IN THE SUPREME COURT OF FLORIDA

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.

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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

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STATEMENT OF THE CASE AND FACTS

On November 3, 2000, Corporate Express filed its Complaint against Respondents, Doug Phillips ("Phillips"), Edward R. Goff ("Goff") Lori L. Farrell ("Farrell") (the "Former Employees") and Commercial Design Services, Inc. ("CDS") (collectively the "Respondents"). Therein, Corporate Express sought damages and injunctive relief due, *inter alia*, to the Former Employees' willful violation of their non-compete agreements (the "Agreements") when they resigned from Corporate Express and went to work for CDS, a direct competitor, and for Respondents' use and disclosure of Corporate Express' Trade Secrets and other confidential information. On December 28, 2000, Corporate Express filed its Motion for Preliminary Injunction (the "Motion"), wherein it sought injunctive relief to enjoin the Former Employees from further breach of their Agreements and to enjoin Respondents' use and disclosure of Corporate Express' Trade Secrets and other confidential information. The Motion was heard before the Honorable George A. Sprinkel IV, Circuit Court Judge, on January 31, 2001.

At the hearing, Respondents incorrectly argued that Corporate Express did not have standing to enforce the Agreements because it was not the "employer" who was the signatory to these Agreements. Respondents took this position to overcome the following transactions that gave Corporate Express enforcement rights to the Agreements: On January 3, 1997, Corporate Express (then known as

Corporate Express of the South, Inc.) acquired the rights to the Phillips and Farrell Agreements after it purchased **100% of the stock** of Bishop Office Furniture Company, Inc. ("Bishop"). In October 1996, Corporate Express (then known as Corporate Express of the South, Inc.) acquired the rights to the Goff Agreement after it purchased the assets of Goff's original employer, Ciera Office Products, Inc. ("Ciera").[1]

From January 1997 through February 1998, Corporate Express continued the business of Bishop and retained the Bishop name. Just over a year after the stock purchase of Bishop, Corporate Express went through an internal reorganization/ consolidation of its related companies that resulted in the merger of its wholly owned subsidiaries. Specifically, in February 1998, Bishop was ***merged into*** its parent company, Corporate Express of the South, Inc. Two days later, Corporate Express of the South, Inc., was ***merged into*** its parent company, Corporate Express of the East, Inc. Thereafter, in July 1998, Corporate Express of the East, Inc., ***changed its name*** to Corporate Express Office Products, Inc., Petitioner herein.

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[1] Because Corporate Express purchased only the assets of Ciera (as opposed to the stock purchase of Bishop), Goff executed a consent to the assignment of his Agreement.

On February 19, 2001, the Trial Court entered its Preliminary Injunction wherein it concluded, as matter of fact and law, that throughout the stock purchase, internal reorganization and name change described above, the Former Employees "remained employed with the corporation that ultimately became known as Corporate Express." The Trial Court held, relying on the First District Court of Appeal's decision in Sears Termite and Pest Control v. Arnold, 745 So. 2d 485 (Fla. lst DCA 1999), that neither the change in ownership of Bishop's stock nor the internal mergers affected Corporate Express' right to enforce the non-compete agreements because none of these events involved the **dissolution** of the Former Employees' employer. Thus, because the rights to the Former Employees' Agreements passed by operation of law, no assignment was necessary and Corporate Express retained its right to enforce the Agreements.

Respondents appealed the Trial Court's decision to the Fifth District Court of Appeal (the "Appellate Court") and claimed that the Trial Court erred when it followed Sears. On August 17, 2001, the Appellate Court reversed the Trial Court's ruling and issued its opinion wherein it **expressly and directly rejected** Sears, stating that it "simply [did] not agree with the rationale of that case." (See Appendix, p. 4). Rather than follow Sears, the Appellate Court's publication of its decision **created new precedent in this State** and held that, regardless of the

nature of the transaction (i.e., stock purchase, asset purchase or merger), a "successor corporation" does not have the right to enforce a non-compete agreement absent the express consent of the employee, even where the only change that occurred was a change in the ownership of the employers' stock and there was no dissolution of the employer.

