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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STATEMENT OF FACTS

A. Acordia's corporate history.

1. *The autonomous Cincinnati office was part of a nationwide insurance business.*

In 1988, Frederick Rauh & Co. was sold to American Business Insurance, a national insurance brokerage business and subsidiary of Great American Insurance. (T.p. 150-151). From and after that acquisition, the Cincinnati office has been owned by and been a part of a national insurance agency. (T.p. 152). In 1994, Acordia, Inc., a subsidiary of Anthem Insurance, purchased American Business Insurance, including Frederick Rauh & Co. (T.p. 152-154). Effective May 1, 2001, Wells Fargo acquired the family of Acordia offices from Acordia, Inc. (Supp. 33, 267; T.p. 95, 408). During the tenure of the Appellees Michael Fishel, Janice Freytag, Mark Taber and Sheila Diefenbach (the "Defecting Employees"), the office on the 11th floor of the Kroger building at 1014 Vine Street, Cincinnati, Ohio has been an integral but autonomous component of a nationwide insurance business successively owned by Great American Insurance, Anthem Insurance and Wells Fargo.

2. *Frederick Rauh & Co. becomes Acordia.*

Following its 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) on August 18, 1994. (Supp. 613-615, 70-73; Plaintiff's Ex. 5; T.p. 154-157). Other than the name, there were no organic or systemic changes to the business. (Supp. 343; T.p. 520). Already part of Acordia, Inc. for more than four years, Acordia of Cincinnati, Inc. merged with its sister companies located in Columbus, Cleveland and Youngstown under the umbrella, Acordia of Ohio, Inc., effective December 31, 1997. (Supp. 828, 618-629; Schaefer Aff. ¶23; Plaintiff's Ex. 7). Pursuant to the Agreement and Plan of Merger, Acordia of

Cincinnati, Inc. and Acordia of Ohio, Inc. became "a single corporation," continuing their business operation without interruption. As Mr. Thomas Riffe, Regional Human Resources Director, testified: "There was no break in the operating entities operations, in its functions ...." (Supp. 309; T.p. 450).

Effective December 31, 2001, Acordia of Ohio, Inc. merged with Acordia of Ohio, LLC pursuant to R.C. 1705.36. (Supp. 635-641; Plaintiff's Ex. 9). Through this merger, Acordia simply changed from a stock corporation to a limited liability company. Mr. Brazill could not be more candid: "It was just a way to change the form of corporate structure." (Supp. 32; T.p. 84). No other alteration or modification of the company was effected.

B. The mergers did not terminate employment.

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, until they resigned August 31, 2005. (Supp. 99-100; T.p. 231-233). Diefenbach was continuously employed as an account manager supporting the account executives and responding to customer questions and requests. (T.p. 744-745). During their tenure, they never went without a paycheck or without benefits. (Supp. 99; T.p. 231). For example, Taber conceded:

> Q. Now from the time you started with Acordia in 1996 through the time you resigned in August of 2005, you were never unemployed, were you?
>
> A. No.
>
> Q. You never missed a paycheck?
>
> A. No.
>
> Q. You always had continuous benefits?
>
> A. Correct.

(T.p. 682).

During their uninterrupted employment, Acordia operated under two tradenames, merged with sister insurance agencies, changed its corporate form and was purchased by a new owner. But through it all, the Defecting Employees continued to work at the same office located on the 11th floor of the Kroger Building, in the commercial lines department, servicing customers generally within a 100 mile radius, performing essentially the same duties, under the supervision of the same people, for which they received the same compensation. (Supp. 99-101; T.p. 231-233). Each year they received performance evaluations based on the prior year performance. (T.p. 677). The Defecting Employees terminated their employment voluntarily when they resigned and began working for Neace Lukens, a competitor, on August 31, 2005. (Supp. 99; T.p. 231). There was no termination of their employment before that date.

