

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2020-000407
Case No. 2017-CP-26-03008

Douglas Kelsey.....Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;
HOB Entertainment, Inc.; and Travis Scott Wagoner.....Defendants.

AND

House of Blues Myrtle Beach Restaurant CorporationThird-Party Plaintiff,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;
Full Throttle LLC; and Full Throttle Sloon Shine, LLC.....Third-Party Defendants.

Of Whom House of Blues Myrtle Beach Restaurant Corporation is the Appellant and Throttlefest,
LLC is the Respondent.

APPELLANT’S RETURN TO RESPONDENT’S MOTION TO DISMISS

On April 30, 2020, Respondent’s filed a Motion to Dismiss and Supporting Memorandum arguing that the instant appeal is interlocutory in nature. Appellant House of Blues Myrtle Beach Restaurant Corporation (“Appellant”) respectfully submits this Return to Respondent’s Motion, which should be denied for the reasons set forth below.

FACTS/PROCEDURAL HISTORY

First-Party Litigation and Third-Party Claims

This is an alleged alcohol liability case related to a motorcycle-on-motorcycle collision on May 16, 2014 in Myrtle Beach, South Carolina, which resulted in injuries to Douglas Kelsey (“Kelsey”), the Plaintiff in the underlying first-party litigation. Kelsey alleges that Travis Wagoner was overserved with two free shots allegedly given to him by Michael “Fajita Mike” Garner during an event called “Throttlefest 2014.” Appellant House of Blues has vehemently denied any liability to Kelsey and disputes that Fajita Mike was acting as its employee when he allegedly served Wagoner.

Respondent Throttlefest, LLC and House of Blues entered into a Co-Promotion Agreement (“Agreement”) with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. Michael Ballard and Jesse James Dupree are affiliated with Throttlefest, LLC, as well as related entities Full Throttle, L.L.C., Full Throttle Sloon Shine, LLC, and American Outlaw Spirits Incorporated, on behalf of which the two men attended the Throttle Fest 2014 event. Appellant avers that throughout the Throttle Fest event, Fajita Mike was acting as the employee or agent of Throttlefest LLC, Full Throttle, L.L.C., Full Throttle Sloon Shine, LLC, and American Outlaw Spirits Incorporated (collectively “the Third-Party Defendants”). Further, the Third-Party Defendants all had the opportunity and responsibility to supervise and control Fajita Mike and all financially benefited from Fajita Mike’s alleged actions.

Though the Third-Party Defendants were previously named as defendants in the first-party litigation, only the House of Blues Defendants and Travis Wagoner remained in the case at the time that Plaintiff filed its Second Amended Complaint on October 15, 2019. The House of Blues defendants filed their Answer to the Second Amended Complaint and Third-Party Complaint on October 18, 2019. The causes of action brought by Appellant against the Third-Party Defendants include breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification, and contribution. (See **Exhibit A**, HOB's Answer and Third-Party Complaint).

Dismissal of Third-Party Claims Against Respondent

Respondent Throttlefest, LLC filed an Answer and Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, followed by a Memorandum in Support of the Motion.¹ (See **Exhibit B**, Throttlefest's Mot. to Dismiss; **Exhibit C**, Throttlefest's Memo. in Support of Mot. to Dismiss). Appellant filed a Memorandum in Opposition to Respondent's Motion. (**Exhibit D**, HOB's Memo. in Opp.). A hearing on Respondent's motion was held on January 8, 2020, before The Honorable Benjamin Culbertson. Judge Culbertson orally granted the motion and entered a Form 4 Order providing the same and instructing counsel for Throttlefest to prepare a formal order. Judge Culbertson entered a written order granting the motion to dismiss on February 4, 2020, and entered an identical order again on February 5, 2020. (**Exhibit E**, Feb. 5, 2020 Order of Dismissal).

¹ The remaining Third-Party Defendants, Full Throttle, L.L.C., Full Throttle Sloon Shine, LLC, and American Outlaw Spirits Incorporated, also filed motions to dismiss Appellant's third-party claims against them. Their motions were heard by The Honorable William A. McKinnon on February 5, 2020, and an Order granting the motions was entered on March 26, 2020. On April 6, 2020, Appellant filed a timely Motion to Alter or Amend, which is currently pending in the Circuit Court.

The trial court dismissed the third-party claim for contribution against Respondent, citing S.C. Code Ann. § 15-38-50 and Smith v. Tiffany, 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017), based upon a finding that Respondent cannot pursue contribution where Plaintiff Kelsey released Respondent from all liability. The court further found that the Third-Party Complaint did not allege that the settlement between Respondent and Kelsey was not in good faith and Appellant did not produce any other evidence to support such an argument. The trial court agreed that Smith v. Tiffany was not decided on due process and equal protection grounds but found that these rights would not be violated by precluding Respondent from being brought back into this case. Rather, the court ruled that Respondent already settled with Kelsey, Appellant had ample opportunity to assert crossclaims or a separate cause of action against Respondent before, and that Respondent's rights are sufficiently protected by its ability to assert an "empty-chair defense." (Order of Dismissal, pp. 5-7).

The trial court dismissed the remaining causes of action for breach of contract, contractual indemnity, negligent misrepresentation, and negligence, based upon the statute of limitations, finding that the claims accrued in May 2014. (Order of Dismissal, pp. 8-10). Appellant argued that its causes of action did not accrue until October 20, 2016, when it was first-noticed of Keley's injuries. The court further found that Appellant's causes of action for negligent misrepresentation, negligence, and equitable indemnification were barred by the terms of the Co-Promotion Agreement. (Order of Dismissal, pp. 11-12).

On February 14, 2020, Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. (**Exhibit F**, HOB Mot. to Alter or Amend). Appellant's motion argued that the trial court should amend its Order to correct the following errors and omissions:

1. The trial court failed to rule on Appellant's argument that Respondent's arguments were not proper for Rule 12(b)(6) dismissal because they required the Court to consider information outside of the Third-Party Complaint.
2. The trial court erred in finding that Appellant was required to plead that Respondent's settlement with Plaintiff was not in good faith or present evidence of the same in order for its contribution claim to survive.
3. The trial court erred in relying upon Smith v. Tiffany to find that Appellant's federal and state constitutional rights of due process and equal protection were protected after admitting that the case explicitly failed to consider such arguments.
4. The trial court erred in dismissing causes of action based upon the statute of limitations where the court failed to properly apply the discovery rule and failed to distinguish the accrual of the indemnification claim.
5. The trial court erred in finding that the existence of the Co-Promotional Agreement precluded alternative tort and equitable claims.
6. The trial court erred in failing to address why amendment of the pleadings was not the proper remedy for any alleged deficiency in the initial pleading.

On March 4, 2020, Judge Culbertson entered a Form 4 Order denying the Motion to Alter or Amend. (**Exhibit G**, Mar. 4, 2020 Order).

Appellant filed the instant appeal from Judge Culbertson's Orders. Respondent filed its motion to dismiss based upon case law which Respondent claims establishes that the appeal is interlocutory. As discussed more fully *infra*, the appealability of an order granting the dismissal of all claims against a party, even where claims against other parties survive, is well established under South Carolina law.

LAW/ANALYSIS

I. The Instant Appeal Is Proper Because the Trial Court’s Grant of Respondent’s Motion to Dismiss Ended the Underlying Action as to Respondent.

Applicable Law

The appealability of the trial court’s order is governed by §14-3-330 of the South Carolina Code of Laws, which provides, in relevant part:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and **final judgments in such actions**; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) **An order affecting a substantial right made in an action when such order** (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) **strikes out an answer or any part thereof or any pleading in any action**;

...

S.C. Code Ann. § 14-3-330 (emphasis added).

These provisions are not always mutually exclusive, though there are some rulings controlled by § 14-3-330(2) that must, for reasons of public policy, be immediately appealed or the right to review will be lost. See Link v. Sch. Dist. of Pickens Cty., 302 S.C. 1, 6, n. 5, 393 S.E.2d 176, 178, n. 5 (1990) (“Implicit in the School District’s contention is the idea that § 14-3-330(1) and (2) are exclusive provisions, and that a given ruling may not fall within the confines of both. We reject this argument.”).

In Lebovitz v. Mudd, our Supreme Court ruled that “[a]n order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading.” 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) (citing Miles v. Charleston Light & Water Co., 87 S.C. 254, 69 S.E. 292 (1910) (order granting demurrer as to portion of complaint)). Thus, the Lebovitz Court ruled that order was subject to immediate appeal and denied the respondent’s motion to dismiss the appeal. Id.

In Link, our Supreme Court clarified that a 12(b)(6) dismissal also fits within the definition of “involving the merits” under §14-3-330(1), thus allowing a party to wait until final judgment to appeal it as an intermediate order “necessarily affecting the judgment not before appealed from.” 302 S.C. at 6, 393 S.E.2d at 179. However, the existence of the option to wait to appeal pursuant to §14-3-330(1) did not contravene the party’s concurrent statutory right to immediate appeal to §14-3-330(2). See id. at 4, 393 S.E.2d at 178. The Link Court further specifically overruled Plaza Dev. Services v. Joe Harden Builder, Inc., 296 S.C. 115, 370 S.E.2d 893 (Ct. App. 1988), “to the extent it holds that one may not appeal the granting of a 12(b)(6) motion under § 14-3-330 if the ruling affects some but not all of a party’s causes of action,” finding that Plaza Development was in direct convention with Lebovitz on that point. Id. at 4 n. 2, 393 S.E.2d at 178 n. 2.

In Olson v. Faculty House of Carolina, Inc., this Court clarified that Link did not deal with multiple defendants, such that its holding regarding the permissibility of waiting to appeal the grant of summary judgment in a multi-claim action until final judgments have been rendered on all other claims was “not controlling under the circumstances of this case.” 344 S.C. 194, 214, 544 S.E.2d 38, 48 (Ct. App. 2001), aff’d, 354 S.C. 161, 580 S.E.2d 440 (2003).

In Olson, the plaintiff brought negligence claims against the University of South Carolina and Faculty House of Carolina, Inc. related to injuries she sustained when she slipped and almost fell in liquid at the Faculty House dining club. Id. at 199, 544 S.E.2d at 41. On September 30, 1998, the trial court granted the University's motion for summary judgment, finding that the claims were barred by the statute of limitations. Id. at 200, 544 S.E.2d at 41. Olson did not immediately appeal this ruling. Id. Subsequently, the trial court granted partial summary judgment to Faculty House. Id. Olson appealed both the earlier grant of summary judgment to the University and the partial grant of summary judgment to Faculty House. Id.

With respect to Olson's appeal from the grant of summary judgment to the University, the Olson Court found that the appeal was not timely where Olson waited more than a year after the ruling before deciding to appeal the order. 344 S.C. at 212, 544 S.E.2d at 47. The Olson Court recognized that "appealability turns on § 14-3-330." Id. (citing James F. Flanagan, South Carolina Civil Procedure 430 (2d ed. 1996) ("The appealability of trial court orders remains determined by the Supreme Court's jurisdictional statute.")). The Court found that the trial court's grant of summary judgment to the University based on the statute of limitations was a final order under S.C. Code Ann. § 14-3-330(1) "because it left nothing further for determination." Id. at 213, 544 S.E.2d at 48. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; **but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final.**" Id. (emphasis in original) (quoting Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1883)).

The Olson Court explained:

The order expressly ruled that **all** of Olson's claims against the University were barred by the statute of limitations. This ruling therefore adjudicated all of the claims as to the University. Faculty House did not assert the statute of limitations as a defense. Olson's claims against Faculty House were thus separate and discrete from her claim against the University. The fact Olson had continuing claims against Faculty House was irrelevant to the dismissal of the University. Nothing short of direct appeal could resurrect the action against the University.

Id. at 214, 544 S.E.2d at 48 (emphasis in original).

The Court further explicated: "In today's world the proliferation of parties is a common occurrence. Were we to adopt Olson's view, a dismissed party would be 'on hold' indefinitely."

Id. Accordingly, Olson's failure to timely serve her notice of appeal from the trial court's dismissal of the University precluded appellate review of the grant of summary judgment. Id. at 214, 544 S.E.2d at 48-49 ("The timely service of an appeal is a jurisdictional requirement that cannot be waived.").

In Murphy v. Owens-Corning Fiberglas Corp., the Court denied the respondent's motion to dismiss. 346 S.C. 37, 43, 550 S.E.2d 589, 592 (Ct. App. 2001), overruled on other grounds by Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003). Like Respondent's motion here, the respondent's motion in Murphy was premised upon a contention that the circuit court's order of dismissal, based upon lack of subject matter jurisdiction, was not immediately appealable because claims against one defendant still remained. Id. The Murphy Court recognized Link's overruling of Plaza Development and the prior holding in Lebovitz "that an order granting a Rule 12(b)(6) motion as to one of multiple claims is directly appealable under S.C. Code Ann. Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading." Id. at 43-44, 550 S.E.2d at 592. The Murphy Court found that while the grant of the Rule 12(b)(1) motion was not a final order as there was a remaining defendant, "the practical effect of the grant of the motion

is that it strikes out the Murphys' complaint with respect to the respondents." Id. at 44, 550 S.E.2d at 592. Accordingly, the Court held that "an order granting a Rule 12 motion as to some, but not all of the defendants in a case, is directly appealable under Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading." Id. at 44-45, 550 S.E.2d at 592; see also Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001) ("Dismissal of an action pursuant to Rule 12(b)(6) is appealable.").

Respondent's Motion and Memorandum failed to reference any of the above cases despite their direct applicability to the argument they advance. Respondent's Memorandum does make a passing reference to Wetzel v. Woodside Dev. Ltd. P'ship, 364 S.C. 589, 615 S.E.2d 437 (2005). (See Resp.'s Memo., p. 6). The Wetzel Court ruled:

Normally, an order granting a motion to set aside an entry of default is not immediately appealable. Here, however, the effect of granting the motion and holding that Steele has not been properly served is equivalent to granting a motion to dismiss under Rule 12(b)(5), SCRCP, since it ends the action as to Steele. Therefore, it is immediately appealable. Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) (grant of a partial motion to dismiss); Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), overruled on other grounds by Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003) (grant of motion to dismiss as to some but not all of the parties is immediately appealable).

364 S.C. at 592-93, 615 S.E.2d at 438-39 (2005) (portion of internal citations omitted).

Rather than recognizing the direct applicability of this case law to the instant case, Respondent relies upon Tillman v. Tillman, 420 S.C. 246, 801 S.E.2d 757 (Ct. App. 2017), which has no applicability to the instant facts.

Tillman involved an ejectment action brought by a sister against her brother and his wife. 420 S.C. at 248, 801 S.E.2d at 758. The appellant-brother counter-claimed, alleging numerous causes of action against the respondent-sister. Id. The trial court granted the respondent's motion to dismiss several of the appellant's counterclaims. Id. Though the trial court denied appellant's

oral motion to amend his pleadings, following a motion to reconsider, the trial court specified in its written order that “the defendants may make a formal motion to amend their counterclaims.” Id. at 248, 801 S.E.2d at 758-59. Thereafter, the appellant filed a notice of appeal and then, ten days later, a motion for leave to amend. Id. at 248, 801 S.E.2d at 759.

The Tillman Court noted that the issue of whether an order that grants a 12(b)(6) motion **yet simultaneously grants leave to amend the pleadings** is immediately appealable had not arisen since the adoption of the South Carolina Appellate Court Rules (SCACR) and South Carolina Rules of Civil Procedure (SCRPC). 420 S.C. at 248, 801 S.E.2d at 759. In finding that the trial court’s order was not immediately appealable, the Court found that “[t]he fate of Appellant’s counterclaims has not been finally determined as long as his motion to amend hangs in the balance.” Id. at 249, 801 S.E.2d at 759. The Tillman Court found that Lebovitz, which found that “the granting of a motion to dismiss may be immediately appealed because it ‘strikes’ a pleading,” was distinguishable. Id. Instead, the facts in Tillman presented “a hybrid: an order that ‘strikes’ a counterclaim, but welcomes a formal motion to amend.” Id. Thus, it was the availability—and pendency—of the appellant’s motion to amend that necessitated a finding that the trial court’s order was not immediately appealable in Tillman. See id. at 249–51, 801 S.E.2d at 759-60.

The Order of Dismissal in the instant case was entered pursuant to Rule 12(b)(6), SCRPC, though Appellant contends it was improperly converted to a motion for summary judgment under Rule 56, SCRPC. (See **Exhibit E**). Regardless, despite Appellant’s request for leave to amend its Complaint to correct any alleged deficiencies, the trial court denied this request. (Id.). As a result, the practical effect of the trial court’s order was to finally determine Appellant’s claims against Respondent by effectively striking them from Appellant’s Third-Party Complaint. In other words,

the Order of Dismissal here “ends to the action as to” Respondent. See Wetzel, 364 S.C. at 592-93, 615 S.E.2d at 438-39 (2005) (holding order setting aside entry of default immediately appealable because it was equivalent to granting a motion to dismiss under Rule 12(b)(5), SCRPC, since it ends the action as to Steele).

