

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

**UNITED STATES OF AMERICA**

**v.**

**KHALID SHAIKH MOHAMMAD;  
WALID MUHAMMAD SALIH  
MUBARAK BIN 'ATTASH;  
RAMZI BINALSHIBH;  
ALI ABDUL AZIZ ALI;  
MUSTAFA AHMED AL HAWSAWI**

**AE 095C**

**Government Response**

To Emergency Defense Motion to Compel  
Appointment and Funding of Defense  
Expert Consultant in the Areas of Industrial  
Hygiene, Preventive Medicine in Public  
Health, and Preventive Medicine in  
Occupational Medicine

12 June 2013

**1. Timeliness**

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

**2. Relief Sought**

The Prosecution respectfully requests that the Defense motion be denied.

**3. Burden of Proof**

The Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

**4. Overview**

This motion should be denied. The health and safety issues of AE 095 and AE 082 were resolved months ago. Two outside experts—accepted by the Defense as qualified—have already fulfilled the relief requested by the Defense in AE 082, AE 095, and AE 095B (WBA Sup). Although the industrial hygiene issues have been satisfactorily resolved, the Defense again raises an issue completely unrelated to the merits of the case. The Defense complains of mildew found on a pair of boots and some clothes left unattended in ELC-3, during a period when the Defense was intermittently using that space. This motion is so meritless that it appears to have been

raised for the sole purpose of avoiding having to litigate anything that has to do with the merits of the case. It does not warrant the requested relief.

## **5. Facts**

On 5 October 2012 and 10 October 2012, following thorough investigations into defense team concerns, reports by the Industrial Hygiene Department certified that normal work operations can continue in the defense team spaces in building AV-29 and AV-34. *See* AE 095, Attachment G & Attachment H. In addition, a room-by-room examination by JTF Preventive Medicine Department into concerns surrounding rodents in building AV-34 concluded that the associated health risk posed by working in building AV-34 was negligible. *See* AE 095, Attachment I. The assessments were performed by qualified industrial hygienists in line with defense counsel's initial requested relief.

On 18 October 2012, counsel for Mr. bin 'Attash questioned the qualifications of the Industrial Hygiene Department, and informed the Commission that if the Prosecution "get[s] us somebody who is qualified to look at this stuff and remediate it, we can make it go away." *See* Unofficial/Unauthenticated Transcript, *United States v. KSM, et al*, at 954. Later that day, defense counsel informed the Commission that the Defense reached an agreement with the Prosecution in that "the government will provide a board-certified industrial hygienist and a board-certified occupational and environmental medicine expert to assess the work situation here at Guantanamo Bay, make appropriate recommendations," and then JTF-GTMO would remediate the work pursuant to the advice of the experts. *Id* at 993-94. The Prosecution confirmed to the Commission that "a comprehensive cleanup project will be initiated in AV-29, AV-34, and the ELC." *Id* at 995-96. The Prosecution further informed the Commission that multiple board certified experts from outside Guantanamo Bay would perform the assessment per the qualifications described by the Defense. *Id.* at 996. The Commission stated that it did not want to address what had happened in the past, but rather wanted to address the issue moving forward. *Id.* at 998.

On 19 October 2012, the Defense, Prosecution, and Commission confirmed the process where the agreed-upon experts would perform an initial assessment and make recommendations to JTF-GTMO for remediation. According to the agreement, after remediation, the experts would return to Guantanamo Bay to assess the remediation project and workspace conditions. *See id* at 1341-1346. The Commission noted that it preferred to defer “to the bugs and vermin expert about the best ways to proceed to turn it into a healthy condition... Let’s defer this to the guys and gals in this business.” *Id.* at 1344-45.

In late October 2012, two experts were chosen to conduct the assessments: CAPT ██████████ MSC, USN, CIH; and CAPT ██████████ MC (UMO/DMO), USN.

Among his many qualifications and subject-matter expertise, at the time of the assessments, CAPT ██████████ was the Head of Industrial Hygiene and Assistant Director of Environmental Health for the Navy Marine Corps Public Health Center. CAPT ██████████ was responsible for technical guidance to all Navy industrial hygiene, and also served as the primary technical advisor to BUMED, CNO, SECNAV, and Navy echelon II. *See* Biography, Attachment B; CV, Attachment C.

Among his many qualifications and subject-matter expertise, at the time of the assessments, CAPT ██████████ was the Division Head of Occupational and Environmental Medicine at the Navy Marine Corps Public Health Center in Virginia. CAPT ██████████ was responsible for providing oversight and authoritative guidance on Navy Occupational Medical Surveillance Programs and Certifications Exams. As a medical doctor, CAPT ██████████ also provided consultative services in the fields of Occupational Medicine and Environmental Medicine. *See* Biography, Attachment D; CV, Attachment E.

In early November 2012, the two experts conducted an assessment of AV-29, AV-34, and the defense spaces in the ELC. On 2 November 2012, counsel for Mr. bin ‘Attash, in an email discussing logistics for the process, acknowledged that the experts “are board certified in the appropriate fields to enable them to assess the work space environments.” *See* Attachment G. In early November, the Defense had the opportunity to meet with the two experts at Guantanamo

Bay. On 7 November 2012, the experts completed their assessment of AV-29, AV-34, and the ELC in advance of the JTF-GTMO cleaning and repair action. Their assessment of all Defense spaces was that they are habitable and continued occupancy posed no health threat. *See* AE 095B (WBA Sup.), Attachment D.

In December 2012, JTF-GTMO conducted a comprehensive cleanup in AV-29, AV-34, and the ELC pursuant to recommendations of CAPT ██████ and CAPT ██████.

In early January 2013, the experts returned to Guantanamo Bay and conducted the post-cleanup assessment. The assessment included collecting air and toxicology samples and hand-carrying the samples to an off-island lab for analysis. An informal assessment at the time revealed that there had been no change to their initial assessment of the buildings in that they remained habitable. *See* Attachment F. However, the experts identified some issues caused by the Defense –personal sanitation and uncontained food items and snacks. For example, the experts observed an open bag of pet food laying on the floor in AV-29. *Id.*

On 23 January 2013, the Prosecution and Defense received the “Habitability Assessment Report for Buildings ELC-3, AV-29, and AV-34.” *See* AE 095B (WBA Sup.), Attachment D. The report is comprehensive, and takes into account Defense concerns and observations, as well as various industry-accepted methods undertaken by the experts. *See, e.g.* AE 095B (WBA Sup.), Attachment D, at 12 (listing “[P]rofessional references germane to this report”). The reassessment revealed that fungal spores in ELC-3, AV-29, and AV-34 were below the outdoor comparison samples, indicating that indoor exposure to indoor fungal spores is no greater than the measured outside air. *See* AE 095B (WBA Sup.), Attachment D, p. 7. The experts noted that “[t]he occupants (of ELC-3) report that due to the nature of the work conducted within ELC-3, room doors cannot be opened while the building is unoccupied or during the periods personnel are working within the rooms. Any combination of factors listed above could lead to occasional conditions that could lead to fungal growth and may also explain the wall surface growth observed during the initial assessment.” *Id.* at 8.

In light of the climate and periodic use of the rooms, the experts provided recommendations to ensure continued habitability of the work spaces, including preventive maintenance by the occupants. *Id* at 11-12. The experts recommended weekly room inspections to identify problem areas. *Id* at 11. The experts also stated that they “have confidence that the USNH GTMO public health staff is competent and capable to conduct facility indoor air quality assessments.” *Id* at 12.

On 23 April 2013, officials from the Industrial Hygiene (“IH”) Department of U.S. Naval Hospital Guantanamo Bay responded to concerns from defense personnel by performing a reassessment of Room 100, ELC-3. *See* AE 095B (WBA Sup.), Attachment M. Consistent with CAPT [REDACTED] and CAPT [REDACTED] report, the IH Department found that the unit was not continuously used and it did not know whether the air conditioning and humidifiers ran while the building was unused. *See id* at 1. The IH investigator sampled the surface fungal growth, and determined it to be the same type as noted by CAPT [REDACTED] and CAPT [REDACTED]. *Id*. The IH investigator found that “[a]t this time the building and room in question are habitable for occupancy.” *Id*. Upon recommendation of IH personnel, the surface fungal growth was scheduled to be cleaned by early June 2013. Defense personnel also were advised that they should not leave clothing items in the spaces for extended periods of time while the spaces were not in use and personnel were in CONUS. *Id.* at 2.

## **6. Law and Argument**

In AE 095B (WBA Sup), the Defense is now claiming that this Commission should order both alternative workspace arrangements and yet another outside expert consultant at government expense, based on the discovery of minor amounts of non-toxic mildew. The mildew was scheduled to be cleaned by contractors in early June, prior to the scheduled hearings, and, as noted above, the experts recommended weekly inspections because the Defense uses ELC-3 intermittently. The Defense has not raised any new or additional concerns about AV-29

and AV-34. The Defense should be in no way limited in conducting their work at Guantanamo Bay.

As noted above, the Defense workspaces were officially deemed safe and habitable for occupancy in October 2012. Since that time, in November 2012 and January 2013, two outside experts in the fields of industrial hygiene, environmental health, preventive medicine, and occupational medicine jointly conducted two in-depth assessments of the workspaces. Both assessments confirmed that the Defense workspaces are safe and habitable for use. A comprehensive cleanup project was conducted in December 2012 in conjunction with the expert recommendations. As such, two outside experts—whose qualifications were deemed acceptable by the Defense—have already fulfilled the relief requested by the Defense in AE 082, AE 095 and AE 095B (WBA Sup).

When conducting their initial assessments, the experts noted that ELC-3 was prone to potential mildew, due to factors specific to ELC-3, including its periodic use. In order to keep mildew under control, the experts recommended weekly monitoring of the defense spaces and continuous running of the air conditioner and humidifier. In any event, the mildew raised in the current motion is irrelevant because the experts determined that the indoor air quality was safe and the minimal amount of mildew found in April 2013 has been scheduled for cleaning on 11 June 2013 by escorted contractors. Industrial Hygiene officials reiterated their recommendation that occupants monitor their spaces on a weekly basis and to avoid leaving clothing in ELC-3 for extended periods of time.

