IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2741

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.

RESPONDENTS' ANSWER BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FIFTH DISTRICT, CASE NO.: 5D01-864

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NATURE OF THE CASE

The primary issue in this case is whether the district court correctly decided that the trial court erred in allowing Petitioner, Corporate Express Office Products, Inc. (hereinafter "Corporate Express"), to obtain an injunction to enforce the non-compete agreement executed by Respondent, Edward R. Goff (hereinafter "Goff"), in favor of his former employer Ciera Office Products, Inc. (hereinafter "Ciera"), and the non-compete agreements executed by Respondent, Doug Phillips (hereinafter "Phillips"), and Respondent, Lori L. Farrell, f/k/a Lori L. Robinson (hereinafter "Farrell"), in favor of their former employer, Bishop Office Furniture Co. (hereinafter "Bishop").

On or about March 5, 1986, Goff entered into the Agreement Not to Compete with his employer, Ciera. (CE App. F, p. 1)

[1] The Agreement Not to Compete included, *inter alia*, a provision which precluded Goff from competing against Ciera in the counties of Marion, Lake and Citrus, Florida, for a period of one (1) year following the termination of his employment with Ciera, provided that Ciera continued "in its present or allied business." (CE App. F, p. 3) On or about August 11, 1986, Phillips entered into

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[1] Citations to Petitioner's Appendix will be in the form used in Petitioner's Initial Brief. "CE App." will be followed by the tab letter of Petitioner's Appendix, then followed by the page number(s), if applicable, of the document under that tab.

the Agreement Not to Compete with his employer, Bishop. (CE App. B, p. 1) The Agreement Not to Compete included, *inter alia*, a provision which precluded Phillips from competing against Bishop in the counties of Orange, Brevard, Seminole, Lake and Osceola, Florida, for a period of one (1) year following the termination of his employment with Bishop, provided that Bishop continued "in its present or allied business." (CE App. B, p. 3) On or about June 5, 1989, Farrell entered into the Agreement Not to Compete with her employer, Bishop. (CE App. C, p. 1) The Agreement Not to Compete included, *inter alia*, a provision which precluded Farrell from competing against Bishop in the counties of Orange, Brevard, Seminole, Lake and Osceola, Florida, for a period of one (1) year following the termination of her employment with Bishop, provided that Bishop continued "in its present or allied business." (CE App. C, p. 3) The non-compete agreements executed by Phillips and Farrell were prepared by Bishop. (CE App. A, p. 51) While working for their respective companies, Goff, Phillips and Farrell were salespeople, soliciting customers and potential customers of their employers to purchase various types of office furniture and equipment. (CE App. A, pp. 14-17)

On or about October 16, 1996, Goff executed the Consent to Assignment of Agreement Not to Compete in favor of Corporate Express of the South, Inc.

(hereinafter "CES"). (CE App. G) CES prepared that document. (CE App. A, p. 53) On or about the same date, CES purportedly acquired the assets of Ciera. (CE App. A, pp. 6, 18-19, 53-54) CES was a company that sold office furniture and equipment. (CE App. A, pp. 11-12) At or about that same time, Ciera ceased doing business, Goff's employment with Ciera was terminated and he became an employee of CES. (CE App. A, pp. 53-54)

On or about January 3, 1997, CES purchased one hundred (100) percent of the issued and outstanding stock of Bishop. (CE App. A, pp. 19, 21-22) At or about that time, Bishop ceased doing business, Phillips' and Farrell's employment with Bishop was terminated and they became employees of CES. (CE App. A, pp. 49-50) In addition, Bishop was administratively dissolved on September 26, 1997. (CE App. A, p. 21) Phillips and Farrell never consented to an assignment of their non-compete agreements from Bishop to CES. (CE App. A, p. 48)

On February 24, 1998, Bishop, a Florida corporation, merged into CES, a Delaware corporation, at which time the Bishop stock was canceled and Bishop ceased to exist. (CE App. A, pp. 19-20, 76; CE App. J, pp. 1-3; Resp. App. A, pp. 2-4)

[2] Two days later, CES merged into Corporate Express of the East, Inc. (hereinafter "CEE"), a Delaware corporation, and CES ceased to exist. (CE App. A, pp. 20, 76; CE App. H, pp. 1-3) On or about the same date, Goff, Phillips and Farrell became employees of CEE, and their employment with CES terminated. (CE App. A, pp. 50-51, 53) Thereafter, on or about July 23, 1998, CEE changed its name to Corporate Express Office Products, Inc., i.e., Petitioner, Corporate Express. (CE App. K, p. 1) Phillips, Farrell and Goff never consented to an assignment of their non-compete agreements to CEE or Corporate Express. (CE App. A, p. 83) Fifteen months later, Corporate Express merged with BT Office Products, a wholly owned subsidiary of Buhrmann NV, a corporation operating under the laws of the Netherlands, and became Corporate Express, a Buhrmann company. (Resp. App. B, p. 3; CE App. A, pp. 97-98)

After the asset purchase, stock purchase and mergers described above, Corporate Express (or its predecessor or successor, as applicable) began implementing its own corporate policies and procedures in place of those that were in place at both Ciera and Bishop. (CE App. A, pp. 62, 97-101) Among the changes in policy and procedures experienced by the individual Respondents was

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[2] Citations to Respondents' Appendix will be in the form "Resp. App." and will be followed by the tab letter of Respondents Appendix, then followed by the page number(s), if applicable, of the document under that tab.

Corporate Express' refusal to pay for travel expenses incurred by salespeople in performing their job duties. (CE App. A, pp. 98-101) Ciera and Bishop had a policy of reimbursing employees for any travel expenses incurred in connection with the performance of their job duties. (CE App. A, pp. 98-100) In fact, each of the non-compete agreements at issue contained a provision that guaranteed Ciera, as to Goff, and Bishop, as to Phillips and Farrell, would reimburse such travel expenses. (CE App. F, p. 1; CE App. B, p. 2; CE App. C, p. 2) Corporate Express' failure to reimburse travel expenses caused a significant change in Goff's, Phillips' and Farrell's annual compensation because they incurred considerable travel expenses in performing their job duties. (CE App. A, pp. 98-101)

As a result, and as a result of other material changes in the terms and conditions of their employment, Goff, Phillips and Farrell decided to terminate their employment with Corporate Express on August 22, 2000, August 23, 2000, and September 12, 2000, respectively. (CE App. O, p. 8; CE App. A, pp. 62, 97-101; Resp. App. B, pp. 11-12) Thereafter, those individuals commenced employment with Respondent, Commercial Design Services, Inc. (hereinafter "CDS"). As employees of CDS, Goff, Phillips and Farrell sold office furniture to customers and potential customers of CDS.

