



WILLIAMS MULLEN

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MEMORANDUM

TO: International Clients

FROM: Thomas B. McVey

DATE: May 13, 2003

RE: Acquirer Can Be Liable For Export Control Violations Of Acquired Company

A far-reaching case was recently decided which holds that an acquirer of a company can be liable for the export control violations of the target company for violations which occurred prior to the acquisition. This is even though the acquisition was structured as the purchase of assets rather than the purchase of stock. This case expands the principle of "successor liability" to the area of international business compliance and increases corporate risk in this area. This is an important case for any firms acquiring target companies which are involved in international business activities.

Facts. The case, In the Matter of Sigma-Aldrich Business Holdings, Inc., was an enforcement action initiated by the Bureau of Industry and Security ("BIS") (formerly the Bureau of Export Administration) for violations of the Export Administration Regulations. BIS alleged that Research Biochemicals Limited Partnership ("RBLP") had exported tetrodotoxin citrate without obtaining required export licenses. After the time in which the alleged illegal actions occurred, RBLP sold its business to Sigma-Aldrich Corporation of St. Louis, Missouri ("Sigma-Aldrich"). The transaction was structured as the sale of assets rather than a sale of stock.

After the acquisition was concluded, BIS initiated an enforcement action against Sigma-Aldrich, alleging violations of the Export Administration Regulations for (i) exporting goods without obtaining required export licenses; (ii) making false or misleading statements; and (iii) violating export recordkeeping requirements. BIS claimed that Sigma-Aldrich was liable for the

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export control violations that RBLP had committed in Sigma-Aldrich's capacity as successor in interest to RBLP, as well as for violations which it had committed on its own.

Case Holding. The administrative law judge ruled that Sigma-Aldrich was liable for the illegal actions previously committed by RBLP. This decision was based upon the principle of "successor liability." Under this principle, the acquiring company is responsible for the liabilities of the target due to the "substantial continuity" of the target company's people, products and business. This is even though the acquisition was structured as a sale of assets rather than a sale of stock. The ALJ wrote:

Successor liability can be applied under the export control regulations. First, the International Emergency Economic Powers Act (IEEPA) imposes liability on any "person" who commits a violation.... Under the federal rules of statutory construction, the term "person" includes "corporations, companies, association, firms, partnerships, societies and joint stock companies, as well as individuals." 1 USC §1. The federal rules of statutory construction further inform us that when "company" or "association" are used in reference to a corporation, they shall be deemed to include successors and assigns. See 1 USC § 5....In addition, the export regulations evince a clear intent to apply their remedies beyond just the "persons" who commit violations.... The intent to apply remedies to successors is reflected in the provision governing "related persons," which states in part that orders affecting export privileges may be applied "not only to the respondent, but also to other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business." See, 15 CFR § 766.23(a). As such, both the language and intent of the IEEPA and EAR strongly suggest that "successors" should not be excluded from liability.

The case settled shortly after the issuance of the decision and Sigma-Aldrich agreed to pay a \$1.76 million penalty.

Impact on Companies Conducting Acquisitions. This case presents far-reaching consequences in acquisition transactions. When a target company is involved in international business activities, it is subject to a broad array of federal laws that regulate international business transactions.¹ When an acquirer purchases the company, it often steps into the shoes of the target and becomes subject to these laws. If the target has violations under these laws, the acquirer can take on these liabilities. This creates significant risk for the acquirer since sanctions

¹ This includes under the Export Administration Regulations, the Foreign Corrupt Practices Act, the U.S. Antiboycott laws, the International Emergency Economic Powers Act, the Arms Export Control Act and the various embargoes and sanctions programs administered by the Office of Foreign Assets Control.

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under these laws include severe civil penalties and criminal penalties of up to 10 years imprisonment.

Previously, if the acquirer structured the transaction as a purchase of assets, it could often insulate itself from the liabilities of the target unless they were specifically assumed. Under the Sigma-Aldrich case, BIS has announced that it will prosecute companies for the export control violations of companies they acquire regardless of how the transaction is structured. Successor liability in acquisitions previously existed in only a few narrow instances involving liabilities under environmental and labor laws. Sigma-Aldrich significantly expands this exception.

