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In the  
*Supreme Court of the United States*

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**SPRING TERM, 2011**  
**Docket No. 11-0107**

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**POVTAK GROUP,**

*Petitioner,*

- against -

**ROBERTA WAGNER & PROFESSIONAL ELECTRICAL WORKERS UNION, LOCAL 12-22,**

*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Thirteenth Circuit

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**BRIEF FOR PETITIONER**

Team No. 2  
Counsel for Petitioner

## **QUESTIONS PRESENTED**

1. Whether Povtak's review of Roberta Wagner's company-owned iPhone when she brought it in for technical support, or a Povtak supervisor's viewing, for employment-related purposes, of Wagner's Facepage profile, which Wagner had maintained using her company-owned iPhone and made accessible to Povtak by "friending" the company, violated Wagner's Fourth Amendment privacy rights.
  
2. Whether Povtak Group, which implemented numerous changes immediately upon winning the City transportation services contract, including modernizing the bus fleet, which required the predecessor's electricians to be trained and gain new skills, and changing the city bus routes, while never implying that they would assume the terms of the predecessor's collective bargaining agreement nor participating in the grievance process, can be considered a successor and thus be bound to the substantive provisions of the collective bargaining agreement between the predecessor and the union, under Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185.

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## **OPINIONS BELOW**

The opinion of the Court of Appeals for the Thirteenth Circuit is published at 1214 F.3d 1 (13th Cir. 2010). The judgment as a matter of law decision by the District Court of Froessel is published at 231 F.Supp.3d 20 (W.D. Frl. 2009). The opinion of the District Court Froessel is published at 185 F.Supp.3d 1 (W.D. 2009).

## **STATUTES INVOLVED**

This case involves the application of the Fourth Amendment to the Constitution of the United States of America, U.S. Const. amend. IV, and the Taft-Hartley Act, 29 U.S.C. § 185 (1947).

## **STATEMENT OF THE CASE**

### **A. Factual History**

In early January 2008, Povtak Group won the Dynes City contract for transportation services. Local 12-22 Prof'l Elec. Workers Union v. Povtak Grp., 185 F. Supp.3d 1, 2 (W.D. Frl. 2009). Once Povtak won the contract, it began making changes to the way that its predecessor, Crimaldi, had operated. Id. at 3. Povtak refitted the City's 40 buses to become more environmentally sound, replacing the traditional internal combustion engines, with electric or organic-diesel burning engines. Id. at 2, 3. Povtak also installed cleaner exhaust systems and retro purple headlights. Id. at 3. Povtak re-routed the City's bus routes in order to make them more efficient, thereby transporting more citizens while traveling shorter distances. Id. Povtak has also won grants from the U.S. Department of Transportation and the U.S. Environmental Protection Agency for its "green transportation" and creating and maintaining "green jobs." Id.

Before winning the contract, Povtak was asked at a pre-bid conference whether it would be hiring Crimaldi employees. Id. at 2. In response, Povtak's Chief Financial Officer, Deborah Quine, said that Povtak would "need all the help it can get." Id. at 2. Povtak offered jobs to 212 of Crimaldi's 342 employees. Id. at 3. Of those 212 employees, sixteen were electricians and electrical workers represented by the Professional Electrical Workers Union ("Local 12-22"). Id. Local 12-22 had represented the electrical workers employed by Crimaldi since 1957. Id. at 2. Because of the changes implemented by Povtak, these electrician's responsibilities expanded to include work on electrical engines. Id. at 3. Povtak held training courses for the Crimaldi electricians in order for them to be able to work on these buses. Id.

Soon after winning the contract, Povtak also issued the Electronic Communications Policy ("ECP"), which governs employee use of employer property. Id. The relevant provisions are Sections 1, 6, and 9. Id. Povtak required all employees to sign a document acknowledging that they read and understood the ECP. Id. at 4. Roberta Wagner, a junior electrician, reviewed and signed the document on February 9, 2008. Id.

Like many other corporations, Povtak launched a profile on Facepage in early February 2008. Id. The company encouraged its employees to "become friends with" its profile, which allows the two profiles to be linked and for each to access the other. Id. Povtak recommended that employees post positive stories about their "green jobs" and Povtak's green projects on its Facepage. Id. at 4. Wagner had created her own Facepage profile in 2006 and in 2008 became friends with Povtak. Id. Although she did not become friends with her supervisors' profiles, she was connected to them through her friendship with Povtak. Id.

Another change Povtak implemented was replacing the old Crimaldi Ex-Rel phones with ePhones and, when Wagner received hers, she immediately downloaded Facepage and three

other applications. Id. 5. In addition to Facepage, another one of the programs, an electrician blog called “Crossing the Wires,” was non-work related. Id. “Crossing the Wires” is a public blog viewable by anyone on the internet. Id. Any visitor can create a username and then post comments on the blog. Id. Wagner also downloaded two work-related applications, one that linked her iPhone to the technical support office of the manufacturer of Povtak’s tram-cars, and the other that linked to her work email. Id.

Using the iPhone, she posted negative messages about Povtak on her Facepage profile during working hours. Id. When she was transferred from the light rail division to the bus division on January 27, 2008, Wagner posted on her Facepage profile stating, “Just been transferred to the ghetto.” Id. One of her friends responded to her post wishing her luck, but reminding her to be cautious about what she wrote on her Facepage profile. Id. Wagner also posted positive messages about Povtak on the company’s profile. Id. During non-work hours, she would use her home computer to post positive and negative messages about the company on Facepage. Id.

Wagner posted a link on her Facepage profile to a “Crossing the Wires” blog posting that was highly critical of some of the green initiatives taken by Povtak. Id. at 6. The post, which was written under the user name “PugLuv86,” identified certain Povtak supervisors by name, claimed that they were inept and insinuated that these initiatives were failing and that they were the reason for that failure. Id. It also contained intimate details about the inner workings of Povtak, leading many at Povtak to believe that the post could only have been written by a Povtak employee. Id. The blog post appeared in an article in the local newspaper, the Lerner Gazette. Id. Povtak began investigating the article’s allegations and searching for the identity of PugLuv86. Id. Povtak issued a memorandum to all shift supervisors to review their employee’s comments

on Povtak's Facepage profile. Id. All employee comments on Povtak's Facepage profile were also reviewed by Povtak's Human Resource Department as an aspect of their routine job performance review. Id.

At about the same time that the PugLuv86 post was published in the Lerner Gazette, Wagner's was up for her routine job performance review. Id. Either as part of Wagner's performance evaluation, or as part of the investigation into the identity of PugLuv86, Wagner's current supervisor, Frank Milmine, viewed Wagner's Facepage profile and submitted screenshots of Wagner's profile for the review. Id. at 7. The screenshots exhibited the negative comments that Wagner had made on her own profile about the same green programs that she praised on Povtak's profile. Id. The screenshots also contained Wagner's comments about her negative feelings toward co-workers and the work environment. Id. In order to view Wagner's Facepage profile, Milmine simply logged on to the Povtak Facepage profile. Id.

Leibson, Wagner's former shift supervisor, submitted a positive performance review. Id. at 6. He wrote that he was aware of the four applications that Wagner had downloaded onto her ePhone, and thought that they improved her work performance. Id. He also noted that Wagner's applications had had positive effects, and said that he encouraged other employees to download the same applications. Id. at 6-7.

