

**NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION
THE 35TH ANNUAL ROBERT F. WAGNER
NATIONAL LABOR & EMPLOYMENT LAW MOOT COURT COMPETITION**

In the

Supreme Court of the United States

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

POVTAK GROUP,

Petitioner,

-against-

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

Respondents.

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

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

1. Whether an employer violates an employee's Fourth Amendment right to be free from an unreasonable search of her personal effects when the employer searched the employee's company-owned cellular phone at the employee's request or when the employer looked at the employee's social networking website profile, to which it had access by consent of the employee.
2. Whether an independent employer will be bound to the substantive provisions of a collective bargaining agreement ("CBA") it was not a party to that was entered into by a predecessor employer under 301 of the Taft-Hartley Act, 29 U.S.C. § 185 when the new employer uses substantially different equipment, trains its employees to do different jobs, and expresses an unwillingness to be bound by the CBA.

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The opinion of the Thirteenth Circuit, reversing the judgment as a matter of law in favor of Povtak Group and reversing the District Court and granting Local 12-22's motion for summary judgment, is reported as Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 1214 F.3d 1 (13th Cir. 2010). The opinion of the District Court, granting judgment as a matter of law in favor of Povtak Group over Roberta Wagner and granting Povtak's motion for summary judgment against Local 12-22, is reported as Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 185 F. Supp. 3d 1 (W.D. Frl. 2009). Each is reproduced in the record.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Section 1983 of Title 42 of the United States Code provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

3. Section 185 of Title 29 of the United States Code, enacted as Section 301 of the Taft-Hartley Act of 1947, provides, in pertinent part:

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Povtak Group (“Povtak”) is an environment-friendly private company that has a contract with the city of Dynes, Froessel, to provide transportation services to the citizens of Dynes. Local 12-22, Prof’l Elec. Workers Union v. Povtak Group, 185 F. Supp. 3d 1, 2 (W.D. Frl. 2009), rev’d, 1214 F.3d 1 (13th Cir. 2010). Povtak was awarded the contract for these services when its low bid was accepted by the City in early January, 2008. Id. Povtak was able to bid for this contract because the Crimaldi Corporation, the company that provided transportation services before Povtak, was denied renewal of its contract, most likely because some of its top officials had been indicted on several criminal charges related to organized crime. Id. at 1.

After winning the transportation contract, Povtak provided the city with a different kind of transportation service, unlike anything Dynes had seen before. Povtak had an environmentally-friendly vision for Dynes’s transportation system and obtained funds from the U.S. Department of Transportation and the U.S. Environmental Protection Agency to help implement this vision. Id. at 3. To provide more “green transportation” for Dynes, Povtak made substantial changes to the city’s buses by replacing their traditional internal combustion engines with cleaner electric or organic-diesel burning engines and adding cleaner exhaust systems and retro purple headlights to the buses. Id. The company also provided shorter and more efficient bus routes that simultaneously allowed them to transport more citizens. Id. To create “green jobs” for the city, Povtak held training courses for its electricians to learn to work on the electrical engines. Id. The company also provided new iPhones for all of its employees along with a new Electronic Communications Policy (“ECP”) that was reviewed and signed by all employees. Id. To help publicize the new “green jobs” and the new “green transportation” offered by Povtak, the company launched a Facepage profile, which allowed employees to

publically share stories about the company's green initiatives. Id. at 4.

Aside from being two completely different companies under different ownership and management, Povtak and Crimaldi acted very differently in carrying out the transportation contract. Before Povtak's acquisition, Crimaldi had provided more traditional transportation services and had not been concerned with "green transportation" or "green jobs." Id. For instance, Crimaldi had a fleet of forty buses that used traditional, less environmentally-friendly internal combustion engines. Id. These buses also operated on less efficient longer routes and carried less people than Povtak's buses. Id. at 3. Crimaldi also gave its employees older, out-dated Ex-Rel phones. Id. at 4.

Additionally, Crimaldi had dealt with Local 12-22, Professional Electrical Workers Union ("Local 12-22" or "the Union"), a respondent in this case, since 1957 as the representative of Crimaldi's electrical workers. Id. at 2. Crimaldi and Local 12-22 had effected a collective bargaining agreement ("CBA") which set out, among other things, a traditional "just cause for discharge" provision and a grievance/arbitration provision. Id. at 3. However, while 212 out 342 of Crimaldi's terminated workers were able to find work with Povtak after the new company began operations, including all sixteen of the Local 12-22 electrical workers, Local 12-22 never made an attempt to negotiate a similar agreement with Povtak, and Povtak never explicitly accepted the CBA the Union had with Crimaldi. Id. In fact, before Povtak won the contract, City officials held a pre-bid conference to allow employees of Crimaldi, including members of Local 12-22, to ask about possible employment opportunities with the new company. Id. at 2. During the conference, Povtak's Chief Financial Officer Deborah Quine ("Quine") was asked if any Crimaldi employees would be hired. She replied that Povtak "would need all the help [they could] get." Id.

Roberta Wagner, also a respondent in this case, was one of the sixteen Crimaldi electricians that were hired when Povtak took over the transportation system. Id. at 4. Once Povtak launched its Facepage profile, Wagner, through her own profile, became “friends” with the company so that she could post encouraging words on Povtak’s page. Id. Povtak’s profile was available for anyone with a computer to view, and Wagner’s profile was set to where only those whom she accepted as “friends” could view her profile. Id. at 4, n. 5. Wagner often posted encouraging words on Povtak’s Facepage profile throughout her employment. Id. at 4. However, she also posted disparaging comments and complaints about Povtak on her own Facepage profile, including her own statements such as, “Just been transferred to the ghetto,” and links to blog posts from a website called “Crossing the Wires,” which were highly critical of Povtak’s green initiatives. Id. at 5. Some of Wagner’s Facepage posts were made via a Facepage application on the ePhone Povtak had issued to her, and some were posted from her personal home computer. Id.

Wagner had downloaded the Facepage application onto her ePhone as soon as she received it. Id. She also downloaded an application that allowed her to check her work email, an application that linked her phone to Povtak’s technical support staff, and an application that linked her phone to the “Crossing the Wires” blog. Id. The “Crossing the Wires” blog application, like the Facepage application, was in no way helpful to Wagner in her duties at Povtak; it was a website that was open for anyone with a computer and internet connection to view where anyone could post anonymous comments under a “screen name.” Id.

A few of the comments posted on “Crossing the Wires” under the screen name “PugLuv86” were highly critical of many of the green initiatives Povtak was attempting to institute. Id. at 6. One of the articles originally posted by “PugLuv86” on “Crossing the Wires”

was published in the local newspaper, the Lerner Gazette. That article bashed many of Povtak's environmentally-friendly initiatives and accused some of Povtak's supervisors by name of being inept in carrying out their duties. Id. Because of the confidential information in the newspaper article, the company believed that "PugLuv86" must have been a disgruntled employee. Id. Because Povtak feared that "PugLuv86" was a disgruntled current employee who was exposing confidential information, Povtak's corporate headquarters issued a memorandum asking all shift supervisors to review all the posts made by their employees' on Povtak's Facepage profile. The shift supervisors, including Frank Milmine, carried out these duties of looking at Povtak's Facepage profile as part of an investigation to uncover the identity of "PugLuv86."

Shortly after being hired by Povtak, Wagner was transferred from the light rail division, where she had worked under Crimaldi, to the bus division. Id. at 5. Not long after Wagner's transfer, Povtak's Human Resources Department ("HR") decided to conduct a routine review of her job performance. As a matter of coincidence, Wagner's performance review happened to take place around the same time that Povtak's supervisors were looking for the identity of "PugLuv86" through the Facepage postings of employees. Wagner's new supervisor from the bus division, Frank Milmine, included in his performance review screen shots of Wagner's Facepage profile, in which she had made disparaging remarks about the Company. Wagner's former shift supervisor, Shane Leibson, submitted positive remarks to her performance review, as well. Overall, Wagner received a B overall, which is the exact middle of the grading scale and represents a "satisfactory" performance of the job. Id. at 7, n. 8.

