

ORIGINAL

IN THE SUPREME COURT OF OHIO

ACORDIA OF OHIO, LLC,

Supreme Court Case No. 11-0163

Appellant,

On Appeal from the Hamilton County  
Court of Appeals, First Appellate District

v.

Court of Appeals  
Case No. C100071

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.

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REPLY BRIEF OF *AMICI CURIAE* OHIO CHAMBER OF COMMERCE,  
OHIO CHEMISTRY TECHNOLOGY COUNCIL, USI HOLDINGS CORP., USI  
MIDWEST, INC., WILLIS OF OHIO, INC., AND HYLANT GROUP, INC.

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    company and are enforceable by the surviving company according to the  
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In urging affirmance, Appellees seek to write into the Ohio law of mergers special rules for the treatment of competition agreements. They argue that enforceability of a competition agreement depends upon which constituent corporation survives a merger. Appellees Brief, 14-15, 18. Because the General Assembly, in fashioning its carefully crafted rules for mergers, made no distinction between which corporation survives insofar as the passing of rights and liabilities to the merged corporation, this court should reverse the First District opinion below.

**1. Appellees' theory is contrary to Ohio merger law and the policy behind it that this Court has consistently recognized.**

According to Appellees, the critical issue in determining a merged corporation's right to enforce competition agreements of its constituents is which constituent survives. Appellees Brief, 18 ("Corporations must carefully chose 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"). If the surviving entity is the signatory to the competition agreement, it can fully enforce it. *Id.*, 21-22. If not, the competition agreement starts to run on the effective date of the merger. *Id.*, 11.

As *amici curiae* pointed out in their merits brief, the policy underlying 150 years of merger law in Ohio is that "the consolidated company merely steps into the shoes of the constituent companies." *Marfield v. Cincinnati, Dayton & Toledo Traction Co.* (1924), 111 Ohio St. 139, 164, 144 N.E. 689;<sup>1</sup> Brief of *Amici Curiae* Ohio Chamber of Commerce, *et al.* ("*Amici* Brief"), 1, 4-8. Because the merged corporation "steps into the shoes" of *all* the

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<sup>1</sup> Tellingly, neither Appellees nor their *amicus*, the Ohio Employment Lawyers' Association, once mention *Marfield* or the equally relevant decision in *Citizens' Savings & Trust Co. v. Cincinnati & Dayton Traction Co.* (1922), 106 Ohio St. 577, 140 N.E. 380 (at paragraph 9 of the syllabus: "Upon consolidation of several railroads under authority of and in accordance with the provisions of Ohio statutes, the nominal existence of the several constituent corporations is terminated, *but their substantial existence is perpetuated by being merged in the consolidated company*" (emphasis added)).

constituent companies – the one that survives *and* those that do not – the statutes make no distinction between rights and obligations of the surviving constituent and those of constituents that are merged out of existence. Appellees’ core argument has no basis in Ohio law.<sup>2</sup>

Moreover, applying Appellees’ supposed principle to this Court’s decision in *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St.3d 666, 665 N.E.2d 1083, would compel a different result. In *ASA Architects*, the company that entered into the shareholder agreement sought to be enforced was the company that ceased to exist in the merger. The very stock subject to that agreement went away as well. 75 Ohio St.3d. at 666. Under Appellees’ theory, the company’s contracts did not survive the company’s termination. After the merger, there would be nothing to enforce. And, to modify the old company’s shareholder agreement to substitute the new merged entity as a party would violate contract law. Appellees Brief, 11-13. But that was not how this Court approached the case. To the contrary, it followed the long history of Ohio law and recognized that the merged company steps into the shoes of the constituent companies – contracts and all.

**2. The definition of the word “Company” in the competition agreements does not alter the principles or policy behind Ohio merger law.**

Appellees make much of the fact that the competition agreements here make reference to a specific company – the original employer merged out of existence. Appellees Brief, 9-13. But that was true of the contracts in *ASA Architects*. The shareholder agreement identified Acock, White & Associates, Architects, Inc., as the “Company” and then required that “the

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<sup>2</sup> Appellees say that what made Mr. Fishel’s competition agreement start to run was the fact that Frederick Rauh was not the surviving corporation in the merger with three other Ohio corporations. Appellees Brief, 21-22. However, even if Rauh had been the surviving entity, they argue that the restrictive covenant would still be unenforceable because, with the other three offices in Ohio included, its scope was broader than what was bargained for. Appellees Brief, 11-12. In the end, the Court is left with the argument that competition agreements are not enforceable through a merger – a result totally inconsistent with the Ohio merger statutes.

stockholder shall sell and the Company shall purchase all of the common stock of the Company owned by the employee.” 75 Ohio St.3d. at 666. The identified “Company” ceased to exist upon merger into a new subchapter S corporation. Nonetheless, this Court enforced the contract against the surviving corporation.