As a result of this case, acquirers will need to modify their defensive procedures in conducting acquisitions where the target company is involved in any type of international business. First, the acquirer should conduct a highly specialized due diligence review focusing specifically on compliance of the target company under the international business statutes. This review should be conducted by a member of the deal team with specific expertise in export control law. If problems are discovered, or if the acquirer identifies a "culture" of sloppy compliance, it should consider having the target undertake voluntary disclosures to relevant export compliance agencies (Department of Commerce, State or Office of Foreign Assets Control) prior to the closing. In addition, it should consider using strong warranties, representations and indemnifications focused specifically on violations of international business statutes in the acquisition agreements. If the problems are severe enough, it should consider not proceeding with the transaction.

We have prepared a Due Diligence Checklist specifically focused on U.S. export control laws for use in acquisition transactions and we would be pleased to make this available. In addition, I have attached a copy of the Sigma-Aldrich decision for your information.

If you have questions regarding the above, please feel free to contact me.

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF INDUSTRY AND SECURITY

In the Matter of:

Sigma-Aldrich Business Holdings, Inc.;

Sigma-Aldrich Corporation; and

Sigma-Aldrich Research Biochemicals, Inc.

Respondents

Case No. 01-BXA-06

Case No. 01 BXA-07

Case No. 01-BXA-11

BEFORE: PETER A. FITZPATRICK
- ADMINISTRATIVE LAW JUDGE

ORDER DENYING RESPONDENTS' MOTIONS FOR SUMMARY DECISION

I.
OVERVIEW

1. These proceedings arise from three separate complaints issued by the Bureau of Industry and Security ("BIS" or "Agency"), formerly the Bureau of Export Administration, against Respondents Sigma-Aldrich Business Holdings (SABH) on March 23, 2001; Sigma-Aldrich Corporation (SAC) on April 2, 2001; and Sigma-Aldrich Research Biochemicals (SARB) on May 29, 2001. The complaints issued by the Agency allege identical violations of the U.S. export control regulations relating to the export of goods without the required license, making false or misleading statements, and failure to maintain records. *See*, 15 CFR Parts 768-799 (1995); 15 CFR Parts 768-799 (1996); and 15 CFR Parts 730-774 (2000).¹ The Agency

¹ The violations at issue occurred from 1995 through 1998. As such, the regulations governing the violations at issue are found in the 1995 through 1998 versions of the Code of Federal regulations: 15 C.F.R. Parts 768-799 (1995); 15 C.F.R. Parts 768-799 (1996), as amended (61 *Fed Reg.* 12714, March 25, 1996); and 15 C.F.R. Parts 730-774 (1997-1998). The March 25, 1996 *Federal Register* publication re-designated, but did not republish, the regulations existing at that time as 15 C.F.R. Part 768A-799A. In addition, the March 25, 1996 *Federal Register* publication restructured and reorganized the regulations, designating

seeks to impose liability on Respondents SABH and SAC as successors in interest to Research Biochemicals Limited Partnership (RBLP), a company that sold its partnership interests to these Respondents on April 9, 1997. In addition, the Agency seeks to impose liability against Respondent SARB as both a successor for violations occurring before the transfer of interest on April 9, 1997 and as the actual wrongdoer for violations occurring after the transfer.

These proceedings were transferred to the United States Coast Guard, Administrative Law Judge Docketing Center, for adjudication pursuant to an interagency agreement between BIS and the Coast Guard dated May 19, 1999. See also 50 USC §2412(d), 5 USC §3344, and 5 CFR §930.213. That agreement was been renewed annually and is still in effect. The above captioned cases were assigned to the undersigned and were consolidated on July 5, 2001.

On March 5, 2002, Respondents filed Motions for Summary Decision pursuant to 15 CFR § 766.8 (2002), seeking the dismissal of all charges against Respondents SAC and SABH as successors in interest and all against SARB relating to exports that allegedly took place prior to April 9, 1997. In addition, Respondent SARB moves for Summary Decision dismissing all charges relating to the exports of a toxic chemical, tetrodotoxin citrate, which Respondents assert was not listed as a controlled item requiring a license at the time of the alleged exports. Also, Respondent SARB moves to dismiss all requests by the Agency for an order denying the Respondent's export privileges or right to practice before the Bureau of Industry and Security. Similarly, in the event SAC's and SABH's motions are denied, they move, in the alternative, for Summary Decision dismissing all charges against them relating to exports of tetrodotoxin citrate and all requests for an order denying their export privileges before BIS.

them as an interim rule at 15 C.F.R. Parts 730-774, effective April 24, 1996. The former regulations define the various violations that BIS alleges occurred from 1995 through December 31, 1996. The current regulations define the various violations that BIS alleges occurred on or after January 1, 1997.