A couple of days after Wagner's performance review was conducted, she brought her ePhone in to Povtak's technical support office because she thought the battery might have a problem because calls were being dropped. Id. at 7. The technician reviewed the device in an

attempt to troubleshoot, and made a note that Wagner had installed four applications. Because one of the applications was a link to “Crossing the Wires,” the technician made an additional note about the possible connection between Wagner and the infamous “PugLuv86” newspaper article. Id. at 8.

After the technician filed his report, Povtak decided to let Wagner go because she had violated the company’s Electronic Communications Policy (“ECP”) when she downloaded the two non-work-related applications to her iPhone. Id. All Povtak employees were required to abide by the ECP upon their being hired. Id. at 3. The employees, including Wagner, signed a separate document, a “User Acknowledgement Form,” confirming that they had read the ECP and agreed to abide by its terms. App. B, 4. The ECP set out guidelines for the employees’ use of all electronic communication devices owned by Povtak and issued to the employees. The very second paragraph of the ECP delineated the employees’ privacy rights regarding the devices and communications made through the devices: “[U]sers should not maintain any expectation of privacy with respect to any usage of the Company’s Electronic Systems. All personnel waive any right of privacy in e-mail messages, other electronic communications or Electronic Systems use, and consent to access by and disclosure of e-mail messages and other electronic communications to authorized company members and administrative staff.” App. B, 1. The policy also clearly stated that “[a]ll Electronic Systems are the sole property of the Company and are to be used solely for business purposes or for limited and reasonable personal use during non-work time” App. B, 2. Thus, when Povtak management learned that Wagner had used her iPhone, an electronic communication device, for personal use during working hours, they made the decision to let her go. 185 F. Supp. 3d at 8.

After Wagner’s termination, Local 12-22 business agents Rahim Roth and Stefan

Blancato attempted to submit a grievance to Povtak pursuant to Article 14.1, Step 4 of the CBA the Union had with Crimaldi protesting Wagner's discharge "without just cause in violation of Article 7.1 of the CBA." Id. at 8. Step 4 laid out the grievance procedures of Local 12-22 and Crimaldi:

In 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 steps outline 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.

See App. A, at 8. The CBA also contained a "time is of the essence" clause in Section 14.3.

However, Povtak never followed any of these procedures and never gave any indication to Local 12-22 that the company was acting under the CBA. Povtak did not notify the Union prior to issuing Wagner's discharge letter. Povtak Group, 185 F. Supp. 3d at 8. Furthermore, when the agents initially came to Povtak's HR office, their entire interaction with any Povtak employee consisted of them handing a document to the administrative assistant Christian Arko. Id. Seven days later, Audrey Livramento, the Assistant HR Manager, courteously met with Roth and Blancato solely to explain the ECP. Id. She also told the agents that Povtak did not need a reason to discharge an employee. Id. Likewise, George Daks, the General Manager of HR, sent an email on March 22 informing Local 12-22 that Povtak was an "at-will company" and would not participate in arbitration under the CBA it was not a party to after Roth attempted to email him and say that they were acting under the CBA. App. C., Ex. A.

On March 5, 2008, Wagner met with local 12-22 representatives and a Local 12-22 attorney. The EEOC issued a "right to sue" letter on June 19, 2008, and Wagner initiated this action within 90 days after receiving that letter. Povtak Group, 185 F. Supp. 3d at 9. Initially, Wagner alleged illegal employment discrimination by Povtak in violation of Title VII of the

Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 200e *et seq.*; and violations of her Fourth Amendment right to be free from unreasonable search and seizures, 42 U.S.C. § 1983. Local 12-22 also sued Povtak to enforce the terms of the CBA negotiated by Crimaldi and to which Povtak was not a party under Section 301 of the Taft-Hartley Act of 1947, 29 U.S.C. § 185.

The United States District Court for the Western District of Froessel correctly ruled in favor of Povtak on each of these issues. First, summary judgment was granted to Povtak on Wagner’s discrimination claim because the claimed failed on the merits. Id. at 11. Second, after a jury trial to determine whether Povtak violated Wagner’s Fourth Amendment right, the district court wisely granted Povtak’s Rule 50 motion for judgment as a matter of law, concluding that no reasonable jury could have found for Wagner under the evidence on the record. Local 12-22, Prof’l Elec. Workers Union v. Povtak Group, 213 F. Supp. 3d 20, 21-22 (W.D. Frl. 2009). Finally, summary judgment was granted to Povtak on the Local 12-22’s successorship claim because the court found a lack of “substantial continuity” between the two companies and that Povtak was simply not a “successor” of Crimaldi. Id. at 19. The court found Povtak was a different employer than Crimaldi, provided new training to its employees, made the transportation process more environmentally friendly, and had not adopted the CBA. Id. Therefore, Povtak could not be bound by the CBA it was not a party. Id.

On appeal, the Thirteenth Circuit erred by reversing the lower court’s judgment as a matter of law on Wagner’s Fourth Amendment Claim and by reversing the grant of summary judgment on Local 12-22’s successorship claim. On the Fourth Amendment claim, the Thirteenth Circuit found that the relevant search was not the search of Wagner’s ePhone, but the search of her Facepage profile. Local 12-22 Prof’l Elec. Workers Union v. Povtak Group, 1214 F.3d 1, 3 (13th Cir. 2010). The circuit court not only failed to apply the Ortega holding as a carve-out

within the Katz standard, but also failed to properly apply the standards set forth in Ortega. Id. at 4-6. The circuit court held that Wagner had a reasonable expectation of privacy in her Facebook profile without first analyzing whether Povtak's actions even constituted a search under the Fourth Amendment. As a result, the court reversed the district court's granting of Povtak's Rule 50 motion and reinstated Wagner's favorable jury verdict. Id. at 15.

On the successorship claim, the court correctly found that Povtak did not fall under any of the three express exceptions to the Court's rule that a successor employer is not bound by the terms of its predecessor's CBA because Povtak was not an alter ego, had not assumed the CBA, and was not a "perfect successor." However, the court went on to use the flawed analysis of a small minority of courts to find that "substantial continuity" existed between Crimaldi and Povtak. Even though Povtak is a separate and independent employer and made substantial changes to the transportation services, the court found that the companies were in substantially the same business, using employees working under substantially the same working conditions, and having about the same customers. Therefore, the court misguidedly held that Povtak was bound by the CBA.

On January 10, 2011, this Court granted certiorari to reexamine these two issues.

SUMMARY OF THE ARGUMENT

I. The Thirteenth Circuit erred in reversing the district court's grant of Povtak's motion for judgment as a matter of law because Povtak did not violate Wagner's Fourth Amendment right by conducting reasonable searches of materials in which Wagner had no legitimate expectation of privacy.

Povtak's actions cannot be considered "searches" for Fourth Amendment analysis because Wagner did not have a reasonable expectation of privacy in her iPhone or in her Facepage profile. First, she did not have a subjectively reasonable expectation of privacy regarding her iPhone because she was aware both that a technician would have to search it for troubleshooting purposes and also that pursuant to a company policy she signed regarding electronic communications, she was to maintain no expectation of privacy with respect to the iPhone. Wagner also did not have a subjectively reasonable expectation of privacy regarding her Facepage profile because she had chosen to allow Povtak access to view the contents of her profile by being "friends" with the company on the site. Second, society would not recognize as reasonable that Wagner would maintain a legitimate privacy expectation in a work-issued cellular device in the face of a company policy that commanded her not to assume any privacy in any company-issued electronic communication devices. Also, society does not recognize as reasonable Wagner's expectation of privacy in statements published on a social networking website because she had posted her statements knowing that Povtak had access to them. Third, Wagner's expectations of privacy in her iPhone and Facepage profile were not reasonable within the context of the work environment because of the ECP that governed Wagner's use of the iPhone and the fact that she had chosen to make the Facepage profile part of her work environment by posting on Povtak's wall.