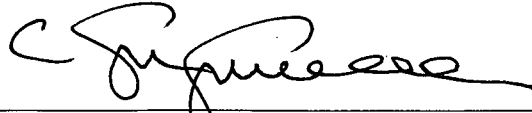
As our courts have repeatedly held, the continued existence of Plaintiff’s claims against Appellant and Appellant’s claims Olson against the remaining Third-Party Defendants is of no consequence to the appealability of the instant Order of Dismissal pursuant to S.C. Code Ann. § 14-3-330. See Olson, 344 S.C. at 214, 544 S.E.2d at 48 (holding that failure to directly appeal from grant of summary judgment adjudicating all claims against that defendant precluded appellate review and that continuing claims against co-defendant were “irrelevant”); Murphy, 346 S.C. at 44-45, 550 S.E.2d at 592 (holding that an order “granting a Rule 12 motion as to some, but not all of the defendants in a case, is directly appealable under Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading”). Here, Appellant’s direct appeal from the Order of Dismissal was not only permissible but necessary to preserve its rights against Respondent. See Olson, *supra*. Thus, in accordance with the line of jurisprudence including Lebovitz, Link, Olson, Murphy, and Wetzel, Respondent’s Motion to Dismiss should be denied.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that Respondent’s Motion to Dismiss be denied.

Respectfully submitted,
COLLINS & LACY, P.C.

By:



CHRISTIAN STEGMAIER
SC Bar No. 68648
cstegmaier@collinsandlacy.com
AMY L. NEUSCHAFER
SC Bar No. 73922
aneuschafer@collinsandlacy.com
LAURA R. BAER
SC Bar No. 101076
lbaer@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (main)
(803) 771-4484 (facsimile)

ATTORNEYS FOR APPELLANT HOUSE OF
BLUES MYRTLE BEACH RESTAURANT
CORPORATION

**APPELLANT'S RETURN TO RESPONDENT'S
MOTION TO DISMISS**

Columbia, South Carolina
May 28, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF HORRY)

FIFTEENTH JUDICIAL CIRCUIT)

Douglas Kelsey,)

Civil Action No.: 2017-CP-26-03008)

Plaintiffs,)

vs.)

House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc.; and Travis Scott Wagoner,)

Defendants.)

House of Blues Myrtle Beach Restaurant Corporation,)

**THIRD-PARTY SUMMONS
(Jury Trial Demanded)**

Third-Party Plaintiff,)

vs.)

Throttlefest LLC; American Outlaw Spirits Incorporated; Full Throttle, L.L.C.; and Full Throttle Sloon Shine, LLC,)

Third-Party Defendants.)

TO: THIRD-PARTY DEFENDANTS/CROSS-DEFENDANT ABOVE-NAMED

YOU ARE HEREBY SUMMONED and required to Answer the Third-Party Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Third-Party Complaint, at Collins & Lacy, P.C., 11945 Grandhaven Drive, Suite D, Murrells Inlet, South Carolina 29576, within 30 days after service hereof, exclusive of the day of such service.

If you shall fail to appear and defend in this matter within the time set forth herein above, judgment for default will be rendered against you for the relief demanded in the Third-Party Complaint.

Respectfully submitted,

COLLINS & LACY, P.C.

By: s/Christian Stegmaier
CHRISTIAN STEGMAIER
SC Bar No. 68648
cstegmaier@collinsandlacy.com
AMY L. NEUSCHAFER
SC Bar No. 73922
aneuschafer@collinsandlacy.com
11945 Grandhaven Drive, Suite D
Murrells Inlet, South Carolina 29576
(843) 353-2350 (voice)
(843) 652-0301 (facsimile)

ATTORNEYS FOR THIRD-PARTY
PLAINTIFF/DEFENDANT HOUSE OF BLUES
MYRTLE BEACH RESTAURANT
CORPORATION

THIRD-PARTY SUMMONS

Murrells Inlet, South Carolina
October 18, 2019

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Douglas Kelsey,)
)
 Plaintiff,)
)
 vs.)
)
 House of Blues Myrtle Beach Restaurant)
 Corporation; HOB Entertainment, Inc.; and)
 Travis Scott Wagoner,)
)
 Defendants.)
 _____)
)
 House of Blues Myrtle Beach Restaurant)
 Corporation,)
)
 Third-Party Plaintiff,)
)
 vs.)
)
 Throttlefest LLC; American Outlaw Spirits)
 Incorporated; Full Throttle, L.L.C.; and)
 Full Throttle Sloon Shine LLC;)
)
 Third-Party Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 Civil Action No.: 2017-CP-26-03008

DEFENDANTS
HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION
AND HOB ENTERTAINMENT, INC.'S
ANSWER TO SECOND AMENDED
COMPLAINT
AND
THIRD-PARTY COMPLAINT

(Jury Trial Demanded)

TO: JAMES RAINSFORD, ESQUIRE, ATTORNEY FOR PLAINTIFF:

Defendants House of Blues Myrtle Beach Restaurant Corporation¹ and HOB Entertainment, Inc. (collectively “Defendants”), reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure or any other dispositive motion, respond to the Second Amended Complaint of Plaintiff Douglas Kelsey by denying each and every allegation not hereinafter specifically admitted, by demanding strict proof thereof, and further responds as set

¹ Defendant House of Blues Myrtle Beach Restaurant Corporation is the real party in interest in the instant case as it relates to the House of Blues defendants.

forth below. Further, Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation (“House of Blues”) brings this Third-Party Complaint against Throttlefest LLC; American Outlaw Spirits Incorporated; Full Throttle, L.L.C.; and Full Throttle Sloon Shine LLC (collectively “Third-Party Defendants”), and further states as set forth below. The assertions of in the third-party causes of action shall not be construed as an admission of liability to the Plaintiff.

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Each and every allegation not herein admitted is hereby denied and strict proof thereof demanded.
2. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraph 1 and therefore deny the same and demand strict proof thereof.
3. Defendants admit only so much of the allegations of Paragraphs 2 and 3 that assert or could be construed as asserting that venue is proper in Horry County. Defendants deny any allegations of Paragraphs 2 and 3 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of Defendants and demand strict proof thereof.
4. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraph 4 and therefore deny the same and demand strict proof thereof.
5. In response to Paragraph 5, Defendants restate and reallege their responses to the above paragraphs, as if repeated verbatim.
6. Defendants admit so much of Paragraph 6 as alleges jurisdiction and venue are proper in this Court. Defendants deny any remaining allegations of Paragraph 6 and demand strict proof thereof.
7. In response to Paragraph 7, Defendants restate and reallege their responses to the above paragraphs, as if repeated verbatim.

8. Defendants deny the allegations of Paragraphs 8, as worded, and demand strict proof thereof. However, Defendants admit that Michael Garner was issued a W-2 but was not an ordinary employee; rather, he was a part of the ThrottleFest festival talent.
9. Defendants deny the allegations of Paragraphs 9 and 10 and demand strict proof thereof.
10. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraph 11 through 15 and therefore deny the same and demand strict proof thereof.
11. The allegations of Paragraph 16 do not constitute factual allegations and/or call for legal conclusions, to which no response is necessary. To the extent a response is required, Defendants deny any allegations of Paragraph 16 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of Defendants and demands strict proof thereof.
12. In response to Paragraph 17, Defendants restate and reallege their responses to the above paragraphs, as if repeated verbatim.
13. Defendants deny the allegations of Paragraph 18, as worded, and demand strict proof thereof. However, Defendants admit alcohol was lawfully purchased from a wholesaler.
14. Defendants deny the allegations of Paragraph 19 and demand strict proof thereof.
15. Defendants deny the allegations of Paragraph 20, as worded, and demand strict proof thereof. However, Defendants admit alcohol was lawfully purchased from a wholesaler.
16. Defendants deny the allegations of Paragraph 21 and demand strict proof thereof.
17. Defendants deny the allegations of Paragraph 22, as worded, and demand strict proof thereof.
18. Defendants deny the allegations of Paragraph 23 and demand strict proof thereof.

19. Defendants deny the allegations of Paragraph 24, as worded, and demand strict proof thereof.
20. Defendants deny the allegations of Paragraph 25 through 29, as worded, and demand strict proof thereof.
21. Defendants deny the allegations of Paragraph 30 and demand strict proof thereof.
22. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 31 through 35 and therefore deny the same and demand strict proof thereof.
23. Defendants admit the allegations of Paragraph 36, except to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
24. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 37 and 38 and therefore deny the same and demand strict proof thereof.
25. Defendants deny the allegations of Paragraphs 39 and 40 and demand strict proof thereof.
26. Defendants deny the allegations of Paragraphs 41 through 44, as worded, and demand strict proof thereof. However, Defendants admit that Michael Garner was issued a W-2 but was not an ordinary employee; rather, he was a part of the ThrottleFest festival talent.
27. Defendants deny the allegations of Paragraph 44 and demand strict proof thereof.
28. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 45 through 51 and therefore deny the same and demand strict proof thereof.
29. The allegations of Paragraph 52 call for legal conclusions, to which no response is necessary. To the extent a response is required, Defendants deny any allegations of Paragraph 52 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of Defendants and demands strict proof thereof.

30. Defendants admit the allegations of Paragraph 53, except to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
31. Defendants deny the allegations of Paragraphs 54 and demand strict proof thereof.
32. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 55 through 67 and therefore deny the same and demand strict proof thereof.
33. Defendants deny the allegations of Paragraphs 68, as worded, and demand strict proof thereof.
34. Defendants deny the allegations of Paragraphs 69, as worded, and demand strict proof thereof. However, Defendants admit that one or more musical acts participating in Throttlefest performed inside of the music hall.
35. Defendants deny the allegations of Paragraphs 70 and demand strict proof thereof.
36. Defendants deny the allegations of Paragraphs 71, as worded, and demand strict proof thereof.
37. Defendants deny the allegations of Paragraphs 72 and 73 and demand strict proof thereof.
38. Defendants deny the allegations of Paragraphs 74, as worded, and demand strict proof thereof.
39. The allegations of Paragraph 75 call for legal conclusions, to which no response is necessary. To the extent a response is required, Defendants deny the allegations of Paragraph 75 and demand strict proof thereof.
40. Defendants deny the allegations of Paragraphs 76 through 82 and demand strict proof thereof.

41. The allegations of Paragraph 83 call for legal conclusions, to which no response is necessary. To the extent a response is required, Defendants deny the allegations of Paragraph 83 and demand strict proof thereof.
42. In response to Paragraph 84, Defendants restate and reallege their responses to the above paragraphs, as if repeated verbatim.
43. Paragraphs 85 through 89 constitute conclusions of law to which Defendants need not respond. To the extent a response is required, Defendants deny the same and demand strict proof thereof.
44. Defendants deny the allegations of Paragraph 90 through 104 and demand strict proof thereof.
45. In response to Paragraph 105, Defendants restate and reallege their responses to the above paragraphs, as if repeated verbatim.
46. Paragraphs 106 through 111 constitute conclusions of law to which Defendants need not respond. To the extent a response is required, Defendants deny the same and demand strict proof thereof.
47. Defendants deny the allegations of Paragraph 112 through 118 and demand strict proof thereof.
48. Paragraph 119 constitutes conclusions of law to which Defendants need not respond. To the extent a response is required, Defendants deny the same and demand strict proof thereof.
49. Defendants deny the allegations of Paragraph 120 and 121 and demand strict proof thereof.
50. In response to Paragraph 122, Defendants restate and reallege their responses to the above paragraphs, as if repeated verbatim.

51. Paragraphs 123 through 129 constitute conclusions of law to which Defendants need not respond. To the extent a response is required, Defendants deny the same and demand strict proof thereof.
52. Defendants deny the allegations of Paragraph 130 through 133 and demand strict proof thereof.
53. In response to Paragraph 134, Defendants restate and reallege their responses to the above paragraphs, as if repeated verbatim.
54. Paragraphs 135 through 142 are not directed to these Defendants and therefore require no response. To the extent a response is required, Defendants deny any allegations of Paragraphs 135 through 142 that allege or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
55. In response to Paragraph 143, Defendants restate and reallege their responses to the above paragraphs, as if repeated verbatim.
56. Defendants deny the allegations of Paragraphs 144 through 146 and demand strict proof thereof.
57. Defendants deny the allegations of Paragraphs 144 through 146 and demand strict proof thereof.
58. Defendants admits the allegations of Paragraphs 147 and 148, except to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof. Defendants further note that the referenced lawsuit was dismissed with prejudice and without any admission of liability. Therefore, Defendants move to strike Paragraphs 147 and 148 from Plaintiff's Second Amended Complaint based on their lack of relevance to the instant litigation.

59. Defendants deny the allegations of Paragraph 149 and demand strict proof thereof. Further, to the extent it makes reference to prior litigation that was dismissed with prejudice and without any admission of liability, Defendants move to strike that portion of Paragraph 149 from Plaintiff's Second Amended Complaint based on its lack of relevance to the instant litigation.
60. Defendants deny the allegations of Paragraphs 150 through 152 and demand strict proof thereof.
61. Defendants deny the allegations of Paragraph 153 – including all subparts – and demand strict proof thereof.
62. Defendants deny the allegations of Paragraphs 154 through 156 and demand strict proof thereof.
63. Defendants deny Plaintiff is entitled to the relief sought in the prayer for relief—including all subparts—and demand strict proof thereof. Defendants likewise demand a jury trial.

FOR A SECOND DEFENSE

64. The Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

65. Any injuries sustained by Plaintiff were due to and caused by the sole negligence of third persons (including Co-Defendant and Third-Party Defendants) over whom Defendants had no control; therefore, Defendants should not be liable to Plaintiff in any sum whatsoever.

FOR A FOURTH DEFENSE

66. Any injuries sustained by the Plaintiff were due to and caused by the intervening and superseding acts of negligence, carelessness, recklessness, and gross negligence on the part of third persons (including Co-Defendant or Third-Party Defendants) as a proximate cause of injuries as alleged, if any; therefore, Defendants should not be liable to the Plaintiff in any sum whatsoever.

FOR A FIFTH DEFENSE

67. Plaintiff's claims may be barred or otherwise reduced due to their failure to mitigate damages as required by law.

FOR A SIXTH DEFENSE

68. Plaintiff's claims may be barred by the doctrine of unavoidable accident.

FOR A SEVENTH DEFENSE

69. Plaintiff's claims may be barred by the doctrine of waiver, estoppel, and/or laches.

FOR AN EIGHTH DEFENSE

70. Plaintiff's claims may be barred by the applicable statute of limitations.

FOR A NINTH DEFENSE

71. Plaintiff's failure to join a necessary party requires dismissal of Defendants pursuant to Rule 12(b)(7) and Rule 19 of the South Carolina Rules of Civil Procedure.

FOR A TENTH DEFENSE

72. To the extent the discovery conducted in this litigation demonstrates the same, any injuries or damages sustained by Plaintiff were due to and caused and occasioned by Plaintiff's own negligence, gross negligence, recklessness, willfulness, and wantonness which was the direct and proximate cause of Plaintiff's alleged injuries or damages, if any, and without which the same would not have occurred. Therefore, due to Plaintiff's sole negligence,

gross negligence, recklessness, willfulness, and wantonness, Plaintiff's claims are barred.

FOR AN ELEVENTH DEFENSE

73. Even if Defendants were negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiff's injuries, if any, which is expressly denied, to the extent the discovery conducted in this litigation demonstrates the same, Defendants allege Plaintiff's negligent, grossly negligent, reckless, willful, and wanton conduct contributed more than fifty percent (50%) to the cause of the accident and, therefore, Plaintiff's claims are barred.

FOR A TWELFTH DEFENSE

74. Even if Defendants were negligent in any respect, which is expressly denied, and even if such conduct on the part of Defendants operated as a greater than fifty percent (50%) cause of Plaintiff's injuries, if any, which is also denied, to the extent the discovery conducted in this litigation demonstrates the same, Defendants are entitled to a determination as to the percentage which Plaintiff's negligent, grossly negligent, reckless, willful, and wanton conduct contributed to Plaintiff's accident and resulting injuries, if any, and to a reduction of any amount awarded to Plaintiff by an amount equal to the percentage of Plaintiff's own negligence.

FOR A THIRTEENTH DEFENSE

75. Any recovery by Plaintiff must be reduced or offset by amounts Plaintiff has received or will receive from others for the same injuries claimed in this lawsuit.

FOR A FOURTEENTH DEFENSE

76. Punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003), and the cases upon which it is based.

FOR A FIFTEENTH DEFENSE

77. The United States Constitution's Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly [do not] represent," Phillip Morris USA v. Williams, 549 U.S. 346, 353, 127 S.Ct. 1057, 1063 (2007), and, therefore, to the extent that Plaintiff seeks an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial.

FOR A SIXTEENTH DEFENSE

78. Pursuant to Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of punitive damages "[are] not really a fact tried by the jury" therefore Plaintiff's request for punitive damages "to be determined by the jury" violates the United States Constitution.

FOR A SEVENTEENTH DEFENSE

79. Notwithstanding Defendants' prior defenses incorporating Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 522 U.S. 424 (2001) and State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003), and the cases upon which they are based, in the event the trial court permits the jury to return a punitive damages award in the instant case, such damages are to be limited to an amount that is no greater than the jury's

award of actual damages, as explicated within Exxon Shipping Company v. Baker, 554 U.S. 471, 128 S. Ct. 2605 (2008).

FOR AN EIGHTEENTH DEFENSE

80. Defendants plead any and all applicable rights and protections afforded to them under the South Carolina Fairness in Civil Justice Act of 2011, codified at South Carolina Code Annotated Sections 15-32-510 to 15-32-540, as a defense to Plaintiff's claims or request for an award of punitive damages.

FOR A NINETEENTH DEFENSE

81. Defendant would show that, to the extent Plaintiff failed to take advantage of the opportunity to avoid the accident with Defendant Wagoner, Plaintiff's claims are barred by the doctrine of last clear chance.

FOR A TWENTIETH DEFENSE

82. Defendants incorporate by reference any applicable defenses asserted by Co-Defendant consistent herewith.

FOR A TWENTY-FIRST DEFENSE

83. Defendants specifically reserve and do not waive any additional defenses that may become apparent during the course of investigation and discovery.

