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.	* * * * * * * * * * * * * * *	Case No. 2011-0163 On Appeal from the Hamilton County Court of Appeals, First Appellate District

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I. OVERVIEW

The Court of Appeals applied the contracts involved in this appeal as written. Appellant asks this Court to rewrite the contracts in its favor under the guise of merger law. This Court should reject appellant's proposition of law, apply the contracts as written, and affirm the Court of Appeals' decision.

II. STATEMENT OF THE FACTS

A. Michael Fishel signs a competition agreement with Rauh.

Fishel signed a competition agreement with Frederick Rauh & Company ("Rauh") on May 28, 1993. (JX 1, Supp. 539-540; T.p. 147-148; Supp. 67.) [1] At the time Fishel signed his competition agreement, Rauh was a single-office insurance agency located in Cincinnati, Ohio. (T.p. 700; Supp. 412.) It served customers located for the most part within 100 miles of Rauh's Cincinnati office. (T.p. 165; Supp. 75.) Rauh was the sole author of the noncompete agreement and did not permit any negotiation over its terms. (T.p. 283-284; Supp. 147-148.) Instead, Rauh presented the agreement to all employees on a take-it-or-leave-it basis as a condition of the employee's at-will employment by Rauh. (T.p. 177.)

Fishel's competition agreement prohibited him from engaging in certain competitive activities for a period of two years following the termination of his employment with "the Company," which the agreement specifically defined to mean "Rauh" and no other employer:

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[1] References to T.p. __ refer to the transcript of proceedings in the preliminary injunction hearing. References to Supp. __ refer to the Supplement to Merit Briefs. References to JX __, DX __ and PX __ refer to the exhibits admitted into evidence in the preliminary injunction hearing.

In consideration of my employment and its continuation by **Frederick Rauh & Company (hereinafter, Company)** I hereby covenant as follows:

1. **For a period of two years following 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 manner perform any services relating to insurance business, insurance policies, or related insurance services for any of the following:**

    (a) 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;

    (b) Any individual or entity whose name was provided me as a prospective client at any time while I was employed by the Company.

(JX 1, Supp. 539-540 (emphasis added).)

Thus, the agreement was expressly limited to Fishel and Rauh. It protected from competition only those clients who did business with Rauh while Fishel was employed by Rauh and did not include any language extending Rauh's rights under the agreement to any successor, assign or subsequent employer.[2] (JX 1, Supp. 539-540; T.p. 284-285, Supp. 148-149.)

B. Acordia, Inc. purchases Rauh and changes Rauh's name to Acordia of Cincinnati, Inc.

In 1994, Rauh was acquired by Acordia, Inc., appellant's former parent company. (T.p. 154, Supp. 70.) In August 1994, Acordia, Inc. changed Rauh's name to Acordia of Cincinnati, Inc. (JX 2, Supp. 541-543). In September 1994, Acordia of Cincinnati, Inc. filed papers with the Ohio Secretary of State reporting the use of the fictitious name "Acordia/Rauh." (JX 3, Supp. 544-545.) Effective January 1, 1995, Acordia of

[2] In contrast to Rauh, appellant uses a noncompete agreement that includes language stating that the agreement "inures to the benefit of successors and assigns of Acordia." (DX 8, Supp. 729-732.)

Cincinnati, Inc. stopped doing business as Frederick Rauh & Company and began doing business as Acordia of Cincinnati, Inc. (T.p. 296, Supp. 160.)

C. Acordia of Cincinnati, Inc. hires Freytag and Taber and they sign competition agreements with it.

Janice Freytag signed a competition agreement with Acordia of Cincinnati, Inc. as a condition of her hire in July 1996. (JX 4, Supp. 546-547.) The competition agreement provided that for two years following the termination of Freytag's employment with Acordia/Rauh (the fictitious name of Acordia of Cincinnati, Inc.) "for any reason," she would not perform insurance services for any entity for whom Acordia/Rauh performed insurance services while she was employed by Acordia/Rauh. The agreement by its express terms was limited to Freytag and Acordia/Rauh, and did not include any language extending Acordia/Rauh's rights under the agreement to any successor, assign or new employer. (JX 4, Supp. 546-547.)

Mark Taber signed a competition agreement with Acordia of Cincinnati, Inc. as a condition of his hire in December 1996. His agreement was identical to that signed by Freytag. (JX 5, Supp. 548-549.)

D. The employment of Fishel, Freytag and Taber by Acordia of Cincinnati, Inc. is terminated when Acordia of Cincinnati, Inc. merges itself out of existence; Acordia of Ohio, Inc. becomes the new employer of Fishel, Freytag and Taber.

