IN THE SUPREME COURT OF FLORIDA

CORPORATE EXPRESS OFFICE PRODUCTS, INC.,

Petitioner,

v.

DOUG PHILLIPS, EDWARD R. GOFF, LORI L. FARRELL, f/k/a LORI L. ROBINSON and COMMERCIAL DESIGN SERVICES, INC.,

Respondents.

PETITIONER'S AMENDED REPLY BRIEF

On Review from the District Court of Appeal, Fifth District, State of Florida
Supreme Court Case No. SC01-2741
Fifth District Appeal No. 5D01-864
Circuit Court Case No. CI 00-8168 Div. 35

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I. I. The Covenants Not To Compete Passed by Operation of Law.

A. None of the Corporations at Issue Here "Dissolved".

Contrary to Respondents' arguments, the cases that do not enforce noncompetition agreements do ***not*** apply here because these mergers did ***not*** "dissolve" the prior corporations.[1] Further, despite Respondents' argument, Florida's, not Delaware's, merger statute applies.[2] Regardless, Delaware law does not supplant nor alter the application of Florida's merger statute and *Sears Termite and Pest Control v. Arnold*.[3] As such, this Court should recognize Corporate Express' ("CE") right to enforce the covenants not to compete (the "Covenants") by operation of law.

1. Statutory Merger and Corporate Dissolution Are Distinct.

It is hornbook law that:

> A ***statutory merger*** effects a combination of two or more corporations in accordance with the detailed procedures established by the corporation laws of a state, with one of the corporations continuing as the same legal entity it was before the transaction. Stated differently, ***a merger is the absorption of one corporation by another***, which retains its name and corporate entity with the added capital, franchises and powers of the merged corporation. It is the ***uniting of two or more corporations by the transfer of property to one of them***, which continues in existence, the others being merged therein.
>
> * * *
>
> A ***corporate dissolution***, on the other hand, ***represents the termination of the corporation's existence as a legal person***. . . . It denotes the ***complete destruction of the corporation*** and within contemplation of law, ***is equivalent to its death***, being sometimes likened to the death of a natural person.
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> * * *
>
> Thus, although in both a statutory merger and dissolution the merged or dissolved corporate entity ***ceases to exist***, ***fundamental distinctions inhere in the two processes***.

Vulcan Materials Co. v. U.S., 446 F.2d 690, 693-94 (5th Cir. 1971) (emphasis added) (citations omitted). Indeed, it is well-settled that:

> In dissolution, the privileges, powers, rights and duties of the corporation come to an end and suffer a corporate death. ***In a merger***, these attributes of corporate life are ***transferred to the surviving corporation*** and are there ***continued and preserved***.

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[1] *See* Resp. Br. Sec. II.
[2] *See* Resp. Br. p. 25.
[3] 745 So. 2d 485 (Fla. 1st DCA 1999).

Id. at 694 (emphasis added).

The Record establishes that the corporate transactions affecting Respondents' prior employers were statutory mergers. Thus, Respondents' employers never dissolved; and each of the cases Respondents rely on involving dissolution are inapplicable. *See Schweiger v. Hoch*, 223 So. 2d 557, 558 (Fla. 4th DCA 1969) (dissolution of partnership); *Johnston v. Dockside Fueling of N. Am.*, 658 So. 2d 618 (Fla. 3d DCA 1995) (corporate dissolution).

Respondents alternatively rely on *Manpower, Inc. of Milwaukee v. Olsten Permanent Agency of Cent. Fla., Inc*.[4] While no corporate dissolution was involved there, *Manpower* did not involve a statutory merger.

Rather, *Manpower* was an attempt to enforce a noncompetition agreement by the corporate parent company and two independent franchises despite the fact that the employee's employer (the subsidiary) with whom he had entered into the agreement still existed and was not a party in the lawsuit. *Id.* at 58. Thus, the court held that these third parties had no right to enforce the agreement. *Id.* at 58-59.

Because CE is not a third party, but was in fact and in law the Respondents' employer, *Manpower* has no application here. The statutory merger transferred all privileges, powers, rights and duties of Bishop, Ciera, and prior CE subsidiaries to CE.[5] This legal principle renders CE the proper party to enforce the Covenants.

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[4] 309 So. 2d 57 (Fla. 2d DCA 1975).
[5] *See infra* Sec. I(2).

