U.S. Department of Justice

Criminal Division

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Washington, D.C. 20530

February 27, 2012

MEMORANDUM

TO: All Federal Prosecutors

FROM: Patty Merkamp Stemler /s PMS
Chief, Criminal Appellate Section

SUBJECT: Guidance Regarding the Application of *United States v. Jones*, 132 S. Ct. 945 (2012), to GPS Tracking Devices

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In *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court affirmed the suppression of location data generated by a GPS tracking device surreptitiously affixed to a car without court authorization and monitored continuously over a 28-day period. [redacted]

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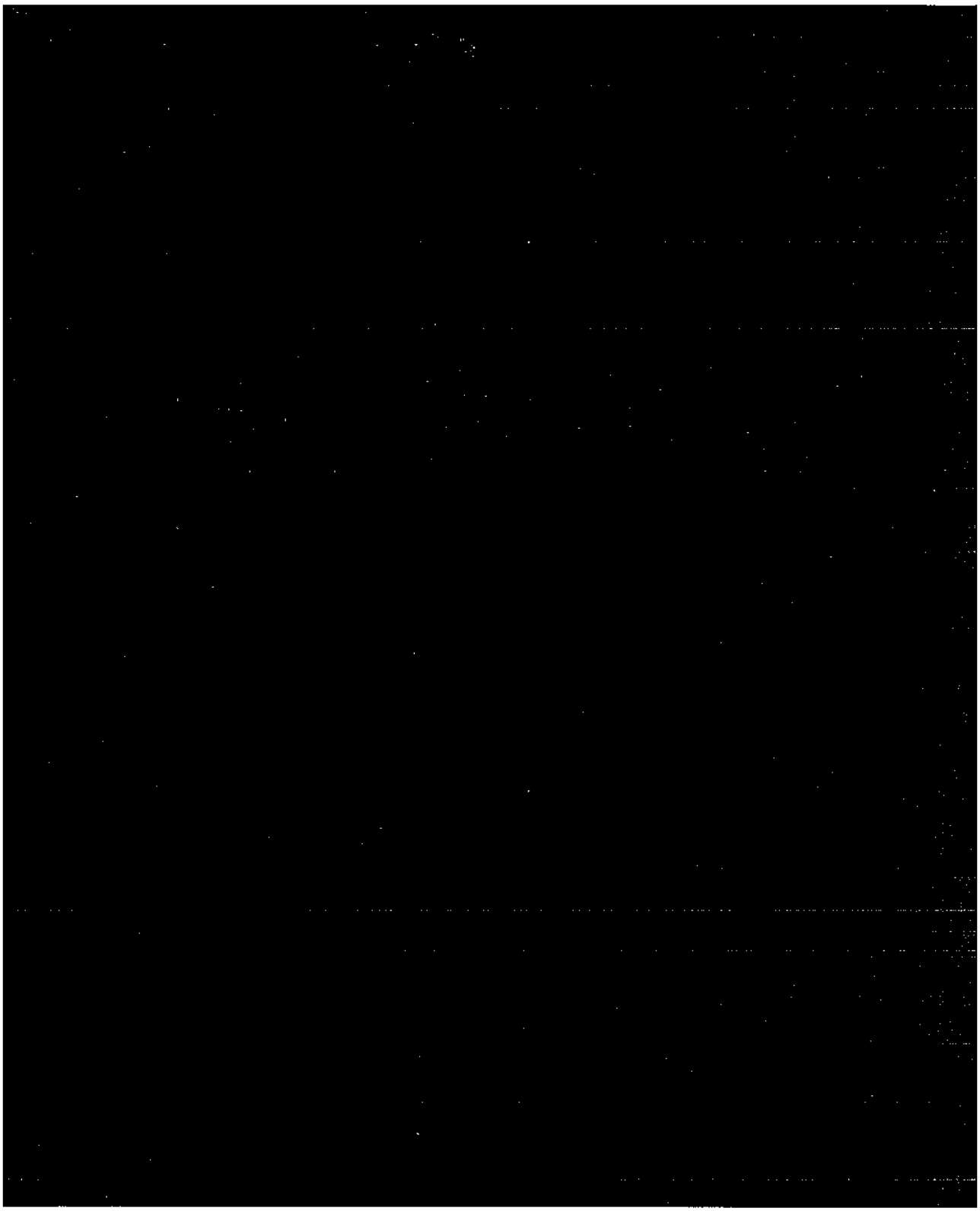

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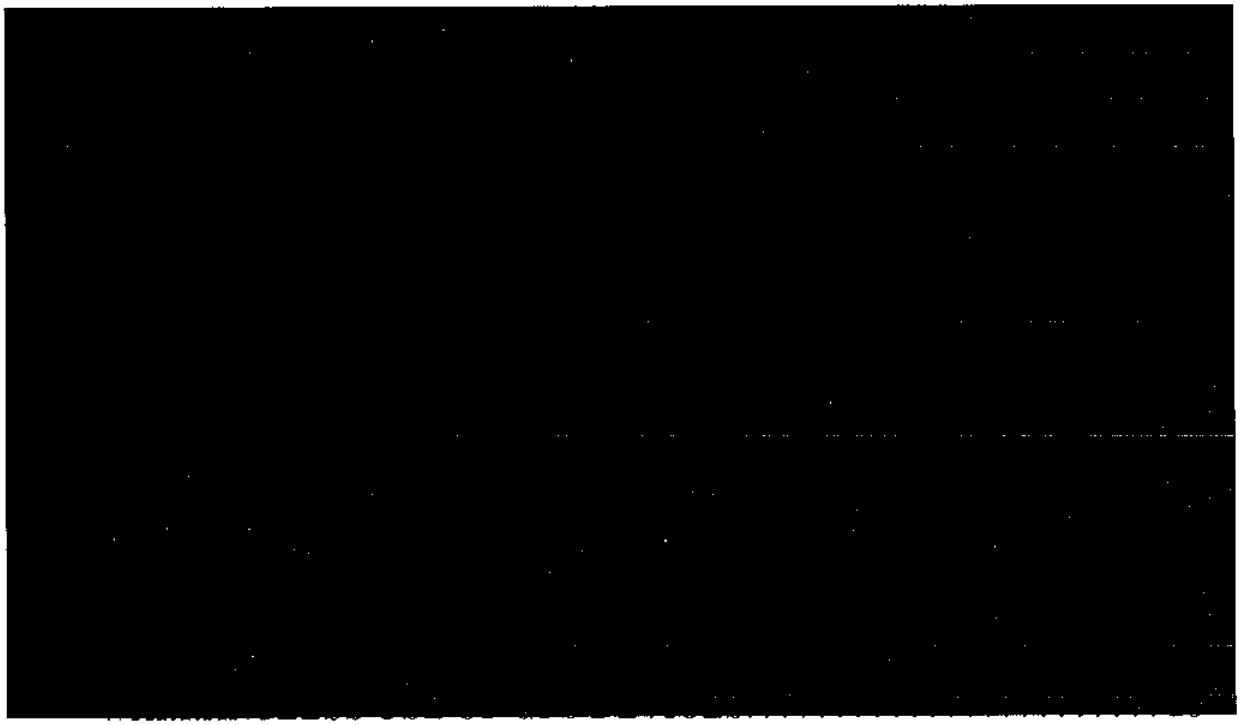

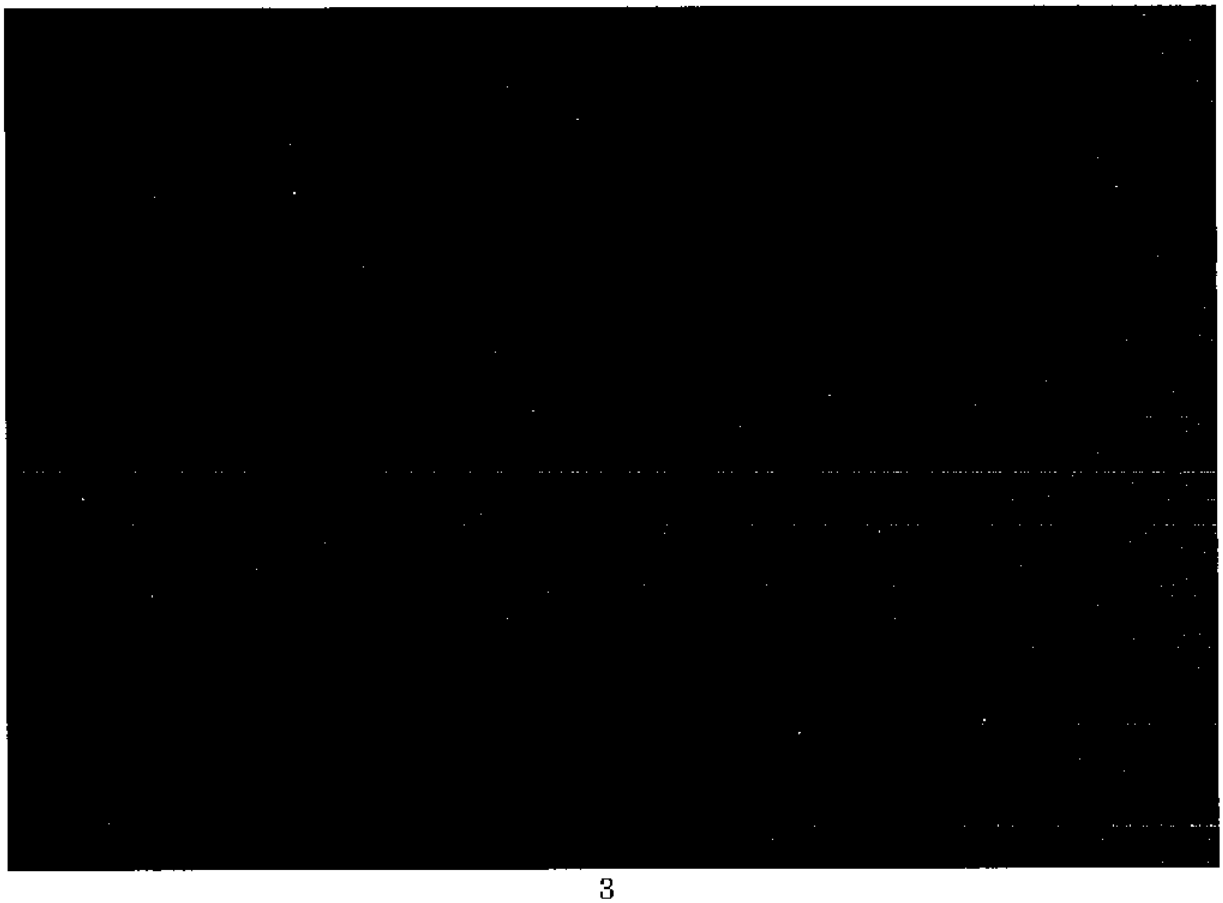

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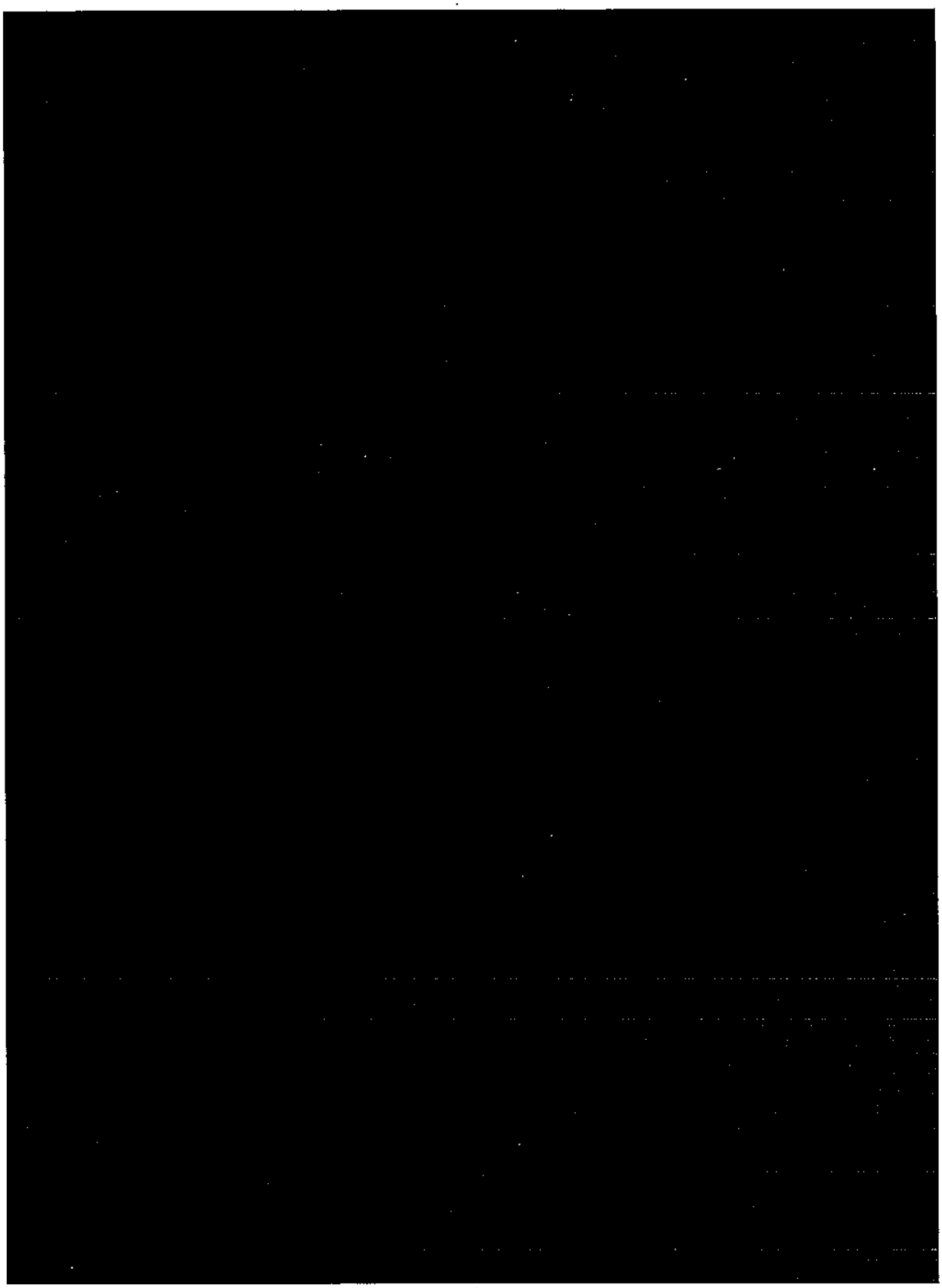

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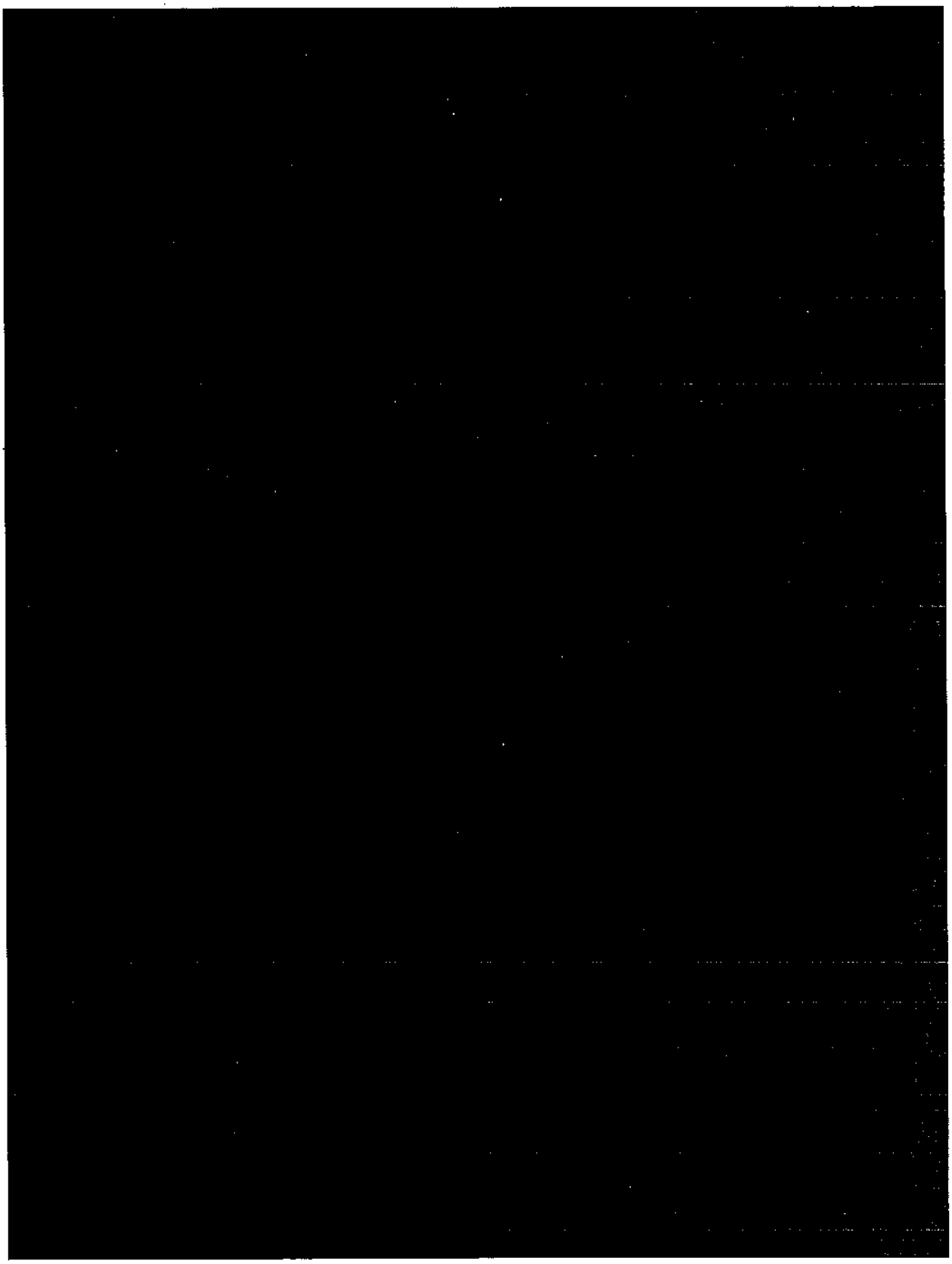

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I. THE DECISION

a. In *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the meaning of the Fourth Amendment. *Id.* at 949 (footnote omitted). Because the government had installed a GPS tracking device on the undercarriage of Jones's vehicle without a valid warrant and had then monitored the vehicle's location by means of satellite signals over the course of 28 days, the Court affirmed the suppression of the GPS-derived locational data. The Court did not consider whether reasonable suspicion could have supported the search, because the government had not raised that argument in the court of appeals. *Id.* at 954.

Although all nine Justices agreed that the evidence should be suppressed, the Court relied on a common-law trespass theory, while the concurring Justices relied on a theory based on interference with a reasonable expectation of privacy. The opinion for the Court, written by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, held that a Fourth Amendment search takes place when, "as here, the Government obtains information by physically intruding on a constitutionally protected area * * *." *Jones*, 132 S. Ct. at 951 n.3. The Court did not analyze whether a search had occurred under the reasonable-expectation-of-privacy test established in *Katz v. United States*, 389 U.S. 347 (1967), finding instead that "a classic trespassory search" had occurred. *Jones*, 132 S. Ct. at 954. Prior to *Katz*, the Court explained, its "Fourth Amendment jurisprudence was tied to common-law trespass * * *." *Id.* at 949. The "*Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 952 (emphasis in original). *Katz* thus "did not erode the principle 'that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'" *Id.* at 951 (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)). "By attaching the [GPS] device to the [vehicle]," the Court concluded, "officers encroached on a protected area." *Jones*, 132 S. Ct. at 952. The vehicle is an "effect," and "[t]he Fourth Amendment protects against trespassory searches * * * with regard to those items ('persons, houses, papers, and effects') that it enumerates." *Id.* at 953 & n.8.

b. Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, concurred in the judgment, but not in its rationale. Indeed, Justice Alito

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criticized the majority for resurrecting a trespass-based Fourth Amendment standard rather than applying the reasonable-expectation-of-privacy test. *Jones*, 132 S. Ct. at 957-962 (Alito, J., concurring in the judgment). In his view, "*Katz* * * * finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation." *Jones*, 132 S. Ct. at 959. Justice Alito would thus ask "whether the [warrantless] use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated." *Id.* at 964.

