

**IN THE SUPREME COURT OF FLORIDA**

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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.

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**PETITIONER'S INITIAL BRIEF**

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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

Allan H. Weitzman  
Joseph G. Santoro  
PROSKAUER ROSE LLP  
Attorneys for Petitioner, Corporate  
Express Office Products, Inc.  
2255 Glades Road, Suite 340W  
Boca Raton, Florida 33431  
Telephone: 561-241-7400

Facsimile: 561-241-7145

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## STATEMENT OF THE CASE AND FINDINGS OF FACT

The Petitioner, Corporate Express Office Products, Inc. (“Corporate Express”) is a Delaware corporation engaged in the business of selling and delivering office products, office furniture and business equipment to customers. (CE App. A., p. 11). Corporate Express is authorized to conduct business in Florida and does so throughout the State, including Orange, Brevard, Seminole, Lake, Marion, Citrus and Osceola Counties. (CE App. A, p. 12).

Respondents, Doug Phillips (“Phillips”), Lori L. Farrell (“Farrell”), and Edward R. Goff (“Goff”) (collectively the “Former Employees”) previously worked for Corporate Express in its furniture sales division. (CE App. A, p. 12). As “Account Managers” for Corporate Express, the Former Employees were responsible for, *inter alia*, soliciting customers on behalf of Corporate Express for the purchase of office furniture and equipment, and for establishing, servicing and maintaining direct relationships with existing and prospective Corporate Express customers. (CE App. A, p. 17).

Respondent, Commercial Design Services, Inc. (“CDS”), is a direct competitor of Corporate Express that, immediately after the Former Employees terminated their

employment relationship with Corporate Express, hired the Former Employees to compete with Corporate Express. (CE App. A, p. 17-18).

At issue in this appeal is whether Corporate Express has standing to enforce the Former Employees' non-compete agreements that were executed by the Former Employees prior to 1990. With respect to Phillips and Farrell, Corporate Express seeks to enforce their agreements following a 100% stock purchase and a series of internal re-organizational mergers of its wholly-owned subsidiaries. With respect to Goff, Corporate Express seeks enforcement based on his consent to the assignment of his non-compete agreement following a separate asset purchase.<sup>1</sup>

Specifically, as established in the Trial Court below, prior to June 28, 1990, each of the Former Employees executed his/her non-compete agreement at issue in this litigation. Phillips and Farrell signed their non-compete agreements on August 11, 1986 and June 5, 1989, respectively, when they began working for **Bishop Office Furniture Company, Inc.** ("Bishop"). (CE App. A, p. 12, CE App. B, C). On January 3, 1997, Corporate Express (then known as **Corporate Express of the**

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<sup>1</sup> From the outset, the Fifth District below mischaracterized the issue in this case when it bundled the Phillips and Farrell situations, on the one hand, and the Goff situation, on the other, when it wrote: "The issue in this case is the enforceability of a non-compete agreement after an asset purchase, stock purchase, merger and name change." (CE App. D, p. 1).

**South, Inc.**) acquired Bishop by purchasing 100% of Bishop's stock. (CE App. A, p. 12, 21-23, CE App. E).

On March 3, 1986, Goff signed his non-compete agreement when he began working with **Ciera Office Products, Inc.** ("Ciera"). (CE App. F). On October 16, 1996, Corporate Express (then known as **Corporate Express of the South, Inc.**) purchased the assets of Ciera, including Goff's non-compete agreement. (CE App. A, p. 16). Because Corporate Express purchased only the assets of Ciera (as opposed to the stock purchase of Bishop), Corporate Express required Goff to execute a consent to the assignment of his non-compete agreement on October 16, 1996. (CE App. A, p. 16, CE App. G). Therein, Goff agreed and consented to the assignment of his non-compete obligations from Ciera to Corporate Express (then known as **Corporate Express of the South, Inc.**). (CE App. G).

At all times material hereto, Corporate Express of the South, Inc., was a wholly owned subsidiary of **Corporate Express of the East, Inc.** (CE App. H, p. 3). In turn, Corporate Express of the East, Inc., was wholly owned by Corporate Express' parent company **Corporate Express, Inc.** (CE App. I, p. 4). Therefore, immediately upon the Bishop stock purchase, and continuing until February 1998, the organization

of Corporate Express and its subsidiaries (collectively referred to as the “Corporate Express Companies”) was as follows:

