

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1002,
2 3 August 2022.]

3 MJ [COL ACOSTA]: The commission is called to order.

4 Trial Counsel, good morning. Please identify who is
5 here on behalf of the United States and if they have the
6 necessary clearance and indicate whether they're located here
7 or appearing remotely from the Remote Hearing Room.

8 TC [MR. MILLER]: Yes, Your Honor. Good morning. These
9 proceedings are being transmitted via CCTV to public viewing
10 locations in the United States pursuant to your previous
11 order.

12 Present for the United States here in GTMO are myself,
13 Mark Miller; Mr. John Wells; Major Stephen Romeo. Forrest --
14 assisting us is Forrest Parker Smith, Mr. Pascual
15 Tavaréz-Patine, Staff Sergeant Jaune Daniels, and our
16 interpreter is in the back.

17 Also present in this -- in the Remote Hearing Room in
18 northern Virginia for the prosecution are Lieutenant Commander
19 Cherie Jolly, Lieutenant Commander Keven Schreiber, Lieutenant
20 Tess Schwartz. Assisting them is Master Sergeant Laura
21 Speranza and Special Agent Paul Rude.

22 All persons have the necessary clearances and
23 qualifications, Your Honor.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17759

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: Thank you, Counsel.

2 LDC [MR. NATALE]: Good morning, Your Honor. Anthony
3 Natale on behalf of Mr. al Nashiri ----

4 MJ [COL ACOSTA]: Good morning, Mr. Natale.

5 LDC [MR. NATALE]: ---- who is present here in court with
6 his -- with the interpreter. Also present is Mr. Dolphin and
7 Ms. Janes. I am the only attorney who will be here in court;
8 however, Captain Mizer will introduce to you all of the people
9 who are up there. It is my understanding that everyone
10 continues to be classified to the levels necessary and
11 qualified to be present here in court.

12 MJ [COL ACOSTA]: Who is the individual sitting at the
13 table -- third table?

14 LDC [MR. NATALE]: Oh.

15 DCDC [CDR WALL]: Your Honor, I'm Darren Wall, the Deputy
16 Chief Defense Counsel. I have all the necessary clearances,
17 and I'm here on General Thompson's behalf.

18 MJ [COL ACOSTA]: All right. Thank you.

19 LDC [MR. NATALE]: Your Honor, I can -- I want to tell you
20 that I tested today negative. I have done everything that I
21 think I needed to be doing, so I've done it. I'm here. I'm
22 healthy, well, and the same as always.

23 MJ [COL ACOSTA]: Good to hear.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17760

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NATALE]: Thank you.

2 MJ [COL ACOSTA]: Thank you.

3 Captain Mizer.

4 DDC [CAPT MIZER]: Good morning, Your Honor, from
5 Virginia.

6 MJ [COL ACOSTA]: Good morning.

7 DDC [CAPT MIZER]: Lieutenant Commander Alaric Piette is
8 here with me in the Remote Hearing Room, Ms. Carmon,
9 Mr. Padilla, and Ms. Morgan. Thank you.

10 MJ [COL ACOSTA]: Thank you, Counsel. All right. As we
11 stated before, the accused is present today. Good morning,
12 Mr. Nashiri.

13 These proceedings were briefly continued last week due
14 to COVID infections that necessitated isolation and testing as
15 mentioned by Mr. Natale. This has been accomplished in an
16 effort to prevent future delay on this issue. The commission
17 is requiring masks of all people in this building.

18 The commission issued a ruling in 475I on the
19 behavioral records yesterday, ordering the production of only
20 the 11 page -- of only the 11 pages not previously provided to
21 the government.

22 I asked for the accused to be present today so that we
23 could -- Mr. Nashiri to be present today so that we could talk

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17761

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 about the commission's continuing inquiry into 339X. As --
2 some of this I'm going to state has been stated before. I'm
3 just trying to make sure that everything is clear on the
4 record.

5 At the beginning of the session on Monday morning, the
6 25th of July, I began the commission's inquiry into the
7 conflict alleged by Captain Mizer in his motion with -- to
8 withdraw from representing the accused. That application is
9 at AE 339X. In this, Captain Mizer's latest application to
10 withdraw, and during my colloquy with Captain Mizer last week,
11 Captain Mizer stated that the application to withdraw that he
12 filed on 17 June 2022 was spurred by the commission's May 2022
13 docketing order. In that docketing order, the commission
14 directed that we begin the process of litigating the
15 admissibility of over 100 hearsay statements that the
16 government intends to offer into evidence at trial and that we
17 would begin that litigation during this session.

18 It was only upon the issuance of that docketing order
19 that Captain Mizer represents that he felt the potential
20 conflict, which is a potential conflict, he states, existed
21 since 2013 related to the admissible hearsay statements -- the
22 admissibility of hearsay statements made by Mr. Hamdan.
23 Mr. Hamdan is Captain Mizer's previous client.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17762

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 It was in May of 2022 that Captain Mizer asserts that
2 this potential conflict grew into an actual conflict in this
3 case and it was only then that Captain Mizer revealed this
4 potential conflict to the commission. Additionally, I noted
5 that in Captain Mizer's 2020 application to withdraw at 339Q,
6 Captain Mizer did not indicate any conflicts as a reason for
7 that withdrawal.

8 Because I determined there was no need to take up the
9 admissibility of Mr. Hamdan's hearsay statements during this
10 session or during any session scheduled for the rest of this
11 calendar year, I found that it was unnecessary to resolve the
12 potential conflict at this time and unnecessary to continue
13 this session as required by the -- as requested, pardon me, by
14 the defense.

15 My decision was based upon the conclusion that, as
16 Captain Mizer framed the nature of the potential conflict,
17 nothing has changed with respect to that potential conflict
18 since 2013 or since Captain Mizer resumed representation of
19 the accused in 2018. I do not find persuasive that the -- I
20 do not find persuasive the argument that any potential
21 conflict related to Mr. Hamdan ripened into an actual conflict
22 simply because I indicated that we would begin litigating the
23 admissibility of the hearsay statements beginning during this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 session.

2 Neither party indicated any intent or expectation that
3 we would litigate Hamdan's hearsay statements during this
4 session. I therefore determined that we could continue with
5 our docket scheduled for this session of the commission while
6 the defense team sought to advise Mr. Nashiri regarding the
7 nature of the potential conflict.

8 Again, as I stated last week, neither in his latest
9 application to withdraw nor on -- during -- nor during
10 questioning on Monday did Captain Mizer assert any potential
11 conflict with his former client arising from the litigation of
12 AE 467, a motion filed by the defense in February of 2022,
13 which is a motion to suppress the statements made by
14 Mr. al Nashiri during a 2007 interview.

15 Further, neither party suggested to the commission
16 that the statements made by Mr. Hamdan were relevant to
17 resolving the issues presented in AE 467 in any pleading about
18 the conflict or in any discussion of those matters. The
19 statements of Mr. Hamdan were not directly offered as evidence
20 in support of AE 467 came up during a -- during witness
21 testimony on AE 467, and AE 467, again, focuses in greatest
22 part on the voluntariness of the accused's statement.

23 Since the defense raised questions related to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17764

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Hamdan during the litigation of AE 467, it stands to
2 reason that Captain Mizer would have informed the commission
3 of the potential conflict at the time the defense filed AE 467
4 in February of this year rather than waiting until June to
5 move to withdraw from the accused in this case.

6 All that said, does any -- does either party
7 anticipate anything related to Mr. Hamdan's statements coming
8 up -- made by him coming up during what we have on the
9 schedule for today? Government?

10 TC [MR. MILLER]: No, Your Honor.

11 MJ [COL ACOSTA]: Defense?

12 LDC [MR. NATALE]: No, Your Honor.

13 MJ [COL ACOSTA]: I've reviewed the written submission by
14 the remainder of Mr. al Nashiri's team, other than Captain
15 Mizer, which is filed at 339EE. It is clear that the
16 remainder of the defense team were aware of Captain Mizer's
17 potential conflict well before June of 2022. No member of the
18 defense team raised the potential conflict to the attention of
19 the commission.

20 The rest of the defense team has now suggested that
21 Captain Mizer's conflict may somehow be imputed to them;
22 however, the first time this possible imputed conflict was
23 raised to the commission was last week. Notably, the rest of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17765

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the defense team made no mention of any possible conflict
2 being imputed to them when they responded to Captain Mizer's
3 request to withdraw in AE 339AA or on 1 July 2022.

4 The remainder of the defense team also did not include
5 any reference to any imputed conflict of interest when they
6 moved in AE 485 to suppress Hamdan's statements due to Captain
7 Mizer's alleged conflict. Instead, in AE 485 the defense
8 suggested that the commission should moot Captain Mizer's
9 potential conflict of interest by denying the government's
10 ability to introduce Mr. Hamdan's hearsay statements into
11 evidence.

12 Having considered AE 339EE, I find that there's no
13 reasonable basis to believe that any other member of this
14 defense team is operating under any potential conflict of
15 interest in this case. Each of the five attorneys are in the
16 same situation whether Captain Mizer's alleged conflict exists
17 or not or if Captain Mizer is on the team or is not. They
18 have the same information now as they would even if Captain
19 Mizer were not on the case.

20 Further, I find unpersuasive the suggestion that the
21 rest of the defense team is potentially conflicted because
22 they rely on Captain Mizer as the longest-tenured member of
23 the team and that his withdrawal from the case would

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 negatively impact the defense team.

2 Again, there's no conceivable reason the five defense
3 counsel who are not Captain Mizer cannot advise Mr. Nashiri on
4 these issues. Those five counsel have represented the accused
5 for a combined period of over 12 years with Lieutenant
6 Commander Piette serving since 2017; learned counsel,
7 Mr. Natale, since 2019.

8 The defense filed AE 467 in February of 2022 with
9 apparent knowledge that the statements of Mr. Hamdan would
10 become an issue in that motion. This would have given the
11 defense team ample opportunity to discuss the potential
12 conflict with Mr. al Nashiri prior to the convening of this
13 session.

14 The greatest concern of the commission, of course, is
15 potential prejudice to the accused that could arise from any
16 potential conflict of interest. The facts before the
17 commission are that it -- that it is -- it appears from
18 Mr. Nashiri's response during the first session of this
19 commission that Mr. Nashiri was not informed of this potential
20 conflict until it was mentioned on the record by me; however,
21 we will look into that in just a moment.

22 Mr. Nashiri has had Captain Mizer as detailed --
23 senior detailed defense counsel for six years, potentially

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17767

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 without any knowledge of this potential conflict. Regardless,
2 Mr. Nashiri is arguably in a better position with Captain
3 Mizer as counsel even if an actual conflict exists.

4 Captain Mizer?

5 DDC [CAPT MIZER]: Yes, Your Honor.

6 ADC [MS. MORGAN]: Your Honor, prior to continuing the
7 defense would like to be heard on the record.

8 MJ [COL ACOSTA]: Not at this time. I'm talking to
9 Captain Mizer right now. I'm going to address you in just a
10 moment.

11 DDC [CAPT MIZER]: Your Honor ----

12 MJ [COL ACOSTA]: Captain Mizer, when, if ever, did you
13 consult with Mr. Nashiri regarding this conflict?

14 DDC [CAPT MIZER]: The potential conflict, Your Honor?
15 That's your question?

16 MJ [COL ACOSTA]: Yes, about the -- regarding your
17 potential conflict of interest between Mr. Nashiri and
18 Mr. Hamdan and your representation of both, when, if ever, did
19 you consult with Mr. Nashiri about this?

20 DDC [CAPT MIZER]: Your Honor, my view is that those
21 conversations would be privileged. I think that I could
22 answer that question in an ex parte session.

23 MJ [COL ACOSTA]: It is part of the rules that you -- that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17768

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the rules that you cite in your pleading -- in your initial
2 request to withdraw about the conflict that an attorney is
3 required to consult with both parties.

4 When did you consult -- I need to know whether or not
5 you consulted with Mr. Nashiri about this conflict. And I
6 don't think that -- I think that has to be established on the
7 record as part of the commission's inquiry.

8 DDC [CAPT MIZER]: You're directing me to answer that
9 question, just to be clear, Judge?

10 MJ [COL ACOSTA]: I am directing you to answer when you --
11 if and when you consulted with Mr. Nashiri about this
12 potential conflict.

13 DDC [CAPT MIZER]: Judge, we discussed the ----

14 MJ [COL ACOSTA]: I don't need to know what was said. I
15 just need to know when it was discussed.

16 DDC [CAPT MIZER]: Understood, Your Honor. We discussed
17 the potential of Mr. Hamdan's statements being used sometime
18 after AE 166 was filed.

19 MJ [COL ACOSTA]: After AE 166 was filed?

20 DDC [CAPT MIZER]: That's right, Judge.

21 MJ [COL ACOSTA]: That includes an extremely long period
22 of time.

23 DDC [CAPT MIZER]: Judge, it's -- I apologize, but as you

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17769

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 heard from many of the witnesses in this case, it's been
2 almost a decade, but with the ----

3 MJ [COL ACOSTA]: Is that when -- is that how long ago it
4 was that you consulted with Mr. Nashiri around ----

5 DDC [CAPT MIZER]: Yeah.

6 MJ [COL ACOSTA]: ---- 2013?

7 DDC [CAPT MIZER]: Yes, Judge.

8 MJ [COL ACOSTA]: Okay.

9 DDC [CAPT MIZER]: 2013, 2014.

10 MJ [COL ACOSTA]: That -- so after that is when you
11 discussed a potential conflict of interest between your former
12 representation of Mr. Hamdan and your continued representation
13 of Mr. Nashiri, correct?

14 DDC [CAPT MIZER]: Judge, we discussed the potential for
15 the government to use those statements. But as I've submitted
16 to the commission on the papers, it is and remains my view
17 that it was a potential conflict. We discussed the potential
18 use of those statements, and that's as far as it went.

19 MJ [COL ACOSTA]: Okay. So you never have discussed your
20 conflict of interest -- and I'm just -- I'm just looking at
21 the Virginia rules that you cited to me, that -- in 1.9, that
22 you -- that you're required to consult with both parties. I'm
23 trying to figure out when you discussed the conflict issue

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17770

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 with him.

2 DDC [CAPT MIZER]: Judge, my view is that it would be
3 inappropriate for me to do that and that the remainder of the
4 defense team should do that. That has been my consistent
5 position with each of the applications to withdraw in this
6 case, is that learned counsel and the rest of the defense team
7 should provide that advice. I did not provide that advice,
8 Judge.

9 MJ [COL ACOSTA]: I'm not talking about advice. I'm
10 talking about telling your client that there's a potential
11 conflict. When did you inform him that there's a -- that you
12 have a potential conflict of interest?

13 DDC [CAPT MIZER]: Judge, I discussed with him in the
14 2013-2014 time frame the potential conflict or the potential
15 that the government may use the statements, but that that was
16 not ----

17 MJ [COL ACOSTA]: Well, which is it? You said the
18 potential conflict or the potential use of the statements.
19 I'm looking for when you discussed, if ever, the conflict of
20 interest that you claimed -- that you claim is a potential or
21 that has ripened into an actual conflict now.

22 DDC [CAPT MIZER]: Judge, I will say that I went no
23 further than a potential use of the statements in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17771

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 compliance ----

2 MJ [COL ACOSTA]: Just potential use of the statements.

3 You've never -- you've never sat down and had a conversation

4 revealing that there is a -- that there is a ethical --

5 potential ethical conflict of interest that you as an attorney

6 have.

7 DDC [CAPT MIZER]: No, Your Honor.

8 MJ [COL ACOSTA]: Mr. Natale.

9 LDC [MR. NATALE]: Yes, Your Honor.

10 MJ [COL ACOSTA]: Have you advised your client on this

11 issue?

12 LDC [MR. NATALE]: I have -- I would ask, Your Honor, that

13 if you're asking me to disclose ----

14 MJ [COL ACOSTA]: I'm not asking you to disclose the

15 contents. I need to know whether or not the defense team has

16 had a consultation with their client about the

17 conflict-of-interest issue.

18 LDC [MR. NATALE]: Absolutely.

19 MJ [COL ACOSTA]: Okay. Defense, is there any indication

20 that Lieutenant Commander Piette will not remain on this case

21 for the foreseeable future?

22 LDC [MR. NATALE]: I have no idea, Your Honor. And the

23 reason why I say that is I am basically kept out of the loop

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17772

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 as far as what the military does with the lawyers they
2 dispatch to me. They've -- they sort of come and go at
3 different times and the like, so I don't know. Possibly
4 Captain Mizer might have a better indication of that or maybe
5 Commander Piette.

6 MJ [COL ACOSTA]: I'm sure Lieutenant Commander Piette
7 might know.

8 Lieutenant Commander Piette.

9 DDC [LCDR PIETTE]: Yes, Your Honor. At this time, I
10 have -- I'm under the understanding that I am here
11 indefinitely, at least to the point that I can -- am eligible
12 for retirement, which is in 2026.

13 MJ [COL ACOSTA]: All right. Thank you.

14 Defense, are there additional military attorneys who
15 are detailed or expected to be detailed to this case? If so,
16 who and when?

17 LDC [MR. NATALE]: Your Honor, just recently, we received
18 two new people, neither of them have been read on. And I
19 would ask Captain Mizer to say their ranks because I'm not
20 sure I will get them correct because they're in different
21 services, and I forget sometimes the transfer.

22 MJ [COL ACOSTA]: All right.

23 LDC [MR. NATALE]: But I can tell you they have literally

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17773

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 just come on in maybe the last week or two and none of them,
2 to my understanding, have been read on to be able to fully
3 engage in the factual investigation of this case or to read
4 the documents.

5 MJ [COL ACOSTA]: All right. Captain Mizer, are you
6 prepared to -- do you know who they are?

7 DDC [CAPT MIZER]: Your Honor, at the beginning of July,
8 we onboarded Air Force Lieutenant Colonel Joshua Nettinga, and
9 Navy Lieutenant Commander Bartholomaus. And I'm sorry, Judge,
10 wasn't expecting the question but I don't have his name for
11 the record.

12 MJ [COL ACOSTA]: That's okay. What is their status of
13 getting read on?

14 DDC [CAPT MIZER]: Judge, we put in the applications.
15 They both have the necessary security clearances, and I think
16 with some encouragement by the commission, that could happen
17 momentarily. I've seen that happen down there.

18 MJ [COL ACOSTA]: Are they currently detailed to this
19 case, Mr. Natale?

20 LDC [MR. NATALE]: Yes, Your Honor. However, they have
21 not entered their formal appearance.

22 MJ [COL ACOSTA]: I understand, but they're detailed to
23 your defense team?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17774

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NATALE]: Yes, sir.

2 MJ [COL ACOSTA]: Okay.

3 DDC [CAPT MIZER]: Judge, if I can interrupt?

4 MJ [COL ACOSTA]: You may.

5 DDC [CAPT MIZER]: I think that Mr. Natale is not familiar
6 with some of the language. They are assigned to the defense
7 team, but until they have the SAP clearance, the general has
8 not detailed them, just in the interest of being precise.

9 LDC [MR. NATALE]: Your Honor, I apologize ----

10 MJ [COL ACOSTA]: That's okay.

11 LDC [MR. NATALE]: ---- for the different terms and their
12 meaning.

13 MJ [COL ACOSTA]: That's okay. The good news is that
14 General Thompson sent his deputy. If you need to consult with
15 him, I'm sure you can reach out to him very quickly in the
16 break to see if you can fast forward their getting read on.

17 LDC [MR. NATALE]: I can tell you ----

18 MJ [COL ACOSTA]: I'm sure that he -- I'm sure that he can
19 use his influence and his request to fast-track that.

20 LDC [MR. NATALE]: Judge, I can tell you that since I came
21 on this case, I have been aggressively pursuing whoever has
22 been the person in charge of the defense team to get me the
23 people I need and to get them read on as soon as I can.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17775

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Because for the vast majority of the three years I've been
2 here, I have had half of the slots filled.

3 So I can guarantee you I am what has been called a
4 complete nuisance in trying to get everyone I need and to get
5 them read on as soon as possible.

6 MJ [COL ACOSTA]: Understood. I'm sure as the deputy
7 commander of the MCDO is sitting here in the courtroom, that
8 he will do everything that's necessary and the government will
9 assist in every way in making sure that those read-ons happen
10 as quickly as possible.

11 Ms. Morgan, you were going to say something, but
12 before I begin my next portion of this, what -- you said you
13 had something to add or did I already cover it?

14 ADC [MS. MORGAN]: You did not, Your Honor. May I
15 approach?

16 MJ [COL ACOSTA]: You may. Good morning.

17 ADC [MS. MORGAN]: Good morning, Your Honor. And I
18 believe it's necessary for the defense to make a record at
19 this point to supplement the commission's finding of fact.

20 The commission outright said -- very much implied, if
21 not outright said, that the defense made a frivolous claim in
22 this matter, very much impugned Captain Mizer's credibility
23 and the credibility of the defense team. And I'd like to just

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17776

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 point out a few matters that the defense believes need to be
2 corrected or reframed.

3 Specifically, the commission said that Captain Mizer
4 revealed this conflict. As discussed previously, the
5 government was very much aware of this conflict in 2018 when
6 Captain Mizer was brought back involuntarily. He declined the
7 orders and was brought back only upon the direct order of the
8 Secretary of Defense.

9 As far as the failure to note in 467 the testimony
10 relating to Mr. Hamdan, it was the government, not the
11 defense, that elicited that testimony.

12 MJ [COL ACOSTA]: I don't believe that's accurate --
13 actually accurate. I believe that the questions regarding
14 that began from the defense direct.

15 ADC [MS. MORGAN]: Your Honor ----

16 MJ [COL ACOSTA]: I'll let you look at the record on that,
17 but I'm ----

18 ADC [MS. MORGAN]: The defense elicited that he was
19 contacted. The contents of the statement -- both statements
20 were elicited by questioning from Mr. Miller.

21 MJ [COL ACOSTA]: Well, I understand that both sides did
22 that. And believe me -- and I will tell you, I'm not -- in no
23 way am I questioning your credibility -- the credibility of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17777

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the defense team or Captain Mizer. I'm talking about what was
2 known and what was revealed at the time.

3 I understand there were reasons for these decisions
4 that have been stated. I'm just questioning why it wasn't
5 brought up sooner. That's my only -- my only issue is that in
6 467 being filed and knowing that that could potentially come
7 up then and my discussion at length about this issue on the
8 first day, neither side brought up, oh, by the way, we're
9 going to talk about Mr. Hamdan tomorrow. So that -- that's
10 part of where the -- the question -- the questions and my
11 findings come from.

12 But you can continue. Go ahead.

13 ADC [MS. MORGAN]: And, Your Honor, the commission
14 specifically made the point regarding the defense's argument
15 as to the potential for an imputed conflict, specifically I
16 believe the commission's language that there was no
17 conceivable reason for the defense to believe there was an
18 imputed conflict, specifically that defense had failed to
19 raise that claim in even its filing in AE 485.

20 Your Honor, if the commission would turn to page 19 of
21 that filing, the defense actually does raise that claim saying
22 that in certain attorney -- in certain situations, these
23 conflicts can warrant removal of the entire team and that the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17778

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 defense attorneys that are -- the remaining defense attorneys
2 on the team believe themselves to potentially be conflicted
3 and to date had not provided that advice.

4 MJ [COL ACOSTA]: Understand. If I missed that, I
5 apologize.

6 ADC [MS. MORGAN]: And, Your Honor ----

7 MJ [COL ACOSTA]: Again ----

8 ADC [MS. MORGAN]: ---- the defense has concerns because
9 of the language "no conceivable reason" gets dangerously close
10 to accusing the defense of bringing a frivolous claim.

11 MJ [COL ACOSTA]: No, no, I'm not saying it's frivolous.
12 I'm just saying I don't see the -- I do not see how you have
13 an imputed conflict or how any person -- I understand every
14 counsel's concern about potential conflict and what that could
15 mean.

16 ADC [MS. MORGAN]: And you ----

17 MJ [COL ACOSTA]: What I don't see is a reason why you're
18 in any different position now, as the remainder of the defense
19 team, knowing what you know, whether Captain Mizer's on the
20 team or not.

21 ADC [MS. MORGAN]: Your Honor, if -- if the commission is
22 preparing to rule on 339, the defense would request the
23 opportunity to provide a brief argument on the merits of 485.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17779

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: I'm not preparing to issue a ruling on
2 that right now. I'm not about -- I'm not going into this and
3 about to rule on it.

4 ADC [MS. MORGAN]: Okay.

5 MJ [COL ACOSTA]: I'm continuing my -- this is continued
6 inquiry. Ms. Morgan, I am not trying to do that. Believe me,
7 there's more information, and it takes me time. As you
8 just -- you just pointed out that apparently I missed a
9 reference on page 19 of your motion, which is not intentional,
10 obviously.

11 But the imputed -- the imputed conflict relates to
12 ineffective -- findings of ineffective assistance of counsel,
13 not for the imputation of the actual conflict. And that's
14 what I'm saying, is you don't have -- you have no conflicting
15 information. Neither do any of the other four attorneys on
16 the -- on the remainder of the team, correct? And so
17 therefore, you don't share that -- you don't share the
18 conflict of information, conflict of interest that Captain
19 Mizer may with his former client, correct?

20 ADC [MS. MORGAN]: Your Honor, I would draw the
21 commission's attention to Rule 1.10 of the Virginia rules, the
22 Florida rules ----

23 MJ [COL ACOSTA]: No -- yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17780

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ADC [MS. MORGAN]: ---- and the service rules, which do
2 operate as -- it's typically the firm disqualification rules,
3 which operate within the military to disqualify attorneys
4 working within the same agency.

5 Now, it's construed a little bit differently. In the
6 military, it allows you to work within -- share resources
7 within the same office but has not been construed to allow you
8 to share resources within the same team.

9 Your Honor, just to give the -- the commission a
10 status update as to where we are ----

11 MJ [COL ACOSTA]: Uh-huh.

12 ADC [MS. MORGAN]: ---- there have been requests routed to
13 the convening authority for independent counsel for
14 Mr. al Nashiri with the endorsement of the CDC, the chief
15 defense counsel. There's also a corresponding request for an
16 appropriate security clearance for that individual.

17 There is also an identified independent counsel for
18 a independent ethics counsel for the remainder of
19 Mr. al Nashiri's attorneys. That has also been endorsed by
20 the chief defense counsel who believes that such counsel is
21 necessary, and an individual has been identified.

22 So those are both with the convening authority with
23 favorable endorsements by the chief defense counsel.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17781

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: If Captain Mizer's request to be
2 granted, that would moot your issue, correct?

3 ADC [MS. MORGAN]: Your Honor, the defense opposes Captain
4 Mizer's disqualification under any circumstances. We are
5 merely safeguarding our professional licensures by seeking
6 independent counsel at this point.

7 MJ [COL ACOSTA]: No, I understand, but you oppose his --
8 his request being granted, but you say you can't serve with
9 him on the same team if he remains on the team, correct?

10 ADC [MS. MORGAN]: Your Honor, I don't actually think that
11 that's the analysis. We are ----

12 MJ [COL ACOSTA]: Then explain to me what your analysis
13 is.

14 ADC [MS. MORGAN]: Your Honor, it's not that we can't
15 serve with him on the same team. There is an entire -- again,
16 to -- if we want to get into the actual merits of the 485
17 argument, we can do that. But while we are in this sort of
18 sticky wicket of 339, we are professionally and ethically
19 required to seek out independent counsel to ensure we are
20 meeting the standards required under our licensures.

21 Once we can get into the paradigm of 485, we can start
22 asking some different questions.

23 MJ [COL ACOSTA]: I'll let you ask them at the -- I'll ask

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 them at that time and I'll let you answer, but I -- it seems
2 that the defense position is either that Captain Mizer must
3 stay and that the government must not be able to use
4 Mr. Hamdan's statements, correct?

5 ADC [MS. MORGAN]: Judge, I actually think this commission
6 has a far more nuanced analysis to take into consideration,
7 and so there's a lot we have to get to before we can get to
8 disqualification. The defense thinks the appropriate answer
9 to that is exclusion under 403.

10 MJ [COL ACOSTA]: Right. That the government can't use
11 Mr. Hamdan's statements, and that resolves the issues for you,
12 correct?

13 ADC [MS. MORGAN]: That does resolve the issue, and that
14 is the simplest, we believe, most correct way to do it.

15 MJ [COL ACOSTA]: That's what I said a few minutes ago. I
16 don't know if it's as -- that your position is -- it appears
17 that your statement is -- I literally just asked you a few
18 moments ago is your position that if the government doesn't
19 use the statement, then everything -- you know, then that
20 resolves your issue, or if Captain Mizer isn't on the team --
21 I asked you prior -- prior to that.

22 ADC [MS. MORGAN]: I apologize, Your Honor. I had only
23 heard your question in regards to Captain Mizer.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17783

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: No.

2 ADC [MS. MORGAN]: I did not hear your question in
3 regards ----

4 MJ [COL ACOSTA]: Yeah.

5 ADC [MS. MORGAN]: ---- to the government's use of the
6 statement.

7 MJ [COL ACOSTA]: That was my follow-up, is if the
8 defense -- if the government -- your other position -- your
9 other position is that if the government can't use the
10 statement, that resolves your issue. And then you went and
11 said that it was more nuanced.

12 But I think it's pretty simple that you're saying that
13 if I exclude it under 403, that your issues are resolved,
14 correct?

15 ADC [MS. MORGAN]: If you exclude it under 403, our issue
16 is resolved, Your Honor. The thing about disqualification of
17 counsel is that it's a nuclear option, and you -- the
18 commission is required to go through an analysis of any number
19 of alternatives short of disqualification prior to reaching
20 that nuclear option. And so what are those options here? And
21 that is part of why the defense has asked for independent
22 counsel for the remaining attorneys on the team and also the
23 independent counsel for Mr. al Nashiri.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17784

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 There is not an ethics expert on this defense team.
2 We want to ensure that we are aware of all of the potential
3 alternatives ----

4 MJ [COL ACOSTA]: Yeah.

5 ADC [MS. MORGAN]: ---- to disqualification and can ensure
6 that all of those are considered prior to disqualification.

7 MJ [COL ACOSTA]: But you've advised -- you've -- well,
8 either you or Mr. Natale have advised Mr. Nashiri about the
9 conflict and his options on this issue, correct?

10 ADC [MS. MORGAN]: No, Your Honor. We have advised
11 Mr. al Nashiri that there -- about the facts, but we have not
12 advised him as to the legal -- legally what he should do. I'm
13 sorry. I apologize. I don't -- when you say advised,
14 you're -- you're looking at a legal terminology.

15 We have sought independent counsel for him to be
16 advised as to his legal options. We have given him the
17 factual scenario.

18 LDC [MR. NATALE]: Your Honor, if you want, I can try to
19 clarify.

20 MJ [COL ACOSTA]: I don't right this second, but I'm going
21 to come to you in a second.

22 The issue remains that I'm -- I've put off or ordered
23 that nothing is to be brought up that is the conflict issue.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17785

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Remember, this potential conflict is only triggered on the
2 litigation of the admissibility of Hamdan's statements. I
3 have put that off. Continuing this -- these sessions or any
4 session in order to allow for this extended period of -- for
5 some extended period of time for independent counsel to be
6 appointed and cleared and processed is not any good use of
7 time.

8 We're in the same situation as before, that it remains
9 this, quote, potential issue of conflict. You're in the exact
10 same position as you were before this -- before the motion to
11 withdraw was raised. Nothing has changed, and that's where we
12 are. But thank you, Ms. Morgan.

13 ADC [MS. MORGAN]: Thank you.

14 MJ [COL ACOSTA]: Defense Counsel, you had something?

15 LDC [MR. NATALE]: Your Honor, I just wanted to clarify
16 that our client has been told all of the facts that we know
17 that would create from a potential conflict to an actual
18 conflict.

19 MJ [COL ACOSTA]: I understand that. And here's -- here's
20 an issue. Where in the rules does it say that other counsel,
21 besides the conflicted counsel, cannot advise their current
22 client about a conflict of interest? Where in the rules does
23 it say that?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17786

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Alternatively, don't the rules specifically state that
2 you have the duty, an ethical duty, to advise him about the
3 issue?

4 LDC [MR. NATALE]: We -- we have. I would say without --
5 if ----

6 MJ [COL ACOSTA]: And without getting into the contents of
7 your discussion.

8 LDC [MR. NATALE]: ---- that he has been made aware of all
9 of the options that are available to him and that it is for
10 him to decide as to what choices he would have, just like if
11 someone wants to choose to plead or not plead or whatever.

12 So he has been informed, I think, completely as to all
13 of the possible alternatives, and that's what has actually
14 happened. But ultimately, as you know, it is -- it's his
15 decision as to what he wants to do.

16 So I think that in some ways, your implication that we
17 can go forward and that you're ordering us to go forward is
18 something which we've raised that we think probably shouldn't,
19 but we will always follow your order and go forward, and we
20 have done everything to be prepared in the event of that.

21 MJ [COL ACOSTA]: Understood. But having known -- the
22 fact that we're not going anywhere -- that we're not going to
23 go into the issue of the potential conflict, defense counsel

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17787

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 has to agree that it -- it creates no problem going forward,
2 correct ----

3 LDC [MR. NATALE]: I agree with you.

4 MJ [COL ACOSTA]: ---- if we don't go anywhere near it,
5 correct?

6 LDC [MR. NATALE]: I agree with you.

7 MJ [COL ACOSTA]: Thank you. And then the next portion
8 would be that having known that this issue was potentially
9 lurking out there -- because the commission was unaware of
10 this until Captain Mizer's application to withdraw. Having
11 the defense having known about this, don't you agree there's
12 an obligation to take steps to mitigate any impact of such a
13 withdrawal?

14 LDC [MR. NATALE]: I -- I think that I have done ----

15 MJ [COL ACOSTA]: I'm just saying, isn't there a duty to
16 do that?

17 LDC [MR. NATALE]: There -- I think that there's
18 certainly, in light of the -- a conflict, both sides would
19 know and, I think, that to mitigate that. I think both sides
20 who are involved in this, both the government and the defense,
21 would have the same obligation.