Two days after her performance review, Wagner turned her ePhone into Povtak's Technical Support Officer because she was experiencing problems with the battery. Id. While investigating the problem with Wagner's phone, the technician discovered the four applications that she had downloaded, Id., and filed a report with his supervisor. Id. at 8. The supervisor, after reviewing the technician's notes, added comments to the report. Id. He indicated a possible link

between the “Crossing the Wires” application on Wagner’s ePhone and the Lerner Gazette news article. Id. Wagner was terminated the next day for violating the ECP. Id.

Local 12-22 sent two agents, Rahim Roth (“Roth”) and Stefan Blancato (“Blancato”) to submit a grievance to Povtak regarding Wagner’s termination. Id. When they arrived at the HR office, the HR secretary, Christian Arko (“Arko”) informed Roth and Blancato that the HR Manager, Audrey Livramento (“Livramento”), was not available, so they instead handed him the grievance pursuant to the CBA. Id. The grievance was in objection to Wagner’s termination “without just cause in violation of Article 7.1 of the CBA” and demanded that she be reinstated and “made whole.” Id. Arko later informed Livramento of these events. Id. Livramento scheduled a meeting for Monday, March 10, 2008 with Roth and Blancato. Id. At the outset of the meeting, Livramento informed them that she was only meeting with them to explain the ECP, and that Wagner was terminated for violating it. Id. A heated exchange ensued. Id. Roth and Blancato believed that they should have been told prior to Wagner’s termination, pursuant to the CBA, that she was being discharged, whereas Livramento explained that this was not necessary since Povtak did not need a reason to terminate her. Id.

On March 12, 2008, Roth emailed the grievance to the HR General Manager, George Daks, and inquired about a time they could meet to discuss the termination. Id. at 9. Daks did not respond. Id. On March 22, 2008, Roth again emailed Daks, but this time declaring that Local 12-22 was “appealing the termination to arbitration under Article 14.2 of the CBA. Id. Daks informed Roth that Povtak would not take part in the arbitration. Id.

## **B. Procedural History**

On March 5, 2009, Ms. Roberta Wagner filed a claim with the Equal Employment Opportunity Commission (“EEOC”) alleging national origin discrimination. Local 12-22, 185 F.Supp.3d at 9. The EEOC did not find evidence of discrimination and on June 19, 2009, issued her a “right to sue” letter. Id. Wagner then filed suit against Povtak Group alleging illegal employment discrimination in violation of Title VII and violations of her Fourth Amendment right to be free from unreasonable search and seizures. Id. Local 12-22 also filed a claim against Povtak in order to enforce the terms of the CBA entered into between Povtak’s predecessor, Crimaldi, and Local 12-22. Id. On August 6, 2009, the District Court of Froessel denied summary judgment for Povtak with respect to the privacy claims, but granted summary judgment with respect to the discrimination and Taft-Hartley claims. Id. at 19. On December 18, 2009, after a trial where the jury rendered a verdict in favor of Wagner on her privacy claim, the District Court granted Povtak’s motion for a judgment as a matter of law. Local 12-22 Prof’l Elec. Workers Union v. Povtak Grp., 231 F.Supp.3d 20, 20, 22 (W.D. Frl. 2009). On October 21, 2010, the Court of Appeals for the Thirteenth Circuit reversed the district court’s rulings on both the privacy and successorship claims and granted Local 12-22’s summary judgment motion. Local 12-22 Prof’l Elec. Workers Union v. Povtak Grp., 1214 F.3d 1, 15 (13th Cir. 2010). This Court granted certiorari on January 10, 2011.

## SUMMARY OF THE ARGUMENT

Povtak did not violate Wagner's Fourth Amendment rights when it searched her iPhone and Facepage profile and is not a successor to Crimaldi and thus cannot be bound by the CBA with Local 12-22, to which it was not a party nor signatory.

To assess whether Fourth Amendment privacy rights were violated in the course of a government employer's search, the Supreme Court has applied two tests. Wagner's claim fails under each. The Ortega plurality applied a two-part analysis: whether the employee had a reasonable expectation of privacy, O'Connor v. Ortega, 480 U.S. 709, 717 (1987), and whether the search was justified in its inception and reasonable in scope. Id. at 726. In order to make the first assessment, the Court considered the particular circumstances of the employment relationship, including office policies. Id. at 717. Courts have generally held that employees cannot have a reasonable expectation of privacy in regards to company-provided electronic equipment and the communications sent through them. See City of Ontario v. Quon, 130 S. Ct. 2619 (2010).

The Court then determined whether the search itself was justified and reasonable. Ortega, 480 U.S. at 726. In order for the employer's search to be justified at its inception, the employer must have reasonable grounds for believing that the search will unearth evidence that the employee engaged in work-related misconduct, or the search must be for a non-investigatory work-related purpose. Id. The scope of the search is reasonable when the action taken by the employer is reasonably related to the purpose of the search, and not "excessively intrusive" when balanced against the employee's misconduct. Id. Scalia's concurrence in Ortega finds that all investigations into the violation of "workplace rules" are reasonable and "normal" in the employment context, and therefore do not violate the Fourth Amendment. Id. at 732.

Wagner does not have a reasonable expectation of privacy in regards to her ePhone and Facepage profile because Povtak's ECP, which Wagner reviewed and signed, explicitly establishes that Povtak can access company-owned electronic devices, and the messages communicated through them, at any time. Moreover, Wagner posted comments about Povtak on work time and over her company-provided ePhone, while voluntarily allowing Povtak access to these comments by "friending" the company, and therefore her expectation of privacy with respect to her Facepage profile is not reasonable. Povtak's searches of the ePhone and Facepage profile were reasonable when she turned in her ePhone for technical support, and the search of her Facepage profile was work-related.

The two-part test set forth in Katz states that a Fourth Amendment privacy claim succeeds when the employee has a subjective expectation of privacy, Katz v. United States, 389 U.S. 347 (1967), and this expectation is "one that society is prepared to recognize as reasonable." Id. at 361. Wagner did not have subjective expectation of privacy with regard to her ePhone or her Facepage profile. She voluntarily relinquished her ePhone to Povtak for technical support, and she knew that Povtak could view her Facepage profile at any time. But even if Wagner did have a subjective expectation of privacy, this is not an expectation that society would find to be reasonable. The ePhone is Povtak property, and society recognizes that information posted on Facepage is accessible to the public.

With respect to the second issue before this Court, the Supreme Court has found that in general, a new company is not bound by the terms of a predecessor's CBA. There are four exceptions to this rule: alter ego; express or implied acceptance; perfect successor; and substantial continuity. In order to determine whether the new company is the alter ego of the original company, the court examines the facts of the case, looking particularly at whether there

is a substantial connection in ownership and whether the predecessor obtains a benefit after the transaction. The Supreme Court has also stated that if a company explicitly or impliedly accepts the substantive terms of the CBA, than it will be bound by them. The third test maintains that only where the successor employer makes it perfectly clear that it will hire all of the predecessor's employees in the bargaining unit and that it will assume the terms of the CBA will the successor be bound by the substantive terms of the CBA. The final test analyzes whether there is substantial continuity between the predecessor's and the successor's businesses by looking at the factors outlined in Fall River Dyeing & Finishing Corp. v. NLRB. 482 U.S. 27, 43 (1987). Povtak does not meet the requirements of any of these four tests and therefore cannot be bound by the substantive provisions of the CBA between Crimaldi and Local 12-22.