**Corporate Express, Inc.**  
(the Corporate Express Companies’ parent company)



**Corporate Express of the East, Inc.**  
(a wholly owned subsidiary of Corporate Express, Inc.)



**Corporate Express of the South, Inc.**  
(a wholly own subsidiary of Corporate Express of the East, Inc.)



**Bishop Office Furniture Company, Inc.**  
(a wholly own subsidiary of Corporate Express of the South, Inc.)

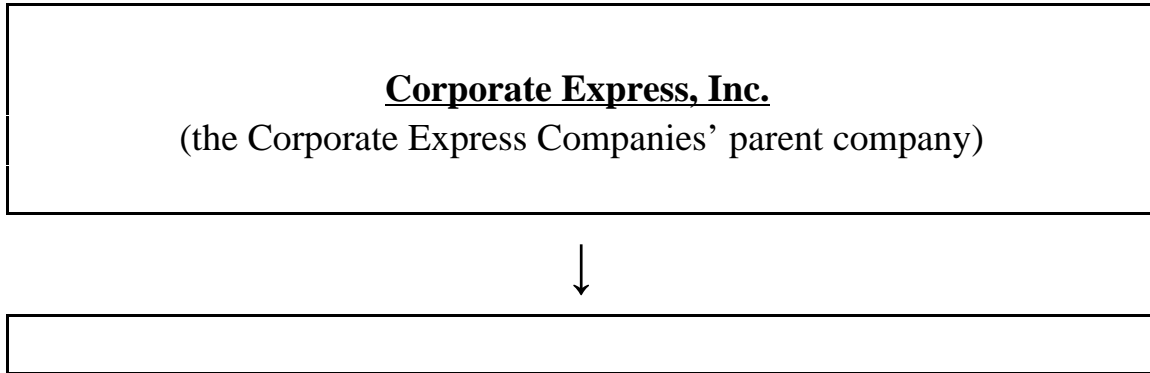
Consistent with the above, beginning January 3, 1997, by virtue of the purchase of its stock, Bishop was a fully integrated member of the Corporate Express family.

From the date it acquired Bishops' stock in January, 1997 through February 1998, Corporate Express continued the business of Bishop and retained the Bishop name. (CE App. A, p. 19). Just over a year after the stock purchase of Bishop, the Corporate Express Companies went through an internal re-organization/consolidation that resulted in the merger of the Corporate Express Companies with their subsidiaries. Specifically, on February 24, 1998, Bishop was *merged into* its parent company, Corporate Express of the South, Inc. (CE App. A, p. 19, CE App. J). Just two days later, on February 26, 1998, Corporate Express of the South, Inc., was *merged into* its parent company, Corporate Express of the East, Inc. (CE App. A, p. 20); (CE App. H). Thereafter, Corporate Express continued as Corporate Express of the East, Inc. until July 23, 1998, when Corporate Express of the East, Inc., *changed its name* to Corporate Express Office Products, Inc., the Petitioner in this case.<sup>2</sup> (CE App. A, p. 20, CE App. K).

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<sup>2</sup> At the injunction hearing and in their briefs before the Fifth District, Respondents attempted to confuse the corporate history of Petitioner with a “red herring” by arguing that in 1999, Corporate Express Office Products, Inc., the Plaintiff in this case, was “acquired by [and] merged into” a company allegedly called “BT Office Products Company, Inc.” (CE App. A, p. 98). This Court  
(continued...)

Thus, as a result of the internal re-organization/consolidation of the Corporate Express Companies — all of which were directly or indirectly wholly-owned by Corporate Express, Inc. — from July 23, 1998, through the present, the corporate structure of the Corporate Express Companies was as follows:



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<sup>2</sup>(...continued)

should disregard Respondents' erroneous claim for several reasons. First, unlike the self-authenticating corporate records introduced by Corporate Express during the Preliminary Injunction hearing evidencing Corporate Express' true corporate history, Petitioners introduced **no evidence whatsoever** to support their claim. Second, the facts are, as evidenced by the public record, that in December 1999, an entity known as BT Office Products International, Inc. ("BT"), was merged into Corporate Express Office Products, Inc. and Corporate Express Office Products, Inc. remained as the surviving entity. Thus, despite this transaction, there was no change whatsoever in the legal status of Former Employees' employer.

Indeed, both the Trial Court's and Fifth District's findings are consistent with Corporate Express' position. Specifically, even though the Trial Court found that a merger between Corporate Express and BT took place, it simply held that after this transaction Corporate Express "became known as Corporate Express, a Buhrmann company" and did not make any findings as to the legal identity/status of Corporate Express following the BT transaction. (CE App. I, p. 5). In addition, the Fifth District did not include the unrelated Buhrmann transaction in its recitation of the corporate history of Petitioner. (CE App. D, p. 2).

**Corporate Express Office Products, Inc.**

(a wholly owned subsidiary of Corporate Express, Inc.; formerly Bishop Office Furniture Company, Inc., Corporate Express of the South, Inc., and Corporate Express of the East, Inc.)

As correctly concluded by the Trial Court and the Fifth District, as a matter of fact and law, throughout the mergers and name changes described above, Phillips, Farrell, and Goff “*remained employed with the corporation that ultimately became known as Corporate Express,*” the Petitioner in this case. (CE App. I, p. 6, CE App. D, p. 2).<sup>3</sup> Specifically, from the date Corporate Express acquired Bishop through the date the Former Employees terminated their employment in August and September of 2000, performed the same jobs, serviced the same territories and serviced the same customers. (CE App. L, pp. 53-55, 61, CE App. M, N).

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<sup>3</sup> Prior to the merger of Bishop into Corporate Express, Bishop went through an administrative dissolution for failure to file an annual report. However, once this paperwork error was discovered, Corporate Express took the necessary steps to reinstate Bishop and to perfect the corporate history in Florida’s records. The Trial Court correctly found that the administrative dissolution was inconsequential because, under Florida law, once a corporation that has been administratively dissolved is reinstated, the reinstatement relates back to and takes effect as of the date of the administrative dissolution; and the corporation resumes carrying on its business as if the administrative dissolution had never occurred. § 607.1422(3), Fla. Stat.; *see also, Triple T., Inc. v. Jaghory*, 612 So. 2d 642, 643 (Fla. 4th DCA 1993) *review denied*, 626 So. 2d 206 (Fla. 1993); (CE App. I, p. 6).

