

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

<p>UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 488E (GOV) /AE 502C (GOV)</p> <p>Government Consolidated Response To Defense Motions To Dismiss For Lack of Personal Jurisdiction Due to the Absence of Hostilities and to Mr. Ali’s Notice of Declination of Joinder and Motion to Consider Other Arguments or For Other Relief Regarding AE 488 (MAH)</p> <p>28 April 2017</p>
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1. Timeliness

The Prosecution timely files this Response pursuant to AE 488-9 (RUL)(GOV).

2. Relief Sought

Mr. Hawsawi is the proponent of the instant motion and requests that the Military Commission dismiss this case for lack of personal jurisdiction because the Accused are not “unprivileged enemy belligerents” over whom this Commission has personal jurisdiction. *See* AE 502 (MAH) at 1. His challenge lies in a claim that “the absence of hostilities deprives the Commission of personal jurisdiction.” AE 502 (MAH) at 2.

As to his co-Accused, Mr. Mohammad and Mr. Ali have filed a seven page joint notice of declination of joinder¹ and motion to consider other arguments or for other relief wherein they both request that “the Military Commission find that the government carries the burden of proving personal jurisdiction relating to hostilities.” *See* AE 502B (KSM, AAA) at 1. Mr. Ali has also filed a 17-page substantive pleading of Notice of Declination of Joinder and Motion to Consider Other Arguments or For Other Relief Regarding AE 488 (MAH), wherein he

¹ The Defense has also requested that the Commission grant Mr. Ali’s request in AE 488-1 (MFL)(AAA) to extend time to file his position until discovery is complete.

acknowledges that the decision by the United States Court of Military Commissions Review in *United States v. al Nashiri*, 191 F. Supp. 3d 1308 (CMCR 2016), forecloses a challenge to subject matter jurisdiction, but nonetheless advocates for a pre-trial hearing challenging personal jurisdiction for a lack of hostilities, which is what Mr. Hawsawi's motion in AE 502 (MAH) actually focuses on. *See* AE 488D (AAA). The legal arguments presented by Mr. Hawsawi and Messrs. Ali and Mohammad are not the same, nor is the requested relief the same.

Mr. Bin 'Attash has declined joinder to this motion. *See* AE 502A(WBA). Mr. Binalshibh has not declined joinder and is presumed to have joined the motion. As such, the Prosecution hereby files a consolidated response to AE 502 (MAH), AE 502A (KSM, AAA) and AE 488D (AAA).²

The Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities should be denied. Should the Military Judge find that the issue of the existence of hostilities, as it applies to a personal jurisdictional challenge, is a mixed question of law and fact, requiring proof by the Prosecution, pre-trial, to establish the existence of hostilities for purposes of establishing jurisdiction over Messrs. Hawsawi, Binalshibh, Mohammad and Ali, the Prosecution requests the Commission consider Appellate Exhibit 119G, Attachments 2 through 94 (excepting Attachments 76 through 87, which are specific to Mr. Bin 'Attash), originally filed on 13 November 2013, to both establish the existence of hostilities and the four Accused's statuses as Alien Unprivileged Enemy Belligerents.

² The Prosecution shares the Defense counsel concerns (raised on the record during the March 2017 hearings) regarding the new court rules requiring the Defense to file a motion for leave to unjoin a motion, and then allowing for counsel to still present additional legal arguments in that motion for leave. It very quickly becomes unclear to the Prosecution what is required to be substantively responded to, or when the due dates would be, and the change has the effect of causing the Prosecution to have to answer multiple related motions, with multiple filings, and multiple deadlines. In regard to this motion series, it has also caused different legal arguments to be advanced in different motions that are, in the Prosecution's view, inextricably inter-twined (the non-joinder arguments in AE 488 were legal arguments made in the AE 502 series). This rule change will also cause more requests for consolidated responses, such as this one, and more requests for extensions to respond. A return to the old rule, which allowed the Defense to simply supplement another counsel's motion, wherein they could indicate that they did not join part of the argument, or could advance a separate argument, and which allowed for the Prosecution to simply respond once to the various legal issues raised by the various counsel, two weeks after the last supplement was filed, is preferred.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief, specifically dismissal of the charges due to a lack of hostilities at the pre-trial phase, is warranted in light of the CMCR's decision in *United States v. al Nashiri*. See R.M.C. 905(c)(1)-(2).

To the extent the motion seeks dismissal, and the Military Judge determines that a challenge to jurisdiction based on the existence of hostilities is not a matter of law, the Prosecution bears the burden of demonstrating hostilities by a preponderance of the evidence. See R.M.C. 905(c)(2)(B).

4. Facts

On September 11, 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. After the hijackers killed or incapacitated the airline pilots, a pilot-hijacker deliberately slammed American Airlines Flight 11 into the North Tower of the World Trade Center in New York, New York. A second pilot-hijacker intentionally flew United Airlines Flight 175 into the South Tower of the World Trade Center. Both towers collapsed soon thereafter. Hijackers also deliberately slammed a third airliner, American Airlines Flight 77, into the Pentagon in Northern Virginia. A fourth hijacked airliner, United Airlines Flight 93, crashed into a field in Pennsylvania after passengers and crew fought to reclaim control of the aircraft. As a result of these attacks, 2,976 people were murdered, and numerous other civilians and military personnel were injured.

On 31 May 2011, charges of Conspiracy, Attacking Civilians, Attacking Civilian Objects,³ Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, Terrorism, and Intentionally Causing Serious Bodily Injury were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi by an Army

³ Attacking Civilian Objects and Destruction of Property in Violation of the Law of War were later dismissed by the Military Commission in AE 251J. The United States is currently appealing this decision to the United States Court of Military Commissions Review.

Warrant Officer subject to the Uniform Code of Military Justice alleging the charges were true to the best of his belief. These charges are all enumerated offenses contained in the Military Commissions Act of 2009 (“M.C.A.”). All of the sworn charges allege that the five Accused named in the charge sheet are persons subject to trial by military commission as Alien Unprivileged Enemy Belligerents (“AUEBs”). All of the sworn charges allege that the Accused’s conduct was committed in the context of, and associated with, hostilities.

On 4 April 2012 sworn charges were all referred jointly to this capital Military Commission. All referred charges allege that the five Accused named in the charge sheet are persons subject to trial by military commission as Alien Unprivileged Enemy Belligerents. All of the referred charges allege that the Accused’s conduct was committed in the context of, and associated with, hostilities.

5. Law and Argument

I. Congress Has Already Determined That Hostilities Existed with Al Qaeda Prior to September 11, 2001 for Purposes of Jurisdictional Challenges

The Defense claims that Mr. Hawsawi cannot be an “unprivileged enemy belligerent” under any part of the definition set forth in the Military Commissions Act unless hostilities existed at the time of his alleged conduct. *See* AE 502 (MAH) at 4. This statement is not accurate for purposes of establishing jurisdiction over the Accused under the Military Commissions Act of 2009 (“M.C.A.”).

When the jurisdictional question faced by the Commission is solely as to whether hostilities existed on September 11, 2001 (the date of the charged offenses), Congress and the President have already decided the issue, and the Commission should give “wide deference” to the political branches. Title 10 U.S.C. § 948d is entitled, “Jurisdiction of military commissions,” and provides for both personal and subject-matter jurisdiction as follows:

A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, whether such offense was committed before, on, or after September 11, 2001, A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

10 U.S.C. § 948d.

As set forth in the Military Commissions Act of 2009, any Alien Unprivileged Enemy Belligerent (“AUEB”) is subject to trial by a military commission. *See* 10 U.S.C. § 948c. This military commission may exercise jurisdiction over Alien Unprivileged Enemy Belligerents for violations of the law of war and other offenses triable by military commission. *See* 10 U.S.C. §948b(a). An “Alien” is defined as an individual who is not a citizen of the United States. *See* 10 U.S.C. § 948a(1). An “Unprivileged Enemy Belligerent” is defined as an individual (other than a privileged belligerent) who has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; *or* was part of al Qaeda at the time of the alleged offense. *See* 10 U.S.C. § 948a(7) (emphasis added).

The very fact that Congress has identified three different, and distinct, manners by which a person could have the status of an Alien Unprivileged Belligerent, with one of them simply establishing the individual as a part of al Qaeda at the time of the offense, belies the Defense argument that the Prosecution has the burden of establishing the existence of hostilities to establish an individual as an AUEB. Proving that the Accused was a part of al Qaeda on September 11, 2001 is sufficient, under the Act, to establish jurisdiction over the Accused. Proving that al Qaeda was engaged in hostilities with the United States, for purposes of jurisdiction, is not necessary under a plain reading of the M.C.A.

Contrary to Mr. Ali’s claims, the reference to “the timing of the offense” in 10 U.S.C. § 948a(7)(C) does not operate “to incorporate the separate § 950p(c) hostilities requirements into personal jurisdiction.” *See* AE 502B (KSM, AAA) at 3 n.13. Recognizing the inherently fatal flaw in its motion, Messrs. Mohammad and Ali seek to bury their acknowledgment that

subsection (c) has no such “hostilities” requirement in a footnote, and requests that the Commission read language into the subsection that Congress did not draft, despite Congress explicitly using the term “hostilities” right above it in the other two subsections of § 948a(7) of the M.C.A.

“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (U.S. 1980). If Congress had intended to incorporate a specific requirement to establish the existence of hostilities for members of al Qaeda in order to establish jurisdiction over them, it could have explicitly done so in 10 U.S.C. § 948a(7)(c). Congress did no such thing. *See GTE Sylvania, Inc.*, 447 U.S. at 109 (“If Congress had intended to exclude FOIA disclosures from § 6(b)(1) it could easily have done so explicitly in this section as it did with respect to the other listed exceptions.”). The reasoning behind this omission is clear: Congress had already determined that hostilities existed with al Qaeda prior to September 11, 2001 when it passed the M.C.A.

It is important to note that the Military Commissions Act of 2009 confers jurisdiction to prosecute various types of Alien Unlawful Enemy Belligerents engaged in hostilities with the United States, and does not exist solely for the prosecution of al Qaeda members. However, specifically in regard to al Qaeda, Congress has already determined that hostilities existed between al Qaeda and the United States before, on, and after September 11, 2001, as set forth in the jurisdictional section of the Act. *See* 10 U.S.C. § 948d (“A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . whether such offense was committed before, on, or after September 11, 2001 . . .”).

While the Prosecution’s evidence will establish that the various Accused, as principals to the attacks of September 11, 2001, “engaged in hostilities against the United States or its coalition partners and purposefully and materially supported hostilities against the United States

or its coalition partners,” the evidence will also establish that the Accused were all acting as “part of al Qaeda at the time of the alleged offense.” As the latter does not require the Prosecution to establish the existence of hostilities at a jurisdictional hearing, pre-trial, the Defense motion alleging that the Prosecution must prove the existence of hostilities with al Qaeda in a pre-trial hearing must fail.

II. Another Military Commission Has Determined That the Existence of Hostilities For Purposes of a Motion to Dismiss for Lack of Jurisdiction is a Question of Law, and that the Determination by Congress and the President that Hostilities Existed Prior to September 11, 2001 Should Be Afforded Wide-Deference.

Although not binding on this Military Commission, the military commission case of *United States v. al Nashiri* also considered, and denied, a motion to dismiss based on an assertion that the commission lacked jurisdiction due to a claimed “lack of hostilities in Yemen in 2000.” See *United States v. al Nashiri*, AE 104F (Order) (Pohl, J). In denying the motion, the Commission found:

Congress, with the President's concurrence, has impliedly made a political judgment regarding the existence of hostilities through its recognition of military commissions as a forum for adjudication of violations of the laws of war occurring “before, on, or after September 11, 2001” 2009 MCA, § 948d. Implicit in a plain-meaning reading of this statutory language is Congress' recognition of the fact that violations of the law of war might have occurred during a state of hostilities existing prior to the attacks of September 11, 2001, and the United States Government had simply been slow to recognize the existence of a state of hostilities then existing between the United States and Al Qaeda and its affiliates and franchises. To wit, in World War II, hostilities began the moment the first bomb was dropped on Pearl Harbor, not the next day when Congress declared war.

Id. at 2-3.

The *al Nashiri* Commission went on to further find that the question of proving hostilities at trial, and the question of proving hostilities for purposes of jurisdiction, were different standards, with differing burdens:

Whether hostilities existed between Al Qaeda and the United States on the dates of the accused's alleged acts is a question of fact and an element of proof, which must be carried by the government.

Whether hostilities existed between Al Qaeda and the United States on the dates of the accused's alleged acts is a jurisdictional question subject to purely legal determination under a "wide deference" standard.⁴

Id. at 5.

Having further found that the political branches made a determination that hostilities existed between al Qaeda and the United States prior to September 11, 2001 and on the dates of the alleged offenses, as evidenced by the passage of the 2009 M.C.A., the referral of charges in the case, and the litigation of the case since arraignment; the Commission found that the political branches' collective determination that hostilities with al Qaeda existed before September 11, 2001 was entitled to judicial deference. *See id.* at 5-6.

III. The CMCR's Decision in *United States v. Al Nashiri* Forecloses the Military Judge From Requiring the Prosecution to Establish the Existence of Hostilities Pre-Trial For a Challenge to Jurisdiction Because It is An Element of the Offense

Although specifically dealing with a challenge regarding whether proof of offenses alleged to have taken place in the context of and associated with hostilities would be required to be proven pre-trial, the CMCR's decision in *United States v. al Nashiri* forecloses the Military Judge from requiring the Prosecution to prove the existence of hostilities in a pre-trial jurisdictional hearing as it is an element of the offense. *See* 191 F. Supp. 3d 1308 (CMCR 2016).

Mr. Ali erroneously claims that the United States Court of Military Commissions Review has held that a challenge to the defendant's nexus to hostilities sounds in jurisdiction over the person rather than jurisdiction over the offense. *See* AE 488D (AAA) at 1. The CMCR made no such finding. At most, the CMCR determined, *arguendo*, that even if the element "in the context of and associated with hostilities" were jurisdictional, the issues should be determined at trial.

⁴ The *al Nashiri* Commission, citing to *Al-Bihani v. Obama*, 590 F.3d 866, 874-875 (D.C. Cir. 2010), held that under the "wide deference" standard, the two political branches' collective determination, evidenced by passage of the statute and its signing into law, that hostilities with al-Qaeda in Yemen commenced prior to the date of the first act charged against the accused in that case was entitled not to be second-guessed by the judiciary. The Commission found that, as the political branches have authority to determine when hostilities have ceased, so must they have corollary authority to determine when hostilities began. *See* AE 104F.

See al Nashiri, 191 F. Supp. 3d at 1325 (“Assuming arguendo that if an offense ‘committed in the context of and associated with hostilities’ could be construed as a ‘jurisdictional element,’ we concur with those courts holding that when the jurisdictional requirement is also a substantive element of the offense, the issue should be determined at trial.”).

Although the CMCR determined that “subject matter jurisdiction was not implicated” by the Defense motion, *see id.* at 1314, and that the Military Judge did not cite to the absence of personal jurisdiction over the offenses for his rationale in dismissing the charges, at no time did the CMCR indicate that “nexus to hostilities sounds in jurisdiction over the person,” as the Defense claims. Further, the CMCR found, contrary to what the Defense seeks in the instant motion, that even if personal jurisdiction were implicated, any motion challenging jurisdiction should be reserved for resolution until after the merits:

The two types of procedures used in courts-martial for pretrial resolution of issues pertaining to personal jurisdiction and unlawful orders support that, here, absent concurrence by both parties, the required approach to use in determining whether the offense is committed "in the context of and associated with hostilities," is to reserve it for resolution until after the government has presented all of the evidence on the merits. Based on our analysis of Supreme Court jurisprudence, and both federal and military case law, we conclude that the military judge is foreclosed from requiring the government to prove an element of the offense prior to the presentation of evidence on the merits.

Id. at 1320.

The Prosecution hereby asserts that the September 11, 2001 attacks that killed the 2,976 people listed in Appendix A to the charge sheet were the very hostilities that the Accused, all of whom were part of al Qaeda, engaged in and supported. The existence of hostilities is, without question, an element of the offenses that the Prosecution must prove beyond a reasonable doubt at trial. However, the remaining definitional portions of who shall be considered an Alien Unlawful Enemy Belligerent for purposes of jurisdiction are not elements of the offense. For example, while certain evidence at trial may establish the below facts, the Prosecution is not required to prove, as an element of any of the offenses, the Accused’s “alienage” at trial on the merits; that the Accused was a member of al Qaeda at the time of the offenses; that the Accused

engaged in hostilities against the United States or its coalition partners; or, that the Accused purposefully and materially supported hostilities against the United States or its coalition partners. But the Prosecution must prove the existence of hostilities as an element of the offense, and therefore is not required to prove the existence of hostilities pre-trial per the CMCR's decision in *United States v. al Nashiri*.

All five Accused proudly took credit for their roles in the attacks of September 11, 2001 in a *sua sponte* filing during a military commission in 2008, which alone establishes, by a preponderance of the evidence, that the charged Accused engaged in hostilities or purposefully and materially supported hostilities against the United States. See AE 119G, Attachment 94. But the question of their involvement in, or material support of, those hostilities is not the issue before the Commission in the AE 502 motion series. The Defense motions in AE 502 (MAH) and AE 502B (KSM, AAA) challenge personal jurisdiction based solely on a lack of hostilities (i.e. there can be no belligerency, because as a matter of law, there were no hostilities). There is no current challenge to other aspects of the Accused's AUEB status that may be capable of determination before the general issue.⁵ The Defense have not properly challenged, in a motion to dismiss for lack of jurisdiction under R.M.C. 907(b), that the Accused were not part of al Qaeda, or that they did not support the attacks of September 11, 2001. Instead, the Defense argument, at this point in the litigation, is that the September 11, 2001 attacks did not legally constitute hostilities, and therefore, if there were no hostilities, the Accused could not have belligerents. While that position is not legally supportable per the above cited case-law, it cannot be that the Defense can simply change the words "subject matter jurisdiction" from its filing in AE 488 to "personal jurisdiction," in its filings in AE 502, and the Prosecution would now again be required to prove the existence of the hostilities prior to trial; but that is exactly what they are

⁵ Mr. Ali, in a motion to unjoin AE 488, states, for purposes of the record, that at no time did he engage in or purposefully and materially support hostilities against the United States or its coalition partners, and was not a part of al Qaeda at the time of the alleged offenses. However, there is no current motion to dismiss pursuant to R.M.C. 907(b) making that claim, or challenging his AUEB status other than as it is implicated by a claimed "lack of hostilities." See AE 488D (AAA).

asking the Commission to require. Such a reading of the CMCR's decision in *al Nashiri* would completely defeat the intent of the opinion, and the policy behind allowing the Prosecution to prove its case at trial, without requiring it to have to prove it twice.

If the Military Judge determines that the question of the existence of hostilities, in a motion to dismiss for a lack thereof, is no longer a matter of law for him to decide (as he so decided in the military commission case of in *United States v. al Nashiri* (AE 104F)), then the Prosecution requests the Commission find that it is foreclosed from requiring the Prosecution to prove the existence of hostilities prior to trial on the merits pursuant to the CMCR's decision in *al Nashiri*. Finally, if the Commission determines that the CMCR's decision in *al Nashiri* is not controlling on this issue, the Prosecution nonetheless requests that the Military Judge still find good cause and determine that this motion be deferred until after trial of the general issue pursuant to R.M.C. 905 (c)(2)(D).⁶ *See al Nashiri*, 191 F. Supp. at 1311.

IV. If The Military Judge Determines That a Pre-Trial Hearing to Determine the Accused's AUEB Status is Warranted Because the Accused Have Properly Challenged Their Belligerent Status Based on a Lack of Hostilities (or Otherwise) the Military Judge Should Consider the Following Proffers and Accompanying Evidence to Determine The Commission Has Jurisdiction

It is true that in 2013, in its reponse to a Defense motion to dismiss for lack of an Article 5 hearing, the Prosecution indicated that it would prove the existence of hostilities between al Qaeda and the United States for purposes of jurisdiction. *See* AE 488D (AAA) at 14. That offer pre-dated the CMCR's decision in *United States v. al Nashiri* in 2016 and the Prosecution is no longer required to do so. However, should the Military Judge disagree, and decide to hold a jurisdictional hearing based on the filings in the AE 502 motion series, a military commission convened under the Military Commissions Act of 2009 is a competent tribunal to make a finding sufficient for jurisdiction. *See* 10 U.S.C. § 948d; R.M.C. 202(c). If jurisdiction is challenged, the Military Commission Act contemplates jurisdiction being established by evidence being

⁶ The "general issue" has been defined as "evidence relevant to the question of guilt or innocence." *See United States v. al Nashiri*, 191 F. Supp. 3d 1308, 1323 (CMCR 2016) (quoting *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005)).

presented before the military judge factually establishing that an Accused meets the definition of an Alien Unprivileged Enemy Belligerent. *See United States v. Khadr*, 717 F. Supp. 2d 1215, 1236 (CMCR 2007). Criminal jurisdiction over an Accused who challenges his status is generally a question of law to be decided by the military judge, and is usually resolved only after presentation of evidence supporting jurisdiction, and entry of corresponding findings of fact. *See id.* at 1236 (citations omitted).