Under Justice Alito's approach, "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Jones*, 132 S. Ct. at 964. (citing *Knotts*, 460 U.S. at 281-282). In contrast, "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Jones*, 132 S. Ct. at 964. Without "identify[ing] with precision the point at which the tracking of [Jones's] vehicle became a search," Justice Alito opined that "the line was surely crossed before the 4-week mark." *Ibid.* He thus concluded that "the lengthy monitoring that occurred in this case constituted a [warrantless] search under the Fourth Amendment" that required the suppression of the evidence obtained. *Ibid.*

c. Justice Sotomayor, who fully joined Justice Scalia's opinion for the Court, wrote an additional concurring opinion in which she also agreed with aspects of Justice Alito's opinion. *Jones*, 132 S. Ct. at 954-957 (Sotomayor, J., concurring). In her view, "the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs." *Id.* at 955. Thus, she emphasized that "*Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it." *Ibid.*

At the same time, however, Justice Sotomayor argued that even in the absence of a physical intrusion, the government's use of invasive "nontrespassory surveillance techniques" might violate "a reasonable societal expectation of privacy * * * ." *Jones*, 132 S. Ct. at 955, 956. "Under that rubric," she believed, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" *Id.* at 955 (quoting Justice Alito's concurring opinion). She also suggested that unique attributes of "even short-term monitoring" through GPS would be relevant to the *Katz* inquiry: the low cost of GPS, its ability to acquire a comprehensive and storable record of a

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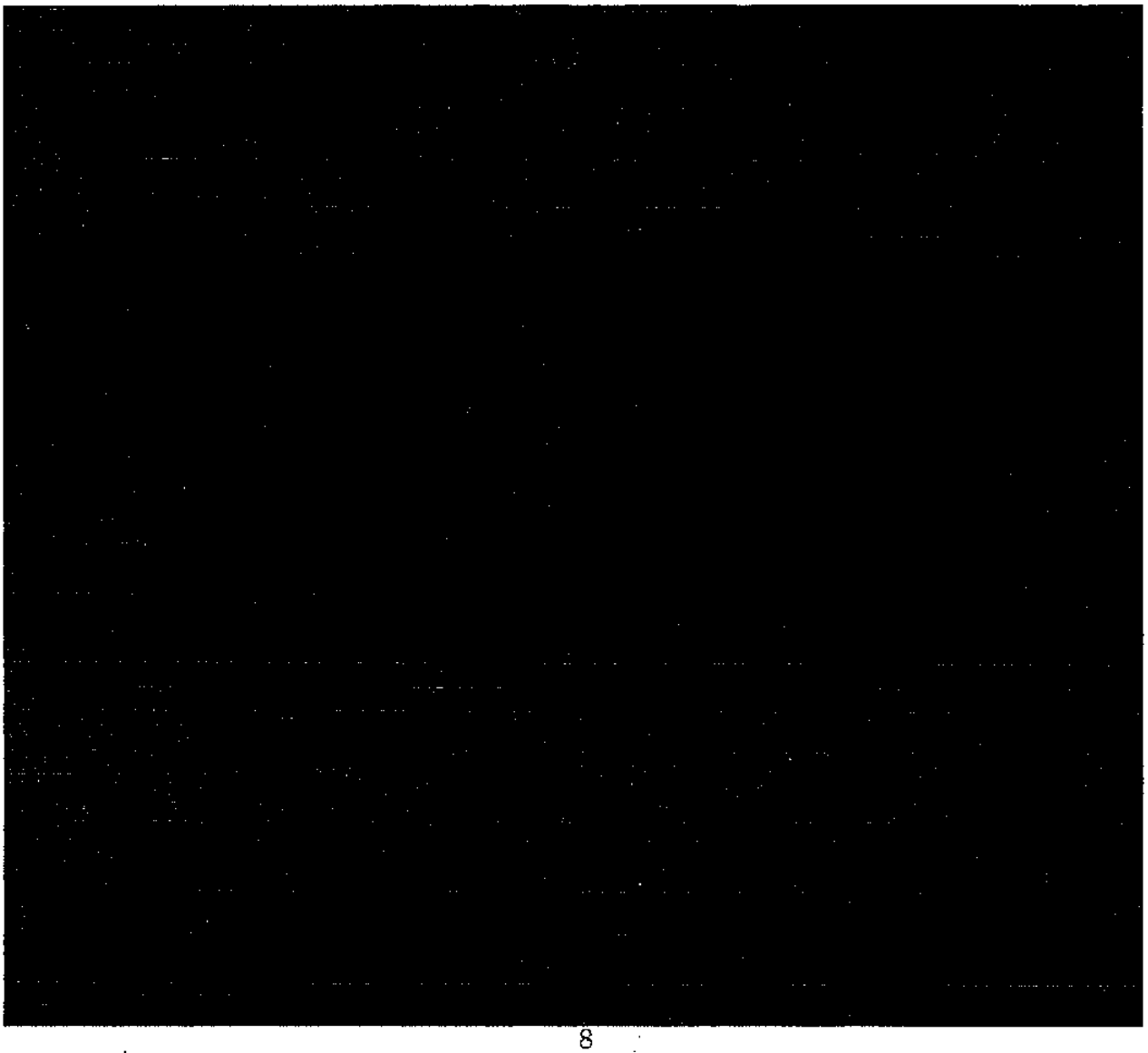
person's movements, and its ability to "reveal private aspects of identity." *Id.* at 956.

Justice Sotomayor concluded by expressing a view that would extend the Fourth Amendment's protections beyond what either the Court's opinion or Justice Alito's concurrence envisioned: "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." *Jones*, 132 S. Ct. at 957. She "would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." *Id.* (citing *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).



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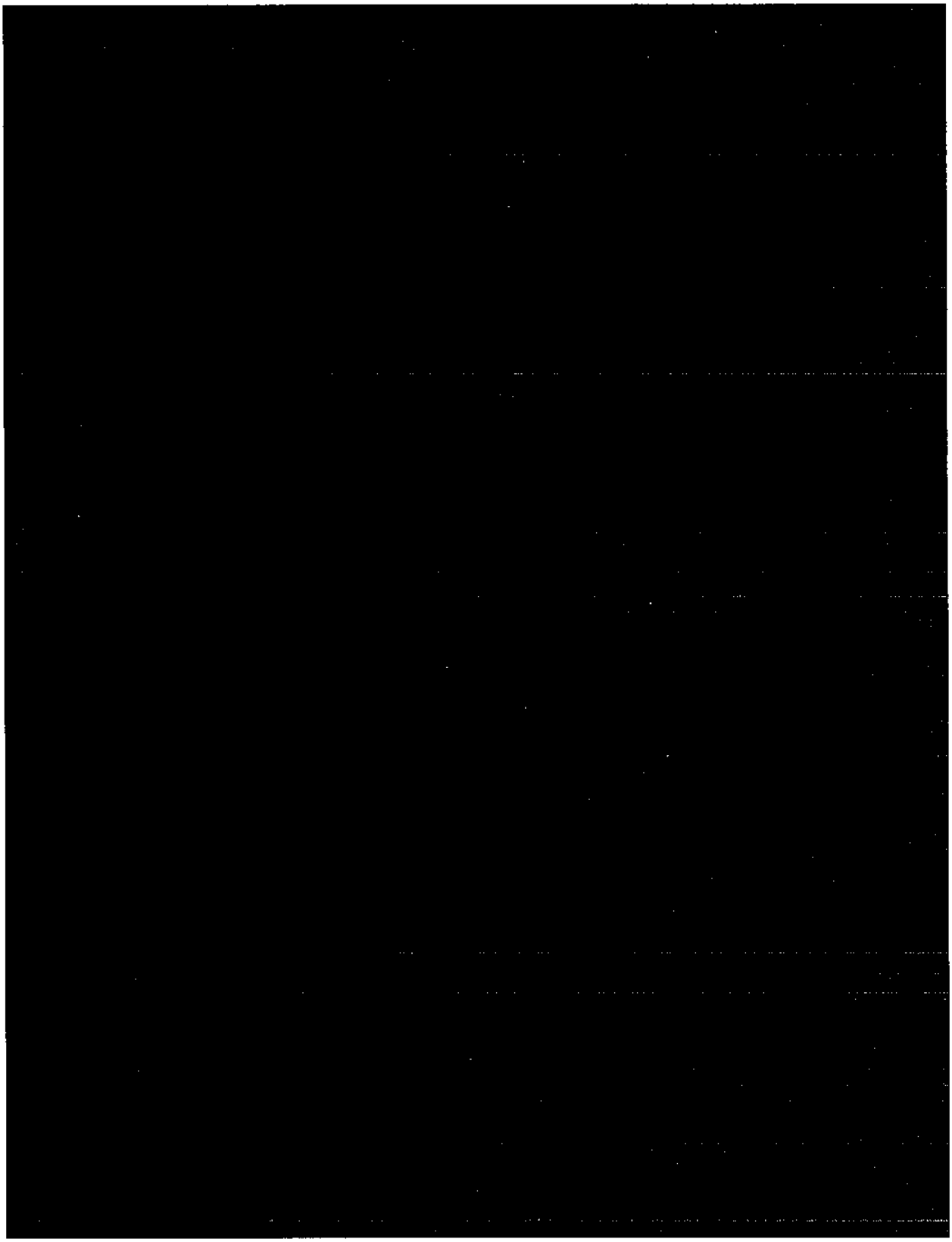

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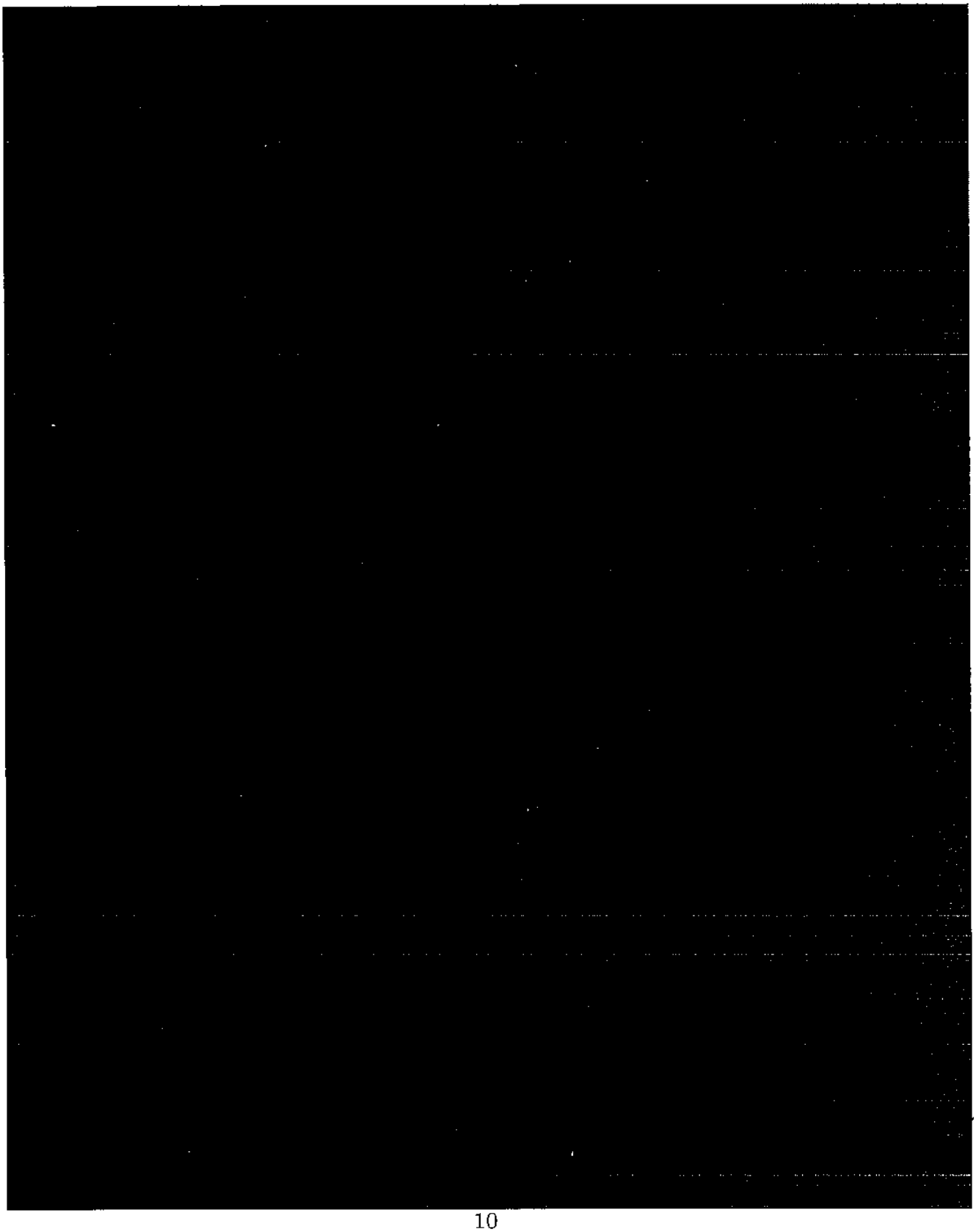

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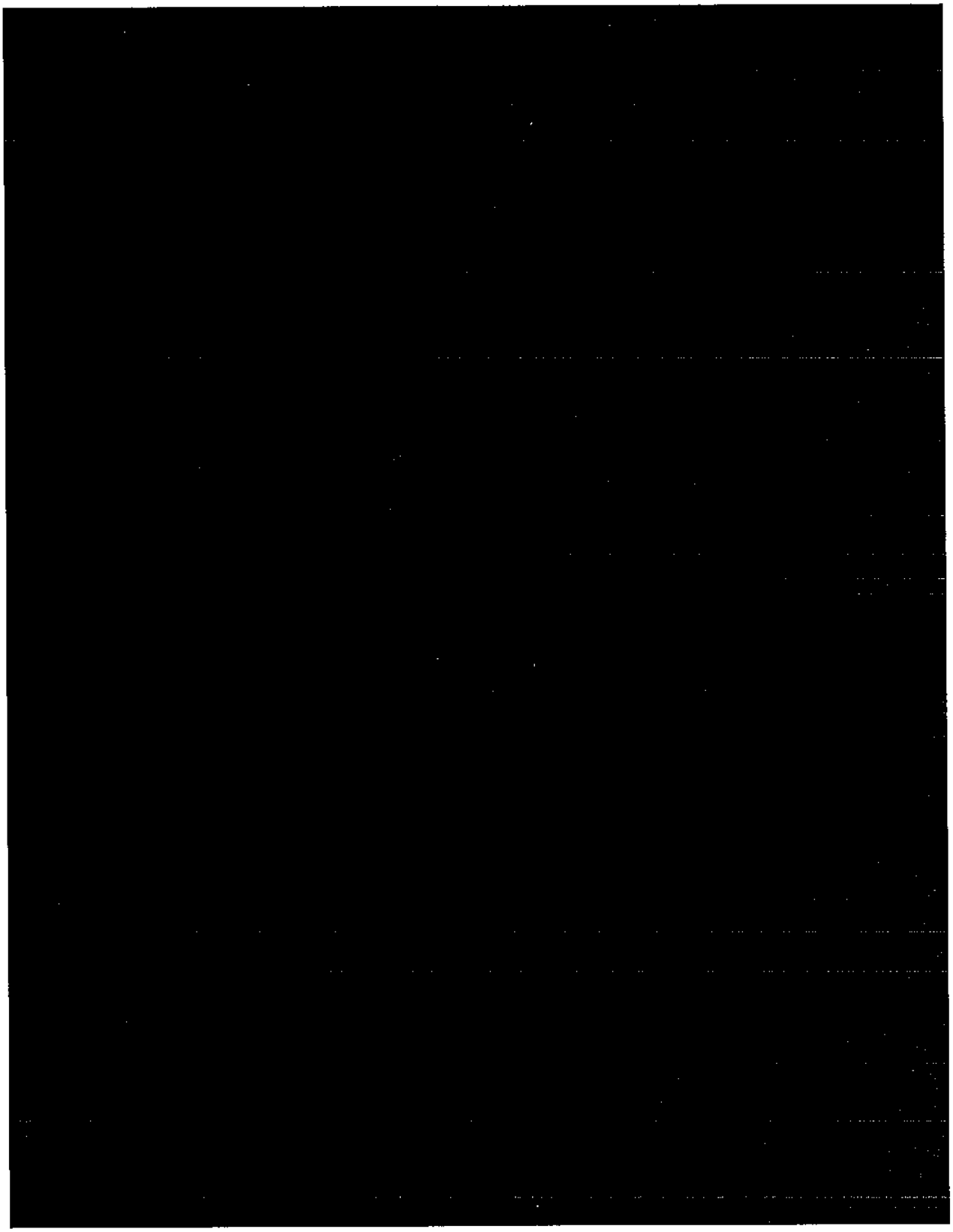

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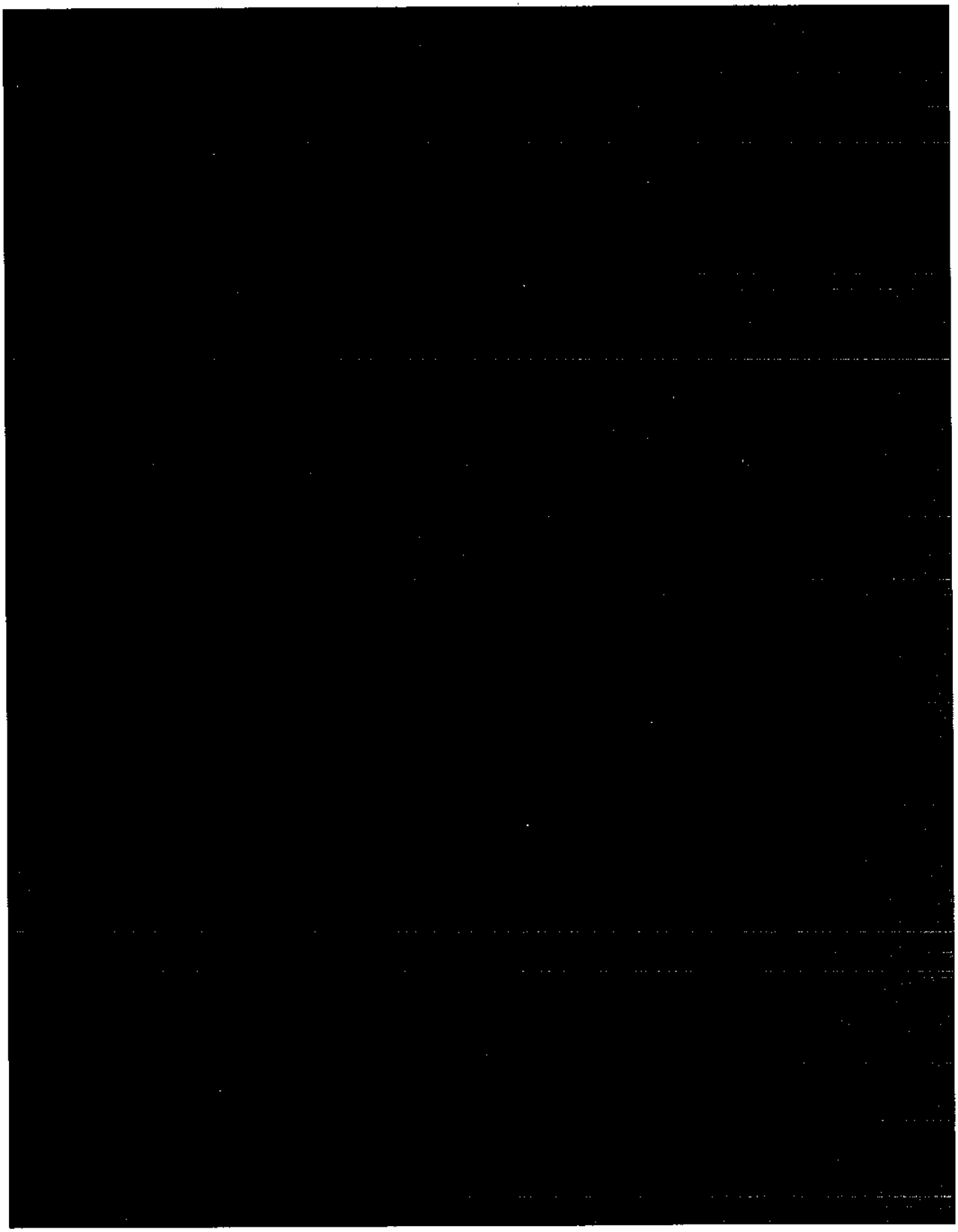

