

Oct 13 2026

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Marth M. Rivers, Circuit Court Judge

Appellate Case No.: 2025-002089

Barry Lanham and Obvia Gamble-Lanham,..... Appellants,

v.

Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co.:
GmbH & Co. KG and Wumag Texroll GmbH & Co. KG,..... Defendants,

of which Wumag Texroll GmbH & Co. KG f/k/a
Kelzenberg + Co.: GmbH & Co. KG is the Respondent.

RECORD ON APPEAL
VOLUME 2 OF 2

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THIRD CAUSE OF ACTION
(Breach of Express and Implied Warranties)

18. The above allegations are repeated as if quoted verbatim.

19. Wumag Texroll expressly and impliedly warranted that the Machine it sold was merchantable and fit for ordinary use.

20. Wumag Texroll breached express and implied warranties in that the Machine it designed, manufactured, sold, and installed and, which was used by the Plaintiff, was not merchantable and was unfit for ordinary, normal use.

21. The breach of Wumag Texroll's express and implied warranties in the sale of the Machine was the proximate cause of the damages Plaintiff sustained for which Defendant is liable.

FOURTH CAUSE OF ACTION
(Loss of Consortium)

22. The Plaintiff, Obvia Gamble-Lanham, due to the injuries sustained by her husband, has suffered the loss of his consortium, support, and care.

WHEREFORE, Plaintiffs pray for judgment against the Defendant for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

[SIGNATURE PAGE TO FOLLOW]

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January 6, 2021
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF EDGEFIELD	)	CIVIL ACTION NO.: 2021-CP-19-____
	)	
Barry Lanham and Obvia Gamble-Lanham,	)	
Plaintiffs,	)	
	)	
v.	)	SUMMONS
	)	(Jury Trial Demanded)
	)	
Wumag Texroll GmbH & Co. KG,	)	
Defendant.	)	

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, Peters, Murdaugh, Parker, Eltzroth & Detirck, P.A. at 101 Mulberry Street East, P.O. Box 457, Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

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January 6, 2021
 Hampton, South Carolina

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

COMPLAINT
(Jury Trial Demanded)

The Plaintiffs allege:

1. The Plaintiffs, Barry Lanham and Obvia Gamble-Lanham (“Plaintiffs” or “Lanham”) are residents of Edgefield County, South Carolina.
2. Obvia Gamble-Lanham is the wife of Barry Lanham.
3. The Defendant, Wumag Texroll GmbH & Co. KG (hereinafter referred to as “Wumag Texroll”) is a foreign corporation organized and maintaining its principal place of business in a state other than South Carolina. Wumag Texroll is engaged in the business of manufacturing, designing, testing, marketing, certifying, supplying, selling, importing and distributing steel industrial machines including, but not limited to, the Laminating Calender Line machine (“Subject Machine”) that forms the basis of this action.
4. Venue is proper in Edgefield County pursuant to S.C. Code Ann. § 15-7-30 as it is the county where the most substantial part of the act or omission giving rise to the cause of action occurred.
5. Wumag Texroll is subject to the jurisdiction of this Court.
6. Wumag Texroll 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.

7. After the Subject Machine was installed by Wumag Texroll, employees and/or agents of Wumag Texroll visited the Bondex plant in Trenton, SC and deactivated safety devices on the Subject Machine.

8. On January 22, 2018, Plaintiff, Barry Lanham, a Bondex, Inc. employee, was cleaning the machine when his left arm and hand was pulled into the Machine, resulting in severe and permanent damage to his left arm and hand.

FIRST CAUSE OF ACTION
(Negligence)

9. The above allegations are repeated as if quoted verbatim.

10. The injuries and damages sustained by Plaintiff are the direct and proximate result of the negligence, carelessness, recklessness, and wanton conduct of Wumag Texroll in the following particulars:

- a. In designing a machine that was unsafe and unreasonably dangerous;
- b. In manufacturing a machine that was unsafe and unreasonably dangerous;
- c. In selling a machine that was unsafe and unreasonably dangerous;
- d. In installing a machine that was unsafe and unreasonably dangerous;
- e. In failing to warn the Plaintiff of the dangerous and defective condition of the machine;
- f. In failing to incorporate certain safeguards on the machine that would have prevented the Plaintiff's injury;
- g. In deactivating safety devices on the Subject Machine that would have prevented Plaintiff's injury;
- h. In designing, manufacturing, selling, and installing a machine that could not be cleaned without endangering the person so cleaning;
- i. In failing to act as a reasonably prudent company would have acted under the same or similar circumstances;
- j. In designing, manufacturing, selling, installing, and altering a machine in utter disregard of the safety of Plaintiff;

- k. In failing to provide instructions about how to properly clean the machine; and
- l. In such other particulars as the evidence and testimony may establish.

11. As a result of the aforementioned events, Plaintiff suffered severe and permanent injury to this left arm and hand, and other parts of his body from which he has suffered and will continue to suffer physical pain; mental anguish and emotional distress; has expended and will in the future expend monies for medical care and treatment; caused to lose the enjoyment of life; and has lost income.

12. By reason of and in consequence of the above-mentioned negligent, careless, reckless, willful, and wanton conduct of Wumag Texroll, Plaintiff has suffered the injuries, losses, and damages complained of for which Wumag Texroll is liable.

SECOND CAUSE OF ACTION
(Strict Liability pursuant to S.C. Code Ann. § 15-73-10, et seq.)

13. The above allegations are repeated as if quoted verbatim.

14. Plaintiff's injuries occurred because the Machine was designed, manufactured, and sold by Wumag Texroll in a defective condition unreasonably dangerous to the Plaintiff.

15. Wumag Texroll designed, manufactured, and sold the Machine in a defective and unreasonably dangerous condition.

16. At the time of Plaintiff's injury, the Machine was in substantially the same condition as it was when it was installed by Defendant.

17. As a direct and proximate result of the defective and unreasonably dangerous condition of Defendant's machine, Plaintiff suffered the injuries and damages complained of for which Defendant is strictly liable, pursuant to S.C. Code Ann. § 15-73-10, to Plaintiff in an amount to be ascertained by the jury at the trial of this action.

THIRD CAUSE OF ACTION
(Breach of Express and Implied Warranties)

18. The above allegations are repeated as if quoted verbatim.

19. Wumag Texroll expressly and impliedly warranted that the Machine it sold was merchantable and fit for ordinary use.

20. Wumag Texroll breached express and implied warranties in that the Machine it designed, manufactured, sold, and installed and, which was used by the Plaintiff, was not merchantable and was unfit for ordinary, normal use.

21. The breach of Wumag Texroll's express and implied warranties in the sale of the Machine was the proximate cause of the damages Plaintiff sustained for which Defendant is liable.

FOURTH CAUSE OF ACTION
(Loss of Consortium)

22. The Plaintiff, Obvia Gamble-Lanham, due to the injuries sustained by her husband, has suffered the loss of his consortium, support, and care.

WHEREFORE, Plaintiffs pray for judgment against the Defendant for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

[SIGNATURE PAGE TO FOLLOW]

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January 6, 2021
Hampton, South Carolina

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, SCRPC." 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), SCRPC. “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), SCRCF (emphasis added). Interpreting section 15-3-20(B) and Rule 3(a), SCRCF, 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), SCRCPP. 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), SCRCPP 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), SCRCPP 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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July 3, 2025

Charleston, South Carolina

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Exhibit A

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Edgefield
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1900005

Barry Lanham et al
PLAINTIFF(S)Wumag Texroll Gmbh & Co. Kg
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Parties convened at the Edgefield County Courthouse on July 18, 2022 on Defendant Wumag Texroll GmbH & Co. KG's Motion to Dismiss. Present at the hearing was John Parker on behalf of the Plaintiff and Robert Osborne on behalf of the Defendant.

At the hearing, defendant sought an order dismissing plaintiffs' complaint for lack of personal jurisdiction, insufficient service of process, and failure to state a claim pursuant to Rules 12(b)(2), 12(b)(5), and 12(b)(6). Plaintiff argued that the Court has personal jurisdiction over the Defendant, that service through the South Carolina Secretary of State was proper, and that the Defendant is liable under SC successor liability law.

Upon review and consideration of arguments made at the hearing, a review of memoranda prepared by the parties and the affidavits provided, the court hereby DENIES the motion at this time. After the completion of appropriate discovery, Defendant's arguments may be readdressed through Rule 56, SCRPC.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/21/2022 .

Alicia K. Clawson

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Edgefield Common Pleas

Case Caption: Barry Lanham , plaintiff, et al VS Wumag Texroll Gmbh & Co. Kg

Case Number: 2021CP1900005

Type: Order/Electronic Form 4

It Is So Ordered

s/ Walton J. McLeod

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Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF EDGEFIELD

Barry Lanham and Obvia Gamble-Lanham,

Plaintiff,

vs.

Wumag Texroll GmbH & Co. KG,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2021-CP-19-00005

**DECLARATION OF MICHAEL HESS
IN SUPPORT OF WUMAG TEXROLL
GMBH & CO. KG'S MOTION TO
DISMISS**

COMES NOW, Michael Hess, who deposes and states as follows:

1. My name is Michael Hess, and I am over the age of eighteen (18) years and am competent to give sworn testimony. I have personal, first-hand knowledge of the matters set forth in this declaration. I offer this declaration in support of Wumag Texrol GmbH & Co. KG's ("Wumag II") Motion to Dismiss in the above-captioned action.

2. I am the Managing Director of Wumag II.

3. Wumag II was previously named Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg"), and I previously served as the Managing Director of Kelzenberg from 2008 to 2019.

4. Wumag II is registered at the district court of Düren, Germany under number HRA 224 and the general partner GmbH under number HRB 154.

5. Wumag II's principal place of business is in Düren, Germany.

6. On September 1, 2019, insolvency proceedings concerning the assets of Wumag Texroll GmbH & Co. KG ("Wumag I") commenced in the district court of Krefeld, Germany.

7. Prior to being insolvent, Wumag I was registered at the district court of Krefeld, Germany under number HRA 3719.

8. On or around September 18, 2019, Kelzenberg entered into an asset purchase agreement to purchase the assets of Wumag I out of insolvency.

9. Dr. Peter Minuth, Attorney at Law and Insolvency Administrator, currently serves as the insolvency administrator for the Wumag I insolvency proceedings.

10. Pursuant to the asset purchase agreement, Kelzenberg purchased certain assets of Wumag I, including machinery, equipment, software licenses. Ownership of the purchased assets was transferred from Wumag I to Kelzenberg on October 1, 2019.

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11. The asset purchase was carried out in Germany and was governed by German law.
12. Under German law, an agreement to purchase assets does not provide for the assumption of liabilities, unless expressly agreed otherwise or statutory provisions of German law stipulate otherwise.
13. On September 18, 2019, for marketing reasons, Kelzenberg changed its name to Wumag II.
14. Despite Wumag II adopted the same name for marketing reasons following the asset purchase, there is not now, and has never been, commonality of officers, directors, or stockholders between Wumag I and Wumag II.
15. The Complaint in this action concerns injuries suffered by Plaintiff Barry Lanham ("Lanham") alleged to have occurred on January 22, 2018 at a Bondex, Inc. plant in Trenton, South Carolina. (See Compl. ¶¶ 3–8).
16. Lanham alleges he was injured by a Laminating Calendar Line machine which was designed and manufactured by Wumag Texroll GmbH & Co. KG and then sold by Wumag Texroll GmbH & Co. KG to Bondex, Inc. (See Compl. ¶¶ 3–8).
17. Lanham's alleged injuries which are the subject of this action and which give rise to the claims asserted in the Complaint occurred almost two years prior to Wumag II purchasing the assets of Wumag I.
18. Wumag II does not now, and has never held an ownership interest in the Laminating Calendar Line machine that allegedly caused Mr. Lanham's injuries.
19. Wumag II did not design, test, manufacture, market, sell, import, distribute, deliver or install the Laminating Calendar Line machine that allegedly caused Mr. Lanham's injuries.
20. Wumag II is not now, and has never been registered with the South Carolina Secretary of State.
21. Wumag II has never registered an agent for service of process with the South Carolina Secretary of State.
22. Wumag II does not now, and has never, maintained an office, manufacturing facility or other place of business within South Carolina.
23. Wumag II does not, does not now, and has never, employed any personnel based in South Carolina.
24. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.



Michael Hess

Date: 08/05/2021

Exhibit C

Vertrag

zwischen

Herrn Rechtsanwalt Dr. Peter Minuth in seiner Eigenschaft als Insolvenzverwalter über das Vermögen der WUMAG TEXROLL GmbH & Co. KG, Düsseldorfer Str. 100, 47809 Krefeld, geschäftsansässig Willstätterstraße 62, 40549 Düsseldorf

- nachfolgend: „Insolvenzverwalter“ oder „Verkäufer“ genannt -

sowie der

KELZENBERG + CO GmbH & Co. KG, vertreten durch die Kelzenberg + Co. Vertriebs GmbH, diese vertreten durch Herrn Michael Hess, Schoellerstraße 164, 52351 Düren

- nachstehend auch „**Käuferin**“ genannt -

- Insolvenzverwalter/Verkäufer und Käufer gemeinschaftlich auch „**die Parteien**“ genannt -

Präambel

Über das Vermögen der WUMAG TEXROLL GmbH & Co. KG (nachfolgend: „Schuldnerin“) ist mit Beschluss des Amtsgerichts Krefeld vom 04.06.2019 ein Insolvenzeröffnungsverfahren eingeleitet und Rechtsanwalt Dr. Peter Minuth zum vorläufigen Insolvenzverwalter bestellt worden.

Mit weiterem Beschluss vom 01.09.2019 ist das Insolvenzverfahren eröffnet und Dr. Minuth zum Insolvenzverwalter bestellt worden.

Die Schuldnerin betreibt auf dem Betriebsgelände Düsseldorfer Str. 100, 47809 Krefeld eine metallverarbeitende Produktionsstätte. Schwerpunktmäßig werden Walzen für die Kunststoff-, Papier- und insbesondere Textilherstellung hergestellt. Das Sortiment setzt sich aus drei Kernbereichen zusammen: Leitwalzen und Leitwalzenrohre, Trockenzyylinder / Kühlzyylinder sowie Doppelmantel-Walzen.

Zweck dieses Vertrages ist die Regelung der Veräußerung einzelner Vermögensgegenständen des Geschäftsbetriebes im Rahmen eines Unternehmenskaufvertrages.

In Kenntnis des Vorstehenden vereinbaren die Parteien Folgendes:

§ 1 Verkauf des Anlagevermögens/Umlaufvermögens

1. Der Insolvenzverwalter veräußert an die Käuferin nach Maßgabe von § 12 (Eigentumsvorbehalt) die in der **Anlage 1** aufgelisteten Maschinen und technischen Anlagen sowie Betriebs- und Geschäftsausstattung, soweit die Gegenstände zum Übernahmestichtag im Eigentum der Schuldnerin stehen. Mitverkauft sind die im Eigentum der Schuldnerin stehenden Softwarelizenzen, sofern gesetzlich zulässig. Dem Käufer ist bekannt, dass die Software MS office, Office Media Kit, MS Remote Desktop Services 2012, MS Office Remote Desktop Services User 2008 geleast ist und nicht mitverkauft wird. Der Käufer verpflichtet sich, unverzüglich die übernommene Software zu löschen, wenn Berechtigte Einwände gegen die Nutzung der und/oder Weitergabe der Software erheben oder zuständige Datenschutzbehörden dies fordern. Dabei ist es unerheblich, ob Einwände gegenüber dem Insolvenzverwalter oder der Käuferin geltend gemacht werden. Der Insolvenzverwalter wird den Käufer über solche Einwände oder Forderungen informieren. Klarstellend vereinbaren die Parteien, dass vom Verkauf nicht erfasst werden Einrichtungen (einschließlich der vorhandenen Computer und Server) im Verwaltungsgebäude mit Ausnahme der dort vorhandenen Dokumente.
2. Der Insolvenzverwalter verkauft an die Käuferin nach Maßgabe von § 12 (Eigentumsvorbehalt) die Vermögensgegenstände des Umlaufvermögens, die in der **Anlage 2** aufgeführt sind, soweit die Gegenstände zum Übernahmestichtag im Eigentum der Schuldnerin stehen. Klarstellend vereinbaren die Parteien, dass die auftragsbezogen bestellten Materialien und angearbeiteten Bestellungen auf dem Gelände nicht vom Verkauf erfasst sind.
3. Etwaige bestehende Sicherungs- und/oder Pfandrechte Dritter an den Kaufgegenständen werden vom Insolvenzverwalter gemäß den gesetzlichen Bestimmungen der Insolvenzordnung aus dem Kaufpreis abgelöst.
4. Gegenstände im Fremdeigentum sind in den **Anlagen 1 und 2** entsprechend gekennzeichnet und werden vom Verkauf bzw. der Übertragung nicht erfasst. Die Käuferin verpflichtet sich, diese Gegenstände auf erstes Anfordern an jeweiligen Dritten herauszugeben und den

Insolvenzverwalter bzw. die von ihm verwaltete Masse von jeglichen Ansprüchen der Dritten freizustellen.

Sollten darüber hinaus weitere Drittrechte festgestellt werden, so verpflichtet sich die Käuferin bereits jetzt, die betreffenden Gegenstände nach Aufforderung durch den Insolvenzverwalter an den Dritten herauszugeben und den Insolvenzverwalter insoweit freizustellen. Die Käuferin kann in diesem Fall für die betroffenen Gegenstände eine Rückzahlung des Kaufpreises entsprechend den Wertesätzen des Bewertungsgutachtens der Firma Aryus in Höhe der jeweiligen Liquidationswerte verlangen.

5. Sofern sich die Kaufgegenstände bei Dritten befinden, tritt der Insolvenzverwalter den Herausgabeanspruch an die Käuferin ab.

§ 2 Fortführung von Kundenaufträgen/Auftragsbestand

1. Die Käuferin hat vor Unterzeichnung des vorliegenden Vertrages alle laufenden Aufträge und Kundenbestellungen, wie sie in **Anlage 3** aufgeführt sind, eingesehen und erklärt sich bereit, diese, soweit sie bis zum Übernahmestichtag noch nicht abgeschlossen sind, im Auftrag des Insolvenzverwalters fertigzustellen und „ab Werk“ (Krefeld) vertragsgemäß zur Auslieferung an den Kunden bereitzustellen. Die Käuferin wird für diese Leistungen nach Fertigstellung auch die Rechnungen kostenfrei für den Insolvenzverwalter erstellen, an den Kunden versenden und Kopien zur Verfügung stellen sowie ggfs. eine Frachtversendung – sofern Teil des Leistungspakets für die Kunden – organisieren.

Zum Übernahmestichtag erfolgt eine gemeinsame Bewertung der Halbfertigbestände sowie der vorhandenen auftragsbezogenen Materialbestände unter Berücksichtigung der Auftragsmargen (nachfolgend kurz: „Halbfertigwert“). Nach Fertigstellung erfolgt eine pauschale Abrechnung der jeweiligen Produkte, indem die Käuferin die Differenz zwischen festgestelltem Halbfertigwert und dem fakturierten Auftragswert an den Insolvenzverwalter in Rechnung stellt. Klarstellend vereinbaren die Parteien, dass bestellte, zum Übernahmestichtag aber noch nicht ausgelieferte, auftragsbezogene Materiallieferungen von Lieferanten ebenfalls zu Gunsten des Halbfertigwertes zu berücksichtigen sind.

Der Insolvenzverwalter ist verpflichtet, die so ermittelte Differenz unverzüglich nach Zahlungseingang des Kunden beim Insolvenzverwalter gegenüber der Käuferin zum Ausgleich zu

bringen. Das Risiko der Leistungsfähigkeit des Kunden trägt der Verkäufer: Sollte mithin ein Drittschuldner seine Zahlungsverpflichtungen beispielsweise aufgrund Insolvenz nicht erfüllen, ist die Differenz aus der Insolvenzmasse an die Käuferin zu erstatten. Gewährleistungsthemen gehen zu Lasten der Käuferin.

2. Sollte der mit der Fa. Shanghai SongWai Automation Co., Ltd. derzeit zum einem Kaufpreis von € 563.000,00 verhandelte Auftrag „Gießwalze 2800x4200“ der Schuldnerin / dem Insolvenzverwalter oder der Käuferin erteilt werden, werden die Parteien eine zusätzliche Provision zu Gunsten der Insolvenzmasse vereinbaren, wobei sich die Höhe nach den Grundsätzen von Treu und Glauben bestimmen soll. Die Käuferin wird den Verkäufer über einen Abschluss und die Konditionen umgehend informieren.

§ 3 Übergabe von Daten – verschriftlicht oder in elektronischer Form

Der Insolvenzverwalter weist die Käuferin darauf hin, dass insbesondere angesichts der Besonderheiten eines Insolvenzverfahrens, nicht festgestellt werden kann, ob die übergebenen Daten zulässigerweise erhoben und gespeichert wurden. Gleiches gilt für die Weitergabe dieser Daten. Die Käuferin verpflichtet sich, unverzüglich Daten zu löschen, wenn Berechtigte Einwände gegen die Speicherung und/oder Weitergabe ihrer Daten erheben oder zuständige Datenschutzbehörden dies fordern. Dabei ist es unerheblich, ob Einwände gegenüber dem Insolvenzverwalter oder der Käuferin geltend gemacht werden. Der Insolvenzverwalter wird die Käuferin über solche Einwände oder Forderungen informieren. Löschen bedeutet die Unkenntlichmachung der Adressen/Daten, unabhängig davon, wo und in welcher Form die Daten gespeichert sind. Gemäß § 34 BDSG tritt an die Stelle der Löschung die Sperrung.

Die Käuferin haftet dafür, dass sie hinsichtlich der ihr übergebenen Daten sämtliche Vorschriften des Bundesdatenschutzgesetzes in der für Daten geltenden Fassung einhält.

§ 4 Überleitung von Dauerschuldverhältnissen

Der Insolvenzverwalter wird die Käuferin bei der Überleitung von Dauerschuldverhältnissen (z.B. Versorgungsverträge) die zugunsten der Schuldnerin mit Dritten bestehen und von der Schuldnerin zur Fortführung des Gewerbebetriebes benötigt werden unterstützen und die erforderlichen Erklärungen abgeben.

Kosten, die den Zeitraum bis Übergangsstichtag betreffen, hat der Verkäufer zu übernehmen und die Käuferin freizustellen. Der Verkäufer übernimmt keinerlei Gewähr für den rechtlichen Bestand und die tatsächliche Nutzbarkeit der Dauerschuldverhältnisse. Insbesondere übernimmt der Verkäufer keine Gewähr dafür, dass die Vertragspartner der Dauerschuldverhältnisse einer Übertragung auf die Käuferin zustimmen oder mit der Käuferin neue Verträge abschließt.

Leasingverträge werden vom Käufer nicht übernommen. Der Insolvenzverwalter die Nichterfüllung der Verträge gem. § 103 InsO erklären.

§ 5 Räumungsverpflichtung - Mietzahlungen

1. Das Mietverhältnis über das von der Schuldnerin genutzte Betriebsgelände Düsseldorfer Str. 100, 47809 Krefeld ist gekündigt. Der Eigentümer des Grundstücks hat sich gegenüber dem Mieter mit der Weiternutzung des Geländers bis zum 31.03.2019 grundsätzlich einverstanden erklärt, wobei Einzelheiten noch abzustimmen sind.
2. Der Insolvenzverwalter räumt der Käuferin in dem Zeitraum vom Übergangsstichtag bis zum 31.03.2020 („Nutzungszeit“) das Nutzungsrecht an den in der **Anlage 4** markierten Produktionshallen ein.
3. Die Anlage 4 nebst ihren textlichen Erläuterungen definiert diesen Nutzungsgegenstand. Den Zutritt zu dem auf dem Flur 11, Flurstück 139 befindliche Haupttrafo für das gesamte Werksgelände durch die Eigentümerin wird die Käuferin dulden. Dieses Trafohaus ist in der Anlage 4 mit „3“ markiert. Die Käuferin duldet ebenfalls die Mitnutzung der Verkehrsflächen durch die Eigentümerin, die Palfinger AG sowie sonstiger Dritter, die an Gegenständen auf der Gesamtfläche, die nicht zur Nutzungssache gehören, ein Nutzungsrecht haben. Die Käuferin erkennt den Zustand der in Anlage 4 beschriebenen Produktionshallen als vertragsgerecht und mangelfrei an und verzichtet auf etwaige anfängliche oder im Verlauf der Nutzungszeit auftretende Mängel.
4. Die Käuferin zahlt für die Nutzung der Nutzungssache für die Dauer der Nutzungszeit ein Entgelt in Höhe von € 15.000,00 zzgl. USt. Die Zahlungen ist fällig zum Übergabestichtag auf das in § 10 Ziffer 4. bezeichnete Insolvenzsonderkonto des Insolvenzverwalters. Zusätzlich zu dem Nutzungsentgelt trägt die Käuferin die Betriebskosten, die von der Eigentümerin gegenüber dem Verkäufer für die Nutzungszeit abgerechnet werden und die Betriebskosten gem. BetrVO sowie der Kosten der Stromversorgung und der Beleuchtung gem. § 7.1 des Mietvertrages zwischen der

Eigentümerin und dem Verkäufer. § 7.1 des Mietvertrages zwischen der Eigentümerin und dem Verkäufer ist als **Anlage 5** beigelegt.

5. Für die Dauer der Nutzungszeit trägt die Käuferin die Verkehrssicherungspflicht für die Nutzungssache und stellt den Verkäufer von etwaigen Ansprüchen der Eigentümerin aus der Verletzung dieser Verpflichtung frei.
6. Die Käuferin stellt den Verkäufer von Ansprüchen der Eigentümerin frei, die durch ihr eigenes oder das Verhalten derjenigen Dritter verursacht werden, die durch sie veranlasst oder zugelassen die Nutzungssache betreten oder auf sonstige Weise auf diese einwirken. Von dieser Verantwortung ausgenommen ist das Verhalten der in Abs. 3 genannten Dritten, die ein eigenes Nutzungsrecht an Gegenständen auf der Gesamtfläche haben.
7. Diese Nutzungsvereinbarung ist auf die Beendigung der Nutzungsvereinbarung zwischen der Eigentümerin und dem Verkäufer auflösend bedingt.
8. Die Käuferin verpflichtet sich, die Nutzungssache bei Beendigung dieser Nutzungsvereinbarung, spätestens zum 31.03.2020 besenrein zu räumen und die Mieträume unmittelbar an den Vermieter herauszugeben. Die Käuferin stimmt zu, dass der Verkäufer den gegen sie gerichteten Räumungsanspruch an der Nutzungssache an Erfüllung Statt an die Eigentümerin abtritt. Klarstellend vereinbaren die Parteien, dass das in der Anlage 4 orange umrandete und mit der Ziffer „6“ markierte Verwaltungsgebäude sowie das ebenfalls orange umrandete und mit der Ziffer „7“ markierte Pförtnerhaus nicht von der Käuferin zu beräumen ist.

§ 6 Leistungsabgrenzung

1. Es besteht Einigkeit darüber, dass bis zum Übergangsstichtag erbrachte Leistungen allein dem Insolvenzverwalter zustehen und ausschließlich von diesem fakturiert und eingezogen werden können. Die Käuferin wird die Rechnungen für erbrachte Leistungen, die zum Übergangsstichtag noch nicht abgerechnet wurden, nach dem Übergangsstichtag innerhalb von 20 Tagen kostenfrei für den Insolvenzverwalter erstellen, versenden und Kopien zur Verfügung stellen.
2. Ab dem Übergangsstichtag erbrachte Leistungen stehen allein der Käuferin zu und werden ausschließlich von dieser geltend gemacht, sofern in § 2 dieses Vertrages keine anderweitige Regelung vereinbart ist.



