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| STATE OF NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION |
| COUNTY OF ALAMANCE | 08 CVS 224 |
| ARMACELL LLC,<br>Plaintiff,<br><br>Vs.<br><br>JEFFREY BOSTIC, L'ISOLANTE K-FLEX S.r.l., and K-FLEX USA L.L.C.,<br>Defendants. | DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS |

NOW COMES Defendant, L'ISOLANTE K-FLEX S.r.l. ("L'Isolante), by and through the undersigned counsel and replies to Plaintiff's Response to Defendant's Motion to Dismiss.

**Statement of Facts**

Plaintiff has taken depositions of multiple employees of K-Flex USA, LLC ("K-Flex") and has filed two lengthy affidavits. Defendants have filed objections to the affidavits. These affidavits are filled with hearsay. L'Isolante will not engage in arguments of fact, but Defendant does request that the Court rely upon the facts and not upon Plaintiff's characterization of the facts.

As an example, Plaintiff alleged in its Complaint that Mr. Spinelli was a manager of K-Flex. (See Armacell Complaint, Paragraph 9.) Plaintiff's contends in its response that the allegation is erroneous, (Plaintiff's Response, footnote 4) and that it is "surprising" that Defendant would contend in its argument that Mr. Spinelli's visits were related to K-Flex. In order to clarify and confirm that Mr. Spinelli is a manager, Defendant files an affidavit to verify that he is a manager of K-Flex. (See Guarino Affidavit.)

**I. L'Isolante has not waived its objections to jurisdiction.**

Plaintiff's initial argument is that L'Isolante waived the objection to jurisdiction. Plaintiff relies on Covenant Equipment Corporation v. Forklift Pro, Inc., 2008 WL 1945973 (N.C. Super. May 1, 2008). The facts are different. In that case, the Defendant filed the Notice of Designation on January 14, 2008 and the Rule 12 Motion to Dismiss on February 13, 2008.

In the present case, L'Isolante filed its Rule 12 Motion to Dismiss for Lack of Jurisdiction in Alamance County Superior Court on May 22, 2008 at 4:37pm, where no local rule requires an accompanying brief, and then filed the Notice of Designation on the same day but one minute later at 4:38pm. In addition, the Notice of Designation references the Motion to Dismiss. The procedural history is different from the procedure in Covenant Equipment Corporation v. Forklift Pro, Inc. That difference compels a different result. L'Isolante has not waived its objection to jurisdiction.

**II. L'Isolante committed no acts within the state which give rise to any cause of action.**

Plaintiff's attempts to re-cast mixed questions of law and fact as uncontroverted facts and glosses over very real issues.

First, the hiring of Bostic by K-Flex was not a breach of Bostic's covenant to compete. The covenant not to compete lists lists four (4) companies. (See section 8, Exhibit 9, Norwood Affidavit.) Plaintiff alleges that "K-Flex is a successor of Rubatex..." (Paragraph III, Amended Complaint.) The allegation is false. K-Flex bought certain assets of RBX Industries, Inc. ("RBX") while RBX was in bankruptcy. (See "Purchase of Intellectual Property from RBX Industries, Inc. by Nomaco K-Flex, LLC" dated January 29, 2004, Guarino Affidavit.) K-Flex is not a successor to Rubatex.

Mr. Guarino acted as an agent for K-Flex not L'Isolante. Mr. Guarino is now President of K-Flex. (Guarino Deposition, p. 6.) Formerly, he was CFO of K-Flex when its name was Nomaco

K-Flex. (Guarino Deposition, p. 7.) He was also a member of the Board. (Guarino Deposition, p. 22.) Mr. Bostic was hired by K-Flex to replace Ed Cole, a plant chemist for K-Flex (then named Nomaco K-Flex). Mr. Guarino, a manager of the limited liability company, see Guarino Affidavit, hired Mr. Bostic to work for the limited liability company, of which he was a manager. Mr. Guarino functioned as an agent of K-Flex. *N.C.G.S. § 3-23.*

There is no factual basis for asserting that he functioned as an agent of L'Isolante. Therefore, the acts of Mr. Guarino in North Carolina should not be attributed to L'Isolante.

