

1 Robert A. Mittelstaedt (SBN 060359)  
 Jason McDonell (SBN 115084)  
 2 Elaine Wallace (SBN 197882)  
 JONES DAY  
 3 555 California Street, 26th Floor  
 San Francisco, CA 94104  
 4 Telephone: (415) 626-3939  
 Facsimile: (415) 875-5700  
 5 ramittelstaedt@jonesday.com  
 jmcdonell@jonesday.com  
 6 ewallace@jonesday.com

7 Tharan Gregory Lanier (SBN 138784)  
 Jane L. Froyd (SBN 220776)  
 8 JONES DAY  
 1755 Embarcadero Road  
 9 Palo Alto, CA 94303  
 Telephone: (650) 739-3939  
 10 Facsimile: (650) 739-3900  
 tglanier@jonesday.com  
 11 jfroyd@jonesday.com

12 Scott W. Cowan (Admitted Pro Hac Vice)  
 Joshua L. Fuchs (Admitted Pro Hac Vice)  
 13 JONES DAY  
 717 Texas, Suite 3300  
 14 Houston, TX 77002  
 Telephone: (832) 239-3939  
 15 Facsimile: (832) 239-3600  
 swcowan@jonesday.com  
 16 jlfuchs@jonesday.com

17 Attorneys for Defendants  
 SAP AG, SAP AMERICA, INC., and  
 18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,  
 Plaintiffs,  
 23  
 v.  
 24 SAP AG, et al.,  
 25 Defendants.  
 26

Case No. 07-CV-1658 PJH (EDL)  
**DECLARATION OF STEPHEN K.  
 CLARKE IN SUPPORT OF  
 DEFENDANTS' OPPOSITION TO  
 PLAINTIFFS' MOTION NO. 1 TO  
 EXCLUDE EXPERT TESTIMONY OF  
 STEPHEN K. CLARKE**

***DOCUMENT SUBMITTED UNDER SEAL***

Date: September 30, 2010  
 Time: 2:30 p.m.  
 Courtroom: 3, 3rd Floor  
 Judge: Hon. Phyllis J. Hamilton

CLARKE DECL. ISO DEFS.' OPP. TO PLFFS.'  
 MOT. TO EXCLUDE CLARKE  
 Case No. 07-CV-1658 PJH(EDL)

1 I, Stephen K. Clarke, declare as follows:

2 1. I have personal knowledge of the matters discussed herein.

3 **A. Background and Qualifications.**

4 2. I am a Certified Public Accountant (Accredited in Business Valuation) in the State  
5 of Arizona; a Certified Fraud Examiner; and a Chartered Accountant in England & Wales. A  
6 copy of my resume is attached as Exhibit 1. I have been engaged as a testifying economic  
7 damages expert in dozens of intellectual property disputes over the last 22 years. Such disputes  
8 have related to copyrights, patents, trade secrets, trade dress and unfair competition, and have  
9 involved aggregate claims well in excess of \$100 billion (prior to this matter). I have provided  
10 testimony as an economic expert in many venues including Federal and State Courts, arbitration  
11 panels, and bankruptcy hearings in the United States, and the Crown Courts in Great Britain. I  
12 have valued over \$20 billion worth of businesses in the same 20 year period. My degree is in  
13 Management Sciences from the University of Manchester in England. I taught economics at  
14 Arizona State University for several years.

15 3. In December 2007, I was retained by Defendants to address Plaintiffs' alleged  
16 damages. I have been working on this case since then.

17 **B. Georgia-Pacific Analysis.**

18 4. I devoted 144 pages (nearly 50%) of my 294 page report to a detailed rebuttal of  
19 Plaintiffs' expert Paul K. Meyer's *Georgia-Pacific* opinion and an analysis of each of the 15  
20 *Georgia-Pacific* factors. On the other hand Meyer spent only 76 pages of his 281 page report  
21 addressing the *Georgia-Pacific* factors. I analyzed several critical factors that Meyer failed to  
22 consider, including Plaintiffs' prior licensing agreements with other support vendors and partners  
23 and Plaintiffs' established relationships with other third-party support vendors who are still  
24 partners and offer similar services to TomorrowNow ("TN"). My report addresses the *Georgia-*  
25 *Pacific* factors in detail and the analysis considers all of the relevant facts in deriving the royalty  
26 rate.

27 5. TN's standard pricing structure was based on 50% of Plaintiffs' price. TN  
28 established its 50% pricing structure by about mid-2004 and, for the most part, continued that

1 pricing structure through the wind down of its operations in October 2008. TN made a few  
2 exceptions to its standard 50% pricing structure. Of its 358 customers, TN provided its services  
3 at no charge to less than 4% of its total customers.

4 **C. Economic Causation Analysis.**

5 6. The Litigation Services Handbook<sup>1</sup> provides an overview of the first steps that an  
6 expert witness takes to calculate lost profits:

7 The first step in a damages study translates the legal theory of the harmful event  
8 into an analysis of the economic impact of that event. In most cases, the analysis  
9 considers the difference between the plaintiff's economic position if the harmful  
10 event had not occurred and the plaintiff's actual economic position. The damages  
11 study restates the plaintiff's position 'but for' the harmful event; this step is often  
12 called the but-for analysis. Damages, then, are the difference between the but-for  
13 value and the actual value.

14 I have attached a copy of the relevant excerpt as Exhibit 2.<sup>2</sup> I consider economic causation in  
15 every case because I am attempting to identify the damages that arose as a result of the alleged  
16 acts. Failure to consider causation results in an inappropriate analysis. Properly applied, a study  
17 of economic causation allows the economist to trace the effects of the damage causing acts  
18 through to the damages opinion, separating their effects from other factors that may have affected  
19 a firm's operations but are unrelated to the damage causing acts. The methodology by which  
20 economic causation is applied is dependent on the facts and circumstances of each case and is  
21 therefore fact intensive.

22 7. In this case, my causation analysis involved 358 customers and had to be done one  
23 customer at a time. The analysis involved reviewing over ten million pages of documents for  
24 causation related information. The only practical way to organize and categorize such a vast  
25 volume of documents is in a database that tracks the reasons each customer terminated its  
26 support with Plaintiffs and/or made purchases from SAP.

27 8. Because of the similarity of characteristics among different customers, I grouped  
28 customers exhibiting similar characteristics, using the term "pools" to describe the grouped

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29 <sup>1</sup> Weil, Roman L., et al. *Litigation Services Handbook: The Role of the Financial Expert*,  
30 3rd Ed., John Wiley & Sons, Inc. (2001), at 5.4.

31 <sup>2</sup> For the Court's convenience, I have identified the portions of certain exhibits that I refer  
32 to herein with red boxes outlining the relevant material.

1 customers for ease of reference. However, the nomenclature is immaterial: the pools could have  
2 been given one of many other names, such as groups or classes. It would be impractical at trial  
3 for the jury to consider all the relevant evidence for each customer individually. An orderly  
4 presentation of pools of customers exhibiting similar characteristics is more efficient and at least  
5 possible within the trial schedule.

6 9. As a damages expert, I routinely analyze economic causation in a wide variety of  
7 industries. For example, I have applied my expertise to the high-tech, aerospace, entertainment,  
8 gaming, and real estate industries, and done so in claims ranging from intellectual property  
9 infringement and contract disputes to fraud analyses and bankruptcies. In each case, I examined  
10 the documents produced, performed appropriate analysis and research, and consulted with  
11 industry experts where appropriate to generate an understanding of the relevant market in which  
12 the parties operate.