C. <u>The mergers did not impose any responsibility to service customers outside the Cincinnati region and did not expand the scope of the covenants.</u>

The Defecting Employees and their amicus suggest that the mergers expanded the geographic scope of customers they were expected to service. Neither the merger of Acordia of Cincinnati, Inc. and Acordia of Ohio, Inc. nor the merger of Acordia of Ohio, Inc. and Acordia of Ohio, LLC imposed any obligation on the Defecting Employees to service customers in Columbus, Cleveland or Youngstown. For example, Freytag acknowledged that following the mergers, she was "still calling on customers located in the greater Cincinnati area." (Supp. 353; T.p. 570). Likewise, Taber conceded that neither merger imposed any responsibility to service new customers. (Supp. 402, 404; T.p. 678, 680). And Fishel made the ultimate concession:

> Q. What new customer did Tom Schaefer say to you following the merger of Acordia of Cincinnati into Acordia of Ohio, in December of 1997, you're required to service this particular customer?
>
> A. I can't think of one.

Q. Following the merger of Acordia of Ohio, Inc. into Acordia of Ohio, LLC, what new customer were you required to service as a result of that merger?

A. I can't think of one.

(Supp. 468-469; T.p. 809-810). Contrary to the hyperbole of the Defecting Employees and their amicus, the mergers imposed no added burden to service customers throughout Ohio.

D. Wells Fargo's acquisition of Acordia, Inc. did not affect employment with Acordia of Ohio.

Wells Fargo acquired the family of Acordia offices, purchasing the stock of Acordia, Inc., effective May 1, 2001. (Supp. 33, 267; T.p. 95, 408). Wells Fargo's acquisition did not alter what the employees did, where the employees did it or how the employees did it. (T.p. 214-215). Wells Fargo simply integrated Acordia employees into its administrative system, including benefit plans, effective January 1, 2002. (Supp. 665-670; Plaintiff's Ex. 22). To enroll, each Acordia employee was required to fill out standard forms: a "Wells Fargo Acquisition Employment Application," a "Department of Justice I-9," a "Background Investigation Authorization" and a "New Hire Team Member Acknowledgement". (Supp. 267-277, 745-748; T.p. 408-418; Defendants' Exs. 10, 11, 12, 13). 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. (Supp. 837-841; Affidavit of Paula M. Fahey Rahill ("Rahill Aff.")). Additionally, Wells Fargo was fastidious in having completed employment forms on file for each employee. (Supp. 270-271; T.p. 411-412). As Mr. Schaefer explained: "Wells Fargo is very particular about having accurate information …." (Supp. 269; T.p. 410). These forms "were not completed in order to obtain employment. They were part of the process of continuing employment." (Supp. 269; T.p. 410). All Acordia employees were advised: "As an active Acordia team member, you have not terminated employment with the company." (Supp. 668; Plaintiff's Ex. 22, p. 4). With the acquisition effective May 1, 2001, the Defecting Employees remained employed by Acordia of Ohio, Inc. (Supp. 272; T.p. 413).

Nothing in any of these forms vitiated or nullified the Competition Agreements. (Supp. 271; T.p. 412). As Ms. Rahill, Human Resources Acquisition Manager for Wells Fargo explained, Wells Fargo employment policies, including the application process, did not and were not intended to void any contract that any employee had with Acordia. (Supp. 837-838; Rahill Aff. ¶5). Likewise, the language of "U.S. Department of Justice, Employment Eligibility Verification, Form I-9" was not intended to suggest new employment. (Supp. 276; T.p. 417). Instead, Wells Fargo simply needed confirmation that the Acordia employees were eligible for employment in the United States. (Supp. 274; T.p. 415). Given that the form was preprinted by the federal government, no alteration, modification or change could be made. (Supp. 273; T.p. 414). Similarly, Acordia had its employees sign "New Hire Team Member Acknowledgement." As Mr. Riffe explained, Acordia simply used a standard form to obtain acknowledgment of Wells Fargo's handbook and code of ethics. (Supp. 277; T.p. 418). This handbook and code of ethics was nothing new. Rather, these policies and procedures were typical to what the company had through its corporate history. (Supp. 253-254; T.p. 389-390).

