

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
06-CVS-2941

CLASSIC COFFEE CONCEPTS, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 J. MICHAEL ANDERSON, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**TRIAL BRIEF OF COUNTERCLAIM - DEFENDANT**  
**CLASSIC COFFEE CONCEPTS, INC.**

Classic Coffee Concepts, Inc. (“Classic Coffee”) respectfully submits this Trial Brief and says:

**I. PROCEDURAL HISTORY.**

At its root, this case involves a dispute between defendant/counterclaimant Michael Anderson and plaintiff/counterclaim-defendant Classic Coffee Concepts, Inc. (“Classic Coffee” or the “Company”) about how much Classic Coffee is required to pay him for his stock in the Company as a result of the termination of his employment in July, 2003. On February 13, 2006, Classic Coffee filed its Complaint in this action in Mecklenburg County Superior Court seeking specific enforcement of a Stockholders Agreement under which Anderson is required to sell his interest in Classic Coffee back to the Company, but has refused to do so. On April 21, 2006, Anderson answered the Complaint and also asserted four separate counterclaims (the “Counterclaims”) alleging causes of action for Breach of Contract, Unconscionability, Breach of Employment Contract and Judicial Dissolution. Following the filing of the Counterclaims,

Classic Coffee designated this action as a complex business case on May 11, 2006, and the matter was referred to the Business Court by the Chief Justice.

On June 22, 2006, Classic Coffee filed a motion to dismiss defendant's counterclaims for unconscionability and judicial dissolution, which the Court granted by Order dated December 1, 2006. On April 24, 2007, plaintiff dismissed its complaint. Defendant has now stipulated to the dismissal of its counterclaim for Breach of Employment Contract, thus leaving the only issue before the Court the resolution of defendant's remaining counterclaim for breach of contract.

## **II. SUMMARY OF THE FACTS AND COUNTERCLAIM.**

Anderson was employed by Classic Coffee in various capacities until his employment was terminated on July 22, 2003. In addition to being an employee of Classic Coffee, when he was terminated he was a stockholder in the Company (Anderson owned one-third of the issued and outstanding shares of the Company's common stock), a Director, and the Chief Financial Officer. Anderson and Classic Coffee were parties to a Stockholders Agreement (the "Stockholders Agreement"), each dated as of December 5, 2000. In his First Cause of Action (Breach of Contract), Anderson asserts a claim for breach of the Stockholders Agreement.

Anderson claims that Classic Coffee breached the Stockholders Agreement by: (i) failing to properly value the shares of stock the Company is obligated to repurchase from him as a result of his termination, thus resulting in a lower purchase price than Anderson believes is appropriate; (ii) failing to repurchase his stock within 60 days of his termination; (iii) failing to make reasonable efforts to secure his release from certain obligations to Bank of America; (iv) denying his request to sell his shares in the Company to a third party; (v) failing to provide him with certain Company information in a timely manner; and (vi) terminating him before he reached 70 years of age.

The evidence at trial will establish that Anderson is not entitled to recover on his counterclaim because: (i) the shares were properly valued in accordance with the terms of the Stockholders Agreement; (ii) Anderson's shares of stock were pledged to Bank of America during all relevant times and the Company could not repurchase them from him within 60 days of his termination because Bank of America possessed the shares and would not release them to Anderson so he could not thereafter deliver the stock to the Company; (iii) the Company was under no obligation, contractual or otherwise, to obtain the release of Anderson's shares from the stock pledge; (iv) Anderson could not sell his encumbered shares to a third party due to Bank of America's possession of the shares under the stock pledge and, in any event, did not follow the procedure set forth in the Stockholders Agreement to initiate such a sale; (v) although the Company continued to provide Anderson with information it was required to provide to its stockholders, the Stockholders Agreement does not obligate Classic Coffee to provide Anderson with *any* information; and (vi) there was no agreement, in the Stockholders Agreement or otherwise, to employ Anderson through age 70.