With the instant motion, the Defense is now attacking the accuracy of the report of two highly experienced Navy Captains, both of whom hold expert qualifications that defense counsel previously accepted. The sole basis for this attack is that mildew has reappeared in ELC-3, just as the two experts predicted might happen if certain steps were not taken. Despite the recommendations provided to alleviate this issue, the Defense has now opted to forgo the two experts' recommendations and assessments altogether and instead shop for somebody else. They are not entitled to further expert assistance.

Among the many protections provided to accused facing trial by military commission is the right to obtain expert witnesses and consultants. The Military Commissions Act of 2009 (hereinafter MCA) provides the accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. *See* 10 U.S.C. §949j. The Secretary of Defense, in turn, promulgated the Manual for Military Commissions (hereinafter “the Manual”), which contains the Rules for Military Commissions (hereinafter R.M.C.). The procedures contained in the Manual are based upon the procedures for trial by general courts martial under chapter 47 of title 10 (the Uniform Code of Military Justice). *See* R.M.C. 102(b). R.M.C. 703 (Production of witnesses and evidence) is among the rules issued by the Secretary of Defense in the Manual.

In this instance, counsel for Mr. bin ‘Attash is requesting an expert consultant. Under R.M.C. 703(d), requested experts must be “relevant and necessary.” To demonstrate necessity, counsel for the accused must show there is a reasonable probability—indeed, more than a mere possibility—that the requested expert would be of assistance and that the denial of such an expert would result in a fundamentally unfair trial. *See, e.g., United States v. Freeman*, 65 M.J.451, 458 (C.A.A.F. 2008); *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994), citing *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987), *cert. denied*, 481 U.S. 1054 (1987). To establish that an expert would be of assistance, the requesting party has the burden of establishing: 1) why the expert assistance is needed; 2) what the expert assistance would accomplish for the accused; and 3) why the defense counsel were unable to gather and present evidence that the expert assistance would be able to develop. *See Freeman*, 65 M.J. at 458, quoting *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005); *see also United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R. 1990), *affd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992).

The Defense has not demonstrated how the proposed consultant would be of assistance, nor has the Defense met its burden in demonstrating how a denial of this consultant would result in a fundamentally unfair trial. Here, despite two lengthy briefs (AE 095; AE 095B (WBA

Sup)), the Defense request to both the Convening Authority and this Commission failed to establish why yet another expert consultant in the areas of Industrial Hygiene and Preventive Medicine is needed. Following the agreement between the Government and Defense, counsel for the Accused in November 2012 acknowledged that “CAPT [REDACTED] and CAPT [REDACTED] are board certified in the appropriate fields to enable them to assess the work space environments.” See Attachment G.

The Defense fails to establish what the proposed consultant would accomplish in light of the fact that multiple assessments have deemed AV-29, AV-34, and ELC-3 safe for normal work operations. The parties already agreed upon two outside experts to assess the workspaces. The purpose of the assessment and comprehensive cleanup project pertained exclusively to ensuring safety within the workspaces. The ongoing safety and habitability of the workspaces has been confirmed by both the two experts and IH officials. As such, there is nothing that the proposed consultant can accomplish that already has not occurred. Finally, the assessments conducted by the agreed-upon experts, as well as the Industrial Hygiene Department and Preventive Health, already concluded information that the expert consultant would be expected to develop.

Recently, the Defense renewed their previously advanced arguments in seeking the proposed consultant. See AE 095 (WBA Sup), at 10-11. In October, the Defense justified their need for this individual “[b]ecause the (October assessment) author is unqualified to issue such opinions, the findings are invalid. Second, the qualifications of the government’s ‘experts’ are particularly alarming . . . . An expert in this particular area is necessary to protect the health of military service members and other government employees.” AE 095 (WBA, KSM, RBS), at 13-14. As articulated above, this attempted justification does not meet the standard pursuant to R.M.C. 703(d). Any concerns over the IH Department’s qualifications were mooted when two highly-qualified experts performed their pre and post-cleanup assessments.<sup>1</sup> When the two qualified outside experts in this particular area jointly conducted two assessments with the

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<sup>1</sup> The Prosecution further maintains that the qualifications of IH Department officials at Guantanamo Bay fully conform to Navy industrial hygiene regulations.

overarching goal of protecting the health of all occupants in the workspaces, the Defense got the exact relief they previously requested and needlessly request again.

It makes little sense that the Defense has chosen to belatedly attack the credibility of the two outside experts and the IH investigator. *See* AE 095B (WBA Sup), at 9-10. The experts were forthcoming in their assessments with regard to mildew in ELC-3. All parties were made aware that, in the Caribbean climate at Guantanamo Bay, mildew could develop in ELC-3 if, among other circumstances, defense personnel did not regularly use the facility. The experts recommended that ELC-3 be monitored on a weekly basis to keep the mildew in check. Personnel were also advised against leaving clothing in the workspaces for extended periods of time. Even now, the mildew that has re-appeared has been deemed well within safe standards, which is consistent with the experts' previous assessments. *See* AE 095B (WBA Sup.), Attachment D, at 1-12; *see also* AE 095B (WBA Sup.), Attachment M.

The Defense does not raise any further concerns with AV-29 or AV-34, but nevertheless attacks the experts' quality of work as "flawed," "poor," and "unsatisfactory." AE 095B (WBA Sup), at 9. Counsel makes these assertions despite the fact that CAPT [REDACTED] and CAPT [REDACTED] have been proven correct with respect to ELC-3—they correctly predicted that mildew could return if the spaces were not regularly utilized. CAPT [REDACTED] and CAPT [REDACTED] credentials and experience in assessing the safety and habitability of Navy workspaces world-wide should not be in question. Instead of simply following their expert recommendations, counsel has opted to propose the services of a third person to act as an expert consultant. It has failed to demonstrate how the proposed consultant is relevant and necessary in light of the expertise already provided on this issue.

In light of the fact that a comprehensive cleanup project was sandwiched between two assessments conducted jointly by two outside experts, defense counsel has failed to demonstrate why an expert consultant in Industrial Hygiene is now needed to travel to Guantanamo Bay to perform a similar function to what already has been conducted. The Prosecution respectfully requests that this Commission deny the defense motion without any oral argument.

**7. Oral Argument**

The Prosecution does not request oral argument. However, the Prosecution requests the right to be heard if this Commission grants the Defense request for oral argument.

**8. Witnesses and Evidence**

None.

**9. Additional Information**

None.

**10. Attachments**

- A. Certificate of Service, dated 12 June 2013.
- B. Biography of CAPT [REDACTED] MSC, USN, CIH
- C. *Curriculum Vitae* of CAPT [REDACTED]
- D. Biography of CAPT [REDACTED] MC (UMO/DMO), USN
- E. *Curriculum Vitae* of CAPT [REDACTED]
- F. Email, BUMED IH Work Wrap-Up
- G. Email from Cheryl Bormann, Assessment of Work Spaces

Respectfully submitted,

//s//

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Michael J. Lebowitz  
Captain, JA, USA  
Assistant Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

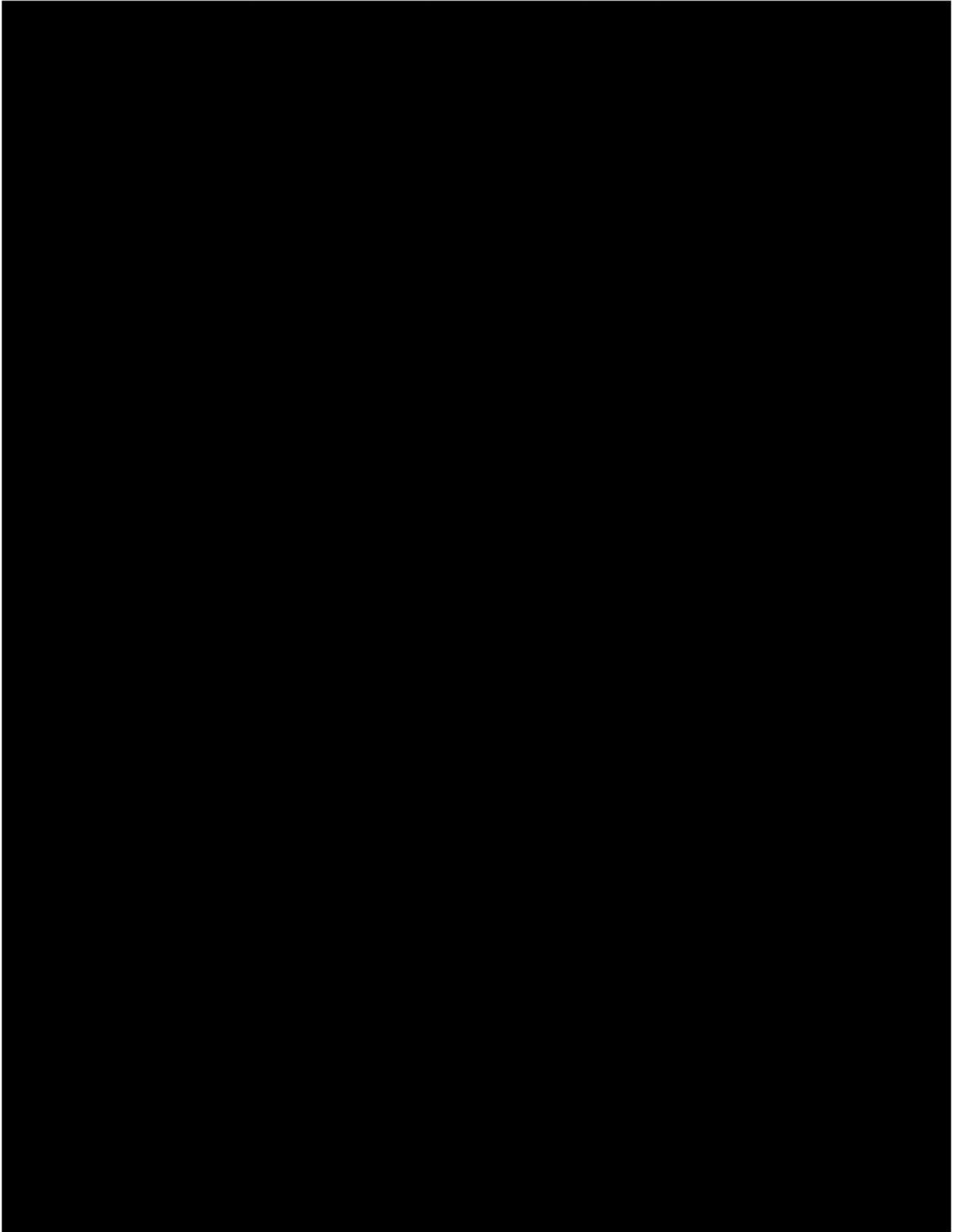
I certify that on the 12th day of June 2013, I filed AE 095C, the **Government Response** to Defense Motion to Compel Appointment and Funding of Defense Expert Consultant in the Areas of Industrial Hygiene, Preventive Medicine in Public Health, and Preventive Medicine in Occupational Medicine with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

