No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioner Microsoft Corporation ("petitioner" or "Microsoft").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioner and respondents have consented to the filing of this *amicus* brief and that *amicus curiae* timely notified counsel of record of its intent to file this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

Since 1983, PLAC has filed more than 1,050 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product manufacturers.

PLAC's members have an interest in this case because the decision below endorses a rule that favors plaintiffs in dubious class actions that fail at class certification by allowing them to voluntarily dismiss their claims and obtain an immediate appellate ruling on class certification – *even after* the Court of Appeals refuses to hear the appeal on a Rule 23(f) petition. The effect of the ruling is to hand plaintiffs a second bite at the apple (with no corresponding opportunity for defendants to seek review notwithstanding denial of a Rule 23(f) petition). That approach to appellate jurisdiction is fundamentally at odds with this Court's prior precedent strictly limiting interlocutory review of class-certification orders. Moreover, the decision below will make the defense of putative class actions more expensive for PLAC's members given the additional layer of appeals that will be mounted by plaintiffs disappointed by an unfavorable class-certification ruling. The Court should grant review and reverse to resolve a percolating circuit split over this important issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a prime opportunity for the Court to resolve a significant question that has divided the federal courts of appeals: whether plaintiffs can manufacture appellate jurisdiction over an adverse class-certification ruling by voluntarily dismissing their claims instead of litigating them on an individual basis to final judgment. The answer to this question is clearly no in light of prior precedent from this Court eliminating the so-called "death knell" doctrine as a basis for appealing an interlocutory class-certification ruling. While most federal appellate courts to confront this issue have recognized as much, the court below and the Second Circuit have failed to do so, leaving a significant divide among the circuits.

In this case, plaintiffs are Xbox 360 console owners alleging a design defect in the product that scratches game discs. However, only a tiny fraction of the putative class experienced the alleged defect at issue. The district court struck the class allegations, relying heavily on a prior ruling from a different judge denying class certification in a virtually indistinguishable case involving a different set of plaintiffs. According to the district court, the class allegations were due to be stricken because individual issues of causation and damages precluded class treatment. Plaintiffs subsequently sought permission to appeal the class-certification ruling under Rule 23(f), arguing that "the district court's order effectively kill[ed] this case." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 18. The Ninth Circuit denied the petition and remanded the case to the district court. Pet. App. 10a. Rather than press

their individual claims, plaintiffs voluntarily dismissed them for the express purpose of appealing the district court's unfavorable class-certification ruling. The Ninth Circuit took the appeal and reversed.

The Ninth Circuit's assumption of jurisdiction over plaintiffs' appeal ignored this Court's prior command that "the fact that an interlocutory [class-certification] order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978). In so doing, the Ninth Circuit departed from the majority of circuits to address the issue and joined the Second Circuit in resurrecting the so-called "death knell" doctrine as a basis for appealing an unfavorable class-certification ruling.

If left to stand, the decision below will spur the type of piecemeal litigation that this Court has previously proscribed and permit plaintiffs to circumvent Rule 23(f) – the only authorized avenue for appealing an interlocutory class-certification ruling before a final judgment on the merits. Because the Ninth Circuit clearly got it wrong and deepened a division among the circuits on this fundamental issue, the Court should grant the petition and reverse.

The decision below also has the potential to do great harm to American product manufacturers, providing further grounds for granting the petition. Class actions are already inherently expensive for product manufacturers to defend given their high stakes – namely, the risk of a potentially crippling class verdict. But these costs would only increase under the approach endorsed by the Ninth Circuit, which would add an additional layer of uncertain and

expensive appellate litigation to the class-certification calculus. Further, that approach unfairly gives plaintiffs a second opportunity at appellate review of an adverse class-certification ruling, increasing their settlement leverage over American businesses.

For both of these reasons, the Court should grant the petition to resolve a deepening circuit split and hold that the only avenue for immediately appealing an unfavorable class-certification ruling is seeking a discretionary appeal under Rule 23(f).

ARGUMENT

I. The Ninth Circuit's Decision Reinforces A Circuit Split, Runs Counter To Supreme Court Precedent And Circumvents Rule 23(f).

The decision below deepens a significant circuit split over whether plaintiffs can manufacture appellate jurisdiction over adverse class-certification orders and places the Ninth Circuit squarely on the wrong side of this growing divide. Following this Court's precedents, most courts have rejected appellate jurisdiction in these circumstances, but the decision below adds to a growing minority of contrary rulings.

