higher amount for a larger bucket. They understand they will enjoy unlimited usage at reduced speeds thereafter, without paying overage fees. The Bureau's suggestion that consumers have the general impression that every plan entitles them to unlimited high-speed data is impossible to reconcile with the purchasing process and the clear and repeated disclosures made throughout.

F. Large Buckets Mean Customers Effectively Have Unlimited High-Speed Data

50. Even if the Bureau's position regarding general impression is correct, which Rogers denies, the overwhelming majority of Infinite customers have access to high-speed data in such

significant quantities that it is *effectively* unlimited for their purposes. That is, the vast majority of Infinite customers never exceed their monthly high-speed data buckets, and therefore never experience speed reductions at all.

51. Consistent with the relative increase in the size of Infinite high-speed data buckets, the average utilization of high-speed data was never close to the average bucket size, and consistently declined since Infinite plans were launched in 2019. Since launch, only a small percentage of Infinite plan customers exceed their high-speed mobile data bucket each month. Of the limited number of Infinite customers each month who exceed their high-speed data bucket, the vast majority continue to use mobile data at reduced speeds without purchasing a Speed Pass.

52. The average percentage of Infinite customers each month that purchase Speed Pass top-up data at any point in their billing cycle is low and has consistently declined. Usage trends demonstrate that, for the vast majority of Infinite plan customers, the high-speed mobile data bucket is effectively unlimited. For the small minority of customers that exceed their high-speed data bucket in a given billing cycle, all continue to enjoy unlimited data at reduced speeds for the remainder of the billing cycle, with no overage fees. Indeed, most of the small number of customers that exceed their high-speed data bucket do not purchase a Speed Pass.

G. Regulated Conduct Defence; Presumption of Consistency with CRTC Wireless Code

53. The promotion of “unlimited data” plans is explicitly addressed by the CRTC in the Wireless Code, as part of its statutory mandate under the *Telecommunications Act*.

54. In 2013, the CRTC implemented the Wireless Code following extensive public consultation with various stakeholders, including submissions from the Competition Bureau. It amended the Wireless Code in 2017, again following an extensive public consultation process.

55. The Wireless Code expressly permits carriers to market “unlimited” data plans, provided (a) those plans do not carry any automatic overage fees, and (b) the carrier clearly explains any plan limits in a “Fair Use Policy” and “Critical Information Summary”.

56. A Fair Use Policy is a publicly accessible document that explains what the carrier considers unacceptable use of its wireless services. A Critical Information Summary is a one- or two-page document provided to customers at the time of purchase, summarizing their key contract terms in plain and easy-to-understand language. It is required to include “a description of any limits imposed on services purchased on an unlimited basis”, including data speed reductions. Rogers has always complied with these requirements.

57. The Tribunal should reject the Bureau’s attempt to undermine the approach established by the CRTC respecting the representations at issue in this Application. The *Competition Act* should be applied in a manner that is consistent with and respects the policy choices of the CRTC, as reflected in the Wireless Code, given the CRTC’s function as a federal agency with the expertise and statutory mandate to regulate the telecommunications industry.

58. In addition, and contrary to paragraph 45 of the Commissioner’s Notice of Application, Rogers’ representations were never inconsistent with the Bureau’s 2017 *Deceptive Marketing Practices Digest*, Volume 3. There, the Bureau stated that “marketing a telecommunication service as ‘unlimited’ *may* raise concerns under the misleading prohibitions in the *Competition Act* if, in fact, the service *is materially limited in a manner that is inconsistent with its general impression*”. It did not say that wireless carriers should never use “unlimited” for plans with high-speed data buckets and reduced speeds thereafter, even if such speed reductions are clearly disclosed.

59. The Bureau also explained that its position is similar to that of the U.S. Federal Trade Commission, which has only required that any restrictions on unlimited wireless plans be clearly and conspicuously disclosed. As set out above, Rogers and other carriers have followed that approach since the launch of Infinite plans and the Bureau did not take any enforcement action with respect to that approach over a five-year period.

