

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS

SUPERIOR COURT

Docket No. _____

New Hampshire Right to Life
P.O. Box 421, Merrimack, NH 03054

v.

New Hampshire Department of Health & Human Services
129 Pleasant Street
Concord, NH 03301-3857

VERIFIED PETITION FOR INJUNCTIVE RELIEF PURSUANT TO RSA 91-A

I. Preliminary Statement

Openness in the conduct of public business is essential to a democratic society. The purpose of [RSA 91-A] is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people. RSA 91-A:1.

This action arises out of the Department of Health and Human Services' repeated failures to comply with New Hampshire's Right to Know Law, RSA 91-A, *et seq.* and the New Hampshire Constitution. The Supreme Court has recognized that when "a public entity seeks to avoid disclosure of material under the Right to Know Law, that entity bears a heavy burden to shift the balance toward non-disclosure." *Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7, 11-12 (2011). Rather than take this obligation seriously, the Respondents have refused to produce public documents or even provide adequate justification for non-disclosure. The documents must be produced.

II. Parties

1. Petitioner NHRTL is a non-profit organization with an address of P.O Box 421, Merrimack, New Hampshire 03054.

2. NHRTL has members in all ten counties of New Hampshire, including Strafford County.
3. NHRTL Board Member and past president Kurt Wuelper is a resident of the town of Strafford in Strafford County.
4. The New Hampshire Department of Health and Human Services is a public body of the state of New Hampshire with an address of 129 Pleasant Street, Concord, NH 03301-3857.

III. Jurisdiction and Venue

5. This Court has jurisdiction over this matter pursuant to RSA 91-A:7.
6. Pursuant to RSA 91-A:7, proceedings under RSA 91-A shall have priority on the Court's calendar.
7. Venue is proper in this Court pursuant to RSA 507:9 because a Petitioner is a resident of this County.

IV. RIGHT TO KNOW REQUEST FOR PHARMACEUTICAL PROTOCOLS

8. Prior to September 2012, the Board of Pharmacy and DHHS had never reviewed pharmaceutical protocols as required by RSA 318:42(VII).
9. On June 30, 2015, Petitioner requested all pharmaceutical protocols approved by DHHS pursuant to RSA 318:42(VII). See attached as Exhibit A.
10. The Petitioner's June 30, 2015 request was not the first time Petitioner had requested pharmaceutical protocols from DHHS.
11. Petitioner had requested pharmaceutical protocols in October 2014 and, after litigating Petitioner's entitlement to these public records, the Strafford Superior Court issued an Order, dated May 15, 2015, that the public interest in disclosure outweighed purported

commercial interest in non-disclosure. This Court ordered all the pharmaceutical protocols at issue in that case must be disclosed. See Order of May 15, 2015, p. 28, in Docket 219-2014-CV-0386 (Mangones, J.).

12. Although this Court determined that the public interest in disclosure of pharmaceutical protocols outweighed any commercial interest, DHHS refused to apply that same reasoning to protocols reviewed after this Court's May 15, 2015 Order or other protocols that were not reviewed by the Court in camera.
13. DHHS ignored the prior orders of this Court stating that they have "no precedential value." See attached as Exhibit B.
14. In particular, although DHHS produced the majority of pharmacy protocols requested, DHHS redacted or withheld 21 pages of documents. See attached as Exhibit C.
15. DHHS's reasoning for redacting or withholding these 21 pages is the same reasoning asserted by DHHS for previous requests but rejected by this Court in its May 15, 2015 Order.
16. DHHS violated RSA 91-A and the New Hampshire Constitution by redacting or withholding the pages at Exhibit C for the same reasons the Court held DHHS violated 91-A in its May 15, 2015 Order pertaining to other pharmaceutical protocols.

V. Request for Injunction Requiring Immediate Production of All Documents

17. As described in more detail above, petitioners have requested certain governmental records and documents, all of which should have been released pursuant to the Right to Know Law without the initiation of this action.

18. The Supreme Court has recognized that when “a public entity seeks to avoid disclosure of material under the Right to Know Law, that entity bears a heavy burden to shift the balance toward non-disclosure.” *Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7, 11-12 (2011).
19. DHHS has not and is not able to meet its heavy burden of showing that the public interest in disclosure of the 21 pages of pharmaceutical protocols is outweighed by a commercial privacy interest. See *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 551 (1997).
20. This Court, applying the *Union Leader* balancing test, already determined that the public interest of all of the pharmaceutical protocols at issue in *NHRTL v. DHHS*, outweighs any asserted commercial privacy interest. See Order of May 15, 2015, p. 28, in Docket 219-2014-CV-0386 (Mangones, J.)
21. “The judicial remedy of summary disclosure may be appropriate where a public agency has improperly withheld agency records. ... Imposition of heavy penalties for violating the Right-to-Know Law may be appropriate to ensure the broadest possible access to public records.” *Union Leader*, 142 N.H. at 551.
22. Petitioner requests a mandatory injunction requiring production of the 21 pages of documents at issue in this case.

VI. Request for Attorney’s Fees

23. DHHS knew, or should have known, that the records requested by Petitioners should have been disclosed pursuant to New Hampshire’s Right to Know Law.
24. DHHS was informed by the Court on May 15, 2015 that other pharmaceutical protocols reviewed by DHHS must be produced.

25. There is no intelligible basis for why some but not all protocols approved by DHHS pursuant to RSA 318:42(VII) must be produced.
26. DHHS has not and cannot assert any basis for the withholding of the 21 pages of pharmaceutical protocols.
27. DHHS knew or should have known that it was required to provide an intelligible basis for any exemptions it asserted.
28. Accordingly, NHRTL is statutorily entitled, pursuant to RSA 91-A:8, to recover its costs and reasonable attorney's fees incurred in bringing this lawsuit.

WHEREFORE, Petitioners respectfully requests that this Court:

- A. Order that HHS produce all responsive documents;
- B. Rule and find that Petitioner is entitled to its reasonable costs and attorney's fees;
and
- C. Grant such further relief as is reasonable and just.

VERIFICATION

I, Jane Cormier, President of New Hampshire Right to Life, hereby affirm that the above facts are true to the best of my knowledge and belief.

Jane Cormier

Jane Cormier

STATE OF NEW HAMPSHIRE

COUNTY OF Hillsborough

Subscribed and sworn to before me this 31st day of July, 2015.

Pauline A. Desfosse

Notary Public

My Commission Expires:

**PAULINE A. DESFOSSES, Notary Public
My Commission Expires April 23, 2019**

Respectfully submitted,
New Hampshire Right to Life
By their Attorneys,
Wadleigh, Starr & Peters, P.L.L.C.

Date:

7-31-15

By:

M J T

Michael J. Tierney - NHBA# 17173
95 Market Street
Manchester, NH 03101
(603) 669-4140
mtierney@wadleighlaw.com

EXHIBIT A

Michael Tierney

From: Michael Tierney
Sent: Tuesday, June 30, 2015 11:35 AM
To: 'Yaple, Megan A'
Cc: Cusack, Lynmarie C
Subject: RE: Request Pursuant to RSA 91-A

The request is directed to DHHS, BOP and the AG's office.

The request is for ALL written prescription drug protocols "in clinics operated by or under contract with" DHHS, not just "clinics of nonprofit family planning agencies under contract with" DHHS.

I am told that DHHS has only approved about a dozen or so protocols, so we are not talking that many protocols.

Michael

Michael J. Tierney, Esq.
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101
603-669-4140
603-206-7239 (Direct)
603-669-6018 (Fax)

From: Yaple, Megan A [mailto:Megan.Yaple@doj.nh.gov]
Sent: Tuesday, June 30, 2015 11:22 AM
To: Michael Tierney
Cc: Cusack, Lynmarie C
Subject: RE: Request Pursuant to RSA 91-A

Hi Michael,

Are you making this request to DHHS?

Also, could you please clarify your request?

RSA 318:42, VII states:

VII. The dispensing of noncontrolled prescription drugs by registered nurses in clinics operated by or under contract with the department of health and human services, or by such nurses in clinics of nonprofit family planning agencies under contract with the department of health and human services, provided that:

(a) The drugs are dispensed under a written protocol established by a licensed physician or by an advanced practice registered nurse, and approved by the department of health and human services which provides for responsible supervision over the activities in question and mentions the name of each registered nurse for whom the physician or advanced practice registered nurse is assuming supervisory responsibility. A written copy of the protocol showing the date it was approved by the department of health and human services shall be kept at the clinic at all times and shall be made available during any inspection conducted under RSA 318:8.

Are you requesting ALL written prescription drug protocols "in clinics operated by or under contract with" DHHS, or just "clinics of nonprofit family planning agencies under contract with" DHHS?

Please let me know and then I can respond accordingly.

Thanks,

Megan A. Yaple
Attorney
Civil Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301
(603)271-0447
megan.yaple@doj.nh.gov

Statement of Confidentiality

The Information contained in this electronic message and any attachments to this message may contain confidential or privileged information and are intended for the exclusive use of the intended recipient(s). Please notify the Attorney General's Office immediately at (603) 271-3658 or reply to justice@doj.nh.gov if you are not the intended recipient and destroy all copies of this electronic message and any attachments.

From: Michael Tierney [<mailto:mtierney@wadleighlaw.com>]
Sent: Tuesday, June 30, 2015 11:07 AM
To: Yaple, Megan A
Cc: Cusack, Lynmarie C
Subject: RE: Request Pursuant to RSA 91-A

Megan:

Please accept this email as a right to know request pursuant to RSA 91-A.

Would you please provide us with all of the protocols approved by HHS pursuant to RSA 318:42(VII)?

If the documents are not immediately available, we would appreciate a response to the request within 5 days pursuant to RSA 91-A:4(IV).

If you believe it is necessary to make the request directly to Commissioner Toumpas for HHS, please let me know.

Thanks,

Michael

Michael J. Tierney, Esq.
Wadleigh, Starr & Peters, PLLC
95 Market Street

EXHIBIT B

Michael Tierney

From: Yaple, Megan A <Megan.Yaple@doj.nh.gov>
Sent: Monday, July 13, 2015 1:03 PM
To: Michael Tierney
Cc: Cusack, Lynmarie C
Subject: RE: Request Pursuant to RSA 91-A

Michael,

I understand that you are requesting ALL protocols ever approved by DHHS. Although you have already received (through your previous Right to Know requests) some of these protocols, they will be provided to you again, as you have requested. You will be given "a full set."

I respectfully disagree with your belief that additional time is not necessary. While it is true that the Strafford County Superior Court determined that the public interest in disclosure of the protocols outweighed any commercial interest at stake, the Court made that finding on only the protocols it had in front of it for review - the PPNNE 2013 protocols, the 2013 Weeks Medical Center protocols, etc. The Court did not make some final determination that ALL protocols ever approved by DHHS must be disclosed without redactions - or that the disclosure of ALL protocols was even required. Although the Court's Order gives us guidance on certain issues, it has no precedential value.

