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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

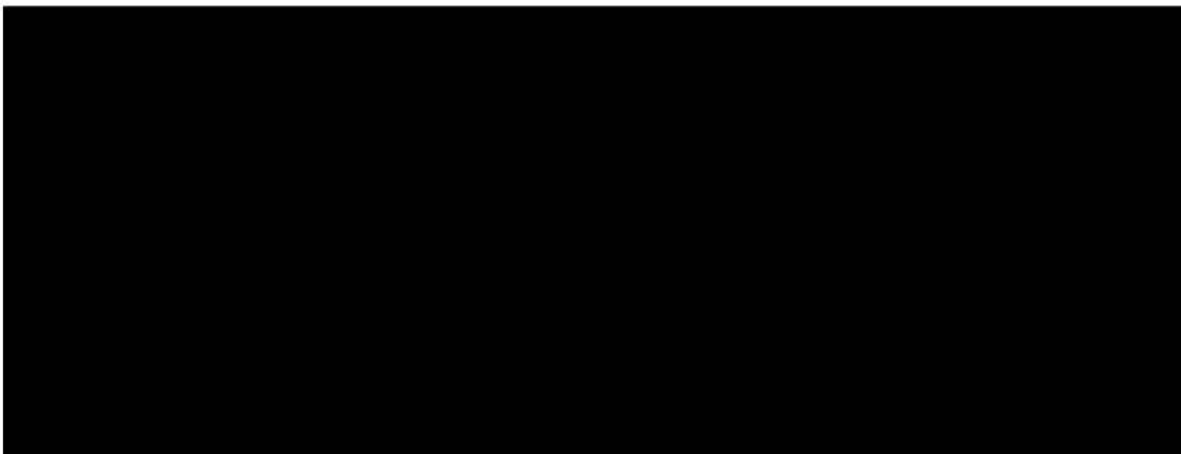
KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

~~(U)~~ AE 722 (RBS)

~~(U)~~ Mr. Bin al Shibh's Motion to Compel
Production of Discovery
Related to Forced Shaving

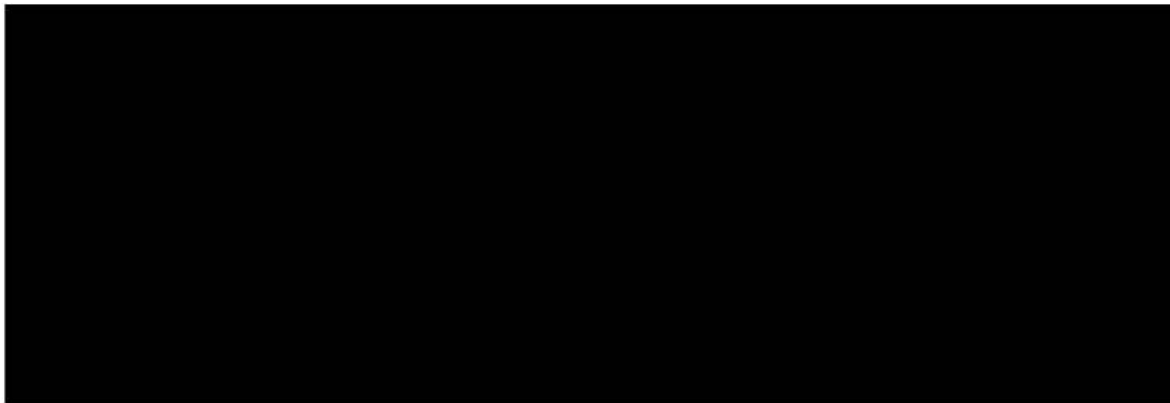
~~(U)~~ 3 February 2020

1. ~~(U)~~ **Timeliness:** This motion is timely filed.
2. ~~(S)~~ **Relief Sought:** Mr. Bin al Shibh respectfully requests the Military Commission compel the production of requested discovery related to multiple forced shaving incidents in 2003, 2005, and 2007.



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3. ~~(U)~~ **Burden of Proof:** The Defense bears the burden of persuasion on the motion to compel to show by a preponderance of the evidence that the requested discovery is relevant and helpful to the preparation of Mr. Bin al Shibh's defense.¹

4. ~~(U)~~ **Facts:** The U.S. Government held Mr. Bin al Shibh in secret, incommunicado detention for nearly four years, from 2002 to 2006, where he was tortured and repeatedly interrogated. Following his transfer to Guantanamo Bay in September 2006, agents of the Federal Bureau of Investigation (FBI) and Department of Defense Criminal Investigative Task Force (DoD CITF) interrogated him on 11-12 January 2007, resulting in statements that the Government now intends to use at trial. Mr. Bin al Shibh has previously provided a more thorough account of relevant facts surrounding his extended detention and torture in the Rendition, Detention, and Interrogation (RDI) Program, which he relies on for this Motion.² Mr. Bin al Shibh has a