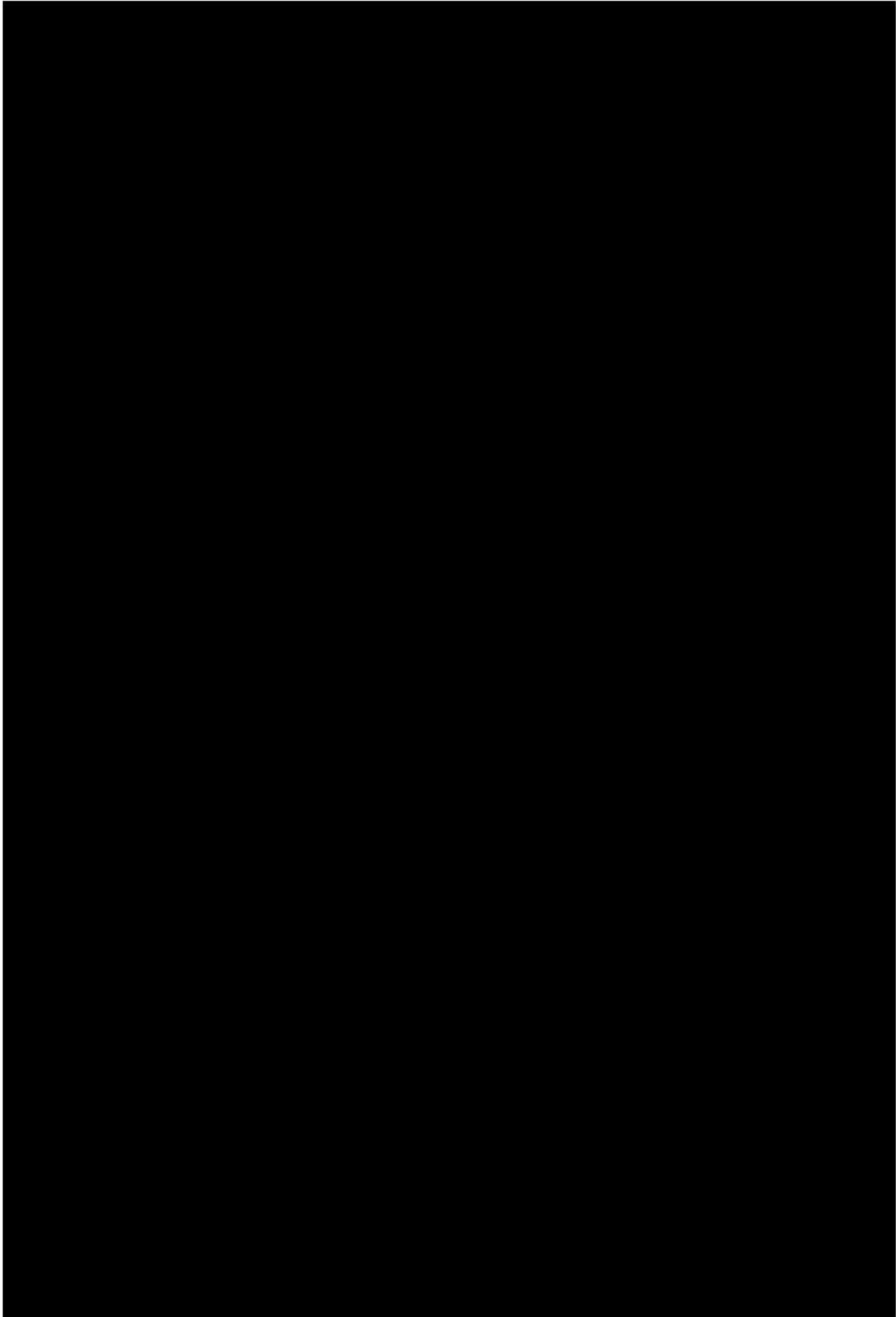
\_\_\_\_\_  
Michael J. Lebowitz  
Captain, JA, U.S. Army  
Assistant Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions

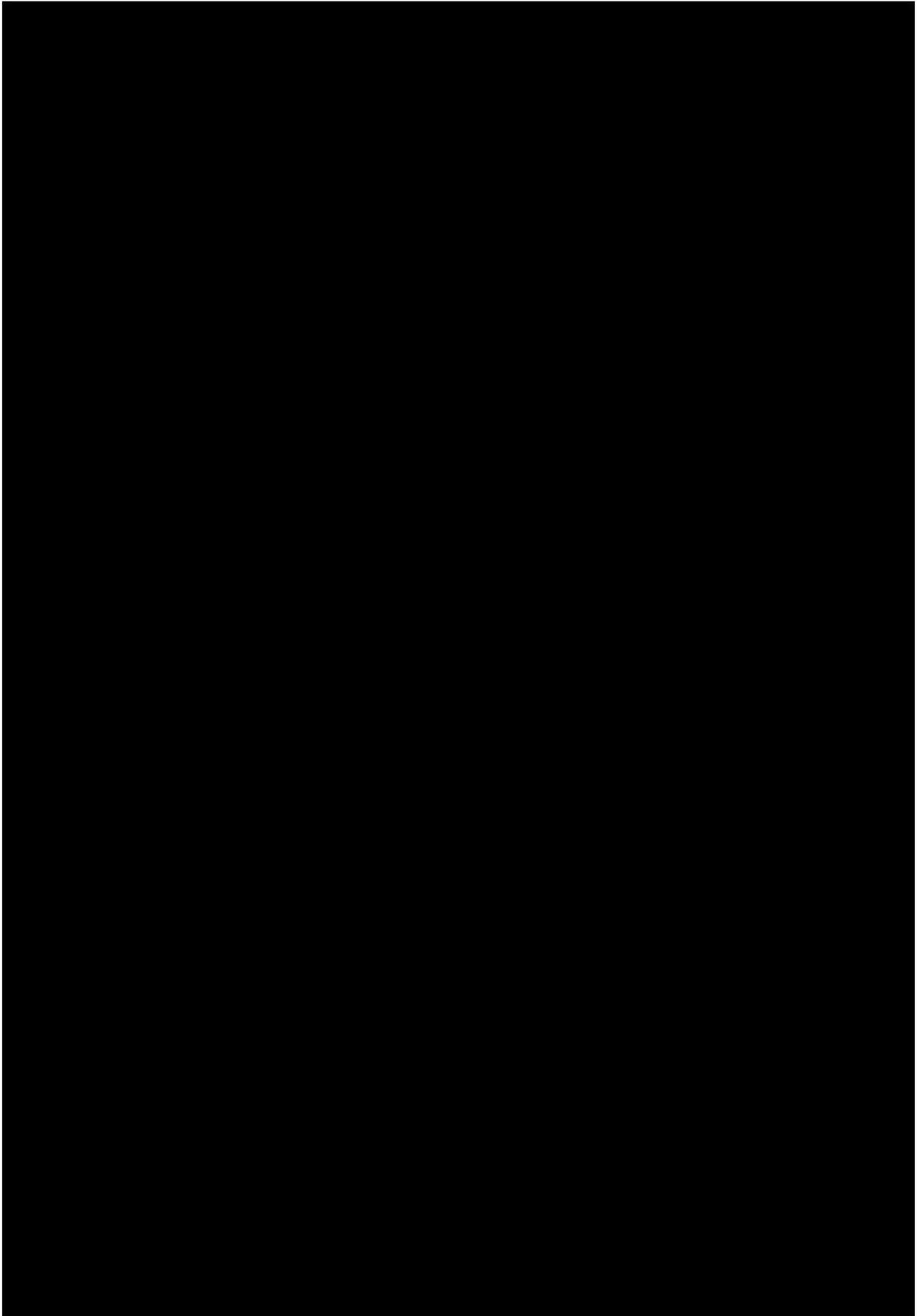
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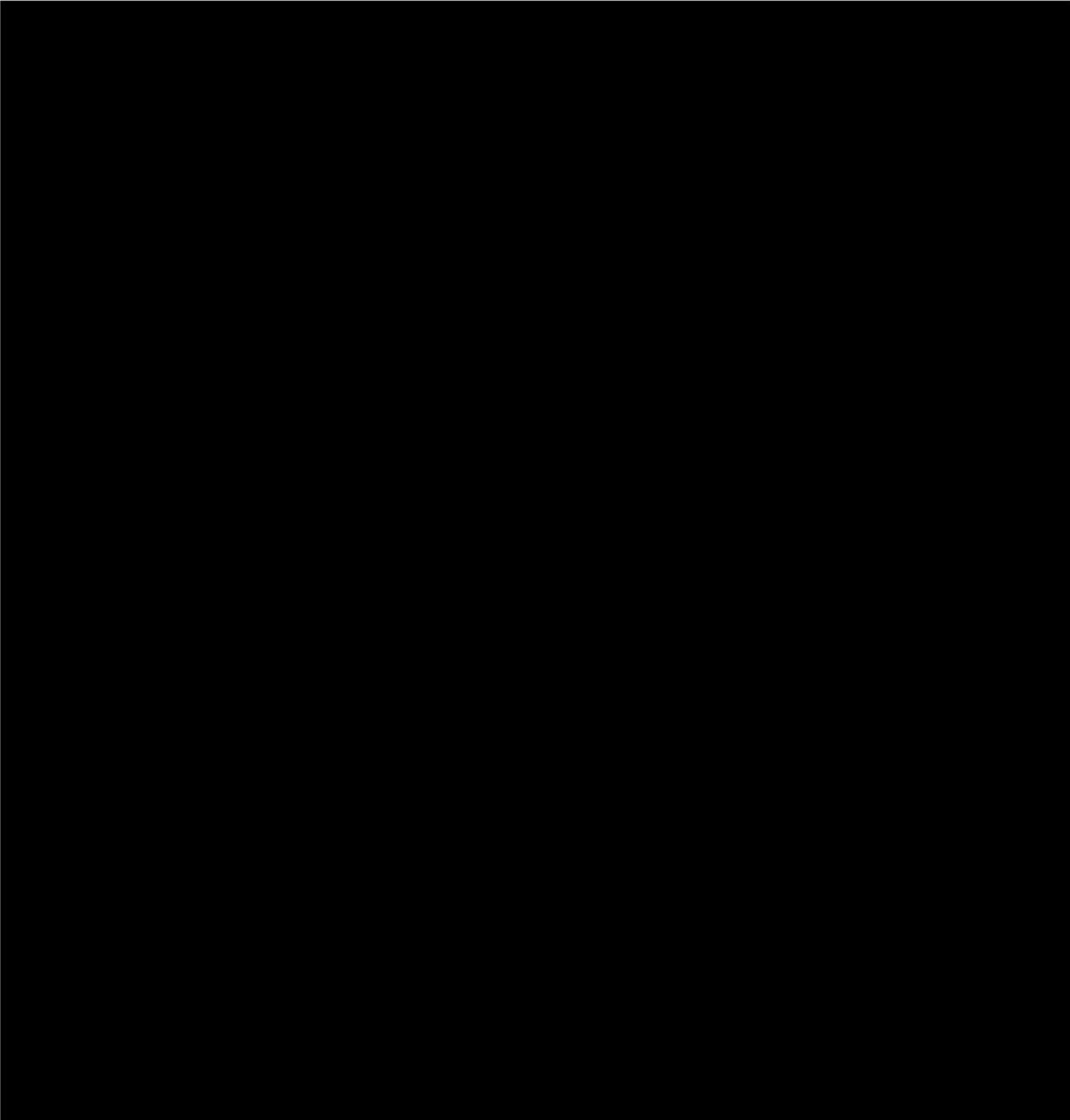
# ATTACHMENT B