13 **D. Analysis of Third Party Support Market.**

14 10. I routinely assess industry markets and competition in the course of my valuation  
15 analyses. I am a Certified Public Accountant, Accredited in Business Valuation, and have 38  
16 years of experience valuing a wide range of businesses. I am required under the AICPA's  
17 Statement on Standards for Valuation Services No. 1 to obtain non-financial information,  
18 including information on the economic environment, geographical markets, industry markets,  
19 and competition, sufficient to understand the subject entity.

20 11. I have performed approximately 2,000 valuation analyses during my 35 year  
21 career in accounting and economics, and have managed at least 200 valuations in numerous  
22 industries in the course of my expert work. During the past 22 years as a litigation consultant, I  
23 have also performed hundreds of lost profits damages calculations for all manner of businesses,  
24 and have analyzed their competitors' information in numerous cases.

25 12. In this case, I relied on numerous sources of information, including: company  
26 websites; industry articles; analyst reports, including Gartner and Forrester; documents produced  
27 by Plaintiffs, Defendants, and customers that describe the offerings of third party support  
28 providers; the TN Wind-Down Report, which tracked where customers went for support after TN

1 ceased operations; and Plaintiffs' At-Risk Reports, which tracked losses to third party support  
2 providers beginning at least as of January 2005 and continuing at least through the beginning of  
3 2008.

4 **E. Regression Analysis.**

5 *Training and expertise.*

6 13. I did my first study of regression analysis at Manchester University in England as  
7 part of my Bachelor's degree, between 1969 and 1972. The classes were part of a number of  
8 mathematics courses which included study of business statistics and other analytical tools. I  
9 continued my education on use of the technique at London School of Accountancy where I  
10 studied numerous modeling techniques (including regression analysis) in a class called "Elements  
11 of Financial Decisions," which was 25% of my final examination to become a Chartered  
12 Accountant in England and Wales. The examination is one of the most demanding of any  
13 professional qualification. Regression analysis was a significant part of the curriculum for  
14 Economics 502, which was the class I taught at Arizona State University.

15 14. Since I became a Chartered Accountant, and later a CPA, I have run hundreds of  
16 regressions for the purposes of my work, usually in order to quantify variable expenses in the  
17 course of computing lost profits. In addition, I also created a multi-variate hedonic regression  
18 analysis designed to quantify the effect that the creation of a 36,000 acre park in Scottsdale,  
19 Arizona had on the value of surrounding property. The regression analysis considered numerous  
20 factors that may have played a role in changing the value of the land in the neighborhood of the  
21 park. The regression incorporated several dummy variables (very similar to what Oracle's  
22 statistics expert Dr. Levy calls fixed effects) for events such as a new freeway, and included  
23 approximately a dozen other variables including lot size, building density, a variety of amenities,  
24 and locational effects, such as distance of the property from the park. I presented the regression  
25 analysis in court and the jury agreed with my conclusion after vigorous cross examination. I also  
26 ran a regression analysis related to the effect that the introduction of a new piece of software had  
27 on the sales revenues of a major software development company. I taught graduate level  
28 Managerial Economics at Arizona State University for three years. Managerial Economics is a

1 branch of economics that applies microeconomic analysis to decision models of management.  
2 This includes operations research, risk analysis, production analysis, pricing analysis, and capital  
3 budgeting. Finally, although I did not do any forecasting as part of my analysis in this matter, I  
4 have applied regression techniques designed to determine the effect on sales or costs of various  
5 events, such as a change in selling price or a change in the competitive environment.

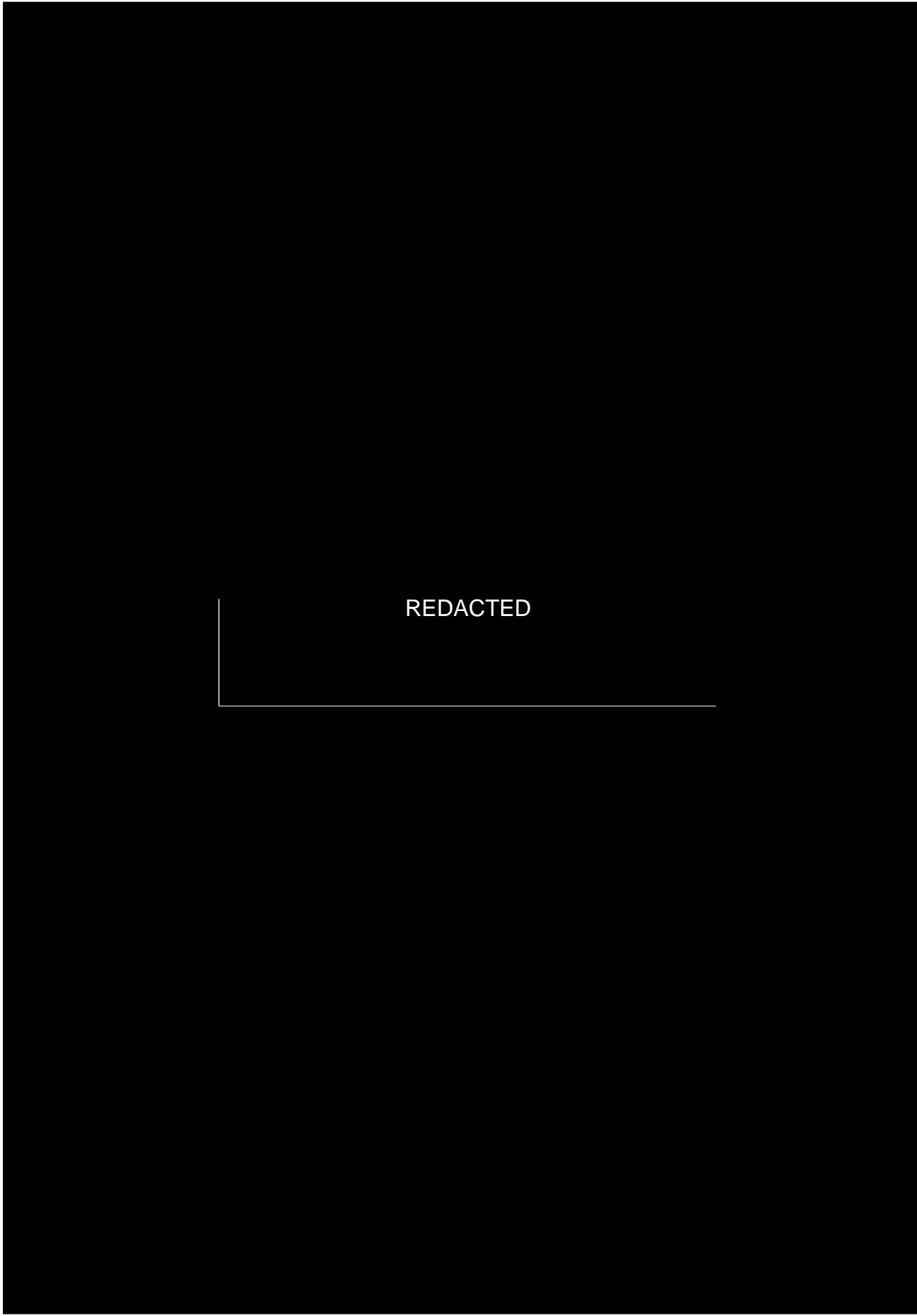
6 15. My report in this case includes a single variable regression analysis (otherwise  
7 known as simple regression) that I have used many times throughout my career, in both the  
8 business and litigation context. Plaintiffs' main complaint appears to be that the Court should  
9 exclude my regression analysis simply because I first studied the technique a long time ago.  
10 However, the technique has not changed since I first studied it.