The CMCR's decision in the *Khadr* case was interpreting the 2006 Military Commissions Act, which contemplated two different ways to establish jurisdiction, either by a determination of a Combatant Status Review Tribunal ("CSRT") that found an accused was an Alien Unlawful Enemy Combatant⁷; or, by an evidentiary hearing held by the military judge. While the CMCR determined that the CSRT was not an adequate process from which a military commission could determine jurisdiction over an accused, the process the CMCR established for determining jurisdiction was an evidentiary hearing before the military judge.

In fact, while there is no reference at all in the 2006 Military Commissions Act Jurisdictional Section regarding whether a military commission was a competent tribunal to consider its own jurisdiction, the 2009 M.C.A. explicitly added the provision that "a military commission is a competent tribunal to make a finding sufficient for jurisdiction," thereby specifically authorizing and adopting the same process that had been set forth by the CMCR in *Khadr* two years prior. *Compare* 10 U.S.C. § 948d (2006) with 10 U.S.C. §948d (2009). Although such a hearing was never held in the military commission case of *United States v. Khadr*, the process set forth by the CMCR in *Khadr* was utilized in *United States v Hamdan*. *See United States v Hamdan*, Record of Trial, 6 December 2007, at 138.

⁷ The term Alien Unlawful Enemy Combatant in the 2006 M.C.A. was changed to Alien Unprivileged Enemy Belligerent in the 2009 M.C.A. The principal change in definitions is the exclusion of a reference to the Taliban or associated forces in the 2009 M.C.A. The definitions of the two terms are otherwise substantively similar. *Compare* 10 U.S.C. § 948a(1)(i) (2006), with 10 U.S.C. § 948a(7) (2009). This change has no impact on the CMCR's intended process of having a military judge determine jurisdiction if challenged.

V. The Prosecution Will Present Evidence Establishing Jurisdiction Over the Accused In a Jurisdictional Hearing before the Military Judge, as Necessary, By Proving By A Preponderance of the Evidence That Each of the Accused is an Alien Unprivileged Enemy Belligerent.

Since four of the Accused have challenged the Military Commission's jurisdiction at this time, the Prosecution is prepared to prove by a preponderance of the evidence, that jurisdiction exists as to each of the four Accused by proving they are Alien Unprivileged Enemy Belligerents ("AUEBs"). *See* R.M.C. 905(c)(2)(B).

To establish jurisdiction by a preponderance of the evidence over the Accused, the Prosecution must establish that the Accused are Alien Unprivileged Enemy Belligerents. An "Alien" is defined as an individual who is not a citizen of the United States. *See* 10 U.S.C. § 948a(1). An "Unprivileged Enemy Belligerent" is defined as an individual (other than a privileged belligerent) who has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or was part of al Qaeda at the time of the alleged offense. *See* 10 U.S.C. § 948a(7).

The evidence that will establish that each Accused is an Alien Unlawful Enemy Belligerent is, by its nature, some of the very same evidence that will be used in the Prosecution's case-in-chief, but is not, definitionally, limited to only those allegations set forth in the current charge sheet.⁸ *See generally* 10 U.S.C. § 948a(7).

All five accused in this case have been charged as "principals" in the September 11, 2001 attacks on the United States that killed 2,976 people. The Military Commissions Act of 2009 defines a "principal" as,

any person [subject to the Act] who—

⁸ The Prosecution reserves the right to present additional evidence other than that attached to, or referenced within, the instant pleading, that establishes that these five Accused are Alien Unprivileged Enemy Belligerents at any jurisdictional hearing should one occur, including with evidence establishing AUEB status that is not necessarily directly related to the 9/11 attacks.

- (1) commits an offense punishable by [the Act], or aids, abets, counsels, commands, or procures its commission;
- (2) causes an act to be done which, if directly performed by him, would be punishable [under the M.C.A.]; or
- (3) who is a superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

10 U.S.C. §950q.

The M.C.A. section on principals is substantively identical to Article 77(1) of the U.C.M.J. for courts-martial, and, as such, courts-martial decisions interpreting the breadth and scope of Article 77 are instructive to this military commission. *See* 10 U.S.C. § 948b(c). In addition to the definition of a “principal” set forth above, military courts have long interpreted Article 77 to also include punishment under a co-conspirator theory of liability as well:

Although Article 77 [of the U.C.M.J.] does not specifically deal with the vicarious liability of a co-conspirator, we believe that the language of Article 77(1) is broad enough to encompass it Indeed, because the Federal Criminal Code (18 U.S.C. § 2) and the Uniform Code contain almost the same provisions for vicarious liability, it would be anomalous to conclude that only the former sufficed to impose vicarious liability on co-conspirators.

United States v. Jefferson, 22 M.J. 315, 323-24 (C.M.A. 1986); *see also id.* at 323 (“Federal cases have established that a person will be held liable for a substantive offense committed in furtherance of a conspiracy”) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)); *United States v. Browning*, 54 M.J. 1, 7-8 (C.A.A.F. 2000) (concluding that the reasoning in *Jefferson* “is consistent with prevailing federal practice, which permits prosecution on a vicarious-liability theory even if aiding and abetting or conspiracy are not pled in the indictment”).

Based on the theories of liability available to the Prosecution at this military commission, the Prosecution’s evidence regarding the acts of the Accused that will establish the Accused as principals for purposes of the Prosecution’s case-in-chief, will also establish jurisdiction over the Accused as Alien Unprivileged Enemy Belligerents.

VI. The Prosecution Will Prove That Hostilities Existed Between Al Qaeda and the United States At All Times Relevant to the Charges at Trial, and for Purposes of Establishing Jurisdiction

All charges allege that the five Accused in this case are persons subject to trial by military commission as Alien Unprivileged Enemy Belligerents. A “common circumstance” for charges brought under the Military Commission Act of 2009 is that the offenses committed must be committed in the context of and associated with hostilities. *See* 10 U.S.C. § 950p(c). As such, all of the charged offenses in this case have the terminal element that the offense took place in the context of and was associated with hostilities. *See* M.M.C. Part IV, Crimes and Elements, para. 5, *et seq.*

For purposes of any jurisdictional hearing that is held, the Prosecution will prove by a preponderance of the evidence that a state of hostilities existed between the United States and al Qaeda at the time of the offense, as well as the fact that the offenses (the 9/11 attacks) were committed in the context of and associated with those hostilities. Hostilities are defined as “any conflict subject to the laws of war.” *See* 10 U.S.C. § 948a(9). At trial, in its case-in-chief, the Prosecution must prove this element beyond a reasonable doubt.

The Prosecution asserts that the armed conflict between the United States and al Qaeda is an armed conflict subject to the laws of war, and hence, proof of that armed conflict at trial would satisfy the element of the existence of hostilities that is a required element of every charge. The Prosecution further asserts that a state of armed conflict, which was and continues to be subject to the laws of war, has existed between al Qaeda and the United States at all times relevant to the charged conduct. Such proof will also satisfy, for purposes of the jurisdictional hearing, the “hostilities” that the Accused engaged in against the United States. *See* 10 U.S.C. § 948a(7).

At trial the Prosecution will be requesting the following instruction be given to the members on the existence of hostilities:⁹

⁹ The 2009 M.C.A. uses the words “Hostilities”

In determining whether hostilities existed between the United States and al Qaeda, and when it began, you should consider the length, duration and intensity of hostilities between the parties; whether there was protracted armed violence between governmental authorities and organized armed groups; whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect; and any other facts and circumstances you consider relevant to the existence of armed conflict.

The CMCR has held that this instruction is the proper instruction for the members to determine whether an armed conflict exists between al Qaeda and the United States during the charged period. *See United States v Hamdan*, 801 F. Supp. 2d 1247, 1279 n.54 (CMCR June 24, 2011), *rev'd on other grounds, Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012). The CMCR's holding is binding on this military commission. The Military Judge should consider the same definition of hostilities during the jurisdictional hearing, albeit at the lower burden of proof (preponderance of the evidence).

VII. The Prosecution Will Prove the Accused Engaged in Hostilities Against the United States, and How Each Accused Purposefully and Materially Supported Hostilities Against the United States, By Establishing that the Accused's Conduct Took Place in the Context of, and was Associated With, Hostilities.

At trial the Prosecution will be requesting the following instruction be given to the members on whether the Accused's conduct took place in the context of an associated with hostilities is as follows:

In determining whether the acts of the accused took place in the context of, and were associated with an armed conflict, you should consider whether the acts of the accused occurred during the period of an armed conflict, as defined above; were performed while the accused acted on behalf of or under the authority of a party to the armed conflict; and whether they constituted, or were closely and substantially related to, hostilities occurring during the armed conflict, and other facts and circumstances you consider relevant to the issue.

The CMCR has held that this instruction is the proper instruction for the members to determine whether acts of the accused took place in the context of, and was associated with, an armed conflict. *See Hamdan*, 801 F. Supp. 2d 1247, 1279 n.54, *rev'd on other grounds, Hamdan v.*

United States, 696 F.3d 1238 (D.C. Cir. 2012). The CMCR's holding is binding on this military commission. The Military Judge should consider the same legal definition of whether the offense took place in the context of and was associated with hostilities in determining whether the Accused engaged in hostilities against the United States, or how each Accused purposefully and materially supported hostilities against the United States. *See* 10 U.S.C. § 948a(7).

The Prosecution may, of course, also establish that the Accused are Alien Unprivileged Enemy Belligerents simply by establishing that the five Accused were part of al Qaeda at the time the offense was committed. *See* 10 U.S.C. § 948(a)(7)(C).

The proof of the Accused's role as principals in the September 11, 2001 attacks, namely evidence establishing they conspired, aided, abetted, counseled, or commanded the nineteen hijackers who committed the September 11, 2001 attacks will, *ipso facto*, also establish the Accused purposefully and materially supported hostilities against the United States, for purposes of establishing jurisdiction over them. The evidence presented at the jurisdictional hearing will also establish that the five Accused were part of al Qaeda at the time of their participation in the attacks, which, alone, is sufficient to establish jurisdiction. *See* 10 U.S.C. § 948(a)(7)(C). Evidence will also be presented that establishes that there is no record of any of the five Accused being citizens of the United States. *See* AE 119G, Attachments 4-8. As such, the evidence presented during the jurisdictional hearing will establish that all five Accused are Alien Unprivileged Enemy Belligerents and that the Military Commission has proper jurisdiction over them.

VIII. Evidence Will Establish That on September 11, 2001, Nineteen Al Qaeda Hijackers Attacked the World Trade Center, the Pentagon, and Intentionally Crashed United Airlines Flight #93 Into a Field in Shanksville, Pennsylvania. The Jurisdiction Over the Accused Will be Proven by Evidence That All Five Accused Purposefully and Materially Supported Hostilities against the United States by Aiding, Abetting, Counseling, or Commanding the Nineteen Hijackers.

The Prosecution asserts that the attacks of September 11, 2001 were armed attacks that were governed by, and violated, the Law of War. The evidence will show that the 9/11 attacks

were but one attack, in a series of attacks, in a broader armed conflict that had already existed between al Qaeda and the United States. Evidence will establish that these hostilities existed from as early as Usama bin Laden's Declaration of War in 1996, and certainly no later than 8 August 1998, when al Qaeda attacked the United States embassies in Kenya and Tanzania.

Evidence will show that on September 11, 2001, Mohamed Atta, Abdul Aziz al Omari, Satam al Suqami, Waleed al Shehri, and Wail al Shehri hijacked American Airlines Flight 11, crashing Flight 11 into the North Tower of the World Trade Center causing the collapse of the tower and the deaths of 87 passengers and crew members on-board, and thousands of persons in and around the World Trade Center. *See* AE 119G, Attachment 11.

Evidence will show that on September 11, 2001, Marwan al Shehhi, Hamza al Ghamdi, Fayeze Banihammad, Mohand al Shehri, and Ahmed al Ghamdi, hijacked United Airlines Flight 175, crashing it into the South Tower of the World Trade Center in Manhattan causing the collapse of the tower and the deaths of 60 passengers and crew members on-board, and thousands of persons in and around the World Trade Center. *See id.*, Attachment 12.

Evidence will show that on September 11, 2001, Hani Hanjour, Khalid al Mihdhar, Majed Moqed, Nawaf al Hazmi, and Salem al Hazmi hijacked American Airlines Flight 77, crashing it into the Pentagon causing the deaths of 59 passengers and crew members on-board and 125 persons in the Pentagon. *See id.*, Attachment 13.

Evidence will show that on September 11, 2001, Ziad Jarrah, Saeed al Ghamdi, Ahmed al Nami, and Ahmed al Haznawi hijacked United Airlines Flight 93, and, after resistance by several passengers, intentionally crashed the plane in Somerset County, Pennsylvania killing all 40 passengers and crew members on-board. *See id.*, Attachment 14.

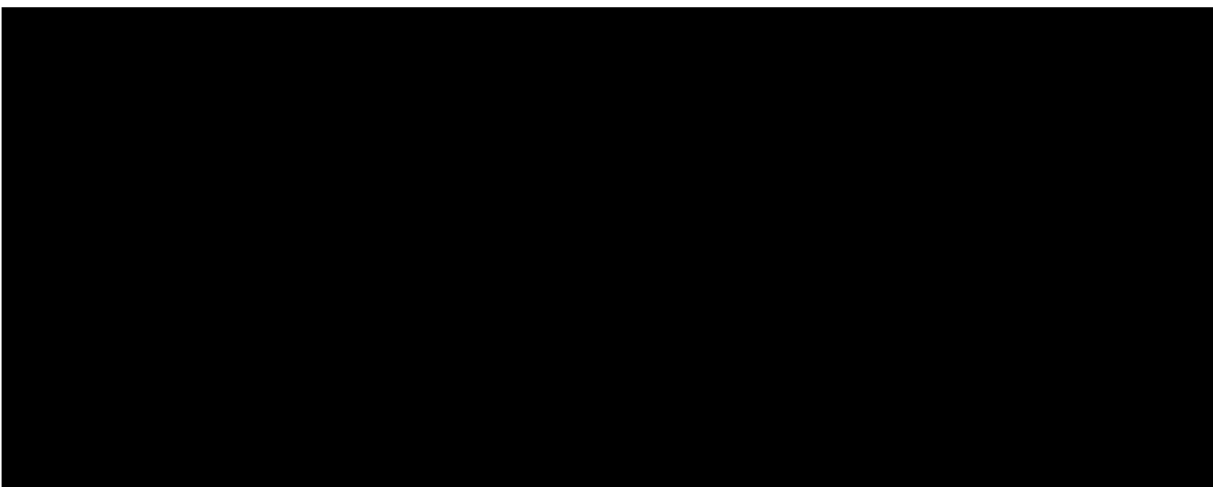
Once the Prosecution has established who the nineteen hijackers were, the Prosecution will then present proof of how all five Accused purposefully and materially supported hostilities against the United States by aiding, abetting, counseling, or commanding the nineteen hijackers.

A. Evidence Will Show That Mustafa al Hawsawi is an Alien Unprivileged Enemy Belligerent By Establishing that He Purposefully and Materially Supported Hostilities Against the United States by, *inter alia*, Aiding, Abetting, Counseling, or Commanding the Above-Named Hijackers, As Set Forth Below¹⁰.

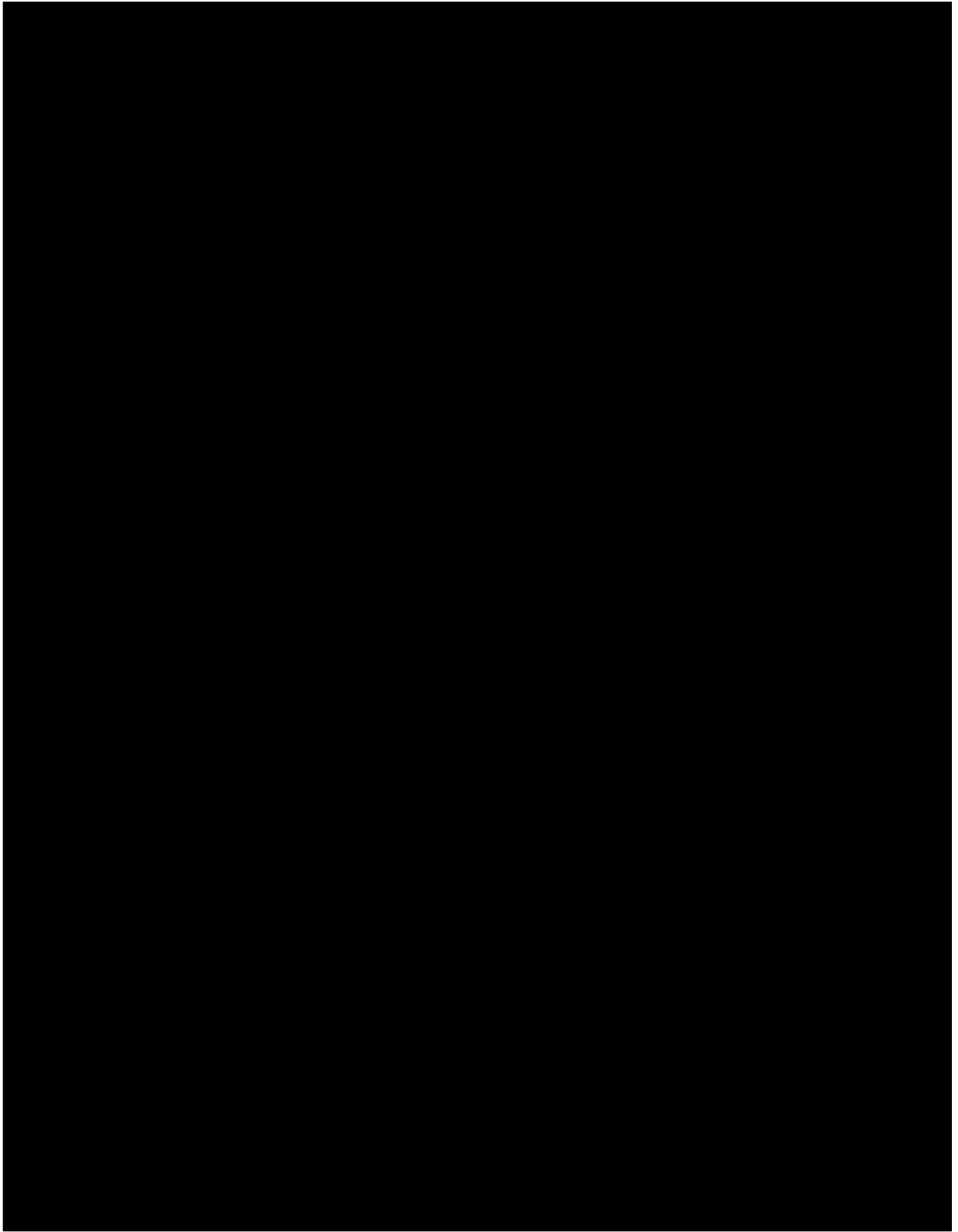
Mr. Hawsawi's acts of facilitating the attacks of September 11, 2001 will clearly establish that he engaged in hostilities against the United States and that he purposefully and materially supported hostilities against the United States. The evidence will also establish that Mr. Hawsawi was part of al Qaeda at the time of his participation in the attacks, which is also sufficient to establish jurisdiction.