Upon their separation of employment, the Former Employees immediately began working for CDS, a direct competitor of Corporate Express, and began competing with Corporate Express in the prohibited territories in violation of their non-compete agreements. (CE App. I, p. 6). Respondents' competitive activities are not disputed. Moreover, both prior to and after the conclusion of their employment with Corporate Express, the Former Employees' misappropriated Corporate Express' trade secrets and other proprietary and confidential information and used it to unlawfully compete with Corporate Express.<sup>4</sup>

As a result of the above unlawful acts and others, Corporate Express initiated this action on November 3, 2000, by filing its Complaint against Respondents. (CE App. O). Therein, Corporate Express sought damages and injunctive relief due, *inter alia*, to Former Employees' willful violation of their non-compete agreements and for Respondents' use and disclosure of Corporate Express' trade secrets and other

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<sup>4</sup> For example, as Petitioner explained to the Trial Court, at the conclusion of Farrell's employment with Corporate Express and after being told not to enter onto the Company's premises, **Farrell entered Corporate Express' Orlando office after business hours — at 10 p.m. at night — and removed multiple boxes of Corporate Express' customer files and other trade secrets and confidential and proprietary information.** (CE App. A, p. 9). Amazingly, she was **accompanied by Phillips**, who had ended his employment with Corporate Express to work for CDS, **two weeks before** and who had previously been escorted off of Corporate Express property. (CE App. A, p. 9-10).

confidential and proprietary information. (CE App. O, p. 1). Corporate Express alleged that the Former Employees were and are in breach of their non-compete agreements because, *inter alia*, they: (i) are presently employed by CDS; (ii) have unlawfully solicited Corporate Express' customers; and (3) have unfairly competed with Corporate Express in the prohibited territories. (CE App. O, p. 12). In addition, Corporate Express alleged in its Complaint that Respondents were and are unlawfully using and disclosing Corporate Express' trade secrets and other confidential and proprietary information in violation of Florida statutory and common law. (CE App. O, p. 12, 14-18).

On December 28, 2000, Corporate Express filed its Motion for Preliminary Injunction, wherein it sought, *inter alia*, immediate injunctive relief to enjoin the Former Employees from further breach of their non-compete agreements by prohibiting them from working for CDS in the prohibited territories and from soliciting Corporate Express' customers, as well as to enjoin Respondents' use and disclosure of Corporate Express' trade secrets and other confidential and proprietary information. (CE App. P, p. 15). The Motion for Preliminary Injunction was heard before the Honorable George A. Sprinkel IV, Circuit Court Judge, on January 31, 2001.

On the day of the hearing, Corporate Express presented evidence that Respondents were in violation of their non-compete agreements and Florida law.<sup>5</sup> Included among the evidence presented to the Trial Court were Phillips' and Farrell's own admissions that they committed numerous violations of their non-compete agreements, including working for CDS in the prohibited territories and soliciting and attempting to divert Corporate Express' customers to CDS. (CE App. A, p. 31-34, CE App. M, N). In addition, Corporate Express presented the Trial Court with evidence establishing that Goff was also in violation of his non-compete agreement due to his solicitation of Corporate Express' customers. (CE App. A, p. 35-38). Moreover, Corporate Express presented to the Trial Court over 54 Exhibits and other evidence establishing that Respondents breached their non-compete agreements and used and disclosed Corporate Express' trade secrets and other confidential and proprietary information.<sup>6</sup>

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<sup>5</sup> At the direction of the Court, the parties made "proffers" of the evidence as established during the extensive written discovery and depositions taken by all parties prior to the hearing. All parties willingly participated in this procedure without any objection.

<sup>6</sup>The sufficiency of Corporate Express' proof of the Respondents' violations of their contractual obligations and Florida common and statutory law is not an issue in this appeal and was not raised by Respondents in the Fifth District.

On February 19, 2001, the Trial Court issued its 15-page Injunction Order. (CE App. I). Therein, relying on the First District Court of Appeal's decision in *Sears Termite and Pest Control v. Arnold*, 745 So. 2d 485, 486 (Fla. 1st DCA 1999) ("*Sears*"), the Trial Court held that Corporate Express was at all times the Former Employees' employer and had the right to enforce the Former Employee's non-compete agreements. (CE App. I, p. 14). Specifically, the Trial Court found that neither the change in ownership of Bishop's stock nor the transfer of Corporate Express' stock in connection with the aforementioned 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. (CE App. I, pp. 9-10). Thus, because the rights to the Former Employees' non-compete agreements passed by operation of law, Corporate Express always had and continued to have the right to enforce these agreements and no assignment was necessary. (CE App. I, p. 10). Accordingly, the Trial Court enjoined the Former Employees from further breach of their non-compete agreements and enjoined Respondents from using and/or disclosing Corporate Express' trade secrets and other confidential information in violation of Florida statutory and common law. (CE App. I, p. 14).

Respondents appealed the Trial Court’s decision to the Fifth District Court of Appeal (the “Fifth District”) claiming, *inter alia*, that the Trial Court erred when it followed *Sears*. On August 17, 2001, the Fifth District 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* App. D, p. 4). As set forth in more detail *infra* at pp. 22-24, rather than follow the appropriate legal analysis used in *Sears*, which focused on the existence of legal changes in the corporate identity of the employer as a basis to determine whether a plaintiff has standing to enforce a non-compete agreement, the Fifth District 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.<sup>7</sup> (CE App. D, pp. 4-5).

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<sup>7</sup> That portion of the Preliminary Injunction that prohibits the Respondents from using or disclosing Corporate Express’ trade secrets and other confidential and proprietary information was not reversed on appeal and remains in effect. (CE App. Q, p. 2.)