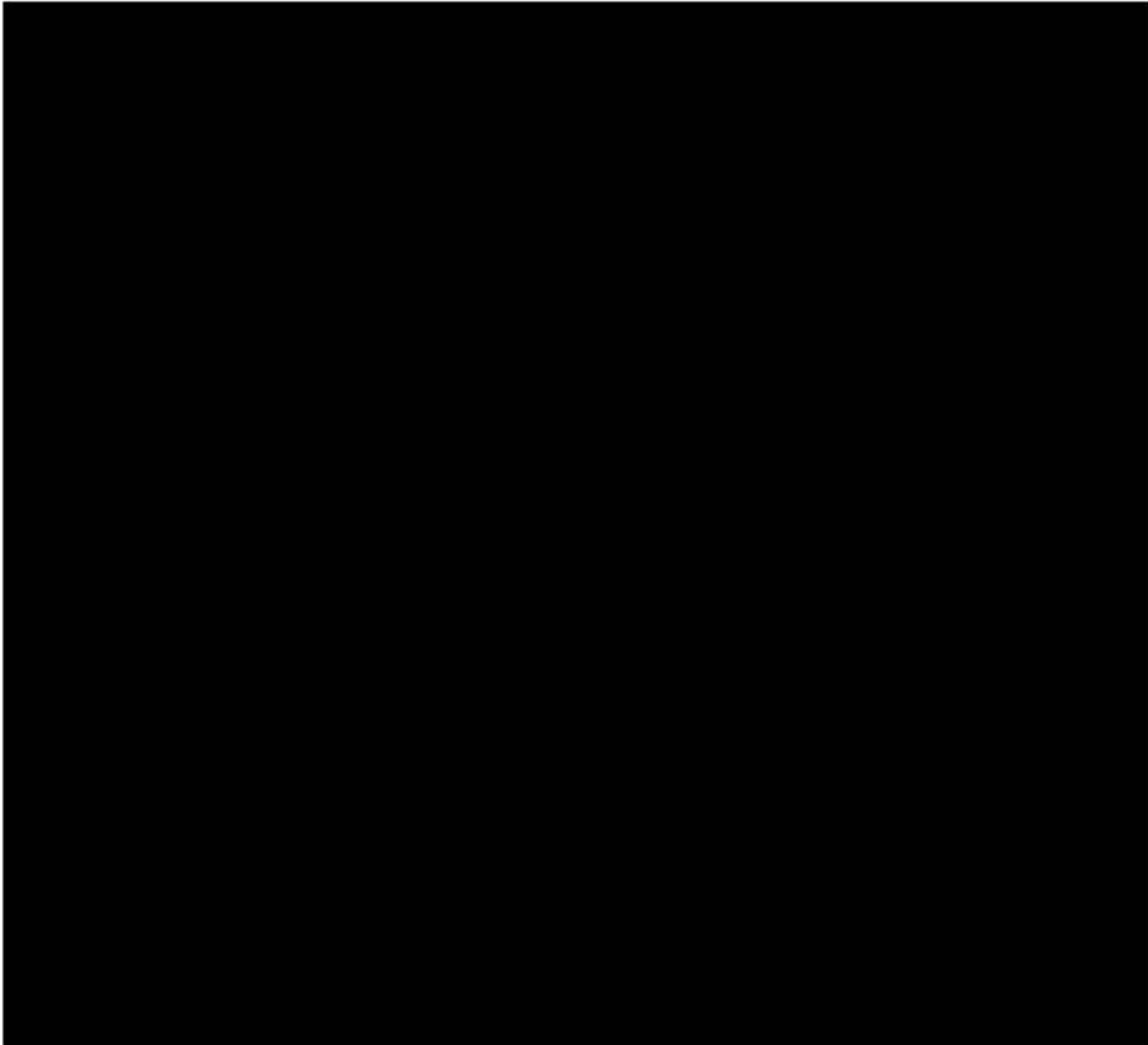
¹ ~~(U)~~ R.M.C. 905(c)(1)-(2).

² ~~(U)~~ See AE 629 (RBS) at 8-26.

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currently pending Motion to Suppress his Letterhead Memorandum ("LHM") statements as involuntary, AE 629 (RBS).



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5. ~~(U)~~ The date and location of any additional forced shaving incidents prior to January 2007, and all records related to and personnel involved in any such incident.⁵

~~(U)~~ The Government responded to this request on 29 January 2020.⁶ It declined to provide any further discovery, asserting that it had provided all discovery required under the ten categories set forth in AE 397F, including all individuals with direct and substantial contact. It also asserted that it was unaware of any other forced shaving incidents.

5. ~~(U)~~ Law and Argument:

~~(U)~~ The Defense is entitled to the requested evidence, as it is “material to preparation of the defense.”⁷ R.M.C. 701(j) establishes that “[e]ach party shall have an adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.” In passing the Military Commissions Act (M.C.A.) of 2009, Congress itself statutorily mandated this process.⁸ R.M.C. 701(c)(1) states that the Government shall permit the defense counsel to examine any books, paper, documents, photographs, tangible objects, buildings, or places so long as they are: (1) under the control of the Government, and (2) material

⁵ ~~(U)~~ Attach. B.

⁶ ~~(U)~~ Attach. C.

⁷ ~~(U)~~ R.M.C. 701(c)(1); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁸ ~~(U)~~ See 10 U.S.C. § 949j (“The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution”).

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to the preparation of the defense or intended for use by the trial counsel as evidence in the Prosecution's case-in-chief at trial.

(U) Demonstrating materiality "is not a heavy burden" and the standard of materiality is broadly construed.⁹ Evidence qualifies as material when there is any reasonable likelihood it could affect the judgment of the jury.¹⁰ Information is material for discovery purposes "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."¹¹ "[A]n accused's right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy."¹² "Material evidence" is also not limited to exculpatory evidence.¹³ It includes information that is unfavorable, as:

(U) [a] defendant in possession of such evidence may alter the quantum of proof in his favor in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence.¹⁴

This is because "it is just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths."¹⁵

⁹ (U) *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1998); *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998); *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006).