It may very well be true that no redactions will be necessary or that none of the information in the protocols is exempt from disclosure. However, those determinations take additional time. We will send you the protocols as soon as possible.

Thank you,
Megan

Megan A. Yaple
Attorney
Civil Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301
603-271-1225
megan.yaple@doj.nh.gov

From: Michael Tierney [mailto:mtierney@wadleighlaw.com]
Sent: Wednesday, July 08, 2015 7:12 PM
To: Yaple, Megan A
Cc: Cusack, Lynmarie C
Subject: RE: Request Pursuant to RSA 91-A

Megan:

As I stated in my initial email and in 3 subsequent emails, NHRTL wants ALL of the protocols ever approved by HHS.

I do not understand why you are claiming to be confused about what the word "all" means.

All means every one, a complete or a full set.

You do not need additional time to determine if redactions can be made. The Strafford Superior Court has already determined that public interest in disclosure of the protocols outweighs any commercial interest at stake. I attach for your reference the Court's May 15, 2015 Order and direct your attention to the Court's discussion of public interest on pages 25-26.

Please send us all of the protocols as we have requested.

Michael

Michael J. Tierney, Esq.
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101
603-669-4140
603-206-7239 (Direct)
603-669-6018 (Fax)

From: Yapple, Megan A [<mailto:Megan.Yapple@doj.nh.gov>]
Sent: Wednesday, July 08, 2015 5:18 PM
To: Michael Tierney
Cc: Cusack, Lynmarie C
Subject: RE: Request Pursuant to RSA 91-A

Hi Michael,

Although DHHS has compiled the documents you have requested, it will need additional time beyond the end of the week (July 10, 2015) to determine if any of those documents require redactions for exemptions under RSA 91-A. I respectfully request an additional week to allow DHHS to make those determinations, thus, we would have the documents to you by Friday, July 17, 2015.

Additionally, please let me know if you are again seeking the same documents that have already been provided to you by the AG's Office.

Megan

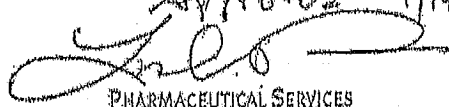
Megan A. Yapple
Attorney
Civil Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301
(603)271-1225
megan.yapple@doj.nh.gov

EXHIBIT C

CONFIDENTIAL

 Planned Parenthood®
of Northern New England

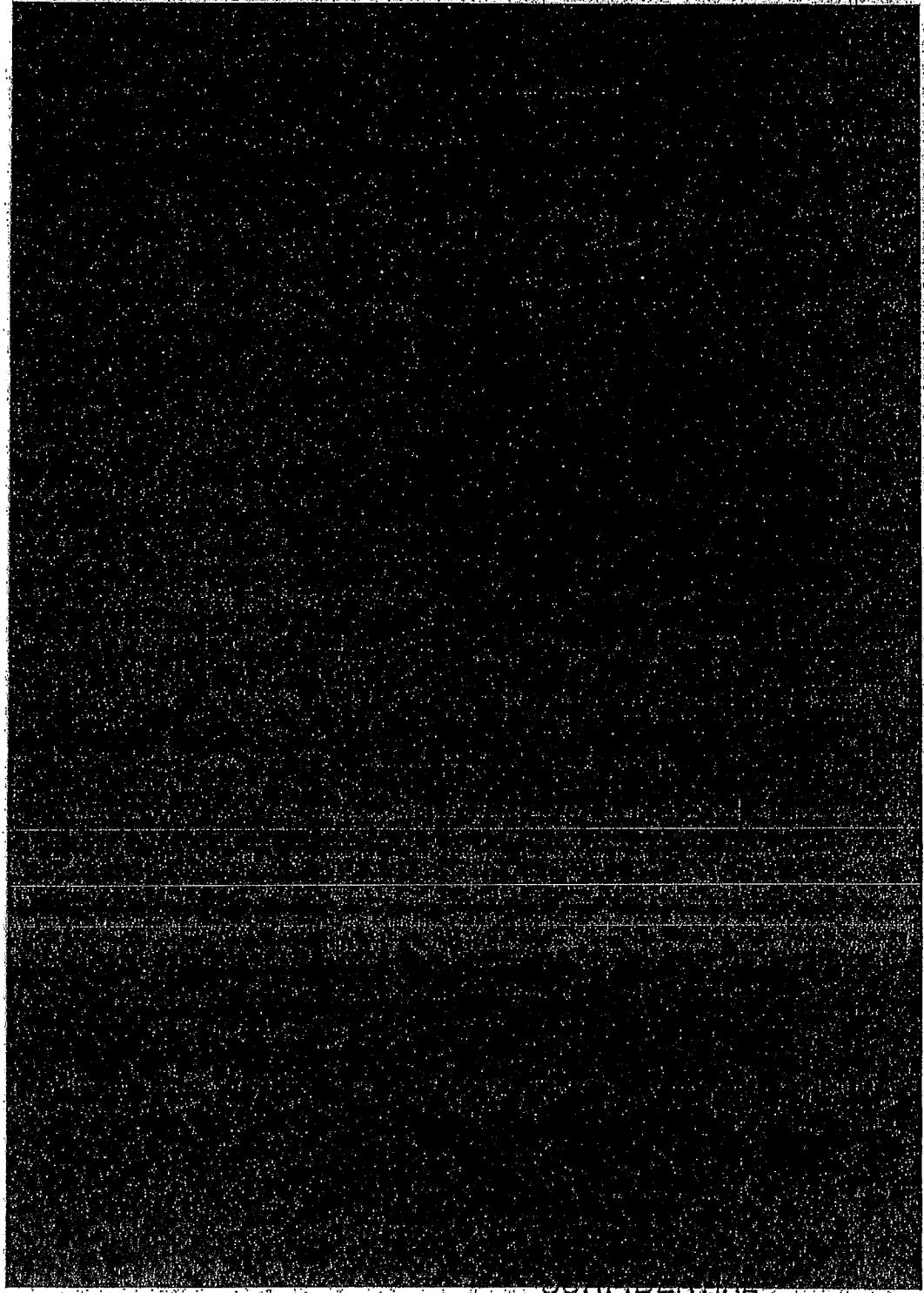
PHARMACEUTICAL SERVICES

Approved 9/14/2012


PHARMACEUTICAL SERVICES
1-A-2 REVISED DECEMBER 2011

Pharm. Serv. Spec.

