ORIGINAL

IN THE SUPREME COURT OF OHIO

ACORDIA OF OHIO, LLC, Appellant, v. MICHAEL FISHEL, JANICE FREYTAG, MARK TABER, SHEILA DIEFENBACH, NEACE LUKENS INSURANCE AGENCY, LLC, NEACE & ASSOCIATES INSURANCE AGENCY OF OHIO, INC., and JOSEPH T. LUKENS, Appellees.	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C100071 11-0163

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT ACORDIA OF OHIO, LLC

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents this Court with an issue of great general interest. Do the carefully crafted corporate merger statutes of the Ohio Revised Code automatically vest all of the assets of the constituent companies on their original terms in the surviving entity without further act or deed as a matter of law? The General Assembly has provided a clear answer - - yes! In stark contrast are the decisions of the lower courts. The courts have denied the surviving company of a statutory merger the right to enforce the agreements not-to-pirate customers signed by employees of the constituent companies, which were assets transferred in the merger to protect the goodwill, trade secrets and proprietary information acquired in the merger. Specifically, the courts denied the surviving company the benefits of the covenants though the company continuously retained the employees, taking on the burden of their salary, only to have the employees pirate the customers with impunity. These decisions undermine the integrity of the merger provisions of the Ohio Revised Code, infect the merger process with uncertainty and create complexity where the General Assembly intended simplicity. This Court previously concluded that this issue was of great general interest. In *Acordia of Ohio, LLC v. Gloria Davis*, Case No. 06-1081, the Court accepted review of this issue but subsequently dismissed the appeal as moot when Ms. Davis was terminated by her competitive employer.

Under clear constitutional authority to provide for the formation of corporations and changes in organization or structure of existing corporations, Article XIII, §2 Ohio Constitution, the General Assembly has enacted a carefully crafted statutory framework for corporate mergers. Companies complying with those statutes reasonably expect to realize the stated effect of such a merger. Revised Code 1701.82(A)(2), for example, provides that after a merger, "the surviving … entity possesses *all* assets and property wherever located, … of each constituent entity, and,

… all obligations belonging to or due to each constituent entity, *all of which are vested in the surviving … entity without further act or deed.*" 12 O. Jur. 3d *Business Relationships* §805 (emphasis added).

This Court has already addressed a corporation's obligations following a merger. "R.C. 1701.82(A)(3) and (4) do not delineate between the types of obligations owed by a constituent corporation and those obligations that are inherited as a matter of law by the surviving corporation." *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St. 3d 666, 673, 665 N.E.2d 1083. "[T]he General Assembly has made its policy perfectly clear with respect to the effects of a merger. The surviving corporation is responsible for *all obligations* of the constituent corporation." *Id.* (emphasis in original). The General Assembly certainly did not intend to penalize corporations for merging by depriving successor corporations of the assets and rights of the constituent corporations. "Such a penalty would clearly be the result if the … successor corporation did not possess the rights and privileges of each of its constituent corporations in addition to acquiring the obligations and liabilities of those same corporations." *Winchester Construction Co. v. Miller County Bd. of Ed.* (M.D. Al. 1993), 821 F. Supp. 697, 701. "Since the successor corporation acquires the rights, privileges and obligations of its constituents, 'it plainly has the right to … prosecute suits at law and equity for the protection of its rights *the same as the original companies would do'.*" *Id.* quoting 19 Am. Jur. 2d, Corporations §2631 (1986) (emphasis added). To hold otherwise would ignore the reality that such agreements are often critical assets that businesses intend to transfer in a merger.

Despite that unambiguous statutory language, the court of appeals assumed the authority to contradict the General Assembly and differentiate between the types of assets that vest in the surviving entity "without further act or deed." The court decided that valid competition agreements, containing covenants not-to-pirate customers and covenants of confidentiality, are not enforceable according to their original terms following a merger. While acknowledging that "*** [t]he surviving or new entity possesses all assets and property of every description ... and the rights, privileges, immunities, powers ... of each constituent entity," the court concluded that the surviving company did not possess the same rights and privileges as the constituent company. Instead, the surviving company possessed only expiring rights and privileges. Before the merger, the constituent company had valid, enforceable and non-expiring restrictive covenants with its employees. After the merger, the surviving company was left with expiring restrictive covenants. The court engrafted this aberration onto Ohio's merger law based on the misconception that the merger alone effected a termination of employment, triggering the period of the restrictive covenants.

This decision represents a renunciation of a fundamental principle of Ohio statutory merger law. Since its inception, Ohio's statutory merger law has considered the merged companies to have a shared corporate existence. This principle is the premise for the automatic statutory transfer of *all* assets and *all* liabilities. Here, however, the court of appeals rejected that principle. Instead of stepping into the shoes of the constituent company with the concomitant right to enforce the competition agreements according to their original terms, the court considered the surviving company to be devoid of any shared corporate existence with the constituent companies, leaving it with competition agreements that were expiring.

This decision injects uncertainty into the effect of statutory mergers. Corporations and limited liability companies planning mergers in Ohio no longer may rely upon the carefully constructed statutory framework promulgated by the General Assembly. Now, not *all* assets and obligations belonging to or due each constituent entity are vested in the surviving entity on their original terms without further act or deed. Instead, corporations and limited liability companies planning to merge must not only comply with the prerequisites of the Revised Code, but must also review a plethora of personal services contracts, covenants not-to-compete, covenants not-to-pirate and covenants of confidentiality, to confirm that each agreement is not expiring or secure affirmation that the agreements will be enforceable according to their original terms. In the alternative, each entity must enter into the merger uncertain if all assets, property, contracts, covenants and leases have transferred. In effect, all assets and property vest only *with* further act and deed, in direct contradiction of the Ohio Revised Code.