2. Florida and Delaware Law Provide That Merged Corporations Lawfully Obtain Rights From Their Constituent Corporations.

Both Florida's and Delaware's merger statutes codify the legal principle that the rights of the merged entity become those of the new entity; and the statutory use of the phrase "cease to exist" is Respondents' red-herring. Respondents' reliance on *PPG Indus., Inc. v. Guardian Indus. Corp.*[6] and *Koppers Coal & Transp. Co. v. U.S.*[7] is unwarranted because those cases do not concern noncompetition agreements. Rather, *PPG* addressed the issue of assignability of a patent license, and applied federal law to render its decision. *PPG*, 597 F.2d at 1091, 1093. Similarly, *Koppers* concerned obligations to pay documentary internal revenue stamps, and also applied federal law. *Koppers*, 107 F.2d at 707.

If anything, Respondents' reliance on *PPG* and *Koppers* bolsters CE's position that it obtained the rights to enforce the Covenants by operation of law. In *PPG*, the court explained that:

> the theory of continuity [for mergers] relates to the fact that ***there is no dissolution of the constituent corporations, and, even though they cease to exist, their essential corporate attributes are vested by operation of law in the surviving or resultant corporation***.

PPG, 597 F.2d at 1095. (emphasis added) (citations omitted).

Moreover, *Koppers* undermines Respondents' assertions that Delaware law provides differently.[8] In fact, the Delaware statute similarly provides that "all

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[6] 597 F.2d 1090 (6th Cir. 1979).
[7] 107 F.2d 706 (3d Cir. 1939).
[8] *See* Resp. Br. pp. 25, 28.

property, real, personal and mixed, . . . belonging to each of such corporations shall be vested in the corporation resulting from or surviving such consolidation or merger." *Koppers*, 107 F.2d at 708 (citing DEL. CODE ANN. tit. 8, § 259(a)(1998)).

3. Neither Statute Contains an Exception for Section 542.33.

Respondents' argument that Florida's (and/or Delaware's) merger statute must yield to § 542.33 because noncompetition agreements are in derogation of the common law is likewise without merit.[9] The Legislature explicitly authorized the enforceability of covenants not to compete by statute. § 542.33, Fla. Stat. (2001). That this is provided by statute rather than the common law is of no consequence to the rights that flow from a merger.

The Legislature, in explicitly providing the statutory mechanism for corporate mergers, provided that when a merger becomes effective, the merging corporation merges into the surviving corporation and the surviving corporation possesses "all the liabilities and obligations" of the merged corporation. § 607.1106, Fla. Stat. (2001). Delaware's merger statute is no different.[10] "All" means "all"; and neither Florida's nor Delaware's merger statute limits what transfers by statute to actions recognized at common law.

II. The Fifth DCA's Decision Is Contrary to Established Florida Law.

Notwithstanding that the foregoing establishes that no assignment was required for CE to enforce what it obtained by operation of merger law, the Covenants are also enforceable because Respondents' arguments opposing their assignability are misplaced and warrant a reply.

A. Non-Competition Agreements Are Assignable in Florida.

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[9] *See* Resp. Br. p. 17.
[10] *See Infra*, Section I(2) at p. 4 (citing DEL. CODE ANN. tit. 8, § 259(a)(1998).

Respondents base their fundamental opposition to CE's appeal on the erroneous premise that "Florida law unequivocally holds that non-compete agreements executed by employees in favor of their former employer are not enforceable by a successor employer absent consent to such enforcement."[11] Indeed, the Fifth DCA similarly based its decision on this premise.[12] Florida courts, however, have recognized that covenants not to compete are assignable without the employee's consent or ratification. *In re Hearing Ctrs. of Am., Inc.* 106 B.R. 719, 721 (M.D. Fla. 1989); *Pino v. Spanish Broad. Sys. of Fla., Inc.*, 564 So. 2d 186, 188 (Fla. 3d DCA 1990). The cases on which Respondents rely in their Response are both inapposite and distinguishable.

