
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 – 12,

Respondents.

On Writ of Certiorari to the
Supreme Court of the United States

BRIEF FOR THE PETITIONER

Team 9
Counsel for the Petitioner

QUESTIONS PRESENTED FOR REVIEW

- I. Whether an employee has a reasonable expectation of privacy in statements made on a social networking site using a company-issued communications device, where the employee knowingly and voluntarily elected to allow the company to access and view her site and where the company explicitly informed all employees that they have no expectation of privacy in electronic communications made on company-issued devices.

- II. Whether the Thirteenth Circuit erred when it bound a successor employer to the terms of its predecessor's collective bargaining agreement, when this Court's precedent and the decisions made by the vast majority of the Circuits hold that, where a successor is not an "alter ego" or "perfect successor" of its predecessor, and has not implicitly or explicitly adopted the terms of that agreement, it cannot be bound by its substantive provisions.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is published at *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 1214 F.3d 1 (13th Cir. 2010). The opinion of the United States District Court for the Western District of Froessel is published at *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 231 F.Supp.3d 20 (W.D. Frl. 2009). The Memorandum and Order of the United States District Court for the Western District of Froessel is published at *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 185 F.Supp.3d 1 (W.D. 2009).

STATEMENT OF JURISDICTION

The formal requirement for a statement of jurisdiction is waived pursuant Rule II(5)(c) of the 2011 Robert F. Wagner National Labor and Employment Law Moot Court Competition.

STATUTORY PROVISIONS

The adjudication of this case involves the application of the Fourth Amendment to the United States Constitution. The Fourth Amendment to the United States Constitution: 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. U.S. CONST. amend. IV.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

The Petitioner, Povtak Group (“Povtak”), has provided transportation services for the City of Dynes (“Dynes”) in the state of Froessel since January 2008. *Local 12-22, Professional*

Electrical Workers Union and Roberta Wagner v. Povtak Group, 185 F.Supp.3d 1, 2 (W.D. 2009). Povtak was the successful bidder for a contract to manage Dynes' public transportation system, after the Crimaldi Corporation ("Crimaldi"), which had been responsible for Dynes' transportation services for over fifty years, became embroiled in a scandal stemming from the indictments of its officers under RICO predicates associated with organized crime. *Id.*

Before losing its contract with Dynes, Crimaldi had employed approximately 342 employees, sixteen of whom worked as electrical workers. *Id.* at 3. Professional Electrical Workers Union, Local 12-22 ("Local 12-22") represented Crimaldi's electrical workers since 1957. (R. at 2.) Crimaldi signed a collective bargaining agreement ("CBA") with Local 12-22 in September 2005, less than a year before Crimaldi's officers were indicted. *Id.* at 2; *See* Appendix A: Collective Bargaining Agreement between Local 12-22 and Crimaldi, at 1. The CBA contains a traditional "just cause for discharge" provision, as well as a grievance/arbitration provision, and is set to expire on August 31, 2012. *Id.* at 3; *See* Appendix A: Collective Bargaining Agreement between Local 12-22 and Crimaldi; Art. 30. As the transportation provider for Dynes, Crimaldi had a fleet of approximately forty buses, all of which harnessed traditional internal combustion engines. *Id.* at 2.

As a result of the indictments, Dynes officials notified Crimaldi that it would not be renewing the transportation contract and that the city would be accepting bids prior to the transportation contract's expiration date of February 1, 2008. *Id.* After Dynes determined that it was going to discontinue using Crimaldi to provide its transportation services, Dynes officials held a pre-bid conference to allow Crimaldi employees to ask questions regarding their future employment at the City terminal. *Id.* Among those present at the pre-bid conference were the Chief Financial Officer of Povtak, Deborah Quine ("Quine"), Crimaldi employees and members

of Local 12-22. *Id.* During the conference, an attendee asked Quine, if any Crimaldi employees would be hired by Povtak. *Id.* Quine responded by saying that, “[Povtak] would need all the help [it] can get.” *Id.* No other questions were asked of Quine regarding future employment, and there was no further discussion of what implications the expiration of Dynes’ contract with Crimaldi would have on the employees. *Id.* at 1-9.

As the lowest bidder for the transportation contract, Povtak was awarded the contract with Dynes in early January 2008. *Id.* at 2. Povtak took over the Dynes City Terminal and assumed Crimaldi’s transportation routes. *Id.* at 3. The contract between Povtak and Dynes has the option to be automatically renewed, but is set to expire on January 30, 2013. *Id.* at 2. Of the 342 employees that worked for Crimaldi, Povtak decided to hire 212 of them, including the sixteen electrical workers who are represented by Local 12-22. *Id.*

Povtak immediately made substantial changes to its employee working conditions and its production process. *Id.* at 3. First, Povtak changed Crimaldi’s management structure by hiring individuals to work as managers who had no past association with Crimaldi. *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 1214 F.3d 1, 7 (13th Cir. 2010). Second, Povtak made a major overhaul of Crimaldi’s former bus fleet, refitting the traditional internal combustion engines with electric and organic-diesel burning engines. *Wagner*, 185 F.Supp.3d at 3. Third, Povtak installed cleaner exhaust systems on the buses. *Id.* Fourth, Povtak replaced the old headlights with more environmentally-friendly retro purple headlights. *Id.* Additionally, Povtak made significant changes to the bus routes in order to provide transportation to more citizens while traveling shorter distances. *Id.*

The many changes that Povtak implemented in order to make its services more environmentally sound required it to provide additional training for the former Crimaldi

electricians to teach them how to work on the retrofitted buses. *Id.* In addition, because of the many changes implemented by Povtak, the electrical workers' responsibilities were somewhat expanded. *Id.*

In recognition of the innovative changes that Povtak was making to Dynes' transportation system, Povtak was awarded funds from both the United States Department of Transportation and the United States Environmental Protection Agency. *Id.* Povtak was granted the funds to further promote its operation of "green transportation" and the creation and maintenance of "green jobs." *Id.*

In addition to the changes made to the process of providing transportation services and to the electrical workers' responsibilities, Povtak also issued its Electronic Communications Policy ("ECP"). *Id.*; See Appendix B: Electronic Communications Policy. Povtak's ECP provisions were similar to those contained in Crimaldi's Employee Handbook; however Crimaldi's communication policy was significantly outdated. *Wagner*, 185 F.Supp.3d at 4. Crimaldi's communication policy was instituted in 1998, and was never updated to encompass new technologies, such as mobile devices, thus, it only expressly pertained to employees' use of company computers. *Id.* at 3. Pursuant to Crimaldi's communication policy, all emails and websites accessed on Crimaldi computers by employees were stored on the company's hard drive and were retained on daily and weekly data backups. *Id.* at 4. Though some of its provisions were akin to those in Crimaldi's communication policy, Povtak's ECP was updated to encompass the use of computers, printers, networks, hardware, software, e-mail, Internet access, and voicemail. *Id.* at 3. Povtak's ECP restricted what employees could do with Povtak-issued technology. See Appendix B: Electronic Communications Policy. The ECP prohibited employees from using Povtak's technology to make or distribute offensive messages, to access

any area of the Internet that would be offensive to others, and for commercial purposes unrelated to Povtak. *Id.* at Sections 2, 3, 4 and 6. The ECP further forbade employees from installing unauthorized software or other systems onto the information systems. *Id.* at Section 9. The ECP also dictated the parameters for employee use of ePhones, which Povtak issued to its employees when it was awarded the City contract. *Wagner*, 185 F.Supp.3d at 4. Violations of the ECP could result in the loss of an employee's network access and further discipline including discharge. *See* Appendix B: Electronic Communications Policy.

In February of 2008, Povtak required all employees to sign a User Acknowledgement Form ("UAF") that confirmed that they had read and understood the ECP. *Wagner*, 185 F.Supp.3d at 4; *See* Appendix B: Electronic Communications Policy, User Acknowledgement Form. Respondent, Roberta Wagner, who worked as an electrical engineer in the rail division for Crimaldi since 2004, reviewed the concise, three page ECP and signed the attached UAF shortly after she received it on February 9, 2008. *Wagner*, 185 F.Supp.3d at 4. Part of the UAF that Wagner signed stated that by signing the document, she acknowledged that she would have no expectation of privacy with regard to any use of Povtak's electronic systems. *See* Appendix B: Electronic Communications Policy, User Acknowledgement Form.

After acknowledging that she understood the terms and conditions of the ECP, Wagner received her Povtak-issued ePhone. *Wagner*, 185 F.Supp.3d at 5. Wagner immediately downloaded four applications¹ onto her phone, despite the fact that the ECP, for which Wagner had just signed a user acknowledgement form, explicitly prohibited the installation of unauthorized software on Povtak's computer network. *Id.*; *See* Appendix B: Electronic Communications Policy, Section 9. Of the four applications that Wagner downloaded in

¹ An application is a software program that can be downloaded directly to the ePhone. An application can provide a number of functions, depending on the type of program.

violation of the ECP, two were work-related and two were not. *Wagner*, 185 F.Supp.3d at 5.

One of the work-related applications linked Wagner's iPhone to the technical support office of the manufacturer of the tram-cars used by Povtak, and the other work-related application linked Wagner to her work email. *Id.* The non-work-related applications linked to Facepage and to an electrician blog called "Crossing the Wires." *Id.* The blog can be accessed by any internet user, and allows for user comments to be posted on its site. *Id.* Wagner showed the applications to her supervisor in the light rail division, Shane Leibson ("Leibson"), while discussing the new iPhones. *Id.* In addition to using her iPhone for work, Wagner would use her iPhone for non-work related activities during working hours. *Id.* at 4.

In early February 2008, Povtak, like many other corporations, launched a Facepage profile ("profile"). *Id.* Povtak encouraged, but did not require, its employees to "become friends with"² its profile, and recommended that employees "post"³ positive stories about their "green jobs" and Povtak's "green projects" on Povtak's profile. *Id.* Wagner, who had a Facepage profile since 2006, became friends with Povtak's profile shortly after its creation. *Id.* Although Wagner was not friends with any of her supervisors' Facepage profiles, she was a frequent commenter on her "friend" Povtak's profile, and posted positive messages about her experiences at Povtak. *Id.* Wagner often utilized the unauthorized applications that she had downloaded

² Once a party is friends with another party's profile, the parties can view each others' profiles subject to certain privacy restrictions set by the creator of the profile. The privacy settings available to Facepage users include: 1) "Everyone" – allows all users on Facepage to view the profile; 2) "Friends" – only individuals accepted as a friend by the creator can view the creator's profile; 3) "Only Me" – only the profile creator can view the information of the creator's profile. Povtak's privacy settings were set to "Everyone," which allows all users on Facepage to see its profile, even those users who are not friends with Povtak. Wagner's privacy settings were set to "Friends," which allows only users who were friends with Wagner to view her profile.

³ A "post" is a message which appears on a Facepage profile. Posts can be made on Povtak's profile by any person who friends Povtak and posts appearing on Povtak's profile can be viewed by any Facepage user.

onto the Povtak-issued ePhone to post comments on Facepage during working hours, when she was supposed to be performing her duties as an electrical worker, against the policies strictly outlined in the ECP. *Id.*

Wagner began to use her Facepage profile to voice her discontent with Povtak, all while continuing to post positive comments on her “friend” Povtak’s profile. *Id.* at 5. On February 27, 2008, Wagner was given a lateral transfer to Povtak’s bus division. *Id.* Wagner’s salary and fringe benefits remained the same and her duties remained largely unchanged. *Id.* Unhappy about the transfer, Wagner expressed her frustration on the internet by posting on Facepage that she had “Just been transferred to the ghetto.” *Id.* Several of Wagner’s Facepage friends responded to her posting, and one cautioned her to be careful about what she posted on Facepage. *Id.*

During working and non-working hours, Wagner read stories and comments on “Crossing the Wires” which criticized numerous Povtak projects as lacking “green-ness.” *Id.* Wagner herself never made any comments or links on the blog, yet at work she used her ePhone to post links to the blog on her Facepage profile. *Id.* Wagner posted a link on her Facepage profile to a “Crossing the Wires” blog entry that was extremely critical of Povtak’s green initiatives. *Id.* The blog named several Povtak supervisors, accused them of being incompetent, and claimed that their ineptness was the root cause of the failing green initiatives at Povtak. *Id.* at 6. The post was made under the username “PugLuv86.” *Id.*

The blog entry from “Crossing the Wires” that Wagner posted on her Facepage profile was later published in the *Lerner Gazette*, a local newspaper in Dynes. *Id.* The article was extremely scathing of Povtak and contained many intimate details concerning the inner workings of Povtak. *Id.* The details contained in the article led many at Povtak to believe that the poster,

“PugLuv86,” was a disgruntled Povtak employee. *Id.* The supervisors named in the article began investigating its allegations, and also sought to ascertain whether “PugLuv86” was a Povtak employee. *Id.* As part of the investigation, Povtak’s corporate headquarters issued a memorandum to all shift supervisors to review their employees’ comments on Povtak’s Facepage profile. *Id.*

Around the same time of the article’s publication, Wagner underwent a routine employee performance review by Povtak’s Human Resources Department (“HR”). *Id.* As part of every employee review, an audit was performed on the employee’s comments on Povtak’s Facepage profile, as Povtak believed that their employees’ comments were indicative of their feelings towards the company. *Id.* The reviews also required supervisors to submit evaluations. *Id.* Leibson, Wagner’s former shift supervisor, submitted positive reviews and noted that Wagner had informed him about the four applications that she downloaded onto her ePhone. *Id.* It was Leibson’s opinion that the applications improved her work performance, and Leibson stated that he encouraged other employees to download the same applications. *Id.* at 7. Wagner’s new supervisor, Frank Milmine (“Milmine”) also submitted information for Wagner’s evaluation. *Id.* Milmine included several screen shots of Wagner’s Facepage profile that contained comments criticizing the exact same green programs that she was praising on Povtak’s Facepage profile. *Id.* The screen shots also included other negative comments that Wagner posted about Povtak and her work environment. *Id.* As a supervisor, Milmine could log into Povtak’s Facepage profile, and because Wagner had become friends with Povtak’s profile, he easily could view Wagner’s profile. *Id.* It is unclear whether Milmine viewed Wagner’s Facepage profile as part of her performance review or as part of the investigation into the identity of “PugLuv86.” *Id.*

Wagner received a “B” on her overall performance review.⁴ *Id.* HR placed the screen shots from Wagner’s Facepage profile in her official personnel file. *Id.* HR did not notify Wagner or Local 12-22 that the screen shots were added to her personnel file, and it is not certain whether HR continued to monitor Wagner’s profile or used the screen shots purely for performance review purposes and then placed them in her personnel file. *Id.*

Two days after her performance evaluation, Wagner brought her ePhone into Povtak’s Technical Support Office because it was dropping calls. *Id.* While inspecting the ePhone, a support technician noticed that Wagner had installed four applications on the ePhone. *Id.* The technician filed a report with his supervisor regarding the battery problems as well as the presence of the four applications that Wagner had downloaded onto her ePhone. *Id.* at 8. The technician’s supervisor reviewed the report and made additional comments about a possible connection between the “Crossing the Wires” application and the defamatory article published in the *Lerner Gazette*. *Id.* Wagner was terminated the following day for violating the ECP. *Id.*

Subsequent to Wagner’s termination, Local 12-22 business agents Rahim Roth (“Roth”) and Stefan Blancato (“Blancato”) submitted a grievance to Povtak’s HR Office. *Id.* at 8; *See* Appendix C, Deposition of Christian Arko, at 1-14. At the office, Roth and Blancato spoke with HR secretary Christian Arko (“Arko”) who told them that Assistant HR Manager Audrey Livramento (“Livramento”) was unavailable. *Id.* The agents handed Arko a grievance pursuant to Article 14.1, Step 4 of the CBA protesting Wagner’s discharge “without just cause in violation of Article 7.1 of the CBA.” *Id.* ; *See* Appendix A: Professional Electrical Workers Union, Local

⁴ Employee performances are rated on an ABC scale. “A” recognizes an employee who is outstanding, shows motivation, completes tasks before deadlines, and is pro-active. “B” is satisfactory, and applies to an employee who does not demonstrate motivation, but does the job. “C” represents a poor performance, and an employee who lacks motivation and fails to complete tasks in a timely manner.