COURSE OF PROCEEDINGS BELOW

On or about November 3, 2000, Corporate Express filed a ten count Complaint against Respondents. (CE App. O) At the same time it filed its Complaint, Corporate Express filed a Motion for Preliminary Injunction, which the trial court set for hearing on January 3, 2001. Corporate Express filed its Amended Motion for Preliminary Injunction, which the trial court scheduled for hearing on January 31, 2001. (CE App. P)

At the hearing, the trial court directed the parties to proceed with arguments and to proffer their evidence, then took the matter under advisement. (CE App. A, pp. 3, 125) On February 20, 2001, the trial court entered a Preliminary Injunction prohibiting Respondents from violating the terms of the non-compete agreements at issue. (CE App. I, p. 14)

Respondents appealed the trial court's decision to the Fifth District Court of Appeal. In a unanimous decision, the appellate court reversed the Preliminary Injunction and held that Corporate Express cannot enforce the non-compete agreements at issue. (CE App. D)

SUMMARY OF ARGUMENT

The trial court failed to apply, or misapplied, well-established Florida law that prohibits the assignment and enforcement of personal service contracts, such as the non-compete agreements in this case, to another employer without the consent of the

employee. The non-compete agreements do not contain assignment provisions or any provisions authorizing their enforcement by anyone other than "the Employer" identified therein. 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. The appellate court's opinion properly subordinated form to substance by holding that the transactions at issue changed the individual Respondents' employer, and precluded Corporate Express from enforcing the non-compete agreements.

Despite case law to the contrary, Corporate Express now claims that because CES acquired all of Bishop's stock and Ciera's assets, Bishop merged into CES, and CES subsequently merged into Corporate Express, it has somehow acquired the right to enforce the non-compete agreements. If it accepts Corporate Express' argument, then this Court will establish a legal principle that allows non-compete agreements to be enforced by a successor if the predecessor merges into, rather than sells its assets to, the successor. Such a rule is at odds with both the common law and the controlling statute, both of which were incorporated in the non-compete agreements.

Even if the non-compete agreements passed by operation of law to Corporate Express, those agreements expired prior to the alleged breaches. Corporate Express is constrained by the language of those agreements, and that language prohibits entry

of an injunction. In addition, the trial court disregarded evidence regarding Corporate Express' conduct which precludes Corporate Express from obtaining injunctive relief. If the facts are viewed in favor of Corporate Express, it still is not entitled to reinstatement of the injunction under the terms of the agreements.

ARGUMENT

I. THIS COURT SHOULD APPROVE THE APPELLATE COURT'S DECISION BECAUSE THAT COURT'S RATIONALE IS SUPPORTED BY FLORIDA LAW

A party seeking the entry of a preliminary injunction must demonstrate: i) irreparable harm; ii) a substantial likelihood of success on the merits stemming from a demonstrably clear legal right; iii) an inadequate remedy at law; and, in some instances, iv) consideration of the public interest. *See Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 770 (Fla. 5th DCA 2000). Furthermore, when seeking the entry of a temporary injunction to enforce a non-compete agreement under the pre-1990 version of section 542.33, Florida Statutes, the movant must also prove: i) the existence of a contract; and ii) the employee's intentional, direct and material breach of the non-compete agreement. *See Chandra v. Gadodia*, 610 So. 2d 15, 19 (Fla. 5th DCA 1992). A trial court's ruling on whether to enter a temporary injunction is reversible upon a showing of an abuse of discretion. *See Anich Indus.*, 751 So. 2d at 769.

Contracts for personal services, or contracts that involve a relationship of personal confidence, are ***not assignable*** by either party absent consent or ratification by the other party, or a provision in the agreement that provides for such an assignment. *See W.S. Badcock Corp. v. Webb*, 699 So. 2d 859, 861 (Fla. 5th DCA

1997); *Schweiger v. Hoch*, 223 So. 2d 557, 558 (Fla. 4th DCA 1969). The defendant in *Schweiger*, an accountant who worked for a partnership, had signed an employment agreement that included a non-compete provision. 223 So. 2d at 558. Approximately three years after signing the employment agreement, one of the partners withdrew from the partnership, causing the dissolution of the partnership. *Id.* The remaining partners formed a new partnership, and Schweiger began his employment with that entity. *Id*. Approximately nine months later, the defendant terminated his employment with the new partnership and started his own accounting business, in which he directly competed against the new partnership. *Id*. The new partnership sued to enforce the non-compete agreement entered into between the defendant and the original partnership. *Id*. The lower court held that the non-compete agreement was enforceable and enjoined the defendant from competing against the new partnership. *Id*. at 557-58.

The issue before the appellate court in *Schweiger* was the assignability and enforceability of the defendant's non-compete agreement. *Id* at 558. The plaintiff maintained that when the original partnership was dissolved and the new partnership was formed, the non-compete agreement was assigned to the new partnership and was enforceable against the defendant. *Id*. The court rejected the plaintiff's argument and held that a non-compete agreement is not assignable, absent a provision that permits

assignment, and absent consent or ratification. *Id*. In explaining why a non-compete agreement is generally not assignable, the court declared:

> "Knowing the character and personality of his master, the employee might be ready and willing to safeguard the trust which his employer has reposed in him by granting a restrictive covenant against leaving that employment. His confidence in his employer might be such that he could scarcely anticipate any rupture between them. As to that particular employer, if a break did occur, he might be willing to pledge that his fidelity would continue after the employment had ended, even at the cost of forsaking the vocation for which he was best suited. This does not mean that he was willing to suffer this restraint for the benefit of a stranger to the original undertaking."

Id. at 559 (quoting *Smith, Bell & Hauck, Inc. v. Cullins*, 183 A.2d 528 (Vt. 1962)).

The *Schweiger* court, relying on *Orlando Orange Groves Co. v. Hale*, 161 So. 284 (Fla. 1935), recognized that the assignment of a non-compete agreement could be consented to or ratified, but held that the defendant's continued employment could not in itself support the conclusion that the parties intended the original contract to be assigned or that the assignment was consented to or ratified by Schweiger. *Id*. The court also stated that it was the new partnership's duty, and not that of the defendant, to enter into a new non-compete agreement with the defendant. *Id*. Therefore, the court reversed the lower court's holding with directions to dissolve the temporary and permanent injunctions. *Id*.

