

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

PARTNERS COFFEE COMPANY, LLC,

Plaintiff,

v.

OCEANA SERVICES AND PRODUCTS  
COMPANY, *et al.*,

Defendants.

Civil Action No. 2:09cv236

The Honorable William L. Standish

Electronically filed

**ANSWER, NEW MATTER, AND COUNTERCLAIMS TO  
PLAINTIFF'S THIRD AMENDED COMPLAINT**

Defendants Oceana Services and Products Company ("Oceana") and Anne C. Gilson, Executrix of the Estate of James S. Gilson (Deceased) (the "Estate"), by and through their attorneys, Morella & Associates, a Professional Corporation, answers the Third Amended Complaint of Plaintiff, Partners Coffee Company, LLC ("Partners"), and in support thereof, aver as follows:

**I. NEGATIVE DEFENSES**

1. Defendants admit the allegations contained in Paragraph 1 of the Third Amended Complaint.
2. Defendants admit James S. Gilson's ("Mr. Gilson") last known address. Defendants deny the remaining allegations contained in Paragraph 2 of the Third Amended Complaint.
3. Defendants admit the allegations contained in Paragraph 3 of the Third Amended Complaint.
4. Defendants admit the allegations contained in Paragraph 4 of the Third Amended Complaint.

5. The allegations contained in Paragraph 5 of the Third Amended Complaint are admitted in part and denied in part. It is denied that Defendants are currently involved in the coffee business, including roasting, producing, and selling coffee and coffee-related transactions. Rather, after the sale of its Assets, Oceana was in the business of providing consulting services regarding the development of food and beverage safety and security programs for manufacturing companies. Defendants admit the remainder of the allegations contained in Paragraph 5 of the Third Amended Complaint.

6. The allegations contained in Paragraph 6 of the Third Amended Complaint are conclusions of law to which no response is required.

7. The allegations contained in Paragraph 7 of the Third Amended Complaint are conclusions of law to which no response is required.

8. The allegations contained in Paragraph 8 of the Third Amended Complaint are conclusions of law to which no response is required.

9. Defendants admit Mr. Gilson was an owner and was authorized to act on behalf of Oceana. Defendants deny the remaining allegations contained in Paragraph 9 of the Third Amended Complaint.

10. Defendants admit the allegations contained in Paragraph 10 of the Third Amended Complaint.

11. Defendants admit the allegations contained in Paragraph 11 of the Third Amended Complaint.

12. The allegations contained in Paragraph 12 of the Third Amended Complaint concern a writing which speaks for itself, and no response is required. To the extent that a response is required, Defendants admit that Partners Coffee Company, LLC, Partners Coffee

Company, Inc., and James S. Gilson entered into an Asset Purchase Agreement dated May 2, 2008, which Plaintiff has breached.

13. The allegations contained in Paragraph 13 of the Third Amended Complaint concern a writing which speaks for itself, and no response is required. To the extent that a response is deemed necessary, Defendants admit that they made the representations and warranties set forth in the Asset Purchase Agreement. Defendants further state that any and all representations and warranties related to the assets addressed in the Asset Purchase Agreement are limited to those representations and warranties set forth in the Asset Purchase Agreement.

14. Defendants deny the allegations contained in Paragraph 14 of the Third Amended Complaint.

15. Defendants deny the allegations contained in Paragraph 15 of the Third Amended Complaint.

16. Defendants deny the allegations contained in Paragraph 16 of the Third Amended Complaint.

17. Defendants deny the allegations contained in Paragraph 17 of the Third Amended Complaint.

18. Defendants deny the allegations contained in Paragraph 18 of the Third Amended Complaint.

19. The allegations contained in Paragraph 19 of the Third Amended Complaint refer to and seek to characterize a writing which speaks for itself and, therefore, no response is required. To the extent that a response is deemed necessary, Defendants admit that Partners and Oceana entered into a Consulting Agreement dated May 2, 2008, which Partners has breached. All other allegations are denied.

20. The allegations contained in Paragraph 20 of the Third Amended Complaint refer to and seek to characterize a writing which speaks for itself and, therefore, no response is required.