Even if Wagner could demonstrate a reasonable expectation of privacy protectable by the Fourth Amendment, Povtak's searches of both Wagner's iPhone and Facepage profile were reasonable in their inception and scope. Also, Povtak's need to control and maintain a peaceful and productive work environment outweighs any privacy concerns Wagner may have had in her iPhone or Facepage profile. Povtak's search of Wagner's iPhone was reasonable in its inception because it was for the non-investigatory, work-related purpose of fixing the phone. Povtak's search of Wagner's Facepage profile was reasonable in its inception because it was for the legitimate purpose of investigating work-related misconduct, namely, attempting to find out the identity of an insubordinate employee who was publicizing Povtak's private information.

Povtak's search of Wagner's iPhone was reasonable in its scope because the measures taken—a simple viewing of the stored programs installed on the phone—were reasonably related to the objective—fixing the phone—and not intrusive in light of the circumstances. Povtak's search of Wagner's Facepage profile was likewise reasonable in its scope because the measures taken—a simple viewing of the statements made on her Facepage profile—were reasonably related to the objective—finding the identity of the insubordinate employee—and not excessively intrusive in light of the circumstances, given that Wagner had knowingly allowed Povtak to view her profile.

II. The Thirteenth Circuit also erred in reversing the district court's grant of Povtak's motion for summary judgment against Local 12-22 because Povtak, as an independent private company, cannot be bound by a predecessor company's CBA with a Union when it is not an alter ego of the predecessor, had not adopted the CBA, and is not a "perfect successor" of Crimaldi.

Povtak is not an alter ego of Crimaldi because it is an independent company and not merely a "disguised discontinuance" of its predecessor. Povtak won its contract through an open bidding process and is owned and operated by completely different individuals. As such, Povtak

cannot be said to be an “alter ego” of Crimaldi and cannot be held to the provisions of its CBA with Local 12-22.

Povtak also did not explicitly or implicitly adopt Local 12-22’s CBA with Crimaldi. Courts must exercise the “utmost restraint” before finding that a successor employer adopted a predecessor’s CBA, and “clear and convincing evidence” of adoption must exist to make such a finding. Both Povtak’s Assistant Manager of Human Resources and General Manager of Human Resources made it clear to Local 12-22 that Povtak was not acting under the CBA and was an “at-will employee.” Furthermore, Povtak did not implicitly adopt the CBA by merely meeting with the Union officials.

Povtak is not a “perfect successor” of Crimaldi and did not mislead its employees into believing that they all would all receive employment with the company. Crimaldi’s employees knew that Povtak was a new and different company. Ms. Deborah Quine’s comment to Crimaldi employees at a pre-bid conference that the company would need all the help they could get was merely an indication that Crimaldi employees could apply for jobs with Povtak. It is far from a “perfectly clear” indication that Povtak intended to hire all of Crimaldi’s workers.

Because Povtak does not fall under any of the above exceptions, the analysis should end here, but even under the flawed “substantial continuity” analysis Povtak cannot be bound by its predecessor’s CBA. Povtak—an independent company with “green transportation” and “green jobs”—is not the same employer as Crimaldi. The working conditions of the employees are also different and new training programs have been implemented. Furthermore, Povtak has installed all new environmentally-friendly engines on its busses and modernized its communication techniques. Thus, Povtak and Crimaldi are not remotely the same, and Povtak cannot be held to the terms of the CBA.

ARGUMENT

II. Povtak did not violate Wagner’s Fourth Amendment right when its agent viewed the contents of her company-issued iPhone or when its agent looked at statements posted on her Facebook profile.

The Fourth Amendment guarantees citizens the right to be free from any unreasonable search or seizure of their personal effects performed by the government or through its agents.¹ U.S. Const. amend. IV. The Fourth Amendment applies only to government actors; it is not implicated in private party searches of an individual’s person, house, papers, or effects.² Walter v. United States, 447 U.S. 649, 656 (1980). The plaintiff must show both that there was a search or seizure and that the search or seizure was unreasonable to be successful on a Fourth Amendment violation claim. To prove that there has been a search, the plaintiff must demonstrate a reasonable expectation of privacy regarding the items searched. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). If the plaintiff had a protectable privacy interest in the items searched, the plaintiff must then prove that the government actor’s search of the items was unreasonable in either its inception or scope. O’Connor v. Ortega, 480 U.S. 709, 726 (1987). If the court finds that the alleged violator was not a government actor, that the individual had no reasonable expectation of privacy regarding the items searched, or that the employer’s search was reasonable under all attendant circumstances, then there has been no violation of the individual’s Fourth Amendment right.

¹ The Fourth Amendment also requires government actors to obtain a detailed warrant for a search, but the Court has consistently held that warrantless searches are permissible in certain circumstances, including employer searches of employees’ effects. Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666-67 (1989); O’Connor v. Ortega, 480 U.S. 709, 725 (1987). Since that issue is not directly before the court, this brief does not address it.

² Whether Povtak may be considered a government actor was disputed at the district level, but that issue is not directly before the Court. Povtak would like to still assert that simply by virtue of its contracting with the government, it is not considered a government actor under the test applied in circuit courts around the country. See United States v. Koenig, 856 F.2d 843, 850 (7th Cir. 1988) (“To effect the transformation of a private search into a government search, party claiming government search must prove some exercise of government power over searching private entity such that private entity may be said to have acted on behalf of the Government rather than for its own private purposes.”); see also United States v. Bowers, 549 F.3d 522, 526 (6th Cir. 2010); United States v. Paige, 136 F.3d 1012, 1017-18 (5th Cir. 1998).

A. Povtak’s actions did not constitute a search subject to the Fourth Amendment because Wagner did not have a reasonable expectation of privacy regarding either her ePhone or her Facepage profile.

The threshold Fourth Amendment requirement for finding that a search occurred necessitates a twofold analysis: first, “that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.” Katz, 389 U.S. at 361 (Harlan, J., concurring). Additionally, the plaintiff’s “expectation of privacy must be one that society is prepared to recognize as *legitimate*.” New Jersey v. T.L.O., 469 U.S. 325, 338 (1985) (emphasis added). Thus, the individual asserting her Fourth Amendment right must demonstrate both that she subjectively thought the items searched were private and that society objectively thinks the items searched were private in nature. Id. The Ortega court added another prong to the Katz standard for determining the reasonableness of a privacy expectation when the plaintiff is an employee: When an employee asserts an employer’s violation of her Fourth Amendment right, she must also show that her expectation was reasonable within the context of the employment relationship, taking into account the operational realities of the workplace. Ortega, 480 U.S. at 717.

In the lower courts, there was a dispute over which “search”—Povtak’s looking at the ePhone or the Facepage profile—constituted the alleged violation of Wagner’s Fourth Amendment right. Povtak Group, 185 F. Supp. 3d at 14-15; 1214 F.3d at 2. Since neither search was violative, it is meaningless to argue that dispute further, and thus, analysis of both searches is appropriate.

1. Wagner cannot demonstrate a subjectively reasonable or legitimate expectation of privacy regarding either her ePhone or her Facepage profile.

Generally, “What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.” Katz, 389 U.S. at 351.

Additionally, “[i]t is clear that a contract may under appropriate circumstances diminish (if not extinguish) legitimate expectations of privacy.” Yin v. California, 95 F.3d 864, 872 (9th Cir. 1996); see also Zap v. United States, 328 U.S. 624 (1946); Muick v. Genayre, 280 F.3d 741, 743 (7th Cir. 2002); United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000).

In United States v. Simons, the Central Intelligence Agency had a company policy that stated the company would “periodically audit, inspect, and/or monitor the user’s Internet access as deemed appropriate.” 206 F.3d at 396. The defendant, Simons, had notice of this policy as an employee of the Agency, and had been charged with knowingly receiving child pornography that had been transported in interstate commerce under 18 U.S.C. § 2252A(a)(2)(A) and one count of knowingly possessing material containing images of child pornography that had been transported in interstate commerce under 18 U.S.C. § 2252A(a)(5)(B). Id. at 397. From a routine search conducted according to the company policy, evidence consisting of photographs depicting child pornography was found on Simons’ computer. Id. at 396-97. The trial court denied the defendant’s motion to suppress the evidence because the search that produced the evidence violated his Fourth Amendment right, and a jury found him guilty on both charges. Id. at 397.