Johnston v. Dockside Fueling of North America, Inc., 658 So. 2d 618 (Fla. 3d

DCA), *review denied*, 666 So. 2d 142 (Fla. 1995), also addressed the enforceability of a non-compete agreement that had purportedly been assigned. Johnston was employed by Dockside to fuel and service its customers. *Id*. at 619. Approximately four years after entering into employment with Dockside, Johnston signed an employment agreement, which included a non-compete covenant. *Id*. Dockside was involved in a fuel spill and shortly thereafter dissolved. *Id*. Three months after the dissolution of Dockside, Dockside N.A. was incorporated and all the assets of Dockside, including Johnston's non-compete agreement, were transferred to Dockside N.A. *Id*. During this time, Johnston continued to work for Dockside, then Dockside N.A. *Id*. After Johnston notified Dockside N.A. that he was going into business for himself, Dockside N.A. terminated Johnston's employment. *Id*. Johnston started his own business, performed the same services as Dockside N.A. and also solicited and serviced customers who had previously utilized the services of Dockside N.A. *Id*. Dockside N.A. filed suit to enforce the non-compete agreement between Johnston and Dockside, and asked the court to enjoin Johnston from competing with Dockside N.A. *Id*.

The appellate court held that the non-compete agreement was not assigned and was not enforceable because there was no provision permitting an assignment, and because Johnston never consented to or ratified the assignment. *Id*. The *Johnston*

court relied on both *Schweiger* and *Hale* in reaching its conclusion, and also held that Johnston's continued employment with the new corporation was insufficient to constitute consent to the assignment of the non-compete agreement from Dockside to Dockside N.A. *Id*.

In *Strehlow v. Legend Equities Corp.*, 727 So. 2d 1076, 1076-77 (Fla. 4th DCA 1999), the appellants signed non-solicitation agreements in favor of a company prior to the time when that company sold its business to the appellee, but the appellants never consented to the assignment of their non-solicitation agreements to the appellee. Therefore, the court held that the non-solicitation agreements were not enforceable, reaffirmed its *Schweiger* decision, and reversed the entry of the temporary injunction. *Id*.

In *Sears Termite & Pest Control, Inc. v. Arnold*, 745 So. 2d 485, 486 (Fla. 1st DCA 1999), Sears Roebuck & Co. purchased 100 percent of the stock in All America Termite and Pest Control, Inc. ("All America"). Subsequent to the stock purchase, All America changed its name to Sears Termite and Pest Control, Inc. ("Sears Termite") *Id*. Prior to the stock purchase, the appellees began their employment with All America, and remained employed until after the name change. *Id*. The court held that neither the name change nor the stock sale affected the corporate existence and identity of the appellees' employer. *Id*. Accordingly, the court held that Sears Termite

could enforce the non-compete agreements executed by the appellees. *Id.*

In addition to the aforesaid judicial decisions, the Florida Legislature has prescribed the extent to which a non-compete agreement is enforceable:

> (1) Notwithstanding other provisions of this chapter to the contrary, each contract by which any person is restrained from exercising a lawful profession, trade, or business of any kind, as provided by subsections (2) and (3) hereof, is to that extent valid, and all other contracts in restraint of trade are void.
>
> (2)(a) One who sells the goodwill of a business, or any shareholder of a corporation selling or otherwise disposing of all of his shares in said corporation, may agree with the buyer, and one who is employed as an agent, independent contractor, or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, so long as the buyer or any person deriving title to the goodwill from him, and so long as such employer, continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.

§ 542.33(1), (2)(a), Fla. Stat. (1989).

In *Manpower, Inc. v. Olsten Permanent Agency of Central Florida, Inc.*, 309 So. 2d 57, 57 (Fla. 2d DCA 1975), the defendant had been employed by Manpower, Inc. of Tennessee ("MIT"), which was a subsidiary of Manpower, Inc. While he was employed by MIT, the defendant entered into a non-compete agreement with Manpower, Inc. and MIT. *Id.* at 57-58. The defendant's non-compete agreement

prohibited him from engaging in a similar business in areas in which Manpower, Inc., or any of its subsidiaries, affiliates or licensees, were operating. *Id.* at 58. The defendant terminated his employment with MIT and went to work for Olsten's, a Tampa company engaged in a business similar to that of Manpower, Inc. *Id.* Manpower, Inc. and two of its franchisees commenced an action to enforce the defendant's non-compete agreement, but the trial court refused and dismissed the case. *Id.*

The appellate court affirmed the trial court's decision and noted that non-compete agreements were unenforceable in Florida prior to the enactment of the statute authorizing such agreements. *Id*. The district court observed that the "statute permits an employee to enter into an agreement with *his employer* whereby he agrees not to compete with *such employer*." *Id.* The court found that the defendant was working for MIT when the non-compete agreement was executed, but MIT was not a plaintiff. *Id*. Although Manpower, Inc. was a plaintiff, that company was not the defendant's employer when the non-compete agreement was executed. *Id.* The court also held that, even if the franchisee plaintiffs were third party beneficiaries under contract principles, the enabling statute could not be expanded to allow a third party beneficiary to enforce a non-compete agreement. *Id.* at 58-59.

In the case before this Court, the trial court held that *Schweiger, Johnston* and

Strehlow were not applicable and relied on *Sears Termite*. (CE App. I, pp. 8-11) The trial court found this case distinguishable from *Schweiger* and *Johnston* because the business entities in those cases were dissolved, and found *Strehlow* to be unclear. (CE App. I, p. 9) Furthermore, the trial court concluded that *Sears Termite* controlled because this case, in the trial court's opinion, involves a merger which included a stock sale. (CE App. I, p. 10)

The appellate court disagreed with the rationale of *Sears Termite* and declared that it was irrelevant whether a company's ownership changed, or whether one company was dissolved and a new company created. (CE App. D, p. 4) Instead, the court focused on the fact that the individual Respondents had worked for Ciera and Bishop, which had unique cultures and modes of operation that were different from the culture and mode of operation of Corporate Express. (CE App. D, p. 5) The district court observed that Phillips' and Farrell's non-compete agreements identified Bishop as "the Employer," and Goff's non-compete agreement identified Ciera as "the Employer." (*Id*.) The opinion pointed out that none of the non-compete agreements contained a provision whereby the individual Respondents agreed to be bound to a successor or assign, and that Corporate Express did not enter into new non-compete agreements with the individual Respondents. (*Id.*) Accordingly, the unanimous decision declared that Corporate Express "cannot be considered 'the Employer' that

is identified in the agreements and the authorizing statute." (*Id*.)