The consequences of the decision are compounded by their application to covenants not-to-compete, covenants not-to-pirate and covenants of confidentiality. The decision exposes the customer relations, goodwill, trade secrets and proprietary information of each constituent entity to irreparable harm. The effect of the decision is that an employee may continue employment with the successor employer and quit after expiration of the restrictive period, exposing the company's goodwill and confidential information to the pirating of its employees. The lower court has placed the surviving entity in the untenable position of acquiring the goodwill, trade secrets and proprietary information of the constituent entities without the benefit of the protections intended for those assets.

This Court has recognized the public policy and economic necessity supporting such covenants:

> The law upholds these agreements because they allow the parties to work together to expand output and competition. If one party can trust the other with confidential information and secrets, then both parties are better positioned to compete with the rest of the world. *** By protecting ancillary covenants not to compete ..., the law "makes it easier for people to cooperate productively in the first place."

Land Lake Emp. Group of Akron, LLC v. Columber, 101 Ohio St. 3d 242, 2004-Ohio-786, 804

N.E.2d 27 (citations omitted). "If covenants not to compete are routinely ignored by courts, the chances for a profitable business operation in a highly competitive marketplace are immeasurably dimmed." *Globe Services, Inc. v. Palmer* (Aug. 18, 1986), Butler Cty. App. No. CA86-02-028, 1986 Ohio App. LEXIS 7937 at *6.

The Court should also accept jurisdiction to restore clarity to the law of Ohio. The Court of Appeals for the First Appellate District alone has issued three conflicting and confusing decisions addressing the right of a surviving company to enforce a competition agreement between an employee and a constituent company following a statutory merger. *Acordia of Ohio, LLC v. Fishel*, 2010-Ohio-6235, *Acordia of Ohio v. Fishel*, Hamilton App. No. C-060292; *Acordia of Ohio, LLC v. Davis*, Hamilton App. No. C-050559. Adding to the legal morass, the court in *Michael's Finer Meats, LLC v. Alfery* (S.D. Ohio 2009), 649 F. Supp.2d 748 mistakenly confused merger with assignment. In stark contrast, the Court of Common Pleas of Franklin County, Ohio in *Wells Fargo Insurance Services of Ohio, LLC v. Baseler* (July 17, 2007), Franklin Cty. Case No. 07 CV 3719 unqualifiedly rejected the decisions in *Fishel*, choosing to adhere to the fundamental principle of Ohio merger law: "... obligations due and owing under a non-competition employment agreement automatically pass to the new entity."

In sum, this case presents the fundamental issues of whether a surviving corporation acquires the benefits of valid restrictive covenants transferred to it as assets in a statutory merger, and whether those covenants are enforceable according to the original terms, as if the surviving company was a party to the original agreement. To promote the integrity of Ohio corporate merger law, to assure uniform application of that law and to preserve the efficacy of Ohio mergers, this Court must grant jurisdiction to hear this case and review the erroneous decision of the court of appeals.

II. STATEMENT OF THE CASE AND FACTS

A. Acordia.

At the time of its Complaint, Appellant Acordia of Ohio, LLC ("Acordia") was a limited liability company under Ohio law. Acordia sold insurance products and services, including property and casualty, health, life and disability insurance, and employee benefits services from its offices on the 11th floor of the Kroger Building at 1014 Vine Street, Cincinnati, Ohio. From its inception, Acordia had grown through acquisitions and mergers, evolving from Frederick Rauh & Co. to Acordia of Ohio to Wells Fargo Insurance Services.[1]

B. The Competition Agreements.

On May 28, 1993, Appellee Michael Fishel ("Fishel"), as a condition of employment, entered into a Competition Agreement with Frederick Rauh & Co. On June 28, 1996, Appellee Janice Freytag ("Freytag"), as a condition of employment, entered into a Competition Agreement with Acordia of Cincinnati, Inc., which had recently changed its name from Frederick Rauh & Co. following its acquisition by Acordia, Inc. On September 25, 1996, Appellee Mark Taber ("Taber"), as a condition of employment, entered into a Competition Agreement with Acordia of Cincinnati, Inc. On July 6, 2000, Appellee Sheila Diefenbach ("Diefenbach"), as a condition of employment, entered into a Competition Agreement with Acordia of Ohio, Inc., the successor to Acordia of Cincinnati, Inc. following a statutory merger.

In each Competition Agreement, these employees (the "Defecting Employees") covenanted:

> A. For a period of two years following the termination of employment with the Company for any reason, I will not directly, indirectly, or through association with others solicit, write, accept or in any other

[1] Today, Wells Fargo Insurance Services USA, Inc. continues to provide the same insurance products and services from its offices on the 11th floor of the Kroger Building.

manner perform any services relating to insurance business, insurance policies, or related insurance services for any of the following:

(1) Any individual or entity for whom the company has written, accepted, or in any other manner performed any services relating to insurance business, insurance policies, or related insurance services at any time while I was employed by the Company; * * *

The covenant contained above shall remain in full force and effect regardless of the cause of termination of employment. I acknowledge that the names of the company's customers, the company's financial statements, valuation appraisals, information regarding the customer's insurance coverage, customer premium arrangements and company commission structures are confidential information in which the company has a proprietary interest. Therefore, I agree that during the term of my employment with the company and for a period of two years following termination of my employment for any reason and thereafter, I shall not disclose such confidential information to any other person or entity for any purpose whatsoever.