The seminal decision is this Court's ruling in *Livesay*. The Eighth Circuit concluded in that case that it had jurisdiction over an order decertifying a class action on the ground that the lower court's ruling "had sounded the 'death knell' of the action" and constituted a final judgment for purposes of 28 U.S.C. § 1291. 437 U.S. at 466. The court of appeals had reasoned that the lack of resources and anticipated costs as a practical matter prevented the plaintiffs

from pursuing their claims individually through trial, effectively converting the decertification order into a final judgment. *Id.* at 466-67.

This Court reversed, holding that "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation *because the plaintiff is free to proceed on his individual claim.*" *Id.* at 467 (emphasis added). In reaching its decision, the Court underscored the importance of the final judgment rule embodied in § 1291: it "evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effects on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.'" *Id.* at 471-72 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)). The so-called "death knell" doctrine, the Court declared, runs "directly contrary" to that legislative judgment because it predicates appellate jurisdiction on a costly and inefficient examination of the possible impact a class-certification order will have on the fate of the litigation. *Id.* at 471, 473-74 (internal quotation marks and citation omitted). As the Court explained, "the principal vice" of the "death knell" doctrine is that it "authorizes *indiscriminate* interlocutory review of decisions made by the trial judge," disregarding the fact that "Congress carefully confined the availability of such review." *Id.* at 474.

In addition, the Court recognized that the doctrine unfairly "operates only in favor of plaintiffs" by giving them an immediate and automatic right to appeal "even though the class issue – whether to certify, and if so, how large the class should be – will often be of critical importance to defendants as well." *Id.* at 476. Accordingly, because Congress "made 'finality'

the test of appealability," *id.* at 472, "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291," *id.* at 477.

Since *Livesay*, most federal appeals courts have understood its reasoning to bar efforts by plaintiffs "to manufacture finality" by voluntarily dismissing their claims following the denial of class certification. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013) (plaintiffs could not "avoid the strong presumption against interlocutory review of such orders by voluntarily dismissing all of their claims under Rule 41"); see also, *e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) (court lacked appellate jurisdiction where "putative class plaintiff voluntarily dismisse[d] the individual claims underlying a request for class certification"), *cert. denied*, 132 S. Ct. 499 (2011); *Chavez v. Ill. State Police*, 251 F.3d 612, 629 (7th Cir. 2001) (declining to "review the district court's refusal to certify a class" when "the plaintiffs requested and were granted a voluntary dismissal of their . . . claims").[3]

The Second Circuit took the opposite view, holding that the voluntary dismissal of a named

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[3] The Eleventh Circuit has applied a similar rule with respect to other interlocutory orders. See *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325-26 (11th Cir. 1999). As the court explained, "[t]he problem with [assuming jurisdiction of an interlocutory order following the voluntary dismissal of claims] is that it is not statutorily authorized. Congress has clearly stated the circumstances under which [a circuit] court may hear an appeal from an interlocutory order." *Id.* at 1326 (citing 28 U.S.C. § 1292 (1994)).

plaintiff's claims suffices to confer appellate jurisdiction over a class-certification denial. See *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990) (jurisdiction existed where named plaintiff invited dismissal by failing to prosecute case after denial of class certification). According to the decision in *Gary Plastic*, *Livesay* is "inapplicable" in this situation because "immediate appellate review will only be available to disappointed class representatives who risk forfeiting their potentially meritorious individual claims." *Id.* at 179.

Within nine years, however, the Second Circuit had recognized that its position "ha[d] been rejected by other circuits," and it announced that *Gary Plastic* should be construed as a "narrow exception[]" that cannot generally be extended to permit a plaintiff to voluntarily dismiss and then appeal an interlocutory ruling in most cases. *Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 192-93 (2d Cir. 1999). Indeed, the Second Circuit notably avoided endorsing *Gary Plastic* in 1999, instead concluding that the case before it did not present an occasion to "revisit our holding[]" in *Gary Plastic* because it concerned an attempt to appeal from a different kind of interlocutory order. *Id.* at 193.

Undeterred by the doubts expressed about the Second Circuit's approach by some of that court's own judges, the Ninth Circuit embraced the minority side of the split, reasoning that it had jurisdiction in the present case "under 28 U.S.C. § 1291 because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse – and thus appealable – final decision." Pet. App. 12a (internal quotation marks

and citation omitted).[4] Notably, the Ninth Circuit's cursory discussion of appellate jurisdiction *did not even cite Livesay* – or any of the many decisions by other circuit courts addressing whether *Livesay* permits appeals in these circumstances. Far less did it attempt to explain how the exercise of jurisdiction in the present case can be reconciled with that binding authority.

