STATE OF SOUTH CAROLINA COUNTY OF EDGEFIELD Barry Lanham and Obvia Gamble-Lanham, Plaintiffs, vs. Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG and Wumag Texroll GmbH & Co. KG, Defendants.	IN THE COURT OF COMMON PLEAS Case No. 2021-CP-19-00005 **WUMAG TEXROLL GMBH & CO. KG F/K/A KELZENBERG + CO. GMBH & CO. KG'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag"),[1] by and through its undersigned counsel, submits this memorandum of law in support of its motion for summary judgment pursuant to Rules 12(b)(2), 12(b)(5) and 56(c) of the South Carolina Rules of Civil Procedure.

I. INTRODUCTION

This case involves claims arising out of a workplace injury suffered by Plaintiff Barry Lanham when his arm was caught in a laminating calendar machine (the "Machine") in January 2018. Kelzenberg-Wumag is entitled to summary judgment on both procedural grounds and on the merits. Contrary to the allegations in the Amended Complaint (the "Complaint"), Kelzenberg-Wumag did not design, test, manufacture, market, sell, import, distribute, deliver or install the Machine that allegedly caused Barry Lanham's injuries. Kelzenberg-Wumag was formed after Kelzenberg + Co: GmbH & Co. KG purchased the assets of Wumag Texroll GmbH & Co. KG ("Wumag") out of German insolvency proceedings in September 2019. Thus, Kelzenberg-Wumag did not come into existence until more than 18 months after the accident giving rise to this action occurred. As such, Kelzenberg-Wumag cannot be liable to Plaintiffs.

[1] Kelzenberg-Wumag is referred to as "Wumag II" in the attached Declaration of Michael Hess.

At the outset of this case, Kelzenberg-Wumag moved for dismissal based on insufficient service of process and lack of personal jurisdiction. The basis for Kelzenberg-Wumag's motion was that it was not subject to service through the Secretary of State pursuant to S.C. Code Ann. § 15-9-245 and not subject to personal jurisdiction because it lacks the requisite contacts with South Carolina. Following a hearing in July 2022, Judge McLeod denied the motion but expressly ordered that Kelzenberg-Wumag could raise its arguments again following discovery. (*See* Form 4 Order on Kelzenberg-Wumag's Motion to Dismiss entered on July 21, 2022, attached hereto as **Exhibit A**). Specifically, Judge McLeod's order states: "the court hereby DENIES [Kelzenberg-Wumag's motion] at this time. After the completion of appropriate discovery, [Kelzenberg-Wumag's] arguments may be readdressed through Rule 56, SCRCP." After nearly three years of discovery, it is clear that Plaintiffs' purported service of Kelzenberg-Wumag was ineffective and that Kelzenberg-Wumag is not subject to personal jurisdiction in South Carolina.

Even ignoring that Kelzenberg-Wumag was not properly served and is not subject to jurisdiction in South Carolina, it is also clear that Kelzenberg-Wumag is entitled to dismissal on the merits. It is undisputed that Kelzenberg-Wumag did not design, test, manufacture, market, sell, import, distribute, deliver or install the Machine. Moreover, there is a complete lack of evidence to support Plaintiffs' allegation that Kelzenberg-Wumag is liable under a successor liability theory. For these reasons, and as set forth in more detail below, Kelzenberg-Wumag is entitled to summary judgment.

II. BACKGROUND AND UNDISPUTED FACTS

A. Plaintiffs' Allegations

On January 22, 2018, Barry Lanham was injured at work while cleaning the Machine at Bondex, Inc.'s facility in Trenton, South Carolina. (Amended Complaint ("Compl.") ¶ 9). Plaintiffs filed this action on January 6, 2021, almost three years later, against "Wumag Texroll

GmbH & Co. KG" and attempted to serve (unsuccessfully) Kelzenberg-Wumag. After Kelzenberg-Wumag provided evidence demonstrating it did not exist when the accident occurred, Plaintiffs filed an Amended Complaint naming Wumag and Kelzenberg-Wumag. Ignoring the clear evidence showing Kelzenberg-Wumag's lack of involvement, the Complaint alleges: "Wumag and Kelzenberg[-Wumag] designed and manufactured a Laminating Calender Line machine, machine number 206460, that was subsequently sold, delivered, and installed at Bondex, Inc. in Trenton, South Carolina." (Compl. ¶ 7). The Amended Complaint, without any factual support or explanation, also alleges: "Kelzenberg[-Wumag] is liable for the acts and omissions of Wumag under German principles of successor liability." (*Id*. ¶ 4).