21. Defendants deny the allegations contained in Paragraph 21 of the Third Amended Complaint.

22. Defendants deny the allegations contained in Paragraph 22 of the Third Amended Complaint.

23. Defendants deny the allegations contained in Paragraph 23 of the Third Amended Complaint.

24. Defendants deny the allegations contained in Paragraph 24 of the Third Amended Complaint.

25. Defendants deny the allegations contained in Paragraph 25 of the Third Amended Complaint.

26. Defendants deny the allegations contained in Paragraph 26 of the Third Amended Complaint.

27. Defendants deny the allegations contained in Paragraph 27 of the Third Amended Complaint.

**Count I**  
**Breach of Asset Purchase Agreement**  
*(Partners v. Oceana and Gilson)*

28. Defendants incorporate their responses to paragraphs 1-27 hereof by reference.

29. The allegations contained in Paragraph 29 of the Third Amended Complaint refer to and seek to characterize a writing which speaks for itself and, therefore, no response is required. To the extent that a response is deemed necessary, Defendants admit that Partners and

Oceana entered into an Asset Purchase Agreement dated May 2, 2008, which Partners has breached.

30. The allegations contained in Paragraph 30 of the Third Amended Complaint concern a writing which speaks for itself, and no response is required. To the extent that a response is deemed necessary, Defendants admit that they made the representations and warranties set forth in the Asset Purchase Agreement. Defendants further state that any and all representations and warranties related to the assets addressed in the Asset Purchase Agreement are limited to those representations and warranties set forth in the Asset Purchase Agreement.

31. Defendants deny the allegations contained in Paragraph 31 of the Third Amended Complaint.

32. Defendants deny the allegations contained in Paragraph 32 of the Third Amended Complaint.

33. The allegations contained in Paragraph 33 of the Third Amended Complaint are conclusions of law to which no response is required. To the extent a response is required, the allegations concern a writing which speaks for itself and mischaracterizations thereof are denied.

34. Defendants deny the allegations contained in Paragraph 34 of the Third Amended Complaint.

35. Defendants deny the allegations contained in Paragraph 35 of the Third Amended Complaint.

36. The allegations contained in Paragraph 36 of the Third Amended Complaint are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

37. Defendants deny the allegations contained in Paragraph 37 of the Third Amended Complaint.

**Count II**  
**Fraud**

*(Partners v. Gilson & Oceana)*

38. Defendants incorporate their responses to paragraphs 1-37 hereof by reference.

39. The allegations contained in Paragraph 39 of the Amended Complaint are statements and/or legal conclusions to which no response is required. To the extent that a response is deemed necessary, Defendants deny the allegations contained in Paragraph 39 of the Third Amended Complaint.

40. Defendants deny the allegations contained in Paragraph 40 of the Third Amended Complaint.

41. Defendants deny the allegations contained in Paragraph 41 of the Third Amended Complaint.

42. Defendants deny the allegations contained in Paragraph 42 of the Third Amended Complaint.

43. Defendants deny the allegations contained in Paragraph 43 of the Third Amended Complaint.

44. The allegations contained in Paragraph 44 of the Third Amended Complaint are statements and/or legal conclusions to which no response is required. To the extent that a response is deemed necessary, Defendants deny the allegations contained in Paragraph 44 of the Third Amended Complaint.

45. Defendants deny the allegations contained in Paragraph 45 of the Third Amended Complaint.

**Count III**  
**Breach of Consulting Agreement**  
*(Partners v. Oceana)*

46. Defendants incorporate their responses to paragraphs 1-45 hereof by reference.

47. Defendants admit the allegations contained in Paragraph 47 of the Third Amended Complaint.

48. The allegations contained in Paragraph 48 of the Third Amended Complaint refer to and seek to characterize a writing which speaks for itself and, therefore, no response is required. Further, the allegations contained in Paragraph 48 of the Third Amended Complaint are statements and/or legal conclusions to which no response is required.

49. The allegations contained in Paragraph 49 of the Third Amended Complaint are statements and/or legal conclusions to which no response is required. To the extent that a response is deemed necessary, Defendants deny the allegations contained in Paragraph 49 of the Third Amended Complaint.

50. Defendants deny the allegations contained in Paragraph 50 of the Third Amended Complaint.

51. Defendants deny the allegations contained in Paragraph 51 of the Third Amended Complaint.

52. The allegations contained in Paragraph 52 of the Third Amended Complaint are statements and/or legal conclusions to which no response is required. To the extent that a response is deemed necessary, Defendants deny the allegations contained in Paragraph 52 of the Third Amended Complaint.

