

Dated

2017

**SUPPLIER/ZGL ENDURING
FUNDING AGREEMENT**

CONFIDENTIAL

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CONFIDENTIAL

PARTIES

- (1) **ZESPRI GROUP LIMITED** (company number 1027483) (**ZGL**)
- (2) **[REGISTERED SUPPLIER]** (company number []) (**Supplier**)

BACKGROUND

- A. The parties have agreed on a new enduring Fruit Return Margin Percentage mechanism for the Supply Agreement intended to implement the KISP Principles related to the funding of ZGL.
- B. The KISP Principles, for the purposes of this agreement, are as follows:
 - ZGL is a commercial business and should act accordingly;
 - ZGL is funded and remunerated appropriately to ensure it can deliver the full scope of its responsibilities;
 - the funding mechanism should be enduring, so that three yearly negotiation is not required;
 - ZGL must act in the best interests of New Zealand growers and shareholders, having a long-term value creation perspective balanced against the need for appropriate cost control to ensure that the benefits of economies of scale are shared between growers and shareholders; and
 - the various segments of the Zespri Group must be allocated their fair share of ZGL costs (as described in the Zespri Segment Allocation Manual).
- C. The new Fruit Return Margin Percentage is expected to be enduring, and to evolve as circumstances change. For this reason, the parties have agreed that the Fruit Return Margin Percentage should sit in this separate agreement that applies over time and that can be used to set the Fruit Return Margin Percentage for the purposes of each year's Supply Agreement between the parties.

AGREEMENT

1. DEFINITIONS AND INTERPRETATION

- 1.1 **Definitions:** In this agreement, unless the context requires otherwise:

Business Day means any day other than a Saturday, Sunday, or public holiday in all of New Zealand;

Commencement Date means 15th December 2017;

Confidential Information means information disclosed by a party under this agreement that is marked as confidential or which might reasonably be expected to be confidential in nature;

Fruit Return Margin Percentage is the percentage referred to or calculated in clause 3.1 of this agreement;

IAC means the kiwifruit Industry Advisory Council, or any successor group or body;

KISP Principles means the principles outlined in Background "B";

Loyalty Agreement means the Three Year Rolling Grower Contract between ZGL and individual kiwifruit growers supplying New Zealand grown kiwifruit;

Net Sales is as defined in the Pricing and Payment Manual for Kiwifruit and Services contained in the Supply Agreement;

NZ Supply EBIT (post-Loyalty) means the "Zespri Earnings before Interest, Tax and Loyalty Premium from NZ Kiwifruit" (calculated in accordance with the Zespri Segment Allocation Manual) less the total loyalty premium paid to growers under the Loyalty Agreements;

Season has the meaning given to that term in the Supply Agreement from time to time;

Supplier Approval means an approval in writing signed by registered New Zealand suppliers to ZGL who between them were responsible for the supply of not less than 70% of the volume of Class 1 New Zealand kiwifruit to ZGL in the most recently completed Season, provided that no one registered New Zealand supplier to ZGL may exercise the power of veto;

Supply Agreement means the supply agreement between ZGL and the Supplier for the supply of kiwifruit and/or services to ZGL in a Season;

Term means the period between the Commencement Date and 31 March 2027, which, for the avoidance of doubt, means that the final Season to which the Fruit Return Margin Percentage in any Supply Agreement calculated under this agreement will be the 2027-2028 Season (unless this agreement is terminated earlier in accordance with this agreement); and

Zespri Segment Allocation Manual means the Zespri Segment Allocation Manual as at the Commencement Date and as amended from time to time pursuant to clause 5.2.

1.2 **Interpretation:** In this agreement, unless the context requires otherwise:

- (a) the **headings** to clauses are inserted for convenience only and shall be ignored in interpreting this agreement;
- (b) the word **including** and other similar words do not imply any limitation;
- (c) a **person** includes any company or body of persons (incorporated or not);
- (d) the **plural** includes the **singular** and vice versa; and
- (e) a reference to a **statute** includes any legislative instrument or other subordinate legislation made under it and amendments to or replacement of any of them from time to time.

