THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
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.

FINAL BRIEF OF RESPONDENTS AMERICAN OUTLAW SPIRITS INCORPORATED, FULL THROTTLE, LLC, AND FULL THROTTLE SLOON SHINE, LLC

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court correctly applied controlling law and properly granted the motion to dismiss Appellant's third-party claims against Respondents American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC based on lack of personal jurisdiction where Appellant's claims do not arise from any contacts between these Respondents and the State of South Carolina.

II. Whether the Circuit Court's decision to dismiss Appellant's third-party claims against Respondents American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC should be affirmed based on the additional alternative sustaining grounds that Appellant's claims are barred by the South Carolina Contribution Among Tortfeasors Act, Appellant's claims are barred by the applicable statute of limitation, and Appellant has failed to plead any duty owed to it beyond those in a contract to which these Respondents were not a party.

STATEMENT OF THE FACTS[1]

I. Introduction

This action arose from a motorcycle collision between Plaintiff and Defendant Travis Wagoner.[2] Plaintiff alleged Wagoner caused the collision after becoming intoxicated at an event called "Throttle Fest" held at the House of Blues ("HOB") in Myrtle Beach on May 16, 2014. In addition to the claims against Wagoner, Plaintiff also pursued claims against Appellant HOB, alleging that it was responsible for overserving Wagoner at Throttle Fest. Plaintiff initially asserted claims against Respondents as well. After Plaintiff settled or dismissed his claims against Respondents, HOB filed a third-party complaint against Respondents.

The Circuit Court dismissed HOB's third-party claims against Respondents, and this appeal followed. Plaintiff has since settled all of his remaining claims, including his claims against

[1] Respondents adopt and incorporate by reference the procedural history set forth in the "Statement of the Case" section of Appellant House of Blue's Initial Brief. (HOB Br. at 2-4.)

[2] This action was initially filed by two plaintiffs: Douglas Kelsey, who was injured in the collision with Defendant Travis Wagoner, and Mark Shimmenger, who allegedly assisted Mr. Kelsey after the collision. The complaint was later amended to remove Mr. Shimmenger, leaving Mr. Kelsey as the only remaining plaintiff. "Plaintiff," as used herein, refers to Mr. Kelsey.

HOB. Thus, HOB's third-party claims against Respondents are the only claims pending in this action, and this appeal addresses only the dismissal of the third-party claims.

The Throttle Fest event at issue in this litigation was organized pursuant to a contract between HOB and Respondent Throttlefest, LLC. This contract, which was called the "Co-Promotion Agreement," addressed all duties and obligations of the parties hosting the Throttle Fest event. The parties to the contract were Appellant HOB and Respondent Throttlefest, LLC; the remaining Respondents were not parties to the contract. This Initial Brief is filed on behalf of only the Respondents who were not parties to the contract—namely, American Outlaw Spirits Incorporated, Full Throttle, LLC, and Full Throttle Sloon Shine, LLC (collectively, the "Non-Hosting Respondents"). Respondent Throttlefest, LLC is represented by separate counsel and is filing a separate Brief.

The Circuit Court dismissed HOB's third-party claims against the Non-Hosting Respondents on the basis that the Court lacks personal jurisdiction over them. (Order, July 31, 2020, R. pp. 001 - 009.)[3] Specifically, the Circuit Court held that the Non-Hosting Respondents did not purposefully avail themselves of the privilege of conducting activities within South Carolina, and held that HOB's effort to cast ThrottleFest, LLC as an "agent" for the Non-Hosting Respondents when it entered into the Co-Promotion Agreement is untenable. (*Id.*) As explained by the Circuit Court:

> House of Blues admits that it and Throttlefest undertook the duties for promoting and conducting the Throttle Fest event and asserts that Throttlefest was responsible for "festival talent/personalities."

[3] The Circuit Court previously issued an Order dismissing the Non-Hosting Respondents based on lack of personal jurisdictional and other grounds. (Order, March 26, 2020, R. pp. 010 - 027.) The Circuit Court later granted in part and denied in part HOB's motion to alter or amend and, in doing so, substituted its Order dated July 31, 2020 in the place of its Order dated March 26, 2020. (*See* Order, July 31, 2020, R. pp. 001 - 009.) The Circuit Court's Order dated July 31, 2020 dismisses HOB's claims against the Non-Hosting Respondents based only on lack of personal jurisdiction.

> House of Blues nevertheless seeks to reach through the Throttlefest LLC to its two individual members and even further beyond that, tracing duties through those members to each of their other businesses. It seeks to hold responsible those non-resident, Non-Hosting parties with the duties of the contracting party, and to hold them responsible for acts or omissions in the performance of the contract. It seeks to hold a South Dakota real estate holding company, for example, responsible for the alleged actions of "festival talent" that another entity purportedly obtained—and whom House of Blues reported to the IRS was their employee.[4]
>
> In light of the materials submitted to address the lack of contacts of these Third-Party Defendants and other matters of record, House of Blues cannot establish that the three non-resident companies themselves had sufficient contacts to have purposefully availed themselves of the privilege of conducting activities within South Carolina.

(*Id.* at 6, R. p. 6.)

