The Dispute Over Neutrality Agreements in *UNITE HERE Local 355 v. Mulhall*: Much Ado About Nothing?[1]

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SUMMARY

In dismissing the writ of certiorari as improvidently granted in December 2013, the U.S. Supreme Court in *UNITE HERE Local 355 v. Mulhall*[2] seemed to implicitly acknowledge the significant flaws in the procedural posture of the case and the risks of ruling on a case that should have never made its way to our nation's highest court. While a minor circuit split now exists regarding whether § 302 of the Labor-Management Relations Act of 1947 (also known as the "Taft-Hartley Act")[3] prohibits some neutrality agreements tainted by corruption and extortion, the practical effects of the split should be relatively minimal. Essentially, for now unions and employers in the Eleventh Circuit will likely not prevail on motions to dismiss these "remarkable"[4] § 302 claims "that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery."[5] Instead, those unions and employers will have to wait until summary judgment to have the cases dismissed once it is demonstrated that—as in *Mulhall*—there was clearly no corruption or extortion of the employer. In the rest of the country, meanwhile, courts will likely continue to uphold neutrality agreements, consistent with a Third

[1] Special thanks to Noah Warman, Esq. of Sugarman & Susskind, P.A., Coral Gables, FL. Mr. Warman was counsel for UNITE HERE Local 355 in this litigation and provided invaluable guidance during the drafting of this paper.

[2] *UNITE HERE Local 355 v. Mulhall*, 134 S. Ct. 594 (2013).

[3] 29 U.S.C. § 186.

[4] *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

[5] *Id.*

Circuit holding[6] that such agreements do not violate § 302 and the Fourth Circuit's dismissal[7] of an almost identical impact suit brought by the same anti-union special interest group behind *Mulhall*, the National Right to Work Legal Defense Foundation ("NRTWLDF").[8] This paper discusses the significant procedural and substantive flaws of the two-judge majority Eleventh Circuit ruling in *Mulhall*, and demonstrates why practitioners—even in the Eleventh Circuit—should not be afraid of neutrality agreements that are not part of a corrupt scheme.

SECTION 302 OF THE TAFT-HARTLEY ACT

Section 302(a) of the Taft-Hartley Act makes it a crime for an employer "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to a labor union that represents or seeks to represent its employees.[9] Section 302(b) makes it a crime "for any person to request, demand, receive or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."[10] Section 302(b) also makes it a crime "for any labor organization . . . to demand or accept from the operator of any motor vehicle . . . or the employer of any such operator . . . any money or other thing of value payable to such organization . . . as a fee or charge for the unloading . . . of the cargo of such vehicle."[11] Section 302(c) lists nine exceptions to the 302 prohibitions, addressing, *e.g.*, payments to benefits funds. [12]

The penalties for violating § 302 depend on the value of the amount of "money or other thing of value" that was paid, loaned or delivered.[13] For amounts up to $1,000, the crime is a

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[6] *Id.*

[7] *Adcock v. Freightliner LLC*, 550 F.3d 369, 377 (4th Cir. 2008).

[8] http://www.nrtw.org/.

[9] 29 U.S.C. § 186(a)(2).

[10] § 186(b)(1).

[11] § 186(b)(2).

[12] § 186(c).

[13] § 186(d).

misdemeanor punishable by a fine of up to $10,000 and up to a year incarceration.[14] For amounts over $1,000, the crime is a felony punishable by a fine of up to $15,000 and up to five years' incarceration.[15]