B. Declaration of Michael Hess

The sworn declaration of Michael Hess ("Hess"), Kelzenberg-Wumag's Managing Director, is undisputed and demonstrates that Kelzenberg-Wumag cannot be liable for Plaintiffs' alleged injuries.[2] (*See* Michael Hess Declaration in Support of Wumag Texroll GmbH & Co. KG's Motion to Dismiss (hereinafter, "Hess Declaration") attached hereto as **Exhibit B**).

Kelzenberg-Wumag is a German corporation and is registered at the district court of Düren, Germany under number HRA 224. (*Id*. ¶ 4). Kelzenberg-Wumag's principal place of business is in Düren, Germany. (*Id*. ¶ 5). Kelzenberg-Wumag came into existence in September 2019, eighteen months after Barry Lanham was allegedly injured. (*Id*. ¶ 8). On September 1, 2019, Wumag, the company that did design, manufactured, sold, delivered, and installed the Machine filed for insolvency.[3] (*Id*. ¶ 6). German insolvency proceedings commenced in the district court of Krefeld, Germany. (*Id*.). As part of the insolvency proceedings, on or around September 18,

[2] In the more than four years since this case was filed, Plaintiffs have not taken a single deposition.

[3] Prior to being insolvent, Wumag was registered at the district court of Krefeld, Germany under number HRA 3719. (Hess Declaration ¶ 7). This is significant because it demonstrates that Wumag and Kelzenberg-Wumag are now, and have always been, registered as separate and distinct companies.

2019, Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg") entered into an asset purchase agreement to purchase the assets, but not the liabilities, of Wumag. (*Id*. ¶¶ 8, 10–12).[4] Ownership of the purchased assets was transferred from Wumag to Kelzenberg on October 1, 2019. (*Id*. ¶ 10). Dr. Peter Minuth, a German attorney and the insolvency administrator for the Wumag insolvency proceedings, oversaw the asset purchase. (*Id*. ¶ 9).

Following the asset purchase, for marketing reasons, Kelzenberg changed its name to Wumag Texroll GmbH & Co. KG (identified in this brief as "Kelzenberg-Wumag"). (*Id*. ¶ 5). Although Kelzenberg-Wumag adopted the Wumag name, there is not now, and has never been, commonality of officers, directors, or stockholders between Wumag and Kelzenberg-Wumag. (*Id*. ¶ 14). In addition, Kelzenberg-Wumag does not now, and has never, held an ownership interest in the Machine. (*Id*. ¶ 18). It also did not design, test, manufacture, market, sell, import, distribute, deliver or install the Machine. (*Id*. ¶ 19). Kelzenberg-Wumag is not now, and has never been, registered with the South Carolina Secretary of State. (*Id*. ¶ 20). Kelzenberg-Wumag has never registered an agent for service of process with the South Carolina Secretary of State. (*Id*. ¶ 21). Kelzenberg-Wumag does not now, and has never, maintained an office, manufacturing facility or other place of business within South Carolina. (*Id*. ¶ 22). Kelzenberg-Wumag does not now, and has never, employed any personnel based in South Carolina. (*Id*. ¶ 23).

III. LEGAL STANDARD

A. Rule 12(b)(5)

Rule 12(b)(5) of the South Carolina Rules of Civil Procedure governs motions to dismiss for insufficiency of service of process. Rule 12(b)(5) is the "proper vehicle for challenging both the mode of delivery [and] the lack of delivery of the summons and complaint." *Unisun Ins. v.*

[4] A copy of the Asset Purchase Agreement is attached hereto as **Exhibit C**. Although the agreement is in German, the signature page demonstrates the agreement was entered into between Kelzenberg and Dr. Peter Minuth as Insolvency Administrator for the Wumag insolvency proceedings.

Hawkins, 342 S.C. 537, 543, 537 S.E.2d 559, 562 (Ct. App. 2000) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil 2d § 1353 (1990)) (internal citations omitted). When raising a defense under Rule 12(b)(5), the individual or corporation challenging service should provide sufficient specificity detailing how a plaintiff "failed to satisfy the requirements of the service provision he utilized." *Id*. at 542, 537 S.E.2d at 562.

B. Rule 12(b)(2)

Rule 12(b)(2) of the South Carolina Rules of Civil Procedure governs motions to dismiss for lack of personal jurisdiction. The party seeking to invoke personal jurisdiction over a nonresident defendant bears the burden of proving the existence of personal jurisdiction. *Moosally v. W.W. Norton & Co.,* 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Id*. "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or 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). When a defendant challenges the court's personal jurisdiction under Rule 12(b)(2), the plaintiff has the burden of proving that jurisdiction exists by a preponderance of the evidence. *Sunny Days Entm't, LLC v. Traxxas, L.P.*, 376 F. Supp. 3d 654, 658 (D.S.C. 2019).