### **III. THE FACTS THAT WILL BE ESTABLISHED AT TRIAL.**

#### **A. Background Facts.**

The evidence at trial will establish that Classic Coffee is Delaware corporation with its principal place of business in Mecklenburg County, North Carolina. The Company was formerly known as Mr. Coffee Concepts, Inc., and changed its name to Classic Coffee Concepts, Inc. on April 26, 2002. Defendant/counterclaimant Michael Anderson lives in Statesville, North Carolina.

Classic Coffee is in the business of selling commercial coffee makers, accessories, coffee and related coffee products principally to office cataloguers, the hospitality market and, indirectly, to small businesses both domestically and internationally. Anderson was initially

employed at Classic Coffee as its Controller. Effective December 5, 2000, Anderson became the Chief Financial Officer and Director of and a shareholder in Classic Coffee. In connection with Anderson's promotion to Chief Financial Officer, Anderson and the Company executed an Employment Agreement effective December 5, 2000(the "Employment Agreement"). In addition, Anderson, who owns 15,000 shares of Classic Coffee's issued and outstanding common stock, and the two other stockholders in Classic Coffee executed the Stockholders Agreement, also effective as of December 5, 2000. On July 22, 2003, the Company terminated Anderson's employment without cause pursuant to the terms of the Employment Agreement.

**B. Facts Relevant to Anderson's Breach of Stockholders Agreement Counterclaim.**

With regard to Anderson's claim for breach of the Stockholders Agreement (Anderson's First Cause of Action), the Stockholders Agreement provides in pertinent part:

3.1 Obligations Upon Stockholder's Termination of Employment.

(b) Other Termination. In the event that a Stockholder's employment with the Company is terminated . . . by the Company without Cause, the Company shall be obligated to purchase from such Stockholder, and each such Stockholder hereby binds such Stockholder or such Stockholder's Representative, as applicable, to sell to the Company, all of the Stock owned by such Stockholder on the date of such Stockholder's termination of employment, at the price per share provided in Section 3.2 and on the terms and conditions provided for in Sections 3.3 and 3.4.

3.2 Purchase Price.

(a) General. The price per share at which the Stock of a Stockholder shall be purchased and sold pursuant to Section 3.1(b) shall be equal to the quotient of the "fair market value" of the Company (as defined below) divided by the total number of shares of capital stock of the Company issued and outstanding as of the date of such Stockholder's termination of employment.

(b) Determination of "Fair Market Value." For purposes of this Section 3.2, the "fair market value" of the Company at any time shall be the amount that is equal to the difference of (i) the fair market value of the Company's capital stock determined by the independent appraisal obtained by the ESOP (the "Appraisal") for the most recent valuation that precedes the date of the

Stockholders termination of employment minus (ii) the aggregate liquidation preference of any preferred stock of the Company issued and outstanding as of the date of the Stockholder's termination of employment; provided, however, that if such Stockholder's employment is terminated by the Company without Cause or by the Stockholder with Good Reason, the "fair market value" of the Company shall be redetermined annually on the anniversary date of such Stockholder's termination of employment in the same manner as set forth in this Section 3.2 and Section 3.3(b) for as long as the Company's Adjustable Note (as defined below) issued pursuant to Section 3.3(b) remains outstanding and unpaid.

3.3 Payment of Purchase Price. The purchase price for the Stock to be purchased and sold pursuant to Section 3.1(b) (the "Purchase Price") shall be paid by the Company at the closing, as follows:

\* \* \* \*

(b) Termination of Employment Without Cause or for Good Reason. If the Stockholder's employment with the Company is terminated by the Company without Cause or by such Stockholder for Good Reason, the Purchase Price shall be paid to the Stockholder at the closing by the delivery of the Company's non-negotiable promissory note payable to the Stockholder for the full amount of the Purchase Price in substantially the form attached hereto as Exhibit C (the "Adjustable Note"). The Purchase Price shall be payable in sixty (60) consecutive monthly principal installments, with the first such principal installment being due and payable on the Initial Payment Date, and with each subsequent monthly principal installment payment being due and payable on the last day of each subsequent month until paid. Provided, however, on each anniversary date of such Stockholder's termination of employment until the Adjustable Note is paid, the Purchase Price shall be redetermined in the same manner as set forth in Section 3.2, except that the Appraisal used for purposes of each such redetermination shall be the Appraisal for the most recent valuation that precedes the applicable anniversary date of such Stockholder's termination of employment. If the Purchase Price, as redetermined for a year, is greater than the initial Purchase Price, then the outstanding principal balance of the Adjustable Note as of such date shall be increased by the difference between the redetermined Purchase Price and the initial Purchase Price, so that such Stockholder shall have the benefit of such appreciation in the Company during the term of the Adjustable Note. In such event, the then outstanding principal balance of the Adjustable Note (after reduction for any principal installment payment then due) shall be divided by the number of installment payments remaining to be made to arrive at the amount of each subsequent principal installment payment under the Adjustable Note (subject, however, to applicable increases as a result of the redetermination of Purchase Price each subsequent year). If the redetermined Purchase Price for a year results in a value that is less than the initial Purchase Price, no adjustment shall be made to the Adjustable Note for such year. For example, if the initial Purchase Price is \$100,000, payable in 60 equal \$1,666.67 installments, and on the first anniversary of such Stockholder's termination of

employment the Purchase Price is redetermined to be \$120,000, then the \$20,000 increase in the value of the Purchase Price would be added to the \$80,000 then outstanding principal balance (after payment of the initial 12 installments totaling \$20,000) so that a \$100,000 principal balance would be outstanding, payable in 48 equal installments of \$2,083.33 each. All accrued interest on the Adjustable Note shall be due and payable on each principal installment payment date until the principal balance of the Adjustable Note is paid in full, at which time all accrued interest shall be due and payable. Interest on the Adjustable Note shall be determined at the same rate and in the same manner as the interest on the Note. The Company shall not have the right to prepay all or any part of the unpaid principal balance (including accrued interest, if any) of the Adjustable Note at any time without the consent of the payee Stockholder.

3.4 Closing. The closing of any purchase and sale (or transfer upon any forfeiture) under this Article III shall be consummated on a date determined by the Company within sixty (60) days following (i) the termination of the Stockholder's employment with the Company or (ii) the qualification of the Representative of a deceased Stockholder, as applicable, and the closing shall take place at the principal offices of the Company in Charlotte, North Carolina, or at such other place as may be mutually agreed upon by the Company and the Stockholder or, if applicable, the Stockholder's Representative. At the closing, the Stockholder or the Stockholder's Representative, as applicable, shall deliver to the Company all of the certificates representing the Stockholder's Stock, properly endorsed, and such papers, certificates and documents (including without limitation, and if applicable, a certificate of representations and warranties, guaranteed signatures and endorsements, a general release, an inheritance tax waiver, an affidavit regarding payments of debts and a bond for federal, state and other death taxes) as the Company may reasonably request. At the closing, the Stockholder or the Stockholder's Representative, as applicable, shall transfer good title to the Stock to the Company, which shall receive such Stock free and clear of all liens, claims and encumbrances of all others whomsoever.

In summary, the Stockholders Agreement requires Classic Coffee to purchase, and the stockholder whose employment is terminated without Cause to sell, all of the Company's stock held by such stockholder. Stockholders Agreement at ¶3.1(b). The purchase price per share shall be "equal to the quotient of the 'fair market value' of [Classic Coffee] divided by the total number of shares . . . issued and outstanding." *Id.* at 3.2(a). Classic Coffee's 'fair market value' is defined as the difference between the fair market value of the Company's capital stock determined by the independent appraisal of the Employee Stock Ownership Plan and Trust ("ESOP") "for the most recent valuation that precedes the date of the Stockholders termination

of employment” and the aggregate liquidation preference of any preferred stock issued and outstanding on the date of the termination of the stockholder’s employment. *Id.* at 3.2(b). The purchase price is then paid to the stockholder by equal monthly payments on a 60-month promissory note. With regard to stockholders who are terminated “without Cause,” the Stockholders Agreement requires that the ‘fair market value’ be annually redetermined on the anniversary date of the stockholder’s termination and that any increase in the value of the stock be added to the purchase price. *Id.* at ¶3.3(b). Finally, the transaction is to be completed within 60 days of the stockholder’s termination. *Id.* at ¶3.4.

