

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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 In the Matter of Arbitration :
 Between: :
 :
 GABRIEL RESOURCES LTD. and GABRIEL :
 RESOURCES (JERSEY) LTD., :
 : Case No.
 Claimants, : ARB/15/31
 :
 and :
 :
 ROMANIA, :
 :
 Respondent. :
 -----x Volume 8

HEARING ON THE MERITS

Tuesday, December 10, 2019

The World Bank Group
1225 Connecticut Avenue, N.W.
C Building
Conference Room C3-150
Washington, D.C.

The hearing in the above-entitled matter came on
at 9:00 a.m. before:

PROF. PIERRE TERCIER, President of the Tribunal

DR. HORACIO A. GRIGERA NAÓN, Co-Arbitrator

PROF. ZACHARY DOUGLAS, Co-Arbitrator

ALSO PRESENT:

MS. SARA MARZAL YETANO
Secretary to the Tribunal

MS. MARIA ATHANASIOU
Tribunal Assistant

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MS. MARLIENA FILIP

MS. ALEXANDRA IULIANA MLADEN

MS. ALEXANDRA DOBRIN

ALSO PRESENT:

Attending on behalf of the Claimants:

MS. ABBY COHEN SMUTNY
MR. DARRYL LEW
MR. BRODY GREENWALD
MR. PETR POLÁŠEK
MR. HANSEL PHAM
MR. FRANCIS VASQUEZ JR.
MR. ANDREI POPOVICI
MS. GABRIELA LOPEZ
MR. FRANCIS LEVESQUE
MR. WILLIAM STROUPE
MS. NATALIA TCHOUKLEVA
MR. JACOB TRUMM
MS. DARA BROWN
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Washington, D.C. 20005
United States of America

MR. FLORENTIN TUCA
MS. IDA-LEVANA ZIGMUND
MS. ANCA DIANA PUSCASU
MS. OANA-MIRUNA URECHE
MS. RUXANDRA NIȚĂ
MS. ANGELICA-IULIANA HOGAȘ-PINTILIE
MR. CORNEL POPA (via video for Prof. Birsan)
Țuca Zbârcea & Asociații
Sos. Nicolae Titulescu nr. 4-8
America House, Aripa de Vest, et. 8
Sector 1, 011141, Bucuresti
Romania

APPEARANCES:

Represent Gabriel Resources Ltd.:

MR. SIMON LUSTY

MR. RICHARD BROWN

Representing Roşia Montană Gold Corporation:

MR. MIHAI BOTEA

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

DR. VEIJO HEISKANEN
MR. MATTHIAS SCHERER
MS. NORADÈLE RADJAI
MS. LORRAINE de GERMINY
MR. CHRISTOPHE GUIBERT de BRUET
MR. DAVID BONIFACIO
MR. BAPTISTE RIGAUDEAU
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MS. ANDREEA SIMULESCU
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MS. LILIANA DEACONESCU
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P R O C E E D I N G S

1
2 PRESIDENT TERCIER: Good morning, ladies and
3 gentlemen. It is my pleasure to and my honor to open
4 the eighth day of the Hearing, First Session of the
5 Hearing, in the ICSID Arbitration Case 15/31 between
6 Gabriel Resources Limited and Gabriel Resources
7 (Jersey) Limited versus Romania.

8 I hope you had a good evening and good
9 night. And we will have also today an interesting
10 and informative hearing.

11 A few points. First again, thank you very
12 much to our Court Reporters for their Transcripts.

13 Secondly, thank you very much for our
14 Secretary having distributed the time report. You
15 have seen where you are, to take an expression that I
16 use.

17 Thirdly, we have received from Respondent
18 demonstrative exhibits, and we have received from
19 Respondent comment on the program agreeing to the
20 program as it stays, with the reservation of your
21 flexibility. Flexibility is the exception; the
22 principle remains, but indeed, we will try to use it

1 with flexibility.

2 We have not received the comments from
3 Claimant. We have not received the comments for
4 Claimants for the program--

5 MR. GREENWALD: Right.

6 PRESIDENT TERCIER: --of the updated program
7 from the Secretary.

8 MR. GREENWALD: As mentioned, I think that
9 those were indicative times as of when they were
10 presented, and some of the examinations will be
11 shorter than indicated, and some will be longer. And
12 if the Tribunal--we're not in a position to say that
13 exactly right at this moment.

14 PRESIDENT TERCIER: Okay. We will go step
15 by step and I'm confident. In any case, we will
16 finish on Friday; huh? Fine. The next point, the
17 Arbitral Tribunal will come today with the proposal
18 for the second session. It will not be easy to find
19 a week somewhere, but we will make proposals.

20 And I've heard from our Secretary that we
21 may, indeed, start with the second part of the
22 examination of Mr. Jurca, and that will have the

1 video only at 10:00. That's fine?

2 SECRETARY MARZAL YETANO: Yes.

3 PRESIDENT TERCIER: Okay, good.

4 Do you have another point that you would
5 like to raise on Claimants' side?

6 MR. PHAM: No, Mr. President.

7 PRESIDENT TERCIER: On Respondent's side?

8 DR. HEISKANEN: Just to indicate that
9 Professor Ian Thomson, Dr. Ian Thomson, has joined
10 the Hearing; he's sitting in the back.