II. HOB's Claims Against the Non-Hosting Respondents

In its third-party complaint, HOB asserts the following claims against all Respondents, including the Non-Hosting Respondents: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. (Third-Party Complaint, R. pp. 189 - 216). At bottom, these claims are based on allegations that Respondents are liable to HOB for "failing to include [HOB] as an Additional Insured on the insurance policies required under the [Co-Promotion] Agreement," and for failing to adequately train and supervise Michael "Fajita Mike" Garner, who allegedly served alcohol to Wagoner during the Throttle Fest event. (*See generally id.* at ¶¶ 116, 120-21, 125-26, 130-31, 141-42, R. pp. 206 - 211; *see also* HOB Initial Br. at pp. 39, 42 (arguing that the Non-Hosting Respondents "wreaked havoc by failing to procure the proper insurance coverage for the festival

[4] The individual whom HOB claimed as an employee in a filing with the IRS is Michael "Fajita Mike" Garner, who allegedly served alcohol to Wagoner during the Throttle Fest event. (*See* HOB Answer and Third-Party Complaint, ¶ 8, R. p. 193.)

held in Myrtle Beach, South Carolina and failing to properly train and supervise their employee and agent, Fajita Mike, resulting the alleged over service of alcohol to a bike week patron").)

HOB does not allege that it entered into a contract with any of the Non-Hosting Respondents. (*See generally* HOB Third-Party Complaint, R. pp. 189 - 216.) HOB also does not assert any claims for product liability or product defect. (*See generally id.*)

III. The Co-Promotion Agreement

The Co-Promotion Agreement, which is a contract between HOB and Throttlefest, LLC with an effective date of March 19, 2014, addresses the duties and obligations of HOB and Throttlefest, LLC in hosting the Throttle Fest event. (*See generally* Co-Promotion Agreement, R. pp. 755 - 762.) The first section of the Co-Promotion Agreement provides that "[t]he 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 . . . ." (*Id.* at HOB002, R. p. 756.) (emphasis added). The Co-Promotion Agreement provides, among other things:

- That "HOB shall have the right to manage and control the presentation of the Event" and that "the parties [HOB and Throttlefest, LLC] shall each use their respective abilities and best efforts to cause the Event to be carried out in a commercially reasonable manner." (*Id.*)

- That Throttlefest, LLC, which was defined in the Agreement as the "Co-Promoter," shall provide "[a]ll components of Full Throttle festival – including, but not limited to, all festival talent/personalities." (*Id.* at HOB002-003, R. pp. 756 - 757.)

- That Throttlefest, LLC "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 Co-Promotion Agreement also contains a separate insurance section in paragraph 6, which provides certain obligations for each party relating to the purchase of insurance for Throttle Fest. (*Id.* at HOB003, HOB005-006, R. pp.757; 759 - 760.)

- That "[t]his 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." (*Id.* at HOB006, R. p. 760.)

- That "[e]ach 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 . . . ." (*Id.* at HB007, R. p. 761.)

IV. Affidavits Submitted by Michael Ballard and Jesse James Dupree

In support of their Motion to Dismiss HOB's Third-Party Complaint for lack of personal jurisdiction, the Non-Hosting Respondents submitted affidavits from their principals, Michael Ballard and Jesse James Dupree. Ballard is the sole member of Full Throttle, LLC and Full Throttle Sloon Shine LLC. (Ballard Aff. ¶ 2, R. p. 765.) Dupree is the sole owner of American Outlaw Spirits Incorporated. (Dupree Aff. ¶ 2, R. p. 763.)

In Ballard's affidavit, he attests that Full Throttle, LLC is in the business of holding real estate located in South Dakota and has never engaged in providing any product or service or any other business activity in South Carolina. (Ballard Aff. ¶¶ 6-7, R. p. 766.) Ballard also states that Full Throttle Sloon Shine LLC is engaged in the business of manufacturing distilled spirits, does not directly sell its products in South Carolina (but instead contracts with distributors who sell throughout the region), and has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina. (*Id.* ¶¶ 14, 15, 20, R. p. 767.) Further, Ballard attests that "Fajita Mike" was not employed by, or an agent of, Full Throttle, LLC or Full Throttle Sloon Shine LLC during the Throttle Fest event. (*Id.* ¶ 24, R. p. 768.)

In Dupree's affidavit, he attests that American Outlaw Spirits Incorporated is a Georgia corporation that manufactures liquor, and that American Outlaw Spirits Incorporated did not transact business in South Carolina at the time of the Throttle Fest event. (Dupree Aff. ¶¶ 6-7, R.

pp. 763 - 764.) Dupree also confirms that "Fajita Mike" has never been employed by, or been an agent of, American Outlaw Spirits Incorporated. (*Id.* ¶ 16, R. p. 764.)

HOB has not submitted any affidavits or other documents in support of personal jurisdiction over the Non-Hosting Respondents. (*See generally* HOB Initial Br.)[5]

V. Relevant Procedural History

HOB hosted Throttle Fest from May 9 to May 17 of 2014. (*See* July 7, 2017, Pls.' Am. Summons & Compl., ¶ 27, R. pp. 084 - 109.) Plaintiff alleged that Defendant Travis Scott Wagoner collided with him after leaving Throttle Fest on May 17, 2014. (*Id.* ¶ 57, R. p. 091.) On May 12, 2017, Plaintiff filed a Summons and Complaint, asserting claims against, among others, HOB and Respondents. (*See generally* Pls.' Summons & Compl., R. pp. 069 - 083.) On August 4, 2017, HOB filed its Answer to the Amended Complaint, but HOB did not assert crossclaims against any of the Respondents, including the Non-Hosting Respondents. (*See generally* HOB Ans. to Am. Compl., R. pp. 110 - 125.)

On January 22, 2018, Plaintiff dismissed his claims against Non-Hosting Respondent American Outlaw Spirits, Inc. (*See* Notice Dismissal, R. p. 068.)