Under the first test, Povtak is not the alter ego of Crimaldi because there is no connection in ownership and because Crimaldi did not obtain any benefits when Povtak won the City of Dynes contract. Second, Povtak never expressly stated that it accepted the terms of the CBA, nor did it imply that it assumed the terms. No statements were made regarding the CBA at the pre-bid conference and therefore, clearly, Povtak did not agree to accept it. Furthermore, Povtak did not abide by any of the terms of the CBA, including the grievance process, and therefore did not imply to the Union that they accepted the terms. Livramento established that the purpose of the meeting with the Union was to explain the policy under which Wagner was terminated. She by no means evinced an adherence to the grievance provision. Third, Povtak is not a perfect successor because, even if the Company made it perfectly clear that it would hire any Crimaldi employee who wished to work for it, Povtak never made a statement that it would assume the terms of the CBA nor that could make the employees reasonably believe that if they worked for Povtak that they would be doing so under the same terms and conditions. Finally, there is not

substantial continuity between Crimaldi and Povtak since Povtak made substantial changes to its business, created a larger customer base, and did not obtain Crimaldi's assets, but rather the City's. Because Povtak does not meet any of these tests, Povtak cannot be bound by the substantive provisions of Crimaldi's CBA with Local 12-22.

## **ARGUMENT**

### **I. POVTAK'S REVIEW OF WAGNER'S COMPANY-OWNED EPHONE AND A POVTAK SUPERVISOR'S VIEWING, FOR WORK-RELATED PURPOSES, OF WAGNER'S FACEPAGE PROFILE, WHICH WAGNER HAD MAINTAINED USING HER EPHONE AND MADE ACCESSIBLE TO POVTAK AFTER "FRIENDING" THE COMPANY, DID NOT VIOLATE WAGNER'S FOURTH AMENDMENT PRIVACY RIGHTS**

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV. The Supreme Court has held that the Fourth Amendment applies to government employers, Treasury Emp. v. Von Raab, 489 U.S. 656, 665 (1989), but also that the warrant and probable cause requirements of the Fourth Amendment do not apply to government employers with "special needs, beyond the need for law enforcement." O'Connor v. Ortega, 480 U.S. 709, 725 (1987).

Two tests govern Fourth Amendment privacy violations in the context of a government employer. In O'Connor v. Ortega, the plurality opinion established a two-part analysis: whether the employee's expectation of privacy was reasonable, 480 U.S. at 715, and if the employer's search was justified when initiated, and reasonable in scope. Id. at 725-26. The second test that courts apply was established in Katz v. United States, 389 U.S. 347 (1967). This two-prong test requires that 1) the employee has a subjective expectation of privacy, and 2) the expectation of privacy is "one that society is prepared to recognize as reasonable." Id. at 361.

Under the Ortega test, Wagner’s expectation of privacy in regards to her ePhone and Facepage profile was not reasonable, given that Povtak’s ECP, which Wagner read and signed, Joint Appendix B: User Acknowledgment Form, Page 4, unambiguously asserts Povtak’s right to review the company’s electronic devices and the communications made through them. Moreover, courts have consistently held that employee do not have reasonable expectations of privacy with respect to the content of their employer-owned systems, and the communications they send through them. Povtak’s search of Wagner’s Facepage profile was reasonable because it was a limited search performed for discrete work-related reasons and the search of the ePhone was conducted as part of a routine technical service procedure. Under the Katz analysis, Wagner did not have a subjective expectation of privacy, but even if she did, this is not an expectation that society would find reasonable. Wagner’s ePhone was not private because it belonged to Povtak, and neither was her Facepage profile private because comments were immediately accessible to Povtak and many of them were made on the company’s phone.

**A. Under the Ortega Test, Wagner’s Expectation of Privacy was Not Reasonable, and Povtak’s Search of Her ePhone and Facepage Profile was Reasonable in Inception and Scope**

1. Wagner’s Expectations of Privacy with Respect to Her ePhone and Facepage Profile Were Not Reasonable

Under the Ortega test, the first consideration is whether Wagner had a reasonable expectation of privacy, and this must be assessed based on the “operational realities of the workplace.” 480 U.S. at 717. The Ortega court found that employees’ expectation of privacy, and therefore the reasonableness of the search itself, depends on the “context of the employment relation.” Id. If the employer has “actual office practices and procedures” in place in regards to employee privacy, this might “reduce an employee’s expectations of privacy in their offices,

desks, and file cabinets.” Id. at 717. The Court held that the petitioner had a reasonable expectation of privacy in his office because he had been in the office for 17 years, continually kept private items in the office, and there was no evidence that the employer had established any “reasonable regulation or policy discouraging employees” from keeping personal effects in their desks or file cabinets. Id. at 719.

In this regard, the facts in Ortega are distinguishable from the case at bar. Unlike in Ortega, where there were no employer policies governing employee’s private use of employer resources, Povtak’s ECP clearly establishes the limits of employee privacy. The court must weigh the provisions ECP heavily, because it is an “office practice[] and procedure[]” which has the effect of “reduc[ing]” an employee’s expectation of privacy. Id. at 717. The ECP, which Wagner reviewed and signed, explicitly and stringently limits Wagner’s privacy in regards to both the ePhone and Facepage.

The ECP declares all electronic systems to be company property and establishes that Povtak may “access, monitor, and view all electronic communications and other components...at any time and for any reason whatsoever.” Joint Appendix B: ECP, Page 1. Furthermore, “users should not maintain any expectation of privacy with respect to any usage of the Company’s Electronic Systems.” Id. “[E]lectronic systems” include “hardware, electronic mail, and Internet/Web access.” Id. Wagner argues that the ePhone is not covered by the ECP, Local 12-22, Prof’l Elec. Workers Union v. Povtak Grp., 185 F.Supp.3d 1, 15 (W.D. Frl. 2009), but this is erroneous. The ePhone is “hardware” that provides both “electronic mail” and “Internet/Web access,” and thus there can be no question that it is an electronic system under the ECP’s definition. Furthermore, a plain reading of the words “electronic systems” can result in only one conclusion: the ePhone is an electronic system. Even if the court were to find that the ePhone is

not explicitly included, the ECP states that electronic systems *include* various devices, indicating that the list it provides is not necessarily exhaustive, and therefore could include ePhones and other electronic devices.

Courts have not hesitated to hold for the government employer in Fourth Amendment cases where the employer had a clear policy with respect to employee privacy. The Fourth Circuit has held that an employee had no legitimate expectation of privacy in regard to downloaded materials resulting from his online activity on a work computer because the employer had an explicit policy stating that the employer would monitor all aspects of the employee's use of the internet. United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000). The Supreme Court agreed in City of Ontario v. Quon, finding that an employee did not have a reasonable expectation of privacy with respect to the texts on his employer-provided pager, despite the fact that the employer's computer policy did not explicitly include pagers. 130 S. Ct. 2619, 2625 (2010). Therefore, even if the Court were to find that the ECP does not explicitly include ePhone use, precedent suggests that the ePhone is accessible to the employer, and therefore the employer's review of the device does not create a Fourth Amendment violation.

The Court must also find that the ECP limits Wagner's expectations of privacy in regards to Facepage. Under the ECP, "[a]ll personnel waive any right of privacy in e-mail messages, *other electronic communications* or Electronic Systems use." J.A. B at 1 (emphasis added). This ECP provision establishes that the posts Wagner made on her Facepage profile, which constitute "other electronic communications," cannot be considered private. Furthermore, Povtak reserves the right to "read and disclose" employee emails "and other electronic communications." Id. Wagner used "Internet/Web access" provided by Povtak to communicate her negative feelings about Povtak on her Facepage profile. The ECP clearly provides that these communications are

Povtak's property, and thus Wagner cannot have a reasonable expectation of privacy with respect to them. It does not matter that Wagner's activity was transmitted, not through Povtak's data servers or internet network, but instead through the wireless provider's. In Quon, the court held that the transcripts of the pager texts could be viewed by the employer despite the fact that "[t]he message did not pass through computers owned by the City." 130 S. Ct. at 2625.