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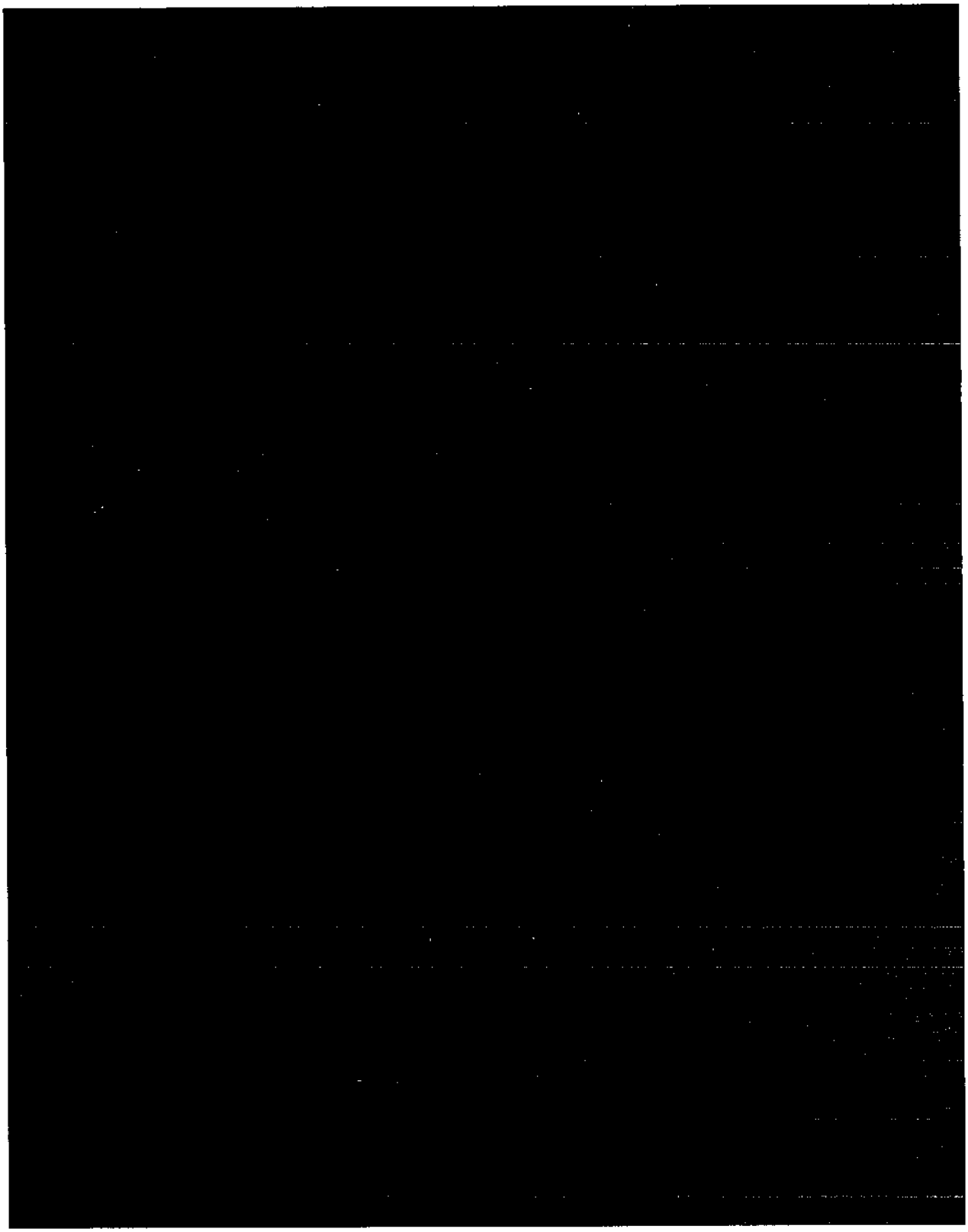

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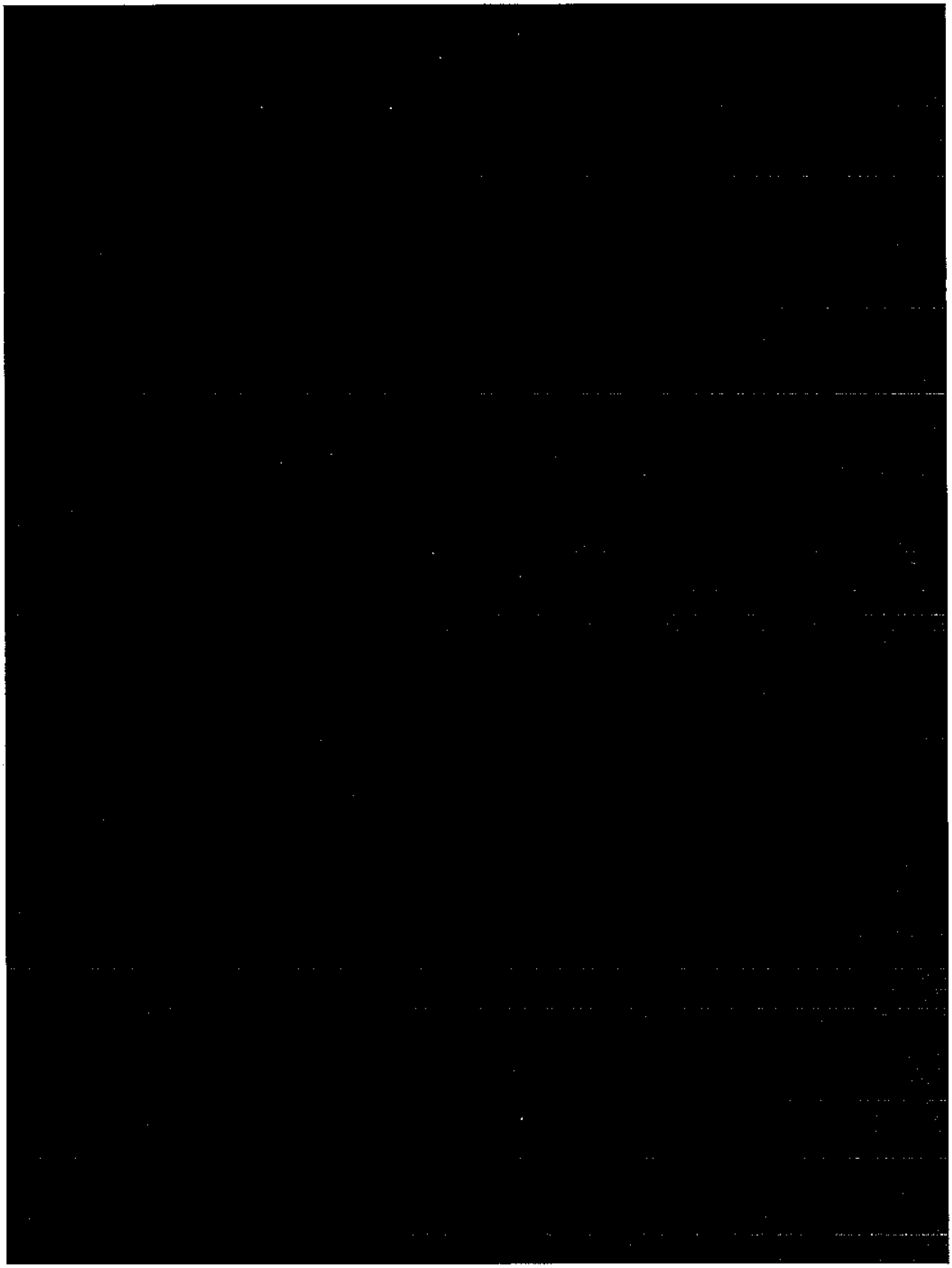

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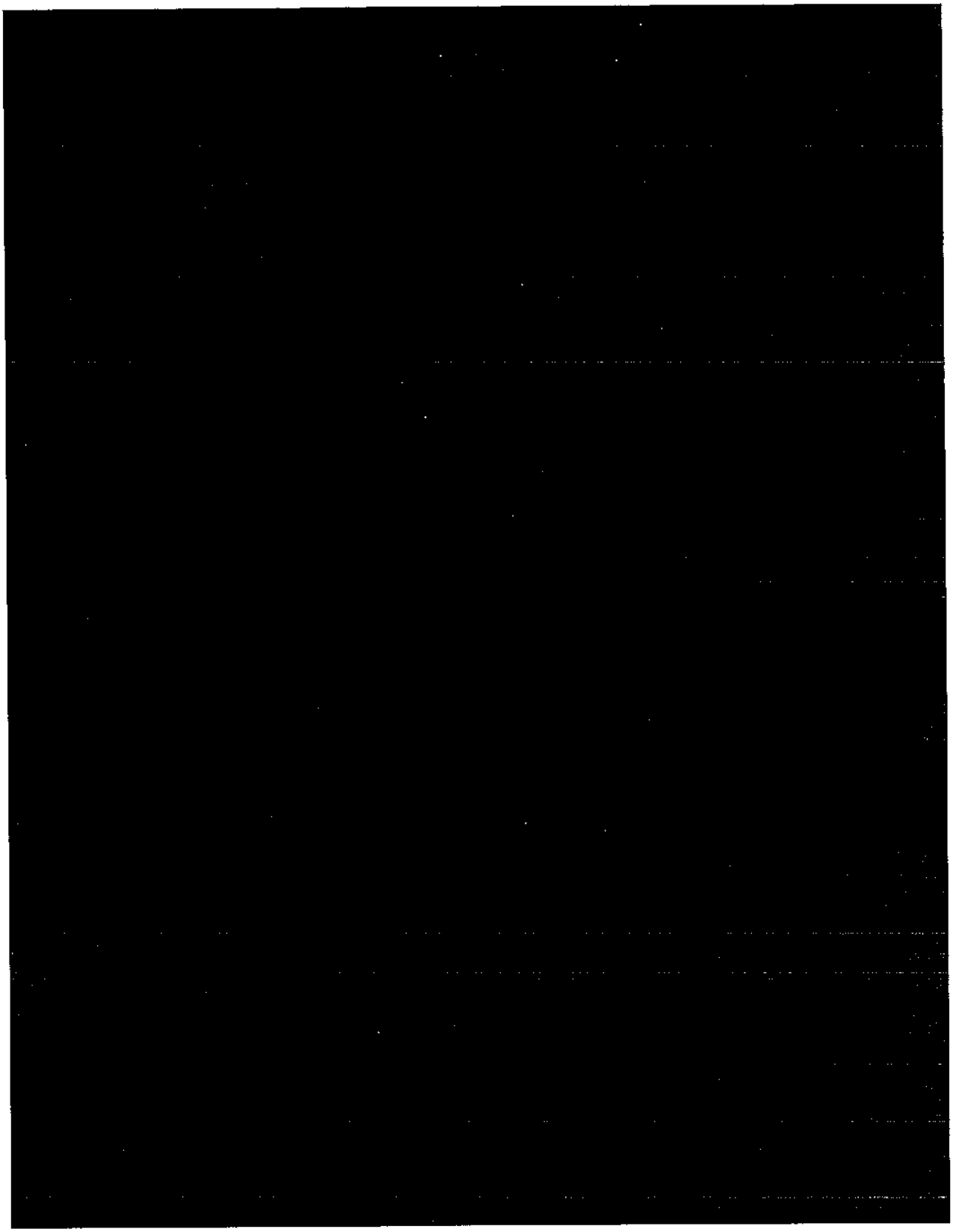

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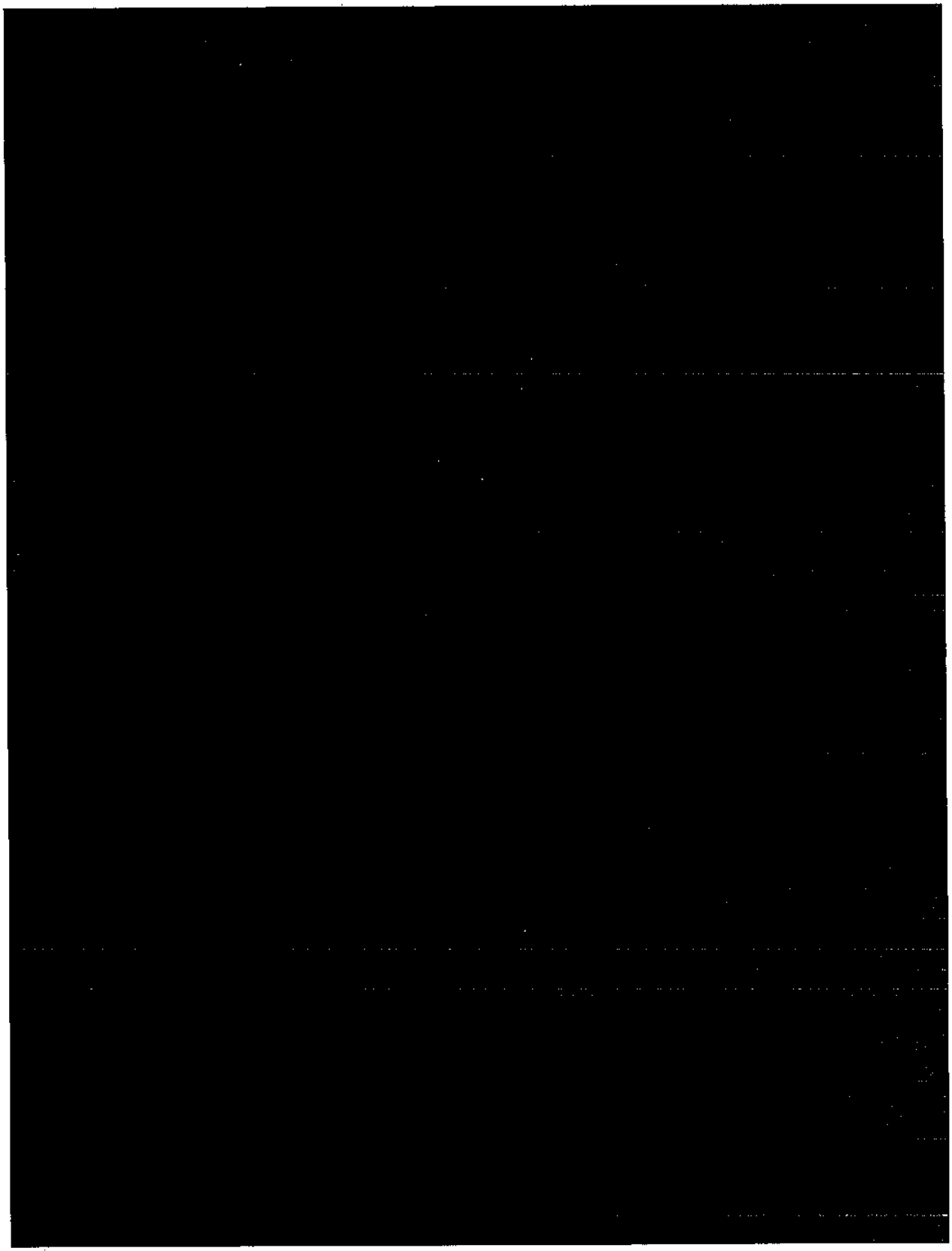

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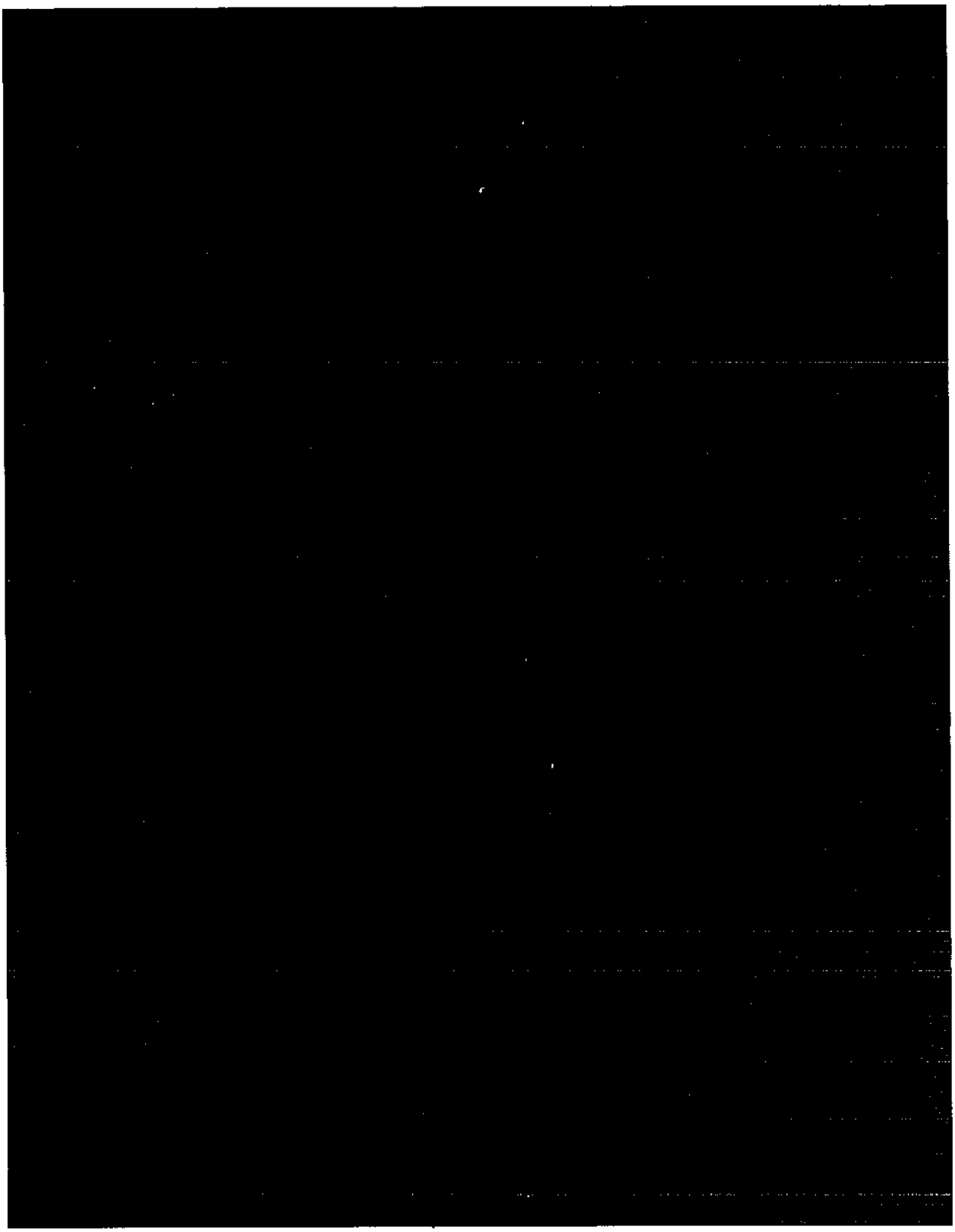