In creating **this new precedent**, the Appellate Court improperly relied on Schweiger v. Hoch, 223 So. 2d 557, 558 (Fla. 4th DCA 1969), wherein the Fourth District ruled that "where a corporation is **dissolved and a new one created**, the employee's continued employment cannot in and of itself be construed as sufficient knowledge and consent to conclude that the assignment was consented to or ratified by the employee." Id. (*emphasis added*). As set forth herein, Schweiger is not applicable to the facts of this case and does not support the Appellate Court's departure from existing jurisprudence.

SUMMARY OF ARGUMENT

Because the Appellate Court's decision below expressly and directly conflicts with the decision of the First District Court of Appeal in Sears Termite and Pest Control v. Arnold, *supra*, this Court has jurisdiction and should review this case. As we explain *infra* at pp. 5-7, Sears holds that in a stock purchase acquisition, the assignment of the acquired employees' non-compete agreements is not necessary

because a mere change in ownership of corporate stock does not affect a company's contract rights and liabilities. Here, however, the Appellate Court expressly rejected Sears and created new law by ruling that Petitioner, Corporate Express Office Products, Inc. ("Corporate Express") could not enforce the non-compete agreements of its former employees because they did not obtain the employees' consent to the assignment of their agreements following a 100% stock purchase and the consolidation of its related companies.

Moreover, as urged *infra* at pp. 8-10, this Court should exercise its jurisdiction because the Appellate Court's ruling also contravenes Florida statutory law and a prior decision of this Court regarding the legal effect of mergers in this State. See § 607.1106, Fla. Stat.; Celotex Corp. v. Picket, 490 So. 2d 35 (Fla. 1986). Thereunder, following a merger, the surviving corporation continues to possess all the rights and liabilities of the merged corporation and the merged entity continues to exist in the surviving corporation. The Appellate Court's ruling ignores this fundamental principle of corporate law. Finally, as we show *infra* at pp. 9-10, the Appellate Court's decision concerns a matter of great public importance because its impact transcends the case at bar in that it substantially alters successorship rights in corporate acquisitions and mergers and creates new law in this State.

ARGUMENT

I. This Court Has Jurisdiction Because the Appellate Court's Ruling Expressly and Directly Conflicts with the First District's Holding in Sears.

This Court has jurisdiction to review the Appellate Court's decision because it **expressly and directly** conflicts with the First District's holding in Sears on the same question of law. See Art. V § 3(b) (3) Fla. Const. (1988); Fla. R. App. P. 9.030 (a)(2)(A)(v). Specifically, Sears held that, **in a stock purchase acquisition**, assignment of a non-compete agreement **is not required** because a mere change in the ownership of corporate stock does not alter its corporate existence, its contract rights or liabilities. Id.; see also Stewart v. Preston, 86 So. 348, 349 (Fla. 1920) ("the change in the name of a corporation has no effect whatsoever upon its property rights, or liabilities. It continues as before [to be] responsible in its new name for liabilities previously contracted or insured and has the right to sue on contracts made or liabilities incurred to it - before the change.").

Following Sears, the Trial Court properly ruled that Corporate Express' acquisition of Bishop through a 100% stock purchase did not affect its ability to enforce the Agreements. Therefore, Corporate Express was not required to obtain an assignment from Phillips and Farrell. Moreover, as held by the Trial Court, the logic of Sears was also applicable to the internal mergers of the Corporate Express entities. Because these mergers only involved the transfer of ownership of Bishop's stock

between wholly owned companies, Corporate Express' rights to the Agreements passed by operation of law and without assignments.

Below, however, the Appellate Court erroneously and expressly rejected Sears and held that Corporate Express did not have the right to enforce the Former Employees' Agreements because it did not obtain separate assignments. (Appendix, p. 6). Rather, the Appellate Court stated that it did not agree with the sound rationale of Sears and incorrectly ruled that the nature of the transaction, whether by asset purchase, stock purchase or merger, was **irrelevant** to the question of enforceability (Appendix, pp. 4-6).

In support of its position, the Appellate Court incorrectly relied on Schweiger v. Hoch, *supra.* That case, however, is not controlling. There, the partnership that was a party to the non-compete agreement **legally dissolved** after the departure of one of its partners. Thereafter, an entirely **new partnership** was created and attempted to enforce the non-compete agreement. Schweiger, *supra.* Accordingly, as the Trial Court correctly held, Schweiger was distinguishable because the Former Employees' "employer" in this case did not dissolve and continued to exist, as a matter of law. In an attempt to circumvent this factual distinction, the Appellate Court applied Schweiger and (without citing authority) held that whether or not the employer had been dissolved was **irrelevant** to its analysis.

