

I. FACTS

From the 1940s until approximately February 11, 1966, Price Battery Corporation (“Price”) operated a lead-acid battery manufacturing plant in Hamburg, Pennsylvania (“the Hamburg Plant” or “the plant”). As a matter of course, Price reused the lead plates from old batteries in the process of creating new batteries. Until the early 1960s, Price employees brought used batteries back to the Hamburg Plant, split them open, and re-used the lead plates in the plant’s smelter. The junk battery casings, each often containing a paste of lead residue, were not re-used. Price employees dumped these battery casings at various locations in and around Hamburg. Price also made these battery casings available for members of the community to pick up for themselves and use as landfill. During this time until 1961, Price also contracted with Blue Mountain Coal Company (“Blue Mountain”) to crush the junk battery casings with a bulldozer after they were dumped in and around Hamburg, and to dump slag (waste leftover from the smelting operations) at the same locations. At least one Blue Mountain truck driver saw pieces of lead in the slag.

Beginning in the early 1960s, Price altered its method of acquiring the lead plates for re-use. Instead of breaking the junk batteries itself, Price contracted with Brown’s Battery (“Brown’s”) to do so. Brown’s used a shear that sliced off the tops of the batteries in order to remove the lead plates for re-use. After the tops were removed, Brown’s shipped not only the lead plates, but the casing battery tops (which also contained re-usable quantities of lead) back to Price. Price crushed the battery tops, removed the lead pieces, and then gave away the remaining battery casing pieces as landfill. Price then re-used both the lead plates and the lead pieces removed from the battery tops in its smelter.

On February 11, 1966, General Battery Corporation (“General”) entered into a Purchase Agreement (the “Agreement”) with Price. The Agreement called for General to purchase all of Price’s assets, except its cash on hand at closing and the Hamburg Plant and attendant land, which were sold to the Greater Berks County Development Fund and leased by General. Price also transferred to General all its rights under its existing contracts, including contracts pertaining to employment and employee benefits, insurance, customers, purchasing, material supply, as well as the battery breaking contract with Brown’s. In exchange, Price received approximately \$2.9 million in cash, 100,000 shares of General’s common stock, and General’s promise to “pay, perform and discharge the debts, obligations, contracts and [certain] liabilities” of Price. Specifically, General agreed to assume all liabilities reflected on its balance sheet as of the day of purchase, and agreed to “indemnify and save harmless Price” regarding “all other liabilities of any kind or character ... unless unknown to Price ... arising out of the operation of the business of Price or its subsidiaries in the normal course prior to January 1, 1966.” Under the Agreement, Price agreed to change its name to Price Investment Company or another name as approved by General. In addition, the Agreement was also conditioned upon General’s employment of numerous Price executives.

General continued the system for re-using the lead in junked batteries that had been in place since the early 1960s: it provided the batteries to Brown’s for breaking and received back both the lead plates and the sheared battery tops. It crushed the battery tops and removed the lead pieces. Finally, it re-used these lead pieces, as well as the returned lead plates, in its smelter. Significantly, however, the parties disagree on what happened to the remaining pieces of the battery tops after General’s purchase. The United States contends that General

continued to give away the remaining pieces for landfill as Price had done. Exide, however, contends that General burned them for fuel and did not give them away. In any case, General continued this basic system to re-use lead from old batteries until the smelter closed in the early 1970s. In 2000, General merged with Exide.

In August 1993, the U.S. Department of Environmental Protection (EPA) performed a removal assessment of two sites near Hamburg – referred to as “the Fieldhouse” and “the Playground” – where Price dumped broken battery casings and where it now observed such casings. Levels of lead well above allowable amounts were found at both sites. EPA performed a removal action from August 1994 to August 1995 at the Fieldhouse and the Playground. In connection with the removal action, EPA discovered three additional sites at which Price had dumped broken battery casings and that now contain levels of lead above EPA’s removal action level. On September 28, 2000, EPA Region III approved the re-start of the removal action to remedy soil erosion due to heightened concern about these hazardous substances in residential areas where children play. As of this date, EPA is still acting at these five sites and is investigating further sites in and around Hamburg where battery casings battery casings may have been dumped.