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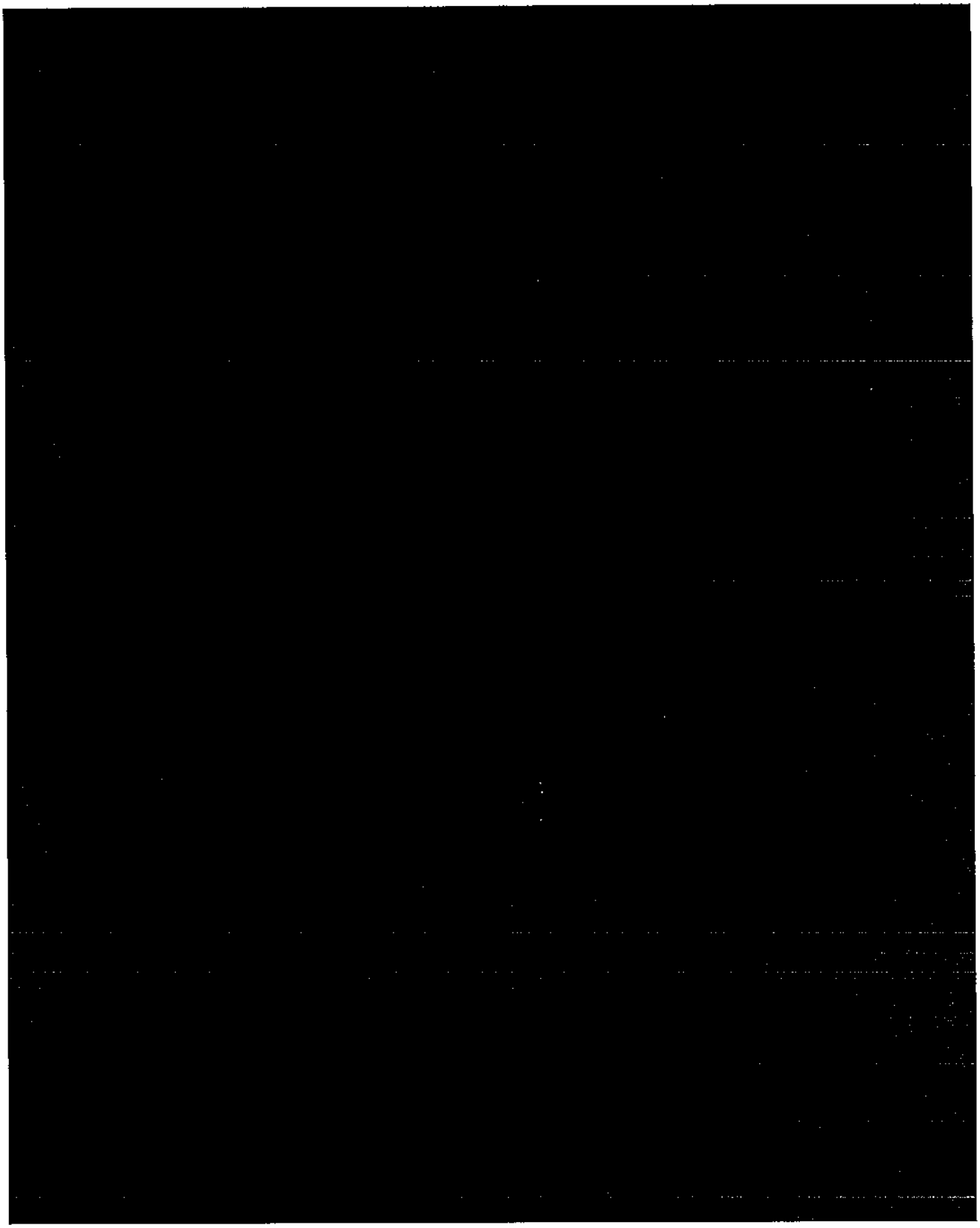

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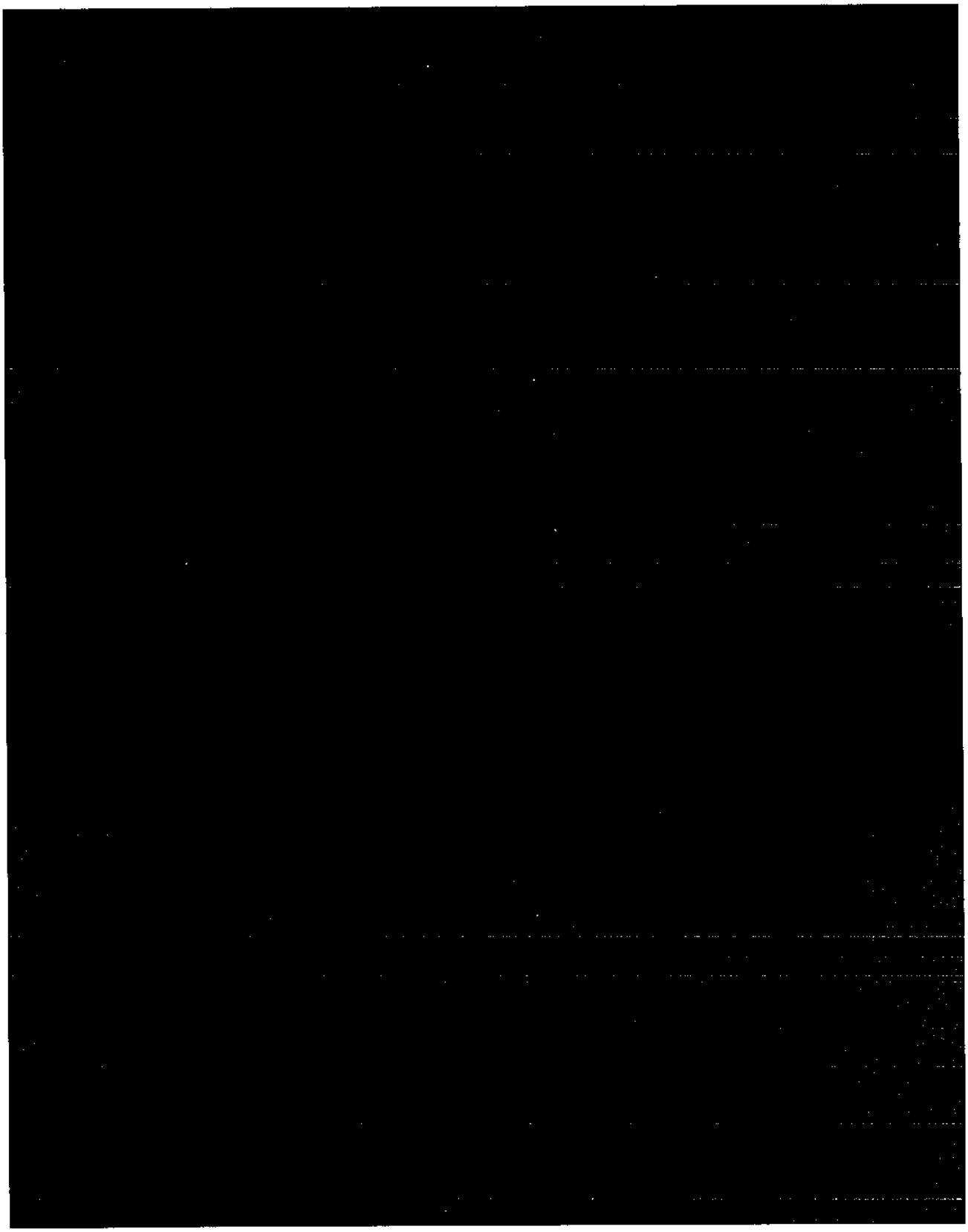

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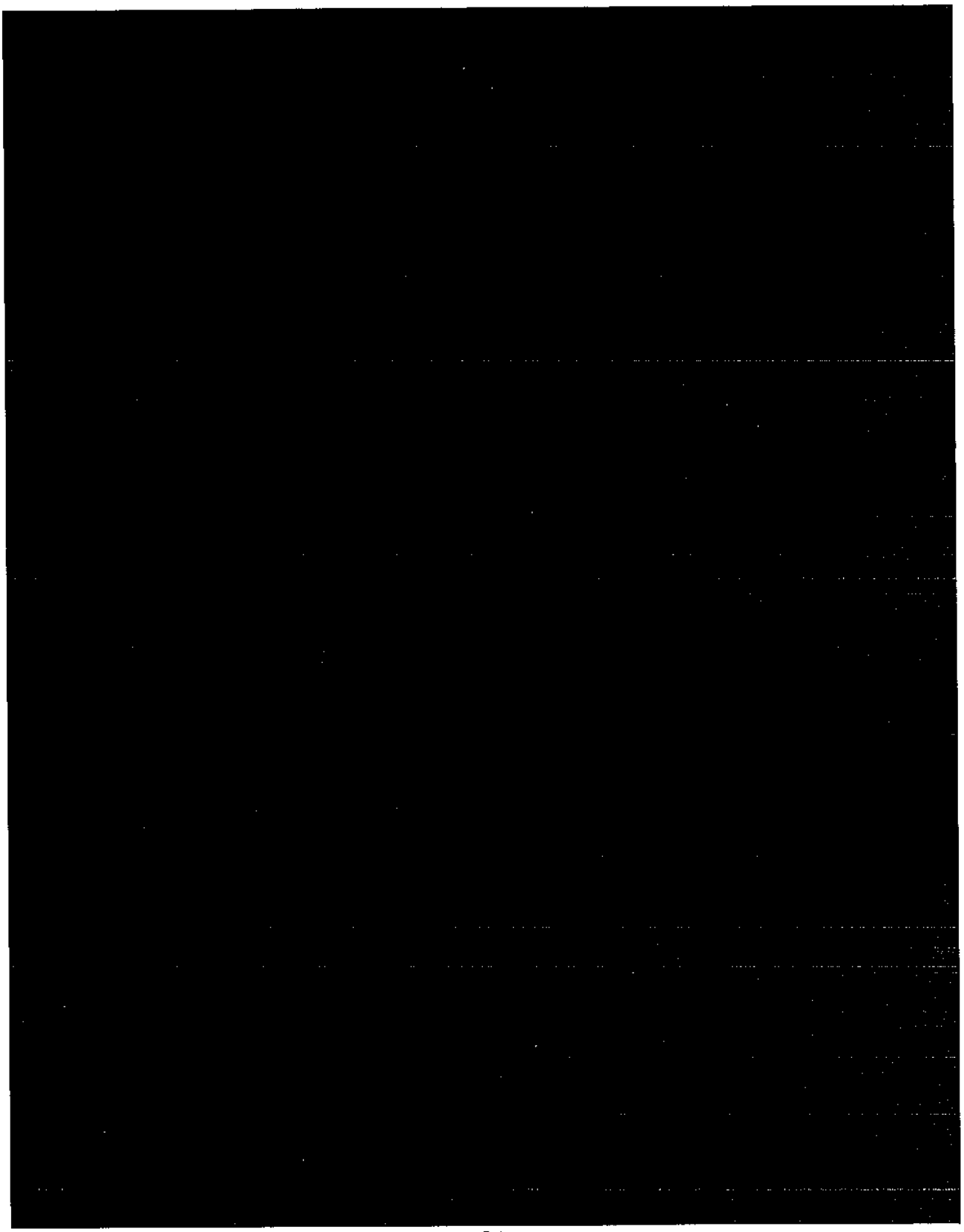

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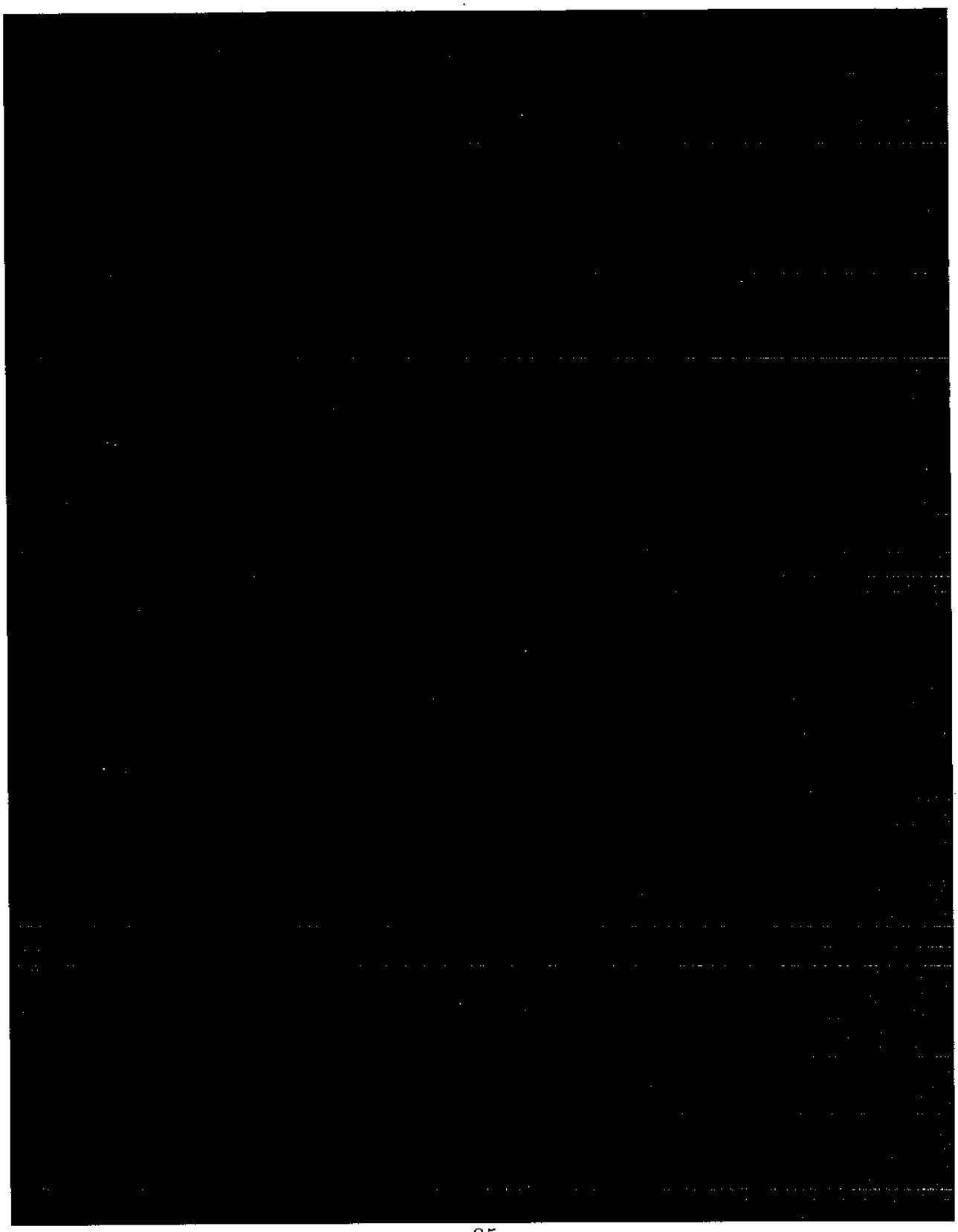

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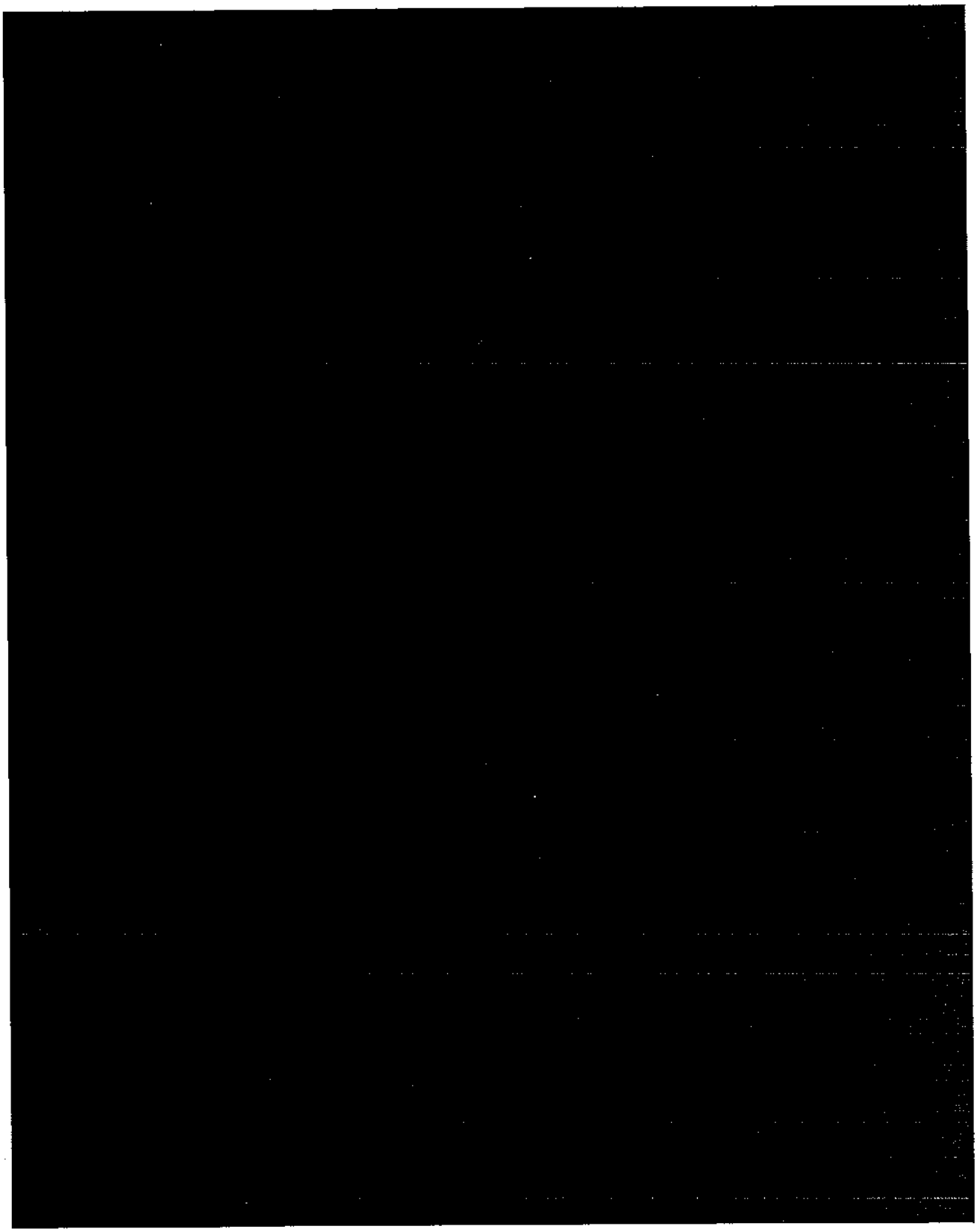

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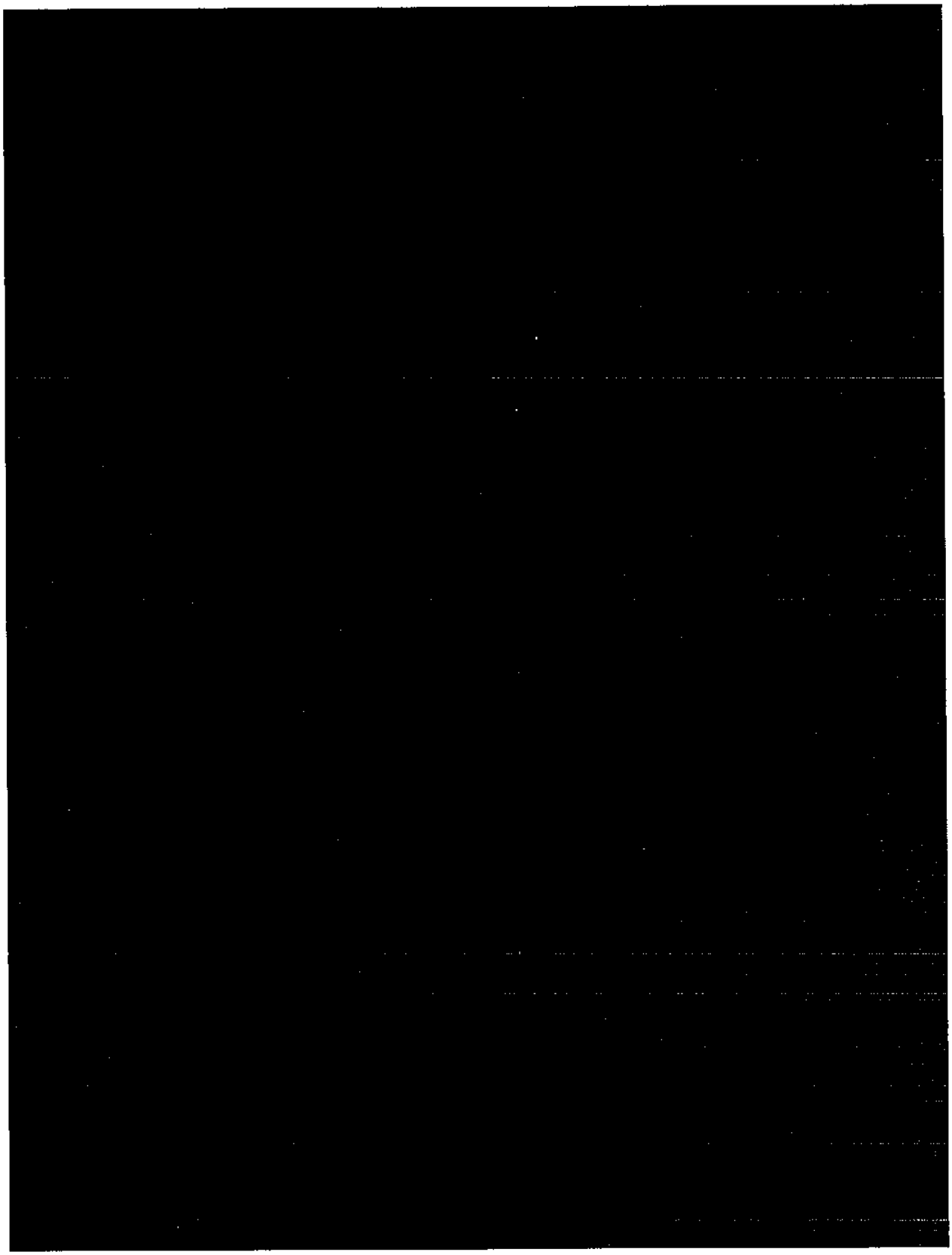