Where Wells Fargo provided the same benefits that Acordia employees had previously, employees were given the same benefits with the same seniority and same vesting. (Supp. 285-286, 665-670; T.p. 426-427, 729; Plaintiff's Ex. 22). For example, the assets of the Acordia 401k were merged into the Wells Fargo 401k and the Defecting Employees were given the same seniority for vesting in the Wells Fargo 401k Plan. (Supp. 280, 285; T.p. 421, 426, 729). Their corporate hire dates were their original dates of hire. (Defendants' Ex. 60). Their severance benefits and short-term disability were calculated based upon *all* of their accumulated years of service. (Supp. 286-287; T.p. 427-428). However, when Wells Fargo provided new benefits, such as a cash balance plan, employees were treated as new participants, not new employees. (Supp. 282; T.p. 423). Because Acordia did not have a defined benefit pension plan and supporting assets, Wells Fargo did not recognize prior service with Acordia to be counted under the cash balance plan. (Supp. 837-841; Rahill Aff. ¶12). As Mr. Riffe explained, Acordia employees were not given this credit for this one new benefit because "there was not a comparable plan in place at Acordia. There was not a trust that could fund those liabilities under the cash balance plan." (Supp. 288; T.p. 429). Therefore, the Acordia employees were expected to meet the 5-year vesting requirement prescribed in the new cash management plan. (Supp. 283-284; T.p. 424-425). Upon termination of their employment on August 31, 2005, the Defecting Employees were paid all of the benefits to which they were entitled. (Supp. 830; Schaefer Aff. ¶32).

E. The Defecting Employees coordinate their departure to transfer customers to Neace Lukens.

Fishel, Freytag and Taber resigned simultaneously and began employment with Neace Lukens on August 31, 2005. (Supp. 830; Schaefer Aff. ¶34). Diefenbach had already resigned and she too began employment with Neace Lukens on August 31, 2005. In positions virtually identical to that which they had at Acordia, Fishel, Freytag and Taber began "soliciting, procuring, ..., engaging in ... the sale of insurance or insurance services" to customers of Acordia. (Supp. 103-106, 355-362, 405-407, 473-475; T.p. 239-243, 589-596, 692-694, 831-833). The Defecting Employees would minimize the affect of their solicitation, citing the total number of Acordia customers. Merit Brief of Appellees, p. 7. In fact, they seriously damaged Acordia's customer relations with customers who generated substantial revenue for the company.

In two days, Fishel and Freytag convinced three customers, Cincinnati Public Schools, ATM Solutions and Realty Management[1], to sign broker of record letters. (Supp. 473-475; T.p. 831-833). These customers alone represented $500,000 in new revenue for Neace Lukens. (Supp. 475, 831-832; T.p. 833; Schaefer Aff. ¶42). As of three days later, Fishel had obtained commitments and/or broker of record letters from 30% of the customers he "handled" at Acordia. (Supp. 485, 832; T.p. 844; Schaefer Aff. ¶44). Within 6 months, the Defecting Employees successfully convinced 19 Acordia customers, amounting to more than $1 million in revenue, to change their "broker of record" to Neace Lukens. (Supp. 832; Schaefer Aff. ¶44). Ultimately, Fishel and Freytag convinced 60% of the 30 customers Fishel serviced to change from Acordia to Neace Lukens. (Supp. 717; Plaintiff's Ex. 47; T.p. 653). Acordia lost not only the current business of these customers but also the new business opportunities these customers offered, including referrals to new customers. (T.p. 530).

ARGUMENT

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.

A. Ohio corporate law is founded on the principle of corporate continuity and the contracts of constituent corporations vest in the surviving corporation following a statutory merger.

The Defecting Employees' argument would put the surviving company in a merge to a Hobson's choice – discharge the employees acquired in the merger in order to preserve the right to keep them from absconding with customers or keep the employees working and lose the protection of the restrictive covenants signed with the constituent companies. The Defecting

1 Cincinnati Public Schools had been an Acordia customer for 10 years. (Supp. 476; T.p. 834). ATM Solutions had been an Acordia customer for 7 years. (Supp. 483; T.p. 841).

Employees and their amicus create this quandary with their argument – if the Ohio merger statutes had intended the surviving company to step into the shoes of its predecessors with the right to enforce the contracts of the constituents, then the statutes would have included language such as: "as if the surviving company were a party to the original agreements." Amicus Brief, p. 8. *See also* Merit Brief of Appellees, p. 10. Instead, they argue that a merger terminates employment. This argument ignores a fundamental principle of Ohio merger law.