53. Defendants deny the allegations contained in Paragraph 53 of the Third Amended Complaint.

**Count IV**  
**Conversion**

*(Partners v. Gilson & Oceana)*

54. Defendants incorporate their responses to paragraphs 1-54 hereof by reference.

55. Defendants deny the allegations contained in Paragraph 55 of the Third Amended Complaint.

56. The allegations contained in Paragraph 56 of the Third Amended Complaint are statements and/or legal conclusions to which no response is required. To the extent that response is deemed necessary, Defendants deny the allegations contained in Paragraph 56 of the Third Amended Complaint.

57. Defendants deny the allegations contained in Paragraph 57 of the Third Amended Complaint.

**Count V**

**Violation of U.S.C. § 1030 (The Computer Fraud and Abuse Act)**

*(Partners v. Gilson & Oceana)*

58. Defendants incorporate their responses to Paragraphs 1-57 hereof by reference.

59. Defendants deny the allegations contained in Paragraph 59 of the Third Amended Complaint.

60. Defendants deny the allegations contained in Paragraph 60 of the Third Amended Complaint.

61. Denied as stated. Partners provided Gilson with an e-mail account so that he could provide consulting services to Partners on behalf of Oceana, as set forth in the Consulting Agreement.

62. Defendants deny the allegations contained in Paragraph 62 of the Third Amended Complaint.



**Count VI**  
**Misappropriation of Trade Secrets**  
*(Partners v. Gilson & Oceana)*

63. Defendants incorporate their responses to paragraphs 1-62 hereof by reference.

64. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 64 of the Third Amended Complaint.

65. The allegations contained in Paragraph 65 of the Third Amended Complaint are statements and/or legal conclusions to which no response is required.

66. Defendants deny the allegations contained in Paragraph 66 of the Third Amended Complaint.

67. Defendants deny the allegations contained in Paragraph 67 of the Third Amended Complaint.

68. Defendants deny the allegations contained in Paragraph 68 of the Third Amended Complaint.

**Count VII**  
**Improper Procurement of Information**  
*(Partners v. Gilson & Oceana)*

69. Defendants incorporate their responses to paragraphs 1-68 hereof by reference.

70. Defendants deny the allegations contained in Paragraph 70 of the Third Amended Complaint.

71. Defendants deny the allegations contained in Paragraph 71 of the Third Amended Complaint.

72. Defendants deny the allegations contained in Paragraph 72 of the Third Amended Complaint.

**Count VIII**  
**Trespass**

*(Partners v. Gilson & Oceana)*

73. Defendants incorporate their responses to paragraphs 1-72 hereof by reference.

74. The allegations contained in Paragraph 74 of the Third Amended Complaint are statements and/or legal conclusions to which no response is required. To the extent that a response is deemed necessary, Defendants deny the allegations contained in Paragraph 74 of the Third Amended Complaint.

75. Defendants deny the allegations contained in Paragraph 75 of the Third Amended Complaint.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

Plaintiff's Third Amended Complaint fails to state a claim on which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the applicable statutes of limitations.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrines of waiver, laches, estoppel and unclean hands.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the Statute of Frauds.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrine of mistake.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrine of fraud.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrine of set-off.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrine of duress.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred for failure of consideration.

**TENTH AFFIRMATIVE DEFENSE**

Defendants' failure to comply with any alleged obligations under the Asset Purchase Agreement and/or the Consulting Agreement is excused by Plaintiff's own prior breaches of those agreements.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff has suffered no compensable damages.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to mitigate its damages, if any.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims sounding in tort are barred by the gist-of-the-action doctrine.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims sounding in tort are barred by the economic loss doctrine.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by any other matter constituting an avoidance or affirmative defense pursuant to Rule 8 of the Federal Rules of Civil Procedure or any other statute, rule, or authority.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Defendants reserve the right to assert any additional defenses which may arise in the course of discovery or at trial in this matter.

WHEREFORE, Defendants, Oceana Services and Products Company and Anne C. Gilson, Executrix of the Estate of James S. Gilson (Deceased), respectfully request this Honorable Court enter judgment in their favor and against Plaintiff, Partners Coffee Company, LLC, together with costs, attorneys' fees and such other relief as is just and proper.