HISTORY OF *MULHALL*

In 2004, Hollywood Greyhound Track, d.b.a. Mardi Gras Gaming ("Mardi Gras"), approached UNITE HERE Local 355 ("Local 355"), the local hospitality workers' union, for support with a ballot proposition to license casino gaming at six or seven different casinos in Florida, only one of which was operated by Mardi Gras.[16] Mardi Gras and Local 355 entered into a fairly typical Memorandum of Understanding ("MOU")—or "neutrality agreement"—in which Mardi Gras agreed to: (1) recognize the union based on a card-check procedure; (2) give the union access to work premises during non-work hours; (3) provide the union a list of employees and their addresses; and (4) remain neutral in the union's organization efforts.[17] Local 355 agreed "not to 'picket, boycott, strike, or take other economic action against Mardi Gras,' and that it would 'expend monetary and other resources' "[18] in support of the ballot proposition supported by the casino operators. According to the Eleventh Circuit, Local 355 "ultimately spent $100,000 on the initiative campaign."[19]

In 2006, Mardi Gras began operating its gaming facility, and, pursuant to the MOU, provided Local 355 with employee information lists.[20] After retaining a former NRTWLDF

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[14] § 186(d)(1).

[15] § 186(d)(2).

[16] Author's conversation with Noah Warman, Esq., counsel for Local 355.

[17] *Mulhall v. UNITE HERE Local 355*, No. 08-61766, 2009 WL 8711022, at *1 (S.D. Fla. Apr. 22, 2009) *rev'd and remanded*, 618 F.3d 1279 (11th Cir. 2010).

[18] *Mulhall v. UNITE HERE Local* 355, 618 F.3d 1279, 1289 (11th Cir. 2010) (quoting Complaint ¶ 11).

[19] *Id.*

[20] *Mulhall v. UNITE HERE Local* 355, No. 08-61766, slip op at 2 (S.D. Fla. Jan. 24, 2011) *rev'd and remanded*, 667 F.3d 1211 (11th Cir. 2012).

attorney, Stuart Rosenfeldt,[21] as new counsel, Mardi Gras decided to stop giving Local 355 employee information.[22] In 2008, after Mardi Gras ignored requests to arbitrate the issue, Local 355 sued in the Southern District of Florida to compel arbitration pursuant to the MOU.[23] Mardi Gras responded that the MOU was void *ab initio* because it violated § 302 in promising "thing[s] of value" to Local 355. The court ordered arbitration and the arbitrator entered an award finding that the MOU was enforceable. In 2010, the court confirmed the arbitration award.[24]

Meanwhile, in 2008, the NRTWLDF filed suit in the Southern District of Florida on behalf of Martin Mulhall, an employee at Mardi Gras, alleging that the MOU was an illegal "thing of value" under § 302.[25] In 2009, the court dismissed the suit based on Mulhall's lack of standing.[26] The Eleventh Circuit then reversed in 2010 and remanded to the Southern District to determine whether Mulhall had a private right of action and whether the MOU constituted an unlawful "thing of value."[27] On remand, the Southern District once again dismissed the suit because the MOU was not a "thing of value," and thus declined to address whether Mulhall enjoyed a private right of action to bring suit.[28]

In 2012, Mulhall once again appealed to the Eleventh Circuit. A two-judge majority of the appellate court ruled that, while "[i]t is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302[,] [e]mployers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement."[29]

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[21] According to his firm's website, Mr. Rosenfeldt "specialized in representing victims of union violence" while at NRTWLDF. *See* STUART A. ROSENFELDT, http://www.randb-law.com/Attorneys/Stuart-A-Rosenfeldt.shtml (last visited Feb. 2, 2014).

[22] Author's conversation, *supra* note 16.

[23] *UNITE HERE v. Hollywood Greyhound Track, Inc.*, No. 08-61655 (S.D. Fla.).

[24] *Id.*

[25] *Mulhall v. UNITE HERE Local 355*, No. 08-61766 (S.D. Fla.).

[26] *Mulhall*, *supra* note 17.

[27] *Mulhall*, *supra* note 18.

[28] *Mulhall*, *supra* note 20.

[29] *Mulhall v. UNITE HERE Local* 355, 667 F.3d 1211, 1215 (11th Cir. 2012).