1. The Ohio merger statutes embody the principle of corporate continuity.

The very premise of the Ohio merger statutes throughout their history has been that the successor company steps into the shoes of the constituent companies following a merger. Although the separate legal existence of the constituent companies may cease, the constituent companies continue to function as components of a consolidated whole. In the words of this Court, "the nominal existence of the several constituent companies terminated, but their substantial existence is perpetuated by being merged into the consolidated company." *Citizens Savings & Trust Co. v. Cincinnati, Dayton & Toledo Traction Co.* (1922), 106 Ohio St. 577, 140 N.E. 280 at ¶9 of the syllabus; *Marfield v. Cincinnati, Dayton & Toledo Traction Co.* (1924), 111 Ohio St. 139, 164, 144 N.E. 689 ("The doctrine of merger rather than the theory of a new, separate and distinct corporation must be weighed and considered ... and when the two doctrines are joined, the conclusion is irresistible that the consolidated company merely steps into the shoes of the constituent companies."). This principle of corporate continuity gives meaning and effect to the transfer of assets and liabilities to the surviving company. Now the surviving company may enforce the identical contract rights, including restrictive covenants, owed to the constituent companies as if it were a party to the original agreements. Given this statutory scheme, the surviving company has no Hobson's choice because a merger does not trigger termination of employment.

2. *Corporate continuity assures the surviving company is vested with all rights, privileges, obligations and liabilities of the constituent companies.*

The General Assembly did not intend to penalize corporations for merging by depriving successor companies of the assets and property of the constituent companies. "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.* (emphasis added) quoting 19 Am. Jur.2d Corporations §2631 (1986).

3. *The Defecting Employees would have this Court emasculate the principle of corporate continuity embodied in the Ohio merger statutes.*

Invoking contract construction, the Defecting Employees argue that this Court should ignore the principle of corporate continuity because the Competition Agreements did not include "successors" in the definition of "Company." Should this Court recognize the principle of corporate continuity, they argue, the Court would be violating basic principles of contract law. Merit Brief of Appellees, p. 13. However, Acordia is not asking this Court to rewrite the Competition Agreements or abrogate contract law. Rather, Acordia would have this Court reaffirm that the Ohio merger statutes are part of the Competition Agreements just as much as each paragraph in the agreements. As this Court eloquently expressed in *Holbrook v. Ives* (1886), 44 Ohio St. 516, 524, 9 N.E. 228:

> The laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of the contract, and this is so, whether such laws effect (sic) its validity, construction, discharge or enforcement.

In the context of corporate mergers, this Court has specifically recognized that the Ohio merger statutes are part of the contracts of the merging companies. "[T]he extent of the liability or obligation of a corporation may be dependent upon and measured by the law which establishes its existence as a legal entity. Thus, that law may authorize the *substitution*, for the liability and obligation of a corporation that it has created as a corporate entity, of the liability of another solvent legal entity into which it lawfully merged." *State ex rel. Safeguard Ins. Co. v. Vorys* (1960), 171 Ohio St. 109, 114, 167 N.E.2d 910 (emphasis added). Ohio merger law complements and supplements each provision of the contracts transferred in a merger.

The Defecting Employees, therefore, entered into the Competition Agreements with the Ohio merger statutes as an integral part of the agreements. No "successor" language was needed. Instead, the law, as an integral part of the agreements, would transfer the obligations due the constituent company to the surviving company and the surviving company would then be entitled to enforce the obligation as if it were a party to the agreement. *Vorys*, 171 Ohio St. at 115 ("... such corporation's obligations and liabilities shall cease to be the obligations and liabilities of such corporation and instead shall become the obligations and liabilities of a ... legal entity into which said corporation merges."). Substitution of Acordia for the constituent company to the Competition Agreements would, therefore, be consistent with Ohio contract law *and* Ohio merger law.