12-22, Collective Bargaining Agreement, Articles 7.1, 14.1. The grievance demanded that Wagner be reinstated with full back-pay, benefits, and seniority rights restored as a remedy, and for her to be made whole in all other respects. *Wagner*, 185 F.Supp.3d at 8.

Arko informed Livramento of the grievance, and she called Blancato to schedule a meeting for the following Monday, March 10, 2008. *Id.*; *See* Appendix C, Deposition of Christian Arko, at 1-14. Livramento began the March 10th meeting by stating to Roth and Blancato that the sole purpose of the meeting was to explain the ECP under which Wagner was terminated. *Id.* Livramento stated that Wagner was terminated for violating the ECP. *Id.* Livid with Livramento's refusal to discuss the matter further, Blancato and Roth retorted that HR should have notified them before Wagner was terminated, pursuant to Article 14.1, Step 4 of the CBA. *Id.*; Appendix A: Professional Electrical Workers Union, Local 12-22, Collective Bargaining Agreement, Articles 14.1. Livramento replied, "We don't even need a reason," and "you are out of line." *Wagner*, 185 F.Supp.3d at 8; *See* Appendix C, Deposition of Christian Arko, at 1-14. Roth then informed Livramento to expect a formal letter from Local 12-22 as well as a possible unfair labor practice charge. *Id.* Livramento responded, "I'm sure you will pursue both, and remember, my door's always open to you," and proceeded to shut the door. *Id.*

On Wednesday, March 12th, Roth emailed George Daks, the General Manager of HR at Povtak, with a request to meet to discuss Wagner's termination and attached the grievance to the email. 185 F.Supp.3d at 9; *See* Appendix C, Arko Deposition, Exhibit. Roth sent a follow-up email, stating that Local 12-22 was appealing Wagner's termination under Article 14.2 of the CBA. *Id.* Daks promptly responded via email that Povtak would not participate in the arbitration. *Id.*

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This suit was brought by the Respondents Roberta Wagner, a former employee of the Petitioner, and the Professional Electrical Workers Union, Local 12-22 (“Local 12-22”), the union that represents Wagner, against the Petitioner Povtak Group (“Povtak”). *Wagner*, 185 F.Supp.3d at 1. Respondent Wagner alleged that Povtak engaged in illegal employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e *et. seq.*, and that Povtak had also violated her Fourth Amendment right to be free from unreasonable search and seizures. *Id.* Respondent Local 12-22 brought suit under Section 301 of the Taft-Hartley Act of 1947, 29 U.S.C. § 185, to compel Povtak to comply with the terms of the collective bargaining agreement entered into by Local 12-22 with Povtak’s predecessor, the Crimaldi Corporation (“Crimaldi”). *Id.*

The United States District Court for the Western District of Froessel dismissed Wagner’s Title VII action, and granted summary judgment to Povtak with regard to the issue of the collective bargaining agreement, and denied Local 12-22’s counter-motion for summary judgment. *Id.* The District Court also denied Povtak’s summary judgment motion for Wagner’s Fourth Amendment violation claim. *Id.*

Wagner’s claim that Povtak violated her Fourth Amendment rights was then tried before a jury. *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 231 F.Supp.3d 20, 21 (W.D. FrI. 2009). During the trial, Povtak moved for a judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure, arguing that Wagner had failed to meet the burden of proof. *Id.* The court reserved its decision on Povtak’s motion, and the jury found in Wagner’s favor for her Fourth Amendment violation claim. *Id.*

Povtak renewed its Rule 50 motion, and challenged the jury’s verdict and the award of damages to Wagner. *Id.* Once again, the court reserved its decision. *Id.* The court eventually issued an order in response to Povtak’s Rule 50 motion, and granted Povtak’s motion for a judgment as a matter of law. *Id.* at 22.

Wagner and Local 12-22 appealed to the United States Court of Appeals for the Thirteenth Circuit, which reversed the judgment of the District Court. *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 1214 F.3d 1, 15 (13th Cir. 2010). This appeal follows the Thirteenth Circuit Court’s decision.

SUMMARY OF THE ARGUMENT

There are two issues presented before this Court. Petitioner, Povtak, respectfully requests this Court reverse the judgment of the Thirteenth Circuit on the first issue presented because Povtak did not violate Respondent, Wagner’s, Fourth Amendment privacy rights. The lower court erred when it neglected to articulate a clear framework to analyze Fourth Amendment privacy claims against public employers. Furthermore, application of an appropriate standard compels the conclusion that any privacy expectation asserted by Wagner in statements on a social networking site is unreasonable. Even if this Court finds that a reasonable expectation of privacy exists for statements made on a social networking site, the resulting searches of Respondent’s communications device and social networking profile were reasonable and thus did not violate the Fourth Amendment.

Second, Povtak requests that this Court reverse the judgment of the Thirteenth Circuit reversing the District Court’s decision that Povtak is not bound by the substantive terms contained in Crimaldi’s CBA with Local 12-22. This Court’s precedent establishes that, where, as is the case here, a successor is not an “alter ego” or “perfect successor” of its predecessor, and

has not implicitly or explicitly adopted the terms of that agreement, it cannot be bound by it. Even in situations where there is substantial continuity in the workforce and in the work operations, as is the case here, this Court has refused to bind a successor to its predecessor's CBA. If this Court were to affirm the Thirteenth Circuit's decision and adopt its "Sliding Scale" test, it would go against its own precedent, as well as almost all of the Circuit Court's Decisions. The adoption by this court of the "Sliding Scale" test would further inhibit the free flow of capital, something that this Court has expressly sought to prevent.

ARGUMENT

I. THE THIRTEENTH CIRCUIT ERRED WHEN IT FOUND THAT WAGNER'S PRIVACY RIGHTS WERE VIOLATED WHEN POVTAKE SEARCHED HER FACEPAGE PROFILE BECAUSE WAGNER HAS NO LEGITIMATE EXPECTATION OF PRIVACY IN STATEMENTS MADE USING A COMPANY-ISSUED COMMUNICATIONS DEVICE ON A SOCIAL NETWORKING SITE THAT SHE KNOWINGLY AND VOLUNTARILY ALLOWED THE COMPANY TO ACCESS.

This Court has consistently held that "what a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967); *see also California v. Greenwood*, 486 U.S. 35, 39 (1988); *United States v. Miller*, 425 U.S. 435, 443 (1976). It is axiomatic that a person loses any reasonable expectation of privacy in information that they willingly and openly share with a third-party. This is exactly what Respondent Wagner did here when she knowingly and voluntarily allowed Povtak to access and view her social networking profile and postings she had made thereon.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." U.S. CONST. amend. IV. This protection applies to searches conducted by the government, and Supreme Court precedent has extended this protection to instances when the government acts in its

capacity as an employer. *O'Connor v. Ortega*, 480 U.S. 709 at 715, 731 (1987) (plurality) (Scalia, J., concurring in judgment) (hereinafter *Ortega*); *See also Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); (holding that the Fourth Amendment protects government employees from unreasonable searches and seizures). Private actors can also be responsible for violations of an employee's constitutional rights if their conduct is so closely associated to the government such that they can be regarded as government agents. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392 (1971) (creating judicial remedy to employees for constitutional violations by government actors). Povtak concedes that it is a government actor and is thus subject to the provisions of the Fourth Amendment.

It is well settled that the Fourth Amendment is only implicated if an individual can claim that the government action at issue invaded a reasonable or legitimate expectation of privacy. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). A determination of reasonableness asks whether an individual, by his conduct, has exhibited a subjective expectation of privacy and whether society is prepared to recognize that expectation as legitimate. *Id.* at 740, citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring). A reasonableness standard also applies to the search itself. *Ortega*, 480 U.S. at 719. Though the Fourth Amendment generally requires issuance of search warrants based upon probable cause, this Court has held that, in certain circumstances, "special needs beyond the normal need for law enforcement" render the warrant and probable-cause requirement impracticable. *Id.* at 720, 735 (plurality opinion), (Scalia, J., concurring in judgment); *Von Raab*, 489 U.S. at 666-67. One such well-delineated exception to the general rule is justified by the "special needs" of the workplace. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (citing *Ortega*, 480 U.S. at 725, 732 (plurality opinion), (Scalia, J., concurring in judgment)).

Recognizing this traditional Fourth Amendment analysis, this Court has attempted to articulate a standard by which to analyze Fourth Amendment claims against government employers. *See Ortega*, 480 U.S. at 709-28. *In Ortega*, a majority of the Justices held that the public employer did not violate the Fourth Amendment when it searched a public employee's office, desk, and drawers; however, the Court remained divided on the proper standard that should apply.⁵ *Id.*

Twenty-three years later, this Court re-visited the question of an employee's expectation of privacy, this time in the context of text messages. *See Quon*, 130 S. Ct. at 2628. This Court again held that the public employee's Fourth Amendment rights were not violated, but unfortunately neglected to resolve the disagreement among the Justices in *Ortega* over the proper standard to apply. *Id.* This Court assumed *arguendo* that an employee has a reasonable expectation of privacy in text messages sent on a city-provided pager.⁶ *Id.* at 2629-30.

Using the standard set forth in Justice O'Connor's plurality opinion in *Ortega*, as well as lower court decisions concerning the scope of an employee's privacy protection in cyberspace, this Court should hold that Wagner's Fourth Amendment privacy rights were not violated when Povtak searched her Facepage profile and ePhone.

A. This Court Should Adopt Justice O'Connor's Plurality Opinion in *Ortega* as the Standard By Which to Analyze a Public Employee's Fourth Amendment Privacy Rights in Cyberspace

The *Quon* Court was hesitant to issue a decision that would have Fourth Amendment implications regarding communications made on government-owned electronic equipment before "[technology's] role in society has become clear." *Id.* at 2629. Though this Court's

⁵ Justice O'Connor wrote for the four-Justice plurality; Justice Scalia wrote a concurring opinion; and Justice Blackmun wrote for the four dissenting Justices. *Ortega*, 480 U.S. at 729-748.

⁶ Justice Stevens concurred in the opinion but wrote separately advocating that the approach suggested in Justice Blackmun's dissent in *Ortega* be re-examined. *Id.* at 2634 (Stevens, J., concurring).

appraisal of the effects of a “far-reaching” standard is prudent, its articulation of “changes in the dynamics of communication and technology” counters its decision not to adopt a standard. *Id.*

In this ever-changing technological world, it is important, if not imperative, to articulate a standard to assess an employee’s expectation of privacy in cyberspace. Pen registers, phone booths, and stationary desktop computers are rapidly being supplanted by smart phones, social networking sites, text messages, and personal laptop computers. As a result, the former established distinctions between “workplace” and “private” spheres blur as technology’s pervasiveness in everyday life increases. As such, it has become increasingly important that employees know the scope of their rights within the workplace and that employers know the boundaries of Fourth Amendment protection.

In *Ortega*, a four-Justice plurality opinion recommended a two step analysis to evaluate Fourth Amendment claims by employees against their employers. *Ortega*, 480 U.S. at 718-22 (plurality opinion). First, Justice O’Connor noted that “some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable,” and that “the operational realities of the workplace” should be considered when determining the reasonableness of an employee’s expectation of privacy. *Id.* at 717-19 (plurality opinion). This necessarily involves a case by case inquiry into the specific circumstances of the work environment. *Id.* at 718. Second, where it has been found that an employee has a legitimate expectation of privacy, “public employer intrusions . . . for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged under all the circumstances.” *Id.* at 725-26. The Court provided further guidance and explained that “under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable.” *Id.*

Since *Ortega*, federal courts have consistently relied on reasonableness factors from Justice O'Connor's plurality opinion to determine the scope of a public employee's privacy protection. See *Shaul v. Cherry Valley-Springfield Central School District*, 363 F.3d 177, 184 (2d Cir. 2004) (finding that the reasonableness standard must be satisfied for both the inception and scope of the search); *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002) (explaining that actual office practices and procedures may reduce a public employee's privacy expectation); *United States v. Simons*, 206 F.3d 392, 399 (4th Cir. 2000) (noting that the operational realities of the employee's workplace may have diminished his legitimate expectation of privacy).

Even if this Court were to adopt Justice Scalia's suggested framework in *Ortega*, this Court would still find that Wagner's Fourth Amendment rights were not violated. An analysis under Justice Scalia's framework would dispense with any inquiry into "the operational realities of the workplace" and broadly hold that "the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter." *Ortega*, 480 U.S. at 731 (Scalia, J., concurring). However, Justice Scalia recognized that "special circumstances" could call for an exception to the general rule, such as when an office is exposed to the public. *Id.* Under Justice Scalia's approach, "government searches to retrieve work-related materials or to investigate violations of workplace rules (searches of the sort that are regarded as reasonable and normal in the private-employer context) do not violate the Fourth Amendment." *Id.* at 732. Because Wagner exposed her Facebook profile to her employer and the resulting search of her profile was for a workplace misconduct violation and a performance review, Wagner's Fourth Amendment privacy rights were not violated.