### **COUNTERCLAIM**

For their Counterclaim against Partners Coffee Company, LLC ("Partners), Oceana Services and Products Company ("Oceana") and James S. Gilson (deceased) ("Mr. Gilson") (collectively, "Counterclaimants") state as follows:

#### **I. INTRODUCTION**

1. On May 2, 2008, Oceana sold most of its assets to Partners.
2. The transaction required payment by Partners to Oceana upon closing (May 2, 2008) and for Partners to retain Oceana as a consultant and, among others, Anne C. Gilson ("Mrs. Gilson") as an employee.
3. On false pretenses, Partners failed to pay the full purchase price at closing and has not paid the full purchase price to date. In addition, it terminated Oceana as a consultant on false pretenses and failed to hire Mrs. Gilson.

#### **II. PARTIES**

4. Counterclaim Plaintiff Oceana is a Georgia corporation with a principal place of business located at 154 Helmswood Circle, Marietta, Georgia.

5. After May 2, 2008 and prior to Mr. Gilson's death, Oceana provided consulting services regarding the development of food and beverage safety and security programs for manufacturing companies.

6. Oceana was formerly known as Partners Coffee Company, Inc.

7. Counterclaimant Anne C. Gilson, Executrix of the Estate of James S. Gilson (Deceased) (the "Estate"), is the Executrix for the Estate. Mrs. Gilson is a resident of the state of Georgia with an address of 154 Helmswood Circle, Marietta, Georgia and owns Oceana.

8. Upon information and belief, Counterclaim Defendant Partners is a Delaware limited liability company, whose sole member is a resident of Pennsylvania.

### **III. JURISDICTION & VENUE**

9. Jurisdiction is proper pursuant to 28 U.S.C. § 1332 where the matter in controversy exceeds the sum or value of \$75,000 and there is complete diversity between the Counterclaim Plaintiffs, who reside in Georgia, and the Counterclaim Defendant, who resides in Pennsylvania.

10. Jurisdiction is proper pursuant to Fed. R. Civ. P. 13(a) and 28 U.S.C. § 1367 where the Counterclaims are so related to Partners' Claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

11. Venue is proper pursuant to ¶14.8 of the Asset Purchase Agreement (attached hereto as Exhibit "A" and incorporated by reference) and ¶14 of the Consulting Agreement (attached hereto as Exhibit "B" and incorporated by reference).

### **IV. BACKGROUND**

12. Prior to May 2, 2008, Oceana and Mr. Gilson had a long standing (ten years) business relationship with Hometown Coffee Company (“Hometown”) and its President, Thomas P. Kazas (“Mr. Kazas”). To wit, Oceana supplied Hometown with coffee.

13. Prior to May 2, 2008, Mr. Gilson and Mr. Kazas discussed the sale of Oceana (then known as Partners Coffee Company, Inc.).

14. The parties negotiated and agreed to terms including, for example, that the transaction would be an asset purchase (as opposed to a stock purchase), the purchase price, and the date for payment of the purchase price. In addition, it was contemplated that the purchaser would be a company Mr. Kazas or Hometown Coffee Company would form specifically for this transaction.

15. Mr. Kazas or Hometown Coffee Company then formed (or caused to be formed on his behalf) that new company, Partners Coffee Company, LLC, specifically for this transaction.

16. Closing was set to occur on May 2, 2008.

17. At closing, a number of documents would be signed and/or provided including an Asset Purchase Agreement, Bill of Sale, Assignment and Assumption Agreement (Real Property Lease), Consent of Landlord to Assignment and Assumption Agreement, Assignment of Intellectual Property, Consulting Agreement, Restrictive Covenant Agreement, and others.

**A. The Asset Purchase Agreement**

18. The Asset Purchase Agreement provided for the sale of substantially all of the business and operating assets owned or utilized by Oceana in connection with its business of purchasing, processing, and packaging coffee products.

19. A material term of the Asset Purchase Agreement was, *inter alia*, that Oceana would be paid by Partners \$800,000 in full at closing.

20. At the closing, Partners did not pay the purchase price as required by the Asset Purchase Agreement.

21. Instead, on the scheduled closing date of May 2, 2008, Partners represented that it was obtaining bank financing to pay the purchase price and that the funding would be completed on May 5, 2008 if Partners received all of the signed closing documents by that date.