As noted above, Anderson owns 15,000 shares of Classic Coffee’s issued and outstanding shares of common stock. However, Anderson’s stock was pledged to Bank of America as security for two term loans and one revolving line of credit that Bank of America made to Classic Coffee in December 2000. The Stockholders Agreement expressly recognizes that its terms are subordinate to the stock pledge to Bank of America:

1.2 Transfer Restrictions.

\* \* \* \*

(b) Stock Pledge to Bank. Notwithstanding the provisions of this Agreement to the contrary, as of the date of the execution of this Agreement the Stock owned by each Stockholder is pledged to Bank of America, N.A. (the “Bank”) to secure contingent obligations of each Stockholder as a guarantor of the Company in connection with a credit facility extended by the Bank to the Company of even date herewith. Each Stockholder acknowledges (i) that he has received a copy of the instruments setting forth the terms of each pledge of the Stock (the “Stock Pledge”) and (ii) that the provisions of this Agreement are subordinate to and in all respects subject to the security interest of the Bank in the Stock. If one of the events described in Article II or III of this Agreement occurs prior to the time that all of a Stockholder’s Stock is released from the Stock Pledge, the Company, if otherwise permitted under the terms of the Stock Pledge, may exercise its rights pursuant to Article II and shall exercise its rights pursuant to Article III to purchase said pledged Stock. In such event, the total purchase price for the Stock shall be determined in accordance with this Agreement and the Company shall be entitled to a dollar-for-dollar credit against the purchase price to be paid to such Stockholder for the Stock for any amounts paid to the Bank to

retire the obligation of the Stockholder to the Bank or to otherwise obtain the release of the pledged Stock from the Stock Pledge. Such dollar-for-dollar credit for amounts paid to the Bank shall be applied against and deducted from payments otherwise due and owing the Stockholder in chronological order of payment. Upon the release of any shares of Stock from the Stock Pledge prior to an event occurring as described in Articles II or III of this Agreement, such Stock shall automatically be subject to all of the terms and conditions of this Agreement without further action on the part of the Stockholder or the Company as if such Stock had never been subject to any such pledge or encumbrance.

Because Anderson's stock was still pledged to Bank of America as of the date of his termination on July 22, 2003, it was impossible for the Company to redeem Anderson's stock in accordance with the terms of the Stockholders Agreement without the Bank's consent. Shortly after the Company terminated Anderson's employment, it requested that Bank of America release his shares from the stock pledge so that the Company could purchase his shares from him in accordance with the Stockholders Agreement. Because the Company still owed substantial sums to Bank of America, it refused to release Anderson's shares; thus, Anderson would not have been able to deliver his shares to the Company at the time.

In November, 2005, Classic Coffee began negotiating a refinancing of its credit arrangements with Bank of America. In connection with those negotiations, the Company raised the issue of the release of Anderson's shares from the stock pledge. Bank of America's representatives said that, in connection with the planned refinancing, the bank would allow Anderson's shares to be released from the stock pledge so that the Company could repurchase them.

The evidence at trial will also establish that Classic Coffee never established an ESOP and that no appraisal of the Company's stock value had been prepared prior to Anderson's termination. Thus, it was impossible for the ESOP to obtain an appraisal of the fair market value of the Company as required in section 3.2(b) of the Stockholders Agreement. However, the evidence will also establish that in 2004 the Company retained Marshall & Stevens to perform a

valuation for the purpose of determining the Company's fair market value as of December 31, 2002 as if an ESOP were in place on that date (the "2002 Appraisal") and of determining the fair market value of Anderson's 15,000 shares of common stock. According to the 2002 Appraisal, the fair market value of Anderson's stock as of December 31, 2002, calculated in accordance with the provisions of the Stockholders Agreement, was \$120,000.

