THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
In the Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2020-000407

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 Corporation......................... Third-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; American Outlaw Spirits Incorporated; Full Throttle, LLC; and Full Throttle Sloon Shine, LLC are the Respondents

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FINAL BRIEF OF RESPONDENT THROTTLEFEST, LLC

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STATEMENT OF ISSUES ON APPEAL

A. Did the trial judge properly consider the underlying agreement and Throttlefest's settlement with the Plaintiff in considering Throttlefest's Motion to Dismiss Third-Party Complaint? (Corresponds to Appellant's Issue (I))

Suggested Answer: **YES.**

B. Did the trial judge properly dismiss House of Blues' Third-Party Complaint where any attempt by House of Blues to amend would be futile?

Suggested Answer: **YES.**

C. Did the trial judge properly dismiss the contribution claims in House of Blues Third-Party Complaint where those claims are barred by S.C. Code § 15-38-50? (Corresponds to Appellant's Issue (II))

Suggested Answer: **YES.**

C.1 Did the trial judge properly dismiss the contribution claims in House of Blues Third-Party Complaint where House of Blues failed to make any allegations challenging the underlying settlement? (Corresponds to Appellant's Issue (II)(a))

Suggested Answer: **YES.**

C.2 Did the trial judge properly conclude that the application of Section 15-38-50 was consistent with the equal protection and due process clauses of the United States and South Carolina constitutions? (Corresponds to Appellant's Issue (II)(b))

Suggested Answer: **YES.**

D. Did the trial judge properly conclude that certain of House of Blue's third-party claims against Throttlefest are time barred? (Corresponds to Appellant's Issue (III))

Suggested Answer: **YES.**

E. Did the trial judge correctly dismiss House of Blues' equitable and tort claims against Throttlefest, where all of those claims are premised on allegations that Throttlefest breached a contract? (Corresponds to Appellant's Issue (IV))

Suggested Answer: **YES.**

STATEMENT OF THE CASE

A. Factual Background

1. The Original and First Amended Complaints

Plaintiff Douglas Kelsey ("Plaintiff")[1] filed this lawsuit on May 12, 2017 against Appellant House of Blues Myrtle Beach Restaurant Corporation ("House of Blues) and certain other Defendants,[2] but not initially against Respondent Throttlefest. (*See generally* R. pp. 69-83). On July 7, 2017, Plaintiff filed the Amended Summons and Complaint which, *inter alia,* added Respondent Throttlefest, LLC ("Throttlefest" or "Respondent") as a named Defendant. (*See generally* R. pp. 84-109). In the Amended Complaint, Plaintiff alleged that Throttlefest was "substituted in this Amended Complaint in place of Full Throttle Saloon and Campground, LLC, who was mistakenly named as a Defendant in the original complaint." (*See id.* R. p. 86 ¶ 8).

Plaintiff alleged in the Amended Complaint that during May of 2014, the Defendants partnered to host "Throttle Fest," a week-long event in which the House of Blues was transformed into Full Throttle, the self-proclaimed world's largest biker bar located in Sturgis, South Dakota (the "Event"). (*See id.* R. p. 87 ¶ 17). Plaintiff asserted that an agreement existed between Appellant House of Blues and Respondent Throttlefest governing some aspects of the Throttle Fest Event. (*See id.* R. p. ¶ 18). Plaintiff alleged that "Throttle Fest [Event] was hosted from May 9 through May 17[, 2014] at the House of Blues in Myrtle Beach " and that Respondent Throttlefest or the other Defendants served alcohol to Defendant Travis Scott Wagoner. (*See id.* R. p. 88 ¶ 27 & p. 91 ¶ 56). Plaintiff further claimed that:

> 57. Defendants did not prevent Defendant Wagoner from leaving the House of Blues around midnight and driving out of its parking lot at approximately 12:15 a.m. on May 17, 2014.
>
> 58. Approximately twenty five minutes after leaving the parking lot, and having consumed no additional alcohol since his departure from inside the House of Blues,

---

1 Mark Shimminger was initially named as a Plaintiff in the original Complaint. However, he was not named a Plaintiff in the Second Amended Complaint or Third-Party Complaint at issue in this appeal.

2 Plaintiffs' Amended Complaint also named as Defendants House of Blues Concerts, LLC and HOB Entertainment, Inc. (referred to herein collectively with House of Blues as the "HOB Defendants").

> Defendant Wagoner crashed his motorcycle into Plaintiff Douglas Kelsey, and made limited contact with Plaintiff Mark Shimmenger's motorcycle.
>
> 59. At approximately 12:40 a.m. on May 17, 2014, after leaving House of Blues Defendant Wagoner was travelling southbound on North Kings Highway in Myrtle Beach, South Carolina and Plaintiffs were travelling northbound on North Kings Highway in Myrtle Beach, South Carolina when Defendant Wagoner's motorcycle illegally crossed the center line, came into Plaintiffs' lane of travel, and struck both Plaintiffs, causing injuries to both Plaintiffs.

(*See id.* R. p. 91 ¶¶ 57-59). The Amended Complaint additionally stated that "[p]rior to Plaintiffs' filing the original complaint on May 12, 2017, Defendant Throttlefest, LLC, as well as all of the other Defendants, were aware of the facts and allegations ultimately made in the original complaint and ultimately made herein and that the original complaint and this amended complaint was being filed with this court." (*See id.* R. p. 93 ¶ 74).

Plaintiff contended that the Defendants were negligent in various ways relating to the service of alcohol to the Event's attendees:

> 81. Defendants violated the statutes in that Defendants' individually and/or by their agents and/or employees (including but not limited to Fajita Mike)continued service of alcoholic beverages to the visibly intoxicated Defendant Wagoner.
>
> 82. Defendants' aforementioned acts (and Defendants' acts as alleged hereinafter) also constitute a common nuisance as that term is defined by South Carolina Code Annotated§ 61-8-10.
>
> 83. Thus Defendants, individually and/or by their agents and/or employees, breached this duty to Plaintiffs and violated the statutes by having actual and constructive knowledge that Defendant Wagoner was visibly intoxicated, thereby causing the subsequent vehicle crash resulting in Plaintiffs' injuries and damages.
>
> 84. Defendants, individually and/or by their agents and/or employees violated the statutes, and were negligent, grossly negligent, careless, reckless, and willful and wanton at the time and place discussed herein in that:
>
> a. they initially served alcoholic beverages to Defendant Wagoner after Defendants, individually and/or by their agents and/or employees, had actual and constructive knowledge that Defendant Wagoner was visibly intoxicated;
>
> b. they then continued to serve alcoholic beverages to Defendant Wagoner after Defendants, individually and/or by their agents

and/or employees, had actual and constructive knowledge that Defendant Wagoner was visibly intoxicated;

c. they failed to institute adequate policies along the chain of command to ensure that liquor would not be served in violation of the statutes;

d. they failed to institute adequate policies along the chain of command within the business to ensure the safety of the public;

e. they failed to supervise Fajita Mike and by allowing him to serve Defendant Wagoner when he was visibly intoxicated;

f. they failed to supervise the bartenders and by allowing them to serve alcohol Defendant Wagoner when he was visibly intoxicated;

g. they allowed and perpetrated the unlawful sale, barter, exchange, storage and/or keeping in possession on the House of Blues premises of spirituous, malt, vinous, fermented, brewed (whether lager or rice beer) or other liquors or beverages or a compound or mixture thereof which contains alcohol and is used as a beverage; and

h. they committed such other acts and/or omissions as shall be shown at the trial of this matter.