The Fifth District's rationale is in accord with Florida law and should be approved by this Court. The relevant statute provides that an "***employee may agree with his employer***, to refrain from carrying on or engaging in a similar business and from soliciting old customers of ***such employer***. . . so long as ***such employer***, continues to carry on a like business therein." § 542.33(2)(a), Fla. Stat. (1989) (emphasis added). That statute must be strictly construed because it is in derogation of the common law rule prohibiting non-compete agreements. *See Dunkin v. Barkus & Kronstadt, D.O.'s, P.A.*, 533 So. 2d 877, 878 (Fla. 3d DCA 1988), *review denied*, 542 So. 2d 1332 (Fla. 1989); *Manpower, Inc.*, 309 So. 2d at 58. The appellate court's rule elevates substance over form by preventing an entity from asserting that it is the "employer" under the relevant statute unless the identity and owners of that entity are the same as those of the "employer" that originally executed the non-compete agreement.

The required strict construction of section 542.33 supports that rule, as does the analysis in *Schweiger* quoted by the appellate court. (CE App. D, pp. 5-6) Even if Bishop's legal identity did not change after the stock sale in 1997, it flies in the face of reality to contend that Bishop was not changed by the fact that 100 percent of its stock was transferred from the Bishops (and their trust) to CES, a Delaware

corporation. (CE App. E, p. 1) Similarly, even if all merged corporations continue in existence in the surviving corporation, it is absurd to argue that the merging corporations and the surviving corporations were unchanged by the mergers. Those changes support the Fifth District's holding that Corporate Express is not "the Employer" and cannot enforce the non-compete agreements. Corporate Express does not, and cannot, argue that it was "the Employer" of the individual Respondents when the non-compete agreements were executed, which precludes it from enforcing those agreements.[3] *See* § 542.33(2)(a); *Manpower, Inc.*, 309 So. 2d at 58. Corporate Express' argument must also be rejected because, as with general contract principles, general legal principles regarding stock sales and mergers must yield to section 542.33. *See Manpower, Inc.*, 309 So. 2d at 58-59.

Corporate Express argues that the district court's conclusion that there was a change in "culture and mode of operation" is unsupported. Apparently, Corporate Express has overlooked the portions of the record showing that such a change occurred. Corporate Express did change the "culture and mode of operation" by changing the compensation plan, discontinuing the past practice of reimbursing travel

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[3] Corporate Express suggests that the Fifth District ignored that Goff consented to the assignment of his non-compete agreement. The appellate court ignored nothing. The court noted that Goff consented to the assignment to CES, but recognized that a different entity, Corporate Express, is seeking relief in this case. (CE App. D, pp. 1-2, 5)

expenses and reducing the number of critical support personnel. (CE App. A, pp. 62, 97-101; Resp. App. B, pp. 11-12) Corporate Express also asserts that the appellate court's opinion will result in a corporation losing its ability to enforce a non-compete agreement even if no change in corporate structure occurs. Such a result is not a logical extension of the Fifth District's rule because the opinion clearly shows that the court found that such changes did occur in this case. (CE App. D, pp. 1-2, 5-6)

Although Corporate Express contends that the individual Respondents continued with the same employer, that argument (which Respondents dispute) ***actually supports*** the appellate court's decision. Under Corporate Express' argument, the individual Respondents remained employed with Bishop or Ciera, as applicable, until they resigned. (Initial Br. at 25-26) Bishop and Ciera cannot enforce the non-compete agreements, however, because Corporate Express claims that all rights under those agreements have passed to it. (*Id*. at 19) Corporate Express cannot enforce the non-compete agreements because, if the individual Respondents remained employed with Bishop or Ciera, they were never employed by Corporate Express. *See* § 542.33(2)(a); *Manpower, Inc.*, 309 So. 2d at 58.

Corporate Express claims that no additional burden will be placed on the individual Respondents if Corporate Express is allowed to enforce the non-compete agreements. Although certain provisions of the non-compete agreements are

geographically limited, not all of the provisions are so limited. (CE App. B, p. 3; CE App. C, p. 3; CE App. F, p. 3) Bishop and Ciera primarily did business in seven counties between them, but Corporate Express does business throughout Florida. (CE App. A, pp. 11-12; CE App. O, pp. 2-3) Therefore, the burden will expand because Corporate Express seeks to prohibit competition for all of its customers, a universe that purportedly includes Bishop's customers, Ciera's customers and its other customers throughout Florida. Even if the non-compete agreements are restricted to the specified counties, the individual Respondents will be additionally burdened because of the aggregation of the aforesaid purported customers.

Corporate Express also argues that the district court's decision, if approved, will impede stock sale transactions. As pointed out by the district court, there will be no impediment if the purchaser obtains new non-compete agreements or the consent of the affected employees. (CE App. D, pp. 5-6) More importantly, unlike a restriction on an individual's right to engage in their chosen occupation, a restriction on a stock sale is not void under the common law. *See Manpower, Inc.*, 309 So. 2d at 58. Thus, it is appropriate to impose a restriction on stock sales in order to vindicate the right to pursue one's vocation.

II. THIS COURT SHOULD APPROVE THE APPELLATE COURT'S DECISION BECAUSE CORPORATE EXPRESS HAS NO RIGHT TO ENFORCE THE NON-COMPETE AGREEMENTS

Even if this Court disagrees with the Fifth District's ***reasoning***, this Court should not reverse the district court unless its ***decision*** was incorrect. *See Choctawhatchee Elec. Coop., Inc. v. Green*, 132 So. 2d 556, 559 (Fla. 1961), *cert. denied*, 369 U.S. 829 (1962); *Congregation Temple De Hirsch v. Aronson*, 128 So. 2d 585, 586 (Fla. 1961). Therefore, if this Court concludes that Corporate Express cannot enforce the non-compete agreements, without disapproving *Sears Termite* and without approving the reasoning of the district court, then the appellate court's decision to reverse the Preliminary Injunction should be approved.