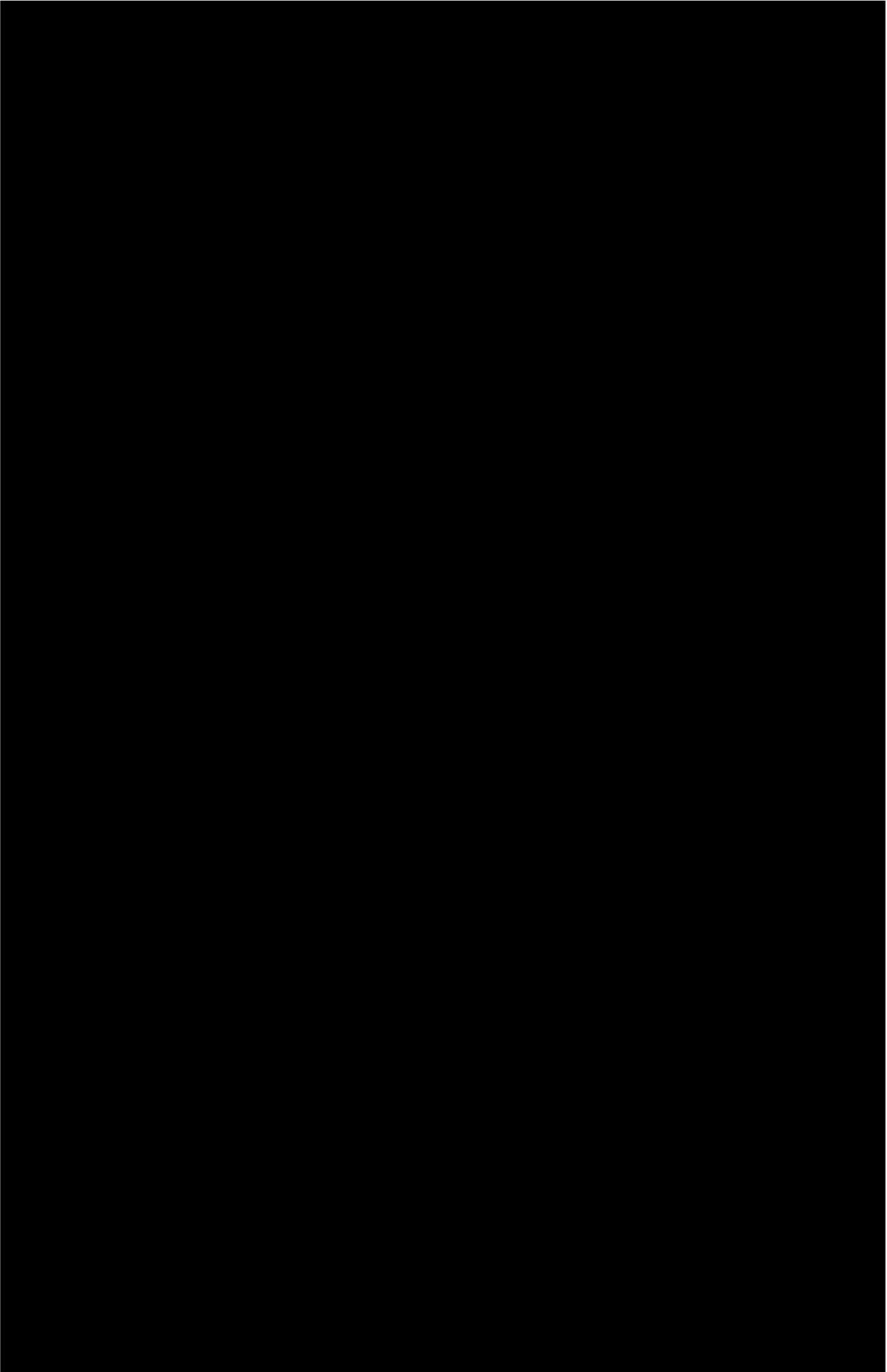
# ATTACHMENT C





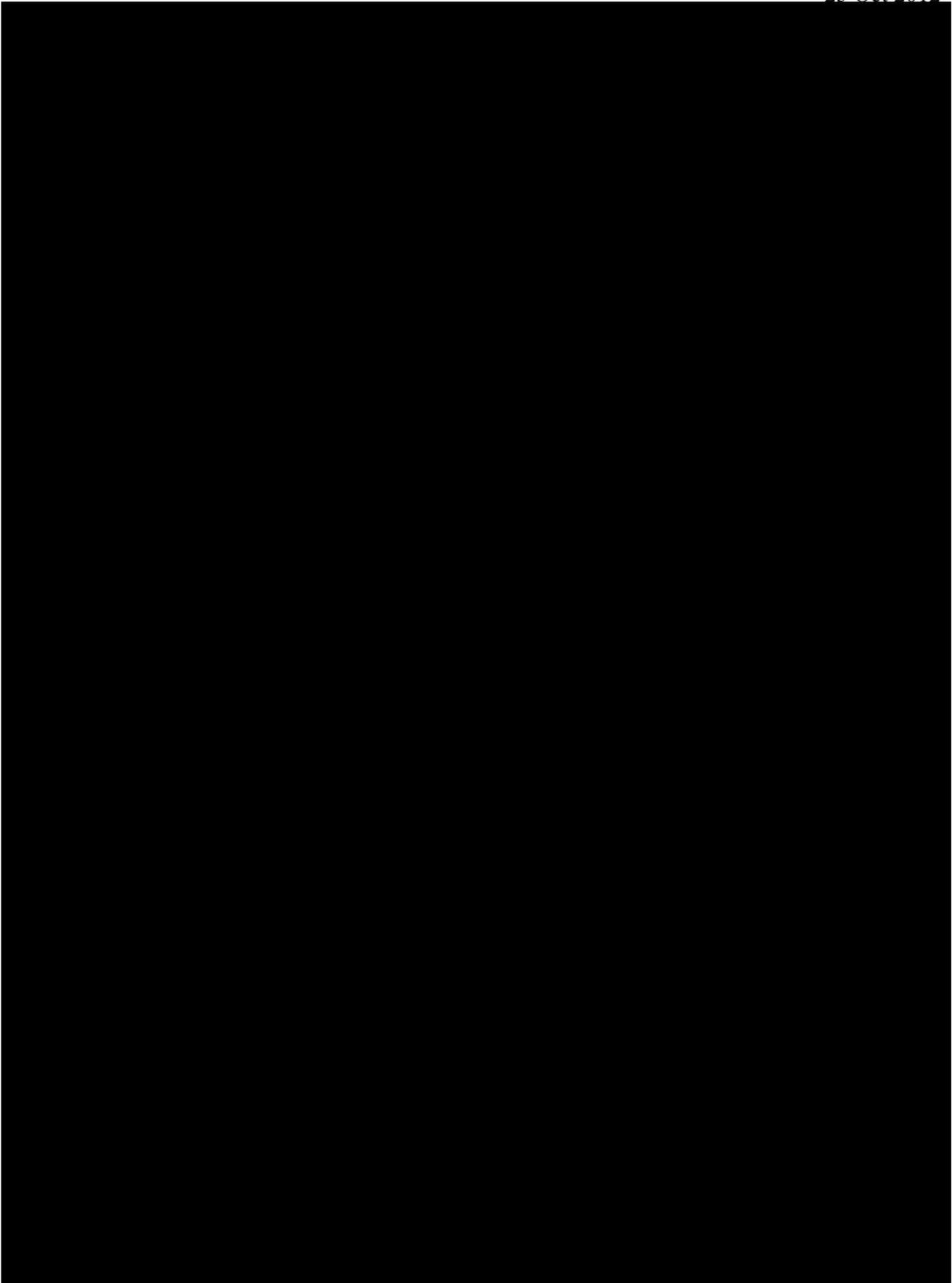


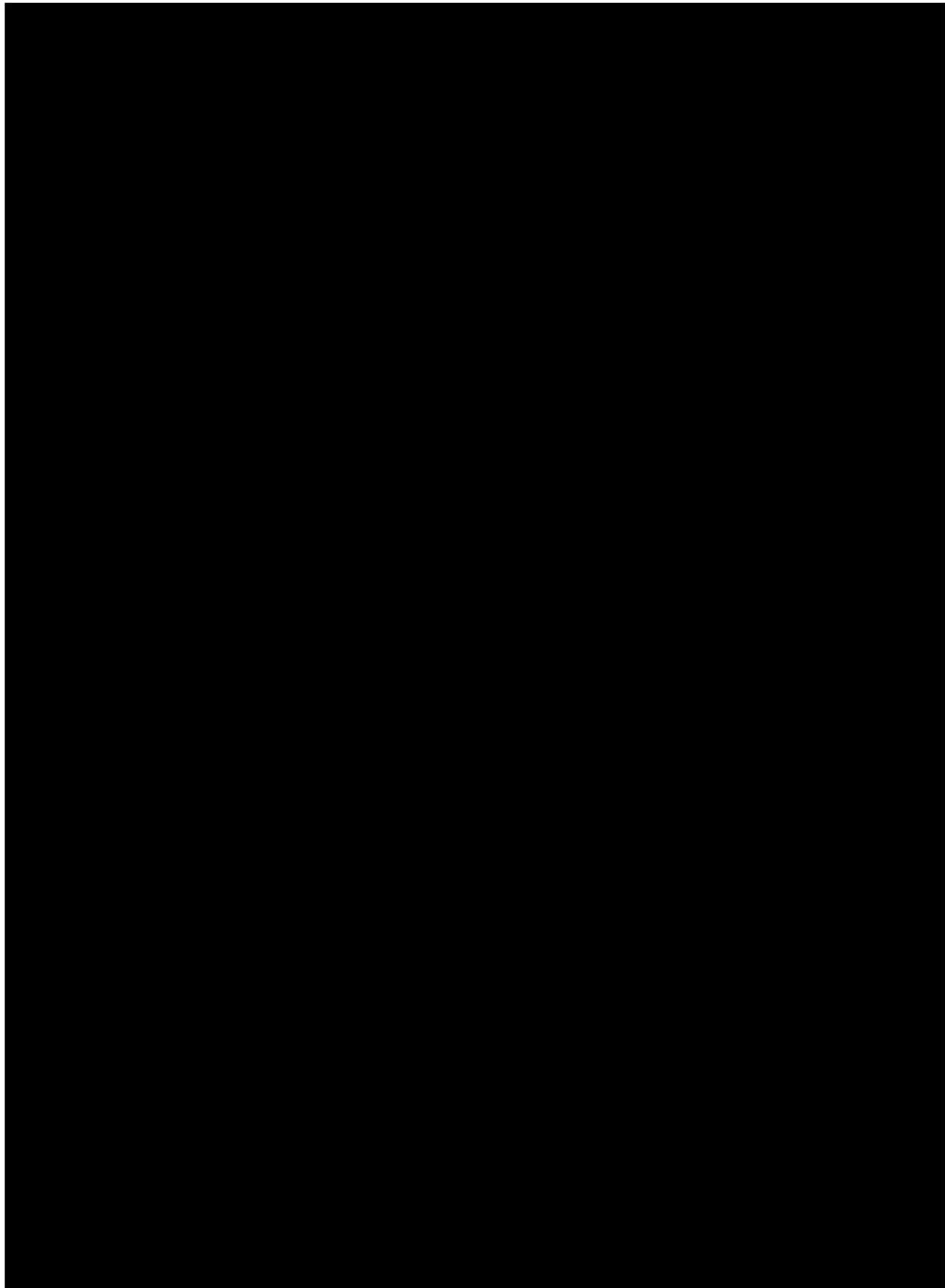
# ATTACHMENT D

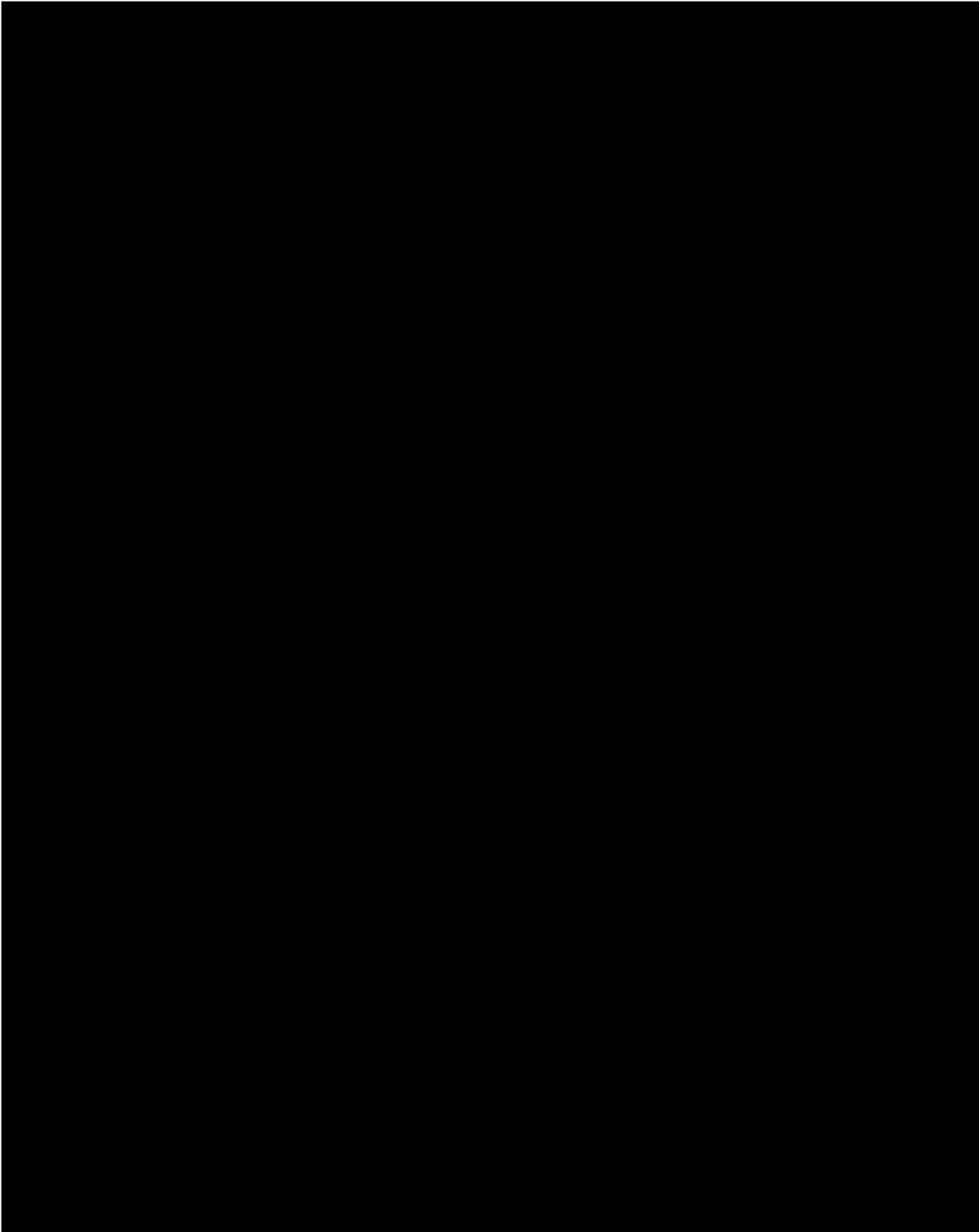


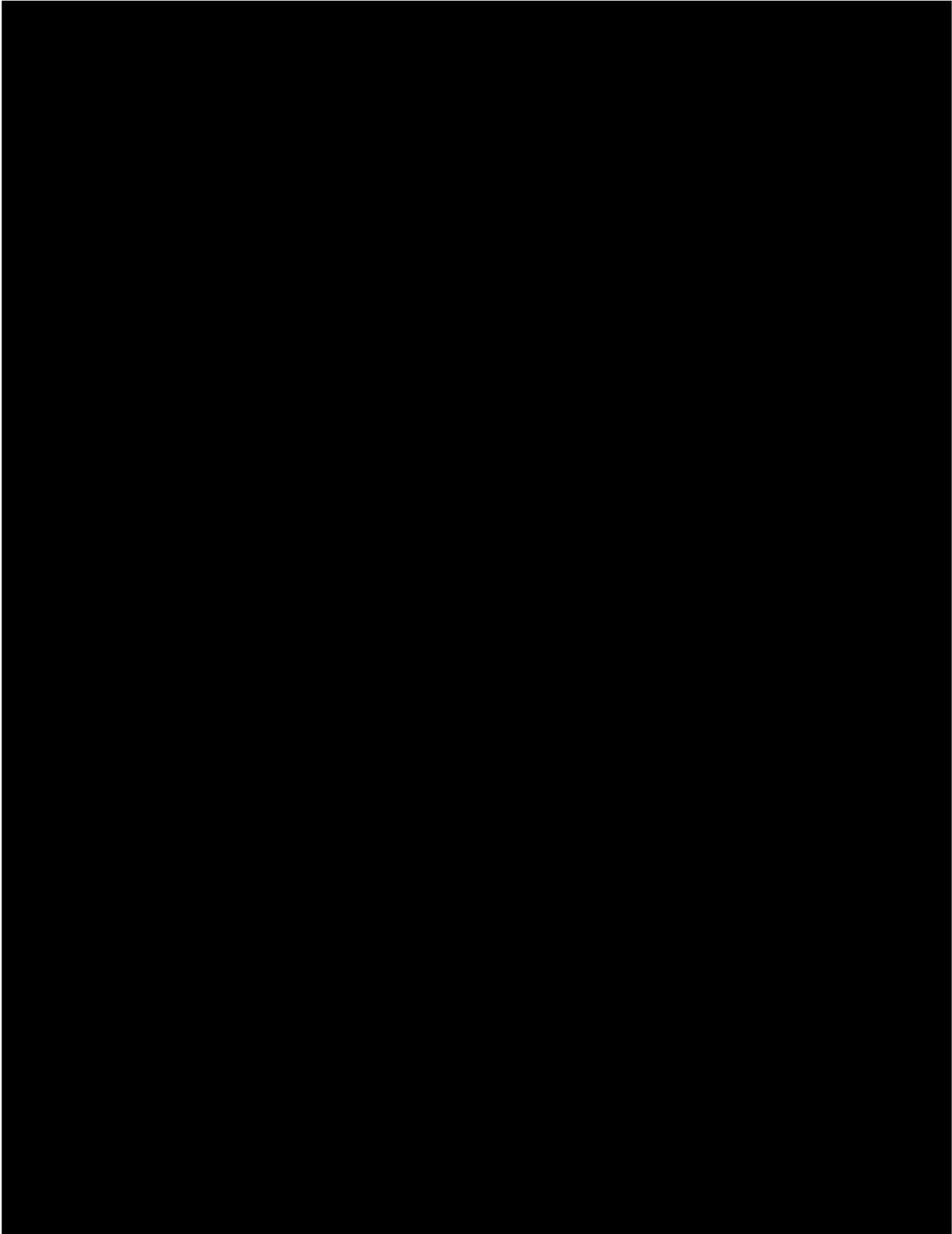
# ATTACHMENT E

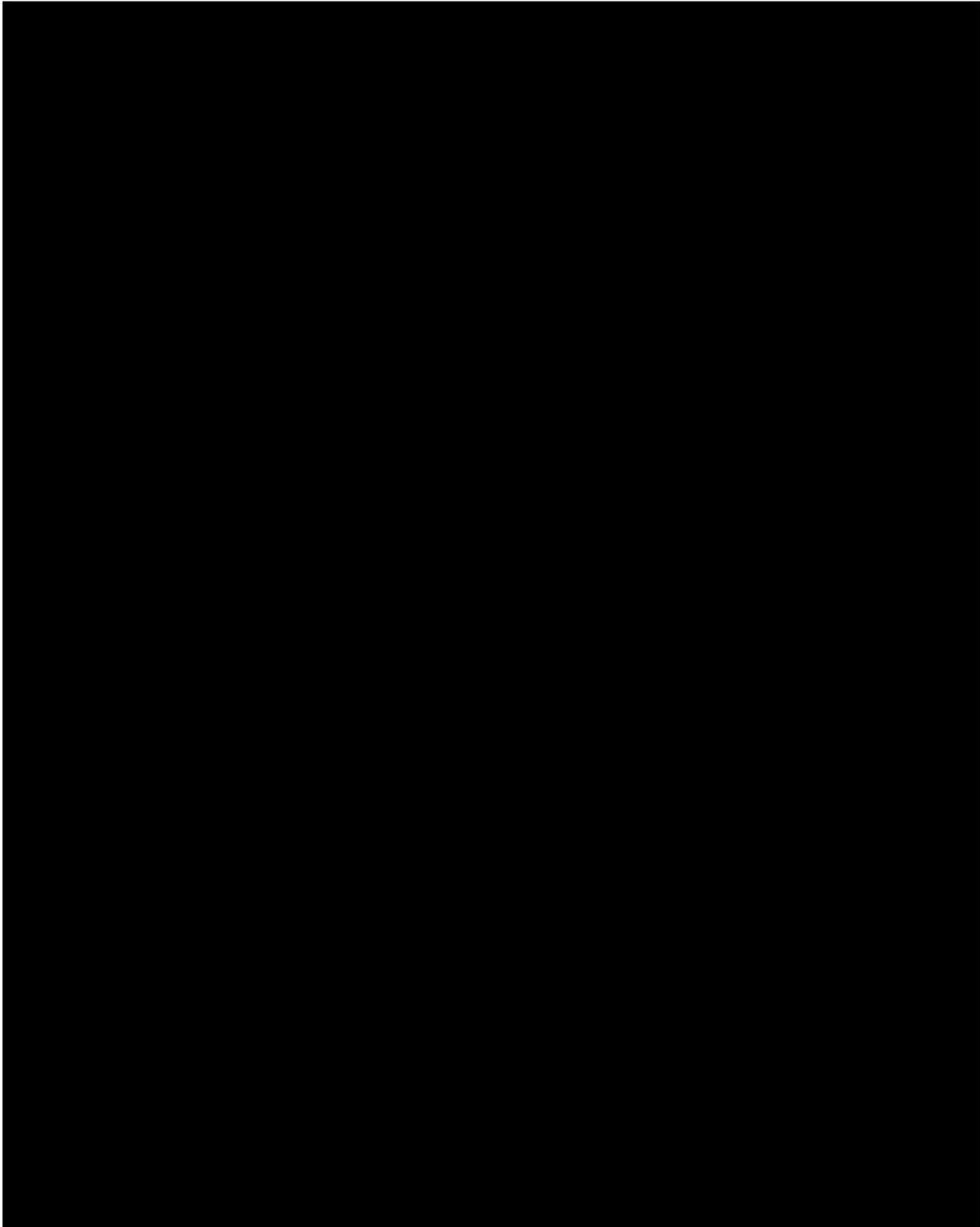
25 Oct 2012

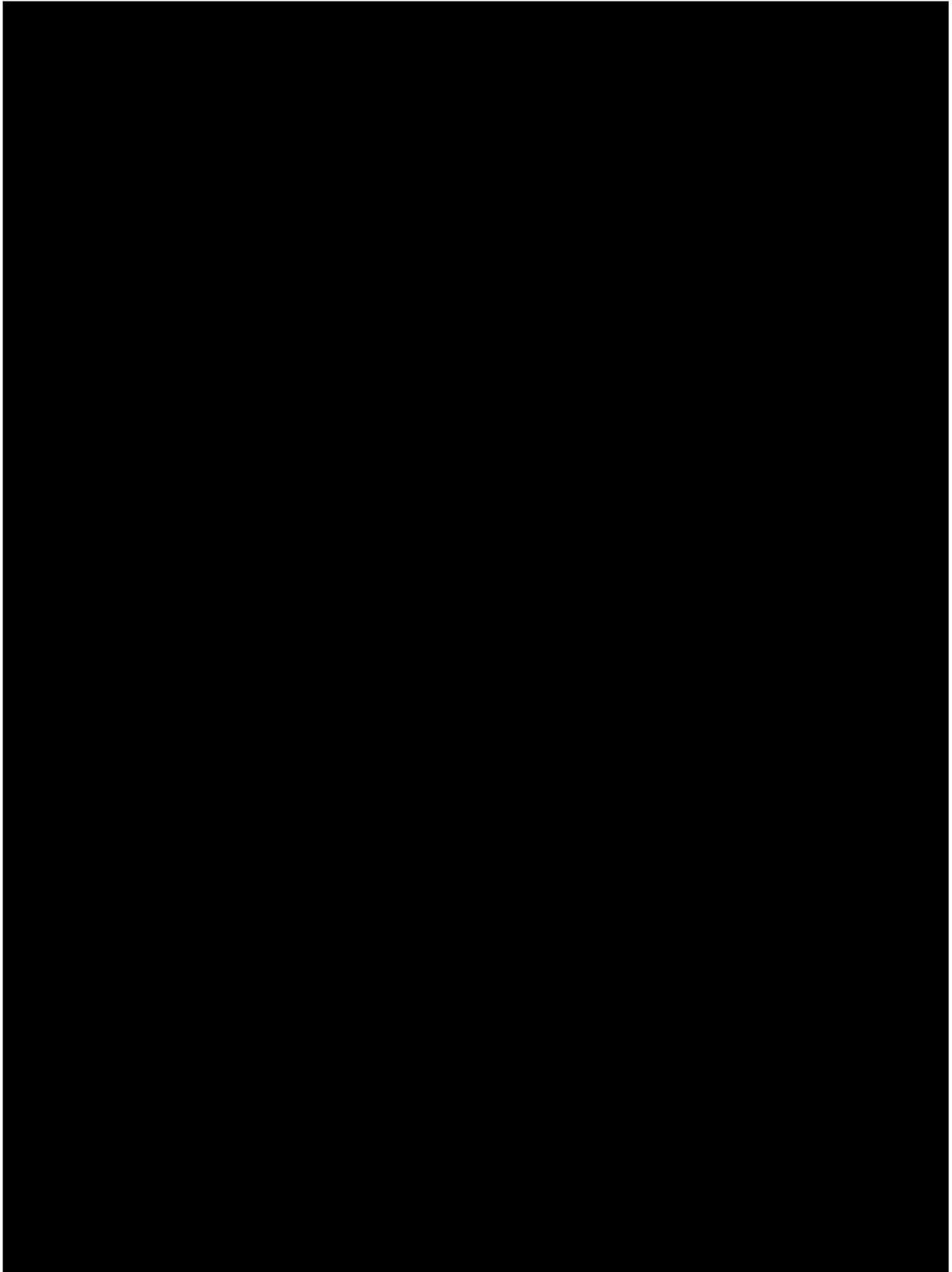


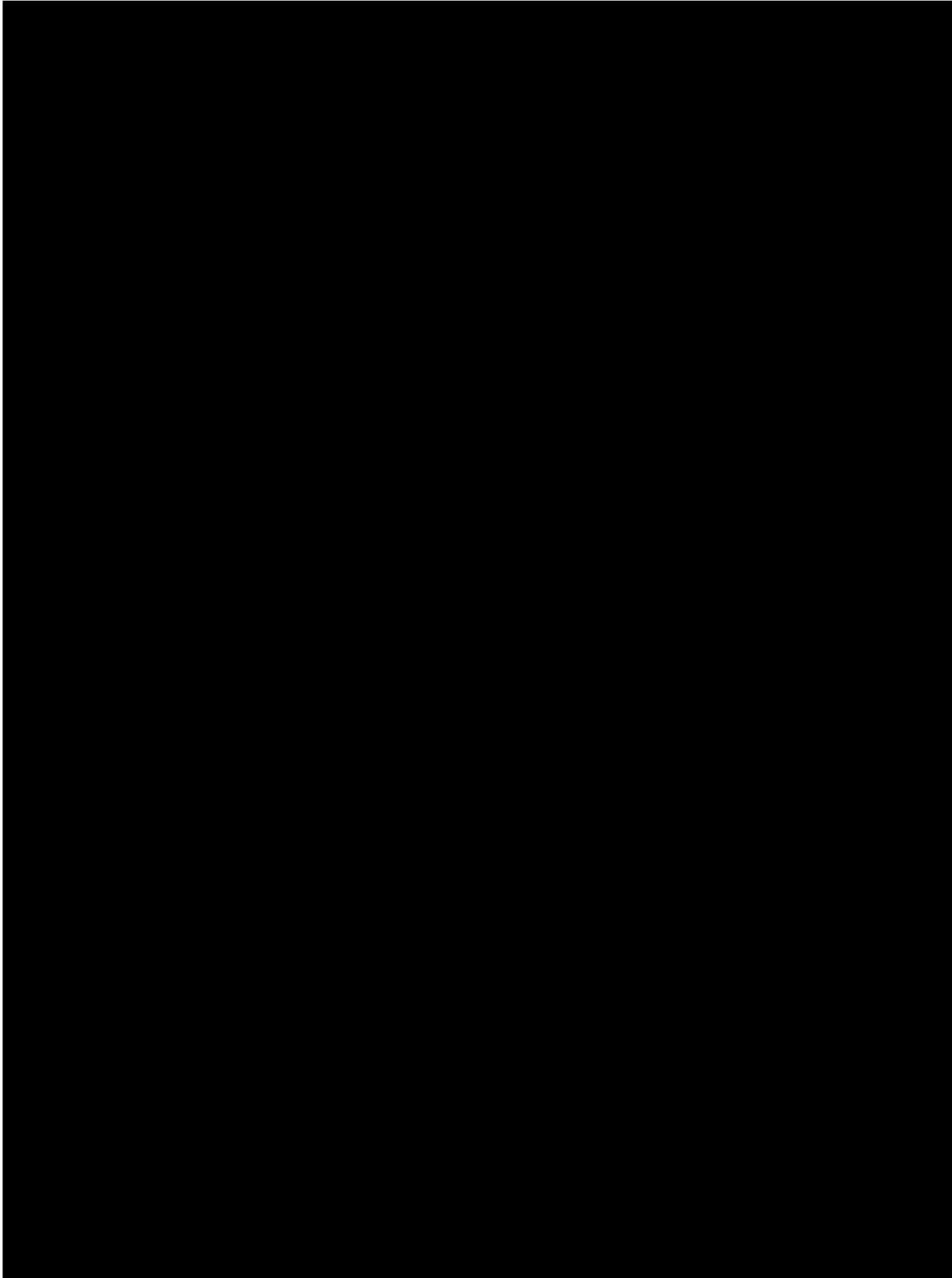














# ATTACHMENT F

UNCLASSIFIED//FOR PUBLIC RELEASE

BUMED IH work wrap-up email ATT F (UNCLASSIFIED).txt  
From: [REDACTED] CAPT JTFGTMO/CSG [REDACTED]  
Sent: Monday, January 14, 2013 12:35 PM  
To: 'Mayberry, Karen E COL OSD OMC Defense'; Broyles, Bryan Mr OSD OMC Defense  
Cc: [REDACTED] CAPT USSOUTHCOM JTFGTMO; Lebowitz, Michael J CPT OSD OMC Prosecution; [REDACTED] CAPT USSOUTHCOM JTFGTMO; [REDACTED]; Ruiz, Walter B, CDR OSD OMC Defense; [REDACTED] LCDR USSOUTHCOM JTFGTMO; [REDACTED] V CIV OSD OMC Convening Authority; Connell, James G III CIV OSD OMC Defense; [REDACTED]; [REDACTED] n, David III GySgt OSD OMC Defense; [REDACTED]; [REDACTED] J CAPT USSOUTHCOM JTFGTMO; MICHAEL5; Sachs, Kenneth LtCol OSD OMC Prosecution; Martins, mark; Lebowitz, Michael J CPT OSD OMC Prosecution; Hill, Karen D CAPT OSD OMC Defense; Bormann, Cheryl T CIV OSD OMC