In October of 2018, Non-Hosting Respondents Full Throttle, LLC and Full Throttle Sloon Shine, LLC entered into confidential settlements with Plaintiff. Although Plaintiff stipulated to the dismissal of Full Throttle, LLC and Full Throttle Sloon Shine, LLC after entering into confidential settlements with them—and although HOB had not asserted any cross-claims against Full Throttle, LLC or Full Throttle Sloon Shine, LLC at the time of the settlements—HOB refused to consent to their dismissal from this litigation, forcing Full Throttle, LLC and Full Throttle Sloon Shine, LLC

[5] In arguing that the Court has personal jurisdiction over the Non-Hosting Respondents, HOB cites to certain deposition excerpts. As discussed below, these deposition excerpts do not support a finding of personal jurisdiction.

to file a Motion to Dismiss Plaintiff's claims against them on the basis that the claims had been settled. (*See* June 25, 2019 Mot. Dismiss, R. pp. 164 - 166; *see also* Mem. Supp. Mot. Dismiss, R. pp. 167 - 169.) HOB did not file a memorandum in opposition to this Motion to Dismiss, and on August 13, 2019, the Circuit Court issued an Order granting the Motion to Dismiss. (Order, R. pp. 060 - 062.)

On October 18, 2019, after all Respondents had been dismissed from the case, HOB filed its Third-Party Complaint against Respondents, asserting claims against them for the first time. (*See generally* Third-Party Complaint, R. pp. 189 - 216.) In its Third-Party Complaint, HOB did not allege that Plaintiff's settlements with Full Throttle, LLC and Full Throttle Sloon Shine, LLC were in bad faith. (*See generally id.*)

In June of 2020, Plaintiff and HOB entered into a settlement agreement. (*See* Oct. 20, 2020 Mot. Enforce Settlement, R. pp. 506 - 520; *see also* July 23, 2020 Hr'g Tr. at 4:10-11, R. p. 524 (HOB's counsel notifying the Circuit Court that Plaintiff's claims against HOB were resolved at mediation); March 17, 2021 Stip. Dismissal, R. pp. 066 - 067.)

ARGUMENT

I. The Circuit Court properly granted the Non-Hosting Respondents' Motion to Dismiss for lack of personal jurisdiction.

A. Standard of Review

When the trial court grants a motion to dismiss for lack of personal jurisdiction, "[t]he decision of the trial court should be affirmed unless unsupported by the evidence or influenced by error of law." *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008).

B. Legal Standard

Personal jurisdiction must be resolved based on the facts of each particular case. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 611 S.E.2d 505 (2005). The party seeking to invoke personal jurisdiction over a non-resident defendant bears the burden of establishing jurisdiction. *Power Prods. & Servs. Co., Inc.*, 379 S.C. at 430, 665 S.E.2d at 664. At the pretrial stage, the plaintiff meets his burden of proving personal jurisdiction over a nonresident defendant by a prima facie showing of jurisdiction either in the complaint or in affidavits. *See Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508.

When a party moves to dismiss based on lack of personal jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction. *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). A plaintiff must allege specific facts to establish the contacts necessary to invoke either general or specific jurisdiction. *See Power Prods.*, 379 S.C. at 433-34, 665 S.E.2d at 665-66 (affirming trial court's dismissal based on lack of personal jurisdiction because plaintiff did not allege specific facts to support personal jurisdiction). Conclusory allegations will not suffice. *Id.* at 433, 665 S.E.2d at 665-66; *see also Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 152, 723 S.E.2d 835, 840 (Ct. App. 2012) (granting motion to dismiss where plaintiff "offered mere speculation and conclusory assertions").

Personal jurisdiction is exercised as "general jurisdiction" or "specific jurisdiction." *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. In this case, HOB does not argue that the Non-Hosting Respondents are subject to general jurisdiction in South Carolina. Rather, HOB argues only that specific jurisdiction exists. (*See* HOB Initial Br. at 30.) Specific jurisdiction exists only

where "the cause of action arises specifically from a defendant's contacts with the forum . . . ." *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478.

"Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question [when deciding whether specific personal jurisdiction exists] becomes whether the exercise of personal jurisdiction would violate due process." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. Due process requires that a defendant have sufficient minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Id.* South Carolina courts recognize that, to satisfy due process, the court must find that (1) the defendant has the requisite minimum contacts with the forum, without which the court does not have the power to adjudicate the action (the power prong); and (2) the exercise of jurisdiction would be "reasonable" or "fair" (the fairness prong). *See S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992). If either prong fails, personal jurisdiction does not exist. *Id.*

This Court has elaborated on the power and fairness prongs as follows:

> Under the power prong, a minimum contacts analysis requires a court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Without minimum contacts, the court does not have the "power" to adjudicate the action. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be hauled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case.
>
> In order to determine whether the exercise of jurisdiction over a foreign defendant meets the fairness prong, the court must consider the following: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience

> resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction.

Power Prods. & Servs. Co., 379 S.C. at 431–33, 665 S.E.2d at 665.

"The due process requirements must be met as to each defendant and thus the Court is to assess individually each defendant's contacts with South Carolina." *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508. In assessing personal jurisdiction, "the focus must center on the contacts generated by the defendant, and not on the unilateral actions of some other entity . . . ." *Id.*; *see also Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 417 (1984) (holding that the "unilateral activity of another party or a third person is not an appropriate consideration" when assessing personal jurisdiction); *Walden v. Fiore*, 571 U.S. 277, 291 (2014) (holding that, for purposes of personal jurisdiction, "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State"). Also, a defendant's contacts with the forum state are only relevant to specific personal jurisdiction to the extent the suit arises out of or relates to those contacts. *See Bristol-Myers Squibb Co. v. Super. Ct. Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017) ("In order for a state court to exercise specific jurisdiction, the *suit* must aris[e] out of or relat[e] to the defendant's contacts *with the forum.*") (emphasis in the original); *Askins v. Firedoor Corp.*, 281 S.C. 611, 616, 316 S.E.2d 713, 716 (Ct. App. 1984) ("The cases are legion that a single contact with the forum state is sufficient to give its courts personal jurisdiction over a nonresident if the contact gives rise to, or figures prominently in the cause of action under consideration."). Thus, contacts between the defendant and the forum state that do not give rise or relate to the plaintiff's claims are irrelevant to specific personal jurisdiction. *See Bristol-Myers Squibb Co.*, 137 S. Ct. 1780 (finding that personal jurisdiction was lacking in California even

though the non-resident defendant had significant in-state contacts because plaintiffs could not show their claims arose out of defendant's in-state contacts).[6]

C. HOB's third-party claims against the Non-Hosting Respondents do not arise out of or relate to contacts between the Non-Hosting Respondents and South Carolina.