**BY WAY OF FURTHER ANSWER AND THIRD-PARTY COMPLAINT AGAINST
THIRD-PARTY DEFENDANTS**

84. The above paragraphs, not inconsistent herewith, are incorporated herein, as if repeated verbatim.
85. Defendant/Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation, complaining of the above-named Third-Party Defendants Throttlefest LLC; American Outlaw Spirits Incorporated; Full Throttle, L.L.C.; and Full Throttle Sloon Shine LLC

(collectively “Third-Party Defendants”), does allege and show unto this Court the following:

86. Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation d/b/a House of Blues (hereinafter “House of Blues”) is a Delaware corporation duly licensed to conduct business in the State of South Carolina and doing business in Horry County, South Carolina.
87. Third-Party Defendant Throttlefest LLC, is a limited liability company organized and existing pursuant to the laws of the State of Florida and whose members are residents of the State of South Dakota and Georgia. Throttlefest LLC transacts business in South Carolina.
88. Third-Party Defendant American Outlaw Spirits Incorporated is a corporation organized and existing pursuant to the laws of the State of Georgia. American Outlaw Spirits Incorporated transacts business in South Carolina.
89. Third-Party Defendant Full Throttle, L.L.C., is a limited liability company organized and existing pursuant to the laws of the State of South Dakota and whose sole member is a resident of the State of South Dakota. Full Throttle, L.L.C. transacts business in South Carolina.
90. Third-Party Defendant Full Throttle Sloon Shine, LLC, is a limited liability company organized and existing pursuant to the laws of the State of South Dakota and whose sole member is a resident of the State of South Dakota. Full Throttle Sloon Shine, LLC transacts business in South Carolina.
91. The Court has personal jurisdiction over the Defendants because they transact business in South Carolina.

92. Venue is proper in this Circuit pursuant to S.C. Code Ann. § 15-7-30(G)(1) because the most substantial part of the acts or omissions giving rise to these causes of action occurred in Myrtle Beach, South Carolina, located in Horry County.
93. Plaintiff commenced the instant first-party action against House of Blues, and others, alleging they suffered damages as a result of a motorcycle collision with Defendant Wagoner, an individual who was allegedly served alcohol at an event known as the Full Throttle Saloon Festival (a/k/a “Throttle Fest”) on May 16, 2014.
94. House of Blues has denied liability for the damages alleged in Plaintiff’s Complaint.
95. All of the Third-Party Defendants were previously named as defendants in the first-party litigation.
96. In light of the trial court’s Orders of Dismissal entered on August 13, 2019 (dismissing Full Throttle and Full Throttle Sloon Shine, LLC), December 14, 2018 (dismissing Throttlefest LLC), and January 22, 2018 (dismissing without prejudice Defendants American Outlaw Spirits, Inc., Michael Ballard, and Jesse James Dupree), none of the Third-Party Defendants remain as co-defendants in the first party action.
97. Throttlefest LLC, and House of Blues entered into a Co-Promotion Agreement (“Agreement”) with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina.
98. Article 2 of the Agreement provides that Co-Promotor [Throttlefest LLC] is responsible to provide “[a]ll components of Full Throttle festival – including, but not limited to, all festival talent/personalities.”
99. Article 2 of the Agreement further provides that alcoholic beverage sponsorships are

“prohibited.”

100. With respect to financial terms, article 3(a) provides that “Co-Promoter [Throttlefest LLC] shall under no circumstances have any financial interest or share in any Bar Profit,” i.e. the revenue minus expenses from the sale of alcoholic beverages.
101. Article 5 of the Agreement contains provides for Throttlefest LLC ‘s indemnification of House of Blues against any act or omission of Throttlefest LLC or its employees, agents or contractors in connection with Throttlefest LLC’s performance under the Agreement.
102. Article 6(b) of the Agreement contains an Additional Insures requires each party to the Agreement to list “the other party, its parents, partners, affiliates and subsidiaries, and their respective officers, directors and employees as ‘Additional Insureds’ with respect to claims arising from the liabilities assumed herein by the named insured.”
103. Article 7(l) of the Agreement requires each party to the Agreement to “be responsible for compliance with all Federal, state and local laws and regulations applicable to such party’s activities in connection with this Agreement or Event, including: without limitation, obtaining any permits applicable to the Event or the activities contemplated herein.”
104. In the first-party action, Plaintiff has alleged personal injury that arises or results from acts and/or omissions of Third-Party Defendants, either personally or by the subcontractors, agents, employees, and/or event sponsors secured by Third-Party Defendants.
105. Plaintiff alleges that S’loon Shine liquor is liquor is produced and sold by Full Throttle Sloon Shine, LLC.
106. Plaintiff alleges that American Outlaw liquor is liquor is produced and sold by American Outlaw Spirits Incorporated.

107. Plaintiff alleges that Michael Garner, also known as "Fajita Mike," sold and gave out shots of S'loon Shine liquor and American Outlaw liquor at the Throttle Fest event.
108. Plaintiff alleges that Defendant Travis Scott Wagoner attended the Throttle Fest event at the House of Blues on May 16, 2014.
109. Plaintiff alleges that Michael Garner gave Wagoner two consecutive shots of liquor between 11:15 and 11:30 p.m., despite signs of visible intoxication.
110. Plaintiff alleges that at approximately, 12:15 p.m. on May 17, 2014, Wagoner left the House of Blues and eventually proceeded northbound on North Kings Highway.
111. Plaintiff alleges that Wagoner was involved in a motorcycle collision with Plaintiff, resulting in damages.
112. Michael Ballard, who is a managing member of Throttlefest LLC, and who is the sole managing member of Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC, attended the Throttle Fest event as a representative of these companies.
113. Jesse James Dupree, who is a managing member of Throttlefest LLC and the sole incorporator and officer of American Outlaw Spirits Incorporated, attended the Throttle Fest event as a representative of this company and corporation.
114. Michael Garner was neither an employee nor an agent of House of Blues.
115. Throughout the Throttle Fest event, Michael Garner was acting as the employee or agent of Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC.
116. Throughout the Throttle Fest event, Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC, all had the opportunity and responsibility to supervise and control Michael Garner's actions.

117. Throughout the Throttle Fest event, Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC, all financially benefited from Michael Garner's alleged actions.
118. Without admitting any liability and/or admitting the existence of any alleged damages, both of which are expressly denied, House of Blues alleges that to the extent that Plaintiff has suffered any recoverable damages in any way related to the service of alcohol at Throttle Fest, such damages are wholly attributable to the Third-Party Defendants. While House of Blues has denied these allegations, the claims and allegations of Plaintiff, if proven, entitle House of Blues to full recovery against the Third-Party Defendants pursuant to the various claims in law and equity enumerated below.

FOR A FIRST CAUSE OF ACTION
AGAINST ALL THIRD-PARTY DEFENDANTS
(Breach of Contract)

119. The above paragraphs, not inconsistent herewith, are incorporated herein, as if repeated verbatim.
120. Pursuant to the Agreement, Throttlefest LLC, was required to maintain insurance coverage, upon which House of Blues was to be listed as an Additional Insured.
121. Pursuant to the Agreement, Throttlefest LLC, was responsible to provide all components of Full Throttle festival, including, but not limited to, all festival talent/personalities.
122. Pursuant to the Agreement, alcoholic beverage sponsorships were "prohibited."
123. Pursuant to the Agreement, Throttlefest LLC, was required to comply with all Federal, state and local laws and regulations applicable to their activities under the Agreement.
124. Though Throttlefest LLC was the named party to and signatory on the Agreement, it was also acting as an agent of the remaining Third-Party Defendants American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC.

125. The Third-Party Defendants breached the Agreement by failing to include House of Blues as an Additional Insured on the insurance policies required under the Agreement;
126. Additionally, if Plaintiff's allegations are proven true, which is expressly denied by House of Blues, the Third-Party Defendants breached the Agreement by:
 - a. Failing to use due care in providing the festival talent and personalities for the Throttle Fest;
 - b. Engaging in prohibited alcoholic beverage sponsorship;
 - c. Failing to comply with state and local laws applicable to their activities;
 - d. Such other and further deficiencies or failures as discovery will reveal.
127. If Plaintiff's allegations are proven true, which is expressly denied by House of Blues, then as a direct and proximate result of the Third-Party Defendants' breach of contract, House of Blues has incurred special damages, damages, and may incur damages in the amount of any monies it is adjudged to owe Plaintiff, if any, or which it pays Plaintiff in any settlement of Plaintiff's claims, plus the costs of investigating and defending Plaintiff's claims.
128. Upon information and belief, House of Blues is entitled to judgment for actual damages against the Third-Party Defendants in the amount of any amount it may be adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as special damages, consequential damages, punitive damages, fees and costs incurred in the investigation, defense, and settlement of Plaintiff's claim, and any and all other damages.

FOR A SECOND CAUSE OF ACTION
AGAINST ALL THIRD-PARTY DEFENDANTS
(Negligent Misrepresentation)

129. The above paragraphs, not inconsistent herewith, are incorporated herein, as if repeated verbatim.

130. The Third-Party Defendants made false representations to House of Blues, specifically that Third-Party Defendants would procure and maintain general and excess insurance coverage, upon which House of Blues would be named as an Additional Insured;
131. Additionally, if Plaintiff's allegations are proven true, the Third-Party Defendants made false representations to House of Blues, including but not limited to:
 - a. That Third-Party Defendants were experienced in putting on a Full Throttle festival;
 - b. That Third-Party Defendants would act in a commercially reasonable manner;
 - c. That Third-Party Defendants would comply with all laws related to the sale and service of alcohol, inclusion any and all prohibitions on the service of free alcohol;
 - d. That Third-Party Defendants would not promote their own alcohol brands, including but not limited to, S'loon Shine and American Outlaw liquor;
 - e. That Third-Party Defendants would properly train and supervise Michael Garner; and
 - f. Such other and further false representations as discovery will reveal.
132. The Third-Party Defendants had a pecuniary interest in making these false statements, as the statements were made in the course of the Third-Party Defendants' business, profession, or employment.
133. The Third-Party Defendants owed a duty of care under the circumstances to see that they communicated truthful information to House of Blues.
134. The Third-Party Defendants breached that duty by failing to exercise due care.
135. House of Blues justifiably relied on the above representations.
136. If Plaintiff's allegations are proven true, which is expressly denied by House of Blues, then House of Blues has and will suffer a pecuniary loss as the proximate result of its reliance upon the representation, including but not limited to past special damages and damages already incurred and future damages in the amount of any monies it is adjudged to owe

Plaintiff, if any, or which is pays Plaintiff in any settlement of Plaintiff's claims, plus the costs of investigating and defending Plaintiff's claims.

137. Upon information and belief, House of Blues is entitled to judgment for actual damages against the Third-Party Defendants in the amount of any amount it may be adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as special damages, consequential damages, punitive damages, fees and costs incurred in the investigation, defense, and settlement of Plaintiff's claim, and any and all other damages.

FOR A THIRD CAUSE OF ACTION
AGAINST ALL THIRD-PARTY DEFENDANTS
(Negligence)

138. The above paragraphs, not inconsistent herewith, are incorporated herein, as if repeated verbatim.
139. The Third-Party Defendants undertook to perform under the Agreement.
140. The Third-Party Defendants had an obligation to exercise due care in their performance.
141. If Plaintiff's allegations are proven true, which is expressly denied by House of Blues, the Third-Party Defendants were negligent, careless, or reckless in the following particulars:
- a. Failing to comply with all laws related to the sale and service of alcohol, including any and all prohibitions on the service of free alcohol;
 - b. Engaging in promotion of their own alcohol brands, including but not limited to, S'loon Shine and American Outlaw liquor;
 - c. Failing to use due care in providing the festival talent and personalities for the Throttle Fest event;
 - d. Failing to properly train and supervise Michael Garner; and
 - e. Such other and further deficiencies or failures as discovery will reveal; and,
 - f. Being otherwise negligent.
142. If Plaintiff's allegations are proven true, which is expressly denied by House of Blues, the

Third-Party Defendants are vicariously liable for the negligent, careless, or reckless conduct of Michael Garner, in the following particulars:

- a. Serving free alcohol;
- b. Failing to take reasonable care in ascertaining the intoxication level of whom he was serving;
- c. Serving of alcohol to an intoxicated person;
- d. Serving of alcohol in such a manner to lead to and promote over-intoxication;
- e. Such other and further deficiencies or failures as discovery will reveal; and,
- f. Being otherwise negligent.

143. If Plaintiff's allegations are proven true, which is expressly denied by House of Blues, then as a direct and proximate result of the Third-Party Defendants' negligence, House of Blues has incurred special damages, damages, and may incur damages in the amount of any monies it is adjudged to owe Plaintiff, if any, or which is pays Plaintiff in any settlement of Plaintiff's claims, plus the costs of investigating and defending Plaintiff's claims.

144. Upon information and belief, House of Blues is entitled to judgment for actual damages against the Third-Party Defendants in the amount of any amount it may be adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as special damages, consequential damages, punitive damages, fees and costs incurred in the investigation, defense, and settlement of Plaintiff's claim, and any and all other damages.

FOR A FOURTH CAUSE OF ACTION
AGAINST ALL THIRD-PARTY DEFENDANTS
(Equitable Indemnification)

145. The above paragraphs, not inconsistent herewith, are incorporated herein, as if repeated verbatim.

146. If Plaintiff's allegations are proven true, and if House of Blues is found liable for the

damages alleged by Plaintiff, which is specifically denied, the damages were caused by the sole acts or omissions of the Third-Party Defendants.

147. The damages alleged by Plaintiff were due to the active or primary fault of Third-Party Defendants and/or its authorized agents, servants, or employees, and to the extent liability or damages are imposed against House of Blues, House of Blues alleges its liability to Plaintiff, if any at all, is only secondary or passive based on each Third-Party Defendants' conduct and the Plaintiff's alleged damages were solely and proximately caused by the active or primary fault of Third-Party Defendants.
148. House of Blues pleads that the right of full equitable indemnity exists in its favor against Third-Party Defendants because House of Blues is exposed to liability in this case, if at all, because of the primary wrongful acts and/or omissions of Third-Party Defendants in which House of Blues did not join; that to the extent Plaintiff recovers against House of Blues, House of Blues alleges that Third-Party Defendants is liable to it as to Plaintiff's claims and Third-Party Defendants must indemnify House of Blues, including all attorneys' fees and costs.

FOR A FIFTH CAUSE OF ACTION
AGAINST ALL THIRD-PARTY DEFENDANTS
(Contractual Indemnification)

149. The above paragraphs, not inconsistent herewith, are incorporated herein, as if repeated verbatim.
150. Article 5 of the Agreement provides, in pertinent part,

Co-Promoters [ThrottleFest LLC] agrees to indemnify, defend and hold HOB [House of Blues Myrtle Beach Restaurant Corporation], its parents, partners, affiliates, and subsidiaries, and their respective officers, directors and employees (collectively, "HOB Parties") harmless from and against any and all claims, demands, suits, causes of action, liability, judgments, damages, costs and expenses (including reasonable attorneys' fees and court costs) asserted against any of the HOB Parties and arising out of or resulting

from any act or omission of Co-Promoters or its employees, agents or contractors (including without limitation, any event sponsors secured by Co-Promoters in accordance with this agreement) in connection with Co-Promotor's performance of its obligations under this agreement, including without limitation, any claims for bodily injury, death or property damage; and/or (B) any material breach of this agreement by Co-Promoters. The parties agree, however, that Co-Promoters shall not be obligated to defend or indemnify the HOB Parties for any claims, demands, suits, liabilities, expenses, etc. that arise out of the sole negligence or willful misconduct of a HOB Party or its respective contractors.

151. In addition, Article 6(b) of the Agreement requires each party to the Agreement to list "the other party, its parents, partners, affiliates and subsidiaries, and their respective officers, directors and employees as "Additional Insureds" with respect to claims arising from the liabilities assumed herein by the named insured."
152. Though Throttlefest LLC was the named party to and signatory on the Agreement, it was also acting as an agent of the remaining Third-Party Defendants American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC.
153. In the first-party action, Plaintiff has alleged personal injury that arises or results from acts and/or omissions of the Third-Party Defendants, either personally or by its subcontractors, agents, employees, and/or event sponsors secured by Third-Party Defendant.
154. House of Blues denies the substance of the Plaintiff's allegations; however, in the event that the facts as alleged by Plaintiff are true, Third-Party Defendants are contractually obligated to indemnify and defend House of Blues for any and all liability imposed upon House of Blues arising out of Third-Party Defendants' acts or omissions, including but not limited to attorney's costs, fees, and expenses incurred in the defense of Plaintiff's action, any sum House of Blues is adjudged to owe Plaintiff, and/or any sum which House of Blues pay Plaintiff in resolution of their claims.

FOR A SIXTH CAUSE OF ACTION
AGAINST ALL THIRD-PARTY DEFENDANTS
(Contribution)

155. The above paragraphs, not inconsistent herewith, are incorporated herein, as if repeated verbatim.
156. If House of Blues is found to be have liability to Plaintiff for the damages alleged in the Complaint, which is strictly denied, then the Third-Party Defendants are joint tortfeasors for the reasons articulated in these third-party causes of action with respect to the acts and omissions that are the subject of Plaintiff's action.
157. If House of Blues is found to be liable to Plaintiff, which House of Blues expressly denies, then as a result of its common liability, the Third-Party Defendants are jointly and severally liable for any judgment Plaintiff may receive in her action against House of Blues.
158. If Plaintiff suffered any damages as alleged in their Complaint, which House of Blues expressly denies, and if House of Blues is found to have liability for such damages or attorney's fees, which House of Blues expressly denies, then upon information and belief, such damages were in fact caused by the Third-Party Defendants as a result of its negligent and/or wrongful acts and omissions.
159. If any damages are awarded to Plaintiff in their action against House of Blues, the entitlement to which is strictly denied, then House of Blues is entitled to recoup a pro rata contribution from the Third-Party Defendants towards any such amount.