C. The Defecting Employees' employment was not terminated until they resigned.

Fishel, Freytag and Taber were continuously employed as account executives, working directly with Acordia's customers to sell or renew property and casualty insurance, including general liability, property and workers' compensation insurance. Diefenbach was continuously employed as a customer service representative regularly interacting with customers to provide information about their insurance policies. "They were the face of … Acordia" to customers. In addition to selling to and servicing existing customers, Fishel, Freytag and Taber were expected to produce new customers for Acordia. Throughout their tenure, these employees had immediate access to Acordia's customer list, key customer contacts, marketing strategy and strategic customer information, all of which Acordia considered to be its trade secrets and/or confidential proprietary information.

During their uninterrupted employment, Acordia operated under two tradenames, merged with sister insurance agencies, substituted benefits, was acquired by new owners and changed its corporate form. But through it all, the Defecting Employees continued to work with the same insurance agency located on the 11th floor of the Kroger Building, in the commercial lines department, servicing customers generally within a 50-mile radius, performing essentially the same duties, under the supervision of the same people, for which they received the same salary, adjusted annually, and the same benefits. These employees did not terminate their employment until they voluntarily resigned and began working for Neace-Lukens, a competitor, in August 2005. Even Fishel acknowledged the continuity of his employment, when he proudly described his success in June and July 2005 as "my two biggest back to back months in my career, 10-year or 13-year career with the firm."

D. Acordia's corporate history.

Following its 1993 acquisition by Acordia, Inc., Frederick Rauh & Co. officially changed its name to Acordia of Cincinnati, Inc. by amending its Articles of Incorporation pursuant to R.C. 1701.69 (B)(1). Because the "Rauh" name continued to have goodwill associated with it among the company's customers in the greater Cincinnati area, the company operated under the trade names "Frederick Rauh & Co." and/or "Acordia/Rauh."

Already part of Acordia, Inc. for more than 4 years, Acordia of Cincinnati, Inc. merged with its sister Ohio companies under the umbrella, Acordia of Ohio, Inc., in December, 1997. The merger was effected pursuant to R.C. 1701.78. Although formally part of the same network of companies, Acordia Cincinnati continued to operate separately from the offices in Columbus, Cleveland and Youngstown. The merger was seamless and had no affect on the employees or the operation of the Cincinnati office. No additional duties, burdens or responsibilities were placed on Cincinnati employees. The Defecting Employees continued to work in the same office, performing essentially the same duties, in the same department, at the same desk, for the same customers, being paid the same annually increased salary.

In December 2001, Acordia of Ohio, Inc. merged with Acordia of Ohio, LLC pursuant to R.C. 1701.36. Through this merger, Acordia changed from a stock corporation to a limited liability company. ("It was just a way to change the form of corporate structure."). No other alteration or modification of the company was effected. Again, this corporate restructuring was seamless for the employees. Following this merger, the Defecting Employees continued to work in the Kroger Building, performing essentially the same duties, in the same department, under the supervision of the same people, for the same customers, for which they received the same salary, adjusted annually. Like the previous merger, this merger added no new duties, responsibilities or customers for the Defecting Employees.

On May 1, 2001, Wells Fargo acquired the family of Acordia offices. This change in ownership did not alter the business of Acordia. As part of its acquisition, Wells Fargo invited Acordia employees into its employee benefits plans. To enroll, each Acordia employee was required to fill out standard forms. As a banking institution subject to the Federal Institution Reform, Recovery & Enforcement Act of 1989, Wells Fargo was required to secure completion of these forms to comply with federal law. These forms "were part of the process of continuing employment," and all Acordia employees were advised: "As an active Acordia team member, you have not terminated employment with the company."

E. Fishel and Freytag go "dialing for Acordia's dollars."

In August, 2005, the Defecting Employees left Acordia to work for a competitor, Neace-Lukens. In positions virtually identical to that which they had at Acordia, Fishel, Freytag and Taber began "soliciting, procuring, accepting, engaging in and having an interest in the sale of insurance or insurance services to customers of Acordia." On September 1, 2005, Fishel unabashedly wrote in an e-mail: "We have been 'dialing for dollars' to obtain BOR's [Broker of Record Letters] as fast as we can." Beginning the very day of their resignation, Fishel and

Freytag solicited Acordia customers.

In two days, Fishel and Freytag, exploiting the years of service and goodwill Acordia provided its customers, convinced three customers to sign agent of record letters. These customers alone represented $500,000 in new revenue for Neace-Lukens. In an e-mail dated September 14, Freytag boasted: "Michael Fishel and I are bringing a lot of business over from Acordia." As of three days later, Fishel had obtained commitments and/or agent of record letters from 30% of the customers he "handled" at Acordia. Within 6 months, the Defecting Employees successfully convinced 19 Acordia customers, amounting to more than $1 million in revenue, to change their agent of record to Neace-Lukens. This sudden loss of customers was not a mere coincidence or a product of fair competition among insurance agencies. It was the direct result of the Defecting Employees exploiting Acordia's confidential, proprietary information and goodwill.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: Pursuant to Ohio's merger statutes, agreements between employees and employers that contain restrictive covenants are assets of the constituent company that transfer automatically by operation of law in a statutory merger from the constituent company to the surviving company and are enforceable by the surviving company according to the agreements' original terms as if the surviving company were a party to the original agreements.