1.3 **IAC:** In the event that the IAC ceases to exist during the Term and there is no successor group or body, then all references within this agreement to IAC approval or decisions shall be read as requiring the approval of the parties previously represented on IAC (which in the case of suppliers, will be met by a Supplier Approval).

2. TERM

2.1 **Term:** This agreement will commence on the Commencement Date and will continue for the Term, unless terminated earlier in accordance with this agreement.

2.2 The parties agree to meet at least one year prior to the expiry of the Term to discuss in good faith a renewal or extension of this agreement, provided that neither party shall be obliged to agree to any proposed renewal or extension of this agreement.

3. FRUIT RETURN MARGIN PERCENTAGE

3.1 **Fruit Return Margin Percentage:** The Supplier and ZGL agree that the Fruit Return Margin Percentage in any Supply Agreement entered into during the Term will be:

- (a) in the 2018-19 Season, 7.50%;
- (b) in the 2019-20 Season, 7.25%;
- (c) in the 2020-21 Season, and in any subsequent Season, either:
 - (i) the percentage that applied in the preceding Season; or
 - (ii) if clause 3.2 applies, the percentage that applied in the preceding Season less 0.25%; or
 - (iii) if clause 3.3 applies, the percentage that applied in the preceding Season plus 0.25%, provided that the maximum the Fruit Return Margin Percentage can increase to under this clause is 7.75%.

3.2 **Automatic adjustment (down):** Option (ii) in clause 3.1(c) applies if:

- (a) the 3 year rolling average of Adjusted NZ Supply EBIT (post-Loyalty) as a percentage of Net Sales is more than 1.20%, calculated as follows:
 - (i) the three year rolling average must be of the three most recent completed Seasons that are not Seasons to which clause 3.3(a) applied and, as a result of which, ZGL increased the Fruit Return Margin Percentage under clause 3.3(b); and
 - (ii) the actual NZ Supply EBIT (post-Loyalty) used for each of the three Seasons must be adjusted by using the Fruit Return Margin Percentage of the most recent completed Season, instead of the Fruit Return Margin Percentage that actually applied in each relevant Season ("**Adjusted NZ Supply EBIT (post-Loyalty)**"); and
- (b) the NZ Supply EBIT (post-Loyalty) was not less than 0.50% of Net Sales for the most recent completed Season.

3.3 **Optional adjustment (up):** Option (iii) in clause 3.1(c) applies if:

- (a) the NZ Supply EBIT (post-Loyalty) was less than 0.50% of Net Sales for the most recent completed Season; and
- (b) ZGL decides to increase the Fruit Return Margin Percentage.

3.4 **Acknowledgements:** The parties acknowledge and agree that:

- (a) in determining whether clauses 3.2 or 3.3 apply in respect of any Season for the purpose of clause 3.1(c), each party will have regard to the worked examples set out in the Schedules;

- (b) nothing in this agreement or the Zespri Segment Allocation Manual transfers ownership in any assets, intellectual property, or intangible assets (including brands or plant variety rights) from a party to the other party to this agreement or any third party;
- (c) the loyalty premium does not transfer the rights and risks of ownership in the New Zealand Kiwifruit Segment (as defined in the Zespri Segment Allocation Manual) to the growers that have signed a Loyalty Agreement or any other person;
- (d) nothing in this agreement or the Zespri Segment Allocation Manual gives any person any right to affect, influence or limit ZGL's operational or commercial decisions;
- (e) nothing in this agreement or the Zespri Segment Allocation Manual requires ZGL to change its current operational practices;
- (f) this agreement and the Zespri Segment Allocation Manual are subject to all applicable laws and accounting standards, and in the event that this agreement is inconsistent with any law or accounting standard, that law or accounting standard will prevail; and
- (g) pursuant to the Kiwifruit Export Regulations, ZGL may not unjustifiably discriminate between suppliers in respect of the terms of purchase for kiwifruit.