§ 7 Marken, Know-how, Kundenstamm, Software

1. Der Verkäufer verkauft hiermit zum Stichtag der Übergabe und nach Maßgabe von § 12 (Eigentumsvorbehalt) an die dies annehmende Käuferin die im Eigentum der Schuldnerin stehenden, in der **Anlage 6** aufgeführten Markenrechte sowie ggfs. weitere geschäftliche Bezeichnungen, Werktitel sowie urheberrechtliche Nutzungsrechte, die direkt oder indirekt zum Geschäftsbetrieb der Schuldnerin gehören.

Der Insolvenzverwalter verkauft der Käuferin des Weiteren den Kundenstamm, das Know-how, Zertifizierungen, Lizenzen an solchen Rechten und Werten, sofern dies rechtlich zulässig ist und diese Rechte ohne Zustimmung von Dritten übertragbar sind.

Dazu zählen auch:

- alle von der Schuldnerin gehaltenen Domains
- alle E-Mail-Adressen
- sämtliche von der Käuferin gewünschten Telefon- und Faxnummern

(nachfolgend kurz: „immaterielle Vermögensgegenstände“).

Derzeit werden noch folgende Telefonnummern von der Schuldnerin genutzt:

Festnetz: 0 21 51 / 526 000 – 526 499

Mobil: 0173 / 7252606

0172 / 2561436

0172 / 2605476

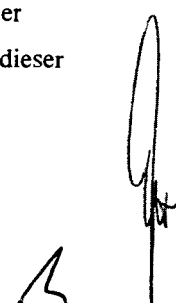
2. Der Verkäufer bleibt neben der Käuferin unwiderruflich berechtigt, bis zum Abschluss des Insolvenzverfahrens die Bezeichnung „WUMAG TEXROLL GmbH & Co. KG“ als Firmenbezeichnung oder sonst im Zusammenhang mit dem Insolvenzverfahren und der Abwicklung des Geschäftsbetriebes und des Insolvenzverfahren unentgeltlich zu nutzen.
3. Soweit erforderlich wird der Insolvenzverwalter der Käuferin bei der Überleitung unterstützen und die erforderlichen Erklärungen abgeben. In dem Zusammenhang anfallende Kosten, insbesondere aus der Ummeldung, werden vom Verkäufer nicht übernommen.

§ 8 Erlaubnisse

Der Verkäufer überträgt hiermit alle öffentlich-rechtlichen und privatrechtlichen Erlaubnisse sowie öffentlich-rechtliche und privatrechtliche Genehmigungen (nachfolgend: „Erlaubnisse“) für den Geschäftsbetrieb, soweit diese Rechtspositionen übertragbar sind. Eine Haftung dafür, dass die vorgenannten Erlaubnisse übertragen werden können, übernimmt der Verkäufer nicht.

§ 9 Gewährleistung

1. Vom Insolvenzverwalter und seinen Mitarbeitern wird keine Garantie übernommen oder eine Zusicherung bzgl. des Weiterbestehens der derzeitigen Kundenbeziehungen abgegeben.
2. Die in der Anlage 1 und 2 aufgeführten Vermögensgegenstände einschließlich der Softwarelizenzen sind gebraucht und können teilweise mit Mängeln belastet sein. Die Käuferin bestätigt, dass sie die Gegenstände vor Vertragsunterzeichnung ausreichend besichtigt und überprüft. In Kenntnis des Vorstehenden vereinbaren die Parteien, dass jegliche Gewährleistung für Sach- und Rechtsmängel ausgeschlossen ist. Der jeweils vereinbarte Kaufpreis berücksichtigt bereits das potentielle Vorhandsein von derzeit nicht bekannten Mängeln. Darüber hinaus sind Ansprüche der Käuferin auf Schadensersatz wegen eines Mangels oder Mangelfolgeschäden gegen allen übrigen Parteien ausgeschlossen.
3. Insbesondere ist auch keine Garantie für den rechtlichen Bestand und die tatsächliche Nutzbarkeit und/oder Übertragbarkeit der immaterielle Vermögensgegenstände sowie der Softwarelizenzen gegeben. Die Käuferin hatte Gelegenheit, die immateriellen Vermögensgegenstände der Schuldnerin zu prüfen.
4. Der Insolvenzverwalter tritt der Käuferin hiermit diejenigen Gewährleistungsansprüche gegen Lieferanten, Vertragspartner und Versicherungen ab, die ihm selbst in Bezug auf die verkauften Gegenstände zum Zeitpunkt des Gewährleistungsanfalles noch zustehen oder zustehen werden. Für den Bestand und die Durchsetzbarkeit der abgetretenen Gewährleistungsansprüche übernimmt der Insolvenzverwalter keine Gewähr.
5. Die Käuferin hat die diesem Vertrag beigelegten Anlagen sowie die relevanten Verträge der Schuldnerin mit Dritten selbst geprüft. Für die inhaltliche Richtigkeit und Vollständigkeit dieser



übergebenen Unterlagen wird jegliche Haftung des Insolvenzverwalters ausgeschlossen. Die Käuferin bestätigt mit der Vertragsunterzeichnung, dass sie ausreichend Gelegenheit hatte, die Unterlagen umfassend zu begutachten und auf Richtigkeit und Vollständigkeit zu prüfen und hiervon Gebrauch gemacht hat sowie die erforderlichen Informationen erhalten hat.

6. Eine persönliche Haftung des Insolvenzverwalters und seiner Mitarbeiter für Ansprüche aus dieser Vereinbarung, insbesondere für Gewährleistungsansprüche und Schadensersatzansprüche ist ausgeschlossen.

§ 10 Kaufpreis

1. Der Kaufpreis für das Anlagevermögen gemäß Anlage 1 einschließlich der immateriellen Vermögensgegenstände beträgt insgesamt € (netto) (Kaufpreisanteil 1) und setzt sich wie folgt zusammen:

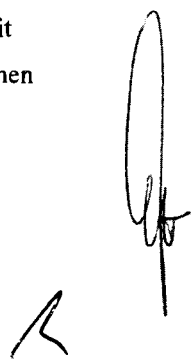
a) Maschinen und technische Anlagen	€ 650.000,00 (netto)
b) Immaterielle Vermögensgegenstände	€ <u>25.000,00 (netto)</u>
Gesamt:	€ <u>675.000,00 (netto)</u>

Der Kaufpreis für das Umlaufvermögen gemäß Anlage 2 beträgt insgesamt € 75.000,00 (netto) (nachstehend kurz: „Kaufpreisanteil 2“).

Der Kaufpreisanteil 1 sowie Kaufpreisanteil 2 bilden den Gesamtkaufpreis, nachstehend kurz: der „Kaufpreis“.

Der Kaufpreisanteil 2 ist wie folgt anzupassen: Am Übernahmestichtag, 9:00 Uhr, werden die Parteien Differenzen zwischen der Anlage 2 und dem aktuellen Bestand des Umlaufvermögens ermitteln. Sollte sich der Bestand erhöht haben, wird die Differenz vom Insolvenzverwalter der Käuferin zusätzlich berechnet; sollte sich der Bestand verringert haben, ist der einvernehmlich ermittelte Differenzbetrag vom Kaufpreis in Abzug zu bringen.

2. Die Vertragsbeteiligten gehen davon aus, dass es sich bei dem Verkauf um eine nicht steuerbare Veräußerung i. S. d. § 1 I 1a UStG handelt und der Kaufpreis daher nicht umsatzsteuerpflichtig ist.
3. Sollte der Verkauf jedoch ganz oder teilweise umsatzsteuerpflichtig sein, so hat die Käuferin die Umsatzsteuer nach zu entrichten. Der Verkäufer erstellt eine ordnungsgemäße Rechnung mit offenem Ausweis der anfallenden Umsatzsteuer. Die nachzuerhebende Steuer ist zwei Wochen



nach Rechnungserhalt fällig. Zur Besicherung des Anspruches des Verkäufers gegen die Käuferin auf die Zahlung des Umsatzsteuerbetrages tritt die Käuferin ihre Vorsteuer-Erstattungsansprüche gegen das Finanzamt bis zur Höhe der Umsatzsteuer Erfüllungshalber zum Zeitpunkt der Fälligkeit der Ansprüche, nicht jedoch vor Fälligkeit der jeweiligen Nettokaufpreise an den Verkäufer ab. Den Beteiligten ist bekannt, dass gemäß § 46 Abs. 2 AO die Abtretung der Finanzbehörde unter Verwendung des vorgeschriebenen Vordruckes anzuzeigen ist; sie sind einander hierzu verpflichtet. Der Verkäufer nimmt die Abtretung an.

Sollte der Vorsteuererstattungsanspruch der Käuferin geringer sein als die Umsatzsteuer, ist die Käuferin verpflichtet, den Differenzbetrag nach Feststellung an den Verkäufer zu zahlen. Entsprechendes gilt für den Fall, dass das Finanzamt aufgrund einer Verrechnung mit anderen Steuerforderungen gegen die Käuferin die Erstattung nicht oder nicht in voller Höhe übernimmt oder eine Verrechnung aus anderen Gründen, die der Verkäufer nicht zu vertreten hat, zu dem Zeitpunkt nicht stattfindet, zu welchem der Verkäufer die Umsatzsteuerschuld aus diesem Kaufvertrag entrichten muss, jedoch nicht vor Fälligkeit der jeweiligen Nettokaufpreise. Die Umsatzsteuer ist auf die von dem Verkäufer jeweils angegebenen Konten einzuzahlen.

4. Der Kaufpreis gem. § 10 in Höhe von insgesamt € 750.000,00 ist von der Käuferin in zwei Teilbeträgen zu zahlen:

€ 250.000,00, fällig am 27. September 2019

€ 500.000,00, fällig am 02. Januar 2020.

Die Zahlung des Kaufpreises hat nur unmittelbar an den Insolvenzverwalter zu erfolgen, auf das Insolvenzsonderkonto bei der

HSBC Trinkaus Düsseldorf
IBAN DE96 3003 0880 0094 8824 43
BIC TUBDDE33XXX

Wird der Kaufpreis bei Fälligkeit nicht gezahlt, so kommt die Käuferin auch ohne Mahnung in Verzug. Im Falle des Verzugs ist ein Verzugszins in Höhe von 5%-Punkten p.a. über dem Basiszinssatz zu zahlen.

Der Verkäufer ist berechtigt, von diesem Kaufvertrag zurückzutreten, wenn

- die Käuferin mit der Entrichtung einer Kaufpreissrate gemäß Ziffer 4 nicht innerhalb von 3 Banktagen nachkommt,

- die gemäß § 11 zu leistende Bürgschaft nicht bis zum Übergangsstichtag dem Verkäufer im Original vorliegt.

Klarstellend vereinbaren die Parteien, dass das Vorliegen bereits eines Rücktrittgrundes zum Rücktritt von diesem Vertrag berechtigt.

Der Rücktritt ist zu erklären durch Einschreiben mit Rückschein und Durchschrift für die Käuferin. Darüber hinaus verbleiben den Beteiligten die gesetzlichen Rücktrittsrechte.

5. Im Falle eines Rücktritts nach Ziffer 4 oder aus sonstigen nicht vom Verkäufer zu vertretenden Gründen stellen die bis dahin auf den Kaufpreis geleisteten Zahlungen ein Äquivalent für den von der Käuferin an den Verkäufer zu leistenden Schadensersatz dar und werden nicht erstattet. Die Geltendmachung eines höheren Schadensersatzanspruches bleibt ausdrücklich vorbehalten.
6. Verkäufer und Käuferin verpflichten sich, alles Erforderliche zu tun, um zügig die vertragsmäßige Übertragung des Eigentums herbeizuführen.

§ 11 Kaufpreissicherheit

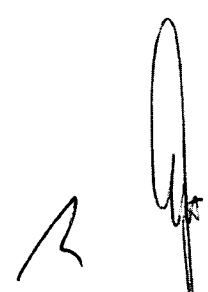
Zur Absicherung des zweiten Teilbetrages des Kaufpreises, der zum 02. Januar 2020 fällig wird, nebst 19% Umsatzsteuer mit den vereinbarten Zins- und Zahlungsbedingungen sowie etwaigen Nachträgen zu diesem Kaufvertrag oder anlässlich seiner Beendigung, verpflichtet sich die Käuferin, eine Kaufpreissicherheit in Höhe von € 500.000,00 (in Worten: € fünfhunderttausend beizubringen).

Die Kaufpreissicherheit ist als selbstschuldnerische Bürgschaft einer deutschen oder europäischen Großbank oder Sparkasse zu erbringen, die in ihrer Form im Wesentlichen dem als **Anlage 7** beigefügten Bürgschaftsformular entspricht, mit einem Verzicht auf die Einreden der Anfechtbarkeit und Aufrechenbarkeit sowie auf die Einrede der Vorausklage gemäß §§ 770, 771, 772 BGB sowie auf die Einrede gemäß § 776 BGB. Diese deutsche oder europäische Bank oder Sparkasse muss über den Einlagensicherungsfonds des Bundesverbands deutscher Banken oder einen ähnlichen Einlagensicherungsfonds abgesichert sein.

Die Bürgschaft kann befristet sein, jedoch nicht kürzer, als bis zum 31. Januar 2020.

§ 12 Übergangsstichtag - Eigentumsvorbehalt

1. Sämtliche Vermögensgegenstände, die die Käuferin nach Maßgabe dieses Vertrages von der Schuldnerin erwirbt, werden schuldrechtlich mit Wirkung ab dem 01. Oktober 2019 („Übergangsstichtag“) auf die Käuferin übertragen, nicht jedoch, bevor
 - die Zustimmung gem. § 18 vorliegt
 - der erste Teilbetrag des Kaufpreises bezahlt wurde, und
 - die gemäß § 11 zu leistende Bürgschaft dem Verkäufer im Original vorliegt.
2. Verkäufer und Käuferin sind sich einig, dass das Eigentum bzw. die Anwartschaftsrechte am Umlaufvermögen gemäß Anlage 2 zum Übergangsstichtag auf die Käuferin übergehen, soweit der Verkäufer Eigentümer solcher Gegenstände bzw. Inhaber des Anwartschaftsrecht ist und die gem. § 11 vereinbarte Bürgschaft dem Verkäufer im Original vorliegt. Unter der aufschiebenden Bedingung, dass die in § 11 vereinbarte Bürgschaft vorliegt, überträgt der Verkäufer hiermit mit Wirkung zum Übergangsstichtag das Eigentum bzw. die Anwartschaftsrechte an den Kaufgegenständen.
3. Die Käuferin verpflichtet sich, das Anlagevermögen bis zu seiner vollständigen Bezahlung gegen Diebstahl und/oder Untergang ordnungsgemäß der Höhe nach zu versichern und dies dem Verkäufer innerhalb von 7 Werktagen nach Vertragsabschluss nachzuweisen. Den Entschädigungsanspruch aus der Versicherung tritt die Käuferin bis zu dem Zeitpunkt der vollständigen Zahlung des Kaufpreises an den Verkäufer ab.
4. Die Käuferin hat das Anlagevermögen bis zur vollständigen Zahlung des Kaufpreises in ordnungsgemäßigem und betriebsfähigem Zustand zu halten und insbesondere die notwendigen Reparaturen sachgerecht durchführen zu lassen. Reparaturen sind bei einem autorisierten Vertragshändler ausführen zu lassen. Die Käuferin hat die Wartungs-, Pflege- und Gebrauchsempfehlungen des Herstellers zu befolgen. Erfüllt die Käuferin die genannten Instandhaltungspflichten nicht, kann der Verkäufer auf Rechnung der Käuferin die erforderlichen Maßnahmen durchführen lassen. Die Käuferin hat bis zur vollständigen Zahlung des Kaufpreises alle jeweils geltenden Gesetze, Verordnungen und Verwaltungsvorschriften, die den Besitz und den Betrieb des Vertragsgegenstandes regeln, einzuhalten und insbesondere alle etwaigen Pflichten daraus zu erfüllen.



Der Insolvenzverwalter ist bereits vor vollständiger Befriedigung verpflichtet, Sicherheiten nach seiner Wahl freizugeben, wenn und soweit der Wert der Sicherheit 120% der Restpreisforderung übersteigt.

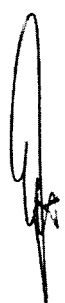
§ 13 Arbeitsverhältnisse

1. Der Insolvenzverwalter und die Käuferin sind sich darüber einig, dass alle bestehenden Arbeitsverhältnisse der Schuldnerin gemäß § 613 a BGB zum Übergangsstichtag auf die Käuferin übergehen, soweit die gesetzlichen Voraussetzungen erfüllt sind und die Arbeitnehmer einem Übergang nicht widersprechen. Eine Auflistung der zum Stichtag beschäftigten Arbeitnehmer hat der Insolvenzverwalter zu erstellen.

In der Anlage ebenfalls separat aufgeführt sind solche Arbeitsverhältnisse, die vom Insolvenzverwalter gekündigt wurden und in diesem Status aufgrund der gesetzlichen Vorschriften übernommen werden müssen. Der Insolvenzverwalter unterstützt die Käuferin im Falle von arbeitsgerichtlichen Auseinandersetzungen, wobei Einigkeit besteht, dass eine juristische Beratung und Vertretung gegenüber Arbeitnehmern durch den Verkäufer nicht möglich ist.

Die Käuferin tritt mit dem Übergangsstichtag in die vorgenannten Arbeitsverhältnisse ein. Die Käuferin verpflichtet sich gegenüber dem Insolvenzverwalter, diesen von der Mithaftung des § 613 a Abs. 2 BGB freizustellen.

2. Die Zahlungsansprüche der zu übernehmenden Arbeitnehmer bis zum Übergangsstichtag sind vom Insolvenzverwalter vorrangig zu bedienen. Das beinhaltet die nach Eröffnung des Insolvenzverfahrens am 01.09.2019 bis zum Übernahmestichtag anfallenden Lohn- und Gehaltsansprüche der zu übernehmenden Arbeitnehmer sowie die im Auslauf der Kündigungsfrist als Masseverbindlichkeiten gem. § 55 InsO anfallenden Lohn- und Gehaltsansprüche der vom Insolvenzverwalter gekündigten Arbeitnehmer bzw. der zu kündigenden Arbeitnehmer, auch wenn zunächst eine Genehmigung des Integrationsamts notwendig ist. Zu kündigende Arbeitnehmer in diesem Sinne sind die namentlich im Interessenausgleich vom 12.09.2019 benannten Arbeitnehmer (**Anlage 8**), soweit diese nicht ohnehin wie vorgesehen aufgrund eines dreiseitigen Vertrags in die bei der mBoss GmbH eingerichtete Transfergesellschaft wechseln. Dies gilt unabhängig von dem Zeitpunkt, zu dem diese Arbeitnehmer in die Transfergesellschaft wechseln. Bei der schwangeren Arbeitnehmerin – soweit diese nicht in die Transfergesellschaft wechselt - übernimmt der Insolvenzverwalter den Lohn bis zum Mutterschutz. Diese Ansprüche



sind, soweit insolvenzrechtlich möglich und zulässig, vom Insolvenzverwalter aus der Insolvenzmasse an die Arbeitnehmer zu begleichen, auch wenn die Arbeitnehmer nach § 613 a BGB auf die Käuferin übergehen sollten. Auf die Besonderheiten des § 208 InsO (Masseunzulänglichkeit) wurde die Käuferin hingewiesen. Zum Ablauf wird vereinbart, dass die Abrechnungen bei der Erwerberin erstellt werden, der Insolvenzverwalter zahlt auf ein vom Erwerber zu benennendes Konto, die Erwerberin zahlt an die Arbeitnehmer aus, so dass er im Außenverhältnis als Arbeitgeber auftritt.

Der Käuferin ist bekannt, dass ohne die vollständige Zahlung des vereinbarten Kaufpreises keine Erfüllung von Arbeitnehmerverbindlichkeiten möglich ist.

3. Urlaubsansprüche sind vom Insolvenzverwalter nicht auszugleichen. Etwaige Urlaubsansprüche werden durch die Käuferin reguliert.
4. Sollte ein Arbeitnehmer dem Übergang seines Arbeitsverhältnisses gem. § 613 a VI BGB widersprechen und den Widerspruch gegenüber der Käuferin erklären, ist die Käuferin verpflichtet, den Widerspruch dem Insolvenzverwalter innerhalb von 3 Werktagen nach Zugang dieses Widerspruchs, anzuzeigen.
5. Die Forderungen der Schuldnerin aus einem Arbeitgeberdarlehen gehen nicht auf die Käuferin über und können nur durch den Insolvenzverwalter gegenüber dem betroffenen Arbeitnehmer geltend gemacht werden.
6. Der Verkäufer wird der Käuferin die vorhandenen Personalakten der Arbeitnehmer, deren Arbeitsverhältnis auf die Käuferin übergehen, übergeben.

§ 14 Archivierung

Alle Geschäftsunterlagen der Schuldnerin werden von der Käuferin übernommen und entsprechend den gesetzlichen Aufbewahrungsfristen auf Rechnung der Käuferin aufbewahrt. Sie hat das Recht der Nutzung sämtlicher Geschäftsunterlagen, insbesondere von sämtlichen Dokumenten, die auftrags- oder kundenbezogen sind sowie technische Dokumentationen (z.B. Zeichnungen) und alle Unterlagen, die zu den Produktionsanlagen, soweit rechtlich zulässig. Die Käuferin wird sicherstellen, dass dem Insolvenzverwalter zum Zwecke der ordnungsgemäßen Durchführung des Insolvenzverfahrens sämtliche Geschäftsunterlagen und Informationen

kurzfristig und kostenfrei zur Verfügung gestellt werden. Die Käuferin verpflichtet sich, die Geschäftsunterlagen der Schuldnerin innerhalb der gesetzlichen Fristen aufzubewahren und sukzessive nach Ablauf der Aufbewahrungsfrist die ordnungsgemäße Vernichtung der gesamten Geschäftsunterlagen der Schuldnerin auf ihre Kosten vorzunehmen. Mit Vertragsunterzeichnung bestätigt die Käuferin die einschlägigen Bestimmungen zur Aufbewahrung von Geschäftsunterlagen zu kennen.

§ 15 Vertraulichkeit

Die Parteien sind sich darüber einig, dass sie die Kenntnis, die sie im Zusammenhang mit der Verhandlung und dem Abschluss dieses Vertrages untereinander und von dem jeweiligen Verbundunternehmen erhalten haben, ebenso streng vertraulich behandeln, wie den Inhalt dieses Vertrages.

Die Käuferin ist berechtigt, mit dem Datum des Vertragsabschlusses die zukünftige Fortführung des Betriebes unter ihrer Leitung öffentlich zu kommunizieren und mit Kunden der Schuldnerin Kontakt bezüglich der weiteren Zusammenarbeit aufzunehmen.

§ 16 Aufrechnung

Die Aufrechnung der Käuferin mit Gegenforderung ist ausgeschlossen.

§ 17 Kosten

Die mit diesem Vertrag und seiner Durchführung verbundenen Gebühren, Kosten, Aufwendungen und Steuern trägt die Käuferin. Die Kosten für Vertretungsbescheinigungen, Vollmachten und Genehmigungen ihrer Erklärungen trägt jede Partei selbst. Im Übrigen trägt jede Partei ihre eigenen Kosten und Steuern sowie die Kosten ihrer Berater selbst.

§ 18 Sonstiges

1. Diese Vereinbarung kann insbesondere durch Übermittlung der Willenserklärungen der Parteien per Telefax und E-Mail geschlossen werden. Änderungen und Ergänzungen dieses Vertrages bedürfen zu ihrer Wirksamkeit der Schriftform. Dies gilt ebenfalls für Ergänzungen oder einer Aufhebung dieser Schriftformklausel. Aufgrund dieses Vertrages abzugebende Erklärungen bedürfen zu ihrer Wirksamkeit der Schriftform.

2. Sollte in diesem Vertrag irgendeine Zusicherung oder Gewährleistung des Insolvenzverwalters enthalten sein, hat der Insolvenzverwalter die Käuferin so zu stellen, als wenn die Zusicherung oder Gewährleistung zutrifft. Ist dies nicht möglich, ist der Käuferin der Schaden zu ersetzen, der darauf entsteht, dass die Zusicherung oder Gewährleistung nicht zutrifft. Der Anspruch ist in jedem Fall begrenzt auf die Höhe des in diesem Vertrag vereinnahmten Kaufpreises.
3. Ansprüche gemäß Ziffer 2 dieses Abschnitts können nur innerhalb einer Frist von sechs Monaten nach Vertragsunterzeichnung geltend gemacht werden und zwar durch schriftliche Anzeige per Einschreiben/Rückschein gegenüber dem Insolvenzverwalter. Werden die Ansprüche anschließend nicht innerhalb von sechs Monaten nach der Anzeige gerichtlich geltend gemacht, kann der Insolvenzverwalter die Einrede der Verjährung geltend machen.
4. Auf die Besonderheit des § 208 InsO (Masseunzulänglichkeit) und § 207 InsO (Einstellung mangels Masse) wurde die Käuferin hingewiesen.
5. Sollten einzelne Bestimmungen oder Teile dieses Vertrages unwirksam sein oder unwirksam werden, so wird die Wirksamkeit des Vertrages im Übrigen nicht berührt. Die Vertragsparteien sind verpflichtet, anstelle der unwirksamen Regelung oder Teile solche Vereinbarungen zu treffen, die dem wirtschaftlichen Zweck der unwirksamen Regelungen oder Teile herbeiführen und ihnen am nächsten kommen. Ebenso soll im Fall einer Vertragslücke verfahren werden.
6. Gerichtsstand für Streitigkeiten, die sich aus dem Vertrag ergeben, ist Krefeld.

Düren, 13.08.2019

Ort, Datum

KELZENBERG + CO

GmbH & Co. KG

Schoellerstrasse 164 - 52351 Düren
Germany

Käuferin

Düsseldorf, 18.9.2019

Ort, Datum

Dr. Peter Minuth
Insolvenzverwalter
Rechtsanwalt und Insolvenzverwalter
Willstätterstr. 62 · 40549 Düsseldorf
Tel. 02 11 / 49 22 40 · Fax 4 92 24 87

Exhibit D

IN THE STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF EDGEFIELD)

No: 2021-CP-19-00005)

Barry Lanham and Obvia Gamble-Lanham,)

Plaintiffs,)

**WUMAG TEXROLL GMBH & CO.
KG'S ANSWERS TO PLAINTIFFS'
FIRST SET OF INTERROGATORIES**

v.)

Wumag Texroll GmbH & Co. KG f/k/a)

Kelzenberg + Co.: GmbH & Co KG and)

Wumag Texroll GmbH & Co. KG,)

Defendants.)