And while "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer[,]. . . an employer's decision to remain neutral or cooperate during an organizing campaign does not constitute a § 302 violation unless the assistance is an improper payment."[30] The dissenting judge would have dismissed Mulhall's suit because the majority improperly inserted an intent standard and—since the Taft-Harley Act "is designed to promote both labor peace and collective bargaining"—the Act "cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights."[31]

The Eleventh Circuit majority remanded the case to determine whether the MOU had a corrupting intent. Local 355 petitioned the Supreme Court for certiorari, which the Court granted in June 2013.[32] On December 13, 2013, the Supreme Court dismissed the writ of certiorari as improvidently granted.[33] Justices Breyer, Sotomayor, and Kagan dissented, having preferred further briefing on their concerns about Mulhall's Article III standing, mootness, and the possible absence of a private right of action.[34]

The Southern District of Florida set January 31, 2014 as the deadline for the parties to notify the court of the status of the case.[35] On that day, Mulhall voluntarily dismissed his suit.[36] The case is now over.

PROCEDURAL PROBLEMS WITH *MULHALL* AND ALL § 302 CIVIL SUITS

Mulhall—as with many § 302 civil suits—was plagued from the beginning with several significant procedural hurdles, making it difficult to comprehend why the Supreme Court granted

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[30] *Id.* at 1215, 16.

[31] *Id.* at 1216-17 (Restani, J., dissenting).

[32] *UNITE HERE Local 355 v. Mulhall*, 133 S. Ct. 2849 (2013).

[33] *UNITE HERE Local 355*, *supra* note 2.

[34] *Id.* at 594-95 (Breyer, J., dissenting).

[35] Author's conversation, *supra* note 16.

[36] *Id.*

certiorari. Those hurdles are: (1) no private right of action; (2) no standing; (3) *Iqbal/Twombly* pleading problems; (4) the case's interlocutory posture; and (5) mootness.

No Private Right of Action

Put simply, § 302 is a criminal statute and does not provide civil litigants with a right of action, at least not in the context we saw it in *Mulhall*. Section 302(e), entitled "Jurisdiction of courts", states "[t]he district courts . . . shall have jurisdiction . . . to restrain violations of this section, without regard to the provisions of [the United States Code that prohibit private parties from seeking injunctive relief in labor cases]."[37] By no means does this language provide a private litigant the unambiguous right to file suit. Mulhall pointed to dictum from a 1962 Supreme Court decision, *Sinclair Refining*,[38] as proof that § 302 offers a private right of action. In that case, the Court wrote that § 302(e) "permit[s] private litigants to obtain injunctions in order to protect the integrity of employees' collective bargaining representatives in carrying out their responsibilities."[39]

Nevertheless, Justice Breyer's dissent in *Mulhall* clearly demonstrates why this dictum—if it ever was authoritative—certainly should not be authoritative in today's judiciary that sets a much higher standard for private actions: "[I]n light of the Court's more restrictive views on private rights of action in recent decades, *see, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001), the legal status of *Sinclair Refining's* dictum is uncertain."[40] Justice Breyer continued: "[a]nd if § 302 in fact does not provide a right of action to private parties like Mulhall, then courts will not need to reach difficult questions about the scope of § 302, as happened in this case, unless the Federal Government decides to prosecute such cases rather than limit its attention to cases that clearly fall within the statute's core antibribery purpose."[41] Indeed, the prospect of a U.S. Attorney prosecuting an employer or union for run-of-the-mill

[37] 29 U.S.C. § 186(e).

[38] *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962).

[39] *Id.* at 205.

[40] *Mulhall*, *supra* note 2, at 595 (Breyer, J., dissenting).

[41] *Id.*

neutrality agreements like that in *Mulhall* is quite unlikely, at least during the Obama administration.

Of note, the Southern District of Florida could have easily ruled that § 302 provided no private right of action, had it not declined to address the issue because it had already found that the MOU was not a "thing of value" and thus dismissed the suit on that basis alone.[42] That it chose not to address this issue in dictum is certainly no indication that § 302 provides a private right of action.