To carry its burden of establishing personal jurisdiction over the Non-Hosting Respondents, HOB must identify specific facts demonstrating that (1) the Non-Hosting Respondents had contacts with South Carolina; *and* (2) HOB's claims arise out of or relate to such contacts. *See Power Prods.*, 379 S.C. at 433-34, 665 S.E.2d at 665-66. HOB has failed to carry this burden.

HOB's third-party claims are based on allegations that Respondents failed to include HOB "as an Additional Insured on the insurance policies required under the [Co-Promotion] Agreement," and that Respondents failed to adequately train and supervise Fajita Mike. (*See generally* Third-Party Complaint at ¶¶ 116, 120-21, 125-26, 130-31, 141-42, R. pp. 206 - 211; *see also* HOB Initial Br. at pp. 39, 42 (arguing that Respondents "wreaked havoc by failing to procure the proper insurance coverage for the festival held in Myrtle Beach, South Carolina and failing to properly train and supervise their employee and agent, Fajita Mike, resulting the alleged over service of alcohol to a bike week patron").) In planning the Throttle Fest event at its venue, HOB entered into a contract with Throttlefest, LLC governing all aspects of the event. (Co-Promotion Agreement, R. pp. 755 - 762). This contract addressed the parties' respective obligations in

[6] In its Brief, HOB cites law relating to the "stream of commerce" theory of personal jurisdiction. (HOB Initial Br. at 28-29, 38, 41-42.) The stream of commerce theory of personal jurisdiction does not apply here because HOB is not asserting claims of product liability or product defect. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 926 (2011) ("The stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting 'jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer.'") (internal citations omitted).

planning the event, including the obligations to purchase insurance, to provide festival talent/personalities, and to comply with all applicable state and federal laws. (*Id.*). HOB did not enter into separate contracts with the Non-Hosting Respondents, much less contracts relating to insurance and supervision and training of staff working at the event. Thus, the Non-Hosting Respondents have no contacts with South Carolina out of which HOB's claims arise or to which they relate. As a result, the Non-Hosting Respondents had no reason to expect that they could ever be hauled into a South Carolina court based on claims relating to the insurance purchased or not purchased for Throttle Fest, or relating to the alleged failure to train and supervise those working at Throttle Fest. Further, Throttlefest, LLC's contract with HOB cannot render the Non-Hosting Respondents subject to personal jurisdiction in South Carolina. *See Walden*, 571 U.S. at 291 (holding that, for purposes of personal jurisdiction, "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State").

D. HOB's conclusory assertion that Throttlefest LLC acted as an "agent" of the Non-Hosting Respondents finds no support in the facts or the law.

HOB's primary argument in support of personal jurisdiction is based on the following "contention":

> Appellant contends that while Throttlefest LLC was the only named entity that entered into the 2014 Co-Promotion Agreement with House of Blues, it was acting as an agent of the remaining Third-Party Defendants American Outlaw Spirits, Full Throttle, and Sloon Shine.

(HOB Initial Br. at 32 (citing HOB Third-Party Compl.).) In support of this contention, HOB cites only to the common ownership of Throttlefest, LLC and the Non-Hosting Respondents, and to the alleged benefit the Non-Hosting Respondents received from Throttle Fest because of alleged liquor

sales and promotions at the event. (*See generally* HOB Initial Br. at 30-42.) But conspicuously absent from HOB's brief is any discussion or application of South Carolina law governing agency.[7]

Under South Carolina law, "[a] party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 564–66, 813 S.E.2d 292, 303–04 (Ct. App. 2018) (internal citation omitted). The existence of an agency relationship is determined by "the relation, the situation, the conduct, and the declarations of the party sought to be charged principal." *Id.* One dealing with an agent has a duty to "use due care to ascertain the scope of the agent's authority." *Id.* Further, "agency" may not be established solely by the declarations and conduct of an alleged agent." *Id.*

An agency relationship may be established by evidence of actual or apparent authority. *Id.* In an" actual agency" case, the question is not whether the purported principal could have exercised control over its agent, but whether it did so. *Jamison v. Morris*, 385 S.C. 215, 222, 684 S.E.2d 168, 171 (2009). Under the doctrine of apparent authority or apparent agency, "the principal is bound by acts of his agent when he has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom, is led to believe the agent has certain authority and in turn deals with the agent based on that assumption." *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244–45, 473 S.E.2d 865, 867–68 (Ct. App. 1996). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* Moreover, the party

[7] On page 30 of its Brief, HOB includes one stray quote from a South Carolina Supreme Court case discussing apparent authority, but HOB does not attempt to apply this law to the facts of this case, nor does HOB otherwise discuss the law of agency. (*See* HOB Initial Br. at 30 (quoting *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982)).)

seeking to establish apparent agency must establish that it reasonably relied on the fact that the agent was acting on behalf of the principal and changed its position based on that reasonable reliance. As this Court has explained:

> To establish apparent agency, it is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant. In order for a third party to recover against the principal based upon this theory, it must be shown that he reasonably relied on the indicia of authority *originated by the principal* and such reliance must have effected a change of position by the third party.

Id. (emphasis in original) (internal citation omitted).

