

1 Christopher A. LaVoy, State Bar No. 016609



3 SEVENTH FLOOR CAMELBACK ESPLANADE II
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9 *Attorneys for Non-Party Robert Jones, II*

10 **SUPERIOR COURT OF ARIZONA**
11 **MARICOPA COUNTY**

12 Desert Mountain Club, Inc.,

13 Plaintiff,

14 vs.

15 Thomas Clark and Barbara Clark,
16 husband and wife,

17 Defendants.

18 Case No. CV2014-015334

19 **NON-PARTY ROBERT JONES, II'S**
20 **MOTION FOR A PROTECTIVE**
21 **ORDER**

22 (Hon. Dawn Bergin)

23 (Oral Argument Requested)

24 **Introduction**

25 Pursuant to Ariz. R. Civ. P. 26(c)(7), non-party Robert Jones, II hereby moves for
26 a protective order (1) prohibiting defense counsel from questioning him at deposition
about matters covered by the confidentiality clause in his settlement agreement with his
former employer; and (2), to the extent such questioning is allowed, prohibiting
defendants from disseminating his deposition to third parties not directly involved in the
case.

Mr. Jones finds himself in a difficult position. Defendants recently noticed his
deposition as part of the case. Mr. Jones is an employee of plaintiff Desert Mountain
Club, Inc. ("DMC"), specifically its Chief Operating Officer and General Manager. He is
also a party to a settlement agreement with a broad confidentiality clause with the former
owner of the golf club assets for whom he previously worked. At his deposition, defense

1 courts, fitness center, restaurants, clubhouses, etc.). To use the golf courses and other
2 club facilities, one must be a member of the “Desert Mountain Club.”

3 The community’s developer, Desert Mountain Properties Limited Partnership
4 (“DMP”), originally owned the club. DMP sold the club’s assets to its members in 2010
5 as part of a member buyout. The members voted overwhelmingly (approximately 99%)
6 in favor of the member buyout.

7 The members created DMC, an Arizona non-profit corporation, to acquire and
8 manage the real estate and other assets constituting the club. DMC is democratically
9 governed. The members elect a board of directors that manages the corporation. DMC’s
10 board of directors appointed Mr. Jones as the Chief Operating Officer and General
11 Manager of the club.

12 Mr. Jones worked for club’s prior owners as well. DMP originally hired Mr. Jones
13 in 1998. He has been with the club through various owners since that time.

14 **B. Mr. Jones’s Settlement Agreement**

15 On or about June 29, 2011, shortly after the member buyout, Mr. Jones entered
16 into a Confidential General Release Agreement (the “Settlement Agreement”) with the
17 club’s original owner (*see* Ex. 1). The purpose of the Settlement Agreement was “to settle
18 all disputes, differences, claims and/or other matters between [the] Company and you.”

19 *Id.* at 1.

20 The Settlement Agreement includes a confidentiality provision, which states in
21 relevant part:

22 **Confidentiality.** You shall continue to abide by Section 8 of the
23 Employment Agreement. . . . [Y]ou will not disclose any of the terms of
24 this Agreement or the subject matter covered in Section 8 of your
Employment Agreement unless the failure to do so would subject you to
liability for violation of a statute, regulation or court order.

25 *Id.* ¶ 13.

26

1 Section 8 of Mr. Jones's Employment Agreement (*see* Ex. 2) in turn provides:

2 **Confidentiality.** In the performance of the Work, Employee may be
3 exposed to the confidential information of DMP and others. Employee shall
4 not disclose to anyone not employed by DMP or Desert Mountain
5 Associates, Inc. (DMP's listing agent for property in Desert Mountain) nor
6 use, except on behalf of DMP or DMA, any such confidential information
7 acquired by it in the performance of the Work except as authorized by DMP
8 in writing and, regardless of the term of this Agreement, Employee shall be
9 bound by this obligation until such time as such confidential information
10 shall become part of the public domain. Information regarding all aspects of
11 DMP's business (including the business of Desert Mountain Associates,
12 Inc., Desert Mountain Development Corporation, Sonora Partners Limited
13 Partnership and their respective subsidiaries and affiliates), and information
14 concerning the Work (either directly or indirectly disclosed to Employee or
15 developed by Employee in the performance of the Work), shall be
16 presumed to be confidential except to the extent the same shall have been
17 published in public documents or otherwise made freely available to the
18 general public without restriction. Employee also agrees that it will not
19 disclose to DMP any information it holds subject to any obligation of
20 confidence to any third parties.

14 **C. The Lawsuit**

15 This lawsuit concerns the circumstances under which a member may resign from
16 membership and the member's financial obligations to DMC upon such resignation.
17 Defendants became members of the prior club in 1988 and, by executing a Conversion
18 Agreement, became members of the new club and reaffirmed their agreement to adhere to
19 the club bylaws and other governance documents in 2010. In mid-2013, they sought to
20 resign their membership with the new member-owned club. This led to a dispute about
21 whether defendants had to continue paying dues until their membership was reissued to a
22 new member. DMC sued defendants for unpaid dues and other charges in late 2014.

23 **D. Mr. Jones's Deposition**

24 Defendants noticed Mr. Jones's deposition for May 20, 2015 at 9:00 a.m. Both Mr.
25 Jones's counsel and counsel for DMC contacted defendants in writing in advance of the
26 deposition concerning these confidentiality issues (Exs. 3 & 4). Defense counsel did not

1 respond. They again raised these confidentiality issues the morning of the deposition.
2 Defense counsel at that point responded by refusing to agree to any limitations on the
3 scope of questioning or public dissemination of the confidential information.

4 The parties proceeded with Mr. Jones’s deposition in the hope they could work
5 through the confidentiality issues as they arose in the context of specific questions.
6 However, this ultimately became unworkable and, approximately two hours into the
7 deposition, Mr. Jones—in his individual capacity (which is the capacity in which he
8 signed the Settlement Agreement), not on behalf of DMC—adjourned the deposition to
9 file this motion seeking resolution of the subject confidentiality issues.

10 Argument

11 **THE COURT SHOULD PROHIBIT DISCOVERY OF THE** 12 **CONFIDENTIAL INFORMATION OR, AT A MINIMUM, PROHIBIT** 13 **DEFENDANTS FROM DISCLOSING IT TO THIRD PARTIES**

14 Discovery of any relevant, non-privileged information is generally permissible.
15 *See* Ariz. R. Civ. P. 26(b)(1). Information is not discoverable if it is not reasonably
16 calculated to the lead to admissible evidence. *See id.* The liberality of the discovery rules
17 “may seriously implicate privacy interest of litigants and third parties.” *Seattle Times Co.*
18 *v. Rhinehart*, 467 U.S. 20, 35 (1984). Thus, “[t]he court may, for good cause, issue an
19 order to protect a party or person from annoyance, embarrassment, oppression, or undue
20 burden or expense, including . . . [that] confidential . . . commercial information not be
21 disclosed or be disclosed only in a designated way.” Ariz. R. Civ. P. 26(c)(7).

22 Because confidentiality is a primary inducement for parties to settle, courts require
23 a strong countervailing interest to breach that confidentiality. *See Miller v. Kelly*, 212
24 Ariz. 283, 287, ¶ 12, 130 P.3d 982, 986 (App. 2006) (noting “strong public policy
25 encouraging settlement of lawsuits, which would be thwarted by disclosure of
26 information intended to remain confidential”).

1 The court should grant a protective order that the subject confidential information
2 not be disclosed. The present case is a straightforward contract dispute. Its resolution
3 turns on a reading of the operative agreements between the parties. Discovery into the
4 policies and procedures of the prior owner of these assets, its internal personnel matters,
5 and its dealings with members besides defendants are not reasonably calculated to lead to
6 the discovery of admissible evidence. *See* Ariz. R. Civ. P. 26(b). Vague assertions of
7 possible relevance should not be accepted in this context because of the countervailing
8 interest in promoting settlement. *See Miller*, 212 Ariz. at 287, ¶ 12, 130 P.3d at 986;
9 *Brantley v. Boyd*, No. 07-CV-06139 NC, 2013 WL 1786585, at *2 (N.D. Cal. Apr. 25,
10 2013) (and authority cited therein).