On appeal, the Fourth Circuit relied on the fact that Simons was aware, because of the company’s clearly stated policy, that the company could monitor the use of his work computer to determine that he had no legitimate subjective expectation of privacy regarding his work computer. Id. at 398. Because Simons’ expectation of privacy was not legitimate, the search did not violate his Fourth Amendment right. Id.

The facts in Simons are analogous to those presented in this case. Just as Simons was aware that his computer was subject to monitoring at all times by his supervisors, Wagner was aware that all electronic communication devices issued to her by the company were subject to

Povtak's "absolute right to access, monitor, and view all electronic communications . . . at any time for any reason whatsoever." App. B, 1, 4. Her signing the "User Acknowledgement Form" regarding the Electronic Communications Policy is prima facie evidence of her knowledge that Povtak could search her iPhone at any time. 185 F. Supp. 3d at 4. However, in this case, the facts lend even more to the conclusion that Wagner had no reasonable or legitimate expectation of privacy. The ECP, under the "Ownership and Privacy" paragraph, states that "users should not maintain any expectation of privacy with respect to any usage of the Company's Electronic Systems. All personnel waive any right of privacy in e-mail messages, [or] other electronic communications" App. B, 1. Though the ECP does not expressly list cellular phones in the text since it was instituted before cellular phones were commonly issued to employees, the phrase "other electronic communications" certainly includes cellular phones by virtue of their being electronic communication devices. 185 F. Supp. 3d at 3. Additionally, Wagner willingly turned over her iPhone to Povtak's technical support specialist to assess why the battery was not holding charge. 185 F. Supp. 3d at 7. Even if the ECP did not apply, this action constituted a waiver of any privacy she may have had in the phone, and it removes any subjective reasonable expectation of privacy she might have had since she knew or should have known that a search of the phone would be conducted after turning it in for assistance.

Due to the relative recency of social networking websites, there is a paucity of case law regarding privacy on these types of sites. However, taking into account the famous phrase from the Katz court, one cannot reasonably expect to keep private what one knowingly exposes to the public. 389 U.S. at 351, 511. It simply defies logic to think that one can expect to keep private from another any materials or statements that the one has knowingly given the other access to view. In fact, the Second Circuit has stated that a person loses all legitimate expectation of

privacy for an e-mail sent to a recipient once the recipient receives the e-mail. United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004). Due to the nature of the Facepage website, by becoming “friends” with another person or entity, a user allows that “friend” to view the statements and posts made by the user (and other users) on the website. 185 F. Supp. 3d at 4, n.5. Wagner was “friends” with Povtak, which allowed Povtak or anyone who could access the website through Povtak’s account to view the posts on her personal page. Id. Since she knew, or at the very least should have known, that she had chosen to share her Facepage posts with Povtak by becoming friends with Povtak, she cannot possibly be said to have subjectively regarded her profile as private from Povtak.

2. Even if Wagner had a valid subjective expectation of privacy, she cannot demonstrate any expectation of privacy in her Facepage profile or her iPhone that society is prepared to recognize as reasonable.

An inquiry into whether society is prepared to recognize certain expectations of privacy as reasonable depends on whether the individual's expectation, viewed objectively, is “justifiable” under the circumstances. Smith v. Maryland, 442 U.S. 735, 740 (1979); Katz, 389 U.S. at 353.

a. Society does not recognize as reasonable an employee’s expectation of privacy in a company-issued and maintained cellular phone.

While the contents of telephone conversations have long been considered private by society, courts have held that information not related to the content of the phone calls regarding telephones is not subject to privacy concerns. Smith, 442 U.S. at 743.

In Smith, the Court upheld as constitutional a police instituted monitoring of a suspected robber’s home telephone system by installing a pen register. Id. at 745-46. The Court, concluding that telephone subscribers do not regard the information about what numbers are dialed from their phones as private, explained:

Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.
Id. at 743.

In this case, there are two reasons why society would not recognize Wagner's privacy concerns as reasonable: First, her ePhone was issued to her by Povtak, and she signed an agreement noting that she knew she "should not maintain any expectation of privacy with respect to any usage of the Company's Electronic Systems." App. B, 4. Second, she must have known that Povtak's technician would have turned the phone on and looked at the applications downloaded on the phone while troubleshooting. App. B, 1. Given both of these attendant circumstances, Wagner cannot be said to have had an objectively reasonable expectation of privacy regarding her ePhone.

b. Society does not recognize as reasonable an expectation of privacy in information exposed on social networking sites.

Courts agree that society does not recognize a protectable privacy interest in statements disclosed on a social networking site. Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 656 (N.Y. App Div. 2010); see also Moreno v. Hanford Sentinel Inc., 91 Cal. Rptr.3d 858 (Cal. Ct. App. 2009); Dexter v. Dexter, No. 2006-P-0051, 2007 WL 1532084 (Ohio Ct. App. May 25, 2007).

In Romano, the plaintiff, Romano, had brought suit against the defendant, Steelcase, for personal injuries arising out of an accident. 907 N.Y.S.2d at 653. Steelcase sought access to Romano's private Facebook and Myspace (social networking websites very similar to Facepage) profiles for discovery. Id. The court noted that Romano had no reasonable expectation of privacy because she consented to the fact that her personal information would be shared with others by

using MySpace and Facebook, and because “the very nature and purpose of these social networking sites” is to allow users to share information. Id. at 656. The court granted Steelcase’s discovery request because Steelcase’s need for access to the information outweighed any privacy concerns Romano may have had. Id. at 657.

The Romano court’s holding signifies a societal realization that information posted on social networking websites offers no guarantees of privacy. Thus, whatever privacy concerns a person may have in the content of their postings on such sites is obliterated. In this case, even if the Wagner had a subjective privacy expectation in her Facepage postings, her expectation would not be objectively reasonable in the eyes of society.

Even if society did regard a legitimate, reasonable expectation of privacy in information willingly posted on social networking sites, the circumstances under which the search was conducted removed any reasonableness from Wagner’s privacy expectation. The circumstance was that Wagner had chosen to become “friends” with Povtak, which meant that she knowingly shared her information with anyone who was authorized to log on to Povtak’s Facepage account. Objectively, no one would regard Wagner’s expectation of privacy from Povtak as reasonable given that she knowingly chose to allow Povtak to see her profile.

3. Even if Wagner’s expectation of privacy was both objectively and subjectively reasonable, because she was an employee, the circumstances of the employment relationship lead to the conclusion that her expectation was not reasonable.

“The operational realities of the workplace . . . may make *some* employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. . . . [T]he question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.” Ortega, 480 U.S. at 717-18 (emphasis in original). In assessing the reasonability of privacy in the workplace under the Ortega rule, courts have looked

into four main factors: (1) whether the work area in question was given over to an employee's exclusive use, (2) the extent to which others had access to the work space, (3) the nature of the employment, and (4) whether office regulations placed the employee on notice that certain areas were subject to employer intrusions. Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174, 179 (1st Cir. 1997). A finding that office regulations placed the employee on notice that certain areas are subject to employer intrusions will effectively remove an employee's expectation of privacy. American Postal Workers Union, Columbus v. United States Post Office, 871 F.2d 556, 560-61 (6th Cir. 1989) (holding that though postal employees' lockers were given to the individuals for each's exclusive use, the employees had no reasonable expectation of privacy because of the company's regulations that the lockers were always subject to examination by authorized personnel).

Given that Povtak had instituted the ECP, which informed Wagner that she should maintain absolutely no expectations of privacy in any electronic communications on company-supplied devices, any privacy expectation regarding her ePhone that she did maintain is not reasonable within that context of the employment relationship. Thus, regardless of the fact that the phone was issued to Wagner for her exclusive use, her knowledge of the terms of the ECP removes all reasonable expectations of privacy.