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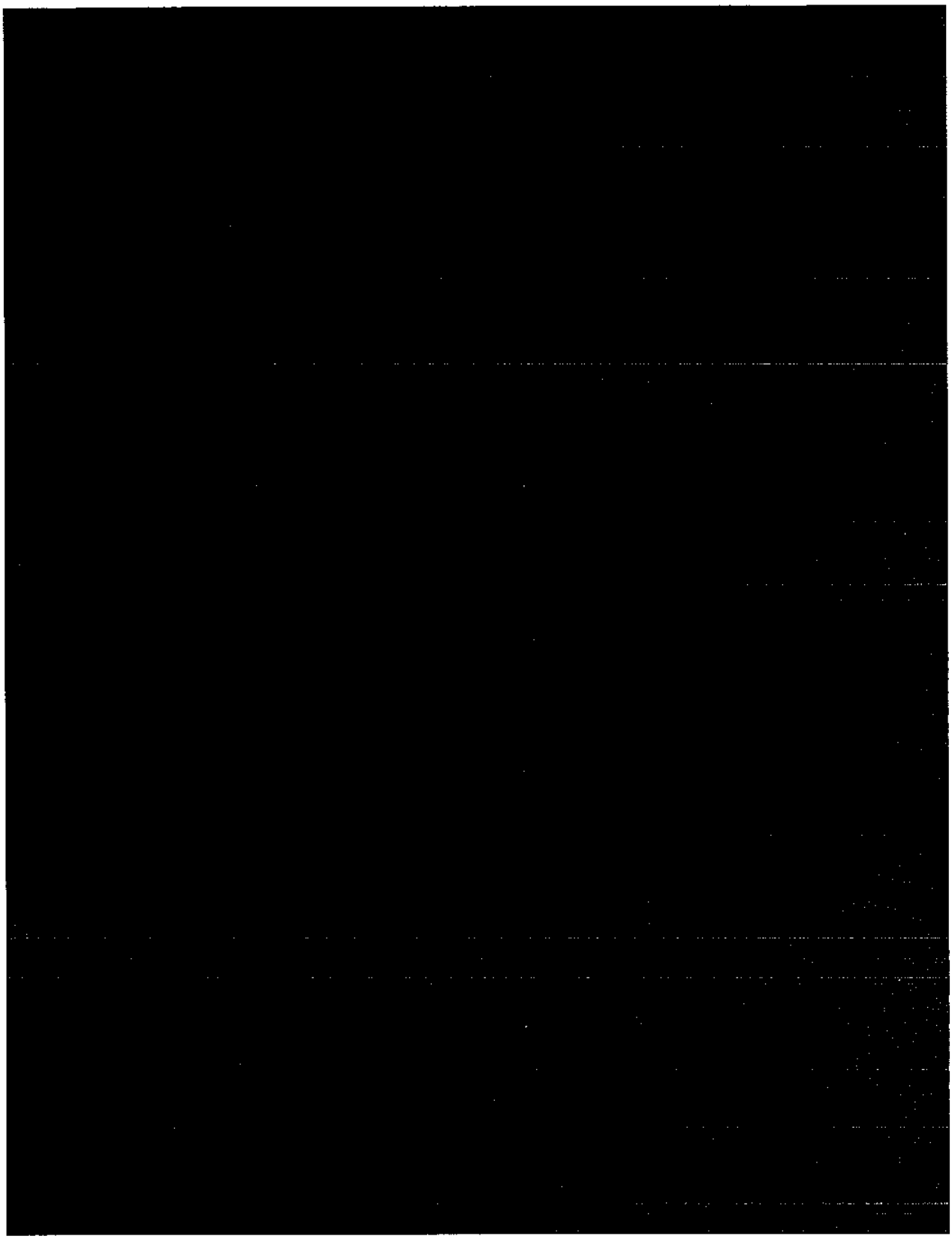

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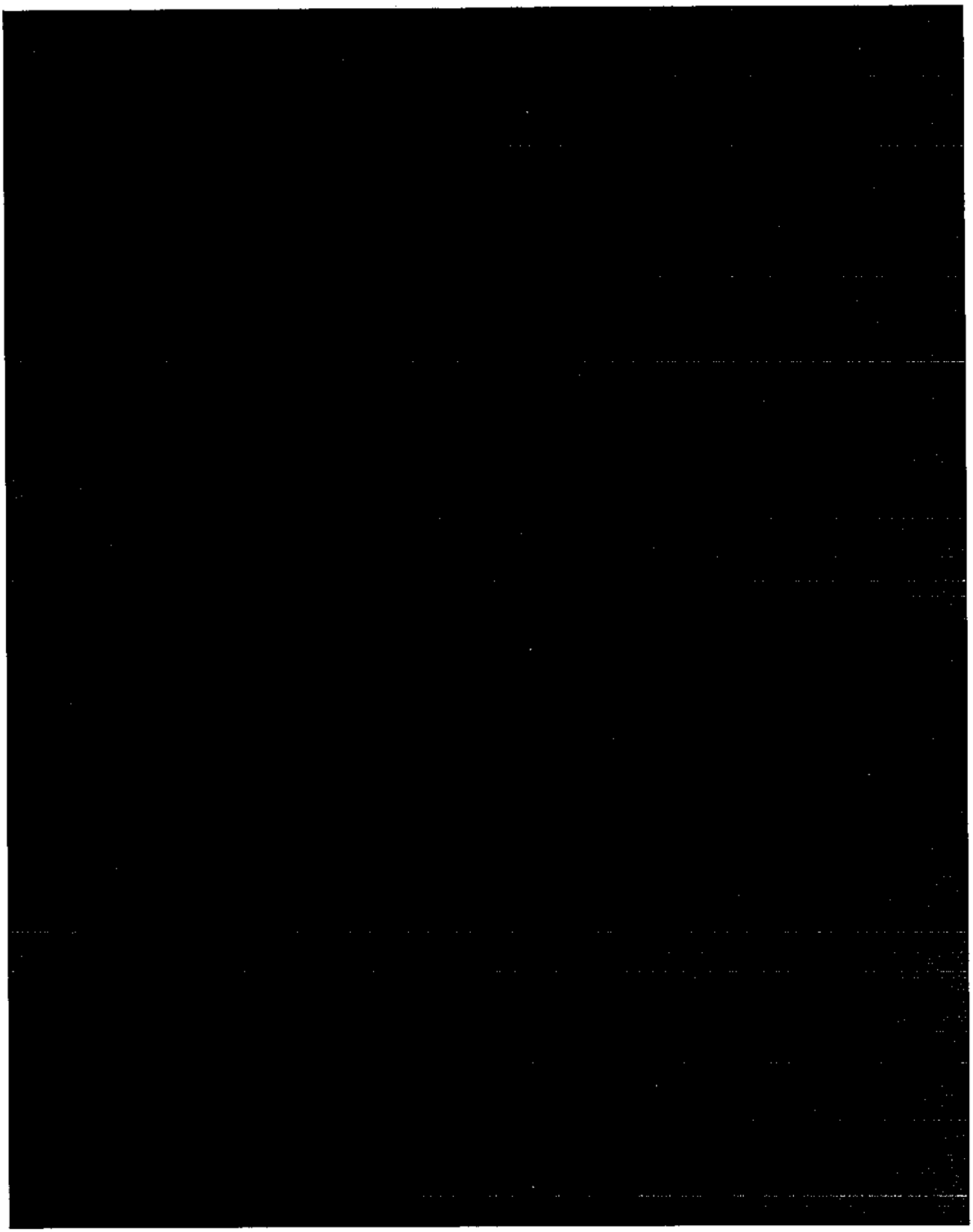

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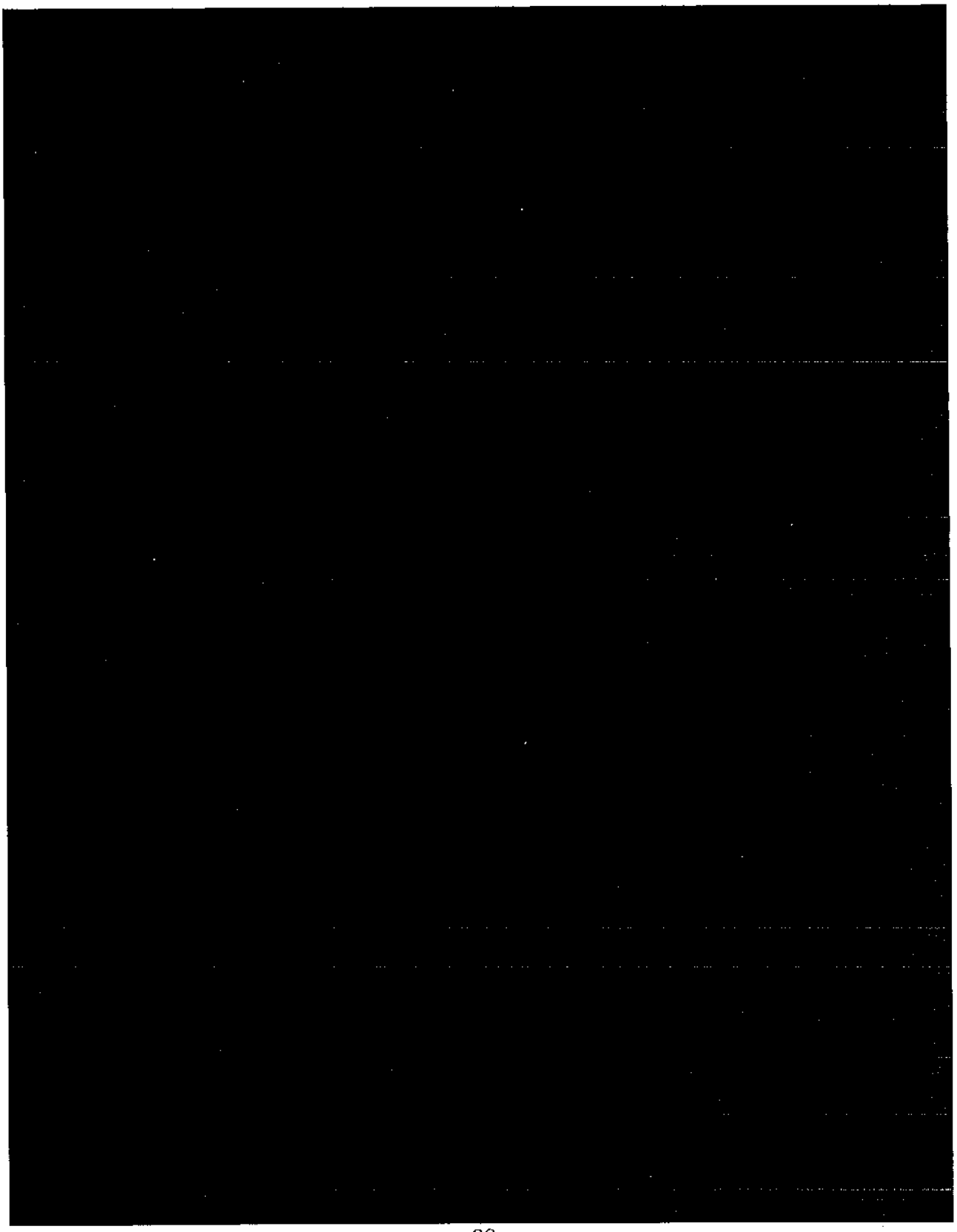

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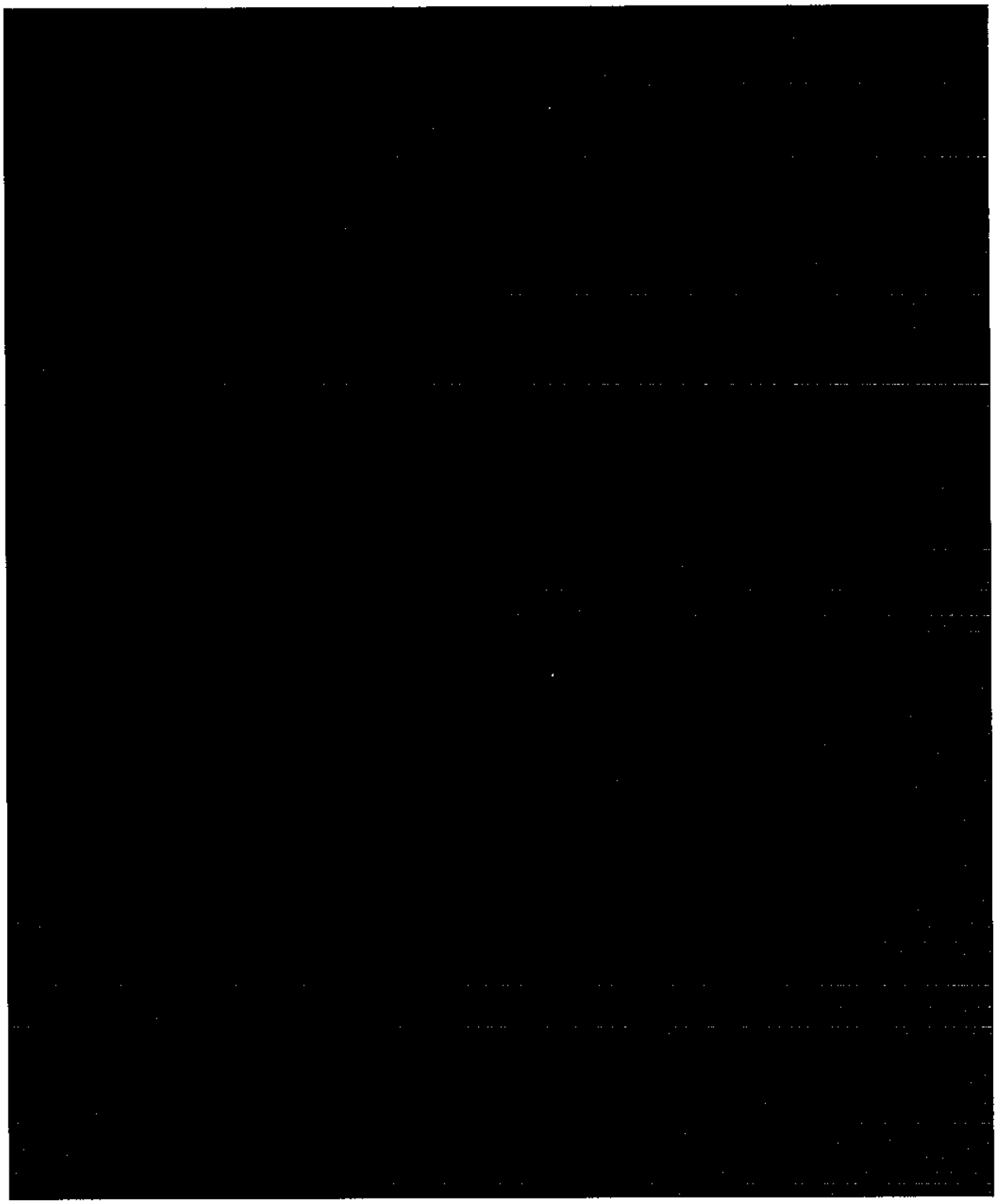

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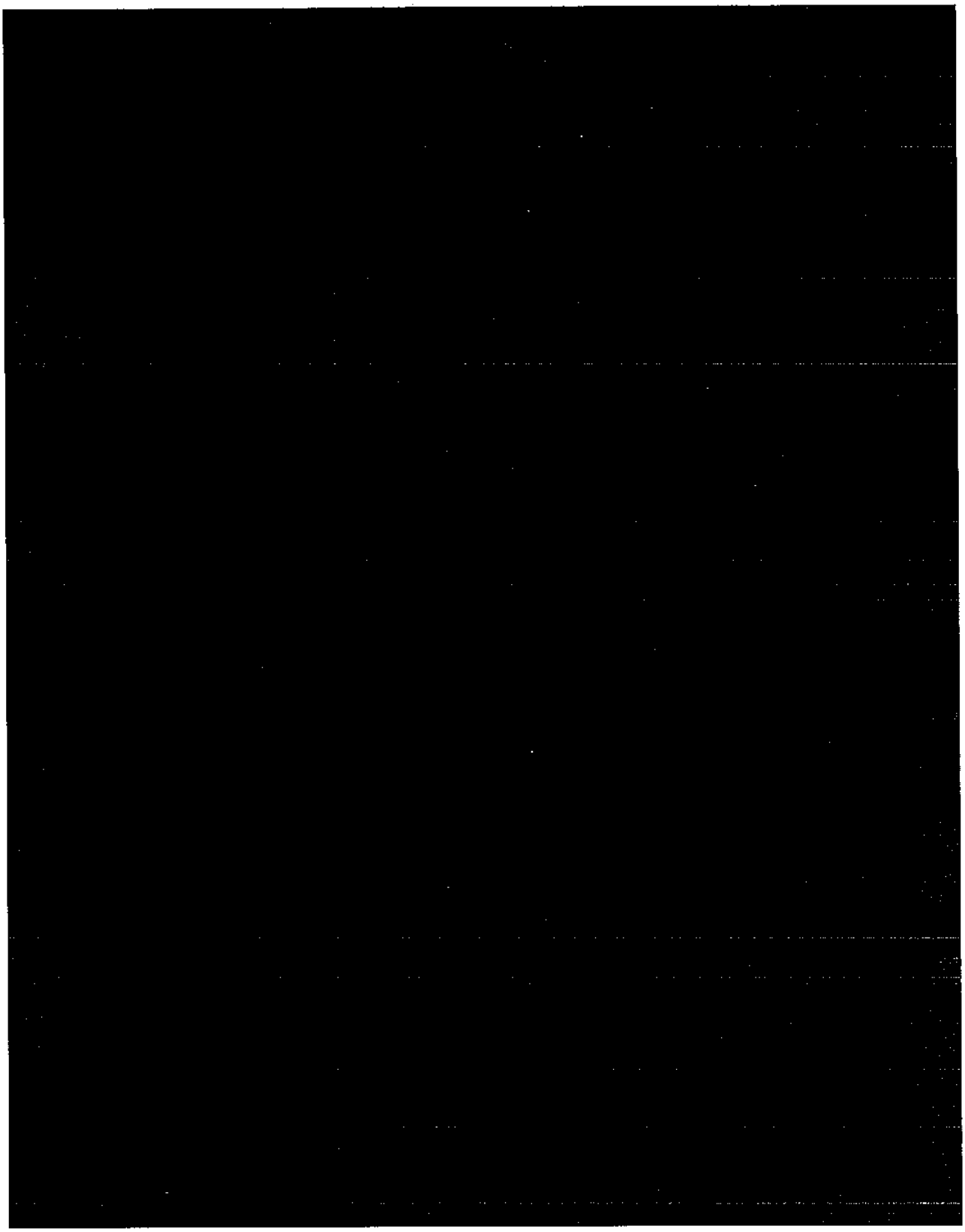