JURY DEMAND

160. House of Blues demands a trial by jury on all claims so triable

WHEREFORE, House of Blues respectfully requests the following relief:

1. Plaintiff take nothing by this action;
2. A judgment of dismissal be entered in favor of Defendants regarding Plaintiff's Complaint;
3. A judgment be entered in favor of House of Blues on its Third-Party Complaint, including an award of attorney's fees and costs;
4. If a judgment is entered in favor of Plaintiff, the Court order the Third-Party Defendants indemnify and/or make contribution to House of Blues for all costs associated with Plaintiff's claims against House of Blues in this lawsuit or settlement;
5. Defendants be awarded the cost of the suit incurred; and
6. Defendants be awarded such other and further relief as the Court deems proper.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

COLLINS & LACY, P.C.

By: s/Christian Stegmaier

CHRISTIAN STEGMAIER

SC Bar No. 68648

cstegmaier@collinsandlacy.com

AMY L. NEUSCHAFER

SC Bar No. 73922

aneuschafer@collinsandlacy.com

11945 Grandhaven Drive, Suite D

Murrells Inlet, South Carolina 29576

(843) 353-2350 (voice)

(843) 652-0301 (facsimile)

ATTORNEYS FOR DEFENDANTS HOUSE OF
BLUES MYRTLE BEACH RESTAURANT
CORPORATION AND HOB ENTERTAINMENT,
INC.

**ANSWER TO SECOND AMENDED
COMPLAINT AND THIRD-PARTY
COMPLAINT**

These Defendants Demand a Trial by Jury

Murrells Inlet, South Carolina
October 18, 2019

EXHIBIT B

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.

**THROTTLEFEST, LLC'S
MOTION TO DISMISS**

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.

**TO: CHRISTIAN STEGMAIER and AMY L. NEUSCHAFER, ATTORNEYS FOR
THIRD-PARTY PLAINTIFF**

Please take notice that Third-Party Defendant Throttlefest, LLC (“Throttlefest”) will move, within ten (10) days of the date of this Motion, or as soon as counsel may be heard, before the Circuit Judge of Horry County for an Order dismissing the Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation’s (“House of Blues”) Third-Party Complaint against Throttlefest in the above matter, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

The basis for this Motion is that House of Blues' Third-Party Complaint fails to state sufficient facts to constitute some or all of the causes of action alleged, as will be further outlined in a Memorandum of Law to be filed with the Court prior to a hearing on this matter. The basis includes, but may not be limited to:

- A release was given in good faith by Plaintiff to Throttlefest which extinguished all liability Throttlefest may have to the Plaintiff, thereby discharging Throttlefest from all liability to any other alleged tortfeasor, including House of Blues.
- Throttlefest and House of Blues' relationship is governed solely by contract and, therefore, House of Blues' causes of action sounding in tort and equity are barred by South Carolina law.
- Throttlefest did not owe any duty to House of Blues, nor did it breach any duty it may have owed.

WHEREFORE Throttlefest prays that this Honorable Court issue an Order granting its Motion to Dismiss the Third-Party Claims asserted by House of Blues.

The undersigned affirms, in accordance with Rule 11 of the South Carolina Rules of Civil Procedure, that no consultation is required with opposing counsel prior to filing this Motion to Dismiss.

[Signature block on following page]

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: s/ Jeffrey M. Bogdan

M. Dawes Cooke, Jr., Esquire

Jeffrey M. Bogdan, Esquire

288 Meeting Street, Suite 200

Charleston, SC 29401

843-577-7700 (phone)

843-577-7708 (fax)

mdc@barnwell-whaley.com

jbogdan@barnwell-whaley.com

Attorneys for Defendant Throttlefest, LLC

December 5, 2019

Charleston, South Carolina

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Douglas Kelsey,

Plaintiff,

vs.

House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc.; and Travis Scott Wagoner,

Defendants.

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.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No.: 2017-CP-26-03008

**THROTTLEFEST, LLC'S
MEMORANDUM IN SUPPORT OF
ITS MOTION TO DISMISS**

**TO: CHRISTIAN STEGMAIER and AMY L. NEUSCHAFER, ATTORNEYS FOR
THIRD-PARTY PLAINTIFF**

Third-Party Defendant Throttlefest, LLC (“Throttlefest”) hereby submits this Memorandum in Support of its Motion to Dismiss the Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation’s (“House of Blues”) Third-Party Complaint against Throttlefest in the above matter, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

INTRODUCTION

The Plaintiff alleges that Travis Wagoner was over-served alcohol at the House of Blues in Myrtle Beach on May 16, 2014, which resulted in a motorcycle accident that injured the Plaintiff. Plaintiff sued both House of Blues and Throttlefest, claiming that each was responsible for the alleged over-service of alcohol. Plaintiff then settled with Throttlefest, releasing Throttlefest of all liability to the Plaintiff. Despite House of Blues' opposition, this Court dismissed Throttlefest from this case on December 11, 2018. Now almost one year later, House of Blues is seeking to bring Throttlefest back into the very case it settled and was dismissed from. Plaintiff does not want Throttlefest back as a party in his case. For the reasons set forth below, House of Blues' Third-Party Complaint as to Throttlefest should be dismissed.

FACTS¹

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, which is attached hereto as Exhibit A,² states

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

² "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."). "In the absence of prior state law on the issue

that it “shall be strictly limited to all functions and acts necessary for promoting and conducting [the Event]” See Agreement at Article 1(a). The Agreement also provides 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. *Id.* at Article 7(n).

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” But the Agreement does not require one party to defend or indemnify the other party “for any claims, demands, suits, liabilities, expenses, etc. that arise out of the sole negligence or willful misconduct of [the other party] or its respective contractors. *Id.* at Article 5.

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

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).

Here, it is appropriate for the Court to consider the Agreement for the purposes of deciding this Motion to Dismiss because House of Blues premises some of its causes of action on the Agreement and directly quotes the Agreement in its Third-Party Complaint.

employee of Throttlefest and not House of Blues.³ 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 counterclaims 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.⁴ 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 was forced to file a Motion to Dismiss, which House of Blues opposed. This Court granted Throttlefest's Motion to Dismiss on December 11, 2018.

³ Even though the evidence collected in this case proves that Michael Garner was a House of Blues employee, Throttlefest recognizes that for the purpose of this Motion to Dismiss, House of Blues' allegations in its Third-Party Complaint must be accept as true. However, Throttlefest vehemently disputes that Michael Garner was a Throttlefest employee and believes that House of Blues has no good ground to support its allegations otherwise, particularly when House of Blues' General Manager testified that Mr. Garner was a House of Blues employee.

⁴ The Release precludes Plaintiff and Throttlefest, including their attorneys, from disclosing the settlement terms to any third party. Throttlefest will make a copy of the Release available to the Court for an *in camera* review. Like the Agreement, the Release may be considered at the Motion to Dismiss stage because it is integral to the Third-Party Complaint and because House of Blues referenced the ultimate dismissal that resulted from the Release in its Third-Party Complaint. See Third-Party Complaint ¶96.

On October 15, 2019, Plaintiff filed his Second Amended Complaint, which does not include Throttlefest as a defendant.⁵ 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 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' sworn 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 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

Each of House of Blues' causes of action against Throttlefest should be dismissed because: (1) a release was given in good faith by Plaintiff to Throttlefest which extinguished all liability Throttlefest may have to the Plaintiff, thereby discharging Throttlefest from all liability to any other alleged tortfeasor, including House of Blues; (2) Throttlefest and House of Blues' relationship is governed solely by contract and, therefore, House of Blues' causes of action

⁵ 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.

sounding in tort and equity are barred by South Carolina law; and (3) House of Blues' contract-based claims are barred by the statute of limitations.

1. HOUSE OF BLUES' ENTIRE CASE OR, AT THE VERY LEAST, ITS CONTRIBUTION CAUSE OF ACTION, SHOULD BE DISMISSED BECAUSE OF THE RELEASE THROTTLEFEST OBTAINED FROM THE PLAINTIFF

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, SCRPC, 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 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, Throttlefest is immune from *any* liability to House of Blues 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. At the very least, according to Tiffany and the plain language of §15-38-50, House of Blues does not have a cause of action against Throttlefest for contribution. Accordingly, House of Blues entire Third-Party Complaint should be dismissed as to Throttlefest or, at the very least, House of Blues’ contribution cause of action should be dismissed because Plaintiff has released Throttlefest from any and all liability.

2. HOUSE OF BLUES’ NEGLIGENT MISREPRESENTATION, NEGLIGENCE, AND EQUITABLE INDEMNIFICATION CAUSES OF ACTION SHOULD BE DISMISSED BECAUSE HOUSE OF BLUES’ CLAIMS WOULD SOUND IN CONTRACT, NOT IN TORT OR EQUITY

Assuming the Court does not dismiss House of Blues’ entire Third-Party Complaint against Throttlefest pursuant to §15-38-50, Rule 14, and/or Tiffany, it should dismiss House of Blues’ causes of action sounding in tort and equity because the Agreement governs the entire relationship between House of Blues and Throttlefest. “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 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. Seebaltd v. First Federal Savings & Loan Association, 269 S.C. at 692, 239 S.E.2d at 727. House of Blues’ Equitable Indemnification cause of action should similarly be 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).

This Court should dismiss House of Blues’ Negligent Misrepresentation, Negligence, and Equitable Indemnification causes of action pursuant to Rule 12(b)(6), SCRPC because the duties and obligations owed between the parties arise solely from contract.

3. ALL OF HOUSE OF BLUES’ CAUSES OF ACTION SHOULD BE DISMISSED BECAUSE THEY ARE TIME-BARRED BY THE STATUTE OF LIMITATIONS

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 (Third-Party Complaint ¶126(b)); and (4) failing to comply with state and local laws applicable to its activities (Third-Party Complaint ¶126(c)). The “Contractual Indemnification” cause of action alleges that Throttlefest is contractually required to indemnify and defend House of Blues against the allegations made in this case. House of Blues’ remaining causes of action based in negligence and equity also stem from Throttlefest’s alleged actions or inactions during or leading up to the Event.

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, 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 Throttlefest’s alleged breaches of the

Agreement and other alleged duties at or around the time of the Event, especially the allegations that Throttlefest breached the Agreement by not fulfilling its duties during the Event, not naming House of Blues as an Additional Insured on Throttlefest's insurance policies, and engaging in prohibited alcohol sponsorships during the Event. House of Blues did not initiate its claims until October 18, 2019, more than five years after the Event concluded. Accordingly and based solely on the allegations of its Third-Party Complaint, House of Blues' entire case against Throttlefest is time-barred by the three-year statute of limitations and, therefore, must be dismissed.

WHEREFORE Throttlefest prays that this Honorable Court issue an Order granting its Motion to Dismiss the Third-Party Claims asserted by House of Blues.

The undersigned affirms, in accordance with Rule 11 of the South Carolina Rules of Civil Procedure, that no consultation is required with opposing counsel prior to filing this Motion to Dismiss.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: s/ Jeffrey M. Bogdan

M. Dawes Cooke, Jr., Esquire

Jeffrey M. Bogdan, Esquire

288 Meeting Street, Suite 200

Charleston, SC 29401

843-577-7700 (phone)

843-577-7708 (fax)

mdc@barnwell-whaley.com

jbogdan@barnwell-whaley.com

Attorneys for Defendant Throttlefest, LLC

December 30, 2019
Charleston, South Carolina



March 19, 2014

Throttlefest, LLC
Jesse Dupree
Via Email: jd@mightyloud.com
Cc: kyelable@mightyloud.com

Re: Full Throttle Festival at House of Blues Myrtle Beach May 9-17, 2014

This AGREEMENT ("Agreement") is entered into effective as of March 19, 2014 by and between House of Blues Myrtle Beach Restaurant Corp. ("HOB") whose address is 1610 Highway 17 South - N, Myrtle Beach, SC 29582 and Throttlefest LLC ("Co-Promoter") whose address is 1480 Old 41 HWY - Kennesaw, GA 30152.

Considering all revenue generated from all events taking place within and around House of Blues Myrtle Beach during the Full Throttle Festival (including, but not limited to, the following shows: The Lacs & Sunny Ledford, Uncle Kraeker, Blackberry Smoke, Danny "the Count"/Zoso, Steel Panther, Jamey Johnson and Jackyl and all parking lot and Deck activities), the following will apply:

If the ancillary revenue figure (collected by Co-Promoter) outside of alcohol sale revenue is more than the total alcohol revenue figure (collected by HOB), Co-Promoter will pay HOB fifty percent (50%) of the surplus amount only.

This payment will be called a *venue rental fee payment*.

An example of this arrangement is as follows:

If ancillary revenue (collected by Co-Promoter) were to equal \$200 and total alcohol sales revenue (collected by HOB) were to equal \$100, Co-Promoter would make a payment of \$50 to HOB; resulting in both Co-promoter and HOB retaining \$150.

If total alcohol sales revenue (collected by HOB) results in more than all ancillary revenue (collected by Co-Promoter), excluding alcohol revenue, HOB will then pay Co-promoter fifty percent (50%) of the surplus amount only.

This payment will be called an *artist appearance fee*.

An example of this alternate arrangement is as follows:

If total alcohol sales revenue were to equal \$300 and ancillary revenue were to equal \$100, HOB would then make a payment of \$100 to Co-Promoter; resulting in both HOB and Co-Promoter retaining \$200.

ACCEPTED AND AGREED as of the date first above written.

Throttlefest LLC
By:
Name: JESSE JAMES DUPREE
Title: PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.
By:
Name: KEVIN SIMONE
Title: GENERAL MANAGER



CO-PROMOTION AGREEMENT

THIS CO-PROMOTION AGREEMENT ("Agreement") is entered into effective as of March 19, 2014 by and between House of Blues Myrtle Beach Restaurant Corp. ("HOB") whose address is 4640 Highway 17 South - N. Myrtle Beach, SC 29582 and Throttlefest LLC ("Co-Promoter") whose address is 1480 Old 41 HWY - Kennesaw, GA 30152. For and in consideration of the mutual covenants and agreements contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

1. Purpose and Scope.

(a) The purpose and scope of this Agreement shall be limited strictly to all functions and acts necessary for promoting and conducting a concert event ("Event") as set forth below:

Headline Artist(s): Full Throttle Saloon Festival - Multiple artists
Support Artist(s): Multiple artists - TBA
Venue: House of Blues Myrtle Beach
Venue Location: 4640 Highway 17 South - N. Myrtle Beach, SC 29582
Date: May 9-17, 2014
Promotional window: TBA: 5/17/2014

2. Management Rights and Responsibilities: HOB shall have the right to manage and control the presentation of the Event. Furthermore, the parties shall each use their respective abilities and best efforts to ensure the Event to be carried out in a commercially reasonable manner.

The Parties individual responsibilities related to the Event shall be as follows:

HOB: Artist contract and payment; production; ticketing

HOB shall assume all responsibility for booking, promoting, and producing the Event, except as otherwise provided herein, including, but not limited to, as applicable, (i) procurement and arrangement of all performance, production, backline, room rental, transportation, security, and any necessary hotel arrangements, and (ii) payment of any and all fees associated with the foregoing duties and responsibilities of HOB (collectively, the "Fees").

HOB shall be responsible for the sale of tickets to the Event. HOB shall be responsible for providing a copy of the ticket audit to Co-Promoter at settlement.

HOB to provide:

- Access to main venue Main Music Hall, The Deck and the Courtyard.
- Artist bookings, with approval of Full Throttle.
- Production/set-up assistance.
- All ticketing/website listing needs. (i.e. listing on Ticketmaster, House of Blues, Live Nation, etc)

Co-Promoter to provide:

- All components of Fall Throttle festival - including, but not limited to, all festival talent/personalities.

Co-Promoter shall also have the right to sell sponsorships directly relating to the Event, provided, however, that Co-Promoter shall obtain HOB's prior written approval of such sponsors to avoid conflicts with existing Venue sponsors and to avoid any alcoholic beverage sponsorships (which are prohibited due to the parties' being licensed alcoholic beverage retailers). Co-Promoter shall be entitled to retain all revenues from the sale of such sponsorships; however, as between Co-Promoter and HOB, Co-Promoter shall be solely responsible for all costs in connection with such sponsorships. Co-Promoter shall be solely responsible for ensuring that all Event sponsors maintain adequate commercial general liability insurance during the Event of not less than \$1,000,000 that lists each of the HOB Parties (as defined below) as additional insureds and providing reasonably satisfactory evidence thereof to HOB. The foregoing shall not prohibit HOB from selling any non-Event sponsorships, nor preclude HOB from negotiation of any non-Event sponsorships during the Event as long as such activation does not preclude a Co-Promoter's Event sponsorship which HOB has approved. All revenue and expenses of any HOB sponsorships shall be retained solely by HOB.