In this case, ***Bishop ceased to exist and its stock was cancelled*** after it merged with CES in 1998. (Resp. App. A, pp. 2-4; CE App. A, pp. 50-51, 76; CE App. J, pp. 1-3) The subsequent merger of CES into CEE, and of Corporate Express into Corporate Express, a Buhrmann Company, had the same effect on CES and Corporate Express, respectively. (CE App. A, pp. 50-51, 76, 97-98; CE App. H, pp. 1-3; Resp. App. B, p. 3) No later than the date of each merger, the identity of the individual Respondents' employer changed to the surviving corporation. (CE App. A, pp. 49-51, 53) There was no proffer to the trial court to support a finding that any of the mergers at issue included a purchase of stock. A merger and a stock purchase are not the same. In a merger, one corporation remains in being, merging into itself other corporations that cease to exist. *See* § 607.1106(1)(a), Fla. Stat. (1999); *see also*

St. Petersburg Sheraton Corp. v. Stuart, 242 So. 2d 185, 189 (Fla. 2d DCA 1970). The purchase by one corporation of all the stock of another corporation does not merge the two corporations because both corporations remain in being.[4] *See id.* at 190.

The trial court's reliance on *Sears Termite* was misplaced. Unlike this case, *Sears Termite* did not involve a series of mergers and a series of changes of employer. *Sears Termite* only addressed a stock purchase and a name change. Corporate Express admits that the mergers changed the "corporate identity" of the individual Respondents' employer (Initial Br. at 36); that admission precludes the application of *Sears Termite*. *See* 745 So. 2d at 486 (no change of "corporate identity"). Also, the corporate party to the non-compete in *Sears Termite* remained operating after its stock was purchased, unlike Bishop and the other merged corporations. *See id*. *Sears Termite* did not construe the language of the non-compete agreements or section 542.33, Florida Statutes. The foregoing shows that *Sears Termite* is distinguishable from this case.[5]

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[4] Even if a merger is equated to a stock purchase, *Sears Termite* did not hold that the purchaser of the stock, Sears Roebuck & Co., could enforce the non-compete agreements. Therefore, that decision does not require holding that the "purchaser" here, Corporate Express, can enforce the non-compete agreements.

[5] Similarly, *Stewart v. Preston*, 86 So. 348 (Fla. 1920), cited in *Sears Termite*, is distinguishable because *Stewart* did not involve a stock sale, a series of mergers, non-compete agreements or section 542.33.

Corporate Express disingenuously argues that the individual Respondents remained employed with the same employer throughout the transactions at issue. Corporate Express cites no proffered evidence to support that contention, which is not surprising given that it did not challenge Respondents' proffer supporting the opposite conclusion. The record shows that their employer changed several times. (CE App. A, pp. 49-51, 53-54, 97-98) Corporate Express' own document states that, as of the effective date of the merger, the existence of Bishop (the "Disappearing Corporation") ceased and CES (the "Surviving Corporation") continued its existence. (Resp. App. A, pp. 2-3) Furthermore, the stock of Bishop was cancelled. (*Id*., p. 4) Bishop was a Florida corporation, CES was a Delaware corporation, and they had different employer ID numbers. (*Id.*, p. 2; CE App. A, p. 50) It was a clear abuse of discretion for the trial court to determine that the individual Respondents' employer remained constant because there is ***no*** factual basis for that finding.[6]

In light of the record, it is absurd for Corporate Express to argue that Phillips and Farrell remained employed by Bishop after the merger. It is equally meritless for

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[6] If the trial court perceived that such a basis existed, then it was a clear abuse of discretion for the trial court to make a choice between perceived conflicting proffers without allowing the parties to present testimony. (CE App. A, pp. 3-4). Although one sentence of the appellate court's opinion repeats the trial court's determination, the remainder of the opinion makes clear that the district court determined that the individual Respondents' employer changed. In any event, a baseless finding by the trial court cannot be approved by the appellate court.

it to contend that the individual Respondents' employer did not change as a result of CES's merger into CEE, and as a result of Corporate Express' (f/k/a CEE) merger into Corporate Express, a Buhrman Company. Corporate Express does not explain how a person can continue to be employed after a merger by the disappearing corporation/predecessor employer, whose existence has ceased, whose stock has been cancelled, and whose employer ID number is different than that of the surviving corporation/successor employer. In fact, Corporate Express' assertion that the non-compete agreements "passed by operation of law" shows that the employer changed. (Initial Br. at 35) If those agreements "passed," then they transferred from one entity to another, i.e., from the predecessor employer/merged entity to the successor employer/surviving corporation.

Corporate Express contends that *Johnston* and *Schweiger* are distinguishable because those cases involved the "dissolution" of the predecessor employer, whereas this case involves mergers. Under that argument, as long as a predecessor employer does not "dissolve," it may transfer its non-compete agreements to a successor employer, without affecting the enforceability of those agreements. Such a proposition is in direct conflict with Florida law holding that contracts of a personal nature cannot be unilaterally assigned. *See Hale,* 161 So. at 290; *Strehlow*, 727 So. 2d at 1076-77; *Webb*, 699 So. 2d at 861; *Johnston*, 658 So. 2d at 619; *Schweiger*, 223 So. 2d at 558.

It is exalting form over substance to distinguish between a merger and an asset transfer/dissolution because the result is the same. The predecessor employer discontinues its operations and the non-compete agreement is transferred to the successor employer without the employee's consent. More importantly, the results in *Schweiger* and *Johnston* were not based upon the dissolution of the predecessor employer, but upon the fact that the successor employer was not a party to the non-compete agreement. When an employee agrees not to compete with his employer,

> *"**[a]s to that particular employer***, if a break did occur, he might be willing to pledge that his fidelity would continue after the employment had ended, even at the cost of forsaking the vocation for which he was best suited. This does not mean that he was willing to suffer this restraint for the benefit of a ***stranger to the original undertaking***."

Schweiger, 223 So. 2d at 559 (emphasis added) (quoting *Cullins*, 183 A.2d 528 (Vt. 1962)). The *Schweiger* court went on to conclude that the original non-compete agreement benefited the predecessor and after the employer changed it was incumbent upon the successor to obtain a new non-compete agreement. *See id.*; *see also Johnston*, 658 So. 2d at 619.

Corporate Express relies on *Celotex Corp. v. Pickett*, 490 So. 2d 35 (Fla. 1986), in support of its argument. In *Celotex*, the issue was whether the surviving corporation was liable for punitive damages based on a tort committed by the merged entity prior to the merger of the two companies. Corporate Express misconstrues the holding in

Celotex by contending that a merged entity "continues to exist in the surviving corporation." (Initial Br. at 31) *Celotex* does not so hold, but simply holds that the merged entity's ***tort liability*** continues against the surviving corporation. 490 So. 2d at 38 (citing statements by out-of-state courts relating to a surviving corporation's liability for its predecessor's torts). The Court relied on language in the merger agreement, and section 607.231, Florida Statutes, regarding liabilities imposed on the successor. *Id*.