II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when “a reasonable jury could return a verdict for the nonmoving party.” Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The nonmoving party, however, cannot “rely merely upon bare assertions, conclusory allegations or suspicions” to support its claim. Fireman’s Ins. Co. v. Du Fresno, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the nonmoving party’s position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, “[t]he moving party is ‘entitled to a judgment as a matter of law’ because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

III. DISCUSSION

A. Liability Under § 107(a) of CERCLA

In order to establish a defendant's liability under § 107(a) of CERCLA, a plaintiff must establish four elements: (1) that hazardous substances were disposed of at a "facility"; (2) that there has been a "release" or "threatened release" of "hazardous substances" from the facility into the environment; (3) that the release or threatened release has required or will require the United States to expend "response costs"; and (4) that the defendant falls within one of four categories of responsible parties set out under the statute. 42 U.S.C. 9607(a). The relevant category of responsible parties includes "any person who by contract, agreement, or otherwise arranged for disposal ... of hazardous substances owned or possessed by such person." 42 U.S.C. 9607(a)(3).¹ If these requirements are met, responsible parties are liable regardless of their intent. United States v. CDMG Realty Co., 96 F.3d 706, 712 (3d Cir. 1996). See also United States v. Alcan Aluminum Corp., 964 F.2d 252, 258-259 (3d Cir. 1992).

Exide does not dispute that the United States satisfies the first three elements of § 107(a). To satisfy the fourth element, in its motion the United States contends that: (1) Exide is a responsible party because it is the successor to the liabilities of General through its merger with General in 2000; (2) General is a responsible party both indirectly, because it was the successor to the liabilities of Price through its purchase of Price in February 1966, and directly, because after the purchase it continued to give away pieces of the battery tops as landfill; and (3) Price is

1. A corporation is a "person" under CERCLA. 42 U.S.C. § 9601(21). Corporations are liable under § 107(a) if their waste containing hazardous substances is transported to a site and the same hazardous substances are later found at the site. See O'Neil v. Picillo, 682 F. Supp. 706, 725 (D.R.I. 1988), aff'd, 833 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990); United States v. Wade, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983).

directly a responsible party since it arranged for disposal of hazardous substances later found in the five sites in and around Hamburg.

Exide does not contest the first and third links in this chain of liability. However, Exide contends that summary judgment in favor of the United States is inappropriate because, viewing the evidence in the light most favorable to it, the United States has not established that General is either successor to the liabilities of Price or directly a responsible party. Exide has also filed its own summary judgment motion on this point, arguing that judgment in *its* favor is appropriate because the United States cannot establish that it is a responsible party under CERCLA as a matter of law for these same reasons. In any case, summary judgment on Exide's liability turns on whether General is liable under either of these two scenarios.

1. General's Successor Liability

In general, "where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor." 15 W. Fletcher, Cyclopedia of the Law of Private Corporations § 7122 (perm. ed. rev. vol. 1999). However, the doctrine of successor liability permits exceptions to the general rule in four specific instances: when (a) the purchaser expressly or implicitly agrees to assume liability; (b) the purchase is a *de facto* consolidation or merger; (c) the purchaser is a mere continuation of the seller; or (d) the transfer of assets is for the fraudulent purpose of escaping liability. See id; Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 308-309 (3d Cir. 1985), cert. denied, 474 U.S. 980 (1985) (reviewing Pennsylvania law).² Significantly, these theories are recognized as

2. Although CERCLA does not provide specifically for successor liability, courts have interpreted the statute as including successor liability, and routinely find successor corporations liable. See Smith Land & Improv. Corp. v. (continued...)

the traditional successor liability rules under *both* Pennsylvania law and federal common law created by some courts to enforce successor liability under CERCLA. See Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1283-1284 (E.D. Pa. 1994). In addition, some federal courts have recognized another theory of CERCLA successor liability under federal common law that is more relaxed, and therefore easier to meet, than the “mere continuation” exception under the traditional successor liability rules. This theory is known as the “substantial continuity” test.³ See United States v. Carolina Transformer Co., 978 F.2d 832, 837-838 (4th Cir. 1992).

The United States contends that General is indirectly responsible for the liabilities of Price under two theories of successor liability. As a threshold matter, the United States argues that this Court should apply federal common law to the question of CERCLA successor liability. Under that federal common law, the United States contends that (1) General’s purchase of Price was a *de facto* merger; and (2) the transaction resulted in a continuation of Price under the “substantial continuity” test recognized by many, but not all, federal courts. In the alternative, the United States argues, even if the Court does not apply federal common law, it should find that the state law requirements for a *de facto* merger have been met. Again, if General is liable either theory of successor liability, then Exide is liable as well, since the chain of liability from Price to Exide is complete.

Exide denies that General is indirectly liable under any theory of successor liability. It contends that this Court should not apply federal common law, and that under

2. (...continued)
Celotex Corp., 851 F.2d 86, 91-92 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989).

3. The “substantial continuity” test is also sometimes referred to as the “continuation of the enterprise” test. To avoid confusion, the Court will consistently refer to it as the “substantial continuity” test.

Pennsylvania law, General's purchase of Price was not a *de facto* merger. In the alternative, Exide argues, even if this Court were to apply federal common law, it should not adopt the "substantial continuity" test and instead find only that the requirements for a *de facto* merger are similarly not met under federal common law. Finally, and again in the alternative, Exide contends that even if federal common law and the "substantial continuity" test are applied, the transaction completed between General and Price does not meet this test such that successor liability should pass to General.