22 And as I said, I think that I know what has been done
23 since I have been here. I think I have dispatched, in every

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17788

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 way, my ethical responsibilities to advise the client, and
2 that if Your Honor is in a position where -- excuse me, Your
3 Honor.

4 I think that, you know, we're sort of clear as to what
5 our position is and why we have that position.

6 MJ [COL ACOSTA]: No, I understand your position. My --
7 the things that make the commission ask the questions that it
8 has, right, is that this has been an issue lurking beneath the
9 surface that comes as a -- a newly raised issue to the
10 commission in July. And then when I say, well, what about all
11 these other dates, you know, you -- you question me
12 questioning you about, oh, you're -- don't -- you're
13 questioning our -- your integrity or decisions? I'm not. I'm
14 just trying to figure out the facts and to conduct the inquiry
15 necessary that is required to resolve this issue.

16 So I have to put it on the record. The rules state
17 that I have to create the record on -- on this issue before I
18 rule on it. And it's left with, you know, a couple of -- a
19 few different options out there, and that's what I'm trying to
20 resolve and to narrow those options down into what it is.

21 The government's position, I'm sure, is that the
22 government gets to put on the case that it wishes to put on.
23 The fact of the matter is that these issues, as Captain Mizer

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 was refusing -- I believe Ms. Morgan stated that Captain Mizer
2 refusing, you know -- declining orders to return onto active
3 duty before being ordered by the -- by higher authority to
4 return to active duty should have raised to the defense, or
5 whoever the leadership was in defense, that there was this
6 issue at the time, and did not -- I know that that was an
7 order of the commission. The previous military judge on the
8 case had sought out Captain Mizer's return to the case.

9 I have no reason to believe that the previous military
10 judge had any indication or knowledge of this conflict and
11 that, had this conflict been raised at that time, if could
12 have been resolved then, prior to his being called back onto
13 active duty. I don't know. That's speculation.

14 But I'm left with where we are now. I'm just trying
15 to figure out -- to make sure that I'm protecting the
16 interests of the accused and having conflict-free counsel and
17 having a qualified defense team. He's got five other
18 attorneys besides Mr. Mizer -- or, pardon me ----

19 LDC [MR. NATALE]: Your Honor, if ----

20 MJ [COL ACOSTA]: ---- don't -- Captain Mizer. Besides
21 Captain Mizer, he's got five other attorneys with two more
22 coming on, and they're all ----

23 LDC [MR. NATALE]: Your Honor, I think that ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17790

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: ---- qualified.

2 LDC [MR. NATALE]: I think the idea that you want to
3 continue the investigation on this is wise. I think we have
4 just made our position for the record, and, quite frankly,
5 like so many things, let's get all the facts together and deal
6 with it. Just like when we have a witness, we need to have
7 all of the discovery before we can deal with it. And I think
8 that that's sort of the best way, and, ultimately, you rule as
9 to each incremental step we take.

10 MJ [COL ACOSTA]: That's what I'm trying to do.

11 And again, Ms. Morgan, nothing in my statement of the
12 facts is an attack on your integrity or an attack on your
13 candor to the court, but I have to have an inquiry as to the
14 specifics of this and to satisfy the commission's duty to
15 complete its inquiry on this potential conflict and the
16 potential options that are there.

17 So, Mr. Nashiri.

18 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes.

19 MJ [COL ACOSTA]: In the interest of ensuring that you
20 understand your rights and the nature of the issues that have
21 been raised, I want to have a discussion with you. Keep in
22 mind I am not your attorney, so I will not be offering you any
23 legal advice. That is for you to -- your detailed counsel to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17791

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 do.

2 First of all, under the Military Commissions Act, the
3 Rules for the Military Commissions, and the regulation or
4 rules that govern military commissions, you have the right to
5 be represented by a detailed military defense counsel; that
6 is, a military defense counsel detailed and assigned to your
7 case.

8 Do you understand that?

9 ACC [MR. AL NASHIRI]: Yes.

10 MJ [COL ACOSTA]: Both Captain Mizer and Lieutenant
11 Commander Piette are detailed military defense counsel that
12 have been assigned to represent you.

13 Do you understand the right that you have to detailed
14 military defense counsel?

15 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes.

16 MJ [COL ACOSTA]: You are also entitled to be represented
17 by civilian counsel, and because this case is a capital case,
18 one with the potential for the death penalty, you are entitled
19 to be represented by what we call learned counsel; that is, an
20 attorney who has appropriate experience and training
21 associated with representing individuals in capital cases.

22 Do you understand those rights to civilian counsel?

23 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17792

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: Mr. Natale ----

2 ACC [MR. AL NASHIRI]: Yes.

3 MJ [COL ACOSTA]: Mr. Natale, as you know, is your learned
4 counsel. As part of your right to counsel, you have the right
5 to be represented by counsel who do not have any conflicts of
6 interest that would be harmful to you or your case. That
7 means the attorneys that represent you should not have
8 personal or professional interests that conflict with your own
9 interests.

10 Do you understand that?

11 ACC [MR. AL NASHIRI]: Yes.

12 MJ [COL ACOSTA]: For example, that means that your
13 lawyers should not represent both you and another client if
14 your interests are directly adverse or against each other
15 unless you and that other client agree.

16 Do you understand that?

17 ACC [MR. AL NASHIRI]: Yes.

18 MJ [COL ACOSTA]: Do you also understand that the things
19 that you say to your attorneys, your lawyers, are privileged
20 which means that those attorneys cannot tell anybody else what
21 you say to them?

22 ACC [MR. AL NASHIRI]: Yes.

23 MJ [COL ACOSTA]: Are you aware that Captain Mizer

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17793

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 previously represented Mr. Salim Ahmed Hamdan?

2 ACC [MR. AL NASHIRI]: Yes.

3 MJ [COL ACOSTA]: Captain Mizer represented Mr. Hamdan for
4 several years until 2012. Captain Mizer also has an
5 attorney-client privilege with Mr. Hamdan because of that
6 previous representation of Mr. Hamdan.

7 Do you understand that?

8 ACC [MR. AL NASHIRI]: Yes.

9 MJ [COL ACOSTA]: That attorney-client privilege continues
10 to exist even after Captain Mizer no longer represents
11 Mr. Hamdan. That means, just like Captain Mizer cannot tell
12 anyone the things that you say to him, he also -- Captain
13 Mizer also cannot tell anyone what Mr. Hamdan has told him in
14 the past.

15 Do you understand that?

16 ACC [MR. AL NASHIRI]: Yes.

17 MJ [COL ACOSTA]: Do you understand that Captain Mizer has
18 requested that I let him withdraw from representing you in
19 this case?

20 ACC [MR. AL NASHIRI]: Lately.

21 MJ [COL ACOSTA]: Has any of your attorneys or anybody
22 else explained to you why Captain Mizer has requested to
23 withdraw from your case? Without telling me what they said,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17794

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 have they explained to you why Captain Mizer is trying to
2 withdraw from this case?

3 ACC [MR. AL NASHIRI]: Yes, all of it was lately, the
4 beginning of these procedures last week.

5 MJ [COL ACOSTA]: Okay. Captain Mizer has requested to
6 withdraw from this case because he believes that he has a
7 conflict of interest because of his previous representation of
8 Mr. Hamdan. Captain Mizer may have information about
9 Mr. Hamdan that might assist you in your case. But because
10 Captain Mizer learned that information while he was
11 representing Mr. Hamdan, he cannot tell anyone, including you,
12 about the information.

13 Do you understand that?

14 ACC [MR. AL NASHIRI]: Yes. Yes.

15 MJ [COL ACOSTA]: Captain Mizer believes he has a conflict
16 because he can't share information about Mr. Hamdan with you
17 or your other attorneys even though the government is going to
18 try to introduce Mr. Hamdan's statements into evidence against
19 you in this case.

20 ACC [MR. AL NASHIRI]: Yes.

21 MJ [COL ACOSTA]: It is possible -- it is possible that
22 the information that Captain Mizer has about Mr. Hamdan could
23 be helpful in your case, but he cannot tell you what that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17795

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 information is.

2 Do you understand that?

3 ACC [MR. AL NASHIRI]: Yes.

4 MJ [COL ACOSTA]: So Captain Mizer can never tell you what
5 he learned about Mr. Hamdan even if that information would be
6 important in your defense.

7 Do you understand that?

8 ACC [MR. AL NASHIRI]: Yes.

9 MJ [COL ACOSTA]: Do you have any questions about anything
10 I've told you so far?

11 ACC [MR. AL NASHIRI]: I think everything is clear right
12 now.

13 MJ [COL ACOSTA]: All right. All right. Before we take
14 up any other issues on this, that we're going to take up
15 today, that concludes my portion of the inquiry that I'm going
16 to conduct today.

17 Counsel, I also need you to be prepared to present
18 argument on AE 440DD on Friday.

19 And prior to taking up the three witnesses that we
20 have scheduled today, we'll take a brief 15-minute recess.

21 Commission is in recess.

22 [The R.M.C. 803 session recessed at 1058,
23 3 August 2022.]

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17796

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1115,
2 3 August 2022.]

3 MJ [COL ACOSTA]: The commission is called to order.

4 Government, all parties present as before?

5 TC [MR. MILLER]: Yes, Your Honor.

6 MJ [COL ACOSTA]: Defense?

7 LDC [MR. NATALE]: Yes, Your Honor.

8 MJ [COL ACOSTA]: All right. Government, I believe we
9 have three witnesses today on -- on the hearsay issue; is that
10 correct?

11 TC [MR. MILLER]: Yes, Your Honor. They will be
12 testifying from the RHR.

13 MJ [COL ACOSTA]: All right. Government, you may proceed.

14 DDC [CAPT MIZER]: Judge, can I make a point about the
15 transcript? Is the -- I know Mr. Miller just mentioned it,
16 but is the transcript going to reflect that these 166
17 witnesses are testifying here in Virginia, which I suspect may
18 be important if this case were to proceed further?

19 MJ [COL ACOSTA]: I believe it will reflect that.

20 TC [MR. MILLER]: Your Honor, may we have an explanation
21 as to why that's important?

22 MJ [COL ACOSTA]: Defense?

23 DDC [CAPT MIZER]: Well, Judge, I mean, one of the key

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17797

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 issues in this case is the confrontation clause. I believe
2 the confrontation clause applies here in Virginia. And as I
3 understand the government's argument, it ends somewhere 12
4 miles south of Key West. That's a legal argument, Judge, but
5 we need the facts on the record that testimonial hearsay is
6 being offered here in Virginia.

7 MJ [COL ACOSTA]: Well, it's on the record. He's
8 testifying from the RHR, and we're going to proceed.

9 DDC [CAPT MIZER]: Thank you, Judge.

10 LDC [MR. NATALE]: Your Honor, before -- I think the next
11 witness is going to be Special Agent Kellerman, and it's ----

12 MJ [COL ACOSTA]: I don't know. The government hasn't
13 called him yet, so ----

14 LDC [MR. NATALE]: The only reason why is because I --
15 before they begin their testimony, there is a matter that I'd
16 like to bring up to the court regarding we have not received
17 all of the discovery on this individual.

18 MJ [COL ACOSTA]: Government.

19 ATC [LCDR SCHREIBER]: Yes, Your Honor. I'll address
20 that. Special Agent Kellerman is next. We intend to call
21 him.

22 The defense requested additional discovery beyond what
23 we provided him -- provided them about the testimony today.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17798

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 We've agreed to provide that information they've requested to
2 the extent that it exists, but we don't have it today.

3 There's no way we could have it today.

4 So the government's position is they are perfectly
5 able to cross based on what they have on this witness, and if
6 something comes up from the discovery that we are able to
7 provide them at a later date, they would be welcome to re-call
8 Special Agent Kellerman or -- or at another time. Special
9 Agent Kellerman will probably testify again. They'd be
10 welcome to question him about anything that they discovered in
11 that other documentation at that time.

12 MJ [COL ACOSTA]: Do you plan on calling him in October as
13 well?

14 ATC [LCDR SCHREIBER]: I suspect so, sir, because he will
15 be continuing as the case agent and doing sort of the same
16 efforts that we're going to have him discuss here.

17 MJ [COL ACOSTA]: All right. Defense?

18 LDC [MR. NATALE]: Your Honor, that's correct.

19 The -- the other question that I raised was whether
20 all of his testimony would be open or may some of -- some of
21 it may be closed.

22 MJ [COL ACOSTA]: I believe it's anticipated that all of
23 his testimony will be open; is that correct, Government?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17799

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [LCDR SCHREIBER]: No, sir. And that's something that
2 I was going to bring up as well, but the defense beat me to
3 the punch.

4 There is a small portion of Special Agent Kellerman's
5 testimony that we'd request be closed because it's
6 a classified matter. Defense is aware of it. There's been no
7 withholding. It is just a matter of need to be discussed ----

8 MJ [COL ACOSTA]: Slow down. Hey, Counsel. You've got to
9 slow down.

10 ATC [LCDR SCHREIBER]: I apologize.

11 MJ [COL ACOSTA]: The accused is in the room today. We
12 need to slow down for the interpreters, please.

13 ATC [LCDR SCHREIBER]: I apologize, sir. We -- there --
14 there are portions of his testimony, a small portion, that
15 deal with foreign government relations that would need to be
16 discussed in a closed session as to the details of those
17 interactions. It's nothing that's been withheld from defense.
18 It just needs to be discussed in closed session.

19 MJ [COL ACOSTA]: Defense, you're aware that there's a
20 closed portion potential for Mr. Kellerman's testimony today?

21 LDC [MR. NATALE]: That was mentioned, Judge. We just
22 received notice of this witness last week. Immediately upon
23 receiving that notice, I made the inquiries regarding the two

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17800

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 matters of whether we received all of the discovery and then,
2 two, whether it would be an open or closed session, and
3 eventually I got the information that we have now. Last night
4 I received that information.

5 I just want to bring it up to Your Honor so you don't
6 think that somehow I have been derelict in my duty in not
7 being competently prepared or not in talking to my brothers
8 and sisters on the other side of the aisle so we could go as
9 smoothly as possible.

10 MJ [COL ACOSTA]: All right. Government, did you provide
11 that information to them last night about Agent Kellerman or
12 yesterday? Is that correct?

13 ATC [LCDR SCHREIBER]: Only -- only insofar as they had
14 requested additional discovery, and we informed them last
15 night we will get that additional discovery and provide it to
16 them as soon as possible.

17 And they had asked the question will this be open or
18 closed, and after talking in detail with Special Agent
19 Kellerman in preparation, we determined that there is a
20 portion that needs to be closed and we informed them of such.
21 The information that is closed session, they've been well
22 aware of since we provided some underlying documents to them
23 several -- I think about two weeks ago.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17801

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: Okay. How many statements is
2 Agent Kellerman going to be proffering this morning?

3 ATC [LCDR SCHREIBER]: He's not to proffer any statements,
4 sir. He's about efforts to locate these individuals, the ones
5 that we have indicated to the commission that we would be
6 answering the defense objection on during this session.

7 MJ [COL ACOSTA]: All right. Call your witness.

8 ATC [LCDR SCHREIBER]: Government calls Special Agent
9 Andrew Kellerman -- excuse me, Aaron Kellerman.

10 Agent Kellerman, would you raise your right hand.
11 SPECIAL AGENT AARON KELLERMAN, civilian, was called as a
12 witness for the prosecution, was sworn, and testified as
13 follows:

14 ATC [LCDR SCHREIBER]: Have a seat.

15 DIRECT EXAMINATION

16 Questions by the Assistant Trial Counsel [LCDR SCHREIBER]:

17 Q. If you could just state your name, please.

18 A. [No audible response.]

19 Q. Okay. And if you'd pull the mic a little closure.

20 The room in here doesn't amplify as well as down on the -- on
21 the island. Okay. Are we good? Thanks.

22 Special Agent Kellerman, what's your present
23 employment?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17802

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. I'm a supervisory special agent with the military
2 commissions prosecution unit of the FBI.

3 Q. And how long have you been assigned -- excuse me. Are
4 you the case agent for this case?

5 A. For the COLE, yes.

6 Q. How long have you been working in that capacity?

7 A. I've been in the unit since January, but I've only
8 been working on the COLE since mid-May.

9 Q. And just as a bit of background, what's your
10 educational background?

11 A. I graduated from James Madison University in 1998 with
12 a Bachelor of Science degree. Then I graduated from Duke
13 University School of Law in 2001.

14 Q. And when did you join the FBI?

15 A. In 2003.

16 Q. What was your motivation to join the FBI?

17 A. I'm sorry?

18 Q. Why did you join the FBI?

19 A. Oh. Just interested in law enforcement work. Wanted
20 to be out in the field as opposed to being a prosecutor. I
21 considered both careers.

22 Q. And I assume that when you joined the FBI, you went to
23 Quantico?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17803

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. Yes.

2 Q. Graduated from Quantico?

3 A. Yes.

4 Q. Can you just give a brief wavelaps of your FBI career
5 up to this point?

6 A. Sure. I've been in multiple offices to include small
7 offices where you kind of work everything, but I've worked
8 Joint Terrorism Task Force, violent crime in Indian
9 reservations, organized crime and drugs, extraterritorial
10 counterterrorism, public corruption.

11 Q. Now, in your role as the assigned case agent for
12 United States v. al Nashiri, what's your function? What do
13 you do?

14 A. Sure. So I assist in administrative tasks with
15 military commissions. So there are staff that work under me,
16 support staff, and they do discovery requests. We respond to
17 trying to locate witnesses. Basically whatever the
18 prosecution needs from the FBI to kind of assist. It's not
19 really an investigatory role. It's doing the functions that
20 are needed in order to help the case proceed.

21 Q. So in that role, you're not like a field agent in the
22 classic sense, right?

23 A. Correct.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17804

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. Okay. And you kind of touched on this in the effect
2 that you have other folks on your team, but if you're asked to
3 conduct investigatory steps, is that stuff you perform
4 yourself or is it a team effort with people who work for you?

5 A. It's a combination thereof. Some things I'll handle.
6 Some things I'll farm out to the people also assigned to the
7 case.

8 Q. All right. For the purposes of this session, were you
9 asked to locate a number of Yemeni witnesses?

10 A. Yes.

11 Q. All right. So let's talk about your efforts to find
12 those people, and then at the end we'll go through the list of
13 people that you tried to seek.

14 Did you make inquiries into public source, like,
15 people-finding systems to attempt to locate these -- these
16 witnesses?

17 A. Yes, a member of the team did.

18 Q. And do you have an idea of which types of services
19 were used?

20 A. Specifically I don't know, but it would have been
21 along the lines of LexisNexis, CLEAR, ChoicePoint, and those
22 type of things.

23 Q. And did you and your team have any success locating

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17805

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 any of these individuals through those methods?

2 A. I believe there were some name matches type things,
3 but with further investigative work, they didn't appear to be
4 the correct people.

5 Q. How about in agencies like Customs and Border Patrol?
6 Did you reach out to them?

7 A. Yes.

8 Q. And what sorts of things can Customs and Border Patrol
9 check into for you?

10 A. So they can check names to see if that person has
11 entered and exited the United States of America through a port
12 of entry.

13 Q. Okay. And so did you ask Customs and Border Patrol to
14 check on all these names or all these witnesses?

15 A. Yes.

16 Q. And were they able to provide positive hits for you?

17 A. No.

18 Q. How about, like, the State Department? Did you reach
19 out to them to locate these witnesses?

20 A. Sure. I didn't. One of our overseas people who works
21 in an embassy, I asked them to ask State Department. So they
22 talked to the State Department. The State Department has an
23 official ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17806

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NATALE]: Your Honor, I'd object to the hearsay
2 unless we know who it is who's giving him this information.

3 MJ [COL ACOSTA]: Government, your response?

4 ATC [LCDR SCHREIBER]: Your Honor, this is documenting the
5 investigatory steps that the case agent took as part of the
6 team. He's farming out information and then telling you what
7 the results of that information were and efforts to find this
8 witness.

9 So while it is hearsay, it's a documentation of his
10 investigatory efforts and the results of those investigatory
11 efforts.

12 MJ [COL ACOSTA]: Overruled. I'll allow it.

13 Go ahead. You can answer the question.

14 A. The State Department stated there was an official
15 process that you had to file some paperwork for that would
16 take several months to get a response. So I didn't do that;
17 the time frame wasn't long enough. But they did a preliminary
18 unofficial check just to see if there were any leads they
19 could give me inside the United States. So with a quick
20 unofficial check, they didn't find anything, but they advised
21 to get a court-ready official answer, I needed to go through
22 the official application process.

23 Q. And do you intend to go through that process in the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 long term with the -- you know, all these witnesses?

2 A. At some point. I don't know if it will be now or
3 before trial, when the proper time to do it will be, but it
4 will happen at some point.

5 Q. Gotcha. Now, I'm not seeking any classified
6 information when I ask this question, so we're going to keep
7 it to the unclass level.

[REDACTED]

11

12 Q. Were you able to get any useful information based on
13 those efforts?

14 A. No. We weren't able to receive either a positive or
15 negative response, just kind of a "we're working on it" type
16 of thing.

17 Q. Did you take any other significant efforts to locate
18 these individuals that I've -- I haven't specifically asked
19 about?

20 A. No.

21 Q. Now, in each instance, did you have access to the full
22 level of identifying information about these witnesses that
23 you might typically want when seeking a person?

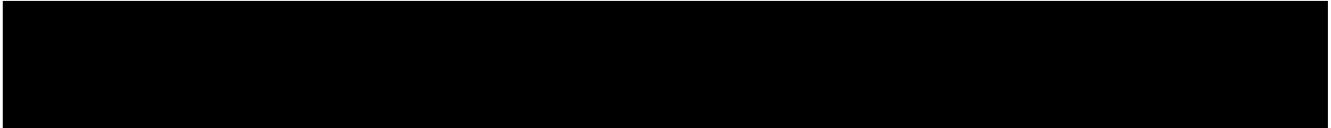
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17808

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. No. The birth dates were sometimes nonexistent. We
2 had an age range or possibly a birth year. I believe one
3 individual did have an exact birth date. But initially we're
4 dealing with not a traditional westernized first, middle, last
5 name. We might have had six names that, if they did come to
6 the U.S., could have been transposed or switched around.
7 Additionally, the spellings aren't always accurate. They
8 might be different in one database or another.

9 So we took all the practical steps, but you can't
10 account for the entire universe of the way names could have
11 been transposed or misspellings or different spellings could
12 have been placed in the databases.



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

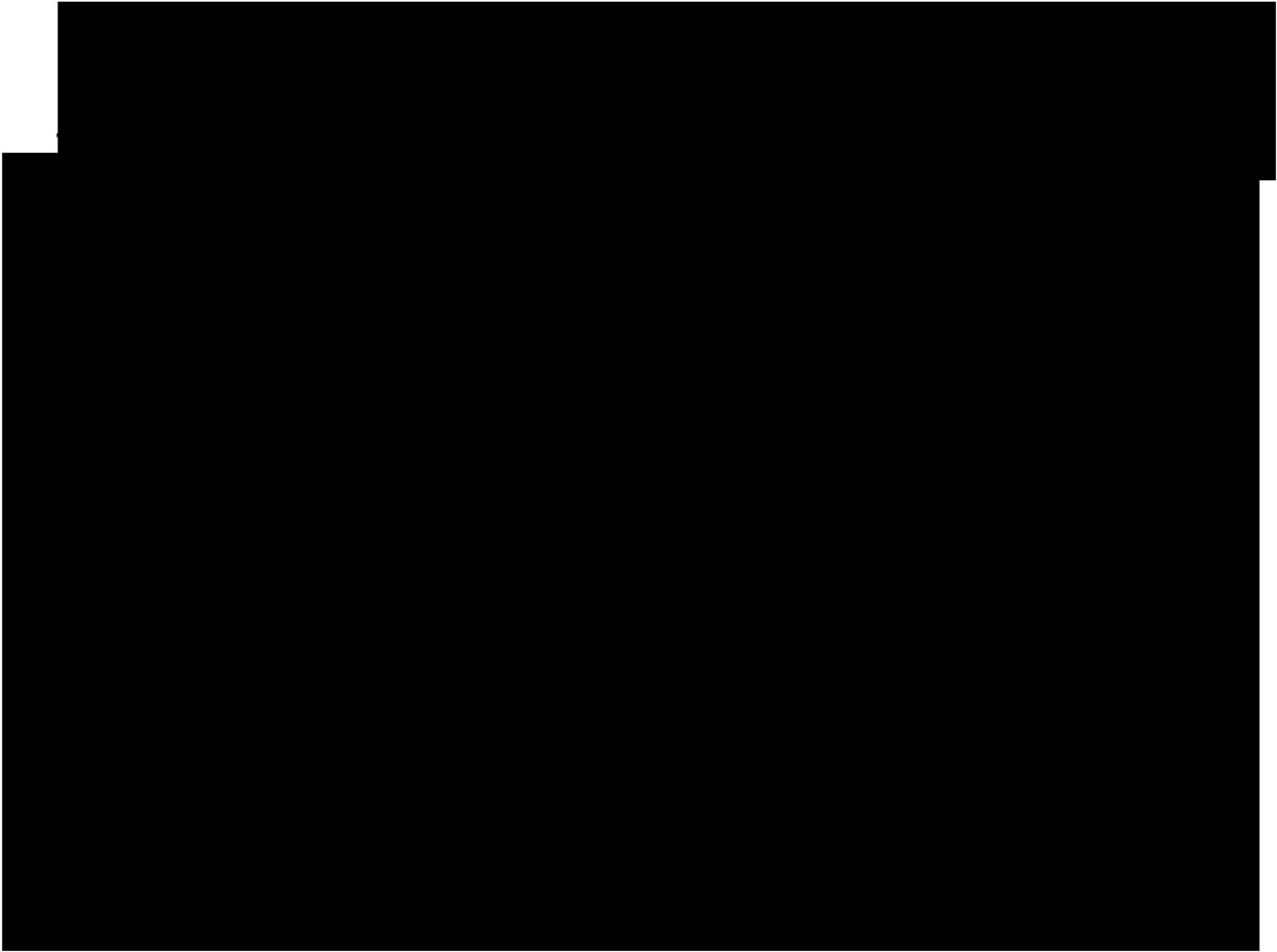
1 steps they might take than seeking a witness or just a person
2 they'd like to speak with?

3 A. Correct.

4 LDC [MR. NATALE]: Objection, leading.

5 ATC [LCDR SCHREIBER]: Your Honor, I asked him an
6 either/or and asked him to respond.

7 MJ [COL ACOSTA]: Right. Rephrase your question.

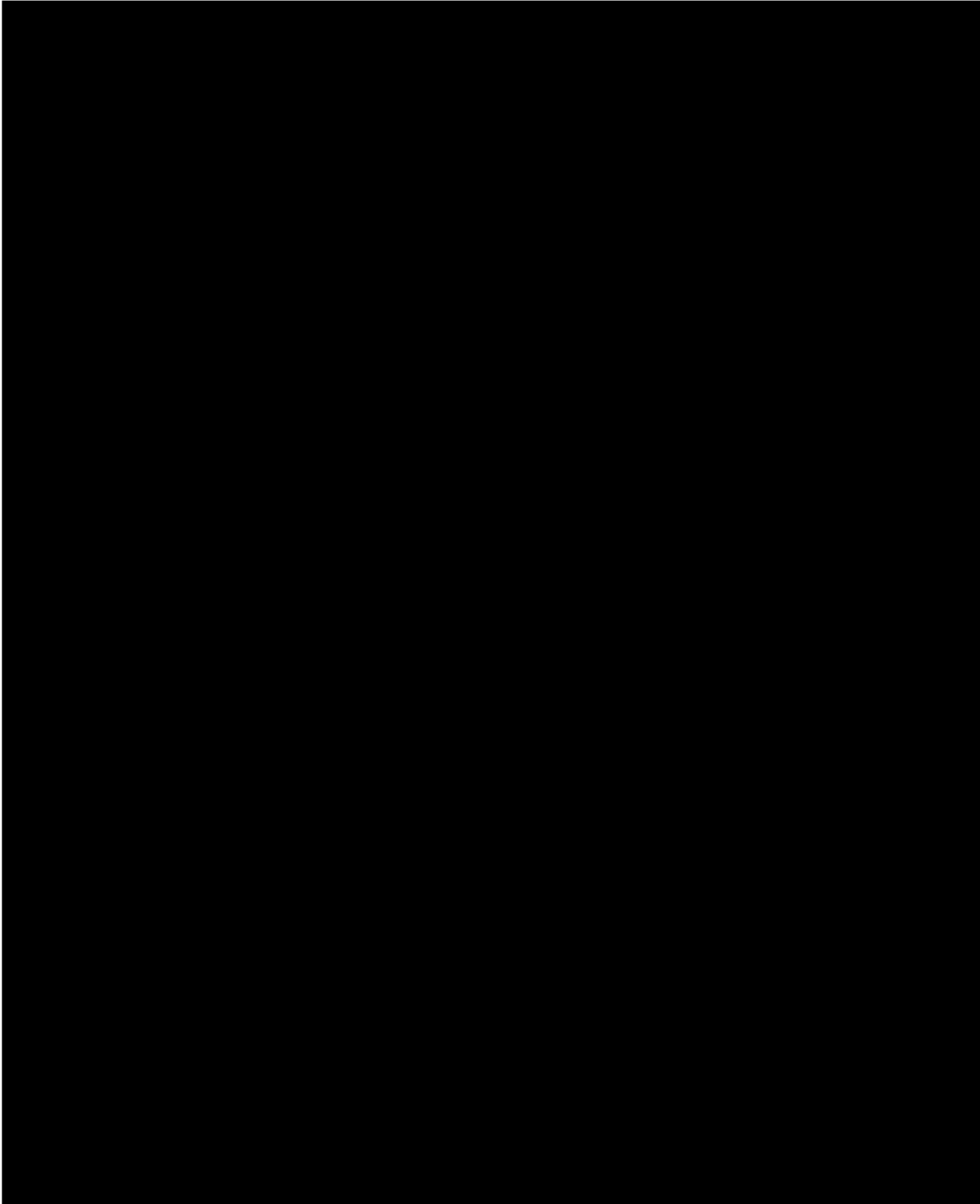


UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17810

UNCLASSIFIED//FOR PUBLIC RELEASE

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17811

UNCLASSIFIED//FOR PUBLIC RELEASE

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

13

14

CROSS-EXAMINATION

15 Questions by the Learned Defense Counsel [MR. NATALE]:

16 Q. Agent Kellerman, when did you receive this assignment?

17 A. The first three names would have been in mid-June.

18 The next 15 names would have been last week.

19 Q. Now, who gave you this assignment?

20 A. The prosecution team.

21 Q. And was it in writing or was it oral?

22 A. I'm -- I don't know. Might have been both.

23 Q. To your knowledge, were you the only person who was

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17812

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 given this assignment to locate the individuals that you just
2 previously listed?

3 A. Me and then the people I delegated the tasks to, yes.

4 Q. What were you told to do, sir?

5 A. Just make best efforts to locate the witnesses, if at
6 all possible.

7 Q. Were you told the importance of your task?

8 A. No, I don't think that came up.

9 Q. Sir, you were aware before testifying that this was a
10 death penalty case?

11 A. I am.

12 Q. And you are aware that traditionally that's considered
13 to be a very serious case?

14 A. Yes.

15 Q. And that the reason for you to locate these
16 individuals was because their testimony was wanted by the
17 government?

18 A. Yes.

19 Q. Is that correct?

20 A. Yes.

21 Q. So it was your impression that what the government was
22 tasking you to do is to locate these individuals so that these
23 people could eventually be brought to a court or somehow

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17813

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 testify in person at a death penalty case?

2 A. Yes.

3 Q. I'm sorry, sir. You have to answer a little louder.

4 I didn't hear it.

5 A. Yes.

6 Q. Are you fluent in the Arabic language?

7 A. No.

8 Q. Did you request at any time the assistance of an
9 interpreter in conducting your inquiry?

10 A. No.

11 Q. Why not?

12 A. I wasn't translating or talking to anybody who spoke
13 Arabic as a native language.

14 Q. Well, sir, I think you mentioned earlier that the
15 spelling of Arabic names can fluctuate and quite possibly your
16 search could have come up with something that was in the
17 Arabic language, wouldn't it?

18 A. No.



23 Q. Is it fair to say that it was your understanding that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17814

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

8

9 MJ [COL ACOSTA]: I'm sorry. Each of your answers is a
10 bit muffled, so I just need you to speak up so that we can
11 hear you down here. Okay?

12 WIT: Yes, sir.

13 MJ [COL ACOSTA]: Thank you.

14 Q. Would you please inform the court as to what
15 documents, information, memorandum, or data systems you were
16 provided to accomplish this task of locating these
17 individuals.

18 A. I'm not sure I understand the question.

19 Q. Let me make it more simply, sir.

20 Did you receive any documents reflecting the
21 statements that were allegedly made by the people who you were
22 trying to locate?

23 A. I did not receive them. When I was given the names, I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17815

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 looked up the 302s only to look for birth date information or
2 personally identifiable information that we could use in
3 database queries, but I didn't look into the content.

4 Q. And I'm going to get to that in a little bit, but were
5 you provided any other information other than the names of
6 these individuals to aid in your search?

7 A. No.

8 Q. Who decided which data systems that you would use to
9 search?

10 A. I mean, I don't know the formal name of the data
11 system that Customs and Border Protection would use, and
12 whoever I assigned the task to would then use whatever their
13 routine databases were.

14 Q. Did you have any indication that any of these
15 individuals ever came to the United States?

16 A. Not that I was aware of, no.

17 Q. Yet, it was directed to the Customs and Border Patrol
18 to see if any of these people came to the United States?

19 A. I'm not sure if I phrased it that way or if I asked if
20 any of the people were currently in the United States. Those
21 are two different inquiries.