No Standing

Justice Breyer highlighted another procedural problem with this case: the possibility that Mulhall lacked Article III standing.[43] Local 355 had already stipulated that it would not seek Mulhall's contact information as was allowed under the MOU,[44] so Mulhall was not harmed in having that information divulged. In holding that Mulhall had standing, the Eleventh Circuit wrote that "Mulhall has a legally cognizable associational interest . . . at imminent risk of invasion, because Mardi Gras' provision of considerable and varied organizing assistance pursuant to the MOU will substantially increase the likelihood that Mulhall will be unionized against his will."[45] Nevertheless, it was impossible for Mulhall to be "unionized against his will" because Florida is a right-to-work state, meaning that Mulhall could not be forced to join the union or pay "fair share" fees.[46] Therefore, the harm he allegedly suffered is hard to comprehend, and the Eleventh Circuit erred in ruling Mulhall had standing.

Indeed, the Southern District of Florida initially dismissed Mulhall's suit for lack of standing.[47] The court listed the three elements of Article III standing: (1) the litigant must have

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[42] *Mulhall*¸ *supra* note 20, at 3, n.1.

[43] *Mulhall*, *supra* note 2, at 595 (Breyer, J., dissenting).

[44] *Mulhall*, *supra* note 17, at *1.

[45] *Mulhall*, *supra* note 18, at 1288.

[46] *See generally*, Frampton, T. Ward, *Neutrality Agreements and Article III Standing: Why Unite Here Local 355 v. Mulhall is Nonjusticiable* (Oct. 7, 2013), *available at* http://ssrn.com/abstract=2336677 or http://dx.doi.org/10.2139/ssrn.2336677.

[47] *Mulhall*, *supra* note 17.

suffered or be under imminent threat of suffering a concrete and particularized injury in fact; (2) the injury must be traceable to the opposing party's actions; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision from the court.[48] The court ruled that Mulhall failed to establish an injury in fact because "assuming *arguendo* that [Local 355] and [Mardi Gras] traded a thing of value in violation of section 302, it does not follow that Mulhall was injured merely because [Local 355] sought to represent him."[49] The court continued "[w]ithout demonstrating that [Local 355] and [Mardi Gras] invaded some legally protected interest of his, Mulhall raises only a generalized grievance and cannot remedy their alleged section 302 violations as a private litigant."[50]

Iqbal/Twombly Pleading Problems

As we all know, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[51] Given the Eleventh Circuit majority's generous reading of § 302—that "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer"[52]—one would assume that Mulhall had alleged a corrupt scheme or extortion. He did not. In fact, nowhere in his pleadings does Mulhall even imply that there was any corruption or extortion involved in the MOU between Local 355 and Mardi Gras. How, then, could his claim for relief be plausible on its face if he did not even allege that the law was violated according to the Eleventh Circuit majority's broad and unprecedented reading of it?

Indeed, the Southern District of Florida dismissed the suit on the second remand for this very reason: "There is no indication of corruption or bribery of [Local 355] officials. In fact, none of the concessions directly benefitted any individual union official or union employee.

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[48] *Id.* at *2 (citations omitted).

[49] *Id.* at *4.

[50] *Id.*

[51] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[52] *Mulhall*, *supra* note 29, at 1215.

Consequently, . . . Mulhall has failed to allege a violation of § 302."[53] The Eleventh Circuit majority practically ignored this pleading concern, summarily concluding that "Mulhall alleged and a jury could find that Mardi Gras's assistance had monetary value . . . . Mulhall's allegations are sufficient to support a § 302 claim."[54] Nevertheless, as the dissent observed, "the complaint must contain sufficient factual allegations showing the union demanded these concessions as extortion or were offered by the employer as a bribe, and not just as regular ground rules of organizing."[55] The dissent concluded that Mulhall's "general allegations are insufficient under our pleading standards" and that the court should have affirmed the Southern District's dismissal for failure to plead a cause of action.[56]