Acordia of Cincinnati, Inc.'s employment of Fishel, Freytag and Taber terminated on December 31, 1997 when Acordia of Cincinnati, Inc. merged itself out of existence by way of its merger into Acordia of Ohio, Inc. (JX 7, Supp. 555-564.) Four separate corporations, one with an office in Cleveland, one (Acordia of Ohio, Inc.) with an office in Columbus, one with an office in Youngstown, and one (Acordia of Cincinnati, Inc.

f/k/a Rauh) with an office in Cincinnati, participated in this merger. (JX 6-8, Supp. 550-582.) Acordia of Ohio, Inc. was the surviving corporation; the other three corporations disappeared in the merger. (JX 6-8, Supp. 550-582; T.p. 110-115, 121-122, Supp. 40-45, 51-52.) Acordia of Ohio, Inc. became the new employer of Fishel, Freytag and Taber. (T.p. 309-312, Supp. 173-176; DX 16, Supp. 753-766.)

Acordia of Ohio, Inc. was a much larger company than Acordia of Cincinnati, Inc. in terms of customers, offices, employees and revenues. (T.p. 114-115, 315, Supp. 44-45, 179.) It had a separate Federal Employer Identification Number, a separate board of directors, and a different management hierarchy. (T.p. 121, 125-126,165-169; Supp. 51, 55-56, 75-79.) Acordia of Cincinnati, Inc., formerly Rauh, ceased to exist and so ceased to employ any employees after its merger into Acordia of Ohio, Inc. (T.p. 336-337, Supp. 200-201.)

E. Acordia of Ohio, Inc. hires Diefenbach and she signs a competition agreement with it.

Sheila Diefenbach signed a competition agreement with Acordia of Ohio, Inc. as a condition of her employment in July 2000. (T.p. 740, Supp 430.) Her agreement was identical to those signed by Freytag and Taber with Acordia of Cincinnati, Inc. (JX 10, Supp. 585-586.) Her noncompete obligations under the agreement expired two years after the termination of her employment with Acordia of Ohio, Inc. "for any reason." (JX 10, Supp. 585-586.)

F. Wells Fargo purchases Acordia of Ohio, Inc.; Wells Fargo requires Fishel, Freytag, Taber and Diefenbach to complete new employment applications and acknowledge their new hire status.

In May 2001 Wells Fargo purchased Acordia, Inc., the parent company of Acordia of Ohio, Inc. (T.p. 95, Supp. 33.) All employees of Acordia of Ohio, Inc., including Fishel, Freytag, Taber and Diefenbach, were required to sign a number of forms acknowledging their new hire status and Wells Fargo's policies, including a "Wells Fargo Acquisition Employment Application" (DX 10, 21, 32 and 45, Supp. 745, 767, 781 and 809), a "Wells Fargo Background Investigation Authorization" (DX 12, 23, 34 and 47, Supp. 747, 769, 783 and 811), a "Wells Fargo New Hire Team Member Acknowledgment" (DX 13, 24, 35 and 48, Supp. 748, 770, 784 and 812) and a U.S. Department of Justice Employment Eligibility Verification ("I-9 form") (DX 11, 22, 33 and 46, Supp. 746, 768, 782 and 810). The Wells Fargo Acquisition Employment Application stated in part that "Wells Fargo's employment policies, including the application process, supersede any prior forms, applications, policies or programs of the acquired company." The employer verification section of each employee's I-9 form was completed by Acordia/Wells Fargo HR employee Sharon Miller, who certified under penalty of perjury that each of the employees would begin their new employment on January 1, 2002. (Tr. 335, Supp. 199; DX 11, 22, 33 and 46, Supp. 746, 768, 782, and 810.)

G. The employment of Fishel, Freytag, Taber and Diefenbach by Acordia of Ohio, Inc. is terminated when Acordia of Ohio, Inc. is merged out of existence; Acordia of Ohio, LLC becomes the new employer of Fishel, Freytag, Taber and Diefenbach.

Acordia of Ohio, Inc. was merged out of existence on December 31, 2001—after that date, it ceased to employ any employees. The surviving company following that merger was plaintiff-appellant Acordia of Ohio, LLC. (JX 12, Supp. 592-598; Tr. 335-336, Supp. 199-200.) Fishel, Freytag, Taber and Diefenbach became employees of appellant effective January 1, 2002.[3] The managing director of appellant's Cincinnati office acknowledged that Acordia of Ohio, Inc. no longer employed any employees as of January 1, 2002 because it had been "merged out of existence." (Tr. 336, 536, Supp. 200, 351.)