On March 28, 2002, the Agency's Opposition to Respondents' Motions for Summary Judgment was filed. The Respondents' filed a reply brief on April 5, 2002. Oral arguments were presented at a hearing on the motions on June 6, 2002 in Baltimore, Maryland. Anstruther Davidson, Esq. and Melissa B. Mannino, Esq. represented the Agency at the hearing. Counsel for the Respondents were Aaron X. Fellmeth, Esq., Stanley Marcuss, Esq., and Rodney F. Page, Esq., Brian Cave LLP, Washington, D.C.²

2. Summary judgment is appropriate only where there is no genuine issue of material fact and where the moving party is entitled to a judgment as a matter of law. *See*, 15 C.F.R. § 766.8. One of the principal purposes of the summary decision or judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Disputes over facts that might affect the outcome will preclude the entry of summary judgment. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When reviewing pleadings, affidavits and other evidence, the court must draw all reasonable, factual inferences in favor of the nonmoving party. In short, summary judgment is appropriate if the evidence is such that no reasonable fact finder could return a verdict for the nonmoving party. *See, Lewis v. State of Oklahoma ex rel. Bd. of Regents for Tulsa Community College*, 2002 WL 1316810 (2002); *see also, Miccosukee Tribe of Indians of Florida v. South Florida Water Management Dist.*, 280 F.3d 1364, 1367 (2002).

3. At the hearing, the Respondents' Motion for Summary Decision was denied with respect to their argument that BIS lacks the statutory authority to impose a denial of export privileges. More specifically, I followed the reasoning in *Iran Air v. Kugelman*, 996 F. 2d 1253

² At the hearing I announced that good cause exists in this case to extend the one year period imposed at 15 CFR § 766.17 for disposition of the case including review by the Under Secretary. The issues raised here are complex and every effort has been made to accommodate the joint recommendations of the

(D.C. Cir. 1993), which held that applicable statutes and agency regulations are deemed precedent, and once the agency has ruled on a given matter, it is not open for re-argument. *See* 996 F.2d at 1260. In this case, the Export Administration Regulations (EAR) provide for the denial of export privileges as a possible penalty for violations of the export control regulations; therefore, there is no basis before this forum for invalidating the clear rule and practice of the Agency. *See*, 15 CFR § 764.3(a)(2).

4. Additionally, the Respondents' raise the following issues, which will be addressed in greater detail:

- (a) All charges in the Charging Letters based on the alleged impermissible exports of tetrodotoxin citrate must be dismissed because the EAR does not prohibit exports of that specific mixture without a license.
- (b) There is no statutory basis or precedent for the creation of successor liability under the EAR.
- (c) Alternatively, even if successor liability were permissible under the Export Control Regulations, it would be unfair to impose liability on these innocent purchasers when the predecessor is capable of providing relief. Moreover, each Respondent here cannot simultaneously have been the successor to RBLP's business.
- (d) Finally, all charges against Respondents SAC and SABH should be dismissed because they cannot be regarded as successors to RBLP's business since only partnership interests, not assets, were acquired.

parties regarding the schedule of the litigation. The case will move forward as expeditiously as possible. See Transcript 4-5.

After reviewing these arguments and reviewing the transcript, pleadings and exhibits, I find that the Respondents' are not entitled to Summary Decision as a matter of law. Also, issues of material fact remain to be decided.

II.

DISCUSSION

1. Several of the charges against the Respondents relate the export without a license of tetrodotoxin citrate, a toxic compound. Tetrodotoxin is listed as a controlled toxin on the Commerce Control List (CCL) under the Export Control Classification Number (ECCN) 1C351. *See*, 15 CFR § 774, Supp. 1. Tetrodotoxin citrate is tetrodotoxin packaged in a citrate buffer as a protective measure. As such, tetrodotoxin citrate is not a chemical derivative of tetrodotoxin but rather a mixture of tetrodotoxin and citric acid. Exporting tetrodotoxin in a citrate buffer is similar to exporting it in packaging material. Therefore, it requires a license from the Department of Commerce before being exported from the United States to the destinations listed in the Charging Letters.