Defense; Hennessy, William T MAJ OSD OMC Defense; [REDACTED] Mrs. OSD OMC Convening Authority; Hatcher, James LCDR OSD OMC Defense; Sachs, Kenneth LtCol OSD OMC Prosecution; Bradley, Ada SGT OSD OMC Defense; [REDACTED] 1st LT USSOUTHCOM JTFGTMO; [REDACTED] 2Lt USSOUTHCOM JTFGTMO; [REDACTED] LtCol USSOUTHCOM JTFGTMO; [REDACTED] CAPT COMUSNAVSO/C4F'; [REDACTED] CIV USSOUTHCOM/SCJ4 (L); [REDACTED] COMUSNAVSO-C4F MYPT\_MEDICAL; [REDACTED] Captain N093, N931; [REDACTED] RDML OPNAV, N093  
Subject: BUMED IH work wrap-up (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: FOUO

Good morning.

The IH and Occ Health Dr left GTMO on Sunday following a delay of 24hrs hand carrying air samples obtained while on island. They have FEDEXed the samples to the lab today and the plan is to provide an electronic and hard copy of the final assessment of AV29/34 and ELC-3 to me during the week of 21 Jan ahead of the 28 Jan hearings. Once I receive the electronic copy I will forward to all on this mail. There has been no change in their assessment of the buildings they are still habitable. They complimented the BEEF on a very thorough cleaning and sealing of openings outside and inside the various offices.