11 PRESIDENT TERCIER: Okay.

12 DR. HEISKANEN: The Respondent's Expert.

13 PRESIDENT TERCIER: Welcome. Good.

14 In that case, without any further delay, I
15 give you the floor, Mr. Pham.

16 MR. PHAM: Thank you.

17 IOAN "SORIN" JURCA, RESPONDENT'S WITNESS, RESUMED

18 CONTINUED CROSS-EXAMINATION

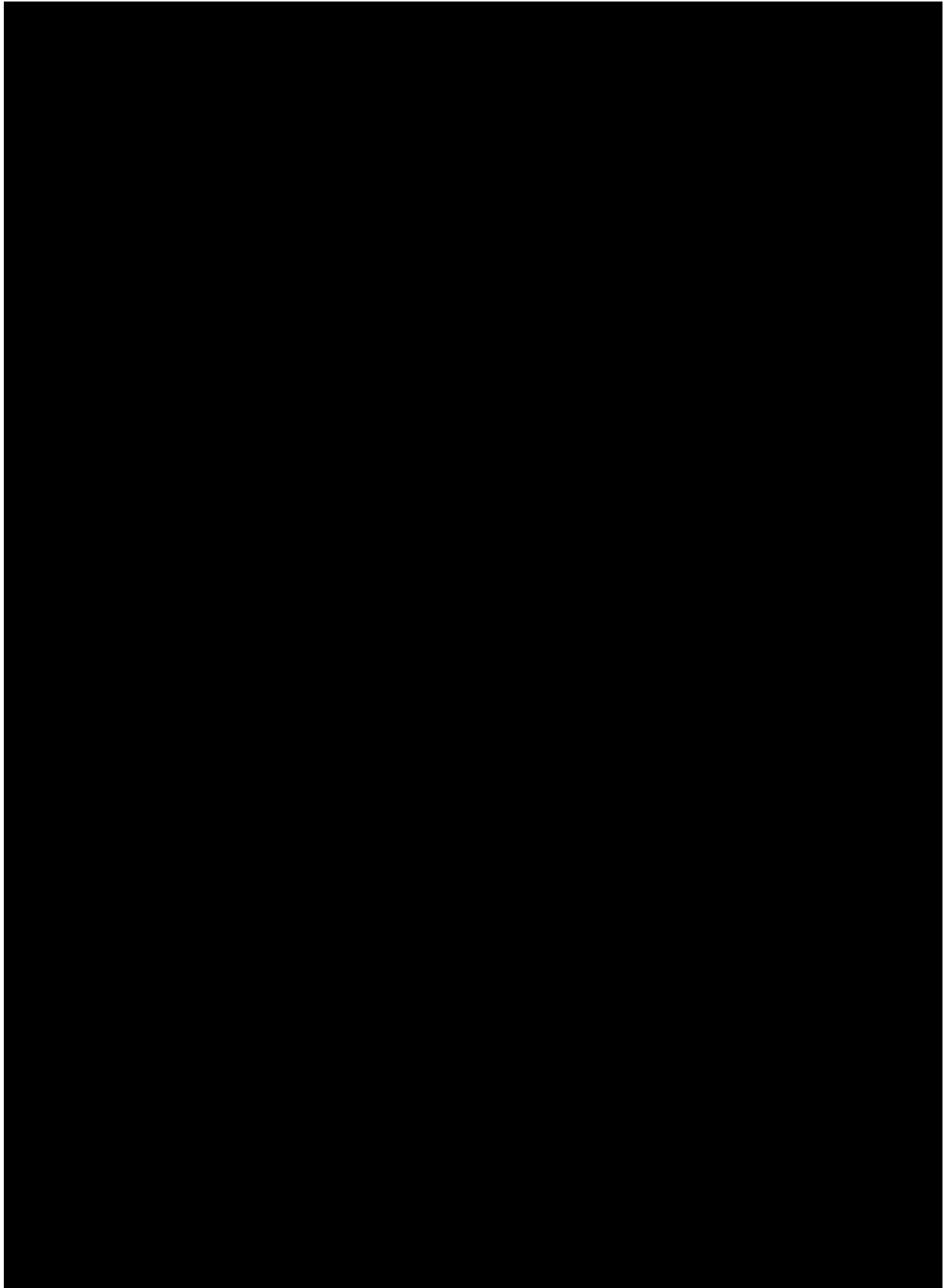
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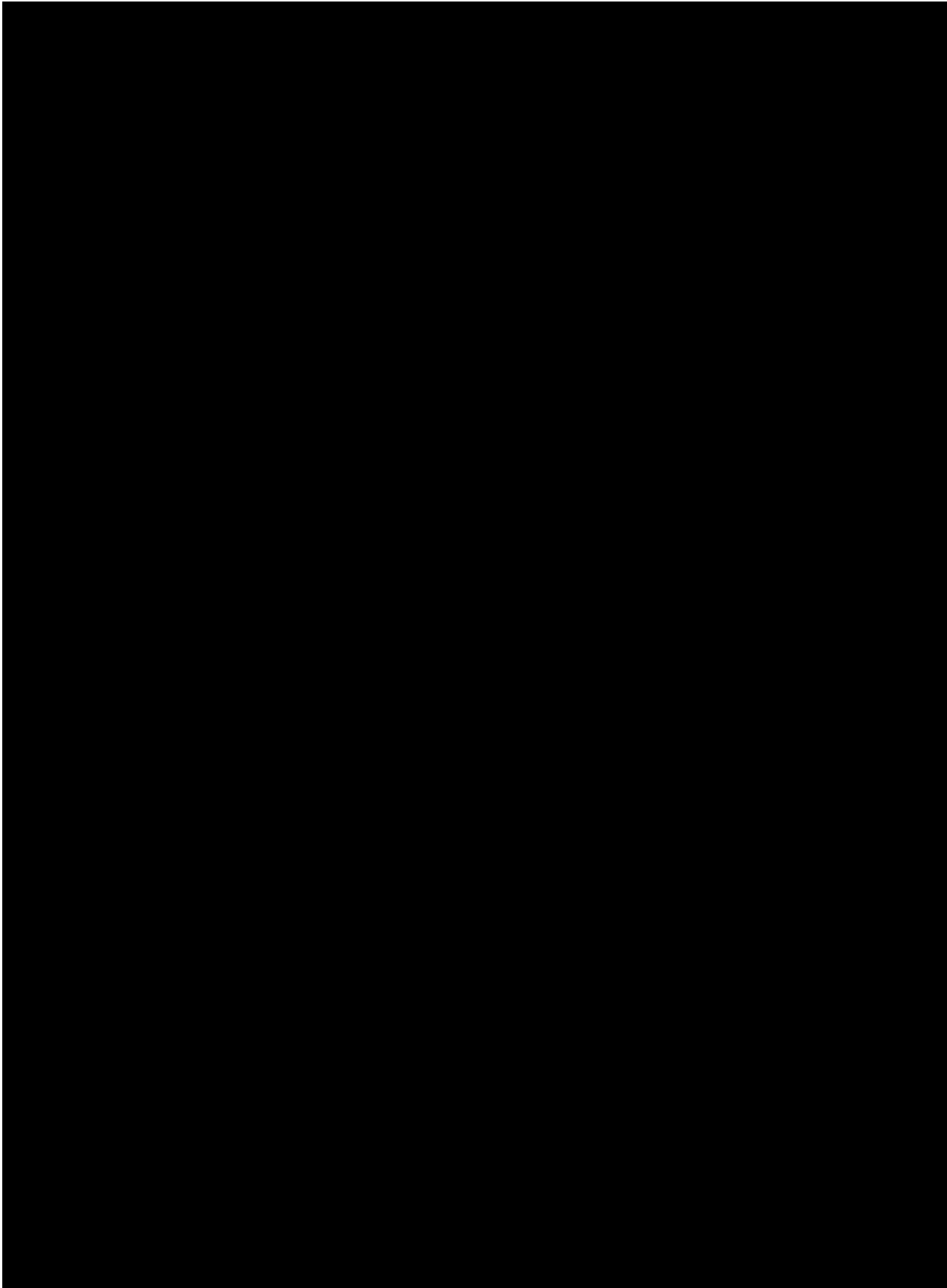
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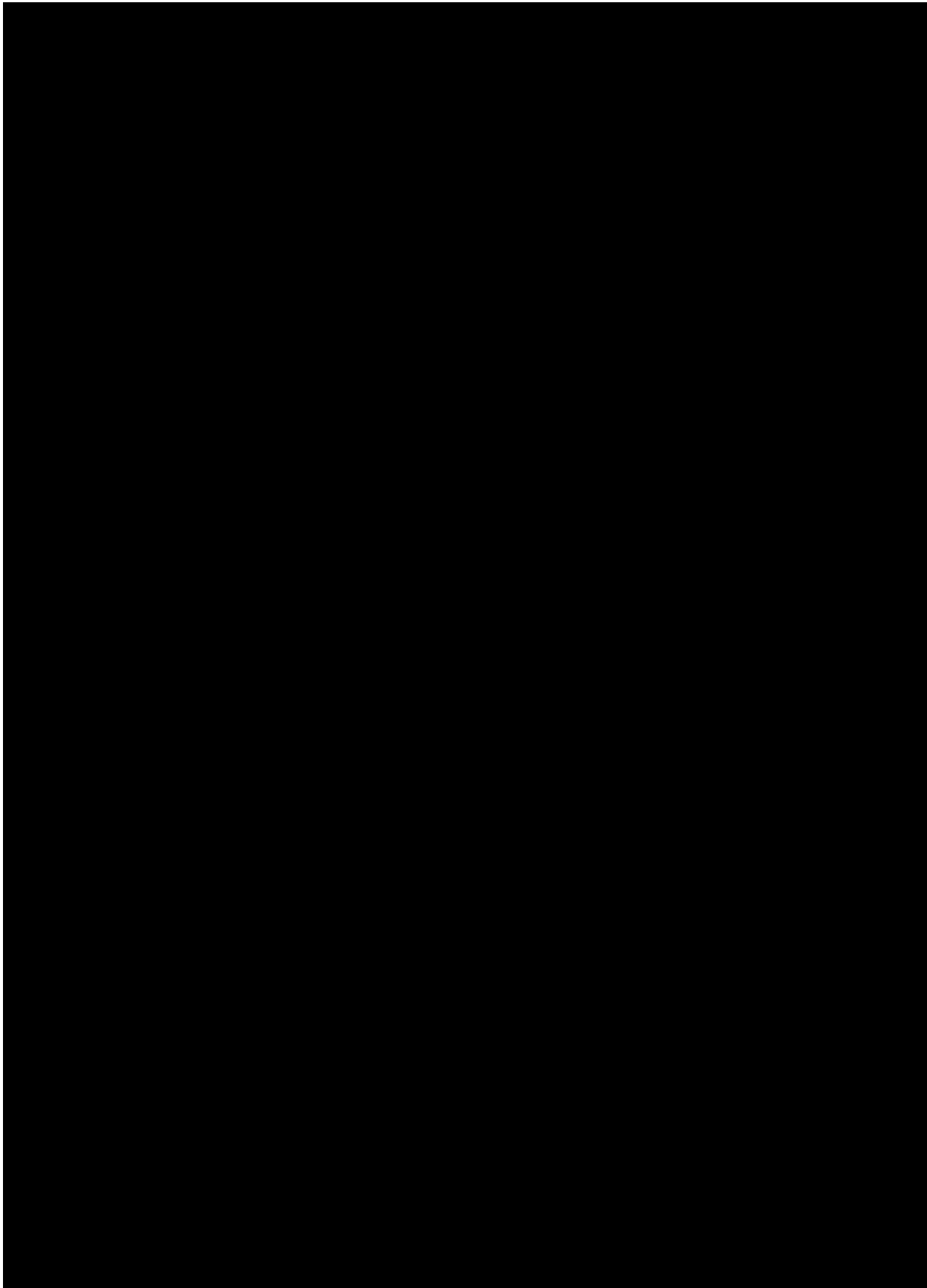
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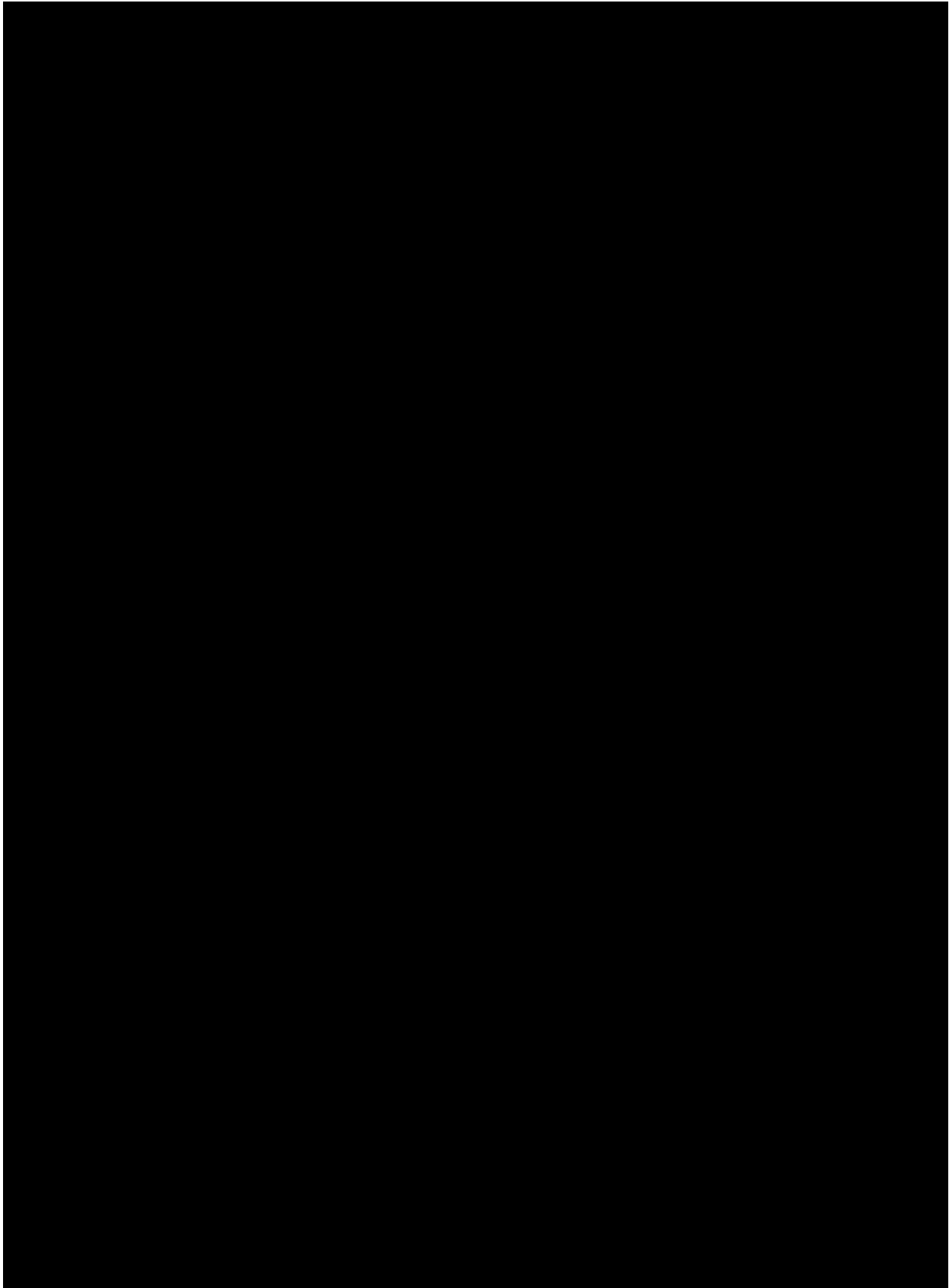
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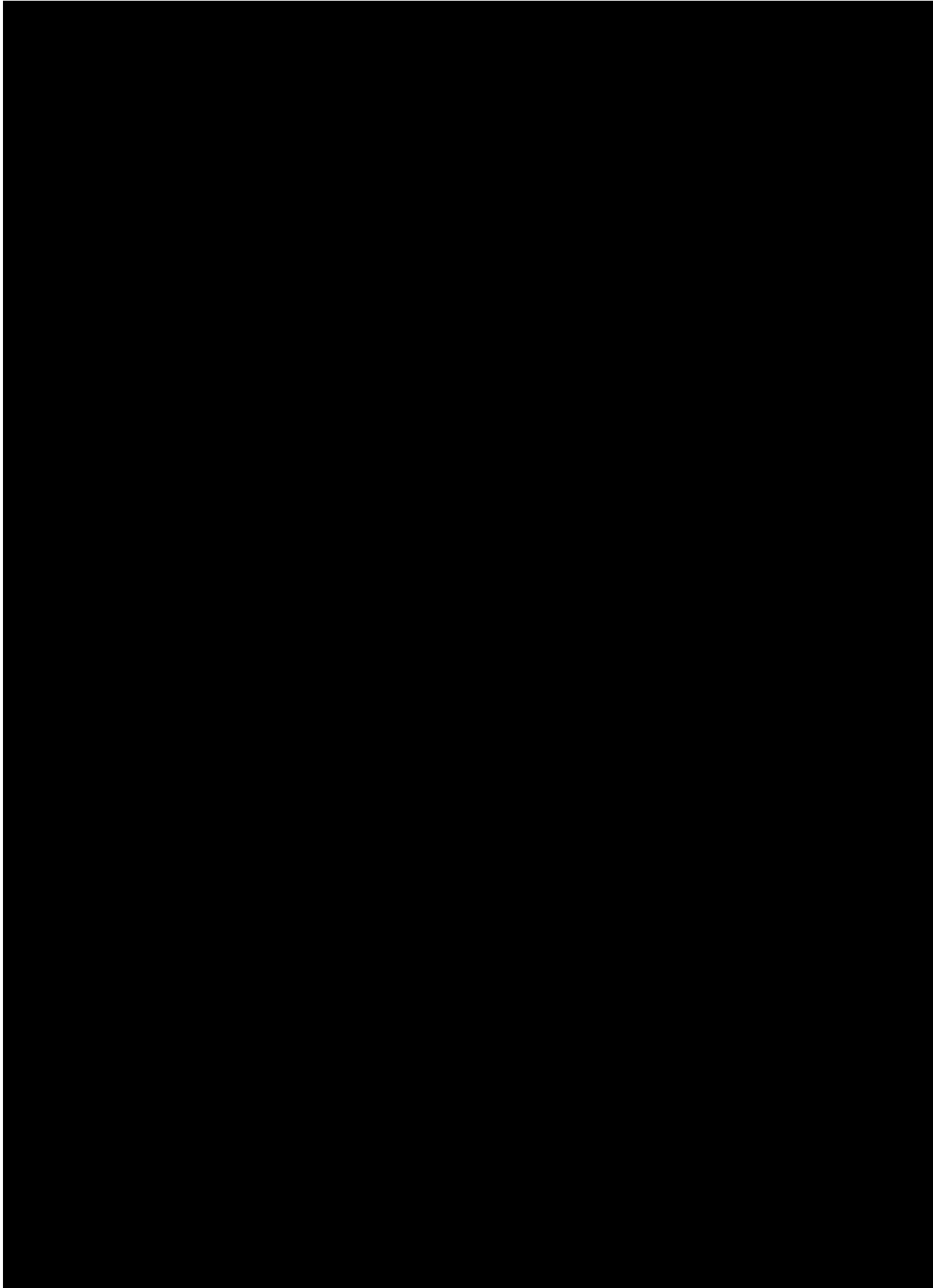
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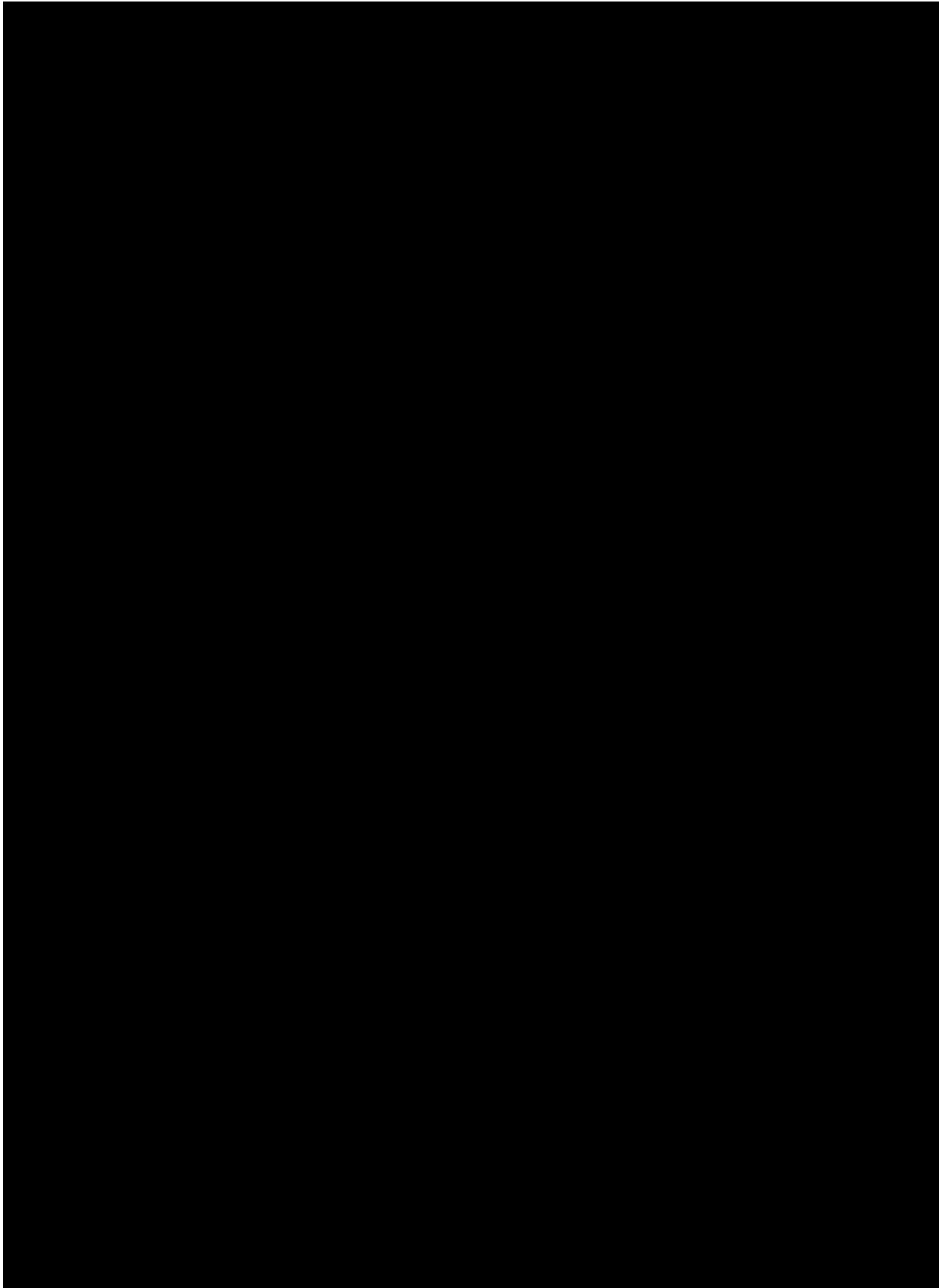
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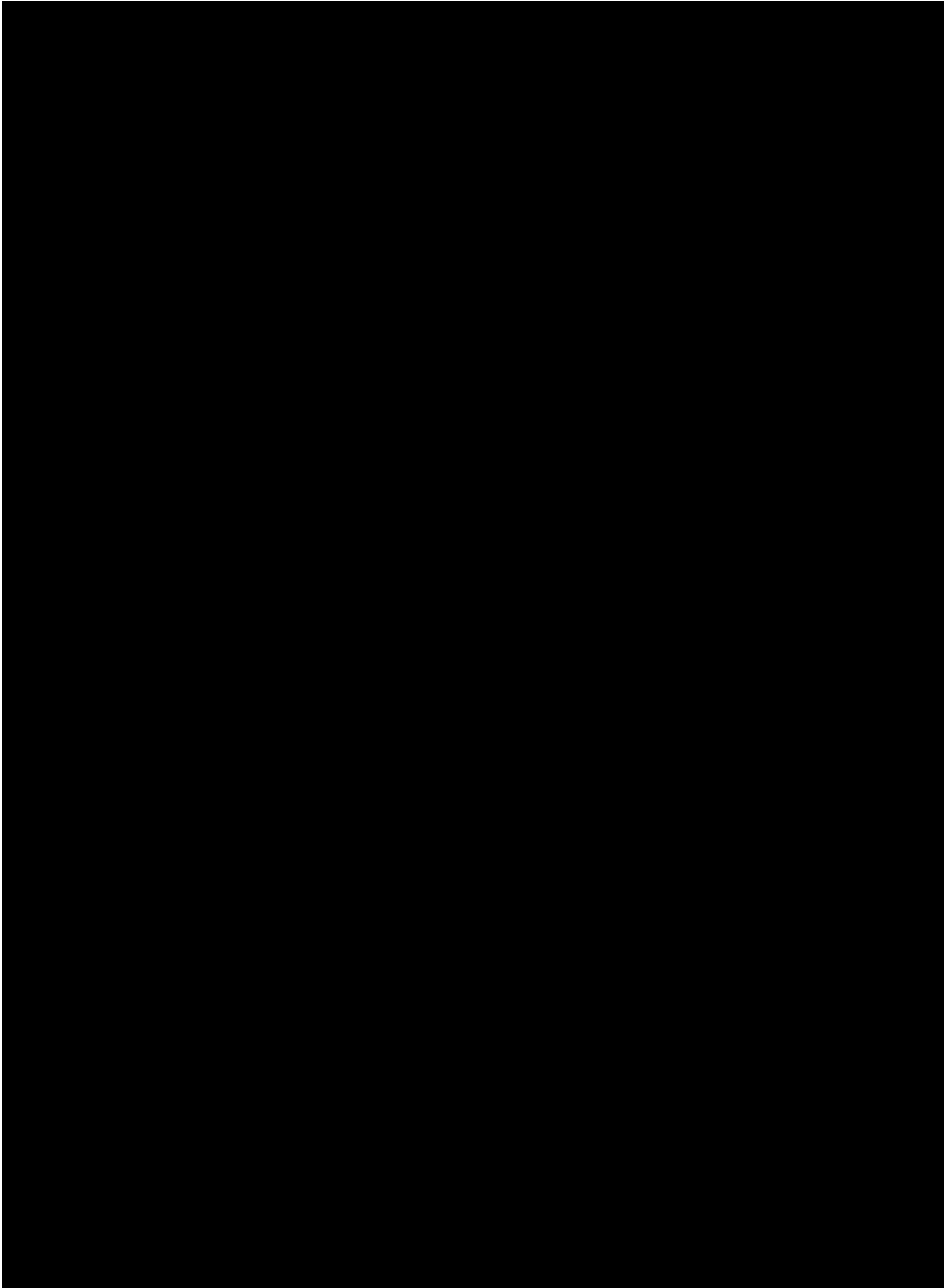
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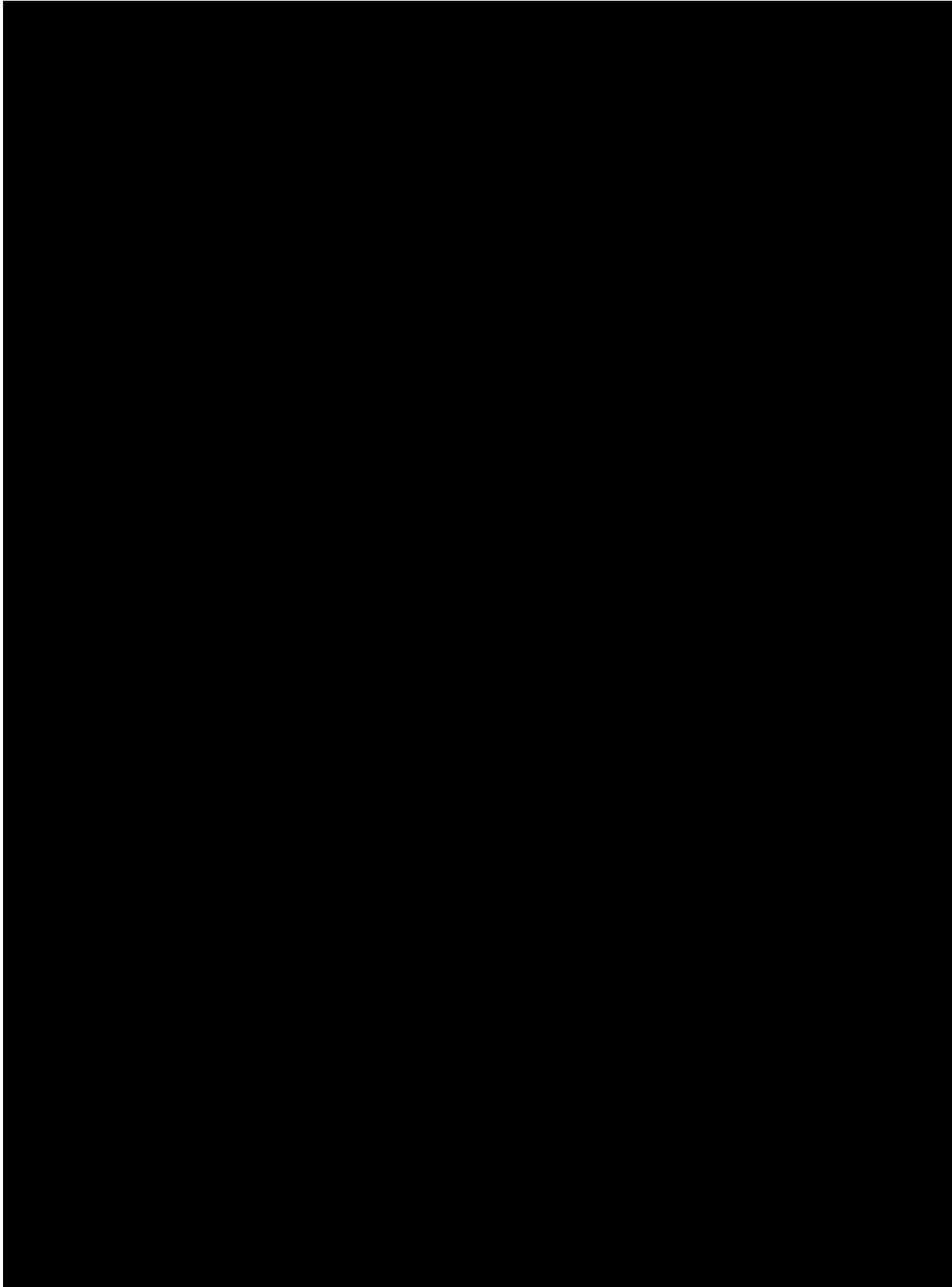
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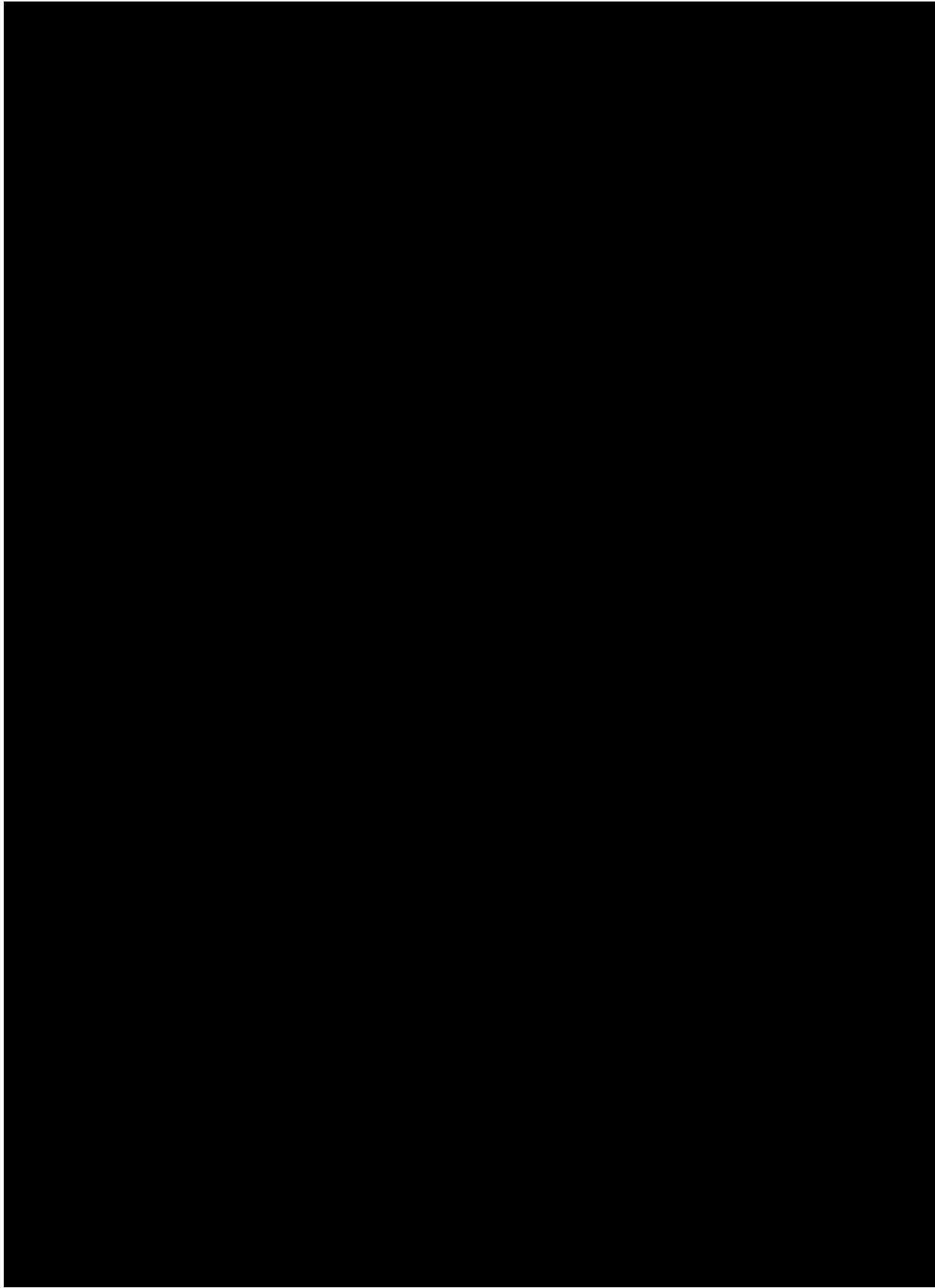
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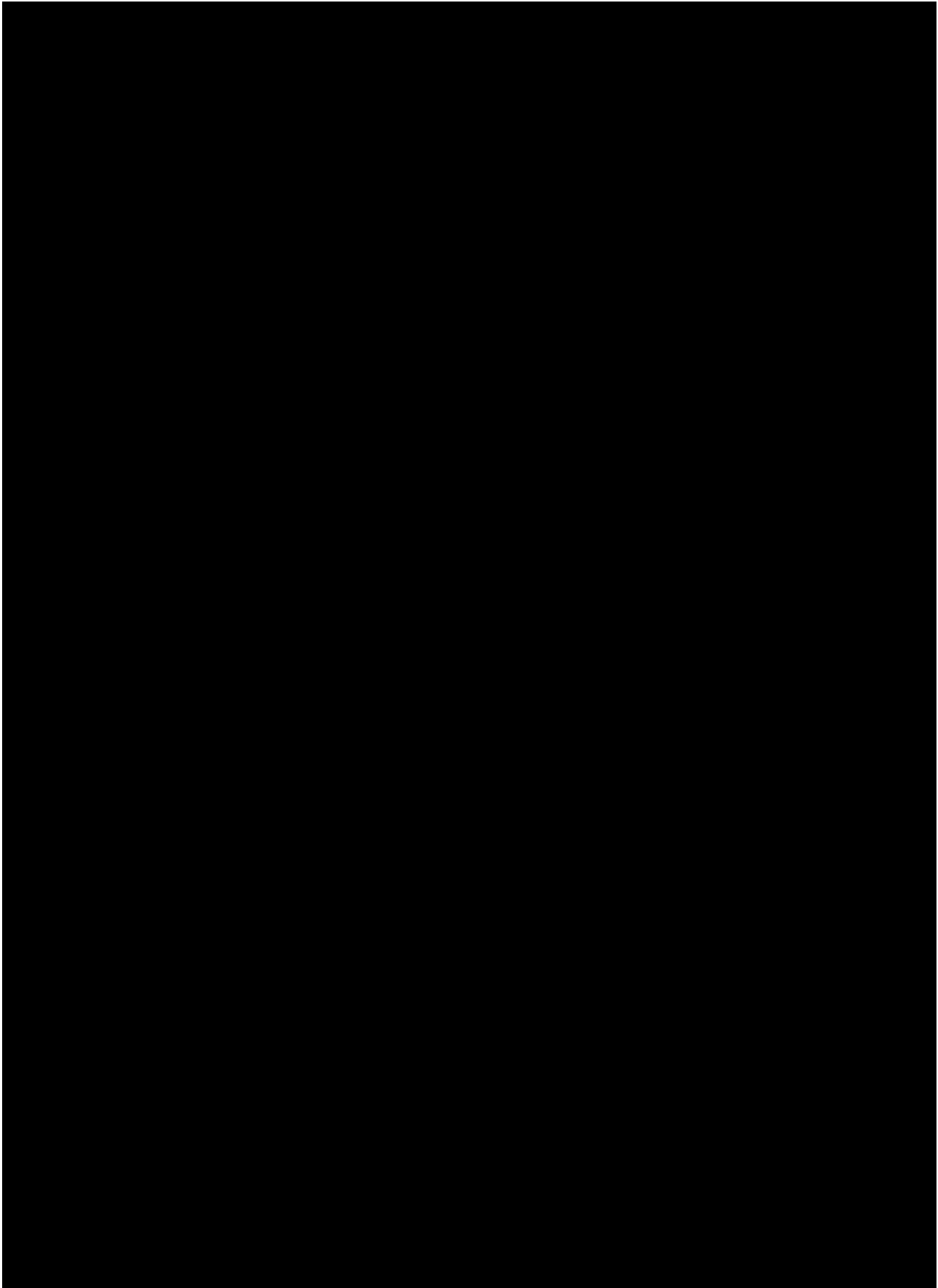
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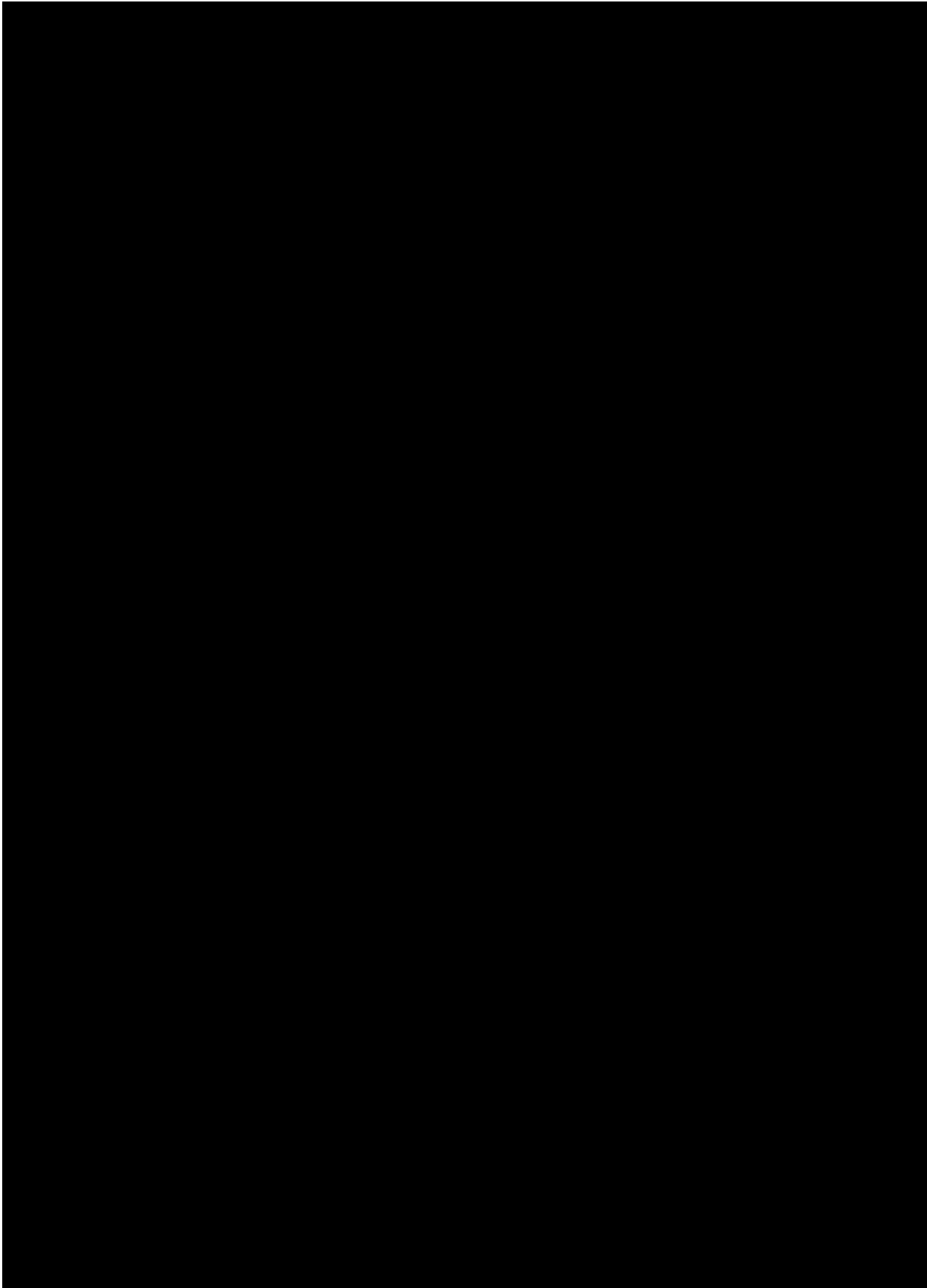
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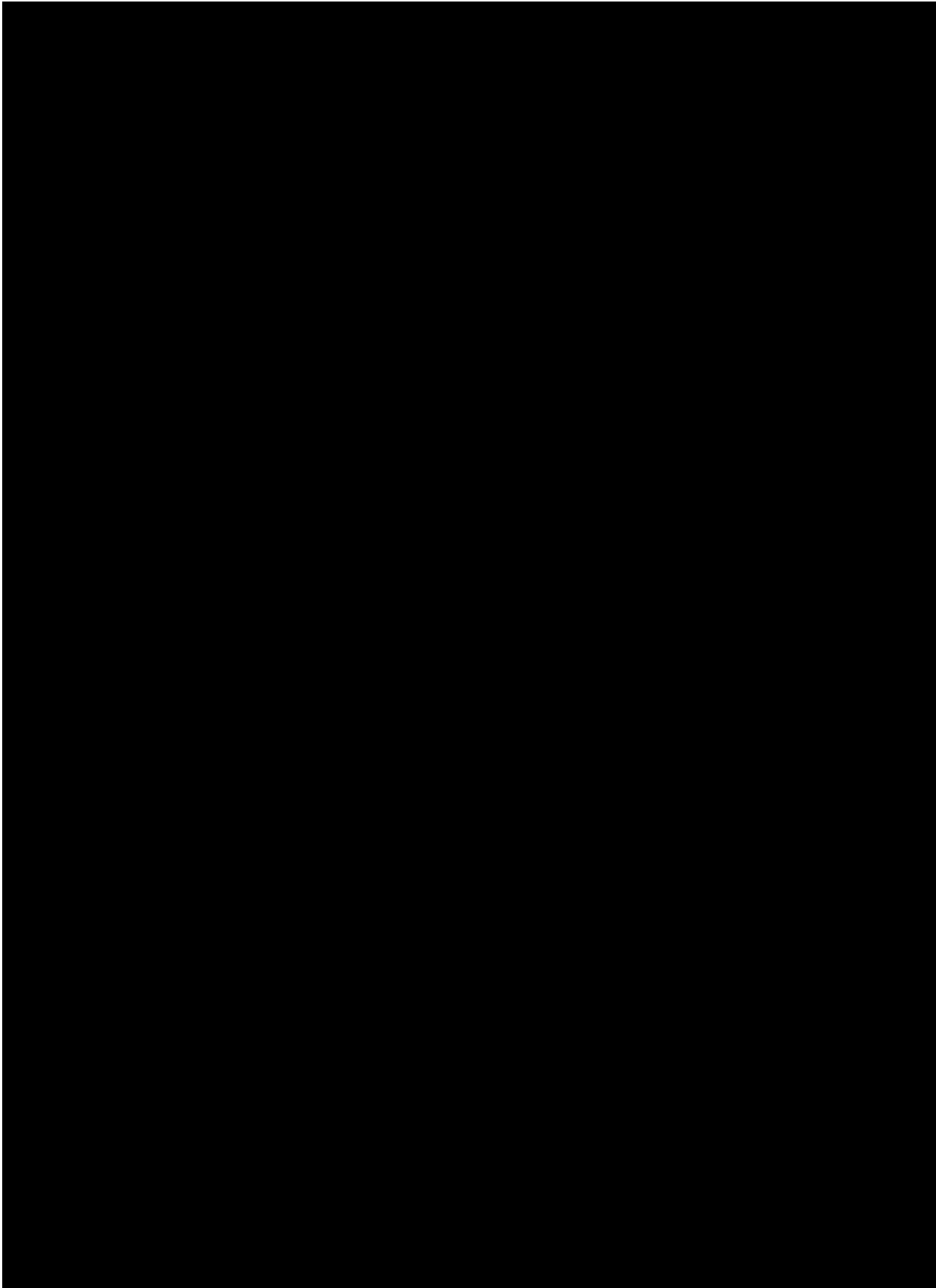
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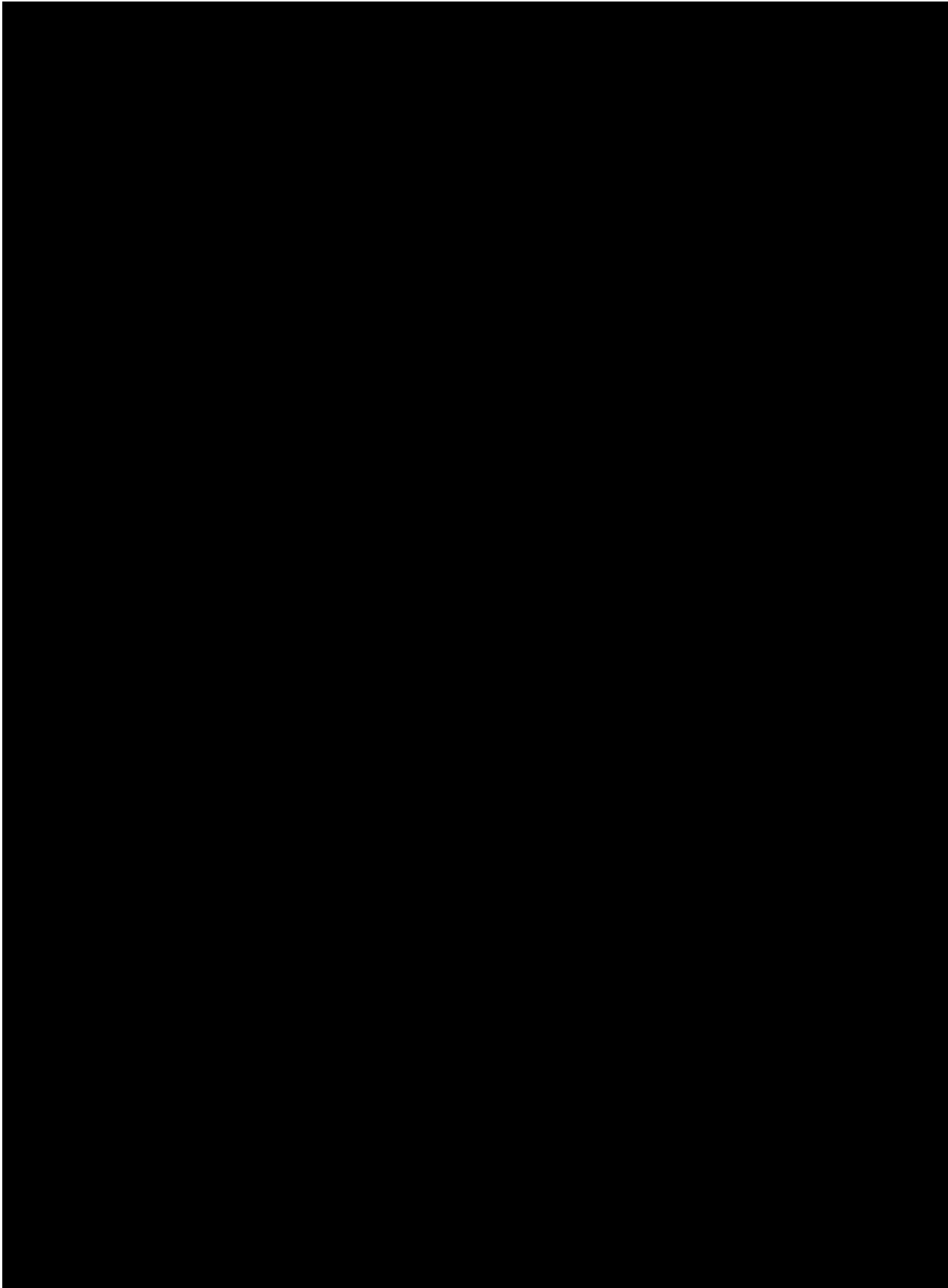
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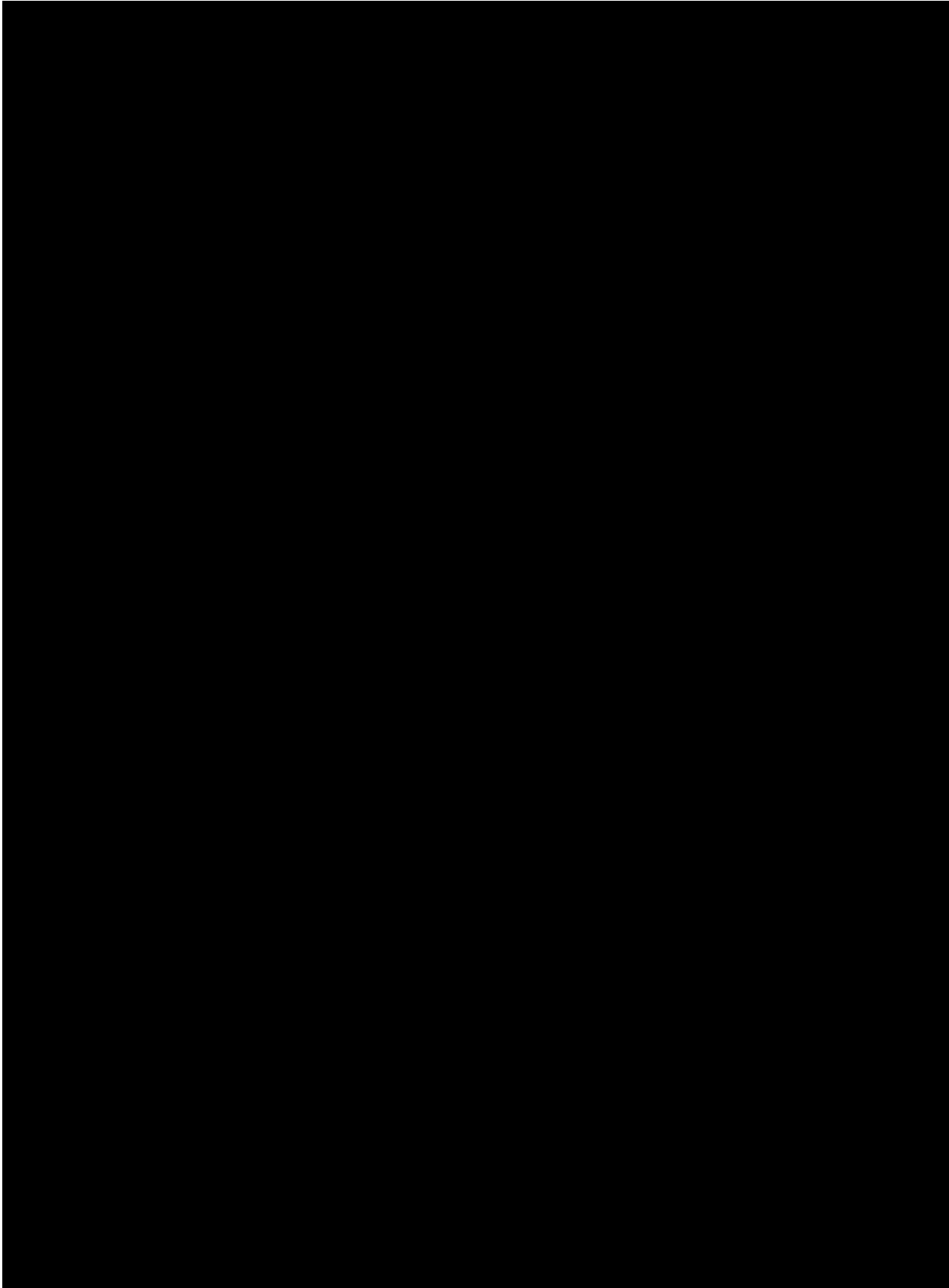
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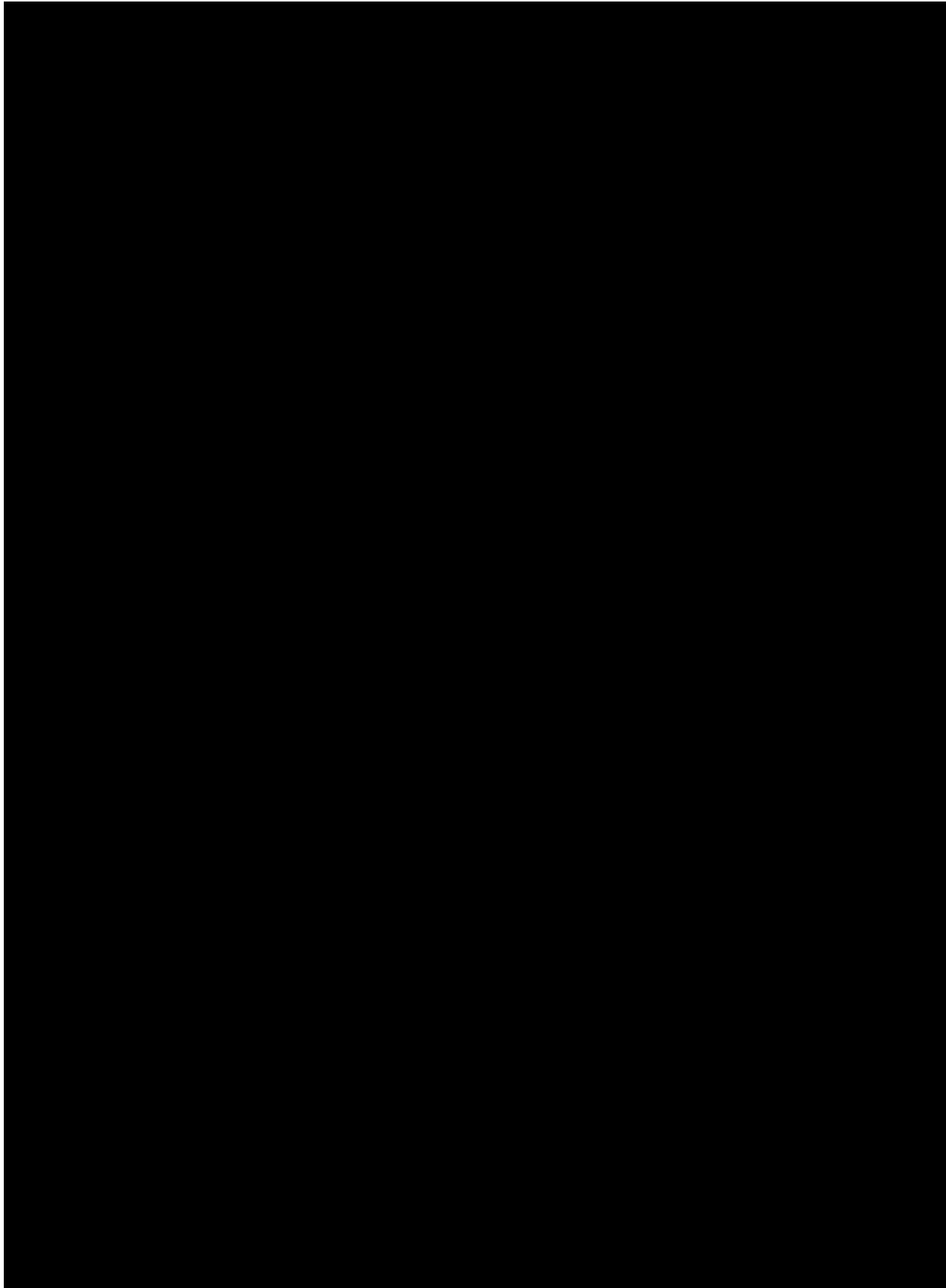
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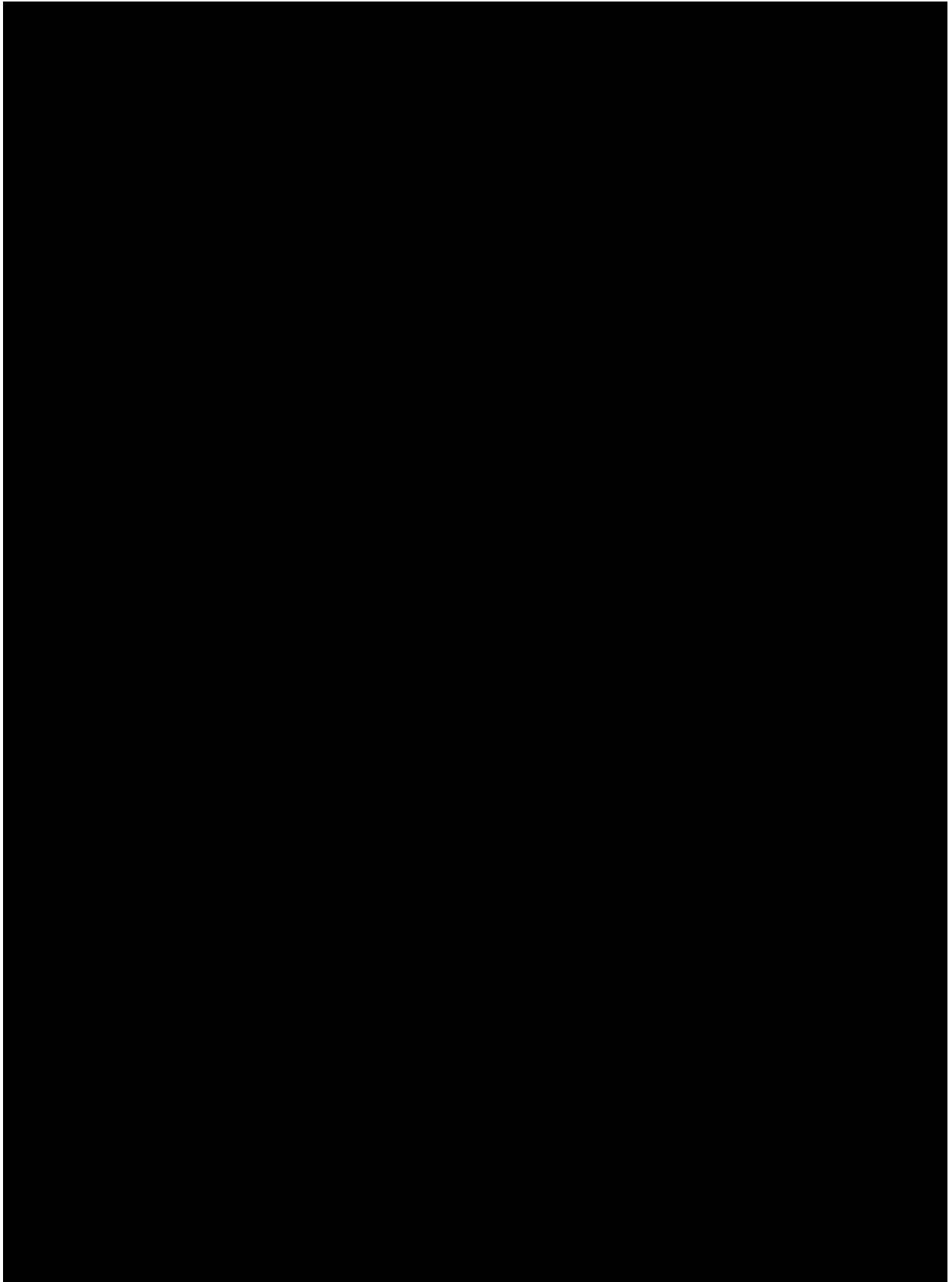
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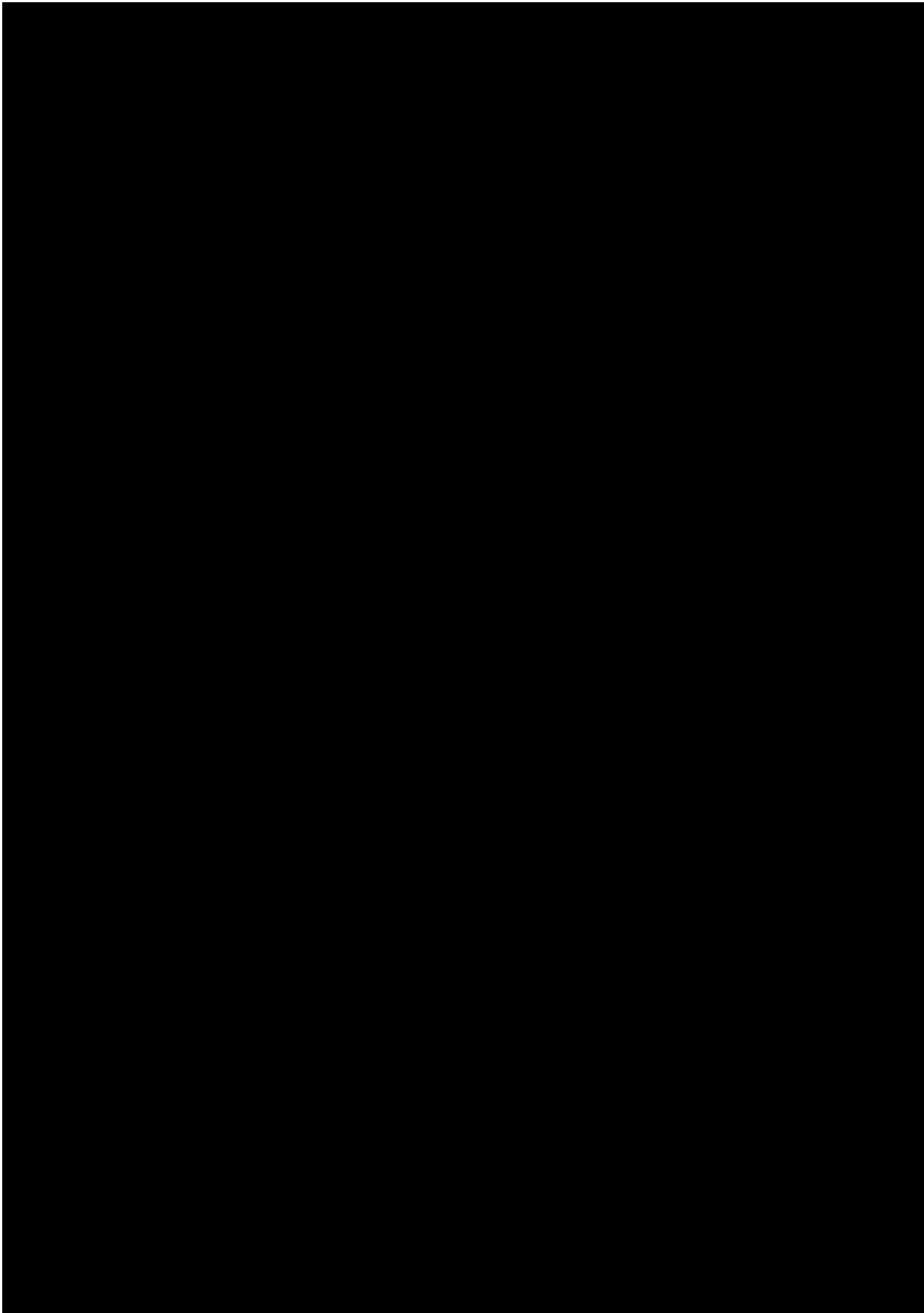
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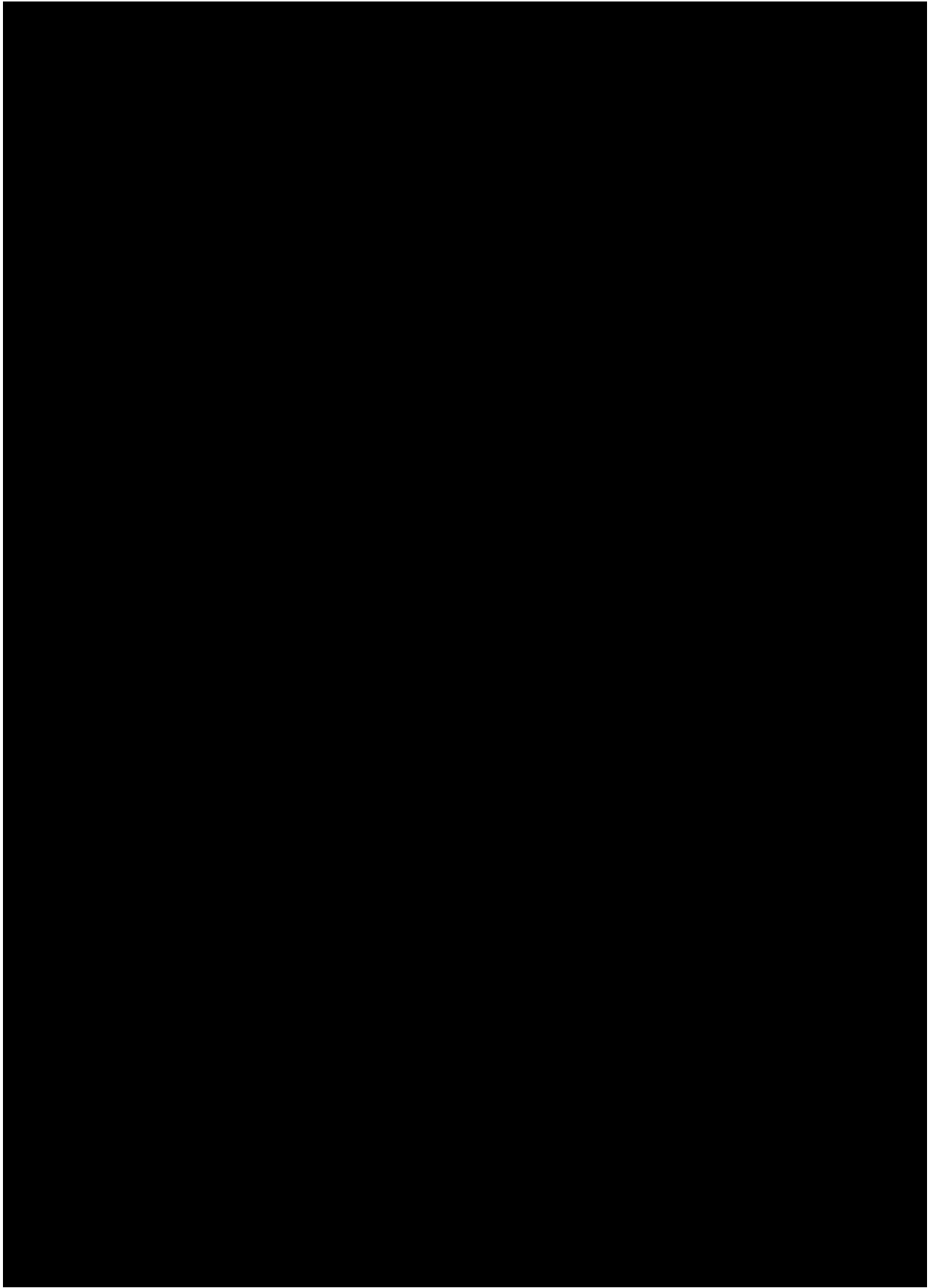
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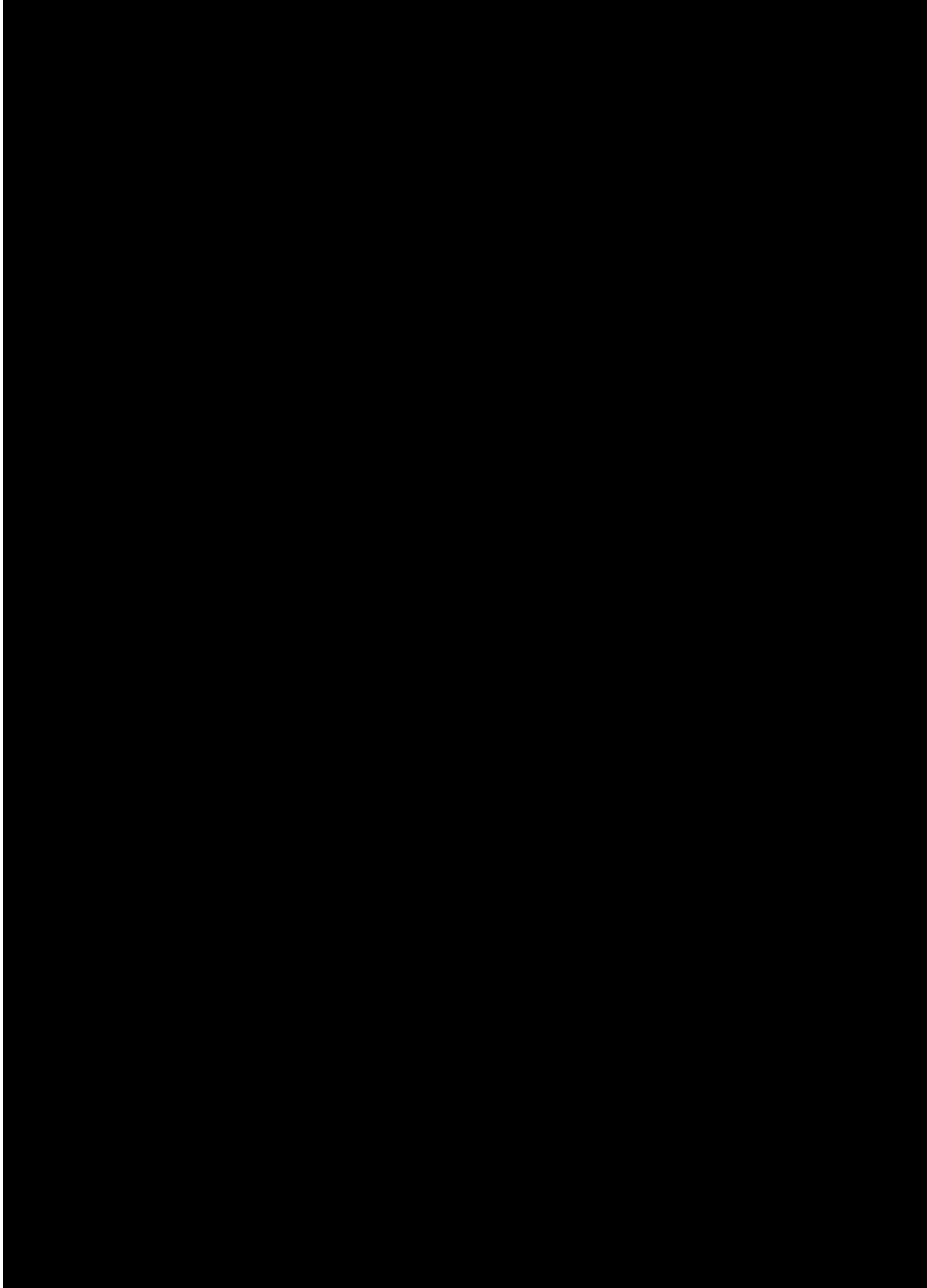
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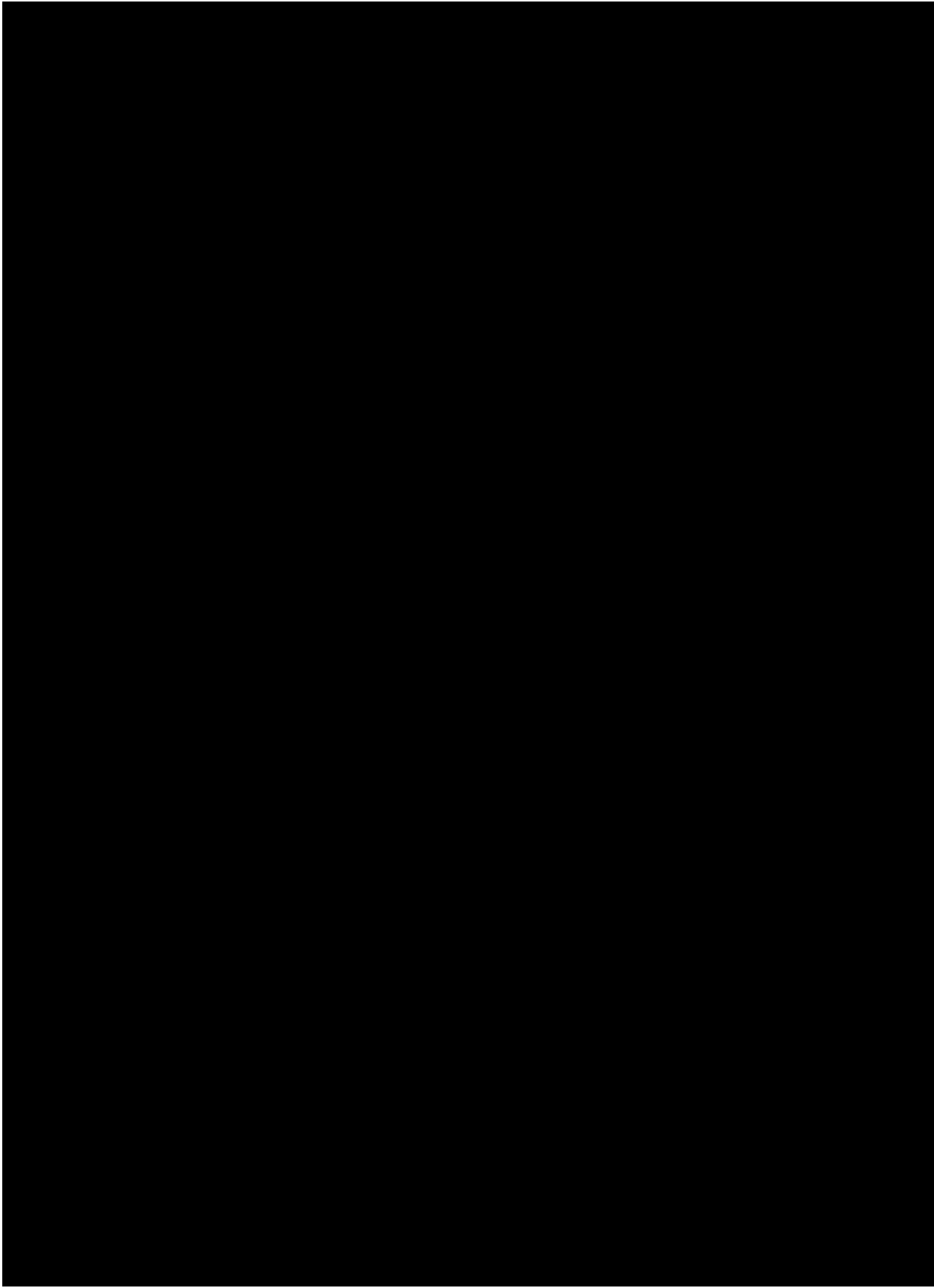
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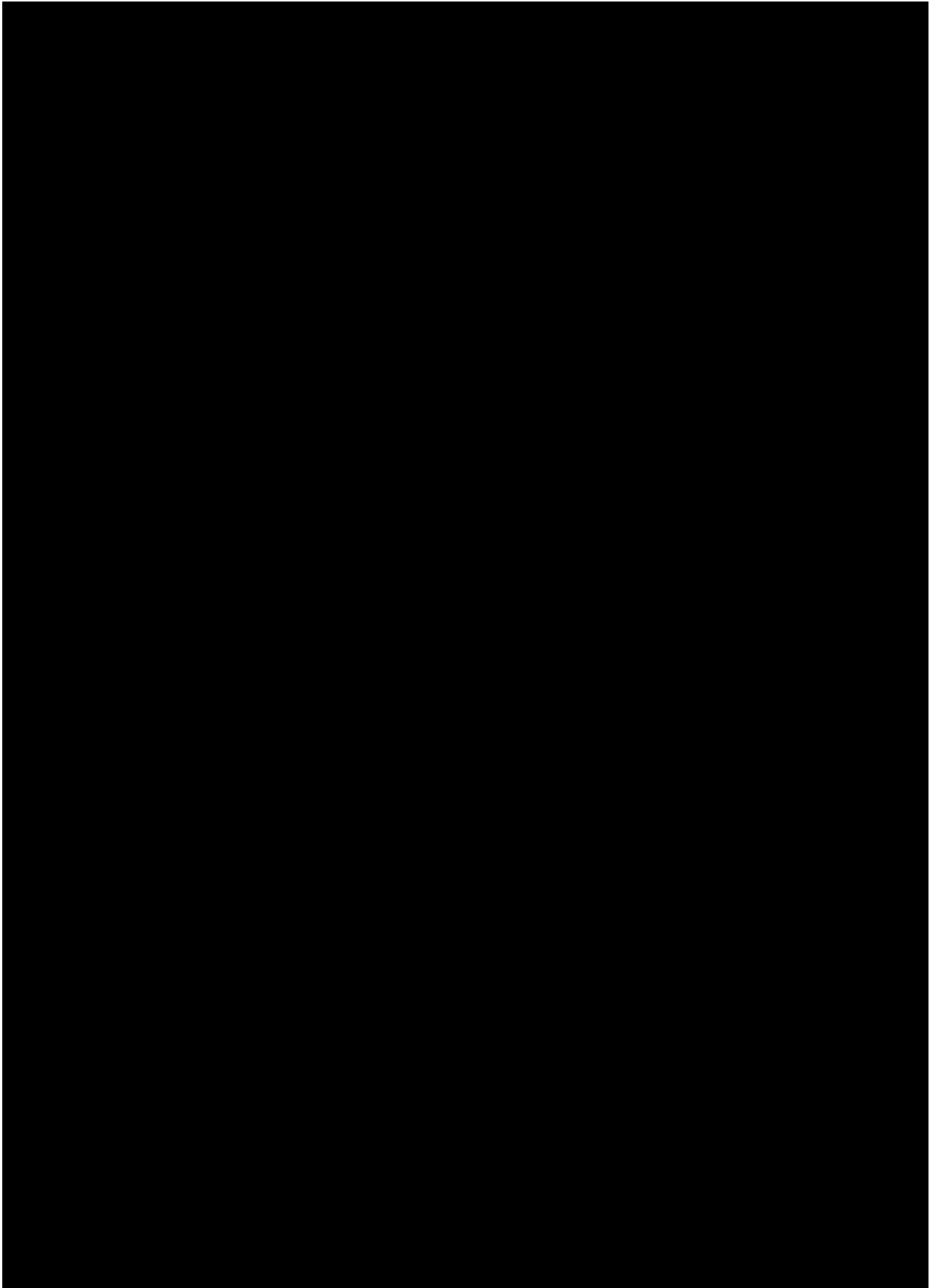
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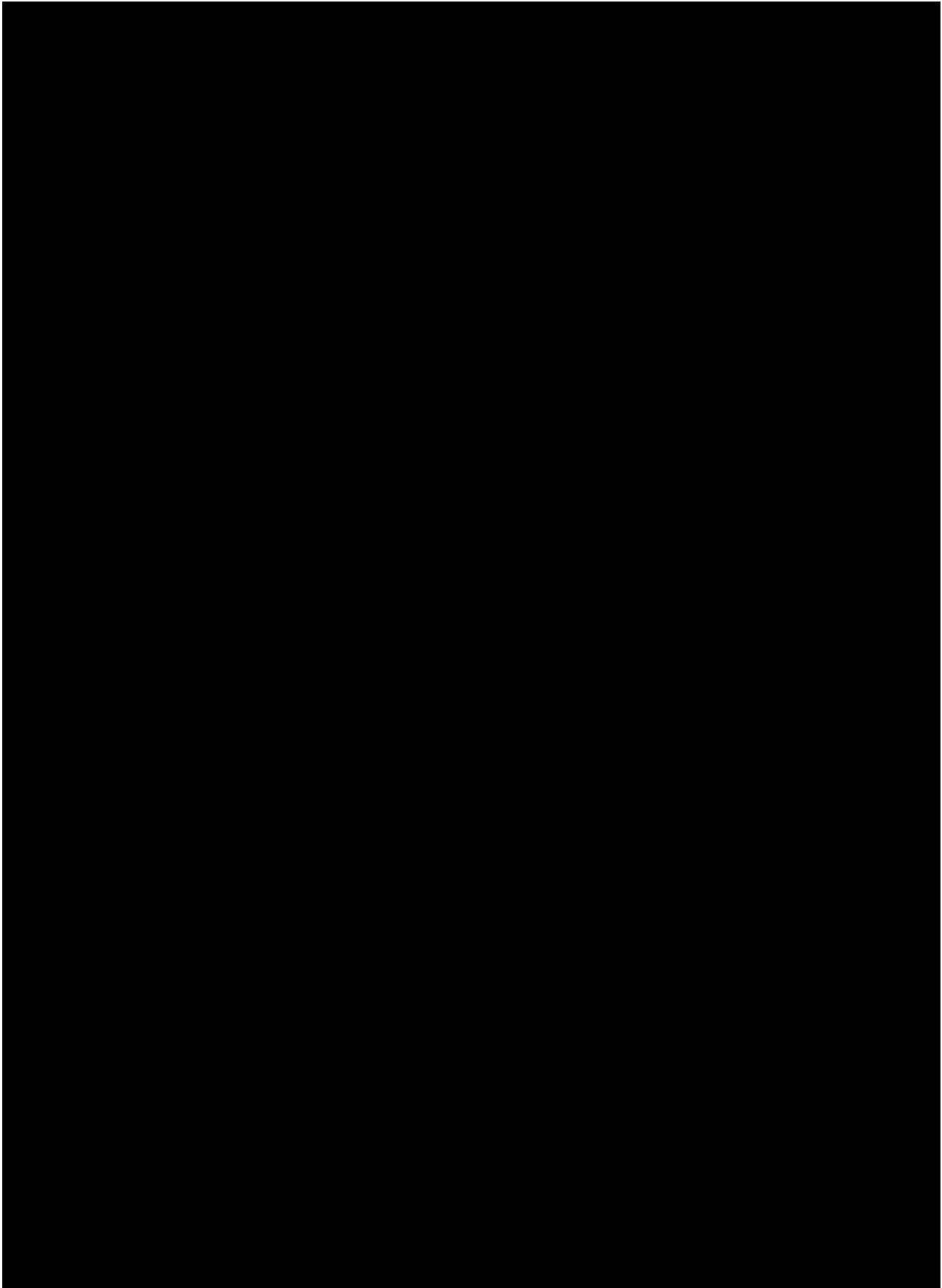
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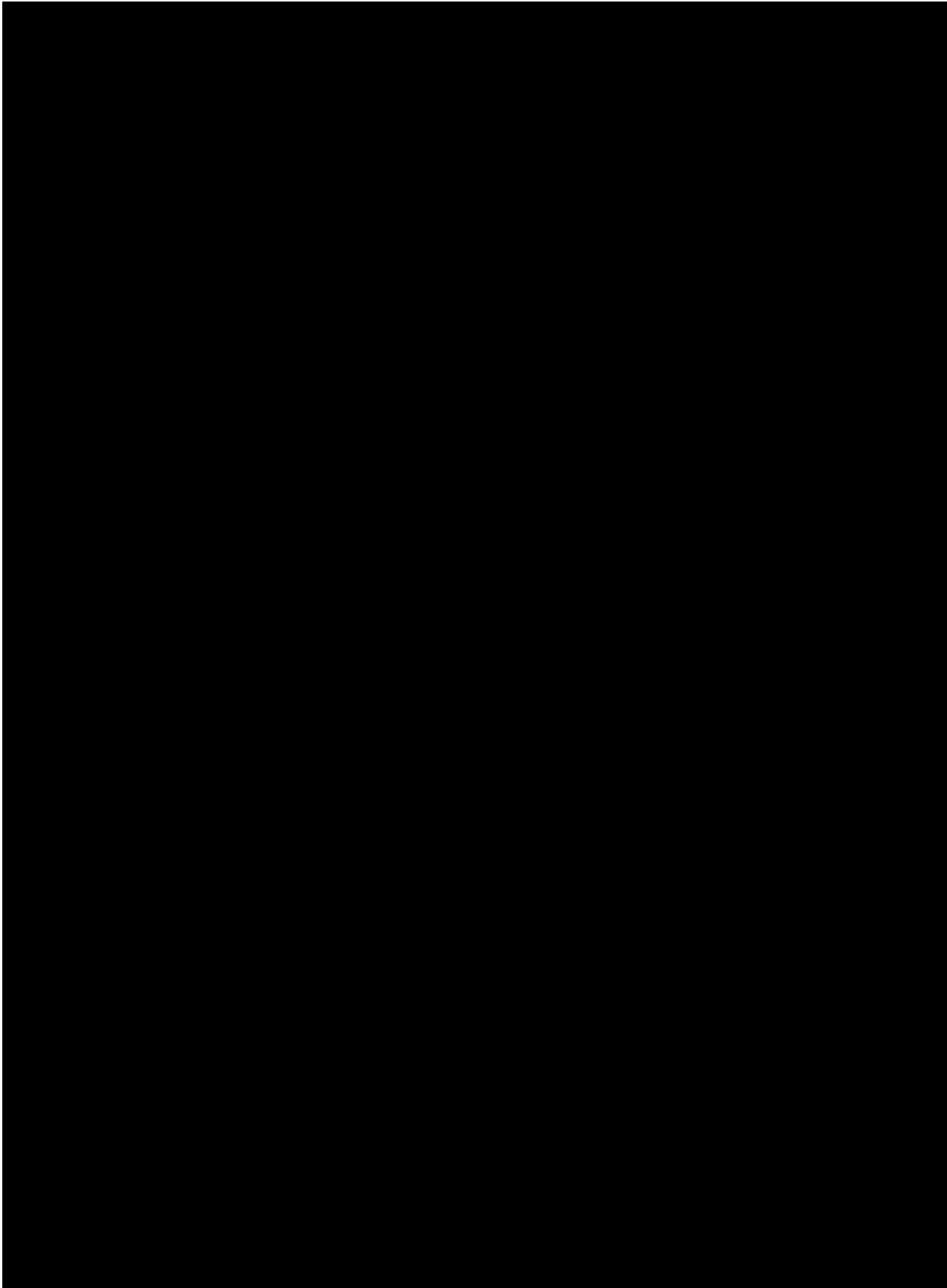
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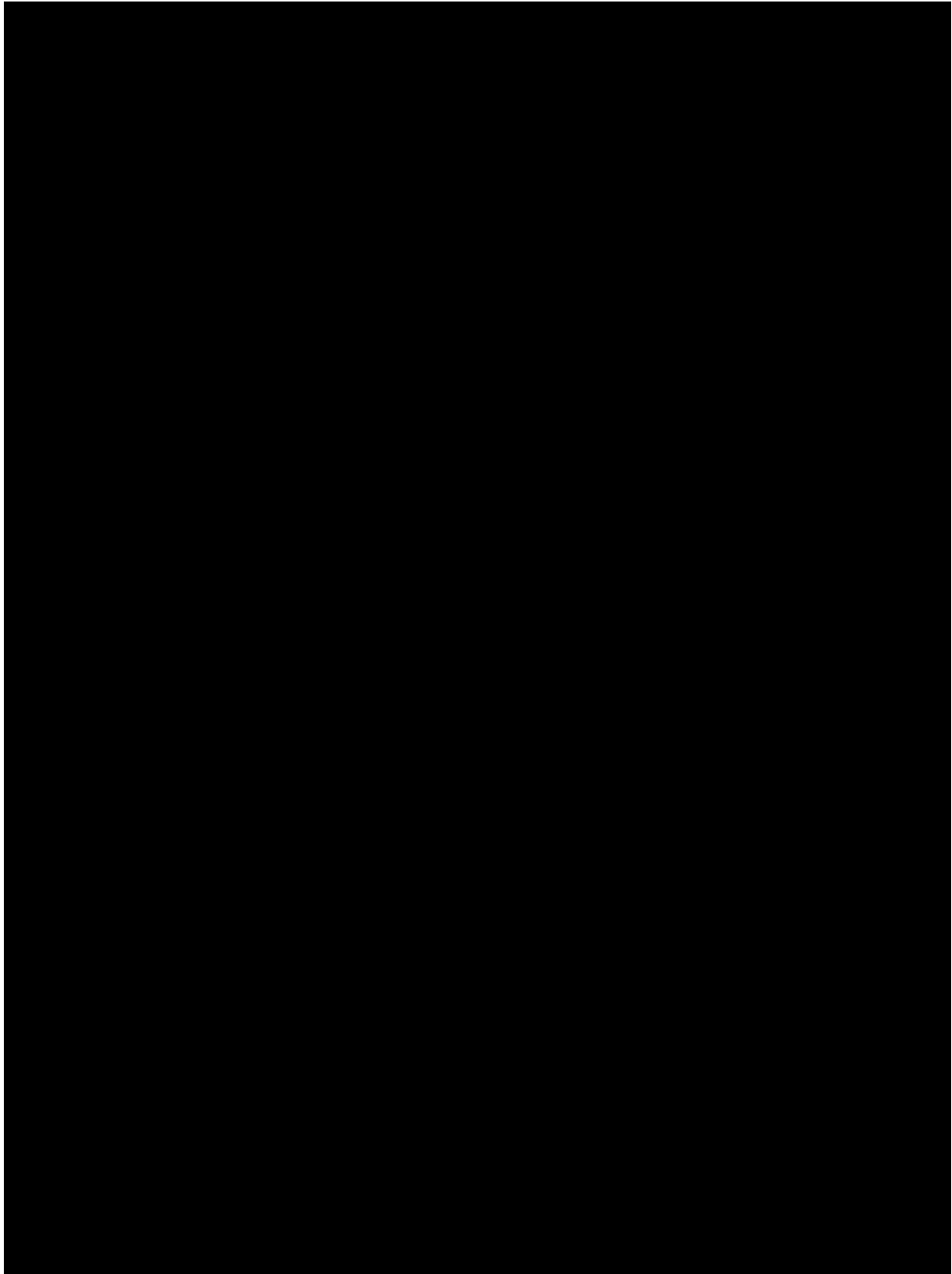
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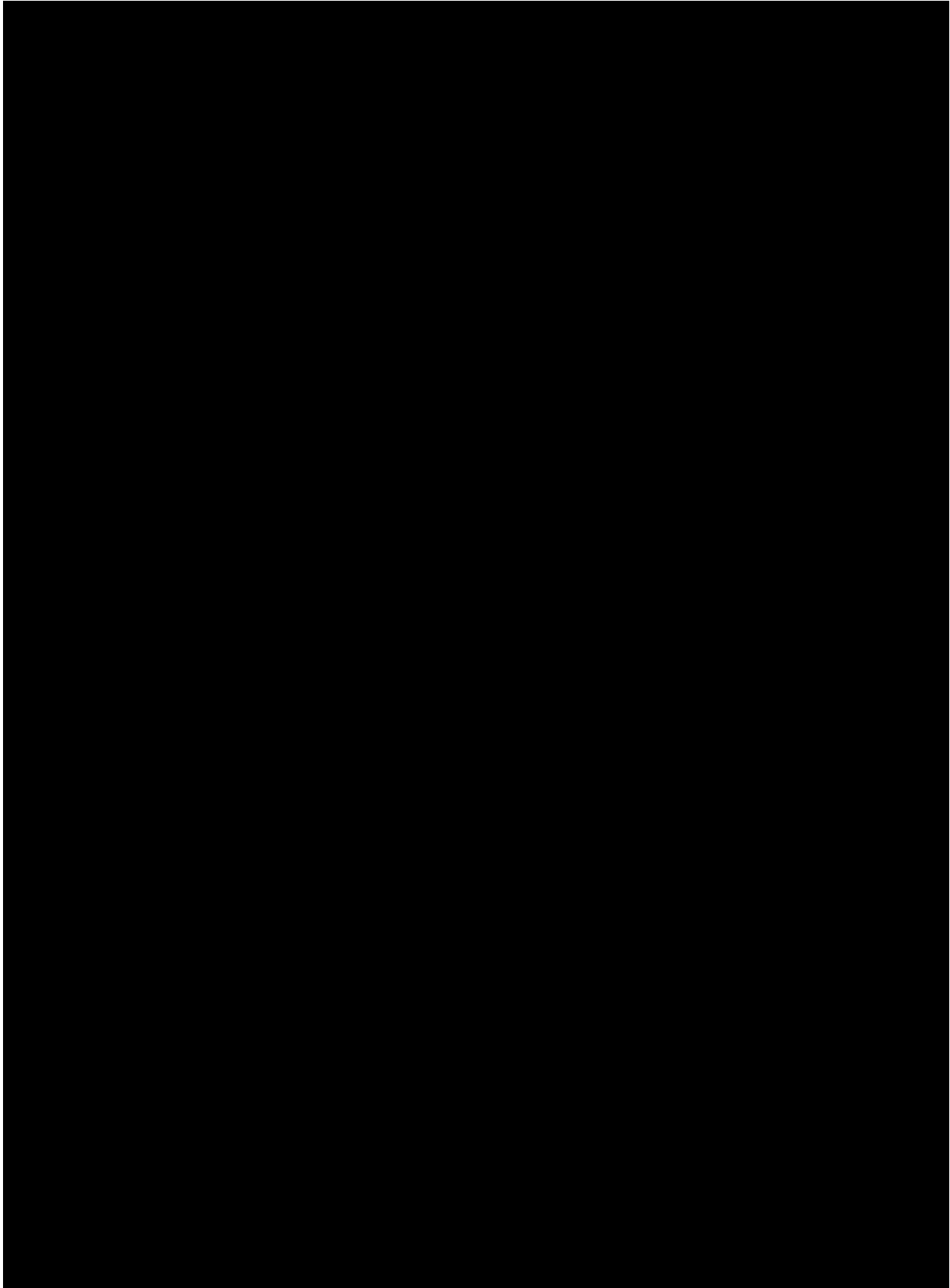
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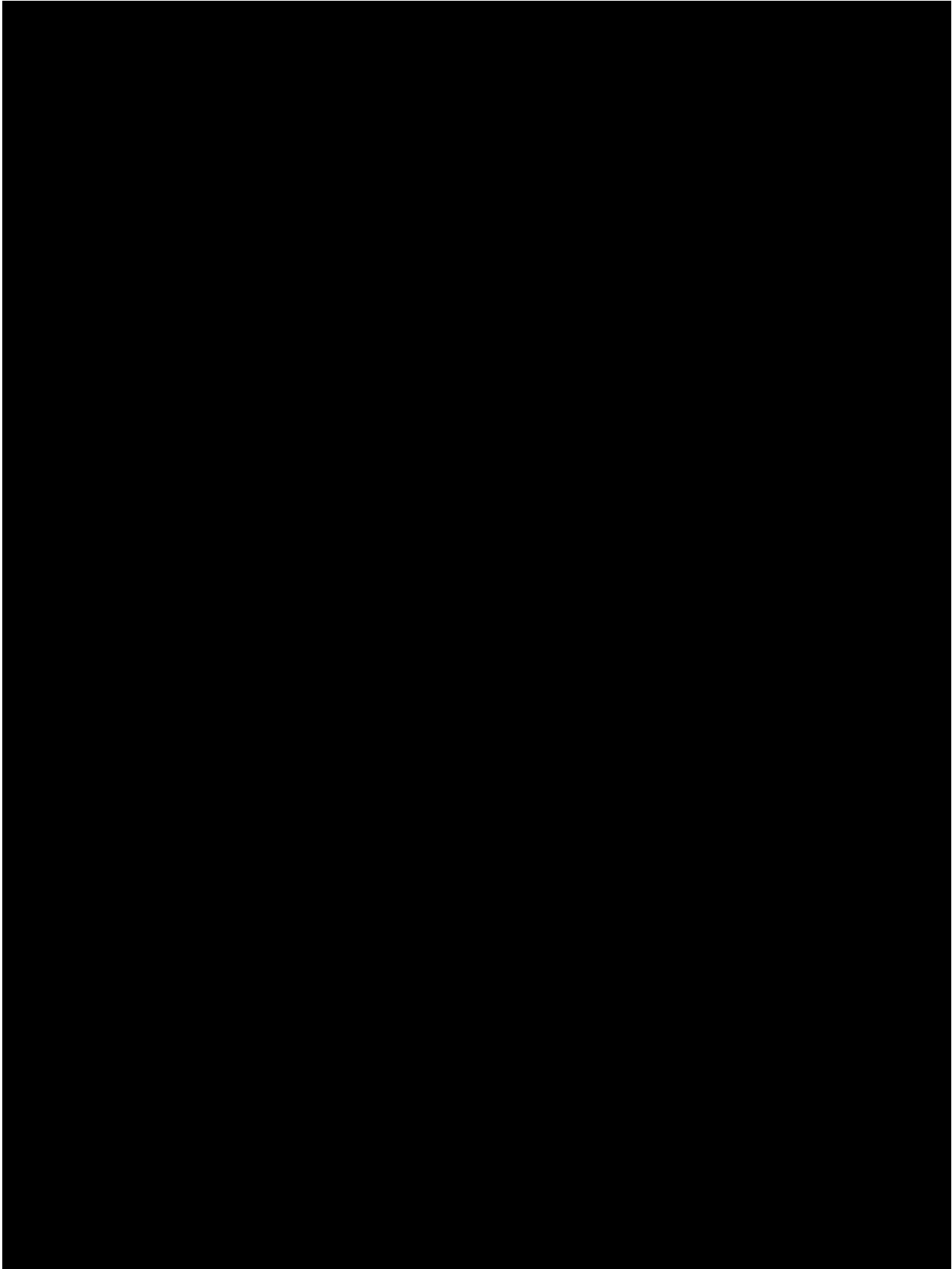
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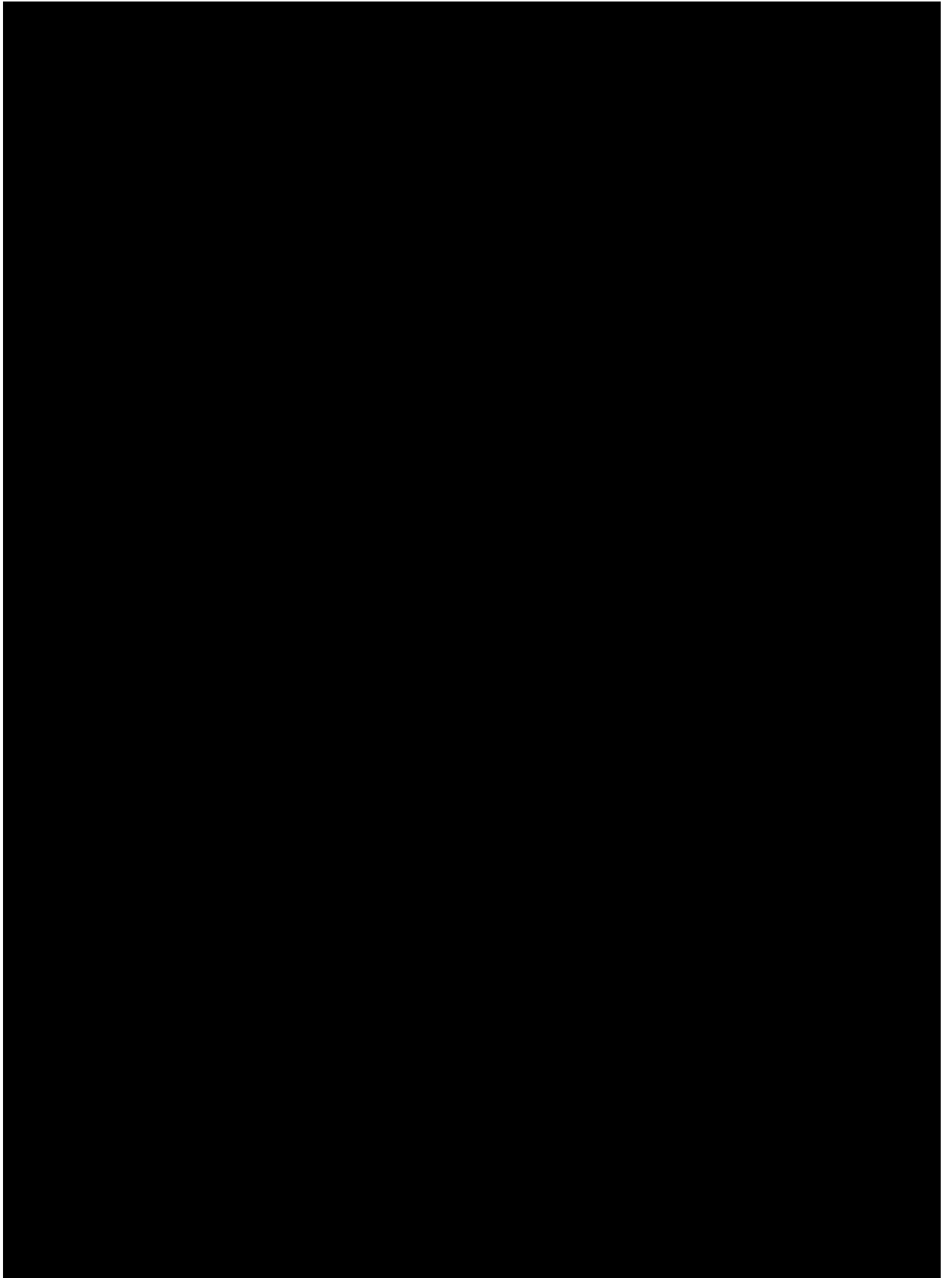
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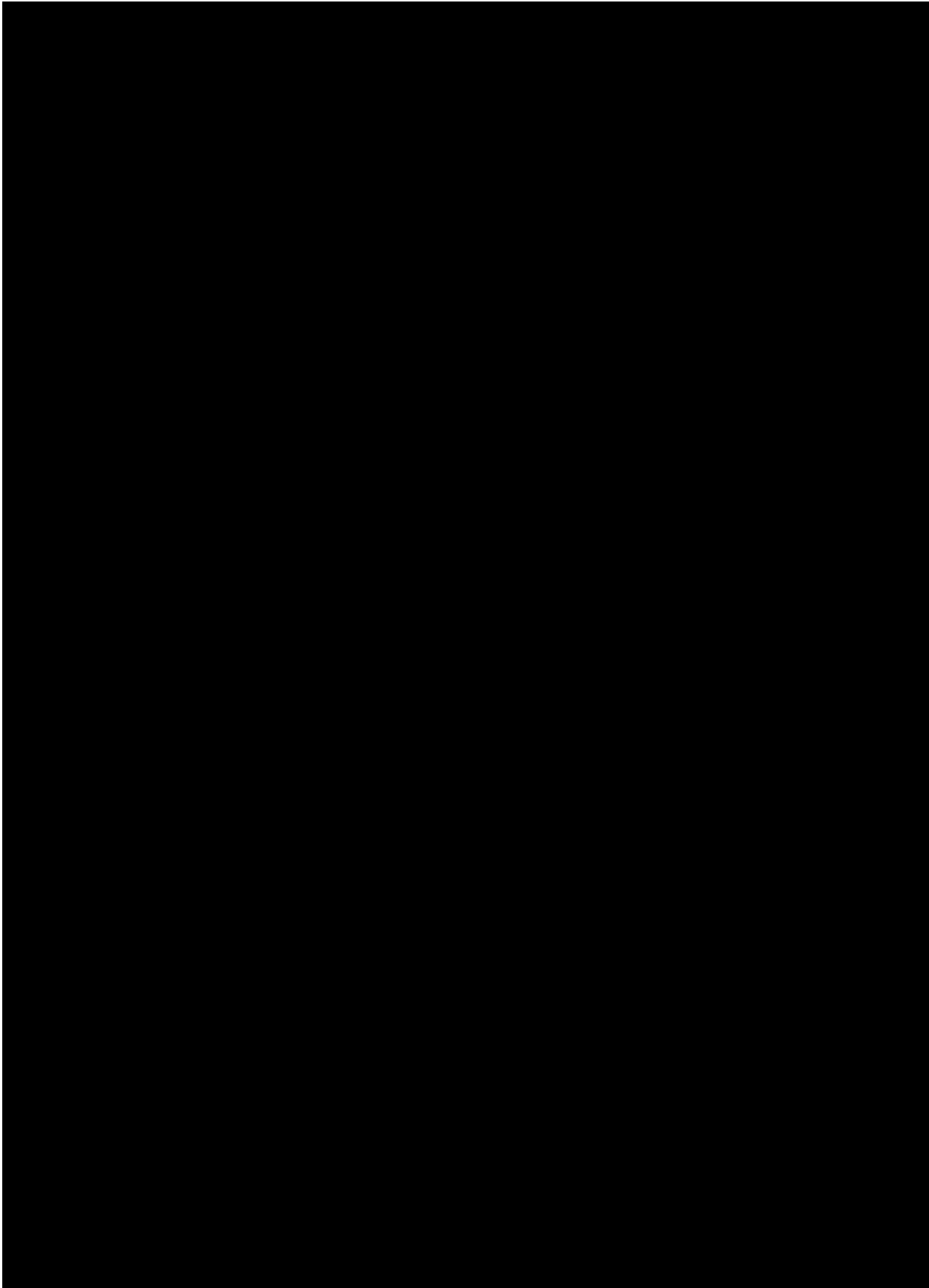
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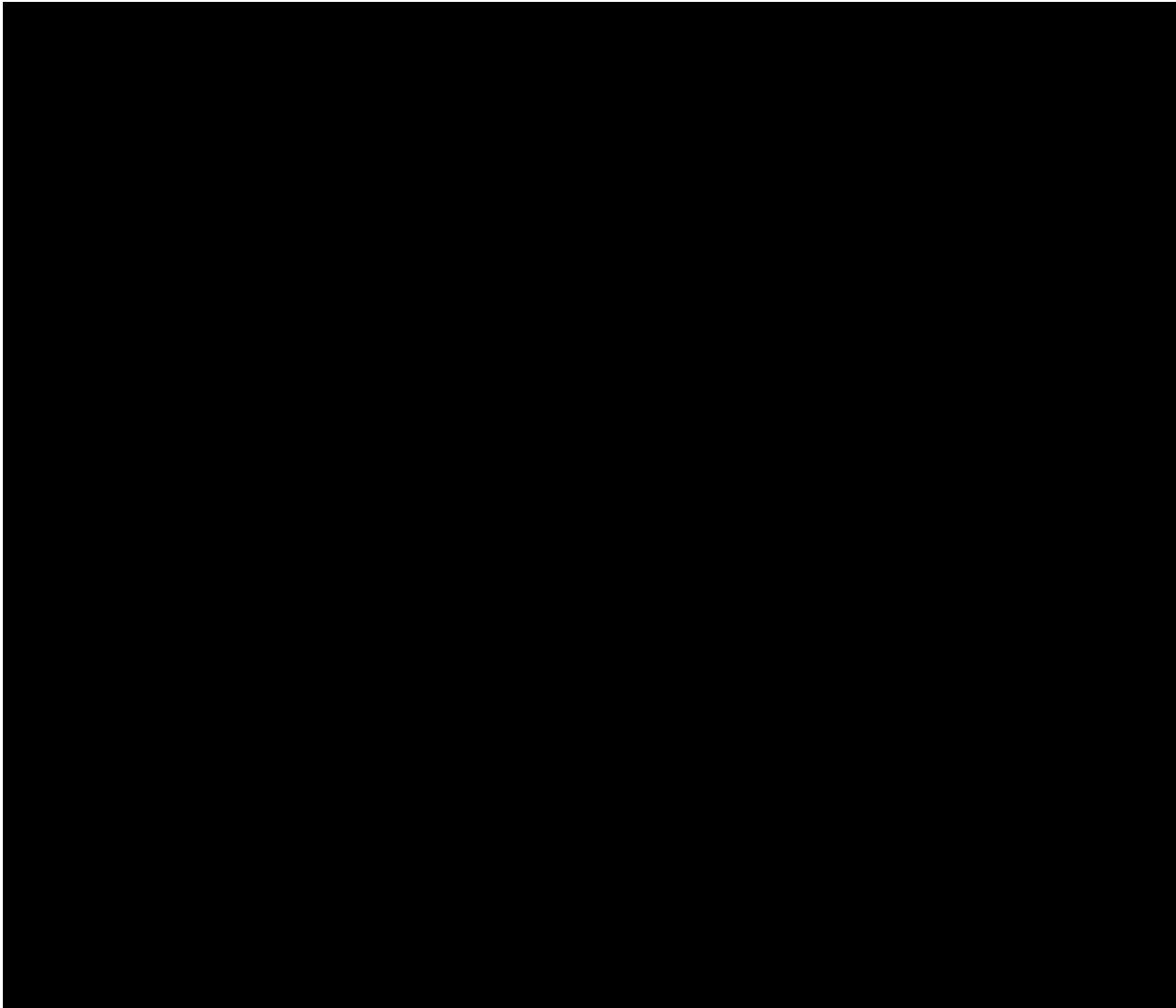
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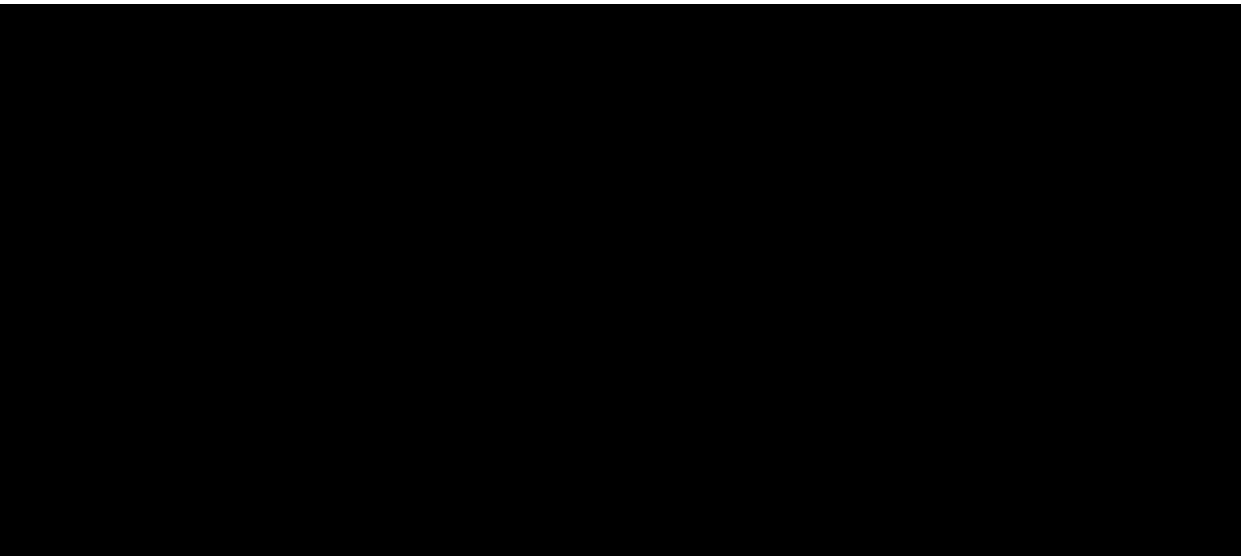
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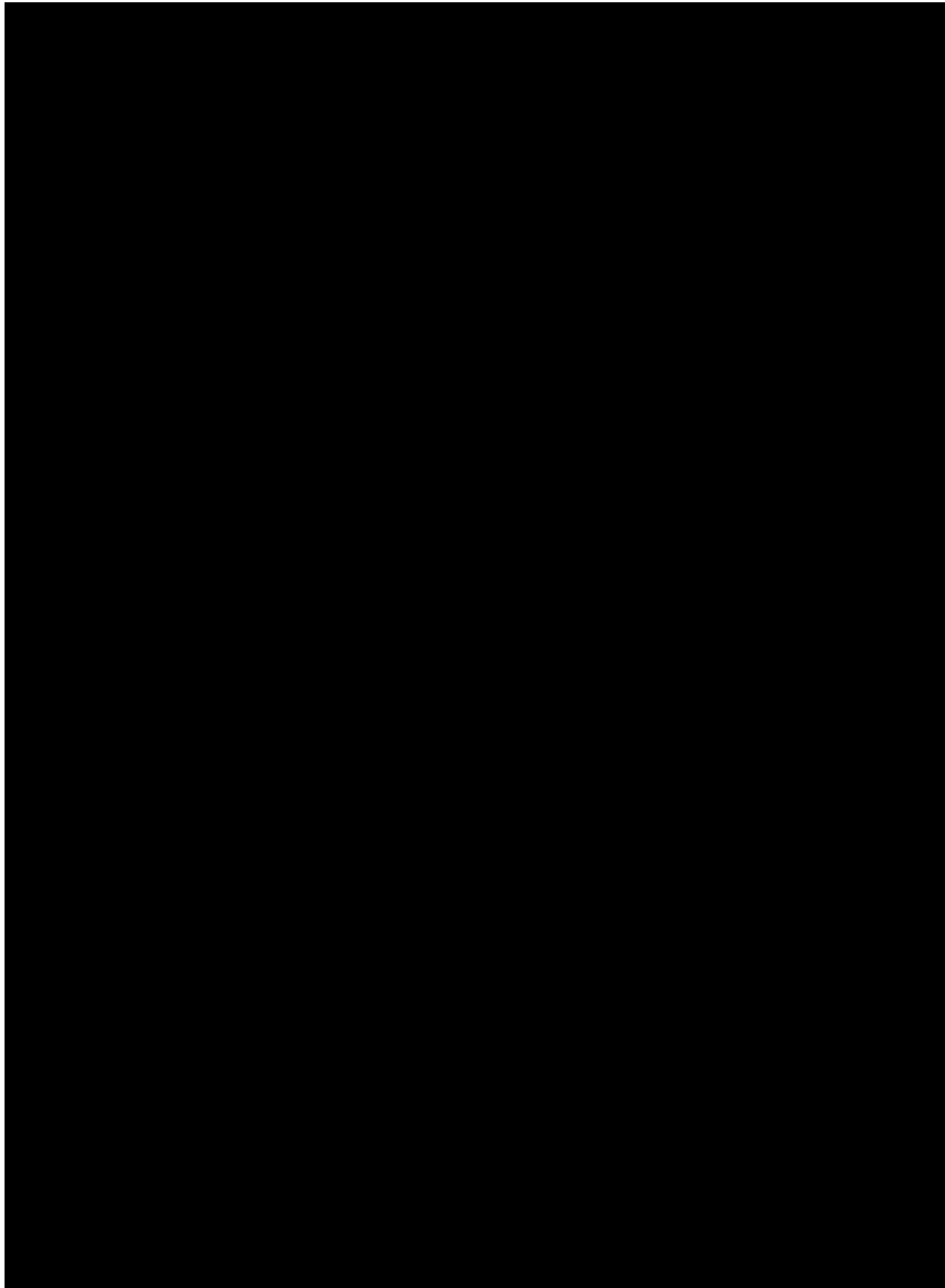
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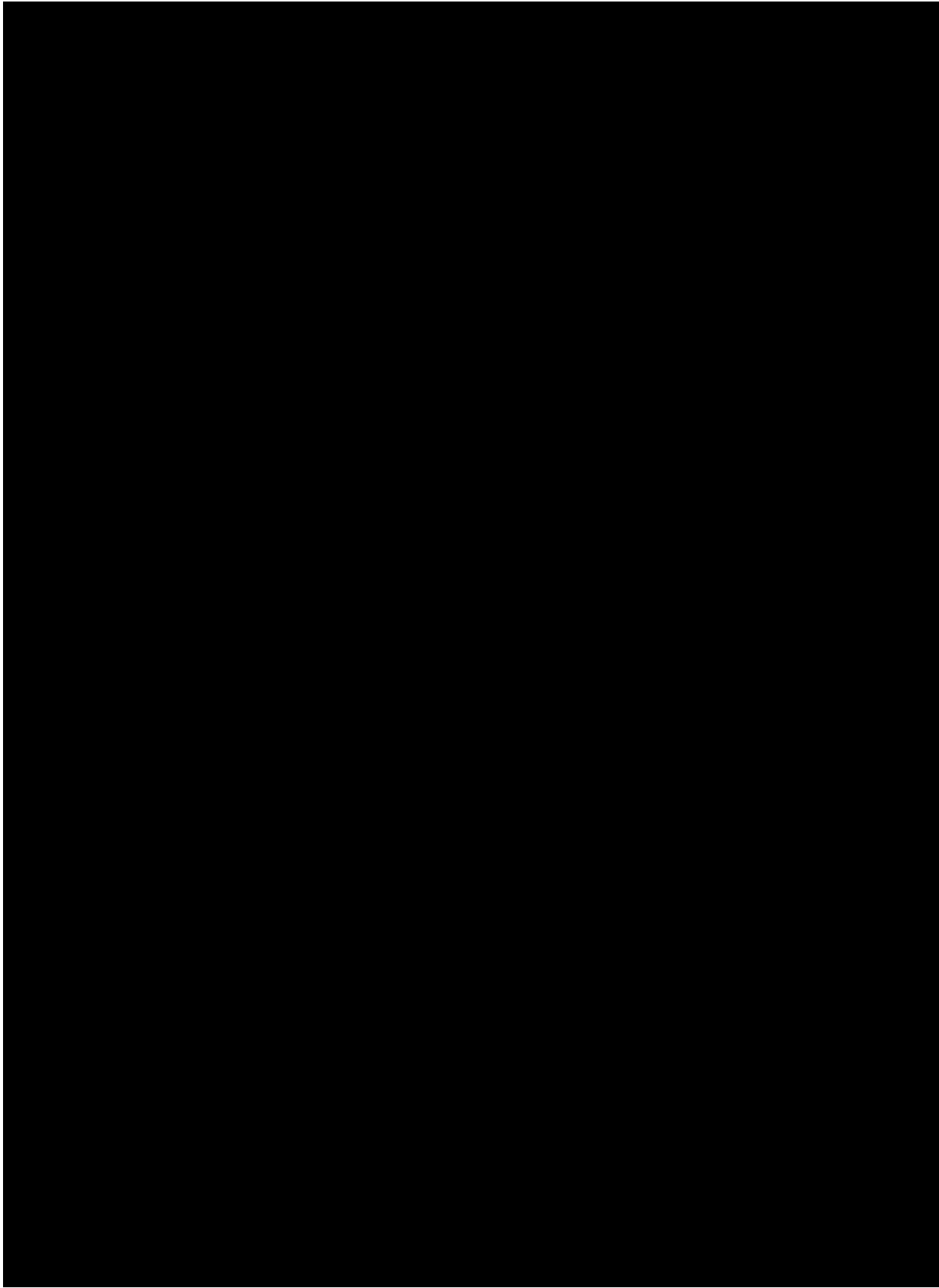
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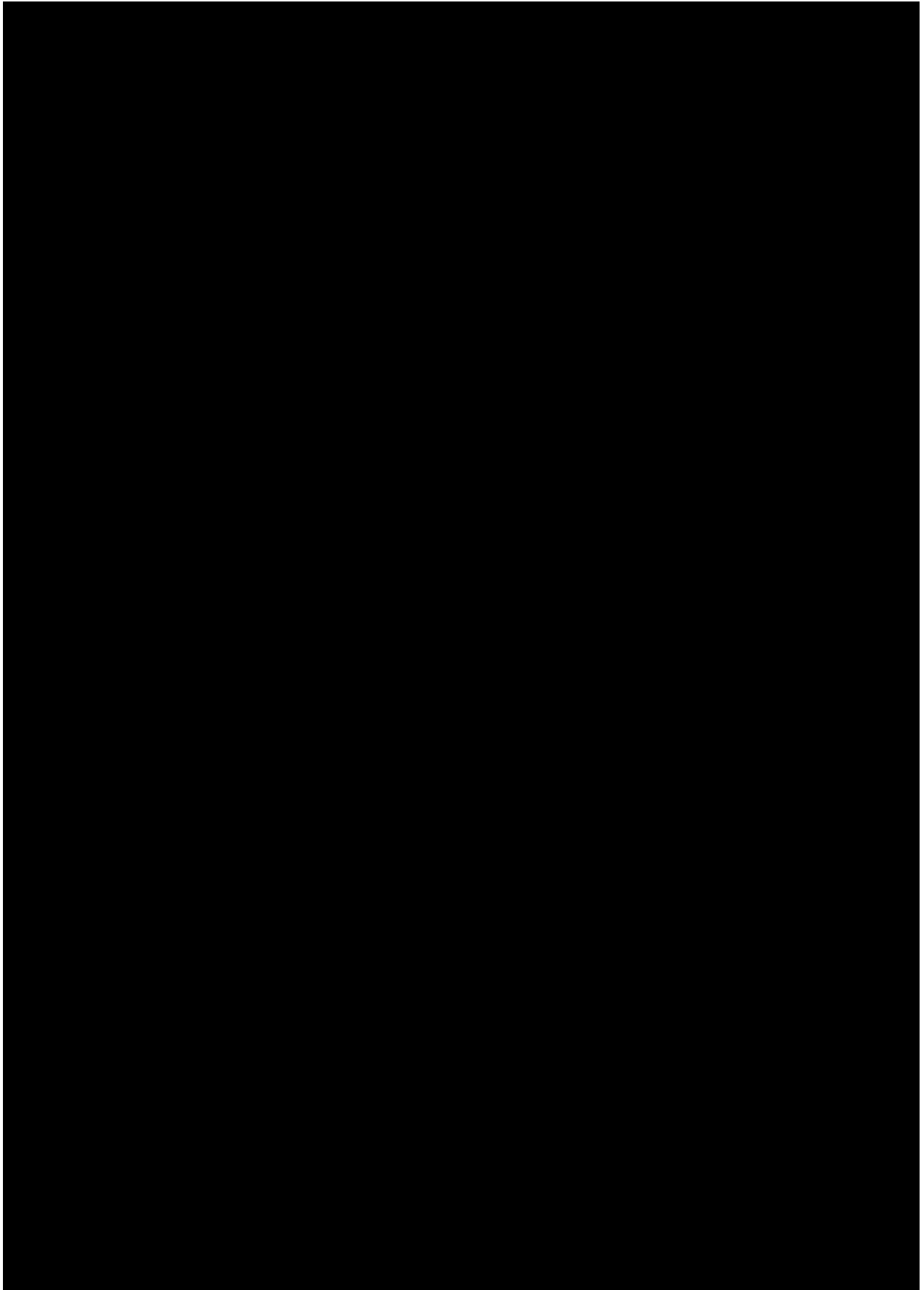
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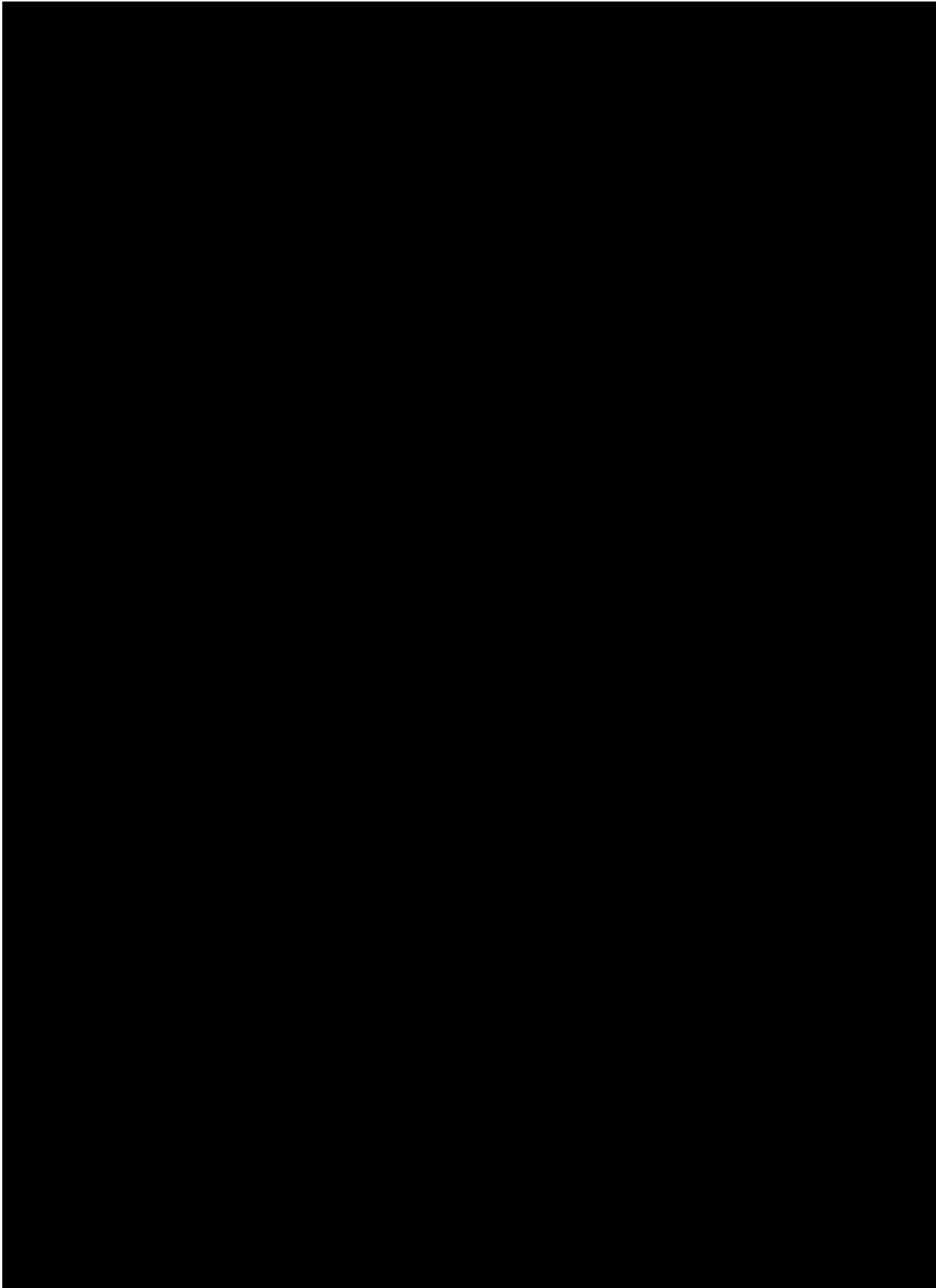
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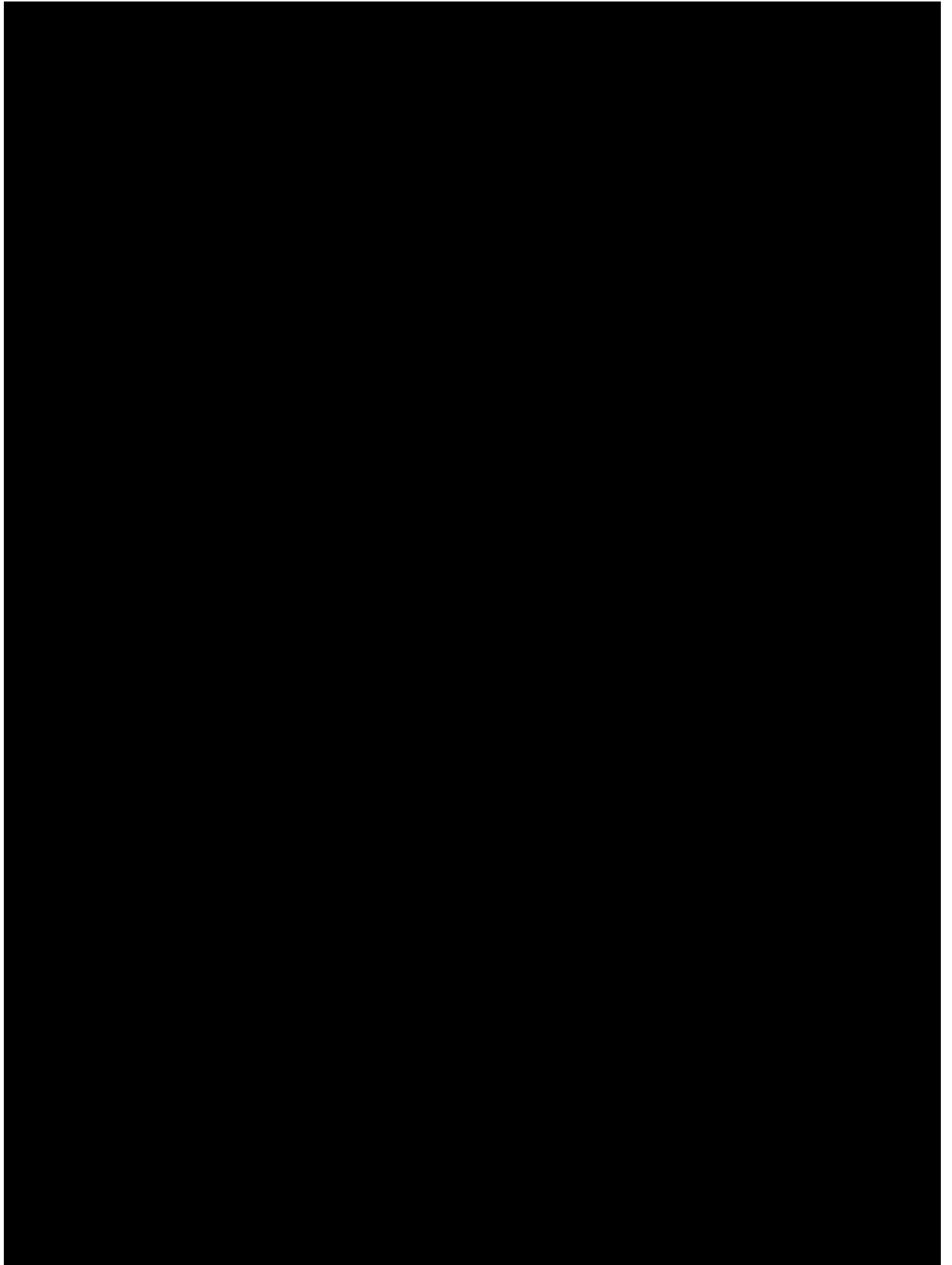
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18 PRESIDENT TERCIER: Thank you very much.

