IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA *ex rel.* Kurt Bunk and Daniel Heuser, Plaintiffs/Relators, v. BIRKART GLOBISTICS GmbH & CO., *et al.*, Defendants.	No. 1:02-cv-1168 (AJT/TRJ)
UNITED STATES OF AMERICA *ex rel.* Ray Ammons, Plaintiff/Relator, v. THE PASHA GROUP, *et al.*, Defendants.	No. 1:07-cv-1198 (AJT/TRJ)

ORDER

Outstanding is the plaintiffs' claim for successor liability on the part of third-party defendant Government Logistics N.V. ("GovLog"), a trial on which is currently scheduled for October 20, 2014. In order to clarify the issues for trial, should trial prove necessary, the Court concludes that the "traditional rule," rather than the "substantial continuity" test, governs the issue of successor liability in this federal False Claims Act case.

The Government and the Relators seek to hold GovLog liable for the damages and penalties assessed against the Gosselin defendants as Gosselin's successor in interest. The Court has previously ruled that this issue is governed by federal common law. *See* Doc. No. 742.

Courts are split as to the federal common law rule applicable in the False Claims Act context, however, and the Fourth Circuit has yet to address the issue. Under the so-called "traditional" common law rule of successor liability, a corporation that acquires the assets of another corporation does not take the liabilities of the corporation from which the assets are acquired unless one of four exceptions applies: "(1) the successor expressly or impliedly agrees to assume the liabilities of the predecessor; (2) the transaction may be considered a de facto merger; (3) the successor may be considered a mere continuation of the predecessor; or (4) the transaction is fraudulent." *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (internal quotation marks omitted). With regard to the third exception, "a corporation is not to be considered the continuation of a predecessor unless, after the transfer of assets, only one corporation remains, and there is an identity of stock, stockholders, and directors between the two corporations." *Id.*

In the labor context, the Supreme Court has adopted the "substantial continuity" or "continuity of enterprise" test, pursuant to which the traditional "mere continuation" exception is replaced with a more flexible multi-factor analysis. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) (listing as relevant factors: "[1] whether the business of both employers is essentially the same; [2] whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and [3] whether the new entity has the same production process, produces the same products, and basically has the same body of customers"). Other courts have adopted this test in certain other federal contexts. *See, e.g., EEOC v. GKG, Inc.*, 39 F.3d 740, 747-48 (7th Cir. 1994) (applying substantial continuity test in Age Discrimination in Employment Act case). The Fourth Circuit has applied the substantial continuity test in the context of the Comprehensive Environmental Response,

Compensation, and Liability Act ("CERCLA"). *See Carolina Transformer Co.*, 978 F.2d at 838. Based on *Carolina Transformer*, the plaintiffs contend that the substantial continuity test must be applied in this case as well.

Despite *Carolina Transformer*, the Court concludes that the traditional rule, and not the substantial continuity test, applies in this case. First, *Carolina Transformer* only addressed the issue in the CERCLA context, and it does not, by its terms, apply directly to the False Claims Act. Moreover, the Fourth Circuit's reasons for applying the substantial continuity test rather than the traditional rule are not entirely clear. *See id.* at 838 (recognizing the "settled rule" of successor liability but instead applying the multi-factor test for continuity of enterprise, as the district court had done). Most dispositive, however, is that, in the False Claims Act context, a departure from the traditional common law rule would be inconsistent with the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), decided after *Carolina Transformer*.

In *Bestfoods*, the Court addressed whether, under CERCLA, the United States could recover cleanup costs from the parent corporation of the chemical plant that generated the waste. The district court held that the parent corporation was liable under CERCLA because it "operated" the facility through its subsidiary, as evidenced by the parent corporation's selecting the subsidiary's board of directors and the significant presence of the parent corporation's officials in the executive ranks of the subsidiary. *Id.* at 59. The Supreme Court rejected, however, the district court's deviation from common law rules of derivative liability. In reaching that decision, the Supreme Court noted that "CERCLA is . . . like many another congressional enactment in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute,'" and held that "the failure of the statute to speak to a matter as fundamental as the liability implications of corporate

ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *Id.* at 63 (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979); *United States v. Texas*, 507 U.S. 529, 534 (1993)).

Nothing in the False Claims Act suggests an intent to modify the common law of successor liability. The reasoning of *Bestfoods* therefore suggests that the Court should apply the common law rule rather than fashioning a new federal rule of liability. While some courts have adopted the substantial continuity test in other federal contexts, and a few have even done so in the False Claims Act context, *see, e.g.*, *United States ex rel. Fisher v. Network Software Assocs., Inc.*, 180 F. Supp. 2d 192, 195-96 (D.D.C. 2002), the traditional rule is still the dominant common law approach outside of the labor context. *See New York v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 685-87 (2d Cir. 2003) (reversing circuit precedent applying the substantial continuity test in the CERCLA context in light of *Bestfoods* and holding that "the substantial continuity test is not a sufficiently well established part of the common law of corporate liability to satisfy *Bestfoods*' dictate that common law must govern").[1] For these reasons, the Court concludes that the traditional rule is appropriate.

In light of this determination and the various issues raised by the parties in their recent briefing, the Court will give the parties the opportunity to file any renewed summary judgment motions in accordance with a schedule to be determined at the status conference set for September 22, 2014. Those motions should address, in particular, whether the plaintiffs' pleadings are adequate to impose successor liability on GovLog based on an alleged fraudulent

[1] As the Second Circuit explained in *New York v. National Services Industries*, while the substantial continuity test is well-established in the area of labor law, the labor law cases are context-specific and cannot easily be extended to other areas of federal common law. *See New York v. Nat'l Servs. Indus., Inc.*, 352 F.3d at 686.

transaction between GovLog and any of the Gosselin defendants, as well as the merits of any such claim.

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
September 12, 2014