Respondents acknowledge that tetrodotoxin citrate is a mixture that contains tetrodotoxin but urge that since mixtures are specifically discussed elsewhere in the EAR, but not in the section pertaining to tetrodotoxin, the regulations here exclude coverage of tetrodotoxin mixtures. It is clear, however, from the language used throughout the EAR that sections pertaining to mixtures have the specific effect of excluding items from control rather than including them. Without that language, a mixture containing any quantity of a controlled substance, regardless of how minute, would be controlled. In essence, this language excludes select mixtures for the benefit of exporters. Although there is specific language in ECCN 1C351 that excludes certain items, such as vaccines and immunotoxins, from coverage, similar exclusion language is not included in ECCN 1C351 for mixtures. Therefore, it is apparent that

while the words "tetrodotoxin citrate" are not on the list, tetrodotoxin citrate, as a mixture of tetrodotoxin, is covered by ECCN 1C351 and its predecessor entry, ECCN 1C61B. *See*, 15 CFR §744, Supp 1.

2. Successor liability can be applied under the export control regulations. First, the International Emergency Economic Powers Act (IEEPA) imposes liability on any "person" who commits a violation.³ More specifically, a civil penalty up to \$10,000 may be imposed on any "person" who violates a license, order or regulation. *See*, 50 USC § 1705. For violations occurring after October 23, 1996, the maximum fine is \$11,000. *See*, 28 USC 2461, *see also* 15 CFR 6.4(A)(2). Under the federal rules of statutory construction, the term "person" includes "corporations, companies, association, firms, partnerships, societies and joint stock companies, as well as individuals." 1 USC §1. The federal rules of statutory construction further inform us that when "company" or "association" are used in reference to a corporation, they shall be deemed to include successors and assigns. *See*, 1 USC § 5. By implication, Congress must have considered the word "corporation" to include corporate successors. *See*, *U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, (8th Cir. 1992); *see also*, *B.F. Goodrich v. Betkoski*, 99 F.3d 505 , (2nd Cir. 1996)

In addition, the export regulations evince a clear intent to apply their remedies beyond just the "persons" who commit violations. For example, the term "person" is specifically defined

³ The Export Administration Regulations were issued under the Export Administration Act of 1979, as amended 50 U.S.C.A. §§ 2401-2420 (1991 & Supp 2000). Although the Act expired on August 20, 1994, Executive Order 1294, which has been extended by successive Presidential Notices, continued the Regulations in effect under the International Emergency Economic Powers Act. *See* 50 U.S. CA 1701-1706 (1991 & Supp 2000).

in the EAR as “a natural person, including a citizen or national of the United States of any foreign country; any firm; any government, government agency, government department, or government commission; any labor union; any fraternal or social organization; and any other association or organization whether or not organized for profit.” *See*, 15 CFR §772.1. The intent to apply remedies to successors is reflected in the provision governing “related persons,” which states in part that orders affecting export privileges may be applied “not only to the respondent, but also to other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business.” *See*, 15 CFR § 766.23(a). As such, both the language and intent of the IEEPA and EAR strongly suggest that “successors” should not be excluded from liability.

3. In order to address the issue of whether the Respondents assumed liability under the export control regulations when they purchased the assets and partnership interests of a predecessor company, the traditional rules of successor liability must be applied. A number of courts have recognized the importance of national uniformity, rather than the successor liability law of a particular state. *See, Smith Land & Imp. Corp. v. Celotex Corp.*, 851 F.2d 86 (3rd Cir. 1988) (instructing District Court to consider national uniformity in resolving successor liability issues under CERCLA); *see also, U.S. v. Mexico Feed and Seed Co*, 980 F.2d at 487 (upholding the application of federal law); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990) (deeming appropriate a federal rule that relies on traditional common law notions because of the need for national uniformity).