11 Defendants have failed to identify the specific information sought and why such
12 information cannot be obtained by other means. *See Flynn v. Portland Gen. Elec. Corp.*,
13 1989 WL 112802 (D. Or. 1989) (party seeking discovery about previously settled case
14 must identify specific information sought and why such information cannot be obtained
15 another way; “the strong public policy favoring settlement of disputed claims dictates that
16 confidentiality agreements regarding such settlements not be lightly abrogated”).

17 To the extent the Court allows discovery of this confidential information, it should
18 set reasonable limits on its dissemination. Ariz. R. Civ. P. 26(c)(7). The Court should
19 order that defendants not upload Mr. Jones’s deposition to their website or otherwise
20 disseminate the deposition to third-parties not directly involved in the case. While “no
21 doubt . . . there exists a common law right of access to civil trials, no such blanket rule
22 exists for pretrial depositions.” *Lewis R. Pyle Mem’l Hosp. v. Superior Court of Arizona*
23 *In & For Gila Cnty.*, 149 Ariz. 193, 197, 717 P.2d 872, 876 (1986). “Even though
24 information may be discoverable per Rule 26(b)(1), such information is not ordinarily
25 public information until introduced into evidence or filed with the clerk of the court.” *Id.*

26

1 Mr. Jones also has an employment agreement with a non-disclosure provision with
2 his current employer, DMC. His understanding is that DMC has agreed to waive such
3 confidentiality subject to certain restrictions on the dissemination of information falling
4 within the scope of the provision. Mr. Jones also agrees to such disclosure on the
5 proposed conditions.

6 **Conclusion**

7 For the foregoing reasons, the Court should order that defense counsel not inquire