In this case, HOB has not carried its burden of alleging specific facts demonstrating that, when Throttlefest LLC entered into the Co-Promotion Agreement, it was acting as an actual agent or an apparent agent of the Non-Hosting Respondents. *See Power Prods.*, 379 S.C. at 433-34, 665 S.E.2d at 665-66 (affirming trial court's dismissal based on lack of personal jurisdiction because plaintiff did not allege specific facts to support personal jurisdiction, and holding that the plaintiff's conclusory assertions were insufficient); *see also Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. For example, HOB has not alleged that, when HOB entered into a contract with Throttlefest, LLC, the Non-Hosting Respondents took some action or made some statement that could have led HOB to believe that Throttlefest, LLC was merely acting as an agent and that HOB was, in fact, entering into a contract with one or more of the Non-Hosting Respondents. Tellingly, HOB has not cited any case in which a court found that a contracting party was acting as an actual or apparent agent for a non-contracting party. Indeed, the cases in which courts have found that an agency relationship exists do not have facts remotely resembling those of this case. *See, e.g.*, *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) (holding that the court should have submitted the question of agency to the jury where a franchisor's name appeared on the restaurant's

sign, napkins, uniforms, and advertising, and where multiple employees of the restaurant testified that they thought they worked for the restaurant's franchisor).

At bottom, HOB's position amounts to an argument that, when a company enters a contract, the contracting company is acting as an "agent" for all other companies with common ownership that could benefit from the contract. But HOB cites no case, statute, treatise, or other source of authority that supports this argument. Indeed, HOB's argument is inconsistent with well-settled South Carolina law that requires the party asserting agency to allege and prove much more to establish an agency relationship. Moreover, and as recognized by the Circuit Court, HOB's argument is essentially an attempt to pierce the corporate veil of Throttlefest, LLC, and not merely reach the principals of Throttlefest, LLC, but reach even beyond the principals and establish liability of other companies owned by the principals. (July 31, 2020 Order, p. 6, R. p. 006) (holding that "House of Blues nevertheless seeks to reach through the Throttlefest LLC to its two individual members and even further beyond that, tracing duties through those members to each of their other businesses") (emphasis added). Accepting HOB's argument would require this Court to rewrite the law on agency, veil-piercing, corporate formalities, and personal jurisdiction. *Cf. Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101–02, 668 S.E.2d 798, 800–01 (2008) (holding that "[i]t is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection"); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683–84 (4th Cir. 1976) ("At the outset, it is recognized that a corporation is an entity, separate and distinct from its officers and stockholders . . . .").

E. HOB's remaining arguments are unavailing.

In addition to its primary argument addressed above, HOB briefly makes a few secondary arguments, none of which is persuasive. For example, HOB argues that it is "notable" that the Co-

Promotion Agreement "originally had Full Throttle listed as the contracting party rather than Throttlefest." (HOB Initial Br. at 37.) HOB, however, does not explain why this fact is notable. In fact, it further demonstrates that the Non-Hosting Respondents took steps to avoid entering into the contract out of which this litigation arose, and shows that HOB agreed to a revision of the draft Co-Promotion Agreement that removed one of the Non-Hosting Respondents as a party. This fact demonstrates that HOB understood that Throttlefest, LLC was the counterparty to the contract, and the one and only counterparty to the contract.

HOB also argues that "Sloon Shine" was being sold at Throttle Fest 2014, including by Fajita Mike, was chugged by Jesse Dupree on-stage during the Jackyl concert, and was advertised on a t-shirt worn by the young woman who allegedly assisted Fajita Mike in distributing shots to Wagoner." (*Id.* at 38.)[8] But none of these allegations, even if accepted as true, supports exercising personal jurisdiction over the Non-Hosting Respondents because HOB's claims do not arise out of or relate to these allegations. That is, HOB's claims against Respondents do not arise from the type of alcohol being sold at the event, Dupree chugging liquor onstage, or the type of t-shirt allegedly worn by a young woman at the concert. *See Bristol-Myers Squibb Co. v. Super. Ct. Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017) ("In order for a state court to exercise specific

[8] HOB contends that Dupree's deposition testimony regarding the types of liquor sold at Throttle Fest contradicts his later-executed affidavit. (HOB Initial Br. at 40-41.) But, in the deposition testimony quoted by HOB, Dupree does not testify that American Outlaw Spirits Incorporated was the company that sold the liquor being served by the HOB during the Throttle Fest event. (*Id.*) And, more importantly, whether HOB sold liquor manufactured by American Outlaw Spirits Incorporated during Throttle Fest is entirely irrelevant to specific personal jurisdiction because HOB's claims do not arise out of or relate to the brand of liquor being sold during Throttle Fest. For example, Wagoner testified that, while at HOB on the night of the collision, he drank four 22-ounce beers and a liquor drink containing Crown Royal. (Wagoner Dep. Tr. 37:14 – 38:19, 82:22-25, R. pp. 685 - 686; 730.) But HOB has not asserted claims against Crown Royal or the manufacturer of the beer that Wagoner drank because HOB's claims do not arise out of or relate to the brand of alcohol consumed by Wagoner.

jurisdiction, the *suit* must aris[e] out of or relat[e] to the defendant's contacts *with the forum*.") (emphasis in the original). Rather, HOB's claims are based on Respondents' alleged failure to purchase certain insurance and alleged failure to properly train and supervise Fajita Mike, neither of which arises from or relates to alleged contacts between the Non-Hosting Respondents and South Carolina. As recognized by the South Carolina Supreme Court, "random, fortuitous, or attenuated contacts"—such as the type of t-shirt someone was wearing or the type of alcohol chugged onstage by a band member at the concert—cannot support personal jurisdiction. *See Power Prods. & Servs. Co.*, 379 S.C. at 431–33, 665 S.E.2d at 665.

