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SC Court of Appeals



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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF EDGEFIELD)	CIVIL ACTION NO.: 2021-CP-19-00005
)	
Barry Lanham and Obvia Gamble-)	
Lanham,)	
Plaintiffs,)	
)	MEMORANDUM IN OPPOSITION TO
v.)	MOTION TO DISMISS
)	
Wumag Texroll GmbH & Co. KG,)	
Defendant.)	

Defendant Wumag Texroll GmbH & Co. KG (“Wumag”) has moved the Court to dismiss this action for lack of personal jurisdiction. Wumag, a German corporation, seeks to avoid the jurisdiction of the Court by contending that it was not properly served consistent with the requirements of the Hague Service Convention. Wumag also purports that it is not the successor in liability to a previous entity with the exact same name and believes that it cannot be bound to defend its products within South Carolina because of an alleged lack of contacts or business presence within this State. However, Wumag’s contentions ignore South Carolina law explicitly providing for the domestic service of process on foreign corporations through the South Carolina Secretary of State.

Additionally, Wumag’s arguments fly in the face of German corporate law providing that it is the successor in liability to its predecessor, Wumag Texroll GmbH & Co. KG, because it has carried on the business activities of its predecessor in the exact same business name. Wumag also ignores the extensive contacts it, and its predecessor, have made within the State of South Carolina by shipping their products

into South Carolina through in-state importers and distributors, who in turn disseminate its products to textile manufacturers throughout the state. Through this system, Wumag's products find a home in factories such as the Bondex, Inc. facility in Trenton, South Carolina that is the locus of this action.

The truth of the matter is that a foreign corporation, through principles of successor liability, has committed a tortious act in South Carolina via the intentional and directed flow of its products into the United States as a whole and South Carolina specifically. Its conduct has now severely injured a South Carolina citizen, and it seeks to escape the jurisdiction of our courts through what amounts to jurisdictional sleight-of-hand and corporate fiction. Wumag's motion lacks merit and should be denied in its entirety.

FACTS

Wumag is a German corporation headquartered in Düren, Germany that designs, manufactures and sells products such as cylinder dryers for textile drying and textile calender machines. (Ex. 1, Wumag Texroll website). Wumag imports its products into South Carolina through the Port of Charleston, from where they are distributed into South Carolina and the United States generally by a number of entities who have been registered with the South Carolina Secretary of State.¹ Further, as has been alleged in Plaintiffs' Complaint, agents and employees of

¹ Exhibit 2, Screenshot of U.S. Customs Records for Wumag Texroll GmbH & Co. KG, <https://www.importgenius.com/suppliers/wumag-texroll-gmbh-co-kg> (last visited June 3, 2022).

Wumag personally visited the Bondex facility and performed installation work on the specific machinery which injured Plaintiff. (Compl. ¶¶ 6-7).²

This case arises out of an accident that occurred in Edgefield County, South Carolina. (Compl. ¶ 4). On January 22, 2018, Barry Lanham was cleaning a Laminating Calender Line machine at the Bondex facility in Trenton (Compl. ¶ 8). The machine was designed and manufactured by Wumag Texroll GmbH & Co. KG with a machine number of 206460. (Compl. ¶ 6). While cleaning the machine, Lanham's left arm and hand were pulled into it, causing permanent damage. (*Id.* at ¶ 8). Plaintiffs have alleged that the incident causing Lanham's injuries was due to the defective condition of the machine and the negligent conduct of Wumag's employees in installing and maintaining the subject machine. (*Id.* at ¶ 7). On January 6, 2021, Lanham filed this products liability and negligence suit against Wumag as the designer, manufacturer, distributor, and seller of the subject machine under theories of negligence, breach of implied warranties and strict liability. (*Id.* at ¶¶ 9-21). A cause of action for loss of consortium was also alleged by Lanham's wife, Obvia Gamble-Lanham. (*Id.* at ¶ 22).

After Lanham's injuries, but prior to his commencement of this action, Wumag Texroll GmbH & Co. KG, became insolvent and its assets were sold to another entity known at the time as Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg"). The asset

² Even if the Court were to grant Wumag's Motion to Dismiss on the bases of personal jurisdiction, Plaintiffs' negligence claim would survive as Plaintiffs allege a separate claim for negligence for the acts and omissions of Wumag's agents within the Bondex facility. This claim is not predicated on a stream of commerce theory of products liability and is not subject to the specific personal jurisdiction analysis.

sale occurred on September 18, 2019. At that time, Kelzenberg ceased doing business as Kelzenberg + Co: GmbH & Co. KG and assumed the name of Wumag Texroll GmbH & Co. KG, continuing the same business as the former Wumag entity with an identical name. This name was registered with the district court at Krefeld, Germany. Thus, Wumag has continued its business enterprise under the same name, selling the same products, as it did prior to the asset purchase. In fact, on its website, Wumag currently boasts that it is over 70 years old and has over 55 years of experience in the design of some of its products. (Ex. 1).

ARGUMENT

- I. Plaintiffs' service of the Summons and Complaint complied with South Carolina law and therefore constitutes valid service of process to confer jurisdiction to the Court.**
 - A. Plaintiff's service on the Secretary of State was proper and not within the scope of the Hague Service Convention.**

Wumag argues that service on the Secretary of State was improper because Wumag has no business presence in South Carolina, and that the proper means of serving Wumag in this action is by complying with the requirements of the Hague Service Convention. Wumag ignores that the Secretary of State is authorized to accept service in-state on behalf of Wumag (1) because Wumag's products are imported and distributed in this state by entities such as Zima Corporation and Morrison Textile Machinery Inc., both registered with the South Carolina Secretary of State, (2) because Wumag sends its agents and employees into this State to service and install its products, and (3) because Wumag transacts business through the Port of Charleston in interstate commerce. *See* discussion *infra* Sections II.B, II.C.1.a; (Ex.