4. SPECIAL CIRCUMSTANCES

4.1 Trigger Events: For the purposes of this clause 4 the following events are "**Trigger Events**":

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

4.2 Renegotiation: The parties agree that, immediately following a Trigger Event occurring, they will commence a re-negotiation of this agreement having regard to the commercial position prevailing or likely to prevail following the occurrence of the Trigger Event. If a signed renegotiated agreement is not achieved within twelve months of negotiations commencing, either party may cancel this agreement by notice in writing to the other, with such cancellation to take effect at the end of the Season in which that cancellation notice is given.

5. REVIEWS

5.1 **Review of this agreement:** The parties acknowledge that the IAC intends to carry out a formal review of this agreement, having regard to whether the KISP Principles have been, or will be, materially satisfied by the operation of this agreement, as soon as possible after the completion of the 2022-2023 Season. If the results of the review show that the operation of this agreement has failed, or is likely to fail, to materially satisfy the KISP Principles, the parties will use all reasonable endeavours in good faith to re-negotiate the terms of this agreement, provided that neither party shall be obliged to agree to any proposed renegotiated terms of this agreement.

5.2 **Review of the Zespri Segment Allocation Manual:** The parties agree that:

- (a) the IAC will review the Zespri Segment Allocation Manual at least once a Season;
- (b) notwithstanding the foregoing, Zespri may propose changes to the Zespri Segment Allocation Manual at any time to reflect changes in Zespri's operational and regulatory requirements, to address accounting requirements, or otherwise; and
- (c) any changes to the Zespri Segment Allocation Manual will be subject to obtaining:
 - (i) IAC approval; and
 - (ii) Supplier Approval.

6. TERMINATION

6.1 **Termination for zero supply:**

- (a) ZGL may request the Supplier to confirm or at its option the Supplier may confirm in writing whether, at the relevant time:
 - (i) its supply of kiwifruit to ZGL has been reduced to nil; and
 - (ii) it expects that it will not supply kiwifruit to ZGL in the future.
- (b) If the Supplier confirms both (a)(i) and (a)(ii) above in writing to ZGL, whether upon request by ZGL or otherwise, then on receipt of that confirmation by ZGL and provided the Supplier is not party to a Supply Agreement, this agreement will terminate.
- (c) This agreement will terminate if the Supplier is not party to a Supply Agreement with ZGL for any Season and has not supplied kiwifruit to ZGL in 9 months prior to that Season.

6.2 **Termination if Supply Agreement terminated:** This agreement will automatically terminate if either party terminates the Supply Agreement, provided that neither the expiry of a Supply Agreement in accordance with its terms, nor the failure of the Supplier to enter into a Supply Agreement for a particular Season (where the Supplier continues to supply kiwifruit to ZGL in that Season notwithstanding the failure to enter into a Supply Agreement) shall constitute termination of the Supply Agreement for the purposes of this clause.

6.3 Termination for default: Either party (“**Notifying Party**”) may terminate this agreement with immediate effect by a written notice given to the other party (“**Defaulting Party**”) if:

- (a) the Defaulting Party has committed a material breach of this agreement and where such breach is capable of remedy, the Defaulting Party has failed to comply with an earlier written notice (“**Default Notice**”) given by the Notifying Party specifying that material breach and requiring that the Defaulting Party remedy that breach within 60 Business Days after receipt of that Default Notice;
- (b) the Defaulting Party has committed a material breach of this agreement and such breach is not capable of remedy.