¹⁰ (U) *See Weary v. Cain*, 136 S.Ct. 1002, 1006 (2016).

¹¹ (U) *Lloyd*, 992 F.2d at 351.

¹² (U) *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008).

¹³ (U) *See Marshall*, 132 F.3d 63 at 67; *see also Libby*, 429 F. Supp. 2d at 7.

¹⁴ (U) *Marshall*, 132 F.3d at 68.

¹⁵ (U) *Id.* at 67.

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~~(U)~~ More broadly, Mr. Bin al Shibh has a constitutional right to present a complete defense.¹⁶ Inseparable from this right is the right to obtain evidence.¹⁷ Additionally, because this is a capital case, “the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case.”¹⁸ The penalty of death is qualitatively different than a sentence of imprisonment, and there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case, and this need affects every procedure at trial.¹⁹

~~(U)~~ Here, the requested evidence, including documents and witness identities, must be turned over to the Defense. It is material to Mr. Bin al Shibh’s motion to suppress for voluntariness, any motions to suppress statements on grounds other than voluntariness, any motion to dismiss for outrageous government misconduct, as well as providing important mitigating evidence in any pre-sentencing hearing. Given the Commission’s duty to consider the totality of circumstance surrounding the LHM interrogations—including both the conditions of the interrogations themselves and their connections to earlier RDI treatment and interrogations—

¹⁶ ~~(U)~~ See, e.g., *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (“[t]he due process clause of the Fifth Amendment guarantees that criminal defendants be afforded a meaningful opportunity to present a complete defense”), citing *California v. Trombetta*, 467 U.S. 479, 485 (1984).

¹⁷ ~~(U)~~ See *Washington v. Texas*, 388 U.S. 14, 19 (1967) (guaranteeing production of documents and witnesses under the Fifth Amendment); *Taylor v. United States*, 329 F.2d 384, 386 (5th Cir. 1964) (guaranteeing production of documents and witnesses under the Sixth Amendment).

¹⁸ ~~(U)~~ *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).

¹⁹ ~~(U)~~ See *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

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the Defense must have access to all evidence that could demonstrate why the statements must be suppressed or refute the Government's theories of voluntariness.



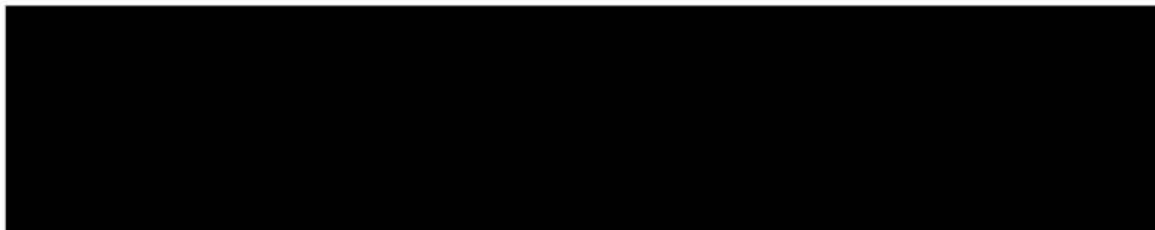
6. ~~(U)~~ **Oral Argument:** Mr. Bin al Shibh requests oral argument on this motion.

7. ~~(U)~~ **Witnesses:** None

8. ~~(U)~~ **Conference with Opposing Counsel:** As articulated in its response to the underlying discovery request, the Prosecution opposes this motion.

9. ~~(U)~~ **Attachments:**

a. (U) Certificate of Service



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~~(U)~~ Respectfully submitted,

//s//

JAMES P. HARRINGTON
Learned Counsel

//s//

WYATT A. FEELER
Defense Counsel

//s//

VIRGINIA M. BARE
Maj, USAF
Defense Counsel

//s//

JOHN M. B. BALOUZIYEH
CPT, USA
Defense Counsel

//s//

DONNA R. CLINE
Defense Counsel

//s//

VIVIAN HERNANDEZ
Defense Counsel

//s//

CLAYTON M. LAWRENCE
LT, USN
Defense Counsel

~~(U)~~ Counsel for Mr. Bin al Shibh

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~~(S)~~ ATTACHMENT A

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~~(U)~~ CERTIFICATE OF SERVICE