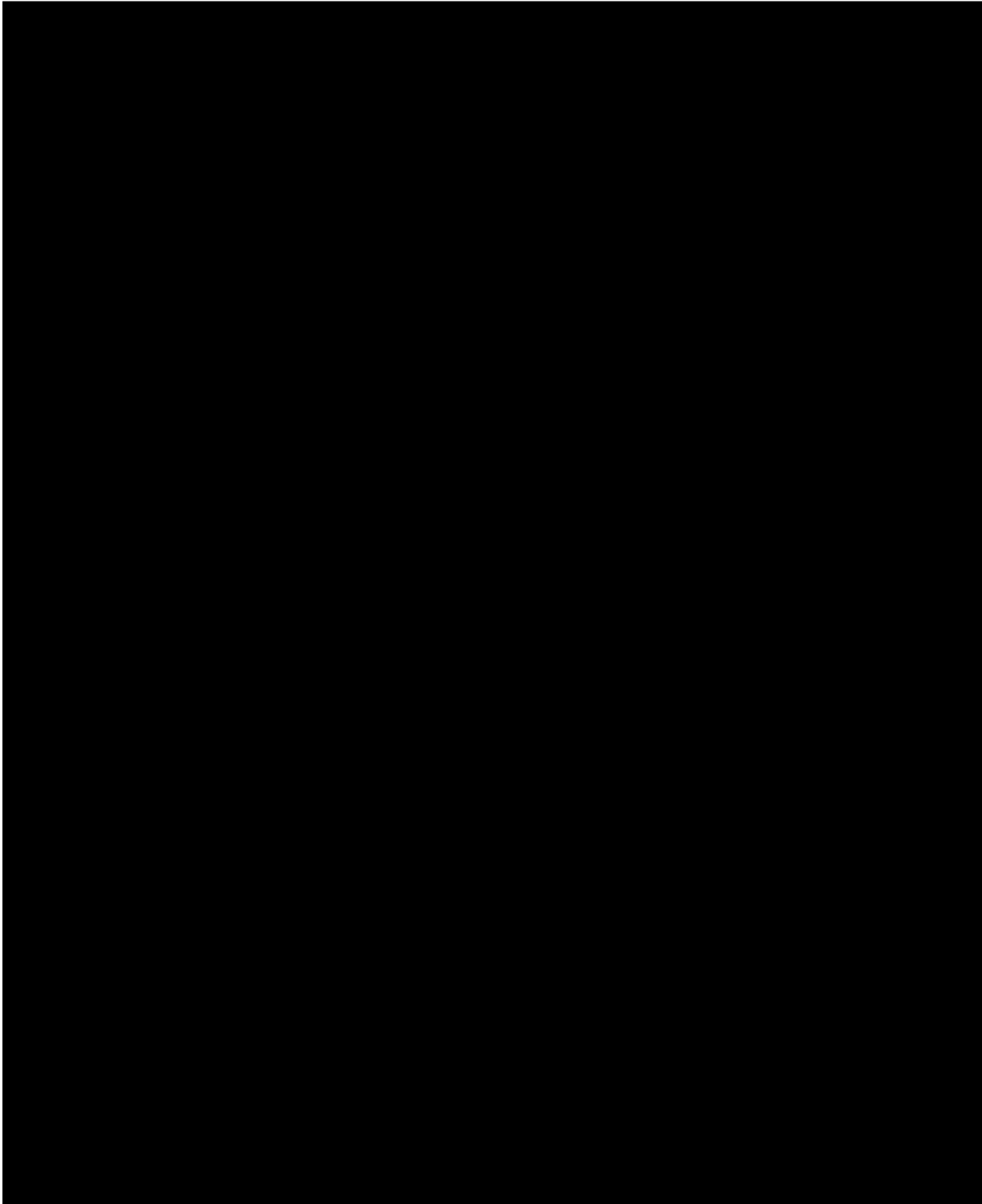
The evidence will show that Mr. Hawsawi purposefully and materially supported hostilities against the United States by aiding, abetting, counseling, and commanding certain hijackers from the United Arab Emirates and Pakistan.

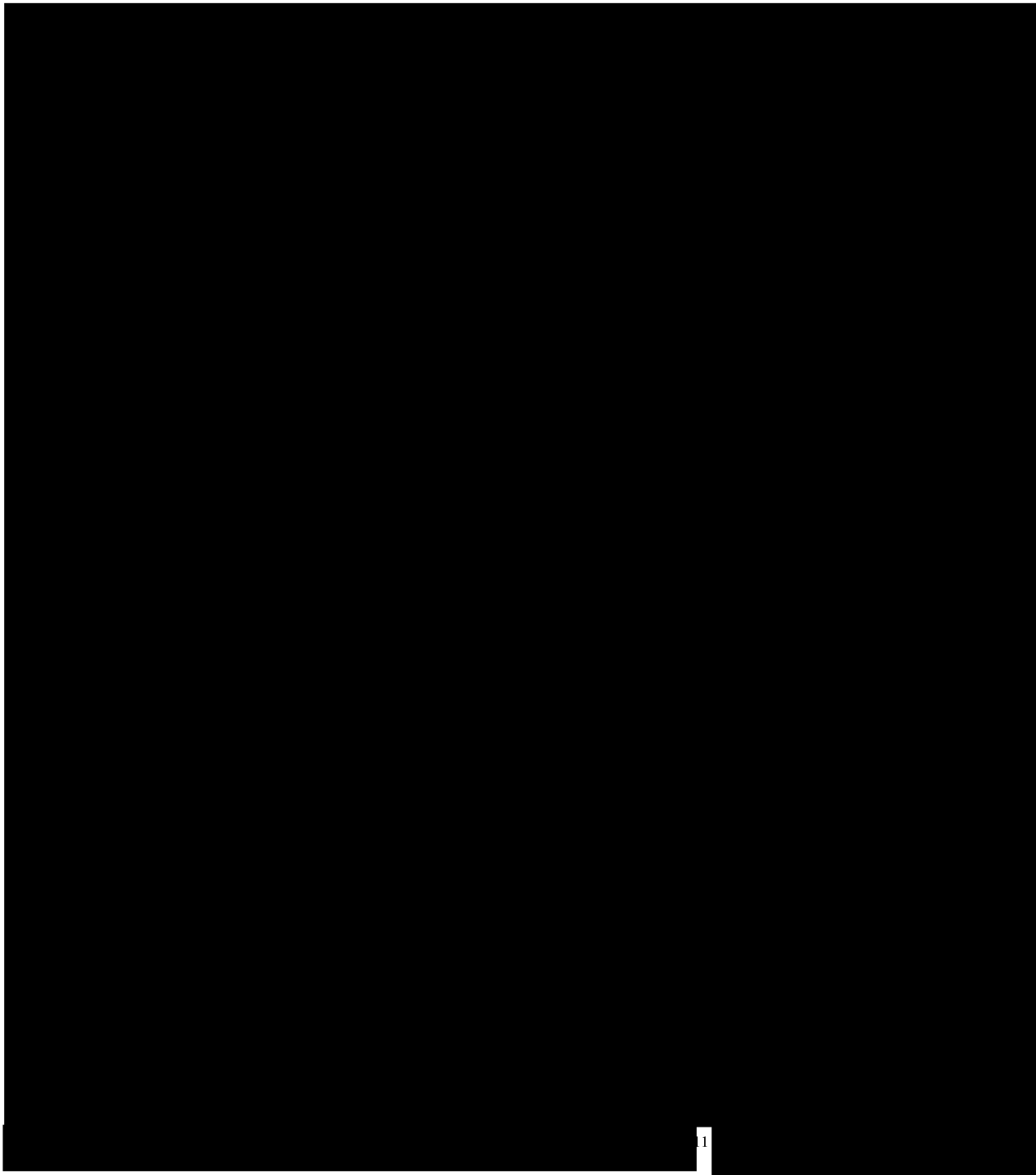
As an initial matter, evidence will establish that Mustafa al Hawsawi has never entered the United States as an immigrant alien, is not a citizen of the United States and, as such, is an "Alien" as that term is defined by the Military Commissions Act of 2009. *See* 18 U.S.C. § 948(a)(1). *See* AE 119G, Attachment 4.



¹⁰ The evidence set forth below, and as the attachments to this motion, are neither the sum total of the evidence that the Prosecution will be using at any jurisdictional hearing, nor is the Prosecution limited to only 9/11-related evidence against the five Accused. The Prosecution will provide notice to the Defense of its evidence sufficiently prior to any jurisdictional hearing.

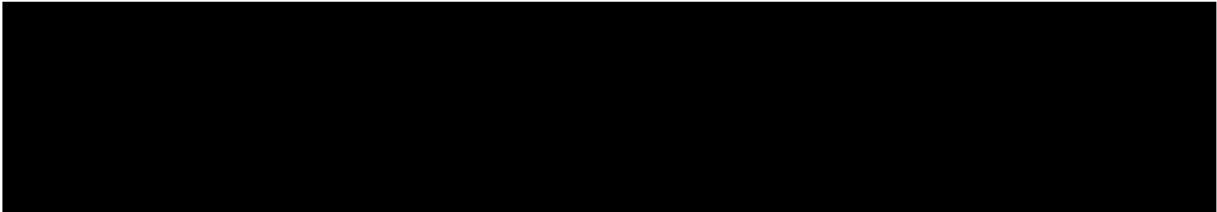
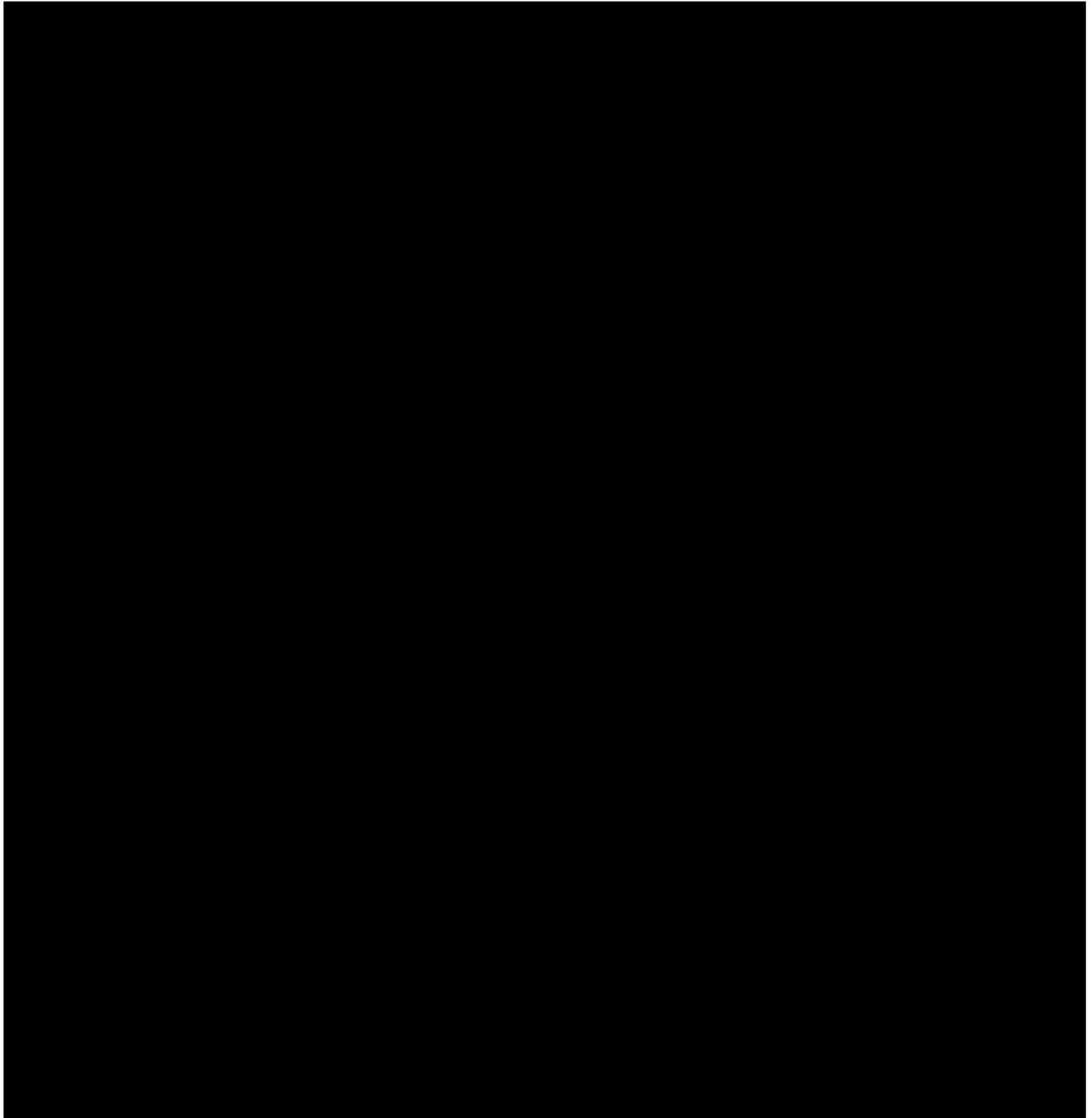


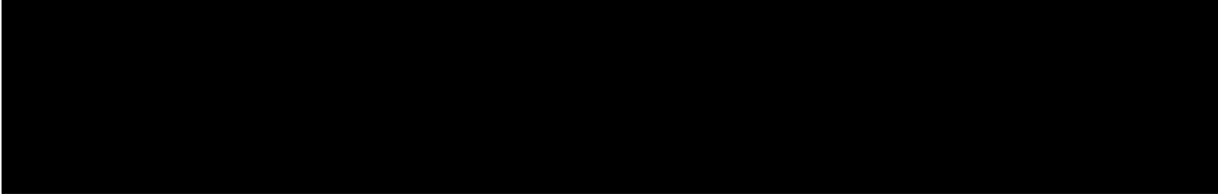




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Evidence will also show that on 21 March 2007, Mustafa al Hawsawi voluntarily admitted to the Combatant Status Review Tribunal (CSRT) that on September 11, 2001 he knew there was an operation before the attacks happened and was told to return to Pakistan by Ramzi Binalshibh and Khalid Sheikh Mohammad. *See id.*, Attachment 16 at 19. He also voluntarily admitted to the CSRT that he had been in Afghanistan, had gone to al Qaeda's al Farouq Training Camp, and had met Usama bin Laden, Ayman al Zawahiri, and Khalid Sheikh Mohammad while there. *See id.*, Attachment 16 at 19-20. Evidence will establish that Mustafa al Hawsawi also voluntarily told the CSRT that he had met four of the hijackers while he was in the UAE, and had communication with Mohamed Atta. *See* Attachment 16 at 20. Although he denies being a "member" of al Qaeda, he voluntarily admitted that he helps all the jihadists. *See id.*, Attachment 16 at 22.

Evidence will establish that, in 2009, all five Accused filed a document with the military commission that stated:

With regards to these nine accusations that you are putting us on trial for; to us, they are not accusations. To us they are badges of honor, which we carry with pride. Many thanks to God, for his kind gesture, and choosing us to perform the act of Jihad for his cause and to defend Islam and Muslims. Therefore, killing you and fighting you, destroying you and terrorizing you, responding back to your attacks, are all considered to be great legitimate duty in our religion.

Id., Attachment 94 at 2.

This evidence will establish by a preponderance of the evidence that Mustafa al Hawsawi purposefully and materially supported hostilities against the United States by aiding, abetting, and counseling four of the hijackers and Mohamed Atta in committing the attacks of September 11, 2001. As such, the Military Commission has, and will continue to have, jurisdiction over Mr. Hawsawi as an Alien Unprivileged Enemy Belligerent.

B. Evidence Will Show That Ali Abdul Aziz Ali is an Alien Unprivileged Enemy Belligerent By Establishing that He Purposefully and Materially Supported Hostilities Against the United States by, *inter alia*, Aiding, Abetting, Counseling, or Commanding the Above-Named Hijackers As Set Forth Below.

Mr. Ali's acts of facilitating the attacks of September 11, 2001 clearly establish that he engaged in hostilities against the United States or its coalition partners AND that he purposefully and materially supported hostilities against the United States or its coalition partners. The evidence will also establish that Mr. Ali was part of al Qaeda at the time of his participation in the attacks, which is also sufficient to establish jurisdiction.

As an initial matter, evidence will establish that Ali Abdul Aziz Ali has never entered the United States as an immigrant alien, is not a citizen of the United States and, as such, is an "Alien" as that term is defined by the Military Commissions Act of 2009. *See* 18 U.S.C. § 948(a)(1). *See* AE 119G, Attachment 5.

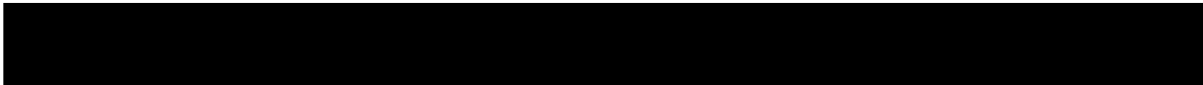
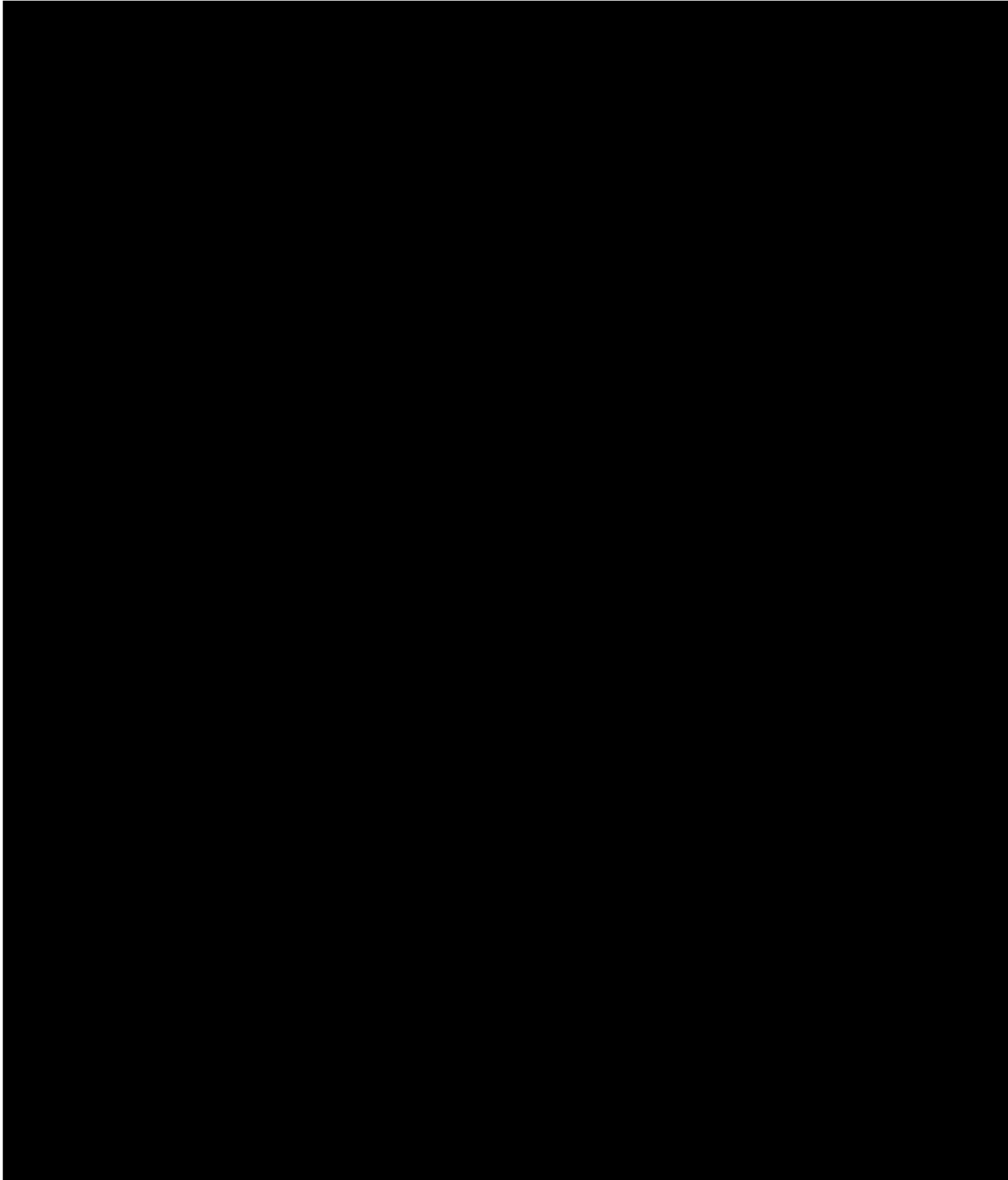
At the jurisdictional hearing, and at trial, the United States will present evidence that Mr. Ali took substantial acts to support the attacks on the United States on September 11, 2001 and that, prior to taking those acts, he was aware of the history of al Qaeda's efforts to target the United States and agreed with al Qaeda's stated rationale for doing so.