Interlocutory Posture

It was surprising that the Supreme Court granted certiorari on a case in such an early stage of development, especially given all of the other procedural obstacles to reaching the merits of the case. Local 355 had never even filed an answer to the complaint. The Eleventh Circuit majority gave the Southern District of Florida the opportunity to address these procedural hurdles—namely, the existence of a private right of action—by remanding the case a second time. The Southern District would have almost certainly ruled on the existence of a private right of action (or lack thereof), making the grant of certiorari imprudent as the Supreme Court later acknowledged.

Mootness

The last issue, though perhaps the most apparent procedural barrier to addressing the merits of this case, was the case's mootness. As Justice Breyer acknowledged in his dissent, "it is possible that the case is moot because the contract between the employer and union that

[53] *Mulhall*¸ *supra* note 20, at 5.

[54] *Mulhall*, *supra* note 29, at 1215-16.

[55] *Id.* at 1217 (Restani, J., dissenting).

[56] *Id.*

contained the allegedly criminal promises appears to have expired by the end of 2011, before the Eleventh Circuit rendered its decision on the scope of § 302."[57]

Specifically, the MOU stated that it was in effect for four years from the first installation of gaming machines in the casino, which happened in 2006. The arbitrator extended the MOU another year, which—whether or not that extension was valid—would have caused the MOU to terminate by the end of 2011, well before the Eleventh Circuit majority issued its opinion on January 18, 2012. In fact, Mardi Gras took advantage of the expiration of the MOU by terminating a group of workers in December 2011, demonstrating that it knew the case may be moot.[58] Therefore, while mootness may be particular to this § 302 case, it certainly provided a solid ground to dismiss Mulhall's complaint.

SUBSTANTIVE PROBLEMS WITH THE ELEVENTH CIRCUIT MAJORITY'S HOLDING

In addition to the above-discussed procedural problems, the Eleventh Circuit majority erred by holding that the MOU *could be* a "thing of value" under § 302 depending on the intent of the parties to the MOU, thereby imposing an intent requirement on a strict liability criminal statute. In declining to affirm dismissal of the case, the Eleventh Circuit has set up a relatively minor split with two sister circuits which have held that neutrality agreements do not represent "thing[s] of value" under § 302.

Purpose of § 302

One must look to the purpose of § 302 to understand the sort of conduct Congress meant to prohibit when it enacted the statute in 1947. The Supreme Court wrote that Congress was "concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control."[59]

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[57] *Mulhall*, *supra* note 2, at 595 (Breyer, J., dissenting).

[58] Local 355 challenged the firings before the NLRB, arguing that the MOU expired on December 31, 2011, while Mardi Gras insisted that the MOU expired earlier in December 2011. Some of those workers are still attempting to get their jobs back. Author's conversation, *supra* note 16.

[59] *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (citations omitted).

In the years since, several appellate courts have elaborated on the purpose of § 302. Indeed, in *Mulhall*, the Eleventh Circuit majority quoted the Ninth Circuit's finding that "[t]he dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."[60] Likewise, the Third and Fourth Circuits have written that "§ 302 is aimed at preventing 'bribery, extortion and other corrupt practices conducted in secret.'"[61] In essence, the statute is meant to prevent employers and unions from trading "thing[s] of value" that may benefit the union at the undue expense of employees.

Section 302(b)(2) provides one concrete example of the sort of conduct Congress had in mind: unions "demand[ing] or accept[ing] from the operator of any motor vehicle . . . or the employer of any such operator . . . any money or other thing of value payable to such organization . . . as a fee or charge for the unloading . . . of the cargo of such vehicle."[62] Evidently, Congress was especially concerned with union representatives receiving or giving monetary tribute to unload trucks. A neutrality agreement like the one in *Mulhall*, however, could not be further from the conduct Congress meant to prohibit; Mulhall did not even *allege* such corrupt or extortionary conduct between Local 355 and Mardi Gras.