An employer's lack of enforcement of an ECP should not lead an employee to expect that the policy is no longer in effect. In Holmes v. Petrovich Development Co., the court found that it was unreasonable for an employee to consider emails written on her employer's computer to be private, even though the employer had not acted on its policy of monitoring employee email in the past. C059133, 2011 Cal. App. LEXIS 33, at \*47-48 (C.A. Ct. App. Jan. 13, 2011). Plaintiff used Defendant's computers and internet server to write emails to her attorney about Defendant, who she was suing. Id. at \*40. Defendant had explicitly informed employees that the it could inspect personal email sent on company computers at any time. Id. at 47-48. The court held that the employer would have to "explicitly contradict[]" the previously stated policy, in order for it to be reasonable for Holmes to believe that her email was private. Id. However, even if the Court were to find that the ECP does not cover the ePhone, it still must hold that that Wagner's expectations of privacy are unreasonable. It is irrational for Wagner to expect that Povtak cannot survey her ePhone in the course of conducting technical assistance.

Wagner knowingly accessed Facepage on company time, using company equipment, and made her posts available to the Povtak at all times by "friending" the company. These facts, both alone and certainly in combination, overwhelmingly indicate that Wagner should not have an expectation of privacy with respect to her Facepage profile. It is not reasonable for Wagner to "friend" Povtak, thereby allowing her employer to visit her profile and read what is posted there,

and then claim a privacy right. The Holmes court found that the plaintiff, who was using her employer's computer and servers to write emails about her lawsuit against that very same employer, had an unreasonable expectation of privacy as to those emails. 2011 Cal. App. LEXIS 33. The court found that these emails were "akin to consulting her attorney in one of defendant's conference rooms, in a loud voice, with the door open," but still unreasonably expecting that the conversation overheard by Petrovich would be private. Id. Wagner's expectation of privacy is unreasonable, like that of the Plaintiff in Holmes. Wagner maintains a webpage that she has invited Povtak to access, and uses that webpage as a forum with which to frequently speak ill of Povtak. The facts at issue are very much in keeping with the court's conference room analogy, although in this case, Wagner has invited her employer to view her Facepage profile, thereby making her expectation of privacy even less reasonable than that of Holmes.

If Povtak wished for privacy, she could have attained it in a myriad of ways that did not involve sharing her thoughts directly with her employer. "The employee may avoid exposing personal belongings at work by simply leaving them at home." Ortega, 480 U.S. at 725. This principle easily applies in an online context as well. Wagner could have created a separate Facepage profile with which to friend Povtak, thus eliminating its access to her mean-spirited posts.

Courts have also considered whether individuals on Facebook, an online networking website similar to Facepage, have a reasonable expectation of privacy over the material that they post on that website. See Local 12-22, 185 F.Supp.3d at 18. In Romano v. Educational and Institutional Cooperative Services, the court granted Defendant access to the public and private portions of Plaintiff's Facebook page, holding that Plaintiff did not have a reasonable expectation of privacy with regards to what she posted there, even if some of what was posted was protected

by privacy settings. 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010). The court found that Plaintiff “consented to the fact that her personal information would be shared with others,” regardless of her privacy settings. Id. The court reasoned that sharing information was “the very nature and purpose of these social networking sites else they would cease to exist,” and since Plaintiff knew that her information might be become available to those outside of her friend group, “she cannot now claim that she had a reasonable expectation of privacy.” Id. Her expectations were ground more in “wishful thinking” than reasonable expectations. Id. In the case at bar, Wagner did not necessarily expect that her Facepage profile would become public, but she did have a reasonable expectation that it could be viewed by Povtak because she friended the company’s profile. Therefore her expectation of privacy similarly seems to be based on wishful thinking rather than logic, particularly because she was warned by a friend to be careful about what she posted.

This Court must follow its precedent in Quon and hold that Wagner cannot reasonably expect privacy in regards to her ePhone because an employee cannot expect to have privacy over electronic communications sent from an employer’s device. Quon, 130 S. Ct. 2619. Moreover, the employer would have to explicitly redact its policy in order for this expectation of privacy to become reasonable. Holmes, 2011 Cal. App. LEXIS 33, at \*47-48. Wagner’s expectations of privacy with respect to her Facepage postings are also unreasonable when, like the Plaintiff in Romano, she knew that her postings could become public because she friended Povtak and posted to her profile using a company-owned device.

2. Povtak’s Search of Wagner’s ePhone and Facepage Profile Was Justifiable in Inception and Reasonable in Scope

Even if the Court finds Wagner’s expectation of privacy to be unreasonable, it must still determine whether the search itself was reasonable. Ortega, 480 U.S. at 725-26. Under Ortega, a

search is reasonable if it is “justified at its inception” and reasonable in scope. Id. The Court found that a search is justified at its inception when the employer has reasonable grounds for believing that the search will result in evidence that the employee has perpetrated a work-related offense, or if it is for a work-related noninvestigatory purpose. Id. at 726. The search is reasonable in scope if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of...the nature of the misconduct.” Id. Justice Scalia’s concurrence in Ortega finds that searches to “investigate violations of workplace rules” are reasonable and “normal” in the employment context, and therefore do not violate the Fourth Amendment. Id. at 732.

Courts have found that the more intrusive the search, the less likely it is to be reasonable under the circumstances. In Delia v. City of Rialto, the Ninth Circuit found that a firefighter plaintiff’s rights were violated when, in order to prove he was not lying about his sick leave, fire department personnel went to his home and ordered that he produce rolls of insulation that he claimed he could not install because of his illness. No. 09-55514, 2010 U.S. App. LEXIS 26968, at \*15-16. Under those circumstances, the court found that the search was unreasonable under the Ortega plurality and the Scalia concurrence. Id. at \*20. Plaintiff’s sick leave, the court determined, had nothing to do with whether he had in fact installed insulation, because the two were mutually exclusive: the Plaintiff could put in installation while also complying with his physician’s orders. Id. The facts in Rialto are distinguishable from those at bar. A search of Wagner’s Facepage profile was relevant in the investigation of the identity of PugLuv86, and it was not excessively intrusive. Perhaps if Wagner’s supervisor had arrived at her house, or demanded that he search her entire work area and personal belongings, an application of the Ortega test would result in a different outcome. But the facts at issue here show that review of

Wagner's Facepage profile and her ePhone was substantially relevant to this investigation, and therefore is legitimate under the Ortega plurality and Scalia's concurrence.

Searches of an employee's work computer are not unreasonable when they are prompted by concerns that are generally related to the resulting investigation. Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001). In Leventhal, the employer received an anonymous letter alleging a variety of employee misconduct. The letter claimed that an employee meeting Plaintiff's description was not doing his work, and that he spent much of his day talking about non-work-related issues with co-workers. Id. at 68. The letter did not aver that this employee was abusing his computer privileges, and in fact, did not mention anything about this particular employee's computer use. Id. Nevertheless, the employer planned a search of Internet logs, telephone and computer records, and a general "computer review" for all employees who fit the descriptions in the letter. Id. The Leventhal court found that this search was reasonable, despite the fact that the employer had no evidence that the employee was engaging in misconduct on his computer, because the letter alleged computer misuse in Plaintiff's office generally. Id. at 76. The scope of the search was not "excessively intrusive" because, the employer copied employee's programs onto a disc, but did not open any personal files. Id.