19 Do my co-Arbitrator have questions? No
20 questions?

21 In that case, Mr. Jurca, I would like to
22 thank you very much for your testimony. I wish you a

1 good trip home.

2 THE WITNESS: Thank you very much.

3 PRESIDENT TERCIER: Fine.

4 (Witness steps down.)

5 PRESIDENT TERCIER: Now we have to organize
6 a video. I've been told we need 10 or 15 minutes,
7 but before it will start with a short presentation by
8 Professor Bîrsan? Yeah? It is correct, it is in the
9 PO1? No objection?

10 MS. COHEN SMUTNY: That's correct.

11 PRESIDENT TERCIER: Okay. He will start?

12 MS. COHEN SMUTNY: Yes, he will.

13 PRESIDENT TERCIER: And he will also testify
14 in Romanian?

15 MS. COHEN SMUTNY: Yes, he will.

16 PRESIDENT TERCIER: He will. Okay. Good.

17 Fine. So, let's say flexibly between 10 and
18 15 minutes' break--let's say 15.

19 (Brief recess.)

20 PRESIDENT TERCIER: So, let's resume.

21 Good morning or good evening, ladies and
22 gentlemen. I welcome you in this Proceeding.

1 Professor Bîrsan, you hear me well?

2 THE WITNESS: I can hear you very well.

3 Thank you.

4 PRESIDENT TERCIER: Fine.

5 And my second question to you before that
6 is, you will testify in Romanian; am I right?

7 THE WITNESS: Yes, I will testify in
8 Romanian.

9 PRESIDENT TERCIER: Do you understand
10 English, or do you speak English?

11 THE WITNESS: I don't speak English as a
12 rule. I can read English and understand written
13 text.

14 PRESIDENT TERCIER: Good.

15 So, welcome in this Proceeding. I would
16 like to introduce you to the Members of the Tribunal.

17 On my left-hand side, our colleague,
18 Professor Horacio Grigera Naón, and on my right-hand
19 side, Professor Zachary Douglas. My name is Pierre
20 Tercier, and we have--I don't know if you see
21 them--the Secretary of the Tribunal and the
22 Assistant.

1 You will be heard in this Proceeding as an
2 expert. May I invite you to read--I don't know if
3 you have it in front of you--the declaration. It
4 must be this document.

5 Can you read it for us, please. Yes.

6 THE WITNESS: I solemnly declare, on my
7 honor and consciousness, that the statement will
8 fully acknowledge my sincere conviction.

9 PRESIDENT TERCIER: Thank you very much.

10 Could the gentlemen who are with you
11 introduce themselves? Probably if we could have a
12 bit--yes.

13 MR. POPA: Good morning, everyone. I am
14 Cornel Popa, a partner lawyer in the Tuca Zbarcea &
15 Asociatii law firm, representing the Claimants in
16 this procedure.

17 MR. BUJU: Good morning, I'm Victor Buju.
18 I'm an associate with Tuca Zbarcea & Asociatii law
19 firm, on behalf of the Claimant.

20 MR. GRIGORESCU: Good morning. My name is--

21 PRESIDENT TERCIER: You speak too quickly
22 because we need to have the translation. So, give a

1 few seconds before intervening.

2 Yes, please, Mr. Grigorescu.

3 MR. GRIGORESCU: Good morning again. I am
4 Marius Grigorescu. I am a partner in LDDP. I am
5 representing the Respondent in this Arbitration.

6 PRESIDENT TERCIER: Very well.

7 Professor Bîrsan, you know, of course, the
8 procedure, as it will be conducted. You will
9 have--we first invite you to introduce yourself--wait
10 a second.

11 THE WITNESS: Yes -

12 PRESIDENT TERCIER: Wait a second.

13 I will--just for introducing you. Then we
14 will have--you will have an opportunity to make a
15 short presentation of your Witness--of your Expert
16 Report, and then it will be to counsel for Respondent
17 to cross-examine you, and there will be, possibly,
18 redirect from the other side.

19 Is it clear to you?

20 THE WITNESS: Yes, it is very clear.

21 PRESIDENT TERCIER: Sorry. If I may just
22 make one or two more points.

1 The first one, for the clarity of the
2 transcript, it is important to avoid overlapping
3 speaking at the same time or before the other speaker
4 has--is speaking.

5 Second, very important here, because there
6 is also probably also a time--time difference--time
7 delay. Before starting to speak, wait a few seconds
8 so that the interpreters have the time to finish
9 their translation. These are two rules for the
10 clarity of the--of the transcript.

11 My first question to you. You have prepared
12 two Witness Statements, the
13 First--Legal--sorry--Legal Opinions. The first dated
14 28th of June 2017, and the Supplemental Legal Opinion
15 dated 2nd of--I cannot read it myself--November 2018.

16 Have you these documents in front of you?

17 THE WITNESS: Yes, I have them in front of
18 me, both in Romanian and in English. I am personally
19 interested in the Romanian version.

20 And, excuse me, President of the Tribunal, I
21 will not introduce myself.

22 PRESIDENT TERCIER: Oh, it's a pity. You

1 can just tell us in a few words. We have your CV.
2 It's a long CV. But probably if you give one or two
3 words just to introduce you as well as I did.

4 THE WITNESS: Just one thing I would
5 like--which I would like to point out. I'm a
6 professor--professor in private law for 53 years.
7 The rest of my activities are included in my CV.

8 PRESIDENT TERCIER: Very good. So, it's a
9 good introduction.

10 Now, please. Now you have the floor, and
11 you can start with your presentation. Please,
12 Professor Bîrsan.

13 DIRECT PRESENTATION

14 THE WITNESS: I drafted, as you have said,
15 President and Honorable Arbitral Tribunal, two
16 Opinions regarding the litigation before this
17 Tribunal. These Opinions regard, first of all, the
18 conditions and the way in which the cooperation
19 issues between the parties appeared regarding the
20 exploitations of two mining perimeters in Romania.

21 In my Opinions, I examined the way in which
22 the Claimants came to obtain some rights and the way

1 in which the Exploitation Licenses and--respectably
2 for Bucium, and the Exploitation License for Rosia
3 Montana were granted.

4 In today's presentation, of course, I will
5 not be able to address all issues that I discussed in
6 my two Opinions. I decided to dwell on some aspects
7 that I hope will be useful to the Arbitral Tribunal.

8 I contemplate at least two general aspects
9 and then two--several concrete matters regarding
10 Bucium Exploitation License and Rosia Montana
11 Exploitation License. In fact, it is exploration for
12 Bucium, possibly exploitation, and then the license
13 concerning Rosia Montana.

14 Regarding the general issues that I want to
15 present, they contemplate two essential ideas,
16 namely. The first idea is the following: The
17 exploitation of mineral resources that make the
18 object of these licenses represent in Romania a
19 public interest activity. I say that starting from
20 the provisions of the Constitutions in this matter.

21 First of all, the provision according to
22 which mineral resources are public--exclusive public

1 property of the Romanian State, irrespective of the
2 nature of these resources.

3 The second principle in this matter is the
4 principle according to which the exploitation of
5 these resources is a national interest of value
6 safeguarded in the Romanian Constitution.

7 Actually, Article 35(d) of the Constitution
8 that you have in front of you also, in English, says
9 that the exploitation of resources is done according
10 to national interest. Moreover, the data and
11 information regarding mineral resources belong to the
12 Romanian State, irrespective of their source as data
13 and information.

14 Of course, the Romanian State operates in
15 this matter through a specialized body, namely the
16 National Agency for Mineral Resources, which is the
17 competent authority in this matter and which
18 represents the interests of the State in the domain
19 of mineral resources.

20 Now, coming back to the essential idea
21 according to which mineral resources are the
22 exclusive property of the Romanian State, but these

1 resources are made use of through a specific
2 modality, namely the conclusion of Concession
3 Contracts with a view to their exploitation.

4 I underline that because, generally, public
5 property are given for administration to State bodies
6 or other entities. But in our case, we don't speak
7 about that. The exploitation of these assets is done
8 through Concession Contracts.

9 These Concession Contracts are
10 concluded--are achieved in consideration of the
11 public interest served by the activity under
12 concession. The activity under concession is itself
13 a public interest activity, and that is reflected in
14 the legal instrument used in order to make the most
15 of mineral resources, namely, Concession Contracts.

16 Concession Contracts represent in our case,
17 in the exploitation of mineral resources, mining
18 licenses where the public interest of the efficient
19 exploitation means the continuity of the exploitation
20 of these resources.

21 I would also like to underline that the
22 public interest established and taken into account

1 upon the granting of a Mining License characterizes
2 the entire procedure for the execution of a Mining
3 Project.

4 Of course, since we speak about a Concession
5 Contract, even under Public Law, this Contract
6 supposes rights and obligations, first of all, the
7 rights and obligations of the Titleholder of a mining
8 concession.

9 The Titleholder of a mining license has,
10 first of all, the exclusive right to maximally
11 explore and exploit the resources and reserves in the
12 approved perimeter. All the mining activities are
13 performed at the risk and responsibility of the
14 concessionaire.

15 These risks suppose, essentially--I mean,
16 most of--the most important of them--they are
17 financial or operational risks of the works. It is
18 possible for the exploitation not to be profitable.
19 It also supposes environmental risks, risks for
20 environmental damages that may be brought to the
21 environment, the environment of the operations.

22 There is also the obligations of the

1 granter. They are general obligations connected to
2 ensuring the necessary conditions for the performance
3 of the contract. There is also the negative
4 obligation not to disturb the concessionaire's
5 exercise of its rights under the contract.

6 There is also the obligation to notify the
7 concessionaire of a situation that might affect its
8 rights under the contract, the obligation to
9 cooperate with the concessionaire in this public
10 interest activity.

11 Now I go back and I underline the fact that
12 granting a mining license reflects a decision taken
13 for the public interest represented by the
14 exploitation of mineral resources.

15 Given that, the specialized body of the
16 State in this matter, namely NAMR, performs a
17 considered analysis upon granting a Mining License,
18 granting the Mining License reflects the conclusion
19 of the specialized body and that of the Government
20 because the license--license is approved through
21 governmental decision, that the public interest
22 requires that mining works be performed in a specific

1 perimeter.

2 Actually, the very Government of Romania, in
3 the Exposition of Reasons to a Draft Law regarding
4 Rosia Montana Mining Operation, said that the
5 approval through governmental decision of the license
6 for exploitation of the gold and silver resources in
7 Rosia Montana mining perimeter by way of Government
8 Decision represents the decision taken by the
9 Romanian State to exploit these resources.

10 Such a decision confirms that the benefits
11 of the exploitation that is to be conducted in
12 accordance with the Law and according with the
13 contract provisions surpass the potential negative
14 aspects of the mining works that are to be performed.

15 Several words about the Bucium Exploration
16 License and its influence on a possible Exploitation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3 So, from that point of view, Article 17 of
4 the Mining Law that you have in front of you
5 stipulates that at its request, the Titleholder of
6 the Exploration License is entitled to directly
7 obtain the Exploitation License for any of the
8 mineral resources discovered.

9 That is, the very objective, as it is
10 natural, of course, of an exploration license is the
11 future exploitation of resources or mineral reserves.
12 This is expressly stated by the Norms to the Mining
13 Law, both the 1998 Mining Law and the 2003 Mining
14 Law.

15 The Norms to the Mining Law show that based
16 on the Exploration License, studies and necessary
17 works can be conducted in order to determine the
18 technical and economic conditions for commercial
19 exploitation.

20 So, the exploration has been done, and now
21 what is intended is the capitalization of what has
22 been found, because the purpose of the exploration

1 works is to substantiate the decision on whether it
2 is opportune to commercially exploit the deposit, to
3 provide the data necessary for the planning and the
4 execution of the opening, preparation and
5 exploitation works. These are very clear provisions,
6 and they are more than logical for the sector that we
7 are talking about.

8 We have to underscore the fact that from my
9 point of view--but I am not the only one to think
10 that, and I am--and it is in no way something that
11 contradicts logic--there would be no interest in
12 exploration absent the certainty of a subsequent
13 right of exploitation, respectively, a subsequent
14 right to exploit.

15 In the Bucium Exploration License, the right
16 to directly obtain the Exploitation License is
17 provided; this license being the compensation for the
18 exploration effort, as it is only natural.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3 Therefore, the Claimants in this case--the
4 Claimant in this case has an exclusive right to
5 obtain exploitation licenses in the Bucium Perimeter.
6 This License is to be granted on the basis of
7 Article 17 of the Mining Law, directly to the holder
8 of the Exploration License upon his or her request
9 for any of the mineral resources discovered.

10 If the Titleholder completes a viable
11 feasibility study on the perimeter, the Titleholder
12 shall have the right to apply for and obtain an
13 Exploitation License for the perimeter for a duration
14 of 20 years, according to the extension possibilities
15 provided for in the Mining Law.

16 Therefore, the right to obtain the
17 Exploitation License is not just a procedural right,
18 nor a mere right to negotiate in order for the
19 License to be issued. This is a right that
20 results--that is entailed by the completion of
21 exploration works, without the need for a tendering
22 procedure to be organized for the exploitation.

1 The Titleholder of the Exploration License
2 that has completed all the operations implied by that
3 activity does not compete with other economic
4 operators, in view of obtaining the exploitation
5 rights.

6 Negotiations between the operator conducting
7 the exploration works and NAMR have a limited scope
8 because the clauses of the future exploitation
9 license are already determined by law, and they also
10 derive from the documents submitted by the operator
11 conducting the exploration in order to obtain the
12 Exploitation License.

13 PRESIDENT TERCIER: Sorry. May I just
14 interrupt you a little bit? I think you speak
15 too--you speak too quickly.

16 Could you just slow down a bit so that we
17 can also follow and the interpreters also? Is this
18 possible?

19 THE WITNESS: I apologize. I started on the
20 right foot, but then I started to rush through the
21 presentation.

22 A State's agency may not refuse, for

1 discretionary reasons, the granting of the
2 Exploitation License. That is why the agency should
3 have granted to the Claimant the Exploitation
4 Licenses in the Bucium Perimeter within a
5 reasonable--within a deadline that should have been
6 reasonable. In essence, this is what we are talking
7 about, as far as the Bucium License is concerned.

8 A word on the Rosia Montana Exploitation
9 License. I will move past the factual issues. I
10 would just underline the fact that it came in effect
11 in 1999 and that the mining perimeter that had been
12 approved reflected the Project submitted by the
13 Claimant.

14 And this mining perimeter, it encompassed
15 two two areas, a main area that--where the
16 exploitation quarries are, and the secondary area
17 where the other mining activities are to take place.

18 From my point of view, it is very important
19 to remember the fact that in 2013, the Agency
20 verified and homologated the resources and reserves
21 by reference to the documentation submitted by the
22 Claimant. Such a license entailed, of course, the

1 payment of a royalty.

2 And the Claimant does have, of course, the
3 obligation to pay a royalty as a price for this
4 concession, and this royalty has a contractual
5 value--pure contractual value, regardless of any
6 changes in the legal provisions in the field. No
7 amendment can be made to the royalty rate without
8 agreement of the Parties.

9 According to the Law, the Claimant has a
10 right to access the lands in the concession
11 perimeter. Among the rights that the Titleholder of
12 the license has is the access rights in compliance
13 with the Law, to the lands and areas necessary for
14 the performance of the mining activities, within the
15 limits of the perimeter provided in the license.

16 I would like to underscore for the Tribunal
17 that the Exploitation License in the Contractual

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3 Now, Claimants may obtain rights over the
4 lands in the perimeter by several methods provided by
5 law that you can see here. I will not go through
6 them. I will not read these legal possibilities, but
7 I will only draw your attention to the fact that some
8 are private law provisions and others are public law
9 provisions.

10 This list shows that public authorities may
11 intervene in order to grant the right of use over
12 lands in the mining perimeter. At the same time,
13 lands inside the mining perimeter are governed by a
14 special legal regime. From this point of view, the
15 General Urban Regulation that was effective in--

16 MS. ZIGMUND: I'm sorry. There is a mistake
17 in the translation, and I think it's important.

18 Can I?

19 PRESIDENT TERCIER: Yes.

20 MS. ZIGMUND: So, the Professor said that
21 the mining perimeter is governed by a special legal
22 regime, and the translation said something about the

1 IGIE Report.

2 THE INTERPRETER: Actually, I did not say
3 anything about that Report. That may have been a
4 transcript--

5 DR. LEAUA: The verbal translation was,
6 indeed, correct, but it's a transcript issue.

7 MS. ZIGMUND: It should be said, then, "The
8 mining perimeter is governed by a special legal
9 regime."

10 (Comments off microphone.)

11 Sorry. "A special legal"--again. Oh,
12 splendid. Thank you. Well, no space. It should be
13 "legal"--"special legal regime."

14 PRESIDENT TERCIER: Okay. I think we have
15 it. That's okay.

16 You're happy with the translation?

17 MS. ZIGMUND: Now. Thank you.

18 PRESIDENT TERCIER: Fine. Yes.

19 Please, Professor Bîrsan.

20 THE WITNESS: Thank you.

21 This General Urban Planning Regulation says,
22 in a special text, that the authorization of the

1 carrying out of definitive constructions other than
2 the industrial constructions necessary for the
3 exploitation and the processing of resources in the
4 mining perimeter that contain identified resources of
5 the soil is prohibited, and those areas delimited, as
6 per the Law, are to be communicated to the bodies of
7 the County Councils by means of an order of the State
8 agency responsible for the field.

9 Also, a further provision of the Mining Law
10 of 2003 in its Article 85, the legal obligation of
11 NAMR is set out to inform in writing, within a 10-day
12 deadline from the coming into effect of the
13 exploitation licenses, to whom--to the Local and
14 County Councils and to County Prefects' offices where
15 the concession perimeters are located about mining
16 activities and perimeters that were concessioned via
17 license. And those have to be reflected in the Urban
18 Plans within a deadline--within a 90-day deadline.

