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SUCCESSOR EMPLOYER'S OBLIGATIONS UNDER A PREEXISTING COLLECTIVE BARGAINING AGREEMENT: THE SECOND CIRCUIT MISINTERPRETS SUPREME COURT DECISIONS AND SETS A HARMFUL PRECEDENT

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IN *LOCAL 348-S v. Meridian Management Corp.*, the Second Circuit held that a successor employer has a duty to arbitrate the issue of whether it is bound by the substantive terms of a collective bargaining agreement (CBA) between the predecessor employer and its employees.[1] In so holding, the Second Circuit appears to have confused the facts of this case with the more restrictive situations in which the Supreme Court has stated that a new employer has a duty to arbitrate disputes over a CBA to which it was not a party.[2] In fact, the court's decision to force Meridian Management Corporation (Meridian) to arbitrate this issue was superfluous since the Supreme Court has already stated that successor employers are "not bound by the substantive provisions of a collective-bargaining contract" under circumstances virtually identical to this case.[3] Moreover, the Second Circuit's policy justification to protect employees' interests may in fact cause an ironic result in that it sends a message to successor employers that they can avoid all obligation under the existing CBA, including a duty to arbitrate disputes, by firing the majority of the employees upon takeover.[4] Accordingly, the appropriate decision in this case would have been to reverse the judgment of the district court and hold that Meridian is not bound by the arbitration provision of the CBA.

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1 583 F.3d 65, 66 (2d Cir. 2010).

2 *See generally* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

3 NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 284 (1972).

4 *Local 348*, 583 F.3d at 85–86 (Livingston, J., dissenting).

In October 2003, Meridian was awarded a three-year contract by the Port Authority of New York and New Jersey (Port Authority) to provide, among other things, janitorial services at the Jamaica Air Train Terminal in JFK International Airport.[5] Meridian subcontracted the janitorial work with Cristi Cleaning Services, Inc. (Cristi), whose unionized janitorial employees were already represented by Local 348-S, UFCW, AFL-CIO (Local 348).[6] The preexisting CBA between Cristi and Local 348 required Cristi to contribute to the union's Health and Welfare Fund, as well as arbitrate all disputes between the parties.[7] In November 2005, Meridian lawfully terminated its contract with Cristi and, after receiving multiple bids from other cleaning services, decided to provide the janitorial services itself.[8] Meridian retained roughly three-quarters of the Cristi employees who had previously performed the janitorial services at the terminal.[9] In response, Local 348 requested that Meridian recognize it as the employees' bargaining representative.[10] Meridian, however, declined to do so, and accordingly did not make any contributions to the union's Health and Welfare Fund.[11]

Local 348 sued Meridian under the Labor Management Relations Act and the Employee Retirement Income Security Act in the United States District Court for the Eastern District of New York in January 2006.[12] The complaint alleged that "there had been a continuation of the Cristi cleaning services work at the terminal" and that Local 348's employees "had continuously performed that work by the same methods."[13] Therefore, Local 348 argued that Meridian had "assumed Cristi's obligations under the CBA and . . . had a duty to contribute to the Fund."[14] Additionally, Local 348 complained that Meridian had failed to make such required contributions.[15] Both parties subsequently moved for summary judgment, with Local 348 requesting that the court compel Meridian to submit to arbitration as required by the CBA, and Meridian arguing that it was not a party to the

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[5] *Id.* at 66 (majority opinion).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 66, 75.
[10] *Id.* at 66–67.
[11] *Id.* at 67.
[12] *Id.*
[13] *Id.* (internal quotations omitted).
[14] *Id.*
[15] *Id.*

CBA and was thus not bound by any of its terms, including the arbitration clause.[16] Finding that Meridian was a "successor employer," the district court granted summary judgment in favor of Local 348 and ordered Meridian to arbitrate to what extent the substantive terms of the CBA bound Meridian.[17] Meridian immediately appealed the district court's ruling.[18]

On appeal, Meridian did not contest the district court's finding that it was a successor employer to Cristi.[19] Thus, the Second Circuit was left to decide: (1) whether Meridian was bound by the CBA's arbitration clause; and (2) whether Meridian was bound by some or all of the substantive terms contained in the CBA.[20] The majority found that, depending on the circumstances, a successor employer may or may not be bound by the substantive terms of an agreement between the predecessor employer and its employees' union, but declined to answer whether Meridian was so obligated in this situation.[21] Instead, the court held that Meridian had a duty under the CBA to submit this issue to arbitration because there was a "substantial continuity of identity of the workforce" between Meridian and Cristi.[22] The majority's justification was that Meridian had hired a majority of Cristi's workforce, and that these employees had "essentially work[ed] for Meridian" from the beginning.[23] Moreover, after analyzing a string of circumstantially similar Supreme Court cases, the majority concluded that its decision was consistent with established precedent and that requiring Meridian to arbitrate was the best way to balance its interests with those of its newly-acquired employees.[24]

The first case the majority discussed was *John Wiley & Sons, Inc. v. Livingston*, in which a corporation merged with a second corporation that had a CBA with its unionized employees.[25] In *Wiley*, the Supreme Court used federal labor laws supported by local state law principles to address whether the merged employer had a duty to arbitrate under the disappearing corpora-

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16 *Id.*

17 *Id.* at 66–67.