Because the Stockholders Agreement provides that Anderson is entitled to the benefit of any appreciation in the fair market value of his stock for a period of five years after his termination, Classic Coffee had Marshall & Stevens perform another fair market value appraisal as of December 31, 2004 for a hypothetical ESOP (the "2004 Appraisal"). The 2004 Appraisal placed the fair market value of Anderson's stock at \$192,000.<sup>1</sup> The evidence at trial will establish that the Company commissioned the later appraisal in connection with its negotiations with Bank of America for the release of the pledge on Anderson's stock and in anticipation of offering to purchase Anderson's stock once that stock was unencumbered and Anderson had the ability to sell it in accordance with the terms of the Stockholders Agreement.

By letter, dated December 14, 2005, Classic Coffee notified Anderson of the bank's willingness to release his stock from the pledge and asked Anderson to cooperate in making arrangements to sell his stock to the Company as expeditiously as possible. In its December 14, 2005 letter, Classic Coffee offered Anderson \$192,000 for his 15,000 shares of stock (based on the inaccurate 2004 Appraisal). Anderson, however, refused to sell.

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<sup>1</sup> The evidence at trial will establish that the fair market value for Classic Coffee set forth in the 2004 Appraisal is incorrect as the result of an error Marshall & Stevens made in the appraisal. Marshall and Stevens issued a letter, dated March 6, 2007, in which it noted that it had failed to consider a certain agreement between Classic Coffee and another company, and that inclusion of that agreement in its calculations would have resulted in the value of the equity of Classic Coffee being zero as of December 31, 2004. In accordance with this information, Classic Coffee's position is that the purchase price for Anderson's stock is \$120,000 – the amount set forth in the 2002 Appraisal.

#### **IV. ANDERSON WILL NOT PREVAIL ON HIS COUNTERCLAIM.**

##### **A. Anderson cannot establish breach of the Stockholders Agreement.**

##### **1. The Company has substantially complied with the Stockholders Agreement's terms respecting the purchase of Anderson's stock.**

Anderson has made it clear during discovery that his principal complaint with respect to the Company's offer to purchase his stock is the price the Company offered him for that stock. The Stockholders Agreement provides that "the 'fair market value' of the Company at any time shall be determined in conjunction with an independent appraisal obtained by the Company's ESOP." As previously noted, the Company never established an ESOP, so there was no ESOP to obtain the appraisal. Because there was no ESOP established to obtain the appraisal, the Company itself retained Marshall & Stevens, a nationally respected independent appraisal firm, to provide independent appraisals of Classic Coffee's fair market value as if an ESOP were in place. Based on the 2002 Appraisal the fair market value of Andersons' stock as of December 31, 2002 was \$120,000. As noted above, Marshall & Stevens has informed Classic Coffee that the 2004 Appraisal was incorrect because of a material mistake in calculating the fair market value of the Company. Thus, rather than having a value of \$192,000 as of December 31, 2004, Anderson's stock in Classic Coffee is worthless as of that date except for whatever value it might have as a speculative investment.

Anderson has failed to identify any damages the Company's failure to fund an ESOP has caused him other than to vaguely speculate that the lack of an ESOP "could have depressed the value of the stock."<sup>2</sup> Anderson Dep. at 64. Classic Coffee will present evidence at trial that the 2002 and 2004 Valuations were performed as if an ESOP had been funded and that Anderson's

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<sup>2</sup> The Company is not required to fund an ESOP under the Stockholders Agreement, the Employment Agreement, or any other agreement.

stock has been valued in accordance with the Stockholders Agreement. In contrast, Anderson has not designated any expert witnesses in this case and will be unable to offer evidence challenging the methodology of the 2002 and 2004 Valuations.<sup>3</sup>

**2. Anderson cannot prevail on his claims that Classic Coffee should have repurchased his stock within sixty days of his termination.**

In its sixth Interrogatory to Defendant, Classic Coffee asked Anderson to state the factual basis for his claim that Classic Coffee breached the Stockholders Agreement. In his responses to Classic Coffee's Interrogatories (hereafter, "Def. Int. Resp., No. \_\_\_"), Anderson indicates that the "Agreement requires specific time frame." When asked at his deposition what he meant by that statement, Anderson testified that the Stockholders Agreement required the Company to repurchase his stock within 60 days of his termination. *See* Anderson Dep., p. 30-31; 61. As noted above, paragraph 1.2 of the Stockholders Agreement specifically recognizes the fact that the stockholders' shares are pledged to Bank of America. Pursuant to paragraph 1.2(b), "[e]ach Stockholder acknowledges (i) that he has received a copy of the instruments setting forth the terms of each pledge of the Stock (the "Stock Pledge") and (ii) that the provisions of this Agreement are subordinate to and in all respects subject to the security interest of the Bank in the Stock."