19 I would like to stress the fact that lands
20 included in the mining perimeter are subject to a
21 prohibitive usage regime because construction permits
22 may only be issued for industrial buildings related

1 to the mining exploitation. So, they become
2 mono-industrial areas, and other activities are
3 excluded.

4 The same goes for residential--the
5 residential purpose. The priority type of activity
6 in that perimeter is the mining activity, within the
7 approved perimeter, that is.

8 The Government of Romania specified in an
9 explanatory statement to a 2013 draft law relating to
10 Rosia Montana that the priority activity in the
11 mining perimeters for which the exploitation licenses
12 were issued would be the mining activity according to
13 public interest, and thus underscoring the public
14 interest governing the field.

15 Therefore, we are talking about a very
16 prohibitive, restrictive regime that was established
17 to govern the lands within the mining perimeter with
18 the obvious purpose of facilitating the development
19 of mining activities. That being so, I think owners
20 in that perimeter--landowners in that perimeter are
21 encouraged to sell their properties to the License
22 Holder, the License Holder being the most interested

1 person in acquiring those lands.

2 I believe that based on what I have seen in
3 legal practice, we can say that the legal regime
4 established for those lands, starting from this
5 prohibition, and the consequences that it entails
6 with regard to those lands could be assimilated to a
7 de facto expropriation. We will probably come back
8 during my deposition to this topic.

9 But I think this regime can be assimilated
10 to this type of expropriation, which is what we have
11 seen in the Case Law. Let me refer to a Decision of
12 the High Court that establishes that the State does
13 have the obligation to expropriate goods or assets if
14 they--if those assets are assigned to a public
15 utility by their nature. And, of course, adequate
16 compensation is to be offered for that expropriation.

17 Lands in the mining perimeter are obviously
18 affected to a public utility purpose. I would like
19 to underscore the fact that expropriation could be
20 similar to a de facto expropriation, but there is
21 also the possibility of a de jure expropriation, as
22 one of the means by which the Titleholder may acquire

1 rights of use over the lands in the mining perimeter.

2 From this point of view, I have mentioned
3 expropriation which is mentioned in the Mining Law as
4 means to obtain the use of these lands, on the one
5 hand. On the other hand, it is worth noting the fact
6 that, by a mere coincidence in the numbering of the
7 texts, Article 6 from the special Expropriation Law
8 says that works to extract and to process the useful
9 mineral substances are of public utility.

10 That public utility of national interest is
11 to be declared by the Government for national
12 interest works and by the County Councils for local
13 interest works. A declaration of public utility for
14 those works is a mere formality, considering that
15 when the Mining License was issued, public utility
16 was taken into account.

17 In the Explanatory Statement to the Draft
18 Law--

19 PRESIDENT TERCIER: Professor Bîrsan, I
20 think your time is over. There is a certain
21 flexibility, but you should come now to the end of
22 your presentation, please.

1 THE WITNESS: All right. That is exactly
2 what I was going to do, with the Tribunal's
3 permission.

4 This Draft Law refers to the public utility
5 of this Project, the Rosia Montana Project, and that
6 is why I concluded that a subsequent declaration was
7 not needed.

8 I would only like to underscore one more
9 idea. The duration of the expropriation procedure,
10 if expropriation is needed for this Project, must be
11 a reasonable one.

12 I thank you for your attention.

13 PRESIDENT TERCIER: Thank you very much,
14 Professor Bîrsan.

15 Now counsel for Respondent has the floor.
16 If I'm well-informed, it will be Matthias Scherer.

17 MR. SCHERER: Yes.

18 CROSS-EXAMINATION

19 BY MR. SCHERER:

20 Q. Good afternoon, Professor Bîrsan. My name
21 is Matthias Scherer. I'm the lawyer
22 for--representing Romania in these proceedings.

1 Thank you for being available.

2 Do you understand what I am saying?

3 A. Of course.

4 Q. I'm afraid we do not have much time, so I
5 would ask you to give short answers. Sometimes a
6 "yes" or "no" should be possible.

7 A. I understand. I agree.

8 PRESIDENT TERCIER: Remember, first, to
9 listen to the question, and only after that,
10 intervene.

11 Yeah. Please.

12 BY MR. SCHERER:

13 Q. You have a binder in front of with you
14 documents that we have printed for you in Bucharest;
15 is that right?

16 A. Yes.

17 Q. I don't have the translation.

18 A. Yes.

19 Q. Yeah, I understood the answer, but I--let me
20 ask a longer question.

21 How many documents do you have in the
22 binder? There's a list--there's a list of documents,

1 or should be.

2 How many tab numbers?

3 A. 20. 20. These are the documents; right?
4 20.

5 Q. Okay. You were a judge at the European
6 Court of Human Rights; correct?

7 A. Yes, for 15 years.

8 Q. In these 15 years, did you come across
9 expropriation cases when sitting as a judge?

10 A. Yes, I did judge such cases. I participated
11 in trying such cases.

12 Q. So, the Parties can seize the European Court
13 of Human Rights after having exhausted all national
14 remedies; is that correct?

15 A. Of course.

16 Q. And the Court's decisions are binding on the
17 State?

18 A. Yes, the States have committed to respect
19 the Decisions of the European Court, subject to the
20 control of the EU Committee of Ministers.

21 Q. How long does it take for the European Court
22 of Human Rights to deal with a case once it reaches

1 your Court in the average, if you have an average?

2 You're smiling.

3 A. I am smiling for the mere reason that the
4 European Court--and I'm saying this in full
5 responsibility based on my insight, experience, and
6 based on my findings--is not a good example
7 concerning the celerity in dealing with the cases
8 brought to its attention, in the sense--to speak more
9 concretely--in general, this period varies between
10 five and six years. It is very rare that it takes
11 shorter, and sometimes it is upsettingly long.

12 Q. I agree.

13 Do you think this is reasonable--a
14 reasonable length?

15 A. In my view, as a European citizen, of course
16 it is not a reasonable length. In fact, throughout
17 my sitting at the European Court, there were many
18 discussions about shortening the duration of the
19 proceedings before the Court. And some measures have
20 been taken in order to reach this outcome.

21 Q. So, once the case reaches the European Court
22 of Human Rights, whether it has been pending in the

1 State for one month, one year, or ten years, you
2 would always have to add this unreasonably long
3 period that it takes for the European Court to decide
4 an expropriation case; is that correct?

5 You have to add them together to get the
6 total length of expropriation proceedings from start
7 to end?

8 A. I do not think we are on the same line.

9 When we speak about the proceeding before
10 the European Court, we have in mind an alleged breach
11 of a right protected by the Convention; whereas, when
12 we speak about expropriation, we are thinking about
13 the protection of the property right, while the
14 proceeding before the Court is completely distinct
15 from the national procedure.

16 It is highly possible that the proceeding
17 before the Court should take a very long amount of
18 time. And if it's very lengthy, then the claimant's
19 interests are not satisfied, of course.

20 Q. Is this because the expropriation--the
21 local--the national expropriation proceedings are
22 extended before the European Court of Human Rights,

1 even if their level of scrutiny and angle of scrutiny
2 is different, but the end result could be that after
3 six years or five years in your Court, the
4 Local--National Expropriation Decision would be
5 annulled as a result, as a de facto result; correct?

6 A. If I may, no. Please allow me to add some
7 nuance to what you are saying.

8 It is very possible that a national
9 procedure, which is potentially reviewed by the
10 European Court, in view of the breach of the
11 protection of the property rights, to be very short,
12 and the procedure before the European Court to be
13 very long.

14 I am not sure if I am clear in what I am
15 saying. I'm not interested in the duration of the
16 procedure from an arithmetical point of view. The
17 thing is whether the internal procedure questions the
18 right to property or how it is performed or how the
19 expropriation is arrived at, means a breach of
20 Article 1, Protocol 1, or not. So, finding whether
21 there is such a breach requires a shorter or longer
22 time, depending on the role of the Court.

1 Q. Thank you. Let's move on.

2 But, still, a question to you in your
3 capacity or with your experience as a judge, and I
4 understand also as an arbitrator. If you have
5 experts in a case--you have two parties, both have
6 experts, and you are the decision-maker--would you
7 find it helpful/useful that the experts of both
8 parties engage with each other at the same time?

9 A. Well, you see, I'm a private law professor
10 for 53 years, and it is not by chance that I said I
11 was a professor. As a private law professor, I am an
12 adversary of litigations or conflictual situations.
13 I think that the best resolution of a private law
14 litigation is the amicable avenue, but the practice
15 is far from meeting what I am saying.

16 Q. Are you aware or familiar with an expert
17 opinion--a legal opinion filed by two Romanian
18 professors, Professor Sferdian and Bojin, in these
19 proceedings?

20 A. Yes, I read them.

21 Q. In your Opening Statement, which we have
22 just heard for 30 minutes do you respond to this

1 legal opinion, or is that considered the response,
2 engaging with these two experts?

3 MS. COHEN SMUTNY: Wait. The procedure--

4 THE WITNESS: I couldn't say this because I
5 submitted my own point of view. As you could notice,
6 Professors Sferdian and Bojin do not agree in many
7 regards with what I say, or sometimes they say,
8 "Professor Bîrsan is right when he says that, but..."

9 So, they have another point of view. These
10 are matters of interpretation. These are matters of
11 appreciation of legal norms and so on.

12 So, I repeat, I did not respond to what
13 these two professors--two distinguished professors
14 say. One of them is a civil law professor, and the
15 other one is an administrative law professor.

16 BY MR. SCHERER:

17 Q. Like you.

18 A. Just that I am much older than they are.

19 Q. But they are two, so we have to add. It's
20 like the--

21 A. Okay. If they are two, they will surpass
22 me.

1 Q. It's like the national proceedings and the
2 European Court of Human Rights proceedings, you have
3 to add--

4 A. Exactly. The procedure is in front of the
5 European Court.

6 Q. Let me come back to that.

7 You said it takes five six years in the
8 European Court.

9 Would it be--would it be likely that the
10 European Court would consider that the national
11 proceedings that lasted for five, six years was
12 unreasonably long if it takes the Court as much time
13 to examine it from a very, very limited angle?

14 A. Counsel, let me tell you the following
15 thing: When I started my activity of the European
16 Court of Human Rights, the simplest cases were those
17 regarding the duration of the proceedings. The most
18 loyal customers, between inverted commas, were the
19 Italian courts.

20 Through the Minister's Committee and various
21 other specific instruments, the Court sought to solve
22 this situation, in the sense of releasing the Court

1 from such lawsuits. And in this respect, there were
2 often discussions about the fact that the National
3 Courts are those that need to trial potential issues
4 relating to the duration of the proceedings. And
5 solutions were found--

6 Please. Please. Go ahead.

7 Q. Sorry, Professor Bîrsan. It's not that I'm
8 not interested, but we do have little time.

9 A. I agree. I just wanted to answer your
10 question and tell you that the Court itself tried to
11 transfer this matter back to domestic courts, to the
12 internal procedures.

13 Q. Your Opening Presentation, which we have
14 received here in Washington as a printout, it is
15 written on a template of White & Case.

16 Have you written it yourself? It's the same
17 as the Opening Statement, which you have not seen.
18 Maybe we can put it on screen there.

19 A. I did not write the presentation myself. I
20 discussed the content of the presentation here in
21 Bucharest, and then I sent it to Washington, and they
22 acted accordingly.

1 Q. I would like to look into your expertise,
2 your professional expertise. According to your Legal
3 Opinion, Paragraph 2--

4 A. Yes, please.

5 Q. --you already confirmed that you are a
6 professor at law in Bucharest, arbitrator.

7 A. Yes. I was also a professor in Paris.

8 Q. Yes, I see that.

9 And you were also--are also a Chevalier of
10 the French Légion d'Honneur, and you received--

11 A. And a member of the Romanian Academy.

12 Q. And your educational background, which is in
13 Paragraph 3, you have a doctorate from the Faculty of
14 Law of Bucharest University, an honorary law degree
15 from Boston.

16 A. Yes.

17 Q. An honorary diploma from CIS in Salzburg,
18 and some other diploma.

19 A. Yes.

20 Q. So, this educational and professional
21 background does not concern the early incorporation
22 and establishment of the--of RMGC, Rosia Montana Gold

1 Corporation?

2 A. If you have a look at the scientific papers
3 that I published, you will also find scientific
4 papers on commercial law.

5 Q. But they are not about the Rosia Montana
6 Exploitation License, your publication?

7 A. No. Absolutely not. No way.

8 Q. Sorry.

9 A. But you know what Terentius used to say?
10 "Nothing has to be foreign to a legal specialist,"
11 even more so legal notions, be they public law
12 notions.

13 Q. Is he an expert in these proceedings?

14 Oh, well. A joke.

15 So, you confirmed that your publications do
16 not concern the Rosia Montana Exploitation License.

17 Do they concern RMGC's right to develop--

18 (Overlapping speakers.)

19 PRESIDENT TERCIER: Please, Professor
20 Bîrsan. Let him finish, please. Please, let him
21 finish the question, and then you will answer. You
22 will have the time to answer, but give him the time

1 to ask the question.

2 BY MR. SCHERER:

3 Q. Your publications do not concern RMGC's
4 right to develop and exploit the resources and
5 reserves in the Rosia Montana perimeter, correct?

6 A. I doubt there are scientific
7 publications--and I repeat, scientific law,
8 scientific research, either private law or public
9 law--regarding the issues raised by Rosia Montana
10 perimeter and the Rosia Montana License and Bucium
11 License. I'm not aware of everything.

12 Q. You have to be short--sorry. I--

13 PRESIDENT TERCIER: Now it is counsel that
14 is violating my rules.

15 MR. SCHERER: I apologize.

16 PRESIDENT TERCIER: Yes, please.

17 MR. SCHERER: Was this translated? Okay.

18 BY MR. SCHERER:

19 Q. So, what I just read to you, my questions
20 may appear out of place. But what I was reading was
21 the table of contents of your Expert Opinion, of your
22 Legal Opinion. So, you are giving opinions on issues

1 that you are not familiar with, which are factual
2 issues.

3 You have provided two extensive and detailed
4 Reports, 175 densely written pages relying on
5 thousands of documents. Have you been assisted by
6 anyone in reading the documents, in drawing up your
7 opinions?

8 PRESIDENT TERCIER: Could you answer the
9 question, please?

10 THE WITNESS: Yes.

11 BY MR. SCHERER:

12 Q. By who?

13 A. Yes. There are--may I answer?

14 Q. Yes.

15 A. There are many documents which--those which
16 regard the factual situations do not pose specific
17 problems in order to be understood. I read them only
18 in Romanian, not in English. That is one.

19 Secondly, I read them so as to understand
20 what the situation was, meaning that I didn't read in
21 detail all the documents. And about drafting the
22 opinions, the two of them, of course that I closely

1 cooperated with the counsels for the Claimants.

2 Q. Which part of the Legal Opinion, the first
3 one, did you write yourself?

4 A. Drafted myself. I have drafted--I haven't
5 drafted myself anything but just looked over the
6 things that we discussed and we agreed to be drafted.
7 So, I can't say these are pages I drafted myself and
8 the others are pages I didn't draft myself. This is
9 how the opinions were drafted, in this way.

10 Counsel, allow me to remind you that I am
11 under oath before the Tribunal. And if you read my
12 First Opinion, at a given point I say that everything
13 that it comprises and everything that the Second
14 Opinion comprises represent my profound convictions.

15 When I signed a document--and these two
16 documents bear my signature--I totally undertake to
17 what they say.

18 Q. Who assisted you? Lawyers from Tuca? White
19 & Case?

20 A. Yes. Not from White & Case because they are
21 in Washington. From Tuca.

22 Q. Let's look at your instructions. It's

1 Paragraph 1 of your Legal Opinion, the first one. It
2 says in English: "Gabriel Resources, Claimants in
3 the ICSID arbitration, have asked me to provide this
4 legal opinion on various issues of Romanian law."

5 A. Yes.

6 Q. And the issues summarized briefly below are
7 those that you set out in Paragraph 7?

8 A. Yes.

9 Q. So, Paragraph 7 summarizes chapter by
10 chapter the main conclusions of your legal opinion,
11 but you do not cite your instructions. Usually as a
12 legal expert, you get instructions, not conclusions.

13 Were you provided with conclusions--with
14 these conclusions rather than with instructions?

15 A. Allow me. I gave the instructions based on
16 what I--what we discussed about what the contents of
17 this--of the opinions should be. I do not know
18 whether I am clear myself. It was not I the one that
19 received instructions, I discussed what should be
20 comprised on the opinions, and the opinions were
21 agreed on the contents, and then I examined to see
22 whether it is--it was exactly what we discussed.

1 Q. You assumed--you took all the facts and
2 all the documents that you received from counsel to
3 Gabriel, and you had your own conclusions based on
4 them?

5 You did not receive a legal opinion or a
6 briefing memorandum?

7 A. I haven't received a briefing memorandum.
8 The documents were shown to me, and we discussed
9 about what they comprised and whether they should be
10 discussed in drafting my opinion or not.

11 I don't--I don't understand why you say
12 about Gabriel Resources. I never discussed--I never
13 personally discussed with the Claimants in this
14 arbitration, only with the counsels.

15 Q. Can we move to the expropriation procedure.

16 A. I'll be delighted.

17 Q. Property is a fundamental right. You agree
18 with that? And it's governed by the Constitution in
19 Romania and in many other countries. The right to
20 property, it's on the constitutional level?

21 A. And it is also safeguarded in international
22 conventions.

1 Q. Indeed.

2 And in the Romanian convention
3 that--Constitution, that would be Article 44,
4 Paragraph 3, which is in Tab 2 of your binder.

5 A. Yes.

6 Q. You do not mention the "Constitution" in
7 your First Opinion. Is there a reason for that?

8 Sorry. You do not mention--you do not
9 mention this provision.

10 (Overlapping speakers.)

11 BY MR. SCHERER:

12 Q. Excuse me. You do not--

13 A. Not because it didn't seem that I should
14 mention it, as I have identified other texts.

15 Q. Yes. Have you identified, amongst others,
16 in your Second Opinion Government Decision 583/1994,
17 which is in Tab 5 of your bundle?

18 You confirm in your Second Legal Opinion,
19 Paragraph--

20 PRESIDENT TERCIER: Wait. Wait.

21 BY MR. SCHERER:

22 Q. It's Tab 5, Exhibit R-123.

1 A. Yes, of course.

2 Q. Look at your Legal Opinion Number 2,
3 Paragraph 115. There you say--

4 A. Yes.

5 Q. --this document sets out--approves the
6 regulation which sets out the procedure to be
7 followed by the commissions that perform the
8 preliminary investigations in view of declaring the
9 public utility.

10 That is why--that is why this regulation is
11 important? You do not mention--

12 A. Yes, of course.

13 Q. You do not--of course.

14 You do not mention this regulation in your
15 First Opinion where you also address expropriation;
16 correct?

17 A. Probably I don't. I will not see now
18 whether I mentioned it or not, but I didn't think it
19 was important to mention it.

20 Q. You just said that it was an important
21 document.

22 Let's move to another affirmation which we

1 heard this morning.

2 A. I said it was an important document. And
3 for that, I mentioned it in my Second Opinion where I
4 had to mention it when speaking about the role of
5 this Commission.

6 Counsel, in my view as a professor, if you
7 allow me--

8 Q. No, I cannot allow you. I'm sorry. We are
9 already over time.

10 You mentioned the de facto expropriation.
11 These are your terms that--the legal regime that
12 governs lands--land in a mining exploitation license
13 perimeter is somehow the same status as--the state
14 that you qualified as de facto.

15 However, you do qualify this assessment in
16 your Second Legal Opinion, Paragraph 54, where you
17 say--and I'm quoting the English: "I emphasize that
18 this"--

19 PRESIDENT TERCIER: Wait a second.

20 THE WITNESS: Yes, 54.

21 BY MR. SCHERER:

22 Q. You qualify your statement that this is a

1 de facto expropriation by saying that you "emphasize
2 that this does not affect the property right itself,
3 but only the legal regime of use of the affected
4 assets"; correct?

5 That's a quote from your Second Opinion.
6 So, what do you mean by that? Sorry. Sorry. I made
7 a list myself. Can we go through it?

8 There are no restrictions on land without
9 structures. If there's no structure on the land, it
10 doesn't have a restriction?

11 A. There is a restriction regarding the legal
12 regime of the land in general, not on specific parts
13 of it. What I say there, I sustain. And I believe
14 it is rigorously exact because it is
15 about--figurative phrase about the legal regime of
16 the land and not about the property right itself.
17 The property right stays in the patrimony of the
18 person under discussion.

19 Q. Indeed.

20 And the legal regime does only apply to
21 those zones that are in the regime of buildable land.
22 It does not apply to forests. It does not apply to

1 agricultural land.

2 You confirmed? I see you are nodding.

3 A. Yes, of course.

4 Q. There is no restriction on the use of
5 existing structures? They can be sold or leased by
6 the owner?

7 A. Definitely, yes, to the extent that there
8 are persons interested in such operations, knowing
9 very well what is the regime of the land.

10 Q. So, all that it establishes is a building
11 freeze. No more structures can be built, no more new
12 structures?

13 A. With the exception of the industrial
14 structures that are used for the exploitation.

15 Q. Yes, even--so, it's not even a full building
16 freeze.

17 And as you confirmed, the Titleholder's
18 right of access/expropriation is distinct from the
19 restrictions imposed on the owners. There may be
20 restrictions, but they do not give a title to the
21 license holder. You confirmed that?

22 It's a--it's not--even in your view, which

1 is contested, it is not a real expropriation, it is
2 what you call a de facto expropriation, but there
3 would be a need for a real expropriation
4 procedurally.

5 Yes or no?

6 A. Yes, of course. The jure expropriation.
7 But I must say that we must make a distinction
8 between the right of access to the land within the
9 mining perimeters where there are--there are legal
10 provisions about easement rights, and access, in a
11 very large sense, as I have explained, and as very
12 diligently the clause that I cited provides for, and
13 you have it also in the clause from the Concession
14 Contract, that it is about the use of those specific
15 lands.

16 Q. Are you aware that this is a point where
17 Professors Sferdian and Bojin do disagree with you
18 about the de facto expropriation? Are you aware of
19 that?

20 A. I am not to blame if they don't agree. But
21 there is case law in this matter to that end. Maybe
22 they don't agree with the case law either, but it is

1 their opinion.

2 Q. Are you aware that RM--now we're getting
3 specific. You have been speaking in general terms.

4 RMGC would have needed to obtain
5 expropriation of the land in the Rosia Montana area
6 through the State. You are aware that they would
7 have needed expropriation? Were you told?

8 A. They wouldn't have needed the expropriation.
9 They would have needed maybe, also the
10 expropriation --because from the discussions--and we
11 get back to those discussions because I didn't count
12 myself how many households were resettled, but from
13 my discussions with my counsels and as it was
14 reflected in my Opinions, that results in more than
15 78 percent of the house--of the affected households
16 existing inside the mining perimeters sold their
17 lands to RMGC.

18 As for expropriation, I understood it was
19 left for a limited number of people that held
20 property in that perimeter. And if I add to that,
21 the circumstances that I have understood, that there
22 are properties of one square meter of land that

1 weren't sold. We are on the verge of abuse of law.

2 Q. You have not verified this yourself. You
3 are just giving information that has been provided to
4 you by Gabriel's counsel? All this factual
5 information you confirmed? Because it's not
6 something you did verify; correct?

7 A. Of course. I didn't go there to count the
8 households in Rosia Montana.

9 Q. Okay. Can we be brief from now on?

10 You said 78 percent were sold to Gabriel.
11 That's, indeed, what Ms. Lorincz also testified, to
12 the percentage. So, this leaves us with 22 percent.

13 Are you aware that Romania has produced
14 Witness Statements from several witnesses who
15 confirmed that they would not have sold their
16 property?

17 This is a yes-or-no answer. Are you aware
18 that there are witnesses?

19 A. I am not aware of the statements of such
20 witnesses, unfortunately, and this is something that
21 I do regret. For objective reasons, I was not able
22 to take part in the process. I do regret that, but I

1 won't contradict you.

2 Q. Okay. Please, short answers.

3 You agree that it's the State that
4 expropriates? It's not the titleholder; it's the
5 State itself?

6 A. Obviously.

7 Q. You agree that there is no expropriation
8 without declaration of public utility? That is in
9 the Constitution.

10 A. Obviously, yes.

11 Q. You agree that the procedure for the
12 declaration of public utility is initiated by the
13 titleholder and not by the State?

14 A. Yes.

15 Q. You are aware that there is a law called
16 "Rosia Montana Draft Law"?

17 It's in Tab 12 of your binder, C-519.

18 A. Yes.

19 Q. So, this law would have been beneficial to
20 the license holder to the extent that it declared the
21 public utility of the Project--of the Rosia Montana
22 Mining Project?

1 A. Yes.

2 Q. You agree--

3 A. It is not clear to me what you mean.

4 Q. Let me first go to something else. You
5 write in your Second Opinion--

6 A. I wouldn't like to remain with this issue
7 unclarified. Could you clarify?

8 Q. Let me first go to another issue. I promise
9 I come back.

10 You write in your Second Opinion that in
11 addition to the public utility, it is also important
12 to see whether the Project is properly registered in
13 the applicable land management and urbanism plans.
14 That is Paragraph 120 of your legal opinion, the
15 second one.

16 A. Just a second. Just let me find it.

17 PRESIDENT TERCIER: In the meantime--

18 THE WITNESS: Yes. Yes.

19 BY MR. SCHERER:

20 Q. So, the Rosia Montana law, had it passed,
21 would have dispensed the license holder from the
22 obligation to show that it complied with urban

1 planning; and had the Law passed and public utility
2 been accepted, there would have been no discussion
3 about whether the Project was properly registered in
4 the applicable land management and urbanism plans.
5 The Law would have done away with that.

6 A. I don't think so. Personally, I don't think
7 so. It would have facilitated, but I don't think it
8 would have disposed of that obligation.

9 We're talking about the theory of competence
10 of the State's authority that the professors referred
11 to--the two professors.

12 Q. The two professors which are not here.

13 I go back to the question that you--

14 A. Their legal opinions are here. What can I
15 do about that?

16 Q. The question where you wanted to go back to
17 was--I believe I said it is the license holder and
18 not the State who triggers the investigation of the
19 public utility, and you said yes.

20 A. I said a very firm yes.

21 MR. SCHERER: Okay. I think we have to
22 stop.

1 PRESIDENT TERCIER: Okay.

2 MR. SCHERER: Thank you very much.

3 PRESIDENT TERCIER: Thank you very much.

4 Mrs. Zigmund?

5 MS. ZIGMUND: I don't have anything on

6 redirect.

7 THE WITNESS: I thank you for your

8 attention. Thank you.

9 PRESIDENT TERCIER: Okay.

10 QUESTIONS FROM THE TRIBUNAL

11 ARBITRATOR DOUGLAS: Good afternoon,
12 Professor. I just have a couple of questions about
13 your Second Opinion.

14 And, in particular, if you want to turn to
15 Paragraphs--

16 THE WITNESS: Excuse me. Could you tell me
17 who you are?

18 PRESIDENT TERCIER: That's a good question.
19 I don't know if you see him. It is Professor Zachary
20 Douglas, who is co-arbitrator in this procedure.

21 THE WITNESS: I understand.

22 PRESIDENT TERCIER: Professor Douglas, you

1 have the floor.

2 ARBITRATOR DOUGLAS: Thank you.

3 Could you have a look at Paragraphs 106 and
4 107 of your Second Opinion. And it goes back to this
5 question of whether, upon the granting of the
6 license, in and of itself that would amount to a de
7 facto expropriation.

8 THE WITNESS: Yes.

9 ARBITRATOR DOUGLAS: And just above
10 Paragraph 107, you say: "The granting of a Mining
11 Exploitation License causes legal limitations on the
12 rights of owners in the affected area to an extent
13 that strongly encourages them to sell their
14 properties and may be compared to a de facto
15 expropriation."

16 And then in 107, you talk about that being
17 equivalent to a de facto expropriation, and such that
18 a State--the State is obligated to expropriate it by
19 offering compensation to its owner.

20 And so, I just--I just want to ask you if
21 that's correct at the granting of the license, does
22 it follow, then, that all the people within the

1 perimeter of the license, if we're talking about
2 Rosia Montana, at that point in time would have the
3 right to sue the Government to recover compensation
4 for this de facto expropriation?

5 THE WITNESS: To the extent to which there
6 were concrete situations that would prevent them from
7 exercising their property rights. I don't see such
8 situations; however, I do not exclude that
9 possibility.

10 ARBITRATOR DOUGLAS: Okay. It's not a
11 general point that you're making. It's a point which
12 may arise depending on what the restriction on the
13 use of the property would be.

14 THE WITNESS: That can be assessed on a case
15 by case basis.

16 PRESIDENT TERCIER: Could we have the
17 translation, please. Please, wait a second.

18 (Overlapping speakers.)

19 THE WITNESS: I do not think that this is a
20 general situation that could lead to an avalanche of
21 legal challenges. But there can be punctual--a very
22 clear specific situation where an owner can be

1 dissatisfied with what he cannot do, what rights he
2 cannot exercise as a result of these restrictions,
3 and then a Court can assess whether it will award
4 damages or not. But that is another issue.

5 ARBITRATOR DOUGLAS: I think I understand
6 that point now.

7 Just a second point, then, in relation to
8 the public utility declaration. And in your
9 Statement and also in your presentation today, you
10 say that it's not subject to judicial review.

11 And, so, I just wanted to ask you, what
12 aspects of an expropriation--what aspects of an
13 expropriation procedure would be subject to judicial
14 review?

15 THE WITNESS: First of all, the meeting of
16 the legal criteria for expropriation and then issues
17 concerning--as the Law says--concerning compensation,
18 remedies to be granted to people who have suffered
19 expropriation.

20 ARBITRATOR DOUGLAS: So, there would have to
21 be an individualized decision by a public authority
22 to expropriate a specific property. And apart from

1 the public utility criterion, the other aspects of
2 that decision could be subject to judicial review; is
3 that correct?

4 THE WITNESS: To the extent to which the
5 file poses other problems, then, of course, the Court
6 would have to go through those to review them and to
7 find the essence and say that expropriation is due.
8 But if the criteria for expropriation are met,
9 including the granting of compensation--because under
10 Law Number 33, expropriation is deemed completed when
11 the compensation has been paid by the State.

12 And that is pronounced so by a Court, by a
13 special decision.

14 ARBITRATOR DOUGLAS: And just to be clear,
15 which organ of State in these circumstances would
16 provide that individualized decision about a specific
17 expropriation?

18 THE WITNESS: The Court of Law.

19 ARBITRATOR DOUGLAS: So, a Court would--

20 THE WITNESS: A Court. Let me be very
21 clear. The County Court in the area of which the
22 expropriated asset is located. Is that clear? Not

1 the Court of First Instance, but a Superior Court,
2 the lawmaker considered that this kind of litigation
3 has a certain importance and thus established the
4 competence of the County Courts if my memory is
5 correct.

6 ARBITRATOR DOUGLAS: Doesn't there have to
7 be an executive decision by an executive organ first,
8 which may then be challenged in court, but doesn't
9 there have to be a decision of a governmental organ
10 first?

11 THE WITNESS: An executive decision on what?
12 On whether or not to perform expropriation?

13 No, there is no such decision to be issued.

14 ARBITRATOR DOUGLAS: So, the Court would
15 identify which property had to be expropriated, the
16 amount of compensation that would be offered, the
17 grounds for the expropriation. That would all be
18 done by a Court upon--

19 THE WITNESS: And they would have to
20 establish that or other formal conditions are met:
21 the existence of the preliminary investigation, the
22 existence of the endorsements, etc., all these legal

1 operations make up the file that a judge will review.

2 What I mean, Mr. Arbitrator, is that in our
3 legal system, expropriation is a judicial matter,
4 unlike the previous situation where it used to be
5 discretionary and abusive in a numerous number of
6 times. In this case, under Law 33, we're talking
7 about judiciary expropriation.

8 ARBITRATOR DOUGLAS: And so, the--just to be
9 absolutely clear, the license holder would apply to
10 Court, and the Court would render a decision on the
11 basis of that application by the license holder, and
12 the other named party of the Respondent Party would
13 be the existing owner; is that correct?

14 THE WITNESS: The legal action is initiated,
15 of course, by the party that is discontent, by the
16 expropriated person, not the license holder. It is
17 not the license holder who would be the Claimant in
18 such a lawsuit.

19 ARBITRATOR DOUGLAS: But which actors
20 expropriated the property prior to the judicial
21 proceedings? That's what I'm trying to get at.

22 Is it simply the fact that the license is

1 being rendered, and that's the expert--

2 THE WITNESS: There is no such decision in
3 our legal system. Such a decision does not exist in
4 our system.

5 The decision for the--whereby the asset
6 becomes part of the State property is the Court
7 Decision. The property title of the State is granted
8 by the court decision which finds that expropriation
9 has been carried out according to the Law.

10 There is a special language for that in the
11 Law of Expropriation.

12 ARBITRATOR DOUGLAS: But in a--just a last
13 clarification, though.

14 In a situation where you have a landowner
15 within the perimeter of the license who doesn't want
16 to sell voluntarily to the license holder, what's the
17 next step in expropriating that land holder?

18 THE WITNESS: Expropriation, yes. We can
19 get to expropriation.

20 ARBITRATOR DOUGLAS: But how? What's the
21 mechanism?

22 THE WITNESS: The one that the Law provides.

1 The grant--the concessionaire notifies the body of
2 the State and steps are taken for expropriation--the
3 expropriation procedure to be carried out.

4 ARBITRATOR DOUGLAS: And just to be clear,
5 which law are you referring to in that context, the
6 Mining Law or the Expropriation?

7 THE WITNESS: Law 33 from 1996, if I'm not
8 mistaken, on Expropriation. Law 33 for sure.

9 ARBITRATOR DOUGLAS: Thank you very much.

10 PRESIDENT TERCIER: Sorry.

11 THE WITNESS: I'm sorry. I really didn't
12 know who was asking the question. That is why I
13 asked who you were.

14 ARBITRATOR DOUGLAS: That's okay.

15 PRESIDENT TERCIER: I can repeat, he is one
16 of the co-arbitrators. You probably have him on the
17 screen.

18 But I have some following questions. I'm
19 the Chairman of the Tribunal.

20 THE WITNESS: I can see you, President.

21 PRESIDENT TERCIER: Okay. I would like to
22 come back because I still have also a few doubts.

1 In the Mining Law, Article 6, there are a
2 list of possibilities for the Titleholder to get
3 properties.

4 THE WITNESS: Yes.

5 PRESIDENT TERCIER: And Article 6(d) says
6 "Expropriation for public utility cause," it's one of
7 them, and then "in compliance with the Law."

8 Which law? Which law?

9 THE WITNESS: Under the terms of the
10 Expropriation Law, Law 33 from 1996 that I mentioned.
11 In principle, that is the applicable law. That is my
12 reference. And then there are other provisions that
13 are applicable, instructions.

14 Mr. President, I would like to reiterate the
15 idea that expropriation is but one possibility.

16 PRESIDENT TERCIER: No, I know that. But we
17 are just dealing with this because the hypothesis is
18 the hypothesis of a certain number of owners that
19 refused to sell, and another question is to see how
20 to overcome this problem.

21 Now, according--just in order--sorry. I'm
22 repeating and asking the same question as

1 Professor Douglas.

2 Now, I'm an owner in the area, in the
3 perimeter. I refuse to sell. Tell me now: What are
4 the steps that you--that RMGC will follow in order to
5 force him to transfer its ownership?

6 THE WITNESS: So, first of all, I will go to
7 the County Council that needs to trigger the
8 expropriation procedure according to Law 33 of 1996,
9 and then the entire procedure will be pursued
10 according to the Law up to the point of having that
11 Court decision I was referring to.

12 PRESIDENT TERCIER: Okay. Of course, with a
13 special situation--no. That's okay.

14 Now, you heard counsel for--it was counsel
15 for Respondent at the end of his examination put one
16 or two questions in connection with the new law, the
17 law that had been adopted. And he was about to say:
18 Did it change something at the procedure?

19 I don't know--I have not the number of the
20 Law.

21 THE WITNESS: Of course. The new law had as
22 purpose, if I understand correctly--because the law

1 was not--did not become effective. So--

2 PRESIDENT TERCIER: That's true, but--

3 THE WITNESS: --I did not see the law
4 enacted. But based on the Exposition of Reasons and
5 based on the content of the law, I think its aim was
6 to simplify the expropriation procedures, in
7 principle.

8 PRESIDENT TERCIER: As far--can you explain?
9 What would be the main simplifications?

10 THE WITNESS: Let me have a look.

11 MR. SCHERER: It's Tab 12.

12 PRESIDENT TERCIER: It's under Tab 12 in
13 your binder, I'm told.

14 MR. SCHERER: C-519.

15 THE WITNESS: Okay. I found it because my
16 colleague helped me. In fact, he was a former
17 student of mine, but he's still a colleague.

18 Okay. If my memory doesn't fail me, when I
19 read the Law, I had found that the time of the
20 expropriation--the length of the expropriation had
21 been shortened.

22 PRESIDENT TERCIER: But does it change

1 something, the procedure that you described a moment
2 ago, go before the County Court?

3 THE WITNESS: Well, you see, this Draft Law
4 concerns certain measures on mining exploitations.
5 It's not a Draft Law specific to expropriation
6 procedures. It's a Draft Law concerning procedures
7 for mining licenses in general.

8 Do you understand me?

9 So, honestly, I do not know right now to
10 what extent we could speak about changes. I see no
11 change as to expropriation in more concrete terms.

12 PRESIDENT TERCIER: Okay.

13 THE WITNESS: And I mean this Draft Law.

14 PRESIDENT TERCIER: Professor Horacio
15 Grigera Naón, who is the second co-arbitrator, has a
16 question.

17 ARBITRATOR GRIGERA NAÓN: Professor Bîrsan,
18 I must say that I am totally confused about all of
19 what I've been hearing. But let's try to throw some
20 light, at least for me.

21 There is on Slide 16 of your presentation a
22 reference to Article 6 of the Mining Law and the

1 reference to Paragraph (d) is Subsection (b) to which
2 the Chairman already made a reference.

3 And it says: "Expropriation for public
4 utility cause in compliance with the Law."

5 And the President asked which law.

6 To determine the public utility clause--to
7 determine the public utility cause, to which law do
8 we have to look at? Is there general expropriation
9 law or something else?

10 Because we also have the notion of de facto
11 expropriation. I would like to know exactly what
12 "public utility cause" means in one scenario or in
13 the other, if they are different.

14 Have I made myself clear?

15 THE WITNESS: Yes, of course. "According to
16 the Law" means according to the Expropriation Law.
17 The notion of de facto expropriation has nothing to
18 do with the conditions of the Law.

19 The notion of de facto expropriation is an
20 ad hoc notion. It's a notion that expresses the
21 restrictive legal regime, even prohibitive legal
22 regime, of the lands in the mining perimeter.

1 ARBITRATOR GRIGERA NAÓN: Okay. So, what
2 you are saying is that the reference to "Law" is to
3 the Expropriation Law. But if we have to look about
4 a notion of public utility--

5 (Overlapping speakers.)

6 PRESIDENT TERCIER: Please.

7 ARBITRATOR GRIGERA NAÓN: But we have to
8 look for a notion of public utility cause, we have to
9 look at what you refer to as de facto expropriation.
10 And which is the notion of public utility cause
11 within the context of a de facto expropriation? Do
12 we have to look at the concession? Legislation?
13 Where do we find the notion?

14 THE WITNESS: We don't find this notion in
15 any legislation. We only find it in the doctrine and
16 in the jurisprudence which assimilated to this notion
17 restrictions concerning the exercise of the property
18 right over the lands located in the mining perimeter.

19 So, I cannot speak about public utility in
20 the case of de facto expropriation. In the case of
21 de facto expropriation, I'm referring to the
22 particular circumstance in which these restrictions,

1 taking into account the purpose why the license was
2 granted, the owner finds himself in a situation where
3 he cannot fully exercise his property rights over
4 that particular land.

5 ARBITRATOR GRIGERA NAÓN: Thank you very
6 much.

7 PRESIDENT TERCIER: Fine. We have no
8 further question.

9 Professor Bîrsan, I would like to thank you
10 for your presence and for your answering the
11 questions. The examination is over. I wish you a
12 very--evening probably. I don't know how late it is
13 in Bucharest.

14 Thank you very much. Thank you very much.

15 THE WITNESS: Thank you as well for your
16 attention.

17 PRESIDENT TERCIER: Good.

18 THE WITNESS: And I was honored to be
19 present in front of this Tribunal.

20 (Witness steps down.)

21 PRESIDENT TERCIER: Good. We will
22 take--would ten minutes be sufficient, according to

1 human rights, for coffee and a short break?

2 The court reporters, they are always happy.

3 Okay. Ten minutes, and we will have
4 Professor Mihai.

5 (Brief recess.)

6 PRESIDENT TERCIER: Before starting, first,
7 sorry, if everybody is here, one question that we
8 could discuss before whether we should still be under
9 red light and whether this should not be, this part
10 with the expert should not be open to the public.

11 Ms. Cohen Smutny, do you have--

12 (Pause.)

13 MS. COHEN SMUTNY: This hasn't been
14 discussed with the Professors who are going to
15 testify. So, if you would like to take a break and
16 we can confer with the Professors about whether or
17 not they're comfortable with this. We understood
18 that the rule was, as we've already established, that
19 all these things are confidential unless not.

20 So, if you want, we haven't discussed this
21 with those who are remaining to testify, and I think
22 that we should at least have a conversation with them

1 before I answer without having conferred.

2 PRESIDENT TERCIER: Okay. I think it's an
3 important--I will give you the floor--important
4 question to solve because on one side they are
5 confidential, in confidentiality, and we have decided
6 for the witnesses, and now the question is whether it
7 must be also, even if we have already started, with
8 one expert, but whether we could not open this to the
9 public.

10 Do you want to have--

11 MS. COHEN SMUTNY: If we could take a few
12 minutes to confer, then we can answer your question.

13 PRESIDENT TERCIER: Okay.

14 MS. COHEN SMUTNY: Okay?

15 PRESIDENT TERCIER: Good. On your side, you
16 also have to discuss it with somebody, or do you have
17 your opinion?

18 DR. HEISKANEN: We have held the position
19 throughout these proceedings that both Witness
20 Statements and expert reports should not be
21 considered confidential.

22 PRESIDENT TERCIER: Okay. So, it's now up

1 to you.

2 (Tribunal conferring.)

3 (Pause.)

4 PRESIDENT TERCIER: So...

5 MS. COHEN SMUTNY: For Professor Mihai's
6 testimony, it's fine if we're green. Green is fine
7 for this testimony, and I think we will just have to
8 ask with the others progressively.

9 PRESIDENT TERCIER: Good. And the arbitral
10 Tribunal will decide case by case.

11 Fine. So, we change the color.

12 (End of Attorneys' Eyes Only session.)

1 OPEN SESSION

2 PRESIDENT TERCIER: Do we need to have the
3 green and red cards?

4 MS. COHEN SMUTNY: There is nothing in
5 Professor Mihai's opinion in terms of documents. I
6 mean, it obviously depends on the question presented,
7 but given the subject matter, it's unlikely.

8 PRESIDENT TERCIER: Fine.

9 Good afternoon, Professor Mihai.

10 LUCIAN MIHAI, CLAIMANTS' WITNESS, CALLED

11 THE WITNESS: (Off microphone.)

12 Good afternoon, Mr. President.

13 PRESIDENT TERCIER: Welcome in this
14 procedure. I would like to start with the question
15 concerning the language in which you will testify.
16 What would you prefer?

17 THE WITNESS: I would prefer to speak in the
18 Romanian language.

19 PRESIDENT TERCIER: Very good. It is your
20 right, of course.

21 You know that you will be an expert in this
22 procedure.

1 THE WITNESS: Yes.

2 PRESIDENT TERCIER: I would like to
3 introduce you to the members of the Arbitral
4 Tribunal. On my left-hand side we have Professor
5 Grigera Naón; on my right-hand side Professor Zachary
6 Douglas. My name is Pierre Tercier, and we have the
7 Secretary to the Tribunal, and the Assistant to the
8 Tribunal, Maria Athanasiou.

9 And, of course, you can imagine who are on
10 both sides of the other room.

11 You will be heard as an expert. As such, I
12 would like to invite you to read the Declaration that
13 you have just received. I think you understand
14 sufficient English to read it and understand it.

15 THE WITNESS: I solemnly declare upon my
16 honor and conscience that my statement will be in
17 accordance with my sincere belief.

18 PRESIDENT TERCIER: Good.

19 You have prepared for this proceeding two
20 expert--two legal opinions, the first dated the 20th
21 of June 2017, and the second 7 November 2018.

22 Do you have these two documents before you?

1 THE WITNESS: Yes, I do.

2 PRESIDENT TERCIER: Can you confirm the
3 content of this document or these documents, or do
4 you wish to make amendments?

5 THE WITNESS: I confirm.

6 PRESIDENT TERCIER: Good. You know the
7 procedure, of course. This is now your testimony.
8 You will have an opportunity to present, 30 minutes
9 maximum to present the main conclusion of your Expert
10 Reports, and then it will be up to counsel for
11 Respondent to ask you in cross-examination, and there
12 will be, if necessary, a redirect. The Tribunal
13 having, of course, the right to ask questions
14 whenever we consider it necessary.

15 It's clear?

16 THE WITNESS: I understand.

17 PRESIDENT TERCIER: Good.

18 And two points for the organization, it is
19 important for the Transcript to avoid to speak when
20 another speaker is just about to make a statement.
21 And secondly, because we'll have a translation, we
22 need just a few seconds to look for the Interpreters

1 to finish their sentence. Very clear?

2 THE WITNESS: I understand.

3 PRESIDENT TERCIER: Also applicable to
4 counsel.

5 The rule is that I start in asking you
6 whether you can in a few words introduce yourself,
7 just so we know what are--your specialties, they are
8 in your statement, but it's good to hear your
9 presentation.

10 Please.

11 THE WITNESS: Thank you, Chairman.

12 Well, I'm a Romanian--

13 PRESIDENT TERCIER: You speak English or
14 Romanian?

15 THE WITNESS: Romanian, okay.

16 (In Romanian) I am a Romanian legal expert.
17 I graduated from the Law Faculty of the Bucharest
18 University in 1976 as head of my class.

19 My main professional activity was and still
20 is that of Professor in the faculty from which I
21 graduated. This means that, since 1979 up to the
22 present time, I have been teaching several law

1 courses, contracts, and Succession Law without
2 interruption.

3 And I also taught courses of
4 intellectual-property law. I am also teaching a
5 course on international arbitration on intellectual
6 property.

7 At this moment, and, in fact, since 2001, I
8 have also been working as a lawyer, being a member of
9 the Bucharest Bar. I'm of counsel in Allen & Overy
10 firm, the Bucharest office. Before that, I was a
11 national partner in the Bucharest Office of
12 Linklaters firm.

13 I'm also an arbitrator included on the list
14 of the Arbitration Department of the Romanian Chamber
15 of Commerce and Industry. And I have also acted as
16 an arbitrator in the Republic of Moldova.

17 I have experience as an arbitrator in
18 arbitration proceedings. I was President of the
19 Romanian Constitutional Court, which is the highest
20 position in the country--I mean, legal position in
21 the country.

22 I was Secretary-General of the Romanian

1 Parliament. I was an ad hoc judge of the European
2 Court of Human Rights, but my most important
3 professional achievement was that of having acted as
4 a president of the Commission in charge of drafting
5 the Romanian Civil Code that entered into force in
6 2011.

7 I am also satisfied to be the personal
8 advisor of the British Ambassador in Bucharest, and I
9 will stop here.

10 PRESIDENT TERCIER: Thank you very much.
11 One question. You're a professor of contracts,
12 succession, and you're giving an opinion here a legal
13 opinion that is more on administrative law. How do
14 you reconcile these two elements?

15 THE WITNESS: (in English) Thank you for
16 your question.

17 Well, I mentioned that--

18 PRESIDENT TERCIER: You can speak Romanian;
19 I think it will be easier.

20 THE WITNESS: Yes.

21 (In Romanian) Thank you for the question.

22 I mentioned that I work as a lawyer, too.

1 In that capacity, I participated in several important
2 Projects that involved administrative law.

3 More than that, I have an extremely
4 important experience and quite rare experience in my
5 capacity as Secretary General of the Romanian
6 Parliament, which is not a political position but a
7 legal position. And in that position, unfortunately,
8 most of the tasks are connected to administrative
9 law. I don't say "unfortunately" because I don't
10 like this part of law, namely the administrative law,
11 but because it's very difficult, so in that position
12 my main task was to enforce administrative law.

13 As a president of the Constitutional Court
14 of Romania, when I was also the financial leader of
15 this institution, I needed to be familiar with
16 administrative law.

17 PRESIDENT TERCIER: Thank you very much. My
18 last question before giving you the floor would be to
19 describe the process that has been followed in
20 preparing these two legal opinions. You received a
21 mandate, you described it in your first page of your
22 first legal consultation, but can you in a few words

1 tell us what is the precise few words--not long, but
2 just explain how you came to these two consultations.

3 THE WITNESS: I prepared these Legal
4 Opinions in my capacity as a lawyer, of counsel in a
5 law firm, Allen & Overy, the Office of Bucharest.

6 And from that position, I worked in this
7 project, as I do in any other project that is
8 commissioned by my law firm. That means that there
9 was a team made up of lawyers that I selected,
10 lawyers that I have previously worked with. They
11 helped me draft this opinion up to the stage of a
12 draft opinion. But the essential decision rested
13 with me when it came to the contents of this draft
14 opinion.

15 Also--and this is something I do whenever I
16 have a client--I worked in close cooperation with my
17 client, and my client is Gabriel Resources. We have
18 a legal assistance contract, and Gabriel Resources
19 has its counsels, so I was in close cooperation with
20 the counsels for Gabriel Resources, and I would like
21 to thank them for making available to me the
22 materials in an organized form and for answering all

1 the questions where I needed an answer from them.

2 PRESIDENT TERCIER: But, at the end of the
3 day, you drafted, or who drafted mainly? You had
4 your team, and you also had contact with counsel for
5 Claimants, who were the final author of the content
6 of the legal opinions?

7 THE WITNESS: (in English) At the end of the
8 day--sorry.

9 (In Romanian) The final document rests on my
10 intellectual activity. The final document--I revised
11 the final document entirely line by line, footnote by
12 footnote, and I inserted all the amendments and the
13 changes that I deemed necessary.

14 PRESIDENT TERCIER: Very well. Thank you
15 very much. If my co-Arbitrators have no further
16 question, you have the floor for your presentation,
17 30 minutes.

18 DR. LEAUA: If I may for the record, matter
19 of interpretation, the Interpreters were constantly
20 translating the Romanian word "avocat," which is like
21 in French "avocat," with "lawyer," which is a broader
22 term. "Avocat" in Romanian language is a legal

1 profession, a specific one, while "lawyers" refer to
2 all the legal professions generally speaking,
3 "advocat pledant," like in-house counsel or outside
4 counsel. Just for the record, it would be useful if
5 the Interpreters would further refer to "avocat" in
6 Romanian language with attorney-at-law to make the
7 distinction between any lawyer and the specific type
8 of lawyer.

9 Thank you.

10 THE WITNESS: (In English) I confirm from my
11 personal situation.

12 PRESIDENT TERCIER: Thank you. We have
13 taken note of it.

14 So, please, you can start.

15 DIRECT PRESENTATION

16 THE WITNESS: I will try to--

17 (In Romanian) I will try, in the next--in
18 the time given to me to present a summary of the two
19 legal opinions.