60. Rogers pleads and relies upon the regulated conduct defence.

H. Request for Relief Is Inappropriate and Unwarranted

61. Even if the Tribunal were to find that Rogers engaged in reviewable conduct, which is expressly denied, the Tribunal should exercise its discretion not to order any relief beyond the declaration pleaded at paragraph 1(a) of the Notice of Application. The other pleaded relief—namely, a prohibition order, an administrative monetary penalty, and a restitutionary award—are inappropriate and unnecessary.

62. Furthermore, to impose such relief particularly after the Bureau chose not to take any enforcement action for more than five years would be contrary to the requirement in section 74.1(4) that any order should be made with a view to promoting conformity and not with a view to punishment.

i. The Requested Administrative Monetary Penalty is Unconstitutional

63. The Commissioner seeks an administrative monetary penalty against Rogers and invites the Tribunal to impose an extraordinary financial penalty order under subsection 74.1(1)(c)(ii) of the *Competition Act*.

64. As a result, Rogers faces the risk of the potential imposition by the Tribunal of true penal consequences at the request of the Commissioner. The Commissioner's Application engages important rights guaranteed to Rogers under the *Charter* and *Bill of Rights*. For these reasons, the Tribunal should hold and declare that subsection 74.1(1)(c)(ii) of the *Competition Act* is constitutionally invalid and of no force or effect pursuant to subsection 52(1) of the *Constitutional Act, 1982*.

65. In the alternative, and to the extent necessary for Rogers to obtain an effective remedy for the infringement of its rights, the Tribunal should declare that section 11 and subsections 74.01(1) and 74.011 of the *Competition Act*, subsections 11(2) of the *Competition Tribunal Act* and rules 60 and 64 of the *Competition Tribunal Rules* are of no force and effect to the extent of their inconsistency with the *Charter* in light of the Commissioner's pursuit of a true penal consequence against Rogers under subsection 74.1(1)(c)(ii) of the *Competition Act*. As a result, the Commissioner's Application against Rogers should be dismissed.

66. Rogers proposes that this question be dealt with as a matter of law at the hearing, as detailed in its Notice of Constitutional Question delivered concurrently with this pleading amendment.

i.ii. Rogers Exercised Due Diligence in Marketing and Promoting Infinite Plans

63-67. At all times material to this Application, Rogers took reasonable and diligent steps to ensure that prospective customers would not be likely to be misled by its Infinite representations. As a result, in accordance with section 74.1(3) of the *Competition Act*, no order under section 74.1(1)(b), (c), or (d) can be ordered against Rogers.

64.68. In particular, since launch in June 2019, Rogers’ Infinite representations have complied with all the requirements of the CRTC in the Wireless Code and with the position of the Competition Bureau described in the 2017 *Deceptive Marketing Practices Digest*—neither of which say that carriers cannot use “unlimited” to promote plans with reduced data speeds where such limitations are clearly disclosed.

65.69. In light of the regulatory environment and the position consistently taken by the Competition Bureau and the CRTC, it was reasonable for Rogers to believe that it was at all times in compliance with its obligations under the *Competition Act*, and that its approach to promoting its Infinite plans—like those of its competitors for their equivalent plans—were neither false nor misleading. No order under section 74.1(1)(b), (c), or (d) should be imposed because Rogers acted with diligence and reasonable care to ensure that the ordinary consumer interested in its Infinite wireless plans was not likely to be misled by its representations.

ii-iii. Section 74.1(5) Factors Weigh Against an Administrative Monetary Penalty

66.70. The Bureau’s request for an administrative monetary penalty against Rogers should be rejected. Rogers denies each of the alleged aggravating factors at paragraph 46 of the Notice of Application, and in addition to the facts pleaded above, relies on the following as relevant factors under s. 74.1(5) of the *Competition Act*:

- (a) Reach, frequency, and duration of the impugned conduct: The Bureau did not take any enforcement action against Rogers for more than five years in respect of what it now claims are deceptive marketing practices. And the Bureau still has not taken any enforcement action against any other carrier. The continued reach,

frequency, and duration of “unlimited” data representations was a direct consequence of this regulatory inaction and cannot be held against Rogers. .