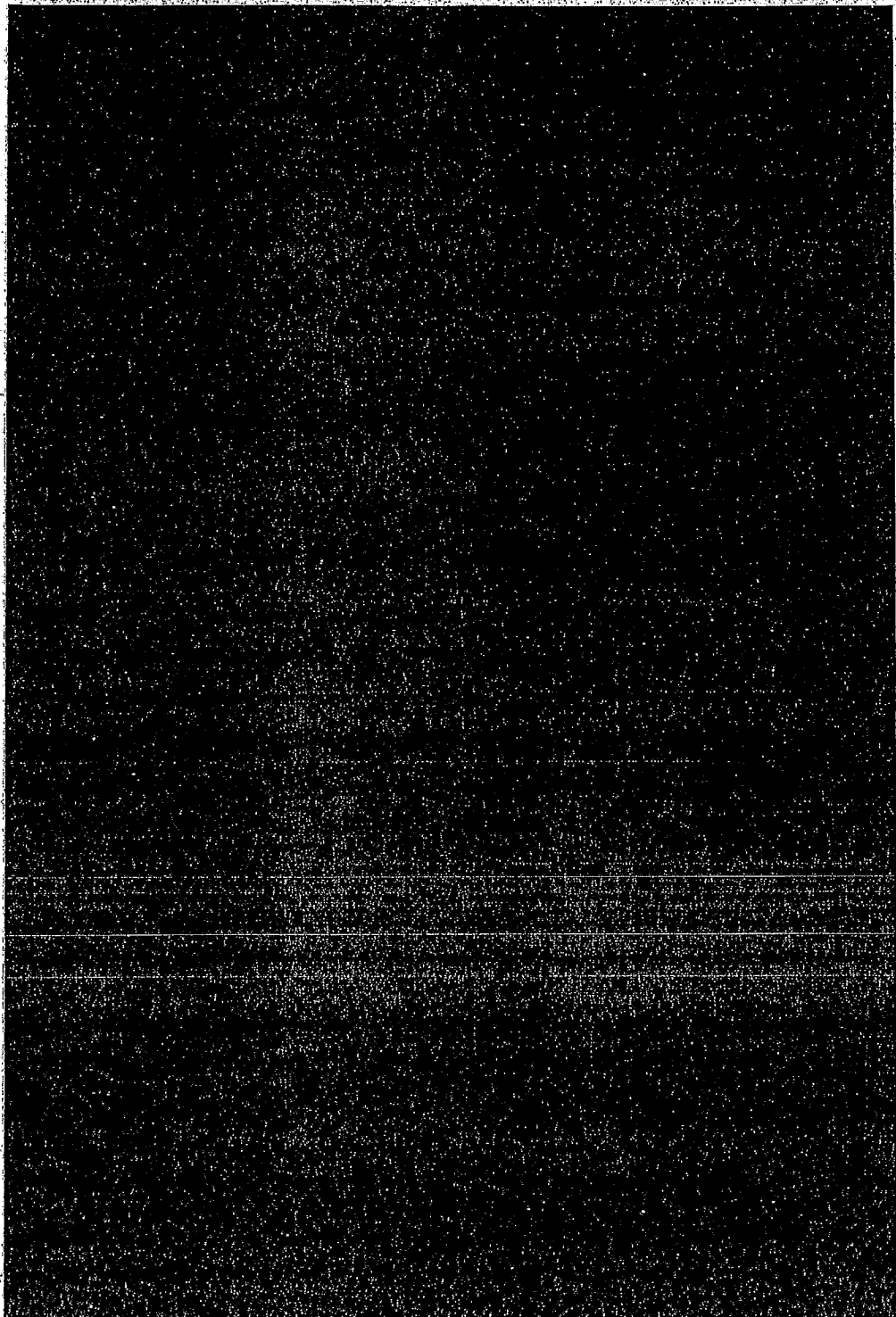
Burton



PHARMACEUTICAL SERVICES
1-A-2 REVISED DECEMBER 2011

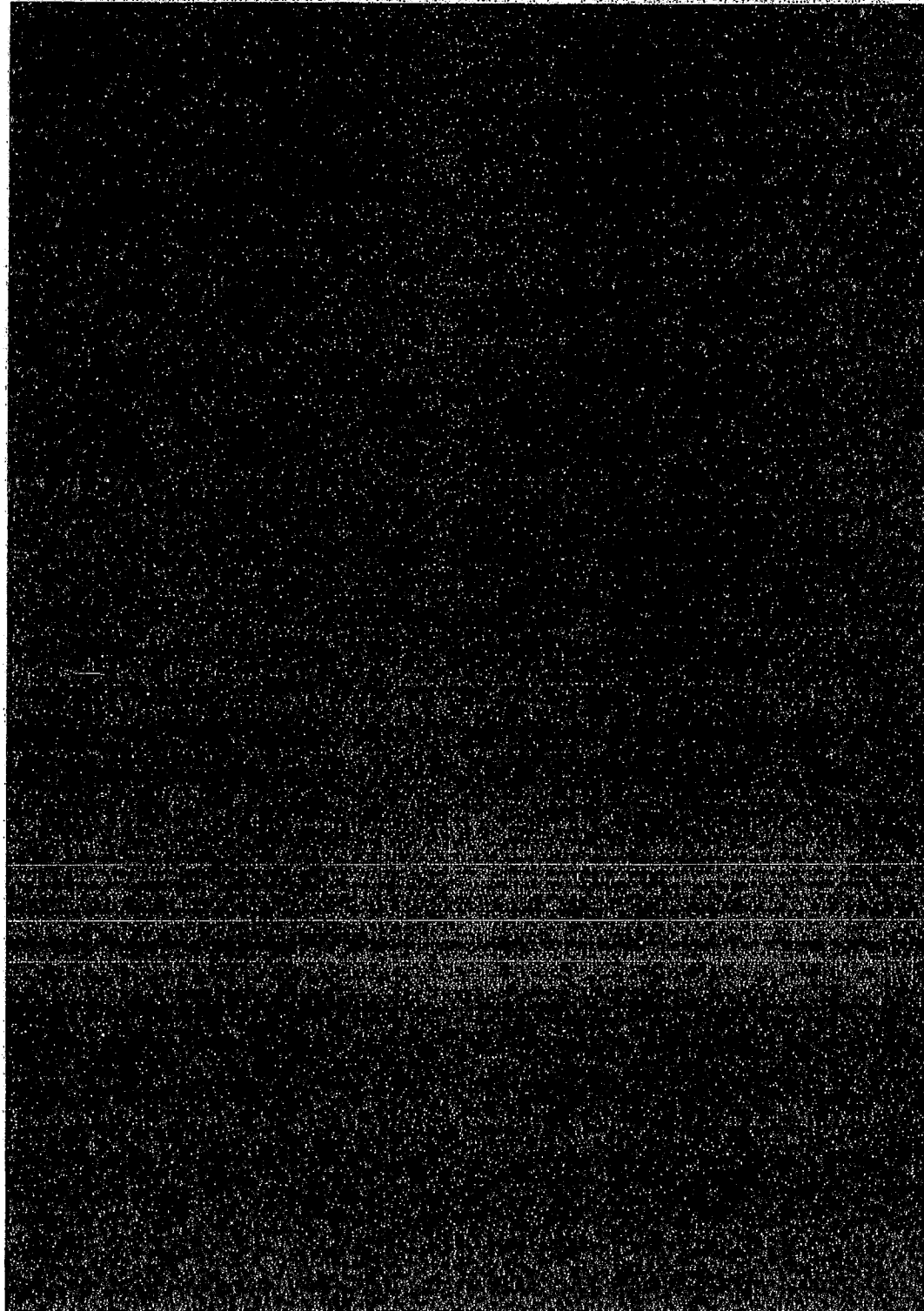
 Planned Parenthood*
of Northern New England

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9/17/12



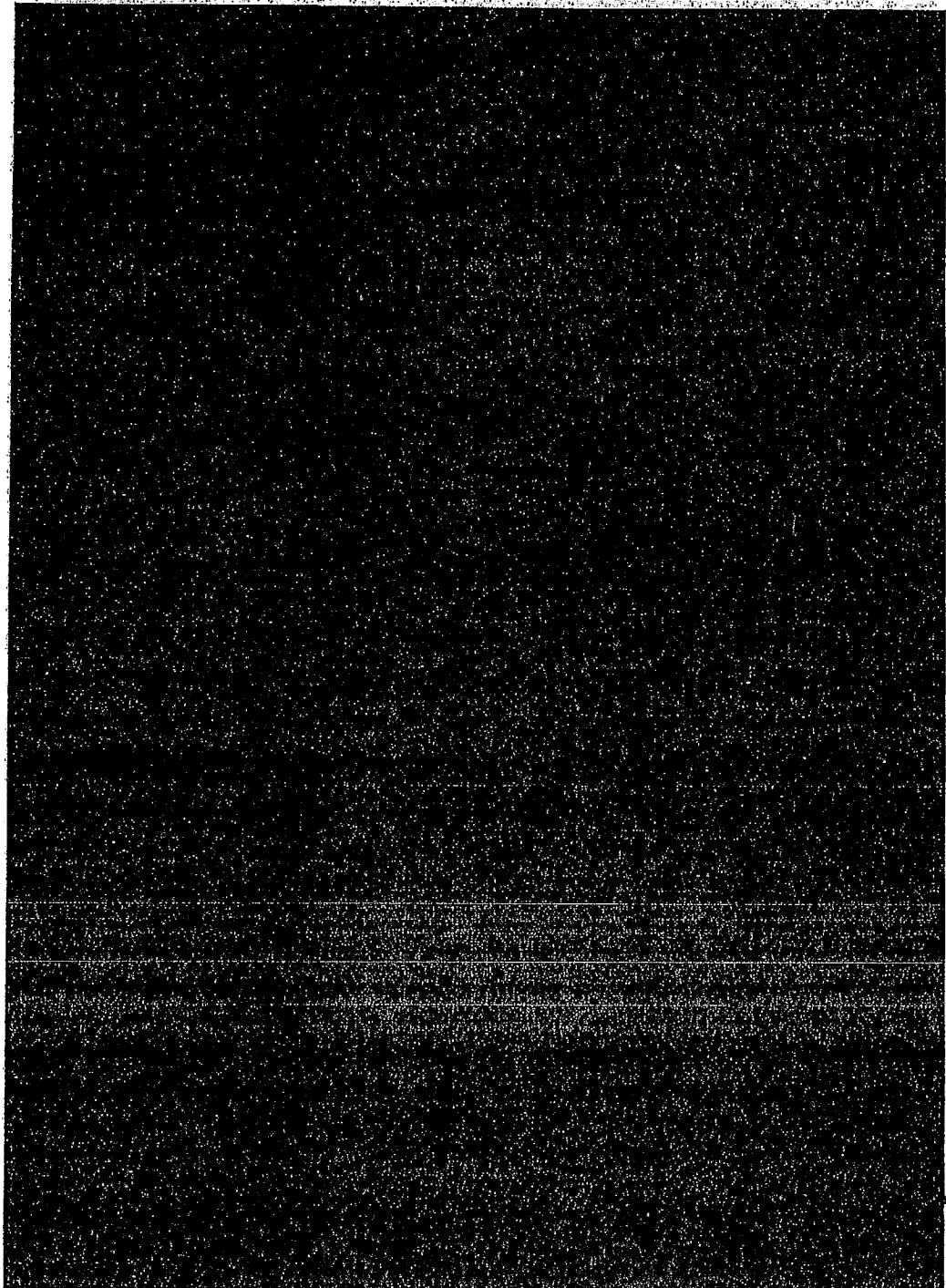
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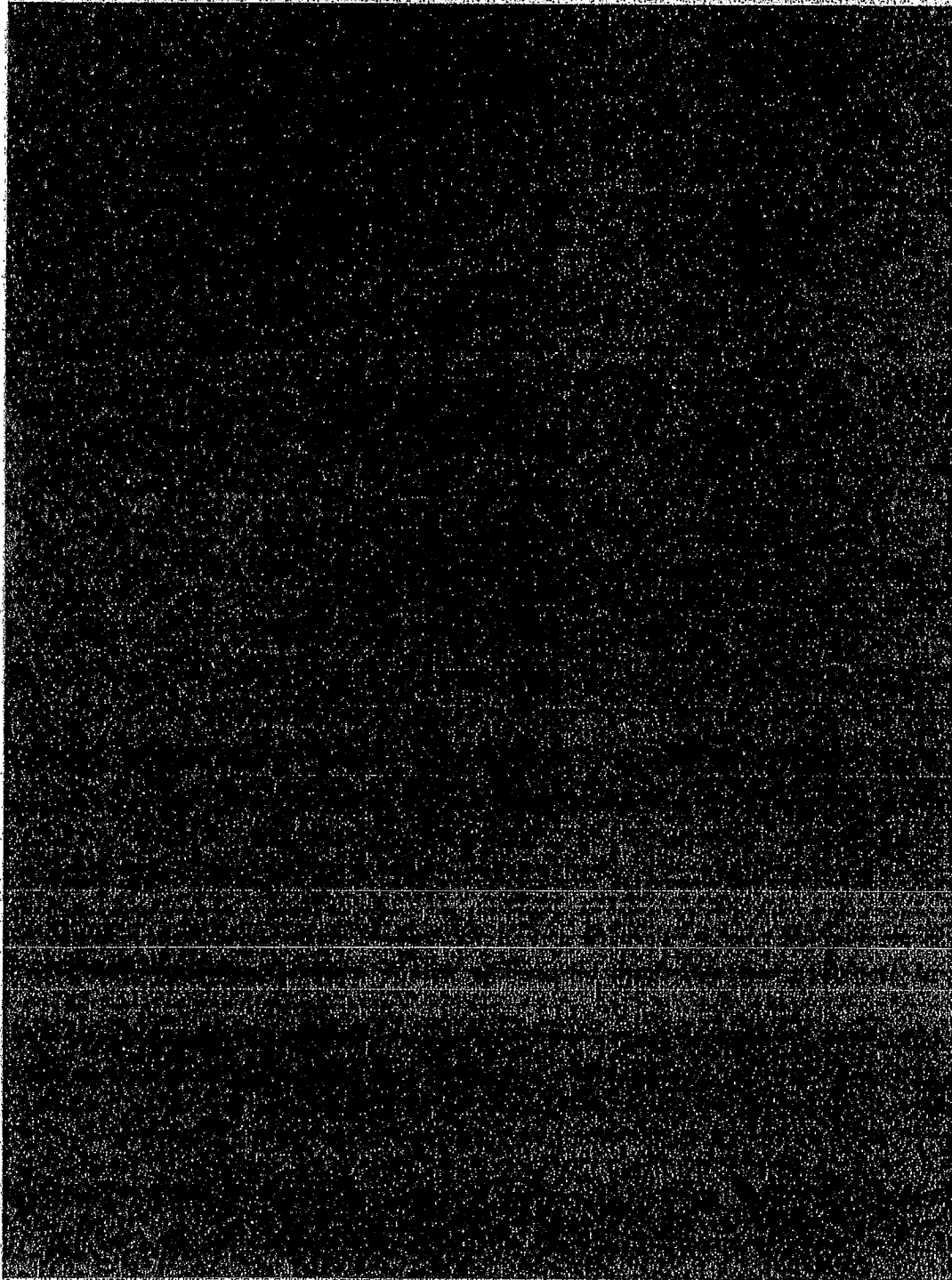
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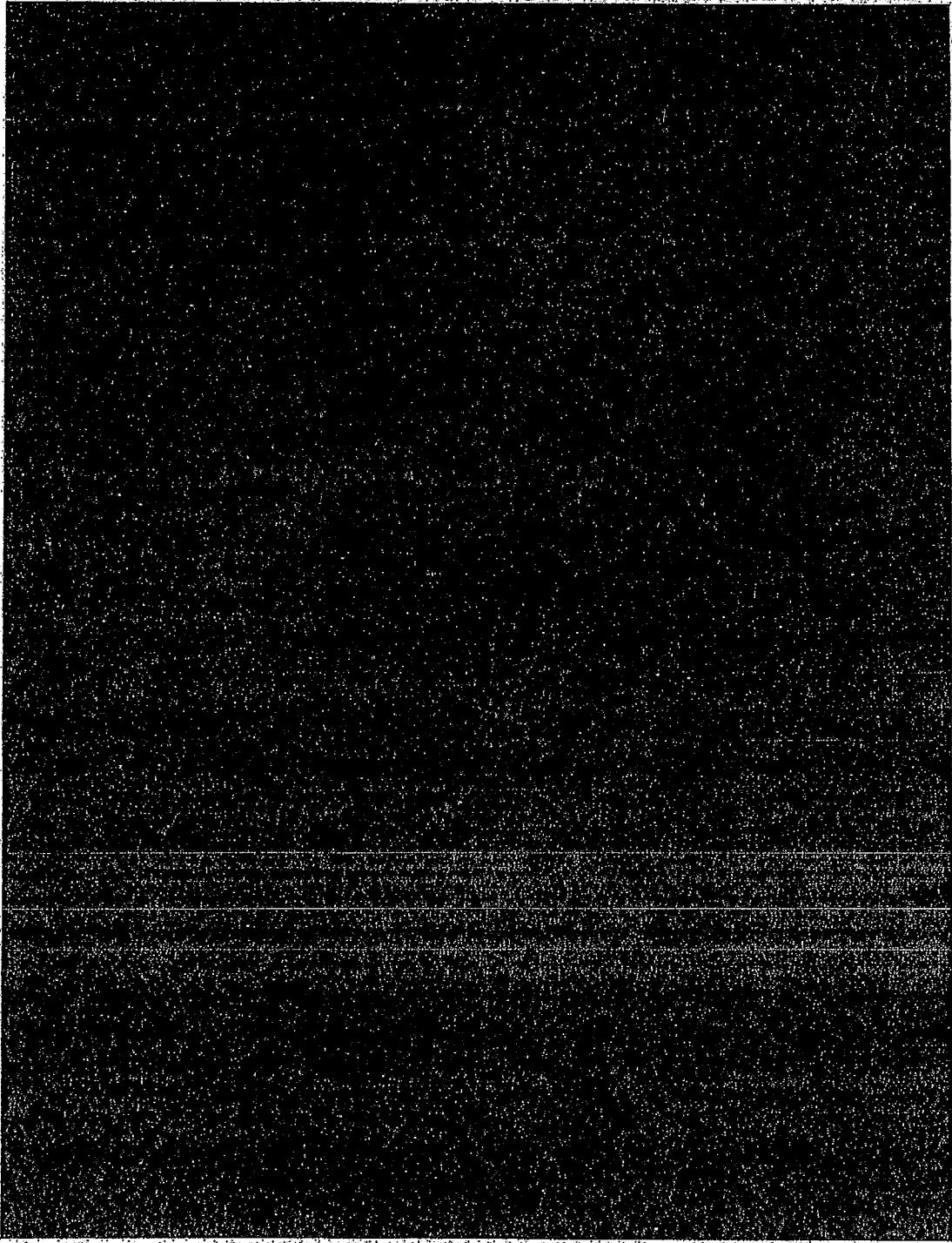