22. Partners' agents, its attorneys, made this representation on a telephone conference call with Mr. Gilson. Mr. Kazas participated in this teleconference call on behalf of Partners.

23. In fact, Partners' attorneys told Mr. Gilson that Partners had completed its loan agreement and its lender was to transfer the required funds into Partners' attorneys' escrow account. This was false. The funds transferred never occurred and Partners' attorneys were unable to explain why.

24. Relying on these representations, Mr. Gilson executed all of the relevant documents including, but not limited to, the Asset Purchase Agreement and the Consulting Agreement, and forwarded the same to Partners' attorneys.

25. On May 5, 2008, Partners' attorneys confirmed via telephone that they had received Mr. Gilson's correctly signed documents. Partners' attorneys also stated that Mr. Kazas had still not signed one of the necessary documents on behalf of Partners, but that the necessary document was in route via courier.

26. Later on May 5, 2008, Partners' attorneys told Mr. Gilson that he could not locate Mr. Kazas, whom he believed to be out of the country, and that the funds would **not** be transferred that day.

27. Oceana and Mr. Gilson later learned that Mr. Kazas was not out of the country during this timeframe, but was instead in Las Vegas, Nevada.

28. On May 8, 2008, Partners' attorneys advised that Partners was looking into a second lending source and needed to determine which lender was offering the best deal for Partners.

29. Oceana and Mr. Gilson relied on Partners, Mr. Kazas, and their agents' representations that bank financing had been secured to pay the full purchase price and that the full purchase price would be paid.

30. Partners has never paid the full purchase price.

31. In addition, the Asset Purchase Agreement provides that Oceana and Mr. Gilson are entitled to all accounts receivables of Oceana existing on the closing date. See Ex. "A," ¶2.2.

32. Nevertheless, Partners has improperly retained monies paid in connection with accounts receivables existing on or before the closing date.

33. Partners was also required to employ Mrs. Gilson pursuant to ¶4.1 of the Asset Purchase Agreement. See Ex. "A." It has not done so.

## **B. The Consulting Agreement**

34. In connection with the Asset Purchase Agreement, Partners and Oceana executed a Consulting Agreement dated May 2, 2008.

35. Pursuant to the Consulting Agreement, Partners retained Oceana to provide services, through Gilson, to Partners through April 30, 2011, with an option for Partners to extend the terms of the Agreement for two consecutive one year periods thereafter.

36. Execution of the Consulting Agreement was a condition precedent to the parties entering into the Asset Purchase Agreement.



37. After Partners failed to pay the purchase price as required under the Asset Purchase Agreement, Partners wrongfully purported to terminate the Consulting Agreement, thereby depriving Oceana of the compensation that it was to receive thereunder.

**C. The Economic Harm**

38. Partners has failed to pay Oceana \$380,000 towards the purchase price as required by the Asset Purchase Agreement.

39. Partners owes Oceana approximately \$20,000 for the accounts receivables Partners improperly retained.

40. Partners has failed to pay Oceana \$105,159.42 towards the Consulting Agreement.

41. Partners has failed to pay Oceana the performance bonus of approximately \$35,416.65 pursuant to the Consulting Agreement.

42. Partners has failed to pay Oceana the Retention Bonus of approximately \$35,416.65 pursuant to the Consulting Agreement.

43. Partners has failed to pay Oceana the Three Year Consulting Agreement Contingent EBITDA Based Bonus pursuant to the Consulting Agreement.

44. Partners owes \$90,000 for failing to employ Mrs. Gilson as an employee/consultant.

45. Oceana is owed statutory interest.

46. Oceana and Mr. Gilson are entitled to reimbursement from Partners for all expenses incurred by them in connection with the Asset Purchase Agreement including, but not limited to, reasonable attorneys' fees actually incurred. See Ex. "A," ¶12.3.

47. Partners' conduct is especially egregious and involves acts that are malicious, wanton, reckless, willful, and/or oppressive.

**V. CLAIMS**

**COUNT I**  
**BREACH OF CONTRACT – ASSET PURCHASE AGREEMENT**  
**OCEANA & GILSON vs. PARTNERS**

48. Oceana and the Estate incorporate paragraphs 1 through 46 of their Counterclaim as if fully set forth herein.

49. Partners entered into a contract with Oceana and Mr. Gilson. The Asset Purchase Agreement is the contract and sets forth the essential terms of their agreement. See Ex. "A."