Finally, HOB asserts that HOB's manager, Robert Simeone, "confirmed his understanding that Fajita Mike was under the control of Ballard—acting on behalf of all entities owned and controlled by Ballard." (HOB Initial Br. at 33.) (emphasis added). However, the deposition testimony HOB cites does not support the underlined portion of this assertion. (*See id.* at 33-34 (quoting Simeone's testimony in which he says that "Fajita Mike's movements were under the direction of Mike Ballard"; Simeone says nothing about Ballard acting on behalf of all entities that he owned and controlled). Further, even if Simeone had provided such testimony, there would be no basis for Simeone to believe that Fajita Mike was being controlled by one of the Non-Hosting Respondents because HOB's contract with Throttlefest, LLC required Throttlefest, LLC—not any other party—to manage all talent and personalities at the event and ensure compliance with all state and federal laws.

In sum, HOB asks the Court to ignore corporate formalities and pretend as though HOB entered into a contract not only with Throttlefest, LLC, but also with all other entities that have common ownership with Throttlefest, LLC. Accepting HOB's arguments would fundamentally change the law of personal jurisdiction as set forth by the South Carolina Supreme Court and the

United States Supreme Court. Because HOB has not alleged any contacts between the Non-Hosting Respondents and South Carolina out of which HOB's claims arise, HOB has failed to carry its burden of establishing that the Circuit Court's decision was unsupported by the evidence or influenced by error of law. Accordingly, this Court should affirm the decision of the Circuit Court dismissing HOB's claims against the Hon-Hosting Respondents for lack of personal jurisdiction.

II. Additional sustaining grounds support the Circuit Court's decision to dismiss HOB's third-party claims against the Non-Hosting Respondents.

Even if the Non-Hosting Respondents were subject to personal jurisdiction in South Carolina—which they are not—the Circuit Court's decision to dismiss HOB's third-party claims against them should be affirmed for the additional reasons discussed below. *See* SCACR 220(c) ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

A. HOB's claims against the Non-Hosting Respondents are barred by the South Carolina Contribution Among Tortfeasors Act.

On or around June 30, 2020, HOB entered into a settlement agreement with Plaintiffs. (*See* Oct. 20, 2020 Mot. Enforce Settlement, R. pp. 506 - 520; *see also* July 23, 2020 Hr'g Tr. at 4:10-11, R. p. 524 (HOB's counsel notifying the Circuit Court that Plaintiffs' claims against HOB were resolved at mediation); March 17, 2021 Stip. Dismissal, R. pp. 066 - 067). Thus, HOB is barred from seeking contribution from the Non-Hosting Respondents pursuant to the South Carolina Contribution Among Tortfeasors Act. *See* S.C. Code § 15-38-20(D) ("A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.").

Moreover, HOB's claims seeking contribution from Non-Hosting Respondents Full Throttle, LLC and Full Throttle Sloon Shine, LLC are barred by a separate subsection of the South Carolina Contribution Among Tortfeasors Act. Specifically, the 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. Because Full Throttle, LLC and Full Throttle Sloon Shine, LLC entered into settlement agreements with and obtained releases from Plaintiff,[9] and because HOB has not alleged that such settlement agreements were entered in bad faith, Full Throttle, LLC and Full Throttle Sloon Shine, LLC are discharged from all liability for contribution claims by any other tortfeasor, including HOB. Respondent Throttlefest, LLC addresses this basis for dismissal more fully in its Initial Brief, and the arguments and authority in Throttlefest, LLC's Initial Brief apply with equal force to HOB's claims against Full Throttle, LLC and Full Throttle Sloon Shine, LLC, both of which also settled with and obtained releases from Plaintiffs. Pursuant to South Carolina Appellate Court Rule 208(b)(6), Full Throttle, LLC and Full Throttle Sloon Shine, LLC adopt by reference the portion of Throttlefest, LLC's Initial Brief addressing this basis for dismissal.

B. HOB's third-party claims are barred by the applicable statute of limitations.

As explained more fully in Respondent Throttlefest, LLC's Initial Brief, any claims HOB may have against Respondents relate to Respondents' acts or omissions during—or in advance of—the Throttle Fest event held at the HOB in May of 2014. HOB, however, did not assert any claims against Respondents, including the Non-Hosting Respondents, until October 18, 2019,

[9] Although Plaintiff dismissed his claims against Non-Hosting Respondent American Outlaw Spirits Incorporated, Plaintiff did not provide a release to American Outlaw Spirits Incorporated.

which was more than five years after the Throttle Fest event. (*See* HOB Third-Party Complaint, R. pp. 189 - 216.) Thus, HOB's claims against the Non-Hosting Respondents are barred by the applicable statute of limitations.

HOB has asserted the same claims based on the same alleged acts or omissions against all Respondents. (*See generally id.*). Thus, the arguments and authority relating to the statute of limitations contained in Throttlefest, LLC's Initial Brief apply with equal force to HOB's claims against the Non-Hosting Respondents. Pursuant to South Carolina Appellate Court Rule 208(b)(6), the Non-Hosting Respondents adopt by reference the portion of Throttlefest, LLC's Initial Brief explaining why HOB's third-party claims are barred by the statute of limitations.