5 & Ex. 6). Wumag also ignores that the requirements of the Hague Service Convention only apply when service of process has been effectuated abroad, and here service was completed in-state through a statutorily designated domestic agent.

The South Carolina Rules of Civil Procedure state that a corporation may be served by delivering a copy of the summons and complaint to any “agent authorized by appointment or by law to receive service of process” Rule 4(d)(3), SCRPC. Wumag was properly served through an agent authorized by statute with a copy of the Summons and Complaint under S.C. Code Ann. § 15-9-245(a), which states:

Every foreign business or nonprofit corporation which is not authorized to do business in this State, by doing in this State, either itself or through an agent, any business, ***including any business activity for which authority need not be obtained as provided by Section 33-15-101***, is considered to have designated the Secretary of State as its agent upon whom process against it may be served in any action or proceeding arising in any court in this State out of or in connection with the doing of any business in this State.

S.C. Code Ann. § 15-9-245(a) (1976) (emphasis added).

Business activities for which authority need not be obtained under S.C. Code Ann. § 33-15-101 include “selling through independent contractors” and “transacting business in interstate commerce.” Thus, a corporation that is not authorized to do business in this State is considered to have designated the Secretary of State as its in-state agent for service of process if it sells through independent contractors and transacts business in interstate commerce within this State.

The Supreme Court of South Carolina has held that a plaintiff’s service of process on a foreign defendant under S.C. Code Ann. § 15-9-245 is effective, complete,

and legally sufficient to charge the defendant with notice of the pending action once process is delivered in-state to the Secretary of State:

In construing statutes similar to the one at hand, this Court has held that service is effected when the designated agent is served. Similarly, the United States District Court for the District of South Carolina has held that service under § 15-9-245 is effected upon delivering suit papers to the Secretary of State. This accords with the general rule that service upon an agent designated by law is permissible without any need to personally serve the defendant. Once a summons and complaint are delivered to the secretary of state, service is complete, regardless of whether the corporation actually receives notice of the suit. We hold that service pursuant to § 15-9-245 is effective upon delivery of the S & C to the Secretary of State.

Holman v. Warwick Furnace Co., 318 S.C. 201, 204, 456 S.E.2d 894, 895-96 (1995). Service under S.C. Code section 15-9-245 is complete once the summons and complaint have been delivered to the Secretary of State. *Id.*; *Hammond v. Honda Motor Co.*, 128 F.R.D. 638, 642 (D.S.C. 1989).

On the other hand, the Hague Service Convention only applies when service has been effectuated abroad. The Convention is a multilateral treaty that was “intended to provide a simpler way to *serve process abroad*” *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698, 108 S. Ct. 2104, 2107 (1988) (emphasis added). “Article 1 defines the scope of the Convention, which is the subject of controversy in this case. It says: ‘The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*.’” *Id.* at 699, 108 S. Ct. at 2108 (emphasis added) (quoting Convention on Service Abroad of Judicial and Extrajudicial

Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention), [1969] 20 U.S.T. 361, 362, T.I.A.S. No. 6638).

The Court in *Schlunk* goes on to state that

The Convention does not specify the circumstances in which there is “occasion to transmit” a complaint “for service abroad.” But at least the term “service of process” has a well-established technical meaning. Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action. The legal sufficiency of a formal delivery of documents must be measured against some standard. The Convention does not prescribe a standard, so we almost necessarily must refer to the internal law of the forum state.

Schlunk, 486 U.S. at 700, 108 S. Ct. at 2108 (citations omitted). The Court later explains that “service abroad” is to be solely defined according to the law of the state that is requesting service of process, i.e., the forum state:

The Yugoslavian delegate offered a proposal to amend Article 1 to make explicit that service abroad is defined according to the law of the state that is requesting service of process The inference we draw from this history is that the Yugoslavian proposal was rejected because it was superfluous, not because it was inaccurate, and that “service abroad” has the same meaning in the final version of the Convention as it had in the preliminary draft.

Id. at 701-02, 108 S. Ct. at 2109. Ultimately, the Court found that “where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications.” *Id.* at 707, 108 S. Ct. at 2112. The Court proceeded to hold that the Hague Service Convention did not apply to the in-state service at issue in *Schlunk*, and that service was proper because the Illinois long-arm statute authorized the plaintiff to serve a statutorily

designated domestic agent without having to serve the defendant abroad. *Id.* at 706, 108 S. Ct. at 2111.

Wumag refuses to acknowledge that in *Holman*, 318 S.C. 201, the Supreme Court of South Carolina explicitly held that service under S.C. Code Ann. § 15-9-245 is complete upon delivery to the South Carolina Secretary of State and is effectuated *in-state*, not abroad, because such an acknowledgement would be fatal to its argument that domestic service on the Secretary of State is within the scope of the Hague Service Convention, which only prescribes methods for service of process *abroad*. Here, the law of the state that is requesting service of process, South Carolina, designates the South Carolina Secretary of State as a domestic agent for in-state service on foreign corporations who are engaged in business activity within the State without a certificate of authority, rather than requiring service abroad: “Service of process is made by delivering to and leaving with the Secretary of State, or with any person designated by him to receive such service, duplicate copies of the process, notice, or demand.” S.C. Code Ann. § 15-9-245. Thus, the internal law of the forum state designates a domestic agent for service of process rather than requiring service abroad. An important objective of the Convention was to provide the means to facilitate service of process abroad to foreign entities, as opposed to in-state service through a domestic agent. *Schlunk*, 486 U.S. at 698, 108 S. Ct. at 2107. S.C. Code Ann. § 15-9-245 provides the means for a party to facilitate service of process in an organized and efficient manner through a statutorily designated *in-state* agent.