C. Rule 56(c)

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri,* 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co*., 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). When a party makes a

motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial." *Coker v. Cummings*, 381 S.C. 45, 54, 671 S.E.2d 383, 388 (Ct. App. 2008) (quoting *S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.,* 283 S.C. 182, 188–89, 322 S.E.2d 453, 457 (Ct. App. 1984)). The nonmoving party must specifically set forth such facts, "as would be admissible in evidence," to show that a true jury issue exists. *See* 56(e), SCRCP. "If the adverse party does not respond accordingly, the trial court shall enter summary judgment against him if appropriate." *Coker,* 381 S.C. at 54, 671 S.E.2d at 388. "When a party makes no factual showing in opposition to a motion for summary judgment, the trial 'court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law.'" *Id.*

IV. ARGUMENT

A. Plaintiffs Have Not Properly Served Kelzenberg-Wumag and Plaintiffs' Claims Are Now Barred by the Statute of Limitations.

Plaintiffs' Complaint should be dismissed because Plaintiffs have not properly served Kelzenberg-Wumag. As a result, because the statute of limitations has run and because Plaintiffs did not serve Kelzenberg-Wumag within 120 days of the filing of the Complaint, Plaintiffs' claims are time-barred.

i. Kelzenberg-Wumag Is Not Subject to Service Pursuant to S.C. Code Ann. § 15-9-245

Plaintiffs filed this action on January 6, 2021, fourteen days before the expiration of the statute of limitations. Plaintiffs' only attempt to serve Kelzenberg-Wumag was through the South Carolina Secretary of State pursuant to S.C. Code Ann. § 15-9-245. Plaintiffs sent copies of the Summons and Complaint to the Secretary of State who then purported to mail a copy to Kelzenberg-Wumag in Germany. Plaintiffs' attempt at service through section 15-9-245 fails.

Section 15-9-245(a) provides a means for service on a foreign corporation not authorized to do business in the State of South Carolina but that does, in fact, conduct business within the state. Under section 15-9-245(a), "[e]very 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***,…is considered to have designated the Secretary of State as its agent upon whom process against it may be served...." (emphasis added). The plain language of section 15-9-245 clearly provides that a foreign corporation must do business in South Carolina, "either itself or through an agent," in order to be subject to service under the statute. *See* S.C. Code Ann. § 15-9-245. Case law interpreting the statute is equally clear. In *South Carolina v. Bulgartabac Holding Grp.*, No. CV 3:05-124-22, 2005 WL 8165771, at *2 (D.S.C. May 24, 2005), the district court found that section 15-9-245 "applies to any [] corporation that does 'any business' in South Carolina 'either itself or through an agent'" and explicitly held that "[i]n order for § 15-9-245(a) to apply, it [is] necessary to find that [a defendant] does business in South Carolina, either itself or through an agent." *South Carolina v. Bulgartabac Holding Grp.*, No. CV 3:05-124-22, 2005 WL 8165771, at *2 (D.S.C. May 24, 2005) (quoting S.C. Code Ann. § 15-9-245).

When it was purportedly served, Kelzenberg-Wumag did not do business in South Carolina. (*See* Hess Declaration ¶¶ 17–23). In the more than four years that this case has been pending, Plaintiffs have not offered *any* evidence to refute this fact. There is no evidence in the record that Kelzenberg-Wumag did business in South Carolina at the time it was purportedly served in January 2021. The fact that Wumag did business in South Carolina prior to that date is irrelevant. Kelzenberg-Wumag and Wumag are separate and distinct entities. Plaintiffs pointing to shipments made by Wumag prior to the date of purported service only further demonstrates that there is no evidence that Kelzenberg-Wumag did business in South Carolina prior to service. Notably, the unauthenticated "customs records" relied upon by Plaintiffs show no shipments

between for a more than two year period between May 2019 and July 2021. The records support Kelzenberg-Wumag's position that it did not do business in South Carolina when Plaintiffs attempted to serve it in January 2021. Kelzenberg-Wumag is not subject to service pursuant to section 15-9-245.[5]

ii. Plaintiffs Have Not Commenced an Action Within the Statute of Limitations, and Their Claims Are Now Time-Barred

S.C. Code Ann. § 15-3-20(B) governs the commencement of actions and states: "A civil action is commenced when the summons and complaint are filed with the clerk of court ***if actual service is accomplished within one hundred twenty days after filing.***" Similarly, Rule 3(a) of the South Carolina Rules of Civil Procedure provides:

> (a) **Commencement of civil action**. A civil action is commenced when the summons and complaint are filed with the clerk of court if:
>
> > (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or
> >
> > (2) ***if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.***

Rule 3(a), SCRCP (emphasis added). Interpreting section 15-3-20(B) and Rule 3(a), SCRCP, our Supreme Court has held that "[w]hen service occurs outside of the statute of limitations it, must occur within 120 days of filing the complaint." *Mims ex rel. Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 347, 732 S.E.2d 395, 398 (2012).