22 Q. Well, regardless of what inquiry you made, did you
23 have any basis to believe that they either had come to the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17816

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 United States or that they were currently in the
2 United States?

3 A. Based on the results I got from Customs and Border
4 Protection, we did not have any reason to believe that any of
5 them were currently in the United States.

6 Q. My question is prior to getting the response from
7 them, did you have any information that would lead you to
8 believe that they could have been presently in the
9 United States or that at some point in time they came to the
10 United States?

11 A. No.

12 Q. Now, did you use any open source databases?

13 A. Yes.

14 Q. And what were those databases?

15 A. Again, I don't know which one the staff operations
16 specialist used. I did -- I used Thomson Reuters myself to
17 follow up on a couple of them.

18 Q. Did you try using Google?

19 A. No.

20 Q. Facebook?

21 A. Nope.

22 Q. Twitter?

23 A. No.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17817

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

3

4 Q. Did you ever ask the prosecution to say can we have
5 the resources of an interpreter so I can really try to find
6 these folks?

7 A. No.

8 Q. Did you ask that?

9 A. No.

10 Q. Why not?

11 A. It wouldn't have been a step that I would have taken.
12 Just didn't think it was necessary.

13

14

15

16

17

18

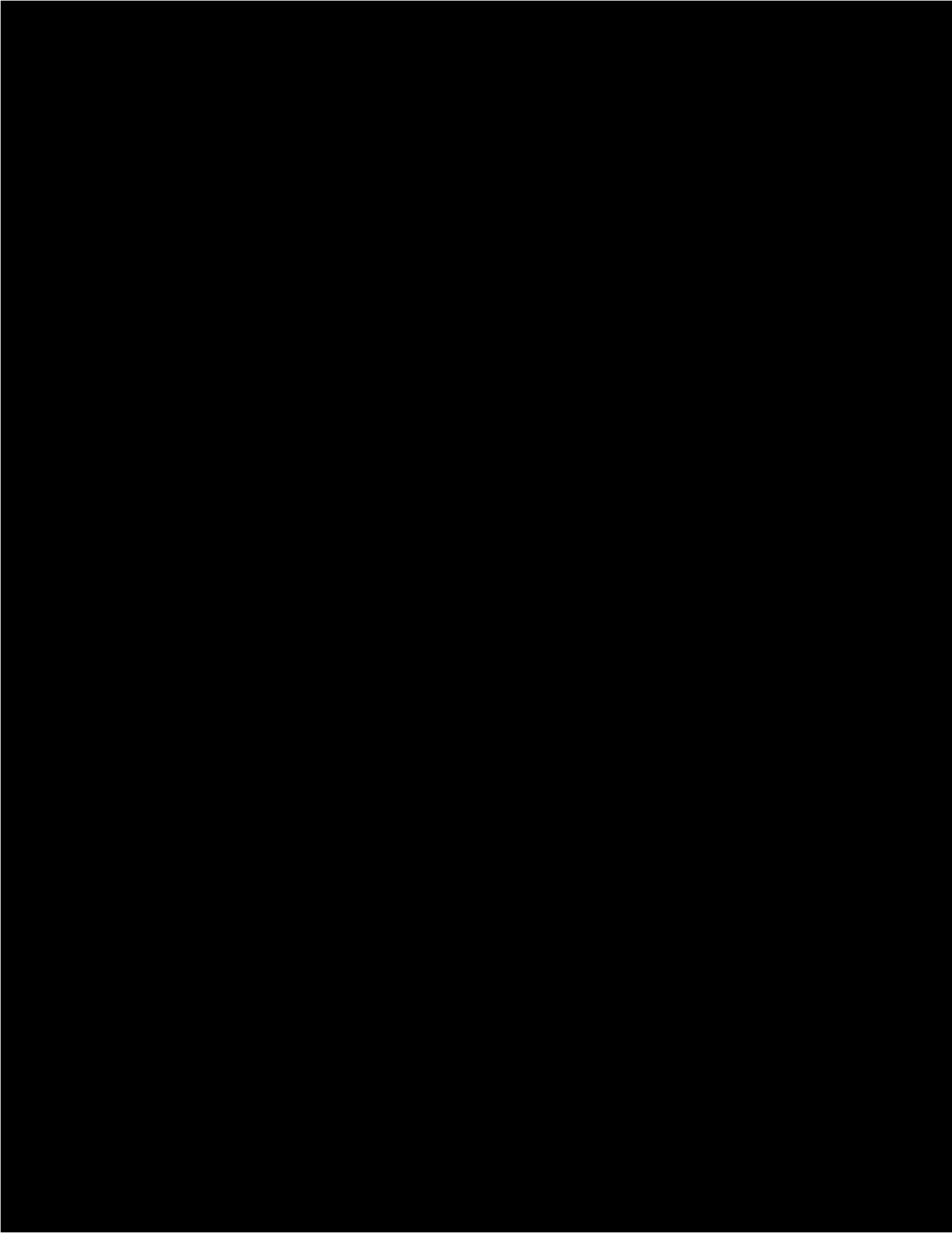
19 ATC [LCDR SCHREIBER]: Objection, argumentative.