They did comment that some issues they observed in Oct/Nov on their first trip were still evident. This includes a geedunk on the 2nd deck of AV29 with snacks not in plastic containers and an office in the defense spaces on the 1st deck of AV29 with an open bag of pet food lying on the floor. They also observed a weber type charcoal grill inside of ELC3. Their recommendations are to enclose all food products inside of a hard plastic container and remove the grill to the outside.

IRT the below email I checked with the BEEF and all maintenance items have been completed and there are no outstanding issues open in their tracking system.

R

[REDACTED]  
Captain, USN  
Director, CLOe, JTF-GTMO  
DSN: [REDACTED]  
COMM: [REDACTED]  
CELL: [REDACTED]  
NIPR: [REDACTED]  
SIPR: [REDACTED]

-----Original Message-----

From: Mayberry, Karen E COL OSD OMC Defense [REDACTED]  
Sent: Tuesday, January 08, 2013 9:24 AM

Page 1

UNCLASSIFIED//FOR PUBLIC RELEASE

BUMED IH work wrap-up email ATT F (UNCLASSIFIED).txt  
To: [REDACTED] F CAPT JTFGTMO/CSG; Broyles, Bryan Mr OSD OMC Defense  
Cc: [REDACTED] CAPT USSOUTHCOM JTFGTMO; Lebowitz, Michael J CPT OSD OMC  
Prosecution; [REDACTED] CAPT USSOUTHCOM JTFGTMO;  
[REDACTED]; Ruiz, Walter B, CDR OSD OMC Defense; [REDACTED]  
[REDACTED] LCDR USSOUTHCOM JTFGTMO; [REDACTED] V CIV OSD OMC Convening  