The merger of Acordia of Cincinnati, Inc. and Acordia of Ohio, Inc. was effected pursuant to R.C. 1701.82, which provides in part:

> (3) The surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of each constituent entity, and all obligations belonging to or due to each constituent entity, all of which are vested in the surviving or new entity without further act or deed. ***

The merger of Acordia of Ohio, Inc. and Acordia of Ohio, LLC was effected pursuant to R.C.

1705.39. Likewise, R.C. 1705.39(A)(4)(a) provides that in the case of a merger in which the surviving entity is a limited liability company, "all of the following are vested in the surviving or new entity *without further act or deed*:

> (i) All assets and property of every description of each constituent entity and every interest in the assets and property of each constituent entity, wherever the assets, property and interests are located.

(emphasis added). These provisions of the Revised Code do not differentiate among assets transferred in a merger. Therefore, the company surviving a merger may enforce covenants not-to-solicit entered into by the constituent company with its employees, such covenants becoming an asset of the surviving entity as a matter of law.

While acknowledging the general proposition of law that "[t]he surviving or new entity possesses all assets and property of every description and every interest in the assets …," the court of appeals gutted the effectiveness of that principle of Ohio merger law. Instead of passing valid and enforceable restrictive covenants, the court concluded that Ohio merger law could only pass restrictive covenants which began to expire with the merger. The premise for this remarkable conclusion was that Ohio merger law effected a termination of employment.

> Ohio law is clear that "a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity." The restrictions in the noncompete agreements in this case took effect when employment was terminated for any reason. Because the predecessor companies ceased to exist following the respective mergers, the Fishel team's employment with those companies was necessarily terminated at the time of the applicable merger. By their own terms, the agreements' restrictions were triggered by the relevant mergers ….

This reasoning of the court of appeals represents a repudiation of a fundamental principle of Ohio merger law. The premise of the Ohio merger statutes throughout their history has been that the consolidated company steps into the shoes of the constituent company. Following a merger, "the nominal existence of the several constituent companies terminated, *but their substantial existence is perpetuated* by being merged in the consolidated company." *Citizens Savings & Trust Co. v. Cincinnati & Dayton Traction Co.* (1922), 106 Ohio St. 577, 140 N.E. 380, at paragraph 9 of the Syllabus (emphasis added). *Accord, Marfield v. Traction Co.* (1924), 111 Ohio St. 139, 144 N.E. 689 ("the substantial existence of the constituent companies was thereby perpetuated by being merged in the consolidated company"). Although the separate existence of the constituent corporations may cease, "[t]he constituent corporations continue to function as components of a consolidated whole." *Anderson v. Cleveland-Cliffs Iron Co.* (C.P. Cuyahoga Cty. 1948), 54 Ohio L. Abs. 65, 87-88, 87 N.E.2d 384. See also 12 O.Jur. 3d *Business Relationships* §787 ("In large measure, the ... merged corporation is a continuation of the old constituent corporations and stands in their shoes; the constituent corporations continue to function as components of a ... merged whole.").

In *Allen, Administratrix v. United of Omaha Life Ins. Co.* (Tx. App. 2007), 236 S.W.3d 315, the Court poetically described this fundamental premise of the Ohio merger statutes:

> [T]he consolidation of two or more corporations is like the uniting of two or more rivers, neither stream is annihilated, but all continue in existence. A new river is formed, but it is a river composed of the old rivers, which still exist, though in a different form. So it is with a consolidated corporation.

Id. at 322 quoting *Atlanta Newspaper, Inc. v. Doyal* (Ga. App. 1951), 65 S.E.2d 432, 437.[2]

Based on this fundamental principle of a merging corporation's shared existence with its

[2] This principle of "corporate continuity" finds further support in the official comment to §11.07 of the Model Business Corporation Act (the "Model Act"), the basis for the Ohio merger statutes. *TXO Production Co. v. M.D. Mark, Inc.* (Tx. App. 1999), 999 S.W.2d 137, 142. "A merger is not a conveyance, transfer or assignment," but rather a unique process of combining corporate entities. 3 Model Bus. Corp. Act Ann. §11.07 comt. (2008). Likewise, the Model Act expressly provides: "... every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor *without reservation or impairment.*" *Id.* §1107(a)(3).

successor, a merger does not result in the termination of employment. The Florida Supreme Court, construing comparable merger statutes, concluded that "the surviving corporation in a merger assumes the right to enforce a noncompete agreement entered into with an employee of the merged corporation by operation of law, and no assignment is necessary. *Corporate Express Office Products, Inc. v. Phillips* (Fla. 2003), 847 So. 2d 406, 414. The Court held that the surviving company under the Florida merger statutes assumed the right to enforce the restrictive covenant on its original terms. The Court based its conclusion on its recognition of a merging corporation's shared existence with its successor. *Id.* ("..., in a merger, the two corporations in essence unite into a single corporate existence.").