When the employment of Fishel, Freytag, Taber and Diefenbach by Acordia of Ohio, Inc. was terminated, they became subject to new terms and conditions of employment that were established by Wells Fargo. (T.p. 341-342, Supp. 205-206.) Their benefits were changed to the Wells Fargo benefit package, and they were treated as new hires for purposes of the Wells Fargo cash balance retirement plan and the Wells Fargo deferred compensation plan. (T.p. 643, 707-712, Supp. 388, 419-424; DX 9, 36, 37, 38, 39 and 40, Supp. 733-744, 785-797.) Wells Fargo did not credit their previous periods of employment with Rauh, Acordia of Cincinnati, Inc., or Acordia of Ohio, Inc. toward Wells Fargo's cash balance retirement plan. (T.p. 424-425, Supp. 283-284.)

H. Fishel, Freytag, Taber and Diefenbach resign their employment with Acordia of Ohio, LLC and join Neace Lukens.

Fishel, Freytag, Taber and Diefenbach terminated their employment with appellant in August 2005 and began working for Neace Lukens. (T.p. 229-230.) It is undisputed that they did not bring any of appellant's documents with them to Neace Lukens, and did not solicit any of appellant's customers to move their business to Neace Lukens until after they resigned. (T.p. 645, 714-715, 893, Supp. 390, 426-427, 521.) Fishel, Freytag, Taber and Diefenbach had not signed any agreements not to

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[3] This is the same date appellant had previously certified on each employee's I-9 as the date the employee would begin employment with "Acordia/Wells Fargo." (DX 11, 22, 33 and 47.)

compete with appellant (T.p. 892, Supp. 520). Because of the corporate mergers discussed above, Rauh, Acordia of Cincinnati, Inc. and Acordia of Ohio, Inc. had ceased to exist more than two years earlier, and the noncompete restrictions therefore had already expired. Thus, after Fishel, Freytag, Taber and Diefenbach joined Neace Lukens, they were free to compete with appellant and proceeded to do so.

Appellant's Cincinnati office had 5000 to 6000 customers at the time Fishel, Freytag, Taber and Diefenbach resigned. (T.p. 325, Supp. 189.) After his departure, Fishel won the business of 10 to 15 customers for whom Fishel had worked while employed by appellant. (T.p. 242-243, Supp. 106-107.) The revenue from those customers represented less than half of the book of business he had developed and serviced for appellant. (T.p. 246-247, Supp. 110-111.) Out of those 10 or 15 customers, only one had done business with Rauh while Fishel was employed by Rauh. (T.p. 326-327, Supp. 190-191.)

I. Appellant's motion for a preliminary injunction is denied and appellee's motion for summary judgment is granted because the competition agreements expired before Fishel, Freytag, Taber and Diefenbach resigned from appellant.

Appellant filed suit and moved for a preliminary injunction. The trial court heard testimony for five days before ruling that appellant failed to present clear and convincing evidence that a preliminary injunction was appropriate. Appellant appealed. The Court of Appeals affirmed, finding no abuse of discretion, and noting that "the Fishel team was not violating the time restriction contained in the noncompete agreements with their former employer." (Supp. 5.)

Appellant filed a notice of appeal and a memorandum in support of jurisdiction with this Court. This Court declined jurisdiction to hear the case. Appellant next filed a motion to reconsider the Court's refusal to grant jurisdiction, which this Court also denied.

After the case returned to the trial court, the trial court granted summary judgment in appellees' favor on all of appellant's claims. (Supp. 7.) Appellant appealed and the Court of Appeals affirmed, holding that the competition agreements had vested in the surviving corporation in each of the mergers, but had expired before Fishel, Freytag, Taber and Diefenbach resigned from appellant. The Court of Appeals' decision also affirmed the dismissal of appellant's trade secret claims. (Supp. 11-25.) Appellant applied for reconsideration on this point, but the Court of Appeals overruled its motion.[4] Appellant then appealed to this Court solely on the issue of the enforceability of the competition agreements.

II. ARGUMENT

APPELLEE'S PROPOSITION OF LAW: When a corporate employer signs a noncompete agreement that runs for a period of two years following the termination of the employee's employment with that specific employer for any reason, and that specific employer is later merged out of existence, the noncompete agreement is vested in the surviving corporation by operation of law, and expires two years later.