Accordingly, the Appellate Court's rejection of Sears and its misplaced reliance on Schweiger created new law in Florida, which was erroneous and should be overturned. Therefore, Corporate Express requests that the Court exercise its jurisdiction to resolve the inter-district conflict created by the Appellate Court's decision.

II. The Appellate Court's Ruling Contravenes Florida Statutory Law and Prior Florida Supreme Court Precedent Regarding the Effect of Mergers on Contracts.

The Appellate Court incorrectly held that Schweiger, which required a consent to an assignment **after a corporation has been dissolved** and a new one created, applied to the internal reorganization of Corporate Express' wholly owned subsidiaries. (See Appendix; p. 6). This ruling, however, directly contradicts Florida Statutory law and a prior decision of this Court. Specifically, pursuant to § 607.1106, Fla. Stat., when a merger becomes effective, the merging corporation merges into the surviving corporation and **the surviving corporation possesses all the rights, liabilities and obligations of the merged corporation**. See § 607.1106(1), Fla. Stat. In effect, the result of a merger under Florida law is that the merging entity ***continues to exist in the surviving corporation*** and ***all*** of its rights and liabilities pass to the surviving corporation as a matter of law. See Celotex Corp. v. Picket, 490 So. 2d 35, 38 (Fla. 1986) ("merger merely directs the ***blood of the old*** corporation ***into the veins***

of the new, the old living in the new"; "merger is like the uniting of two or more rivers, neither stream is annihilated, but ***all continue in existence.***") (*emphasis added*).

Rather than explain why it did not follow these legal standards when deciding this case (as was urged by Corporate Express in its Answer Brief), the Appellate Court chose to ignore these legal principles. Because the Appellate Court's conclusion is in direct conflict with Florida statutory law and a prior decision of this Court, it should be reversed.

III. This Court Should Accept Jurisdiction and Review the Decision of the Appellate Court Because It Involves the Creation of New Precedent in This State and is a Matter of Great Public Importance.

The Appellate Court's ruling has far-reaching consequences that extend beyond this case. Specifically, under the new standard created by the Appellate Court, companies throughout Florida will lose the protection of these types of agreements every time there is **any** change in their corporate structure (including internal "paper" consolidations, such as those that occurred in this case). Moreover, under the Appellate Court's new standard, a single company in Florida that has employees throughout the state may not be able to enforce the agreements of some of their employees simply because they reside in the Fifth District.

In addition, the Appellate Court's ruling creates a particularly unjust result where, as here, the "paper" changes to the employees' actual employer did not change the extent of the employees' obligations under the Agreements. Here, the Former Employees' Agreements were **geographically** limited and only prohibited them from competing with Corporate Express in certain **identified** Florida Counties. Thus, despite Bishop's acquisition by Corporate Express and Corporate Express' internal reorganization, the competitive restraints agreed to by the Former Employees did not expand following the stock purchase or reorganization.

Finally, the far reaching importance of this case is evidenced by the fact that just days after the Appellate Court issued this opinion, its decision was reported by the Bureau of National Affairs on a **national level** as being a case of substantial interest in the field of employment law. Obviously, it was newsworthy because its results created new law. The fact that the case was wrongly decided justifies this Court's taking jurisdiction to right this wrong and restore credibility to jurisprudence in our state.

CONCLUSION

For the reasons set forth above, this Court should exercise its discretionary jurisdiction to review the decision below.

Dated this 20th day of December, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished via U.S. Mail to:

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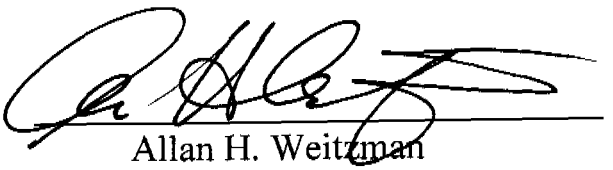
Dated this 20th day of December, 2001.

By: _____
Allan H. Weitzman

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Fla. R. App. P. 9.210.



