

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

STEVEN THOMAS, a Minor,
by his guardian ad litem,
SUSAN M. GRAMLING;
Plaintiff,

Case No. 99-CV-6411

v.

Case code 30107

THE ATLANTIC RICHFIELD COMPANY;
E.I. DUPONT DE NEMOURS AND CO.;
CONAGRA GROCERY PRODUCTS CO.;
NL INDUSTRIES, INC.;
SCM CHEMICALS;
THE SHERWIN-WILLIAMS CO.;

EPA Region 5 Records Ctr.



372367

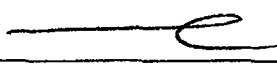
Defendants.

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT – THE
ATLANTIC RICHFIELD COMPANY'S SUCCESSORSHIP LIABILITY DATED,
APRIL 30, 2007**

Plaintiff, Steven Thomas, hereby moves for summary judgment on the issue of Atlantic Richfield Company's successorship to Anaconda Lead Products Company and International Smelting & Refining Company. The grounds for this motion are set forth in the accompanying Memorandum of Law and the Affidavit of Michael G. Rousseau filed concurrently herewith.

Dated: April 30, 2007.

LAW OFFICE OF PETER EARLE, LLC
Attorneys for the Plaintiff


By: 
Robert J. McConnell (*admitted pro hac vice*)
Fidelma L. Fitzpatrick (*admitted pro hac vice*)

Aileen L. Sprague (*admitted pro hac vice*)
Jonathan D. Orent (State Bar No. 1062035)
Michael G. Rousseau (State Bar No. 1062037)
MOTLEY RICE LLC
321 South Main Street, 2nd Floor
Providence, RI 02940
Tel: (401) 457-7700
Fax: (401) 457-7708

Peter G. Earle, Esq.
State Bar No. 1012176
700 North Water Street, Suite 646
Milwaukee, WI 53202
Tel.: (414) 276-1076
Fax: (414) 276-0460

CERTIFICATION

I hereby certify that on April 30th, 2007, I did cause to be served, via regular mail, postage prepaid, the within Plaintiff's Motion for Partial Summary Judgment – The Atlantic Richfield Company's Successorship Liability dated April 30, 2007.



Steven Thomas v. Lead Industries Association, Inc., et al.
Case No. 99-CV-6411/Q&B #850710.70023

Hon. Richard J. Sankovitz

Milwaukee County Courthouse
901 North 9th Street
Milwaukee, Wisconsin 53233

Counsel for Plaintiffs

Peter G. Earle, Esq.

LAW OFFICE OF PETER EARLE, LLC

First Financial Centre
700 North Water Street, Suite 646
Milwaukee, Wisconsin 53202
(414) 276-1076
(414) 276-0460 (fax)

John J. McConnell, Jr., Esq.
Robert J. McConnell, Esq.
*Fidelma L. Fitzpatrick, Esq.

MOTLEY RICE LLC

321 South Main Street
P.O. Box 6067
Providence, RI 02940
(401) 457-7700
(401) 457-7708 (fax)

Counsel for E.I. DuPont De Nemours & Co.

*Joy C. Fuhr, Esq.
Christian Hennecke, Esq.
R. Trent Taylor, Esq.
Jonathan P. Harmon, Esq.
MCGUIRE WOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804) 775-1000
(804) 698-2056 (fax)

Richard H. Porter, Esq.
*Chris J. Trebatoski, Esq.
GONZALEZ, SAGGIO, & HARLAN, LLP
225 East Michigan St., 4th Floor
Milwaukee, WI 53202
(414) 277-8500
(414) 277-8521 (fax)

Counsel for Atlantic Richfield Company

David G. Peterson, Esq.
GODFREY & KAHN
780 North Water Street
Milwaukee, WI 53202-3590
(414) 273-3500
(414) 273-5198 (fax)

*Bruce R. Kelly, Esq.
Philip Curtis, Esq.
Angela Showalter, Esq.
Reuben S. Koolyk, Esq.
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022
(212) 715-1000
(212) 715-1399 (fax)

Counsel for NL Industries, Inc.

*James T. Murray, Jr., Esq.
Michael J. Wirth, Esq.
PETERSON, JOHNSON & MURRAY, S.C.
733 North Van Buren Street, 6th Floor
Milwaukee, WI 53202-4792
(414) 278-8800
(414) 278-0920 (fax)

Timothy S. Hardy, Esq.
837 Sherman Street
Second Floor
Denver, CO 80203
(303) 733-2174
(303) 733-2193 (fax)

Michael D. Jones, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
(202) 879-5200

Counsel for Glidden & SCM Chemicals, Inc.
(Millenium Holdings, LLC)

James R. Clark, Esq.
*Trevor J. Wills, Esq.
Christopher S. Schilder, Esq.
Brian P. Keenan, Esq.
FOLEY & LARDNER
First Star Center
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
(414) 271-2400
(414) 297-4900 (fax)

Michael T. Nilan, Esq.
Courtney Ward-Reichard, Esq.
*Courtney G. Sylvester, Esq.
Scott A. Smith, Esq.
**HALLELAND, LEWIS, NILAN
& JOHNSON, P.A.**
600 U.S. Bank Plaza South
220 South Sixth Street, Suite 600
Minneapolis, MN 55402-4501
(612) 338-1838
(612) 338-7858 (fax)

Counsel for The Sherwin-Williams Co.

Frank J. Daily, Esq.
M. Christine Cowles, Esq.
*Jeffrey K. Spoerk, Esq.
Lucas W. Andrews, Esq.
Attorney Jamila Hall
Attorney Anne Johnson
Richard Deane, Jr., Esq.
Attorney Paula Wilson
Thomas S. Jones, Esq.
QUARLES & BRADY, LLP
411 East Wisconsin Avenue, Suite 2040
Milwaukee, WI 53202-4497
(414) 277-5000
(414) 978-8970 (fax)

Charles H. Moellenberg, Esq.
Paul Michael Pohl, Esq.
John E. Iole, Esq.
Jennifer B. Flannery, Esq.
Laura A. Meaden
Lucas W. Andrews, Esq.
Jamila M. Hall, Esq.
JONES DAY
500 Grant Street, 31st Floor
Pittsburgh, PA 15219
(419) 873-1845
(412) 394-7959 (fax)

Robert S. Walker, Esq.
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114-1190
(216) 586-7576
(216) 579-0212 (fax)

Anne M. Johnson, Esq.
Richard H. Deane, Jr., Esq.
JONES DAY
1420 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309-3053
(404) 521-3939
(404)-581-8330 (fax)

Counsel for Conagra Grocery Products, Inc.

*James P. Fitzgerald, Esq.
Robert D. Mullin, Jr., Esq.
MCGRATH, NORTH, MULLIN & KRATZ, P.C.
Suite 3700 First National Tower
1601 Dodge Street
Omaha, NE 68102
(402) 341-3070
(402) 341-0216 (fax)

*Paul Benson, Esq.
Nathaniel Cade, Jr., Esq.
MICHAEL, BEST & FRIEDRICH
100 East Wisconsin Avenue, Suite 3300
Milwaukee, WI 53202-4108
(414) 277-6560
(414) 277-0656 (fax)

Steven Thomas Guardian Ad Litem

Susan M. Gramling

2266 North Prospect Avenue, Suite 505

Milwaukee, WI 53202-6306

(414) 224-8780

(414) 224-1665 (fax)

* Asterisks designate primary points of contact

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

STEVEN THOMAS, a Minor,
by his guardian ad litem,
SUSAN M. GRAMLING;
Plaintiff,

Case No. 99-CV-6411

v.

Case code 30107

THE ATLANTIC RICHFIELD COMPANY;
E.I. DUPONT DE NEMOURS AND CO.;
CONAGRA GROCERY PRODUCTS CO.;
NL INDUSTRIES, INC.;
SCM CHEMICALS;
THE SHERWIN-WILLIAMS CO.;

Defendants.