Appellant's proposition of law is erroneous because it contradicts itself. It begins with the correct statement that an employment contract between an employee and a disappearing corporation passes to the surviving corporation by operation of law and is enforceable by the surviving corporation in accordance with the contract's original terms. It then contradicts itself by adding the proposition that the surviving corporation may enforce the disappearing corporation's agreement "as if the surviving company

[4] Because appellant did not appeal the trade-secrets issue, the Court of Appeals' affirmance that appellant's trade-secret claims raised no genuine issue of material fact is a final judgment notwithstanding appellant's continued overwrought and factually unsupported assertions that appellees misappropriated its trade secrets.

were a party to the original agreements." This is not enforcing the agreement according to its original terms, but rather rewriting the agreement to extend additional rights to appellant.

Here, appellant's proposition would fundamentally alter the contractual definition of "Company," which is essential to the language that triggered the restrictive covenant provision. This would grant appellant far greater rights than the disappearing corporation had, which violates the governing principle of Ohio merger law—namely, that the surviving corporation is vested with all the disappearing corporation's rights and obligations, no more and no less.

Appellant's erroneous proposition of law would rewrite both Ohio's merger statutes and the innumerable contracts that pass by operation of law to surviving corporations in mergers.

A. The surviving corporation in an Ohio statutory merger is vested with all the rights and obligations of the disappearing corporations, nothing more or less.

Neither party (and no court involved in this case) disputes that the surviving company following a merger is automatically vested with all the rights and obligations of the disappearing corporation. But appellant wants more. The law manifestly rejects appellant's argument.

R.C. 1701.82 clearly describes the effect of a merger: "The separate existence of each constituent entity other than the surviving entity shall cease." R.C. 1701.82(A)(1). The only exception is when some act is necessary to vest property or rights in the surviving entity, in which case the existence of the disappearing entity is continued for the limited purpose of enabling its authorized representatives to perform that act. *Id.* All the assets, property and rights of the disappearing entity, and all the obligations of the disappearing entity, are vested in the surviving entity without further act or deed. R.C. 1701.82(A)(3) and (4).

In *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St. 3d 666, this Court construed and applied R.C. 1701.82(A)(3) and (4) to a stock purchase agreement following a merger. The Court held that the surviving corporation had the same obligations as the disappearing corporation, and those obligations were determined in accordance with the agreement's original terms. The Court did not suggest that the merger altered the terms of the agreement or imposed any greater obligations on the surviving corporation than the disappearing corporation had.

In the same fashion, a surviving corporation in a merger has the same rights under a contract that the disappearing corporation had–not greater rights.

Just as in *ASA Architects,* appellant "is attempting to add language to R.C. 1701.82(A)(3) and (4) that simply does not exist." *Id.* at 673. R.C. 1701.82(A)(3) provides that the surviving entity is vested with the "obligations... due to each constituent entity" but appellant instead insists that it should be vested with the greater obligations that would be due it if its name were substituted for the name of the constituent entity that entered into the agreement.

Neither *ASA Architects* nor any other Ohio decision suggests that the surviving corporation in a merger has any greater rights or obligations under a contract than the disappearing corporation that signed the contract had under that contract. Appellant ignores this and asks for more than the contracts contemplated.

B. Appellant seeks greater rights under the competition agreements than the disappearing corporations that signed the agreements had.

Appellant asks this Court to strike out the defined employer's name and replace it with appellant's name in the employment agreements. But under this approach, appellant would have greater rights than the disappearing corporations that signed the agreements had in two significant respects.

First, the start of the two-year restrictive covenants would be extended by several years. Under the terms of their contracts, Fishel, Freytag and Taber's two-year restrictive covenant began to run in December 1997 (when Acordia of Cincinnati, Inc. ceased to exist). Diefenbach's began to run in December 2001 (when Acordia of Ohio, Inc. ceased to exist). Appellant seeks to extend the triggering events to August 2005, when all four employees resigned from appellant. Because "Company" is a defined contract term, substituting appellant's name for the contracting employer identified in the agreements would give appellant at least four (and up to eight) additional years of protection that were not available to the contracting corporations. The competition agreements could have said that the restrictive covenants began to run when the employee's employment with the defined employer or any successor employer was terminated—but they do not. Instead, appellant asks this Court to give it greater contractual rights than its predecessors had by substituting its name for the name of the defined employer.

Second, the scope of the restrictive covenants would be greatly expanded. For example, Fishel's restrictive covenant prohibited him from performing any insurance services for any individual or entity for whom Rauh (a/k/a Acordia of Cincinnati, Inc.) performed any insurance services while Fishel was employed by Rauh. Substituting appellant's name for the name of the defined employer would prohibit Fishel from competing for the business of any individual or entity for whom appellant performed any insurance services through August 2005—a much larger number than contemplated by his original agreement, which only covered Rauh's customers.