3. Financial Terms: The parties agree that all non-sponsorship related Event revenue shall be allocated as follows:

(a) Bar Revenue: All revenue related to the sale of alcoholic beverages shall be retained solely by HOB, and HOB shall be solely responsible for the costs of goods, labor and other expenses related to sale of alcoholic beverages. The result of all such revenue minus all such expenses shall be called "Bar Profit". Co-Promoter shall under no circumstances have any financial interest or share of any Bar Profit.

(b) Food and Non-Alcoholic Beverages: All revenue related to the sale of food and non-alcoholic beverages shall be called "F&B Revenue".

(c) Ticket Revenue: All revenue related to the sale of tickets, less applicable taxes (not including HOB income taxes) shall be called "Ticket Revenue".

(d) Ticketmaster Rebates and Facility Maintenance Fee Revenue: All revenue related to the sale of tickets via Ticketmaster, including Rebates received by HOB and revenue related to the Facility Maintenance Fee collected per ticket shall be included in this agreement and understood to be included under the term of "Ticket Revenue".

(e) Event Expenses: All Fees (defined above), together with all other production costs and expenses related to producing, promoting and executing the Event (excluding amounts allocated to Bar Revenue in (a) above, and also excluding any amounts related to the manufacture, transport and sale of and merchandise other than food and non-alcoholic beverages) shall be called "Event Expenses". The expenses to be incurred by Co-Promoter, regardless of whether paid out-of-pocket by Co-Promoter or HOB, shall be subject to the prior, mutual and written approval of both HOB and Co-Promoter and shall not exceed 105% of the identical amounts incurred for the 2012 Event, including, but not limited to, travel, lodging and transportation expenses. (Final 2012 Event settlement expenses are attached and are to be used as the guideline for the upcoming Event in 2013.)

(f) Net Revenue: The result of F&B Revenue plus Ticket Revenue, minus Event Expenses, shall be called "Net Revenue". The parties agree to split Net Revenue from the Event Fifty Percent

(50%) to HOB and Fifty Percent (50%) to Co-Promoter; provided, for so long as Net Revenue is equal to or less than the amount of the Bar Profit, Co-Promoter shall retain One Hundred Percent (100%) of Net Revenue. At such time as the amount of Net Revenue equals or exceeds Bar Profit, then, the amount by which Net Revenue exceeds Bar Profit shall be split by the parties Fifty Percent (50%) to HOB and Fifty Percent (50%) to Co-Promoter. Should Net Revenue equal a negative number ("Loss"), such Loss shall be borne One Hundred Percent (100%) by HOB (collectively, "Percentage Shares").

(g) Merchandise: Co-Promoter shall be solely responsible for all costs associated with the manufacture, transport and/or sale of Full Throttle-related merchandise. The revenue from all sales of Full Throttle-related merchandise shall be split Eighty Five Percent (85%) to Co-Promoter and Fifteen Percent (15%) to HOB. There is to be a 3.5% credit card charge cap in effect prior to calculating the merchandise split. With respect to any sales of HOB-related merchandise, HOB shall retain 100% of HOB-related merchandise revenue and HOB shall be solely responsible for all expenses associated with the manufacture, transport and/or sale of HOB-related merchandise.

4. Box Office Revenues / Distributions / Accounting.

(a) Box Office Revenues Held in Trust. If either party is holding the box office revenues, such box office revenues shall be held in trust for the benefit of the other party pending settlement with the Artist and Venue and the co-promotion settlement described in this Agreement. All monies shall be paid consistent with the terms of this Agreement and be released from trust only upon such payment. Each party acknowledges and agrees that should it become a debtor or debtor-in-possession in any bankruptcy proceeding, then the box office revenues due the other party shall not become property of the estate, and further agrees that it shall hold only legal title to such funds and no equitable interest therein, until the revenues and receipts due to the other party are actually paid to the other party. Consistent with the terms of the Agreement, each party expressly agrees that all such funds will be held in trust pending payment to the other party regardless of the name or title of any account in which the funds are located, or the identity of the account holder.

(b) Additional Expenses. The parties agree to settle the Event promptly and make such payments to the other parties as may be required. If it is determined that there are additional approved expenses for which reimbursement is due to any party, such expenses will be reimbursed by the parties, according to each party's Percentage Share.

(c) Event Accounting / Reporting. Each party shall make available to the other copies of financial information reasonably necessary for financial settlements as set forth herein on the day of the Event or within a reasonable period of time thereafter as mutually agreed by the parties, but in no event later than fifteen (15) days after the Event.

(d) Access to Books and Records. Each party shall maintain full and complete books and records with respect to the Event in connection with this Agreement, in accordance with generally accepted accounting principles. Each party shall have the right, during normal business hours and upon five (5) business days prior written notice to the other, to inspect and examine such books and records related solely to the settlement of Net Revenues in connection with the Event hereunder.

5. INDEMNITY. HOB AGREES TO INDEMNIFY, DEFEND AND HOLD CO-PROMOTERS, ITS PARENTS, PARTNERS, AFFILIATES AND SUBSIDIARIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS AND EMPLOYEES (COLLECTIVELY, "CO-PROMOTERS PARTIES"), HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, SUITS, CAUSES OF ACTION, LIABILITY, JUDGMENTS, DAMAGES, COSTS AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES AND COURT COSTS)

ASSERTED AGAINST ANY OF THE CO-PROMOTERS PARTIES AND ARISING OUT OF OR RESULTING FROM ANY (A) ACT OR OMISSION OF LIVE NATION OR ITS EMPLOYEES, AGENTS OR CONTRACTORS IN CONNECTION WITH HOB'S PERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ANY CLAIMS FOR BODILY INJURY, DEATH OR PROPERTY DAMAGE; AND/OR (B) ANY MATERIAL BREACH OF THIS AGREEMENT BY HOB. THE PARTIES AGREE, HOWEVER, THAT HOB SHALL NOT BE OBLIGATED TO DEFEND OR INDEMNIFY THE CO-PROMOTERS PARTIES FOR ANY CLAIMS, DEMANDS, SUITS, LIABILITIES, EXPENSES, ETC. THAT ARISE OUT OF THE SOLE NEGLIGENCE OR WILLFUL MISCONDUCT OF A CO-PROMOTERS PARTY OR ITS RESPECTIVE CONTRACTORS.

CO-PROMOTERS AGREES TO INDEMNIFY, DEFEND AND HOLD HOB, ITS PARENTS, PARTNERS, AFFILIATES AND SUBSIDIARIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS AND EMPLOYEES (COLLECTIVELY, "HOB PARTIES"), HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, SUITS, CAUSES OF ACTION, LIABILITY, JUDGEMENTS, DAMAGES, COSTS AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES AND COURT COSTS) ASSERTED AGAINST ANY OF THE HOB PARTIES AND ARISING OUT OF OR RESULTING FROM ANY ACT OR OMISSION OF CO-PROMOTERS OR ITS EMPLOYEES, AGENTS OR CONTRACTORS (INCLUDING, WITHOUT LIMITATION, ANY EVENT SPONSORS SECURED BY CO-PROMOTERS IN ACCORDANCE WITH THIS AGREEMENT) IN CONNECTION WITH CO-PROMOTERS'S PERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ANY CLAIMS FOR BODILY INJURY, DEATH OR PROPERTY DAMAGE; AND/OR (B) ANY MATERIAL BREACH OF THIS AGREEMENT BY CO-PROMOTERS. THE PARTIES AGREE, HOWEVER, THAT CO-PROMOTERS SHALL NOT BE OBLIGATED TO DEFEND OR INDEMNIFY THE HOB PARTIES FOR ANY CLAIMS, DEMANDS, SUITS, LIABILITIES, EXPENSES, ETC. THAT ARISE OUT OF THE SOLE NEGLIGENCE OR WILLFUL MISCONDUCT OF A HOB PARTY OR ITS RESPECTIVE CONTRACTORS.

6. Insurance.

(a) Each party hereto will maintain and pay all premium costs for the following insurance coverages for its own operations, in amounts not less than specified, throughout the duration of the Event (including load-in and load-out):

(i) Statutory Workers' Compensation including Employer's Liability Insurance, with limits of not less than \$500,000.00, affording coverage under the Workers' Compensation laws of the applicable state. Each party will cause, if allowed by law, its workers' compensation carrier to waive insurers' right of subrogation with respect to the other party and its respective parents, partners and affiliates.

(ii) Commercial General Liability Insurance with limits of not less than \$1,000,000.00 per occurrence Bodily Injury and Property Damage combined; \$1,000,000.00 per occurrence Personal and Advertising Injury; \$2,000,000.00 aggregate Products and Completed Operations Liability; \$100,000.00 Fire Legal Liability, and \$2,000,000.00 general aggregate limit per location. This policy shall be written on an occurrence basis.

(iii) Automobile Liability Insurance with a limit of not less than \$1,000,000.00 combined, covering all owned, non-owned and hired vehicles.

(iv) Umbrella Liability Insurance with not less than \$4,000,000.00 limit providing excess coverage over all limits and coverages noted in paragraphs (ii) and (iii) above. This policy shall be written on an occurrence basis.

(b) Each party hereto shall list on its policies (ii), (iii) and (iv) above the other party, its parents, partners, affiliates and subsidiaries, and their respective officers, directors and employees as "Additional Insureds" with respect to claims arising from the liabilities assumed herein by the named insured.

(c) Each party hereto will deliver to the other satisfactory evidence of the aforescribed insurance coverages on a certificate form reasonably acceptable to the other party. All required insurance will be placed with carriers licensed to do business in the applicable state, have a rating in the most current edition of A.M. Best's Property Casualty Key Rating Guide that is reasonably acceptable to the other party and will provide thirty (30) days written notice of cancellation or non-renewal.

(d) **HOB'S COMMERCIAL GENERAL LIABILITY INSURANCE POLICY WILL BE WILL BE CHARGED AS AN EXPENSE TO THE EVENT IF APPLICABLE.**

7. Miscellaneous Provisions.

(a) Law Governing. This Agreement shall be construed under and in accordance with laws of the state of South Carolina.

(b) Assignment. This Agreement or any part hereof may not be transferred, conveyed or assigned by either party without the prior written consent of the other party, provided, however, that this Agreement or any part hereof may be assigned or transferred by either party to an affiliate of such party or any entity controlled by or under common control with such party without such prior written consent.

(c) Successor and Assigns. This Agreement and all terms, provisions and conditions hereof shall be binding upon and shall inure to the benefit of the parties and their respective successors and permitted assigns.

(d) Further Assurances. Each party to this Agreement, upon the request of any other party to this Agreement, will execute, acknowledge and deliver such further documents or instruments and perform such further acts as may be necessary, desirable or proper to carry out more effectively the purpose of this Agreement. Each party warrants its undersigned's authority to execute this Agreement on its respective behalf.

(e) Entire Agreement and Modification. This Agreement contains the entire agreement between the parties relating to the subject matter hereof and all prior agreements relative hereto which are not contained herein are terminated. This Agreement may not be amended, revised or terminated except by a written instrument executed by the party against which enforcement of the amendment, revision or termination is asserted.

(f) Force Majeure. The failure of any party hereto to comply with the terms and conditions hereof because of a "Force Majeure Occurrence" shall not be deemed a breach of this Agreement. "Force Majeure Occurrence" shall be defined to include, without limitation, Act of God, strike, labor disputes, war, fire, earthquake, acts of public enemies, acts of terrorism, epidemic, action of federal, state or local governmental authorities or an event or reason beyond the reasonable control of a party. In the event of a cancellation of the Event due to a Force Majeure Occurrence, each party shall be relieved of its obligations hereunder with respect to the performance so prevented. In such event neither party shall

have a claim against the other party except that each party shall be responsible for bearing its Percentage Share of any unrecovered expenses actually incurred prior to such cancellation.

(g) Survival of Commitments. All representations, warranties, provisions regarding insurance and agreements to indemnify shall survive the termination of the Agreement.

(h) Notices. All notices given hereunder shall be in writing and shall be deemed to have been duly given if delivered personally with receipt acknowledged or sent by registered or certified mail or equivalent, if available, return receipt requested, or by facsimile (which shall be confirmed by a writing sent by registered or certified mail or equivalent promptly after such facsimile is sent), or by nationally recognized overnight courier for next day delivery, addressed or sent to the parties at the addresses set forth herein with a copy to Live Nation, Legal Department - Clubs and Theatres Division, 7060 Hollywood Blvd., Los Angeles, California 90028, Attn: Roger Tefft, and another copy sent to House of Blues, Talent Department 1490 E. Buena Vista Drive, Lake Buena Vista, FL 32830, Attn: Jovanna Quiñones.

(i) Invalidity. If any term, provision, covenant or condition of the Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of this Agreement will remain in full force and effect and will in no way be affected, impaired or invalidated.

(j) No Waiver of Rights. If either party fails to enforce any of the provisions of this Agreement or any rights or fails to exercise any election provided in the Agreement, it will not be considered to be a waiver of those provisions, rights or elections or in any way affect the validity of this Agreement. The failure of either party to exercise any of these provisions, rights or elections will not preclude or prejudice such party from later enforcing or exercising the same or any other provision, right or election which it may have under this Agreement.

(k) Relationship of the Parties. Except as specifically authorized herein, nothing herein contained will create or be construed as creating a partnership, joint venture or agency relationship between the parties and no party will have the authority to bind the other in any respect. Each party shall be solely responsible for all wages, income taxes, worker's compensation requirements and any other requirements for all personnel it supplies pursuant to this Agreement.

(l) Compliance with Laws. Each party shall be responsible for compliance with all federal, state and local laws and regulations applicable to such party's activities in connection with this Agreement or the Event, including, without limitation, obtaining any permits applicable to the Event or the activities contemplated herein.

(m) Counterparts. This Agreement may be executed by facsimile and PDF (and other similar electronic format) and in any number of counterparts, each of which shall be deemed an original.

(n) Other Activities. Except as specifically set forth herein, nothing contained in this Agreement, nor the co-promotion relationship created thereby, shall be deemed in any way or manner to prohibit or restrict any party from conducting any other business or activity. Except as specifically set forth herein, no party shall have any obligation whatsoever (including, without limitation, the sharing of profits or proceeds therefrom) to the other parties in connection with its other activities, notwithstanding the fact that such business may be considered competitive with the Event to be co-promoted pursuant to this Agreement.

ACCEPTED AND AGREED as of the date first above written.

Throttlefest LLC

By: 

Name: JESSE JAMES D'ARCE

Title: PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name: ROBERT SIMONS

Title: General Manager

EXHIBIT D

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Douglas Kelsey,)
)
 Plaintiffs,)
)
 vs.)
)
 House of Blues Myrtle Beach Restaurant)
 Corporation; HOB Entertainment, Inc.; and)
 Travis Scott Wagoner,)
)
 Defendants.)
)
 _____)
)
 House of Blues Myrtle Beach Restaurant)
 Corporation,)
)
 Third-Party Plaintiff,)
)
 vs.)
)
 Throttlefest LLC; American Outlaw Spirits)
 Incorporated; Full Throttle, L.L.C.; and)
 Full Throttle Sloon Shine, LLC,)
)
 Third-Party Defendants.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 Civil Action No.: 2017-CP-26-03008

**HOUSE OF BLUES
 MYRTLE BEACH RESTAURANT
 CORPORATION'S
 MEMORANDUM IN OPPOSITION
 TO THROTTLEFEST LLC'S
 MOTION TO DISMISS**

TO: M. DAWES COOKE, JR., ESQUIRE, AND JEFFREY M. BOGDAN, ESQUIRE,
 ATTORNEYS FOR THIRD-PARTY DEFENDANT THROTTLEFEST, LLC.

Third Party Defendant Throttlefest LLC filed a motion to dismiss, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, requesting the Court dismiss Defendant/Third Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation's ("House of Blues") Third-Party Complaints against Throttlefest LLC. Throttlefest LLC recently supplemented its motion with a memorandum of law. House of Blues offers this memorandum of law in opposition of Throttlefest LLC's motions to dismiss.

FACTUAL/PROCEDURAL BACKGROUND

This is an alleged alcohol liability case related to a motorcycle on motorcycle collision on May 16, 2014 in Myrtles Beach, South Carolina, which resulted in injuries to Plaintiff. Plaintiff alleges that Travis Wagoner was overserved with two free shots allegedly given to him by Michael “Fajita Mike” Garner during an event called “Throttlefest 2014.” (See Pl.’s Second Am. Compl., ¶8-15). House of Blues has vehemently denied any liability to Plaintiff and disputes that Fajita Mike was acting as its employee when he allegedly served Wagoner. (HOB Answer to Second Am. Compl./Third Party Compl., ¶ 8, 114-116).

Though all of the Third-Party Defendants were previously named as defendants in the first-party litigation, only the House of Blues Defendants and Travis Wagoner remain in the case. This court dismissed Full Throttle and Full Throttle Sloon Shine, LLC by order entered on August 13, 2019; dismissed Throttlefest LLC by order entered on December 14, 2018; and dismissed American Outlaw Spirits, Inc., Michael Ballard, and Jesse James Dupree by order entered on January 22, 2018. (HOB Answer to Second Am. Compl./Third-Party Compl., ¶¶ 95-96).

Throttlefest LLC, and House of Blues entered into a Co-Promotion Agreement (“Agreement”) with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. (HOB Answer to Second Am. Compl./Third-Party Compl., ¶ 97). Michael Ballard, who is a managing member of Throttlefest LLC, and who is the sole managing member of Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC, attended the Throttle Fest event as a representative of these companies. (*Id.* at ¶112). Jesse James Dupree, who is a managing member of Throttlefest LLC and the sole incorporator and officer of American Outlaw Spirits Incorporated, attended the Throttle Fest event as a

representative of this company and corporation. (Id. at ¶113). Throughout the Throttle Fest event, Fajita Mike was acting as the employee or agent of Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC. (Id. at ¶115). Further, Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC, all had the opportunity and responsibility to supervise and control Fajita Mike and all financially benefited from Fajita Mike's alleged actions. (Id. at ¶¶116-117). Consequently, House of Blues asserts claims for breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification, and contribution against all of the Third-Party Defendants. (Id. at ¶¶ 119-159).