20 MJ [COL ACOSTA]: Sustained.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

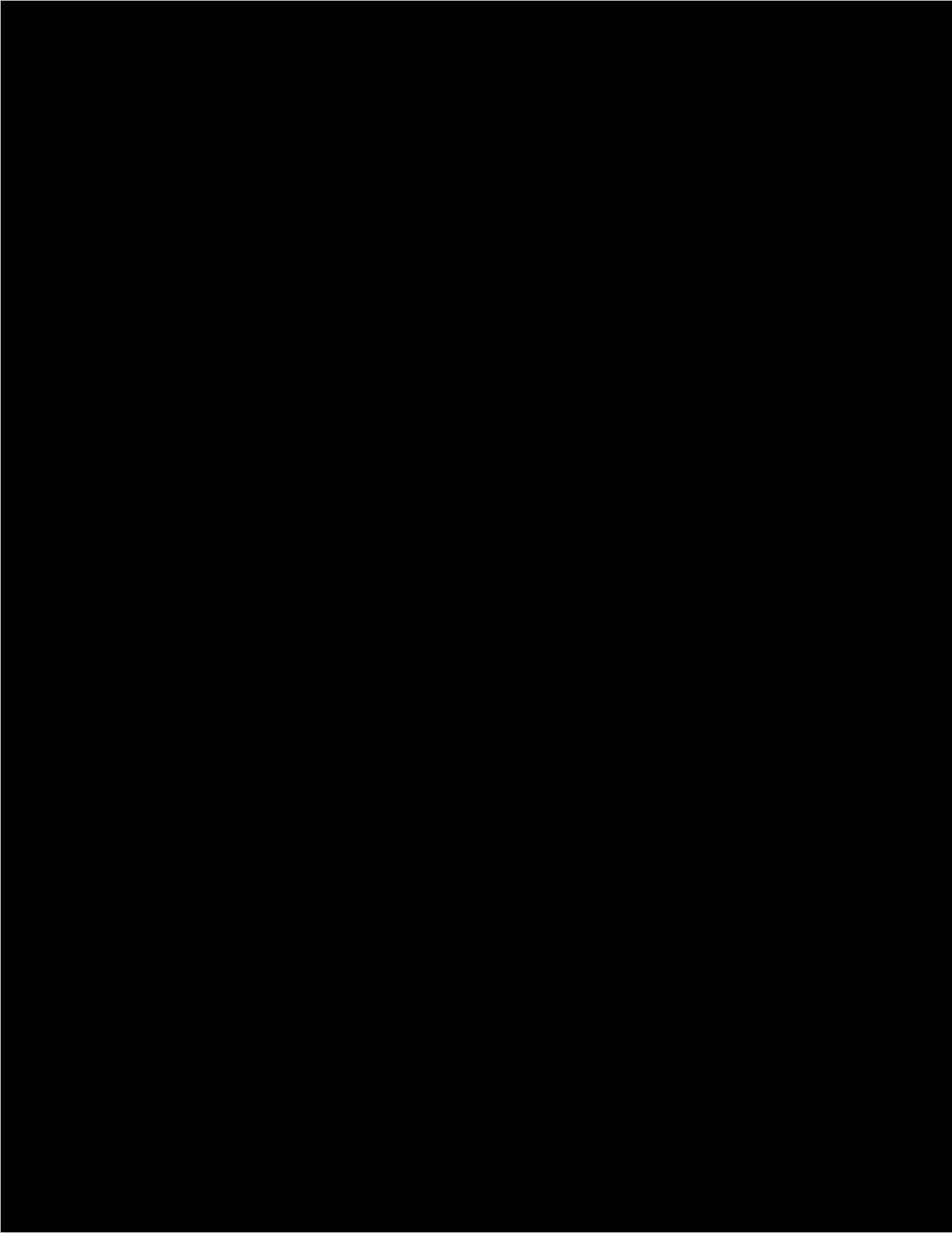
17818

UNCLASSIFIED//FOR PUBLIC RELEASE

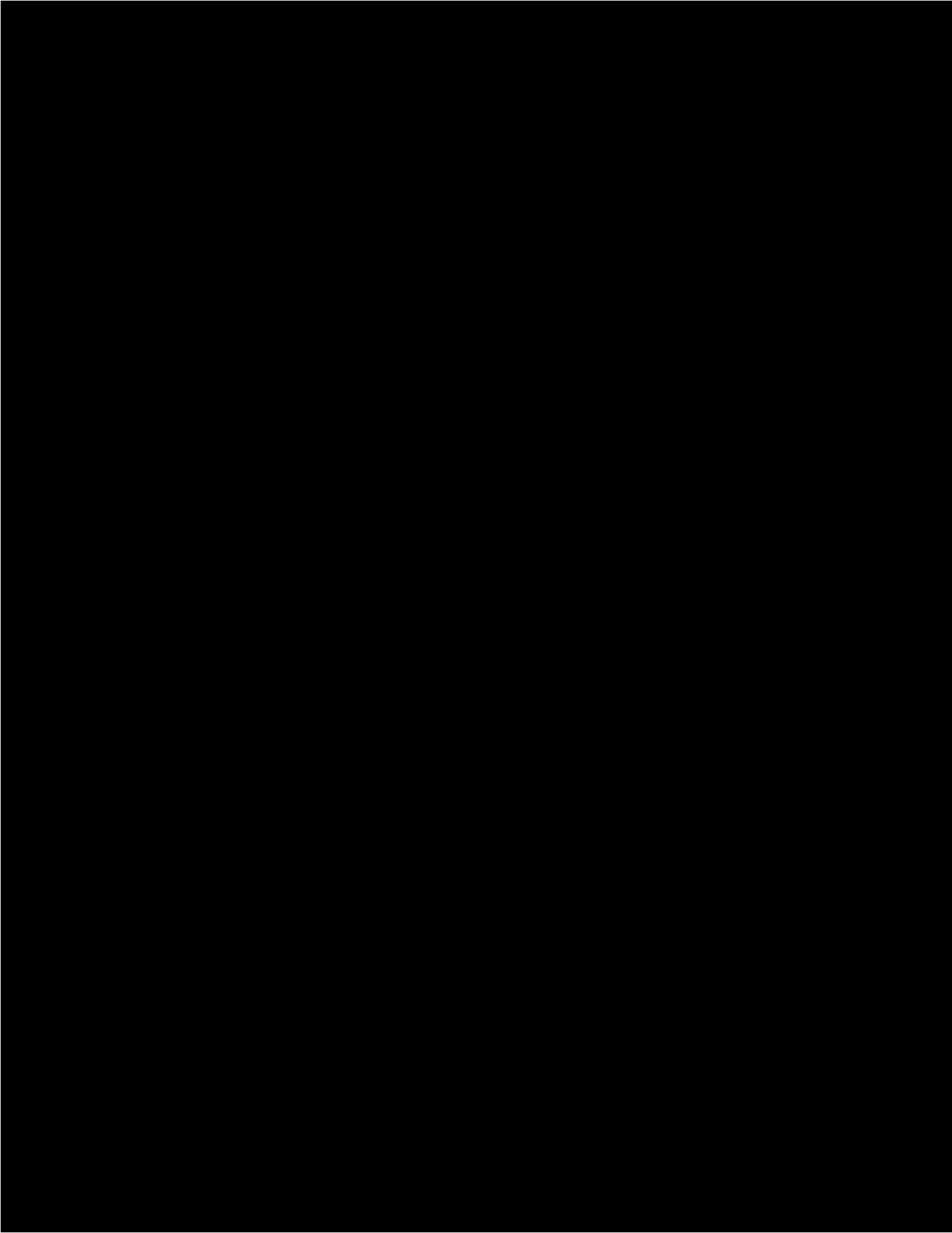


UNCLASSIFIED//FOR PUBLIC RELEASE

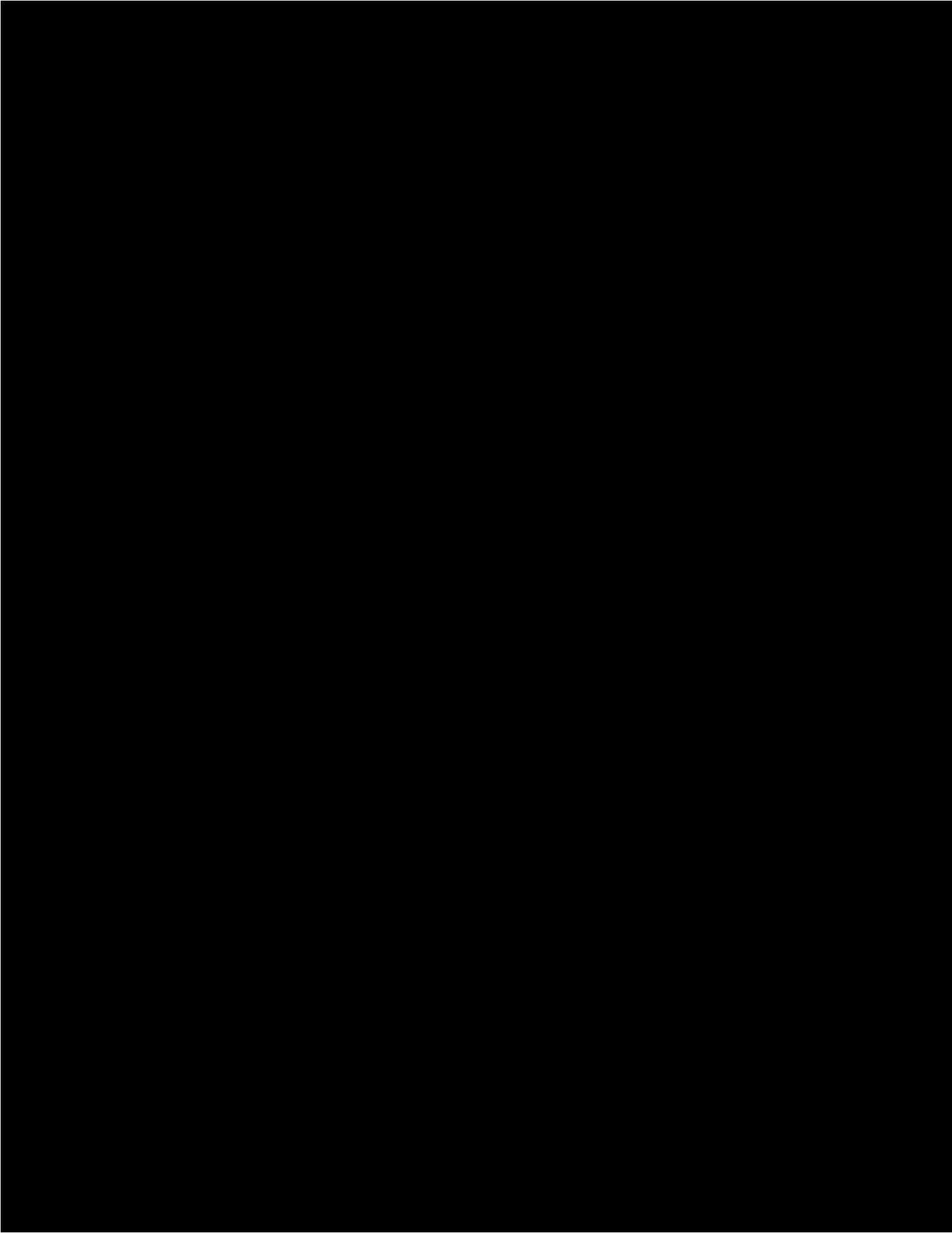
UNCLASSIFIED//FOR PUBLIC RELEASE



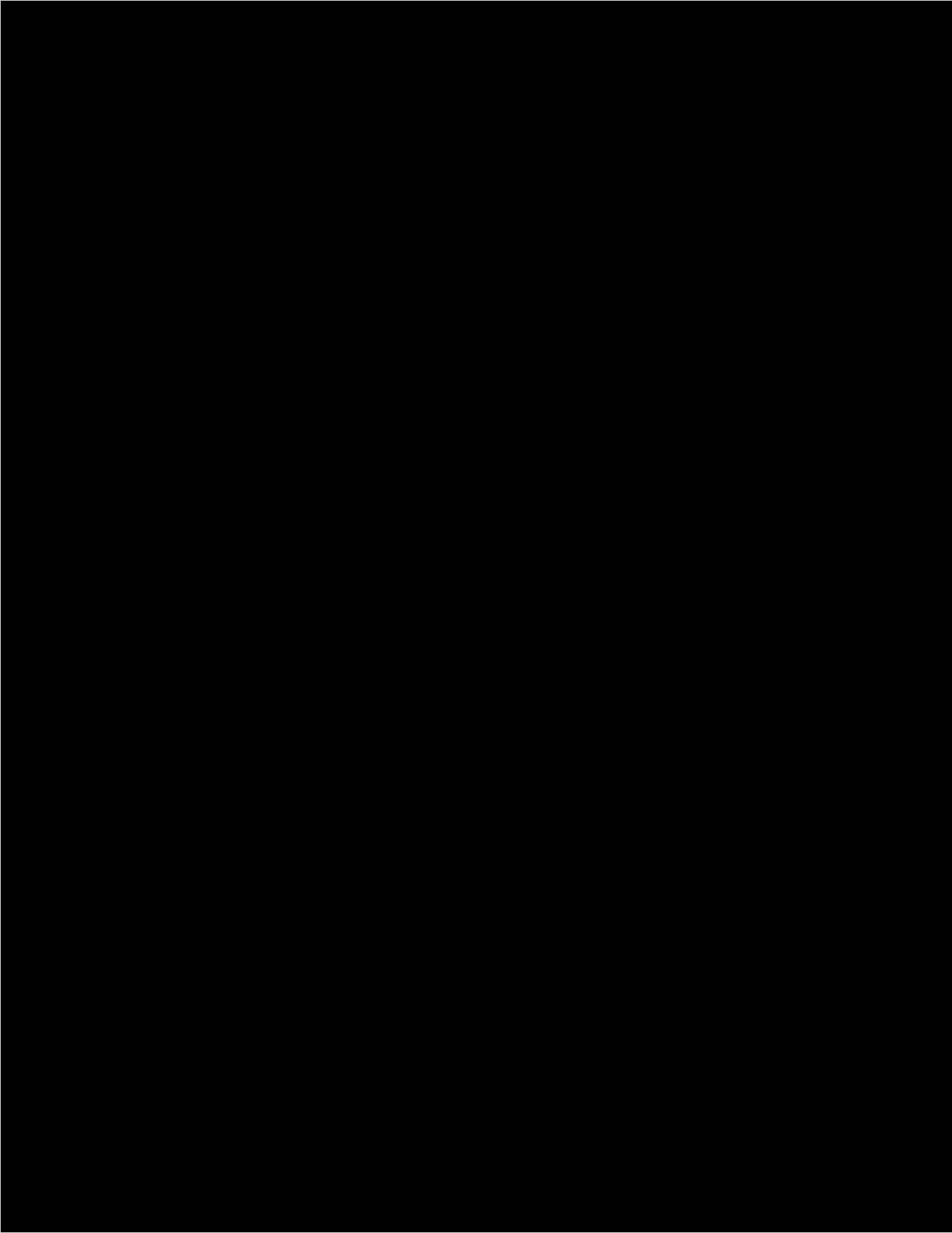
UNCLASSIFIED//FOR PUBLIC RELEASE



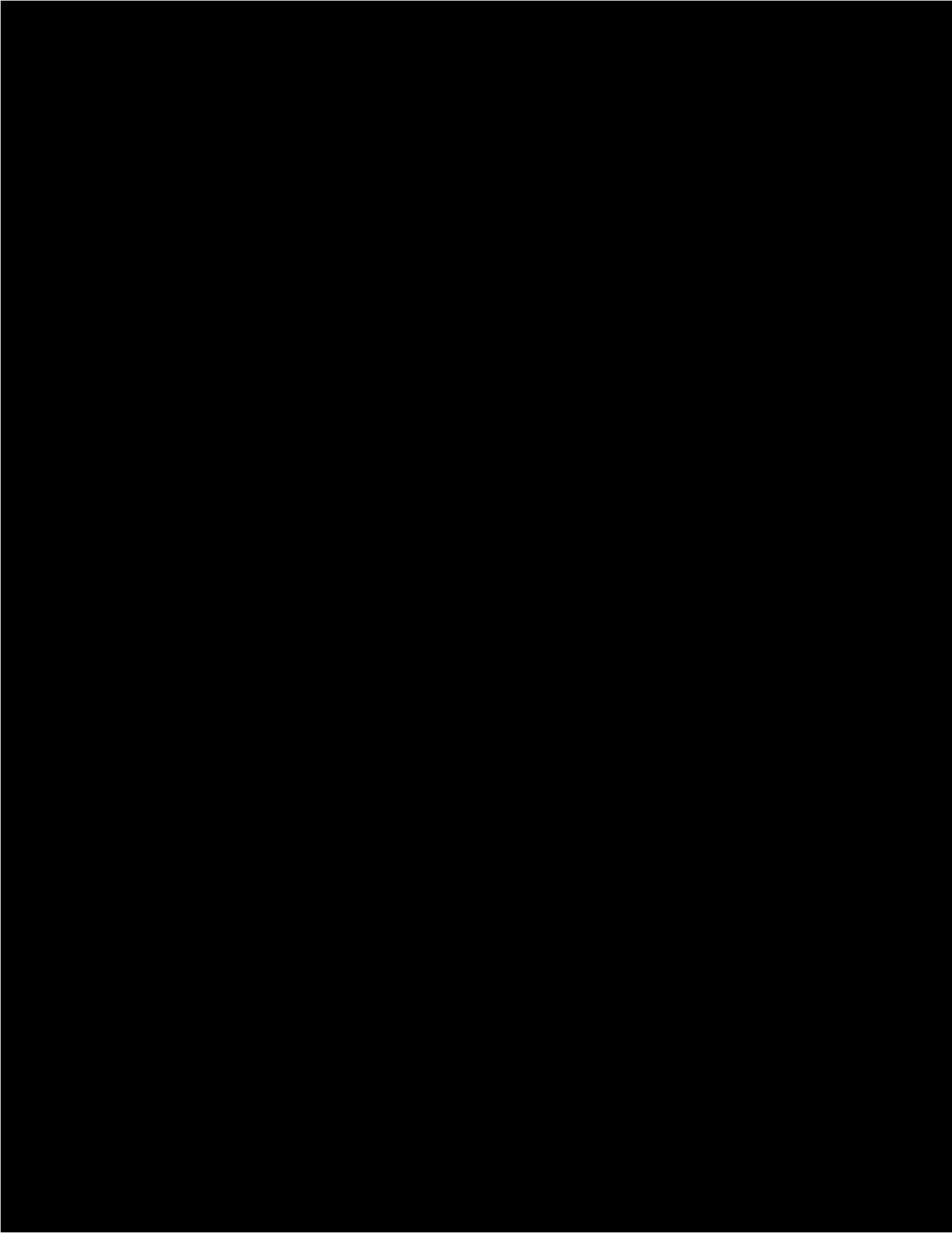
UNCLASSIFIED//FOR PUBLIC RELEASE



UNCLASSIFIED//FOR PUBLIC RELEASE

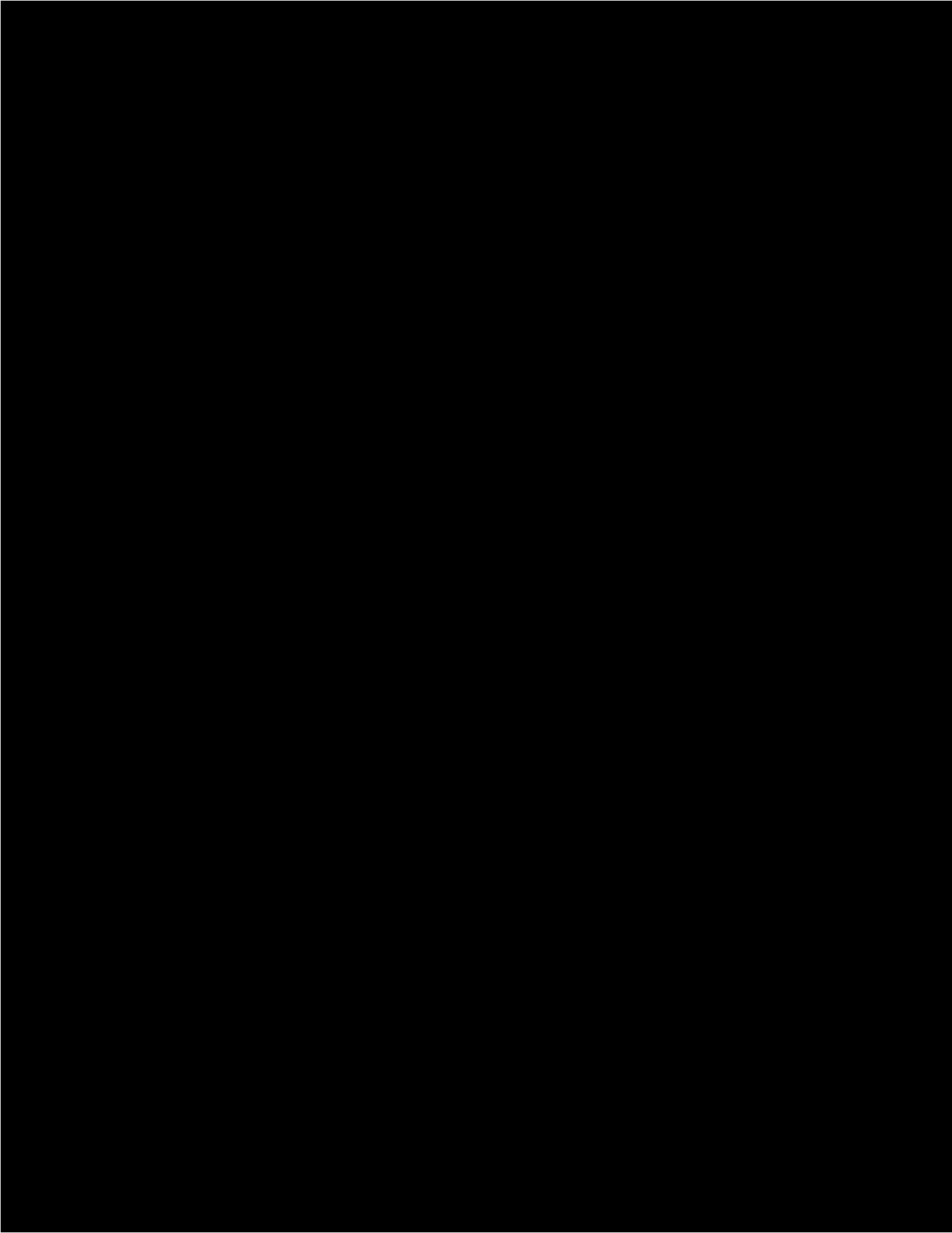


UNCLASSIFIED//FOR PUBLIC RELEASE

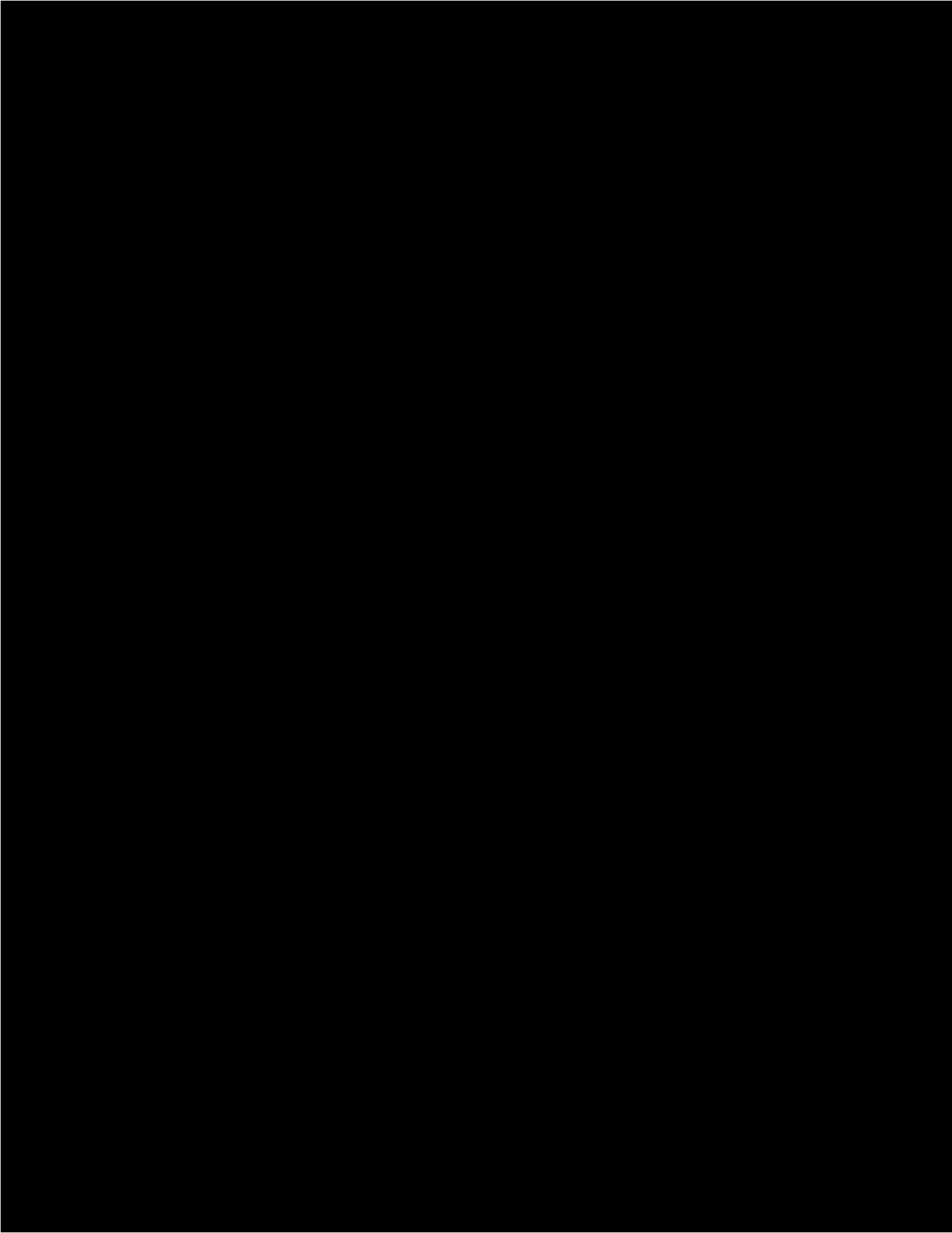


UNCLASSIFIED//FOR PUBLIC RELEASE

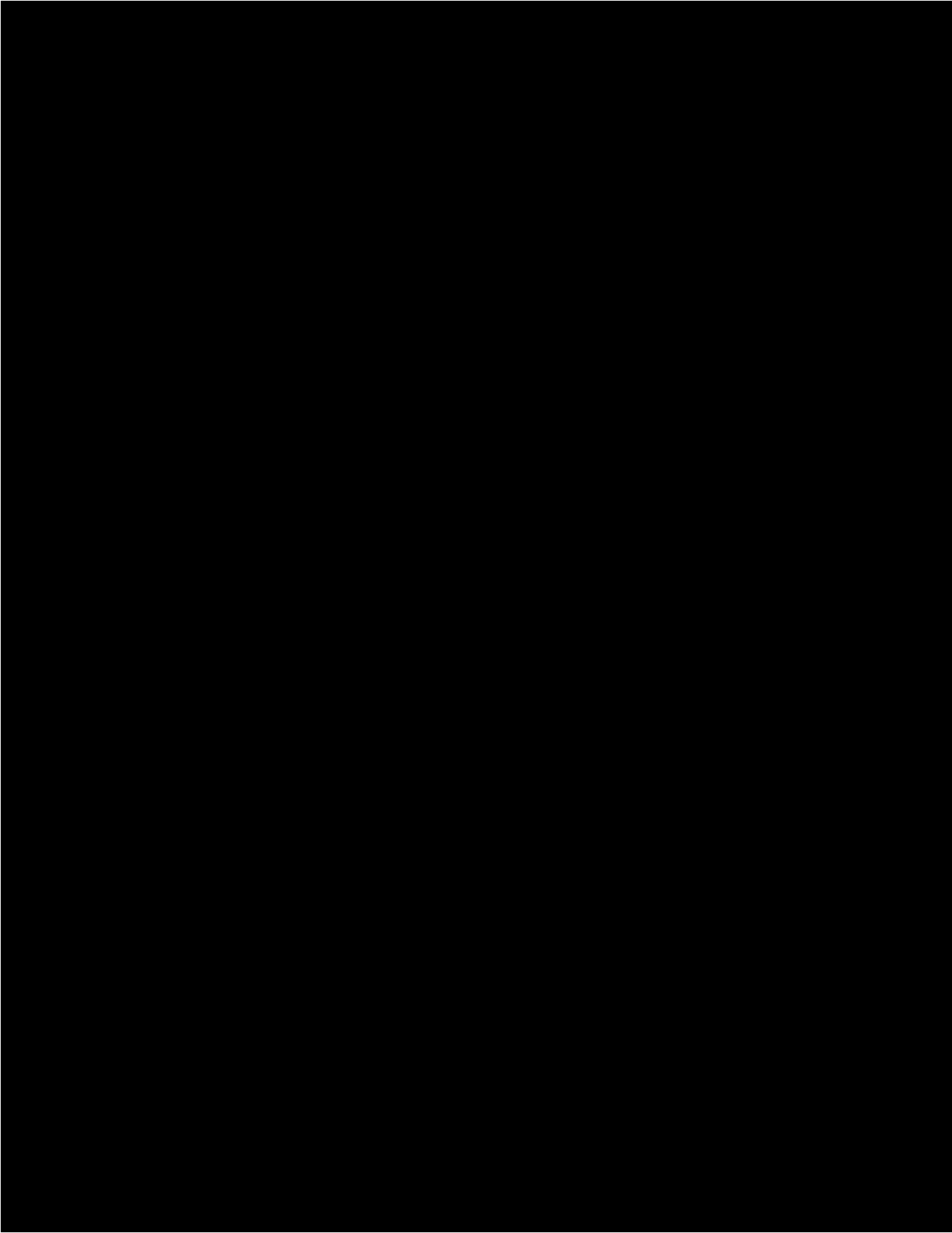
UNCLASSIFIED//FOR PUBLIC RELEASE



UNCLASSIFIED//FOR PUBLIC RELEASE



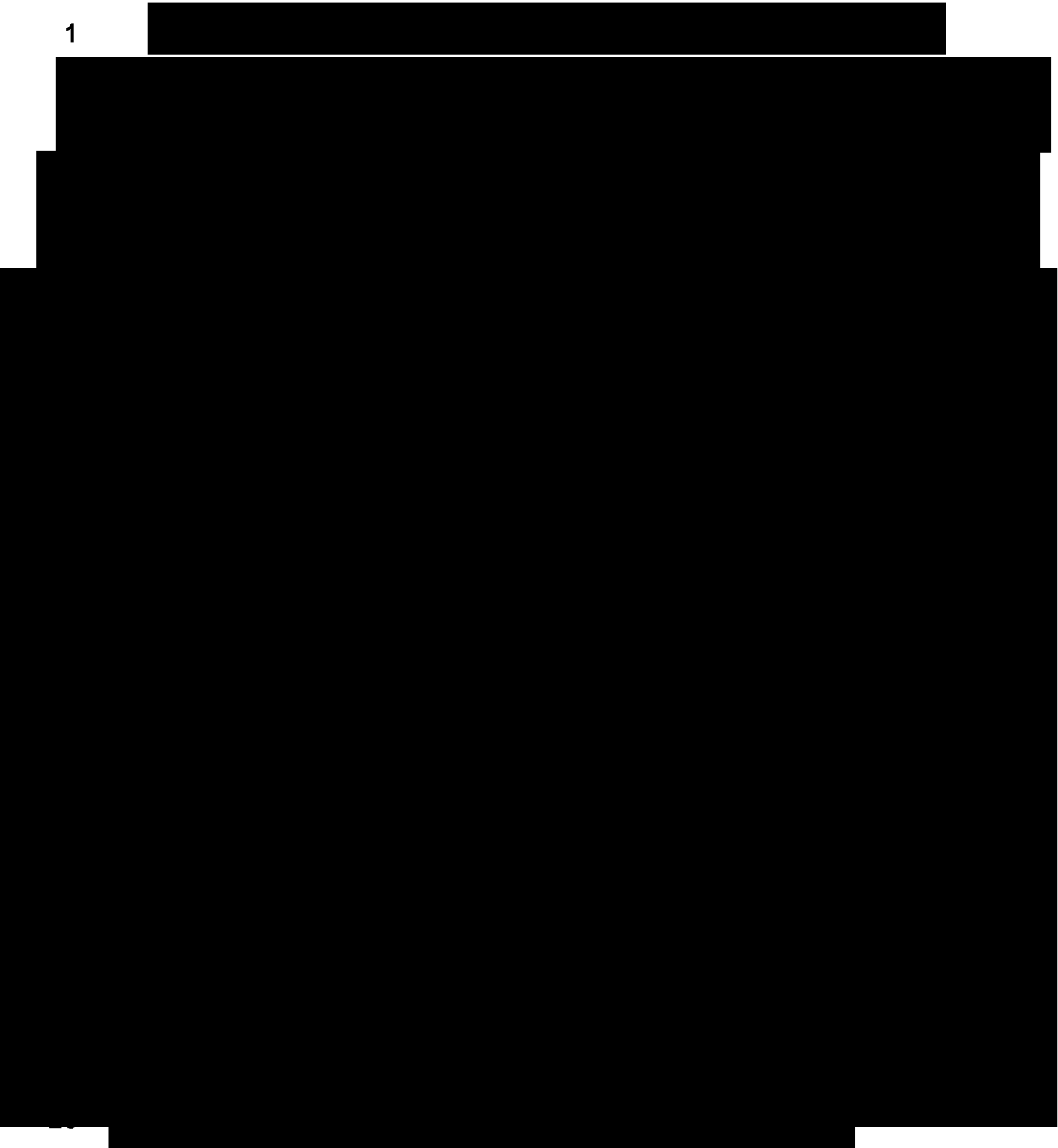
UNCLASSIFIED//FOR PUBLIC RELEASE



UNCLASSIFIED//FOR PUBLIC RELEASE

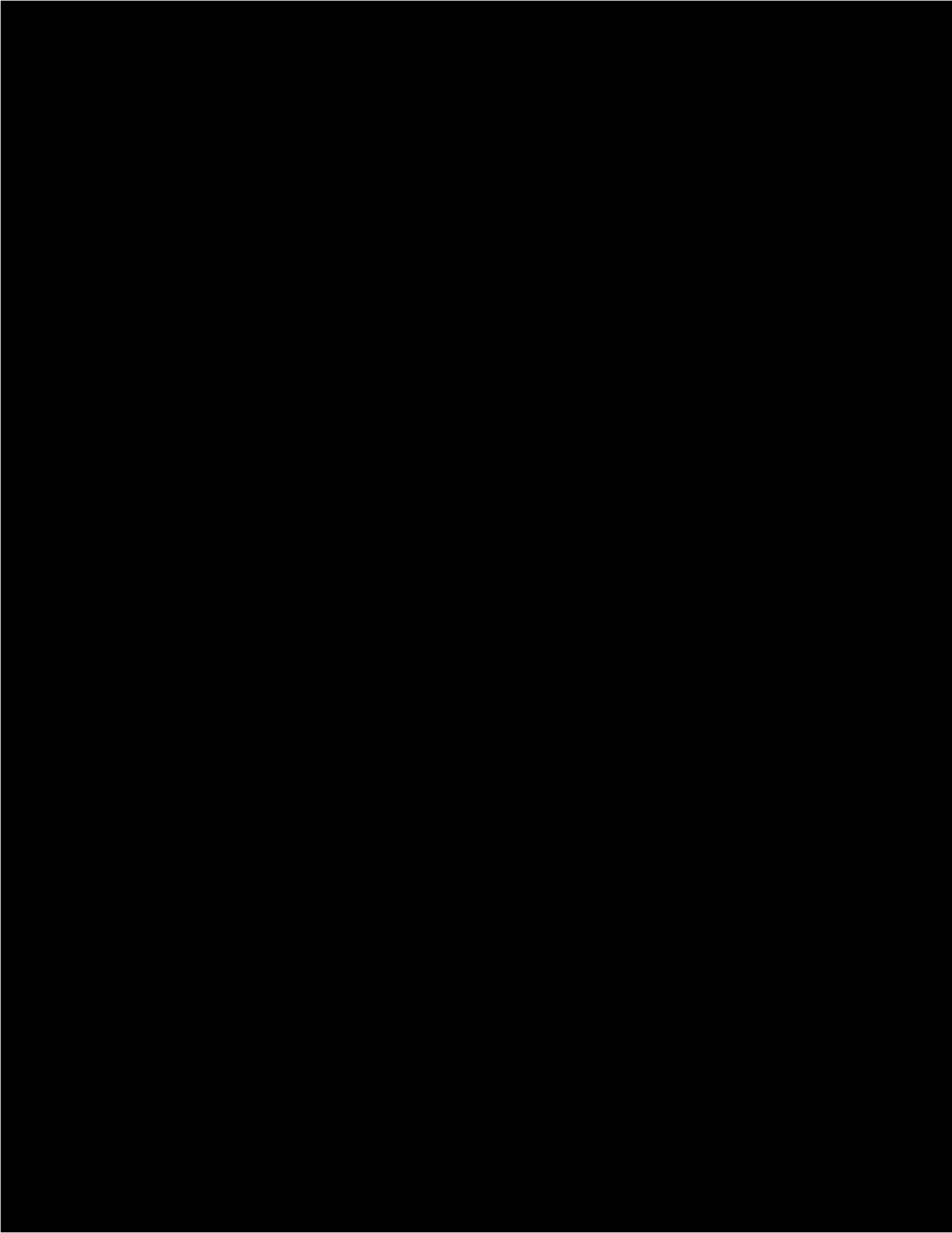
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17828



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this -- if your answer to this is classified, then do not
2 answer it. Go ahead.

3 Q. Did you ask other countries to help in locating these
4 individuals?

5 A. No.

6 Q. Did you request that the government try to contact
7 other countries to see if they could aid in locating these
8 people?

9 ATC [LCDR SCHREIBER]: Objection. Clarification on other
10 countries. It's unclear. The question is unclear.

11 Q. Any countries other than the United States?

12 A. No. A significant number of other countries won't
13 assist in death penalty cases, and I had no lead information
14 indicating any of these people had gone to other countries.
15 If I did, I would have pursued information with those
16 countries.

17 Q. Since you were listed as a witness last week, what
18 efforts have you engaged to locate any of the 15 people that
19 you mentioned?

20 A. I mean, since last week is when I received -- last
21 week I received the additional names, and that's when I
22 requested CBP and one of our SOSs run the names.

23 Q. Well, last week you were present here on the island,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17830

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 weren't you, sir?

2 A. Yes.

3 Q. You were present here in the courtroom?

4 A. Yes.

5 Q. What efforts did you do last week or over the weekend
6 to try to locate any of the people who were on the list that
7 you went through earlier?

8 A. Personally, I didn't take ----

9 Q. Let's start off with personally.

10 A. I didn't take any investigative steps last week.

11 Q. Did you -- did you direct anybody to take any steps?

12 A. Yes.

13 Q. And who did you direct to take those steps? What were
14 their occupations? What were their professional criteria for
15 doing that?

16 A. So I asked one of the staff operations specialists who
17 were trained in -- I don't know specifically what their
18 training is, but it's their job to do routine database checks.
19 I work with them in the field. So I tasked one of them to do
20 the public source database checks. And I followed that up by
21 asking a Customs and Border Protection detailee to the FBI to
22 check the CBP records.

23 Q. I believe you've already answered this, but you have

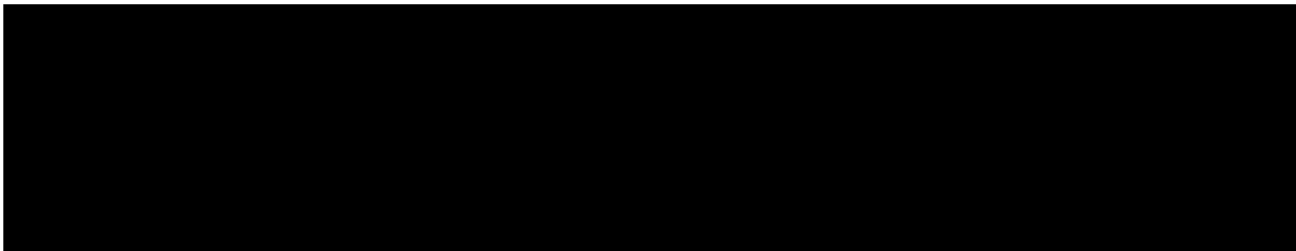
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17831

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

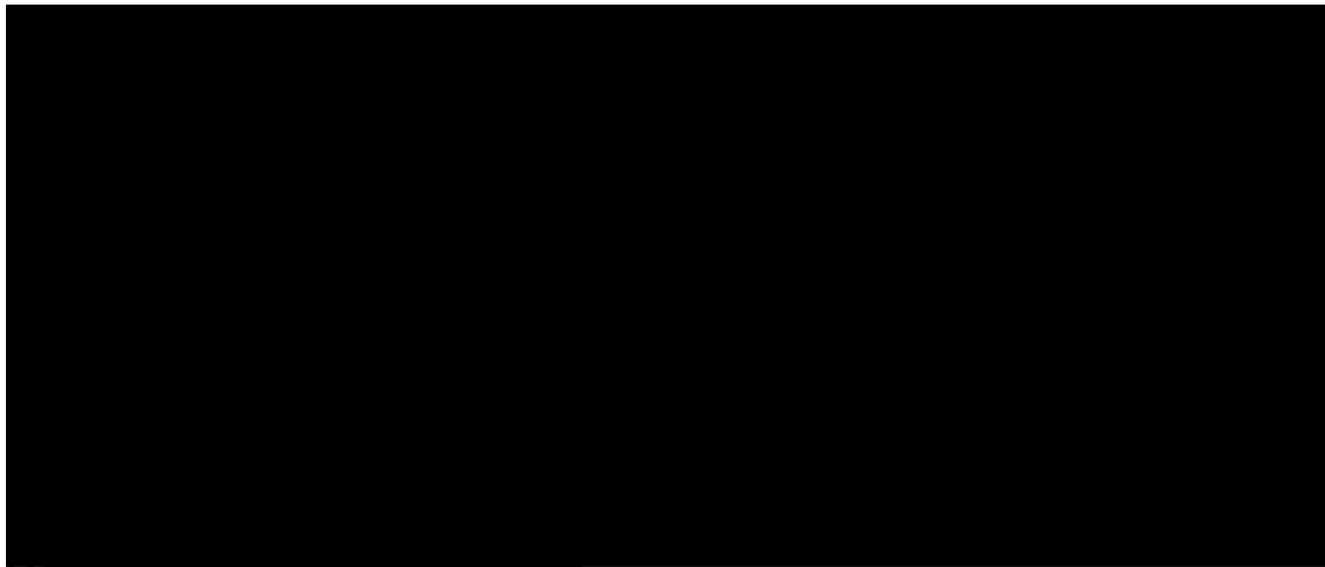
1 no personal knowledge as to what public databases these people
2 would have checked out since you gave them the assignment of
3 the 15 people; is that correct?

4 A. Well, the staff operations specialist, yes. The CBP
5 database is not public.



10 ATC [LCDR SCHREIBER]: Objection. That needs to be done
11 in closed session.

12 MJ [COL ACOSTA]: All right. Sustained. We'll take that
13 up in closed.



23 ATC [LCDR SCHREIBER]: Objection. This is, again, closed

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17832

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 session.

2 MJ [COL ACOSTA]: Okay. We'll take that up in closed
3 session.

4 LDC [MR. NATALE]: Your Honor, may I have a moment?

5 MJ [COL ACOSTA]: You may.

6 [Counsel conferred]



10

11 LDC [MR. NATALE]: Your Honor, I pass the witness.

12 MJ [COL ACOSTA]: All right. Government, if we're going
13 to take up this witness in a closed session, we need to have a
14 recess in order to prepare to do that.

15 Is this the only witness we're going to take up in
16 closed session today, Government?

17 ATC [LCDR SCHREIBER]: Your Honor, no. There's a portion
18 of testimony of another witness that will be in closed
19 session. I think the government's recommendation is that we
20 handle both of those closed sessions together toward the end
21 of the day.

22 MJ [COL ACOSTA]: I concur.

23 ATC [LCDR SCHREIBER]: Excuse me. I think all three

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17833

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 maybe have -- I'm sorry. I'm getting a note that all three
2 will have a small closed portion, so we do all those together.

3 MJ [COL ACOSTA]: Yep. We'll do them all together. So
4 what we'll do now is recess until 1315, and then we'll come
5 back up with open session for your redirect and the next
6 witnesses in open session.

7 The commission is in recess until 1315.

8 [The R.M.C. 803 session recessed at 1203, 3 August 2022.]

9 [The R.M.C. 803 session was called to order at 1203,
10 3 August 2022.]

11 MJ [COL ACOSTA]: The commission is called to order.

12 Agent, I do this on occasion, I forget to warn you
13 before you leave. I remind you that you remain under --
14 remain under oath during this session. You're essentially
15 still on the stand, so you can't talk about your testimony
16 with anybody, including supervisors, the government, or the
17 defense.

18 Do you understand that?

19 WIT: Yes, sir.

20 MJ [COL ACOSTA]: All right. If anybody tries to talk to
21 you about your current testimony, tell them that I told you
22 you can't and report it to me at the next session.

23 Can you do that?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17834

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 WIT: Yes, sir.

2 [The witness was warned, was temporarily excused, and withdrew
3 from the RHR.]

4 MJ [COL ACOSTA]: All right. The commission is in recess.

5 [The R.M.C. 803 session recessed at 1203, 3 August 2022.]

6 [The R.M.C. 803 session was called to order at 1318,
7 3 August 2022.]

8 MJ [COL ACOSTA]: The commission is called to order.

9 Government, all parties present as before?

10 TC [MR. MILLER]: Yes, Your Honor, with the addition that
11 I did not account for Major Ross this morning, who is at the
12 RHR. [REDACTED]

14 MJ [COL ACOSTA]: Thank you.

15 Defense?

16 LDC [MR. NATALE]: I'm present here, and Captain Mizer can
17 report up in the RHR.

18 DDC [CAPT MIZER]: Same individuals as this morning,
19 Judge.

20 MJ [COL ACOSTA]: Counsel, I'll note that Mr. Nashiri is
21 absent now.

22 LDC [MR. NATALE]: That's correct, Your Honor. He has
23 decided that he needs to rest this afternoon. He's not

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17835

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 coming.

2 MJ [COL ACOSTA]: All right. And did you discuss this
3 with him?

4 LDC [MR. NATALE]: I discussed it with him at length,
5 actually. Even early this morning he made it clear that the
6 morning was probably the most that he could do right now.

7 MJ [COL ACOSTA]: So is his absence a voluntary waiver of
8 his right to be present at today's session?

9 LDC [MR. NATALE]: Absolutely, Your Honor.

10 MJ [COL ACOSTA]: All right. Thank you. The commission
11 finds that he has voluntarily waived his right to be present
12 at today's session. All right.

13 Government?

14 DDC [CAPT MIZER]: Your Honor, I apologize. Manice Brown
15 is also present, a paralegal with the defense, here in the
16 RHR.

17 MJ [COL ACOSTA]: Thank you, Captain Mizer. All right.

18 Government?

19 ATC [LCDR SCHREIBER]: We'll re-call the witness, Your
20 Honor.

21 [The witness, Special Agent Aaron Kellerman, resumed the
22 witness stand.]

23 MJ [COL ACOSTA]: Agent, I'll remind you that you remain

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17836

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 under oath.

2 WIT: Yes, sir.

3 MJ [COL ACOSTA]: Government, you may proceed with your
4 redirect.

5 ATC [LCDR SCHREIBER]: Thank you, sir.

6 REDIRECT EXAMINATION

7 Questions by the Assistant Trial Counsel [LCDR SCHREIBER]:

8 Q. Special Agent Kellerman, defense asked on their cross
9 about the potential for doing social media checks. [REDACTED]

20

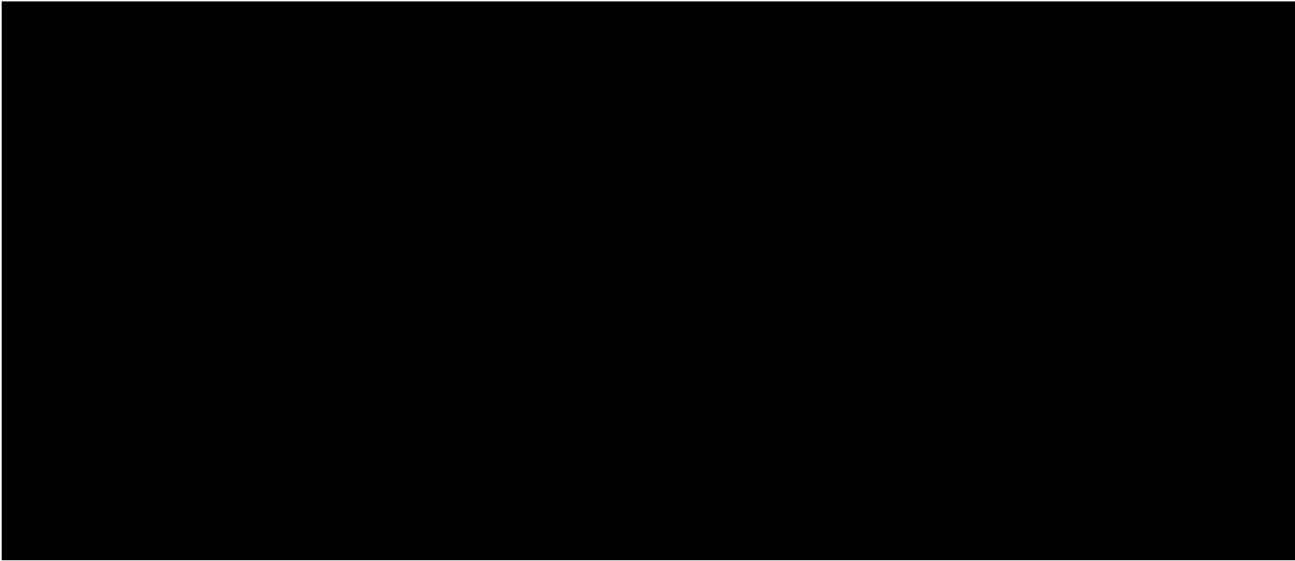
21

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17837

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

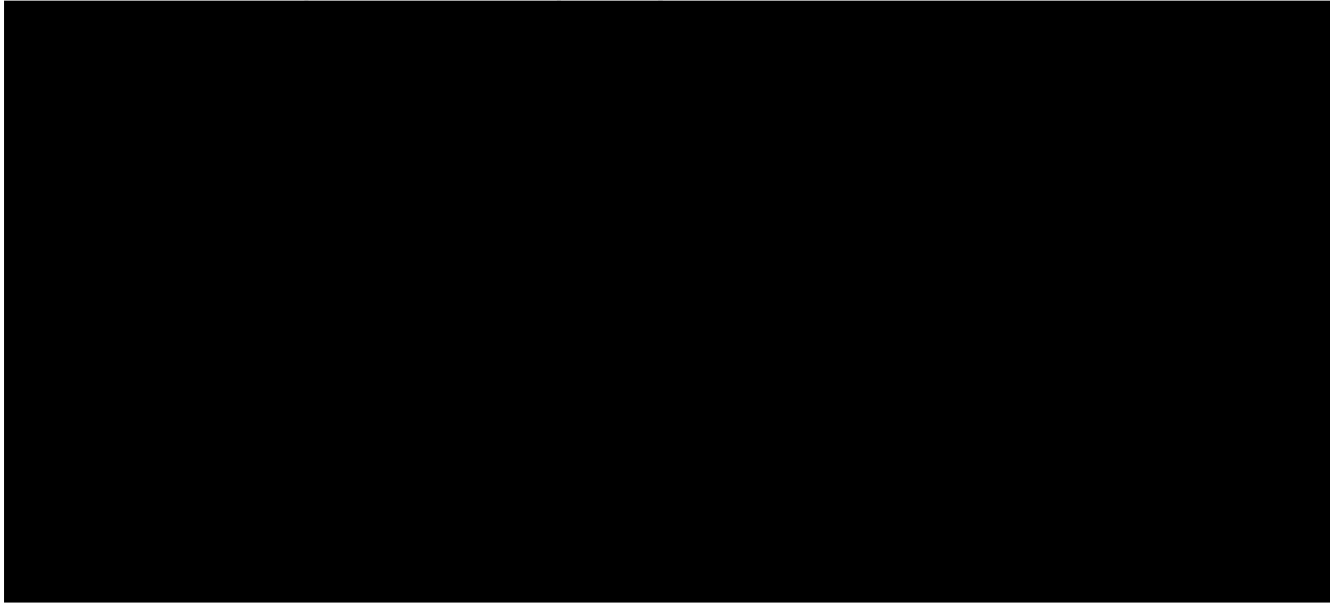
1



11 ATC [LCDR SCHREIBER]: That's all I have for redirect,
12 thank you, sir.

13 EXAMINATION BY THE MILITARY COMMISSION

14 Questions by the Military Judge [COL ACOSTA]:



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17838

UNCLASSIFIED//FOR PUBLIC RELEASE

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

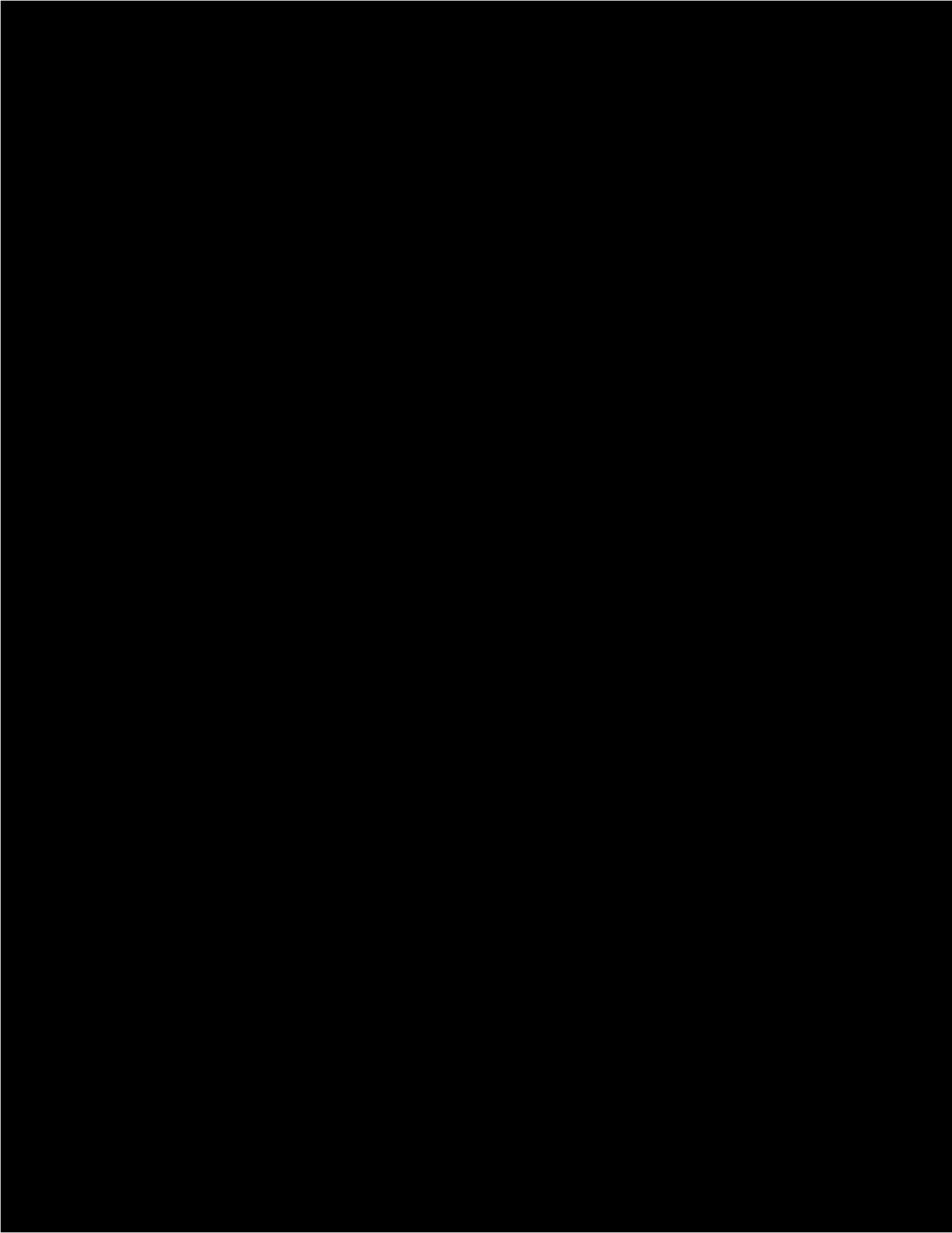
[REDACTED]

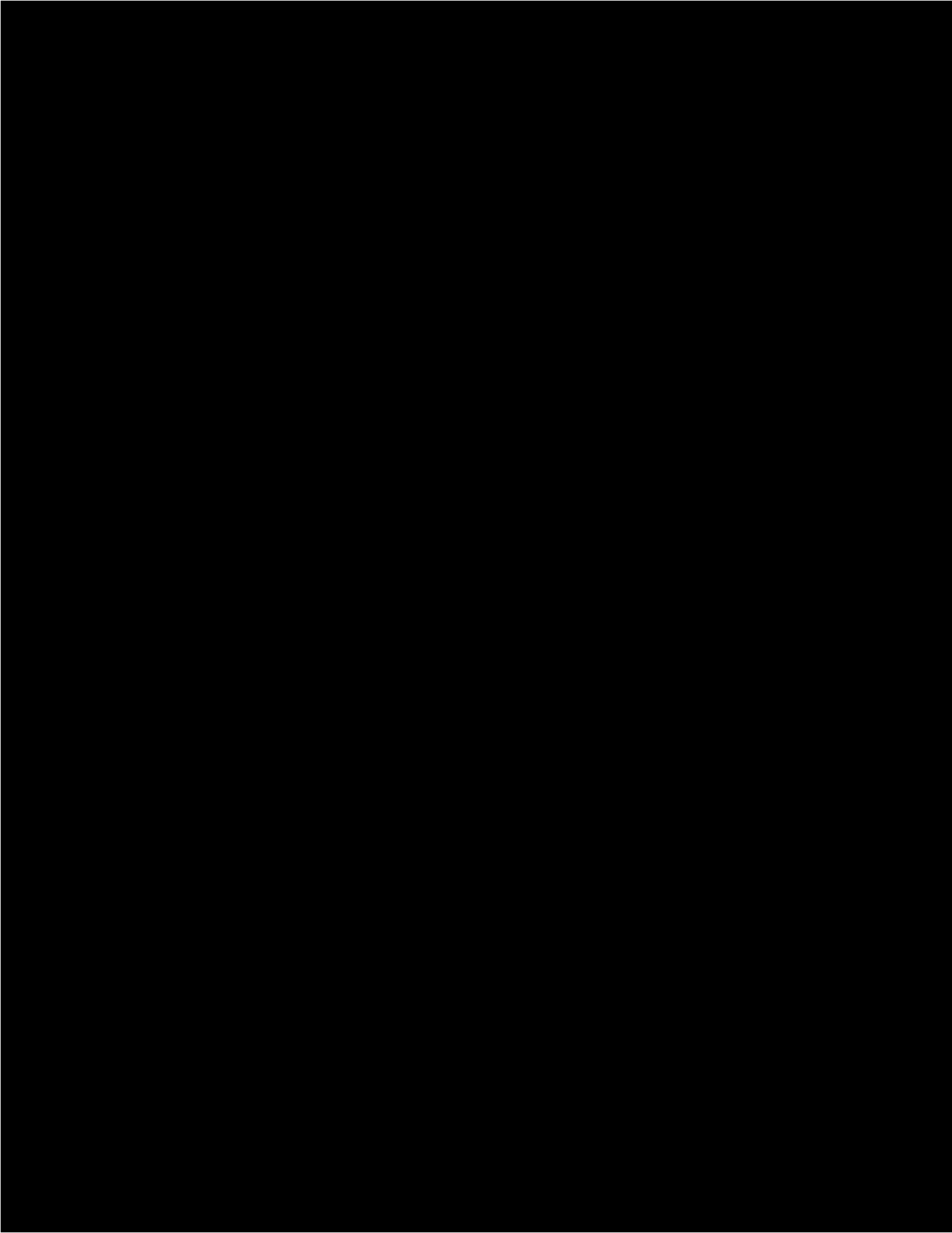
[REDACTED]

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17839

UNCLASSIFIED//FOR PUBLIC RELEASE





UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. I do not know.

2 MJ [COL ACOSTA]: Okay. All right.

3 Government, any questions based upon mine?

4 ATC [LCDR SCHREIBER]: No, Your Honor.

5 MJ [COL ACOSTA]: Defense?

6 LDC [MR. NATALE]: No, Your Honor.

7 MJ [COL ACOSTA]: All right. Agent, you're temporarily

8 excused until we go into a closed session later this

9 afternoon. In the interim, do not discuss your testimony or

10 your knowledge of this case with anyone other than counsel --

11 actually, don't discuss your testimony with anybody. This is

12 just like before. You're not to discuss your testimony with

13 the government or the defense prior to going into closed

14 session with us later today.

15 You may step down.

16 [The witness was warned, was temporarily excused, and withdrew

17 from the RHR.]

18 MJ [COL ACOSTA]: Government?

19 ATC [MAJ ROSS]: Your Honor, this is Major Ross in the

20 RHR. Can you hear me?

21 MJ [COL ACOSTA]: I can.

22 ATC [MAJ ROSS]: The next witness is a defense witness,

23 Mr. Fernandez, on AE 327.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17842

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DDC [LCDR PIETTE]: The defense calls Special Agent
2 Fernandez.