Celotex did not decide whether a merged entity continues to exist after the merger or whether the surviving corporation could enforce the merged entity's non-compete agreements. Section 607.1106, Florida Statutes, was not construed in *Celotex*. *Id*. Under that statute, every corporation involved in a merger ***ceases to exist***, except the surviving corporation.[7] *See* § 607.1106(1)(a), Fla. Stat. (1999). The

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[7] The effect of the merger of Bishop into CES is governed by the statute relating to a merger of a domestic corporation into a foreign corporation. *See* § 607.1107(1), Fla. Stat. (1999). Thus, the effect of such merger is as set forth in section 607.1106, except to the extent that Delaware law provides otherwise. *See* § 607.1107(4). The effect of the merger of CES into Corporate Express (f/k/a CEE) is governed by Delaware law. Under Delaware law, every corporation involved in a merger ***ceases to exist***, except the surviving corporation. *See* Del. Code Ann. tit 8, § 259(a) (1998). Furthermore, Corporate Express' argument that a merged entity does not dissolve, but continues its existence after a merger, has been rejected under Delaware law. *See Koppers Coal & Transp. Co. v. United States*, 107 F.2d 706, 707-08 (3d Cir. 1939). Therefore, notwithstanding Florida law regarding mergers, Delaware law precludes finding that the merged entities in this case continued to exist.

facts in this case also establish that the merged entities ceased to exist. *See supra* pp. 20, 22. More importantly, *Celotex* does not analyze section 542.33, Florida Statutes. In view of the foregoing, *Celotex* is inapposite in this case.

Corporate Express cites *Nenow v. L.C. Cassidy & Son of Florida, Inc.*, 141 So. 2d 636 (Fla. 2d DCA 1962), for the proposition that a merger does not change or abrogate an employment contract. Therefore, Corporate Express contends, this Court should not conclude that the mergers caused a termination of employment with the merged entities. Corporate Express has erroneously described the holding in *Nenow*. The proposition espoused by Corporate Express was part of a treatise quoted by the court, was not a statement of Florida law and, in any event, was dicta because *Nenow* did not involve a merger. As the *Schweiger* court observed, *Nenow* did not involve a change of employer, unlike this case. *See* 223 So. 2d at 558-59. Accordingly, *Nenow* cannot be applied here.

In a desperate attempt to support its position, Corporate Express relies on *UARCO, Inc. v. Lam*, 18 F. Supp. 2d 1116 (D. Haw. 1998). The trial court did not cite *Lam* in its Preliminary Injunction. The Fifth District did not find that *Lam* warranted discussion. The lower courts' disregard of *Lam* was appropriate because that decision is based on Hawaii law, and is completely at odds with the Florida statutes and case law applicable to this case. Therefore, it is meritless for Corporate Express to urge this Court to adopt that decision.

It is undisputed that the non-compete agreements do not contain provisions allowing assignment to, transfer to, or enforcement by, an assignee or successor. The

parties are deemed to have incorporated the *Manpower, Inc.* and *Schweiger* rules, *supra* pp. 8-10, 13-14, 16-17, into those agreements, which precludes such assignment, transfer or enforcement. *See City of Homestead v. Beard*, 600 So. 2d 450, 454-55 (Fla. 1992) (existing case law incorporated into a contract). In addition, the governing statute provides that an "***employee may agree with his employer***, to refrain from carrying on or engaging in a similar business and from soliciting old customers of ***such employer*** . . . so long as ***such employer***, ***continues to carry on a like business*** therein." § 542.33(2)(a), Fla. Stat. (1989) (emphasis added). As a matter of law, that statute was incorporated into the non-compete agreements. *See Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) (existing statute incorporated into a contract), *cert. denied*, 507 U.S. 1005 (1993). Bishop and Ciera are the employers with whom the individual Respondents agreed not to compete. (CE App. B, p. 1; CE App. C, p. 1; (CE App. F, p. 1) Furthermore, Bishop and Ciera ceased their business operations in January, 1997, and October, 1996, respectively. (CE App. A, pp. 49-50, 53-54) Therefore, Corporate Express cannot enforce the non-compete agreements.

Corporate Express seeks to persuade this Court that it has the right to enforce the non-compete agreements under section 607.1106, Florida Statutes. That statute, however, does not state that the surviving corporation obtains the right to enforce a merged entity's contract, even if the contract prohibits a successor from acquiring

such a right. Corporate Express cites no authority to support its claim that it by merger, eviscerated section 542.33 and the case law prohibiting a successor from unilaterally acquiring rights under a non-compete agreement, which were incorporated into the agreements at issue.

In fact, the Delaware merger statute has been construed to ***not*** allow the surviving corporation to enforce a contract that contained a provision prohibiting assignment without consent. *See PPG Indus., Inc. v. Guardian Indus. Corp.*, 597 F.2d 1090, 1095-96 (6th Cir.), *cert. denied* 444 U.S. 930 (1979). The court declared that the contract at issue was of a personal nature and was not assignable unless the parties expressly agreed otherwise. *See id*. at 1093-94. The court also observed that the parties could have provided in the contract for an exception in the event of a merger. *See id*. at 1095. The court noted that a merger results in an assignment, and rejected the contention that such a transfer by operation of law was distinguishable from an assignment agreement. *See id*. at 1095-96. Although *PPG Industries* did not involve a non-compete agreement, its analysis is applicable here because of the personal nature of the non-compete agreements and the restrictions on alienation incorporated therein. Accordingly, even if Florida law regarding mergers supported Corporate Express' position, Delaware law prohibits it from enforcing the non-compete agreements in this case. *See supra* note 7.

Corporate Express' reliance on section 607.1106 is also unavailing because that general statute relating to mergers cannot trump the specific statute enacted by the Legislature to govern non-compete agreements.[8] *See McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994); *SunTrust Banks of Fla., Inc. v. Don Wood, Inc.*, 693 So. 2d 99, 101 (Fla. 5th DCA 1997). The rule espoused by Corporate Express would allow a predecessor to unilaterally transfer a non-compete agreement to a successor through a merger, even though it could not do so through an asset sale. Corporate Express' argument is devoid of authority which supports finding that the Legislature intended for a successor's right to enforce its predecessor's non-compete agreement to depend on the form of the transaction by which the right was purportedly acquired. In fact, the plain language of the statute does not provide for enforcement by a successor. *See* § 542.33(2)(a), Fla. Stat. (1989).