- (b) Vulnerability of the consumers: Infinite plans are directed at sophisticated, high-use data customers, who are interested in accessing large data buckets and having bill certainty. Customers in other segments of the wireless market can purchase other kinds of plans that best serve their needs, including occasional use or low-cost plans. Contrary to paragraph 46(c) of the Commissioner’s Notice of Application, the ordinary consumers in the market for unlimited wireless services are not vulnerable, are capable of understanding clear and repeated disclosures of speed reduction, and are clearly familiar with the option to purchase high-speed data buckets of different sizes and at different prices

- (c) Materiality of any representations: Customers were repeatedly told, both in promotions and during the purchasing process, that Infinite plans include a high-speed data bucket and unlimited data at reduced speeds thereafter. The Bureau’s selection of isolated and incomplete promotional statements are insufficiently material to alter customers’ purchasing decisions in respect of unlimited wireless plans. This is particularly the case in light of the repeated disclosure made to relevant consumers throughout the purchasing process.

- (d) The effect on competition in the wireless market: Rogers’ introduction of Infinite plans was manifestly pro-competitive, which was widely recognized in the media and acknowledged by the Competition Bureau in its CRTC submissions referenced above. Customers are unquestionably better off with bigger data

buckets, lower prices, and no overage fees. If anything, the fact that Rogers' competitors soon launched their own similar unlimited plans should be a mitigating factor, since Rogers stood to gain no benefit from its approach to marketing its plans.

- (e) Likelihood of self-correction: No administrative remedy under s. 74.1 is necessary to ensure compliance with any finding of the Tribunal regarding the impugned representations.

- (f) Financial position of the person against whom the order is made: As noted above, the overriding principle under s. 74.1(4) of the *Competition Act* is that any relief must be determined with a view to promoting compliance, not punishment. Compliance with the Tribunal's determinations can be achieved in this case without a monetary penalty.

- (g) Rogers' history of compliance with the *Competition Act*: Contrary to the Bureau's characterization of the two inquiries referenced in paragraph 46(i):
 - With respect to Rogers' performance claims concerning Chatr (Rogers' pre-paid wireless brand), these claims were found by the Ontario Superior Court to be unquestionably true and fully substantiated after the claims were made. In that case, the Ontario Superior Court specifically determined that Rogers had suffered reputational harm as a result of the Commissioner's application in that case; and

- The consent agreement reached between the Commissioner and Rogers concerning industry-wide “premium text messaging” is a negotiated settlement that states expressly that nothing in that agreement “shall be taken as an admission or acceptance by [Rogers] of any facts, wrongdoing, submissions, legal argument or conclusions for any other purpose”. In that case, the Commissioner took enforcement action against Rogers, Bell, and Telus at the same time and ultimately reached negotiated resolutions with all three carriers. In this instance, the Commissioner has targeted Rogers and remained silent with respect to its competitors.

67.71. For all of the reasons outlined above, should the Tribunal find any violation of the *Competition Act*, it should exercise its discretion not to order any relief under s. 74.1(1).

I. Other Procedural Matters

68.72. For the reasons set out above, Rogers asks that the Application be dismissed in its entirety, with costs.

69.73. Rogers agrees with the Commissioner that this proceeding be conducted in English in the City of Ottawa.

DATED at the City of Toronto, this 6th 13th day of ~~February, 2025~~ November, 2025.

LAX O’SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus LSO# 32952H
jlisus@lolg.ca
Tel: 416.598.7873

Crawford Smith LSO# 42131S
csmith@lolg.ca
Tel: 416 598 8648

Bradley Vermeersch LSO# 69004K
bvermeersch@lolg.ca
Tel: 416 646 7997

John Carlo Mastrangelo LSO# 76002P
jmastrangelo@lolg.ca
Tel: 416 956 0101

DAVIES WARD PHILLIPS & VINEBERG LLP
40th Floor – 155 Wellington St. West
Toronto, ON M5V 3J7

Anita Banicevic LSO# 42793G
abanicevic@dwpv.com
Tel: 416 863 5523

Teraleigh Stevenson LSO# 82540E
tstevenson@dwpv.com
Tel: 416 367 7627

Counsel for the Respondent, Rogers
Communications Inc.