C. HOB fails to state a claim for breach of contract or contractual indemnification against the Non-Hosting Respondents.

In its Third-Party Complaint, HOB asserts claims for breach of contract and contractual indemnification against the Non-Hosting Respondents. (*See* Third-Party Complaint, ¶¶ 119-28, 149-54, R. pp. 207 - 208; 212 - 213.) HOB does not allege that it entered into a contract with the Non-Hosting Respondents; rather, HOB alleges that, "[t]hough Throttlefest LLC was the named party to and signatory on the [Co-Promotion] Agreement, it was also acting as an agent of the [Non-Hosting Respondents]." (*Id.* ¶ 124, R. p. 207.) But, as explained above, HOB has failed to allege any facts to support this conclusory assertion. *See* Section I.D., *supra*. Where, as here, a party's arguments concerning a theory of liability are "conclusory," this Court has held that dismissal of the claims is appropriate. *See HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010) (holding that plaintiff's "conclusory" arguments were insufficient, affirming dismissal, and holding that, "on a [Rule] 12(b)(6) motion, the court is required to presume all well pled *facts*, not propositions of law, to be true") (emphasis in original). Thus, HOB's contract-based claims against the Non-Hosting Respondents are subject to dismissal

because HOB has not alleged a contractual relationship with the Non-Hosting Respondents and has alleged no facts to support its conclusory assertion that Throttlefest, LLC was acting as the Non-Hosting Respondents' "agent."

D. HOB's tort and equitable claims against the Non-Hosting Respondents are subject to dismissal as a matter of law because HOB has failed to plead any duty owed to HOB separate and distinct from the duties owed under the Co-Promotion Agreement.

Each of HOB's claims is based on allegations that Respondents are liable to HOB for failing to procure adequate insurance and failing to train and supervise Fajita Mike. (*See* HOB Third-Party Complaint at ¶¶ 116, 120-21, 125-26, 130-31, 141-42, R. pp. 206 - 211; *see also* HOB Initial Br. at pp. 39, 42 (arguing that the Non-Hosting Respondents "wreaked havoc by failing to procure the proper insurance coverage for the festival held in Myrtle Beach, South Carolina and failing to properly train and supervise their employee and agent, Fajita Mike, resulting the alleged over service of alcohol to a bike week patron").) As is clear from the face of HOB's Third-Party Complaint, HOB contractually agreed that the purchase of insurance and the training and supervision of staff working the Throttle Fest event were the responsibility of Throttlefest, LLC. (*See, e.g.*, HOB Third-Party Complaint, ¶ 120, R. p. 207 (alleging that "[p]ursuant to the [Co-Promotion] Agreement, Throttlefest LLC, was required to maintain insurance coverage, upon which House of Blues was to be listed as an Additional Insured"); *id.* ¶ 121, R. p. 207 (alleging that "pursuant to the [Co-Promotion] Agreement, Throttlefest LLC, was responsible to provide all components of Full Throttle festival, including, but not limited to, all festival talent/personalities"). Moreover, the Co-Promotion Agreement itself, which HOB references extensively in its Third-Party Complaint, makes clear that HOB contractually agreed that Throttlefest, LLC and HOB were

responsible for all aspects of Throttle Fest, including the purchase of insurance and the training and supervision of staff. *See* Statement of Facts, Section III, *supra*.[10]

Although HOB alleges that Respondents' liability is based on a breach of duties owed under the Co-Promotion Agreement, HOB's Third-Party Complaint includes tort claims (negligence and negligent misrepresentation) and equitable claims (equitable indemnification and contribution), in addition to its contract-based claims discussed above. But, as discussed below, tort claims and equitable claims must be based on some duty owed by the defendant that is distinct from the duties owed under a contract. Further, South Carolina law does not permit a plaintiff to assert a tort claim by merely disguising a breach of contract claim as a tort claim. Here, the Non-Hosting Respondents owed no duties to HOB—with respect to the purchase of insurance, the training and supervision of staff at Throttle Fest, or otherwise—because the only duties owed to HOB relating to the Throttle Fest event are set forth in the Co-Promotion Agreement between HOB and Throttlefest, LLC. Thus, HOB's tort claims and equitable claims against the Non-Hosting Respondents fail as a matter of law.

i. South Carolina law regarding duties owed by a non-contracting party.

Whether the Non-Hosting Respondents, despite not being parties to the Co-Promotion Agreement, owed a legal duty to HOB relating to Throttle Fest is an issue of law for the Court to decide. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456–57, 578 S.E.2d 711, 714 (2003) ("Whether the law recognizes a particular duty is an issue of law to be decided by the Court."). A legal duty exists "only if created by statute, contract, relationship, status, property interest, or some other

[10] As explained in Throttlefest, LLC's Initial Brief, the Circuit Court's decision to consider the Co-Promotion Agreement at the motion to dismiss stage was proper. The Non-Hosting Respondents adopt this discussion by reference. *See* SCACR 208(b)(6).

special circumstance." *Id.* Moreover, where a plaintiff sues in tort, the plaintiff must allege some duty owed by the defendant that is separate from the duties owed under a contract.

> South Carolina courts have recognized the distinction between contract and tort causes of action and have held that in order for a plaintiff to state a claim in tort, he must allege a duty owed him by the defendant separate and distinct from any duty owed under a contract:
>
> > Ordinarily, where there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract, but when the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by the contract, it is a tort . . . As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract.

Duc v. Orkin Exterminating Co., 729 F. Supp. 1533, 1535 (D.S.C. 1990) (quoting *Dixon v. Texas Co.*, 222 S.C. 385, 72 S.E.2d 897, 899 (1952)); *see also Dennis by Evans v. Timmons,* 313 S.C. 338, 342, 437 S.E.2d 138, 141 (Ct. App. 1993) ("Generally, there is no common law duty to act. Thus, a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct.") (internal citation omitted).

Likewise, South Carolina courts have rejected attempts by plaintiffs to dress up a breach of contract claim using tort terminology. In other words, where the only duties owed to the plaintiff are governed by a contract, courts will not permit plaintiffs to manufacture a separate duty by disguising breach of contract claims as tort claims. *See, e.g., Toney v. LaSalle Bank Nat. Ass'n*, 896 F. Supp. 2d 455 (D.S.C. 2012) ("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.'"); *Seebaldt v. First Fed. Savings & Loan Ass'n*, 269 S.C. 691, 239 S.E.2d 726 (1977) (affirming dismissal of negligence complaint where the only alleged duties arose from a contract,

and holding: "Bare allegations of negligence cannot convert a breach of contract action into an action in tort."); *Webb v. First Fed. Sav. & Loan Ass'n*, 300 S.C. 507, 510, 388 S.E.2d 823, 825 (Ct. App. 1989) (holding that, "in the case of actual contracts the agreement defines the duty"), *overruled on other grounds by Myrtle Beach Hospital, Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000).