The decision below is clearly wrong because it runs afoul of *Livesay* by reviving the "death knell" doctrine that this Court previously rejected. As the Third Circuit succinctly explained in rejecting plaintiffs' "attempts to manufacture finality" by voluntarily dismissing their claims in the wake of a class-certification denial:

> [i]f we were to allow such a procedural sleight-of-hand to bring about finality . . . there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action.

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[4] The Court of Appeals relied heavily on a prior decision by another panel, holding that "'in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal. . . .'" Pet. App. 12a (quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1064 (9th Cir. 2014)). *Berger* was wrongly decided for all the same reasons and, not surprisingly, also did not acknowledge *Livesay* or the decisions of other circuits construing it. See generally 741 F.3d 1061. Because the defendant prevailed on appeal in *Berger*, there was no occasion to present the Ninth Circuit's flawed jurisdictional analysis to this Court in that case.

Camesi, 729 F.3d at 245-46. Permitting such tactics "would greatly undermine the policy against piecemeal litigation embodied by § 1291," *id.* at 246 – the very policy that prompted this Court to retire the "death knell" doctrine as a basis for immediately appealing class-certification orders. As the Tenth Circuit put it, the only difference between *Livesay* and a case in which a plaintiff voluntarily dismisses a claim in the hope of manufacturing appellate jurisdiction is that the death knell in the latter case is more "graphic." *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 800 (10th Cir. 1980) (court lacked appellate jurisdiction where plaintiff allowed claim to be dismissed for failure to prosecute after class certification had been denied). The effect in both circumstances is the same: to permit essentially interlocutory review as a matter of right for disappointed class plaintiffs. This Court's decision in *Livesay* "does not tolerate creation of a loophole by the simple device of allowing the claim of a class representative to be dismissed" voluntarily. *Id.* at 800-02.

Moreover, the error of the panel's decision is made all the more glaring in view of Rule 23(f), which authorizes *discretionary* appeals of class-certification orders. See Fed. R. Civ. P. 23(f) ("A court of appeals *may* permit an appeal from an order granting or denying class-action certification . . . .") (emphasis added). As the petition points out, Rule 23(f) by design imbues courts of appeals with absolute discretion to grant review of an order addressing class certification, leaving them "free to reject plaintiffs' Rule 23(f) petitions for any reason." Pet. at 18. That is precisely what the Ninth Circuit did when it denied plaintiffs' petition for interlocutory review

under Rule 23(f), over plaintiffs' argument that the district court's order sounded the "death knell" for plaintiffs. See *id.* at 4. By allowing plaintiffs to dismiss and appeal, the Ninth Circuit enabled plaintiffs' evasion of that discretionary decision, nullifying the discretionary nature of class-certification appeals.

For all of these reasons, the Court should grant certiorari and reverse the Ninth Circuit's decision, clarifying that plaintiffs may *not* evade *Livesay* and Rule 23(f) by voluntarily dismissing their claims in the wake of an adverse class-certification ruling in order to seek immediate appellate review of that unfavorable decision.

II. The Rule Followed By The Ninth Circuit Is Damaging To American Product Manufacturers.

The Court should also grant certiorari and reverse the decision below because affording plaintiffs multiple opportunities for appellate review of adverse class-certification rulings will hurt American product manufacturers. Although Rule 23(f) is supposed to limit class-action appeals (and by extension the costs associated with litigating them), the Ninth Circuit's rule is likely to spawn dismissals and appeals in every case involving an unsuccessful class-certification bid. Moreover, because the Ninth Circuit's rule works only in favor of plaintiffs, it will provide them with greater leverage over defendants in settlement negotiations, using the threat of possible reversal on an appeal that never should have been allowed to force resolution. For both reasons, the Ninth Circuit's rule stands to greatly expand the costs of litigation and the potential exposure to liability in questionable class actions.

This development is a bad one for American manufacturers. "By their very nature, class actions are high-stakes endeavors. A verdict in a consumer fraud class action will deliver a crippling blow to all but the most well-heeled" defendant. John Doroghazi & Armel Jacobs, *Basic Strategic Considerations in Defending Consumer Class Actions Against Franchisors*, 33 Franchise L.J. 167, 192-93 (2013); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (recognizing the "higher stakes of class litigation"). Indeed, according to a 2015 study, companies spent $2 billion on class action lawsuits in 2014. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 3; see also Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition) (noting the "very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."). Simply put, defending against putative class actions is already an inherently expensive proposition for American businesses given the high stakes involved – i.e., the risk of a gargantuan class verdict. Granting plaintiffs an additional layer of appeals in every case involving an adverse class-certification ruling will needlessly prolong class-action litigation, generating further litigation costs for American manufacturers.