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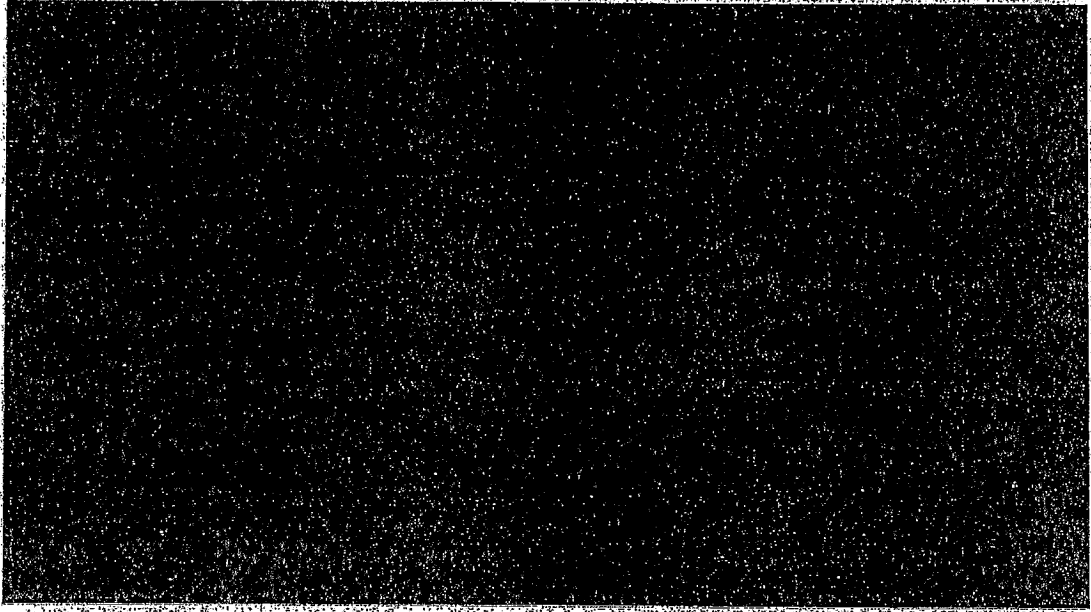
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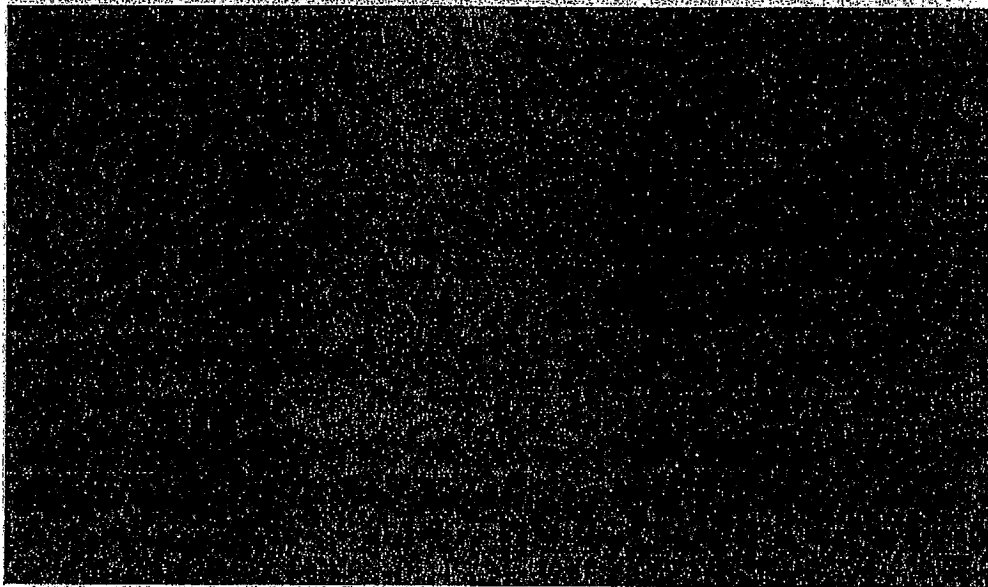


Goodwin Community Health

Consulting Pharmacy Agreement

This agreement is intended to provide for compliance with Chapter 158 of the laws of the State of New Hampshire (RSA, 318) relative to the possession and dispensing of prescriptive drugs by Goodwin Community Health (GCH) and the consulting pharmacist in the implementation of provisions as stipulated by the law.

GCH and the consulting pharmacist hereby agree to the following responsibilities:



4. This agreement shall remain in effect until termination by either party after the provision of at least 60 days advance written notice is provided.

Signatures:

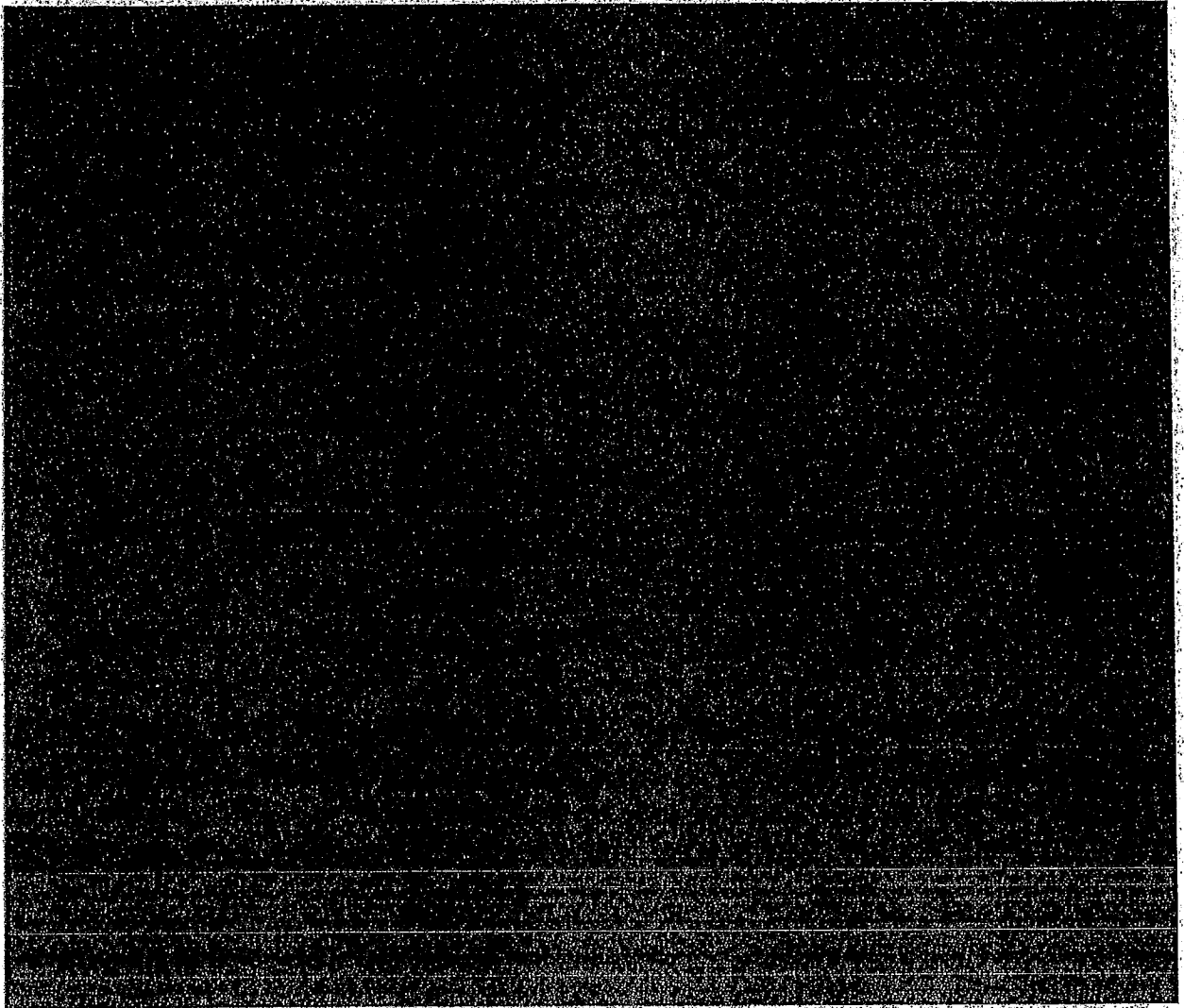
Goodwin Community Health
Executive Director