50. Oceana and Mr. Gilson complied with the contract's terms. To wit, they have fulfilled all duties, obligations and conditions precedent with regard to enforcement of the Asset Purchase Agreement.

51. As set forth above, Partners has substantially and materially breached the terms of the Asset Purchase Agreement by

- a. failing and refusing to pay to Oceana the purchase price as required thereunder;
- b. improperly retaining accounts receivables; and
- c. failing to employ Mrs. Gilson.

52. Partners breached the contract's implied covenant of good faith and fair dealing by attempting to evade the spirit of the bargain, utilizing subterfuges and inaction to evade its obligations, and willfully rendering imperfect performance.

53. Despite demand, Partners has failed and refused to remedy its breach of the Asset Purchase Agreement.

54. Oceana and the Estate have suffered and will continue to suffer substantial damages as a result of Partners' breach of the Asset Purchase Agreement.

**COUNT II**  
**BREACH OF CONTRACT – CONSULTING AGREEMENT**  
**OCEANA vs. PARTNERS**

55. Oceana and the Estate incorporate paragraphs 1 through 46 of their Counterclaim as if fully set forth herein.

56. Partners entered into a contract with Oceana. The Consulting Agreement is the contract and sets forth the essential terms of their agreement. See Ex. “B.”

57. Oceana has fulfilled all duties, obligations and conditions precedent with regard to enforcement of the Consulting Agreement.

58. As set forth above, Partners has substantially and materially breached the terms of the Consulting Agreement by impermissibly purporting to terminate the Consulting Agreement.

59. Despite demand, Partners has failed and refused to remedy its breach of the Consulting Agreement.

60. Oceana has suffered and will continue to suffer substantial damages as a result of Partners' breach of the Consulting Agreement.

**COUNT III**  
**FRAUD-IN-THE-INDUCEMENT**  
**(OCEANA AND GILSON vs. PARTNERS)**

61. Oceana and the Estate incorporate paragraphs 1 through 47 of their Counterclaim as if fully set forth herein.

62. Partners, itself and its authorized agents, represented to Oceana and Mr. Gilson that:

a. Partners was obtaining bank financing to pay the full purchase price and that funding would be completed on May 5, 2008 if Partners received all of the closing documents fully executed by Oceana by that date;

b. Partners had completed its loan agreement and its lender was to transfer the required funds into Partners' agents' (the law firm representing it in the transaction) escrow account by May 5, 2008;

c. on May 5, 2008 Mr. Kazas was out of the country;

d. on May 8, 2008 Partners was looking into a second lending source and needed to determine which lender was offering the best deal for Partners;

e. Partners would retain Oceana pursuant to a Consulting Agreement for the term of the agreement;

f. Partners would employ or retain Mrs. Gilson as an employee or consultant.

63. Partners, itself and its authorized agents, without privilege, deliberately failed to disclose to Oceana and Mr. Gilson that:

a. Partners had not obtained bank financing by May 2, 2008;

b. Funding for the full purchase price would not be completed on May 5, 2008 if Partners received all of the closing documents fully executed by Oceana by that date;

c. Partners had not completed the loan agreement of its lender (in order to fully finance the transaction) by May 2, 2008;

d. The lender was not to transfer the funds into Partners' agents' (law firm) escrow account by May 5, 2008;

- e. Mr. Kazas was in Las Vegas, Nevada on May 5, 2008;
- f. Upon information and belief, Partners was not looking into a second lending source or, in the alternative, was looking into a second lending source because the first lender could not or would not finance all or part of the transaction;
- g. Partners was undercapitalized;
- h. Partners was unable or unwilling to obtain sufficient debt financing in order to pay the purchase price pursuant to the Asset Purchase Agreement or to finance the Consulting Agreement;
- i. Partners had no intention of retaining Oceana for the term of any Consulting Agreement;
- j. Prior to (and after) executing the documents, Partners intended to promptly terminate the Consulting Agreement after its execution on a false pretext;
- k. Prior to (and after) executing the documents, Partners had no intention of employing or paying Oceana for consulting services as set forth in the Consulting Agreement; and
- l. Prior to (and after) executing the closing documents, Partners never intended to retain or employ Mrs. Gilson as an employee or consultant.