11 16. Support for my position is provided by The Litigation Services Handbook,  
12 published by Wiley & Sons (3<sup>rd</sup> edition), a recent text intended to assist accounting professionals  
13 in the context of litigation. Exhibit 2. The book offers extensive guidance on how accountants  
14 might compute variable costs and suggests a regression analysis as one way to do so. See pages  
15 at 7-11 to 7-25. As Levy admits in his declaration at 5:1 and 8:2-5, my equation estimates the  
16 change in cost due to a change in revenue. This is the precise definition of variable cost and is the  
17 exact reason I did the analysis. I have attached several descriptions of the variable cost curve as it  
18 appears in economic textbooks in Exhibits 7 to 13.

19 *Levy's criticisms of my use of  $R^2$ .*

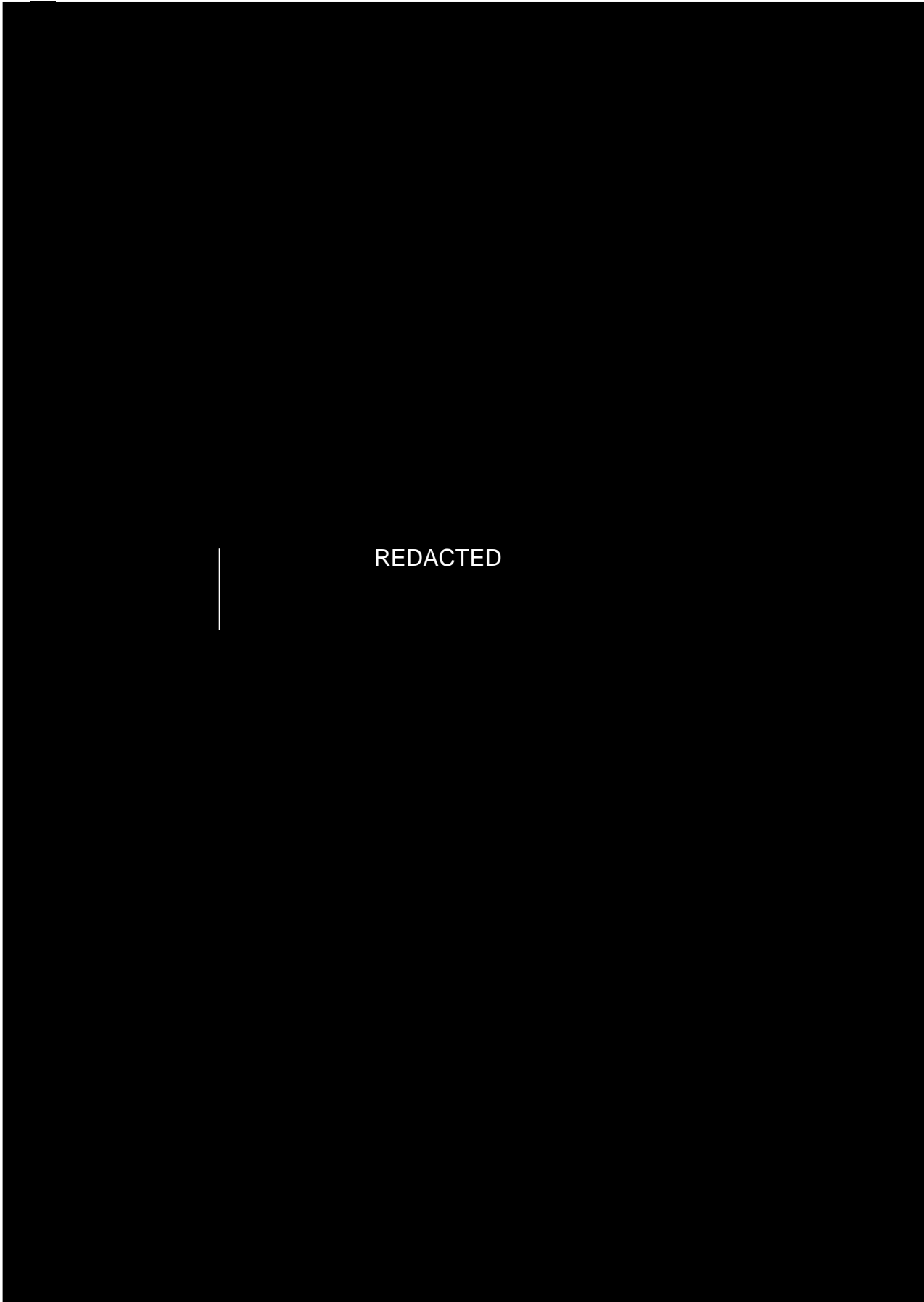
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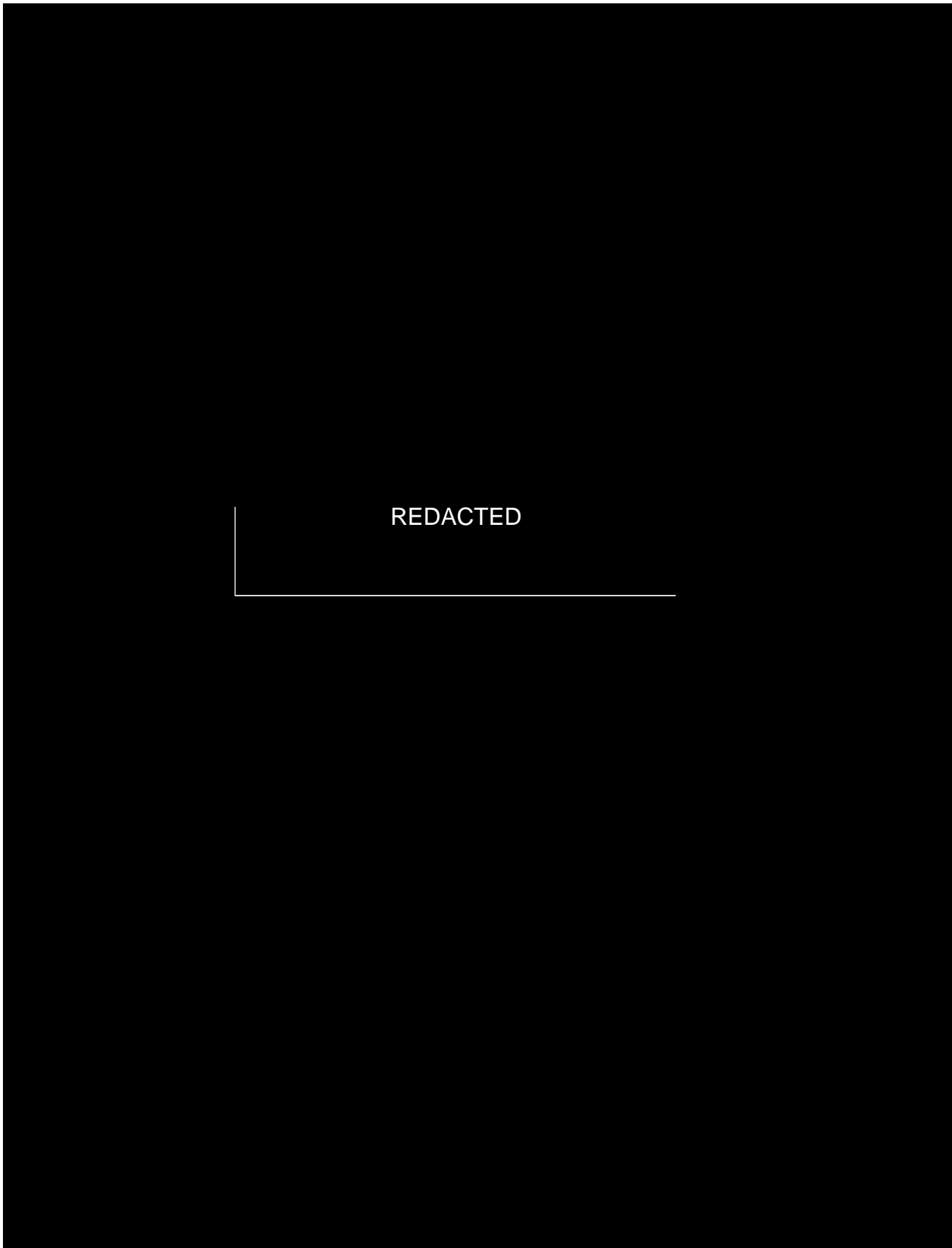
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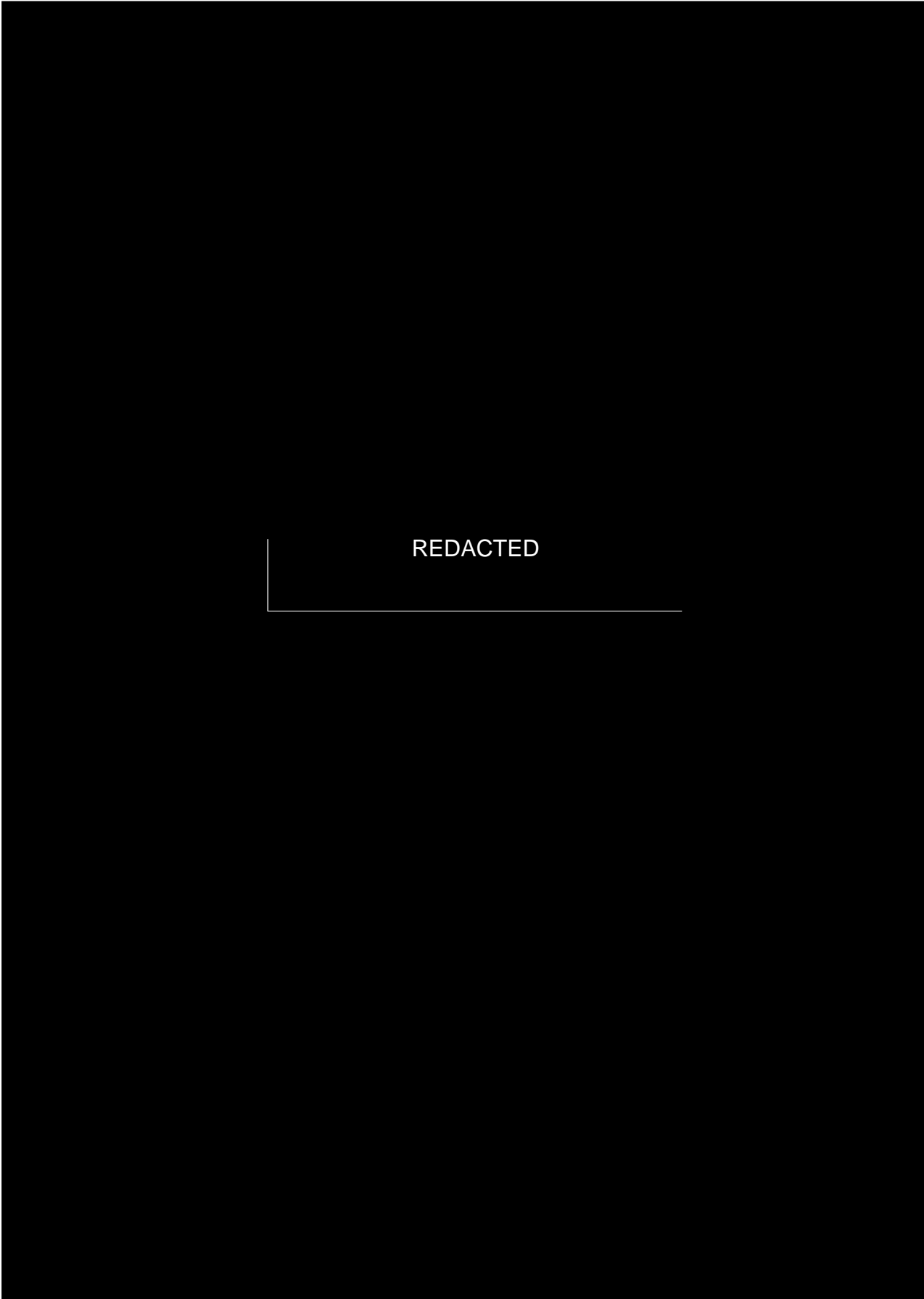


