EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT C/A No.: 2017-CP-26-03008
Douglas Kelsey, Plaintiff, vs. House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc.; and Travis Scott Wagoner, Defendants.	**ORDER**
House of Blues Myrtle Beach Restaurant Corporation, Third-Party Plaintiff, vs. Throttlefest, LLC; American Outlaw Spirits Incorporated; Full Throttle LLC; and Full Throttle Sloon Shine, LLC, Third-Party Defendants.	

This matter is before the Court on Third-Party Defendant Throttlefest, LLC's ("Throttlefest") Motion to Dismiss the Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation's ("House of Blues") Third-Party Complaint against Throttlefest, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing was held on January 8, 2020. Present and arguing on behalf of Throttlefest was Jeff Bogdan. Present and arguing on behalf of House of Blues was Christian Stegmaier. James Rainsford was present for the Plaintiff.

After considering all materials filed and submitted by both parties as well as arguments of counsel, the Court hereby GRANTS the Motion to Dismiss.

FACTS[1]

House of Blues and Throttlefest entered into a Co-Promotion Agreement (hereinafter the "Agreement") with an effective date of March 19, 2014 "concerning the functions and acts necessary for promoting and conducting" an event called the Full Throttle Festival (hereinafter the "Event") which was held at the House of Blues in Myrtle Beach from May 9 until May 17, 2014. Third-Party Complaint ¶¶93-97. The Agreement contains cross-indemnification provisions, which require House of Blues and Throttlefest to indemnify, defend, and hold each other harmless "from and against any and all claims, demands, suits, causes of action, liability, judgments, damages, costs and expenses (including reasonable attorneys fees and costs) asserted against [one party] and arising out of or resulting from any (A) act or omission of [the other party] or its employees, agents, or contractors in connection with [the other party's] performance of its obligations under this Agreement, . . . and/or (B) any material breach of this Agreement . . . ." Third-Party Complaint ¶¶150.

Plaintiff alleges that Travis Wagoner was present at the House of Blues on May 16, 2014 and that Michael Garner gave Wagoner two shots of liquor despite Wagoner showing signs of intoxication. Third-Party Complaint ¶¶108-109. Plaintiff then alleges that Wagoner left the House of Blues in an intoxicated state and caused an accident that injured the Plaintiff. Third-Party Complaint ¶¶110-111. While the Plaintiff alleges that Michael Garner was an employee of House of Blues and not Throttlefest, House of Blues alleges the exact opposite – that Mr. Garner was an

[1] Unless otherwise noted, the facts recited herein derive from House of Blues' Third-Party Complaint or Plaintiff's Second Amended Complaint.

employee of Throttlefest and not House of Blues. Compare Plaintiff's Second Amended Complaint ¶¶8, 16, 29, 40, 41, 42, 68, 74, 93 with Third-Party Complaint ¶¶114-115.

PROCEDURAL HISTORY

Plaintiff filed his initial Complaint in this case on May 12, 2017. He did not name Throttlefest as a Defendant. On July 7, 2017, Plaintiff filed an Amended Complaint, naming Throttlefest as a Defendant. In the Amended Complaint, Plaintiff alleged that Michael Garner was simultaneously an employee or agent of both Throttlefest and House of Blues and that he was selling alcohol under House of Blues' alcohol license. House of Blues did not file any crossclaims against Throttlefest.

Throttlefest settled with the Plaintiff and received a full and final release of all liability and damages of any kind relating to the injuries the Plaintiff sustained from the accident allegedly caused by Mr. Wagoner and his intoxication. Despite obtaining the Release from the Plaintiff, House of Blues refused to consent to Throttlefest's dismissal from the case, even though House of Blues did not have any claims pending against Throttlefest. Throttlefest filed a Motion to Dismiss, which House of Blues opposed. This Court granted Throttlefest's Motion to Dismiss on December 11, 2018.

On October 15, 2019, Plaintiff filed a Second Amended Complaint, which does not include Throttlefest as a defendant.[2] Plaintiff's Second Amended Complaint alleges that it was only House of Blues' employees and agents that served Travis Wagoner alcohol to the point of intoxication and caused the accident. Second Amended Complaint ¶¶¶¶8, 16, 29, 39, 40, 41, 42, 68, 74, 91, 93, 97. Plaintiff's Second Amended Complaint cites to specific House of Blues documents

[2] The initial Complaint and the Amended Complaint had two Plaintiffs, Douglas Kelsey and Mark Shimmenger. Mr. Shimmenger is not included as a Plaintiff in the Second Amended Complaint.

showing that Michael Garner was acting as a House of Blues employee on May 16, 2014 when he allegedly gave Wagoner two shots of liquor. Id. at ¶¶29, 42, 43. Plaintiff's Second Amended Complaint alleges that Michael Garner was solely House of Blues' employee and cites to House of Blues' testimony admitting the same. Id. at ¶¶40-41. Plaintiff alleges that when he filed his first Amended Complaint (which named Throttlefest) he had not yet discovered that Michael Garner was a House of Blues employee. Id. at ¶68.

