UNITED STATES OF AMERICA	)	
	)	**DEFENSE RESPONSE TO**
v.	)	**GOVERNMENT MOTION IN LIMINE**
	)	**TO EXCLUDE MOTIVE EVIDENCE**
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6) [redacted]	)	
HHC, USAG,	)	
Joint Base Myer-Henderson Hall	)	**30 November 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The defense respectfully requests that the Court deny the Government's 16 November Motion in Limine to Exclude Motive Evidence. The evidence described as motive evidence is actually admissible considering all of the relevant facts and law.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Government, as the moving party, bears the burden of proof as well as the burden of persuasion. *See* RCM 905.

FACTS

The Defense stipulates to the facts described by the Government in its motion.

WITNESSES/EVIDENCE

The defense does not request the production of witnesses or evidence in order to resolve any legal or factual issues with respect to this motion.

LEGAL AUTHORITY AND ARGUMENT

The Defense does intend to call Adrian Lamo to discuss in detail his "chat" conversations with PFC Manning. We anticipate that examination will include a discussion of PFC Manning's motivation during the charged time period. *See* AE 344. Likewise, the Defense intends to call Zachary Antolak to discuss those matters described on pages 3 and 4 of our Motion to Compel the Production of Witnesses, dated 23 November 2012. (*See* AE 408.)

Motive evidence is relevant in this case for two separate reasons: (1) the elements of certain charged offenses make PFC Manning's motivation relevant and (2) the testimony of Jihrleah Showman with respect to PFC Manning's intent makes evidence of motivation proper rebuttal evidence.

This topic was generally addressed by the Defense Motion to Compel the Production of Witnesses (AE 408) discussed above. Therein, the Defense described the need to

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produce Antolak and essentially requested the same relief sought in this instant motion. The Defense writes this separate response in order to address the cases cited by the Government in its Motion in Limine.

Many of the cases cited by the Government (Diaz, McGuiness, and Kiriakou) do not altogether block motivation evidence in this case because those accused, unlike PFC Manning, were not charged with Aiding the Enemy under Article 104, UCMJ. In order to find PFC Manning guilty of the Specification of Charge I, the trier of fact will have to determine that he aided the enemy with a "general evil inent...the accused had to know he was dealing, directly or indirectly, with an enemy of the United States." *See* AE 410. Evidence that suggests that PFC Manning's motivation was something other than to deal with an enemy would tend to make a fact of consequence (e.g. his guilty knowledge) less probable and, therefore, relevant. This same logic applies to every charged offense that requires guilty knowledge (e.g. Specifications 1, 4, 6, 8, and 12 of Charge II).

Additionally, the Government sought to introduce evidence under MRE 404(b) of an act of PFC Manning that was proof of his intent to commit the charged offenses in a motion on 3 August 2012. *See* AE 250. Specifically, the Government described an encounter that PFC Manning had with then-SPC Jihrleah Showman, another Solider assigned to HHC, 2/10 at Fort Drum, prior to their deployment to Iraq. During this conversation, SPC Showman recalls PFC Manning telling her that he has no loyalty to his country. The Court granted the Government's motion with respect to this particular piece of evidence and will allow it for its tendency, if any, to prove PFC Manning's intent with respect to the charged offenses. *See* AE 287.

The Defense believes that the evidence described in the preceding paragraph opens the door to motive evidence. A closer examination of US v. Huet-Vaughn, 43 M.J. 105 (CAAF 1995) is instructive with respect to this point. As indicated by the Government in its brief, CAAF used that case to distinguish between motive and intent by distinguishing between an immediate intent and an ulterior one. *See* Huet-Vaughn, 43 M.J. at 113-114. The former is the requisite intent in order to commit a crime; the latter is often inadmissible motive when offered by an accused on the merits. Id.

The Defense submits that the Showman intent evidence is only relevant to describe an ulterior (and not immediate) intent of PFC Manning. That conclusion is compelled when you examine "404(b) intent cases" that are emblematic of a more immediate intent: US v. Sweeny, 48 M.J. 117 (CAAF 1998) (stalking of ex-wife is relevant in prosecution of stalking current wife) and US v. Harrow, 65 M.J. 190 (CAAF 2007) (evidence of assaultive behavior toward daughter is evidence when accused is charged with her premeditated murder). These cases show the difference between putting on evidence of another crime or simply another act. Evidence of another crime like those cited earlier in this paragraph will more often supply a more "immediate" intent.

There are plenty of 404(b) "intent" cases that seem to more accurately describe the ultimate criminal "motive" of an accused: US v. Henry, 55 M.J. 108 (CAAF 2000)

(evidence of pornographic video order form possession admissible when accused is charged with making a minor watch pornography with him) and US v. Hays, 62 M.J. 158 (CAAF 2005) (intent evidence of explicit emails admissible when accused is charged with solicitation to commit rape of a minor). The Court can see that this evidence, while called evidence of intent, is ultimately more probative of the criminal motive of an accused. The testimony of Showman will describe conduct that falls more within this line of cases. As such, the Court must allow the Defense to rebut the Government's 404(b) evidence.

The "pigeon holes" of 404(b) should be of no moment to the Court in making this determination to allow the Defense to rebut the Showman "intent" evidence with the Lamo and Antolak "motivation" evidence. It is long settled that a trial judge should not be particularly concerned with how this evidence is characterized. *See* US v. Castillo, 25 M.J. 145 (CMA 1989).

The Defense would certainly understand any desire to avoid over-litigation of a collateral matter. However, the evidence offered by the Government through Showman must be put in its appropriate context. Stated bluntly, Lamo and Antolak will impeach the evidence from Showman by contradiction, showing that her testimony should be given little weight when considered in the context of all the other evidence at trial.

CONCLUSION

The defense respectfully requests that the Court deny the Government's 16 November Motion in Limine to Exclude Motive Evidence. The evidence described as motive evidence is actually admissible considering all of the relevant facts and law.

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MAJ, JA
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