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR PARTIAL
SUMMARY JUDGMENT – THE ATLANTIC RICHFIELD COMPANY'S
SUCCESSORSHIP LIABILITY, DATED APRIL 30, 2007**

Defendant The Atlantic Richfield Company ("Arco") is "...the successor-in-interest to International Smelting & Refining Company and Anaconda Lead Products Company..." Second Amended Complaint at ¶ 4 (attached to the Affidavit of Michael G. Rousseau as Exhibit 1.) The Atlantic Richfield Company has denied it is the successor-in-interest to both International Smelting & Refining Company and Anaconda Lead Products Company. Answer of Defendant Atlantic Richfield Company at ¶ 4 (attached to the Affidavit of Michael G. Rousseau as Exhibit 13.) Plaintiff files this motion for summary judgment as there can be no factual dispute that Arco is, in fact and law, the successor to the lead pigment liabilities of International Smelting & Refining Company ("International") and Anaconda Lead Products Company ("ALPC").

Factual Background

The corporate history of the various Anaconda companies is rife with many transactions among and between the various subsidiaries. However, for purposes of this case there are two transactions relevant to the determination of whether Arco is the successor-in-interest to ALPC and International. Those transactions, as described by International's ledger related to its ownership of ALPC's stock are as follows:

Oct. 1, 1936 Acquired from Anaconda Copper Mining Company all outstanding capital stock of Anaconda Lead Products Company in exchange for 13,500 shares of capital stock of International Smelting & Refining Company of a par value of \$75 per share.

Oct. 31, 1936 Anaconda Lead Products Company was dissolved, its assets and liabilities transferred to International Smelting & Refining Company and its capital stock cancelled.

(MGR Aff., Exhibit 7, Tab 13.)

In State of Rhode Island v. Lead Industries Association, et. al., C.A. No. 99-5226,

Arco entered into the following stipulation with the State relevant to these transactions:

For the purposes of this trial only, Atlantic Richfield Company and the State stipulate and agree as follows. Anaconda Lead Products Company was incorporated in 1919. From 1920 until 1936 it produced lead pigment at an East Chicago, Indiana plant. On October 31, 1936, Anaconda Lead Products Company was dissolved, and its assets and properties were transferred and distributed to its parent International Smelting & Refining Company. International Smelting Company, which was incorporated in 1914 and changed its name to International Smelting & Refining Company in 1934, was a wholly-owned subsidiary of Anaconda Copper Mining Company throughout its existence. International Smelting & Refining Company produced lead pigment at the East Chicago plant from 1936 until 1946. Effective January 1, 1973, International Smelting & Refining Company was merged into its parent, The Anaconda Company. In 1977 100 percent of the shares of The Anaconda Company were acquired by Atlantic Richfield Company. On December 31, 1981, The Anaconda Company was merged into Atlantic Richfield Company. That completes the stipulation, Your Honor.

Rhode Island v. Lead Industries Association et. al., C.A.No. 99-5226, 01/26/06 Official

Tr. At 7-8 attached to the Affidavit of Michael G. Rousseau as Exhibit 2. This stipulation coupled with facts and documentary evidence discussed herein that was not put into evidence in that case, require this Court to determine as a matter of law that Arco is the successor to the lead pigment liabilities of International and ALPC.

I. SUMMARY JUDGMENT STANDARD

Pursuant to Wisconsin Rule 802.08, “a motion for summary judgment must be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.” Smith v. Katz, 226 Wis.2d 798, 805, 595 N.W.2d 345, 349 (1999). Summary judgment must be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact.” Wis. State §802.08(2).

Regardless of which party moves for summary judgment, the ultimate burden of demonstrating that there is sufficient evidence to go to trial “is on the party that has the burden of proof on the issue that is the object of the motion.” Transportation Ins. Co. v. Hunzinger Constr. Co., 179 Wis.2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993); Kaufman v. State Street Ltd. Partnership, 187 Wis.2d 54, 58, 522 N.W.2d 249, 251 (Ct. App. 1994).

Once the moving party has demonstrated the absence of a material fact, the opposing party may avoid summary judgment only by setting forth specific facts showing there is a genuine issue for trial. Id. at 290-291, 507 N.W.2d at 139.

II. ARCO IS THE SUCCESSOR TO INTERNATIONAL SMELTING & REFINING

In the stipulation entered into by Arco in Rhode Island v. Lead Industries Association et. al., C.A.No. 99-5226, (hereinafter referred to as the “Rhode Island case”)

Arco agrees to facts that require a finding that it is in fact the successor to International.

Specifically:

International Smelting Company, which was incorporated in 1914 and changed its name to International Smelting & Refining Company in 1934, was a wholly-owned subsidiary of Anaconda Copper Mining Company throughout its existence. International Smelting & Refining Company produced lead pigment at the East Chicago plant from 1936 until 1946. Effective January 1, 1973, International Smelting & Refining Company was merged into its parent, The Anaconda Company. In 1977, 100 percent of the shares of The Anaconda Company were acquired by Atlantic Richfield Company. On December 31, 1981, The Anaconda Company was merged into Atlantic Richfield Company.

(MGR Aff. Exhibit 2 at 7-8) On the basis of this stipulation, the Court correctly instructed the jury:

That same stipulation provides that International Smelting & Refining Company produced lead pigment from 1936 until 1946; that International Smelting & Refining Company merged into its parent Anaconda Company in 1973; that in 1977 Atlantic Richfield Company acquired all of the shares of the Anaconda Company and that at the end of 1981 the Anaconda Company was merged into Atlantic Richfield Company. I instruct you that as a matter of law upon the merger of corporations, the surviving corporation is subject to the liabilities of the corporation which was merged into it.

(MGR Aff. Exhibit 3 at 3-4)

The stipulation and jury instructions in the Rhode Island case merely restate Atlantic Richfield Company's position as to the transactions between International Smelting & Refining Company, Anaconda Company and Atlantic Richfield it first articulated in Santiago v. NL Industries, Inc., Civil Action No. 87-2799-T. Specifically, in its Supplemental Response to Plaintiff's First Set of Interrogatories By Defendant Atlantic Richfield Company, Arco indicates in its Introductory Statement:

Atlantic Richfield was never in the lead pigment business, and to the best of its knowledge, it has no employees with first-hand knowledge regarding the lead pigment industry. On or about January 12, 1977, Atlantic

Richfield acquired The Anaconda Company by statutory merger. Upon information and belief, at some point before that merger, International Smelting & Refining Company was a wholly-owned subsidiary of The Anaconda Company, and was merged into The Anaconda Company on or about January 1, 1973.

(MGR Aff., Exhibit 7, tab 28 at 1)

Under the set of facts agreed to by Arco in both the Rhode Island case and in Santiago, there is simply no factual dispute possible that Arco is the successor-in-interest to International Smelting & Refining Company. Therefore, Plaintiff requests this Court grant this motion for summary judgment and instruct the jury that Arco is the successor-in-interest to International Smelting & Refining Company.

III. ARCO IS THE SUCCESSOR TO ANACONDA LEAD PRODUCTS COMPANY

On October 31, 1936, the *assets and liabilities* of ALPC were transferred to its sole shareholder, International, and the stock was subsequently cancelled or redeemed. (MGR Aff., Exhibit 7, Tab 13.) In so doing, International expressly assumed the liabilities of ALPC, and through its continued manufacture, marketing and sale of Anaconda brand white lead carbonate. were, in any event, a mere continuation of ALPC.

However, in the Rhode Island case, the jury was instructed that Arco was not the successor-in-interest to Anaconda Lead Products Company, which produced white lead carbonate from 1920 until 1936.