8 into matter covered by the confidentiality clause of the Settlement Agreement at Mr.
9 Jones's deposition. To the extent such questioning is allowed, the Court should order that
10 defendants not disseminate the deposition to third parties not directly involved in the
11 case.

12 DATED this 26th day of May, 2015.

13 TIFFANY & BOSCO, P.A.

14 By: /s/ Christopher A. LaVoy
15 Christopher A. LaVoy
16 Seventh Floor Camelback Esplanade II
17 2525 East Camelback Road
18 Phoenix, Arizona 85016-4237
19 *Attorneys for Non-Party Robert Jones, II*

20
21
22 ORIGINAL of the foregoing **electronically**
23 **filed** and a COPY **electronically mailed** this
24 26th day of May, 2015 to:

25 Daryl M. Williams, Esq.
26 Baird, Williams, & Greer, LLP
darylwilliams@bwglaw.net
Attorneys for Defendants

1 Christopher L. Callahan, Esq.
2 Seth G. Schuknecht, Esq.
3 Fennemore Craig, PC
4 ccallahan@fclaw.com
5 sschuknecht@fclaw.com
6 *Attorneys for Plaintiff*

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By: s/ Emily Kingston

Exhibit 1

CONFIDENTIAL GENERAL RELEASE AGREEMENT

This Confidential General Release Agreement ("Agreement"), entered into by and between Robert Edward Jones II ("you" or "your") and Desert Mountain Development Corporation, a Delaware Corporation the "Company") (singularly, a "party," and collectively herein "the parties"), arises from the terms of the Employment Agreement (as defined below).

[REDACTED]

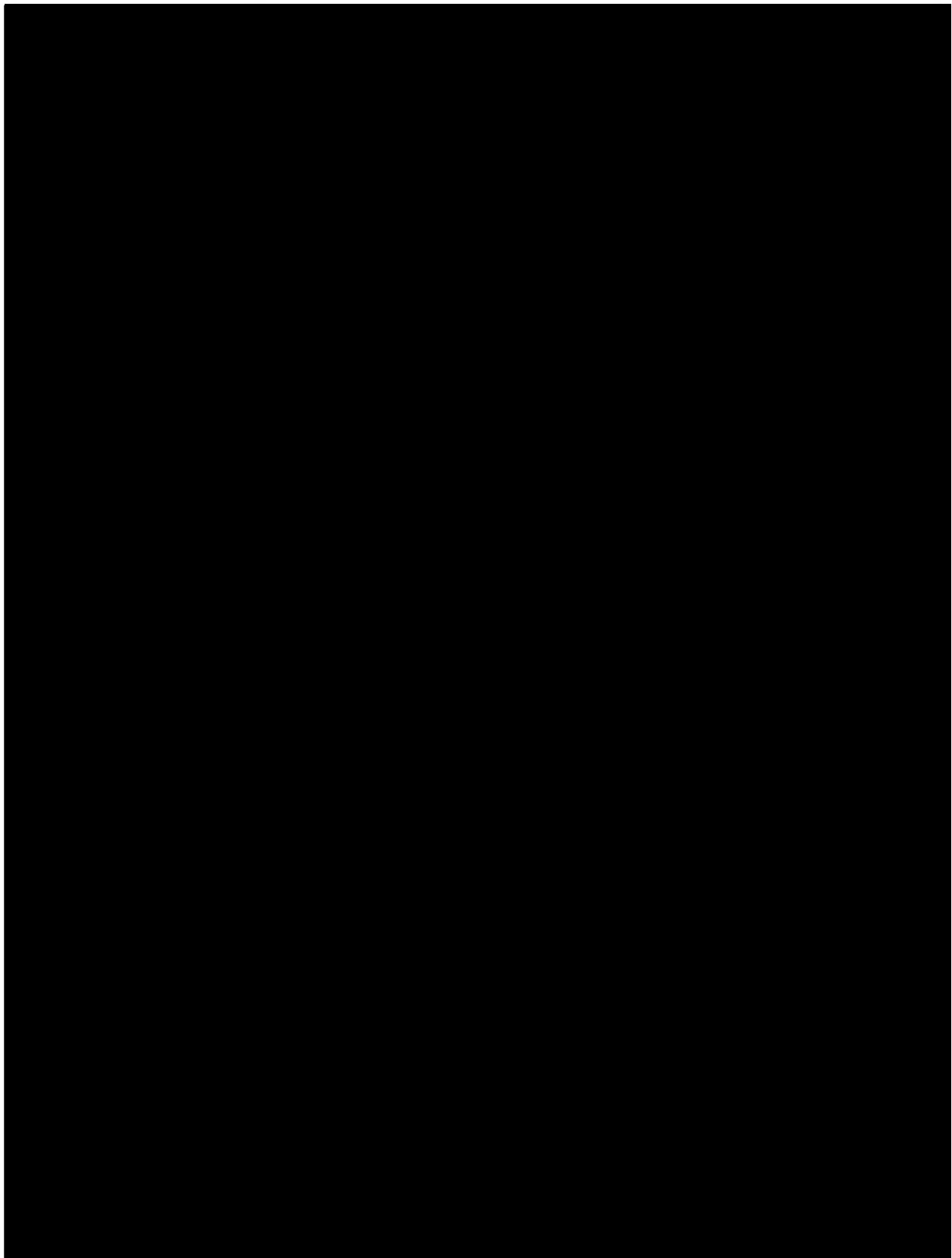
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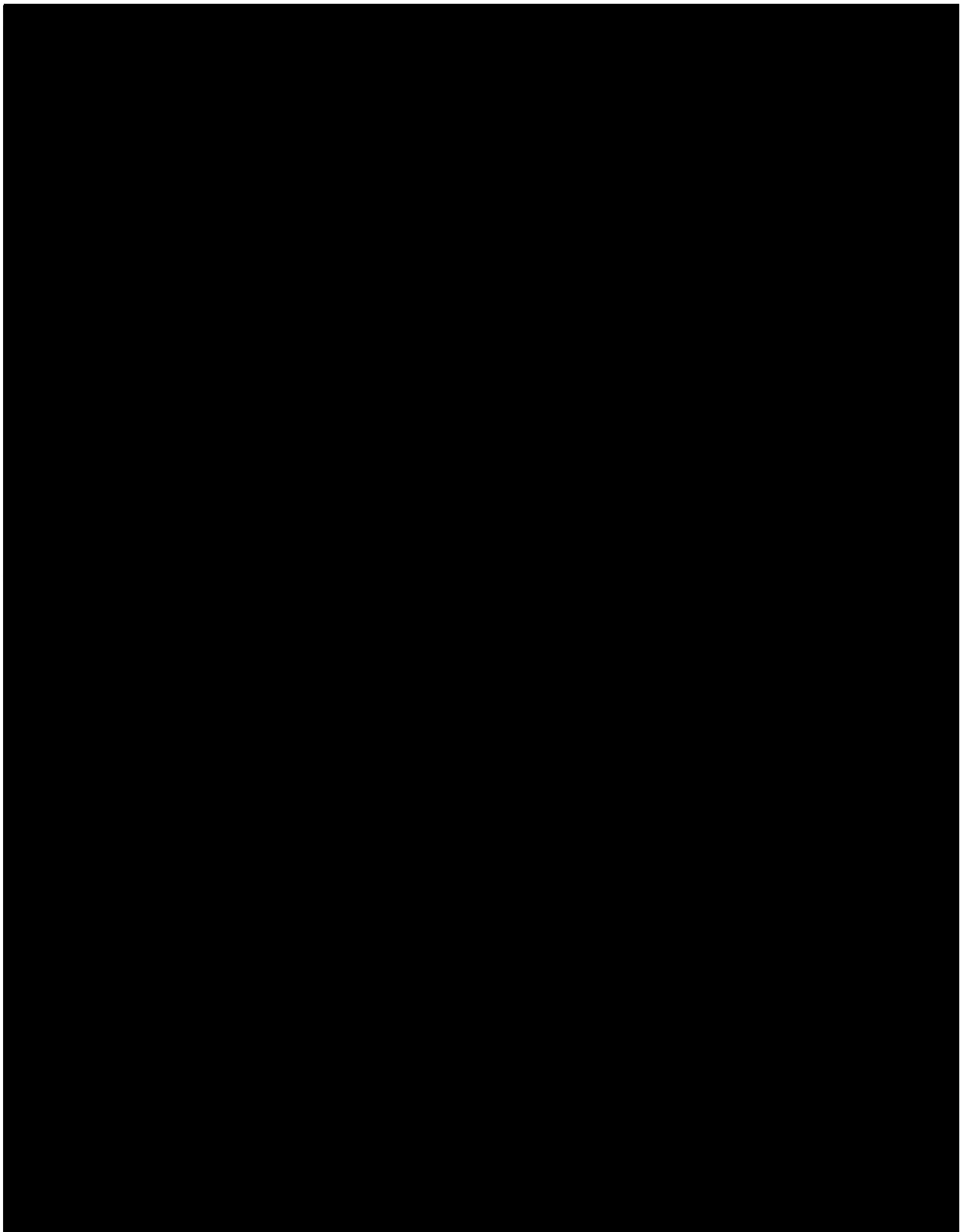
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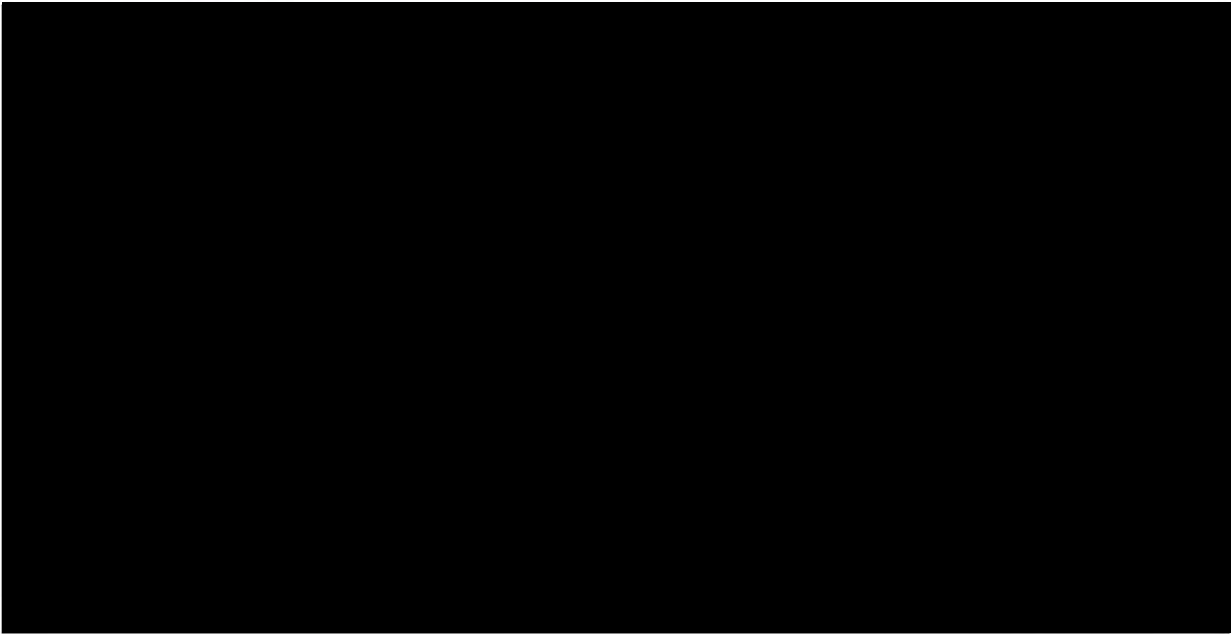
WHEREAS, the parties agree and wish to ensure that they have amicably resolved and settled all possible disputes, differences, claims and all other matters related to, arising from, or associated with Company and/or the Turnover.