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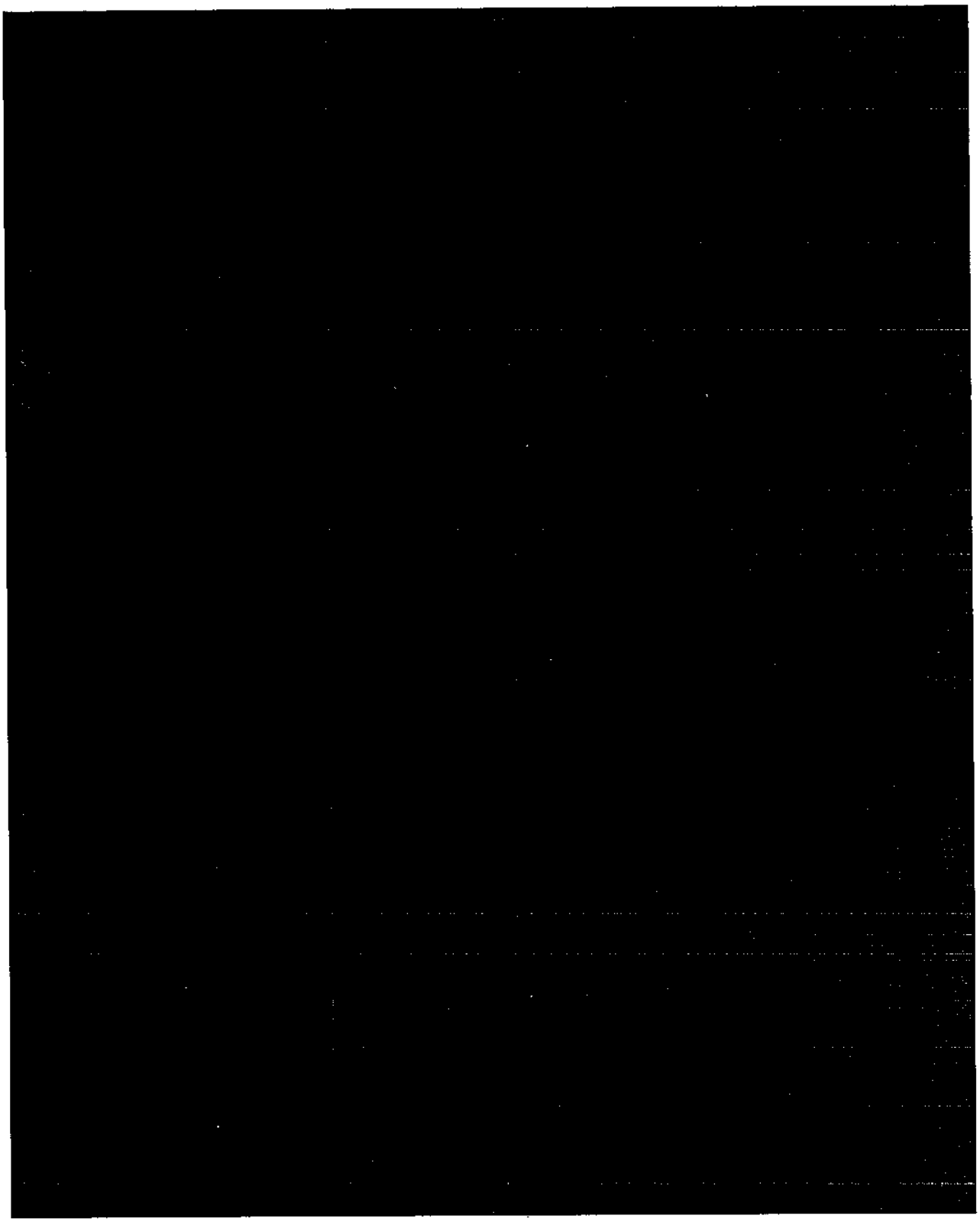

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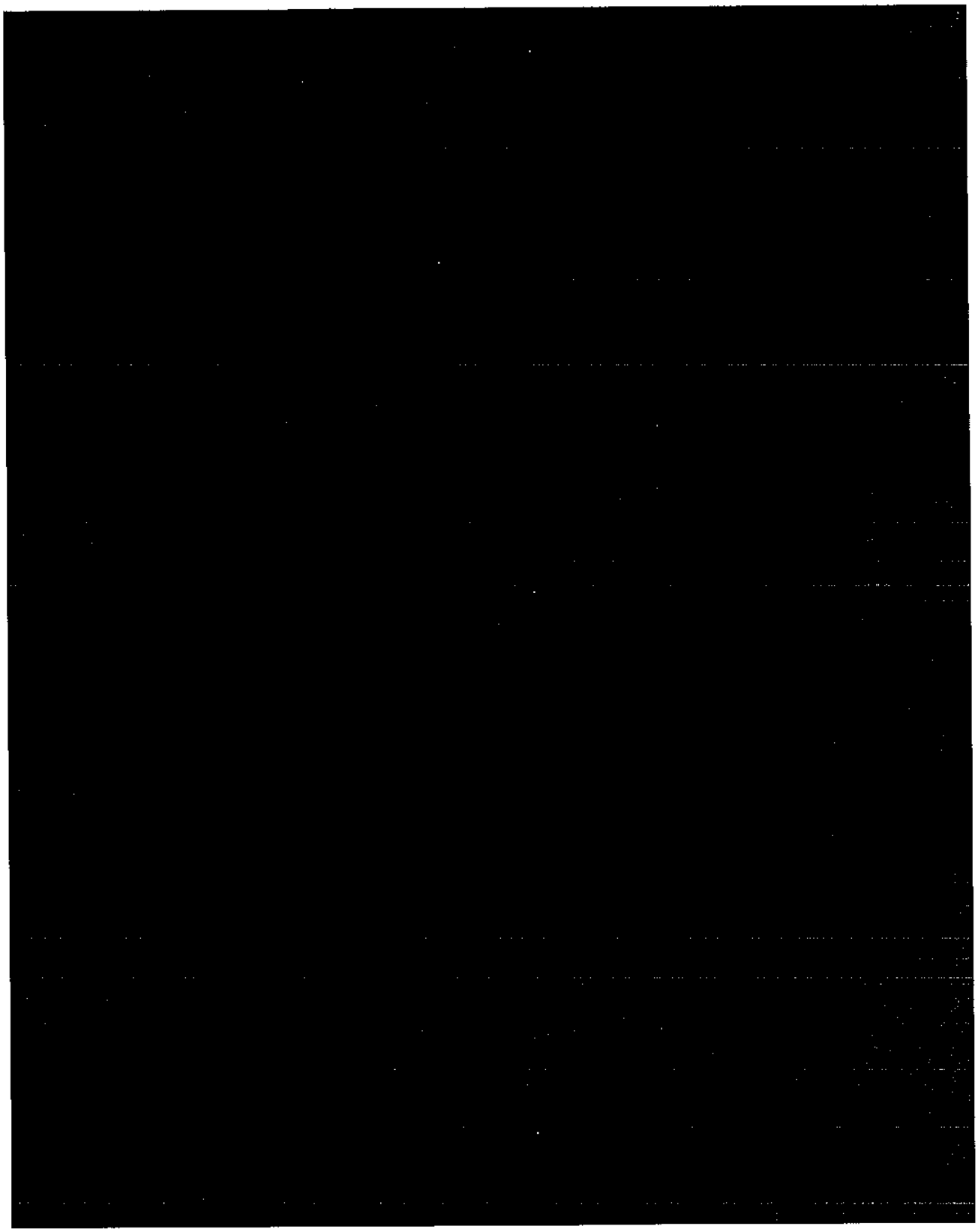

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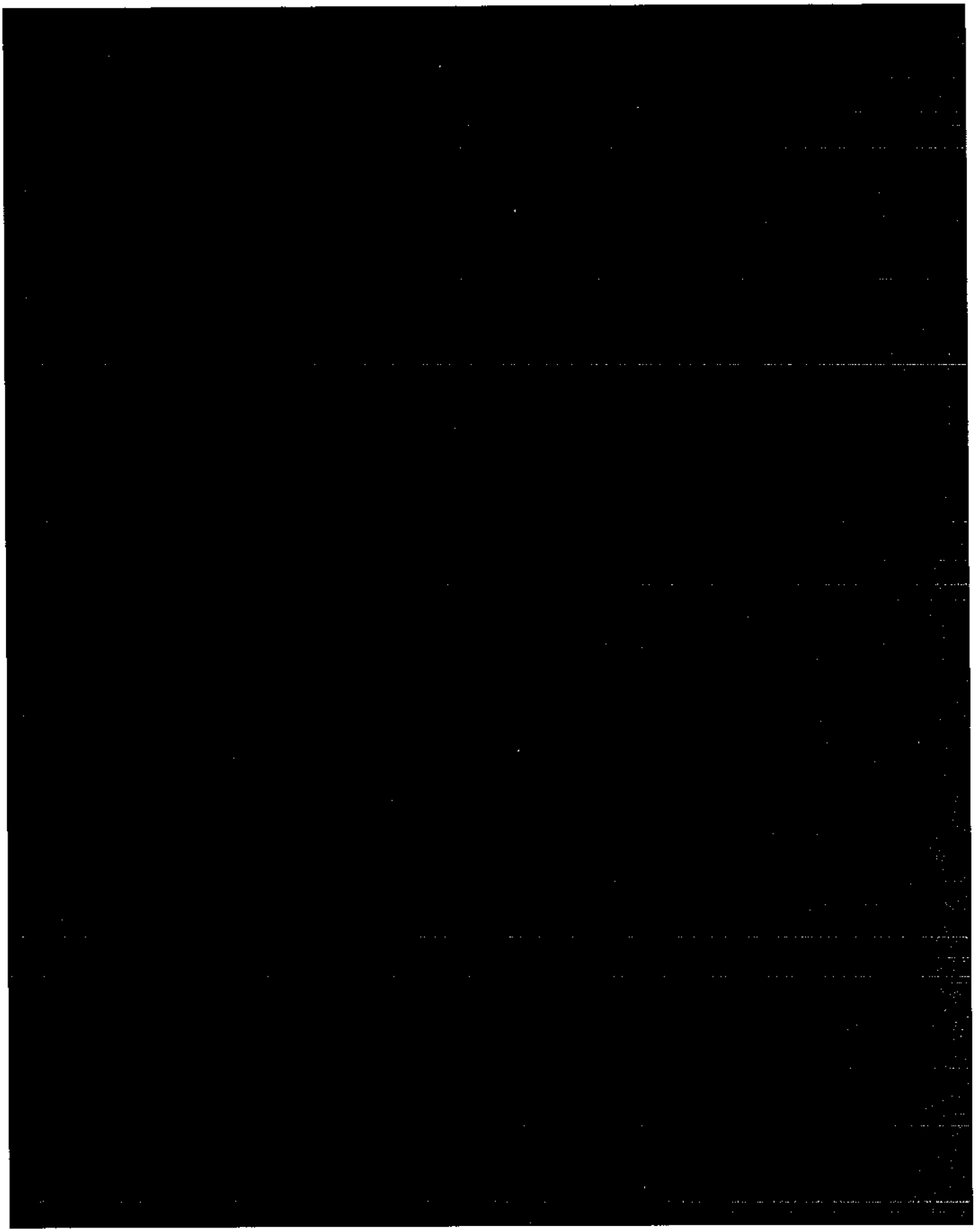

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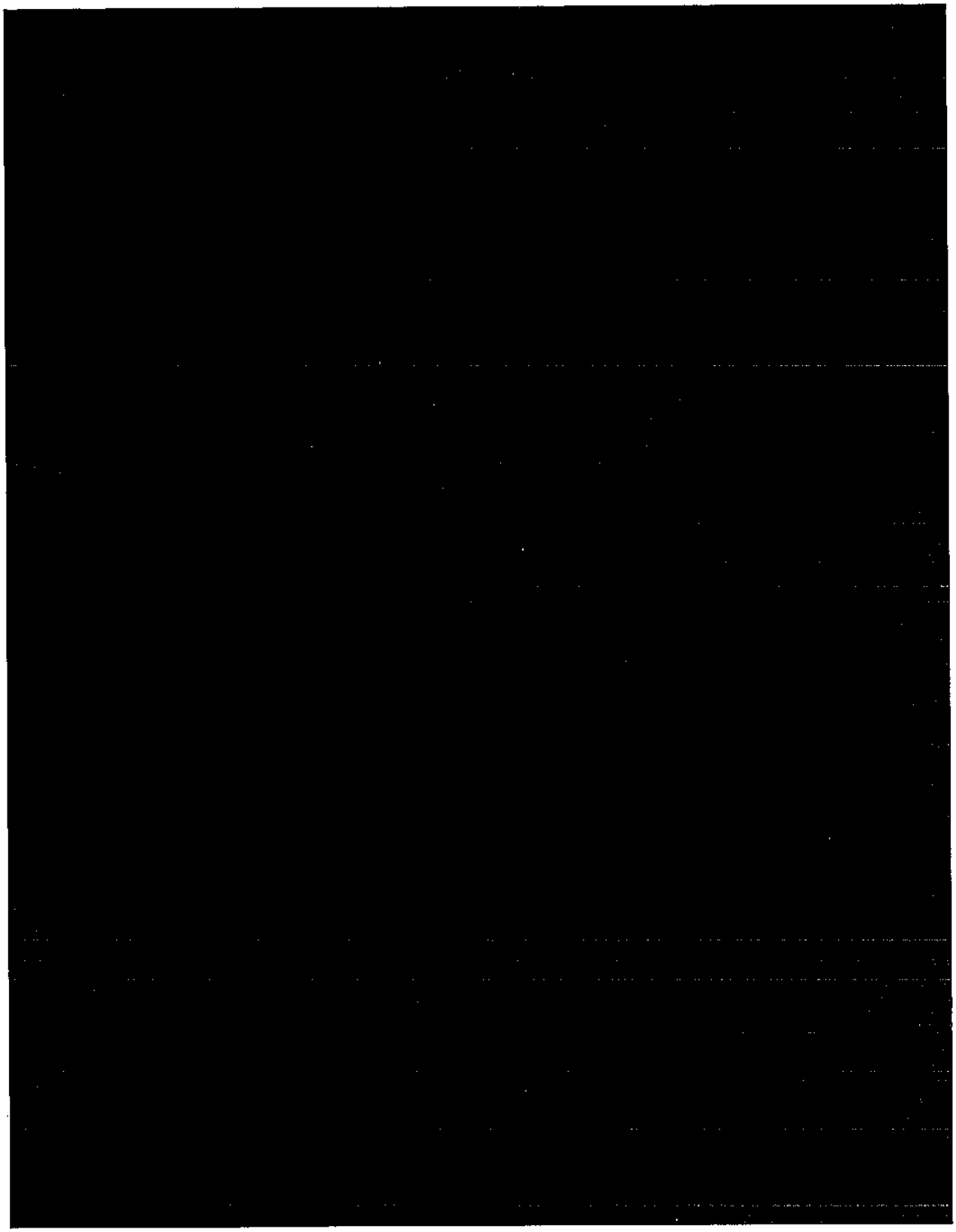

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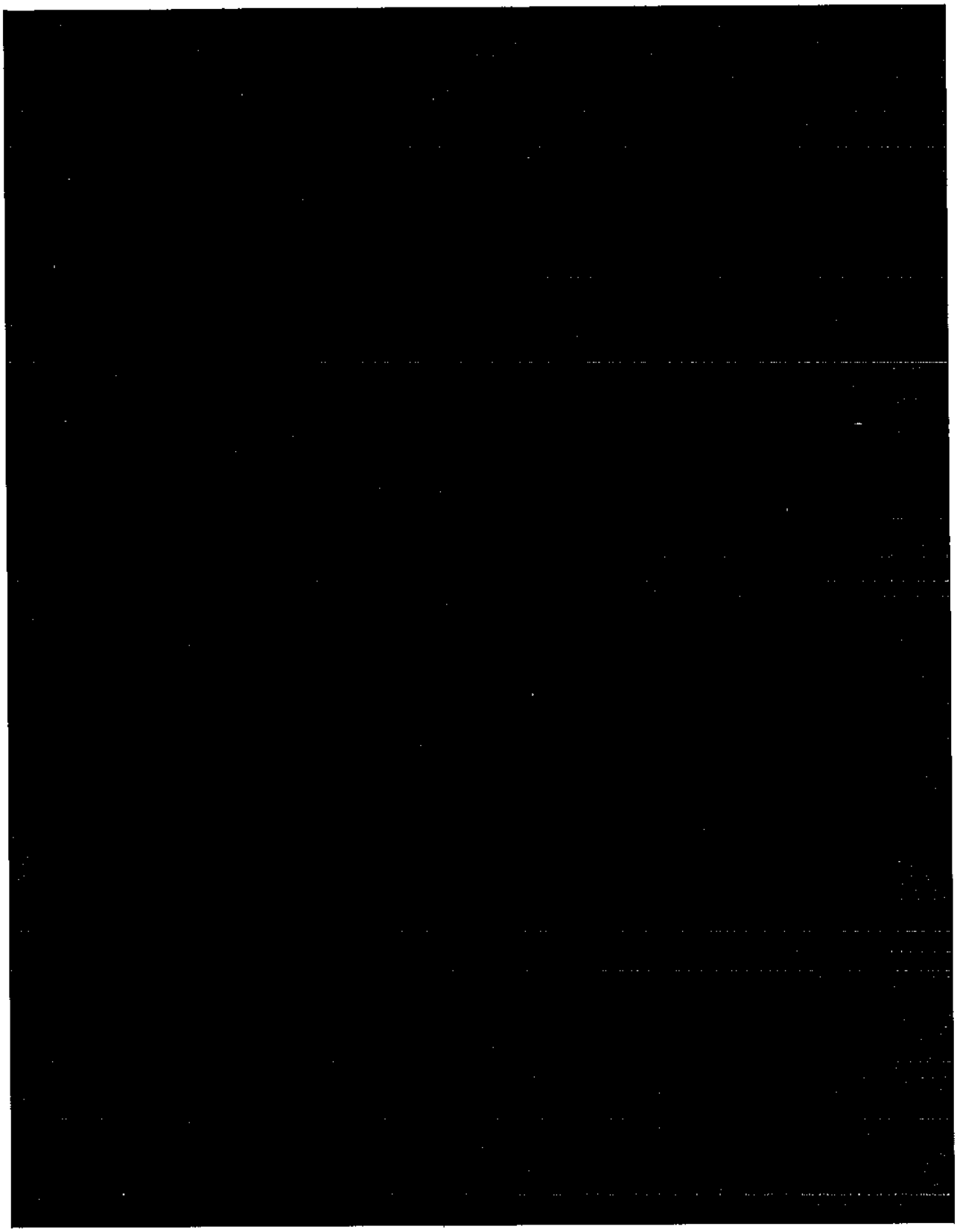