Plaintiffs' failure to serve Kelzenberg-Wumag within 120 days of the filing of the Complaint requires dismissal of this action. Plaintiffs' claims arise out of an injury occurring on January 22, 2018, and are subject to a three-year statute of limitations. *See* Compl. ¶ 8; S.C. Code Ann. § 15-3-350 (establishing a three-year statute of limitations for personal injury claims).

[5] Plaintiffs have also failed to comply with section 15-9-245(c), which sets forth specific requirements for demonstrating proof of service, including the filing of an affidavit of compliance and a return receipt signed by Kelzenberg-Wumag evidencing actual delivery of the Summons and Complaint. Plaintiffs have not (and cannot) satisfy the requirements of section 15-9-245(c).

Plaintiffs filed this action on January 6, 2021, just 14 days prior to the expiration of the statute of limitations. To timely commence an action, Plaintiffs were required to serve Kelzenberg-Wumag on or before May 6, 2021. *See* S.C. Code Ann. § 15-3-20(B) and Rule 3(a), SCRCP. Plaintiffs have missed the deadline by over four years. Under black-letter South Carolina law, Plaintiffs have failed to commence an action within the required time period, and Plaintiffs' claims must be dismissed. *See Kinder v. City of Myrtle Beach*, No. 4:15-cv-01416-RBH, 2017 WL 227969 (D.S.C. Jan. 19, 2017) (applying S.C. Code Ann. § 15-3-20(B) and Rule 3(a), SCRCP and dismissing plaintiff's complaint, with prejudice, because the complaint was not served within the statute of limitations or within 120 days of the filing of the summons and complaint).

B. The Exercise of Personal Jurisdiction over Kelzenberg-Wumag in South Carolina Would Violate the Due Process Clause

Although Plaintiffs' failure to properly serve Kelzenberg-Wumag within the required time period is dispositive, Rule 12(b)(2), SCRCP provides additional grounds for this Court to dismiss Plaintiffs' Complaint because this Court exercising personal jurisdiction over Kelzenberg-Wumag would violate the Due Process Clause.

i. The Due Process Clause and Personal Jurisdiction

The "Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945)). The minimum contacts requirement "protects a defendant from burdensome litigation in a far-flung jurisdiction" and upholds the general principle of law that "those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

Traditionally, in South Carolina, the determination of whether a court may exercise personal jurisdiction over a nonresident involved a two-step analysis, which examined (1) whether the South Carolina long-arm statute is satisfied, and then (2) whether the nonresident's contacts in South Carolina satisfied due process. *Cribb v. Spatholt*, 382 S.C. 490, 499, 676 S.E.2d 714, 719 (Ct. App. 2009) (citing *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008)). However, "because South Carolina treats its long-arm statute as coextensive with the due process clause, the question becomes whether the exercise of personal jurisdiction would violate due process." *Moosally,* 358 S.C. at 329, 594 S.E.2d at 883; *see also Sunny Days Entm't, LLC*, 376 F. Supp. 3d at 659 (D.S.C. 2019) ("South Carolina's long-arm statute has been interpreted to reach the outer bounds permitted by the Due Process Clause.").

There are two ways to establish personal jurisdiction: (1) general jurisdiction and (2) specific jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). This Court lacks both general and specific jurisdiction over Kelzenberg-Wumag.

ii. There Is No Basis for This Court to Exercise General Personal Jurisdiction over Wumag

"In recent years, the Supreme Court has significantly narrowed the reaches of general personal jurisdiction." *Sunny Days Entm't, LLC*, 376 F. Supp. 3d at 660; *see also Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Under the Due Process Clause, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially ***at home*** in the forum State." *Daimler AG*, 571 U.S. at 138–39 (emphasis added) (citing *Goodyear*, 564 U.S. at 919). "[O]nly a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Id*. at 137 (citing *Goodyear*, 564 U.S. at 919). For corporate defendants like Kelzenberg-Wumag, "the 'paradigm' forums in which it can be considered 'at home' are the [company's] place of incorporation and its principal place of

business." *See BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549 (2017) (citing *Daimler AG*, 571 U.S. at 137). Beyond where the corporate defendant is incorporated or maintains its principal place of business, only in an "exceptional case" will contacts with another forum be "so substantial and of such a nature as to render the corporation at home in that State." *See Daimler AG*, 571 U.S. at 139 n.19. Kelzenberg-Wumag is a German company with its principal place of business in Düren, Germany. (Hess Declaration ¶ 4). The Hess Declaration makes it clear that Kelzenberg-Wumag is not "at home" in South Carolina. As such, there is no basis to argue Kelzenberg-Wumag is subject to general jurisdiction in South Carolina.