In regard to Wagner's Facepage profile, even though the profile can be considered a private enclave separate from her work environment, the fact that she became "friends" with Povtak and regularly posted encouraging words on its profile page made the Facepage profile a part of the work environment. Povtak's search of Wagner's profile may not have been routine, but the fact that she not only made no attempts to preclude Povtak from viewing her profile, but also knowingly allowed Povtak access to her page by being "friends" with Povtak discounts any

argument that she had kept her Facepage profile separate and private from her work environment.

B. Even if Wagner’s expectation of privacy is assumed or irrelevant³ such that Povtak’s actions may be considered searches, Povtak’s searches of Wagner’s ePhone and Facepage profile were reasonable in both inception and scope.

If an individual has proven a reasonable expectation of privacy regarding the items searched by the government employer, the court must determine whether the employer’s search was reasonable. Ortega, 480 U.S. at 717. To determine the reasonableness of the search, a court must determine the context of the employment relation within which the search took place. Id.

In the most recent decision dealing with an employer’s search of an employee’s effects, the Court laid out the standard for determining the reasonableness of an employer’s search:

[W]hen conducted for a non-investigatory, work-related purpose or for the investigation of work-related misconduct, a government employer’s warrantless search is reasonable if it is justified at its inception and if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search.

City of Ontario, California v. Quon, 130 S. Ct. 2619, 2630 (internal quotations omitted). Thus, if the employer’s search was reasonable both at its inception and in its scope, then there has been no violation of an employee’s Fourth Amendment rights. Id. If the employer’s search was conducted for the investigation of work-related misconduct, the court must then balance the employee’s expectation of privacy with the employer’s legitimate interest in supervising, controlling, and operating the workplace. Ortega, 480 U.S. at 719-20.

In Quon, a police officer, along with other officers, brought suit against the city police department for violating his Fourth Amendment rights when the department reviewed text messages sent to and from the officer’s work-issued paging device. 130 S. Ct. 2619, 2625

³ Justice Scalia, in his concurrence in Ortega, argued that an employee’s expectation of privacy in the workplace should be assumed, and as thus, would be irrelevant to the analysis. 480 U.S. at 731, 1505. Since the Court did not define which analysis was proper, both analyses must be mentioned. Quon, 139 S. Ct. at 2628-29.

(2010). The paging devices were given to the plaintiff and other officers to aid them in mobilizing quickly and responding to emergency situations. Id. The officers had a monthly character limit based on a contract with the wireless service provider; additional charges attached if an officer exceeded his monthly character allowance. Id. The officers would pay out-of-pocket for the overage charges if they exceeded the limit. Id. After a few months of the officers' consistently exceeding their character limit, the police chief decided to determine whether the character limit was too low, causing the officers to pay for work-related charges, or if the overages were a result of personal messages. Id. at 2626. At the police chief's request, the wireless company provided transcripts of all text messages sent by the plaintiff and other officers for review. Id. After reviewing the transcripts, the chief determined that the plaintiff and other officers had violated the department's policy restricting the use of the pagers to work-related use only, and the plaintiff was allegedly disciplined, though not fired. Id.

At trial, a jury found that the police chief's purpose in reviewing the text messages was to determine the efficacy of the character limits, not for determining whether the officers were wasting time. Id. at 2627. The district court concluded that because of the jury's finding, the police chief's search was reasonable. Id. The Ninth Circuit reversed, stating that the scope of the chief's search was unreasonable. Id. This Court granted certiorari and reversed the Ninth Circuit's finding that the employer's search was unreasonable. Id. at 2633. The Court found that the search was reasonable in its inception because it was necessary for a non-investigatory work-related purpose. Id. at 2631. The Court also noted that under the Ortega rule, a search would be reasonable in its inception if it were performed for the investigation of work-related misconduct. Id. at 2630. The Court held that since the search was limited to two months of transcripts out of many other months when officers exceeded their character limit, it was reasonable in its scope.

Id. at 2631. Without deciding whether the plaintiff had a reasonable expectation of privacy, the Court reversed the Ninth Circuit's ruling that the employer police department had violated the plaintiff's Fourth Amendment rights because the questionable search had been reasonable. Id.

Likewise, Povtak's search of Wagner's ePhone was for a non-investigatory work-related purpose. The technician searched Wagner's ePhone was because she had brought it in to be serviced. 185 F. Supp. 3d at 7. The "search" was part of the work-related purpose of ensuring that her phone worked, and it was in no way investigatory; the technician merely noted that applications were installed simply by viewing the phone. Id. at 7-8. This is similar to the employer's search of the paging devices in Quon: both were searches of electronic communication devices afforded to the plaintiffs in their work capacity with no guarantees of privacy, and both searches were performed for a legitimate, work-related purpose. Thus, just as the employer's search in Quon was reasonable at its inception, Povtak's search is also reasonable in the present case.

Additionally, the scope of Povtak's search of Wagner's ePhone was reasonable. There is no evidence in the record that the technician performed any intrusive search of the contents of the phone that was not reasonably related to the purpose of fixing the phone's battery problem. The objective of the search was to find out the problem with the phone, and the measures taken were reasonably related to that objective. Thus, under the standard set forth by this Court in Quon and Ortega, Povtak's search of Wagner's ePhone was reasonable in its scope.

Povtak's search of Wagner's Facepage profile was for the purpose of investigating work-related misconduct. Though this is the alternative ground for reasonability to that found in Quon, the Ortega holding makes it clear that "when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct," the

employer's search will be justified at its inception. Ortega, 480 U.S. at 726. The Court did not and has not since stated whether individualized suspicion is necessary to provide reasonable grounds for employee misconduct, but as long as the search was reasonable in its scope, the search will not be considered unreasonable. Id.

In this case, Povtak had a legitimate interest in finding out the identity of the employee posting blog entries under the name "PugLuv86," because that employee was sharing confidential information about the company that only an employee would know. 185 F. Supp. 3d at 6. Under paragraph 11 of the ECP that all Povtak employees agreed to, communicating Povtak's proprietary or confidential information to anyone outside the company was "strictly prohibited." App. B, 3. Povtak therefore had a legitimate interest in attempting to find the identity of the employee who was relating confidential information on the "Crossing the Wires" blog, since that constituted work-related misconduct. Id. Povtak had reasonable grounds to search Wagner's Facepage profile, even if she had maintained a reasonable expectation of privacy in her profile and had not freely given the company access to her profile. Thus, Povtak's search of Wagner's Facepage profile was reasonable at its inception.

Likewise, Povtak's search of Wagner's Facepage profile was reasonable in its scope. The measures adopted were reasonably related to the objectives of the search because Povtak's objective was to discover the identity of "PugLuv86," and searching its employees' Facepage profiles could reasonably have led to evidence as to that poster's identity. Also, the search was not excessively intrusive in light of the circumstances giving rise to the search. In fact, the search was not intrusive at all because Wagner had agreed to share her personal Facepage profile information with Povtak by being friends with Povtak. Also, in light of Povtak's interest in finding out the identity of "PugLuv86," Povtak's search was a reasonable means of

accomplishing that task. Thus, since Povtak's search of Wagner's Facepage profile was reasonably related to the objective of the search, and the search was not excessively intrusive in light of the circumstances, the search was reasonable in its scope.

C. Povtak's interest in supervising and operating its workplace outweighs any possible privacy rights Wagner may have had in her ePhone or her Facepage profile.

The final step in analyzing the reasonableness of an employer's search is to ensure that the employer's legitimate interest in supervising, controlling, and operating the workplace outweighs the employee's privacy concerns, which must be done on a case-by-case basis.

Ortega, 480 U.S. at 719-20.

Here, Povtak's interest in seeking out secretly insubordinate employees far outweighs any privacy concerns the Wagner may have had regarding her Facepage profile. Keeping confidentiality and ensuring that employees remain loyal to the company is a compelling and important aspect of operating any business. The possibility of a disgruntled employee causing extensive damage to Povtak, who supplies a necessary service to the citizens of Dynes, far outweighs any privacy expectation Wagner may have had in Facepage statements that she expressly allowed Povtak to see by virtue of their being "friends" on the site.