In *Aon Consulting, Inc. v. Pearson* (2008), 748 N.W.2d 626, the Nebraska Supreme Court was confronted with virtually identical facts as this case. Pearson signed a similar non-solicitation agreement, prohibiting him from soliciting certain customers for two years after leaving employment with Aon's predecessor, Alexander & Alexander Services, Inc. ("A&A"). Sixteen years after Pearson signed the non-solicitation agreement, A&A merged with Aon. Pearson became dissatisfied with his employment with Aon and resigned to work for a competitor. Counsel advised Pearson that "the agreement was not enforceable because he was no longer employed by A&A, but rather, by Aon, and more than 2 years had elapsed since he was last employed by A&A." *Id.* at 633. After leaving Aon, Pearson "helped customers prepare broker of record letters changing those customers' affiliations from Aon to [the competitor]." *Id.* at 634. On appeal, Pearson argued that Aon had no right to enforce the non-solicitation agreement. The Nebraska Supreme Court found that under the governing merger statute, the assets of each party to the merger transfer to, vest in, and devolve on the successor without further act or deed. Canvassing other jurisdictions, the Court found that "other state courts applying similar statutory language have concluded that a covenant not to compete is an asset which is transferred to and vests in the surviving entity of a merger by operation of law." *Id.* at 636. Concurring with those cases, the Court concluded that "Aon succeeded to A&A's right to enforce its nonsolicitation agreement with Pearson." *Id.* at 637-638.

Guided by the reasoning in *Corporate Express* and *Aon Consulting*, the Nevada Supreme Court also recognized the principle of shared corporate existence in a merger. *HD Supply Facilities Maintenance, Ltd. v. Bymoen* (2009), 210 P.3d 183, 187. "[I]n a merger, two corporations unite into a single corporate existence." *Id.* at 186. Taking the lead from *Corporate Express* and *Aon* which "looked directly to the relevant merger statute ... to resolve whether a restrictive covenant transferred to a successor corporation following a merger," the Court concluded that "the right to enforce the restrictive covenants of a merged corporation ... vests in the surviving entity." *Id.* at 187.[3]

These Supreme Courts provide this Court with a road map to guide its decision. The merger statue preempts any other analysis. The merger statute embodies the principle of shared corporate existence. The merger statute is intended to distinguish a merger from an asset purchase, an assignment or any other corporate transaction. Based on these principles intended to bring stability and certainty to corporate mergers, all assets, liabilities, rights and obligations

3 Numerous courts in other jurisdictions have held that competition agreements are fully enforceable by the surviving corporation to a series of corporate mergers. See, e.g., *Farm Credit Services of North Central Wisconsin, ACA v. Wysocki* (Wis. 2001), 627 N.W.2d 444; *Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham* (Ala. 1998), 711 So.2d 995, 1001; *Equifax Services, Inc. v. Hitz* (10th Cir. 1990), 905 F.2d 1355, 1361; *Sager Spuck Statewide Supply Co., Inc. v. Meyer* (2000), 710 N.Y.S.2d 429; *UARCO, Inc. v. Lam* (D. Hawaii 1998), 18 F. Supp. 2d 1116; *Guy Carpenter & Co. v. Collins* (D. Minn. August 29, 2006), No. 05-1623, unreported, 2006 U.S. Dist. Lexis 61765, *15; *Alexander & Alexander, Inc. v. Koelz* (Mo. App. 1986), 722 S.W.2d 311, 313.

are transferred without reservation, impairment or alteration to the surviving entity.[4]

IV. CONCLUSION

The Defecting Employees readily admitted that there was no period of time during which they did not receive a salary and benefits for their continuous employment with the insurance agency located on the 11th floor of the Kroger Building, where they serviced the same customers performed essentially the same duties under the supervision of the same people, and for which they were paid the same salary, adjusted annually. While their employer changed names, operated under tradenames, merged with sister companies, changed owners and changed corporate structure, through it all, the Defecting Employees worked at the same insurance agency, performing the same duties, being paid the same annually increased salary, under the same supervision. The name change, merger, change of owners and change of corporate structure did not and cannot, under well-settled Ohio corporate law, effect a termination of their employment or toll the period of their competition agreements. This Court must grant jurisdiction to hear this case and review the decision of the court of appeals.

Respectfully submitted,

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4 Not only does the court of appeals' decision abrogate Ohio merger law, the decision is in stark contrast with the treatment of mergers in other contexts. For example, the Internal Revenue Service has consistently concluded that an employee will not be considered "separated" when the employee continues in the same job following a merger or consolidation. Rev. Rul. 79-336. This has been recognized as the "same chair" rule. Likewise, the federal courts, applying ERISA, have concluded that employees who continue in the same jobs following a merger will not be considered "separated from service." *See Gillis v. Hoechst Celanese Corp.* (3d Cir. 1993), 4 F.3d 1137, 1147; *Hollingshead v. Burford Equip. Co.* (M.D. Ala. 1992), 809 F. Supp. 906, 917-917.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via regular United States mail this 28th day of January, 2011 upon the following:

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James F. McCarthy III

KTBH: 4827-3473-3832, v. 1

APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ACORDIA OF OHIO, LLC,	:	APPEAL NO. C-100071 TRIAL NO. A-0507349
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
vs.	:	
MICHAEL FISHEL,	:	
JANICE FREYTAG,	:	
MARK TABER,	:	
SHEILA DIEFENBACH,	:	
NEACE LUKENS INSURANCE AGENCY, LLC,	:	
NEACE & ASSOCIATES INSURANCE AGENCY OF OHIO, INC.,	:	ENTERED DEC 17 2010
and	:	
JOSEPH T. LUKENS,		D91170080
Defendants-Appellees.		