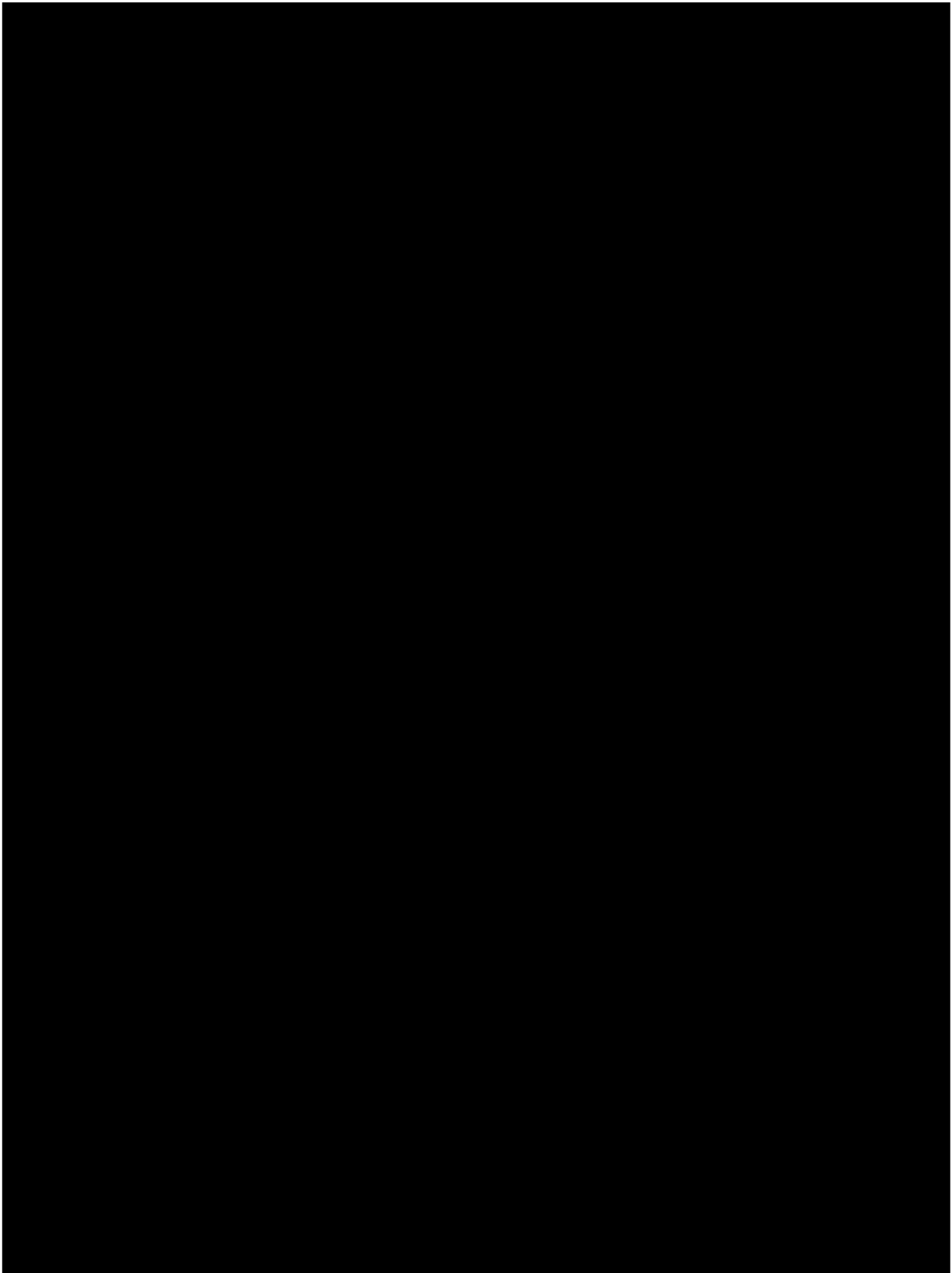
~~(U)~~ I certify that on 3 February 2020, I electronically filed the foregoing motion and served it on all counsel of record by e-mail.

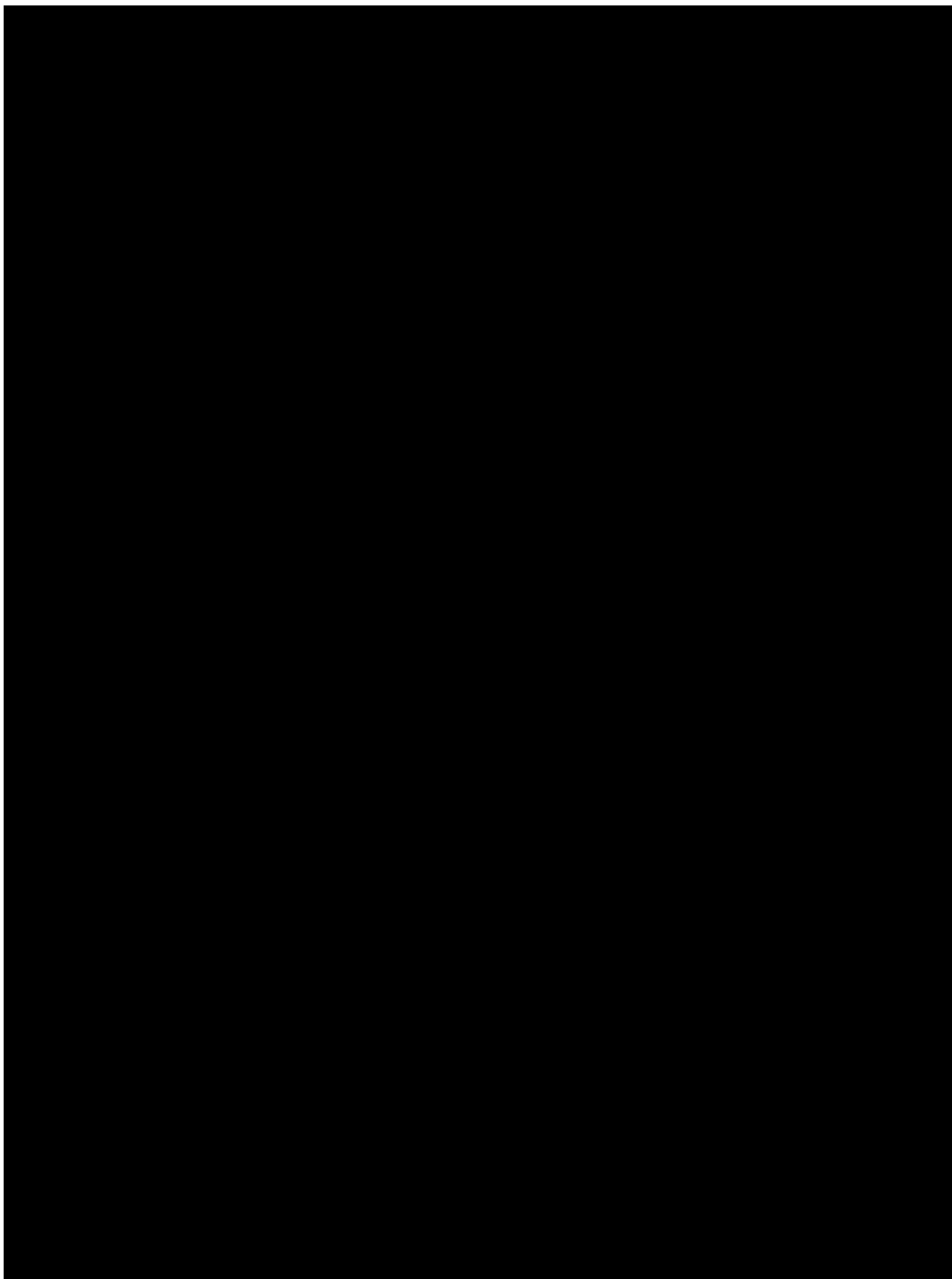
//s//
JAMES P. HARRINGTON
Learned Counsel