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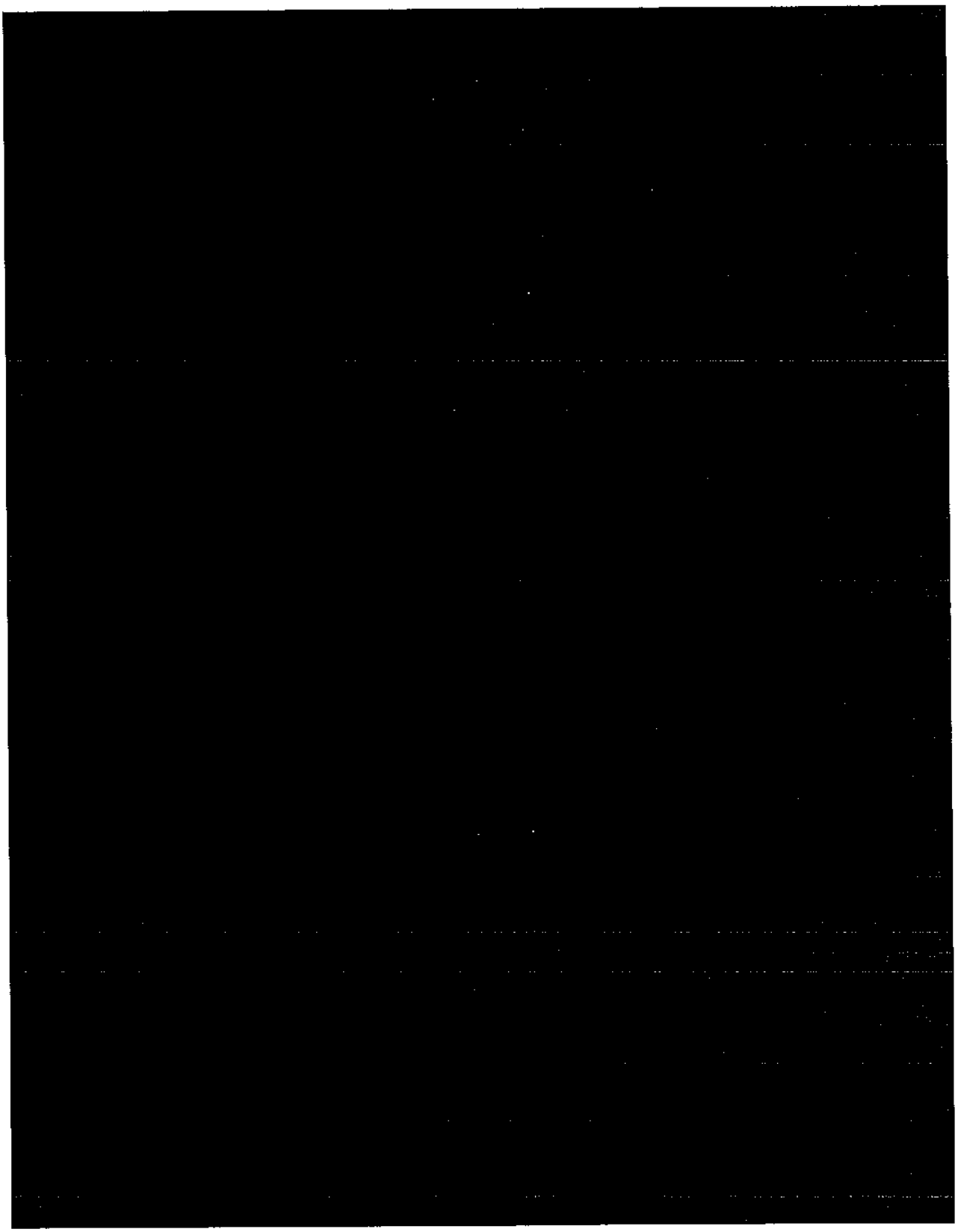

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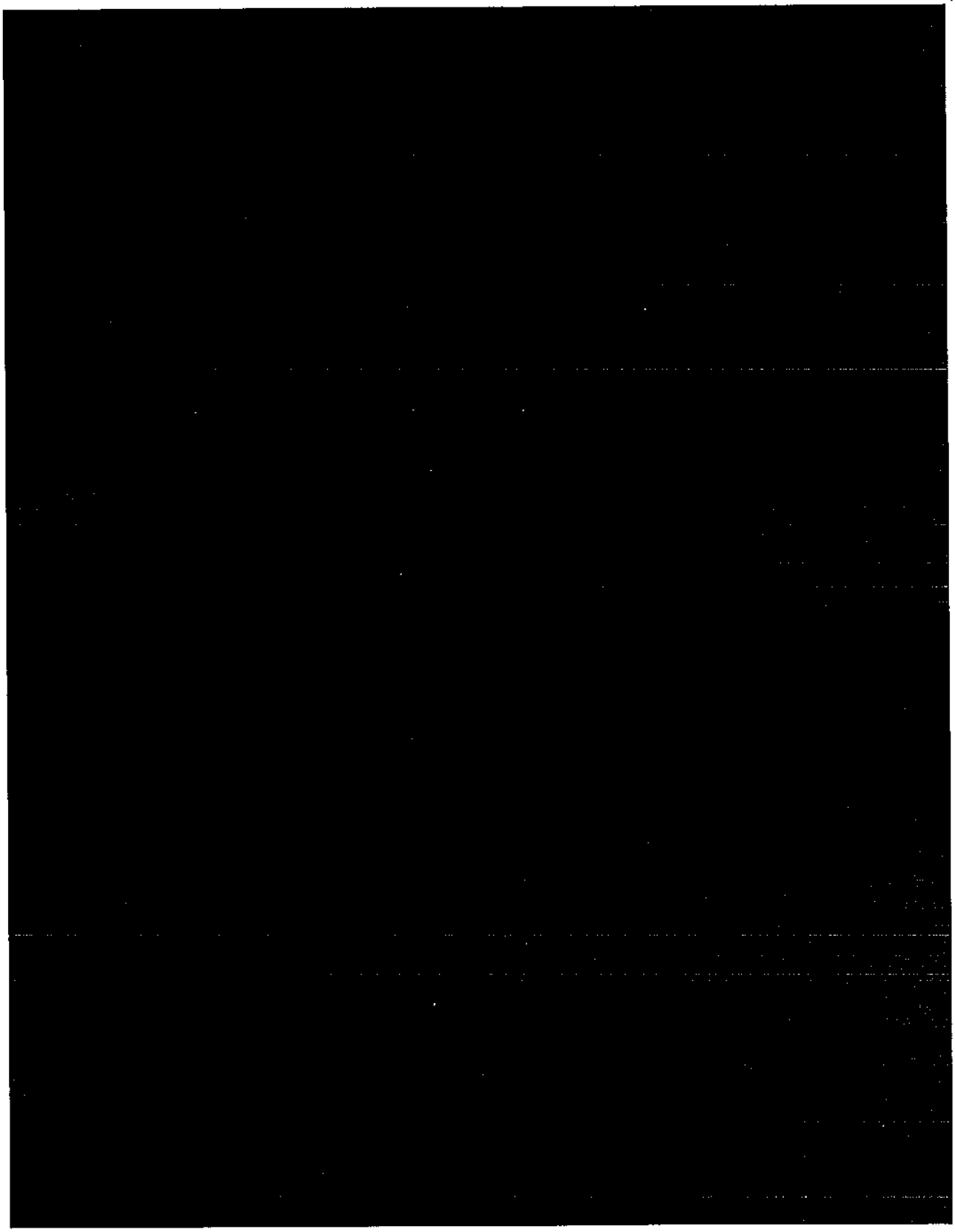

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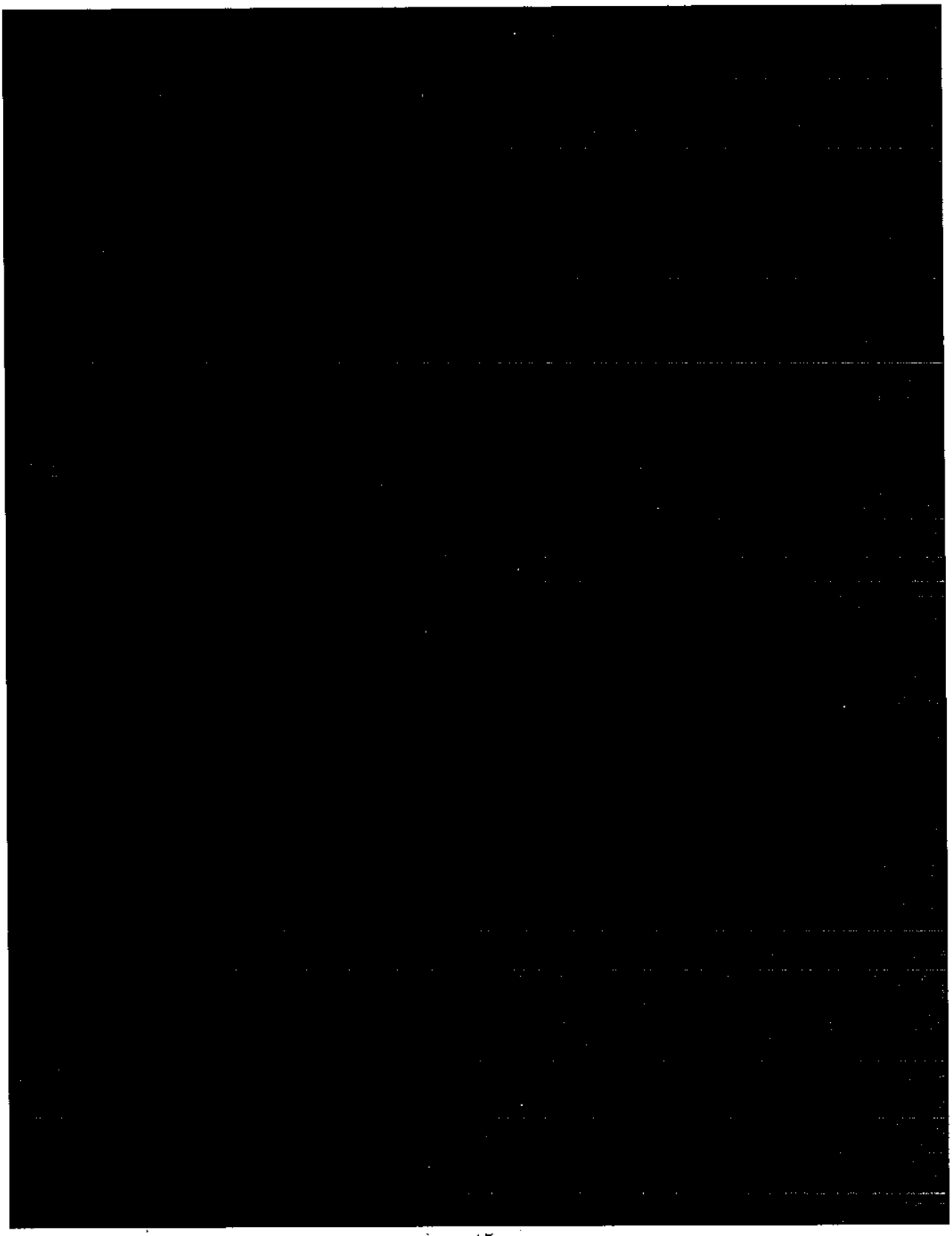

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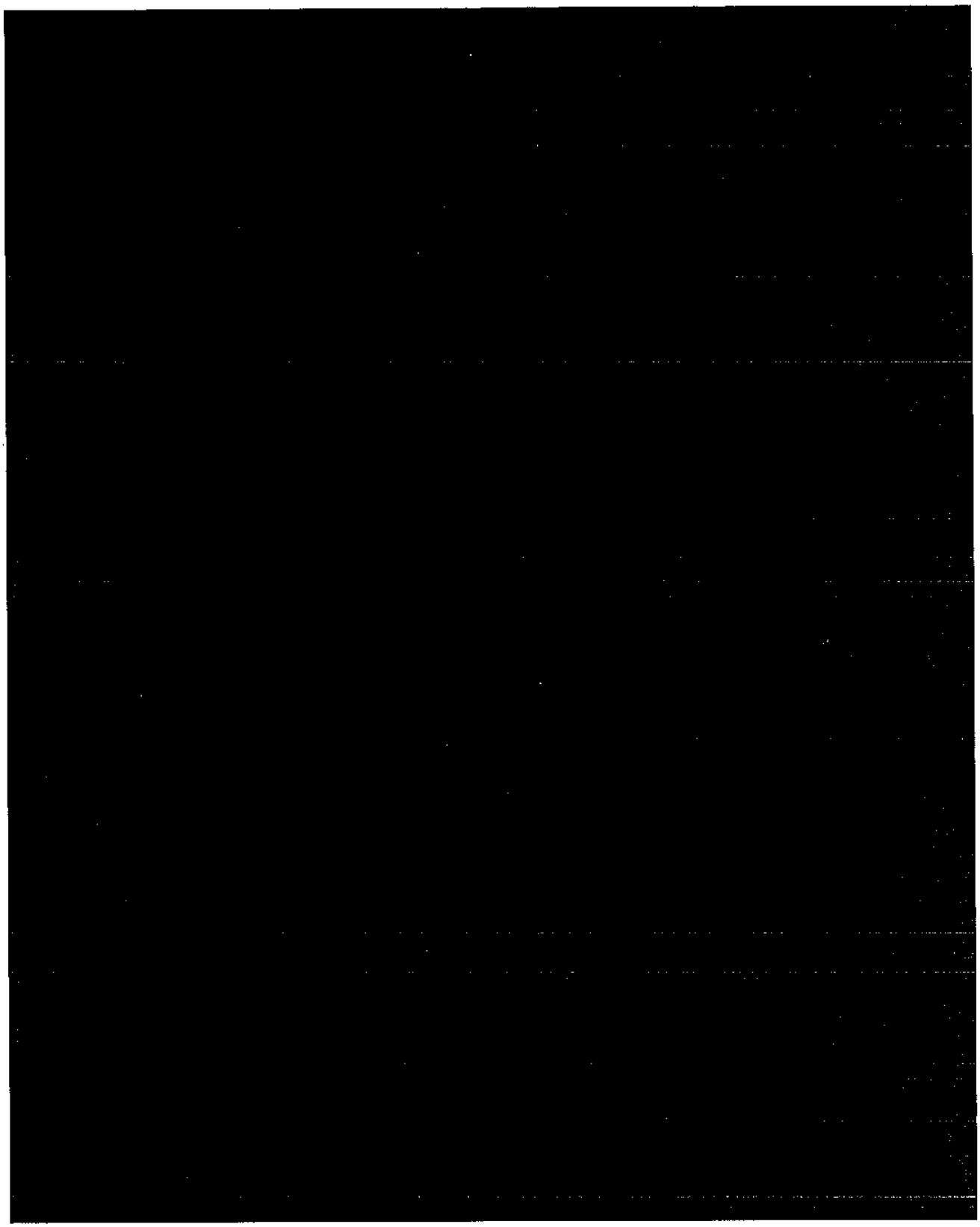

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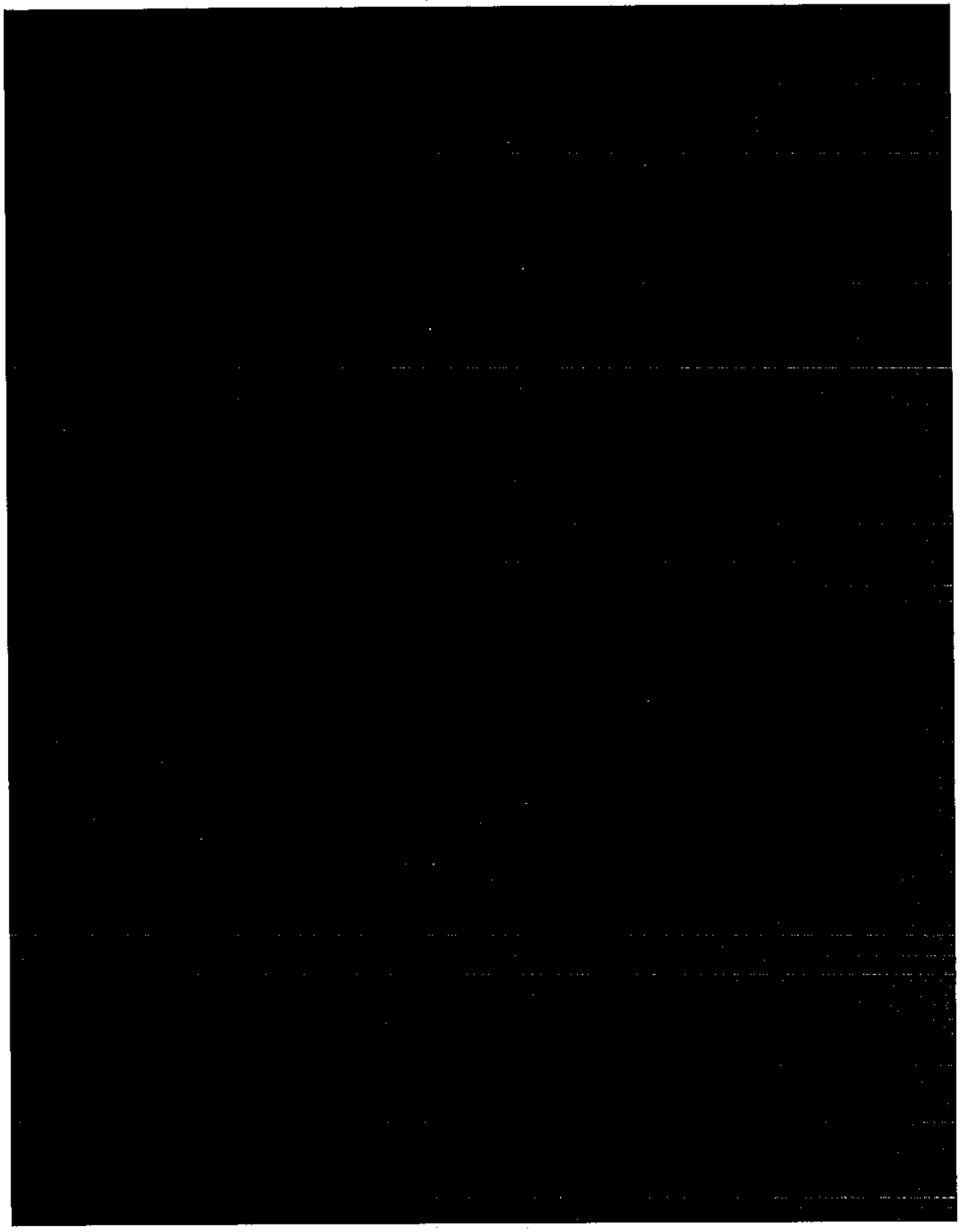

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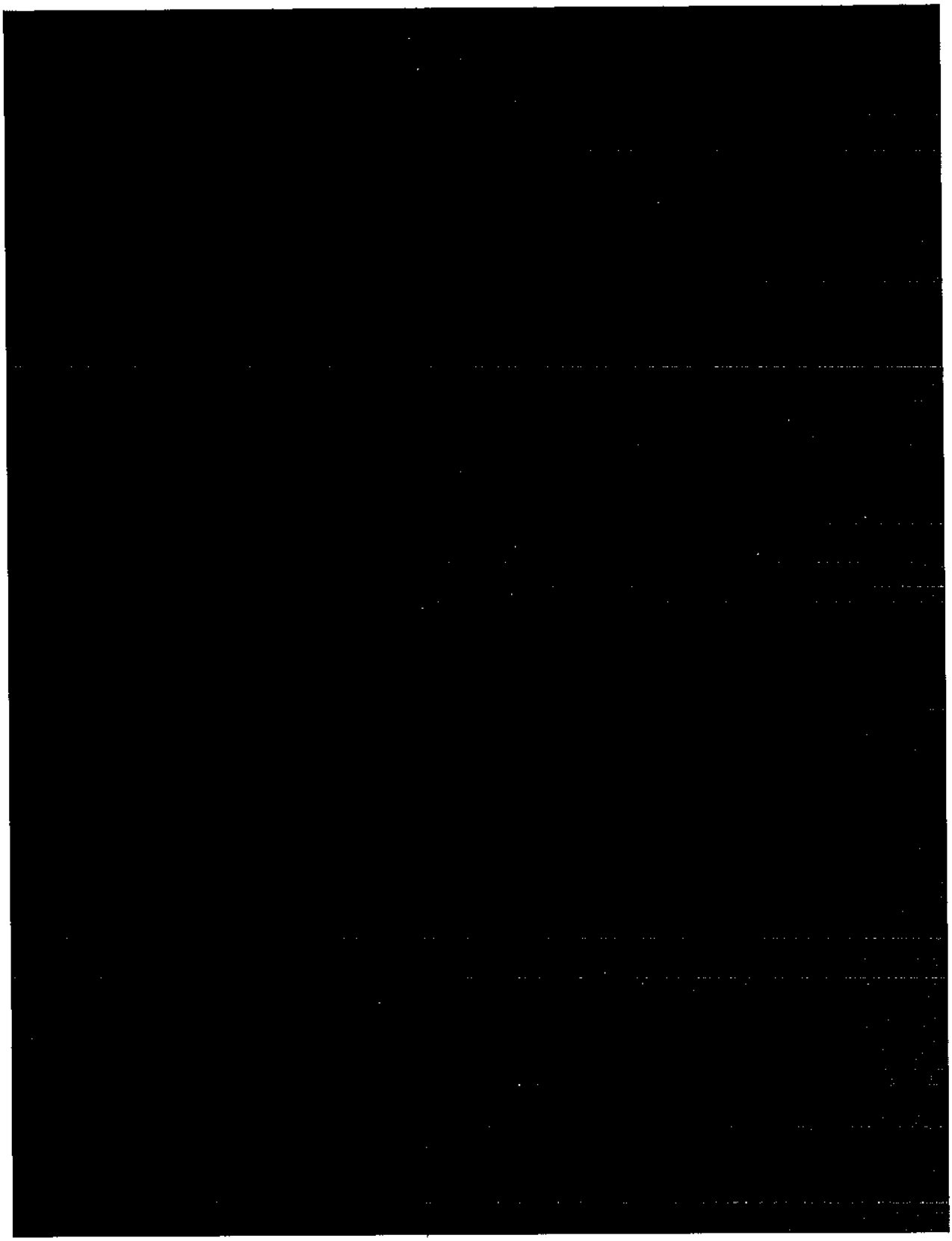