The basis of Throttlefest, LLC's motion to dismiss is threefold. First, they contend that they the Release previously executed between Throttlefest, LLC and Plaintiff discharges Throttlefest from all liability to any other alleged tortfeasor, including House of Blues. Second, they contend that the relationship between Throttlefest, LLC and House of Blues is governed solely by contract such that House of Blues' causes of action sounding in tort and equity are barred by South Carolina law. Lastly, they contend that House of Blues' contract-based claims are barred by the statute of limitations. (Throttlefest Memo. in Support of Mot. to Dismiss). For the reasons discussed herein, Throttlefest, LLC's motion to dismiss should be denied.

STANDARD OF REVIEW

In considering a Rule 12(b)(6), SCRCF motion, a trial court must base its ruling solely on the allegations on the face of the Complaint. Styles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). A motion under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413 (Ct. App. 2003); see also Baird v.

Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case).

Where a pleading is attacked for an alleged failure to state a cause of action, “the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case.” Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496. The pleader’s likelihood of success at trial is irrelevant to deciding whether he has properly stated a claim. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007); Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019) (“Skydive was—any plaintiff is—entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim.”).

LAW/ANALYSIS

I. Dismissal of House of Blues’ Third-Party Complaint Against Throttlefest, LLC Would Require Findings of Fact Not Evident on the Face of the Third-Party Complaint.

Plaintiff brought this motion pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the ruling on which must be based solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). While a 12(b)(6) motion may be converted to a motion for summary judgment when matters outside the pleading are presented to and not excluded by the Court, all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Baird v. Charleston Cty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (citing Rule 12(b)(6), SCRCPP). “The notice provisions

in Rule 56 are incorporated into Rule 12(b)(6).” Id. (quoting Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987)). Thus, where the trial court does not give notice to the parties that it will consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment, consideration of the same, the evidence outside of the complaint is not properly considered. Id.

Here, Throttlefest, LLC made its motion pursuant to Rule 12(b)(6), SCRCP, and references only Rule 12(b)(6) in its memorandum in support of its motion, filed on December 30, 2019. Considering only the allegations of the Complaint, as required by the applicable Rule, Throttlefest, LLC cannot show that it is entitled to dismissal on any of its three arguments, as such would require reliance on evidence outside of the Complaint.¹

With respect to Throttlefest, LLC’s alleged settlement agreement with Plaintiff Kelsey, the Court’s evaluation of the argument requires a review of the contents and terms of the Settlement Agreement, a matter outside of the Third-Party Complaint. It is notable that Smith v. Tiffany, upon which Throttlefest, LLC relies in support of its argument involved a motion for summary judgment and not a motion to dismiss. 419 S.C. 548, 555, 799 S.E.2d 479, 482 (2017). With respect to Throttlefest, LLC’s claim that the relationship between it and House of Blues is purely contractual, the Court’s evaluation of the argument requires a review of deposition testimony of various witnesses, which are outside of the Third-Party Complaint. With respect to Throttlefest, LLC’s claim that the third-party action is barred by the statute of limitations, the Court’s evaluation of the argument requires consideration of when House of Blues knew or should have known of its third-party claims, which is outside of the Third-Party Complaint.

¹ To the extent House of Blues cites to and relies upon additional evidence in its Opposition to Plaintiff Kelsey’s Motion to Sever, the same should not be considered in evaluating the instant Motion to Dismiss or construed as consent to convert the instant motion to one for summary judgment.

In light of the lack of any notice that Throttlefest, LLC's motion will be converted to one for summary judgment, this Court cannot consider matters outside of the Complaint itself. Accordingly, Throttlefest, LLC cannot support its arguments and its motion to dismiss should be denied.

II. Throttlefest, LLC's Settlement with The First-Party Plaintiff Does Warrant Dismissal of the Third-Party Claims Where Throttlefest, LLC Breached the Duties that It Had to House of Blues, the Settlement with Plaintiff Kelsey was Not in Good Faith, and Dismissal Would Violate House of Blues' Due Process and Equal Protection Rights.

In addition to the fact that Throttlefest, LLC's argument that the Third-Party Complaint should be dismissed because of the alleged release it obtained from Plaintiff would require consideration of matters outside of the Third-Party Complaint, making disposition under Rule 12(b)(6) improper, the argument must also fail on its merits.

This case is distinguishable from Smith v. Tiffany, an automobile accident case, in that the appellants therein conceded that Mizzell did not breach any duty of care owed to them. 419 S.C. 548, 554, 799 S.E.2d 479, 482 (2017). Rather, the Smith v. Tiffany appellants asserted that they were entitled to apportionment based on an independent contribution claim against Mizzell. Id. Here, House of Blues asserts several causes of action outside of the contribution claim, including breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification. Smith v. Tiffany does not address the viability of such claims in a Third-Party Complaint and thus provides no support for Throttlefest, LLC's claim that the "House of Blues' entire case...should be dismissed." (Throttlefest Memo. in Support of Mot. to Dismiss, p. 6). This is likely why Throttlefest, LLC included the caveat "at the very least, its contribution cause of action" in drafting its argument. (Id.). Here, Throttlefest, LLC had a contractual relationship with House of Blues pursuant to the Co-Promotional Agreement for the Throttlefest 2014 event. Its managing members, Michael Ballard and Jesse James Dupree attended the Throttlefest 2014 event.

It was Throttlefest, LLC and the other third-party defendants who had the opportunity and responsibility to supervise and control Michael Garner. (HOB Answer to Second Am. Compl./Third Party Compl., ¶¶ 97, 112-117).

Further, in Smith v. Tiffany, our Supreme Court acknowledged that “achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature’s enactment of the [South Carolina Contribution Among Joint Tortfeasors] Act.” 419 S.C. at 556, 799 S.E.2d at 483-84. “[T]he legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements.” Id. at 557, 799 S.E.2d at 484. The Act provides:

When 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:

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
- (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (emphasis added).

Our Courts have long recognized the competing interests in settling cases with alleged joint tortfeasors. In Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, the Court wrote:

We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party. However, these settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process.

374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007).

Here, there are significant public policy concerns regarding whether Throttlefest, LLC's dismissal from the case was truly a good faith settlement or a mere nominal, self-protectionist release for a responsible party with no deep pocket insurance coverage. The Texas Supreme Court, in Elbaor v. Smith, discussed its balance of such competing interests, writing:

As a matter of public policy, this Court favors settlements, but we do not favor partial settlements that promote rather than discourage further litigation. And we do not favor settlement arrangements that **skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment.** **The bottom line is that our public policy favoring fair trials outweighs our public policy favoring partial settlements.**

Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992) (emphasis added) (declaring Mary Carter agreements, whereby the plaintiff enters into a settlement agreement with one defendant and goes to trial against the remaining defendant, to be void as violative of sound public policy).

Here, we do not know the terms, conditions, basis or amount of Throttlefest, LLC's alleged settlement with Plaintiff Kelsey, which would be essential to evaluating whether it contravenes public policy or the law. To the extent that the sum is negligible in comparison to Plaintiff's alleged damages and other proper considerations, the due process concerns discussed *infra* will be amplified.

While Throttlefest, LLC argues that Smith v. Tiffany forecloses the notion of placing a settling party on the jury verdict form for purposes of allocation of fault, **the Supreme Court's opinion did not preclude the of filing a third party action, declaratory judgment action or any motion pursuant to Rule 14 or 19 of the South Carolina Rules of Civil Procedure against a settling tortfeasor for the sole purpose of allocation of fault under S.C. Code Ann. § 15-38-15, on the grounds of due process and equal protection.** Specifically, the Court stated that "because Appellants' brief includes only conclusory reference to 'due process consideration of

fairness and equity’ and sets forth no substantive legal argument or supporting citations to authority (even to the due process clauses themselves), we do not consider Appellants’ argument that the trial court erred in finding their due process rights were violated by the inability to join [third party defendant] or include him on the verdict form for purposes of allocation.” Smith, 419 S.C. at 558, n. 3, 799 S.E.2d at 484, n.3.

Article I, Section 3 of the South Carolina Constitution provides:

The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

S.C. Const. Art. I, § 3.

The United States Constitution similarly states:

No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

The Due Process and Equal Protection Clauses of the South Carolina Constitution and United States Constitution require that “the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application **must be justified by the law’s purpose.**” Town of Iva ex rel. Zoning Administrator v. Holley, 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007) (quoting Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995)). Any separate classification “must be reasonable, **not arbitrary**, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” Id. (emphasis added).

Prior to the 2005, South Carolina was a pure joint and several liability state. Any defendant, regardless of percentage of fault allocated by a jury, was liable to pay the entire amount of damages awarded to a plaintiff. On July 1, 2005, the South Carolina legislature modified joint and several liability law, eliminating joint and several liability for “any defendant whose conduct is determined to be less than fifty percent of the total fault” S.C. Code Ann. § 15-38-15. The clear intent of the legislature was to protect the least-culpable potential tortfeasors, from those who owned the lion’s share of culpability.

The Act sets forth the procedure for allocation of fault by the fact finder in matters involving more than one defendant:

(C) The jury, or the court if there is no jury, shall:

...

(3) upon motion by at least one defendant, where there is a verdict ... for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict ... the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct ... that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property.” The Act further provides that “[a] defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

Section 15-38-15 continues:

(D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

The dismissal of a third-party action against a settling tortfeasor for the purpose of naming the settling tortfeasor as a defendant violates the due process and equal protection rights afforded

under the modified joint and several liability law. In short, section 15-38-15 would provide protections to some defendants (i.e., in cases where all named tortfeasors are named as a defendant) while extinguishing the protections to others (i.e., in cases where not all tortfeasors are named as a defendant). In the latter scenario, the defendants are “forced to absorb the entire fault of non-parties.”

Section 15-38-15(D) provides no safety net. While the statute permits for a defendant to assert that an “empty-chair defendant” contributed “to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party[,]” is without consequence. The reality is, where a jury cannot apportion fault to a nonparty tortfeasor, a defendant cannot simply argue that the “empty-chair defendant” contributed to a plaintiff’s injury or damages or may be liable for any portion of the damages. Similar to the issue presented regarding apportionment of fault among tortfeasors (vs. defendants) as articulated in 15-38-15(C), the same issue is presented with regard to subsection (D). Subsection (C)(3) provides that the total percentages of fault allocated must be one hundred percent. Accordingly, subsection (D) only provides protection to named-defendants on a “perfect” empty-chair defendant argument. Therefore, there can simply be no argument that a nonparty tortfeasor is liable to a plaintiff in an amount less than one hundred percent. The protections afforded to some defendants under modified joint and several liability are eliminated, while yet defendants in other actions where a plaintiff has chosen to bring all potential tortfeasors to court are provided the protections; that being, if the defendant, among all defendants, is found to be less than fifty percent at fault, that defendant will only be liable for the damages awarded to plaintiff relative to the percentage of fault. The unfortunate elimination of the protections afforded under modified joint and several liability lead to obscure results.

Justice Pleicones, in his dissent, illustrates this principal through several hypotheticals. See Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (Pleicones, J., dissenting); Town of Kearny v. Brandt, 214 N.J. 76, 67 A.3d 601 (2013) (finding that where the joint and several liability statute regarding allocation of fault references allocation among the parties, a named defendant can request that a jury consider the specific apportionment of fault as to nondefendant tortfeasors); see generally Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (Kan. 1978) (“The legislature intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. **There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss**, and there is no social policy that should compel defendants to pay more than their fair share of the loss.”); Amity S. Edmonds, Tort Liability in South Carolina: Does Section 15-38-15 Truly Limit Joint and Several Liability or Is It A Mere Illusion in the Realm of Phantom Tortfeasors?, 5 Charleston L. Rev. 679 (2011) (“It is fundamentally unfair to hoist the entire burden of a phantom or absent tortfeasor on a marginally negligent co-defendant However, if South Carolina courts fail to allow apportionment of fault to nonparty or settling defendants, the ostensible protection provided to defendants within the Act from the harsh injustice of joint and several liability could all but vanish without a trace.”).

There is no justification for the unequal application of law to defendants in actions where plaintiffs fail to name all potential tortfeasors. The inability to assert any cause of action against a nonparty tortfeasor for the purpose of preserving the right to have a jury allocate fault to the nonparty tortfeasor would violate the due process and equal protection clauses of the Constitution and the protections afforded to named defendants under the amended joint and several liability laws. Accordingly, the Court must deny Throttlefest, LLC’s motion to dismiss.

III. The Existence of House of Blues' Breach of Contract Claim Against Throttlefest, LLC Does Not Preclude House of Blues' Additional Causes of Action Based in Equity and Tort.

Throttlefest, LLC seeks dismissal of House of Blues' claims for negligent misrepresentation, negligence, and equitable indemnity "because the Agreement governs the entire relationship between House of Blues and Throttlefest." South Carolina general rules of pleading provides:

A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

Rule 8(e)(2), SCRPC,

"A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999). "A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action." Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (citing State Ports Auth. v. Booz-Allen, 289 S.C. 373, 346 S.E.2d 324 (1986)). "In most instances, a negligence action will not lie when the parties are in privity of contract." Id. "When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action." Id.

In the present case, House of Blues asserts that Throttefest, LLC made representations to House of Blues outside of the Agreement. Thus, while the Agreement in this case created some

duties between the parties, it was not the exclusive source of Throttlefest, LLC's duties. Further, House of Blues anticipates that Throttlefest, LLC may dispute the validity and scope of the Agreement. Consequently, House of Blues' additional and alternative tort claims are properly pleaded. With respect to the equitable indemnification claim, House of Blues may properly plead contractual and equitable indemnification as alternative claims. House of Blues does not intend to pursue double recovery under both causes of action. See, e.g., Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 188, 826 S.E.2d 585, 592 (2019) (finding plaintiff properly pled alternative theories of liability).

Further, to the extent this Court determines that there are any defects in its pleading, the proper relief would be to dismiss the claims without prejudice and allow leave to amend. Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted. Skydive Myrtle Beach, Inc., 426 S.C. at 189, 826 S.E.2d at 592. "A complaint is not subject to dismissal with prejudice unless it appears *to a certainty* that no relief can be granted under any set of facts that can be proved in support of its allegations." Id. at 189-90, 826 S.E.2d at 592-93 (quoting Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006)).

IV. House of Blues' Claims Against Throttlefest, LLC Should Not Be Dismissed Based Upon the Statute of Limitations Where (A) The Third-Party Complaint was Filed Within the Limitations Period; (B) The Limitations Period is Subject to Equitable Tolling, and (C) Throttlefest, LLC is Estopped From Raising the Statute of Limitations Defense.

House of Blues reiterates that an evaluation of the statute of limitations defense cannot be properly conducted without reference to matters outside of the Third-Party Complaint itself. See Part I, *supra*. Nonetheless, the Complaint was timely filed on October 18, 2019, where House of Blues **first** notice of the underlying first party claim, which gave rise to the third-party claims, was

a letter dated October 20, 2016, from Plaintiff Kelsey's counsel sent certified mail to House of Blues. See S.C. Code Ann. § 15-3-530 (establishing three years limitations period).

Throttlefest, LLC correctly notes that the 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); see also RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) ("Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence."). However, Throttlefest, LLC attempts to impute Plaintiff Kelsey's knowledge of the underlying incident to House of Blues, despite the fact that the incident occurred off of the House of Blues property. In reality, House of Blues was not notified of the incident involving Kelsey and the alleged over-service by Fajita Mike until after October 20, 2016. Moreover, it was during the course of discovery in the first-party litigation that House of Blues learned that Throttlefest, LLC's breaches of contract, tortious conduct, and the need for indemnification. Thus, the fact that Throttlefest 2014 was held from May 9-17, 2014, is of no consequence. Rather, the earliest date from which House of Blues knew or should have known of its third-party claims against Throttlefest, LLC was October 20, 2016.

Additionally, equitable tolling should apply to the period from May 12, 2017, when Plaintiff Kelsey's Complaint was filed against both House of Blues and Throttlefest, LLC, and December 14, 2018, when Throttlefest, LLC was dismissed from the first-party action. In addition to statutory tolling mechanisms, "in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386

S.C. 108, 115, 687 S.E.2d 29, 32 (2009). “‘Tolling’ refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting.” 51 Am. Jur. 2d Limitation of Actions § 169 (2000). “Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period.” Id. “The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.” Hooper, 386 S.C. at 115, 687 S.E.2d at 32. Here, until Throttlefest, LLC was dismissed as a party, House of Blues was adequately protected by the assertion of many of its same claims against Throttlefest, LLC having been made by Plaintiff. Once Throttlefest, LLC was dismissed, the third-party claims became necessary to protect House of Blues. Throttlefest, LLC was well aware during its involvement in the first-party litigation that House of Blues defense included that Fajita Mike was truly the agent and employee of Throttlefest, LLC, who was solely responsible for his supervision and control.