## **SUMMARY OF ARGUMENT**

The fundamental problem with the decision below is that when 100% of a company's stock is purchased by someone who wants to own an on-going concern in a state such as Florida that will enforce valid non-compete agreements, the purchaser's acquisition may be worthless if the employees do not come to work for their new employer and can walk across the street to work for a competitor in violation of an otherwise enforceable non-compete agreement. And, while the Fifth District believes that the solution to this problem is to have the employees sign new non-compete agreements, no rational business person will wait until after the purchase price has been paid to solicit new agreements. Therefore, the Fifth District's decision will force potential buyers to seek new agreements as a pre-purchase condition. Thus, the infusion of new capital into Florida will be thwarted by any employee who can effectively veto a stock sale by his/her present employer by a pre-sale refusal to consent. It is in this context that this Court should reverse the ruling of the Fifth District and remand this case with instructions to reinstate the Preliminary Injunction granted in favor of Corporate Express because the business-unfriendly analysis and conclusions in the Fifth District's opinion are also contrary to Florida law.

As established in Point I *infra* at pp. 19-29, the Fifth District improperly rejected the First District’s correct holding and analysis of *Sears*, which held that in a stock purchase acquisition, assignment of a non-compete agreement is not required because a mere change in the ownership of a corporation does not alter the corporation’s existence, contractual rights or liabilities. Based on this standard, the Trial Court correctly concluded that because the transactions at issue here (a 100% stock purchase of Bishop and the internal mergers of Corporate Express’ wholly owned subsidiaries) only involved a change in ownership of corporate stock and did not involve the dissolution of the contracting employer, Corporate Express had the legal right to enforce the Former Employees’ non-compete agreements and was not required to obtain these rights through an assignment of the agreements. (CE App. I, p. 10).

As set forth *infra* at pp. 22-24, the Fifth District erred when it (i) held that the long-standing law in Florida assuring the continuation of corporate rights and liabilities following the transfer of its stock and/or after a name change was “irrelevant” to the analysis of this case and, (ii) instead, in direct conflict with the First District’s holding in *Sears*, created a new test to support its intended result that has no support under Florida law in the absence of a corporate dissolution. Specifically, the Fifth District

held that Corporate Express was required to obtain an assignment of the Former Employees' non-compete agreements and their consent thereto because of a change in “**culture and mode of operation**” that allegedly occurred as a result of the changes in stock ownership. (CE App. D, p. 5). The Fifth District's use of this new standard is not supported by Florida law for several reasons.

First, as established *infra* at pp. 24-26, the Fifth District's reliance on *Schweiger v. Hoch*, 223 So. 2d 557 (Fla. 4th DCA 1969) and *Johnston v. Dockside Fueling of North America, Inc.*, 658 So. 2d 618 (Fla. 3d DCA 1995), was improper. Neither of those cases support the Fifth District's position that a change in “culture and mode of operation” requires the assignment of a non-compete agreement to an employer who, as a matter of law, had the legal right to enforce the agreement. Moreover, the Fifth District expressly chose to ignore the critical fact that in both of those cases the employer with whom the employee originally contracted had **dissolved** and an entirely new employer was seeking to enforce the agreements.

Second, as demonstrated *infra* at pp. 26-27, there is no support for the argument that any alleged changes in “culture and mode of operation” made it inequitable for Corporate Express to enforce the Former Employees' non-compete agreements in the absence of any change whatsoever in the Former Employees'

obligations to Corporate Express under the non-compete agreements. Indeed, each of these agreements is geographically limited and only prevents the Former Employees from competing with Corporate Express in certain identified Florida counties.

Third, as we argue *infra* at pp. 28-29, because changes in “corporate culture and mode of operation” are not always associated with a change in corporate ownership, the Fifth District’s standard could result in an employer’s loss of protection of its agreements with its employees simply by appointing new leadership or changing its mode of doing business when reacting to market conditions. This cannot be an appropriate result under Florida law.

As established in Point II, the Fifth District ignored Florida law that establishes Corporate Express’ right to enforce the Former Employees’ non-compete agreements. Specifically, as discussed *infra* at pp. 29-32, Florida law holds that Corporate Express’ internal consolidations of its wholly owned subsidiaries, which were nothing more than “paperwork transactions”, did not affect its ability to enforce the non-compete agreements. Florida **statutory and case law** make plain that Corporate Express’ merger and consolidation of its subsidiaries, including Bishop, had no effect on its rights to enforce the non-compete agreements. 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 rights, liabilities and obligations of the merged corporation. Here, as correctly concluded by the Trial Court, no assignments of the Former Employees' non-compete agreements were necessary because Corporate Express obtained these rights by operation of law. The Fifth District ignored these long-standing principles.

Finally, as argued *infra* at pp. 32-36, the Fifth District ignored the Federal District Court's opinion in *Uarco, Inc. v. Lam*, 18 F. Supp. 2d 1116 (D. Haw.1998). While this case is not binding on the Fifth District or this Court, it is the only reported case in the country that Corporate Express could find that squarely addresses the legal issue presented here. In *Uarco*, the Federal District Court ruled that the surviving corporation following a merger had the right to enforce the non-compete agreements of the employees of the merged corporation because, as a matter of law, the surviving corporation following a merger possesses all of the obligations and rights of the predecessor corporation. Thus, the Federal District Court ruled that the surviving corporation following a merger obtains these rights by **operation of law and no assignment is necessary**. *Id.* at 1122. Even though this decision was based on Hawaii law, *Uarco* is especially instructive here because, under Hawaii law, non-compete agreements are not assignable as a matter of public policy.