1. These Covenants Are Not Personal Service Contracts.

Here, Respondents never executed traditional "***employment*** agreements" with their respective former employers, Bishop or Ciera. Instead, each Respondent was an at-will employee of Bishop, Ciera and CE.[13] Each Respondent solely executed a ***bare covenant not to compete***. While CE does not dispute that "***employment agreements***" may constitute "personal service contracts" pursuant to Florida law, CE rejects Respondents' unfounded leap in asserting that these ***bare covenants not to compete*** are personal service contracts. Indeed, at least one court interpreting Florida law has found that contracts not to compete, on their own, are not personal service contracts and are assignable without consent. *In re Hearing Ctrs. of Am., Inc.*, 106 B.R. at 721.

There, the court granted the debtor corporation's motion to assign to the purchasing corporation the covenants not to compete that the debtor had entered

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[11] Resp. Br. p. 6.
[12] Resp. App. C, pp. 5-6.
[13] CE App. A, p. 56.

into with its former employees. While noting that personal service contracts are not assignable in Florida without the promising party's consent, the court held that covenants not to compete are assignable without consent. *Id.*

The court was "satisfied that the contract at issue [was] not a personal service contract in the traditional sense." *Id.* at 721 (citing *Schweiger,* 223 So. 2d 557). Rather, "the contracts that the Debtors [sought] to assign contain[ed] a covenant which attempt[ed] to keep the employees from performing, rather than an attempt to assign the performance of a personal service." *Id.* at 722.

Likewise, these Covenants are bare and are not personal service contracts. As such, Bishop and Ciera were not precluded from assigning the Covenants to CE. Thus, the cases Respondents relied on are not applicable because each of them deals with the assignment of a traditional "***employment agreement***" for personal services that also included a covenant not to compete.[14]

2. Florida Law Does Not Prohibit Assignment of Covenants Not To Compete That Are Authorized by Section 542.33.

Contrary to Respondents' blanket assertion that any assignment of the Covenants to CE is invalid, § 542.33 does not preclude their assignment, regardless of whether they stand alone as the case here, or whether they are incorporated into employment agreements. Indeed, as recognized by at least one Florida state court:

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[14] *See Schweiger*, 223 So. 2d 557 (employment contract as an accountant); *W.S. Badcock Corp. v. Webb*, 699 So. 2d 859 (Fla. 5th DCA 1997) (independent dealers contract); *Johnston, Inc.*, 658 So. 2d 618 (employment contract); *Strehlow v. Legend Equities Corp.*, 727 So. 2d 1076 (Fla. 4th DCA 1999) (sales representative contracts); *Manpower,* 309 So. 2d 57 (management employment agreement).

> Section 542.33(2)(a) ***does not expressly prohibit the right to assign personal service contracts containing covenants not to compete***. . . . Moreover, the broad language of section 542.33(2)(a), Florida Statutes (1985), indicates that the legislature did not intend to extinguish the vesting right to assign personal service contracts, including those which contain covenants not to compete. Our holding conforms with the policy of preserving the sanctity of contract and providing uniformity and certainty in commercial transactions.

Pino, 564 So. 2d at 188-89 (emphasis added).

Additionally, the *Pino* court noted that "[o]ther jurisdictions have held that ***covenants not to compete are assignable business assets***." *Id.* at 188 (emphasis added) (citing *Torrington Creamery v. Davenport*, 12 A.2d 780, 783 (Conn. 1940)). In *Torrington*, "the purchaser of a milk distribution business sought to enforce a noncompetition covenant . . . executed by an employee and the former owner of the business." *Pino*, 546 So. 2d at 188. The Third DCA found *Torrington* instructive because that case "held that ***the covenant was an assignable asset of the business and, therefore, enforceable by the purchaser of the business***." *Id.* (emphasis added) (citing *Torrington*, 12 A.2d at 783).

Here, the Record establishes that Bishop, Ciera, and CE all recognized the Covenants as business assets. Indeed, the Phillips and Farrell Covenants were specifically listed as part of Bishop's "Representations and Warranties" in the Stock Purchase Agreement.[15] Further, in its asset purchase of Ciera, CE requested and received Goff's written consent to the assignment of his Covenant.[16] Thus, all the business parties recognized that following the corporate transformations that

[15] CE App. H, p. 8, § 2.14, & Sched. 2.14 at CE000055A.
[16] CE App. E.

rendered Bishop and Ciera part of the CE corporate family, the benefits of the Covenants would survive in, and be enforceable by, CE. Indeed, Florida's well-established public policy to enforce noncompetition covenants to protect and preserve employers' legitimate business interests squarely applies here.