6.4 Supply Agreements on different terms: If:

- (a) ZGL accepts the supply of Class 1 New Zealand kiwifruit for export from any third party, other than:
 - (i) pursuant to a collaborative marketing arrangement; or
 - (ii) kiwifruit for export to Australia; or
 - (iii) kiwifruit for research projects, or kiwifruit of a pre-commercial variety which is exported for the purposes of market trials and development; and
- (b) that third party is:
 - (i) not party to a Supply Agreement and Enduring Funding Agreement with ZGL; or
 - (ii) party to a Supply Agreement and Enduring Funding Agreement with ZGL but the terms of one or both of those agreements are not identical in all material respects to the Supply Agreement and Enduring Funding Agreement to which the Supplier is a party,

then the Supplier may give Zespri written notice requiring Zespri to enter into a Supply Agreement and Enduring Funding Agreement with the third party that is identical in all material respects to the Supply Agreement and Enduring Funding Agreement to which the Supplier is a party within 60 Business Days of receipt of the notice. In the event that at the completion of the 60 Business Days, Zespri has not entered into such agreements with the third party, the Supplier shall have the right to terminate this Agreement effective immediately, provided that:

- (c) the parties acknowledge and agree that Zespri enters into Service Level Agreements pursuant to the Supply Agreement with New Zealand kiwifruit suppliers from time to time, and that any such arrangements shall not trigger clause 6.4(b)(ii) above and are entered into in a manner which is consistent with Zespri’s non-discrimination obligations under the Kiwifruit Export Regulations 1999.

6.5 Post-termination margin: The parties acknowledge and agree that if this Agreement is cancelled or terminated for any reason during any Season, then the Fruit Return Margin Percentage to be applied for the balance of the Season shall be the Fruit Return Margin Percentage in effect at the time of cancellation/termination. If, following any termination or cancellation of this agreement at any time, a revised Enduring Funding Agreement has not been signed by the commencement of the next Season, then the Fruit Return Margin Percentage to be applied for that next Season (until a

new amount is agreed – which may be backdated to the beginning of a Season) shall be the Fruit Return Margin Percentage in effect at the time of cancellation/termination.

7. CONFIDENTIALITY

- 7.1 **Restrictions:** Except as permitted by this clause 7, each party shall keep the other party's Confidential Information confidential and shall not disclose such Confidential Information to any person or use such Confidential Information for any purpose other than the purpose of this agreement.
- 7.2 **General exceptions:** Notwithstanding clause 7.1, a party may disclose Confidential Information:
- (a) to its professional advisers, auditors or bankers on a need to know basis; or
 - (b) if and to the extent disclosure is required by law; or
 - (c) if and to the extent the information is obtained or developed independently of the information disclosed by the disclosing party; or
 - (d) to enforce its rights or to defend any claim under this agreement.
- 7.3 **Exception for NZKGI:** Notwithstanding clause 7.1, ZGL may inform New Zealand Kiwifruit Growers Incorporated, who may in turn inform its members, that any of the following events have occurred:
- (a) ZGL and the Supplier enter this agreement;
 - (b) this agreement terminates;
 - (c) any person proposes a renegotiation of this agreement;
 - (d) any person proposes an amendment to this agreement; or
 - (e) the fact that there is a dispute between ZGL and the Supplier under this agreement, provided that ZGL must not provide details of the dispute (other than the Supplier's name) without the prior written consent of the Supplier.

8. DISPUTE RESOLUTION

- 8.1 **Dispute Notice:** A party claiming a dispute has arisen is to give written notice ("**Notice of Dispute**") to the other party specifying the nature and details of the dispute.
- 8.2 **Negotiation:** As soon as reasonably practicable after receipt of a Notice of Dispute, senior managers of the parties must meet to endeavour to resolve the dispute in good faith and otherwise in the manner that they reasonably consider to be the most efficient and effective in the circumstances. The parties will use their best efforts to resolve the dispute within 20 Business Days of the Notice of Dispute being received.
- 8.3 **IAC Referral:** If the dispute is not resolved within the time frame set out in clause 8.2, then either party may, within 20 Business Days refer the dispute to the IAC for consideration, by written notice to the other party (copied to the IAC).