TO: **THE REGISTRAR**
COMPETITION TRIBUNAL
Thomas D’Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

PUBLIC

- 31 -

AND TO: **THE COMMISSIONER OF COMPETITION**

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Jonathan Hood

jonathan.hood@cb-bc.gc.ca
Tel: 416 954 5925

Tanis Halpape

tanis.halpape@cb-bc.gc.ca
Tel: 613 979 8851

Irene Cybulsky

irene.cybulsky@cb-bc.gc.ca
Tel: 613 316 5034

Kendra Wilson

kendra.wilson@cb-bc.gc.ca
Tel: 613 799 9454

Counsel for the Applicant,
The Commissioner of Competition

PUBLIC

PUBLIC

CT-2024-012

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 by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC.

Respondent

AMENDED REPLY OF THE COMMISSIONER OF COMPETITION

I. OVERVIEW

1. Rogers' advertisements that make unqualified promises of unlimited or infinite data have been viewed innumerable times by millions of Canadians. These ads are false or misleading in a material respect and are not negated by other advertisements, which Rogers alleges make "ubiquitous disclosure of key plan features", that are also false or misleading in a material respect.
- ~~2. Rogers points to the fact that its misleading advertising campaign spurred other wireless carriers to follow suit, and claims that this is pro-competitive. The fact that other wireless carriers may have copied Rogers' reviewable conduct is an aggravating factor, not a mitigating one.~~
2. The Commissioner repeats and relies upon the allegations in his Notice of Application and, except as hereinafter expressly admitted, denies the allegations in the Response. Unless otherwise indicated, defined terms in the Reply have the meaning ascribed to them in the Notice of Application.

II. Rogers' advertisements were viewed by millions of Canadians innumerable times

3. Contrary to Rogers' Response, the representations provided in the Notice of Application that make unqualified promises of unlimited and infinite data have been viewed innumerable times by all types of Canadians. In 2019, Rogers blanketed the country with these advertisements with the intention of owning the idea of unlimited data and searing it into Canadians' brains. These advertisements impact consumers' understanding of the Rogers Infinite Unlimited Plans and their benefits, the main message being "Unlimited data for infinite possibilities". Rogers' goal was not only to promote the sale of the plans; it was also to improve consumers' impression of the Rogers brand.

4. These false or misleading advertisements are not cured because Rogers made additional representations that allegedly disclosed the “key plan” features. First, the implication of Rogers’ defence is that a company can blatantly engage in an extensive campaign of advertising that is false or misleading, provided at a latter stage it makes advertisements which are less misleading. Second, the Commissioner expressly denies that the minimal disclosures offered by Rogers in other representations were in any way adequate to overcome the claims that the product offered unlimited data. Furthermore, the ads are insufficient to provide consumers with an appreciation for the impact of throttled data on their mobile usage experience. As stated in the Notice of Application, subsequent disclosure of “key plan features” does not cure the false or misleading general impression created by the advertisements.

III. Rogers was aware of the Bureau’s position that telecom services should not be marketed as unlimited if they are in fact limited

5. Rogers argues in paragraph 24 of its Response that the Bureau issued no guidance with respect to its position that telecom services should not be marketed as unlimited if they are in fact limited. Rogers’ assertion is inaccurate. The Bureau published an article in Volume 3 of the Deceptive Marketing Practices Digest (the “Digest”) in 2017, advising the telecom sector not to engage in precisely the kind of conduct that Rogers went on to engage in, and warning that the Bureau will take action if required.

6. Likewise in the same paragraph of its Response, Rogers also incorrectly claims that the Bureau has never taken any enforcement actions against any carrier for these kinds of claims. In the very same Digest article that Rogers claims to have abided by, the Bureau describes a consent agreement with another telecom operator for offering unlimited internet services, where disclaimers showed that speeds were significantly slowed after a data cap was reached. The reviewable conduct in the Consent Agreement is similar to the conduct in this case.

IV. Giving consumers less than what they were promised is not a pro-consumer development

7. In its Response, Rogers extolls the benefits to consumers brought about by the introduction of the Rogers Infinite Unlimited Plans. It admits that other wireless carriers ~~immediately began~~ quickly followed by engaging in similar conduct as Rogers. The Bureau expressly denies that giving consumers less than what they were promised is a pro-consumer development, or that Rogers winning the race to the bottom should be celebrated.