In short, it is plain that if appellant has the right to have the competition agreements rewritten to substitute the appellant's name for the name of the defined employer, it will have greater rights under the agreements than the defined employers had. But the agreements give it no right to be substituted for the defined employers, and the courts below properly applied the agreements as written.

C. Under the clear and unambiguous terms of the competition agreements, the restrictive covenants expired two years after the termination of each employee's employment with the contracting employer.

This Court consistently has held that unambiguous contracts must be enforced as written and that a court may not look beyond the plain language of an unambiguous agreement to determine the parties' rights and obligations. See, e.g., *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, 220 ("When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties"); *Cincinnati Ins. Co. v. CPS Holdings, Inc.* (2007), 115 Ohio St. 3d 306, 308 (same); *Cincinnati Indemnity Co. v. Martin* (1999), 85 Ohio St. 3d 604, 607 ("It is well established that when the language in a [contract] is clear and unambiguous, we must enforce the contract as written and give the words their plain and ordinary meaning"); *E. S. Preston Associates, Inc. v. Preston* (1986), 24 Ohio St. 3d 7, 10 ("Where the terms of a contract are clear and unambiguous, this court cannot find a different intent from that expressed in the contract.").

Appellant wants this Court to treat appellant "as if the surviving company were a party to the original agreements." Its proposal is to replace the defined contract term of "Company" with appellant's own name. But this would violate basic principles of contract law. This Court has "stated that the most critical rule [of contract construction] is that which stops this court from rewriting the contract when the intent of the parties is evident, i.e., if the language of the [contract] is clear and unambiguous." *Hybud Equipment Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St. 3d 657, 665.[5]

While appellant attempts to portray itself as victimized by the Court of Appeals' decision to apply the competition agreements as written, such attempts go nowhere. Courts will not rewrite an unambiguous agreement even when the agreement works a hardship on one party and a corresponding advantage on the other party. *Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs.* (2007), 113 Ohio St. 3d 226, 231 (The Supreme Court "has long recognized that where a contract is plain and unambiguous, it does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto and a corresponding advantage to the other, [and] that it is not the province of courts to relieve parties of improvident contracts").

[5] Appellant also argues that the words used in the agreements are essentially irrelevant because "the language of the agreements cannot dictate the effect of the governing statute." (Appellant's Brief at 32.) This argument directly contradicts the syllabus law announced by this Court in *ASA Architects*, supra: agreements pass to the surviving corporation in a merger by operation of law "unless the agreement explicitly sets forth that in the event of a merger, the obligations of the constituent corporation cease to exist." *Id.* at Syllabus. Such a "no-merger" clause only has meaning if the name of the disappearing corporation remains a part of the agreement. Appellant's proposition of law seeks to make such a clause irrelevant by striking out the disappearing corporation's name and replacing it with the surviving corporation's name. This further demonstrates how appellant's proposition of law would impose contractual obligations that the parties never contemplated.

Nor can appellant escape the clear terms of the agreements by claiming that their terms are ambiguous; any ambiguities are to be construed against appellant's position. *O'Neill v. German* (1951), 154 Ohio St. 565, 571 ("Authorities without number can be cited to support the rule that doubtful language in a contract is to be interpreted most strongly against ... the party who prepared the contract"). Similarly, this Court repeatedly has recognized that ambiguities in a boilerplate agreement between parties of unequal bargaining power, such as the competition agreements at issue here, must be strictly construed against the drafter. *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, 220 ("[W]here the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party"); *Safeco Ins. Co. of Am. v. White* (2009), 122 Ohio St. 3d 562, 567 (same).

The Court of Appeals followed basic principles of contract law when it applied the agreements as written.

D. An employee's employment with an employer is terminated when that employer is merged out of existence.

In another attempt to avoid the clear and unambiguous language in the competition agreements, appellant makes the remarkable argument that Fishel, Freytag, Taber and Diefenbach are still employed by the companies that signed their competition agreements, even though those companies have been merged out of existence. Appellant argues that although R.C. 1701.82(A)(1) states that the "separate existence of each constituent entity other than the surviving entity in a merger shall cease" the word "separate" shows "a deliberate intent to continue the existence of the constituent entities as part of the unified surviving entity" (Appellant's Brief at 22). This argument ignores the fact that R.C. 1701.82(A)(1) specifies that the disappearing corporation in a merger continues to exist only when some act is necessary to vest property or rights in the surviving entity, in which case the existence of the disappearing entity is continued only for the limited purpose of enabling its authorized representative to perform that act.