Finally, though Justice Stevens, in his concurrence in *Quon*, promoted a re-visitation to the rationale suggested by the *Ortega* dissent⁷, it is doubtful whether a standard which would have produced the opposite judgment in that case could possibly ever be the controlling framework without overruling *Ortega*. In fact, Justice Scalia, in his concurring opinion, emphasized that under *Marks v. United States*, 430 U.S. 188 (1977), the only two potential controlling opinions from *Ortega* are the plurality opinion and his concurrence. *Quon*, 130 S. Ct. at 2634 (Scalia, J., concurring in the judgment) (arguing that “unless [*Ortega*] is overruled, it is assuredly false that a test that would have produced the *opposite* result in that case is still in the running).

Therefore, in light of recent lower court decisions, this Court should apply the well-reasoned rationale of Justice O’Connor’s plurality opinion in *Ortega* and hold that Povtak did not violate Wagner’s Fourth Amendment right to privacy when it searched her Facepage and ePhone.

B. Application of the *Ortega* Plurality Compels a Finding that Wagner Had No Reasonable Expectation of Privacy in Statements Made on a Social Networking Site Using her Povtak-Issued EPhone

Under the *Ortega* plurality’s approach, Wagner had no reasonable expectation of privacy in posts she made on her Facepage profile using her Povtak-issued ePhone, because the operational realities of the workplace negate any potential privacy expectation in electronic communications and because she willingly became friends with Povtak’s profile on Facepage,

⁷ Justice Blackmun dissented with the judgment and suggested a third rationale for analyzing Fourth Amendment violations by government employers. He agreed that in certain instances “the operational realities of the workplace may remove some expectation of privacy on the part of the employee,” but advocated that the Court undergo a fact specific, case by case determination regarding an employee’s privacy expectation. *Id.* at 737, 748 (Blackmun, J., dissenting).

thereby disclosing her information to a third party. *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 185 F.Supp.3d 1, 4 (W.D. 2009).

An employee's expectation of privacy may be unreasonable in light of the "operational realities of the workplace." *Ortega*, 480 U.S. at 717. The workplace includes "those areas and items that are related to work and are generally within the employer's control," and these areas remain the workplace even if personal items are placed in them by the employee. *Id.* at 715-16. Given the diversity of work environments, the question of an employee's privacy expectation must be assessed on an individual, case by case basis. *Id.*, at 716.

Further, this Court has consistently held that voluntary disclosure of information to third parties destroys any legitimate expectation of privacy held by an individual. *Miller*, 425 U.S. at 442-44; *Smith*, 442 U.S. at 743-44. Lower courts have applied this longstanding principle to eviscerate reasonable expectations of privacy in certain elements of cyberspace, including stored internet files and photographs posted on an Internet web page. *See Simons*, 206 F.3d at 398-99; *United States v. Gines-Perez*, 214 F.Supp.2d 205, 225-26 (U.S. Dist. Ct. Puerto Rico 2002). Similarly, a federal court has held that an e-mail sender loses any reasonable expectation of privacy in the contents of an e-mail once it is received by a third party. *United States v. Charbonneau*, 979 F.Supp. 1177, 1184-85 (U.S. Dist. Ct. S.D. Ohio 1997).

This Court should find that society is not prepared to recognize that posts made on a social-networking site, by an employee, using her company-issued communications device, carry with them any reasonable or legitimate expectation of privacy.

1. The "operational realities" of the City terminal are that Povtak employees are explicitly informed that they have no expectation of privacy in statements made on company-issued devices

The "operational realities" of the workplace dictate that Wagner had no reasonable expectation of privacy in statements made on Facepage using a company-issued phone. It is

irrelevant whether Wagner subjectively believed that comments and links posted on her Facebook profile were private, because such a belief was not *objectively* reasonable in light of the operational realities of the City Terminal. *See Simons*, 206 F.3d at 398 (finding that “regardless of whether Simons subjectively believed that the files he transferred from the Internet were private, such a belief was not *objectively* reasonable after [the Foreign Bureau of Information Services] notified him that it would be over-seeing his Internet use”) (emphasis added).

Here, Povtak policies and procedures prevent any of its employees from reasonably expecting privacy “with respect to any usage of the Company’s Electronic Systems.”⁸ The ECP explicitly notifies employees that, “[A]ll personnel waive any right of privacy in e-mail messages, other electronic communications or Electronic Systems use.”⁹ The term “Electronic Systems” is defined by the policy to include computers, printers, networks, hardware, electronic mail, Internet/Web Access and voice mail.¹⁰ Povtak’s ECP further states that, “All electronic systems, including hardware and software, are company property . . . and all messages composed, sent, or received on the electronic mail system are and remain the property of the Company at all times.”¹¹ Wagner received a copy of Povtak’s ECP and, after having reviewed it, voluntarily signed the document, thus expressly acknowledged that she had “no expectation of privacy with regard to any use of these Electronic Systems.”¹² *See Quon*, 130 S. Ct. at 2630 (noting that employer communications policies will “of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated”).

⁸ *See* Appendix B: ECP.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id. at 1.*

¹² *See Appendix B: User Acknowledgement Form*

Although the ECP does not list cellular devices as an “Electronic System” on its face, Wagner’s ePhone would reasonably be considered as an Electronic System, given that the policy covers computers, voice mail, e-mail messages, Internet/Web Access and hardware.¹³ Wagner could access e-mail, voicemail, and Internet/Web Access on the ePhone, and all at the expense of Povtak. *Wagner*, 185 F.Supp.3d at 4. Additionally, Povtak and Northstarr Wireless, Inc., contracted to provide the wireless communications for all of the ePhones. *Id.* In fact, if Wagner encountered an issue with her ePhone, she would turn it into Povtak’s Technical Support Department, not to the wireless communications provider. *Id.* at 7-8. Therefore, because Wagner’s ePhone is an Electronic System, any Internet or Web Access utilized by Wagner is governed by the ECP.

In addition to expressly signing a user acknowledgement form indicating that she understood the company’s communications policy, Wagner’s expectation of privacy is further diminished because Povtak has a legitimate reason to review employee postings made on social networking sites. *See Quon*, 130 S. Ct. at 2629. In *Quon*, this Court noted that a review of text messages sent on police pagers could be justified for other reasons, such as “performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws,” and that these matters are all relevant to the legitimacy of an employee’s privacy expectation. *Id.* In this case, in accordance with performance evaluations, Povtak supervisors were instructed to consult the Povtak company profile and note any comments made by employees regarding their feelings towards the company. *Wagner*, 185 F.Supp.3d at 6-7. Positive comments were reasonably seen as an indication of positive feelings about the company. *Id.* at 6. It follows that negative comments about the company indicate

¹³ *See* Appendix B: ECP.

negative feelings about the company, and that those negative comments should be included in performance evaluations as well. Because Wagner had voluntarily become friends with Povtak on Facepage, and because supervisors had authority to log into Povtak's profile, supervisors could view Wagner's Facepage profile. *Id.* at 5, 7.

2. Wagner cannot claim an objectively reasonable expectation of privacy in comments made on her Facepage profile because she voluntarily became friends with Povtak's profile and allowed Povtak to view her profile

Wagner knowingly and willingly became friends with Povtak on Facepage thereby allowing the company to view her own Facepage profile. Although users can control security on their own Facepage profiles, here Wagner elected to allow friends, such as Povtak, to view her Facepage profile. *Id.* at 5. As such, Povtak was legitimately in a location where it could view Wagner's profile.

Lower courts presented with the issue of privacy rights in cyberspace have analogized cyberspace communications to traditional non-cyberspace rulings to determine Fourth Amendment protection. *See* Hodge, Matthew J., *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and Myspace.com*, 31 S. Ill. U. L. J. 95, 102 (2006). In *Charbonneau*, for example, the court compared an e-mail transmission to first-class mail sealed in an envelope and to a conversation over the telephone. *Charbonneau*, 979 F.Supp. at 1184. The transmitter of information may enjoy a reasonable expectation of privacy before the information is delivered, but "once the transmissions are received by another person, the transmitter no longer controls its destiny." *Id.* Thus, courts have held that an individual generally loses any reasonable expectation of privacy in information once it is exposed to a third party. *Id.*; *See also Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) (holding that defendants lost any expectation of privacy in their subscriber information when they communicated it to the

system operators and also suggesting that computer bulletin board users would therefore logically lack a reasonable privacy expectation in materials intended for public posting).

Recently, a New York state case, citing *Guest*, held that a plaintiff could not claim an expectation of privacy in personal information contained on the social networking site Facebook, despite her privacy settings. *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010). The court explained that the “very nature and purpose of these social networking sites” is to share personal information with others. *Id.* Similar to the social networking site at issue in *Romano*, here, Facepage is designed so that users can share personal information with third parties. *Wagner*, 185 F.Supp.3d at 4. Unlike e-mail, which can be exchanged between as few as two parties, here when Wagner posts on her Facepage profile, the post is automatically shared with anyone friends her on Facepage, notwithstanding any individual looking at Wagner’s profile with one of her “friends.” *Id.* at 4-5. Courts have already established that e-mail senders lose any expectation of privacy when their e-mail is received. *See e.g. Charbonneau*, 979 F.Supp. at 1184. Because a posting on a social networking site, despite subjective steps to increase privacy, should logically be afforded even less protection than an e-mail, this Court should apply the rationale of the lower court opinions and find that Wagner had no reasonable expectation of privacy in statements she posted on her profile.

C. Even if this Court finds that Wagner had a reasonable expectation of privacy, under the appropriate standard, searches of Wagner’s ePhone and Facepage were reasonable and did not violate her Fourth Amendment privacy rights

Even if this Court finds that Wagner possessed a reasonable expectation of privacy in her Facepage posts, Povtak did not violate her Fourth Amendment rights when it searched her Facepage profile or her company-issued ePhone because the searches were reasonable at inception and in scope.

“Special needs” of the workplace justify an exception to the general Fourth Amendment warrant requirement. *Quon*, 130 S. Ct. at 2630 (citing *Ortega*, 480 U.S. at 725 (Blackmun, J., concurring)). The *Ortega* plurality clearly states that, “public employer intrusions . . . for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.” *Ortega*, 480 U.S. at 725-26. Under this standard of reasonableness, “both the inception and the scope of the intrusion must be reasonable.” *Id.* at 726.

The *Ortega* plurality expanded upon this standard and explained that a search is justified at its inception if there are reasonable grounds for suspecting that the search was motivated by legitimate, work-related reasons, such as retrieval of a necessary file, or if there are reasonable grounds for suspecting that evidence of employee misconduct will be discovered. *Quon*, 130 S. Ct. at 2631; *Ortega*, 480 U.S. at 726. The scope of the search will be permissible in scope if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive.” *Ortega*, 480 U.S. at 726 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

In *Quon*, this Court held that the search of Quon’s pager transcripts was justified at its inception and in its scope. *Quon*, 130 S. Ct. at 2630-32. This Court accepted, as a legitimate work-related rationale, that the search was conducted to determine whether the character limit on text messages was sufficient for City employees’ needs, and therefore held that the search was justified at its inception. *Id.* at 2631. Persuasive to this Court’s finding that the scope of the search was also reasonable, were the following facts: that the method employed was an efficient and expedient way to determine the sufficiency of the character limit, messages sent while off duty were redacted from the transcript, and a reasonable employee would be aware that a

possible audit of messages sent on his pager could occur due to firm management practices. *Id.* at 2631.

Here, both the scope and the inception of Povtak's search of Wagner's Facepage and ePhone were reasonable and did not violate her Fourth Amendment privacy rights.

1. The searches of Wagner's ePhone and Facepage profile were both reasonable at their inception

Neither the search of Wagner's ePhone nor the search of her Facepage profile violated her Fourth Amendment privacy rights because both searches were reasonable at their inceptions. In the case of Wagner's ePhone, Povtak had a legitimate work-related reason to search the phone as Wagner voluntarily turned in to Povtak's Technical Support Office because it was dropping calls. *Wagner*, 185 F.Supp.3d at 7-8. In order to properly evaluate the underlying problem, the technician unavoidably would have to search the phone. *Id.* Povtak has a legitimate interest in the efficient and proper operation of its workplace. *See Ortega*, 480 U.S. at 723 (finding that "the governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the workplace"). To restrict the technician's access to view Wagner's ePhone would run contrary to a proper operation of the workplace. Therefore, because Povtak had a legitimate, work-related reason to search Wagner's phone, the search was reasonable at its inception.

Additionally, Povtak could search Wagner's Facepage profile because there were reasonable grounds to suggest that evidence of employee misconduct would be present on her profile. *Wagner*, 185 F.Supp.3d at 5-7. Following publication of the defamatory "Crossing the Wires" blog posting in the *Lerner Gazette*, Povtak supervisors who were mentioned in the article began searching for the identity of "PugLuv86," the user who posted the offending information. *Id.* at 6. The supervisors had well-founded reasons to suspect that PugLuv86 was in fact a

Povtak employee, due to the highly confidential information released in the article. *Id.*

Therefore, there were reasonable grounds to suggest that the true identity of PugLuv86 would also post defamatory comments about Povtak on her Facepage profile, thus justifying the search of Wagner's Facepage profile at its inception.

2. The searches of Wagner's ePhone and Facepage profile were both reasonable in scope

The searches of Wagner's ePhone and Facepage profile did not violate Wagner's Fourth Amendment privacy rights because both searches were reasonable in scope. Assuming that an employee had a reasonable expectation of privacy in statements made on a social networking site, "the extent of [this] expectation is relevant to assessing whether the search was too intrusive." *Quon*, 130 S. Ct. at 2631 (recognizing that even if Quon could assume some expectation of privacy in text messages, it would be unreasonable for him to therefore presume that, in all circumstances, his messages were immune from scrutiny). This principle is especially important here, where an employee can reasonably expect to undergo performance evaluations and can also reasonably expect that supervisors would thoroughly investigate the identity of the author of a defamatory blog post. Moreover, Povtak issued the ePhones to all employees and Wagner received no assurances of privacy regarding her ePhone. These factors weigh heavily on a finding that the scope of the search is reasonable.

When Povtak searched Wagner's ePhone, only the presence of the applications was discovered and disclosed to a supervisor. There is no evidence that the technician or the supervisor, upon discovery of the applications, opened the applications or searched the contents of any of the applications. Here, the objective of the search was to repair Wagner's phone. The evidence demonstrates that the technician only adopted measures necessary to inspect and repair the phone, and thus the scope of the search was reasonable.

Regardless of the motivation underlying the search of Wagner's Facepage profile, the measures adopted were reasonably related to the objectives of the search. Wagner's supervisor, acting under instructions to investigate the identity of PugLuv86 and with authority to log into Povtak's profile, retrieved screen shots of Wagner's profile. The screen shots displayed negative comments made by Wagner regarding Povtak co-workers and the work environment. The screen shots also included comments posted by her criticizing the same programs she praised on Povtak's profile. The retrieval of screenshots was reasonably related to both possible motivations for the search.