The parties have thoroughly briefed the issue of whether this Court should apply federal common law to the case at bar, and if so, whether it should apply the "substantial continuity" test of successor liability. In its sole teaching directly on point, the Third Circuit held that courts should look to federal common law to determine successor liability under CERCLA. The court reasoned that federal common law's uniformity would support CERCLA's broad remedial aim to find successor corporations, and not taxpayers, liable for the costs associated with hazardous substance clean-up. See Smith Land & Improv. Corp. v. Celotex Corp., 851 F.2d 86, 91-92 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989). The Fourth Circuit subsequently fashioned the "substantial continuity" test as part of that common law in Carolina Transformer. A number of circuits followed suit in recognizing that test for successor liability under CERCLA, while others have declined to do so.⁴ The Third Circuit has not specifically endorsed the

4. See B.F. Goodrich v. Betkoski, 99 F.3d 505, 518-519 (2d Cir. 1996), cert. denied, 524 U.S. 926 (1998) (applying federal common law and the "substantial continuity" test); United States v. Mexico Feed & Seed, 980 F.2d 478, 487-489 (8th Cir. 1992) (applying the "substantial continuity" test). Cf. Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1501-1502 (11th Cir. 1996); City Mgmt Corp. v. U.S. Chem. Co., 43 F.3d 244, 253 n. 12 (6th Cir. 1994).

“substantial continuity” test.⁵ However, courts in this circuit routinely apply it in making successor liability determinations under CERCLA. See, e.g., Gould, Inc. v. A&M Battery & Tire Serv., 950 F. Supp. 653, 656 (M.D. Pa. 1997).

Exide’s principal argument as to why this Court should *not* apply federal common law, and especially not the “substantial continuity” test, is that the rationale and authority for applying them have been eroded by U.S. Supreme Court decisions postdating Smith Land. The U.S. Supreme Court has indeed cautioned courts regarding the unwarranted creation of federal common law in a number of cases since Smith Land. Exide calls the Court’s attention to three decisions in particular.

In O’Melveny & Myers v. FDIC, 512 U.S. 79 (1994), the FDIC sued the former counsel of a failed savings and loan for legal malpractice and breach of fiduciary duty, causes of action created under state law. Quoting the familiar passage from Erie R.R. v. Thompkins, 304 U.S. 64, 78 (1938), that “[t]here is no general federal common law,” the Court held that state law governed the issue of imputation of knowledge to corporate victims of alleged negligence. O’Melveny, 512 U.S. at 83-84.

Similarly, in Atherton v. FDIC, 519 U.S. 213 (1997), the Court held that state law, and not federal common law, governed the standard of care applicable to the corporate governance of federally chartered banks. The Court instructed that in order to fashion rules of federal common law, the “guiding principle is that a significant conflict between some federal

5. The Third Circuit rejected the “substantial continuity” in the products liability context due to concerns that application of the test would violate traditional tort law’s causation requirement. See Polius v. Clark Equipment Co., 802 F.2d 75, 81 (3d Cir. 1986). However, such concerns are not present under CERCLA, which imposes strict liability. See United States v. Alcan Aluminum Corp., 964 F.2d 252, 259 (3d Cir. 1992).

policy or interest and the use of state law ... must first be specifically shown.” Id. at 218. It cautioned that “[t]o invoke the concept of uniformity ... is not to prove its need.” Id. at 220. Finally, the Court concluded that there was no evidence of significant conflict or threat to the federal interest if state law standards of care were applied. Id. at 225.

More recently, the Supreme Court addressed the issue of indirect liability of a parent corporation for its subsidiaries under CERCLA itself in United States v. Bestfoods, 524 U.S. 51 (1998). In Bestfoods, the Court held, *inter alia*, that a parent corporation may be indirectly liable under CERCLA for its subsidiary’s actions only if the corporate veil may be pierced. Id. at 63-64.

To some extent, O’Melveny, Atherton, and Bestfoods can be construed to undermine the reasoning behind Smith Land, since they caution against the creation of federal common law (even when the need for uniformity is asserted) other than when a significant conflict between federal interests and application of state law is concretely demonstrated.⁶ Significantly, however, neither O’Melveny nor Atherton addressed the creation of federal common law in the context of a cause of action created under a federal statute, such as CERCLA.