(*See id.* R. pp. 94-96 ¶¶ 81-84).

On August 4, 2017, House of Blues (along with the other HOB Defendants) filed its Answer to Amended Complaint. (*See generally* R. pp. 110-125). Although House of Blues alleged "a contractual relationship with Throttlefest, LLC concerning the Full Throttle Festival held in May 2014," it did *not* assert crossclaims (or any other claim) against Respondent Throttlefest at that time. (*See id.* R. p. 119 ¶¶ 63, 64). House of Blues did assert as a defense that "[t]o the extent it is determined Throttlefest, LLC should be dismissed from this action, Plaintiffs' 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." (*See id.* R. p. 121 ¶ 77).

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2. Respondent Throttlefest's Motion to Dismiss the First Amended Complaint.

On January 15, 2018, Respondent Throttlefest filed its Answer to Amended Complaint. (*See generally* R. pp. 126-141). Subsequently, on November 6, 2018, Respondent Throttlefest filed a Motion to Dismiss Plaintiffs' Amended Complaint. (*See generally* R. pp. 142-49). The basis for this motion was that Plaintiffs had agreed to settle all claims against Respondent (the "Settlement"). The motion further recited that "[f]ollowing the October 9, 2018 depositions of Throttlefest's Rule 30(b)(6) designee and defendant Michael Garner, counsel for the Plaintiffs agreed to voluntarily dismiss Throttlefest from this case." (*See* R. p. 142 ¶ 1).

Throttlefest attached as an exhibit to this Motion to Dismiss an October 12, 2018 email from its counsel to all counsel of record stating that "Plaintiffs have agreed to dismiss Throttlefest, LLC from this case" and asking for consent to file a Stipulation of Dismissal. (*See* R. p. 144). With that email, Throttlefest's counsel enclosed a draft Stipulation of Dismissal, which stated that "[Plaintiffs] have agreed and do hereby stipulate to the voluntary dismissal of all claims that were or could have been asserted against Throttlefest, LLC in the above-referenced matter, with prejudice." (*See* R. pp. 145-46). Counsel for Plaintiff granted his consent to Throttlefest filing a stipulation of dismissal with prejudice of all claims against Throttlefest. (*See* R. p. 147). However, despite repeated requests, Appellant House of Blues never agreed to sign the Stipulation of Dismissal; as a result, Throttlefest was forced to file and prosecute the Motion to Dismiss Plaintiff's claims with prejudice, which Plaintiff's counsel did not oppose. (*See* R. p. 153). Appellant House of Blues did not state why it would not consent to the Stipulation of Dismissal with prejudice.

On November 30, 2018, because Appellant House of Blues refused to consent to the dismissal of Plaintiff's claims against Respondent Throttlefest, Throttlefest filed its Memorandum in Support of Motion to Dismiss the Plaintiff's claims, stating:

> *Throttlefest has reached a settlement with the Plaintiffs that releases Throttlefest from any liability to the Plaintiffs related to this matter*. The settlement contains a confidentiality provision, so documentation of such is not being attached here. South Carolina law has recognized for almost two hundred years that the plaintiff in a lawsuit has the right to choose its defendant(s). *Smith v. Tiffany*, 419 S.C. 548, 562-64, 799 S.E.2d 479, 487-88 (2017). Plaintiffs here have chosen to settle with

> and not pursue any claims against Throttlefest. The House of Blues defendants, having no claims against Throttlefest, do not have a right to block the Plaintiffs' right to choose.

(*See* R. p. 151 (emphasis added)). Ten days later, House of Blues filed its Memorandum in Opposition to Throttlefest's Motion to Dismiss the Plaintiff's claims, conceding that Respondent Throttlefest had moved to dismiss Plaintiffs' claims "on the grounds that Throttlefest has reached a settlement with the Plaintiffs and therefore, should be dismissed as a party from this matter." (*See* R. p. 161). House of Blues argued that it and Throttlefest agreed to mutually present the Event as a joint venture and co-promoted, organized, and managed the Event. (*See* R. p. 162). House of Blues "importantly" argued that "the HOB Defendants and Throttlefest acted as co-employers of Fajita Mike and the other employees who are alleged to have overserved Wagoner." (*See id.*). House of Blues continued that the dismissal of Throttlefest "would prevent a complete determination of liability as to the remaining Defendants" and that it "would be deprived of complete relief if Throttlefest is dismissed as a party from this action." (*See id.*). House of Blues did not, at that time, argue or suggest that the Settlement was (or might be) collusive or was not made in good faith. It did not seek to conduct any discovery at that time concerning the details of the Settlement or its propriety. House of Blues did not move for leave to assert crossclaims against Throttlefest at that time.

By Form 4 Order, dated December 11, 2018, Judge William H. Seals granted Throttlefest's Motion to Dismiss Plaintiff's claims in the Amended Complaint.[3] (*See* R. pp. 63-65). House of Blues did not file a Rule 59 motion to alter or amend or undertake any immediate efforts to rectify any alleged prejudice from the dismissal of Throttlefest from the Lawsuit at that time. It did not argue at that time that the Settlement between Plaintiff and Throttlefest was in not in good faith or was collusive or otherwise improper. Moreover, House of Blues did not seek to amend its answer to assert a third-party claim against Throttlefest.

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[3] On October 15, 2019, Plaintiff Kelsey filed his Second Amended Complaint against the HOB Defendants and Defendant Wagoner. (*See generally* R. pp. 170-88). This Second Amended Complaint did not assert any claims against Defendant/Respondent Throttlefest.

3. Appellant House of Blue's Third-Party Complaint and the Order at Issue in this Appeal.

Instead of immediately taking action to try to assert a claim against Throttlefest, House of Blues slumbered on its rights for months and ultimately filed its Third-Party Summons and Answer to Second Amended Complaint and Third-Party Complaint on October 18, 2019 ("Third-Party Complaint"). House of Blues' Third-Party Complaint rejoined Throttlefest — which House of Blues knew had months before settled with and obtained a release from Plaintiff — as a Third-Party Defendant. (*See generally* R. pp. 189-216). In the Third-Party Complaint, Appellant House of Blues asserted claims against Respondent Throttlefest, as well as American Outlaw Spirits Incorporated; Full Throttle, L.L.C.; and Full Throttle Sloon Shine LLC.[4]

In its Third-Party Complaint, House of Blues noted that Throttlefest was " previously named as [a] defendant[] in the first-party litigation." (*See* R. p. 204 ¶ 95). It further conceded that Kelsey's first-party claims against Throttlefest had been dismissed on December 18, 2018 and was no longer a party. (*See* R. p. 204 ¶ 96). House of Blues alleged in the Third-Party Complaint that it entered into a Co-Promotion Agreement ("Agreement") (effective March 19, 2014) with Throttlefest, 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." (*See* R. p. 204 ¶ 97). The Third-Party Complaint, while not attaching a copy of the Agreement, expressly referenced numerous provisions of the Agreement, directly quoting some of them. (*See* R. pp. 204-05 ¶¶ 98-103).