Atlantic Richfield Company and the State stipulated that Anaconda Lead products Company manufactured white lead from 1920 to 1936. I now instruct you that I have made a legal determination that Atlantic Richfield Company is not responsible for any acts or omissions of Anaconda Lead Products Company.

Id.

In rendering this decision that resulted in the above jury instruction, the Court was

very clear it was disturbed by its ruling as there was a "gotcha" perpetrated at some point that led to the result.

The Court has heard much about "gotcha." As the comments of counsel on both sides have displayed something of a love-fest as between them, the Court takes this opportunity to indicate to all that I know all of you as well, and I don't think there was a "gotcha" as to the attorneys who are here. It is clear to those of you who hear what I am saying that the ruling I have just made is very disturbing to this Court because I am convinced there was a "gotcha" somewhere.

(MGR Aff., Exhibit 4 at 39)(emphasis added)

This decision essentially ruled that since International did not succeed to the liabilities of ALPC, neither did Arco. This legal determination was premised upon only the documents in evidence in the Rhode Island case and the stipulation referred to above. This decision was rendered without the benefit of the facts and testimony described below which necessarily demands a different outcome. Plaintiff presents the Court with this evidence, and seeks a motion for summary judgment on this issue in an effort to avoid another "gotcha" moment at trial in this case.

A. Relevant Wisconsin Successorship Law

In Wisconsin, as a general rule, "a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation." Leannais v. Cincinnati, Inc., 565 F.2d 437, 439 (7th Cir. 1977)(Emphasis added). There are four well recognized exceptions to this general rule: "(1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporations liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) when the purchaser corporation is merely a continuation of the seller corporation; or (4) when the transaction is entered into fraudulently to escape liability for

such obligations.” Id. Exception (4) is not relevant to this inquiry as the Plaintiff does not allege any of the corporate transactions discussed herein were entered into with the intent to fraudulently escape liability.

1. Express & Implied Assumption of ALPC Liability by International

The documents and testimony in this case indicate that International expressly assumed the liabilities of ALPC. A ledger from ALPC states clearly such liabilities were transferred to International:

Oct. 31, 1936: Anaconda Lead Products Company was dissolved, its assets and *liabilities* transferred to International Smelting & Refining Company and its capital stock cancelled.

(MGR Aff., Exhibit 7, Tab 13)(Emphasis added)

In addition to this explicit entry in International’s ledgers, documents produced by Arco, and testimony given by Arco in the Rule §804.05(2)(E) deposition of Arco indicate certain specific liabilities were in fact expressly assumed by International.

Q. BY MR. EARLE: Okay. Dr. Kalt, I remind you that you remain under oath. Did you in the course of your preparation for this deposition make an effort to determine whether there were any liabilities of ALPC that were subsequently carried by IS&R¹ after the dissolution of ALPC?

A. I’ve looked at that issue, yes.

Q. Did you find any such liability?

A. There’s a reference in some documents to what appear to be ongoing accounts that are still open, sales accounts. I’m not an expert accountant, but they seem to be labeled liability. They seem to be situations where people have prepaid for supply and then -- have prepaid. And so those are carried forward. The company owes something. That is the supply. So those sales accounts do appear to be -- do appear to have been carried forward.

Q. Okay. So now without regard to legal implications or legal meaning -- because I’m not asking in a legal context, and none of my words should be connoted as having legal meaning; all right -- it’s accurate to say that there were, as a matter of fact, legalities [sic] that appeared on the books of ALPC that were subsequently carried over to IS&R upon the

¹ IS&R refers to International Smelting and Refining Company.

dissolution of ALPC; is that correct?

A. I don't -- I can't say that. I'm not an expert accountant. On one set of documents there appear to be some sales accounts that are carried forward where it appears, as we can tell, somebody has prepaid for supply. And those do ap- -- do appear to be carried forward. I believe they are labeled in somebody's handwriting as I recall -- maybe typewriting -- liabilities. But I'm not an interpreter of the word liability. That's an accountings -- an accountant's term, and I'm not trained in accounting.

(MGR Aff., Exhibit 7 at 118-120) Subsequent testimony was elicited concerning certain specific accounts referred to above by Arco. Those accounts included accounts with people and/or organizations named E. Bailey & Sons, Incorporated (MGR Aff., Exhibit 7 at 122-129); Cooperative Farm Supply; (MGR Aff., Exhibit 7 at 132-133); and Mr. W.E. Wilson (MGR Aff., Exhibit 7 at 132-133).

International indicates in its own ledgers that ALPC's dissolution resulted in a transfer of its liabilities to International, and International's corporate documents produced by Arco in response to discovery, provide concrete proof of International's assumption of certain specific ALPC liabilities.

2. International was a mere continuation of ALPC

A corporate successor is liable when the successor is merely a continuation of the predecessor corporation. Tift v. Forage King Industries, Inc., 108 Wis.2d 72, 78, 322 N.W.2d 14, 16 (1982). In Tift, the Wisconsin Supreme Court addressed the issue of whether "mere continuation" exception could be applied when the predecessor was not a corporation, rather it was a sole proprietorship and stated that "[N]o corporation should be permitted to place into the stream of commerce a defective product and avoid liability through corporate transformations or changes in form only." Id. at 16. The Court then answered that question affirmatively and held, "...we conclude that the responsibility of a subsequent business organization, irrespective of the nature of either the predecessor or

successor, proprietorship, partnership, or corporation, cannot be facilely dismissed on the basis of the semantics of the rule.” Id. at 16. Having determined it was immaterial that the predecessor was an unincorporated sole proprietorship, the court proceeded to apply the test for “mere continuation” to the facts of Tift. In so doing, the court looked to the following factors: (1) Were all the assets acquired; (2) Did the alleged successor continue the same manufacturing operation; (3) Did the alleged successor continue to manufacture the same product; and (4) Was there sufficient “identity” among the business organizations? Applying these factors the court held:

“Our case, however, is a clear case of “identity.” The present Forage King Industries, Inc., is, for practical purposes relevant to consumer protection, the continuation of the same entity as that operated as a sole proprietorship by Wiberg. The present Forage King Industries, Inc., acquired all the assets of Forage King Industries, which was incorporated originally by Wiberg and Nedland, which in turn derived its assets from the sole proprietorship of Wiberg, which actually built the defective forage box in 1961 or 1962. Essentially the same manufacturing operation and the manufacture of the same product, the forage box, was continued through all these organizational transformations. The present corporation is in fact substantially identical to the organization that manufactured the allegedly defective chopper box and is therefor liable. Only the form of business organization has changed.” Id. at 17-18.

“We hold that the present Forage King Industries, Inc., is substantially the same business organization that manufactured the allegedly defective implement. We arrive at that conclusion by the application of traditional tests for successor liability. The present organization, although it has undergone a structural metamorphosis, remains in substance the identical organization manufacturing the same product. It is liable for the defective product manufactured by the original business organization.” Id. at 18.²

² Subsequent case law confirms the factors analyzed by the Tift court and indicates other factors not explicitly discussed in Tift were nonetheless satisfied. For example, in Parson v. Roper Whitney, the district court stressed under Wisconsin law after Tift, continuity of ownership and management was still required. Specifically, the concluded the Tift court “found a complete counterpart in their roles as sole stockholders in the successor corporation. There was clear continuity of ownership and management. Second, once formed, the corporation manufactured the very products manufactured by the sole proprietorship, and sold them to the same dealers. There was clear continuity of the business operations.” Parson v. Roper Whitney, 586 F.Supp at 1451-1452. The facts and circumstances surrounding the October 1936 transactions satisfy Wisconsin’s test for the “mere continuation” exception. See also Sedbrook v. Zimmerman Design Group Ltd., 526 N.W.2d 758 (Wis.App., 1994)(Identity of management is element that