Rule 4(d)(3), SCRCF, provides that service on a corporation may be had through an agent authorized by statute by mailing a copy of the summons and complaint to the defendant if the statute so requires. Additionally, *Schlunk* contained dicta stating that “[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.” *Schlunk*, 486 U.S. at 700, 108 S. Ct. at 2108. However, by its terms S.C. Code Ann. § 15-9-245(b) explicitly does not require the transmittal of the documents to the defendant *to effect service*. Although section 15-9-245(b) instructs the Secretary of State, as the statutorily designated agent for in-state service of process, to immediately forward one of the copies of the process to the foreign defendant, it does not require that the process be actually transmitted: the in-state service is still effective and complete even if the defendant refuses to accept delivery of the process. S.C. Code Ann. § 15-9-245(b-c) (“[T]he refusal to accept delivery of the certified mail or to sign the return receipt shall not affect the validity of the service”); *Holman*, 318 S.C. at 204-05 n.3, 456 S.E.2d at 896 n.3.

Essentially, the forwarding of one of the copies of the process to the foreign defendant is analogous to a registered agent handing the summons and complaint to its principal. While it is a step that is taken following service, it is not part of the act of serving process. In any event, when the above statement from *Schlunk* is read within the context of the entire decision, it becomes clear that the Court was referring to the “transmittal of documents abroad” as a necessary step to effectuate service abroad, whereas in the present case the Secretary of State’s forwarding of the process

is simply a notice requirement that is performed *after* service has already been effected:

[Defendant] explains that, as a practical matter, [statutorily designated in-state agent] was certain to transmit the complaint to Germany to notify [defendant] of the litigation. Indeed, as a legal matter, the Due Process Clause requires every method of service to provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [Defendant] argues that, because of this notice requirement, every case involving service on a foreign national will present an “occasion to transmit a judicial . . . document for service abroad” within the meaning of Article 1 We reject this argument ***The only transmittal to which the Convention applies is a transmittal abroad that is required as a necessary part of service.*** And, contrary to [defendant’s] assertion, the Due Process Clause does not require an official transmittal of documents abroad every time there is service on a foreign national.

Schlunk, 486 U.S. at 707, 108 S. Ct. at 2112 (citations omitted) (emphasis added).

This concept is echoed in other federal and state court decisions. Indeed, the United States District Court for the District of South Carolina has found that the service of process on the Secretary of State under S.C. Code Ann. § 15-9-245 makes unnecessary the application of the provisions of the Hague Service Convention. *Hammond v. Honda Motor Co., Ltd.*, 128 F.R.D. 638, 642 (D.S.C. 1989). “When service upon a domestic agent is valid and complete according to state law and the due process clause, the Convention procedures are not invoked.” *Id.* While the court could not conclude whether the plaintiff in *Hammond* had complied with the requirements of S.C. Code Ann. § 15-9-245, it nevertheless determined that service under the statute is valid and complete in-state, negating the application of the Hague Service Convention to service pursuant to the statute.

Under S.C. Code Ann. § 15-9-245 and in the present circumstances, service was never effectuated by certified mail sent abroad, because Wumag had already been effectively served in-state before the Summons and Complaint were ever forwarded to Germany. The court in *Hammond* is not alone in concluding that complete service on a domestic agent precludes the application of the Hague Service Convention, regardless of whether the process is subsequently forwarded to the defendant by the agent. *See Melia v. Les Grands Chais de France*, 135 F.R.D. 28, (D.R.I. 1991) (“Although the statute requires the secretary of state to forward notice to the defendant corporation, other states with similar statutes have interpreted the statutes to mean that service is complete when the secretary is served Thus, because the statute does not require that *plaintiff* mail notice directly to the defendant *in addition* to the service on the secretary of state, service may be completed without the transmission of documents abroad and the Hague Convention does not apply.”); *Lamb By and Through Donaldson v. Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95, 97 (S.D. Fla. 1985) (“By its terms, The Hague Convention is applicable only to attempts to serve process in foreign countries There is nowhere among the provisions of The Hague Convention any indication that it is to control attempts to serve process on foreign corporations or agents of foreign corporations within the State of origin.”); *McHugh v. Int’l Components Corp.*, 461 N.Y.S.2d 166, 167-68 (1983) (“Marcon Japan’s reliance on the ‘Hague Convention’ is misplaced. The purpose of that treaty, as is clearly set forth in its title and declarations, is for assuring sufficient notice when service is made in a foreign

country. Here, service was made within the United States . . .”). Furthermore, the District of South Carolina has recently affirmed the *Hammond* decision and found that the provisions of the Hague Service Convention do not apply to the domestic service of a foreign corporation through the Secretary of State under section 15-9-245:

[T]he court “anticipates” that the South Carolina Supreme Court would rule in lock-step with its holding in *Holman* and determine that, under § 15-9-245, (1) service is complete at the moment a plaintiff delivers the summons and complaint to the Secretary of State and (2) service does not “require the transmission of judicial documents *abroad*” to effectuate service; therefore, (3) the Hague Convention does not apply.

Peake v. Suzuki Motor Corp., Case No. 0:19-cv-00382-JMC, 2019 WL 5691632 at *8 (D.S.C. Nov. 4, 2019). South Carolina state courts have also found that service on the Secretary of State under circumstances nearly identical to those presented by this action is proper. (Exhibit 3, Order).

