EXHIBIT
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STATE OF SOUTH CAROLINA COUNTY OF EDGEFIELD Barry Lanham and Obvia Gamble-Lanham, Plaintiffs, v. Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG and Wumag Texroll GmbH & Co. KG, Defendants. Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG, Third-Party Plaintiff, v. Wumag Texroll GmbH & Co. KG, Third-Party Defendant.	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 2021-CP-19-00005 **SUPPLEMENTAL MEMORANDUM IN FURTHER OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Barry Lanham and Obvia Gamble-Lanham respectfully submit this Supplemental Memorandum in Opposition to Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG's ("Wumag II") Motion for Summary Judgment. At the July 7, 2025 hearing on Wumag II's motion, Plaintiffs took the position that under South Carolina choice of law principles, German law, specifically Handelsgesetzbuch [HGB] [Commercial Code], § 25, would apply to determine whether Wumag II was the successor-in-liability to Wumag Texroll GmbH & Co. KG ("Wumag I"), and whether Wumag I's jurisdictional contacts could be imputed to

Wumag II. Wumag II's position was that under federal and state common law, the jurisdictional contacts of Wumag I could only be imputed to Wumag II by applying South Carolina successor liability law to the facts of this case.

Wumag II took the alternative position that if German law did apply, German Comm. Code § 25 would not provide for successor liability in this case because Wumag II purchased the assets of Wumag I from an insolvency administrator out of an opened insolvency proceeding. Likewise, Plaintiffs took the alternative position that even if South Carolina successor liability law had to be applied to determine if Wumag I's forum contacts could be imputed to Wumag II, the Supreme Court of South Carolina has not explicitly rejected a continuity of enterprise theory based on the doctrine's merits, which are essentially codified by German Comm. Code § 25, and in fact that the Supreme Court had strongly indicated that there is merit to the theory and that it would take up the opportunity to adopt the theory at some point in the future. Plaintiffs also argued that the facts of this case strongly supported a continuity of enterprise theory.

At the hearing, Wumag II argued that under federal and state common law, a corporation's contacts with a forum may be imputed to its successor only if *forum law* would hold the successor liable for the actions of its predecessor. *E.g. Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 783 (7th Cir. 2003); *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1131 (10th Cir. 1991). Plaintiffs argued that forum choice of law principles had to be applied first to determine whether forum law or foreign law would determine whether a corporation

was a successor. The Court asked the undersigned if there was any case law, federal or state, supporting that the forum state's choice of law principles would be first applied to determine the applicable successor liability law in a jurisdictional contacts analysis. The undersigned has not been able to locate any case law addressing the precise issue and concedes that it is likely that under the current framework of the successor liability analysis, at least for the purpose of determining whether jurisdictional contacts can be imputed, South Carolina law controls.[1]

Under South Carolina law as well as the law of the majority of state jurisdictions, and as argued by Wumag II, in general a corporation is not the successor-in-liability to a predecessor unless one of four exceptions is met. As set forth in *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924) more than 100 years ago, a "purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) *the successor company was a mere continuation of the predecessor*, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditor's claims. *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 315-16, 622 S.E.2d 213, 217 (2005) (Burnett, J., dissenting).

In *Simmons*, the United States District Court for the District of South Carolina certified a question to the Supreme Court of South Carolina asking: "In the product

[1] To state the obvious, a threshold determination for the Court is whether to apply South Carolina or German successor liability law.

liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?" *Id.* at 310, 622 S.E.2d at 214. The Supreme Court relied on *Brown* to resolve the question, despite the plaintiff's argument that under a continuity of enterprise theory the defendant would be liable as a successor-in-interest. *Id.* at 312, 622 S.E.2d at 215.

In a lengthy dissent, Justice Burnett began his analysis by stating "I disagree with the majority that the certified questions may be resolved by relying exclusively on a general rule of corporate law set forth in *Brown* more than eighty years ago . . . . *Brown* should be the starting point of our analysis, not the beginning and end of it." *Id.* at 317, 622 S.E.2d at 217. Justice Burnett noted that the *Brown* rule predated modern products liability law, including the tort of strict liability, and that a continuity of enterprise theory should be folded into the successor liability analysis under *Brown*'s "mere continuation" exception because such an approach comported with product liability law's policy goals of "acting as a deterrent and a method of allocating the risk of loss among those best equipped to deal with it." *Id.* at 317-24, 622 S.E.2d at 218-21 (quoting *Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 454, 595 S.E.2d 493, 496 (2004)).

Additionally, such an approach would conform with the rationale of *Brown*'s general rule:

> It would be manifestly unfair, unjust, and contrary to equity that [the successor] should thus acquire all of the assets of the other corporation, and its franchise, both to be, and to do, leaving no one to be sued by its creditors and no property to satisfy its debts and other liabilities, and

> not itself become responsible for such debts and other liabilities. *If [the successor] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches with it.*"

Id. at 317-18, 622 S.E.2d at 218 (quoting *Brown*, 128 S.C. at 432, 123 S.E. at 99). In finding that historically South Carolina would recognize a continuity of enterprise theory under *Brown* within the tort context, Justice Burnett relied in part upon *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939).