3 ATC [MAJ ROSS]: If you could please raise your right
4 hand.

5 SPECIAL AGENT CARLOS T. FERNANDEZ, civilian, was called as a
6 witness for the defense, was sworn, and testified as follows:

7 ATC [MAJ ROSS]: Please have a seat.

8 DIRECT EXAMINATION

9 Questions by the Detailed Defense Counsel [LCDR PIETTE]:

10 Q. Good afternoon. Could you please state your name.

11 A. Sure. Carlos T. Fernandez.

12 Q. Were you an FBI agent in November of 2007?

13 A. Yes, I was.

14 Q. Are you currently an FBI agent?

15 A. No, I'm not. I'm retired.

16 Q. And do you know why you're here testifying today?

17 A. Yes, I do.

18 Q. And why are you here?

19 A. I'm here because I was called to testify a [REDACTED]

20 [REDACTED] I
21 believe.

22 Q. And for -- in preparation for your testimony, did you
23 review any documents?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17843

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. And, I'm sorry, I can't hear you all that well, so I
2 apologize, so -- that would be helpful.

3 Q. I'll ask it again.

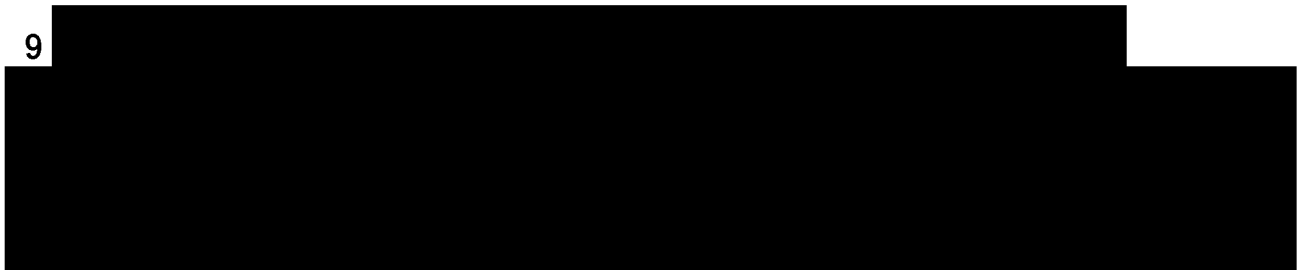
4 In preparation for your testimony today, did you
5 review any documents?

6 A. I did.

7 Q. What did you review?

8 A. I reviewed a 302.

9



13 Q. Okay. Did you speak with prosecutors in preparation
14 for your testimony?

15 A. I did.

16 Q. How many times?

17 A. Twice.

18 Q. Did you speak with the defense at all?

19 A. I did not.

20 Q. All right. We'll move on.

21 Is your -- what is your current occupation?

22 A. I'm the chief security officer for Digital Currency
23 Group.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17844

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. And you mentioned earlier that you retired from the
2 FBI. How long were you in the FBI?

3 A. Approximately 21 years.

4 Q. When did you join?

5 A. I joined in 1996.

6 Q. Before that, did you have any law enforcement
7 experience?

8 A. No, I did not.

9 Q. How about any military experience?

10 A. Yes.

11 Q. And what was that military experience?

12 A. I was in the Marine Corps.

13 Q. How long were you in the Marine Corps?

14 A. Approximately six years.

15 Q. Okay. And were you enlisted or officer?

16 A. I was enlisted.

17 Q. Did you go to college after the Marine Corps?

18 A. I went to college while I was in the Marine Corps and
19 after I graduated -- or after I finished the Marine Corps.

20 Q. Okay. What was your MOS in the Marine Corps?

21 A. 0311.

22 Q. And what is that for ----

23 A. It's an infantryman.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17845

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. And where did you go to college?

2 A. I went to several colleges. But ultimately I got my
3 degree from SUNY Purchase.

4 Q. And after that, is that when you joined the FBI?

5 A. No, sir.

6 Q. How much -- or what did you do in the interim?

7 A. Well, I'm Cuban by background, so I went to go work
8 for a cigar company.

9 Q. And again, you joined the -- or how long did you do
10 that before joining the FBI?

11 A. Approximately two years, I believe.

12 Q. And what was your first assignment once you joined the
13 FBI?

14 A. My first assignment after the academy was to the
15 Applicant Squad.

16 Q. And what is that?

17 A. The Applicant Squad is typically a squad that each
18 division has to run new agents through to give them an
19 opportunity to learn all the inner workings of a field office
20 and also to learn about conducting background investigations
21 for incoming applicants that want to become agents.

22 Q. Is this after or before you go to training at
23 Quantico?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17846

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. I'm sorry, sir. I couldn't hear you.

2 Q. Is this after or before you go to training at
3 Quantico?

4 A. This is afterwards.

5 Q. Okay. And how long is the training at Quantico?

6 A. I've been out quite some time, so I want to say
7 approximately three months.

8 Q. Okay. And what kind of training do you get at
9 Quantico?

10 A. There's a whole series of training that you get there
11 from firearms training to interviewing training to legal
12 driving, a whole host of different issues that are taught
13 there.

14 Q. Is it similar to sort of, well, like basic training in
15 the military? Is it sort of very basic and then the thing you
16 were just talking about before is more advanced training?

17 A. No, sir.

18 Q. Okay. Well, I'll move on. I don't think that's
19 terribly relevant.

20 So where was your first field office that you were
21 stationed?

22 A. New York, sir.

23 Q. And in there, when you were at the New York Field

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17847

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Office, did you -- did you investigate the East Africa
2 bombings out of there?

3 A. Yes, sir.

4 Q. How about -- is that where you became involved in the
5 USS COLE investigation?

6 A. No, sir.

7 Q. Where -- where were you stationed or what was your
8 assignment when you got involved in the USS COLE
9 investigation?

10 A. At the time I was assigned to a drug squad; however, I
11 was part of the New York SWAT team [REDACTED],

13 f

14 Q. And what year was that?

15 A. That I deployed for -- for the COLE?

16 Q. Yes.

17 A. I believe that was 2000 -- 2001.

18 Q. And you said you were part of the SWAT team at a point
19 for the FBI?

20 A. Yes, sir.

21 Q. Is that the same as the HRT or Hostage Rescue Team?

22 A. Not -- not exactly, sir.

23 Q. How long had you been doing that?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. At the time of my deployment?

2 Q. Yes.

3 A. I'm not certain. I would say approximately a year or
4 two.

5 Q. And moving on throughout your career, after -- how
6 long were you involved in the COLE operation -- or the COLE
7 investigation initially?

8 A. Sir, I deployed there shortly after October 12th. I
9 was involved as a SWAT team member there for several months,

10

11

12

18 Q. Did you ever get assigned back to New York City?

19 A. Yes.

20 Q. Were you ever part of the New York City
21 Counterterrorism Office?

22 A. Yes.

23 Q. Were you special agent in charge at any point?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17849

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. Yes, sir.

2 Q. Did you ever -- or did you ever go work for Joint
3 Special Operations Command, or JSOC?

4 A. I did.

5 Q. And what year was that?

6 A. That was approximately 2009, I believe, sir.

7 Q. And my understanding is you would be working under
8 Admiral McRaven; is that correct?

9 A. Yes, sir.

10 Q. Outstanding. And after JSOC, did you return back to
11 New York City?

12 A. I did.

13 Q. Is that where you -- the office that you retired from?

14 A. Yes.

15 Q. And what was your position when you retired?

16 A. Special agent in charge of the Joint Terrorism Task
17 Force.

18 Q. Okay. Real quick -- you mentioned it before. I'd
19 like to drill down a little deeper.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17850

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

[REDACTED]

3
4
5
6
7
8

[REDACTED]

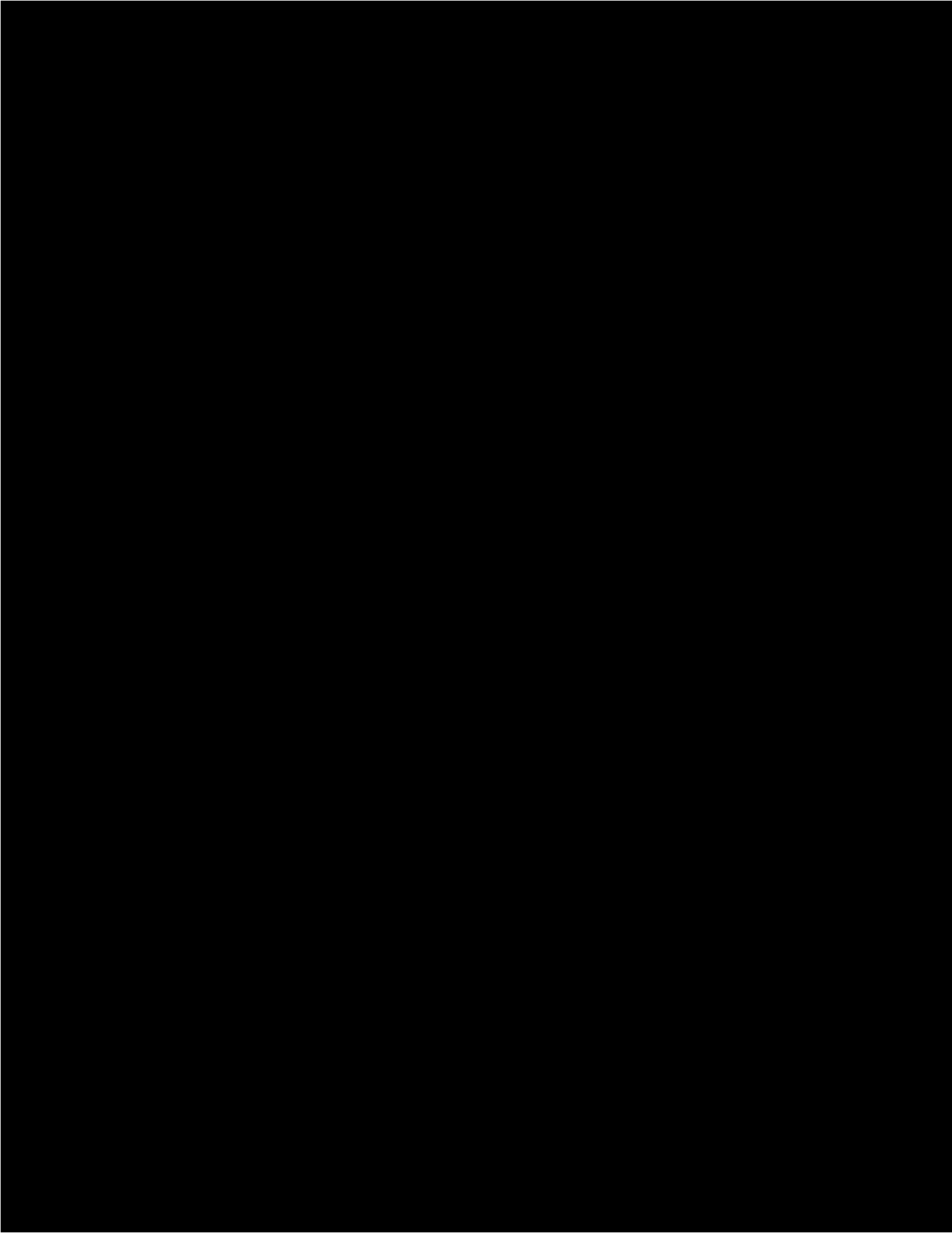
[REDACTED]

[REDACTED]