20 Thank you for helping me.

21 It is the first time I see this document in
22 printed form. That's why I needed some assistance

1 from the attorney-at-law.

2 I understand that you can also look at the
3 slides in the room.

4 The first issue that I address is the fact
5 that, as I have shown in my two opinions, the
6 Environmental Impact Assessment procedure that I
7 looked closely into is governed by Romanian law,
8 namely Romanian legislation. This does not mean,
9 however, that we must understand that I did not also
10 contemplate the provisions under European Union law.
11 I don't use the wording European law because that
12 would also involve the Council of Europe, so I
13 contemplated the Law of the European Union, too;
14 namely, several directives of the European Union.
15 Romania, as an EU Member State, has the legal
16 obligation to transpose into national legislation the
17 EU Directives.

18 But, according to the Treaty on the
19 functioning of the EU, any Member State, including
20 Romania, enjoys an autonomy, a "procedural autonomy,"
21 as it is called, but the meaning is that the Member
22 State itself is the one who decides, establishes what

1 are the forms, the legal ways, the modalities to be
2 followed in order to do this transposition of the EU
3 Directives in order to completely meet the goals set
4 out in those directives.

5 I found that, in the case at hand, there has
6 never been called into discussion a concrete conflict
7 between the provisions under the Romanian Law
8 regarding the Environmental Impact Assessment, on one
9 hand and the relevant EU Directives, on the other
10 hand. That is why the principles under European law,
11 namely the primacy or the direct effect of the
12 directives, are not principles that would be
13 applicable in the case at bar.

14 But even if, in theory, arguendo, there
15 would be such a conflict, the State, the Member State
16 of the EU cannot call against an entity such as Rosia
17 Montana the provisions that were incorrectly or
18 incompletely transposed from an EU Directive.

19 With regard to the European Directives, I
20 would like to make the specification, which is
21 detailed in one of my legal opinions, that the
22 European Directive, EIA Directive, that was called

1 upon in passing in various situations in the other
2 statements, namely Directive 2014/52, is not
3 applicable in the case at hand. Why? - because this
4 Directive was transposed by Romania by means of a law
5 adopted in 2018, and that became effective this year,
6 in 2019.

7 And it is important for the Arbitral
8 Tribunal to know the fact that, according to
9 Romania's Constitution, we have the principle of
10 absolute non-retroactivity of laws. Not all
11 Constitutions comprise this principle; by the
12 absolute principle of non-retroactivity I understand
13 that in no situation, that there is no exception from
14 the interdiction on retroactivity. Such as for
15 example, I know that in certain Constitutions the
16 interpretation laws can be retroactive, for instance.

17 Now, allow me to move on to the problem of
18 the EIA Procedure in Romania.

19 We're interested in this process, especially
20 in one stage of the procedure, namely the last one.
21 The assessment of the quality of the EIA Report, the
22 report submitted by the Titleholder of the Project;

1 and also the decision-making stage. It is not about
2 two different stages but rather a complex stage.

3 This procedure is a regulated procedure. It cannot
4 unfold or be conducted--it can only be conducted in
5 compliance with the conditions under the applicable
6 law to this procedure.

7 There are three stages. I will only refer
8 to the last stage, as I said. The assessment
9 procedure must be conducted based on the applicable
10 legislation within a reasonable timeline. This
11 obligation, as such, is expressed in one of the
12 applicable enactments. This procedure concludes with
13 a decision issued by the State body indicated in the
14 relevant regulations. This decision may be a
15 decision to issue the Environmental Permit or, on the
16 contrary, a decision to reject the EP.

17 Any of these decisions should be motivated
18 and grounded in the Law. These decisions cannot be
19 issued based on the potential preferences of the body
20 called to act in the procedure.

21 More concretely, in the case of the Rosia
22 Montana Project, the Environmental Permit lies with

1 the Government in terms of issuance competence: The
2 Cabinet, the highest body within the executive power.
3 For less important Projects--I mean, less important
4 than the category in which this project is included,
5 according to the Law, the competence lies with the
6 Ministry of the Environment.

7 The assessment procedure, the EIA process is
8 conducted by the Ministry of Environment, not the
9 Government. According to the applicable regulations,
10 this procedure conducted by the Ministry of the
11 Environment is conducted in consultation--and I quote
12 "in consultation"--with a body that is called the
13 Technical Assessment Committee. I will use the
14 abbreviation in English, "TAC."

15 PRESIDENT TERCIER: Professor Mihai, may I
16 just interrupt you to making you aware of the fact
17 that time is running and you know that we have a
18 limited time, and as is often the first slides is
19 probably less interesting for us than the last one,
20 where we come to really very focused question.

21 THE WITNESS: (In English) Thank you.

22 PRESIDENT TERCIER: I don't want to deprive

1 you of the right to speak, but to just make you aware
2 of the fact that we will more or less comply with
3 flexibility, comply with the time limit that we have
4 affixed and agreed.

5 THE WITNESS: I understand, I do thank you.
6 And I appreciate, thank you.

7 (In Romanian) That is why I must specify,
8 under the circumstance, that TAC is a consultative
9 body. These are the very words used in the
10 regulations. It has no legal personality. It mainly
11 consists of central public authorities which are
12 represented based on their competences such as NAMR
13 and other such bodies, which are represented in the
14 procedure by State Secretaries within these entities.

15 A State Secretary is a Deputy Minister.
16 Sometimes, some entities, some bodies are led by
17 persons called Directors or General Directors by
18 their positions. I must say that the TAC members
19 issue consultative points of view as regards the
20 issuance of an Environmental Permit. Their points of
21 view can be directly expressed in the TAC meeting or
22 sometimes these points of view may be formulated in

1 writing when they were not expressed during the
2 meeting within a certain deadline. In case one such
3 entity does not provide a point of view, that is
4 equivalent to "no objection."

5 I must say that this consultative body does
6 not adopt a collective decision. Actually, in TAC,
7 there is no voting procedure. They don't even make
8 decisions through consensus in TAC. In TAC, they
9 don't make decisions regarding the issuance of the
10 EP. It is true that, in some of the applicable
11 regulations, there are some inconsistencies that I
12 qualify as pertaining to legislative technique. It
13 is true that in at least two orders--and there are
14 enactments, orders of the Ministry of the
15 Environment--there are some passages that do not
16 benefit from legislative technique and that might
17 create the impression that a decision is taken.

18 But, in Romania, there is the principle of
19 the hierarchy of enactments. That is why the
20 contents of these orders is removed by the power of
21 higher ranking enactments - namely a Government
22 Decision having this object.

1 Within TAC, the members analyze whether the
2 information from the Assessment Report submitted by
3 the Titleholder are adequate--is adequate or not.
4 What do I mean by that? Whether there is sufficient
5 information in order to perform or not an analysis of
6 the impact on the--the environmental impact of a
7 project. If the information submitted or reviewed by
8 the TAC members is insufficient, and if this missing
9 information may affect the decision on the issuance
10 of the EP, then the Ministry of the Environment must,
11 according to the regulations, issue a decision to
12 redo or complete the Report and indicate in writing
13 what information should be added.

14 In such a situation, which is a difficult
15 one, there must--the Ministry of the Environment must
16 make a decision to allow the process to continue or
17 to interrupt it. In another factual situation that
18 is that of an important project in Romania, namely
19 the Cernavoda nuclear plant--Cernavoda is a city in
20 Romania--after the EIA Report was analyzed, the
21 Ministry of the Environment issued such a decision
22 that I personally saw a copy of, requesting that the

1 Report be redone because the information included in
2 the report was not adequate.

3 What is the procedure to obtain the EP? The
4 Ministry of the Environment is the decision-making
5 body that must make a decision on the proposal
6 whether to issue an Environmental Permit, namely
7 within 10 working days from the date when the TAC
8 members expressed their consultative points of view
9 or if they failed to do so, ten working days from the
10 date when the deadline when they were supposed to
11 gather all the complete information has expired.

12 Let me correct that. The decision must be a
13 reasoned one. It must be motivated. And if the
14 decision is to deny or to reject the application to
15 issue an EP, they must say why it was rejected, why
16 the EP was denied.

17 The Draft Decision that is issued as such as
18 a draft in this particular case because we're talking
19 about the Rosia Montana Project, which is an
20 important one, the Draft Decision of the Ministry of
21 the Environment is published on the Ministry's
22 website so that any interested members of the public

1 may become aware of this Draft Decision, the members
2 of the public may make remarks, comment on that, and
3 the Ministry has the obligation to look at those, to
4 review them. And if they find that those comments
5 are grounded and justified, the Ministry can decide
6 to request that the Report be redone, based solely on
7 those remarks by the public. But as part of this
8 procedure that is a regulated procedure.

9 After that stage is overcome, the Ministry
10 sends to the Government the proposal on the issuance
11 of the EP. The Government does not have specialized
12 bodies in charge of verifying the proposal, this
13 proposal. The Government, in the field of
14 Environmental Protection acts through the Ministry of
15 the Environment that has all the specialized staff
16 and the relevant information to make a decision on
17 this subject. That is why the Government cannot
18 ignore the Draft Decision prepared by the Ministry of
19 the Environment. They have to take it into account.

20 For instance, if the Draft Decision is to
21 the effect of rejecting the Application for the
22 issuance of an EP, the Government will not be able to

1 issue the permit.

2 MS. URECHE: Professor Mihai, there is a
3 problem with the translation. Professor Mihai said
4 that the Government does not have specialized bodies
5 other than the Ministry of Environment. In the
6 Transcript it appears that the Ministry does not have
7 specialized bodies, so it should be corrected. It's
8 about the Government.

9 THE WITNESS: (In English) It's a very
10 difficult work to translate what I'm saying; I
11 realize.

12 (In Romanian) Well, I would like to focus on
13 some other important issues such as the principle of
14 the legality and the security of legislative--of
15 legal reports or relations from the point of view of
16 the appreciations of State bodies.

17 Romania's constitution is the Laws--the
18 country's fundamental law. It was adopted in 1992,
19 and it was reviewed in 2003. Article 1 of the
20 Constitution sets out very important provisions on
21 the existence of this rule of law in Romania.
22 Paragraph "3" of the first Article of the

1 Constitution states as follows: "Romania is a State
2 governed by rule of law, a democratic and a social
3 State." That is, this is a State where the Law
4 governs.

5 Article 4 says that the State is organized
6 on the basis of the separation and balance of powers:
7 Legislative power, executive and judicial powers. I
8 would like to point out the fact that, in 1992, an
9 initial version of the Constitution did not mention
10 this principle of the separation of powers. And
11 after pressure by the citizens, this principle was
12 expressly introduced in the language of the
13 Constitution in 2003. In Romania, observing the
14 Constitution, it's supremacy, and supremacy of the
15 Laws is mandatory for all, just as in the United
16 States of America, for instance.

17 The legality principle is closely connected
18 with the principle of the security of the legal
19 relations --excuse me, I have to interrupt the
20 speaker.

21 THE INTERPRETER: Excuse me, I have to
22 interrupt the speaker.

1 PRESIDENT TERCIER: Sorry?

2 THE INTERPRETER: I'm sorry, that was to
3 quick. I was not able to follow the speaker. I
4 apologize. Could he repeat the last sentence,
5 please.

6 PRESIDENT TERCIER: May I? Two comments.
7 First, I think you speak too quickly for the
8 Interpreters and secondly, if I may draw your
9 attention on the time that is running.

10 THE WITNESS: (In English) thank you,
11 Chairman.

12 Could I know how many minutes do I have?

13 PRESIDENT TERCIER: Yes, you can.

14 THE WITNESS: Thank you.

15 SECRETARY MARZAL YETANO: About 10 more
16 minutes.

17 THE WITNESS: I understand this. Okay. I
18 will manage. So--

19 (In Romanian) That is why the principle of
20 the security of legal relations says that legal
21 provisions must be precise, clear, predictable and
22 transparent. At the end of the day, that is nothing

1 more but an application in Romania of decisions of
2 the ECHR.

3 Let me refer you to the famous Sunday Times
4 case. Administrative bodies/authorities have to
5 strictly abide by the legal provisions. However,
6 administrative authorities, in principle, as a
7 principle, have a right of appreciation, a
8 discretionary power, which, in the doctrine is
9 analyzed in connection with the so-called opportunity
10 concept regarding the issuance or denial of an
11 administrative act, even though the legal provisions
12 are met for either its issuance or rejection.

13 From this principle there are a number of
14 reservations, reasonable reservations, that are
15 grounded, that are reasonable better said. Within a
16 regulated procedure that refers to the issuance of
17 permits or authorizations, the discretionary power of
18 the administrative body of the State is extremely
19 limited. For instance, when the conditions provided
20 by law for the issuance of the permit or
21 authorization are met, the administrative body has
22 the obligation to issue that act, that permit or

1 authorization.

2 At any rate, bodies of the administration
3 may not themselves impose, based on those
4 discretionary powers, additional criteria to--before
5 the issuance of a permit or authorization.

6 In my opinion, I looked at some situations
7 from the point of view of the issuance of the permits
8 or other administrative enactments.

9 Let me speak about the Urban Planning
10 Certificate. This certificate must be obtained by
11 the Titleholder for the proceeding before the
12 Minister of the Environment to be initiated. But the
13 PUZ is not necessary in the third phase of the EIA,
14 the Urbanism Certificate is not required in the third
15 phase of the EIA process where impact is assessed.
16 There are expressed provisions in the Construction
17 Law according to which the Urbanism Certificate is
18 required for the Construction Permit to be issued,
19 which is the last step in the process.

20 I also looked at the town planning plan, and
21 I looked at the urbanism plan to see whether or not
22 it was required for the issuance of the Environmental

1 Permit because it is said that it is necessary for
2 the authorization.

3 I will not speak about the Water Management
4 Permit endorsement now because the explanations are
5 the same.

6 Now, when it comes to the Archaeological
7 Discharge Certificates that are issued by the
8 Ministry of Culture, these are required for the
9 issuance of the Construction Permit but not for the
10 issuance of the Environmental Permit. For the
11 issuance of the Environmental Permit, the Ministry of
12 Culture must issue an "endorsement," as we call it,
13 that is to be used within the procedure, but the
14 Archaeological Discharge Certificate, if it were
15 obtained in this phase, would make it unnecessary to
16 obtain an endorsement, so there is no prohibition on
17 there being a Discharge Certificate at this stage,
18 but if an Archaeological Discharge Certificate exists
19 this one covers the requirement to obtain an
20 endorsement. This is an argument that shows that it
21 is not mandatory for there to necessarily be an
22 Archaeological Discharge Certificate at this stage

1 because if it existed, if that had been issued, the
2 endorsement would not be necessary anymore.

3 Something that is closely connected to my
4 activity, my professional activity, is related to the
5 effect of litigation against administrative
6 enactments. As per the Law, administrative
7 enactments enjoy the presumption of legality because
8 they are issued by the state organs indicated as per
9 the Law. You do not need to have a court decide that
10 deed is legal. There is the presumption of their
11 legality.

12 Also, they are enforceable, presumed
13 enforceable, ever since their issuance. That is why
14 actions may be filed to challenge the validity of
15 administrative deeds. The Constitution of Romania
16 provides for the "free access to justice" principle.

17 First of all, we have to say that if there
18 is an administrative deed that was issued, it is
19 enforceable, and refusing to enforce it is breaching
20 the Law. Claims have been made in the file that when
21 legal action is filed to challenge an administrative
22 deed that enjoys the presumption of legality, from

1 the very first moment of that legal action being
2 filed, "eo ipso" by this mere fact, its legal and
3 enforceable characters are removed. These are claims
4 in the file. But they're not at all correct because
5 the mere filing of a legal action is nothing more
6 than the legal expression of a right recognized by
7 the Constitution - that of access to justice whenever
8 you deem necessary, but the process has to be to run
9 its course, and it is only a final and irrevocable
10 Court Decision that may declare null and void such a
11 deed or a stay its execution.

12 I would also like to shortly refer to the
13 so-called "social license." I must confess that when
14 I read about the social license in the documents that
15 I was shown, I felt honestly ignorant because, in my
16 entire activity as a legal expert in Romania, I had
17 not come across this concept, this expression.

18 I found that the Romanian Law does not
19 regulate the legal concept of "social license."
20 Under the circumstances, we cannot say, for instance,
21 for this project, we would need a social license for
22 the Environmental Permit to be issued. However, in

1 Romanian Law legislation, there are provisions that I
2 have referred to before on the real participation of
3 the general public in these proceedings, on the
4 grounds of European legislation, the Aarhus
5 Convention, among others. Those regulations or norms
6 would not be necessary because the very Constitution
7 of Romania is built around the public's right to
8 information.

9 The public is consulted during several
10 stages, I will not refer to these, there are details
11 in my legal opinion. If you allow me one more thing,
12 I would like to add one more thing. The remarks, the
13 comments of the public are taken into consideration
14 in this process, in this proceeding, by the Ministry
15 of the Environment but in the form that are precisely
16 regulated by the applicable law. Namely, the
17 Minister of the Environment has the obligation to
18 analyze these, if they wish, they may obtain
19 information from the Project Titleholder, and the
20 mere existence of comments from the public does
21 not--do not--does not represent an obligation for the
22 Ministry to adopt the position of the public.

1 Thank you, and thank you to the Interpreters
2 as well.

3 PRESIDENT TERCIER: Thank you very much,
4 Professor Mihai.

5 We will now interrupt, I think it's not
6 worth starting because we will have time for the
7 lunch break. We will start at 2:00. You have an
8 hour and 30 minutes, for your cross-examination, and
9 then, according to what we have said, 20 minutes for
10 your redirect.

11 A few points, first, I would be very
12 grateful if you could have a short contact with
13 Professors Schiau and Professor Podaru to know
14 whether it would be under green or red light. So
15 that we have another discussion before.

16 Second, as I told you this morning, the
17 Tribunal will come to you with a proposal for the
18 last session.

19 Have you another point you would like to
20 raise at this point? Another case? Not the case.

21 In that case, I would like to mention that
22 you know, as an arbitrator, you are under testimony;

1 therefore, please do not have any contact with a
2 representative or counsel.

3 THE WITNESS: (In English) I confirm.

4 PRESIDENT TERCIER: Thank you very much.

5 (Whereupon, at 1:01 p.m., the Hearing was
6 adjourned until 2:00 p.m., the same day.)

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AFTERNOON SESSION

PRESIDENT TERCIER: So, ladies and gentlemen, I suggest that we proceed and go on.

Please, Mr. Scherer. You have the floor.

MR. SCHERER: Thank you, Mr. President.

CROSS-EXAMINATION

BY MR. SCHERER:

Q. Good afternoon, Professor Mihai. I would start with a few questions that you have, in some shape or form, already heard from the President about your qualifications.

You say that you have taught civil law relating to contracts, insurance, inheritance, and intellectual property law.

That is Paragraph 3 of your First Report. That's correct?

A. I confirm. It is correct. Among other activities, I also performed these activities.

Q. You mentioned that you have written six books. We have found four volumes of a treatise on civil law and one book on the inventions, the conditions for their registration. We haven't found

1 the sixth one.

2 But it is not about environmental law or
3 administrative law either, is it?

4 A. (In English) There is no such book regarding
5 the environmental law.

6 PRESIDENT TERCIER: You can speak in
7 Romanian; otherwise, it will be very confusing for
8 the Interpreters.

9 THE WITNESS: I apologize. I confirm that
10 among the indicated books mentioned in my
11 presentation, there is no book on Environmental
12 Protection Law.

13 BY MR. SCHERER:

14 Q. You mention in your First Witness Statement,
15 Paragraph 6, that you are ranked in Chambers and
16 Legal 500. And there--I looked it up--it says that:
17 "He is widely admired for his career as an IP
18 litigator, as well as for his academic credentials."

19 Does that sound right?

20 A. I am proud to be described as such, and I
21 confirm the existence of this presentation.

22 Q. And Legal 500 also praises your experience

1 in IP and dispute resolution; correct?

2 A. (In English) It's correct, but that is
3 ranking without considering administrative law, as
4 far as I know.

5 Q. That is the point.

6 You are not recognized by your peers and by
7 the Directorate as being a specialist in the topic
8 that you are giving testimony on in this Arbitration,
9 are you?

10 A. I understand your question, and I will
11 answer. What I said is different. I said that those
12 publications, which are commercial publications, do
13 not include research or information about
14 administrative law. They contain information about
15 intellectual property law, about litigations, which
16 litigations may also concern administrative law.

17 As an attorney, I worked in many
18 administrative law litigations. And even at present,
19 there are administrative litigations pending before
20 the courts which I am in charge of.

21 Q. This is new evidence. You have not
22 mentioned that before; correct?

1 A. I did not deem it necessary to mention this,
2 but I am recognized--I'm known in Romania as one of
3 the important litigation specialists with a varied
4 activity.

5 Q. I am told by my team that Chambers has a
6 category on administrative public law, and so does
7 Legal 500.

8 A. Thank you for this item of information.
9 What I said earlier was in good faith, I can
10 assure you. I thought there was none. But I was not
11 interested.

12 Q. You do opine extensively and critically
13 about the EIA Process and on how--and I quote--"the
14 TAC operates in practice."

15 That is from your First Opinion,
16 Paragraph 95.

17 You do not cite the source of your
18 experience of TAC proceedings.

19 Where does your experience with TAC
20 proceedings come from, if any?

21 A. I do not have such practical experience
22 personally. There are many areas where I do not have

1 experience because it was not necessary.

2 However, as I mentioned in my presentation,
3 it so happens that I am a legal specialist with a
4 long-standing activity with diverse and varied
5 activity. This is why the fact that I am specialized
6 and known in the country in particular as a civil law
7 professor, as a private law professor, does not
8 prevent my possibility of becoming aware of such
9 procedures from the applicable legal act.

10 I don't think that you personally were ever
11 practically involved in such an activity, and yet I
12 do not challenge your possibility to ask questions to
13 me. Even more so that--Mr. Scherer, I have to tell
14 you that it is always a great pleasure for me to meet
15 you because we worked together very well in numerous
16 other cases before, and I know how well-trained you
17 are professionally.

18 PRESIDENT TERCIER: Okay. Now you can stop
19 with the compliments and go to the merit of the case,
20 please.

21 MR. SCHERER: So, I can jump ten pages of
22 my...

1 BY MR. SCHERER:

2 Q. So, you would give the same answer without
3 the compliments to me if I were to ask you about your
4 experience in EIA Processes?

5 To my knowledge, there are only two EIA
6 Processes, one for Cernavoda, the nuclear power plant
7 that you mentioned, and the other for Rosia Montana;
8 is that correct?

9 And you were not involved in either of them?

10 A. I confirm that I was not personally involved
11 in any of these two procedures, but I do not know
12 whether there were only these two procedures or
13 others as well.

14 Anyhow, no matter how many there were, I was
15 not personally involved. My level of professional
16 training does not require me to participate directly
17 in such activities.

18 After all, I am a former President of the
19 Constitutional Court of Romania. After all, I am the
20 President of the Commission in charge of drafting the
21 Romanian Civil Code. I don't think it's absolutely
22 necessary for me to participate in such procedures.

1 Q. In order to give a legal opinion on
2 something, are you not familiar with?

3 When it comes to--but you do--even if you
4 depict yourself as an experienced lawyer, you do need
5 factual input. And you have not written, or your
6 team has not written, this legal opinion based on
7 factual information that you have gathered yourself.

8 You have entirely relied on information
9 about what happened at these TAC proceedings and TAC
10 meetings, information provided by Claimant in this
11 Arbitration; correct?

12 A. I mentioned before that when it comes to
13 this case, I behaved in the same way in which I
14 behave in every file where I work as an of counsel.
15 We never go on-site. We have enough professional
16 discernment to request information from safe or
17 certain sources via our client with regard to the
18 various factual situations.

19 After all, I have been called here as an
20 expert. Oh, I don't know if I am one, but this is my
21 capacity here, as an expert in law. This capacity
22 does not necessarily require me to be present in the

1 field.

2 Q. I'm not sure if that was translated
3 properly.

4 My question was about facts that are
5 described in documents, how the TAC proceedings went,
6 what happened in meetings. All this you only know
7 from the documents. You have not queried and
8 questioned and tried to find out if there were other
9 views about these circumstances and events. You rely
10 entirely on the file as it was provided to you and
11 your team by counsel for Claimants?

12 It is a question. I'm not blaming you. I'm
13 just inquiring what happened.

14 A. I confirm that I did not undertake
15 independent actions to obtain information from
16 sources other than those that are generally
17 accessible to me in my activity as an attorney.

18 Naturally, as it happens in any other case
19 where I work, I received information from the client.
20 I presumed, as it is only normal and as I do in any
21 other situation as an attorney, that this information
22 corresponds to the reality. It would have been a

1 violation of the ethics applicable to my profession
2 if I had doubted the reality of this information and
3 if I had undertaken independent action to verify it.

4 Q. One of my deceased senior partners said,
5 "Your worst enemy is your client." I'm not sure
6 whether I would agree with you, what you just said.

7 You are an arbitrator, expert of counsel
8 Allen & Overy, as you said, professor of civil law,
9 and you held administration and administrative
10 positions. You write that you are head of the
11 Private Law Department of the Faculty of Law at
12 Bucharest University. That is your CV, Page 2.

13 Now, I understand that this last position is
14 not the honorary position, but it's quite intense
15 that your responsibilities include signing and filing
16 of documents of the department, like time sheets of
17 professors, curricula, student evaluations.

18 How time-consuming is your position as Head
19 of the Private Law Department?

20 A short answer. Per week, how much time do
21 you spend on the average?

22 A. Currently, I spent no second in this

1 capacity. I submitted the CV in my file in 2017,
2 when I had this capacity. It was the second term
3 because I was elected twice. There are free
4 elections by my colleagues. Most of them are my
5 former students who thought it was appropriate for me
6 to hold this position of following in the footsteps
7 of my professors.

8 When I carried out these activities for 8 or
9 10 years--I don't remember exactly, and it doesn't
10 matter anymore--of course, I tried to fulfill my
11 attributions diligently. And this required
12 allocating the necessary time. However, I must tell
13 you that in this capacity, I had help from other
14 colleagues, from younger colleagues. And some of the
15 younger colleagues took over some of the duties.

16 In my activity, my main task was to
17 coordinate the administrative activities of the
18 department, and I was mainly in charge with the
19 academic matters.

20 Q. Can we be a bit shorter with your questions?

21 I apologize. My question wasn't precise
22 enough about the time period I had in mind, but I

1 think your answer was a bit long, and it didn't
2 answer my question.

3 My question was: How much time do you spend
4 percentage-wise per day, in a week, an ordinary week?
5 Five days? Three days? Two days? Half a day? I
6 don't know.

7 Can you answer?

8 A. I cannot answer because I was never
9 concerned with making such measurements. What I can
10 tell you, though, is that throughout--almost
11 throughout my career, I did not limit myself to the
12 academic work. I thought it was necessary for my
13 professional training and for my students that I also
14 conduct, in parallel, professional activities other
15 than the academic work.

16 Q. You are a busy person.

17 And I understand that in addition to all
18 these activities, in 2017 and '18, you were also the
19 Director of the LLM program in arbitration, while you
20 held a private law chair.

21 So, you taught two--two syllabi at the same
22 time in that academic year; is that correct?

1 A. It is correct.

2 I apologize. So, I will have to start every
3 answer with wordings, such as a simple statement is
4 not enough.

5 So, it is correct in the following
6 circumstances: My capacity as director, between
7 inverted commas, in the master's program, dedicated
8 to international arbitration, is a program initiated
9 in our faculty by Distinguished Professor Leaua.
10 This is an academic and not an administrative
11 capacity.

12 PRESIDENT TERCIER: Could we go to another
13 subject.

14 MR. SCHERER: Okay.

15 BY MR. SCHERER:

16 Q. You were so busy, when did you start writing
17 the Award? Not the Award. Apologies. That was not
18 a Freudian slip.

19 When did you start writing your First Legal
20 Opinion? When did your team start writing this
21 Opinion?

22 It is dated 30th of June, 2017. How long

1 did it take to get it ready? And don't forget, it's
2 about 2,500 pages, documents.

3 A. I refer to your statement, first of all,
4 because you said that I am very busy. My wife
5 reproaches that on me almost daily. So, it is a
6 confirmation of reality.

7 Q. What is the answer to my question?

8 A. I cannot answer precisely to your question.
9 I must confess it has been a while since my memory
10 has started to fail me. Meanwhile, I have acquired
11 other qualities. I don't know whether they are more
12 important than memory or not.

13 I couldn't under any circumstances, neither
14 at gunpoint, tell you when I started to write this
15 Opinion. Everything is put down in the internal
16 documents of the law firm where I work because,
17 similar to what happens in Lalive, we also record our
18 activities, all our activities.

19 Q. Roughly? Was it late 2016? Early 2017?
20 Spring 2017?

21 When were you contacted first?

22 A. Mr. Scherer, in all good faith--

1 Q. Say no.

2 A. --I cannot say precisely. It is impossible
3 to recall. For me, years have started to be very
4 short. If I only rely on my own memory, I can't
5 answer your question precisely in all good faith.

6 BY MR. SCHERER:

7 Q. That is fine. Now, in your Legal Opinion,
8 Paragraph 8, you say that you "provided expert
9 reports, legal opinions on Romanian law for the use
10 of Romanian and foreign (UK and Canada) courts of
11 law, as well as for ICSID, ICC, and other arbitration
12 proceedings."

13 Now, in these UK and Canadian court
14 proceedings, did you act in any capacity for Gabriel
15 or affiliates or shareholders of Gabriel?

16 A. In none of these previous activities. I am
17 not aware of ever having acted for Gabriel. It's
18 certain I have never acted for Gabriel. I don't know
19 whether in the corporate system there could be some
20 connection.

21 Q. You can simply say no if you wish.

22 A. If you will agree, I will say now no.

1 Q. But the next question you should say yes.

2 Going to ICSID Proceedings, your first case
3 was EDF v. Romania, ICSID Case 5/13. You gave an
4 Expert Report for Romania; correct?

5 EDF v. Romania, you gave an Expert Opinion
6 for Romania?

7 A. As far as I remember, yes. This was the
8 first case against Romania with EDF. I had the honor
9 to participate in that case.

10 Q. On Romania's side?

11 A. Yes, on Romania's side. And in other
12 situations, including in my cooperation with you, I
13 was on Romania's side.

14 Q. It's on my list.

15 Now, the second case you appeared as an
16 expert was Rompetrol v. Romania, ICSID 06/03, started
17 in 2005 and ended in 2013; is that correct? And
18 Lalive and Leaua were counsel. Rompetrol v. Romania.

19 PRESIDENT TERCIER: You should say
20 yes--"yes" or "no" for the transcript, please.

21 THE WITNESS: Yes, I confirm.

22 BY MR. SCHERER:

1 Q. The third case was Audi vs. Romania, ICSID
2 Case 10/13, from 2010 to 2015.

3 You also gave a Legal Opinion for Romania;
4 correct?

5 A. It is correct. It is the only case Romania
6 won--or lost. I don't remember.

7 Q. That is a rather negative view on the
8 results that were obtained, but it's your privilege.

9 Can we go on?

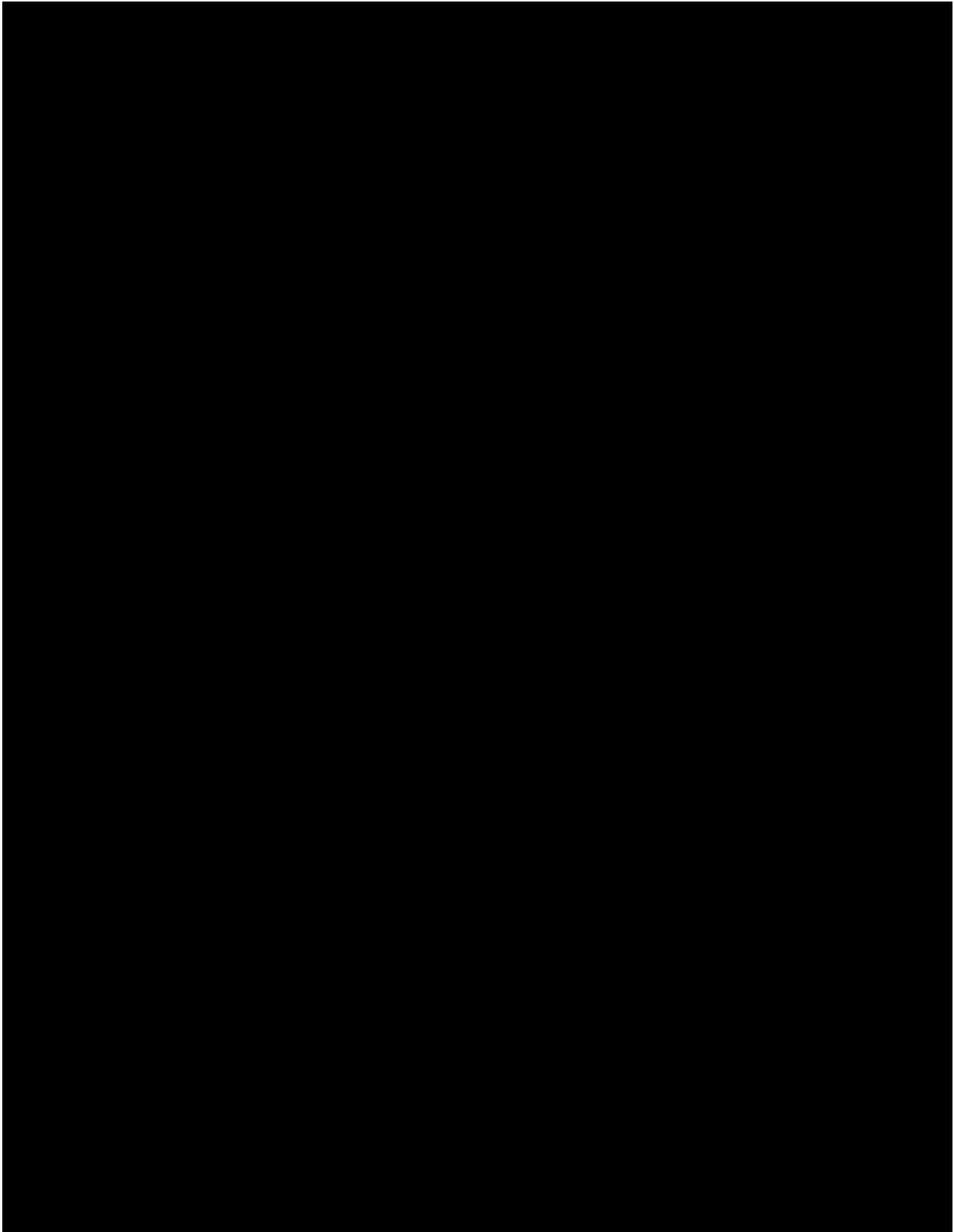
10 In Opinion 18, you mentioned that you had
11 other arbitration proceedings and--indeed, in
12 addition to these three ICSID cases--and now we need,
13 quickly, to go onto confidential.

14 MR. SCHERER: Can we go to the red light,
15 please.

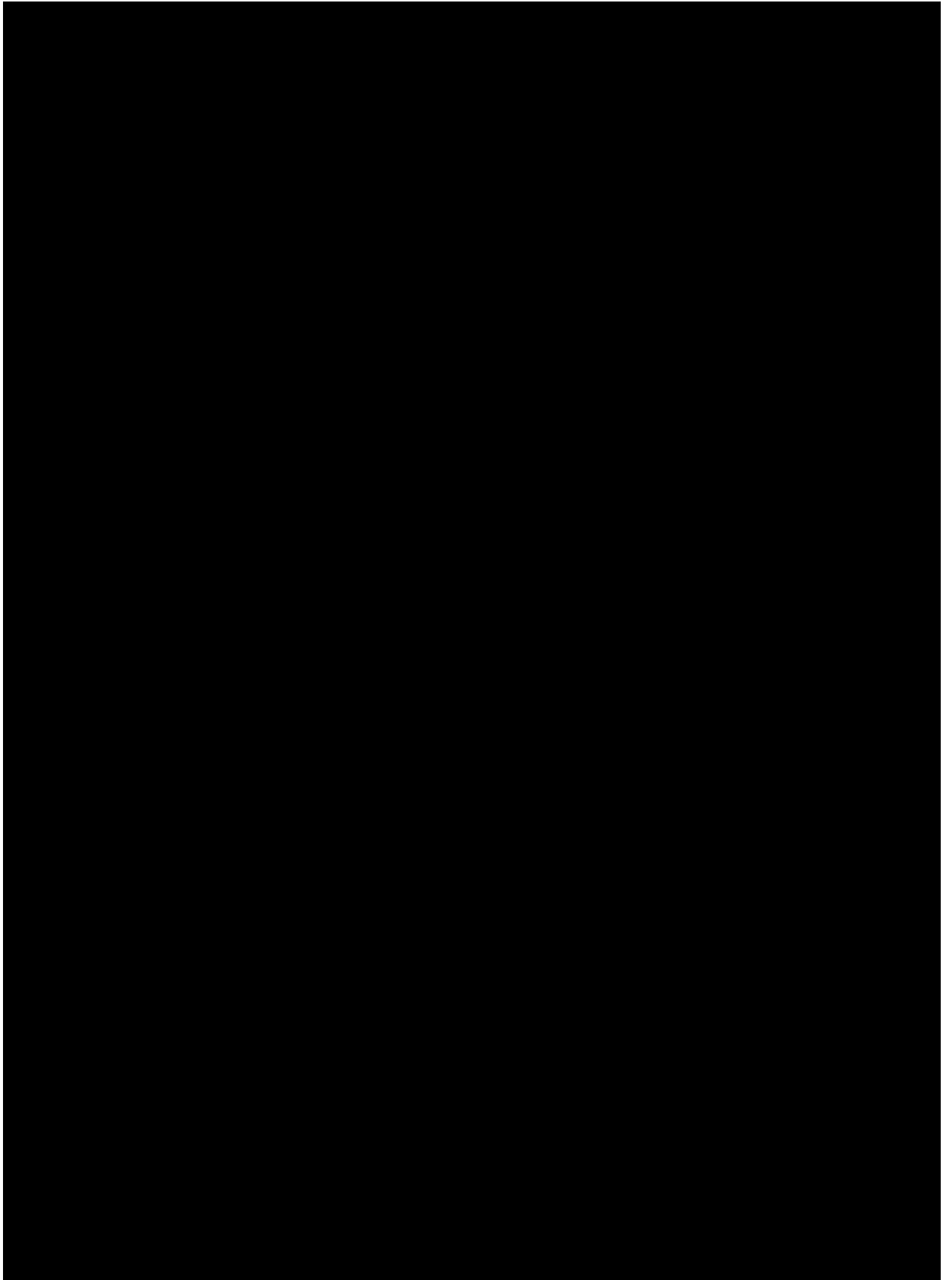
16 (End of open session. Attorneys' Eyes Only
17 information follows.)

ATTORNEYS' EYES ONLY SESSION

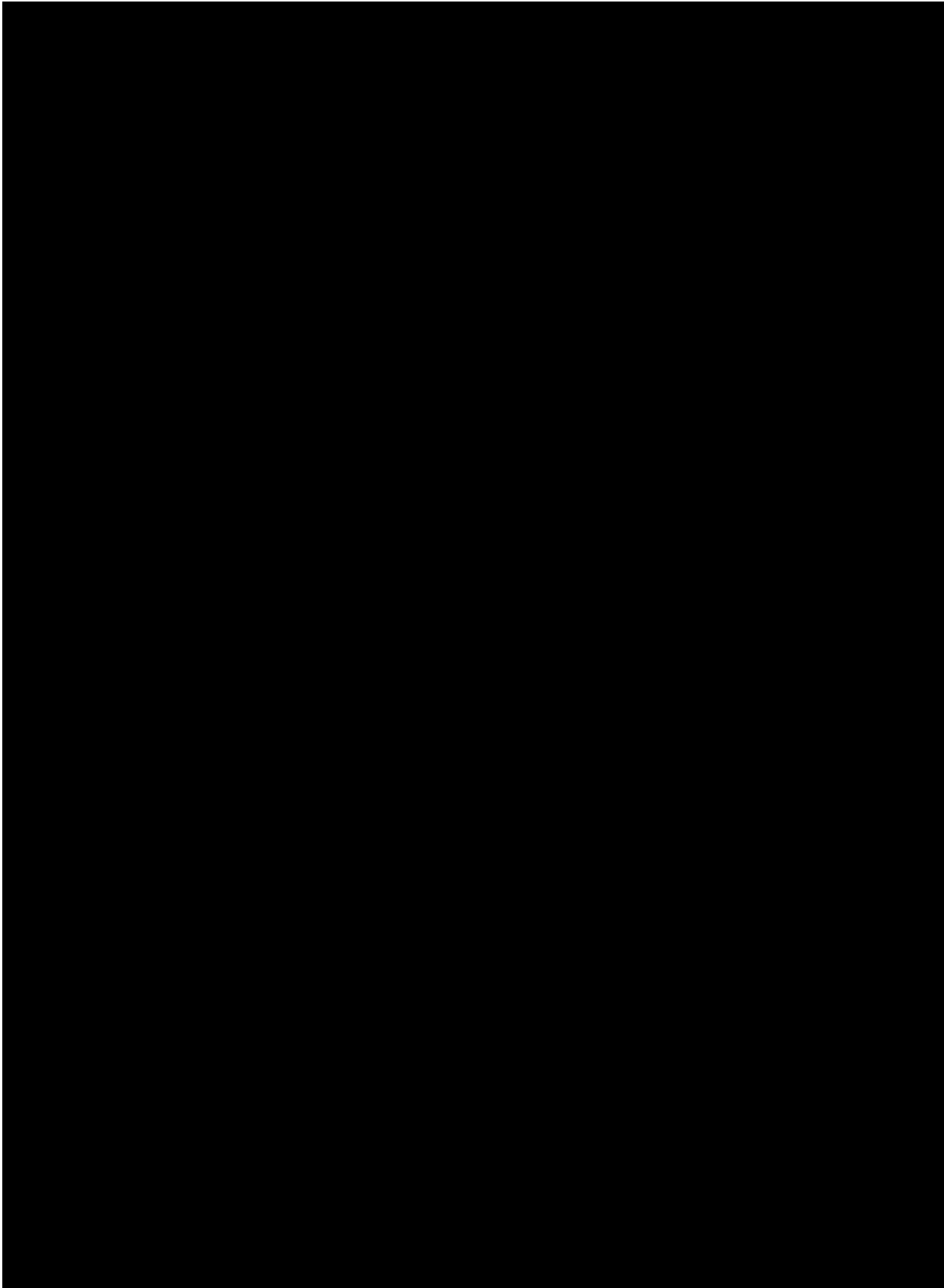
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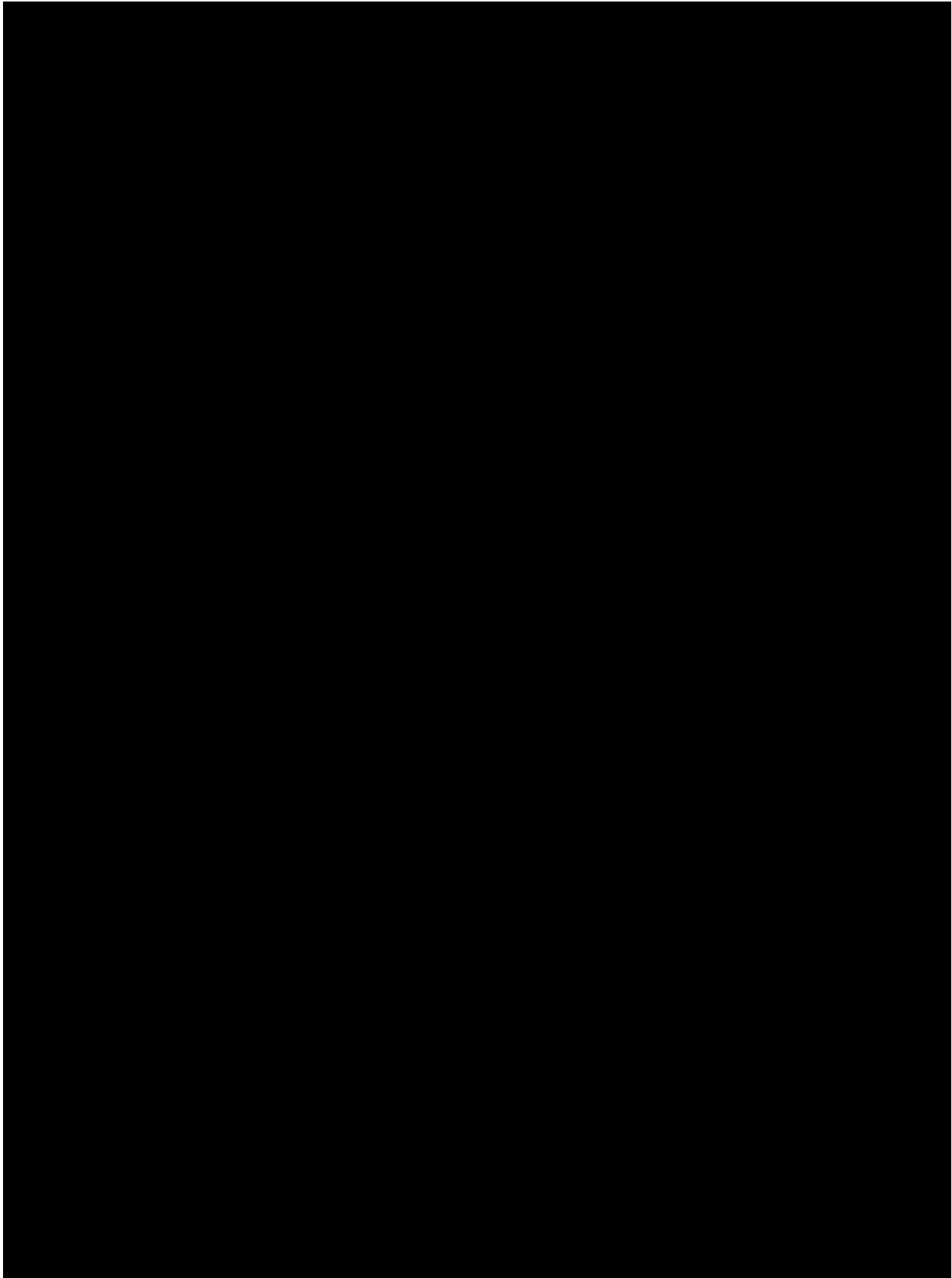
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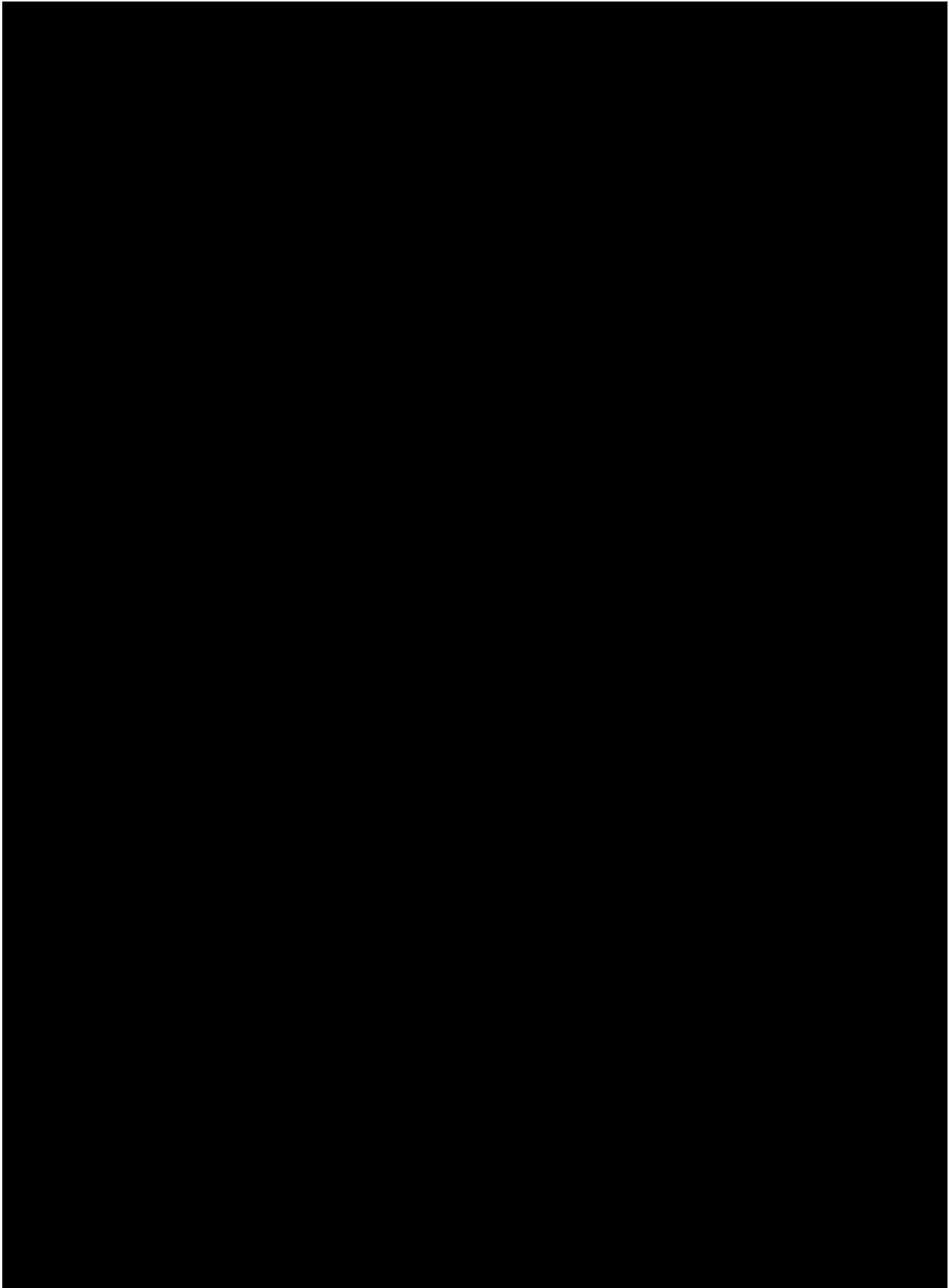
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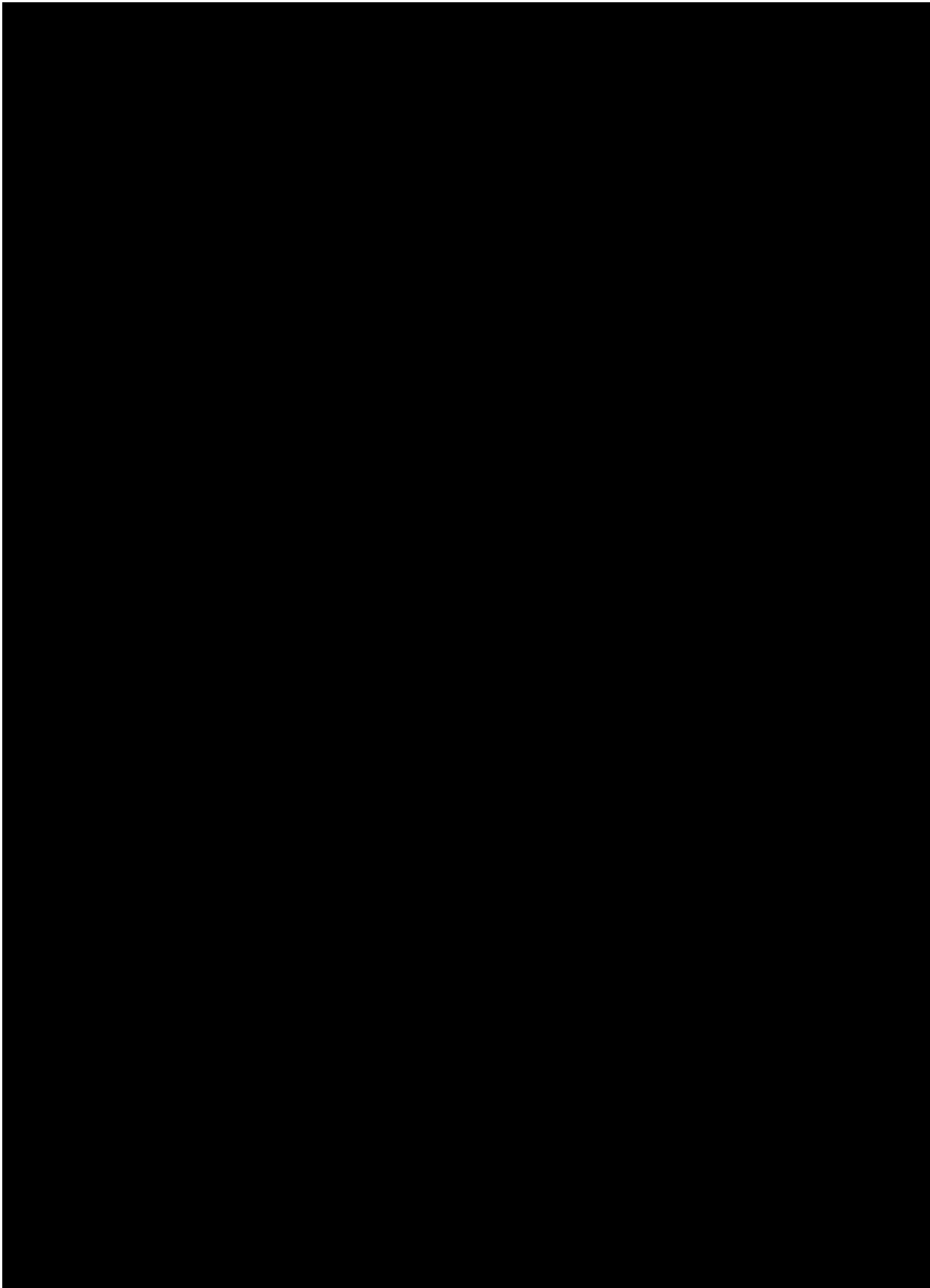
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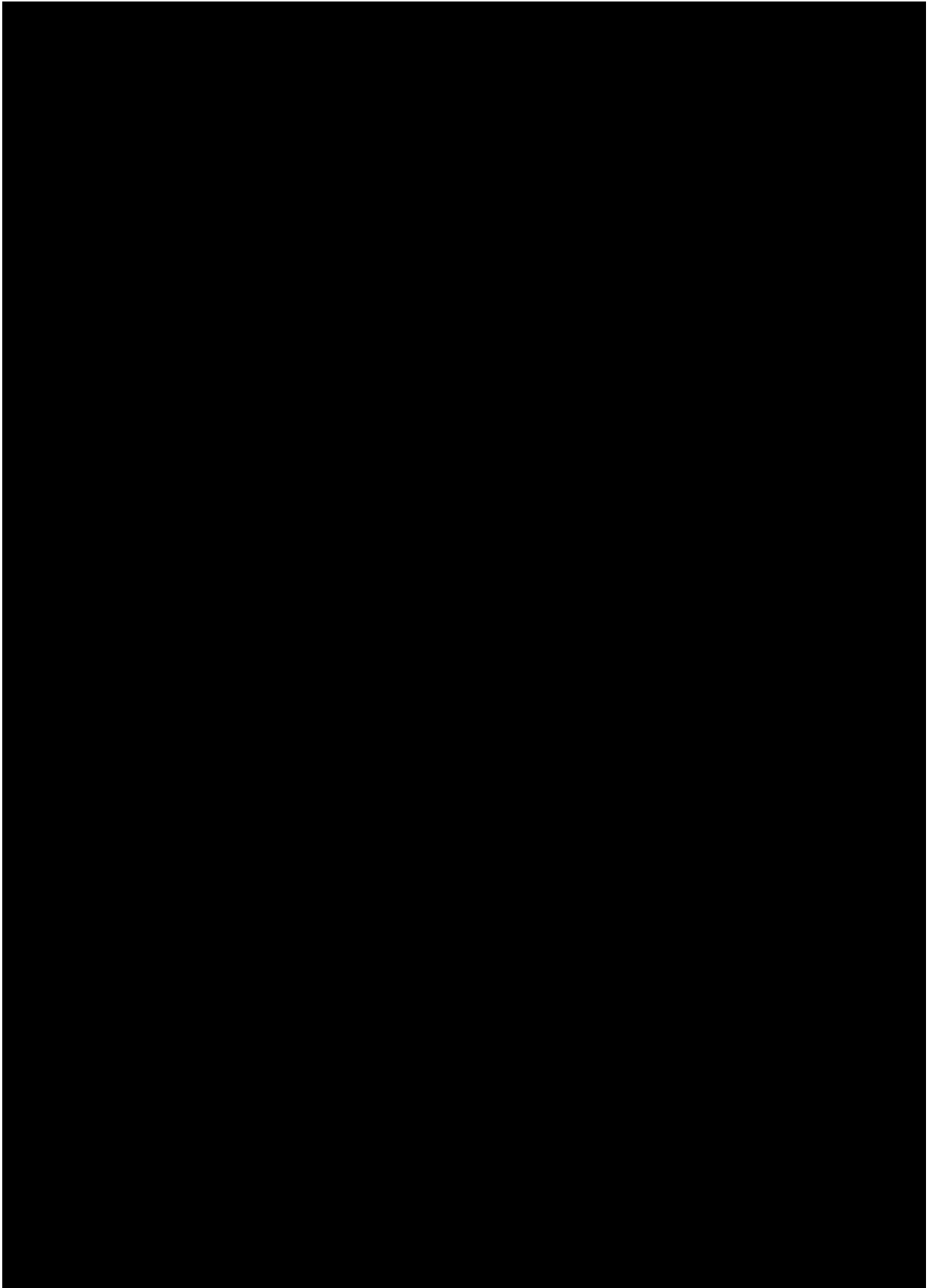
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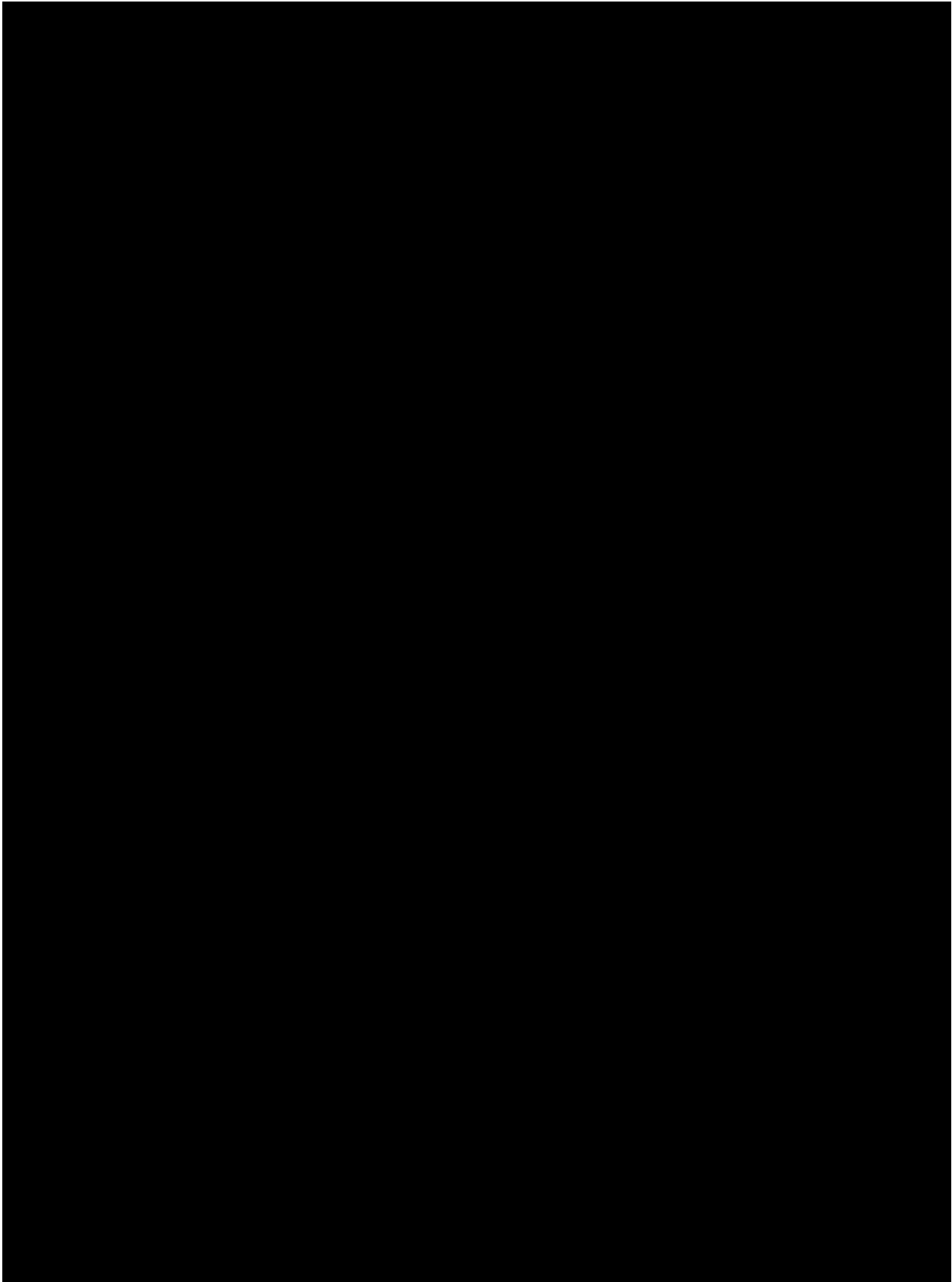
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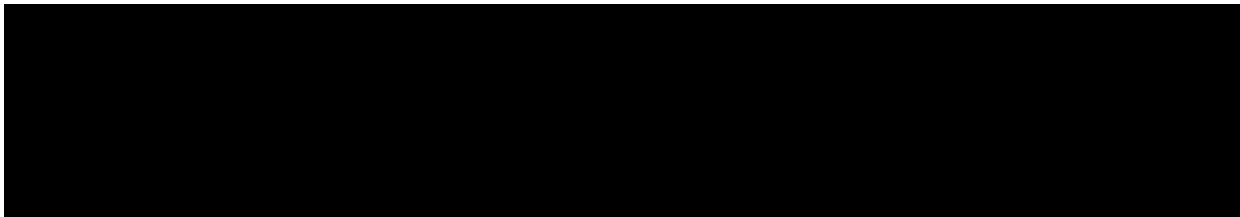
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(End of Attorneys' Eyes Only session.)