6. In light of these Supreme Court cases, the First Circuit recently declined to adopt federal common law and instead applied state law to a successor liability question in United States v. Davis, 261 F.3d 1, 53-54 (1st Cir. 2001). In response, the United States points out that in Davis, the First Circuit relied in part on its previous decision in John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 406 (1st Cir. 1993). In that case, the court applied state law to construe an indemnity agreement between two corporations to apportion liability. The United States argues that in Boyd, there was no real federal interest at stake, since rules of successor liability were applied to determine *which of two different defendants* were liable to the government under CERCLA. In the case at bar, a federal interest in forcing a responsible party (and not taxpayers) to pay for environmental clean-up under CERCLA is present, since if Exide is not liable, taxpayers will ultimately pay. As a result, the United States argues, this federal interest bolsters the argument that federal common law should be applied in this case. In addition, the United States notes, the Third Circuit has effectively recognized this distinction by holding that federal common law applies to successor liability issues under CERCLA in Smith Land, while also holding that state law should be used to interpret CERCLA indemnification provisions negotiated between two defendants. See Beazer East, Inc. v. Mead Corp., 34 F.3d 206, 214 (3d Cir. 1994), cert. denied, 514 U.S. 1065 (1995).

Furthermore, in Bestfoods, the Court specifically declined to address whether the source of the veil-piercing law should be state or federal common law.⁷ Id. at 64 n.9. Therefore, in the absence of any authority specifically overruling it, this Court remains bound by Smith Land.⁸ In accordance with Smith Land, the Court will apply federal common law.

As noted supra, there is no specific guidance from the Third Circuit regarding application of the “substantial continuity” test to the issue of CERCLA successor liability. And O’Melveny, Atherton, and Bestfoods can also be construed to undermine the rationale for applying the “substantial continuity” test as part of federal common law.⁹ Significantly, however, even after these Supreme Court decisions cited by Exide, courts in this circuit have continued to apply the test. See, e.g., Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp.2d 391, 405-406 (M.D. Pa. 1998).¹⁰ In any case, the court need not resolve whether federal common law properly includes the “substantial continuity test” since, as a matter of law, Exide is

7. Significantly, the Third Circuit looks to federal common law to decide this question. See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993).

8. Exide also argues that Third Circuit case law since Smith Land counsels against applying both federal common law and the “substantial continuity” doctrine as well. See Smithkline Beecham Corp. v. Rohm & Haas Co., 89 F.3d 154, 158 (3d Cir. 1996) (applying state law to construe CERCLA indemnification provision); Beazer East, 34 F.3d at 214 (same); Witco Corp. v. Beekhuis, 38 F.3d 682, 688 (3d Cir. 1994) (applying state nonclaim statute to liability question under CERCLA). However, these decisions did not specifically affect that court’s Smith Land holding, and in fact often cite it with approval.

9. Before these Supreme Court cases, the Ninth Circuit had held open the question of whether to adopt the “substantial continuity” test. See Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1262-1265 (9th Cir. 1990). After these decisions, however, that court specifically declined to do so. See Atchison, Topeka & Santa Fe R. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 361-364 (9th Cir. 1998). The Court found that, under this line of cases, there was no evidence that the application of traditional rules of successor liability would frustrate CERCLA’s objectives because there was no evidence that traditional state law rules were not already sufficiently uniform and otherwise up to the task of finding successor corporations liable. Significantly, the court held that it need not decide whether, in applying the traditional rules of successor liability, it applied them as federal common law or state law, since the outcome of its analysis was the same. Id. at 364.

10. Courts in the Second Circuit, which previously expressly adopted the “substantial continuity” test, have continued to apply it in light of these Supreme Court cases as well. See New York v. Nat’l Servs. Indus., 134 F. Supp.2d 275, 277-278 (E.D.N.Y. 2001).

indirectly liable as the successor to Price *both* because (1) General’s transaction with Price meets the definition of a *de facto* merger under traditional successor liability concepts recognized by federal common law, *and* because (2) the Price-General transaction meets the “substantial continuity” test as well. Because General is indirectly responsible for Price’s CERCLA liability under both of these theories, Exide is liable due to its merger with General.

a. *De Facto* Merger Test

Under traditional rules, courts consider four factors to determine whether a transaction is a *de facto* merger:

- (1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.
- (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
- (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
- (4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Smithkline Beecham Corp. v. Rohm & Haas Co., 89 F.3d 154, 162 n.6 (3d Cir. 1996) (citing Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 310 (3d Cir.), cert. denied, 474 U.S. 980 (1985)). No one of the factors outlined above is either necessary or sufficient to find the

existence of a *de facto* merger. See United States v. Keystone Sanitation Co., No. CV-93-1482, 1996 WL 672891 at *7 (M.D. Pa. Aug. 22, 1996).

First, then, the Court must ascertain if Price's enterprise was continued by General in terms of management, personnel, physical location, assets, and general business operations. As for management and personnel, even viewing the evidence in the light most favorable to Exide, the record on the whole reveals that there was significant continuity of management and almost total continuity of other personnel at the Hamburg Plant after the transaction with General.