Wumag is not authorized to conduct business in South Carolina.³ However, Wumag engages in business activity in South Carolina by shipping its products in interstate commerce through the Port of Charleston and distributing its products within South Carolina through presumably independent contractors. *See* discussion *infra* Sections II.B, II.C.1.a. These contractors include entities such as Zima Corporation and Morrison Textile Machinery, Inc. who have South Carolina places of business and are registered to do business with the South Carolina Secretary of State. (Ex. 5, Zima Corp. filing; Ex. 6, Morrison Textile Mach. Inc. filing). Further,

³ Exhibit 4, Business Name Search- Wumag Texroll GmbH & Co. KG, South Carolina Secretary of State Business Entities Online, <https://businessfilings.sc.gov/BusinessFiling/Entity/Search> (last visited June 3, 2022).

Wumag sends its own agents into South Carolina to perform work on and install its products within textile facilities. (*See* Compl ¶¶ 6-7).

In the light most favorable to the Plaintiff, since Wumag injects its products into this State through a network of presumably independent dealers and is engaged in interstate commerce by designing, manufacturing, and shipping its products to and through South Carolina without a certificate of authority, Wumag is engaged in business activities that require the Secretary of State to act as Wumag's agent for service of process, even if Wumag is not required to have a certificate of authority. *See* S.C. Code Ann. §§ 15-9-245 and 33-15-110. As demonstrated in Sections II.B and II.C.1.a, *infra*, Wumag engages in interstate commerce within South Carolina by shipping through the Port of Charleston.

The Secretary of State accepted service on behalf of Wumag on January 11, 2021.⁴ It is important to note that service was performed in-state on a statutorily designated agent of Wumag. Plaintiff's service of process upon the South Carolina Secretary of State clearly does not fall within the ambit of the Hague Service Convention, which specifically contemplates the service of process *abroad*. *Schlunk*, 486 U.S. at 700, 108 S. Ct. at 2108 (emphasis added). Here, substituted service was completed by in-state delivery of the Summons and Complaint to the Secretary of State. *See Holman*, 318 S.C. at 204, 456 S.E.2d at 895-96 (“[T]his Court has held that service is effected when the designated agent is served”). This clearly meets the requirements of the South Carolina Rules of Civil Procedure and South Carolina

⁴ Exhibit 7, Service of Wumag Texroll GmbH & Co. KG South Carolina Secretary of State.

statutory law, specifically Rule 4, SCRCP, S.C. Code §§ 15-9-245 and 33-15-110, and therefore service was properly completed in-state and outside the scope of the Hague Service Convention.⁵

II. Wumag is subject to personal jurisdiction in South Carolina through the contacts with which Wumag purposefully avails itself of the privilege of conducting business activities within the State.

Wumag's Motion to Dismiss for lack of personal jurisdiction should be denied for the simple reason that this Court has specific personal jurisdiction over Wumag. The Court has specific personal jurisdiction over Wumag because: (1) Wumag has purposefully availed itself of the privilege of conducting business activities within South Carolina by serving the in-state market, both directly and indirectly, with its products, (2) Wumag ships its products in interstate commerce through the Port of Charleston, and (3) Wumag has deliberately and precisely chosen in-state importers and distributors to disseminate its products throughout the United States, including South Carolina.

⁵ Wumag has argued that Plaintiffs failed to comply with section 15-9-245(c) by not providing the Court with a return receipt documenting the Secretary of State's forwarding of the Summons and Complaint to Wumag. It is Plaintiffs' position that the statute has been complied with: "[t]here must be filed with the affidavit of compliance the return receipt signed by the foreign business or nonprofit corporation **or other official proof of delivery.**" Plaintiffs have filed with the Court an affidavit of compliance and an official proof of delivery in the form of a USPS Product Tracking and Reporting System receipt that demonstrates Wumag received the Summons and Complaint. And even if Plaintiffs had not provided such proof of delivery, it is Plaintiffs' position that such a failure would not invalidate service under South Carolina law, as Wumag does not contest that it received notice of the proceedings. *See Patel v. Southern Brokers Ltd.*, 277 S.C. 490, 494, 289 S.E.2d 642, 645 (1982) ("This Court has consistently overruled technical objections to service of process where the defendant has not been denied due process.").

When a court's power to exercise personal jurisdiction over a non-resident defendant is challenged by a motion under South Carolina Rule of Civil Procedure 12(b)(2), "the plaintiff *need only make a prima facie showing* by pleadings and affidavits" that the trial court should exercise personal jurisdiction. *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 332, 426 S.E.2d 777, 779 (1993) (emphasis added). The trial judge is not required to verify the pleadings, as the allegations of the complaint are normally sufficient to warrant the court's exercise of jurisdiction. *Id.* "It is only when the complaint does not demonstrate jurisdiction that the plaintiff must supply other evidence of jurisdiction." *Springmasters, Inc. v. D & M Mfg.*, 303 S.C. 528, 531, 402 S.E.2d 192, 193 (Ct. App. 1991). "Thus, nothing requires the plaintiff to present evidence of jurisdiction if the complaint demonstrates jurisdiction." *Id.*

Here, the Complaint alleged that Wumag designed and manufactured the subject machine and sold, delivered, and installed the subject machine within South Carolina. (Compl. ¶ 3). Plaintiff's inclusion of a jurisdictional allegation should serve as a prima facie showing of personal jurisdiction sufficient for the Court to deny Wumag's motion to dismiss for lack of personal jurisdiction. Defendant does not dispute that Wumag sold, delivered, and installed the subject machine within South Carolina, but argues instead that these actions were taken by its predecessor, and that it is not liable for its predecessor's conduct. German law indicates otherwise, and federal law holds that the contacts of a predecessor are imputed to the successor within the personal jurisdiction analysis.