House of Blues alleged in the Third-Party Complaint "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," including Throttlefest. (*See* R. p. 207 ¶ 118). Appellant House of Blues asserted claims against Throttlefest sounding in:

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[4] These additional Third-Party Defendants were dismissed from this lawsuit for lack of personal jurisdiction. Appellant House of Blues has appealed those dismissals and argues in its combined Initial Brief that the trial judge erred in dismissing those parties. This Brief is submitted only on behalf of Throttlefest and will not address any issues relating to Plaintiff's claims against American Outlaw Spirits Incorporated; Full Throttle, L.L.C.; and Full Throttle Sloon Shine LLC.

(a) Breach of contract (First Count) based on Throttlefest's alleged breaches of the Agreement;

(b) Negligent misrepresentation (Second Count) based on Throttlefest's alleged representations concerning its ability to fulfill its obligations under the Agreement;

(c) Negligence (Third Count) based on Throttlefest's alleged negligence in performing its contractual obligations;

(d) Equitable indemnification (Fourth Count) based on Throttlefest's alleged conduct in connection with the performance of its promises under the Agreement;

(e) Contractual indemnification (Fifth Count) based on Throttlefest's alleged conduct in connection with its conduct under the Agreement; and

(f) Contribution (Sixth Count) also based on Throttlefest's alleged conduct in connection with its performance of its duties under the Agreement.

(*See generally* R. pp. 189-216).

On December 5, 2019, Respondent Throttlefest filed its Answer to Third-Party Complaint and Counterclaim. (*See* R. pp. 217-34). In its Answer to Third-Party Complaint, "Throttlefest states that it has obtained a complete and full release of all liability directly from the Plaintiff which completely precludes some or all of the claims Third-Party Plaintiff has asserted against Throttlefest." (*See* R. p228 ¶ 88).

On the same date, Respondent Throttlefest filed a Motion to Dismiss Third-Party Complaint, the bases of which included:

- Plaintiff had given a good faith release to Throttlefest which extinguished Throttlefest's liability to Plaintiff and, thereby, discharged Throttlefest from all liability to other alleged tortfeasors, including House of Blues.
- Throttlefest and House of Blues' relationship is governed solely by contract and, therefore, South Carolina law barred House of Blues' equitable and tort causes of action.
- Throttlefest did not owe any duty to House of Blues, nor did it breach any duty it may have owed.

(*See* R. pp. 238-40). On December 30, 2019, Respondent Throttlefest filed its Memorandum in Support of Its Motion to Dismiss, which attached the March 19, 2014 Co-Promotion Agreement

as an exhibit. (*See generally* R. pp. 247-65). On January 7, 2020, Appellant House of Blues filed its Memorandum in Opposition to Throttlefest, LLC's Motion to Dismiss. (*See generally* R. pp. 354-71). In this Opposition, House of Blues asserted, *inter alia,* that "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." (*See* R. p. 361). However, House of Blues did not assert any specific reason that it believed the Settlement was not in good faith. Rather, it only stated:

> [W]e 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.

(*See id.*). To this date, House of Blues has not set forth any reasonable basis to believe that the Settlement might have not been made in good faith or might be improper.

On January 8, 2020, oral argument was held on Respondent Throttlefest's Motion to Dismiss before the Honorable Benjamin Culbertson. (*See generally* R. pp. 603-48). At oral argument, counsel for House of Blues argued:

> [W]e've asserted that the settlement was not made in good faith, was not made in good faith. That is what we have alleged. The reason why all of these parties weren't in the case or don't remain in the case, candidly, sir, is that they didn't procure the right coverage. They didn't procure the right alcohol liability related coverage for the plaintiff to be able to recover under their Title 61 theory of liability.
>
> The plaintiff in this case has only one cause of action, and that relates to Title 61. In order to -- in order to recover meaningfully, there has to be insurance for that. Throttle Fest, notwithstanding what was in the contract, again, outside of the pleadings, they didn't procure the right coverage. So when it became abundantly clear that there wouldn't be any recovery, they let them go. The plaintiff let them go. We don't have any idea -- we don't have any understanding as to what that settlement amount was, but we have an understanding that it was minimal, and in light of what was asserted as alleged damages in this case, we think that far outweighs -- whatever got paid far outweighs what Throttle Fest actually owes.
>
> In our briefing, which we invite the Court to take a look at, as it relates to what constitutes a good faith settlement, there is all sorts of analysis, including the

> opinion from Justice Pleicones, that says these are things that need to be examined. Respectfully, at a Rule 12 stage, I don't think this Court can make that examination.

(*See* R. p. 622:25-624:4).

On February 4, 2020, the trial court entered an Order granting Throttlefest's Motion to Dismiss. (*See generally* R. pp. 44-56). On February 14, 2020, Appellant House of Blues filed its Motion to Alter or Amend pursuant to Rule 59(e). (*See generally* R. pp. 442-65). On February 28, 2020, Respondent Throttlefest filed its Memorandum in Opposition to Motion to Alter or Amend. (*See generally* R. pp. 466-73). On March 4, 2020, Judge Culbertson entered a Form 4 Order denying the Motion to Alter or Amend. (*See generally* R. pp. 28-30). Third-Party Plaintiff filed this appeal from the trial judge's orders granting Respondent Throttlefest's Motion to Dismiss and denying Appellant House of Blue's Motion to Alter or Amend. For the reason that follow, the Court should *affirm* the trial court's dismissal of House of Blues' third-party claims against Throttlefest with prejudice.

ARGUMENTS

I. Standard of Review.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), SCRCP, an appellate court applies the same standard of review as the [circuit] court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009); *accord Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (same). "Under Rule 12(b)(6), SCRCP, a [party] may move to dismiss based on a failure to state facts sufficient to constitute a cause of action." *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). The question to be considered on a motion to dismiss is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief. *See Williams v. Condon*, 347 S.C. 227, 232–233, 553 S.E.2d 496, 499 (Ct. App. 2001). "[O]n a [Rule] 12(b)(6) motion, the court is required to presume all well pled *facts*, not propositions of law, to be true." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010). "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory." *Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004).

For the reasons that follow, this Court should affirm the trial judge's grant of Throttlefest's Motion to Dismiss House of Blues' third-party claims against it.

II. The Trial Judge Did Not Err in Considering Evidence or Information Outside of the Four Corners of House of Blues' Third-Party Complaint (Appellant's Issue (I)).

Appellant House of Blues first argues that "[w]hile Throttlefest's motion was articulated only under Rule 12(b)(6), it required consideration outside of the pleadings for a full and fair adjudication." (*See* Appellant's Br., at 12). Specifically, Appellant House of Blues argues that the trial judge erred in expressly considering the Agreement. (*See id.* at 13). It also contends that the trial judge erred in considering Respondent Throttlefest's Release with Kelsey in dismissing the contribution claim:

> The circuit court should have found that the viability of the contribution cause of action was not proper for dismissal and could be raised again on summary judgment. The same is true for Throttlefest's claim that the relationship between it

> and Appellant is purely contractual, a full and fair evaluation of the argument would have required a review of deposition testimony of various witnesses, which are outside of the Third-Party Complaint.

(*See id.*). For the following reasons, Appellant's argument is without merit, since the trial court did not consider or rely upon any improper information in its analysis.