Therefore, under Leventhal, the measures Povtak took to investigate the identity of PugLuv86 are more than justified. When confidential information about the inner workings of Povtak's operations was disclosed on "Crossing the Wires," Povtak had a legitimate business reason to investigate the identity of PugLuv86. It was necessary to identify PugLuv86 in order to prevent more company secrets from being revealed to the public. Investigating Wagner's Facepage profile is justified because Povtak was concerned with her conduct on the Internet with respect to it. Just as Leventhal's computer was a logical place to investigate whether he was

doing his job, Wagner’s Facepage profile was a plausible place to learn about her Internet activity. Moreover, Povtak’s search was not excessively intrusive. Povtak did not investigate all of Wagner’s internet activity. It did not review her phone records, emails, or Facepage messages she sent with her ePhone. The investigation was limited to her Facepage postings. This makes the search reasonably narrow in scope, as the court found was the case in Leventhal. Although Povtak did not explicitly require supervisors to view employee’s personal Facepage profiles, it was logical to do so within the scope of the investigation and the performance review. Viewing an online profile, which Wagner made available to Povtak, is not “excessively intrusive.”

Finally, Povtak’s review of Wagner’s ePhone was for a “work-related noninvestigatory purpose” and therefore is reasonable within the scope of a routine examination by Povtak. Since the phone is owned by Povtak, it would only seem logical that the company would want to check it when Wagner turned it in for servicing. It is in the company’s best interest to ensure that the phone is in good shape and is being used correctly. Moreover, the search of the phone was limited in scope: just as the employer in Leventhal did not open personal files, the Povtak technician did not open any of Wagner’s programs or personal files. Her or she simply identified the programs and reported them. No further investigation was made. Therefore the search of the ePhone was not excessively intrusive.

**B. Under the Katz Test, Wagner Does Not Have a Subjective Expectation of Privacy, and Even if She Did, Society Would Not Find This Expectation to be Reasonable**

Under the two-prong approach in Katz, Wagner must show that she had a subjective expectation of privacy, and that society would view this expectation to be reasonable. 389 U.S., at 361. The Katz court held that a plaintiff who went into a public phone booth and shut the door behind him is “surely entitled to assume that the words he utters into the mouthpiece will not be

broadcast to the world.” 389 U.S., at 352. The Plaintiff’s actions in Katz are distinguishable from Wagner’s actions with regard to her iPhone and Facepage profile. Wagner did not have a subjective expectation of privacy because she reviewed and signed Povtak’s ECP agreement, which clearly establishes the limits of employee privacy.

But even if Wagner maintains that she did not read the ECP carefully and therefore subjectively did not understand her privacy limitations, it is still evident that Wagner did not have a subjective perception of privacy in regards to her iPhone. By turning the iPhone in to be serviced, Wagner must have known that a technician would view it. With respect to her Facepage profile, Wagner would be hard-pressed to argue that she felt that her Facepage presence was not private, since she voluntarily and knowingly invited her employer to have constant access to her profile by friending Povtak.

However, if the court were to find that Wagner had a subjective expectation of privacy on her iPhone or Facepage profile, the court must then determine that this belief was reasonable in order to find that Wagner’s Fourth Amendment right to privacy was violated. In Smith v. Maryland, the Supreme Court found that even if petitioner had a subjective belief that the numbers that he dialed into his home telephone were private, this is not a belief that society is prepared to accept as reasonable. 442 U.S. 735, 743 (1979). For the reasons explored in the Ortega analysis *supra*, society would not find Wagner’s expectations to be reasonable. Moreover, the Internet has changed traditional societal norms about privacy. Local 12-22, 1214 F.3d 1, 17-18 (13th Cir. 2010). Thoughts and feelings, which were once reserved for intimate conversations, are now shared with the entire world through Internet chat rooms, Facepage, Facebook, Twitter, MySpace, YouTube, and a plethora of other social media websites and programs. The Romano court used the privacy policy of Facebook, a program that is

substantially similar to Facepage, to show that, though there are privacy settings available to the user, there is still a general expectation that Facebook cannot “guarantee complete privacy.” Romano, 907 N.Y.S.2d at 656. The relevant provision of the Facebook policy warns users that they post content at their own risk, and that personal information may be revealed publicly. Id. at 656-57. Therefore, society is prepared to accept that Facepage, like Facebook, is not a protected place. This is particularly the case where an individual relinquishes the available protections by “friending” the very entity from which she seeks privacy.

**II. POVTAK DOES NOT MEET THE REQUIREMENTS OF ANY OF THE FOUR SUCCESSORSHIP TESTS BECAUSE, AFTER WINNING THE CITY OF DYNES TRANSPORTATION SERVICES CONTRACT, POVTAK IMMEDIATELY IMPLEMENTED NUMEROUS CHANGES, INCLUDING MODERNIZING THE BUS FLEET, WHICH REQUIRED THE CRIMALDI ELECTRICIANS HIRED BY POVTAK TO BE TRAINED AND GAIN NEW SKILLS, AND CHANGING THE CITY BUS ROUTES, WHILE NEVER EXPRESSLY STATING OR IMPLYING THAT THEY WOULD ASSUME THE TERMS OF THE CRIMALDI CBA NOR PARTICIPATING IN THE GRIEVANCE PROCESS, AND THUS CANNOT BE BOUND BY THE SUBSTANTIVE PROVISIONS OF THE CBA UNDER SECTION 301 OF THE TAFT-HARTLEY ACT, 29 U.S.C. § 185.**

Povtak is not a successor of Crimaldi and is not bound by the substantive provisions of Crimaldi’s CBA with Local 12-22 pursuant to Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. Whether a company is a “successor” does not always determine whether it is bound by the previous employer’s contract, since the new company “may be a successor for some purposes and not for others.” Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd., 417 U.S. 249, 264 n.9 (1974). “[T]he real question in ... ‘successorship’ cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner.” Id. The Supreme Court has recognized four tests that ascertain whether a successor is to be bound by the substantive provisions of the predecessor’s collective bargaining agreement.

The first test is whether “the successor is an alter ego of the predecessor.” Local 12-22 Prof’l Elec. Workers Union v. Povtak Grp., 1214 F.3d 1, 6 (13th Cir. 2010); see also Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982). The standard for this test requires a connection in ownership and/or an overlap of management between the two companies. Carpenters Local Union, 690 F.2d at 507. The second test is whether “the successor implicitly or explicitly adopts the CBA,” which is judged by a standard of “clear and convincing evidence of consent, either actual or constructive.” Local 12-22, 1214 F.3d at 6; see also Local 32B-32J Serv. Emps. Int’l Union v. NLRB, 982 F.2d 845, 850 (2d Cir. 1993). The third test is whether “it is ‘perfectly clear’ that the new employer plans to retain all of the employees in the bargaining unit,” Local 12-22, 1214 F.3d at 6; see also Coastal Int’l Sec., Inc. v. NLRB, 320 Fed. Appx. 276 (5th Cir. 2009), and “that it *would* assume the terms of the predecessor’s CBA.” Local 12-22, 1214 F.3d at 9 (citing Coastal Int’l Sec., 320 Fed. Appx. at 84) (internal citations omitted). The final test is whether “there is a ‘substantial continuity of identity in the business enterprise’ between the predecessor and successor,” which requires an analysis into the “sameness” of the business enterprises and whether there were any substantial changes. Local 12-22, 1214 F.3d at 6; see also Howard Johnson, 417 U.S. at 263 (citations omitted); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987). The successor employer need only meet the requirements of one of these tests to be bound by the substantive terms of the predecessor’s CBA. Local 12-22, 1214 F.3d at 6.