iii. There Is No Basis for This Court to Exercise Specific Personal Jurisdiction over Kelzenberg-Wumag

This Court also lacks specific personal jurisdiction over Kelzenberg-Wumag. For specific personal jurisdiction, due process mandates that a defendant have sufficient minimum contacts with the forum state such that it could reasonably anticipate being haled into court there, and such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Power Prod. & Servs. Co.,* 379 S.C. at 431, 665 S.E.2d at 665. Guided by these principles, "[t]he determination of whether the requirements of due process are satisfied involves a two-prong analysis of (1) the 'power' prong, under which minimum contacts grant a court the 'power' to adjudicate the action; and (2) the 'fairness' prong, which requires the exercise of jurisdiction to be 'reasonable' or 'fair.'" *Hidria, USA, Inc. v. Delo*, 415 S.C. 533, 541–42, 783 S.E.2d 839, 843 (Ct. App. 2016). If a plaintiff fails to satisfy one of the prongs, "the exercise of personal jurisdiction over the [nonresident] defendant fails to comport with the requirements of due process." *Id*. (citing *S. Plastics Co.*, 310 S.C. at 260, 423 S.E.2d at 131). In this case, Plaintiffs fail to satisfy both the "power" prong and the "fairness" prong.

(a) Plaintiffs Fail to Satisfy the Power Prong Because Kelzenberg-Wumag Does Not Have "Minimum Contacts" with the State of South Carolina

The power prong of the due process test requires "a minimum contacts analysis" to determine whether a defendant has "directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." *Id*. (citing *Moosally*, 358 S.C. at 331–332, 594 S.E.2d at 884–85). In *Moosally*, the court explained the minimum contacts requirement as follows:

> Without minimum contacts, the court does not have the 'power' to adjudicate the action. ***It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.*** The 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.

Moosally, 358 S.C. at 331–332, 594 S.E.2d at 884–85 (emphasis added) (internal citations omitted).

The unopposed declaration of Michael Hess establishes that Kelzenberg-Wumag does not have minimum contacts with South Carolina.[6] Kelzenberg-Wumag is not now, and has never been, registered with the South Carolina Secretary of State. (Hess Declaration ¶ 20). Kelzenberg-Wumag has never registered an agent for service of process with the South Carolina Secretary of State. (*Id.* ¶ 21). Kelzenberg-Wumag does not now, and has never, maintained an office, manufacturing facility or other place of business within South Carolina. (*Id.* ¶ 22). Kelzenberg-Wumag does not now, and has never, employed any personnel based in South Carolina. (*Id.* ¶ 23).

It is also undisputed that Kelzenberg-Wumag has no contacts with South Carolina related to this case. "In order for a state court to exercise specific jurisdiction, 'the suit' must arise out of or relate to the defendant's contacts with the forum." *See Bristol-Myers Squibb Co. v. Superior*

[6] Again, "[w]hen a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Power Prods. & Servs. Co.,* 379 S.C. at 430, 665 S.E.2d at 664.

Court of California, San Francisco Cty., 137 S.Ct. 1773, 1780 (2017). "[T]here must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State." *Id*. "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id*. at 1781.

Kelzenberg-Wumag has no connection to Plaintiffs' alleged injuries. Eighteen months after the alleged accident, Kelzenberg-Wumag entered into an asset purchase agreement to purchase the assets, but not the liabilities, of Wumag. (Hess Declaration ¶¶ 17–18). Kelzenberg-Wumag did not design, test, manufacture, market, sell, import, distribute, deliver or install the Machine. (*Id*. ¶ 19). This is undisputed—Wumag admits that it sold the Machine to Bondex in 2016. (*See* Wumag's Answer to Plaintiffs' Amended Complaint. ¶ 7; Wumag's Answer to Kelzenberg-Wumag's Crossclaims, ¶ 57). Based on Kelzenberg-Wumag's lack of any connection to the accident and Plaintiffs' alleged injuries, there is no basis for this court to exercise over Kelzenberg-Wumag in this case.

Plaintiffs argument that jurisdiction should be based on purported contacts with South Carolina after the filing of the Complaint ignores well-settled law. ***Personal jurisdiction must exist at the time of filing***. *See, e.g., Gonzalez Corp. v. Consejo Nacional De Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980) (defendant's "visit occurred after the filing of the complaint in this action so it cannot establish personal jurisdiction"); *Rice v. Karsch*, 154 F. App'x 454, 462 (6th Cir. 2005) (actions taken or communications sent by a defendant after the filing of a complaint should not, as a matter of law, be considered when determining whether the defendant had "purposefully availed" himself of the privilege of acting in that jurisdiction); *Duravest, Inc. v. Viscardi*, 581 F.Supp.2d 628, 639 (S.D.N.Y.2008) (contacts that "occurred after the complaint was filed ... are therefore irrelevant to this [personal jurisdiction] inquiry"); *Brunson v. Kalil & Co.*,

404 F.Supp.2d 221, 236 (D.D.C.2005) ("This Court can find personal jurisdiction based only on the acts that had occurred at the time the Complaint was filed, not those acts occurring after Plaintiff filed her Complaint").