8. Rogers decided long ago to charge its wireless customers expensive overage fees for exceeding their monthly allotment, a practice that Rogers admits in paragraph 12 was a significant source of consumer complaints. The Commissioner has no quarrel with Rogers' decision to increase data buckets, get rid of overages, and throttle speeds after consumers hit their data cap. However, Roger's misrepresentation of these data plans to millions of Canadian consumers cannot be characterized as a pro-consumer development; no benefit has accrued to consumers from the deceptive marketing. Similarly, there is nothing pro-competitive about the fact that Roger's misleading claims ~~have been emulated~~ were quickly followed by competitors launching similar plans with similar representations.

V. Rogers introduced the Infinite Plans because it was profit maximizing to do so

9. Rogers claims in paragraphs 19 and 20 that it had no intention of trying to increase revenues from the sale of data. In support of this assertion, Rogers relies on the fact that revenues from overages fell by over \$50 million immediately after introduction of the plans, and have decreased since. This is misleading: revenues from overages decreased because overage charges had been eliminated from Rogers' Infinite Plans.

However, instead of decreasing, Rogers' own records show that Rogers anticipated that its wireless revenues would significantly increase over the next five years after launch of the Rogers Infinite Unlimited Plans, notwithstanding the elimination of overage fees.

VI. Rogers incorrectly argues that consumers will understand the word “unlimited” to actually mean limited

10. Rogers argues that its representations promising unlimited data do not convey the general impression to the ordinary consumer that they will receive unlimited data. Rogers argues that instead, consumers will understand the claims of unlimited data to mean that consumers will get a set amount of high-speed data, after which the data is capped and throttled thereafter. Put another way, Rogers argues that consumers will understand the word “unlimited” to actually mean “limited”, such that the general impression is the opposite of its plain meaning. The Commissioner denies that this is the general impression that is conveyed by the impugned representations. Rogers' own research shows that many consumers interpret claims of “unlimited data” in a manner consistent with its ordinary meaning.
11. Rogers claims in paragraph 35 that ordinary consumers of Rogers Infinite Unlimited Plans are highly knowledgeable about wireless services. However, their own research showed many consumers' beliefs were often not aligned with the reality of the plan features, such as throttling and truly unlimited data.
12. Rogers ignores that its advertisements promising infinite data for unlimited possibilities were shown repeatedly to millions of consumers across Canada regardless of their knowledge of wireless plans. Indeed, Rogers' own records make it clear that the representations were intended to reach a wide swath of consumers.

13. Further, Rogers has argued that the benefit of its Rogers Infinite Unlimited Plans was that consumers would never have to pay overage charges again. Rogers has admitted that many consumers had negative reactions to these overages, not just consumers who were highly knowledgeable about wireless services. That being the case, the appeal of unlimited data cuts across all Canadian wireless consumers.
14. Even if somehow only select consumers were influenced by the representations, which is denied, this alone would not be enough to make such consumers understand that “unlimited” does not in fact mean “unlimited”.
15. Rogers also ignores the fact that it has marketed other products as unlimited to consumers for other services such as home internet, where the word “unlimited” actually means unlimited. Indeed, even many of Rogers Infinite Unlimited Plans are marketed as having unlimited data as well as unlimited talk and text. However, while the talk and text is truly unlimited, the data is not. The Commissioner denies that consumers, even sophisticated ones, would understand that “unlimited” actually means ‘limited by a data cap, followed by speeds that only allow for limited functionality’.

VII. The fact that some consumers may not reach their caps does not cure Rogers’ misrepresentations

16. Rogers’ argument that its advertising is not misleading because the data caps are set high such that consumers were not hitting their caps ignores what consumers were promised by Rogers when they purchased the Rogers Infinite Unlimited Plans: data without limits. Rogers’ assertion that the cap is such that it might as well be unlimited does not cure the misrepresentation. Rogers could have chosen to market the plans as involving big buckets of data. It chose instead to market them as offering “unlimited” data.

17. Even if Rogers is correct that few subscribers reach the threshold, many clearly do, and these consumers have paid millions of dollars in fees to access what should be unlimited data, or have paid to upgrade to more expensive plans to get more data. This also ignores, for example, the customers who may have curtailed their data usage upon being notified they were approaching their data cap.