B. <u>Courts from other jurisdictions have construed comparable merger statutes to find the restrictive covenants with constituent companies fully enforceable by the surviving company as written.</u>

Courts in other states have been presented with the identical issue under comparable statutes and facts. Those courts have consistently concluded that the merger statute vested the successor company with the noncompetition agreements transferred as an asset in the merger and with the right to enforce the agreements as if it had been an original party. The Defecting

Employees cursorily dismiss those cases. *See* Merit Brief of Appellees, pp. 21-23. However, examination of the facts in just one case illustrates that the courts found the same arguments as the Defecting Employees' to be meritless.

The Defecting Employees dismiss *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.* (Neb. 2008), 748 N.W.2d 626, arguing that the Nebraska Supreme Court "never addressed whether the agreement had expired on its own terms." Merit Brief of Appellees, p. 22. In fact, the Nebraska Supreme Court was confronted with virtually identical facts and arguments as this case. In 1981, William Pearson began working for Alexander & Alexander Services, Inc. ("A&A") as an account executive selling and servicing group health insurance plans. Several months later, he signed a non-solicitation agreement, prohibiting him from soliciting certain customers for two years after leaving employment with A&A. ("[I]f your employment with A&A should terminate …) *Id.* at 633. In 1990, Pearson became manager of A&A's Lincoln, Nebraska office. *Id.* In 1994, he became manager of the Omaha, Nebraska office as well. *Id.* In 1997, A&A merged with Aon Consulting, Inc. "Pearson continued to work for the company in the same capacity and performed the same duties." *Id.* Four years after the merger, Pearson became dissatisfied with his employment with Aon and sought legal advice regarding the validity of the nonsolicitation agreement. *Id.* 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 633-634. Armed with that legal advice, Pearson and a co-worker resigned from Aon and immediately commenced employment with a competitor, Midland Financial Benefits, Inc. on September 28, 2001. *Id.* at 634. After leaving Aon, Pearson "helped customers prepare broker of record letters changing those customers' affiliations from Aon to Midlands." *Id.* On appeal, Pearson argued that Aon had no right to enforce the non-solicitation agreement. *Id.* at 635. The Nebraska Supreme Court rejected his argument. Instead, the 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." *Id.* at 636. Canvassing other jurisdictions applying comparable merger statutes, 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.* Concurring with those cases, the Court concluded that "by virtue of the merger, Aon succeeded to A&A's right to enforce its nonsolicitation agreement with Pearson." *Id.* at 637-638. In other words, Aon succeeded to the right to enforce the agreement as if it were a party to the original agreement and the merger did not trigger termination of Pearson's employment.

C. <u>The Defecting Employees' argument would leave the surviving company with less contractual rights than the constituent companies.</u>

The Defecting Employees and their amicus argue that Acordia seeks "... greater contractual rights than its predecessors ... by substituting its name for the name of the defined employer." Merit Brief of Appellees, p. 11. Acordia seeks nothing more than to possess the exact assets and property of every description and the rights, privileges and powers of each constituent entity and all obligations belonging to or due each constituent entity. See R.C. 1701.82(A)(3) and R.C. 1705.39(A)(4). The court of appeals, however, left Acordia with less! On the day before the merger, Frederick Rauh & Co, for example, had a restrictive covenant from Fishel that for a period of two years following his termination of employment that he would not "directly, indirectly, ... solicit, write, accept or in any other manner perform any services relating to insurance business, insurance policies, or related insurance services ..." for any individual or entity for whom insurance had been written, accepted or in any other manner performed during his employment. (Supp. 605-606; Plaintiff's Ex. 1). On the day after the merger, according to the court of appeals and the Defecting Employees, Acordia did not possess that same asset and obligation. Instead, Acordia was left with a dwindling asset and a diminishing obligation from its employee. Acordia was left with an expiring restrictive covenant.