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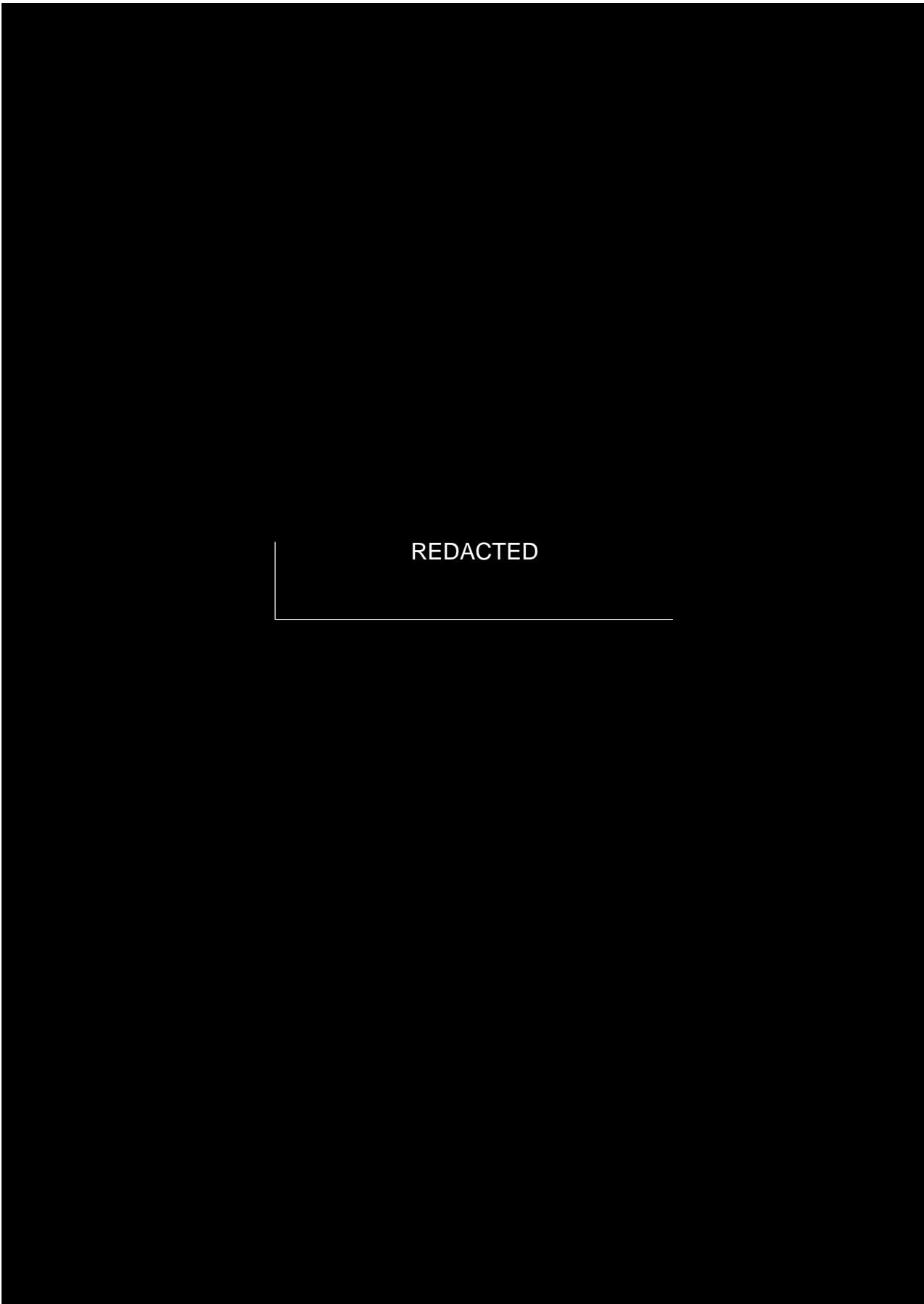
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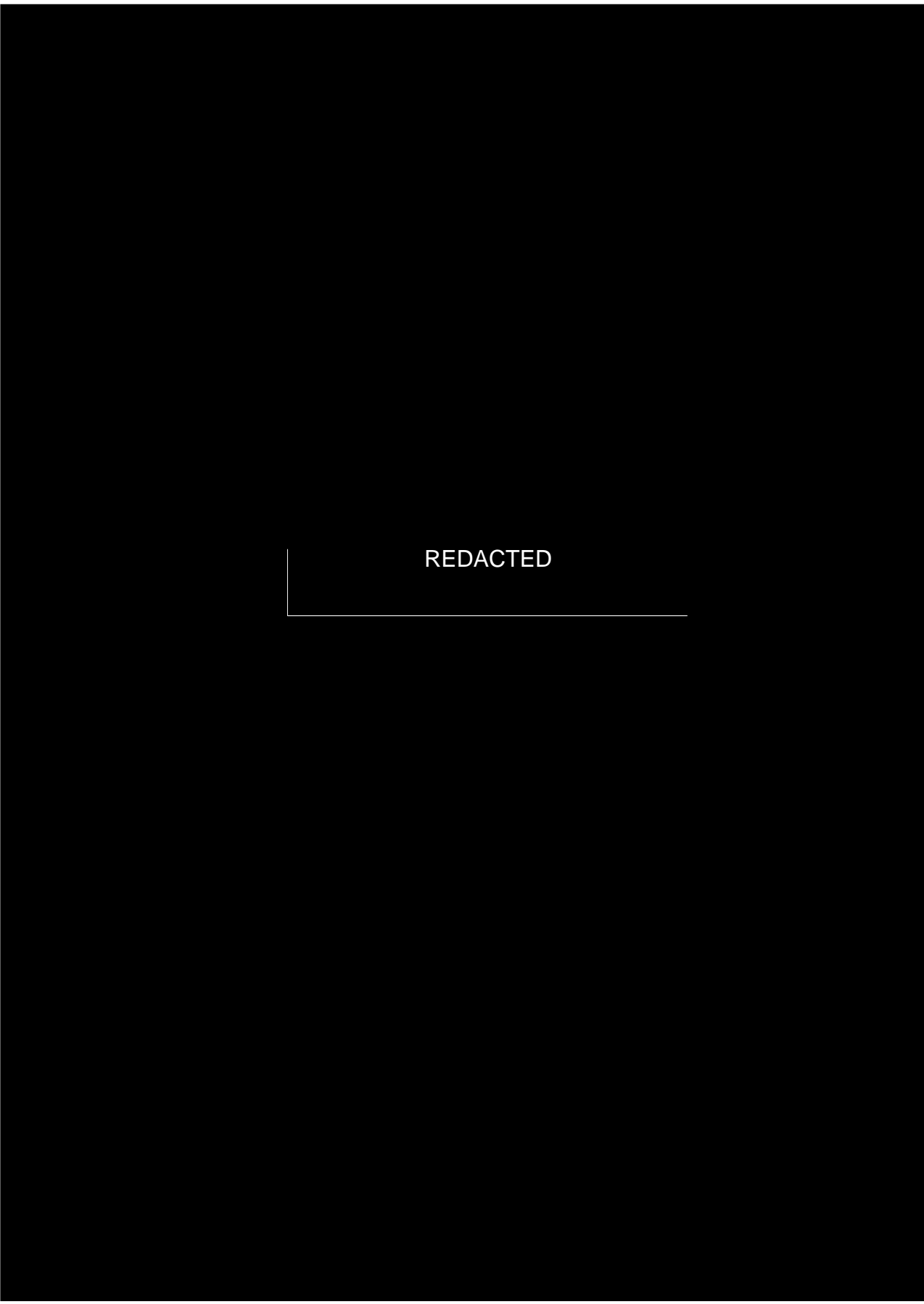
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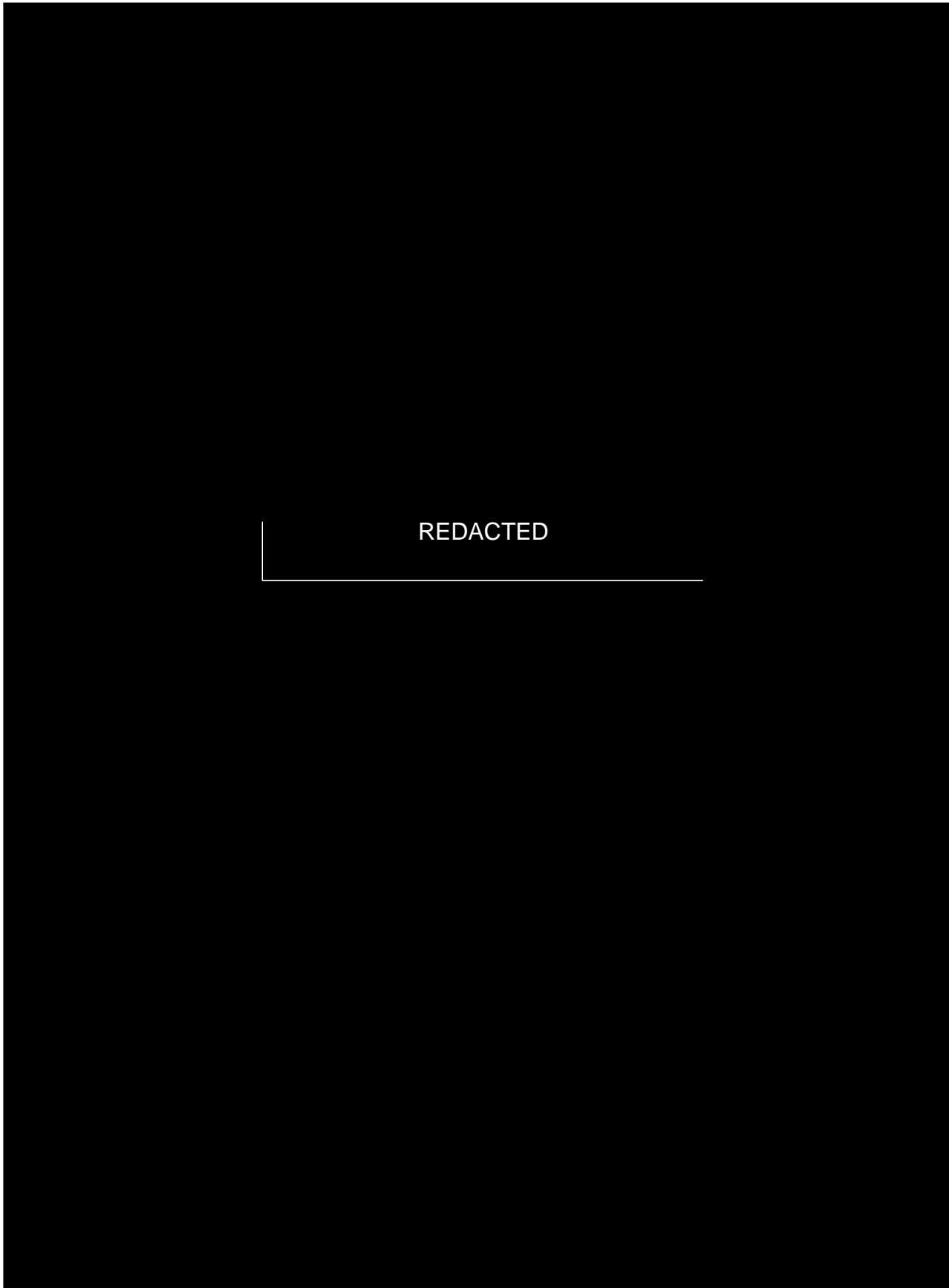