Plaintiffs claiming that Wumag's contacts with South Carolina (prior to Kelzenberg-Wumag's existence) provides a basis for jurisdiction also ignores well-settled law. Minimum contacts must arise out of contacts that the 'defendant [itself]' creates with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (emphasis added) (quoting *Burger King Corp.,* 471 U.S. at 474 (1985)). The activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 417 (1984). The Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Walden*, 571 U.S. at 284.

Moreover, Plaintiffs' claim that Wumag's contacts with South Carolina ***must*** be imputed to Kelzenberg-Wumag is simply incorrect. Even the cases cited by Plaintiffs highlight the necessity of finding that "forum law would hold the successor liable for its predecessor's actions." *Richmond v. Madison Mgmt. Grp., Inc*.,918 F.2d 438, 454 (4th Cir. 1990). As noted by one court:

> The basic test is to gear the jurisdiction question to whether, as a substantive matter, the successor corporation may be liable for the obligations of the predecessor. The mere fact that a corporation acquires all the assets of another does not necessarily mean it will be liable for the obligations of its predecessor. If it is liable for the predecessor's obligations, however, it will be subject to long-arm jurisdiction in a suit to enforce the obligation if the predecessor would have been subject to such jurisdiction.

Inter–Americas Ins. Corp., Inc. v. Xycor Sys. Inc., 757 F.Supp. 1213, 1217 (D.Kan.1991); *see also Johnston v. Pneumo Corp.,* 652 F.Supp. 1402, 1406 (S.D.Miss.1987) ("This Court declines to hold that contacts with a forum may be attributed or imputed to a successor corporation simply because

that corporation purchases assets and liabilities" of predecessor that was subject to personal jurisdiction). Here, as detailed below, Kelzenberg-Wumag is not subject to successor liability. Therefore, under well-settled law, Wumag's contacts with South Carolina cannot be imputed to Kelzenberg-Wumag.

(b) Plaintiffs Fail to Satisfy the Fairness Prong Because This Court Exercising Jurisdiction over Kelzenberg-Wumag Does Not Comport with the Notions of "Fair Play and Substantial Justice"

Even if Plaintiffs could establish that Kelzenberg-Wumag has sufficient minimum contacts with the State of South Carolina, which it cannot, this Court must also consider the "fairness" prong, which examines whether the exercise of personal jurisdiction over Kelzenberg-Wumag comports with "traditional notions of fair play and substantial justice." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. at 491, 611 S.E.2d at 508 (citing *Burger King Corp.,* 471 U.S. at 464). Plainly stated, the court must find that the exercise of jurisdiction is "reasonable" or "fair." Under the fairness prong, "the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction." *Id*. (citing *Clark v. Key,* 304 S.C. 497, 405 S.E.2d 599 (1991)).

The relevant factors weigh heavily against this case continuing in South Carolina. Kelzenberg-Wumag has no contacts in South Carolina related, in any way, to this case. No act or omission of Kelzenberg-Wumag gives rise to Plaintiffs' claims. The analysis relating to the third element is moot. Plaintiffs have already named Wumag and this case will continue in South Carolina. Even ignoring that there is no basis for liability against Kelzenberg-Wumag, the inconvenience of forcing it to defend a suit in which it has no contacts is readily apparent. Finally, South Carolina has no legitimate interest in exercising jurisdiction over a nonresident defendant

that has no connection to the injuries alleged by Plaintiffs. For all of these reasons, it would be unfair for this Court to exercise jurisdiction over Kelzenberg-Wumag.

C. Kelzenberg-Wumag Cannot Be Liable to Plaintiffs Because It Did Not Design, Manufacture, Sell, Deliver or Install the Machine

Plaintiffs' claims against Kelzenberg-Wumag are based on the mistaken allegation that it designed, manufactured, sold, delivered, and/or installed the Machine. (*See generally,* Compl.). Demonstrating Plaintiffs' confusion at the time the lawsuit was filed, the Complaint also alleges that Wumag designed, manufactured, sold, delivered, and/or installed the Machine. (*See id*.). The pleadings and evidence establish that Wumag, not Kelzenberg-Wumag, designed, manufactured, sold, delivered, and/or installed the Machine.