## ARGUMENT

### STANDARD OF REVIEW ON APPEAL

It is well-settled that the scope of the Florida Supreme Court's review of a decision of a Court of Appeal is limited when the grounds for accepting jurisdiction was a conflict with the decision of another appellate court on the same point of law. *See South Fla. Hospital Corp. v McCrea*, 118 So. 2d 25, 27 (Fla. 1960); *see also, Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). In these circumstances, the Court will preliminarily direct its attention to ascertaining whether there is a conflict between the cases that requires resolution to achieve "standardization" between the decisions on the same point of law. *South Fla. Hospital Corp.*, 118 So. 2d at 27. Thereafter, the Court will examine the pronouncements in the decisions and resolve the conflict. *Id.*; *see also*, Art. V, § 3(b)(3), Fla. Const., *Florida Power & Light Co. v. Bell*, 113 So. 2d 697, 698 (Fla. 1959) (when the Florida Supreme Court grants discretionary jurisdiction based on a conflict between districts, the question to be resolved is the conflict on the "point of law" that differs between the decisions).

## POINT I

**BECAUSE THE FIFTH DISTRICT'S ANALYSIS AND CONCLUSIONS ARE NOT SUPPORTED BY ESTABLISHED PRECEDENT, THIS COURT SHOULD REVERSE ITS RULING AND REMAND THIS CASE WITH INSTRUCTIONS TO REINSTATE THE PRELIMINARY INJUNCTION.**

Throughout this case, Corporate Express argued, and the Trial Court agreed, that under existing Florida law and the underlying facts: (i) an assignment of the Former Employees' non-compete agreements was not required; and (ii) Corporate Express has standing to enforce these agreements as a matter of law. Specifically, for Phillips and Farrell, Corporate Express proved that because the underlying transactions included a 100% stock purchase and the internal merger of its wholly-owned subsidiaries, the right to enforce their non-compete agreements passed to Corporate Express by operation of law and neither the assignment of these agreements nor the Former Employees' consent thereto was necessary. For Goff, Corporate Express proved that he actually consented to the assignment of his non-compete agreement — a fact that was ignored by the Fifth District.

In support of this position, Corporate Express relies on existing Florida statutory and case law including, but not limited to, the First District's decision in

*Sears* and Florida's corporate merger statute. *See* § 607.1106, Fla. Stat. As set forth below, the Fifth District's rejection of *Sears* and its conclusion that the Trial Court's reliance thereon was an abuse of discretion, was improper.

In *Sears*, a pest control company's sales technician executed an employment contract containing a covenant not to compete with his employer "All America Termite and Pest Control" ("All America"). *Sears, supra* at 486. Five years later, Sears Roebuck and Co. purchased 100% of the stock of All America and subsequently changed All America's name to "Sears Termite and Pest Control." *Id.* After the employee left to form his own competing company, Sears Termite and Pest Control, Inc., sought to enforce his non-compete agreement and the agreement of a co-worker. *Id.*

In response to the complaint, the employees argued, as Respondents have here, that their non-compete agreements were unenforceable because they did not consent to an assignment of the contracts to Sears, the party seeking enforcement. *Id.* The First District rejected the employees' argument. Specifically, the First District held that, in a stock purchase acquisition, **assignment of a non-compete agreement is not required** because a change in the ownership of corporate stock does not alter the corporation's existence, contractual rights or liabilities. *Id.* Relying on a prior

decision of this Court, the First District also explained its holding by noting that “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.” *Sears* at 486 , citing *Stewart v. Preston*, 86 So. 348, 349 (Fla. 1920).

The First District distinguished *Sears* from the two cases cited by the employees by noting that the corporations that had been parties to those non-compete agreements had **legally dissolved** and had, therefore, ceased to exist in any legal capacity. *See id.* Therefore, the critical inquiry, as seen by the First District, was whether there was a change in the **legal status of the contracting employer**, such as a dissolution, that would alter the corporation’s contractual rights, necessitate an assignment of the agreement to a **new party** and require the employee’s consent.

Based on *Sears*, the Trial Court correctly concluded that because the transactions at issue (a 100% stock purchase of Bishop, the internal mergers of the Corporate Express Companies and a name change) only involved a change in ownership of corporate stock and did not involve the dissolution of the contracting employer, Corporate Express (as the embodiment of prior entities) had the legal right

to enforce the Former Employees' non-compete agreements and was not required to obtain these rights through an assignment of the agreements. (CE App. I, p. 10).<sup>8</sup>

The Fifth District in this case, however, issued its opinion that **expressly and directly** conflicts with *Sears* and rejected its holding, notwithstanding that it accepted the legal principles discussed above as "fact."<sup>9</sup> Instead, the Fifth District adopted a **new test** never before seen in Florida:

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.

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 was referred to

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<sup>8</sup> Respondents will undoubtedly argue, as they did below, that personal service contracts are not assignable absent consent. This argument, however, overlooks the fact that under the Trial Court's correct interpretation of *Sears*, there has been no change in the employer; and, therefore, no assignment was necessary. *See also, Uarco, Inc. v. Lam*, 18 F. Supp. 2d 1116 (D. Haw. 1998), at pp. 35-39, *infra*.

<sup>9</sup> As set forth in Petitioner's Amended Brief on Jurisdiction previously submitted on December 1, 2001, the Fifth District expressly acknowledged that its ruling was in direct conflict with the First District's holding in *Sears*. Moreover, as established *infra* at pp. 26-32, the Fifth District's holding in this case is, in fact, in direct conflict with *Sears* on the same point of law.

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 authorizing statute.

(CE App. D, p. 5) (*emphasis added*).