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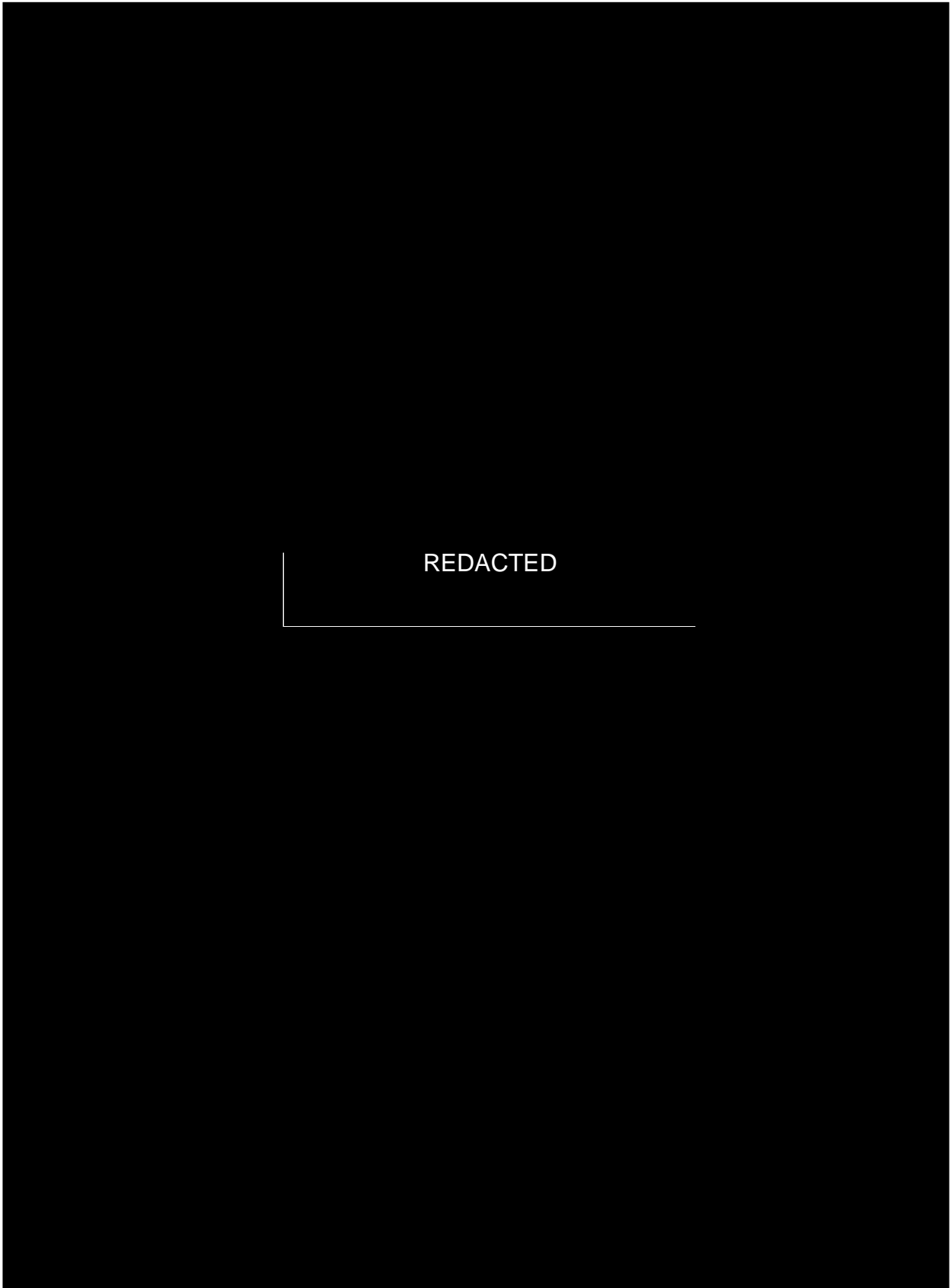
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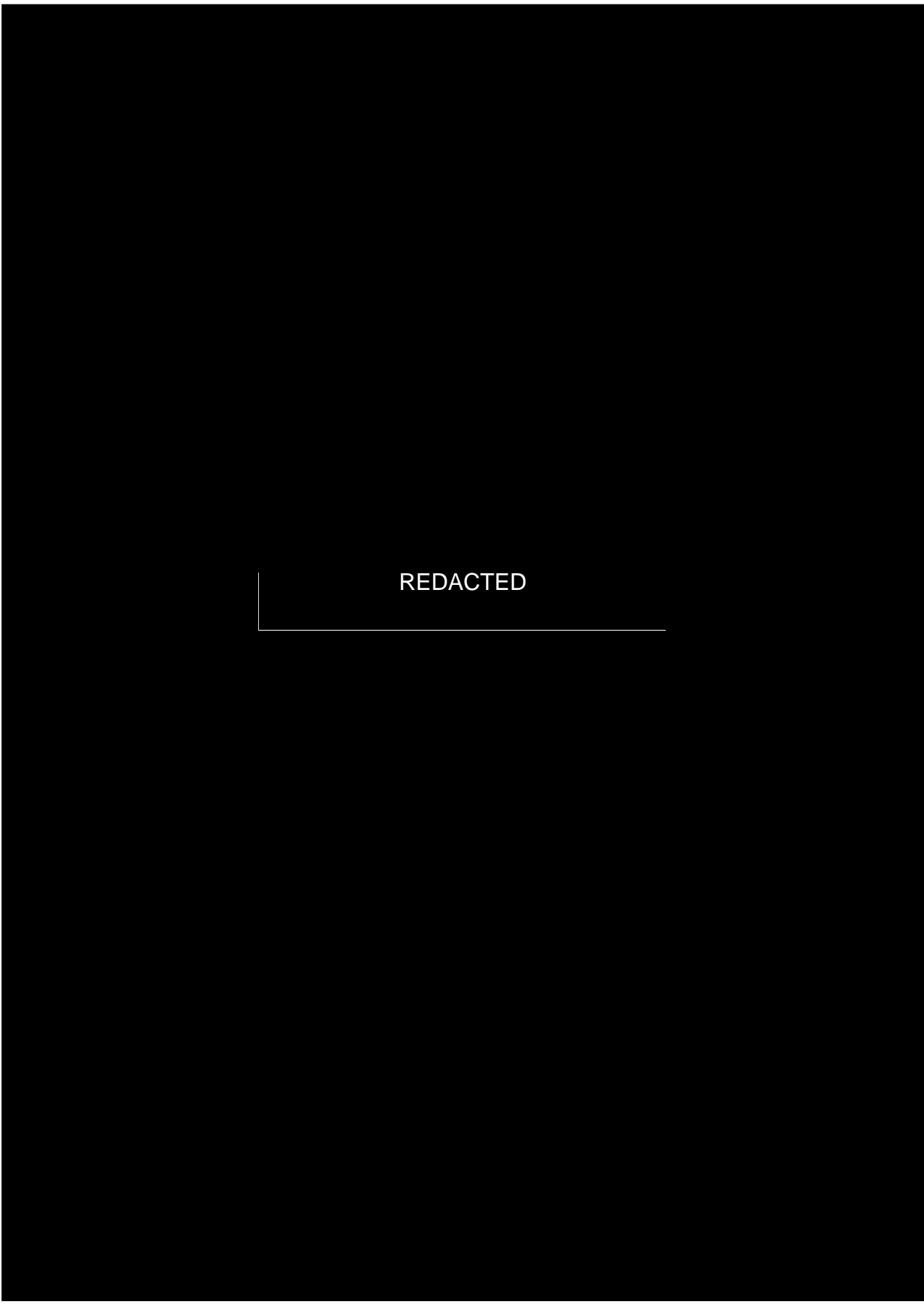
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