No Intent Requirement

Section 302 is a strict liability criminal statute—there is no *mens rea* element to the crime. If money or other things of value are paid, loaned, or delivered, the employer and union (or their representatives) have committed a crime. Nevertheless, the Eleventh Circuit majority judicially amended the statute by holding that only neutrality agreements that have "the intention of improperly influencing a union" are criminal under § 302.[63] The dissent correctly

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[60] *Mulhall, supra* note 29, at 1214 (quoting *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979)).

[61] *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008) (quoting *Caterpillar Inc. v. Int'l Union, United Auto. Workers*, 107 F.3d 1052, 1057 (3d Cir. 1997) (*en banc*)); *accord Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

[62] 29 U.S.C. § 186(b)(2).

[63] *Mulhall, supra* note 29, at 1215.

noted this improper interpretation of the statute, writing, "[a]dding the element of intent is a non-starter because to do so conflicts with the purpose of [§ 302 of] the LMRA regardless of whether the focus is the concessions or the intent behind them."[64]

"Thing of Value"

In essence, Local 355 argued that the phrase "thing of value," when read together with the antecedent term "money," means that the item paid, loaned, or delivered must have some *monetary* value in the commercial market. This argument is logical when one reads § 302 as a whole—otherwise, the tiered criminal penalties based on the monetary value of the "money or other thing of value" paid, loaned, or delivered would make no sense.[65] The Southern District of Florida agreed, noting that Mulhall incorrectly asserted that the Eleventh Circuit "has determined that generally the term ["thing of value"] is a term of art and thus the term should be interpreted the same way in all circumstances and under all statutes."[66] The Southern District continued, "[h]owever, Mulhall has not offered any authority to support this sweeping proposition and the authorities he does rely on are inapplicable to this matter."[67] Nevertheless, Mulhall stayed with this argument all the way to the Supreme Court, citing inapplicable criminal cases like *Nilsen*, in which the Eleventh Circuit "found that a defendant's attempt to silence a government witness could be a thing of value under the criminal statute."[68] "Clearly," wrote the Southern District, "that is not the same thing as Mardi Gras *agreeing* to remain neutral regarding the union. Consequently, Mulhall has failed to cite to a single binding case that demonstrates that the concessions Mardi Gras gave [Local 355] amount to things of value under § 302."[69]

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[64] *Id.* at 1216 (Restani, J., dissenting).

[65] *See* § 186(d) (up to $1,000 is a misdemeanor; over $1,000 is a felony).

[66] *Mulhall*¸ *supra* note 20, at 6.

[67] *Id.* (citing *U.S. v. Nilsen*, 967 F.2d 539, 542-43 (11th Cir. 1992) (holding that the use of the term "thing of value" is a term of art as used in various *criminal* statutes) (emphasis in *Mulhall*)).

[68] *Id.* at 8.

[69] *Id.* (emphasis in original).

For these reasons, the two other circuits that have addressed this issue in very similar cases held that neutrality agreements do not violate § 302. In *Sage Hospitality*,[70] a union sued Sage Hospitality Resources, a hotel developer, because Sage refused to arbitrate a neutrality agreement containing a card check provision. Sage refused to abide by the agreement's arbitration provision on the basis that the card check provision was a "thing of value" under § 302.[71] The Third Circuit affirmed the district court's enforcement of the arbitration provision, writing:

> Not surprisingly, Sage is unable to provide any legal support for *the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery*. There are many reasons why this argument makes no sense, including the language of section 302 itself, which proscribes agreements to "pay, lend, or deliver . . . any money or other thing of value." The agreement here involves no payment, loan, or delivery of anything. The fact that a Neutrality Agreement—like any other labor arbitration agreement—benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a "thing of value" within the meaning of the statute.[72]

The Third Circuit further held that "Sage's interpretation of section 302 *would wreak havoc* on the carefully balanced structure of the laws governing recognition of and bargaining with unions."[73]

Four years later, in 2008, the Fourth Circuit heard another very similar case brought by NRTWLDF. In *Adcock v. Freightliner*,[74] the union and employer signed an agreement that: (1) required some of its employees to attend, on paid company time, union presentations explaining the card check agreement; (2) provided the union reasonable access to nonwork areas in company plants to allow union representatives to meet with employees; and (3) refrained from

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[70] *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004).