As set forth above, the Fifth District rejected (without any substantive explanation) the analysis of *Sears* (and that of the Trial Court), arguing instead that the long-standing law (and “fact”) in Florida assuring the continuation of corporate rights and liabilities following a sale of stock or name change was “irrelevant.” (CE App. D, p. 4.) To the contrary, the Fifth District concluded that because there was a change in “**culture and mode of operation**”, Corporate Express was required to obtain consents from the Former Employees to the transfer of their non-compete agreements to Corporate Express. (CE App. D, p. 5). In so holding, the Fifth District apparently found (again without explanation or factual support) that there was an actual “change in culture” and that Corporate Express “could have eliminated any doubt as to the

enforceability of the non-compete agreements by obtaining consents from the former employees.” (CE App. D, p. 6).<sup>10</sup>

To support its intended result, the Fifth District improperly relied on *Schweiger v. Hoch*, 223 So. 2d 557, 558 (Fla. 4th DCA 1969) and *Johnston v. Dockside Fueling of North America, Inc.*, 658 So. 2d 618 (Fla. 3d DCA 1995), claiming that “regardless of the distinction between dissolution and merger” Corporate Express was required to obtain the Former Employees’ consent to the assignment of their agreements because it was not the “employer” with whom they originally contracted. (CE App. D, p. 5). The Fifth District’s conclusions are in error; and its reliance on *Schweiger* and *Johnston* is misplaced for several reasons.

First, neither *Schweiger* nor *Johnston*, stand for the proposition that a “change in corporate culture or mode of operation” requires the assignment of a non-compete

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<sup>10</sup> To justify its requirement that consents are required in these circumstances, the Fifth District treated Corporate Express’ attempt to have Phillips sign a new agreement as an admission that this was necessary. (CE App. D, p. 6). In so doing, the Fifth District ignored the fact that the so called “new” non-compete agreement was a different agreement in that it would have changed the duration of the restriction from one year to two. (CE App. A, pp. 122-123). Thus, if anything, these efforts were made to provide Petitioner with greater protection — and there is no record evidence that there was any other motive or recognition of “need.” Besides, even if the perceived “need” were, in an abundance of caution, to avoid a litigation over this very issue, that is hardly a justification for cutting off legally enforceable rights.

agreement to an employer who, as a matter of law, had the legal right to enforce the agreement. Instead, in *Schweiger, supra*, the employee entered into an employment agreement with an accounting partnership that, three years after he signed the employment agreement, **dissolved** due to one of the primary partners leaving the partnership. *Id.* at 558. Thereafter, an **entirely new** partnership was formed and the employee began to work for the new partnership. *Id.* The court held that the new partnership could not enforce the employee's non-compete agreement reasoning that "when the initial partnership was **dissolved and a new one created**, the defendant's continued employment could [n]ot in itself be construed as sufficient knowledge and consent to conclude that the parties intended that the original contract to be assigned or that the assignment was consented to or ratified by the defendant." *Id.* at 559 (*emphasis added*). Similarly, in *Johnston, supra*, the employer with whom the employee had entered into his non-compete agreement **dissolved**. *Johnston* at 618. Over three (3) months later, a **completely new corporation** was formed and the assets of the previous company were transferred to the new entity. *Id.*

By relying on these cases to support its conclusion, the Fifth District explicitly chose to **ignore the critical fact** that in both of these cases the corporations with whom the employees originally contracted **dissolved** and an **entirely new entity** was

attempting to enforce the agreements. *See Schweiger, supra* at 558; *Johnston, supra* at 618. Here, as correctly found by the Trial Court, **there was no dissolution** of the Former Employees' "employer." Instead, the Former Employees' employment continued as a matter of law with the same employer, until the time of their resignation. (CE App. I, p. 10).

Second, *Schweiger* and *Johnston* are not applicable to the facts of this case because *Schweiger* did not pertain to stock purchases or mergers and, in *Johnston*, the successor company acquired the employee's non-compete agreement as a result of an **asset** sale. Indeed, here Corporate Express complied with the assignment requirement of *Johnston* when, after the purchase of Ciera's assets, Corporate Express obtained Goff's written consent to the assignment of his non-compete agreement.

Third, there is no support for the proposition that any changes in "culture and mode of operation" were such that it would be inequitable for Corporate Express to enforce the non-compete agreements against the Former Employees. Specifically, as established in the Trial Court, from the date Corporate Express acquired Bishop (and Goff consented to the assignment of his non-compete agreement) through the date the Former Employees terminated their employment in August and September of 2000,

they performed the same job, serviced the same territories and serviced the same customers. (CE App. L, p. 53-55, 61, CE App. M, N). Significantly, throughout the stock purchase and internal re-organization, there was never any change whatsoever in the Former Employees' obligations to Corporate Express under the non-compete agreements. In fact, each of the non-compete agreements is **geographically limited** and only prohibit the Former Employees from competing with Corporate Express (in the sale of office furniture and equipment) in certain identified Florida Counties. (CE App. B, C, F).