Therefore, because the searches of Wagner's iPhone and Facepage profile were for legitimate, work-related purposes or investigations of work-related misconduct, and in light of their reasonableness at inception and in scope, Povtak did not violate Wagner's Fourth Amendment privacy rights.

II. THIS COURT SHOULD REVERSE THE DECISION OF THE THIRTEENTH CIRCUIT AND FOLLOW THE PRINCIPLE IT ARTICULATED IN *BURNS* AND IN ITS PROGENY BY HOLDING THAT A SUCCESSOR EMPLOYER CANNOT BE BOUND BY THE SUBSTANTIVE PROVISIONS OF ITS PREDECESSOR'S COLLECTIVE BARGAINING AGREEMENT.

The precedent of this Court holds that while Povtak, as a successor employer, is obligated to recognize and bargain with Local 12-22, it is not bound by the substantive terms of the CBA that was entered into by Crimaldi and Local 12-22, because it is not an "alter ego" or a "perfect successor" of Crimaldi, and because Povtak has neither expressly nor implicitly assumed the obligations of that agreement.

It is the role of the courts to interpret federal labor law to determine what legal duties a successor employer has to its predecessor's employees. *See John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 546 (1964). Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, "authorizes federal courts to fashion a body of law for the enforcement of [CBAs]." *Textile*

Workers v. Lincoln Mills, 353 U.S. 448, 451 (1957). A subsequent employer is considered to be a successor employer when a majority of the subsequent employer's workforce consists of the predecessor's employees, and there is "substantial continuity" in the employees' work, even with the change in their employer. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987). "[S]o long as there [is] indicia of 'substantial continuity,' the way in which a successor obtains the predecessor's assets is generally not determinative of the 'substantial continuity' question." *Id.* at 44 n.10 (citing *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 257 (1974)). However, there is not just one definition of "successor," and a new employer can be considered a successor for certain purposes and not for others. See *Golden State Bottling Co. v. NLRB*, 414 U.S.168, 184 (1973). If an employer is deemed to be a successor, it is obligated to recognize and bargain with the union. *Fall River*, 482 U.S. at 43. Although it has a duty to bargain with the union, a successor is not bound by the substantive provisions of its predecessor's CBA, and is ordinarily free to unilaterally set its own initial terms and conditions of employment. *Id.* at 52; *NLRB v. Burns Int'l Sec. Services*, 406 U.S. 272, 279 (1972); *But see Wiley*, 376 U.S. at 546 (In certain circumstances, a successor may be required to arbitrate with the union under the predecessor's CBA.). A successor may bound by the substantive provisions of its predecessor's CBA in certain circumstances. *Howard Johnson*, 417 U.S. at 264. If a successor is the "alter ego" of its predecessor, then it will be bound by the substantive terms of its predecessor's CBA. See *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). A successor may also be bound by its predecessor's CBA if it explicitly or implicitly adopts it. *Burns*, 406 U.S. at 291. If a successor is deemed to be a "perfect successor," it may also be bound by the substantive terms contained in the predecessor's CBA. *Id.* at 294-95. However, the duty to be bound by the substantive provisions of the CBA

“does not ensue as a matter of law 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.

Although the Circuits struggle to interpret many aspects of successorship law, almost every Circuit has interpreted this Court’s precedent in the *Wiley-Burns-Howard Johnson* Trilogy, and in *Fall River* to mean that an unconsenting successor employer cannot be bound by the substantive terms of its predecessor’s CBA. *See Ameristeel Corp. v. Int’l Bhd. of Teamsters*, 267 F.3d 264, 275-77 (3d Cir. 2001). However, a small minority of the Circuits have chosen to depart from this Court’s precedent and have found that successors can be obligated to existing CBAs if they have “substantial continuity” with their predecessors. *See UFCW, AFL-CIO v. Meridian Management Corp.*, 583 F.3d 65 (2d Cir. 2009); *Stotter Division of Graduate Plastics Company, Inc. v. District 65, United Auto Workers, AFL-CIO*, 991 F.2d 997 (2d Cir. 1993); *Boeing Co. v. Int’l Ass’n of Machinists and Aerospace Workers*, 504 F.2d 307 (5th Cir. 1974). The vast majority of the Circuits hold that a successor cannot be bound by the substantive provisions of its predecessor’s CBA, unless the successor is the “alter ego” or “perfect successor” of the predecessor, or it has explicitly or implicitly assumed the terms of that CBA. *See Ameristeel Corp.*, 267 F.3d at 275-77. This Court’s precedent holds that, with a few judicially recognized exceptions, a successor who has substantial continuity with its predecessor only has a duty to recognize and bargain with its predecessor’s union, and is not bound by the substantive terms of its predecessor’s CBA. *See Fall River*, 482 U.S. at 52; *Burns*, 406 U.S. at 279.

Under the correct interpretation of the *Wiley-Burns-Howard Johnson* Trilogy and *Fall River*, Povtak cannot be bound by the substantive provisions of Crimaldi’s CBA, because it is not Crimaldi’s “alter ego,” or “perfect successor,” and it has not voluntarily assumed the

provisions of that agreement. *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 1214 F.3d 1, 6-10 (13th Cir. 2010). Although the District Court determined that Povtak had no substantial continuity with Crimaldi under the same factors that were utilized by the Thirteenth Circuit’s “Sliding Scale” test, if this Court were to adopt that test, it would result in the automatic binding of almost every unconsenting successor employer to its predecessor’s CBA, and would impose extra-contractual terms that would inhibit the free flow of capital, something that this Court sought to prevent when it made its decision in *Burns*. *Burns*, 406 U.S. at 287; *Wagner v. Povtak Group*, 185 F.Supp.3d at 16-19.

A. A Proper Understanding of the Wiley-Burns-Howard Johnson Trilogy and Fall River requires reversal in this case.

Although the majority in the Thirteenth Circuit believes that Chief Judge Becker’s dissent in *Ameristeel* represents the best reading of the *Wiley-Burns-Howard Johnson* Trilogy and *Fall River*, the correct analysis of the Court’s decisions in these cases, which was developed by the majority in *Ameristeel*, leads to the conclusion that the “Sliding Scale” test adopted by the Thirteenth Circuit has no legal precedent because it incorrectly uses the framework that this Court developed to decide an employer’s successor liability and misapplies it to determine a successor’s obligations to its predecessor’s CBA. *Wagner*, 1214 F.3d at 6-15; *Compare Ameristeel*, 267 F.3d at 265-77 with 267 F.3d at 277-89 (Becker, Ch. J., dissenting). The Court’s decision in *Fall River* reinforces the principle established in *Burns* that, with a few judicially affirmed exceptions, an unconsenting successor employer cannot be bound by the substantive terms of a CBA negotiated by its predecessor, thus, this Court should reverse the Thirteenth Circuit’s decision. *Fall River*, 482 U.S. at 52.

1. This Court in Wiley created a very narrow rule.

The modern law of successorship emanates from this Court’s ruling in *Wiley* in 1964. *Wiley*, 376 U.S. at 548. *Wiley* involved a merger of two companies that resulted in the

disappearance of the predecessor employer. *Id.* at 545. Shortly after the merger, the union that represented its predecessor's employees, brought suit under § 301 of the Taft-Hartley Act against the successor to compel arbitration under the terms of the predecessor's CBA. *Id.* at 545-46. In a narrowly-tailored holding, this Court held that, in a merger of two companies where the predecessor has entered into a CBA with a union, the rights of the predecessor's employees that were covered by the CBA do not automatically disappear. *Id.* at 551. This Court reached its decision by relying on state law, which stated that a merger did not eliminate any obligations that had been held by the merged company. *Id.* at 547-48. This Court made it clear that its ruling was intentionally limited to the specific facts of the case and that it was not creating a general rule that successor employers would always be bound by their predecessors' CBAs. *Id.* at 549-51.

2. *Burns* establishes that an unconsenting successor cannot be bound by the substantive terms of its predecessor's CBA.

This Court again addressed the issue of a successor's legal obligations to its predecessor's CBA in *Burns*. *Burns*, 406 U.S. at 274. *Burns* involved a predecessor employer who provided security services at a plant and then subsequently was out bid by the successor employer, who then hired many of the predecessor's former employees. *Id.* at 274-5. The predecessor's employees' union filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") after the successor refused to honor its predecessor's CBA. *Id.* at 267. In *Burns*, this Court held that a successor employer has a duty to recognize and bargain with the union representing its predecessor's employees, but that it cannot be bound against its will by the substantive terms of an existing CBA, and that a successor employer is generally free to set initial terms and conditions of employment prior to bargaining with the union. *Id.* at 285-91. In setting this rule, this Court also created an exception to it, known as the "perfectly

clear”¹⁴ successor doctrine. *Id.* at 294-95. In reaching its decision in *Burns*, this Court reasoned that binding these successors would dissuade employers from transferring capital, for fear of being fettered to an agreement that they were not a party to. *Id.* at 287.

3. *Howard Johnson* strengthens this Court’s reasoning and logic in *Burns*.

In *Howard Johnson*, a successor employer purchased the assets of a restaurant and motor lodge, and hired only nine of the predecessor’s fifty-three employees. *Howard Johnson*, 417 U.S. at 250. The predecessor had a CBA with the union that represented its employees that contained a “successor clause” that would bind all successors to arbitration. *Id.* When the successor refused to submit to the union’s demand for arbitration, the Union sued the successor under Section 301 of the Taft-Hartley Act to compel arbitration. *Id.* at 252. Though this Court’s holdings in *Wiley* and *Burns* were in conflict, this Court did not resolve their differences in the *Howard Johnson* decision. *Id.* at 256. This Court did, however, describe *Wiley* as a “guarded, almost tentative statement,” and only looked to it to compare its facts with those in *Howard Johnson*. *Id.* at 256-264. This Court also looked to *Burns*, but utilized it more for its legal reasoning than for its facts. *Id.*

After comparing the facts in *Wiley* with those in *Howard Johnson*, this Court reversed the decisions from the courts below, and found that the successor had no duty to arbitrate under the predecessor’s CBA. *Id.* at 264-65. The key distinction between *Wiley* and *Howard Johnson* according to this Court, was that the successor in *Howard Johnson* lacked substantial continuity

¹⁴ The *Burns* Court held that if a successor employer makes it “perfectly clear” to the employees of its predecessor that substantially all of them will be hired, and it makes no further statements regarding any changes in those employees terms of employment, then that successor employer will be required to bargain with the Union prior to setting its own initial terms. *Burns*, 406 U.S. at 294-95. The “Perfectly Clear” Successor Rule has been expanded by the Circuit Courts and in the majority of circuits, if an employer is determined to be a “Perfectly Clear” successor, then it will be bound by the substantive terms of the predecessor’s CBA. *See NLRB v. Houston Bldg. Servs. Inc.*, 128 F.3d 860, 864 (5th Cir. 1997).

with its predecessor, as it had only hired a small fraction of its predecessor's employees, and to compel a successor to arbitrate under *Wiley*, there needed to be substantial continuity. *Id.* at 263. In its decision, this Court discussed another exception to the general rule established in *Burns*, known as the "Alter Ego"¹⁵ exception, and stated that the facts present did not indicate that the successor was an "alter ego" of its predecessor. *Id.* at 261 n. 5.

Because this Court did not address the conflicts between its decisions in *Wiley* and *Burns*, the holding in *Howard Johnson* has been interpreted as a limited one and as one that does not create any doctrine or set of rules that can be used to analyze future successorship cases. *See Ameristeel*, 267 F.3d at 272. Because this Court's analysis ended after it determined that there was no substantial continuity between the predecessor and successor employers, there is no indication that substantial continuity is or should be the only factor used to determine a successor's obligations to an existing CBA. *Id.*

4. *Fall River* dispels the possibility that substantial continuity is the sole factor in determining whether a successor is obligated to its predecessor's CBA.

The *Fall River* Court reaffirmed the principle established in *Burns* that a successor is not bound by the substantive provisions of its predecessor's CBA. *Fall River*, 482 U.S. at 40. In *Fall River*, this Court was asked to determine whether a subsequent employer was a successor employer and whether that employer had a duty to bargain with the union representing its predecessor's employees. *Id.* at 29-31. The *Fall River* Court held that a successor has a duty to bargain with the union representing its predecessor's employees when there is a "substantial continuity" between the predecessor and the successor. *Id.* at 43-47. Though the Court in *Fall*

¹⁵ The "alter ego" exception which permits a successor to be bound by its predecessor's CBA if the transition in the employer involves only a mere technical change in operation or identity of the employer, and there is no substantial change in the company's management or ownership. *Howard Johnson*, 417 U.S. at 261 n. 5.

River outlined criteria for determining whether substantial continuity exists, and found that the successor had substantial continuity with its predecessor, it also explicitly reiterated the principle created in *Burns*, that a successor employer is not legally bound by the substantive terms of its predecessor's CBA, which indicates that the reasoning and logic from *Burns* prevails. *Id.* at 40; *Ameristeel*, 267 F. 3d at 273.

Though *Wiley* still remains good law, its applicability and legal authority has been significantly diminished by its progeny. Even though the successor in *Burns* was performing the same type of work as its predecessor, under the same conditions as its predecessor, and it had hired a majority of its predecessor's employees, this Court found those conditions insufficient to bind the successor to its predecessor's CBA, and declined to extend *Wiley* beyond the narrow scope of its specific facts. *Burns*, 406 U.S. at 281-82. The *Burns* Court set out an explicit rule stating that "although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a [CBA] negotiated by their predecessors but not agreed to or assumed by them." *Id.* at 284. The precedential value of *Wiley* continued to deteriorate in *Howard Johnson*, where *Wiley* was utilized as a means of comparison to distinguish its facts from those present in *Howard Johnson*. *Howard Johnson*, 417 U.S. at 256-57. This Court in *Howard Johnson* did not make a decision on whether a successor who had substantial continuity with its predecessor would then be bound by its predecessor's CBA. *Id.* at 256, 264-65. Even though *Fall River* defined what factors should be used to determine the substantial continuity between successors and predecessors, nowhere in *Fall River* did this Court indicate that a successor who has substantial continuity with its predecessor should also be bound by its predecessor's CBA. *Id.* at 27-54. Although *Wiley* has been cited in five recent opinions by this Court, it has not been cited for guidance on the issue of a successor's obligation to its

predecessor's CBA. *See Granite Rock Co. v. Intl Bhd. of Teamsters*, 130 S. Ct. 2847, 2855 (2010) (*Wiley* cited by the majority for why the courts have authority to decide arbitration disputes.); *Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (*Wiley* cited for when an arbitrator can decide a dispute over arbitration.); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 457 (2003) (*Wiley* cited for guidance on what arbitration issues should be decided by the courts.); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002) (*Wiley* cited to state the rule on what issues related to arbitration can be decided by the courts.); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 471 (2002) (*Wiley* cited in the dissent.). Thus, looking at this Court's precedent, it is evident that Povtak should not be bound by Crimaldi's CBA.