18 *See id.* at 67.

19 *Id.* at 68.

20 *Id.*

21 *Id.* at 76–77.

22 *Id.* at 76.

23 *Id.* at 74.

24 *Id.* at 78.

25 *Id.* at 68–69 (discussing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 544–45 (1964)).

tion's preexisting CBA.[26] Despite the merged employer's contention that it was never a party to the CBA, and therefore had no duty to recognize or bargain with the employees' union, the Supreme Court required it to arbitrate its dispute, stating that "a collective bargaining agreement is not an ordinary contract" but a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[27] Furthermore, the Supreme Court noted that in merger situations, resolving disputes with arbitration generally eases the managerial transition for the employees and helps to avoid "industrial strife."[28]

The majority next cited *NLRB v. Burns International Security Services, Inc.*, an earlier Second Circuit case in which the court decided—and the Supreme Court affirmed—that a subsequent employer was *not* bound by the substantive terms of a CBA between the predecessor employer and the employees it had retained.[29] Similar to the facts in the instant case, the new employer in *Burns* outbid its predecessor for the latest contract to provide security services to a third party and, upon commencement of the work, chose to hire the majority of the predecessor's employees to perform the same work as they had for the predecessor employer.[30] The Supreme Court noted that the new employer was obligated to recognize and bargain with the union because it hired the majority of its predecessor's employees, but specifically held that such employers "are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors *but not agreed to or assumed by them.*"[31]

The majority then discussed the Supreme Court's holding in *Howard Johnson Co. v. Hotel and Restaurant Employees* where the successor employer only retained twenty percent of the predecessor's employees and thus did *not* have a duty to arbitrate under the preexisting CBA.[32] The Supreme Court distinguished this holding from that in *Wiley* on two grounds: (1) in this case the predecessor employer remained a viable entity after its suc-

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[26] *John Wiley*, 376 U.S. at 548.

[27] *Id.* at 550.

[28] *Id.* at 549.

[29] *Local 348*, 583 F.3d at 69–70 (discussing NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 281–82 (1972)).

[30] *Burns*, 406 U.S. at 274–76.

[31] *Id.* at 281–82 (emphasis added).

[32] *Local 348*, 583 F.3d at 70–72 (discussing Howard Johnson Co. v. Hotel and Rest. Emps., 417 U.S. 249, 249, 262–65 (1974)).

cessor took over, thus the retained employees had recourse against the predecessor, which was not an option in *Wiley* because the predecessor employer ceased to exist after the merger; and (2) in *Wiley* there had been a "substantial continuity of identity in the business enterprise" in large part because the successor employer kept all of the employees of the merged corporation, while in this case the subsequent employer hired only a small portion of its predecessor's employees.[33]

With these cases in mind, the majority proceeded to synthesize the facts of the instant case with these previous decisions.[34] The court first noted that as in *Wiley* and unlike *Howard Johnson*, Meridian hired the majority of Cristi's workforce, who continued to do essentially the same work that they had performed for Cristi.[35] Furthermore, the majority found there was a "substantial continuity of identity" between Meridian and Cristi because both employers provided the same janitorial services, the employees performed the same duties at the same location, and both employers provided the same service to the Port Authority.[36] In particular, the majority focused on the "key factor" that the employees had "essentially work[ed] for Meridian" the entire time, stating that "Cristi was simply the middleman."[37]

The dissent argued that the majority had misinterpreted the Supreme Court cases it cited and had thereby confused the issue of when a successor employer must recognize and bargain with its new employees' union when it had a duty to arbitrate under a preexisting CBA.[38] The dissent's interpretation of these Supreme Court decisions was that the "substantial continuity of identity" test only determined whether there was a duty to recognize and bargain, and even if the new employer had such a duty, it was only required to arbitrate if there had been a merger, an assumption of the CBA, or where the two employers were essentially the same entity that only appeared to operate autonomously, as when a parent company conducts independent operations under separate corporations.[39] The dissent concluded that because Meridian did not fall within any of these

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[33] *Howard Johnson*, 417 U.S. at 257.

[34] *Local 348*, 583 F.3d at 74.

[35] *Id.*

[36] *Id.* at 74–75.

[37] *Id.* at 74.

[38] *Id.* at 78–79 (Livingston, J., dissenting).