Povtak does not meet the requirements of any of the four tests. Because there is no connection in ownership between Crimaldi and Povtak and no overlap of management, Povtak is not the alter ego of Crimaldi. Additionally, Povtak neither expressly nor impliedly accepted the terms of the CBA. Simply because Povtak’s HR assistant received the grievance document does

not lead to the conclusion that Povtak impliedly accepted the terms of the CBA. Nor does it follow that because Povtak went above its required duties to discuss the ECP with the Union, that this action should be held against them to bind them to the substantive provisions. Povtak did not make it “perfectly clear” that it would hire most, if not all, of Crimaldi’s employees, but even if it did, the company never made it “perfectly clear” that it would assume the terms of Crimaldi’s CBA and thus cannot be bound by its provisions. Lastly, Povtak is not a successor under the substantial continuity doctrine. Povtak made substantial changes to the operations of the business and trained the Crimaldi workers, thus changing their jobs and the nature of Povtak’s business. Therefore, Povtak is not a successor and is not bound by the substantive provisions of Crimaldi’s CBA with Local 12-22.

**A. Povtak is Not the Alter Ego of Crimaldi.**

Povtak does not meet the elements of the alter ego test. “Although a bona fide successor is not in general bound by a prior collective bargaining agreement, an alter ego will be so bound.” Carpenters Local Union, 690 F.2d at 507. To determine whether a company is an alter ego, the court should apply a fact-based analysis, see Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942), concentrating on “whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership.” Carpenters Local Union, 690 F.2d at 507. The alter ego doctrine “requires an examination of the circumstances under which the transfer of business operations was conducted,” Alkire v. NLRB, 716 F.2d 1014, 1018 (4th Cir 1983), because it focuses on “the existence of a disguised continuance or an attempt to avoid the obligations of a [CBA] through a sham transaction or technical change in operations.” Carpenters Local Union, 690 F.2d at 508. Often, at the very

least, the facts will suggest that the old employer received a benefit from the new employer. Alkire, 716 F.2d at 1019.

Povtak's ownership and management are completely different and distinct from that of Crimaldi. "[T]he entire structure of Povtak's management consists of individuals who have no prior employment experience with Crimaldi." Local 12-22, 1214 F.3d at 7. In fact, two of Crimaldi's high ranking officials, the Chief Executive Officer and Chief Operating Officer, were indicted for charges associated with organized crime. Local 12-22 Prof'l Elec. Workers Union v. Povtak Grp., 185 F.Supp.3d 1, 2 (W.D. Fl. 2009). Unlike Crimaldi, Povtak is committed to green initiatives and has received federal funds for its pioneering work in green technology and for creating green jobs. Additionally, by changing the City's bus routes, Povtak expanded its customer base and therefore has a larger group of customers than Crimaldi. Povtak also changed the engines of the buses, so although the buses themselves may be the same, the equipment as a whole is different. Moreover, Povtak received the City of Dunes transportation services contract through the bidding process with the City and not through any transaction with Crimaldi. Crimaldi has received no benefit from the transfer of the contract to Povtak. If anything, the "transfer" to Povtak was a detriment to Crimaldi. Even if the Court finds that Crimaldi and Povtak still share a customer base and equipment for the most part, because the management and ownership of the two companies are entirely different, Povtak is not the alter ego of Crimaldi and cannot be bound by the substantive provision of Crimaldi's CBA with Local 12-22.

**B. Povtak is Not Bound by the CBA Under the Express or Implied Acceptance Test.**

Povtak neither expressly nor impliedly accepted the terms of Crimaldi's CBA. In order to be bound by the terms of a predecessor's CBA, the new employer must have expressly accepted the CBA, see Bath Iron Works Corp. v. Bath Marine Draftsmen's Assoc., 393 F.2d 407, 410 n.3

(1st Cir. 1968), or impliedly accepted it. See Wood v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am., Local 406, 807 F.2d 493, 498 (6th Cir. 1986). The standard imposed in determining whether a company has assumed its predecessor's contract is "clear and convincing evidence of consent, either actual or constructive." Local 32B-32J, 982 F.2d at 850. Here, there is no clear and convincing evidence that Povtak assumed Crimaldi's CBA. While Povtak's Chief Financial Officer stated "[Povtak] would need all the help [it] can get" in response to whether Povtak would hire any Crimaldi employees, she never mentioned the CBA, let alone agreed to its terms. Furthermore, Povtak did not participate in the grievance process and thus did not either explicitly or impliedly adopt the grievance procedure. Because Povtak did not accept the terms of Crimaldi's CBA, Povtak is not bound by its provisions, including the grievance and arbitration ones.

Courts have recognized that being required to bargain with a predecessor's union does not mean that the employer must be held to the substantive terms of the predecessor's CBA with that union. "An employer that hires a majority of the old labor force must bargain with any union that represents the workers....This obligation to consult does not necessarily imply that the incoming owner is stuck with the predecessor's terms...." United States Can Co. v. NLRB, 984 F.2d 864, 869 (7th Cir. 1993). An employer may only be bound by the predecessor's CBA if it expressly or impliedly accepts it. Local 12-22, 1214 F.3d at 6; see also Bath Iron Works, 393 F.2d at 410 n.3; Wood, 807 F.2d at 498-99. The test of whether an employer has "impliedly assented to and assumed the obligations of an agreement [is] a consistent pattern of conduct conforming to the terms of the agreement." Audit Servs., Inc. v. Rolfson, 641 F.2d 757, 763-64 (9th Cir. 1981). In order to be found to have assumed the contract, there must be "clear and

convincing evidence of consent, either actual or constructive....” Local 32B-32J, 982 F.2d at 850.

Courts have held that even where the new employer hires the entirety of the old employer’s workforce, the new employer is not bound to the CBA. In Local 32B-32J, Field Bridge and Rachel Bridge each bought a property from Cedar York Properties Limited Partnership, which were under management by Arco Management Corporation (“Arco”). Id. at 847. Arco, whose employees were members of the Union, had “agreed to be bound by the terms of a CBA between the Reality Advisory Board and the Union.” Id. Soon after Field Bridge and Rachel Bridge took over their respective properties, they terminated Arco, but retained all of the Arco employees. Id. The Union brought unfair labor practice charges, but the Second Circuit found that Field Bridge and Rachel Bridge were not a successor and “never assumed” the CBA and thus were not bound by its terms. Id. at 847-48, 851.

The facts in 32B-32J are akin to those at issue here. Although Povtak hired all of Crimaldi’s union electricians, it is not bound to the CBA because Crimaldi is not a successor and never expressly assumed the CBA. Povtak’s Chief Financial Officer did not state at the pre-bid meeting that Povtak would be accepting the CBA terms and thus did not bind the company. Nor did Povtak’s HR Department expressly accept the CBA agreement when it met with the Union representatives.

Courts have found that a letter is sufficient to constitute express acceptance of the predecessor’s contract. In United States Can Co. (“U.S. Can”), the employer sent a letter to the Union stating, “[i]n the interim, the terms and conditions including wages, benefits and working conditions as they presently exist under the [CBA] with the Continental Can Company shall remain in effect.” 984 F.2d at 867. The court found that U.S. Can had assumed Continental

Can's CBA because of the letter and "subsequent implementation of most terms of the existing pact." Id. at 868. Therefore, without a clear statement of acceptance of the Crimaldi's CBA, Povtak cannot be bound to its terms. And even if there had been an express acceptance of the CBA, under U.S. Can more would still be needed.