THEREFORE, in order fully and finally to settle all disputes, differences, claims and/or other matters between Company and you, for the mutual consideration set forth herein, the parties hereby agree to the following terms and conditions:

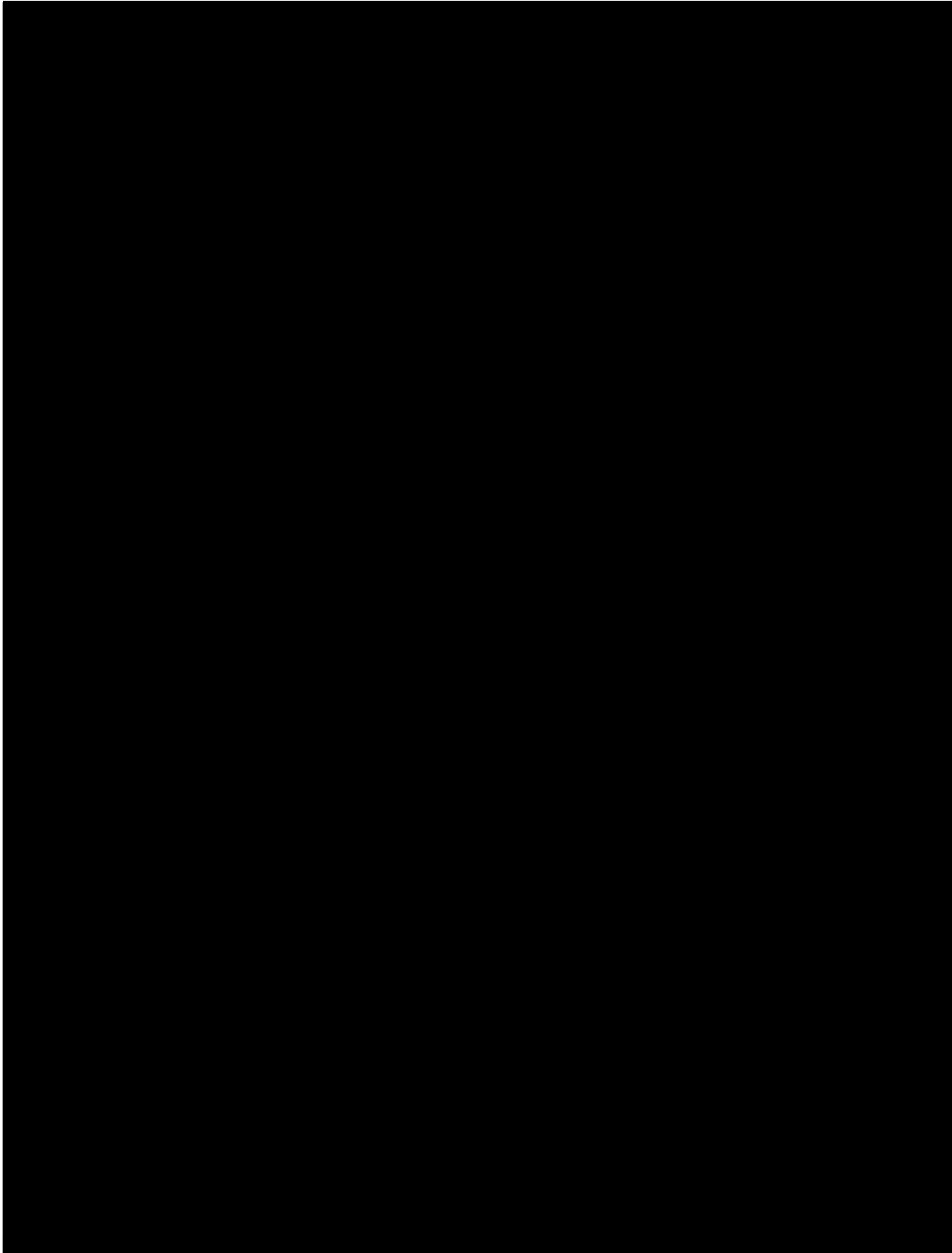
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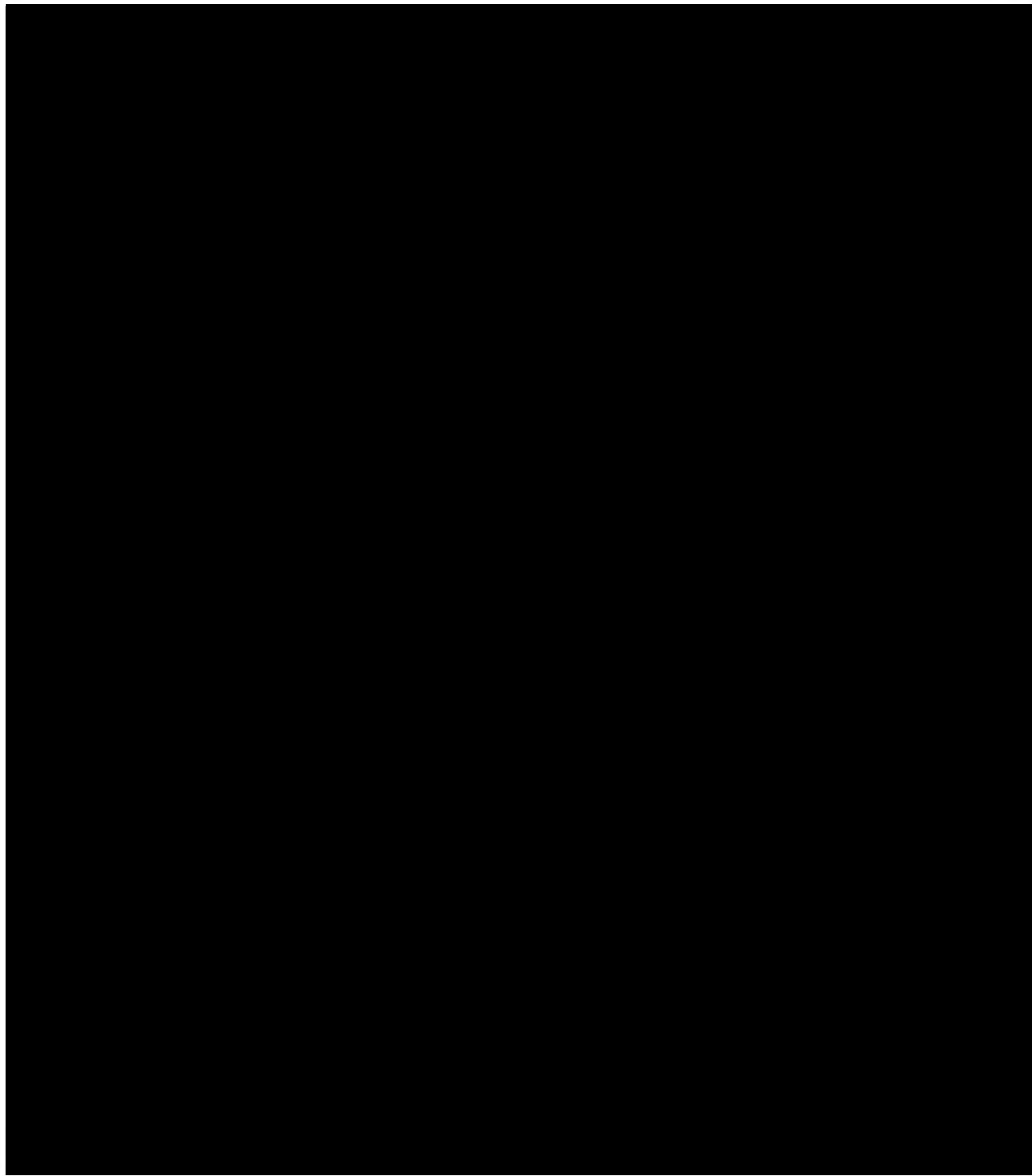




13. **Confidentiality.** You shall continue to abide by Section 8 of the Employment Agreement. In the event that you are requested pursuant to, or required by, applicable law or rule, regulation or by legal process to disclose any terms of this Agreement or the subject matter covered in Section 8 of your Employment Agreement, you agree that you will provide us with prompt notice of such request or requirement in order to enable us to seek an appropriate protective order or other remedy, to consult with you with respect to our taking steps to resist or narrow the scope of such request or legal process, or to waive compliance, in whole or in part, with the terms of this Agreement. In any such event, you shall use your commercially reasonable efforts to ensure that all of the terms of this Agreement and the subject matter covered in Section 8 of your Employment Agreement and other information that is so disclosed will be accorded confidential treatment. In any event, you will not disclose any of the terms of this Agreement or the subject matter covered in Section 8 of your Employment Agreement unless the failure to do so would subject you to liability for violation of a statute, regulation or court order. Notwithstanding the foregoing you shall be entitled to utilize the ordinary business records of Desert Mountain Properties and information to which you were exposed during your employment by Company (a) as may be considered reasonably proper by you to conduct the affairs of the Desert Mountain Club on behalf of Desert Mountain Club, Inc. (DMCI) and (b) as may have been transferred to or access otherwise permitted by DMCI pursuant to that Purchase and Sale Agreement dated November 16, 2010.
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17. **Confidentiality of Agreement.** The terms of this Agreement shall be confidential. You shall not disclose its terms to anyone other than your spouse, attorney, accountant or tax advisor, without Company's prior written approval. You shall notify your spouse, attorney, accountant and tax advisor of the confidential nature of this Agreement.
- 





IN WITNESS WHEREOF, this Confidential Release and Severance Agreement has been executed by the parties below.

Robert E. Jones II

Robert E. Jones II

Dated: 6/29/11

DESERT MOUNTAIN DEVELOPMENT CORPORATION, a Delaware corporation

By: *Suzanne Stevens*

Title: Executive VP, CFO

Dated: 6/30/11

Exhibit 2

EMPLOYMENT AGREEMENT
THE DESERT MOUNTAIN CLUB

Senior Vice President/General Manager, Club Operations

This Employment Agreement ("Agreement") is made as of the 30th day of September, 2001 and supercedes the agreement dated as of the 19th day of January, 1998, between Desert Mountain Properties Limited Partnership, a Delaware limited partnership, d/b/a "The Desert Mountain Club" ("DMP") and Robert E. Jones II ("Employee").

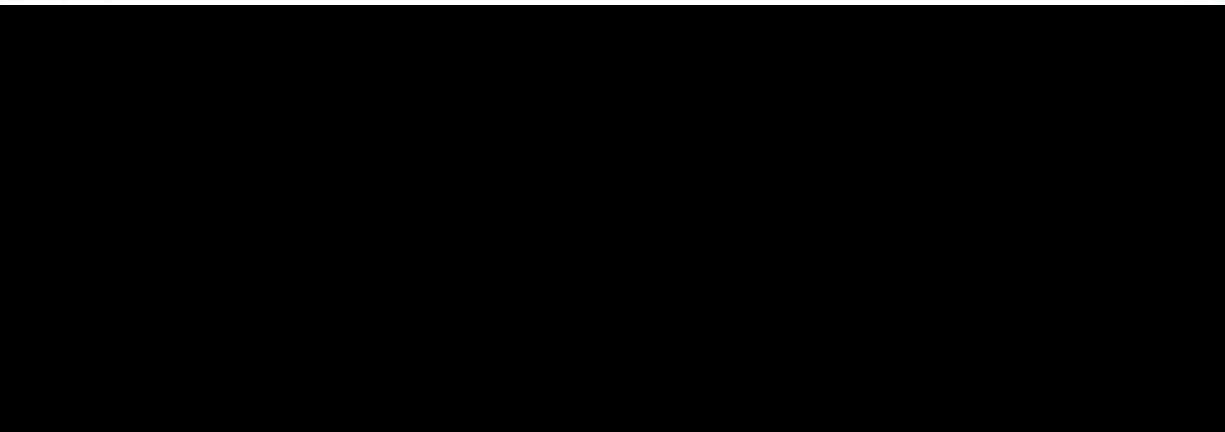
RECITALS

A. DMP is the current owner and operator of The Desert Mountain Club, located in the City of Scottsdale, Arizona, as well as the developer of Desert Mountain, a master-planned mixed-use community.