Authority; Connell, James G III CIV OSD OMC Defense; Cintron, David III GySgt  
OSD OMC Defense; [REDACTED]; [REDACTED] CAPT USSOUTHCOM JTFGTMO;  
Lebowitz, Michael; Sachs, Kenneth LtCol OSD OMC Prosecution; [REDACTED];  
Lebowitz, Michael J CPT OSD OMC Prosecution; Hill, Karen D CAPT OSD OMC  
Defense; Bormann, Cheryl T CIV OSD OMC Defense; Hennessy, William T MAJ OSD  
OMC Defense; [REDACTED] Mrs. OSD OMC Convening Authority; Hatcher, James  
LCDR OSD OMC Defense; Sachs, Kenneth LtCol OSD OMC Prosecution; Bradley, Ada  
SGT OSD OMC Defense; [REDACTED] 1st LT USSOUTHCOM JTFGTMO; [REDACTED]  
[REDACTED] 2Lt USSOUTHCOM JTFGTMO; [REDACTED] LtCol USSOUTHCOM JTFGTMO  
Subject: RE: IH work (UNCLASSIFIED)

Good Morning -- thank you for the update. In speaking to CAPT Hill last night, she indicated that there was a report filed of a broken thermostat in the ELC towards the end of last year. In November we were told that a replacement thermostat was on order. We will get the word out to the teams to keep the thermostats at 72 during non-occupancy of the spaces, but I do believe we need to resolve the issue of whether or not all of the equipment is operational. Since CAPT Hill is on island, she can provide follow on details WRT the previously identified thermostat malfunction.