Additionally, Povtak's search of Wagner's ePhone was done for her own benefit. This particular search cannot be properly analyzed by the balancing test because Povtak's actions were for Wagner's own benefit, so it would be as if the court were weighing her need for a working cell phone against her own privacy concerns.

Thus, because Povtak's actions regarding Wagner's ePhone and Facepage profile did not constitute searches and because those actions, even if they were searches, were reasonable, Povtak did not violate Wagner's Fourth Amendment right.

II. Povtak is not bound by the substantive terms of its predecessor’s collective bargaining agreement because it is not an alter ego, it never assumed the CBA, and it is not a “perfect successor.”

The right of a person to contract freely with another is a right that is essential to prosperity within American society, that is indispensable to the growth of business, and that should remain unbridled by restrictive conditions. In suits by labor unions under Section 301 of the Taft-Hartley Act of 1947, 29 U.S.C. § 185 (“the Act”) against a successor employer, the Court has generally protected and defended the successor employer’s fundamental right to freedom of contract. Under the successorship doctrine, when dealing with the employees of the predecessor the Court first asks “what are the legal obligations of the [successor] employer to the employees of the former owner or their representative?” Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249, 262, n. 9 (1974). While the Act allows suits for breaches of contract “between an employer and a labor organization representing employees in an industry affecting commerce,” there must first be a contract to which both parties are bound. 29 U.S.C. § 185. As a general rule, the Court has said a successor employer is not bound by the substantive provisions of a CBA “negotiated by their predecessors but not agreed to or assumed by them.” NLRB v Burns Int’l Sec. Serv., Inc., 406 U.S. 272, 284 (1972). As such, the Court has strictly construed the three limited exceptions to the general rule. These narrow exceptions are (1) the alter ego exception, (2) express or implied acceptance of the CBA by the successor, and (3) the “perfect successor” exception. While these limited exceptions have been expressly recognized by the Court, a small minority of lower courts have misconstrued the Court’s successorship decisions and found that a successor may be bound by some of the substantive terms of a predecessor’s CBA if there is “substantial continuity” between the two companies. See Local 348-S, UFCW, AFL-CIO v. Meridian Management Corp., 583 F.3d 65, 72 (2d. Cir. 2009).

However, this analysis has not been accepted by the Court and should not be followed.

A. Povtak Group is not an “Alter Ego” of its predecessor because Povtak is an independent, separately owned company, not “merely a disguised discontinuance” of Crimaldi.

One narrowly-construed exception to the general rule that successor employers are not bound to the substantive terms of a collective bargaining agreement negotiated by their predecessors is that a successor may be bound by some of the terms of the CBA if the successor is found to be an alter ego of the predecessor. Southward v. S. Cent. Ready Mix Supply Corp., 7 F.3d 487, 496 (6th Cir. 1993). See also Local Union No. 249 v. Bill’s Trucking, Inc., 493 F.2d 956, 962, n. 32 (3d Cir. 1974). Courts label a successor employer as an alter ego if the successor is “merely a disguised continuance” of the predecessor rather than an independent company where there has been a “bona fide discontinuance and a true change of ownership.” Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942). See also NLRB v. Al Bryant, Inc., 711 F.2d 543 (3d Cir. 1983) (describing “alter ego” as the absence of an arm’s length transaction between companies). To determine alter ego status and whether the successor is “merely a disguised continuance,” the National Labor Relations Board (“NLRB”) as well as courts examine whether the two companies have “‘substantially identical’ management, business purpose, operation, equipment, customers and supervision, as well as ownership.” Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. NLRB, 663 F.2d 223, 226-27 (6th Cir. 1980) (quoting Crawford Doors Sales Co., 226 NLRB 1144 (1976)). If the successor is found to be an alter ego of its predecessor, it is then “held to all of the prior employer’s agreements and obligations.” Southward, 7 F.3d at 496. However, if all of these factors are not met and the two companies are not essentially the same company, then alter ego status cannot be attributed to the successor company. See Alkire v. NLRB, 716 F.2d 1014, 1020 (4th Cir. 1983) (discussing whether

“substantially the same entity controls both the old and new employer”).

As was undisputed in the courts below, Povtak is not an alter ego of Crimaldi and cannot be held to the substantive provisions of the CBA to which it was not a party. First, there was simply no transaction or interaction between Crimaldi and Povtak and no evidence that Povtak was merely a “disguised continuance” of its predecessor. Local 12-22, Prof’l Elec. Workers Union v. Povtak Group, 1214 F.3d 1, 8 (13th Cir. 2010). Povtak assumed the obligation to provide public transportation services to Dynes only through the open bidding process, not through any transaction with Crimaldi. Id. at 7. Second, Povtak’s management was nowhere near identical to that of Crimaldi because it consisted entirely of individuals who had had no prior experience with Crimaldi. Id. Third, the operation of the public transportation system substantially changed under Povtak: the environmentally-friendly company changed the bus routes to transport more citizens more efficiently and it revised the electricians’ responsibilities to include work on cleaner electric engines. Povtak Group, 185 F. Supp. 3d at 3. Fourth, the “green” equipment used by Povtak employees is not “substantially identical” to the traditional equipment used by Crimaldi because the bus fleet now consists of “either electric or organic-diesel burning engines, cleaner exhaust systems, and retro purple headlights.” Id. Moreover, Povtak replaced the outdated Crimaldi-issued Ex-Rel phones with iPhones for all of its employees. Id. at 4. Finally, the customer base served by Povtak is substantially different than that served by Crimaldi, given that Povtak now transports many more citizens on different bus routes. Id. at 3.

Therefore, because Povtak had no transaction with Crimaldi and the two companies are not even remotely identical, Povtak cannot be said to have alter ego status. Povtak does not fall within the narrowly-construed alter ego exception to the general rule and thus is not subject to

the terms of Crimaldi's and Local 12-22's CBA.

B. No “clear and convincing evidence” exists that Povtak explicitly or implicitly adopted its predecessor’s CBA.

Another limited exception to the rule that successor employers are not bound by the CBA negotiated by their predecessors is that the successor is bound by the CBA if they explicitly or implicitly adopt it. U.S. Can Co. v. NLRB, 984 F.2d 864, 869 (7th Cir. 1993). See also NLRB v. Burns Int’l Sec. Services, Inc., 406 U.S. 272, 284 (1972). While the Burns Court implied that in many cases, successor employers may find it advantageous to adopt the pre-existing CBA, “Burns [also]. . . counsels [using the] utmost restraint” before finding that a successor company has adopted a predecessor’s CBA. Local 32B-32J Svc. Empl. Int’l Union v. NLRB, 982 F.2d 845, 850 (quoting All State Factors, 205 NLRB 1122, 1127 (1973)). Accordingly, courts have formulated a high standard of proof for the adoption exception, and a plaintiff must provide “clear and convincing evidence of consent” before a successor employer will be found to have adopted the CBA. Id. at 851. For instance, the Second Circuit found that when two successor employers took over management of apartment complexes there was no “clear and convincing evidence of consent” by the successors to adopt the CBA even though they had retained all of the predecessor’s former employees. Id. Therefore, without clear proof that a successor consented to adopt the CBA, a successor employer cannot be held to the terms of a predecessor’s CBA.

In this case, Povtak never explicitly adopted any part of the Union’s CBA. Much less than “clear and convincing evidence,” there is simply no evidence that Povtak stated that it would adopt the provisions of the CBA. Povtak officials explicitly indicated to Union officials that the company was not going to adopt the CBA. Ms. Livramento, Povtak’s Assistant Human Resources Manager, told two Local 12-22 officials that “she doesn’t need a reason to terminate an employee of Povtak” or “need their permission to do her job” after being informed that the

officials were attempting to act under the CBA. App. C, 11. Furthermore, George Daks, General Manager of Povtak's Human Resources Department, told Union officials upon inquiry about Wagner's termination that Povtak was an "at-will company" and that the company was not required to participate in arbitration or deal with Local 12-22. App. C, Ex. A. As these statements indicate, Povtak expressly confirmed that it had not adopted the CBA negotiated by the Union and Crimaldi, and Povtak officials did not assume that they were bound by such agreement. As such, Povtak cannot be found to have adopted the CBA.