Similarly, equitable estoppel may preclude dismissal under Throttlefest, LLC’s statute of limitations theory. In South Carolina, a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit. Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 339 (Ct. App. 2001). “Application of equitable estoppel does not require an intentional misrepresentation.” Id. at 360, 559 S.E.2d at 338-39. “It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire.” Id. “Whether the defendant’s actions lulled the plaintiff into “a false sense of security” is usually a question of fact.” Id. at 360–61, 559 S.E.2d at 339. Here, Throttlefest, LLC actively defended the first-party litigation for over a year and a half, leading House of Blues to believe that its third-party claims did not need to be asserted. Throttlefest, LLC was well aware that House of Blues

defense included that Fajita Mike was truly an agent and employee of Throttlefest, LLC, or its related entities, who were solely responsible for his supervision and control. Rather than admit its true connection to Fajita Mike, Throttlefest, LLC falsely claimed that it had no connection to Fajita Mike's presence at Throttlefest 2014. This false deposition testimony in October 2018 is purportedly what induced Plaintiff to dismiss him Throttlefest, LLC from the first-party lawsuit.

In sum, the statute of limitations issue is not proper for 12(b)(6) dismissal, the third-party claims were timely filed, and any untimely filing should be excused under the doctrines of equitable tolling and/or estoppel.

CONCLUSION

Based on the aforementioned, House of Blues respectfully requests the Court deny Throttlefest, LLC's motions to dismiss.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,
COLLINS & LACY, P.C.

By: s/Christian Stegmaier
CHRISTIAN STEGMAIER
SC Bar No. 68648
cstegmaier@collinsandlacy.com
AMY L. NEUSCHAFER
SC Bar #73922
aneuschafer@collinsandlacy.com
11945 Grandhaven Drive, Suite D
Murrells Inlet, South Carolina 29576
(843) 353-2350 (voice)
(843) 652-0301 (facsimile)

ATTORNEYS FOR THIRD-PARTY
PLAINTIFF/DEFENDANT HOUSE OF BLUES
MYRTLE BEACH RESTAURANT
CORPORATION

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION'S
MEMORANDUM IN OPPOSITION TO
THROTTLEFEST LLC'S MOTION TO
DISMISS**

Murrells Inlet, South Carolina
January 7, 2020

EXHIBIT E

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) 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.

FACTS¹

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 Contract 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 itself⁴ 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. Seebaltd 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

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EXHIBIT F

RELEVANT FACTS AND PROCEDURAL HISTORY

This is an alleged alcohol liability case related to a motorcycle-on-motorcycle collision on May 16, 2014 in Myrtles Beach, South Carolina, which resulted in injuries to Plaintiff Kelsey. Plaintiff alleges that Travis Wagoner was overserved with two free shots allegedly given to him by Michael “Fajita Mike” Garner during an event called “Throttlefest 2014.” (See Pl.’s Second Am. Compl., ¶8-15). House of Blues has vehemently denied any liability to Plaintiff and disputes that Fajita Mike was acting as its employee when he allegedly served Wagoner. (HOB Answer to Second Am. Compl./Third Party Compl., ¶ 8, 114-116).

Throttlefest LLC, and House of Blues entered into a Co-Promotion Agreement (“Agreement”) with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. (HOB Answer to Second Am. Compl./Third-Party Compl., ¶ 97). Michael Ballard, who is a managing member of Throttlefest LLC, and who is the sole managing member of Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC, attended the Throttle Fest event as a representative of these companies. (*Id.* at ¶112). Jesse James Dupree, who is a managing member of Throttlefest LLC and the sole incorporator and officer of American Outlaw Spirits Incorporated, attended the Throttle Fest event as a representative of this company and corporation. (*Id.* at ¶113). Throughout the Throttle Fest event, Fajita Mike was acting as the employee or agent of Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC. (*Id.* at ¶115). Further, Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC, all had the opportunity and responsibility to supervise and control Fajita Mike and all financially benefited from Fajita Mike’s alleged actions. (*Id.* at ¶¶116-117). Though all of

the Third-Party Defendants were previously named as defendants in the first-party litigation, only the House of Blues Defendants and Travis Wagoner remained in the case at the time that Plaintiff filed its Second Amended Complaint. (Id. at ¶¶ 95-96).

House of Blues filed its Answer to the Second Amended Complaint and Third-Party Complaint on October 18, 2019. The third-party causes of action include breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification, and contribution. (HOB Answer to Second Am. Compl./Third Party Compl. at ¶¶ 119-159).

Throttlefest, one of the third-party defendants, filed a Motion to Dismiss, followed by a Memorandum in Support thereof. A hearing on the motion was held on January 8, 2020 before The Honorable Benjamin Culbertson. Judge Culbertson orally granted the motion and entered a Form 4 Order providing the same and instructing counsel for Throttlefest to prepare a formal order.¹ This Court entered a written order granting the motion to dismiss on February 4, 2020, and entered an identical order again on February 5, 2020.

This Court dismissed the third-party claim for contribution, citing S.C. Code Ann. § 15-38-50 and Smith v. Tiffany, 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017), and finding that House of Blues does not have a contribution claim against Throttlefest because Plaintiff released Throttlefest from all liability. This Court further found that the Third-Party Complaint did not allege that the settlement between Throttlefest and Plaintiff was not in good faith or House of Blues did not produce any other evidence to support such an argument. This Court agreed that Smith v. Tiffany was not decided on due process and equal protection grounds but found that these rights would not be violated by precluding Throttlefest from being brought back into this case, but ruled

¹ Plaintiff Kelsey's Motion to Sever the third-party claims was also heard on January 8, 2020, and was denied.

that Throttlefest already settled with Plaintiff, House of Blues had ample opportunity to assert cross-claims or a separate cause of action against Throttlefest before, and that House Blues' rights are sufficiently protected by its ability to assert an "empty-chair defense." (Order, pp. 5-7).

This Court also dismissed the remaining causes of action for breach of contract, contractual indemnity, negligent misrepresentation, and negligence, finding that they were barred by the applicable statute of limitations. Regarding the contractually based causes of action for breach of contract and contractual indemnity, this Court found that because "the Event occurred on House of Blues' premises," "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." (Order, pp. 8-9). Thus, this Court reasoned that the breach of contract actions accrued in May 2014. (Order, p. 9). This Court found that the negligent misrepresentation and negligence causes of action "are based, at least in part, on Throttlefest's alleged improper promotion of alcohol brands during the Event," such that they also accrued in May 2014. (Order, p. 9). This Court found that despite the fact that House of Blues did not learn of Plaintiff's injuries until October 20, 2016, that the third-party claims "are not based solely on Plaintiff's injuries." (Order, pp. 9-10). Rather, "[s]ome 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." (Order, p. 10).

This Court further found that House of Blues' causes of action for negligent misrepresentation, negligence, and equitable indemnification were barred by the Agreement. This Court found that because the Agreement specified that "the parties shall not have any obligations whatsoever to each other outside of the Agreement" and the third-party claims relate to Throttlefest's actions or inactions during the Event, that House of Blues' Third-Party Complaint sounds in breach of contract, not tort. (Order, p. 11). Regarding equitable indemnification, this Court dismissed it "because the Agreement contains cross-indemnification provisions." (Order, p. 12). This Court further found that any representations made to House of Blues outside of the Agreement "were regarding Throttlefest's performance under the Agreement." (Order, p. 12). The Court was "not convinced that these alleged representations support tort claims." (Order, p. 12). The Court found that its rulings on this issue could be made based upon the Third-Party Complaint and the Agreement, without consideration of deposition testimony or any other evidence. (Order p. 11, fn. 4).

As will be discussed more fully *infra*, this Court failed to rule upon House of Blues' argument that Plaintiff's arguments were not proper for Rule 12(b)(6) dismissal because they required the Court to consider information outside of the Third-Party Complaint. This Court further erred in finding that House of Blues was required to plead that Throttlefest's settlement with Plaintiff was not in good faith or present evidence of the same in order for its contribution claim to survive. This Court additionally erred in relying upon Smith v. Tiffany to find that the House of Blues' federal and state constitutional rights of due process and equal protection were protected after admitting that the case explicitly failed to consider such arguments. In conclusory fashion, this Court finds that empty-chair defense is the legislatively adopted remedy for any concern. In dismissing causes of action based upon the statute of limitations, this Court failed to

properly apply the discovery rule and failed to distinguish the accrual of the indemnification claim. Lastly, this Court erred in finding that the existence of the Agreement precluded alternative tort and equitable claims and did not address why amendment of the pleadings was not the proper remedy for any alleged deficiency in the initial pleading.

STANDARDS OF REVIEW

Rule 59(e) Motion

Rule 59(e) of the South Carolina Rules of Civil Procedure provide that “[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.” Rule 59(e), SCRPC. The filing of such a motion is “[t]he proper procedure for correcting factual errors in an order.” Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996). Further, in order to preserve it for appellate review, a party must make a Rule 59(e) motion where the trial court does not explicitly rule on an argument raised. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991); Smith v. NCCI, Inc., 369 S.C. 236, 247–48, 631 S.E.2d 268, 274 (Ct. App. 2006); Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”). However, “a party cannot use a Rule 59(e) motion to present to the family court an issue the party could have raised prior to judgment but did not.” Gartside v. Gartside, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009).

Rule 12(b)(6) Motion

In considering a Rule 12(b)(6), SCRPC motion, a trial court must base its ruling solely on the allegations on the face of the Complaint. Styles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). A motion under Rule 12(b)(6) should not be granted if facts alleged and inferences

reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413 (Ct. App. 2003); see also Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case).

Where a pleading is attacked for an alleged failure to state a cause of action, “the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case.” Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496. The pleader’s likelihood of success at trial is irrelevant to deciding whether he has properly stated a claim. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007); Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019) (“Skydive was—any plaintiff is—entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim.”).

LAW/ANALYSIS

I. This Court Failed to Rule Upon House of Blues’ Argument that Dismissal Would Require Findings of Fact Not Evident on the Face of the Third-Party Complaint, Which is Beyond the Scope of Rule 12(b)(6), SCRCF Review.

In House of Blues’ Memorandum in Opposition to Throttlefest’s Motion to Dismiss, we specifically raised the limited scope of review pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, which must be based solely upon allegations set forth on the face of the complaint. (HOB Memo. in Opp., pp. 4-6). In order to convert a 12(b)(6) motion to a motion for summary judgment, all parties must be given reasonable opportunity to present all material

made pertinent to such a motion by Rule 56. Baird v. Charleston Cty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (citing Rule 12(b)(6), SCRCP). “The notice provisions in Rule 56 are incorporated into Rule 12(b)(6).” Id. (quoting Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987)). Thus, where the trial court does not give notice to the parties that it will consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment, consideration of the same, the evidence outside of the complaint is not properly considered. Id. House of Blues argued that all of Throttlefest’s arguments for dismissal all required reliance on evidence outside of the Complaint. (HOB Memo. in Opp., pp. 5-6).

In its section finding that House of Blues’ equitable and negligence causes of action were barred by the Agreement, this Court wrote:

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.

(Order p. 11, fn. 4). House of Blues does not contend that consideration of the Agreement was improper. Rather, House of Blues’ argues the all of the grounds for dismissal asserted by Throttlefest—prior settlement, statute of limitations, and the existence of a purely contractual relationship—are, in fact, arguments for summary judgment. Thus, in order to *fully and fairly* decide them, this Court would have to consider evidence outside of the Third-Party Complaint. However, there was no notice provided to House of Blues that the motion to dismiss would be converted to one for summary judgment. Thus, House of Blues was not given an opportunity to fully contravene these arguments with deposition testimony, affidavits, and other evidence.

With the exception of the minor reference noted *supra*, the Court's Order was silent as to this procedural defect raised by House of Blues. Accordingly, House of Blues requests that this Court provide a ruling on this issue. See Herring v. Home Depot, Inc., 350 S.C. 373, 382 n.19, 565 S.E.2d 773, 777 n.19 (Ct. App. 2002) ("To preserve an issue for review on appeal, a party must raise the issue and obtain a ruling.").

II. This Court Erred in Dismissing the Contribution Cause of Action Where House of Blues Was Not Required to Plead that Throttlefest's Settlement with Plaintiff Was Not in Good Faith or Present Evidence of the Same in Order for Its Contribution Claim to Survive.

This Court wrote:

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.

(Order p. 6). Importantly, House of Blues' Third-Party Complaint contains no allegation that a settlement was made with any of the Third-Party Defendants at all. Rather, the Third-Party Complaint asserts: "All of the Third-Party Defendants were previously named as defendants in the first-party litigation." (HOB Answer to Second Am. Compl./Third-Party Compl., ¶ 95). Additionally, it asserts: "In light of the trial court's Orders of Dismissal entered on August 13, 2019 (dismissing Full Throttle and Full Throttle Sloon Shine, LLC), December 14, 2018 (dismissing Throttlefest LLC), and January 22, 2018 (dismissing without prejudice Defendants American Outlaw Spirits, Inc., Michael Ballard, and Jesse James Dupree), none of the Third Party Defendants remain as co-defendants in the first party action." (*Id.* at ¶ 96).

It was Throttlefest's Motion to Dismiss and memorandum which raised an argument that the contribution cause of action (and all other causes of action) should be precluded pursuant to

S.C. Code Ann. §15-38-50 and Smith v. Tiffany. In response, House of Blues distinguished Smith v. Tiffany, which was notably a summary judgment case, and argued that this Court's decision would necessarily require consideration of matters outside of the Third-Party Complaint to determine if the settlement with Throttlefest was made in good faith. (HOB Memo. in Opp., pp. 6-8).

There is no basis to find that House of Blues was required to anticipate that Throttlefest would raise its settlement with Plaintiff as a defense and preemptively plead that such a settlement existed and was not made in good faith. See Stephens v. Hendricks, 226 S.C. 79, 88, 83 S.E.2d 634, 639 (1954) ("It is a general principle that a pleading need and should not, by its averments, anticipate a defense thereto, and negative or avoid it."). Further, to require House of Blues to produce evidence that the settlement was not made in good faith at the Rule 12(b)(6) level is to convert the claim to one for summary judgment. Neither the terms nor the amount of the settlement have been disclosed to House of Blues. House of Blues was not put on notice that such conversion of the motion from an ordinary dismissal motion would be made so as to subpoena this evidence or call a witness in order to compel the disclosure of the same. Rather, by making this ruling, this Court confirms that it was applying a different standard than that for a Rule 12(b)(6) motion. See Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987) (reversing dismissal where it was apparent the trial court looked beyond the complaint and gave no notice to the parties that it was going to hear the 12(b)(6) motion as a motion for summary judgment).

Accordingly, House of Blues requests that this Court reconsider its ruling granting dismissal of House of Blues' cause of action for contribution against Throttlefest and amend its Order to deny dismissal.

III. This Court Erred in Dismissing the Contribution Cause of Action by Relying Upon Smith v. Tiffany to Support Its Finding That There Was No Violation of House of Blues' Due Process and Equal Protection Rights Where the Smith v. Tiffany Expressly Failed to Consider Any Constitutional Arguments in Reaching Its Decision and Deferring to the Legislative Remedy Challenged As Insufficient.

This Court ruled:

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.**

(Order, pp. 6-7) (emphasis added). This reasoning is circular and fails to address and rule upon the specific constitutional arguments raised under the state and federal constitutions. As an initial matter, this Court's reference to past opportunities to file cross-claims or a separate action certainly has no bearing on the Court's analysis, as if the contribution were truly precluded now as these third-party claims, the same causes of action raised in a different posture would not be in any better position to survive.

Moreover, this Court's reliance upon Smith v. Tiffany's discussion of the empty-chair defense is misplaced. The Smith v. Tiffany Court wrote:

[P]erhaps in recognition of the perceived inequity complained of by Appellants, the General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection (E), the right to offset the value of any settlement received prior to

the verdict—a right which arises by operation of law and is not within the discretion of the courts. Thus, a critical feature of the statute is the codification of the empty chair defense—a defendant “retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages”—which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being “empty”).

419 S.C. at 557, 799 S.E.2d at 484 (internal citations omitted).

However, the Court specifically noted that it was not considering “Appellants’ argument that the trial court erred in finding their due process rights were violated by the inability to join [third party defendant] or include him on the verdict form for purposes of allocation.” 419 S.C. at 558, n. 3, 799 S.E.2d at 484, n.3. Thus, the discussion of this defense in Smith v. Tiffany was not grounded in any consideration of due process or equal protection.

It is equally unavailing for this Court to reference the empty-chair defense’s codification by the Legislature. House of Blues’ attack on §15-38-50 is that the Legislature has violated defendant’s rights to due process and equal protection by providing protections to some defendants (i.e., in cases where all named tortfeasors are named as a defendant) while extinguishing the protections to others (i.e., in cases where not all tortfeasors are named as a defendant). In the latter scenario, the defendants are “forced to absorb the entire fault of non-parties.” (HOB Memo. in Opp., pp. 8-11). House of Blues argues that the empty-chair defense under subsection (D) provides no remedy, as “[t]he reality is, where a jury cannot apportion fault to a nonparty tortfeasor, a defendant cannot simply argue that the ‘empty-chair defendant’ contributed to a plaintiff’s injury or damages or may be liable for any portion of the damages.” (Id. at p. 12). “Subsection (D) only provides protection to named-defendants on a “perfect” empty-chair defendant argument.” (Id.). This is an attack on the constitutionality of the Legislature’s enactment of §15-38-50 as a whole, which cannot be resolved with deference to the Legislature.

Accordingly, House of Blues requests that this Court reconsider its ruling granting dismissal of House of Blues' cause of action for contribution against Throttlefest and amend its Order to deny dismissal.

IV. This Court Erred in Misapplying the Discovery Rule and Finding that House of Blues' Claims Against Throttlefest, LLC Were Barred by the Statute of Limitations and Failing to Distinguish the Contractual Indemnity Claim.