B. Povtak is not bound by the substantive terms of its predecessor's CBA because it does not meet any of the judicially affirmed exceptions.

Povtak cannot be bound by the substantive terms of Crimaldi's CBA because the facts do not fall into any of the judicially affirmed exceptions to the general rule established by this Court that a successor cannot be bound by the substantive provisions of its predecessor's CBA.

Wagner, 124 F.3d at 6-10; *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 185 F.Supp.3d 1, 2-9 (W.D. 2009).

1. Povtak is not a "perfect successor" to Crimaldi.

Povtak is not a "perfectly clear" successor because it never made any affirmations to Crimaldi's employees that it would be bound by the terms in Crimaldi's CBA. *Id.* An employer is a "perfect successor" if it makes it "perfectly clear" that it plans to hire all the predecessor's employees and hires those employees in a manner which leads them to believe that they will be hired on the terms and conditions that existed under the predecessor employer. *Burns*, 406 U.S. at 294-95. If it has been determined that an employer is a "perfect successor," then it will be required to bargain with the union prior to setting its own initial terms. *Id.* In some Circuits, a

“perfect successor” can be bound by the terms of its predecessor’s CBA. *See Coastal Int’l Sec., Inc. v. NLRB*, 320 Fed. Appx. 276, 285 (5th Cir. 2009); *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced without op.*, 529 F.2d 516 (4th Cir.1975).

Povtak is not a “perfectly clear” successor to Crimaldi because it did not present itself as though it would follow the terms of Crimaldi’s CBA. *Wagner*, 1214 F.3d at 6-10; *Wagner*, 185 F.Supp.3d at 2-9. Nothing in Quine’s statement at the pre-bid conference indicates that Povtak was holding itself out as a successor. *Id.* Unlike the successor in *Coastal Int’l Sec.*, Povtak never mentioned anything about a CBA, let alone about agreeing to adopt one. *Compare Id. with Coastal Int’l Sec.*, 320 Fed. Appx. at 285. Although Judge Homfelt contends in her concurrence to the Thirteenth Circuit’s decision that under *Spruce Up*, Povtak is a “perfectly clear” successor, her argument is not supported by this Court’s precedent. *Burns*, 406 U.S. at 294-95; *Wagner*, 1214 F.3d at 19-21 (Homefelt, J., Concurring). The decision in *Spruce Up* has not been adopted by this Court, and it moreover represents a highly restrictive interpretation of *Burns*’ “perfectly clear” successor exception. *Compare Burns*, 406 U.S. at 294-95 *with Spruce Up Corp.*, 209 NLRB at 195. *Spruce Up* holds that a successor employer will be bound by the substantive terms of the predecessor’s CBA *unless* it explicitly gives advance notice that it wants both to hire the old employees and to set initial terms unilaterally. *Spruce Up Corp.*, 209 NLRB at 195. The rule established in *Spruce Up* distorts the decision in *Burns* by adding an additional requirement for finding a “perfect successor” which is neither warranted nor intended by this Court. *See Canteen Co.*, 317 NLRB 1052, 1054 (1995) (Gould, C., Concurring).

Because Povtak never made any statement that could be considered “perfectly clear” that it was going to hire all of Crimaldi’s employees and adopt the terms of the CBA, Povtak cannot be bound by it.

2. Povtak is not the “alter ego” of Crimaldi.

Povtak is not the “alter ego” of Crimaldi because it is not “merely a disguised continuance of the old employer.” *Southport Petroleum Co.*, 315 U.S. at 106. A successor is considered an “alter ego” of its predecessor when the succession involves “a mere technical change in the structure or identity of the employing entity [...] without substantial change in its ownership or management.” *Howard Johnson*, 417 U.S. at 264. If a successor is the “alter ego” of its predecessor, then it will be bound by the substantive terms of the predecessor’s CBA. *See Southport Petroleum Co.*, 315 U.S. at 106; *Goodman Piping Products, Inc. v. NLRB*, 741 F.2d 10 (2d Cir. 1984).

Here, it is evident that Povtak is not a disguised continuance of Crimaldi. First, Povtak came to assume Crimaldi’s responsibility to provide transportation to Dynes not through any transaction with Crimaldi, but rather, Povtak was awarded a bid by Dynes to provide those services to the City. *Wagner*, 185 F.Supp.3d at 2. Second, unlike the successor in *Goodman Piping Products*, Povtak does not have the same management and ownership as Crimaldi, rather, Povtak’s structure and management are completely different from Crimaldi’s. *Wagner*, 1214 F.3d at 7. Because the succession between Crimaldi and Povtak marked a significant change in management and structure, Povtak cannot be bound by the substantive terms of Crimaldi’s CBA as an “alter ego.”

3. Povtak neither implicitly nor explicitly adopted the terms of Crimaldi’s CBA.

Povtak cannot be bound by the substantive terms contained in Crimaldi’s CBA because it neither implicitly nor explicitly adopted those terms.

Although a successor employer has a duty to bargain with the incumbent union, it is not bound by the substantive provisions of the CBA negotiated by its predecessor but not agreed to

or assumed by it. *Burns*, 406 U.S. at 287; *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349 (9th Cir. 1981); *Audit Services, Inc. v Rolfson*, 641 F.2d 757 (9th Cir. 1981).

Povtak neither explicitly nor implicitly adopted the terms contained in Crimaldi's CBA. Unlike the subsequent employer in *World Evangelism*, nothing said by the Povtak officials to the union representatives could lead a reasonable person to believe that the subsequent employer had expressly bound itself to the existing CBA. *World Evangelism, Inc.*, 656 F.2d at 1352. In the one meeting that Povtak had with the Local 12-22 representatives, Povtak expressly stated that the sole purpose of the meeting was to discuss the ECP under which Wagner had been terminated.¹⁶ *Wagner*, F.Supp.3d at 8. Furthermore, the conversation contained in the Arko Deposition cannot be depicted as a substantive discussion regarding Wagner's termination or as Povtak's express participation in the grievance process.¹⁷ *Id.* Unlike the successor in *Rolfson*, Povtak did not implicitly agree to its predecessor's CBA by maintaining a consistent pattern of conduct that conformed to the terms of the predecessor's CBA. *Compare Wagner*, 185 F.Supp.3d at 2-8 with *Rolfson*, 641 F.2d at 763, Povtak has done nothing of the sort, rather it has expressly stated that it will not participate in any arbitration with the Union. *Id.* at 2-9. Because Povtak never implicitly nor explicitly consented to assume the terms of Crimaldi's CBA, it cannot be bound by it.

C. The Thirteenth Circuit's use of the "Sliding Scale" test to determine Povtak's obligation to Crimaldi's CBA flies in the face of this Court's precedent and has only been followed by two other circuits.

¹⁶ See Appendix C: Arko Deposition, at 1-14.

¹⁷ *Id.*

The “Sliding Scale” test adopted by the Thirteenth Circuit is not the proper framework to use to determine whether a successor is obligated to the terms of its predecessor’s CBA because it has no legal precedent. *See Ameristeel*, 267 F.3d at 275-6. Even if this Court were to adopt the “Sliding Scale” test, Povtak would not be considered to have substantial continuity with Crimaldi, and thus would not be bound by Crimaldi’s CBA, nevertheless, the adoption of the “Sliding Scale” test by this Court would chill the transfer of capital and upend federal labor policy by binding almost every successor employer to its predecessor’s CBA.

1. The “Sliding Scale”/ “Substantial Continuity” test is not supported by the vast majority of jurisprudence concerning the successorship doctrine.

In interpreting the law of successorship, only two other Circuits utilize the “Sliding Scale”/ “Substantial Continuity” test that was adopted by the Thirteenth Circuit. *See Meridian*, 583 F.3d at 64; *Boeing*, 504 F.2d at 310-11. However, the persuasiveness of the Second and Fifth Circuits’ application of the “Sliding Scale”/“Substantial Continuity” test is limited because the Fifth Circuit case that applied the test predates *Fall River*, and is thus of limited legal precedent, and because the Second Circuit’s decision to use the *Fall River* factors to determine a successor’s liability to its predecessor’s CBA goes directly against the vast majority of jurisprudence concerning the successorship doctrine. *Id.*

Almost every Circuit has interpreted this Court’s precedent to mean that, although a successor is required to bargain with its predecessor’s union, it cannot be bound by the substantive provisions of its predecessor’s CBA, unless it is the “alter ego” or “perfect successor” of its predecessor, or it has voluntarily assumed the obligations of the agreement. *See 3750 Orange Place Ltd. P’ship v. NLRB*, 333 F.3d 646, 654 (6th Cir. 2003) (“A new employer is not bound by the substantive terms of a [CBA] entered into by its predecessor absent an express or implied assumption of the [CBA].”); *Ameristeel Corp.*, 267 F.3d at 275 (“[...] An

unconsenting successor employer cannot be bound by the substantive terms of a CBA negotiated by its predecessor...”); *NLRB v. Hosp. San Rafael, Inc.*, 42 F.3d 45, 50 (1st Cir. 1994) (A new owner unaffiliated with its predecessor may not be bound by its predecessor’s CBA.); *Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler*, 10 F.3d 1563, 1566-67 (11th Cir. 1994) (“Ordinarily the successor is not bound by substantive provisions of an existing [CBA] between the union and the predecessor.”); *Southward v. S. Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 493 (6th Cir. 1993) (“If the successor's business is a “substantial continuation” of its predecessor's business, but the successor is not the “alter ego” of its predecessor and has not voluntarily assumed the obligations of its predecessor's CBA, then *at most* the successor will have a duty to recognize and bargain with the union that represented its predecessor's employees and arbitrate any disputes.”); *Sullivan Indus. v. NLRB*, 957 F.2d 890, 895 (D.C.Cir.1992) (“While a successor has a duty to bargain with an incumbent union, it is not bound by the substantive terms of the previously negotiated [CBA.]”); *New England Mechanical, Inc. v. Laborers Local Union 294*, 909 F.2d 1339, 1342 (9th Cir. 1990) (“In general, if an employer takes over another business, the employer is not bound by its predecessor's [CBAs.]”).

With the exception of the Second, Fifth and Thirteenth Circuits, no Circuit has held that the substantial continuity of workforce and operations alone is sufficient to bind a successor employer to the substantive terms of a predecessor’s CBA. *Id.* The case, *Stotter*, that the Second Circuit recently relied on to justify its use of the “Sliding Scale”/“Substantial Continuity” test in *Meridian*, had a successor that agreed to bound by its predecessor’s CBA, and thus, is not relevant to the vast majority of successorship cases, as the *Stotter* successor expressly agreed to its predecessor’s CBA. See *Meridian*, 583 F.3d at 74 (“We have previously used the *Fall River* factors to make a fact-specific finding that a successor corporation was bound by a predecessor's

CBA...”); *Stotter*, 991 F.2d at 1001 (Successor participated in arbitration proceedings, successor and predecessor had the same vice president, and the CBA expressly adopted provisions from the prior contract.)

Given that this Court has never held that substantial continuity is sole determinant in deciding whether a successor is bound by the terms contained in its predecessor’s CBA, and the fact that virtually all of the Circuits have rejected the Second Circuit’s use of the “substantial continuity” factors in that manner, this Court should reverse the Thirteenth Circuit’s decision.

2. Adoption of the Thirteenth Circuit’s “Sliding Scale” test would inhibit the free flow of capital.

Under the Thirteenth Circuit’s “Sliding Scale” test, Povtak would not be seen as having substantial continuity with Crimaldi, as is evidenced by the District Court’s Judgment, which used the same factors that make up the “Sliding Scale” test to determine that Povtak and Crimaldi had no substantial continuity. *Compare Wagner*, 1214 F.3d at 6-15 *with Wagner*, 185 F.Supp.3d at 16-19. Nevertheless, if this Court were to adopt the “Sliding Scale” test, it would go against the policies upon which this Court’s precedent was founded, and would chill the transfer of capital and discourage innovation.

In reaching its decision in *Burns*, this Court stated that an important aim of federal labor legislation is to prevent industrial strife, but that Congress had specifically decided not to make employers and unions’ freedom to bargain secondary to that goal. *Burns*, 406 U.S. at 287. The *Burns* Court went on to state that binding successors to the substantive terms of old CBAs may result in serious inequities, which would discourage and inhibit the transfer of capital, because potential employers would not want to take over businesses if they had to be “saddled” to the terms and conditions that were contained in their predecessors’ CBAs. *Id.* at 287-88. Thus, this

Court chose to forgo requiring successors to agree to their predecessors' CBAs in favor of a rule that requires the successor to recognize and bargain with its predecessor's union. *Id.*

If this Court were to utilize the "Sliding Scale" test to determine a successor's obligation to a predecessor's CBA, then nearly every employer deemed a "successor" would be bound by the incumbent union's CBA because the same factors that are used to decide whether a subsequent employer is a successor employer would be utilized to determine a successor's liability to the existing CBA. *Compare Wagner*, 1214 F.3d at 6-15 *with Wagner*, 185 F.Supp.3d at 16-19. Had such a rule been the desire of this Court, then it would have ruled accordingly in *Wiley* and its progeny. However, this Court's precedent does not support the contention that a successor who has substantial continuity with its predecessor is automatically bound by the CBA, rather, this Court holds just the opposite, as is evidenced in *Fall River*, where it reiterated the important policy implications behind a successor's duty to recognize and bargain with its predecessor's union. *Fall River*, 482 U.S. at 38-39. An adoption of the "Sliding Scale" test by this Court would discourage succession among employers. Such a chilling effect on the transfer of capital is exactly what the Court in *Burns* tried to prevent in its holding. *Burns*, 406 U.S. at 287.

This Court should reverse the Thirteenth Circuit's decision and reaffirm the principle it established in *Burns* and reiterated in *Fall River*, that an unconsenting successor cannot be bound by the substantive terms of an existing CBA. The correct reading of the *Wiley-Burns-Howard Johnson* Trilogy and of *Fall River* leads to the conclusion that the "Sliding Scale" test utilized by the Thirteenth Circuit is not supported by this Court's precedent and runs counter to the policies that this Court, in its decisions, has sought to promote. For these reasons, this Court should reverse the decision of the Thirteenth Circuit.

Professional Electrical Workers Union, Local 12-22

COLLECTIVE BARGAINING AGREEMENT

This Agreement effective from the 1st day of September 2005, by and between Professional Electrical Workers Union, Local 12-22, located at 1503 McCully Road, Dynes City, State of Froessel, (hereinafter referred to as "UNION") and CRIMALDI CORPORATION, with a principal place of business at (185 West Broadway, Dynes, Froessel) (hereinafter referred to as the "COMPANY").