Consulting Pharmacist

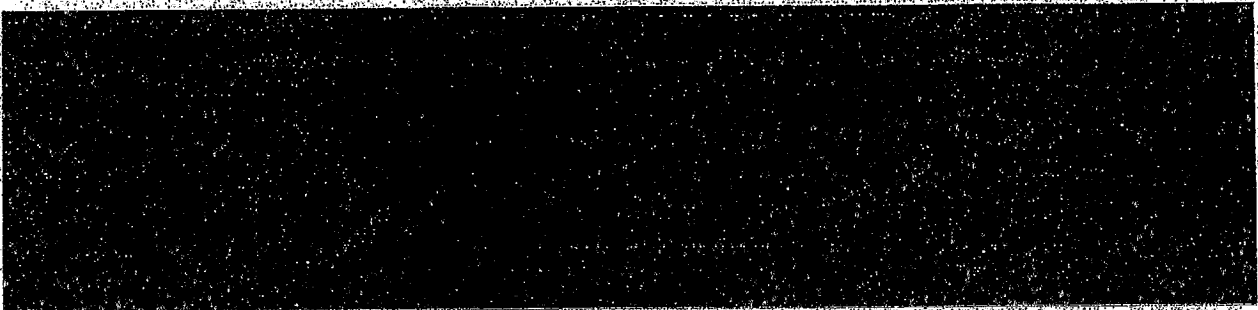
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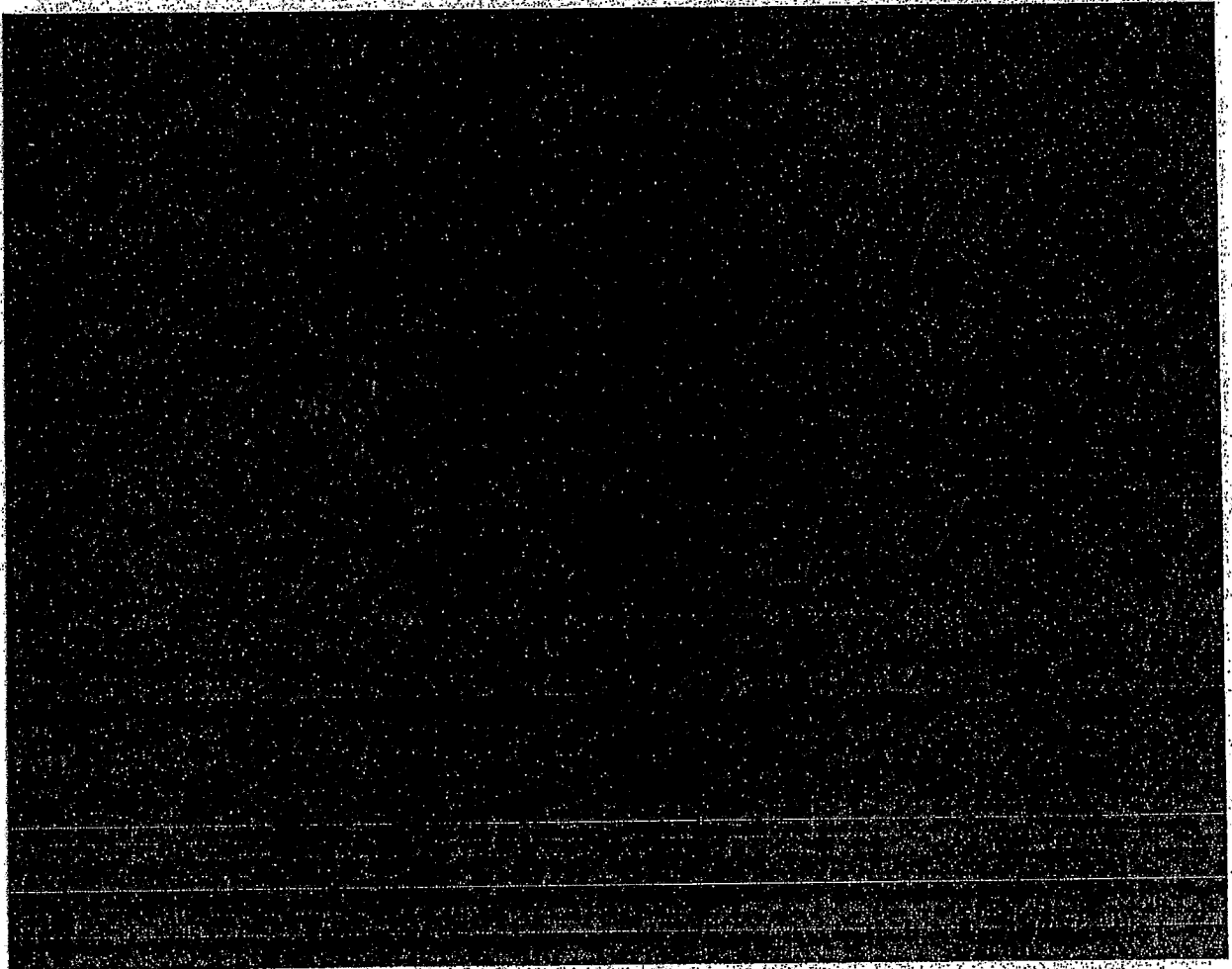
311 Route 108 • Somersworth, NH 03878
(603) 749-2948 • Fax (603) 953-0066
www.GoodwinCH.org Federal Tax ID# 02-0904203