"Generally, in considering a [Rule] 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)). In construing Rule 12(b)(6), Respondent Throttlefest would respectfully suggest that federal case law is informative and persuasive. "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). "South Carolina Rule 12(b)(6) essentially tracks Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). There is one difference, however; Rule 12(b)(6) "retains the Code Pleading standard ... rather than the more lenient notice pleading standard found in the federal rules." *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000), *aff'd as modified*, 354 S.C. 416, 581 S.E.2d 169 (2003). In other words, when applying Rule 12(b)(6) to a complaint, South Carolina state courts should be even more rigorous (*i.e.,* more demanding of the party asserting the claim) than federal courts.

Under the Federal Rules of Civil Procedure, a court analyzing a Rule 12(b)(6) motion to dismiss may consider not only the four corners of the complaint, but also documents that are integral to the complaint:

> Ordinarily, in resolving a motion under Rule 12(b)(6), if a court considers material outside of the pleadings, "the motion must be treated as one for summary judgment under Rule 56," in which case "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). However, the court may properly consider documents "attached to the complaint, as well those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (citations omitted). Accordingly, the court finds that the mortgage and Release, which are attached to the motion to dismiss, are integral to the Amended

Complaint, and the court has considered these documents in ruling on this motion to dismiss.

See Land v. Green Tree Servicing, LLC, No. CA 8:14-1165-TMC, 2014 WL 5527854, at *2 (D.S.C. Oct. 31, 2014); *Epstein v. World Acceptance Corp.,* 203 F. Supp. 3d 655, 662 (D.S.C. 2016) (court may consider "facts alleged in the complaint, which may include any documents referenced, and matters of which the court may take judicial notice."); *accord Martin v. Companion Healthcare Corp.*, No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) ("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.") (citations omitted).

Moreover, a court may consider documents attached to a motion to dismiss that are integral to the complaint in the absence of a challenge to authenticity. *See Phillips v. LCI Int'l, Inc.,* 190 F.3d 609, 618 (4th Cir. 1999) ("We note that although the stockholders failed to attach that article to their complaint (LCI attached it to its motion to dismiss), a court may consider it in determining whether to dismiss the complaint because it was integral to and explicitly relied on in the complaint and because the plaintiffs do not challenge its authenticity."); *accord Goines v. Valley Cmt'y Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (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."). Under these standards, the trial judge did not improperly consider materials in his analysis of Throttlefest's motion to dismiss House of Blues' Third-Party Complaint.

First, it is readily apparent that the trial court could consider the Agreement in considering Throttlefest's Motion to Dismiss. Appellant's own' Third-Party Complaint against Respondent frequently references the Agreement. (*See* R. p. 204 ¶ 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.")). In fact, Appellant House of Blues' Third Party Complaint extensively quotes from the Agreement:

> 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."

(*See* R. pp. 204-05 ¶¶ 98-103). There is no doubt that the Agreement is integral to House of Blues' Third-Party Complaint, insofar as Appellant extensively cited and quoted the Agreement in support of Appellant's third-party claims. House of Blues has not suggested that the Agreement cited in the Motion to Dismiss or in the trial court's orders was not authentic or was incomplete. Therefore, the trial judge did not err in considering the Agreement in analyzing Throttlefest's Motion to Dismiss the Third-Party Complaint.

Moreover, the trial judge did not err in considering Respondent's Settlement and release with Plaintiff as a ground for dismissal. House of Blues had been aware for months before filing

the Third-Party Complaint that Plaintiff had settled his claims against Throttlefest for a release. For example, Throttlefest's Memorandum in Support of Motion to Dismiss Plaintiff's claims made clear that "Throttlefest has reached a settlement with the Plaintiffs that releases Throttlefest from any liability to the Plaintiffs related to this matter. The settlement contains a confidentiality provision, so documentation of such is not being attached here." (*See* R. p. 151).[5] House of Blues does not suggest that Respondent's counsel misrepresented the Settlement and release of Plaintiff's claims to the trial court. Rather than promptly seek additional information about the Settlement, House of Blues waited for nearly a year and asserted third-party claims against a party that it already *knew* had settled with Plaintiff. House of Blues cannot, in good faith, dispute that Plaintiff settled and released all claims against Throttlefest. Instead, Plaintiff asks this court to reinstate a third-party claim that is plainly barred based on the mere conjecture.

A *sine qua non* of Appellant House of Blues' third-party claims against Respondent is the absence of a valid Settlement agreement. At the time it asserted its third-party claims, House of Blues absolutely knew about the Settlement agreement that caused the dismissal of Plaintiff's claims against Respondent. There is no suggestion that the Settlement agreement was not authentic or that it did not, in fact, release Respondent Throttlefest from Plaintiff's claims. Instead, the most Plaintiff can muster is speculation that such release *might* not be in good faith, for yet-to-be disclosed reason. Importantly, Appellant House of Blues has not suggested in its Third-Party Complaint that Throttlefest engaged in any particular misconduct with regard to the Settlement agreement.

At the end of the day, House of Blues does not have — and has never had — a good faith basis to dispute the key underpinning of the Motion to Dismiss: that Plaintiff settled and released his claims against Respondent Throttlefest. There is no factual dispute about that question. From the time Throttlefest moved to dismiss Plaintiff's claims through the present date, House of Blues

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5 House of Blues' response to Throttlefest's Motion to Dismiss recognized that Throttlefest moved to dismiss Plaintiffs' claims "on the grounds that Throttlefest has reached a settlement with the Plaintiffs and therefore, should be dismissed as a party from this matter." (*See* R. p. 161).

has not made any substantive claim that the Settlement agreement and release did not exist or that it was not made in good faith. Far from going beyond the complaint, the trial judge here merely relied upon an undisputed Settlement and release that was not the subject of any challenge.

For the foregoing reasons, the trial judge did not improperly consider information beyond the Complaint in his consideration of Throttlefest's Motion to Dismiss the Third-Party Complaint. Therefore, this Court should affirm the dismissal of House of Blues' Third-Party Complaint.

III. **The Trial Judge Did Not Err in Dismissing Appellant House of Blues' Third-Party Claims *with Prejudice.***

Appellant House of Blues contends that Judge Culbertson erred in dismissing its Third Party Complaint *with prejudice* and that he should have allowed House of Blues an opportunity to amend its Third-Party Complaint. In support of this argument, House of Blues cites a South Carolina case stating that "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." (*See* Appellant's Br., at 26 (*quoting Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019)). For the following reasons, Appellant's House of Blues' argument is also without merit.

"Although leave to amend should generally be 'freely given," this court has held that it may be denied where the proposed amendment would be futile." *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010), *rev'd on other grds.*, 401 S.C. 1, 736 S.E.2d 242 (2012) (*citing Higgins v. Medical Univ. of S.C.*, 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct. App. 1997) ("[A]ny amendment of the Higginses' complaint which alleges the doctors were paid by UMA ultimately would be futile . . . . Thus, the dismissal of the doctors is final.")). In *Skydive Myrtle Beach*, the Court remanded the case to allow amendment after the grant of a motion to dismiss because it determined that an amendment would *not* necessarily be futile: "In this case, we cannot definitively say it would be impossible for Skydive to succeed with an amended pleading. Allowing leave to amend the complaint, therefore, was not clearly futile. The circuit court should

not have denied—and we will not deny—Skydive the opportunity to amend its complaint." *See id.*, 426 S.C. at 192, 826 S.E.2d at 594; *accord Couram v. Davis*, No. 2015-UP-065, 2015 WL 477266, at *1 (S.C. Ct. App. Feb. 4, 2015) ("[W]e find the circuit court properly denied Couram's motion to amend her complaint on the grounds that any amendment would be futile because the SCTCA's two-year statute of limitations expired on all of her claims.").