First, Wumag admits that it designed, manufactured and sold the Machine. In response to Plaintiff's interrogatories to Wumag seeking information regarding the design and manufacture of the Machine, Wumag responded as follows:

> ***The design of the Machine was a collaborative process between Wumag and Bondex***, which provided Wumag with specific design requests, standards, and measurements. Wumag worked in conjunction with Bondex to finalize a custom design (including safety features) for the Machine. ***Following Bondex's approval of the design, Wumag then manufactured the Machine*** in accordance with the applicable standard of care. Upon information and belief, in conjunction with Bondex employees, then Wumag employees Sebastian Becker, Henning Gugel, Gerald Raeth, Rudiger Muller, and Achin Gesser assisted in the design of the Machine.

(Wumag's Answers to Plaintiffs' First Set of Interrogatories ¶¶ 14–15 attached hereto as **Exhibit D** (emphasis added)). In response to Plaintiffs' interrogatory seeking information on the delivery of the Machine, Wumag admits that it "delivered the Machine to Bondex in or around 2016." (*Id*. ¶ 19).

In addition to Wumag's admissions, there is clear evidence that Wumag did, in fact, design, manufacture and/or sell the [M]achine. A plate attached to the Machine demonstrates it was

manufactured by Wumag in 2016, approximately two years before Plaintiff's accident and more than three years before Kelzenberg-Wumag's asset purchase.

(*See* **Exhibit E**). The reference to Krefeld, Germany on the plate further demonstrates that Kelzenberg-Wumag has no connection to the Machine. As set forth above, Kelzenberg-Wumag is registered and based in Düren, Germany (Hess Declaration ¶¶ 4–5). When it operated, Wumag was based in Krefeld, Germany. (*Id.* ¶ 7).

There is absolutely no evidence to support Plaintiffs' allegation that Kelzenberg-Wumag designed, manufactured, sold, delivered, and/or installed the Machine. Pursuant to Rule 56(c), SCRCP, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). When, like here, Kelzenberg-Wumag demonstrates "there is an absence of evidence to support [Plaintiffs'] case," Plaintiffs must "set forth specific facts showing that there is a genuine issue for trial" and that such facts "would be

admissible in evidence." See Rule 56(e), SCRCP.[7] Plaintiffs have clearly failed to show a jury issue exists as to Kelzenberg-Wumag.

D. Kelzenberg-Wumag Is Not Liable to Plaintiffs Under a Theory of Successor Liability

After more than four years of litigation and nearly six years since Kelzenberg-Wumag purchased Wumag's assets, Plaintiffs have offered no evidence whatsoever to support their claim of successor liability against Kelzenberg-Wumag. This absence of proof is dispositive. *See Baughman v. AT&T*, 306 S.C. 101, 110, 410 S.E.2d 537, 543 (1991) ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial."). There is no document or testimony in this case suggesting that Kelzenberg-Wumag assumed any of Wumag's liabilities or meets any recognized basis for imposing successor liability.

Knowing the application of South Carolina law is fatal to their successor liability claim against Kelzenberg-Wumag, with any supporting authority, Plaintiffs argue German successor liability law applies.[8] However, "[u]nder traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the lex loci delicti, the law of the state in which the injury occurred." *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001). In

[7] The Supreme Court recently clarified that the "'mere scintilla' standard previously applied by South Carolina courts does not apply under Rule 56(c)." *See Kitchen Planners, LLC v. Friedman,* 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). Rather, as set forth in the rule, the proper standard is whether a "genuine issue of material fact" exists. *Id*.

[8] Regardless of whether German or South Carolina law applies, Kelzenberg-Wumag is not liable under a theory of successor liability. The analysis under German law is straightforward—a buyer of the assets of an insolvent company through German insolvency proceedings does not assume the liabilities of the insolvent company. Plaintiffs claim "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.'" (*See* Plaintiffs' Memorandum in Opposition to Motion to for Summary Judgment, July 2, 2025). However, Plaintiffs ignore that Germany's Federal Court of Justice has ruled that Section 25 of the German Commercial Code does not apply when, as here, a transfer of assets take place through insolvency proceedings. *See* BGH, December 3, 2019, ZR 457/; *see also* https://www.mtrlegal.com/en/sale-during-self-administered-insolvency-buyer-is-not-liable-for-existing-liabilities/;https://www.fgvw.de/en/news/archive-2020/is-there-a-liability-for-old-debts-in-case-of-buying-a-business-from-the-self-administrator

factually analogous cases, our Supreme Court has consistently applied South Carolina successor law. *See Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.,* 424 S.C. 256, 818 S.E.2d 447 (2018) (applying South Carolina successor liability law when a company went through bankruptcy proceedings in Ohio but the alleged injury occurred in South Carolina); *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 314–16, 622 S.E.2d 213, 216–217 (2005) (applying South Carolina law to determine if purchaser of a company's assets out of California bankruptcy proceedings was liable for an accident occurring in South Carolina.