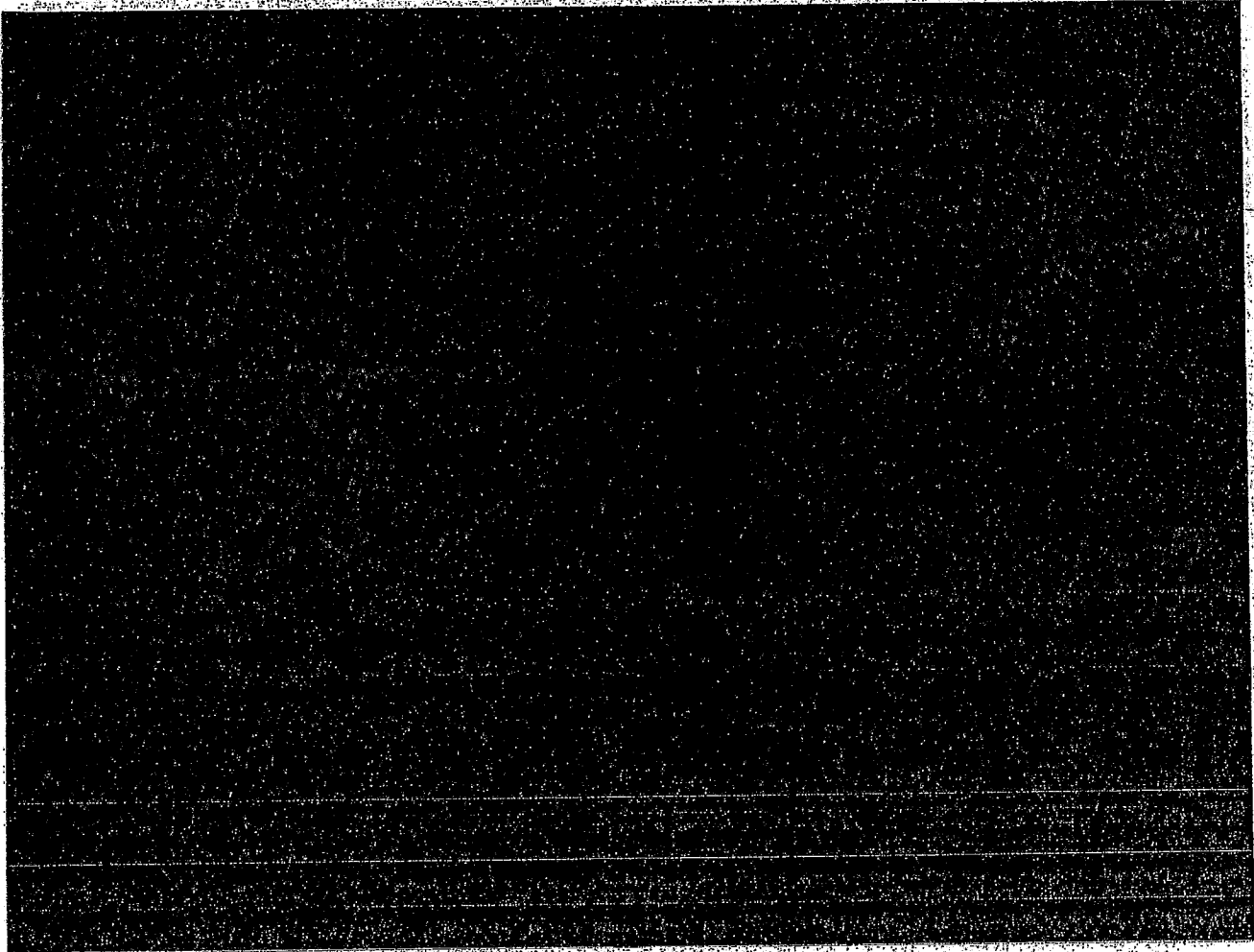
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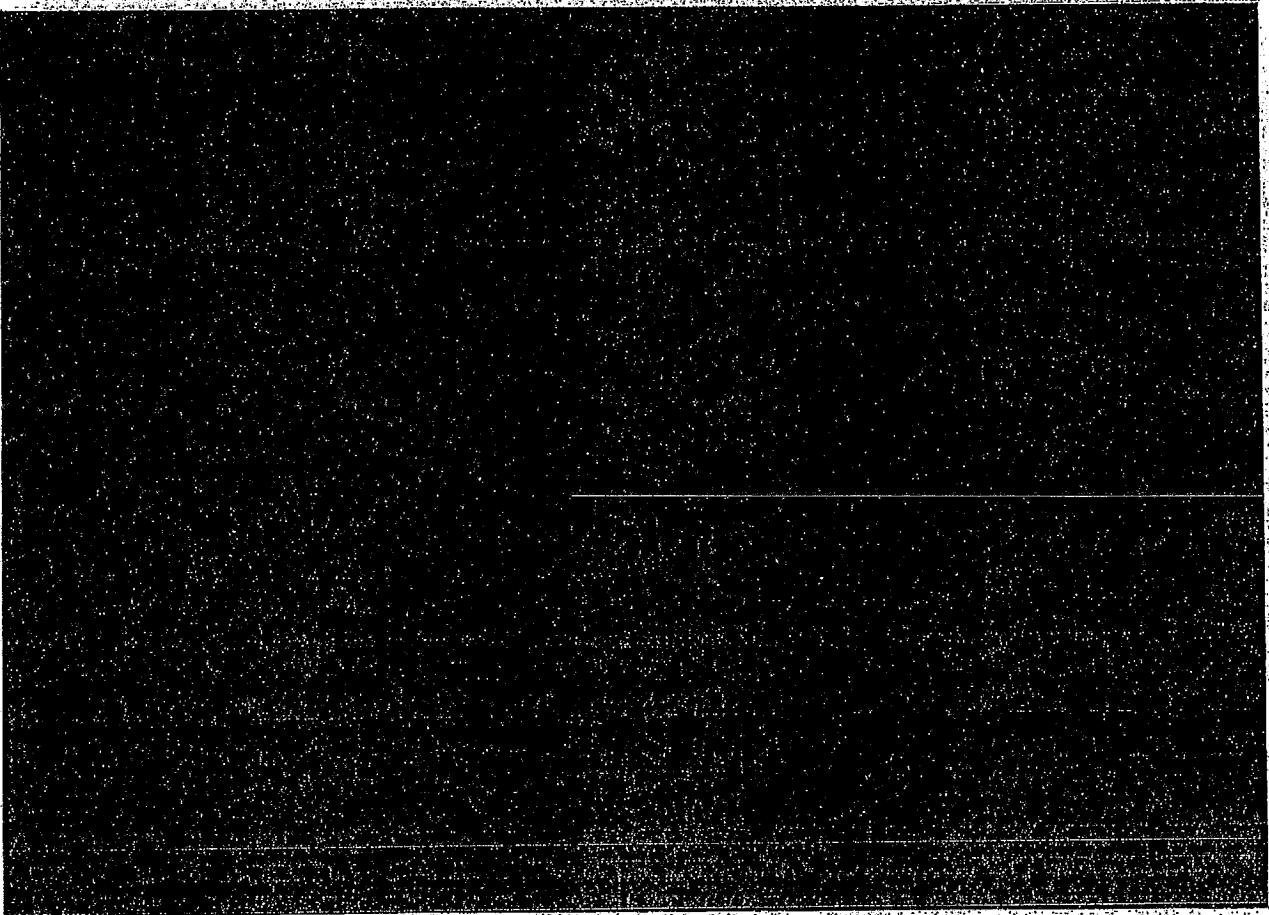
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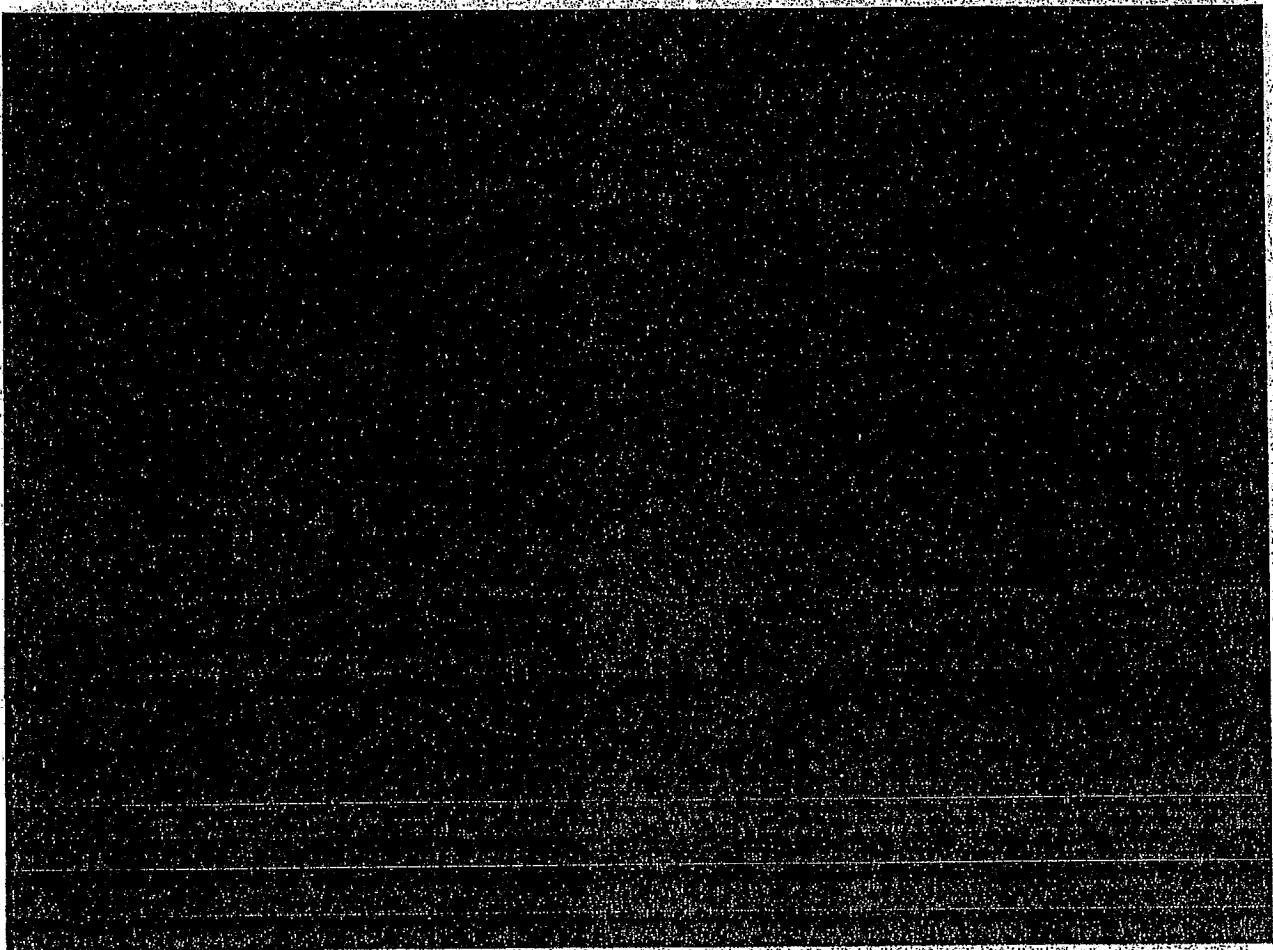
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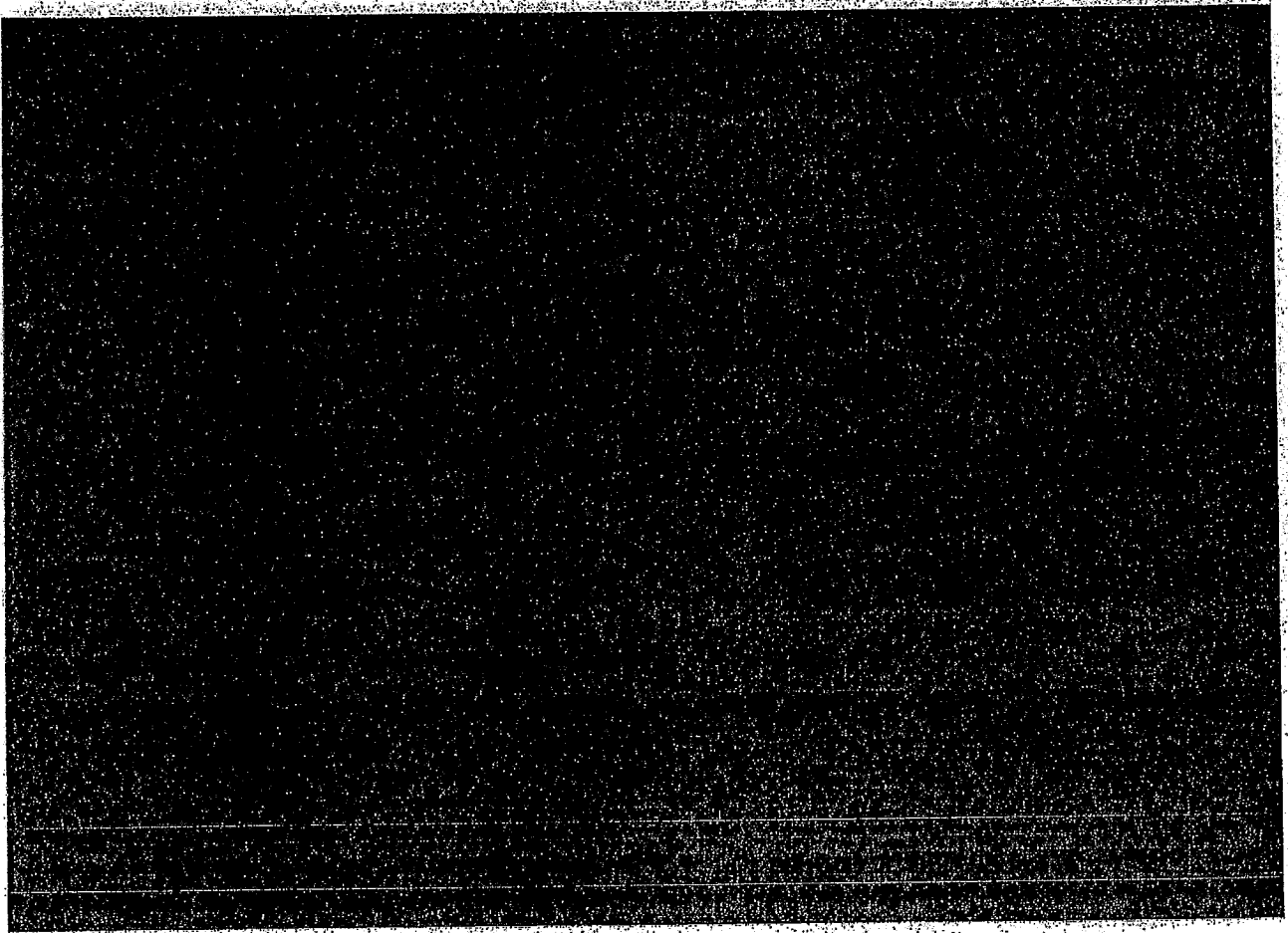