For Phillips and Farrell, their non-compete agreements only prohibit them from, directly or indirectly, competing with Corporate Express in Orange, Brevard, Seminole, Lake and Osceola Counties, Florida. (CE App. B, C, p. 2-3). Similarly, Goff's non-compete agreement prohibits him from, directly or indirectly, competing with Corporate Express in Marion, Lake and Citrus Counties, Florida. (CE App. F, p. 3-4). Thus, despite Bishop's sale of stock to Corporate Express and Goff's consent to the assignment of his non-compete agreement, the competitive restraints agreed to by the Former Employees remained constant and did not expand in any way following the stock purchase (in the case of Phillips and Farrell), asset purchase and consent (in the case of Goff) or reorganization. Accordingly, no separate assignment

(or additional assignment in the case of Goff) was necessary to protect the Former Employees from being burdened beyond that to which they had contractually agreed.<sup>11</sup>

Fourth, the Fifth District's test is not workable and will lead to an inequitable result in this case and others. It is a matter of corporate reality that changes in "culture and mode of operation" happen every day and are not necessarily tied to a change in ownership. In fact, there are often dramatic changes in "corporate culture and mode of operation" that are associated with leadership changes and changes in the marketplace. Taken to its logical extension, under the Fifth District's improper standard, a corporation that had undergone **no change in its corporate structure** could lose the protection of its non-compete agreements with its employees simply by

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<sup>11</sup> The Fifth District's holding relies on "changes in culture and mode of operation" to support its conclusion that Corporate Express lost its rights to enforce the Former Employees' non-compete agreements. If that was due to the internal merger of its wholly-owned subsidiaries, the Fifth District's reliance is misplaced for two reasons. First, Goff consented to any changes in corporate culture when he agreed to the assignment of his non-compete agreement to Corporate Express. Second, any changes in "corporate culture" that would have effected Phillips and Farrell occurred, if at all, at the time of Corporate Express' acquisition of Bishop, when Bishop became a fully integrated member of the Corporate Express family. Thus, there were no significant "changes in culture" that would have occurred as a result of the mergers that would have extinguished Corporate Express' rights to enforce the Former Employees non-compete agreements.

appointing new leadership or by changing its mode of doing business when reacting to market conditions.

The inappropriateness of this result is evidence that this analysis cannot be done without looking, as was done in *Sears* and by the Trial Court in this case, at whether there has been an actual change in the Former Employees' "employer" that would, as a matter of law, require the assignment of the Former Employees' non-compete agreements and, accordingly, their consent thereto.

For these reasons, the Fifth District's analysis in this case and its conclusions are improper and contrary to Florida law. Accordingly, this Court should reverse the Fifth District's holding and remand this case with instructions to reinstate the Preliminary Injunction.

## **POINT II**

### **THE FIFTH DISTRICT'S HOLDING IGNORES FLORIDA LAW THAT CONFIRMS CORPORATE EXPRESS' RIGHT TO ENFORCE THE FORMER EMPLOYEES' NON-COMPETE AGREEMENTS.**

In addition to improperly rejecting *Sears*, the Fifth District ignored other Florida statutory and case law that establishes Corporate Express' right to enforce the Former Employees' non-compete agreements. As set forth *supra* at pp. 21-22, based on the holding in *Sears*, there is no legitimate dispute that up until the time of the

consolidation of the Corporate Express Companies, Bishop, then wholly owned by Corporate Express of the South, Inc., retained its rights to enforce the non-compete agreements of Phillips and Farrell. Moreover, by virtue of Goff's consent to the assignment of his non-compete agreement, Corporate Express of the South, Inc., had the undisputed right to enforce the terms of his non-compete agreement. (CE App. G).

Consistent with the above, the only remaining issue is whether the subsequent internal re-organization/consolidation of the Corporate Express Companies triggered the legal need for an assignment of the Former Employees' non-compete agreements under Florida law. The Trial Court correctly concluded that no assignments were necessary because, throughout the mergers of the Corporate Express Companies, the Former Employees at all times remained employed with the same employer, Corporate Express.<sup>12</sup> (CE App. I, p. 6).

As established in the Trial Court, the first internal consolidation occurred on February 12, 1998, when Bishop *merged into* its parent company, Corporate Express of the South, Inc. Under Florida law, this merger had no effect on the enforceability

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<sup>12</sup> Based on its conclusion that the Former Employees were employed by the same employer throughout, the Trial Court's decision was consistent with § 542.33(2)(a), Fla. Stat. (1989), which makes non-compete agreements enforceable between an employee and his/her employer.

of the Former Employees' non-compete agreements. Specifically, pursuant to § 607.1106, Fla. Stat., when a merger becomes effective, the merging corporation (Bishop) merges into the surviving corporation (Corporate Express of the South, Inc.) 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 Corporation v. Picket*, 490 So. 2d 35, 38 (Fla. 1986) (corporation formed after the merger of two entities is the “present embodiment” of the merged entities; quoting *Moe v. Transamerica Title Insurance Co.*, 21 Cal. App. 3d 289 (1971), for the proposition that “merger merely directs the *blood of the old* corporation *into the veins of the new*, the old living in the new” and quoting *Atlanta Newspapers, Inc. v. Doyal*, 65 S.E. 2d 432, 437 (1951), for the proposition that “merger is like the uniting of two or more rivers, neither stream is annihilated, but *all continue in existence.*”). Moreover, in Florida, the merging of a business **does not change or abrogate a contract of employment.** See, e.g., *Nenow v. L.C. Cassidy & Son of Florida, Inc.*, 141 So. 2d 636, 638-39 (Fla. 2d DCA 1962).

When ruling in this case, the Fifth District improperly ignored the above cited Florida statute and case law that establish that Corporate Express retained its rights to enforce the Former Employees' non-compete agreements following the merger of its subsidiaries. Despite the fact that these issues were fully briefed by Corporate Express as additional support for the Trial Court's conclusions, the Fifth District did not even attempt to explain why § 607.1106(1), Fla. Stat. is not controlling here, nor did it attempt to distinguish this Court's holding in *Celotex* or the Second District's holding in *Nenow*.