Allan H. Weitzman

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

JULY TERM 2001

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

DOUG PHILLIPS, EDWARD R. GOFF, et al.,

Appellants,

v.

Case No. 5D01-864

CORPORATE EXPRESS OFFICE PRODUCTS, INC.,

Appellee.

_____/

Opinion Filed August 17, 2001

Non-Final Appeal from the
Circuit Court for Orange County,
George A. Sprinkel, IV, Judge.

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Allan H. Weitzman and Joseph G. Santoro of Proskauer Rose LLP, Boca Raton, for Appellee.

PLEUS, J.

The issue in this case is the enforceability of a non-compete agreement after an asset purchase, stock purchase, merger and name change.

Corporate Express Office Products, Inc. ("Corporate Express"), sells office products, furniture and equipment. It sued three former employees (Goff, Phillips and Farrell) and their new employer, Commercial Design Services, Inc. ("Commercial Design"), for unlawful use of trade secrets and breach of non-compete agreements. Corporate Express sought and obtained a preliminary injunction against the former employees and their new employer. On appeal, the former employees argue that Corporate Express has no legal

right to enforce the non-compete agreements. We agree and reverse.

In 1986, Edward Goff signed a non-compete agreement with his employer, Ciera Office Products ("Ciera"). That same year, Doug Phillips signed a similar agreement with his employer, Bishop Office Furniture Co. ("Bishop"). In 1989, Lori Farrell signed her non-compete agreement with Bishop. All of these agreements precluded the employees from competing against their employers or soliciting the employers' customers for one year following the termination of employment. None of the agreements contained assignment clauses.

In 1996, Corporate Express of the South, Inc. ("CES"), purchased the assets of Ciera. As part of the transaction, CES required Ciera's employees to execute consents to the assignment of their non-compete agreements to CES. Goff executed a consent to Ciera's assignment of his non-compete agreement to CES.

In 1997, CES purchased 100% of Bishop's stock. CES did not require Bishop employees to execute consents to assign their non-compete agreements to CES. Accordingly, Phillips and Farrell did not execute consents. CES continued operating Bishop's business under the Bishop name. In 1998, Bishop merged into its parent company, CES. Shortly thereafter, CES merged into its parent company, Corporate Express of the East, Inc. ("CEE"). Five months later, CEE changed its name to Corporate Express Office Products, Inc. ("Corporate Express").

Throughout the asset purchase, stock purchase, mergers and name changes, Goff, Phillips and Farrell remained employed with the corporation that ultimately came to be known as Corporate Express. In 2000, Goff, Phillips and Farrell terminated their employment with Corporate Express and began working for Commercial Design, allegedly

in violation of their non-compete agreements.

In Florida, non-compete agreements are considered personal services contracts and are generally not assignable without the parties' consent or ratification. *Schweiger v. Hoch*, 223 So. 2d 557, 558 (Fla. 4th DCA 1969),citing *Orlando Orange Groves Co. v. Hale*, 161 So. 2d 284 (Fla. 1935). "When a corporation is dissolved and a new one created, the employee's continued employment cannot in and of itself be construed as sufficient knowledge and consent to conclude that the assignment was consented to or ratified by the employee." *Schweiger*, 223 So. 2d at 559; *see also, Johnston v. Dockside Fueling of North America, Inc.*, 658 So.2d 618 (Fla. 3d DCA 1995).

Despite the well-settled law on the issue, the First District, in *Sears Termite and Pest Control, Inc. v. Arnold*, 745 So.2d 485 (Fla. 1st DCA 1999), held that "a 100% stock purchase does not involve the dissolution of the corporate entity" and thus, the new owner may enforce a non-compete agreement between the corporation and its employee without the necessity of an assignment. The court distinguished *Schweiger* and *Johnston* on the grounds that both of those cases involved dissolution of the former entity and creation of a different one. 745 So. 2d at 486.