Povtak also did not impliedly accept the terms of Crimaldi's CBA. Povtak did not evince an intention to be held to the terms of Crimaldi's CBA because it did not consistently engage in a pattern of conduct of abiding by the terms. There is no evidence in the record that Povtak honored any terms of the CBA, including deducting union dues and initiation fees pursuant to Article 13, Check – Off, or making contributions to the Pension plan pursuant to Article 25. Additionally, although Povtak's HR Assistant Arko took the Union representative's grievance document, Livramento's subsequent meeting with the union was only to explain the ECP under which Wagner was terminated. Neither the act of receiving the grievance document nor the meeting to discuss the ECP constitute an implied acceptance of the CBA in general, or the grievance and arbitration provisions in particular.

Article 14.1, Step 4 of Crimaldi's CBA states,

[i]n the event of an employee discharge, the grievance will be submitted by the Union within 7 working days of the discharge to the HR Department without resort to the steps outlined above. Within 5 days thereafter, the Union and the Director of Labor Relations will meet to attempt resolution of the grievance. HR will notify the Union prior to issuing any discharge letters.

Joint Appendix A: CBA, Pages 7-8. It is likely, based on Arko's deposition, that he did not know of the grievance procedures, and thus, when accepting the grievance document provided by the Union representatives, he was not doing this in order to comply with provision 14.1(4) of the CBA. See Appendix C: Arko Deposition, Page 9 (when questioned regarding how the union was bringing the grievance, Arko responded with, "[s]ome number in the CBA," and could not recall

the provision even after being told it by the Local 12-22's attorney). Although the Union representatives told him that the grievance was pursuant to Article 14.1, step 4, without Arko knowing exactly what that provision said, it would be illogical to say that he accepted it in accordance with the provision. Furthermore, it does not reasonably flow that Livramento was conforming to the CBA when she called the Union agents and met with them after receiving the grievance. It is just as likely that she was extending a professional courtesy to the Union and being cordial after receiving the grievance, since she was not there when they first came to the office. This argument is bolstered by the fact that at the beginning of the meeting, Livramento "explained to Roth and Blancato that the *sole purpose* of the meeting was to explain the ECP under [sic] which Wagner was terminated." Local 12-22, 185 F.Supp.3d at 8 (emphasis added). In addition, no attempt to resolve the grievance was made at this meeting. Therefore, because neither the HR Assistant's acceptance of the grievance document or Livramento's meeting conformed to Article 14.1, step 4, Povtak did not impliedly accept the grievance provision or the CBA in general. Therefore, without this implied acceptance, Povtak cannot be bound by the substantive provisions of Crimaldi's CBA.

### **C. Under the Perfect Successor Analysis, Povtak is Not Bound by the CBA.**

An employer is a "perfect successor" when it "holds itself as if it will adhere to the terms of the previous CBA" and can only be bound by the previous CBA when the new employer makes it "'perfectly clear' that it *would* assume the terms of the predecessor's CBA." Local 12-22, 1214 F.3d at 9 (citations omitted). The employer may not lead the employees to believe that they will be hired by the new employer under the same terms and conditions of their previous employment. Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974). Quine's statement "we need all the help we can get" did not make it "perfectly clear" that all Crimaldi employees would be

hired. But even if it did, the statement certainly did not make the Crimaldi employees believe that Povtak would accept the terms of their CBA. Therefore, Povtak is not a “perfect successor” of Crimaldi and cannot be held to the terms of the CBA.

Only if the new employer makes it “perfectly clear that [it] plans to retain all of the employees in the unit,” Id. at 195, and “holds itself as if it will adhere to the terms of the previous CBA,” can it be considered a “perfect successor.” Local 12-22, 1214 F.3d at 9 (citing NLRB v. Houston Bldg. Servs., Inc., 128 F.3d 860, 864 n.6 (5th Cir. 1997); see also Local 12-22, 1214 F.3d at 9 (citing Coastal Int’l, 320 Fed. Appx. at 284) (internal citations omitted). This can be accomplished by the new employer “either actively or, by tacit inference, misle[ading] employees into believing they would all be retained without change in their wages, hours, or conditions of employment...” Spruce Up Corp., 209 N.L.R.B. at 195. However, if the new employer never made it “perfectly clear” that it would assume the terms of the previous CBA, but has hired all the predecessor’s employees in the bargaining unit, the new employer must only bargain with the union upon request. Fall River, 482 U.S. at 52 (“The successor’s duty to bargain ... is triggered only when the union had made a bargaining demand.”); see also Spruce Up Corp., 209 N.L.R.B. at 196.

Povtak is not a perfect successor because it did not make its intention to abide by the terms of the contract perfectly clear, nor did the union make a bargaining demand. Quine’s statement that Povtak “would need all the help [it] could get” in response to the question of whether any Crimaldi employees would be hired by Povtak, is not sufficient to make Povtak a “perfect successor.” First, Crimaldi employees could not reasonably infer from this statement that Povtak would hire the entire Crimaldi workforce. Quine’s response might indicate that the company is eager to hire Crimaldi employees, but does not make it perfectly clear that it plans to

retain the entire unit. But even if the employees could infer this, at no point in the press conference did Quine mention the CBA, let alone insinuate that Povtak would be accepting the terms of the CBA. Moreover, the press conference was for *all* Crimaldi employees, not just Local 12-22 members, and the question was not presented as coming from a Union member with regards to their employment, but rather a general question by an attendee, who may not even have been a union member or known of the CBA under dispute. Furthermore, unless the union members made themselves known, it is not clear that Povtak even knew that Local 12-22 members were at the meeting. Consequently, it is a far reach to conclude that Povtak, by this simple statement, “either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment.” *Id.* at 195. Therefore, it is illogical to assume that Quine’s response to a question from an employee, who is not a known union member about continuing employment for all Crimaldi employees, and not just Local 12-22 members, would bind Povtak to the terms of the CBA, including the grievance and arbitration provisions.

This case is similar to NLRB v. Burns International Security Services, Inc. There, Burns succeeded Wackenhut as the company providing security services to Lockheed Aircraft Service after a bidding process. NLRB v. Burns Int’l Sec. Servs., Inc., 406 U.S. 272, 274 (1972). However, unlike Crimaldi, Wackenhut informed all of the bidders that there was a CBA in existence. *Id.* at 275. When Burns started its services, 27 out of the 42 guards they employed were previously employees of Wackenhut. *Id.* at 274. Burns refused to bargain with the union, which had recently been certified as the representatives of the Wackenhut guards, and the union demanded that Burns honor the CBA between them and Wackenhut. *Id.* at 275-76. Although Burns was held to be required to bargain with the union because a majority of its employees

were previous Wackenhut union employees, the court found that Burns was not bound to Wackenhut's contract with the union. Id. at 281-82. The number of Wackenhut employees hired by Burns was a "wholly insufficient basis" for the court to bind Burns to the previous contract. Id. at 286-87. At a minimum, like Burns, Povtak may have had to bargain with Local 12-22, but because Local 12-22 never approached them and requested bargaining, Povtak did not breach this obligation. Thus, although Povtak hired all the Local 12-22 electricians, it did not agree to the terms of the CBA and thus cannot be bound to the terms of Local 12-22's CBA with Crimaldi.