3. This Court Has Recognized That Personal Service Contracts May Be Assigned by the Conduct of the Parties.

In reply to Respondents' assertion that the Covenants could not be assigned, it should also be stressed, as recognized by both the Fifth DCA below and Respondents here, that this Court has noted:

> The acts and conduct of a party to a [personal services] contract, with knowledge of the fact that it has been assigned, may be such as to warrant the conclusion that a provision in the contract against assignment has been waived, ***as where work has been performed and been accepted.***

Orlando Orange Groves Co. v. Hale, 161 So. 284, 290 (Fla. 1935) (emphasis added). There, this Court found that an employment contract could be "assigned" without any express words to that effect by utilizing the concept of novation. *Id.* at 291. Indeed, this Court held that the parties in *Hale* manifested their consent to an assignment/novation of the employment contract because the party who sought to avoid the assignment of the contract had continued to enjoy the benefits of the contract after the "assignment." *Id.*

That rationale applies here; and the Fourth DCA's decision in *Schweiger*, which acknowledged *Hale* but arrived at a different conclusion, is inapposite. Contrary to Respondents' misrepresentations to this Court, neither Bishop, Ciera,

nor CE ever terminated Respondents' employment.[17] Indeed, the Record evidences that each Respondent enjoyed continuous, uninterrupted employment with each employer and throughout each corporate transaction, from the dates they were hired by Bishop and Ciera to the dates they resigned their employment with CE in August and September 2000 (several years after the mergers).[18] The corporate changes did not cause any break in Respondents' work, flow of compensation, nor receipt of benefits.[19]

Thus, there can be no dispute that CE continued to employ Respondents; and that Respondents accepted this continued, uninterrupted work, compensation and benefits. As such, Respondents consented to and ratified the Covenants; and Respondents' continued employment was adequate consideration to support the "assignment" or "novation" to CE. Moreover, none of the Covenants contains any prohibition on assignment. Therefore, the conduct of the parties subsequent to each corporate change (*i.e.*, Respondents' continued employment by CE) is, under *Hale*, sufficient to establish consent and/or ratification of the Covenants, as well as adequate consideration for the "novation."

Given these facts, *Schweiger* has no application here. There, the issue centered on the enforceability of a traditional ***employment agreement***. That employee was not an at-will employee but worked for his original employer through a contract that contained, among other things, a covenant not to compete. Thus,

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[17] Resp. Br. p. 3.
[18] CE App. A, p. 55; Resp. App. B, p. 3.
[19] CE Initial Br., p. 7 (citing to Rec.).

the court determined that the purported assignment of the employment agreement to the new employer following a formal dissolution of the original employer was invalid for want of consent or ratification. Unlike this case, the employee's employment agreement already promised him employment under certain terms and conditions; and, therefore, his continued employment was not sufficient consideration to support the assignment.

Here, however, the Covenants were not traditional employment agreements; nor did they guarantee or even specify the terms of the Respondents' at-will employment. Thus, the fact that each of the Respondents continued to enjoy the benefits of their continued employment with CE provided sufficient consideration to support the assignment of the Covenants to CE.[20]

B. Florida Statutes, Section 542.335, Does Not Apply.

Respondents' attempts to persuade this Court to look to the enactment of § 542.335 and its legislative intent should be disregarded.[21] The law applicable here is § 532.33, and the body of Florida jurisprudence applying same. *See* § 542.331, Fla. Stat. (2001). Further, because Respondents executed the Covenants prior to 1990, this Court must apply § 542.33 as it existed prior to the Legislature's 1990 amendments.[22]

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[20] *Cf., Criss v. Davis, Presser & LaFaye, P.A.*, 494 So. 2d 525, 527 (Fla. 1st DCA 1986) (quoting *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52, 54 (Fla. 3d DCA 1960) and citing *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623 (Fla. 4th DCA 1982)).

[21] *See* Resp. Br., pp. 29-30.

[22] *City of Homestead v. Beard*, 600 So. 2d 450, 454-55 (Fla. 1992); *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992); *Chandra, M.C. v. Gadodia, M.D.*, 610 So. 2d 15, 17 (Fla. 5th DCA 1992) (holding that the 1990 amendment to § 542.33 affected underlying substantive vested right, and thus, the

In addition, the plain language of § 542.331 instructs that although § 542.33 was repealed in 1996 and replaced by § 542.335, ***"Section 542.33 shall continue to govern enforcement of restrictive covenants entered into before July 1, 1996."*** § 542.331, Fla. Stat. (2001) (emphasis added). Thus, the body of Florida jurisprudence concerning § 542.335, including the policies the Legislature sought to promote with the 1996 amendment, does not apply here.