There is no dispute that the principal upper-level management figures at Price were all employed by General in various capacities after the sale. Some of these managers continued to have some responsibility for the Hamburg Plant, although they were eventually moved from Hamburg to General's offices in Reading, Pennsylvania. William Price, Sr., the Chairman of the Board at Price, was employed as a consultant and named to the Board of Directors of General, as well as its Executive Committee, although he was not involved with the day-to-day management of the Hamburg Plant after the transaction. William Price, Jr., the President of Price, came to be employed as an officer of General, although, Exide contends, one without significant administrative duties. Saul Dershwin, Price's Executive Vice President, and Robert Restrepo, the Vice President for Manufacturing of Price, both became officers of General with some responsibility for all General plants, including the Hamburg Plant. Dershwin also became a member of General's Board of Directors. At some point after the sale, Dershwin and Restrepo ceased to have operating responsibilities at the Hamburg Plant, although it is unclear

precisely when.¹¹ Mid-level management remained basically the same, as Warren Werley continued to serve in a significant capacity at the Hamburg Plant. Before the sale, and for an unspecified time thereafter, Werley served as superintendent. At some point after the sale, he became plant manager.

Exide argues that after the sale, there was no continuity of management, since ultimate responsibility for the Hamburg Plant passed to General's Board of Directors and upper-level management in Reading. However, it is clear that *former Price managers became a part of General's Board and upper-level management after the transaction*. Additionally, as for management of the day-to-day plant operations, despite the fact that members of the upper-level management of Price were at some point moved to Reading, Exide has not set forth evidence that *any* member of the General management team was named to a position at the Hamburg Plant or assumed any day-to-day management responsibility there.¹²

Personnel continuity at the lower levels was even greater. The sales personnel were retained. Additionally, union members and other hourly workers were kept on. Ralph Mengel, the Hamburg Plant's Traffic Manager in charge of transporting batteries to customers, stated in an affidavit that General kept the same employees and management personnel. Robert Schock, a member of the steelworker's union who worked at the plant's smelter, stated in an

11. Both Restrepo's and Dershwin's offices were eventually moved to Reading. However, Restrepo's office was not moved until six months to a year after the sale. It is unclear when Dershwin's was moved.

12. Although Exide also argues that environmental management of the plant significantly changed with Price's sale to General, there is no evidence to support this contention. The document Exide offers as evidence of such, a memorandum regarding anti-pollution measures to be taken at the Hamburg Plant, was written in response to a government investigation requiring the company to submit a pollution abatement plan. It therefore is not evidence of a marked shift in the company's environmental policy initiated by new General management. In addition, the document was written over a year and a half after the sale took place, and was authored by Robert Restrepo, a former member of *Price's* management.

affidavit that he and his fellow union members continued to work at the plant, under the same supervisors. Finally, Miriam Woerner, who worked in Personnel, stated in an affidavit that no major changes in personnel at the Hamburg Plant were made after the sale.

The location and assets of Price's operations at the Hamburg Plant obviously remained the same. Exide argues that no continuity of assets occurred because the Agreement did not include the sale of the Hamburg Plant itself and its land. However, this analysis fails to appreciate the true nature of the transaction. On February 11, 1966, the real property and Hamburg Plant were sold by Price to the Greater Berks County Development Fund (the "Fund"), an organization which exists to arrange for low-interest loans, tax credits and development assistance for qualified businesses. The Fund then entered into a mortgage agreement with American Bank & Trust Co. of Pennsylvania, and leased the Hamburg Plant to General. General then effectively made the mortgage payments on the property until 1978, when the deed was transferred to it for a nominal sum. Therefore, as a practical matter, all of Price's assets were transferred to General as part of the transaction between the companies, and all the assets continued to be part of the ongoing business.

The general business operations at the Hamburg Plant remained very similar after the sale to General. General used the same employees and used the same equipment to make the same batteries as had Price. General then used the same employees to sell and deliver the batteries to the same customers. This make sense, since General had assumed Price's obligations under "its existing contracts of every kind and description, oral or written, including ... all contracts for the purchase or sale of goods, materials, equipment, machinery, supplies or services, warranties, leases, licenses, union contracts, royalty agreements, distributor's contracts and

employment contracts.” One witness, Arthur Kistler, stated in an affidavit that he did not observe any changes to the plant when Price was sold to General.