Applying the four factors of Tift to the facts of this case, the only possible conclusion to be reached is that International was a mere continuation of ALPC. First, there is no dispute that on October 31, 2006, all of the assets of ALPC were transferred to International. See § III(A)(2)(ii) below. Second, there is no dispute that International continued the same manufacturing operation of ALPC without interruption. See § III(A)(2)(iii) & (iv) below. Third, there is no dispute that International manufactured the same white lead carbonate products to the same customers using the same trade-name as ALPC. See § III(A)(2)(iii) & (iv) below. Finally, there can be no question that International and ALPC maintained sufficient “identity” among the business organizations as ALPC and International maintained (a) continuity of management; (b) continuity of employees; (c) continuity of manufacturing operations; (d) shared office space and sales staff; and (e) manufacture of identical white lead carbonate products marketed under identical trade-marks and trade-names and sold to the same customers. See § III(A)(2)(iv) below.

i. Frank H. Hurless Testimony

Perhaps the best source of information concerning the overlapping “identity” of ALPC and International comes from a former employee of International Smelting & Refining Company, Frank H. Hurless. Mr. Hurless’ sworn testimony unequivocally

must be satisfied under continuation exception to general rule that corporation purchasing assets of another corporation will not be liable for obligations of selling corporations.); Gallenberg Equipment, Inc. v. Agromac Intern., Inc., 10 F.Supp.2d 1050 (E.D. Wis., 1998)(Under Wisconsin law, “mere continuation” exception to general rule that corporation that purchases the assets of another corporation does not succeed to the seller’s liabilities requires a common identity of directors, officers, and stockholders, and the existence of only one corporation at the completion of the transfer.); Fish v. Amsted Industries, Inc., 376 N.W.2d 820 (Wis, 1985)(Key element in determining whether purchaser corporation is continuation of seller corporation such that purchaser corporation succeeds to liabilities of seller corporation is whether officers, directors and stockholders in seller and purchaser corporations have common identity.).

proves International was a mere continuation of ALPC as he confirms ALPC and International shared not only sufficient "identity" but identical "identity."

In 1947, Mr. Hurless testified before the Federal Trade Commission concerning his employment with International and its interactions with ALPC and another subsidiary, Anaconda Sales Company.³ One of the issues in this case was whether Anaconda Copper Mining Company could be held responsible by the Federal Trade Commission for the activities of its subsidiaries International, ALPC and Anaconda Sales Company. The direct and re-direct examination of Mr. Hurless was conducted by attorney for International Smelting & Refining, Mr. Henry E. Gardiner. (MGR Aff., Exhibit 7, tab 6)

Mr. Hurless began his employment with International in 1922⁴ as a checker in the construction of a zinc oxide plant at Akron, Ohio. (MGR Aff., Exhibit 7, Tab 6 at 1841) In 1927, Mr. Hurless began part-time sales work, and in 1929 he began full-time sales work for International. (MGR Aff., Exhibit 7, Tab 6 at 1841) In 1929, Mr. Hurless was transferred to the main office of International at East Chicago, Indiana. (MGR Aff., Exhibit 7, Tab 6 at 1841). In 1930, Mr. Hurless was made district sales manager in charge of the dry white lead and zinc oxide sales in the Midwest.⁵ (MGR Aff., Exhibit 7, Tab 6 at 1842) In 1936, Mr. Hurless was made assistant sales manager, "and had charge of the sale of dry white lead, white lead and oil, and zinc oxide" for International. (MGR

³ For the convenience of the Court, Mr. Hurless' complete testimony before the FTC can be found at tab 6 of Exhibit 7 attached to the Affidavit of Michael G. Rousseau filed concurrently herewith.

⁴ At the time, International was named International Smelting Company. In 1934, International Smelting Company was renamed International Smelting & Refining Company. Throughout the course of his testimony, Mr. Hurless refers to the company as International Smelting & Refining even when testifying about events prior to the corporate name change.

⁵ This fact is extremely significant. In 1930, at a time when Mr. Hurless' employer, International Smelting & Refining, was not manufacturing white lead carbonate in any form, Mr. Hurless was put in charge of dry white lead sales in the Midwest. Mr. Hurless also indicates he first sold white lead and oil in 1931 (MGR Aff., Exhibit 7, tab 6 at 1842), again at a time when the only relevant company manufacturing white lead and oil was ALPC.

Aff., Exhibit 7, Tab 6 at 1842) During this time period, Mr. Hurless testified “I virtually had charge of the sales of all territories, inasmuch as our official sales manager, who was located in Akron, Ohio, had other duties which prevented him from giving full time to sales work.” (MGR Aff., Exhibit 7, tab 6 at 1842) In 1938, Mr. Hurless was made sales manager “and had full charge of the sale of dry white lead, white lead and oil, and zinc oxide for all territories.” (MGR Aff., Exhibit 7, tab 6 at 1842) Finally, at the time of his testimony before the FTC, Mr. Hurless was still employed by International as a “special representative” in the Midwest region for International. (MGR Aff., Exhibit 7, tab 6 at 1841)⁶ Mr. Hurless’ testimony highlighted below that Arco was unable to contradict or disagree with during its Rule §804.05(2)(E), is premised upon his 25 years of service for International Smelting & Refining.

ii. All of the assets of ALPC were acquired by International

There is no dispute between the parties or in the historical record, that the October 31, 1936 transaction by and between ALPC and International resulted in all of the assets of ALPC being transferred to International. For example, in the Rhode Island case, Arco stipulated to the transfer of ALPC assets and properties to International:

On October 31, 1936, Anaconda Lead Products Company was dissolved, and its assets and properties were transferred and distributed to its parent International Smelting & Refining Company.

(MGR Aff., Exhibit 2 at 7-8)

Similarly, the documentary evidence available to the parties provides no indication that any assets or properties of ALPC were not transferred to International on

⁶ For more information concerning Mr. Hurless’ employment with International, see MGR Aff., Exhibit 7, tab 6 at 1855-1856; 1877-1878. See also Arco 30(b)(6) testimony concerning Hurless’ identity at MGR Aff., Exhibit 7 at 50-55; 67-69; 71; 78; 81-83.

October 31, 2006. For example:

Resolved, that said officers be and they hereby are authorized and directed to liquidate the Corporation and to distribute and transfer all of the assets and property of the Corporation to its stockholders in complete cancellation or redemption of all its stock upon surrender of the certificates representing said stock.

Anaconda Lead Products Company Ballot attached as Exhibit 5 to the Affidavit of Michael G. Rousseau. (Emphasis added)

NOW, THEREFORE, BE IT RESOLVED that proper officers of this Company be and they hereby are authorized and directed to take such action on behalf of this Company as owner of all outstanding capital stock of Anaconda Lead Products Company as may be necessary or required under the laws of the State of Delaware to dissolve said Anaconda Lead Products Company, liquidate its affairs and distribute and transfer all of its assets and property to this Company in complete cancellation or redemption of all the stock of said Anaconda Lead Products Company.

International Smelting & Refining Company Director's Resolution attached as exhibit 6 to the Affidavit of Michael G. Rousseau. (Emphasis added)

iii. International continued the manufacturing operations of ALPC and Manufactured white lead carbonate and white lead-in-oil

In his sworn testimony before the Federal Trade Commission Mr. Hurless testified that International continued the manufacturing operations of ALPC after ALPC's dissolution and manufactured dry white lead and white lead in oil:

- Q. When did International first start to manufacture dry white lead?
- A. In the latter part of 1936.
- Q. Where was this operation conducted?
- A. At East Chicago, Indiana.
- Q. Prior to 1936, was dry white lead produced at the East Chicago plant of International?
- A. Yes, it was.
- Q. By what company was dry white lead produced prior to that time?
- A. By the Anaconda Lead Products Company.
- Q. Do you know what relation that company had to respondent, International, and respondent, Anaconda Copper Mining Company?