TO: COLIN T.L. SPANGLER, ESQ., JOHN E. PARKER, ESQ., JOHN E. PARKER, JR., ESQ., AND NEIL A. ALGER, ATTORNEYS FOR PLAINTIFFS

Defendant Wumag Texroll GmbH & Co. KG ("**Wumag**"), hereby objects and responds to the First Set of Interrogatories to Defendant of Plaintiffs Barry Lanham and Obvia Gamble-Lanham ("**Plaintiffs**") as follows:

DEFINITIONS

In connection with these responses, the following definitions shall apply:

1. **"Machine"** refers to the Laminating Calendar Line machine at issue in this case and referred to as "Subject Machine" in Plaintiff's Amended Complaint.
2. **"The Incident"** refers to the January 22, 2018, incident during which Plaintiff "was cleaning the [M]achine when his left arm and hand was pulled into the Machine," resulting in injury to his left arm and hand. Am. Compl., at ¶ 9.
3. **"Document"** has the same full meaning as in South Carolina Rule of Civil Procedure 34(a), and includes, without limitation, the original(s) or one identical and legible copy thereof, and all non-identical copies of any written, recorded, transcribed, punched, filmed,

taped, or graphic matter of any type, however and by whomever prepared, including, but not limited to, letters, memoranda, telegrams, reports, minutes of meetings, contracts, agreements, communications, correspondence, notes, studies, plans, analyses, work papers, diary or calendar entries, statistical and financial records, books, logs, promotional materials, catalogs, prospectuses, press releases, speeches, notices, minutes or records of meetings, minutes or records of conferences, records or summaries of telephone calls or other conversations or communications, magnetic tapes, sound or mechanical reproductions, visual or sound tapes or other recordings, data compilations, tabulations, forecasts, brochures, pamphlets, trade letters, maps, blueprints, charts, drawings,, budgets, vouchers, receipts, canceled checks and stubs, as well as data processing machine or computer cards, printouts, tapes or disks. The term “document” also includes any and all copies of any document that contain any notation or otherwise differ from the original and other copies, and specifically includes any and all drafts of the above and any and all handwritten notes or notations in whatever form together with any attachments to any such documents.

4. **“Refer to,” “referring to,” “relate to” or “relating to”** means in whole or in part relating to, referring to, constituting, containing, embodying, discussing, reflecting, dealing with, analyzing, pertaining to or in any way relevant within the meaning of Rule 26(b)(1) of the South Carolina Rules of Civil Procedure.

WUMAG’S ANSWERS TO PLAINTIFFS’ FIRST SET OF INTERROGATORIES

1. Give the name and address of each person whom you know to be a witness concerning the facts in this case and state whether or not a written or recorded statement has been taken from each such witness and provide the name and address of each person who has possession of each such statement.

ANSWER: The following individuals may be witnesses concerning the facts of this case:

- **Plaintiff Barry Lanham.** Plaintiff Lanham is expected to testify about facts related to the claims and defenses in the case, including those about any safety training he received about the Machine and cleaning of it; the Machine and any changes Bondex made to the Machine and its safety aspects; the Incident and how it occurred; and his alleged damages.
- **Plaintiff Obvia Gamble-Lanham.** Mrs. Gamble-Lanham is expected to testify about facts related to the claims and defenses in the case, including Plaintiff's and her alleged damages.
- **Former Wumag Employees, including:**
 - Sebastian Becker
 - Henning Gugel
 - Gerald Raeth
 - Rudiger Muller
 - Achim Gesser

Wumag anticipates these individuals may have factual knowledge about the claims and defenses in the case, including those related to the Machine and its custom specifications for Bondex; the safety aspects of the Machine and Bondex's changes to them; and the Incident. It is not aware of any written or recorded statements from these individuals. Wumag is no longer operational, has no existing employees, and remains in insolvency proceedings in Germany. It thus is not aware of the above individuals' current contact information or addresses, though it expects these individuals reside in Germany.

- **Bondex, Inc., and Employees of Bondex, Inc., including but not limited to, Reece Walmsley (VP Technical Service), Steve Fransoso (President); Charlie Waters (Plant Manager) and Mark Wetherell (Controller).** Wumag anticipates these individuals may have factual information about the claims and defenses in the case, including those related to the Machine and its custom specifications for Bondex; Bondex's alternations to the Machine, including its safety aspects and changes or deactivation of the Machine's light curtains; any training provided to Plaintiff regarding the Machine and cleaning of it; the lack of a written lockout/tagout program for the Machine; and the Incident. It also notes that Walmsley was intimately involved in the

design process of the Machine on behalf of Bondex.

- **Representatives of Kelzenberg-Wumag.** Representatives of Kelzenberg-Wumag are expected to testify as the answer filed on behalf of Kelzenberg-Wumag, the incident, and/or any other relevant issues in this lawsuit.
- **Any and all witnesses (including expert witnesses) disclosed by Plaintiffs or Co-Defendant Kelzenberg-Wumag.**
- **Representatives from OSHA.** These individuals may have factual knowledge related to the claims and defenses in the case, including the Incident, OSHA's investigation of the Incident, and OSHA's citations to Bondex for the Incident.

In addition to the above-listed witnesses, Wumag references witnesses whom any other party to this lawsuit discloses as having discoverable information relevant to the facts of this case and/or the issues set forth in the pleadings. Wumag reserves the right to supplement this response as discovery progresses.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in your possession that relate to the claim of this case.

ANSWER: In response to Interrogatory No. 2, Wumag refers Plaintiffs to the documents produced in response to Plaintiffs' Requests for Production. Also, Wumag refers to the documents produced by Co-Defendant Kelzenberg-Wumag.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: Wumag is producing its insurance policy with Chubb Insurance Company of Europe SE from 2015. Upon information and belief, this insurance policy was renewed annually and in place in 2018. Wumag will supplement this response upon confirming this information.

4. List the names and addresses of any expert witnesses whom the Defendant proposes to use as a witness at the trial of the case. With respect to each such witness, respond to the following:

- a) Identify the subject matter upon which the expert is expected to testify;
- b) A detailed summary of his/her qualifications to testify on each identified subject (in lieu of such summary, you may provide a copy of the expert's most current curriculum vitae);
- c) A complete statement of all opinions to be expressed and the bases and reasons therefor;
- d) The data and other information considered by the expert in forming the opinions;
- e) Any exhibits to be used as a summary of or support for the opinions;
- f) Citations of any treatise, text, or other authority upon which the expert especially relies;
- g) State whether a report has been prepared; and
- h) Identify all documents which have been exchanged with each witness, including reports and billing statements and payments.

ANSWER: At this stage of the case, Wumag has not identified all expert witnesses whom it proposes to use as a witness at the trial of this case and reserves the right to supplement this response in accordance with any scheduling order and/or the Rules of Civil Procedure.

5. For each person known to the party or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the plaintiffs of the important facts known to or observed by such witness, or provide a copy of any written or recorded statement taken from such witness.

ANSWER: Wumag refers Plaintiffs to its response to Interrogatory No. 1.

6. State the full name, current address, telephone number, employer, and job title of every person participating in compiling the answers to these Interrogatories.

ANSWER: Wumag is no longer operational, has no existing employees, and remains in a German insolvency proceeding. As a result, these responses are based on information evidenced in documents produced in the case.

However, to the extent this request seeks information protected by the attorney-client privilege and/or the work product doctrine, Wumag objects to Interrogatory No. 6. It also objects to this Interrogatory as being overly broad, unduly burdensome, and seeking information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

7. Is the Defendant aware of anyone who interviewed the Plaintiff(s) or other witnesses about the incident or Plaintiff's injuries, or heard the Plaintiff(s) make statements about the incident or Plaintiff's injuries, at any time immediately after the incident up to the present? If so, state everything said by the Plaintiff(s) on each such occasion, to whom the Plaintiff(s) was speaking on each such occasion, and the date on which each such conversation or interview took place.

ANSWER: Wumag refers to the OSHA investigation of the Incident and any interviews OSHA conducted for that investigation.

8. Does the Defendant have any written statements or stenographic, mechanical, electronic, or other type of recorded statements (or transcription thereof) made by any fact witnesses to this incident? If so, set out each such statement verbatim or attach a copy of each such statement to your answers.

ANSWER: No.

9. Identify each person from whom the Defendant has written or recorded statements concerning the incident, or any other matters relevant to this case. State the full name, current (or last known) address, and phone number of each individual with custody of each written or recorded statement.

ANSWER: None.

10. Identify each person who has investigated the incident on the Defendant's behalf and state the beginning and ending dates of each such person's investigation. This interrogatory applies, but is not limited to, insurance adjusters, persons employed by private adjusting firms, and private investigators.

ANSWER: Prior to this lawsuit's filing, none. However, Wumag notes that all parties were present at an inspection of the Machine at Bondex on September 3, 2024.

To the extent this Interrogatory seeks information about any investigation conducted by Wumag's attorneys, Wumag objects as such information is attorney-client privileged.

11. If you contend that Plaintiffs' or anyone else's acts caused or contributed to this incident, identify such persons or entities, the specific act(s) you complain of, and each person or entity with knowledge of facts regarding this contention.

ANSWER: Wumag objects to this interrogatory to the extent that it calls for disclosure of privileged information including attorney mental impressions and attorney work product. Subject to and without waiving these objections, Wumag refers Plaintiffs to its Answer, OSHA's citations to Bondex over the Incident, and OSHA's investigation report about the Incident – all of which support that Plaintiff and his employer, Bondex, were negligent in causing the Incident. It also notes that Bondex altered the Machine,

including making changes to its safety aspects and/or deactivating the light curtains; Bondex failed to appropriately train Plaintiff about how to clean the Machine; and Bondex failed to have a written lockout tagout program for the Machine. Further, Plaintiff utilized the incorrect mode to clean the Machine.

Wumag reserves its right to supplement this response as discovery progresses in the case.

12. Identify each person who has knowledge of relevant facts whose name has not appeared in response to the foregoing Interrogatories and state the general area of knowledge of each such person.

ANSWER: Wumag refers Plaintiffs to all documents produced in the case, which may reveal the identity of persons other than those disclosed in response to Interrogatory No. 1 that have knowledge of relevant facts.

13. List the names of all persons and/or entities to which you or anyone on your behalf has issued Subpoena(s) or Freedom of Information Act (FOIA) requests seeking information in this matter. Also, produce copies of all documents received pursuant to a subpoena or FOIA request.

ANSWER: Wumag refers Plaintiffs to the documents produced in Response to Plaintiffs' Requests for Production, which include all records it has obtained via subpoena.

14. Did the Defendant design the product in question? If so, please state the name and address of the person primarily responsible for its design and give the approximate date that product(s) was designed. If the Defendant did not design the product in question, please list the name and address of the individual or entity responsible for its design, and an approximate date

of when the Defendant understands the product was designed.

ANSWER: 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 notes that the Machine ultimately included parts and components from a variety of third party manufacturers.

Additionally, in or around 2016 or 2017 and following delivery of the Machine to Bondex, Bondex, without Wumag's approval or involvement, altered safety features of the Machine, including the Machine's light barriers. As shown in email correspondence between Wumag and Bondex (e.g., in March 2017), Wumag expressly disclaimed any responsibility for Bondex's changes to the Machine, such as to the light barriers.

15. Did the Defendant manufacture the product(s) in question? If so, state the date of its manufacture and the locations where it was manufactured. If the Defendant did not manufacture the product(s) in question, please list the name and address of the individual or entity responsible for its manufacture, and the date the device was manufactured.

ANSWER: Wumag refers Plaintiffs to its response to Interrogatory No. 14.

16. Was the product in question altered in any way while in possession of this Defendant or by Defendant at any time? If so, set forth the date of the alteration(s) and the

exact manner in which the product in question was altered.

ANSWER: No. Wumag refers Plaintiff to its response to Interrogatory No. 14 and again emphasizes that *Bondex* altered the Machine prior to the Incident.

17. Have there been any changes in the design and/or manufacture of the device since it was originally introduced into the market? If so, describe each such design change(s), manufacture change(s), the reason for the change(s) with respect to any design or manufacturing changes and the entity who made the change.

ANSWER: Wumag refers Plaintiff to its responses to Interrogatory No. 14 and emphasizes that Wumag worked with Bondex to specifically design and manufacture this custom Machine and that, post-delivery, Bondex, without Wumag's approval or involvement, altered some or all of the safety features of the Machine.

18. Please state the name, address, and job title of the person or persons currently or formerly employed by the Defendant who possess the greatest amount of knowledge with regard to the design and manufacture of the product(s) in question.

ANSWER: Wumag refers Plaintiffs to its response to Interrogatory No. 1 and its identification of former Wumag employees who may have factual knowledge about the design and manufacture of the Machine.

19. Identify the specific dates that the Defendant had the subject heat setter in their possession, who it was obtained from and the entity who obtained the heat setter from the Defendant.

ANSWER: Wumag delivered the Machine to Bondex in or around 2016.

20. State the correct name of any corporations, entity, or individual who designed, manufactured, and sold the product(s) in question if other than a current or former

employee/agent of the Defendant.

ANSWER: Wumag refers Plaintiffs to its response to Interrogatory No. 14.

21. Does the Defendant contend that the heat setter was altered or modified between the time it was sold and the date of the occurrence in question? If so, please describe what alterations or modifications the Defendant contends have been made with respect to the heat setter of how any such change contributed, if any, to the incident in question.

ANSWER: Yes. Wumag refers Plaintiffs to its response to Interrogatory No. 14.

22. What governmental, industry, or safety organization standards, codes or regulations pertain to the design, manufacture, assembly, distribution, or sale of the heat setter? State for each standard the date such standard was promulgated, the sponsoring body, and whether the Defendant claims such standard was complied with in connection with the design, manufacture, or marketing of the heat setter.

ANSWER: Wumag objects to Interrogatory No. 22 as it seeks a legal interpretation of standards, codes, or regulations. Wumag further objects to this Interrogatory as Bondex unilaterally modified the Machine prior to the time of the Incident.

23. Please identify each person by name, address and telephone number who has informed the Defendant of an incident in which someone was injured by the heat setter or as a result of a product failure.

ANSWER: Wumag objects to Interrogatory No. 23 because it is overly broad in time and scope and seeks information that is not relevant to the claims or defenses (such as injuries that are factually unrelated to the Incident). Without waiving those objections, Wumag notes that the Machine was custom built to Bondex's specifications. To Wumag's

knowledge, the only person that has allegedly been injured by the Machine is Plaintiff.

24. Has a claim or lawsuit ever been filed against the Defendant where a person claimed he or she was injured as a result of a product failure? If so, please list the name and address of each claimant and give a complete description of the claim or lawsuit.

ANSWER: Wumag objects to Interrogatory No. 24 to the extent it seeks publicly available information. Without waiving that objection, Wumag is not aware of any claims or lawsuits factually similar to Plaintiff's and again notes that Bondex altered the Machine prior to the Incident.

25. Has the heat setter ever been the subject of a recall or service bulletin by the Defendant or any other company and, if so, state the date of such recall and the reason for such recall or service bulletin.

ANSWER: The Machine has not been the subject of a recall or service bulletin by Wumag. Wumag again notes that it produced machines that were custom-built to customer needs. As a result, no two machines would have been identical. Additionally, machines produced by Wumag included parts and components from a variety of manufacturers.

26. Please state the purchase price of the heat setter at the time it was sold and put into the stream of commerce.

ANSWER: Wumag refers Plaintiffs to the documents produced in the case.

27. Please state the commission or revenue received by this Defendant when the product was sold.

ANSWER: Wumag objects to Interrogatory No. 27 because it seeks confidential, proprietary information that is not relevant to the claims or defenses in the case.

28. Identify every person by name and job title who contributed any information contained or reflected in Defendant's answers to Plaintiffs' First Set of Interrogatories and First Requests for Production.

ANSWER: Wumag refers Plaintiff to its response to Interrogatory No. 6.

29. Identify every person by name and job title employed by the Defendant whom the Defendant requested information, documents, emails, or other correspondence from regarding Defendant's answers to Plaintiffs' First Set of Interrogatories and First Requests for Production?

ANSWER: Wumag refers Plaintiffs to Wumag's response to Interrogatory No. 6.

30. Identify all documents in the Defendant's possession, or readily available to the Defendant, pertaining to Plaintiff(s), to include his medical care and any documentation concerning the subject incident.

ANSWER: Wumag refers Plaintiffs to the documents produced in Response to Plaintiffs' Requests for Production, which include all records obtained via subpoena.

31. Identify the name, address, and job title of the most knowledgeable individual that was responsible for quality control of the heat setter.

ANSWER: In response to Interrogatory No. 31, Wumag refers Plaintiffs to its response to Interrogatory No. 1.

32. Identify any document commenting on quality control, inspections, adjustment, failure or return rates, compliance with manufacturing standards or production tolerances of the heat setter.

ANSWER: Wumag refers Plaintiffs to the documents produced in the case.

33. Identify all corporate officers and/or executives for the history of Defendant's existence.

ANSWER: Wumag objects to Interrogatory No. 33 because its scope is overly broad and unduly burdensome and the Interrogatory seeks information that is not relevant to any of the claims or defenses in the case. Without waiving those objections, Wumag's former managing directors were: Mr. Siyou Yan, Ms. Shifa Yan, Mr. Manfred Witschinski, and Dr. Xun Yu.

34. Identify any prior or subsequent affiliates, subsidiaries, or business organizations that have sold, transferred, or surrendered any current assets or liabilities of this Defendant that were used in the manufacturing of this Product.

ANSWER: Kelzenberg-Wumag purchased Wumag assets via an insolvency process in Germany.



Catherine F. Wrenn (SC Bar No.: 76042)

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John A. Woods (SC Bar No. 105346)

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Attorneys for Wumag Texroll GmbH & Co. KG

November 26, 2024
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF EDGEFIELD)

No: 2021-CP-19-00005

Barry Lanham and Obvia Gamble-Lanham,)

Plaintiffs,)

v.)

CERTIFICATE OF SERVICE

Wumag Texroll GmbH & Co. KG f/k/a)

Kelzenberg + Co.: GmbH & Co KG and)

Wumag Texroll GmbH & Co. KG,)

Defendants.)

I hereby certify that a copy of Defendant Wumag Texroll GmbH & Co. KG's Answers to Plaintiffs' First Set of Interrogatories have been served upon the following counsel of record by electronic mail addressed as shown below this 26th day of November, 2024:

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***Attorneys for Defendant Wumag Texroll
GmbH & Co. KG f/k/a Kelzenberg + Co:
GmbH & Co. KG***



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Exhibit E





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Washington, DC

July 11, 2025

VIA E-FILING and E-MAIL

The Honorable Martha M. Rivers
P.O. Box 3081
Aiken, SC 29802
mriverssc@sccourts.org
mriverslc@sccourts.org

Re: *Barry Lanham and Obvia Gamble-Lanham v. Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag") et, al.; Civil Action No. 2021-CP-19-00005*

Declaration of Dr. Nils Derksen in Support of Kelzenberg-Wumag's Motion for Summary Judgment

Dear Judge Rivers:

I represent Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag") in the above-referenced matter. Kelzenberg-Wumag's Motion for Summary Judgment was heard before you on Monday, July 7, 2025. At the conclusion of the hearing, you indicated the parties could make additional submissions in support of their respective positions this week.

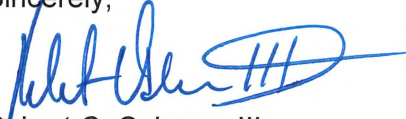
Enclosed is the Declaration of Dr. Nils Derksen. See **Exhibit 1**. Dr. Derksen is a practicing attorney in Cologne, Germany who specializes in the area of German insolvency law. See **Exhibit 2**. Dr. Derksen's Declaration addresses Kelzenberg-Wumag's purchase of Wumag Texroll GmbH & Co. KG's ("Wumag") assets in September 2019, and German cases concerning Section 25(1) of the German Commercial Code (*Handelsgesetzbuch - HGB*). According to Plaintiffs' Section 25(1) HGB results in Kelzenberg-Wumag acquiring liabilities from Wumag. However, Dr. Derksen's Declaration cites (and translates) German authority stating Section 25(1) HGB does not apply to the acquisition of assets from the insolvency administrator out of an opened insolvency proceeding. The primary cases cited in Dr. Derksen's Declaration are provided in German with unofficial translations. See **Exhibit 3**. If the Court would like certified translations of the cited cases, we will work to provide them as soon as possible.

The law, both in South Carolina and Germany, clearly provides that Kelzenberg-Wumag cannot be liable for Plaintiffs injuries under a theory of successor liability. For this reason, and the additional arguments set forth in Kelzenberg-Wumag's prior briefing, Kelzenberg-Wumag's Motion for Summary Judgment should be granted.

Charles L. Alford, III
July 11, 2025
Page 2

Thank you for the Court's time and consideration. If you have questions or need any additional information, please feel free to contact me.

Sincerely,



Robert C. Osborne III

/RCO
Enclosures

cc: John E. Parker, Jr., Esq.
Neil E. Alger, Esq.
Catherine F. Wrenn, Esq.
Jack Woods, Esq.

Exhibit 1

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

**DECLARATION OF DR. NILS
DERKSEN**

COMES NOW, Dr. Nils Derksen, who deposes and states as follows:

1. My name is Dr. Nils Derksen, and I am over the age of eighteen (18) years and am competent to give sworn testimony. I have personal knowledge of the matters set forth in this declaration. I offer this declaration in support of Wumag Texroll GmbH & Co. KG's f/k/a Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag") Motion for Summary Judgment in the above-referenced matter.

2. I am an attorney with Loschelder Rechtsanwälte Partnerschaftsgesellschaft mbB in Cologne, Germany.

3. I have been a licensed attorney since 2014. As part of my practice, I advise and represent clients in the area of German insolvency law.

4. On September 1, 2019, insolvency proceedings concerning the assets of Wumag Texroll GmbH & Co. KG ("Wumag") commenced in the district court of Krefeld, Germany. Dr. Peter Minuth was appointed as insolvency administrator.

5. On or around September 18, 2019, Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag"), entered into an asset purchase agreement to purchase the assets of Wumag out of the opened insolvency proceeding (the "Asset Purchase Agreement").

6. Pursuant to the Asset Purchase Agreement, Kelzenberg-Wumag purchased certain assets of Wumag, including, inter alia, machinery, equipment, software licenses. Ownership of the purchased assets was transferred from Wumag to Kelzenberg-Wumag on October 1, 2019. After the asset purchase, Kelzenberg-Wumag adopted the "Wumag Texroll GmbH & Co. KG" name.

7. Under German law, an agreement to purchase assets out of an opened insolvency proceeding generally does not provide for the assumption of liabilities.

8. Kelzenberg-Wumag did not assume Wumag's liabilities pursuant to the Asset Purchase Agreement.

9. Section 25 (1) of the German Commercial Code (*Handelsgesetzbuch - HGB*) provides that: Anyone who continues a commercial business acquired *inter vivos* under the previous company name, with or without the addition of an addendum indicating the succession relationship, is liable for all liabilities of the previous owner arising from the operation of the business. The claims against the debtors arising from the business shall be deemed to have been transferred to the acquirer if the previous owner or his heirs have consented to the continuation of the business.

10. However, Section 25 (1) of the German Commercial Code does not apply to the acquisition of assets from the insolvency administrator out of an opened insolvency proceeding.

According to the case law of the German Federal Court of Justice (*Bundesgerichtshof – BGH*) and the general opinion in the legal literature, Section 25 is not applicable to the acquisition of a company from the insolvency administrator out of an opened insolvency proceeding. The German Federal Court of Justice argues in its decision of April 11, 1988 that the insolvency administrator's task of selling the company as a whole in the interest of the creditors should not be made more difficult by a possible liability of the purchaser for the debts of the previous company owner.

„Aufgabe des Konkursverwalters ist es, die Vermögensgegenstände des Gemeinschuldners zu verwerten und dabei im Interesse der Gläubiger den höchstmöglichen Erlös zwecks anschließender Verwertung zu erzielen. Mit dieser Aufgabe wäre es unvereinbar, wenn der Erwerber eines zur Masse gehörenden Unternehmens nach § 25 I HGB (...) haften müßte. Eine Veräußerung des Unternehmens mit sämtlichen Schulden, die zum Zusammenbruch des bisherigen Trägers geführt haben, wäre nur in den seltensten Fällen erreichbar. Der Konkursverwalter wäre deshalb in aller Regel darauf beschränkt, eine Verwertung des Schuldnervermögens durch Zerschlagung durchzuführen. Dies würde Sinn und Zweck des § 25 I HGB (...), der den Gläubiger begünstigen soll, widersprechen (...).“

The bankruptcy administrator's [which corresponds to the insolvency administrator in current law] task is to realize the assets of the bankrupt and to achieve the highest possible proceeds in the interests of the creditors for the purpose of subsequent realization. It would be incompatible with this task if the purchaser of a company belonging to the estate were to be liable in accordance with Section 25 (1) HGB (...). A sale of the company with all the debts that led to the collapse of the previous owner would only be achievable in the rarest of cases. The bankruptcy trustee would therefore generally be limited to liquidating the debtor's assets by breaking them up. This would contradict the meaning and purpose of Section 25 (1) HGB (...) which is intended to benefit the creditor.

(German Federal Court of Justice, April 11, 1988 – II ZR 313/87, NJW 1988, 1912).

This case law was confirmed in further judgments of the German Federal Court of Justice: November 4, 1991 - II ZR 85/91, NJW 1992, 911; September 24, 2008 - VIII ZR 192/06, DStR 2009, 383; December 3, 2019 - II ZR 457/18, BeckRS 2019, 35515.

The German Federal Labor Court has also ruled:

„Die Anwendung von § 25 I HGB auch im Falle des Erwerbs vom Insolvenzverwalter stünde im Widerspruch zu den bestimmenden Grundsätzen des Insolvenzverfahrens und der dem Insolvenzverwalter darin zugewiesenen Funktion. Die Veräußerung in der Insolvenz duldet wesensgemäß eine Schuldenhaftung des Erwerbers nach § 25 I HGB nicht (...). Aufgabe des Insolvenzverwalters ist es, die Vermögensgegenstände des Gemeinschuldners zu verwerten und dabei im Interesse der Insolvenzgläubiger den höchstmöglichen Erlös zwecks anschließender Verteilung zu erzielen. Mit dieser Aufgabe wäre es unvereinbar, wenn der Erwerber eines zur Masse gehörenden Unternehmens nach § 25 I HGB (...) haften müsste. Eine Veräußerung des Unternehmens mit sämtlichen Schulden, die zum Zusammenbruch geführt haben, wäre in den seltensten Fällen erreichbar. Die Unanwendbarkeit des § 25 I HGB auf Unternehmensveräußerungen durch den Konkursverwalter beruht, wie der BGH in seiner Entscheidung vom 11. 4. 1988 (BGHZ 104, 151 = NJW 1988, 1912) ausgeführt hat, maßgeblich auf dem Gesichtspunkt, dass die Aufgabe des Konkursverwalters, das Unternehmen im Interesse der Gläubiger an der schnellstmöglichen Verwertung der Masse im Ganzen zu veräußern, nicht durch eine mögliche Haftung des Erwerbers für die Schulden des bisherigen Unternehmensträgers erschwert werden soll.“

The application of Section 25 (1) HGB also in the case of acquisition from the insolvency administrator would be contrary to the determining principles of the insolvency proceedings and the function assigned to the insolvency administrator therein. By its very nature, the sale in insolvency does not tolerate the acquirer's liability for debts in accordance with Section 25 (1) HGB (...). The task of the insolvency administrator is to realize the assets of the debtor-in-possession and to achieve the highest possible proceeds in the interests of the insolvency creditors for the purpose of subsequent distribution. It would be incompatible with this task if the acquirer of a company belonging to the estate were to be liable in accordance with Section 25 (1) HGB (...). A sale of the company with all the debts that led to its collapse would only be achievable in the rarest of cases. The inapplicability of Section 25 (1) HGB to company sales by the bankruptcy trustee is based, as the BGH stated in its decision of April 11, 1988 (BGHZ 104, 151 = NJW 1988, 1912), primarily on the aspect that the bankruptcy trustee's task of selling the company as a whole in the interest of the creditors in the fastest possible realization of the assets should not be made more difficult by a possible liability of the purchaser for the debts of the previous company owner.