More importantly, this dwindling asset would be worthless to Acordia. Following termination of employment, such restrictive covenants are intended to protect the legitimate business interests of the former employer. "Protecting customer relations is a legitimate employer interest." *Penzone, Inc. v. Koster*, 2008-Ohio-327 ¶22. On the day after the merger, Fishel returned to the same office in the Kroger building, sat at the same desk, called on the same customers and sold the same commercial insurance policies, for which he received the same pay. Acordia did not need to restrict his activities. Acordia wanted him to call on its customers, solicit its customers and to write, accept or in any other manner perform any services relating to insurance business, insurance policies or related insurance services for its customers. Having an expiring restrictive covenant during employment provides no protection. In effect, the court of appeals left Acordia with none of the protection that the constituent companies had before the merger.

D. The mergers did not expand the scope of the covenants or place undue burdens on the Defecting Employees.[2]

1. *Under Ohio law, an asset sale requires an assignment of a restrictive covenant, but a merger does not.*

The Defecting Employees and their amicus argue that this Court should write an

[2] The irony of the "undue burden" argument should not be lost on the Court. After resigning employment with Acordia, Fishel, Freytag and Taber signed Producer Employment Agreements with Neace Lukens which contained identical non-solicitation covenants but for a period of 3 years. (Plaintiff's Exs. 12, 17 and 19).

exclusion into the Ohio merger statutes – the surviving company possesses all assets and property of every description of each constituent entity except those assets and property which may create an "undue burden." However, the "added burdens" of transferring a restrictive covenant are not relevant to a merger under Ohio law. Unlike an asset purchase which requires the assignment of the restrictive covenant, a merger is fundamentally different. "[A] sale of corporate assets introduces into the equation an entirely different entity, the acquiring business." *Corporate Express Office Products, Inc. v. Phillips* (Fl. 2003), 847 So.2d 406, 412.. The asset sale to that entity may include some or all of the corporate assets. The selling company may continue in existence, dissolve or merge with an entirely different company. A merger, however, does not entail an assignment. The Ohio Revised Code provides that "upon merger ... all obligations and rights are automatically conferred upon the new entity and no assignment necessary." *Transcontinental Ins. Co. v. SimplexGrinnell, LP* (N.D. Ohio 2006), 2006 U.S. Dist. LEXIS 48654 at *9. Therefore, the "added burdens" of transferring restrictive covenants have no pertinence to a merger.

2. *The Defecting Employees confuse enforceability with enforcement.*

The Defecting Employees and their amicus argue that should this Court adopt Acordia's proposition, the Court would be imposing an undue burden exponentially greater than that for which they had originally contracted. The fundamental error in this argument is that the Defecting Employees and their amicus are confusing enforceability with enforcement. This Court has developed a clear and concise jurisprudence governing the enforcement of restrictive covenants in Ohio. This Court has long recognized the need for non-piracy, non-competition and other restrictive covenants. See *Rogers v. Runfola & Assocs., Inc.* (1991), 57 Ohio St.3d 5, 565 N.E.2d 540. Recently, this Court recognized that "[m]odern economic realities ... do not justify a strict prohibition of non-competition agreements between employer and employee in an at-will relationship. 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." *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, ¶8 (citations omitted).

In Ohio, reasonable restrictive covenants are enforceable and those that are unreasonable are enforceable to the extent necessary to protect the employer's legitimate business interests. *Rogers*, 57 Ohio St.3d at 8. To be reasonable, the restraint must be no greater than required for the protection of the company, must not impose an undue hardship on the employee, and must not be injurious to the public. *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 325 N.E.2d 544. Here, Acordia was faithful to this Court's jurisprudence. Acordia did not seek to preclude solicitation of all Acordia customers in Ohio or all Acordia customers in Cincinnati. Instead, Acordia sought only to restrain the Defecting Employees from soliciting those customers that they serviced and handled during their tenure until they resigned. (Supp. 262; T.p. 398). As Mr. Schaefer advised the trial court when asked who the Defecting Employees should be restrained from dealing with: "The clients that were assigned to them while they were employed [with Acordia]." (Supp. 262; T.p. 398). Clearly, enforcement, as in this case, would not impose *any* undue burden.