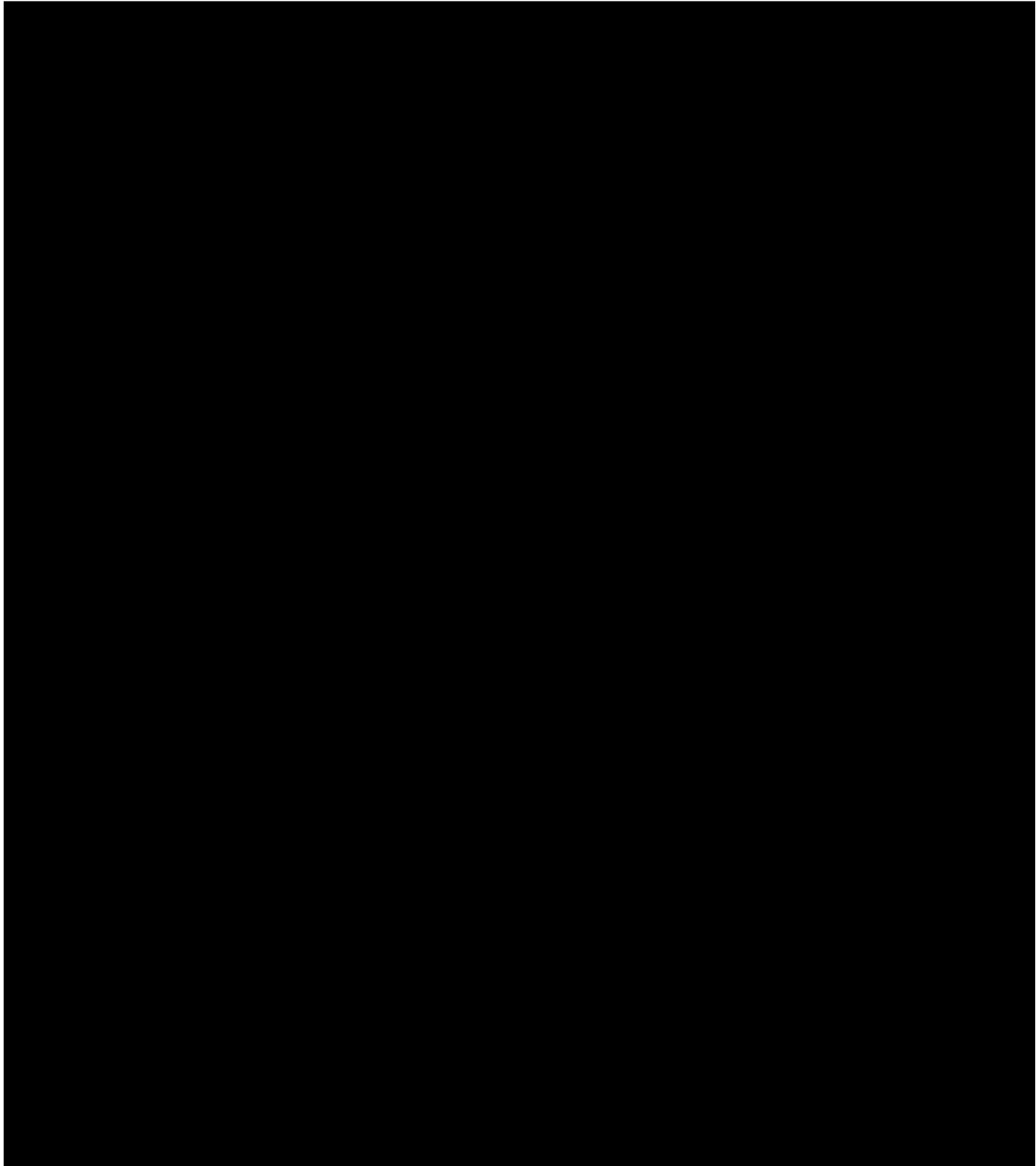
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¹² Ramzi Yousef was convicted in 1998 for his role in the 1993 attack on the World Trade Center. He was sentenced to 240 years in prison. Mr. Yousef was also convicted for his role in an attack on a commercial airliner in the Phillipines meant as a test run for a larger plot targeting a dozen U.S. airliners. During his sentencing hearing, Mr. Yousef stated, "I support terrorism as long as it is used against the United States and Israel. You are more than terrorists. You are butchers, liars and hypocrites."

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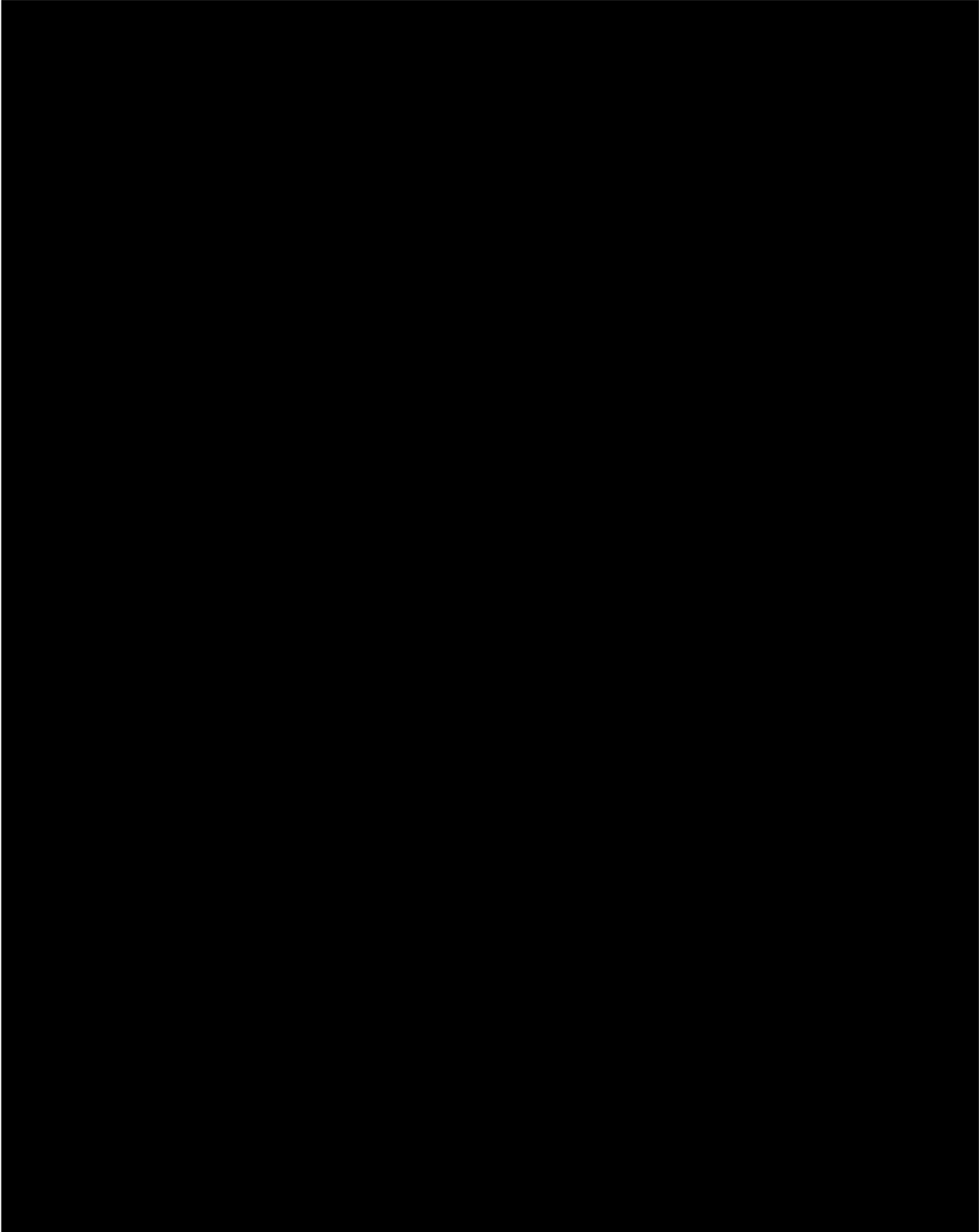
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Evidence will also establish that, in 2009, all five Accused filed a document with the military commission that stated:

With regards to these nine accusations that you are putting us on trial for; to us, they are not accusations. To us they are badges of honor, which we carry with pride. Many thanks to God, for his kind gesture, and choosing us to perform the act of Jihad for his cause and to defend Islam and Muslims. Therefore, killing you and fighting you, destroying you and terrorizing you, responding back to your attacks, are all considered to be great legitimate duty in our religion.

See id., Attachment 94 at 2.

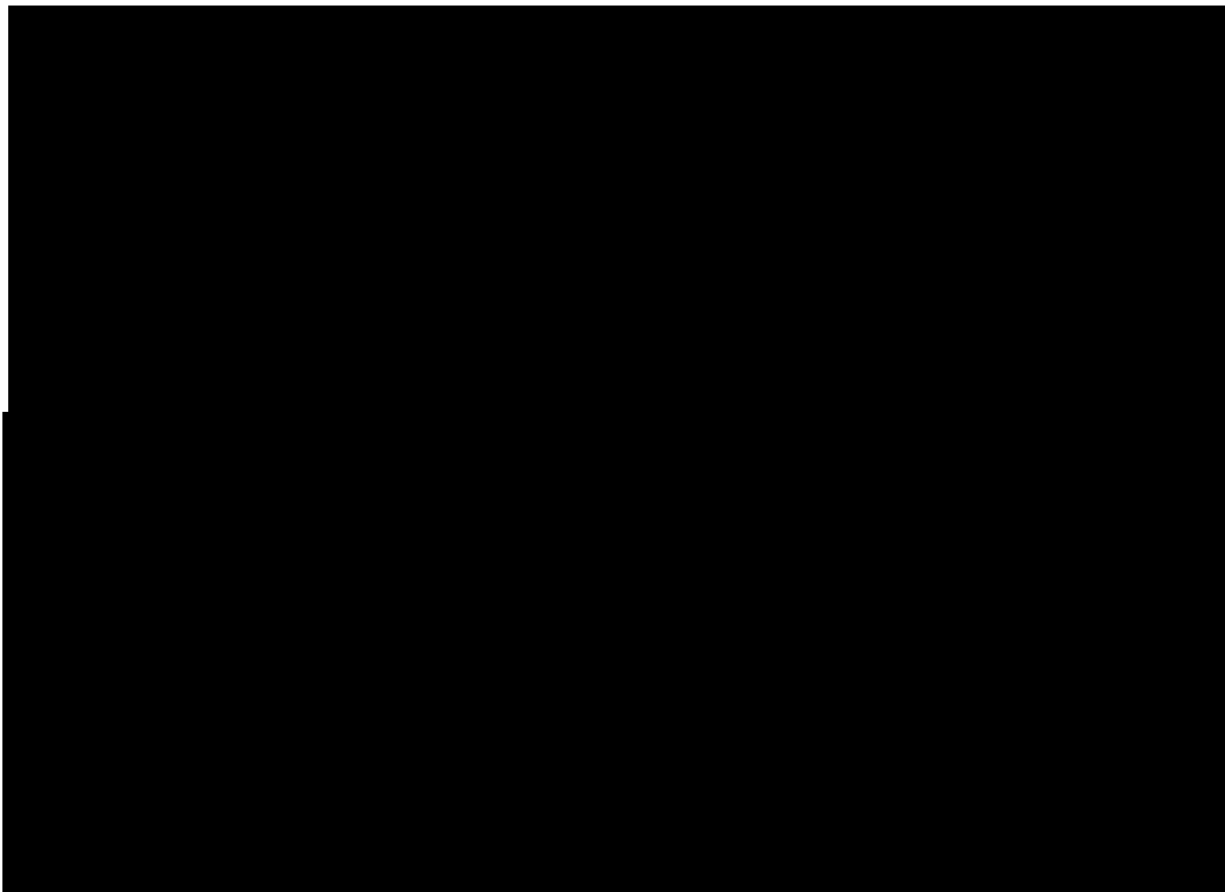
This evidence will establish by a preponderance of the evidence that Ali Abdul Aziz Ali purposefully and materially supported hostilities against the United States by aiding, abetting, and counseling the hijackers in committing the attacks of September 11, 2001. As such, the military commission has, and will continue to have jurisdiction over Mr. Ali as an Alien Unprivileged Enemy Belligerent.

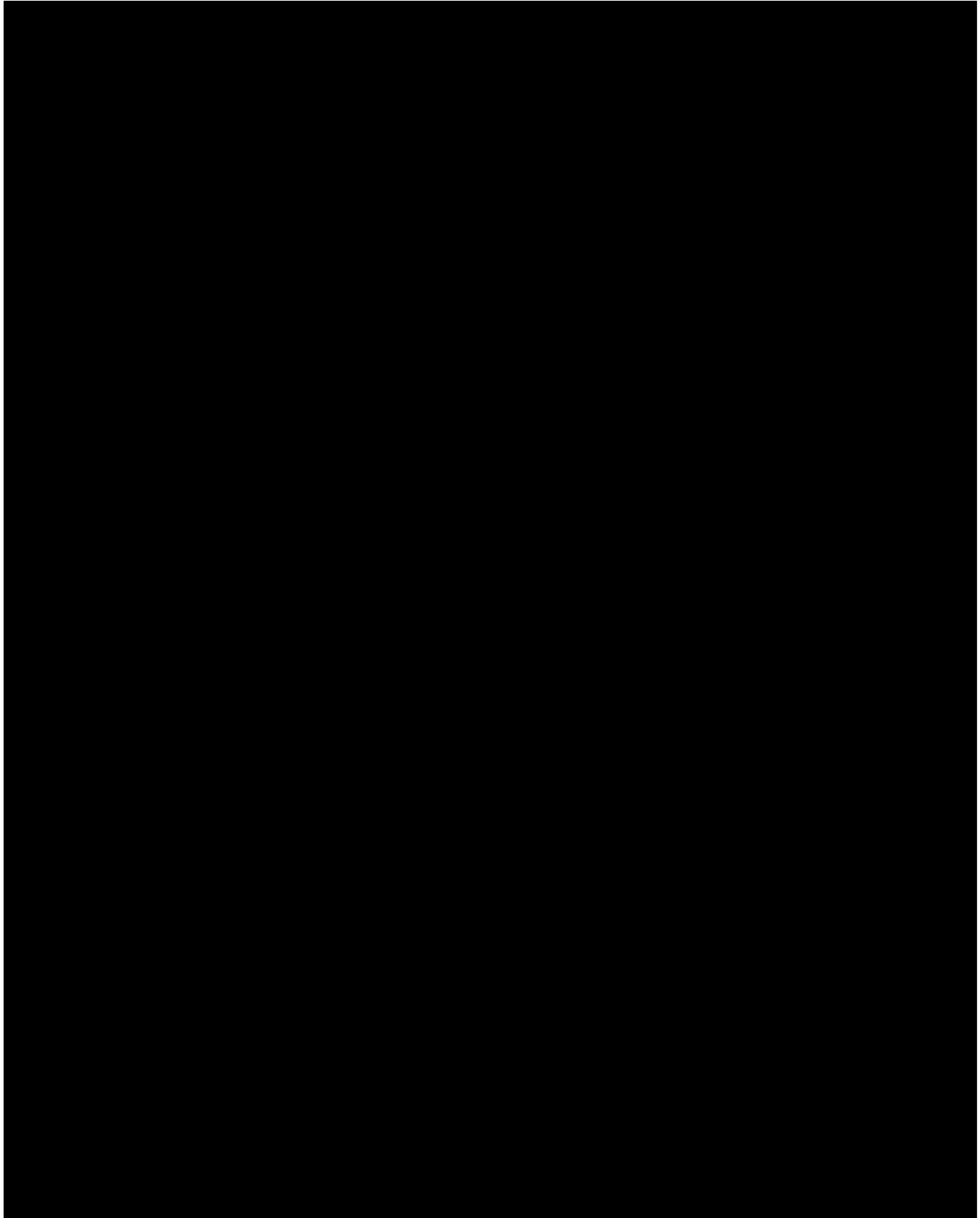
¹⁵ That same animosity toward Israel was likewise demonstrated during Mr. Ali's appearance before a Combatant Status Tribunal (CSRT) at Guantanamo Bay on March 18, 2007. *See* AE 119G, Attachment 46 at 33-35.

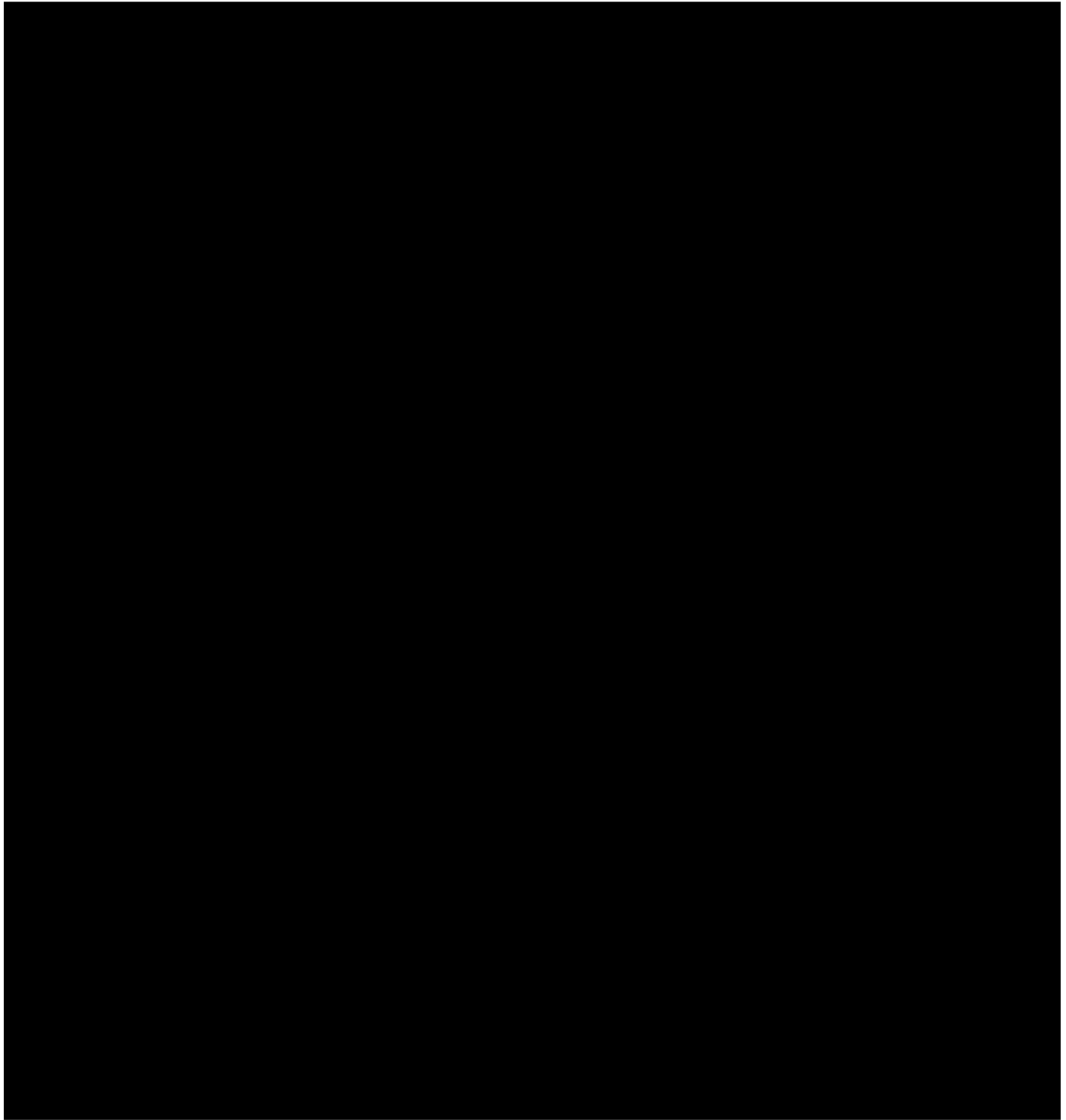
C. Evidence Will Show That Ramzi Binalshibh is an Alien Unprivileged Enemy Belligerent By Establishing that He Purposefully and Materially Supported Hostilities Against the United States by, *inter alia*, Aiding, Abetting, Counseling, or Commanding The Above-Named Hijackers As Set Forth Below.

Mr. Binalshibh's acts of facilitating the attacks of September 11, 2001 clearly establish that he engaged in hostilities against the United States AND that he purposefully and materially supported hostilities against the United States. The evidence will also establish that Mr. Binalshibh was part of al Qaeda at the time of his participation in the attacks, which also is sufficient to establish jurisdiction.