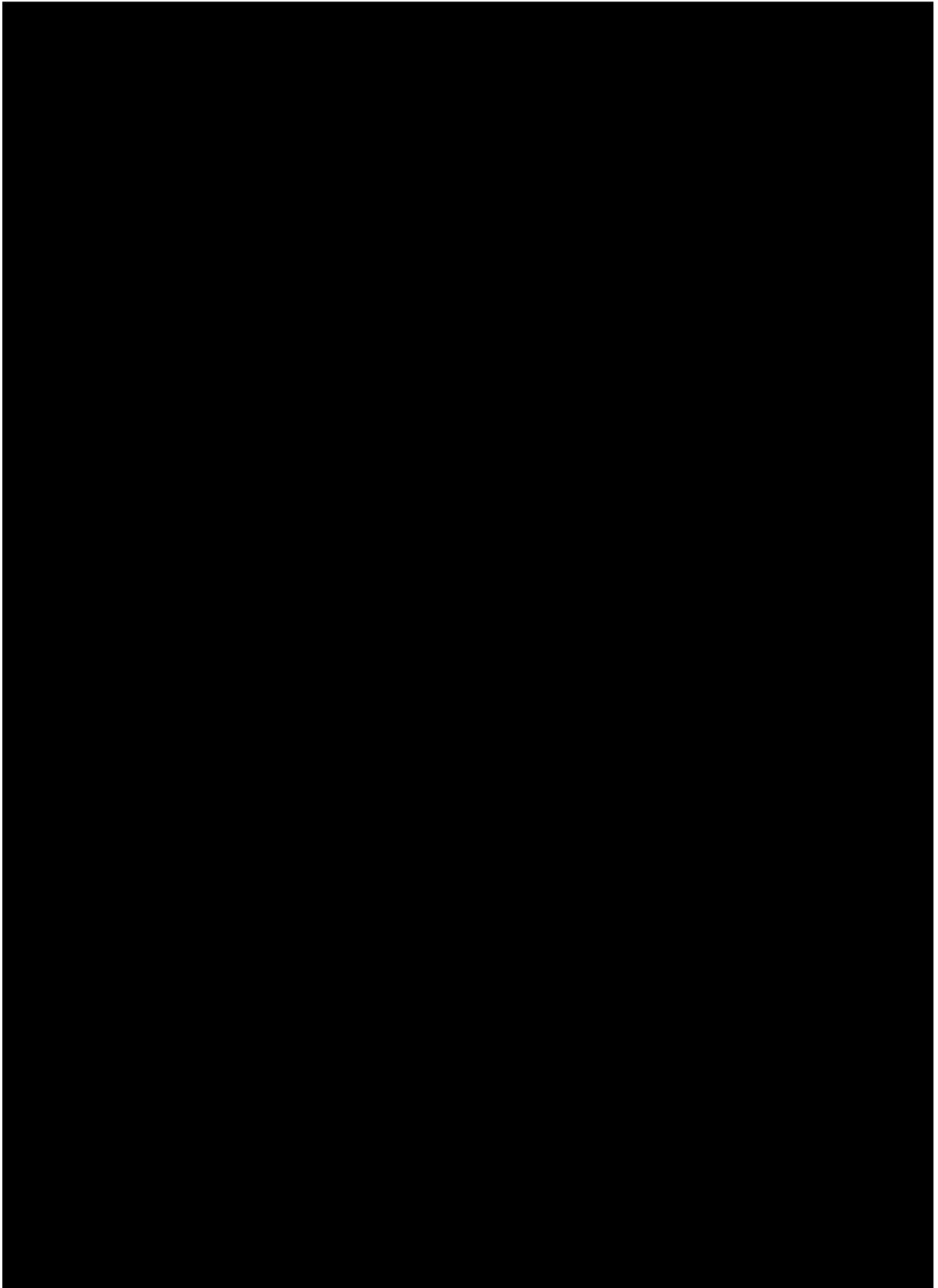
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~~(U)~~ ATTACHMENT B