- 8.4 **IAC Recommendation:** The parties must have regard to any recommendation made by the IAC in respect of the dispute and, as soon as reasonably practicable after the IAC makes a recommendation, senior managers of the parties must meet to endeavour to resolve the dispute in good faith having regard to the IAC recommendation and otherwise in the manner that they reasonably consider to be the most efficient and effective in the circumstances.
- 8.5 **Referral to IAC:** Notwithstanding anything in clause 7 or 8.4, in the event that a dispute is referred to the IAC for consideration under clause 8.3:
- (a) the IAC shall not be deemed to be acting as an expert or an arbitrator;
 - (b) no party is required to disclose any Confidential Information to the IAC, nor may either party disclose the Confidential Information of the other to the IAC without that party's prior written approval;
 - (c) any IAC recommendation regarding the dispute shall not be binding on the parties; and
 - (d) if the IAC does not make a recommendation regarding the dispute within 20 Business Days of referral or the dispute is not resolved within 20 Business Days of the IAC making a recommendation to the parties, either party may issue legal proceedings in respect of the dispute.
- 8.6 **Issue Proceedings:** Neither party may issue legal proceedings (other than for urgent interlocutory relief) in respect of such dispute, unless that party has first taken all reasonable steps to comply with this clause 8 and the dispute has already been referred to the IAC under clause 8.3.
- 8.7 **Continuing Obligations:** Pending resolution of any dispute, the parties will continue to perform their obligations under this agreement without prejudice to their respective rights and remedies.
- 8.8 **Without Prejudice:** The exchange of information or documents or the making of any offer of settlement by either of the parties under this clause is for the purpose of attempting to settle the dispute and is provided and made on a "without prejudice" basis.

9. GENERAL

- 9.1 **Amendments:** This agreement cannot be amended or varied except in writing signed by the parties, provided that any such amendment or variation must be approved by an IAC resolution.
- 9.2 **Notices:** Each notice under this agreement shall be in writing and delivered personally or sent by post or email to the address specified in clause 9.3. A notice is deemed to be received:
- (a) if delivered personally, when delivered;
 - (b) if posted, three Business Days after posting; or
 - (c) if sent by email, when actually received by the recipient designated for the purposes of this agreement.

9.3 **Contact details:** The parties' initial contact details (which may be amended from time to time by notice to the other parties) are set out below:

ZGL

Address:

400 Maunganui Road

Mount Maunganui 3149

Email: legal@zespri.com

Attention: General Counsel

The Supplier

Address:

[address]

Email: [email]

Attention: [name]

9.4 **Assignment:** Neither party may assign or novate, in whole or in part, its benefits or obligations under this agreement without the prior written consent of the other party (such consent not to be unreasonably withheld in the case of an assignment or novation to a company under the effective control of the same persons that had control of the party requesting the assignment or novation at the time this agreement was entered into, or, in the case of ZGL, to a company under the effective control of ZGL). Change in the effective control of a party is deemed to be an assignment.

9.5 **Entire agreement:** This agreement is the entire agreement of the parties and supersedes all prior agreements and representations between the parties relating to the matters dealt with in this agreement.

9.6 **Further assurances:** Each party shall, at its own expense, promptly sign and deliver any documents which are reasonably required to give full effect to the provisions of this agreement.

9.7 **Privity:** A person who is not a party shall not have any rights under or in connection with this agreement by virtue of the Contract and Commercial Law Act 2017, Part 2, Subpart 1.

9.8 **Relationship of parties:** The parties are independent contractors, and this agreement does not create any partnership, agency or employment relationship between them.

9.9 **Remedies cumulative:** The rights and remedies provided in this agreement are cumulative and not exclusive of any rights or remedies provided by this agreement or law.

9.10 **Severance:** If any provision of this agreement is illegal, invalid or unenforceable, that provision shall be read down to the extent necessary to make it legal, valid and enforceable.

9.11 **Survival:** Following termination or expiry of this agreement clauses 7 (confidentiality) and 8 (dispute resolution), together with other provisions that are by their nature intended to survive, will remain in effect.

9.12 **Waiver:** A waiver of a right under this agreement is ineffective unless it is in writing.

9.13 **Governing law and jurisdiction:** This agreement is governed by New Zealand law and the parties irrevocably submit to the non-exclusive jurisdiction of the New Zealand courts.