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

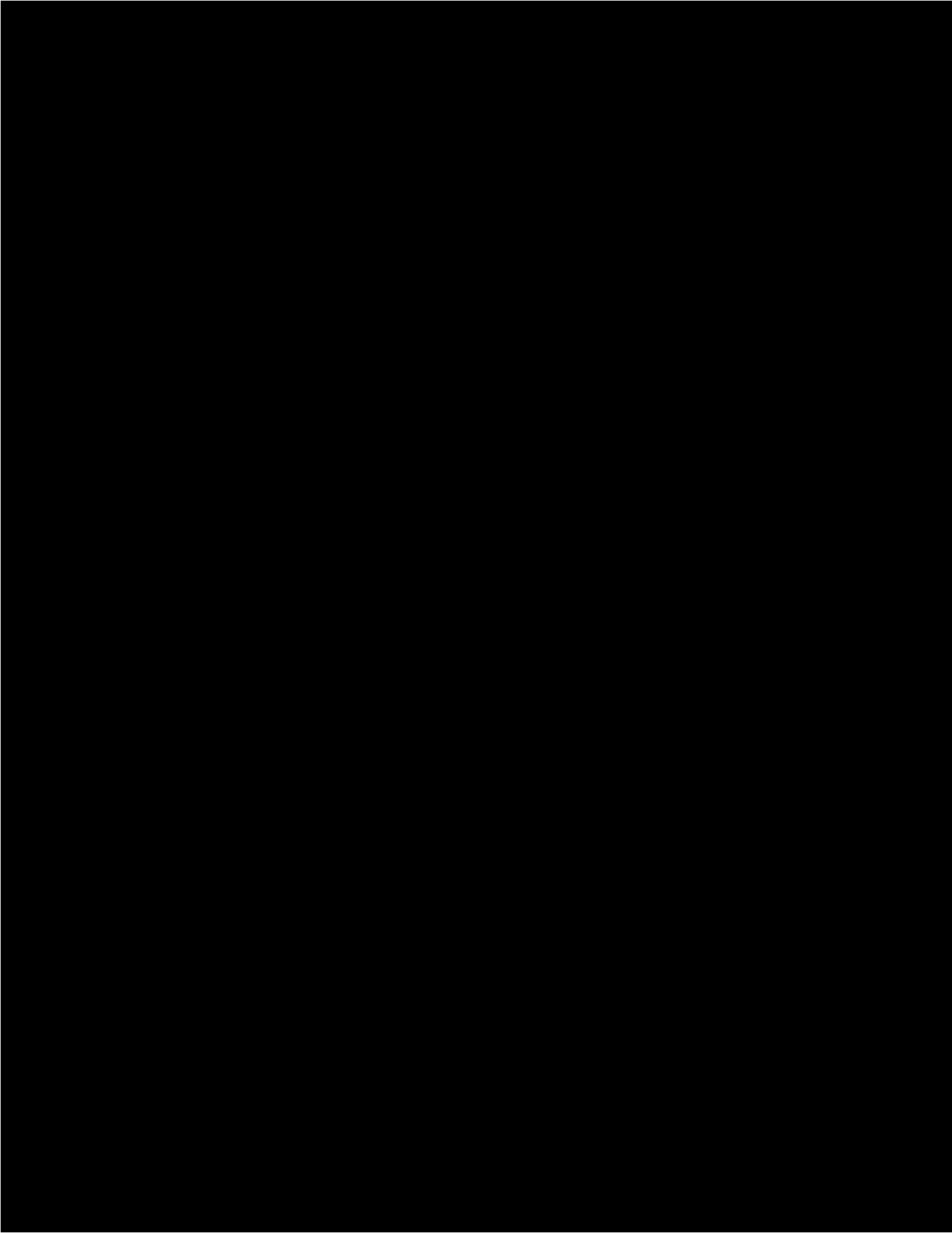
17851

UNCLASSIFIED//FOR PUBLIC RELEASE

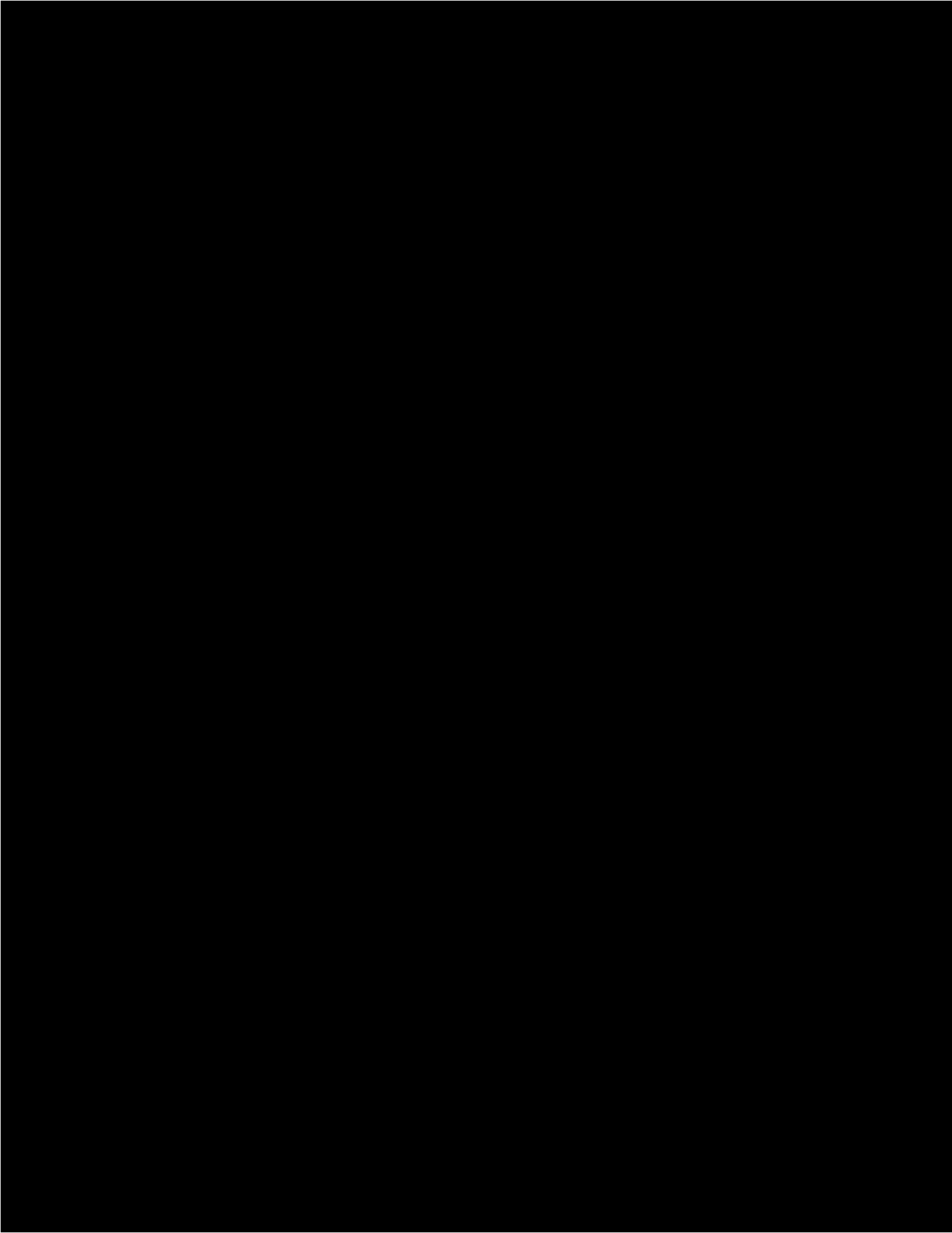


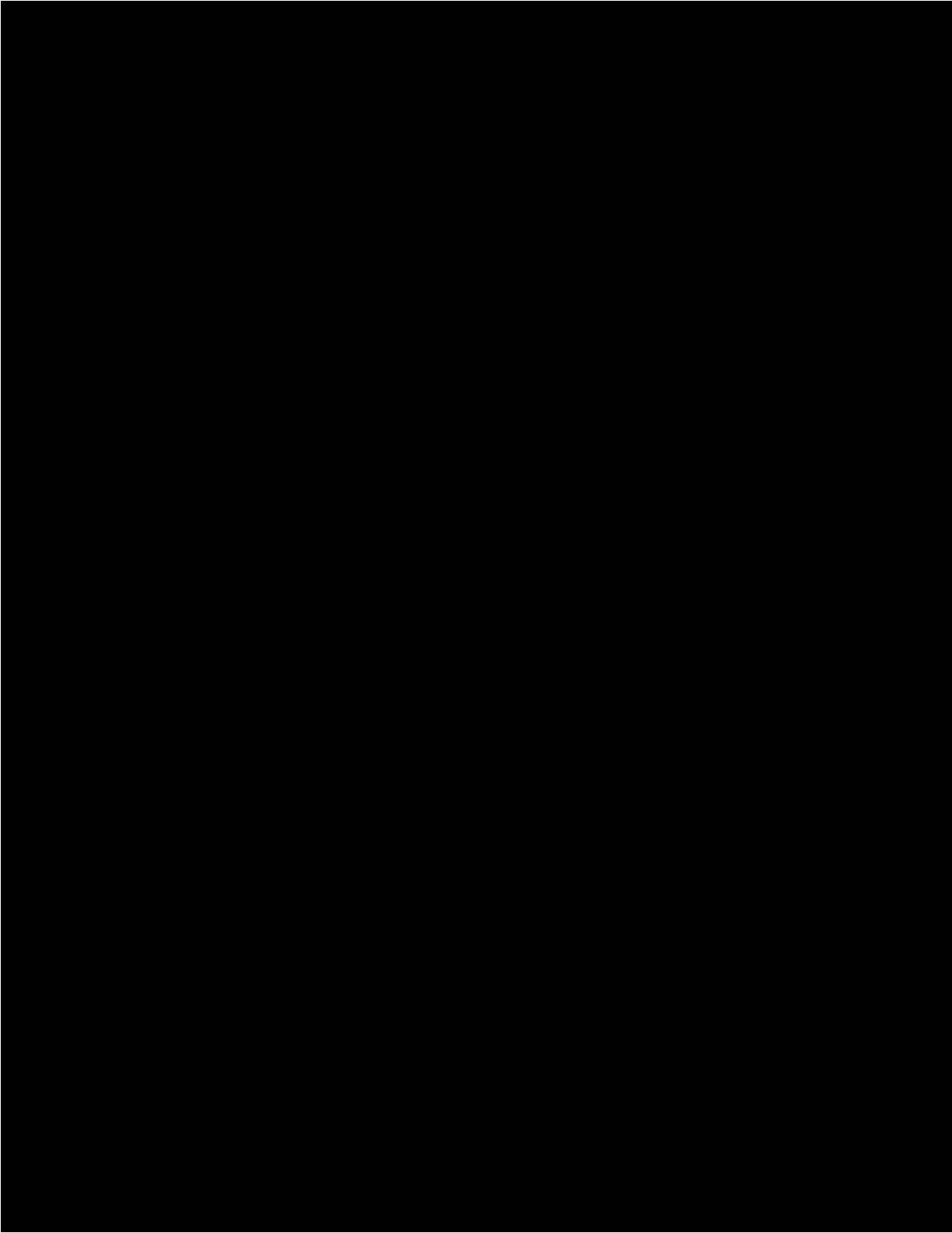
UNCLASSIFIED//FOR PUBLIC RELEASE

UNCLASSIFIED//FOR PUBLIC RELEASE

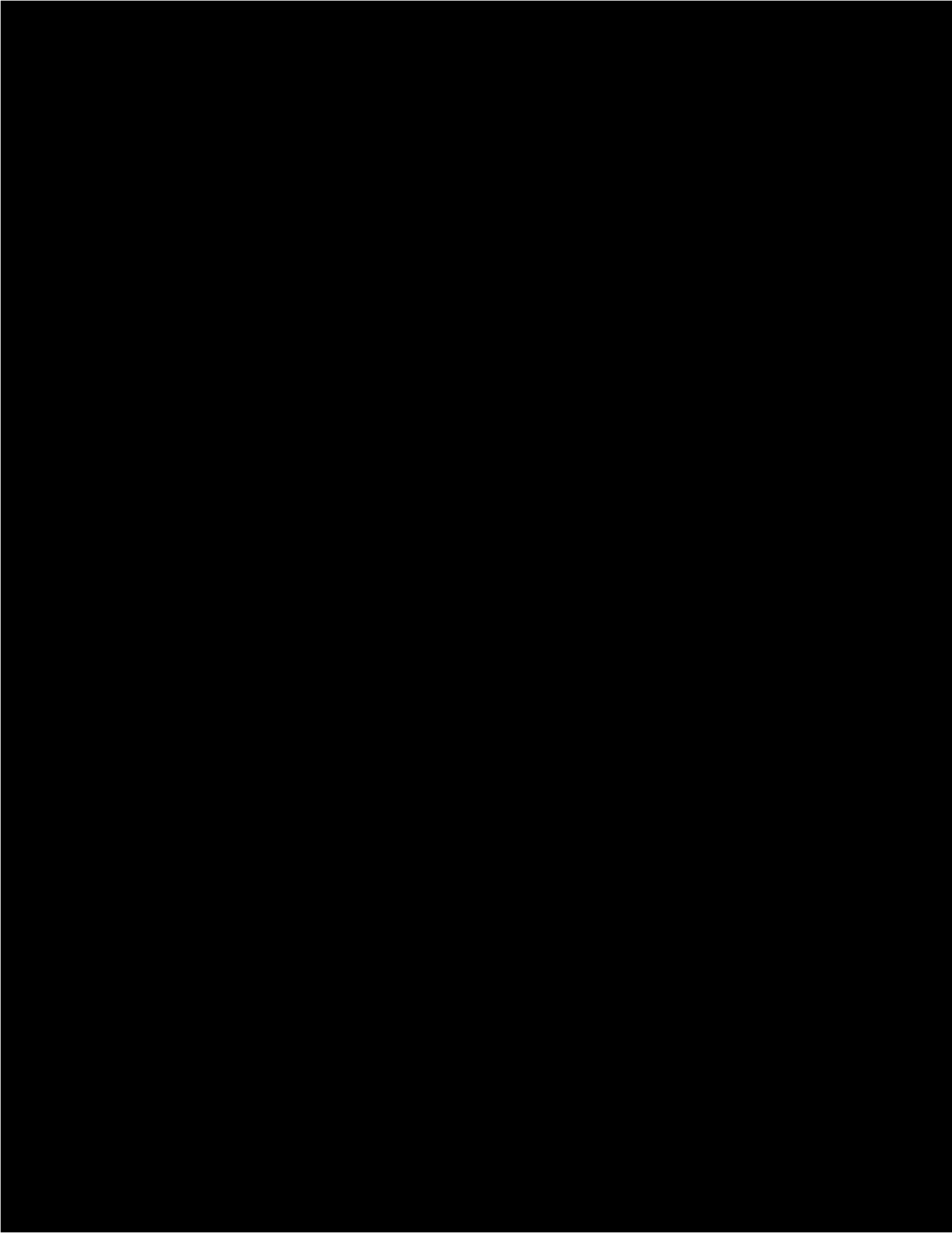


UNCLASSIFIED//FOR PUBLIC RELEASE

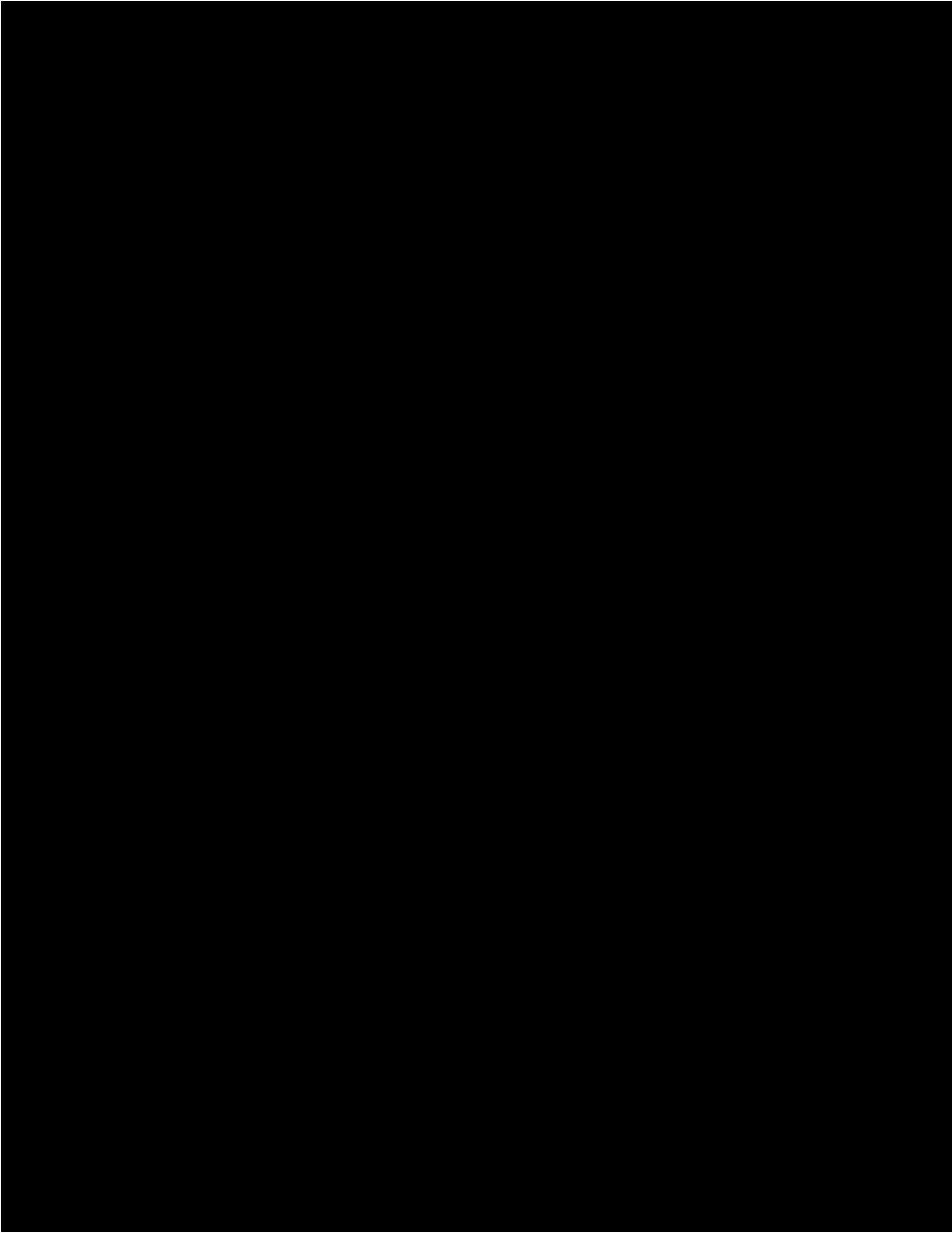


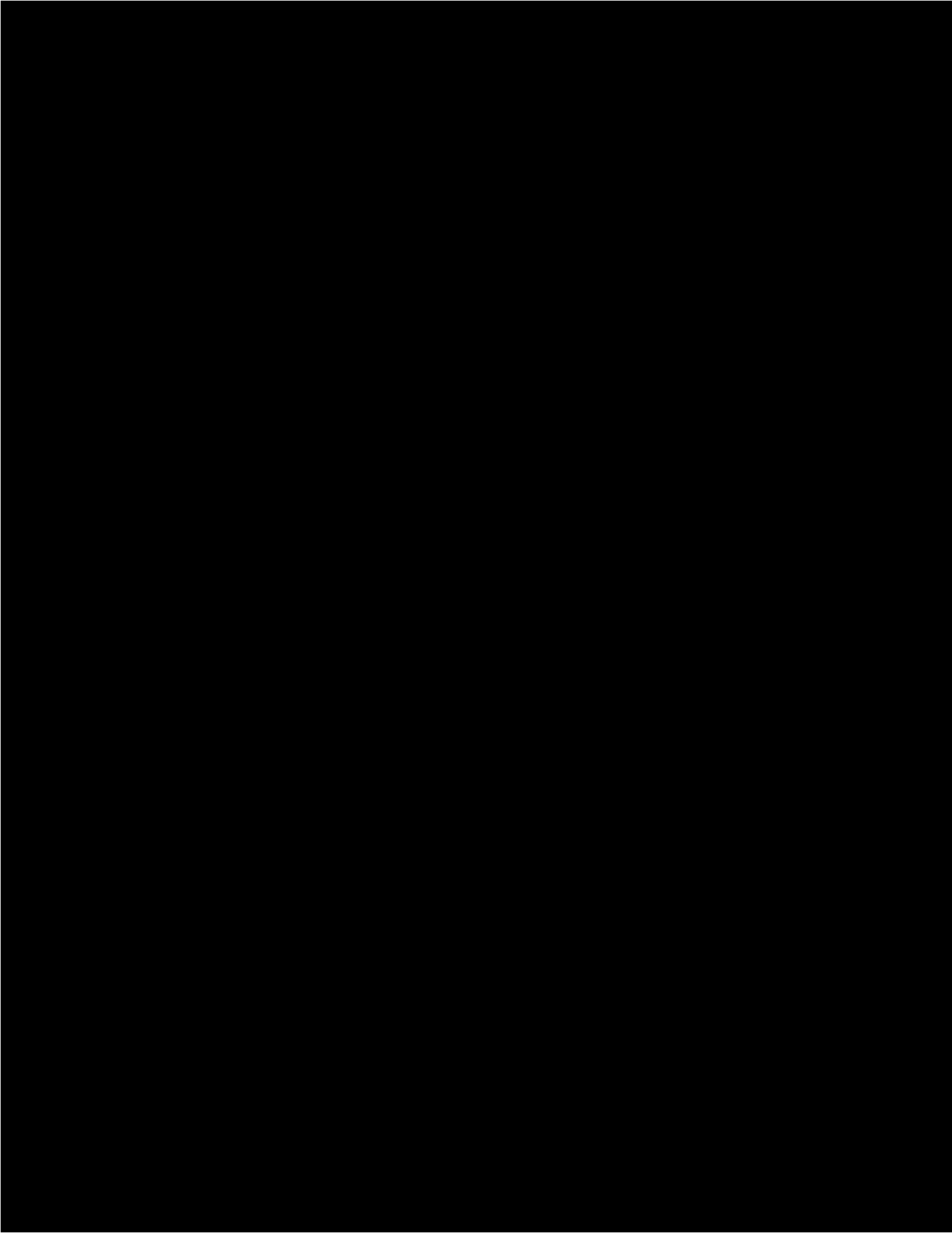


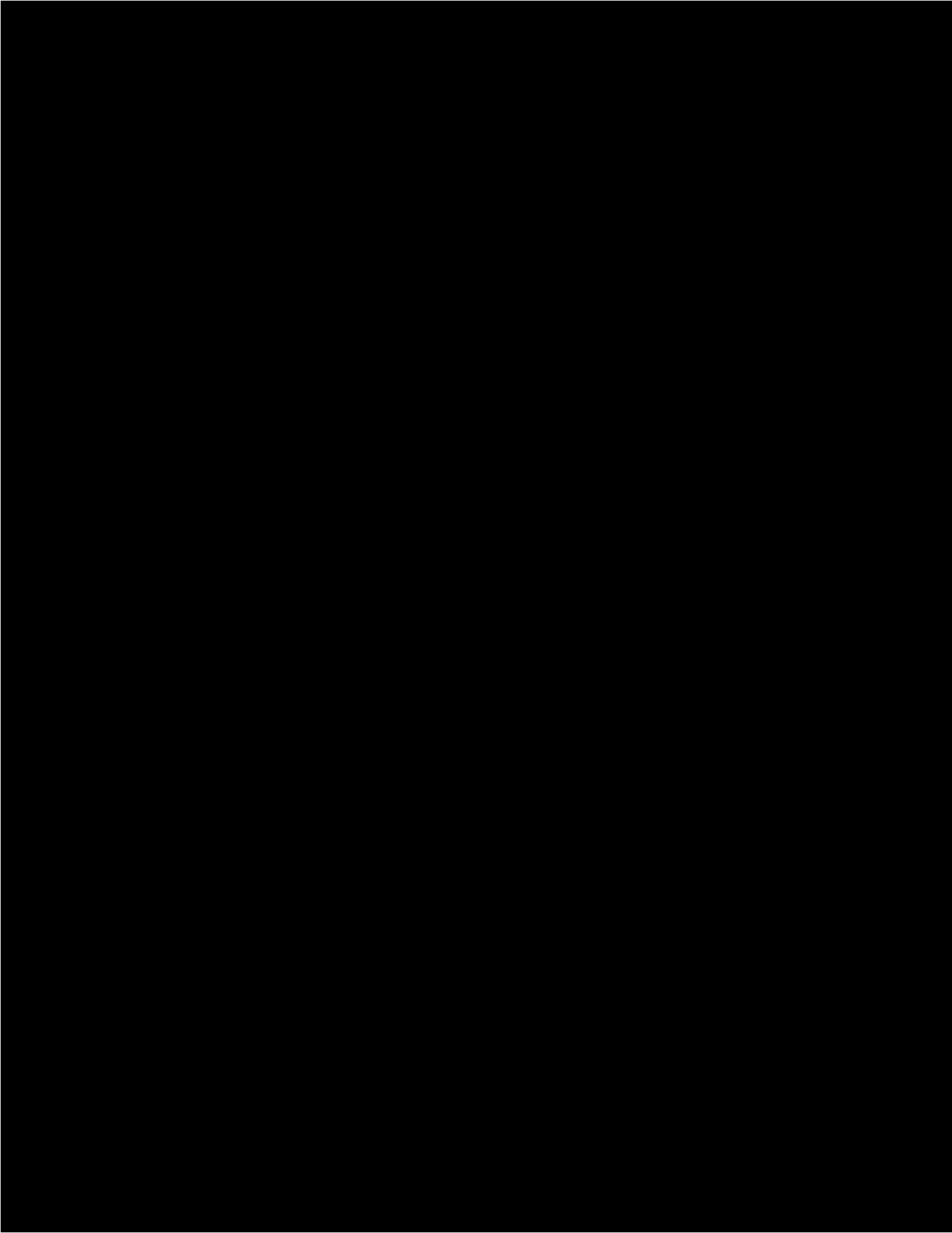
UNCLASSIFIED//FOR PUBLIC RELEASE

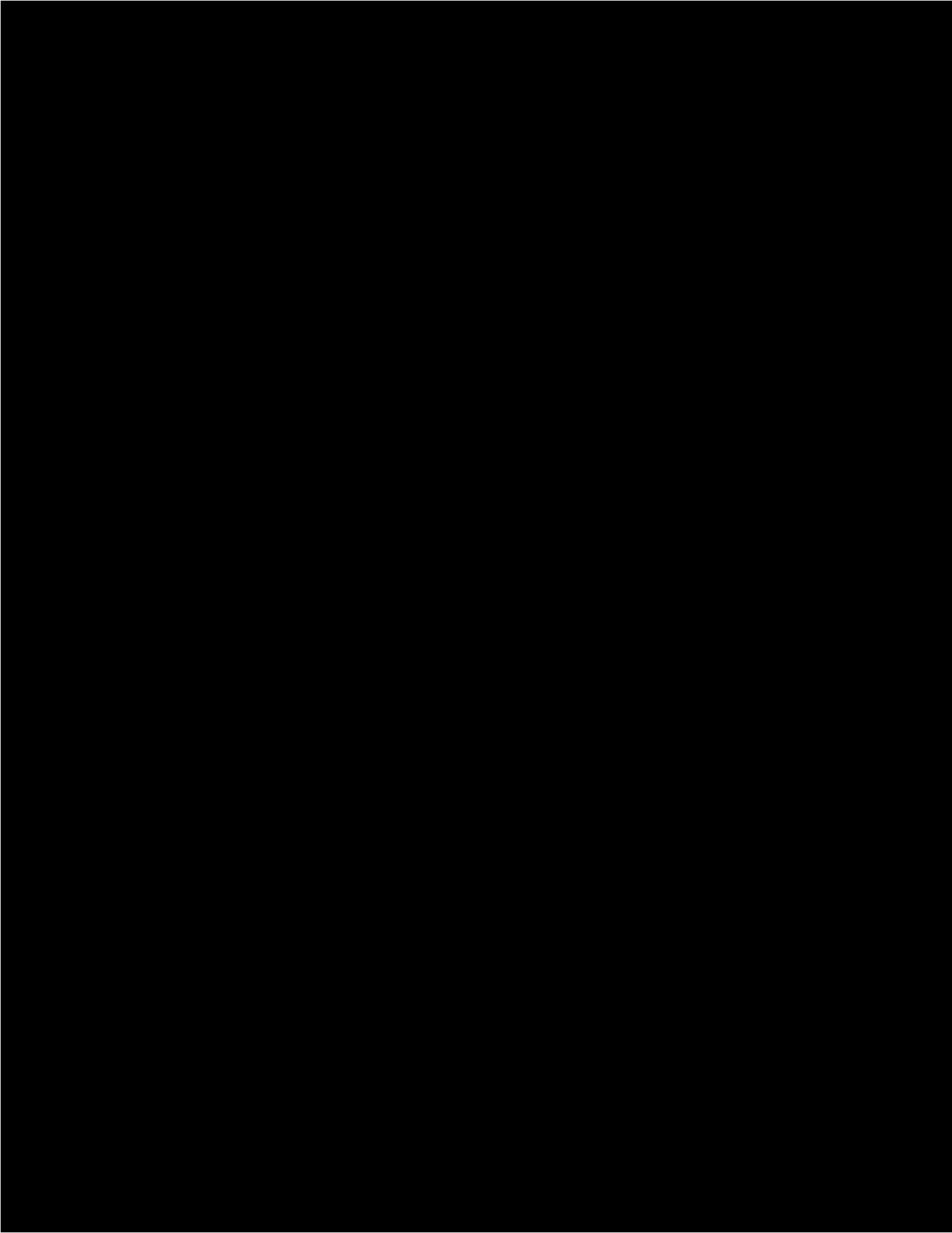


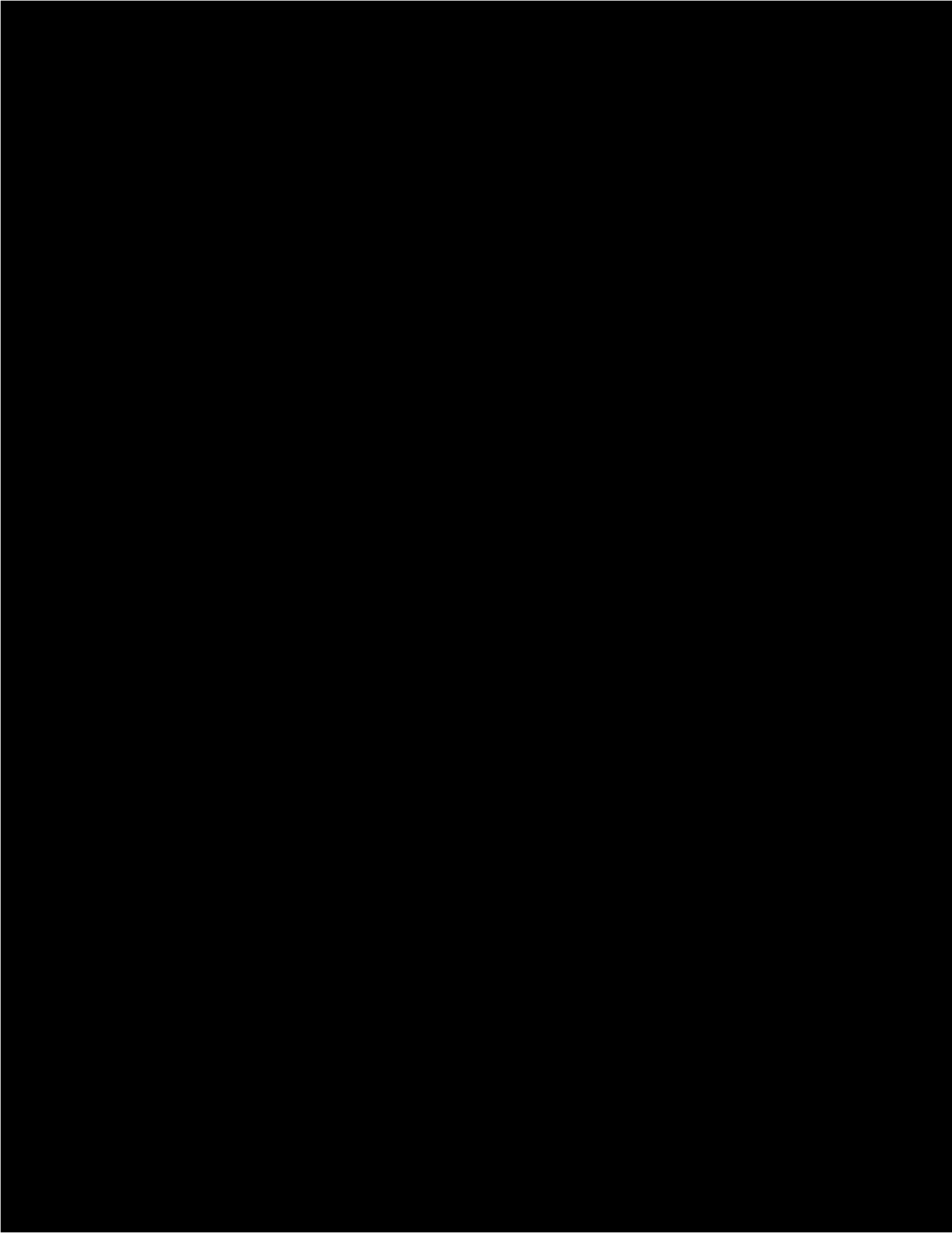
UNCLASSIFIED//FOR PUBLIC RELEASE

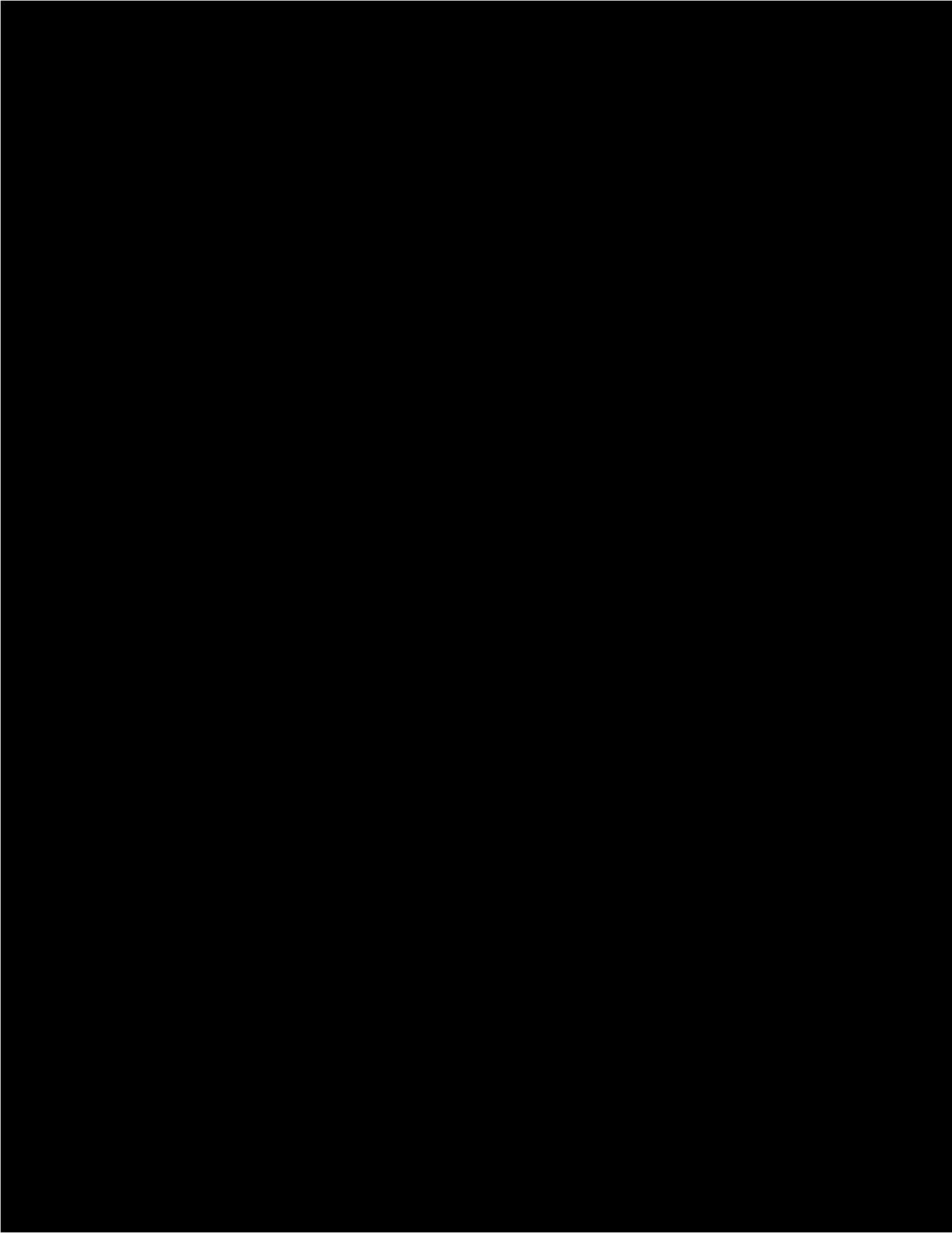


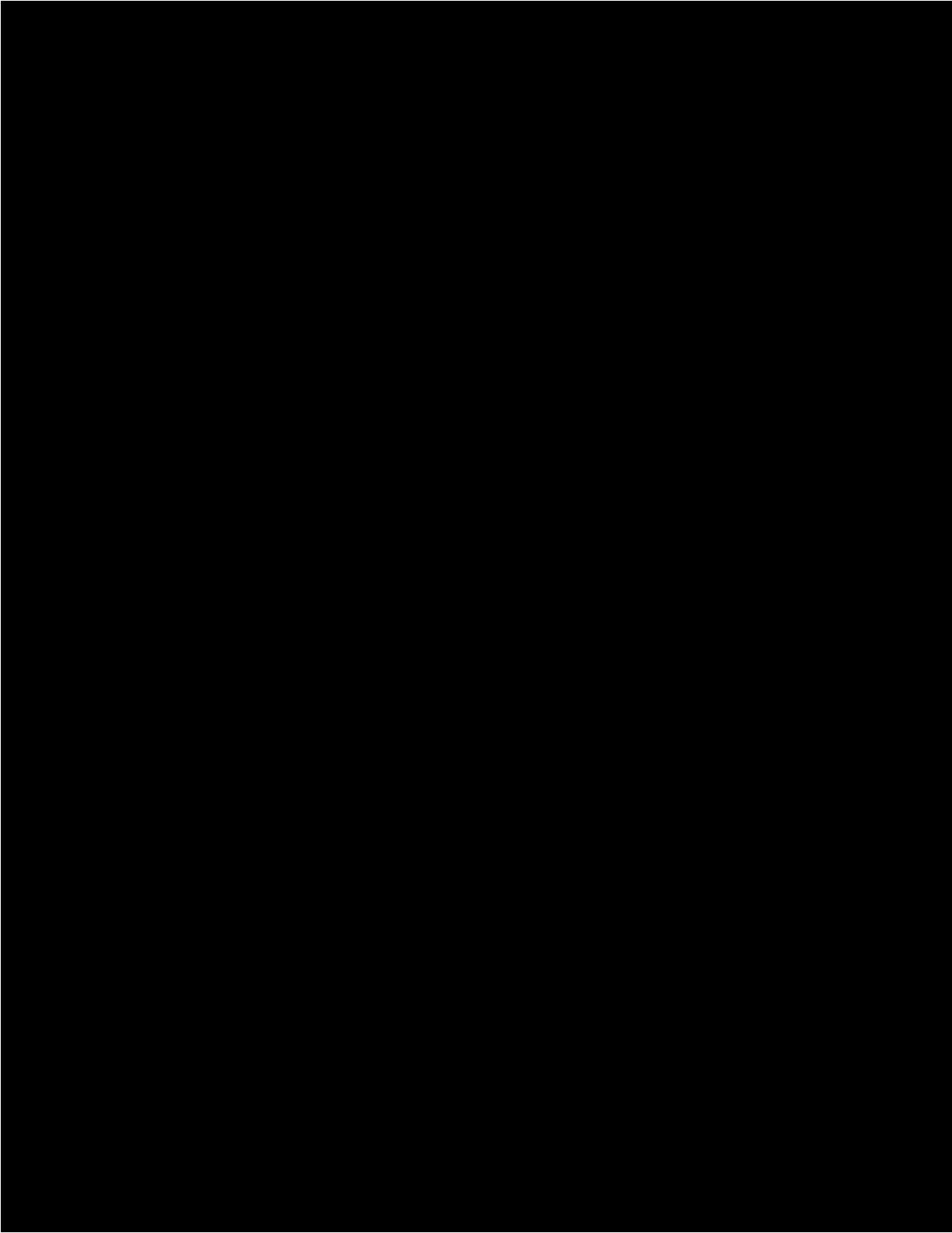


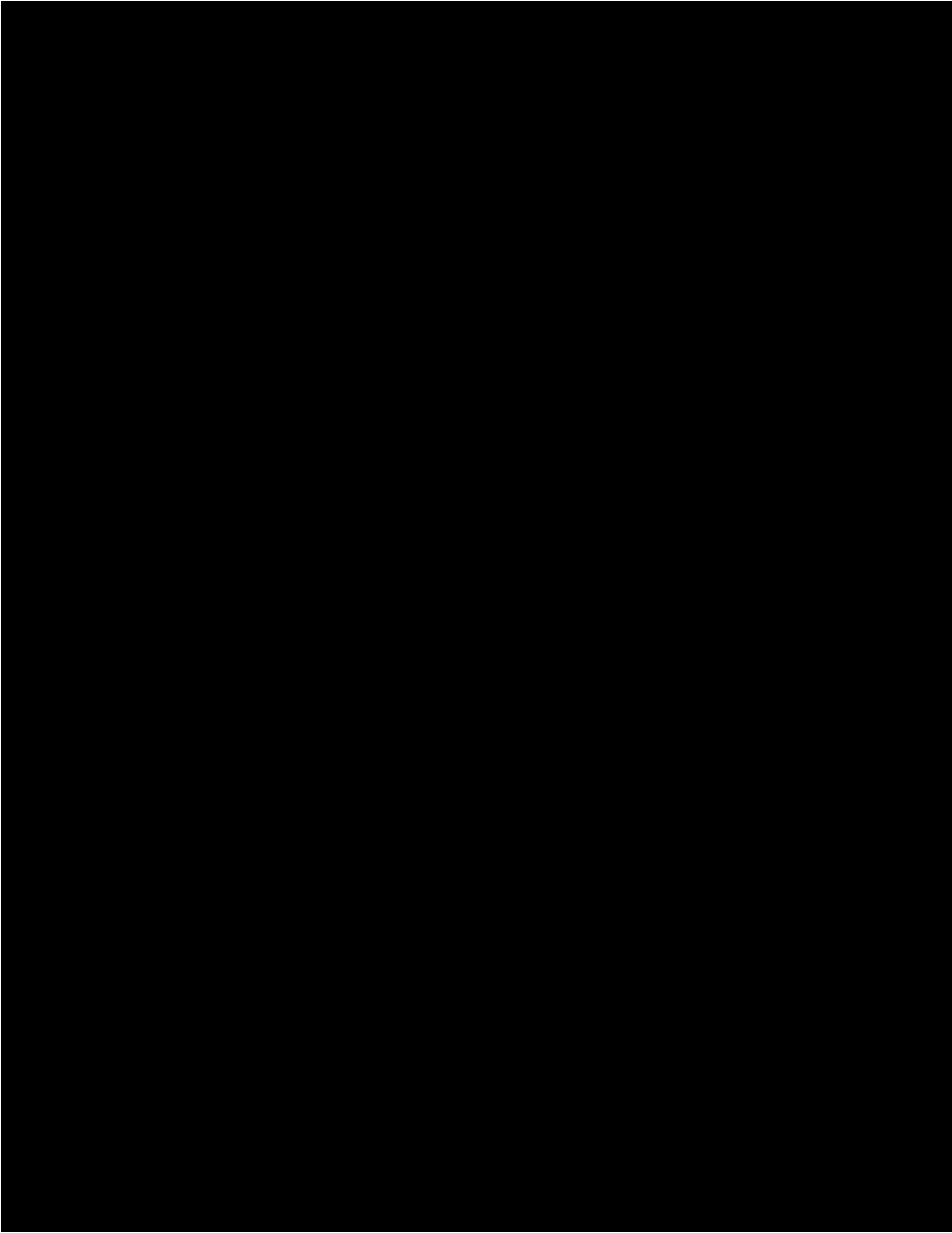


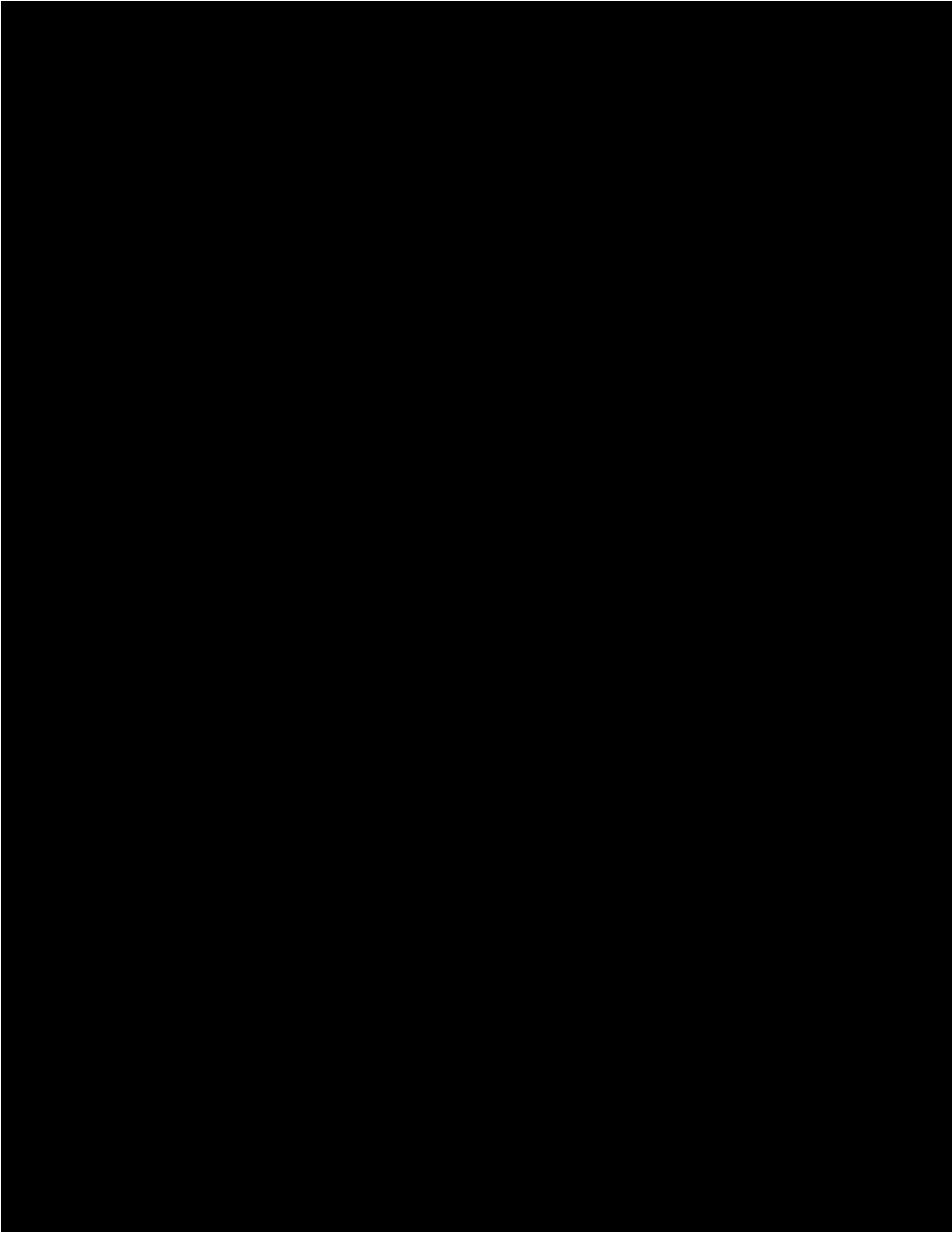


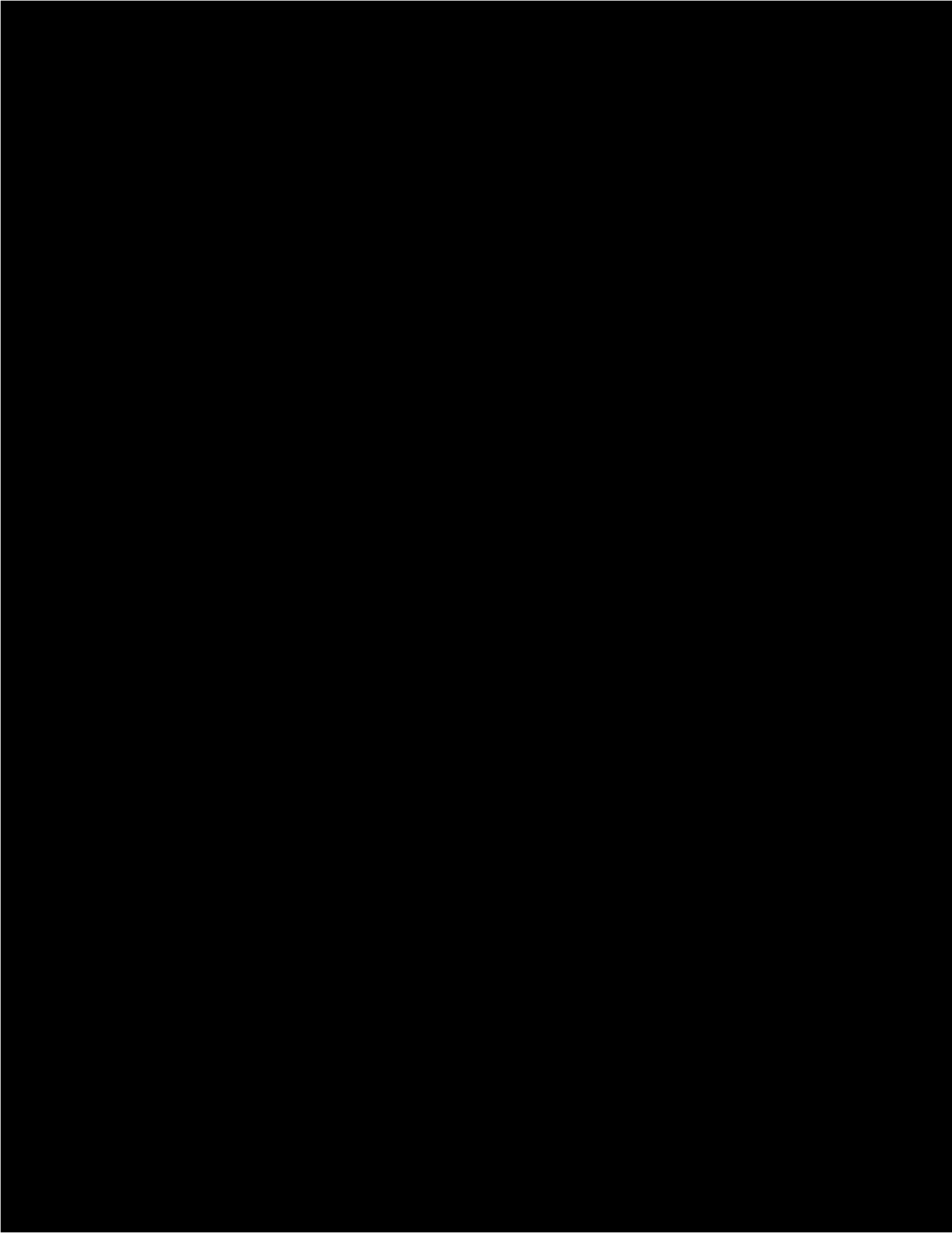


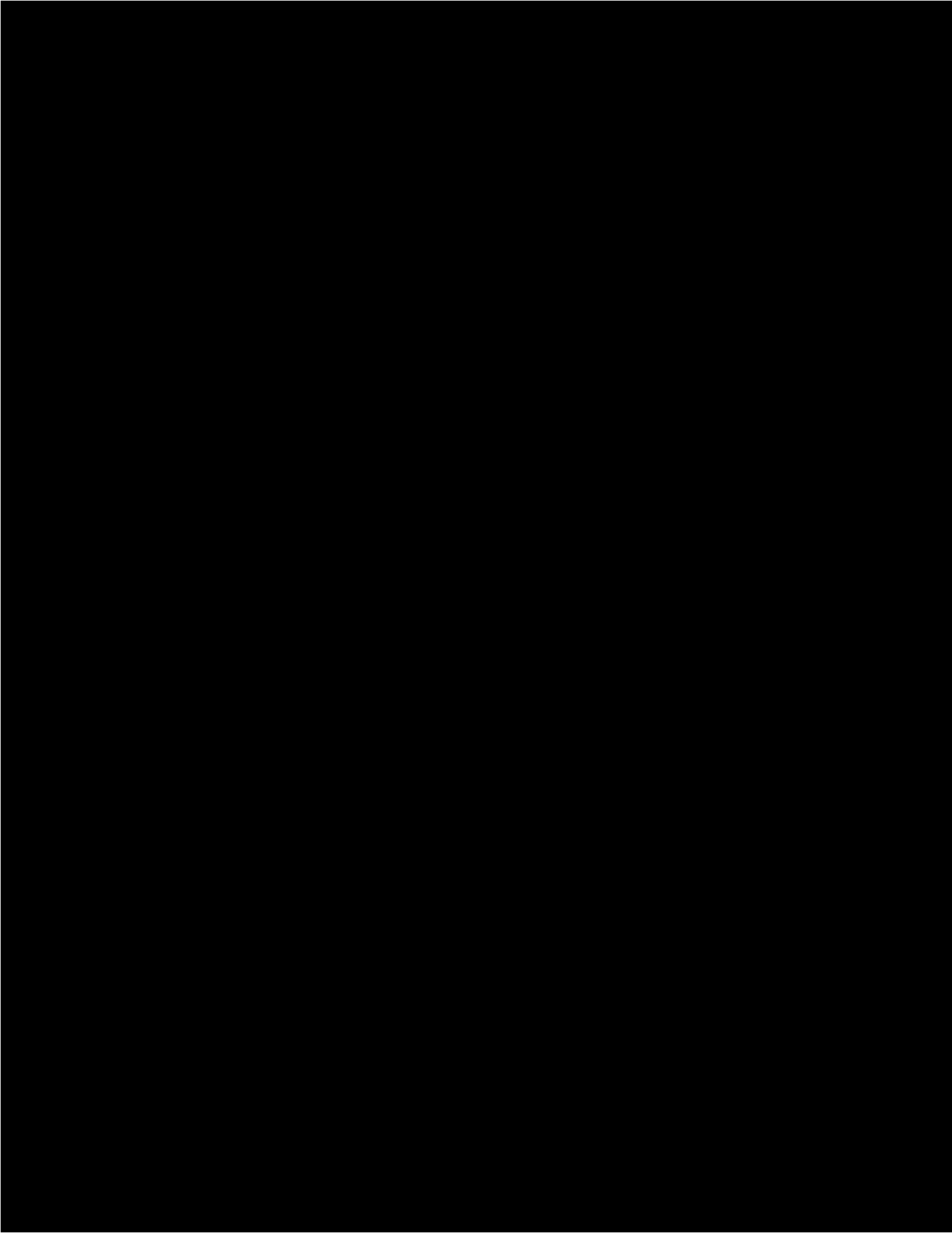


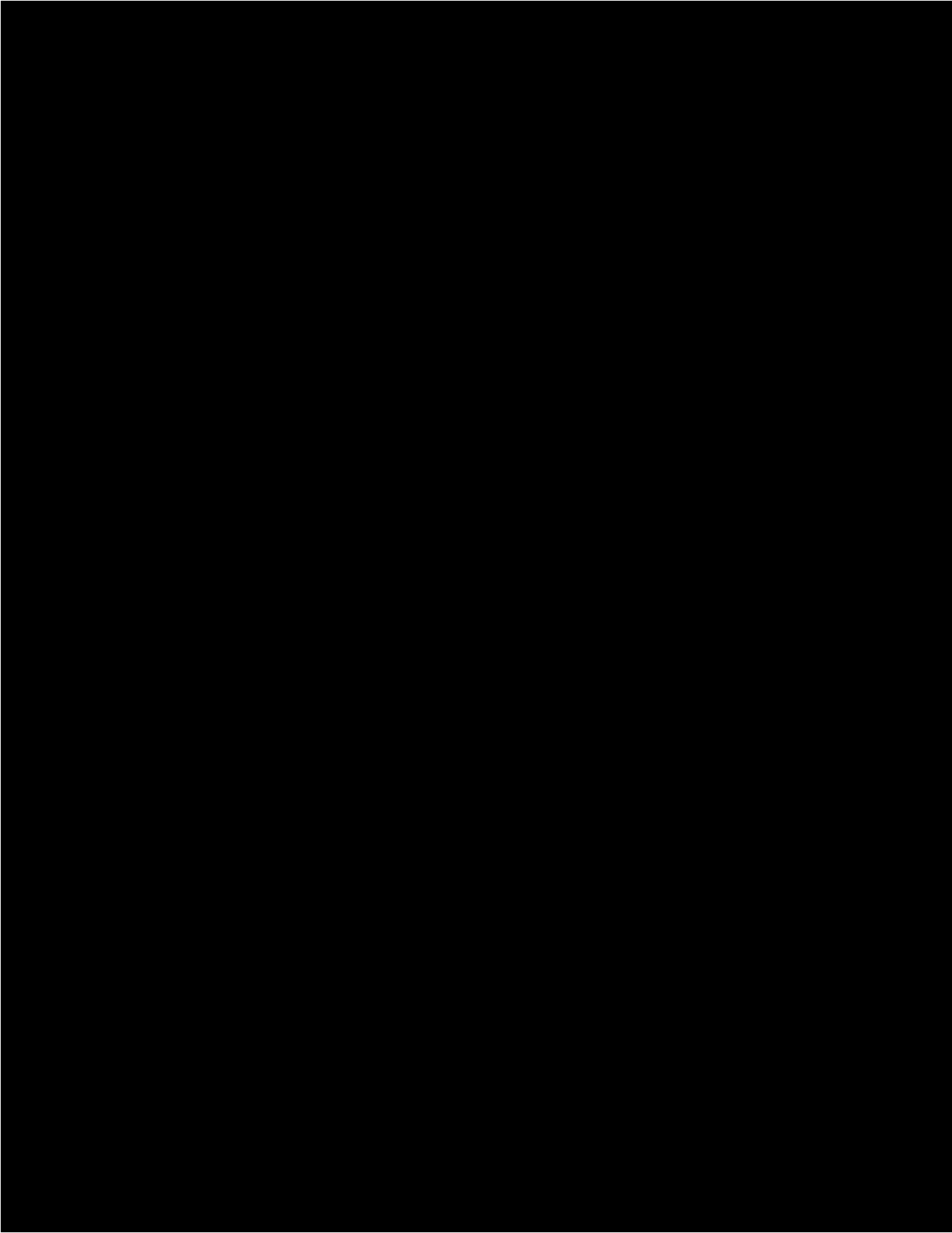


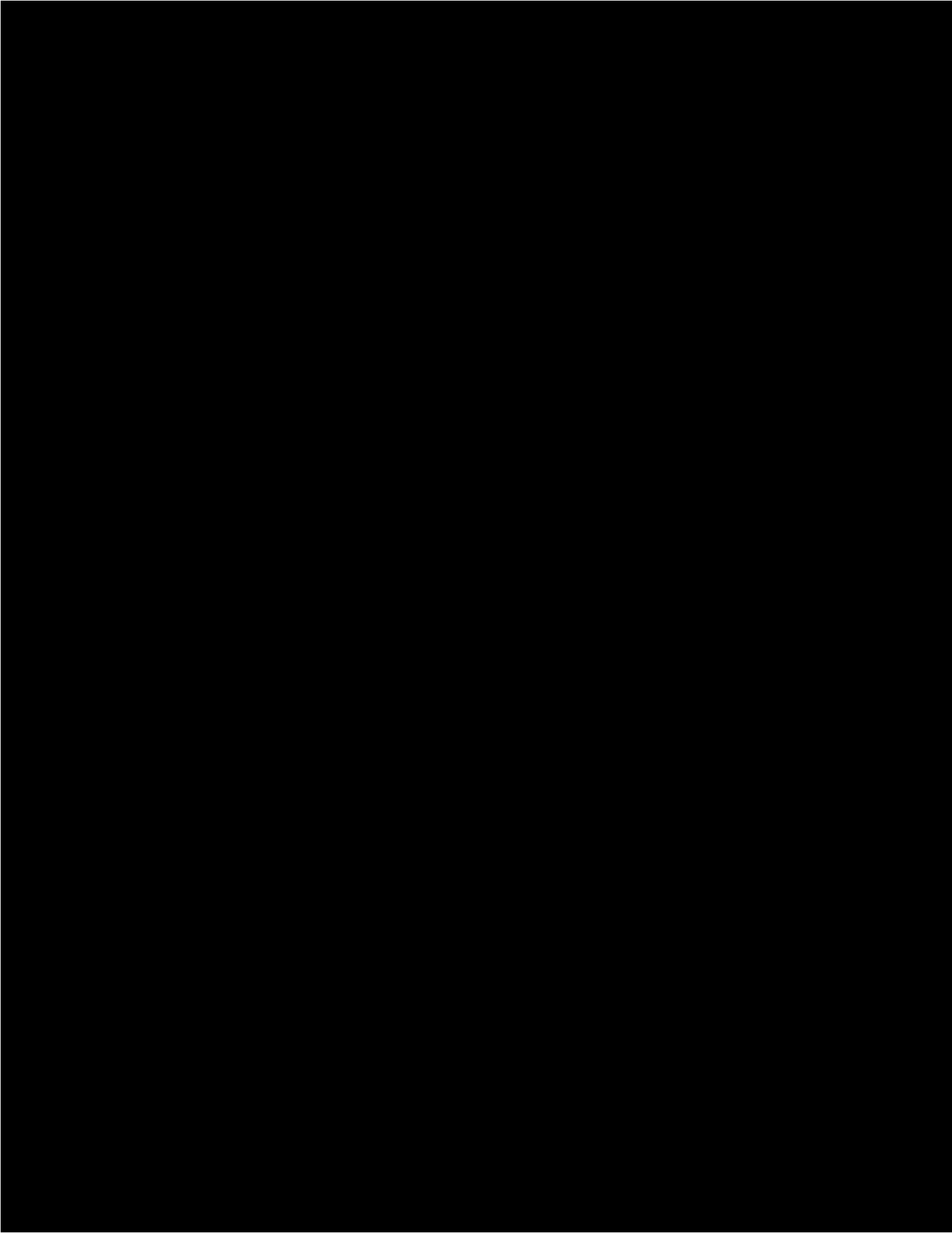


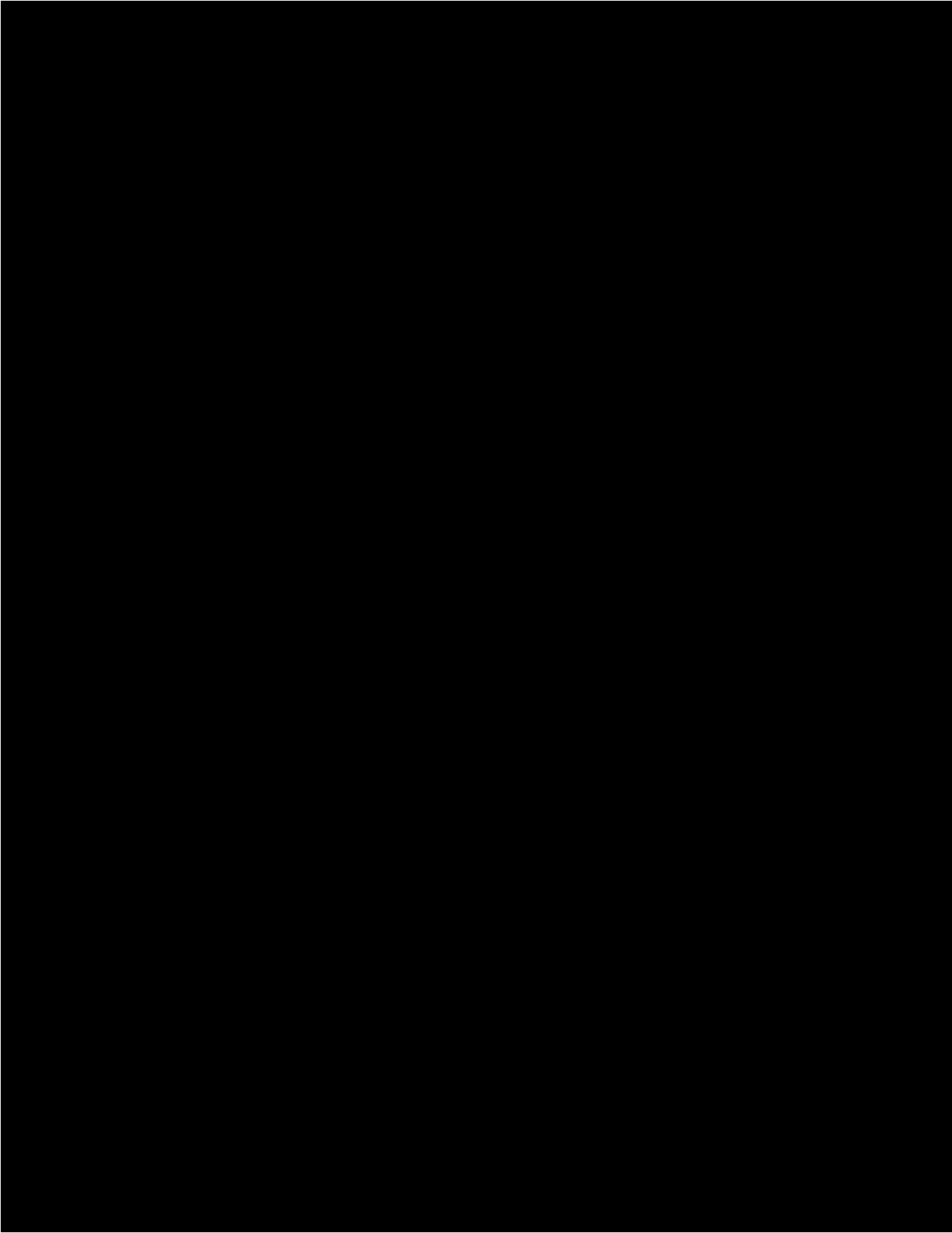