There is also undisputed evidence that General continued to use the Price name, at least to some extent. Exhibits to the Agreement demonstrate that, at least at one time, General intended to continue the Price name by operating it as its own division – “new Price.” Therefore, it required Price to change its name to Price Investment Co., which it did. The United States submits evidence that the company continued to hold itself out using the Price name after the sale, including: a worker’s compensation report generated by the company referring to Price as a division of General in July 1966 (six months after the sale); documents from Brown’s invoicing “Price Battery Co.” dated August 1966 (seven months after the sale); Price’s own use of forms with the name “Price Battery Corporation” at the top in November 1966 (nine months after the sale); and a letter from the Pennsylvania Department of Health addressed to “Price Battery Corporation” in December 1967 (twenty-two months after the sale).

Exide responds that, to the contrary, General did not continue Price’s general business operations precisely because it did *not* continue to use the Price name. Exide sets forth its own undisputed evidence on this point. For example, the sign identifying the plant as a Price facility was taken down right away after the sale, and at some unknown point afterward, a new sign with the General name was put up. At least some correspondence from the plant after the sale was written on letterhead identifying it as General, not Price. Additionally, although former Price managers had battery labels created continuing the Price name as a division of General, according to Exide, these labels were destroyed.

There is, however, as noted supra, undisputed evidence that the Price name continued to be used formally both inside and outside the company many months after the transaction – evidence that points toward a general continuity of business operations. In any case, however, the Court does not place great emphasis on the continuation of Price’s name in this case for two reasons. First, the batteries made by the plant – under both Price and General – were generally not branded with the manufacturer name, but with store brand names, thereby making the “Price” name less significant to customers. Second, regardless of the name by which the company was known, there is every indication that General continued servicing Price’s customers in an uninterrupted fashion.

Under these circumstances, the Court finds that Price’s enterprise was continued by General as revealed by the significant continuity in management, personnel, physical location, assets, and general business operations.

Under the second *de facto* merger factor, the Court must consider whether the transaction was marked by a continuity of shareholders such that Price’s sole shareholder, William Price Sr., became a constituent part of General. There is no question that General paid for Price’s assets as a going concern in part with 100,000 shares of its own common stock, and that after the completion of the transaction, those shares – approximately 4.537% of General’s issued and outstanding shares of common stock – were held by Price Sr.

Exide makes two principal arguments as to why these undisputed facts do not satisfy the continuity of shareholders factor. First, it contends that this small percentage of ownership was not enough to make Price Sr. “a constituent part” of General. However, under the *de facto* merger exception, there is no requirement that the seller acquire majority control or any

specific percentage of the buyer, only that there be some continuity of shareholder ownership and control. In fact, one court has held that a seller acquiring a percentage as small as .0009% of the buyer nonetheless supported finding a *de facto* merger. See Keystone, No. CV-93-1482, 1996 WL 672891 at *7. In the case at bar, the percentage of shares Price Sr. acquired was significant enough to be comparable to the percentages held by the founders of General during that same year.¹³ Furthermore, in addition to acquiring his shares of General, Price Sr. gained additional control over General when he was placed on its Board of Directors, as well as that Board's Executive Committee. Under these circumstances, Exide's argument concerning the percentage of General acquired by Price Sr. is unavailing.

Second, Exide argues that because Price Sr. also acquired a significant amount of cash – in fact, cash worth more than the shares of stock he also received – that the transaction should be not treated as a merger. However, there is no support for this contention under the plain reading of this *de facto* merger factor, which – again – merely requires *some* continuity of shareholders. Exide does not cite any caselaw under which a court *required* a seller's shareholders to have received little or no cash (in addition to stock) from the buyer – or indicated a required relationship between cash and stock received – to fulfill the requirements of a *de facto* merger. Under these circumstances, this Court finds that the sole shareholder of Price, Price Sr., became a constituent shareholder of General, and as such there was a continuity of shareholders required by the second *de facto* merger factor.

13. The two founders of General, W.A. Shea and H.J. Nozensky, served as, respectively, its Chairman of the Board of Directors and Chief Executive Officer when it went public in 1960. In 1966, these individuals still served as Directors of the company. In October 1966, W.A. Shea owned 5.12% of General's issued and outstanding shares, and in April 1966, H.J. Nozensky owned 4.44% of General's issued and outstanding shares.

The third *de facto* merger factor directs this Court to consider whether Price ceased its ordinary business operations, liquidated, and dissolved as soon as legally and practically possible. Price did not formally dissolve as a corporate entity upon the completion of the transaction on February 11, 1966. Indeed, the Agreement required it to hold a cash reserve until December 1966. However, there is undisputed evidence that this factor nonetheless supports the conclusion that the transaction should be considered a *de facto* merger. Pursuant to the Agreement, on February 11, 1966, Price immediately transferred all of its operations to General, and immediately amended its articles of incorporation to change its name to Price Investment Company. Within a short period of time after Price was permitted to liquidate its assets under the Agreement, in February 1967, it filed for corporate dissolution, and was dissolved on July 21, 1967. There is no indication that Price Investment Company conducted, or had the capacity to conduct, any business as had Price before the transaction. Under Third Circuit precedent, a transaction may be considered a *de facto* merger when the normal business operations of the seller cease at the time of the sale, even though the seller formally continues to exist as a shell with valuable assets for as long as a year and a half. See Knapp v. North American Rockwell Corp., 506 F.2d 361, 367 (3d Cir. 1974). Therefore, the third factor provides sufficient evidence of a *de facto* merger.