EXECUTION

SIGNED for and on behalf of
ZESPRI GROUP LIMITED by

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Signature

[Print Name]

Position

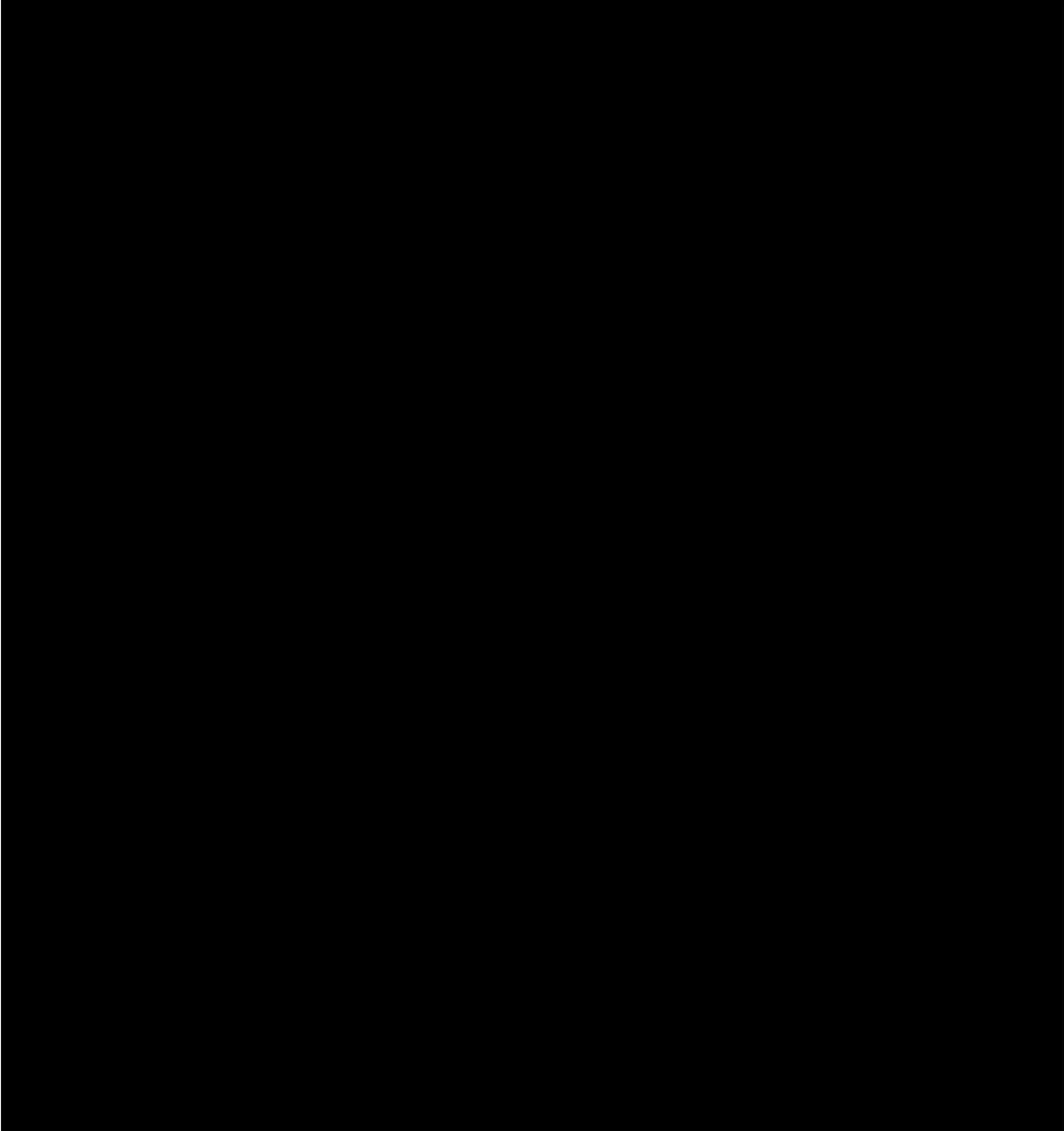