(German Federal Labor Court, September 20, 2006 – 6 AZR 215/06, NJW 2007, 942)

11. Based on my review of the Asset Purchase Agreement and applicable German law, Kelzenberg-Wumag did not assume liability for the injuries claimed by the Plaintiffs in this case.

12. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

Date: July, 11 2025

A handwritten signature in blue ink, appearing to read "N. Derksen".

Dr. Nils Derksen

Exhibit 2

Dr. Nils Derksen - Insolvency law, Corporate restructuring, (Distressed) M&A, Corporate law

 loschelder.de/en/lawyers-cologne/dr-nils-derksen.html



Dr. Nils Derksen

Partner

Insolvency law and corporate restructuring, (Distressed) M&A, corporate law

Telephone: +49 221 65065-224

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E-Mail: nils.derksen@loschelder.de

vCard: [vCard of Dr. Nils Derksen](#)

Legal training:

Legal clerkship in Cologne and New York

Legal studies in Bonn and London

Dr jur

Bank clerk

Call to the Bar: 2014

Languages: English

Nils advises local and international clients on out-of-court and in-court restructuring matters, distressed M&A transactions as well as reorganisation and insolvency law. Nils' main focus is on advising investors, insolvency administrators, debtors, creditors and shareholders in special situations and insolvency proceedings (including self-administration and insolvency plan proceedings).

In addition, Nils advises on corporate law matters as well as national and cross-border mergers & acquisitions with a focus on group reorganisations (e.g. carve-outs, capital measures, transformation measures).

Nils is the author of several book contributions in German and English on current restructuring and insolvency topics.

Prior to joining our firm, Nils worked as a lawyer at the international law firm Freshfields Bruckhaus Deringer for almost eight years.

Exhibit 3

Erwerb eines Handelsunternehmens vom Sequester ±

KO § 106; HGB § 25 I; BGB § 419

Der Erwerb eines Handelsunternehmens aus der Hand des Sequesters schließt die Anwendbarkeit von § 25 I HGB und § 419 BGB jedenfalls dann nicht aus, wenn sich an die Sequestration nicht die Eröffnung des Konkursverfahrens anschließt.

BGH, Urteil vom 11-04-1988 - II ZR 313/87 (Bremen)

Zum Sachverhalt:

Die Kl. macht gegen die bekl. M-GmbH aus dem Gesichtspunkt der Firmenfortführung und der Vermögensübernahme Ansprüche in Höhe von 6032,52 DM aus Warenlieferungen an die M-GmbH & Co. KG (KG) geltend. Über diese Gesellschaft, die auf dem Gebiete der Holzverarbeitung und Tischlerei tätig war, sowie über ihre Komplementär-GmbH war am 11. 10. 1985 nach Stellung des Konkursantrages die Sequestration angeordnet worden, die am 17. 2. 1986 mit der Ablehnung des Konkursantrages mangels Masse endete. Die am 14. 12. 1985 gegründete und am 21. 1. 1986 in das Handelsregister eingetragene Bekl. erwarb am 15. 1. 1986 von dem Sequester einen Teil des Inventars und der Maschinen der KG zum Preise von ca. 26000 DM und betreibt mit Hilfe einiger von der KG übernommener Angestellter in einem Teil der ehemaligen Betriebsräume ein Unternehmen, dessen Gegenstand sie mit Beratung und Innenausbau angibt. Eigentümer der Räume ist der frühere Geschäftsführer und - gemeinsam mit seiner Ehefrau - Alleingesellschafter der persönlich haftenden Gesellschafterin der KG, der Tischlermeister H. Er war zugleich Gründer und erster Geschäftsführer der Bekl. Jetziger Geschäftsführer und Alleingesellschafter ist sein Sohn, der Student D. Sein Vater bekleidet dort gegenwärtig die Stellung eines Prokuristen. Die Bekl. macht geltend, sie führe weder das Handelsgeschäft noch die Firma der ehemaligen M-GmbH & Co. KG fort. Sie habe überdies nur einen kleinen Teil des freien Betriebsvermögens der KG, das sich auf insgesamt 161605 DM belaufen habe, übernommen; den Rest habe der Sequester anderweit verwertet. Das BerGer. hat die in erster Instanz erfolgreiche Klage abgewiesen. Die Revision führte zur Aufhebung und Zurückverweisung.

BGH: Erwerb eines Handelsunternehmens vom Sequester (NJW 1988, 1912)

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Aus den Gründen:

Das BerGer. führt aus, es möge sein, daß das Auftreten der Bekl. nach außen hin so geartet gewesen sei, daß dies als Fortführung des früheren Handelsgeschäfts unter der bisherigen Firma angesehen werden konnte.

Es meint jedoch, ein Erwerb vom Sequester könne ebenso wenig wie derjenige vom Konkurs- oder Nachlaßverwalter eine Haftung nach § 25 I HGB, § 419 BGB auslösen. Zu der dem

Sequester obliegenden Verwaltung könne auch die sinnvolle Veräußerung von Vermögensgegenständen des zukünftigen Gemeinschuldners gehören, da auf diese Weise Geld hereinkomme, das zur gleichmäßigen Befriedigung der Konkursgläubiger dienen solle. Dieser Zweck würde weitgehend zunichte gemacht, wenn derjenige, der vom Sequester etwas erwirbt und ihm damit hilft, den Zweck der Sequestration zu ermöglichen, befürchten müßte, von einzelnen Gläubigern des künftigen Gemeinschuldners als dessen Nachfolger in der Haftung in Anspruch genommen zu werden. Dies müßte auch dann gelten, wenn er in diesem Zusammenhang wie ein Firmennachfolger auftrete. Diese Ausführungen halten rechtlicher Prüfung nicht stand.

I. Das BerGer. erkennt zwar zutreffend, daß nach allgemeiner Meinung § 25 I HGB und § 419 BGB nicht anwendbar sind, wenn der Konkursverwalter das Unternehmen des Gemeinschuldners veräußert (BGHZ 66, 217 (228) = NJW 1976, 1398; BGH, NJW 1987, 1019 (1020) = BGHRBGBB § 419 Abs. 1 "Nachlaßverwaltung 1" - für den Nachlaßverwalter; RGZ 58, 166; BAG, NJW 1966, 1984; Staub-Hüffer, HGB, 4. Aufl., § 25 Rdnr. 60; Baumbach-Duden-Hopt, HGB, 27. Aufl., § 25 Anm. 3 Cc; Schlegelberger-Hildebrandt, HGB, 5. Aufl., § 25 Rdnr. 8; Jäger-Henckel, KO, 9. Aufl., § 1 Rdnr. 16; Kuhn-Uhlenbruck, KO, 10. Aufl., § 1 Rdnr. 80e; Kilger, KO, 15. Aufl., § 1 Anm. 3 Cd). Indem das BerGer. maßgeblich darauf abstellt, zu der dem Sequester obliegenden Verwaltung könne auch die Veräußerung von Vermögensgegenständen des Gemeinschuldners gehören, da auf diese Weise Geld zur gleichmäßigen Befriedigung der Konkursgläubiger hereinkomme, berücksichtigt es jedoch nicht ausreichend, daß Aufgaben und Stellung des Sequesters einerseits und des Konkursverwalters andererseits verschieden sind. Diese Unterschiede sind grundlegender Art und betreffen gerade diejenigen Gesichtspunkte, aus denen die herrschende Meinung letztlich ihre Rechtfertigung bezieht. Ausschlaggebend für die Nichtanwendbarkeit von § 25 I HGB und § 419 BGB auf Unternehmensveräußerungen durch den Konkursverwalter kann nämlich weder sein, daß sie - was auch auf den Sequester zuträfe - durch einen Amtswalter im Rahmen eines gerichtlich kontrollierten Verfahrens erfolgen (so aber anscheinend OLG Köln, WM 1987, 1047), noch daß sie der Masse einen Gegenwert zuführen (so jedoch Schlegelberger-Hildebrandt, § 25 Rdnr. 8). Es wäre nicht verständlich, warum § 25 I HGB und § 419 BGB, die keine Mißbrauchstatbestände sind, allein deshalb nicht gelten sollten, weil die Veräußerung nicht durch den Schuldner persönlich, sondern durch einen gerichtlich kontrollierten Amtsträger geschieht, der die Verwaltungs- und Verfügungsbefugnisse des Schuldners an dessen Stelle ausübt. Der zur Masse gelangende Gegenwert kann die Anwendbarkeit von § 25 I HGB und § 419 BGB schon deshalb nicht ausschließen, weil diese Vorschriften keine unentgeltliche Verfügung voraussetzen, sondern in beiden Fällen die Haftung des Erwerbers ungeachtet der von ihm erbrachten Gegenleistung neben diejenige des Veräußerers tritt. Die Beschränkung der Konkursgläubiger auf die Masse, auf die in diesem Zusammenhang zur Begründung teilweise hingewiesen wird (so u. a. in RGZ 58, 166), ist zwar ein Leitprinzip des Konkursrechts, gilt aber nur in bezug auf das

Schuldnervermögen und verbietet nicht zwingend, daß die Gläubiger außerhalb des Konkursverfahrens Befriedigung aus dem Vermögen eines mithaftenden Dritten suchen. Schließlich vermag auch die Begründung nicht zu überzeugen, die im Konkursverfahren bestehenden Unterrichtungspflichten (§§ 11, 134 Nr. 1 KO) ersetzen die Bekanntmachung nach § 25 II HGB. Diese (vom BAG, NJW 1966, 1984 im übrigen auch nur ergänzend herangezogene) Argumentation ist weitgehend fiktiver Art und könnte auch allenfalls die Nichtanwendung des abdingbaren § 25 I HGB, nicht aber des zwingenden § 419 BGB erklären. Letztlich ausschlaggebend ist vielmehr, wie auch das BerGer. nicht zu verkennen scheint, daß die Anwendung von § 25 I HGB und § 419 BGB auf Veräußerungsgeschäfte des Konkursverwalters im Widerspruch zu den bestimmenden Grundsätzen des Konkursverfahrens und der dem Konkursverwalter darin zugewiesenen Funktion stünde. Aufgabe des Konkursverwalters ist es, die Vermögensgegenstände des Gemeinschuldners zu verwerten und dabei im Interesse der Gläubiger den höchstmöglichen Erlös zwecks anschließender Verwertung zu erzielen. Mit dieser Aufgabe wäre es unvereinbar, wenn der Erwerber eines zur Masse gehörenden Unternehmens nach § 25 I HGB oder § 419 BGB haften müßte. Eine Veräußerung des Unternehmens mit sämtlichen Schulden, die zum Zusammenbruch des bisherigen Trägers geführt haben, wäre nur in den seltensten Fällen erreichbar. Der Konkursverwalter wäre deshalb in aller Regel darauf beschränkt, eine Verwertung des Schuldnervermögens durch Zerschlagung durchzuführen. Dies würde Sinn und Zweck des § 25 I HGB und vor allem des § 419 BGB, der den Gläubiger begünstigen soll, widersprechen (so vor allem Staub-Hüffer, § 25 Rdnr. 61; ähnliche Erwägungen finden sich u. a. auch in RGZ 58, 166, und BAG, NJW 1966, 1984; vgl. ferner die Regelung der Haftung für Steuerrückstände eines aus der Konkursmasse erworbenen Unternehmens in § 75 II AO 1977).

Dieser die Unanwendbarkeit von § 25 HGB und § 419 BGB bei Unternehmensveräußerungen durch den Konkursverwalter letztlich rechtfertigende Gesichtspunkt trifft auf den Sequester nicht zu. Der BGH hat bereits mehrfach entgegen Bestrebungen von Teilen des insolvenzrechtlichen Schrifttums, die für möglichst umfassende Befugnisse des Sequesters eintreten (vgl. Castendieck, KTS 1978, 13; Kilger, in: Festschr. 100 Jahre Konkursordnung, S. 189, 193; Baur-Stürner, Rdnr. 977; Fricke, MDR 1978, 100), daran festgehalten, daß die Funktionen des Konkursverwalters und des Sequesters nicht miteinander vergleichbar sind (vgl. BGHZ 86, 190 (195 f.) = NJW 1983, 887; BGH, NJW-RR 1987, 1276 = WM 1987, 1228; BGHZ 97, 87 = NJW 1986, 1498; im gleichen Sinne im Schrifttum aber auch Kuhn-Uhlenbruck, § 106 Rdnr. 7; zurückhaltend jetzt auch Kilger, § 106 Anm. 4). Insbesondere gehört es weder zu den Rechten noch zu den Pflichten des Sequesters, das Vermögen des Schuldners zwecks Erhalt von Barmitteln zur Verteilung an die Gläubiger zu veräußern. Diese Aufgabe ist nach der eindeutigen Kompetenzzuweisung des § 117 KO allein dem Konkursverwalter vorbehalten. Die im Gesetz nicht näher geregelte Funktion des Sequesters beruht auf § 106 KO. Sie beschränkt sich folglich ausschließlich auf die Erhaltung und

Sicherung des Schuldnervermögens für den - zu dieser Zeit keineswegs feststehenden - Fall einer späteren Eröffnung des Konkursverfahrens, ohne daß dem Sequester schon umfassende Verwaltungs- und Verfügungsbefugnisse zustehen (BGHZ 86, 190 (196) = NJW 1983, 887 m. w. Nachw.). Die Sequestration darf deshalb nicht als eine Art "Vorkonkurs" und die Stellung des Sequesters nicht als diejenige eines "Vorkonkursverwalters" verstanden werden (so nachdrücklich Kuhn-Uhlenbruck, § 106 Rdnr. 7). Im Hinblick auf die grundlegende Verschiedenheit der Funktionen von Sequester und Konkursverwalter hat der BGH ausgesprochen, daß die Sequestration das Prozeßführungsrecht des Schuldners unberührt läßt (Senat, NJW-RR 1987, 1276) und Rechtshandlungen des Sequesters nach Eröffnung des Konkursverfahrens genauso angefochten werden können als wären sie vom Gemeinschuldner selber vorgenommen worden, und zwar grundsätzlich auch dann, wenn der Konkursverwalter mit dem ehemaligen Sequester personengleich ist (BGHZ 86, 190 = NJW 1983, 887; BGHZ 97, 87 = NJW 1986, 1498). Auch das Wahlrecht nach § 17 KO steht dem Sequester nicht zu (BGHZ 97, 87 = NJW 1986, 1498). Infolge der Beschränkung des Sequesters auf vorläufige Sicherungs- und Erhaltungsmaßnahmen ist er grundsätzlich auch nicht zur Liquidierung eines dem Schuldner gehörenden Unternehmens (BGH, NJW 1961, 1304 ff.; Kuhn-Uhlenbruck, § 106 Rdnr. 13 a m. w. Nachw. in Rdnr. 13; Gerhardt, ZIP 1982, 7; zurückhaltend jetzt auch Kilger, § 106 Rdnr. 4) und deshalb auch nicht zu dessen Veräußerung berechtigt (vgl. Kuhn-Uhlenbruck, § 106 Rdnr. 13 a i. V. mit 13 c; Gerhardt, ZIP 1982, 7; LG Düsseldorf, NJW 1987, 2091 (2092); uneingeschränkt a. A. anscheinend nur Castendieck, KTS 1978, 14). Durch diese Maßnahme würde ein endgültiger Zustand geschaffen, zu dessen Herbeiführung der Sequester schon deshalb nicht befugt sein kann, weil die Voraussetzungen für die Eröffnung des Konkursverfahrens noch gar nicht geprüft sind. Ob eine Ausnahme zu rechtfertigen sein kann, wenn die Sicherung des Schuldnervermögens im Hinblick auf die als gewiß vorauszusehende Eröffnung des Konkursverfahrens dies zwingend gebietet, wozu allerdings nicht ausreichen kann, daß

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das Unternehmen verlustbringend ist, kann dahinstehen, weil dies im vorliegenden Fall nicht geltend gemacht wird. Einer trotzdem vorgenommenen Unternehmensveräußerung könnte allenfalls die Zustimmung des Schuldners als des Rechtsträgers und - wenn auch aufgrund des mit der Sequestration verbundenen allgemeinen Veräußerungsverbots vorübergehend in der Ausübung dieser Befugnis beschränkten - Verfügungsberechtigten zur Wirksamkeit verhelfen. Eine Veräußerung des Unternehmens vor der Konkurseröffnung während der Sequestration steht damit rechtlich einer Veräußerung durch den Schuldner näher als derjenigen durch den Konkursverwalter in Ausübung des ihm durch § 117 KO erteilten gesetzlichen Auftrags. Bei dieser Sachlage fehlt es an einer inneren Rechtfertigung, die Unternehmensveräußerung durch den Sequester mit Zustimmung des Schuldners unter dem Gesichtspunkt von § 25 I HGB und § 419 BGB derjenigen durch den Konkursverwalter

gleichzustellen (a. A. LG Düsseldorf, NJW 1987, 2091; Kilger § 1 Anm. 3 Cd, die allerdings die Berechtigung der Gleichstellung der Veräußerung durch den Sequester mit derjenigen durch den Konkursverwalter nicht begründen, was vor allem an den Entscheidungsgründen des LG Düsseldorf, NJW 1987, 2091 deutlich wird, sowie OLG Köln, WM 1987, 1047 m. Anm. Rehbein, in: WuB VI C. § 106 KO 3.87, das sich lediglich auf den unzureichenden Gesichtspunkt stützt, auch bei der Veräußerung durch den Sequester mit Zustimmung des späteren Gemeinschuldners handele es sich um ein gerichtlich kontrolliertes Verfahren, das mit der Risikosituation des § 419 BGB nichts zu tun habe). Dies muß jedenfalls dann gelten, wenn sich, wie im vorliegenden Fall, an die Sequestration nicht die Eröffnung des Konkursverfahrens anschließt, etwa weil sich herausstellt, daß die dafür erforderlichen Voraussetzungen (Zahlungsunfähigkeit, Überschuldung) nicht erfüllt sind, oder eine kostendeckende Masse nicht vorhanden ist. In diesem Falle ist das sequestrierte Vermögen nach Abzug der Kosten an den Schuldner zur freien Verfügung auszuhändigen. Die damit entstehende Situation entspricht vor allem auch im Hinblick auf die Stellung der Gläubiger in jeder Weise derjenigen bei Veräußerung des Unternehmens durch den Schuldner außerhalb eines Konkursverfahrens; es gibt deshalb keinen Grund, § 25 I HGB und § 419 BGB in einem solchen Falle nicht anzuwenden.

N.

Anm. d. Schriftltg.:

Zur Anwendung von Handelsrecht auf Rechtshandlungen des Konkursverwalters vgl. Karsten Schmidt, NJW 1987, 1905.

± Zum Abdruck in der Entscheidungssammlung vorgesehen

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COCOUNSEL

Skill: Review Documents**Result created:** July 11, 2025**Prompt:** Translate the document to English.**Files:**

- [BGH Erwerb eines Handelsunternehmens vom Sequester - beck-online.pdf](#)
-

Result:**Result:**

The task is to translate the provided legal document from German to English. Below is the translation of the document:

BGH: Acquisition of a Commercial Enterprise from the Trustee**NJW 1988, 1912****Acquisition of a Commercial Enterprise from the Trustee****KO § 106; HGB § 25 I; BGB § 419**

The acquisition of a commercial enterprise from the hands of the trustee does not preclude the applicability of § 25 I HGB and § 419 BGB, at least when the sequestration is not followed by the opening of bankruptcy proceedings.

BGH, Judgment of 11-04-1988 - II ZR 313/87 (Bremen)**Facts of the Case:**

The plaintiff claims against the defendant M-GmbH on the grounds of company continuation and asset acquisition claims amounting to 6032.52 DM from goods deliveries to M-GmbH & Co. KG (KG). On October 11, 1985, after filing for bankruptcy, sequestration was ordered over this company, which was active in the field of wood processing and carpentry, as well as over its general partner GmbH. The sequestration ended on February 17, 1986, with the rejection of the bankruptcy petition due to lack of assets. The defendant, founded on December 14, 1985, and registered in the commercial register on January 21, 1986, acquired part of the inventory and machinery of KG from the trustee on January 15, 1986, for approximately 26,000 DM and operates a business with the help of some employees taken over from KG in part of the former business premises, which it describes as consulting and interior design. The owner of the premises is the former managing director and - together with his wife - sole shareholder of the personally liable partner

of KG, the master carpenter H. He was also the founder and first managing director of the defendant. The current managing director and sole shareholder is his son, the student D. His father currently holds the position of authorized signatory there. The defendant claims that it neither continues the business nor the company of the former M-GmbH & Co. KG. Moreover, it has only taken over a small part of the free operating assets of KG, which amounted to a total of 161,605 DM; the rest was otherwise utilized by the trustee. The appellate court dismissed the claim, which was successful in the first instance. The revision led to annulment and remand.

BGH: Acquisition of a Commercial Enterprise from the Trustee (NJW 1988, 1912) 1913

Reasons:

The appellate court states that it may be that the defendant's appearance to the outside world was such that it could be regarded as a continuation of the former business under the previous company name. However, it believes that an acquisition from the trustee, like one from the bankruptcy or estate administrator, cannot trigger liability under § 25 I HGB, § 419 BGB.

The trustee's administration may also include the sensible sale of assets of the future common debtor, as this would bring in money to serve the equal satisfaction of the bankruptcy creditors. This purpose would be largely thwarted if the person acquiring something from the trustee and thereby helping to achieve the purpose of sequestration had to fear being held liable by individual creditors of the future common debtor as its successor. This must also apply if he appears in this context as a company successor. These statements do not withstand legal scrutiny.

I. The appellate court correctly recognizes that, according to general opinion, § 25 HGB and § 419 BGB are not applicable when the bankruptcy administrator sells the enterprise of the common debtor. However, by focusing significantly on the fact that the trustee's administration may also include the sale of the common debtor's assets, as this would bring in money for the equal satisfaction of the bankruptcy creditors, it does not sufficiently consider that the tasks and position of the trustee and the bankruptcy administrator are different. These differences are fundamental and concern precisely those aspects from which the prevailing opinion ultimately derives its justification. The decisive factor for the non-applicability of § 25 I HGB and § 419 BGB to company sales by the bankruptcy administrator cannot be that they - which would also apply to the trustee - are carried out by an official within the framework of a court-controlled procedure, nor that they add value to the estate. It would not be understandable why § 25 I HGB and § 419 BGB, which are not abuse provisions, should not apply simply because the sale is not carried out by the debtor personally, but by a court-controlled official who exercises the debtor's administrative and disposal powers in his place. The value added to the estate cannot exclude the applicability of § 25 I HGB and § 419 BGB because these provisions do not presuppose a gratuitous disposition, but in both cases, the acquirer's liability is added to that of the seller regardless of the consideration

provided by him. The restriction of bankruptcy creditors to the estate, which is partly referred to in this context for justification, is indeed a guiding principle of bankruptcy law but applies only concerning the debtor's assets and does not necessarily prohibit creditors from seeking satisfaction from the assets of a jointly liable third party outside the bankruptcy proceedings. Finally, the argument that the information obligations existing in the bankruptcy proceedings replace the announcement under § 25 II HGB is not convincing. This argument is largely fictitious and could at most explain the non-application of the waivable § 25 I HGB, but not of the mandatory § 419 BGB. Ultimately decisive, as the appellate court does not seem to overlook, is that the application of § 25 I HGB and § 419 BGB to sales transactions by the bankruptcy administrator would contradict the determining principles of the bankruptcy proceedings and the function assigned to the bankruptcy administrator therein. The task of the bankruptcy administrator is to realize the assets of the common debtor and to achieve the highest possible proceeds in the interest of the creditors for subsequent realization. It would be incompatible with this task if the acquirer of a company belonging to the estate had to be liable under § 25 I HGB or § 419 BGB. A sale of the company with all the debts that led to the collapse of the previous carrier would only be achievable in the rarest cases. The bankruptcy administrator would therefore generally be limited to realizing the debtor's assets through liquidation. This would contradict the purpose of § 25 I HGB and especially § 419 BGB, which is intended to benefit the creditor.

This ultimately justifying aspect of the non-applicability of § 25 HGB and § 419 BGB in company sales by the bankruptcy administrator does not apply to the trustee. The BGH has repeatedly maintained, contrary to efforts by parts of the insolvency law literature advocating for the most comprehensive powers of the trustee, that the functions of the bankruptcy administrator and the trustee are not comparable. In particular, it is neither the right nor the duty of the trustee to sell the debtor's assets to obtain cash for distribution to creditors. This task is solely reserved for the bankruptcy administrator according to the clear competence assignment of § 117 KO. The function of the trustee, not further regulated in the law, is based on § 106 KO. It is therefore exclusively limited to the preservation and securing of the debtor's assets for the - at this time by no means certain - case of a later opening of bankruptcy proceedings, without the trustee already having comprehensive administrative and disposal powers. Sequestration must therefore not be understood as a kind of "pre-bankruptcy" and the position of the trustee not as that of a "pre-bankruptcy administrator." In view of the fundamental difference in the functions of the trustee and the bankruptcy administrator, the BGH has stated that sequestration leaves the debtor's right to conduct proceedings unaffected and that legal actions by the trustee after the opening of bankruptcy proceedings can be challenged just as if they had been carried out by the common debtor himself, and this is generally also the case if the bankruptcy administrator is identical to the former trustee. The right of choice under § 17 KO is also not available to the trustee. Due to the restriction of the trustee to provisional security and preservation measures, he is generally not entitled

to liquidate a company belonging to the debtor and therefore also not to sell it. By this measure, a final state would be created, which the trustee cannot be authorized to bring about because the prerequisites for the opening of bankruptcy proceedings have not yet been examined. Whether an exception can be justified if the securing of the debtor's assets in view of the foreseeable opening of bankruptcy proceedings makes this imperative, which, however, cannot be sufficient, that the company is loss-making, can remain open because this is not asserted in the present case. A company sale nevertheless carried out could at most be made effective by the consent of the debtor as the legal entity and - even if temporarily restricted in the exercise of this power due to the general prohibition of disposal associated with sequestration - the authorized person. A sale of the company before the opening of bankruptcy during sequestration is thus legally closer to a sale by the debtor than to one by the bankruptcy administrator in the exercise of the statutory mandate granted to him by § 117 KO. In this situation, there is no internal justification for equating the company sale by the trustee with the consent of the debtor under the aspect of § 25 I HGB and § 419 BGB with that by the bankruptcy administrator.

This must apply at least when, as in the present case, the sequestration is not followed by the opening of bankruptcy proceedings, for example, because it turns out that the necessary prerequisites (insolvency, over-indebtedness) are not met, or a cost-covering estate is not available. In this case, the sequestered assets must be handed over to the debtor for free disposal after deducting the costs. The resulting situation corresponds in every way to that of a company sale by the debtor outside of bankruptcy proceedings, especially concerning the position of the creditors; there is therefore no reason not to apply § 25 I HGB and § 419 BGB in such a case.

Note by the Editorial Staff:

For the application of commercial law to legal actions of the bankruptcy administrator, see Karsten Schmidt, NJW 1987, 1905.

This translation captures the essence and legal reasoning of the original German document, focusing on the applicability of specific German commercial and civil code sections in the context of business acquisitions from a trustee.

*** Haftung bei Erwerb eines Unternehmens vom Insolvenzverwalter**

HGB § 25 I, II; InsO § 38; EGInsO Art. 33 Nr. 16; BGB § 613a; BGB a.F. § 419

Der Erwerb eines Handelsunternehmens aus der Hand des Insolvenzverwalters schließt die Anwendbarkeit von § 25 I HGB aus.