As an initial matter, evidence will establish that Ramzi Binalshibh has never entered the United States as an immigrant alien, is not a citizen of the United States and, as such, is an "Alien" as that term is defined by the Military Commissions Act of 2009. *See* 18 U.S.C. § 948(a)(1); *see* AE 119G, Attachment 6.







Evidence will also establish that, in 2009, all five Accused filed a document with the military commission that stated:

With regards to these nine accusations that you are putting us on trial for; to us, they are not accusations. To us they are badges of honor, which we carry with pride.

Many thanks to God, for his kind gesture, and choosing us to perform the act of Jihad for his cause and to defend Islam and Muslims. Therefore, killing you and fighting you, destroying you and terrorizing you, responding back to your attacks, are all considered to be great legitimate duty in our religion.

See id., Attachment 94 at 2.

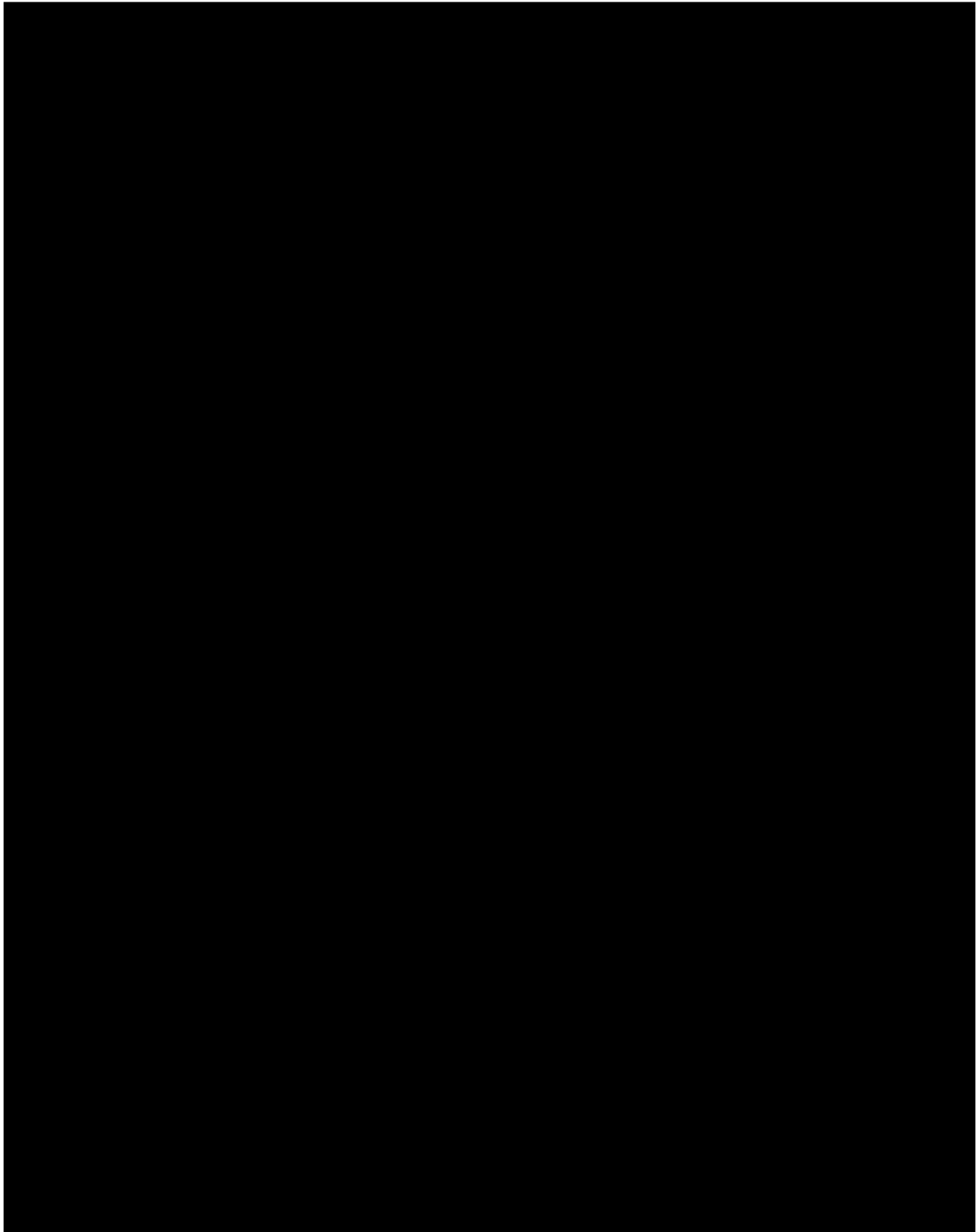
During 2008 court proceedings, Ramzi Binalshibh also asked that God protect Usama bin Laden, and asked Usama bin Laden to attack the American Enemy. *See United States v. Mohammed, et al.*, Transcript at 920 (8 December 2008).

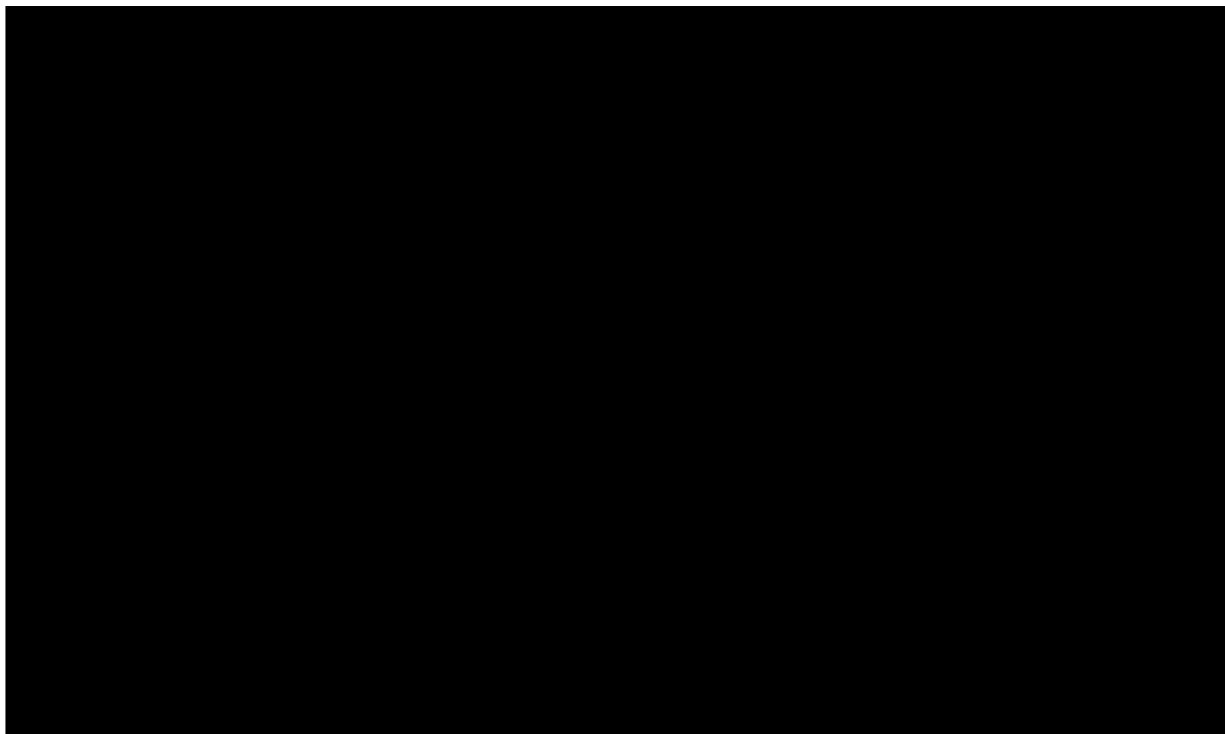
This evidence will also establish by a preponderance of the evidence that Ramzi Binalshibh purposefully and materially supported hostilities against the United States by aiding, abetting, and counseling the hijackers in committing the attacks of September 11, 2001. As such, the Military Commission has, and will continue to have jurisdiction over Mr. Binalshibh as an Alien Unprivileged Enemy Belligerent.

D. Evidence Will Show That Khalid Shaikh Mohammad is an Alien Unprivileged Enemy Belligerent By Establishing That He Purposefully and Materially Supported Hostilities against the United States by, *inter alia*, Aiding, Abetting, Counseling, or Commanding The Above-Named Hijackers As Set Forth Below.

Mr. Mohammad's acts of facilitating the attacks of September 11, 2001 clearly establish that he engaged in hostilities against the United States AND that he purposefully and materially supported hostilities against the United States. The evidence will also establish that Mr. Mohammad was part of al Qaeda at the time of his participation in the attacks, which also is sufficient to establish jurisdiction.

As an initial matter, evidence will establish that Khalid Shaikh Mohammad has never entered the United States as an immigrant alien, is not a citizen of the United States and, as such, is an "Alien" as that term is defined by the Military Commissions Act of 2009. *See* 18 U.S.C. § 948(a)(1); AE 119G, Attachment 8.





Evidence will show that Khalid Sheikh Mohammad, through his personal representative, admitted to his Combatant Status Review Tribunal that he swore bayat to Shiekh Usama Bin Laden; that he was a member of the al Qaeda Council; that he was the Media Operations Director of al Qaeda; that he was the Operational Director for Sheikh Usama Bin Laden for the organizing, planning, follow-up and execution of the 9/11 Operation; that he was al Qaeda's Military Operational Commander for all foreign operations around the world; and that he was responsible for the 9/11 Operations "from A to Z." *See id.*, Attachment 89 at 17-18.

Evidence will establish that, in 2009, all five Accused filed a document with the military commission that stated:

With regards to these nine accusations that you are putting us on trial for; to us, they are not accusations. To us they are badges of honor, which we carry with pride. Many thanks to God, for his kind gesture, and choosing us to perform the act of Jihad for his cause and to defend Islam and Muslims. Therefore, killing you and fighting you, destroying you and terrorizing you, responding back to your attacks, are all considered to be great legitimate duty in our religion."

See id., Attachment 94 at 2.

This evidence also will establish by a preponderance of the evidence that Khalid Sheikh Mohammad purposefully and materially supported hostilities against the United States by aiding, abetting, and counseling the hijackers in committing the attacks of September 11, 2001. As such, the Military Commission has, and will continue to have jurisdiction over Mr. Mohamamd as an Alien Unprivileged Enemy Belligerent.

6. Conclusion

Should the Military Judge not find the issue of the existence of hostilities, in regard to a challenge to the jurisdiction of the commission, is a matter of law for him to decide, the Prosecution is prepared to prove jurisdiction over the four accused with evidence establishing each of the accused are Alien Unprivileged Enemy Belligerents as set forth above at any hearing convened for such purpose. The Prosecution requests to litigate the motion after the Prosecution's case in chief, per the CMCR's decision in *United States v. al Nashiri*, but is prepared to do so earlier, if required. The Prosecution asserts that the Attachments in AE 119G are sufficient, alone, to establish jurisdiction, but reserves the right to present additional evidence, as necessary.

7. Oral Argument

The Prosecution requests oral argument and a jurisdictional hearing to the extent the Defense Motion has properly raised a challenge to the jurisdiction of this military commission.

8. Witnesses and Evidence

As attached.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

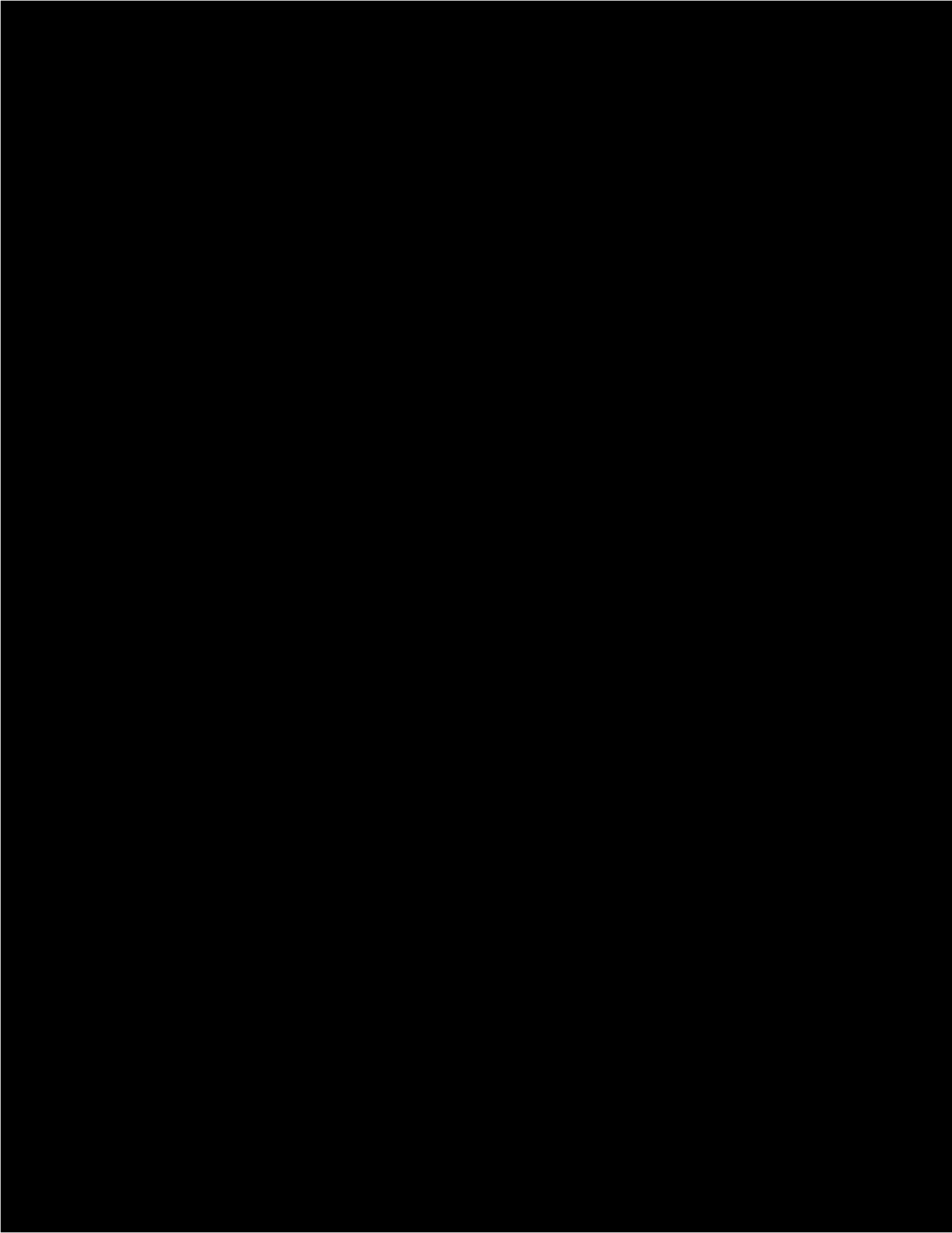
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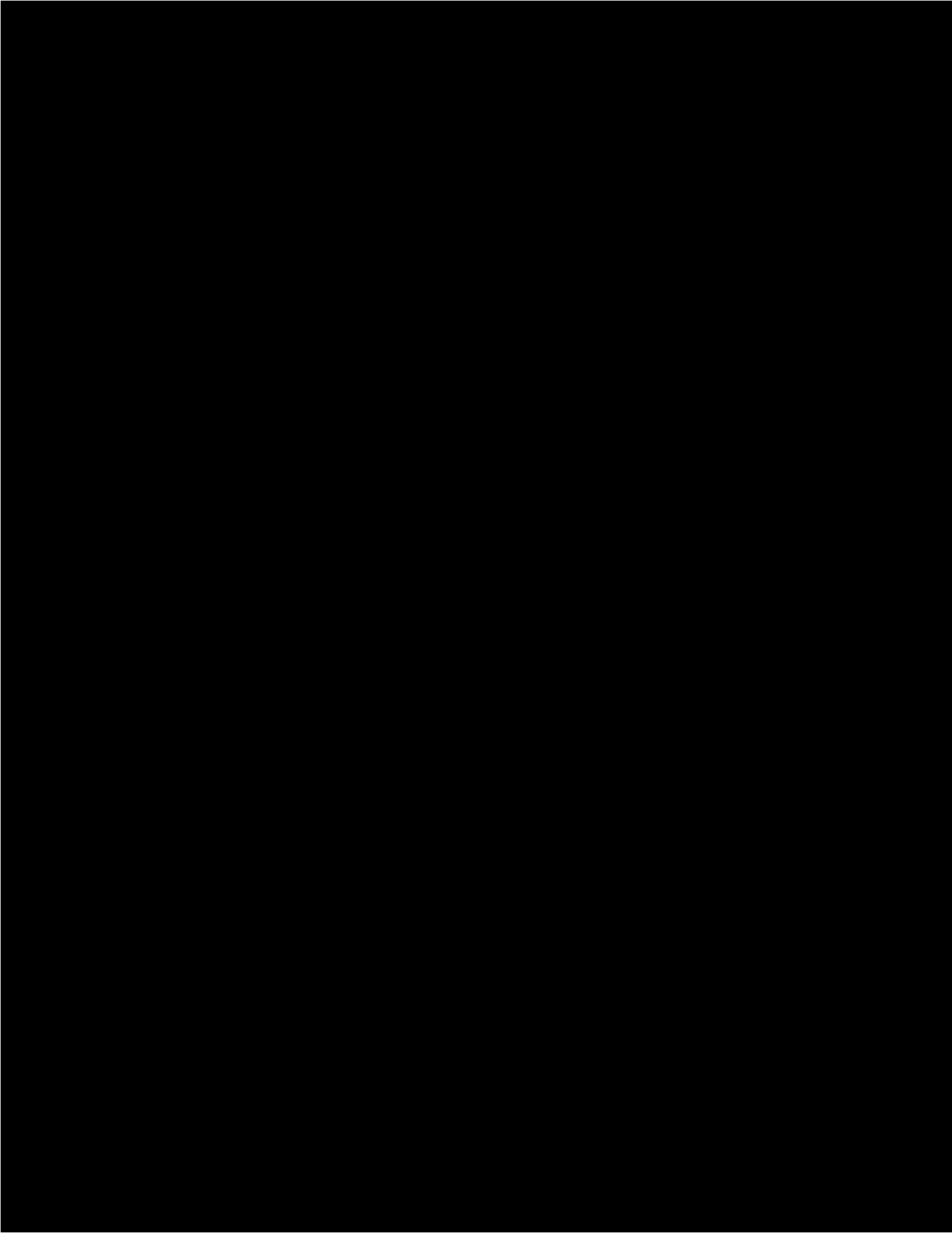
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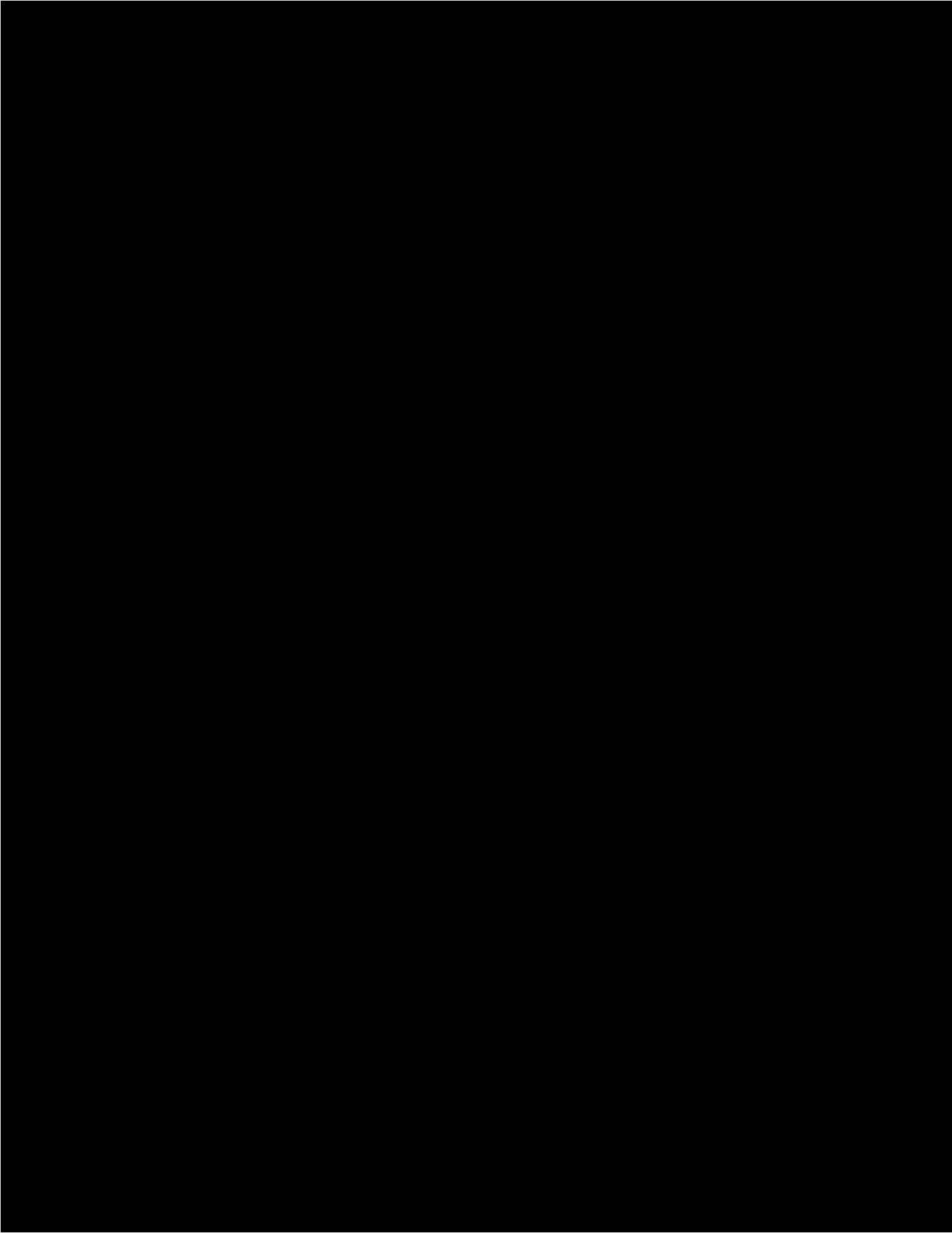
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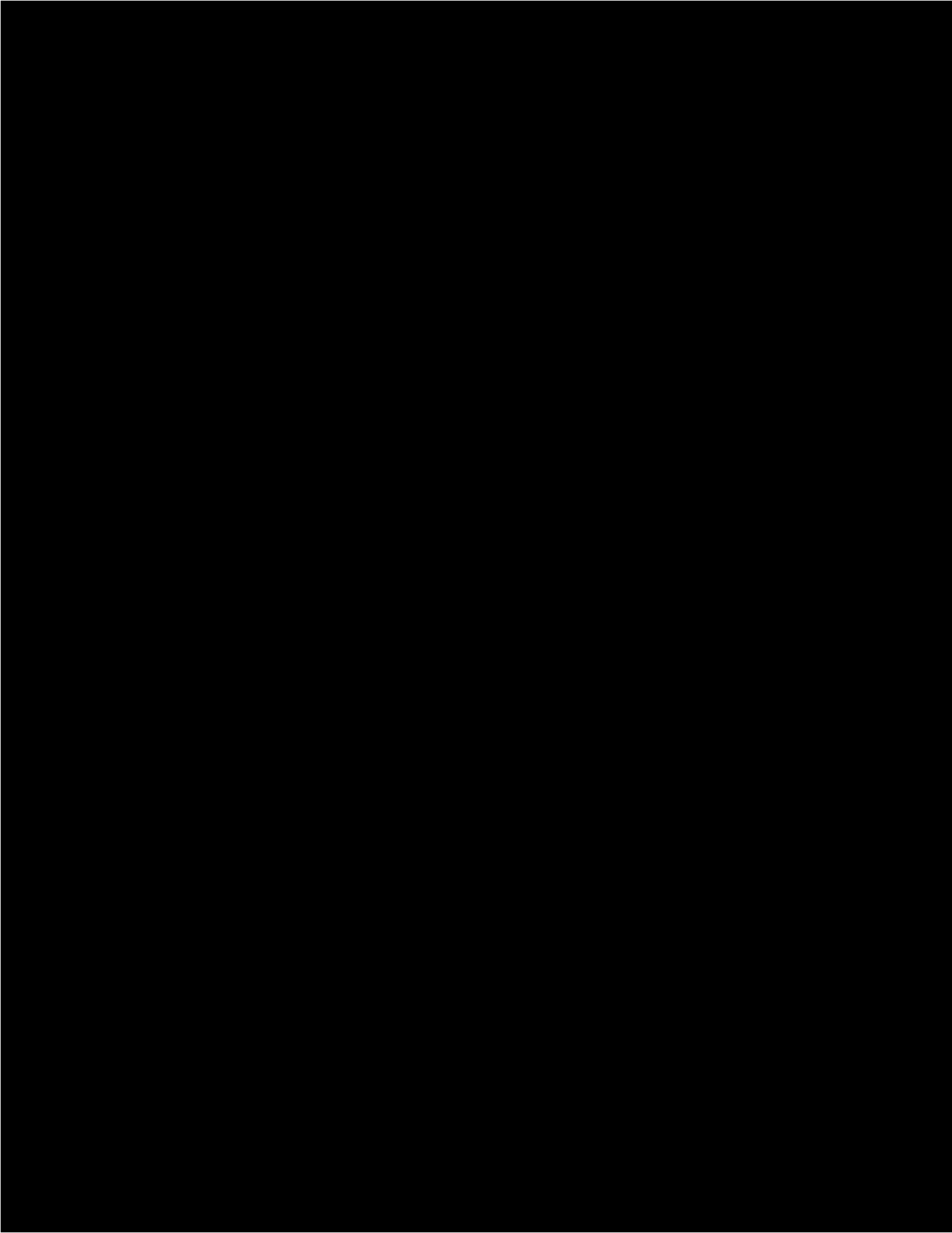
ATTACHMENT A