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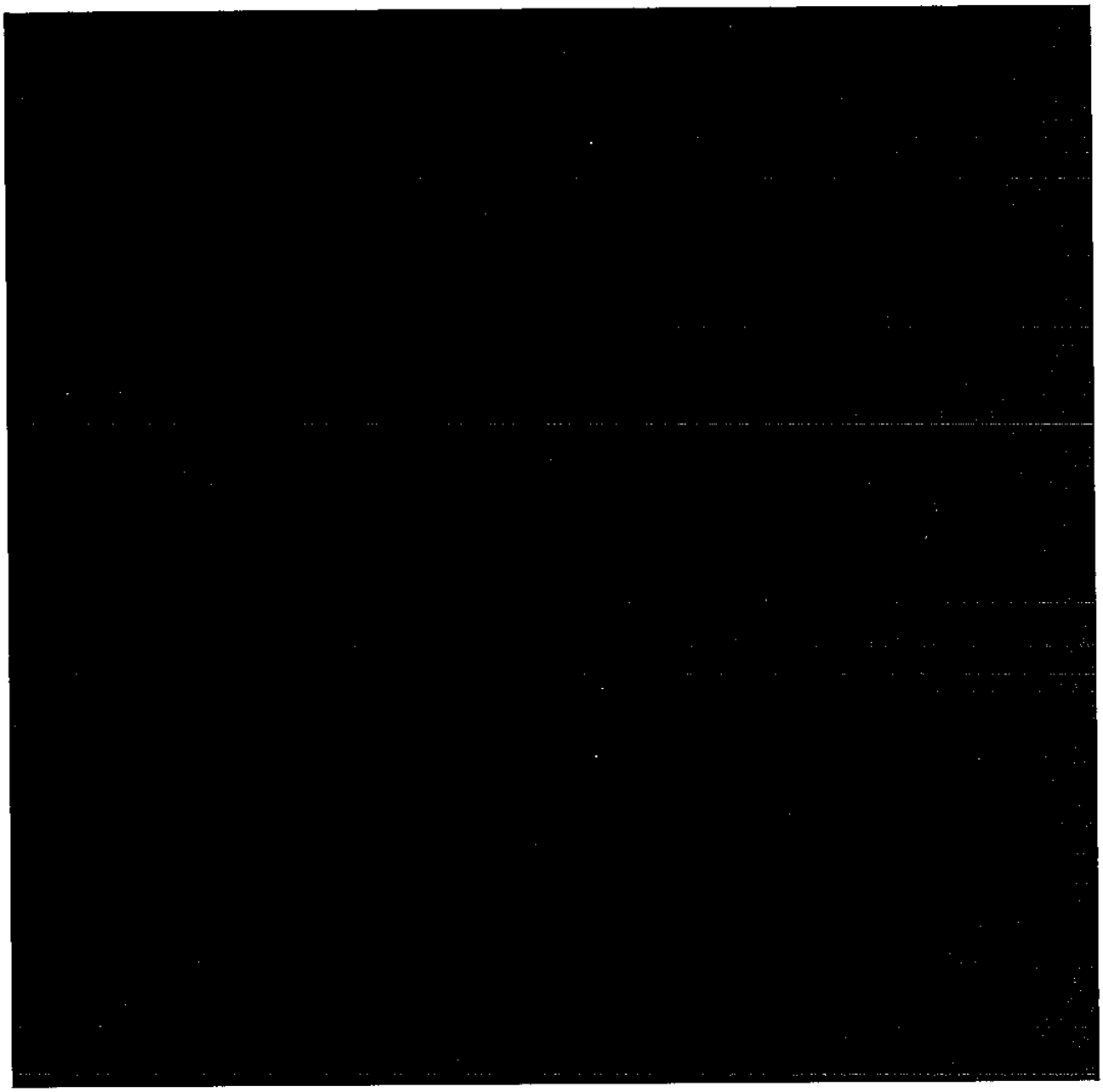

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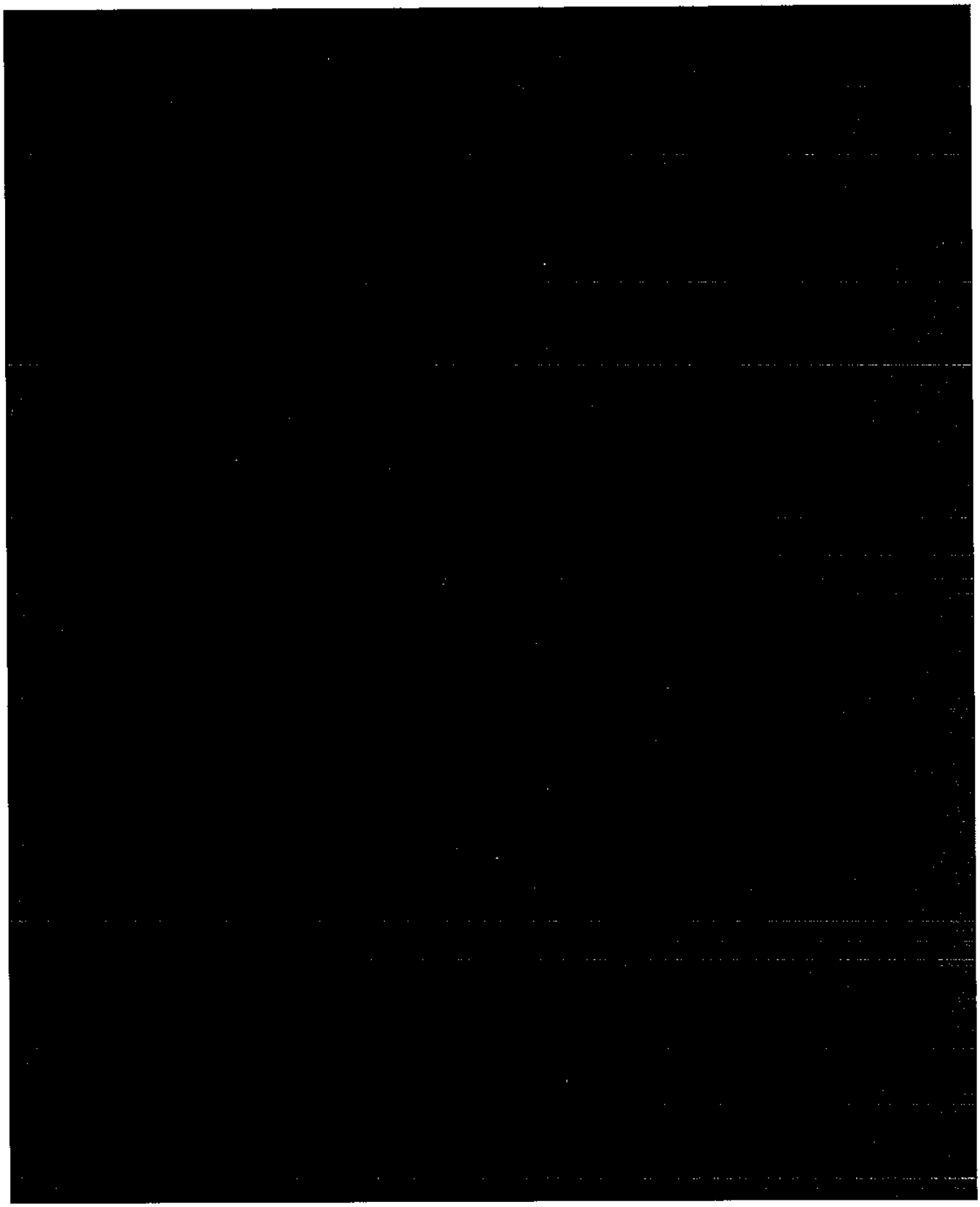

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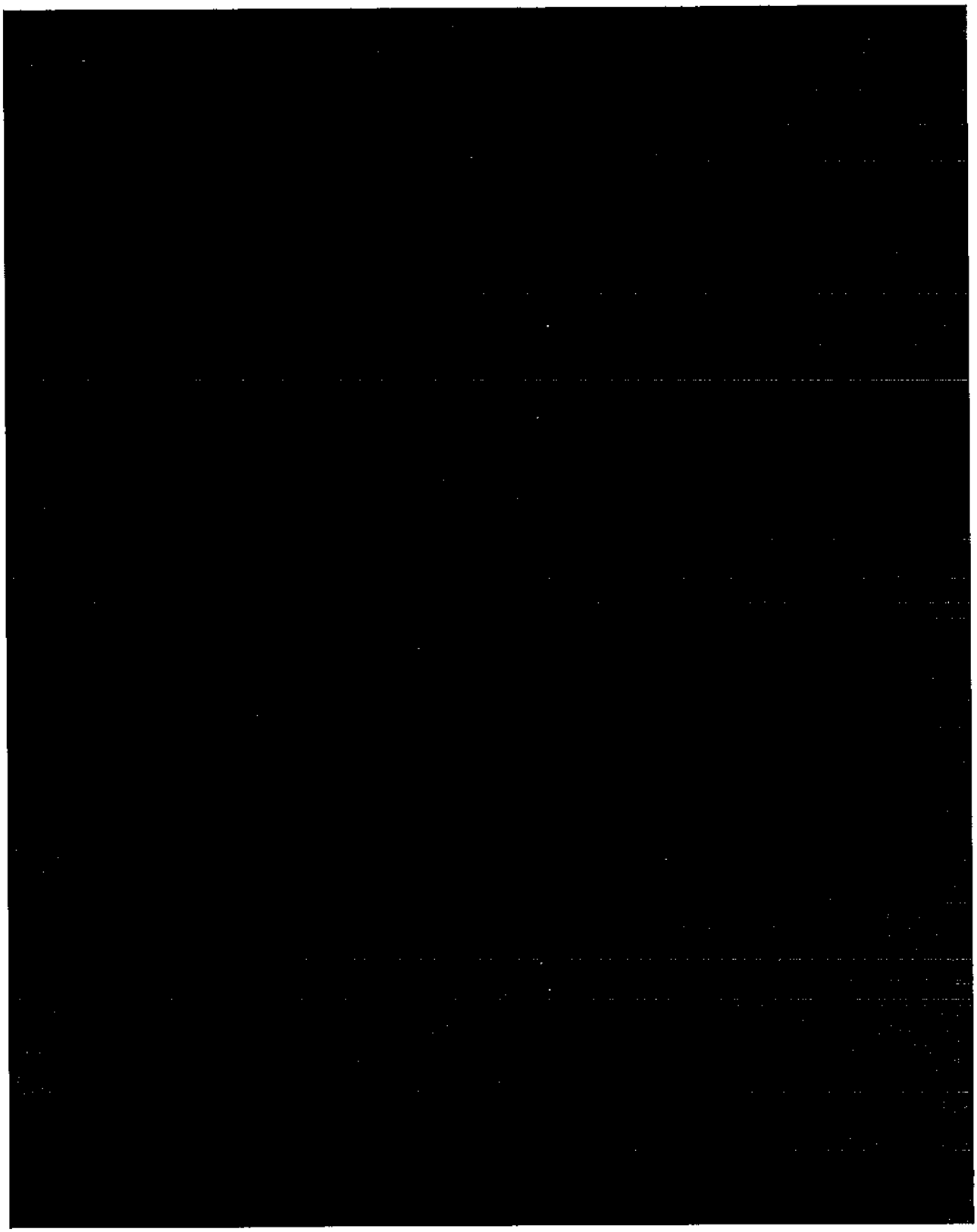

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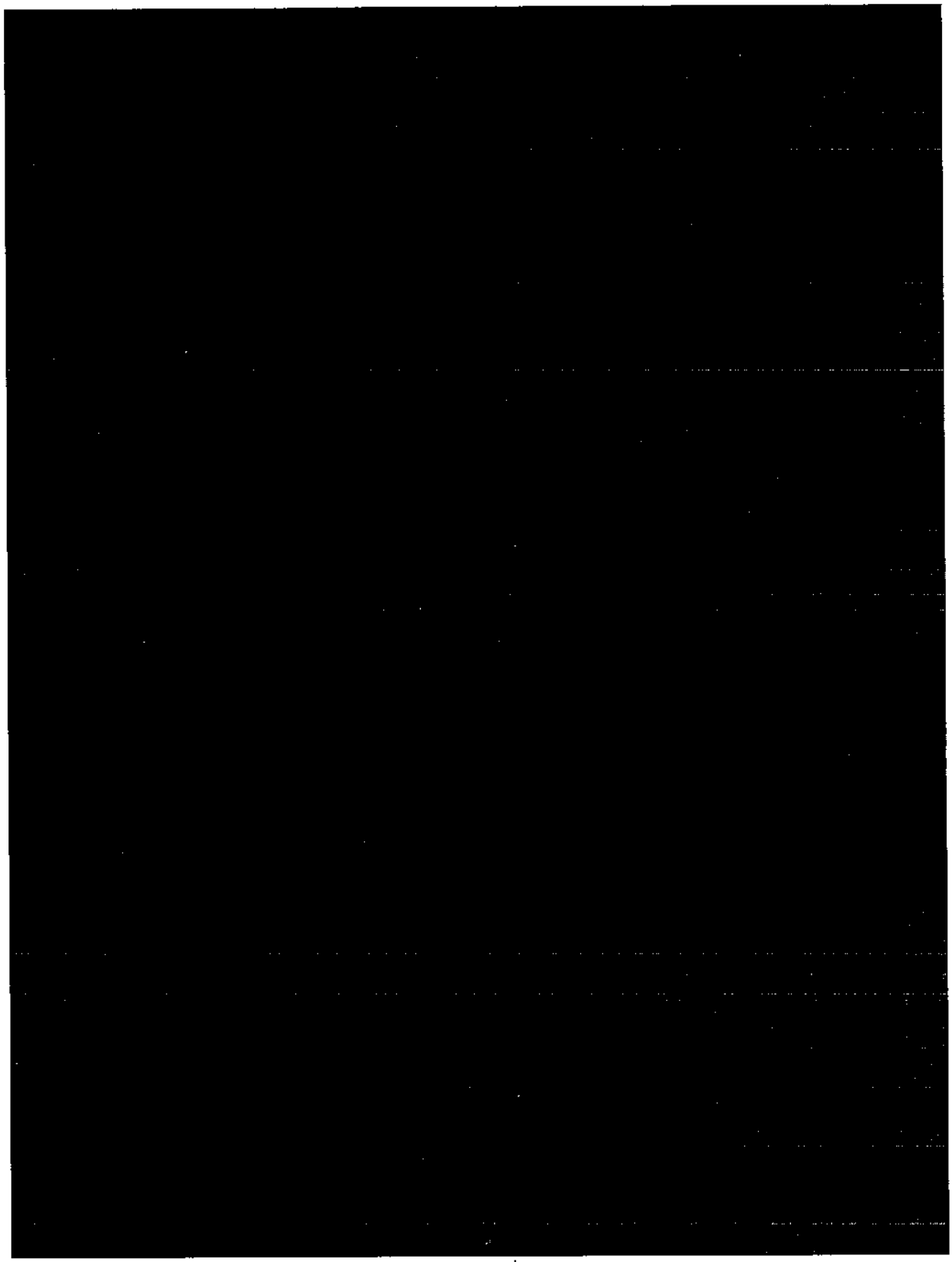

WIF
(6)5
7(E)

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WIF
(b)5
7(E)

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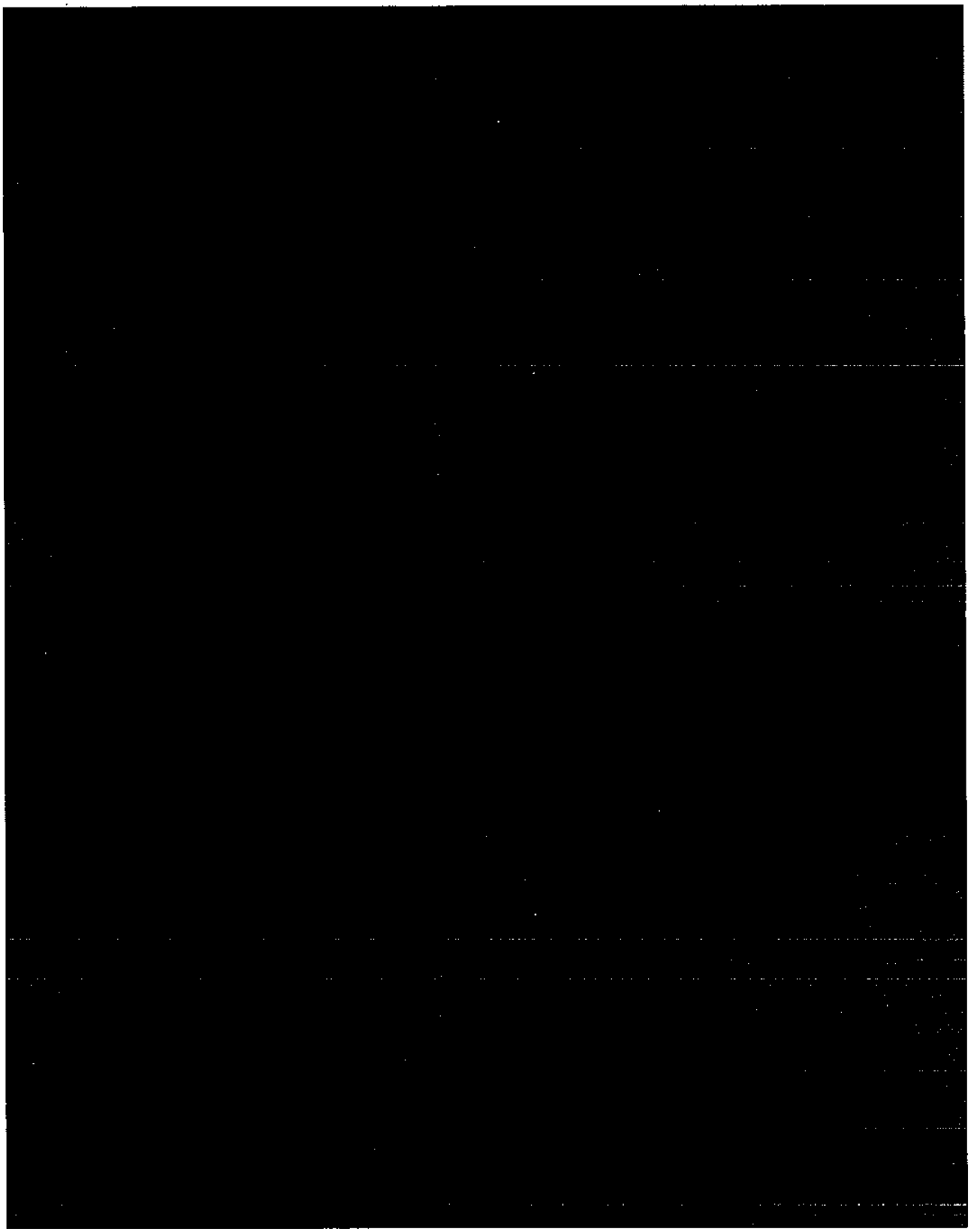
WIF
(b)5
7(E)



WIF
(b)5
7(E)