A. The Anaconda Lead Products Company was a subsidiary of the Anaconda Copper Mining Company, as was the International Smelting & Refining Company.

Q. Do you know whether there was any subsequent change in this relationship?"

A. Yes, there was.

Q. Is the Anaconda Lead Products Company still in existence?

A. No, it is not.

Q. What became of it?

A. The assets and properties of the Anaconda Lead Products Company were taken over by the International Smelting & Refining Company.

Q. Is the Anaconda Lead Products Company as a company still in existence, do you know?

A. No, it was dissolved.

Q. Do you know when?

A. In the latter part of 1936.

Q. When did the Anaconda Lead Products Company first start to produce dry white lead?

A. In the latter part of 1919.

Q. And do you know when they first made sales of that product?

A. In the first part of 1920.

(MGR Aff., Exhibit 7, tab 6 at 1842-1843; See also MGR Aff., Exhibit 7, tab 6 at 1855.)

In its Rule §804.05(2)(E) deposition, Arco provided testimony under oath that explicitly concedes the accuracy of Mr. Hurless' testimony cited above. (MGR Aff., Exhibit 7 at 56-59)⁷ In addition, Arco also provided independent testimony that reaffirms Mr. Hurless' testimony and confirms there was continuity between the manufacturing operations of ALPC and International.

Q. Yeah. There was no interruption in the manufacture of white lead from ALPC to IS&R in 1936; correct?

A. You asked me those questions, and what I've indicated to you is I'm not aware of any documents that indicate an interruption in the production process, the manufacturing process.

Q. Let's do it this way in order to make it, perhaps, a little simpler; all right? We'll do it by dates instead. I want to know -- I'm going to ask you

⁷ Plaintiff has attached the entire first day of the Rule §804.05(2)(E) deposition of Arco dated April 5, 2006 transcript and its exhibits to the Affidavit of Michael G. Rousseau as Exhibit 7. In addition, for the Court's convenience, Plaintiff has also attached to the Affidavit of Michael G. Rousseau as Exhibit 8 DVD copies of the video of this deposition.

a series of questions about what happened in the month of October of 1936 and what happened in the month of November in 1936; okay? ALPC was producing white lead during the month of October 1936; correct?

A. I believe that's correct.

Q. And ALPC was producing white lead-in-oil during the month of October of 1936; correct?

A. I believe that's correct.

Q. IS&R was producing white lead during the month of November 1936; correct?

A. I believe that's correct, yes.

Q. IS&R was producing white lead-in-oil during the month of November of 1936; correct?

A. I believe that's correct from what I can tell.

(MGR Aff., Exhibit 7 at 170-171)

iv. International and ALPC shared the same "identity"

When one considers the evidence, it is impossible to arrive at any other conclusion than that International and ALPC shared the same "identity." The testimony of Mr. Hurless makes certain that the two companies shared the same officers, directors, employees, manufacturing facilities, offices, sales force, products manufactured, trademarks and customer base.

Continuity of Management

Q. Who is the president of International Smelting & Refining Company?

A. It is my understanding that Mr. C.F. Kelly is president of International Smelting & Refining Company.

Q. Was he president of it back in 1936; do you recall?

A. I do not know.

Q. What office does Mr. Kelly hold in the Anaconda Copper Mining Company?

A. I understand that he is chairman of the board.

Q. Is Mr. Kelly also a director of International Smelting & Refining Company?

A. I believe that he is.

Q. Who are the other directors of International Smelting & Refining Company?

A. I believe that Mr. Frederick Laist is.

- Q. That is L-a-i-s-t?
- A. Yes. And Mr. E.O. Sowerwine is a director, I believe.
- Q. Who are the other directors; do you recall?
- A. I do not know who they are.
- Q. Is Mr. Laist or Mr. Sowerwine connected with the Anaconda Copper Mining Company in any way?
- A. I believe Mr. Laist is the vice-president of the Anaconda Copper Mining Company.
- Q. Does he have any official position with International Smelting aside from being a director?
- A. I believe he is vice-president of International Smelting & Refining Company.
- Q. What is Mr. Sowerwine's position with International beyond that, for the record?
- A. I am not sure, but I think he is secretary-treasurer.

(MGR Aff., Exhibit 7, tab 6 at 1878; See also Arco Rule § 804.05(2)(E) testimony, MGR Aff., Exhibit 7 at 83-85; 174-175)

In its Rule 804.05(2)(E) deposition, Arco indicates it has no dispute with Mr. Hurless' testimony concerning the continuity of management.

Q. You can stop there. Do, do you as Arco have or know of any documents containing information inconsistent with what you just read off of page 1878?

A. Insofar as Mr. Hurless here is expressing his understanding, I have no reason to doubt that this was his understanding when he gave this testimony. Whether individuals that are being talked about there line up to particular time periods is somewhat vague in the context of the answer. So at this point I would not say that I dispute this, but it's a little bit vague as to time periods.

Q. Let's go to the next page, 1879 [MGR Aff., Exhibit 7, tab 6 at 1879], and there's a question and answer near the bottom of that page. And the question is, Who is the president of the Anaconda Sales Company? And the answer is, I believe that Mr. C.F. Kelly is president. Do you dispute that testimony?

A. Um, I'd have to go back and look at documents, but as I sit here right now, I don't dispute it.

(MGR Aff., Exhibit 7 at 85-86)

In addition to the testimony cited above, documents produced by Arco also indicate significant over-lap between the officers and directors of ALPC and

International.

DATE	DOCUMENT	EMPLOYEE / BOARD MEMBER
08/28/36	FGH4-0102 thru - 0113 (MGR Aff., Exhibit 12)	R. E. Dwyer (ALPC Board of Directors), D. B. Hennessy (ALPC Board of Directors), James Dickson (ALPC Board of Directors), C. F. Kelly (ALPC Board of Directors), and Frederick Laist (ALPC Board of Directors).
10/28/36	N11305 (MGR Aff., Exhibit 9)	<u>Robert E. Dwyer</u> (ALPC Board of Directors), <u>Frederick Laist</u> (ALPC Board of Directors), <u>D. B. Hennessy</u> (ALPC Board of Directors), <u>James Dickson</u> (ALPC Board of Directors), and <u>W. K. Daly</u> (ALPC Board of Directors).
11/01/38	N11197 (MGR Aff., Exhibit 10)	<u>Robert E. Dwyer</u> (IS&R Director), <u>C. F. Kelly</u> (IS&R President), and <u>Frederick Laist</u> (IS&R Officer and Director).
12/31/38	N11199 (MGR Aff., Exhibit 11)	<u>Robert E. Dwyer</u> (IS&R Director), <u>C. F. Kelly</u> (IS&R President), <u>Frederick Laist</u> (IS&R Vice-President and Director), and <u>D. B. Hennessy</u> (IS&R Director).

Continuity of Employees:

In its Rule 804.05(2)(E) deposition, Arco testified it appeared that the same individuals that were employees of ALPC were employees of International immediately after the October 31, 1936 transaction.

Q. Were any employees fired as a result of the dissolution of ALPC?

A. I have not seen any documents that have indicated that anyone was fired or lost their jobs at the time of the dissolution of ALPC.

(MGR Aff., Exhibit 7, tab 6 at 157)

Q. IS&R continued to use the same employees that ALPC used -- strike that. I'm going to rephrase that. IS&R continued to use the same employees during the month of November 1936 that ALPC had used during the month of October of 1936; correct?

A. I think that seems to be the case with respect to some employees. Mr. Hurless indicates that about himself, and beyond that, my understanding of the record is that we don't see the broad generic statement that you're making either supported or contradicted in the record.