In the alternative, when a foreign defendant attacks the allegations of the complaint based on personal jurisdiction, the court is not confined to the pleadings and may resort to affidavits and other evidence to determine jurisdiction. *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). In resolving a Rule 12(b)(2), SCRCP, motion to dismiss, the court should take as true the allegations of the nonmoving party and resolve all factual disputes in its favor, including any factual disputes brought up by submitted affidavits and evidence. *Brown v. Inv. Mgmt. and Research, Inc.*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996).

- A. Defendant is the successor in liability to the previous Wumag entity under German law, and the previous entity's contacts are imputed to the current Defendant.**

German law determines whether Wumag in its current form would be liable for the tortious conduct of its predecessor, which did business in South Carolina under an identical name as that of Defendant. In order to determine whether German law or South Carolina law would apply to determine successor liability, the Court must conduct a choice of law analysis, as a true conflict exists between the law of South Carolina and the law of Germany regarding successor liability. Here, there is a true conflict of law because German law provides that a successor may be liable for the torts of its predecessor if it continues business under the exact same name as its predecessor, while South Carolina law provides that there must be a commonality of ownership and control for successor liability to be established. *Handelsgesetzbuch [HGB] [Commercial Code]*, § 25, http://www.gesetze-im-internet.de/englisch_hgb/

englisch_hgb.html#p0165 (Ger.); *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 266, 818 S.E.2d 447, 453 (2018); see *Bouchillon v. Same Deutz-Fahr Group*, Civil Action No. 1:14CV00135-DMB-DAS, 2016 WL 11299892 at *14 (N. D. Miss. Dec. 8, 2016).

South Carolina follows common law choice of law rules. *Witt v. Am. Trucking Assocs., Inc.*, 860 F. Supp. 295, 300 (D.S.C. 1994). With regards to contracts, South Carolina courts apply the substantive law of the place where the contract at issue was formed. *O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 256, 305 S.E.2d 241, 243 (1983). Defendant has asserted that it acquired the assets of its predecessor through an asset purchase agreement that was created and executed in Germany and that the agreement does not include the transfer of liabilities from its predecessor to Defendant. Thus, the pertinent issue concerns an agreement entered in Germany, and whether it included the transfer of liabilities at the time of execution, and German law applies.

Section 25 of the German Commercial Code provides a form of successor liability if an entity “carries on a commercial business acquired *inter vivos* under the previous business name, with or without an addition indicating successorship.” *Handelsgesetzbuch [HGB] [Commercial Code]*, § 25. The acquirer is “liable for all obligations of the former owner incurred in the operation of the business. Where the former owner or his heirs have consented to continuation of the business name, claims arising out of the operation of the business shall, with respect to debtors, be deemed to have devolved to the transferee.”

An obligation is incurred within the meaning of section 25 of the German Commercial Code if the statutory prerequisites of a cause of action for damages pursuant to section 1 subsection 1 of the German Products Liability Act are met. *Bouchillon*, 2016 WL 11299892 at *14. Under section 1 subsection 1 of the GPLA, a cause of action for damages arises when a person is injured as a result of a defective product. *Id.* at *11. In this case, Plaintiff was injured on January 22, 2018, over a year and a half before Defendant acquired the predecessor Wumag entity's assets. Therefore, an obligation or claim under German law existed at the time of the transfer, and since Defendant continued the predecessor entity's business in its exact same name, liability for the claim transferred to Defendant at the time of the asset purchase agreement.

Defendant is likely to argue that even if liability for this action transferred as a result of the asset purchase agreement, it is not subject to personal jurisdiction within South Carolina, because the contacts of its predecessor in selling and installing the subject machine and importing goods into South Carolina cannot be imputed to Defendant. However, this argument is not supported by law. Courts have

consistently acknowledged that it is compatible with due process for a court to exercise personal jurisdiction over an individual or corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court. The theory underlying these cases is that, because the two corporations . . . are the *same entity*, the jurisdictional contacts of one *are* the jurisdictional contacts of the other for the purposes of the *International Shoe* due process analysis.

Patin v. Thoroughbred Power Boats, Inc., 294 F.3d 640, 653 (5th Cir. 2002); see e.g., *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1069 n.17 (9th Cir. 2000); *Minnesota Mining & Mfg. Co. v. Eco Chem Inc.*, 757 F.2d 1256, 1265 (Fed. Cir. 1985); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 903 (2d Cir. 1981); *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 637-38 (8th Cir. 1975); *Huth v. Hillsboro Ins. Mgmt., Inc.*, 72 F. Supp. 2d 506, 510 (E.D. Pa. 1999). Additionally, as demonstrated within this Memorandum, within its current form Defendant itself has continuing and systematic contacts within South Carolina. Because Defendant and its predecessor both have contacts within the State of South Carolina through their importation, distribution, and sales efforts, and because the predecessor's contacts are imputed to Defendant, it is only fair and reasonable that Defendant should be expected to appear and defend itself in a South Carolina court as a result of injuries that were caused by one of its products within the State.

B. The Court has jurisdiction over Wumag pursuant to South Carolina's Long Arm Statute.

Under South Carolina precedent, courts may exercise personal jurisdiction over a foreign corporation when (1) such jurisdiction is authorized by the South Carolina long-arm statute; and (2) the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992). South Carolina's long-arm statute allows South Carolina courts to establish personal jurisdiction over a foreign corporation as to a cause of action arising from the corporation's:

(1) transacting any business in this State; (2) contracting to supply services or things in the State; (3) commission of a tortious act in whole or in part in this State; (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; . . . (7) entry into a contract to be performed in whole or in part by either party in this State; or (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803 (emphasis added).