On October 18, 2019, House of Blues filed its Answer to the Second Amended Complaint and its Third-Party Complaint against Throttlefest and others. House of Blues asserts six causes of action against Throttlefest: Breach of Contract, Negligent Misrepresentation, Negligence, Equitable Indemnification, Contractual Indemnification, and Contribution.

LAW/ANALYSIS

Under Rule 12(b)(6), the court must dismiss a complaint if fails to state facts sufficient to constitute a cause of action. "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint." Doe v. Marion, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004), citing Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995)). However, the "Court may consider documents outside the pleadings in determining whether to dismiss a complaint where the documents are integral to the complaint, explicitly relied on in the complaint and where the plaintiff does not challenge their authenticity." Martin v. Companion Healthcare Corp., No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) (citing Phillips v. LCI Int'l, Inc., 190 F.3d 609 (4th Cir. 1999); see also Goines v. Valley Cmt'y Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016) (on a motion to dismiss, the court "may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no

dispute about the document's authenticity."); Epstein v. World Acceptance Corp., 203 F. Supp. 3d 655, 662 (D.S.C. 2016) (in deciding a motion to dismiss, the court may consider "only the facts alleged in the complaint, which may include any documents referenced, and matters of which the court may take judicial notice.").[3]

I. House of Blues' Contribution Cause of Action is Barred by S.C. Code §15-38-50

South Carolina Code §15-38-50 provides that "[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: . . . (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." In Smith v. Tiffany, 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017), the South Carolina Supreme Court confirmed that when the injured party releases one potential joint tortfeasor from liability, the released tortfeasor "is also immune from *any liability* to non-settling alleged tortfeasors . . . by virtue of section 15-38-50." (emphasis added). There, Smith was injured in a motor vehicle accident and settled with Mizell and gave Mizell a covenant not to execute, making Mizell immune from liability to Smith. Id. at 554, 799 S.E.2d at 482. Smith then sued Tiffany for causing the accident. Id. Tiffany responded and asserted a third-party complaint against Mizell under Rule 14, SCRCP, claiming that Mizell was responsible for part of Smith's damages. Id. The Supreme Court found that Tiffany could not bring Mizell into the case as a third-party defendant because doing so would "require (1) a plaintiff to maintain a suit against someone with whom he has already settled; (2) a settling defendant to defend a lawsuit he has already settled . . . ." Id. at 569, 799 S.E.2d at 485. The Supreme Court recognized that Rule 14 provides "a defending party, as a third-party plaintiff, may

[3] "In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive." Unisum Ins. v. Hawkins, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000).

cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him* for all or part of the plaintiff's claim against him." Id. at 560, 799 S.E.2d at 486 (emphasis in original). The Tiffany Court held that Tiffany could not bring a third-party complaint against Mizell because Mizell was "not subject to liability for any part of Smith's claims based on the covenant not to execute he obtained from Smith." Id. at 560-61, 799 S.E.2d at 486.

Here, just like in Tiffany, Throttlefest is not subject to liability for any part of Plaintiff's claims based on the Release Throttlefest obtained from Plaintiff. Therefore, according to Tiffany, and §15-38-50, House of Blues does not have a contribution claim against Throttlefest because Plaintiff released Throttlefest from all liability to him. House of Blues cannot use Rule 14 to bring Throttlefest into this case as a third-party defendant under a contribution theory. Accordingly, House of Blues' Contribution cause of action is dismissed.

House of Blues argues that §15-38-50 does not apply here because the settlement between Throttlefest and the Plaintiff was not in "good faith," as is required by the statute. However, House of Blues did not allege in its Third-Party Complaint that the settlement was not in good faith. Nor did House of Blues present anything else that the Court could consider to support this argument. Accordingly, the Court rejects it. House of Blues next argues that Smith v. Tiffany did not decide whether due process and equal protection would allow a non-settling defendant to bring a settling party back into a case. While it is true that Smith v. Tiffany did not decide this issue, the Court declines to rule that House of Blues' due process or equal protection rights would be violated by not allowing it to bring Throttlefest back into this case. Throttlefest has already settled with the Plaintiff. House of Blues had ample opportunity to assert cross-claims against Throttlefest when they were both parties to this case, and further has had opportunities to file a separate action against Throttlefest. House of Blues' constitutional rights are not violated by its inability to bring

Throttlefest back into this case. House of Blues further argues that its ability to use the "empty-chair defense" at trial is insufficient to protect its rights. However, the empty-chair defense was adopted by the legislature and discussed in Smith v. Tiffany as a non-settling defendant's remedy in place of being able to bring settling entities in as parties to a case.