In the instant case, the trial court analyzed these cases as follows:

> A change in ownership of corporate stock, such as in a merger, does not affect the corporation's existence, its contract rights, or its liabilities. *See Sears Termite and Pest Control v. Arnold*, 745 So.2d 485, 486 (Fla. 1st DCA 1999) (citing 18 C.J.S. § 283 Corporations (1990)). *See also Stewart v. Preston*, 86 So. 348, 349 (Fla. 1920) (The change in the name of a corporation has no effect upon its property, rights, or liabilities. The corporation continues as before, and has the right to sue on contracts made to it before the change.). Further, a 100 percent stock purchase does not involve a

> dissolution of the corporate entity. *See Sears Termite*, 745 So.2d 485. Therefore, a merger which includes a 100 percent stock purchase does not affect the surviving corporation's right to enforce a non-compete agreement.

Based on *Sears Termite*, the trial court concluded that Corporate Express had the right to enforce the non-compete agreements.

In *Sedgwick of Florida, Inc. v. Lahey*, 771 So.2d 1178 (Fla. 5th DCA 2000), this court per curiam affirmed, with citation to *Schweiger*,[1] a summary judgment in favor of a former employee against the surviving corporation of a merger. Similar to the instant case, the original employer underwent a series of mergers and name changes. The successor corporation sought to enforce a non-compete agreement against the employee, who had remained with the company throughout these changes, but subsequently left to compete against it. The trial court found, citing *Strehlow*, *Johnston*, and *Schweiger*, that the surviving corporation had "no rights in the contract" since personal services are "not assignable by either party absent express consent. On appeal, the successor corporation relied on *Sears Termite*. However, this court rejected *Sears Termite* and followed *Schweiger*.

We understand how the trial court could be led astray by *Sears Termite*. We simply do not agree with the rationale of that case. The fact that after the change in ownership or stock sale or name change, liabilities or property rights are not changed, is irrelevant to the issue in this case. Equally irrelevant to our analysis is the fact that one corporation is dissolved and a new entity created.

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[1] This citation appears in the actual opinion but not in the Southern Reporter. We do not know why the Southern Reporter failed to publish the full opinion.

We focus instead on the reality that Goff, Phillips and Farrell worked for Ciera and Bishop Office Furniture Co. Those companies had a culture and mode of operation unique to themselves. Corporate Express had a culture and mode of operation different from Bishop or Ciera. Both Phillips and Farrell signed non-compete agreements with Bishop, in which Bishop is referred to as "the Employer." Goff's non-compete agreement refers to his employer as "Ciera Office Products, Inc." or "the Employer." There is no language in any of the agreements indicating that the employee is agreeing to be bound to the employers' successors or assigns. Thus, because Corporate Express did not contract with any of the former employees for new non-compete agreements, it cannot be considered "the Employer" that is identified in the agreements and the authorizing statute.

Regardless of the distinction between dissolution and merger, we again reject *Sears Termite* and agree with the analysis in *Schweiger* that:

> The contract not to compete was for the benefit of the employing firm and when the firm changed it was incumbent upon the new firm to then have a new contract not to compete entered into. Naturally it would be the responsibility of the employee to then sign the contract or the employer could release him. It would not be the duty of the employee, when the firm was changed, to approach the employer and repudiate the contract which he had with the original employer.

223 So. 2d at 558.

The court explained the purpose of prohibiting the subsequent employer from enforcing the non-compete agreement, quoting from *Smith, Bell & Hauck, Inc. v. Cullins*, 123 Vt. 96, 101, 183 A.2d 528, 532 (Vt. 1962), as follows:

> Knowing the character and personality of his master, the employee might be ready and willing to safeguard the trust which his employer had 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 saw willing to suffer this restraint for the benefit of a stranger to the original undertaking.

223 So. 2d at 559.

In the instant case, Corporate Express could have eliminated any doubt as to the enforceability of the non-competes by obtaining consents from the former employees. Phillips testified in his deposition that CES managers repeatedly tried to intimidate him into signing a new non-compete agreement. These actions demonstrate that CES recognized the need to have the continuing employees execute consents to assign their non-compete agreements. However, they failed to obtain these consents.

Although *Schweiger* involved the dissolution of the former employer, we believe its reasoning also applies to the stock purchase and mergers in the case at bar. To this extent, we recognize that our position conflicts with *Sears Termite.* Accordingly, we reverse the preliminary injunction. Because of our holding, we do not address the remaining issues.

REVERSED.

THOMPSON, C.J., and PETERSON, J., concur.

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.

FRANK J. HABERSHAW, CLERK
DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT

Per _____
Deputy Clerk