**D. There is No Substantial Continuity Between Crimaldi and Povtak.**

Unless substantial continuity is found to exist in the "business enterprise" between the predecessor and new employer, the new employer cannot be held to the terms of the CBA. Howard Johnson, 417 U.S. at 263 (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964)). Whether there is substantial continuity is a question of fact based on a consideration of factors, such as the "sameness" of the businesses of both employers and whether the employees are doing the same work in equivalent conditions. See Fall River, 482 U.S. at 43. How the successor employer acquired its predecessor's assets is an additional factor in the analysis, although not generally determinative. See Id. at 44 n.10. Although Povtak and Crimaldi both provided transportation services to the City of Dynes, Povtak acquired the business through a bidding process with the City and not through any direct transaction with Crimaldi. Thus, Povtak did not acquire Crimaldi's assets, but rather the City's. Furthermore, Povtak installed new green engines and after receiving training, Crimaldi electricians saw changes to both their work and working conditions. For these reasons, there is not a substantial continuity between Crimaldi

and Povtak and thus, Povtak cannot be held to the grievance and arbitration provisions of the Crimaldi CBA.

An employer cannot be bound by a predecessor's CBA unless there is "substantial continuity of identity in the business enterprise." Howard Johnson, 417 U.S. at 263 (citing Wiley, 376 U.S. at 551). The substantial continuity analysis is "primarily factual in nature and is based upon the totality of the circumstances of a given situation" and "requires ... focus on whether the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" Fall River, 482 U.S. at 43 (citing Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973)). The factors considered in this analysis are,

whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Id. at 43. Three other factors also considered, although not determinative, are whether the new employer "*intends* to take advantage of the trained work force of its predecessor," Id. at 41, "the way in which a successor obtains the predecessor's assets," Id. at 44 n.10, and whether "those employees who have been retained will understandably view their jobs situations as essentially unaltered." Id. at 43 (citing Golden State Bottling Co., 414 U.S. at 184). Nevertheless, "substantial continuity" alone does not create the obligation of the successor company to be bound by the terms of the predecessor's CBA, but rather, only creates the duty to bargain with the union unless the successor is also the alter ego of the predecessor or has expressly or impliedly accepted the predecessor's CBA. See Southward v. S. Cent. Ready Mix Supply Corp., 7 F.3d 487, 493, 496 (6th Cir. 1993); see also AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 269 (3d Cir. 2001) ("[T]he 'substantial continuity' concept ... should properly be

viewed as a *necessary* but not a *sufficient* conditions for the imposition of arbitration on an unconsenting successor.”).

1. The *Fall River* Factors Do Not Establish Substantial Continuity

a. *The Sameness of Employers’ Businesses*

Although Povtak, like its predecessor, is in the business of providing transportation services to the City of Dynes, this similarity should not carry a lot of weight. First, the City contracted out this business and thus Povtak did not necessarily follow in Crimaldi’s footsteps because it chose to, but rather because it was required to by the City. Second, although the general business of “transportation services” is the same, Povtak made substantial changes to its business and thus is less similar to Crimaldi than it appears from the outset. Povtak is now in the business of “operating ‘green transportation’” and “creating and/or maintaining ‘green jobs,’” not just transportation in general, as was Crimaldi.

b. *The Sameness of Job, Working Conditions, and Supervisors and Intent to Take Advantage of Predecessor’s Trained Workforce*

The Povtak employees are not performing the same electrical work as they did while working for Crimaldi. The electricians that were hired from Crimaldi underwent training to be able to work on the new electric or organic-diesel burning engines. These changes highlight the fact that Povtak did not intend to take advantage of Crimaldi’s “trained workforce” (since Povtak trained these employees once hired), and that the electricians were doing different work. The working conditions at Povtak also differed from Crimaldi. The fact that they were working on the new engines meant that they were performing different types of work and that the conditions surrounding the work changed. The employees were now also encouraged to promote the “green jobs” the company was working on. Furthermore, it is unclear whether these employees were

working under the same supervisors, but even if they were, because their job and working conditions were different, this would be insignificant in the totality of the circumstances.

*c. Sameness of Production Process, Product, and Body of Customers*

As the district court stated, “the services of a city-contracted private transportation company cannot be easily supplanted, and thus the ‘production process’ or manner of providing services will likely not vary.” Local 12-22, 185 F.Supp.3d at 18. Yet within the inherently circumscribed nature of a City contract, Povtak made significant changes to both the production process and the body of customers. Povtak altered the City’s bus routes previously used by Crimaldi, which allowed them to expand their customer base. The “product” has also changed. Although the product of transportation is technically the same, the buses are now more environmentally friendly, run by electric or organic-diesel burning engines and thus are different than the ones used by Crimaldi.

*d. The Way in Which a Successor Obtains the Predecessor’s Assets*

Although the way in which a successor obtains the predecessor’s assets is not generally determinative, in this case, it should be weighed heavily since the cases that cited this proposition were differentiating between mergers, consolidations and sales of assets, see Fall River, 482 U.S. at 44 n.10 (citing Howard Johnson, 417 U.S. at 257), and here, none of those transactions occurred. Rather, Povtak obtained the business through a bidding process with the City. In addition, there is no evidence that Povtak obtained Crimaldi’s assets, instead the buses are the City’s. Therefore, it follows that the only connection between Povtak and Crimaldi is the contract with the City of Dynes. It would be unreasonable under these circumstances to bind Povtak to Crimaldi’s grievance and arbitration provisions.

e. *Whether the Retained Employees Understandably Viewed Their Job Situations as Essentially Unaltered*

For the reasons mentioned throughout, it would not be reasonable or understandable for the employees to view their jobs situations as essentially unaltered. First, at the pre-bid conference, Quine only suggested that Crimaldi employees, who would otherwise be out of a job, would be hired by Povtak because “[it] would need all the help it could get.” Quine never indicated what work they would be hired to do, nor mentioned the CBA. Second, soon after the Local 12-22 employees were hired, they were required to go through training to be able to work on the new electrical and organic-diesel engines. After completing the training, their responsibilities expanded. Third, the employees were highly encouraged to become friends with Povtak on Facepage and write positive comments about the “green jobs” Povtak was working on. This was an additional responsibility that the employees had to take on and was incorporated into their performance reviews. Therefore, because of these changes and the differences between Crimaldi and Povtak, it is unreasonable for the Local 12-22 employees to view their jobs situations as essentially unaltered.

2. When Applying the *Fall River* Factors, it is Clear that Povtak Cannot Be Bound by the CBA Because There is No Substantial Continuity.

Looking at all the Fall River factors, and giving each one appropriate weight in the circumstances of this case, it cannot be found that there is substantial continuity between Crimaldi and Povtak. The changes that Povtak made to its business differentiated it from Crimaldi’s business, changed the job and working conditions of the Local 12-22 electricians, as well as expanded Povtak’s customer base. Furthermore, Povtak succeeded Crimaldi only after winning the contract from the City and thus did not obtain Crimaldi’s assets. These factors, combined with the fact that the employees’ job situations have been significantly altered and

because Povtak is also not the alter ego of Crimaldi and it has not either expressly or impliedly accepted the terms of Crimaldi's CBA with Local 12-22, Povtak cannot be held to the terms CBA, including the grievance and arbitration clauses.

### **CONCLUSION**

For the foregoing reasons, this Court must reverse the judgment of the Thirteenth Circuit and reinstate the District Court's judgment as a matter of law because Wagner's Fourth Amendment privacy claim fails under both tests set forth by the Supreme Court. This Court must also reverse the Thirteenth Circuit's granting of summary judgment to Local 12-22 and reinstate the District Court's summary judgment in favor of Povtak because Povtak is not a successor under any of the four exceptions recognized by the Supreme Court and thus cannot be bound by the substantive provisions of the CBA, including the grievance and arbitration provisions.