3. The Defecting Employees exaggerate the enforcement of the Competition Agreements.

The Defecting Employees argue that "substituting [Acordia's] name for the contracting employer … would give … [Acordia] at least four (and up to eight) additional years of protection …." Merit Brief of Appellees, p. 11. Here, however, Acordia did not seek to enlarge the duration of the restrictive covenant. Acordia sought only to enforce the non-solicitation covenant for a period of two years as specified in the Competition Agreements following termination of employment. Just as the Defecting Employees enjoyed the benefits of continued employment, including total gross income for the seven years following the first merger of $3,009,455.47 (Fishel), $547,007.88 (Freytag)[3], and $883,088.16 (Taber) plus benefits, Acordia was entitled to the benefits of the restrictive covenants following termination of that continued employment to protect the customer relations and goodwill developed during that employment. (Supp. 753-766, 771-780, 799-808; Defendants' Exs. 16, 26, 43).

E. The consequences of the court of appeals decision will wreak havoc on employees following a merger.

The Defecting Employees and their amicus have proffered prophylactic rules in lieu of adhering to the Ohio merger statutes. To ensure enforceable restrictive covenants, they have suggested – firing employees following a merger to assure protection under the expiring covenants, or threatening to fire employees to coerce execution of new restrictive covenants, or blackmailing employees with expiring restrictive covenants to amend the expiring covenants. *See* Brief of Amicus, p. 12. If employers in Ohio are left to such draconian and demoralizing options in lieu of reliance upon the Ohio's merger statutes, employees will suffer exponentially greater burdens. Instead of continuing employment under identical conditions, employees will suffer uncertainty and unemployment. Now, the employee may be forced to seek new employment – limited by the restrictive covenant in a job market which is already oversaturated with qualified employees. Alternatively, the employer may demoralize its entire workforce with company-wide threats of termination. Just imagine the scene – the day following the merger, the company's manager stands before the employees and announces – you're fired and by the way –

[3] Freytag's gross salary was only for six years. (Supp. 771-880, Defendants' Ex. 26). Her 1999 W-2 was not offered into evidence.

don't forget your non-compete. The consequences of the court of appeals' decision and the arguments of the Defecting Employees and their amicus will wreak havoc on employers and employees following a merger throughout Ohio.

F. The Defecting Employees' argument is premised upon aberrant case law.

The Defecting Employees have also cited this Court to case law eclipsed by the modern trend to find such covenants transfer in a merger "because they allow the parties to work together to expand output and competition." *Lake Land Emp. Group*, 101 Ohio St.3d at ¶8. The Defecting Employees commenced their misinterpretations with *Farmer v. Luntz Corp.* (Jan. 21, 1993), 8th App. Dist. No. 61873, 1993 Ohio App. LEXIS 196. Rather than supporting the argument that a merger results in the termination of employment, *Farmer* confirms the fundamental principle of continuity embodied in the Ohio merger statutes. Attempting to avoid the bar to suing an employer for injury incurred in the course of employment, Farmer alleged that the decedent had been employed with a constituent corporation following the merger. Holding that the employment continued with the surviving corporation following a merger, the Court of Appeals found that the employment with the constituent corporation had transferred to the surviving corporation. Thus, this case confirms the principle of corporate continuity.

Likewise, reliance upon *Cincom Systems, Inc. v. Novelis* (6th Cir. 2009), 581 F.3d 431 is misplaced. In *Novelis,* the United States Court of Appeals for the Sixth Circuit explained that federal common law, not state law, governed the transfer of federal intellectual property, including patents and copyrights. *Id.* at 436. Citing its earlier decision in *PPG Industries, Inc. v. Guardian Industries Corp.* (1974), 597 F.2d 1090, the Court explained that a license of federal intellectual property is presumed to be "non-assignable and non-transferable in the absence of express provisions to the contrary." *Id.* (quotation omitted). "Because this was a mandate of federal law, Ohio law could not override this presumption." *Id.* Therefore, the Court concluded that federal common law trumped the Ohio merger statute to block the transfer of a license of federal intellectual property, a copyrighted software program, as an asset in an Ohio merger. *Id.* at 437. ("[W]here state law would allow for the transfer of a license absent express authorization, state law must yield to the federal common law rule prohibiting such unauthorized transfers.").