Finally, the Fifth District chose to ignore the only reported decision in the country that is **directly on point**. In *Uarco, Inc. v. Lam*, 18 F. Supp. 2d 1116 (D. Haw. 1998), the issue of whether an assignment of a non-compete was necessary in the context of this type of corporate merger was squarely addressed. In *Uarco*, the surviving corporation from a corporate merger sought to enforce the non-compete provisions in the employment contracts of former employees that were entered into with the merged company. *Id.* at 1122. The United States Federal District Court in *Uarco* held that the non-compete agreements were enforceable by the surviving corporation. Specifically, the court stated that statutory and case law are **clear** that, following a merger, the surviving corporation possesses all obligations and rights of

the predecessor corporation. *Id.* at 1122. Accordingly, the right to enforce the covenants not to compete passed *by operation of law* to the surviving corporation and a separate assignment was not necessary. *Id.*

Despite Respondents' argument that *Uarco* is inapplicable because its is based on Hawaii law, *Uarco* is particularly instructive here because not only was Hawaii's corporate merger statute substantially similar to Florida's statute<sup>13</sup>, but Hawaii law also

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<sup>13</sup> Hawaii's corporate merger statute states, in relevant part:

When a merger or consolidation has become effective:

- (1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;
- (2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;
- (3) The surviving or new corporation shall have all of the rights, privileges, immunities, and powers and shall be subject to all of the duties and liabilities of a corporation organized under this chapter;
- (4) The surviving or new corporation shall thereupon and thereafter possess all of the rights, privileges, immunities, and franchises, of a public as well as of a private nature, or each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and transferred to and vested in the single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of the corporations shall not revert or be impaired in any way by reason of the merger or consolidation; and

(continued...)

held that non-compete agreements **were not assignable** as a matter of public policy. *Id.* at 1121. Thus, the Federal District Court in *Uarco* found the principles urged by Corporate Express here so compelling that it was willing to enforce the employee's non-compete agreements even in the face of strict public policy prohibiting their assignment under any circumstances. *See id.* Finally, the *Uarco* court noted that (in unreported decisions) state courts in Washington and Oregon have also reached the conclusion that non-compete agreements remained enforceable without assignment after merger. *Id.* at 1122 n.2.<sup>14</sup>

It follows from *Uarco* that the application of Florida's merger statute with respect to the merger between Corporate Express of the South, Inc., and its parent, Corporate Express of the East, Inc., did not affect the enforceability of the non-

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<sup>13</sup>(...continued)

(5) The surviving or new corporation shall thenceforth be responsible and liable for all of the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of the corporations may be prosecuted as if the merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by the merger or consolidation.

*See* Haw. Rev. Stat. § 415-76 (1997).

<sup>14</sup> Respondents' anticipated argument that, by the terms of the agreements at issue, only Bishop and Ciera had standing to enforce the non-compete agreements ignores the impact of Florida's merger statute discussed at pp. 30-32, *supra*.

compete agreements. On February 26, 1998, just *two days* after the Bishop merger, Corporate Express of the South, Inc. *merged into* its parent, Corporate Express of the East, Inc. Thus, just as in the previous internal merger, the Former Employees' non-compete agreements (including the Goff non-compete agreement that was assigned directly to Corporate Express of the South, Inc.) passed by operation of law to Corporate Express of the East, Inc.

On July 23, 1998, Corporate Express of the East, Inc. changed its name to Corporate Express Office Products, Inc. - the Appellee/Plaintiff in this case. This name change did not affect the enforceability of Appellants/Defendants' non-compete agreements. *See 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 incurred and has the right to sue on contracts made or liabilities incurred to it - before the change.”)

Accordingly, here, neither the consolidation mergers nor the name change had any impact on Corporate Express' rights to enforce the non-compete agreements. Florida statutory and case law unequivocally hold that, despite the stock purchase and internal corporate mergers, Corporate Express remained the Former Employees'

employer and retained its rights to enforce the non-compete agreements. Again, under *Sears*, there is no dispute that immediately after the stock purchase, Corporate Express (Bishop) retained the right to enforce the non-compete agreements without the need for a separate assignment. The internal consolidation mergers that took place thereafter were mere “paper changes” in the corporate identity of the Former Employees’ employer — and had no legal effect whatsoever on the Former Employees’ obligations under their employment agreements.

### **CONCLUSION**

For the reasons asserted herein and pursuant to Florida law, this Court should reverse the holding of the Fifth District and remand this case with instructions to reinstate the Preliminary Injunction in accordance with the Trial Court’s Order.

Dated: June \_\_\_\_, 2002.

PROSKAUER ROSE LLP  
Attorneys for Plaintiff/Petitioner  
2255 Glades Road, Suite 340W  
Boca Raton, Florida 33431  
Telephone: 561-241-7400  
Facsimile: 561-241-7145

By:

\_\_\_\_\_

Allan H. Weitzman  
Florida Bar No. 0045860  
Joseph G. Santoro  
Florida Bar No. 0150649

**CERTIFICATE OF SERVICE**

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

Alan M. Gerlach, Esq.  
Keith F. White, Esq.  
Keith E. Kress, Esq.  
Broad and Cassel  
390 North Orange Avenue, Suite 1100  
Orlando, Florida 32801

By: \_\_\_\_\_

Joseph G. Santoro

**CERTIFICATE OF COMPLIANCE**

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

Dated this \_\_\_\_ day of June, 2002.

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Joseph G. Santoro