1 OPEN SESSION

2 BY MR. SCHERER:

3 Q. Let's move on, Professor Mihai.

4 You understand that the Rosia Montana
5 Project is a large-scale project; correct?

6 A. I confirm that.

7 Q. You're also aware that it has international
8 repercussions over seven countries: Romania, Hungary,
9 Serbia, Montenegro, Bulgaria, Moldova, Ukraine, and
10 Slovakia.

11 A. I'm not aware of there being repercussions.
12 I know there are concerns with regard to possible
13 repercussions.

14 Q. Can you go to Tab 5 in your binder. This is
15 from the Rosia Montana Mining Project.

16 ARBITRATOR DOUGLAS: Sorry. Which exhibit
17 number?

18 MR. SCHERER: Apologies. C-1751. 1751.

19 BY MR. SCHERER:

20 Q. Ministry of Environment website, description
21 of the Rosia Montana Project.

22 If you go to the second paragraph.

1 A. I confirm that I have read the second
2 paragraph.

3 The documentation submitted by the
4 Titleholder includes data sheet and--next to the
5 urbanism certificate, and so on and so forth.

6 It could be the third paragraph.

7 Q. Sorry. Sorry.

8 A. It is the third.

9 Q. Thank you.

10 A. Let me read it, please.

11 It is about sending notifications to States
12 that are possibly affected--potentially affected
13 States, and they are listed.

14 And I am convinced that the States that you
15 mentioned are correct.

16 Q. And would you agree with me that the TAC
17 proceedings should take into consideration the
18 complexity--international repercussions and technical
19 complexity of the Mining Project?

20 Or maybe to simplify my question: Does the
21 complexity of the case have an impact on the TAC
22 procedures--proceedings?

1 A. That is normal. Not only in this situation,
2 it is normal that when a case is--reaches a certain
3 degree of complexity, all the aspects must be taken
4 into consideration globally.

5 Q. In Paragraph 268 of your First Opinion, you
6 write that: "Although there is no legal ground for
7 such approach, one could find it acceptable under the
8 circumstances"--sorry.

9 MR. SCHERER: Are you there? It's the
10 Witness Legal Opinion, Paragraph 268.

11 THE WITNESS: (In Romanian.)

12 BY MR. SCHERER:

13 Q. Can I first ask my question?

14 A. I think I have identified the paragraph.

15 Q. The sentence I am interested in is your
16 statement that "Although there is no legal ground for
17 such approach, one could find it acceptable under the
18 circumstances for the Ministry of Environment to
19 organize more than one TAC meeting to analyze its
20 content."

21 You are not being very generous.

22 Out of curiosity, when you wrote this, were

1 you aware of the volume of the file?

2 Are you now aware of the volume of the file,
3 how many documents were there? The EIA Report, how
4 many documents did it encompass?

5 A. I have tried to follow your question and all
6 its aspects. It is not a reproach, but your question
7 was, indeed, very long. So, please let me go through
8 it stage by stage so that I can answer.

9 First, I need to read the full paragraph, if
10 you agree. I think if you were in my place, you
11 would do the same. I thank you for your
12 understanding.

13 Q. But if you were in my place, you wouldn't
14 allow you to do that. We don't have time.

15 PRESIDENT TERCIER: Okay. Avoid to lose
16 time with such comments.

17 I'm not sure, Professor Mihai, that you need
18 to read everything.

19 Now, you can start and read the four or five
20 lines. I've read the next part. It is possible that
21 you will be further questioned.

22 But if you can just read them, and then you

1 have a short question to which you will give a short
2 answer.

3 THE WITNESS: I understand. That was the
4 sense of my comment. I just want to see what this is
5 about.

6 (Reviewing document.)

7 THE WITNESS: I have read the first part,
8 yes.

9 Could you tell me what your question is, if
10 you don't mind.

11 BY MR. SCHERER:

12 Q. Are you aware how many documents were in the
13 EIA Report--how many pages?

14 A. I do not have the capacity, even if you put
15 a bullet to my head, to memorize that information or
16 to be able to provide an answer to that information. I
17 realize that the volume was huge.

18 PRESIDENT TERCIER: So, your answer is no?

19 THE WITNESS: (In English) The answer is no.

20 BY MR. SCHERER:

21 Q. So, when you wrote this Paragraph 268 and
22 your Legal Opinion in general, you did not know that

1 the EIA Report totaled almost 25,000 pages?

2 But that is correct. You just confirmed it.

3 Would you still say that one meeting
4 is--would you write that sentence again like that?

5 A. So, you are asking me about the first
6 sentence, according to which (in English) "One could
7 find it acceptable under the circumstances for
8 Ministry of Environment to organize more than one
9 TAC."

10 (In Romanian) I uphold what I wrote in that
11 sentence.

12 Q. Are you aware that the Parties were actually
13 in agreement that it would take much more than one
14 meeting?

15 A. I have to confess that I can't remember that
16 particular aspect.

17 Q. Can we go to--

18 A. I don't remember the Parties agreeing about
19 that. That wouldn't be something that I would have
20 to know.

21 Q. If you go to Tab 2 in your binder. And
22 that's Exhibit C-482, that's minutes of a TAC

1 meeting, the transcript of the TAC meeting.

2 And if you read on Page 3 what the Chairman
3 says--the TAC Chairman, the part in the middle where
4 he says: "I think you will agree with us that the
5 load, as obvious--the workload involved by this
6 analysis is huge. There are approximately 18,000
7 pages, as it then was. I think this cannot be
8 completed in one meeting."

9 Have you read that?

10 A. I have read it, yes. I have just read it
11 now.

12 Q. Now, you also say in your First Legal
13 Opinion that the Ministry of Environment must take a
14 decision whether or not to issue the Environmental
15 Permit within ten working days from the date when the
16 TAC consultation process is complete.

17 That is your First Opinion at Paragraph 138.
18 That's what you wrote.

19 So, my question on that, you agree that as
20 long as the TAC process is not completed, this 10-day
21 deadline, if it exists, is not triggered?

22 A. I will answer your question.

1 At 138, at this paragraph, I inform the
2 Arbitration Court, because that is the recipient of
3 the document, about the contents of the legal
4 provisions adopted in Romania from this point of view
5 in the--in this field.

6 It is a matter of language. I'm not sure
7 whether or not the "must" is properly used in this
8 sentence. But the sense is that is always the one
9 used in legal provisions. These are
10 provisions/rules. This is the contents of
11 Article 138.

12 However, I do agree that we can argue about
13 whether or not this deadline needs to be abided by or
14 not. But this is the applicable law. And I am a
15 legal expert, and I provide information from this
16 perspective. There is no inconsistency in
17 Article 138.

18 Q. Sorry. This is not the question. Not the
19 question.

20 My question was whether the deadline was
21 triggered as long as the TAC proceedings are not
22 complete. And you have not answered that, but we

1 move on.

2 You are aware that--

3 A. I can answer your question.

4 Q. Yes or no?

5 A. There is no way I can answer "yes" or "no."

6 I have to say the following: The deadline starts to
7 run as the provisions establish, that it either
8 starts to run when the activities of the CAT (sic),
9 as per the Law, are finalized or from the moment
10 when, according to the Law, after the meeting,
11 written opinions are sent to the Ministry, written
12 opinions that were not voiced during the meeting.

13 If those written opinions are not submitted
14 within the 10 or 15 days' deadline--whatever that is,
15 because I really don't know--then if there are no
16 such written opinions sent within the deadline
17 provided by the law, then it is deemed there are no
18 objections.

19 Q. You are aware that the Rosia Montana Project
20 involves the use of cyanide for the mining process?

21 A. I am aware of that. I didn't need to be an
22 expert to know that. I confirm that I know that--I

1 knew that.

2 Q. You were aware--or you were familiar with
3 the Baia Mare--the Baia Mare cyanide spill in the
4 Year 2000? Do you know what it was?

5 A. I read about it in the press. I'm a
6 Romanian citizen, and I try to stay connected to what
7 happens in my country. And I rely on the press and
8 nothing else.

9 Q. In the press it was noted that it--or it was
10 called that it--called the "worst environmental
11 disaster in Europe since Chernobyl."

12 Would that--

13 A. I'm sorry. Could you repeat the question?

14 Q. It was a catastrophic cyanide spill
15 accident.

16 I'm not asking this as an expert, but as a
17 Romanian citizen. You're aware that this occurred?

18 A. Yes. I--I knew about that, but you added
19 something to that question. You said something about
20 how the press commented on that.

21 In my country, we have free media. My wife
22 is a journalist herself, and I am very well-informed

1 about the freedom of the press in my country.

2 Q. Are you aware that RMGC has never
3 communicated its final proposal to the TAC as to how
4 they wanted to handle the cyanide and transport it to
5 the site?

6 Is that information that you have been
7 provided with?

8 A. No, I did not have that information, but I
9 went through the documents related to the November
10 TAC meeting--I think it was November. I hope I'm not
11 wrong. I know that the Chairman of the TAC, which is
12 a State Secretary, did not mention this thing that
13 you refer to.

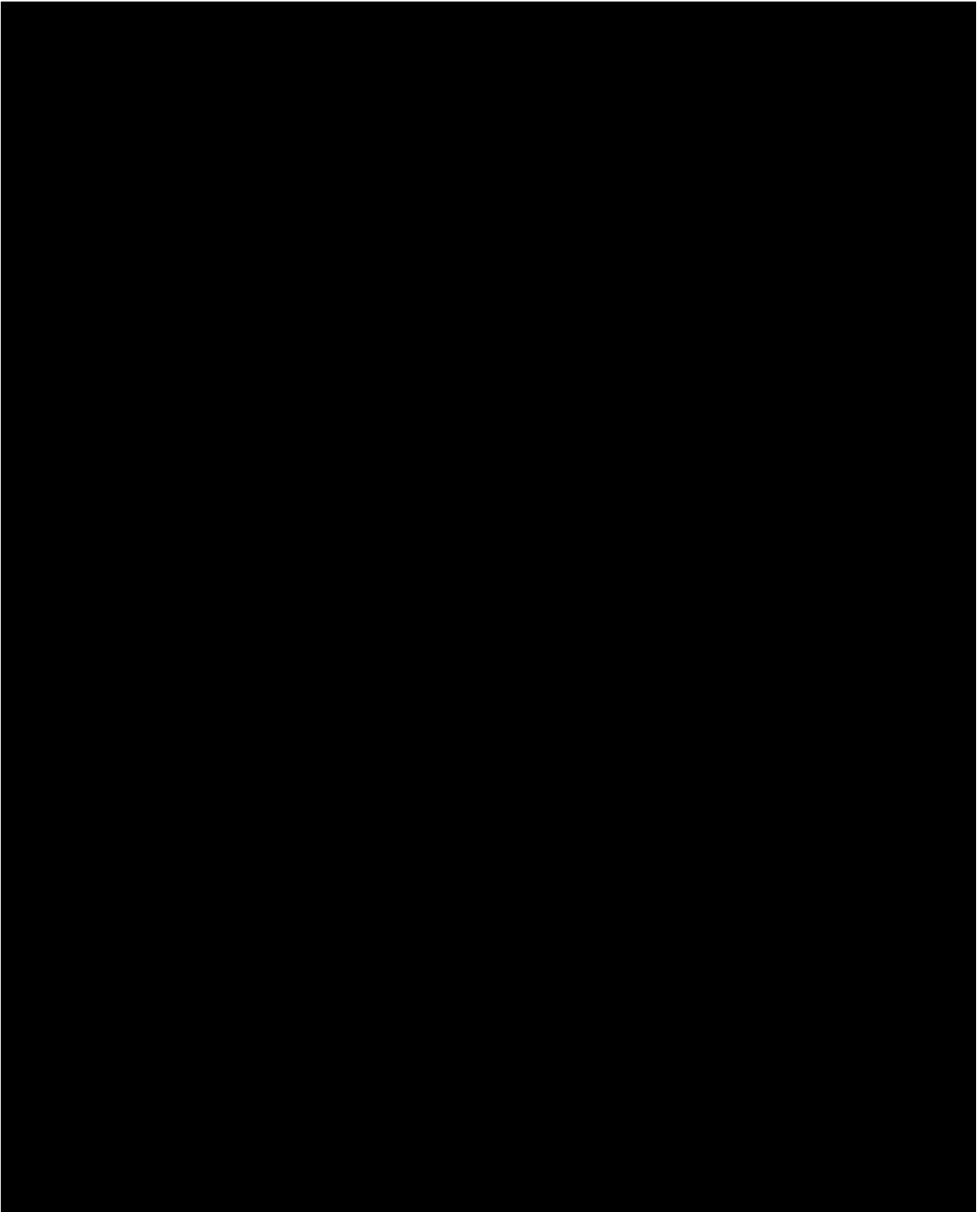
14 I have no other source of information.

15 Q. There is a report in Tab 10. It's C-943 in
16 your bundle.

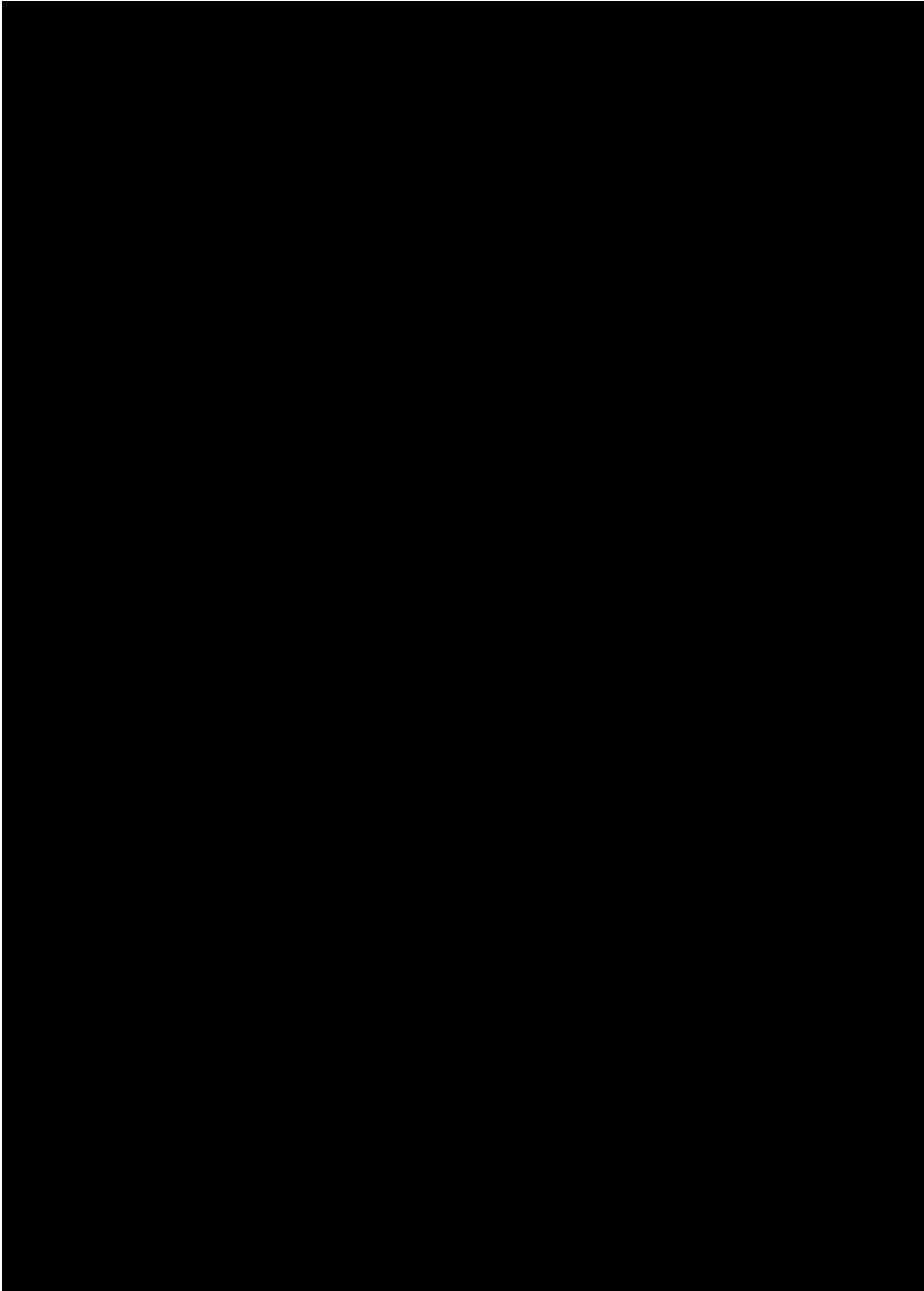
17 (End of open session. Attorneys' Eyes Only
18 information follows.)

ATTORNEYS' EYES ONLY SESSION

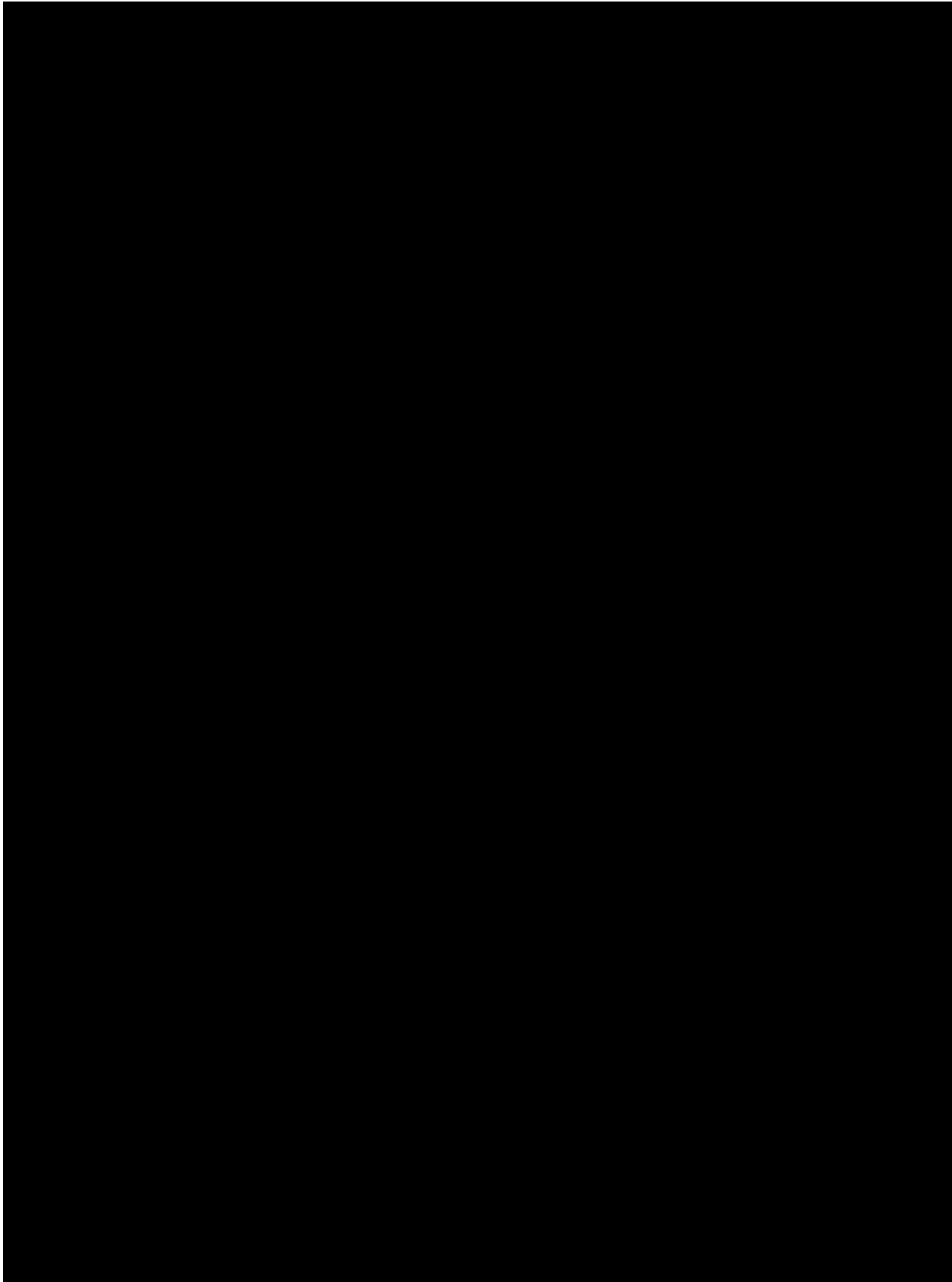
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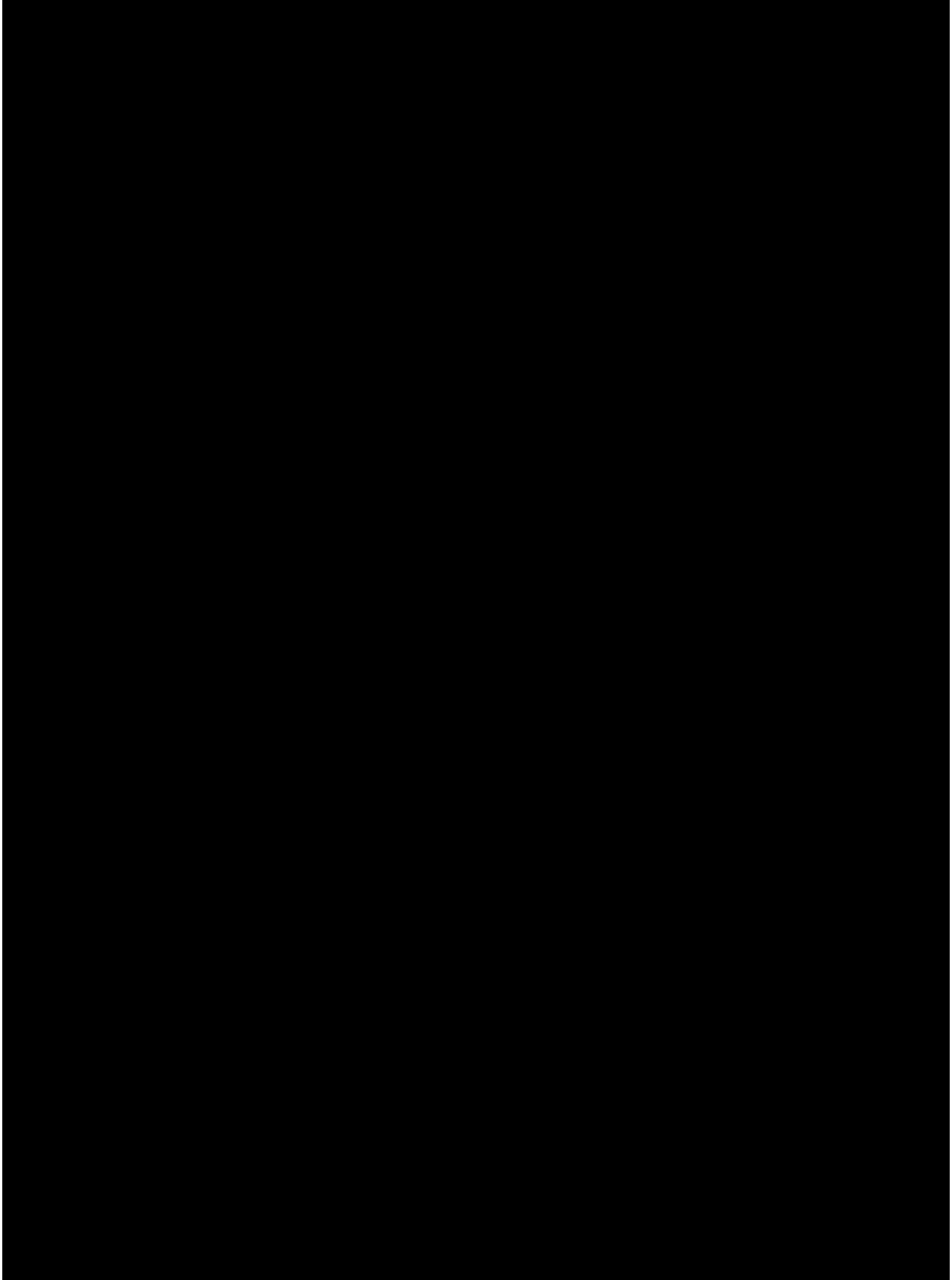
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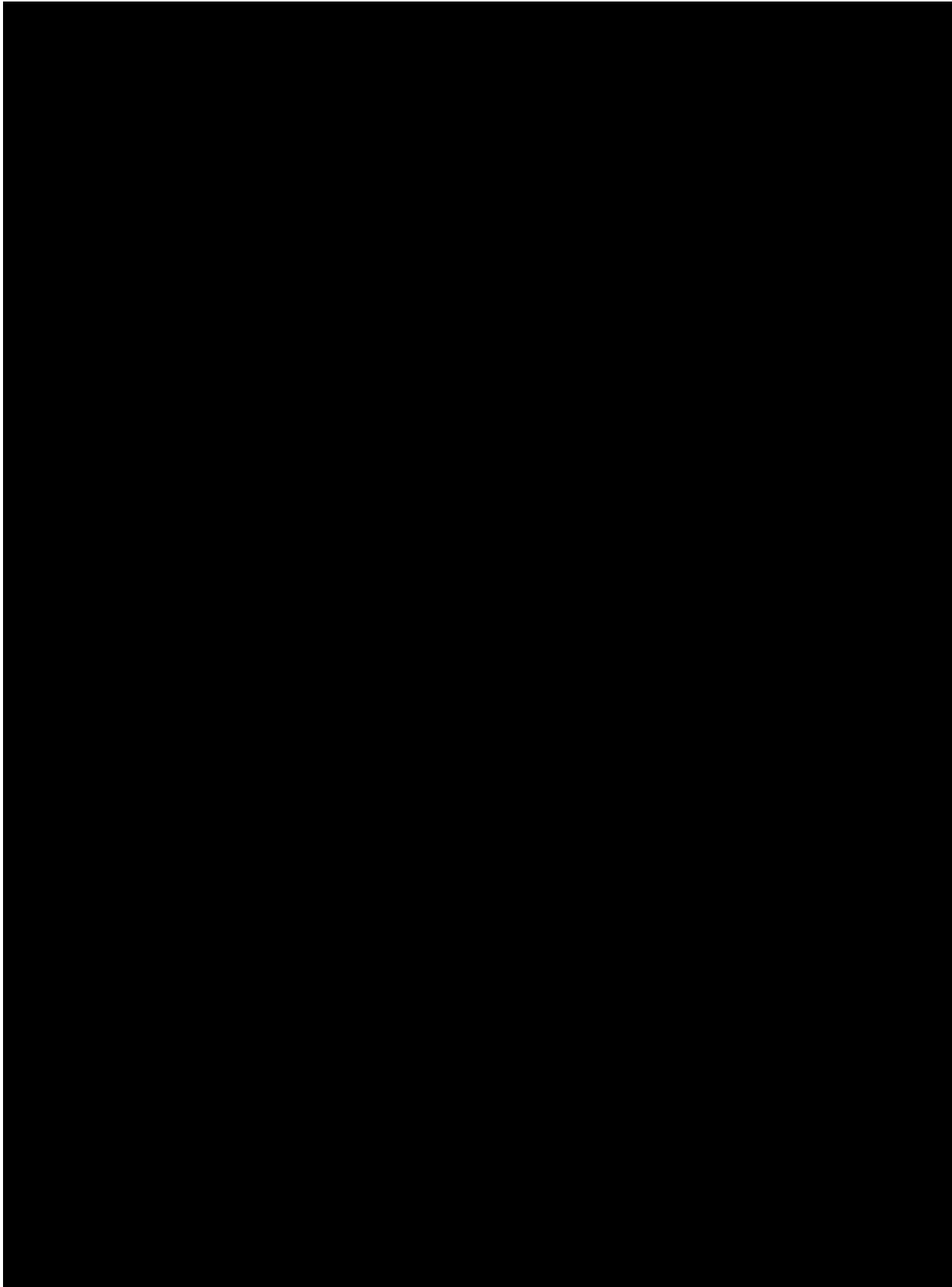
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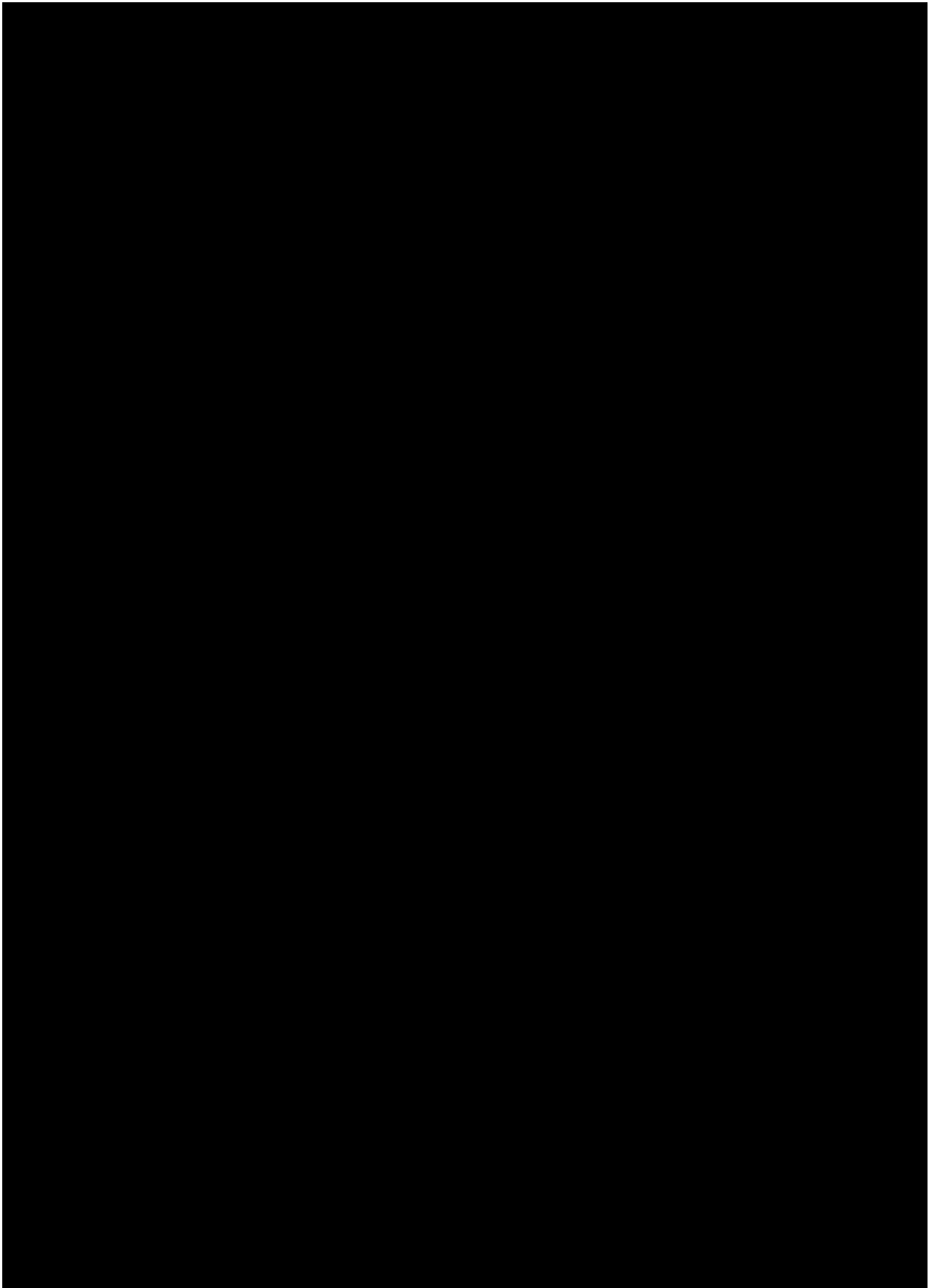
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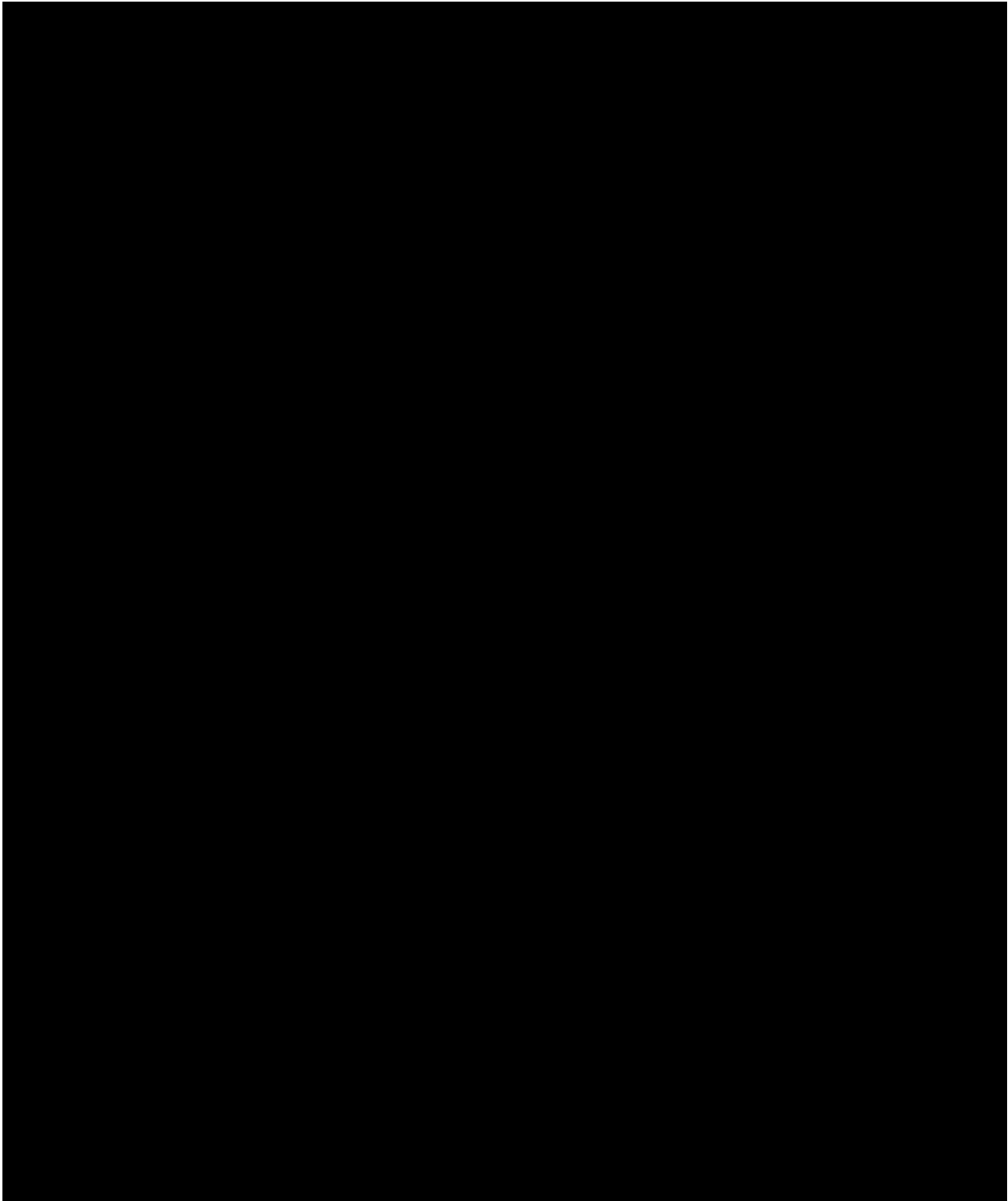
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(End of Attorneys' Eyes Only session.)

1 OPEN SESSION

2 BY MR. SCHERER:

3 Q. I move to an area that you skipped in your
4 Opening--I was very surprised--the Water Management
5 Permit.6 You said, "I don't go there. It's the same
7 as, I think, archeological stuff or something."8 Slide 18. You say there, if I go to
9 Slide 18 of your presentation at the bottom, that the
10 Water Framework Directive was integrated into the EIA
11 Procedure and that the Water Management Permit became
12 a prerequisite for the EP only by Law 292/2018, which
13 came into force in late January of this year, and
14 that it has no retroactivity.15 Now, leaving the legal regime aside, would
16 you agree with me that water is part of our
17 environment?

18 A. It is obvious.

19 Q. And it should be part of any Environmental
20 Impact Analysis?21 A. It is obvious, in the conditions established
22 by the Law and not by the addition of certain

1 conditions because there is a rule of law.

2 MR. SCHERER: Could we have a look at a
3 document? I'm afraid it's not in the bundle because
4 it came up in the presentation. It's C-565, TAC
5 Minutes of June 2010.

6 PRESIDENT TERCIER: Do you have a Romanian
7 version?

8 MR. SCHERER: I don't think so.

9 A Romanian? Yes. Yes.

10 We need to verify that the Romanian version
11 is...

12 Would it be acceptable for you if we show it
13 on the screen?

14 PRESIDENT TERCIER: But do you have a
15 version--a printed version?

16 MR. SCHERER: I do have, but then I cannot
17 ask the question. Or I can ask the question and then
18 give it to him.

19 PRESIDENT TERCIER: Probably the best would
20 be to read, it will be translated, and so he will
21 have it.

22 MR. SCHERER: Yes. This is a TAC meeting of

1 23 June 2010.

2 PRESIDENT TERCIER: You have not in your
3 binder--

4 THE WITNESS: (In English) I understand.

5 PRESIDENT TERCIER: Yeah. You can take
6 notes, yeah.

7 THE WITNESS: (In English) I understand.

8 BY MR. SCHERER:

9 Q. And it says that the department--it's
10 (e)--Paragraph 3(e), at the bottom of the page of the
11 English document.

12 "The department for the arrangement and
13 safety of hydro-technical construction within MMP
14 stated that the Romanian Waters issues the Water
15 Management Permit, and that this regulatory deed, in
16 a chronological interval, is issued following the
17 permit for the safety of dams and before
18 obtaining--the obtaining of the Environmental
19 Permit."

20 So, the Water Management Permit has been
21 mentioned as early as June 2010, and not only in 2018
22 with the new law.

1 Is that correct? Is that your reading of
2 these minutes?

3 A. I say in all good faith that I didn't have
4 the time to put down what was said. I cannot answer.
5 Could you repeat, please. I do not understand
6 otherwise.

7 PRESIDENT TERCIER: May I ask a question
8 again?

9 You tell us that the legal enactment is not
10 applicable in the case at hand, is retroactively
11 prohibited under the Romanian Constitution. This is
12 in line with the Water Framework Directive of the EC.

13 Okay. So, we leave it by the side.

14 So, what was before? And the question is:
15 How far is it necessary for the TAC also to consider
16 the question linked with the water and possible water
17 pollution?

18 You had a basis for that or not? And the
19 question that is asked by counsel is showing you the
20 minutes of a TAC meeting of 2010, but there were
21 already assessments made in connection with this
22 site.

1 So, what is your position/your reaction?

2 THE WITNESS: This is new information. I
3 must say it from the beginning.

4 Under the circumstances, as a legal expert,
5 I know that the Water Management Plan is a document
6 that should review all these aspects, but it is
7 necessary in order to issue a Building Permit. I
8 wrote that in my presentation - it is true that I
9 didn't read that, but it was random, it could have
10 been something else that I did not read, it was not
11 in bad-faith. But what I know as a legal expert is
12 that before 2018, when the--not the Directive, but
13 the transposition law came into force in Romania, the
14 only enactment in this field was Article 49 of the
15 Waters Law saying that the Water Management Plan
16 represents a condition for the issuance of the
17 Building Permit.

18 I don't exclude the possibility, however,
19 that in the TAC meeting, members have addressed this
20 issue because there, there are technical people,
21 people who are well informed. There was at least a
22 draft directive back then. And it is possible that

1 the members in the TAC could have been aware of this
2 draft piece of legislation and that might have
3 sparked that discussion. But de lege lata is only
4 this article.

5 BY MR. SCHERER:

6 Q. You say that you haven't read it, but you do
7 mention it in your First Legal Opinion. In
8 Footnote 47, you do refer to this Document C-565.
9 There may be other places, but that's the one I just
10 saw.