Under these traditional rules, asset purchasers are not liable as successors unless one of the following four exceptions applies: (1) The purchasing corporation expressly or impliedly agrees to assume the liability; (2) The transaction amounts to a de facto consolidation or merger;

(3) The purchasing corporation is merely a continuation of the selling corporation; or (4) The transaction was fraudulently entered into in order to escape liability. *See, Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 812 F.Supp. 124 (N.D. Ill. 1993); *see also, Atlantic Richfield Co. v. Blosenski* 847 F.Supp. 1261 (E.D. Pa. 1994); *Sylvester Bros. Development Co. v. Burlington Northern R.R.*, 772 F.Supp. 443 (D. Minn. 1990); *U.S. v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir. 1992); *U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, (8th Cir. 1992); *Canadyne-Georgia Corp. v. Cleveland*, 72 F.Supp.2d 1373 (M.D. Ga. 1999).

The exceptions to the traditional rules of successor liability prevent a corporation from escaping its liabilities merely by changing hats. As such, close scrutiny must be given to corporate realities, rather than a mechanical application of a multi-factor test. *See, Gallenberg Equipment, Inc. v. Agromac Intern., Inc.*, 10 F.Supp.2d 1050 (E.D. Wis. 1998). Therefore, in deciding whether to apply the mere continuation or de facto merger exception, several courts have held that there must be a transfer of assets and business from one corporation to another in exchange for securities. *See, Baker's Carpet Gallery, Inc. v. Mohawk Industries, Inc.*, 942 F.Supp.1464 (N.D. Ga. 1996); *see also, Liberty Mut. Ins. Co. v. Household Intern*, 136 F.Supp.2d 5(D. Mas. 2001); *Gallenberg Equipment, Inc. v. Agromac Intern., Inc.*, 10 F.Supp.2d 1050 (E.D. Wis. 1998). At the very least, there must be some sort of continuation of the stockholders' ownership interests. *See, Taylor v. Atlas Safety Equip. Co., Inc.*, 808 F.Supp. 1246 (E.D. Va. 1992); *see also, Crawford Harbor Associates v. Blake Const. Co., Inc.*, 661 F.Supp. 880 (E.D. Va. 1987). Even if the corporation sells its entire business operation and all its assets to another corporation, in exchange for some consideration other than stock, the two corporate entities remain distinct and intact. *See, Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985); *see also, Harris v. T.I., Inc.*, 413 S.E.2d 605 (Va. 1992); *see also, Ney v.*

Landmark Educ. Corp., 16 F.3d 410 (1994); *Liberty Mut. Ins. Co. v. Household Intern*, 136 F.Supp.2d 5 (D. Mass. 2001). For example, where the assets are sold for cash rather than stock, no basic fundamental change occurs in the relationship of the stockholders to their respective corporations. See, *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d at 1458. Given the absent continuity of shareholder interest, the two corporations remain strangers, both before and after the sale. See, *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d at 1457.

Several courts however have applied a broadened "mere continuation" theory commonly known as the "substantial continuity" exception, which eliminates the requirement for a continuity of shareholders. See, *Gould, Inc. v. A & M Battery and Tire Service*, 950 F.Supp. 653 (M.D. Pa. 1997); see also, *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2nd Cir. 1996). Under this theory, a literal "purchase" of assets is not required to establish successor liability so long as there is some form of a "transfer" of assets. See, *State of N.Y. v. N. Storonske Cooperage Co., Inc.*, 174 B.R. 366 (N.D. N.Y. 1994). Among the factors to be considered under the "substantial continuity" approach are whether the successor: (1) retains the same employees, supervisory personnel and the same production facilities in the same location; (2) continues production of the same products; (3) retains the same business name; (4) maintains the same assets and general business operations; and (5) holds itself out to the public as a continuation of the previous corporation. See, *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 812 F.Supp. 124 (N.D. Ill. 1993); see also, *Atlantic Richfield Co. v. Blosenski* 847 F.Supp. 1261 (E.D. Pa.1994); *Gould, Inc. v. A & M Battery and Tire Service*, 950 F.Supp. 653 (M.D. Pa.1997).

Although the substantial continuity exception has been interpreted to require knowledge of potential liability on the part of the successor corporation, at least one court has held that knowledge can be inferred from the facts, taken in totality of the circumstances. See, *Gould, Inc.*

v. A & M Battery and Tire Service, 950 F.Supp. 653 (M.D.Pa. 1997). For example, it is easy to infer knowledge or notice when the successor holds itself out as the continuation of the previous enterprise by retaining the same employees, the same supervisory personnel, the same production facilities in the same location, produces the same product, and maintains a continuity of assets and the general business operations. *See*, 950 F.Supp. at 659.