Wumag would have the Court believe that it has no contacts with South Carolina that are “related to” the events giving rise to this cause of action. According to Wumag, it has never registered with the South Carolina Secretary of State, it has never registered an agent for service of process with the South Carolina Secretary of State, does not have an office, manufacturing facility, or other place of business within South Carolina, nor does it employ any personnel based in South Carolina. However, these statements bear no significance on the statutory meaning of transacting business under section 36-2-803 as well as sections 15-9-245 and 33-15-101.

In other words, under South Carolina’s expansive long-arm statutes, a foreign corporation unauthorized to do business in the United States is considered to be doing or transacting business if it sells through an independent contractor or engages in a persistent course of conduct such as engaging in interstate commerce; this is the case even if that foreign corporation does not do so directly. It is irrelevant whether Wumag transacts business itself or through an agent as defined by South Carolina’s long-arm statutes. And a careful reading of the Affidavit of Michael Hess, submitted

by Defendant in support of its Motion to Dismiss, reveals that Defendant does not deny that it designs, tests, manufactures, markets, sells, imports, distributes, delivers, or installs laminating calender line machines or other products within this State; rather, it simply claims that it did not manufacture, sell, import, deliver, and install the particular machine at issue in this action. However, this raises an issue of successor liability, not specific personal jurisdiction. For the purposes of the long-arm statutes, by shipping its products in interstate commerce into the Port of Charleston and importing them for use within the State and the United States as a whole, Defendant has submitted itself to the personal jurisdiction of this Court for all actions related to the distribution and sale of its products, including the products sold by its predecessor in liability.⁶

Wumag's conduct satisfies several provisions of South Carolina's long-arm statute. Wumag contracts with precisely chosen companies such as Zima Corp. and Morrison Textile Mach. Inc., which are registered with the South Carolina Secretary of State and have places of business within South Carolina, to supply Wumag-manufactured products to the United States, including textile facilities such as Bondex in South Carolina. Wumag imports its products through the Port of Charleston for such distribution. This is sufficient to support the conclusion that Wumag has a reasonable expectation that its products will be used or consumed

⁶ As to personal jurisdiction, under principles of successor liability and United States Supreme Court precedent, Defendant's predecessor's contacts concerning the subject machine are imputed to Defendant, and a causal relationship does not have to exist between Defendant's own contacts and the subject machine in this cause of action, so long as there is some degree of relatedness. *See* discussion Section II.A, *supra*, and Section II.C.1.a., *infra*.

within South Carolina. Therefore, under South Carolina statutory law, Wumag is subject to this Court's personal jurisdiction, so long as the jurisdiction comports with due process requirements. *See S. Plastics Co.*, 310 S.C. at 259, 423 S.E.2d at 130.

C. Establishing personal jurisdiction over Wumag due to its extensive contacts with the State of South Carolina does not offend traditional notions of fair play and substantial justice.

The appropriate question for the court in considering a personal jurisdiction defense raised by a foreign defendant is whether that defendant has minimum contacts with South Carolina such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *State v. NV Sumatra Tobacco Trading*, 379 S.C. 81, 89, 666 S.E.2d 218, 222 (2008) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174 (1985)). Personal jurisdiction may be established through specific jurisdiction or general jurisdiction. *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). Plaintiff concedes that the Court likely does not have general personal jurisdiction over Wumag.

1. This Court has specific personal jurisdiction over Wumag.

Specific jurisdiction over a defendant exists when an action arises from *or is related to* sufficient contacts by the defendant within the forum state. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 492, 611 S.E.2d 505, 508 (2005). To determine whether specific jurisdiction exists, the Supreme Court of South Carolina has created a two-part test. The proper test asks courts to examine whether (1) the defendant has the requisite minimum contacts with the forum such that the court would have the

“power” to adjudicate the action, and (2) whether the exercise of jurisdiction is “reasonable” or “fair.” *S. Plastics Co.*, 310 S.C. at 260, 423 S.E.2d at 131. Even a single act by a defendant can be sufficient to satisfy the necessary quality and nature of such minimal contacts, depending on the circumstances of its commission. *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 317-18, 55 S. Ct. 154, 159 (1945); *Springmasters*, 303 S.C. at 533, 402 S.E.2d at 194. Physical presence in the State is not required to establish personal jurisdiction. *NV Sumatra*, 379 S.C. at 90, 666 S.E.2d at 222.

As noted above, Wumag imports its products directly into the Port of Charleston, and contracts with distributors located in-state to supply its products within the United States generally and South Carolina specifically. Therefore, Defendant should and could reasonably anticipate being haled into court in South Carolina. Additionally, fairness and justice require this dispute to be heard in South Carolina, as the overwhelming majority of evidence is here, the State has a substantial interest in adjudicating the dispute, and it is the only venue available to Plaintiff.

- a. **Wumag has purposefully availed itself of the privilege of conducting activities in South Carolina by importing its products for use in South Carolina, as well as by shipping its products through the Port of Charleston.**

The first step of the jurisdictional analysis asks whether the defendant has the requisite minimum contacts with the forum such that the court would have the “power” to adjudicate the action. *NV Sumatra*, 379 S.C. at 89, 666 S.E.2d at 222. The defendant must have sufficient minimum contacts to have purposefully availed itself

of the privilege of conducting activities within the forum state, such that it could reasonably anticipate being haled into court there. *Id.* When considering whether an entity has purposefully availed itself of the laws of the forum state, courts should ask whether the entity has a reasonable expectation that goods it has placed into the stream of commerce will be used in the forum state, making it reasonably foreseeable that the entity could be haled into court there. *Id.* This is the stream of commerce theory, and it is the law of South Carolina. *Id.* at 89 n.5, 666 S.E.2d at 222 n.5.