11 You mentioned--

12 PRESIDENT TERCIER: Let him--

13 MR. SCHERER: Sorry.

14 PRESIDENT TERCIER: --check it.

15 BY MR. SCHERER:

16 Q. I'm told it's also in Footnote 114 of the
17 same document.

18 A. (In English) I am reading 94--Paragraph 94
19 in the--this paragraph.

20 (In Romanian) I'm reading Paragraph 94 from
21 the First Legal Opinion. I understood that you
22 referred to the footnote from there. Which footnote

1 it is--footnote it is? Because in 94, I can see
2 nothing. Perhaps you can tell me the number of the
3 footnote.

4 (In English) Okay. Thank you. Okay. I
5 understand it's the minutes--it is the Board--

6 (In Romanian) It is about the minutes from
7 the 23rd of June 2010, which--to which this footnote
8 refers.

9 Q. Yes. That is the document you said you
10 hadn't read. That's all I wanted to confirm.

11 Can we move on?

12 A. You said it was not included in the file.

13 Q. I didn't--

14 A. (In English) No, no, no.

15 Q. I didn't mean to mislead you. It wasn't
16 included in the binder that you had. And I
17 apologize.

18 Cernavoda, you mentioned, is the nuclear
19 power plant, the only other EIA Process that was
20 conducted in Romania at the national level by the
21 Ministry of Environment.

22 Are you aware that a Water Management Permit

1 was required there too, and that was well before the
2 Law that came into force this year?

3 A. I'm aware of that.

4 Q. Are you aware that this Water Management
5 Permit was obtained prior to the issuance of the
6 Cernavoda EP, Environmental Permit?

7 A. I'm not aware of that. I should have been
8 involved, but I was not.

9 Q. Now, if you forget about the Water
10 Management Permit, which you say was not a
11 requirement, but we have seen that it was
12 nevertheless demanded--forget about that.

13 You do not dispute that RMGC had to comply
14 with the EU Water Framework Directive? That is
15 recognized?

16 PRESIDENT TERCIER: You must say "yes" or
17 "no" for the transcript.

18 BY MR. SCHERER:

19 Q. Do you agree that RMGC, when they applied
20 for the EP in the TAC process, had to comply with
21 EU Water--with the EU Water Framework Directive?

22 A. The Water Framework Directive cannot apply

1 as such in Romania, not before it is transposed
2 through national legislation, generally through a
3 law.

4 Of course, Framework Directive can be
5 applied directly, but these are exceptions that do
6 not work under these circumstances.

7 What is important is that in the Romanian
8 positive law, de lege lata, such provisions did not
9 exist. Of course, this endorsement could have been
10 obtained before, but this is not an obligation. It
11 is nice to have it, so to speak. It would be a good
12 thing to have it.

13 It does--the fact of bringing it earlier
14 does not represent a violation of the Law, but there
15 is no violation of the Law if it is not brought
16 earlier.

17 Q. Are we speaking about the same things?
18 There are two different things. There's the Water
19 Management Permit, and there's the EU Water Framework
20 Directive.

21 Are you saying that Romania could have
22 issued or any authority in Romania could have issued

1 an EIA, an EP, an Environmental Permit, without
2 respecting the EU Water Framework Directive? Is that
3 your--that would be surprising?

4 A. It is the rule of law. The Directive,
5 according to the Treaty--and the Treaty is mandatory
6 for Romania after it was signed--must be transposed
7 in national legislation. There are deadlines as per
8 the Directive or granted by the competent bodies of
9 the EU.

10 There is no obligation to necessarily apply
11 a directive which has not been transposed, as there
12 is no punishable breach in case it is applied--it is
13 applied earlier provided the internal Norms or the
14 internal provisions are not breached.

15 So, a directive should be transposed in the
16 national legislation, and this is the essential
17 difference between a regulation and a directive
18 because regulations are applied directly whereas
19 directives should be transposed.

20 Q. Could--

21 A. It is even illegal to directly enforce a
22 directive before it was transposed in the national

1 legislation.

2 Q. Can I show you--I hope this will be the last
3 document--Document R-545. It is not in your binder
4 that we have given to you, but we will find a copy
5 for you.

6 PRESIDENT TERCIER: And if you need to have
7 a translation, we can ask our secretary or somebody
8 to translate it.

9 MR. SCHERER: Do you have four pages? Then
10 the last two should be the translation.

11 PRESIDENT TERCIER: Translation or the
12 original?

13 THE WITNESS: I confirm that there is a
14 document in Romanian there.

15 BY MR. SCHERER:

16 Q. So, if you--this is the Environmental--the
17 Ministry of Environment writing to the Ministry of
18 External Affairs. And it concerns the European
19 Commission's request for information concerning the
20 implementation of the Water Framework Directive in
21 the case of the Rosia Montana Project, R-545.

22 PRESIDENT TERCIER: Take the time to read

1 it.

2 BY MR. SCHERER:

3 Q. You may want to read the second paragraph.
4 The document is dated the 25th of
5 February 2014.

6 A. I have read this document briefly.

7 Q. So, the Waters Law as subsequently amended,
8 would that transpose the Water Framework Directive?

9 A. I apologize. I have not understood the
10 question.

11 Q. You said the European Directive was not
12 transposed into Romanian law before 2019, if I
13 understood you correctly.

14 Is that still your position?

15 A. As far as I know, the directive was formally
16 implemented through the Law from 2018. This is what
17 happens when a directive is transposed into Romanian
18 legislation. The Romanian enactment would mention
19 that this is a transposition of the directive. And
20 there was such a mention in that case.

21 Q. Okay. The Ministry of Environment writes
22 here in the middle: "In this regard, any project

1 which is to be executed on water or which is
2 connected with water must obtain a Water Management
3 Permit issued based on a documentation prepared,
4 according to the legal norms, by the 'Romanian
5 Waters' National Administration. Within this permit,
6 all conditions related to water use and protection
7 are set forth, including those referring to meeting
8 and/or following the objectives of the Water
9 Directive. And...up to present, no documentation for
10 issuing the Water Management Permit for the Rosia
11 Montana Project has been submitted."

12 So, this would confirm that (A) a water--(A)
13 there was no documentation submitted yet by RMGC, but
14 that such documentation was required to issue a Water
15 Management Permit.

16 Is that a correct reading of this letter?

17 A. First of all, we have to specify that this
18 is a letter from the Ministry of Foreign Affairs. I
19 happen to know the people who were involved in this.

20 Second of all--

21 Q. It is not. I'm sorry. It is not.

22 PRESIDENT TERCIER: It's to the Ministry of

1 Foreign Affairs.

2 THE WITNESS: (In English) Sorry. Yes. You
3 are right.

4 (In Romanian) I apologize. You are right.
5 My mistake. It is a letter from the Ministry of
6 Environment to the Ministry of Foreign Affairs, Mr.
7 Răzvan Horațiu Radu.

8 The Ministry relies or bases its statements
9 on the Waters--Water Law from 1996. This is before
10 the transposition of the Directive into Romanian law.

11 And that point in time, in 2014, the
12 provisions of the Waters Law that this letter refers
13 to--the provisions that are the legal grounds for
14 this letter are these that I have mentioned in the
15 summary and in my opinion, Article 49, Paragraph 3 of
16 the Law of Waters.

17 To get the permit--getting the permit is
18 necessary--it's required to get the Building Permit.
19 There were no other provisions in the Waters
20 Management Law but this one. And those provisions
21 which were subsequently introduced in the Romanian
22 Law after the transpositions of the Water Framework

1 Directive did not exist in that law at the time.

2 The sense of this provision is that the
3 Water Management Permit must be issued and used no
4 later than the date when the Application is filed
5 requesting the Building Permit. This is the sense of
6 it, the meaning of it.

7 And the people from the Ministry of
8 Environment requested this. They said: "Please
9 enforce the existing provisions of the Waters Law
10 when it comes to the Water Management Permit," but
11 there was no obligation to submit that permit in
12 order to--in order for the Environmental Permit to be
13 issued, but only for the construction--the Building
14 Permit.

15 PRESIDENT TERCIER: I have one or two
16 questions in order to understand.

17 In your PowerPoint presentation at Page 18,
18 you quote Article 49(3) of the Waters Law.

19 Is it the one from 1996?

20 THE WITNESS: Yes.

21 PRESIDENT TERCIER: Which is a--it is the
22 same as the Law that is quoted in the first line of

1 the document that you have in front of you.

2 You have it? Waters Law.

3 THE WITNESS: I confirm. That was my
4 thinking.

5 PRESIDENT TERCIER: Okay. Good.

6 But here it is stated that: "This law,
7 a law by which the stipulation of the
8 Directive 2000/60/CE for establishing of Water
9 Framework Directive," so forth.

10 Apparently, this first directive has been
11 implemented by the 1996 Waters Law.

12 THE WITNESS: I must confess that I will
13 need to check that, if you'll allow me.

14 The Water Framework Directive was integrated
15 in the assessment proceeding via the 2018 Law in the
16 sense that the Water Management Permit became--
17 started to be required based on the 2018 law for the
18 Environmental Permit to be issued.

19 Because in 2018, an integration of the
20 verification of all the conditions took place. So,
21 all the criteria were introduced in 2018.

22 PRESIDENT TERCIER: Okay. I'm having a bit

1 of difficulty to understand the link with what is in
2 this passage.

3 But I have a second question, but this is an
4 ancillary question. What are the Minister of Foreign
5 Affairs doing in this--in this letter? We had a lot
6 of ministers, but now we have also the Ministry of
7 Foreign Affairs.

8 MR. SCHERER: Yes. Interesting. If you
9 look at the first paragraph, at the R-545, this
10 concerns information requested by the European
11 Commission. And, of course, the European Commission
12 communicates with the Ministry of Foreign Affairs and
13 not with the Environmental Ministry.

14 The European Commission was concerned about
15 the implementation of the Water Framework Directive
16 in the case of the Rosia Montana Project. That was
17 their concern.

18 PRESIDENT TERCIER: Okay.

19 MR. SCHERER: And they got back.

20 I've got a whole bunch of questions, but
21 I--last one.

22 BY MR. SCHERER:

1 Q. You would agree that the Ministry of
2 Environment has nothing to do with the Building
3 Permit?

4 A. The Ministry of the Environment has at least
5 one thing to do in connection with the Building
6 Permit because the Environmental Permit is one of the
7 several documents to be submitted when the
8 Application is filed to obtain the Building Permit.

9 PRESIDENT TERCIER: Okay.

10 MR. SCHERER: Thank you, Professor.

11 PRESIDENT TERCIER: Thank you, Mr. Scherer.
12 Mrs. Zigmund?

13 MS. COHEN SMUTNY: Can we just confer for a
14 few minutes?

15 PRESIDENT TERCIER: Okay.

16 (Pause.)

17 MS. COHEN SMUTNY: We have no questions.

18 PRESIDENT TERCIER: Thank you very much.

19 Do you have a question on this side? No?

20 You have a question?

21 QUESTIONS FROM THE TRIBUNAL

22 ARBITRATOR DOUGLAS: Good afternoon,

1 Professor. I have a few questions on a topic that
2 didn't come up, actually. It's--as you know, it's a
3 professor's job to be interested in things that no
4 one else is interested in, so . . .

5 Paragraph 418 of your Second Report.

6 And just so you have a bit of background
7 here, you're describing a Constitutional Court
8 Decision--it may have been one of yours; I don't
9 know--which stands for the proposition--you see that
10 you summarized the proposition just before
11 Paragraph 419, which is that a Parliamentary
12 Commission that takes over the decisional role of the
13 Parliament would be unconstitutional.

14 And then you get into your discussion about
15 the Joint Special Commission that was appointed to
16 review the Draft Law. And it's your conclusion that
17 what happened with the Joint Special Commission was
18 unconstitutional. I just wanted to ask you a few
19 questions about that.

20 You say in Paragraph 419 that it stripped
21 the Parliament as a whole of its decisional role.
22 And you have a few points that you make in relation

1 to that.

2 In Paragraph 420, you say: "First, the
3 Joint Special Commission arranged for the highest
4 degree of publicity, ensuring that almost two months
5 of meetings were broadcasted on national television."

6 And then at the bottom of 421: it issued a
7 report opposing the Draft Law, usurped the role of
8 Parliament as a whole, publicly delegitimized a
9 decision that by law was for the Government to make.

10 And then you talk in the next paragraph
11 about creating a public expectation that the Joint
12 Special Commission's conclusions were final for the
13 legislative process.

14 I just wanted to know, as from a legal
15 perspective--I understand that this process may have
16 had all sorts of political consequences, but just
17 from a legal perspective, how were these things
18 usurping the role of Parliament in an
19 unconstitutional sense?

20 THE WITNESS: I thank you for that question.

21 First of all, this is not a decision that I
22 signed myself, but it is a decision of the

1 Constitutional Court, and I happen to agree with its
2 contents.

3 This was about a legislative initiative
4 about a Draft Law submitted to Parliament by the
5 Government of Romania that, according to the
6 Constitution, it is entitled to propose to Parliament
7 the adoption of a law according to the project that
8 is submitted, the draft that it submitted.

9 According to the Parliament's regulation, we
10 have bicameral Parliament, but the same goes for both
11 chambers. This Draft Law has to go through a process
12 that involves the analysis of that Draft Law in
13 Parliamentary committees, committees composed of
14 members of the Parliament specialized in those areas,
15 and commissions draft reports. There can be one or
16 several committees.

17 The reports issued by the commission, these
18 are taken into consideration by the plenary of the
19 Parliament that carries the Draft Law or amends it or
20 rejects it.

21 The role of these Parliamentary committees
22 is to work on the contents of the Draft Law. The

1 role played by these committees is to spend time in
2 their offices, their members, that is, and carefully
3 look at the document that represents the Draft Law.

4 However--but, first, I have to say that
5 exceptionally, a committee was set up--a special
6 committee was set up. We did not have the permanent
7 committees look at that issue. But a special
8 committee was formed with members of the Parliament
9 to look at this Draft Law because the issue was
10 deemed to be very special and complex.

11 Anyhow, this committee had the role to
12 review the Draft Law. The regulations of the
13 Parliament also set out the possibility to establish
14 inquiry Parliamentary committees for a particular
15 aspect in the life of the country.

16 Those committees--

17 ARBITRATOR DOUGLAS: Sorry. I don't want to
18 interrupt. The President is going to get very upset
19 with me if this takes too long.

20 THE WITNESS: He's a professor.

21 ARBITRATOR DOUGLAS: I just want to get to
22 the crux of the point, which is--and this is at

1 Paragraph 427 of your opinion.

2 You say that the Joint Special Commission
3 negative--had a negative endorsement of the Draft
4 Law, and the nature--that's, by law, the nature of a
5 recommendation without binding effects. And then the
6 Government--sorry--the Parliament voted on that and
7 rejected the Draft Law.

8 And I'm just--the point I'm not quite
9 following is if Parliament voted on something and
10 they voted to reject something, how has the Joint
11 Special Commission usurped the role of Parliament if
12 ultimately Parliament decides whether or not to vote
13 in favor or against?

14 I mean, presumably it was open to them to
15 vote against as it was to vote in favor. So, how is
16 the Joint Special Commission taking away the right of
17 Parliament in that constitutional sense?

18 THE WITNESS: I understand, and I will try
19 to be very brief.

20 The Parliamentary Commission is part of the
21 Parliament. It is the Parliament. But, indeed,
22 there has to be a distinction between the

1 Parliamentary Commission and the plenum of the
2 Parliament.

3 The second issue. This Parliamentary
4 Commission, instead of examining the Draft Law,
5 started to conduct an investigation activity
6 concerning matters that are not within the remit of
7 the Parliament in general.

8 The Parliament has a legislative function.
9 It does not have the function to investigate, except
10 for situations when Parliamentary investigation
11 commissions are established. But we are not in this
12 situation.

13 In fact, they conducted an investigation.
14 They did not review the Draft Law. In their
15 investigations, they also traveled on-site. They
16 went on-site to see for themselves what was going on.

17 But this investigation cannot be part of the
18 Parliament's remit. It's an administrative remit.
19 It's within the competence of the administration, of
20 the ministries, of the Government, of the executive
21 branch.

22 ARBITRATOR DOUGLAS: So, it sounds like the

1 Commission traversed the exclusive domain of the
2 executive, not that the Commission usurped the power
3 of Parliament. It sounds like you're saying they're
4 stepping on the shoes of the executive.

5 THE WITNESS: The Commission set the tone.
6 It's true. First of all, the Government shouldn't
7 have sent such a Draft Law to Parliament because
8 these were matters pertaining to the executive
9 competence, so there was no need for a law to solve
10 these matters. There were enough provisions in the
11 Law to be enforced further.

12 ARBITRATOR DOUGLAS: Just on that point, was
13 it unconstitutional for the Government to send a
14 Draft Law to Parliament?

15 THE WITNESS: That's a very difficult
16 question. After all, it is like that because we have
17 the separation of powers in the State. And here
18 there is disregard--and I'm not saying breach--a
19 disregard of the separation of powers in the State.

20 In any case, there was no need for a law to
21 solve a problem that was already regulated through
22 the Romanian legislation and that was in the

1 competence of the executive power.

2 ARBITRATOR DOUGLAS: Thank you very much.

3 PRESIDENT TERCIER: Good. In that case,
4 Professor Mihai, I would like to thank you for your
5 testimony. His testimony is now over.

6 THE WITNESS: Thank you, President, and I
7 would also like to thank the arbitrators.

8 PRESIDENT TERCIER: Thank you.

9 (Witness steps down.)

10 PRESIDENT TERCIER: I'd like to take ten
11 minutes, if possible. I think we should introduce a
12 further break, especially for the court reporters and
13 interpreters later on.

14 And Mr. Schiau is here. I checked my
15 pronunciation. Not too bad. I hope so.

16 (Brief recess.)

17 IOAN SCHIAU, CLAIMANTS' WITNESS, CALLED

18 PRESIDENT TERCIER: Good afternoon,
19 Professor Schiau.

20 THE WITNESS: Good afternoon.

21 PRESIDENT TERCIER: You're ready?

22 THE WITNESS: Quite.

1 PRESIDENT TERCIER: Certainly you are.

2 And on your side, Claimants, you're ready?

3 MS. COHEN SMUTNY: Yes, we are.

4 PRESIDENT TERCIER: And the Respondent's
5 side, and the Court Reporter and the Interpreters.

6 Well, we may start.

7 Good afternoon, Professor Schiau. I welcome
8 you in this Hearing. I start with the question of
9 the language. I've been told that you will testify
10 in Romanian; am I right?

11 THE WITNESS: (in English) Yes,
12 Mr. President.

13 PRESIDENT TERCIER: Okay. Do you understand
14 English? Do you read English?

15 THE WITNESS: Yes, yes.

16 PRESIDENT TERCIER: You do it. Okay. But
17 you prefer to testify in English?

18 THE WITNESS: Yes.

19 PRESIDENT TERCIER: Which is your right.

20 Good.

21 I would just introduce to you the Members of
22 the Tribunal, my left-hand side, Professor Horacio

1 Grigera Naón; on my right-hand side, Professor
2 Zachary Douglas; we have the Secretary to our
3 Tribunal Ms. Marzal Yetano, and the Assistant of the
4 Tribunal, Ms. Athanasiou. And again, I assume you
5 know who are on each side of the room. You will be
6 heard as an expert. I would invite you first to
7 read, and I'm sure you know English sufficiently to
8 understand, the form that is before you.

9 THE WITNESS: I solemnly declare upon my
10 honor and conscience that my statement will be in
11 accordance with my sincere belief.

12 PRESIDENT TERCIER: Thank you.

13 You have prepared for this procedure two
14 legal opinions, the first on heritage law issues
15 related to the Rosia Montana Project dated 30th of
16 June 2017, and the second dated 2nd of November 2018.

17 You have these two documents in front of
18 you.

19 THE WITNESS: Yes, Mr. President.

20 PRESIDENT TERCIER: Can you confirm the
21 contents of these documents or you wish to make
22 amendments?

1 THE WITNESS: I confirm the content of these
2 documents.

3 PRESIDENT TERCIER: Okay. You know how the
4 procedure will be conducted. I will ask you my
5 traditional introductory question. Then you will
6 have the floor for a maximum of half an hour to
7 present the main conclusion of your Legal Opinions,
8 and then it will be up to counsel for Respondent to
9 cross-examine you, and there will be, if need be, the
10 redirect. The Members of the Tribunal have the right
11 to ask questions whenever they wish.

12 Is it clear?

13 THE WITNESS: Yes, I understand that.

14 PRESIDENT TERCIER: Good. And there are two
15 questions--two small points that might be of
16 importance concerning the Transcript. First, please
17 avoid to speak at the same time as another person--to
18 avoid overlapping--and, secondly, to answer--to wait
19 three or four seconds before answering a question so
20 to give to the Interpreters the time to finish a
21 sentence of the translation.

22 Is that clear?

1 THE WITNESS: Yes.

2 PRESIDENT TERCIER: Okay. Thank you.

3 My first question to you is to, just as a
4 civil person, to introduce yourself shortly with your
5 background, and what is your current activity, what
6 has been your activities and specialties. Please.

7 THE WITNESS: (In Romanian) Mr. President,
8 Arbitrators, I am a professor of law, and a doctor in
9 law. I am a professor of law at the Law Faculty of
10 the Transylvania University of Braşov; that's a
11 historical Province of my country.

12 And I am teaching commercial law,
13 international trade law, insolvency law, and some
14 subject matters at master level relating to European
15 law.

16 As regards all these topics, I have written
17 several books, several studies, and I also submitted
18 opinions before national and international courts and
19 also before the Arbitration Tribunals established
20 under the aegis of the Paris ICC.

21 I am also a practitioner of law, I'm an
22 attorney-at-law. In the same areas, in particular in

1 the area of private law, but also other fields
2 working as an attorney-at-law and being in charge
3 with the Management of the law firm that I direct.

4 I was an expert in several international
5 projects funded by the World Bank and the European
6 Commission, and I am also an arbitrator and a
7 Chairman of the Court of Arbitration in my native
8 town of Braşov. And I'm also a member of several
9 other arbitration courts.

10 I participated in several arbitrations as an
11 arbitrator or attorney, and even arbitrations under
12 the aegis of the International Arbitration Court in
13 Paris.

14 I believe that other details concerning my
15 background and my professional career can be found in
16 the CV attached to my opinion.

17 PRESIDENT TERCIER: Okay. Thank you very
18 much, indeed, but my follow-up question is, on one
19 side, you have described what are your specialties,
20 and this is private law in a broad term, but here
21 you're giving legal opinions--

22 THE WITNESS: Yes.

1 PRESIDENT TERCIER: --on questions that are
2 not maybe, but not directly linked to private law, so
3 how do you reconcile these two assessments.

4 THE WITNESS: (In English) Well, I consider
5 these--sorry.

6 (In Romanian) Indeed, these are not matters
7 relating directly to my personal experience as a
8 university professor, but these are matters which, as
9 a theoretician in law, I could review and assimilate
10 without difficulty. Also, as a practitioner of law,
11 I encounter these matters in my legal practice.

12 Furthermore, the legislation governing the
13 field in which I drafted my Expert Report is not that
14 dense so as not to be able to be mastered by someone
15 that has the exercise of studying and acquiring
16 knowledge, and for whom scientific research has
17 become a habit after so many years of a teaching
18 career.

19 On the other hand, the legislation on
20 cultural heritage involves areas from several areas
21 of law: Administrative law, civil law, criminal law,
22 contraventional law, fiscal law, and financial law.

1 So, it's not a stand-alone branch of law in our legal
2 system, but it could become one because the Romanian
3 Government, since 2016, initiated a code of cultural
4 heritage which it submitted to public debate.

5 PRESIDENT TERCIER: Sorry, just a small
6 question: Are there, in your faculty, Law Faculty or
7 elsewhere, colleagues that are specialized in
8 cultural heritage?

9 THE WITNESS: No, Mr. President. The
10 curriculum of our faculty and the curriculum of
11 Romanian Law schools do not include such a university
12 specialization dealing strictly with this matter.

13 PRESIDENT TERCIER: About these fields, if
14 taught, would be in the competence of which of your
15 colleagues? Of you or other colleagues? Is it
16 taught in university?

17 THE WITNESS: Some aspects could be dealt
18 with by the colleagues specializing in environmental
19 law. This is something I did not refer to in my
20 opinion except for some marginal aspects. Others may
21 pertain to the competence of those teaching
22 administrative law, but not as regards specific

1 matters, but general matters of administrative law
2 such as the legal force of the administrative deed
3 and so on.

4 PRESIDENT TERCIER: Okay. My second set of
5 questions is also classic. I would like to know how
6 you prepared these two legal opinions, you receive
7 the mandate, and then who started drafting, which
8 were the documents that you received, were you in
9 contact with counsel or with Claimants--in a few
10 words.

11 THE WITNESS: (In English) In a few words--
12 (In Romanian) Mr. President, that's a long
13 history, but I will summarize it in a few words.

14 I think I started somewhere in 2016. If I
15 remember correctly, I think it was still summer when
16 we had the first meetings. I don't have an Agenda of
17 the meetings. When I examined the issue of a
18 potential opinion, to see to what extent I am
19 qualified to express my view on these matters.

20 It was quite a long, lengthy process in
21 which the Claimants' counsel provided me with a
22 database that they had organized around the topics I

1 addressed in my opinions. They delivered this
2 database to me, and I think I--it took me more than
3 six months of collaborating on the drafting of this
4 opinion with observations from each side until we
5 ended up with a final version that I endorsed and I
6 submitted to this Tribunal.

7 I made no personal investigation on the
8 factual situation. I just did my research on the
9 legislative aspects that I referred to. I received
10 the documents communicated to me by the counsel for
11 Claimants. And as I declared in my opinion, I
12 qualified them as being authentic and communicated in
13 good faith; I have no doubt about that. So, that's a
14 matter of professional ethics.

15 PRESIDENT TERCIER: Did you have a team help
16 in drafting?

17 THE WITNESS: In drafting this opinion?

18 PRESIDENT TERCIER: I have footnotes here.

19 (Overlapping interpretation with speaker.)

20 THE WITNESS: In some matters that seemed
21 important to me, I asked for the opinion of my
22 colleagues from my law firm on principles' level so

1 to speak. I didn't discuss with them factual matters
2 or matters pertaining to the case because I
3 considered that this is a confidential opinion since
4 it is part of arbitration.

5 PRESIDENT TERCIER: And counsel for Claimant
6 had also a part in this drafting or not? Or checking
7 the draft? And what will the role be--

8 (Overlapping speakers.)

9 PRESIDENT TERCIER: Please.

10 --of the role of the counsel.

11 THE WITNESS: This is what I had in mind
12 earlier, namely that I closely cooperated with the
13 counsel for the Claimant; namely, that I presented to
14 them my opinions. They helped me a lot with English
15 language--I'm not speaking here about typos, but
16 phrasing the sentences. They suggested various
17 topics as per the instructions, the topics to be
18 addressed in my opinion.

19 So, there was an exchange, a long exchange
20 between us on this topic.

21 PRESIDENT TERCIER: Okay. Thank you very
22 much.

1 Now, you have the floor for the presentation
2 of your introduction. We have received the
3 PowerPoint. Now, please, you have the floor for 30
4 minutes.

5 DIRECT PRESENTATION

6 THE WITNESS: Thank you, President.

7 I had the opportunity to assist in the
8 Opening Statements of the Parties in this
9 arbitration, and to be present in hearing some of the
10 witnesses. That is why, from my two statements that
11 I fully ascertain, I have decided to deliver in front
12 of you the presentation of some topics of
13 consequence, more relevant topics in this file.

14 There are three topics that I will dwell on
15 in my presentation:

16 First of all, the ADCs entail
17 declassification and exclude classification of
18 historic monuments.

19 The second topic, the fact that the Minister
20 of Culture's endorsement for the EP only requires a
21 preliminary archaeological Research Report; and
22 thirdly, Chance Finds Protocol is a methodology of

1 archaeological supervision and excludes conservation
2 in situ.

3 I would also like to specify that in order
4 to make my presentation more fluent, I will use a
5 list of acronyms, which I will explain, if necessary.
6 In Romanian legislation, there are two levels of
7 protection for archaeological sites, according to the
8 Law: Government Ordinance 43 of 2000 protects
9 archaeological sites in general, including sites with
10 known and researched archaeological heritage, and
11 also sites with traced archaeological heritage,
12 meaning "still unsearched."

13 The second legal instrument, Law 422 of
14 2001, which protects archaeological sites classified
15 as "historical monuments." Only the significant
16 archaeological site or remarkable archeological sites
17 may be classified as historical monuments. This
18 follows from the very definition of "historical
19 monuments" under Law 422 of 2001, which stipulates
20 that historical monuments are immovable assets,
21 constructions and lands which are significant for the
22 national or universal history, culture, and

1 civilization. While one of the categories of
2 protected monuments, namely the site, is an area of
3 land identified with topographical data that contains
4 such human creations that represents significant
5 cultural or historical testimony. So, both
6 provisions underline the significance or remarkable
7 character of a site.

8 The protection regime of an archaeological
9 site is established following archaeological
10 research. Based on the results of archaeological
11 research, the Authorities may take the following
12 decisions: To classify the researched archaeological
13 site as historical monument, if found significant or
14 remarkable; and to archaeologically discharge the
15 site by way of an ADC, "Archaeological Discharge
16 Certificate," where the research performed is
17 preventive research financed by a developer with a
18 view to perform construction works.

19 The ADC is the administrative deed that
20 nullifies the protection regime of the archaeological
21 site, making it available for construction works. In
22 that sense, the Law provides that the ADC nullifies

1 the previously established protection regime on the
2 land where archaeological heritage was found.

3 The ADC is issued by the Ministry of Culture
4 with the prior approval of the National Commission of
5 Archaeology, and based on the recommendation of
6 authorized archaeologists by the Ministry of Culture.
7 The ADC is a decision of advisability taken by the
8 competent administrative authorities based upon a
9 balanced analysis of all applicable factual and legal
10 circumstances taking into account the public interest
11 of the Project about to be performed in a specific
12 area, compared to the archaeological value of the
13 site that is about to be discharged.

14 The ADCs are administrative deeds in rem,
15 meaning that they regard the very object. They don't
16 address a specific person. So, irrespective of the
17 financier of the research or the changes in ownership
18 or the changes of the level of developer, the sites
19 will stay discharged and available to human
20 activities as long as the ADC is valid. To that end,
21 Governmental Ordinance 43 of 2000 points to the fact
22 that the land where archaeological heritage was found

1 may be returned to current human activities in case
2 the archeological discharge procedure confirms it.
3 For instance, the State-owned Minvest entity
4 benefited from the ADC issued on the 14th of
5 December 2001 following research funded by RMGC for
6 Cetate Massif site, and once this ADC was issued,
7 Minvest's continuous mining activities in this Massif
8 became lawful.

9 The ADC leads to the ex officio
10 declassification for a historical monument -
11 archaeological site. This is logical since the most
12 basic prerequisite for the classification of an
13 archaeological site as a historical monument is its
14 very archaeological nature, while the ADC eliminates
15 this very feature. Once the site's archaeological
16 value is deemed inconsequential enough to be
17 discharged, there is no basis in law or in fact to
18 maintain its classification as a historical monument.

19 This means that the procedure should be
20 initiated sua sponte, ex officio, by the County
21 Department of the Ministry of Culture, and at the
22 same time--

1 PRESIDENT TERCIER: What do you mean by
2 procedure? You mean procedure for ADC?

3 THE WITNESS: (In English) Sorry?

4 PRESIDENT TERCIER: For an ADC.

5 THE WITNESS: (In Romanian) The
6 declassification procedure in case there is such a
7 monument, a historical monument which is an
8 archaeological site, declassification should be
9 initiated after the issuance of the ADC without delay
10 and ex officio by the Ministry of Culture. This is a
11 legal obligation under the Law.

12 Once the ADC are issued and they are valid,
13 they forbid to classify the site as historical
14 monument. If a site is inconsequential, there is no
15 basis in law or in fact to maintain its
16 classification as a historical monument, as there is
17 no reason not to declassify a historical monument
18 after an ADC is issued. Moreover, an archaeological
19 site can be classified as a historical monument if
20 considered significant. This is a feature eliminated
21 by the ADC. In other words, the most basic
22 prerequisite for a classification is absent upon

1 discharge.

2 Therefore, the ADCs are superseding deeds in
3 relation to the list of historical monuments, which
4 is updated once every five years. Once an
5 archaeological site is discharged, it cannot be a
6 historical monument. It cannot be classified as
7 such; and, if already classified, it must be
8 declassified. Nevertheless, in the case at hand, the
9 List of Historical Monuments of 2010 and especially
10 the 2015 LHM, both of which were adopted after the
11 relevant ADCs had already been issued by the Ministry
12 of Culture, purported to reclassify the entire Rosia
13 Montana locality plus a two kilometer radius area
14 around it in complete disregard of the ADCs and,
15 indeed, the imperative requirements of the Law.

16 To that end, allow me to give two examples
17 showing that repeatedly the Romanian authorities
18 ignored their legal obligations to classify or
19 declassify historical monuments. ADC 4 per 2004 for
20 Cârnic Massif was annulled by a court decision in
21 2008. The only effect of the annulment of ADC 4 of
22 2004 was and could only be the reinstatement of the

1 legal regime previously governing the discharged
2 area, that of an archaeological site. In order to
3 list this site under the 2010 LHM (essentially a
4 first ever classification of this site), the
5 Authorities should have followed the classification
6 procedure, and the Minister of Culture should have
7 issued a classification order. However, the culture
8 authorities included the entire Cârnic Massif into
9 the 2010 LHM without a classification procedure.

10 Then, ADC 9 of 2011 discharged the Cârnic
11 Massif again in July 2011. Upon the issuance of ADC
12 9 of 2011, the Authorities should have declassified
13 the area of Cârnic Massif listed as historical
14 monument in the 2010 LHM. Though ADC 9 of 2011
15 produced legal effects until the 30th of
16 January 2014, when it was suspended by a court, the
17 Romanian authorities did not proceed to the
18 declassification of this monument.

19 A second example. In the 2015 LHM, the
20 Authorities reinstated the so-called "historical
21 monuments" listed in the 1992 Draft LHM in Rosia
22 Montana, adding a new address; namely, Rosia Montana

1 "the entire locality on a two kilometer radius." The
2 Ministry of Culture approved the 2016 Delineation
3 Documentation prepared by the National Institute of
4 Heritage outlining the detailed footprint of the new
5 historical monument. While the local authorities
6 were instructed to reflect the 2016 Delineation
7 Documentation in their urbanism plans. Another
8 objective of the 2016 Delineation Documentation was
9 to support the study for the delimitation of the
10 property nominated for UNESCO.

11 And in order to illustrate this situation of
12 the UNESCO file and the nominated property for the
13 UNESCO file, on the map that you can see on the
14 screen, you can see marked in green all the areas for
15 which RMGC received an ADC. Each and every area has
16 on it the number of the ADC. You can see that all
17 these ADCs overlapped the footprint of the Project,
18 90 percent of it, in gray on this map. In blue--

19 PRESIDENT TERCIER: Sorry, could you just
20 elaborate a little bit because it's difficult to
21 read, so can you start again with the green then the
22 gray and the blue.

1 THE WITNESS: The green marks all the ADCs
2 issued for the Rosia Montana Perimeter in general, in
3 generic terms. Every shade that is in green has--

4 PRESIDENT TERCIER: I'm sorry, it's simple.
5 You have on one side limits, green limits, and you
6 have--

7 THE WITNESS: (In English) Yes.

8 PRESIDENT TERCIER: You have also green
9 colors but not the--all the land that is surrounded
10 by the limit is not in green.

11 Do you understand my point? If you see, for
12 instance, on the northeast--no--northeast, southwest,
13 there is a passage that is not in green?

14 THE WITNESS: (In English) If I may, let me
15 look at this from a different perspective. What you
16 see in gray is the footprint of the Rosia Montana
17 Project, mining project, so what is in gray is where
18 the Project was to be carried out.

19 The green marks the areas that received a
20 discharge through 11 ADCs. The file that Romania
21 filed to UNESCO shows in blue the limit, the boundary
22 of the property that was designated an UNESCO

1 monument by the Romanian State. As you can see, the
2 blue limit and the Protection Area in light blue
3 practically cover most of the sites that had already
4 been discharged by these ADCs, and that could not
5 have been part of a new monument classified by the
6 Romanian State without due process, because the
7 limits of the property nominated for the UNESCO and
8 about which the Romanian State stated that it was a
9 historical monument of over 2000 hectares are similar
10 to those delimited by the delineation documents that
11 I mentioned; they had been delineated in 2016.

12 For that Delineation Documentation to be
13 submitted with the UNESCO Project, and for those--and
14 for the State to declare that there is a historical
15 monument within those boundaries, the Romanian State
16 did not go through the due classification process to
17 classify this new historical monument on the List of
18 Historical Monuments. They wouldn't have been able
19 to follow any classification procedure anyway because
20 most of this area had already received archaeological
21 discharge; therefore, it had no significant or
22 remarkable archaeological value. Quite to the

1 contrary, it was about to be declassified, not
2 classified, baselessly.

3 The second topic that I approached, if I may
4 move on, is the Ministry of Culture's endorsement for
5 the EP, that only required the preliminary
6 archaeological Research Report. The Ministry of
7 Culture's endorsement is necessary, is required for
8 issuance of an EP for projects proposed in areas with
9 archaeological heritage, and it is issued based on
10 the information obtained from a preliminary
11 archaeological research funded by the developer. The
12 legal provisions setting out the Ministry of Culture
13 endorsement requirement provide, under 2(9) to (11)
14 Ordinance 43 of 2000 that shows that preliminary
15 archaeological research is mandatory in all cases
16 where Environmental Permits are issued with regards
17 to areas with archaeological heritage as the sole
18 modality for identifying, describing, and evaluating
19 the direct and indirect effects of that investment
20 Projects may have on archaeological heritage.

21 The Environmental Permit is issued only
22 after the Minister of Culture and Cults issues its

1 endorsement. In order to apply the principle of
2 integrated conservation and the cost of the
3 archaeological research necessary for the
4 Environmental Permit fall on the developer. These
5 are the provisions that are relevant.

6 Ordinance 43 of 2000 does not define the
7 concept of preliminary archaeological research
8 (although it does use the term) needed for the
9 Ministry of Culture's endorsement in the EIA
10 proceeding. The preliminary research may consist in
11 any of the stages of preventive archaeological
12 research: theoretical assessment or inventory, field
13 evaluation or diagnosis, and diggings or excavation,
14 the most intrusive phase of research that normally
15 leads to the ADC. It is less likely for the digging
16 to be deemed as representing preliminary
17 archaeological research because it usually ends with
18 an ADC, and it deprives the land of any
19 archaeological value.

20 A theoretical assessment, a field evaluation
21 or a diggings report meets the requirement of
22 Article 2(10) of GO 43 on preliminary archaeological

1 research.

2 The Ministry of Culture, in the
3 accomplishment of its legal obligation, issued two
4 endorsements based on Article 2(10) of GO 43 per
5 2000.

6 Thus, on December 7, 2011, it issued an
7 endorsement referred to as a "point of view" on the
8 implementation of the Project that references legal
9 provisions regulating the endorsement, Article 2
10 para. 10 of the ordinance. And on April 10, 2013,
11 they issued another endorsement with substantively
12 the same contents as the point of view issued on
13 December 7, 2011. Both these documents are based on
14 a preliminary archaeological research, namely the
15 2011 Orlea Preliminary Report essentially based on a
16 field survey of Orlea performed in 2007 and submitted
17 by RMGC to the Ministry of Culture for the purposes
18 of the endorsement on the 26th of August 2011. The
19 only preliminary condition for the Ministry of
20 Culture's endorsement for the EP was a preliminary
21 archaeological Research Report. The 2011 Orlea
22 Report was a preliminary archaeological Report, and

1 it preceded both the point of view of 2011 and the
2 endorsement of 2013. Under the Law, the Orlea
3 Preliminary Report did not need the approval of the
4 National Commission of Archaeology. De facto, on the
5 1st of March 2013, the National Commission of
6 Archaeology did not approve the 2011 Preliminary
7 Report, but only the Orlea Research Project of 2013.

8 And the 2013 Orlea Research Project was not
9 a requirement under Article 2 para. 9 of GO 43 per
10 2000. There was no legal basis for the Ministry of
11 Culture to request the Orlea Research Project as a
12 basis for its endorsement. And, indeed, the project
13 was not requested, in the sense that there is no
14 formal request to this effect from the Ministry of
15 Culture. Thus, the 2013 Orlea Research Project was
16 only a plan for future research and not a report
17 comprising additional information on preliminary
18 research.

19 In its endorsement of 2013, in fact, it is
20 the very Ministry of Culture that qualifies the 2011
21 Orlea Report as being the Report comprising the
22 preliminary archaeological research required under

1 Article 2 para.9 of OG 43 per 2000. It is shown that
2 the archaeologic Assessment Report submitted with the
3 Ministry of Culture in 2011 is drafted in the context
4 of a preliminary research procedure as per Article 2
5 para. 9 of GO 43 per 2000.

6 PRESIDENT TERCIER: You could slow down for
7 a little bit for the Court Reporters.

8 THE WITNESS: (In English) I would be very
9 grateful if you could tell me how many minutes.

10 PRESIDENT TERCIER: I cannot, but I'm sure
11 that our Secretary will be able to tell you that.

12 SECRETARY MARZAL YETANO: Five more minutes.

13 PRESIDENT TERCIER: That's not the reason to
14 go quicker. On the contrary, I would like you really
15 to slow down.

16 THE WITNESS: I will do my best.

17 The third topic, the Chance Finds Protocol
18 is a methodology for archaeological supervision, and
19 it excludes conservation in situ. The CFP is a
20 protocol for archeological supervision of the
21 perimeter and management of Potential finds to be
22 implemented during the construction and operation

1 phase of the Project, in area that had already
2 received an archaeological discharge. The Romanian
3 National History Museum that prepared the CFP
4 proposed more than the Law requires, considering the
5 Law did not make it mandatory to perform
6 archaeological supervision in areas already
7 discharged. The terms of the CFP excluded the
8 possibility of a decision of conservation in situ
9 because most of--

10 COURT REPORTER: Could we slow down a little
11 bit more, please.

12 THE WITNESS: Most perimeters with
13 archaeological potential that were confirmed under
14 the mining project's footprint had been subjected to
15 the archaeological burden discharge proceeding;
16 therefore, archaeological surveillance is a
17 complementary measure.

18 Despite its name, the Chance Finds Protocol
19 does not refer to Chance Finds--does not envisage
20 Chance Finds as that term is defined by the Law
21 because, under the Romanian Law, areas with
22 archaeological potential discovered by chance are

1 defined as "areas" where heritage assets were
2 unpredictably discovered as a result of human actions
3 other than attested archaeological research. On the
4 other hand, the Law does not compel the Authorities
5 to protect archaeological discoveries in situ,
6 regardless of their relative value. This is a
7 decision of advisability of the administration. All
8 the areas envisaged under the CFP were areas already
9 discharged. The ADCs were, therefore, issued in full
10 knowledge of the existence of certain limited areas
11 not fully accessible for research, the so-called
12 "risk areas" in the CFP. The Authorities took a
13 decision of advisability to discharge the entire
14 area, including the risk areas that were limited in
15 terms of surface.

16 The ADC is not a provisional or a
17 conditional administrative deed, but an
18 administrative act which creates a continuous
19 situation: That of land without archaeological
20 value. The authorities cannot reconsider the
21 Discharge Decision. The complementary measure of
22 archaeological supervision proposed by the CFP could

1 not provide the basis to change the Authorities'
2 decision of discharge.

3 The protocol clearly confirms that no in
4 situ preservation was envisaged, regardless of the
5 finds. Therefore, it is shown that the
6 implementation of the CFP is part of a "safeguard
7 through study" approach aiming to recover the
8 artifacts, to record in an exact and detailed manner
9 the archaeological context, to draft specialized
10 reports and set up a research archive. The CFP also
11 confirms that any archaeological activity undertaken
12 following a find would be completed with a minimum
13 interruption of the Project's work schedule.

14 This protocol, namely the Chance Finds
15 Protocol was favorably endorsed by the Ministry of
16 Culture which correctly qualified the protocol as
17 being a project for archaeological supervision. And
18 in this respect, in its endorsement submitted to the
19 Ministry of the Environment, it specified that in
20 order to ensure the protection, preservation, and
21 valorization of the archaeological heritage, Rosia
22 Montana Gold Corporation shall finance and ensure the

1 archaeological monitoring activity and shall carry
2 out its obligations undertaken through the Chance
3 Finds Protocol. Also, it shall bring any
4 modifications to the mining project that is necessary
5 to protect the chance discoveries.

6 And with this, I conclude my presentation,
7 President and Arbitrators, and I thank you very much
8 for your attention.

9 I remain at your disposal for questions.

10 PRESIDENT TERCIER: I'm sure there will be
11 some questions.

12 Yes, please, DR. LEAUA.

13 CROSS-EXAMINATION

14 BY DR. LEAUA:

15 Q. Good afternoon, Professor Schiau.

16 A. Good afternoon.

17 Q. We know each other, of course, but for the
18 record I am Crenguța Leaua, and I will address you a
19 number of questions concerning the two legal opinions
20 you submitted in support of Claimants' case in this
21 arbitration, and I will do so in my capacity as
22 counsel for Respondent in this arbitration.

1 In the interest of time, I would be grateful
2 if you could keep your answers as short as possible,
3 and I will try on my end to have specific questions
4 that would allow you to answer in this way.

5 You should have in front of you two legal
6 opinions that you drafted and also a binder that is
7 going to be handed to you right now, which contains a
8 number of documents to which I will take you during
9 this examination.

10 But, first of all, I would like to discuss
11 with you your instructions in preparing your Expert
12 Reports.

13 You say in Paragraph 1 of your first Legal
14 Opinion that you refer to issues which are--that your
15 Legal Opinion concerns mainly Romanian Law issues,
16 and that, I take, it was prepared at the request of
17 Claimants; right?

18 A. Yes, it is.

19 Q. You also say at Paragraph 1 that you were
20 provided with instructions. They are also summarized
21 in this section?

22 A. I believe that the wording in English does

1 not fully match the meaning you are ascribing.

2 Q. What do you mean by "terms of my
3 engagement"?

4 A. It means the Contract I have signed with
5 Claimants' counsel.

6 Q. So, what do you mean "instructions,
7 information, instructions" in the context of the same
8 paragraph?

9 A. In the context of the same paragraph, by
10 "instructions," I mean the discussions I had in
11 connection to the scope and area of drafting this
12 opinion, namely its topics addressed. By
13 "information," I understand information that was
14 transmitted to me verbally and also information that
15 I received in writing through the organization of a
16 database that was provided to me, and that is
17 referred to in my opinion.

18 And, of course, the documents represent the
19 material support for this information.

20 Q. Have you listed in your Legal Opinion at any
21 point the instructions that were given to you, the
22 information that was given to you, and the documents

1 that were provided to you, so for Respondent to be
2 able to check and test the extent of your knowledge
3 on the case that formed the basis of your Legal
4 Opinion?

5 A. I did not consider it necessary to refer to
6 the explicit content of the instructions I received.
7 And, as I told you, they refer strictly to the topics
8 addressed in these opinions. As to the information
9 and documents I received from the Claimants' counsel,
10 or counsels, I mentioned in my opinions which are
11 these documents, and also in the footnotes I was
12 referring to them.

13 Q. Have you been provided with documents
14 submitted by Respondent in this arbitration?

15 A. I was provided with documents which, for
16 example, were submitted by the Experts in this
17 arbitration in the other legal opinions to the extent
18 I was interested in them. I'm referring to the
19 Claimants' experts in particular and to the
20 Respondent's Expert, but I don't think I was provided
21 with the documents submitted by the Respondent
22 because I don't think they concerned me. If such

1 documents happened to be available, I think I have
2 listed them in my opinions, to the extent I referred
3 to them.

4 Probably in the procedural stages of the
5 development of this arbitration, prior to expressing
6 my opinions, if the Respondent referred to certain
7 documents, which had not already been submitted by
8 the Claimant, I may have been provided with these
9 documents. But, if I was provided with them, they
10 are, without doubt, mentioned in my documents.

11 Q. So, the only documents submitted by the
12 Respondent in this arbitration concerning the topic
13 of your analysis that were provided to you are
14 already quoted in your opinion. So, when we want to
15 list them, we have to go through the footnotes; and,
16 if we find something submitted by the Respondent as
17 an exhibit then, that is the full list of documents
18 provided to you by the Claimants; right?

19 A. I'm not sure I understood your question.

20 PRESIDENT TERCIER: The question is: You
21 have listed to find--the footnotes of your legal
22 opinions a certain number of documents submitted by

1 Respondent, and the question is: Have you seen other
2 documents that you have not considered, or is it the
3 full list of documents that you've used?

4 This was your question, more or less?

5 THE WITNESS: I don't believe I saw other
6 documents of the Respondent in addition to what I
7 have already listed.

8 In drafting these legal opinions, I was
9 telling you that the process was lengthy and lasted a
10 few years, and I saw numerous documents.

11 BY DR. LEAUA:

12 Q. Do you independently verified or have you
13 independently verified whether the information and
14 the documents that you were provided with are
15 complete in the sense that they are all the relevant
16 documents in this arbitration submitted by both
17 Parties in support of their position on the legal
18 issues that you have analyzed in your Legal Opinion?

19 A. If you look at Paragraph 6 in my First
20 Opinion--and you certainly are familiar with it--I
21 said there that this opinion is based exclusively on
22 the documents provided to me by the counsel for

1 Claimants, based on my belief that they are identical
2 to the original and that the signatures are
3 authentic.

4 I also said that I did not make any
5 independent verification of the relevant facts for
6 this project, and I think this answers your question.
7 All the documents that were used as a basis for my
8 opinion were those provided to me by the Claimant,
9 which organized them in a database which it
10 communicated to me. And, as regards the legislation
11 or the sources or the public sources of information,
12 of course, I did my own research on various websites,
13 including those of the involved institutions, and I'm
14 referring here to certain documents.

15 Q. Just to make sure that I understand, your
16 opinion is based only on the facts and documents that
17 Claimant provided to you, and that you obviously did
18 not identify it in a list. However, you do not have
19 a certitude and neither you made an inquiry whether
20 this is a complete set of documents submitted in the
21 arbitration file for the purpose of the Tribunal's
22 assessment on the legal issues that you referred to

1 in your Legal Opinion?

2 A. As you have well noted, it is the task of
3 the Tribunal to decide on these matters. As far as I
4 am concerned, I expressed a legal opinion, which
5 Legal Opinion is based on the documents that I had at
6 my disposal. I do not know whether these documents
7 comprise the whole set of evidence that you, as
8 representatives of the Respondent, submitted in this
9 case. I do not know that.

10 There are many documents that have nothing
11 to do to the area on which I expressed my opinion and
12 which you submitted. I just started from the
13 presumption that I was communicated those documents
14 that are relevant for the topic of my opinion.

15 Q. So, you would agree with me that the
16 Arbitral Tribunal might look at your legal opinion
17 differently, or yourself may look at your previous
18 assessment in your legal opinion differently should
19 the factual exhibits presented to you, be completed
20 with other factual exhibits, that were not yet
21 presented to you by counsel for Claimants. Would you
22 admit that?

1 A. I'm sorry, but I do not agree. If you
2 carefully look at the title of my opinions, they are
3 called "legal opinions," which means that they
4 examine the provisions of the applicable laws in
5 these situations, and they do not examine factual
6 matters; and, as I said, I did not conduct an
7 independent verification of the facts that are
8 relevant for this project.