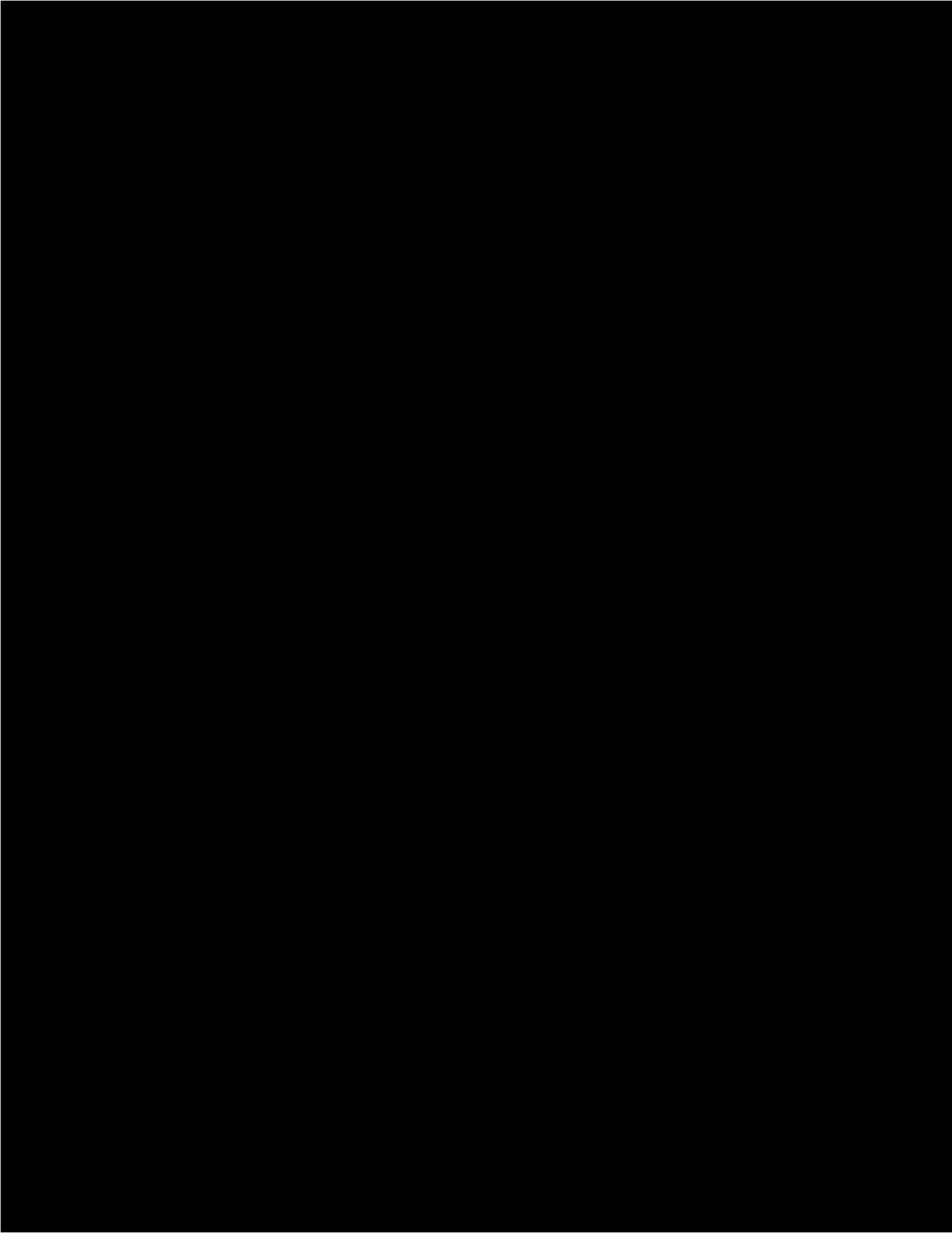






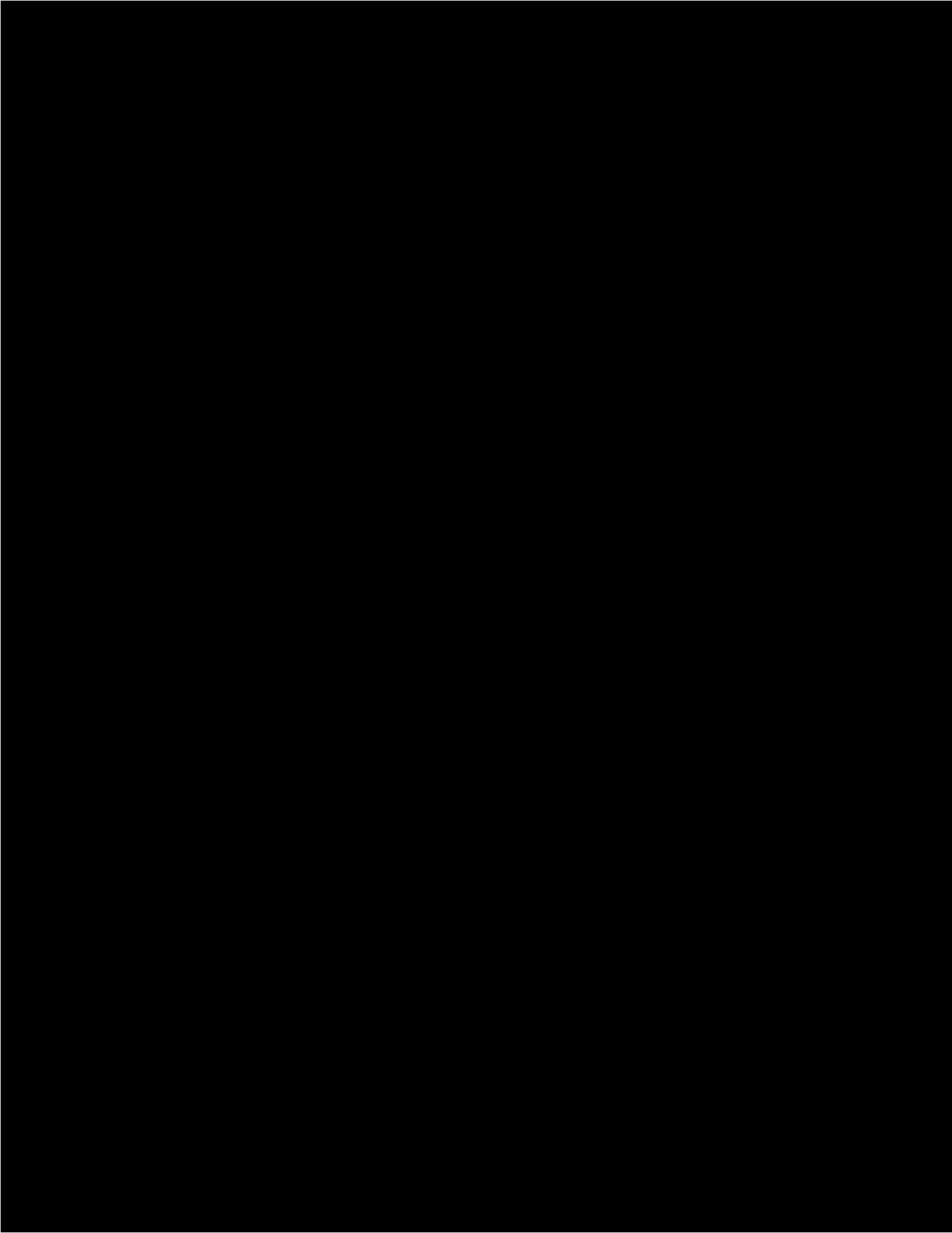


UNCLASSIFIED//FOR PUBLIC RELEASE



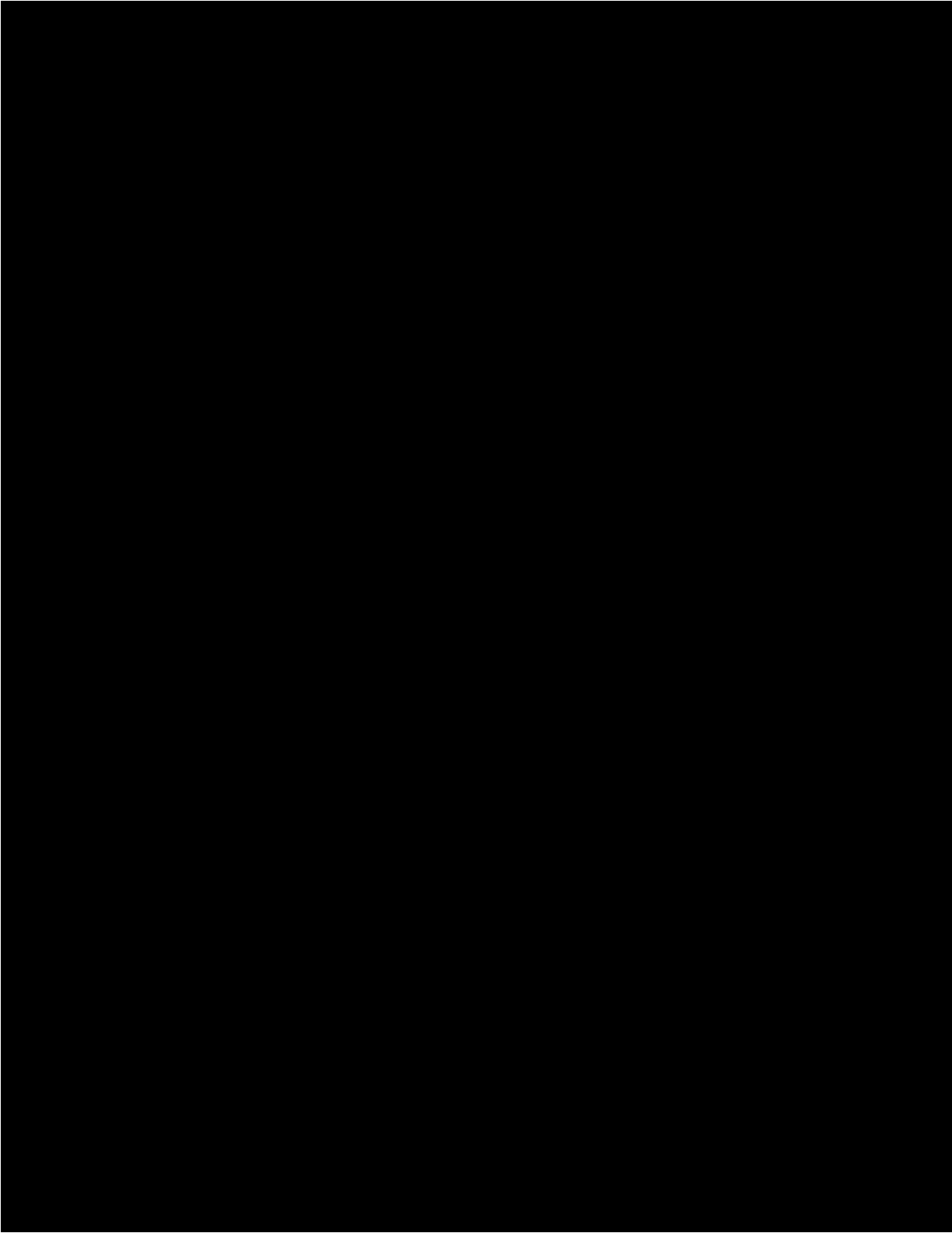
UNCLASSIFIED//FOR PUBLIC RELEASE

UNCLASSIFIED//FOR PUBLIC RELEASE



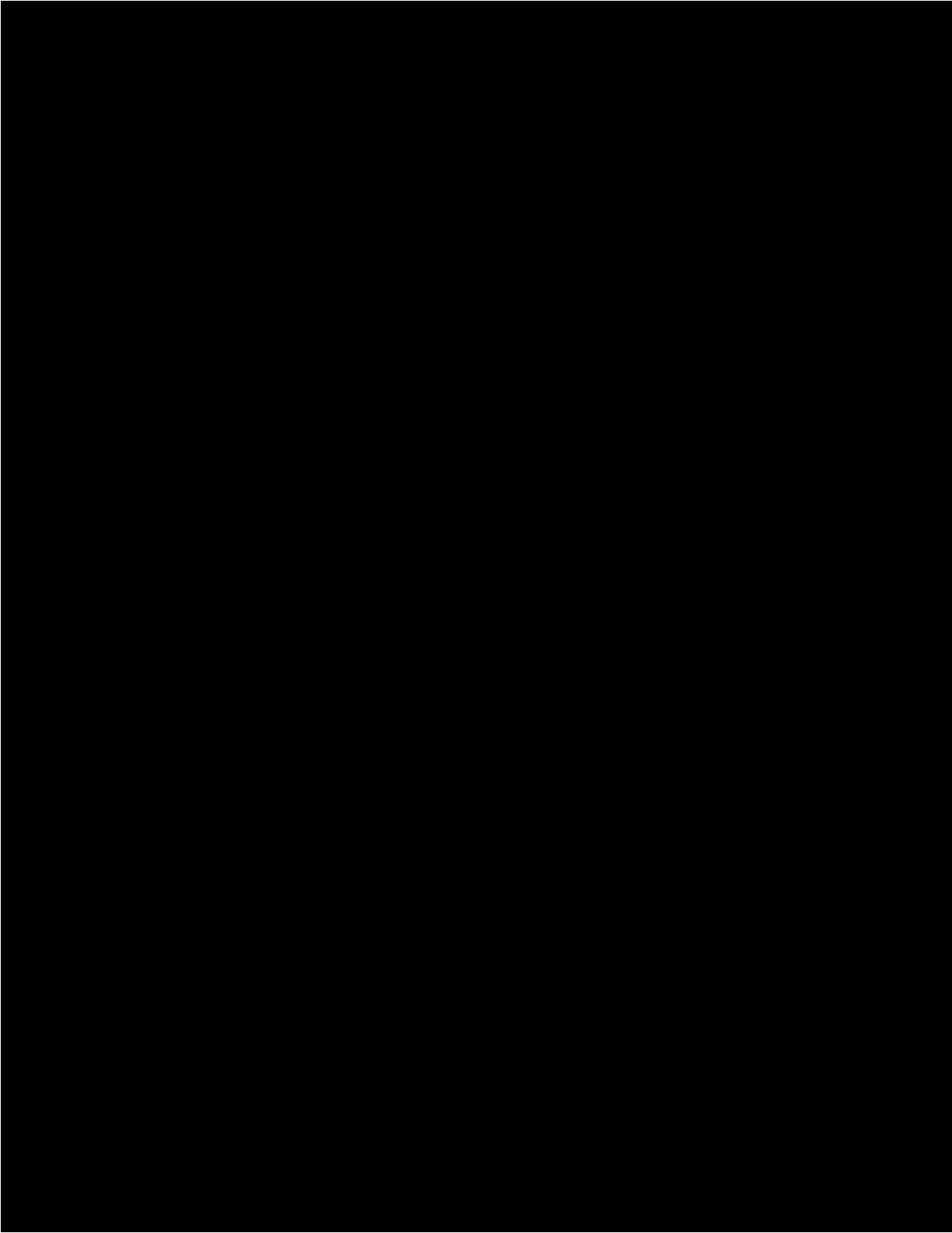
UNCLASSIFIED//FOR PUBLIC RELEASE

UNCLASSIFIED//FOR PUBLIC RELEASE



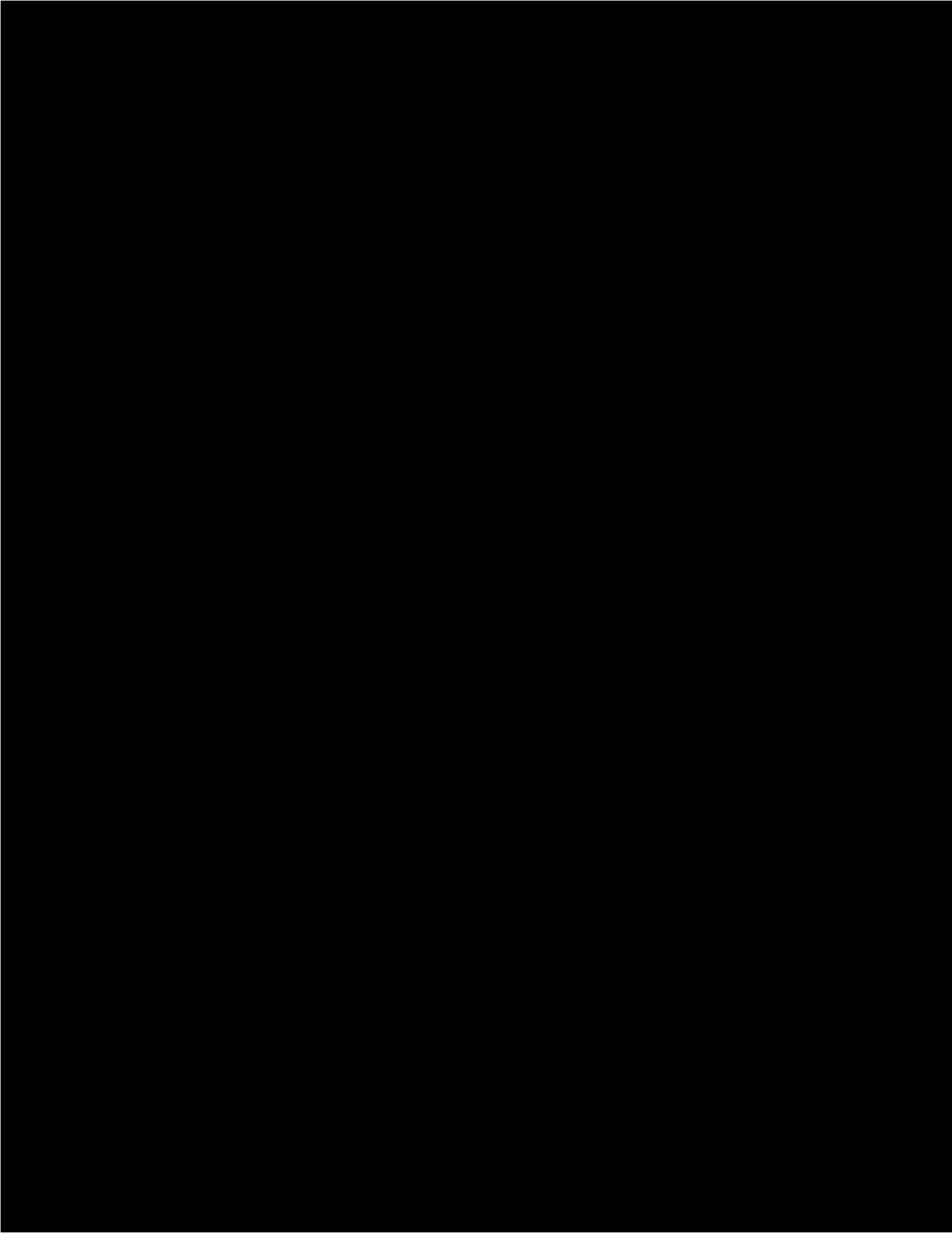
UNCLASSIFIED//FOR PUBLIC RELEASE

UNCLASSIFIED//FOR PUBLIC RELEASE

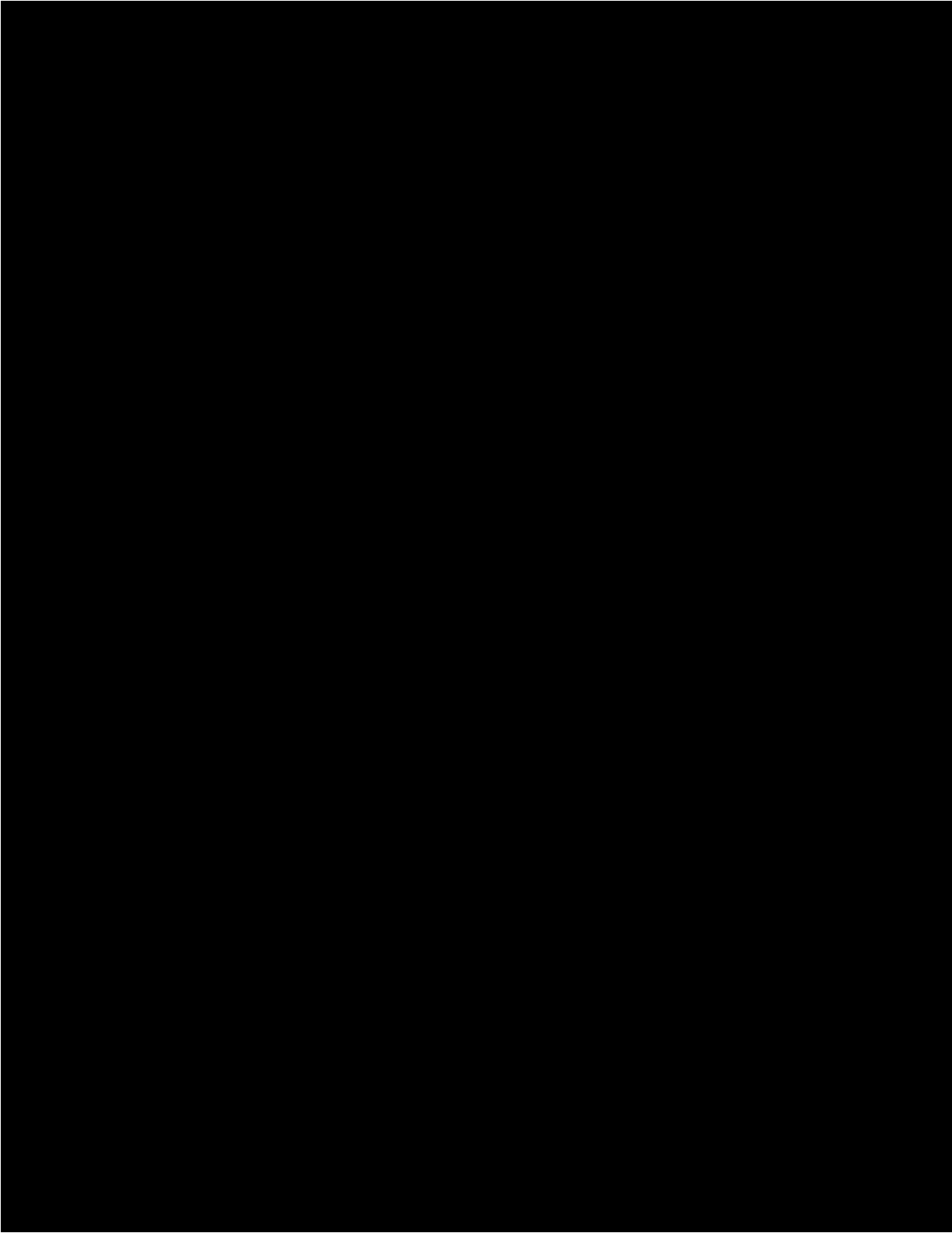


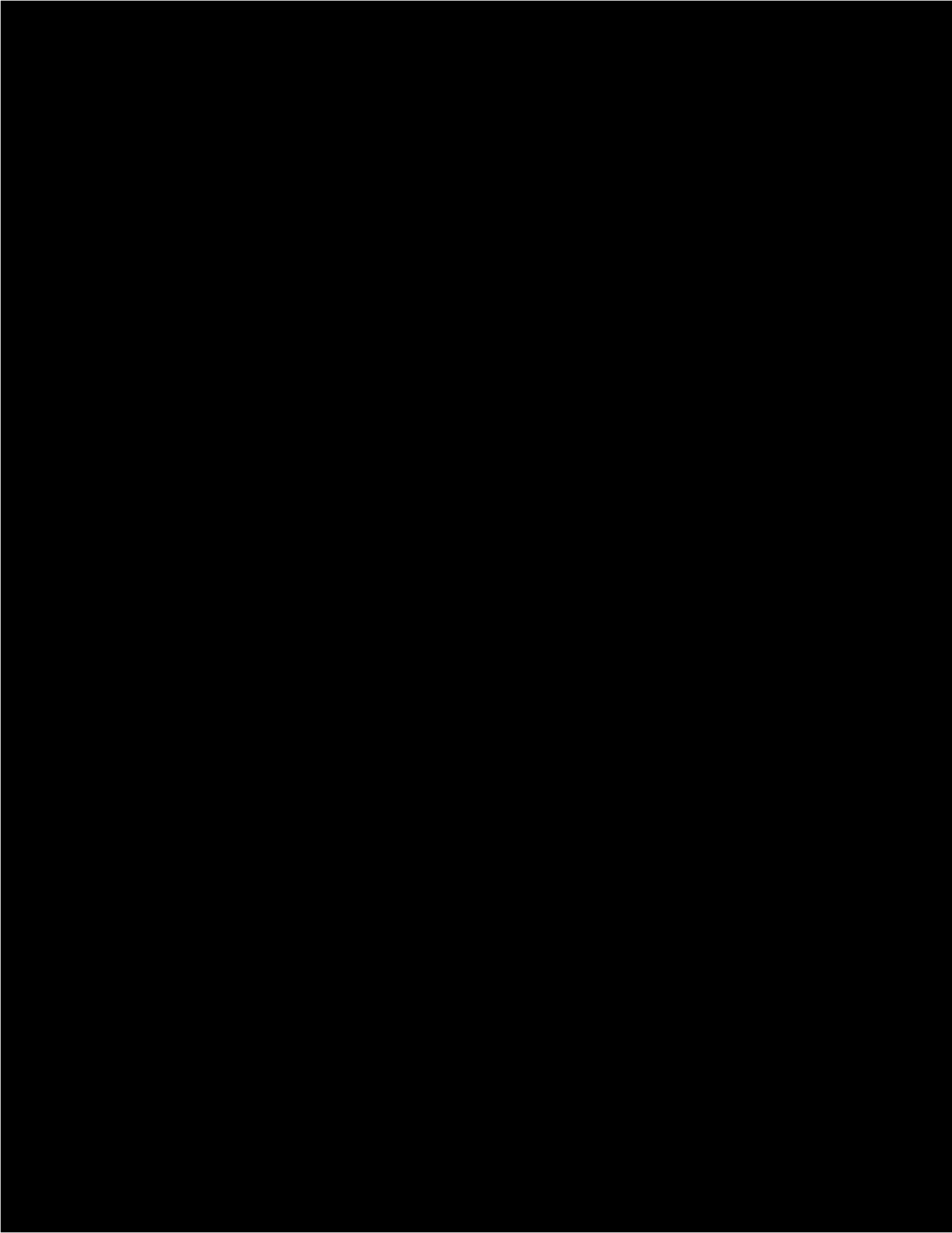
UNCLASSIFIED//FOR PUBLIC RELEASE

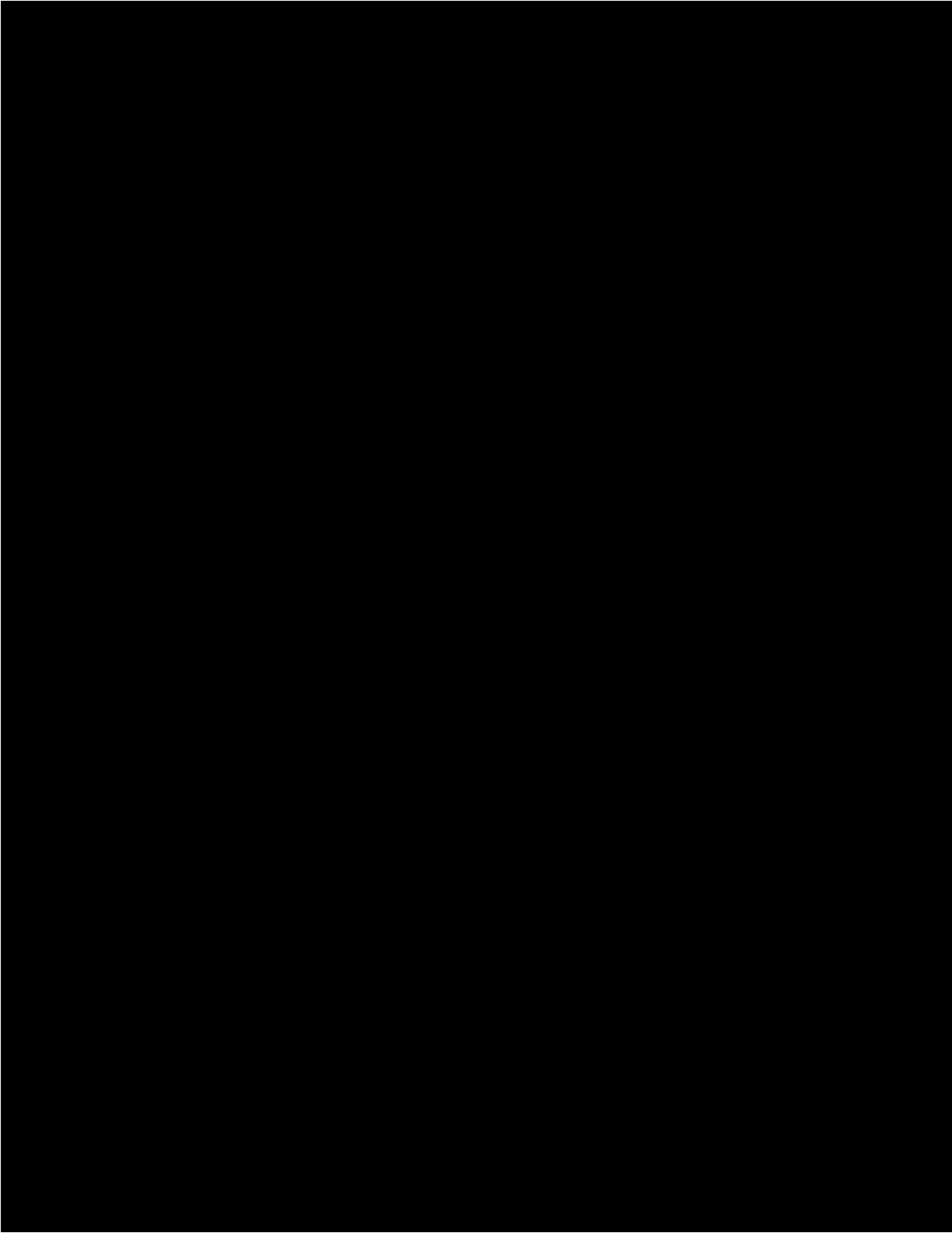
UNCLASSIFIED//FOR PUBLIC RELEASE



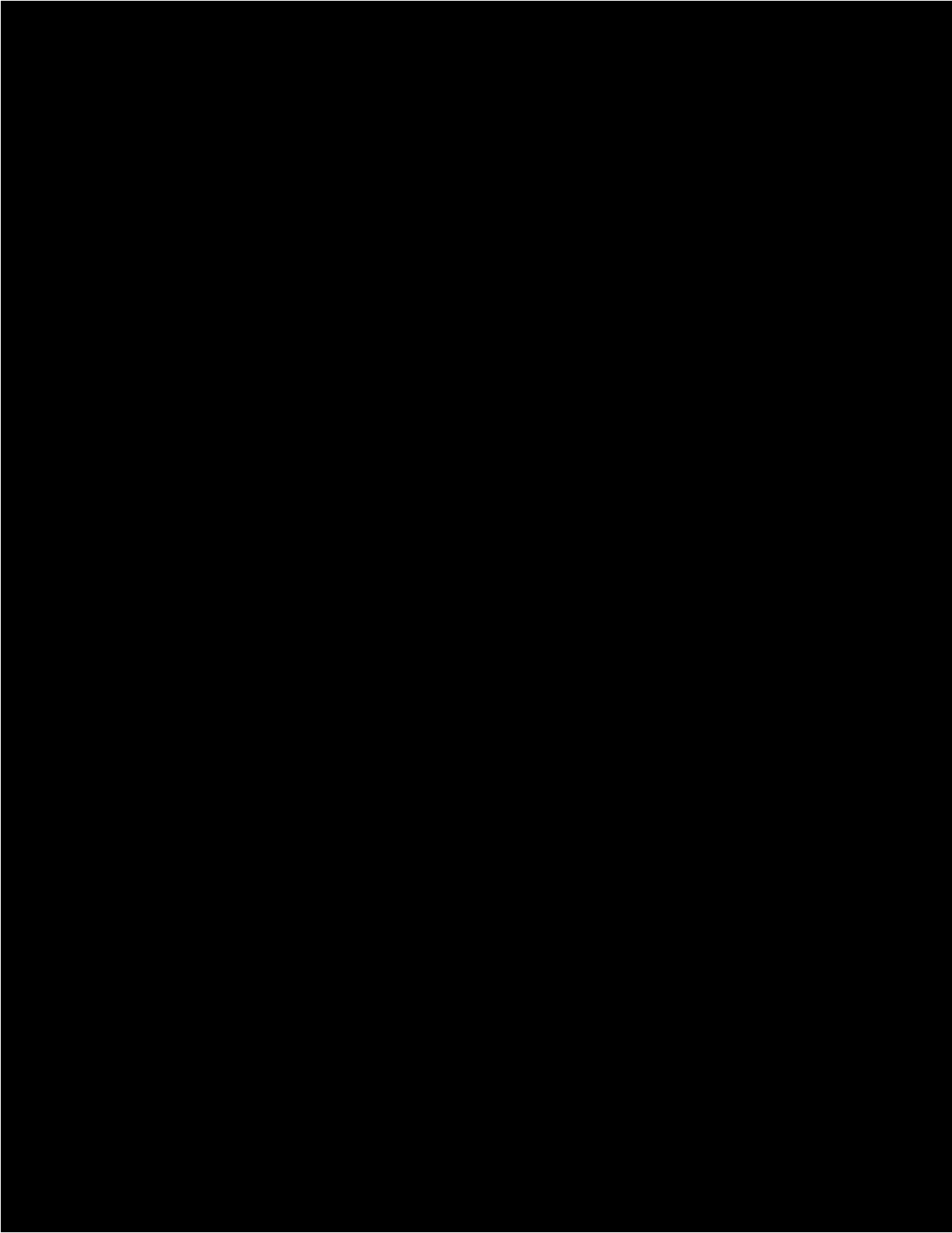
UNCLASSIFIED//FOR PUBLIC RELEASE



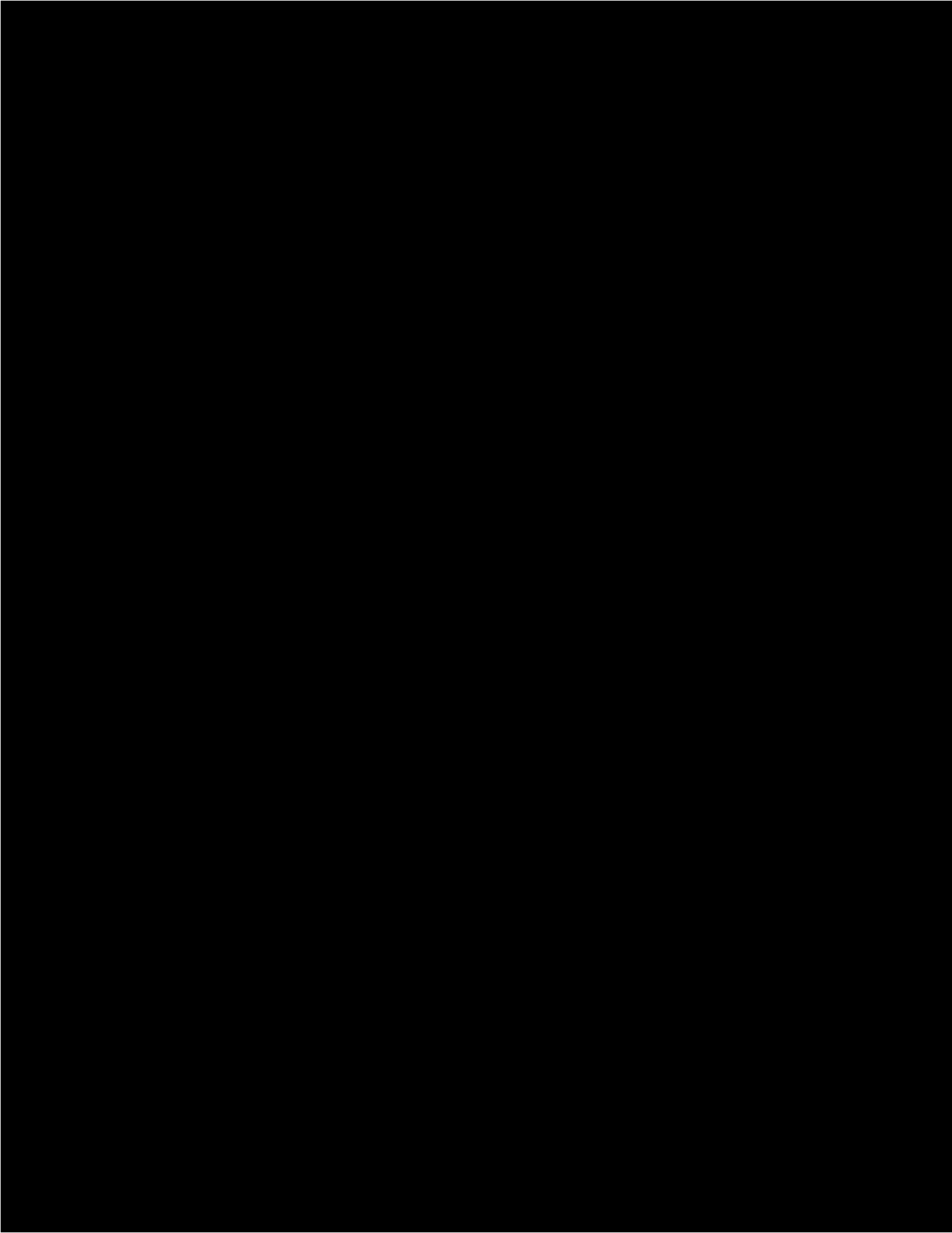


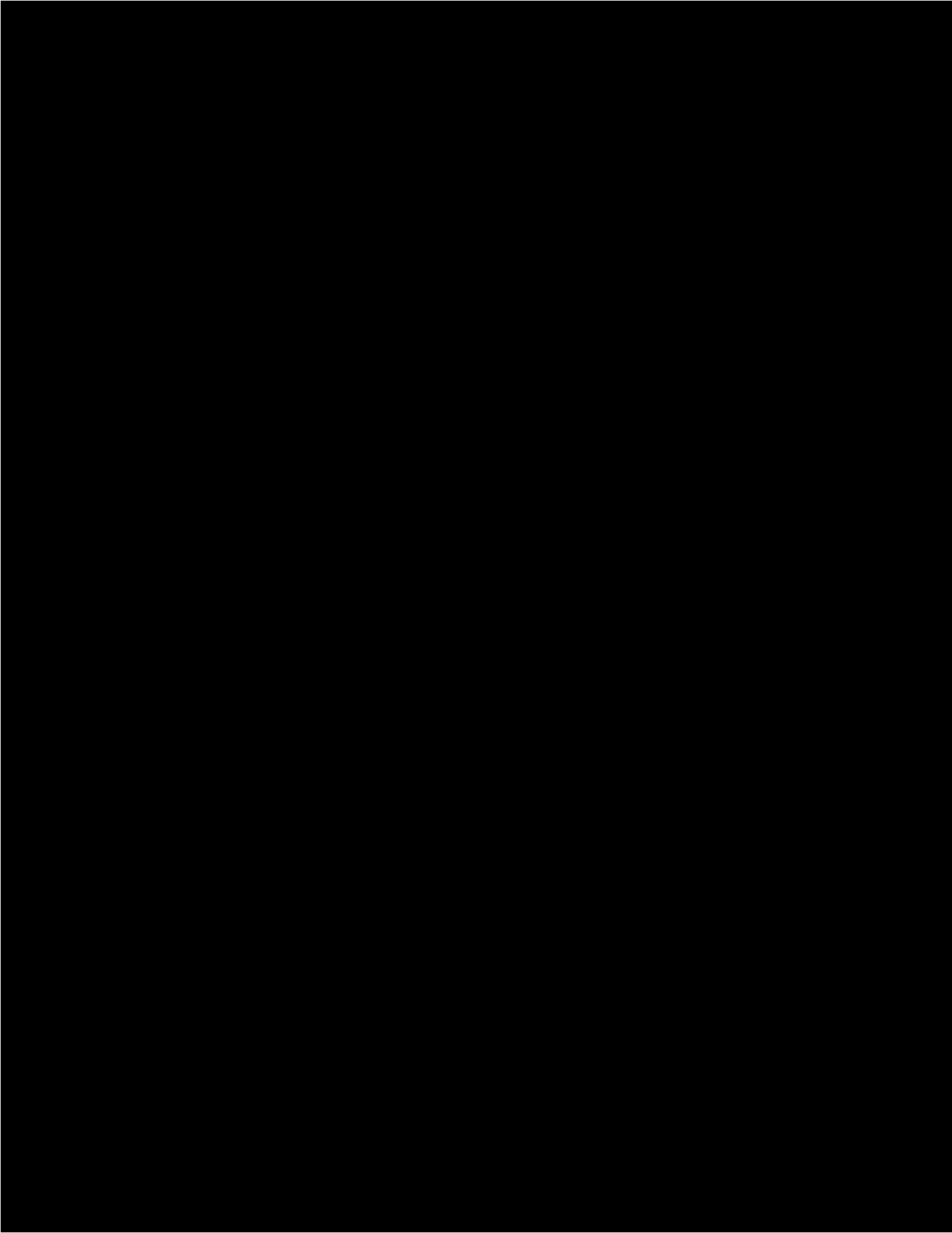


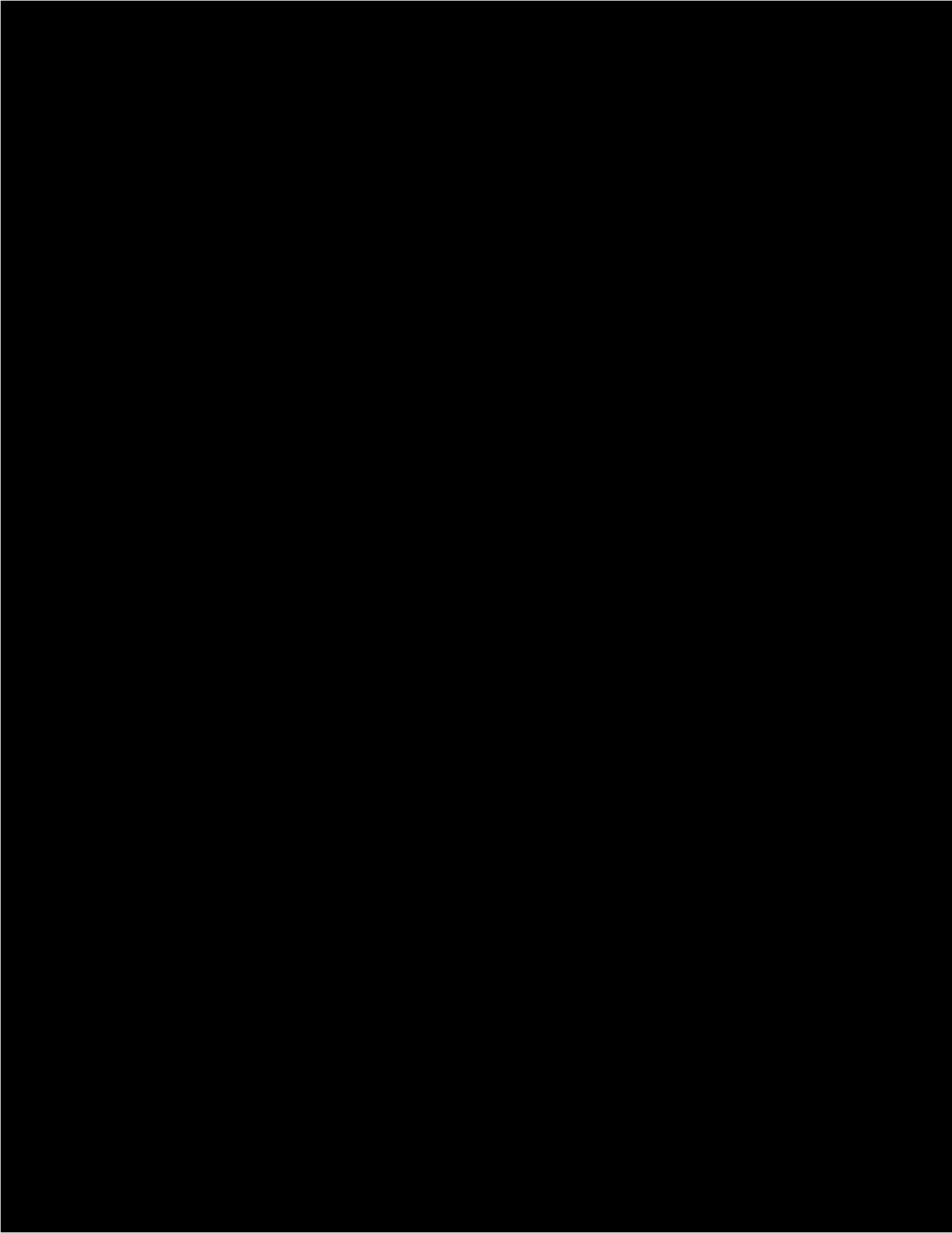
UNCLASSIFIED//FOR PUBLIC RELEASE



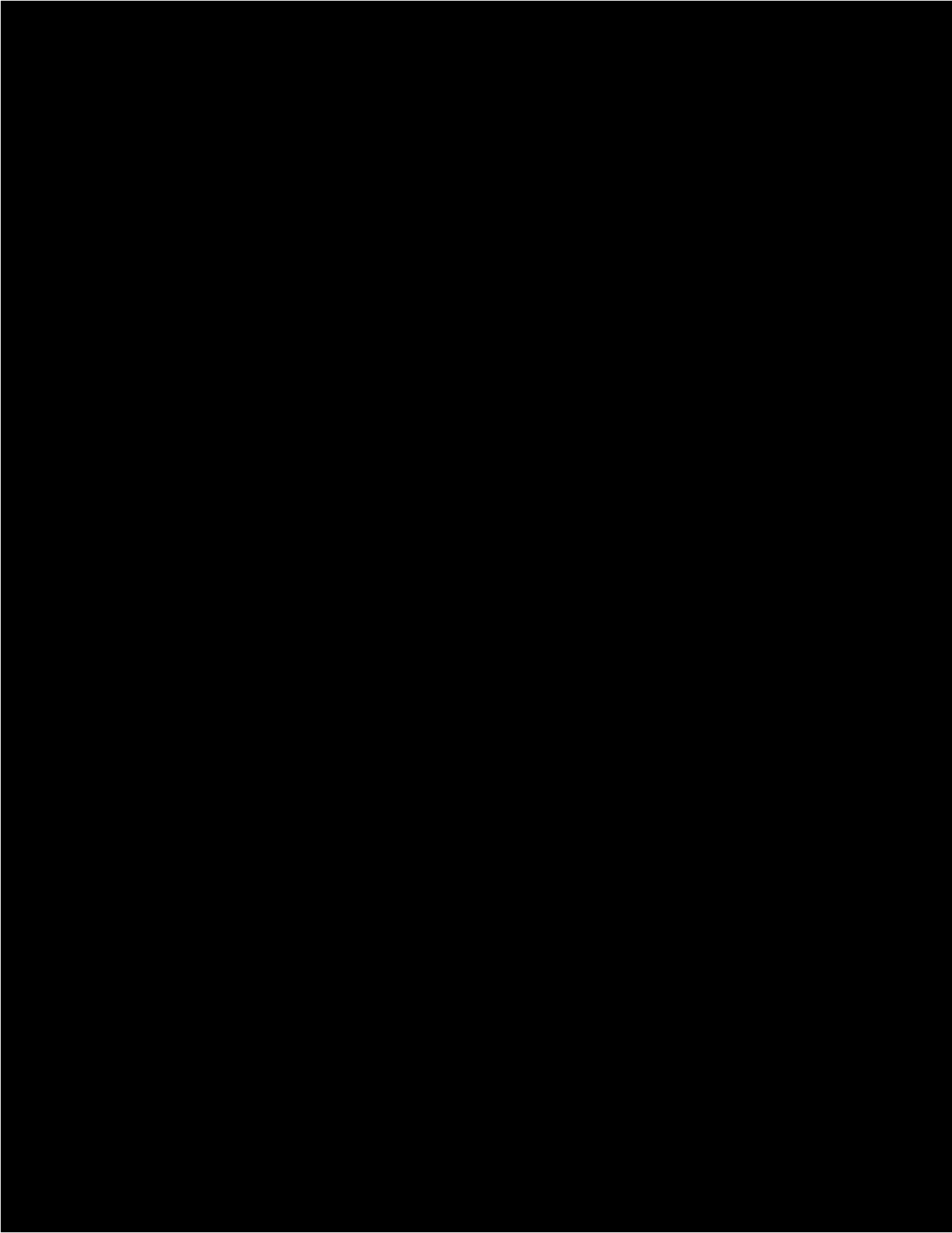
UNCLASSIFIED//FOR PUBLIC RELEASE





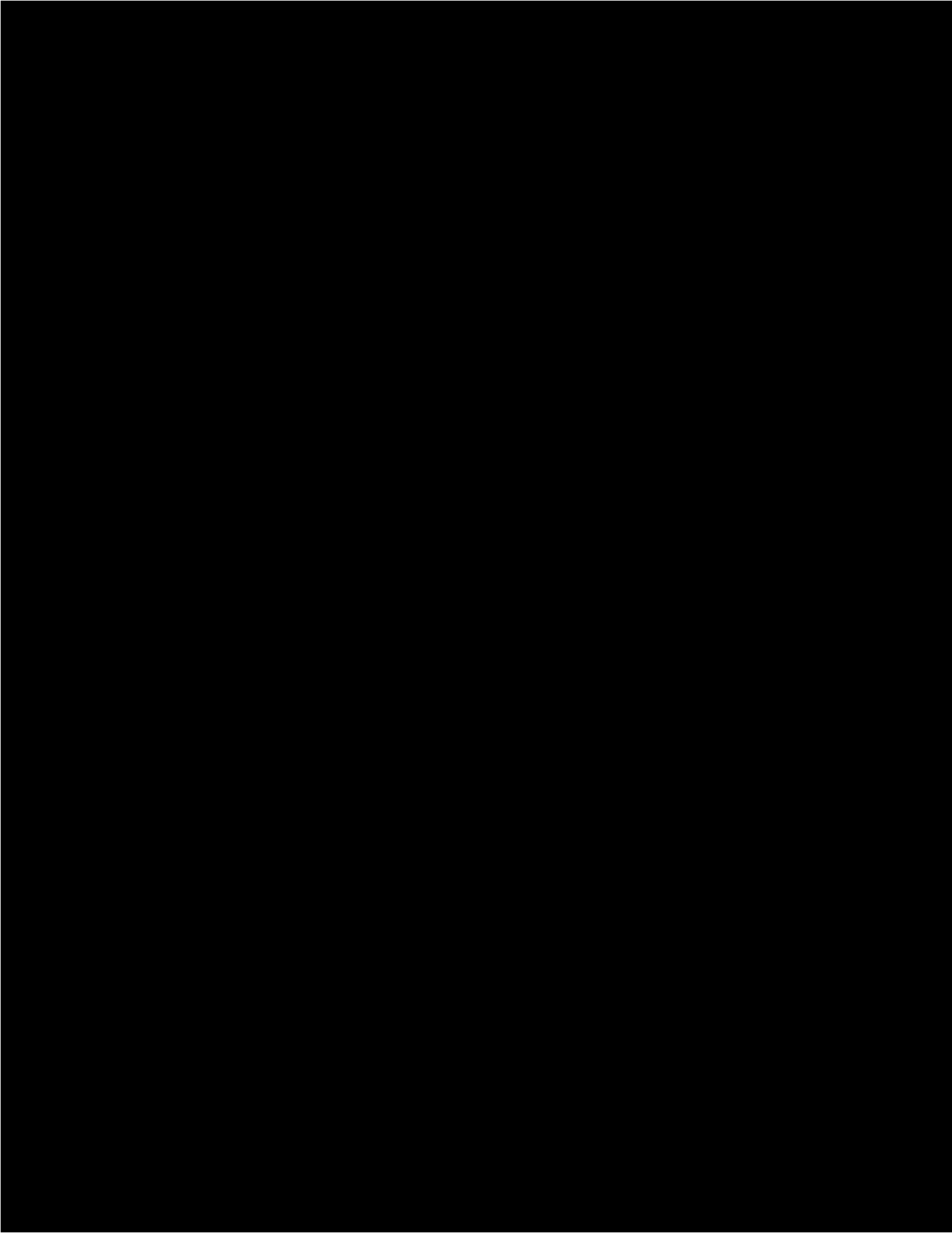


UNCLASSIFIED//FOR PUBLIC RELEASE