In the present case, the facts developed at trial will show that when the parties executed the Shareholders Agreement, Anderson signed a personal guaranty to Bank of America guaranteeing repayment of Classic Coffee's debt. In connection with that guarantee, Anderson also pledged his shares of stock to Bank of America. After Anderson was terminated, and even

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<sup>3</sup> Classic Coffee believes that at trial Anderson will take issue with the Marshall & Stevens appraisals because during his deposition Anderson lodged several personal objections to the methodology used in the Marshall & Stevens appraisal. Anderson, however, concedes that he is not an expert in business evaluations (Anderson Dep., p. 160); therefore, his personal opinions about deficiencies in the Marshall & Stevens appraisals are inadmissible.

though Classic Coffee had no duty to do so, it requested Bank of America to release Anderson's shares so that it could repurchase them; however, the bank was unwilling to do so because of the amount of Classic Coffee's debt. As the Court has already found in this case: "As a result, Classic Coffee could not purchase Anderson's stock within sixty days of the termination of Anderson's employment." December 1, 2006 Order denying Anderson's Motion To Disqualify and granting Classic Coffee's Motion To Dismiss at p.5, ¶24.<sup>4</sup> In any event, Anderson has never quantified any damages in connection with his claim that Classic Coffee should have purchased his stock within 60 days of his termination (Anderson Dep., p. 61), and will not be able to recover on this aspect of his claim that Classic Coffee breached the Stockholders Agreement.

**3. Anderson cannot prevail on his claim that Classic Coffee denied his request to sell his stock to a third party.**

Anderson also alleges that Classic Coffee denied his request to sell his stock to a third party and claims that such denial constitutes a breach of the Stockholders Agreement. *See* Def. Resp. Int. No. 6. Transfers of a shareholder's stock to a third party are governed by Article 2 of the Stockholders Agreement. Article 2.1 provides that "[a] Stockholder may transfer any of such Stockholder's Stock by a bona fide sale only in strict compliance with the terms, conditions and provisions of this Article II." Article 2.2 requires that the shareholder desiring to sell his stock must provide written notice of intent to sell to the Company and to the other stockholders. In addition to notifying the Company and the other stockholders of the selling stockholder's intent to sell, the written notice must specifically identify the proposed purchaser, the number of shares

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<sup>4</sup> Anderson also claims that Classic Coffee did not make reasonable efforts to secure his release from his obligations to the bank. *See* Def. Resp. Int. No. 6. Anderson does not identify the source of any duty on behalf of the Classic Coffee to negotiate on his behalf for the release of his obligations to the bank, and neither the Stockholders Agreement nor the Employment Agreement places such a burden on Classic Coffee. Classic Coffee was not a party to the personal guaranty agreement between Anderson and Bank of America.

and a description of the stock to be sold, and identify the proposed consideration for the sale. Pursuant to Article 2.3, the Company then has 45 days to notify the selling stockholder whether the Company intends to purchase the stock on the same terms and conditions as those offered by the prospective purchaser.

In this case, the evidence adduced at trial will establish that Anderson *never* provided notice to Classic Coffee of his intent to sell his stock to a third person.<sup>5</sup> *See* Anderson Dep., p.128. Furthermore, even if Anderson had followed the requirements of the Stockholders Agreement, he could not have sold his shares of stock to a third party because they were subject to the stock pledge in favor of Bank of America. Because Anderson could not have sold his shares of stock even if he had a prospective purchaser and even if he complied with the terms of the Stockholders Agreement (which he did not), he cannot succeed on his claim that the Company breached the Shareholders Agreement by denying his request to sell his shares to a third party.