The Legislature amended section 542.33 several times after the *Manpower, Inc.* and *Schweiger* decisions, but did not amend the statute to allow a successor to

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[8] Corporate Express cites no authority indicating that section 542.33 should be displaced by the general Delaware statute regarding mergers. In fact, Delaware law supports the opposite conclusion. *See supra* p. 28. Even if Corporate Express could convince this Court that it has the right to enforce the non-compete agreements under Delaware law, this Court should disallow such enforcement in Florida because it is contrary to the public policy set forth in section 542.33. *See Cerniglia v. C. & D. Farms, Inc.*, 203 So. 2d 1, 2 (Fla. 1967), *aff'g in part, rev'g in part on other grounds*, 189 So. 2d 384, 386 (Fla. 3d DCA 1966).

enforce a predecessor's non-compete agreement. *See* § 542.33 (History). Thus, the Legislature is presumed to have adopted the rules set forth in those cases that preclude such enforcement. *See City of Hollywood v. Lombardi*, 770 So. 2d 1196, 1202 (Fla. 2000). In fact, when the Legislature did address the issue, it declared that a successor could ***not*** enforce a predecessor's non-compete agreement unless the agreement specifically provided otherwise. *See* § 542.335(1)(f), Fla. Stat. (1997).

More importantly, the statute regarding non-compete agreements is in derogation of the common law rule proscribing such agreements. *See Dunkin*, 533 So. 2d at 878; *Manpower, Inc.*, 309 So. 2d at 58. This Court has declared:

> Statutes in derogation of the common law are to be construed strictly, however. They will ***not*** be interpreted to displace the common law further than is ***clearly*** necessary. Rather, the courts will infer that such a statute was ***not*** intended to make any alteration other than what was ***specified and plainly pronounced***. A statute, therefore, designed to change the common law rule must speak in ***clear, unequivocal terms***, for the presumption is that ***no*** change in the common law is intended unless the statute is ***explicit*** in this regard. Inference and implication cannot be substituted for ***clear expression***.

Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977) (emphasis added) (citations omitted). Corporate Express cannot enforce the agreements in this case because section 542.33 does not clearly and unequivocally state that a successor can enforce a predecessor's non-compete agreements.

III. THIS COURT SHOULD APPROVE THE APPELLATE COURT'S DECISION BECAUSE CORPORATE EXPRESS HAS NO RIGHT TO A PRELIMINARY INJUNCTION

In the event that this Court rejects Respondents' arguments set forth *supra*, the appellate court should not be reversed if other grounds support its decision. *See Green*, 132 So. 2d at 559; *Aronson*, 128 So. 2d at 586. Accordingly, if the trial court erred by granting injunctive relief, then this Court should approve the Fifth District's decision reversing the Preliminary Injunction.

Notwithstanding Corporate Express' argument to the contrary, Bishop and CES could not enforce the non-compete agreements prior to the mergers at issue. Respondents did not concede that those agreements were enforceable after CES purchased the stock of Bishop, but only stated that the non-compete agreements were not unenforceable by virtue of the stock sale ***alone***. (CE App. A, pp. 44-45) In fact, it has always been Respondents' position that the non-compete agreements were unenforceable after the stock sale and the asset sale.

Subsequent to the stock sale in January, 1997, Bishop ceased doing business, and Phillips' and Farrells' employment with Bishop ended. (CE App. A, pp. 49-51) Similarly, after the asset sale in October, 1996, Goff's employment with Ciera terminated, and Ciera no longer engaged in business. (*Id.*, pp. 53-54) Corporate Express did not proffer contrary evidence at the hearing. In fact, its own documents

show that the individual Respondents' employment ended with their prior employer, and began with CES. (CE App. G ("Employee's employment with CES"); CE App. O, pp. 5-6 (Phillips and Farrell became employees of Corporate Express, f/k/a CES)) Thus, given the undisputed facts, the non-compete agreements expired immediately after the asset sale and stock sale because neither Ciera nor Bishop was "engaged in its present or any allied business." (CE App. B, p. 3; CE App. C, p. 3; CE App. F, p. 3) At the latest, the non-compete agreements expired in January, 1998, or October, 1997, as applicable, because the duration of those agreements was limited to one year after the termination of employment. (CE App. B, p. 3; CE App. C, p. 3; CE App. F, p. 3)

The foregoing illustrates the flaw in Corporate Express' argument. Corporate Express asserts that it acquired the rights under the non-compete agreements by virtue of the mergers in February, 1998. At that time, however, the non-compete agreements had expired. Corporate Express cites no authority to support a claim that the mergers resurrected the expired agreements. Even if the individual Respondents' employment with Bishop and Ciera did not terminate, and those entities did not cease to do business until after the mergers in February, 1998, the non-compete agreements expired almost two (or three) years before the individual Respondents allegedly violated those agreements. Assuming *arguendo* that Corporate Express obtained the

right to enforce the non-compete agreements, it cannot do so after those agreements expired by their own terms.

Corporate Express essentially asks this Court to change the express terms of the non-compete agreements by substituting Corporate Express as "the Employer." Not surprisingly, Corporate Express cites no authority to support its argument that the mergers caused such substantive (and nonsensical) changes to the non-compete agreements, which are replete with references to "the Employer." (CE App. B, pp. 1-3; CE App. C, pp. 1-3; CE App. F, pp. 1-4) The consent to assignment specifically states that it does not "alter, modify, or amend" Goff's non-compete agreement, (CE App. G), and there is no logical reason why the mergers had a different effect. The consent to assignment, and Phillips' and Farrell's non- compete agreements, were not prepared by the individual Respondents, (CE App. A, pp. 51, 53), and must be construed against Corporate Express. *See City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) More importantly, non-compete agreements are in derogation of the common law and must be strictly construed against the alleged restraint. *See Wilson v. S. Repair Servs., Inc.*, 795 So. 2d 1121, 1123-24 (Fla. 5th DCA 2001); *Weintraub v. Roth*, 617 So. 2d 1158, 1159 (Fla. 4th DCA 1993). It was an abuse of discretion for the trial court to grant injunctive relief because, as a matter of law, the alleged breaches of the non-compete agreements occurred after those agreements expired by

their own terms. *See supra* pp. 31-32.