In *Long*, the plaintiff was injured when her vehicle collided with a baking company truck. Two years prior to the wreck, the assets of the predecessor corporation (Carolina Baking) were transferred to a successor corporation (Columbia Baking), a Delaware corporation with its principal place of business in Georgia. Carolina Baking was dissolved after the asset sale. Columbia Baking continued to use the same trade name as Carolina Baking, licensed the subject truck and its business under the name of Carolina Baking, and used the name on its vehicles and buildings. The court disagreed with the defendant's argument that the plaintiff had sued the wrong entity and that Carolina Baking no longer existed under what amounts to a continuity of enterprise theory:

> The verdict and judgment against Carolina Baking Company [are] binding upon the existent corporate entity and its assets, by whatsoever name it may be known or called. The corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it.

Simmons, 366 S.C. at 319, 622 S.E.2d at 219 (quoting *Long*, 190 S.C. at 377, 3 S.E.2d at 50).

Justice Burnett cited numerous factors for determining whether successor liability exists under a blended mere continuation/continuity of enterprise theory, including

> (1) whether the successor, taking lawful advantage of the predecessor's accumulated goodwill and reputation, held itself out to the world as a continuation of the predecessor through continued use of the predecessor's corporate identity, trade names, advertising, or other intellectual property; (2) whether the successor continued to manufacture substantially the same product line as the predecessor, recognizing that manufacturing activity by its nature involves modification of product lines and elimination of unprofitable items; (3) whether the successor retained the predecessor's managers, employees, or sales force; (4) whether the successor continued to use the predecessor's equipment, supplier, dealer, or customer lists; (5) whether the successor assumed those liabilities and obligations of the predecessor ordinarily necessary for the continuation of normal business operations of the predecessor; and (6) whether the successor's officers, directors, or shareholders are substantially the same as the predecessor's. No one factor can be dispositive in this fact-intensive analysis.

Id. at 323, 622 S.E.2d at 221.

Thirteen years later, the Supreme Court again addressed the continuity of enterprise theory in *Nationwide Mutual Insurance Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E.2d 447 (2018). The court, looking to *Simmons*, concluded that it had already "unequivocally rejected" the theory. *Id.* at 263, 622 S.E.2d at 451. This is a mischaracterization of the holding from *Simmons*. The court in *Simmons* did not flatly reject the theory; instead, it confined its holding to finding that the certified question could be answered by solely relying on *Brown*. *Simmons*, 366 S.C. at 312-13, 622 S.E.2d at 215. The *Simmons* majority neither engaged in a lengthy analysis of the continuity of enterprise theory or expressly held that it should be rejected outright

based on its merits. In a unanimous decision, the court in *Nationwide* went on to note that "there arguably may be merits to expanding South Carolina's successor liability test to include the continuity of enterprise theory", but that the issue was not before the Court and had not been advanced by the parties. *Nationwide*, 426 S.C. at 267, 818 S.E.2d at 453. The only members of the current Supreme Court who were also members of the *Nationwide* court, Justice Kittredge and Justice James, joined in that unanimous decision.

The United States District Court for the District of South Carolina has applied the continuity of enterprise theory to a products liability case under South Carolina law. In *Holloway v. John E. Smith's Sons Co., Div. of Hobam, Inc.*, 432 F. Supp. 454 (D.S.C. 1977), the court found that a successor was liable for a defective meat grinder manufactured by its predecessor. Analyzing the circumstances under the mere continuation exception, the court found that the successor had the same address and same employees as the predecessor, and that it held itself out to the public as a business entity under a name identical to its predecessor. *Id.* at 456. The court denied the successor's motion for summary judgment based on these facts.

Here, there is admissible evidence demonstrating that the circumstances of this case satisfy at least the first four factors of Justice Burnett's test. As previously demonstrated to the Court, Wumag II uses the exact same name, same logo, same manufacturing facility, same products, and holds itself out as the same company as Wumag II, boasting that it is more than 70 years old. (Ex. 1, Wumag website). Wumag II acquired Wumag I's commercial premises, machines, and trademarks in the asset

purchase agreement. (Ex. 2, Krafft-Walzen website). Further, Wumag II maintained the employees and staff of Wumag I as its own employees. (*Id.*). The brand name of Wumag Texroll remained unchanged. (*Id.*) None of these facts are disputed by Wumag II.

Imputing liability and contacts to Wumag II in this instance is in accord with the policy considerations underlying modern products liability law, as noted by Justice Burnett. If Wumag II is permitted to escape liability and the Court's jurisdiction, the only avenue left for Plaintiffs to recover for their injuries will be against an insolvent defendant who may or may not have viable coverage. This wholly shifts the costs for a defective product to the injured party, who happens to be the party least equipped to deal with the costs, and allows the company who has benefitted from all of the tortfeasor's good will, ingenuity, business acumen, and workforce to continue on with the predecessor's enterprise while taking none of its burdens. Such a result is contrary to modern products liability law and is manifestly inequitable.

This evidence is sufficient for the purposes of summary judgment for the Court to conclude that there is an issue of fact as to whether Wumag II is the successor of Wumag I, and therefore, that there is an issue of fact as to whether Wumag I's contacts are imputed to Wumag II such that Wumag II would be subject to the Court's personal jurisdiction and service pursuant to S.C. Code Ann. § 15-9-245. For these reasons and those argued to the Court in Plaintiffs' previous memorandum and at

the hearing on Wumag II's motion, Plaintiffs respectfully request that the Court deny Wumag II's motion.

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