W I T N E S S E T H:

Whereas, it is the intent and purpose of the parties to promote and improve the industrial and economic relations between the Company, its employees and the Union, to establish a basic understanding relative to rates of pay, hours of work, and other conditions of employment and to provide means for the amicable adjustment of all disputes and grievances:

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE 1

RECOGNITION

The Company recognizes and acknowledges the Union as the sole and exclusive collective bargaining agent for all of its Dynes Terminal Electricians, excluding all salaried employees, confidential employees, computer department employees, mechanics, drivers, schedulers, operators, and administrative personnel.

ARTICLE 2

UNION SECURITY

2.1 It shall be a condition of employment that all employees of the Company covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall remain members in good standing; and all employees covered by this Agreement who are not Union members and are hired on or after the execution date of this agreement shall on the first of the month following the thirtieth (30th) calendar day of such employment become and remain members in good standing with the Union. Good standing with the Union will be defined in accordance with applicable National Labor Relations Board and Federal case law.

2.2 The Company shall notify the Union of all new employees hired within one week following their first day of employment. New employees shall be employed on a probationary period until the first day of the month following the first sixty (60) calendar days of the individual's employment with the Company.

During or at the end of the probationary period, the Employer may discharge such employee for any reason, at any time, which need not be stated by the Employer. Such discharge shall not be subject to the grievance/arbitration provisions of this Agreement. If an employee is discharged during his/her probationary period and is then subsequently hired again, such rehiring shall be considered a new hiring and no credit will be given for time worked during the previous probationary period. Upon successful completion of the probationary period, the employee will become a regular bargaining unit employee subject to the terms of this Agreement with his/her seniority measured back to the first day of employment. Employees are not eligible to receive any benefits during their probationary period except as otherwise indicated by any specific term of the Agreement.

2.3 The Union shall indemnify, defend and save the Employer harmless against any and all demands, suits or other forms of liability that shall arise out of or by reason of discharging any employee requested or required by the Union as a result of this Article.

ARTICLE 3

HOURS OF WORK AND WAGES

3.1 All bargaining unit employees will work a regular forty (40) hour work week divided into five (5) days Monday through Friday of eight hours per day plus a thirty (30) minute unpaid meal period. Time and one-half shall be paid after forty (40) hours of work in a week. Time and one-half shall be paid for work done on Saturdays. Double time shall be paid for work on Sundays if the employee works the day before and the day after. Time and one-half, plus holiday pay at regular pay, shall be paid for work on the paid holidays hereinafter listed.

3.2 Overtime may be offered to employees on a daily or weekend basis. Employees may be required to work overtime as needed. Continued failure to work overtime as required will result in disciplinary action. Employees will be offered available overtime based on qualification and seniority area. Employees will be offered training in specialized areas such in the event the nature of their work so requires. Employers will then certify such employees as having received such training.

In order to be eligible to work available overtime on weekends, the employee must have worked at least two (2) days of daily overtime in the work week until at least 8:00 p.m. each day. Failure to do so may disqualify the employee from working weekend overtime at the sole discretion of the employer. If there are more qualified employees than needed to work weekend overtime, employees will be offered weekend overtime work on a seniority basis (i.e. needed employees will then be drawn from a pool of employees, who worked at least two (2) days of overtime until 8:00 p.m., by seniority and ability to do the job.) Employees who are selected to work weekend overtime must work the full weekend shift unless they are excused from doing so by management on a case by case basis for exceptional reason or cause. Any excuse from working the full overtime shift may not be used as precedent in any future situations that may arise.

ARTICLE 4

HOLIDAYS

4.1 The following days shall be deemed holidays under this Agreement with pay for such day at the employee's average straight time hourly earnings for the week in which the holiday occurs, except when an employee is absent from work the day preceding or following the holiday without acceptable excuse, holiday pay will not be granted.

NEW YEAR'S DAY

LABOR DAY

PRESIDENTS DAY

THANKSGIVING DAY

MEMORIAL DAY

DAY AFTER THANKSGIVING DAY

INDEPENDENCE DAY

CHRISTMAS DAY

TWO FLOATING HOLIDAYS ANNUALLY - which can be taken after a two (2) weeks notice is given to the Company. These holidays may not be taken consecutively, or on a normal workday immediately preceding or following another Holiday.

EMPLOYEE'S OWN BIRTHDAY - it is agreed if it falls on a weekend or holiday that it may be taken at any time during the week in which it falls.

4.2 Should any of the aforementioned holidays occur on Sunday, it shall be celebrated on the following Monday. Should any holiday listed above occur on a Saturday, it shall be celebrated on the preceding Friday.

4.3 Should any of the aforementioned holidays fall within the probation period referred to in Subsection 2.1 the employee shall receive pay completed. All laid-off employees shall receive holiday pay for the aforementioned holidays if they have worked at any time within thirty (30) days preceding the holiday, except employees laid off for just cause.

ARTICLE 5

VACATION

5.1 The Company shall grant to all of its employees during each anniversary year vacations as follows:

AFTER 1 YEAR 2 Weeks *

*One (1) week shall be available after six (6) months of consecutive employment.

AFTER 3 YEARS of employment the employee shall begin accumulating vacation at the rate of 1 week every 4 months. This accumulation occurs during the fourth (4th) year of employment.

AFTER 10 YEARS of employment the employee shall begin accumulating vacation at the rate of 1 week every 3 months. This accumulation occurs during the eleventh (11th) year of employment.

AFTER 15 YEARS of employment the employee shall begin accumulating vacation at the rate of 1 week every ten and one-half (10 1/2) weeks. This accumulation occurs during the sixteenth (16th) year of employment.

5.2 Vacation money shall be paid immediately before the employee leaves for his vacation period; the vacation period shall be designated by the Company at the Company's discretion, at least four (4) weeks prior to the time it commences. Holidays falling during the vacation period shall be paid for, in addition to the vacation pay. The Company may schedule a vacation shutdown period, and all employees will be required to take their vacation during such period.

5.3 Employees laid-off, discharged or quitting prior to the vacation period shall be paid vacation monies on a pro-rata basis at the time such employment is terminated. Should the laid-off employees be recalled, then, at the time of vacation period, they shall receive the balance of vacation pay due them. Lay-off time, up to a maximum of two (2) months in any anniversary year, shall be credited as time worked for vacation purposes. In event of the death of any employee covered by this Agreement, vacation monies due, on a pro-rata basis, shall be paid to the designated beneficiary. Vacation time may not be banked from year to year.

The Employer will provide eight (8) vacation slots per year where an employee could take three (3) consecutive weeks of vacation. Employees will not be able to select three (3) week vacations slots during the months of March, June, September and December. Employees will be offered this opportunity in descending order of seniority over the life of the contract among employees who are eligible to receive three (3) weeks of vacation. Once an employee is offered one of those special vacation slots and either refuses it or accepts it, he/she will be moved to the bottom of the seniority list.

It is the intention of the company to normally close the Distribution Center for the first week of July, and employees may take available vacation at that time. However, based on business and operational needs, the Company - at its sole discretion - may decide to remain open or to be open on a limited basis during that week. The company will try to give reasonable notice to the Union and employees if it decides NOT to close or to remain partially open during that week.

ARTICLE 6

WAGE INCREASE

All Bargaining Unit employees who have completed their probationary period at the time of an increase, shall receive increases based on the following schedule:

September 1, 1999 - Fifty (0.50) cents per hour increase.

January 1, 2000 - Fifty (0.50) cents per hour increase.

September 1, 2000 - Three (3%) percent per hour increase.
September 1, 2001 - Three (3%) percent per hour increase.
September 1, 2002 - Three (3%) percent per hour increase.

Upon a new employee's entry into the Union, the employee shall receive a five (5%) wage increase.

Nothing in this Agreement shall preclude the Company from giving merit increases to individual employees.

ARTICLE 7

DISCIPLINE AND DISCHARGE

7.1 The Employer shall have the right to discipline/ discharge employees for just cause. The steps of progressive discipline will be:

Written Warnings (2)
Unpaid Suspension [up to one (1) week]
Discharge

The Employer shall have the right to advance the level of discipline to whatever step it believes is appropriate under the circumstances up to and including immediate discharge for a first offense. It may also utilize an unpaid investigatory suspension whenever it believes it is necessary to take proper action with regard to an employee. If an employee is not disciplined as a result of the investigation, the employee will be paid for time lost without pay.

7.2 Any disciplinary action or measure imposed by the Company on a non-probationary employee, which cannot be adjusted between the parties, may be processed as a grievance through the regular grievance process, and then to Arbitration. However, the Union must raise the issue through the grievance process no later than ten (10) days from the date of disciplinary action. The failure to discipline or discharge in any particular instance shall not be deemed to be a waiver of the Employer's right with respect to future or other instances involving the same or different employees.

7.3 Disciplinary actions shall be removed from employees Active File after they are thirty (30) months old.

ARTICLE 8

SENIORITY PROVISIONS

8.1 Seniority shall be plant wide by classification, and the principle thereof shall be applied by the Company when it determined ability is equal to lay-offs and rehiring. The Company shall furnish the Union a seniority list within ten (10) days from the date of this executed Agreement.

ARTICLE 9

DISCRIMINATION

9.1 There shall be no discrimination of any kind against any member of the Union, for Union activity, race, color, creed, sex, age, or nationality.

ARTICLE 10

MILITARY SERVICE

10.1 All military leaves shall be as provided by the Military Act or other legislation governing same, except that in any event, employees shall be restored to their former positions at the prevailing rate of pay, on the basis of seniority, the time spent in military service considered as time actually employed by the Company. Reinstatement, however, must be applied for within ninety (90) days after receiving an honorable discharge, and the applicant must be physically and mentally able to do the work.

ARTICLE 11

SHOP STEWARD

11.1 The Union shall have the right to designate a Shop Steward in each plant covered by this Agreement. The Union must notify the Employer in writing when an individual is either appointed to or removed from a Shop Steward position. Properly designated Stewards shall have the right to take up with an authorized representative of the Company, at times which are mutually agreed, all grievances arising out of this Agreement. Shop Steward will have no authority of any kind except that given them under this Agreement, and no Shop Steward will engage in any conduct which interferes with or impedes the normal work or encourage employees to do the same.

ARTICLE 12

REDUCTION OF WAGES RATES

12.1 Nothing in any provision of this Agreement shall be so construed, anything to the contrary notwithstanding as to effect reduction in the wage rate of any worker.

ARTICLE 13

CHECK - OFF

13.1 The Company agrees to deduct from the salary of any present or future employee covered by this Agreement, as directed by the Union, the amount of dues and initiation fees the employee is required to pay to the Union. As to new employees, the Company will deduct from their salaries such amounts as the Union will bill the Company for the purposes hereinabove specified.

13.2 Once a month, within one week after the last day of the preceding month the Company will deliver the money's billed and required to

be deducted during the preceding month to a duly authorized representative designated by the Union for the purposes. The Union agrees that it will file with the Company written authorizations for such deductions, which shall comply with the law.

ARTICLE 14

GRIEVANCE PROCEDURE

14.1 Any and all complaints, disputes and grievances or differences arising under and during the term of this Agreement, between the Company and employees in the bargaining unit, and/or the Union, with respect to wages, hours of work, and conditions of employment, shall be handled in accordance with the following procedure:

- 1) The grievance shall be discussed, within five (5) working days of the occurrence thereof, by the employee involved, with his immediate supervisor, in an attempt to settle the matter. The Union Steward may or may not be present, at the election of the aggrieved, and said steward. The supervisor involved shall give an oral answer with respect to the grievance immediately, if possible, but not later than three (3) working days following the discussion. If the oral answer given by the supervisor does not settle the issue, then the employee and/or the Union Steward may proceed with the next grievance step.
- 2) Within three (3) working days following receipt of the oral answer provided for in step 1, the chief Union Steward and aggrieved employees may present the grievance in writing (specifying the provision of the contract allegedly violated), to the appropriate department or plant manager or his designated representative, with a copy to the Union business representative. The manager shall then meet with the aggrieved employee and the chief Union Steward within three (3) working days following his receipt of the written grievance and shall attempt to settle the matter. If settlement is reached, the matter shall be considered closed. If the grievance is not settled, a written and signed decision setting forth the manager's position, and the reason therefore, shall be submitted by the manager to the chief Union Steward and the aggrieved employee within three (3) working days following said meeting. If the grievance is not settled at this step, then.
- 3) Within seven (7) working days following receipt of the manager's written decision, the business representative of the Union and a designated representative of the Company shall meet at a mutually convenient time and place and attempt to settle the grievance. If a settlement is reached, it shall be reduced to writing and signed by both of said representatives.
- 4) 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 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.

5) In the event that any complaints, claims, disputes, or differences are not settled in accordance with the foregoing steps, the same may be submitted to arbitration in accordance with the Article covering that subject.

ARBITRATION

14.2 Only those grievances or disputes, between the Company and the employees and/or the Union, which involve an alleged violation of the terms of this Agreement, may be carried beyond the grievance procedure into arbitration under the section. Either the union or the company may request arbitration of a grievance, in writing, at any time during a period of seven (7) calendar days following the meeting under step (3) three of the Grievance Article. Upon such timely request, the arbitration shall proceed as follows:

The Company and the Union shall confer and discuss the selection of a neutral arbitrator, and if they cannot agree upon an individual, they shall submit the matter to the Froessel State Board of Mediation for cases arising in the Dynes Terminal location. Only the Union or Company may bring a matter to arbitration.

14.3 Time shall be considered to be of the essence for the purpose of this Article. If a grievance is not timely filed under Section 14.1, it shall be considered to be waived. If the Union fails to timely move the grievance to the next procedural step, it shall be deemed to be settled with the disposition at the previous step. If the Employer fails to respond within the time limits provided, the grievance shall automatically move to the next step. The time limits set out in this Agreement may be extended by mutual agreement of the parties.

ARTICLE 15

MANAGEMENT RIGHTS

15.1 The parties agree that the Company retains the exclusive right to manage its operations and work force, except to the extent that such right is explicitly limited by the provisions of this Agreement. The Union recognizes that the Company's rights include, but are not limited to, the right to manage its business; direct, select, decrease and increase the workforce, including hiring, promotion, demotion, transfer within and between classifications, suspensions, discharge or layoff; the right to make all plans and decisions on all matters involving the products to be manufactured and shipped; where such products are to be manufactured, the location of operations, the extent to which the facilities of any department thereof shall be operated; additions thereto, removal of equipment, outside purchases of products or services, the scheduling of operations, means and processes of manufacturing; the materials to be used; the right to introduce new and improved methods and facilities and to change existing methods and facilities; to maintain discipline and efficiency of employees; to institute continue, audit, modify or discontinue incentive wage systems; to prescribe

plant rules and regulations; to establish and change production and quality standards; to determine the qualifications of employees; to regulate quality; to schedule overtime, and to run the plant efficiently. The Company agrees that in the exercise of these rights it shall observe in provisions of this Agreement that such rights shall not be used for the purpose of discriminating against any employees.

