

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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MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION

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## I. INTRODUCTION

Appellant's motion for reconsideration merely rehashes the arguments it made in its merit brief. Appellant now mischaracterizes this court's opinion – despite the opinion's plain language and simple holding – in an attempt to lend plausibility to a parade of horrors that appellant claims will result from allowing parties to write their own contracts. But despite appellant's rhetoric, the lead opinion simply affirms the basic and vital principle that contracts will be enforced according to their terms.

## II. ARGUMENT

### A. **Appellant did not file an appropriate motion for reconsideration; appellant merely reargues its merit brief.**

Supreme Court Practice Rule 11.2(A) provides that a motion for reconsideration “shall not constitute a reargument of the case.” *See also State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶19 (“respondents’ attempted reargument of this contention is not authorized by our Rules of Practice”). But appellant's motion for reconsideration simply repeats the arguments made in its brief on the merits. Appellant's motion for reconsideration is therefore improper and should be denied.

Appellant, in its reargument of its case, wrongly implies that the court published its lead opinion without thoughtfully considering the issues. Appellant calls the lead opinion “untethered from precedent,” accuses this court of “usurp[ing] legislative authority” and “abrogat[ing] fundamental corporate law,” implies that the lead opinion is “pernicious,” and derides the court's decision to hold parties to the express terms of their contracts as a “let them eat cake suggestion.” (Motion for Reconsideration pp. 2,

3, 5, 8, 12) (internal quotations omitted). All this is premised on appellant's false claim that the lead opinion requires "successor and assign" language to transfer agreements in a merger and that the absence of "successor and assign" language means that an agreement will not "survive a merger." (Motion for Reconsideration pp. 3, 5). But in fact the lead opinion clearly held that the agreements at issue here transferred by operation of law in the various mergers without a successor and assigns clause.

In short, appellant's motion adds nothing to its merit brief. It simply hurls the same unfounded insults at the lead opinion that it previously hurled at the court of appeals' opinion. The court should therefore deny the motion.

**B. The lead opinion correctly applies Ohio law to the contracts in this case.**

Appellant's arguments on the merits are false and overwrought. The lead opinion simply applied merger law to hold that the agreements passed by operation of law to the surviving company, and then applied the clear terms of the agreements to hold that the agreements had expired before the surviving company sought to enforce them. Here the non-compete agreements were triggered by the termination of employment with "the Company," a term expressly and narrowly defined in the agreements. Applying merger law, those non-compete agreements inured to the benefit of the successor for two years following each employee's termination of employment with the company specified in the agreement. "The L.L.C. acquired only the ability to prevent employees from competing two years after their employment terminated with the specific company named in the agreements." *Acordia of Ohio LLC v. Fishel*, 2012-Ohio-2297, ¶7.

Appellant wrongly argues that the lead opinion held that some contracts do not transfer from the predecessor to the successor in a merger. This ignores the lead opinion's unequivocal statement that "it is clear that employee contracts transfer to the resulting company." *Id.* at ¶10.

There is nothing radical about the lead opinion's holding the parties to the terms of their agreements. Appellant argues that the court has "reversed by implication" its decision in *ASA Architects, Inc. v. Schlegel*, 75 Ohio St.3d 666, 665 N.E.2d 1083 (1996). (Motion for Reconsideration p. 2.) But the lead opinion is completely consistent with the holding in *ASA Architects*. There the court held that an agreement may validly set forth "that in the event of a merger, the obligations of the constituent corporation cease to exist." *ASA Architects* at the syllabus. Surely then the parties can contractually agree that their non-compete agreements begin to run at the time the employer is merged out of existence, as they did here.

The court's decision confirms that contract rights and obligations pass in a merger through operation of law, and the successor company has the same right to enforce the contract as the predecessor had – but no greater rights. The court simply held that, in this case, the narrow and specific definition of "the Company" necessarily meant that the parties intended the noncompete period to begin as soon as appellees' employment terminated with the original signatory employer. The court's decision here to apply these agreements according to their express terms should not be reconsidered.

**C. The parade of horrors that appellant claims will result from the lead opinion is animated only by appellant's mischaracterization of the lead opinion's holding.**

Appellant employs its mischaracterization of the lead opinion to suggest a parade of horrors that will supposedly ensue. But appellant's parade of horrors will not march. The many hypothetical scenarios constructed by appellant and amici to suggest that "clever" companies will now be able to "manipulate" what agreements will survive a merger (Motion for Reconsideration p.5) depend on a willful misreading of the lead opinion. The true outcome of these hypothetical scenarios is easily discerned from the lead opinion - the agreements transfer to the surviving company by operation of law, and they will be enforced according to their terms.

Appellant asserts that the lead opinion will greatly increase the cost of due diligence and depress the value of Ohio companies. But acquiring companies must already read the targeted companies' noncompete agreements – any other process could hardly be characterized as diligent, especially if the acquiring companies hope to rely on those agreements. Successor companies must know, among other things, the extent of the employees' obligations and what impact, if any, the change in employer will have on the agreements.

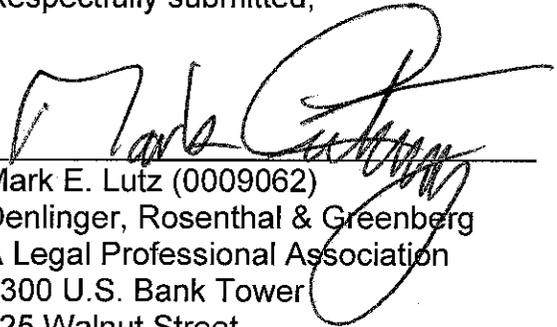
And, as the court recognized, the lead opinion would not have significantly increased the costs of the mergers in this case. Wells Fargo already required appellees to sign several new-hire and employment forms as a condition of continued employment. A new noncompete agreement would have been simply one more form. *Fishel*, 2012-Ohio-2297, at ¶15.

If appellant's mistaken view of merger law was correct, parties could never agree that a non-compete agreement would begin to run when the contracting employer was merged out of existence. But as this court recognized in *ASA Architects*, and again in this case, parties are free to enter into binding contracts which specify the consequences of a merger on the obligations of the parties.

### III. CONCLUSION

The court's well-reasoned lead opinion should not be reconsidered, and appellant's motion should be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Memorandum Opposing Motion for Reconsideration of Appellant Acordia of Ohio, LLC via regular U.S. mail, postage prepaid, this 13<sup>th</sup> day of June, 2012 upon the following:

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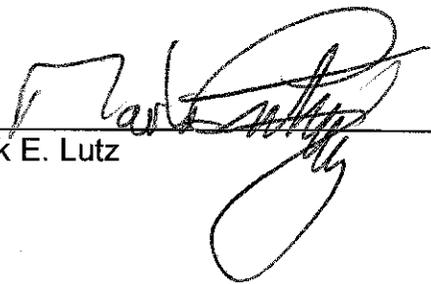
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