An employer who materially breaches an employment agreement, or prevents performance by the employee, is precluded from obtaining an injunction to enforce the agreement. *See Seaboard Oil Co. v. Donovan*, 128 So. 821, 824 (Fla. 1930); *Bradley v. Health Coalition, Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997); *Troup v. Heacock*, 367 So. 2d 691, 692 (Fla. 1st DCA 1979). Therefore, if Respondents demonstrated that Corporate Express materially breached, or prevented performance under, the non-compete agreements at issue, then Corporate Express was not entitled to obtain the Preliminary Injunction to enforce those agreements. The record shows that such a demonstration was made. (CE App. A, pp. 62, 97-101; Resp. App. B, pp. 11-12)

In its Preliminary Injunction, the trial court cursorily broached the issue of whether Corporate Express breached the non-compete agreements by implementing a policy that required the individual Respondents to incur travel expenses associated with their employment with Corporate Express. (CE App. I, p. 11) At the hearing, Corporate Express did not dispute the policy change, but the trial court did not request any evidence regarding the decrease in earnings that resulted under the new policy. Without hearing such evidence, the trial court could not make a determination under *Donovan* and its progeny of whether Corporate Express' breach of the non-

compete agreements was material. If the trial court believed that the resolution of that issue required additional evidence, then the proffer procedure required that the trial court request Respondents to do so. (CE App. A, pp. 3-4) Thus, the trial court abused its discretion by holding that the change in the travel expense policy did not preclude Corporate Express from obtaining an injunction.

Moreover, the trial court did not address the evidence regarding other breaches of, and the prevention of performance under, the non-compete agreements. (CE App. I, p. 11) Respondents established, and Corporate Express did not dispute, that Corporate Express changed the compensation plan and eliminated critical personnel that the individual Respondents needed to perform their jobs. (CE App. A, pp. 62, 97-101); Resp. App. B, pp. 11-12) The failure of the trial court to determine the legal effect of those events probably stems from its belief that such issues were irrelevant because Corporate Express was seeking a temporary injunction. (*See* CE App. A, pp. 85-86, 89-90) Accordingly, the trial court abused its discretion by granting the Preliminary Injunction. *See Bradley*, 687 So. 2d at 333 (failing to consider defenses until trial on the merits was erroneous).

In its Answer Brief to the Fifth District, Corporate Express argued that its alterations to the travel reimbursement policy were inconsequential and did not constitute a material breach of the non-compete agreements. Furthermore, Corporate

Express claimed that the "obscure" language contained in those agreements regarding the reimbursement of travel expenses made the provisions unenforceable. Such arguments are flawed; it is fatuous to allege that a provision regarding an employee's compensation is inconsequential and does not go to the essence of the agreement. Moreover, the non-compete agreements unambiguously state that the travel expenses incurred will be "at the expense of the Employer," and such unequivocal language is not open for interpretation. (CE App. B, p. 2; CE App. C, p. 2; CE App. F, p. 1) Corporate Express' decision to discontinue reimbursing the individual Respondents for their substantial business travel expenses reduced their compensation, constituted a material breach of the non-compete agreements, and disqualified Corporate Express from receiving injunctive relief. *See Donovan*, 128 So. at 824; *Bradley*, 687 So. 2d at 333; *Troup*, 367 So. 2d at 692.

In the appellate court, Corporate Express also relied on *Kupscznk v. Blasters, Inc.*, 647 So. 2d 888 (Fla. 2d DCA 1994), *review denied*, 658 So. 2d 991 (Fla. 1995), to support its argument that, if an employer can alter an employee's compensation, such alteration is not material to the non-compete agreement. The employee in *Kupscznk* signed a non-compete agreement that did ***not*** contain a provision regarding compensation, and the court held that the employer was free to alter the employee's compensation at any time. *See id*. at 890. *Kupscznk* is distinguishable from this case

because the non-compete agreements at issue contain provisions requiring the reimbursement of travel expenses. Furthermore, the non-compete agreements provide that employment would be on "such terms as the parties may hereafter ***agree***." (CE App. B, p. 3; CE App. C, p. 3; CE App. F, p. 2) (emphasis added) Corporate Express was bound by the provisions in those agreements, and could not unilaterally alter the travel reimbursement policy or other terms of employment. In addition, *Kupscznk* did not involve action by the employer that prevented performance by the employee, unlike this case.

Corporate Express' argument would allow it to obtain an injunction to enforce the non-compete agreements despite the fact that it changed the terms of employment in contravention of the expressed consideration for those agreements. That argument fails because the non-compete agreements must be construed against Corporate Express and against restraint. *See supra* p. 33. Furthermore, the principle advocated by Corporate Express works an injustice by binding the individual Respondents to the non-compete agreements, while excusing Corporate Express from its obligations under those agreements. Equity cannot tolerate such a result. *See, e.g., Donovan,* 128 So. at 824. Therefore, it was an abuse of discretion for the trial court to enter the Preliminary Injunction.

Even under Corporate Express' version of the facts, reinstatement of that

injunction is not warranted. According to Corporate Express, the individual Respondents terminated their employment no later than September, 2000. (CE App. O, p. 8) Therefore, the Preliminary Injunction cannot be reinstated because the non-compete agreements expired no later than one year after the individual Respondents terminated their employment with Corporate Express, i.e, no later than September, 2001. (CE App. B, p. 3; CE App. C, p. 3; CE App. F, p. 3) Respondents recognize that this argument is contrary to the holding in *Capelouto v. Orkin Exterminating Co. of Fla., Inc.*, 183 So. 2d 532, 534-35 (Fla. 1966) (4-3 decision). Respondents respectfully suggest that the dissenting opinion is more well-reasoned than the majority opinion. *See id.* at 535 (Caldwell, J., dissenting in part). It is also worth noting that the fourth vote for the majority opinion was cast by a circuit judge, apparently sitting by designation. *See id.* Respondents urge this Court to overrule *Capelouto* and adopt Justice Caldwell's opinion that an injunction cannot continue beyond the date that is the contractually prescribed after the termination of employment. In that event, Corporate Express is not entitled to reinstatement of the Preliminary Injunction.

CONCLUSION

In view of the foregoing, this Court should approve the district court's decision to reverse the Preliminary Injunction. In any event, this Court should not reinstate the Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Answer Brief has been furnished by U.S. Mail to Joseph G. Santoro, Esquire and Allan H. Weitzman, Esquire, 2255 Glades Road, Suite 340 West, Boca Raton, Florida 33431-7360 this ____ day of July, 2002.

By:_____
Keith F. White, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondents' Answer Brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, and that the font used in this brief is Times New Roman 14-Point.

By:_____
Keith F. White, Esquire