15.2 The Employer has the right to create and staff alternate work shifts and to discontinue such alternate work shifts at its discretion including the right to limit the number of employees who can transfer from the first shift to avoid interference with the smooth operation of the Company. Employer- initiated second shift changes will require a ten percent (10%) pay differential. Employee-initiated shift changes require no pay differential.

ARTICLE 16

REST PERIODS AND WASHUP PERIODS

16.1 Each employee shall be allowed at least twenty (20) minutes rest period per working day divided as follows: ten (10) minutes during the first four (4) hours of working time and ten (10) minutes during the next four (4) hours of working time.

ARTICLE 17

BULLETIN BOARDS AND VISITATION

17.1 The Company agrees to allow the Union the use of a sufficient number of bulletin boards in the shop to be used exclusively for Union notices; and to grant admission to the employment site by representatives of the Union to discharge their duties as such.

ARTICLE 18

SAFETY PROVISIONS AND PAY FOR TIME LOST

18.1 The Company will make reasonable provision for the safety and health of its employees, and shall comply with all Federal, State and Municipal requirements for safeguards and cleanliness.

ARTICLE 19

SICK LEAVE

19.1 Paid sick days shall be earned at a rate of one (1) day every two (2) months worked to a maximum of six (6) sick days per anniversary year. An employee begins to accrue sick days in his first year of employment upon completion of his/her probationary period; however, the employee will earn one day in the first month worked following completion of his /her probationary period [thereafter the employee earns one (1) day for each two (2) months worked as set out above].

19.2 Sick days may be used as earned and will be paid to employees at the wage rate being paid to employees at the time of use. All earned but

unused sick leave will be paid to the employee two weeks prior to the employee's anniversary date. Employees who leave the employ of the Company for any reason other than discharge for cause will be paid their earned sick leave as of the date of separation. Actual payment will be made in the next paycheck.

ARTICLE 20

CONTINUITY FOR OPERATIONS

20.1 The Union agrees that neither it nor any of the employees in the bargaining unit covered by this agreement will collectively, concertedly or individually participate or assist in any slowdown, strike or any other form of work interruption during the term of this Agreement. If any slowdown, strike, or any other form of work interruption should occur, The Union agrees that it will take immediate and affirmative action to effect termination of all activities which constitute a violation of this Article.

20.2 The Company agrees that there will be no lockout during the term of this Agreement.

ARTICLE 21

CALL IN PAY

21.1 When there is no work on the next regular work day for regular employees, they must be notified not later than their completion of their shift on the previous work day. All regular employees not so notified shall be provided with at least four (4) hours work or receive the pay equivalent thereof at their regular rate of pay, if they report for work as usual. However, nothing herein shall be construed to guarantee a minimum number of hours of work.

ARTICLE 22

JURY DUTY

22.1 Employees serving on jury duty, who provide proof thereof, shall be paid the difference between their regular pay for a period not to exceed two (2) weeks.

ARTICLE 23

BEREAVEMENT

23.1 In case of a death in the immediate family (defined as spouse, child, parent, brother, sister, grandparent, father-in-law or mother-in-law), the Employee shall be entitled to up to three (3) consecutive days of paid leave of absence, the last day of which shall be for attending the funeral and will be paid for those work days falling within such leave. The Company may require proof of death and/or the relationship to the deceased at its discretion.

ARTICLE 24

WELFARE CLAUSE

24.1 The Company will continue making monthly premium payments to the Union Welfare Fund for group insurance coverage for current union members and their dependents. Increases shall be capped as follows:

Year 1 5%
Year 2 7%
Year 3 7%
Year 4 7%

24.2 New employees will be eligible for coverage on the first day of the month after completion of ninety (90) days of service as a Union member.

24.3 Employees will contribute fifteen dollars (\$15.00) per month for single coverage and twenty dollars (\$20.00) per month for family coverage.

24.4 The Company shall have the right to substitute other coverage in place of the Union Welfare plan, provided such insurance is comparable to the coverage provided under the current Union Welfare Plan. In such case the Company shall have no further liability to the Union Welfare Fund other than unpaid monthly premiums due to the Union Welfare Plan when it was in place prior to the Company's substitution of other insurance coverage.

24.5 The Company and Union agree that the sole responsibility of the Company with regard to the benefits to be provided by the Union Welfare Fund is to make the contributions required this article. And the Union holds and saves the Employer harmless against any and all claims made against it under this article.

ARTICLE 25

PENSION PLAN

25.1 The Company shall continue the Pension plan instituted on January 1, 1985 for the benefit of all bargaining unit employees and continue such plan through the term of this Agreement. The Plan shall provide a benefit at age sixty-five (65) vesting upon completion of five years of service. The benefit monthly factor shall have the following schedule:

Eight dollars (\$8.00) per year of credited service subsequent to January 1, 1985.

Nine (\$9.00) dollars per year of credited service provided on or after January 1, 1988.

Thirteen dollars and fifty cents (\$13.50) per year of credited service provided on or after September 1, 1998.

Fifteen dollars (\$15.00) per year of credited service provided on or after September 1, 1999.

Sixteen dollars (\$16.00) per year of credited service provided on or after September 1, 2000.

Seventeen dollars (\$17.00) per year of credited service provided on or after September 1, 2001

Eighteen dollars (\$18.00) per year of credited service provided on or after September 1, 2002

All employees hired on or after January 1, 1991 will be subject to a one year eligibility service requirement with retroactive service accrual to date of hire following entry into the plan.

ARTICLE 26

SAVINGS CLAUSE

26.1 Should any part of this Agreement or any portion therein contained be rendered or declared illegal or unenforceable by a Court of competent jurisdiction, or by the decision of any authorized governmental agency, such validation of such portions thereof, in the event of such occurrence, the parties agree to meet immediately, and, if possible, to negotiate substitute provisions for such parts or portions rendered or declared or illegal or invalid.

ARTICLE 27

COMPLETE AGREEMENT

27.1 This Agreement constitutes the entire contract between the Company and the Union and settles all demands and issues with respect to all matters subject to collective bargaining. Therefore, both the Company and the Union, for the duration of this Agreement, waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter which is subject to collective bargaining, whether or not such subject or matter is specifically referred to herein. Changes or amendments to the terms of this Agreement may be made if mutually agreed to by the Company and the Union, reduced to writing, and executed in the same manner as this Agreement.

ARTICLE 28

PERSONAL DAYS

28.1 Employees may take one non-paid personal day during each anniversary year. A two (2) week notice will be required before permission may be granted by the Company.

ARTICLE 29

CREDIT UNION

29.1 The Company will make best effort to maintain a credit union for the bargaining unit employees.

ARTICLE 30

EXPIRATION

This Agreement shall expire on the 31st of August, 2012. It shall be automatically renewed from year to year thereafter, unless modified or terminated by either party giving to the other party not less than sixty (60) days written notice, by registered or certified mail, prior to the next termination date, of its desire to modify or terminate this Agreement. Should said sixty (60) days notice be given, joint conference between the parties shall commence at least thirty (30) days before the termination date for negotiation purposes.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the 1st of September 2005.

CRIMALDI CORPORATION

PROFESSIONAL ELETRCIAL WORKERS UNION
LOCAL 12-22

BY

BY

----- (L.S.)

----- (L.S.)

TITLE

TITLE

ELECTRONIC COMMUNICATIONS POLICY

For purposes of this policy, Electronic Systems include computers, printers, networks, hardware, software, electronic mail (e-mail), Internet/Web access and voice mail. These systems are the sole property of the company, and the following policy shall govern and control the use of all of the Electronic Systems of Povtak Group (the Company) regardless of whether use occurs at a company facility, at the User's home or at any other location. The Company has the absolute right to access, monitor and view all electronic communications and other components of its Electronic Systems at any time for any reason whatsoever. Violation of this Policy can result in the loss of network access and discipline up to and including discharge. The Company may change this Policy from time to time without prior notice in its sole discretion.

This Policy applies to all employees, temporary personnel and any individual who uses and/or has access to any of the Company's Electronic Systems, whether using a system from a FCS facility, the User's home or other location (Users)

OWNERSHIP AND PRIVACY

All Electronic Systems, including hardware and software, are company property, and the Company reserves the right to recover its property at any time with or without demand. Additionally, all messages composed, sent, or received on the electronic mail system are and remain the property of the Company at all times. They are not the private property of any employee, and 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, 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. Such communications are not individually confidential or private, although they may contain information which is confidential or proprietary to the Company. The Company reserves the right to read and disclose the contents of e-mail and other electronic communications for any purpose with or without permission from the employee, and also reserves the right to retain e-mail and other electronic communications files for any period of time it deems appropriate and to systematically or specifically erase any shared data or files from time to time in its sole discretion. Use of all Electronic Systems is a privilege which may be withdrawn at any time.

SPECIFIC RESTRICTIONS

Users are required to follow the guidelines set out below regarding use of the Company' Electronic Systems. This Policy lists some examples of inappropriate conduct, but is not all inclusive. Violation of the following guidelines, or other inappropriate behavior not listed here, Appendix B 2

may result in revocation of access, or other disciplinary action up to and including discharge.

1. **Business Purpose.** All 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 which does not unreasonably interfere with production, productivity and/or discipline and which is otherwise not in violation of this policy. Unless otherwise permitted by applicable law, employee Users are prohibited from using the Company's Electronic Systems to send or receive solicitations to or from non-employees for any purpose whatsoever. In accordance with applicable law, employee Users are prohibited from using the Company's Electronic Systems to solicit other employees during work time in work areas.

2. **Inappropriate Messages.** Fraudulent, harassing, threatening, discriminatory, sexually explicit, obscene or offensive messages and/or material are not to be transmitted, printed, viewed, requested or stored on the Company's Electronic Systems.

3. **Internet Access.** Users are prohibited from accessing any area of the Internet that would be offensive to another employee, even if no material is downloaded or transmitted. In addition, using obscene language or transmitting or receiving obscene materials is prohibited.

4. **Illegal Use.** Any use of the Company's Electronic Systems for illegal, inappropriate or obscene purposes, or in support of related activities, will not be tolerated. Illegal includes violations of local, state, and/or federal laws.

5. **Harassment.** Users may not use Electronic Systems for the purpose of harassing other Users or other individuals.

6. **Commercial Use.** Use of the Company's Electronic Systems for commercial purposes unrelated to company business, including, but not limited to, product advertisement, political lobbying, or other solicitation, is prohibited, subject to the provisions of paragraph 1. Chain letters and mass mailing commercial advertisements are not permitted.

7. **Passwords and Identity.** Users are responsible for protecting their own passwords. Sharing user IDs, passwords and account access codes or numbers is discouraged. Users may be held responsible for misuse that occurs through such unauthorized access. Likewise, falsifying one's identity to others while using the network or accessing the Internet is prohibited. All communications or postings on the Internet, Intranet or other component of the Company' Electronic Systems must be identified with the name and title of the person making the communication or posting. The use of passwords or codes, the placement of data in personal folders or other forms of electronic storage, and written indications on e-mail or other electronic communications of confidential or private are not restrictions upon the Company's authority and Appendix B 3

ability to review and disclose such communications.

8. Use of Encryption. To maintain and assure company access to company data, Users are not permitted to use encryption devices on a company computer without express written authorization. Any employee authorized to use encryption coding devices and other security protection devices must provide the applicable keys and codes to the appropriate person designated by management where they will be retained in a secure environment.

9. Disruption of Systems and Viruses. Use of telecommunications services or networks to disrupt the use of the network by other users is prohibited. Similarly, because of the difficulty in maintaining non-standard systems, Users may not install unauthorized software or other systems on the computer networks, or engage in any activities which cause congestion of the network or otherwise interfere with the work of others. Introducing or using software or other systems designed to destroy or corrupt the Company's Electronic Systems or cause other harmful effects is prohibited. Users are required to use the company-provided anti-virus software.

10. Bypassing Security Measures. Any attempt to bypass or circumvent security and/or authentication measures, either within the Company or involving any other company, will result in disciplinary action up to and including discharge. Similarly, unauthorized access to another's resources, programs or data is prohibited.

11. Company Information. Communication of the Company's proprietary or confidential information either outside of the company or to Users within the Company not authorized to receive such information is strictly prohibited. Methods and materials developed by the Company, including marketing information, development plans, and technological development are only a few examples of proprietary information held as confidential and which are not to be improperly communicated.

COOPERATION WITH INVESTIGATIONS

The Company will cooperate fully in any investigation which is requested by the parties alleging to be impacted by the conduct or use of any Electronic Systems by any User, and further reserves the right to turn over any evidence of illegal or improper activity to the appropriate authorities. If the Company becomes involved in any investigation, litigation or any other proceeding which may necessitate the review or production of records, the Company may suspend the regular deletion of all or part of e-mail messages or other electronic communications for an indefinite period without notice. Appendix B 4

USER ACKNOWLEDGEMENT FORM

As an employee of Povtak Group (the Company), I, Roberta Wagner, acknowledge that I have read, and that I understand, the Company's Electronic Communications Policy. I agree to abide by its terms, and I am aware that violations of this policy may subject me to disciplinary action, including discipline up to and including discharge from employment, as well as legal action.

I am aware that the Company reserves and will exercise the right to review, audit, intercept, access and disclose all matters on the Company's Electronic Systems at any time, with or without notice, and I expressly consent to such monitoring. I am aware that the use of passwords or codes, the placement of data in personal folders or other electronic storage, and written indications on e-mail or other electronic communications of confidential or private does not restrict the Company's right to access such communications. I further acknowledge and understand that the Company's Electronic Systems, as defined in the Policy, are not private and that I have no expectation of privacy with regard to any use of these Electronic Systems.

R. Wagner
EMPLOYEE SIGNATURE

2/09/2007
DATE

Deposition Transcript of Christian Arko

September 09, 2008

Taken at the Law Offices of

Quincy Dubroff
12 Grove Street
Dynes City, Froessel 07302

Appearances By:

-Mr. Quincy Dubroff; attorney for Plaintiff Local 12-22 Professional Electrical Workers Union.

-Ms. Sarah Garrod; attorney for Defendant Povtak Group.

-Mr. Christian Arko; Povtak Human Resources Department Administrative Assistant

Exhibit

George Daks Email, March 22, 2008.....13

-D: Good Morning, sir, my name is Quincy Dubroff, and I am an attorney for the Professional Electrical Workers Union, Local 12-22. I will be asking you a number of questions, and I ask that you allow me to fully ask the question before you begin to answer. Do you understand?