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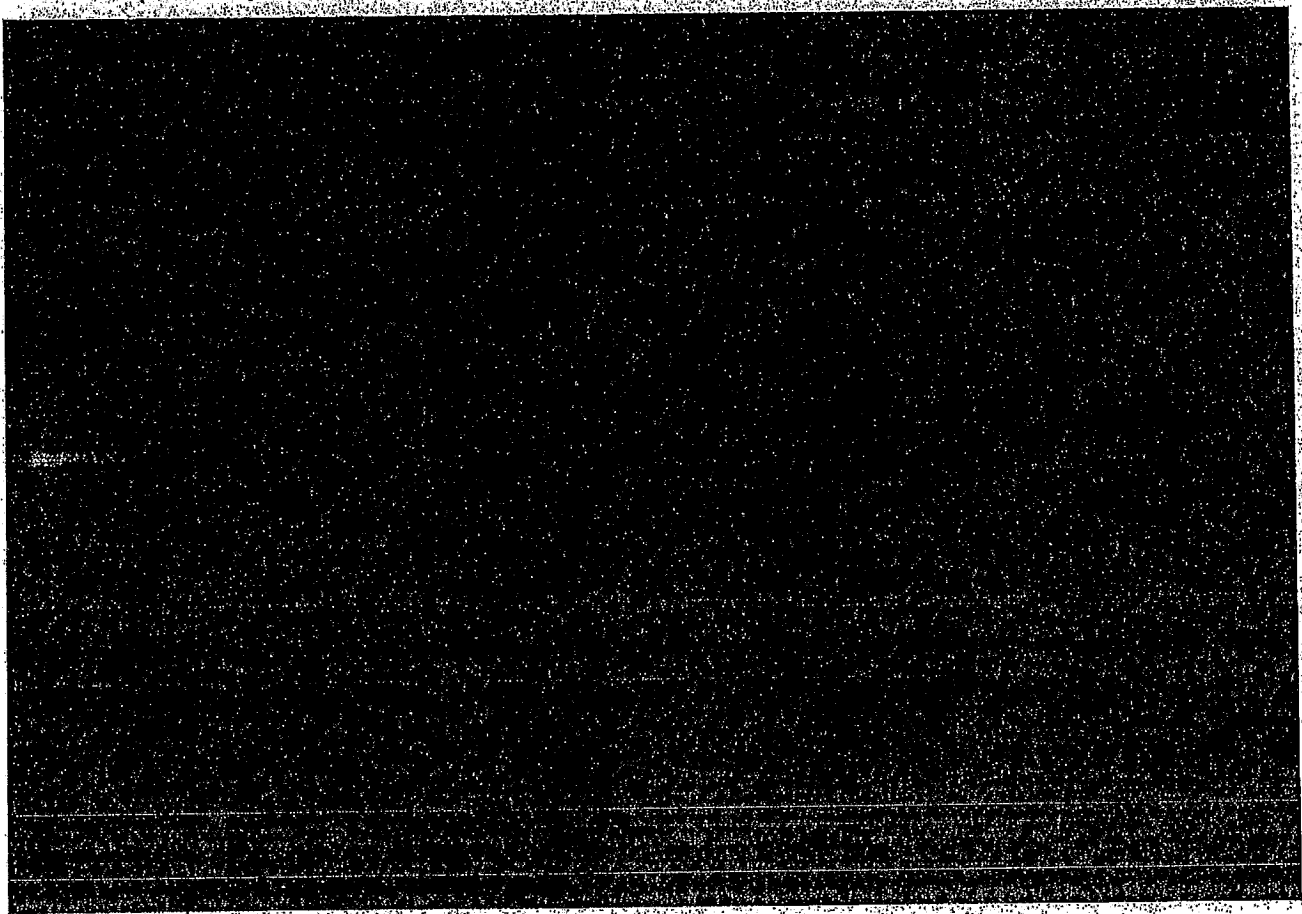
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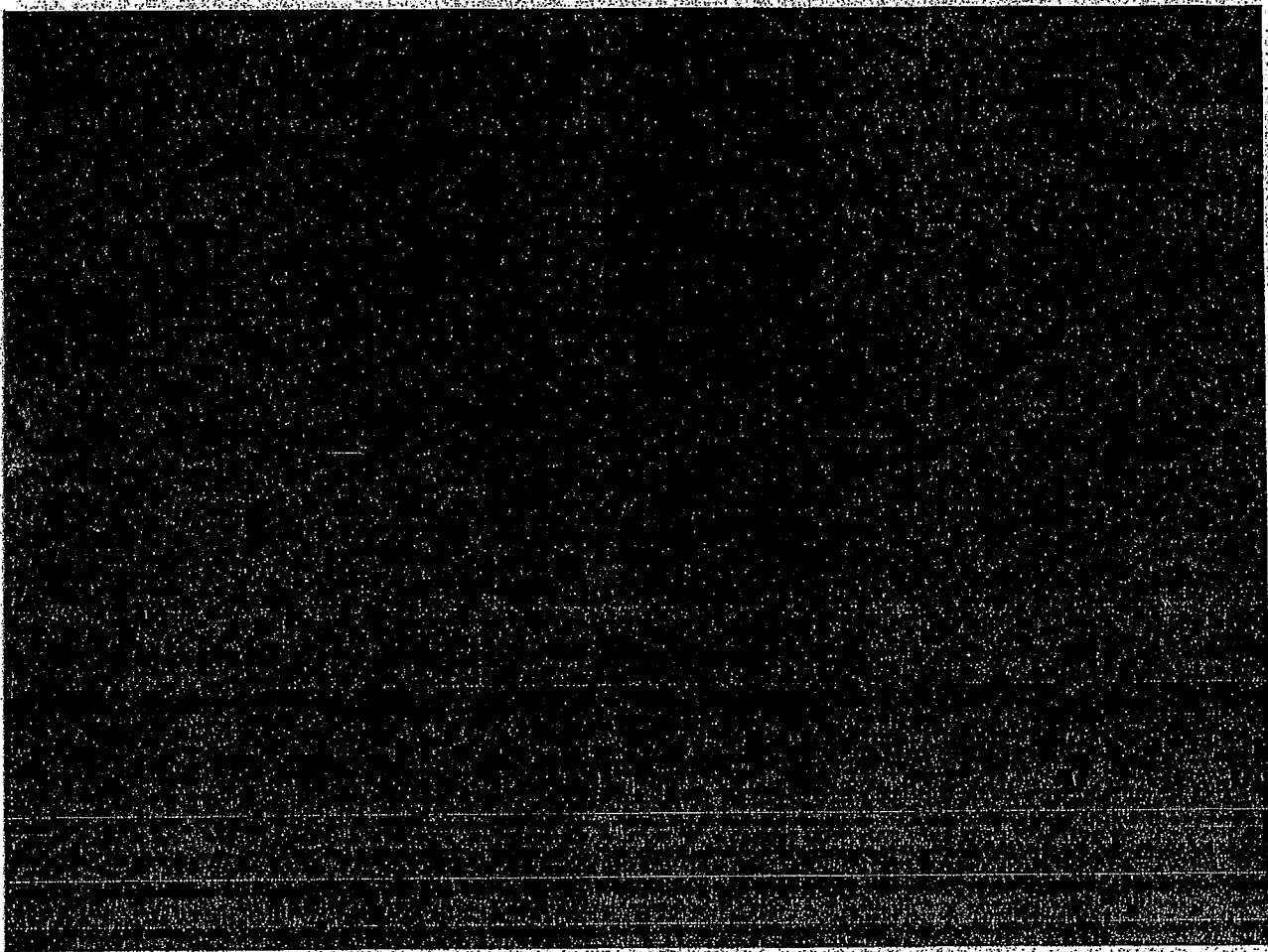
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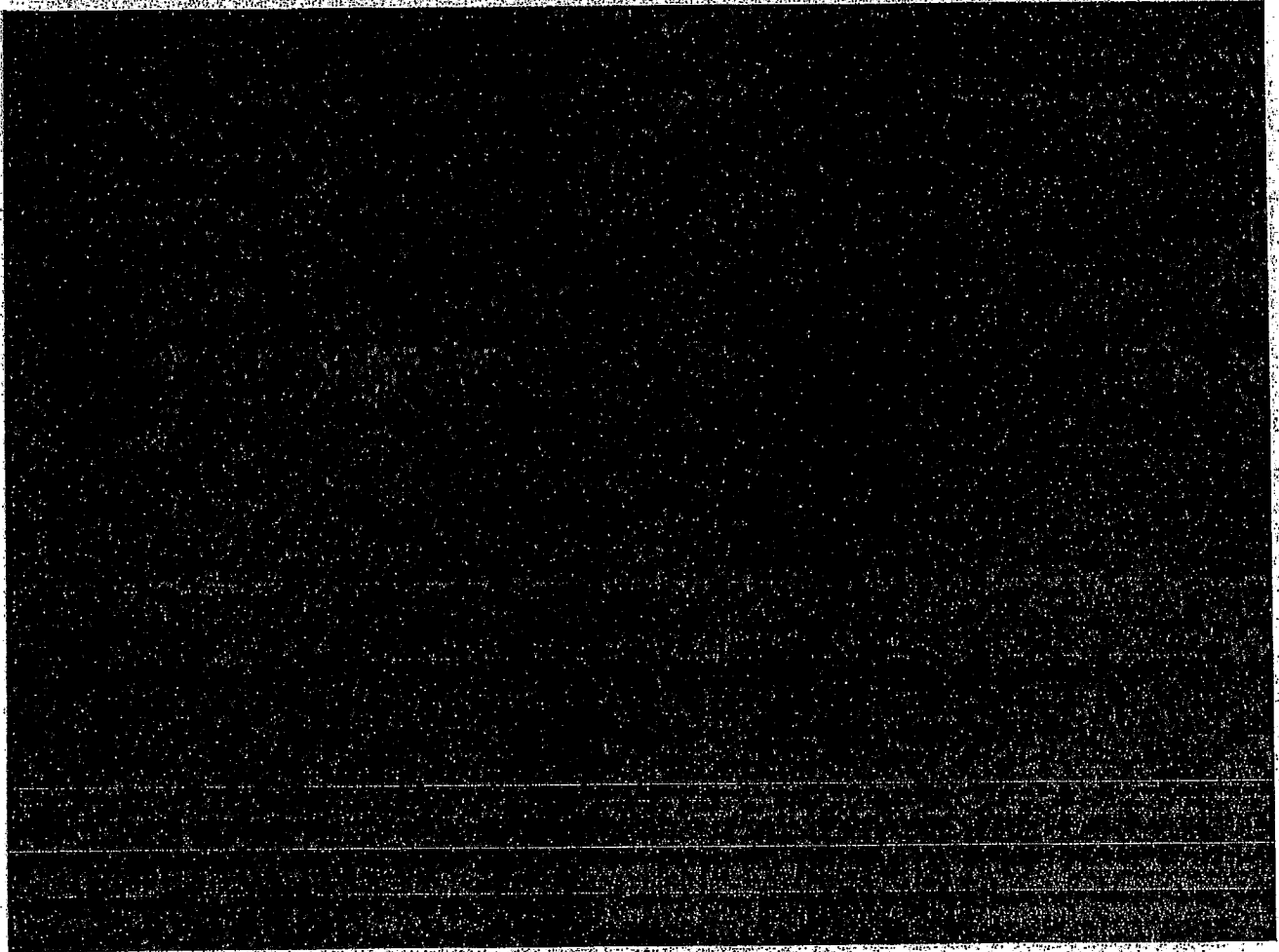