The policy behind applying the more flexible substantial continuity exception to successor liability is to preclude responsible parties from using corporate formalities to escape liability. To date, the test has been used in the context of both labor relations, and federal environmental regulations. *See, Musikiwamba v. ESSI, Inc.*, 760 F.2d 740 (7th Cir. 1985); *see also, U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, (8th Cir. 1992). The substantial continuity theory would be an appropriate test for successor liability under the EAR.

4. The common law rules of successor liability and its exceptions generally apply regardless of whether the predecessor or successor organization was a corporation, individual, or some other form of business organization. *See, Tift v. Forage King Industries, Inc.*, 322 N.W.2d 14 (Wis. 1982); *see also, Baker v. Dorfman*, 2000 WL 1010285 (S.D.N.Y. 2000); *Carter Enterprises, Inc. v. Ashland Specialty Co., Inc.*, 257 B.R. 797 (S.D. W.Va. 2001). In addition, responsible parties may be held jointly and severally liable. *See, Oner II, Inc. v. E.P.A.*, 597 F.2d 184 (19th Cir. 1979) (Agency was allowed to charge more than one respondent for successor liability under the doctrine of joint and several liability).

In addition, the doctrine of successor liability may be applied even when the Agency does not assert charges against the predecessor corporation. As such, the Respondents' assertion that RBLP, as the predecessor corporation, must be unavailable before its successors can be held liable, is unavailing. Instead, the more important question is whether the predecessor is merely a

hollow shell or an entity with assets answerable to judgments. Because it is not always the case that a corporation purchased by a second corporation disappears as a legal entity and cannot be sued, a successor business organization cannot avoid liability simply because its predecessor is a proper defendant. *See, Tift v. Forage King Industries, Inc.*, 322 N.W.2d 14 (Wis. 1982).

Rather, the successor corporations may be sued, as well as the original proprietorship. *See, id.*

In this case, the Respondents argue that although RBLP was dissolved under Delaware state law for failing to pay its taxes, it was sufficiently alive and existed at the time the action was instituted to permit it to be sued. However, when the Agency issued the charging letters, RBLP had transferred all of its assets, obligations, past contracts and liabilities to the Respondents. Moreover, given its status as a dissolved corporation, RBLP was prevented from conducting future business. Suffice it to say, RBLP was no longer viable as it existed for nearly five years (1997-2002). It was merely a legal formality and was devoid of any significant assets.

Finally, liability may be extended to successors corporations for the purpose of enforcing statutes by assessing civil penalties. Although Respondents contend that the successor liability doctrine was developed solely for remedial purposes, successor liability has been imposed to protect the public interest, as well as to prevent the purpose of federal regulations from being circumvented by corporate structuring formalities. For example, in *Oner II, Inc. v. E.P.A.*, 597 F.2d 184 (19th Cir. 1979), the District Court held that “an agency may pursue the objectives of the Act by imposing successor liability where it will facilitate enforcement of the Act.” *See*, 597 F.2d at 186. In *Oner II*, a successor corporation was held liable for violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) because the Agency’s authority to extend

liability to successor corporations stems from the purpose of the statute it administers. *See*, 597 F.2d at 186.

Just as the purpose of FIFRA is to regulate pesticides and protect the national environment, the primary objective behind the export control regulations is to protect the national security and safeguard the public from potential harm. More specifically, a review of the applicable regulations reveals that the export control provision of the EAR are designed to limit the military and terrorism support capacity of certain countries and to restrict the access of items, such as weapons of mass destruction, that may be used by countries or persons wishing to harm U.S. interests. *See*, 15 CFR 730.6. National security interest considerations are provided for in 15 CFR § 742.4, which states in part “it is the policy of the U.S. to restrict the export and re-export of items that would make a significant contribution of countries that would prove detrimental to the national security of the United States.” *See*, 15 CFR § 742.4(a). As such, successor liability would not only further the purpose of IEEPA and the EAR, but the policies behind the regulations would be sharply curtailed and the enforcement of the Act unnecessarily hampered if it was not applied.