Indeed, the fact that the 1996 amendments (§ 542.335(1)(f)) included language precluding a successor employer's enforcement of an employee's covenant not to compete entered into with a prior employer reveals that the Legislature sought to change the state of the law under § 542.33. *See Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977) ("when a statute is amended, it is presumed that the Legislature intended it to have a meaning ***different from that accorded to it before the amendment***") (emphasis added). Thus, the proper inference to be drawn from the 1996 amendment is that Florida law, prior to the 1996 amendment, actually permitted a successor employer's enforcement of an employee's covenant not to compete entered into with the prior employer.

III. CE Has Demonstrated Its Right to a Preliminary Injunction.

A. The Covenants Did Not Expire.

Respondents contend that the Covenants expired when they began working for CE.[23] However, the foregoing law concerning statutory merger reveals that this argument has no merit. Rather, the Covenants transferred to CE as a matter of law.[24] Because the Respondents continued their employment with CE, the Covenants remained in force as if Respondents were still employed by Bishop or Ciera or any of the CE subsidiaries.

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amendment would be applied prospectively only).

[23] Resp. Br. pp. 31-32.

[24] *See supra* Sec. I.

B. CE Never Breached the Covenants.

Respondents also argue that CE has no right to enforce the Covenants because it purportedly "breached" its terms.[25] However, as the Record reveals, Respondents have misrepresented that the Covenants "contained a provision that ***guaranteed*** Ciera, as to Goff, and Bishop, as to Phillips and Farrell, would reimburse [their respective] travel expenses".[26] To the contrary, the Covenants do not contain any term that "guaranteed" reimbursement of travel expenses.[27] Rather, ***only in the "whereas clauses"*** do the Covenants mention that at the time the Respondents entered into the Covenants, the Respondents travelled at their employer's expense.[28] Florida law, however, expressly provides that "prefatory recitations contained in the . . . 'whereas' clauses are [not] binding, operative provisions to [an] otherwise unambiguous contract." *Johnson v. Johnson*, 725 So. 2d 1209, 1212-13 (Fla. 3d DCA 1999). Respondents concede that the Covenants are unambiguous.[29] As such, the mere mention of the then existing travel reimbursement policy in the "whereas" clauses was never a term of the unambiguous Covenants; and any change in that policy is not a breach.

Furthermore, Florida law recognizes that employers are free to change an at-will employee's compensation, despite contractual provisions concerning same contained in non-competition agreements.[30]

C. CE Does Not Seek To Expand the Covenants' Restraints.

Respondents' assertions that they would be "additionally burdened" by CE's enforcement of the Covenants are equally without merit.[31] The Covenants set forth their reasonable scope in terms of

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[25] Resp. Br. pp. 34-38.
[26] Resp. Br. p. 4 (emphasis added).
[27] CE App. B, C & D.
[28] CE App. B, C & D.
[29] Resp. Br. p. 36.
[30] *Kupscznk v. Blasters, Inc.*, 647 So. 2d 888 (Fla. 2d DCA 1994) (declining to find a breach of the noncompetition agreement because it "would have the result that an employer, faced with changing economic circumstances, would not be empowered to modify to any degree its employee's compensation without potentially losing the benefit of the noncompetition agreement").
[31] Resp. Br. pp. 18-19.

time and geography.[32] Throughout the corporate transactions, the Covenants' terms remained unaltered. [33] Further, throughout their employment with Bishop, Ciera and CE, Respondents performed the same job and serviced the same territories and customers.[34] In addition, CE never requested, nor does it request now, anything more than the enforcement of the Covenants in the specific counties covered by these express terms.

Dated: September ___, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished this ____ day of September, 2002, via facsimile and U. S. Mail to:

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[32] CE App., B, C & F.
[33] *See* CE Initial Br. p. 27.
[34] CE App. L, pp. 53-55, 61; CE App. M & N.

CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief complies with the font requirements set forth in Fla. R. App. P. 9.210(a)(2).

Dated this ___ day of September, 2002.

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Sarah A. Mindes