South Carolina law is clear—a successor corporation is not liable for the debts or liabilities of its predecessor unless one of four narrow exceptions applies. The South Carolina Supreme Court has consistently held that liability may attach only if: (1) there was an agreement to assume the predecessor's debts, (2) the circumstances surrounding the transaction indicate a consolidation or merger of the two corporations, (3) the successor company is a mere continuation of the predecessor, (4) the transaction was fraudulently entered into for the purpose of wrongfully defeating creditors' claims. *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 314–16, 622 S.E.2d 213, 216–217 (2005) ("a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless" an exception applies.); *Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451 (2018) ("Although the mere continuation test is a high burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability.").

As an initial matter, Plaintiffs have not alleged that one of the exceptions applies. They have only generally alleged that Kelzenberg-Wumag is subject to successor liability. (*See* Compl. ¶ 4). Regardless, the undisputed evidence confirms that none of the exceptions apply. Kelzenberg-Wumag purchased the assets, but did not assume the liabilities, of Wumag. (Hess Declaration ¶¶ 8–12). Kelzenberg-Wumag and Wumag do not have common officers, directors, or shareholders,

and Kelzenberg-Wumag had no prior affiliation with Wumag before entering into the asset purchase. (Hess Declaration ¶ 14). In summary, there is no evidence of any agreement to assume liability, no evidence of merger or consolidation, no evidence of a "mere continuation," and no evidence of fraud. On the contrary, the evidence confirms that Kelzenberg was a distinct and independent entity that acquired certain assets of Wumag, but did not assume any liabilities.

South Carolina courts have addressed the scenario presented in this case and have repeatedly rejected attempts to impose successor liability where, as here, a buyer entity acquires assets through bankruptcy proceedings. *See Eagle Window & Door, Inc.*, 424 S.C. at 265–269, 818 S.E.2d at 451–454 (rejecting successor liability where buyer acquired assets out of bankruptcy and there was no overlap in shareholders or directors); *Simmons*, 366 S.C. at 314–315, 622 S.E.2d at 216 (holding that a plaintiff may maintain a state law-based product liability claim under a successor liability theory against a successor corporation that purchased the predecessor's assets in a voluntary sale approved by the federal bankruptcy court only if one of the four exceptions applies).

In *Eagle Window & Door*, an insurance company filed a contribution action against Eagle Window & Door, Inc. for allegedly defective windows manufactured by a company called Eagle & Taylor Company. *Eagle Window & Door, Inc.,* 424 S.C. at 259, 818 S.E.2d at 449. At the time the windows were manufactured and sold, Eagle & Taylor was a wholly owned subsidiary of American Architectural Products Company. *Id*. A year later, the parent company filed for protection under the Bankruptcy Code, and substantially all of Eagle & Taylor's assets were sold to a hedge fund. *Id*. After the assets were conveyed, the acquiring company adopted the Eagle Window & Door name. *Id.*

After the asset purchase, Eagle Window & Door engaged in substantially the same business and used the same facilities as Eagle & Taylor. *Id.* Five of Eagle & Taylor's eight officers joined

Eagle Window & Door. *Id*. at 450. There was, however, little to no similarity of shareholders and directors. *Id*. at 449. Based on these facts, the insurer argued that Eagle Window & Door was a mere continuation of Eagle & Taylor because it retained a substantially similar name, produced the same products in the same facility, and benefited from Eagle & Taylor's history by holding itself out as a successor entity. *Id*. at 450. It also argued that commonality of only officers, directors, or shareholders—not all three—was required. *Id.* The trial court and court of appeals agreed with the insurer. The Supreme Court of South Carolina reversed, stating:

> The issue now before the Court hinges on the proper application of the mere continuation test established in *Simmons*. Eagle argues the trial court and court of appeals erred by holding *Simmons* only required a plaintiff to prove commonality of officers, directors, or shareholders, rather than all three classes, to establish mere continuation. We agree with Eagle.

Id. at 452–53. The Supreme Court's ruling is clear—successor liability under the "mere continuation" exception requires establishing commonality of officers, directors, ***and*** shareholders. Plaintiffs have not, and cannot, meet their burden in this case. Accordingly, Kelzenberg is entitled to summary judgment on Plaintiffs' vague allegation of successor liability.

V. CONCLUSION

For the foregoing reasons, Kelzenberg-Wumag respectfully requests that the Court issue an Order dismissing Plaintiffs' Complaint, with prejudice, pursuant to Rule 12(b)(5), Rule 12(b)(2) and/or Rule 56(c), SCRCP.

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