Q. Okay. Let's focus on the latter part of -- the latter clause of what you just said and that is contradicted. I want to focus narrowly on that and just determine with certainty that you know of no documents that you can produce here right now that would contradict that; correct?

A. I know of no documents that would contradict a statement which says that there was -- there were the same employees both before and after the dissolution. I also know of no document that would indicate they were the same. In other words, it goes both ways. We do not have the record that tells us.

(MGR Aff., Exhibit 7 at 171-172; See also MGR Aff., Exhibit 7 at 157-158)

Manufacturing operations continued without interruption:

In his sworn testimony before the Federal Trade Commission, Mr. Hurless indicates there were no organizational changes that resulted from the October 31, 1936 transaction.

Q. Now, when the International Smelting & Refining Company acquired the plant of the Anaconda Lead Products Company in 1936, will you tell us just what changes of organization were made necessary as a result of that, what shifts of personnel, changes in methods of handling business?

A. Well, as I recall it there were practically no changes, I don't remember any that were made at the time.

Q. In other words, business was continued on. It was largely a bookkeeping transaction?

A. That is right, pretty much the same as before.

Q. Didn't you consider yourself an employee of the Anaconda

organization, I mean disregarding the technicalities now?

A. Well, I think that I am a direct employee of the International Smelting & Refining Company.

(MGR Aff., Exhibit 7, tab 6 at 1882; MGR Aff., Exhibit 7 at 94-95)

Arco confirmed Mr. Hurless' testimony as it has not seen any documents that indicates there was any interruption of manufacturing activities that resulted from the October 31, 2006 transaction.

Q. All right. All right. So you don't recall seeing any document that would indicate there was interruption of manufacturing activity? You --

A. I may have seen one. I don't recall it right now.

Q. Okay. And we have the testimony of Mr. Hurless indicating that there was no interruption of sales activity; correct?

A. I don't know what word you used. We have his testimony. He talks about the transition as being what he said it was. He didn't talk about interruption. He didn't use the word interruption. But we went, we went through that. He says what he says.

Q. So the answer to the question is what?

A. What Mr. Hurless said.

Q. Well, what is your answer right now?

A. **What Mr. Hurless said.**

Q. Do you agree that --

A. **I have no reason to disagree with Mr. Hurless.**

Q. Wait, wait. Please don't interrupt me, sir. You, you agree that there was no interruption of sales activity of white lead and white lead-in-oil from -- at the point at which ALPC was dissolved?

A. I don't recall seeing a document indicating a disruption in sales activity with respect to customers. There obviously is disruption on the internal business side in the sense that accounts are being transferred. They're having to go back and ask Mr. Stolte. You saw that in that document. So there's that kind of disruption internal to the company. I don't recall seeing any document indicating disruption vis-a-vis customers.

(MGR Aff., Exhibit 7 at 141-143; See also MGR Aff., Exhibit 7 at 136-138)(Emphasis added)

Shared Offices & Staff of ALPC, IS&R and Anaconda Sales Pre-Transaction:

The sworn testimony of Mr. Hurless also confirms that ALPC, International and Anaconda Sales Company shared office space and had overlapping sales accounts.

Q. Were employees of the Anaconda Lead Products in that office?
A. You mean in the sales office?
Q. Occupying joint offices.
A. Well, the operating, sales, and accounting departments all had their offices in East Chicago in the same building.
Q. Was it the same department with different accounts or were they physically separated?
A. Will you state that question again, please?
Q. Was it a single office with different accounts, or were the sales and accounting offices of the three companies physically separated?
A. No, the offices were not physically separated, but there, there were different accounts, Anaconda Sales Company and the Anaconda Lead Products Company.
Q. For bookkeeping purposes?
A. That is right.
Q. Now, when you sold dry white lead at that time, was that transferred on the books from Anaconda Lead Products Company to Anaconda Sales Company to International Smelting & Refining Company, or do you know how that was handled?
A. If a sale was effected through the Anaconda Sales Company, I would say that there would be a transfer from Anaconda Lead Products Company to Anaconda Sales Company.
Q. How would you effect such a sale in the name of the Anaconda Lead Products Company in your capacity as sales manager in that district?
A. I would not affect it, no. I would simply sell the material.
Q. You were the one who would make the sale?
A. That is right.
Q. You were the one who would make the sale?
A. That is right.
Q. Would you know in advance for which account it would be sold?
A. To some extent that would depend upon the immediate shipping point to the customer.
Q. In other words, there were certain territories in which accounts were for the Anaconda Sales Company?
A. That is right.
Q. Anybody located in that territory?
A. That is right.
Q. But that was the only basis of division?
A. That is right.

(MGR Aff., Exhibit 7, tab 6 at 1881-1882)

In the Rule §804.05(2)(E) deposition, Arco is unable to point to any concrete evidence that contradicts Mr. Hurless' testimony. See MGR Aff., Exhibit 7 at 96-103.

Overlapping Sales Force:

Mr. Hurless' testimony reveals that the sales force of ALPC, International and Anaconda Sales Company were so interwoven that sales were made by the same sales force for all three companies without regard to who their employer was. In addition, Mr. Hurless was always paid for his services by International, no matter whose account he made a sale for.

Q.....As I understand it, during that period from 1930 to '36, the production was by Anaconda Lead Products, and the sales were by Anaconda Lead Products and Anaconda Sales Company; is that correct?

A. That is right.

Q. Well, how did you, as an employee of International Smelting & Refining Company, have charge of those sales at that time?

A. Well, in my capacity – for example in 1930, I was district sales manager – I simply sold the – sold the products that were produced by the Anaconda Lead Products Company.

Q. Well, were you acting for Anaconda Sales Company, Anaconda Lead Products Company, or International Smelting & Refining Company, or could you tell where one began and the other left off?

A. They were pretty much overlapping.

(MGR Aff., Exhibit 7, tab 6 at 1880-1881; See also MGR Aff., Exhibit 7, at 86-87)

Q. Now, was part of your compensation paid by Anaconda Sales Company, part by Anaconda Lead Products, or were you an employee solely of International Smelting & Refining?

A. I understand that I was an employee solely of International Smelting & Refining Company.

Q. You don't know whether the other two companies were compensated for your services in selling for their account?

A. I don't know about the Anaconda Lead Products Company. I don't think the Anaconda Sales Company was, but I'm not sure of it.

(MGR Aff., Exhibit 7, tab 6 at 1882; See also MGR Aff., Exhibit 7 at 94.)

Identical Trademarks / Trade Names

From the perspective of the general consuming public, International and ALPC may as well have been the same company as they used identical trademarks and trade

names for their white lead carbonate.

Q. In advertising their products, did Anaconda Lead Products and International use a common name and trade-mark?

A. Yes.

Q. What was it?

A. It was the Anaconda trade-mark.

Q. Do you know if there was any arrangement with the Anaconda Copper Mining Company for such use?

A. I do not know of it.

Q. Why was that particular trademark used?

A. Well, we used it to help us to sell our white lead in oil, which was a comparatively unknown product at that time.

(MGR Aff., exhibit 7, tab 6 at 1872; See also MGR Aff., Exhibit 7 at 79-80)

Arco conceded in its Rule §804.05(2)(E) deposition that the testimony of Mr.

Hurless is accurate and it knows of no documents that contradict him.

Q. The product produced in October of 1936 and the product produced in November of 1936 was the same in terms of its marketing and package; correct?

A. The documentary evidence doesn't tell us one way or the other, that is, it does not tell us they didn't change the packaging. It doesn't tell us that they did change the packaging. It's just -- I'm not aware of anything that tells us right at that moment whether there was change in packaging.

Q. Trade names were the same; correct?

A. I believe that's the case.

Q. So the same brands were used; correct?

A. The trade names were the same. I know in advertisements, the particular company that was selling will sometimes be identified, and that would have changed since ALPC would no longer exist, for example. But that's the state of the record.