The record is also void of any "clear and convincing evidence" that Povtak implicitly adopted the CBA by allegedly following the grievance procedures set forth under the CBA. In contrast to Judge Homfelt's dissent, neither Ms. Livramento nor Povtak "fully abided" by Step 4 of the grievance procedures of the CBA. Povtak Group, 1214 F.3d at 20 (Hornfeldt, J., concurring in part and dissenting in part). First, as found by the court below found, the Union's two agents' meeting with Ms. Livramento in no way shows adoption of the grievance procedures of the CBA by Povtak. Rather than meeting "to attempt resolution of the grievance" as required under Step 4, Ms. Livramento consistently stated that the sole purpose of meeting with the agents was to explain the ECP—nothing else. See App. A, 8; Art. 14.1; App. C, 11. Furthermore, Ms. Livramento is only the Assistant Human Resources Manager at Povtak, not the "Director of Labor Relations" required by the CBA to be at a grievance meeting. Id. Additionally, the meeting took place seven days after Ms. Wagner was discharged rather than within the five days required by the CBA and its "time is of the essence" provision. Id. Povtak also did not notify the Union prior to discharging Ms. Wagner, which is yet another requirement of Step 4. Id. In short, Povtak followed none of the Step 4 requirements of the grievance procedures in the CBA, and there is simply no "clear and convincing evidence" that Ms. Livramento or Povtak acted under

the CBA.

Second, the mere act of an administrative assistant's accepting a document from the two Local 12-22 agents is far from "clear and convincing evidence" that Povtak has implicitly adopted the grievance procedures of the CBA. As found by the Thirteenth Circuit, the entire meeting between Mr. Arko and the Union's agents consisted of the agents' handing Mr. Arko a form and his agreeing to give it to Ms. Livramento. See App. C, 9. Mr. Arko never said that Povtak was acting under Step 4 of the grievance procedures of the CBA. Id. He simply placed the document on Ms. Livramento's desk. Id. This act is not enough to overcome the presumption against a successor's adopting a predecessor's CBA, and it is certainly not "clear and convincing evidence" of adoption.

Therefore, because Povtak did not explicitly or implicitly adopt the grievance provisions of its predecessor's CBA, the company does not fall under the narrowly-construed adoption exception and cannot be bound by the substantive provisions of the CBA.

C. Povtak is not a "perfect successor" of Crimaldi and did not mislead Crimaldi's employees into believing they all would be hired.

Some courts have also found a narrow exception to the general rule that a successor employer is not bound by its predecessor's CBA if the successor employer is a "perfect successor" to its predecessor. See Coastal Int'l Sec. Inc. v. NLRB, 320 Fed. Appx. 276, 284 (5th Cir. 2009) (citing Burns, 406 U.S. at 294-95). A "perfect successor" is one that makes it "perfectly clear" that it intends to retain all of its predecessor's employees and "to assume the terms of the predecessor's CBA." Id. The NLRB has narrowly interpreted this exception to apply only to instances when a successor employer "either actively or, by tacit interference, misle[ads] employees into believing they would all be retained without change in their wages, hours, or conditions of employment." Spruce Up Corp., 209 NLRB 194, 195. If the successor employer

does mislead the employees and “holds itself as if it will adhere to the terms of the previous CBA,” only then may it be held to the terms of the predecessor’s CBA. NLRB v. Houston Bldg. Serv., Inc., 128 F.3d 860, 864 n. 6 (5th Cir. 1997).

For instance, in Coastal, the Fifth Circuit held that a successor employer made it “perfectly clear” it would assume the CBA when it executed a Letter of Understanding between it and the predecessor’s employees that stated, “All other provisions, terms, and conditions of the [CBA] . . . shall continue in full force and effect.” Coastal, 320 Fed. Appx. at 285. However, in Spruce Up, the NLRB found that although a successor employer who was the low-bidder for a barber business expressed a “general willingness” to hire the barbers employed by his predecessor because of changes in pay rates, the Board found that it was not “perfectly clear” that the successor intended to assume the CBA and therefore, could not be bound by the CBA. Spruce Up. Corp. 209 NLRB at 195. See also Int’l Ass’n of Machinists & Aerospace Workers v. NLRB, 595 F.2d 664, 674 (D.C. Cir. 1978) (finding that an employer who indicated a purpose to retain its predecessor’s employees but also proposed substantial reductions in benefits was not a “perfect successor”).

Like the employer in Spruce Up, Povtak is not a “perfect successor” to Crimaldi and cannot be held to the terms of the CBA. First, Povtak did not mislead Crimaldi’s employees into believing that they all would be retained. At a pre-bid conference where Crimaldi employees could learn about possible employment opportunities with the new company, someone asked Ms. Deborah Quine, Povtak’s Chief Financial Officer, how many people Povtak would hire if they won the bid. App. C, 5. Quine told the crowd that the company “would need all the help [it] could get.” Id. This generalized comment is far from being “perfectly clear” that Povtak would retain all of Crimaldi’s employees; it merely shows a “general willingness” to allow Crimaldi

employees to apply for jobs with Crimaldi. It cannot reasonably be interpreted as an indication that everyone at Crimaldi would be retained. Second, Quine’s statement at the pre-bid conference is not a “perfectly clear” statement that Povtak would assume the terms of the CBA or that the conditions of employment for former Crimaldi employees would not change. Unlike the Letter of Understanding presented to the predecessor’s employees in Coastal, which expressly assumed the CBA, Quine’s remark about needing a lot of help is a far cry from holding out to Crimaldi employees that the CBA would be assumed by Povtak. See Coastal, 320 Fed. Appx. at 285. In fact, Quine never mentioned the CBA or any terms of employment in her remarks. See App. C, 6.

Povtak did not make it “perfectly clear” that it intended to retain all of Crimaldi’s employees or assume the CBA, and it did not mislead Crimaldi employees into thinking that they would be retained. Therefore, Povtak does not fall within the “perfect successor” exception, and cannot be held to the substantive terms of its predecessor’s CBA.

D. Under the Court’s Wiley-Burns-Howard Johnson trilogy, Povtak is not bound by the CBA negotiated by its predecessor.

Because the above narrowly-construed exceptions are the only ones expressly recognized by the Court and because Povtak does not fall under any of them, the majority of courts would end their analysis at this point. The majority follows the general rule that “an unconsenting successor employer cannot be bound by the substantive terms of a CBA negotiated by its predecessor” absent the three exceptions discussed above. Ameristeel Corp. v. Int’l Bhd. of Teamsters, 267 F.3d 264, 273 (3d Cir. 2001). However, a minority of lower courts have dove into the “treacherous waters of the Supreme Court’s labor law successorship doctrine” and drastically stretched the language to find a duty of a successor employer to arbitrate under the CBA when there is “substantial continuity” between the two companies. Id. at 267. See

Meridian, 583 F.3d at 72. However, this minority view of the Court’s decisions in Wiley, Burns, and Howard Johnson misinterprets these decisions and conflicts with the clear rule stated by the Court. Nevertheless, under either interpretation Povtak is not bound by the substantive provisions of Crimaldi’s CBA. Under the majority view, Povtak did not consent to the CBA and cannot be bound by its terms. However, even under the misinterpreted minority view, there is no “substantial continuity” between the two companies, and so Povtak cannot be bound to the CBA.

1. Povtak is not bound by Crimaldi’s CBA because no “substantial continuity” exception is recognized the Court.

The vast majority of courts follow the Court’s mandate in successorship cases that successor employers “are not bound by the substantive provisions of a [CBA] negotiated by their predecessors but not agreed to or assumed by them.” Burns, 406 U.S. at 284. Furthermore, the Court has said obligations under the previous CBA do not arise from “the mere fact that an employer is doing the same work in the same place with the same employees as his predecessor.” Id. at 291.