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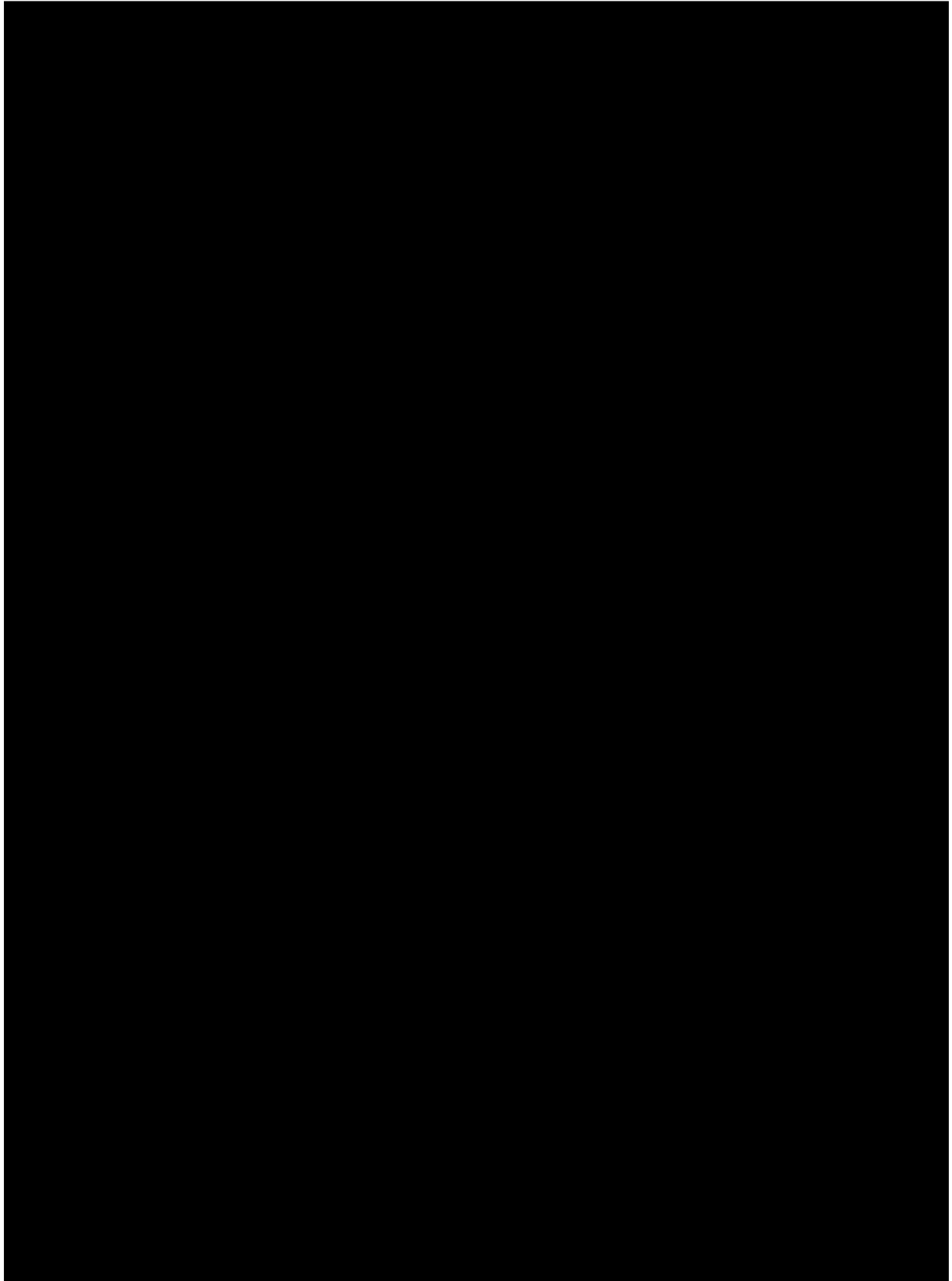