Further, this Court and the South Carolina Supreme Court have affirmed the dismissal of tort claims where, as here, the party asserting the tort claim fails to allege any facts supporting a duty owed by the defendant to the plaintiff. *See, e.g.*, *Doe v. Marion*, 361 S.C. 463, 470–71, 605 S.E.2d 556, 560 (Ct. App. 2004) (affirming dismissal of a negligence claim on the grounds that the defendant owed no duty to the plaintiff), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Washington v. Lexington Cty. Jail*, 337 S.C. 400, 405–06, 523 S.E.2d 204, 206–07 (Ct. App. 1999) (same). As this Court has held, "there is no general duty to control the conduct of another," and this rule is subject to only five exceptions under South Carolina law:

> 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant.

Doe, 361 S.C. at 471, 605 S.E.2d at 560. Also, where the plaintiff alleges only economic injury, as is the case here, South Carolina courts have held that a plaintiff cannot recover based on a theory that the defendant voluntarily assumed a duty to the plaintiff. *See Brumbaugh v. First Fin. Ins. Co.*, No. CV 2:13-2432, 2015 WL 12817166, at *1–2 (D.S.C. Mar. 17, 2015) (granting a motion to dismiss for failure to adequately allege a duty and holding: "South Carolina courts have squarely addressed and refused to recognize an extension of the voluntary assumption of duty cause of action to a claim for economic loss, such as Plaintiff asserts here."); *see also Kennedy v. Columbia*

Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989) ("The 'economic loss' rule will still apply where duties are created *solely* by contract. In that situation, no cause of action in negligence will lie.") (emphasis in original).

ii. HOB's tort claims are subject to dismissal because HOB fails to allege any source of a duty owed by the Non-Hosting Respondents to HOB.

The only source of duty alleged in HOB's Third-Party Complaint is the Co-Promotion Agreement. (*See generally* HOB Third-Party Compl., R. pp. 189 - 216; *see also id.* ¶ 139, R. p. 210 (alleging as the basis for its Negligence cause of action that Respondents "undertook to perform under the [Co-Promotion] Agreement"). Indeed, HOB specifically alleges that, pursuant to the Co-Promotion Agreement, "Throttlefest LLC, was responsible to provide all components of Full Throttle festival." (*Id.* ¶ 121, R. p. 207.) (emphasis added). And HOB specifically alleges that the Co-Promotion Agreement required Throttlefest, LLC to purchase insurance and provide the staff for the event. (*See id.* ¶¶ 120-21, R. p. 207.)

To state a claim in tort, HOB must allege a duty owed to it that is "separate and distinct from any duty owed under a contract." *Duc v. Orkin Exterminating Co.*, 729 F. Supp. 1533, 1535 (D.S.C. 1990). Because HOB has failed to allege a separate and distinct duty from those owed under the controlling contract, and because South Carolina law does not permit HOB to disguise a breach of contract claim using tort terminology—as HOB has attempted to do here—HOB's tort claims are subject to dismissal as a matter of law. Moreover, even if HOB's Third-Party Complaint could be construed as alleging that the Non-Hosting Respondents voluntarily assumed a duty to HOB—an allegation which would have no factual support—HOB's claim would be subject to dismissal because HOB alleges only economic damages.

iii. HOB's equitable claims are likewise subject to dismissal.

HOB's equitable claims contain no specific factual allegations; rather, they merely incorporate the factual allegations contained in HOB's other causes of action. (*See* HOB Third-Party Complaint, ¶¶ 145-48, 155-59, R. pp. 211 – 212; 214.) These claims are subject to dismissal for the same reasons HOB's tort claims are subject to dismissal. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (holding that equitable indemnity is proper where some special relationship exists between the parties).

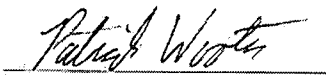
CONCLUSION

HOB alleges that, pursuant to the Co-Promotion Agreement, "Throttlefest LLC, was responsible to provide all components of Full Throttle festival." (*Id.* ¶ 121, R. p. 207.) (emphasis added). To the extent HOB alleges that Throttlefest, LLC failed to perform under the Co-Promotion Agreement, such alleged failures do not somehow provide a basis for HOB to assert claims against all other entities that have common ownership with Throttlefest, LLC. This is particularly true where the Non-Hosting Respondents are non-resident defendants that have no contacts with South Carolina giving rise to HOB's claims. Allowing HOB to pursue claims against the Non-Hosting Respondents would require the Court to ignore the well-settled law governing agency, veil-piercing, corporate formalities, and personal jurisdiction. Moreover, HOB's claims are barred by the statute of limitations and the South Carolina Contribution Among Tortfeasors Act.

For the foregoing reasons, the Non-Hosting Respondents respectfully request that this Court affirm the Circuit Court's decision to dismiss HOB's third-party claims against the Non-Hosting Respondents.

Signature on following page.

Respectfully submitted,



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July 28, 2021
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUL 30 2021
SC Court of Appeals

APPEAL FROM HORRY COUNTY
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.

CERTIFICATE OF COUNSEL

I, Patrick C. Wooten certify that the Final Brief of Respondents American Outlaw Spirits Incorporated, Full Throttle, LLC, and Full Throttle Sloon Shine, LLC complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

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July 28, 2021
Charleston, South Carolina