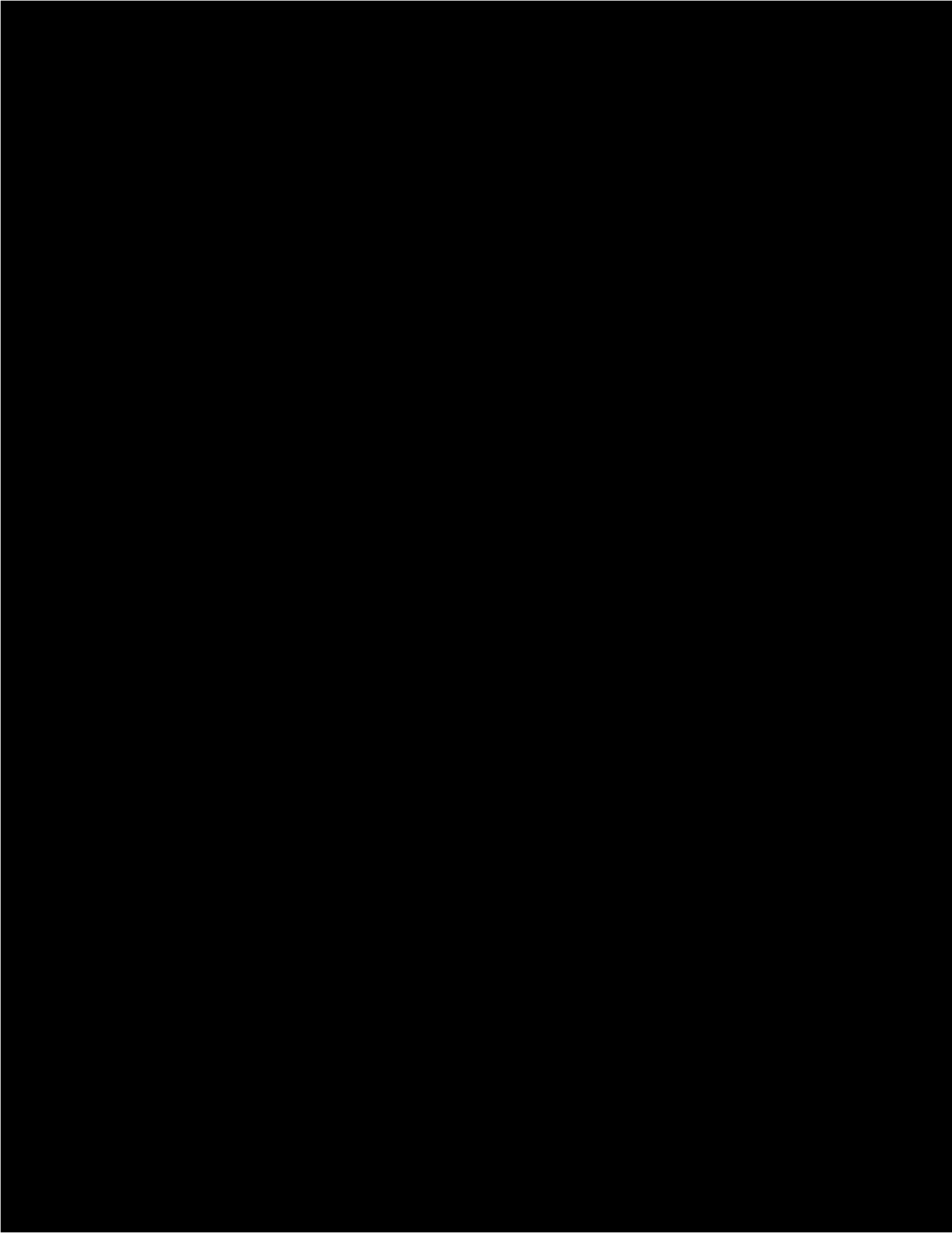
ATTACHMENT B

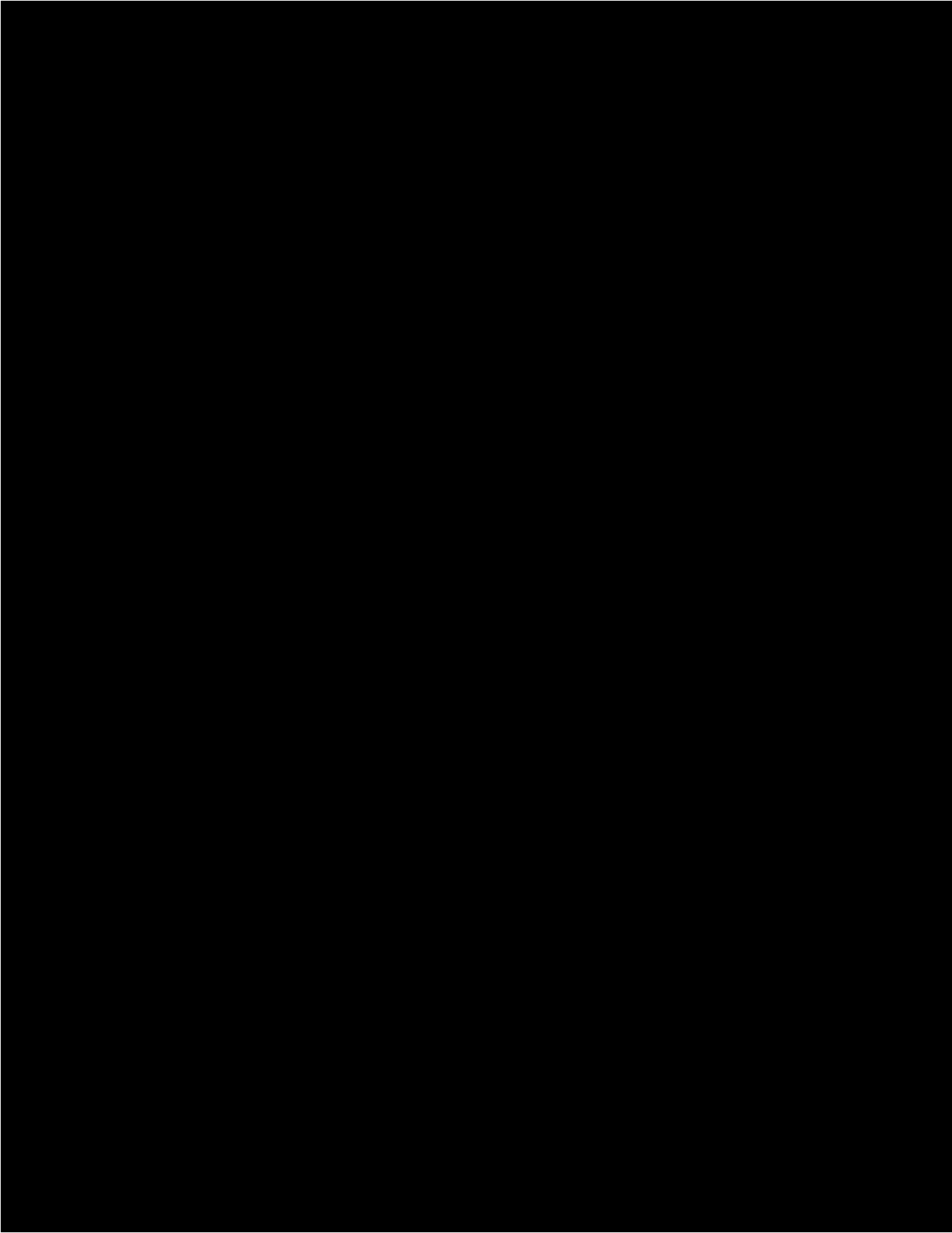


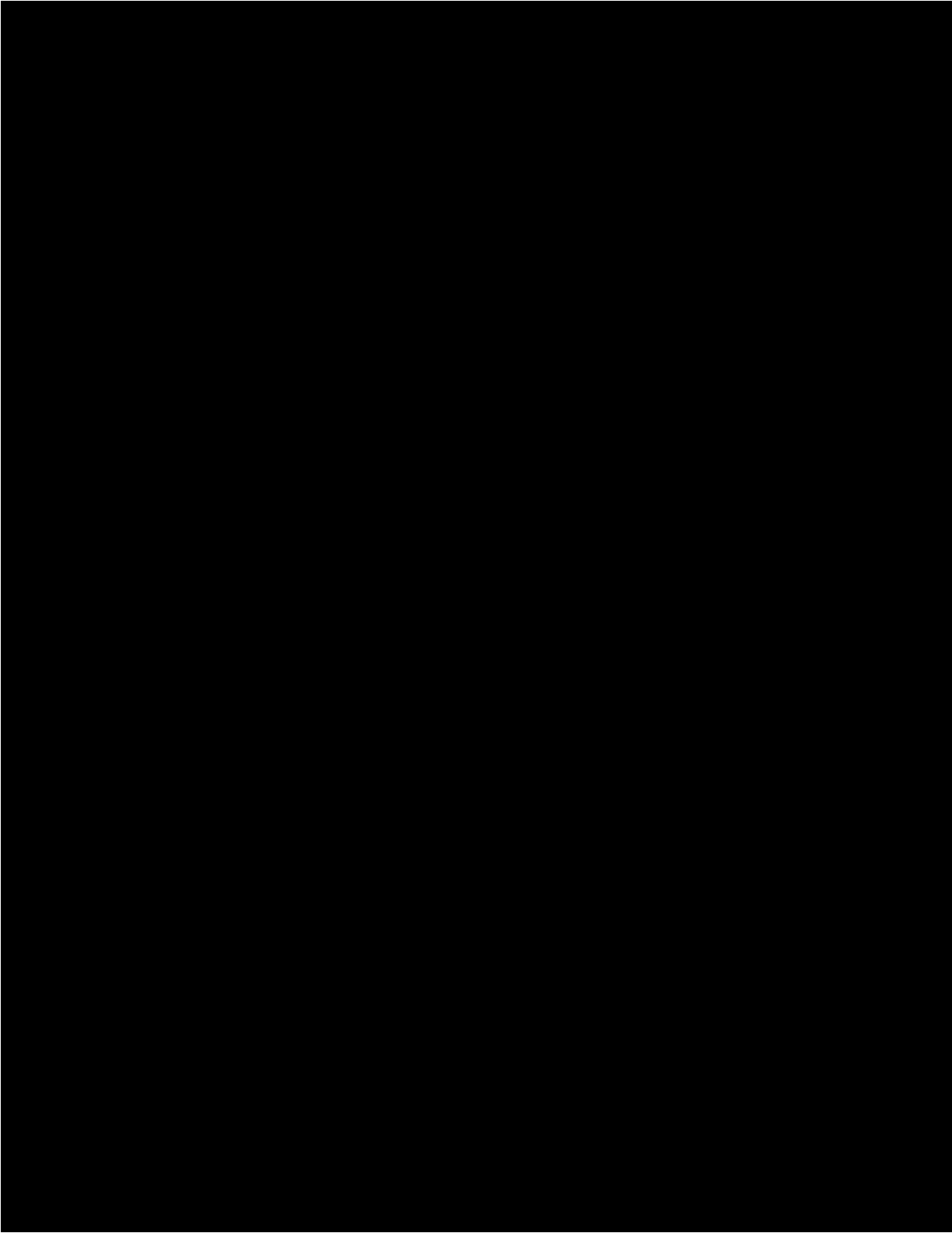




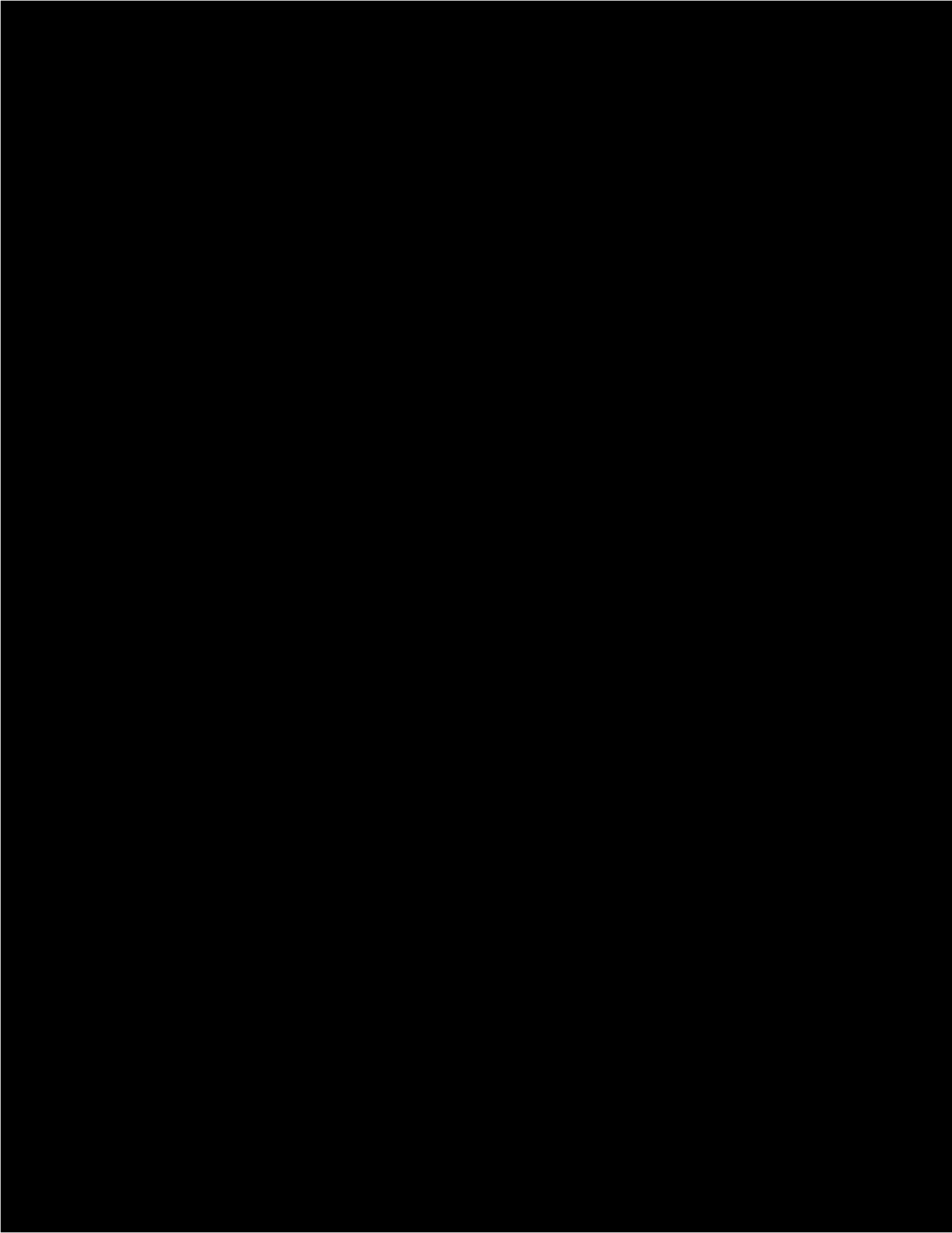


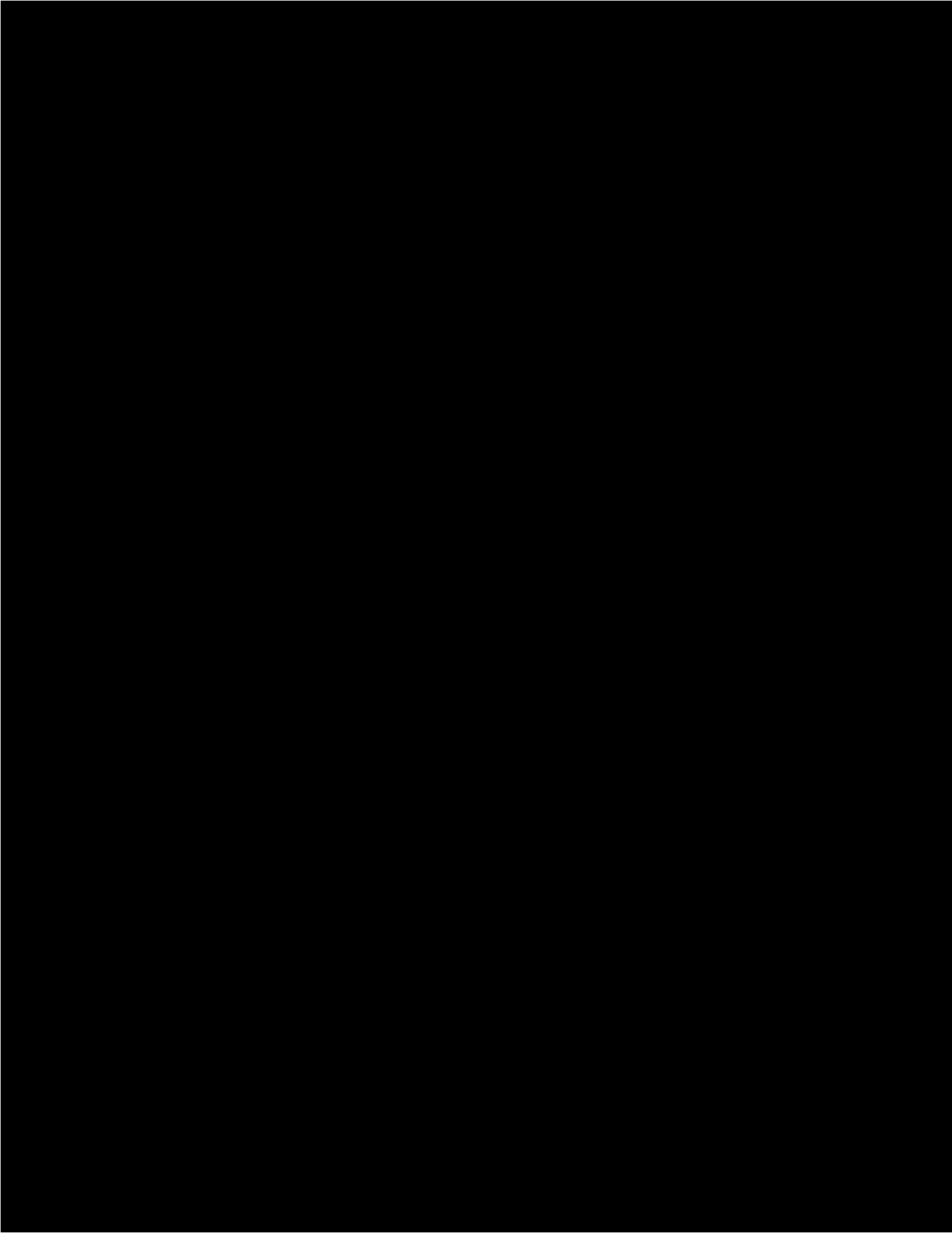




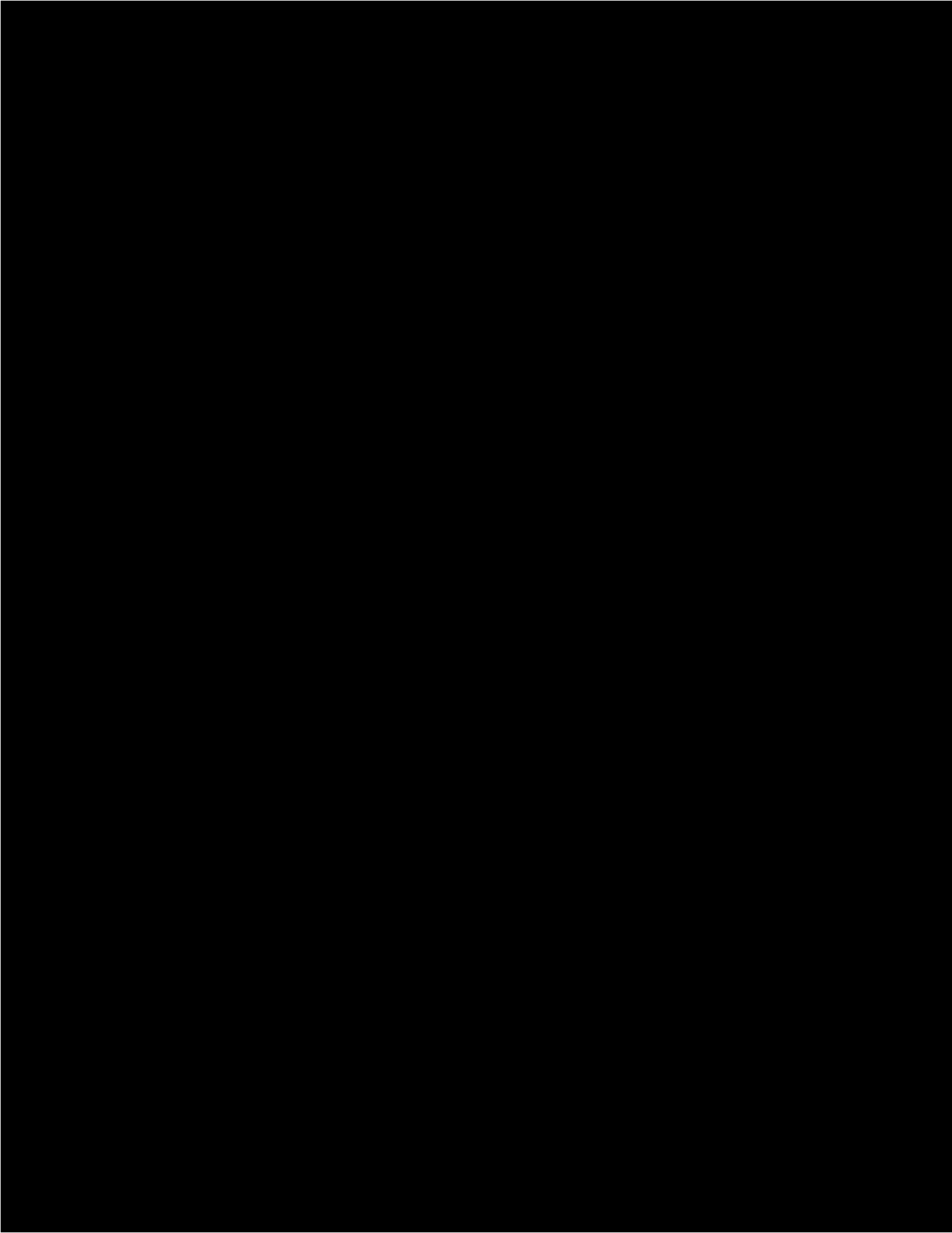