BAG, Urteil vom 20. 9. 2006 - 6 AZR 215/06 (LAG Düsseldorf)

Zum Sachverhalt:

Die Parteien streiten über eine Haftung des Bekl. für Vergütungsansprüche aus einem Ausbildungsverhältnis. Der Kl. war vom 1. 8. 2001 bis zum 31. 3. 2003 als Auszubildender bei der *E*GmbH beschäftigt, deren Geschäftsführer der Bekl. war. Die durchschnittliche Bruttovergütung betrug 518,96 Euro brutto, wobei als Ausbildungsvergütung ein Betrag von 480,61 Euro sowie Urlaubsgeld und vermögenswirksame Leistungen vereinbart waren. Die Firma *E*GmbH zahlte auf die geschuldete Ausbildungsvergütung des Kl. für die Monate November und Dezember 2002 insgesamt einen Teilbetrag von 89,12 Euro netto. Mit Beschluss des *AG Wuppertal* vom 5. 8. 2003 (145 IN 387/03) wurde über das Vermögen der *E*GmbH das Insolvenzverfahren eröffnet. Zu einem späteren Zeitpunkt erwarb der Geschäftsführer und jetzige Bekl. vom Insolvenzverwalter die Betriebsausstattung der Schuldnerin und betreibt seitdem in den Räumlichkeiten der Insolvenzschuldnerin an gleicher Stelle die Einzelfirma *S*.

Der Kl. macht gegenüber dem Bekl. die Vergütungsansprüche aus der Zeit vor der Eröffnung des Insolvenzverfahrens aus dem Haftungsgrund der Firmenfortführung gem. § 25 HGB geltend. Mit der am 28. 6. 2005 zunächst beim *AG Mettmann* eingegangenen Klage und nach Verweisung des Rechtsstreits an das *ArbG Düsseldorf* beansprucht der Kl. vom Bekl. die Zahlung der Ausbildungsvergütung für die Monate November und Dezember 2002. Der Kl. hat erstinstanzlich zuletzt beantragt, gegen den im Verhandlungstermin nicht anwesenden Bekl. ein Versäumnis-Urteil zu erlassen und ihn zu verurteilen, an den Kl. 1037,92 Euro brutto abzüglich gezahlter 89,12 Euro netto nebst Zinsen seit dem 11. 9. 2004 zu zahlen.

Das *ArbG* hat die Klage abgewiesen und die Klageabweisung damit begründet, dass eine Haftung aus § 25 HGB entfalle, soweit Insolvenzgläubiger betroffen seien. Das *LAG* hat die Berufung des Kl. zurückgewiesen. Die Revision des Kl. blieb ohne Erfolg.

Aus den Gründen:

6 Die Vorinstanzen haben zu Recht die Klage als unbegründet abgewiesen. Der Kl. hat gegen den Bekl. keinen Anspruch auf Zahlung weiterer Ausbildungsvergütung für die Monate November und Dezember 2002.

7 1. Der Kl. kann seine Forderung nicht mit Erfolg auf § 25 I HGB stützen.

8 Nach dieser Vorschrift haftet grundsätzlich der Erwerber eines Handelsgeschäfts für die im Betrieb dieses Geschäfts begründeten Verbindlichkeiten des früheren Inhabers, wenn er das Geschäft unter der bisherigen Firma fortführt.

9 Der Kl. ist jedoch Insolvenzgläubiger i.S. von § 38 InsO. Ein Konkurs- bzw. Insolvenzgläubiger kann sich aber nicht auf § 25 I HGB berufen, wenn der Konkurs- bzw. Insolvenzverwalter das Handelsgeschäft veräußert hat (vgl. BAGE 18, 286 = NJW 1966, 1984; BAGE 64, 196 = NZA 1990, 522; BGHZ 104, 151 = NJW 1988, 1912; BAG, NJW 1992, 911 = ZIP 1992, 398; BGH, NJW 2006, 1001 = DB 2006, 444; OLG Düsseldorf, NJW-RR 1999, 1556).

Dieser Rechtsprechung ist die Literatur einhellig gefolgt (vgl. GK-HGB/Nickel, 5. Aufl., § 25 Rdnr. 11; Roth, in: Koller/Roth/Morck, HGB, 5. Aufl., § 25 Rdnr. 4; Ebenroth/Boujong/Joost/Zimmer/Scheffel, HGB, Bd. 1, § 25 Rdnr. 41; Hüffer, in: Großkomm. z. HGB, 4. Aufl., Bd. I, § 25 Rdnrn. 60f.; Lieb, in: MünchKomm-HGB, 2. Aufl., Bd. 1, § 25 Rdnr. 32; Ott, in: MünchKomm-InsO, Bd. 1, § 80 Rdnr. 102; Baumbach/Hopt, HGB, 32. Aufl., § 25 Rdnr. 4; Uhlenbruck, ZIP 2000, 401 [403]; Henckel, in: Jaeger, InsO, Bd. 1, § 35 Rdnr. 30). Die Auffassung wird mit zum Teil unterschiedlicher Begründung auch nach Inkrafttreten der Insolvenzordnung weiterhin vertreten. Hiervon abzuweichen besteht nach Ansicht des *Senats* kein Anlass.

10 a) Die Anwendung von § 25 I HGB auch im Falle des Erwerbs vom Insolvenzverwalter stünde im Widerspruch zu den bestimmenden Grundsätzen des Insolvenzverfahrens und der dem Insolvenzverwalter darin zugewiesenen Funktion. Die Veräußerung in der Insolvenz duldet wesensgemäß eine Schuldenhaftung des Erwerbers nach § 25 I HGB nicht (vgl. noch zur KO Beitzke, Anm. zu BAG, NJW 1966, 1984 = AP BGB § 419 Betriebsnachfolge Nr. 7). Aufgabe des Insolvenzverwalters ist es, die Vermögensgegenstände des Gemeinschuldners zu verwerten und dabei im Interesse der Insolvenzgläubiger den höchstmöglichen Erlös zwecks anschließender Verteilung zu erzielen. Mit dieser Aufgabe wäre es unvereinbar, wenn der Erwerber eines zur Masse gehörenden Unternehmens nach § 25 I HGB oder § 419 BGB a.F. haften müsste. Eine Veräußerung des Unternehmens mit sämtlichen Schulden, die zum Zusammenbruch geführt haben, wäre in den seltensten Fällen erreichbar. Die Unanwendbarkeit des § 25 I HGB auf Unternehmensveräußerungen durch den Konkursverwalter beruht, wie der BGH in seiner Entscheidung vom 11. 4. 1988 (BGHZ 104, 151 = NJW 1988, 1912) ausgeführt hat, maßgeblich auf dem Gesichtspunkt, dass die Aufgabe des Konkursverwalters, das Unternehmen im Interesse der Gläubiger an der schnellstmöglichen Verwertung der Masse im Ganzen zu veräußern, nicht durch eine mögliche Haftung des Erwerbers für die Schulden des bisherigen Unternehmensträgers erschwert werden soll.

Zu Recht hat auch das LAG darauf hingewiesen, es käme zur Bevorzugung einzelner Insolvenzgläubiger und gleichzeitig zur Benachteiligung der übrigen Insolvenzgläubiger, da sich im Falle einer nach § 25 HGB bestehenden Haftung des Erwerbers der Preis, den der Käufer für den Erwerb des Unternehmens zu zahlen bereit wäre, entsprechend reduzieren

würde. § 25 HGB erfasst nämlich nur Geschäfts-, nicht auch Privatgläubiger. Eine Bevorzugung einzelner Insolvenzgläubiger wäre systemwidrig und widerspräche dem Grundsatz der gleichmäßigen Befriedigung aller Insolvenzgläubiger. Dass mit dem Inkrafttreten der Insolvenzordnung nur die Vorschrift des § 419 BGB entfallen ist (Art. 33 Nr. 16 EGlinsO), ändert daran angesichts des auf Geschäftsgläubiger beschränkten Anwendungsbereichs von § 25 HGB ebenso wenig wie die bloße Möglichkeit einer Haftungsvermeidung gemäß Absatz 2 dieser Vorschrift.

11 b) Auch in der Literatur wird betont, Sinn einer solchen Veräußerung sei es, den Erlös zur Masse zu ziehen, nicht aber die weitergehende Haftung des Erwerbers zu begründen (vgl. GK-HGB/*Nicke*, § 25 Rdnr. 11). Beim Erwerb vom Insolvenzverwalter bleibe § 25 I HGB trotz der Existenz des § 25 II HGB unangewendet (vgl. *Roth*, in: *Koller/Roth/Morck*, HGB, 5. Aufl., § 25 Rdnr. 4). Eine Haftung des Erwerbers gem. § 25 I HGB widerspräche grundlegenden Prinzipien des Insolvenzrechts, indem sie zu einer Umgehung der von der Insolvenzordnung vorgesehenen gleichmäßigen Befriedigung aller Gläubiger führe (vgl. *Ebenroth/Boujong/Joost/Zimmer/Scheffel*, HGB, Bd. 1, § 25 Rdnr. 41). Die Vorschrift des § 25 HGB passe nicht für den Fall der Geschäftsübertragung aus einer Insolvenzmasse, denn § 25 HGB gehe von einer Übernahme der Aktiva und Passiva aus, während der Insolvenzverwalter nur Aktiva übertrage. Mit der Anwendung der Vorschrift würde sich eine Tilgung der Geschäftsschulden außerhalb des Insolvenzverfahrens vollziehen. Es sei

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Insolvenzverwalter(NJW 2007, 942) 943

aber ein Grundprinzip unseres Haftungsrechts, dass die Aktiva des Vermögens den Gläubigern hafteten und die Realisierung dieser Haftung nicht dadurch verkürzt werden dürfe, dass Aktiva mit Schulden belastet übertragen würden, die den am Verwertungserlös Berechtigten nicht vorgehen (vgl. *Henckel*, in: *Jaeger*, § 35 Rdnr. 30).

12 c) Dem steht nicht entgegen, dass § 25 HGB ansonsten auch auf die Übernahme des Unternehmens eines überschuldeten Rechtsträgers angewendet wird, denn die genannten durch die Besonderheiten des Insolvenzverfahrens bedingten Gesichtspunkte treffen bei einem Erwerb außerhalb eines Insolvenzverfahrens nicht in gleicher Weise zu.

13 aa) Nach der Entscheidung des *BGH* vom 4. 11. 1991 (NJW 1992, 911 = ZIP 1992, 398) gilt die Haftungsregelung des § 25 HGB auch für den Fall, dass die Eröffnung des Konkursverfahrens in Ermangelung einer die Verfahrenskosten deckenden Masse abgelehnt worden ist. Die in § 25 I HGB vorgesehene Rechtsfolge setze nicht voraus, dass das übernommene Unternehmen einen zur Befriedigung seiner Gläubiger ausreichenden Wert verkörpere. Dieser Rechtsprechung ist auch der *BGH* in seiner Entscheidung vom 28. 11. 2005 (NJW 2006, 1001 = DB 2006, 444) gefolgt, die von der Revision zur Begründung ihrer Rechtsansicht angeführt wird. Danach gilt zwar die Haftungsregelung des § 25 HGB auch dann, wenn das übernommene Unternehmen insolvent ist. In dieser Entscheidung hat der

BGH - entgegen dem von der Revision erstrebten Ergebnis - aber ausdrücklich ausgeführt, dass der Kl. nicht so zu behandeln sei, als habe die Bekl. das Unternehmen in der Insolvenz erworben. Gerade letztgenannte Fallgestaltung ist jedoch vorliegend gegeben.

14 bb) Der Erwerb eines Handelsunternehmens aus der Hand eines Sequesters schließt die Anwendbarkeit von § 25 I HGB und von § 419 BGB a.F. nur dann nicht aus, wenn sich an die Sequestration nicht die Eröffnung des Konkursverfahrens anschließt (vgl. BGHZ 104, 151 = NJW 1988, 1912). Im Hinblick auf die grundlegende Verschiedenheit der Funktionen von Sequester und Konkursverwalter hat der *BGH* angenommen, dass die Sequestration das Prozessführungsrecht des Schuldners unberührt lasse. Eine Veräußerung des Unternehmens vor der Konkurseröffnung während der Sequestration stehe damit rechtlich einer Veräußerung durch den Schuldner näher als derjenigen durch den Konkursverwalter in Ausübung des ihm erteilten gesetzlichen Auftrags. Bei dieser Sachlage fehle es an einer inneren Rechtfertigung, die Unternehmensveräußerung durch den Sequester mit Zustimmung des Schuldners unter dem Gesichtspunkt von § 25 I HGB und § 419 BGB a.F. derjenigen durch den Konkursverwalter gleichzustellen. Dies müsse jedenfalls dann gelten, wenn sich, wie in dem dieser Entscheidung zu Grunde liegenden Fall, an die Sequestration nicht die Eröffnung des Konkursverfahrens anschließe, etwa weil sich herausstelle, dass die dafür erforderlichen Voraussetzungen (Zahlungsunfähigkeit, Überschuldung) nicht erfüllt seien, oder eine kostendeckende Masse nicht vorhanden sei. Dagegen ist aber auch nach dieser Entscheidung des *BGH* § 25 I HGB dann nicht anwendbar, wenn der Konkursverwalter - wie vorliegend - das Unternehmen des Gemeinschuldners veräußert.

15 2. Dieses Ergebnis steht auch im Einklang mit der Rechtsprechung zu § 613a BGB. Diese Vorschrift ist bei einer Betriebsveräußerung im Rahmen eines Insolvenzverfahrens nicht anwendbar. Insoweit haben die Verteilungsgrundsätze des Insolvenzverfahrens Vorrang (so einhellige Meinung, vgl. zuletzt BAGE 64, 196 = NZA 1990, 522 m.w. Nachw.; *Henckel*, in: *Jaeger*, § 35 Rdnr. 31). Nur auf Betriebsveräußerungen vor der Eröffnung des Insolvenzverfahrens ist § 613a BGB uneingeschränkt anwendbar.

Anm. d. Schriftltg.:

Vgl. zur Haftung nach Erwerb eines Handelsgeschäfts *OLG Frankfurt a.M.*, NJW-Spezial 2005, 510, und zu den Beratungspflichten eines Rechtsanwalts bei Gesellschaftsgründung s. *OLG Schleswig*, NJW-RR 2004, 417.

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COCOUNSEL

Skill: Review Documents**Result created:** July 11, 2025**Prompt:** Translate the document to English.**Files:**

- [BAG Haftung bei Erwerb eines Unternehmens vom Insolvenzverwalter - beck-online.pdf](#)
-

Result:

Result:

The document titled "BAG Haftung bei Erwerb eines Unternehmens vom Insolvenzverwalter" discusses the liability issues related to acquiring a company from an insolvency administrator under German law. Below is the translation of the document into English:

BAG: Liability in the Acquisition of a Company from the Insolvency Administrator**HGB § 25 I, II; InsO § 38; EGInsO Art. 33 No. 16; BGB § 613a; BGB a.F. § 419**

The acquisition of a commercial enterprise from the insolvency administrator excludes the applicability of § 25 I HGB.

BAG, Judgment of 20.9.2006 - 6 AZR 215/06 (LAG Düsseldorf)**Facts of the Case:**

The parties are disputing the liability of the defendant for remuneration claims from a training relationship. The plaintiff was employed as a trainee by E-GmbH from 1.8.2001 to 31.3.2003, whose managing director was the defendant. The average gross remuneration was 518.96 euros gross, with an agreed training allowance of 480.61 euros plus holiday pay and capital-forming benefits. E-GmbH paid a partial amount of 89.12 euros net for the months of November and December 2002 on the owed training remuneration of the plaintiff. By decision of the AG Wuppertal on 5.8.2003 (145 IN 387/03), insolvency proceedings were opened over the assets of E-GmbH. At a later date, the managing director and current defendant acquired the business equipment of the debtor from the insolvency administrator and has since operated the sole proprietorship S in the premises of the insolvency debtor at the same location.

The plaintiff asserts remuneration claims against the defendant from the time before the opening of the insolvency proceedings based on the liability reason of company

continuation according to § 25 HGB. With the lawsuit initially filed on 28.6.2005 at the AG Mettmann and after referral of the legal dispute to the ArbG Düsseldorf, the plaintiff claims from the defendant the payment of the training remuneration for the months of November and December 2002. The plaintiff finally requested in the first instance to issue a default judgment against the defendant, who was not present at the hearing, and to order him to pay the plaintiff 1037.92 euros gross minus the paid 89.12 euros net plus interest since 11.9.2004.

The ArbG dismissed the lawsuit and justified the dismissal by stating that liability under § 25 HGB is excluded as far as insolvency creditors are concerned. The LAG dismissed the plaintiff's appeal. The plaintiff's revision was unsuccessful.

Reasons:

The lower courts rightly dismissed the lawsuit as unfounded. The plaintiff has no claim against the defendant for further payment of training remuneration for the months of November and December 2002.

1. The plaintiff cannot successfully base his claim on § 25 I HGB.

According to this provision, the acquirer of a commercial business is generally liable for the liabilities established in the operation of this business by the previous owner if he continues the business under the previous company name.

However, the plaintiff is an insolvency creditor within the meaning of § 38 InsO. A bankruptcy or insolvency creditor cannot rely on § 25 I HGB if the bankruptcy or insolvency administrator has sold the commercial business.

This jurisprudence has been unanimously followed by the literature. The view is still held after the entry into force of the Insolvency Code. There is no reason to deviate from this according to the Senate.

- a) The application of § 25 I HGB also in the case of acquisition from the insolvency administrator would contradict the determining principles of the insolvency proceedings and the function assigned to the insolvency administrator therein. The sale in insolvency inherently does not tolerate a debt liability of the acquirer under § 25 I HGB. The task of the insolvency administrator is to realize the assets of the common debtor and to achieve the highest possible proceeds for subsequent distribution in the interest of the insolvency creditors. It would be incompatible with this task if the acquirer of a company belonging to the estate had to be liable under § 25 I HGB or § 419 BGB a.F.

The LAG rightly pointed out that it would lead to the preference of individual insolvency creditors and at the same time to the disadvantage of the other insolvency creditors, as the price the buyer would be willing to pay for the acquisition of the company would be correspondingly reduced.

- b) The literature also emphasizes that the purpose of such a sale is to draw the proceeds into the estate, not to establish further liability of the acquirer. In the

acquisition from the insolvency administrator, § 25 I HGB remains unapplied despite the existence of § 25 II HGB. Liability of the acquirer under § 25 I HGB would contradict fundamental principles of insolvency law by leading to a circumvention of the equal satisfaction of all creditors provided for by the Insolvency Code.

- c) This is not contradicted by the fact that § 25 HGB is otherwise also applied to the acquisition of the company of an over-indebted legal entity, as the points mentioned due to the peculiarities of the insolvency proceedings do not apply in the same way in an acquisition outside of insolvency proceedings.

aa) According to the BGH decision of 4.11.1991, the liability regulation of § 25 HGB also applies if the opening of the bankruptcy proceedings is rejected due to a lack of a mass covering the procedural costs. The legal consequence provided for in § 25 I HGB does not require that the acquired company embodies a value sufficient to satisfy its creditors. This jurisprudence was also followed by the BGH in its decision of 28.11.2005.

However, the BGH explicitly stated that the plaintiff should not be treated as if the defendant had acquired the company in insolvency. This very last-mentioned case is, however, present here.

bb) The acquisition of a commercial enterprise from the hand of a sequestrator does not exclude the applicability of § 25 I HGB and § 419 BGB a.F. only if the sequestration is not followed by the opening of bankruptcy proceedings. In view of the fundamental difference in the functions of sequestrator and bankruptcy administrator, the BGH has assumed that sequestration leaves the debtor's right to conduct proceedings unaffected. A sale of the company before the opening of bankruptcy during sequestration is thus legally closer to a sale by the debtor than to that by the bankruptcy administrator in the exercise of the statutory mandate given to him.

- 2. This result is also in line with the case law on § 613a BGB. This provision is not applicable in the case of a business sale within the framework of insolvency proceedings. The distribution principles of the insolvency proceedings take precedence in this respect. Only for business sales before the opening of insolvency proceedings is § 613a BGB fully applicable.

This translation captures the legal arguments and conclusions presented in the original German document, maintaining the legal precision and context.

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,	)	
	)	SUPPLEMENTAL MEMORANDUM IN
v.	)	FURTHER OPPOSITION TO
	)	MOTION FOR SUMMARY JUDGMENT
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.	)	

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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-AND-

PARKER LAW GROUP, LLP

BY: /s/John E. Parker, Jr.

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July 18, 2025
Hampton, South Carolina

We are looking for YOU!

Currently only available in German. Please take a look to the German page.

Applications by e-mail or post to:

mail@krafft-walzen.com or

WUMAG TEXROLL GmbH & Co. KG
Schoellerstrasse 164
52351 Düren, Germany

Company

More than 70 years old, WUMAG presents itself as a young, modern business company that is highly valued by all experts and it's customers all over the world for it's perfomance, it's extensive experience and absolute relaibility.

WUMAG belongs to those medium-size financed companies whose creativity, specialist knowledge and innovative strengths ensure constant adaptation to changing circumstances



as well as new market requirements and prevent solidification in firmly established structures.

As of October 1, 2019, the business operations of WUMAG TEXROLL in Krefeld will continue as a subsidiary under the direction of **Carl KRAFFT & Söhne GmbH & Co.KG** in Düren.

In the Center of Excellence in Krefeld we are producing the following core products

- Thin-walled Drying Cylinders for textile drying (PED, ASME and Chinese ML specifications) - the #WTD
- Double-Shell Rollers with thin-walled stainless steel jackets
- Double-Shell Large Rollers
- Elektric Heated Dryers - the #EHD
- Cylinder Dryer
- Thermofixing and Stretching Machines
- Calender

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WUMAG TEXROLL - Continuation with plan to success

09/24/2019

We are pleased to inform you that the business operations of the insolvent WUMAG TEXROLL in Krefeld will be continued as a subsidiary under the management of Carl KRAFFT & Söhne GmbH & Co. KG in Düren, starting as of October 01st, 2019.

Carl KRAFFT & Söhne has been able to acquire the business objects as part of an asset deal. The acquisition includes, among other things, the commercial premises in Krefeld, machines and trademarks. Furthermore, we have been successful in maintaining the highly qualified technical employees for the new scope of work. However, the number of employees had to be adjusted to the planned realignment.

The origin of the commitment of the new shareholder stems from their conviction, that they will be able to successfully take advantage of the extraordinary capabilities of the production site in Krefeld and have many benefits from the numerous synergies with the business in Düren. WUMAG TEXROLL will be active on the market as an independent company and focus on the manufacture of the products in Krefeld. The administrative tasks will be combined and carried out in Düren.

It is of great importance to us, in order to achieve optimal cooperation, that the brand name WUMAG TEXROLL remains unchanged. This is our way of expressing our respect for, and commitment to, the employees and their considerable abilities, as well as to the customers and the products.

We will produce the following core products at the Center of Excellence in Krefeld: Thin-walled Drying Cylinders for textile drying (PED, ASME and Chinese ML specifications), Double-Shell Rollers with thin-walled stainless steel jackets and Double-Shell Large Rollers. In the mechanical engineering division, using the WUMAG TEXROLL brand, we will create a new starting point for another successful presence on the market with the innovative product "Plug & Dry" for complete cylinder drying systems.

We would be very pleased if you would recognize this commitment as another building brick towards our future strategy.

You can reach the "usual" employees at the telephone numbers and e-mail addresses you have always used.

If everything does not run as smoothly as you would expect from rollmakers at the start, please be patient and make allowances at the start. We may not be able to solve all organizational tasks and problems immediately.

With kind regards from your KRAFFT team in Düren as well as from our new colleagues in Krefeld

[Back](#)



Contact

Carl KRAFFT & Söhne GmbH & Co. KG

Schoellerstrasse 164
52351 Düren, Germany

Telephone: +49 2421 9360-0

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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,)

v.)

**MOTION TO ALTER/AMEND
AND MOTION TO CERTIFY ORDER
PURSUANT TO RULE 54(b), SCRCP**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.)

Plaintiffs Barry Lanham and Obvia Gamble-Lanham respectfully move the Court pursuant to Rule 54(b), SCRCP, and Rule 59(e), SCRCP, to reconsider, alter, or amend, and clarify its September 19, 2025 order granting summary judgment to Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG ("Wumag II"). Out of an abundance of caution, Plaintiffs also respectfully request that

the Court certify its prior order and any order regarding this motion as final pursuant to Rule 54(b), SCRCP.¹

The hearing on Wumag II's motion for summary judgment was on July 7, 2025. The Court gave the parties until July 11, 2025 to submit supplemental briefing. (Ex. 1, July 11, 2025 Letter). On July 11, 2025, Wumag II submitted a new declaration from Dr. Nils Derksen, a German attorney, setting forth his opinions on whether German law precluded Wumag II from being a successor-in-liability to Wumag I. On July 11, 2025, Plaintiffs requested a ten-day extension to submit supplemental briefing. (Ex. 2, July 11, 2025 Email). On July 18, 2025, the Court granted Plaintiff's request. (Ex. 3, July 18, 2025 Email). Plaintiffs filed their supplemental briefing on July 18, 2025.

Plaintiffs request that the Court reconsider its order to clarify its position and give an explicit ruling on Plaintiffs' argument set forth at the hearing and in their supplemental briefing. Plaintiffs specifically argued that the Court should apply the continuity of enterprise theory in conformity with dicta from the Supreme Court's decisions in *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939) and *Nationwide Mutual Insurance Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E.2d 447 (2018), as well as Justice Burnett's dissenting opinion in *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005). Plaintiffs advanced but did not elaborate on this argument at the hearing on Wumag II's motion for summary judgment.

¹ The Court has jurisdiction to modify its previous order to include certification of a partial final judgment pursuant to Rule 54(b), SCRCP.

Specifically, Plaintiffs argued that under successor liability's mere continuation exception as articulated in *Brown v. American Railway Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924), a successor may be liable as the mere continuation of its predecessor not only if it has a commonality of officers, directors, and shareholders, but also if it continues the predecessor's business using its name, trademarks, logos, employees, products, and facilities, and benefits from the predecessor's goodwill and reputation. Plaintiffs argued that public policy supports adopting the continuity of enterprise doctrine under the current facts, as it would comport with *Brown's* rationale and modern South Carolina product liability law's stated policy goals of shifting the risk of loss away from the consumer and deterring the sale of unsafe products. Out of similar fairness concerns, the United States Bankruptcy Code precludes an asset purchase agreement from extinguishing successor liability claims predicated on prepetition debtor conduct causing personal injury. *See In re Grumman Olson Indus.*, 467 B.R. 694, 703-05 (S.D.N.Y. Bkr. 2012).

Plaintiffs also argued that under numerous factors articulated by Justice Burnett in *Simmons* that Wumag II was the successor of Wumag I. Plaintiffs request that the Court give an explicit ruling on whether the evidence introduced by Plaintiffs relevant to their continuity of enterprise theory satisfies Justice Burnett's factors, and if it does, whether public policy, the above mentioned authorities, and South Carolina product liability law support application of the continuity of enterprise theory in this instance.

Plaintiffs also request that the Court certify its order as final pursuant to Rule 54(b), SCRCP. While Plaintiffs believe that the Court's order is immediately appealable under S.C. Code Ann. § 14-3-330(1) as an intermediate judgment involving the merits of Plaintiffs' claim against Wumag II, Plaintiffs also believe that certification is warranted pursuant to Rule 54(b) because immediate appeal would preserve the judicial system's resources, eliminate unnecessary delay, and promote the ends of justice.