Any efforts to amend House of Blues' Third-Party Complaint would be futile. As discussed below, the governing statute of limitations, South Carolina Code § 15-38-50, and *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), bar House of Blues' third-party claims against Throttlefest. There is no set of facts that House of Blues could allege that would revive those third-party claims. House of Blues has not identified any allegations it would make, if given the opportunity to amend, that would change the outcome of its claims against Respondent Throttlefest. Therefore, the trial court did not err in dismissing House of Blues' Third-Party Complaint *with prejudice*.

IV. Judge Culbertson Properly Dismissed Appellant House of Blues' Third-Party Claims Against Throttlefest Pursuant to S.C. Code § 15-38-50 (Appellant's Issue (II)).

Applying South Carolina Code Section 15-38-50, the trial judge dismissed Appellant House of Blues' contribution claims against Throttlefest (Count 6). (*See* R. pp. 48-50). For the reasons that follow, the Court should affirm the trial court's dismissal under Section 15-38-50 of Appellant House of Blues' claims.

A. The Trial Judge Did Not Improperly Require House of Blues to Plead an Absence of Bad Faith (Appellant's Issue (II)(a)).

In relevant part, the South Carolina Contribution Among Tortfeasors Act provides that "[w]hen a release . . . 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." S.C. Code § 15-38-50. The South Carolina Supreme Court analyzed this statute in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017). In *Tiffany*, Smith (the injured plaintiff) settled with Mizzell for policy limits in exchange for a covenant not to execute. Smith then sued Tiffany and others (collectively "new defendants"),

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claiming that their negligence proximately caused the accident. The new defendants joined Mizzell as a defendant by third-party complaint. The trial court granted summary judgment and dismissed the third-party claims against Mizzell. In affirming the grant of summary judgment, the Supreme Court held:

> [A]chieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the Act. We disagree that fair apportionment was the only underlying policy goal. Indeed, when the Act is read as a whole, with each section and subsection given effect, it is apparent that the legislature was not solely attempting to protect nonsettling defendants. Rather, the 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.

See id., 419 S.C. at 557, 799 S.E.2d at 483-84. There is no dispute as to the meaning of the law governing this issue; the legislature has made clear its intentions.

Under these standards, it is clear that Throttlefest's indisputably good faith Settlement with Plaintiff had the effect of eliminating any potential liability to House of Blues for any third-party contribution claims. In other words, Respondent Throttlefest's Settlement of Plaintiff's claims against it is effective to obtain peace from all claims relating to Plaintiff's alleged injuries. This result is logical and is consistent with the policy favoring settlement of lawsuits. *See Darden v. Witham*, 258 S.C. 380, 388, 188 S.E.2d 776, 778 (1972) ("The courts favor settlements and agreements amongst litigants, and regard as commendable efforts by the parties to settle their differences without the courts' intervention or assistance."). Appellant House of Blues cannot dispute that a good faith Settlement with Plaintiff — which is indisputably present here — would automatically discharge House of Blues' contribution claims against Throttlefest.

House of Blues' arguments on appeal are based on the slender reed that the Settlement agreement *might not have been* in good faith, though it has no actual basis for such speculation. In his order granting Throttlefest's Motion to Dismiss, the trial judge noted that House of Blues "did not allege in its Third-Party Complaint that the settlement was not in good faith." (*See* R. p. 47). House of Blues responds in its brief that it did not plead that the Settlement was not in good faith because it did not need to "anticipate that Throttlefest would raise its settlement with Plaintiff

as a defense" and preemptively plead that the Settlement was not in good faith. (*See* Appellant's Br., at 16). For the reasons that follow, the facts and the law belie Appellant House of Blues' assertions.

First, House of Blues had more than sufficient information to "anticipate" that the Settlement agreement would prevent any success on its third-party claim against Throttlefest. In fact, Throttlefest expressly informed House of Blues in its Motion to Dismiss Plaintiff's Amended Complaint — filed nearly a year before House of Blues filed its Third-Party Complaint — that Throttlefest had "reached a settlement with the Plaintiffs that releases Throttlefest from any liability to the Plaintiffs." (*See* R. p. 151). Moreover, on December 10, 2018 — ten months before filing its Third-Party Claims — House of Blues, though not a party to any claim against Throttlefest at that time, opposed the dismissal of Plaintiff's claims against Throttlefest. (*See generally* R. pp. 159-63). At that time, House of Blues recited that Throttlefest had moved to dismiss Plaintiff's claims because it had "reached a settlement with the Plaintiffs and therefore, should be dismissed as a party from this matter." (*See* R. p. 161). House of Blues argued that, nevertheless, Throttlefest should not be dismissed because it was a necessary and indispensable party, arguing in part that it "would be deprived of complete relief if Throttlefest is dismissed as a party from this action." (*See* R. p. 162). House of Blues' opposition to Throttlefest's Motion to Dismiss Plaintiff's claims did not challenge the Settlement or release of Plaintiff's claims against Throttlefest or suggest that the Settlement was not reached in good faith. House of Blues cannot credibly suggest that Throttlefest's reliance on its Settlement with Plaintiff caught it off-guard.

Far from being an unanticipated affirmative defense, dealing with the impact of Throttlefest's known Settlement with Plaintiff was, in reality, a part of House of Blues' Third-Party claims themselves. House of Blues does not dispute that a Settlement occurred and that Section 15-38-50 would preclude the third-party claims because of that Settlement. House of Blues argues that Section 15-38-50 should not apply because the Settlement *might*, for some as yet undetermined reason, not be a good faith Settlement. South Carolina has not ruled on the precise issue of who bears the burden of proving whether a settlement is in good or bad faith in the context of

determining the effect of a settlement on contribution claims against a released party. However, courts in various other jurisdictions have held that the party seeking to *challenge* a settlement bears the burden of proving that the settlement was not made in good faith:

> [T]he party seeking to void a settlement and release of a joint tortfeasor has the burden of proving its invalidity. *State Farm Fire and Cas. Co. v. Rossini*, 14 Ariz. App. 235, 482 P.2d 484, *vacated on other grounds*, 107 Ariz. 561, 490 P.2d 567 (1971). Once the settling party introduces proof of the settlement and the amount thereof, the burden shifts to the party challenging the settlement to "show that the amount paid by the claimant in settlement was not paid in good faith ..." 18 Am. Jur. 2d, Contribution § 127 at 130 (1985). *Accord Wagoner v. Mountain Savings & Loan Assoc.*, 311 F.2d 403 (10th Cir. 1962); *Wasmund v. Metropolitan Sanitary Dist.*, 135 Ill. App.3d 926, 90 Ill. Dec. 532, 482 N.E.2d 351 (1985); *Dawes v. Elliston*, 369 S.W.2d 285 (Mo. App. 1963). We note that other jurisdictions that have adopted the Uniform Contribution Among Tortfeasors Act (UCATA) place the burden on the challenging party to prove lack of good faith. *Home Ins. Co. v. Advance Mach. Co.*, 443 So.2d 165 (Fla.App.1983); *O'Connor v. Pinto Trucking Serv. Inc.*, 149 Ill.App.3d 911, 103 Ill. Dec. 242, 501 N.E.2d 263 (1986). We see no reason to deviate from Arizona precedent and require the settling party to prove good faith. We do not assume that parties to an agreement acted collusively. We presume that they acted in good faith and require the challenging party to prove a lack thereof.