(MGR Aff., Exhibit 7 at 173-174; See also MGR Aff., Exhibit 7 at 79-80)

Same Customers Pre- and Post Transaction:

Arco has also conceded that the dissolution of ALPC and transfer of its assets to International did not cause any change in relationships with ALPC's customers.

Q. Now, when the International Smelting & Refining Company acquired the plant of the Anaconda Lead Products Company in 1936, will

you tell us just what changes of organization were made necessary as a result of that, what shifts of personnel, changes in methods of handling business?

A. Well, as I recall it there were practically no changes, I don't remember any that were made at the time.

Q. In other words, business was continued on. It was largely a bookkeeping transaction?

A. That is right, pretty much the same as before.

(MGR Aff., Exhibit 7, tab 6 at 1882.)

Q. BY MR. EARLE: There's nothing in the record that you can identify that would indicate there was a change in customers as a result of the change from ALPC to IS&R; correct?

A. I don't see anything in the record in which the dissolution of ALPC and the transfer of its properties and assets to IS&R resulted in a change -- that fact resulted in a change in, in a relationship with a customer.

(MGR Aff., Exhibit 7 at 173)

v. ALPC ceased to exist as a result of the transaction

There is no dispute, and Arco has never contended, that ALPC continued in existence after the October 31, 1936 dissolution.

It is clear from the facts and testimony cited above, that International acquired all the assets of ALPC, continued its white lead carbonate manufacturing at the former ALPC white lead plant, and ALPC and International clearly shared the same "identity" required for the mere continuation exception to apply.

3. De Facto Merger

In Wisconsin, "Four factors are generally considered determinative of whether a transaction may be considered *de facto* merger:

(1) the assets of the seller corporation are acquired with shares of the stock in the buyer corporation, resulting in a continuity of shareholders; (2) the seller ceases operations and dissolves soon after the sale; (3) the buyer continues the enterprise of the seller corporation so that there is a continuity of management, employees, business location, assets and general business operations; and (4) the buyer assumes those liabilities of the seller necessary for the uninterrupted continuation of normal business

operations.”

Sedbrook v. Zimmerman Design Group, LTD., 190 Wis.2d 14, 20-21, 526 N.W.2d 758, 760 (Ct.App.1994).

Application of the factors identified by Sedbrook to the two transactions of October of 1936 must result in a finding of *de facto* merger.

i. International acquired ALPC assets with Shares of its Stock

On October 1, 1936, International acquired all of the assets of ALPC in exchange for 13,500 share of its own stock. (MGR Aff., Exhibit 7, Tab 13)

ii. ALPC ceased operations and dissolved

It is undisputed that ALPC ceased its manufacture of white lead carbonate and was dissolved on October 31, 2006. (MGR Aff., Exhibit 7, Tab 13)

iii. International continued ALPC’s enterprise

The evidence and testimony provided above in section III(A)(2)(ii)-(iv) conclusively proves International continued the manufacturing activities of ALPC. The continuation of ALPC’s enterprise was so pervasive that International and ALPC shared (a) continuity of management; (b) continuity of employees; (c) continuity of manufacturing operations; (d) shared office space and sales staff; and (e) manufacture of identical white lead carbonate products marketed under identical trade-marks and trade-names and sold to the same customers. Id. There is simply no issue of fact as the only conclusion supported by the historical record is that International continued the business enterprise such that there was a continuity of management, employees, business location, assets and general business operations.

- iv. International assumed those liabilities necessary for uninterrupted manufacture of white lead carbonate

The evidence and testimony provided above in section III(A)(1) leaves no factual dispute as to whether International assumed those liabilities necessary for uninterrupted manufacture of white lead carbonate. International clearly assumed liabilities it required to continue the uninterrupted manufacture and sale to ALPC's former customers of white lead carbonate.

IV. CHANGES IN CORPORATE FORM CANNOT BE USED TO AVOID LIABILITY

During the Rule §804.05(2)(E) deposition of Arco, when asked where the liabilities of ALPC went upon its dissolution, the witness indicated such liabilities were "dissolved."

Q. What happened to the liabilities of ALPC upon its dissolution?

MR. KELLY: Object to the form of the question.

MR. EARLE: And what's the objection about the form of the question?

MR. KELLY: It's overly broad and it assumes that all liabilities were treated alike.

MR. EARLE: No, it doesn't. It doesn't imply that at all. You may answer the question.

THE WITNESS: My understanding was that ALPC was dissolved, that its assets and properties were transferred to IS&R in October of 1936, and, um, um and upon the dissolution of the company, that was the distribution of assets and liabilities. It was dissolved.

Q. BY MR. EARLE: Well, what happened to the liabilities?

MR. KELLY: Objection to the form of the question.

Q. BY MR. EARLE: They were distributed to IS&R?

A. No. The company was dissolved. Companies get dissolved, and they dissolve.

COURT REPORTER: I'm sorry, companies get dissolved --

THE WITNESS: And they get dissolved.

Q. BY MR. EARLE: And what happened to the liabilities?

MR. KELLY: Objection to the form of the question.

Q. BY MR. EARLE: Where did they go?

MR. KELLY: Objection to the form of the question.

THE WITNESS: My understanding is that any liabilities that were

not transferred were dissolved. That's my understanding.

(MGR Aff., Exhibit 7 at 150-151). Such a dissolution of liabilities is contrary to the public policy of the State of Wisconsin as enumerated by the Courts. As the Tift court indicated:

The court of appeals, however, recognized the paramount policy reasons for imposing liability on a business which succeeds another because: 'No corporation should be permitted to place into the stream of commerce a defective product and avoid liability through corporate transformations or changes in form only.' Tift, 108 Wis.2d at 77 (Internal citations omitted).

Permitting Arco to avoid liability for the activities of ALPC through a voluntary and unilateral dissolution of liabilities will subvert the express intention of the public policy reasons for imposing liability on a successor business. This Court must not sanction such a result.

V. CONCLUSION

Whether analyzed as an express or implied assumption, as a mere continuation, or as a *de facto* merger, the facts and evidence discussed above leads to the inexorable conclusion that Arco does, in fact succeed to the lead pigment liabilities of International and ALPC. Even in the absence of such a determination, the public policy of Wisconsin as identified by the Tift court requires this Court to prevent Arco from escaping liability due to technicalities in corporate form. Therefore, Plaintiff requests this Court grant this motion for summary judgment in all respects.

Dated: April 30, 2007.

LAW OFFICE OF PETER EARLE, LLC
Attorneys for the Plaintiff

By: 

Robert J. McConnell (*admitted pro hac vice*)
Fidelma L. Fitzpatrick (*admitted pro hac vice*)
Aileen L. Sprague (*admitted pro hac vice*)
Jonathan D. Orent (State Bar No. 1062035)
Michael G. Rousseau (State Bar No. 1062037)
MOTLEY RICE LLC
321 South Main Street, 2nd Floor
Providence, RI 02940
Tel: (401) 457-7700
Fax: (401) 457-7708

Peter G. Earle, Esq.
State Bar No. 1012176
700 North Water Street, Suite 646
Milwaukee, WI 53202
Tel.: (414) 276-1076
Fax: (414) 276-0460

CERTIFICATION

I hereby certify that on April 30th, 2007, I did cause to be served, via regular mail, postage prepaid, the within Plaintiff's Memorandum in Support of His Motion for Partial Summary Judgment – The Atlantic Richfield Company's Successorship Liability dated April 30, 2007.