Rule 54(b) provides:

When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order . . . however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Three prerequisites must be satisfied for Rule 54(b) certification: (1) there must be multiple claims for relief or multiple parties, (2) a judgment entered on the certified claim would be final, and (3) the trial court must expressly state its reasoning and findings of fact supporting its reasoning. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 466, 570 S.E.2d 197, 200 (Ct. App. 2002). The first two prerequisites are undisputedly satisfied in this case: there are two defendants, and the Court's order is an ultimate disposition that precludes

Plaintiffs from seeking relief against Wumag II under the only available theory of recovery.

Under the third prerequisite, the Court's reasoning and findings of fact for granting certification will be reviewed by the appellate courts under an abuse of discretion standard, therefore, if there is any evidence supporting the Court's findings, certification will be affirmed on review. *Id.* Here, there are multiple explanations for why there is no just reason for delay. First, Plaintiffs' claims against Wumag II are entirely predicated on theories of successor liability, which involve their own unique sets of facts and evidence, thereby eliminating the potential for the appellate courts to have to review the same facts if the case were then tried and appealed on liability issues. *See id.* (stating that Rule 54(b)'s limitation is meant to spare the court of appeals from relearning the same facts on successive appeals). The evidence relevant to Wumag II's motion that will be reviewed by the appellate courts in this instance is separate from, unrelated to, and does not overlap with the merits of Plaintiffs' product liability claims against Wumag I.

Second, if the orders are not certified, and Plaintiffs are incorrect that the orders will be immediately appealable under S.C. Code Ann. § 14-3-330(1), Plaintiffs will be forced to mediate and try the case against Wumag I without having Wumag II meaningfully participate in mediation or defend the underlying tort claim. This will potentially frustrate the resolution of Plaintiff's claim against Wumag I and potentially deprive Wumag II of the opportunity to present its own witnesses and

evidence when it could be subject to res judicata principles as to liability such as issue or claim preclusion.

Lastly, as the Court is aware, it is undisputed that Wumag I is a dissolved corporation that does not possess any assets with which to satisfy a judgment. Wumag II, on the other hand, is a going business concern. It would be unfair to require Plaintiffs to try their case against Wumag I without Wumag II's participation, possibly obtain a judgment against an insolvent Wumag I, appeal the Court's orders after a final judgment is entered, then potentially have to retry the case in its entirety against Wumag II if res judicata principles do not apply. Plaintiffs cannot realistically formulate a strategy and gauge the risk of litigating a case against Wumag I as a sole defendant based on its insolvent status and the above-described uncertainties.

For these reasons, there is no just reason to delay immediate review of the Court's orders granting summary judgment to Wumag II. For these reasons and any that may be presented to the Court at a hearing on this matter, Plaintiffs respectfully request that the Court reconsider, alter or amend, or clarify its order and certify the orders pursuant to Rule 54(b), SCRCP. Further should the Court grant Plaintiffs' motion for certification, Plaintiffs believe that a stay of the action would be appropriate pursuant to Rule 62(h), SCRCP.

[SIGNATURE PAGE TO FOLLOW]

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September 24, 2025
Hampton, South Carolina

**EXHIBIT****1**

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July 11, 2025

VIA E-FILING and E-MAIL

The Honorable Martha M. Rivers
P.O. Box 3081
Aiken, SC 29802
mriverssc@sccourts.org
mriverslc@sccourts.org

Re: *Barry Lanham and Obvia Gamble-Lanham v. Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag") et, al.; Civil Action No. 2021-CP-19-00005*

Declaration of Dr. Nils Derksen in Support of Kelzenberg-Wumag's Motion for Summary Judgment

Dear Judge Rivers:

I represent Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag") in the above-referenced matter. Kelzenberg-Wumag's Motion for Summary Judgment was heard before you on Monday, July 7, 2025. At the conclusion of the hearing, you indicated the parties could make additional submissions in support of their respective positions this week.

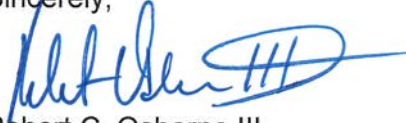
Enclosed is the Declaration of Dr. Nils Derksen. See **Exhibit 1**. Dr. Derksen is a practicing attorney in Cologne, Germany who specializes in the area of German insolvency law. See **Exhibit 2**. Dr. Derksen's Declaration addresses Kelzenberg-Wumag's purchase of Wumag Texroll GmbH & Co. KG's ("Wumag") assets in September 2019, and German cases concerning Section 25(1) of the German Commercial Code (*Handelsgesetzbuch - HGB*). According to Plaintiffs' Section 25(1) HGB results in Kelzenberg-Wumag acquiring liabilities from Wuumag. However, Dr. Derksen's Declaration cites (and translates) German authority stating Section 25(1) HGB does not apply to the acquisition of assets from the insolvency administrator out of an opened insolvency proceeding. The primary cases cited in Dr. Derksen's Declaration are provided in German with unofficial translations. See **Exhibit 3**. If the Court would like certified translations of the cited cases, we will work to provide them as soon as possible.

The law, both in South Carolina and Germany, clearly provides that Kelzenberg-Wumag cannot be liable for Plaintiffs injuries under a theory of successor liability. For this reason, and the additional arguments set forth in Kelzenberg-Wumag's prior briefing, Kelzenberg-Wumag's Motion for Summary Judgment should be granted.

Charles L. Alford, III
July 11, 2025
Page 2

Thank you for the Court's time and consideration. If you have questions or need any additional information, please feel free to contact me.

Sincerely,



Robert C. Osborne III

/RCO
Enclosures

cc: John E. Parker, Jr., Esq.
Neil E. Alger, Esq.
Catherine F. Wrenn, Esq.
Jack Woods, Esq.

ELECTRONICALLY FILED - 2025 Jul 11 2:13 PM - EDGEFIELD - COMMON PLEAS - CASE#2021CP1900005
ELECTRONICALLY FILED - 2025 Sep 25 2:42 PM - EDGEFIELD - COMMON PLEAS - CASE#2021CP1900005

Exhibit 1

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

**DECLARATION OF DR. NILS
DERKSEN**

COMES NOW, Dr. Nils Derksen, who deposes and states as follows:

1. My name is Dr. Nils Derksen, and I am over the age of eighteen (18) years and am competent to give sworn testimony. I have personal knowledge of the matters set forth in this declaration. I offer this declaration in support of Wumag Texroll GmbH & Co. KG's f/k/a Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag") Motion for Summary Judgment in the above-referenced matter.

2. I am an attorney with Loschelder Rechtsanwälte Partnerschaftsgesellschaft mbB in Cologne, Germany.

3. I have been a licensed attorney since 2014. As part of my practice, I advise and represent clients in the area of German insolvency law.

4. On September 1, 2019, insolvency proceedings concerning the assets of Wumag Texroll GmbH & Co. KG ("Wumag") commenced in the district court of Krefeld, Germany. Dr. Peter Minuth was appointed as insolvency administrator.

5. On or around September 18, 2019, Kelzenberg + Co: GmbH & Co. KG ("Kelzenberg-Wumag"), entered into an asset purchase agreement to purchase the assets of Wumag out of the opened insolvency proceeding (the "Asset Purchase Agreement").

6. Pursuant to the Asset Purchase Agreement, Kelzenberg-Wumag purchased certain assets of Wumag, including, inter alia, machinery, equipment, software licenses. Ownership of the purchased assets was transferred from Wumag to Kelzenberg-Wumag on October 1, 2019. After the asset purchase, Kelzenberg-Wumag adopted the "Wumag Texroll GmbH & Co. KG" name.

7. Under German law, an agreement to purchase assets out of an opened insolvency proceeding generally does not provide for the assumption of liabilities.

8. Kelzenberg-Wumag did not assume Wumag's liabilities pursuant to the Asset Purchase Agreement.

9. Section 25 (1) of the German Commercial Code (*Handelsgesetzbuch - HGB*) provides that: Anyone who continues a commercial business acquired inter vivos under the previous company name, with or without the addition of an addendum indicating the succession relationship, is liable for all liabilities of the previous owner arising from the operation of the business. The claims against the debtors arising from the business shall be deemed to have been transferred to the acquirer if the previous owner or his heirs have consented to the continuation of the business.

10. However, Section 25 (1) of the German Commercial Code does not apply to the acquisition of assets from the insolvency administrator out of an opened insolvency proceeding.

According to the case law of the German Federal Court of Justice (*Bundesgerichtshof – BGH*) and the general opinion in the legal literature, Section 25 is not applicable to the acquisition of a company from the insolvency administrator out of an opened insolvency proceeding. The German Federal Court of Justice argues in its decision of April 11, 1988 that the insolvency administrator's task of selling the company as a whole in the interest of the creditors should not be made more difficult by a possible liability of the purchaser for the debts of the previous company owner.

„Aufgabe des Konkursverwalters ist es, die Vermögensgegenstände des Gemeinschuldners zu verwerten und dabei im Interesse der Gläubiger den höchstmöglichen Erlös zwecks anschließender Verwertung zu erzielen. Mit dieser Aufgabe wäre es unvereinbar, wenn der Erwerber eines zur Masse gehörenden Unternehmens nach § 25 I HGB (...) haften müßte. Eine Veräußerung des Unternehmens mit sämtlichen Schulden, die zum Zusammenbruch des bisherigen Trägers geführt haben, wäre nur in den seltensten Fällen erreichbar. Der Konkursverwalter wäre deshalb in aller Regel darauf beschränkt, eine Verwertung des Schuldnervermögens durch Zerschlagung durchzuführen. Dies würde Sinn und Zweck des § 25 I HGB (...), der den Gläubiger begünstigen soll, widersprechen (...).“

The bankruptcy administrator's [which corresponds to the insolvency administrator in current law] task is to realize the assets of the bankrupt and to achieve the highest possible proceeds in the interests of the creditors for the purpose of subsequent realization. It would be incompatible with this task if the purchaser of a company belonging to the estate were to be liable in accordance with Section 25 (1) HGB (...). A sale of the company with all the debts that led to the collapse of the previous owner would only be achievable in the rarest of cases. The bankruptcy trustee would therefore generally be limited to liquidating the debtor's assets by breaking them up. This would contradict the meaning and purpose of Section 25 (1) HGB (...) which is intended to benefit the creditor.

(German Federal Court of Justice, April 11, 1988 – II ZR 313/87, NJW 1988, 1912).

This case law was confirmed in further judgments of the German Federal Court of Justice: November 4, 1991 - II ZR 85/91, NJW 1992, 911; September 24, 2008 - VIII ZR 192/06, DStR 2009, 383; December 3, 2019 - II ZR 457/18, BeckRS 2019, 35515.

The German Federal Labor Court has also ruled:

„Die Anwendung von § 25 I HGB auch im Falle des Erwerbs vom Insolvenzverwalter stünde im Widerspruch zu den bestimmenden Grundsätzen des Insolvenzverfahrens und der dem Insolvenzverwalter darin zugewiesenen Funktion. Die Veräußerung in der Insolvenz duldet wesensgemäß eine Schuldenhaftung des Erwerbers nach § 25 I HGB nicht (...). Aufgabe des Insolvenzverwalters ist es, die Vermögensgegenstände des Gemeinschuldners zu verwerten und dabei im Interesse der Insolvenzgläubiger den höchstmöglichen Erlös zwecks anschließender Verteilung zu erzielen. Mit dieser Aufgabe wäre es unvereinbar, wenn der Erwerber eines zur Masse gehörenden Unternehmens nach § 25 I HGB (...) haften müsste. Eine Veräußerung des Unternehmens mit sämtlichen Schulden, die zum Zusammenbruch geführt haben, wäre in den seltensten Fällen erreichbar. Die Unanwendbarkeit des § 25 I HGB auf Unternehmensveräußerungen durch den Konkursverwalter beruht, wie der BGH in seiner Entscheidung vom 11. 4. 1988 (BGHZ 104, 151 = NJW 1988, 1912) ausgeführt hat, maßgeblich auf dem Gesichtspunkt, dass die Aufgabe des Konkursverwalters, das Unternehmen im Interesse der Gläubiger an der schnellstmöglichen Verwertung der Masse im Ganzen zu veräußern, nicht durch eine mögliche Haftung des Erwerbers für die Schulden des bisherigen Unternehmensträgers erschwert werden soll.“

The application of Section 25 (1) HGB also in the case of acquisition from the insolvency administrator would be contrary to the determining principles of the insolvency proceedings and the function assigned to the insolvency administrator therein. By its very nature, the sale in insolvency does not tolerate the acquirer's liability for debts in accordance with Section 25 (1) HGB (...). The task of the insolvency administrator is to realize the assets of the debtor-in-possession and to achieve the highest possible proceeds in the interests of the insolvency creditors for the purpose of subsequent distribution. It would be incompatible with this task if the acquirer of a company belonging to the estate were to be liable in accordance with Section 25 (1) HGB (...). A sale of the company with all the debts that led to its collapse would only be achievable in the rarest of cases. The inapplicability of Section 25 (1) HGB to company sales by the bankruptcy trustee is based, as the BGH stated in its decision of April 11, 1988 (BGHZ 104, 151 = NJW 1988, 1912), primarily on the aspect that the bankruptcy trustee's task of selling the company as a whole in the interest of the creditors in the fastest possible realization of the assets should not be made more difficult by a possible liability of the purchaser for the debts of the previous company owner.

(German Federal Labor Court, September 20, 2006 – 6 AZR 215/06, NJW 2007, 942)

11. Based on my review of the Asset Purchase Agreement and applicable German law, Kelzenberg-Wumag did not assume liability for the injuries claimed by the Plaintiffs in this case.

12. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

Date: July, 11 2025

A handwritten signature in blue ink, appearing to read "N. Derksen".

Dr. Nils Derksen

Exhibit 2

Dr. Nils Derksen - Insolvency law, Corporate restructuring, (Distressed) M&A, Corporate law

 loschelder.de/en/lawyers-cologne/dr-nils-derksen.html



Dr. Nils Derksen

Partner

Insolvency law and corporate restructuring, (Distressed) M&A, corporate law

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E-Mail: nils.derksen@loschelder.de

vCard: [vCard of Dr. Nils Derksen](#)

Legal training:

Legal clerkship in Cologne and New York

Legal studies in Bonn and London

Dr jur

Bank clerk

Call to the Bar: 2014

Languages: English

Nils advises local and international clients on out-of-court and in-court restructuring matters, distressed M&A transactions as well as reorganisation and insolvency law. Nils' main focus is on advising investors, insolvency administrators, debtors, creditors and shareholders in special situations and insolvency proceedings (including self-administration and insolvency plan proceedings).

In addition, Nils advises on corporate law matters as well as national and cross-border mergers & acquisitions with a focus on group reorganisations (e.g. carve-outs, capital measures, transformation measures).

Nils is the author of several book contributions in German and English on current restructuring and insolvency topics.

Prior to joining our firm, Nils worked as a lawyer at the international law firm Freshfields Bruckhaus Deringer for almost eight years.

Exhibit 3

Erwerb eines Handelsunternehmens vom Sequester †

KO § 106; HGB § 25 I; BGB § 419

Der Erwerb eines Handelsunternehmens aus der Hand des Sequesters schließt die Anwendbarkeit von § 25 I HGB und § 419 BGB jedenfalls dann nicht aus, wenn sich an die Sequestration nicht die Eröffnung des Konkursverfahrens anschließt.

BGH, Urteil vom 11-04-1988 - II ZR 313/87 (Bremen)

Zum Sachverhalt:

Die Kl. macht gegen die bekl. M-GmbH aus dem Gesichtspunkt der Firmenfortführung und der Vermögensübernahme Ansprüche in Höhe von 6032,52 DM aus Warenlieferungen an die M-GmbH & Co. KG (KG) geltend. Über diese Gesellschaft, die auf dem Gebiete der Holzverarbeitung und Tischlerei tätig war, sowie über ihre Komplementär-GmbH war am 11. 10. 1985 nach Stellung des Konkursantrages die Sequestration angeordnet worden, die am 17. 2. 1986 mit der Ablehnung des Konkursantrages mangels Masse endete. Die am 14. 12. 1985 gegründete und am 21. 1. 1986 in das Handelsregister eingetragene Bekl. erwarb am 15. 1. 1986 von dem Sequester einen Teil des Inventars und der Maschinen der KG zum Preise von ca. 26000 DM und betreibt mit Hilfe einiger von der KG übernommener Angestellter in einem Teil der ehemaligen Betriebsräume ein Unternehmen, dessen Gegenstand sie mit Beratung und Innenausbau angibt. Eigentümer der Räume ist der frühere Geschäftsführer und - gemeinsam mit seiner Ehefrau - Alleingesellschafter der persönlich haftenden Gesellschafterin der KG, der Tischlermeister H. Er war zugleich Gründer und erster Geschäftsführer der Bekl. Jetziger Geschäftsführer und Alleingesellschafter ist sein Sohn, der Student D. Sein Vater bekleidet dort gegenwärtig die Stellung eines Prokuristen. Die Bekl. macht geltend, sie führe weder das Handelsgeschäft noch die Firma der ehemaligen M-GmbH & Co. KG fort. Sie habe überdies nur einen kleinen Teil des freien Betriebsvermögens der KG, das sich auf insgesamt 161605 DM belaufen habe, übernommen; den Rest habe der Sequester anderweit verwertet. Das BerGer. hat die in erster Instanz erfolgreiche Klage abgewiesen. Die Revision führte zur Aufhebung und Zurückverweisung.

BGH: Erwerb eines Handelsunternehmens vom Sequester (NJW 1988, 1912)

1913

Aus den Gründen:

Das BerGer. führt aus, es möge sein, daß das Auftreten der Bekl. nach außen hin so geartet gewesen sei, daß dies als Fortführung des früheren Handelsgeschäfts unter der bisherigen Firma angesehen werden konnte.

Es meint jedoch, ein Erwerb vom Sequester könne ebenso wenig wie derjenige vom Konkurs- oder Nachlaßverwalter eine Haftung nach § 25 I HGB, § 419 BGB auslösen. Zu der dem

Sequester obliegenden Verwaltung könne auch die sinnvolle Veräußerung von Vermögensgegenständen des zukünftigen Gemeinschuldners gehören, da auf diese Weise Geld hereinkomme, das zur gleichmäßigen Befriedigung der Konkursgläubiger dienen solle. Dieser Zweck würde weitgehend zunichte gemacht, wenn derjenige, der vom Sequester etwas erwirbt und ihm damit hilft, den Zweck der Sequestration zu ermöglichen, befürchten müßte, von einzelnen Gläubigern des künftigen Gemeinschuldners als dessen Nachfolger in der Haftung in Anspruch genommen zu werden. Dies müßte auch dann gelten, wenn er in diesem Zusammenhang wie ein Firmennachfolger auftrete. Diese Ausführungen halten rechtlicher Prüfung nicht stand.

I. Das BerGer. erkennt zwar zutreffend, daß nach allgemeiner Meinung § 25 I HGB und § 419 BGB nicht anwendbar sind, wenn der Konkursverwalter das Unternehmen des Gemeinschuldners veräußert (BGHZ 66, 217 (228) = NJW 1976, 1398; BGH, NJW 1987, 1019 (1020) = BGHRBGBB § 419 Abs. 1 "Nachlaßverwaltung 1" - für den Nachlaßverwalter; RGZ 58, 166; BAG, NJW 1966, 1984; Staub-Hüffer, HGB, 4. Aufl., § 25 Rdnr. 60; Baumbach-Duden-Hopt, HGB, 27. Aufl., § 25 Anm. 3 Cc; Schlegelberger-Hildebrandt, HGB, 5. Aufl., § 25 Rdnr. 8; Jäger-Henckel, KO, 9. Aufl., § 1 Rdnr. 16; Kuhn-Uhlenbruck, KO, 10. Aufl., § 1 Rdnr. 80e; Kilger, KO, 15. Aufl., § 1 Anm. 3 Cd). Indem das BerGer. maßgeblich darauf abstellt, zu der dem Sequester obliegenden Verwaltung könne auch die Veräußerung von Vermögensgegenständen des Gemeinschuldners gehören, da auf diese Weise Geld zur gleichmäßigen Befriedigung der Konkursgläubiger hereinkomme, berücksichtigt es jedoch nicht ausreichend, daß Aufgaben und Stellung des Sequesters einerseits und des Konkursverwalters andererseits verschieden sind. Diese Unterschiede sind grundlegender Art und betreffen gerade diejenigen Gesichtspunkte, aus denen die herrschende Meinung letztlich ihre Rechtfertigung bezieht. Ausschlaggebend für die Nichtanwendbarkeit von § 25 I HGB und § 419 BGB auf Unternehmensveräußerungen durch den Konkursverwalter kann nämlich weder sein, daß sie - was auch auf den Sequester zuträfe - durch einen Amtswalter im Rahmen eines gerichtlich kontrollierten Verfahrens erfolgen (so aber anscheinend OLG Köln, WM 1987, 1047), noch daß sie der Masse einen Gegenwert zuführen (so jedoch Schlegelberger-Hildebrandt, § 25 Rdnr. 8). Es wäre nicht verständlich, warum § 25 I HGB und § 419 BGB, die keine Mißbrauchstatbestände sind, allein deshalb nicht gelten sollten, weil die Veräußerung nicht durch den Schuldner persönlich, sondern durch einen gerichtlich kontrollierten Amtsträger geschieht, der die Verwaltungs- und Verfügungsbefugnisse des Schuldners an dessen Stelle ausübt. Der zur Masse gelangende Gegenwert kann die Anwendbarkeit von § 25 I HGB und § 419 BGB schon deshalb nicht ausschließen, weil diese Vorschriften keine unentgeltliche Verfügung voraussetzen, sondern in beiden Fällen die Haftung des Erwerbers ungeachtet der von ihm erbrachten Gegenleistung neben diejenige des Veräußerers tritt. Die Beschränkung der Konkursgläubiger auf die Masse, auf die in diesem Zusammenhang zur Begründung teilweise hingewiesen wird (so u. a. in RGZ 58, 166), ist zwar ein Leitprinzip des Konkursrechts, gilt aber nur in bezug auf das

Schuldnervermögen und verbietet nicht zwingend, daß die Gläubiger außerhalb des Konkursverfahrens Befriedigung aus dem Vermögen eines mithaftenden Dritten suchen. Schließlich vermag auch die Begründung nicht zu überzeugen, die im Konkursverfahren bestehenden Unterrichtungspflichten (§§ 11, 134 Nr. 1 KO) ersetzen die Bekanntmachung nach § 25 II HGB. Diese (vom BAG, NJW 1966, 1984 im übrigen auch nur ergänzend herangezogene) Argumentation ist weitgehend fiktiver Art und könnte auch allenfalls die Nichtanwendung des abdingbaren § 25 I HGB, nicht aber des zwingenden § 419 BGB erklären. Letztlich ausschlaggebend ist vielmehr, wie auch das BerGer. nicht zu verkennen scheint, daß die Anwendung von § 25 I HGB und § 419 BGB auf Veräußerungsgeschäfte des Konkursverwalters im Widerspruch zu den bestimmenden Grundsätzen des Konkursverfahrens und der dem Konkursverwalter darin zugewiesenen Funktion stünde. Aufgabe des Konkursverwalters ist es, die Vermögensgegenstände des Gemeinschuldners zu verwerten und dabei im Interesse der Gläubiger den höchstmöglichen Erlös zwecks anschließender Verwertung zu erzielen. Mit dieser Aufgabe wäre es unvereinbar, wenn der Erwerber eines zur Masse gehörenden Unternehmens nach § 25 I HGB oder § 419 BGB haften müßte. Eine Veräußerung des Unternehmens mit sämtlichen Schulden, die zum Zusammenbruch des bisherigen Trägers geführt haben, wäre nur in den seltensten Fällen erreichbar. Der Konkursverwalter wäre deshalb in aller Regel darauf beschränkt, eine Verwertung des Schuldnervermögens durch Zerschlagung durchzuführen. Dies würde Sinn und Zweck des § 25 I HGB und vor allem des § 419 BGB, der den Gläubiger begünstigen soll, widersprechen (so vor allem Staub-Hüffer, § 25 Rdnr. 61; ähnliche Erwägungen finden sich u. a. auch in RGZ 58, 166, und BAG, NJW 1966, 1984; vgl. ferner die Regelung der Haftung für Steuerrückstände eines aus der Konkursmasse erworbenen Unternehmens in § 75 II AO 1977).