**4. The Company had no obligation under the Shareholder's Agreement to provide information to Anderson.**

In addition to his claim that Classic Coffee has undervalued his interest in the Company, Anderson claims that Classic Coffee has breached the Shareholders Agreement by failing to provide him with information “in a timely manner.” *See* Def. Int. Resp., No. 6. Anderson testified during his deposition that the information that Classic Coffee failed to provide him in a timely manner was financial information relating to the Company, including its tax returns. Anderson Dep. p. 28-29. Anderson concedes that he has received the information that he

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<sup>5</sup> At his deposition, Anderson was only able to identify one person he approached about the sale of his stock. Anderson Dep. at 35-36. According to Anderson's own testimony, that person simply indicated he was not interested in acquiring Anderson's stock in Classic Coffee. *Id.* at 41.

requested from the Company except for the Company's tax returns and certain "reviews" related to executive compensation. *Id.* at 29. Anderson couches his claim that the Company failed to provide him information in a timely manner as one for breach of the Stockholders Agreement. Anderson's claim must fail, however, because there is no provision of the Stockholders Agreement that requires the Company to provide him the information about which he complains.

**5. There is no enforceable agreement requiring the Company to employ Anderson through age 70.**

As another part of his claim for breach of the Stockholders Agreement, Anderson contends that the Stockholders Agreement implied his continued employment with the Company until he reached age 70. Def. Int. Resp., No. 6. During his deposition, Anderson testified that he and the other Classic Coffee shareholders had discussions before the execution of the Stockholders Agreement in which they discussed the fact that they would be able to work through age 70. Anderson Dep., p. 31. Anderson characterizes that discussion as an implied term of the Stockholders Agreement. The Stockholders Agreement, however, contains no provision requiring that Anderson be employed through age 70. Furthermore, the Stockholders Agreement contains the following integration clause at paragraph 5.3:

5.3 Entire Agreement. This Agreement contains the entire understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written, except as herein contained, which shall supersede any course of performance inconsistent with any of the terms hereof. This Agreement may not be modified or amended other than by an agreement in writing executed by the parties hereto.

In general, "[t]he parol evidence rule excludes prior or contemporaneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties." *Cable TV, Inc. v. Theatre Supply Co.*, 62 N.C.App. 61, 64-65, 302 S.E.2d 458, 460 (1983). In *Cable TV* the Court held that the parol evidence rule applied to

exclude parol testimony where the written contract included a merger or integration clause which stated that “[t]his instrument constitutes the entire agreement between the parties.... *Id.* Because the discussions on which Anderson relies for the implied term of the agreement requiring him to be employed through age 70 took place before he executed the Stockholders Agreement, and because the agreement contains a valid integration clause, Anderson may not rely on parol evidence of an agreement to employ him through age 70 for a breach of contract claim.

Anderson might argue that the parol evidence rule does not bar his claim that there was an agreement that he would be employed through age 70 because the Stockholders Agreement is silent as to the duration of Anderson’s employment; thus, Anderson might argue that testimony that he would be employed through age 70 is not barred because it is not evidence of an agreement that is inconsistent with the terms of the Shareholders Agreement. Such an argument would be futile because the term of Anderson’s employment was addressed in the Employment Agreement, which specifically states that Anderson may be terminated at any time without cause. Employment Agreement, ¶ 1.5(b). Furthermore, like the Shareholders Agreement, the Employment Agreement contains an integration clause that states that the Employment Agreement is the “entire understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written, except as herein contained, which shall supersede any course of performance inconsistent with any of the terms hereof.”

This the 11<sup>th</sup> day of September, 2007.

**MAYER BROWN LLP**

By: /s/ Eric H. Cottrell  
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Coffee Concepts, Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **TRIAL BRIEF OF COUNTERCLAIM-DEFENDANT CLASSIC COFFEE CONCEPTS, INC.** was served via U.S. Mail this 11<sup>th</sup> day of September 2007, upon the following:

Ned McNaughton  
Gregory L. Shelton  
McNaughton & Shelton, PLLC  
2210-A Crown Point Drive  
Charlotte, NC 28227

/s/ Eric H. Cottrell \_\_\_\_\_  
Eric H. Cottrell