9 So, my knowledge of these facts results from
10 documents and from the Law. I did not conduct
11 investigations to see to what extent you provided
12 documents that would contradict the factual situation
13 that I understood from the presentation of the
14 Claimant, but I do not doubt that if there is such a
15 situation, you will present it to me.

16 Q. Well, even in your presentation today had on
17 practically every single slide at least two or three
18 factual exhibits, and it was referring to a sequence
19 of events that was relating facts rather than issues
20 of law. Practically every single slide was
21 addressing that, but that was the purpose of my
22 question.

1 But I will move on to the next point of
2 clarification at the beginning, which is related to
3 the scope of your legal analysis--I mean, your--I
4 would have thought that this might have been defined
5 in the instructions but I now I take it that you
6 referred by the instructions to some sort of oral
7 explanations that were given to you by counsel of
8 Claimant, so I would rephrase, and I would say
9 instead of instructions, Terms of Reference or Scope
10 of Work of your Legal Opinion.

11 And I would look now at Paragraph 4 of your
12 supplemented Legal Opinion, for instance, or
13 Paragraph 4 of the first Legal Opinion. I'm just
14 directing you to the specific paragraphs. It's
15 Paragraph 4 of 2nd and Paragraph 4 of 1st Legal
16 Opinion.

17 And in both of them, you present a number of
18 issues as falling within the scope of your analysis.
19 Once again, in the first Legal Opinion, you mention
20 that this opinion has been structured to address
21 mainly the following issues. That is on display, it
22 is the second Legal Opinion. Please display the

1 first Legal Opinion, and then we will go to the
2 second.

3 So, this opinion has been structured to
4 address mainly the following issues, and then you
5 refer to a number of what I would define as
6 "conclusions" because they are basically statements
7 as to different issues, so were these the topics that
8 you were asked to analyze or are actually these the
9 conclusions of your opinion at the end of the
10 analysis.

11 A. And your question is?

12 Q. This Paragraph 4 refers to the scope of your
13 Legal Opinion, your task, the issues that you were
14 supposed to analyze, or they're displaying the
15 conclusions of your analysis. To whom these
16 statements belong? To the Claimant when asking you
17 to work on your Legal Opinion or to yourself at the
18 end of your work?

19 A. I read Paragraph 4 of my opinion as follows:
20 It shows that this opinion was structured so as to
21 address mainly the following issues. I listed here
22 the questions that I was about to address in this

1 opinion, and the elements that would enlarge the
2 scope of my opinion, they're not conclusions. As you
3 said, the conclusions are found at the end of each
4 statement or section in my opinion or chapter in my
5 opinion.

6 Q. Can we go on letter D among the five letters
7 displayed under Article 4 or Point 4, Paragraph 4,
8 and there at the end, the last part, it seems to be
9 part of your Scope of Work as you describe right now,
10 "the list approved by the Ministry of Culture in 2010
11 and 2015 were, by law, updates of the 2004 list,
12 which updates solely based on the individual
13 classification/declassification orders issued in the
14 intervening years. Despite these applicable
15 legislative requirements, the 2010 and 2015 updates,
16 in disregard of the Law, incorporate significant
17 changes in the description of some of the historical
18 monuments in Rosia Montana," a similar type of
19 wording one can find in the other paragraphs, like
20 wordings that one might be consider be to statements
21 instead of scope of an analysis, an objective
22 analysis of an expert; would you agree with me?

1 A. I didn't understand the meaning of your
2 question, but in order to answer, I should explain a
3 little bit of philosophy in structuring my opinion.

4 In these statements, I understood to show
5 the topic that I would address and provided a
6 description of the stages to be covered in order to
7 reach a conclusion. I don't understand what is your
8 criticism about, perhaps there is no criticism, and I
9 didn't understand the question. This was the way I
10 structured my opinion, and the way I did it was the
11 common way in which I worked before. I worked with
12 you before providing opinions, and I had the same
13 structure.

14 At the beginning, I listed the topics and
15 then briefly the main issues, the main milestones of
16 the opinion that I was expressing below.

17 Q. I strongly disagree with your statement that
18 you would ever have worked with me in the way
19 that--to structure such a legal opinion in this way,
20 so this I strongly disagree, and I would try rather
21 to take it as a--whether, not so well-informed
22 recollection, but referring to your Legal Opinion.

1 The second one, I would just like to put on
2 record is this the same perception that you now
3 explain that you had namely like an explanation of
4 what you present in your Legal Opinion to be applied
5 also to Paragraph 9 of your second Legal Opinion in
6 relationship also with Paragraph 4 that refers to the
7 new elements that were given to you for the purpose
8 of this second Legal Opinion, so Paragraph 4. "For
9 purposes of this new analysis, I have reviewed a
10 number of documents." And then Paragraph 9: "A
11 brief overview of the supplemental Legal Opinion is
12 as follows." Is it the same explanation, the same
13 logic?

14 A. No doubt. No doubt. There is the same
15 logic, and if you follow the paragraphs under
16 Chapter II, you will see that this statement is
17 descriptive, in the sense that it describes the
18 logical sequence of the arguments that I put forward.

19 Q. So, the instructions--

20 A. If you allow me--and sorry for
21 interrupting--the statement that is prior to the
22 listing, "brief overview of this supplemental Legal

1 Opinion is as follows," so that makes it clear that
2 it's a brief overview, meaning a summary of this
3 opinion of the issues that were addressed in these
4 opinions.

5 Q. So, the instructions you were provided with
6 were basically the structure and the content, future
7 content of your opinion; right?

8 A. I didn't say that.

9 As I said, these instructions referred at
10 the topic of this opinion. If you want to suggest
11 that these instructions were a statement of the topic
12 and then how to take over or reflect the opinion of
13 the Claimants and argue them based on legal
14 arguments, I reject such description.

15 I didn't say that the instructions referred
16 to anything else but the topic I was supposed to
17 address and, if you will, the way in which we were
18 going to work together, meaning, Professor, we
19 provide you with a database that will be structured
20 in such a way as to ease your access to the documents
21 you are interested in, if you need, please indicate
22 what might be the documents you find necessary.

1 These would be the things.

2 And if you allow me to go back briefly to
3 something that you raised before, my statement is a
4 boilerplate. It's a typical clause in all such
5 opinions, mainly that I acted based on the
6 instructions received from the Party that hired me.
7 This doesn't mean that my independence was affected
8 through such a statement. I would say on the
9 contrary, should there be any suspicion, I wouldn't
10 have made such a statement.

11 Q. So, basically, you do not list the
12 instructions, then, that were given to you? That is
13 the only conclusion that one can draw; right?

14 A. Excuse me, I didn't say that Paragraph 4
15 from my First Opinion or Paragraph 9 for the Second
16 Opinion represent the instructions I received
17 because, there, you can find the topics and a brief
18 description of the contents that was addressed in
19 each topic--in each chapter. Sorry.

20 Q. Yes, but nowhere where you say where your
21 instructions are, there's the problem. So let's move
22 on, on the content of your Legal Opinion.

1 A. But I would like to answer to that--

2 (Overlapping interpretation with speaker.)

3 Q. Thank you.

4 A. And don't say such things.

5 Q. You do have the instructions listed? I
6 mean, the scope of your work, the topics, the Terms
7 of Reference included in your Legal Opinion? "Yes"
8 or "no," then?

9 A. No.

10 Q. Thank you.

11 A. And I didn't maintain such a thing. I
12 didn't say that I received written instructions.

13 Q. You never received written instructions?

14 PRESIDENT TERCIER: Okay. I think we could
15 now move. You have five minutes left for the
16 content.

17 BY DR. LEAUA:

18 Q. Very simple questions. Hopefully this time
19 responded shortly.

20 PRESIDENT TERCIER: You don't need to make
21 comments.

22 BY DR. LEAUA:

1 Q. Would you agree with me that the issues that
2 you have addressed in your Legal Opinion are
3 public-law and not private-law issues under Romanian
4 Law?

5 A. To the largest extent the topics belong to
6 private law.

7 Q. Private law?

8 THE INTERPRETER: Sorry, public law. It was
9 my mistake.

10 DR. LEAUA: Okay.

11 BY DR. LEAUA:

12 Q. Now, I would like to address with you one
13 specific chapter, which is six, of your supplemental
14 Legal Opinion: Cultural aspects in the EIA
15 procedure. And you refer in Paragraphs 268 to 271 to
16 the Ministry of Culture's endorsement needed for the
17 issuance of the Environmental Permit as per
18 Government Ordinance 43 of 2000; right?

19 PRESIDENT TERCIER: Is it possible to put it
20 on the screen, or we don't need it?

21 DR. LEAUA: We don't need it, actually. I'm
22 just introducing the topic to the Professor.

1 THE WITNESS: Could you please tell me what
2 the first paragraph was?

3 BY DR. LEAUA:

4 Q. 268 to 271. Basically, you address here the
5 endorsement of the Ministry of Culture as needed for
6 the issuance of the Environmental Permit; and, in
7 this context, I would like to address you the
8 following question: Please turn to Tab 5 in the
9 binder that you have on your table, and that is
10 Exhibit C-1701, which is the text of the Government
11 Emergency Ordinance Number 43 of 2000 for the
12 Protection of Archaeological Heritage.

13 On Page 3, right at the bottom--it's the
14 same in the Romanian language as well--you will find
15 Article 2, which at Paragraph 10 reads as follows:
16 "The Environmental Permit is issued only after the
17 Ministry of Culture and Cults issued its endorsement,
18 in order to apply the principle of integrated
19 conservation."

20 So, by law, the Ministry of Culture was
21 required under this Government Ordinance 43 to
22 endorse the Project before the Ministry of the

1 Environment could issue the Environmental Permit;
2 right?

3 A. And your question?

4 Q. By law, the Ministry of Culture was required
5 under this Government Ordinance Number 43 to endorse
6 the Project before the Ministry of the Environment
7 could issue the Environmental Permit; right?

8 A. Almost right, not right. They should
9 have--should issue an endorsement, not to endorse the
10 Project, that is, in this case the Rosia Montana
11 Mining Project. They were supposed to issue an
12 endorsement based on a preliminary archaeological
13 research and that would refer to the area where the
14 Project was to be implemented. But as we can see the
15 text, we can both read it and it says what it says.

16 Q. And you state in your opinion that according
17 to Romanian Administrative Law, this endorsement,
18 "aviz" in Romanian language, is a conformity
19 endorsement. I make reference to your Supplementary
20 Opinion on Page--Paragraph 82 Footnote 401. I'm
21 sorry, Page 82, Footnote 401.

22 Correct?

1 A. I'm not there yet, just a second.

2 82, Footnote 401?

3 Q. Yes.

4 A. It refers to my Opinion, Paragraph 146
5 and--145, 146.

6 Q. You do remember your opinion. I mean, it's
7 a simple question, that under Romanian Administrative
8 Law, this endorsement is a conformity endorsement?

9 A. It is the conformity endorsement, but when
10 you refer to a page, a certain paragraph and a
11 certain footnote, I think it is only natural for me
12 to go to those points and review them with due
13 attention so that I can understand fully what exactly
14 you refer to out of where I state in the two
15 paragraphs and Footnote and the third
16 footnote--paragraph, so that I can make all the
17 necessary connections.

18 Of course, I remember what I said in my
19 opinions, but let me remind you that, although I did
20 prepare for this Hearing, those opinions were from
21 2017 and 2018.

22 (Overlapping interpretation with speaker.)

1 PRESIDENT TERCIER: Another way to do this,
2 Footnote 401 is at the end of Paragraph 279, so it
3 must be the demonstration of the proof for what is
4 there.

5 THE WITNESS: I was able to find it. I
6 found the footnote.

7 BY DR. LEAUA:

8 Q. We will move on to Tab 1 of your binder.
9 And for the record, this is Exhibit C-564, which is
10 the 2010 "REGULATION FOR THE ORGANIZATION AND
11 FUNCTIONING OF THE CENTRALLY ESTABLISHED TECHNICAL
12 ANALYSIS COMMITTEE." Please go on Page 4 in the
13 Romanian, and for the Tribunal in the consolidated
14 PDF, this is Page 7. You will find there Article 13.

15 A. Page 4 in the Romanian version, Article 13.

16 Q. Paragraph 1, which reads as follows: "The
17 Committee shall exert its consultative role by
18 debating the reviewed documents and the expression,
19 by each and every member, of the viewpoint on the
20 project/activity subject to the regulatory
21 procedure."

22 You saw that? The viewpoint.

1 Are you familiar with these provisions?

2 A. I have read them.

3 Q. And it is based on this text that each
4 member of the TAC, the Technical Analysis Committee,
5 was required to express their point of view within
6 the meetings; right?

7 A. That is right, but it is not the subject of
8 my opinion, but it is correct.

9 Q. So, by law, the Ministry of Culture, like
10 any other TAC member, was required to express its
11 point of view regarding the Project within the TAC
12 meetings; right?

13 A. That is correct.

14 Q. Okay. So, now let's look at Paragraph 2 of
15 the same Article 13, where you can read that: "In
16 the event that a committee member cannot express a
17 viewpoint during the meeting, he or she shall send it
18 in writing to the central authority for environmental
19 protection."

20 You see that?

21 A. I can see that.

22 Q. Okay. So, now we have this legal provision

1 concerning the point of view, and let's move on to
2 the other legal provision that refers this time to
3 the endorsement, and that is Tab 5, Exhibit C-1701,
4 Article 2, Page 3, same in Romanian, same in English.
5 Article 210, where it's written: "The Environmental
6 Permit is issued only after the Ministry of Culture
7 and Cults issued its endorsement." Would you just
8 look at that.

9 You see that?

10 A. Yes.

11 Q. So, these are legal provisions that refers
12 to the situation in which the Ministry of Culture has
13 to present its position, in one situation, the
14 endorsement, and the other situation, the point of
15 view. Correct?

16 A. I would say no. I would say that you are
17 making a confusion between two documents and two
18 legal provisions that have very different legal
19 bearing or force. The conditions for the issuance of
20 an Environmental Permit are regulated by Article 2
21 para. 9 and Article 2 para. 10 of the ordinance.
22 What you showed me was a regulation of the Ministry

1 of Culture approved by Order of the Ministry of
2 Culture, which is an administrative deed that has
3 much less force than the Law, that cannot add to the
4 Law, it cannot provide another legal provision than
5 that stipulated in the law. This is the meaning of
6 my statement and of my Legal Opinion. The fact that,
7 for this proceeding to follow due process, the
8 Ministry of the Environment and the other Ministries
9 involved set up a Technical Analysis Commission that
10 collected the opinions of all the Parties involved
11 and had to reach a conclusion in an efficient manner,
12 which does not mean that, by their own will, they can
13 add--they could add to the Law additional
14 requirements to those stipulated by law.

15 Q. My question was simple.

16 PRESIDENT TERCIER: You know that we are
17 already over time.

18 DR. LEAUA: Yes, but I still hope that in
19 case that I will receive at least two short answers,
20 I will be able to reach a conclusion, at least on one
21 point.

22 PRESIDENT TERCIER: Two short questions, two

1 short answers.

2 BY DR. LEAUA:

3 Q. You agree that there are two different legal
4 provisions. I take that because you said that no one
5 should make a confusion, but you add that one of
6 these legal provisions--

7 (Overlapping interpretation with speaker.)

8 PRESIDENT TERCIER: Stop. You interrupted
9 her. Please let her finish.

10 BY DR. LEAUA:

11 Q. You just add that one of these legal
12 provisions would originate from a legal deed that
13 would be of inferior value in the hierarchy of the
14 Norms in Romanian Law, if I understand you correctly;
15 right?

16 A. Undoubtedly. I apologize, but I did not
17 want you to interpret my statement about the
18 confusion that was being made as being offensive.

19 Q. But then the question is: Has been this
20 other provision that you consider to be inferior
21 annulled, challenged, in any way removed from the
22 Romanian legislation as possibly it would have been

1 the case if Claimants would have challenged it in the
2 courts of law, has been removed from the legislation,
3 or it is there?

4 A. I'm not aware of that. I do not know the
5 answer to that question.

6 Q. So, it is your choice to disregard it;
7 right?

8 A. No, but if I'm not asked the question, I do
9 not see why I would answer, but if you ask me, I can
10 answer it to clarify the situation that I see you're
11 aiming at.

12 PRESIDENT TERCIER: Thank you. We had a lot
13 of opportunity to explain to the Tribunal. We are at
14 the end of the cross.

15 DR. LEAUA: Just one moment.

16 DR. HEISKANEN: Mr. President, we indicated
17 yesterday when we agreed to the timetable that it
18 should be administered with flexibility. It's an
19 estimate, if we need five or 10 or 15 minutes more or
20 less with a particular witness, in our submission,
21 that should be within the scope of permissible
22 examination.

1 PRESIDENT TERCIER: This is 50 percent more,
2 half an hour.

3 DR. HEISKANEN: We're now 10 minutes over
4 the estimated time of 30 minutes for this
5 examination.

6 PRESIDENT TERCIER: Do you want five
7 minutes, to have 15 minutes, 10 plus five make 15.

8 DR. HEISKANEN: That is within a reasonable
9 scope of examination.

10 PRESIDENT TERCIER: So, five minutes, but no
11 more.

12 DR. LEAUA: I will just go briefly on one
13 particular point, and that is the following. It's a
14 matter of logic.

15 BY DR. LEAUA:

16 Q. And I will try to do it without reference to
17 the tabs as much as I can in order to be precise.

18 So, the Archaeological Discharge Certificate
19 and its relationship with the Chance Findings. What
20 you're basically saying is that, once an
21 Archaeological Discharge Certificate has been issued,
22 then no matter what kind of Chance Findings might be

1 there, it will be always only the situation of
2 recording them and possibly removing them, but it
3 will be never an in situ preservation; right? This
4 is what you say.

5 A. No, that is not correct. What is correct is
6 that I stated that there is a protocol on Chance
7 Finds that regulated what happened in the case of a
8 Chance Find. What this protocol says is that no
9 conservation in situ is to be carried out, but
10 conservation by record. I did not discuss abstract
11 matters, but a very specific case because there was
12 this protocol in effect.

13 Q. Can you look at Article 5 of Government
14 Ordinance 43 that you have already, on your record,
15 Tab 5, and that is Exhibit C-1701.

16 A: (Lost interpretation.) Article 5 para. 1.

17 Q. One.

18 (Lost interpretation.)

19 Q. Yes. And I will read it for the record in
20 English: "The protection of archaeological heritage
21 assets and lands within the areas defined at
22 Article 2 para. (1) letters(j) and (k) represents the

1 scientific, administrative and technical measures
2 adopted in order to preserve the vestiges discovered
3 by chance or as a result of archaeological research
4 until the concerned assets are classified or the
5 archaeological research is completed, by enforcing
6 obligations to the owners, managers, or holders of
7 the other real rights over the lands that contains or
8 contained the respective archaeological heritage
9 assets, as well as by regulating or prohibiting," and
10 I underline, that is my underline, "and prohibiting
11 any human activities, including those previously
12 authorized." And once again I underline "including
13 those previously authorized."

14 So, you see this is a legal text that puts
15 the situation of prohibiting any human activities,
16 which is basically related with preservation in situ,
17 not removal, including of those previously
18 authorized.

19 Do you maintain your Legal Opinion on this
20 particular issue even in view of this legal text?

21 A. Without the shadow of a doubt, the key to
22 the interpretation of this legal text is the

1 reference to Article 2 para.(1) letters(j) and (k)
2 that show that they refer to areas with traced
3 archaeological heritage and to areas with
4 archaeological potential discovered by chance. Areas
5 with traced archaeological heritage are areas that
6 have not yet been the object of research, where
7 archaeological research is to be conducted.

8 Areas with archaeological potential
9 discovered by chance are those where, in an
10 unpredictable manner following the forces of nature
11 or after human activity, discoveries were made
12 outside archaeological research activities, and this
13 protocol, President and honorable Members of the
14 Tribunal, this protocol refers to areas that are
15 discharged from an archaeological point of view, that
16 cannot be with traced potential or areas with Chance
17 Finds because it does not refer to unpredictable
18 finds, but finds that are made under archaeological
19 supervision which is an attested form of
20 archaeological research during construction works.

21 Q. Two points more definitively important:
22 One, do you see on this legal text the expression

1 "contained," which means "included in"?

2 A. Let's not waste time, where?

3 Q. The text that you are considering--
4 (Overlapping speakers.)

5 Q. Oh, I'm sorry. I think you can look at it.
6 It's the second-to-last row. Maybe number five on
7 the English version.

8 A. That "contain" or "contained" the
9 archaeological heritage assets?

10 Q. "Contain" in the present tense; right? Not
11 in the past. That's first, "contain" is the present
12 tense, and then we have "contained" which is in the
13 past, both tenses; right?

14 A. Yes, but without any doubt, it refers to the
15 fact that they contained movable archaeological
16 heritage assets and not immovable assets because
17 those remained there.

18 (Overlapping speakers.)

19 Q. Do you see a distinction--

20 A. We're not talking about immovable
21 archaeological assets. It's a distinction of
22 interpretation that I would like to make and I'm sure

1 I'm right.

2 (Overlapping interpretation with speaker.)

3 Q. Is there a distinction between movable and
4 immovable archaeological assets in this text?

5 A. Let's make a simple interpretation rule.

6 Q. I don't have much time. Do you see any kind
7 of reference to movable or immovable assets in this
8 legal text? "Yes" or "no".

9 A. I've already answered your question. My
10 interpretation is that when it refers to a land that
11 contained archaeological traces, it cannot refer to
12 immovable assets but only to movable assets because
13 immovable assets, in order to be protected, have to
14 stay there, to be there. If they contained, they
15 disappeared.

16 Q. Do you agree with me that Romanian Law has
17 at the core of the rules of interpretation the Latin
18 dictum "ubi lex non distinguit, nec nos distinguere
19 debemus" where the law doesn't make a distinction,
20 not the Interpreter should make a distinction? Is it
21 that the basic notion of interpretation of law under
22 Romanian Law? "Yes" or "no".

1 A. Yes.

2 Q. And is it--

3 PRESIDENT TERCIER: All right.

4 DR. LEAUA: This is my last question.

5 PRESIDENT TERCIER: You said no.

6 THE WITNESS: I said no--I said yes.

7 PRESIDENT TERCIER: Sorry. I misunderstood.

8 I thought it was--

9 THE WITNESS: It's one of the interpretation
10 rules, one of them. It's not the only one. It's not
11 the supreme rule of interpretation.

12 BY DR. LEAUA:

13 Q. Once that this has been clarified, try to
14 understand a little bit of your logic, and you say
15 that movable and immovable should nevertheless be
16 made as a distinction because of the reference to
17 "contained" or "contain," in the past or present
18 tense. But if movable, make it--does the text have
19 any kind of sense because otherwise why prohibit
20 actions or activities of humans in that area, if they
21 are movable that, therefore, they can be moved?
22 Obviously, the text refers precisely and more in the

1 first instance to immovable because then you have a
2 sense or a logic in prohibiting human activities in a
3 certain area?

4 A. My answer: I do not know the meaning of
5 this debate because, in my point of view, things are
6 very simple: We have a Chance Finds Protocol in an
7 area that was researched and discharged, and where
8 the Authorities, based on their right of
9 appreciation, already made the decision to establish
10 certain measures. This text tells us that they can
11 also prohibit activities, but the Authorities did not
12 decide on this measure. On the contrary, they
13 decided to allow in certain conditions the
14 continuation of the activity if there are any Chance
15 Finds that may appear. So, the authority decided its
16 right to exercise an option. The fact that it
17 exercised this right doesn't mean it violated a
18 provision of the Law because this is not an
19 imperative provision because, under this provision,
20 different measures can be taken.

21 DR. LEAUA: I think the Tribunal has
22 received the clarification that Respondent wanted to

1 obtain by the way of cross-examination. We thank
2 you, Professor Schiau, for your answers, and this
3 concludes Respondent's cross-examination.

4 PRESIDENT TERCIER: Thank you very much.

5 (Witness drops document on floor.)

6 THE WITNESS: Sorry.

7 PRESIDENT TERCIER: This is a Chance Find.
8 Do you have a redirect?

9 MS. COHEN SMUTNY: Yes, we have a brief
10 redirect.

11 We're going to pull up again those
12 provisions that we were just looking at.

13 MS. COHEN SMUTNY: Can we get up onto the
14 screen Article 5 of C-1701. Let's pull up so one can
15 see the full paragraph that you were just looking at.

16 REDIRECT EXAMINATION

17 BY MS. COHEN SMUTNY:

18 Q. Professor Schiau, you were asked about this
19 Article, and I recall you made mention of Article 2
20 paragraph (1) letters (j) and (k) that begins the
21 opening sentence of Article 5.

22 What is the significance of the reference to

1 Article 2 paragraph (1) letter (j) and letter (k)?

2 A. It actually identifies the sites to which
3 these provisions apply, the area with traced
4 archeological heritage and the area with
5 archeological potential evidenced by chance.

6 Q. Yes. Let's look at--if we could pull up
7 Article 2 paragraph (1) letter (k).

8 2 paragraph (1) letter(k). If you could
9 pull the full paragraph, please.

10 Professor Schiau, what is the significance
11 of this provision? If you could describe that to the
12 Tribunal.

13 What are we looking at here?

14 A. Here, we are looking at a provision which
15 shows that in certain situations, one can reveal an
16 archeological potential on a certain land following
17 human activities other than archaeological research
18 and also as a result of the action of natural
19 factors, such as earthquakes and other natural
20 events.

21 This means that, here, we have an
22 archeological discovery which is evidenced by chance.

1 And such discovery evidenced by chance is defined in
2 Article 2 letter (j), meaning--evidencing of
3 archeological assets as a result of the action of
4 natural factors and human actions other than attested
5 archeological research.

6 Q. The last reference--your last sentence,
7 "other than attested archeological research," could
8 you explain a little bit more what you mean and what
9 exactly you're referring to?

10 A. Letter (k), which we have in front of us,
11 you mean?

12 Q. Yes.

13 A. So, it refers to discoveries evidenced by
14 chance which require archeological research for the
15 purpose of recording and scientific valorization.

16 MS. COHEN SMUTNY: Okay. We have no more
17 questions.

18 PRESIDENT TERCIER: Do my co-arbitrators
19 have questions? Not the case? Not the case.

20 In that case, Professor Schiau, I'd like to
21 thank you for your testimony.

22 THE WITNESS: Thank you as well.

1 (Witness steps down.)

2 PRESIDENT TERCIER: We have the next Expert,
3 and this is Professor Podaru. I'm not sure we will
4 be able to complete the whole examination, but I
5 would like, really, very much, to start with it, in
6 particular with the presentation.

7 It is half an hour, and then we will have
8 cross. Normally, it is 1 hour and 20 minutes, but we
9 can do it tomorrow if you are in agreement.

10 Ms. Cohen Smutny.

11 MS. COHEN SMUTNY: We are prepared to
12 proceed, and we would like to proceed, and although
13 we haven't discussed again the schedule, I think if
14 we stop at 6:00 o'clock on the remaining days, we're
15 not going to make through the time.

16 So, we're prepared to try to complete the
17 examination of this Expert this evening, if that's at
18 all possible.

19 PRESIDENT TERCIER: It means two hours, huh?

20 MS. COHEN SMUTNY: I suppose it depends if
21 the estimates prove to be accurate.

22 PRESIDENT TERCIER: That's true, but you

1 have 30 minutes plus one hour plus 20 minutes. We
2 are close to two hours. I don't really--that--it
3 will be--it is already quarter to 6:00.

4 Okay. Let's start, and we'll see how far we
5 can go.

6 OVIDIU PODARU, CLAIMANTS' WITNESS, CALLED

7 PRESIDENT TERCIER: Okay. Professor Podaru,
8 good evening. You have stated--I don't know if you
9 stated the language in which you will testify.

10 THE WITNESS: I do speak and understand
11 English, but because of the technical terms using
12 administrative and urban planning law that I used so
13 many years in Romanian language, I would prefer to
14 have my presentation in Romanian.

15 PRESIDENT TERCIER: It is your perfect
16 right.

17 Good. You will be--I don't think that I
18 need--to save time, need to present the Members of
19 the Arbitral Tribunal. You will be heard as an
20 expert.

21 I would like you to read the declaration
22 that is in front of you.

1 THE WITNESS: I solemnly declare, upon my
2 honor and conscience, that my statement will be in
3 accordance with my sincere belief.

4 PRESIDENT TERCIER: Thank you very much.

5 You have prepared for this proceeding a
6 Legal Opinion. And this Legal Opinion is dated as
7 the 2nd of November 2018, and you have it in front of
8 you.

9 THE WITNESS: Yes.

10 PRESIDENT TERCIER: Can you confirm the
11 content of this document?

12 THE WITNESS: I do. I confirm the content.

13 PRESIDENT TERCIER: Okay. You know the
14 procedure, in order to save time. You know also the
15 rules aiming at having a clear transcript.

16 I would like you to mention very shortly--a
17 short introduction. And you heard, also, the two
18 questions. The second will be the process that has
19 been followed for the preparation of the--of your
20 Legal Opinion.

21 So, please, you have the floor.

22 You know that you have 30 minutes, huh?

1 THE WITNESS: Yes, I know.

2 PRESIDENT TERCIER: You have 27 slides. It
3 makes one slide per minute.

4 THE WITNESS: I know but...

5 DIRECT PRESENTATION

6 THE WITNESS: I am Ovidiu Podaru. I am a
7 lecturer and Ph.D. coordinator for Babeş-Bolyai law
8 school in Cluj-Napoca, and there I have been teaching
9 administrative law for about 20 years in two courses.
10 One, about mainly administrative assets law, and
11 there we analyze administrative contracts like public
12 procurement, concessions, special administrative
13 regimes for goods and procedures existing in matters
14 of expropriation.

15 In the same faculties, law school, I teach
16 land management, urbanism, and building activities.
17 Under this course, I teach the notions and the
18 various urbanism regimes: PUGs, PUZs, urbanism
19 certificates, and building permits. And the other
20 one pertains to the general procedures when it comes
21 to obtaining a building permit and to other special
22 procedures.

1 I am also an attorney at law for about 20
2 years too. And on principle, I work in
3 administrative litigation. I believe these are the
4 reasons why I was called to give this Legal Opinion.

5 As far as I remember, two years ago or so,
6 at the end of 2016 or beginning of 2017, I was
7 contacted by Tuca Zbârcea & Asociatii for an
8 agreement in principle regarding drafting a Legal
9 Opinion in this case. On principle, I agreed.

10 We met for a first time--the meeting lasted
11 several hours. We agreed on some details. They
12 provided me a big binder, as big as this one, full of
13 documents. And later on I received two or three
14 more. And we identified a list of topics, nine or
15 ten, on which I should give a Legal Opinion.

16 Later on, I was told that my Opinion would
17 be submitted later in this case, so I had time to
18 write it. Several months more or maybe a year.

19 I looked at the case law, the doctrine, in
20 detail. And in about one year, we met again when,
21 given the fact that the Arbitration has already
22 advanced, I was asked to provide an Opinion on

1 additional topics. Then, given the two Drafts, we
2 met. And in the end, we came to the final form of
3 this Opinion.

4 We discussed together the order of the ideas
5 from this Opinion in order to make--to clarify to the
6 Tribunal what I wanted to say.

7 That was the process.

8 PRESIDENT TERCIER: Thank you very much.

9 You may proceed.

10 THE WITNESS: With regards to my Opinion
11 before the Tribunal, in essence, it analyzes three
12 main topics linked to administrative law and the Law
13 on Urbanism and Building.

14 The first--and I will point just to several
15 things in the 30 minutes that were given to me
16 because I decided to identify more important topics.

17 First, I started from the principles that
18 govern administrative activity in Romania, with the
19 purpose of showing that two different procedures:
20 the general one regarding permitting of constructions
21 works, and then the special EIA permitting procedure,
22 are interconnected only in a limited way and as

1 provided by the law.

2 The second point--the second important topic
3 is the analysis of special law regimes, the ones
4 applicable to mining perimeters, namely the
5 protection of heritage area in Romania. And then I
6 showed how these special regimes are reflected in the
7 urbanism documentation adopted in Rosia Montana
8 throughout the time.

9 And the last point was the review of the
10 current urbanism status of the territory within the
11 footprint of the Project, as such was modelled by the
12 List of Historic Monuments from 2010 uncorrected,
13 followed by the 2015 list, the updated list, and then
14 the Application to UNESCO to put Rosia Montana on
15 UNESCO's heritage list.

16 With regard to the first topic, I started
17 from the best-known principle that governs
18 administrative law in Romania, the principle of
19 legality.

20 I pointed out that unlike private civil law,
21 which is a right of freedoms because it allows
22 individuals to adopt any conduct except those

1 explicitly forbidden by the Law, administrative law
2 is more strict. In other words, administrative
3 authorities cannot act otherwise but what is
4 explicitly provided under the Law and only by
5 compliance with the legal procedures.

6 On the other hand--and this is a different
7 facet of the same principle--administrative law is a
8 law of strict interpretation.

9 Now, speaking about procedural--procedure, I
10 showed that administrative authorities cannot impose
11 conditions which are not explicitly provided in the
12 Law.

13 In other words, the endorsements, other
14 approvals, or any other procedural elements, on the
15 one hand, are explicitly provided in the Law and, on
16 the other hand, they are mandatory for the
17 administrative authorities.

18 From another perspective, another big
19 principle in administrative law is the transparency
20 principle, which lays down that administrative
21 authorities must always publish on principle on their
22 website, what are the documents requested in order to

1 issue a permit or a certificate.

2 As a consequence of the legality principle,
3 I have shown that the appreciation right of
4 administrative authorities does not apply to permits
5 when it comes to the large topic of urbanism.

6 On the one hand, I pointed that
7 administrative authorities cannot require documents
8 or other conditions of form or procedure but those
9 explicitly provided in the Law. And, secondly, if
10 all the conditions under the Law are complied with,
11 on principle, administrative authorities are obliged
12 to issue that document.

13 I also showed--shown as a consequence that
14 if, assumingly, claiming a hypothetical appreciation
15 right in such a procedure, the authority would issue
16 a rejection decision, this can be canceled in court
17 because of excess of power and declared illegal.

18 Now, about the two procedures at hand in
19 this Arbitration.

20 I showed that also as part of the legality
21 principle, the EIA Procedure is coordinated in a
22 limited way with the building permitting. There are

1 two connecting points. The first one: This EIA
2 Procedure, which is the first to be delineated in the
3 permitting procedure, follows its own course and is
4 regulated by its own procedure.

5 And, as this specific procedure does not
6 allow for its suspension, my conclusion was that any
7 suspension, any stay in the proceedings is
8 essentially illegal. On the other hand, the other
9 connecting point, if we have projects that suppose
10 several stages, with several building permits issued
11 for each stage, the EIA Procedure must take place one
12 time, at the beginning, for the entire project.

13 Consequently, going into details, I
14 showed--I've shown that specific documents such as
15 the Urbanism Certificate, the Urbanism Plan, the
16 ADCs, or ownership--land ownership rights, are
17 important only for the issuance of the Building
18 Permit, where there are specific provisions and not
19 in the EIA Procedure, where such provisions do not
20 exist. And then I analyzed them one by one.

21 The Urbanism Certificate, this is an
22 informative deed for the applicant, necessary at the

1 beginning of the Procedure, informing upon the legal
2 conditions because they are provided in the Law and
3 in the Urbanism documentation, namely, the list of
4 endorsements that are necessary in order to obtain a
5 building permit.

6 It is also a conformity endorsement because
7 the issuer of the Certificate is liable for the
8 correctness of the information contained thereon.

9 Of course, there have been many discussions
10 and many controversies around the legal nature of
11 this Urbanism Certificate, but they belong to the
12 past.

13 Because I've shown in my Opinion that there
14 are two Decisions of the High Cassation Court of
15 Justice, 25 of 2017 and 13 of 2018--which according
16 to the Law, are mandatory for all courts in
17 Romania--which established clearly and definitely the
18 fact that the Urbanism Certificate is on principle,
19 an administrative operation, that cannot be
20 challenged separately in court, and by exception, it
21 may get the features of an administrative deed only
22 when in its contents there are interdictions or

1 conditions that prevent the applicant to obtain the
2 final deed, namely the Building Permit.

3 Given this situation, the Urbanism
4 Certificates are valid until they expire, of course
5 with two exceptions: Unless the investor would ask
6 their renewal or the developer abandons the
7 investment.

8 But even admitting that the Urbanism
9 Certificate is an administrative deed and can be
10 challenged in court, we must clarify that according
11 to the Romanian Law, the mere challenge of such a
12 deed does not deprive it of legal effects. For that,
13 we need a court decision to suspend or annul this
14 deed.

15 Anyway, all these discussions in this case,
16 to me, at least, seem theoretical, because from the
17 documents that were made available to me, RMGC had a
18 valid Urbanism Certificate between 2010 and 2018, as
19 I have shown in my Opinion.

20 About the ADCs. They're not necessary,
21 according to my opinion, in the EIA Procedure. I
22 have shown and my colleague has also shown that the

1 ADCs annul, in essence, the legal protection of the
2 historical sites, and make--make land available for
3 building. They are necessary in order to obtain a
4 building permit therefore.

5 But once a piece of land is archeologically
6 discharged, these areas cannot make the object of
7 endorsement or any other documents issued by the
8 Ministry of Culture for the very reason that they are
9 no longer archeological sites.

10 But in the EIA Procedure, the Ministry of
11 Culture would issue an endorsement for those areas
12 that have not been discharged. I have shown that the
13 rights on land--the ownership rights are necessary
14 also for obtaining the building permit.

15 There is an explicit provision to that end,
16 the investor being able to make proof of these
17 rights, before Step number 5 of the Building
18 Permit--of the issuance of the Building Permit, the
19 moment they submit for a Building Permit.

20 And, finally, the plans and urbanism
21 regulations which are also necessary only for a
22 building permit. When it is necessary, according to

1 Construction Law, local authorities may ask the
2 investor to amend existing urbanism plans for the
3 permit to be issued.

4 In this particular situation, revised
5 urbanism documents are to be obtained at Step 3 of
6 the construction permitting procedure in parallel
7 with the other permits and endorsements, including
8 the environmental endorsement. I have not identified
9 an express legal provision conditioning the issuance
10 of the Environmental Permit on the existence of such
11 reviewed documentations.

12 Of course, in the procedure for the
13 elaboration of the urbanism plan or program there
14 exists a procedure to assess impact on the
15 environment, the SEA Procedure. But the SEA
16 guidelines only mention that these SEA Procedures
17 must usually be followed before the EIA, but there is
18 no legal obligation to this effect.

19 Even if we accepted that the SEA Procedure
20 had mandatory to take place before the EIA Procedure,
21 that by no means meant that the very plan approved
22 had to be submitted for approval--in this case by the

1 local counties--before the issuance of the
2 Environmental Permit.

3 In this case, the company must--it must be
4 mentioned the company obtained the SEA Endorsement
5 that completes the procedure in March 2011.

6 As a consequence of this legal status, I say
7 that the Minister of the Environment cannot impose on
8 the company to submit an approved PUZ before the
9 issuance of the Environmental Permit only because
10 they believe that was preferable.

11 Of course, if essential amendments are
12 brought to--brought to a project after the issuance
13 of the EP such must be notified to the environmental
14 authority because they may entail redoing the EIA
15 Procedure.

16 But that does not mean that environmental
17 authorities may oblige the--force the investor to
18 present an approved PUZ prior to the issuance of the
19 EI--of the Environmental Permit just because they
20 believe that is preferable in order to avoid a
21 possible repetition of the environmental procedure.

22 Had the Environmental Ministry rejected the

1 Application to issue an Environmental Permit because
2 no PUZ had been submitted, the decision would have
3 been annulled in court as being unlawful.

4 My second point refers to the two special
5 urbanism regimes of the area. On the one hand,
6 Article 6 para. 1 says that mining perimeters are
7 exclusively designated to profit-making activities.
8 This text from the General Urbanism Regulation tells
9 us that the authorization of definitive constructions
10 other than those necessary for mining activities is
11 prohibited. In other words, once the license is
12 issued, the area becomes mono-industrial.

13 This text comes together with Article 41 of
14 the Mining Law, which says on the one hand that the
15 license must be communicated by its issuer to the
16 local authorities, and those authorities are given a
17 deadline to amend urbanism plans to the effect--to
18 take into account the existence of that license. So,
19 they have to attach this special specific regime,
20 typical of mining areas.

21 From the documents that were provided to me,
22 I understand that this obligation was known and

1 acknowledged by the involved authorities; that is the
2 Ministry of Environment, NAMR, and local authorities
3 in Rosia Montana.

4 On the one hand--

5 MS. ZIGMUND: I see the translator is
6 struggling. Can you slow down a bit?

7 PRESIDENT TERCIER: Thank you.

8 THE WITNESS: On the one hand, the Romanian
9 Law does have a special urbanism regime for the
10 protection of archeological sites and historical
11 monuments. Namely that urbanism documents, PUZs or
12 PUGs, must have special rules to protect those
13 heritage goods.

14 After I reviewed all of the urbanism
15 documents in Rosia Montana, I started with the 2000
16 PUG that reflected the mining areas and the cultural
17 heritage goods known at that time.

18 The 2000 PUG mentions the Rosia Montana
19 Exploitation License, some rights of the company
20 arising from that license. They indicated the fact
21 that the territory--the perimeter of the locality was
22 to be split in territorial reference areas based on a

1 feasibility study of the mining project that was
2 being drafted back then, and they took into
3 consideration the fact that the mining exploitation
4 was in the process of extending and there were
5 prohibitions with regard to the areas where
6 extensions were to be made.

7 The 2000 PUG did not mention any concrete
8 historical monument in the Rosia Montana area. It
9 only referred to a feasibility study for
10 archeological purposes dating from 2000 that was then
11 drafted by a State institution and that was going to
12 identify archeological vestiges in the area.

13 The 2002 PUG and PUZ also reflected the
14 Project on the one hand and the status of heritage
15 goods on the other hand, as they were known at the
16 time.

17 That is, on the one hand, they regulated the
18 Industrial Area of the Project with restrictions and
19 building--and specific building restrictions
20 according to mining provisions. And, on the other
21 hand, as far as the cultural heritage areas were
22 concerned, the 2002 PUG mentions the National

1 Alburnus Maior Research Program and also reflected
2 the archeologically discharged perimeters at the
3 time.

4 It is also worth mentioning that the two
5 administrative deeds were favorably endorsed by the
6 Ministry of the Environment--of Culture.

7 The 2006 PUZ was an updated version of the
8 2002 PUZ which remained at the draft stage. It
9 reflected, on the one hand, the final form of the
10 project with the same restrictions and building
11 limitations specific to mining perimeters, but it
12 reflected--it reflected the amendments that had been
13 brought during the EIA Procedure to diminish impact
14 on the environment.

15 It also reflected Historical Monuments in
16 Rosia Montana that were included in the 2004 list and
17 areas that had been archeologically discharged.

18 I would also like to add the fact that local
19 authorities had the obligation to initiate, to
20 prepare, and to approve PUZs for protected areas for
21 every single one of these Historical Monuments.

22 For this 2006 PUZ, in March 2011 an SEA

1 Endorsement was obtained to assess the impact on the
2 environment.

3 And this is how I move to my third topic.
4 The SEA Endorsement was canceled three years later in
5 2014 by a Court of First Instance--Initial Instance
6 based on two reasons: Because the SEA Endorsement
7 and the Report at its basis did not reflect the
8 historical monuments in the updated List of
9 Historical Monuments as of 2010 and, on the other
10 hand, because at the time, there were no PUZs for
11 protected areas for Historical Monuments in the area.

12 Therefore, in the meantime, an updated List
13 of Historical Monuments had been adopted as of 2010,
14 and essentially, contrary to the 2004 list, included
15 the addresses of two archeological sites in Orlea, a
16 radius of 2 kilometers around the Orlea locality,
17 which actually doesn't exist as a locality, as a
18 settlement, human settlement.

19 So, this form of identifying the monuments
20 was quite ambiguous. Competent authorities after
21 that list was issued, on the one hand, admitted in
22 various correspondence items the fact that the list

1 contained errors that had to be corrected and, on the
2 other hand, the Ministry of Culture itself issued a
3 favorable opinion on--endorsement for the project,
4 after publication of that list.

5 But the first instance court annulled in
6 2014 this SEA Endorsement, given that that address of
7 a 2-kilometer radius around Orlea locality indicated
8 the surface area of a historical monument in Rosia
9 Montana.

10 The company challenged the 2010 list,
11 asking, on the one hand, the Court to find that the
12 list was unlawful and for the authorities to be urged
13 to correct the list or to amend it.

14 The Ministry of Culture and the National
15 Institute of Heritage were Respondents in this case.
16 The two actions were deemed inadmissible. One of
17 them was dropped because this arbitration was
18 ongoing, and the other was dismissed as not
19 presenting any interest on the grounds that in the
20 meantime a new List of Historical Monuments had been
21 adopted. That is the 2015 list.

22 In both cases competent authorities

1 stood--upheld that list as being unlawful. They
2 changed their behavior. They said that, essentially,
3 it was just a correction of an alleged abusive
4 declassification under the 2004 list regarding
5 certain Historical Monuments included in the 2002
6 draft list of historical monuments.

7 I called it a draft because, as a
8 parenthesis, in my opinion, this list does not meet
9 the criteria for it to be considered an adequate
10 administrative deed based on the principles of
11 Administrative Law.

12 I showed in my opinion that this idea would
13 not hold to criticism for at least three reasons.
14 From an urbanism perspective, the 1992 draft could
15 not have designated such a large historical monument
16 of over 1,200 hectares without such being further
17 reflected in the urbanism documentations.

18 From 1992 onwards, obviously, a large part
19 of the Project would bring--had been discharged by
20 ADCs and only a few sites had been classified via the
21 2004 list. The very existence of the 2004 list that
22 was effective from 2004 to 2010, without being not

1 revoked but not even challenged, represents in itself
2 evidence that supports my Statement.

3 Later, in 2015, a new version of this list
4 is adopted. Essentially, besides the 2-kilometer
5 radius in the Orlea Area, it establishes a different
6 radius of 2 kilometers, calculated this time from the
7 center point of the Rosia Montana Commune.

8 Based on that list, the Ministry of Culture
9 approved a delineation document to delineate this
10 historical monument and it sent it to local
11 authorities in Rosia Montana.

12 Thus, it showed two very clear things, in my
13 opinion. Namely, that the 2015 list indeed
14 established a historical monument with the area of at
15 least 1,257 hectares, and this monument had to be
16 reflected as such in the documentations and urbanism
17 plans.

18 And on the other hand, consequently, the
19 Mining Project could no longer be reflected in the
20 same urbanism documentations as we had a legal text,
21 Article 11 of the Mining Law, which expressly forbids
22 mining in protected areas.

1 Finally, in January, 2017, the Government
2 proposed the classification of the Rosia Montana site
3 on the UNESCO World Heritage List. Consequently,
4 according to the Law, the areas where UNESCO
5 monuments are located enjoy specific protection
6 measures established by Government Decision.

7 Furthermore, according to the law, the same
8 protection measures, the same regime, also apply to
9 the areas, to the goods, to the monuments for which
10 the Romanian Government filed a request for
11 classification or for inclusion on the UNESCO World
12 Heritage List.

13 Or, as far as I understand at the present
14 moment, as the solution of the Application is pending
15 and the Application was not withdrawn, the legal
16 regime of the site is the same as if the UNESCO
17 Application had been accepted.

18 Since there is this Application and since
19 there is the 2015 list with a delineation
20 documentation, the Mining Project obviously cannot be
21 part of the urbanism documentations and, therefore,
22 one cannot obtain the necessary authorizations.

1 Thank you very much. That was all I had to
2 say.

3 PRESIDENT TERCIER: Thank you very much,
4 Professor Podaru. Now we must look at the next step.

5 You had announced one-hour
6 cross-examination?

7 DR. LEAUA: Approximately, yes.

8 PRESIDENT TERCIER: With flexibility, yeah.
9 Could be redirect, we don't know, 20 minutes. It is
10 quarter after 6:00. Personally, I'm not ready to
11 work until 8:00 o'clock.

12 I think, really, we have--I don't know.
13 What is your position? You would continue?

14 But we will certainly not finish tonight,
15 this evening.

16 MS. COHEN SMUTNY: Claimant is happy to
17 proceed as you prefer. We just want to make sure
18 that we complete the hearing fairly at the end of
19 Friday.

20 PRESIDENT TERCIER: I agree with you.
21 That's, of course, the goal that we all have. I
22 think we will make some math tonight in order to see

1 the time that has already elapsed, the credit that is
2 still on your account, and based on the estimation
3 that you've had the time that we have.

4 We have a little bit but not much freedom on
5 Friday, but we will see it. But I personally
6 really--I'm at the end of my co-arbitrator for once.

7 (Tribunal conferring.)

8 DR. HEISKANEN: May I summarize the
9 Respondent's position before we finish?

10 PRESIDENT TERCIER: That's fine.

11 DR. HEISKANEN: We have some flexibility,
12 and quite a bit of flexibility on Friday. If we
13 follow the current program, we will finish by noon.
14 If we added an hour--

15 PRESIDENT TERCIER: You think?

16 DR. HEISKANEN: Yes, indeed. It's only 2
17 hours and 45 minutes planned for Friday. If we add
18 the 1 hour and 20 minutes or 30 minutes, whatever
19 that we have still left for today to the Friday's
20 program, we would still finish early afternoon on
21 Friday.

22 So, our suggestion would be to--if there's a

1 need to go on longer and they're still showing that
2 we will need to go on longer on Friday, we extend the
3 Friday session to early afternoon.

4 SECRETARY YETANO: Mr. President, if I
5 just--for you to consider, we still have at this
6 point in total for the Parties 23 hours and 30
7 minutes left. So, if we divide that by 3, it's a
8 little bit over 7 hours of Parties' time, and we have
9 three days left. And we have spent less--as an
10 average, less than 7 hours on the previous days. I'm
11 just a bit concerned about that.

12 PRESIDENT TERCIER: Okay. I think there are
13 two decisions.

14 The first decision is to decide what we are
15 doing right now. We are professors. We know that
16 the students are able to understand--to listen during
17 a limited time. It's also true of professors. I
18 think, really, we should now interrupt.

19 The second point, we will indeed look at the
20 time, and I share the concern with the Tribunal
21 Secretary. But, again, the principle is first that
22 we will try to have sufficient time to hear all the

1 expert and witnesses and, secondly, that it will
2 be--the time will be shared with slight flexibility
3 equally between the Parties.

4 So, we will come to you with a proposal
5 tomorrow to see if it's true that we have a provision
6 for Friday afternoon. But even then, we may have to
7 make sure that we can comply with everything.

8 Okay? Is it good for you? For you too,
9 Dr. Heiskanen?

10 DR. HEISKANEN: Yes.

11 PRESIDENT TERCIER: You take note?

12 DR. HEISKANEN: We take note.

13 PRESIDENT TERCIER: Thank you very much. I
14 wish you a very pleasant evening.

15 (Whereupon, at 6:21 p.m., the Hearing was
16 adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

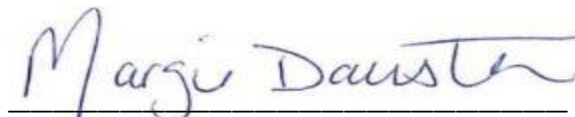


DAVID A. KASDAN

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I, Margie Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.


MARGIE DAUSTER