Steven Thomas v. Lead Industries Association, Inc., et al.
Case No. 99-CV-6411/Q&B #850710.70023

Hon. Richard J. Sankovitz

Milwaukee County Courthouse
901 North 9th Street
Milwaukee, Wisconsin 53233

Counsel for Plaintiffs

Peter G. Earle, Esq.
LAW OFFICE OF PETER EARLE, LLC
First Financial Centre
700 North Water Street, Suite 646
Milwaukee, Wisconsin 53202
(414) 276-1076
(414) 276-0460 (fax)

John J. McConnell, Jr., Esq.
Robert J. McConnell, Esq.
*Fidelma L. Fitzpatrick, Esq.
MOTLEY RICE LLC
321 South Main Street
P.O. Box 6067
Providence, RI 02940
(401) 457-7700
(401) 457-7708 (fax)

Counsel for E.I. DuPont De Nemours & Co.

*Joy C. Fuhr, Esq.
Christian Hennecke, Esq.
R. Trent Taylor, Esq.
Jonathan P. Harmon, Esq.
MCGUIRE WOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804) 775-1000
(804) 698-2056 (fax)

Richard H. Porter, Esq.
*Chris J. Trebatoski, Esq.
GONZALEZ, SAGGIO, & HARLAN, LLP
225 East Michigan St., 4th Floor
Milwaukee, WI 53202
(414) 277-8500
(414) 277-8521 (fax)

Counsel for Atlantic Richfield Company

David G. Peterson, Esq.
GODFREY & KAHN
780 North Water Street
Milwaukee, WI 53202-3590
(414) 273-3500
(414) 273-5198 (fax)

*Bruce R. Kelly, Esq.
Philip Curtis, Esq.
Angela Showalter, Esq.
Reuben S. Koolyk, Esq.
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022
(212) 715-1000
(212) 715-1399 (fax)

Counsel for NL Industries, Inc.

*James T. Murray, Jr., Esq.
Michael J. Wirth, Esq.
PETERSON, JOHNSON & MURRAY, S.C.
733 North Van Buren Street, 6th Floor
Milwaukee, WI 53202-4792
(414) 278-8800
(414) 278-0920 (fax)

Timothy S. Hardy, Esq.
837 Sherman Street
Second Floor
Denver, CO 80203
(303) 733-2174
(303) 733-2193 (fax)

Michael D. Jones, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
(202) 879-5200

Counsel for Glidden & SCM Chemicals, Inc.
(Millenium Holdings, LLC)

James R. Clark, Esq.
*Trevor J. Wills, Esq.
Christopher S. Schilder, Esq.
Brian P. Keenan, Esq.
FOLEY & LARDNER
First Star Center
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
(414) 271-2400
(414) 297-4900 (fax)

Michael T. Nilan, Esq.
Courtney Ward-Reichard, Esq.
*Courtney G. Sylvester, Esq.
Scott A. Smith, Esq.
**HALLELAND, LEWIS, NILAN
& JOHNSON, P.A.**
600 U.S. Bank Plaza South
220 South Sixth Street, Suite 600
Minneapolis, MN 55402-4501
(612) 338-1838
(612) 338-7858 (fax)

Counsel for The Sherwin-Williams Co.

Frank J. Daily, Esq.
M. Christine Cowles, Esq.
*Jeffrey K. Spoerk, Esq.
Lucas W. Andrews, Esq.
Attorney Jamila Hall
Attorney Anne Johnson
Richard Deane, Jr., Esq.
Attorney Paula Wilson
Thomas S. Jones, Esq.
QUARLES & BRADY, LLP
411 East Wisconsin Avenue, Suite 2040
Milwaukee, WI 53202-4497
(414) 277-5000
(414) 978-8970 (fax)

Charles H. Moellenberg, Esq.
Paul Michael Pohl, Esq.
John E. Iole, Esq.
Jennifer B. Flannery, Esq.
Laura A. Meaden
Lucas W. Andrews, Esq.
Jamila M. Hall, Esq.
JONES DAY
500 Grant Street, 31st Floor
Pittsburgh, PA 15219
(419) 873-1845
(412) 394-7959 (fax)

Robert S. Walker, Esq.
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114-1190
(216) 586-7576
(216) 579-0212 (fax)

Anne M. Johnson, Esq.
Richard H. Deane, Jr., Esq.
JONES DAY
1420 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309-3053
(404) 521-3939
(404)-581-8330 (fax)

Counsel for Conagra Grocery Products, Inc.

*James P. Fitzgerald, Esq.
Robert D. Mullin, Jr., Esq.
MCGRATH, NORTH, MULLIN & KRATZ, P.C.
Suite 3700 First National Tower
1601 Dodge Street
Omaha, NE 68102
(402) 341-3070
(402) 341-0216 (fax)

*Paul Benson, Esq.
Nathaniel Cade, Jr., Esq.
MICHAEL, BEST & FRIEDRICH
100 East Wisconsin Avenue, Suite 3300
Milwaukee, WI 53202-4108
(414) 277-6560
(414) 277-0656 (fax)

Steven Thomas Guardian Ad Litem

Susan M. Gramling

2256 North Prospect Avenue, Suite 505

Milwaukee, WI 53202-6306

(414) 224-8780

(414) 224-1665 (fax)

* Asterisks designate primary points of contact

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

STEVEN THOMAS, a Minor,
by his guardian ad litem,
SUSAN M. GRAMLING;
Plaintiff,

Case No. 99-CV-6411

v.

Case code 30107

THE ATLANTIC RICHFIELD COMPANY;
E.I. DUPONT DE NEMOURS AND CO.;
CONAGRA GROCERY PRODUCTS CO.;
NL INDUSTRIES, INC.;
MILLENNIUM HOLDINGS LLC;
THE SHERWIN-WILLIAMS CO.;

Defendants.

**AFFIDAVIT OF MICHAEL G. ROUSSEAU, ESQ., IN SUPPORT OF
PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR PARTIAL
SUMMARY JUDGMENT – THE ATLANTIC RICHFIELD COMPANY'S
SUCCESSORSHIP LIABILITY DATED, APRIL 30, 2007**

STATE OF RHODE ISLAND)
) SS
PROVIDENCE COUNTY)

MICHAEL G. ROUSSEAU, being first duly sworn on oath, deposes and states as follows:

- 1) I am an attorney licensed to practice in the State of Wisconsin and am one of the attorneys representing the plaintiff Steven Thomas.
- 2) This affidavit is being offered in support of Plaintiff's Memorandum in Support of His Motion for Summary Judgment – The Atlantic Richfield Company's Successorship Liability dated April 30, 2007.
- 3) Attached as Exhibit 1 and incorporated herein by this reference is a true

and accurate copy of the Second Amended Complaint in this case dated May 10, 2000.

- 4) Attached as Exhibit 2 and incorporated herein by this reference is a true and accurate copy of the Thursday, January 26, 2006 Official Transcript in State of Rhode Island v. Lead Industries Association, et. al., C.A.No. 99-5226.
- 5) Attached as Exhibit 3 and incorporated herein by this reference is a true and accurate copy of the Jury Instructions in State of Rhode Island v. Lead Industries Association, et. al., C.A.No. 99-5226.
- 6) Attached as Exhibit 4 and incorporated herein by this reference is a true and accurate copy of the Thursday, February 2, 2006 Official Transcript in State of Rhode Island v. Lead Industries Association, et. al., C.A.No. 99-5226.
- 7) Attached as Exhibit 5 and incorporated herein by this reference is a true and accurate copy of "Anaconda Lead Products Company – Ballot" identified by bates number FGH 4-0005 and produced by defendant The Atlantic Richfield Company.
- 8) Attached as Exhibit 6 and incorporated herein by this reference is a true and accurate copy of "International Smelting & Refining Company Directors' Resolution," dated October 27, 1936, identified by bates number FGH 4-00009 and produced by defendant The Atlantic Richfield Company.
- 9) Attached as Exhibit 7 and incorporated herein by this reference is a true and accurate copy of The Atlantic Richfield Company's Rule