Appellees are just plain wrong when they accuse Acordia of seeking to modify the contracts terms. Appellees Brief, 11, 13 (“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”). Acordia is no more seeking to change the definition of the term “Company” in the competition agreement than this Court was changing the definition of the same term in the shareholders agreement in *ASA Architects*. Rather, both read the contract in light of the statutes and the policy of *Marfield* that this Court has consistently recognized. It is the law of Ohio that treats the merged corporation as if it were a party to its constituent corporations’ contracts. *State ex rel. Safeguard Ins. Co. v. Vorys* (1960), 171 Ohio St. 109, 112-113, 167 N.E.2d 910 (“when the merger [between the ‘indemnity company’ and the surviving ‘relator’] became effective, ... all liabilities of the indemnity company became liabilities of relator *as if incurred by relator*” (emphasis added)).<sup>3</sup>

The policy that a merged corporation “steps into the shoes of the constituent corporations” does not change just because a contract defines “Company” or does not say “successors and assigns.” The contract continues because, as the statute says, the surviving

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<sup>3</sup> The policy that this Court has consistently recognized traces its origin directly to the General Assembly’s first pronouncement on mergers in Ohio: “such new corporation shall hold and enjoy the same ... in the same manner, and to the same extent, *as if the said two or more [constituent] corporations, parties to such agreement, should have continued to retain the title, and transact the business of such corporations.*” An Act to Provide for the Creation and Regulation of Incorporated Companies in the State of Ohio (1852), 50 v. 274, S.C. 271 (emphasis added); *Amici* Brief, 5.

entity is vested with the rights of and obligations due to each constituent entity. This Court confirmed that principle in *ASA Architects*: “a properly executed mandatory stock purchase agreement entered into between a closely held constituent corporation and shareholders of the company is binding upon the surviving corporation in a merger *unless the agreement explicitly sets forth that in the event of a merger, the obligations of the constituent corporation cease to exist.*” 75 Ohio St.3d 666, at paragraph 1 of the syllabus (emphasis added). Here, the competition agreements contain no such limitation.

### **3. Appellees’ position undermines Ohio’s business competitiveness.**

As *amici curiae* pointed out in their brief, Appellees’ proposed rule that competition agreements of a non-surviving constituent entity start running upon the merger’s completion presents the now-merged company with a Hobson’s choice: fire all employees immediately and take advantage of the competition agreements or retain all the employees and lose the benefit of the competition agreements. *Amici* Brief, 16. In response, Appellees and their *amicus* suggest a way out of that dilemma – simply threaten to terminate all employees to get them to sign new competition agreements. Appellees Brief, 18-19; Employment Lawyers Brief, 12.

In the real world, in which *amici curiae* and their members operate every day, such an approach would wreak havoc. To be successful, mergers require a smooth transition from the operations of the constituent entities to those of the merged entity. The last thing businesses want is the chaos from threatening their employees with immediate terminations. At a point when Ohio struggles with a 9% unemployment rate – and that only counting those people who have not given up searching for a job – Ohio cannot afford Appellees’ proffered approach.

Faced with that option as the appropriate means of addressing the rule Appellees want instilled in Ohio law, Ohio corporations will vote with their feet. They will not do mergers in Ohio; they will not incorporate in Ohio; they will take their business elsewhere. Given what

the law is on this issue in state after state across this country, *Amici* Brief, 12-15, businesses have many options other than Ohio. This case is an attempt not only to ignore 150 years of merger law in Ohio, but to make Ohio less competitive in a global marketplace. As *amici curiae* said in their merit brief, this case is about the economic competitiveness of this state.

### CONCLUSION

The Court should reverse the decision of the First District Court of Appeals and reconfirm the law of Ohio that, in a merger, the merged company steps into the shoes of the constituent companies.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing REPLY BRIEF OF *AMICI CURIAE* OHIO CHAMBER OF COMMERCE, OHIO CHEMISTRY TECHNOLOGY COUNCIL, USI HOLDINGS CORP., USI MIDWEST, INC., WILLIS OF OHIO, INC., AND HYLANT GROUP, INC. IN SUPPORT OF APPELLANT was sent via regular U.S. mail, postage prepaid this 6th day of September 2011, to the following:

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