See Barmat v. John & Jane Doe Partners A-D, 165 Ariz. 205, 209-10, 797 P.2d 1223, 1227-28 (Ct. App. 1990); *accord Gray v. Derderian,* 2009 WL 1575189, at *5 (D.R.I. June 4, 2009) ("[T]here is a presumption that the settlement has been made in good faith, and the burden is on the challenging party to show that the settlement is infected with collusion or other tortious or wrongful conduct."); *Dacotah Mktg. & Rsch., L.L.C. v. Versatility, Inc.*, 21 F. Supp. 2d 570, 578 (E.D. Va. 1998) ("Analysis begins with the presumption that the settlement has been made in good faith . . . ."); *Massachusetts. Ave. Laundries v. Cissell Mfg. Co.*, 1996 WL 1353058, at *2 (Mass. Super. Apr. 10, 1996) ("Cissell has not alleged that the settlement was not executed in good faith, and 'the burden of coming forward with some showing of lack of good faith ought to rest, we think, with those opposing the discharge.'") (citation omitted).

It was entirely appropriate for the trial judge to require that House of Blues, which had actual notice of the Settlement (having opposed Throttlefest's motion to dismiss the Plaintiff's claims), to allege any basis that might support that the Settlement was not in good faith. If House

of Blues could not — and did not — make such an allegation, it is beyond dispute that its third-party claims against Respondent must fail.

Therefore, for all of the foregoing reasons, the Court should affirm the trial judge's dismissal of Appellant House of Blues' third-party claims against Throttlefest.

B. **The Trial Judge Did Not Improperly Reject House of Blues' Due Process and Equal Protection Arguments (Appellant's Issue (II)(b)).**

1. **House of Blues Has Not Shown the Absence of a Rational Basis Supporting the Statutes at Issue.**

Appellant House of Blues next argues that the trial court "erred in its analysis and rejection of Appellant's argument that the application of S.C. Code § 15-38-50 to preclude Appellant's contribution claim would violate Appellant's due process and equal protection rights." (*See* Appellant's Br., at 17). Appellant's argument is based on Section 15-38-*15*, which permits a defendant to have its liability allocated among other defendants:

> As applied, section 15-38-15 provides protections to some defendants (*i.e.*, in cases where all named tortfeasors are named and remain as a defendant) while extinguishing the protections to others (i.e., in cases where not all tortfeasors are named and remain as a defendant). In the latter scenario, the defendants are forced to absorb the entire fault of the non-parties.

(*See id.* at 20). House of Blues argues that the Act violates due process and equal protection because it: (a) allocates liability among named defendants (Section 15-38-15(C)(3)); and (b) provides a vague "empty chair" defense in the context of a settling co-defendant. (*See id.*).

"When an act is challenged under the due process clause, this 'Court only requires the act to be reasonably designed to accomplish its purposes, unless some fundamental right or suspect class is implicated.'" *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) (*quoting State v. Hornsby*, 326 S.C. 121, 125–26, 484 S.E.2d 869, 872 (1997)). Under the due process provisions of the constitution, "the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary." *Hamilton v. Bd. of Trustees of Oconee Cty. Sch. Dist.*, 282 S.C. 519, 524, 319 S.E.2d 717, 721 (Ct. App. 1984). "The burden of showing that a statute is unreasonable falls on the party attacking it on due process grounds." *In re*

Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Gardner v. South Carolina Dep't of Rev.*, 353 S.C. 1, 19, 577 S.E.2d 190, 199 (2003).

The standards governing the application of the due process clauses of the South Carolina and United States constitutions are similar:

> "The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 293, 737 S.E.2d 601, 608 (2013); [citation omitted]. To prevail under the rational basis standard, *a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose. Dunes W.*, 401 S.C. at 293–94, 737 S.E.2d at 608; *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 53, 504 S.E.2d 112, 116 (1998).

See Town of Hollywood v. Floyd, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013) (emphasis added).

Similarly, the standards of equal protection applicable to a statute are well established in South Carolina:

> So long as the statute "does not implicate a suspect class or abridge a fundamental right, the rational basis test is used" to determine whether the classification falls into the prohibited group. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis. *Id.*
>
> We give great deference to the General Assembly's decision to create a classification. *Davis v. Cnty. of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386. Consequently, those who challenge the validity of one under rational basis review must "negate every conceivable basis which might support it." *Lee v. S.C. Dep't of Natural Res.*, 339 S.C. 463, 470 n. 4, 530 S.E.2d 112, 115 n. 4 (2000). Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. *Id.* Moreover, "[t]he fact that the classification may result in some inequity does not render it unconstitutional." *Davis*, 313 S.C. at 465, 443 S.E.2d at 386.

See Bodman v. State, 403 S.C. 60, 69–70, 742 S.E.2d 363, 367–68 (2013)

With regard to its constitutional arguments, Appellant House of Blues argues that:

> There is no justification for the unequal application of law to defendants in actions where plaintiffs fail to name all potential tortfeasors or settle with one or more them before trial. 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 violates 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. . . . [W]e 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.

(*See* Appellant's Br., at 21). However, Appellant House of Blues has not done anything to carry its burden of establishing that any alleged disparate treatment under the statute did not bear a rational relationship to a legitimate state interest.

To the contrary, the provisions of the South Carolina Contribution Among Tortfeasors Act — particularly Section 15-38-50 — further legitimate state interests. South Carolina "courts favor settlements and agreements amongst litigants, and regard as commendable efforts by the parties to settle their differences without the courts' intervention or assistance." *Darden v. Witham*, 258 S.C. 380, 388, 188 S.E.2d 776, 778 (1972). "[T]he [South Carolina Contribution Among Tortfeasors] Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) (*citing Chester v. South Carolina Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010)). The legislature has considered the competing interests and created the Contribution Among Tortfeasors Act as its determination of the most appropriate balance of those interests. Any perceived unfair treatment of House of Blues serves the legislature's purpose of encouraging settlement. While it may disagree with the legislature's policy choices, House of Blues has made no showing that — despite these well-established state interests it serves — the Contribution Among Tortfeasors Act is so arbitrary that it is somehow unconstitutional.

House of Blues' requested interpretation of the constitution would discourage settlements in complex tort cases. Litigation would multiply, as fellow tortfeasors would be encouraged to challenge (without having any specific basis for doing so) the good faith of settlements with a common plaintiff. The net result of House of Blues' arguments would be to completely eliminate the certainty that Section 15-38-50 presently provides to settling parties. This would disincentivize partial settlements and encourage more protracted and expensive litigation. House of Blues' argument that the application of the Contribution Among Tortfeasors Act violates the constitution would make settlements in complex lawsuits even more difficult.

For the foregoing reasons, the trial judge properly determined that the application of Section 15-38-50 did not violate House of Blues' due process or equal protection rights. Therefore, the Court should affirm the dismissal of House of Blues' Third-Party Complaint against Respondent Throttlefest.