[39] *Id.*

three situations, requiring it to arbitrate was a departure from well-settled case law.[40]

The majority held that requiring Meridian to arbitrate was the "most effective way to balance those interests recognized by the Supreme Court," including the employer's right to negotiate its own terms with the union and the employees' need for stability and protection of their expectations during the transition.[41] The majority also rejected Meridian's reliance on the Third Circuit's decision in *AmeriSteel Corp. v. International Brotherhood of Teamsters*, which considered an almost identical set of facts as the instant case and held that because the Supreme Court had already made it clear that a successor employer would not be bound by the substantive terms of a preexisting CBA, arbitration was unnecessary because any award in the union's favor could not "receive judicial sanction."[42] According to the majority, its sister circuit's opinion ignored the overriding importance of arbitration in balancing the employer's right to negotiate its own CBA and the employees' need for stability throughout the transition process from one employer to another.[43] The dissent, however, argued that the majority's holding could incentivize successor employers to not retain their predecessor's employees to avoid all obligation to the CBA, including arbitration.[44] Ultimately, however, the Second Circuit affirmed the trial court's decision to require Meridian to arbitrate whether, and to what extent, it may be bound by the terms of the CBA between Cristi and Local 348.[45]

In doing so, the majority misinterpreted the Supreme Court decisions it cited and effectively crafted a new rule that is both unsupported and dangerous for the very employees it is purported to protect. The majority apparently deduced from *Wiley* that a successor employer is required to arbitrate its duties under the CBA any time there is a "substantial continuity of identity"—i.e., when it retains the majority of its predecessor's employees.[46] Applying this test to the facts of *Burns*, the successor employer should have been required to arbitrate since it

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[40] *Id.* at 80.

[41] *Id.* at 76 (majority opinion).

[42] *Id.* at 77–78; AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 273–74 (3d Cir. 2001).

[43] *Local 348*, 583 F.3d at 78.

[44] *Id.* at 85–86 (Livingston, J., dissenting).

[45] *Id.* at 78 (majority opinion).

[46] *Id.* at 74–76.

hired the majority of its predecessors employees, who ultimately performed identical work for their new employer;[47] however, in reality, the Supreme Court held the employer in *Burns* to no such obligation.[48] The *Burns* decision clearly indicates that *Wiley* did not stand for such a blanket proposition.[49] In fact, the Supreme Court in both *Burns* and *Howard Johnson* cautioned against extending *Wiley* beyond the factual context of that case, specifically noting that *Wiley* was a "narrower holding deal[ing] with a merger occurring against a background of state law that embodied the general rule that in *merger situations* the surviving corporation is *liable for the obligations of the disappearing corporation.*"[50] This indicates that a determinative consideration for mandating arbitration is whether there is a possibility that the successor employer could be bound by the CBA terms, thus explaining the opposite outcome in *Burns* and *Wiley*.[51]

Accordingly, the appropriate inquiry should have been whether there was a chance Meridian could have been bound by the substantive terms of the CBA between Cristi and Local 348. Because the instant case is substantively indistinguishable from *Burns*—where the Supreme Court held that the successor employer could not be bound by CBA terms—requiring Meridian to arbitrate was erroneous. Both cases involved a situation where a service was bid out by a central entity, the original provider of the service was eventually replaced by another provider, and the subsequent provider hired several of the first provider's employees to continue doing the same work at the same location.[52] The majority attempts to distinguish these two cases on the ground that *Burns* involved competitors instead of a contractor and sub-contractor whereby, it argues, the Cristi employees had in a sense always worked for Meridian.[53] Using this same reasoning, however, the employees in both cases had always worked for the central entity that bid the work out initially;[54] it is of no consequence that the money originally passed through an additional hand in the instant case. Therefore, any attempt to

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[47] *See* NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 274 (1972).

[48] *See id.* at 281–82.

[49] *See id.* at 286–87.

[50] *Id.* at 286 (emphasis added); *see also* Howard Johnson Co. v. Hotel and Rest. Emps., 417 U.S. 249, 256–57 (1974).

[51] *See Burns*, 406 U.S. at 287.

[52] *Id.* at 274–76; Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 66 (2d Cir. 2010).

[53] *Local 348*, 583 F.3d at 74–75.

[54] *Burns*, 406 U.S. 274–75; *Local 348*, 583 F.3d at 66–67.

distinguish these cases based on the nature of the relationship between the employers has no effect on the determinative question of whether the successor employer can be bound by the substantive terms of the CBA.

Finally, the majority's justification that its decision protects the employees' interests is myopic.[55] The long-term effect of this decision is that it encourages future successor employers to question whether to retain their predecessors' unionized employees. Any employer cognizant of this decision who is in a situation similar to Meridian will undoubtedly weigh the benefits of retaining experienced workers with the possibly lengthy and expensive pitfalls of litigating, appealing, arbitrating, and potentially relitigating an erroneous arbitration award.[56] This decision assures these employers that they can avoid this hassle by simply firing their predecessor's employees.[57] It therefore cannot be argued that this holding protects the *best* interest of the employees—i.e., to continue to have a job.[58]

Meridian conceded that it had a duty to recognize and bargain with Local 348 as its employees representative.[59] As part of this process, the parties would certainly have bargained over Meridian's obligation to contribute to the Health and Welfare Fund. Thus, requiring that they arbitrate over terms that ultimately would have been negotiated during the bargaining process was an unnecessary and expensive step for both parties. The more prudent holding would thus have been to affirm Meridian's duty to recognize and bargain with Local 348 and mandate that this occur within a reasonable time period following the decision.

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[55] *See Local 348*, 583 F.3d at 78.

[56] *See id.* at 86 (Livingston, J., dissenting).

[57] *See id.*

[58] *See id.*

[59] *Id.* at 79 (majority opinion).