[71] *See id.* at 209.

[72] *Id.* at 219 (emphasis added).

[73] *Id.* (emphasis added).

[74] *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008).

making negative comments about the union during organizing campaigns.[75] Five workers represented by NRTWLDF sued the union and the employer, arguing that the agreement violated RICO because it provided "thing[s] of value" under § 302.[76] The Fourth Circuit affirmed the district court's dismissal of the suit, recognizing that many courts have upheld neutrality agreements over the years[77] and that the agreement was not a "thing of value" that Congress intended to prohibit. "We agree with the Third Circuit [in *Sage*] that an agreement setting forth ground rules to keep an organizing campaign peaceful does not involve the delivery of a 'thing of value' to a union," wrote the Fourth Circuit.[78]

Lingering Contradictions from the Eleventh Circuit Majority's Holding

Several contradictions now linger after the Eleventh Circuit majority's *Mulhall* holding. First, one remedy courts and the NLRB may impose on employers is to *require* employers to give union representatives access to employee lists and to the employer's property.[79] Under the Eleventh Circuit majority's reasoning, however, such Board or court orders could require the union and the employer to commit a felony.[80] Clearly, this does not make sense. Second,

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[75] *Id.* at 371.

[76] *Id.* at 373.

[77] *Id.* at 371, n.1 (listing cases upholding neutrality agreements).

[78] The term "ground rules" or "neutrality agreement" is a more accurate description than the term "organizing assistance," which the Eleventh Circuit adopted from NRTWLDF's briefing. In none of these cases did the employer "assist" the union in demonstrating that a majority of the workers favored union representation—that was the sole responsibility of the union. Indeed, some commentators have characterized neutrality agreements as an end-run around the requirement that the union demonstrate majority support. Not only is this inaccurate but such an end-run would clearly be illegal under NLRA § 8(a)(2) because a union may not represent workers when it does not enjoy the support of a majority.

[79] *See, e.g., Fieldcrest Cannon, Inc. v. N.L.R.B.*, 97 F.3d 65, 74 (4th Cir. 1996); *Monfort, Inc. v. N.L.R.B.*, 965 F.2d 1538, 1548 (10th Cir. 1992).

[80] *See* 29 U.S.C. § 186(d)(2) (for amounts over $1,000). Depending on how a reviewing court characterized such a requirement, however, the § 302(c)(2) exception "with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court" may apply. Nonetheless, it still defies logic and national labor policy that a court or the NLRB may *require* such union access, but an employer may be committing a crime if it merely sua sponte *permits* a union such access to employees.

according to the reasoning of the Eleventh Circuit majority, *all* agreements—including ordinary collective bargaining agreements—*could* constitute criminal "thing[s] of value" because they include provisions valuable to both the employer and the union. Again, such a reading of § 302 is clearly not rational. Third, federal labor law *encourages* the efficient resolution of labor disputes through collective bargaining agreements,[81] and the Federal Arbitration Act ("FAA")—of recent favor to the Supreme Court[82]—encourages the private resolution of disputes through arbitration.[83] An overbroad reading of § 302, however, would discourage unions and employers from trying to come to terms on their own, forcing them instead to resort to more confrontational conduct like lockouts and strikes. Fourth, and most bizarre, Mardi Gras, in pursuing this lawsuit,[84] essentially confessed to felonious conduct in admitting that it violated § 302 by agreeing to enforcement of the terms of the MOU with Local 355.