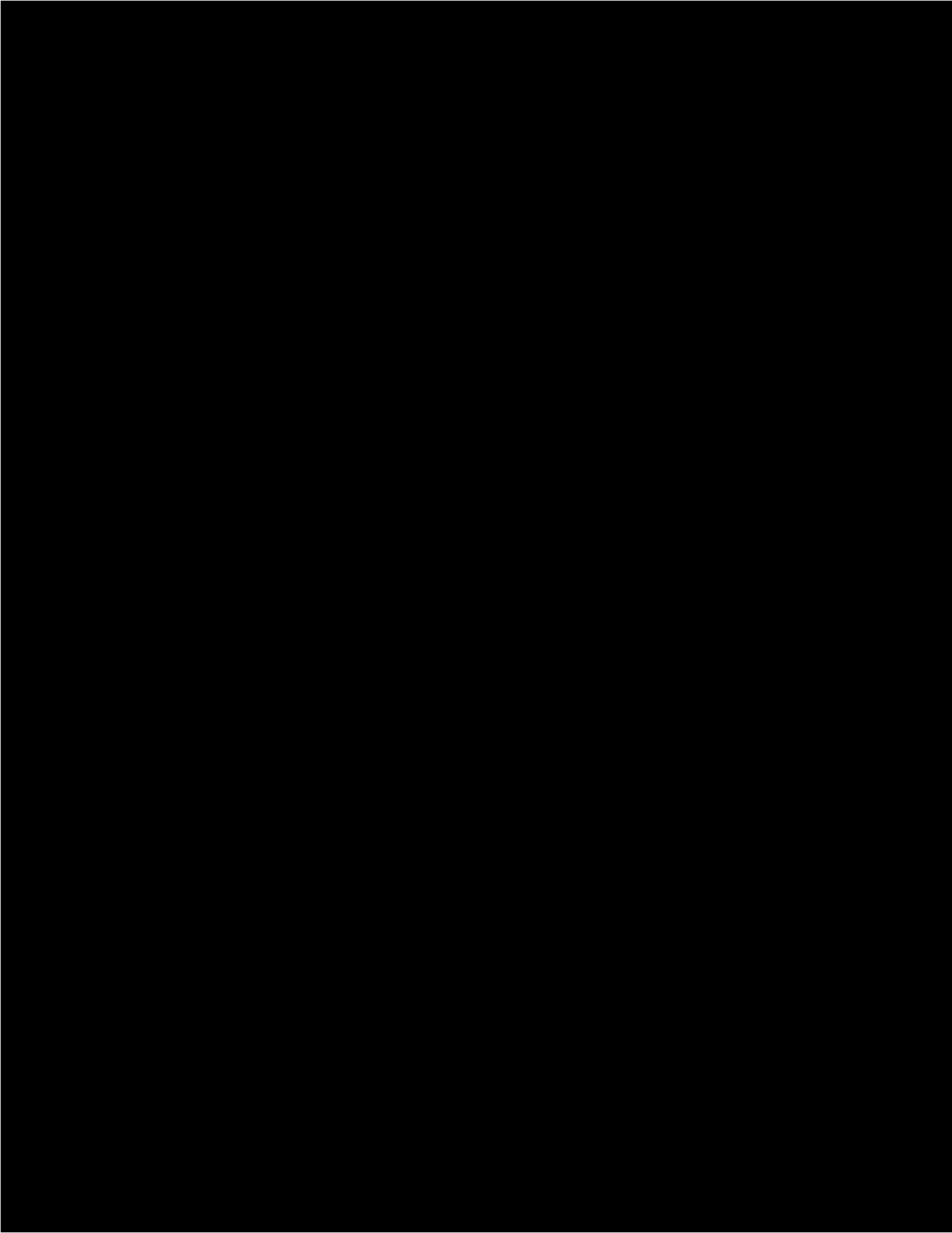


UNCLASSIFIED//FOR PUBLIC RELEASE

UNCLASSIFIED//FOR PUBLIC RELEASE



UNCLASSIFIED//FOR PUBLIC RELEASE



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of time for closed session. I'm going to -- all right. It's
2 going to take about -- let's start back up at -- it's 1420
3 right now, so we'll take until 1500 until we start up with the
4 closed session.

5 And to the -- to the public, that means we're going
6 into a closed session hearing. We discussed this previously.
7 This will be a portion at which the accused is not permitted
8 to be present and which must be closed pursuant to the
9 commission's previous order, closing particular portions of
10 this at the request of both parties.

11 So pursuant to that order we're going to begin a
12 closed session at 1500. Until that time, this commission is
13 in recess.

14 [The R.M.C. 803 session recessed at 1422, 3 August 2022.]

15 [END OF PAGE]

16

17

18

19

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

17886