Appellant's argument that the disappearing entity continues to exist also ignores settled Ohio law. Ohio courts have recognized that under Ohio's merger laws, the disappearing corporation in a merger ceases to employ any employees, and the surviving corporation becomes the new employer of the employees formerly employed by the disappearing corporation. For example, in *Farmer v. Luntz Corp.* (Jan. 21, 1993), 8th Dist. No. 61873, 1993 Ohio App. LEXIS 196, the Eighth District held that, following a merger, the surviving corporation—not the company that had been merged out of existence—was the employer of the retained employees.

This same principle was applied in *W.R. Grace & Co. v. Hargadine* (6th Cir. 1968), 392 F.2d 9. There, Hargadine signed a covenant not to compete for a period of two years after the termination of his employment with Dubois Holding Company or Dubois Co., Inc. Dubois Holding Company and Dubois Co., Inc. subsequently merged into Dubois Chemicals, Inc. and Hargadine became an employee of Dubois Chemicals, Inc. Dubois Chemicals, Inc. was later purchased by W.R. Grace & Co., which sued Hargadine for allegedly breaching his covenant not to compete. The district court held, just as the Court of Appeals held here, that Hargadine's covenant not to compete expired "two years from and after the termination of his employment with the original signatory companies" and that his employment with the original signatory companies terminated "when the existence of his employer, the DuBois Co., Inc. ceased under the specific terms of the agreement of merger which resulting in the formation of Dubois Chemicals, Inc." *Id.* at 19. In affirming, the Sixth Circuit held that the district court had properly held the parties to the literal terms of the covenant not to compete, and had properly declined to "supply the missing language" that W.R. Grace & Co. was attempting to read into the contract. *Id.* at 20.[6] Thus, *W.R. Grace* is directly on point: a restrictive covenant that begins to run when employment with a defined employer terminates is triggered when the defined employer is merged out of existence.

The Sixth Circuit Court of Appeals also rejected appellant's claim that the disappearing corporation in an Ohio merger somehow continues to exist in *Cincom Systems, Inc. v. Novelis Corp.* (6th Cir. 2009), 581 F.3d 431. That case involved a software licensing agreement between Cincom (the software provider) and Alcan Ohio (the user). Through a series of mergers, Alcan Ohio was merged out of existence into Novelis, which continued to use Cincom's software. Cincom sued Novelis for breaching the software license agreement. Novelis argued that there was no breach of the agreement because Alcan's agreement with Cincom transferred to Novelis under Ohio merger law. Essentially, Novelis wanted the court to strike the name "Alcan Ohio" from the license agreement and replace it with "Novelis." The Sixth Circuit refused to do this. The court reasoned that, while "the license once held by Alcan Ohio automatically vested by operation of [Ohio merger] law in Novelis, ...[under] federal common law, and

[6] Although the Sixth Circuit also stated that a covenant not to compete is not assignable without the consent of the employee, the Sixth Circuit subsequently recognized that this was mere dicta and that covenants not to compete are in fact assignable. *Managed Health Care Associates, Inc. v. Kethan* (6th Cir. 2000), 209 F.3d 923, 930.

the actual language of the license in this case, ... the only legal entity that can hold a license from Cincom is Alcan Ohio." *Id.* at 439. The court specifically noted that Alcan Ohio "no longer exists as a legal entity under Ohio law." *Id.* See also *PPG Industries, Inc. v. Guardian Industries Corp.* (6th Cir. 1979), 597 F.2d 1090 (company merged out of existence no longer exists); *Koppers Coal & Transp. Co. v. United States* (3rd Cir. 1939), 107 F.2d 706 (same).

This Court also rejected the notion that disappearing corporations in a merger continue to exist following a merger when it decided *Hoover Universal, Inc. v. Limbach* (1991), 61 Ohio St. 3d 563. There, the tax commissioner argued that Hoover, the surviving corporation in a merger with two of its subsidiaries, could not claim a tax credit because the applicable statute denied the credit if the property was previously required to be listed for taxation by someone other than the taxpayer, and the subsidiaries were the first entities required to list the property. This Court disagreed. Citing R.C. 1701.82(A), the Court stated: "R.C. 5733.061 disallows the investment tax credit for property required to be listed by another person. Here, however, the subsidiaries were not required to list the property because they no longer existed. . . . Hoover did not own or control the subsidiaries on or after February 29, 1980 [the date of the merger], the time for making returns. The subsidiaries no longer existed, could not be owned, and owned no property." 61 Ohio St. 3d at 566-567. Accord, *Morris v. Investment Life Ins. Co.* (1971), 27 Ohio St. 2d 26, 31 ("It is settled law 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"); 12 Ohio Jur. 3d §787 ("all but one of the constituent entities is terminated in a merger").[7]

In identical fashion, after Acordia of Cincinnati, Inc. and Acordia of Ohio, Inc. were merged out of existence, they no longer existed and could not employ employees. The employees instead became the employees of the surviving corporation, a distinct corporate entity with its own Federal Employer Identification Number, its own duty to withhold taxes from employee paychecks, its own account with the Bureau of Workers' Compensation, its own reporting and compliance obligations under state and federal employment laws, and so on. No case has held that a disappearing corporation in a merger continues to employ its former employees, and any such holding would be inconsistent with Ohio's merger laws and common sense.