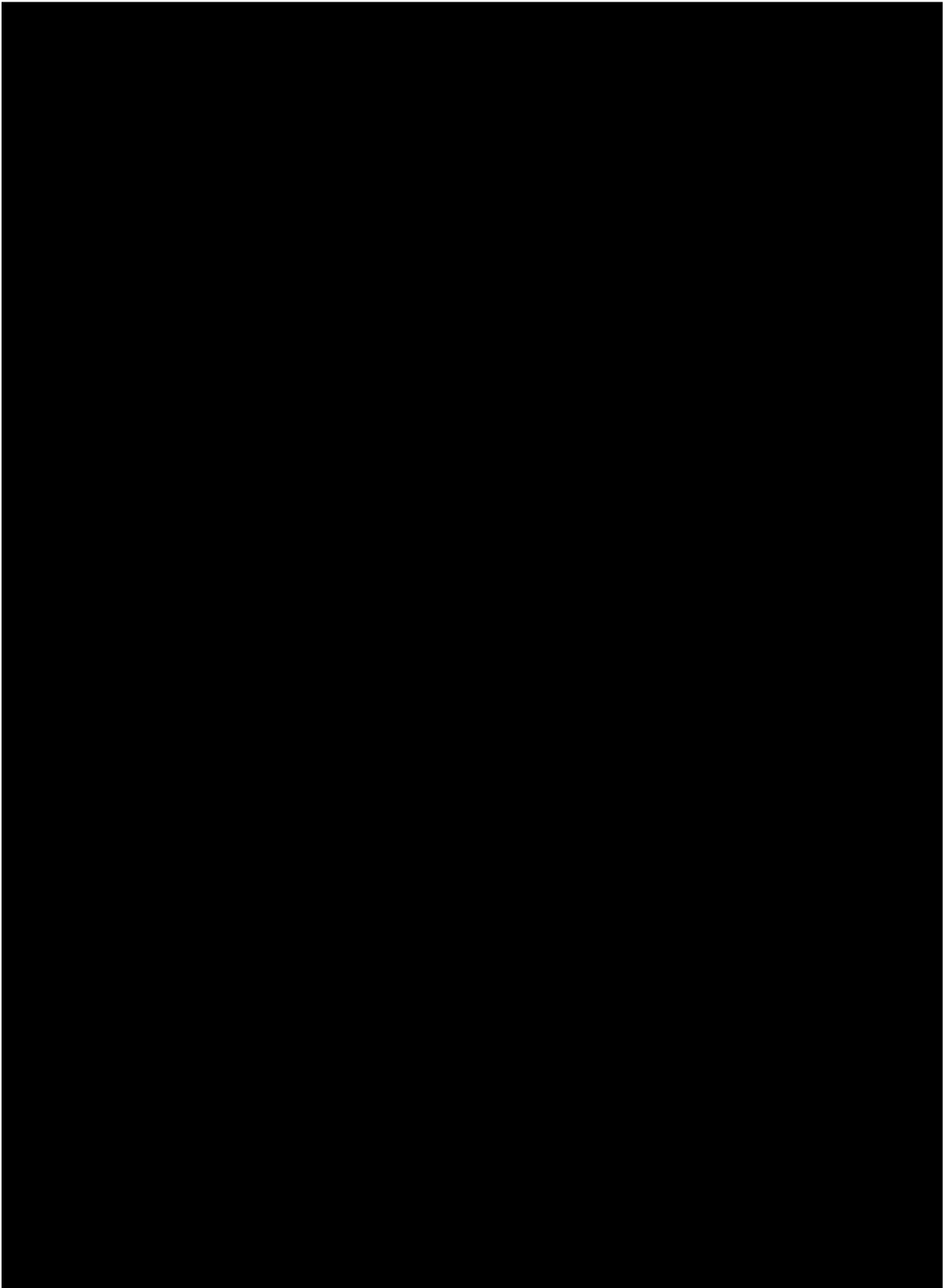


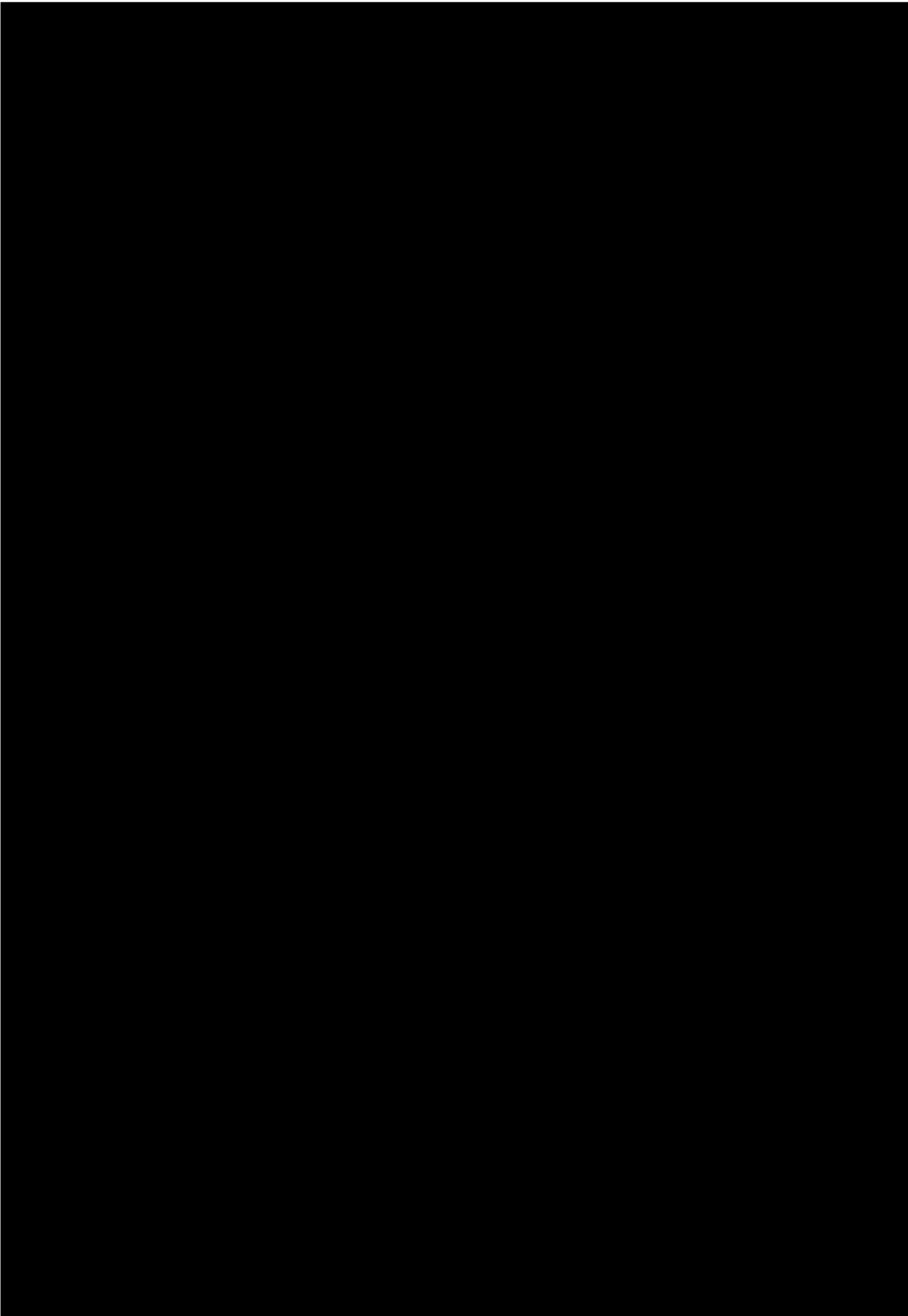
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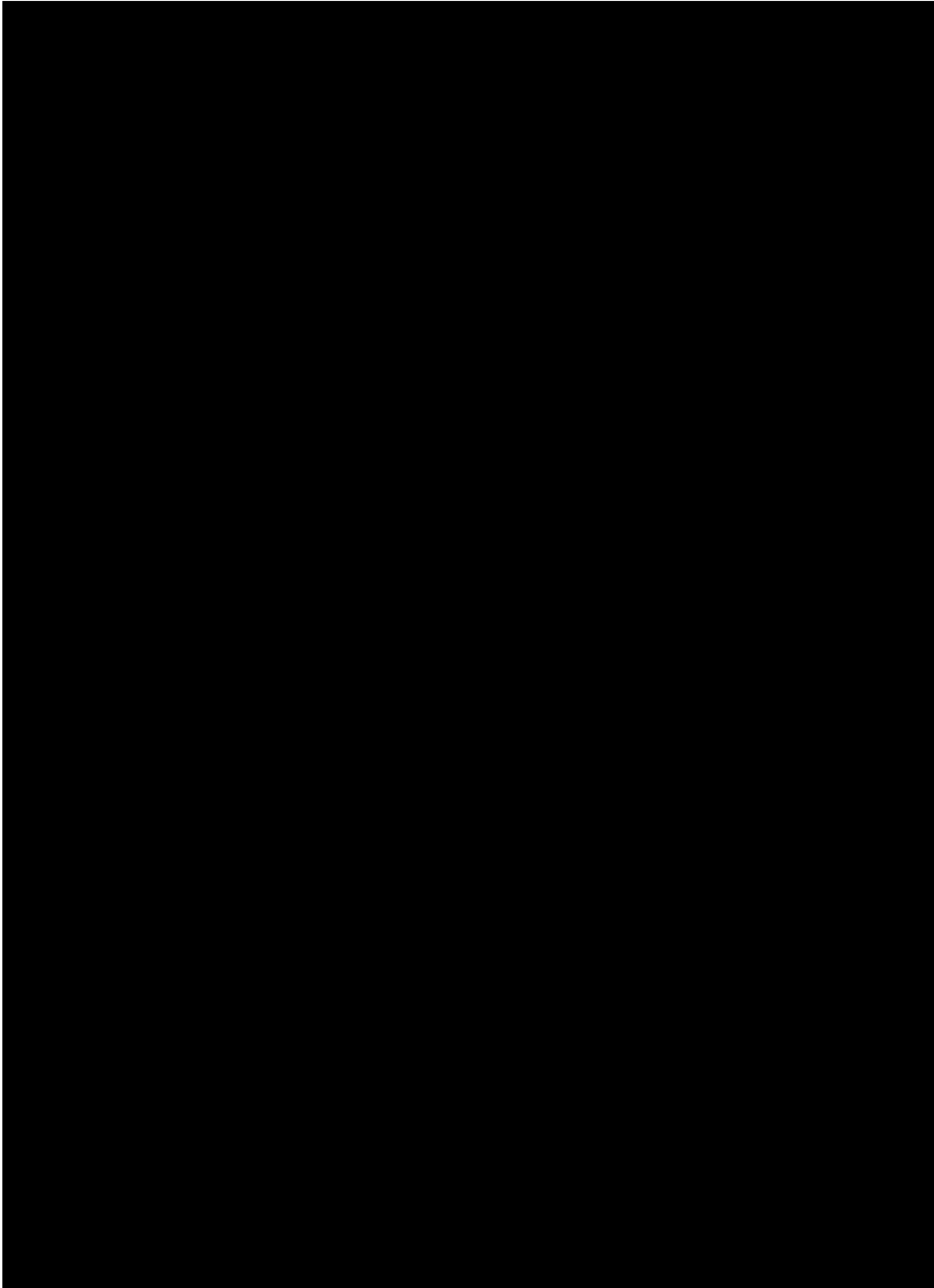
~~(U)~~ ATTACHMENT C

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~~(U)~~ ATTACHMENT D

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