Dieser die Unanwendbarkeit von § 25 HGB und § 419 BGB bei Unternehmensveräußerungen durch den Konkursverwalter letztlich rechtfertigende Gesichtspunkt trifft auf den Sequester nicht zu. Der BGH hat bereits mehrfach entgegen Bestrebungen von Teilen des insolvenzrechtlichen Schrifttums, die für möglichst umfassende Befugnisse des Sequesters eintreten (vgl. Castendieck, KTS 1978, 13; Kilger, in: Festschr. 100 Jahre Konkursordnung, S. 189, 193; Baur-Stürner, Rdnr. 977; Fricke, MDR 1978, 100), daran festgehalten, daß die Funktionen des Konkursverwalters und des Sequesters nicht miteinander vergleichbar sind (vgl. BGHZ 86, 190 (195 f.) = NJW 1983, 887; BGH, NJW-RR 1987, 1276 = WM 1987, 1228; BGHZ 97, 87 = NJW 1986, 1498; im gleichen Sinne im Schrifttum aber auch Kuhn-Uhlenbruck, § 106 Rdnr. 7; zurückhaltend jetzt auch Kilger, § 106 Anm. 4). Insbesondere gehört es weder zu den Rechten noch zu den Pflichten des Sequesters, das Vermögen des Schuldners zwecks Erhalt von Barmitteln zur Verteilung an die Gläubiger zu veräußern. Diese Aufgabe ist nach der eindeutigen Kompetenzzuweisung des § 117 KO allein dem Konkursverwalter vorbehalten. Die im Gesetz nicht näher geregelte Funktion des Sequesters beruht auf § 106 KO. Sie beschränkt sich folglich ausschließlich auf die Erhaltung und

Sicherung des Schuldnervermögens für den - zu dieser Zeit keineswegs feststehenden - Fall einer späteren Eröffnung des Konkursverfahrens, ohne daß dem Sequester schon umfassende Verwaltungs- und Verfügungsbefugnisse zustehen (BGHZ 86, 190 (196) = NJW 1983, 887 m. w. Nachw.). Die Sequestration darf deshalb nicht als eine Art "Vorkonkurs" und die Stellung des Sequesters nicht als diejenige eines "Vorkonkursverwalters" verstanden werden (so nachdrücklich Kuhn-Uhlenbruck, § 106 Rdnr. 7). Im Hinblick auf die grundlegende Verschiedenheit der Funktionen von Sequester und Konkursverwalter hat der BGH ausgesprochen, daß die Sequestration das Prozeßführungsrecht des Schuldners unberührt läßt (Senat, NJW-RR 1987, 1276) und Rechtshandlungen des Sequesters nach Eröffnung des Konkursverfahrens genauso angefochten werden können als wären sie vom Gemeinschuldner selber vorgenommen worden, und zwar grundsätzlich auch dann, wenn der Konkursverwalter mit dem ehemaligen Sequester personengleich ist (BGHZ 86, 190 = NJW 1983, 887; BGHZ 97, 87 = NJW 1986, 1498). Auch das Wahlrecht nach § 17 KO steht dem Sequester nicht zu (BGHZ 97, 87 = NJW 1986, 1498). Infolge der Beschränkung des Sequesters auf vorläufige Sicherungs- und Erhaltungsmaßnahmen ist er grundsätzlich auch nicht zur Liquidierung eines dem Schuldner gehörenden Unternehmens (BGH, NJW 1961, 1304 ff.; Kuhn-Uhlenbruck, § 106 Rdnr. 13 a m. w. Nachw. in Rdnr. 13; Gerhardt, ZIP 1982, 7; zurückhaltend jetzt auch Kilger, § 106 Rdnr. 4) und deshalb auch nicht zu dessen Veräußerung berechtigt (vgl. Kuhn-Uhlenbruck, § 106 Rdnr. 13 a i. V. mit 13 c; Gerhardt, ZIP 1982, 7; LG Düsseldorf, NJW 1987, 2091 (2092); uneingeschränkt a. A. anscheinend nur Castendieck, KTS 1978, 14). Durch diese Maßnahme würde ein endgültiger Zustand geschaffen, zu dessen Herbeiführung der Sequester schon deshalb nicht befugt sein kann, weil die Voraussetzungen für die Eröffnung des Konkursverfahrens noch gar nicht geprüft sind. Ob eine Ausnahme zu rechtfertigen sein kann, wenn die Sicherung des Schuldnervermögens im Hinblick auf die als gewiß vorauszusehende Eröffnung des Konkursverfahrens dies zwingend gebietet, wozu allerdings nicht ausreichen kann, daß

BGH: Erwerb eines Handelsunternehmens vom Sequester (NJW 1988, 1912)

1914

das Unternehmen verlustbringend ist, kann dahinstehen, weil dies im vorliegenden Fall nicht geltend gemacht wird. Einer trotzdem vorgenommenen Unternehmensveräußerung könnte allenfalls die Zustimmung des Schuldners als des Rechtsträgers und - wenn auch aufgrund des mit der Sequestration verbundenen allgemeinen Veräußerungsverbots vorübergehend in der Ausübung dieser Befugnis beschränkten - Verfügungsberechtigten zur Wirksamkeit verhelfen. Eine Veräußerung des Unternehmens vor der Konkurseröffnung während der Sequestration steht damit rechtlich einer Veräußerung durch den Schuldner näher als derjenigen durch den Konkursverwalter in Ausübung des ihm durch § 117 KO erteilten gesetzlichen Auftrags. Bei dieser Sachlage fehlt es an einer inneren Rechtfertigung, die Unternehmensveräußerung durch den Sequester mit Zustimmung des Schuldners unter dem Gesichtspunkt von § 25 I HGB und § 419 BGB derjenigen durch den Konkursverwalter

gleichzustellen (a. A. LG Düsseldorf, NJW 1987, 2091; Kilger § 1 Anm. 3 Cd, die allerdings die Berechtigung der Gleichstellung der Veräußerung durch den Sequester mit derjenigen durch den Konkursverwalter nicht begründen, was vor allem an den Entscheidungsgründen des LG Düsseldorf, NJW 1987, 2091 deutlich wird, sowie OLG Köln, WM 1987, 1047 m. Anm. Rehbein, in: WuB VI C. § 106 KO 3.87, das sich lediglich auf den unzureichenden Gesichtspunkt stützt, auch bei der Veräußerung durch den Sequester mit Zustimmung des späteren Gemeinschuldners handele es sich um ein gerichtlich kontrolliertes Verfahren, das mit der Risikosituation des § 419 BGB nichts zu tun habe). Dies muß jedenfalls dann gelten, wenn sich, wie im vorliegenden Fall, an die Sequestration nicht die Eröffnung des Konkursverfahrens anschließt, etwa weil sich herausstellt, daß die dafür erforderlichen Voraussetzungen (Zahlungsunfähigkeit, Überschuldung) nicht erfüllt sind, oder eine kostendeckende Masse nicht vorhanden ist. In diesem Falle ist das sequestrierte Vermögen nach Abzug der Kosten an den Schuldner zur freien Verfügung auszuhändigen. Die damit entstehende Situation entspricht vor allem auch im Hinblick auf die Stellung der Gläubiger in jeder Weise derjenigen bei Veräußerung des Unternehmens durch den Schuldner außerhalb eines Konkursverfahrens; es gibt deshalb keinen Grund, § 25 I HGB und § 419 BGB in einem solchen Falle nicht anzuwenden.

N.

Anm. d. Schriftltg.:

Zur Anwendung von Handelsrecht auf Rechtshandlungen des Konkursverwalters vgl. Karsten Schmidt, NJW 1987, 1905.

± Zum Abdruck in der Entscheidungssammlung vorgesehen

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COCOUNSEL

Skill: Review Documents

Result created: July 11, 2025

Prompt: Translate the document to English.

Files:

- [BGH Erwerb eines Handelsunternehmens vom Sequester - beck-online.pdf](#)
-

Result:

Result:

The task is to translate the provided legal document from German to English. Below is the translation of the document:

BGH: Acquisition of a Commercial Enterprise from the Trustee

NJW 1988, 1912

Acquisition of a Commercial Enterprise from the Trustee

KO § 106; HGB § 25 I; BGB § 419

The acquisition of a commercial enterprise from the hands of the trustee does not preclude the applicability of § 25 I HGB and § 419 BGB, at least when the sequestration is not followed by the opening of bankruptcy proceedings.

BGH, Judgment of 11-04-1988 - II ZR 313/87 (Bremen)

Facts of the Case:

The plaintiff claims against the defendant M-GmbH on the grounds of company continuation and asset acquisition claims amounting to 6032.52 DM from goods deliveries to M-GmbH & Co. KG (KG). On October 11, 1985, after filing for bankruptcy, sequestration was ordered over this company, which was active in the field of wood processing and carpentry, as well as over its general partner GmbH. The sequestration ended on February 17, 1986, with the rejection of the bankruptcy petition due to lack of assets. The defendant, founded on December 14, 1985, and registered in the commercial register on January 21, 1986, acquired part of the inventory and machinery of KG from the trustee on January 15, 1986, for approximately 26,000 DM and operates a business with the help of some employees taken over from KG in part of the former business premises, which it describes as consulting and interior design. The owner of the premises is the former managing director and - together with his wife - sole shareholder of the personally liable partner

of KG, the master carpenter H. He was also the founder and first managing director of the defendant. The current managing director and sole shareholder is his son, the student D. His father currently holds the position of authorized signatory there. The defendant claims that it neither continues the business nor the company of the former M-GmbH & Co. KG. Moreover, it has only taken over a small part of the free operating assets of KG, which amounted to a total of 161,605 DM; the rest was otherwise utilized by the trustee. The appellate court dismissed the claim, which was successful in the first instance. The revision led to annulment and remand.

BGH: Acquisition of a Commercial Enterprise from the Trustee (NJW 1988, 1912) 1913

Reasons:

The appellate court states that it may be that the defendant's appearance to the outside world was such that it could be regarded as a continuation of the former business under the previous company name. However, it believes that an acquisition from the trustee, like one from the bankruptcy or estate administrator, cannot trigger liability under § 25 I HGB, § 419 BGB.

The trustee's administration may also include the sensible sale of assets of the future common debtor, as this would bring in money to serve the equal satisfaction of the bankruptcy creditors. This purpose would be largely thwarted if the person acquiring something from the trustee and thereby helping to achieve the purpose of sequestration had to fear being held liable by individual creditors of the future common debtor as its successor. This must also apply if he appears in this context as a company successor. These statements do not withstand legal scrutiny.

I. The appellate court correctly recognizes that, according to general opinion, § 25 HGB and § 419 BGB are not applicable when the bankruptcy administrator sells the enterprise of the common debtor. However, by focusing significantly on the fact that the trustee's administration may also include the sale of the common debtor's assets, as this would bring in money for the equal satisfaction of the bankruptcy creditors, it does not sufficiently consider that the tasks and position of the trustee and the bankruptcy administrator are different. These differences are fundamental and concern precisely those aspects from which the prevailing opinion ultimately derives its justification. The decisive factor for the non-applicability of § 25 I HGB and § 419 BGB to company sales by the bankruptcy administrator cannot be that they - which would also apply to the trustee - are carried out by an official within the framework of a court-controlled procedure, nor that they add value to the estate. It would not be understandable why § 25 I HGB and § 419 BGB, which are not abuse provisions, should not apply simply because the sale is not carried out by the debtor personally, but by a court-controlled official who exercises the debtor's administrative and disposal powers in his place. The value added to the estate cannot exclude the applicability of § 25 I HGB and § 419 BGB because these provisions do not presuppose a gratuitous disposition, but in both cases, the acquirer's liability is added to that of the seller regardless of the consideration

provided by him. The restriction of bankruptcy creditors to the estate, which is partly referred to in this context for justification, is indeed a guiding principle of bankruptcy law but applies only concerning the debtor's assets and does not necessarily prohibit creditors from seeking satisfaction from the assets of a jointly liable third party outside the bankruptcy proceedings. Finally, the argument that the information obligations existing in the bankruptcy proceedings replace the announcement under § 25 II HGB is not convincing. This argument is largely fictitious and could at most explain the non-application of the waivable § 25 I HGB, but not of the mandatory § 419 BGB. Ultimately decisive, as the appellate court does not seem to overlook, is that the application of § 25 I HGB and § 419 BGB to sales transactions by the bankruptcy administrator would contradict the determining principles of the bankruptcy proceedings and the function assigned to the bankruptcy administrator therein. The task of the bankruptcy administrator is to realize the assets of the common debtor and to achieve the highest possible proceeds in the interest of the creditors for subsequent realization. It would be incompatible with this task if the acquirer of a company belonging to the estate had to be liable under § 25 I HGB or § 419 BGB. A sale of the company with all the debts that led to the collapse of the previous carrier would only be achievable in the rarest cases. The bankruptcy administrator would therefore generally be limited to realizing the debtor's assets through liquidation. This would contradict the purpose of § 25 I HGB and especially § 419 BGB, which is intended to benefit the creditor.

This ultimately justifying aspect of the non-applicability of § 25 HGB and § 419 BGB in company sales by the bankruptcy administrator does not apply to the trustee. The BGH has repeatedly maintained, contrary to efforts by parts of the insolvency law literature advocating for the most comprehensive powers of the trustee, that the functions of the bankruptcy administrator and the trustee are not comparable. In particular, it is neither the right nor the duty of the trustee to sell the debtor's assets to obtain cash for distribution to creditors. This task is solely reserved for the bankruptcy administrator according to the clear competence assignment of § 117 KO. The function of the trustee, not further regulated in the law, is based on § 106 KO. It is therefore exclusively limited to the preservation and securing of the debtor's assets for the - at this time by no means certain - case of a later opening of bankruptcy proceedings, without the trustee already having comprehensive administrative and disposal powers. Sequestration must therefore not be understood as a kind of "pre-bankruptcy" and the position of the trustee not as that of a "pre-bankruptcy administrator." In view of the fundamental difference in the functions of the trustee and the bankruptcy administrator, the BGH has stated that sequestration leaves the debtor's right to conduct proceedings unaffected and that legal actions by the trustee after the opening of bankruptcy proceedings can be challenged just as if they had been carried out by the common debtor himself, and this is generally also the case if the bankruptcy administrator is identical to the former trustee. The right of choice under § 17 KO is also not available to the trustee. Due to the restriction of the trustee to provisional security and preservation measures, he is generally not entitled

to liquidate a company belonging to the debtor and therefore also not to sell it. By this measure, a final state would be created, which the trustee cannot be authorized to bring about because the prerequisites for the opening of bankruptcy proceedings have not yet been examined. Whether an exception can be justified if the securing of the debtor's assets in view of the foreseeable opening of bankruptcy proceedings makes this imperative, which, however, cannot be sufficient, that the company is loss-making, can remain open because this is not asserted in the present case. A company sale nevertheless carried out could at most be made effective by the consent of the debtor as the legal entity and - even if temporarily restricted in the exercise of this power due to the general prohibition of disposal associated with sequestration - the authorized person. A sale of the company before the opening of bankruptcy during sequestration is thus legally closer to a sale by the debtor than to one by the bankruptcy administrator in the exercise of the statutory mandate granted to him by § 117 KO. In this situation, there is no internal justification for equating the company sale by the trustee with the consent of the debtor under the aspect of § 25 I HGB and § 419 BGB with that by the bankruptcy administrator.

This must apply at least when, as in the present case, the sequestration is not followed by the opening of bankruptcy proceedings, for example, because it turns out that the necessary prerequisites (insolvency, over-indebtedness) are not met, or a cost-covering estate is not available. In this case, the sequestered assets must be handed over to the debtor for free disposal after deducting the costs. The resulting situation corresponds in every way to that of a company sale by the debtor outside of bankruptcy proceedings, especially concerning the position of the creditors; there is therefore no reason not to apply § 25 I HGB and § 419 BGB in such a case.

Note by the Editorial Staff:

For the application of commercial law to legal actions of the bankruptcy administrator, see Karsten Schmidt, NJW 1987, 1905.

This translation captures the essence and legal reasoning of the original German document, focusing on the applicability of specific German commercial and civil code sections in the context of business acquisitions from a trustee.

*** Haftung bei Erwerb eines Unternehmens vom Insolvenzverwalter**

HGB § 25 I, II; InsO § 38; EGInsO Art. 33 Nr. 16; BGB § 613a; BGB a.F. § 419

Der Erwerb eines Handelsunternehmens aus der Hand des Insolvenzverwalters schließt die Anwendbarkeit von § 25 I HGB aus.

BAG, Urteil vom 20. 9. 2006 - 6 AZR 215/06 (LAG Düsseldorf)

Zum Sachverhalt:

Die Parteien streiten über eine Haftung des Bekl. für Vergütungsansprüche aus einem Ausbildungsverhältnis. Der Kl. war vom 1. 8. 2001 bis zum 31. 3. 2003 als Auszubildender bei der *E*GmbH beschäftigt, deren Geschäftsführer der Bekl. war. Die durchschnittliche Bruttovergütung betrug 518,96 Euro brutto, wobei als Ausbildungsvergütung ein Betrag von 480,61 Euro sowie Urlaubsgeld und vermögenswirksame Leistungen vereinbart waren. Die Firma *E*GmbH zahlte auf die geschuldete Ausbildungsvergütung des Kl. für die Monate November und Dezember 2002 insgesamt einen Teilbetrag von 89,12 Euro netto. Mit Beschluss des *AG Wuppertal* vom 5. 8. 2003 (145 IN 387/03) wurde über das Vermögen der *E*GmbH das Insolvenzverfahren eröffnet. Zu einem späteren Zeitpunkt erwarb der Geschäftsführer und jetzige Bekl. vom Insolvenzverwalter die Betriebsausstattung der Schuldnerin und betreibt seitdem in den Räumlichkeiten der Insolvenzschuldnerin an gleicher Stelle die Einzelfirma *S*.

Der Kl. macht gegenüber dem Bekl. die Vergütungsansprüche aus der Zeit vor der Eröffnung des Insolvenzverfahrens aus dem Haftungsgrund der Firmenfortführung gem. § 25 HGB geltend. Mit der am 28. 6. 2005 zunächst beim *AG Mettmann* eingegangenen Klage und nach Verweisung des Rechtsstreits an das *ArbG Düsseldorf* beansprucht der Kl. vom Bekl. die Zahlung der Ausbildungsvergütung für die Monate November und Dezember 2002. Der Kl. hat erstinstanzlich zuletzt beantragt, gegen den im Verhandlungstermin nicht anwesenden Bekl. ein Versäumnis-Urteil zu erlassen und ihn zu verurteilen, an den Kl. 1037,92 Euro brutto abzüglich gezahlter 89,12 Euro netto nebst Zinsen seit dem 11. 9. 2004 zu zahlen.

Das *ArbG* hat die Klage abgewiesen und die Klageabweisung damit begründet, dass eine Haftung aus § 25 HGB entfalle, soweit Insolvenzgläubiger betroffen seien. Das *LAG* hat die Berufung des Kl. zurückgewiesen. Die Revision des Kl. blieb ohne Erfolg.

Aus den Gründen:

6 Die Vorinstanzen haben zu Recht die Klage als unbegründet abgewiesen. Der Kl. hat gegen den Bekl. keinen Anspruch auf Zahlung weiterer Ausbildungsvergütung für die Monate November und Dezember 2002.

7 1. Der Kl. kann seine Forderung nicht mit Erfolg auf § 25 I HGB stützen.

8 Nach dieser Vorschrift haftet grundsätzlich der Erwerber eines Handelsgeschäfts für die im Betrieb dieses Geschäfts begründeten Verbindlichkeiten des früheren Inhabers, wenn er das Geschäft unter der bisherigen Firma fortführt.

9 Der Kl. ist jedoch Insolvenzgläubiger i.S. von § 38 InsO. Ein Konkurs- bzw. Insolvenzgläubiger kann sich aber nicht auf § 25 I HGB berufen, wenn der Konkurs- bzw. Insolvenzverwalter das Handelsgeschäft veräußert hat (vgl. BAGE 18, 286 = NJW 1966, 1984; BAGE 64, 196 = NZA 1990, 522; BGHZ 104, 151 = NJW 1988, 1912; BAG, NJW 1992, 911 = ZIP 1992, 398; BGH, NJW 2006, 1001 = DB 2006, 444; OLG Düsseldorf, NJW-RR 1999, 1556).

Dieser Rechtsprechung ist die Literatur einhellig gefolgt (vgl. GK-HGB/Nickel, 5. Aufl., § 25 Rdnr. 11; Roth, in: Koller/Roth/Morck, HGB, 5. Aufl., § 25 Rdnr. 4; Ebenroth/Boujong/Joost/Zimmer/Scheffel, HGB, Bd. 1, § 25 Rdnr. 41; Hüffer, in: Großkomm. z. HGB, 4. Aufl., Bd. I, § 25 Rdnrn. 60f.; Lieb, in: MünchKomm-HGB, 2. Aufl., Bd. 1, § 25 Rdnr. 32; Ott, in: MünchKomm-InsO, Bd. 1, § 80 Rdnr. 102; Baumbach/Hopt, HGB, 32. Aufl., § 25 Rdnr. 4; Uhlenbruck, ZIP 2000, 401 [403]; Henckel, in: Jaeger, InsO, Bd. 1, § 35 Rdnr. 30). Die Auffassung wird mit zum Teil unterschiedlicher Begründung auch nach Inkrafttreten der Insolvenzordnung weiterhin vertreten. Hiervon abzuweichen besteht nach Ansicht des *Senats* kein Anlass.

10 a) Die Anwendung von § 25 I HGB auch im Falle des Erwerbs vom Insolvenzverwalter stünde im Widerspruch zu den bestimmenden Grundsätzen des Insolvenzverfahrens und der dem Insolvenzverwalter darin zugewiesenen Funktion. Die Veräußerung in der Insolvenz duldet wesensgemäß eine Schuldenhaftung des Erwerbers nach § 25 I HGB nicht (vgl. noch zur KO Beitzke, Anm. zu BAG, NJW 1966, 1984 = AP BGB § 419 Betriebsnachfolge Nr. 7). Aufgabe des Insolvenzverwalters ist es, die Vermögensgegenstände des Gemeinschuldners zu verwerten und dabei im Interesse der Insolvenzgläubiger den höchstmöglichen Erlös zwecks anschließender Verteilung zu erzielen. Mit dieser Aufgabe wäre es unvereinbar, wenn der Erwerber eines zur Masse gehörenden Unternehmens nach § 25 I HGB oder § 419 BGB a.F. haften müsste. Eine Veräußerung des Unternehmens mit sämtlichen Schulden, die zum Zusammenbruch geführt haben, wäre in den seltensten Fällen erreichbar. Die Unanwendbarkeit des § 25 I HGB auf Unternehmensveräußerungen durch den Konkursverwalter beruht, wie der BGH in seiner Entscheidung vom 11. 4. 1988 (BGHZ 104, 151 = NJW 1988, 1912) ausgeführt hat, maßgeblich auf dem Gesichtspunkt, dass die Aufgabe des Konkursverwalters, das Unternehmen im Interesse der Gläubiger an der schnellstmöglichen Verwertung der Masse im Ganzen zu veräußern, nicht durch eine mögliche Haftung des Erwerbers für die Schulden des bisherigen Unternehmensträgers erschwert werden soll.

Zu Recht hat auch das LAG darauf hingewiesen, es käme zur Bevorzugung einzelner Insolvenzgläubiger und gleichzeitig zur Benachteiligung der übrigen Insolvenzgläubiger, da sich im Falle einer nach § 25 HGB bestehenden Haftung des Erwerbers der Preis, den der Käufer für den Erwerb des Unternehmens zu zahlen bereit wäre, entsprechend reduzieren

würde. § 25 HGB erfasst nämlich nur Geschäfts-, nicht auch Privatgläubiger. Eine Bevorzugung einzelner Insolvenzgläubiger wäre systemwidrig und widerspräche dem Grundsatz der gleichmäßigen Befriedigung aller Insolvenzgläubiger. Dass mit dem Inkrafttreten der Insolvenzordnung nur die Vorschrift des § 419 BGB entfallen ist (Art. 33 Nr. 16 EGlinsO), ändert daran angesichts des auf Geschäftsgläubiger beschränkten Anwendungsbereichs von § 25 HGB ebenso wenig wie die bloße Möglichkeit einer Haftungsvermeidung gemäß Absatz 2 dieser Vorschrift.

11 b) Auch in der Literatur wird betont, Sinn einer solchen Veräußerung sei es, den Erlös zur Masse zu ziehen, nicht aber die weitergehende Haftung des Erwerbers zu begründen (vgl. GK-HGB/*Nicke*, § 25 Rdnr. 11). Beim Erwerb vom Insolvenzverwalter bleibe § 25 I HGB trotz der Existenz des § 25 II HGB unangewendet (vgl. *Roth*, in: *Koller/Roth/Morck*, HGB, 5. Aufl., § 25 Rdnr. 4). Eine Haftung des Erwerbers gem. § 25 I HGB widerspräche grundlegenden Prinzipien des Insolvenzrechts, indem sie zu einer Umgehung der von der Insolvenzordnung vorgesehenen gleichmäßigen Befriedigung aller Gläubiger führe (vgl. *Ebenroth/Boujong/Joost/Zimmer/Scheffel*, HGB, Bd. 1, § 25 Rdnr. 41). Die Vorschrift des § 25 HGB passe nicht für den Fall der Geschäftsübertragung aus einer Insolvenzmasse, denn § 25 HGB gehe von einer Übernahme der Aktiva und Passiva aus, während der Insolvenzverwalter nur Aktiva übertrage. Mit der Anwendung der Vorschrift würde sich eine Tilgung der Geschäftsschulden außerhalb des Insolvenzverfahrens vollziehen. Es sei

BAG: * Haftung bei Erwerb eines Unternehmens vom Insolvenzverwalter (NJW 2007, 943)

aber ein Grundprinzip unseres Haftungsrechts, dass die Aktiva des Vermögens den Gläubigern hafteten und die Realisierung dieser Haftung nicht dadurch verkürzt werden dürfe, dass Aktiva mit Schulden belastet übertragen würden, die den am Verwertungserlös Berechtigten nicht vorgehen (vgl. *Henckel*, in: *Jaeger*, § 35 Rdnr. 30).

12 c) Dem steht nicht entgegen, dass § 25 HGB ansonsten auch auf die Übernahme des Unternehmens eines überschuldeten Rechtsträgers angewendet wird, denn die genannten durch die Besonderheiten des Insolvenzverfahrens bedingten Gesichtspunkte treffen bei einem Erwerb außerhalb eines Insolvenzverfahrens nicht in gleicher Weise zu.

13 aa) Nach der Entscheidung des *BGH* vom 4. 11. 1991 (NJW 1992, 911 = ZIP 1992, 398) gilt die Haftungsregelung des § 25 HGB auch für den Fall, dass die Eröffnung des Konkursverfahrens in Ermangelung einer die Verfahrenskosten deckenden Masse abgelehnt worden ist. Die in § 25 I HGB vorgesehene Rechtsfolge setze nicht voraus, dass das übernommene Unternehmen einen zur Befriedigung seiner Gläubiger ausreichenden Wert verkörpere. Dieser Rechtsprechung ist auch der *BGH* in seiner Entscheidung vom 28. 11. 2005 (NJW 2006, 1001 = DB 2006, 444) gefolgt, die von der Revision zur Begründung ihrer Rechtsansicht angeführt wird. Danach gilt zwar die Haftungsregelung des § 25 HGB auch dann, wenn das übernommene Unternehmen insolvent ist. In dieser Entscheidung hat der

BGH - entgegen dem von der Revision erstrebten Ergebnis - aber ausdrücklich ausgeführt, dass der Kl. nicht so zu behandeln sei, als habe die Bekl. das Unternehmen in der Insolvenz erworben. Gerade letztgenannte Fallgestaltung ist jedoch vorliegend gegeben.

14 bb) Der Erwerb eines Handelsunternehmens aus der Hand eines Sequesters schließt die Anwendbarkeit von § 25 I HGB und von § 419 BGB a.F. nur dann nicht aus, wenn sich an die Sequestration nicht die Eröffnung des Konkursverfahrens anschließt (vgl. BGHZ 104, 151 = NJW 1988, 1912). Im Hinblick auf die grundlegende Verschiedenheit der Funktionen von Sequester und Konkursverwalter hat der *BGH* angenommen, dass die Sequestration das Prozessführungsrecht des Schuldners unberührt lasse. Eine Veräußerung des Unternehmens vor der Konkurseröffnung während der Sequestration stehe damit rechtlich einer Veräußerung durch den Schuldner näher als derjenigen durch den Konkursverwalter in Ausübung des ihm erteilten gesetzlichen Auftrags. Bei dieser Sachlage fehle es an einer inneren Rechtfertigung, die Unternehmensveräußerung durch den Sequester mit Zustimmung des Schuldners unter dem Gesichtspunkt von § 25 I HGB und § 419 BGB a.F. derjenigen durch den Konkursverwalter gleichzustellen. Dies müsse jedenfalls dann gelten, wenn sich, wie in dem dieser Entscheidung zu Grunde liegenden Fall, an die Sequestration nicht die Eröffnung des Konkursverfahrens anschließe, etwa weil sich herausstelle, dass die dafür erforderlichen Voraussetzungen (Zahlungsunfähigkeit, Überschuldung) nicht erfüllt seien, oder eine kostendeckende Masse nicht vorhanden sei. Dagegen ist aber auch nach dieser Entscheidung des *BGH* § 25 I HGB dann nicht anwendbar, wenn der Konkursverwalter - wie vorliegend - das Unternehmen des Gemeinschuldners veräußert.

15 2. Dieses Ergebnis steht auch im Einklang mit der Rechtsprechung zu § 613a BGB. Diese Vorschrift ist bei einer Betriebsveräußerung im Rahmen eines Insolvenzverfahrens nicht anwendbar. Insoweit haben die Verteilungsgrundsätze des Insolvenzverfahrens Vorrang (so einhellige Meinung, vgl. zuletzt BAGE 64, 196 = NZA 1990, 522 m.w. Nachw.; *Henckel*, in: *Jaeger*, § 35 Rdnr. 31). Nur auf Betriebsveräußerungen vor der Eröffnung des Insolvenzverfahrens ist § 613a BGB uneingeschränkt anwendbar.

Anm. d. Schriftltg.:

Vgl. zur Haftung nach Erwerb eines Handelsgeschäfts *OLG Frankfurt a.M.*, NJW-Spezial 2005, 510, und zu den Beratungspflichten eines Rechtsanwalts bei Gesellschaftsgründung s. *OLG Schleswig*, NJW-RR 2004, 417.

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COCOUNSEL

Skill: Review Documents

Result created: July 11, 2025

Prompt: Translate the document to English.