Corporations must carefully choose which entity will survive a merger; they must consider, for example, which corporation has the necessary licensing, and which has the more favorable tax treatment. And they must accept the consequences of that choice. Appellant cannot have it both ways. Appellant and its predecessors entered into mergers to "eliminate redundant entities" (T.p. 78-79) after determining that each redundant entity was costing up to $100,000 in additional payroll filings, tax filings and other filings (T.p. 87-88). But when appellant and its predecessors merged these "redundant" entities out of existence, one inescapable consequence was that they

[7] This Court again debunked the notion that a disappearing corporation in a merger somehow continues to exist when it noted in *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St. 3d 666, 671 fn. 7 that "any reference to constituent corporation concerns the company that was **absorbed and extinguished** by virtue of the ... merger" (emphasis added).

ceased to employ any employees. Appellant must live with the benefits and the consequences of its choice.

Appellant's reliance on federal tax and ERISA laws concerning whether an employee is "separated from service" as a result of a merger also is misplaced. The competition agreements at issue here say that the restrictive covenants begin to run when the employee's employment with the defined employer is terminated, not when the employee is "separated from service"—a term of art under federal tax and ERISA laws. The IRS Revenue Ruling cited by appellant actually supports the Court of Appeals' decision, because it recognizes that as a result of a merger, an employee's employment with the disappearing corporation is terminated, and that the employee becomes employed by "a different employer." Rev. Rul. 79-336.

The fact that appellees became employed by a different employer following the mergers is dispositive under the agreements at issue here. Those agreements provide that the non-compete provisions begin to run when the employee's employment with the specifically defined employer is terminated "for any reason." "For any reason" covers any termination of employment, no matter what caused it. It plainly covers the termination of employment that results when an employer is merged out of existence. Appellant discusses at length the fact that the employees became employed by the surviving corporation, but under the terms of the agreements, that fact is simply irrelevant. All that matters under the agreements is that their employment with the defined employer was terminated.

E. The Court of Appeals' opinion is consistent with the clear and unambiguous terms of the competition agreements and with Ohio's merger laws.

The Court of Appeals gave Ohio's merger laws full effect, recognizing that the surviving company in each of the mergers was vested with all the rights and assets of the disappearing company. "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." (Slip Op. 7, Supp. 18.)

The Court of Appeals then turned to the competition agreements to determine what rights the disappearing corporations had under those agreements. "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. [f/k/a Frederick Rauh & Company] was merged into Acordia of Ohio. Inc." (Slip Op. 8, Supp. 19.) The Court of Appeals held that the surviving corporation (appellant or its immediate predecessor) had the right to enforce the agreement for the two-year period following the employee's termination of employment with the defined employer. Thus, the Court of Appeals honored both Ohio's merger statutes and the clear and unambiguous language of the competition agreements.

Appellant misrepresents the Court of Appeals' decision when it argues that the decision "would require every contract to contain an assignment clause in order to pass by operation of the Ohio merger statutes." (Appellant's Brief at 28.) None of the competition agreements at issue here contained an assignment clause, yet the Court of Appeals nonetheless held that they passed by operation of the Ohio merger statutes, and were enforceable by the surviving corporation for the two-year period stated in the agreements. The Court of Appeals neither required an assignment clause nor held that the absence of an assignment clause precluded their being vested in the surviving corporation. The Court of Appeals simply applied the agreements as written and recognized that the surviving corporation had no greater rights under the agreements than the disappearing corporations had.

F. Appellant's cited cases offer it no help; most relate only to the non-controversial proposition that assets automatically transfer to the surviving company following a merger, and none construe analogous contract language.

Appellant argues that courts in other jurisdictions with comparable merger statutes have found restrictive covenants with constituent companies enforceable by the surviving company. But the decisions relied on by appellant hold only what the Court of Appeals held here, namely that the agreements are vested in the surviving corporation by operation of law. None of these decisions hold that the terms of the agreements are irrelevant, or that the agreements must be rewritten to grant the surviving corporation greater rights than the disappearing corporation had.