In Burns, Burns International Security Services outbid Wackenhut and took over plant protection services for Lockheed Aircraft Service. Id. at 285. Even though Burns hired a substantial number of Wackenhut’s former employees, the Court protected “the bargaining freedom of employers” and held that Burns was not bound by the CBA that the employees had previously negotiated with Wackenhut. Id. at 284-87. In fact, in Howard Johnson, where a family sold a restaurant and motor lodge to the Howard Johnson Company, the Court strengthened and reaffirmed the reasoning of Burns and found that Howard Johnson had no duty to arbitrate under the CBA negotiated by its predecessor. Ameristeel, 267 F.3d at 272.

A small minority of courts have reasoned that a successor employer may be bound by some of the provisions of a predecessor’s CBA if there is “substantial continuity” between the

successor and predecessor by relying heavily on the Court’s decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). Meridian, 583 F.3d at 72; Ameristeel, 267 F.3d at 285 (Becker, C.J., dissenting). However, this reasoning is flawed for a number of reasons. First, the decision in Wiley was limited to its facts and did “not hold that in every case in which the ownership or corporate structure changed the duty to arbitrate [under the CBA] survives.” Wiley, 376 U.S. at 548. In fact, the Court in Howard Johnson downplayed the significance of Wiley and warned against “an unwarranted extension of Wiley beyond any factual context it may have contemplated.” Howard Johnson, 417 U.S. at 257. Wiley dealt with a merger between Interscience Publishers and John Wiley & Sons where there was a “wholesale transfer” of all the Interscience employees. Id. Furthermore, Wiley was decided “against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation.” Burns, 406 U.S. at 286. Thus, because of the narrow holding and the background of the state law rule, Wiley’s analysis does not lend itself to such a far-reaching interpretation by lower courts. Second, while “substantial continuity” may be a “necessary” condition for the imposition of some of the substantive terms of a CBA on a successor, it is by no means a “sufficient” condition. Ameristeel, 267 F.3d at 269. Burns made clear that “substantial continuity” between two companies “is a wholly insufficient basis for implying either in fact or in law that [the successor employer] had agreed or must be held to have agreed to honor [the predecessor employer’s] collective-bargaining contract.” Burns, 406 U.S. at 206. The Court’s holding in Howard Johnson reaffirms this proposition by pointing out that on the facts of the case, “not even Wiley (and certainly not Burns) could justify forcing Howard Johnson to submit to arbitration against its will.” Id. at 273. In other words, Howard Johnson does nothing to disturb the general rule promulgated by Burns; it merely notes that “substantial

continuity” is one factor to examine when deciding the obligations of a successor to a predecessor’s employees. *Id.* See also Southward, 7 F.3d at 493 (finding that if there is a “substantial continuation,” but the successor is not an alter ego or has assumed the contract, then they cannot be held to the substantive provisions of the CBA).

The analysis put forth by the minority of courts is unwarranted and does not comport with the Court’s decisions. The general rule from Burns that has been reaffirmed by the majority of courts applies, and thus, Povtak is not bound by the terms of the CBA.

2. Even under the minority’s misconstrued “substantial continuity” exception, Povtak is not bound by the CBA of its predecessor because no “substantial continuity” exists.

Even analyzed under the flawed reasoning of the minority, Povtak still cannot be bound by the substantive provisions of its predecessor’s CBA. The minority uses the Wiley-Burns-Howard Johnson trilogy as a type of “sliding scale” that compares the facts of a particular successorship case to each of the Supreme Court cases to determine the burdens that should be imposed on the successor. Ameristeel, 267 F.3d at 285 (Becker, C.J., dissenting). For a successor to be bound by the provisions of a previous CBA, a successor company must be closest in comparison to the successor in Wiley where the Court found “substantial continuity” between the successor and its predecessor. *Id.*; Meridian, 583 F.3d at 74. “Substantial continuity” exists, according to these courts, by examining the factors promulgated by the Court in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), even though the case only dealt with a successor’s duty to bargain with a union. Meridian, 583 F.3d at 74. The minority courts examine: (1) “whether the business of both employers is essentially the same”; (2) “whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors”; and (3) “whether the new entity has the same production process, produces the

same products, and basically has the same body of customers.” Fall River, 482 U.S. at 43. These factors are viewed from the point of view of the employees who have been retained, and the courts ask if they “will understandably view their job situations as essentially unaltered.” Id. (citing Golden State Bottling Co. v. NLRB, 414 U.S. 168, 181 (1973)). If any of these Fall River factors are not met, then the minority will not hold a successor to any of the substantive provisions of the CBA.

The first Fall River factor is “whether the business of both employers is essentially the same.” Id. From the point of view of the employees retained by Povtak, the new business is not “essentially” the same as that of Crimaldi. Povtak, as an independent private company, has revolutionized the transportation services in Dynes by offering “green transportation” and using innovative techniques “to transport more citizens while traveling shorter distances.” Povtak Group, 185 F. Supp. 3d at 3. In fact, Povtak abandoned the traditional services offered by its predecessor and obtained federal funding to help implement its new environmentally-friendly vision. Id. Povtak has also launched a Facepage profile to modernize the company and to allow discussion of “green transportation” and “green jobs.” Id. at 4. Furthermore, while the court below relies on Southward to find that the business is the same, that case does not recognize “substantial continuity” as an exception to the general rule and actually finds that a successor employer is not bound by the substantive terms of the predecessor’s CBA. Southward, 7 F.3d at 495. Therefore, Povtak’s business operation, viewed through the eyes of its employees, is not essentially the same as that of Crimaldi.

The second Fall River factor is “whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors.” Fall River, 482 U.S. at 43. Unlike in Wiley, in this case, there was not a wholesale transfer of the predecessor’s

employees to the successor employer. In fact, only 212 out of the 342 former Crimaldi employees obtained new jobs with Povtak. Furthermore, once these employees began working at Povtak, their job descriptions changed substantially. Povtak changed the bus operation by offering “green transportation” and retrofitting the buses with “either electric or organic-diesel burning engines, cleaner exhaust systems, and retro purple headlights.” Povtak Group, 185 F. Supp. 3d at 3. Also, the responsibilities of electricians expanded under Povtak, and the company required that the electricians attend training courses to learn to work on the new electrical engines. Id. Povtak did not intend to take advantage of its predecessor’s work force, as the court below argued, when it had to expend its own resources to completely train the electricians it hired. Additionally, all Povtak employees were given new iPhones and encouraged to post on Povtak’s Facepage profile. Id. None of the former Crimaldi employees—especially not the electricians—could reasonably view their jobs as the same under Povtak. Therefore, the second Fall River factor is not met, and there is no “substantial continuity” between the two companies.

The third and final factor is “whether the new entity has the same production process, produces the same products, and basically has the same body of customers.” Fall River, 482 U.S. at 43. In this case, Povtak both offers a different product and attracts a different body of customers than Crimaldi. Instead of offering traditional public transportation using buses with gas-powered engines as Crimaldi did, Povtak offers the citizens of Dynes “green transportation” on environmentally-friendly electric or organic-diesel burning buses. Povtak Group, 185 F. Supp. 3d at 3. In fact, Povtak set up a Facepage to allow people to learn about its “green jobs” and how environmentally sound the company was. Id. Povtak also offers shorter and different bus routes than Crimaldi. Id. at 4. The shorter routes allow more members of the public to use the buses. Id. Furthermore, by holding itself out as a “green employer” Povtak has also attracted

a customer base that is more conscious of the environment and ride the buses in order to be more “green.” *Id.* at 4. Because the product offered by Povtak is different and the customer base has changed, no “substantial continuity” exists between them and Crimaldi and cannot be held to the substantive provisions of the CBA.

Therefore, because Povtak is not an alter ego of its predecessor, did not adopt the CBA, is not a “perfect successor,” and lacks “substantial continuity” with its predecessor, it cannot be bound by its predecessor’s CBA.

CONCLUSION

For the foregoing reasons, this Court should reinstate the district court’s grant of Povtak’s motion for judgment as a matter of law and reverse the Thirteenth Circuit’s granting of summary judgment to respondent, Local 12-22.

Respectfully Submitted,

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