Files:

- [BAG Haftung bei Erwerb eines Unternehmens vom Insolvenzverwalter - beck-online.pdf](#)
-

Result:

Result:

The document titled "BAG Haftung bei Erwerb eines Unternehmens vom Insolvenzverwalter" discusses the liability issues related to acquiring a company from an insolvency administrator under German law. Below is the translation of the document into English:

BAG: Liability in the Acquisition of a Company from the Insolvency Administrator

HGB § 25 I, II; InsO § 38; EGInsO Art. 33 No. 16; BGB § 613a; BGB a.F. § 419

The acquisition of a commercial enterprise from the insolvency administrator excludes the applicability of § 25 I HGB.

BAG, Judgment of 20.9.2006 - 6 AZR 215/06 (LAG Düsseldorf)

Facts of the Case:

The parties are disputing the liability of the defendant for remuneration claims from a training relationship. The plaintiff was employed as a trainee by E-GmbH from 1.8.2001 to 31.3.2003, whose managing director was the defendant. The average gross remuneration was 518.96 euros gross, with an agreed training allowance of 480.61 euros plus holiday pay and capital-forming benefits. E-GmbH paid a partial amount of 89.12 euros net for the months of November and December 2002 on the owed training remuneration of the plaintiff. By decision of the AG Wuppertal on 5.8.2003 (145 IN 387/03), insolvency proceedings were opened over the assets of E-GmbH. At a later date, the managing director and current defendant acquired the business equipment of the debtor from the insolvency administrator and has since operated the sole proprietorship S in the premises of the insolvency debtor at the same location.

The plaintiff asserts remuneration claims against the defendant from the time before the opening of the insolvency proceedings based on the liability reason of company

continuation according to § 25 HGB. With the lawsuit initially filed on 28.6.2005 at the AG Mettmann and after referral of the legal dispute to the ArbG Düsseldorf, the plaintiff claims from the defendant the payment of the training remuneration for the months of November and December 2002. The plaintiff finally requested in the first instance to issue a default judgment against the defendant, who was not present at the hearing, and to order him to pay the plaintiff 1037.92 euros gross minus the paid 89.12 euros net plus interest since 11.9.2004.

The ArbG dismissed the lawsuit and justified the dismissal by stating that liability under § 25 HGB is excluded as far as insolvency creditors are concerned. The LAG dismissed the plaintiff's appeal. The plaintiff's revision was unsuccessful.

Reasons:

The lower courts rightly dismissed the lawsuit as unfounded. The plaintiff has no claim against the defendant for further payment of training remuneration for the months of November and December 2002.

1. The plaintiff cannot successfully base his claim on § 25 I HGB.

According to this provision, the acquirer of a commercial business is generally liable for the liabilities established in the operation of this business by the previous owner if he continues the business under the previous company name.

However, the plaintiff is an insolvency creditor within the meaning of § 38 InsO. A bankruptcy or insolvency creditor cannot rely on § 25 I HGB if the bankruptcy or insolvency administrator has sold the commercial business.

This jurisprudence has been unanimously followed by the literature. The view is still held after the entry into force of the Insolvency Code. There is no reason to deviate from this according to the Senate.

- a) The application of § 25 I HGB also in the case of acquisition from the insolvency administrator would contradict the determining principles of the insolvency proceedings and the function assigned to the insolvency administrator therein. The sale in insolvency inherently does not tolerate a debt liability of the acquirer under § 25 I HGB. The task of the insolvency administrator is to realize the assets of the common debtor and to achieve the highest possible proceeds for subsequent distribution in the interest of the insolvency creditors. It would be incompatible with this task if the acquirer of a company belonging to the estate had to be liable under § 25 I HGB or § 419 BGB a.F.

The LAG rightly pointed out that it would lead to the preference of individual insolvency creditors and at the same time to the disadvantage of the other insolvency creditors, as the price the buyer would be willing to pay for the acquisition of the company would be correspondingly reduced.

- b) The literature also emphasizes that the purpose of such a sale is to draw the proceeds into the estate, not to establish further liability of the acquirer. In the

acquisition from the insolvency administrator, § 25 I HGB remains unapplied despite the existence of § 25 II HGB. Liability of the acquirer under § 25 I HGB would contradict fundamental principles of insolvency law by leading to a circumvention of the equal satisfaction of all creditors provided for by the Insolvency Code.

- c) This is not contradicted by the fact that § 25 HGB is otherwise also applied to the acquisition of the company of an over-indebted legal entity, as the points mentioned due to the peculiarities of the insolvency proceedings do not apply in the same way in an acquisition outside of insolvency proceedings.

aa) According to the BGH decision of 4.11.1991, the liability regulation of § 25 HGB also applies if the opening of the bankruptcy proceedings is rejected due to a lack of a mass covering the procedural costs. The legal consequence provided for in § 25 I HGB does not require that the acquired company embodies a value sufficient to satisfy its creditors. This jurisprudence was also followed by the BGH in its decision of 28.11.2005.

However, the BGH explicitly stated that the plaintiff should not be treated as if the defendant had acquired the company in insolvency. This very last-mentioned case is, however, present here.

bb) The acquisition of a commercial enterprise from the hand of a sequestrator does not exclude the applicability of § 25 I HGB and § 419 BGB a.F. only if the sequestration is not followed by the opening of bankruptcy proceedings. In view of the fundamental difference in the functions of sequestrator and bankruptcy administrator, the BGH has assumed that sequestration leaves the debtor's right to conduct proceedings unaffected. A sale of the company before the opening of bankruptcy during sequestration is thus legally closer to a sale by the debtor than to that by the bankruptcy administrator in the exercise of the statutory mandate given to him.

- 2. This result is also in line with the case law on § 613a BGB. This provision is not applicable in the case of a business sale within the framework of insolvency proceedings. The distribution principles of the insolvency proceedings take precedence in this respect. Only for business sales before the opening of insolvency proceedings is § 613a BGB fully applicable.

This translation captures the legal arguments and conclusions presented in the original German document, maintaining the legal precision and context.

From: Osborne, Robert C. <robertosborne@parkerpoe.com>

Sent: Friday, July 11, 2025 4:19 PM

To: mriverssc@sccourts.org; mriverslc@sccourts.org

Cc: Jay Parker <jayparker@parkerlawgroupsc.com>; Neil E. Alger <nalger@parkerlawgroupsc.com>; Catherine Wrenn <cwrenn@bakerdonelson.com>; Jack Woods <jwoods@bakerdonelson.com>; Jordan, Robert H. <robertjordan@parkerpoe.com>; Mallett, Celeste M. <celestemallett@parkerpoe.com>

Subject: Lanham v. Wumag; 2021-CP-19-00005 - Declaration of Dr. Nils Derksen in Support of Kelzenberg-Wumag's Motion for Summary Judgment



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Dear Judge Rivers:

At the conclusion of the hearing in this matter on Monday, you indicated the parties could make additional submissions in support of their respective positions this week. Attached please find a courtesy copy of correspondence and the Declaration of Dr. Nils Derksen offered in further support of Kelzenberg-Wumag's Motion for Summary Judgment. The same has been e-filed. If you need any additional information, please let me know.

Sincerely,

Robert Osborne

Robert Osborne
Partner



850 Morrison Drive | Suite 400 | Charleston, SC 29403
Office: 843.727.2662 | Fax: 843.727.2680 | [map](#)

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From: Rivers, Martha M. Law Clerk (Athanasios Platanis) <mriverslc@sccourts.org>
Sent: Friday, July 18, 2025 11:49 AM
To: Jay Parker <jayparker@parkerlawgroupsc.com>
Subject: Re: Lanham v. Wumag



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Good afternoon, Mr. Parker.

Please file and submit the supplemental briefing.

Thank you for following up,
Athan Platanis

From: Jay Parker <jayparker@parkerlawgroupsc.com>
Sent: Thursday, July 17, 2025 3:56 PM
To: Rivers, Martha M. Law Clerk (Athanasios Platanis) <mriverslc@sccourts.org>
Cc: Rivers, Martha M. Secretary (Lisa Washington) <mriverssc@sccourts.org>; Osborne, Robert C. <robertosborne@parkerpoe.com>
Subject: RE: Lanham v. Wumag

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Mr. Platanis

I am just following up on my request for a small extension to file supplemental briefing, particularly in light of the defendant filing a new affidavit in support of its motion on Friday. Please advise if we may provide to the Court and file within 10 days of this past Friday.

Thank you,



John "Jay" E. Parker, Jr.
Attorney

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From: Jay Parker

Sent: Friday, July 11, 2025 4:19 PM

To: Rivers, Martha M. Law Clerk (Athanasios Platanis) <mriverslc@sccourts.org>

Cc: Rivers, Martha M. Secretary (Lisa Washington) <mriverssc@sccourts.org>; Osborne, Robert C. <robertosborne@parkerpoe.com>

Subject: Lanham v. Wumag

All

Unfortunately I am unable to meet Judge Rivers deadline of today for us to submit supplemental briefing on Mr. Osborne's motion for summary judgment due to briefing deadlines I had in two cases in state and federal court that were due today and Monday. If Mr. Osborne does not object, I would like to request an additional 10 days to file some supplemental briefing on the issues we addressed at the hearing and in our briefs.

Thank you,



John "Jay" E. Parker, Jr.
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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,	)	
	)	
v.	)	
	)	
Wumag Texroll GmbH & Co. KG f/k/a	)	
Kelzenberg + Co: GmbH & Co. KG and	)	
Wumag Texroll GmbH & Co. KG,	)	
	)	
Defendants.	)	MOTION TO ALTER/AMEND
	)	
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.	)	

Plaintiffs Barry Lanham and Obvia Gamble-Lanham respectfully move the Court pursuant to Rule 54(b), SCRCP, and Rule 59(e), SCRCP, to reconsider, alter, or amend, its September 25, 2025 order denying Plaintiffs' motion to alter or amend its September 19, 2025 order. Plaintiffs do not ask the Court to reconsider for a second time its reasoning and decision as to Plaintiffs' continuity of enterprise arguments. Instead, Plaintiffs seek clarification and an amendment of the order as to their contemporaneously made motion to certify the judgment as final pursuant to Rule 54(b), SCRCP.

The Court's September 25, 2025 order does not explicitly grant Plaintiffs' motion to certify the judgment under Rule 54(b), SCRCP, and instead summarily provides that "[t]he Order Granting Summary Judgment is a final judgment as to Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co. GmbH & Co. KG." However, under Rule 54(b), SCRCP, for the order to be certified as final the Court is required to make "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment." While the Court's order satisfies that second requirement, it does not contain any specific language satisfying the first. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 468, 570 S.E.2d 197, 201 (Ct. App. 2002) ("After a trial court determines there are multiple claims or parties, and has directed judgment as to a claim, it must expressly determine there is no just reason for delay.").

When a trial court certifies a judgment as final, "it must do so in a definite, unmistakable manner." *Id.* at 466, 570 S.E.2d at 200. The trial court must state its reasoning in the order as to why there is no just reason for delay:

Where the [trial] court is persuaded that Rule 54(b) certification is appropriate, the [trial] court should state those findings on the record or in its order. The expression of clear and cogent findings of fact is crucial. In fact, numerous courts have held that where the [trial] court's Rule 54(b) certification is devoid of findings or reasoning in support thereof, the deference normally accorded such a certification is nullified.

Id. at 469, 570 S.E.2d at 201-02 (citing *Braswell Shipyards v. Beazer East*, 2 F.3d 1331, 1336 (4th Cir. 1993)). Our appellate courts have stated that it is an abuse of discretion to certify an order as final under Rule 54(b) without explaining its reasoning in support of certification.

To the extent that the September 25, 2025 order appears to have granted Plaintiff's motion for certification, Plaintiffs provided the following reasoning for why there is no just reason for delay. First, an immediate appeal would preserve the judicial system's resources, eliminate unnecessary delay, and promote the ends of justice. Second, Plaintiffs' claims against Wumag II are entirely predicated on theories of successor liability, which involve their own unique sets of facts and evidence, thereby eliminating the potential for the appellate courts to have to review the same facts if the case were then tried and appealed on liability issues. The evidence relevant to Wumag II's motion that will be reviewed by the appellate courts in this instance is separate from, unrelated to, and does not overlap with the merits of Plaintiffs' product liability claims against Wumag I.

Third, if the orders are not certified, and Plaintiffs are incorrect that the orders will be immediately appealable under S.C. Code Ann. § 14-3-330(1), Plaintiffs will be forced to mediate and try the case against Wumag I without having Wumag II meaningfully participate in mediation or defend the underlying tort claim. This will potentially frustrate the resolution of Plaintiff's claim against Wumag I and potentially deprive Wumag II of the opportunity to present its own witnesses and evidence when it could be subject to res judicata principles as to liability such as issue or claim preclusion.

Lastly, as the Court is aware, it is undisputed that Wumag I is a dissolved corporation that does not possess any assets with which to satisfy a judgment. Wumag II, on the other hand, is a going business concern. It would be unfair to

require Plaintiffs to try their case against Wumag I without Wumag II's participation, possibly obtain a judgment against an insolvent Wumag I, appeal the Court's orders after a final judgment is entered, then potentially have to retry the case in its entirety against Wumag II if res judicata principles do not apply. Plaintiffs cannot realistically formulate a strategy and gauge the risk of litigating a case against Wumag I as a sole defendant based on its insolvent status and the above-described uncertainties.

Plaintiffs' respectfully request that the Court amend its September 25, 2025 order to explicitly state that it is granting Plaintiffs' motion for certification and to adopt Plaintiff's proposed reasoning as to why there is no just reason to delay entering final judgment as to Wumag II or whatever reasoning the Court finds appropriate to support Rule 54(b) certification.

[SIGNATURE PAGE TO FOLLOW]

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-AND-

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September 26, 2025
Hampton, South Carolina

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Oct 09 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Marth M. Rivers, Circuit Court Judge

Civil Action No.: 2021-CP-19-00005

Barry Lanham and Obvia Gamble-Lanham,..... Appellants,

v.

Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co.:
GmbH & Co. KG and Wumag Texroll GmbH & Co. KG,..... Defendants,

Of which Wumag Texroll GmbH & Co. KG f/k/a
Kelzenberg + Co.: GmbH & Co. KG is the Respondent.

NOTICE OF APPEAL

PLEASE take notice that Barry Lanham and Obvia Gamble-Lanham (“Appellants”), pursuant to Rule 203, SCACR, appeal the following orders, certified as final by order filed October 9, 2025 (Exhibit A), pursuant to Rule 54(b), SCRCP, in this matter:

- Order filed September 19, 2025, granting Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co.: GmbH & Co. KG summary judgment. (Exhibit B).

- Order denying Plaintiffs' motion to reconsider filed September 25, 2025.
(Exhibit C).

Appellants received notice of entry of the order denying Plaintiff's motion to reconsider on September 25, 2025, and notice of entry of the order granting certification on October 9, 2025. This notice is timely filed. A copy of the orders appealed are attached to this notice.

Respectfully submitted,

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October 9, 2025
Hampton, South Carolina

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

**ORDER****RECEIVED****Oct 09 2025****SC Court of Appeals**

This matter came before the me upon a motion to reconsider, alter, or amend the order dated September 25, 2025 order granting in part and denying in part Plaintiffs Barry Lanham and Obvia Gamble-Lanham's motion to alter or amend the September 19, 2025 order granting partial summary judgment. While the September 25, 2025 order provided that the decision as to Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG ("Wumag II") was final at Plaintiffs' insistence, the Court denied all other relief requested by Plaintiffs.

On their second motion to alter or amend, Plaintiffs do not ask the Court to reconsider for a second time the merits of the Court's previous decision. Instead, Plaintiffs seek clarification and an amendment of the September 25, 2025 order to specifically certify the September 19, 2025

judgment as final pursuant to Rule 54(b), SCRCF, and to provide an express determination that there is no just reason for delay of entry of final judgment as required by the Rule. To that extent, Plaintiffs' motion is granted.

The Court is mindful that when it certifies a judgment as final, "it must do so in a definite, unmistakable manner." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 466, 570 S.E.2d 197, 200 (Ct. App. 2002).

Where the [trial] court is persuaded that Rule 54(b) certification is appropriate, the [trial] court should state those findings on the record or in its order. The expression of clear and cogent findings of fact is crucial. In fact, numerous courts have held that where the [trial] court's Rule 54(b) certification is devoid of findings or reasoning in support thereof, the deference normally accorded such a certification is nullified.

Id. at 469, 570 S.E.2d at 201-02 (citing *Braswell Shipyards v. Beazer East*, 2 F.3d 1331, 1336 (4th Cir. 1993)). The Court finds in this case that there is no just reason for delay and directs entry of judgment as to the dismissal of all of Plaintiffs' claims against Wumag II.

The reasoning for the Court's decision that there is no just reason for delay is as follows and has not been opposed by any of the parties. First, an immediate appeal would preserve the judicial system's resources, eliminate unnecessary delay, and promote the ends of justice. Second, Plaintiffs' claims against Wumag II are entirely predicated on theories of successor liability, which involve their own unique sets of facts and evidence, thereby eliminating the potential for the appellate courts to have to review the same facts if the case is eventually tried and appealed on liability issues as to Wumag II or the remaining defendant. The evidence relevant to Wumag II's motion for summary judgment that will be reviewed by the appellate courts in this instance is separate from, unrelated to, and does not overlap with the merits of Plaintiffs' product liability claims against Wumag I, the remaining defendant.

Third, if the orders are not certified, and the orders are not immediately appealable under S.C. Code Ann. § 14-3-330(1), Plaintiffs will be forced to mediate and try the case against Wumag I without having Wumag II meaningfully participate in mediation or defend the underlying tort claim. This will potentially frustrate the resolution of Plaintiff's claim against Wumag I, depending upon the outcome of an appeal, as Wumag II is an alleged successor-in-interest, and could also potentially deprive Wumag II of the opportunity to present its own witnesses and evidence when it could be subject to res judicata principles as to liability such as issue or claim preclusion.

Lastly, Wumag I's counsel was present at the initial summary judgment hearing and acknowledged the corporation was dissolved with little to no assets from which to satisfy a judgment a judgment. Wumag II, on the other hand, is a going business concern. It is undisputed that Wumag II purchased all assets of Wumag I.

Plaintiffs' request for clarification of the Court's previous order is granted and the Court expressly determines that certification under Rule 54(b) in this instance is appropriate. Further, as previously requested by Plaintiffs, pursuant to Rule 62(h), SCRCF, the Court has wide latitude to take actions necessary to benefit the party in whose favor a judgment is entered under Rule 54(b), SCRCF. *See* Rule 62(h), SCRCF ("[T]he court . . . may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."); *AMTRAK v. Cimarron Crossing Feeders*, No. 16-1094-JTM; No. 18-1081-JTM, 2019 U.S. Dist. LEXIS 33480, at*5 (D. Kan. March 4, 2019) (staying all proceedings pending an appeal under identical federal rule). In this instance, a stay of the action in conjunction with Rule 54(b) certification for appeal would benefit Wumag II for the reasons outlined above, including the avoidance of any prejudicial effect a trial against Wumag I could have against Wumag II during the pendency of any

forthcoming appeal. For these reasons, the remainder of the action is stayed while any appeal of the merits of the Court's September 19, 2025, and September 25, 2025 orders is pending.

IT IS SO ORDERED.

The Hon. Martha M. Rivers
Second Judicial Circuit

[Electronic Signature to Follow]



Edgefield Common Pleas

Case Caption: Barry Lanham , plaintiff, et al VS Wumag Texroll Gmbh & Co. Kg
fka Kelzenberg + Co. GmbH & Co K , defendant, et al
Case Number: 2021CP1900005
Type: Order/Other

IT IS SO ORDERED.

/s/ Hon. Martha M. Rivers (2788)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON
	)	PLEAS
COUNTY OF EDGEFIELD	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Barry Lanham and Obvia Gamble-Lanham,	)	2021-CP-19-00005
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER GRANTING
	)	DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT
Wumag Texroll GmbH & Co. KG f/k/a	)	
Kelzenberg + Co: GmbH & Co. KG, et al.,	)	
	)	
Defendant.	)	



This matter came before the Court upon motions for summary judgment filed by Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG (hereinafter “Kelzenberg-Wumag”). On June 13, 2025, Kelzenberg-Wumag filed a motion for summary judgment, arguing Kelzenberg-Wumag, as a successor corporation, did not assume or otherwise contract for the liabilities of Wumag. On July 2, 2025, Plaintiffs Barry Lanham and Obvia Gamble-Lanham (hereinafter “Lanham”) filed a memorandum in opposition arguing that South Carolina should adopt the continuity of enterprise recognized under German law.

This Court declines to adopt the law proposed by Plaintiff that has yet been adopted in South Carolina and agrees Defendant Kelzenberg-Wumag is not liable to Plaintiff Lanham under current South Carolina law. Having considered the arguments presented by both sides, as discussed in more detail herein, Defendant Kelzenberg-Wumag’s motion for summary judgment is GRANTED.

On January 22, 2018, Plaintiff Barry Lanham was injured while operating a laminating calendar machine (hereinafter “Machine”) at his workplace in Trenton, South Carolina. The

Machine that Plaintiff alleges was defectively produced or otherwise caused the injury was designed, manufactured, sold, delivered and installed by Wumag Texroll GmbH & Co. KG (hereinafter “Wumag”). On September 1, 2019, Wumag, a German manufacturer, filed insolvency proceedings in Krefeld, Germany. On September 18, 2019, Kelzenberg + Co: GmbH & Co. KG purchased the assets of Wumag, forming the company “Kelzenberg-Wumag.”. Defendant Kelzenberg-Wumag states that this agreement was expressly not a purchase of liabilities. Since the purchase, Wumag has no assets.

Defendant Kelzenberg-Wumag previously moved for dismissal on the same or similar basis and jurisdictional issues as to Kelzenberg-Wumag. This motion was denied to allow discovery as to jurisdictional issues.

Summary judgment is proper if, when viewing the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party, there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. SCRCPP, Rule 56(c); *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459 (2023).

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 has minimum contacts with the state in order to satisfy due process requirements. *Krell v. Carolina Bank*, 283 S.C. 5, 7 (1984). Under South Carolina contract law, South Carolina courts apply the substantive law of the place where the contract at issue was formed unless a valid choice-of-law clause exists that does not violate public policy. *Howell v. Covalent Chemical, LLC*, 435 S.C. 345, 351.

Under South Carolina successor law, the liabilities and debts of the corporation are not imputed to the successor corporation until (1) there was an express agreement to assume the debts, (2) there is a consolidation or merger of the two corporations, (3) the successor corporation was a mere continuation of the predecessor corporation, or (4) the transaction was entered into fraudulently with the purpose of defeating creditor's claims. *Simmons v. Mark Life Indus., Inc.*, 366 S.C. 308 (2005). The continuity of enterprise theory that a successor may inherit liability from a predecessor due to the continuity of business operations, management, or ownership has been rejected and distinguished from the mere continuation exception that South Carolina courts follow. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263 (2018). Under the mere continuation exception, continuity of ownership is shown through commonality of officers, directors, and shareholders. *Id.*

Under German law, a commercial business acquired under the previous business name shall be liable for the obligations of the predecessor business. Handelsgesetzbuch [HGB] [Commercial Code], § 25.¹

In Defendant Kelzenberg-Wumag's motion, it asserts that it has no connections with the state of South Carolina for service purposes. It asserts that it has no liability in this claim as it is a separate corporation not in existence at the time of the injury with no transfer of liability. The Court finds that the ultimate determination is whether Kelzenberg-Wumag, by law or contract,

¹ Counsel referenced to an opinion from the German courts based upon its research notations due to translation issues.

now stands in the shoes of Wumag such that it is the successor in interest for Wumag's potential liability.²

If Kelzenberg-Wumag is the successor of Wumag's potential liability, then there is no jurisdictional or statute of limitation issue as it is clear Wumag conducted business within South Carolina. Furthermore, there would be evidence to survive the summary judgment request as a genuine issue of fact exists regarding liability of the manufacturer. The Court finds that this is not the case.

The Court agrees that Kelzenberg-Wumag's purchase of Wumag's assets does not meet any of the exceptions under South Carolina successor liability. There is no evidence of an express agreement for Kelzenberg-Wumag to assume all debts and liabilities of Wumag. The purchase of Wumag was not a consolidation or merger of the two corporations, but a purchase of the assets. Kelzenberg-Wumag does not share officers, directors, and shareholders. There is no evidence that the transaction was entered into fraudulently. Therefore, the Court finds no exception is met and Kelzenberg-Wumag is not responsible for Wumag's potential liability.

Plaintiff relies upon Section 25 of the German Commercial Code to argue continuity of enterprise pursuant to German law by arguing that Kelzenberg-Wumag continued ownership by operating business under the same name as Wumag.³

² Defendant Kelzenberg-Wumag argues partially that the case should be dismissed because Plaintiff's claims are barred by the statute of limitations due to insufficient service and lack of personal jurisdiction

³ It appears the German court ruled that Section 25 does not apply for continuity of enterprise theory. As the German court has ruled that the insolvency proceedings do not apply continuity of enterprise and our courts have not recognized the doctrine, this Court rejects to apply the theory in this case.

IT IS SO ORDERED.

The Hon. Martha M. Rivers
Presiding Judge

September____, 2025

[Electronic signature to follow]



Edgefield Common Pleas

Case Caption: Barry Lanham , plaintiff, et al VS Wumag Texroll Gmbh & Co. Kg
fka Kelzenberg + Co. GmbH & Co K , defendant, et al
Case Number: 2021CP1900005
Type: Order/Summary Judgment

IT IS SO ORDERED.

/s/ Hon. Martha M. Rivers (2788)

Electronically signed on 2025-09-19 14:48:56 page 6 of 6

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Edgefield
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1900005

Barry Lanham et al
PLAINTIFF(S)

Wumag Texroll Gmbh & Co. Kg fka Kelzenberg + Co. GmbH & Co K et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

RECEIVED
Oct 09 2025
SC Court of Appeals

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Court denies Plaintiff's Motion to Amend filed on September 24, 2025. Having considered the arguments for some time, additional filings or hearing is not necessary. Plaintiff's request encourages the court to adopt the theory of continuity of enterprise. This court does not believe that is appropriate and continues to deny this request. The Order Granting Summary Judgment is a final judgment as to Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG. The judgment does not release Defendant Wumag Texroll GmbH & Co. Kg., the predecessor company that manufactured the product complained of in this litigation. IT IS SO ORDERED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/25/2025 .

Alicia K. Clawson
Wumag Texroll GmbH & Co KG fka Kelzenberu +Co GmbH & Co KG

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Edgefield Common Pleas

Case Caption: Barry Lanham , plaintiff, et al VS Wumag Texroll Gmbh & Co. Kg
fka Kelzenberg + Co. GmbH & Co K , defendant, et al
Case Number: 2021CP1900005
Type: Order/Electronic Form 4

IT IS SO ORDERED.

/s/ Hon. Martha M. Rivers (2788)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Oct 09 2025

SC Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Marth M. Rivers, Circuit Court Judge

Civil Action No.: 2021-CP-19-00005

Barry Lanham and Obvia Gamble-Lanham,..... Appellants,

v.

Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co.:
GmbH & Co. KG and Wumag Texroll GmbH & Co. KG,..... Defendants,

Of which Wumag Texroll GmbH & Co. KG f/k/a
Kelzenberg + Co.: GmbH & Co. KG is the Respondent.

PROOF OF SERVICE

The undersigned certifies that a copy of Notice of Appeal has been served
upon the following counsel of record by emailing a copy of the same this 9th day of
October 2025.

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Respectfully submitted,

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