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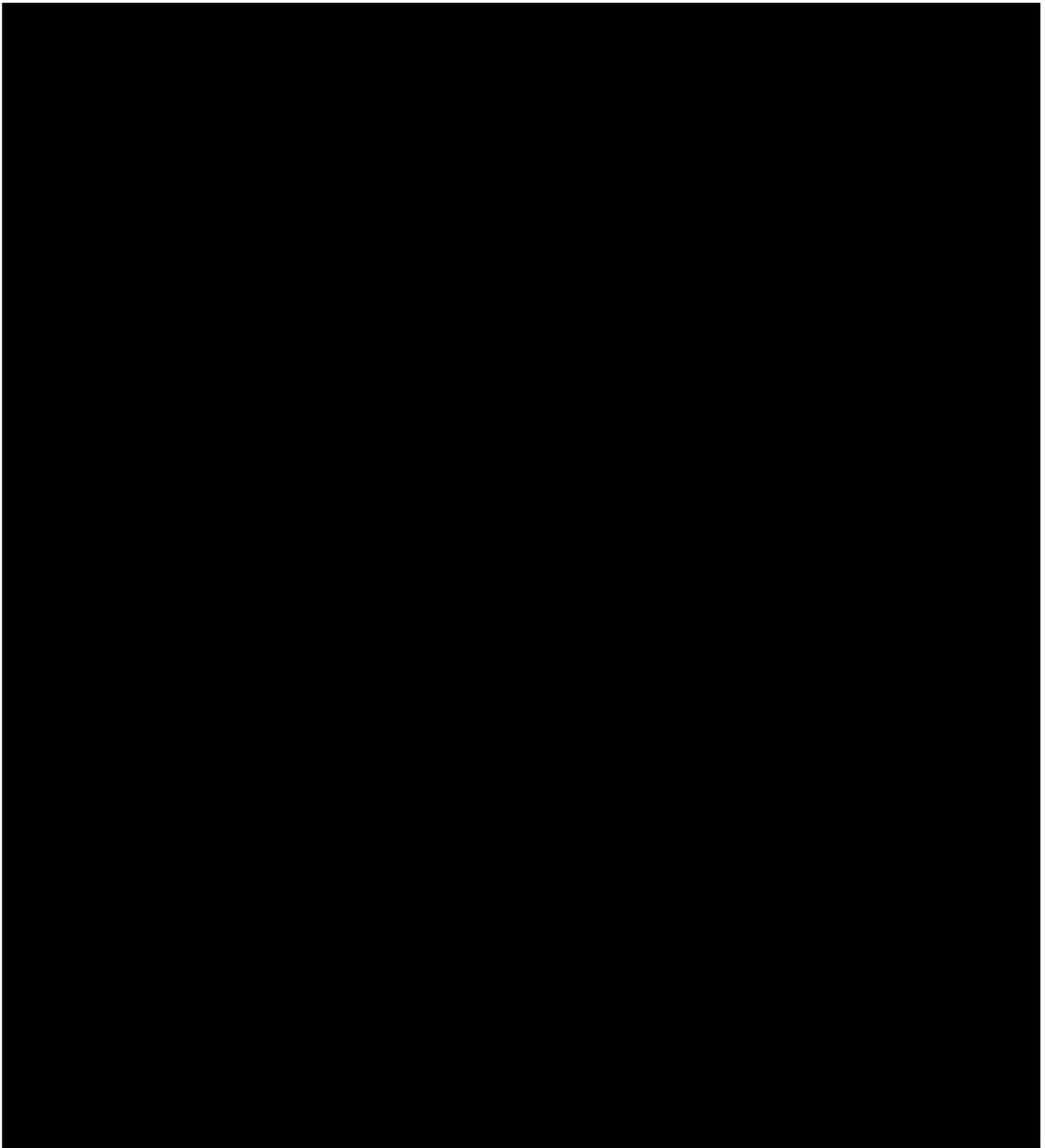
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Signature