Moreover, because the approach endorsed by the Ninth Circuit only inures to the benefit of *plaintiffs* –

not defendants – plaintiffs would gain greater leverage over defendants in inducing settlements. Defendants faced with improvidently certified, meritless lawsuits already feel intense pressure to settle before trial, culminating in "judicial blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."); see also Kristen L. Wenger, *The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation*, 38 Fla. St. U. L. Rev. 679, 688 (2011) ("Critics of class action litigation have also pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations.").

Affording plaintiffs a second bite at the apple in seeking class certification will exacerbate the pressure to settle. The resultant increased costs of class litigation will put settlement pressure on many defendants, as will the possibility of reversal that would not exist but for the Ninth Circuit's one-sided rule.

For these reasons too, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Microsoft Corporation, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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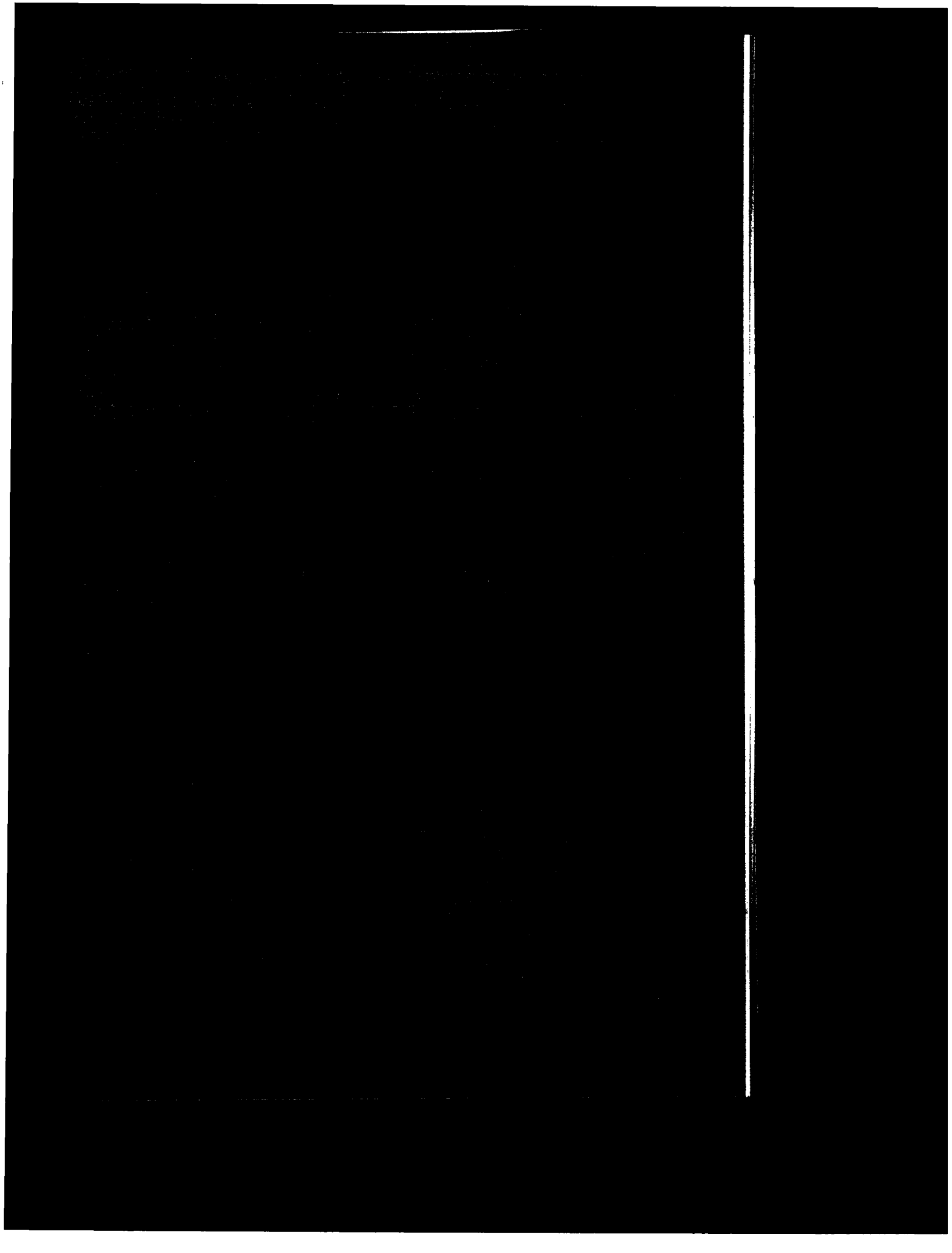

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