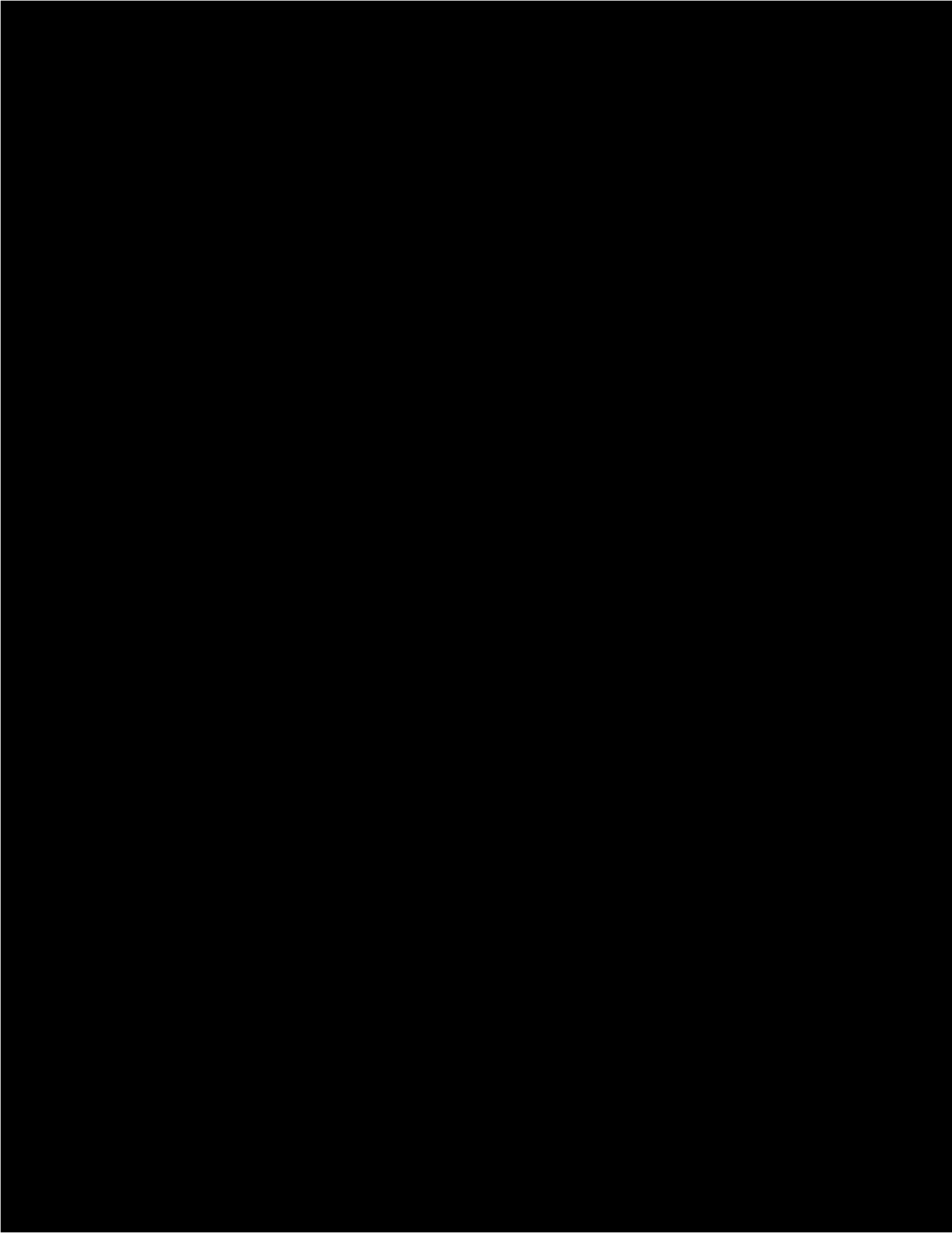
ATTACHMENT C



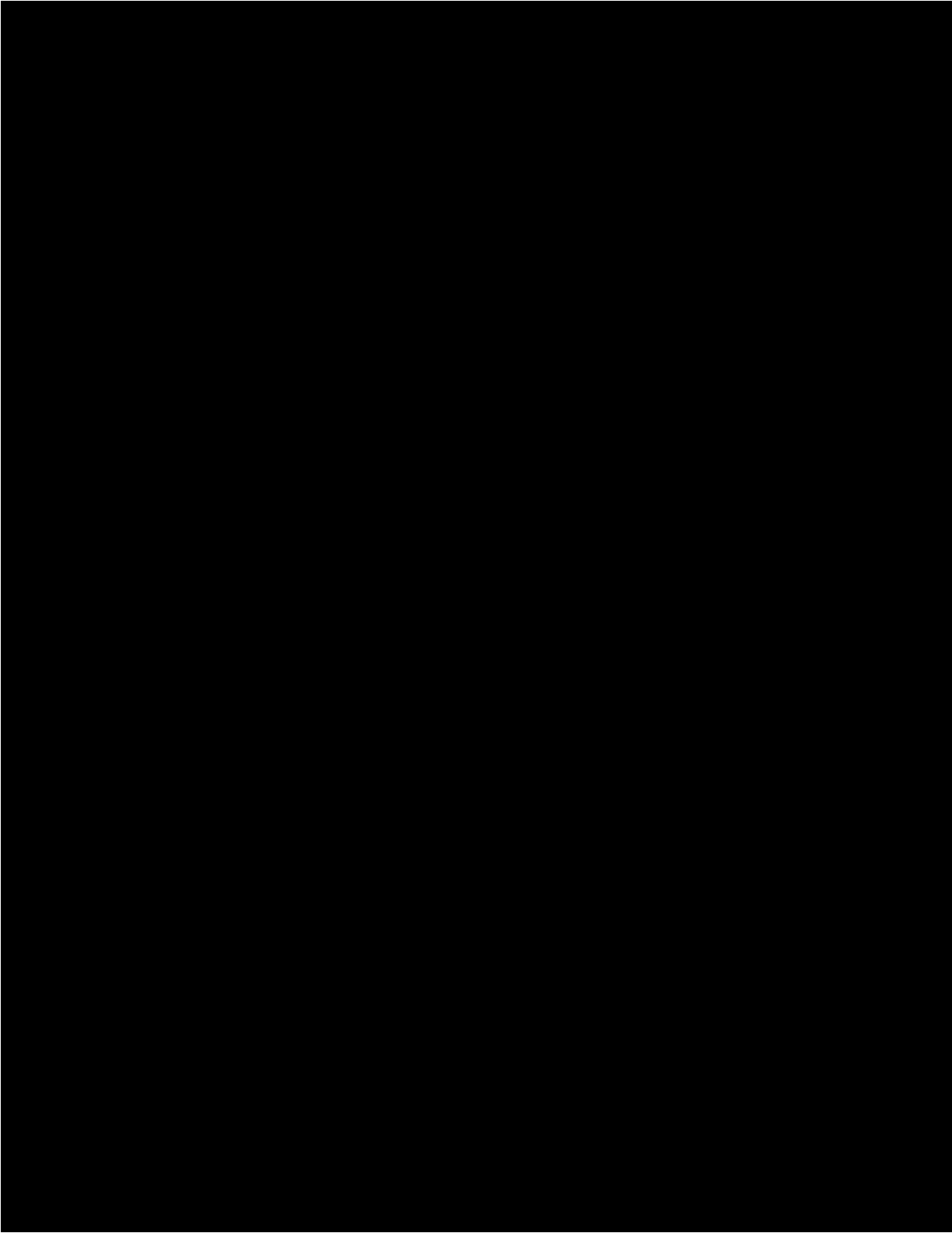


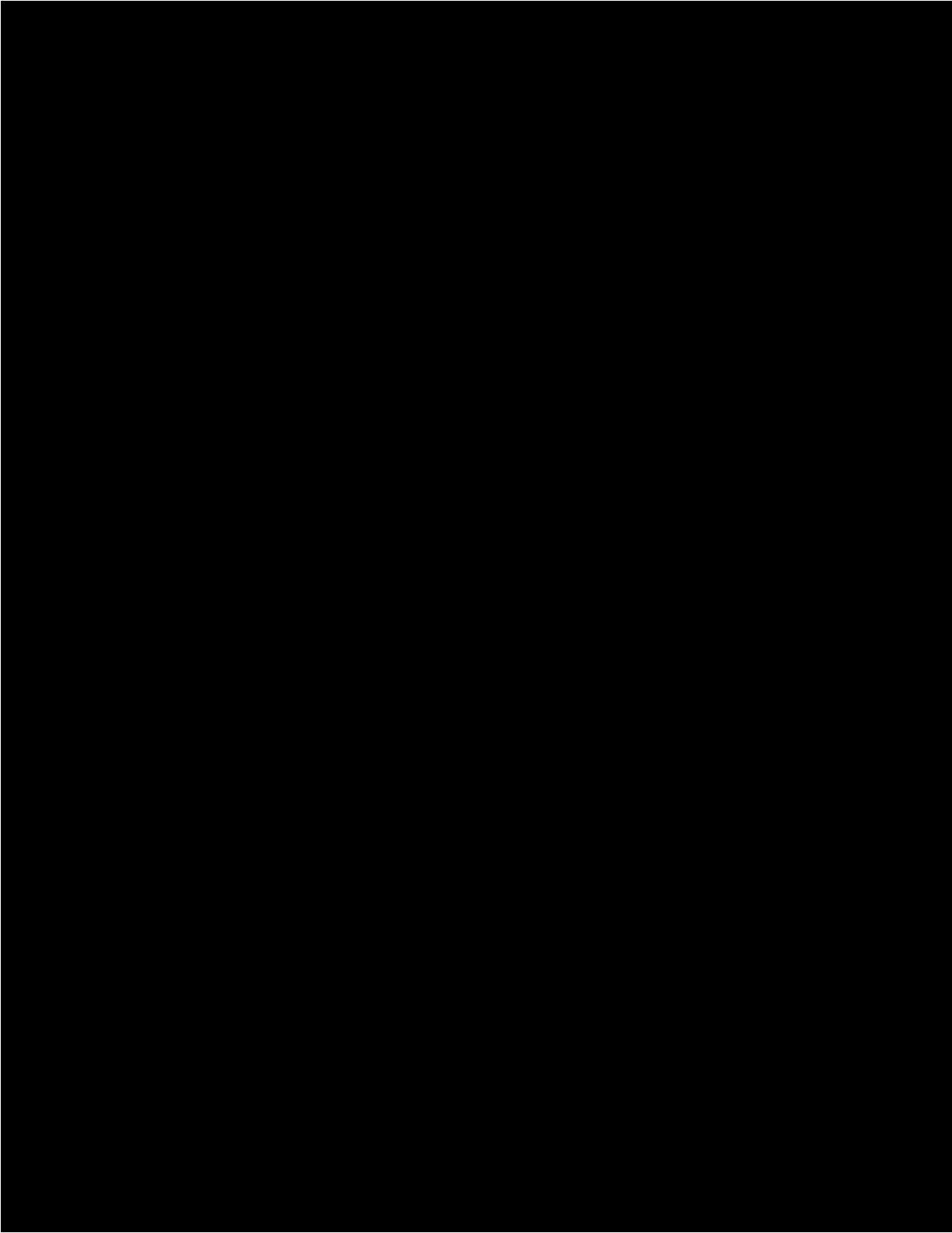
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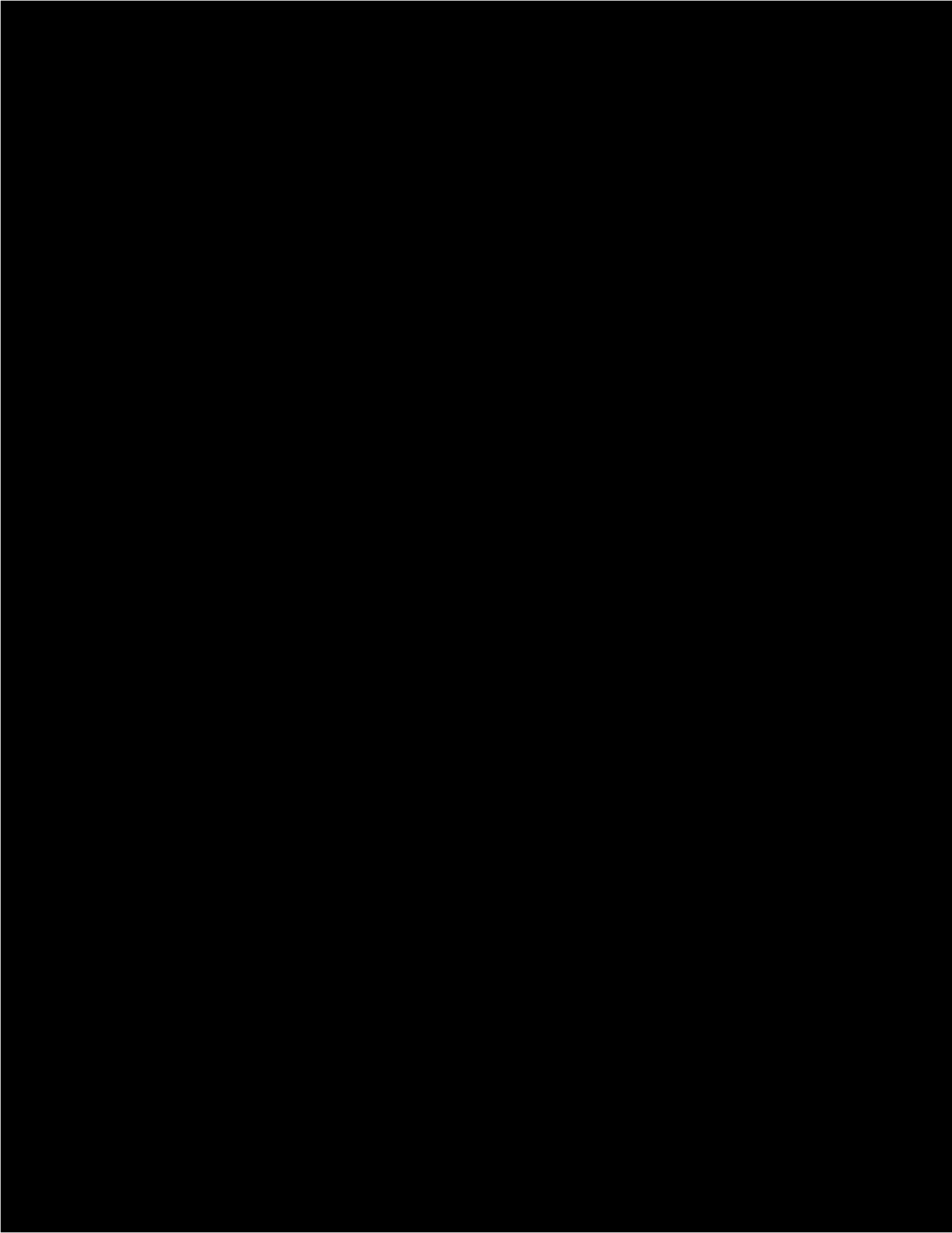