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 17, 2010 per Order of the Court.

By: ______________________
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ACORDIA OF OHIO, LLC,	:	APPEAL NO. C-100071 TRIAL NO. A-0507349
Plaintiff-Appellant,	:	*DECISION.*
vs.	:	
MICHAEL FISHEL,	:	
JANICE FREYTAG,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
MARK TABER,	:	DEC 17 2010
SHEILA DIEFENBACH,	:	COURT OF APPEALS
NEACE LUKENS INSURANCE AGENCY, LLC,	:	
NEACE & ASSOCIATES INSURANCE AGENCY OF OHIO, INC.,	:	ENTERED
and	:	DEC 17 2010
JOSEPH T. LUKENS,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 17, 2010

James McCarthy, III, and *Katz, Teller, Brant & Hild*, for Plaintiff-Appellant,

Mark E. Lutz, Michael Majba, and *Denlinger, Rosenthal & Greenberg*, for Defendants-Appellees.

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Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Judge.

{¶1} Plaintiff-appellant, Acordia of Ohio, LLC, an insurance agency, filed this action seeking damages and injunctive relief against four former employees, defendants-appellees Michael Fishel, Janice Freytag, Mark Taber, and Sheila Diefenbach ("the Fishel team"), as well as competitors of Acordia, Neace Lukens Insurance Agency, LLC, Neace & Associates Insurance Agency of Ohio, Inc., and Joseph Lukens ("Neace-Lukens"). Acordia asserted various causes of action, including violation of noncompete agreements and misappropriation of trade secrets.

{¶2} Each member of the Fishel team left Acordia to begin employment with Neace-Lukens. When the members of the Fishel team had initially begun employment with Acordia, each had signed a noncompete agreement. But Acordia is the product of various corporate mergers, and all of the noncompete agreements were signed with Acordia's predecessor companies. The following is a summary of how the members of the Fishel team came to be employed by Acordia.

{¶3} In 1993, Fishel joined Frederick Rauh & Co. and signed a noncompete agreement. In 1994, Frederick Rauh was acquired by Acordia, Inc. Frederick Rauh's name was legally changed to Acordia of Cincinnati, Inc. But Acordia of Cincinnati, Inc., also registered the fictitious name Acordia/Rauh and did business as such. In 1996, both Janice Freytag and Mark Taber joined the company and signed noncompete agreements. The following year, Acordia of Cincinnati, Inc., merged into Acordia of Ohio, Inc. In 1999, Ohio's Secretary of State canceled the fictitious name of Acordia/Rauh because a renewal had not been filed. One year later, Sheila

Diefenbach joined the company and signed a noncompete agreement with Acordia of Ohio, Inc. In May 2001, Wells Fargo purchased the parent company Acordia, Inc., and later that year Acordia of Ohio, Inc., was merged into Acordia of Ohio, LLC.

{¶4} In August 2005, each member of the Fishel team resigned from Acordia and began employment with Neace-Lukens. Acordia immediately filed the present action seeking monetary damages and injunctive relief. Acordia also filed a motion for a preliminary injunction, seeking to prevent the Fishel team from soliciting any individuals or entities whom Acordia had done business with and from using any of Acordia's trade secrets. Following a hearing, the trial court denied Acordia's motion for a preliminary injunction. It determined that the noncompete agreements had not been assignable to successors such as Acordia, and that the information Acordia sought to protect was not properly classified as a trade secret. Acordia appealed to this court, where we determined that the trial court had not abused its discretion in denying injunctive relief.

{¶5} Following this court's decision on injunctive relief, the Fishel team and Neace-Lukens (collectively referred to as "the appellees") filed motions for summary judgment in the trial court. The court granted summary judgment to the appellees on all of Acordia's claims. This appeal ensued. In one assignment of error, Acordia now argues that the trial court's grant of summary judgment was in error.

Standard of Review

{¶6} We review a trial court's ruling on a motion for summary judgment de novo.[1] Summary judgment is appropriately granted when there exists no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and the

[1] *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to the nonmoving party.[2]

Law of the Case

{¶7} We first consider the appellees' argument that all rulings made in our earlier decision are the law of the case and are binding in this appeal. Appellees assert that, under the law-of-the-case doctrine, this court must conclude that the Fishel team had not violated their noncompete agreements. But Acordia argues that the law-of-the-case doctrine is not applicable, and that we are not bound by conclusions of law made in an earlier appeal concerning injunctive relief.

{¶8} The law-of-the-case doctrine provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."[3] The doctrine's purpose is to "ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution."[4]

{¶9} This court's earlier decision involved the review of the trial court's denial of a preliminary injunction. The granting or denial of a preliminary injunction does not involve a ruling on the merits of a case. Rather, an injunction is designed to preserve the status quo of the parties pending a ruling on the merits.[5] Further, the standard applied by an appellate court when reviewing a ruling on a motion for an injunction is that of abuse of discretion.[6] In contrast, this appeal involves a de novo

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[2] *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.
[3] *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410.
[4] Id.
[5] *Procter & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 267, 747 N.E.2d 268.
[6] Id. at 269.

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review of a trial court's grant of summary judgment. The merits of the case will be considered in this appeal. For these reasons, we conclude that this court's earlier decision has no effect on the present appeal because it did not become the law of the case for the issues currently in dispute.