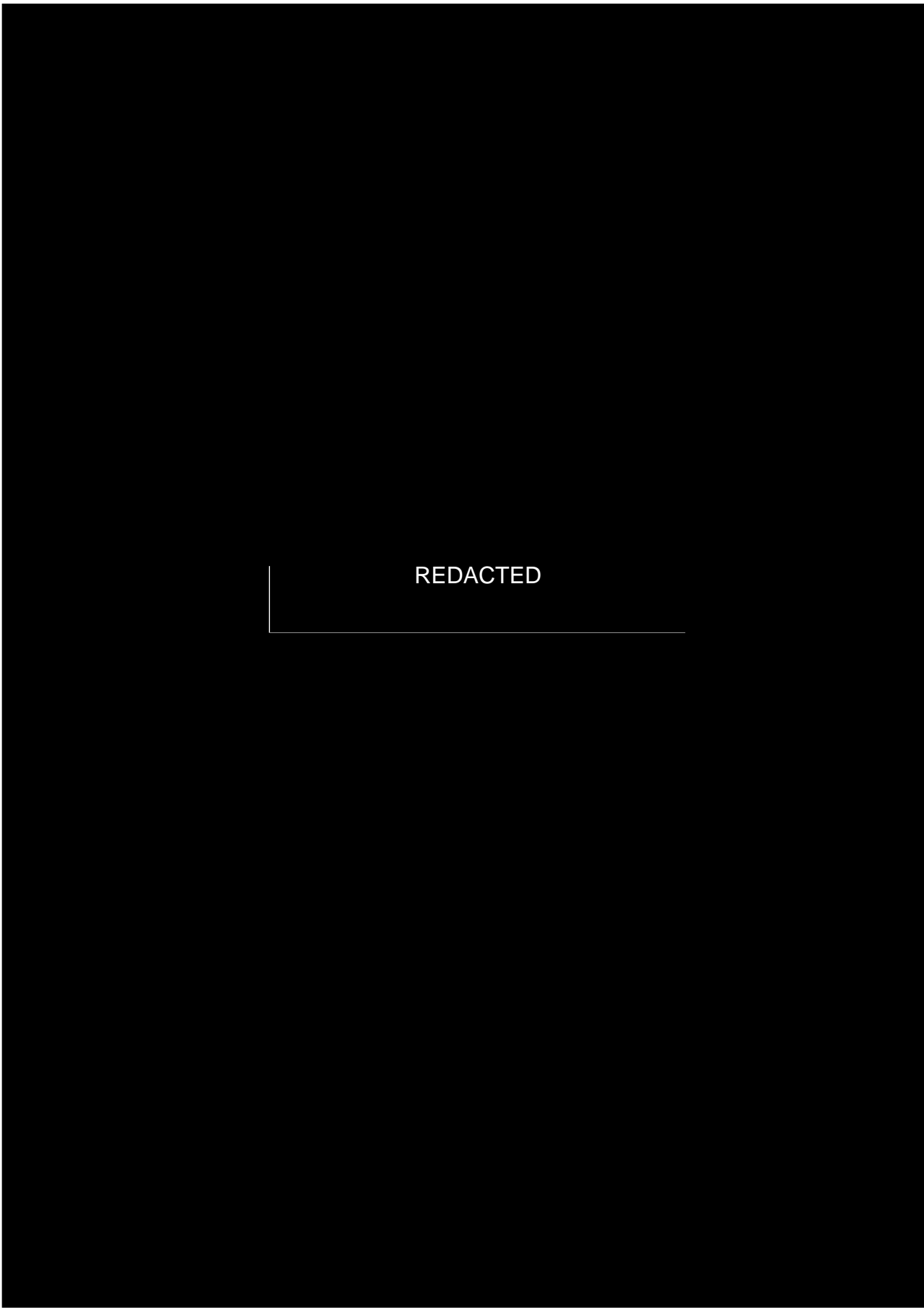
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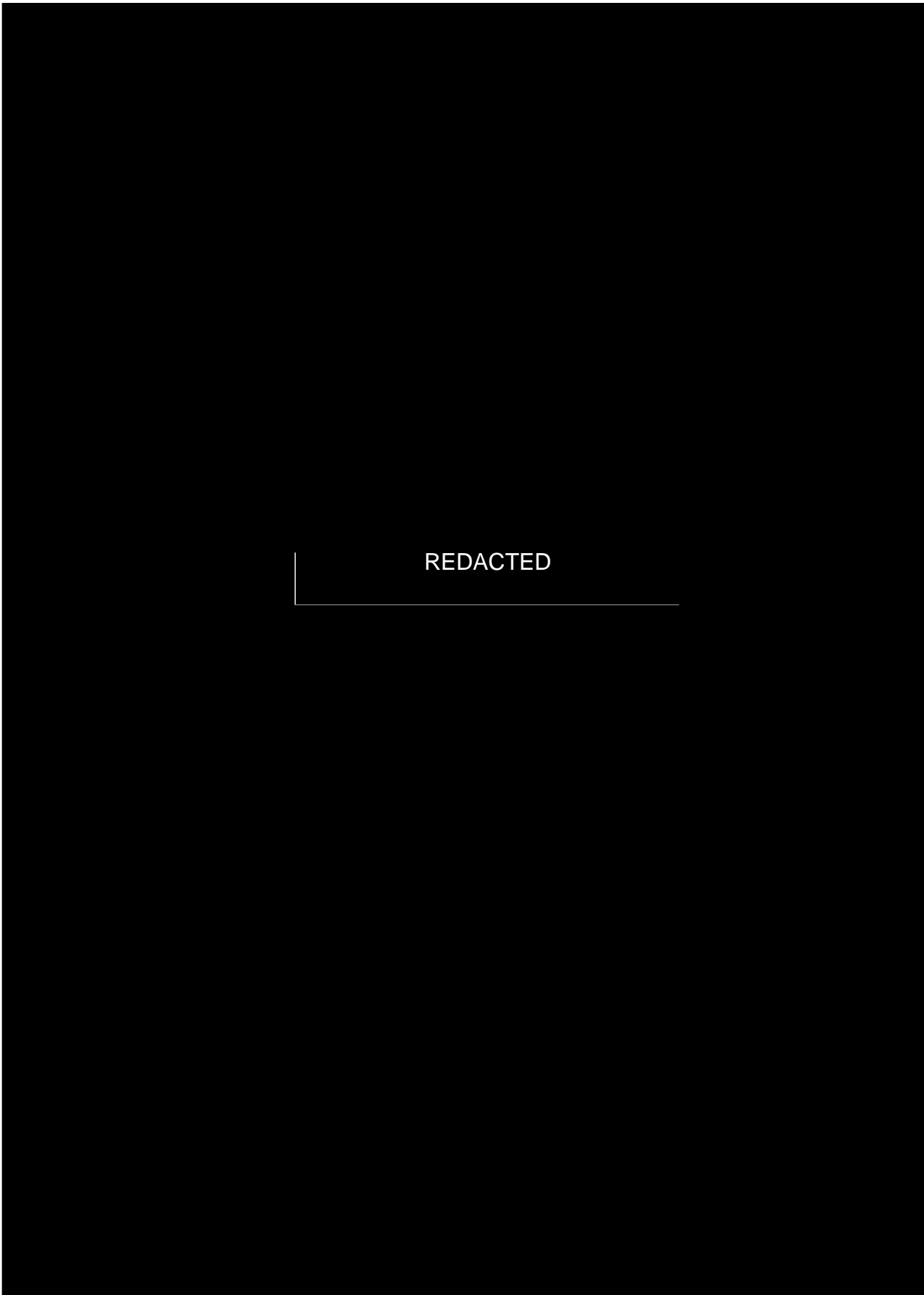
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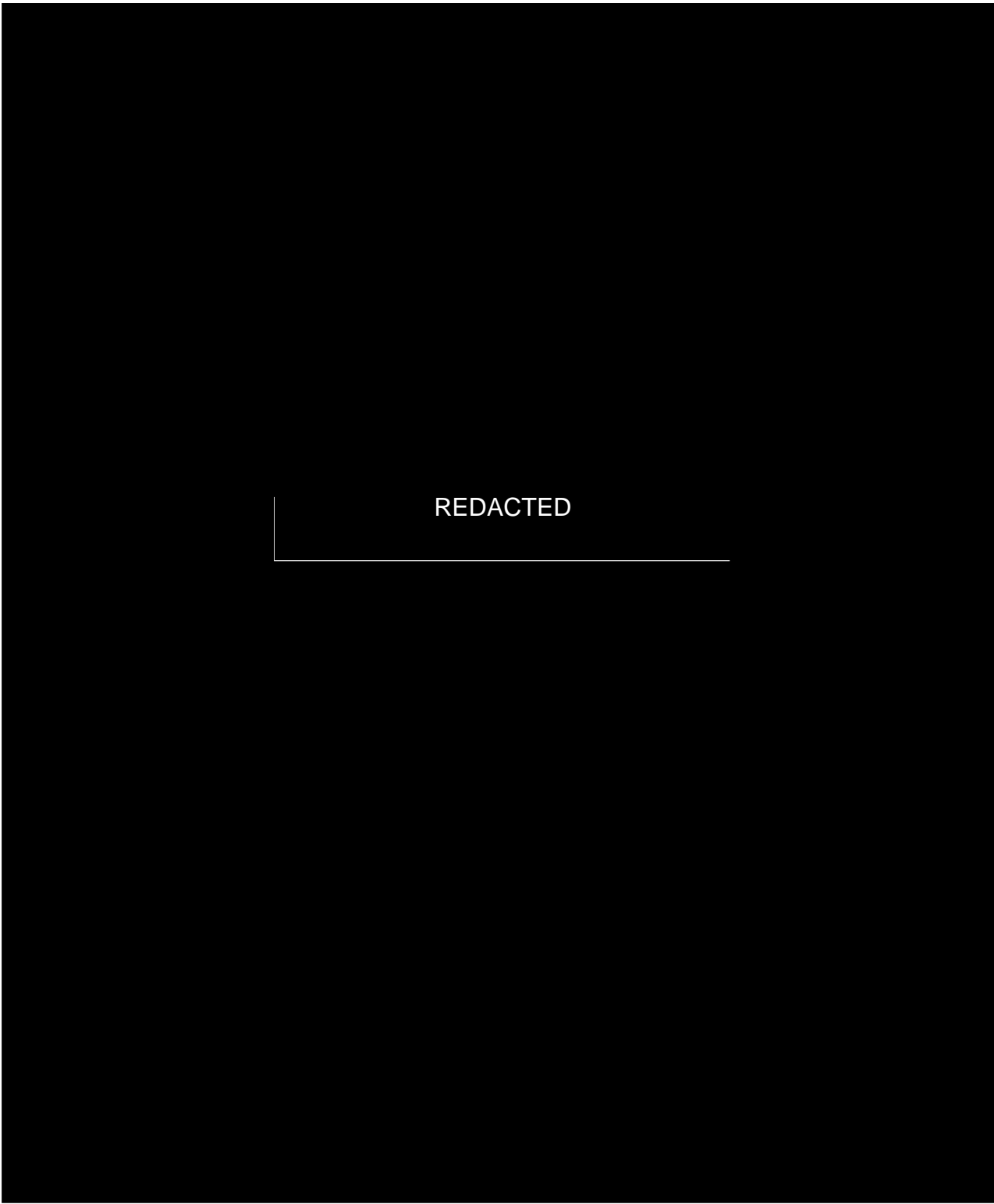


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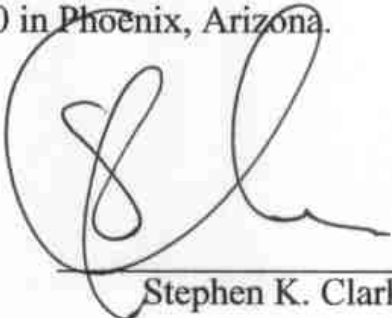
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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 9th day of September, 2010 in Phoenix, Arizona.



Stephen K. Clarke