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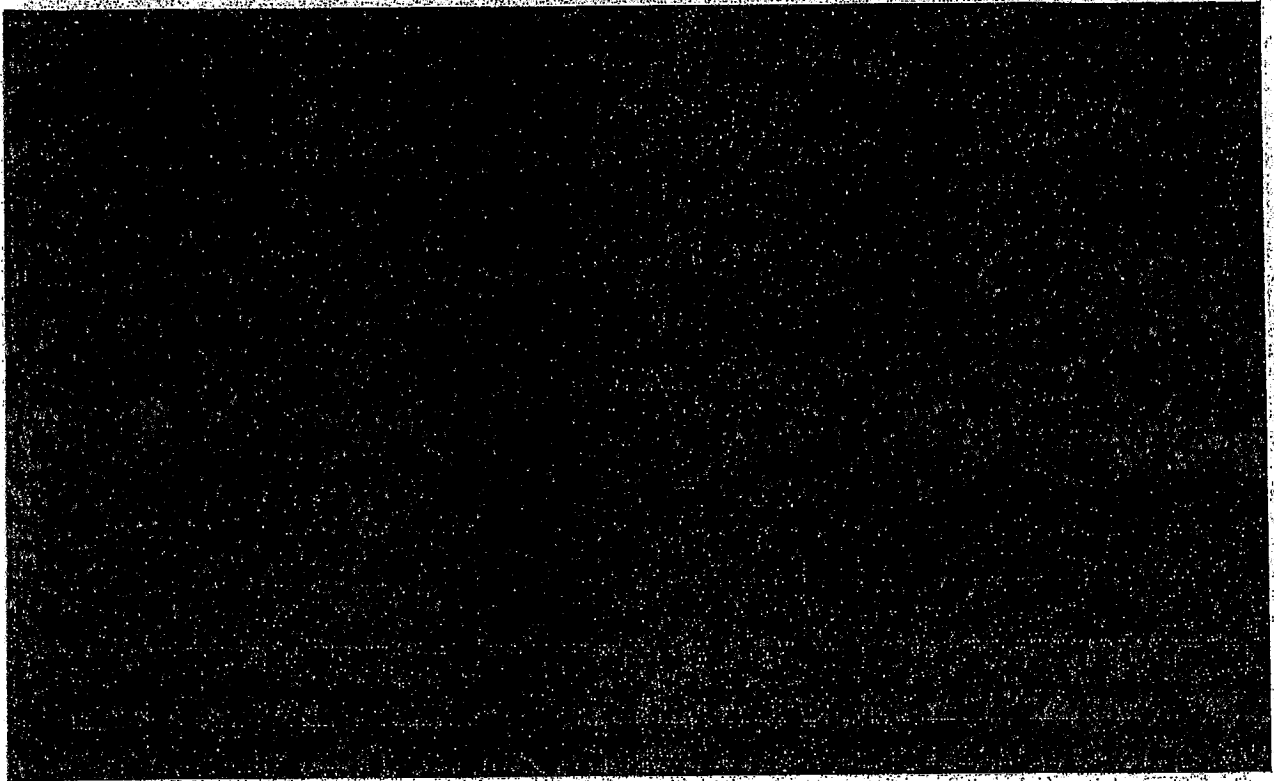
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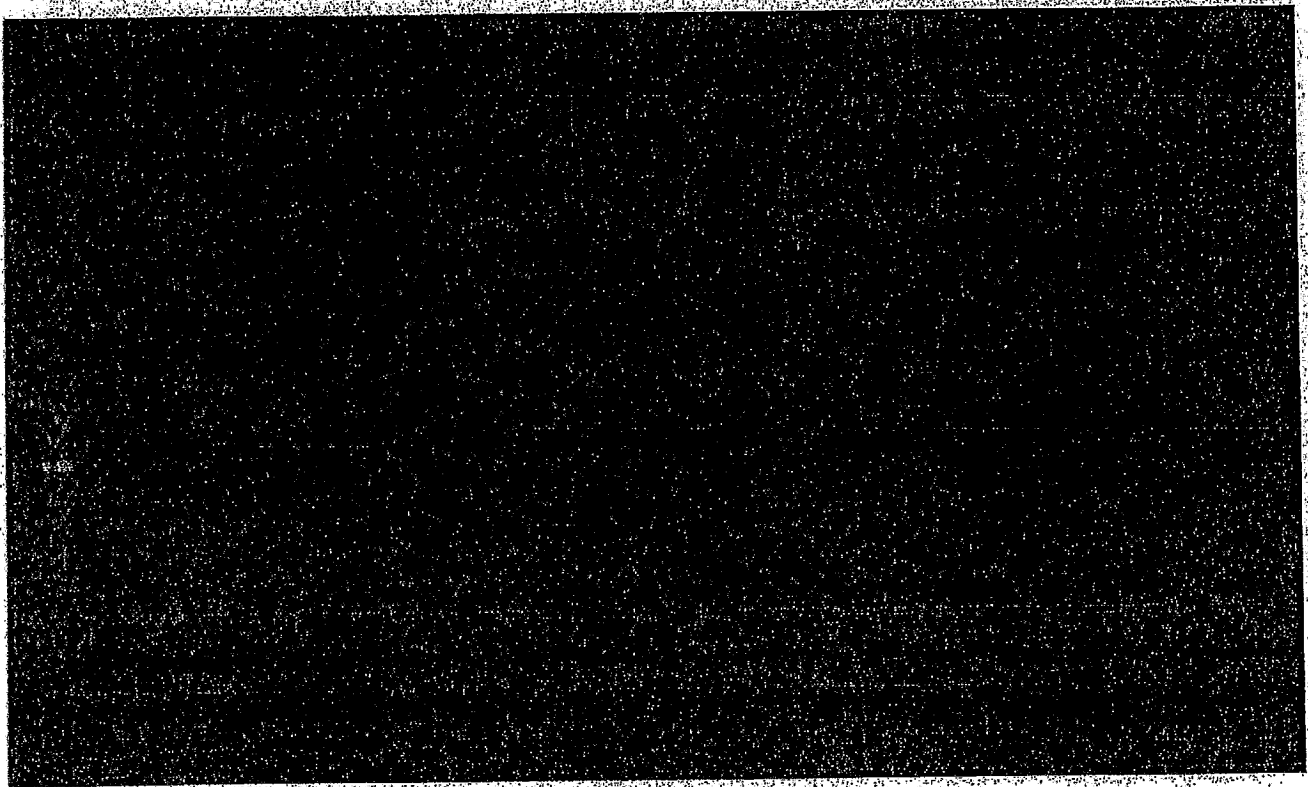
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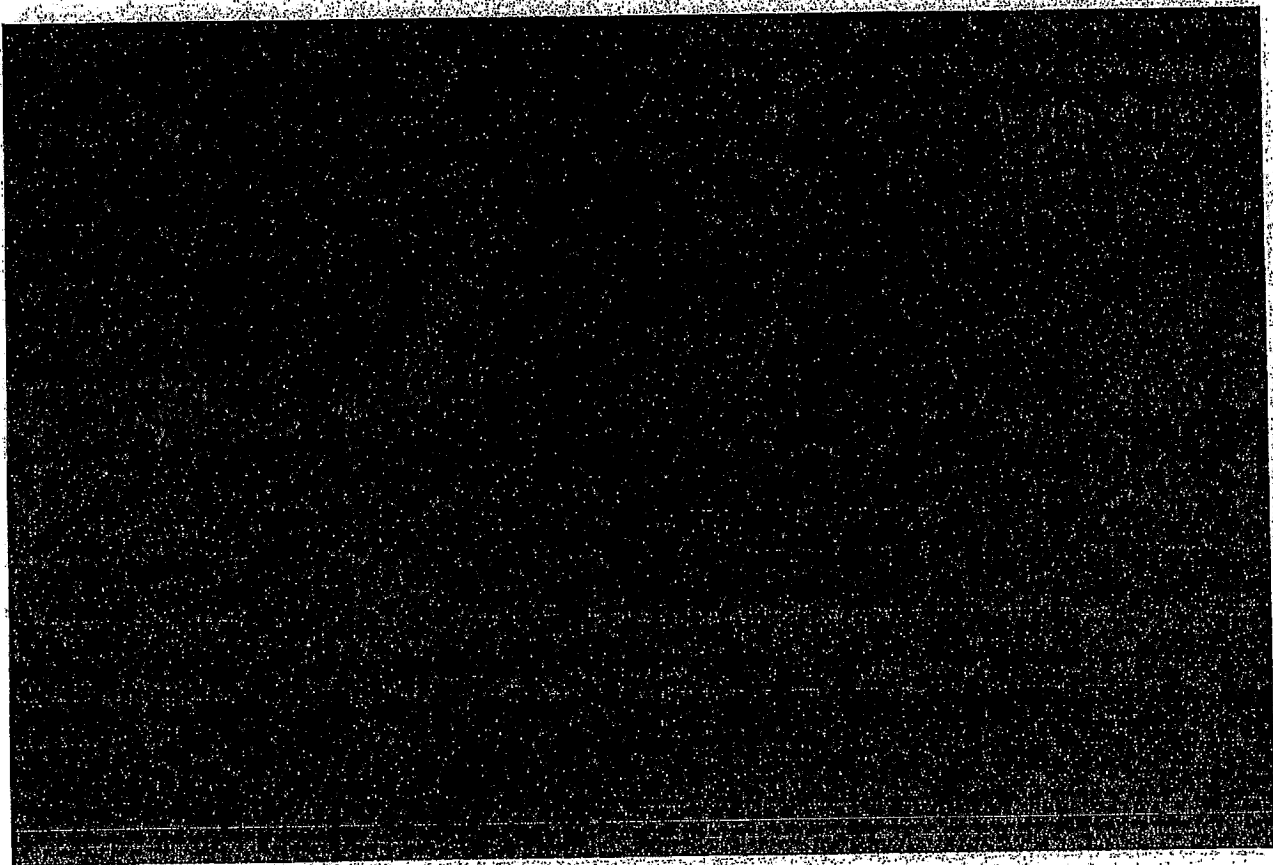


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