2. <u>The Trial Judge Did Not Improperly Rely on *Smith v. Tiffany*.</u>

In granting Throttlefest's Motion to Dismiss House of Blues' Third-Party Complaint, the circuit 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 crossclaims 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.

(*See* R. pp. 49-50). House of Blues argues that the trial court's application of *Tiffany* was erroneous. (*See* Appellant's Br., at 21 ("There is no justification for the unequal application of law to defendants in actions where plaintiffs fail to name all potential tortfeasors or settle with one or

more them before trial."). For the following reasons, this Court should reject House of Blues' arguments and affirm the trial court's dismissal of Appellant's third-party claims.

In *Tiffany,* the plaintiff settled claims against another driver involved in an accident. The plaintiff then sued the driver (and his employer) of a disabled truck that was parked along the highway, asserting it obstructed the view of oncoming traffic. The trial court dismissed the defendants' third-party complaint against the settling driver and request to add the settling driver to the verdict form for purposes of apportioning fault. On appeal, the primary issue was whether defendant could bring a third-party claim against a settling party that the plaintiff had never sued. In its analysis, the South Carolina Supreme Court considered the interplay between two subsections of Section 15-38-15:

> (C) The jury . . . shall: (3) upon a motion by at least one defendant, . . . specify in a separate verdict . . . the percentage of liability that proximately caused the indivisible injury . . . that is attributable to *each defendant* whose actions are a proximate cause of the indivisible injury . . . . In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. . . .
>
> (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.

See S.C. Code § 15-38-15(C) & (D) (emphasis added). The Court held that, because Subsection (C) uses the language "attributable to *each defendant*" (rather than "potential tortfeasor, whether or not a party"), the defendant could not join the settling driver (who was never a defendant) into the case for purposes of attributing percentages of liability. The Court concluded that the appropriate relief for the non-settling defendant as to the settling driver was the "empty chair" defendant of Subsection (D): "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')." *See Tiffany*, 419 S.C. at 557, 799 S.E.2d at 484. Additionally, the Court

concluded that the settlement with the plaintiff extinguished the defendant's contribution claim against the settling driver.

Appellant House of Blues argues that the trial court's application of *Tiffany*'s construction of the Contribution Among Tortfeasors Act created an unconstitutional result:

> As applied, section 15-38-15 provides protections to some defendants (i.e., in cases where all named tortfeasors are named and remain as a defendant) while extinguishing the protections to others (*i.e.*, in cases where not all tortfeasors are named and remain as a defendant). In the latter scenario, the defendants are forced to absorb the entire fault of the non-parties.
>
> Section 15-38-15(D)'s provision regarding an "empty-chair defendant" provides no safety net. 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. 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.

(*See* Appellant's Br., at 20). House of Blues' position seems to be that the Act is unconstitutional because it treats House of Blues (where Plaintiff settled with a now-former Defendant) differently from other tortfeasors, insofar as House of Blues will be unable to obtain a jury allocation of percentages of liability that includes Throttlefest.

House of Blues' argument misses the mark, as the Contribution Among Tortfeasors Act represents the legislature's determination of the fairest way to allocate liability in multiple-tortfeasor cases. This Court should not lightly disregard the legislature's policy balancing set forth in the Contribution Among Tortfeasors Act. In fact, the *Tiffany* court explained how the legislature carefully crafted the Act to balance competing fairness interests as much as possible:

> We acknowledge that achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the Act. We disagree that fair apportionment was the only underlying policy goal. Indeed, when the Act is read as a whole, with each section and subsection given effect, it is apparent that the legislature was not solely attempting to protect nonsettling defendants. Rather, the 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.

See Tiffany, 419 S.C. at 556-57, 799 S.E.2d at 483-84. The *Tiffany* Court stated that the courts should not substitute their definition of "fairness" for legislature's:

> Our decision is the result of determining and honoring legislative intent. We respectfully reject Appellants' invitation to adopt a result that comports with their sense of equity. We construe the statute in a manner to give effect to the policy decision made by the legislature. Is the policy decision advanced by Appellants, and adopted by the dissent, equitable and defensible? Absolutely. Could the legislature have drafted the statute to achieve the result desired by Appellants? Absolutely. But the policy decision belongs to the legislature, and the legislature has crafted the provisions of the Act as it sees fit. We are a court, not a legislative body. *That a court may disagree with a legislative body's policy decisions or believe a perceived "more fair" outcome exists is of no moment.*

See id., 419 S.C. at 565, 799 S.E.2d at 488 (emphasis added). Although "one can easily imagine scenarios where the result may be inequitable," the Court "adhere[d] to the principle that a court must not reject the legislature's policy determinations merely because the court may prefer what it believes is a more equitable result." *See id.*, 419 S.C. at 559, 799 S.E.2d at 485. Likewise, the fact that House of Blues thinks its approach is "more fair" does not make the legislature's reasoned allocation of liability "arbitrary." Instead, the legislature did the best that it could in dealing with a complex problem with many tentacles.

As the trial court noted (consistent with the intent of the legislature), House of Blues does have a remedy to protect its interests. It can argue that Throttlefest "contributed to the alleged injury or damages." *See* S.C. Code § 15-38-15(D). Additionally, Plaintiff's Settlement with Respondent Throttlefest would reduce the claim against House of Blues "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." *See* S.C. Code § 15-38-50(1). While House of Blues may disagree with its decision as a matter of fairness, the legislature enacted these statutes as the fairest way to allocate responsibility in difficult cases. House of Blues can make no showing that the legislature's chosen solutions are arbitrary. It cannot show that the legislature did not have a rational basis for its choices.

If anything, House of Blues' construction of the Contribution Among Tortfeasor's Act would be just as unfair to Throttlefest as the House of Blues believes the trial court was to it. House of Blues would treat Throttlefest different from other settling tortfeasors merely because it happened to formerly be an active defendant. Obviously, being named as a defendant in a complaint was entirely outside of Throttlefest's control. House of Blues would disregard the Supreme Court's holding in *Tiffany* and deny Throttlefest the certainty of its Settlement because Plaintiff named Throttlefest as a defendant in the Amended Complaint.

Moreover, far from being good policy, House of Blues' legal position would essentially prevent a plaintiff from ever settling with one of several defendants. This would run contrary to the specific language of the Contribution Among Tortfeasors' Act, which allows (if not encourages) Plaintiffs to settle claims as to one tortfeasor. In *any* case, after the Settlement, Plaintiff's claims against the settling Defendant tortfeasor (here Throttlefest) would necessarily be dismissed before trial (just as the trial court dismissed Plaintiff's claims against Throttlefest here). It would be difficult to imagine a scenario where a plaintiff could settle with one tortfeasor and extinguish all of that tortfeasor's potential liabilities. This will force defendants to reject settlement opportunities out of fear of remaining exposed to liability for contribution.

For all of the foregoing reasons, this Court should affirm the trial judge's dismissal of House of Blues' Third-Party Complaint against Respondent Throttlefest.

V. <u>The Trial Judge Correctly Granted Respondent Throttlefest's Motion to Dismiss Because Appellant House of Blues' Third-Party Claims are Time-Barred (Appellant's Issue (III)).</u>

The trial judge also granted Throttlefest's Motion to Dismiss because House of Blues' breach of contract, contractual indemnity, negligent misrepresentation and negligence claims are untimely-filed under the governing statutes of limitations:

> 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. . . . 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* R. pp. 51-52). The trial judge further correctly noted that Appellant's "Negligent Misrepresentation and Negligence Causes of Action, even if not fully developed, accrued in May 2014 and should have been filed within three years." (*See* R. p. 52).