B. DMP maintains offices at 10550 E. Desert Hills Drive, Scottsdale, Arizona, properly equipped with furnishings and other equipment and supplies necessary for the proper operation of the Club and of a real estate development company.

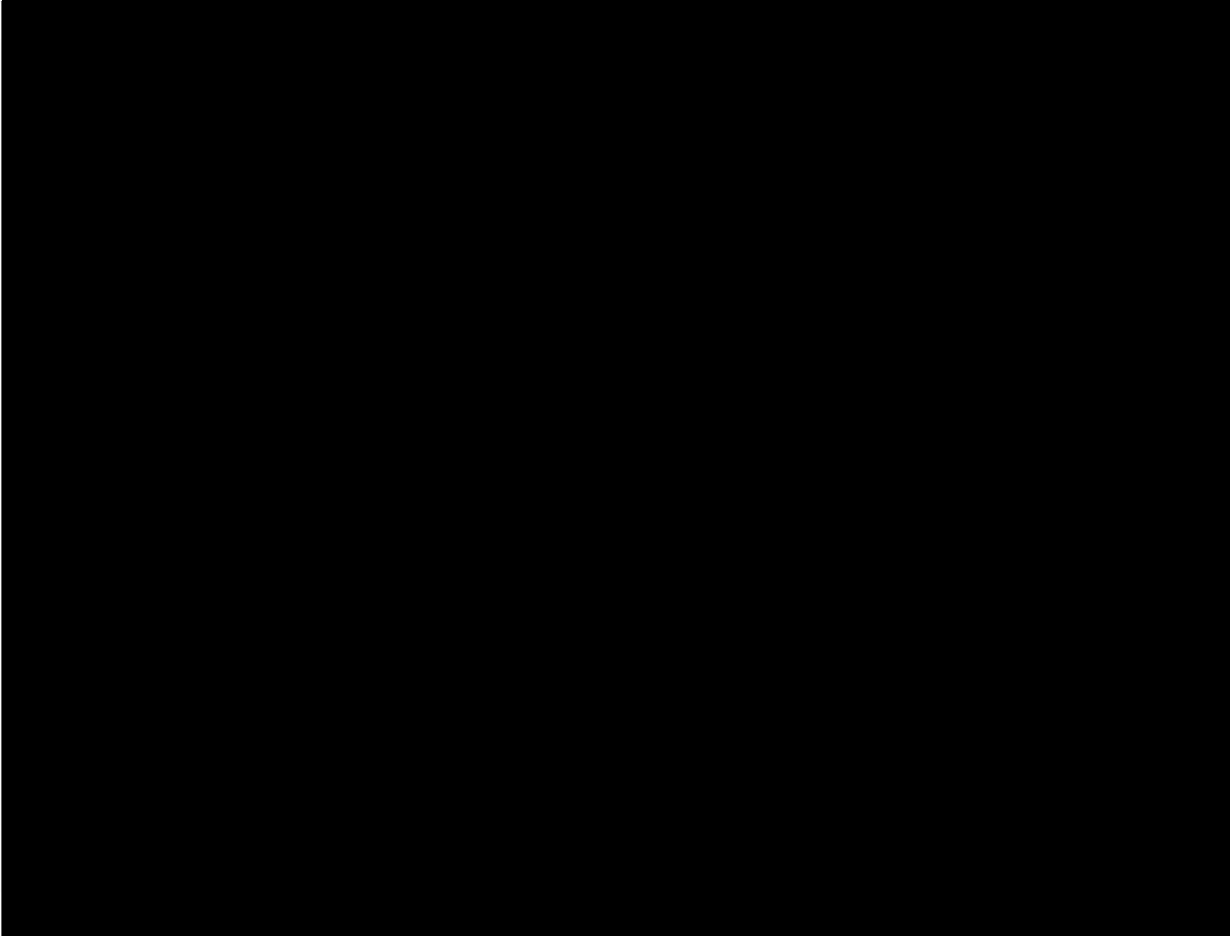
C. DMP desires to employ Employee, and Employee desires to be employed of DMP, for the purposes and under the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, DMP and Employee (collectively "Parties," singularly "Party"), hereby agree as follows:

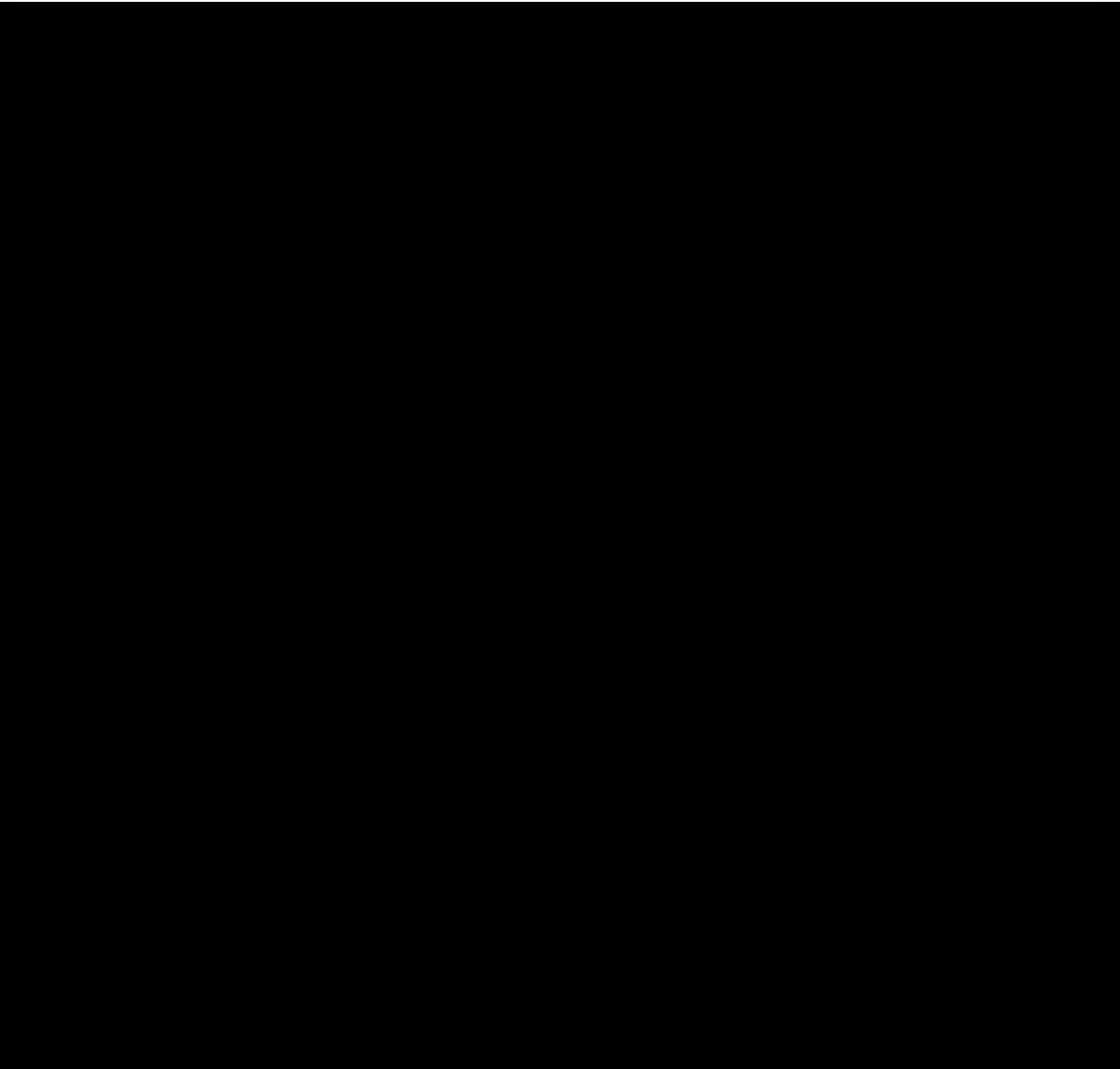


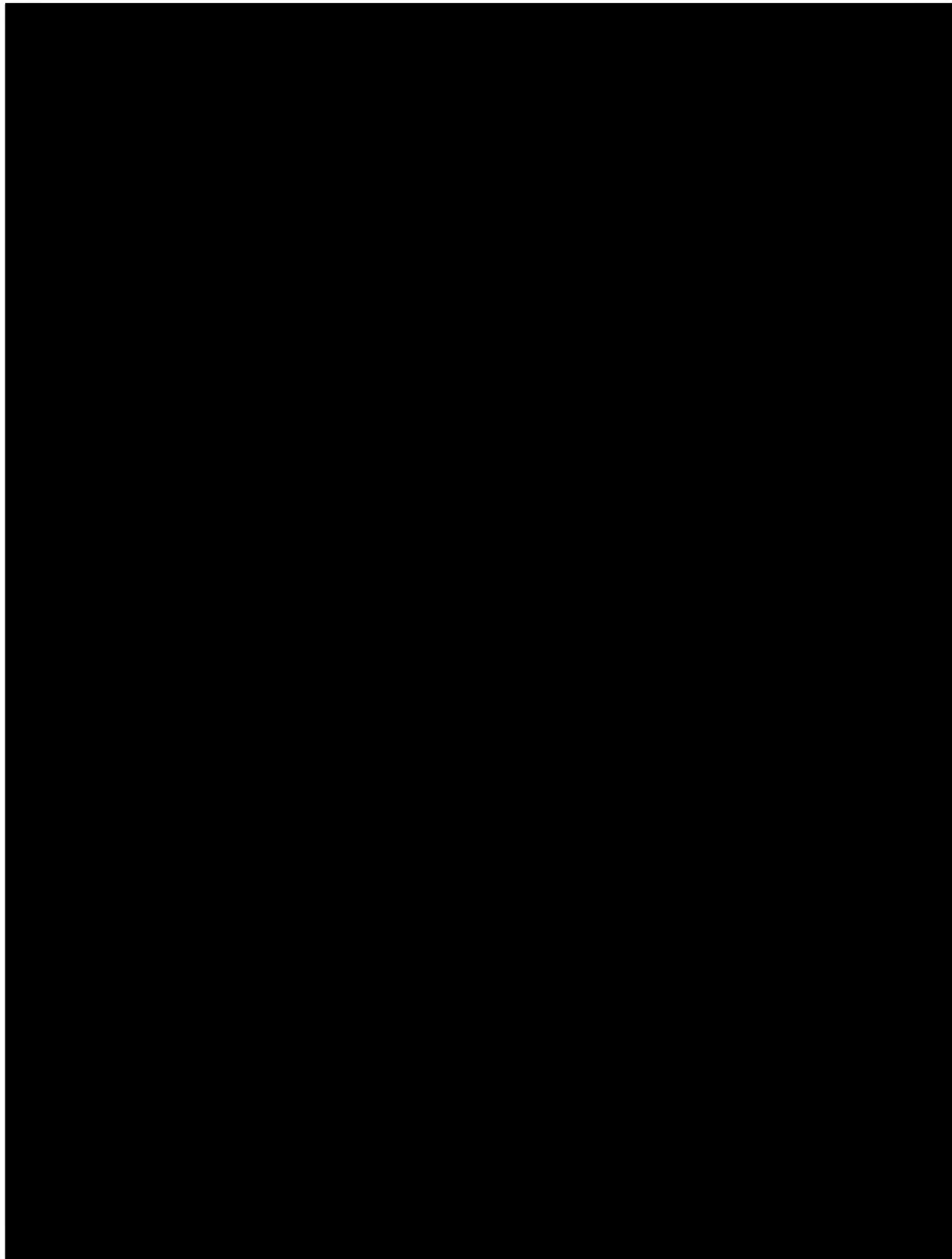
4. Performance. During the term of this Agreement, Employee shall devote his time and efforts consistent with his past performance, in performing all work necessary and appropriate to the position of Senior Vice President and General Manager, Club Operations, including, without limitation, training and oversight of all personnel providing Club-related goods and services, implementation of Club policies and procedures, development and implementation of Club budgets, and maintenance of positive member relations (the "Work"). Employee understands and agrees to perform the Work during the hours and on the days determined by DMP. Employee further understands that the nature of the Work may require

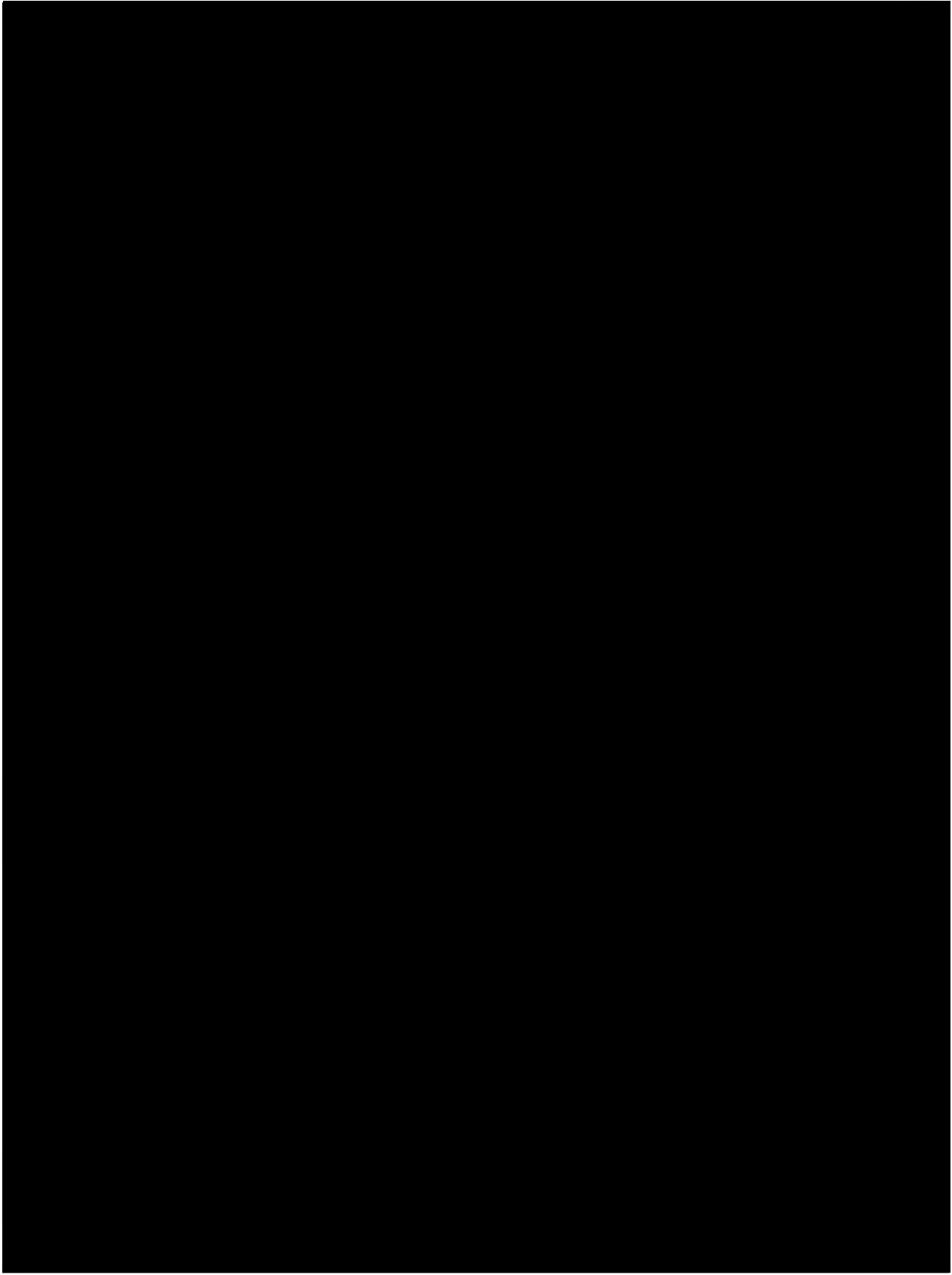
Employee to render services in any one day, week, or month during the term of this Agreement beyond the time normally specified for Employee's performance, and Employee agrees to render services during these times at no additional compensation beyond what is specified in this Agreement. Employee agrees to not encourage or seek other employment opportunities during the term of this employment, as long as Employee's Base Salary is increased annually at a rate of increase that satisfies both of the following: (a) such increase is at least as great as the percentage rate of increase in the Consumer Price Index for the 12-month period ending on July 31, 2002 and each July 31 thereafter. ("Consumer Price Index" for purposes of this subpart (a) means the Consumer Price Index, United States City Average, All Urban Consumers, All Items, Not Seasonally Adjusted, with a base period equaling 100 in 1993-1995); and (b) such increase is at least as great as the percentage rate increase for the most recent 12-month period, in the Consumer Price Index, Phoenix-Mesa, Arizona, Metropolitan Statistical Area, All Urban Consumers, All Items, Not Seasonally Adjusted, with a base period equaling 100 in December 2001. In each case, the Consumer Price Index shall be as published by the United States Department of Labor's Bureau of Labor Statistics or any successor agency. If the United States Department of Labor, Bureau of Labor Statistics ceases to publish one or both of the foregoing Consumer Price Indices, the index that will most nearly accomplish the purpose thereof and the use thereof by the parties hereby with respect to the adjustment of Employee's Base Salary shall be used in lieu of foregoing Consumer Price Index or Indices.