{¶10} The Eighth Appellate District considered a similar argument with respect to the law-of-the-case doctrine when it analyzed whether conclusions reached in an appeal concerning a temporary injunction were binding on the same parties in a later appeal from the granting of a motion to dismiss.[7] Noting that although each appeal contained similar facts and issues, each also involved a differing standard of review, the court declined to apply the law-of-the-case doctrine. The court held that "[f]or the reason that these standards differ, we will not apply the 'law of the case' doctrine in this instance."[8]

{¶11} We agree with the reasoning employed by the Eighth Appellate District, and we hold that this court's decision affirming the trial court's denial of injunctive relief is not the law of the case for purposes of deciding the present appeal. We now proceed to discuss the merits of this appeal.

Noncompete Agreements had Expired

{¶12} Acordia argues that the trial court erred in granting summary judgment to the appellees because the noncompete agreements signed by each member of the Fishel Team had transferred to Acordia of Ohio, LLC.

{¶13} Ohio law provides that noncompete agreements transfer by law in a merger or consolidation. R.C. 1701.82(A)(3) specifically states that "[w]hen a merger

[7] *In Defense of Deer v. Cleveland Metroparks* (2000), 138 Ohio App.3d 153, 740 N.E.2d 714.
[8] Id. at 162.

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or consolidation becomes effective * * * [t]he surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers * * * of each constituent entity."

{¶14} Under this provision, Acordia of Ohio, LLC, inherited all assets, rights, and the like that belonged to Acordia of Ohio, Inc. This would have included any valid noncompete agreements. And it necessarily follows that Acordia of Ohio, Inc., inherited all assets, rights, and the like that belonged to Acordia of Cincinnati, Inc. This case has a significant history of mergers and acquisitions, and the same fundamental logic applies to each such transaction.

{¶15} Because a successor entity inherits only the assets and rights belonging to the predecessor entity, we must determine whether Acordia of Ohio, Inc., possessed the right to enforce the noncompete agreements at the time that it was merged into Acordia of Ohio, LLC. To do so, we must examine the language contained in the noncompete agreements signed by each member of the Fishel team.

{¶16} Michael Fishel signed his noncompete agreement with Frederick Rauh & Co. The agreement stated, "In consideration of my employment and its continuation by Frederick Rauh & Company (hereinafter, Company) I hereby covenant as follows: (A) For a period of two years following termination of employment with the company for any reason, I will not directly * * *solicit, write, accept or in any other manner perform services relating to insurance business, insurance policies, or related insurance services for any of the following * * *." The agreement further stated that "[t]he covenant contained above shall remain in full force and effect regardless of the cause of termination of employment."

{¶17} The noncompete agreement specifically identified Fishel's employer as Frederick Rauh & Company, and it prohibited Fishel from competing with Frederick Rauh & Company for two years following his termination of employment with the company for any reason. Fishel's employment with Frederick Rauh & Company terminated at the very latest when Acordia of Cincinnati, Inc., was merged into Acordia of Ohio, Inc., and the company ceased using the fictitious name Acordia/Rauh. Consequently, the two-year period of Fishel's noncompete agreement began to run at that time. And should it have become necessary, those successor entities would have possessed the right to enforce that agreement during the relevant two-year period. Acordia of Ohio, LLC, did not have an enforceable noncompete agreement with Fishel, because the time restriction under the agreement had expired by the time that Fishel left his employment with Acordia of Ohio, LLC.

{¶18} The noncompete agreements signed by the three other members of the Fishel team were nearly identical to that signed by Michael Fishel. Mark Taber and Janice Freytag each signed their noncompete agreements with Acordia of Cincinnati, Inc., and Sheila Diefenbach signed her noncompete agreement with Acordia of Ohio, Inc. Each agreement defined the company as Acordia/Rauh. Taber and Freytag's noncompete agreements began to run in 1997, when Acordia of Cincinnati, Inc., was merged into Acordia of Ohio, Inc. And the restrictions under Diefenbach's noncompete agreement were triggered in 2001, when Acordia of Ohio, Inc., was merged into Acordia of Ohio, LLC.

{¶19} Acordia argues that the restrictions under the noncompete agreements were not triggered by the various mergers and acquisitions because the Fishel team had remained continuously employed at all times. We are not persuaded. Ohio law

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is clear that "a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity."[9] The restrictions in the noncompete agreements in this case took effect when employment was terminated for any reason. Because the predecessor companies ceased to exist following the respective mergers, the Fishel team's employment with those companies was necessarily terminated at the time of the applicable merger. By their own terms, the agreements' restrictions were triggered by the relevant mergers and acquisitions.

{¶20} Because the Fishel team's noncompete agreements had already expired, Acordia of Ohio, LLC, did not have the right to enforce those agreements. Accordingly, the trial court did not err in granting summary judgment to the appellees on Acordia's claim alleging violations of the noncompete agreements.

{¶21} Acordia raises several additional arguments in its brief regarding the noncompete agreements. Our conclusion that these agreements had expired prior to the Fishel team's employment with Acordia of Ohio, LLC, is enough to dispose of these arguments, but we address them briefly.

{¶22} Acordia first asserts that enforcement of the noncompete agreements is consistent with public policy, and that the conclusion that the agreements had not survived the corporate mergers violated public policy. Acordia further alleges that this court's prior decision, along with the trial court's decision granting summary judgment, "has perpetuated an aberration of Ohio corporate law." Acordia cites an unreported decision from a trial court in Warren County, *Wells Fargo v. Baseler*,

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[9] *Morris v. Investment Life Ins. Co.* (1971), 27 Ohio St.2d 26, 31, 272 N.E.2d 105.