In its brief, Appellant House of Blues argues that the trial court erred in considering matters outside of the Third-Party Complaint in determining that House of Blues' claims were time-barred. House of Blues further contends that its "Third-Party Complaint was timely filed on October 18, 2019, because House of Blues['] first notice of the underlying first party claim, which are what gave rise to the third-party claims, was a letter dated October 20, 2016, from Kelsey's counsel sent certified mail to House of Blues." (*See* Appellant's Br., at 22). For the following reasons, this Court should affirm the trial court's dismissal of these claims as untimely.

Under South Carolina law, an action on a contract must be commenced within three years after the breach. *See* S.C. Code § 15-3-530(1). Likewise, the statute of limitations for tort actions in South Carolina is three years. *See* 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." *See City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); *accord 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.").

A statute of limitations begins to run when the cause of action accrues. *King v. James*, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010). "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)). A cause of action accrues when defendant breaches a duty, even though substantial damages were not discovered or did not occur until later. *Grooms v. Med. Soc. of S.C.*, 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989).

"'Under the discovery rule, the statute does not run from the date of the negligent act, but from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.'" *McClain v. Jarrard*, 354 S.C. 218, 220, 580 S.E.2d 763, 764 (Ct. App. 2003) (*quoting Wilson v. Shannon*, 299 S.C. 512, 513, 386 S.E.2d 257, 258 (Ct. App. 1989)). "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). "'Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence.'" *Kagan v. Simchon*, 429 S.C. 516, 527-28, 839 S.E.2d 106, 112 (Ct. App. 2020), *reh'g denied* (Mar. 30, 2020) (*quoting Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998)). "The date on which discovery should have been made is an objective, not subjective, question." *See 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). "In other words, whether the particular plaintiff actually knew he had a claim is not the test." *Young v. South Carolina Dep't of Corr.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

It is undisputed that the Throttle Fest Event took place between May 9 and May 17, 2014. The incident giving rise to Plaintiff's lawsuit occurred on May 16-17, 2014. (*See* R. pp. 204 ¶¶93 & 97 and p. 206 ¶¶ 108-110). House of Blues alleges that Throttlefest breached several provisions of the parties' Agreement in connection with the Event:

> 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."

(*See* R. pp. 204-05 ¶¶ 98-102). Appellant House of Blues further alleges that Throttlefest breached the Agreement because it did not fulfill its duties during the Event, failed to name House of Blues as an Additional Insured, and engaged in prohibited alcohol sponsorships:

> 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 case in providing the festival talent and personalities for the Throttle Fest;
>
> b. Engaging in prohibited alcoholic beverage sponsorship;

(*See* R. p. 208 ¶¶ 125-126). In other words, all of the alleged Throttlefest's alleged malfeasance occurred, if at all, on or before the date of the accident, which is well outside of the statutory period.

House of Blues either knew or should have known of Throttlefest's alleged breaches of the Agreement or other duties at or around the time of the Throttle Fest Event, which took place on its own premises. It is undisputed that Appellant House of Blues did not initiate its third-party claims until October 18, 2019, **more than five years** after the Event concluded. All of Throttlefest's alleged misconduct occurred in connection with the Event and/or on House of Blue's property. All such alleged misconduct occurred pursuant to a written agreement under which House of Blues agreed to "assume all responsibility for booking, promoting and producing the Event." (*See* R. p. 259 ¶ 2). House of Blues cannot possibly contend that it had no obligation to be aware of what its contractual partner was doing in connection with an Event of House of Blues' property that House of Blues had assumed sole responsibility for producing. There is no reasonable basis for House of Blues to claim that it engaged in sufficient diligence under the discovery rule, where it apparently stuck its head in the sand and failed to monitor its contract partner who was on its property. Accordingly (and based solely on the allegations of the Third-Party Complaint), the trial judge properly concluded that the three-year statute of limitations bars certain of House of Blues' third-party claims against Throttlefest.

In support of its invocation of the discovery rule, House of Blues asserts that "there is no evidence that Appellant had reason to believe that Throttlefest had done anything wrong prior to notice of the first-party claim from [Plaintiff]'s counsel after October 20, 2016." (*See* Appellant's Br., at 23). However, the plain allegations of the Third-Party Complaint focus entirely on conduct

on House of Blues' property and/or in breach of the Agreement for the Event. House of Blues cannot contend that it was not aware of what was occurring on its property pursuant to the Agreement during the Event.

Appellant House of Blues also argues that "the statute of limitations issue could not be resolved based solely on the pleadings, as the matter of when Appellant could and should have reasonably discovered Throttlefest's contractual breaches and tortious conduct was not apparent form the Complaint." (*See* Appellant's Br., at 14). Throttlefest is cognizant that "an affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense." *Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006); *accord Citizens & S. Nat. Bank of S.C. v. Constr. Enterprises, Inc. of TN*, 309 S.C. 500, 504, 424 S.E.2d 530, 532 (Ct. App. 1992) ("Because material issues of fact existed regarding Froehling & Robertson's time-limitation defenses, its motion for judgment on the pleadings based on these affirmative defenses should not have been granted."). However, the face of the Third-Party Complaint makes clear, beyond any doubt, that House of Blues' claims are time-barred.

VI. The Trial Judge Correctly Dismissed Appellant House of Blues' Equitable and Tort Claims Because It May Only Sue Respondent Throttlefest in Contract (Appellant's Issue (IV)).

The trial court also properly dismissed House of Blues' tort and equity (negligent misrepresentation, negligence and equitable indemnification) claims because the Agreement governs and controls the entire relationship between House of Blues and Throttlefest and sets forth all of the duties between the two of them.

"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 § 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 plaintiff could not establish claim for gross negligence where claim arose out of contract). "Bare allegations of negligence cannot convert a breach of contract action into an action in tort." *Seebaldt v. First Fed. Savings & Loan Ass'n*, 269 S.C. 691, 239 S.E.2d 726 (1977) (affirming dismissal of negligence complaint where contract created all alleged duties). "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 the Agreement with Throttlefest "concerning the functions and acts necessary for promoting and conducting" the Throttle Fest event. (*See* R. p. 204 ¶¶93-97). The Agreement "shall be strictly limited to all functions and acts necessary for promoting and conducting" the Throttle Fest Event (*See* R. p. 259 § 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. (*See* R. p. 264 § 7(n)). House of Blues alleges that Throttlefest is liable because of its actions or inactions during the Throttle Fest event — all of which took place under the auspices of the parties' Agreement. Accordingly, any claim in House of Blues' Third-Party Complaint against Throttlefest must necessarily sound in breach of contract, not tort. *Seebaldt*, 269 S.C. at 692, 239 S.E.2d at 727.

The trial judge also properly dismissed House of Blues' equitable indemnification claim 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). Respondent Throttlefest's duty to indemnify must be limited to the express indemnification agreements contained in the Agreement. House of Blues may not also assert a claim for equitable indemnification.

CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's grant of Respondent Throttlefest, LLC's Motion to Dismiss House of Blues' Third-Party Complaint against it.

July 16, 2021

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