For example, in *Farm Credit Services v. Wysocki* (Wis. 2001), 243 Wis.2d 305, 627 N.W.2d 444, the court rejected an argument that a noncompete agreement did not survive a merger, noting that the surviving company in the merger was the same company that signed the original agreement, and that the mergers did not change the parties to the original noncompete agreement. The factual analogy here would be if Rauh (or Acordia of Ohio, Inc., in Diefenbach's case) had been the surviving corporation throughout the various mergers. Because it was not, *Wysocki* is not helpful to appellant.

Likewise, in *Corporate Express Office Products, Inc. v. Phillips* (Fla. 2003), 847 So. 2d 406, the only issue was whether an assignment clause was necessary for the surviving corporation in a merger to enforce the disappearing corporation's noncompete agreements. The Florida Supreme Court held that the noncompete agreements passed from the disappearing corporation to the surviving corporation by operation of law, and that no assignment was necessary, just as the Court of Appeals did here. The Florida Supreme Court never addressed whether the agreements had expired by their own terms following their vesting in the surviving corporation.

Similarly, in *Aon Consulting, Inc. v. Pearson* (Neb. 2008), 748 N.W.2d 626, the Nebraska Supreme court, like the Court of Appeals here, held that a noncompete agreement is a corporate asset "which passes by operation of law to a successor corporation as the result of a merger, regardless of whether the agreement would otherwise be assignable." *Id.* at 637. The Nebraska Supreme Court never addressed whether the agreement had expired on its own terms.

The many other decisions cited by appellant similarly stand for nothing more than the rule followed by the Court of Appeals here, namely that a noncompete agreement entered into by the disappearing corporation in a merger is vested in the surviving corporation by operation of law, notwithstanding the absence of an assignment clause.

See, e.g., *HD Supply Facilities Maintenance, Ltd. v. Bymoen* (Nev. 2009), 210 P.3d 183; *CDI Corp. v. Hough* (La. App. 2009), 9 So.3d 282; *National Instrument, LLC v. Braithwaite* (Md. Cir. Ct. 2006), 2006 Md. Cir. Ct. LEXIS 12; *Equifax Services, Inc. v. Hitz* (10th Cir. 1990), 905 F.2d 1355; *UARCO, Inc. v. Lam*, (D.Haw. 1998), 18 F. Supp. 2d 1116. None of these cases stand for the proposition that the terms of the noncompete agreements are irrelevant, or that they can be rewritten by substituting the name of the surviving corporation for the name of the disappearing corporation that signed the agreement. Appellant asks this Court to be the first to rewrite a contract in this manner.

G. The Court of Appeals' opinion does not inject uncertainty into mergers.

Appellant and the amici supporting appellant claim that the Court of Appeals' decision injects uncertainty into mergers by requiring corporations contemplating a merger to review the contracts of the corporation that would disappear in the merger. This claim ignores the fact that such a review is already a part of due diligence in any merger.[8] Does the disappearing corporation have a two-year lease or a five-year lease on its headquarters? Does the disappearing corporation have executive employment contracts that will allow the executives to resign their employment and receive severance pay upon a change in control? Does the disappearing corporation have union contracts that the surviving corporation will be obliged to honor? Does the disappearing corporation have noncompete agreements that will be triggered by the termination of the employees' employment with the disappearing corporation? These

[8] The record in this case includes extensive testimony about the merger and acquisition groups that arranged the mergers in this case and the due diligence involved in a merger. (T.p. 71-134; Supp. 27-64.)

are all questions that already must be answered as part of the routine due diligence conducted before a merger. Requiring appellant to read the contracts and apply them as written is no great burden.

It is appellant's proposition of law that would inject uncertainty into the routine interaction between employees and employers. Agreements not to compete have become commonplace. All interested parties need to be able to rely on the clear and unambiguous contract terms defining the duration and scope of an employee's obligations. This includes employees contemplating changing employers, employers contemplating hiring an employee with a competition agreement, and employers seeking to enforce competition agreements. Appellant's approach would require interested parties to guess how a merger might have rewritten the relevant contracts. Appellee's approach requires no such legal gymnastics; it simply applies the contracts as written. Accordingly, this Court should reject appellant's proposition.

III. CONCLUSION

The Court of Appeals properly applied Ohio's merger laws and the plain language of the agreements to hold that the agreements had expired before appellant attempted to enforce them. Appellant's proposition of law attempts to rewrite both the merger statutes and the agreements. This Court should reject that effort and affirm the Court of Appeals' decision.

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