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which, it asserts, conflicts with this court's earlier decision and compels this court to conclude that the noncompete agreements had been passed along by operation of law in each merger and were therefore enforceable by Acordia. Last, Acordia argues that a change in corporate ownership did not invalidate the noncompete agreements.

{¶23} Acordia's arguments are inapposite, and it appears to have misinterpreted this court's prior decision. We did not conclude that the Fishel team's noncompete agreements had not survived the corporate mergers. In fact, we explicitly stated that "regardless of the assignability of a noncompete agreement, the right to enforce the agreement transfers by law in a merger to the successor entity without specific language." We reach the same conclusion in this decision. The noncompete agreements passed to the successor entity, but their restrictions were triggered by their own terms when a merger occurred, and each had expired prior to the Fishel team terminating their employment with Acordia of Ohio, LLC. Acordia's arguments are without merit.

Trade Secrets

{¶24} Acordia asserts that the trial court erred in determining that there was no genuine issue of material fact regarding the Fishel team's alleged misappropriation of Acordia's trade secrets and confidential and proprietary information.

{¶25} Ohio's Uniform Trade Secrets Act is contained in R.C. 1333.61 through 1333.69. The act defines a trade secret as information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use," and as information that "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[10]

{¶26} Acordia has identified the following as the information and materials misappropriated and exploited by the Fishel team: identities of clients and customers; identity, authority, and responsibilities of the key contacts with each client; service-cost burden with respect to each client; insurance coverages for each client; specific insurance policies purchased for clients; expiration dates, premiums, commissions rates, and other terms and conditions of clients' policies; clients' risk specifications and claims-loss histories; business strategies and techniques to respond to specific clients' needs; and financial information.

{¶27} Following our review of the record, we cannot conclude that the trial court erred in determining that no genuine issue of material fact existed with respect to the Fishel team's alleged misappropriation of trade secrets. The record demonstrates that the Fishel team contacted many former Acordia clients after joining Neace-Lukens. Many of those clients ceased doing business with Acordia to follow the Fishel team to Neace-Lukens. But the record does not indicate that the Fishel team used Acordia's confidential information and trade secrets to maintain business relationships with these clients. The record indicates that the Fishel team was able to obtain the allegedly confidential information and trade secrets through public sources and from the clients themselves.

{¶28} Acordia argues that, under Ohio law, one cannot escape liability for a trade-secrets violation merely because the information at issue is obtainable from other sources. The Ohio Supreme Court has held that the purpose behind Ohio's

[10] R.C. 1333.61(D).

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trade-secrets law "would be frustrated were we to except from trade secret status any knowledge or process based simply on the fact that the information at issue was capable of being independently replicated."[11] But the court further suggested that, for summary judgment to be denied on these grounds, the record must actually raise a genuine issue of fact as to how the allegedly confidential information was obtained.[12] Here, no such genuine issue of fact is present.

{¶29} The information identified by Acordia as trade secrets was most certainly valuable to Acordia. But given the absence of evidence in the record that such information was misappropriated by the Fishel team, we conclude that the trial court did not err in granting summary judgment to the appellees on Acordia's claims for trade-secrets violations.

Duty of Loyalty and Tortious Interference

{¶30} Acordia further argues that the trial court erred in granting summary judgment to the appellees on its claims for breach of the duty of loyalty.

{¶31} Acordia specifically argues that the Fishel team breached the duty of loyalty owed to Acordia by plotting a coordinated resignation from the company and soliciting Acordia's clients on behalf of their new employer. The duty of loyalty requires an employee "to act 'in the utmost good faith and loyalty toward his * * * employer.' "[13] Here, the record contains no genuine issue of material fact that the Fishel team had violated its duty of loyalty to Acordia. The four members of the Fishel team resigned from Acordia simultaneously. But they did not solicit Acordia's

[11] *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 183, 1999-Ohio-260, 707 N.E.2d 853.
[12] Id. at 182.
[13] *Orbit Electronics, Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91, ¶34, quoting *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 440, 116 N.E.2d 701.

clients on behalf of Neace-Lukens until they were employed by Neace-Lukens. And because their noncompete agreements had expired, the Fishel team was entitled to compete with Acordia for the business of clients whom they had worked with while employed by Acordia.

{¶32} Acordia next asserts that the trial court erred in granting summary judgment on its claims for tortious interference with business relationships. Acordia correctly states that "[t]he torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another."[14]

{¶33} Because their noncompete agreements had expired, the appellees were entitled to compete with Acordia for the business of Acordia's clients. Their behavior in so doing was not improper, and they did not tortiously interfere with Acordia's business relationships.

{¶34} The trial court properly granted summary judgment to the appellees on Acordia's claims for breaches of the duty of loyalty and tortious interference with business relationships.

Conclusion

{¶35} The trial court properly granted summary judgment to the members of the Fishel team on Acordia's claims for violation of the noncompete agreements. Although they had survived the applicable corporate mergers, the noncompete agreements had expired and were not enforceable by Acordia by the time the Fishel

[14] *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14, 1995-Ohio-66, 651 N.E.2d 1283.

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team left Acordia. And the trial court did not err in granting summary judgment on Acordia's remaining claims for misappropriation of trade secrets, breach of the duty of loyalty, and tortious interference with business relationships. The judgment of the trial court is, accordingly, affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and DINKELACKER, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.