II. House of Blues' Breach of Contract, Contractual Indemnity, Negligent Misrepresentation, and Negligence Claims are Barred by the Applicable Statutes of Limitations

An action upon a contract must be commenced within three years of the breach. S.C. Code §15-3-530(1). The statute of limitations for negligence actions in South Carolina is also three years. S.C. Code §15-3-530. The South Carolina Supreme Court has "repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded." City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) ("The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."); Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("[T]he injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist."). "The date on which discovery should have been made is an objective, not subjective, question." Stokes–Craven Holding Corp. v. Robinson, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016); Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). A statute of limitations begins to run at the time the cause of action accrues. King v. James, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010). The question of when a cause of action accrues is a question of law for the court to decide. Menezes v. WL Ross & Co., LLC, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). "A cause of action accrues at

the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." Bergstrom v. Palmetto Health All., 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004), quoting Stephens v. Draffin, 327 S.C. 1, 4–5, 488 S.E.2d 307, 309 (1997); McAlhany v. Carter, 415 S.C. 54, 67, 781 S.E.2d 105, 112 (Ct. App. 2015), aff'd, No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017). A cause of action accrues when defendant breaches a duty owed to the plaintiff, even though substantial damages either were not discovered or did not even occur until sometime later. Grooms v. Med. Soc. of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989).

Here, House of Blues alleges two separate causes of action based on breach of contract. The "Breach of Contract" cause of action alleges that Throttlefest breached the Agreement by: (1) failing to name House of Blues as an Additional Insured on the insurance policies Throttlefest was required to obtain under the Agreement (Third-Party Complaint ¶125); (2) failing to use due care in providing festival talent and personalities for the Event (Third-Party Complaint ¶126(a)); (3) engaging in prohibited alcoholic beverage sponsorships during the Event (Third-Party Complaint ¶126(b)); and (4) failing to comply with state and local laws applicable to its activities during the Event (Third-Party Complaint ¶126(c)). The "Contractual Indemnification" cause of action is actually a breach of contract claim, as it alleges that Throttlefest is contractually required to indemnify and defend House of Blues against the allegations made in this case, but has failed to do so.

The Event took place between May 9 and May 17, 2014 and the incident giving rise to the Plaintiff's lawsuit occurred on May 16-17, 2014 (Third-Party Complaint ¶¶93, 97, 108-110). House of Blues either knew or should have known of at least some Throttlefest's alleged breaches

of the Agreement during the Event, especially the allegations that Throttlefest engaged in prohibited alcohol sponsorships during the Event, failed to fulfill its duties during the Event, and failed to name House of Blues as an Additional Insured on Throttlefest's insurance policies. Since the Event occurred on House of Blues' premises, it either knew or should have known in May 2014 that Throttlefest was engaging in prohibited alcohol sponsorships at the House of Blues in May 2014. Accordingly, House of Blues' Breach of Contract cause of action, even if not fully developed accrued in May 2014. See Richland-Lexington Airport Dist. v. Am. Airlines, Inc., 306 F. Supp. 2d 548, 566 (D.S.C. 2002), aff'd, 61 F. App'x 67 (4th Cir. 2003) ("A breach of contract action generally accrues at the time the contract is breached or broken). House of Blues had until May 2017 to file its Breach of Contact cause of action against Throttlefest, which it could have amended if and when it learned of additional breaches, including Throttlefest's alleged failure to indemnify House of Blues per the Agreement. House of Blues did not file its Breach of Contract claims until October 18, 2019, more than five years after the Event concluded. It is notable that Plaintiff originally sued House of Blues on May 12, 2017. House of Blues did not file its claims against Throttlefest at that time, which would have been within the statute of limitations.

House of Blues' Negligent Misrepresentation and Negligence Causes of Action are also based, at least in part, on Throttlefest's alleged improper promotion of alcohol brands during the Event. For the same reasons stated above, House of Blues' Negligent Misrepresentation and Negligence Causes of Action, even if not fully developed, accrued in May 2014 and should have been filed within three years. Since they were not filed until October 2019, they are barred by the statute of limitations.