The fourth and final factor – whether General assumed Price’s obligations necessary for the uninterrupted continuation of Price’s normal business operations – is not seriously contested by Exide. General assumed Price’s obligations under “its existing contracts of every kind and description, oral or written, including ... all contracts for the purchase or sale of goods, materials, equipment, machinery, supplies or services, warranties, leases, licenses, union

contracts, royalty agreements, distributor's contracts and employment contracts" including the battery breaking contract with Brown's. It is clear that General assumed Price's obligations necessary for the uninterrupted continuation of its normal business operations.

Finally, Exide argues that equitable factors weigh in favor of declining to find that General is the successor of Price under either the *de facto* merger or "substantial continuity" tests. Arguments that pertain to the failure of General to possess certain knowledge are discussed *infra*. The other principal equitable argument advanced is that General specifically did not assume Price's CERCLA liability under the Agreement. General agreed to "indemnify and save harmless Price" regarding "all ... liabilities of any kind or character ... unless unknown to Price ... arising out of the operation of the business of Price or its subsidiaries in the normal course prior to January 1, 1966." However, General did *not* agree to indemnify Price for liabilities "sounding in tort or liabilities arising out of occurrences for which a tort claim would apply."

Even assuming *arguendo* that CERCLA liability was not assumed by General pursuant to the Agreement, the Third Circuit has held on more than one occasion that under CERCLA, "agreements to indemnify or hold harmless are enforceable between the parties but not against the government." Smithkline, 89 F.3d at 158 (3d Cir. 1996) (citing Beazer East, Inc. v. Mead Corp., 34 F.3d 206, 211 (3d Cir. 1994)). "Thus, responsible parties can lawfully allocate CERCLA response costs among themselves while remaining jointly and severally liable to the government for the entire clean-up." Id. As a result, if General is a responsible party because it is successor to the liabilities of Price, the terms of the Agreement do not save it from liability. Considering the broad remedial purpose of CERCLA, it is not inequitable to hold General, and therefore Exide, liable for response costs, as opposed to taxpayers. As a result,

even viewing all the evidence in the light most favorable to Exide, the Court finds that the purchase of Price by General was a *de facto* merger, and as a result, General is successor to the CERCLA liability of Price.

b. “Substantial Continuity” Test

As set forth in Carolina Transformer, the following factors should be considered in deciding successor liability under the “substantial continuity” test:

- (1) retention of the same employees;
- (2) retention of the same supervisory personnel;
- (3) retention of the same production facilities and location;
- (4) production of the same products
- (5) retention of the same name;
- (6) continuity of assets; and
- (7) whether the successor holds itself out as the continuation of the previous enterprise.

Carolina Transformer, 978 F.2d at 838.

These are essentially the same factors considered under the first of the four *de factomerger* elements. Numerous courts have noted the similarities between these two tests. See Keystone, No. CV-93-1482, 1996 WL 672891 at *4; Blosenski, 847 F. Supp. at 1284 n.22. As set out supra, a thorough analysis of these factors indicates that, considering all the undisputed evidence, successor liability is also warranted under the “substantial continuity” test. The Court will not recite these facts again, but will instead address the arguments set forth by Exide why they do not constitute “substantial continuity.”

First, Exide contends that General should not be considered a successor to Price’s liability because it had no knowledge or notice of Price’s potential environmental liability when

it negotiated an arms-length transaction to acquire Price's assets.¹⁴ Indeed, some courts have also added a knowledge component as an additional factor under the "substantial continuity" test. See United States v. Atlas Minerals & Chemicals, Inc., 824 F. Supp. 46, 51 (E.D. Pa 1993); see also United States v. Atlas Minerals & Chemicals, Inc., 1993 WL 482952 at *4 & n.1. (E.D. Pa. Sept. 11, 1993). However, numerous courts have subsequently rejected this knowledge requirement in order to find CERCLA successor liability under the "substantial continuity" test, since engrafting such onto the test is inconsistent with the broad remedial goals of the statute. See Andritz, 12 F. Supp.2d at 405-406; Blosenski, 847 F. Supp. at 1287. As one court explained,

[T]he purpose of applying the [substantial continuity] theory is to support the goals of CERCLA and to hold *responsible parties* liable, not to hold only those who knew of the potential problems liable. Furthermore, the purpose behind the [substantial continuity] theory is .. "justified by a showing that in substance, if not in form, the successor is a responsible party."