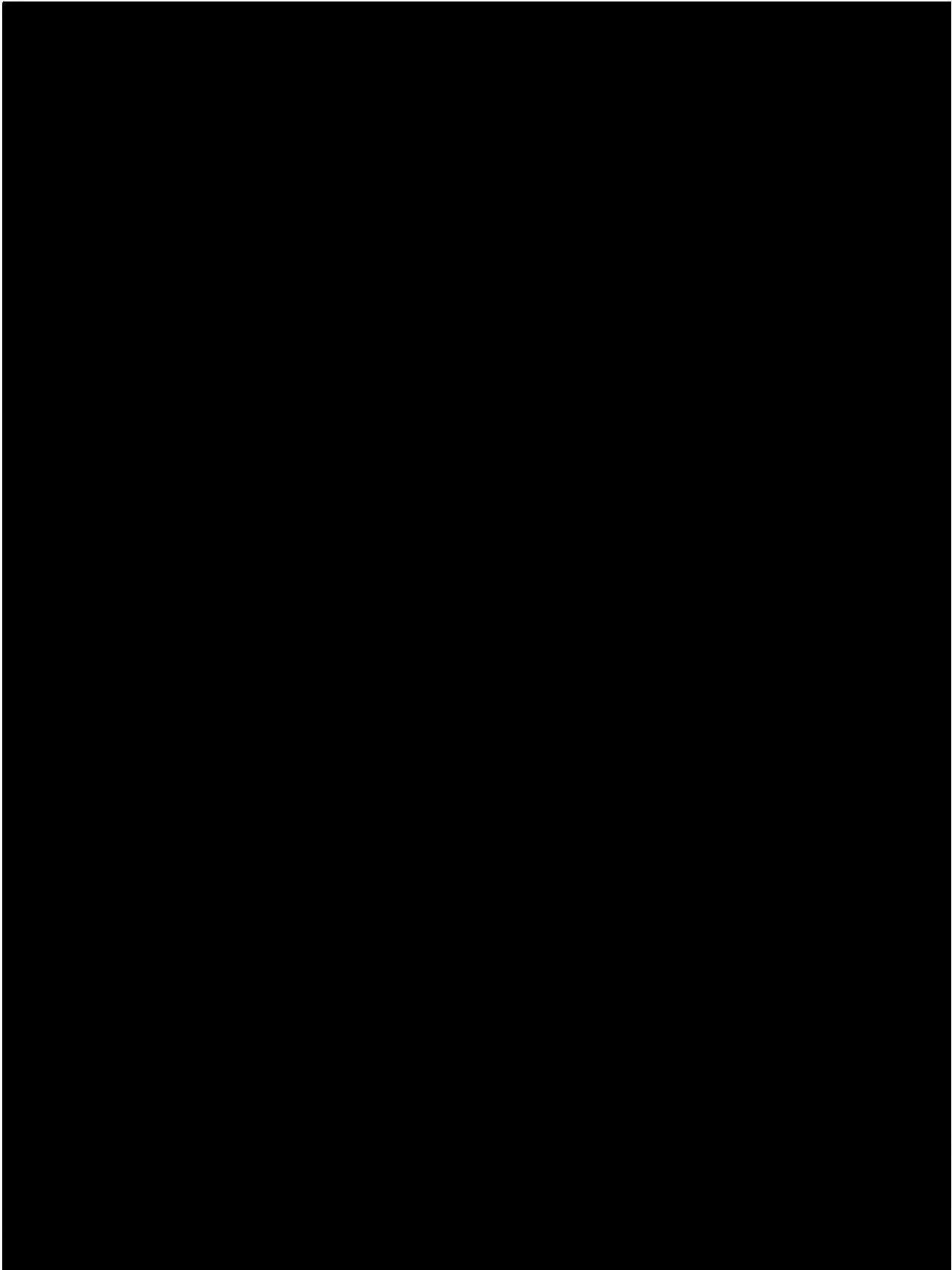


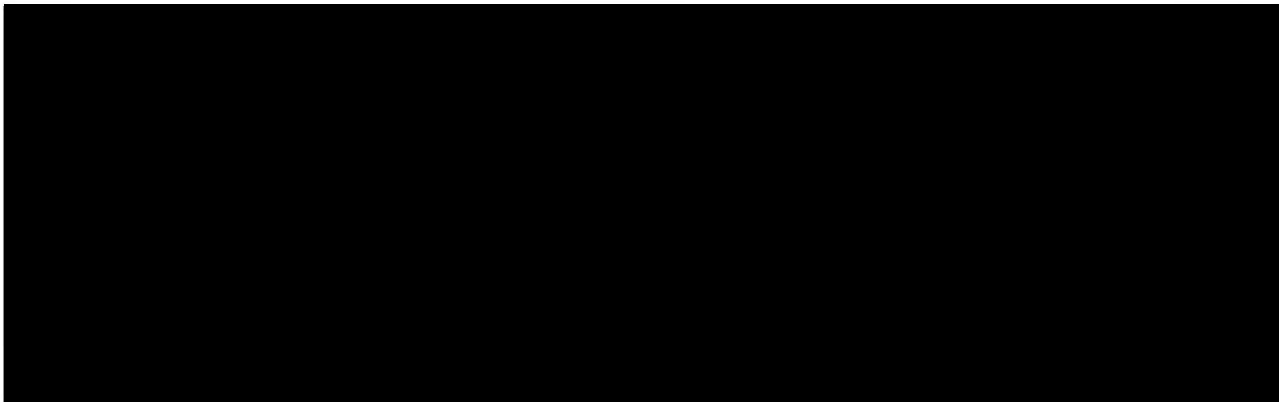
8. Confidentiality. In the performance of the Work, Employee may be exposed to the confidential information of DMP and others. Employee shall not disclose to anyone not employed by DMP or Desert Mountain Associates, Inc. (DMP's listing agent for property in Desert Mountain) nor use, except on behalf of DMP or DMA, any such confidential information acquired by it in the performance of the Work except as authorized by DMP in writing and, regardless of the term of this Agreement, Employee shall be bound by this obligation until such time as such confidential information shall become part of the public domain. Information regarding all aspects of DMP's business (including the business of Desert Mountain Associates, Inc., Desert Mountain Development Corporation, Sonora Partners Limited Partnership and their respective subsidiaries and affiliates), and information concerning the Work (either directly or indirectly disclosed to Employee or developed by Employee in the performance of the Work), shall be presumed to be confidential except to the extent that same shall have been published in public documents or otherwise made freely available to the general public without restriction. Employee also agrees that it will not disclose to DMP any information it holds subject to any obligation of confidence to any third parties.











IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

Robert E. Jones II

DESERT MOUNTAIN DEVELOPMENT CORPORATION, a Delaware corporation

By:

Jeff Stevens

President and Sole Director of the Board

Exhibit "A"
Compensation

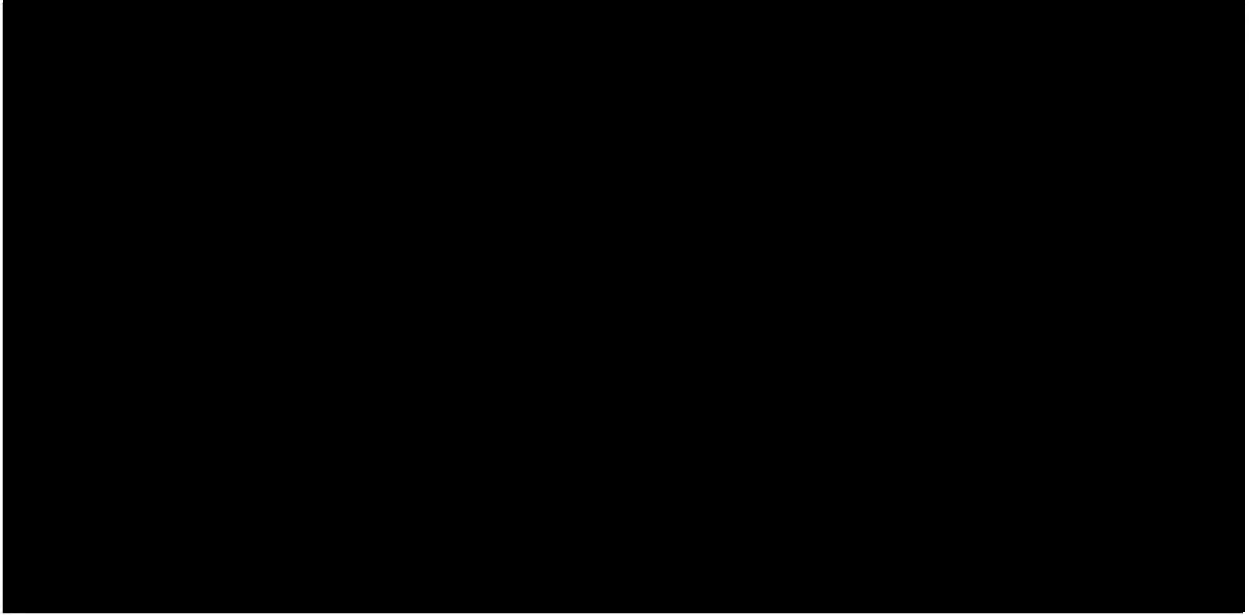


Exhibit 3



Offices in:
Phoenix, Arizona
Las Vegas, Nevada

May 15, 2015

Via U.S. Mail and Electronic Mail

Daryl M. Williams, Esq.
Baird, Williams & Greer, L.L.P.
6225 North 24th Street, Suite 125
Phoenix, Arizona 85016
darylwilliams@bwglaw.net

**Re: May 20, 2015 Deposition of Robert Jones II
Desert Mountain Club, Inc. v. Thomas Clark and Barbara Clark,
Superior Ct. of Ariz., Maricopa Cnty., Case No. CV2014-015334**

Dear Daryl:

This firm represents Robert Jones II in his individual capacity with respect to the Notice of Videotaped Deposition of Robert Jones that you served on counsel for plaintiff Desert Mountain Club, Inc. ("DMCI") in the above-referenced action. Mr. Jones is not a party in the action, but rather an employee of DMCI.

The purpose of this letter is to provide you with advance notice that Mr. Jones is contractually prohibited from disclosing the following information at his deposition:

1. Any confidential information that he acquired in the performance of his duties for the "Desert Mountain Club" while employed by Desert Mountain Properties Limited Partnership, with such confidential information presumptively including all information related to the company's business, as well as that of Desert Mountain Properties Limited Partnership, Desert Mountain Associates, Inc., Desert Mountain Development Corporation, and Sonora Partners Limited Partnership, including their respective subsidiaries and affiliates;
2. The terms of his separation from the companies and partnerships referenced in the preceding paragraph; and
3. Any confidential information that he acquired in the performance of his duties for DMCI, including but not limited to executive compensation, internal policies and procedures, disciplinary practices, and personnel matters.

Daryl M. Williams, Esq.
May 15, 2015
Page 2

With respect to the third category of information, my understanding is that DMCI will consent to Mr. Jones providing testimony regarding his activities as the General Manager/Chief Operating Officer of DMCI pertinent to the club's dealings with Mr. and Mrs. Clark so long as the deposition transcript is marked confidential, is used only in connection with the above-referenced action, and is not disseminated to any individuals who are not parties to the suit or their attorneys. Please notify me in writing by next Monday, May 18, whether your clients are willing to accept these conditions.

Mr. Jones will not answer any questions in the foregoing subject areas (except as described in the preceding paragraph) absent a court order compelling him to do so. I will also be attending the deposition to represent Mr. Jones in his individual capacity, which is the capacity in which he owes these confidentiality obligations.

Sincerely,

s/ Christopher A. LaVoy

Christopher A. LaVoy

cc: Christopher L. Callahan, Esq. (via e-mail: ccallahan@fclaw.com)

Exhibit 4

SCHUKNECHT, SETH

From: CALLAHAN, CHRISTOPHER
Sent: Friday, May 15, 2015 11:14 AM
To: Daryl M. Williams
Cc: SCHUKNECHT, SETH
Subject: FW: Executive Employment Agreement between the Desert Mountain Club and Mr. Jones [FC-Email.FID6446486]

Mr. Williams:

At the request of the President of Desert Mountain Club, Inc., I am forwarding to you an email that I received from him this morning. As you can tell from the email, Bob Jones has a Non-Disclosure Clause in his Employment Agreement with the Club. The Club is willing to waive this clause for purposes of Mr. Jones' deposition in the instant litigation on the condition that the transcript is designated as confidential and is not disseminated outside of the parties, the attorneys and their consultants in this matter.

We would propose that, so as not to disrupt the previously agreed-to deposition schedule, we agree that: (1) the transcript shall be designated as confidential; (2) neither the transcript nor the video recording of the deposition may be provided to anyone other than your clients, your firm, our firm and any consultants retained by either your firm or ours in connection with this matter; (3) the attorneys, their firms and their consultants would be advised that the transcript is confidential and that it may not be further disseminated; and (4) this agreement shall be made without prejudice to your clients' ability to challenge the confidentiality designation at a later date should you feel the need to do so.

Please let me know at your earliest convenience whether you are amenable to this proposal. If you are, please confirm. If not, please let me know as well so that we can make an attempt to bring this matter to the Court's attention. I look forward to hearing from you.

From: Maslick, Joseph [<mailto:jmaslick@griffithlaboratories.com>]
Sent: Friday, May 15, 2015 6:14 AM
To: CALLAHAN, CHRISTOPHER
Subject: Executive Employment Agreement between the Desert Mountain Club and Mr. Jones

Dear Chris:

I understand that the attorney for Tom and Barbara Clark intends to take the deposition of Bob Jones on May 20, 2015 in connection with the Club's lawsuit to collect from the Clarks the amounts that they owe to the Club.

There is an Executive Employment Agreement between the Club and Mr. Jones that contains a Non-Disclosure Clause. That clause provides, in part, as follows:

In performing work for the Club, Executive will be exposed to confidential information of the Club and others. Executive will not at any time, during or after Executive's employment with the Club, without the express written consent of an officer of the Club, publish, disclose, or divulge to any Person . . . any confidential information of the Club.

Executive Employment Agreement, § 8.

The Club regards its executive compensation, internal policies and procedures, disciplinary practices and personnel matters as confidential and subject to Mr. Jones' non-disclosure obligations under the Employment Agreement.

The Club consents to Mr. Jones providing testimony regarding his activities as the General Manager/Chief Operating Officer of Desert Mountain Club, Inc. pertinent to the Club's dealings with Mr. and Mrs. Clark in the deposition so long as the deposition transcript is marked confidential, is used only in connection with the pending lawsuit between the Club and the Clarks and is not disseminated to any individuals who are not parties to the suit or their attorneys.

Please provide a copy of this communication to the Clarks' attorney. Since this consent will allow Mr. Jones to testify fully regarding all matters at issue since the inception of Desert Mountain Club, Inc. and will allow the Clarks' full and complete use of his testimony in the pending action, we trust that he will have no objection to this position. Please let us know his position as soon as he responds to this notification.

Joseph Maslick
President
Desert Mountain Club, Inc.