Karen E. Mayberry, Col, USAF  
Chief Defense Counsel  
Military Commissions  
1620 Defense Pentagon, Room 3B688  
Washington, D.C. 20301-1620  
(703) 588-0105  
Bberry: (703) 470-2747

-----Original Message-----

From: [REDACTED] CAPT JTFGTMO/CSG [REDACTED]  
Sent: Tuesday, January 08, 2013 8:57 AM  
To: Mayberry, Karen E COL OSD OMC Defense; Broyles, Bryan Mr OSD OMC Defense  
Cc: [REDACTED] SSOUTHCOM JTFGTMO; Lebowitz, Michael J CPT OSD OMC  
Prosecution; [REDACTED] CAPT USSOUTHCOM JTFGTMO;  
[REDACTED]; Ruiz, Walter B, CDR OSD OMC Defense; [REDACTED]  
[REDACTED] LCDR USSOUTHCOM JTFGTMO; [REDACTED] CIV OSD OMC Convening  
Authority; Connell, James G III CIV OSD OMC Defense; Cintron, David III GySgt  
OSD OMC Defense; [REDACTED]; [REDACTED] CAPT USSOUTHCOM JTFGTMO;  
Lebowitz, Michael; Sachs, Kenneth LtCol OSD OMC Prosecution; Martins, Mark S  
BG Chief Prosecutor Military Commissions; Lebowitz, Michael J CPT OSD OMC  
Prosecution; Hill, Karen D CAPT OSD OMC Defense; Bormann, Cheryl T CIV OSD OMC  
Defense; Hennessy, William T MAJ OSD OMC Defense; [REDACTED] Mrs. OSD OMC  
Convening Authority; Hatcher, James LCDR OSD OMC Defense; Sachs, Kenneth LtCol  
OSD OMC Prosecution; Bradley, Ada CTR OMC South Defense; [REDACTED] 1st  
LT USSOUTHCOM JTFGTMO; [REDACTED] D.2Lt USSOUTHCOM JTFGTMO; [REDACTED]  
[REDACTED] LtCol USSOUTHCOM JTFGTMO  
Subject: IH work (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: FOUO

Good morning.

The BUMED personnel began their efforts in ELC-3 yesterday afternoon. As they  
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BUMED IH work wrap-up email ATT F (UNCLASSIFIED).txt began their assessment of ELC-3 they identified wide variances with the room temperatures, some room thermostats were set to 66 degrees. Their recommendation is to leave all thermostats set no lower than 72 degrees, the reasoning is lower temperatures will cause condensation to occur, which then could lead to mold. One of ELC-3's A/C units (there are 2) was not operating and was blowing warm air due to a Freon leak. The breakdown happened sometime between the last OMC-D visit and yesterday, no reports were made to the BEEF during this timeframe. A suggestion made by the BUMED folks was during long periods of non-use a periodic walk through of the spaces to identify and report maintenance issues.

The plan today is to wrap up ELC3 and tackle AV29.

R

[REDACTED]  
Captain, USN  
Director, CLOe, JTF-GTMO  
DSN: [REDACTED]  
COMM: [REDACTED]  
CELL: [REDACTED]  
NIPR: [REDACTED]  
SIPR: [REDACTED]

Classification: UNCLASSIFIED  
Caveats: FOUO

Classification: UNCLASSIFIED  
Caveats: FOUO

# ATTACHMENT G

RE Assessment of work spaces ATT G.txt

From: Bormann, Cheryl T CIV OSD OMC Defense [REDACTED]  
 Sent: Friday, November 02, 2012 1:37 PM  
 To: MICHAEL5  
 Cc: Martins, Mark S BG Chief Prosecutor Military Commissions; Mayberry, Karen E COL OSD OMC Defense; Broyles, Bryan Mr OSD OMC Defense; Hill, Karen D CAPT OSD OMC Defense; [REDACTED] CTR OSD OMC; Hatcher, James LCDR OSD OMC Defense; Hennessy, William T MAJ OSD OMC Defense; O'Brien, Terry A LtCol OSD OMC; Orr, Timothy D SSG OSD OMC Defense; Schwartz, Michael A Capt OSD OMC Defense; [REDACTED] Tindal, Cassandra L TSgt OSD OMC Defense  
 Subject: RE: Assessment of work spaces  
 Signed By: [REDACTED]

CPT Lebowitz,

Thank you for responding to my email. You correctly point out that CAPT [REDACTED] and CAPT [REDACTED] are board certified in the appropriate fields to enable them to assess the work space environments. That having been said, our agreement required that we be provided the information regarding these consultants prior to their engagement and that we be consulted in scheduling the necessary inspection. You informed me, and consequently the court, that the above working scenario would be handled in a forthright fashion and that CAPT [REDACTED] was to be the POC. I was never informed of the selected consultants before they landed in Guantanamo and nobody attempted to schedule the physical assessment with me. To this date, CAPT [REDACTED] has refused to answer any of my emails on this topic.

Because I have yet to get a response from CAPT [REDACTED] or either of the consultants, we have no one in place at the base to assist in the building assessments. Had I been informed of the arrival of and schedule for Captains [REDACTED] and [REDACTED] in advance, it is likely we could have scheduled defense personnel in Guantanamo before this Monday. Unfortunately, CAPT [REDACTED] has failed to respond to my requests for information and Captains [REDACTED] and [REDACTED] have followed suit. As you may know, OMC requires 72 hours advance notice to approve travel and to ticket staff, so getting somebody down there tomorrow is out of the question.

Had you informed me of the final selection of the consultants before they were in Guantanamo, we could have coordinated the timing. Had CAPT [REDACTED] informed me or the Chief Defense Counsel of the selection of CAPT [REDACTED] and CAPT [REDACTED] we could have worked to coordinate timing. Had CAPT [REDACTED] responded to my or Col Mayberry's email requests for more information, we could have coordinated timing. There appears to be a common theme developing here: the complete refusal of the prosecution and JTF-GTMO to relay to us any of the information needed to facilitate an adequate assessment.

Maj Hennessy, LCDR Hatcher and CAPT Hill will land in Guantanamo Monday afternoon. They can meet with the consultants as soon as they get through the red carpet procedure. They are available the rest of the day Monday, all day Tuesday after noon, and all day Wednesday. If the consultants take the OMC flight to Andrews on Friday, Maj Hennessy, LCDR Hatcher and CAPT Hill can provide assistance all day Thursday as well. Of course, this can only happen if JTF-GTMO provides access to the consultants when the defense people land on Monday. We have yet to hear from CAPT [REDACTED], CAPT [REDACTED] or CAPT [REDACTED].

I am disappointed that our attempt to work out an agreed resolution has become such a headache, and I am concerned about the lack of professional courtesy extended to myself and Col Mayberry. At this point, I can only hope that the lack of professionalism does not infect the opinions of Captains [REDACTED] and [REDACTED]. Please let me know if you hear from CAPT [REDACTED] or either of the consultants. Thank you.

Cheryl T. Bormann  
 Learned Defense Counsel  
 Office of the Chief Defense Counsel  
 Office: 703-588-0428  
 Blackberry: 571-286-0226

[REDACTED] RE Assessment of work spaces ATT G.txt

MAILING ADDRESS ONLY:  
Office of Military Commissions  
Office of Chief Defense Counsel  
1620 Defense Pentagon  
Washington, DC 20301-1620

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From: [REDACTED] [mailto:[REDACTED]]  
Sent: Thursday, November 01, 2012 3:15 PM  
To: [REDACTED] Off-site; [REDACTED] Off-site; [REDACTED];  
Bormann, Cheryl T CIV OSD OMC Defense  
Cc: Martins, Mark S BG Chief Prosecutor Military Commissions  
Subject: Assessment of work spaces

Ms. Bormann,

I wanted to contact you directly in order to ensure that we are on the same page as the inspection and cleanup project in AV 34/29/ELC moves forward. Based on your email sent this afternoon, I believe we are.

As promised during our October hearing, the government identified board certified experts, including an MD, to begin the inspection and cleanup process beginning the week after the October Nashiri hearings. As represented to the court, the experts were on island and available to begin the inspection process during the agreed-upon timeline. The Chief Defense Counsel confirmed that the defense is comfortable with the qualifications of the government-identified experts in this field. However, Col Mayberry prohibited defense paralegal LNC [REDACTED] from escorting the experts into defense spaces in order to conduct the inspection. The prosecution is committed to ensuring that this inspection and cleanup process move forward promptly, as health and safety are vitally important. As such, as you also indicated in your email, I would like to prevent any further delays while also ensuring that the process can be conducted in a proper and professional manner.

As you know, the experts have been on island for about a week. They have inspected some facilities; however, they did not enter defense spaces per Col Mayberry's reservations. The prosecution believes that it is reasonable for defense personnel to provide the experts with information detailing health effects and observations within the facilities. In fact, I believe you have already provided the experts with some detailed information via email and also through court filings on this topic. In addition, Col Mayberry stated that

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RE Assessment of work spaces ATT G.txt  
CAPT Hill was expected to provide a written report by today.

The experts are highly sought-after professionals, and they will perform their mission as long as needed to assess the safety of the spaces. At the same time, however, we should all of course work together in order to manage their time wisely and efficiently. In this case, we have been successful in keeping the experts on island until next Thursday to accommodate the altered inspection schedule, with the added expectation that defense personnel will permit the experts to enter the defense spaces. Saying that, is it possible for defense personnel who wish to meet personally with the experts to arrange to travel on Saturday's rotator? This will accommodate the defense's proposed process along with the experts. As an alternative, once the experts are provided with all defense input by Friday, is it possible for LNC [REDACTED] to escort the experts into the defense spaces? Then on Monday at 1600, CAPT Hill and counsel can meet with the experts, receive information based on their inspection of defense spaces, and potentially engage with counsel/CAPT Hill on pinpointed trouble areas, etc.

The prosecution seeks to work with you to reasonably accomplish this important goal. Please feel free to let me know if you have any questions or concerns.

v/r

MICHAEL J. LEBOWITZ

Captain, USA

Prosecutor, Office of Military Commissions

(703) 556-5054 (office)

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