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Position

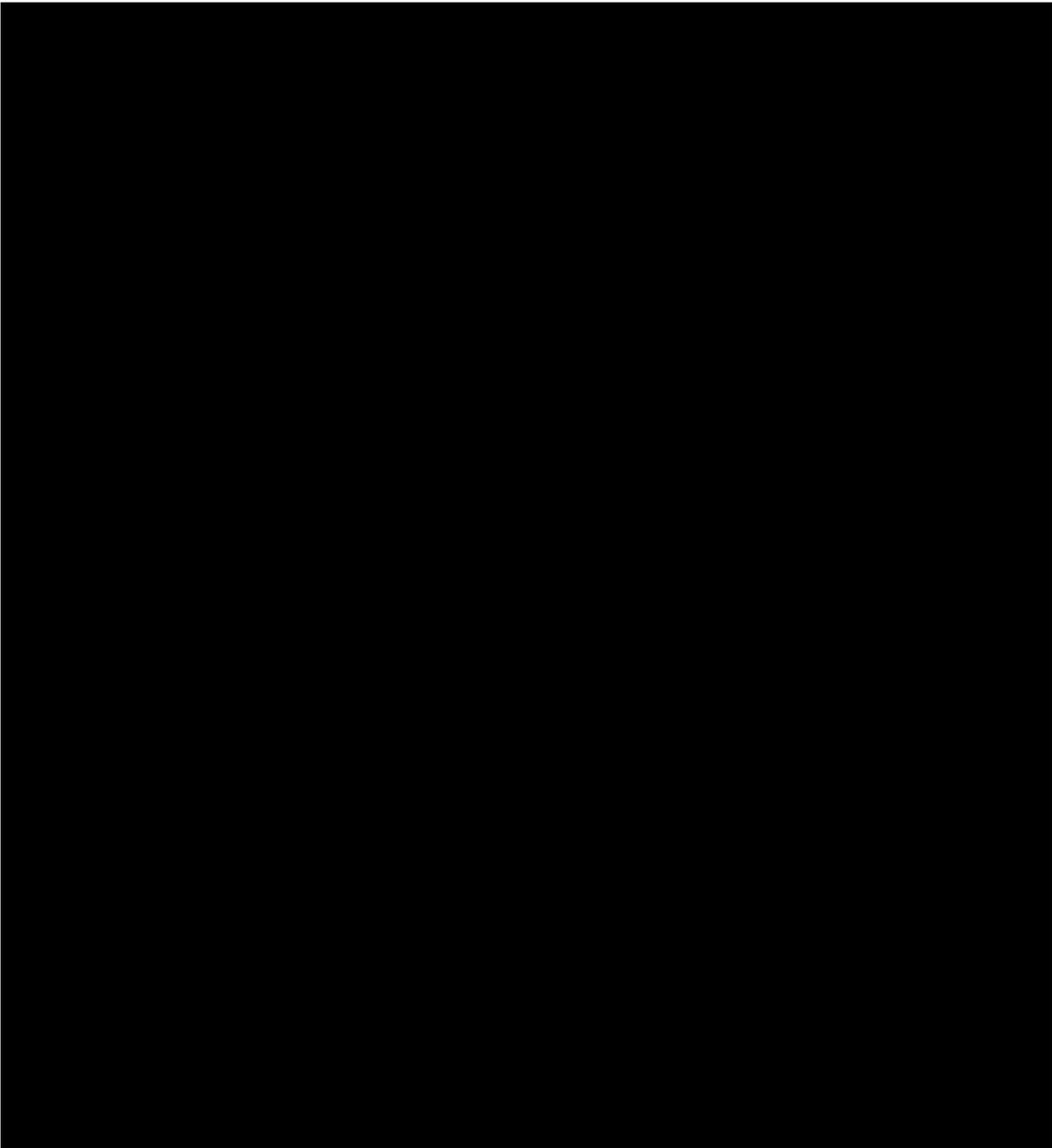




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