House of Blues argues that its causes of action did not accrue until October 20, 2016, when it learned of Plaintiff's injuries. However, House of Blues' claims are not based solely on

Plaintiff's injuries. Some are based on Throttlefest's actions during the event which House of Blues either knew of or should have known of during the Event (e.g. Throttlefest's alleged impermissible participation in alcohol sponsorships during the Event). House of Blues either knew or should have known enough at the time of the Event for its causes of action to accrue. House of Blues also argues that equitable tolling should apply between May 12, 2017 (when Plaintiff filed his Amended Complaint naming both House of Blues and Throttlefest) and December 14, 2018 (when Throttlefest was dismissed) because House of Blues was adequately protected by having Throttlefest in the case during that time. Even if the Court would find the statute of limitations tolled during this period, House of Blues' claims would still be barred. As noted above, the claims accrued during the Event, which occurred in May 2014. If the statute of limitations was stopped on May 12, 2017, there would have been less than a month left until it expired. If the clock restarted on December 14, 2018, that remaining month would have passed long before House of Blues filed its Third-Party Complaint in October 2019. The Court also rejects House of Blues' argument that Throttlefest should be equitably estopped from arguing the statute of limitations because it defended itself in this case when it was involved as a first-party defendant. Throttlefest had no other option than to defend itself, and it even asserted the statute of limitations as an affirmative defense when it was a first-party defendant.

III. House of Blues' Negligent Misrepresentation, Negligence, and Equitable Indemnification Causes of Action are Also Barred by the Agreement

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Stanley Smith & Sons, Inc. v. Limestone College, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984). "'[I]n the case of actual contracts the agreement defines the duty[.]'" Webb v. First Fed. Sav. & Loan Ass'n, 300 S.C. 507, 510, 388 S.E.2d 823, 825 (Ct. App. 1989) (quoting 66 Am.Jur.2d Restitution and Implied Contracts Section

2 (1973), overruled on other grounds by Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000). "Under South Carolina law, 'if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.'" Toney v. LaSalle Bank Nat. Ass'n, 896 F. Supp. 2d 455 (D.S.C. 2012), aff'd, 2013 WL 751299 (4th Cir. 2013) (holding that a plaintiff cannot establish a claim for gross negligence where the claim arises from a contract). "Bare allegations of negligence cannot convert a breach of contract action into an action in tort." Seebaltd v. First Federal Savings & Loan Association, 269 S.C. 691, 239 S.E.2d 726 (1977) (affirming dismissal of a complaint containing allegations couched in terms of negligence where the only duties owed were contractual). "When it is questionable whether an action is plead on contract or in tort, doubt is generally resolved in favor of regarding the action to be on contract." Id. at 693, 239 S.E.2d at 727.

House of Blues alleges that it entered into a contract (the Agreement) with Throttlefest "concerning the functions and acts necessary for promoting and conducting" the Event. Third-Party Complaint ¶¶93-97. The Agreement itself[4] states that it "shall be strictly limited to all functions and acts necessary for promoting and conducting" the Event (Article 1(a)), that it shall not govern or restrict the parties from conducting other business or activities, *and that the parties shall not have any obligations whatsoever to each other outside of the Agreement* (Article 7(n)). House of Blues' Third-Party Complaint alleges that Throttlefest is liable to it because of Throttlefest's actions or inactions during the Event. Accordingly, House of Blues' Third-Party Complaint sounds in breach of contract, not tort. Seebaldt v. First Federal Savings & Loan

[4] The Court has considered the Agreement at the 12(b)(6) stage because it is integral to and expressly relied on in House of Blues' Third-Party Complaint (House of Blues even quoted directly from it) and House of Blues does not challenge its authenticity. Even if the Court did not consider the Agreement, the result would be the same because House of Blues alleged in its Third-Party Complaint that the Agreement controlled the parties' relationship. The Court disagrees with House of Blues' position that it would have to consider deposition testimony in deciding this issue, which the Court has not done.

Association, 269 S.C. at 692, 239 S.E.2d at 727. House of Blues tort claims, Negligence and Negligent Misrepresentation are dismissed. House of Blues' Equitable Indemnification cause of action is also dismissed because the Agreement contains cross-indemnification provisions. See Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 132, 414 S.E.2d 118, 121 (1992) ("A right to indemnity may arise by contract (express or implied) *or by* operation of law as a matter of equity between the first and second party. . . . The very nature of equitable indemnification is that a contract for indemnity is unnecessary.") (emphasis added).

House of Blues argues that Throttlefest made representations to House of Blues outside of the Agreement and, therefore, additional duties were created. A review of House of Blues' Third-Party Complaint shows that the representations that House of Blues alleges Throttlefest made were regarding Throttlefest's performance under the Agreement. The Court is not convinced that these alleged representations support tort claims.

CONCLUSION

For the reasons stated herein, the Court grants Throttlefest, LLC's Motion to Dismiss House of Blues Third-Party Complaint against it, dismissing Throttlefest, LLC from this case, again.

Benjamin H. Culbertson
Presiding Judge

Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach Restaurant Corporation , defendant, et al

Case Number: 2017CP2603008

Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148