THE LIKELY EFFECT OF *MULHALL* ON FUTURE § 302 JURISPRUDENCE IS MINIMAL

The likely effects of the Eleventh Circuit's *Mulhall* decision are minimal because of: (1) the contradictions in the Eleventh Circuit majority's holding in *Mulhall* noted immediately *supra*; (2) the Eleventh Circuit majority's judicial amendment to § 302 (imposing an intent element on a strict liability criminal statute); (3) the Third and Fourth Circuit rulings that neutrality agreements do not violate § 302; and (4) the suggestion in Justice Breyer's *Mulhall*

[81] *See generally* NLRA § 1, 29 U.S.C. § 151 ("encouraging the practice and procedure of collective bargaining and [] protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

[82] *See, e.g., Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) ("[T]he FAA . . . favor[s] the absence of litigation when that is the consequence of a class-action waiver, since its principal purpose is the enforcement of arbitration agreements according to their terms." (citations and internal quotation marks omitted)); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the FAA preempts state rules prohibiting unconscionable class arbitration waivers in consumer contracts).

[83] 9 U.S.C. §§ 1-16.

[84] Though Mardi Gras was a named defendant, its counsel, Stuart Rosenfeldt, is a former attorney for NRTWLDF and NRTWLDF's William Messenger was lead attorney for Mulhall.

dissent that § 302 may not offer a private party a right of action or standing. Indeed, after a decade of litigation, *Mulhall* may be much ado about nothing.

As discussed *supra*, the only way to rationalize the Eleventh Circuit majority's holding is to conclude that neutrality agreements in the Eleventh Circuit that have no corrupting or extortionary intent—indeed, all the neutrality agreements considered by the courts to date—fare no ill fate. The Eleventh Circuit majority did not establish a *per se* rule that all neutrality agreements are "thing[s] of value" under § 302.[85] In fact, it held that normal neutrality agreements with no indication of corruption are completely acceptable, writing, "[e]mployers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement."[86] Therefore, in the Eleventh Circuit, for now, a union or employer may not be able to defeat on a motion to dismiss a § 302 lawsuit challenging a neutrality agreement, but it will almost certainly win on summary judgment once it has demonstrated that there was no corrupting or extortionary intent behind the neutrality agreement.

Meanwhile, in the Third and Fourth Circuits, § 302 suits challenging neutrality agreements will almost certainly die at the motion to dismiss stage. As for the other circuits, it is likely that William Messenger and NRTWLDF will continuing bringing these speculative impact cases in the hopes that other courts will go further than the Eleventh Circuit majority's ruling by holding that *all* neutrality agreements are "thing[s] of value" under § 302. Though highly unlikely, the ultimate outcome of such a holding could change labor relations as we know it by criminalizing many agreements between employers and unions. For the sake of our profession and labor relations generally, let's hope this does not happen.

Fortunately, we are very far from such an outcome, and for all the reasons articulated in this paper, practitioners should not shy away from neutrality agreements. To the contrary, neutrality agreements and other ground rules for organizing workplaces encourage labor peace and are firmly supported by statutes like the NLRA[87] and the Federal Arbitration Act,[88] along

[85] *Mulhall*, *supra* note 29, at 1215.

[86] *Id.*

[87] 29 U.S.C. §§ 151-69.

[88] 9 U.S.C. §§ 1-16.

with numerous court opinions spanning decades. The Eleventh Circuit majority's holding in *Mulhall*, though creating a minor split with its sister circuits, does not constitute a basis to discourage employers and unions from agreeing to neutrality and card check. Moreover, § 302 almost certainly does not provide a private right of action to challenge neutrality agreements, and "unless the Federal Government decides to prosecute such cases rather than limit its attention to cases that clearly fall within the statute's core antibribery purpose[,]"[89] we should not fear encouraging our clients to continue signing such agreements.

[89] *Mulhall*, *supra* note 2, at 595 (Breyer, J., dissenting).