The stream of commerce theory was endorsed by a majority of the Supreme Court of the United States as well in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980) (stating that a court may exercise personal jurisdiction over “a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”). Wumag has asserted that the subject machine in this action was not sold by Wumag and that it was sold by its predecessor. However, under German law, South Carolina law and federal precedent, each of these could be true and Wumag would still be subject to the Court’s jurisdiction. This would apply even if Wumag’s products were imported and distributed within South Carolina by an independent contractor.

In *NV Sumatra*, the State of South Carolina filed an action against defendant NV Sumatra Tobacco Trading Co., a cigarette manufacturer under the Tobacco Escrow Fund Act, for failing to make the escrow deposit and certification required by the Act for cigarettes that had been sold in South Carolina. *NV Sumatra*, 379 S.C. at 84, 666 S.E.2d at 219. The defendant moved to dismiss for lack of personal

jurisdiction, claiming that it was an Indonesian corporation, that it did not directly sell its products in South Carolina, that it sold its products in Indonesia solely to an independent Singapore corporation for distribution outside of Indonesia, and that it did not have any contractual relationships requiring it to sell its cigarettes in South Carolina. *Id.* at 85-86, 666 S.E.2d at 220.

Additionally, the defendant was not registered to do business in South Carolina, had no office in South Carolina, and a representative of the defendant had never been in South Carolina. *Id.* at 90, 666 S.E.2d at 222. Despite this, the court found that the defendant

[H]as minimum contacts with the United States as a whole and, via the stream of commerce theory, the State has shown Sumatra has minimum contacts with South Carolina Regardless of how the cigarettes arrived in South Carolina, minimum contacts are established by the above information. Sumatra's actions indicate that it purposely availed itself of conducting business in all 50 states, including South Carolina. It is troubling that Sumatra insists it could engage in the activities listed above but avoid paying into state escrow accounts and avoid suit in each and every state of the nation by asserting the lack of personal jurisdiction in each state. We find Sumatra should have reasonably anticipated that it would be haled into court in a state such as South Carolina.

Id. at 90, 666 S.E.2d 222-223.

In *World-Wide Volkswagen*, an automobile purchased by New York residents from a New York retailer was involved in an accident causing severe burn injuries to the purchasers and their children in Oklahoma during a cross-country move. *Id.* at 288, 100 S. Ct. at 562. The purchasers brought a products liability action against the vehicle manufacturer, importer, distributor, and retail dealer in Oklahoma alleging defective design of the automobile's gas tank and fuel system. *Id.* The New York

dealer and regional distributor contested the Oklahoma court's exercise of jurisdiction over them, claiming that it violated the Due Process Clause. *Id.*

The facts presented to the District Court showed that the dealer and distributor were fully independent of one another, did no business in Oklahoma, and did not ship or sell any products to or in Oklahoma. *Id.* at 289, 100 S. Ct. at 563. There was no showing that any automobile sold by the dealer or distributor had ever entered Oklahoma except the single vehicle involved in the accident. *Id.* In holding that the Oklahoma court's exercise of jurisdiction over the nonresident dealer and distributor was unconstitutional, the Court found that the dealer and distributor availed themselves of none of the privileges and benefits of Oklahoma law, and that jurisdiction had been based on a single, isolated, fortuitous occurrence. *Id.* at 296, 100 S. Ct. at 566. The Court then articulated a rule permitting a court to exercise personal jurisdiction when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297, 100 S. Ct. at 567 (citations omitted).

Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98, 100 S. Ct. at 567 (citation omitted) (emphasis added). Thus, while the Supreme Court found that the distributor and dealer were not subject to the

Oklahoma court's jurisdiction, it found that these facts *would permit* Oklahoma to exercise jurisdiction over the manufacturer and importer. It is important to note that the *World-Wide Volkswagen* decision was reached by a *majority* of the Court and still has valid and controlling precedential value.

Furthermore, the Supreme Courts of the United States and South Carolina have unequivocally held that if the sale of a product of a manufacturer is not simply an isolated occurrence, but arises from the efforts of the manufacturer to serve indirectly the market for its product in South Carolina, it is not unreasonable to subject it to suit in South Carolina if its defective products cause an injury. Here, Wumag manufactures and sells its products through in-state entities that it deliberately chose for that purpose.

Wumag maintains that it has no contacts with South Carolina sufficient to bring it under the Court's jurisdiction; however, this is not the case. A preliminary search of U.S. Customs data shows that Wumag has been the shipper of textile manufacturing products and parts to the Port of Charleston, South Carolina as recently as 2021.⁷ These shipments have originated from Germany on numerous occasions and list Wumag Texroll GmbH & Co. KG as the shipper, both prior to and after the asset purchase. Wumag has been the shipper of imports consigned by companies with South Carolina addresses in Spartanburg and Fort Lawn. The majority of Wumag's products enter the United States through the Port of Charleston. These activities constitute substantial evidence that Defendant, both itself and

⁷ Exhibit 2, Screenshot of U.S. Customs Records for Wumag Texroll GmbH & Co. KG.

through the imputed contacts of its predecessor, not only had a reasonable expectation that its products would end up in South Carolina, but that it did something more: it relied on South Carolina and the protection of its laws in utilizing a distribution network that would generate a considerable stream of income for itself.