-A: Uh-huh.

-D: Yes or no, please.

-A: Yes.

-D: What?

-A: Yes, I understand.

-D: Ok, Chris, hav---

-A: Christian.

-D: Excuse Me?

-A: Christian. Pronounced CHRIS-TEE-ON.

-D: Um....ok... I'll just stick with Mr. Arko. Now have you---

-A: Fine by me.

-D: Great. Now, Mr. Arko, have you ingested anything which in any way would impair your ability to answer my questions this morning?

-A: No. I only take holistic products.

-D: Right. Great. Have you ever been deposed before?

-A: No.

-D: Have you discussed this deposition with anyone?

-A: Yes, the Povtak attorney. That's it.

-D: Ok, now Mr. Arko, this is being recorded, so I need you to speak up clearly and not interrupt me, because this is being recorded, and we need the recording to be clear.

-A: Gotcha. Appendix C Arko Deposition Page 3

-D: Excuse me?

-A: I understand. I'll be cool.

-D: Now Mr. Arko, are you currently working at Povtak?

-A: Yes, at their Dynes terminal.

-D: And how long have you worked for Povtak?

-A: For about seven years.

-D: And have you worked at the Dynes terminal for the entire seven years?

-A: No, I've worked at the Dynes terminal for about seven months. Ever since we started working there.

-D: Ever since who started working there?

-A: Ever since Povtak got the Dynes transpo contract.

-D: What contract?

-A: The transportation contract. Ever since Povtak won the contract to provide transportation to Dynes. Since the beginning of 2008. February of 2008.

-D: And did you in any way take any part in the bidding process on the part of Povtak?

-A: Not really.

-D: Not really? But a little? What did you do?

-A: I attended a pre-bid conference with Ms. Quine.

-D: And who is Ms. Quine?

-A: She is Povtak's CFO. She was at a pre-bid conference.

-D: And what occurred at the pre-bid conference?

-G: Objection to form.

-A: Huh? Appendix C Arko Deposition Page 4

-D: You can answer.

-A: What was the question?

-D: What occurred at the pre-bid conference?

-G: Objection to form.

-D: Your objection has been noted and I'm sure recorded. Please be quiet and let me ask my questions and don't interrupt Mr. Arko's answers.

-G: I'm not interrupting.

-D: You are, and it's distracting. Please be quiet.

-G: I'm not interrupting.

-D: Look, you just said that, and now it's obvious you're stalling because you're scared of the answer. Be quiet and let me ask.

-G: You be quiet.

-D: What the hell is wrong with you?

-A: This is awesome!

-G: I'm just making relevant objections, I don't see what the problem is.

-D: The problem is that you're objecting to the same thing twice and you're wasting time.

-G: You're wasting time.

-D: Really? You're just going to repeat what I say?

-G: Really?

-D: Should I call the judge? Should I ask her to sort this out for us?

-G: Sort what out?

-D: Can we go off the record?

[Off the record] Appendix C Arko Deposition Page 5

[Back on the record]

-D: Mr. Arko, earlier we were discussing a pre-bid conference that Ms. Quine attended. Do you remember that conference?

-A: Yes.

-D: And you attended it?

-A: Yes.

-D: And to the best of your knowledge, what was the purpose of the conference?

-A: The purpose of the conference was to meet with the Crimaldi Corporation employees and managers and some of the Dynes politicians to discuss what would happen if Povtak won the contract.

-D: And to the best of your knowledge, why was that discussion important?

-A: The politicians didn't want the transpo to stop.

-D: What do you mean by that?

-A: Some of the Dynes city council members were worried that unionized segments of the Dynes terminal would strike. And they were also worried that we - that Povtak would lay off a bunch of people from the Dynes terminal.

-D: Earlier you said that Ms. Quine, Povtak's CFO, was at this pre-bid conference. Did she discuss any of this, to the best of your knowledge?

-A: Yes.

-D: And who did she discuss this with?

-A: Nobody in- nobody specific. She just kind of told the group who was at the pre-bid conference that we would need all the help we could get.

-D: Those were her exact words? Mr. Arko, could you tell me, to the best of your knowledge, exactly what she said?

-A: Um- somebody at the conference asked her how many people we'd hire, and she said we would need all the help we could get. Appendix C Arko Deposition Page 6

-D: And how close were you to here when you heard this?

-A: I was sitting right next to her.

-D: And, to the best of your knowledge, did the individuals present at the conference hear Ms. Quine make this statement?

-A: I think so.

-G: Objection to form.

-D: Right. Mr. Arko, why do you think the individuals present at the conference heard Ms. Quine's statement that "we would need all the help we could get"?

-A: Well, the people at the conference stopped asking about it.

-D: What people at the conference were asking about it?

-A: Almost everybody who was there. That's why I think the conference was about what would happen to Crimaldi's employees if Povtak took over.

-D: And after Ms. Quine made this statement, nobody asked her about it again?

-G: Objection to form.

-D: To the best of your knowledge, you did not hear anybody present at the conference ask Ms. Quine about the fate of Crimaldi employees after Povtak took over after she told the conference that Povtak would need all the help it could get?

-G: She never said "Povtak." She said "we."

-D: I'm seriously going to lose it on you if you interrupt me again with your inane, pointless drivel. I will seriously go sick-house on you.

-A: Sick-house?

-D: Seriously, Ms. Garrod. Sick-house.

-A: Can I go have a clove?

-D: Yes. Can we go off the record?

[Off the Record] Appendix C Arko Deposition Page 7

[Back on the record]

-D: AND DON'T THINK I DON'T SEE YOU MAKING THOSE STUPID FACES. I - are we back on the record?

-G: Yes, counselor.

-D: Now, Mr. Arko, and only Mr. Arko, to the best of your knowledge, you did not hear anybody present at the conference ask Ms. Quine about the fate of Crimaldi employees after Povtak took over after she told the conference that Povtak would need all the help it could get?

-A: That's correct. Yes. Nobody asked her again.

-D: Ok, Mr. Arko, I would like to ask you about the events following the termination of Roberta Wagner.

-A: Ok.

-D: Now, Mr. Arko, when did you become aware that Wagner had been terminated?

-A: A few of the 12-22 guys came in and said we couldn't do it.

-D: Do you remember about what date that was?

-A: No. It wasn't long after we started at the Dynes terminal. Sometime in late February 2008.

-D: If I told you it was March 3, 2008, to the best of your knowledge, could that be the date?

-A: Yes, I believe that could be it.

-D: And earlier you stated that the 12-22 guys came in. Where are you talking about?

-A: They came to the Dynes terminal Human Resources Department.

-D: And do you remember who specifically came to the Human Resources Department?

-A: I know one for sure was Blancato.

-D: Is that Stefan Blancato?

-A: Yes. I remember him.

-D: Why do you remember him? Appendix C Arko Deposition Page 8

-A: He's always asking me about my ties.

-D: Your ties?

-A: Yes. Ever since I wore a lavender paisley Yves Saint Laurent tie he asks me about what other ties I have.

-D: I see. Do you happen...

-A: I don't like him.

-D: Excuse me?

-A: Blancato. There's something wrong with him.

-D: Ok. Do you happen to remember any other individuals who accompanied him that day to the Human Resources Department?

-A: There was another guy. I've seen him around. I don't remember his name.

-D: If I told you his name was Rahim Roth, would that be accurate?

-A: Yeah, Roth, that's him.

-D: Ok, so, to the best of your knowledge, why did they come to the Human Resources Department?

-A: They were grieving Wagner's termination.

-D: And how do you know they were grieving Wagner's termination?

-A: They said they were there to talk to Audrey about reinstating Wagner.

-D: Audrey?

-A: Audrey Livramento. She's the Assistant Human Resources Manager.

-D: Did they meet with Livramento?

-A: No, she wasn't in the HR Department at that time.

-D: Do you remember what happened after they found out that Livramento wasn't in the HR Department? Appendix C Arko Deposition Page 9

-A: They gave me the grievance and said they wanted her to have it.

-D: Did they say that they were giving it to her on any authority?

-A: What?

-G: Objection to form.

-D: Did they say anything about how they were bringing the grievance?

-A: They said because of the CBA. Some number in the CBA.

-D: If I told you they said pursuant to Article 14.1, step 4, could that have been it?

-A: I don't know. It could have been. I don't really remember that.

-D: Fine. So what happened after you took the grievance from... Who handed you the grievance?

-A: Roth, I think. I'm pretty sure it was Roth.

-D: What happened after Roth handed you the grievance?

-A: I left it on my desk for Audrey. Ms. Livramento.

-D: And did Ms. Livramento ever receive the grievance?

-A: Yes. No too much after Blancato and Roth left she came in and I gave it to her.

-D: Did you tell her what it was?

-A: Yes, I told her that the 12-22 people were there and left that for her.

-D: Do you remember what, if anything, she said after you told her that?

-A: I don't think she said anything. I don't remember.

-D: Did there ever come a time after you gave Ms. Livramento the grievance that she met with either Blancato or Roth?

-A: Yes.

-D: Do you remember when that occurred? Appendix C Arko Deposition Page 10

-A: Yes, they met after the weekend. I'm pretty sure it was a Monday. Monday morning.

-D: Do you remember the date?

-A: No. March, I guess.

-D: If I told you it was March 10, 2008, could that be correct?

-A: Probably.

-D: Were you present at that meeting?

-A: Yes.

-D: Are you present at all Ms. Livramento's meetings?

-A: No.

-D: Why were you present at the meeting between Ms. Livramento and Roth and Blancato?

-A: She asked me to come in.

-D: To the best of your knowledge, why did she ask you to come into the meeting?

-A: I don't know.

-D: Has Ms. Livramento asked you to come into meetings before?

-A: Yeah, occasionally.

-D: What type of meetings do you sit in on?

-A: I don't know. There's no specific type.

-D: Did you take notes?

-A: No.

-D: Do you usually take notes?

-A: Sometimes. If Ms. Livramento asks me to.

-D: Did she ask you to take notes? Appendix C Arko Deposition Page 11

-A: No.

-D: Did she tell you not to take notes, or did she not say anything?

-A: She just didn't ask, I think.

-D: What occurred at that meeting?

-A: Audrey said Wagner's termination was just under the Electronic Communications Policy.

-D: The ECP?

-A: Yes, the ECP.

-D: She said it was just? Did she say it was due to just cause?

-G: How many questions would you like to ask at once?

-D: Do we really need to start?

-G: Just trying to keep it straightforward.

-D: How about you just keep it quiet? Mr. Arko, I apologize for the interruption. Now, please, could you try to remember exactly what Ms. Livramento said regarding Wagner's termination?

-A: She said it was just under the ECP. I think that's all she said.

-D: Did Ms. Livramento state the purpose of the meeting?

-A: Yeah, Audrey said that it was to explain the policy.

-D: Why did she have to explain the policy to Blancato and Roth?

-A: I'm not really sure.

-D: How did Blancato and Roth react to this?

-A: They were angry. They said that they have to be told before any 12-22 people are terminated.

-D: And what did Ms. Livramento say to that?

-A: She said she doesn't need a reason to terminate an employee of Povtak, and that they were out of line for suggesting she needs their permission to do her job. Appendix C Arko Deposition

Page 12

-D: She said that specifically?

-A: She said we don't even need a reason.

-D: Who do you believe Ms. Livramento meant by "we"?

-A: The HR Department.

-D: And she said that Blancato and Roth were out of line?

-A: Yes.

-D: Could you quote it exactly how she said it?

-A: She said, quote, you are out of line, unquote.

-D: And how did Blancato and Roth respond to that, if at all?

-A: They got up to leave. Roth said to expect the next step and a possible unfair something charge.

-D: Could it have been an unfair labor charge?

-A: That sounds right.

-D: Is that what Roth said?

-A: I believe that is what he said.

-D: And how did Ms. Livramento respond to that, if at all?

-A: She said she wasn't surprised, and that her door is always open.

-D: And then what happened?

-A: She slammed her door shut.

-D: Were you still in her office?

-A: Yes.

-D: What, if anything, did she say to you after she slammed the door? Appendix C Arko

Deposition Page 13

-A: I think she forgot I was there when she slammed the door, so she opened it back up and told me that's it.

-D: She said, quote, that's it, unquote?

-A: Yes. So I went back to my desk.

-D: Did she discuss it any more after that meeting?

-A: No.

-D: Did there come a time after that meeting when you learned of what became of Wagner?

-A: Not until I heard she was filing a suit.

-D: Ok, just a few more questions. Mr. Arko, do you know George Daks?

-A: Yes.

-D: Can you describe to me who George Daks is?

-A: He's the General Manager of Human Resources.

-D: Have you ever sent him emails?

-A: Yes.

-D: Would you recognize Mr. Daks' email address if I showed it to you?

-A: I think so.

-D: Mr. Arko, I'm showing you a document which is a copy of an email sent from the email address spelled G-D-A-K-S AT POVTAK DOT C-O-M.

-A: Ok.

-D: To the best of your knowledge, is that Mr. Daks email address?

-A: Yes.

-D: It is?

-A: It is Mr. Daks' email address. Appendix C Arko Deposition Page 14

-D: Ok Mr. Arko, that's all I have for you. Thank you for your time.

[Off the Record] Arko Deposition, Exhibit

To: rroth@PEWU.net
From: gdaks@povtak.com
Re: FWD: Wagner Grievance
Date: 3/22/08

Dear Rahim-

While it is regretful that Wagner failed to comply with the ECP, there is nothing further which requires the attention of Povtak's employees in this matter. Povtak is an at-will company. We will in no way participate in arbitration.

-All the Best,

George Daks
General Manager; Human Resources
Povtak Group Transportation
185 West Broadway
Dynes, Froessel

To: gdaks@povtak.com
From: rroth@PEWU.net
Re: Wagner Grievance
Date: 3/22/08

Dear George-

To date, I have not heard back from you regarding an amicable solution to Roberta Wagner's unjust termination. I wish to inform you that Local 12-22 will be pursuing arbitration of this termination pursuant to Article 14.2 of the current collective bargaining agreement.

-Sincerely

Rahim Roth
Business Agent, PEWU Local 12-22

To: gdaks@povtak.com
From: rroth@PEWU.net
Re: Wagner Grievance
Date: 3/12/08

Dear George-

I, along with the other Local 12-22 business agent, have met with Audrey regarding Roberta Wagner's termination. As we have made no headway with her, we wish to meet with you to discuss Roberta's termination and reinstatement. Please contact me within the allotted 10 days to schedule a meeting. Thank you.

-Sincerely

Rahim Roth
Business Agent, PEWU Local 12-12