VIII. The regulated conduct defence is not available

18. Contrary to the response, the regulated conduct defence is not available as a matter of law under section 74.1 of the Act.

19. In addition, the CRTC Wireless Code (the “Wireless Code”) does not shield Rogers from engaging in misleading advertising. Rogers, in its Response, has mischaracterized what the Wireless Code provides, claiming that it allows unlimited claims, subject only to the requirement that speed or quality restrictions are disclosed. The 2013 CRTC decision establishing the Wireless Code provides that consumers of unlimited plans should not be subject to any usage limitations beyond those necessary for network management purposes, and that there should be no restrictions outside of the service provider’s fair use policy. A fair use policy is defined as a policy that explains what is considered to be unacceptable use of the service provider’s wireless services and the consequences of unacceptable use (e.g. using the service to engage in an activity that constitutes a criminal offence).

20. In any event, the *Competition Act* (the “Act”) regulates misleading advertising while the Wireless Code has a different purpose. Specifically, the Wireless Code ensures that consumers of wireless services are informed of their rights and obligations in their contracts. Consistent with this, the 2013 CRTC decision establishing the Wireless Code reminds readers that advertising laws must still be followed.

IX. Rogers did not exercise due diligence in marketing its plans

21. Contrary to the allegations contained in the Response, including paragraphs 63 – 65, the due diligence defence is unavailable to Rogers, as its application would interfere with the positive obligations set out in section 74.01.
22. Rogers argues in paragraph 64 that it exercised due diligence because it complied with the Digest article regarding the making of unlimited claims in telecom. As set out in paragraph 6, the Digest was a warning to the telecom sector not to engage in exactly the kind of conduct that Rogers chose to engage in. Rogers was aware of the Bureau’s position on these claims. It was also aware that the Bureau had already taken enforcement action against another telecom provider for engaging in practices that were similar to the conduct that Rogers engaged in. This is the opposite of due diligence, and in fact should be considered an aggravating factor.
23. Rogers ignores the fact that it could have offered the exact same product to consumers and simply informed them about what they would receive: high-speed data that is capped, followed by throttled data that allows a minimal level of connectivity. Rogers instead chose to blanket the country with claims that the data was “unlimited”.
24. Rogers makes much of the amount of time that has passed since it started the conduct. Yet, even in 2023 when the Bureau notified Rogers about its problematic conduct, Rogers did not change its conduct. Instead, Rogers continues to engage in the reviewable conduct based on its own independent business assessment and the benefits (financial and otherwise) this conduct provides Rogers.
25. Further, Rogers did not seek or obtain any advisory opinion when they commenced the conduct as was open to them under section 124.1 of the Act.

26. Finally, Rogers’ due diligence defence founders on the fact that prior to launching the plans in 2019, Rogers commissioned market research which showed Rogers that using the terms “infinite” and “unlimited” data would mislead consumers. After the plans had been in the market for two years, Rogers commissioned further research which demonstrated that nearly all consumers tested, including Rogers Infinite customers, understood “unlimited data” claims to mean that the plans do not have a data cap.

X. The Administrative Monetary Remedy Sought is Constitutional

27. Rogers raises a constitutional challenge that is substantially similar to that raised by Google Canada Corporation and Google LLC in *Commissioner of Competition v Google Canada Corporation and Google LLC* (Tribunal file no.: CT-2024-010).

28. Contrary to Rogers’ position, subparagraph 74.1(1)(c)(ii) of the Act is constitutional under the *Canadian Charter of Rights and Freedoms* (“Charter”) and consistent with the *Canadian Bill of Rights*, SC 1960, c 44 (“Bill of Rights”). Rogers’ challenge is contingent on speculation that the Tribunal might exercise its discretion in such a way that imposes a true penal consequence.

29. However, the Commissioner does not seek, nor does subparagraph 74.1(1)(c) of the Act permit the imposition of, a true penal consequence. In exercising its discretion to impose an administrative monetary penalty (“AMP”), the Tribunal is constrained by both the Act and established constitutional principles.

a. Under subsection 74.1(4), the amount imposed by the Tribunal is limited to that necessary to promote practices that are in conformity with the Act, and not to punish.