5. Applying the rules of successor liability and its exemptions, Respondent SARB shows all of the hallmark signs of substantial continuity in the present case. Following the terms of the Bill and Sale and Assignment and Assumption Agreement, RBLP transferred all rights, title and interest in its assets to SARB on April 9, 1997. The Bill of Sale further defines the term assets to include “all assets, property, associated rights and interest, real, personal and mixed, tangible and intangible.” In addition, the Novation Agreement provided in the Bill of Sale reveals that SARB, as the transferee, agreed to fully perform all obligations under preexisting contracts and purchase orders. Similarly, SARB agreed to assume all preexisting liabilities and claims against

RBLP. The record further shows that after SARB acquired all business assets from RBLP, it continued RBLP's export practices without interruption. Thus, SARB appears to be a substantial continuation of RBLP's business as well as a successor in interest of that partnership.

Questions of fact arise regarding the precise nature of the relationship between all the Respondents in this transaction. First, according to the Purchase Agreement signed on April 9, 1997, approximately \$18 million dollars was paid by Respondents SAC and SABH in return for 100% of RBLP's partnership units. The partnership units were split between the two corporations, with SAC acquiring approximately 1% and SABH acquiring approximately 99%. According to the Purchase Agreement, the transaction was arrived at by arms-length negotiations and properly reflected fair market value. Moreover, Article I of the Purchase Agreement clearly indicates that only partnership units were transferred, as there is no reference to an exchange of assets, obligations or liabilities. Ordinarily, Respondents SAC and SABH would not be considered successors in interest under the above scenario. An entity that holds partnership units in another company is not liable for that company's wrongdoing, unless it can be shown that the partners were controlling the operations of that company. However, the undersigned is not convinced that Respondents SAC and SABH purchased only RBLP's partnership units.

According to the Declaration of Michael Hogan, RBLP sold all its assets and business to Respondent SARB. (Respondent Exhibit J, paragraph 9). Yet the record here is devoid of any consideration paid by Respondent SARB in exchange for RBLP's assets and business. The only consideration in evidence that was exchanged between any of the parties was the sum of \$18 million dollars allegedly paid by Respondents SAC and SABH for RBLP's partnership units. Therefore, the issue remains whether RBLP gratuitously transferred its assets and business to

Respondents SARB, or whether RBLP's assets and liabilities were first acquired by Respondents SAC and SABH before being transferred to Respondent SARB.

III.
ORDER

WHEREFORE,

IT IS HEREBY ORDERED that Respondents' Motions for Summary Decision on the grounds that tetrodotoxin citrate was not a controlled item requiring a license from the Department of Commerce at the time of the alleged exports is DENIED.

IT IS FURTHER ORDERED that Respondents' Motions for Summary Decision on the grounds that the export control regulations do not provide for successor liability is DENIED.

IT IS FURTHER ORDERED that Respondents' Motions for Summary Decision on the grounds that the Respondents can not be liable as successors in interest is DENIED.


IT IS FURTHER ORDERED that Respondents' Motions for Summary Decision on the grounds that the Agency (BIS) lacks statutory authority to impose a denial of export privilege is DENIED.

IT IS FURTHER ORDERED that the hearing in this case will commence as follows:

November 4, 2002 @ 1330 hours
United States Custom House
United States Coast Guard
ALJ Courtroom, Room 403
40 South Gay Street
Baltimore, Maryland 21202

IT IS FURTHER ORDERED that the parties and their counsel, are DIRECTED TO BE PRESENT at the hearing with all of their witnesses and/or exhibits, or stipulations with the opposing party in lieu of same. The parties are to be fully prepared to proceed with the hearings

until they are concluded. Failure to appear as now directed, in the absence of any contrary instruction from the above office or for good cause shown, may result in an immediate ruling or disposition adverse to the failing party's interests.


PETER A. FITZPATRICK
Administrative Law Judge

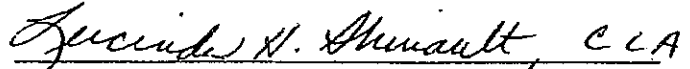
Done and dated this 29 day of August 2002.
Norfolk, Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing by facsimile and e-mail to the following persons:

Anstruther Davidson, Esq. /Melissa Mannino, Esq.
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