As asserted in Section I, *supra*, this Court erred in considering matters outside of the Complaint and determining that House of Blues "should have known" of its claims against Throttlefest during the Event held May 9-17, 2014. See Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987) ("It is also our opinion that the trial court's ruling on the statute of limitations, *res judicata* and collateral estoppel was error because these defenses were not apparent from the face of the complaint."). This Court failed to rule upon House of Blues' argument that a statute of limitations defense was not a proper matter for disposition under Rule 12(b)(6), SCRPC.

Under South Carolina law, however, the limitations period "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); see also RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) ("Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence."). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." McAlhany v. Carter, 415 S.C. 54, 63, 781 S.E.2d 105, 110 (Ct. App. 2015).

“The date on which discovery should have been made is an objective, not subjective, question.” Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). “In other words, whether the particular plaintiff actually knew he had a claim is not the test.” Id. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.” Id.

Here, it not dispositive that Throttlefest 2014 was held from May 9-17, 2014 such that Throttlefest’s misconduct must have occurred before and during that time period. While actual notice is also not the ultimate test, there is no evidence that House of Blues had reason to believe that any these Third-Party Defendants had done anything wrong prior to notice of the first-party claim from Kelsey’s counsel. House of Blues is not omniscient. The motorcycle accident injuring first-party Plaintiff Kelsey did not occur on House of Blues property and was unknown to them until notified of the claim by Kelsey’s lawyer by letter dated October 20, 2016. It was in that letter that House of Blues was notified of first-party Plaintiff Kelsey’s allegation that Fajita Mike overserved a bar patron Travis Wagoner, resulting in the motorcycle accident and his severe injuries. Travis Wagoner admitted that he was not sure if anyone at House of Blues saw him being served by Fajita Mike. (**Exhibit A**, Depo. Tr. of Travis Wagoner, p. 45, line 20 – p. 46, line 2).² It was during the course of discovery in the first-party litigation that House of Blues learned additional facts supporting its claims against Throttlefest, including their failure to procure the requisite insurance and which specific liquors were allegedly involved. Considering this, the operative date for the statute of limitations is the earliest date from which House of Blues knew or

² This deposition testimony was not previously submitted to the Court because House of Blues was relying upon application of the Rule 12(b)(6) standard.

should have known of its third-party claims against these Third-Party Defendants, which was October 20, 2016.

To the extent that Throttefest disputes these facts, Throttefest has not presented any evidence, beyond mere supposition and speculation, that House of Blues should have known about Throttefest's breaches and torts during the Event. This further reveals why the limitations should be resolved only after discovery and on a motion for summary judgment where consideration of this additional evidence would be proper. Dismissal pursuant to Rule 12(b)(6) was not warranted.

Additionally, this Court failed to distinguish the breach of contract and contractual indemnity claims, lumping them together as the same. (Order, p. 8) In First Gen. Servs. of Charleston, Inc. v. Miller, our Supreme Court ruled: "As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. There being no judgment at this time, First General's third-party action for indemnity is not time-barred." 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). This Court's finding that "[t]he 'Contractual Indemnification' cause of action is actually a breach of contract claim, as it alleges that Throttefest is contractually required to indemnify and defend House of Blues against the allegations made in this case, but has failed to do so" is in error.

Accordingly, House of Blues requests that this Court reconsider its ruling granting dismissal of House of Blues' causes of action against Throttefest based upon statute of limitations and amend its Order to deny dismissal.

V. This Court Erred in Finding that the Existence of House of Blues' Agreement with Throttefest Precluded House of Blues' Additional Tort Claims and Resorting to the Drastic Remedy of Dismissal.

This Court further found that because the Agreement specified that "the parties shall not have any obligations whatsoever to each other outside of the Agreement" and the third-party

claims relate to Throttlefest's actions or inactions during the Event, that House of Blues' Third-Party Complaint sounds in breach of contract, not tort. (Order, p. 11). This Court further ruled:

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.

(Order, p. 12).

The existence of the Agreement and its "exclusive duties" provision are not dispositive regarding the propriety of the tort claims. See, e.g., Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 188, 826 S.E.2d 585, 592 (2019) (finding plaintiff properly pled alternative theories of liability).

As one example of how House of Blues properly pled its additional and alternative tort claims, Throttlefest specifically denies that its duties under the Agreement included proper training and supervision of Fajita Mike. House of Blues asserts that Throttlefest represented to them by its words and actions, that Throttlefest would properly train and supervise Fajita Mike. "While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019). "The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." Id. (internal citations and quotations omitted)). Thus, there is a basis to assert that Throttlefest's breach of duty arose independently of any contract duties between the parties, which is sufficient to support a tort action. See Tommy L. Griffin Plumbing & Heating Co. v.

Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (“A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action.”).

Additionally, House of Blues argued that to the extent the Court determined that there are any defects in its pleading, the proper relief would be to dismiss the claims without prejudice and allow leave to amend, citing Skydive Myrtle Beach, Inc., 426 S.C. at 189, 826 S.E.2d at 592. (HOB Memo. in Opp., p. 14). This Court failed to rule upon or explain why an opportunity to amend its pleadings was not the proper remedy for the alleged deficiency in the Third-Party Complaint.

Accordingly, House of Blues requests that this Court reconsider its ruling granting dismissal of House of Blues’ negligent misrepresentation and negligence cause of action against Throttlefest and amend its Order to deny dismissal. Alternatively, House of Blues request that this Court rule upon why an opportunity to amend its Third-Party Complaint is not the proper remedy.

VI. This Court Erred in Finding that the Existence of House of Blues’ Agreement with Throttlefest Precluded House of Blues’ Additional Tort Claims and Resorting to the Drastic Remedy of Dismissal.

South Carolina general rules of pleading provides:

A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

Rule 8(e)(2), SCRCF. Nonetheless, this Court ruled: “House of Blues’ Equitable Indemnification cause of action is also dismissed because the Agreement contains cross-indemnification

provisions.” (Order, p. 12). This Court overlooked that the Third-Party Complaint raised allegations in contract and tort, such that reliance upon either contractual or equitable indemnification would necessarily depend upon which theory of liability (or both) was determined by the fact-finder. If a jury found Throttlefest breached its contract with HOB, then contractual indemnification would apply. If a jury found that Throttlefest voluntarily undertook a duty outside of the contract and was liable in tort, then equitable indemnity would apply.

Accordingly, House of Blues requests that this Court reconsider its ruling granting dismissal of House of Blues’ equitable indemnification cause of action against Throttlefest and amend its Order to deny dismissal.

CONCLUSION

Based on the foregoing, House of Blues respectfully requests the Court reconsider its February 4 and 5, 2020 Orders granting dismissal of the third-party claims against Throttlefest and amend its Judgment to deny Throttlefest’s Motion to Dismiss.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,
COLLINS & LACY, P.C.

By: s/Christian Stegmaier
CHRISTIAN STEGMAIER
SC Bar No. 68648
cstegmaier@collinsandlacy.com
AMY L. NEUSCHAFER
SC Bar #73922
aneuschafer@collinsandlacy.com
11945 Grandhaven Drive, Suite D
Murrells Inlet, South Carolina 29576
(843) 353-2350 (voice)
(843) 652-0301 (facsimile)

ATTORNEYS FOR THIRD-PARTY
PLAINTIFF/DEFENDANT HOUSE OF BLUES
MYRTLE BEACH RESTAURANT
CORPORATION

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION'S MOTION
TO ALTER OR AMEND JUDGMENT**

Murrells Inlet, South Carolina
February 14, 2020

EXHIBIT A

Deposition of Travis Scott Wagoner

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ELECTRONICALLY FILED - 2020 Feb 14 3:49 PM - Horry - COMMON PLEAS - CASE#2017CP2603008

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IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
HORRY COUNTY

DEPOSITION OF TRAVIS SCOTT WAGONER

DOUGLAS KELSEY AND MARK SHIMMINGER,
Plaintiffs,

vs. CASE NO. 2017-CP-26-3008

HOUSE OF BLUES MYRTLE BEACH RESTAURANT
CORPORATION; HOUSE OF BLUES CONCERTS, INC.; HOB
ENTERTAINMENT, INC.; FULL THROTTLE, LLC; FULL
THROTTLE SLOON SHINE, LLC; THROTTLEFEST, LLC;
MICHAEL GARNER; AND TRAVIS SCOTT WAGONER,
Defendants.

DEPONENT: TRAVIS SCOTT WAGONER

DATE: APRIL 23, 2018

TIME: 10:58 A.M.

LOCATION: TURNER PADGET GRAHAM & LANEY
MYRTLE BEACH, SOUTH CAROLINA

REPORTED BY: RONDA K. BLANTON, RPR
NCRA REGISTERED PROFESSIONAL
REPORTER
CLARK & ASSOCIATES, INC.
P.O. BOX 73129
CHARLESTON, SC 29415
843-762-6294
office@clark-associates.com
WWW.CLARK-ASSOCIATES.COM

Deposition of Travis Scott Wagoner

2
ELECTRONICALLY FILED - 2020 Feb 14 3:49 PM - HORRY - COMMON PLEAS - CASE#2017CP2603008

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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

COLEMAN GLEDHILL HARGRAVE MERRITT
& RAINSFORD, PC

BY: JAMES RAINSFORD, ESQ.
129 East Tryon Street
Hillsborough, NC 27278

ON BEHALF OF THE DEFENDANTS HOUSE OF BLUES MYRTLE
BEACH RESTAURANT CORPORATION; HOUSE OF BLUES
CONCERTS, INC.; AND HOB ENTERTAINMENT, INC.:

COLLINS & LACY, PC
BY: CHRISTIAN STEGMAIER, ESQ.
1330 Lady Street
Columbia, SC 29201

ON BEHALF OF THE DEFENDANT THROTTLEFEST, LLC:

BARNWELL WHALEY PATTERSON & HELMS, LLC
BY: JEFFREY M. BOGDAN, ESQ.
288 Meeting Street, Suite 200
Charleston, SC 29401

ON BEHALF OF THE DEFENDANT TRAVIS SCOTT WAGONER:

TURNER PADGET GRAHAM & LANEY, PA
BY: JULIE OLIVER, ESQ.
2411 North Oak Street, Suite 301
Myrtle Beach, SC 29577

- - -

1 Q. All right. Paragraph 55 says, "This was
2 done" -- and "this was done" is in reference to
3 the additional shots there that were served to
4 you by Fajita Mike. "In the middle of the House
5 of Blues in full sight of its staff members at a
6 time when the house lights were on; and, thus,
7 the room was not dark."

8 Again, Mr. Rainsford wasn't there. And
9 so I'm presuming this information that found its
10 way into paragraph 55 was information you
11 supplied?

12 A. Uh-huh.

13 Q. All right. Is that a yes?

14 A. Yes.

15 Q. Sorry. I don't mean to get on you like
16 that.

17 A. No. That's okay. That's okay.

18 Q. So were the house lights on?

19 A. Yes.

20 Q. All right. Who at House of Blues saw
21 you being served by Fajita Mike?

22 A. I don't know that -- for sure that
23 somebody had saw.

24 Q. Okay.

25 A. But it --

1 Q. So you're just guessing.

2 A. Yes. That's a -- that's a guess.

3 Q. All right. So paragraph 55 is just a
4 guess.

5 A. Yes.

6 Q. All right. All right. Page --
7 paragraph 56 -- well, this is kind of more legal
8 than factual. But since I reference it, I'll be
9 fair to you and read it.

10 "Thus while at the House of Blues,
11 Defendants individually or through agents or
12 employees served Defendant Wagoner alcoholic
13 beverages with actual knowledge and constructive
14 knowledge of Defendant Wagoner's visibly
15 intoxicated condition."

16 Of course, at this point in time, you
17 can't tell me who's going to testify to you being
18 visibly intoxicated; correct?

19 A. Correct.

20 Q. "And Defendants permitted Defendant
21 Wagoner to drive away in a visibly intoxicated
22 condition."

23 So after the accident happens and you
24 get up on the road -- off the road and you see
25 that your bike had crossed the centerline and

EXHIBIT G

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2603008

Douglas Kelsey et al
PLAINTIFF(S)

House Of Blues Myrtle Beach Restaurant Corporation 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), 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:

Motion to Alter or Amend Judgment by Defendant/Third Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation is DENIED.

(This motion is decided on parties' briefs without oral arguments.)

ORDER INFORMATION

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

For Clerk of Court Office Use Only

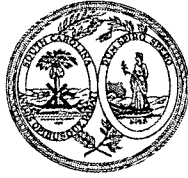
This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/03/2020 .

Kara Shea Grevey for Full Throttle Sloon Shine Llc, Full Throttle, L.L.C., American Outlaw Spirits Incorporated, American Outlaw Spirits Incorporated, Full Throttle LLC, Full Throttle Sloon Shine, LLC
 Brian C Duffy for Full Throttle Sloon Shine Llc, Full Throttle, L.L.C., American Outlaw Spirits Incorporated, American Outlaw Spirits Incorporated, Full Throttle LLC, Full Throttle Sloon Shine, LLC
 House of Blues Myrtle Beach Restaurant Corporation
 Christian Stegmaier for House Of Blues Myrtle Beach Restaurant Corporation, HOB Entertainment Inc
 Amy Lynn Neuschafer for House Of Blues Myrtle Beach Restaurant Corporation, HOB Entertainment Inc
 William Edward Lawson for Travis Scott Wagoner
 Jason Paul Murphy for Douglas Kelsey
 James John Rainsford for Douglas Kelsey
 Katherine T. Merritt for Douglas Kelsey

DOUGLAS KELSEY 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.



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/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2020-000407
Case No. 2017-CP-26-03008

RECEIVED
MAY 29 2020
SC Court of Appeals

Douglas Kelsey.....Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;
HOB Entertainment, Inc.; and Travis Scott Wagoner.....Defendants.

AND

House of Blues Myrtle Beach Restaurant CorporationThird-Party Plaintiff,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;
Full Throttle LLC; and Full Throttle Sloon Shine, LLC.....Third-Party Defendants.

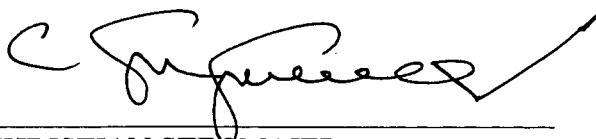
of which House of Blues Myrtle Beach Restaurant Corporation is the Appellant and Throttlefest, LLC is the Respondent.

CERTIFICATE OF SERVICE

I certify that I have served APPELLANT’S RETURN TO RESPONDENT’S MOTION TO DISMISS by mailing a copy of same in the United States mail, with sufficient postage affixed thereto on this 28th day of May, 2020, to the following:

M. Dawes Cooke, Jr., Esquire
Jeffrey M. Bogdan, Esquire
Barnwell Whaley Patterson & Helms, LLC
P. O. Drawer H
Charleston, SC 29402-0197
Counsel for Respondent Throttlefest, LLC

COLLINS & LACY, P.C.



By:

CHRISTIAN STEGMAIER

SC Bar No. 68648

cstegmaier@collinsandlacy.com

AMY L. NEUSCHAFER

SC Bar No. 73922

aneuschafer@collinsandlacy.com

LAURA R. BAER

SC Bar No. 101076

lbaer@collinsandlacy.com

1330 Lady Street, Sixth Floor (29201)

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660 (main)

(803) 771-4484 (facsimile)

ATTORNEYS FOR APPELLANT HOUSE OF
BLUES MYRTLE BEACH RESTAURANT
CORPORATION

CERTIFICATE OF SERVICE

Columbia, South Carolina
May 28, 2020



Christian Stegmaier | D: 803.255.0454 | E: cstegmaier@collinsandlacy.com

May 28, 2020

RECEIVED
MAY 29 2020
SC Court of Appeals

VIA UNITED STATES MAIL

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *Douglas Kelsey v. House of Blues Myrtle Beach Restaurant Corporation, HOB Entertainment, Inc., and Travis Scott Wagoner; House of Blues Myrtle Beach Restaurant Corporation v. Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC*
Civil Action No. 2017-CP-26-03008
Claim No. 188372477-001-GL
C&L File No. 001133-00111

Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and one (1) copy of ***Appellant’s Return to Respondent’s Motion to Dismiss*** in the above referenced matter. Please file the original and return a clocked copy of same in an envelope provided for your convenience.

Pursuant to the Supreme Court’s Order “re: Operation of the Appellate Courts During the Coronavirus Emergency” (2020-03-20-01), no additional copies are being provided. If any additional copies are required, please let us know.

By copy of this letter and enclosure, we are serving same on all parties.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact us.

Respectfully,

Christian Stegmaier

CS/net
Encl.

The Honorable Jenny A. Kitchings

May 28, 2020

Page 2

cc (via U.S. Mail and email):

M. Dawes Cooke, Jr., Esquire

Jeffrey M. Bogdan, Esquire

James Rainsford, Esquire

Katherine T. Merritt, Esquire

Jason Paul Murphy, Esquire

William E. Lawson, Esquire

Brian C. Duffy, Esquire

Kara Shea Grevey, Esquire

Hasler

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MAY 29 2020

SC Court of Appeals

Collins  Lacy SM
ATTORNEYS AT LAW

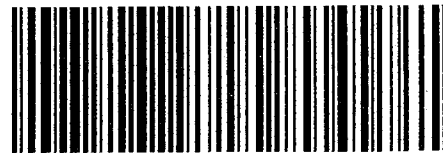
1330 Lady Street, Sixth Floor (29201) Post Office Box 12487 | Columbia, SC 29211

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
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