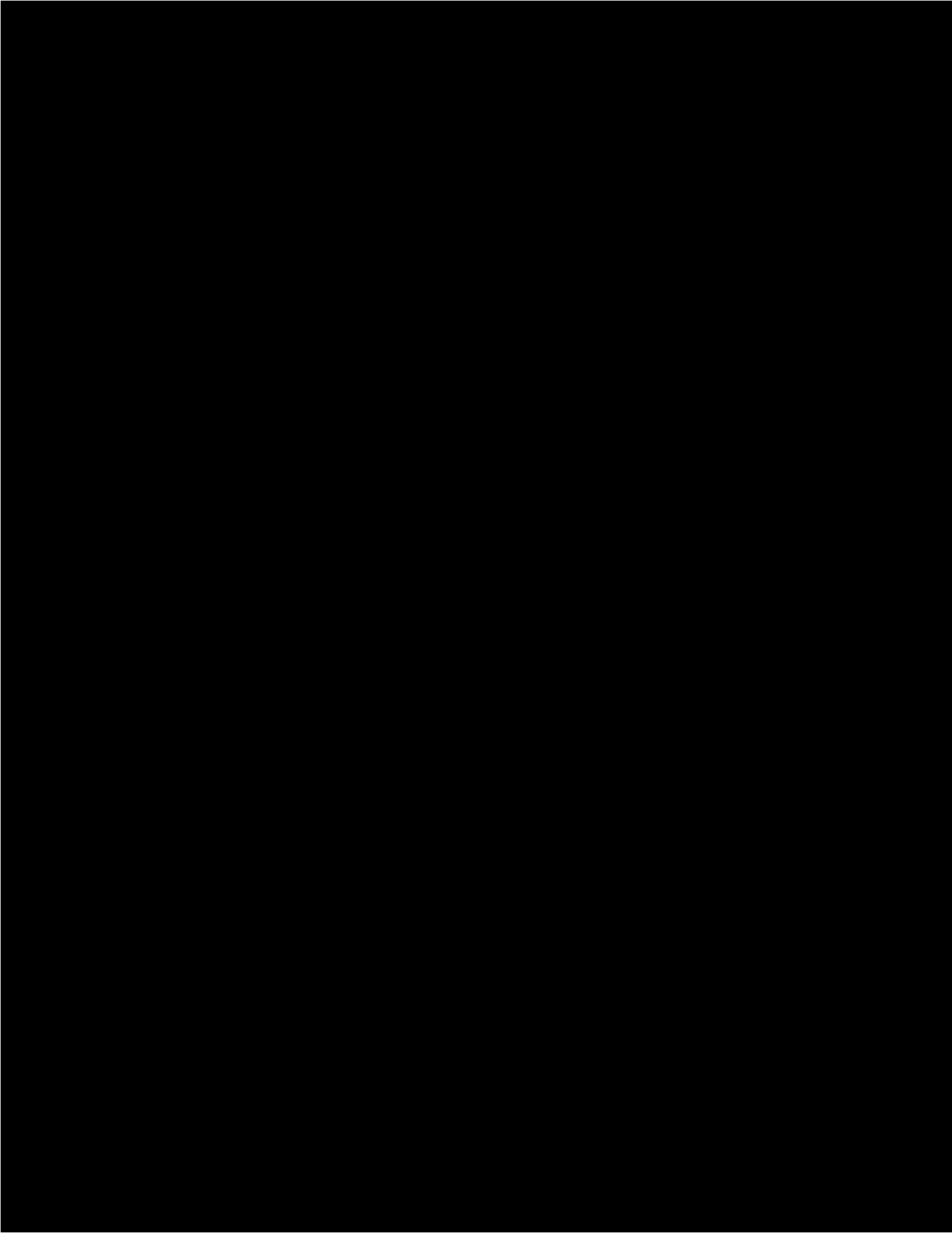


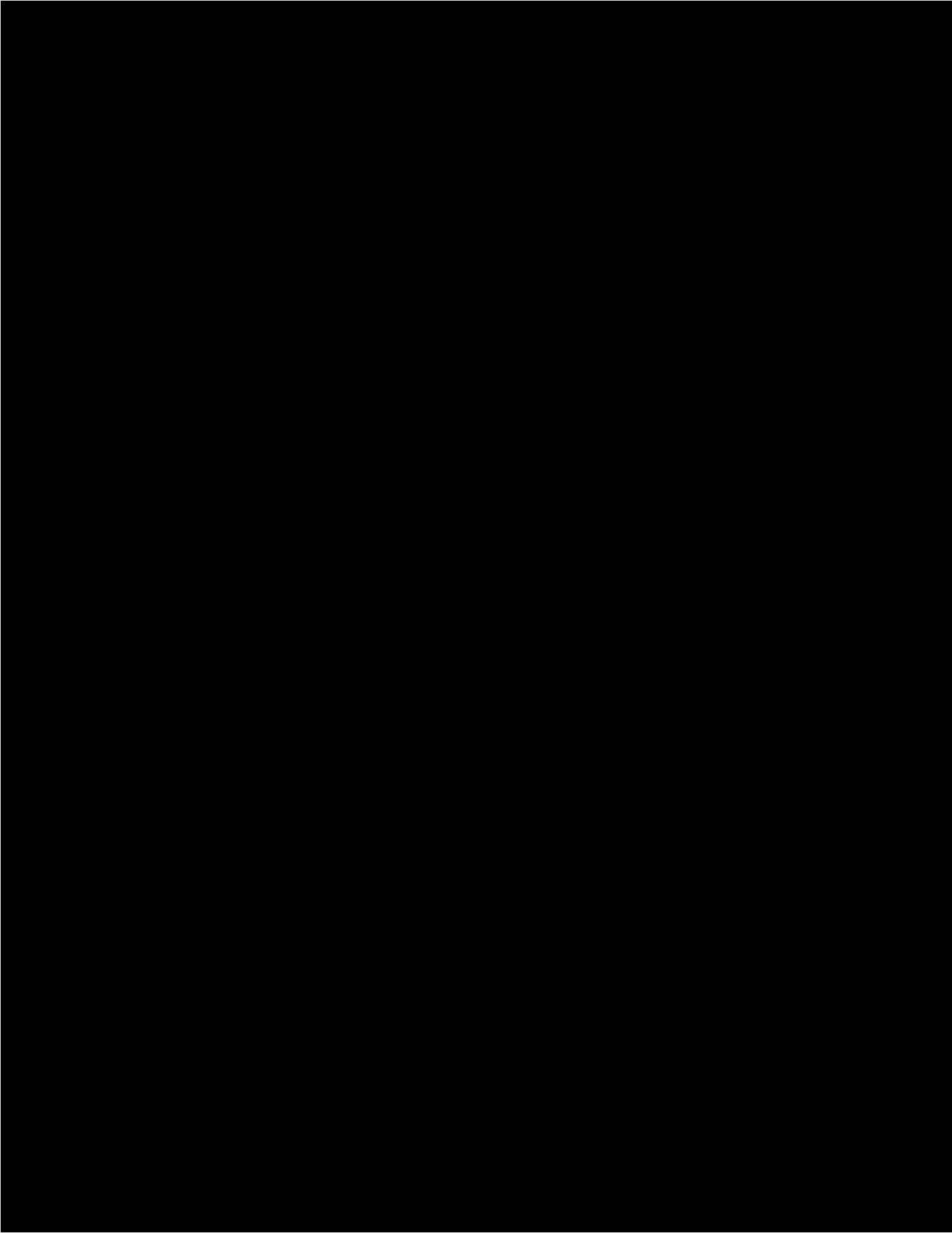
ATTACHMENT E

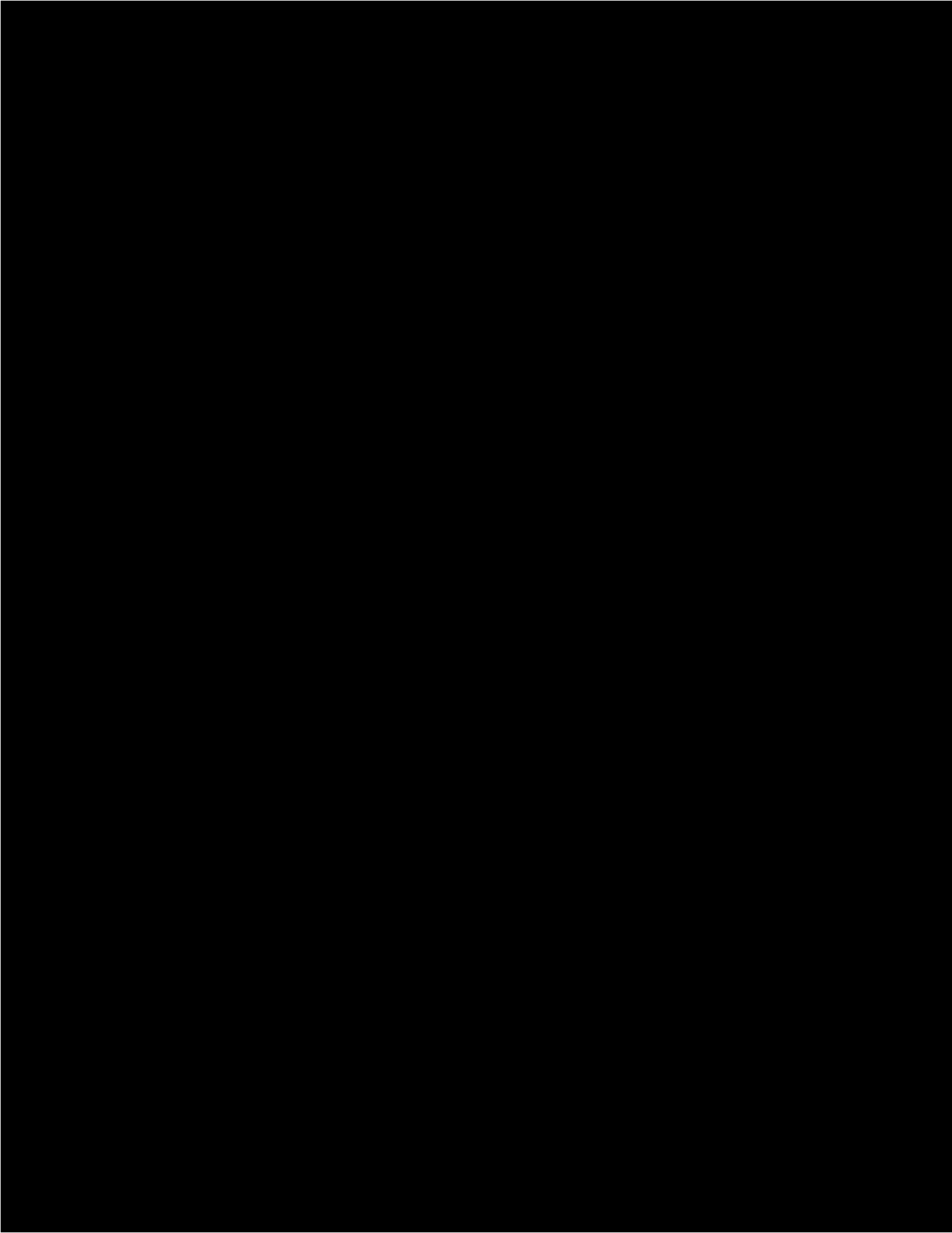


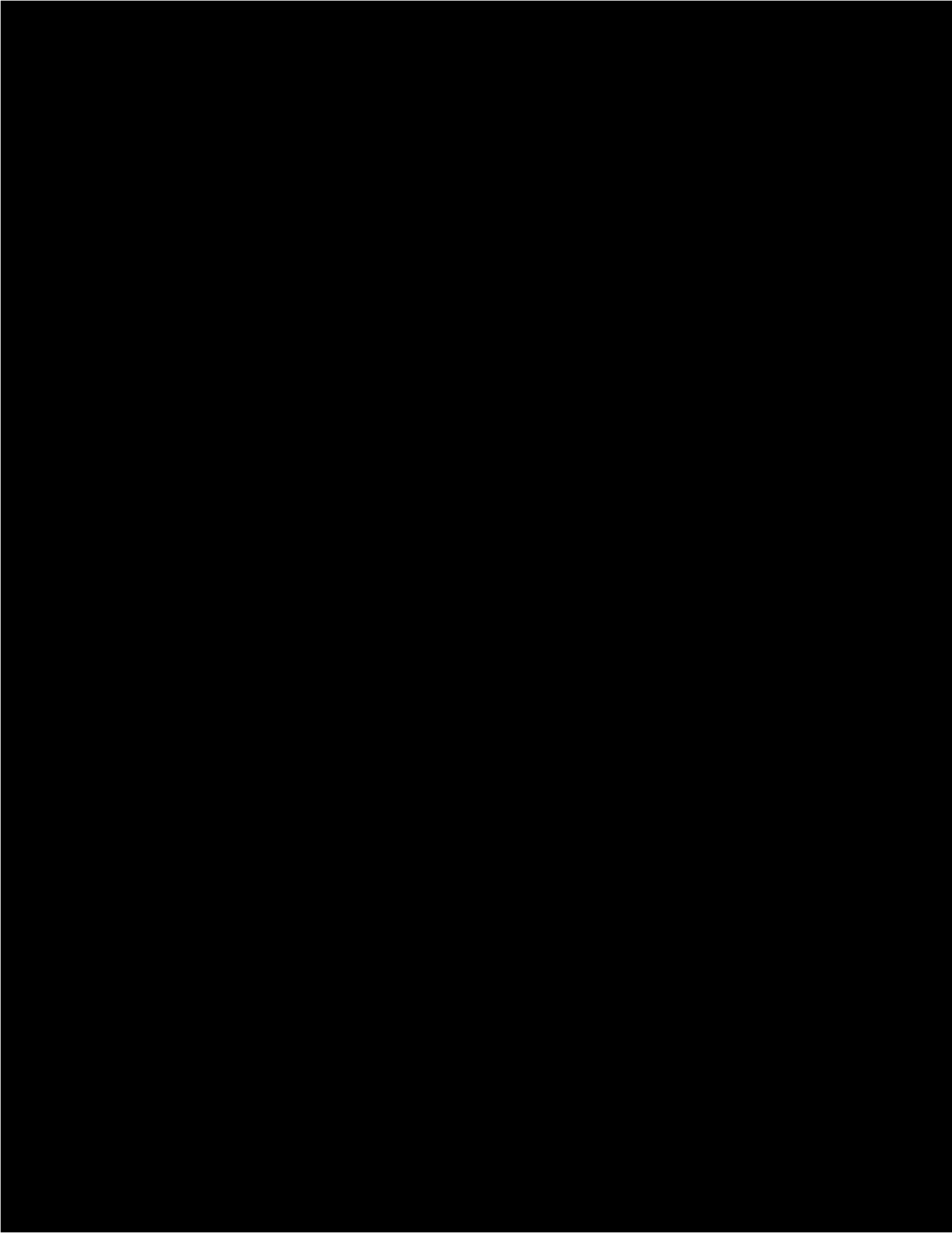


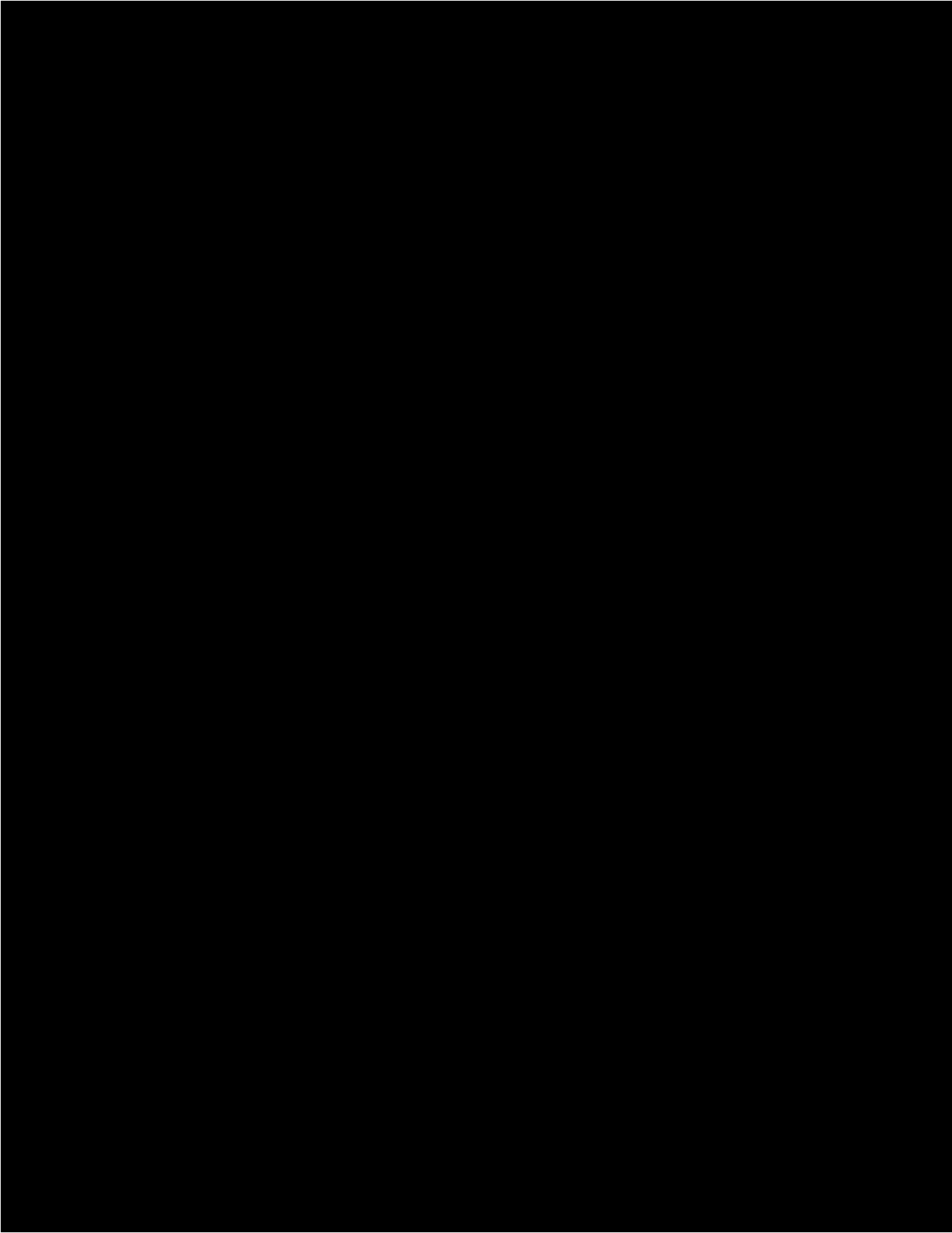












ATTACHMENT F