64. The representations were material in that Oceana and Mr. Gilson would not have executed or otherwise entered into the Asset Purchase Agreement, Consulting Agreement or any of the other closing documents had they known the truth. They were material also in that the representations were made knowingly and involved a non-privileged failure to disclose. Partners concealed these omissions in order to deceive Oceana and Mr. Gilson into believing Oceana would receive the full purchase price as required by the Asset Purchase Agreement by May 5,

2008 and to induce Mr. Gilson and Partners into executing the closing documents and delivering them to Partners or its agent.

65. The representations made by Partners were made with knowledge that they were false, conscious ignorance of the truth, or recklessness as to whether the representations were true or false.

66. The representations made by Partners were made with the intent of misleading Oceana and Mr. Gilson into relying on them and with the intent of inducing them to execute, *inter alia*, the Asset Purchase Agreement and the Consulting Agreement and deliver the agreements to Partners or its agent.

67. Oceana and Mr. Gilson relied on the above-described fraudulent misrepresentations made by Partners. Their reliance was justifiable in that: (a) Oceana and Mr. Gilson had a long standing (ten year) business relationship with Mr. Kazas and Hometown Coffee Company; (b) Mr. Kazas and Partners were represented by sophisticated legal counsel and said legal counsel made some or all of the above-referenced representations to Mr. Gilson and Oceana; (c) the closing occurred through the use of the mails due to the geographic locality of each party; and (d) Mr. Kazas, Partners, and its agents assured Oceana and Mr. Gilson that the terms of the agreements would be complied with if Mr. Gilson executed the documents and forwarded them to Partners' legal counsel.

68. The above-described damages suffered by Oceana and Mr. Gilson are the proximate result of Partners above-described fraudulent material misrepresentations and Oceana and Mr. Gilson's justifiable reliance thereon.

**COUNT IV**  
**NEGLIGENT MISREPRESENTATION**  
**(OCEANA AND GILSON vs. PARTNERS)**

69. Oceana and the Estate incorporate paragraphs 1 through 47 & 61-68 of their Counterclaim as if fully set forth herein.

70. Partners made the above-described misrepresentation of material facts.

71. Partners made the misrepresentations under circumstances in which Partners ought to have known their falsity.

72. Partners made the misrepresentations with the intent to induce Oceana and Mr. Gilson into executing the Asset Purchase Agreement, Consulting Agreement, and other closing documents and forwarding or delivering them to Partners' legal counsel.

73. Partners misrepresentations resulted in injury to Oceana and Partners who acted in justifiable reliance on the misrepresentations.

**COUNT V**  
**PIERCING THE COMPANY VEIL**  
**(OCEANA AND GILSON vs. PARTNERS)**

74. Oceana and the Estate incorporate paragraphs 1 through 73 of their Counterclaim as if fully set forth herein.

75. Upon information and belief, (a) company formalities were not observed or company records kept for Partners; (b) there were no other members other than the company officers and directors for Hometown Coffee Company; and (c) Mr. Kazas and/or Hometown Coffee Company used assets of Partners for their own personal use.

76. Upon information and belief, (a) Partners was insufficiently capitalized at the outset; (b) there was intermingling of funds between and among Hometown Coffee Company and Partners as well as the personal assets of Mr. Kazas; (c) officers, managers, and directors, or the equivalent thereof, of Partners, if any, were not functioning; (d) Partners did not pay distributions in the regular or ordinary course of business; and (e) Mr. Kazas and/or Hometown

Coffee Company held themselves out as conducting the business affairs without the use of company names and without identifying that their actions were taken as an officer or manager of Partners.

77. Upon information and belief, Partners is the alter ego of Mr. Kazas and/or Hometown Coffee Company or were operated as a single entity.

## **VI. REQUEST FOR RELIEF**

WHEREFORE, Counterclaim Plaintiffs, Oceana Services and Products Company and Anne C. Gilson, Executrix of the Estate of James S. Gilson (Deceased), respectfully request that this Court enter judgment in their favor and against Counterclaim Defendant, Partners Coffee Company, LLC, for damages exceeding \$75,000.00, punitive damages per Counts III & IV, rescission, attorneys' fees, interest and costs, and other such relief as this Court deems just proper.

Respectfully submitted,

**MORELLA & ASSOCIATES  
A PROFESSIONAL CORPORATION**

January 11, 2010

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