Contrary to the misreading of the Defecting Employees, *Hoover Universal, Inc. v. Limbach* (1991), 61 Ohio St.3d 653, 575 N.E.2d 811 does not reject the fundamental principle that a merger results in a continuation of all constituent companies in the surviving company. Instead, this Court simply agreed with the tax commissioner that "the specific provisions of R.C. 5733.061 prevail over the general provisions of R.C. 1701.82 and that R.C. 5733.061 specifically disallows the credit if the property must be listed by a person other than the taxpayer." *Id.* at 565. Again, this case offers the Defecting Employees no basis to rest their erroneous argument.

The Defecting Employees also cite the United States Court of Appeals for the Sixth Circuit in *W.R. Grace & Co. v. Hargadine* (1968), 392 F.2d 9. Like their other citations, this citation provides this Court with no guidance. The Sixth Circuit has itself described its decision as "ambiguous at best." *Managed Healthcare Assocs. v. Ketham* (2000), 209 F.3d 923, 930.

The Defecting Employees boldly argue that their review of case law finds no case holding that a surviving company can be substituted for a constituent company in a contract following a merger. Merit Brief of Appellees, p. 18. The Texas Court of Appeals' decision, applying Ohio law, in *Allen v. United of Omaha Life Ins. Co.* (2007), 236 S.W.3d 315, however, is but one example illustrating exactly that substitution. In *Allen*, CreditWatch Services, L.P. ("CreditWatch") purchased a "key man" life insurance policy on the life of its CEO, Fred Allen, from United of Omaha Life Insurance Co. ("United"). In the application, Allen designated

CreditWatch as the policy's sole beneficiary. CreditWatch subsequently merged with CreditWatch Services, Ltd., an Ohio limited company, under Ohio law. CreditWatch Services, Ltd. later changed its name to CreditWatch Services, LLC. The insurance policy's beneficiary designation, however, was not changed from CreditWatch. Allen died of natural causes. United issued a check payable to "CreditWatch Services" for the policy proceeds. Allen's wife sued United for the proceeds arguing that the policy's named beneficiary ceased to exist before the insured had died and, therefore, the proceeds should be paid to his estate. On appeal of the summary judgment in favor of United, Allen's wife argued that CreditWatch could not convey its rights as the policy's beneficiary to CreditWatch Services, Ltd. because CreditWatch was merged out of existence and its rights as beneficiary were merged out of existence too. The Court unqualifiedly rejected the argument. As a result of the merger, CreditWatch Services, LLC was substituted as the beneficiary of the life insurance policy for CreditWatch. *Id.*

G. The existence of a corporate entity is not affected by changes in its ownership.

The Defecting Employees expend considerable time discussing the new employment policies implemented by Wells Fargo following its acquisition of Acordia, Inc. Wells Fargo's introduction of new employment policies and employment benefits has no bearing on the identity of the employer. A foundation of corporate law is that, unlike a partnership or a sole proprietorship, the existence of a corporate entity is not affected by changes in its ownership or changes in its management. *Corporate Express*, 847 So.2d at 411 citing *Cedric Kushner Promotions, Ltd. v. King* (2001), 533 U.S. 158, 163. As Mr. Brazill, Vice President of Mergers & Acquisitions, testified, the change in ownership of Acordia no more affected employment than would purchasing a share of Proctor & Gamble affect employment in that company. (T.p. 96). "With a stock purchase, the corporation whose stock is acquired continues in existence, even though there may be a change in its management." 847 So.2d at 412. As explained in *Corporate*

Express, "the fact that there is a change in ownership of corporate stock does not affect the corporation's existence or its contract rights, or its liabilities." *Id.* (citation omitted).

CONCLUSION

For more than 150 years, the carefully crafted Ohio merger statutes have provided that the surviving company following a merger steps into the shoes of the constituent companies vested with all and every asset of the constituent companies, including contracts on their original terms as if it was the original party to the contract. Consistent with that precedent, Acordia should have the right to enforce the Competition Agreements signed by their former employees. Enforcing those agreements would neither abrogate Ohio contract law nor impose an undue burden. This Court should reverse the decision of the court of appeals, find the Competition Agreements enforceable by Acordia and restore clarity and stability to Ohio merger law.

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KTBH: 4822-0579-8154, v. 4