Gould, 950 F. Supp. at 659 (quoting in part United States v. Mexico Feed & Seed, 980 F.2d 478, 488 (8th Cir. 1992) (emphasis added). This is the better rule, and as applied below makes logical sense since there is no general knowledge or intent requirement to be a responsible party under CERCLA.

Exide argues that General did not know that (1) battery casings containing lead were dumped by Price, (2) lead in these casings could harm the environment, and (3) CERCLA would subsequently be enacted to redress that harm. However, under CERCLA, there is no

14. As noted supra, Exide makes this equitable argument regarding knowledge as to why the Court should not find General liable under both the *de facto* merger and "substantial continuity" tests. For the reasons set forth, the argument is unconvincing under either analysis.

doubt that *Price* is liable as a responsible party *despite the fact that it might not have known* that its dumping would cause harm, or that CERCLA would become law in the future. Therefore, there is no reason why failure to possess this knowledge should free *General* from liability – if it is otherwise the successor to *Price*. Furthermore, although Exide also argues that *General* did not even know that *Price* dumped the battery casings, this argument is also unavailing. If, as Exide claims, *General* did not know such conduct could be harmful to the environment or that liability would eventually attach for it, then this knowledge would presumably have had no effect on its transaction with *Price*, and there is nothing inequitable about holding *General* liable – again, if it is *Price*'s successor.

Second, Exide points to the fact that, in conducting a “substantial continuity” analysis, at least one court has warned about placing too much emphasis on continuity of the same employees, retention of the same production facilities and location, production of the same products, and continuity of assets, since if these factors were determinative, almost no sale of a plant or operating facility would ever be exempt from “substantial continuity.” See Andritz, 12 F. Supp.2d at 406. This is a fair concern. In Andritz, the court declined to find CERCLA successor liability for the purchaser under the “substantial continuity” test. However, in this case, unlike Andritz, there is undisputed evidence that members of *Price* management were integrated into the management of *General* and that some of these former *Price* managers continued to have some responsibilities related to the Hamburg Plant. Significantly, also unlike in Andritz, there is no evidence that any new management or supervisory personnel were installed at the Hamburg Plant by *General*, or that *General* modified the *Price* production techniques. Id. Furthermore, again unlike Andritz, there is undisputed evidence that the *Price*

name continued to be used by the company, without any reference to General, in documents dated many months after the transaction.¹⁵ Id.

Therefore, since General's purchase of Price meets the "substantial continuity" test, General is the successor to the CERCLA liability of Price.

2. General's Direct Liability

The Court concludes that Price is directly a responsible party under CERCLA, and General is *indirectly* the successor to the liabilities of Price under both the *de facto* merger and "substantial continuity" tests. Therefore, since Exide is the successor to the liabilities of General, Exide is liable under CERCLA. As a result, the Court need not determine whether General was itself directly a responsible party under CERCLA.

IV. CONCLUSION

Price is directly liable under § 107(a) of CERCLA, since (1) it disposed hazardous substances at a "facility"; (2) there was a "release" of "hazardous substances" from the facility into the environment; (3) the release required the United States to expend "response costs"; and (4) it "by contract, agreement, or otherwise arranged for disposal ... of hazardous substances owned or possessed...." 42 U.S.C. 9607(a)(3). General is the successor to Price's CERCLA liability indirectly because, under federal common law, its transaction with Price was *de facto* merger and because the transaction meets the "substantial continuity" test. Finally, Exide is

15. Exide also compares the case at bar with Elf Atochem North America v. United States, 908 F. Supp. 275 (E.D. Pa. 1995), in which the court also declined to find CERCLA successor liability under the "substantial continuity" test. However, in that case, there was no evidence that the purchased company's name was used by the purchaser after the transaction. Furthermore, in that case the seller remained in the business in question, continued to pay its own debts, and in fact remained a competitor of the purchaser. Id. at 279-281.

indirectly liable because it is, as it admits, successor to the liabilities of General pursuant to its merger with General.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 00-CV-3057
v.	:	
	:	
EXIDE CORPORATION,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 27th day of February 2002, upon consideration of Plaintiff's Motion for Summary Judgment on Liability (Docket No. 16), Defendant's response thereto (Docket No. 20), and Plaintiff's Reply (Docket No. 21), as well as Defendant's Motion for Summary Judgment (Docket No. 18), Plaintiff's response thereto (Docket No. 19), and Defendant's Reply (Docket No. 23) it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED**, and Defendant's Motion is **DENIED**.

Judgment on liability is entered in favor of Plaintiff United States of America and against Defendant Exide Corporation.

BY THE COURT:

RONALD L. BUCKWALTER, J.