Citing language from *Walden v. Fiore*, 571 U.S. 277 (2014), Defendant argues that it is not subject to personal jurisdiction in South Carolina because any contacts it has with South Carolina in importing and distributing its products through the Port of Charleston are not causally related to the sale and installation of the subject machine that injured Plaintiff, and that its predecessor's contacts cannot be imputed to Defendant. In other words, because Defendant's ostensibly unrelated shipping and importing activities did not give rise to the sale of the subject machine and subsequent injuries, those contacts are not sufficient to establish specific personal jurisdiction over this action. Plaintiff has already demonstrated why the latter argument as to imputed contacts is erroneous. *See* discussion Section II.A, *infra*. As for the former argument, it has recently been unanimously rejected by the Supreme Court of the United States.

In *Ford Motor Co. v. Montana Eighth Judicial District Court*, Ford argued that it was not subject to specific personal jurisdiction in states where accidents involving used Ford vehicles occurred because it had not sold the subject vehicles within those states, even though Ford had established sufficient minimum contacts within those states through its activities in selling and distributing other products. The Court disagreed with Ford's position:

Ford’s causation-only approach finds no support in this Court’s requirement of a “connection” between a plaintiff’s suit and a defendant’s activities. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant’s in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit “arise out of *or relate to* the defendant’s contacts with the forum.” The first half of that standard asks about causation; but the back half, after the “or,” contemplates that some relationships will support jurisdiction without a causal showing . . . [W]e have never framed the specific jurisdiction inquiry as always requiring proof of causation-*i.e.*, proof that the plaintiff’s claim came about because of the defendant’s in-state conduct.

Ford, 141 S. Ct. 1017, 1026, 209 L. Ed. 2d 225 (2021) (citations omitted). In this case, Plaintiff’s claim is clearly related to Defendant’s activities in seeking to import and distribute its products for use into South Carolina specifically, and the United States as a whole. If not for Defendant’s (and its predecessor’s) importation efforts, the subject machine would never have arrived within South Carolina to injure Plaintiff.⁸ Such a showing of minimum contacts is sufficient to survive a motion to dismiss for lack of personal jurisdiction under both South Carolina and federal law.

b. The exercise of personal jurisdiction over Wumag is constitutionally reasonable and fair.

The second prong of the analysis requires that the court consider whether the exercise of jurisdiction is “reasonable” or “fair.” *S. Plastics Co.*, 310 S.C. at 260, 423 S.E.2d at 131. Courts may look to the following factors to determine if the exercise of jurisdiction is reasonable: (1) the burden on the defendant of litigating in the forum;

⁸ Under successor liability theories, a successor and predecessor corporation are considered to be the same entity. *See Patin*, 294 F.3d at 654 (stating that a successor corporation is the same corporate entity as the predecessor corporation, simply wearing a “new hat.”).

(2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the shared interest of the states in obtaining efficient resolution of disputes; and (5) the interests of the states in furthering substantive social policies. *Id.* at 263, 423 S.E.2d at 132 (citation omitted).

Plaintiff was injured in an accident caused by a defective machine designed and manufactured by Wumag and/or its predecessor. Wumag continues to sell machinery utilized by the textile industry within South Carolina. Plaintiff's claim that he was injured by a defective Wumag product is directly related to Wumag's activity of selling its products for distribution throughout the United States, including South Carolina in particular. Wumag has not come forward with any evidence that its products are not distributed and sold within the State because it cannot.

Defendant appears to believe that maintenance of this suit in South Carolina is inconvenient, burdensome, or unfair due to its unsupported belief that it is not responsible for the liabilities and obligations of its predecessor under German law. This position is astoundingly hypocritical. Defendant benefits from the good will and brand established by its predecessor. Wumag enjoys profits, potentially in the millions of dollars, through the sale of its products in South Carolina and the United States. It's not in any way unfair to require it to answer the bell of responsibility when a product it designed, manufactured, and sold under theories of successor liability permanently injures one of our citizens.

Any burden Wumag might undertake in defending itself in South Carolina will be minimal. It is not inconvenient or burdensome to send its agents into South Carolina in connection to a sale, so it should not be inconvenient for Wumag to appear before this Court. Even if the case were adjudicated elsewhere, Wumag would have to come to South Carolina to investigate and gather the evidence. The accident that injured Plaintiff occurred in South Carolina. South Carolina law will be applied to the facts in this action. No other forum has a more compelling connection to this case, as it is South Carolina that should have the final word in discouraging injuries that occur within the State.

It is primarily in the interest of this Court, not a German court, to adjudicate the merits of this dispute. The majority of evidence, from medical records, witnesses, to the subject machine and facility themselves, are present within the State of South Carolina. Wumag sent its products into this State for its own immense profit. Not only is it fair and constitutionally reasonable for Wumag to be required to defend the products it sends into South Carolina when they injure a South Carolina citizen within the boundaries of the State, it would be blatantly unfair to require Plaintiff to seek a remedy against Wumag in Germany. Plaintiff has no means to seek a judgment from a German court. Wumag's premise that it cannot be haled into a South Carolina court represents a distortion of our personal jurisdiction jurisprudence that would leave Plaintiff without a means of redress against Wumag. If that is not offensive to "traditional notions of fair play and substantial justice," then nothing is. The Defendant's Motion to Dismiss should be denied.

CONCLUSION

Wumag is a corporation which seeks to reap all the benefits of selling its products in the United States, including South Carolina, without incurring the resulting liabilities and costs. South Carolina law does not permit it to do so. Wumag is subject to the Court's jurisdiction in this action and has been properly served. For the foregoing reasons, Wumag's motion should be denied.

[SIGNATURE PAGE TO FOLLOW]

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