- b. In exercising its discretion, the Tribunal must account for the factors listed in subsection 74.1(5), including Rogers' financial position.
 - c. The Tribunal must consider the Charter, the Bill of Rights, and the associated jurisprudence in determining an appropriate amount for the AMP.
30. In light of these constraints, any AMP ordered by the Tribunal cannot be punitive in purpose or effect, nor can it constitute a true penal consequence. Since Rogers' claims under the Charter and Bill of Rights depend on subparagraph 74.1(1)(c)(ii) of the Act giving rise to a true penal consequence, its challenge must fail.
31. Nevertheless, if the Tribunal finds subsection 74.1(1)(c)(ii) of the Act to be unconstitutional, dismissal of the Commissioner's application is not the appropriate remedy. Instead, the Tribunal should read-down subparagraph 74.1(1)(c)(ii) to allow an amount that the Tribunal finds would not impose true penal consequences. This amount would be no less than that provided for by subparagraph 74.1(1)(c)(ii) as it read immediately prior to June 23, 2022.
32. Moreover, sections 74.01 and 74.011 of the Act, subsections 11(2) of the *Competition Tribunal Act*, and rules 60 and 64 of the *Competition Tribunal Rules* are also constitutional, even if the Tribunal finds subparagraph 74.1(1)(c)(ii) unconstitutional. In the event that the Tribunal finds subparagraph 74.1(1)(c)(ii) unconstitutional and does not grant an AMP that imposes true penal consequences, there will not have been a breach of Rogers' rights requiring a remedy in respect of these other provisions. As a result, these provisions cannot be said to be unconstitutional, nor would it be appropriate to exclude evidence obtained under these provisions.

33. With respect to Rogers' Charter challenge of section 11 of the Act, the Tribunal is respectfully not a "court of competent jurisdiction". While the Tribunal may determine the admissibility of evidence obtained pursuant to an order under section 11, it does not have the jurisdiction in the current proceeding to determine the constitutionality of that provision. Parliament granted the exclusive jurisdiction to hear and determine matters under section 11 to superior or county courts. To allow Rogers to challenge the constitutionality of section 11 would allow the Tribunal to invalidate orders of the superior or county courts that are entirely under the latter's jurisdiction. In the event the Tribunal finds that it is a court of competent jurisdiction, section 11 is nevertheless constitutional for the reasons in the foregoing paragraph.
34. Additionally, the processes applicable to orders under section 11 of the Act and applications before the Tribunal meet or exceed the requirements of s. 2(e) of the Bill of Rights.

DATED AT Gatineau, Quebec, this 26th day of November, 2025.



**ATTORNEY GENERAL OF
CANADA**

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Tel: (819) 360-7427

Jonathan Hood
Jonathan.Hood@cb-bc.gc.ca

PUBLIC

– 12 –

Kevin Hong

Kevin.Hong@cb-bc.gc.ca

Irene Cybulsky

Irene.Cybulksy@cb-bc.gc.ca

Kendra Wilson

Kendra.Wilson@cb-bc.gc.ca

Counsel to the Commissioner of Competition

TO: LAX O’SULLIVAN LISUS GOTTLIEB LLP

Counsel

Suite 2750, 145 King Street West

Toronto, ON M5H 1J8

Jonathan Lisus LSO# 32952H

jlisus@lolg.ca

Tel: 416.598.7873

Crawford Smith LSO# 42131S

csmith@lolg.ca

Tel: 416 598 8648

Bradley Vermeersch LSO# 69004K

bvermeersch@lolg.ca

Tel: 416 646 7997

John Carlo Mastrangelo LSO# 76002P

jmastrangelo@lolg.ca

Tel: 416 956 0101

DAVIES WARD PHILLIPS & VINEBERG LLP

40th Floor – 155 Wellington St. West

Toronto, ON M5V 3J7

Anita Banicevic LSO# 42793G

abanicevic@dwpv.com

Tel: 416 863 5523

PUBLIC

– 13 –

Teraleigh Stevenson LSO# 82540E
tstevenson@dwpv.com
Tel: 416 367 7627

Counsel for the Respondent, Rogers
Communications Inc.

AND TO: **THE REGISTRAR**
COMPETITION TRIBUNAL
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario

PUBLIC

TAB 19