Mr. Spinelli also was and is a manager of K-Flex. (See Guarino Affidavit.) His actions in recruiting and hiring Mr. Bostic as a replacement for Ed Cole, the prior plant chemist who resigned, were actions relating to the business of K-Flex. By like manner, when he works to generate sales for K-Flex, he is working as an agent of K-Flex. Those acts are acts of K-Flex and should not be attributed to L'Isolante.

There are, therefore, no actions within the state by L'Isolante which give rise to a cause of action. There is no jurisdiction under *N.C.G.S. §1-75.4.*

**III. There is no competent basis of fact in the record to support Plaintiff's claims of L'Isolante's sales into North Carolina.**

Plaintiff has filed the affidavit of Keith Norwood to which Exhibit 11 is attached. To the extent that Mr. Norwood is attempting to testify about the sales, such testimony is inadmissable hearsay. N.C. Rule of Evidence 802. To the extend that this is an attempt to authenticate the attachment as required by N.C. Rule of Evidence 901, there is no basis upon which he could authenticate this exhibit.

**IV. L'Isolante's ownership of a membership interest in K-Flex is not a basis for either specific or general jurisdiction.**

When the acts of Mr. Spinelli and Mr. Guarino are properly viewed as the acts of K-Flex, which is the limited liability company of which they are managers, then the sole basis for the exercise of jurisdiction over L'Isolante is its relationship with K-Flex.

It is true that L'Isolante is a member of K-Flex. Generally, mere ownership of a domestic company is not a basis for the exercise of jurisdiction. Abney Mills v. Tri-State Motor Transit Company, 265 N.C. 61, 71, 143 S.E. 2d 235, 242 (1965). However, if the foreign corporation itself transacts the business of the domestic company and controls its internal affairs of the domestic company, the foreign company may be subject to jurisdiction. *Id*. at 72.

The factual issue is whether L'Isolante simply owns K-Flex or whether L'Isolante so controls K-Flex that it is in effect, doing business in the name of K-Flex. The facts, as they are on the record before the Court, do not support a finding of such control. Prior to January 9, 2008, when L'Isolante bought out Nomaco, Inc.'s membership interest, there was no control. (Guarino Deposition, pp. 18-22, 39-41, and 221.) As one of the two equal members in the limited liability company, L'Isolante would not have control. After January 9, 2008, there is no evidence of the type of "control" that would subject L'Isolante to jurisdiction. The evidence is clear that L'Isolante provides research and development services to K-Flex, that it provides technical assistance with manufacturing, and that it provides training at its facilities in Italy. Such aid and assistance does not rise to the level of control described by the court in Abney Mills v. Tri-State Motor Transit Company, *supra*. Mr. Spinelli does exercise control in his capacity as manager, but that control is control arising from his role as manager of K-Flex. The evidence of record is more akin to the mere ownership discussed in Abney Mills v. Tri-State Motor Transport, *supra*. Certainly, it cannot be shown, from the record

before the Court, that L'Isolante manages and controls the internal affairs of K-Flex and, in effect, transacts its own business through K-Flex as is required for the exercise of jurisdiction over L'Isolante.

**Conclusion**

For the reasons previously set forth in its original memorandum of law, for the reasons set forth herein, and for such other reasons as may seem persuasive to the Court, Defendant L'Isolante respectfully urges the Court to grant its Motion to Dismiss for lack of jurisdiction over the person of L'Isolante.

This the 6th day of April, 2009.

/s/ Nigle B. Barrow, Jr.

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CERTIFICATE OF COMPLIANCE WITH BUSINESS COURT RULE 15.8

I certify that this response complies with the word limitation in Business Court Rule 15.8 in that, excluding the caption, and inclusive of all headings and footnotes and certificates, this reply contains less than 3,750 words. I base this certification on the word count of the word-processing system that was used to prepare the response. (Corel Word Perfect)

/s/ Nigle B. Barrow, Jr.
Nigle B. Barrow, Jr.

CERTIFICATE OF SERVICE

This to certify that the foregoing Response was served upon the plaintiff and defendant Bostic via U.S Mail to the attorneys for same as follows:

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This the 6th day of April, 2009.

/s/ Nigle B. Barrow, Jr.
Nigle B. Barrow, Jr.